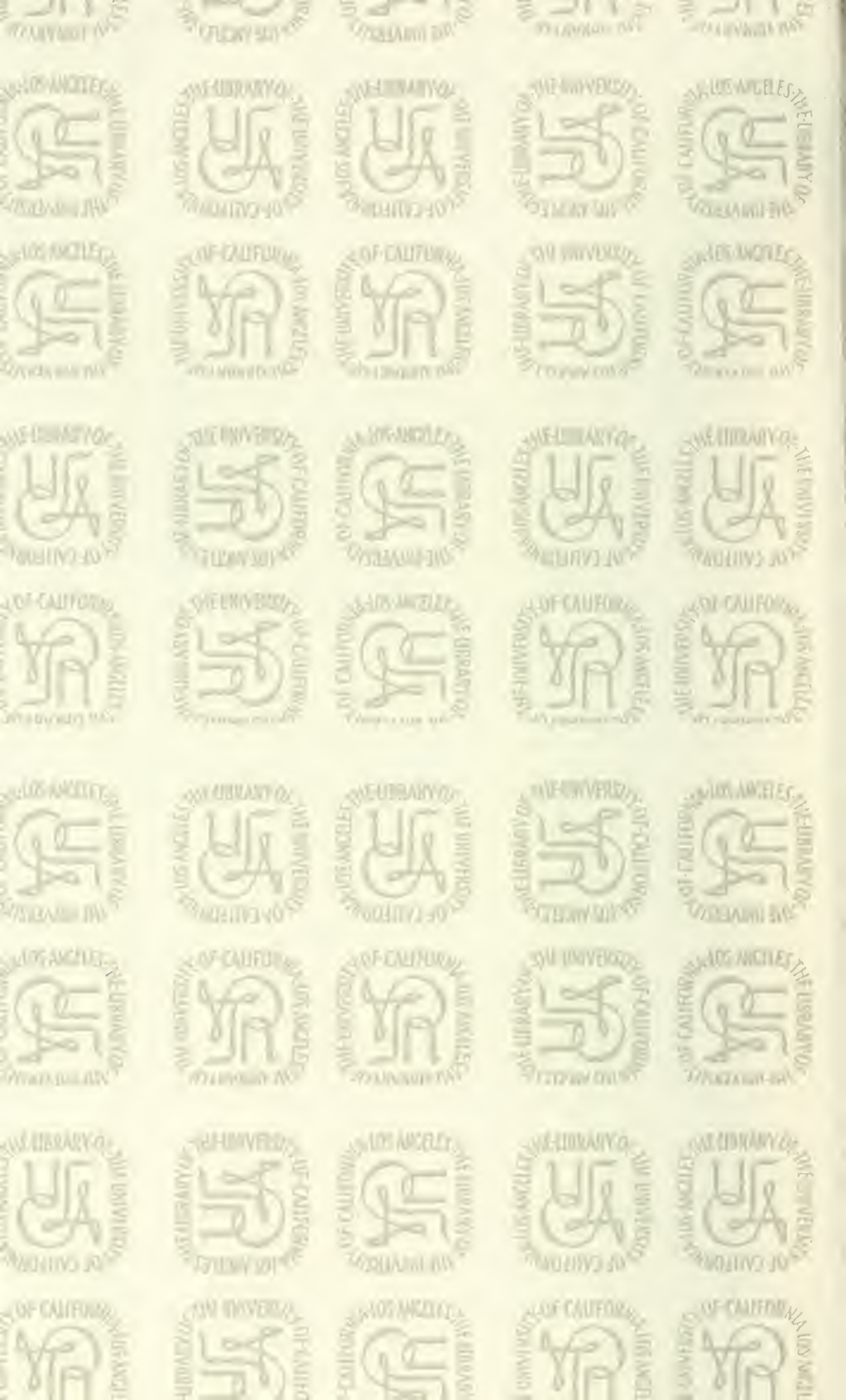


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1915

SUPPLEMENT

TO THE

ENCYCLOPÆDIA

OF

EVIDENCE

LOS ANGELES
L. D. POWELL COMPANY
CHICAGO

Cite this Supplement

Ency. of Ev. 1915 Supp.

followed by bottom page number.

ABBREVIATIONS

For the purpose of saving space the style of citing certain reports has been changed as follows:

A..... Atlantic Reporter.
Am. St..... American State Reports.
Ky. L. R.....Kentucky Law Reporter.
N. Y. S.....New York Supplement.
P..... Pacific Reporter.
P. R. Fed.....Porto Rico Federal.
S..... Southern Reporter.
Tex. Civ..... Texas Civil Appeals.
Tex. Cr.....Texas Criminal.

The following abbreviations have also been adopted:

aff.....affirmed or affirming.
appr.....approved or approving.
cit.....citing.
C.....Commonwealth.
disap..... disapproved or disapproving.
dist.....distinguished or distinguishing.
foll.....followed or following.
mod..... modified or modifying.
over..... overruled or overruling.
P.....People.
quot.....quoting.
ref..... referring.
rev..... reversed or reversing.
S.....State.
s. c.....same case.

EXPLANATORY NOTE

The words and figures at the top of each page refer to the volume and title to which the page relates. The black figures at the left in each column — thus: **756-21** — represent, respectively, the page and note number of the original volume to which the supplementary matter relates.

Matter not covered by the original is placed under the page and note number nearest to which it would logically have fallen.

Italic lines at the head of an article herein form an index to new matter contained therein.

In examining a proposition in any one of the volumes the investigator should always be sure to turn to the Supplement to ascertain what, if any, decisions directly in point have been made since the original article was written. To illustrate: Suppose you are examining authorities bearing on the rule stated in the articles on "Sales," Volume 11, page 603, note 59, as to evidence of the difference between the contract price and the market price at the time and place of delivery. Run through this Supplement until you see the guiding terms "Vol. 11" at the top of the page in the margin; turn until you come to the running title "Sales;" then glance down the columns and turn until you see, at the left of the column, the black figures "**603-59.**" Following this will be found the authorities supplementing the original work on this point.

This volume includes all cases in the reports and advance sheets, decided since the original matter was prepared, down to October 1, 1914.

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Recognizing title in another is cogent evidence. Enno-S. Co. *v.* Fishman, 127 Mo. App. 207, 104 S. W. 1156.

Inconsistent use of easement, if it renders easement unbeneficial, may show intention to abandon. New England Co. *v.* Co., 189 Mass. 145, 75 N. E. 85; *In re* North 5th St., 64 App. Div. 611, 71 N. Y. S. 644. But, generally, encroachments upon a common right of way do not manifest such intention; they are, however, to be considered. King *v.* Murphy, 140 Mass. 254, 4 N. E. 566. Such use may be a partial abandonment, but it is not that as between purchaser with notice and owner of easement. Young *v.* Co., 86 L. T. N. S. (Eng.) 41. Change of use of easement, not decisive. Pitcairn *v.* Harkness, 10 Cal. App. 295, 101 P. 809; Clark *v.* Club, 44 Ind. App. 426, 88 N. E. 100; Betjemann *v.* R. Co., 127 App. Div. 83, 111 N. Y. S. 567. May be so if inconsistent and followed by change of conditions which led to its creation. Brown *v.* R. Co., 36 Utah 257, 102 P. 740; Fowler *v.* Wick, 74 N. J. Eq. 603, 70 A. 682.

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5-22 *In re* Buffalo, 120 N. Y. S. 611; McMillan *v.* Titus, 222 Pa. 500, 72 A. 240; Ft. Worth, etc. R. Co. *v.* R. Co. (Tex. Civ.), 151 S. W. 850; Miller *v.* Wheeler, 54 Wash. 429, 103 P. 641. See Strickland *v.* Co., 55 Or. 48, 104 P. 965.

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Acquiescence in cancellation of application to buy land and making a new application shows abandonment of prior application. Williams *v.* Robison, 103 Tex. 90, 124 S. W. 85.

6-23 Enfield Mfg. Co. *v.* Ward, 190 Mass. 314, 76 N. E. 1053 (by trustees); Sowles *v.* Minot, 82 Vt. 344, 73 A. 1025. Long continued absence and failure to pay taxes or exercise acts of ownership may justify a judgment of abandonment (Murphy *v.* Dafoe, 18 S. D. 42, 99 N. W. 86; Oviatt *v.* Co., 39 Or. 118, 65 P. 811); it is at least evidence thereof. Timber *v.* Desparois, 18 S. D. 587, 101 N. W. 879.

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7-29 Mining claim.—See Badger, etc. Co. *v.* Co., 139 Fed. 838; Norman *v.* Corbley, 32 Mont. 195, 79 P. 1059. But see Conn *v.* Oberto, 32 Colo. 313, 76 P. 369.

8-30 Wood *v.* Co., 147 Cal. 228, 81 P. 512; Utt *v.* Frey, 106 Cal. 392, 39 P. 807; Rawlings *v.* Armel, 70 Kan. 778, 79 P. 683; New England Co. *v.* Co., 189 Mass. 145, 75 N. E. 85; Heughes *v.* Co., 133 App. Div. 814, 118 N. Y. S. 109; Cambria I. Co. *v.* Leidy, 226 Pa. 122, 75 A. 186; McMillin *v.* Titus, 222 Pa. 500, 72 A. 240; Russell *v.* Stratton, 201 Pa. 277, 50 A. 975; Patterson *v.* Williams, 52 Pa. Super. 299; Phillis *v.* Gross, 32 S. D. 438, 143 N. W. 373; Percival *v.* Williams, 82 Vt. 531, 74 A. 321; Garrett *v.* Co., 66 W. Va. 587, 66 S. E. 741.

9-31 Gaston *v.* R. Co., 120 Ga. 516, 48 S. E. 188; Price *v.* Black, 126 Ia. 304, 101 N. W. 1056.

9-32 Conkling *v.* Krandusky, 127 App. Div. 761, 112 N. Y. S. 13. See Cleveland *v.* R. Co., 8 O. N. P. (N. S.) 457.

9-33 McMillin *v.* Titus, 222 Pa. 500, 72 A. 240; Patterson *v.* Williams, 52 Pa. Super. 299. See McKinley *v.* R. Co., 222 Pa. 48, 70 A. 946.

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10-34 Mining claim, see infra, "Mines and Minerals," 600-35.

10-35 Hammer *v.* Co., 130 U. S. 291; McCulloch *v.* Murphy, 125 Fed. 147; Buffalo Z. & C. Co. *v.* Crump, 70 Ark

525, 539, 69 S. W. 572, 91 Am. St. 87; Lozar *v.* Neill, 37 Mont. 287, 96 P. 343; Agnew *v.* Pawnee, 79 Neb. 603, 113 N. W. 236; Hennessy *v.* Murdock, 137 N. Y. 317, 33 N. E. 330; Ruppreeht *v.* Society, 131 App. Div. 564, 115 N. Y. Supp. 926; Graham *v.* Purcell, 126 App. Div. 407, 110 N. Y. S. 813 (proof must be clear and convincing); Phy *v.* Hatfield, 122 Tenn. 694, 126 S. W. 105 (evidence must be clear and unmistakable); Scott *v.* Moore, 98 Va. 668, 686, 37 S. E. 342, 81 Am. St. 749; Miller *v.* Wheeler, 54 Wash. 429, 103 P. 641 (burden not shifted by proof of failure to use).

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11-37 Price *v.* Black, 126 Ia. 304, 101 N. W. 1056; Hall *v.* S., 72 App. Div. 360, 77 N. Y. S. 282; Stage *v.* Boyer, 183 Pa. 560, 38 A. 1035; Calhoon *v.* Neely, 201 Pa. 97, 50 A. 967; Scott *v.* Moore, 98 Va. 668, 37 S. E. 342, 81 Am. St. 749.

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11-38 Charter of railroad not abandoned by suspension of construction. Collier *v.* R. Co., 113 Tenn. 96, 83 S. W. 155.

12-40 Clear proof must be made to establish abandonment of easement. Hennessy *v.* Murdock, 137 N. Y. 317, 33 N. E. 330. No presumption from non-user under twenty years. Woodruff *v.* Paddock, 130 N. Y. 618, 29 N. E. 1021; Gaston *v.* R. Co., 120 Ga. 516, 48 S. E. 188. Non-user of easement held under grant, immaterial. Heughes *v.* Co., 133 App. Div. 814, 118 N. Y. S. 109. *Contra.* Percival *v.* Williams, 82 Vt. 531, 74 A. 321 (non-user evidentiary, not conclusive; owner may testify to his expectation to acquire property for benefit of which easement granted).

13-42 Washington G. M. Co. *v.* O'Laughlin, 46 Colo. 503, 105 P. 1092; Roberson *v.* Ellis, 58 Or. 219, 114 P. 100; Houston O. Co. *v.* Kimball, 103 Tex. 94, 122 S. W. 533.

Boundary fence—its location, character and date of erection. Amee *v.* R. Co., 212 Mass. 421, 99 N. E 168.

Opinions as to effect of facts testified to, incompetent. Use made of easement was authorized may be shown. Gaston *v.* R. Co., supra. All pertinent facts indicative of intention may be proved (New England Co. *v.* Co., 189 Mass. 145, 75 N. E. 85; Oviatt *v.* Co., 39 Or. 118, 65 P. 811), as advice of counsel (Wood *v.* Co., 147 Cal. 228, 81 P. 512; Peoria M., etc. Co. *v.* Turner, 20 Colo. App. 474, 79 P. 915), void sale of property, and declarations of vendor. Griseza *v.* Terwilliger, 144 Cal. 456, 77 P. 1034; Conn *v.* Oberto, 32 Colo. 313, 76 P. 369; Central T. Co. *v.* Culver, 35 Colo. 93, 83 P. 1064; Galloway *v.* Rowlett, 24 Ky. L. R. 2503, 74 S. W. 260; Noland *v.* Coon, 1 Alaska 36. Owner may testify of his intent in doing acts relied upon to show abandonment. Bouler, etc. Co. *v.* Co., 36 Colo. 455, 86 P. 101.

Removal of improvements may be shown, and is persuasive in some cases (Noyes *v.* Douglas, 39 Wash. 314, 81 P. 724; Johnson *v.* Brown, 33 Wash. 588, 74 P. 677; Oviatt *v.* Co., 39 Or. 118, 65 P. 811); but failure to take possession cannot, though conveyance not recorded. Bond *v.* Wilson, 129 N. C. 325, 40 S. E. 179. Diverting a watercourse is not evidence of abandonment. Bolter *v.* Garrett, 44 Or. 304, 75 P. 142. Witness may not testify as to conclusion, but should state facts. Gaston *v.* R. Co., 120 Ga. 516, 48 S. E. 188.

Claim for services.—Evidence of failure to press, is competent as bearing upon the question of abandonment. Rowell *v.* Battle Creek, 169 Mich. 19, 135 N. W. 79.

ABATEMENT.

"Abatement, Pleas of," see 1 STANDARD PROC.

15-2 Bland *v.* Bird, 134 Ga. 74, 67 S. E. 427.

16-5 Jordan *v.* Underhill, 91 App. Div. 124, 86 N. Y. S. 620.

16-6 Howell *v.* Howell, 171 Ala. 502, 54 S. 601; Bradford *v.* R. Co., 132 Ga. 851, 65 S. E. 127; Phillips *v.* R. Co., 110 Ky. 33, 60 S. W. 941; Manufacturers Bottle Co. *v.* Glass Co., 208 Mass. 593, 95 N. E. 103; Brown *v.* Gaskill, 74 N. J. Eq. 620, 70 A. 665; Fleming *v.* R. Co., 128 N. C. 80, 38 S. E. 253; Burnett *v.* R. Co., 62 S. C. 281, 40 S. E. 679; Holbrook *v.* Quinlan & Co., 84 Vt. 411, 80 A. 339.

17-8 Consolidated Co. *v.* Oeltjen, 189 Ill. 85, 59 N. E. 600; C. *v.* R. Co., 127 Ky. 358, 105 S. W. 466; Dodge *v.* Cornelius, 168 N. Y. 242, 61 N. E. 244; Hirsh *v.* R. Co., 84 App. Div. 374, 82 N. Y. S. 754; Pullman Co. *v.* Hoyle, 52 Tex. Civ. 534, 115 S. W. 315.

18-9 U. S. *v.* R. Co, 114 Fed. 682; Chapman *v.* Moore, 151 Cal. 509, 91 P. 324; S. *v.* Hines, 148 Mo. App. 298, 128 S. W. 250 (judicial action must be shown); Shaughnessy *v.* Church, 63 Neb. 798, 89 N. W. 263.

18-10 Proof action commenced does not show it was pending when plea of abatement interposed. Hirsh *v.* E. Co., 84 App. Div. 374, 82 N. Y. S. 754.

19-12 Sloss-Sheffield Steel & Iron Co. *v.* Milbra, 173 Ala. 658, 55 So. 890; Stokes *v.* Dimmick, 157 Ala. 237, 48 S. 66; Ashton *v.* Heggerty, 130 Cal. 516, 62 P. 934; Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631; Dodge *v.* Cornelius, 168 N. Y. 242, 61 N. E. 244; Madison *v.* Co., 113 Tenn. 331, 83 S. W. 658; Cooper *v.* Mayfield, 94 Tex. 107, 58 S. W. 827; Pullman Co. *v.* Hoyle, 52 Tex. Civ. 534, 115 S. W. 315; Level L. Co. *v.* Sivyer, 112 Wis. 442, 88 N. W. 317.

Parties interested since suit. See Haas *v.* Righeimer, 220 Ill. 193, 77 N. E. 69.

20-13 Chapman *v.* Moore, 151 Cal 509, 91 P. 324; Wilkes *v.* R. Co., 85 S. C. 346, 67 S. E. 292; Jenkins *v.* R. Co., 89 S. C. 408, 71 S. E. 1010.

Variation in parties immaterial if issues same and judgment would operate on principal parties. Quinn *v.* County, 140 Ia. 105, 117 N. W. 1100.

20-14 Park *v.* Zellars, 139 Ga. 585, 77 S. E. 922;Van Vleck *v.* Anderson, 136 Ia. 366, 113 N. W. 853; Guinn *v.* Elliott, 123 Ia. 179, 98 N. W. 625.

21-15 Emry *v.* Chappell, 148 N. C. 327, 62 S. E. 411.

21-16 Guinn *v.* Elliott, 123 Ia. 179, 98 N. W. 625; Consolidated Co. *v.* Wisner, 38 App. Div. 369, 56 N. Y. S. 723; Jordan *v.* Underhill, 91 App. Div. 124, 86 N. Y. S. 620.

21-18 McClellan *v.* Carland, 187 Fed. 915, 110 C. C. A. 49; Bates *v.* Force, 139 Fed. 746; Berliner G. Co. *v.* Seaman, 111 Fed. 679; Ashton *v.* Heggerty, 130 Cal. 516, 62 P. 934; Mitchell *v.* Pearson, 34 Colo. 278, 82 P. 446; Pratt *v.* Stoner, 78 Conn. 310, 61 A. 1009; Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631; Fetzer *v.* Clark, 153 Ill. App. 152; Mullinnix *v.* Brown, 151 Ia. 468, 131 N. W. 671; Lake Park State Bank *v.* Rood Bros., 152 Ia. 47, 131 N. W. 55; Henderson, etc. Co. *v.* Howard, 119 La. 555, 44 S. 296; Central, etc. Co. *v.* Co., 119 La. 263, 44 S. 10; Gilpin *v.* Carroll, 92 Md. 44, 47 A. 1021; Early *v.* Judge, 166 Mich. 517, 131 N. W. 1104; Carr *v.* Lyle, 126 Mich. 655, 86 N. W. 145; Piper *v.* Sawyer, 82 Minn. 474, 85 N. W. 206; Libbe *v.* Libbe, 157 Mo. App. 610, 138 S. W. 688; Courtney *v.* Assn. (Mo. App.), 94 S. W. 768; Reed *v.* Lowe, 163 Mo. 519, 63 S. W. 687; Van Houten *v.* Stevenson, 68 N. J. Eq. 490, 64 A. 1058; Standard S. M. Co. *v.* Kattell, 132 App. Div. 539, 117 N. Y. S. 32; Smith *v.* Co., 35 Misc. 203, 71 N. Y. S. 479; Cobb *v.* Co., 68 App. Div. 179, 74 N. Y. S. 56; Lawrence *v.* Freeman, 59 App. Div. 55, 69 N. Y. S. 6; Hofmann *v.* Nestel, 146 App. Div. 305, 130 N. Y. S. 775; Fogarty *v.* Stange, 72 Misc. 225, 129 N. Y. S. 610; Alcolm *v.* Co., 96 N. Y. S. 221; McLain *v.* Nurnberg, 16 N. D. 138, 112 N. W. 245; Donatelli *v.* Casciola, 215 Pa. 21, 64 A. 319; Madison *v.* Co., supra; Carmack *v.* Drum, 27 Wash. 382, 67 P. 808.

Applicable to mandamus proceedings. U. S. *v.* R. Co., 114 Fed. 682.

Copy of complaint in prior action. Romaine *v.* R. Co., 87 App. Div. 569, 84 N. Y. S. 491.

A set-off pleaded in one action is good ground for a plea of another action pending in a separate suit for the same cause. Manufacturers' Bottle Co. *v.* Glass Co., 208 Mass. 593, 95 N. E. 103.

In suit for breach of contract to pay in monthly instalments, suit on one instalment cannot be pleaded in bar of action on subsequent one. Gravette *v.* Graphite Co., 1 Ala. App. 656, 56 S. 17.

ABBREVIATIONS.

See also 1 STANDARD PROC. 73, *et seq.*

24-8 Birmingham & A. R. Co. *v.* Maddox, 155 Ala. 292, 46 S. 780 ("5x16," referring to shingles); Raggio *v.* Palmtag, 155 Cal. 797, 103 P. 312 ("int." means "interest"); *In re* Lakemeyer, 135 Cal. 28, 66 P. 961, 87 Am. St. 96; Board *v.* Hider (Cal.), 107 P. 1068; Topeka *v.* Stevenson, 79 Kan. 394, 99 P. 589; Alabama G. S. R. Co. *v.* Co., 92 Miss. 781, 46 S. 254 ("O. N." in freight bill—"order notify"); Manganese S. S. Co. *v.* Bk., 25 S. D. 119, 125 N. W. 572.

Other examples.—"F. O. B." means "free on board." Kilmer *v.* Co., 36 Ind. App. 568, 76 N. E. 271; Vogt *v.* Schienebeck, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756. The character "&" means "and." Stewart *v.* S., 137 Ala. 33, 34 S. 818. The dollar mark, the sign "%" meaning per cent., "c|o," meaning "care of," etc., judicially noticed. *In re* Lakemeyer, supra. Meaning of "R. L. D." in records of office of federal revenue collector have been noticed. S. *v.* Nippert, 74 Kan. 371, 86 P. 478; Billingsley *v.* State, 4 Okla. Cr. 597, 113 P. 241. A contract, part of signature to which was "Mfg." instead of "Manufacturing," admissible. Seiberling *v.* Miller, 207 Ill. 443, 69 N. E. 800. "Pres.," affixed to signature means "president." Griffin *v.* Erskine, 131 Ia. 444, 109 N. W. 13.

24-9 Southwestern T. & T. Co. *v.* Owens (Tex. Civ.), 116 S. W. 89 (of "10-10-04").

25-14 Stanton *v.* Hotchkiss, 157 Cal. 652, 108 P. 864.

Judicial notice taken of "§§23, 38, 14" in report of commissioners relative to a special assessment. McChesney *v.* Chicago, 173 Ill. 75, 50 N. E. 191), and in tax receipts. Paris *v.* Lewis, 85 Ill. 597; Kile *v.* Yellowhead, 80 Ill. 208.

26-18 "M. C. R. R." in a security have been interpreted to mean "Michigan Central Railroad." Ripley *v.* Case, 78 Mich. 126, 43 N. W. 1097, 18 Am. St. 28.

26-19 "J. P." following name of person affixed to jurat of affidavit, indicate person named is a justice of the peace. Abrams *v.* S., 121 Ga. 170, 48 S. E. 965.

Notice taken of meaning of "Jno. M." in indictment. McDonald *v.* S., 55 Fla. 134, 46 S. 176.

27-20 Holbrook *v.* Quinlan & Co., 84 Vt. 411, 80 A. 339.

28-21 W. U. T. Co. *v.* Northcutt, 158 Ala. 539, 48 S. 553; Same *v.* Merritt, 55 Fla. 462, 46 S. 1024; Cole *v.* Leach, 47 Ind. App. 341, 94 N. E. 577; Griffin *v.* Erskine, 131 Ia. 444, 109 N. W. 13; Wilson, etc. L. Co. *v.* Capron, 145 Mo. App. 497, 122 S. W. 1085.

29-26 Atlantic & C. R. Co. *v.* Dahlberg, etc. Co., 170 Ala. 617, 54 S. 168; Louisville & N. R. Co. *v.* Flour & Grain Co., 136 Ga. 538, 71 S. E. 884; Illinois Custom Tailoring Co. *v.* Co., 158 Ill. App. 374; Fischl *v.* S., 54 Tex. Cr. 55, 111 S. W. 410.

29-27 "O. K." Penn. T. Co. *v.* Leman, 109 Ga. 428, 34 S. E. 679; Wilson-Reheis-Rolfes Lumb. Co. *v.* Ware, 158 Mo. App. 179, 138 S. W. 690.

30-31 In tract book kept by register of land office. Nurnberger *v.* U. S., 156 Fed. 721, 84 C. C. A. 377.

30-32 Flegel *v.* Dowling, 54 Or. 40, 102 P. 178.

30-33 Paris *v.* Lewis, 85 Ill. 597; McChesney *v.* Chicago, 173 Ill. 75, 50 N. E. 191; Douglass *v.* Byers, 69 Kan. 59, 76 P. 432; Gogebic L. Co. *v.* Moore, 157 Mich. 499, 122 N. W. 128 (return to service of notice).

31-36 Merchants' abbreviations used in papers in replevin suit explained. Dages *v.* Brake, 125 Mich. 64, 83 N. W. 1039, 84 Am. St. 556.

31-38 S. *v.* Germain, 54 Or. 395, 103 P. 521.

31-40 In bank books. Kossuth Bk. *v.* Richardson, 141 Ia. 738, 118 N. W. 906.

31-41 In correspondence by telegraph. W. U. T. Co. *v.* Merritt, 55 Fla. 462, 46 S. 1024. And by mail. Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215.

Short names for corporations may be used by witnesses. Hunt *v.* R. Co., 224 Pa. 604, 73 A. 968.

ABDUCTION.

Proposition by woman, 34-1; *Evidence of conspiracy*, 45-58; *Proof of age*, 47-72.

For procedure see 1 STANDARD PROC. 77, *et seq.*

Definition.—See 1 STANDARD PROC. 78.

Not Indictable at Common Law.—See 1 STANDARD PROC. 78.

Purpose of Statutes.—See 1 STANDARD PROC. 79.

34-1 Under statute forbidding "taking" of unmarried girl, it is enough to show she and defendant quitted her father's house together in consequence of her proposal and statement to him she intended to leave. Reg. *v.* Biswell, 2 Cox C. C. (Eng.) 279; Griffin *v.* S., 109 Tenn. 17, 32, 70 S. W. 61.

Receiving minor female for specified purposes is an abduction. See P. *v.* Smith, 114 App. Div. 513, 100 N. Y. S. 259.

Detention against will may be shown by conduct which resulted in causing woman to leave highway and by following her, though she was not touched. Jones *v.* C., 28 Ky. L. R. 213, 89 S. W. 174.

34-5 S. *v.* Chisenhall, 106 N. C. 676, 11 S. E. 518; S. *v.* Burnett, 142 N. C. 577, 55 S. E. 72; U. S. *v.* Alvarez, 1 Phil. Isl. 351.

35-11 Defendant's conduct previous to taking is competent. P. *v.* Spriggs, 119 App. Div. 236, 104 N. Y. S. 539.

Woman may take minor female for prostitution. S. *v.* Rorebeck, 158 Mo. 130, 59 S. W. 67.

35-12 Defendant's previous marriage to prostitute. P. *v.* Claudius, 8 Cal. App. 597, 97 P. 687.

36-14 Presumption that person contemplates probable consequences of his acts may aid testimony concerning intent. P. *v.* Claudius, 8 Cal. App. 597, 97 P. 687.

36-15 P. *v.* Lewis, 141 Cal. 543, 75 P. 189; P. *v.* Claudius, supra. It is immaterial in prosecution for abduction of minor for purpose of marrying her that defendant had a wife when offense committed. P. *v.* Cerami, 101 App. Div. 366, 91 N. Y. S. 1027.

37-19 S. *v.* Burnett, 142 N. C. 577, 55 S. E. 72.

38-21 The statutory words "for the purpose of prostitution" mean indiscriminate sexual intercourse. S. *v.* Rorebeck, 158 Mo. 130, 59 S. W. 67.

38-23 S. *v.* Chisenhall, 106 N. C. 676, 11 S. E. 518.

Defendant's intent may be shown by indirect evidence. P. *v.* Newton, 11 Cal. App. 762, 106 P. 247.

Costume worn by person abducted and provided by keeper of house may be admitted. P. *v.* Claudius, 8 Cal. App. 597, 97 P. 687.

38-24 Evidence of illicit relations are competent to show intent. P. *v.* Seo, 258 Ill. 152, 101 N. E. 257.

Offense may be established without showing cohabitation and sexual intercourse followed the taking. S. *v.* Tucker, 72 Kan. 481, 84 P. 126; S. *v.* Neasby, 188 Mo. 467, 87 S. W. 468.

Guilt inferred from circumstances. S. *v.* Tucker, 72 Kan. 481, 84 P. 126.

39-27 Carnal Knowledge. — Under statute making it a crime to abduct a woman for purpose of unlawful sexual intercourse at a house of ill-fame, purpose for which act was done may be shown by evidence she was taken to more than one such house. S. *v.* Savant, 115 La. 226, 38 S. 974.

Unmarried state of female need not be proved though alleged. P. *v.* Newton, 11 Cal. App. 762, 106 P. 247.

39-29 Evidence to show use of entreaty or persuasion is competent. Barker *v.* S., 1 Ga. App. 286, 57 S. E. 989.

40-35 Ignorance of minor's age no defense. Maguire *v.* P., 219 Ill. 16, 76 N. E. 67. See Brown *v.* S., (Del.), 74 A. 836.

41-38 If person in whose care a girl has been placed for a proper purpose takes her for a forbidden purpose, he takes her from her parent. P. *v.* Lewis, 141 Cal. 543, 75 P. 189; S. *v.* Gordon, 46 N. J. L. 432.

42-44 Parent may testify to nonconsent. S. *v.* Baldwin, 214 Mo. 290, 113 S. W. 1123.

43-52 General character for virtue may be shown. S. *v.* Connor, 142 N. C. 700, 55 S. E. 787.

Chastity of unmarried woman presumed. U. S. *v.* Alvarez, 1 Phil. Isl. 351.

45-58 Proof of chastity and consent. If statute is silent as to chastity of female, burden is not upon state to show she was chaste; if she was unchaste defendant must show fact (Griffin *v.* S., 109 Tenn. 17, 70 S. W. 61), and that taking was with parent's consent. S. *v.* Burnett, 142 N. C. 577, 55 S. E. 72. But if offense depends upon her chastity and corroboration is required, fact of chastity must be shown by state. S. *v.* Connor, supra.

Evidence of character in rebuttal. If testimony of improper conduct of prosecutrix with men and of admissions by her of having sexual intercourse received, state may offer evidence in rebuttal to show good repu-

tation. S. *v.* Jones, 191 Mo. 653, 90 S. W. 465.

Evidence of conspiracy.—If a man and wife have been jointly engaged in getting a girl into their house for immoral purposes evidence may be given of their acts and words done spoken in promotion of their purpose, though both not present at time. S. *v.* Dickerhoff, 127 Ia. 404, 103 N. W. 350.

45-59 Carter *v.* State (Ga. App.), 80 S. E. 206.

46-67 Corroborative evidence must be of such character as tends to prove, to some extent, guilt of accused by connecting him with the offense. P. *v.* Swasey, 77 App. Div. 185, 78 N. Y. S. 1103; P. *v.* Miller, 70 App. Div. 592, 75 N. Y. S. 655; P. *v.* Smith, 114 App. Div. 513, 100 N. Y. S. 259.

47-71 Accomplice may give corroborating testimony (P. *v.* Powell, 4 N. Y. Cr. 585), as may another person abducted at same time by same parties. P. *v.* Panyko, 71 App. Div. 324, 75 N. Y. S. 945, *aff.*, 171 N. Y. 669, 64 N. E. 1124.

47-72 S. *v.* Neasby, 188 Mo. 467, 87 S. W. 468; Tores *v.* S. (Tex. Cr.), 63 S. W. 880.

Age, how shown, see *infra,* the title "Age."

47-78 Best evidence of disappearance of a person is testimony of members of his family. U. S. *v.* de Sosa, 1 Phil. Isl. 687.

47-79 A sister of abducted person may be asked on cross-examination if she advised that person to go with accused. S. *v.* Kebler, 228 Mo. 367, 128 S. W. 721.

Circumstances held insufficient to justify taking. S. *v.* Tillotson, 85 Kan. 577, 117 P. 1030.

48-80 Stewart *v.* Com., 141 Ky. 522, 133 S. W. 202.

Want of chastity is a matter of defense. Defendant may discharge burden by creating a reasonable doubt. Griffin *v.* S., 109 Tenn. 17, 70 S. W. 61.

Unchaste character immaterial where woman under eighteen abducted for concubinage. S. *v.* Baldwin, 214 Mo. 290, 113 S. W. 1123.

48-86 See Baumgartner *v.* Eigenbrot, 100 Md. 508, 60 A. 601.

49-88 Right of father to services of child is sufficient to maintain action; proof of their loss is not essential. Soper *v.* Igo, 28 Ky. L. R. 519, 89 S. W. 538; Washburn *v.* Abram, 28 Ky. L. R. 985, 90 S. W. 997.

ABORTION.

Proof of intent, 54-1; *The corpus delicti,* 55-6; *Order of proof,* 55-6; *Attempt to produce miscarriage,* 55-14; *Evidence of custom,* 55-14; *Opinions not competent,* 56-16; *Advertisement of facilities for committing,* 57-25; *Sufficiency of means used,* 57-29; *Personal administration,* 58-34; *Defendant's belief as to pregnancy,* 58-37; *Character of corroborating evidence,* 62-59; *Dying declarations,* 65-77.

For matters of procedure, see 1 STANDARD PROC. 91 *et seq.*

Definition of abortion and kindred terms. 1 STANDARD PROC. 94, 95.

Common Law and Statutes.—See 1 STANDARD PROC. 95.

54-1 S. *v.* Tippie (Ohio), 105 N. E. 75; S. *v.* Lilly, 47 W. Va. 496, 35 S. E. 837; C. *v.* Corkin, 136 Mass. 429.

Intent may be shown by evidence of defendant's acts, measures of concealment or precautions, and other circumstances from which it may be inferred. S. *v.* Magnell, 3 Penne. (Del.) 307, 51 A. 606; S. *v.* Jones, 4 Penne. (Del.) 109, 53 A. 858. It may be shown instrument was made for him, though it was not used (Moore *v.* S., 37 Tex. Cr. 552, 40 S. W. 287); but not that he bought one before pregnancy produced. S. *v.* McCoy, 15 Utah 136, 49 P. 420. Advertisements are admissible. P. *v.* Hagenow, 236 Ill. 514, 86 N. E. 370.

Proof of defendant's general reputation for morality and decency may be received (S. *v.* Jones, 4 Penne. (Del.) 109, 53 A. 858), as may proof he had solicited patronage as abortionist (Clark *v.* P., 224 Ill. 554, 79 N. E. 941); but testimony as to general good character cannot be rebutted by proving reputation as abortionist. C. *v.* Gibbins, 3 Pa. Super. 408.

54-2 S. *v.* Brown (Del.), 85 A. 797; Scott *v.* P., 141 Ill. 195, 30 N. E. 329, prior or subsequent to the act alleged.

54-3 Rex *v.* Bond (1906), 2 K. B. (Eng.) 389; P. *v.* Hagenow, supra, *cit.* the text; Clark *v.* C., 121 Ky. 443, 63 S. W. 740. *Contra* in absence of evidence of system. Rex *v.* Pollard, 19 Ont. L. R. (Can.) 96 (accused tes-

tified operation performed for lawful purpose, and without criminal intent, and, on cross-examination, denied he had performed a like operation on a person then in court, though such person testified to the contrary).
Contra.—Baker *v.* P., 105 Ill. 452; S. *v.* Crofford, 121 Ia. 395, 96 N. W. 889.
Sale of articles for purpose of abortion to other persons upon different occasions is incompetent. P. *v.* Spier, 120 App. Div. 786, 105 N. Y. S. 741.
Declarations.—It may be shown defendant, when using instruments used language tending to show he customarily performed like operations for an unlawful purpose. Rex *v.* Bond, (1906), 2 K. B. (Eng.) 389.
55-6 Intent to kill child may exist without absolute knowledge it is quick. Barrow *v.* S., 121 Ga. 187, 48 S. E. 950.
The corpus delicti.—On the issue as to whether natural causes or a criminal operation brought about abortion, proof of openings from the uteris into the abdominal cavity, delay in calling a physician, and statement of deceased to accused, just prior to sickness, of her purpose to get rid of the child, prove the corpus delicti. Seifert *v.* S., 160 Ind. 464, 67 N. E. 100, 98 Am. St. 340.
Order of proof.—A physician who has made a post mortem examination may testify to manner in which miscarriage produced before proof is made of corpus delicti; such evidence tends to prove corpus delicti. Hauk *v.* S., 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.
55-11 S. *v.* Wells, 35 Utah 400, 100 P. 681.
55-12 Barrow *v.* S., 121 Ga. 187, 48 S. E. 950; Gullatt *v.* S. (Ga. App.), 80 S. E. 340. It may be shown accused recommended other men to have intercourse with woman, and promised to help them out of any resulting trouble. Fretwell *v.* S., 43 Tex. Cr. 501, 67 S. W. 1021. Proof may be made of occurrences between parties after prior operation (S. *v.* Carey, 76 Conn. 342, 56 A. 632), and that woman told defendant of her pregnancy and he made prior unsuccessful attempts to cause abortion (Sullivan *v.* S., 121 Ga. 183, 48 S. E. 949).
55-13 Barrow *v.* S., 121 Ga. 187, 48 S. E. 950.
55-14 S. *v.* Carey, 76 Conn. 342, 56 A. 632; S. *v.* Magnell, 3 Penne. (Del.) 307, 61 A. 606; Barrow *v.* S., 121 Ga. 187, 48 S. E. 950.
Attempt to produce miscarriage.—Defendant cannot show woman attempted or submitted to attempt to produce miscarriage prior to operation. S. *v.* Carey, 76 Conn. 342, 56 A. 632; Hauk *v.* S., 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; C. *v.* Felch, 132 Mass. 22.
Medical testimony as to prevalence of custom among unmarried pregnant women to take means to produce miscarriage is irrelevant . Clark *v.* C., 111 Ky. 443, 462, 63 S. W. 740.
55-15 A physician who knew deceased and made a post mortem examination may testify it was not necessary to produce abortion to save life. S. *v.* McCoy, 15 Utah 136, 49 P. 420. If such necessity is alleged it may be shown defendant had performed a like operation on another for same end. P. *v.* Hodge, 141 Mich. 312, 104 N. W. 599.
56-16 Sufficiency of evidence to show absence of necessity. See P. *v.* Balkwell, 143 Cal. 259, 76 P. 1017; Hatchard *v.* S., 79 Wis. 357, 48 N. W. 380.
Evidence of female's prior good health to negative necessity. S. *v.* De Groat (Mo.), 168 S. W. 702.
Opinions not competent.—Person on whom instruments used cannot testify as to her opinions or conclusions as to purpose for which used, it being contended it was lawful. S. *v.* Pierce, 85 Minn. 101, 88 N. W. 417.
Absence of necessity may be shown by circumstantial evidence. Diehl *v.* S., 157 Ind. 549, 62 N. E. 51; S. *v.* Longstreth, 19 N. D. 268, 121 N. W. 1114; S. *v.* Wells, 35 Utah 400, 100 P. 681 (basis for such evidence cannot be presumed good health and physical condition).
56-19 S. *v.* De Groat (Mo.), 168 S. W. 702.
56-20 S. *v.* Brown (Del.), 85 A. 797; S. *v.* Magnell, 3 Penne. (Del.), 307, 51 A. 606; S. *v.* De Groat (Mo.), 168 S. W. 702; S. *v.* Sonner, 253 Mo. 440, 161 S. W. 723; S. *v.* Schuerman, 70 Mo. App. 518; S. *v.* Wells, 35 Utah 400, 100 P. 681. See S. *v.* McCoy, 15 Utah 136, 49 P. 420.
56-21 S. *v.* Sonner, 253 Mo. 440, 161 S. W. 723.
56-22 Fitch *v.* P., 45 Colo. 298, 100 P. 1132.

56-23 Circumstances under which woman visited physician's office and absence of necessity for so doing may be shown, as may fact she tried to conceal identity. Cook *v.* P., 177 Ill. 146, 52 N. E. 273; Jackson *v.* S., 55 Tex. Cr. 79, 115 S. W. 262.

Deceased's visit to defendant.—P. *v.* Fritch, 170 Mich. 258, 136 N. W. 493.

57-25 P. *v.* Hagenow, 236 Ill. 514, 86 N. E. 370.

Cards found in the defendant's trunk tending to show he held himself out as being in the business of procuring abortions are competent (C. *v.* Barrows, 176 Mass. 17, 56 N. E. 830; C *v.* Bishop, 165 Mass. 148, 42 N. E. 560), though printed two or three years before offense. Weed *v.* P., 3 Thomp. & C. (N. Y.) 50, *aff.*, 56 N. Y. 628.

57-27 Clark *v.* C., 111 Ky. 443, 462, 63 S. W. 740. *Contra,* if part, of one transaction. P. *v.* Simon, 21 Cal. App. 88, 131 P. 102.

57-28 S. *v.* Dean, 85 Mo. App. 473.

It must be shown instrument was used as alleged. S. *v.* Magnell, 3 Penne. (Del.) 307, 51 A. 606.

57-29 Thomas *v.* S., 156 Ala. 166, 47 S. 257; S. *v.* Stafford, 145 Ia. 285, 123 N. W. 167; S. *v.* Bly, 99 Minn. 74, 108 N. W. 833; S. *v.* Lilly, 47 W. Va. 496, 35 S. E. 837.

Some statutes are not predicated on means prescribed, but on those used, in which case doses taken must be sufficient to have produced result. Offense not established by proof that those prescribed would be likely to have done so. Fretwell *v.* S., 43 Tex. Cr. 501, 67 S. W. 1021.

58-34 S. *v.* Stafford, 145 Ia. 285, 123 N. W. 167 (procuring and delivering).

That accused sent medicine to prosecutrix. Burris *v.* S., 73 Ark. 453, 84 S. W. 723.

58-35 Female may testify as to pregnancy when denied by defendant. Link *v.* S. (Tex. Civ.), 164 S. W. 987. *Contra,* Link *v.* S. (Tex. Cr.), 164 S. W. 987.

58-36 Eggart *v.* S., 40 Fla. 527, 25 S. 144; Wilson *v.* C., 22 Ky. L. R. 1251, 60 S. W. 400.

58-37 S. Stafford, 145 Ia. 285, 123 N. W. 167 (absolute certainty not required; it is enough to show pregnancy beyond reasonable doubt).

Pregnancy must be proved.—Evidence that deceased had not menstruated for two months and that she supposed herself to be pregnant is admissible. P. *v.* Fritch, 170 Mich. 258, 136 N. W. 493.

In Missouri pregnancy at time of administering must be proved. S. *v.* Rogers, 135 Mo. App. 695, 116 S. W. 469.

Defendant's belief or supposition as to pregnancy is immaterial.—Eggart *v.* S., supra; C. *v.* Tibbetts, 157 Mass. 519, 32 N. E. 910; C. *v.* Surles, 165 Mass. 59, 42 N. E. 502. Belief such is the fact is enough. C. *v.* Nailor, 29 Pa. Super. 271; Powe *v.* S., 48 N. J. L. 34, 2 A. 662; S. *v.* Magnell, 3 Penne. (Del.) 307, 51 A. 606.

58-38 S. *v.* Stafford, 145 Ia. 285, 123 N. W. 167.

59-39 Fitch *v.* P., 45 Colo. 298, 100 P. 1132; S. *v.* Brown (Del.), 85 Atl. 797; S. *v.* Magnell, 3 Penne. (Del.), 307, 51 A. 606.

Offense is established by proof that pregnant woman was placed in position to be operated upon, in connection with evidence of intent. P. *v.* Conrad, 102 App. Div. 566, 92 N. Y. S. 606.

59-40 S. *v.* Fletcher, 77 N. J. L. 346, 72 A. 33.

59-42 Carter *v.* S., 172 Ind. 227, 87 N. E. 1081; S. *v.* Dean, 85 Mo. App. 473.

60-53 Shaw *v.* S. (Tex. Cr.), 165 S. W. 930.

She cannot be asked as to the paternity of the child. P. *v.* Wah Hing, 15 Cal. App. 195, 114 P. 416.

60-54 State *v.* Miller, 90 Kan. 230, 133 P. 878.

Competent witness against husband if he became such since offense, on ground bodily injury inflicted. C. *v.* Kreuger, 17 Pa. C. C. 181.

Wife of accused is not competent in his behalf, though she is in behalf of his co-defendant. Smartt *v.* S., 112 Tenn. 539, 80 S. W. 586.

61-55 Smartt *v.* S., 112 Tenn. 539, 80 S. W. 586.

61-57 P. *v.* Wah Hing, 15 Cal. App. 195, 114 P. 416.

61-58 S. *v.* Carey, 76 Conn. 342, 56 A. 632; S. *v.* Stafford, 145 Ia. 285, 123 N. W. 167; Meno *v.* S., 117 Md. 435, 83 A. 759; C. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471; P. *v.* Vedder, 98 N. Y. 630; C. *v.* Bell, 4 Pa. Super. 187; Smartt *v.* S., 112 Tenn. 539, 80 S. W. 586; S. *v.* Lilly, 47 W. Va. 496, 35 S. E. 837.

Nor in the absence of such statute can

the woman be convicted for committing an abortion upon herself. C. *v.* Weible, 45 Pa. Super. 207.

62-59 See Meno *v.* S., 117 Md. 435, 83 A. 759.

Character of corroborating evidence to show assault with intent to commit abortion. See S. *v.* Lee, 69 Conn. 186, 37 A. 75.

Where corroboration required it is enough if evidence relates to some portion of the material testimony; it need not cover every material fact if it tends to prove commission of offense and identify defendant with it. C. *v.* Keene, 7 Pa. Super. 293.

62-60 S. *v.* McCoy, 15 Utah 136, 49 P. 420; Wilson *v.* C., 22 Ky. L. R. 1251, 60 S. W. 400.

Medical witness should not be asked for or permitted to give the opinion that a *criminal* operation had been performed. P. *v.* Fritch, 170 Mich. 258, 136 N. W. 493.

62-61 P. *v.* Hagenow, 236 Ill. 514, 86 N. E. 370 (after post mortem).

63-62 Stevens *v.* P., 215 Ill. 593, 74 N. E. 786.

Experts may testify as to physical effect drugs administered by defendant would have upon a pregnant woman, and as to whether they would give her, if they did not desire to produce a miscarriage, the quantity per day testified to have been given. Eggart *v.* S., 40 Fla. 527, 25 S. 144; C. *v.* Sinclair, 195 Mass. 100, 80 N. E. 799. They may give opinions as to kind of instrument used and mode of its use. C. *v.* Sinclair, supra.

Non-experts.—Unskilfulness of defendant as a physician or surgeon may be testified to by those personally acquainted with his attainments; but their testimony cannot rest on his reputation. Clark *v.* C., 111 Ky. 443, 63 S. W. 740.

63-63 Thomas *v.* S., 156 Ala. 166, 47 S. 257.

63-64 Previous pregnancy may be testified to by non-expert, as may fact as to previous operations. Thomas *v.* S., supra.

63-65 Wilson *v.* C., 22 Ky. L. R. 1251, 60 S. W. 400; P. *v.* Hodge, 141 Mich. 312, 104 N. W. 599; S. *v.* Finley, 193 Mo. 202, 91 S. W. 942.

What defendant did in his professional capacity before, at and after the birth is proper evidence. S. *v.* Miller, 90 Kan. 230, 133 P. 878.

Any acts which are part of the res gestae are admissible. S. *v.* Moeller, 24 N. D. 165, 138 N. W. 981.

Self-serving declarations of accused made prior to act, not admissible. P. *v.* Huntington, 8 Cal. App. 612, 97 P. 760.

Inquiries by deceased of witness, as to a doctor and that witness directed her to defendant. P. *v.* Fritch, 170 Mich. 258, 136 N. W. 493.

63-66 S. *v.* Crofford, 121 Ia. 395, 96 N. W. 889; S. *v.* Bly, 99 Minn. 74, 108 N. W. 833; C. *v.* Mitchell, 6 Pa. Super. 369.

Anonymous letters.—See S. *v.* Kesner, 72 Kan. 87, 82 P. 720.

Evidence of declarations and admissions by conduct may be received in connection with proof of corpus delicti. S. *v.* Kesner, 72 Kan. 87, 82 P. 720. Entries in account book kept by defendant and containing name of woman operated on may be shown. C. *v.* Sinclair, 195 Mass. 100, 80 N. E. 799.

63-69 Harrison *v.* S. (Tex. Cr.), 153 S. W. 139.

64-71 Recitals by deceased to witness, of her conversations with accused, inadmissible. P. *v.* Fritch, 170 Mich. 258, 136 N. W. 493.

64-75 P. *v.* Wright (Cal.), 138 P. 349.

Admissibility of declarations.—If state proves part of a conversation between defendant and deceased after offense committed, he may prove remainder. Diehl *v.* S., 157 Ind. 549, 62 N. E. 51. Statements by deceased prior to offense or thereafter are not provable if they do not relate to the act (Howard *v.* P., 185 Ill. 552, 57 N. E. 441; Clark *v.* P., 224 Ill. 554, 79 N. E. 941); but declarations as to woman's condition and request for means to produce abortion are competent (Brown *v.* C., 26 Ky. L. R. 1269, 83 S. W. 645), and where woman sought defendant and voluntarily submitted to operation her statements to her husband as to who had operated were competent. Johnson *v.* P., 33 Colo. 224, 80 P. 133. Statement made by patient to physician that abortion had been performed is incompetent. C. *v.* Sinclair, 195 Mass. 100, 80 N. E. 799.

65-76 Evidence of subsequent intercourse after attempt to commit abortion inadmissible to contradict dying declaration. S. *v.* Law, 150 Wis. 313, 136 N. W. 803, 137 N. W. 457.

Admissible though demanded by attending physician. S. *v.* Law, 150 Wis. 313, 136 N. W. 803, 137 N. W. 457.

65-77 Dying declarations admissible where death an element of the offense. Montgomery *v.* S., 80 Ind. 338; Seifert *v.* S., 160 Ind. 464, 67 N. E. 100, 98 Am. St. 340; S. *v.* Leeper, 70 Ia. 748, 30 N. W. 501; Wilson *v.* C., 22 Ky. L. R. 1251, 60 S. W. 400; P. *v.* C., 87 Ky. 487, 9 S. W. 509, 810; Hawkins *v.* S., 98 Md. 355, 57 A. 27; P. *v.* Lonsdale, 122 Mich. 388, 81 N. W. 277; S. *v.* Pearce, 56 Minn. 226, 57 N. W. 652, 1065; Edwards *v.* S., 79 Neb. 251, 112 N. W. 611; S. *v.* Meyer, 65 N. J. L. 237, 47 A. 486, 86 Am. St. 634, 52 L. R. A. 346, *rev.* 64 N. J. L. 382, 45 A. 779; C. *v.* Winkelman, 12 Pa. Super. Ct. 497; S. *v.* Dickinson, 41 Wis. 299. They must relate to circumstances attending injury; so far as they disclose antecedent or subsequent events they are incompetent. P. *v.* C., 87 Ky. 487, 9 S. W. 509, 810; Montgomery *v.* S., 80 Ind. 338. Statement as to purpose for which operation performed is inadmissible. Ibid. But it is otherwise as to narration of defendant's conduct in furnishing declarant with instrument and inciting her to use it. Seifert *v.* S., supra. Mental soundness of declarant may be shown by non-expert testimony. C. *v.* Keene, 7 Pa. Super. 293.

See further the title "Dying Declarations."

Admissible against defendant doubly indicted and on trial for attempt to procure miscarriage and for procuring an abortion. C. *v.* Keene, supra.

ABSTRACTS OF TITLE

66-1 Einstein *v.* Co., 132 Mo. App. 82, 111 S. W. 859.

67-5 Abstract examined by proposed purchaser of land is admissible to show contract to supply one disclosing good title was complied with. Lang *v.* Murphy, 137 Mo. App. 217, 117 S. W. 665

67-6 Hammond *v.* Glos, 250 Ill. 32, 95 N. E. 39.

The abstract which may be required in ejectment is sufficient if it informs party of title upon which his adversary will rely; it is admissible though not technically an abstract. Jackson *v.* Tribble, 156 Ala. 480, 47 S. 310.

68-7 "**Land titles act.**"—Jackson *v.* Glos, 249 Ill. 388, 94 N. E. 502.

68-9 Foundation for introduction of secondary evidence must be laid in accordance with statute providing for admission of abstracts in lieu of original deeds. Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80; Glos *v.* Hallowell, 190 Ill. 65, 60 N. E. 62; Glos *v.* Talcott, 213 Ill. 81, 72 N. E. 707; Messenger *v.* Messenger, 223 Ill. 282, 79 N. E. 27.

Statute making abstracts or certified copies thereof prima facie evidence is valid. Brooke *v.* Glos, 243 Ill. 392, 90 N. E. 751.

Under Texas statute providing for abstracts in actions of trespass to try title, if an abstract offered is objected to because deficient remedy is by motion, before trial, to have defect cured. Stokes *v.* Riley, 29 Tex. Civ. 373, 68 S. W. 703. See "Title," infra, 1246-56.

Official examiner's certificate of title and abstract are not evidence on the hearing to establish title. Voorhies *v.* Voorhies, 66 Misc. 78, 120 N. Y. S. 677.

68-10 Bauer *v.* Glos, 244 Ill. 627, 91 N. E. 701.

69-11 Ibid. (unintentionally); McMahon *v.* Rowley, 238 Ill. 31, 87 N. E. 66.

69-14 An uncertified copy is not admissible. Hammond *v.* Glos, 250 Ill. 32, 95 N. E. 39.

Private abstracts are not public records and certified copies, not admissible. Whitman *v.* Giesing, 224 Mo. 600, 123 S. W. 1052.

ACCESSORIES, AIDERS AND ABETTORS.

For indictment and trial of accessory, see 1 STANDARD PROC., 123 *et seq.*

Definitions and distinctions.—1 STANDARD PROC., 125-133.

72-1 Brown *v.* U. S., 142 Fed. 1, 73 C. C. A. 187; Rawlins *v.* S., 124 Ga. 31, 52 S. E. 1; Osborne *v.* S., 99 Miss. 410, 55 S. 52 (*over.* the suggestion of error, 54 S. 450); S. *v.* McCall, 131 N. C. 798, 42 S. E. 894; Williams *v.* S., 5 Okla. Cr. 206, 114 P. 624; Kaufman *v.* S. (Tex. Cr.), 159 S. W. 58; Tuttle *v.* S. (Tex. Cr.), 49 S. W. 82; S. *v.* Lilly, 47 W. Va. 496, 35 S. E. 837.

Principal's guilt must be shown by

judgment. Daughtrey *v.* S., 46 Fla. 109, 35 S. 397.

Under some statutes accessories before fact may be tried jointly with principal or severally, though he be not convicted. C. *v.* Hicks, 118 Ky. 637, 82 S. W. 265; C. *v.* Bradley, 16 Pa. Super. 561; Stone *v.* S., 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145. See Begley *v.* C., 26 Ky. L. R. 598, 82 S. W. 285.

May be indicted jointly.—Rawlins *v.* S., 124 Ga. 31, 52 S. E. 1.

73-3 Brown *v.* U. S., 142 Fed. 1, 73 C. C. A. 187; C. *v.* Asherowski, 196 Mass. 342, 82 N. E. 13.

Intent is not to be tested by principal's subsequent state of mind or conduct, except so far as latter indicated intent when done. S. *v.* Palmer, 4 Penne. (Del.), 126, 53 A. 359.

Intent shown by circumstantial evidence.—C. *v.* Asherowski, 196 Mass. 342, 82 N. E. 13.

74-4 Bliss *v.* U. S., 105 Fed. 508, 44 C. C. A. 324; S. *v.* Stark, 63 Kan. 529, 66 P. 243, 54 L. R. A. 910; C. *v.* Sherman, 191 Mass. 439, 78 N. E. 98; S. *v.* Davenport, 156 N. C. 596, 72 S. E. 7; Wishard *v.* S., 5 Okla. Cr. 610, 115 P. 796.

In manslaughter no accessory before the fact. Maughon *v.* S., 9 Ga. App. 559, 71 S. E. 922.

Statutes abolish distinction between felonies and misdemeanors. S. *v.* Spence, 81 N. J. L. 265, 79 A. 1029.

Evidence principal confessed crime is admissible as substantive evidence against him; but is only corroborative as against accessory. S. *v.* McCall, 131 N. C. 798, 42 S. E. 894.

74-6 Rawlins *v.* S., 124 Ga. 31, 52 S. E. 1; Gullatt *v.* S. (Ga. App.), 80 S. E. 340 (admissions of principal); S. *v.* Kennedy, 85 S. C. 146, 67 S. E. 152; Millner *v.* S. (Tex. Cr.), 162 S. W. 348; Thomason *v.* S. (Tex. Cr.), 160 S. W. 359; Harrison *v.* S. (Tex. Cr.), 153 S. W. 139.

75-7 Jones *v.* S., (Ark.), 158 S. W. 132; Rawlins *v.* S., 124 Ga. 31, 52 S. E. 1; Tuttle *v.* S. (Tex. Cr.), 49 S. W. 82.

Conviction of principal may be shown by evidence aliunde record. C. *v.* House, 10 Pa. Super. 259.

76-8 Snow *v.* S., 5 Ga. App. 608, 63 S. E. 651.

76-9 Pierce *v.* S. (Tenn.), 168 S. W. 851.

Under some statutes accessory may be punished though principal acquitted. S. *v.* Bogue, 52 Kan. 79, 34 P. 410; Noland *v.* S., 19 O. 131; Hanoff *v.* S., 37 O. St. 178; Goins *v.* S., 46 O. 457, 21 N. E. 476; S. *v.* Phillips, 24 Mo. 475; S. *v.* Ross, 29 Mo. 32.

Pardon of principal does not relieve accessory. C. *v.* House, 10 Pa. Super. 259.

77-10 See P. *v.* Gerst, 137 App. Div. 272, 121 N. Y. S. 934.

Advice or abetment must be shown. Butler *v.* S., 11 Ga. App. 815, 76 S. E. 368.

Connection with one of several principals, enough. S. *v.* Roberts, 50 W. Va. 422, 40 S. E. 484.

Conspiracy need not be shown to convict accessory if felony committed in pursuance of advice and counsel. Powers *v.* C., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245.

77-11 That the crime was induced thereby, must appear. Powers *v.* C., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245; Hall *v.* C., 29 Ky. L. R, 485, 93 S. W. 904.

Proof of other motive is admissible. Millner *v.* S. (Tex. Cr.), 162 S. W. 348.

77-13 Henderson *v.* S., 156 Ala. 1, 47 S. 76; Ferguson *v.* S., 134 Ala. 63, 32 S. 760; S. *v.* Fiore (N. J.), 88 A. 1039.

Absence of accessory before the fact at time and from place of principal offense is an essential element. S. *v.* Roberts, 50 W. Va. 422, 40 S. E. 484. Under some statutes rule is otherwise. Henderson *v.* S., 156 Ala. 1, 47 S. 76; Ferguson *v.* S., 134 Ala. 63, 32 S. 760; C. *v.* Bradley, 16 Pa. Super. 561.

Statements by defendant several minutes after he learned of the crime, not provable. Powers *v.* C., 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494.

78-14 Powers *v.* C., supra (77-10).

78-15 Scott *v.* S., 46 Tex. Cr. 536, 81 S. W. 294.

Evidence of previous wrongdoing on part of principal, at instigation of accessory, competent to show plans and designs of latter. P. *v.* Lewis, 9 Cal. App. 279, 98 P. 1078.

Information given in another state by accused to principal as to where money to be taken was to be found. Fox *v.* S., 102 Ark. 393, 144 S. W. 516.

79-16 Pearce *v.* Oklahoma, 118 Fed. 425, 55 C. C. A. 550; Pearce *v.* Ty., 11 Okla. 438, 68 P. 504; Ferguson *v.* S., 134 Ala. 63, 32 S. 760; U. S. *v.* de Jesus, 2 Phil. Isl. 514.

Liability for acts resulting from general design does not extend to independent acts done by particular malice of principals or any of them. It is for jury to say whether or not act done by them, or either of them, was result of common design. Powers *v.* C., supra; S. *v.* Kennedy, 85 S. C. 146, 67 S. E. 152 (crime committed on person not intended by mistake).

80-18 Wilson *v.* U. S., 5 Ind. Ty. 610, 82 S. W. 924.

80-20 Judgment is competent, but not conclusive evidence of principal's conviction. Dent *v.* S., 43 Tex. Cr. 126, 65 S. W. 627.

81-21 S. *v.* Naughton, 221 Mo. 398, 120 S. W. 53.

It is not necessary for accessory to have absolute or actual knowledge of all facts going to show criminality of principal. Dent *v.* S., 43 Tex. Cr. 126, 65 S. W. 627, *appr.* Tully *v.* C., 13 Bush (Ky.), 142, quot. from Vol. 1, Encyc. of Ev., p. 82, note.

82-22 Levering *v.* C., 132 Ky. 666, 117 S. W. 253; S. *v.* Miller, 182 Mo. 370, 81 S. W. 867; S. *v.* Moxley, 54 Or. 409, 103 P. 655 (receiver of stolen goods); Dent *v.* S., 43 Tex. Cr. 126, 65 S. W. 627, *appr.* Blakely *v.* S., cited in next note.

82-23 Concealing knowledge. Foster *v.* S. (Tex. Cr.), 150 S. W. 936.

Character of assistance.—It is not enough to show defendant aided in spiriting away prosecuting witness so that she might not testify before grand jury. Caylor *v.* S., 44 Tex. Cr. 118, 68 S. W. 982. Majority of court distinguished Blakely *v.* S., 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. 912, which is stated on p. 82, Vol. 1 of this work.

Denial of knowledge of the crime is not enough. Pinckard *v.* S. (Tex. Cr.), 138 S. W. 601.

Conditional agreement not to prosecute does not make parties to it accessories. Smith *v.* S., 51 Tex. Cr. 137, 100 S. W. 924.

85-26 Defendant must show he is of the excepted class. S. *v.* Miller, 182 Mo. 370, 81 S. W. 867.

85-27 Declarations of others.—If offense committed in execution of a purpose entertained by others, testimony as to declarations of persons assembled to carry out the purpose is competent; but not statements of those not acting with defendant. Telegrams sent after crime committed by those jointly indicted with defendant as co-conspirators are relevant. Powers *v.* C., 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494.

Declarations of principal, in absence of accessory and long after event, not competent. S. *v.* Bogue, 52 Kan. 79, 34 P. 410.

86-28 One may be a principal in second degree though he could not commit crime with which he is connected. Bishop *v.* S., 118 Ga. 799, 45 S. E. 614.

86-29 P. *v.* Lewis, 9 Cal. App. 279, 98 P. 1078; Bishop *v.* S., 118 Ga. 799, 45 S. E. 614; S. *v.* Hoerr, 88 Kan. 573, 129 P. 153.

86-31 S. *v.* Palmer, 4 Penne. (Del.), 126, 53 A. 359; S. *v.* Berger, 121 Ia. 581, 96 N. W. 1094; Martin *v.* S., 44 Tex. Cr. 279, 70 S. W. 973; Grimsinger *v.* S., 44 Tex. Cr. 1, 69 S. W. 583.

88-32 S. *v.* Wakefield (Conn.), 90 A. 230; Wright *v.* S. (Ga.), 80 S. E. 544; S. *v.* Wolf, 112 Ia. 458, 84 N. W. 536; Howard *v.* C., 110 Ky. 356, 61 S. W. 756; U. S. *v.* Guevara, 2 Phil. Isl. 528; Monroe *v.* S., 47 Tex. Cr. 59, 81 S. W. 726; Chenault *v.* S., 46 Tex. Cr. 351, 81 S. W. 971.

Agreement inferable from facts. S. *v.* Wakefield (Conn.), 90 A. 230.

An agreement to commit a crime may be proved by inference, and it need not be shown that the principal and abettor had an oral or written agreement. S. *v.* Wakefield (Conn.), 90 A. 230.

Sufficient evidence to go to the jury. Condron *v.* S., 62 Tex. Cr. 485, 138 S. W. 594.

Compounding a felony does not make compounder accessory (Chenault *v.* S., supra, *over.* Gatlin *v.* S., 40 Tex. Cr. 116, 49 S. W. 87), nor does concealment of fact crime committed. Monroe *v.* S., supra.

Furnishing weapon.—Collins *v.* S., 138 Ala. 57, 34 S. 993.

Failure to attempt to prevent crime. S. *v.* Fox, 70 N. J. L. 353, 57 A. 270.

Aiding and abetting.—On the issue as to whether defendant aided and abetted commission of offense by principal, his guilt may be shown, as may his acts and declarations tending to show guilt, if there was other evidence tending to connect him with the crime by inducing or assisting in its commission. S. *v.* Brown, 130 Ia. 57, 106 N. W. 379.

See Coffman *v.* S., 51 Tex. Cr. 478, 103 S. W. 1128. Ownership of liquor sold illegally need not be in person aiding and abetting sale. S. *v.* Fulman, 7 Penne. (Del.) 123, 74 A. 1.

88-33 Strong *v.* S., 88 Ark. 240, 114 S. W. 239, 20 L. R. A. (N. S.) 321; S. *v.* Cloninger, 149 N. C. 567, 63 S. E. 154; S. *v.* Gray, 116 Ia. 231, 89 N. W. 987; Dean *v.* S., 85 Miss. 40, 37 S. 501; Metcalf *v.* S. (Okla.), 133 P. 1130; Drysdale *v.* S. (Tex. Cr.) 156 S. W. 685; Grimsinger *v.* S., 44 Tex. Cr. 1, 69 S. W. 583; Renner *v.* S., 43 Tex. Cr. 347, 65 S. W. 1102.

Where one encourages another by his conduct, being present, he makes himself responsible though there was no previously formed plan or agreement. Thomas *v.* S., 130 Ala. 62, 30 S. 391; Starks *v.* S., 137 Ala. 9, 34 S. 687.

Watching to prevent surprise, etc. Grimsinger *v.* S., supra; Winfield *v.* S., 44 Tex. Cr. 475, 72 S. W. 182.

90-34 S. *v.* Hess, 65 N. J. L. 544, 47 A. 806; S. *v.* King, 24 Utah 482, 68 P. 418; P. *v.* Coughlin, 13 Utah 58, 44 P. 94.

90-35 Mow *v.* P., 31 Colo. 351, 72 P. 1069; Jahnke *v.* S., 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; Newberry *v.* S. (Tex. Cr.), 74 S. W. 774; Renner *v.* S., 43 Tex. Cr. 347, 65 S. W. 1102.

90-36 P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364, 370; Whorley *v.* S., 45 Fla. 123, 33 S. 849; U. S. *v.* Onti, 4 Phil. Isl. 78; Ramon *v.* S. (Tex. Cr.), 68 S. W. 987; Bibby *v.* S. (Tex. Cr.), 65 S. W. 193.

Defendant has burden of proving duress. Pirkle *v.* S., 11 Ga. App. 98, 74 S. E. 709.

Individual malicious act.—If two or more engage to do an unlawful act and one of them, incited by his personal malice, though the object be to further escape of all engaged, does an act foreign to the common design, such act is not imputable to any other person. Renner *v.* S., 43 Tex. Cr. 347, 65 S. W. 1102.

Unity of intent.—One who loans a pistol to another and advises latter to kill a third person on condition is not possessed of same intent and felonious design as person who subsequently does killing, independently of existence of condition. Thornton *v.* S., 119 Ga. 437, 46 S. E. 640.

91-37 Whorley *v.* S., 45 Fla. 123, 33 S. 849.

Commission of principal crime must be shown. S. *v.* Wakefield (Conn.), 90 A. 230.

Aider and abettor may be convicted though principal unknown. Howard *v.* C., 110 Ky. 356, 61 S. W. 756.

Minutes of court admissible to show conviction of principal offense if record not made up. S. *v.* Warady, 77 N. J. L. 348, 72 A. 37.

91-38 S. *v.* Berger, 121 Ia. 581, 96 N. W. 1094; Steely *v.* C., 132 Ky. 213, 116 S. W. 714.

ACCOMPLICES.

Authority of prosecutor, 95-6; *Was common law rule binding—Origin of English practice,* 100-18; *Complaints as corroborative evidence,* 104-29; *Other like crimes,* 107-33; *Attempt to commit same crime,* 107-33; *Burden of showing witness to be accomplice,* 112-50; *Coindictee of accomplice competent witness,* 115-60.

See the title "Accessories and Accomplices" in 1 STANDARD PROC., for questions relating to indictment, jurisdiction, and conduct of trial.

94-2 Barr *v.* P., 30 Colo. 522, 71 P. 392.

An accomplice is not disqualified to testify because his confession was brought about by unlawful means; circumstances under which it was made may affect weight to be given his testimony. Rawlins *v.* S., 124 Ga. 31, 52 S. E. 1. Defendant cannot invoke privilege that witness need not incriminate himself. Barr *v.* P., 30 Colo. 522, 71 P. 392.

94-3 Murphy *v.* S., 124 Wis. 635, 102 N. W. 1087.

95-4 Unauthorized conditional promise made wtiness by his attorney may be proved. P. *v.* Moore, 96 App. Div. 56, 89 N. Y. S. 83.

Testimony of grand jurors, prosecuting officer and minutes of proceedings of jury are competent to establish claim to immunity. Murphy *v.* S., 124 Wis. 635, 102 N. W. 1087.

95-5 Testimony of accomplice cannot be bolstered up by proving by him prosecuting officer, at time they contracted, told him contract would be forfeited if any innocent man should be implicated by witness' testimony.

Faulkner *v.* S., 43 Tex. Cr. 311, 65 S. W. 1093.

Threat by prosecutor.—It cannot be shown prosecuting officer told witness he should have his liberty if he testified a certain way; otherwise, he would be punished. Barr *v.* P., 30 Colo. 522, 71 P. 392.

Terms of promise may be gone into on re-direct examination if witness testified thereof on his cross-examination. Fruger *v.* S., 56 Tex. Cr. 393, 120 S. W. 197.

96-6 Prosecuting officer cannot bind state by agreement to dismiss case if defendant therein will testify for prosecution on trial of another and distinct offense. Tullis *v.* S., 41 Tex. Cr. 87, 52 S. W. 83. Agreement that party shall be admitted to bail is beyond power of such officer. Ex parte Greenhaw, 41 Tex. Cr. 278, 53 S. W. 1024. See Barr *v.* P., 30 Colo. 522, 71 P. 392.

96-8 Missouri statute requires *nol pros.* or prior acquittal. State *v.* Falger, 154 Mo. App. 1, 133 S. W. 85.

Contract between prosecuting officer and accomplice not regarded if made without consent of court (Reagan *v.* S., 49 Tex. Cr. 443, 93 S. W. 733; Ex parte Greenhaw, 41 Tex. Cr. 278, 53 S. W. 1024); at least if accomplice testified falsely on examining trial. Cox *v.* S. (Tex. Cr.), 69 S. W. 145; Tullis *v.* S., 41 Tex. Cr. 87, 52 S. W. 83.

98-10 S. *v.* Shelton, 223 Mo. 118, 122 S. W. 732. See P. *v.* Schmitz, 7 Cal. App. 330, 94 P. 407, 419; Barbe *v.* Ty., 16 Okla. 562, 86 P. 61.

99-15 Powell *v.* S. (Ga. App.), 81 S. E. 396; People *v.* Baskin, 254 Ill. 509, 98 N. E. 957; S. *v.* Sassaman, 214 Mo. 695, 114 S. W. 590; Mitchell *v.* S., 21 Ohio C. C. 24.

Besides corroborative testimony must raise inference of guilt. Bishop *v.* S., 9 Ga. App. 205, 70 S. E. 976.

Credibility of accomplice's testimony may be sustained in usual ways. Butt *v.* S., 81 Ark. 173, 98 S. W. 723; Rice *v.* S., 50 Tex. Cr. 648, 100 S. W. 771.

100-16 U. S. *v.* Giuliani, 147 Fed. 594; Hanley *v.* U. S., 123 Fed. 849, 59 C. C. A. 153; S. *v.* Ryan, 1 Boyce (Del.) 223, 75 A. 869; S. *v.* Fahey, 3 Penne. (Del.), 594, 54 A. 690; S. *v.* Freedman, 3 Penne. (Del.), 403, 53 A. 356; S. *v.* Short, 7 Penne. (Del.) 295, 75 A. 787; Myers *v.* S., 43 Fla. 500, 31 S. 275; Caldwell *v.* S., 50 Fla. 4, 39 S. 188; Stone *v.* S., 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145; King *v.* Wo Sow, 7 Haw. 734; P. *v.* Covitz, 262 Ill. 514, 104 N. E. 887; P. *v.* Feinberg, 237 Ill. 348, 86 N. E. 584; Juretich *v.* P., 223 Ill. 484, 79 N. E. 181; S. *v.* Perry (Ia.), 105 N. W. 507; Weber *v.* C., 24 Ky. L. R. 1726, 72 S. W. 30; S. *v.* De Hart, 109 La. 570, 33 S. 605; S. *v.* Michel, 111 La. 434, 35 S. 629; S. *v.* Shelton, 223 Mo. 118, 122 S. W. 732; S. *v.* Day, 188 Mo. 359, 87 S. W. 465; S. *v.* Wigger, 196 Mo. 90, 93 S. W. 390; S. *v.* Dilts, 191 Mo. 665, 90 S. W. 782; S. *v.* Jones, 32 Mont. 442, 80 P. 1095; S. *v.* Lieberman, 80 N. J. L. 506, 79 Atl. 331; S. *v.* Simon, 71 N. J. L. 142, 58 A. 107, *aff.*, without opinion, 59 A. 1118; S. *v.* Goldman, 65 N. J. L. 394, 47 A. 641; S. *v.* Register, 133 N. C. 746, 46 S. E. 21; Straub *v.* S., 5 Ohio C. C. (N. S.) 529; Brenton *v.* Ty., 15 Okla. 6, 78 P. 83 *over.* Sowers *v.* Ty., 6 Okla. 436, 50 P. 257; C. *v.* Klein, 42 Pa. Super. 66; C. *v.* Lenhart, 40 Pa. Super. 572; C. *v.* Craig, 19 Pa. Super. 81; C. *v.* Sayars, 21 Pa. Super. 75; U. S. *v.* Ocampo, 5 Phil. Isl. 339; S. *v.* Sowell, 85 S. C. 278, 67 S. E. 316; S. *v.* Meares, 60 S. C. 527, 39 S. E. 245; S. *v.* Prater, 26 S. C. 198, 613, 2 S. E. 108; Fruger *v.* S., 56 Tex. Cr. 393, 120 S. W. 197; Hill *v.* S. (Tex. Cr.), 77 S. W. 808; Reagan *v.* S., 49 Tex. Cr. 443, 93 S. W. 733; Jones *v.* C., 111 Va. 862, 69 S. E. 953; S. *v.* McLeod (Wash.), 138 P. 648; S. *v.* Fetterly, 33 Wash. 599, 74 P. 810; S. *v.* Ray, 62 Wash. 582, 114 P. 439; S. *v.* Roller, 30 Wash. 692, 71 P. 718; Lanphere *v.* S., 114 Wis. 193, 89 N. W. 128; Means *v.* S., 125 Wis. 650, 104 N. W. 815. *Contra*, if accomplice admits on oath his testimony was false. Hill *v.* S., 55 Tex. Cr. 435, 117 S. W. 134. *Comp.* S. *v.* Brown, 146 Ia. 113, 124 N. W. 899 (adultery).

If accomplice wilfully swears falsely as to a material matter his uncorroborated testimony will not sustain a conviction. Jahnke *v.* S., 68 Neb. 154, 94 N. W. 158, 104 N. W. 154.

100-17 Palmer *v.* S., 165 Ala. 129, 51 S. 358; Rhea *v.* S. (Ark.), 147 S. W. 463; Burnett *v.* S., 76 Ark. 295, 88 S. W. 956; Rucker *v.* S., 77 Ark. 23, 90 S. W. 151; Davis *v.* S., 120 Ga. 433, 48 S. E. 180; Solomon *v.* S., 113 Ga. 192, 38 S. E. 332; Dixon *v.* S., 116 Ga. 186, 42 S. E. 357; Yother *v.* S., 120 Ga. 204, 47 S. E. 555; Durden *v.* S., 120 Ga. 860,

48 S. E. 315; Smith *v.* S., 5 Ga. App. 833, 63 S. E. 917; S. *v.* Rooke, 10 Idaho 388, 79 P. 82; S. *v.* Bond, 12 Idaho 424, 86 P. 43; Hinkle *v.* S., 157 Ind. 237, 61 N. E. 196; S. *v.* Callaghan (Ia.), 138 N. W. 402; C. *v.* Barton, 153 Ky. 465, 156 S. W. 113; Smith *v.* C., 148 Ky. 60, 146 S. W. 4; Mann *v.* C., 25 Ky. L. R. 1964, 79 S. W. 230; Simpson *v.* C., 31 Ky. L. R. 769, 103 S. W. 332; Lanasa *v.* S., 109 Md. 602, 71 A. 1058; S. *v.* Clements, 82 Minn. 434, 85 N. W. 229; S. *v.* Douglas, 26 Nev. 196, 65 P. 802; P. *v.* Evans, 81 Misc. 606, 143 N. Y. S. 49; P. *v.* Furlong, 127 N. Y. S. 422; P. *v.* Kathan, 136 App. Div. 303, 120 N. Y. S. 1096; Jones *v.* S. (Okla. Cr.), 137 P. 121; Gillam *v.* S. (Okla. Cr.), 135 P. 441; Nichols *v.* S. (Okla. Cr.), 133 P. 256; Thompson *v.* S. (Okla. Cr.), 132 P. 695; Head *v.* S. (Okla. Cr.), 131 P. 937; Cooper *v.* Ty., 19 Okla. 496, 91 P. 1032; S. *v.* Kelliher, 49 Or. 77, 88 P. 867; Gillespie *v.* S. (Tex. Cr.), 166 S. W. 135; Jobe *v.* S. (Tex. Cr.), 161 S. W. 966; Perry *v.* S. (Tex. Cr.), 155 S. W. 263; Burford *v.* S. (Tex. Cr.), 151 S. W. 538; Bush *v.* S. (Tex. Cr.), 151 S. W. 554; Bishop *v.* S. (Tex. Cr.), 151 S. W. 821; Townser *v.* S., 58 Tex. Cr. 453, 126 S. W. 572; Clifton *v.* S., 46 Tex. Cr. 18, 79 S. W. 824; Custer *v.* S. (Tex. Cr.), 76 S. W. 476 (*comp.* Hill *v.* S. (Tex. Cr.), 77 S. W. 808); Johnson *v.* S., 58 Tex. Cr. 244, 125 S. W. 16; King *v.* S., 57 Tex. Cr. 363, 123 S. W. 135; Green *v.* S., 56 Tex. Cr. 599, 120 S. W. 1002; Russell *v.* S., 55 Tex. Cr. 330, 116 S. W. 573; Newman *v.* S., 55 Tex. Cr. 273, 116 S. W. 577; Close *v.* S., 55 Tex. Cr. 380, 117 S. W. 137; Gardner *v.* S., 55 Tex. Cr. 400, 117 S. W. 148; Hanks *v.* S., 55 Tex. Cr. 405, 117 S. W. 149; Conant *v.* S., 51 Tex. Cr. 610, 103 S. W. 897; McDaniel *v.* S., 48 Tex. Cr. 342, 87 S. W. 1044.

Statute does not apply to misdemeanor cases. Brooks *v.* S., 12 Ga. App. 693, 78 S. E. 143.

Accomplice in offense being investigated is meant. People *v.* Ruef, 14 Cal. App. 576, 114 P. 48, 54.

Peremptory instruction for acquittal called for if no corroboration. De Boe *v.* C., 146 Ky. 696, 143 S. W. 39.

Are statutes applicable to federal courts.—Affirmative is held in U. S. *v.* Van Leuven, 65 Fed. 78, and negative in Hanley *v.* U. S., 123 Fed. 849, 59 C. C. A. 153. But see 3 ENCYCLOPÆDIA OF EVIDENCE 197.

Statutes not extended by construction. Brenton *v.* Ty., 15 Okla. 6, 78 P. 83.

Uncorroborated testimony not sufficient on preliminary examination.—S. *v.* Smith, 138 Ala. 111, 35 S. 42.

Accomplice not credible witness under statutes concerning conviction for perjury. Conant *v.* S., 51 Tex. Cr. 610, 103 S. W. 897.

100-18 Goldstein *v.* S. (Tex. Cr.), 166 S. W. 149; Vantreese *v.* S., 59 Tex. Cr. 281, 128 S. W. 383; Johnson *v.* S., 58 Tex. Cr. 244, 125 S. W. 16. See S. *v.* Shelton, 223 Mo. 118, 122 S. W. 732; King *v.* Tate, 2 K. B. (1908) 680.

In trials before court testimony of accomplices should be received with caution and carefully weighed. U. S. *v.* Quiamson, 5 Phil. Isl. 444. If it is contradictory no weight will be given it. U. S. *v.* Padlan, 7 Phil. Isl. 517.

Was common law rule binding.—If the practice of cautioning jury is a rule of law (court inclined to regard it as a rule of practice), it was not of force in England May 14, 1776, and therefore not within the terms of our adopting act. And as a rule of practice it ceased to have any validity when legislature prohibited judges from advising jury as to what had or had not been proved, or expressing any opinion as to the evidence or weight to be given it. Stone *v.* S., 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145; S. *v.* Sowell, 85 S. C. 278, 67 S. E. 316.

101-19 Holmgren *v.* U. S., 217 U. S. 509; Sykes *v.* U. S., 204 Fed. 909, 123 C. C. A. 205; U. S. *v.* Giuliani, 147 Fed. 594; S. *v.* Fahey, 3 Penne. (Del.) 594, 54 A. 690; S. *v.* Freedman, 3 Penne. (Del.) 403, 53 A. 356; C. *v.* Barton, 153 Ky. 465, 156 S. W. 113; Best *v.* C., 29 Ky. L. R. 137, 92 S. W. 555; S. *v.* Sprague, 149 Mo. 409, 50 S. W. 901; S. *v.* Prater, 26 S. C. 198, 613, 2 S. E. 108; S. *v.* Meares, 60 S. C. 527, 39 S. E. 245; Smith *v.* S., 45 Tex. Cr. 405, 77 S. W. 453; S. *v.* Pearson, 37 Wash. 405, 79 P. 985.

Court should direct an acquittal. Reynolds *v.* S., 14 Ariz. 302, 127 P. 731.

Pennsylvania.—"There is no rule of law in this state that forbids a conviction on the uncorroborated testimony of an accomplice. Ettinger *v.* Commonwealth, 98 Pa. 338; Cox *v.* Commonwealth, 125 Pa. 94, 17 Atl. 227. The duty to examine such testimony with care, and to accept and act upon it only when convinced of its truth-

fulness, was pointed out in the charge.'' C. *v.* De Masi, 234 Pa. 570, 83 A. 430.

Sufficiency of caution.—Uncorroborated testimony may be relied upon if it produces most positive conviction of its truth. U. S. *v.* Richards, 149 Fed. 443. Direct and positive testimony will support a conviction though not corroborated. S. *v.* Conlin, 45 Wash. 478, 88 P. 932. It is enough to say jury should be cautious in convicting upon unsupported testimony. S. *v.* Register, 133 N. C. 746, 46 S. E. 21. Or if court directs attention of jury to conduct of accomplice, and says it is for their consideration (Borck *v.* S. (Ala.), 39 S. 580); or instructs that courts regard testimony of accomplices with considerable suspicion, and it should be carefully scrutinized. Hanley *v.* U. S., 123 Fed. 849, 59 C. C. A. 153.

Not necessary if accomplice corroborated.—S. *v.* Koplan, 167 Mo. 298, 66 S. W. 967.

Caution not required.—Myers *v.* S., 43 Fla. 500, 31 S. 275; Bacon *v.* S., 22 Fla. 51; Shiver *v.* S., 41 Fla. 630, 27 S. 36; P. *v.* Dumas, 161 Mich. 45, 125 N. W. 766; Murphy *v.* S., 124 Wis. 635, 102 N. W. 1087. See last paragraph of note to 100-18.

101-20 See S. *v.* Sassaman, 214 Mo. 695, 114 S. W. 590.

It is character and interest of witness, as shown on trial, and not mere fact of his being an accomplice that determines discretion of judge in commenting on his credibility. S. *v.* Carey, 76 Conn. 342, 56 A. 632. Giving cautionary instructions is rather a rule of practice than of law. O'Grady *v.* P., 42 Colo. 312, 95 P. 346; S. *v.* De Hart, 109 La. 570, 33 S. 605; C. *v.* Wilson, 152 Mass. 12, 25 N. E. 16; C. *v.* Clune, 162 Mass. 206, 38 N. E. 435; S. *v.* Hier, 78 Vt. 488, 63 A. 877. See 100-18.

102-23 Caution must be in words of statute or equivalent terms. Fisher *v.* Ty., 17 Okla. 455, 87 P. 301. Exact words not essential. McKinney *v.* S., 48 Tex. Cr. 402, 88 S. W. 1012.

103-24 Quong Yu *v.* Ty., 12 Ariz. 183, 100 P. 462; U. S. *v.* Balisacan, 4 Phil. Isl. 545; Beeson *v.* S., 60 Tex. Cr. 39, 130 S. W. 1006.

The question of corroboration is one of law, but sufficiency of evidence is for jury (P. *v.* Adams, 72 App. Div. 166, 76 N. Y. S. 361), and proof must extend to every material fact testified to by accomplice. Burnett *v.* S., 76 Ark. 295, 88 S. W. 956. His acts, statements and declarations are not corroborative. Carrens *v.* S., 77 Ark. 16, 91 S. W. 30; S. *v.* Egbert, 125 Ia. 443, 101 N. W. 191; P. *v.* Green, 103 App. Div. 79, 92 N. Y. S. 508; Barnard *v.* S. (Tex. Cr.), 76 S. W. 475; Thompson *v.* S. (Tex. Cr.), 78 S. W. 691; Wallace *v.* S., 48 Tex. Cr. 318, 87 S. W. 1041.

103-25 Sykes *v.* U. S., 204 Fed. 909, 123 C. C. A. 205; P. *v.* Sternberg, 111 Cal. 3, 43 P. 198; P. *v.* O'Farrell, 175 N. Y. 323, 67 N. E. 588; C. *v.* Simon, 44 Pa. Super. 538; Eddens *v.* S., 47 Tex. Cr. 529, 84 S. W. 828; Wallace *v.* S., supra; Jackson *v.* S., 48 Tex. Cr. 648, 90 S. W. 34; Jones *v.* C., 111 Va. 862, 69 S. E. 953.

Under a code providing that testimony of a single witness is generally sufficient to establish a fact, and stating exceptions to the rule, courts may not require corroboration of a certain character, or declare testimony of two accomplices is not sufficient. Stone *v.* S., 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145.

104-27 P. *v.* Morton, 139 Cal. 719, 73 P. 609; Durden *v.* S., 120 Ga. 860, 48 S. E. 315; S. *v.* Brown, 146 Ia. 113, 124 N. W. 899; S. *v.* Wheeler, 116 Ia. 212, 89 N. W. 978; Frazier *v.* C., 25 Ky. L. R. 461, 76 S. W. 28; P. *v.* Ryland, 28 Hun (N. Y.) 568; Gillespie *v.* S. (Tex. Cr.), 166 S. W. 135; Holmes *v.* S. (Tex. Cr.), 156 S. W. 1172; Bishop *v.* S. (Tex. Cr.), 151 S. W. 821; Holmes *v.* S. (Tex. Cr.), 157 S. W. 487; Campbell *v.* S., 57 Tex. Cr. 301, 123 S. W. 583 (form of instruction); Welden *v.* S., 10 Tex. App. 400.

104-28 P. *v.* Leavens, 12 Cal. App. 178, 106 P. 1103; Peckham *v.* P. 32 Colo. 140, 75 P. 422; Hargrove *v.* S., 125 Ga. 270, 54 S. E. 164; Dixon *v.* S., 116 Ga. 186, 42 S. E. 357; S. *v.* Bond, 12 Ida. 424, 86 P. 43; S. *v.* Briggs, 122 Minn. 493, 142 N. W. 823; C. *v.* Goldberg, 4 Pa. Super. 142; Warren *v.* S. (Tex. Cr.), 149 S. W. 130; S. *v.* Bean, 77 Vt. 384, 60 A. 807.

No special corroboration is required. S. *v.* Bean, 77 Vt. 384, 60 A. 807.

104-29 Newsum *v.* S. (Ala.), 65 S. 87; Rhodes *v.* S., 141 Ala. 66, 37 S. 365; Roberts *v.* S., 96 Ark. 58, 131 S. W. 60; P. *v.* Sullivan, 144 Cal. 471, 77 P. 1000; P. *v.* Leavens, 12 Cal. App. 178, 106 P.

1103; P. *v.* Garwood, 11 Cal. App. 665, 106 P. 113; P. *v.* Spadoni, 11 Cal. App. 216, 104 P. 588; Butts *v.* S. (Ga.), 82 S. E. 375; Baker *v.* S. (Ga.), 81 S. E. 805; Smith *v.* S., 5 Ga. App. 833, 63 S. E. 917; S. *v.* Bond, 12 Ida. 424, 86 P. 43; S. *v.* Waters, 132 Ia. 481, 109 N. W. 1013; S. *v.* Johnson, 133 Ia. 38, 110 N. W. 170; Best *v.* C., 29 Ky. L. R. 137, 92 S. W. 555; Fitzgerald *v.* S., 78 Neb. 1, 110 N. W. 676; P. *v.* Acritelli, 57 Misc. 574, 110 N. Y. S. 430; P. *v.* Sweeney, 161 App. Div. 221, 146 N. Y. S. 637; P. *v.* Kathan, 136 App. Div. 303, 120 N. Y. S. 1096; P. *v.* Barry, 132 App. Div. 231, 116 N. Y. S. 870; P. *v.* Weiss, 129 App. Div. 671, 114 N. Y. S. 236; P. *v.* Adams, 72 App. Div. 166, 76 N. Y. S. 361; Flynn *v.* S. (Okla. Cr.), 133 P. 1133; Hill *v.* Ty., 15 Okla. 212, 79 P. 757; Barbe *v.* Ty., 16 Okla. 562; 86 P. 61; S. *v.* Walsh, 25 S. D. 30, 125 N. W. 295; Maibaum *v.* S., 59 Tex. Cr. 386, 128 S. W. 378. See Pace *v.* S., 58 Tex. Cr. 90, 124 S. W. 949; Maples *v.* S., 56 Tex. Cr. 99, 119 S. W. 105; Newman *v.* S., 55 Tex. Cr. 273, 116 S. W. 577; Tate *v.* S., 55 Tex. Cr. 397, 116 S. W. 604; Green *v.* S., 49 Tex. Cr. 238, 90 S. W. 1115; McGinsey *v.* S. (Tex. Cr.), 144 S. W. 268.

Any corroborating evidence will support a verdict. Mann *v.* C., 25 Ky. L. R. 1964, 79 S. W. 230.

Complaints—See "Corroboration," infra, 731-12.

105-30 P. *v.* Weiss, 129 App. Div 671, 114 N. Y. S. 236.

Must be corroborated in each essential detail. P. *v.* Willard, 159 App. Div. 19, 143 N. Y. Supp. 1032. *Contra,* Holmes *v.* S. (Tex. Cr.), 157 S. W. 487.

Contradiction of accomplice as to some details of his testimony is not material if contradicting testimony tends to corroborate him as to the main fact. Locklin *v.* S. (Tex. Cr.), 75 S. W. 305.

Parties continuously associated together for two years is not sufficient corroboration of plaintiff's testimony as to defendant's engagement to marry her. Fine *v.* S., 45 Tex. Cr. 290, 77 S. W. 806.

105-31 Solomon *v.* S., 113 Ga. 192, 38 S. E. 332; Milner *v.* S., 7 Ga. App. 82, 66 S. E. 280; Truelove *v.* S., 44 Tex. Cr. 386, 71 S. W. 601. See P. *v.* Sweeney, 161 App. Div. 221, 146 N. Y. S. 637.

Commission of offense may be established by accomplice's testimony. P. *v.* Leavens, 12 Cal. App. 178, 106 P. 1103.

106-32 P. *v.* Morton, 139 Cal. 719, 73 P. 609; Altman *v.* S., 5 Ga. App. 833, 63 S. E. 928; Smith *v.* S., 44 Tex. Cr. 53, 68 S. W. 267.

A plea of guilty may be considered; it is not conclusive. Hargrove *v.* S., 125 Ga. 270, 54 S. E. 164.

107-33 Reynolds *v.* S., 14 Ariz. 302, 127 P. 731; Cook *v.* S., 75 Ark. 540, 87 S. W. 1176; P. *v.* Howard, 135 Cal. 266, 67 P. 148; P. *v.* Watson, 21 Cal. App. 692, 132 P. 836; Milner *v.* S., 7 Ga. App. 82, 66 S. E. 280; Altman *v.* S., supra; S. *v.* Knudston, 11 Ida. 524, 83 P. 226; S. *v.* Egbert, 125 Ia. 443, 101 N. W. 191; Frazier *v.* C. (Ky.), 124 S. W. 797; Lane *v.* C., 134 Ky. 518, 121 S. W. 486; Frazier *v.* C., 25 Ky. L. R. 461, 76 S. W. 28; Simpson *v.* C., 31 Ky. L. R. 769, 103 S. W. 332; S. *v.* Koplan, 167 Mo. 298, 66 S. W. 967; P. *v.* Bissert, 71 App. Div. 118, 75 N. Y. S. 630; P. *v.* Patrick, 182 N. Y. 131, 74 N. E. 843; Kirk *v.* S. (Okla.), 135 P. 1156; Flynn *v.* S. (Okla.), 133 P. 1133; Fair *v.* S. (Tex. Cr.), 160 S. W. 1187; Holmes *v.* S. (Tex. Cr.), 157 S. W. 487; Briseno *v.* S., 60 Tex. Cr. 98, 131 S. W. 327; King *v.* S., 57 Tex. Cr. 363, 123 S. W. 135; Barber *v.* S. (Tex. Cr.), 70 S. W. 210; Campbell *v.* S., 57 Tex. Cr. 301, 123 S. W. 583; Bismark *v.* S., 45 Tex. Cr. 54, 73 S. W. 965; Denson *v.* S., 47 Tex. Cr. 439, 83 S. W. 820; Wright *v.* S., 47 Tex. Cr. 433, 84 S. W. 593; Giles *v.* S., 43 Tex. Cr. 561, 67 S. W. 411.

Comp. McDaniels *v.* S., 162 Ala. 25, 50 S. 324.

See P. *v.* Martin, 19 Cal. App. 295, 125 P. 919; S. *v.* Duncan (Ia.), 138 N. W. 913; Hicks *v.* S., 126 Tenn. 359, 149 S. W. 1055.

Corroboration as to time, place and circumstances insufficient if prisoner connected only by accomplice testimony. Smith *v.* S., 7 Ga. App. 781, 68 S. E. 335.

It is sufficient if evidence "tends to connect defendant with the commission of the offense" (P. *v.* Balkwell, 143 Cal. 259, 76 P. 1017); but an instruction which adds to the quoted words of the Code the words "in any way," is erroneous. P. *v.* Compton, 123 Cal. 403, 56 P. 44.

Proof of opportunity to commit crime in question is not, of itself, sufficient to connect accused with it. S. *v.*

Wheeler, 116 Ia. 212, 89 N. W. 978; S. *v.* Egbert, 125 Ia. 443, 101 N. W. 191.

Evidence of similar crimes to that alleged to have been committed by accused has been received. Peckham *v.* P., 32 Colo. 140, 75 P. 422; O'Brien *v.* C., 115 Ky. 608, 74 S. W. 666; S. *v.* Peres, 27 Mont. 358, 71 P. 162; S. *v.* Robinson, 32 Or. 43, 48 P. 357; S. *v.* Fetterly, 33 Wash. 599, 74 P. 810; Lanphere *v.* S., 114 Wis. 193, 89 N. W. 128; Proper *v.* S., 85 Wis. 615, 55 N. W. 1035. But it is not competent unless it shows system. Buck *v.* S., 47 Tex. Cr. 319, 83 S. W. 387. It must be confined to offenses committed before date alleged in indictment. P. *v.* Robertson, 88 App. Div. 198, 84 N. Y. S. 401. It has been denied such proof is corroborative of accomplice. P. *v.* Flaherty, 27 App. Div. 535, 50 N. Y S. 574.

Attempt to commit same crime.—In a prosecution for burglary and larceny it may be shown defendant and two others recently attempted to commit same crime at same place, and obtained and kept a key to the building burglarized. Such testimony is corroborative of the testimony of an accomplice. Cook *v.* S., 80 Ark. 495, 97 S. W. 683.

Slight evidence from an extraneous source identifying accused as a participator in the crime will be sufficient corroboration of accomplice to support verdict. Hargrove *v.* S., 125 Ga. 270, 54 S. E. 164. Evidence need not tend directly to connect defendant with crime. P. *v.* Ah Lung, 2 Cal. App. 278, 83 P. 296; S. *v.* Gallivan, 75 Conn. 326, 53 A. 731.

Inference of guilt.—Harrell *v.* S., 121 Ga. 607, 49 S. E. 703.

Must relate to material matter. Wright *v.* S., 47 Tex. Cr. 433, 84 S. W. 593.

Need not extend to whole case.—S. *v.* Jones, 115 Ia. 113, 88 N. W. 196; S. *v.* Stevenson, 26 Mont. 332, 67 P. 1001; P. *v.* Adams, 72 App. Div. 166, 76 N. Y. S. 361.

107-34 Hargrove *v.* S., supra; Best *v.* C., 29 Ky. L. R. 137, 92 S. W. 555. See P. *v.* Courtney, 28 Hun (N. Y.) 589; P. *v.* Kathan, 136 App. Div. 303, 120 N. Y. S. 1096.

Former association and concerted action with criminals may be shown, though it occurred long anterior to commission of instant crime. C. *v.* Biddle, 200 Pa. 640, 50 A. 262.

108-35 Crittenden *v.* S., 134 Ala. 145, 32 S. 273; Rawlins *v.* S., 124 Ga. 31, 52 S. E. 1; Byrd *v.* S., 49 Tex. Cr. 279, 93 S. W. 114.

108-36 P. *v.* Hoagland, 138 Cal. 338, 71 P. 359; Milner *v.* S., 7 Ga. App. 82, 66 S. E. 280.

It is not enough to create a grave or strong suspicion (P. *v.* Sciaroni, 4 Cal. App. 698, 89 P. 133; Harrell *v.* S., 121 Ga. 607, 49 S. E. 703; S. *v.* Spotted Hawk, 22 Mont. 33, 55 P. 1026); evidence must raise reasonable inference of guilt. Cooper *v.* Ty., 19 Okla. 496, 91 P. 1032. All the testimony of accomplice need not be corroborated. P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364, 370. Evidence of motive not enough. Vails *v.* S., 59 Tex. Cr. 340, 128 S. W. 1117.

108-38 P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364, 370; P. *v.* Ah Lung, 2 Cal. App. 278, 83 P. 296; Peckham *v.* P., 32 Colo. 140, 75 P. 422; Butts *v.* S. (Ga.), 82 S. E. 375; Dixon *v.* S., 7 Ga. App. 604, 67 S. E. 699; S. *v.* Jones, 115 Ia. 113, 88 N. W. 196; S. *v.* Norris, 127 Ia. 683, 104 N. W. 282; S. *v.* Bartlett, 127 Ia. 689, 104 N. W. 285; S. *v.* Ozias, 136 Iowa 175, 113 N. W. 761; Mann *v.* C., 25 Ky. L. R. 1964, 79 S. W. 230; Best *v.* C., supra; Smith *v.* C., 119 Ky. 280, 83 S. W. 647; S. *v.* Dilts, 191 Mo. 665, 90 S. W. 782; S. *v.* Jones, 32 Mont. 442, 80 P. 1095; P. *v.* Patrick, 182 N. Y. 131, 74 N. E. 843; C. *v.* Swift, 44 Pa. Super. 546; S. *v.* Ballew, 83 S. C. 82, 63 S. E. 688, 64 S. E. 1019; Holmes *v.* S. (Tex. Cr.), 157 S. W. 487; Cole *v.* S. (Tex. Cr.), 156 S. W. 929; Bost *v.* S., 64 Tex. Cr. 464, 144 S. W. 589; Locklin *v.* S. (Tex. Cr.), 75 S. W. 305; Stiles *v.* S. (Tex. Cr.), 75 S. W. 511; Moore *v.* S., 47 Tex. Cr. 410, 83 S. W. 1117; Sexton *v.* S. (Tex. Cr.), 92 S. W. 37; Byrd *v.* S., 49 Tex. Cr. 279, 93 S. W. 114; S. *v.* Conlin, 45 Wash. 478, 88 P. 932. See P. *v.* Martin, 19 Cal. App. 295, 125 P. 919.

The fact that the defendant, who, at the time of the commission of the alleged offense, lived at Ensley, some distance from Jacksonville, where the residence which was burned was situated, was, only two or three days before it was destroyed by fire, driving about near Jacksonville with his alleged accomplice; that on that par-

ticular occasion he called upon and obtained from the agent of the insurance company a permit to allow the residence to remain vacant; the fact that the residence was vacant, and was therefore producing no income; and the fact that, shortly after his arrest, he asked the officer making the arrest if the alleged accomplice had made an affidavit against him connecting him with the alleged offense—were all matters corroborative of the testimony of the alleged accomplice, and they possessed some tendency to connect the defendant with the commission of the corpus delicti. Williams *v.* S., 4 Ala. App. 92, 58 S. 925.

Financial situation of accomplice in robbery, before and after crime, may be shown. C. *v.* Devaney, 182 Mass. 33, 64 N. E. 402.

Testimony of accomplice considered. While corroborative evidence necessary to justify conviction must come from some other than accomplice, it is proper to consider his testimony in order to determine whether or not there is other evidence tending to connect accused with the offense. S. *v.* Carpenter, 124 Ia. 5, 98 N. W. 775.

Specific facts sworn to by accomplice need not be corroborated. P. *v.* Ammon, 92 App. Div. 205, 87 N. Y. S. 358, *affd.*, without opinion, 179 N. Y. 540, 71 N. E. 1135; P. *v.* Strauss, 94 App. Div. 453, 88 N. Y. S. 40, *affd.*, without opinion, 179 N. Y. 553, 71 N. E. 1135; Hill *v.* Ty., 15 Okla. 212, 79 P. 757.

Remote and fragmentary evidence admissible to corroborate. Howard *v.* C., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704.

109-39 Rain *v.* S. (Ariz.), 137 P. 550; Quong Yu *v.* Ty., 12 Ariz. 183, 100 P. 462; P. *v.* Spadoni, 11 Cal. App. 216, 104 P. 588; S. *v.* Gallivan, 75 Conn. 326, 53 A. 731; S. *v.* Blain, 118 Ia. 466, 92 N. W. 650; S. *v.* Goldman, 65 N. J. L. 394, 47 A. 641.

110-42 P. *v.* Spadoni, 11 Cal. App. 216, 104 P. 588.

Defendant's own testimony may constitute sufficient corroboration. P. *v.* Sullivan, 144 Cal. 471, 77 P. 1000; P. *v.* Watson, 21 Cal. App. 692, 132 P. 836.

Flight of accused (George *v.* S., 61 Neb. 669, 85 N. W. 840), conduct when first informed of charge and appeal to prosecutrix not to appear against him are corroborative. S. *v.* Roller, 30 Wash. 692, 71 P. 718.

110-43 Crittenden *v.* S., 134 Ala. 145, 32 S. 273; Tollifson *v.* P., 49 Colo. 219, 112 P. 794; S. *v.* Ruck, 194 Mo. 416, 92 S. W. 706.

Confession not conclusive as to principal's guilt. Thomas *v.* S., 43 Tex. Cr. 20, 62 S. W. 919.

Confession not part of res gestae. Confession of one accomplice, made in absence of others and not a part of res gestae, is admissible only against confessor. S. *v.* McCoy, 61 W. Va. 258, 57 S. E. 294.

If part of confession is admitted to discredit accomplice's testimony the whole may be introduced by state. S. *v.* Myers, 198 Mo. 225, 94 S. W. 242.

110-44 Russell *v.* S., 97 Ark. 92, 133 S. W. 188; P. *v.* Spadoni, 11 Cal. App. 216, 104 P. 588; P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364, 370; King *v.* McGiffin, 7 Haw. 104; C. *v.* Devaney, 182 Mass. 33, 64 N. E. 402; S. *v.* Sublett, 191 Mo. 163, 90 S. W. 374; S. *v.* Peres, 27 Mont. 358, 71 P. 162; S. *v.* Lovelace, 29 Nev. 43, 83 P. 330; S. *v.* Kincaid, 142 N. C. 657, 55 S. E. 647; Mason *v.* S. (Tex. Cr.), 81 S. W. 718; Harrold *v.* S., 46 Tex. Cr. 568, 81 S. W. 728.

Silence when formally charged with offense, not sufficient corroboration. King *v.* Tate, 2 K. B. (1908) 680. But it may be otherwise if there is also a statement by person making accusation he possessed evidence of prisoner's guilt. Reg. *v.* Cramp, 14 Cox C. C. 390.

111-46 P. *v.* Davis, 135 Cal. 162, 67 P. 59; Hays *v.* S., 9 Ga. App. 829, 72 S. E. 285.

111-47 Vails *v.* S., 59 Tex. Cr. 340, 128 S. W. 1117 (not fatal to submit question to jury); Clifton *v.* S., 46 Tex. Cr. 18, 79 S. W. 824; Hatcher *v.* S., 43 Tex. Cr. 237, 65 S. W. 97.

111-48 Holmgren *v.* U. S., 217 U. S. 509; P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364, 370; Hargrove *v.* S., 125 Ga. 270, 54 S. E. 164; S. *v.* Norris, 127 Ia. 683, 104 N. W. 282; Best *v.* C., 29 Ky. L. R. 137, 92 S. W. 555; P. *v.* O'Farrell, 175 N. Y. 323, 67 N. E. 588; P. *v.* Russo, 126 App. Div. 717, 111 N. Y. S. 190 (state not absolutely bound by allegation witness is an accomplice); Driggers *v.* U. S., 21 Okla. 60, 95 P. 612; Brown *v.* S., 58 Tex. Cr. 336, 125 S. W. 915; Mosely

v. S. (Tex. Cr.), 67 S. W. 103; Pace *v.* S., 58 Tex. Cr. 90, 124 S. W. 949; Snelling *v.* S., 57 Tex. Cr. 416, 123 S. W. 610.

Indictment as accomplice not enough. Smith *v.* C., 148 Ky. 60, 146 S. W. 4.

112-50 Burden of proving witness to be accomplice is upon party alleging it. His joinder in indictment with defendant does not establish he was such. Hargrove *v.* S., 125 Ga. 270, 54 S. E. 164; Davis *v.* S., 122 Ga. 564, 50 S. E. 376; Walker *v.* S., 118 Ga. 757, 45 S. E. 608; Williams *v.* S. (Tex. Cr.), 85 S. W. 1142.

"Jury must be reasonably satisfied." S. *v.* Wong Si Sam, 63 Or. 266, 127 P. 683.

112-51 Polk *v.* S., 36 Ark. 117; S. *v.* Duff, 144 Ia. 142, 122 N. W. 829; C. *v.* Barton, 153 Ky. 465, 156 S. W. 113; S. *v.* Wilkins, 221 Mo. 444, 120 S. W. 22; Goldstein *v.* S. (Tex. Cr.), 166 S. W. 149; Johnson *v.* S., 58 Tex. Cr. 244, 125 S. W. 16; Chitister *v.* S., 33 Tex. Cr. 635, 28 S. W. 683.

The test is said to be could the alleged accomplice be indicted for offense for which accused is being tried. S. *v.* Jones, 115 Ia. 113, 88 N. W. 196; Keller *v.* S., 102 Ga. 506, 31 S. E. 92; Stone *v.* S., 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145 (but *comp.* Walker *v.* S., 118 Ga. 757, 45 S. E. 608); Stone *v.* S., 47 Tex. Cr. 575, 85 S. W. 808.

Until the party is indicted incompetency as a witness does not attach. Ponder *v.* S. (Tex. Crim.), 155 S. W. 244.

112-52 See Huffman *v.* S., 57 Tex. Cr. 399, 123 S. W. 596, for rule in misdemeanor cases.

112-53 Palmer *v.* S., 165 Ala. 129, 51 S. 358; Borck *v.* S. (Ala.), 39 S. 580; Baker *v.* S., 121 Ga. 189, 48 S. E. 967; Walker *v.* S., 118 Ga. 757, 45 S. E. 608; Powell *v.* S. (Ga. App.), 81 S. E. 396; Henderson *v.* S., 5 Ga. App. 495, 63 S. E. 535 (coercion by fear of danger to life or limb); Short *v.* C., 25 Ky. L. R. 451, 76 S. W. 11; Best *v.* C., 29 Ky. L. R. 137, 92 S. W. 555; Brinegar *v.* S., 82 Neb. 558, 118 N. W. 475; S. *v.* Smith, 33 Nev. 438, 117 P. 19; P. *v.* Hyde, 156 App. Div. 618, 141 N. Y. S. 1089; P. *v.* Sweeney, 161 App. Div. 221, 146 N. Y. S. 637; P. *v.* Acritelli, 57 Misc. 574, 110 N. Y. S. 430; Hicks *v.* S., 126 Tenn. 359, 149 S. W. 1055; Holmes *v.* S. (Tex. Cr.), 156 S. W. 1172; Newton *v.* S., 62 Tex. Cr. 622, 138 S. W. 708; Deary *v.* S., 62 Tex. Cr. 352, 137 S. W. 699; Jordan *v.* S., 62 Tex. Cr. 388, 137 S. W. 114; Price *v.* S., 56 Tex. Cr. 82, 119 S. W. 99; Worsham *v.* S., 56 Tex. Cr. 253, 120 S. W. 439; Jackson *v.* S., 48 Tex. Cr. 648, 90 S. W. 34; Burton *v.* S., 51 Tex. Cr. 196, 101 S. W. 226; Means *v.* S., 125 Wis. 650, 104 N. W. 815.

Detectives not. Cone *v.* Wasson, 42 Pa. Super. 38.

Infant.—In a prosecution for rape a girl under the age of consent cannot be an accomplice. In adultery this rule does not apply. Price *v.* S. (Tex. Cr.), 142 S. W. 586.

One may be accomplice though he engages in offense unwillingly (Pate *v.* S. [Tex. Cr.], 93 S. W. 556; Yother *v.* S., 120 Ga. 204, 47 S. E. 555), and without same desire as principal. Clifton *v.* S., 46 Tex. Cr. 18, 79 S. W. 824.

Feigned accomplices.—The rule concerning accomplices does not extend to detectives and others who seemingly aid in commission of crime for purpose of bringing guilty to trial. P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364, 370; Porter *v.* P., 31 Colo. 508, 74 P. 879; S. *v.* Douglas, 26 Nev. 196, 65 P. 802; S. *v.* Hoxsie, 15 R. I. 1, 22 A. 1059, 2 Am. St. 838; Sanchez *v.* S., 48 Tex. Cr. 591, 90 S. W. 641. See Vol. 4, p. 630.

Branding animals.—Leak *v.* S. (Tex. Cr.), 97 S. W. 476.

Duress.—One who engages in crime because of force is not an accomplice. S. *v.* Rennick, 127 Ia. 294, 103 N. W. 159; Schwartz *v.* S., 65 Neb. 196, 91 N. W. 190. See Burton *v.* S., 51 Tex. Cr. 196, 101 S. W. 226.

Abortion.—Woman is not accomplice because she knew of pregnancy of friend, her desire to be relieved, and accompanied her to place where abortion committed, no aid or advice being given, and she not being present at time. P. *v.* Balkwell, 143 Cal. 259, 76 P. 1017. Woman who submits to abortion, not an accomplice. Smartt *v.* S., 112 Tenn. 539, 80 S. W. 586. See Vol. 1, p. 61.

Seduction—Victim of seducer, not accomplice. Keller *v.* S., 102 Ga. 506, 31 S. E. 92, 910. But if woman of age of consent assents to incestuous intercourse she is particeps criminis, and her testimony must be corroborated (Sol-

omon *v.* S., 113 Ga. 192, 38 S. E. 332); but if she is the victim of force or fraud, or undue influence, or is too young to be able to give legal assent, so that she does not wilfully and willingly join in the act, she is not an accomplice. P. *v.* Stratton, 141 Cal. 604, 75 P. 166; Bridges *v.* S., 80 Neb. 91, 113 N. W. 1048; Schwartz *v.* S., 65 Neb. 196, 91 N. W. 190; Straub *v.* S., 5 Ohio C. C. (N. S.) 529; S. *v.* Knighten, 39 Or. 63, 64 P. 866; Lanphere *v.* S., 114 Wis. 193, 89 N. W. 128; Donley *v.* S., 44 Tex. Cr. 428, 71 S. W. 958.

Common intent.—Participation in same offense. See Springer *v.* S., 102 Ga. 447, 30 S. E. 971; Hargrove *v.* S., 125 Ga. 270, 54 S. E. 164.

Commission of other felonious acts by witness who admitted doing one in question under threats of accused may not be proved to show witness was not accomplice unless such act was done in fear of immediate danger. P. *v.* Martin, 13 Cal. App. 96, 108 P. 1034.

113-54 Bird *v.* U. S., 187 U. S. 118; Simms *v.* S., 105 Ark. 16, 150 S. W. 113; Butt *v.* S., 81 Ark. 173, 98 S. W. 723; P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364, 370; Hargrove *v.* S., 125 Ga. 270, 54 S. E. 164; Levering *v.* C., 132 Ky. 666, 117 S. W. 253 (unless a duty is owing to person in danger); P. *v.* Yannicola, 133 App. Div. 885, 117 N. Y. S. 381; Greenwood *v.* S., 3 Okla. Cr. 247, 105 P. 371; Holmes *v.* S. (Tex. Cr.), 156 S. W. 1172; Tucker *v.* S., 58 Tex. Cr. 271, 124 S. W. 904; Mosely *v.* S. (Tex. Cr.), 67 S. W. 103. See P. *v.* Holden, 127 App. Div. 758, 111 N. Y. S. 1019.

Falsification does not make one an accomplice. Alexander *v.* S., 49 Tex. Cr. 93, 90 S. W. 1112; Schackey *v.* S., 41 Tex. Cr. 255, 53 S. W. 877.

Wilful ignorance.—"The defendant could not close his eyes to matters which were passing about him, and allow his premises to be used in violation of law, and escape responsibility." P. *v.* Finucan, 80 App. Div. 407, 80 N. Y. S. 929.

Officer who administers oath, not accomplice because he knew affidavit was false. Wilson *v.* S., 49 Tex. Cr. 496, 93 S. W. 547.

113-55 U. S. *v.* Van Leuven, 65 Fed. 78; P. *v.* Sternberg, 111 Cal. 3, 43 P. 198; Hargrove *v.* S., 125 Ga. 270, 54 S. E. 164; S. *v.* Wakely, 43 Mont. 427, 117 P. 95; S. *v.* Kelliher, 49 Or. 77, 88 P. 867; S. *v.* Moxley, 54 Or. 409, 103 P. 655; Veal *v.* S., 56 Tex. Cr. 220, 120 S. W. 173; Buck *v.* S. (Tex. Cr.), 83 S. W. 390. *Comp.* P. *v.* Holden, 127 App. Div. 758, 111 N. Y. S. 1019.

Two similar crimes.—In a prosecution for receiving goods stolen on two successive days an accomplice as to one theft may testify as to the other, and his testimony is independent evidence to show defendant's guilty knowledge and intent in regard to transaction of which accomplice testified. C. *v.* Brennor, 194 Mass. 17, 79 N. E. 799.

Receiving stolen goods.—Newman *v.* P. (Colo.), 135 P. 460.

Jury must believe corroborating evidence or it cannot convict. Crenshaw *v.* S., 48 Tex. Cr. 77, 85 S. W. 1147.

114-56 S. *v.* Wright, 152 Mo. App. 510, 133 S. W. 664; Best *v.* C., supra. Unaccepted offer not to prosecute accused on condition does not make person who made it accomplice. Robertson *v.* S., 46 Tex. Cr. 441, 80 S. W. 1000; Holley *v.* S., 49 Tex. Cr. 306, 92 S. W. 422. Gatlin *v.* S., 40 Tex. Cr. 116, 49 S. W. 87, and other cases overruled in Chenault *v.* S., 46 Tex. Cr. 351, 81 S. W. 971.

115-57 Held to be accomplices. Rex *v.* Moores, 7 Car. & P. 270, 32 E. C. L. 507; Stevens *v.* (Ark.), 163 S. W. 778; Edmondson *v.* S., 51 Ark. 115, 10 S. W. 21; Wyatt *v.* S., 55 Tex. Cr. 73, 114 S. W. 812; Richard *v.* S., 49 Tex. Cr. 192, 90 S. W. 1017.

Held not to be accomplices.—Birdsong *v.* S., 120 Ga. 850, 48 S. E. 329; Walker *v.* S., 118 Ga. 757, 45 S. E. 608; S. *v.* Jones, 115 Ia. 113, 88 N. W. 196; S. *v.* Hayden, 45 Ia. 11; Levering *v.* C., 132 Ky. 666, 117 S. W. 253; S. *v.* Gordon, 105 Minn. 217, 117 N. W. 483; S. *v.* Shapiro, 216 Mo. 359, 115 S. W. 1022; S. *v.* Kuhlman, 152 Mo. 100, 53 S. W. 416, 75 Am. St. 438; S. *v.* Rachman, 68 N. J. L. 120, 53 A. 1046; S. *v.* Phillips, 18 S. D. 1, 98 N. W. 171.

115-58 Testimony admissible. Menefee *v.* S., 59 Fla. 316, 51 S. 555; U. S. *v.* Ocampo, 4 Phil. Isl. 400.

115-59 Crawford *v.* U. S., 212 U. S. 183; Lujan *v.* S. (Ariz.), 141 P. 706 (after severance); S. *v.* Shaft (N. C.), 81 S. E. 932; Thomas *v.* S. (Tex. Cr.), 146 S. W. 878.

For the defense.—Sheppard *v.* S., 172 Ala. 363, 55 S. 514.

For the state.—Streight *v.* S., 62 Tex. Cr. 453, 138 S. W. 742.

Corroborated accomplice may testify as to who committed crime. Rhodes *v.* S., 141 Ala. 66, 37 S. 365.

115-60 Moxie *v.* S., 54 Tex. Cr. 529, 114 S. W. 375 (both accomplices witnesses).

One jointly indicted with defendant as accomplice is a competent witness against him though indictment is pending (Powers *v.* C., 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494; Simpson *v.* C., 31 Ky. L. R. 769, 103 S. W. 332), or though witness convicted (Barbe *v.* Ty., 16 Okla. 562, 86 P. 62; Rice *v.* S., 50 Tex. Cr. 648, 100 S. W. 771), and motion for new trial in favor of accomplice is pending. S. *v.* Myers, 198 Mo. 225, 94 S. W. 242.

ACCORD AND SATISFACTION.

Plea of, see 1 STANDARD PROC. 171, *et seq.*

Definitions and distinctions.—1 STANDARD PROC. 163-165.

Essential elements.—1 STANDARD PROC. 165.

New agreement.—1 STANDARD PROC. 166-167.

Consideration.—1 STANDARD PROC. 167.

What amounts to accord and satisfaction.—1 STANDARD PROC. 168-170.

118-7 *Contra.* Klair *v.* R. Co., 2 Boyce (Del.) 274, 78 Atl. 1085; Van Allen *v.* Shulenburgh, 58 Misc. 136, 110 N. Y. S. 464.

118-8 Fogil *v.* Boody, 76 Conn. 194, 56 A. 526; Covell *v.* Carpenter, 24 R. I. 1, 51 A. 425; Gossett *v.* R. Co., 115 Tenn. 376, 89 S. W. 737, 1 L. R. A. (N. S.) 97.

If a plea to a suit on account merely denies account, it is proper to exclude testimony of defendant "that the account sued on by the plaintiff had been fully paid, and that in the last settlement he had with the plaintiff that plaintiff was indebted to him about $1.80, and that defendant derived his knowledge from his book of account, which he kept himself." Dickson *v.* Wainwright, 137 Ga. 299, 73 S. E. 515.

Fraud may be shown without pleading it if plaintiff could not be assumed to know a defense would be set up. Whitehead *v.* Co., 51 Misc. 664, 101 N. Y. S. 250.

118-9 Board *v.* Durnell, 17 Colo. App. 85, 66 P. 1073; S. *v.* Regelin, 147 Ill. App. 550; Jennings *v.* Hoop Co., 50 Ind. App. 241, 98 N. E. 194; General Renting & Inv. Co. *v.* Bernardnon, 164 Mo. App. 384, 144 S. W. 1105; Barrett *v.* Kern, 141 Mo. App. 5, 121 S. W. 774; McKinnon *v.* Holden, 85 Neb. 406, 123 N. W. 439; Wolf *v.* Humboldt (Nev.), 131 P. 964; Mitterwallner *v.* Lodge, 109 App. Div. 70, 95 N. Y. S. 1090; Weinberg *v.* Novick, 88 N. Y. S. 168; Standard S. M. Co. *v.* Gunter, 102 Va. 568, 46 S. E. 690; National C. R. Co. *v.* Petsas, 43 Wash. 376, 86 P. 662.

See further 1 STANDARD PROC. 190.

Attorney's authority to make record must be shown by party who asserts it, as must a ratification of his act. Fosha *v.* O'Donnell, 120 Wis. 336, 97 N. W. 924.

118-10 Bergman Produce Co. *v.* Brown (Tex. Civ.), 156 S. W. 1102.

119-12 Howard *v.* Co., 11 Ariz. 158, 89 P. 541; Miller *v.* Co., 46 Colo. 221, 103 P. 290; Bowen *v.* Waxelbaum, 2 Ga. App. 521, 58 S. E. 784; Bell *v.* Pitman, 143 Ky. 521, 136 S. W. 1026; Mayo *v.* Leighton, 101 Me. 63, 63 A. 298; Burr's T. W. *v.* Co., 142 Mich. 417, 105 N. W. 858; Carter *v.* R. Co., 136 Mo. App. 719, 119 S. W. 35; Slover *v.* Rock, 96 Mo. App. 335, 70 S. W. 268; Gerhart R. Co. *v.* Co., 94 Mo. App. 356, 68 S. W. 86; Goffe *v.* Jones, 132 App. Div. 864, 117 N. Y. S. 407; Webster *v.* McLaren, 19 N. D. 751, 123 N. W. 395; Kinney *v.* Brotherhood, 15 N. D. 21, 106 N. W. 44; Eichelberger *v.* Mann (Va.), 80 S. E. 595.

Satisfaction may be by parol exchange of claims. Upton *v.* Co., 109 La. 670, 33 S. 725.

Retention of part paid.—Plaintiff is not estopped to deny execution of accord by retaining so much of satisfaction as was paid. Kinney *v.* Brotherhood, 15 N. D. 21, 106 N. W. 44.

119-13 North State Ins. Co. *v.* Dillard, 88 Ark. 473, 115 S. W. 154.

120-14 Mayo *v.* Leighton, 101 Me. 63, 63 A. 298; Prest *v.* Cole, 183 Mass. 283, 67 N. E. 246.

120-15 What evidence admissible. Parol evidence may be received to show actual consideration for agreement, though it varies terms of writing. Williams *v.* Blumenthal, 27 Wash. 24, 67 P. 393. Intention of parties is material, and may be evidenced by unequivocal acts—as a surrender of

former securities, release or receipt in full, or proof new contract has been executed to that point where it was to operate as present satisfaction of pre-existing liability. Langhead *v.* Frick, 209 Pa. 368, 58 A. 685. In equity, proof of payment into court shows a satisfaction. In re Freeman, 117 Fed. 680. Letters between parties, competent to show an unliquidated account, existed. Barham *v.* Bk., 94 Ark. 158, 126 S. W. 394.

120-16 Farmers' & M. Assn. *v.* Caine, 224 Ill. 599, 79 N. E. 956; Olson *v.* Co., 126 Ill. App. 253; Cunningham *v.* C. Co., 134 Ky. 198, 119 S. W. 765; New York Ins. Co. *v.* Van Meter, 137 Ky. 4, 121 S. W. 438; Vinson *v.* Lumb. Co., 167 Mo. App. 201, 151 S. W. 199; Barrett *v.* Kern, 141 Mo. App. 5, 121 S. W. 774; McKinnon *v.* Holden, 85 Neb. 406, 123 N. W. 439; Pike *v.* Buzzell, 76 N. H. 120, 79 A. 992; New York *v.* R. Co., 126 App. Div. 36, 110 N. Y. S. 720 (payment of license fee based on defendant's estimate of number of cars to be run); Dorman *v.* Arkin, 120 N. Y. S. 757; Ex parte Zeigler, 83 S. C. 78, 64 S. E. 513, 916; Parker *v.* Mayes, 85 S. C. 419, 67 S. E. 559; Eggland *v.* South, 22 S. D. 467, 118 N. W. 719; Nixon *v.* Kiddy, 66 W. Va. 355, 66 S. E. 500; Hicks Prtg. Co. *v.* R. Co., 138 Wis. 584, 120 N. W. 512. But see Uvalde A. P. Co. *v.* N. Y., 99 App. Div. 327, 91 N. Y. S. 131.

120-17 Mayfield W. M. Co. *v.* Long (Tex. Civ.), 119 S. W. 908.

121-20 Change of debtors. Van Allen *v.* Shulenburgh, 58 Misc. 136, 110 N. Y. S. 464.

122-22 Donahue *v.* Brooks, 143 Ill. App. 188; Wherley *v.* Rowe, 106 Minn. 494, 119 N. W. 222; Missouri & I. C. Co. *v.* Co., 127 Mo. App. 320, 105 S. W. 682; Pollman Co. *v.* St. Louis, 145 Mo. 651, 47 S. W. 563; Goodson *v.* Assn., 91 Mo. App. 339; Roberts *v.* Banse, 78 N. J. L. 57, 72 A. 452 (abandonment of appeal at creditor's request); Bloomington M. Co. *v.* Co., 58 App. Div. 66, 68 N. Y. S. 699, *affi.*, without opinion, 171 N. Y. 673, 64 N. E. 1118; Ex parte Zeigler, 83 S. C. 78, 64 S. E. 513, 916. Payment of part by third party may be shown. Partridge *v.* Moynihan, 59 Misc. 234, 110 N. Y. S. 539.

123-23 Andrews *v.* Co., 32 App. D. C. 392; Hand L. Co. *v.* Hall, 147 Ala. 561, 41 S. 78; Barham *v.* Bk., 94 Ark. 158, 126 S. W. 394; Creighton *v.* Gregory, 142 Cal. 34, 75 P. 569; Harvey *v.* R. Co., 44 Colo. 258, 99 P. 31; Fogil *v.* Boody, 76 Conn. 194, 56 A. 526; Wallner *v.* Co., 245 Ill. 148, 91 N. E. 1053; Bingham *v.* Browning, 197 Ill. 122, 64 N. E. 317; Northwestern Assn. *v.* Crawford, 126 Ill. App. 468; Snow *v.* Griesheimer, 120 Ill. App. 516; Little *v.* Koerner, 28 Ind. App. 625, 63 N. E. 766; Greenlee *v.* Mosnat, 116 Ia. 535, 90 N. W. 338; Neely *v.* Thompson, 68 Kan. 193, 75 P 117; Cunningham *v.* Co., 134 Ky. 198, 119 S. W. 765; Richardson *v.* Taylor, 100 Me. 175, 60 A. 796; Anderson *v.* Co., 92 Me. 429, 43 A. 21; Weber *v.* Board, 93 Minn. 320, 101 N. W. 296; Goodloe *v.* P. Co., 145 Mo. App. 574, 122 S. W. 771; Universal T. M. Co. *v.* Rosenfield, 141 Mo. App. 621, 125 S. W. 524; Publishers *v.* S. Co., 137 Mo. App. 472, 119 S. W. 38; Andrews *v.* Stubbs, 100 Mo. App. 599, 75 S. W. 178; Simons *v.* Council, 178 N. Y. 263, 70 N. E. 776; Auerbach *v.* Curie, 126 App. Div. 836, 111 N. Y. S. 327; Jackson *v.* Volkening, 81 App. Div. 36, 80 N. Y. S. 1102; Caravia *v.* Levy, 119 N. Y. S. 160; Cohen *v.* Levine, 114 N. Y. S. 840; Ravenswood P. M. Co. *v.* Dix, 61 Misc. 235, 113 N. Y. S. 721; Armstrong *v.* Lonon, 149 N. C. 434, 63 S. E. 101; Flynn *v.* Hurlock, 194 Pa. 462, 45 A. 312; Hunt *v.* Ogden (Tex. Civ.), 125 S. W. 386; Daugherty *v.* Herndon, 27 Tex. Civ. 175, 65 S. W. 891.

Dispute shown.—Kochman *v.* Karp, 130 N. Y S. 175.

Expressing willingness to explain any items not understood is not admission of doubt as to correctness of account, or that amount shown as a balance is open to inquiry. Neely *v.* Thompson, 68 Kan. 193, 75 P. 117.

Intention of parties.—See Jacobs *v.* Jacobs, 130 Ia. 10, 104 N. W. 489.

Payee's expressed dissent may prevent acceptance and retention from being a satisfaction. Perin *v.* Catheart, 115 Ia. 553, 89 N. W. 12.

123-24 Weller *v.* Stevens, 12 Cal. App. 779, 108 P. 532; Lang *v.* Lane, 83 Ill. App. 543; Am. F. & M. Co. *v.* Lindsay, 129 Ill. App. 548; Canton U. C. Co. *v.* Co., 117 Ill. App. 622; Harrison *v.* Henderson, 67 Kan. 194, 72 P. 875; Proctor *v.* Hobart, 145 Mich. 503, 108 N. W. 992; Hillestad *v.* Lee, 91 Minn. 335, 97 N. W. 1055; Sampson *v.* Ins. Co., 85 Neb. 319, 123 N. W. 302; Ramapo F. & W. Wks. *v.* Carey, 113

N. Y. S. 10; Policastro *v.* Pitske, 65 Misc. 524, 120 N. Y. S. 743; Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034; Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715; Colvard *v.* R. Co., 151 N. C. 522, 66 S. E. 570; Drewry-H. Co. *v.* Davis, 151 N. C. 295, 66 S. E. 139; West Point C. M. *v.* Blythe, 29 Pa. Super. 642.

Payment of balance is not enough. Harrison *v.* Henderson, 67 Kan. 194, 72 P. 875.

"Ordinarily the acceptance by a creditor of a check for a part of a disputed claim will not constitute an accord and satisfaction, although the check agrees in amount with the balance due as claimed by the debtor. In order to make it so, the check must recite, in effect, that it is in full payment of the claim, or be so declared, expressly or by necessary implication, when the check is tendered." Hillestad *v.* Lee, 91 Minn. 335, 97 N. W. 1055.

Retention of check.—If creditor retains debtor's check for unreasonable time, pending discussion of whether it should be received in full or not, it is for jury to find whether it was so accepted. Fredonia G. Co. *v.* Elwood, 71 Kan. 464, 80 P. 969.

Notice of objection.—If debtor is notified immediately on receipt of check, suit will be brought to recover what is claimed to be due, there is no accord and satisfaction. Harby *v.* Henes, 45 Misc. 366, 90 N. Y. S. 461.

Question of fact.—Whether or not there has been such a giving and acceptance as to amount to an accord and satisfaction is for jury. Perin *v.* Cathcart, 115 Ia. 553, 89 N. W. 12.

Knowledge of custom of county. One who receives county warrants with knowledge, or its equivalent, that amounts allowed were on express condition they must be taken in full payment, and that balance of his claims had been disallowed cannot recover any other amount in absence of a protest then made, though he had previously protested. Board *v.* Morgan, 28 Colo. 322, 65 P. 41.

Subsequent conduct of creditor may show acceptance though check not tendered with statement it was in full. Stan *v.* Regelin, 147 Ill. App. 550.

125-25 Sanders *v.* Standard Wheel Co., 151 Ky. 257, 151 S. W. 674; Jacoby *v.* Black, 119 N. Y. S. 1067.

126-26 Melton *v.* Rittenhouse, 111 Ill. App. 30; Knickerbocker T. Co. *v.* Ryan, 227 Pa. 245, 75 A. 1073; Rawlins *v.* Jungquist, 16 Wyo. 403, 96 P. 144.

126-28 Contract showing adjustment of differences, admissible. Murphy *v.* Lever, 147 Ill. App. 460.

126-29 See Patten *v.* Lynett, 133 App. Div. 746, 118 N. Y. S. 185.

126-30 Upton *v.* Co., 109 La. 670, 33 S. 725.

127-31 Pacific Coast C. Co. *v.* Co., 11 Cal. App. 712, 106 P. 262; Redmond *v.* R. Co., 129 Ga. 133, 58 S. E. 874; Hurrle G. Co. *v.* Hooker, 120 Ill. App. 433; Freeman *v.* Studios, 128 App. Div. 868, 113 N. Y. S. 64; Dobbs *v.* S. Co., 115 N. Y. S. 1076; Ereno *v.* P., 2 P. R. Fed. 290; Mayfield W. M. Co. *v.* Long (Tex. Civ.), 119 S. W. 908.

Qualified receipt.—A receipt "in full," with addition that sum named is accepted under protest, is not an accord and satisfaction. Mitterwallner *v.* Lodge, 109 App. Div. 70, 95 N. Y. S. 1090.

Parol evidence is competent to show receipt was signed upon unexpressed understanding. Komp *v.* Raymond, 175 N. Y. 102, 67 N. E. 113. And to explain receipt. Ramapo F. & W. Wks. *v.* Carey, 113 N. Y. S. 10.

Not affected by promise of third party. A receipt in full, standing alone and unimpeached, is not inconclusive because, in addition thereto and in connection with sum paid, receiptor had promise of something from another party, distinct from him who made payment. Langhead *v.* Frick, 209 Pa. 368, 58 A. 685.

Part performance of agreement may be shown. New York E. J. Pub. Co. *v.* Co., 110 N. Y. S. 391.

127-32 Reed *v.* Engel, 237 Ill. 628, 86 N. E. 1110, 142 Ill. App. 413; Hayes *v.* R. Co., 143 N. C. 125, 55 S. E. 437; Fosha *v.* O'Donnell, 120 Wis. 336, 97 N. W. 924. See Atkinson *v.* Heine, 134 App. Div. 406, 119 N. Y. S. 122.

Or duress.—If the debtor should take the occasion to represent to his creditor his financial condition as being such that, at the end of the lawsuit there would be nothing to satisfy the judgment, he would thereby introduce an element of coercion in his offer. The offer then, instead of being, "Take this, or take what the law will adjudge to be your due," will be equivalent to

"Take this, or you will never get anything." Scott *v.* Imp. Co., 241 Mo. 112, 145 S. W. 48.

127-34 Creighton *v.* Gregory, 142 Cal. 34, 75 P. 569; Kelley *v.* Martin, 169 Ill. App. 92; Simons *v.* Council, 178 N. Y. 263, 70 N. E. 776.

127-35 Greenlee *v.* Mosnat, 116 Ia. 535, 90 N. W. 338.

In absence of oral testimony affecting letters in evidence or any dispute of fact concerning them, question is for court. Logan *v.* Davidson, 18 App. Div. 353, 45 N. Y. Supp. 961.

The jury must find what claims and demands covered by accord and satisfaction (Mayo *v.* Leighton, 101 Me. 63, 63 A. 298; McCormick *v.* Shea, 47 Misc. 613, 94 N. Y. S. 485), and decide whether there was a good faith dispute. Beaver *v.* Porter, 129 Ia. 41, 105 N. W. 346; McCormick *v.* Shea, supra; Greenlee *v.* Mosnot, 116 Ia. 535, 90 N. W. 338. Inferences to be drawn from facts proved is for court. Canton U. C. Co. *v.* Parlin, 215 Ill. 244, 74 N. E. 143, 117 Ill. App. 622. It is a question of fact whether creditor has retained check sent him in full payment for an unreasonable time. Fredonia G. Co. *v.* Elwood, 71 Kan. 464, 80 P. 969.

128-36 Fowley *v.* Thompson, 173 Ill. App. 333; Sanders *v.* Standard Wheel Co., 151 Ky. 257, 151 S. W. 674; Rose *v.* American Paper Co., 83 N. J. L. 707, 85 Atl. 354; Schuller *v.* Robinson, 139 App. Div. 97, 123 N. Y. S. 881; Cornell *v.* Taylor, 137 App. Div. 496, 122 N. Y. S. 157; Eng *v.* Cammann, 85 Misc. 27, 147 N. Y. S. 23; Brewster *v.* Silverstein, 78 Misc. 123, 137 N. Y. S. 912; Pub. Co. *v.* A. Co., 110 N. Y. S. 391; Ransom *v.* Crawford, 44 Pa. Super. 592.

Province of Court and Jury.—See 1 STANDARD PROC. 191.

Verdict and Judgment.—See 1 STANDARD PROC. 192.

ACCOUNTS, ACCOUNTING AND ACCOUNTS STATED

Accounting in Equity.—See 1 STANDARD PROC. 263-315.

132-1 Account furnished plaintiff after action begun is not conclusive, and he need not disprove or falsify it to entitle himself to interlocutory judgment. Moore *v.* Reinhardt, 132 App. Div. 707, 117 N. Y. S. 531.

133-2 Jordan *v.* Underhill, 71 App. Div. 559, 76 N. Y. S. 95; Buchner *v.* Wait (Tex. Civ.), 137 S. W. 383.

Necessity of demand. — Cal. Raisin Growers' Assn. *v.* Abbott, 160 Cal. 601, 117 P. 767.

133-3 Hardin *v.* Stanton (Ga.), 80 S. E. 698; Stitzer *v.* Founder, 214 Pa. 117, 63 A. 421.

Co-tenant may maintain action.—Cady *v.* Ridenour, 158 Ill. App. 97.

134-5 Kosovits *v.* Society, 130 N. Y. S. 72.

134-6 Dettering *v.* Nordstrom, 148 Fed. 81, 78 C. C. A. 157.

135-8 Butts *v.* Cooper, 152 Ala. 375, 44 S. 616; Brown *v.* Cragg, 230 Ill. 299, 82 N. E. 569; Bruhns *v.* Seymour, 143 Ia. 464, 121 N. W. 1016; O'Connor *v.* Minehin, 214 Mass. 50, 100 N. E. 1081. See Peters *v.* Soc., 200 Mass. 579, 86 N. E. 885.

Evidence warranting accounting.—Ennis *v.* Smith (Del.), 80 A. 636; Wasey *v.* Whitcomb, 167 Mich. 58, 132 N. W. 572.

Evidence on plea of an accounting. Dettering *v.* Nordstrom, supra. Use of books on accounting by a trustee is discretionary; court may receive any evidence it deems proper. Cairns *v.* Murray, 37 Can. Sup. 163. If parties bound themselves to keep books those opened for that purpose are competent in support of the bill. Stitzer *v.* Founder, 214 Pa. 117, 63 A. 421.

135-10 *Contra* as to second accounting. Des Moines Nat. Bk. *v.* Sisson, 143 Ia. 191, 121 N. W. 533.

137-15 Anderson *v.* Anderson, 24 Utah 497, 68 P. 319.

137-16 Offenstein *v.* Gehner, 223 Mo. 318, 122 S. W. 715; Anderson *v.* Anderson, 24 Utah 497, 68 P. 319.

138-18 In the absence of mistake, fraud or duress account stated by partners will not be opened in action for accounting. Wahl *v.* Barnum, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623; Hale *v.* Hale, 14 S. D. 644, 86 N. W. 650.

139-22 On a reference to take accounts a party is entitled to a commission to cross-examine opposite party upon affidavits filed in proof of accounts. Horlick *v.* Eschweiler, 11 Ont. L. R. (Can.) 140.

142-29 Order in which testimony shall be produced is within master's discretion. Holden *v.* Thurber (R. I.), 72 A. 720.

144-34 The answer has less scope than answers in ordinary cases; defendant under a bill for an accounting involving mutual accounts has nothing to plead in order to have advantage of items constituting his offsets and expenses directly connected with matters alleged in the bill. Dettering *v.* Nordstrom, 148 Fed. 81, 78 C. C. A. 157; Goldthwait *v.* Day, 149 Mass. 185, 21 N. E. 359; Armstrong *v.* Bk., 37 Fed. 466. But defendant must plead any demands he seeks to have allowed if bill does not include them. Dettering *v.* Nordstrom, supra.

144-35 Choctaw, etc. R. Co. *v.* Sittel, 21 Okla. 695, 97 P. 363; Holden *v.* Thurber (R. I.), 72 A. 720.

Burden is on receivers called to account to justify and vouch accounts rendered, at least so far as exceptions are taken. Gutterson *v.* Co., 151 Fed. 72. If firm books are not produced on a partnership accounting, partner in charge of them and of book-keeper has burden of sustaining his contention concerning their contents. Sandford *v.* Embry, 151 Fed. 977, 81 C. C. A. 167.

145-37 Ashley *v.* Winkley, 209 Mass. 509, 95 N. E. 932.

145-38 Holden *v.* Thurber (R. I.), 72 A. 720.

148-49 Account may be sent down for extension of accounting from time auditor struck a balance to time of trial. Fricker *v.* Co., 124 Ga. 165, 52 S. E. 65.

148-51 Reid *v.* Freed, 100 Miss. 48, 56 S. 278.

151 Action of Account.—See 1 STANDARD PROC. 213-233.

152-71 Chicago Crayon Co. *v.* Choate, 102 Ark. 603, 145 S. W. 197; Keating I. & M. Co. *v.* Erie City (Tex. Civ.), 63 S. W. 546.

Account is, in effect, a complaint, and plaintiff cannot recover more than is stated therein to be due. Miller *v.* Armstrong, 123 Ia. 86, 98 N. W. 561.

Book-keeper's statement not conclusive. United Walnut Co. *v.* Courtney, 96 Ark. 46, 130 S. W. 566.

Burden of proof is upon party who pleads a general settlement. If settlement is attacked for fraud or mistake, burden is upon attacking party. Johnson *v.* Berdo, 131 Ia. 524, 106 N. W. 609. If defendant refuses to produce records which show amount due, he has the burden to establish the amount. Schrimplin *v.* Assn., 123 Ia. 102, 98 N. W. 613. Plaintiff must show existence of facts which justify his charges. Laurel Co. Ct. *v.* Pennington, 26 Ky. L. R. 124, 80 S. W. 820. Burden is not met by evidence showing only the rendition of service and its value; there must also be evidence of non-payment when due. Pollak *v.* Winter, 166 Ala. 255, 51 S. 998.

Entries in books will not be received if they are too detached from usual course of business between parties as merchant and customer. Bader *v.* Ferguson, 118 Mo. App. 34, 94 S. W. 836. Books admissible to show capacity in which defendant was charged therein, he not having objected to charges as made. Love *v.* Ramsey, 139 Mich. 47, 102 N. W. 279.

152-72 Modern D. & C. C. Co. *v.* Co. (Tex. Civ.), 116 S. W. 153.

Testimony as to identity of account is not a conclusion if but one account is shown. Lamar-R. D. Co. *v.* Copeland, 7 Ga. App. 567, 67 S. E. 703.

153-73 Romoneda *v.* Jackson, 93 Miss. 92, 46 S. 258; Knight *v.* Taylor, 131 N. C. 84, 42 S. E. 537; Myers *v.* Church, 11 Okla. 544, 69 P. 874; Pittsburg P. G. Co. *v.* Roquemore (Tex. Civ.), 88 S. W. 449; Hickman *v.* Co. (Tex. Civ.), 62 S. W. 1081.

Texas statute relates only to accounts for personal property sold and delivered by plaintiff in general course of dealing. Oden *v.* Co., 34 Tex. Civ. 115, 77 S. W. 967. But an account not within it is not inadmissible because verified. Standifer *v.* Co. (Tex. Civ.), 94 S. W. 144.

A single item for services rendered during several years in one matter, which necessarily embraced many items, is not an account on which judgment can be rendered upon an affidavit as a book account regularly and fairly kept. Taylor *v.* Addicks, 4 Penne. (Del.) 411, 55 A. 1010.

Under a statute providing for verification of open accounts proof cannot be made of a stated account by creditor's affidavit, though no objection made to its admission. Wroten G. & L. Co. *v.* Co. (Tex. Civ.), 95 S. W. 744.

Verified accounts, admissible only by virtue of statute. Bass *v.* Gobert, 113 Ga. 262, 38 S. E. 834. May be received to aid jurors' memory of testimony. Mann L. Co. *v.* Co., 156 Ala. 598, 47 S. 325.

Bond given to secure accounting not within statute. Adams *v.* Ins. Co., 94 Miss. 433, 49 S. 119.

153-76 Polytinsky *v.* Stewart, 158 Ala. 179, 48 S. 395 (statement given witness by defendant's book-keeper on defendant's request is admissible, though changed by him; that fact affected only its weight); Baker *v.* Haynes, 146 Ala. 520, 40 S. 968; Chicago Crayon Co. *v.* Choate, 102 Ark. 603, 145 S. W. 197; Weakley *v.* Woodward, 2 Tenn. Ch. App. 586; Eclipse P. & Mfg. Co. *v.* Co., 55 Tex. Civ. 553, 120 S. W. 532; Modern D. & C. Co. *v.* S. Co. (Tex. Civ.), 116 S. W. 153.

Plaintiff may negative prima facie case made by his verified account. Kennedy *v.* Price, 138 N. C. 173, 50 S. E. 566.

Such statement is only admissible against person named. Pittsburg P. G. Co. *v.* Roquemore (Tex. Civ.), 88 S. W. 449.

It is not inadmissible because it contains trade names and abbreviations (Claus-Shear Co. *v.* Lee, 140 N. C. 352, 53 S. E. 433), nor a variation in debtor's name in account and verification (Pelican L. Co. *v.* Johnson (Tex. Civ.), 89 S. W. 439), nor other informalities. Davidson *v.* Co. (Tex. Civ.), 95 S. W. 32; Owensboro W. Co. *v.* Hall, 149 Ala. 210, 43 S. 71.

In absence of a sworn plea of non est factum an order for goods is admissible, account being verified. Fulton *v.* Co., 145 Ala. 331, 40 S. 393.

Credits allowed plaintiff need not be verified by him. Polytinsky *v.* Stewart, 158 Ala. 179, 48 S. 395.

154-80 Any defense which does not deny reasonableness of sums charged or correctness of items may be made Lucas *v.* Board, 67 Kan. 418, 73 P. 56.

154-81 See Brierton *v.* Smith, 7 Ga. App. 69, 66 S. E. 375.

154-82 Davidson *v.* Co. (Tex. Civ.), 95 S. W. 32.

Defendant may show there were wrongful charges and omitted credits in account filed, though he had given a note for amount of it. Boone *v.* Goodlett, 71 Ark. 577, 76 S. W. 1059.

155-83 Stephenville, etc. R. Co. *v.* Co. (Tex. Civ.), 127 S. W. 245; Rust *v.* Sanger (Tex. Civ.), 105 S. W. 66.

Sufficiency of denial.—Allegation defendant never purchased certain of the goods and did not authorize their purchase is sufficient to prevent judgment on a verified demand based upon a book account. Davenport *v.* Addicks, 5 Penne. (Del.) 4, 57 A. 532.

The burden is on plaintiff as in other cases to establish his cause of action. Continental Lumb. Co. *v.* Miller (Tex. Civ.), 145 S. W. 735. If plaintiff's affidavit is met by a counter-affidavit former must show correctness of claim, and if he fails to do so as to any item it will be disallowed. Keating I. & M. Co. *v.* Erie City (Tex. Civ.), 63 S. W. 546.

155-85 Polytinsky *v.* Stewart, 158 Ala. 179, 48 S. 395.

Defendant must establish by other evidence than his verified plea right to credits claimed therein if he has admitted correctness of plaintiff's account. Blackwell, etc. Co. *v.* Jacobs, 57 Tex. Civ. 295, 122 S. W. 66.

155-86 Statutes of the kind referred to in the text do not apply to accounts stated. Martin *v.* Heinze, 31 Mont. 68, 77 P. 427. Account may be admissible though not verified as required. Standifer *v.* Co. (Tex. Civ.), 94 S. W. 144. Statements in form of bills of particulars not conclusive; if different claims have been made therein all may go to jury. Snyder *v.* Patton, 143 Mich. 350, 106 N. W. 1106.

157-93 Plaintiff may testify as to his custom in keeping accounts. Mullenary *v.* Burton, 3 Cal. App. 263, 84 P. 159.

157-94 Drakesboro Min. Co. *v.* Brashears, 144 Ky. 39, 137 S. W. 765.

157-95 Jarrett *v.* Johnson, 116 Ill. App. 592; White City S. Bk. *v.* Bk., 90 Mo. App. 395; Hood *v.* Tyner, 3 Ind. App. 51, 28 N. E. 1033; Stadtler *v.* Co. (Tex. Civ.), 121 S. W. 1132.

A letter written by direction of debtor in response to request for payment is admissible though no instructions were given writen as to what should be said. Skidmore *v.* Johnson, 70 N. J. L. 674, 57 A. 450.

Husband's admission may be proved if he and wife are jointly and severally liable. Richardson *v.* Co., 93 Ill. App. 283.

158 Action on Stated Account.—See 1 STANDARD PROC. 240-262.

158-98 Actual delivery of each item is not necessary where plaintiff has made out a prima facie case by reference to his books. Horton *v.* Haralson, 130 La. 100, 57 S. 643.

158-99 Sufficient showing of delivery of a disputed item. Minot Flour Mill Co. *v.* Swords, 23 N. D. 571, 137 N. W. 828. Agreement on price shown. Duff & Oney *v.* Rose, 149 Ky. 482, 149 S. W. 884.

158-1 **Plaintiff may give evidence** of a sale at any time prior to filing of suit. Buckeye B. Co. *v.* Dickey, 122 Ga. 290, 50 S. E. 66.

Course of business.—It is within discretion of court to receive evidence of the entire business transaction, as bearing on the question as to whether anything was due from defendant. Mille. *v.* Carnes, 95 Minn. 179, 103 N. W. 877.

159-5 Ivy C. & C. Co. *v.* Long, 139 Ala. 535, 36 S. 722; Stimson M. Co. *v.* Co., 8 Cal. App. 559, 97 P. 322; Sonnenschein *v.* Malter, 144 Ill. App. 183; Chase *v.* Chase, 191 Mass. 556, 78 N. E. 115; Barr *v.* Lake, 147 Mo. App. 252, 126 S. W. 755; Blendermann *v.* Wray, 60 Misc. 117, 111 N. Y. S. 827; Koht *v.* Frazin, 144 N. Y. S. 644; McMullin *v.* Reid, 213 Pa. 338, 62 A. 924.

Not an account stated.—A summary covering a year and containing one item for cash collected, items for cash to be collected, and, on the other side, one item for cash paid, and items for bills to be paid, is not an account stated. McGinn *v.* Benner, 180 Pa. 396, 36 A. 925.

Goods sold to third person.—An account stated cannot be based on bills made out to defendant long after sale of goods to another, merely because he retained them without objection. Brush & S. Co. *v.* Ross, 51 Misc. 44, 99 N. Y. S. 796.

A subsisting debt must be shown. McAveigh *v.* R. Co., 120 N. Y. S. 102.

159-8 Daytona B. Co. *v.* Bond, 47 Fla. 136, 36 S. 445.

It is for the jury to find whether parties have had such dealings as makes an account stated. Little *v.* Pigg, 29 Ky. L. R. 809, 96 S. W. 455.

160-9 Joshua Hendy Iron Works *v.* Brenneman, 185 Fed. 183; Kahn *v.* Metz, 88 Ark. 363, 114 S. W. 911; Allen-West C. Co. *v.* Hudgins, 74 Ark. 468, 86 S. W. 289.

Account stated.—United Hardware-Furniture Co. *v.* Blue (Fla.), 52 S. 364.

Presumption.—Nothing appearing to the contrary, it will be presumed an account sent in usual way was received. Dick *v.* Zimmerman, 105 Ill. App. 615.

Dealings between the parties must be related to matters stated in the account. Powers *v.* Ins. Co., 68 Vt. 390, 35 A. 331.

What is sufficient. — Some authorities define an account stated as an account in writing, examined and accepted by both parties (Leinbach *v.* Wolle, 211 Pa. 629, 61 A. 248); others that, in the absence of a statute requiring such account to be in writing, an oral statement is binding (Quinn *v.* White, 26 Nev. 42, 62 P. 995, 64 P. 818; Forbes *v.* Wheeler, 39 Misc. 538, 80 N. Y. S. 373; Powers *v.* Ins. Co., 68 Vt. 390, 35 A. 331; Burritt *v.* Villenuve, 92 Mich. 282, 52 N. W. 614; Goodrich *v.* Coffin, 83 Me. 324, 22 A. 217), though not based on writing evidencing transactions. Converse *v.* Scott, 137 Cal. 239, 70 P. 13. It is said in the opinion that the earlier English cases to the contrary appear to have been overruled. Account must have been rendered by party authorized. Kauffmann *v.* Judah, 78 App. Div. 632, 79 N. Y. S. 494.

160-12 Little *v.* McClain, 134 App. Div. 197, 118 N. Y. S. 916.

162-18 Sharp *v.* Behr, 136 Fed. 795; Schultheis *v.* Caughey, 146 App. Div. 102, 130 N. Y. S. 373; Smith *v.* Allmon, 74 S. C. 502, 54 S. E. 1014; Shaw *v.* Lobe, 58 Wash. 219, 108 P. 450.

Binding force of an account stated will not be given to the mere furnishing of an account not given with a view to ascertaining the claim, establishing balance due, or finally adjusting account. Harrison *v.* Henderson, 67 Kan. 202, 72 P. 878.

162-19 Brandon *v.* Distilling Co., 167 Ala. 365, 52 S. 640; Moore *v.* Maxwell, 155 Ala. 299, 46 S. 755; Moore *v.* Holdoway, 138 Ala. 448, 35 S. 453; Allen-West C. Co. *v.* Hudgins, 74 Ark. 468, 86 S. W. 289; Borders *v.* Gay, 6 Ga. App. 734, 65 S. E. 788; Jones *v.* Research Extension, 157 Ill. App. 132; Atlas R. S. Co. *v.* Forster, 123 Ill. App. 538; Harrison *v.* Henderson, supra; Love *v.* Ramsey, 139 Mich. 47, 102 N. W. 279; Wright *v.* Co., 146 Mich. 555, 109 N. W. 1062; Witte *v.* Storm, 236 Mo. 470, 139 S. W. 384; Ottofy *v.* Winsor, 137 Mo. App. 272, 119 S. W. 40; Haish *v.* Dillon, 71 Neb. 290, 98 N. W. 818; Carlisle *v.* Norris, 144 App. Div. 690, 129 N. Y. S. 585; New York Board *v.* Boughan, 97 N. Y. S. 402; McAveigh *v.* R. Co., 120 N. Y.

S. 102; Doubleday, Page & Co. *v.* Shumaker, 60 Misc. 227, 113 N. Y. S. 83; Forbes *v.* Wheeler, 39 Misc. 538, 80 N. Y. S. 373; Eames Co. *v.* Prosser, 157 N. Y. 289, 51 N. E. 986; Little *v.* McClain, supra; Oberndorfer *v.* Moyer, 30 Utah 325, 84 P. 1102; Shaw *v.* Lobe, 58 Wash. 219, 108 P. 450; McGraw *v.* Bk., 64 W. Va. 509, 63 S. E. 398.

Account assented to by debtor only. In some cases the rule is said to be that assent need only be given by party sought to be charged. Leiser *v.* McDowell, 69 App. Div. 444, 74 N. Y. S. 1021; Pierce *v.* Pierce, 199 Pa. 4, 48 A. 689.

Admission of items; denial of indebtedness. Stewart *v.* Ry. Co., 157 Mo. App. 225, 137 S. W. 46.

Confession by employe as to amount of his arrearages is not an account stated. Wheeler *v.* Baker, 132 Mich. 507, 93 N. W. 1069.

Admission of items; denial of indebtedness.—The rule laid down in Ryan *v.* Gross, 48 Ala. 370, and stated in Vol. 1 of this work, p. 162, note, is approved in Columbia R. P. Co. *v.* Tallant, 132 Fed. 271, 133 Fed. 990 (on rehearing).

What constitutes.—There must be a mutual examination of each other's items and a mutual agreement as to correctness of allowance and disallowance of the respective claims, and of balance on final adjustment. Charlesworth *v.* Whitlow, 74 Ark. 277, 85 S. W. 423.

Objections stated to agent.—If debtor is referred to an agent in connection with the account, statements made by him to the agent may be shown. Allen *v.* Uplinger, 98 Minn. 242, 107 N. W. 1131.

Parol evidence of a settlement of the amount due under a written contract is competent. Krueger *v.* Dodge, 15 S. D. 159, 87 N. W. 965.

163-20 Krueger *v.* Dodge, 15 S. D. 159, 87 N. W. 965.

Letters written on defendant's behalf prior and subsequent to rendition of account indicating dissatisfaction with plaintiff's services are not relevant on question of assent to the account. Gardam *v.* Batterson, 198 N. Y. 175, 91 N. E. 371.

Value of services rendered may be shown to prove probability or improbability of assent to account by person who rendered them. Landis *v.* Watts, 82 Neb. 359, 117 N. W. 705.

163-21 Dolvin *v.* Hicks, 4 Ga. App. 653, 62 S. E. 95; Sariol *v.* McDonald, 127 App. Div. 648, 111 N. Y. S. 796.

Administrator may become bound in that capacity upon account stated by him with a creditor of his decedent. Withers *v.* Sandlin, 44 Fla. 253, 32 S. 829.

164-22 Manchester F. Assn. Co. *v.* Fitzpatrick, 120 Ill. App. 535; Forbes *v.* Wheeler, 39 Misc. 538, 80 N. Y. S. 373.

Statement that debtor would soon be prepared to settle a disputed account is not a promise to pay. Atlas R. S. Co. *v.* Forster, 123 Ill. App. 558; U. S., etc. Ins. Co. *v.* Batt, 49 Ind. App. 277, 97 N. E. 195.

164-24 Louisville B. Co. *v.* Asher, 112 Ky. 138, 65 S. W. 133; Frothingham *v.* Satterlee, 70 App. Div. 613, 75 N. Y. S. 21.

Indorsement by debtor of "O. K." shows assent to account. Clark *v.* Hoffman, 128 Ill. App. 422.

164-25 Naylor *v.* R. Co., 14 Ida. 789, 96 P. 573; Rust *v.* Sanger (Tex. Civ.), 105 S. W. 66.

Admissions by debtor may be proved though made in effort to compromise. Baker *v.* Haynes, 146 Ala. 520, 40 S. 968; Matthews *v.* Farrell, 140 Ala. 298, 37 S. 325. See Vol. 1, p. 596, et seq.

Verbal promise to secure debt may be proved. Quinn *v.* White, 26 Nev. 42, 62 P. 995, 64 P. 818. If statement is signed collateral agreements which annul and vary it cannot be proved. Jackson *v.* Drake, 37 Can. Sup. 315.

165-27 U. S., etc. Ins. Co. *v.* Batt, 49 Ind. App. 277, 97 N. E. 195.

166-31 Ersbrowsky *v.* Korn, 113 N. Y. S. 478.

166-32 Bartholomew *v.* Shepperd, 41 Tex. Civ. 579, 93 S. W. 218.

Admission must be of a definite sum. Bloomley *v.* Grinton, 1 U. C. C. P. 309, *appr.* in Haish *v.* Dillon, 71 Neb. 290, 98 N. W. 818.

167 Assent cannot be withdrawn unless supported by evidence showing fraud or mistake. MacPherson *v.* Harding, 40 App. Cas. (D. C.) 404.

167-35 Johnson *v.* Curtis, 3 Bro. C. C. 266, 29 Eng. Reprint 528; Wonderly *v.* Christian, 91 Mo. App. 158; Young *v.* Hill, 67 N. Y. 162.

167-36 McLaughlin *v.* U. S., 36 Ct. Cl. (U. S.) 138, 187.

167-39 Spellman *v.* Muehfeld, 166 N. Y. 245, 59 N. E. 817; Delabarre *v.* McAlpin, 101 App. Div. 468, 92 N. Y. S. 129.

Letter from debtor to creditor is competent to show former objected to the account. Copland *v.* Co., 136 N. C. 11, 48 S. E. 501.

167-40 Kenneth Ins. Co. *v.* Bk., 96 Mo. App. 125, 70 S. W. 173; Columbia B. Co. *v.* Berney, 90 Mo. App. 96; Farry *v.* Bk. (N. J. Eq.), 58 A. 305; Nodine *v.* Bk., 41 Or. 386, 68 P. 1109; Greenhalgh Co. *v.* Bk., 226 Pa. 184, 75 A. 260; Brown *v.* Bk., 109 Va. 530, 64 S. E. 950.

Silence is admission where bank book and vouchers are returned. Leather M. Bk. *v.* Morgan, 117 U. S. 96. See ibid. and Lieber *v.* Bk., 137 Mo. App. 158, 117 S. W. 672, for rule where forged checks included. Entitled to weight, especially if followed by later dealings. Payne *v.* Nichols, 2 Phila. (Pa.) 220.

168-41 Notice of overdraft. Smith *v.* Allen, 7 Ala. App. 397, 62 So. 296.

168-42 Chandler *v.* Robinett, 21 Cal. App. 333, 131 P. 891; Cusick *v.* Boyne, 1 Cal. App. 643, 82 P. 985; Shively *v.* Co., 5 Cal. App. 236, 89 P. 1073; Lewis *v.* Co., 10 Ida. 214, 77 P. 336; Pickham *v.* R. Co., 153 Ill. App. 281; Northwestern F. Co. *v.* Co., 144 Ill. App. 92; Dewes B. Co. *v.* Kerwin, 107 Ill. App. 620; Lutcher & M. L. Co. *v.* Eells, 108 Ill. App. 156; Rudolph Wurlitzer Co. *v.* Dickinson, 153 Ill. App. 36, judg. *aff.*, 247 Ill. 27, 93 N. E. 132; Little *v.* Pigg, 29 Ky. L. R. 809, 96 S. W. 455; Hoffmaster *v.* Hodges, 154 Mich. 641, 118 N. W. 484; Adam Roth G. Co. *v.* Hotel Monticello (Mo.), 166 S. W. 1125; Little *v.* McClain, 134 App. Div. 197, 118 N. Y. S. 916; Burnham *v.* Black, 121 N. Y. S. 616; Davis *v.* Stephenson, 149 N. C. 113, 62 S. E. 900; Gorman *v.* McGowan, 44 Or. 597, 76 P. 769; Leinbach *v.* Wolle, 211 Pa. 629, 61 A. 248; Lodge *v.* Heron, 3 Phila. (Pa.) 356; McMullin *v.* Reid, 213 Pa. 338, 62 A. 924; Ripley *v.* Co., 138 Wis. 304, 119 N. W. 108; Jones *v.* DeMuth, 137 Wis. 120, 118 N. W. 542.

Objections to account waived by acquiescence in subsequent statements thereof. Syson *v.* Hieronymous, 127 Ala. 482, 28 S. 967.

169-46 Adams *v.* Hubbard, 221 Pa. 511, 70 A. 835 (on dissolution if liquidation of assets and shrinkage contemplated).

Partnership accounts are within general rule where expert selected by parties and a copy of account given each, no objection being made to it. Leinbach *v.* Wolle, 211 Pa. 629, 61 A. 248.

169-47 Charlesworth *v.* Whitlow, 74 Ark. 277, 85 S. W. 423.

169-48 Harrison *v.* Henderson, 67 Kan. 202, 72 P. 878.

170-51 Limited in application to transactions between banker and customer. McGraw *v.* Bk., 64 W. Va. 509, 63 S. E. 398.

170-52 Harrison *v.* Henderson, supra; Nodine *v.* Bk., 41 Or. 386, 68 P. 1109.

The general rule has no application when invoked by the debtor who is bound to account for moneys collected and of the amount of which he only has knowledge. Vanuxem *v.* Ins. Co., 122 Fed. 107.

170-53 Brown & M. Co. *v.* Guise, 14 N. M. 282, 91 P. 716.

Does not establish maritime lien.—The J. S. Warden, 155 Fed. 697.

Agreement as to subsequent accounts. If objection to account is made by debtor and parties agree that, as to the future, amount to become due shall be fixed by agreement, debtor is not bound by retention of subsequent accounts rendered. Pierce *v.* Pierce, 199 Pa. 4, 48 A. 689.

A denial of liability previous to rendition of account makes rendering of it ineffectual. Jacobs *v.* Cohn, 46 Misc. 115, 91 N. Y. S. 339; Love *v.* Ramsey, 139 Mich. 47, 102 N. W. 279; Benedict *v.* Jennings, 47 Misc. 134, 93 N. Y. S. 464.

170-54 Jasper T. Co. *v.* Lamkin, 162 Ala. 388, 50 S. 337.

171-57 Stimson M. Co. *v.* Co., 8 Cal. App. 559, 97 P. 322; Daytona B. Co. *v.* Bond, 47 Fla. 136, 36 S. 445.

171-58 Withers *v.* Sandlin, 44 Fla. 253, 32 S. 829.

172-65 If account is sent by mail party charged must in terms be a party to it, or grounds upon which he is held liable must be clearly disclosed to him and demand made for payment. Daytona B. Co. *v.* Bond, 47 Fla. 136, 36 S. 445.

173-67 Daytona B. Co. *v.* Bond, 47 Fla. 136, 36 S. 445; Nodine *v.* Bk., 41 Or. 386, 68 P. 1109.

Delay of two and one-half months not unreasonable. Sharp *v.* Behr, 136 Fed. 795. Five months unreasonable. McLaughlin *v.* U. S., 36 Ct. Cl. (U. S.) 138.

174-69 Taber L. Co. *v.* O'Neal, 160 Fed. 596, 87 C. C. A. 498; Daytona B. Co. *v.* Bond, 47 Fla. 136, 36 S. 445; Nodine *v.* Bk., 41 Or. 386, 68 P. 1109. *Contra* it seems. Little *v.* McClain, 134 App. Div. 197, 118 N. Y. S. 916.

Question of reasonable time is for jury. Lewis *v.* Co., 10 Ida. 214, 77 P. 336.

174-70 McLaughlin *v.* U. S., 36 Ct. Cl. (U. S.) 138; Napolean Hill Cotton Co. *v.* Gray, 99 Ark. 648, 137 S. W. 827; Borders *v.* Gay, 6 Ga. App. 734, 65 S. E. 788; Dolvin *v.* Hicks, 4 Ga. App. 653, 62 S. E. 95; Harrison *v.* Henderson, 67 Kan. 202, 72 P. 878; Adam Rock G. Co. *v.* Hotel Monticello (Mo.), 165 S. W. 1125; Chapman *v.* Co., 57 W. Va. 395, 50 S. E. 601; Jones *v.* DeMuth, 137 Wis. 120, 118 N. W. 542.

Silent retention of account furnished by request, without purpose to adjust claim, will not raise implication account was stated. Harrison *v.* Henderson, 67 Kan. 202, 72 P. 878.

In case of an estoppel, there being neither fraud nor mistake, failure to seasonably object establishes absolute liability. Daytona B. Co. *v.* Bond, 47 Fla. 136, 36 S. 445; Patillo *v.* Co., 131 Fed. 680, 65 C. C. A. 508; Fitzgerald *v.* Bk., 114 Fed. 474, 52 C. C. A. 276.

175-71 Plaintiff's inability to keep correct account may be shown. Davis *v.* Stephenson, 149 N. C. 113, 62 S. E. 900.

176-72 Other means of proof.—A settlement sheet not admitted to be correct is not conclusive as to what it shows. Plano Mfg. Co. *v.* Kautenberger, 121 Ia. 213, 96 N. W. 743. Agent who made settlement may testify debtor appeared to be satisfied, but not as to latter's understanding concerning his remaining indebtedness. Id. Plaintiff is not concluded because bills of particulars filed by him do not agree, nor because his claims are inconsistent with receipts given. These are all for jury. A bill of particulars may be used in testifying of sum due. Snyder *v.* Patton, 143 Mich. 350, 106 N. W. 1106. It may be shown by parol that credit was extended to another than defendant. S. *v.* Elmore, 68 S. C. 140, 46 S. E. 939.

Proof that plaintiff demanded money of defendant is irrelevant in action to recover for three items unless it is shown on account of which item demand made. Ehrman *v.* Whelan (Miss.), 40 S. 430.

177-82 Seal L. Co. *v.* Co., 98 Ill. App. 637.

178-84 Hale *v.* Hale, 14 S. D. 644, 86 N. W. 650.

178-86 Mattingly *v.* Shortell, 27 Ky. L. R. 426, 85 S. W. 215; Voight *v.* Brooks, 19 Mont. 374, 48 P. 549; Noyes *v.* Young, 32 Mont. 226, 79 P. 1063.

179-88 A note, though competent (Gross *v.* Jones, 89 Miss. 44, 42 S. 802), is only prima facie evidence of account stated. Kneeland *v.* Pennell, 49 Misc. 94, 96 N. Y. S. 403.

180-92 McCormick *v.* St. Louis, 166 Mo. 315, 65 S. W. 1038.

180-94 Amount for which judgment taken may be strong evidence account had been rendered. Burritt *v.* Villenuve, 92 Mich. 282, 52 N. W. 614.

180-95 Noyes *v.* Young, 32 Mont. 226, 79 P. 1063; Peters' Estate, 20 Pa. Super. 223.

Admissions to third parties.—Adam Rock G. Co. *v.* Hotel Monticello (Mo.), 166 S. W. 1125.

181-96 Smith *v.* Allen, 7 Ala. App. 397, 62 S. 296.

181-97 Moore *v.* Holdoway, 138 Ala. 448, 35 S. 453.

Evidence showing sale of property at agreed price, payable at a stated time or presently, tends to show existence of account stated. Moore *v.* Crosthwait, 135 Ala. 272, 33 S. 28.

181-98 McLellan Co. *v.* Land Co. (Cal.), 137 P. 1145; Deakins *v.* Herz, 142 N. Y. S. 466; Baker *v.* Griffin, 86 N. Y. S. 579.

181-99 Payment may be shown. Wonderly *v.* Christian, 91 Mo. App. 158; Baker *v.* Griffin, 86 N. Y. S. 579.

Indebtedness outside account cannot be shown. Uhlhorn *v.* Hovey, 49 Misc. 638, 97 N. Y. S. 1040.

181-3 Sturgeon *v.* Wightman, 32 Wash. 195, 72 P. 1045.

182-4 First Nat. Bk. *v.* Peck (Ind.), 103 N. E. 643; Zucchi Mfg. Co. *v.* Herbert, 127 N. Y. S. 961; Mattingly *v.* Shortell, 27 Ky. L. R. 426, 85 S. W. 215; Pavero *v.* Howard, 47 Misc. 347, 93 N. Y. S. 1115.

Burden of showing assent to account bound others than he who gave it is on plaintiff. Clark *v.* Hoffman, 128 Ill. App. 422.

182-5 Rosenbaum *v.* McEwen, 24 Colo. App. 58, 131 P. 780; Poppell *v.* Culpepper, 56 Fla. 515, 47 S. 351; Withers *v.* Sandlin, 44 Fla. 253, 32 S. 829; Jones *v.* Research Extension, 157 Ill. App. 132; Poppers *v.* Schoenfeld, 97 Ill. App. 477; Peeples *v.* Yates, 88 Miss. 289, 40 S. 996; Wonderly *v.* Christian, 91 Mo. App. 158; Kenneth I. Co. *v.* Bk., 96 Mo. App. 125, 70 S. W. 173; Johnson *v.* Co., 38 Mont. 83, 98 P. 883; Doubleday *v.* Shumaker, 60 Misc. 227, 113 N. Y. S. 83; Brown *v.* Bk., 109 Va. 530, 64 S. E. 950; Harman *v.* Maddy Bros., 57 W. Va. 66, 49 S. E. 1009.

Under statute making a written instrument presumptive evidence of a consideration and placing burden upon attacking party, account stated proves itself, and, in absence of fraud or mistake, which must be specially pleaded, is conclusive. Noyes *v.* Young, 32 Mont. 226, 79 P. 1063. And so in absence of such statute. Brown & M. Co. *v.* Gise, 14 N. M. 282, 91 P. 716.

182-6 Daytona B. Co. *v.* Bond, 47 Fla. 136, 36 S. 445; Kenneth I. Co. *v.* Bk., 96 Mo. App. 125, 70 S. W. 173; Farry *v.* Bk. (N. J. Eq.), 58 A. 305; Frothingham *v.* Satterlee, 70 App. Div. 613, 75 N. Y. S. 21.

If evidence shows mistake resulted in injury to plaintiff and in unearned profit to defendant, and latter has not so changed his situation with reference to subject-matter that he will be injured by correction of mistake, correction will be made. Union, etc. Co. *v.* Co., 122 Mo. App. 631, 99 S. W. 804.

182-7 Loewer *v.* Mill Co. (Ark.), 161 S. W. 1042; Naylor *v.* R. Co., 14 Ida. 789, 96 P. 573; Johnson *v.* Co., 38 Mont. 83, 98 P. 883; Rudolph Wurlitzer Co. *v.* Dickinson, 153 Ill. App. 36; judg. *aff.*, 247 Ill. 27, 93 N. E. 132; Des Jardins *v.* Hotchkin, 142 App. Div. 845, 127 N. Y. S. 504; Little *v.* McClain, 134 App. Div. 197, 118 N. Y. S. 916; Barlow *v.* Platt, 133 App. Div. 364, 117 N. Y. S. 235; Boyce *v.* Walker, 130 App. Div. 305, 114 N. Y. S. 166; Greenhalgh Co. *v.* Bk., 226 Pa. 184, 75 A. 260; Guhl *v.* Frank, 22 Pa. Super. 531; Chapman *v.* Co., 57 W. Va. 395, 50 S. E. 601.

In the absence of averments sufficient to surcharge and falsify an account stated no evidence is admissible except to show there had been no dealings between the parties, or consent had not been given to settlement. Columbia B. Co. *v.* Berney, 90 Mo. App. 96.

The quantum of proof necessary to set aside an account stated will depend upon circumstances. Chapman *v.* Co., 57 W. Va. 395, 50 S. E. 601.

Receipt as evidence.—If the only testimony given is by the parties and is in direct conflict a receipt cannot be given such effect as to turn the scale in favor of its holder. Devenceuzi *v.* Cassinelli, 28 Nev. 222, 81 P. 41.

183-9 McLellan Co. *v.* Land Co. (Cal.), 137 P. 1145.

184-11 When account stated and a balance struck and agreed upon the cause of action must be proved as alleged, unless pleadings are amended. Mattingly *v.* Shortell, 27 Ky. L. R. 426, 85 S. W. 215. Plaintiff cannot recover by proving items of account. Mincer *v.* Green, 47 Misc. 374, 94 N. Y. S. 15; Martin *v.* Heinze, 31 Mont. 68, 77 P. 427.

Proof of account will not sustain a recovery for a demand clearly shown to be unfounded. Withers *v.* Sandlin, 44 Fla. 253, 32 S. 829.

184-13 Johnson *v.* Berdo, 131 Ia. 524, 106 N. W. 609.

Payment on account stated does not deprive it of its antecedent effect. Pollack *v.* Gunter, 162 Ala. 317, 50 S. 155.

ACKNOWLEDGMENTS

186-2 Smith *v.* Allen (Wash.), 138 P. 683; Forrester *v.* Transfer Co., 59 Wash. 86, 109 P. 312.

187-4 LeMesnager *v.* Hamilton, 101 Cal. 532, 35 P. 1054, 40 Am. St. 81; Langenbeck *v.* Louis, 140 Cal. 406, 73 P. 1086; Ford *v.* Ford, 27 App. D. C. 411; Long *v.* Powell, 120 Ga. 621, 48 S. E. 185; First Nat. Bk. *v.* Glenn, 10 Ida. 224, 77 P. 623; Ewing *v.* Janion, 1 Haw. 134; In re Porter, 1 Haw. 297; Hawaiian T. & I. Co. *v.* Barton, 16 Haw. 294; Prewitt *v.* Morgan (Ky.), 119 S. W. 174; Burk *v.* Pence, 206 Mo. 315, 104 S. W. 23; Uvalde *v.* New York, 99 App. Div. 327, 91 N. Y. S. 131; Washburn L. Co. *v.* Swanby, 131 Wis. 1, 110 N. W. 806.

Under our statute (section 2820, R. S. 1909), and the case law of this state, the certificate of acknowledgment is not conclusive proof of the facts re-

cited therein. Albright *v.* Stevenson, 227 Mo. 333, 340, 126 S. W. 1027, and cases cited therein. The certificate can be rebutted by evidence showing a different state of facts from those recited in the certificate. The case law only differs upon the quantum of proof required. In this state some of the cases require the proof to be "clear, cogent and convincing," and others say that it must be made by "a clear and decided preponderance of evidence," and still others say that such proof should be "clear and satisfactory." In some other states the proof must be such as to remove all reasonable doubt as to the falsity of the officer's certificate. Suffice it to say that our rule is not so broad. We have to consider the statute in fixing the rule as to the quantum and character of proof. In other words, before we will hold for naught the certificate of acknowledgment, the proof must be clear, cogent and convincing. Fifer *v.* McCarty, 243 Mo. 42, 147 S. W. 833.

Effect of irregularity.—Certificate should not be impeached because officer performed duty irregularly. Boldt *v.* Becker, 1 Neb. (Unof.) 75, 95 N. W. 509; Council Bluffs Bk. *v.* Smith, 59 Neb. 90, 80 N. W. 270, 80 Am. St. 669; Morris *v.* Linton, 61 Neb. 537, 85 N. W. 565; Ronner *v.* Welcker, 99 Tenn. 623, 42 S. W. 439; Brand *v.* Co., 30 Tex. Civ. 458, 70 S. W. 578.

Certificate equivalent to testimony. Albany Co. Bk. *v.* McCarty, 149 N. Y. 71, 43 N. E. 427; Bennett *v.* Edgar, 46 Misc. 231, 93 N. Y. S. 203.

Certificate is not effective as to papers not required to be acknowledged. Rutherford *v.* Rutherford, 55 W. Va. 56, 47 S. E. 240.

187-5 Martin *v.* Evans, 163 Ala. 657, 50 S. 997; Holland *v.* Webster, 43 Fla. 85, 29 S. 625; Everman *v.* Everman (Ky.), 122 S. W. 135; Veit *v.* Schwob, 127 App. Div. 171, 111 N. Y. S. 286; Patnode *v.* Deschenes, 15 N. D. 100, 106 N. W. 573; McCardia *v.* Billings, 10 N. D. 373, 87 N. W. 1008, 88 Am. St. 729; Kennedy *v.* Assn. (Tenn Ch. App.), 57 S. W. 388; Bryant *v.* Grand Lodge (Tex. Civ.), 152 S. W. 714.

Conclusive as to date of acknowledgment. Weisiger *v.* Mills, 28 Ky. L. R. 1208, 91 S. W. 689. "That the magistrate's certificate, when made in the form required by the statute, and duly recorded, is conclusive evidence that he has performed his duty, has not been directly adjudged by this court; but the course of its decisions has tended to this conclusion." Hitz *v.* Jenks, 123 U. S. 297.

188-6 Cook *v.* Bartlett, 179 Mass. 576, 61 N. E. 266.

A defective acknowledgment may be cured by a reacknowledgment, which, except as to third persons, may be proof of execution of instrument as of time of original delivery. Simmons *v.* Hewitt (Tex. Civ.), 87 S. W. 188; Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484.

Official character.—Signature to acknowledgment was followed thus: "Notary Public W. C. S. T." Held, that official character of officer was shown thereby in connection with caption of deed, and that acknowledgment was taken and certificate made in Walker county, Texas. Williams *v.* Cessna, 43 Tex. Civ. 315, 95 S. W. 1106.

Certificate of a United States consul to signature and seal of a foreign officer who certified acknowledgment, and the seal of such officer to his capacity and authority to make same, prove themselves under statute. Werner *v.* Marx, 113 La. 1002, 37 S. 905.

188-7 Swett *v.* Large, 122 Ia. 267, 97 N. W. 1104.

188-8 Russell *v.* Holman, 156 Ala. 432, 47 S. 205; People's G. Co. *v.* Fletcher, 81 Kan. 76, 105 P. 34; Burk *v.* Pence, 206 Mo. 315, 104 S. W. 23; Uvalde A. P. Co. *v.* New York, 99 App. Div. 327, 91 N. Y. S. 131; Hallohan *v.* Rempe, 120 N. Y. S. 901; Swiger *v.* Swiger, 58 W. Va. 119, 52 S. E. 23.

Not conclusive in favor of bona fide purchaser who relied upon acknowledgment. Smith *v.* Markland, 223 Pa. 605, 72 A. 1047.

189-9 Knowledge of character of instrument on part of persons executing it presumed from certificate. In re Adriaans, 28 App. Cas. (D. C.) 515.

189-10 Walker *v.* Shepard, 210 Ill. 100, 71 N. E. 422; Jackson *v.* Schoonmaker, 4 Johns. (N. Y.) 161. *Contra.* Russell *v.* Holman, 156 Ala. 432, 47 S. 205; Touart *v.* Rickert, 163 Ala. 362, 50 S. 896.

189-11 Burk *v.* Pence, 206 Mo. 315, 104 S. W. 23.

Delivery not presumed from facts of

acknowledgment and privy examination of grantor's wife. Tarlton *v.* Griggs, 131 N. C. 216, 42 S. E. 591.

190-14 Ewing *v.* Janion, 1 Haw. 134; In re Porter, 1 Haw. 297.

No presumption of identity of notary and attorney of claimant of same name. Buhler *v.* Hysell, 37 Okla. 392, 132 P. 140. See the title "Identity."

Presumption arises from lapse of time if many conveyances have been based on the deed. Hudson *v.* Webber, 104 Me. 429, 72 A. 184.

Officer of another state, not recognized by statutes of forum as authorized to take acknowledgments, will not, in the absence of official seal or other evidence of authority, be presumed to be authorized to do so. Hayes *v.* Banks, 132 Ala. 354, 31 S. 464. Presumed recorded mortgage acknowledged. In re Pirie, 133 App. Div. 431, 117 N. Y. S. 753.

Exception made if officer is real grantee in deed and fraud is charged; presumption is dormant until rightfulness of transaction shown. Albright *v.* Stevenson, 227 Mo. 333, 126 S. W. 1027.

191-16 Lucas *v.* Boyd, 156 Ala. 427, 47 S. 209; Beaty *v.* Sears, 132 Ga. 516, 64 S. E. 321.

193-22 Due acknowledgment may be shown by parol. Williams *v.* Butterfield, 214 Mo. 412, 114 S. W. 13.

193-23 Character of officer who took acknowledgment not a subject for evidence on issue of forgery. West *v.* Co., 136 Fed. 343, 69 C. C. A. 169.

194-26 It may be shown acknowledgment was taken in state in which officer resided, though venue laid in another state. Rogers *v.* Pell, 47 App. Div. 240, 62 N. Y. S. 92.

195-29 Mosier *v.* Momsen, 13 Okla. 41, 74 P. 905.

196-31 If the names of two grantors are used in body of deed and acknowledgment uses the word "he," it cannot be shown by parol that both acknowledge its execution. Hughes *v.* Wright (Tex. Civ.), 97 S. W. 525.

If certificate fails to express fact that execution of instrument was acknowledged, defect cannot be cured by parol. Lalakea *v.* Co., 15 Haw. 570; Solt *v.* Anderson, 71 Neb. 826, 99 N. W. 678.

197-33 If there are two certificates of same date concerning same matter, any indefiniteness in one may be aided by explicit statement in the other. Rogers *v.* Pell, 47 App. Div. 240, 62 N. Y. S. 92.

197-34 Officer who took acknowledgment may testify to fact, though he was agent of grantor, or acknowledgment was defective for other reasons. Linton *v.* Ins. Co., 104 Fed. 584, 44 C. C. A. 54; First Nat. Bk. *v.* Glenn, 10 Ida. 224, 77 P. 623; Brooks *v.* Hunt, 26 Ky. L. R. 608, 82 S. W. 296; Interstate B. Assn. *v.* Goforth, 94 Tex. 259, 59 S. W. 871; Cassidy *v.* Co., 27 Tex. Civ. 211, 64 S. W. 1023.

Execution.—Prima facie effect of certificate as to execution and delivery may be fortified by parol. Burk *v.* Pence, 206 Mo. 315, 104 S. W. 23.

197-35 Russell *v.* Holman, 156 Ala. 432, 47 S. 205; Currier *v.* Clark, 145 Ia. 613, 124 N. W. 622; Swett *v.* Large, 122 Ia. 267, 97 N. W. 1104; Metropolitan L. Co. *v.* McColeman, 140 Mich. 333, 103 N. W. 809; Benedict *v.* Jones, 129 N. C. 470, 40 S. E. 221; Ronner *v.* Welcker, 99 Tenn. 623, 42 S. W. 439; Adams *v.* Smith, 11 Wyo. 200, 70 P. 1043.

The certificate should not be overthrown upon evidence of a doubtful nature, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance, but only upon proof so clear and convincing as to amount to a moral certainty. Duncan *v.* Duncan, 203 Ill. 461, 67 N. E. 763; Ross *v.* Harney, 139 Ill. App. 513; Elliott *v.* Sheppard, 179 Mo. 382, 78 S. W. 627; Banking House *v.* Stewart, 70 Neb. 815, 98 N. W. 34; Davis *v.* Kelly, 62 Neb. 642, 87 N. W. 347; Albany Co. Bk. *v.* McCarty, 149 N. Y. 71, 43 N. E. 427; Bennett *v.* Edgar, 46 Misc. 231, 93 N. Y. S. 203. See infra, 202-41, 206-54.

198-36 Babbitt *v.* Bk., 50 Colo. 258, 108 P. 1003; Hilsmeyer *v.* Blake, 34 Okla. 477, 125 P. 1129.

198-37 Aultman-T. Co. *v.* Frasure, 95 Ky. 429, 26 S. W. 5; Gustine *v.* Westenberger, 224 Pa. 455, 73 A. 913.

198-38 Freeman *v.* Blount, 172 Ala. 655, 55 S. 293; Orendorff *v.* Suit, 167 Ala. 563, 52 S. 744; Langenbeck *v.* Louis, 140 Cal. 406, 73 P. 1086; Ford *v.* Ford, 27 App. Cas. (D. C.) 401; Kosturska *v.* Bartkiewicz, 241 Ill. 604, 89 N. E. 657 (grantor's unsupported testimony insufficient); Mahan *v.* Schroeder, 142 Ill. App. 538; Johnston *v.* Linder (Ia.), 143 N. W. 410; Davis *v.* Kelly, 62 Neb. 642, 87 N. W. 347;

McGuire *v.* Wilson, 5 Neb. (Unof.) 540, 99 N. W. 244; Banking House *v.* Stewart, 70 Neb. 815, 98 N. W. 34; Hallohan *v.* Rempe, 120 N. Y. S. 901; Benedict *v.* Jones, 129 N. C. 470, 40 S. E. 221; Western L. & S. Co. *v.* Waisman, 32 Wash. 644, 73 P. 703.

Quantum of proof.—The proof must be of the clearest, strongest and most convincing character, and come from disinterested witnesses. Gritten *v.* Dickerson, 202 Ill. 372, 66 N. E. 1090; Dickerson *v.* Gritten, 103 Ill. App. 351. It must be clear, convincing and satisfactory. Goulet *v.* Dubreuille, 84 Minn. 72, 86 N. W. 779; Patnode *v.* Deschenes, 15 N. D. 100, 106 N. W. 573; Feagles *v.* Tanner, 20 Ohio C. C. 86 (excluding every reasonable doubt); Adams *v.* Smith, 11 Wyo. 200, 70 P. 1043. Unsupported testimony of interested witness will not usually overcome presumption in favor of certificate. McCardia *v.* Billings, 10 N. D. 373, 87 N. W. 1008, 88 Am. St. 729; Adams *v.* Smith, supra. Clear and convincing beyond a reasonable doubt. Hill *v.* Coal Land Co., 70 W. Va. 221, 73 S. E. 718. Less convincing proof will suffice to prove forgery where a recorded copy is introduced instead of the original deed. Vesey *v.* Solberg, 27 S. D. 618, 132 N. W. 254.

199-39 Long *v.* Branham, 30 Ky. L. R. 552, 99 S. W. 271; Ronner *v.* Welcker, 99 Tenn. 623, 42 S. W. 439.

202-41 Bouvier-Iaeger Coal Land Co. *v.* Sypher, 186 Fed. 644; Alford *v.* Doe, 156 Ala. 438, 47 S. 230; Meyer *v.* Gossett, 38 Ark. 377; LeMesnager *v.* Hamilton, 101 Cal. 532, 35 P. 1054; Borland *v.* Walrath, 33 Ia. 130; People's G. Co. *v.* Fletcher, 81 Kan. 76, 105 P. 34 (parties who deny execution may impeach certificate by their testimony); Nicholson *v.* Snyder, 97 Md. 415, 55 A. 484; Benedict *v.* Jones, 129 N. C. 470, 40 S. E. 221; Pickens *v.* Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. 622.

Where wife acknowledged deed through telephone, and it was delivered, with apparently proper acknowledgment to grantee, who had no notice of manner in which acknowledgment made, certificate was conclusive. Banning *v.* Banning, 80 Cal. 271, 22 P. 210, 13 Am. St. 156.

202-42 First Nat. Bk. *v.* Glenn, 10 Ida. 224, 77 P. 623; Nicholson *v.* Snyder, 97 Md. 415, 55 A. 484.

203-43 Heaton *v.* Bk., 59 Kan. 281, 52 P. 876; Partridge *v.* Partridge, 220 Mo. 321, 119 S. W. 415 (to show mistake in description); Ronner *v.* Welcker, 99 Tenn. 623, 42 S. W. 439; Winn *v.* Itzel, 125 Wis. 19, 103 N. W. 220.

In absence of a satisfactory explanation by officer, showing that certificate, through mistake, was honestly made, his testimony impeaching it is entitled to but little weight. Winn *v.* Itzel, 125 Wis. 19, 103 N. W. 220.

203-44 Huston *v.* Smith, 248 Ill. 396, 94 N. E. 63; Drew *v.* Bouffleur, 69 Wash. 610, 125 P. 947; Hill *v.* Coal Land Co., 70 W. Va. 221, 73 S. E. 718.

Grantor's testimony must be supported by conclusive proof which excludes all reasonable doubts. Bowes Inv. Co. *v.* Steinlauf, 174 Ill. App. 581.

203-45 Lack of jurisdiction may be shown by parol. Russell *v.* Holman, 156 Ala. 432, 47 S. 205.

204-46 Wife cannot impeach certificate in collateral action because husband present when she executed conveyance or acknowledgment was taken in a different county from that stated. Harpending *v.* Wylie, 14 Bush (Ky.) 380.

204-48 Tinkham *v.* Wright (Tex. Civ. App.), 163 S. W. 615.

204-50 Adams *v.* Smith, 11 Wyo. 200, 70 P. 1043.

205-51 Examination of wife.—If the certificate is silent as to examination of a married woman it may be shown such examination was not had. Adams *v.* Smith, 11 Wyo. 200, 70 P. 1043.

Under a Texas statute a defective acknowledgment by a wife may be aided by parol proof showing she did in fact properly acknowledge it; such proof may be made to support a plea of the statute, but not to show title. Veeder *v.* Gilmer, 47 Tex. Civ. 464, 105 S. W. 331 (Tex. Civ.), 120 S. W. 584.

205-52 If a deed is lost fact officer explained it to the wife and took her acknowledgment may be shown by circumstantial evidence. Simpson *v.* Edens, 14 Tex. Civ. 235, 38 S. W. 474; Daniels *v.* Creekmore, 7 Tex. Civ. 573, 27 S. W. 148. After lapse of a long period proof need not go to details of execution of the deed. Texas L. & C. Co. *v.* Walker, 47 Tex. Civ. 543, 105 S. W. 545.

206-53 Mather *v.* Jarel, 33 Fed. 366; Western L. & S. Co. *v.* Waisman, 32 Wash. 644, 73 P. 703. See Alford *v.* Doe, 156 Ala. 438, 47 S. 230; Gribben *v.* Clement, 141 Ia. 144, 119 N. W. 596.

Parol evidence is inadmissible to impeach in the absence of fraud or duress. Parrish *v.* Russell, 172 Ala. 1, 55 S. 140.

206-54 People's G. Co. *v.* Fletcher, 81 Kan. 76, 105 P. 34.

Acknowledgment as wife may show she was not wife. Dunn *v.* Taylor (Tex. Civ.), 143 S. W. 311.

Husband's testimony is competent to show wife not examined and did not acknowledge execution of deed. Chattanooga Assn. *v.* Vaught, 143 Ala. 389, 39 S. 215.

Insufficiency of testimony.—The husband's testimony, based only on his recollection his wife was not present when he signed the deed, and that of two interested witnesses that signature did not resemble her writing, is not sufficient to overcome notary's certificate. Sassenberg *v.* Huseman, 182 Ill. 341, 55 N. E. 346; Gritten *v.* Dickerson, 202 Ill. 372, 66 N. E. 1090.

ADJOINING LAND OWNERS

Presumption as to boundary, 209-3; *Rule as to notice of excavation applicable to municipalities,* 210-7; *Presumption that consequences of excavating were foreseen,* 212-15; *Competency of evidence to show malice in erecting structure,* 212-15; *Proof of damage,* 212-15; *Proof of intent as to depth of excavation,* 213-18; *Evidence of damage to party wall,* 215-27; *Evidence of special damage,* 215-27; *Evidence in action for contribution for building party wall,* 218-40.

For matters of procedure, see 1 STANDARD PROC., 316-334.

209-2 For a statement of the extent of the right, and a treatment of the injured party's right of action and of his pleadings, see 1 STANDARD PROC., 318-322.

209-3 It is presumed a party wall located by agreement is on boundary line, and presumption is strengthened after its location has been settled by litigation. Capital City Inv. Co. *v.* Burnham, 143 Ia. 134, 121 N. W. 708. Silence of owner of adjoining property when wall erected raises presumption it was on correct line. Webster *v.* Temple, 141 Ia. 325, 117 N. W. 665.

Every wall of separation between buildings is presumed to be a common or party wall, if contrary not shown. Bellenot *v.* Laube, 104 Va. 842, 52 S. E. 698.

209-4 Lexington etc. R. Co. *v.* Baker, 156 Ky. 431, 161 S. W. 228; Cooper *v.* Supply Co., 231 Pa. 557, 80 A. 1047. But see Stancourt Laundry Co. *v.* Lamura, 147 N. Y. S. 895.

New.—Burden of proving license from former owner of plaintiff's land is on defendant. Milton *v.* Puffer, 207 Mass. 416, 93 N. E. 634.

Negligence need not be shown under building code of New York City. Post *v.* Kerwin, 133 App. Div. 404, 117 N. Y. S. 761. It is not presumed from infliction of damage. Serio *v.* Murphy, 99 Md. 545, 58 A. 435.

Burden is on party alleging prescriptive right to lateral support for land improved with buildings. Ceffarelli *v.* Landino, 82 Conn. 126, 72 A. 564.

210-6 Elston *v.* McGlauflin (Wash.), 140 P. 396.

210-7 Rule as to notice of excavation applicable to municipalities. Gerst *v.* St. Louis, 185 Mo. 191, 84 S. W. 34; Stearns *v.* Richmond, 88 Va. 992, 14 S. E. 847, 29 Am. St. 578.

210-8 Serio *v.* Murphy, 99 Md. 545, 58 A. 435; Carpenter *v.* Co., 103 Mo. App. 480, 77 S. W. 1004.

State of weather when excavation made is relevant. Walker *v.* Strosnider, 67 W. Va. 39, 67 S. E. 1087.

211-9 Carpenter *v.* Co., 103 Mo. App. 480, 77 S. W. 1004; Hannicker *v.* Lepper, 20 S. D. 371, 107 N. W. 202, 6 L. R. A. (N. S.) 243; Walker *v.* Strosnider, 67 W. Va. 39, 67 S. E. 1087.

Leaving excavation without foundation walls. Hannicker *v.* Lepper, 20 S. D. 371, 107 N. W. 202, 6 L. R. A. (N. S.) 243; Garvy *v.* Coughlan, 92 Ill. App. 582.

Negligence immaterial when land in natural condition. Schmoe *v.* Cotton, 167 Ind. 364, 79 N. E. 184; Farnandis *v.* R. Co., 41 Wash. 486, 84 P. 18.

In condemnation proceedings negligence is immaterial where lateral support is removed and there is liability for damage to property not taken. Fyfe *v.* Turtle Creek, 22 Pa. Super. 292; Farnandis *v.* R. Co., 41 Wash. 486, 84 P. 18.

211-10 Zilka *v.* Graham (Ida.), 141 P. 639; Flanagan *v.* Levine, 142 Mo. App. 242, 125 S. W. 1172. See Walker *v.* Strosnider, 67 W. Va. 39, 67 S. E. 1087.

Change to other method of excavation without notice. Cooper *v.* Concrete C. & S. Co., 53 Pa. Super. 141.

212-15 It is presumed consequences of leaving open excavation adjoining building were foreseen; proof that it was so left wilfully or maliciously is not necessary. Garvy *v.* Coughlan, 92 Ill. App. 582.

Evidence to show malice in erecting structure.—Under a statute providing that the erection of any structure on one's own land, which impairs the value of adjacent land, shall create a liability to pay the damage thus caused, when the structure is maliciously erected and with intent thereby to injure adjacent owner, proof that value of adjacent land is impaired by the structure, that it serves and was not erected to serve any purpose in the use and enjoyment of plaintiff's land, and that it is of a description, location and surroundings indicative of a controlling purpose to injure plaintiff, sufficiently shows that it was maliciously erected within the statute. Whitlock *v.* Uhle, 75 Conn. 423, 53 A. 891.

Proof of damage.—Condition of land may be shown by a map after removal of support; extent of the damage may be shown by opinions of witnesses based on market value of property. Ruppert *v.* R. Co., 25 Pa. Super. 613.

213-17 Failure to give notice is not excused because adjoining owner knew of proposed excavation, but did not know it was to extend below foundation of his building. Davis *v.* Summerfield, 131 N. C. 352, 42 S. E. 818.

Actual knowledge precludes recovery for personal injury. Pullan *v.* Stallman, 70 N. J. L. 10, 56 A. 116.

213-18 Intent to excavate more than a certain depth may be shown by evidence that excavator applied to adjoining landowner for license to enter upon his premises, as required by municipal building code. Blanchard *v.* Savarese, 97 App. Div. 58, 89 N. Y. S. 664.

213-20 A contract between defendant and one who was doing the excavating is not admissible. Kopp *v.* R. Co., 41 Minn. 310, 43 N. W. 73.

214-23 Brent *v.* Baldwin, 160 Ala. 635, 49 S. 343; Bissell *v.* Ford, 176 Mich. 64, 141 N. W. 860.

214-24 Opinions as to cause of fall of building, admissible. Walker *v.* Strosnider, 67 W. Va. 39, 67 S. E. 1087.

215-27 Evidence as to the cost of a retaining wall may be received to show damage done, and also evidence as to value of lot before and after excavation and resulting injury. Kopp *v.* R. Co., 41 Minn. 310, 43 N. W. 73. Qualified witnesses may give opinions of such value. Schmoe *v.* Cotton, 167 Ind. 364, 79 N. E. 184. It is competent to show use to which affected land put. Farnandis *v.* R. Co., 41 Wash. 480, 84 P. 18. Evidence of the cost of reconstructing a retaining wall must be limited to conditions existing when it fell. Jones *v.* Greenfield, 25 Pa. Super. 315.

Evidence of special damage.—Where there has been improper interference with a party wall plaintiff may give evidence of special damage sustained to his stock by dust and dirt, necessitating its removal and creating loss by deterioration, and show that, by other means, the use of his building was interfered with. Swisher *v.* Sipps, 19 Pa. Super. 43.

216-31 Transp. Co. *v.* Chicago, 99 U. S. 635; Moellering *v.* Evans, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449; Gilmore *v.* Driscoll, 122 Mass. 199; Matulys *v.* Co., 201 Pa. 70, 50 A. 823; Fyfe *v.* Turtle Creek, 22 Pa. Super. 292. See Gillies *v.* Eckerson, 97 App. Div. 153, 89 N. Y. S. 609.

Increase in lateral pressure must be shown though buildings on land. Riley *v.* Co., 110 App. Div. 787, 97 N. Y. S. 283.

217-35 Riley *v.* Co., 110 App. Div. 787, 97 N. Y. S. 283. Parol proof is competent to show consent was given as part of consideration for conveyance of land affected. Payne *v.* Moore, 31 Ind. App. 360, 66 N. E. 483, 67 N. E. 1005.

217-37 Consent to removal of a roof in order that a party wall might be raised bars right to recover for damage to building, in absence of negligence. Riiff *v.* Garvey, 74 Neb. 522, 104 N. W. 1143.

218-39 Griffin *v.* Sansom, 31 Tex. Civ. 560, 72 S. W. 864.

218-40 See Bright *v.* Bacon, 131 Ky. 848, 116 S. W. 268.

The contract made for building a wall is evidence in action for contribution. If parties stipulated that expense shall be fixed by a designated person the party attacking his estimate has burden of proof. Watkins *v.* Glas, 5 Cal. App. 68, 89 P. 840.

Plans for buildings, admissible to show which party was to build wall. Ida Grove City *v.* Co., 146 Ia. 690, 125 N. W. 866.

No presumption owner of adjacent lot who used party wall paid his proportion of price to purchaser's vendor. Sandberg *v.* Rowland, 51 Wash. 7, 97 P. 1087.

ADMIRALTY

Breach of charter—mitigation of damages, 252-41; *Collision of anchored vessels,* 261-31; *Presumption as to signal,* 265-69; *How seaworthiness determined,* 267-95; *Breaking of refrigerating apparatus,* 267-9; *Failure to produce testimony,* 267-9; *Customs and usages as affecting stowage,* 268-18; *Evidence to show deficiency of freight,* 272-40; *Liability for supplies,* 334-14; *Effect of experiments,* 338-39; *Cost of repairs,* 338-39.

For a full historical and technical treatment of admiralty courts and jurisdiction, see 1 STANDARD PROC., 350-407.

227-1 For an exhaustive treatment of admiralty procedure, see 1 STANDARD PROC., 408-580.

228-15 Except as it has been adopted by statute the general maritime law is not the law of the United States. The Sacramento, 131 Fed. 373.

229-21 As between parties or ships of different nationalities cases arising on the high seas, not within jurisdiction of any nation, will be determined by law of forum. Pouppirt *v.* Co., 122 Fed. 983.

230-28 Hearsay testimony not given probative force, although it was first objected to when exceptions filed to report of commissioner. The Anson M. Bangs, 129 Fed. 103, 63 C. C. A. 605.

244-57 Palmer *v.* Co., 154 Fed. 683.

244-59 Barber *v.* Lockwood, 134 Fed. 985.

Technical inaccuracies, except under peremptory circumstances, not regarded. The Metamora, 144 Fed. 936, 75 C. C. A. 576.

Pleading and proof.—If the facts are set out and pleadings meet actual issues it is immaterial that breach of a charter which was not binding is counted upon. Keyser *v.* Jurvelius, 122 Fed. 218, 58 C. C. A. 664. It is too late to secure consideration of other grounds of fault than those alleged in a collision case after it has been heard on other issues. The Werdenfels, 150 Fed. 400.

245 As to amendments generally, see 1 STANDARD PROC., 471, *et seq.*

245-65 If the essential facts are alleged the failure to interpret them properly or to give the scientific reason for their result will not be regarded as a material variance. Kelley Isl. L. & T. Co. *v.* Cleveland, 144 Fed. 207.

245-69 Amendment is proper to correct the estimate of value stated if it does not involve introduction of new facts or change cause of action (The Minnetonka, 146 Fed. 509, 77 C. C. A. 217); and to set up a claim for loss because of cancellation of charter party under which ship was proceeding when stranded. Harrison *v.* Hughes, 119 Fed. 997. A libel against a vessel and its owner may be amended so as to make proceeding one in rem. The San Rafael, 141 Fed. 270, 72 C. C. A. 388. Allegation of negligence may be made specific as to details. The Saranac, 132 Fed. 936. Amendments may be made at any stage of the trial. Palmer *v.* Co., 154 Fed. 683; Kelley Isl. L. & T. Co. *v.* Cleveland, supra; La Bourgogne, 144 Fed. 781, 75 C. C. A. 647.

246-75 Amendment converting action from a proceeding in rem to one in personam not allowed in absence of a general appearance or service of a monition. The Lowlands, 147 Fed. 986.

247-83 A new defense cannot be set up by amendment after evidence is all in, facts sought to be pleaded having been known to party when he answered (Brennan *v.* Hagan, 147 Fed. 290); nor can a special defense be set up after its merits have been thrice passed upon and case remanded for trial on another issue. Burrill *v.* Crossman, 111 Fed. 192.

247-90 Verified pleadings may discredit testimony of party responsible

for them, and will be considered in ascertaining facts in a collision case. The Richmond, 143 Fed. 996.

248-99 If a libel states a cause of action and issue is raised thereon, it is not proper, under admiralty rule fifty-one, to grant a summary motion on the pleadings to vacate an attachment because there is no replication. The Celtic Monarch, 138 Fed. 711, 71 C. C. A. 127.

249-3 Answer admitting an allegation in a libel suit does not preclude libelant from proving fact was otherwise, admission not being sustained by evidence. The Volunteer, 149 Fed. 723, 79 C. C. A. 429.

249-6 Bock *v.* Co., 124 Fed. 711. See 1 STANDARD PROC., 465, *et seq.*

Interrogatories may be attached to a libel against a corporation for answer by officer thereof who is named; they may not only call for information as to his personal knowledge but for answers according to his information—that received in his official capacity. Bock *v.* Co., 124 Fed. 711.

A verification which contains all that is essential will be sustained though not strictly in the usual form. In re Knickerbocker S. Co., 139 Fed. 713.

Unanswered interrogatories. — Judgment should not be given plaintiff on the pleadings if they raise an issue and interrogatories in answer are not responded to. The Oregon, 116 Fed. 482, 53 C. C. A. 650.

Refusal to answer.—A party may refuse to answer interrogatories which will expose him to punishment or forfeiture; but his objection must be explicit. In re Knickerbocker S. Co., 139 Fed. 713.

249-8 Answers as evidence for both parties. See discussion in Bock *v.* Co., 124 Fed. 711.

252-41 A charterer who has broken his contract must show vessel could, with reasonable diligence, have reduced or prevented damage sustained thereby. Cornwall *v.* Moore, 132 Fed. 868.

256-86 Ely *v.* Murray & T. Co., 200 Fed. 368, 118 C. C. A. 520; The Wyandotte, 145 Fed. 321, 75 C. C. A. 117.

The general presumption in favor of the master's authority prevails though vessel chartered, whether this was known to persons who furnished supplies or not. The Surprise, 129 Fed. 873, 64 C. C. A. 309. But if supplies are furnished charterer at his residence, it is presumed credit was given him. The Valencia, 165 U. S. 264; Alaska, etc. Co. *v.* Chamberlain, 116 Fed. 600, 54 C. C. A. 56; The Wm. P. Donnelly, 156 Fed. 302.

Evidence to rebut presumption.—Such presumption may be rebutted only by proof that credit was in fact given the vessel. But in order to establish that fact it is necessary to show such was the intention of both parties. Cuddy *v.* Clement, 115 Fed. 301, 53 C. C. A. 94. It is not sufficient to show vendor so understood, or that he charged supplies to vessel, and so entered them upon his books. The Kalorama, 10 Wall. (U. S.) 204; The James Guy, 1 Ben. 112, 13 Fed. Cas. No. 7,195; The Union Express, 1 Bro. Adm. 537, 24 Fed. Cas. 14,364; Stephenson *v.* The Francis, 21 Fed. 715; The St. John, 74 Fed. 842, 21 C. C. A. 141; The Columbus, 67 Fed. 553, 14 C. C. A. 522. It is not necessary that intent so to bind vessel be expressed in words or in the form of an agreement. It may be established by proof of circumstances from which it may be deduced, but it is essential the evidence shows a purpose on part of seller to sell on credit of vessel, and on part of purchaser to pledge her. Alaska, etc. Co. *v.* Chamberlain, 116 Fed. 600, 54 C. C. A. 56.

256-87 Ely *v.* Murray & T. Co., 200 Fed. 368, 118 C. C. A. 520.

257 Collision.—See the title "Collision," 5 STANDARD PROC.

257-94 They who set up defense to a bottomry bond that supplies might have been obtained on personal credit of owners have burden of showing they had credit or funds at the port where master obtained supplies. The Wyandotte, 145 Fed. 321, 75 C. C. A. 117.

257-1 The Winnie, 149 Fed. 725, 79 C. C. A. 431; The Echo, 131 Fed. 622; The Gertrude, 118 Fed. 130, 55 C. C. A. 80; Chicago T. Co. *v.* Campbell, 110 Ill. App. 366.

258-2 The Tarpon, 132 Fed. 277.

258-3 The Europe, 175 Fed. 596; The Sicilian Prince, 128 Fed. 133; The Elizabeth, 114 Fed. 757; The Wm. Chisholm, 153 Fed. 704, 82 C. C. A. 562; Pouppirt *v.* Co., 122 Fed. 983; Southern R. Co. *v.* U. S., 45 Ct. Cl. (U. S.) 322.

258-4 Wilder's S. S. Co. *v.* Low, 112 Fed. 161, 50 C. C. A. 473.

If the evidence is hopelessly conflicting as to the fault for a collision and there is no doubt of the incompetency of a helmsman on one of the vessels, the fault will be attributed to her. The Senator Sullivan, 117 Fed. 176.

258-5 The Eagle Wing, 135 Fed. 826. See The Gertrude, 118 Fed. 130, 55 C. C. A. 80, for evidence which failed to show contributory negligence because schooner not properly manned.

258-9 Rich *v.* Co., 117 Fed. 751; The Fontana, 119 Fed. 853, 56 C. C. A. 365; The Genesta, 125 Fed. 423; The Wallace B. Flint, 125 Fed. 426; The Umbria, 153 Fed. 851, 83 C. C. A. 33; The H. B. Rawson, 152 Fed. 1001; The Wilkesbarre, 151 Fed. 501; Carter *v.* R. Co., 151 Fed. 531; The John Bossert, 148 Fed. 903; The Metamora, 144 Fed. 936, 75 C. C. A. 576; New York, etc. Co. *v.* R. Co., 143 Fed. 991; The City of Portsmouth, 143 Fed. 856, 74 C. C. A. 608; Brigham *v.* Luckenbach, 140 Fed. 322; The Dauntless, 121 Fed. 420, 129 Fed. 715, 64 C. C. A. 243; The J. C. Ames, 121 Fed. 918; The Gadsby, 120 Fed. 851; Wilder's S. S. Co. *v.* Low, 112 Fed. 161, 50 C. C. A. 473; The Arthur M. Palmer, 115 Fed. 417; The Captain Sam, 115 Fed. 1000.

Proper lookouts are persons other than officers of the deck or helmsman. The Echo, 131 Fed. 622; Wilder's S. S. Co. *v.* Low, 112 Fed. 161, 50 C. C. A. 473.

No lookout.—Where a ship navigating a narrow channel has no proper lookout and neglects to signal her course at a reasonable distance, thus perplexing and misleading a meeting ship, former is alone responsible for damages caused by collision even if, in the agony of collision, a different maneuvre by the other ship might have avoided the accident. The S. S. Cape Breton *v.* Co., 36 Can. Sup. 564.

Failure to have a proper lookout is not excused by alleging navigation according to rule, the proof showing that boat failed to so navigate because in extremis. The James A. Lawrence, 117 Fed. 228, 54 C. C. A. 260.

Proof of defective lookout.—Unexplained failure of officers of a boat to see what they ought to have seen or hear what they ought to have heard is conclusive. The New York, 175 U. S. 187.

Absence of a trustworthy lookout, besides the helmsman, is prima facie evidence collision was fault of steamer, which has burden of showing it could not have been guarded against by a lookout. The Pilot Boy, 115 Fed. 873, 53 C. C. A. 329.

Location of a lookout.—A lookout should be placed in the bow of a ship, and it will not avail to show her deck was so overcrowded proper room could not be reserved for a lookout. The Vedamore, 137 Fed. 844, 70 C. C. A. 342; The Patria, 92 Fed. 411; Brigham *v.* Luckenbach, 140 Fed. 322.

Other contributing cause than lookout. See The Wilkesbarre, 151 Fed. 501.

Special lookout not required.—The Pocomoke, 150 Fed. 193.

258-10 The Mary Buhne, 118 Fed. 1000, 54 C. C. A. 494; The Dauntless, 121 Fed. 420.

259-16 Rosalind *v.* Senlac, 41 Can. Sup. 54.

259-17 The Eagle Point, 120 Fed. 449, 56 C. C. A. 599; Wineman *v.* Drake, 154 Fed. 933, 83 C. C. A. 505; The Lakme, 118 Fed. 972, 55 C. C. A. 466.

Presumption against vessel in fault will be strengthened by silence of her log book or meager entries in it, or removal of entries. The Sicilian Prince, 128 Fed 133.

259-18 S. S. Arranmore *v.* Rudolph, 38 Can. Sup. 176; Bingham *v.* Luckenbach, 140 Fed. 322; Wilder's S. S. Co. *v.* Low, 112 Fed. 161, 50 C. C. A. 473; The Gadsby, 120 Fed. 851; Hind *v.* S. S. Co., 13 Haw. 112; Chicago T. Co. *v.* Campbell, 110 Ill. App. 366.

260-19 The Georg Dumois, 153 Fed. 833, 83 C. C. A. 15.

A schooner has same right to a well-known navigated channel as a steamer, and cannot be guilty of misconduct in claiming and exercising such right. The Ardanrose, 115 Fed. 1010.

260-20 The distance of two miles, which is the distance at which lights must be made visible, is, by implication, to be taken as the distance within which vessels should be required to keep their course. The Queen Elizabeth, 122 Fed. 406, 59 C. C. A. 345; Brigham *v.* Luckenbach, 140 Fed. 322.

260-21 The Dauntless, 129 Fed. 715, 64 C. C. A. 243.

260-22 Pennell *v.* U. S., 162 Fed. 64; The Maine, 153 Fed. 635.

260-24 The Frank S. Hall, 116 Fed. 559.

A vessel which failed to display lights must show collision was not thereby

contributed to (The Komuk, 120 Fed. 841); and so of a vessel which did not give fog signals. Baltimore S. P. Co. *v.* Co., 139 Fed. 777.

260-25 The Gilchrist, 173 Fed. 666; The North Star, 151 Fed. 168, 80 C. C. A. 536; The Falcon, 116 Fed. 753; The Fleetwing, 114 Fed. 409; The Alabama, 114 Fed. 214; The Jamestown, 114 Fed. 593; The Aureole, 113 Fed. 224, 51 C. C. A. 181; The Sicilian Prince, 128 Fed. 133; The Rebecca, 122 Fed. 619.

All presumptions in favor of vessel overtaken. The Atlantis, 119 Fed. 568, 56 C. C. A. 134.

Injury by suction.—See The Aureole, 113 Fed. 224, 51 C. C. A. 181; The Mesaba, 111 Fed. 215.

261-28 The Homer, 109 Fed. 572, 48 C. C. A. 465; Ross *v.* Co., 143 Fed. 166, 149 Fed. 196, 79 C. C. A. 514; The Newburgh, 130 Fed. 321, 64 C. C. A. 567; Island T. Co. *v.* Seattle, 205 Fed. 993; The Rotherfield, 123 Fed. 460; The City of Macon, 121 Fed. 686, 58 C. C. A. 434.

Practically the only defense of moving vessel is vis major or inevitable accident. The Mary S. Blees, 120 Fed. 44; Rich *v.* Co., 117 Fed. 751; Rebstock *v.* Co., 132 Fed. 174. She cannot be exonerated because movements controlled by a tug unless fact is pleaded. The Degama, 150 Fed. 323, 80 C. C. A. 93.

261-29 The Europe, 175 Fed. 596.

The fact that other vessels, both before and after collision, passed an anchored vessel in safety does not show she was properly anchored and did not obstruct navigation. The Caldy, 153 Fed. 837. See the Banan, 116 Fed. 900.

Place of moored vessel.—Irrespective of whether or not a vessel anchors or moors in a proper and safe place, moving vessel must avoid her when, with reasonable practicability, she can do so, having regard for her own safety. Rebstock *v.* Co., 132 Fed. 174.

261-31 An anchored vessel which dragged its anchor and was in fault for having but one anchor out is presumed responsible for collision with a vessel whose anchor did not drag. The Severn, 113 Fed. 578.

261-32 The Cadeby, (1909) Prob. 257; North & East River S. Co. *v.* R. Co., 162 Fed. 682, 89 C. C. A. 474; The North Point, 205 Fed. 958; The Ramleh, 157 Fed. 769; The C. Van Cott, 152 Fed. 1016; The Winnie, 149 Fed. 725, 79 C. C. A. 431; The Jumna, 149 Fed. 171, 79 C. C. A. 119; Chicago T. Co. *v.* Campbell, 110 Ill. App. 366.

262-34 The Oregon, 180 Fed. 299.

262-35 The Severn, 113 Fed. 578.

262-36 The Greystoke Castle, 199 Fed. 521; The Philip Minch, 128 Fed. 578, 63 C. C. A. 14; The Iberia, 123 Fed. 865, 59 C. C. A. 306; The Ashbourne, 181 Fed. 815, 104 C. C. A. 325; The North Point, 205 Fed. 958.

262-37 The Livingstone, 113 Fed. 879, 51 C. C. A. 560.

Contributory negligence must be affirmatively shown. The Nellie, 130 Fed. 213; The Newburgh, 130 Fed. 321, 64 C. C. A. 567.

262-38 North Am. D. Co. *v.* Cutler, 162 Fed. 457, 89 C. C. A. 343; The Northern Queen, 117 Fed. 906. Liability of vessel which violates a statutory rule is not affected by a custom to so do under certain conditions. Presumption of fault exists. The Transfer No. 10, 137 Fed. 666.

262-39 Hawgood T. Co. *v.* Co., 166 Fed. 697, 92 C. C. A. 369; The Henry O. Barrett, 161 Fed. 481, 88 C. C. A. 432 (vessel insufficiently manned); The Caldy, 153 Fed. 837, 83 C. C. A. 19; The Ellis, 152 Fed. 981; The Georgetown, 135 Fed. 854; The George W. Roby, 111 Fed. 601, 49 C. C. A. 481; The Westhall, 153 Fed. 1010; The Pocomoke, 150 Fed. 193.

262-40 The Komuk, 120 Fed. 841. Same presumption exists against vessel which breaks agreement with another (The Luther C. Ward, 149 Fed. 787; The Werdenfels, 150 Fed. 400), and against one in charge of a licensed pilot under a compulsory statute. Rich *v.* Co., 117 Fed. 751.

262-44 The Henry W. Oliver, 202 Fed. 306.

263-47 The Joseph Vaccaro, 180 Fed. 272.

263-49 Rosalind *v.* Senlac, 41 Can. Sup. 54; The John Fleming, 149 Fed. 904; The Zampa, 113 Fed. 541; The Livingstone, 113 Fed. 879, 51 C. C. A. 560; The Australia, 120 Fed. 220, 56 C. C. A. 568; The Pacific, 154 Fed. 943, 83 C. C. A. 515; Mitchell T. Co. *v.* Green, 120 Fed. 49, 56 C. C. A. 455; The Georgetown, 135 Fed. 854; The Monterey, 153 Fed. 935; Minnesota S. S. Co. *v.* Co., 129 Fed. 22, 63 C. C. A. 672.

The general rule applies to vessels in tow which changes her course. The Fontana, 119 Fed. 853, 56 C. C. A. 365.

Duty of sailing vessel.—The rule requiring that where one of two vessels is to keep out of the way the other shall keep her course and speed, requires a sailing vessel in the near presence of a steamer to beat out of its track if there are not emergencies to prevent it. Jacobson *v.* Co., 114 Fed. 705, 52 C. C. A. 407.

Change of course to avoid collision. See the General U. S. Grant, 6 Ben. 465, 10 Fed. Cas. 5,320; The Zampa, 113 Fed. 541.

263-50 The Europa, 116 Fed. 696.

263-52 The J. C. Ames, 121 Fed. 918; The Richmond, 114 Fed. 208; The Ardanrose, 115 Fed. 1010; The Pilot Boy, 115 Fed. 873, 53 C. C. A. 329.

263-54 The Lucille, 169 Fed. 719; The Northern Queen, 117 Fed. 906.

Vessel under slight motion.—A vessel which has almost come to a standstill has all the rights of an anchored vessel as against a moving steamer. Britain S. S. Co. *v.* Co., 131 Fed. 62, 65 C. C. A. 300; The John F. Gaynor, 130 Fed. 856, 65 C. C. A. 340.

Sheer of steamer.—To say that the erratic course of a vessel in "bounding backward and forward across the channel was due to a sheer is no defense, unless she can show that the sheer was unavoidable, that is, that the cause which started the sheer and maintained it was a force which she could not resist or guard against by that reasonable degree of skill required from a navigator in the waters where this sheer occurred." The Australia, 120 Fed. 220, 56 C. C. A. 568.

Evidence to overcome presumption. Presumption favored vessel kept on her course may be overcome by evidence, notwithstanding the improbability of her not having done so, in which case liability for collision can only be avoided by proving fault of the other vessel by a clear preponderance of evidence. The Eagle Wing, 135 Fed. 826.

Presumptions against moving vessel very strong (The Mary S. Blees, 120 Fed. 44); and so where a stationary object is run into. The Blackheath, 154 Fed. 758.

264-60 Philadelphia & R. R. Co. *v.* Imp. Co., 183 Fed. 109, 105 C. C. A. 401.

264-62 A moored vessel which breaks away must show affirmatively she drifted because of inevitable accident or a vis major which could not have been prevented (The Wm. E. Reis, 152 Fed. 673, 143 Fed. 1013; The Tarpon, 132 Fed. 277; The Andrew Welch, 122 Fed. 557); and if placed in exposed position must show negligence on the part of a moving steamer. The New York, 109 Fed. 909; The John H. Starin, 122 Fed. 236, 58 C. C. A. 600, *rev.* 113 Fed. 419. Presumption arising from failure to give proper signals must be overcome by clear evidence. The Annex No. 5, 117 Fed. 754.

264-64 If the sheering of a barge beyond the middle of a channel injures a barge in tow there, burden is on former to show reasonable diligence or skill could not have avoided collision. The Australia, 120 Fed. 220, 56 C. C. A. 568.

265-67 Owner of a wharf with which a vessel has collided in consequence of an obstruction under the water must show contributory negligence on her part. The Nellie, 130 Fed. 213.

265-69 The Britannia, 148 Fed. 495.

Negligence presumed if an accident which should have been anticipated and guarded against happens, no means having been taken to guard against it. The Genessee, 139 Fed. 549, 70 C. C. A. 673.

Presumption as to signal.—Where a light placed above a sunken wreck was burning brightly about two hours before collision of a tug with the wreck, and it is shown it was capable of burning for some hours after wreck occurred, it is presumed to have been burning then, and burden is on tug which collided with wreck at night to show the contrary. The Volunteer, 149 Fed. 723, 79 C. C. A. 429.

265-78 The Flushing, 159 Fed. 570; The Winnie, 149 Fed. 725, 79 C. C. A. 431; The Britannia, 148 Fed. 495; Davidson *v.* S. S. Co., 120 Fed. 250, 56 C. C. A. 86.

266-84 The Somers N. Smith, 120 Fed. 569; The W. G. Mason, 142 Fed. 913, 74 C. C. A. 83; The Inca, 148 Fed. 363, 78 C. C. A. 273.

266-85 Hughes *v.* R. Co., 113 Fed. 925, 51 C. C. A. 555 (abandonment did not occur in storm).

266-86 The Mabel S., 113 Fed. 971; Burr *v.* Co., 132 Fed. 248, 65 C. C. A. 554.

266-87 The Ashbourne, 206 Fed. 860; The Resolute, 149 Fed. 1005.

266-89 The Potomac, 147 Fed. 293; The Inca, 148 Fed. 363, 78 C. C. A. 273; The W. G. Mason, 131 Fed. 632.

Tug owners must excuse a collision with a properly lighted wreck (The Volunteer, 149 Fed. 723, 79 C. C. A. 429); or with a disabled vessel which gave the usual signal (The Protector, 113 Fed. 868, 51 C. C. A. 492); that she kept her tow at a safe distance from an anchored dredge (The Wyomissing, 149 Fed. 241; The Overbrook, 149 Fed. 785); prove a contract whereby a vessel was to be towed at risk of owners (The Somers N. Smith, 120 Fed. 569); and to show she had the right to expect the aid of steam from a vessel too heavy for tug to move. The J. S. T. Stranahan, 151 Fed. 364.

267-95 The Southwark, 191 U. S. 1; The Rappahannock, 173 Fed. 829.

Seaworthiness; implied contract.—The implied contract is seaworthiness for the special cargo (Neilson *v.* Co., 122 Fed. 617, 60 C. C. A. 175; The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 421; Insurance Co. *v.* Co., 106 Fed. 973), and voyage undertaken. The Nellie, 116 Fed. 80. Warranty extends to a charterer who has no knowledge of unseaworthiness (The Presque Isle, 140 Fed. 202); but does not include vessels carrying passengers. The Oregon, 133 Fed. 609, 68 C. C. A. 603.

Under the Harter act shipowner must show vessel was seaworthy at inception of voyage, or that due diligence had been used to make her so (The Wildcroft, 201 U. S. 378; International N. Co. *v.* Co., 181 U. S. 218; The Southwark, 191 U. S. 1); regardless of whether there is conflicting testimony concerning seaworthiness. The Wildcroft, supra.

"**The question of seaworthiness is to be determined** with reference to the custom and usages of the port from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters." The Tjomo, 115 Fed. 919; The Titania, 19 Fed. 101.

267-1 Presumption of seaworthiness is not overcome by proof that vessel sank near her wharf, because injured by pounding against another boat on the pier. National Board *v.* Bowring, 148 Fed. 1010.

267-2 Shipowner cannot limit liability under the Harter act unless he shows affirmatively he has properly officered and equipped his vessel for the contemplated service; it is not sufficient to show he had no knowledge or reason to believe in the incompetency of her master. McGill *v.* Co., 144 Fed. 788, 75 C. C. A. 518.

267-4 Insurance Co. *v.* Co., 106 Fed. 973; The Nellie Floyd, 116 Fed. 80; Nielson *v.* Co., 122 Fed. 617, 60 C. C. A. 175.

267-5 Ins. Co. *v.* Co., 106 Fed. 973; The Nellie Floyd, 116 Fed. 80.

267-8 See Terry *v.* Co., 168 Fed. 533, 93 C. C. A. 613; The America, 174 Fed. 724, as to presumption when vessel chartered.

267-9 The Tenedos, 137 Fed. 443.

Failure to close port holes.—See International N. Co. *v.* Co., 181 U. S. 218.

Sudden breaking down of refrigerating apparatus of a vessel within three hours of sailing raises presumption of unseaworthiness when she left port. The Southwark, 191 U. S. 1.

Failure to take the testimony of a ship's carpenter, named in its commission for examination, on being informed by libelant of his whereabouts, raises presumption his testimony as to the vessel's seaworthiness would have been unfavorable. The Manitou, 116 Fed. 60, 127 Fed. 554, 63 C. C. A. 109.

268-10 The Oneida, 128 Fed. 687, 63 C. C. A. 239.

268-15 The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 421; Am. S. R. Co. *v.* Rickinson, 123 Fed. 188, 59 C. C. A. 604.

268-18 In determining what is proper stowage the customs and usages of place of shipment are to be considered, and, if these are followed, and none of the known and usual precautions for safe stowage are omitted, no breach of duty or negligence can be imputed to the ship. The Tjomo, 115 Fed. 919.

269-20 Corsar *v.* Co., 141 Fed. 260, 72 C. C. A. 378; Harloff *v.* Barber, 150 Fed. 185; Dene S. S. Co. *v.* Co., 133 Fed. 589, 143 Fed. 854, 74 C. C. A. 606.

It cannot be said a vessel is seaworthy which has, at inception of her voyage, little, if any, positive metacentric height, a list of eight or nine degrees,

and her cargo so distributed instability must increase as she proceeds. The Oneida, 128 Fed. 687, 63 C. C. A. 239.

269-23 Cau *v.* R. Co., 194 U. S. 427; Lazarus *v.* Barber, 136 Fed. 534, 69 C. C. A. 310.

If implied warranty of seaworthiness has been varied shipper must show negligence. The Tjomo, 115 Fed. 919; The Southwark, 104 Fed. 103. Hirer must show damage resulted from a defect in the outfit as specified in the charter party. Hills *v.* Leeds, 149 Fed. 878.

If notice of claim is made a condition precedent to liability shipper must show it has been given if contrary is alleged. The Westminister, 127 Fed. 680, 62 C. C. A. 406.

269-24 The Musselcrag, 125 Fed. 786, 82 C. C. A. 426.

270-25 The St. Quentin, 162 Fed. 883, 89 C. C. A. 573.

270-30 The Presque Isle, 140 Fed. 202; The D. Harvey, 139 Fed. 755; The LaKroma, 138 Fed. 936; Doherr *v.* Houston, 128 Fed. 594, 64 C. C. A. 102; The Patria, 125 Fed. 425, 132 Fed. 971, 68 C. C. A. 397; Pacific C. S. S. Co. *v.* Co., 94 Fed. 180, 36 C. C. A. 135.

Distinctions as to burden of proof. "When the damage is manifestly of the sort excepted the ship is under no obligation to show the promoting cause. To illustrate, if the exception is 'damage caused by peril of the sea,' and the cargo is landed drenched with salt water, it will be for the ship to show that the salt water found access to the cargo through a peril of the sea; but if the exception is 'damage by breakage,' and the article arrives broken, the ship is not required to show how it got broken—although the libelant may show that negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and showing that, may recover." The Patria, 125 Fed. 425, 132 Fed. 971, 68 C. C. A. 397.

271-33 The Manitou, 116 Fed. 60, 127 Fed. 554, 63 C. C. A. 109.

Relation of burden of proof to presumption.—"The casting of the burden of proof on one party or the other in a given case, does not destroy the presumptions in favor of a party, which exist under the general law of evidence. Presumptions are a sort of proof and a substitute in certain stages of a case for affirmative testimony. A disputable presumption may operate as a prima facie case upon a particular point." The Wilderoft, 139 Fed. 521, 65 C. C. A. 145.

Effect of Harter act.—A vessel owner cannot take advantage of §3 of the Harter act unless he shows affirmatively vessel was seaworthy at commencement of voyage, or due diligence had been used to make her so. The C. W. Elphicke, 117 Fed. 279, 122 Fed. 439, 58 C. C. A. 421, and cases cited in next note. Such proof cannot be supplied by inferences or presumptions. The Wilderoft, 201 U. S. 378; Bradley *v.* R. Co., 153 Fed. 350. If circumstances are such opportunity for giving testimony is solely with the owner, burden upon him is thereby increased. The Manitou, supra. If a bill of lading is issued after goods are loaded and have passed from owner's control carrier has burden of showing his assent to terms of the bill. Pacific C. Co. *v.* Co., 155 Fed. 29, 83 C. C. A. 625.

Injury by escaping steam.—See The Manitou, 116 Fed. 60, 127 Fed. 554, 63 C. C. A. 109.

271-34 The Victoria, 114 Fed. 962; The Mississippi, 113 Fed. 985.

Sufficiency of packing.—See Doherr *v.* Houston, 123 Fed. 334.

Stowage of skins with tea.—See The Hudson, 122 Fed. 96.

271-35 It is negligent to stow barrels of cod oil over wool without securing them. The Orcadian, 116 Fed. 930. See The Musselcrag, 125 Fed. 786.

272-37 Liability is established by showing baggage was in good condition when put on board, and was wet at end of voyage. Weinberger *v.* C. G. T., 146 Fed. 516.

272-38 Under that clause of the Harter act which releases vessel owners from liability provided they exercised due diligence to make their vessel in all respects seaworthy and properly manned, they must show master was competent, was selected with due diligence (which must be particularly specified), was habitually diligent, or they rightly believed him to be so. The Fri, 140 Fed. 123; The Cygnet, 126 Fed. 742, 61 C. C. A. 348.

272-40 Evidence to show deficiency of freight.—Where it is claimed that less freight than was due was delivered, it is competent to show that other consignees who shipped like

freight at the same time in the same vessels received much more than they had bought and more than their bills of lading called for. Dana *v.* Co., 131 Fed. 158.

Shipper must prove delivery of goods to vessel.—The prima facie case made by a bill of lading is overthrown by proof it was delivered before goods put aboard or consigned to care of master, and before vessel was in port. Cunard S. S. Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310; Kelley *v.* Co., 120 Fed. 536.

Execution of bill of lading by carrier's agent must be shown by shipper. Cunard S. S. Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310.

275-60 Burden of explaining accident to passenger and relieving itself from imputation of negligence is upon carrier. Walker *v.* S. S. Co., 117 Fed. 784; Pouppirt *v.* Co., 122 Fed. 983. A prima facie case is shown by proof of breaking of chain used in unloading heavy articles. Lewers Co. *v.* Kekauoha, 114 Fed. 849, 52 C. C. A. 483.

275-65 The H. B. Rawson, 162 Fed. 312, 89 C. C. A. 20.

Inspectors' rules will be considered though not received in evidence if in the record, referred to in testimony and discussed in briefs. The H. B. Rawson, 162 Fed. 312, 89 C. C. A. 20.

275-66 Admiralty court may notice a statute of Canada regulating navigation in Canadian waters, and also the revised international rules and regulations concerning navigation. The New York, 175 U. S. 187. The Liverpool S. Co. *v.* Ins. Co., 129 U. S. 397, is distinguished because it did not involve a question of general maritime law, but a statutory exemption from consequences of negligence in navigation given by act of parliament.

275-67 Sufficient certificate. Where a statute was used in the district court by consent and treated as part of the record, though not made such, and was certified in obedience to a certiorari to the court of appeals by clerk of district court as a true copy of the original act as published, it was properly before the appellate court though not certified to be a part of the record. The New York, 175 U. S. 187.

State statutes creating liens are noticed. The Alligator, 161 Fed. 37, 88 C. C. A. 201.

276-68 Notorious facts. — Judicial notice will be taken of the intimate commercial relations existing between the ports of Puget Sound and Alaskan ports, and in the absence of contrary proof it will be inferred the highest rate of seamen's wages at Nome was not less than the usual rate of wages at Tacoma. The Elihu Thompson, 139 Fed. 89.

Sack rafts.—In the absence of a statute defining or describing a sack raft or testimony disclosing that it is commonly known, it cannot be judicially known what constitutes such a raft. The Mary, 123 Fed. 609.

279-1 Nielson *v.* Co., 122 Fed. 617, 60 C. C. A. 175.

282-27 Unsealed deposition not personally delivered into court is not admissible. The Saranac, 132 Fed. 936.

282-32 One case may be submitted upon the testimony taken in another involving the same facts. The Oregon, 133 Fed. 609, 68 C. C. A. 603. Relevant testimony taken under examinations by counsel for three separate interests is properly before the court on the final hearing, regardless of whom it was offered by, though there were separate answers and separate issues. The Bayonne, 128 Fed. 288.

Scope of interrogatories under rule 32. See The Baker Palmer, 172 Fed. 154.

284-46 A carrier cannot object to an interrogatory concerning amount of freight delivered to other consignees than libelant, on the ground that to do so would disclose their business to him. Such testimony has a bearing on the issue as to whether all freight due libelant had been delivered. Dana *v.* Co., 131 Fed. 158.

284-50 Findings should be made in numbered paragraphs. The Itasca, 117 Fed. 885.

284-53 A general objection that the evidence does not warrant the finding is sufficient if all the evidence is attached to the report. The Paqueto Habana, 189 U. S. 453; Merritt, etc. *v.* Co., 132 Fed. 154. Exceptions must refer to the pertinent evidence. The Waiontha, 122 Fed. 719; The John H. Starin, 116 Fed. 433. If not urged they are waived. The Eliza Lines, 114 Fed. 307, 52 C. C. A. 195. Objection to hearsay testimony may be made when exceptions filed. The Anson M. Bangs, 129 Fed. 103, 62 C. C. A. 605. A plain error in computation may be

corrected in absence of a formal exception. The Eliza Lines, 132 Fed. 242, 65 C. C. A. 538.

284-57 The Ida G. Farren, 127 Fed. 766.

285-58 Watts *v.* U. S. 129 Fed. 222; The Gertrude, 112 Fed. 448.

285-59 The Minniehaha, 151 Fed. 782; The Mobila, 147 Fed. 882; La Bourgogne, 144 Fed. 781, 75 C. C. A. 647.

If but little testimony was taken by commissioner, the weight accorded his findings will be lessened. The Sovereign of the Seas, 139 Fed. 812.

A finding as to cost of preparing a vessel, based upon account of party who did the work and proof of payment of bill, sustained. Thompson *v.* Winslow, 130 Fed. 1001.

285-61 If the parties refuse to stipulate that stenographer may be employed in a proper case court will authorize employment of one, whose fees shall be taxed as costs. Rogers *v.* Brown, 136 Fed. 813. If testimony was taken before tender made and money paid into court, the cost thereof may be taxed if it was not used until time of the trial and was one of the grounds on which action defeated. The Claverburn, 148 Fed. 139.

287-73 In absence of a charter party bill of lading delivered to shipper is best evidence of the contract or as a substitute for a regularly drawn charter party. The Eva D. Rose, 151 Fed. 704.

287-74 Log book not usually evidence.—Worrall *v.* Co., 113 Fed. 549 (under the circumstances court looked in it).

Evidence of some purposes.—A log book is competent evidence to show speed of a vessel between designated points, entries having been made before litigation begun. The New York, 109 Fed. 909. It may be called for and used by party who did not make it for purpose of cross-examining witnesses if testimony so adduced is more intelligible by a reference to it. The Kentucky, 148 Fed. 500.

Silence of log book.—The failure of log book or protest made immediately after collision to mention absence of lights on sailing vessel collided with is a significant fact to show that her lights were burning. The Richmond, 114 Fed. 208; Pennell *v.* U. S., 162 Fed. 64.

287-75 Pennell *v.* U. S., 162 Fed. 64. Is better evidence than testimony of officer who made entries though he testified after reading them. Bacon *v.* Conroy, 172 Fed. 532, 97 C. C. A. 158.

293-8 Bills of lading do not prove themselves, and shipper has the burden of showing their execution by carrier. Cunard S. S. Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310. They are sufficient evidence of receipt of goods (The Titania, 131 Fed. 229, 65 C. C. A. 215, 124 Fed. 975), unless executed before goods delivered or before vessel reached port. Cunard S. S. Co. *v.* Kelley, supra; Kelley *v.* Co., 120 Fed. 536.

299-33 A charter party which contains a stipulation fixing rate of demurrage is admissible to make a prima facie case for assessment of damages in case of delay of vessel. The Columbia, 109 Fed. 660, 48 C. C. A. 596; Orhanovich *v.* The American, 4 Fed. 337; The Silica *v.* The Lord Warden, 30 Fed. 845. *Contra.* The Jas. A. Dumont, 34 Fed. 428. Correspondence preceding making of charter party, which presents facts and circumstances surrounding and pertinent to it, and out of which it grew, is admissible to explain contract. Sewall *v.* Wood, 135 Fed. 12, 67 C. C. A. 580. But if correspondence is merged in contract it may be excluded. U. S. *v.* Conkling, 135 Fed. 508, 68 C. C. A. 220.

300-41 Entries in ship's tally book and mate's receipt book are not calculated to show what bales of goods were covered or uncovered, nor the character of the goods, such entries being based on declarations of shipper. They are evidence of the number of bales and of their dimensions. Cunard S. S. Co. *v.* Kelley, 126 Fed. 610, 61 C. C. A. 532. See Kelley *v.* Co., 120 Fed. 536.

302-56 Registry of a ship is slight prima facie evidence of ownership. Post *v.* Schooner, 1 Haw. 286.

315-6 Dennis *v.* Slyfield, 117 Fed. 474, 54 C. C. A. 520; De Sola *v.* Pomares, 119 Fed. 373.

315-7 Ocean S. S. Co. *v.* Ins. Co., 121 Fed. 882.

316-13 Evidence of conversations between the parties prior to issuance of bill of lading is admissible to show intent and aid in construing bill with reference thereto; and if it was issued after goods were put on board and had passed from control of shipper, parol evidence may be competent to

modify it. Pacific Coast Co. *v.* Co., 155 Fed. 29, 83 C. C. A. 625. Circumstances under which contract for towage made may be proved. Daly *v.* Bacon, 149 Fed. 401, 79 C. C. A. 221.

320-38 Cunard S. S. Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310.

321-39 The Seefahrer, 133 Fed. 793.

325-55 Statements by master day after his vessel collided with another as to how collision occurred admissible against her. The Severn, 113 Fed. 578.

326-62 The Maurice, 135 Fed. 516, 68 C. C. A. 228.

326-64 Mate's declaration made ten minutes after accident is not part of the res gestae. The Saranac, 132 Fed. 936.

327-71 After insurer has taken usual steps to ascertain extent of injury to a vessel and amount of damage and paid sum fixed upon by appraisement a very strong presumption arises that damage equaled sum paid. Fairgrieve *v.* Ins. Co., 112 Fed. 364, 50 C. C. A. 286.

328-77 The Umbria, 148 Fed. 283; The Mobila, 147 Fed. 882 (value of a lost vessel); La Bourgogne, 144 Fed. 781, 75 C. C. A. 647 (value of lost property without market value).

329-80 Opinions of competent persons may be given as to whether vessel had stopped when collision occurred. The Belgian King, 125 Fed. 869, 60 C. C. A. 451.

330-91 Statements of officers, as to necessity for maintaining a rate of speed are not entitled to much consideration. The Eagle Point, 120 Fed. 449, 56 C. C. A. 599.

331-96 Negligence cannot be shown by opinions, no facts being stated. Manila *v.* Rodriguez, 7 Phil. Isl. 292.

331-97 The proper course for the district court in collision cases is to receive testimony tendered, subject to objection, unless it be so utterly irrelevant or immaterial there could not possibly be any doubt about it. The position of a sunken vessel may be material in fixing fault for a collision. Minnesota S. S. Co. *v.* Co., 129 Fed. 22, 63 C. C. A. 672. As to a party not bound by stipulations in charter party concerning demurrage, evidence of the net yearly earnings of the vessel will be considered in connection with such stipulations for purpose of assessing damages for detention. Keyser *v.* Jurvelius, 122 Fed. 218, 58 C. C. A. 661.

Weight of goods at interior plantations prior to shipment establishes, prima facie, amount lost. The Rose Innes, 122 Fed. 750. Refusal to insure a vessel may be some evidence of unseaworthiness. Mooro *v.* Cornwall, 144 Fed. 22, 75 C. C. A. 180.

333-13 More weight will be given the testimony of witnesses who have had experience as to the carrying capacity of a vessel than to the estimates of a witness based upon her plan. Hreglich *v.* Coal, 128 Fed. 464. Positive testimony of witnesses identifying a vessel is not overcome by entries in her log book showing she may not have been at place in question, or that under ordinary conditions she probably was not there at time testified of. Ross R. Co., 146 Fed. 608. If there is irreconcilable conflict in the testimony that of witnesses who had best opportunity of knowing the facts to which they testify and least inducement to testify falsely should be believed. The Itasca, 117 Fed. 885. Refusal to insure a vessel is not conclusive as to her seaworthiness. Mooro *v.* Cornwall, 144 Fed. 22, 75 C. C. A. 180.

334-14 Uncorroborated testimony of a dealer concerning credit given a vessel in her home port for supplies is not controlling; nor is the fact she was charged therewith on his books. The Wm. P. Donnelly, 156 Fed. 302.

334-15 The Geo. W. Peavey, 173 Fed. 715 (as against opinions of witnesses on the other vessel as to what they observed); The Erandio, 163 Fed. 435; The Dorchester, 163 Fed. 779; Pennell *v.* U. S., 162 Fed. 64; The Dorchester, 121 Fed. 889; The Captain Sam, 115 Fed. 1000; Minnesota S. S. Co. *v.* Co., 129 Fed. 22, 63 C. C. A. 672; The Georgetown, 135 Fed. 854; The Martha E. Wallace, 148 Fed. 94. **Rule has less force where question** concerns lights on the other vessel. The Roman, 14 Fed. 61; The Monmouthshire, 44 Fed. 697.

Opportunity of witnesses on another vessel to see movements of the one in question is to be regarded in weighing their testimony. The J. G. Gilchrist, 173 Fed. 666.

335-17 The George W. Peavey, 183 Fed. 571, 106 C. C. A. 117.

335-27 The Dorchester, 163 Fed. 779; The Stamford, 148 Fed. 509.

336-29 The Eagle Wing, 135 Fed.

826; The Bayonne, 128 Fed. 288; The John Fleming, 149 Fed. 904; The Dauntless, 121 Fed. 420; The Senator Sullivan, 117 Fed. 176.

Probability and improbability; lights on opposite vessel.—See The Richmond, 114 Fed. 208; Brigham *v.* Luckenbach, 140 Fed. 322. The positive testimony of witnesses whose duty it was to see lights on a vessel (there being nothing to intercept their vision) that there were no lights is not overcome by evidence showing such vessel had a light twenty or thirty minutes before collision occurred, it not being shown to have been burning thereafter. The John H. Starin, 122 Fed. 236, 58 C. C. A. 600; The Maggie Ellen, 120 Fed. 662, 57 C. C. A. 124.

State of weather.—The pleadings and the observations of witnesses, taken on the water, are better evidence of the velocity of the wind and condition of sea than the record of the weather bureau as to the wind, the observations being made several miles away and at a considerable elevation. The Winnie, 137 Fed. 166.

Delay in making a claim for damages may be very persuasive as to non-existence of negligence on part of libeled vessel. The New York, 109 Fed. 909.

Fact a vessel was struck by a vessel moving from behind against her goes far to create a preponderance of evidence and to solve the difficulty raised by conflicting testimony. The Rebecca, 122 Fed. 619, 60 C. C. A. 251.

Testimony as to what a man has seen in the performance of duty will outweigh that of a witness who was not chargeable with any duty in the premises. Brigham *v.* Luckenbach, 140 Fed. 322; The Maggie Ellen, 120 Fed. 662, 57 C. C. A. 124.

337-30 Great weight may fairly be given to the improbability that vessel, whose master knows she was being overtaken by a vessel, in such a position that she cannot help but know she is herself overtaking, should improperly change his course when, under the plain text of the rule, no new navigation on her part was called for, and all she had to do was to keep her course and let all overtaking vessels keep out of her way. The Nathan Hale, 113 Fed. 865, 51 C. C. A. 489. If all the evidence cannot be true that will be rejected which was most liable to error and the elimination of which will make the harmonizing of the remainder most easy. The Helen G. Moseley, 128 Fed. 402, 63 C. C. A. 144.

337-33 The Dauntless, 129 Fed. 715, 64 C. C. A. 243.

337-35 Brigham *v.* Luckenbach, 140 Fed. 322; The Alabama, 114 Fed. 214; The Volunteer, 149 Fed. 723, 79 C. C. A. 429; The Fin Mac Cool, 147 Fed. 123, 77 C. C. A. 349; The Martha E. Wallace, 148 Fed. 94; The Richmond, 114 Fed. 208.

338-38 When the testimony is in conflict failure of vessel, against which the weight of evidence exists, to produce all its officers and crew informed of the circumstances weakens its case. The Georgetown, 135 Fed. 854; The Gladys, 135 Fed. 601; The New York, 175 U. S. 187.

338-39 Testimony as to the result of experiments conducted without notice to the opposing party and under conditions different from those existing when collision occurred, will be received with greatest caution, if at all. The Richmond, 114 Fed. 208.

The cost of repairs is proved by prima facie testimony they were rendered necessary by reason of the collision, were made, and at the lowest price, and testimony of ship's agent they had paid the bills. The Bratsberg, 127 Fed. 1005.

338-45 Circumstantial evidence of seaworthiness, if strong and sufficient when considered in connection with the other testimony, will sustain a finding in favor of the vessel. The Wildcroft, 130 Fed. 521, 65 C. C. A. 145.

341-64 The Eagle Wing, 162 Fed. 882, 89 C. C. A. 572; Baton Rouge P. Co. *v.* George, 128 Fed. 914, 63 C. C. A. 640.

341-65 A judgment based on depositions is not so favorably regarded. The Santa Rita, 176 Fed. 890, 100 C. C. A. 360.

341-66 Perriam *v.* Co., 133 Fed. 140, 66 C. C. A. 206; Hume *v.* Co., 115 Fed. 51, 52 C. C. A. 645; The Eliza Strong, 130 Fed. 99, 64 C. C. A. 433.

If allowance deviates from current of authority or is based upon a misapprehension it will be readjusted. The Edith L. Allen, 129 Fed. 209, 63 C. C. A. 367; The Flottbek, 118 Fed. 954, 55 C. C. A. 448.

342-71 Rule stated in text for note 71 applies though some of the parties do not join in the appeal (The San

Rafael, 141 Fed. 270, 72 C. C. A. 388), and where finding below rests upon alleged preponderance of evidence. The Fin Mac Cool, 147 Fed. 123, 77 C. C. A. 349.

342-77 Only such evidence as is made a part of the bill of exceptions will be considered. The Wyandotte, 145 Fed. 321, 75 C. C. A. 117.

343-79 New evidence may be taken in a personal injury case growing out of a collision. The Homer, 109 Fed. 572, 48 C. C. A. 465.

344-83 Practice of applying for leave to take additional testimony disapproved. Pacific S. W. Co. *v.* Grismore, 117 Fed. 68, 54 C. C. A. 454.

344-88 The Ferguson, 153 Fed. 366, 82 C. C. A. 442.

345-89 Gaffner *v.* Pigott, 116 Fed. 486, 54 C. C. A. 641.

345-91 Peterson *v.* Larsen, 177 Fed. 617, 101 C. C. A. 243; The Volunteer, 149 Fed. 723, 79 C. C. A. 429; Coastwise T. Co. *v.* Co., 148 Fed. 837, 78 C. C. A. 527; The Inca, 148 Fed. 363, 78 C. C. A. 273; The Edward Smith, 135 Fed. 32, 67 C. C. A. 506; Perriam *v.* Co., 133 Fed. 140, 66 C. C. A. 206; Jameson *v.* Lewis, 131 Fed. 728, 65 C. C. A. 586; The Oscar B., 121 Fed. 978, 58 C. C. A. 316; Baker-W. C. Co. *v.* Co., 120 Fed. 247, 56 C. C. A. 83; Alaska P. Assn. *v.* Domenico, 117 Fed. 99, 54 C. C. A. 485; Paauhau S. P. Co. *v.* Palapala, 127 Fed. 920, 62 C. C. A. 552; Appeal of Cahill, 124 Fed. 63, 59 C. C. A. 519; Memphis & N. P. Co. *v.* Hill, 122 Fed. 246, 58 C. C. A. 610; Jacobsen *v.* Co., 112 Fed. 73, 50 C. C. A. 121.

The trial judge will not be reversed though testimony evenly balanced (The Asher J. Hudson, 154 Fed. 354), and reviewing court is in doubt about the finding (The Wallace B. Flint, 130 Fed. 338, 64 C. C. A. 584); nor will his action in discrediting testimony be interfered with. The Fontana, 119 Fed. 853, 56 C. C. A. 365. If a finding has been concurred in by two courts it will ordinarily be sustained though the substantial part of the testimony was not given orally in court. Wilder's S. S. Co. *v.* Low, 112 Fed. 161, 50 C. C. A. 173. But if trial judge saw none of the witnesses and there is a conflict in the evidence the entire record will be examined. Lazarus *v.* Barber, 136 Fed. 534, 69 C. C. A. 310; Paauhau Co. *v.* Palapala, 127 Fed. 920, 62 C. C. A. 552.

There is less than the usual reason for adhering to his findings where the case was heard and decided years after testimony taken, and especially so if he fell into a misapprehension of the charge made in the libel and the trend of the proof. Mitchell T. Co. *v.* Green, 120 Fed. 49, 56 C. C. A. 455.

345-92 The Svealand, 136 Fed. 109, 69 C. C. A. 97.

345-94 Leave will not be given to introduce new evidence after decree if it might have been introduced originally, or means or knowledge of its existence was within reach of party. Merchants' B. Co. *v.* Cargo, 134 Fed. 727, 67 C. C. A. 618; Kenney *v.* Blake, 125 Fed. 672, 60 C. C. A. 362; The McDonald, 112 Fed. 681, 50 C. C. A. 423.

ADMISSIONS.

Precautionary measures to prevent harm, 365-25; *Remoteness of conduct*, 365-25; *Silence of person under arrest*, 367-27; *Silence of wife in husband's presence*, 371-32; *Failure to assert claim*, 375-37; *Silence in court*, 377-47; *Joint answer not admission of joint liability*, 401-9; *Explanation of pleading*, 425-86; *Pleading by one not a party*, 425-86; *Effect of time on admission*, 430-1; *Do not preclude evidence*, 464-12; *Effect of consent order*, 470-30; *Admissions to secure right to open and close*, 480-64; *Effect given strongest admissions*, 486-79; *Not binding in toto*, 486-79; *Failure to offer evidence*, 487-81; *Proof of deposition*, 488-83; *Depositions of corporate officers; Lost deposition*, 489-91; *Answers to interrogatories by corporation*, 489-91; *Who may offer answers; party in court*, 489-91; *Bills of particulars*, 490-92; *By one of several legatees or devisees*, 507-61; *Exceptions to rule concerning admissions by former owners*, 516-81; *By master of vessel*, 538-48; *Must not relate to future*, 556-75; *Reports to insurer*, 556-76; *Expression of opinion or conclusion*, 556-77; *By corporate records*, 556-77; *Acts of promoters*, 556-77; *Of members of corporation*, 556-77; *By one trustee against another*, 568-15; *Against personal interest of trustees*, 568-15; *Respecting claims in favor of estate*, 570-31; *By one of two receivers*, 571-36; *Lessor and lessee*, 576-56; *By members of limited partnership*, 578-60; *As be-*

tween two sets of sureties, 586-79; *While intoxicated,* 595-11; *Proved by book,* 606--48; *By deceased persons,* 611-61.

357-1 Rice *v.* Taliaferro (Tex. Civ.), 156 S. W. 242; Goodwin *v.* Holmes (Vt.), 89 A. 742.

Expression of opinion, without knowledge, is not an admission. Aschenbach *v.* Keene, 46 Misc. 600, 92 N. Y. S. 764. Conclusion is valueless. Draper *v.* Brown, 153 Mich. 120, 117 N. W. 213.

357-2 Competency of confessions and admissions is determinable upon same principles; but a broad distinction lies in their weight and effect as testimony. Shelton *v.* S., 144 Ala. 106, 42 S. 30.

Admission of a fact, not in itself involving criminal intent, is not a confession, as that we had to kill deceased to save ourselves. Owens *v.* S., 120 Ga. 296, 48 S. E. 21. From such admission no presumption arises that homicide was murder. Perkins *v.* S., 124 Ga. 6, 52 S. E. 17.

357-3 Fact testimony given grand jury was in obedience to process will not render admissions therein involuntary, and they, if of an exculpatory nature, may be proved against accused. S. *v.* Campbell, 73 Kan. 688, 85 P. 784; S. *v.* Finch, 71 Kan. 793, 81 P. 494. One who testifies merely as a witness does so subject to the liability of having his testimony subsequently used against him on his trial for the offense concerning which he testified. P. *v.* Molineaux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; Wilson *v.* S., 110 Ala. 1, 20 S. 415, 55 Am. St. 17; Jones *v.* S., 120 Ala. 303, 25 S. 204. *Contra.* S. *v.* Young, 119 Mo. 495, 24 S. W. 1038; S. *v.* O'Brien, 18 Mont. 1, 43 P. 1091, 44 P. 399; if he testified at his own request and was informed of consequence. S. *v.* Simpson, 133 N. C. 676, 45 S. E. 567. Same condition applicable to voluntary statements made out of court. S. *v.* Inman, 70 Kan. 894, 79 P. 162.

Formal caution essential.—S. *v.* Parker, 132 N. C. 1014, 43 S. E. 830.

359-9 Clay *v.* Brown, 148 Mo. App. 541, 128 S. W. 803, *cit.* the text.

360-11 Bollinger *v.* Bollinger, 153 Cal. 190, 94 P. 770; Leroy P. Co. *v.* Van Evra, 94 Ill. App. 356; S. *v.* Peterson, 149 N. C. 533, 63 S. E. 87.

Direct admissions competent though they show commission of another crime than that in question. S. *v.* Poole, 42 Wash. 192, 84 P. 727.

360-12 Collard *v.* Burch, 138 Mo. App. 94, 119 S. W. 1009; Robb *v.* Hewitt, 39 Neb. 217, 58 N. W. 88; Gatzemeyer *v.* Peterson, 68 Neb. 832, 94 N. W. 974; Till *v.* S., 132 Wis. 242, 111 N. W. 1109.

Examples.—A statement in a motion that a party had become a nonresident since suit commenced admits prior residence. Fidelity & C. Co. *v.* Brown, 4 Ind. Ty. 397, 69 S. W. 915.

Killing a dog which, to knowledge of owner, had been charged with killing sheep, is a provable admission. Anderson *v.* Halverson, 126 Ia. 125, 101 N. W. 781.

A donee of land who recognizes in widow of his childless donor right to be endowed with one-half the latter's lands impliedly admits title in donor at time of death. Coberly *v.* Coberly, 189 Mo. 1, 87 S. W. 957.

Order of proof of indirect admissions is in discretion of state. Till *v.* S., 132 Wis. 242, 111 N. W. 1109.

361-13 See Clay *v.* Brown, 148 Mo. App. 541, 128 S. W. 803, *cit.* the text.

Where wife charged husband with commission of a homicide, and he replied person named was not hurt much, his statement was susceptible of construction he did the killing. Knight *v.* S., 114 Ga. 48, 39 S. E. 928.

362-14 U. S. *v.* Weems, 7 Phil. Isl. 241.

Admissions of man and woman they are married are evidence when made against their interest. C. *v.* Haylow, 17 Pa. Super. 541.

One who acts as executor admits property devised belonged to testator. Sullivan *v.* R. Co., 128 Ala. 77, 30 S. 528.

Proof by judicial decree is not precluded by admission. Jones *v.* Downs, 82 Conn. 33, 72 A. 589.

362-15 Johnson *v.* Perkins, 4 Ga. App. 633, 62 S. E. 152 (unreasonable, improbable or impossible explanation of conduct); Des Moines S. Bk. *v.* Kennedy, 142 Ia. 272, 120 N. W. 742 (identity of paper admitted by producing it under order of court); Searle *v.* Bishop, 203 Mass. 493, 89 N. E. 809; Lee *v.* Conran, 243 Mo. 404, 111 S. W. 1151; Leggat *v.* Palmer, 39 Mont. 302, 102 P. 327 (failure to claim interest); John *v.* S., 5 O. C. C. (N. S.) 200; Wade *v.* R. Co., 89 S. C. 280, 71 S. E.

859. See Stoakes *v.* Larson, 108 Minn. 234, 121 N. W. 1112 (payment by defendant of other claims against partnership); Peterson *v.* Smith, 72 Wash. 284, 130 P. 338.

Conduct in the course of litigation. Failure to produce bonds in a suit in which they obviously had a place amounts to an admission of their payment. Huntington, etc. Co. *v.* Coke Co. (W. Va.), 80 S. E. 871.

Appellant, when approached about occupation of building, referred appellee to another, and at the time was disclaiming any rights in the building. This conduct on the part of the agent of the appellant was sufficient of itself to induce those who were attempting to get the use of the building to believe that no rent charge would be made, at least on the part of the appellant. Graham Clothing Co. *v.* Co., 101 Ark. 504, 142 S. W. 859.

Failure to object to direction of verdict.—Norton *v.* University, 106 Me 436, 76 A. 912.

362-16 Tapp *v.* Dibrell, 134 N. C. 546, 47 S. E. 51; Stadtler *v.* Co. (Tex. Civ.), 121 S. W. 1132.

Payment to avoid litigation.—Whitlock *v.* Mungiven (R. I.), 90 A. 756.

Part payment is but admission pro tanto. McAveigh *v.* R. Co., 120 N. Y. S. 102.

Offer of part payment.—McIntosh *v.* Patton, 12 Ga. App. 305, 77 S. E. 6.

Offer to pay costs of treatment not an admission of liability. Winter *v.* Van Blarcom (Mo.), 167 S. W. 498; Grogan *v.* Dooley, 211 N. Y. 30, 105 N. E. 135.

363-18 Mashburn *v.* Dannenberg Co., 117 Ga. 567, 44 S. E. 97; Close *v.* Chicago, 257 Ill. 47, 100 N. E. 215; Payton *v.* Co., 28 Ky. L. R. 1303, 91 S. W. 719; Boyer *v.* R. Co., 97 Tex. 107, 76 S. W. 441. See Wilson *v.* Sarment (Cal.), 96 P. 315.

Ground for distinction between real and personal property. See Lewis *v.* R. Co., 223 Ill. 223, 79 N. E. 44 (valuation of land for taxation not admission).

May show assessor valued property. If oath is not to valuation, but only to correctness of property listed, it may be shown assessor placed valuation on property. Boyer *v.* R. Co., 97 Tex. 107, 76 S. W. 441.

Tax returns competent as showing size of tract of land claimed by person who made them. Ivey *v.* Cowart, 124 Ga. 159, 52 S. E. 436.

Making statement of land owned is in nature of admission land not included was not that of person who made statement. Field *v.* Field, 39 Tex. Civ. 1, 87 S. W. 726.

364-19 P. *v.* Bird (Cal.), 132 P. 1061; C. *v.* Min. Sing, 202 Mass. 121, 88 N. E. 918 (applicable to conduct of accused); Nowack *v.* R. Co., 166 N. Y. 433, 60 N. E. 32; Rhodes *v.* S. (Tex. Cr.), 153 S. W. 128; Loftus *v.* Sturgis (Tex. Civ. App.), 167 S. W. 14.

Authorities collected.—See Nowack *v.* R. Co., supra; Moriarty *v.* R. Co., L. R. 5 Q. B. (Eng.) 314 (leading case).

An attempt to suppress evidence is an admission it is deemed unfavorable to party suppressing it; but an attempt to keep adverse witness from testifying is not an admission party is making unjust or a false claim. Harrison *v.* Harrison, 124 Ia. 525, 100 N. W. 344. Suppression of documents not admission they would prove what is claimed. Stout *v.* Sands, 56 W. Va. 663, 49 S. E. 428.

364-20 S. *v.* Smith, 72 Vt. 366, 48 A. 647.

Conduct of party to a suit indicating belief in weakness of cause is in nature of admission, especially if resort be had to falsehood. Neece *v.* Neece, 104 Va. 343, 51 S. E. 739.

365-21 Heller *v.* Katz, 62 Misc. 266, 114 N. Y. S. 806.

365-22 Houston *v.* R. Co., 204 Pa. 321, 54 A. 166.

Refusal to sell property at a given price is in nature of admission owner considers it of value. Conynham *v.* Baldwin, 120 Fed. 500, 56 C. C. A. 650.

365-23 Knight *v.* Hunter, 155 Ala. 238, 46 S. 235 (offer to buy property claimed adversely).

365-25 King *v.* Franklin, 132 Ala. 559, 31 S. 467; Jewell B. Co. *v.* Mfg. Co., 257 Ill. 238, 100 N. E. 920; Second Nat. Bk. *v.* Gibboney, 43 Ind. App. 492, 87 N. E. 1064; South C., etc. R. Co. *v.* McHugh, 25 Ky. L. R. 1112, 77 S. W. 202 (verified claim for damages admission as to party liable and as to extent of loss); Snow *v.* R. Co., 185 Mass. 321, 70 N. E. 205 (genuineness and extent of injury); Sibley *v.* Nason, 196 Mass. 125, 81 N. E. 887 (report to insurer); Perkins *v.* Rice, 187 Mass. 28, 72 N. E. 323 (existence of

policy competent to show person in control of property); Anderson *v.* Duckworth, 162 Mass. 251, 38 N. E. 510 (making repairs on property by person who denied ownership); Ghio *v.* Merc. Co. (Mo.), 163 S. W. 551; Iowa Nat. Bk. *v.* Sherman, 23 S. D. 8, 119 N. W. 1010; Lissner *v.* Stewart (Tex. Civ.), 147 S. W. 610; Pecos *v.* R. Co., 35 Tex. Civ. 659, 80 S. W. 867; St. Louis R. Co. *v.* Smith, 33 Tex. Civ. 520, 77 S. W. 28; W. U. Tel. Co. *v.* Stubbs, 43 Tex. Civ. 132, 94 S. W. 1083; Gulf, etc. R. Co. *v.* Comber (Tex. Civ.), 80 S. W. 1045.

No admission of negligence from discharge of employe. Gillet *v.* Shaw (Mass.), 104 N. E. 719.

Acts of control over property.—Tipton *v.* R. Co., 89 Kan. 451, 132 P. 189.

Attested statement by bank director. Chesbrough *v.* Woodworth, 195 Fed. 875, 116 C. C. A. 465.

Illustrations.—A tender admits indebtedness pro tanto and validity of demand. Cameron *v.* Campbell, 141 Fed. 32, 71 C. C. A. 520; Hopkins *v.* Rodgers, 91 N. Y. S. 749. See "Tender," infra, 495-27. A statement of account made by direction and approved is admission (Rand *v.* Whipple, 71 App. Div. 62, 75 N. Y. S. 740), and if rendered by vendee is conclusive as to price of items specified, though counter demand of vendor disputed. Ketchum *v.* Co., 33 Wash. 92, 73 P. 1127. Price for which part of one's land sold is admissible as to value of part unsold (Houston *v.* R. Co., 204 Pa. 321, 54 A. 166), though sale void because made by parol. Griseza *v.* Terwilliger, 144 Cal. 456, 77 P. 1034. Failure to claim a credit may be regarded in determining whether or not payment was made. Ogden *v.* W. O. W., 78 Neb. 806, 113 N. W. 524. Acting as executor and reviving suit begun by testator and joining heirs admission property involved was owned by testator. Sullivan *v.* R. Co., 128 Ala. 77, 30 S. 528. A conspiracy of heirs to deprive grantees of land may be shown as admission of existence of deed. Chew *v.* Jackson, 45 Tex. Civ. 656, 102 S. W. 427. Fraudulent entries in books, admissions. Culver *v.* Caldwell, 137 Ala. 125, 34 S. 13.

It may be shown person accused or suspected of committing crime attempted to escape or avoid arrest (Graham *v.* S., 125 Ga. 48, 53 S. E. 816; Grant *v.* S., 122 Ga. 740, 50 S. E. 946; S. *v.* Williams, 118 Ia. 494, 92 N. W. 652; S. *v.* Matheson, 130 Ia. 440, 103 N. W. 137; S. *v.* Stewart, 65 Kan. 371, 69 P. 335; S. *v.* Kesner, 72 Kan. 87, 82 P. 720); that he offered to pay value of property stolen (Seaborn *v.* S. (Tex. Civ.), 90 S. W. 649), and intentionally made false statements respecting material matter. C. *v.* Devaney, 182 Mass. 33, 64 N. E. 402. Employer does not admit his negligence toward employes by insuring himself against liability for injuries to them (Rupp *v.* Shaffer, 21 O. C. C. 643; Manley *v.* Co., 76 Minn. 169, 78 N. W. 1050), nor by furnishing aid to one injured. Sias *v.* Co., 73 Vt. 35, 50 A. 554. Making reduction from contract price for work is not admission going to sufficiency of plans according to which work done. Watson *v.* Co., 77 Conn. 124, 58 A. 741.

In the absence of proof as to who paid lodge dues for which deceased member liable, an offer to repay sum, made after suit brought, is not admission of receipt of money by society. National C. *v.* Dillon, 212 Ill. 320, 72 N. E. 367.

A letter written concerning payment of indebtedness for an article which contains no complaint concerning it is admissible. Hansen *v.* Wayer, 101 Ill. App. 212.

Payment of commission to cancel contract shuts off claim that broker was not entitled to commission for procuring. Swee *v.* Neumann, 123 N. Y. S. 776.

Officer who arrested a person accused of uttering forged check and observed his acts may testify thereof and of his declarations. C. *v.* Bond, 188 Mass. 91, 74 N. E. 293.

It may be shown one claiming to be principal of another drew upon him for price of goods consigned. Northern Mfg. Co. *v.* Wagner, 108 Wis. 584, 84 N. W. 894.

In an action on book account defendant concedes correctness of charges by crediting plaintiff with amount thereof under a plea in offset. Cameron *v.* Estabrooks, 73 Vt. 73, 50 A. 638.

Precautionary measures to prevent harm.—It may be shown that prior to infliction of injury steps were taken to remedy defect which caused it; doing so is admission ordinary care required it. Mount Morris *v.* Kanode, 98 Ill.

App. 373; Chicago R. Co. *v.* Eaton, 194 Ill. 441, 62 N. E. 784.

Subsequent precautions and repairs, see Vols. 2-928; 6-496; 10-567; 12-140; 14-40; 14-322.

Conduct sought to be proved must not be so remote or apparently disconnected with the matter under investigation as to create a strong probability it is the result of other motives than a consciousness of guilt. Grant *v.* S., 122 Ga. 740, 50 S. E. 946.

367-27 Int. Harv. Co. *v.* Voboril, 187 Fed. 973, 110 C. C. A. 311; Parulo *v.* R. Co., 145 Fed. 664; Sloss-S. S. & I. Co. *v.* Sharp, 156 Ala. 284, 47 S. 279; Jones *v.* S., 156 Ala. 175, 47 S. 100; Simmons *v.* S., 7 Ala. App. 107, 61 S. 466; In re De Laveaga's Est., 165 Cal. 607, 133 P. 307; In re Ricks' Estate, 160 Cal. 467, 117 P. 539; In re Snowball's Est., 157 Cal. 301, 107 P. 598; P. *v.* Swaile, 12 Cal. App. 192, 107 P. 134; P. *v.* Morley, 8 Cal. App. 372, 97 P. 84; Bashore *v.* Mooney, 4 Cal. App. 276, 87 P. 553; Godwin *v.* S., 1 Boyce (Del.) 173, 74 A. 1101 (not cogent); Holston *v.* R. Co., 116 Ga. 656, 43 S. E. 29; Clark *v.* S., 117 Ga. 254, 43 S. E. 853; McElroy *v.* S., 125 Ga. 37, 53 S. E. 759; P. *v.* Tielke, 259 Ill. 88, 102 N. E. 229; P. *v.* Hagenow, 236 Ill. 514, 86 N. E. 370; Chicago R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28; Pritchett *v.* Sheridan, 29 Ind. App. 81, 63 N. E. 865; Masons' Assn. *v.* Brockman, 26 Ind. App. 182, 59 N. E. 401; Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, 23 L. R. A. 244; Raum *v.* Council, 155 Ky. 690, 160 S. W. 255; Givens *v.* R. Co., 24 Ky. L. R. 1796, 72 S. W. 320; C. *v.* Dewhirst, 190 Mass. 293, 76 N. E. 1052; Sumner *v.* Gardiner, 184 Mass. 433, 68 N. E. 850; C. *v.* O'Brien, 179 Mass. 533, 61 N. E. 213; P. *v.* Daily (Mich.), 144 N. W. 890; P. *v.* Hammond, 177 Mich. 416, 143 N. W. 244; S. *v.* Quirk, 101 Minn. 334, 112 N. W. 409; Bathke *v.* Krassin, 82 Minn. 226, 84 N. W. 796; Bailey *v.* Bailey, 139 Mo. App. 176, 122 S. W. 1099; Horan *v.* Byrnes, 72 N. H. 93, 54 A. 945; S. *v.* D'Adame, 84 N. J. L. 386, 86 A. 414; Stecher L. Co. *v.* Inman, 175 N. Y. 124, 67 N. E. 213, 67 App. Div. 625, 74 N. Y. S. 1147; P. *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; Ga Nun *v.* Palmer, 159 App. Div. 86, 144 N. Y. S. 457; Packard Co. *v.* New York, 151 App. Div. 941, 137 N. Y. S. 9; Schilling *v.* R. Co., 77 App. Div. 74, 78 N. Y. S. 1015; Watson *v.* Newell, 142 N. Y. S. 653; Wallace *v.* Wallace, 137 N. Y. S. 43; S. *v.* Record, 151 N. C. 695, 65 S. E. 1010; Virginia-C. C. Co. *v.* Kirven, 130 N. C. 161, 41 S. E. 1; John *v.* S., 5 O. C. C. (N. S.) 200; Vaughan *v.* S., 7 Okla. Cr. 685, 127 P. 264; Patty *v.* Co., 53 Or. 350, 96 P. 1106, *cit.* the text; C. *v.* Aston, 227 Pa. 112, 75 A. 1019; Talbert *v.* Talbert (S. C.), 81 S. E. 644; S. *v.* Sudduth, 74 S. C. 498, 54 S. E. 1013; S. *v.* Major, 70 S. C. 387, 50 S. E. 13; Houston & T. C. R. Co. *v.* Fox (Tex.), 166 S. W. 693; Davis *v.* S., 54 Tex. Cr. 236, 114 S. W. 366; Reid Auto Co. *v.* Gorszcyo (Tex. Civ.), 144 S. W. 688; Bass *v.* Tolbert, 51 Tex. Civ. 437, 112 S. W. 1077; S. *v.* Mortensen, 26 Utah 312, 73 P. 562, 633; S. *v.* Smith, 72 Vt. 366, 48 A. 647; Hardy *v.* S. (Wis.), 136 N. W. 638.

See Modlin *v.* Jones, 84 Neb. 551, 121 N. W. 984.

Contra as to written communication. S. *v.* MacFarland, 83 N. J. L. 474, 83 A. 993.

Statement made by witness.—P. *v.* Jacobs, 158 App. Div. 293, 143 N. Y. S. 21; Kaht *v.* Frazin, 144 N. Y. S. 644.

Failure to contradict assertion of title by another. Welch *v.* McNeil, 214 Mass. 402, 101 N. E. 985.

Evidence of silence to be received with caution. Joiner *v.* S., 129 Ga. 295, 58 S. E. 859; Phelan *v.* S., 114 Tenn. 483, 88 S. W. 1040.

Discrediting witness by proof of silence.—See Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694.

Silence not equivalent to a confession. S. *v.* Edwards, 13 S. C. 30.

Non-production of book of accounts. An admission defendant received from plaintiff's decedent sum of money sued for, and failure to produce any book in which it was charged, tends to show a delivery of money did not create a debt. Blaisdell *v.* Davis, 72 Vt. 295, 48 A. 14.

Confessions by silence, see Vol. 3, p 299.

Silence of person under arrest, see Vol. 3, p. 149; Vol. 6, p. 668, and infra, "Circumstantial Evidence," 149-18.

Silence of one accused, see Vol. 3, p. 148; Vol. 6, p. 665, and infra, "Circumstantial Evidence," 148-12.

Failure to answer letter not admission. Marshall *v.* U. S., 197 Fed. 511, 117 C. C. A. 65.

371-32 S. *v.* Record, 151 N. C. 695, 65 S. E. 1010.

Incompetency of wife.—Rule stated in text applies to a conversation overheard by a third person, though wife not competent to explain or deny her part therein on trial against husband. Ford *v.* S., 124 Ga. 793, 53 S. E. 335; Knight *v.* S., 114 Ga. 48, 39 S. E. 928.

Prosecution for wife beating.—Rule applies on trial of husband for beating wife, although she declines to testify against him. Joiner *v.* S., 119 Ga. 315, 46 S. E. 412.

Silence of wife in husband's presence. Wife does not admit husband not indebted to her by remaining silent when he so asserted, at least as against those who became his creditors later. Paul *v.* Kunz, 188 Pa. 504, 41 A. 610; Thomas *v.* Butler, 24 Pa. Super. 305.

373-35 Bartlett *v.* Co., 142 Ia. 538, 119 N. W. 729. Rule has exceptions. Snell *v.* Weldon, 239 Ill. 279, 87 N. E. 1022.

373-36 Jackson *v.* Drake, 37 Can. Sup. 315; McNamara *v.* Douglas, 78 Conn. 219, 61 A. 368; Givens *v.* Co., 22 Ky. L. R. 1217, 60 S. W. 304; Adam Roth G. Co. *v.* Hotel Monticello (Mo.), 166 S. W. 1125; Blanding *v.* Cohen, 101 App. Div. 442, 92 N. Y. S. 93.

Failure to reply to letter demanding payment of disputed claim, not admission. Haas *v.* Bonwit, 119 N. Y. S. 202. See 379-52, infra.

375-37 Matthews *v.* Farrell, 140 Ala. 298, 37 S. 325; Baker *v.* Haynes, 146 Ala. 520, 40 So. 968. See "Accounts," etc., supra.

Mere denial of amount is admission of the receipt of goods. Montgomery *v.* Pfluger, 3 Haw. 388.

One who objects to account sent him because it is not in accordance with contract may retain money sent on account of the contract, though it purported to be in full payment. Robinson *v.* Co., 120 Ga. 901, 48 S. E. 380.

Failure to assert claim at proper time and place is some evidence of admission inconsistent with claim subsequently made. Nichols *v.* New Britain, 77 Conn. 695, 60 A. 655; Tripp *v.* Macomber, 187 Mass. 109, 72 N. E. 361. But see Houston & T. C. R. Co. *v.* Fox (Tex.), 166 S. W. 693.

Failure to examine books of account. Though a member of a partnership may never have seen a balance sheet nor had occasion to look at the books, if he has had access to them he cannot object to any charges therein against him as between himself and co-partners. Turner *v.* Turner, 98 Md. 22, 55 A. 1023 (sub. nom., Safe Dep. *v.* Turner, 98 Md. 22, 55 A. 1023).

375-38 Sonnenschein *v.* Malter, 144 Ill. App. 183.

375-40 O'Hearn *v.* S., 79 Neb. 513, 113 N. W. 130.

376-42 Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181; Parulo *v.* R. Co., 145 Fed. 664; Sprouse *v.* Co., 132 Ky. 269, 116 S. W. 344; Eaton *v.* C., 28 Ky. L. R. 906, 90 S. W. 972; Tate *v.* S., 95 Miss. 138, 48 S. 13; Irving *v.* S., 92 Miss. 662, 47 S. 518; S. *v.* Bowen, 247 Mo. 584, 153 S. W. 1033; Stecher L. Co. *v.* Inman, 175 N. Y. 124, 67 N. E. 213, 67 App. Div. 625, 74 N. Y. S. 1147; P. *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; S. *v.* Jackson, 150 N. C. 831, 64 S. E. 376; Phelan *v.* S., 114 Tenn. 483, 88 S. W. 1040; S. *v.* Baruth, 47 Wash. 283, 91 P. 977; McCord *v.* Co., 46 Wash. 145, 89 P. 491, 13 L. R. A. (N. S.) 349; Maxwell *v.* Wellington, 138 Wis. 607, 120 N. W. 505.

A party seriously injured and suffering from shock, though conscious, is not bound to give heed to every remark made relating to occurrence which produced his condition. Schilling *v.* R. Co., 77 App. Div. 74, 78 N. Y. S. 1015. *Comp.* Holston *v.* R. Co., 116 Ga. 656, 43 S. E. 29; Givens *v.* R. Co., 24 Ky. L. R. 1796, 72 S. W. 320.

If it is doubtful whether accused heard a statement concerning his action, proof of it may be received and jury instructed to disregard it if they believe it was not heard. Knight *v.* S., 114 Ga. 48, 39 S. E. 928.

Where party is near enough to hear it is almost a necessary inference he did hear. Virginia-C. C. Co. *v.* Kirven, 130 N. C. 161, 41 S. E. 1. See Vol. 6, p. 666.

Conclusion that statement was heard by one not a party to conversation, inadmissible. Urdangen *v.* Doner, 122 Ia. 533, 98 N. W. 317.

376-43 Hauger *v.* U. S., 173 Fed. 54, 97 C. C. A. 372; Eaton *v.* C., 28 Ky. L. R. 906, 90 S. W. 972; Stecher L. Co. *v.* Inman, 175 N. Y. 124, 67 N. E. 213, 67 App. Div. 625, 74 N. Y. S. 1147. See Couch *v.* S., 58 Tex. Cr. 505, 126 S. W. 866.

A guest on an automobile ride is not

in position to give orders as to movement of machine, or dissent from orders given by his host. Routledge *v.* Co. (Tex. Civ.), 95 S. W. 749.

Circumstances may excuse silence on part of accused. Sprouse *v.* Co., 132 Ky. 269, 116 S. W. 344.

376-45 Millsapp *v.* Woolfe, 1 Ala. App. 599, 56 S. 22; Briel *v.* Exch. Nat. Bk., 172 Ala. 475, 55 S. 808; Hauger *v.* U. S., 173 Fed. 54, 97 C. C. A. 372; Joiner *v.* S., 129 Ga. 295, 56 S. E. 859; Stevens *v.* S., 118 Ga. 806, 45 S. E. 615; P. *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; Boney *v.* Boney, 161 N. C. 614, 77 S. E. 784; S. *v.* Jackson, 150 N. C. 831, 64 S. E. 376; Virginia-C. C. Co. *v.* Kirven, 130 N. C. 161, 41 S. E. 1; Crowell *v.* S., 56 Tex. Cr. 480, 120 S. W. 897 (declaration in presence of accused must amount to accusation); Pond *v.* Pond, 79 Vt. 352, 65 A. 97; S. *v.* Baruth, 47 Wash. 283, 91 P. 977.

Calling for an answer.—Mere fact statement is read to accused does not make it incumbent on him to answer. P. *v.* Young, 72 App. Div. 9, 76 N. Y. S. 275.

Newspaper article not denied. Louisiana Purchase Exposition Co. *v.* Emerson, 149 Mo. App. 594, 129 S. W. 753.

Question of law whether reply required. Whether circumstances called for reply is preliminary question for court. Parulo *v.* R. Co., 145 Fed. 664; P. *v.* Mallon, 103 Cal. 513, 37 P. 512; Schilling *v.* R. Co., 77 App. Div. 74, 78 N. Y. S. 1015; Pierce *v.* Pierce, 66 Vt. 369, 29 A. 364.

377-46 Hansen *v.* Williams (Tex. Civ.), 113 S. W. 312.

Administrator, if without prior knowledge of any item of plaintiff's claim against estate, is not bound to object to statement made by plaintiff concerning it. Davis *v.* Gallagher, 124 N. Y. 487, 26 N. E. 1045.

377-47 S. *v.* Baruth, 47 Wash. 283, 91 P. 977.

Silence in court.—One is not bound to contradict testimony of witness unless he is called as witness or heard the testimony; and if it was heard it need not be contradicted unless it was material to the issue being tried against person sought to be affected by silence. Thayer *v.* Usher, 98 Me. 468, 57 A. 839 (dist. Blanchard *v.* Hodgkins, 62 Me. 119, on ground defendant was called as witness and testimony he failed to deny was material). To same effect as principal case are Caseday *v.* Lindstrom, 44 Or. 309, 75 P. 222; Patty *v.* Co., 53 Or. 350, 96 P. 1106; and it need not be contradicted if person who heard it is called as witness. Leggett *v.* Schwab, 111 App. Div. 341, 97 N. Y. S. 805; C. *v.* Burton, 183 Mass. 461, 67 N. E. 419.

Fact witness did not deny statement when made in her presence at a former trial is incompetent as tending to establish falsity of her testimony. 1 Greenl. Ev., §98, note; Melen *v.* Andrews, Moo & M. (Eng.), 336, 31 R. R. 736; C. *v.* Kenney, 12 Met. (Mass.) 235; Blackwell *v.* McElwee, 96 N. C. 71, 1 S. E. 676, 60 Am. Rep. 404; Broyles *v.* S., 47 Ind. 251. The suggestion in Blanchard *v.* Hopkins, 62 Me. 119, that rule is changed by admission of parties to testify is not sustained by reasons for exclusion or modern authorities. Horan *v.* Byrnes, 72 N. H. 93, 54 A. 945. But in Illinois a party who fails to contradict testimony of other party to a suit on a vital point in issue practically admits truth of testimony. Muetze *v.* Procasky, 126 Ill. App. 589. A person is not bound to reply to conclusions stated by another. Saunders *v.* R. Co., 99 Tenn. 130, 41 S. W. 1031. Failure to testify or call witnesses is in nature of admission where circumstances are such, party would ordinarily do so. Howe *v.* Howe, 199 Mass. 598, 85 N. E. 945. Silence of party in court as to facts reflecting on him and of which he has information is not a positive admission of truth of adverse testimony; it warrants unfavorable inference. Meyer *v.* Minsky, 128 App. Div. 589, 112 N. Y. S. 860.

Impeachment by failure to testify, see Vol. 7, p. 155.

Deposition used in court without jurisdiction need not be denied. O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59. Accused is not called on to deny testimony given on examining trial. Maloney *v.* S., 91 Ark. 485, 121 S. W. 728.

378-48 P. *v.* Manasse, 153 Cal. 10, 94 P. 92; Bulfer *v.* P., 141 Ill. App. 70; Rafter *v.* R. Co., 139 Ill. App. 81; In re Thorp's Will, 150 N. C. 487, 64 S. E. 379 (silence of client in court).

Physical condition of party may excuse him from replying to statements. Tate *v.* S., 95 Miss. 138, 48 S. 13.

Admissible on question of ownership of personalty when verified. Fudge *v.* Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895.

378-49 Seevers *v.* C. Co. (Ia.), 138 N. W. 793; Biggs *v.* Stueler, 93 Md. 100, 48 A. 727; Pye *v.* Perry (Mass.) 104 N. E. 460; Jennings *v.* Wall (Mass.), 104 N. E. 738; Callahan *v.* Goldman, 216 Mass. 234, 103 N. E. 687; Parker *v.* Ins. Co., 188 Mass. 257, 74 N. E. 286; State Bk. *v.* McCabe, 135 Mich. 479, 98 N. W. 20; Thomas *v.* Gage, 141 N. Y. 506, 36 N. E. 385; Irwin *v.* Co., 39 Wash. 346, 81 P. 849.

379-50 Benn *v.* Forrest, 213 Fed. 763 (C. C. A.).

379-52 Failure to answer letter. When a party who has received a letter stating terms and conditions upon and purpose for which a check was sent does not refuse to accept check or object to statements, both check and letter are evidence of admissions. St. Joseph H. Co. *v.* Co., 156 Ind. 665, 59 N. E. 995. One who knows that a party holds a note purporting to be signed by him must not remain silent when asked by letter if signature is genuine. Harmon *v.* Leberman, 39 Tex. Civ. 251, 87 S. W. 203. Unanswered telegram not competent to show addressee was a business associate of sender. Lynch *v.* McCabe, 126 App. Div. 744, 111 N. Y. S. 291. See 373-36, supra.

Promise to act.—Silence of a party who has promised to act and to whom letters written may be regarded as admission he understood contract as did other party. Murray *v.* Co., 22 Ky. L. R. 1477, 60 S. W. 648.

380-54 Foster *v.* Hobson, 131 Ia. 58, 107 N. W. 1101; McKnight *v.* Co. (Tex. Civ.), 99 S. W. 198.

380-56 Coombs *v.* Joerg, 125 App. Div. 615, 110 N. Y. S. 6 (executor's retention of bill for services rendered decedent).

382-60 See infra, 610-60, et seq. Reason for remaining silent may be explained. Cable *v.* Bowlus, 21 O. C. C. 53.

382-61 Conyngham *v.* Baldwin, 120 Fed. 500, 56 C. C. A. 650; South C., etc. R. Co. *v.* McHugh, 25 Ky. L. R. 1112, 77 S. W. 202; McManus *v.* Co., 105 Minn. 114, 117 N. W. 233; S. *v.* Quirk, 101 Minn. 334, 112 N. W. 409; S. *v.* Sudduth, 74 S. C. 498, 54 S. E. 1013; Phelan *v.* S., 114 Tenn. 483, 88 S. W. 1040.

383-62 Thrush *v.* Fullhart, 210 Fed. 1 (C. C. A.); Thompson *v.* U. S., 202 Fed. 401, 406, 120 C. C. A. 575; Woolsey *v.* Haynes, 165 Fed. 391, 91 C. C. A. 341; Varley D. M. Co. *v.* Ostheimer, 159 Fed. 655, 86 C. C. A. 523; Edwards *v.* Bates, 117 Fed. 526; Board *v.* Bk., 108 Fed. 505, 47 C. C. A. 464; Williams *v.* Lay (Ala.), 63 So. 466; Hartsell *v.* Masterson, 132 Ala. 275, 31 S. 616; Key *v.* S., 8 Ala. App. 2, 62 S. 335; Russell *v.* Webb, 96 Ark. 190, 131 S. W. 456; Batcheller *v.* Whittier, 12 Cal. App. 262, 107 P. 141; Womble *v.* Wilbur, 3 Cal. App. 535, 86 P. 916; Hayden *v.* Collins, 1 Cal. App. 259, 81 P. 1120; In re Burnham's Will (Colo.), 134 P. 254; Denver & C. I. Co. *v.* Rudolph, 47 Colo. 380, 107 P. 816; Woodbridge I. Co. *v.* Co., 81 Conn. 479, 71 A. 577; McNamara *v.* Cotton Co., 10 Ga. App. 669, 73 S. E. 1092; So. R. Co. *v.* Allison, 115 Ga. 635, 42 S. E. 15; Paulo *v.* Malo, 6 Haw. 390; Frike *v.* Orr, 109 Ill. App. 200; Chicago, etc. Co. *v.* Mitchell (Ind.), 105 N. E. 396; Breiner *v.* Nugent, 136 Ia. 322, 111 N. W. 446; Jackson B. Church *v.* Combs, 130 Ky. 255, 113 S. W. 119; Shelbyville *v.* McDade, 29 Ky. L. R. 119, 92 S. W. 568; Marks *v.* Hardy, 117 Ky. 663, 78 S. W. 864, 1105; Skidmore *v.* Smith, 27 Ky. L. R. 323, 84 S. W. 1163; Hutchinson *v.* Nay, 183 Mass. 355, 67 N. E. 601; Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979; Granger *v.* Farrant (Mich.), 146 N. W. 218; Snyder *v.* Patton, 143 Mich. 350, 106 N. W. 1106; Dickson *v.* Miller, 124 Minn. 346, 145 N. W. 112; Gardner *v.* Northern R. Co., 118 Minn. 275, 136 N. W. 1028; Bailey *v.* S., 94 Miss. 863, 48 S. 227 (failure to use opportunity to escape from prison and notification of escape of another); Northup *v.* Colter, 150 Mo. App. 639, 131 S. W. 364; Hitt *v.* Hitt, 150 Mo. App. 631, 131 S. W. 369; Vermillion *v.* Parsons, 107 Mo. App. 192, 80 S. W. 916; *s. c.*, 101 Mo. App. 602, 73 S. W. 994; Wangner *v.* Grimm, 169 N. Y. 421, 62 N. E. 569; Spink *v.* Bodensiek, 142 N. Y. S. 321; Williams *v.* Hamlin, 121 N. Y. S. 228; S. *v.* Peterson, 149 N. C. 533, 63 S. E. 87; Kann *v.* Bennett, 223 Pa. 36, 72 A. 342 (immaterial declarations attached to pleadings if their correctness denied); Wonsetler *v.* Wonsetler, 23 Pa. Super. 321; Morse *v.* Stanley County, 26 S. D. 313, 128 N. W.

153; Lindquist *v.* Port Huron Co., 22 S. D. 298, 117 N. W. 365; Lee *v.* S., 121 Tenn. 521, 116 S. W. 881; Houston, etc. Co. *v.* Fox (Tex.), 166 S. W. 693; Duckett *v.* S. (Tex. Cr.), 150 S. W. 1177; Holt *v.* Gerguin (Tex. Civ.), 156 S. W. 581; Gamble *v.* Martin (Tex. Civ.), 151 S. W. 327; Ratcliff *v.* Gordon (Tex. Civ.), 149 S. W. 197; McMillion *v.* Bk. (Tex. Civ.), 145 S. W. 300; First Nat. Bk. *v.* Pearce (Tex. Civ.), 126 S. W. 285; Arthur C. Co. *v.* Willis (Tex. Civ.), 125 S. W. 584; Johnson *v.* Hulett, 56 Tex. Civ. 11, 120 S. W. 257; Johnson *v.* Buchanan, 54 Tex. Civ. 328, 116 S. W. 875; Hudson *v.* S., 53 Tex. Civ. 453, 117 S. W. 469; Malfi *v.* Stephens (Tex. Civ.), 93 S. W. 158; Over *v.* R. Co. (Tex. Civ.), 73 S. W. 535; Lindsey *v.* White (Tex. Civ.), 61 S. W. 438; Cutchin *v.* Roanoke, 113 Va. 452, 74 S. E. 403; Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320; Repass *v.* Richmond, 99 Va. 508, 39 S. E. 160; Kellogg L. & M. Co. *v.* Co., 140 Wis. 341, 122 N. W. 737; Manning *v.* School Dist., 124 Wis. 84, 102 N. W. 356; Jenkins *v.* S. (Wyo.), 134 P. 260.

As part of res gestae.—People's Nat. Bk. *v.* Rhoades (Del.), 90 A. 409; Pecos, etc. Co. *v.* Coffman (Tex. Civ.), 160 S. W. 145.

Not to establish his own title or claim, or the claim of those holding under him. Strickland *v.* Strickland, 103 Ark. 183, 146 S. W. 501.

The letters written by appellee to appellant after the termination of his services for her, were improperly admitted, because they were self-serving declarations by appellee, and were not of such character as reasonably to impose upon appellant the duty to reply thereto and refute the claims made therein. Curtsinger *v.* McGown (Tex. Civ.), 149 S. W. 303.

It is the circumstances surrounding the party speaking and the nature of the litigation when the testimony is offered which determines the admissibility of the testimony. Cryer *v.* McGuire, 148 Ky. 100, 146 S. W. 402.

Declaration as to age held not self-serving. Home Benefit Assn. *v.* Wester (Tex. Civ.), 146 S. W. 1022.

Admission of marriage may be against interest. Seibert's Estate, 1 Pa. C. C. 229.

Self-serving statements by decedent. It is immaterial such statements made by person since deceased (Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154), if not made in presence of adverse party. Pym *v.* Pym, 118 Wis. 662, 96 N. W. 429.

Letters from plaintiff to defendant in nature of self-serving declarations as to contract. Geo. W. Mueller Mfg. Co. *v.* Benton, 137 Ga. 411, 73 S. E. 669. And see Heard *v.* Clegg (Tex. Civ.), 111 S. W. 1145.

Conversation between accomplices. Maxwell *v.* S. (Tex. Cr.), 149 S. W. 171.

384-63 Eilerman *v.* Farmer (Ky.), 118 S. W. 289 (immaterial statement made in presence of other party).

385-64 Olson *v.* Brundage, 139 Ill. App. 559, *cit.* the text; Merrill *v.* Leisenring, 166 Mich. 219, 131 N. W. 538; Wilson *v.* S. (Tex. Cr.), 155 S. W. 242.

386-65 Varley D. M. Co. *v.* Ostheimer, 159 Fed. 655, 86 C. C. A. 523; Lunham *v.* Lunham, 133 App. Div. 215, 117 N. Y. S. 396; Wonsetler *v.* Wonsetler, 23 Pa. Super. 321.

387-66 Downs *v.* Co., 175 Mo. App. 382, 162 S. W. 331.

387-67 Am. L. & S. Bk. *v.* Co., 165 Fed. 34, 91 C. C. A. 72; Detroit, etc. Co. *v.* Applebaum, 132 Mich. 555, 94 N. W. 12; Craig *v.* Parret, 56 N. J. Eq. 848, 42 A. 1117.

388-69 Hulse *v.* R. Co., 47 Mont. 59, 130 P. 415.

388-70 C. *v.* Howard, 205 Mass. 128, 91 N. E. 397.

390-72 Dow *v.* Oroville, 22 Cal. App 215, 134 P. 197.

390-73 Droste *v.* R. Co., 153 App. Div. 160, 138 N. Y. S. 203.

390-75 Nunez, etc. Co. *v.* Moore, 12 Ga. App. 73, 76 S. E. 758; Govin *v.* De Miranda, 140 N. Y. 474, 35 N. E. 626; Gallagher *v.* Brewster, 153 N. Y. 364, 47 N. E. 450; In re Narganes (App. Div.), 146 N. Y. S. 922; Zarate *v.* Villareal (Tex. Civ.), 155 S. W. 328.

Deed not acknowledged.—Mortimer *v.* Jackson (Tex. Civ.), 155 S. W. 341.

Rendered statement for services performed admission of strongest character. Patterson *v.* Houston, 92 Ill. App. 624.

391-76 Faircloth-Byrd Mercantile Co. *v.* Adkinson, 167 Ala. 344, 52 S. 419; Stevens *v.* Co., 132 Ia. 597, 109 N. W. 1090.

392-77 Seitz *v.* Starks, 136 Mich. 90, 98 N. W. 852.

Unexecuted and undelivered contract

not admissible to show who was real party in interest. United Press *v.* Co., 79 App. Div. 550, 80 N. Y. S. 454.

392-78 Hay *v.* Clay Co. (Mo. App.), 162 S. W. 666; Morgan *v.* Tims, 44 Tex. Civ. 308, 97 S. W. 832.

392-79 Lyell *v.* Walbach, 111 Md. 610, 75 A. 339; Miller *v.* Campbell, 13 Okla. 75, 74 P. 507.

392-80 Smith *v.* Miller, 152 Ala. 485, 44 S. 399; Dresbach *v.* Minnis, 45 Cal. 223; Hicks *v.* Co., 68 App. Div. 134, 74 N. Y. S. 180; Rapp *v.* Platt, 117 N. Y. S. 987.

392-81 Parker *v.* S. (Ala.), 65 S. 90; Whatley *v.* S., 144 Ala. 68, 39 S. 1014; P. *v.* Rollins, 14 Cal. App. 134, 111 P. 123; Wadleigh *v.* Phelps, 149 Cal. 627, 87 P. 93; Colonial S. Co. *v.* Larson, 47 Colo. 25, 105 P. 861; Brooke *v.* Lowe, 122 Ga. 358, 50 S. E. 146; First Nat. Bk. *v.* Miller, 139 Ill. App. 608; Hansen *v.* Wayer, 101 Ill. App. 212; Castner *v.* R. Co., 126 Ia. 581, 102 N. W. 499; Nichols *v.* Ringler, 135 Ia. 181, 112 N. W. 543; McConnell's Exr. *v.* McConnell, 138 Ky. 783, 129 S. W. 106; Neyaus *v.* Dickinson Bros., 138 Ky. 760, 129 S. W. 100; Aultman & T. M. Co. *v.* Walker, 138 Ky. 835, 124 S. W. 329; Dimmick *v.* Hendley, 117 Md. 458, 84 A. 171; Turner *v.* Turner, 98 Md. 22, 55 A. 1023; *s. c.*, sub. nom. Safe Dep. Co. *v.* Turner, 98 Md. 22, 55 A. 1023; Conant *v.* Evans, 202 Mass. 34, 88 N. E. 438; Brown *v.* Maccabees, 167 Mich. 123, 132 N. W. 562; Stuart *v.* Co., 161 Mich. 123, 125 N. W. 720; Draper *v.* Brown, 153 Mich. 120, 117 N. W. 213; Cedar Rapids Nat. Bk. *v.* Lundy, 96 Miss. 805, 51 S. 4; Chambers *v.* Chambers, 227 Mo. 262, 127 S. W. 86; Rowan *v.* Yarnall (N. J.), 90 A. 730; Lambeck *v.* Stiefel, 71 N. J. L. 320, 59 A. 460; Chamberlain *v.* Iba, 181 N. Y. 486, 74 N. E. 481; General Fire R. Co. *v.* Price, 115 N. Y. S. 171; Schreiner *v.* Kissock, 91 N. Y. S. 28; P. *v.* Cohen, 148 App. Div. 205, 133 N. Y. S. 103; Lewis Pub. Co. *v.* Lenz, 86 App. Div. 451, 83 N. Y. S. S. 841; Mahon *v.* Rankin, 54 Or. 328, 103 P. 53, 102 P. 608; In re Peters, 20 Pa. Super. 223; Kaufman *v.* R. Co., 210 Pa. 440, 60 A. 2; Birdsong & Son *v.* Allen (Tex. Civ.), 166 S. W. 1177; McGaughey *v.* Bk., 41 Tex. Civ. 191, 92 S. W. 1003; S. *v.* Manley, 82 Vt. 556, 74 A. 231; Bell *v.* Gund, 110 Wis. 271, 85 N. W. 1031.

Admission by letters.—One who replies to a letter written in a representative capacity by addressing writer as individual does not admit existence of such capacity. Sullivan *v.* R. Co., 128 Ala. 77, 30 S. 528.

Authorship of letter must be proved. Brooke *v.* Lowe, 122 Ga. 358, 50 S. E. 146. See St. Louis R. Co. *v.* McIntyre, 36 Tex. Civ. 399, 82 S. W. 346.

Unmailed letter.—A self-charging admission does not lose all its evidential force because it is not transmitted or delivered. Chadwick *v.* U. S., 141 Fed. 225, 72 C. C. A. 343; Medway *v.* U. S., 6 Ct. Cl. (U. S.) 421.

393-83 Ft. Worth, etc. R. Co. *v.* Chisholm (Tex. Civ.), 146 S. W. 988.

Owner of property may show it was valued by assessor. Boyer *v.* R. Co., 97 Tex. 107, 76 S. W. 441; Oldenburg *v.* Co., 39 Or. 564, 65 P. 869.

Tax returns as admission concerning boundary line.—Ivey *v.* Cowart, 124 Ga. 159, 52 S. E. 436.

Tax returns as admission of assets. Mashburn *v.* Co., 117 Ga. 567, 44 S. E. 97.

Sworn statements of taxable property. Jenning *v.* Rohde, 99 Minn. 335, 109 N. W. 597.

Assessed value of property is admission by owner where he appeared before authorities and asked a reduction, and assessment reduced accordingly. Gossage *v.* R. Co., 101 Md. 698, 61 A. 692.

Unsworn return.—Burton L. Co. *v.* Houston, 45 Tex. Civ. 363, 101 S. W. 822.

395-84 Polytinsky *v.* Stewart, 158 Ala. 179, 48 S. 395; Kipp *v.* Miller, 47 Colo. 598, 108 P. 164; Kaleikini *v.* Waterhouse, 19 Haw. 359; Second Borrowers Assn. *v.* Cochrane, 103 Ill. App. 29; Saal *v.* Katz, 81 Misc. 239, 142 N. Y. S. 516; St. Louis, etc. Co. *v.* Zickafoose, 39 Okla. 302, 135 P. 406; Behn *v.* Rosatzin, 5 Phil. Isl. 660; Taplin *v.* Harris (Vt.), 90 A. 956; Russell *v.* Co., 49 Wash. 362, 95 P. 327. And see Foster *v.* U. S., 178 Fed. 165, 101 C. C. A. 485.

Conflicting admissions in books.—See Opperman B. Co. *v.* Pearson, 68 App. Div. 637, 74 N. Y. S. 187.

Entries in books and statements in reports of officer to corporation whose accounts he kept need not be proved in accordance with usual requirements. Second Borrowers Assn. *v.* Cochrane, 103 Ill. App. 29.

395-84 Gross *v.* Tillinghast, 35 R. I. 298, 86 A. 721.

395-85 Copeland *v.* Co., 184 Mass. 207, 68 N. E. 218.

395-86 In re Hermann's Est., 226 Pa. 513, 75 A. 731.

395-87 Stevens *v.* Crosby (Tex. Civ.), 166 S. W. 62.

Statement in deed it is a duplicate is admission of execution of original. Hickory *v.* R. Co., 137 N. C. 189, 49 S. E. 202.

395-88 Carrier's receipt is, by statute, conclusive as to statements concerning condition of goods. Kavanaugh *v.* R. Co., 120 Ga. 62, 47 S. E. 526.

395-89 Gilmore *v.* McBride, 156 Fed. 464, 84 C. C. A. 274 (claim for lien); Brandon *v.* Distilling Co., 167 Ala. 365, 52 S. 640 (check); Martin *v.* Co., 151 Ala. 289, 44 S. 112; St. Louis, etc. R. Co. *v.* Dallas, 93 Ark. 209, 124 S. W. 247 (though signer denies making statements); Togni *v.* Slocomb, 12 Cal. App. 733, 108 P. 723; Boyd *v.* Bargagliotti, 12 Cal. App. 228, 107 P. 150; New York, etc. Co. *v.* Dist., 33 App. Cas. (D. C.) 377; Kellan *v.* Kellan, 258 Ill. 256, 101 N. E. 614; Pinnell *v.* R. Co., 146 Ill. App. 150 (claim for damages); Haywood *v.* Co., 145 Ill. App. 506 (pay slips and envelopes issued by mine operator); Second Borrowers' Assn. *v.* Cochrane, 103 Ill. App. 29; Templer *v.* Lee (Ind.), 103 N. E. 1090; Swan-Day Lumb. Co. *v.* Boling, 148 Ky. 432, 146 S. W. 746; Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402 (rules of employer not observed by him); In re Jarboe's Est., 227 Mo. 59, 127 S. W. 26; Kirn *v.* I. Co., 146 Mo. App. 451, 124 S. W. 45 (building permit and application for it); Malmstrom *v.* D. Co., 32 Nev. 246, 107 P. 98; Southern M'f'g. Co. *v.* Wagner, 14 N. M. 195, 89 P. 259; Ackerman *v.* Berriman, 113 N. Y. S. 1015; Kroder *v.* H. Co., 113 N. Y. S. 575; Stone *v.* Schlesinger, 110 N. Y. S. 852; Lynch *v.* Troxell, 207 Pa. 162, 56 A. 413; Oas *v.* Roa, 7 Phil. Isl. 20; Pecos, etc. R. Co. *v.* Cox (Tex. Civ.), 150 S. W. 265 (railroad folder); Sallaske *v.* Fletcher, 73 Wash. 593, 132 P. 648; Berger *v.* Abel, 141 Wis. 321, 124 N. W. 410 (notice of injury by servant and demand of damages given effect to).

Not admissible unless assented to. S. *v.* R. Co., 114 Minn. 293, 131 N. W. 330.

Mortgage executed by the defendant. Hope *v.* S., 5 Ala. App. 123, 59 S. 326.

Summons and complaint signed by attorney competent, because it tended to show common source of title. Benbow *v.* Harvin, 92 S. C. 180, 75 S. E. 414.

Memorandum in handwriting of deceased found upon his person after death, admitted as proof of his indebtedness. Toner *v.* Taggart, 5 Bin. (Pa.) 490.

Unreceipted bills in possession of a person prior to decease not competent to show he assented to them. If they were receipted then, prima facie, there would be admission goods charged for were property of such person. Pleasanton *v.* Simmons, 2 Penne. (Del.) 477, 47 A. 697.

Other illustrations.—Rule in text applies to minute book kept by subordinate lodge and containing entries required by superior body (Plattdeytsche Grot Gilde *v.* Ross, 117 Ill. App. 247); proofs of death made to insurer (Holleran *v.* Co., 18 Pa. Super. 573; Baldi *v.* Ins. Co., 18 Pa. Super. 599); prices current sent by factor to customer (Weidner *v.* Olivit, 108 App. Div. 122, 96 N. Y. S. 37); I. O. U.'s (Lefevre *v.* Silo, 112 App. Div. 464, 98 N. Y. S. 321); statement of assets made by president of corporation as against his claim of title to property scheduled (Saginaw S. R. Co. *v.* Connelly, 146 Mich. 395, 109 N. W. 677); values put by agent on articles inventoried (Chicago T. & T. Co. *v.* Core, 223 Ill. 58, 79 N. E. 108); forthcoming bond in attachment proceedings, at least where property could be appraised if obligee thought value specified in bond excessive (Tingle *v.* Kelly, 29 Ky. L. R. 24, 92 S. W. 303); record of stockholders' meeting and schedule of creditors filed in pursuance of action taken thereat (Clarke *v.* Co., 174 Mass. 434, 54 N. E. 887). Naturalization record in court of another state competent on question of eligibility of person naturalized to hold office. S. *v.* McDonald, 108 Wis. 8, 84 N. W. 171.

395-90 Huggins *v.* R. Co., 148 Ala. 153, 41 S. 856; Tison *v.* R. Co., 8 Ga. App. 91, 68 S. E. 651; Greenburg *v.* Childs, 242 Ill. 110, 89 N. E. 679; Home R. Co. *v.* Fores, 64 Kan. 39, 67

P. 445; Pacific E. Co. *v.* Co., 46 Or. 194, 80 P. 105; Morgan *v.* Tims, 44 Tex. Civ. 308, 97 S. W. 832.

396-92 Kemper *v.* Whiteside, 122 N. Y. S. 265.

396-94 Gilmore *v.* McBride, 156 Fed. 464, 84 C. C. A. 274; Southern, etc. Co. *v.* Fuller, 116 Ga. 695, 43 S. E. 64; Chicago T. & T. Co. *v.* Core, 223 Ill. 58, 79 N. E. 108; Patterson *v.* Houston, 92 Ill. App. 624; Lucks *v.* Bk., 148 Mo. App. 376, 128 S. W. 19; Aetna L. Ins. Co. *v.* Pelham, 52 Misc. 658, 102 N. Y. S. 461; Mahon *v.* Rankin, 54 Or. 328, 102 P. 608, 103 P. 53, *quot.* the text; In re O'Bold's Est., 221 Pa. 145, 70 A. 555; Kaufman *v.* R. Co., 210 Pa. 440, 60 A. 2; Peters' Est., 20 Pa. Super. 223; Holleran *v.* Co., 18 Pa. Super. 573; Baldi *v.* Ins. Co., 18 Pa. Super. 599; Lee *v.* Neumen, 15 S. D. 642, 91 N. W. 320; Russell *v.* Co., 49 Wash. 362, 95 P. 327; Dudley *v.* Niswander, 65 W. Va. 461, 64 S. E. 745, *cit.* the text.

Statements in proof of death that insured, prior to date of application and three or four years before death by angina pectoris, had a mild attack thereof, which was then cured, is not conclusive he had incurable disease prior to date of policy. Baldi *v.* Ins. Co., 18 Pa. Super. 599; Rondinella *v.* Ins. Co., 18 Pa. Super. 613.

In quantum meruit to recover for services creditor is not concluded as to their value by sum charged in his bill, neither tender nor payment being made. Shiland *v.* Loeb, 58 App. Div. 565, 69 N. Y. S. 11.

396-95 Fourth Nat. Bk. *v.* Albaugh, 188 U. S. 734; Magee *v.* Vaughan, 212 Fed. 278; Alkon *v.* U. S., 163 Fed. 810, 90 C. C. A. 116; Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581; Smith *v.* Allen (Ala.), 62 S. 296; Taylor *v.* White, 1 Ala. App. 593, 56 S. 2; Massey *v.* Fain, 1 Ala. App. 424, 55 S. 936; Sloss-S. S. & I. Co. *v.* Sharp, 156 Ala. 284, 47 S. 279; Moore *v.* Crosthwait, 135 Ala. 272, 33 S. 28; Rain *v.* S. (Ariz.), 137 P. 550; In re Ricks' Est., 160 Cal. 467, 117 P. 539; Ernest *v.* McCauley, 155 Cal. 739, 102 P. 924; Rudd *v.* Byrnes, 156 Cal. 636, 105 P. 957; Story *v.* Nidiffer, 146 Cal. 549, 80 P. 692; P. *v.* Melandrez, 4 Cal. App. 396, 88 P. 372; Miller *v.* Kinsel, 20 Colo. App. 346, 78 P. 1075; Everett *v.* Hart, 20 Colo. App. 93, 77 P. 254; Foote *v.* Brown, 81 Conn. 218, 70 A. 699; Central of Ga. R. Co. *v.* Mosely, 112 Ga. 914, 38 S. E. 350; Springfield *v.* Granite City, 157 Ill. App. 61; Fitzgerald *v.* Coleman, 114 Ill. App. 25; Chicago R. Co. *v.* Henry, 218 Ill. 92, 75 N. E. 758; Colsch *v.* R. Co., 149 Ia. 176, 127 N. W. 198, *rev.* 117 N. W. 281 (suit for loss of cattle in transit); Bullard *v.* Bullard, 112 Ia. 423, 84 N. W. 513; McConnell's Exr. *v.* McConnell, 138 Ky. 783, 129 S. W. 106 (of devisee to show his influence over testator); American Dist. Tel. Co. *v.* Oldham, 148 Ky. 320, 146 S. W. 764; Harp *v.* C. (Ky.), 119 S. W. 1191; Stacy *v.* C., 29 Ky. L. R. 1242, 97 S. W. 39; Sullivan *v.* Sullivan, 29 Ky. L. R. 239, 92 S. W. 966; Richardson *v.* Anderson, 109 Md. 641, 72 A. 485; McKeever *v.* Ratcliffe (Mass.), 105 N. E. 552; Smith *v.* Ins. Co., 200 Mass. 50, 85 N. E. 841; Priebisch *v.* Ottenwess, 176 Mich. 476, 142 N. W. 762; Mohn *v.* Mansfield, 167 Mich. 10, 132 N. W. 525; Rowe *v.* Bregenzer, 161 Mich. 684, 126 N. W. 706 (action for fire); Sherrard *v.* Cudney, 134 Mich. 200, 96 N. W. 15; Reiser *v.* Portere, 106 Mich. 102, 63 N. W. 1041; McManus *v.* Co., 105 Minn. 144, 117 N. W. 223; Jenning *v.* Rhode, 99 Minn. 335, 109 N. W. 597; Liles *v.* May (Miss.), 63 S. 217; Richburger *v.* S., 90 Miss. 806, 44 S. 772; Myer *v.* Spann (Miss.), 35 S. 177; Newberry *v.* Co. (Mo.), 163 S. W. 570; S. *v.* Donnington, 246 Mo. 343, 151 S. W. 975; Mason *v.* Agr. Ins. Co., 150 Mo. App. 17, 129 S. W. 472 (action on fire insurance policy); Shamp *v.* Lambert, 142 Mo. App. 567, 121 S. W. 770; Sullivan *v.* Girson, 39 Mont. 274, 102 P 320; Lowe *v.* Keens, 90 Neb. 565, 133 N. W. 1127 (on subscription to church building); Ogden *v.* W. O. W., 78 Neb. 806, 113 N. W. 524; Young *v.* Kinney, 79 Neb. 421, 112 N. W. 558; Carlson *v.* Holm, 2 Neb. (Unof.) 38, 95 N. W. 1125; Lemire *v.* Pilawski (N. H.), 88 A. 702; McBlain *v.* Edgar, 65 N. J. L. 634, 48 A. 600; U. S. *v.* Adamson, 15 N. M. 280, 106 P. 653; Ty. *v.* Sais, 15 N. M. 171, 103 P. 980; P. *v.* Cahill, 193 N. Y. 232, 86 N. E. 39; Frederick Figge Co. *v.* Stevenson, 138 N. Y. S. 98; Flieg *v.* Levy, 133 N. Y. S. 249; Johnson *v.* Woodworth, 134 App. Div. 715, 119 N. Y. S. 146; Carson *v.* Blount, 156 N. C. 103, 72 S. E. 90; In re Shuman's Est., 45 Pa. Super. 587; Stewart *v.* Gleason, 23 Pa. Super. 325; Brown *v.* R. Co., 83 S. C. 53, 64 S. E

1012 (are affirmative evidence for defendant); Bliss *v.* Waterbury (S. D.), 145 N. W. 434; Wofford *v.* Lane (Tex. Civ.), 167 S. W. 180; Autrey *v.* Linn (Tex. Civ.), 138 S. W. 197; Holt *v.* S., 57 Tex. Cr. 432, 125 S. W. 43; W. U. T. Co. *v.* Burton, 53 Tex. Civ. 378, 115 S. W. 364; Wood *v.* S., 50 Tex. Cr. 580, 99 S. W. 1009; McKay *v.* Elder (Tex. Civ.), 92 S. W. 268; Kirk *v.* S., 56 Tex. Cr. 429, 120 S. W. 436; Minor *v.* S., 56 Tex. Cr. 431, 120 S. W. 860; Stapleton *v.* S., 56 Tex. Cr. 422, 120 S. W. 866; Davis *v.* S., 55 Tex. Cr. 437, 117 S. W. 138; Over *v.* R. Co. (Tex. Civ.), 73 S. W. 535; S. *v.* Moore, 36 Utah 521, 105 P. 293; Corbett *v.* Weaver, 59 Wash. 248, 109 P. 803 (action for services); Hilton *v.* Hayes, 154 Wis. 27, 141 N. W. 1015; Lewis *v.* England, 14 Wyo. 128, 82 P. 869.

See also Lilly *v.* Bk., 178 Fed. 53, 102 C. C. A. 1.

Evidence given in a prior proceeding. Sweetser *v.* Jordan, 211 Mass. 393, 97 N. E. 768.

What a party says may be evidence of admission, whether it relates to contents of a paper or anything else. Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979.

Weight to be given.—Admission personal injury was result of injured party's negligence will not always release defendant. Copley *v.* R. Co., 26 Utah 361, 73 P. 517.

Provable in actions for libel.—Admissions as to conduct made by party claimed to have been libeled may be proved to establish truth of libel. Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512.

An evasive reply to request to perform duty and failure to deny existence of duty is admission. Avery *v.* Stewart, 136 N. C. 426, 48 S. E. 775.

Need not be based upon knowledge. If admissions are made unqualifiedly it is immaterial admitter had no personal knowledge of their truth. Reed *v.* McCord, 160 N. Y. 330, 54 N. E. 737.

Made after cause of action accrued may be proved. White *v.* White, 76 Kan. 82, 90 P. 1087; Theophine *v.* Valchos, 53 Misc. 612, 103 N. Y. S. 776. Admissions as to capacity of testator must be made as of time will executed unless they tend to prove he was afflicted with permanent insanity. Gesell *v.* Baugher, 100 Md. 677, 60 A. 481.

Grantee's admission of insanity of grantor may be testified to without giving reasons on which opinion rested. Stafford *v.* Tarter, 29 Ky. L. R. 1184, 96 S. W. 1127.

Admission of execution of contract is some evidence it continued to be in force. Unger *v.* Mellinger, 43 Ind. App. 524, 88 N. E. 74.

Admission of guilt of individual offense not evidence of later joint offense. Goll *v.* U. S., 166 Fed. 419, 92 C. C. A. 171.

397-97 Met. L. Ins. Co. *v.* O'Grady (Va.), 80 S. E. 743.

Proof of corpus delicti.—Admissions by accused cannot be shown until proof is made of every necessary element to show act was a crime. P. *v.* Grill, 3 Cal. App. 514, 86 P. 613; P. *v.* Frank, 2 Cal. App. 283, 83 P. 578. See "Corpus Delicti."

Schedule in bankruptcy admissible to show insolvency of party who made it. Fales *v.* Browning, 68 S. C. 13, 46 S. E. 545.

397-98 Kline *v.* Kline, 14 Ariz. 369, 128 P. 805; Coleman *v.* Jones, 131 La. 803, 60 S. 243; Manor R. Co. *v.* Egbert, 153 App. Div. 904, 138 N. Y. S. 502.

398-99 S. *v.* Pt. of Bayocean, 65 Or. 506, 133 P. 85.

398-1 Williams *v.* City St. Joseph, 166 Mo. App. 299, 148 S. W. 459.

Admissions in former testimony are disputable. Wiley *v.* R. Co., 86 Vt. 504, 86 A. 808.

398-2 Koch *v.* Denver, 24 Colo. App. 406, 133 P. 1119; Hall *v.* Corp, 13 Ga. App. 632, 79 S. E. 750; Kinney *v.* Reed (Ia.), 145 N. W. 900; Benton *v.* Dumbarton R. Co. (Ia.), 143 N. W. 586; Youngberg *v.* Brick Co. (Tex. Civ.), 155 S. W. 715; Johnson *v.* Zufeldt, 56 Wash. 5, 104 P. 1132.

398-3 La Compagnie, etc. *v.* Hayes, 168 Fed. 903, 94 C. C. A. 243; Hudson *v.* Wright, 164 Ala. 298, 51 S. 389; Beauchamp *v.* Bertig, 90 Ark. 351, 119 S. W. 75; Spaeth *v.* Inv. Co., 16 Cal. App. 329, 116 P. 980; Los Angeles P. B. Co. *v.* Higgins, 8 Cal. App. 414, 97 P. 420; Harvey *v.* Co. (Colo.), 139 P. 1098; Patchen *v.* Co., 82 Conn. 592, 74 A. 881 (admission does not lose effect in presence of other pleading to contrary in answer, whether inconsistent pleading embodied in same defense or another); Florida Y. P. Co. *v.* Stores Co., 140 Ga. 321, 78 S. E. 900 (admis-

sion conclusive); Manley *v.* McKenzie, 128 Ga. 347, 57 S. E. 705; Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348; Templer *v.* Lee (Ind.), 103 N. E. 1090; Wood *v.* Brotherhood, 140 Ia. 98, 117 N. W. 1123; White *v.* Smith, 79 Kan. 96, 98 P. 766; Louisville, etc. R. Co. *v.* McDonald, 33 Ky. L. R. 762, 111 S. W. 289; Nicola Bros. Co. *v.* Hurst, 28 Ky. L. R. 87, 88 S. W. 1081; Palmer Co. *v.* Eaves, 27 Ky. L. R. 573, 85 S. W. 750; Shea *v.* Board, 124 La. 299, 50 S. 166; Chandler *v.* Ins. Co. (Mo.), 167 S. W. 1162; City of Maysville *v.* Truex, 235 Mo. 619, 139 S. W. 390; Smith *v.* Vickery, 235 Mo. 413, 138 S. W. 502; Harrison *v.* McReynolds, 183 Mo. 533, 82 S. W. 120; Jewell *v.* Mfg. Co., 143 Mo. App. 200, 127 S. W. 598; Johnson *v.* Co., 41 Mont. 158, 108 P. 1057; Kraus *v.* Birnbaum, 132 App. Div. 567, 116 N. Y. S. 916; Carroll *v.* James, 156 N. C. 68, 72 S. E. 81; Matthews *v.* Peterson, 152 N. C. 168, 67 S. E. 340; Leathers *v.* Co., 144 N. C. 330, 57 S. E. 11; Williamson *v.* Bryan, 142 N. C. 81, 55 S. E. 77; Mitchell *v.* Co., 19 N. D. 736, 124 N. W. 946; Okla. etc. Co. *v.* Smith (Okla.), 139 P. 285; Hofer *v.* Smith, 65 Or. 145, 129 P. 761 (admission in the complaint); Holland *v.* Rhoades, 56 Or. 206, 106 P. 779; Bigelow *v.* M. Co., 54 Or. 452, 103 P. 56; Webb *v.* Heintz, 52 Or. 444, 97 P. 753 (notwithstanding denials in the reply); McElroy *v.* McCarville (R. I.), 71 A. 646; Houston, etc. R. Co. *v.* De Walt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. 877; Merriman *v.* Blalack, 56 Tex. Civ. 594, 121 S. W. 552; Gaffney *v.* Clark (Tex. Civ.), 118 S. W. 606; Hildebrandt *v.* Hoffman (Tex. Civ.), 113 S. W. 785; Eclipse P. & Mfg. Co. *v.* Co., 55 Tex. Civ. 553, 120 S. W. 532; Berry *v.* Fairbanks, 51 Tex. Civ. 558, 112 S. W. 427; Hague *v.* Co., 37 Utah 290, 107 P. 249; Sanitas Co. *v.* Niezorawski, 138 Wis. 377, 120 N. W. 292; Van Eps *v.* Newald, 139 Wis. 129, 120 N. W. 853.

See Karbs H. Co. *v.* Taylor, 52 Or. 627, 97 P. 44.

Bringing action against foreign corporation admission it was doing business in jurisdiction in which action brought. So. R. Co. *v.* Mayes, 113 Fed. 84, 51 C. C. A. 70.

Extent of admission.—Admission that paragraph of complaint alleging copy of a protested check is hereto attached is true admits indorsement on check. Wachstein *v.* Bk., 120 Ga. 229, 47 S. E. 586. Admission relieves defendant of burden of proof only to extent it admits the facts alleged. Whitfield *v.* Co., 152 N. C. 211, 67 S. E. 512.

Admission contract pleaded is a true copy of that made does not admit allegations of other matters alleged to have been made part of contract but were not embodied in it as written through oversight or mistake. Am., etc. Wks. *v.* Co., 30 Wash. 178, 70 P. 236.

Admission of payment.—Under the English workmen's compensation act, 1897, admission that within a few days after accident defendant paid plaintiff a certain sum, and allegation no claim for compensation had been made as required, admission of payment was a fact on which plaintiff might rely and some evidence of a claim having been duly made. Lowe *v.* Myers, (1906) 2 K. B. 265.

Manner of making immaterial.—Eames *v.* Armstrong, 142 N. C. 506, 55 S. E. 405.

Express admission construed in connection with allegations of complaint as filed, rather than in relation to amended complaint subsequently filed. Klein *v.* Co., 182 N. Y. 27, 74 N. E. 495.

Admission of ouster in ejectment.—A denial in ejectment that defendant, without right or title, entered into possession, and putting in issue plaintiff's title and right of possession and averring possession in defendant, not denied by plaintiff, is admission of ouster. Dondero *v.* O'Hara, 3 Cal. App. 633, 86 P. 985.

399-4 Wea Tp. *v.* Cloyd, 46 Ind. App. 49, 91 N. E. 959; Young *v.* Assn., 126 Mo. App. 325, 103 S. W. 557.

Denial of execution of bond sued upon, and "for further defense" a statement that "the alleged bond" sued on etc., is not admission of its execution. Reed *v.* Reed, 93 N. C. 462. Admission controls inconsistent allegation. Irwin *v.* Co., 39 Wash. 346, 81 P. 849. Allegation that plaintiff "inadvertently" did an act which might have been negligent is not admission he was negligent. Colusa Parrot M. & . Co. *v.* Monahan, 162 Fed. 276, 89 C. C. A. 256.

399-5 In re Cooksey, 79 Kan. 550, 100 P. 62.

Admitting a fact is not admission of its cause. Fenton *v.* Assn., 139 Ia.

166, 117 N. W. 251; Casper *v.* Co., 121 La. 603, 46 S. 666.

400-6 McKane *v.* Dady, 128 App. Div. 190, 112 N. Y. S. 650.

400-7 Los Angeles P. B. Co. *v.* Higgins, 8 Cal. App. 414, 97 P. 420 (consolidation of actions does not affect admissions when applied to cases in which made).

400-8 Montgomery *v.* Glasscock (Ky.), 121 S. W. 668; Duguid *v.* Roberts (Ky.), 121 S. W. 464.

401-9 Parker *v.* Wilson (Ala.), 60 S. 150; St. Louis, etc. R. Co. *v.* Weatherly, 93 Ark. 269, 124 S. W. 1031; Reclamation Dist. No. 730 *v.* Hershey, 160 Cal. 692, 117 P. 904; Wardlow *v.* Middleton, 156 Cal. 585, 105 P. 738; Madison *v.* O. Co., 154 Cal. 768, 99 P. 176; McCoy *v.* Buckley, 11 Cal. App. 241, 104 P. 705; Lucas *v.* Gobbi, 10 Cal. App. 648, 103 P. 157; Vance R. L. Co. *v.* Durphy, 8 Cal. App. 664, 97 P. 702; Tracy *v.* R. Co., 82 Conn. 1, 72 A. 156; Alabama G. S. R. Co. *v.* Hardy, 131 Ga. 238, 62 S. E. 71; Garbutt L. Co. *v.* Wall, 126 Ga. 172, 54 S. E. 944; Oliver *v.* S., 7 Ga. App. 695, 67 S. E. 886; P. *v.* O'Connor, 239 Ill. 272, 87 N. E. 1016; Tate *v.* R. Co., 147 Ill. App. 155; Wolf *v.* Powers, 144 Ill. App. 168; Brunhild *v.* T. Co., 144 Ill. App. 198; Barnes *v.* R. & L. Co., 143 Ill. App. 259; Morris *v.* Williams, 143 Ill. App. 140; Powers *v.* R. Co., 142 Ill. App. 515; Feld *v.* Loftis, 140 Ill. App. 530; Baxter *v.* Moore (Ind.), 105 N. E. 588; Gordon *v.* Simmons, 136 Ky. 273, 124 S. W. 306; Dycus *v.* Brown, 135 Ky. 140, 121 S. W. 1010; Adkins *v.* Kendrick, 131 Ky. 779, 115 S. W. 814; Louisville R. Co. *v.* Scomp, 30 Ky. L. R. 487, 98 S. W. 1024; Van Doorn *v.* Heap, 160 Mich. 199, 125 N. W. 11; Providence J. Co. *v.* Bailey, 159 Mich. 285, 123 N. W. 1117; Miller *v.* Ins. Co., 158 Mich. 402, 122 N. W. 1093; Miller *v.* Journal Co., 246 Mo. 722, 152 S. W. 40; Himmelborger-H. L. Co. *v.* Jones, 220 Mo. 190, 119 S. W. 366; S. *v.* Riley, 219 Mo. 667, 118 S. W. 647; Greer *v.* R. Co., 173 Mo. App. 276, 158 S. W. 740; Northwestern, S. R. Co. *v.* Cornwall, 148 Mo. App. 605, 128 S. W. 535; S. *v.* Henderson, 86 Mo. App. 482; In re Simmons, 130 App. Div. 350, 114 N. Y. S. 571; Hollis *v.* R. Co., 128 App. Div. 821, 113 N. Y. S. 4; Zettel *v.* Taylor, 128 App. Div. 251, 112 N. Y. S. 639; Stroock P. Co. *v.* Falcott, 129 App. Div. 14, 113 N. Y. S. 214; McCloskey *v.* Goldman, 62 Misc. 462, 115 N. Y. S. 189; Willis *v.* Co., 150 N. C. 318, 64 S. E. 11 (filing amended answer by leave affects only weight of admissions by silence of original); Armstrong *v.* Crump, 25 Okla. 452, 106 P. 855; St. Louis, etc. R. Co. *v.* Cake, 25 Okla. 227, 105 P. 322: Mellon Nat. Bk. *v.* Bk., 226 Pa. 261, 75 A. 363; Williams *v.* O'Donnell, 225 Pa. 321, 74 A. 205; Giraud *v.* Winslow (Tex. Civ.), 127 S. W. 1180; International, etc. R. Co. *v.* Ormond, 57 Tex. Civ. 79, 121 S. W. 899; Steely *v.* Imp. Co., 55 Tex. Civ. 463, 119 S. W. 319; Meekler *v.* Mettler, 50 Wash. 473, 97 P. 507; Sanitas Co. *v.* Niezorawski, 138 Wis. 377, 120 N. W. 292. *Contra*, if petition is withdrawn. Sawyer *v.* Kelly, 148 Ia. 644, 127 N. W. 977.

Unecessary reply need not be controverted. Pott *v.* Hanson, 109 Minn. 416, 124 N. W. 17.

Admission of by clear and necessary implication from other facts pleaded is as effective as though it were expressly stated, notwithstanding a general denial. Malick *v.* Kellogg, 118 Wis. 405, 95 N. W. 372.

Failure to rebut allegation by evidence does not admit its truth. Ragland *v.* Ins. Co. (Tex. Civ.), 157 S. W. 1187.

Slander.—Failure to deny immaterial allegations as to good character of plaintiff and his innocence of accusations against him is not admission of falsity thereof Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931.

Presumption following admission.—If it affirmatively appears defendant claimed under no one except common grantor, the fact that he so claimed must be taken as admission grantor had title, and, until something to the contrary appears, such admission raises presumption such grantor was owner. Garbutt L. Co. *v.* Wall, 126 Ga. 172, 54 S. E. 944; Deen *v.* Williams, 128 Ga. 265, 57 S. E. 427.

Joining in a joint answer is not evidence of joint liability as charged. Livesay *v.* Bk., 36 Colo. 526, 86 P. 102.

403-10 Birmingham R., etc. Co. *v.* Haggard, 155 Ala. 343, 46 S. 519.

404-11 Krause *v.* Woodmen, 133 Ia. 199, 110 N. W. 452.

404-12 Shuttleworth *v.* Marx, 159 Ala. 418, 49 S. 83; Street *v.* Smith, 15 N. M. 95, 103 P. 644.

404-13 Hankins *v.* Helms, 12 Ariz.

178, 100 P. 460; Chapman & Co. *v.* Wilson, 91 Ark. 30, 120 S. W. 391; Hibernia S. & L. Soc. *v.* Boyd, 155 Cal. 193, 100 P. 239; Blodgett *v.* Scott, 11 Cal. App. 310, 104 P. 842; Edwards *v.* Harris, 7 Ga. App. 207, 66 S. E. 622; Seymour *v.* League, 155 Ill. App. 21; Hurst *v.* Swango, 144 Ky. 22, 137 S. W. 794; Louisville R. Co. *v.* Scomp, 30 Ky. L. R. 487, 98 S. W. 1024; Junkins *v.* Sullivan, 110 Md. 539, 73 A. 264; Putnan *v.* Middleborough, 209 Mass. 456, 95 N. E. 749; Grimme *v.* Aid Assn. 167 Mich. 240, 132 N. W. 497; Bowen *v.* Kansas City, 140 Mo. App. 695, 126 S. W. 790; Ft. Smith R. Co. *v.* Solsberger (Okla.), 131 P. 1078.

Same result under rules of court Neely *v.* Bair, 144 Pa. 250, 22 A. 673.

Admission of title.—Failure to deny paragraph of complaint setting out abstract of plaintiff's title does not admit latter, there being a denial of his title or right of possession. Roberts *v.* Center, 26 Wash. 435, 67 P. 151.

Failure to act on admission not always error. See McCready *v.* Crane, 74 Kan. 710, 88 P. 748.

406-14 Howard *v.* R. Co., 24 Ky. L. R. 1051, 70 S. W. 631.

Verified account, if not denied, entitles plaintiff to judgment in absence of proof. Baker *v.* Haynes, 146 Ala. 520, 40 S. 968.

Denial is sufficient if it is as specific as circumstances allow; thus, allegation note in suit, which purported to be that of a corporation by its president, was not signed by authority, was a good denial of signature. Marshall F. & Co. *v.* Ruffcorn, 117 Ia. 157, 90 N. W. 618.

Admission of genuineness of signature does not include execution of note of which signature is part. Mack *v.* Cole, 130 Mich. 84, 89 N. W. 564.

Inconsistent defenses.—In one part of the answer a fact denied must be proved though its existence is admitted in another part. Houston, etc. R. Co. *v.* De Walt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. 877.

408-19 Branch *v.* Johnson, 9 Ga. App. 699, 71 S. E. 1123.

410-27 Unsigned contract not within statute. Tonopah L. Co. *v.* Riley, 30 Nev. 312, 95 P. 1001.

415-47 Fifer *v.* Co., 103 Md. 1, 62 A. 1122; Rudd *v.* Dewey, 121 Ia. 454, 96 N. W. 973.

Must be proved if admitted in one plea and denied in inconsistent plea. Livesey *v.* Besson, 82 N. J. L. 333, 82 A. 509.

Admission in counter-claim may be considered for purpose of overcoming effect of a general denial, though it will not be conclusive. Talbot *v.* Laubheim, 188 N. Y. 421, 81 N. E. 163.

Plea of non-assumpsit accompanied by notice of recoupment not admission. Hornblower *v.* University, 31 App. Cas. (D. C.) 64.

415-48 White S. M. Co. *v.* Horkan, 7 Ga. App. 283, 66 S. E. 811; Moultrie *v.* Schofield (Ga. App.), 65 S. E. 315; Johnson *v.* Co., 41 Mont. 158, 108 P. 1057.

418-59 Kidwell *v.* Ketler, 146 Cal. 12, 79 P. 514 (*quot.* from Brown *v.* Newall, 2 Myl. & C. 558, 40 Eng. Reprint 752, thus: Now it is a rule of pleading, that although a party is bound by the facts which he states, he is not bound by his statement of the legal consequences of those facts. It is for the court to judge what are those legal consequences); S. *v.* Cass County Court, 137 Mo. App. 698, 119 S. W. 1010; Herndon *v.* Salt Lake City, 34 Utah 65, 95 P. 646.

The rule that, in actions to recover money upon ordinary contracts, the general denial does not put allegation of non-payment in issue has no application to action on official or other bond of indemnity which does not create relation of debtor and creditor. Offer to prove payment may only go to extent of showing right of action never existed. Barker *v.* Wheeler, 62 Neb. 150, 87 N. W. 20.

419-61 Plea of settlement and payment does not admit existence of specific cause of action. Fitch *v.* Martin, 83 Neb. 124, 119 N. W. 25.

419-65 Welch *v.* Bigger, 24 Idaho 169, 133 P. 381. Answer not final as to quantum of damages plaintiff entitled to. Masterson *v.* Heitmann, 38 Tex. Civ. 476, 87 S. W. 227. Silence as to damages sustained is not admission. Bigham *v.* R. Co., 223 Pa. 106, 72 A. 318.

420-66 Hewitt *v.* Huffman, 55 Or. 57, 105 P. 98. See **Thompson *v.* Colvin,** 53 Or. 488, 101 P. 201.

Defendant cannot object to a verdict finding value of property for which he is liable at sum fixed in answer. Curtis *v.* Co., 36 Wash. 55, 78 P. 133.

421-71 Chicago R. Co. *v.* Wirkus,

131 Ill. App. 485; Chicago R. Co. *v.* Jerka, 126 Ill. App. 365.

422-76 Craig *v.* Burris, 4 Penne (Del.), 156, 55 A. 353; Knowles *v.* Dist., 16 Ida. 217, 101 P. 81, cit. the text; Buckeye B. Co. *v.* Eymer, 157 Mich. 518, 122 N. W. 124; Carpenter *v.* Carpenter, 126 Mich. 217, 85 N. W. 576.

423-79 Manley *v.* McKenzie, 128 Ga. 347, 57 S. E. 705; Vollman *v.* Spry, 26 Ky. L. R. 228, 80 S. W. 1092; Johnson *v.* Co., 41 Mont. 158, 108 P. 1057; Walter *v.* Meader, 75 App. Div. 612, 77 N. Y. S. 407; Gossler *v.* Wood, 120 N. C. 69, 27 S. E. 33.

If sworn to are evidence of strongest kind. Barber *v.* S., 64 Tex. Cr. 96, 142 S. W. 577.

423-80 Crosby *v.* Hammerling, 170 Fed. 857 (affidavit of defense under Pennsylvania practice); Sunday *v.* Dietrich, 16 Pa. Super. 640; Flegal *v.* Hoover, 156 Pa. 276, 27 A. 162.

Pleadings must be offered.—If papers do not contain pleadings on which case tried, admissions in them cannot be considered unless they are formally introduced. Marshall F. & Co. *v.* Ruffcorn, 117 Ia. 157, 90 N. W. 618 (*over.* Mulligan *v.* R. Co., 36 Ia. 181).

Either party may introduce pleadings of other. Palmer T. Co. *v.* Eaves, 27 Ky. L. R. 573, 85 S. W. 750.

In Pennsylvania affidavit of defense is competent to prove admissions, but not to open up collateral matters not raised by offering it. Neely *v.* Bair, 144 Pa. 250, 22 A. 673; Farmers' Bk. *v.* Bk., 30 Pa. Super. 271; Jacoby *v.* Ins. Co., 10 Pa. Super. 366.

Witness' testimony may be explained by complaint. S. *v.* Bringgold, 40 Wash. 12, 82 P. 132.

423-82 Clark *v.* R. Co., 179 Mo. 66, 77 S. W. 882. *Contra,* Johnson *v.* Co., 41 Mont. 158, 108 P. 1057.

One suing a reinsurer, though he offers in evidence the answer, is not bound by the provisions of the contract contained therein. Federal Life Ins. Co. *v.* Petty, 177 Ind. 256, 97 N. E. 1011.

Only what necessary if meaning of whole not changed. Sibert *v.* Hostick, 91 Neb. 255, 135 N. W. 1054.

423-83 Hewlett *v.* Hyden, 4 Ind. Ty. 176, 69 S. W. 839; Gossler *v.* Wood, 120 N. C. 69, 27 S. E. 33. See Hockfield *v.* R. Co., 150 N. C. 419, 64 S. E. 181.

Affidavit of defense.—City of Pittsburgh *v.* R. Co., 234 Pa. 223, 83 A. 273.

That part of answer containing admission may be introduced without offering that which denies allegations of complaint. Lewis *v.* R. Co., 132 N. C. 382, 43 S. E. 919. That part which contains qualifying and explanatory matter, in no way affecting admission, need not be offered. Sawyer *v.* R. Co., 145 N. C. 24, 58 S. E. 598; Hedrick *v.* R. Co., 136 N. C. 510, 48 S. E. 830; Stewart *v.* R. Co., 136 N. C. 385; 48 S. E. 793; Wade *v.* Co., 149 N. C. 177, 62 S. E. 919.

Entire record admitted to show admissions. Stockwell *v.* Loecher, 9 Pa. Super. 241. When received a pleading is in evidence for all purposes. Hastings *v.* Speer, 15 Pa. Super. 115. Self-serving allegations should not go to jury. Breiner *v.* Nugent, 136 Ia. 322, 111 N. W. 446.

424-85 Hartsell *v.* Masterson, 132 Ala. 275, 31 S. 616; Valley P. Co. *v.* Wise, 93 Ark. 1, 123 S. W. 768; Boulder, etc. Co. *v.* Co., 36 Colo. 455, 86 P. 101; McKinnon *v.* Johnson, 57 Fla. 120, 48 S. 910; Watkins *v.* Fountain (Ga. App.), 80 S. E. 694; Seymour *v.* Co., 103 Ill. App. 625; Hostetter *v.* Green (Ky.), 167 S. W. 919; S. *v.* Paxton, 65 Neb. 110, 90 N. W. 983; Johnson *v.* Ditch Co. (S. D.), 143 N. W. 959; Lewis *v.* Crouch (Tex. Civ.), 85 S. W. 1009; Cuneo *v.* De Cuneo, 24 Tex. Civ. 436, 59 S. W. 284. See Wingard *v.* Wingard, 56 Wash. 389, 105 P. 834.

Damages claimed—amount in writ. Necessary to show that party knew what amount his attorney inserted in writ. Snow *v.* Rubber C., 211 Mass. 82, 97 N. E. 618.

Rule applies to pleading filed in subsequent action (Hewlett *v.* Hyden, 4 Ind. Ty. 176, 69 S. W. 839); immaterial cause of action not the same. C. *v.* Co., 216 Pa. 108, 64 A. 909.

Rule in criminal case.—Complaint to which defendant had pleaded guilty on former trial is admissible without authentication if it is shown it had been read to him and is identified as the one to which he had so pleaded. S. *v.* Bringgold, 40 Wash. 12, 82 P. 132.

Proof of mistake in pleading.—Attorney who drew pleading offered may testify he used name of wrong party therein. Ritchey *v.* Seeley, 68 Neb. 120, 93 N. W. 977, 94 N. W. 972, 97 N. W. 818.

An authenticated transcript of the proceedings and decree in a cause in another court will be given full faith and credit in another case between same parties. Seymour *v.* Co., 103 Ill. App. 625.

Admission not binding if party introduces testimony to controvert it. Dressner *v.* Co., 92 N. Y. S. 800.

425-86 General Elec. Co. *v.* Clark, 108 Fed. 170; Boulder, etc. Co. *v.* Co., 36 Colo. 455, 86 P. 101; Booth *v.* Lenox, 45 Fla. 191, 34 S. 566; St. Paul, etc. Co. *v.* Co., 113 Ga. 786, 39 S. E. 483; Oliver *v.* S., 7 Ga. App. 695, 67 S. E. 886; First Nat. Bk. *v.* Duncan, 80 Kan. 196, 101 P. 992; First Nat. Bk. *v.* Wisdom, 23 Ky. L. R. 530, 63 S. W. 461; Humphrey *v.* Stage Co., 115 Minn. 18, 131 N. W. 498; Tague *v.* Caplice, 28 Mont. 51, 72 P. 297; Paxton *v.* S., 59 Neb. 460, 81 N. W. 383, 80 Am. St. 689; s. c. 60 Neb. 763, 84 N. W. 254; Baker *v.* Duff, 136 App. Div. 13, 120 N. Y. S. 184; Benedict *v.* Pincus, 134 App. Div. 555, 119 N. Y. S. 226; Chicago, etc. R. Co. *v.* Mashore, 21 Okla. 275, 96 P. 630; Limerick *v.* Lee. 17 Okla. 165, 87 P. 859; Hofer *v.* Smith, 65 Ore. 145, 129 P. 761; Floyd *v.* Co., 222 Pa. 257, 71 A. 13; Fales *v.* Brown. ing, 68 S. C. 13, 46 S. E. 545; Greif *v.* Seligman (Tex. Civ.), 82 S. W. 533. See Bryant *v.* Cadle, 18 Wyo. 64, 104 P. 23.

Allegations in a cross-bill between defendants held not admission of liability to plaintiff. Missouri, etc. R. Co. *v.* Maxwell (Tex. Civ.), 130 S. W. 722.

Pleading of an ancestor is evidence against his heirs in trespass to try title. Warner *v.* Sapp (Tex. Civ.), 97 S. W. 125. But it has been ruled that pleadings are inadmissible where defendant and former owner of land were parties and suit commenced without notice to defendant. Texas & P. R. Co. *v.* O'Mahoney, 24 Tex. Civ. 631, 60 S. W. 902.

May be best evidence.—See O'Neal *v.* Fenwick, 23 Ky. L. R. 1219, 64 S. W. 952.

Plea in bar filed in another case in which defendant pleaded guilty to charge of maintaining a nuisance about the time and in connection with the premises in question is competent in action for that offense. S. *v.* Schmidt, 74 Kan. 627, 87 P. 742.

Explanation of pleading.—On the admission of a pleading drawn by the attorney general he may testify to the theory of law upon which it was drawn and filed for the purpose of depriving it of its apparent force. S. *v.* Paxton, 65 Neb. 110, 90 N. W. 983.

Explanation of statement in subsequent trial. See Union P. R. Co. *v.* Connolly, 77 Neb. 254, 109 N. W. 368.

Pleading by one not a party.—An answer filed in his own behalf in another action by an attorney in a pending suit, to which he is not a party or in the result of which he is not interested, otherwise than as attorney, is not admissible. Hamilton-B. S. Co. *v.* Milliken, 62 Neb. 116, 86 N. W. 913.

A plea of guilty is admissible in a civil action growing out of same act (Risdon *v.* Yates, 145 Cal. 210, 78 P. 641; Hendle *v.* Geiler (Del.), 50 A. 632; Hauser *v.* Griffith, 102 Ia. 215, 71 N. W. 223; Wisnieski *v.* Vanek, 5 Neb. (Unof.) 512, 99 N. W. 258; Yeska *v.* Swendrzynski, 133 Wis. 475, 113 N. W. 959); but proof may be made of circumstances under which it was entered. Yeska *v.* Swendrzynski, supra. It has no other effect than oral admission (Risdon *v.* Yates, supra); but this view is not everywhere accepted. Hauser *v.* Griffith, supra; Root *v.* Sturdivant, 70 Ia. 55, 29 N. W. 802; Meyers *v.* Dillon, 39 Or. 581, 65 P. 867, 66 P. 814. Such plea, entered in one court to the charge of violating ordinance, is admissible in prosecution by state. Ehrlick *v.* C., 31 Ky. L. R. 401, 102 S. W. 289.

426-88 Tague *v.* Caplice, 28 Mont. 51, 72 P. 297; McLemore *v.* R. Co., 111 Tenn. 639, 69 S. W. 338; Harris *v.* Co., 114 Tenn. 328, 85 S. W. 897.

Sworn complaint equivalent to an affidavit. Ex parte Boyd (Nev.), 134 P. 455.

Verification not essential.—Pecos, etc. R. Co. *v.* Blasengame, 42 Tex. Civ. 66, 93 S. W. 187.

Evidence to lessen weight of admission in sworn answer.—See Booth *v.* Lenox, 45 Fla. 191, 34 S. 566.

427-89 Tague *v.* Caplice, 28 Mont. 51, 72 P. 297; Michel *v.* Michel (Tex. Civ.), 115 S. W. 358.

427-90 Wyles *v.* Berry, 116 Ky. 377, 76 S. W. 126.

427-91 Paxton *v.* S., 59 Neb. 460, 81 N. W. 383, 80 Am. St. 689.

428-95 Merriman *v.* Blalack, 56 Tex. Civ. 594, 121 S. W. 552; Galloway *v.* R. Co. (Tex. Civ.), 78 S. W. 32.

If allegations are made upon a mis-

understanding of the facts and not by authority, fact may be shown. Houston, etc. R. Co. *v.* De Walt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. 877; Galveston, etc. R. Co. *v.* Fitzpatrick (Tex. Civ.), 91 S. W. 355.

430-1 Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211; Galveston, etc. R. Co. *v.* Fitzpatrick (Tex. Civ.), 91 S. W. 355.

In Pennsylvania entire affidavit of defense may be offered and advantage taken of part, and remainder contradicted. McAvoy *v.* Ins. Co., 27 Pa. Super. 271.

Effect of time on admission.—A pleading in another action admitting a material fact does not establish affirmative of the issue in absence of proof that cause of action arose soon after admission made. Mandelbaum *v.* R. Co., 90 N. Y. S. 377.

430-2 See Slayden *v.* Palmo, 53 Tex. Civ. 227, 117 S. W. 1051.

431-3 An admission contained in one plea cannot be used to limit effect of another plea. Chicago, etc. R. Co. *v.* Newell, 113 Ill. App. 263.

Formal admission of a conclusion of law may be avoided by averments showing it to be erroneous. Hensel *v.* Hoffman, 74 Neb. 382, 104 N. W. 603.

433-16 Younglove *v.* Knox, 44 Fla. 743, 33 S. 427; Lindsay *v.* Dutton, 227 Pa. 208, 75 A. 1096.

434-18 Lindsay *v.* Dutton, 227 Pa. 208, 75 A. 1096; Lewis *v.* Crouch (Tex. Civ.), 85 S. W. 1009.

Allegations in a cross-bill filed in a separate suit not conclusive. Lewis *v.* Crouch, 227 Pa. 208, 75 A. 1096.

435-21 All parties entitled to benefit of admission if pleading received generally. Baker *v.* Duff, 136 App. Div. 13, 120 N. Y. S. 184.

435-23 Kidwell *v.* Ketler, 146 Cal. 12, 79 P. 514; Tiddy *v.* Graves, 126 N. C. 620, 36 S. E. 127. See McElmurray *v.* Blodgett, 120 Ga. 9, 47 S. E. 531; and vol. 1, p. 596.

436-28 Belden *v.* Blackman, 124 Mich. 667, 83 N. W. 616; Donovan *v.* Boeck, 217 Mo. 70, 116 S. W. 543; Truitt *v.* Philadelphia, 221 Pa. 331, 70 A. 757.

Apprehended facts pleaded not admitted by demurrer. Heaton *v.* Parker, 131 App. Div. 812, 116 N. Y. S. 46.

437-31 U. S. *v.* Gentry, 119 Fed. 70, 55 C. C. A. 658; Baldwin *v.* Siddons, 46 Ind. App. 313, 92 N. E. 349, *denying* rehearing, 90 N. E. 1055; Keller *v.* Morton, 63 Misc. 340, 117 N. Y. S. 200; McKane *v.* Dady, 128 App. Div. 190, 112 N. Y. S. 650; *aff'd.* 201 N. Y. 574, 95 N. E. 1133; Kineart *v.* Shambrook, 64 Or. 27, 128 P. 1003.

437-32 Bowes *v.* Cannon, 50 Colo. 262, 116 P. 336; Smith *v.* Smith, 136 Ga. 531, 71 S. E. 869; McClure *v.* Assn., 141 Ia. 350, 118 N. W. 269; Hallowell *v.* McLaughlin, 136 Ia. 279, 111 N. W. 428; Marshall F. & Co. *v.* Ruffcorn, 117 Ia. 157, 90 N. W. 618; Bernard *v.* Co., 137 Mich. 279, 100 N. W. 396; Briscoe *v.* R. Co., 222 Mo. 104, 120 S. W. 1162; Hesston State Bank *v.* Luthy, 155 Mo. App. 363, 137 S. W. 66; Cummings *v.* Hoffman, 113 N. C. 267, 18 S. E. 170; Leistikow *v.* Zuelsdorf, 18 N. D. 511; 122 N. W. 340, cit. the text; Kineart *v.* Shambrook, 64 Or. 27, 128 P. 1003; Schultz *v.* Culbertson, 125 Wis. 169, 103 N. W. 234.

Intention of parties in abandoning original pleading does not avoid its effect in absence of mistake. Lane I. Co. *v.* Lowder, 11 Okla. 61, 65 P. 926.

438-33 Taylor *v.* Evans, 102 Ark. 640, 145 S. W. 564; Hester *v.* Gairdner, 128 Ga. 531, 58 S. E. 165; Stevenson *v.* Co., 143 Ill. App. 397; Sheldon *v.* Crane, 146 Ia. 461, 125 N. W. 238; Arnd *v.* Aylesworth, 145 Ia. 185, 123 N. W. 1000; Reemsnyder *v.* Reemsnyder, 75 Kan. 565, 89 P. 1014; Breese *v.* Graves, 67 App. Div. 322, 73 N. Y. S. 167; Keller *v.* Morton, 63 Misc. 340, 117 N. Y. S. 200; Gossler *v.* Wood, 120 N. C. 69, 27 S. E. 33; Noreum *v.* Savage, 140 N. C. 472, 53 S. E. 289; Cummings *v.* Hoffman, 113 N. C. 267, 18 S. E. 170; Lane I. Co. *v.* Lowder, 11 Okla. 61, 65 P. 926; Page *v.* Co., 17 Okla. 110, 87 P. 851; Cameron *v.* Realmuto, 45 Tex. Civ. 305, 100 S. W. 194; Houston, etc. R. Co. *v.* De Walt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. 877; Galveston, etc. R. Co. *v.* Fitzpatrick (Tex. Civ.), 91 S. W. 355; Schoette *v.* Drake, 139 Wis. 18, 120 N. W. 393; Schultz *v.* Culbertson, 125 Wis. 169, 103 N. W. 234.

When a writing ceases to be a pleading its cogency varies according to many collateral circumstances, such as the deliberation and care with which made, clearness of comprehension, of either maker or reporter of statement, or, especially when emanating from an agent, fullness of consultation with and disclosure from principal. Hence, it may be shown it was made without consultation with, or information from,

the client, but upon information obtained from others. Ranken *v.* Probey, 136 App. Div. 134, 120 N. Y. S. 413; Schultz *v.* Culbertson, 125 Wis. 169, 103 N. W. 234.

438-34 Ralphs *v.* Hensler, 114 Cal. 196, 45 P. 1062; Hess *v.* Webb (Tex. Civ.), 113 S. W. 618.

Competency as evidence doubtful. "When defendant used the original declaration as an admission made by plaintiff, and its right to do so is doubtful (see Smith *v.* Davidson, 41 Fed. 172; Holland *v.* Rogers, 33 Ark. 251; Mecham *v.* McKay, 37 Cal. 154; Vogel *v.* Co., 32 Minn. 167, 20 N. W. 129; Corbett *v.* Clough, 8 S. D. 176, 65 N. W. 1074), it seems to me clear that plaintiff had a right to prove that he did not make the admission." Bernard *v.* Co., 137 Mich. 279, 100 N. W. 396.

But rule will not be extended and does not apply to verified claim against an estate. Pollitz *v.* Wickersham, 150 Cal. 238, 88 P. 911.

Rule of text does not apply to admission which is merely an opinion. McElmurray *v.* Blodgett, 120 Ga. 9, 47 S. E. 531. A stricken pleading does not govern admission of testimony. Kelly *v.* Fejervary, 11 Ia. 693, 83 N. W. 791.

439-35 Leistikow *v.* Zuelsdorf, 18 N. D. 511, 122 N. W. 340.

Original pleadings not conclusive. Mulligan *v.* Ry., 36 Ia. 181, 14 Am. Rep. 514, holding affirmative is overruled. See McClure *v.* Assn., 141 Ia. 350, 118 N. W. 269.

441-41 Alabama M. R. Co. *v.* Guilford, 114 Ga. 627, 40 S. E. 794, 119 Ga. 523, 46 S. E. 655; Lydia Pinkham M. Co. *v.* Gibbs, 108 Ga. 138, 33 S. E. 945; Cooley *v.* Abbey, 111 Ga. 443, 439, 36 S. E. 786.

442-42 Loomis *v.* S. Co., 81 Conn. 343, 71 A. 358; Alabama M. R. Co. *v.* Guilford, 114 Ga. 627, 40 S. E. 794, 119 Ga. 523, 46 S. E. 655; Wilson *v.* Newton, 11 Ga. App. 816, 76 S. E. 648; Caldwell *v.* Drummond (Ia.), 96 N. W. 1122; Watt *v.* R. Co., 82 Kan. 458, 108 P. 811; Arkansas City *v.* Payne, 80 Kan. 353, 102 P. 781; Wyles *v.* Berry, 25 Ky. L. R. 606, 76 S. W. 126; Meriwether *v.* Publishers, 224 Mo. 617, 123 S. W. 1100; Fink *v.* R. Co., 169 Mo. App. 691, 154 S. W. 1134; Breese *v.* Graves, 67 App. Div. 322, 73 N. Y. S. 167; Elliff *v.* R. Co., 53 Or. 66, 99 P. 76; O'Connell *v.* King, 26 R. I. 544, 59 A. 926; Houston, etc. R. Co. *v.* De Walt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. 877; St. Louis R. Co. *v.* Duncan (Tex. Civ.), 164 S. W. 1087; Austin *v.* Bk. (Tex. Civ.), 125 S. W. 936; Orange Rice M. Co. *v.* McIlhenny, 33 Tex. Civ. 592, 77 S. W. 428; Prouty *v.* Musquiz (Tex. Civ.), 59 S. W. 568.

A plea of guilty, withdrawn and superseded by plea of not guilty in a justice's court, is evidence on appeal, its weight being for jury. C. *v.* Brown, 150 Mass. 330, 23 N. E. 49; P. *v.* Gould, 70 Mich. 240, 38 N. W. 232, 14 Am. St. 493; Murmutt *v.* S. (Tex. Cr.), 67 S. W. 508; Terry *v.* S., 39 Tex. Cr. 628, 47 S. W. 654; S. *v.* Bringgold, 40 Wash. 12, 82 P. 132.

Admission in original pleading not binding.—Plaintiff may show declaration in original pleading was not his. Presumptively it was his, although signed only by his attorney. For testimony to have the effect of counteracting its force it should show not only that plaintiff had not so informed counsel, but that he did not know petition contained such allegation. Galloway *v.* R. Co. (Tex. Civ.), 78 S. W. 32. See Kirven *v.* Co., 145 Fed. 288, 76 C. C. A. 172, where complaint withdrawn, before defendant appeared was inadmissible because not relied on.

Whether or not such an admission is weak or strong depends largely upon nature and character of fact admitted, number of times it was repeated, its materiality to the issues and knowledge or want of knowledge of party making admission; it is for jury to say what weight shall be given it. Overton *v.* White, 117 Mo. App. 576, 93 S. W. 363.

Part of record.—Withdrawn pleading should not be removed from files without leaving attested copy. Wyles *v.* Berry, 26 Ky. L. R. 606, 76 S. W. 126.

In Texas it is immaterial whether or not abandoned pleadings are verified. Texas & P. R. Co. *v.* Goggin, 33 Tex. Civ. 667, 77 S. W. 1053; Barrett *v.* Featherstone, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245; Orange Rice M. Co. *v.* McIlhenny, 33 Tex. Civ. 592, 77 S. W. 428; Miller *v.* Drought (Tex. Civ.), 102 S. W. 145; Ft. Worth & D. C. R. Co. *v.* Wright, 27 Tex. Civ. 198, 64 S. W. 1001; First Nat. Bk. *v.* Watson (Tex. Civ.), 66 S. W. 232.

In Kentucky verification is essential. Wyles *v.* Berry, 26 Ky. L. R. 606, 76 S. W. 126.

In Missouri abandoned pleadings are admissible though admissions not authorized. Overton *v.* White, 117 Mo. App. 576, 93 S. W. 363.

442-43 Ruddock Co. *v.* Johnson, 135 Cal. xix, 67 P. 680; Miles *v.* Woodward, 115 Cal. 308, 46 P. 1076; Hamilton-B. S. Co. *v.* Milliken, 62 Neb. 116, 86 N. W. 913.

Withdrawal of admission by amendment not allowed after lapse of long period if judgment may be rendered on pleadings. Demuth G. Mfg. Co. *v.* Early, 131 App. Div. 203, 115 N. Y. S. 672.

442-44 Allegations made in brief statement filed by defendant not admissions. Piper *v.* R., 75 N. H. 435, 75 A. 1041.

444-48 Unless sworn to with knowledge of the facts allegations in pleadings may be explained and rebutted. Potter *v.* Co., 110 Ill. App. 430.

444-51 Great Falls Nat. Bk. *v.* McClure, 176 Fed. 208, 99 C. C. A. 562; New *v.* Young, 148 Ala. 253, 41 S. 523; Long *v.* Lawson, 7 Ga. App. 461, 67 S. E. 124; Burgener *v.* Lippold, 128 Ill. App. 590; Daub *v.* Engelbach, 109 Ill. 267; Gardner *v.* Meeker, 169 Ill. 40, 48 N. E. 307; Youngblood *v.* Mason City (Ia.), 146 N. W. 20 (cross petition); Boothe *v.* Cheek, 253 Mo. 119, 161 S. W. 791; West Assur. Co. *v.* Hillyer etc. Co. (Tex. Civ. App.), 167 S. W. 816.

Not if verified on information and belief. Alamo Club *v.* S. (Tex. Civ.), 147 S. W. 639.

Unless verified with knowledge a bill is open to explanation. Potter *v.* Co., 110 Ill. App. 430.

Allegations concerning a conclusion from facts alleged not admissions. Huger *v.* Cunningham, 126 Ga. 684, 56 S. E. 64.

Effect of decree upon admission.—The court declined to concede a decree could deprive a bill of its quality as evidence of admissions, though point not adjudged. Burgener *v.* Lippold, 128 Ill. App. 590.

444-53 Shurtleff *v.* Right, 66 W. Va. 582, 66 S. E. 719 (under statute).

A bill filed in one suit and sworn to by one of the complainants is evidence in another suit against them involving same subject-matter. Burgener *v.* Lippold, 128 Ill. App. 590.

445-56a in federal courts allegation of defendant's citizenship is admitted though denied by answer if plea to jurisdiction not filed. Crown C. & S. Co. *v.* Brewery, 174 Fed. 252.

445-60 Langley *v.* Andrews, 142 Ala. 665, 38 S. 238; Whitaker *v.* S., 138 Ga. 139, 75 S. E. 254; Potter *v.* Co., 110 Ill. App. 430; Nicholson *v.* Snyder, 97 Md. 415, 55 A. 484; Williams *v.* R. Co., 169 Mo. App. 468, 155 S. W. 64; Craft *v.* Schlag, 61 N. J. Eq. 567, 49 A. 431. Issues must be same. Viqueril *v.* Co., 121 La. 97, 46 S. 114.

448-65 Reager *v.* Chappelear, 104 Va. 14, 51 S. E. 170.

448-66 Sixto *v.* Maldonado, 2 P. R. Fed. 454; Gamet *v.* Haas (Ia.), 146 N. W. 465; Lee *v.* Bk. & Tr. Co., 124 Tenn. 582, 139 S. W. 690.

Admission to be conclusive must be complete in itself, or made so by necessary inference from some other averment; it is not conclusive if it depends on finding further fact from testimony. Scoville *v.* Brock, 81 Vt. 405, 70 A. 1014.

448-67 In absence of an estoppel a verified answer is not conclusive in another action between same parties involving same issue. Nicholson *v.* Snyder, 97 Md. 415, 55 A. 484.

449-69 Avery *v.* Stewart, 136 N. C. 426, 48 S. E. 775.

449-70 First answer may be availed of without introducing second. Avery *v.* Stewart, 136 N. C. 426, 48 S. E. 775.

449-72 Norris *v.* Rawlings, 138 Ga. 711, 76 S. E. 60.

452-80 Hageman *v.* Brown, 76 N. J. Eq. 126, 73 A. 862; Johnson *v.* Hall (Tex. Civ.), 163 S. W. 399 (special answer).

453-84 Jenkins *v.* Seminary, 205 Mass. 376, 91 N. E. 352 (limited by allegations of bill).

453-85 Averments of evidentiary nature, indicating plaintiff has consciously overstated his claim, not admissions. Harris *v.* Chipman, 156 Fed. 929, 84 C. C. A. 429.

454-86 S. *v.* Benners, 172 Ala. 168, 55 S. 298.

454-90 Admissions in the answer when bill amended.—An amended bill, being treated as a new bill, replies thereto are dropped from pleadings, leaving defendant to plead anew. Hence answer to original bill is not an ad-

mission, though any material admissions in it may be proved like any documentary admission outside the record. Scoville *v.* Brock, 79 Vt. 449, 65 A. 577.

Change in condition.—Admission as to rental value of land does not preclude defendant from showing a decrease since answer made. Hall *v.* Waddill, 78 Miss. 16, 28 S. 831, 27 S. 936.

455-91 Stemm *v.* Gavin, 255 Ill. 480, 99 N. E. 663.

455-92 People's U. S. Bk. *v.* Gilson, 161 Fed. 286, 88 C. C. A. 332; Hitt Lumb. Co. *v.* Turner (Ala.), 65 S. 807; Kenney *v.* Streeter, 88 Ark. 406, 114 S. W. 923; Marks *v.* Taylor, 23 Utah 152, 63 P. 897.

456-96 See People's U. S. Bk. *v.* Gilson, 161 Fed. 286, 88 C. C. A. 332, for collection of cases and statement of limitations of rule.

459-99 Johnson *v.* Hattaway, 155 Ala. 516, 46 S. 760; St. Louis H. & S. Co. *v.* Danforth, 160 Mich. 226, 125 N. W. 5; Arroyo y Bonilla *v.* Arrese y Zelaya, 2 P. R. Fed. 27.

459-1 Lybass *v.* Ft. Myers, 56 Fla. 817, 47 S. 346; Lafrance *v.* Griffin, 160 Mich. 236, 125 N. W. 34. See Beuthien *v.* Dillon, 160 Mich. 396, 125 N. W. 363.

460-4 Kidwell *v.* Ketter, 146 Cal. 12, 79 P. 514; Knights Templars *v.* Crayton, 209 Ill. 550, 70 N. E. 1066; 110 Ill. App. 648.

460-5 Glade C. M. Co. *v.* Harris, 65 W. Va. 152, 63 S. E. 873.

Complaint verified by guardian ad litem not competent to contradict ward's testimony. Schlotterer *v.* Co., 75 App. Div. 330, 78 N. Y. S. 202.

463-9 Confessions must be well established, direct and certain, free from suspicion of collusion, and corroborated by independent facts and circumstances. Michalowicz *v.* Michalowicz, 25 App. Cas. (D. C.) 484.

464-12 Grand Trunk W. R. Co. *v.* Reddick, 160 Fed. 898, 88 C. C. A. 80; Dempster *v.* Cochran, 174 Fed. 587, 98 C. C. A. 433; Pitcairn *v.* Co., 113 Fed. 492, 51 C. C. A. 323; Caruthers *v.* Greer, 92 Ark. 167, 122 S. W. 629; Aikin *v.* Perry, 119 Ga. 263, 46 S. E. 93; Blandon *v.* S., 6 Ga. App. 782, 65 S. E. 842; Fuller *v.* Co., 16 Haw. 1; Bochat *v.* Knisely, 144 Ill. App. 551; Fidelity & C. Co. *v.* Morrison, 129 Ill. App. 360; S. *v.* Wilson, 124 La. 82, 49 S. 986; Hensel *v.* Johnson, 94 Md. 729, 51 A. 575; Barrett *v.* R. Co., 106 Minn. 51, 117 N. W. 1047 (recognizing the rule); Stephenson *v.* Austin, 217 Mo. 355, 116 S. W. 1090; Gottlieb *v.* Co., 87 App. Div. 380, 84 N. Y. S. 413; P. *v.* Mole, 85 App. Div. 33, 82 N. Y. S. 747; Kelly *v.* Ins. Co., 84 S. C. 95, 65 S. E. 949; Galloway *v.* Floyd, 36 Tex. Civ. 379, 81 S. W. 805.

Scope of admission.—Where insurer conceded its liability under one clause of policy, which concession involved the means by which insured came to death, it also admitted liability under another clause which provided for payment of another sum if death resulted from conceded means. Fidelity & C. Co. *v.* Morrison, 129 Ill. App. 360. Admission of correctness of account carries with it admission of correctness of application of payment shown therein. Blaisdell *v.* Davis, 72 Vt. 295, 48 A. 14. A motion in arrest of judgment on ground description of lands involved was too indefinite to sustain judgment is admission there was a defect or error in description. Ager *v.* S., 162 Ind. 538, 70 N. E. 808.

Admissions made in a justice's court and entered of record are binding on appeal if cause is heard on the record. Merriman *v.* Anselment, 86 Minn. 6, 89 N. W. 1125.

Admissions do not necessarily preclude party for whose benefit they are made from proving admitted facts. Webster *v.* Moore, 108 Md. 572, 71 A. 466. If made on trial do not preclude proof of previous admission in writing if defendant has pleaded a general denial. Conant *v.* Evans, 202 Mass. 34, 88 N. E. 438.

Oral admissions not to be regarded in passing on demurrer to pleading. Hicks *v.* Beacham, 131 Ga. 89, 62 S. E. 45.

464-13 Grand Trunk W. R. Co. *v.* Reddick, 160 Fed. 898, 88 C. C. A. 80.

464-14 Moynahan *v.* Perkins, 36 Colo. 481, 85 P. 1132; Cadigan *v.* Crabtree, 192 Mass. 233, 78 N. E. 412; Detroit *v.* Co., 146 Mich. 373, 109 N. W. 671.

465-16 Moynahan *v.* Perkins, 36 Colo. 481, 85 P. 1132; Perry *v.* Co., 40 Conn. 313; Ager *v.* S., 162 Ind. 538, 70 N. E. 808; Wells, etc. Council *v.* Littleton, 100 Md. 416, 60 A. 22; York *v.* Everton, 135 Mo. App. 607, 116 S. W. 490 ("for the purposes of the

suit"); Gallagher *v.* McBride, 66 N. J. L. 360, 49 A. 582; Stemmler *v.* Mayor, 179 N. Y. 173, 72 N. E. 581; Barnes *v.* Bkg. & Tr. Co. (Tex. Civ.), 153 S. W. 1172; Citizens S. Bk. *v.* Ins. Co. (Vt.), 86 A. 1056.

In acting upon a motion for continuance ex parte affidavits and oral admissions of former counsel may be regarded. Heyward *v.* Middleton, 65 S. C. 493, 43 S. E. 956.

466-19 See P. *v.* Botkin, 9 Cal. App. 244, 98 P. 861.

Admission by state on appeal will bind it though record silent. S. *v.* Goodager, 56 Or. 198, 108 P. 185.

467-20 Tevis *v.* Ryan, 13 Ariz. 120, 108 P. 161; Parker-W. Co. *v.* Cole, 137 Mo. App. 530, 120 S. W. 118; Hicks *v.* Co., 138 N. C. 319, 50 S. E. 703.

Construction.—Oral admission letter was written, signed and delivered as stated does not include all allegations of complaint as to purpose, objects and intent in writing letter; it was limited to fact of signing, writing and delivering. Master Builders' Assn. *v.* Domascio, 16 Colo. App. 25, 63 P. 782. Admissions will not be extended beyond their terms. United B. Co. *v.* Bass, 121 Ill. App. 299.

Made by counsel in one case not admissible in another.—Arguments made by attorney and letters and newspaper clippings used by him in argument before a public officer are not competent in an action subsequently brought against client on another question. Miller *v.* U. S., 133 Fed. 337, 66 C. C. A. 399. Opinion of attorney, adverse to client, based on facts reported to him, is incompetent on second trial, there having been a change of attorneys. Hicks *v.* Co., 138 N. C. 319, 50 S. E. 703.

In argument.—Issues of law are not determinable by arguments of counsel. Voorhees *v.* Porter, 134 N. C. 591, 47 S. E. 31. A party who incorporates in his brief a statement of trial court concerning admission cannot be heard, on appeal, to deny it was made. Pitcairn *v.* Co., 113 Fed. 492, 51 C. C. A. 323.

Objections to testimony.—The fact that a witness is a representative of a party may be shown by objections to his testimony referring to him as such, and by questions which draw out the fact that such witness is possessed of the papers on which action is based. Sisk *v.* Ins. Co., 95 Mo. App. 695, 69 S. W. 687.

Allegations in a bill admitted by motion to dismiss for want of equity. Peters *v.* Rhodes, 157 Ala. 25, 47 S. 183.

Tacit admissions by both parties, by moving for directed verdict, preclude objections to trial by court. Lindquist *v.* Co., 22 S. D. 298, 117 N. W. 365.

468-25 Court may act on statement in brief as to amount of damages. Missouri, etc. R. Co. *v.* Rogers (Tex. Civ.), 118 S. W. 738.

469-27 Admissions fairly made in opening statement of civil suit may obviate necessity for proof (Preston *v.* Davis, 112 Ill. App. 636; Missouri & K. T. Co. *v.* Vandevort, 67 Kan. 269, 72 P. 771); may be proved on subsequent trial of same cause (Missouri & K. T. Co. *v.* Vandevort, supra), and will be binding on appeal. Connecticut M. L. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668.

A motion for judgment on pleadings and admissions in counsel's opening statement admits truth of latter. Roberts *v.* R. Co., 45 Colo. 188, 101 P. 59.

470-29 Mayer *v.* Hamre (Ia.), 144 N. W. 334; State *v.* Wilson (Ia.), 144 N. W. 47.

Admissions made by prosecuting officer are binding on jury. Watson *v.* S., 118 Ga. 66, 44 S. E. 803. Though counsel may not enter a plea of guilty without authority, his admission of facts shown by the evidence, covering every element of the offense alleged to have been committed, will be assumed to have been authorized in absence of objection by client. S. *v.* Kinney, 21 S. D. 390, 113 N. W. 77. Admission of fact or of law will be corrected if it clearly appears to be erroneous. S. *v.* Foster, 130 N. C. 666, 41 S. E. 284, *mod.* S. *v.* Rash, 34 N. C. 382, 55 Am. Dec. 240, where is was said it never can be error for court to act on admissions of fact.

470-30 An admission made in a motion for a new trial will dispense with a rule of practice, otherwise necessary, in bringing the evidence up for review, such motion having been denied. Beck *v.* Crum, 127 Ga. 94, 56 S. E. 242.

A consent order is conclusive in the cause in which made; but in another cause of a criminal nature it is not

conclusive of guilt. In re Duncan, 64 S. C. 461, 42 S. E. 433.

470-31 Maring *v.* Meeker, 263 Ill. 136, 105 N. E. 31; Barnes *v.* Brown, 1 Tenn. Ch. App. 726; Aaron *v.* Holmes, 35 Utah 49, 99 P. 450.

Accused by stipulation setting forth what absent witness would testify to if present; his right to be confronted by witness is thus waived. S. *v.* Mortensen, 26 Utah 312, 73 P. 562, 633.

471-32 Rigdon *v.* More, 147 Ill. App. 346, *aff'd.*, 242 Ill. 256, 89 N. E. 992.

471-33 Made without limitation. Text sustained so far as it relates to same case in which stipulation made. Stemmler *v.* Mayor, 179 N. Y. 473, 72 N. E. 581; Fortunato *v.* Mayor, 74 App. Div. 441, 77 N. Y. S. 575, *aff.* 173 N. Y. 608, 66 N. E. 1109. Parties may stipulate evidence taken in another case, in essential respects similar, shall be evidence in a pending case, and that they will abide result of former. Such a stipulation is binding upon the successors of the attorney general who have become parties to the action. Prout *v.* Starr, 188 U. S. 537.

Scope of stipulation.—A stipulation in an action on a life policy that plaintiff had made a prima facie case admits he had an insurable interest in life of deceased to extent of casting burden to show otherwise upon defendant. Merchants' L. Assn. *v.* Treat, 98 Ill. App. 59.

472-36 Walls *v.* R. Co. (Del.), 80 A. 355.

473-40 If trial is had on facts stipulated and evidence in addition, latter is competent though not harmonizable with stipulation. Hunt *v.* Van Burg, 75 Neb. 304, 106 N. W. 329.

475-46 See Taplin *v.* Marcy, 81 Vt. 428, 71 A. 72.

476-47 La Compagnie, etc. *v.* Hayes, 168 Fed. 903, 94 C. C. A. 243; Swindall *v.* Ford (Ala.), 63 S. 651; Floyd *v.* Co., 222 Pa. 257, 71 A. 13 (requests for instructions and assignments of error).

476-49 In absence of anything in bill of exceptions as to admissions made in trial court, the adoption and insertion in brief on appeal of statement of that court as to admissions will be binding on reviewing court. Pitcairn *v.* Co., 113 Fed. 492, 51 C. C. A. 323.

476-50 Jackson *v.* Grisham, 171 Ala. 553, 55 S. 165; Patterson *v.* S., 8 Ala. App. 420, 62 S. 1023; Donnelly *v.* Rees, 141 Cal. 56, 74 P. 433; Ex parte Boyd (Nev.), 134 P. 455 (sworn complaint); P. *v.* Ouderkirk, 120 App. Div. 650, 105 N. Y. S. 134; C. *v.* Ensign, 40 Pa. Super. 157 (schedules filed in involuntary bankruptcy).

Affidavits.—Affidavit admissible though affiant dead and it was used in previous litigation to which defendant not a party. Collinsville G. Co. *v.* Phillips, 123 Ga. 830, 51 S. E. 666. Affidavit by a party and his solicitor, made at party's request, is evidence against party in another suit. Cornelissen *v.* Ort, 132 Mich. 294, 93 N. W. 617. Affidavit as to affiant's residence is conclusive upon his administrator for jurisdictional purposes. Long *v.* Lockman, 135 Fed. 197. Denial of knowledge of contents of affidavit is not reason for excluding it; contrary may be shown. New *v.* Young, 148 Ala. 253, 41 S. 523. Affidavits filed in bankruptcy proceedings are sufficient evidence as to partnership (In re Henschel, 114 Fed. 968), and of insolvency of affiants. West Co. *v.* Lea, 174 U. S. 590. A superseded verified claim against an estate is an admission. Pollitz *v.* Wickersham, 150 Cal. 238, 88 P. 911. Affidavit by applicant for a patent, not conclusive as between him and his assignee. De Laval S. Co., 135 Fed. 772, 68 C. C. A. 474. Affidavit made under a mistake as to affiant's rights may be excluded. Mackenzie *v.* Minis, 132 Ga. 323, 63 S. E. 900.

Petition for a franchise is not admission petitioner does not own land described in it. Columbia & P. S. R. Co. *v.* Seattle, 33 Wash. 513, 74 P. 670.

Who may make for corporation.—The power to make admissions by petition in bankruptcy may be exercised by such corporate officials as are authorized under local laws to make a general assignment; in the absence of such laws, it resides in the directors. In re Moench Co., 130 Fed. 685, 66 C. C. A. 37.

478-55 Staley *v.* Co. (N. J.), 90 A. 1042 (ex parte affidavit).

479-59 Gray *v.* Co., 81 Minn. 333, 84 N. W. 113.

480-64 Hagmann *v.* Schoelkopf, 157 Ill. App. 313; Neidy *v.* Littlejohn, 146 Ia. 355, 125 N. W. 198 (except to avoid a second continuance); Howerton *v.* C., 129 Ky. 482, 112 S. W. 606;

S. *v.* Butler, 151 N. C. 672, 65 S. E. 993; Cutler *v.* Cutler, 130 N. C. 1, 40 S. E. 698. *Contra* as to first point. S. *v.* Ryan, 1 Boyce (Del.) 223, 75 A. 869.

Admissions may be made in affidavit for continuance. Palmer T. Co. *v.* Eaves, 27 Ky. L. R. 573, 85 S. W. 750.

Scope of admission.—It does not extend to the competency, relevancy or materiality of the evidence. Tague *v.* Co., 28 Mont. 51, 72 P. 297.

Affidavit conclusive as to what witness would have testified to if present. Gibson *v.* Sutton, 24 Ky. L. R. 868, 70 S. W. 188.

Application for continuance is competent to contradict testimony of party on whose behalf it was made. Scott *v.* Woodward, 39 Tex. Civ. 498, 88 S. W. 406.

To secure right to open and close defendant must make admissions in his pleadings, before testimony is offered, showing a prima facie case against him. Mitchem *v.* Allen, 128 Ga. 407, 57 S. E. 721; Whitaker *v.* Arnold, 110 Ga. 857, 36 S. E. 231; Central R. Co. *v.* Morgan, 110 Ga. 168, 35 S. E. 345. Such admissions conclusive. Albany P. Co. *v.* Hugger, 4 Ga. App. 771, 62 S. E. 533.

Admission is not sufficient if it merely covers execution and delivery of note sued on; it should include right of plaintiff to sue on it. Reid *v.* Sewell, 111 Ga. 880, 36 S. E. 937.

481-65 Cimiotti U. Co. *v.* Bowsky, 113 Fed. 698; Wilson *v.* S. (Ala.), 65 S. 919; Stamps *v.* Thomas, 7 Ala. App. 622, 62 S. 314; Fagan *v.* Lentz, 156 Cal. 681, 105 P. 951; Horton *v.* Zimmer, 32 App. Cas. (D. C.) 217; Rivers *v.* S., 118 Ga. 42, 44 S. E. 859; P. *v.* Stricker, 258 Ill. 618, 102 N. E. 216; Fuller *v.* Fuller, 52 Ind. App. 488, 100 N. E. 869; Ruble *v.* Bunting, 31 Ind. App. 654, 68 N. E. 1041; Lush *v.* Parkersburg, 127 Ia. 701, 104 N. W. 336; Shinkle *v.* McCullough, 25 Ky. L. R. 1143, 77 S. W. 196; Hutchinson *v.* Plant (Mass.), 105 N. E. 1017; Farnum *v.* Whitman, 187 Mass. 381, 73 N. E. 473; Merrill *v.* Leisenring, 166 Mich. 219, 131 N. W. 538; White *v.* Collins, 90 Minn. 165, 95 N. W. 765; Disbrow *v.* Ice Co., 170 Mo. App. 585, 157 S. W. 116; Congleton *v.* Schreihofer (N. J. Eq.), 54 A. 144; Koester *v.* Wks., 194 N. Y. 92, 87 N. E. 77; Hillman *v.* De Rosa, 92 N. Y. S. 67; Egyptian F. C. Co. *v.* Comisky, 40 Misc. 236, 81 N. Y. S. 673; Reed *v.* McCord, 160 N. Y. 330, 54 N. E. 737; Sternbach *v.* Friedman, 75 App. Div. 418, 78 N. Y. S. 318; Binford *v.* Steele, 161 N. C. 660, 77 S. E. 954; Bowman *v.* Blankenship (N. C.), 81 S. E. 746; S. *v.* Longstreth, 19 N. D. 268, 121 N. W. 1114; Anderson *v.* Adams, 43 Or. 621, 74 P 215; Behrens *v.* Mountz, 37 Pa. Super. 326; Harrison *v.* S. (Tex. Cr.), 153 S. W. 139 (admissions made before grand jury); Slayden & Co. *v.* Palmo (Tex. Civ.), 151 S. W. 649; Texarkana G. & E. Co. *v.* Lanier (Tex. Civ.), 126 S. W. 67; Birkman *v.* Fahrenthold (Tex. Civ.), 114 S. W. 428; Munk *v.* Stanfield (Tex. Civ.), 100 S. W. 213; Morehead *v.* Hering, 53 Tex. Civ. 605, 116 S. W. 164.

And see Tate *v.* Tate, 126 Tenn. 169, 148 S. W. 1042.

Answer to double leading question not conclusive on party. Hutton *v.* R. Co., 166 Mo. App. 645, 150 S. W. 722.

Party may introduce all of his former testimony where part has been admitted against him. Merrill *v.* Leisenring, 166 Mich. 219, 131 N. W. 538.

Circumstances under which testimony was given.—It is immaterial in what case testimony given or occasion under which it was given, and whether facts of case in which it was given were identical with those of case on trial. Farnum *v.* Whitman, 187 Mass. 381, 73 N. E. 473.

Accused person who voluntarily became a witness cannot object to having his testimony used against him on a second trial for same offense even if he does not testify on that trial. Miller *v.* P., 216 Ill. 309, 74 N. E. 743 (three judges dissented); S. *v.* Campbell, 73 Kan. 688, 85 P. 784; C. *v.* House, 6 Pa. Super. 92; C. *v.* Doughty, 139 Pa. 383, 21 A. 228. Testimony of prosecutor may be used against him as defendant in another action. S. *v.* Simpson, 133 N. C. 676, 45 S. E. 567.

Testimony is to be read in connection with pleadings to determine whether it is an admission. Elliott *v.* McAllister, 106 Minn. 25, 117 N. W. 921.

482-66 One does not admit validity of paper title by introducing document. Vanderbilt *v.* Brown, 128 N. C 498, 39 S. E. 36.

483-68 S. *v.* Campbell, 73 Kan. 688,

85 P. 784; S. *v.* Finch, 71 Kan. 793, 81 P. 494.

484-72 Miller *v.* P., 216 Ill. 309, 74 N. E. 743; Cohen *v.* Sobel, 137 N. Y. S. 897.

Testimony before coroner.—Though a coroner is required to commit to writing substance of testimony taken, witnesses who profess to remember substance of statement made by accused may testify thereof. Green *v.* S., 124 Ga. 343, 52 S. E. 431.

Previous testimony should be proved by official reporter though he had no recollection of it aside from his notes. C. *v.* House, 6 Pa. Super. 92.

485-74 Competency of evidence not material if party believes fact to be true upon evidence sufficient to convince him—as where conclusion is given. Brookfield *v.* College, 139 Mo. App. 339, 123 S. W. 86.

486-76 Bentley *v.* Co., 1 Neb. (Unof.) 558, 95 N. W. 803.

A transferee of mortgage is bound by testimony of his transferor for whom he is substituted in the case. Continental Fert. Co. *v.* Madden, 140 Ga. 39, 78 S. E. 460.

486-77 Relevant testimony of witness called by party may be received on later trial as admission. Knapp *v.* Yeoman, 149 Ia. 137, 126 N. W. 336.

486-79 Himrod C. Co. *v.* Adack, 94 Ill. App. 1; Koester *v.* Wks., 194 N. Y. 92, 87 N. E. 77; Gt. Western, etc. Co. *v.* Shumway, 25 N. D. 268, 141 N. W. 479; Field *v.* Schuster, 26 Pa. Super. 82; Slayden & Co. *v.* Palmo (Tex. Civ.), 151 S. W. 649.

It is otherwise where neither husband nor wife can testify for or against each other without consent. Aldous *v.* Olverson, 17 S. D. 190, 95 N. W. 917.

Effect given strongest admissions.—If there is conflict in the testimony of plaintiff he will be bound by strongest admissions made in determining its effect. Cogan *v.* R. Co., 101 Mo. App. 179, 73 S. W. 738.

Not binding in toto.—Admission by one party may be availed of in part only; admittee is not bound by all testimony of admitter. Leisemer *v.* Burg, 106 Mich. 124, 63 N. W. 999; Parret *v.* Craig, 56 N. J. Eq. 280, 38 A. 305, *rev.* 56 N. J. Eq. 848, 42 A. 1117 (no opinion).

486-80 But see Birmingham & A. R. Co. *v.* Maddox, 155 Ala. 292, 46 S. 780 (evidence in support of plea of tender), and *comp.* Stockham *v.* Malcolm, 111 Md. 615, 74 A. 569.

"**A defendant testifying in his own behalf** is not so bound by his own admission as to be precluded from availing himself of defenses brought out in the evidence of his adversary. A plaintiff must recover, if at all, on the strength of his own case, not on the weakness or falsity of the defense. ' A suitor who testifies is but a witness after all.' Knorpp *v.* Wagner, 195 Mo. 637, 93 S. W. 961. The rule that a party may rely on the testimony of the witnesses of the adverse party to prove a defense or material facts denied by his own testimony (Hill *v.* R. Co., 158 Mass. 458, 33 N. E. 582) is recognized and applied by the Supreme Court in the criminal case that grew out of the affair in question and may be accepted as settled." Brubaker *v.* Bidstrup, 163 Mo. App. 646, 147 S. W. 541, cit. this text.

487-81 A hearing to determine whether or not inquest shall be held is not a legal examination within meaning of such statute; voluntary testimony given thereat may be used against accused. S. *v.* Legg, 59 W. Va. 315, 53 S. E. 545. For cases within such a statute, see Kirby *v.* C., 77 Va. 681; S. *v.* Hall, 31 W. Va. 505, 7 S. E. 422.

Failure to offer evidence to disprove denied fact or rebut testimony to establish such fact is not admission. S. *v.* Johnson, 85 S. C. 265, 67 S. E. 453.

487-82 Spann *v.* Torbert, 130 Ala. 541, 30 S. 389; Culbertson *v.* Salinger (Ia.), 117 N. W. 6; Thompson's Exr. *v.* Thompson's Exr., 155 Ky. 323, 159 S. W. 831; Hellman *v.* Somerville, 212 Mo. 415, 111 S. W. 30; Southern Bk. *v.* Nichols, 202 Mo. 309, 100 S. W. 613; Gubernator *v.* Rettalack, 86 Mo. App. 184; Phillips *v.* Lindley, 112 App. Div. 283, 98 N. Y. S. 423; Stevenson *v.* Co., 201 Pa. 112, 50 A. 818; Nash *v.* Co., 109 Va. 14, 63 S. E. 14.

Not admissible in subsequent cause where parties not same. Parlin *v.* Yawter, 39 Tex. Civ. 520, 88 S. W. 407.

Deposition of one party not incompetent because contradicted by deponent under examination of other party. Vollkommer *v.* Cody, 177 N. Y. 124, 69 N. E. 277.

488-83 Profile & F. H. Co. *v.* Bickford, 72 N. H. 73, 54 A. 699. A quashed deposition has no other effect than any paper containing admission. Joy *v.* Ins. Co., 32 Tex. Civ. 433, 74 S. W. 822; Gross *v.* Coffey, 111 Ala. 468, 20 S. 428.

488-84 Black *v.* Epstein, 221 Mo. 286, 120 S. W. 754; Southern Bk. *v.* Nichols, 202 Mo. 309, 100 S. W. 613.

489-87 Kellner *v.* Randle (Tex. Civ.), 165 S. W. 509.

489-88 In re Arnold's Est., 147 Cal. 583, 82 P. 252; Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979; Southern Bk. *v.* Nichols, 202 Mo. 309, 100 S. W. 613. *Contra.* Farmers' & M's. Bk. *v.* Wood, 143 Ia. 635, 118 N. W. 282; Culbertson *v.* Salinger (Ia.), 117 N. W. 6 (each party may read so much as he thinks relevant).

If one party offers but part the other may introduce remainder. Aetna Ins. Co. *v.* Eastman (Tex. Civ.), 80 S. W. 255. If party who took deposition does not introduce it other party may, and if deponent has been examined as to different matters, only that part which relates to one or more of them need be offered, but all that part must be introduced. Hamilton B. Co. *v.* Milliken, 62 Neb. 116, 86 N. W. 913.

489-91 Sizer *v.* Melton, 129 Ga. 143, 58 S. E. 1055.

Lost deposition.—Officer before whom lost edposition taken may testify to admission therein. Marx *v.* Hart, 166 Mo. 503, 66 S. W. 260.

Answer of person chosen by corporation to reply to interrogatories on its behalf may be read against it because it is answer of corporation, and is on same footing as that of an individual. Welsbach I. G. L. Co. *v.* Co., 83 L. T. N. S. 58, 48 W. R. 595, 69 L. J. Ch. 546 (court of appeal).

Who may offer answers; party in court.—Under some statutes answers to interrogatories are available only to party propounding them; if he does not offer answers party who has given them and who is in court can not do so. Beem *v.* Farrell, 135 Ia. 670, 113 N. W. 509. If party entitled to do so offers answers they must be received though party making them is in court. Beem *v.* Farrell, supra; Island Co. *v.* Babock, 20 Wash. 238, 55 P. 114.

490-92 A bill of particulars cannot be evidence against party furnishing it in any case or for any purpose where pleading or notice to which bill relates would not be evidence, as against defendant who has raised an issue upon all material matters set forth in the bill. Roscoe L. Co. *v.* Co., 62 App. Div. 421, 70 N. Y. S. 1130. It may be evidence of admissions in a different action if they were made with knowledge and sanction of party who made admissions. Hutchins *v.* Van Vechten, 140 N. Y. 115, 35 N. E. 446; Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836. Though it was served in response to demand a bill is not affirmative proof unless verified and identified. Hesser-M. R. C. Co. *v.* Co., 114 Wis. 654, 90 N. W. 1094.

490-93 Chicago *v.* English, 198 Ill. 211, 64 N. E. 976; Leinhart *v.* Kirkwood, 130 Ill. App. 398; W. W. Brown Cons. Co. *v.* MacArthur Bros., 236 Mo. 41, 139 S. W. 104.

492-98 Gadsden *v.* Chemical Co. (S. C.), 72 S. E. 15.

501-37 A confession of judgment for part of sum claimed is complete proof against party who made it. Citizens' L. & P. Co. *v.* St. Louis, 34 Can. Sup. 495; Hudon C. Co. *v.* Co., 13 Can. Sup. 401.

502-42 Palatine Ins. C. *v.* O'Brien, 109 Md. 100, 71 A. 775.

503-47 In civil action admission by a party of any fact material to the issue is always evidence against him wherever, whenever or to whomsoever made. Reed *v.* McCord, 160 N. Y. 330, 54 N. E. 737.

Weight.—When offered by parties or privies admissions in a deed are generally conclusive; but when offered by a stranger they have same effect as parol admissions. Peters *v.* Co., 61 W. Va. 392, 56 S. E. 735.

503-49 Miller *v.* McDowell, 69 Kan. 453, 77 P. 101; Barker *v.* R. Co., 35 R. I. 406, 87 A. 174.

May be made to corporate agent (McBride *v.* R. Co., 125 Ga. 515, 54 S. E. 674); or prosecutrix. Whatley *v.* S., 144 Ala. 68, 39 S. 1014.

503-51 Beck & Co. *v.* Hanline (Md.), 89 A. 377.

503-52 Alexander *v.* Smith (Ala.), 61 S. 68; Whatley *v.* S., 144 Ala. 68, 39 S. 1014; Story *v.* Nidiffer, 146 Cal. 549, 80 P. 692; Freet *v.* Sup. Co., 257 Ill. 248, 100 N. E. 933; Vincent *v.* Co., 113 Ill. App. 463; Hofacre *v.* Monti-

cello, 128 Ia. 239, 103 N. W. 488; Wright *v.* Reed, 118 Ia. 333, 92 N. W. 61; Clark *v.* C., 33 Ky. L. R. 974, 112 S. W. 571; Martindale *v.* Cummins Co., 143 N. Y. S. 1100; Day *v.* Hunnicutt (Tex. Civ.), 160 S. W. 134; Bender *v.* Brooks (Tex. Civ.), 130 S. W. 653.

504-55 Anderson & Co. *v.* Brammer, 1 Ala. App. 596, 58 S. 941; Himrod C. Co. *v.* Adack, 94 Ill. App. 1; Seymour *v.* Co., 103 Ill. App. 625; Steele *v.* Buggy Co., 50 Ind. App. 635, 95 N. E. 435; Brown *v.* Brown, 62 Kan. 666, 64 P. 599; Allen *v.* Hall, 64 Neb. 256, 89 N. W. 803; Lynch's Admr. *v.* Murray, 86 Vt. 1, 83 A. 746; Peters *v.* Co., 61 W. Va. 392, 56 S. E. 735.

Admissions in answer.—"Where all the defendants unite in an answer, the admissions therein are to be treated in the action in which the pleading is served as the admissions of each, and not confined to the person actually verifying the same." Talbot *v.* Laubheim, 188 N. Y. 421, 81 N. E. 163.

Admissions of sole legatee, competent against will. In re Miller's Est., 31 Utah 415, 88 P. 338.

505-56 Chappell *v.* John, 45 Colo. 45, 99 P. 44; McMillan *v.* McDill, 110 Ill. 47; Campbell *v.* Campbell, 138 Ill. 612, 28 N. E. 1080; Dowie *v.* Driscoll, 203 Ill. 480, 68 N. E. 56; Schweikert *v* Richards, 144 Ky. 304, 137 S. W. 1074; Seitz *v.* Starks, 136 Mich. 90, 98 N. W. 852; Parlin *v.* Vawter, 39 Tex. Civ. 520, 88 S. W. 407; Stamnes *v.* R. Co., 131 Wis. 85, 109 N. W. 100, 925, 111 N. W. 62.

Statements by one formerly a party are not provable if made after he ceased to be such, except to impeach him as a witness. Himrod C. Co. *v.* Adack, 94 Ill. App. 1.

Identity of interest must exist when cause of action arose. Judd *v.* New York, 128 Fed. 7, 62 C. C. A. 515.

One who has merely a contingent or collateral interest in a suit brought by another cannot bind parties by admission. Judd *v.* New York, 128 Fed. 7, 62 C. C. A. 515.

Admissions by judgment debtor on his examination not competent in subsequent trial against parties who became such thereafter. Shields *v.* Lewis, 24 Ky. L. R. 822, 70 S. W. 51.

507-59 Fourth National Bk. *v.* Albaugh, 107 Fed. 819, 46 C. C. A. 655.

507-61 Graham *v.* Walsh (Ga. App.), 80 S. E. 693; Coldren L. Co. *v.* Royal, 140 Ia. 381, 118 N. W. 426; Illinois C. R. Co. *v.* Houchins, 28 Ky. L. R. 499, 89 S. W. 530, 1 L. R. A. (N. S.) 375; Rosseau *v.* Deschenes, 203 Mass. 261, 89 N. E. 391; Whaples *v.* Fahys 109 App. Div. 594, 96 N. Y. S. 323; Shawnee etc. Co. *v.* Motesenbocker (Okla.), 138 P. 790; Stevenson *v.* Co., 201 Pa. 112, 50 A. 818; Sunday *v.* Dietrich, 16 Pa. Super. 640.

Effect of admission.—Proof of such admission, though it may not be entitled to the effect of an admission by all concerned, may tend legitimately to raise a presumption against them that thing admitted may be true. Gibson *v.* Sutton, 24 Ky. L. R. 868, 70 S. W. 188.

Admission of one defendant not evidence against a plaintiff in favor of another defendant sued on independent grounds. Koplan *v.* Co., 177 Mass. 15, 58 N. E. 183.

Jury should be cautioned.—Illinois C. R. Co. *v.* Houchins, 28 Ky. L. R. 499, 89 S. W. 530, 1 L. R. A. (N. S.) 375.

By one of several legatees or devisees, see vol. 14, p. 356, *et seq.*

Reason for the rule.—See Carpenter's Appeal, 74 Conn. 431, 51 A. 126; Zimmerman *v.* Beatson, 39 Ind. App. 664, 79 N. E. 518, 80 id. 165; In re Kennedy, 167 N. Y. 163, 60 N. E. 442.

Admission of marriage by one of two defendants is sufficient evidence thereof as against admitter, but not against co-defendant in prosecution for adultery. Ty. *v.* Castro, 14 Haw. 131.

Individual defendant in suit against county and others concerning a highway may not bind county by admission. Quinn *v.* County, 140 Ia. 105, 117 N. W. 1100.

507-62 West *v.* Co., 136 Fed. 343, 69 C. C. A. 169; Pearson *v.* Adams, 129 Ala. 157, 29 S. 977; McBride *v.* R. Co., 125 Ga. 515, 54 S. E. 674.

508-64 Stevenson *v.* Co., 201 Pa. 112, 50 A. 818.

508-65 Netzow Mfg. Co. *v.* R. Co., 7 Ga. App. 163, 66 S. E. 399; Dowie *v.* Driscoll, 203 Ill. 480, 68 N. E. 56; Mississippi Cent. R. Co. *v.* Pillows, 101 Miss. 527, 58 S. 483; St. Louis, etc. R. Co. *v.* Knowles, 44 Tex. Civ. 172, 99 S. W. 867; Hall *v.* Clountz, 26 Tex. Civ. 348, 63 S. W. 941.

509-69 Admissions of improper party not competent. Horan *v.* Byrnes, 70 N. H. 531, 49 A. 569.

Declaration of devisee, not a party, is inadmissible against co devisees to prove undue influence. In re Hewitt's Will, 161 Mich. 536, 126 N. W. 848.

510-71 Kinnane *v.* Conroy, 52 Wash. 651, 101 P. 223.

510-72 Rountree *v.* Gaulden, 128 Ga. 737, 58 S. E. 346; Webb *v.* Hardaway (Ky.), 121 S. W. 669; Washoe Copper Co. *v.* Junila, 43 Mont. 178, 115 P. 917; Smith *v.* Moore, 149 N. C. 185, 62 S. E. 892; Noreum *v.* Savage, 140 N. C. 472, 53 S. E. 289; Warren *v.* Wilson, 89 S. C. 420, 71 S. E. 818, appeal dismissed on rehearing, 71 S. E. 992; Stewart *v.* Doak, 58 W. Va. 172, 52 S. E. 95. And see House *v.* Ponce, 13 Cal. App. 279, 109 P. 161.

510-73 Knight *v.* Hunter, 155 Ala. 238, 46 S. 235; Costello *v.* Graham, 9 Ariz. 257, 80 P. 336; Russell *v.* Webb, 96 Ark. 190, 131 S. W. 456; Cribbs *v.* Walker, 74 Ark. 104, 85 S. W. 244; Broaddus *v.* Monroe(Cal.), 110 P. 158; Murphy *v.* R. Co., 135 Ga. 194, 69 S. E. 117; McElwaney *v.* McDiarmid, 131 Ga. 97, 62 S. E. 20; Daly *v.* Jossly, 7 Ida. 657, 65 P. 442; Quick *v.* Cotman, 124 Ia. 102, 99 N. W. 301; Kitchell *v.* Hodgen, 78 Kan. 551, 97 P. 369; Collins *v.* Taylor, 101 Me. 542, 64 A. 946; Abbott *v.* Walker, 204 Mass. 71, 90 N. E. 405; Minor *v.* Burton, 228 Mo. 558, 128 S. W. 964; Noreum *v.* Savage, 140 N. C. 472, 53 S. E. 289; Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154; King *v.* Weible, 10 Pa. C. C. 521; Edmunds *v.* Barrow, 112 Va. 330, 71 S. E. 544.

Must be against interest.—Washoe Copper Co. *v.* Junila, 43 Mont. 178, 115 P. 917.

Declarations made by execution defendant, not owner or possessor of property, after litigation begun, not admissible. Rountree *v.* Gaulden, 128 Ga. 737, 58 S. E. 346.

513-78 Doe *v.* Edmondson, 145 Ala. 557, 40 S. 505; Josslyn *v.* Daly, 15 Ida. 137, 96 P. 568, cit. the text; Holton *v.* Dunker, 198 Ill. 407, 64 N. E. 1050; Higgins *v.* Spahr, 145 Ind. 167, 43 N. E. 11; Jonas *v.* Hirshberg, 40 Ind. App. 88, 79 N. E. 1058; Rix *v.* Smith, 145 Mich. 203, 108 N. W. 691; Johnston *v.* Garvey, 139 App. Div. 659, 124 N. Y. Supp. 278, *aff.*, 201 N. Y. 548, 95 N. E. 1130; Manila *v.* Rosario, 5 Phil. Isl. 227.

514-79 Northrop *v.* Co., 186 Fed. 770, 108 C. C. A. 640; West *v.* Co., 136 Fed. 343, 69 C. C. A. 169; Adair *v.* Craig, 135 Ala. 332, 33 S. 902; Bismark M. G. M. Co. *v.* Co., 14 Ida. 516, 95 P. 14; Lang *v.* Metzger, 206 Ill. 475, 69 N. E. 493; Holton *v.* Dunker, 198 Ill. 407, 64 N. E. 1050; Ikand *v.* Minter, 4 Ind. Ty. 214, 69 S. W. 852; Severson *v.* Gremm, 124 Ia. 729, 100 N. W. 862; Skidmore *v.* Smith, 27 Ky. L. R. 323, 84 S. W. 1163; Johnston *v.* Garvey, 139 App. Div. 659, 124 N. Y. S. 278; Gilmartin *v.* Buchanan, 134 App. Div. 587, 119 N. Y. S. 489; Pfeffer *v.* Kling, 58 App. Div. 179, 68 N. Y. S. 641, *aff.* (no opinion), 171 N. Y. 668, 64 N. E. 1125; Leary *v.* Corvin, 63 App. Div. 151, 71 N. Y. S. 335; Leonard *v.* Fleming, 13 N. D. 629, 102 N. W. 308; Beall *v.* Chatham, 100 Tex. 371, 99 S. W. 1116; Moore *v.* Robinson (Tex. Civ.), 75 S. W. 890; McKnight *v.* Reed, 30 Tex. Civ. 204, 71 S. W. 318.

515-80 Broughan *v.* Broughan, 62 Kan. 724, 64 P. 608; Burg *v.* Rivera, 105 Ia. 144, 29 S. 482 (in absence of purchaser); Interstate C. & I. Co. *v.* Co., 105 Va. 574, 54 S. E. 593.

516-81 Exceptions to the rule are: (1) Where there has been a prima facie case of fraud established, as where the thing granted has a corpus, and possession of it after sale remains with seller; (2) where declarations are made in presence of vendee, and he acquiesces in statements, or asserts no rights where he ought to speak, and (3) where evidence establishes a continuing conspiracy to defraud between vendor and vendee. Mooro *v.* Robinson (Tex. Civ.), 75 S. W. 890. "Sayings of a person in possession of real estate or some interest therein ought not to be admitted against another unless it appears that this other claims through or under him or stands in privity with him, these declarations not being offered, apparently, to prove adverse possession on the part of the person making them. When such declarations are offered it is material to show, accurately or approximately, when they were made." Whelchel *v.* R. Co., 116 Ga. 431, 42 S. E. 776; Smith *v.* Glenn, 129 Cal. xviii, 62 P. 180.

516-82 Earp *v.* Edgington, 107 Tenn. 23, 64 S. W. 40.

517-83 Admissions of grantee as to competency of his grantor may be proved against former's heirs. Ben-

son *v.* Raymond, 142 Mich. 357, 105 N. W. 870, 108 N. W. 660.

517-84 Dedication of land; declaration while deed in escrow. See Admissions of a prior tenant, binding upon his successors. Neff *v.* Ryman, 100 Va. 521, 42 S. E. 314.

517-85 Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026.

517-86 Costello *v.* Graham, 9 Ariz. 257, 80 P. 336; Josslyn *v.* Daly, 15 Ida. 137, 96 P. 568.

517-88 Pearson *v.* Adams, 129 Ala. 157, 29 S. 977; Cooney *v.* Glynn, 157 Cal. 583, 108 P. 506; Murphy *v.* Rooney, 26 Ky. L. R. 634, 82 S. W. 396; Leary *v.* Corvin, 63 App. Div. 151, 71 N. Y. S. 335; Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250; Hill *v.* Bean, 150 N. C. 436, 64 S. E. 212.

Made after bar of statute complete, competent on issue of possession. Walling *v.* Eggers, 31 Ky. L. R. 1009, 104 S. W. 360.

What may be shown.—Declarations against interest in regard to the nature, character or extent of declarant's possession, identity, or location of boundaries and monuments called for in a deed, or in regard to any matter concerning physical condition or use of property, which must be, from nature of things, proved by parol, admissible. Phillips *v.* Laughlin, 99 Me. 26, 58 A. 64; Fall *v.* Fall, 100 Me. 98, 60 A. 718.

518-89 Munsey *v.* Hanly, 102 Me. 423, 67 A. 217, 13 L. R. A. (N. S.) 209; Phillips *v.* Laughlin, 99 Me. 26, 58 A. 64; Hall *v.* Waddill, 78 Miss. 16, 27 S. 936, 28 S. 831; Leonard *v.* Fleming, 13 N. D. 629, 102 N. W. 308; Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026.

520-90 Kennedy *v.* Bates, 142 Fed. 51, 73 C. C. A. 237; Phillips *v.* Laughlin, 99 Me. 26, 58 A. 64.

Declarations concerning mistake in deed and land intended to be conveyed may be proved. Miller *v.* Miller, 7 Ariz. 316, 64 P. 415. But a plain, unambiguous description cannot be affected. Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

520-91 Pentico *v.* Hays, 75 Kan. 76, 88 P. 738; Fall *v.* Fall, 100 Me. 98, 60 A. 718.

It may be shown by declarations of deceased grantee that deed was given to secure payment of indebtedness. Harp *v.* Harp, 136 Cal. 421, 69 P. 28.

520-92 Hargus *v.* Hayes, 83 Ark. 186, 103 S. W. 163.

521-94 Taliaferro *v.* Evans, 160 Mo. 380, 61 S. W. 185; Lent *v.* Shear, 160 N. Y. 462, 55 N. E. 2; Wadleigh *v.* Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063; Kalish *v.* Higgins, 70 App. Div. 192, 75 N. Y. S. 397; Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154; Hetrick *v.* Gregg, 8 O. N. P. 24; Muller *v.* Flavin, 13 S. D. 595, 616, 83 N. W. 687. *Contra* if grantee participated in fraud. Homewood P. Bk. *v.* Marshall, 223 Pa. 289, 72 A. 627.

See the title "Admissions," vol, 6, p. 149, *et seq.*

In absence of other party, not admissible. Skelley *v.* Vail, 27 Ind. App. 87, 60 N. E. 961; Stam *v.* Smith, 183 Mo. 464, 81 S. W. 1217.

Declarations made after conveyance. When the good faith of a transfer has been attacked by creditors and some evidence adduced to show a common purpose or design to hinder, delay or defraud creditors, subsequent declarations by grantor are admissible. Jonas *v.* Hirshberg, 40 Ind. App. 88, 79 N. E. 1058; Skelley *v.* Vail, 27 Ind. App. 87, 60 N. E. 961; Walker *v.* Harold, 44 Or. 205, 74 P. 705; Boyer *v.* Weimer, 204 Pa. 295, 54 A. 21.

There are cases favoring right to prove declarations of grantor after conveyance, as against him, though they would be inadmissible against grantee. Hogan *v.* Robinson, 94 Ind. 138; Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463; Vansickle *v.* Shenk, 150 Ind. 413, 50 N. E. 381.

Declarations made intermediate transfer and recording of conveyance may be proved. Bush *v.* Helbing, 134 Cal. 676, 66 P. 967.

522-97 Doé *v.* Edmondson, 145 Ala. 557, 40 S. 505; Anniston C. L. Co. *v.* Edmondson, 127 Ala. 445, 30 S. 61; Hughes *v.* Redus, 90 Ark. 149, 118 S. W. 414; Bollinger *v.* Bollinger, 154 Cal. 695, 99 P. 196; Hutton *v.* Doxsee, 116 Ia. 13, 89 N. W. 79; Fall *v.* Fall, 100 Me. 98, 60 A. 718; Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864.

523-98 Warner *v.* Sapp (Tex. Civ.), 97 S. W. 125.

524-99 Strickland *v.* Strickland, 103 Ark. 183, 146 S. W. 501; Hughes *v.* Redus, 90 Ark. 149, 118 S. W. 414; Pleasanton *v.* Simmons, 2 Penne. (Del.) 477, 47 A. 697; Mann *v.* Cavanaugh, 23 Ky.

L. R. 238, 62 S. W. 854; Hill *v.* Bean, 150 N. C. 436, 64 S. E. 212.

525-5 Campbell *v.* Eichorst, 122 Ill. App. 609; Vermillion *v.* LeClare, 89 Mo. App. 55; Moore *v.* Fingar, 138 App. Div. 929, 122 N. Y. S. 851; Mower *v.* McCarthy, 79 Vt. 142, 155, 64 A. 578, 7 L. R. A. (N. S.) 418.

An agent, not a party, cannot prove his possession of property owned by another by his own declarations. Whitney *v.* Wagener, 84 Minn. 211, 87 N. W. 602.

526-7 Bullard *v.* Bullard, 112 Ia. 423, 84 N. W. 513; Moore *v.* Fingar, 138 App. Div. 929, 122 N. Y. S. 851.

526-10 Lent *v.* Shear, 160 N. Y. 462, 55 N. E. 2; Wangner *v.* Grimm, 169 N. Y. 421, 431, 62 N. E. 569; Aldous *v.* Olverson, 17 S. D. 190, 95 N. W. 917; Bruce *v.* Bruce (Tex. Civ.), 89 S. W. 435; Wooley *v.* Bell, 33 Tex. Civ. 399, 76 S. W. 797.

526-11 McKnight *v.* U. S., 130 Fed. 659; Vermillion *v.* LeClare, 89 Mo. App. 55.

526-14 Moravec *v.* Grell, 78 App. Div. 146, 79 N. Y. S. 533; Newgass *v.* Co., 81 App. Div. 411, 80 N. Y. S. 778; Woods *v.* Faurot, 14 Okla. 171, 77 P. 346; Boltz *v.* Engelke (Tex. Civ.), 63 S. W. 899 (and in presence of vendee); Mower *v.* McCarthy, 79 Vt. 142, 155, 64 A. 578, 7 L. R. A. (N. S.) 418.

528-15 Woods *v.* Faurot, 14 Okla. 171, 77 P. 346.

528-16 Is rule applicable to testimony.—In Texas a vendor may testify to facts and circumstances connected with sale of his property; objections to oral admissions out of court have no application to testimony. Schmitt *v.* Jacques, 26 Tex. Civ. 125, 62 S. W. 956. But this distinction is not generally recognized, and has been denied. Lent *v.* Shear, 160 N. Y. 462, 55 N. E. 2.

Admissions pending transaction.—Admissions made by vendor in presence of vendee after he has taken possession, but pending completion of inventory and exchange of papers, are competent to show vendee's knowledge of vendor's purpose. Bender *v.* Kingman, 62 Neb. 469, 87 N. W. 142.

Admissions by bankrupt in possession may be proved after his death. Smith *v.* AuGres, 150 Fed. 257, 80 C. C. A. 145. Court doubted as to admissions made by bankrupt after trustee succeeded to title to the property.

As between mortgagor and mortgagee declarations by former, after execution of mortgage are competent. Levy *v.* Hamilton, 68 App. Div. 277, 74 N. Y. S. 159.

528-17 Scheps *v.* Bk., 97 App. Div. 434, 90 N. Y. S. 26; Van Arsdale *v.* Buck, 82 App. Div. 383, 81 N. Y. S. 1017; Wangner *v.* Grimm, 169 N. Y. 421, 431, 62 N. E. 569; Newgass *v.* Co., 81 App. Div. 411, 80 N. Y. S. 778.

Declarations by donor, not part of res gestate and not communicated to donee, not provable to show a loan was an advancement. Garned *v.* Taylor (Tenn. Ch. App.), 58 S. W. 758.

529-20 Banning *v.* Marleau, 133 Cal. 485, 65 P. 964; Bk. *v.* Levy, 138 N. C. 274, 50 S. E. 657; Shelley *v.* Nolen, 38 Tex. Civ. 343, 88 S. W. 524.

529-21 Gage *v.* Trawick, 94 Mo. App. 307, 68 S. W. 85; Beers *v.* Aylsworth, 41 Or. 251, 69 P. 1025. If vendor remains in possession with vendee's consent former's admissions may be proved. Avard *v.* Carpenter, 72 App. Div. 258, 56 N. Y. S. 105. If fraudulent representations are alleged statements of vendor and statements made in his presence after fraud discovered may be proved. Geraghty *v.* Randall, 18 Colo. App. 194, 70 P. 767.

531-25 Admissions by a vendor, while in possession by consent of vendee, are competent in action by latter for conversion of property by execution sale (Avard *v.* Carpenter, 72 App. Div. 258, 56 N. Y. S. 105); and against deceased mortgagee though made subsequent to mortgage (Levy *v.* Hamilton, 68 App. Div. 277, 74 N. Y. S. 159); also competent against creditors whose rights are dependent upon rights of their debtor on principle of subrogation. Fourth Nat. B. *v.* Albaugh, 107 Fed. 819, 46 C. C. A. 655.

531-26 Davis *v.* Buchanan, 73 Vt. 67, 50 A. 545.

532-28 Thompson *v.* Rosenstein (Tex. Civ.), 67 S. W. 439.

532-30 Smith *v.* AuGres, 150 Fed. 257, 80 C. C. A. 145; Continental Nat. Bk. *v.* Moore, 83 App. Div. 419, 82 N. Y. S. 302; Scheurer *v.* Brown, 67 App. Div. 567, 73 N. Y. S. 877; Squire *v.* Greene, 47 App. Div. 636, 62 N. Y. S. 48; New York Ins. Co. *v.* Manning, 124 N. Y. S. 775; First Nat. Bk. *v.* Harvey, 29 S. D. 284, 137 N. W. 365.

532-31 Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. 757; Mitchell *v.* Baldwin, 88 App. Div. 265, 84 N. Y. S. 1043.

533-32 Ellis *v.* Watkins, 73 Vt. 371, 50 A. 1105.

534-35 Barnett *v.* Ins. Co., 91 App. Div. 435, 86 N. Y. S. 842; Finance Co. *v.* Josephson, 88 N. Y. S. 707.

Choses in action governed by same rule. Cases in *n.* 31, supra; Tittle *v.* Van Valkenburg, 75 App. Div. 69, 77 N. Y. S. 786, *dist.* Von Sachs *v.* Kretz, 72 N. Y. 548.

535-36 Assignor's declarations prior to assignment may be shown to aid in determining whether all his property was delivered and whether assignment bona fide. Armour *v.* Doig, 45 Fla. 162, 34 S. 249.

535-37 Oliver *v.* McDowell, 100 Ill. App. 45; Finance Co. *v.* Josephson, 88 N. Y. S. 707; Kalish *v.* Higgins, 70 App. Div. 192, 75 N. Y. S. 397, *aff.* on opinion below, 175 N. Y. 495, 67 N. E. 1084; Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. 757; Conkling *v.* Weatherwax, 90 App. Div. 585, 86 N. Y. S. 139; Barnett *v.* Ins. Co., 91 App. Div. 435, 86 N. Y. S. 842; City Nat. Bk. *v.* Bridgers, 128 N. C. 322, 38 S. E. 888.

Declarations after transfer of check, in absence of holder, cannot be shown to contradict his testimony as to bona fides of his title. Maslon *v.* Sprinkerhoff, 98 N. Y. S. 618. Subsequent death of assignor immaterial to application of rule (Crawford *v.* Hord, 40 Tex. Civ. 352, 89 S. W. 1097); and so is fact declarations were heard by assignee. Gerding *v.* Funk, 48 App. Div. 603, 64 N. Y. S. 423.

537-41 Fuqua *v.* Bogard, 22 Ky. L. R. 1910, 62 S. W. 480.

537-42 West Co. *v.* Lea, 174 U. S. 590; Smith *v.* AuGres, 150 Fed. 257, 80 C. C. A. 145.

Made while not in possession may be proved against trustee, substituted as defendant. Kuh *v.* Glucklick, 120 Ia. 504, 94 N. W. 1105.

Trustee is privy to bankrupt. In re Thompson, 197 Fed. 681.

538-48 Fleming *v.* Lunsford, 163 Ala. 540, 50 S. 921; Montgomery M. Co. *v.* Leith, 162 Ala. 246, 50 S. 210; Pearson *v.* Adams, 129 Ala. 157, 29 S. 977; Brandt *v.* Krogh, 14 Cal. App. 39, 111 P. 275; Cable Co. *v.* Walker, 127 Ga. 65, 56 S. E. 108; S. *v.* Co., 79 Kan. 371, 99 P. 603; Trosper C. Co. *v.* Rader, 154 Ky. 670, 159 S. W. 536; Baldwin *v.* Tucker, 25 Ky. L. R. 222, 75 S. W. 196; McDonough *v.* R. Co., 191 Mass. 509, 78 N. E. 141; Sills *v.* Burge, 141 Mo. App. 148, 124 S. W. 605; Kirn *v.* I. Co., 146 Mo. App. 451, 124 S. W. 45; Hill *v.* Bk., 100 Mo. App. 230, 73 S. W. 307; White City S. Bk. *v.* Bk., 90 Mo. App. 395; Stecher Co. *v.* Inman, 175 N. Y. 124, 67 N. E. 213, 67 App. Div. 625, 74 N. Y. S. 1147; Nowack *v.* R. Co., 166 N. Y. 433, 60 N. E. 32; Slayden & Co. *v.* Palmo (Tex. Civ.), 151 S. W. 649; Stark G. Co. *v.* Co., 57 Tex. Civ. 529, 122 S. W. 947; Pecos, etc. R. Co. *v.* Lovelady, 35 Tex. Civ. 659, 80 S. W. 867; Holbrook *v.* Co., 84 Vt. 411, 80 A. 339.

Admissions by master of vessel after collision and relating to it are evidence against owner. The Severn, 113 Fed. 578; The Enterprise, 2 Curt. 317, 8 Fed. Cas. No. 4,497; The Potomac, 8 Wall. (U. S.) 590; Packet Co. *v.* Clough, 20 Wall. (U. S.) 528.

539-49 Northern P. R. Co. *v.* Kempton, 138 Fed. 992, 71 C. C. A. 246; Schiffer *v.* Anderson, 146 Fed. 457, 76 C. C. A. 667; Barnesville Mfg. Co. *v.* Love, 3 Penne. (Del.) 569, 52 A. 267; Monahan *v.* R. Co., 4 Ga. App. 680, 62 S. E. 127; Waters *v.* R. Co., 101 Ill. App. 265; Krohn *v.* Anderson, 29 Ind. App. 379, 64 N. E. 621; Cockrill *v.* R. Co., 90 Kan. 650, 136 Pac. 322; Kentucky S. Co. *v.* Page (Ky.), 125 S. W. 170; Southern R. Co. *v.* Railey, 26 Ky. L. R. 53, 80 S. W. 786; Iron Clad Mfg. Co. *v.* Thomas B. Stanfield, 112 Md. 360, 76 A. 854; Biglow Carpet Co. *v.* Wiggin, 209 Mass. 542, 95 N. E. 938; Copeland *v.* Co., 184 Mass. 207, 68 N. E. 218; Garfield *v.* Co., 189 Mass. 395, 75 N. E. 695; S. *v.* Co., 173 Mo. 356, 73 S. W. 645, 61 L. R. A. 464; Levi *v.* R. Co., 157 Mo. App. 536, 138 S. W. 699; Roth *v.* Co., 94 Mo. App. 236, 68 S. W. 594, 602; Fowles *v.* Co., 86 Mo. App. 103; Bowman *v.* Lickey, 86 Mo. App. 47, 59; Henderson W. Mills *v.* Edwards, 84 Mo. App. 448; Clough *v.* Co., 75 N. H. 84, 71 A. 223; Campbell *v.* Emslie, 101 App. Div. 369, 91 N. Y. Supp. 1069; Bernstein *v.* Exp. Co., 137 N. Y. S. 910; L. & N. R. Co. *v.* Bohan, 116 Tenn. 271, 290, 94 S. W. 84; Buick A. Co. *v.* Weaver (Tex. Civ.), 163 S. W. 594; Autrey *v.* Linn (Tex. Civ.), 138 S. W. 197; Patterson *v.* R. Co. (Tex. Civ.), 126 S. W. 336; Milmo Nat.

Bk. *v.* Cobbs, 53 Tex. Civ. 1, 115 S. W. 345; Myers *v.* R. Co., 39 Utah 198, 116 P. 1119; Comeau *v.* Co., 84 Vt. 501, 80 A. 51; Wright *v.* Stewart, 19 Wash. 179, 52 P. 1020; Hall *v.* Ins. Co., 23 Wash. 610, 63 P. 505; Moran Co. *v.* Co., 29 Wash. 292, 69 P. 759; Hall *v.* Ins. Co., 23 Wash. 610, 63 P. 505, 51 L. R. A. 288; Henderson *v.* Coleman, 19 Wyo. 183, 115 P. 439, rehearing denied, 115 P. 1136.

Principal's knowledge of admissions immaterial. Carney *v.* Hennessey, 74 Conn. 107, 49 A. 910, 53 L. R. A. 699.

Admission by agent of both parties may be competent against both. Copeland *v.* Co., 184 Mass. 207, 68 N. E. 218.

Book entries by agent in course of employment admissible after his death, though not constituting part of res gestate. Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969.

Sub-agent's authority.—Agent may delegate performance of ministerial acts, and he and his principal be bound by declarations of sub-agent within scope of authority granted. Bowman *v.* Lickey, 86 Mo. App. 47, 59.

540-51 Woolsey *v.* Haynes, 165 Fed. 391, 91 C. C. A. 341; Graham *v.* R. Co., 161 Fed. 262, 88 C. C. A. 308; The Maurice, 135 Fed. 516, 68 C. C. A. 228; Marande *v.* R. Co., 124 Fed. 42, 59 C. C. A. 562; Walker Mfg. Co. *v.* Knox, 136 Fed. 334, 69 C. C. A. 160; Gochrig *v.* Stryker, 174 Fed. 897; Beitman *v.* Birmingham (Ala.), 64 S. 600; Clarke *v.* Dunn, 161 Ala. 633, 50 S. 93; Union N. S. Co. *v.* Pugh, 156 Ala. 369, 47 S. 48; Haywood *v.* Hamm, 77 Conn. 158, 58 A. 695; Columbus R. Co. *v.* Peddy, 120 Ga. 589, 48 S. E. 149; Turner *v.* Turner, 123 Ga. 5, 50 S. E. 696; National B. Assn. *v.* Quin, 120 Ga. 358, 47 S. E. 962; Hilbert *v.* R. Co., 20 Idaho 54, 116 P. 1116; Andalman *v.* R. Co., 153 Ill. App. 169; Helbig *v.* Ins. Co., 120 Ill. App. 58; Delaware C. Co. *v.* Mitchell, 92 Ill. App. 577; First Nat. Bk. *v.* Josefoff (Ind.), 105 N. E. 175; Johnson *v.* Co., 79 Kan. 423, 100 P. 52; Case P. Wks. *v.* Pulsifer, 79 Kan. 176, 98 P. 787; Duff Const. Co. *v.* Alford, 149 Ky. 594, 149 S. W. 943; Southern Exp. Co. *v.* Fox, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270; Holzhauer *v.* Sheeny, 31 Ky. L. R. 1238, 104 S. W. 1034; Caldwell *v.* Morris, 125 La. 301, 51 S. 205; Baker *v.* Temple, 160 Mich. 318, 125 N. W. 63; Trainor *v.* Schutz, 98 Minn. 213, 107 N. W. 812; Pannell *v.* Allen, 160 Mo. App. 714, 142 S. W. 482; Walkeen L. M. Co. *v.* Johnston, 131 Mo. App. 693, 111 S. W. 639 (as to intent of principal); Rice *v.* St. Louis, 165 Mo. 636, 65 S. W. 1002; Loving Co. *v.* Co., 176 Mo. 330, 75 S. W. 1095; Callahan *v.* R. Co., 47 Mont. 401, 133 P. 687; Sheridan Coal Co. *v.* C. W. Hull Co., 87 Neb. 117, 127 N. W. 218; Corkran *v.* Taylor, 77 N. J. L. 195, 71 A. 124; Blackman *v.* R. Co., 68 N. J. L. 1, 52 A. 370; Corn *v.* Bergmann, 145 App. Div. 218, 129 N. Y. S. 1049; P. *v.* Terwilliger, 59 Misc. 617, 110 N. Y. S. 1034; Gazzam *v.* Ins. Co., 155 N. C. 330, 71 S. E. 434; Younce *v.* Lumb. Co., 155 N. C. 239, 71 S. E. 329; Holt *v.* Johnson, 129 N. C. 138, 39 S. E. 796; Fredenthal *v.* Brown, 52 Or. 33, 95 P. 1114; Paulton *v.* Keith, 23 R. I. 164, 49 A. 635; Jungworth *v.* R. Co., 24 S. D. 342, 123 N. W. 695; Guitar *v.* McGee (Tex. Civ.), 139 S. W. 622; Ward *v.* Powell (Tex. Civ.), 127 S. W. 851; Galveston E. Co. *v.* Dickey (Tex. Civ.), 126 S. W. 332; Cameron *v.* Blackwell, 53 Tex. Civ. 414, 115 S. W. 856; Taplin *v.* Marey, 81 Vt. 428, 71 A. 72; Baltimore, etc. R. Co. *v.* Hudgins (Va.), 81 S. E. 48; Blodgett *v.* Inglis, 63 Wash. 513, 115 P. 1043; Caldwell *v.* Co., 58 Wash. 461, 108 P. 1075; Harris *v.* Co., 43 Wash. 647, 86 P. 1125; Manning *v.* Dist., 124 Wis. 84, 102 N. W. 356.

See Snyder *v.* Maxwell, 138 App. Div. 621, 122 N. Y. S. 876.

Not if made after termination of agency.—Western Newspaper Union *v.* Judson (Ala.), 55 S. 1026.

Agent's admissions not binding on principal's receiver.—Smith *v.* Coe, 57 App. Div. 631, 68 N. Y. S. 274.

Not within scope of authority.—Agent for delivery of goods has no authority to make declarations as to their title or ownership. Goltra *v.* Penland, 45 Or. 254, 77 P. 129. Nor as to their condition. Peterson *v.* Co., 140 Cal. 624, 74 P. 162. Nor is driver of automobile the agent ipso facto of defendant to settle for damages caused by his careless handling of machine.

Letter by agent.—A reply to a letter asking for money, written by agent of debtor who was asked to answer it, but given no instructions, is admissible. Skidmore *v.* Johnson, 70 N. J. L. 671, 57 A. 450.

Agent for mechanical purposes.—Master not bound by what employee engaged in mechanical labor may say. King *v.* Co., 70 N. J. L. 679, 58 A. 345.

A representative whose knowledge is that of his principal may bind latter by admission. Cudahy P. Co. *v.* Hays, 74 Kan. 124, 85 P. 811.

543-52 Pittsburgh P. G. Co. *v.* Kerline, 122 Fed. 414, 58 C. C. A. 648; Marande *v.* R. Co., 124 Fed. 42, 59 C. C. A. 562; Northern P. R. Co. *v.* Kempton, 138 Fed. 992, 71 C. C. A. 246; Warren L. S. Co. *v.* Farr, 142 Fed. 116, 73 C. C. A. 340; Westall *v.* Osborne, 115 Fed. 282, 53 C. C. A. 74; Southern R. Co. *v.* Reeder, 152 Ala. 227, 44 S. 699; Bundy *v.* Co., 149 Cal 772, 87 P. 622; Haywood *v.* Hamm, 77 Conn. 158, 58 A. 695; Childs *v.* Ponder, 117 Ga. 553, 43 S. E. 986; Young *v.* Grand Lodge, 149 Ill. App. 603; Chicago & E. I. R. Co. *v.* Keegan, 112 Ill. App. 338; Baier *v.* Selke, 211 Ill. 512, 71 N. E. 1074; Delaware & H. C. Co. *v.* Mitchell, 92 Ill. App. 577; Druecker *v.* Co., 93 Ill. App. 406; Alquist *v.* Wks., 126 Ia. 67, 101 N. W. 520; Kentucky S. Co. *v.* Page (Ky.), 125 S. W. 170; Wells *v.* W. Co. (Ky.), 114 S. W. 737 (anterior admission); Illinois C. R. Co. *v.* Houchins, 28 Ky. L. R. 499, 89 S. W. 530; Holzhauer *v.* Sheeny, 31 Ky. L. R. 1238, 104 S. W. 1034; McFarland *v.* Harbison, 26 Ky. L. R. 746, 82 S. W. 430; Gillet *v.* Shaw (Mass.), 104 N. E. 719 (statement of chauffeur after accident not competent); Butler *v.* R. Co., 138 Mich. 206, 101 N. W. 232; Parker *v.* R. Co., 83 Minn. 212, 86 N. W. 2; Wojtylak *v.* Co., 188 Mo. 260, 87 S. W. 506; Helm *v.* R. Co., 98 Mo. App. 419, 72 S. W. 148; Wright Inv. Co. *v.* Fillingham, 85 Mo. App. 534; Needham *v.* Halerson, 22 N. D. 594, 135 N. W. 203; Fredenthal *v.* Brown, 52 Or. 33, 95 P. 1114; Salley *v.* R. Co., 62 S. C. 127, 40 S. E. 111; Missouri K. & T. Co. *v.* Ramsey (Tex. Civ.), 128 S. W. 1184; International & G. N. R. Co. *v.* Carr (Tex. Civ.), 91 S. W. 858; Hall *v.* Ins. Co., 23 Wash. 610, 63 P. 505, 51 L. R. A. 288; Harris *v.* Co., 43 Wash. 647, 86 P. 1125; Cook *v.* Co., 36 Wash. 36, 78 P. 39; Roberts *v.* Co., 30 Wash. 25, 70 P. 111; Chilcott *v.* Co., 45 Wash. 148, 88 P. 113.

Statements of defendant's fire boss and mine examiner as to danger in mine, made three or four days before injury to plaintiff, have been proved. Athens M. Co. *v.* Carnduff, 123 Ill. App. 178, 186.

545-53 Southern P. Co. *v.* Arnett, 111 Fed. 849, 50 C. C. A. 17; Fidelity & C. Co. *v.* Haines, 111 Fed. 337, 49 C. C. A. 379; Alabama S. Co. *v.* Dewey, 156 Ala. 530, 47 S. 55; St. Louis & S. F. R. Co. *v.* Crowder, 82 Ark. 562, 103 S. W. 172; Barlow *v.* Parsons, 73 Conn. 696, 49 A. 205; James *v.* Conklin, 158 Ill. App. 640; Bean *v.* Taylor, 22 Ky. L. R. 1665, 61 S. W. 31; Spencer *v.* Ins. Co., 112 Mo. App. 86, 86 S. W. 899; Brounfield *v.* Denton, 72 N. J. L. 235, 61 A. 378; Diehl *v.* Watson, 89 App. Div. 445, 85 N. Y. S. 851; Leary *v.* Co., 77 App. Div. 6, 79 N. Y. S. 130; Harkins *v.* Ins. Co., 106 App. Div. 170, 94 N. Y. S. 140; Asheville S. & F. Co. *v.* Machin, 150 N. C. 738, 64 S. E. 887; Klingaman *v.* Fish & H. Co., 19 S. D. 139, 102 N. W. 601; Boehrens *v.* Brice (Tex. Civ.), 113 S. W. 782; Stevens *v.* Co., 29 Tex. Civ. 168, 67 S. W. 1041; Henderson *v.* Coleman, 19 Wyo. 183, 115 P. 439, rehearing denied, 115 P. 1136.

Proof of agency.—Proof that a party went into a branch office of defendant and was there directed to the main office where he held conversation with the receiving clerk and cashier established their status as agents. W. U. T. Co. *v.* Wells, 50 Fla. 474, 39 S. 838.

Relation of principal and agent may be shown by usual methods. Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969; Cable Co. *v.* Walker, 127 Ga. 65, 56 S. E. 108.

Proof of duties of agent.—The fact that a person was held out by principal to be its sales manager makes his admission binding without proof as to his duties as manager. Garfield *v.* Co., 189 Mass. 395, 75 N. E. 695.

Admissions of one in possession of goods competent without proof of agency for any specific purpose. Kaufman *v.* Burchinell, 15 Colo. App. 520, 63 P. 786.

Offer to pay expenses of person injured in consequence of negligence is not admission negligent person was servant of him who made offer. Powell *v.* McGlynn, 2 Ir. Rep. (1902) 154.

546-54 Sibley W. S. Co. *v.* Durand, 200 Ill. 354, 65 N. E. 676, 102 Ill. App. 406; Pease *v.* Trench, 197 Ill. 101, 64 N. E. 368; Helm *v.* R. Co., 98 Mo. App. 419, 72 S. W. 148; Huebner *v.*

R. Co., 69 N. J. L. 327, 55 A. 273; St. Louis, etc. R. Co. *v.* Carlisle, 34 Tex. Civ. 268, 78 S. W. 553; Sias *v.* Co., 73 Vt. 35, 50 A. 554.

Agent's declaration should not be received before proof of agency, unless party tendering them offers in good faith to supplement them by other and independent evidence of agency; and if such offer is not made good declarations ought to be excluded. Indiana F. Co. *v.* Sandlin, 125 Ga. 222, 54 S. E. 65.

546-55 Union N. S. Co. *v.* Pugh, 156 Ala. 369, 47 S. 48; Castner *v.* Rinne, 31 Colo. 256, 72 P. 1052; Extension G. M. Co. *v.* Skinner, 28 Colo. 237, 64 P. 198; Murphy *v.* Gumaer, 12 Colo. App. 472, 55 P. 951; Indiana F. Co. *v.* Sandlin, 125 Ga. 222, 54 S. E. 65; Brooks *v.* Lowe, 122 Ga. 358, 50 S. E. 146; Payton *v.* Co., 28 Ky. L. R. 1303, 91 S. W. 719; Dieckman *v.* Weirich, 24 Ky. L. R. 2340, 73 S. W. 1119; Fifer *v.* Co., 103 Md. 1, 62 A. 1122; Whitney *v.* Wagener, 84 Minn. 211, 87 N. W. 602; S. *v.* Henderson, 86 Mo. App. 482; Brounfield *v.* Denton, 72 N. J. L. 235, 61 A. 378; Burns *v.* Co., 93 App. Div. 566, 87 N. Y. S. 883; Legnard *v.* Ins. Co., 81 App. Div. 320, 81 N. Y. S. 516; Jackson *v.* Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; Sloan *v.* Sloan, 46 Or. 36, 78 P. 893; Paulton *v.* Keith, 23 R. I. 164, 49 A. 635; Cannel Coal Co. *v.* Luna (Tex. Civ.), 144 S. W. 721; Ellwood *v.* Stallcup, 57 Tex. Civ. 343, 122 S. W. 906. See "Principal and Agent," *infra*, 15-52.

In the absence of other proof of agency orders for money signed by alleged agent or agreed settlements by him of claims against his principal are not competent. Amicalola M. & P. Co. *v.* Coker, 111 Ga. 872, 36 S. E. 950.

547-60 Henderson *v.* Coleman, 19 Wyo. 183, 115 P. 439, rehearing denied, 115 P. 1136.

548-61 Carney *v.* Hennessey, 74 Conn. 107, 49 A. 910, 53 L. R. A. 699; Haywood *v.* Hamm, 77 Conn. 158, 58 A. 695 (prima facie proof of agency); Fifer *v.* Co., 103 Md. 1, 62 A. 1122; St. Louis S. R. Co. *v.* McIntyre, 36 Tex. Civ. 399, 82 S. W. 346; Am., etc. Wks. *v.* Co., 30 Wash. 178, 70 P. 236.

Agency existing is presumed to have continued. Hall *v.* Ins. Co., 23 Wash. 610, 63 P. 505.

Letter is presumed to be genuine and authorized when received in reply to one addressed to agent of corporation. St. Louis S. R. Co. *v.* McIntyre, 36 Tex. Civ. 399, 82 S. W. 346.

548-62 Ratification may be found in proof of silence of principal when he was required to speak. Sloan *v.* Sloan, 46 Or. 36, 78 P. 893.

Where several heirs unite in praying to be put in possession of an estate inherited by them, the fact that one of them, a married woman, was, at the time, unauthorized by her husband does not weaken the force of the judicial admissions of the others; and the subsequent ratification of the husband may validate the act of the wife. Priestly *v.* Chapman, 130 La. 480, 58 S. 156.

548-65 Statements by general agent to principal concerning latter's business and according to former's duty are said to be admissible whether part of res gestae or not (Knarston *v.* Ins. Co., 140 Cal. 57, 73 P. 740); a distinction not everywhere recognized. Butters S. & L. Co. *v.* Vogel, 135 Mich. 381, 97 N. W. 757.

549-66 King *v.* Ins. Co., 101 Mo. App. 163, 76 S. W. 55.

Authority of agent.—Declarations of agent in possession of property not admissible to show title to it in another than his principal. Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76.

Agent to procure evidence.—An agent appointed to look up and "see to" witnesses, no restrictions being placed upon him, is agent in whatever he does in the direct line of his employment, and his acts in trying to bribe a witness may be proved against his principal. Nowack *v.* R. Co., 166 N. Y. 433, 60 N. E. 32. But see Green *v.* Woodbury, 48 Vt. 5.

549-67 Farrell *v.* Dubuque, 129 Ia. 447, 105 N. W. 690; Hofacre *v.* Monticello, 128 Ia. 239, 103 N. W. 488.

Condition of city's building, cannot be proved by declarations of building commissioner. Chicago *v.* Rust, 117 Ill. App. 427.

Entries in municipal books and letter written by mayor are competent to prove admissions in a matter in which no governmental function is involved. Commercial W. Co. *v.* Boston, 194 Mass. 460, 80 N. E. 645.

550-69 Kurrle *v.* Baltimore, 113 Md. 63, 77 A. 373; Franklin Savings Bk. *v.* Inhabitants of Framingham (Mass.), 98 N. E. 925 (*citing* Lowell

Bk. *v.* Winchester, 8 Allen 109; Abbott *v.* North Andover, 145 Mass. 484, 14 N. E. 754; Brown *v.* Newburyport, 209 Mass. 259, 95 N. E. 504); Cook *v.* Mohawk, 207 N. Y. 311, 100 N. E. 815; Adkins *v.* Monmouth, 41 Or. 266, 68 P. 737; Austin *v.* Forbis, 99 Tex. 234, 89 S. W. 405; Lamar County *v.* Talley (Tex. Civ.), 127 S. W. 272. The last case but one seems to decide that if officer who made admission had authority to adjust claims against city his admission might have been proved. In the absence of such authority it was immaterial that, as between him and employees under his control, he may have been vice-principal of city or of a commission, the individual members of which were also defendants.

Letter admissible to prove filing of claim against city. South Omaha *v.* Wrzesinski, 66 Neb. 790, 92 N. W. 1045.

Statements of superior officers of city, as repeated by their subordinates, may be proved. Chicago *v.* Co., 97 Ill. App. 583.

550-70 Escher *v.* County, 146 Ia. 738, 125 N. W. 810; Foss *v.* Whitehouse, 94 Me. 491, 48 A. 109.

Title to public property cannot be affected by statements of officers. Lamar County *v.* Talley (Tex. Civ.), 94 S. W. 1069.

Subsequent declarations may be proved to show notice of defect in street. Denver *v.* Cochran, 17 Colo. App. 72, 67 P. 23; Mount Morris *v.* Kanode, 98 Ill. App. 373; Vandewater *v.* Wappinger, 69 App. Div. 325, 74 N. Y. S. 699; Radichel *v.* Kendall, 121 Wis. 560, 99 N. W. 348.

551-71 Monogram H. Co. *v.* Thrower (Ala.), 65 S. 89.

551-74 Hill *v.* Pullman Co., 188 Fed. 497; Joslyn *v.* Co., 177 Fed. 863, 101 C. C. A. 77; New York C. R. Co. *v.* U. S., 165 Fed. 833, 91 C. C. A. 519; Crosswhite *v.* Brew. Co. (Ala.), 65 S. 298; First Nat. Bk. *v.* Alexander, 161 Ala. 580, 50 S. 45; Bailey *v.* Co., 142 Ala. 254, 37 S. 827; Smith *v.* Co., 11 Cal. App. 253, 104 P. 706; Mantle *v.* Min. Co., 24 Ida. 613, 135 P. 854, 136 P. 1130; Hilbert *v.* R. Co., 20 Idaho 54, 116 P. 1116; Axtell *v.* R. Co., 9 Ida. 392, 74 P. 1075; Pennington *v.* R. Co., 252 Ill. 584, 97 N. E. 289; Prussian Nat. Ins. Co. *v.* Co., 113 Ill. App. 67; Kern *v.* R. Co., 141 Ia. 620, 118 N. W. 451; St. Louis, etc. R. Co. *v.* Stone, 78 Kan. 505, 97 P. 471; Cudahy P. Co. *v.* Hays, 74 Kan. 124, 85 P. 811; Louisville R. Co. *v.* Johnson, 131 Ky. 277, 115 S. W. 207; Mussellam *v.* R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Dean *v.* R. Co., 148 Mo. App. 428, 128 S. W. 10; Sisk *v.* Ins. Co., 95 Mo. App. 695, 69 S. W. 687; Johnson *v.* I. & R. Co., 143 Mo. App. 441, 127 S. W. 692; Moseley *v.* R. Co., 132 Mo. App. 642, 112 S. W. 1010; Egner *v.* Co. (Neb.), 146 N. W. 1032 (by physician of an insurance company); Head & D. Co. *v.* Club, 75 N. H. 449, 75 A. 982; Hill *v.* Co., 77 N. J. L. 19, 71 A. 683; Witthaus *v.* St. Thomas Church, 161 App. Div. 208, 146 N. Y. S. 279; Quinn *v.* Sand Co., 140 N. Y. S. 390; People's O. & F. Co. *v.* R. Co., 83 S. C. 530, 65 S. E. 733; Tenhet *v.* R. Co., 82 S. C. 465, 64 S. E. 232; Ragsdale *v.* R. Co., 72 S. C. 120, 51 S. E. 540; Ft. Worth, etc. R. Co. *v.* R. Co. (Tex. Civ.), 151 S. W. 850; Missouri, etc. R. Co. *v.* Ramsey (Tex. Civ.), 128 S. W. 1184; Galveston, etc. R. Co. *v.* Norton, 55 Tex. Civ. 478, 119 S. W. 702; St. Louis, etc. R. Co. *v.* Adams, 55 Tex. Civ. 245, 118 S. W. 1155; Gulf, etc. R. Co. *v.* Cunningham, 51 Tex. Civ. 368, 113 S. W. 767; Standefer *v.* Co., 34 Tex. Civ. 160, 78 S. W. 552; Hall *v.* Ins. Co., 23 Wash. 610, 63 P. 505; Moran *v.* Co., 29 Wash. 292, 69 P. 759.

Record kept by employee in the regular course of his duties. Louisville & N. R. Co. *v.* U. S., 186 Fed. 280, 108 C. C. A. 326.

Letters of president of corporation apparently within scope of his duties and pertinent to the issue. Farmers' O. & G. Co. *v.* Co., 10 Ga. App. 416, 73 S. E. 428, cit. L. & N. R. Co. *v.* Tift, 100 Ga. 86, 27 S. E. 765.

By a railroad conductor.—"These exceptions complain of error in allowing the testimony as to what the conductor said the next day. The testimony tended to show that the conductor, who certainly was the agent of the company, was still engaged in the business of the wreck, and went to the plaintiff for the purpose of getting a statement from him as a part of his official duties in connection with the wreck. An agent is rarely, if ever, commissioned expressly to make admissions of responsibility; but it would be monstrous to hold that an agent to get admissions could make none." Nelson *v.* R. Co., 92 S. C. 151, 75 S. E. 408.

Officers of benefit society its agents. If by-laws of benefit society and form provided by it on which to make proof of death impose upon a local body the duty of making such proof and of expressing opinion as to validity of claim, admissions made in such proof may be proved against superior body. Patterson *v.* Artisans, 43 Or. 333, 72 P. 1095.

Agent may communicate admission made by principal. Ulysses E. B. Co. *v.* Ins. Co., 20 Pa. Super. 384.

Admissions as to ownership of stock and persons interested in corporation. See Jones *v.* Co., 27 Wash. 136, 67 P. 586.

A litigant does not by implication, approve and adopt as his own all statements in depositions, testimonies and affidavits offered in his behalf, so they may be used as admissions. Sizer *v.* Melton, 129 Ga. 143, 58 S. E. 1055.

Private corporations not bound by admissions made by officers or agents as witnesses. Vohs *v.* Shorthill, 124 Ia. 471, 100 N. W. 495; Harrison Co. *v.* Bk., 127 Ia. 242, 103 N. W. 121.

556-75 Fidelity & C. Co. *v.* Haines, 111 Fed. 337, 49 C. C. A. 379; Walker Mfg. Co. *v.* Knox, 136 Fed. 334, 69 C. C. A. 160; Mobile L. R. Co. *v.* Baker, 138 Ala. 491, 48 S. 119; Western Newspaper Union *v.* Judson, 1 Ala. App. 615, 55 S. 1026; Luman *v.* Co., 140 Cal. 700, 74 P. 307; Baldwin *v.* Bk., 17 Colo. App. 7, 67 P. 179; Gould *v.* R. Co., 141 Ill. App. 344; Harrison Co. *v.* Bk., 127 Ia. 242, 103 N. W. 121; Farmers' Bk. *v.* Wickliffe, 131 Ky. 787, 116 S. W. 249; Parker *v.* Co., 25 Ky. L. R. 1391, 77 S. W. 1109; Illinois C. R. Co. *v.* Winslow, 27 Ky. L. R. 329, 84 S. W. 1175; Straight Creek C. Co. *v.* Haney, 27 Ky. L. R. 1117, 87 S. W. 1114; Bachant *v.* R. Co., 187 Mass. 392, 73 N. E. 642; Allington Mfg. Co. *v.* Co., 133 Mich. 427, 95 N. W. 562; Beunk *v.* Co., 128 Mich. 562, 87 N. W. 793; Western U. T. Co. *v.* Jackson, 95 Miss. 471, 49 S. 737; Lee *v.* R. Co., 112 Mo. App. 372, 87 S. W. 12; Redmon *v.* R. Co., 185 Mo. 1, 84 S. W. 26; Hogan *v.* Kelly, 29 Mont. 485, 75 P. 81; Dennison *v.* Co., 82 Neb. 675, 118 N. W. 568; Blackman *v.* R. Co., 68 N. J. L. 1, 52 A. 370; Walsh *v.* Co., 126 App. Div. 229, 110 N. Y. S. 523; Ginsburg *v.* Co., 35 Misc. 389, 71 N. Y. S. 1030; Wimmer *v.* R. Co., 92 App. Div. 258, 86 N. Y. S. 1052; Callahan *v.* A. Co., 111 N. Y. S. 781; McConnell *v.* Operating Co., 148 App. Div. 635, 133 N. Y. S. 255; Lyman *v.* R. Co., 132 N. C. 721, 44 S. E. 550; McEntyre *v.* Cotton Mills, 132 N. C. 598, 44 S. E. 109; Darlington *v.* Co., 127 N. C. 448, 37 S. E. 479; Gillespie *v.* Bk., 20 Okla. 768, 95 P. 220; Alden *v.* Co., 46 Or. 593, 81 P. 385; Hannan *v.* Greenfield, 36 Or. 97, 58 P. 888; Matteson *v.* R. Co., 218 Pa. 527, 67 A. 847; Rookard *v.* R. Co., 84 S. C. 190, 65 S. E. 1047; Ragsdale *v.* R. Co., 69 S. C. 429, 48 S. E. 466; Salley *v.* R. Co., 62 S. C. 127, 40 S. E. 111; St. Louis, etc. R. Co. *v.* Adams, 55 Tex. Civ. 245, 118 S. W. 1155; North Am. Acc. Ins. Co. *v.* Frazer (Tex. Civ.), 112 S. W. 812 (inadmissible if made after parties' rights are fixed); Houston & T. C. R. Co. *v.* Laforge (Tex. Civ.), 84 S. W. 1072; Meyers *v.* R. Co., 36 Utah 307, 104 P. 736; Blue Ridge L. & P. Co. *v.* Price, 103 Va. 652, 62 S. E. 938; Cook *v.* Co., 36 Wash. 36, 78 P. 39; Kamp *v.* Coxe, 122 Wis 206, 99 N. W. 366; Small *v.* McGovern, 117 Wis. 608, 94 N. W. 651.

Illustrations. — Where plaintiff, after applying for leave to enter defendant's premises and examine hoops which had come from a broken vat, was shown the hoops by a person having authority to exhibit them, his remark, "those are the hoops," was admissible as part of the res gestae; but if such person had also said, "those hoops were in the same decayed condition prior to the accident," or "I knew their condition then," such declaration would have been inadmissible to prove such past fact, even if it might have been received as characterizing the act of exhibiting to plaintiff. Kamp *v.* Coxe, supra; Hupfer *v.* Co., 127 Wis. 306, 106 N. W. 831.

Declaration by defendant's superintendent, before accident, and while unfit employee was in service, to the effect latter was given to intoxication, was competent as res gestae to the act then being done by the superintendent on behalf of his principal, to show the knowledge he had while transacting the business; but, it was said, admission afterward would stand upon a different footing. Chapman *v.* R. Co., 55 N. Y. 579; Harper *v.* Co., 92 Mo. App. 304.

Pending transaction.—A statement by telegraph agent, made three days after message sent, that he knew it had been delivered, related to an uncompleted,

pending transaction. W. U. T. Co. *v.* Barefoot (Tex. Civ.), 74 S. W. 560, *rev.* on other questions, 76 S. W. 914. See Cooper G. Co. *v.* Britton (Tex. Civ.), 74 S. W. 91.

Declarations in connection with principal's assent to rescission of a contract do not relate to past transactions. Aetna I. Co. *v.* Co., 147 Fed. 95, 78 C. C. A. 262. If agent's duty is a continuing one—as to collect insurance premiums—he may bind principal by admissions concerning them after completion of contract. Hall *v.* Ins. Co., 23 Wash. 610, 63 P. 505. Admissions to secure renewal of a loan do not relate to past transactions. First Nat. Bk. *v.* Arnold, 156 Ind. 487, 60 N. E. 134.

Declarations as to future conduct of agent, although made while doing act which he purposed to repeat, are not provable. Waggoner *v.* Snody, 98 Tex. 512, 85 S. W. 1134.

Admissions subsequent to negotiations between parties are sometimes competent. Home Ice F. *v.* Co., 157 Ala. 603, 48 S. 117.

556-76 Sweeney *v.* R. Co., 148 Ill. App. 351; Atchison, etc. R. Co. *v.* Burks, 78 Kan. 515, 96 P. 950. *Contra,* if agent's duties not terminated when report made. Phillips *v.* R. Co., 211 Mo. 419, 111 S. W. 109.

A report made in the line of duty is not inadmissible because person making it had no personal knowledge of fact admitted. Virginia-C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725. Report to a principal is competent to show condition of work done for it. Lipscomb *v.* R. Co., 65 S. C. 148, 43 S. E. 388. Report by secretary of corporation to its insurer is competent evidence of admissions therein in favor of injured employee. Roche *v.* Wks., 140 Cal. 563, 74 P. 147. Report adopted and promulgated by corporation is competent against it. Vicksburg, etc. R. Co. *v.* Putnam, 118 U. S. 545. See Atchison, etc. R. Co. *v.* Burks, 78 Kan. 515, 96 P. 950.

556-77 Golden Cycle Min. Co. *v.* Min. Co., 188 Fed. 179, 112 C. C. A. 95; Fidelity & C. Co. *v.* Haines, 111 Fed. 337, 49 C. C. A. 379; Central E. Co. *v.* Co., 120 Fed. 925, 57 C. C. A. 197; In re Furniture Co., 166 Fed. 516; Stanton *v.* Co., 132 Ala. 635, 32 S. 299; Kelley *v.* Campbell, 134 Cal. 175, 66 P. 220; Hill *v.* Barner, 8 Cal. App. 58, 96 P. 111; Castner *v.* Rinne, 31 Colo. 256, 72 P. 1052; Morse *v.* R. Co., 81 Conn. 395, 71 A. 553; Hayzel *v.* R. Co., 19 App. Cas. (D. C.) 359, 369; Blanchard C. Co. *v.* Garritson, 43 Ind. App. 303, 87 N. E. 151, *cit.* the text; Swift *v.* Redhead, 147 Ia. 94, 122 N. W. 140; Haney-C. Co. *v.* Assn., 119 Ia. 188, 93 N. W. 297; Crowley *v.* R. Co., 204 Mass. 241, 90 N. E. 532; Allington Mfg. Co. *v.* Co., 133 Mich. 427, 95 N. W. 562; Reason *v.* R. Co., 150 Mich. 50, 113 N. W. 596; Itasca, etc. Co. *v.* McKinley, 124 Minn. 183, 144 N. W. 768, 1135; Shoemaker *v.* Assur. Co., 75 Neb. 587, 106 N. W. 316; Yoshimi *v.* Exp. Co., 78 N. J. L. 281, 73 A. 45; Rapp *v.* Co. (N. J. L.), 72 A. 38; Statler *v.* Co., 105 N. Y. 478, 88 N. E. 1063; Gross *v.* Outfitting Co., 140 N. Y. S. 115; Utica City Nat. Bk. *v.* Tallman, 63 App. Div. 480, 71 N. Y. S. 861, *aff.,* without opinion, 172 N. Y. 642, 65 N. E. 1123; Wickham *v.* R. Co., 85 App. Div. 182, 83 N. Y. S. 146; Goetz *v.* R. Co., 54 App. Div. 365, 66 N. Y. S. 666; McAveigh *v.* R. Co., 120 N. Y. S. 102; Stonehill W. Co. *v.* Lupo, 110 N. Y. S. 408; Fuller *v.* R. Co., 61 Misc. 599, 113 N. Y. S. 1001; Harding *v.* Oregon-Idaho Co., 57 Or. 34, 110 P. 412; Haspel *v.* McLaughlin, 38 Pa. Super. 334; North Am. Acc. Ins. Co. *v.* Frazer (Tex. Civ.), 112 S. W. 812; Galveston, etc. R. Co. *v.* Levy, 45 Tex. Civ. 373, 100 S. W. 195; Continental Ins. Co. *v.* Cummings, 98 Tex. 115, 81 S. W. 705; Sias *v.* L. Co., 73 Vt. 35, 50 A. 554; Hardwick S. Bk. *v.* Drenan, 72 Vt. 438, 48 A. 645.

"**The witness testified** that Johnson, the local freight agent of the Southern Pacific Company, spoke of the justness of the claim and the readiness of the company to pay it, and explained why it had not been paid. As the record discloses, Johnson was merely the local freight agent of the company. It is not shown that he had the authority to pay, settle, or even admit the payment of a claim owing by the company, or that he was permitted by the company to hold himself out as an agent having such authority; in fact, Johnson subsequently testified that he did not have such authority. We therefore think this testimony was inadmissible." N. Y. & B. Transp. Line *v.* Lewis Baer & Co., 118 Md. 73, 84 A. 251.

Evidence as to presidency of corpora-

tion.—Election of a president being shown his continuing act tends to show he held the office. Clarke *v.* Co., 174 Mass. 434, 54 N. E. 887. See Choctaw, etc. R. Co. *v.* Rolfe, 76 Ark. 220, 88 S. W. 870.

Admissions of president of a corporation, apparently made in discharge of his duties, are competent (Masonic T. S. D. Co. *v.* Langfelt, 117 Ill. App. 652; First Nat. Bk. *v.* Arnold, 156 Ind. 487, 497, 60 N. E. 134); and so are admissions of vice president while acting as president. Vincent *v.* Co., 113 Ill. App. 463.

Statement by president to board.—An admission is not made out by evidence showing president of a corporation at a meeting of trustees called attention to a claim against it, said the board had formerly recognized such claim. Childs *v.* Ponder, 117 Ga. 553, 43 S. E. 986.

President's representative.—Admissions of person who is sent by president of corporation to interview writer of a letter may be proved. Griffen *v.* Co., 115 Fed. 749.

Authority of vice-president of corporation must be shown. Patterson *v.* Co., 85 N. Y. S. 359; Westminster Nat. Bk. *v.* Wks., 73 N. H. 465, 62 A. 871.

Proof of authority not essential.—A letter written by general manager, who was also secretary and treasurer of company and its controlling spirit, was received without other proof of authority to write it. White, H. Co. *v.* Hall, 102 Va. 284, 46 S. E. 290.

Assignment made by president and cashier of bank, without authority of the directors, is admissible as a circumstance showing its insolvency. McGregor *v.* Battle, 128 Ga. 577, 585, 58 S. E. 28.

Admissions of bank cashier in negotiating and conducting a transaction which devolved upon him are binding on the bank. Blair *v.* Bk., 103 Va. 762, 50 S. E. 262. And so his admission as to value of services of clerk employed by him for it. Meislahn *v.* Bk., 62 App. Div. 231, 70 N. Y. S. 988.

Drawbridge tenders.—Declarations by, admissible. Toll B. Co. *v.* Betsworth, 30 Conn. 380; Sizer *v.* Melton, 129 Ga. 143, 58 S. E. 1055.

Manager of telephone company may bind it by admission as to ownership of wire. Lynchburg T. Co. *v.* Booker, 103 Va. 594, 604, 50 S. E. 148; Virginia-C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725.

Freight agent.—Statements as to nondelivery of freight made in answer to question admissible. Lane *v.* R. Co., 112 Mass. 455.

A person who was officer in both corporations concerned and their "ruling spirit" bound them by admissions. Huse Co. *v.* Co., 121 Mo. App. 89, 97 S. W. 990.

Person acting in two capacities.— The conversation of one who acts for himself and the plaintiffs, who was a corporate director, and who narrated his conversation to another director and the treasurer of the corporation, may be proved. Randall *v.* Claflin, 194 Mass. 560, 80 N. E. 594.

Action of committee of corporation. See Clarke *v.* Co., 174 Mass. 434, 54 N. E. 887.

Admission of conductor concerning delay of train, the schedule of which was not under his control or for the delay of which he was not responsible, is not binding. St. Louis, etc. R. Co. *v.* Carlisle, 34 Tex. Civ. 268, 78 S. W. 553. Conductor may bind company as to manner of loss of baggage by answering passenger's inquiries. Morse *v.* R. Co., 6 Gray (Mass.) 450. And his admission concerning condition of engine in use is provable. Missouri, etc. R. Co. *v.* Russell, 40 Tex. Civ. 114, 88 S. W. 379.

Admission by motorman is incompetent to prove negligence of principal. Wallace *v.* R. Co., 145 Ala. 682, 40 S. 89; Robinson *v.* R. Co., 189 Mass. 594, 76 N. E. 190; Rogers *v.* R. Co., 84 N. Y. S. 974.

Authority of agent to adjust claims. In Missouri, etc. R. Co. *v.* Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643, it was held a written statement of defendant's claim agent was not competent evidence because it was not shown that in making it he acted within the scope of his authority. In the subsequent case of the same company against Gernan, 84 Tex. 141, 19 S. W. 461, a similar statement of the same person as to the burning of cotton was held competent, it having been shown he was a general agent invested with authority to adjust claims against defendant. See Austin *v.* Forbis, 99 Tex. 234, 89 S. W. 405.

Admissions in contract.—Where a contract, not ultra vires, is executed in

due form by proper officers of a corporation it will be presumed admissions therein are binding. Tague *v.* Co., 28 Mont. 51, 72 P. 297.

Principal is not affected by opinions or conclusions of agent, unless it has empowered him to express them. Fidelity & C. Co. *v.* Haines, 111 Fed. 337, 49 C. C. A. 379.

By corporate records.—Admission may be proved by corporate records, and is evidence although it relates to the contents of a paper or to a corporate vote. Clarke *v.* Co., 174 Mass. 434, 54 N. E. 887.

Acts of promoters.—Where a corporation adopts and acts on the negotiations and inchoate contracts of promoters who formed it, their acts and declarations, so far as they would have been competent against themselves, are competent against it. Raegener *v.* Brockway, 58 App. Div. 166, 68 N. Y. S. 712.

Of members of corporation.—When a court must satisfy itself that an association was organized with a certain intent, and was not organized for a certain purpose, declarations of some of its organizers and members, against interest, are admissible, at least as against them, to show intent in forming the organization. Star B. G. Assn. *v.* Assn., 77 Conn. 83, 58 A. 467.

558-78 Mathews *v.* Livingston, 86 Conn. 263, 85 Atl. 529; Godwin *v.* S., 1 Boyce (Del.) 173, 74 A. 1101; Clark *v.* Emerson (Ga.), 81 S. E. 870; Brown *v.* Great Camp, 167 Mich. 123, 132 N. W. 562; Frey *v.* Myers (Tex. Civ.), 113 S. W. 592; U. S. *v.* Co., 83 Vt. 278, 75 A. 280; Boettger *v.* Two Rivers (Wis.), 144 N. W. 1097.

Attorney's advice will not be treated as admission of client's liability, especially if he disregards it. Klein *v.* Co., 182 N. Y. 27, 35, 74 N. E. 495.

559-81 New York L. Ins. Co. *v.* Rankin, 162 Fed. 103, 89 C. C. A. 103; Horseshoe M. Co. *v.* Co., 147 Fed. 517, 77 C. C. A. 213; Todd *v.* Daniels, 153 Ill. App. 223; Spurgeon *v.* Rhodes, 167 Ind. 1, 76 N. E. 228; Callaway *v.* Co., 67 N. J. L. 44, 50 A. 900; Murray *v* Sweasy, 69 App. Div. 45, 74 N. Y. S 543; Asheville S. & F. Co. *v.* Machin, 150 N. C. 738, 64 S. E. 887.

Prima facie an attorney has authority to write a letter asking for itemized bill against his client and promising client will pay it. McNamara *v.* Douglas, 78 Conn. 219, 61 A. 368.

Failure to answer letters.—An attorney who has claims for collection is not bound to deny any assertions made by debtor; he cannot bind client by neglect or failure to answer letters. Irwin *v.* Co., 39 Wash. 346, 81 P. 849.

Attorney employed to straighten out an account is but agent, and his admission concerning account binds principal. Burraston *v.* Bk., 22 Utah 328, 62 P. 425.

Declaration of attorney's clerk binding. Lord *v.* Wood, 120 Ia. 303, 94 N. W. 842.

560-83 New York L. Ins. Co. *v.* Rankin, 162 Fed. 103, 89 C. C. A. 103.

560-84 New York L. Ins. So. *v.* Rankin, 162 Fed. 103, 89 C. C. A. 103; Waterbury *v.* Co., 74 Conn. 152, 50 A. 3; Sudworth *v.* Morton, 137 Mich. 575, 100 N. W. 769; Missouri, etc. R. Co. *v.* Sullivan (Tex. Civ.), 157 S. W. 193.

A conversation between attorneys of opposing parties, in absence of party to be affected, cannot be shown. Cable Co. *v.* Parantha, 118 Ga. 913, 45 S. E. 787.

Attorney employed to try a cause cannot make admission after judgment. Waterbury *v.* Co., 74 Conn. 152, 50 A. 3.

560-85 James *v.* R. Co., 201 Mass. 263, 87 N. E. 474.

561-88 Atchison, etc. R. Co. *v.* Sullivan, 173 Fed. 456, 97 C. C. A. 1 (if different issues involved).

It is for jury to find whether admission made on previous trial was limited or general. Kirchheimer *v.* Barrett, 125 Ill. App. 56, *appr.* Central B., etc. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

561-90 Virginia-C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725; Dollar *v.* Imp. Co., 72 Wash. 1, 129 P. 578. *Contra.* Godwin *v.* S., 1 Boyce (Del.) 173, 74 A. 1101 (admission by silence).

Remarks made during the taking of a deposition do not amount to admissions. O'Donnell *v.* McElroy, 157 Mo. App. 547, 138 S. W. 674.

A letter written to the clerk of court directing him what witnesses to summon and stating where they could be found, is not an admission that all who were working at a certain place were employees of defendant, though it was so stated. Virginia-C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725.

561-91 Rousseau *v.* Brotherhood, etc., 177 Mich. 568, 143 N. W. 626; Fosha *v.* O'Donnell, 120 Wis. 336, 97 N. W. 924.

If made by mistake extrajudicial admission may be withdrawn before it is acted upon (Hortz's Est., 30 Pa. C. C. 44); it may be proved, the withdrawal only affecting its weight. Liberty *v.* Haines, 101 Me. 402, 64 A. 665.

561-92 If husband does not waive privilege a pleading prepared by his attorney, in pursuance of communications made by wife, is not admissible against her. Leyner *v.* Leyner, 123 Ia. 185, 98 N. W. 628.

561-93 Woods *v.* Jensen, 130 Cal. 200, 62 P. 473; Bartoletti *v.* Hoerner, 154 Ill. App. 336; Neindorf *v.* Van De Voorde, 143 Ia. 318, 120 N. W. 84; S. *v.* Werner, 16 N. D. 83, 112 N. W. 60; Armstrong *v.* Crump, 25 Okla. 452, 106 P. 855; Equitable Mfg. Co. *v.* Cooley, 69 S. C. 332, 48 S. E. 267; Missouri, etc. R. Co. *v.* Pettit, 54 Tex. Civ. 358, 117 S. W. 894.

563-96 Graves *v.* Graves, 70 Ark. 541, 69 S. W. 544; McIntire *v.* Schiffer, 31 Colo. 246, 72 P. 1056; Chicago C. R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28; S. *v.* Record, 151 N. C. 695, 65 S. E. 1010; S. *v.* Carpenter, 32 Wash. 254, 73 P. 357.

Silent acquiescence of husband in wife's statements may be shown. Hight *v.* Klingensmith, 75 Ark. 218, 87 S. W. 138.

In action against husband and wife to reach property of his held in her name, his declarations against interest may be shown. Pullins *v.* Pullins, 23 Ky. L. R. 333, 62 S. W. 865.

Admissions made by husband as witness for wife on trial of independent issue between her and the party to a subsequent action are not competent as against her. Bouton *v.* Welch, 59 App. Div. 288, 69 N. Y. S. 407.

Disclaimer of possession.—If the wife alleges possession of property through her husband as agent, his disclaimer of possession and right thereto is competent evidence against her, as is his offer to buy the land she claimed. Pearson *v.* Adams, 129 Ala. 157, 29 S. 977.

563-98 Hoyt *v.* Zumwalt, 149 Cal. 381, 86 P. 600; Butts County *v.* Hixon, 135 Ga. 26, 68 S. E. 786; Hayes *v.* Funk, 79 Kan. 416, 99 P. 1131; Payton *v.* Co., 28 Ky. L. R. 1303, 91 S. W. 719; Hansen *v.* Vogelsang, 139 App. Div. 936, 124 N. Y. S. 438; Winans *v.* Demarest, 84 N. Y. S. 504; Aldous *v.* Olverson, 17 S. D. 190, 95 N. W. 917; Word *v.* Kennon (Tex. Civ.), 75 S. W. 365; Maffi *v.* Stephens (Tex. Civ.), 93 S. W. 158.

Declarations competent to show abandonment.—In a proceeding to foreclose a lien on the homestead of a married woman, her declarations as to the husband's abandonment of her may be proved. Mabry *v.* Co., 47 Tex. Civ. 443, 105 S. W. 1156.

A receipt for goods signed by wife has been admitted without proof of agency for purpose of showing their delivery. Smith *v.* Miller, 152 Ala. 485, 44 S. 399.

564-99 Duncan *v.* Landis, 106 Fed. 839, 45 C. C. A. 666; Canole *v.* Allen, 222 Pa. 156, 70 A. 1053; Martin *v.* Rutt, 127 Pa. 380, 17 A. 993; Thomas *v.* Butler, 24 Pa. Super. 305, 317.

Where husband and wife are joint parties, testimony or declarations of either are admissible, though code provides neither can be a witness against the other. Declarations of either are not admissible against the other. Chaslavka *v.* Mechalek, 124 Ia. 69, 99 N. W. 154.

Statement of wife, assented to by husband, made in presence of others, competent against him. S. *v.* Wooley, 215 Mo. 620, 115 S. W. 417.

565-1 Duncan *v.* Landis, 106 Fed. 839, 45 C. C. A. 666; Northington *v.* Granade, 118 Ga. 584, 45 S. E. 447; Leyner *v.* Leyner, 123 Ia. 185, 98 N. W. 628; Priestly *v.* Chapman, 130 La. 480, 58 S. 156; Baker *v.* Thompson, 214 Mo. 500, 114 S. W. 497.

Wife not bound to deny statements made by husband in her presence and adverse to her rights. Thomas *v.* Butler, 24 Pa. Super. 305.

Husband's admissions competent to impeach testimony for wife. Thomas *v.* Butler, 16 Pa. Super. 16, 268, 24 Pa. Super. 305.

565-2 Martin *v.* Bks., 89 Ark. 77, 155 S. W. 928; Conner *v.* Martin, 46 Ind. App. 141, 92 N. E. 3; Payton *v.* Com., 28 Ky. L. R. 1303, 91 S. W. 719; Hartman *v.* Thompson, 104 Md. 389, 65 A. 117; Meyer *v.* Jewell, 88 N. Y. S. 972; Thomas *v.* Butler, 16 Pa. Super. 268.

Evidence of agent's acts.—What husband has done in the management of

his wife's property was presumably done with her knowledge, and was relevant to show her ownership; and so was evidence he kept the bank account in her name relevant to show her ownership of the business he conducted; but what he said in her absence concerning her ownership was not competent against her. Payton *v.* Co., 28 Ky. L. R. 1303, 91 S. W. 719.

The authority of general manager of a store does not extend to admissions made to creditors of his wife in her absence. Duncan *v.* Landis, 106 Fed. 839, 45 C. C. A. 666.

Wife's admission of husband's agency does not imply he was authorized to sell her property. Newberry *v.* Durand, 87 Mo. App. 290. The relationship does not extend husband's authority. Hartman *v.* Thompson, 104 Md. 389, 65 A. 117.

566-3 The cases bearing upon competency of undelivered letter from one spouse to another as admission are collected in Hammons *v.* S., 73 Ark. 495, 84 S. W. 718, which held letter privileged. See S. *v.* Perkins, 143 Ia. 55, 120 N. W. 62.

566-4 Belknap S. Bk. *v.* Co., 28 Colo. 326, 64 P. 212.

566-6 First Nat. Bk. *v.* Bk., 171 Ind. 323, 86 N. E. 417; Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694; Hudson *v.* Judge, 114 Mich. 116, 72 N. W. 162, 68 Am. St. 465, 47 L. R. A. 345.

567-8 Tierney *v.* Fitzpatrick, 195 N. Y. 433, 88 N. E. 750; Calvert *v.* Alvey, 152 N. C. 610, 68 S. E. 153.

568-14 Husband cannot replace securities mismanaged and for which he was responsible by a statement that certain stocks standing in name of his wife were held in place of those disposed of. As to her, if she had not adopted it, such statement contained in an exhibit was hearsay. Putnam *v.* Co., 87 App. Div. 13, 83 N. Y. S. 1091.

568-15 Johnson *v.* Amberson, 140 Ala. 342, 37 S. 273; Putnam *v.* Co., 87 App. Div. 13, 83 N. Y. S. 1091; McClellan *v.* Grant, 83 App. Div. 599, 82 N. Y. S. 208; Leary *v.* Corvin, 63 App. Div. 151, 71 N. Y. S. 335.

Report made by one of two trustees not admissible against the other. Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800.

Against personal interests of trustees competent. Jarrett *v.* Johnson, 116 Ill. App. 592.

568-20 Supra, 460-5.

569-21 Hutchinson *v.* McLaughlin, 15 Colo. 492, 25 P. 317, 11 L. R. A. 287; Rarick *v.* Vandeiver, 11 Colo. App. 116, 52 P. 743; Knights Templars & M. L. I. Co. *v.* Crayton, 209 Ill. 550, 563, 70 N. E. 1066, 110 Ill. App. 648; Neff *v.* Cameron, 213 Mo. 350, 111 S. W. 1139; Queatham *v.* Woodmen, 148 Mo. App. 33, 127 S. W. 651; Stevens *v.* Co., 12 N. D. 463, 97 N. W. 862.

569-22 Hart *v.* Miller, 29 Ind. App. 222, 64 N. E. 239; Buffalo L. T. Co. *v.* Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. 839.

Made prior to appointment or in individual capacity not competent. Johnston *v.* Coney, 120 Ga. 767, 48 S. E. 373.

569-25 Miss. Cent. R. Co. *v.* Pillows, 101 Miss. 527, 58 S. 483.

Parents cannot bind infants by admissions. Glade C. M. Co. *v.* Harris, 65 W. Va. 152, 63 S. E. 873.

569-26 Blue *v.* Blue, 155 Ala. 206, 46 S. 571; Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. 93; Breese *v.* Graves, 67 App. Div. 322, 73 N. Y. S. 167; Crouse *v.* Judson, 41 Misc. 338, 84 N. Y. S. 755.

570-27 MacKenzie *v.* Barrett, 148 Ill. App. 414.

570-28 Lecour *v.* Bk., 61 App. Div. 163, 70 N. Y. S. 419; In re Hermann's Est., 226 Pa. 543, 75 A. 731.

570-30 Hadlock *v.* Brooks, 178 Mass. 425, 59 N. E. 1009; Thomas *v.* Byron Tp., 168 Mich. 593, 134 N. W. 1021; Davis *v.* Gallagher, 124 N. Y. 487, 26 N. E. 1045; Williams *v.* Culver, 39 Or. 337, 64 P. 763; Lindsey *v.* White (Tex. Civ.), 61 S. W. 438.

Made after revocation of letters not competent against surety of representative. Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165.

570-31 Breese *v.* Graves, 67 App. Div. 322, 73 N. Y. S. 167.

Administrator, subject to his responsibility to the estate, may bind it by evidence in a suit to recover for services as well as by his pleadings in action against the estate. Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. 93.

Weight of admission.—An item in an inventory filed by an executor of his father's estate specifying a claim against himself will not support an action or establish a set-off. Pentz *v.* Ins. Co., 92 Md. 444, 48 A. 139; Sie-

bert *v.* Steinmeyer, 204 Pa. 419, 54 A. 336.

Silence of inventories concerning an account of the existence of which administrators must have had knowledge, is in the nature of admission estate had no rights therein. Crane *v.* Brooks, 189 Mass. 228, 75 N. E. 710.

570-32 Advertisement of sale of intestate's land not competent to show adverse possession by him at time of decease. Whitehead *v.* Pitts, 127 Ga. 774, 56 S. E. 1004.

571-33 Crouse *v.* Judson, 41 Misc. 338, 84 N. Y. S. 755.

571-34 Crouse *v.* Judson, 41 Misc 338, 84 N. Y. S. 755.

571-36 Admissions by one of two receivers competent against both. Shirk *v.* Brookfield, 77 App. Div. 295, 79 N. Y. S. 225.

571-39 Gibson *v.* Boston, 75 N. H. 405, 75 A. 103; Davis *v.* Gallagher, 124 N. Y. 487, 26 N. E. 1045.

571-40 People's S. Bk. *v.* Hoppe, 132 Mo. App. 449, 111 S. W. 1190.

572-41 Schell *v.* Weaver, 225 Ill. 159, 80 N. E. 95.

572-43 Am. C. Ins. Co. *v.* Rosenstein (Ind. App.), 88 N. E. 97; Sutcliffe *v.* Assn., 119 Ia. 220, 93 N. W. 90; Henn *v.* Ins. Co., 67 N. J. L. 310, 51 A. 689; Union Cent. L. Ins. Co. *v.* Cheever, 36 O. St. 201; Daley *v.* Trainmen, 7 O. N. P. (N. S.) 238; Ellis *v.* Ins. Co., 18 Pa. Dist. 501; Arnold *v.* Ins. Co., 20 Pa. Super. 61; Thompson *v.* Ins. Co., 63 S. C. 290, 41 S. E. 464.

Insured's declaration as to payment of premiums competent. Manhattan Ins. Co. *v.* Myers, 22 Ky. L. R. 875, 59 S. W. 30.

573-44 Hews *v.* Soc., 143 Fed. 850, 74 C. C. A. 676; Van Frank *v.* Assn., 158 Ill. 560, 41 N. E. 1005; Kearney *v.* Ins. Co., 109 Ill. App. 609; National Union *v.* Hunter, 99 Ill. App. 146; Callies *v.* Woodmen, 98 Mo. App. 521, 72 S. W. 713; Ogden *v.* W. O. W., 78 Neb. 804, 111 N. W. 797; Life Assn. *v.* Winn, 96 Tenn. 224, 33 S. W. 1045; Atkins *v.* Ins. Co. (Tex. Civ.), 62 S. W. 563.

573-45 Hews *v.* Soc., 143 Fed. 850, 74 C. C. A. 676; Finn *v.* Ins. Co., 98 App. Div. 588, 90 N. Y. S. 697. *Contra*, Daley *v.* Trainmen, 7 O. N. P. (N. S.) 238.

A considerable latitude will be allowed in the inquiry where representation was insured had never been afflicted with ailment covered by admission. Hews *v.* Soc., 143 Fed. 850, 74 C. C. A. 676.

573-46 Woodmen *v.* Jackson, 80 Ark. 419, 97 S. W. 673; Coulter *v.* Assn., 144 Ill. App. 255; Siebelist *v.* Ins. Co., 19 Pa. Super. 221; Holleran *v.* Assur. Co., 18 Pa. Super. 573; Voelkel *v.* Tent, 116 Wis. 202, 92 N. W. 1104; Hart *v.* Alliance, 108 Wis. 490, 84 N. W. 851.

Proof of death made by one not a party, on behalf of all beneficiaries, admissible. Fey *v.* Ins. Soc., 120 Wis. 358, 98 N. W. 206.

Not conclusive.—Signing and swearing to proof of death, without intention to mislead or defraud, is not conclusive upon beneficiary as to cause of death of insured, insurer not having altered its position. Supreme Tent *v.* Stensland, 206 Ill. 124, 68 N. E. 1098, 105 Ill. App. 267. And so if proof accompanied by statement maker declines to be bound by it. Fisher *v.* Assn., 188 Pa. 1, 13 A. 467.

573-47 Will *v.* Tornabells, 3 P. R. Fed. 125; Scott *v.* Maddox, 113 Ga. 795, 39 S. E. 500; Hopper *v.* Sellers, 91 Kan. 876, 139 P. 365; Irving *v.* S., 92 Miss. 662, 47 S. 518; Neff *v.* Cameron, 213 Mo. 350, 111 S. W. 1139; Genest *v.* Co., 75 N. H. 365, 74 A. 593 (non-judicial admission of witness not competent against party who called him); Mautner *v.* Brody, 120 N. Y. S. 734; Daniel *v.* Dixon, 161 N. C. 377, 77 S. E. 305; Eminent Household *v.* Prater, 37 Okla. 568, 133 P. 48; Gleason *v.* Denson, 65 Or. 199, 132 P. 530; Gowdy *v.* Gowdy, 83 S. C. 349, 65 S. E. 385; Stouffer *v.* Erwin, 81 S. C. 541, 62 S. E. 843; Elkins *v.* S., 59 Tex. Cr. 157, 127 S. W. 833; Melton *v.* S., 58 Tex. Cr. 86, 124 S. W. 910.

Mortgagor and mortgagee.—If there is no collusion between mortgagor and mortgagee that relation does not create such privity as makes declarations of one evidence against the other. Mower *v.* McCarthy, 79 Vt. 142, 155, 64 A. 578, 7 L. R. A. (N. S.) 418.

By one of several legatees or heirs. See 507-61, supra.

Admissions by consignor cannot bind consignee. Bank *v.* Co., 127 Ia. 1, 102 N. W. 107.

In a criminal action, state, not complaining witness, is the party, and admissions by him are not competent in favor of accused. S. *v.* Brady, 71 N.

J. L. 360, 59 A. 6; C. *v.* Densmore, 12 Allen (Mass.) 535. Statements by injured person not competent for accused as admissions. P. *v.* Pezutto, 255 Ill. 583, 99 N. E. 677.

But admissions of a drawer who has not parted with all his interest in a bill are admissible. Greenburg Nat. Bk. *v.* C. Syer & Co., 113 Va. 53, 73 S. E. 438.

574-48 Chicago, etc. R. Co. *v.* Clarkson, 147 Fed. 397, 77 C. C. A. 575; Graves *v.* Graves, 70 Ark. 541, 69 S. W. 544; Stoddard *v.* Newhall, 1 Cal. App. 111, 81 P. 666; Georgia R. & B. Co. *v.* Fitzgerald, 108 Ga. 507, 34 S. E. 316; Bradenkamp *v.* Rouge, 143 Ill. App. 492; Schell *v.* Weaver, 128 Ill. App. 106; Deuterman *v.* Ruppel, 103 Ill. App. 106; O'Brien *v.* Knotts, 165 Ind. 308, 75 N. E. 594; Wright *v.* Reed, 118 Ia. 333, 92 N. W. 61; Jamison *v.* Jamison, 113 Ia. 720, 84 N. W. 705; Miller *v.* McDowell, 69 Kan. 453, 77 P. 101; Tripp *v.* Macomber, 187 Mass. 109, 72 N. E. 361; Coleman *v.* McGowan, 149 Mich. 624, 113 N. W. 17; Laird *v.* Laird, 127 Mich. 24, 86 N. W. 436; Komitsch *v.* DeGroot, 80 App. Div. 376, 80 N. Y. S. 970; Levy *v.* Hamilton, 68 App. Div. 277, 74 N. Y. S. 159; In re McCahan's Est. (No. 2), 221 Pa. 188, 70 A. 711; Murphey's Est., 26 Pa. C. C. 256; Rhoades' Est., 29 Pa. C. C. 512; Hubbard *v.* Cox, 76 Tex. 239, 13 S. W. 170; Chew *v.* Jackson, 45 Tex. Civ. 656, 102 S. W. 427; Warner *v.* Sapp (Tex. Civ.), 97 S. W. 125; Scott *v.* Crouch, 24 Utah 377, 67 P. 1068.

Contra. Neff *v.* Cameron, 213 Mo. 350, 111 S. W. 1139.

Scope to be given admission.—See quotation from Reg. *v.* Overseers, 1 B. & S. Q. B. 763, 121 Eng. Reprint 897, in Stoddard *v.* Newhall, 1 Cal. App. 111, 81 P. 666.

Such declarations evidence as to any fact therein stated which deceased knew or was bound to know. Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969.

Declarations of deceased joint owner, made after issue of patent, competent to show a party was part owner of a mining claim and his name was fraudulently omitted from patent. Delmoe *v.* Long, 35 Mont. 139, 88 P. 778.

Declarations of deceased grantee, made before and after conveyance, competent to show deed absolute in form was intended to secure indebtedness. Harp *v.* Harp, 136 Cal. 421, 69 P. 28.

In Massachusetts it is provided by statute that memoranda and written entries made by deceased shall be admissible in favor of the personal representative when a cause of action against him is supported by oral proof of admissions by deceased. This statute applies when proof of admissions is made solely to sustain testimony offered by plaintiff, and such writings are admissible as negative testimony. Huebener *v.* Childs, 180 Mass. 483, 62 N. E. 729.

574-51 Murphy *v.* R. Co., 92 Ark. 159, 122 S. W. 636.

Decedent's declarations as to indebtedness bind his heirs or legatees. Deuterman *v.* Ruppel, 103 Ill. App. 106.

575-52 McCullough Bros. *v.* Sawtell, 134 Ga. 512, 68 S. E. 89; Miller *v.* Mathias, 145 Ill. App. 465; Thomas *v.* Mosher, 128 Ill. App. 479; Summerville *v.* Co., 119 Ill. App. 152; Baker *v.* Bk., 63 Neb. 801, 89 N. W. 269; Martin *v.* Farrell, 66 App. Div. 177, 72 N. Y. S. 934; Miller *v.* Harris, 117 App. Div. 395, 102 N. Y. S. 604; Maier *v.* Rebstock, 92 App. Div. 587, 87 N. Y. S. 85; Pearsall *v.* R. Co., 2 Tenn. Ch. App. 682; Bowman *v.* Rector (Tenn. Ch. App.), 59 S. W. 389, *aff.* by supreme court without opinion.

If a prima facie case of joint liability has been made acts and declarations of one of the parties alleged to be jointly liable are admissible in aid of such prima facie case, although not made in presence of the others. Thomas *v.* Mosher, 128 Ill. App. 479.

An heir is not bound by an admission of a co-heir. Stitzel *v.* Miller, 250 Ill. 72, 95 N. E. 53.

576-56 Indianapolis & C. T. Co. *v.* Wiles, 174 Ind. 236, 91 N. E. 161; Nichols *v.* Ringler, 135 Ia. 181, 112 N. W. 543; In re Kennedy's Will, 167 N. Y. 163, 177, 60 N. E. 442; Naul *v.* Naul, 75 App. Div. 292, 78 N. Y. S. 101.

Liability of lessor for acts of lessee does not make it competent to prove admission of one against the other. Rookard *v.* R. Co., 84 S. C. 190, 65 S. E. 1047.

577-57 McCloskey *v.* Goldman, 62 Misc. 462, 115 N. Y. S. 189.

577-59 Admissions by one maker of a note are not evidence, after death of both, against heirs of either. Matteson *v.* Palsner, 56 App. Div. 91, 67 N. Y. S. 612.

578-60 Rathbun *v.* White, 157 Cal.

248, 107 P. 309; Peterson *v.* Co., 140 Cal. 624, 74 P. 162; Rudy *v.* Katz, 23 Ky. L. R. 1697, 66 S. W. 18; Cannon *v.* Wing, 150 Mo. App. 12, 129 S. W. 718; Carlson *v.* Holm, 2 Neb. (Unof.) 38, 95 N. W. 1125; Parker *v.* Paine, 37 Misc. 768, 76 N. Y. S. 942; Tapp *v.* Dibrell, 134 N. C. 546, 47 S. E. 51; Boston Foundry Co. *v.* Whiteman, 31 R. I. 88, 76 A. 757; Muench *v.* Heinemann, 119 Wis. 441, 96 N. W. 800.

When not conclusive against co-partner.—Maxwell *v.* Massachusetts Title Ins. Co., 206 Mass. 197, 92 N. E. 42.

In a criminal case against partners admission made by one is not competent against the other unless he was connected with or had knowledge of it. S. *v.* Burns, 25 S. D. 361, 126 N. W. 572.

A single manager of a limited partnership cannot bind it by his admissions unless they are made as special agent. Abington D. Co. *v.* Reynolds, 24 Pa. Super. 632.

580-61 S. *v.* Salmon, 216 Mo. 466, 115 S. W. 1106; Wyatt *v.* Cely, 86 S. C. 539, 68 S. E. 657.

A statement made to a commercial agency by one member of a firm is not evidence of its assets and liabilities. Kliger *v.* Rosenfeld, 120 App. Div. 396, 105 N. Y. S. 214.

580-65 Peoria L. Co. *v.* Cohen, 113 Ill. App. 30; Wilson *v.* Whitten, 99 Ill. App. 233; Mackintosh *v.* Kimball, 101 App. Div. 494, 92 N. Y. S. 132.

582-66 Maxwell *v.* Mass. Title Ins. Co., 206 Mass. 197, 92 N. E. 42.

583-67 Tapp *v.* Dibrell, 134 N. C. 546, 47 S. E. 51.

Leases signed by one as a member of a firm are admissible against him, he being connected with firm by other evidence; they do not, conclusively establish a partnership. Parker *v.* Paine, 37 Misc. 768, 76 N. Y. S. 942.

584-73 No more satisfactory proof of the persons who form a partnership can be made than their sworn declarations. In re Henschel, 114 Fed. 968.

584-74 People's Bk. *v.* Harper, 114 Ga. 603, 40 S. E. 717; Parker *v.* Paine, 37 Misc. 768, 76 N. Y. S. 942. See "Partnership," infra, 544-20.

585-77 Barwick *v.* Alderman, 46 Fla. 433, 35 S. 13. See "Partnership," infra, 544-20.

Silence sufficient. Sumner *v.* Gardiner, 184 Mass. 433, 68 N. E. 850; Reiser *v.* Portere, 106 Mich. 102, 63 N. W. 1041.

586-79 Guarantee Co. *v.* Ins. Co., 124 Fed. 170, 59 C. C. A. 376; U. S. *v.* Gaussen, 19 Wall. (U. S.) 198; Chicago P. C. *v.* O'Neal, 6 Ga. App. 425, 65 S. E. 161, cit. the text; Sanders *v.* Keller, 18 Ida. 590, 111 P. 350; Cicero *v.* Grisko, 240 Ill. 220, 88 N. E. 478; People *v.* Surety Co., 156 Ill. App. 488; Swift *v.* Trustees, 189 Ill. 584, 60 N. E. 44, 91 Ill. App. 221; Federal Union Surety Co. *v.* Mfg. Co., 176 Ind. 328, 95 N. E. 1104; Bartlett *v.* Co., 142 Ia. 538, 119 N. W. 729; S. *v.* Paxton, 65 Neb. 110, 90 N. W. 983; Paxton *v.* S., 59 Neb. 460, 81 N. W. 383, 80 Am. St. 689; Yates *v.* Thomas, 35 Misc. 552, 71 N. Y. S. 1113; Phillips *v.* Eggert, 133 Wis. 318, 113 N. W. 686.

Guardian's report.—Statements, in final report of guardian not admissible in judicio by his surety, although he may have instigated or approved them, and they may have been for his benefit. Rich *v.* Co., 126 Ga. 466, 55 S. E. 336.

As between two sets of sureties.—An officer who, in accounting to himself as his own successor, turns over bank credits which are afterwards entered as cash receipts on the books, prima facie relieves bondsmen of his first term and charges those of second with amount of such credits. Paxton *v.* S., 59 Neb. 460, 81 N. W. 383, 80 Am. St. 689.

587-80 Bailey *v.* McAlpin, 122 Ga. 616, 50 S. E. 388; Chicago P. Co. *v.* O'Neal, 6 Ga. App. 425, 65 S. E. 161, cit. the text; Knott *v.* Peterson, 125 Ia. 404, 101 N. W. 173; Weider *v.* Co., 42 Misc. 499, 86 N. Y. S. 105; Birkman *v.* Fahrenthold, 52 Tex. Civ. 335, 114 S. W. 428.

Reason of the rule.—"The bond was not to be responsible for any declarations of the principal, but for his conduct only." Hence, it is only his conduct in carrying on the business, or declarations accompanying his acts while so engaged, that are admissible in evidence against his surety. Knott *v.* Peterson, 125 Ia. 404, 101 N. W. 173, *disap.* Amherst Bk. *v.* Root, 2 Met. (Mass.) 522; Davis *v.* Kingsley, 13 Conn. 285; Singer Mfg. Co. *v.* Reynolds, 168 Mass. 588, 47 N. E. 438, 60 Am. Rep. 417.

A statement of moneys due from an officer whose term has just expired,

handed to his successor as part of duty of turning office over, is admission as against sureties. Paxton *v.* S., 59 Neb. 460, 81 N. W. 383, 80 Am. St. 689.

589-84 Official records are evidence against sureties of officer who made them, and are conclusive if not rebutted. Paxton *v.* S., 59 Neb. 460, 81 N. W. 383, 80 Am. St. 689. They are not conclusive, and sureties are not bound to impeach them by showing entries were incorrect; they may show the facts concerning time of defalcation and amount thereof in any way and by any testimony by which any other fact could be established. S. *v.* Paxton, 65 Neb. 110, 90 N. W. 983, 992.

589-89 Turner *v.* Mitchell, 22 Ky. L. R. 1784, 61 S. W. 468.

589-90 Atlas Shoe Co. *v.* Bloom, 209 Mass. 563, 95 N. E. 952.

589-92 Barrow *v.* S., 121 Ga. 187, 48 S. E. 950; Somers *v.* S., 116 Ga. 535, 48 S. E. 779; Miller *v.* John, 111 Ill. App. 56, 208 Ill. 173, 70 N. E. 27; Lasher *v.* Littell, 202 Ill. 551, 67 N. E. 372; Standard O. Co. *v.* Doyle, 26 Ky. L. R. 544, 82 S. W. 271; Com. *v.* MacKenzie, 211 Mass. 578, 98 N. E. 598; Carson *v.* Hawley, 82 Minn. 204, 84 N. W. 746; Meier *v.* Butcher, 197 Mo. 68, 92, 94 S. W. 883; Lane *v.* Bailey, 29 Mont. 548, 75 P. 191; Cleland *v.* Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212; Cohn *v.* Saidel, 71 N. H. 558, 53 A. 800; Lockhart *v.* Min. Co., 16 N. M. 223, 117 P. 833; Cartwright *v.* Canode (Tex. Civ.), 138 S. W. 792; McCarty *v.* Ins. Co., 33 Tex. Civ. 122, 75 S. W. 934; Hughes *v.* Co., 25 Tex. Civ. 212, 60 S. W. 981; Dubois *v.* Roby, 84 Vt. 465, 80 A. 150.

591-93 Meyer *v.* Munro, 9 Ida. 46, 71 P. 969; Hertrich *v.* Hertrich, 114 Ia. 643, 87 N. W. 689; Wall *v.* Beedy, 161 Mo. 625, 641, 61 S. W. 864; Marshall *v.* Faddis, 199 Pa. 397, 49 A. 225; Moore *v.* Robinson (Tex. Civ.), 75 S. W. 890; Mower *v.* McCarty, 79 Vt. 142, 154, 64 A. 578, 7 L. R. A. (N. S.) 418.

Tendency of evidence to establish conspiracy is enough. Harrell *v.* S., 121 Ga. 607, 49 S. E. 703.

592-94 Lent *v.* Shear, 160 N. Y. 462, 471, 55 N. E. 2.

592-95 Seitz *v.* Starks, 136 Mich. 90, 98 N. W. 852; P. *v.* Van Tassel, 156 N. Y. 561, 51 N. E. 274; Voisin *v.* Ins. Co., 60 App. Div. 139, 70 N. Y. S. 147; Perry *v.* S., 44 Tex. Civ. 55, 98 S. W. 411.

Made in absence of co-conspirator not competent. Connecticut Mut. L. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668.

592-96 Porter *v.* P., 31 Colo. 508, 74 P. 879; Richards *v.* C., 24 Ky. L. R. 14, 67 S. W. 818; Cleland *v.* Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212; C. *v.* Snyder, 40 Pa. Super. 485; Barton *v.* S., 49 Tex. Cr. 121, 90 S. W. 877.

Undelivered letter.—A letter containing self-charging admissions is competent, though not communicated to any of the writer's co-conspirators, to point to writer as one party to the conspiracy and her relations to persons to whom letter addressed. Chadwick *v.* U. S., 141 Fed. 225, 240, 72 C. C. A. 343.

Letter by unidentified author.—If there is no question concerning the genuineness of letter written by a conspirator it may be received, though authorship not established further than to show it was written by one of two conspirators. Ramsey *v.* Flowers, 72 Ark. 316, 80 S. W. 147.

593-97 P. *v.* Stokes, 5 Cal. App. 205, 89 P. 997; Barrow *v.* S., 121 Ga. 187, 48 S. E. 950; Cohn *v.* Saidel, 71 N. H. 558, 53 A. 800; Marshall *v.* Faddis, 199 Pa. 397, 49 A. 225.

Same rule applies in case of other crimes.—S. *v.* Kesner, 72 Kan. 87, 82 P. 720; S. *v.* Davis, 48 Kan. 1, 28 P. 1092.

593-1 Connecticut Mut. L. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668; Suttles *v.* Sewell, 117 Ga. 214, 43 S. E. 486; P. *v.* McQuade, 110 N. Y. 284, 307, 18 N. E. 156, 1 L. R. A. 273; Lederer *v.* Adler, 46 Misc. 564, 92 N. Y. S. 827.

The facts that some of the statements were made before formation of conspiracy and by some of the conspirators, does not render proof of them inadmissible for all purposes—as to show motive. Ramsey *v.* Flowers, 72 Ark. 316, 80 S. W. 147.

594-3 Abingdon Mills *v.* Grogan, 167 Ala. 146, 52 S. 596; Lefler *v.* Fox, 92 N. Y. S. 227; P. *v.* McQuade, 110 N. Y. 284, 307, 18 N. E. 156, 1 L. R. A. 273; Cranfill *v.* Hayden, 97 Tex. 544, 80 S. W. 609.

Statement of purpose.—In what man-

ner can it be said to have advanced or to have tended to advance the design, if any, of the accused parties of carrying the girls away, and inducing them to lead lives of prostitution and the like? An admission or confession of what is proposed to be done is not to be misconstrued into or confused with declarations in aid or promotion of the design talked about. The statement of Black was of what he and Pearson and defendant were going to do; i. e., going to Chicago and allow the girls to support them by prostitution. This was a clear admission of the connection with the alleged conspiracy, but as such did not in any way tend to further the same, and for this reason was not admissible against the defendant, who was not shown to have been present. See State *v.* Gilmore, 151 Ia. 618, 132 N. W. 53, 35 L. R. A. (N. S.) 1084; S. *v.* Poder, 154 Ia. 686, 135 N. W. 421.

594-5 Infants can neither make nor authorize another to make, admissions. Knights Templars *v.* Crayton, 209 Ill. 550, 70 N. E. 1066, 110 Ill. App. 648.

595-6 Text sustained (Louisville, etc. R. Co. *v.* Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646, *appr.* s. c. 2 Ind. App. 427, 28 N. E. 714); opposing view taken. Stein *v.* R. Co., 10 Phila. (Pa.) 440.

595-7 Hart *v.* Miller, 29 Ind. App. 222, 64 N. E. 239.

595-8 Admissions of one alleged to be incapable of managing property and who is a party to a proceeding for appointment of a guardian, provable on question of sanity. Conway *v.* Murphy, 135 Ia. 171, 112 N. W. 764.

595-11 See S. *v.* Cobb, 164 N. C. 418, 79 S. E. 419.

Statements obtained by coercion, threat or promise are subject to objection. Hardy *v.* U. S., 186 U. S. 224. Admissions which do not per se show guilt, though when connected with other evidence tend to prove it, are competent without preliminary proof they were voluntarily made. P. *v.* Stokes, 5 Cal. App. 205, 89 P. 997. Admissions by a person under arrest may be proved, at least if he was cautioned they might be used against him. C. *v.* Devaney, 182 Mass. 33, 64 N. E. 402; S. *v.* Conly, 130 N. C. 683, 41 S. E. 534. In some states such caution must be given. S. *v.* Parker, 132 N. C. 1011, 43 S. E. 830. Fact father of prosecutrix made threats against accused does not necessarily require exclusion of latter's admissions. P. *v.* Rich, 133 Mich. 14, 94 N. W. 375.

Admissions not incompetent because subsequently conditional promises of leniency are made. Republic *v.* Hang Cheong, 10 Haw. 94.

Testimony showing admissions were voluntarily made need not be in language of statute if substance of condition is testified to. S. *v.* Newton, 29 Wash. 373, 381, 70 P. 31; S. *v.* Carpenter, 32 Wash. 254, 73 P. 373.

Presumed on appeal trial court ascertained admission freely and voluntarily made. Whatley *v.* S., 144 Ala. 68, 75, 39 S. 1014.

Burden of proving admissions not voluntarily made is upon admitter. Green *v.* S., 124 Ga. 343, 52 S. E. 431.

While intoxicated.—Admissions made to an officer by a person he caused to become intoxicated are incompetent. McNutt *v.* S., 68 Neb. 207, 94 N. W. 143.

596-17 Bishop *v.* Treasurer, 37 Colo. 378, 86 P. 1021; Peckham *v.* P., 32 Colo. 140, 75 P. 422; P. *v.* R. Co., 244 Ill. 166, 91 N. E. 48; City Club *v.* McGeer, 198 N. Y. 160, 91 N. E. 539; Barnes *v.* Brown, 1 Tenn. Ch. App. 726, 744. See Vol. 1, p. 435, and supplementary matter thereto, supra.

Admission as to time a constitutional amendment took effect not regarded. Denver *v.* County, 33 Colo. 1, 77 P. 858.

Allegation of ownership is not a mere conclusion of law. Louisville & N. R. Co. *v.* Scomp, 30 Ky. L. R. 487, 98 S. W. 1024.

596-18 N. Y. L. Ins. Co. *v.* Rankin, 162 Fed. 103, 89 C. C. A. 103; Collins *v.* U. S., 35 Ct. Cl. (U. S.) 122; Stinson *v.* S., 3 Ala. App. 74, 57 S. 509; Zimmerman Mfg. Co. *v.* Dunn, 163 Ala. 272, 50 S. 906; St. Louis, etc. R. Co. *v.* C. G. Co., 161 Ala. 332, 50 S. 81; Waldrip *v.* Grisham (Ark.), 164 S. W. 1133; Donley *v.* Bailey, 48 Colo. 373, 110 P. 65; Denver, etc. R. Co. *v.* Brennaman, 45 Colo. 264, 100 P. 414; Beattie *v.* McMullen, 82 Conn. 484, 74 A. 767; Hudson *v.* Williams, 6 Penne. (Del.) 550, 72 A. 985; Dance *v.* Mize, 134 Ga. 646, 68 S. E. 434; Jenkins *v.* Co., 7 Ga. App. 484, 67 S. E. 124; Kelly *v.* Strouse, 116 Ga. 872, 900, 43 S. E. 280; Wall *v.* Moulton, 125 Ga. 121, 53 S. E. 591; Moore *v.* Vickers, 126 Ga. 42, 54 S. E.

814; Kroetch *v.* Co., 9 Ida. 277, 74 P. 868; Mahan *v.* Schroeder, 236 Ill. 392, 86 N. E. 97; O'Meara *v.* Coal Co., 154 Ill. App. 321; American Ins. Co. *v.* Walston, 111 Ill. App. 133; Keely *v.* City, 49 Ind. App. 396, 97 N. E. 568; Habich *v.* Bldg. Co., 177 Ind. 193, 97 N. E. 539; Welker *v.* Appleman, 44 Ind. App. 699, 90 N. E. 35; Halstead *v.* Coen, 31 Ind. App. 302, 67 N. E. 957; Natchez D. Co. *v.* Seed House (Ia.), 146 N. W. 865; Kurtz *v.* Ins. Co., 156 Ia. 376, 135 N. W. 1075; Rudd *v.* Dewey, 121 Ia. 454, 96 N. W. 937; Myers *v.* Goggerty, 10 Kan. App. 190, 63 P. 296; Hurst *v.* Williams, 31 Ky. L. R. 658, 102 S. W. 1176; Illinois C. R. Co. *v.* Colly, 27 Ky. L. R. 730, 86 S. W. 536; Shaw *v.* R. Co., 108 Me. 568, 82 A. 1005; Finn *v.* Co., 101 Me. 279, 64 A. 490; Biggs *v.* Langhammer, 103 Md. 94, 102, 63 A. 198; Lee *v.* Ins. Co., 206 Mass. 440, 92 N. E. 709; Grebonstein *v.* Co., 205 Mass. 431, 91 N. E. 411; Higgins *v.* Shepard, 182 Mass. 364, 65 N. E. 805; Hutchinson *v.* Nay, 183 Mass. 355, 67 N. E. 601; Crane *v.* Ross, 168 Mich. 623, 135 N. W. 83; Germain *v.* Dist., 158 Mich. 214, 122 N. W. 524, 123 N. W. 798; Musselman Co. *v.* Casler, 138 Mich. 24, 100 N. W. 997; Love *v.* Scott (Mo.), 166 S. W. 859; Newberry *v.* Co. (Mo.), 163 S. W. 570; Ohio *v.* Merc. Co. (Mo.), 163 S. W. 551; Bauer *v.* Imp. Co., 148 Mo. App. 652, 129 S. W. 59; Sterrett *v.* R. Co., 225 Mo. 99, 123 S. W. 877; Baldauf *v.* Peyton, 135 Mo. App. 492, 116 S. W. 27; Cullen *v.* Ins. Co., 126 Mo. App. 412, 104 S. W. 117; Lenahan *v.* Casey, 46 Mont. 367, 128 P. 601; Theobald *v.* Shepard, 75 N. H. 52, 71 A. 26; Union Bk. *v.* Deshel, 123 N. Y. S. 585; Schwartzman *v.* Cohen, 51 Misc. 635, 101 N. Y. S. 236; Roos *v.* Decker, 34 Misc. 168, 68 N. Y. S. 790; O'Brien *v.* R. Co., 55 Misc. 228, 105 N. Y. S. 238; Vautier *v.* Co., 231 Pa. 8, 79 A. 814; Green *v.* Bauer, 15 Pa. Super. 372; Field *v.* Schuster, 26 Pa. Super. 82; Manila *v.* del Rosario, 5 Phil. Isl. 227; Busch *v.* R. Co., 29 S. D. 44, 135 N. W. 757; Slaydon & Co. *v.* Palmo (Tex. Civ.), 151 S. W. 649; Gulf, etc. R. Co. *v.* Bagby (Tex. Civ.), 127 S. W. 254; San Antonio *v.* Stevens (Tex. Civ.), 126 S. W. 666; Wall *v.* Melton (Tex. Civ.), 94 S. W. 358; McKnight *v.* Co. (Tex. Civ.), 99 S. W. 198; Houston *v.* Stewart (Tex. Civ.), 90 S. W. 49; Floresville Mfg. Co. *v.* R. Co., 55 Tex. Civ. 78, 118 S. W. 194; Watson *v.* Boswell, 25 Tex. Civ. 379, 61 S. W. 407; San Antonio & A. P. R. Co. *v.* Stone (Tex. Civ.), 60 S. W. 461; Security Mut. L. Ins. Co. *v.* Calvert, 101 Tex. 128, 105 S. W. 320; McKinney *v.* Carson, 35 Utah 180, 99 P. 660; Nat. Bk. *v.* Gougar, 51 Wash. 204, 98 P. 607; Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026.

Contingent offer.—Admissions made in contemplation of effort to compromise in a contingency which might or might not arise are provable. Upson *v.* Campbell (Tex. Civ.), 99 S. W. 1129. But in cases of tort an offer to purchase peace, made either with intent to prevent a possible controversy or to end one, cannot be used as an admission. Finn *v.* Co., 101 Me. 279, 64 A. 490.

The rule applies as well to claim of plaintiff as to defense of defendant. Biggs *v.* Langhammer, 103 Md. 94, 102, 63 A. 198.

Disputed and unquestioned claims. "There is a distinction between an offer or proposition to compromise a doubtful or disputed claim, and an offer to settle upon certain terms a claim that is unquestioned. An admission made in an offer of this latter character will be admissible, when one made in an offer of the former character will not." Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782; Kelly *v.* Strouse, 116 Ga. 872, 900, 43 S. E. 280.

Admissions to arbitrator may be proved. Sullivan *v.* Sullivan, 29 Ky. L. R. 239, 92 S. W. 966.

Parol testimony showing purpose to compromise.—Writer of letter which definitely stated amount of damage done his property may testify it was written to secure a compromise and was not intended to be an accurate statement of his claim. Castner *v.* R. Co., 126 Ia. 581, 102 N. W. 499. "A party cannot render an admission incompetent by testifying he intended it to bring about a compromise, unless there was in fact an honest controversy between the parties and a treaty, pending or proposed, to settle it without resort to litigation." Steeg *v.* Walls, 4 Ind. App. 18, 30 N. E. 312; St. Louis S. R. Co. *v.* Smith, 33 Tex. Civ. 520, 77 S. W. 28.

Belief of party.—If a party believes he has a good cause of action, though litigation may show he has not, his

offer of compromise is not provable; and it is immaterial reasons given for his belief are not valid. Biggs *v.* Langhammer, 103 Md. 94, 102, 63 A. 198.

Offer to contribute money to send prosecutrix away or take her to a physician for an unlawful purpose is an admission. Robb *v.* Hewitt, 39 Neb. 217, 58 N. W. 88; Gatzemeyer *v.* Peterson, 68 Neb. 832, 94 N. W. 974.

A proposition to settle made by one of the parties does not refer to a compromise, but to a determination of the facts in dispute by those who had a direct part in the transaction. Collins *v.* McGuire, 76 App. Div. 443, 78 N. Y. S. 527.

A conference for the purpose of fixing upon the sum due one of the parties is not in the nature of a compromise. Hunter *v.* Helsley, 98 Mo. App. 616, 73 S. W. 719.

Offer to pay.—The fact a person offers after suit brought, to pay a claim without costs does not, of itself, show a compromise. Draper *v.* Horton, 22 R. I. 592, 48 A. 945.

Offer to retract libel is not within rule forbidding proof of offers to compromise. Dalziel *v.* Co., 52 Misc. 207, 102 N. Y. S. 909.

In condemnation proceedings by a railroad company right of landowner to sue for damages accrues when road located. Until that time all negotiations looking toward acquiring property are solely upon basis of purchase and sale. Kaufman *v.* R. Co., 210 Pa. 440, 60 A. 2. *Contra.* Indianapolis N. T. Co. *v.* Dunn, 37 Ind. App. 248, 76 N. E. 269.

Statement to third party.—It may be shown defendant stated to a third party he had offered a sum of money to plaintiff. Story *v.* Nidiffer, 146 Cal. 549, 80 P. 692. It cannot be shown as an independent fact defendant told a third person a compromise had been agreed on, and he had decided to repudiate it. Wall *v.* Moulton, 125 Ga. 121, 53 S. E. 591.

It may be shown who made offer of settlement for purpose of determining who was a party to a contract for exchange of property to which offer related. Watson *v.* Reed, 129 Ala. 388, 29 S. 837.

A proposition to compromise does not operate retractively to affect previous admissions (McBride *v.* R. Co., 125 Ga. 515, 54 S. E. 674), though made in compromising a suit disposed of before pending action brought and concerning a different subject matter. McCrum *v.* McCrum, 36 Ind. App. 636, 76 N. E. 415.

598-19 S. *v.* Rucker, 86 S. C. 66, 68 S. E. 133.

599-20 Hilburn *v.* Ins. Co., 140 Mo. App. 355, 124 S. W. 63; Paris *v.* Waddell, 139 Mo. App. 288, 123 S. W. 79.

Mere settlement to avoid suit is not enough. Texas & N. O. R. Co. *v.* Assur. Co. (Tex. Civ.), 137 S. W. 401.

Offer not made "without prejudice," will not be regarded as made to buy peace unless facts plainly show it was made as a concession or sacrifice in behalf of peace. Chesapeake & O. R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161.

If liability admitted offer to pay is not offer to buy peace, but admission that offered sum was due. Blake *v.* Austin, 33 Tex. Civ. 112, 75 S. W. 571. See Donley *v.* Bailey, 48 Colo. 373, 110 P. 65, where the evidence was held to show an admission of absolute liability.

Intention controls.—See Colburn *v.* Groton, 66 N. H. 151, 28 A. 95, 22 L. R. A. 763; Finn *v.* Co., 101 Me. 279, 64 A. 490. Preliminary question of intention is for court unless only inference from testimony shows intention in offering compromise was not to buy peace. Finn *v.* Co., supra.

599-21 Donley *v.* Bailey, 48 Colo. 373, 110 P. 65; Love *v.* Scott (Mo.), 166 S. W. 859.

599-22 In re Breon Lumb. Co., 181 Fed. 909; Hughes *v.* Daniel (Ala.), 65 S. 518; Matthews *v.* Farrell, 140 Ala. 298, 37 S. 325; Baker *v.* Haynes, 146 Ala. 520, 40 S. 968; Miller *v.* Kinsel, 20 Colo. App. 346, 78 P. 1075; Hudson *v.* Williams, 6 Penne. (Del.) 550, 72 A. 985; Austin *v.* Long, 5 Ga. App. 551, 63 S. E. 640; Teasley *v.* Bradley, 120 Ga. 373, 47 S. E. 925; Domm *v.* Hollenbeck, 142 Ill. App. 439; Freel *v.* Harken, 155 Ia. 146, 135 N. W. 648; Kennell *v.* Boyer, 144 Ia. 303, 122 N. W. 941; List *v.* List, 26 Ky. L. R. 691, 82 S. W. 446; Leader Realty Co. *v.* Markham, 163 Mo. App. 314, 143 S. W. 1104; Quinn *v.* White, 26 Nev. 42, 62 P. 995; Rabinowitz *v.* Silverman, 223 Pa. 139, 72 A. 378; Allen & Co. *v.* Burnett, 92 S. C. 95, 75 S. E. 368; Tenhet *v.* R. Co., 82 S. C. 465, 64 S. E. 232; Busch *v.* R. Co., 29 S. D. 41, 135 N. W.

757; St. Louis, etc. R. Co. *v.* Thomas (Tex. Civ.), 167 S. W. 784; McKinney *v.* Carson, 35 Utah 180, 99 P. 660.

Contra if admission made in same conversation as offer. Davis *v.* Co. (Ky.), 127 S. W. 479.

Resolution of board of directors. Montana, etc. Min. Co. *v.* Dunlap, 196 Fed. 612, 116 C. C. A. 286.

"**The preliminary question always is,** not merely whether an admission of the fact was made during a settlement or negotiation, but whether a statement or act was intended to be an admission. It is a question, not of time or circumstance, but of intention." Colburn *v.* Groton, 66 N. H. 151, 28 A. 95, 22 L. R. A. 763.

A proposition to settle "our affair" and statement party addressed "should be paid," does not admit any facts. Rudd *v.* Dewey, 121 Ia. 454, 96 N. W. 973.

The only kind of admission made during an attempt at compromise which can be proved is where there was a distinct, unqualified admission of an independent fact, made, not as a part of an attempted adjustment, but because it was a fact. Roome *v.* Robinson, 99 App. Div. 143, 90 N. Y. S. 1055; White *v.* S. S. Co., 102 N. Y. 661, 6 N. E. 289.

Testimony as to compromise.—It is not competent for a witness to testify whether or not a negotiation was in the nature of a compromise. St. Louis, etc. R. Co. *v.* Co., 198 Mo. 698, 715, 96 S. W. 1011.

A fact admitted in confidence or without prejudice is not provable. Baker *v.* Haynes, 146 Ala. 520, 40 S. 968; Alminowicz *v.* P., 117 Ill. App. 415.

Admissions made before arbitrators are admissible and may be proved by arbitrator. Meyer *v.* Frenkil, 116 Md. 411, 82 A. 208.

600-25 Oliver *v.* McDowell, 100 Ill. App. 45; Ft. Worth, etc. R. Co. *v.* Lock, 30 Tex. Civ. 426, 70 S. W. 456; Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320.

Proof of confidential relation must be clear.—Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969.

Report made by officer of corporation in the course of his duty, before action brought or threatened, though afterwards communicated to its attorney, is not a privileged communication. Virginia-C. C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725.

601-27 See Dimon *v.* Keery, 54 App. Div. 318, 66 N. Y. S. 817.

602-30 See P. *v.* Giro, 197 N. Y. 152, 90 N. E. 432.

603-34 Empire Ranch, etc. Co. *v.* Irwin (Colo. App.), 128 P. 867. See Williams *v.* Walden, 124 Ga. 913, 53 S. E. 564.

603-35 Bines *v.* S., 118 Ga. 320, 45 S. E. 376; Porter *v.* S., 173 Ind. 694, 91 N. E. 340; Spears *v.* Weddington, 146 Ky. 434, 142 S. W. 679; First Nat. Bk. *v.* Wisdom, 23 Ky. L. R. 530, 63 S. W. 461; Thayer *v.* Usher, 98 Me. 468, 57 A. 839; P. *v.* Williams, 159 Mich. 518, 124 N. W. 555; Atherton *v.* Defreeze, 129 Mich. 364, 88 N. W. 886; Wojtylak *v.* Co., 188 Mo. 260, 87 S. W. 506; Schreyer *v.* Bk., 74 App. Div. 478, 77 N. Y. S. 494; Winn *v.* Winn., 23 Tex. Civ. 617, 57 S. W. 80; International etc. Co. *v.* Goswick, 98 Tex. 477, 85 S. W. 785.

604-38 Admissions made upon prior trial of same case may be proved. Sterling *v.* DeLaune, 47 Tex. Civ. 470, 105 S. W. 1169.

604-39 Interpreter chosen by the parties is their joint agent, and his statements of what they said in each other's presence are their statements, and may be proved by any person who heard them; interpreter need not be a witness. Kelly *v.* Assn., 2 Cal. App. 460, 84 P. 321.

Not hearsay.—Terrapin *v.* Barker, 26 Okla. 93, 109 P. 931.

604-41 Godair *v.* Bk., 225 Ill. 572, 80 N. E. 407; Chapman *v.* C., 33 Ky. L. R. 965, 112 S. W. 567; Beck *v.* Freund, 117 N. Y. S. 193. See Harrison G. Co. *v.* R. Co., 145 Mich. 712, 108 N. W. 1081 (if there is proof of identity); Lincoln M. Co. *v.* Wissler, 4 Neb. (Unof.) 675, 95 N. W. 857; Swing *v.* Walker, 27 Pa. Super. 366 (if witness knew admitter's voice).

If a person stated in a telephone directory to live at a given place bearing the same number as admitter, is called for by the telephone there and admits identity, it is proper to prove admission made. Holzhauer *v.* Sheeny, 31 Ky. L. R. 1238, 104 S. W. 1034.

Proof of by party hearing one side. Rees *v.* Gair, 144 App. Div. 294, 129 N. Y. S. 213.

605-42 Party's attention need not be called to time and place when and

where admission made. Conselyea *v.* Van Dorn, 129 App. Div. 520, 114 N. Y. S. 61.

605-43 Smith *v.* AuGres, 150 Fed. 257, 80 C. C. A. 145; Jolls *v.* Keegan, 4 Penne. (Del.) 21, 55 A. 340; S. *v.* Campbell, 73 Kan. 688, 702, 85 P. 784; Brown *v.* Patterson, 224 Mo. 639, 124 S. W. 1; Allen *v.* Hall, 64 Neb. 256, 89 N. W. 803; Yeager's Est., 18 Pa. Dist. 980; Hobin *v.* Hobin, 33 R. I. 249, 80 A. 595; S. *v.* Bringgold, 40 Wash. 12, 82 P. 132.

Disclosure of admissions made in private conversation may be compelled. Ex parte Parker, 74 S. C. 466, 55 S. E. 122.

605-44 Robinson *v.* Green, 148 Ala. 434, 43 S. 797; Miller *v.* P., 216 Ill. 309, 74 N. E. 743; Frick *v.* Kabaker, 116 Ia. 494, 90 N. W. 498; S. *v.* Thompson, 116 La. 829, 41 S. 107; Lange *v.* Klatt, 135 Mich. 262, 97 N. W. 708; Reiser *v.* Portere, 106 Mich. 102, 63 N. W. 1041; Profile & F. H. Co. *v.* Bickford, 72 N. H. 73, 54 A. 699; Egyptian F. C. Co. *v.* Comisky, 40 Misc. 236, 81 N. Y. S. 673; Virginia-C. Co. *v.* Kirven, 130 N. C. 161, 41 S. E. 1; S. *v.* Glover, 21 S. D. 465, 113 N. W. 625.

Immaterial admitter might be called as witness (Stewart *v.* Doak, 58 W. Va. 172, 52 S. E. 95); or that admission made in presence of adverse party. Vincent *v.* Soper, 113 Ill. App. 463.

Best evidence rule does not apply. Purinton *v.* Purinton, 101 Me. 250, 63 A. 925.

Compliance with statute.—If it is provided by statute how declarations made by accused may be proved, statute must be complied with; if not, witnesses who heard statement may testify. S. *v.* Thompson, 116 La. 829, 41 S. 107.

605-45 Graves *v.* Graves, 70 Ark. 541, 69 S. W. 544; Northington *v.* Granade, 118 Ga. 548, 45 S. E. 447.

606-46 Interest does not disqualify witness from testifying to admissions made in his presence by testator to another, they not being addressed to him. Reid *v.* Sewell, 111 Ga. 880, 36 S. E. 937.

606-48 Rosenfeld *v.* Siegfried, 91 Mo. App. 169; Egyptian F. C. Co. *v.* Comisky, 40 Misc. 236, 81 N. Y. S. 673.

Admissions by a party on the trial may be proved in a proceeding before a referee by the record. Sternbach *v.* Friedman, 75 App. Div. 418, 78 N. Y. S. 318.

Proved by book.—Written admission may be proved by producing book which contains it, though it is not evidence for any other purpose. Harrison *v.* Co., 140 Fed. 385, 401, 72 C. C. A. 405.

606-49 Edwards *v.* Massingill, 3 Ala. App. 406, 57 S. 400; Reinhardt *v.* Marks, 29 Ky. L. R. 388, 93 S. W. 32; Union P. R. Co. *v.* Connolly, 77 Neb. 254, 109 N. W. 368.

Inability to fix date only affects weight of testimony. Norris *v.* Clark, 29 Pa. Super. 562.

Cross-examination.—A witness who testifies of the evidence given by defendant on a former trial may be cross-examined as to other questions and answers tending to explain or qualify those testified of. Brown *v.* S., 119 Ga. 572, 46 S. E. 833; Miller *v.* P., 216 Ill. 309, 74 N. E. 743; Reiser *v.* Portere, 106 Mich. 102, 63 N. W. 1041; C. *v.* House, 6 Pa. Super. 92, 114.

606-50 Butterfield *v.* Kirtley, 114 Ia. 520, 87 N. W. 407; Clark *v.* C., 33 Ky. L. R. 974, 112 S. W. 571; Holzhauer *v.* Sheeny, 31 Ky. L. R. 1238, 104 S. W. 1034; Clark *v.* C., 32 Ky. L. R. 63, 105 S. W. 393. See supra, 604-41.

606-51 Davis *v.* S., 55 Tex. Cr. 437, 117 S. W. 138.

If all that was testified to cannot be given no evidence respecting it should be received. Salley *v.* R. Co., 62 S. C. 127, 40 S. E. 111.

606-52 Powell *v.* McGlyn, (1902) 2 Ir. Rep. 154; Fidelity & C. Co. *v.* Dorough, 107 Fed. 389, 46 C. C. A. 364; Maddox *v.* S., 159 Ala. 53, 48 S. 689; Dennie *v.* Clark, 3 Cal. App. 760, 87 P. 59; Brown *v.* S., 119 Ga. 572, 46 S. E. 833; Hawkins *v.* Chambliss, 120 Ga. 614, 48 S. E. 169; Corning *v.* Dollmeyer, 123 Ill. App. 188; Campbell *v.* Eichorst, 122 Ill. App. 609; Adams *v.* Long, 114 Ill. App. 277; Millard *v.* Millard, 123 id. 264; Chicago R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28; Marks *v.* Hardy, 117 Ky. 663, 78 S. W. 864, 1105; S. *v.* Price, 121 La. 53, 46 S. 99 (question and answer); S. *v.* Thompson, 116 La. 829, 41 S. 107; Campbell *v.* Seeh, 155 Mich. 634, 119 N. W. 922; Jenning *v.* Rohde, 99 Minn. 335, 109 N. W. 597; Trent *v.* Co., 141 Mo. App. 437, 126 S. W. 238; Chamberlain *v.* Iba, 181 N. Y. 486, 74 N. E.

481; Eldridge *v.* Hoefer, 45 Or. 239, 77 P. 874; Aldous *v.* Olverson, 17 S. D. 190, 95 N. W. 917; P. *v.* Cahill, 193 N. Y. 232, 86 N. E. 39; Snyder *v.* Mystic Circle, 122 Tenn. 248, 122 S. W. 981; Maxey *v.* S., 58 Tex. Cr. 118, 124 S. W. 927; Wells *v.* Hobbs, 57 Tex. Civ. 375, 122 S. W. 451, cit. the text; Bartley *v.* Comer (Tex. Civ.), 89 S. W. 82; Blaisdell *v.* Davis, 72 Vt. 295, 48 A. 14; Coruth *v.* Jones, 77 Vt. 441, 60 A. 814; Edwards Mfg. Co. *v.* Carr, 65 W. Va. 673, 64 S. E. 1030.

Comp. Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215.

Rule applicable to oral pleading. Risdon *v.* Yates, 145 Cal. 210, 78 P. 641; Yeska *v.* Swendrzynski, 133 Wis. 475, 13 N. W. 959. *Contra.* Root *v.* Sturdivant, 70 Ia. 55, 29 N. W. 802; Hauser *v.* Griffith, 102 Ia. 215, 71 N. W. 223.

Rule not applicable to testimony. Farnum *v.* Whitman, 187 Mass. 381, 73 N. E. 473.

Advice of counsel.—Admitter may testify he acted under advice of counsel, but not to what counsel said unless on cross-examination. Bartley *v.* Comer (Tex. Civ.), 89 S. W. 82.

Immaterial admission made without consulting attorney. Harvey *v.* R. Co., 221 Ill. 242, 77 N. E. 569.

Explanation of omission in letters. If letters are inconsistent with testimony given by a party in support of counterclaims he may explain why letters contained no reference thereto. Hopler *v.* Hunter Co., 64 App. Div. 80, 71 N. Y. S. 687; Chamberlain *v.* Iba, 181 N. Y. 486, 74 N. E. 481.

Plea of guilty.—Reasons for making may be explained. Yeska *v.* Swendrzynski, 133 Wis. 475, 13 N. W. 959.

Circumstances connected with signing paper may be shown. Badanes *v.* Feder, 47 Misc. 91, 93 N. Y. S. 478.

Evidence on former trial.—If a party is cross-examined concerning testimony given by him on a former trial he may, on redirect examination, give all such testimony in reference to the facts about which he was cross-examined. Illinois S. Co. *v.* Wierzbicky, 206 Ill. 201, 68 N. E. 1101. Uncommunicated reasons may be stated in explanation. Richardson *v.* Baker, 83 Vt. 204, 75 A. 151.

608-53 Maddox *v.* S., 159 Ala. 53, 48 S. 689; S. *v.* Thompson, 116 La. 829, 41 S. 107; Seibert's Est., 1 Pa. C. C. 229.

Not always strictly applied.—Alkon *v.* U. S., 163 Fed. 810, 90 C. C. A. 116; Conover *v.* Neher, 38 Wash. 172, 80 P. 281.

609-54 Fidelity & C. Co. *v.* Dorough, 107 Fed. 389, 46 C. C. A. 364; Brown *v.* S., 119 Ga. 572, 46 S. E. 833; Bode *v.* S., 80 Neb. 74, 113 N. W. 996.

Exception is made in case of necessity. Fitzpatrick *v.* Tucker, 70 Kan. 338, 78 P. 828.

609-55 Perin *v.* U. S. 169 Fed. 17, 94 C. C. A. 385; Coulter *v.* Assn., 144 Ill. App. 255 (part not read by one party may be read by other); Lombard *v.* Chaplin, 98 Me. 309, 56 A. 903; Hunter *v.* Johnson, 119 Mo. App. 487, 94 S. W. 311; Modlin *v.* Ins. Co., 151 N. C. 35, 65 S. E. 605 (only admission need be read); Aetna Ins. Co. *v.* Eastman (Tex. Civ.), 80 S. W. 255.

Ambiguities may be explained.—Coldren *v.* LeGore, 118 Ia. 212, 91 N. W. 1066. Parol evidence, admissible to explain. Cleveland S. Co. *v.* Moore, 142 Ill. App. 615. Method of keeping accounts offered as admission may be explained. Eddy *v.* Church, 64 Misc. 7, 118 N. Y. S. 795.

610-56 Morris *v.* Jamieson, 205 Ill. 87, 68 N. E. 742; Lombard *v.* Chaplin, 98 Me. 309, 56 A. 903; Lewis Pub. Co. *v.* Lenz, 86 App. Div. 451, 83 N. Y. S. 841.

Remoteness.—It has been said correspondence must have been written within a reasonable time. Lexow *v.* Belding, 72 App. Div. 446, 76 N. Y. S. 602.

Writer's lack of authority may be shown. Liberty *v.* Haines, 101 Me. 402, 64 A. 665.

610-57 Fidelity & C. Co. *v.* Dorough, 107 Fed. 389, 46 C. C. A. 364; Moore *v.* Crosthwait, 135 Ala. 272, 33 S. 28; Manley *v.* McKenzie, 128 Ga. 347, 57 S. E. 705; Seymour *v.* Co., 103 Ill. App. 625; Second Borrowers *v.* Cochrane, 103 Ill. App. 29; Pritchett *v.* Sheridan, 29 Ind. App. 81, 63 N. E. 865; Bullard *v.* Bullard, 112 Ia. 423, 84 N. W. 513; White *v.* Collins, 90 Minn. 165, 95 N. W. 765; Dunafon *v.* Barber, 3 Neb. (Unof.) 613, 92 N. W. 198; Young *v.* Kinney, 79 Neb. 421, 112 N. W. 558; McBlain *v.* Edgar, 65 N. J. L. 634, 48 A. 600; Gossler *v.* Wood, 120 N. C. 69, 27 S. E. 33; Contreras *v.* Co. (Tex.

Civ.), 83 S. W. 870; Sterling v. De Laune, 47 Tex. Civ. 470, 105 S. W. 1169.

Record of case in which admissions made in pleadings must be produced. Colborn v. Fry, 23 Ind. App. 485, 55 N. E. 621.

610-60 Brosius v. Zinc Co., 149 Mo. App. 181, 130 S. W. 134; Ludberg v. Barghoorn, 73 Wash. 476, 131 P. 1165; Maxwell v. Wellington, 138 Wis. 607, 120 N. W. 505.

Verbal admissions are weakest kind of evidence, especially when exact language cannot be given. Des Allemands L. Co. v. Co., 117 La. 1, 41 S. 332.

Admissions of young children should be received with more caution than those of an adult, and are to be weighed with reference to their ages and understandings. Chicago R. Co. v. Tuohy, 196 Ill. 410, 430, 63 N. E. 997.

General oral admissions not sufficient to overcome legal presumption. Donovan v. Driscoll, 116 Ia. 339, 90 N. W. 60. *Contra*, Lewis v. England, 14 Wyo. 128, 82 P. 869.

611-61 Rogers v. Burt, 157 Ala. 91, 47 S. 226; Ladd v. Co., 147 Ala. 173, 40 S. 610; Copper R. M. Co. v. McClellan, 2 Alaska 134, 153; P. v. Hill, 1 Cal. App. 414, 82 P. 398; P. v. Wardrip, 141 Cal. 229, 74 P. 744; Freeman v. Peterson, 45 Colo. 102, 100 P. 600; McBride v. R. Co., 125 Ga. 515, 54 S. E. 674; Burk v. Hill, 119 Ga. 38, 45 S. E. 732; Burnett v. P., 204 Ill. 208, 226, 68 N. E. 505; Litolff v. R. & L. Co., 124 La. 278, 50 S. 105; Ferguson v. Robinson (Mo.), 167 S. W. 447; Wilson v. Terry, 70 N. J. Eq. 231, 62 A. 310; Ryan v. Halligan, 136 App. Div. 65, 120 N. Y. S. 646 (decedent's admissions); In re Shuman's Est., 45 Pa. Super. 587; Earp v. Edgington, 107 Tenn. 23, 39, 61 S. W. 40; Denny v. Holden, 55 Wash. 22, 103 P. 1109.

It is presumed admissions are true. Shepard v. Co., 189 Mo. 362, 373, 87 S. W. 1007.

Are unreliable at best. Des Allemands L. Co. v. Co., 117 La. 1, 41 S. 332.

Weakest kind of testimony if made casually to disinterested persons. Haven v. Markstrum, 67 Wis. 493, 30 N. W. 720; Emery v. S., 101 Wis. 627, 78 N. W. 145; Grotjan v. Rice, 124 Wis. 253, 102 N. W. 551.

Not to be taken as conclusively true though made in giving testimony. Houston v. R. Co., 118 Mo. App. 464, 94 S. W. 560.

By deceased persons.—Special caution should be used as to weight given oral admissions by deceased persons. Russell v. Sharp, 192 Mo. 270, 290, 91 S. W. 131; Reed v. Morgan, 100 Mo. App. 713, 73 S. W. 381; Kinney v. Murray, 170 Mo. 674, 706, 71 S. W. 197; Rosenwald v. Middlebrook, 188 Mo. 58, 94, 86 S. W. 200; Wilson v. Terry, 70 N. J. Eq. 231, 62 A. 310; Roberge v. Bonner, 94 App. Div. 342, 88 N. Y. S. 91; Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118. They are the weakest of all evidence. In most instances such testimony is scarcely worthy of consideration. Clarke v. Roberts, 38 Colo. 316, 87 P. 1077, *quot.* from Bodenheimer v. Bodenheimer, 35 La. Ann. 1005. In re Gabisso, 122 La. 824, 48 S. 277, to same effect see Wilder v. Franklin, 10 La. Ann. 279; Bringier v. Gordon, 14 La. Ann. 274; Portis v. Hill, 14 Tex. 69, 65 Am. Dec. 99. They must be established by clear, creditable and satisfactory evidence. Tousey v. Hastings, 194 N. Y. 72, 86 N. E. 831. Not final though uncontradicted. Powers v. Johnson, 107 Minn. 476, 120 N. W. 1021.

Written casual admissions insufficient to show payment of an acknowledged debt when payment denied. Anderson v. Davis, 55 W. Va. 429, 47 S. E. 157. On the other hand, such admissions, deliberately made and signed, are not to be lightly regarded. Castner v. R. Co., 126 Ia. 581, 102 N. W. 499. Written admissions made before a controversy, as to meaning and effect of contract, outweigh oral testimony in contradiction of the same thereafter. Moore v. Grayson, 132 Cal. 602, 64 P. 1074.

Concerning contract rights.—Declarations based upon assurances and under the pressure of the convincing arguments of the opposing parties to a contract will not weigh much as against declarant's manifest intention concerning contract before it was made. Clinton Ins. Co. v. Zeigler, 101 Ill. App. 165.

Sometimes the best evidence.—When good faith or intent of a party is in issue, his acts and sayings at about time of transaction are generally best evidence of the fact. U. S. v. Gentry, 119 Fed. 70, 55 C. C. A. 658.

612-62 P. v. Darr, 3 Cal. App. 50,

84 P. 457; Harp *v.* Harp, 136 Cal. 421, 69 P. 28; Everett *v.* Hart, 20 Colo. App. 93, 77 P. 254; Simeone *v.* Lindsay, 6 Penne. (Del.) 224, 65 A. 778; Burk *v.* Hill, 119 Ga. 38, 45 S. E. 732; Lipsey *v.* P., 227 Ill. 364, 381, 81 N. E. 348; Equitable Ins. Co. *v.* McCrae, 156 Ill. App. 467; Worth *v.* Zerwick, 97 Ill. App. 306; Schell *v.* Weaver, 128 Ill. App. 106; Scurlock *v.* Boone, 142 Ia. 580, 120 N. W. 313; Castner *v.* R. Co., 126 Ia. 581, 102 N. W. 499; Nichols *v.* Ringler, 135 Ia. 181, 112 N. W. 543; Succession of Zacharie, 119 La. 150, 43 S. 988; P. *v.* Rich, 133 Mich. 14, 94 N. W. 375; Chambers *v.* Chambers, 227 Mo. 262, 127 S. W. 86; Bode *v.* S., 80 Neb. 74, 113 N. W. 996; Oram *v.* Oram, 77 N. J. Eq. 1, 75 A. 994; In re Titus Street, 139 App. Div. 238, 123 N. Y. S. 1018; Roach *v.* Burgess (Tex. Civ.), 62 S. W. 803; Dudley *v.* Niswander, 65 W. Va. 461, 64 S. E. 745; Scheer *v.* Ulrich, 133 Wis. 311, 113 N. W. 661.

Exclamatory admissions made by persons suddenly injured ought to be presumed free from pretense; though deductions from facts admitted may be incorrect. Chicago, etc. R. Co. *v.* Clarkson, 147 Fed. 397, 77 C. C. A. 575.

May be sufficient.—Rule that admissions are not sufficient to convict without proof of corpus delicti, not applicable to civil cases. Worth *v.* Zerwick, 97 Ill. App. 306.

In prosecution for bigamy defendant's admissions may establish first marriage. McSein *v.* S., 120 Ga. 175, 47 S. E. 544.

612-63 Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969; Murphy *v.* S., 122 Ga. 149, 50 S. E. 48; McBride *v.* R. Co., 125 Ga. 515, 54 S. E. 674; Burk *v.* Hill, 119 Ga. 38, 45 S. E. 732; Dudley *v.* R. Co., 167 Mo. App. 647, 150 S. W. 737; S. *v.* Fraser, 161 Mo. App. 333, 143 S. W. 545; Linderman *v.* Carmin, 142 Mo. App. 519, 127 S. W. 124; Schmidt *v.* Co. (N. J.), 90 A. 1017; Earp *v.* Edgerton, 107 Tenn. 23, 39, 64 S. W. 40; Edwards Mfg. Co. *v.* Carr, 65 W. Va. 673, 64 S. E. 1030; Bruger *v.* Ins. Co., 129 Wis. 281, 109 N. W. 95. See Scurlock *v.* Boone, 142 Ia. 580, 120 N. W. 313.

612-64 Joslyn *v.* Co., 177 Fed. 863, 101 C. C. A. 77; Boswell *v.* Thompson, 160 Ala. 306, 49 S. 73; Dennie *v.* Clark, 3 Cal. App. 760, 87 P. 59; Traders Ins. Co. *v.* Mann, 118 Ga. 381, 45 S. E. 426; Severns *v.* Broffey, 155 Ill. App. 10; Patterson *v.* Houston, 92 Ill. App. 624; Bruner *v.* Co., 133 Ky. 41, 117 S. W. 373; Morehead *v.* Bk., 130 Ky. 414, 113 S. W. 501; Murphy *v.* Roney, 26 Ky. L. R. 634, 82 S. W. 396; Coleman *v.* Jones, 131 La. 803, 60 S. 243; C. *v.* Devaney, 182 Mass. 33, 64 N. E. 402; Campbell *v.* Seeh, 155 Mich. 634, 119 N. W. 922; P. *v.* Rich, 133 Mich. 14, 94 N. W. 375; Hesston St. Bk. *v.* Luthy, 155 Mo. App. 363, 137 S. W. 66; Houston *v.* R. Co., 118 Mo. App. 464, 94 S. W. 560; Sheperd *v.* Co., 189 Mo. 362, 87 S. W. 1007; Bond *v.* R. Co., 110 Mo. App. 131, 84 S. W. 124; Hoffman *v.* Condon, 134 App. Div. 205, 118 N. Y. S. 899; Lewis *v.* Du Bois, 126 App. Div. 514, 110 N. Y. S. 337; Miller *v.* Hill, 64 Misc. 199, 118 N. Y. S. 63; Eckstein *v.* Schleimer, 62 Misc. 635, 116 N. Y. S. 7; S. *v.* Shorter, 85 S. C. 170, 67 S. E. 131; Pecos, etc. R. Co. *v.* Lovelady, 35 Tex. Civ. 659, 80 S. W. 867; Boyer *v.* R. Co., 97 Tex. 107, 76 S. W. 441; Whealton *v.* Doughty, 112 Va. 649, 72 S. E. 112; Dudley *v.* Niswander, 65 W. Va. 461, 64 S. E. 745; Hamilton *v.* Diefenderfer (Wyo.), 133 P. 1081 (*quot.* 1 ENCYCLOPÆDIA OF EVIDENCE 612).

Admissions are merely evidence against the maker and his privies. In re Thompson, 197 Fed. 681.

Statement of plaintiff immediately after accident he was careless and alone to blame, was not conclusive proof of contributory negligence, but was open to neutralization by showing that, on reflection and consideration, he had come to think otherwise. LaFlam *v.* Co., 74 Vt. 125, 52 A. 526.

613-65 Morgan *v.* U. S., 169 Fed. 242, 94 C. C. A. 518; Owsley *v.* Owsley, 25 Ky. L. R. 1186, 77 S. W. 397; Merrill *v.* Leisenring, 166 Mich. 219, 131 N. W. 538; Downs *v.* Co., 175 Mo. App. 382, 162 S. W. 331.

613-66 Coleman *v.* Jones, 131 La. 803, 60 S. 243.

613-67 Coleman *v.* Jones, 131 La. 803, 60 S. 243; Stephenson *v.* Austin, 217 Mo. 355, 116 S. W. 1090; Coolidge *v.* Taylor, 85 Vt. 39, 80 A. 1038.

613-68 Cooley *v.* Abbey, 111 Ga. 439, 443, 36 S. E. 786; Murphy *v.* P., 129 Ill. App. 533; Gulf Refining Co. *v.* Hart, 130 La. 51, 57 S. 581; McKee *v.* Bernheim, 130 App. Div. 424, 114 N. Y. S. 1080; Herbert *v.* Wagg, 27 Okla. 674, 117 P. 209; Holbrook *v.* J. Quinlan, 84 Vt. 411, 80 A. 339. *Contra*

if based on conclusion of law. Co-operative B. Bk. *v.* Hawkins, 30 R. I. 171, 73 A. 617, and as to admission concerning manner in which plaintiff alleged he was injured. McGrath *v.* R. Co., 128 App. Div. 63, 112 N. Y. S. 471. Prejudicial effect not given admission beyond scope of language used. Saal *v.* Fortner, 121 La. 112, 49 S. 997.

Abandoned pleadings not within rule. Bartlow *v.* R. Co., 243 Ill. 332, 90 N. E. 721 (bill in equity); Overton *v.* White, 117 Mo. App. 576, 607, 93 S. W. 363; Barden *v.* Hornthal, 151 N. C. 8, 65 S. E. 513; Orange Co. *v.* McIlhenny, 33 Tex. Civ. 592, 77 S. W. 428; Miller *v.* Drought (Tex. Civ.), 102 S. W. 145; S. *v.* Bringgold, 40 Wash. 12, 82 P. 132.

614-69 Valley P. Co. *v.* Wise, 93 Ark. 1, 123 S. W. 768; Nicholson *v.* Snyder, 97 Md. 415, 55 A. 481; Goerke Co. *v.* Diskon (N. J. Eq.), 75 A. 780 (not entitled to much weight if contract not before attorney when offered pleading drawn); Dahlstrom *v.* Gemunder, 133 App. Div. 69, 117 N. Y. S. 576; Cahill *v.* Torrey, 121 N. Y. S. 598; McLemore *v.* R. Co., 111 Tenn. 639, 664, 69 S. W. 338; Harris *v.* Co., 114 Tenn. 328, 340, 85 S. W. 897; Yeska *v.* Swendrzynski, 133 Wis. 475, 113 N. W. 959.

614-70 Payment into court, conclusive pro tanto. Heller *v.* Katz, 62 Misc. 266, 114 N. Y. S. 800.

614-72 Hoover *v.* Hubbard, 202 N. Y. 289, 95 N. E. 702.

One who has made solemn admissions under oath will not be permitted to deny them without first showing they were made inconsiderately or without full knowledge of the facts. Chilton *v.* Scruggs, 5 Lea (Tenn.) 308. If inconsiderately made or without such knowledge, party should not be bound. Blanks *v.* Klein, 53 Fed. 136, 3 C. C. A. 585; Hamilton *v.* Zimmerman, 5 Sneed (Tenn.) 39.

614-73 Layson *v.* Cooper, 174 Mo. 211, 73 S. W. 472.

Evidence of admissions by conduct is competent though induced by false representations. C. *v.* Hartford, 193 Mass. 464, 79 N. E. 784.

614-74 Nicholson *v.* Snyder, 97 Md. 415, 55 A. 484.

The burden of proof is on defendant, satisfactorily to prove each constituent fact involved in the estoppel. Royle Mining Co. *v.* Casualty Co., 161 Mo. App. 185, 142 S. W. 138.

615-77 Connecticut Mut. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668; Patterson *v.* Houston, 92 Ill. App. 624; Lusk *v.* Throop, 189 Ill. 127, 135, 59 N. E. 529; Bamberge *v.* Supreme Tribe, 159 Mo. App. 102, 139 S. W. 235; St. Louis C. A. Co. *v.* Baptiste, 135 Mo. App. 503, 116 S. W. 438; Norris *v.* Lee, 136 App. Div. 685, 121 N. Y. S. 512; Oas *v.* Roa, 7 Phil. Isl. 20; Quigley *v.* Gulf, etc. R. Co. (Tex. Civ.), 142 S. W. 633; Mitchell *v.* R. Co. (Tex. Civ.), 130 S. W. 735; Bardsley *v.* Truax, 64 Wash. 400, 116 P. 1075.

Conclusive on assignee who stated he had property of assignor. In re Pool, 8 Misc. 284, 28 N. Y. S. 707.

May overcome admitter's testimony. General Tire *v.* R. Co., 115 N. Y. S. 171.

615-79 Louisville & N. R. Co. *v.* O'Nan (Ky.), 119 S. W. 1192.

Oral admissions do not affect title to land. Pleasanton *v.* Simmons, 2 Penne. (Del.) 477, 47 A. 697.

615-80 Ausmus *v.* P., 47 Colo. 167, 107 P. 204; Phoenix Ins. Co. *v.* Gray, 113 Ga. 424, 38 S. E. 992; Stewart *v.* Gleason, 23 Pa. Super. 325; C. *v.* Haylow, 17 Pa. Super. 541; Connor *v.* Uvalde Nat. Bk. (Tex. Civ.), 156 S. W. 1092.

Ambiguous admissions are for jury. Allred *v.* S., 126 Ga. 537, 55 S. E. 178.

ADULTERATION.

Manner of, 616-1; *Comparison of articles*, 617-3; *Label*, 617-3; *Burden of proof*, 618-7; *Judicial notice*, 620-11; *Sale for analysis*, 622-15; *Character not involved*, 622-15.

Definition.—1 STANDARD PROC. 582.

Manner of Prosecution.—See 1 STANDARD PROC. 582.

Jurisdiction.—See 1 STANDARD PROC. 582.

Indictment or Complaint.—See 1 STANDARD PROC. 582-588.

Injunction to prevent prosecution. See 1 STANDARD PROC. 590.

616-1 Certificate is evidence. St. Louis *v.* Co., 190 Mo. 507, 89 S. W. 627; P. *v.* Woodbeck, 55 App. Div. 277, 67 N. Y. S. 38. *Contra* in injunction proceedings. P. *v.* Schintzius, 61 Misc. 410, 113 N. Y. S. 313.

Manner of.—Proof need not be made

of particular manner in which analysis conducted. Testimony of chemist who made it he was appointed for that purpose is prima facie evidence. Vandegrift *v.* Meible, 66 N. J. L. 92, 49 A. 16.

Correctness of analysis.—State must show sample analyzed had not been tampered with or had not deteriorated because not properly sealed. C. *v.* Lockhardt, 144 Mass. 132, 10 N. E. 511.

Substantial compliance with statute concerning method of taking sample is sufficient. P. *v.* Tsitsera, 138 App. Div. 446, 122 N. Y. S. 915.

617-2 St. Louis *v.* Co., 190 Mo. 507, 89 S. W. 627. *Contra.* King *v.* Mahoney (1909), Irish 490, *dist.* Buckler's Case (1896), 1 Q. B. 83.

617-3 Vermont *v.* U. S., 174 Fed. 792, 98 C. C. A. 500 (circumstantial evidence); P. *v.* Bailey, 136 App. Div. 130, 120 N. Y. S. 618; S. *v.* Ehinger, 67 O. St. 51, 65 N. E. 148.

Proof of purity of articles offered as samples need not necessarily be made by chemical analysis. A witness competent to do so may testify thereof after applying other tests. C. *v.* Mellet, 27 Pa. Super. 41.

Label on compound offered for sale as a pure production is evidence on question as to whether it was offered as such. P. *v.* Berghoff, 112 App. Div. 772, 99 N. Y. S. 201.

618-4 St. Louis *v.* Co., 190 Mo. 507, 89 S. W. 627; St. Louis *v.* Liessing, 190 Mo. 464, 89 S. W. 611.

618-7 Burden of proof upon plaintiff in action to recover price of milk may be met without proving analysis of it, as by evidence of nature of his herd of cattle, manner of feeding them, that no foreign substance was added to milk, and it was of good quality and unskimmed. Copeland *v.* Co., 189 Mass. 342, 75 N. E. 704.

619-8 Groff *v.* S., 171 Ind. 547, 85 N. E. 769; S. *v.* Rogers, 95 Me. 94, 49 A. 564; C. *v.* Wheeler, 205 Mass. 384, 91 N. E. 415; Meshbesher *v.* Co., 107 Minn. 104, 119 N. W. 428; P. *v.* Tsitsera, 138 App. Div. 446, 122 N. Y. S. 915; P. *v.* Friedman, 138 App. Div. 29, 122 N. Y. S. 500; P. *v.* Greenberg, 134 App. Div. 599, 119 N. Y. S. 325; P. *v.* Bosch, 129 App. Div. 660, 114 N. Y. S. 65.

It is presumed, where skimmed milk was offered for sale as milk, it was offered as pure milk. P. *v.* Abramson, 137 App. Div. 549, 122 N. Y. S. 115.

Under federal pure food law government must show labels were false and misleading. U. S. *v.* Catsup, 166 Fed. 773.

Resemblance of imitation and genuine article.—Statutes prohibiting manufacture of article made in imitation of another contemplate designed and intentional imitation. S. *v.* P. Co., 105 Minn. 359, 117 N. W. 606; Ammon *v.* Newton, 50 N. J. L. 543, 14 A. 610; P. *v.* Meyer, 44 App. Div. 1, 60 N. Y. S. 415; Meyer *v.* S., 134 Wis. 156, 114 N. W. 501. *Contra,* S. *v.* P. Co., 124 Ia. 323, 100 N. W. 59. Proof that oleomargarine sold as butter contained coloring matter justifies inference it was colored to imitate butter. P. *v.* Teele, 131 App. Div. 87, 115 N. Y. S. 212. The intent to make oleomargarine of a shade or tint of yellow by the selection of ingredients is no evidence of an intent to deceive either purchaser or consumer. S. *v.* Hanson, 118 Minn. 85, 136 N. W. 412.

619-9 U. S. *v.* Mill Co., 232 U. S. 399, 34 Sup. Ct. 337; P. *v.* Steers, 113 N. Y. S. 486; P. *v.* Schintzius, 61 Misc. 410, 113 N. Y. S. 313. See P. *v.* Bailey, 136 App. Div. 130, 120 N. Y. S. 618; P. *v.* Terwilliger, 59 Misc. 617, 110 N. Y. S. 1034.

620-11 Judicial notice cannot be taken of fact that milk containing less than a stated per cent of butter fat is universally conceded to be wholesome. St. Louis *v.* Co., 190 Mo. 507, 89 S. W. 627.

A sale or offering for sale is shown by delivery of adulterated milk and taking receipt for it. P. *v.* Co., 122 N. Y. S. 294.

Defendant's admission is sufficient evidence of sale. P. *v.* Tsitsera, 138 App. Div. 446, 122 N. Y. S. 915.

Only presumptions of fact against defendant are those arising from statute. P. *v.* Terwilliger, 59 Misc. 617, 110 N. Y. S. 1034.

620-12 See U. S. *v.* Molasses, 174 Fed. 325, 98 C. C. A. 197.

Defendant may show he did not sell the article and that person who made sale was not his agent or employe and did not account to him therefor. Diersing *v.* S., 9 O. C. C. (N. S.) 214. And that sale was made by clerk contrary to instructions. Williams *v.* S., 4 O.

C. C. (N. S.) 193. *Contra.* Groff *v.* S., 171 Ind. 547, 85 N. E. 769.

One charged with selling oleomargarine colored to resemble butter may show cotton-seed oil is, commercially, a constituent of oleomargarine; and such testimony may be rebutted by proof such oil does not necessarily give that article the color of butter. C. *v.* Mellet, 27 Pa. Super. 41.

Sale in violation of law by one defendant, without approval of or knowledge by, the other will not sustain conviction of both. Declaration of one he was working for other, inadmissible. Goll *v.* U. S., 166 Fed. 419, 92 C. C. A. 171.

Admission of previous sale not evidence of later one. Goll *v.* U. S., 166 Fed. 419, 92 C. C. A. 171.

621-13 S. *v.* Rogers, 95 Me. 94, 49 A. 561; C. *v.* Farren, 9 Allen (Mass.) 489; Board *v.* Vandruens, 77 N. J. L. 443, 72 A. 125; Vandegrift *v.* Meihle, 66 N. J. L. 92, 49 A. 16.

Not material to show pure milk frequently falls below statutory standard. S. *v.* Campbell, 61 N. H. 402, 13 A. 585, 10 Am. St. 419.

622-15 P. *v.* Tsitsera, 138 App. Div. 446, 122 N. Y. S. 915.

Sale for analysis.—Defense that article was sold in order it might be analyzed must be sustained by proof of refusal to sell it in course of trade, or it was sold under compulsion, real or supposed, in pursuance of a demand for such purpose. Lansing *v.* S., 73 Neb. 121, 102 N. W. 254.

Character not involved.—If violation of the law has been habitual defendant's character is immaterial. C. *v.* Kolb, 13 Pa. Super. 347.

ADULTERY.

License to marry, 625-4; *Statutory proof of marriage not exclusive,* 625-6; *Presumption of authority to perform ceremony,* 625-6; *Weight of evidence arising from proof of opportunity,* 629-26; *Acts of intimacy; remoteness,* 629-26; *Anterior misconduct,* 629-28; *Time of conception,* 630-32; *Time and place,* 631-24.

The offense defined and its status in various periods explained in 1 STANDARD PROC. 593-595.

Manner of prosecution and various matters connected therewith. 1 STANDARD PROC. 596-599.

Indictment and Information.—See 1 STANDARD PROC. 599-611.

Pleas.—1 STANDARD PROC. 612.

Manner of Trial.—1 STANDARD PROC. 612-614.

624-1 Cartier *v.* U. S., 148 Fed. 804, 78 C. C. A. 494; Tison *v.* S., 125 Ga. 7, 53 S. E. 809; Zackery *v.* S., 6 Ga. App. 104, 64 S. E. 281; S. *v.* Chafin, 80 Kan. 653, 103 P. 143; C. *v.* Nick, 29 Pa. C. C. 8; Brown *v.* S. (Tex. Cr.), 154 S. W. 567; Dixon *v.* S., 50 Tex. Cr. 385, 97 S. W. 692; S. *v.* Greene, 38 Utah 389, 113 P. 181. *Contra* under federal statute. U. S. *v.* Cook, 15 N. M. 124, 103 P. 305, though it was alleged defendant was married.

Under statute making both parties guilty, on proof that one was married, the state need not prove marriage of defendant. Goodwin *v.* S. (Tex. Cr.), 158 S. W. 274.

Testimony that a person claimed to be married has no probative value. Tison *v.* S., 125 Ga. 7, 53 S. E. 809.

Marriage of woman with whom offense committed must be proved by state; if witness who testified she was his wife is shown to have been married previously to another state must show his competency to contract a second marriage. Accused may show first wife alive when second marriage contracted. Purdy *v.* S., 86 Neb. 638, 126 N. W. 90.

625-2 Zackery *v.* S., 6 Ga. App. 104, 64 S. E. 281 (mere reputation insufficient); Holm *v.* Holm (Utah), 139 P. 937.

625-3 See Craft *v.* S., 13 Ga. App. 776, 78 S. E. 776.

"The fact of the marriage may be at least prima facie shown by either of the following methods: By proof of general repute in family (Civ. Code 1910, §5764); by proof of general reputation in the community (Drawdy *v.* Hesters, 130 Ga. 161 (1), 60 S. E. 451, 15 L. R. A. (N. S.) 190; Clark *v.* Cassidy, 62 Ga. 407; Wood *v.* State, 62 Ga. 406); by proof of the fact that the man or the woman, as the case may be, lives together with a person of the opposite sex as his or her spouse, with general recognition in the community of their being married to each other. Clark *v.* Cassidy, supra." Miller *v.* S., 9 Ga. App. 827, 72 S. E. 279, *per* Powell, J.

In South Carolina marriage may be

proved by general reputation and declarations of parties. S. *v.* Still, 68 S. C. 37, 46 S. E. 524.

Holding themselves out as married may be shown to supplement other evidence that parties were husband and wife. S. *v.* Nelson, 39 Wash. 221, 81 P. 721.

Understanding of witness that defendant had been married may be testified to. Coons *v.* S., 49 Tex. Cr. 256, 91 S. W. 1085.

Defendant's paramour may testify as to his marriage because of having met his wife. Reynolds *v.* U. S., 7 Ind. Ty. 51, 103 S. W. 762.

625-4 Republic *v.* Waipa, 10 Haw. 442.

Proof of identity of parties need not be very strong. Republic *v.* Waipa, 10 Haw. 442.

License to marry need not be shown, and if license is put in evidence it need not be shown it was issued by authority. Republic *v.* Waipa, 10 Haw. 442.

Variation in name.—It may be shown name of one of the parties is not name used in certificate. S. *v.* Thompson, 31 Utah 228, 87 P. 709.

625-6 Republic *v.* Kuhia, 10 Haw. 440; Lyman *v.* P., 198 Ill. 544, 64 N. E. 974, 98 Ill. App. 386; S. *v.* Eggleston, 45 Or. 346, 77 P. 738; S. *v.* Thompson, 31 Utah 228, 87 P. 709.

Testimony of one who witnessed a marriage need not be supplemented by proof that minister ordained or authorized, where parties lived together many years and raised a family. Lyman *v.* P., 198 Ill. 544, 64 N. E. 974, 98 Ill. App. 386.

It is presumed person who performed ceremony was authorized to do so. Republic *v.* Kunia, 10 Haw. 440.

Statute providing for proof of marriage by recorded certificate does not exclude other methods of proof. S. *v.* Nelson, 39 Wash. 221, 81 P. 721.

626-7 Republic *v.* Kahakauila, 10 Haw. 28; Reynolds *v.* U. S., 7 Ind. Ty. 51, 103 S. W. 762; Russell *v.* S., 53 Tex. Cr. 500, 111 S. W. 658; S. *v.* Moore (Utah), 126 P. 322; S. *v.* Greene, 38 Utah 389, 115 P. 181; S. *v.* Moore, 36 Utah 521, 105 P. 293; S. *v.* Kimball, 74 Vt. 223, 52 A. 430.

Statement made a year previous insufficient. See Craft *v.* S., 13 Ga. App. 79, 78 S. E. 776.

626-9 Extrajudicial admission may be proved against party who made it and is sufficient as to him, but not as against co-defendant. Ty. *v.* Castro, 14 Haw. 131.

626-11 S. *v.* Eggleston, 45 Or. 346, 77 P. 738; Coons *v.* S., 49 Tex. Cr. 256, 91 S. W. 1085.

626-13 Presumption of marriage arising from cohabitation, given effect. U. S. *v.* Villafuerte, 4 Phil. Isl. 559, 4 Phil. Isl. 476.

627-14 The fact that consort of defendant testified before grand jury in response to a subpoena is not proof he instituted prosecution. S. *v.* Loftus, 128 Ia. 529, 104 N. W. 906. It need not be shown beyond reasonable doubt prosecution was instituted by proper person; whether it was or not is for court. S. *v.* Harmann, 135 Ia. 167, 112 N. W. 632.

Voluntary institution is for the jury. State *v.* Leek, 152 Iowa 12, 130 N. W. 1062.

627-15 S. *v.* Heffernan, 24 S. D. 1, 123 N. W. 87; Counts *v.* S., 49 Tex. Cr. 329, 94 S. W. 220; S. *v.* Thompson, 31 Utah 228, 87 P. 709.

627-16 C. *v.* Shanor, 29 Pa. Super. 358.

Photograph competent though taken years before trial.—S. *v.* Hasty, 121 Ia. 507, 96 N. W. 1115.

627-17 *Contra* where unmarried man marries woman believed to be unmarried, though fact otherwise. S. *v.* Audette, 81 Vt. 400, 70 A. 833.

627-18 Impotence of particeps criminis. S. *v.* Cushing, 86 Vt. 416, 85 A. 770.

628-21 Boice *v.* S. (Ala.), 65 S. 83; Woodson *v.* S., 62 Fla. 106, 57 S. 174; S. *v.* Holland, 162 Mo. App. 687, 145 S. W. 522.

Single act sufficient under statute. Bond *v.* Bond's Admr., 150 Ky. 389, 150 S. W. 363.

628-22 Jones *v.* S., 156 Ala. 175, 47 S. 100.

Statutory offense of adultery "by living together" is established by proof parties have so lived and had intercourse; it need not be shown they lived together as husband and wife. Shaw *v.* S., 49 Tex. Cr. 379, 91 S. W. 1087.

Continuous relations.—If evidence shows parties continuously roomed together state will not be required to elect on which act of intercourse it will rely, though a particular date is alleged. Proof may be made of distinct acts in explanation of or as characterizing their acts and conduct. S. *v.*

Higgins, 121 Ia. 19, 95 N. W. 244.

Consent of female must be shown. Nephew *v.* S., 5 Ga. App. 841, 63 S. E. 930.

628-23 Jones *v.* S., 156 Ala. 175, 47 S. 100; Hill *v.* S., 137 Ala. 66, 34 S. 106; Lorenson *v.* Lorenson, 155 Ill. App. 35; Zimmerman *v.* Zimmerman, 149 Ill. App. 231, decree *mod.* 242 Ill. 552, 90 N. E. 192; Wendenhammer *v.* S. (Ind.), 104 N. E. 577; S. *v.* Baker, 146 Ia. 612, 125 N. W. 659; Wheeler *v.* Abbott, 89 Neb. 455, 131 N. W. 942; Kitchens *v.* S. (Okla.), 140 P. 619; Mitchell *v.* S. (Okla.), 140 P. 622; Saxton *v.* Barber (Ore.), 139 P. 334; S. *v.* LaMore, 53 Or. 261, 99 P. 417; Mabry *v.* S., 54 Tex. Cr. 449, 114 S. W. 378; S. *v.* Kimball, 74 Vt. 223, 52 A. 430; Gust *v.* Gust, 70 Wash. 695, 127 P. 292; Huff *v.* Huff (W. Va.), 80 S. E. 846; Monteith *v.* S., 114 Wis. 165, 89 N. W. 828.

Sitting on lap of co-defendant. Palmer *v.* S., 168 Ala. 124, 53 S. 283.

Occupancy of same room.—Leonard *v.* Leonard, 101 Ark. 522, 142 S. W. 1133.

Pregnancy of the woman may be shown in corroboration. Clark *v.* S., 170 Ala. 101, 54 S. 431.

628-24 Palmer *v.* S., 168 Ala. 124, 53 S. 283; Sims *v.* S., 1 Ala. App. 240, 55 S. 1027; Kendall *v.* S. (Ind.), 105 N. E. 899; S. *v.* Thompson, 133 Ia. 741, 111 N. W. 319; S. *v.* Ling, 91 Kan. 647, 138 P. 582; U. S. *v.* Griego, 11 N. M. 392, 72 P. 20; Timmann *v.* Timmann, 142 N. Y. S. 298; Burroughs *v.* Burroughs, 160 N. C. 515, 76 S. E. 478; Grant *v.* Mitchell, 156 N. C. 15, 71 S. E. 1087; Saxton *v.* Barber (Or.), 139 P. 334; S. *v.* Milam, 89 S. C. 149, 71 S. E. 833; Mackey *v.* S. (Tex. Cr.), 151 S. W. 502; S. *v.* Grace, 86 Vt. 470, 86 A. 162; S. *v.* Cushing, 86 Vt. 416, 85 A. 770; S. *v.* Kimball, 74 Vt. 223, 52 A. 430; Till *v.* S., 132 Wis. 242, 111 N. W. 1109; Monteith *v.* S., 114 Wis. 165, 89 N. W. 828; Scope of admissible evidence is very extended. Coons *v.* S., 49 Tex. Cr. 256, 91 S. W. 1085; Roller *v.* S., 43 Tex. Cr. 433, 66 S. W. 777; S. *v.* Thompson, 31 Utah 228, 87 P. 709; S. *v.* Nelson, 39 Wash. 221, 81 P. 721.

Evidence held sufficient.—Bottom *v.* Bottom, 143 Ky. 666, 137 S. W. 198.

629-25 S. *v.* Taylor (Ia.), 141 N. W. 946; S. *v.* Thompson, 133 Ia. 741, 111 N. W. 319; S. *v.* Ling, 91 Kan. 647, 138 P. 582; U. S. *v.* Griego, 11 N. M. 392, 72 P. 20; Woody *v.* S. (Okla. Cr.), 136 P. 430; S. *v.* LaMore, 53 Or. 261, 99 P. 417 (circumstantial); S. *v.* Eggleston, 45 Or. 346, 77 P. 738; S. *v.* Grace, 86 Vt. 470, 86 A. 162; S. *v.* Moss, 73 Wash. 130, 131 P. 1132.

Antenuptial incontinence not admissible. Earl *v.* Earl, 81 N. J. Eq. 444, 86 A. 940.

Illicit acts of parties committed when such acts constituted no offense, not admissible. P. *v.* Breeding, 19 Cal. App. 359, 126 P. 179.

Acts of intimacy, short of intercourse, may be proved if recent; but not if they antedate offense four or five years. French *v.* S., 47 Tex. Cr. 571, 85 S. W. 4.

629-26 Palmer *v.* S., 165 Ala. 129, 51 S. 358; Smith *v.* Smith, 149 Ill. App. 596; Russell *v.* S., 53 Tex. Cr. 500, 111 S. W. 658 (defendant's horse hitched in front of paramour's home). See 629-25.

Weight of evidence arising from proof of opportunity.—Proof of opportunity is insufficient to convict unless there be proof also of adulterous mind on the part of both parties; and to prove this circumstantial evidence is admissible to show a purpose or inclination to commit the act. S. *v.* Eggleston, 45 Or. 346, 77 P. 738; S. *v.* Scott, 28 Or. 331, 42 P. 1. If proof of adulterous disposition has been made evidence of opportunity is admissible, and from these combined factors guilt may be reasonably inferred. S. *v.* Eggleston, supra; S. *v.* Kimball, 74 Vt. 223, 52 A. 430; Monteith *v.* S., 114 Wis. 165, 89 N. W. 828. But it is said in a late case: The crime may not be inferred from mutual disposition of accused and another to have intercourse, when coupled with no proof save that of opportunity to indulge therein. S. *v.* Thompson, 133 Ia. 741, 111 N. W. 319. The case last cited is approved in Till *v.* S., 132 Wis. 242, 111 N. W. 1109.

629-27 Palmer *v.* S., 165 Ala. 129, 51 S. 358 (to weaken testimony defendant was father of her child); Sutton *v.* S., 124 Ga. 815, 53 S. E. 381; Ferguson *v.* Ferguson, 153 Ky. 742, 156 S. W. 413; S. *v.* Eggleston, 45 Or. 346, 77 P. 738; S. *v.* Snyder, 86 Vt. 449, 85 A. 984; S. *v.* Nieburg, 86 Vt. 392, 85 A. 769; Huff *v.* Huff (W. Va.), 80 S. E. 846.

629-28 Hill *v.* S., 137 Ala. 66, 34 S. 106; Radford *v.* S., 7 Ga. App. 600, 67

S. E. 707; Republic *v.* Waipa, 10 Haw. 442; S. *v.* Brown (Ia.), 121 N. W. 513 (notwithstanding suspension of relations for one year); S. *v.* Hicks, 170 Mo. App. 183, 155 S. W. 482; P. *v.* McCoy, 147 N. Y. S. 748; S. *v.* Eggleston, 45 Or. 346, 77 P. 738; C. *v.* Burk, 2 Pa. C. C. 12; Russell *v.* S., 53 Tex. Cr. 500, 111 S. W. 658; S. *v.* Snyder, 86 Vt. 449, 85 A. 984; S. *v.* Potter, 52 Vt. 33; S. *v.* Nelson, 39 Wash. 221, 81 P. 721.

Conflict in Texas.—"The rule in this state was that former acts of intercourse could be proved, not only in incest and adultery, but in rape, in order to shed light on the offense charged. Burnett *v.* S., 32 Tex. Cr. 86, 22 S. W. 47; Funderburg *v.* S., 23 Tex. App. 392, 5 S. W. 244. But this doctrine as to rape has been overruled. Smith *v.* S. (Tex. Cr.), 73 S. W. 401, 74 S. W. 556. It has also been overruled as to incest. Clifton *v.* S., 46 Tex. Cr. 18, 79 S. W. 824. We can see no distinction as to incest and adultery. However, these authorities are limited as to other acts of carnal intercourse." French *v.* S., 47 Tex. Cr. 571, 85 S. W. 4.

Anterior misconduct.—It is not proper to show accused ran away with other men than her alleged paramour long before she was indicted. Quinn *v.* S., 51 Tex. Cr. 155, 101 S. W. 248.

If state elects as to act it relies on evidence of acts within a year and a half before indictment found is not proper. S. *v.* Harmann, 135 Ia. 167, 112 N. W. 632.

Defendant's arrest for bastardy may not be shown. S. *v.* Sanderson, 83 Vt. 351, 75 A. 961.

630-32 Hill *v.* S., 137 Ala. 66, 34 S. 406; S. *v.* Eggleston, 45 Or. 346, 77 P. 738.

Evidence of continuous acts of intercourse within statute of limitations may be proved as constituting part of the offense. French *v.* S., 47 Tex. Cr. 571, 85 S. W. 4.

Acts against which statute has run. P. *v.* Hendrickson, 53 Mich. 525, 19 N. W. 169; U. S. *v.* Griego, 11 N. M. 392, 72 P. 20.

Conduct after indictment.—Where acts of intercourse after indictment cannot be proved (S. *v.* Hilberg, 22 Utah 27, 61 P. 215), association of parties thereafter may be shown, including attendance of defendant upon his paramour during illness. S. *v.* Snowden, 23 Utah 318, 331, 65 P. 479. Letters addressed by accused to woman competent. Monteith *v.* S., 114 Wis. 165, 89 N. W. 828.

Time of conception.—Medical testimony as to time female conceived is not objectionable as proving another subsequent adulterous act. S. *v.* Thompson, 31 Utah 228, 87 P. 709.

631-34 Nobles *v.* S., 127 Ga. 212, 56 S. E. 125; S. *v.* Leek (Ia.), 130 N. W. 1062; Coons *v.* S., 49 Tex. Cr. 256, 91 S. W. 1085. See Counts *v.* S., 49 Tex. Cr. 329, 94 S. W. 220. *Contra.* C. *v.* Shanor, 29 Pa. Super. 358.

Evidence of general cohabitation characterized by suspicious circumstances dispenses with need of proof as to any particular time or place when or where act committed. S. *v.* Kimball, 74 Vt. 223, 52 A. 430.

631-36 S. *v.* Sanderson, 83 Vt. 351, 75 A. 961, notwithstanding acts of intercourse shown were too remote from child's birth if other opportunities for intercourse were afforded by situation of parties.

632-38 It is competent to show defendant furnished woman with necessaries. Hill *v.* S., 137 Ala. 66, 34 S. 406. Acts of accused in connection with burial of her child are relevant. S. *v.* Anderson, 83 Vt. 351, 75 A. 961.

632-39 Sims *v.* S., 1 Ala. App. 240, 55 S. 1027; Connell *v.* S., 9 Ga. App. 818, 72 S. E. 304. See S. *v.* Kruse, 24 S. D. 174, 123 N. W. 71.

Salacious photographs in possession of defendant. Yates *v.* Yates (N. Y.), 105 N. E. 195.

Defendant's conduct in community generally, not admissible. S. *v.* Naylor (Or.), 136 P. 889.

Acts of intimacy subsequent to date charged, not admissible. P. *v.* Davis, 175 Mich. 594, 141 N. W. 667.

Paramour's letters, if not connected with accused, inadmissible. S. *v.* Loftus, 128 Ia. 529, 104 N. W. 906.

633-41 Palmer *v.* S., 165 Ala. 129, 51 S. 358; S. *v.* Brown (Ia.), 124 N. W. 899 (corroboration not sufficient); Bond *v.* Bond's Admr., 150 Ky. 389, 150 S. W. 363; Moore *v.* S., 58 Tex. Cr. 183, 125 S. W. 34; Smith *v.* S., 58 Tex. Cr. 106, 124 S. W. 919; Jackson *v.* S., 51 Tex. Cr. 220, 101 S. W. 807.

633-43 U. S. *v.* Meyers, 14 N. M. 522, 99 P. 336; C. *v.* Weber, 17 Pa.

Dist. 100; C. v. Shaffer, 27 Pa. C. C. 415.

Consort's testimony excluded by statute. S. v. Ling, 91 Kan. 647, 138 P. 582.

Divorced wife of accused may testify against him except concerning confidential communications. If defendant's paramour is not on trial or is not accused her husband may testify. S. v. Nelson, 39 Wash. 221, 81 P. 721. *Contra*, as to last point. C. v. Nick, 29 Pa. C. C. 8.

Husband or wife competent witness. Pruett v. S., 141 Ala. 69, 37 S. 343; Campbell v. S., 133 Ala. 158, 32 S. 625; S. v. Koller, 129 Ia. 111, 105 N. W. 391. To prove marriage of the other. C. v. McGaughan, 29 Pa. C. C. 361; C. v. Fitzpatrick, 18 Pa. Super. 529. *Contra.* Republic v. Kahakauila, 10 Haw. 28.

Rule in civil action.—Rule of text applies in action by husband for alienation of wife's affections and causing her to commit adultery. Graves v. Harris, 117 Ga. 817, 45 S. E. 239; Bishop v. Bishop, 124 Ga. 293, 52 S. E. 743.

In action of crim. con. husband of woman is not competent witness to forge a single link in chain of circumstances pointing to her criminal conduct. Cornelius v. Hambay, 150 Pa. 359, 24 A. 515.

633-44 In Oklahoma, under Comp. Laws, 1909, §2366, either may testify against the other. Heacock v. S., 4 Okla. Cr. 606, 112 P. 949.

Admissible.—Kitchens v. S. (Okla.), 140 P. 619; Mitchell v. S. (Okla.), 140 P. 622.

Texas.—See Sargent v. S., 61 Tex. Cr. 34, 133 S. W. 885.

633-45 See 633-43.

633-46 Jones v. S., 156 Ala. 175, 47 S. 100; S. v. Hasty, 121 Ia. 507, 96 N. W. 1115.

Letter written by accused to paramour is competent.—Lorenson v. Lorenson, 155 Ill. App. 35.

634-47 Admissions of specific facts, not themselves constituting crime, nor any part of it, but furnishing links in chain of circumstantial evidence leading to proof thereof, may be shown in any order. Till v. S., 132 Wis. 242, 111 N. W. 1109.

Conduct of accused after illness of paramour may be described and opinions given concerning his appearance. Till v. S., 132 Wis. 242, 111 N. W. 1109.

634-49 Declarations made by woman after birth of child not competent to show who its father is. Palmer v. S., 165 Ala. 129, 51 S. 358.

634-51 Two witnesses and corroborative evidence required by statute. Beatty v. Beatty, 151 Ky. 547, 152 S. W. 540.

634-53 Naudain v. Naudain, 1 Boyce (Del.) 594, 76 A. 225; Burroughs v. Burroughs, 160 N. C. 515, 76 N. E. 478.

Circumstances indicating a married man had been in the room of an unmarried woman, together with fact he had paid her marked attentions, will support a verdict of guilty. S. v. Schaedler, 116 Ia. 488, 90 N. W. 91.

Opportunity and disposition not enough. S. v. Trachsel, 150 Ia. 135, 129 N. W. 736.

634-54 Evidence insufficient. Kientz v. Kientz, 104 Ark. 381, 149 S. W. 86.

635-58 Insufficient evidence. Long v. S., 5 Ga. App. 176, 62 S. E. 711; Manuel v. S., 45 Tex. Cr. 96, 74 S. W. 30; Paul v. S., 49 Tex. Cr. 20, 90 S. W. 171; Taylor v. S., 48 Tex. Cr. 216, 87 S. W. 148.

Habitual intercourse not shown.—Boswell v. S., 48 Tex. Cr. 47, 85 S. W. 1076; Curlee v. S. (Tex. Cr.), 98 S. W. 840.

Family relations.—If state shows defendant left his home and resided elsewhere, he may show his wife rendered his life unsafe. S. v. Koller, 129 Ia. 111, 105 N. W. 391.

Propriety of situation.—If state alleges defendant carried his paramour to his place it may be shown his father owned the property and that woman went there for legitimate purposes. Hill v. S., 137 Ala. 66, 34 S. 406.

Rules of church of which defendant a priest, relating to cleanliness of his house, immaterial on prosecution for adultery with housekeeper. Lenert v. S. (Tex. Cr.), 63 S. W. 563.

Consent of consort is not shown by delay of seven months in filing complaint. Gali v. Sahagun, 2 Phil. Isl 425.

639-2 Tyler v. Wright, 164 Mich. 606, 130 N. W. 205; Dunlap v. Robinson, 87 S. C. 577, 70 S. E. 313; Wm. M. Rice Inst. v. Goolsbee (Tex. Civ.). 134 S. W. 397.

ADVERSE POSSESSION.

Quantum of proof, 642-6; *Rule as to easements*, 642-6; *Shifting of burden*, 643-7; *Adverse use of water*, 645-11; *Administrator's possession that of heirs*, 653-25; *Absence of disability*, 665-47; *Presumption when vendor in possession*, 666-49; *Subsequent entry by grantor*, 666-49; *Presumption arising from relationship*, 669-56; *Presumption as to time of possession*, 669-56; *Color of title as affecting weight of evidence*, 672-60; *Rule where title void in part*, 672-60; *Admissions after title acquired*, 682-78; *Opinion evidence*, 684-83; *Presumption between parties claiming adversely*, 694-5; *Evidence to overcome title*, 701-17.

Necessity and Sufficiency of Pleading. 1 STANDARD PROC. 621-632.

Questions of Law and Fact.—1 STANDARD PROC. 632-637.

Instructions.—1 STANDARD PROC. 637-641.

640-3 Hoyle *v.* Mann, 144 Ala. 516, 41 S. 835; Driver *v.* King, 145 Ala. 585, 40 S. 315; Carroll *v.* Rabberman, 240 Ill. 450, 88 N. E. 995; Webb *v.* Rhodes, 28 Ind. App. 393, 61 N. E. 735; Logsdon *v.* Dingg, 32 Ind. App. 158, 69 N. E. 409; Batchelder *v.* Robbins, 95 Me. 59, 49 A. 210; Sell *v.* McAnaw, 158 Mo. 466, 59 S. W. 1003; Perkins L. & L. Co. *v.* Irvin, 200 Mo. 485, 98 S. W. 580.

Verdict may be directed, though it is irregular to do so. Owens *v.* Meredith, 117 Ky. 402, 78 S. W. 145. The practice recognized. McKee *v.* Grand Rapids, 133 Mich. 272, 95 N. W. 85; Chilton *v.* Comanianni, 221 Mo. 685, 120 S. W. 1174.

641-4 Fifty years' adverse possession. Driskill *v.* Morehead, 147 Ky. 107, 143 S. W. 758.

641-5 Central C. & C. Co. *v.* Penny, 173 Fed. 340, 97 C. C. A. 600 (conclusive legal presumption of a grant is not rebutted by evidence that grantor, under whom plaintiff claims because of exclusive possession for more than twenty years, had attempted to convey land to others. Such evidence does not show he could not have conveyed it to plaintiffs); Nevin *v.* Disharoon, 6 Penne. (Del.) 278, 66 A. 362.

Presumption not conclusive where possession shared with another. Nevin *v.* Disharoon, 6 Penne. (Del.) 278, 66 A. 362.

642-6 Original C. M. Co. *v.* Abbott, 167 Fed. 681; Alexander, etc. Co. *v.* R. Co. (Ala.), 62 S. 745; Bowles *v.* Lowery (Ala.), 62 S. 107; McLester Bldg. Co. *v.* Upchurch (Ala.), 60 S. 173; Norsworthy *v.* Willoughby, 176 Ala. 145, 57 S. 717; Hays *v.* Dillard, 176 Ala. 109, 57 S. 695; Nashville, etc. R. Co. *v.* Proctor, 160 Ala. 450, 49 S. 377; Lawrence *v.* Co., 144 Ala. 524, 41 S. 612; Maney *v.* Dennison (Ark.), 163 S. W. 783; Bradley L. Co. *v.* Miller, 94 Ark. 118, 126 S. W. 98; Gaither *v.* Gage, 82 Ark. 51, 100 S. W. 80; Galvin *v.* White, 159 Cal. 797, 116 P. 42; Clarke *v.* Clarke, 133 Cal. 667, 66 P. 10; Abbott *v.* Pond, 142 Cal. 393, 76 P. 60; Janke *v.* McMahon, 21 Cal. App. 781, 133 P. 21; Gurnsey *v.* Co., 6 Cal. App. 387, 92 P. 326; Ceffarelli *v.* Landino, 82 Conn. 126, 72 A. 564; Carney *v.* Hennessey, 77 Conn. 577, 60 A. 129; Nevin *v.* Disharoon, 6 Penne. (Del.) 278, 66 A. 362; Bayard *v.* Printing Co., 9 Del. Ch. 127, 77 A. 885; Pennington *v.* Lewis, 4 Penne. (Del.) 447, 56 A. 378; Dallam *v.* Sanchez, 56 Fla. 779, 47 S. 871; Avery *v.* Lock, 55 Fla. 612, 46 S. 844; Wilson *v.* Johnson, 51 Fla. 370, 41 S. 395; David *v.* Tucker, 140 Ga. 240, 78 S. E. 909; Kaaihue *v.* Crabbe, 3 Haw. 768; Peabody *v.* Burri, 255 Ill. 592, 99 N. E. 690; Lambert *v.* Hemler, 244 Ill. 254, 91 N. E. 435; White *v.* Harris, 206 Ill. 584, 69 N. E. 519; Kerr *v.* Yager (Ia.), 138 N. W. 905; Garrett *v.* Olford, 152 Ia. 265, 132 N. W. 379; Webster *v.* Temple Co., 141 Ia. 325, 117 N. W. 665; Lizer *v.* Clubine, 140 Ia. 246, 118 N. W. 409; McClenahan *v.* Stevenson, 118 Ia. 106, 91 N. W. 925; Freemon *v.* Funk, 85 Kan. 473, 117 P. 1024; Tippenhauer *v.* Tippenhauer, 158 Ky. 639, 166 S. W. 225; Northern Coal & Coke Co. *v.* Vermillion, 140 Ky. 475, 131 S. W. 259; Upchurch *v.* Sutton Bros., 142 Ky. 420, 134 S. W. 477; Ball *v.* Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Walling *v.* Eggers, 25 Ky. L. R. 1563, 78 S. W. 428; Batchelder *v.* Robbins, 95 Me. 59, 49 A. 210; Whitten *v.* Haverhill, 204 Mass. 95, 90 N. E. 409; Todd *v.* Weed, 84 Minn. 4, 86 N. W. 756; Cohn *v.* Co., 80 Miss. 649, 32 S. 292; Norton *v.* Reed, 225 Mo. 236, 161 S. W. 842; Spicer *v.* Spicer, 249 Mo. 582, 155 S. W. 832; Himmelberger-H. Lumb. Co. *v.* Craig, 248 Mo. 319, 154 S. W. 73; Barnard R. Co. *v.* Butte (Mont.), 136 P. 1064; Smith *v.*

Duff, 39 Mont. 374, 102 P. 981; Larsen *v.* Sanzieri, 83 Neb. 384, 119 N. W. 661; Myers *v.* Folkman (N. J.), 90 A. 1051; Licari *v.* Carr, 84 N. J. L. 345, 86 A. 421; Cramp *v.* Dady, 147 N. Y. S. 619; Koch *v.* Ellwood, 138 App. Div. 584, 123 N. Y. S. 502; Blixt *v.* Realty Co., 138 App. Div. 499, 122 N. Y. S. 861; Lewis *v.* Upton, 90 App. Div. 453, 86 N. Y. S. 397; Barfield *v.* Hill, 163 N. C. 262, 79 S. E. 677; Stewart *v.* McCormick, 161 N. C. 625, 77 S. E. 761; Locklear *v.* Savage, 159 N. C. 236, 74 S. E. 347; Monk *v.* Wilmington, 137 N. C. 322, 49 S. E. 345; Drucker *v.* Village, 31 Ohio C. C. 466, *aff.*, 91 N. E. 1142; Johns *v.* Johns (Pa.), 90 A. 535; C. *v.* Bierly, 37 Pa. Super. 496; Crist *v.* Boust, 26 Pa. Super. 543; Wallace *v.* Dunton, 30 S. D. 598, 139 N. W. 345; Sutton *v.* Whetstone, 21 S. D. 341, 112 N. W. 850; Dunn *v.* Taylor, 102 Tex. 80, 113 S. W. 265; West *v.* Houston (Tex. Civ.), 163 S. W. 679 (right of way by prescription); Rio Grande, etc. R. Co. *v.* Kinkel (Tex. Civ. App.), 158 S. W. 214; Carlock *v.* Willard (Tex. Civ.), 149 S. W. 363; Connor *v.* Weik (Tex. Civ.), 116 S. W. 650; Uvalde County *v.* Oppenheimer, 53 Tex. Civ. 137, 115 S. W. 904; Haynes *v.* R. Co., 51 Tex. Civ. 49, 111 S. W. 427 (writ of error denied by supreme court); Simpson Bk. *v.* Smith, 52 Tex. Civ. 349, 114 S. W. 445; McAllen *v.* Alonzo, 46 Tex. Civ. 449, 102 S. W. 475; English *v.* Openshaw, 28 Utah 241, 78 P. 476; Illinois Co. *v.* Budzisz, 115 Wis. 68, 84, 90 N. W. 1019; Board *v.* Patrick, 18 Wyo. 130, 104 P. 531.

Where the use has continued for a long period of time, the burden is on the owner to show that it was merely permissive. Wray *v.* Brown, 155 Ky. 757, 160 S. W. 488.

That improvements are such as to put owner on notice. Ver Steeg *v.* Wabash R. Co. (Mo.), 151 S. W. 431.

Plaintiff showing legal title makes a prima facie case; defendant by showing adverse possession for twenty years brings himself within the statute of repose. Thereupon plaintiff, if he claims that the case falls within exceptions set out in another section of the statute, has the burden of proof. Koch *v.* Ellwood, 138 App. Div. 584, 123 N. Y. S. 502.

A preponderance of evidence is required. McAllen *v.* Crafts (Tex. Civ.), 139 S. W. 41.

Evidence held sufficient. Gray *v.* Bloom, 151 Ia. 566, 132 N. W. 42.

Evidence held insufficient to show possession of claimant. McAllen *v.* Crafts (Tex. Civ.), 139 S. W. 41; Mineral Development Co. *v.* Craft, 147 Ky. 434, 144 S. W. 51; Town *v.* Robinson, 115 Minn. 247, 132 N. W. 204.

Possession is a collective fact, and witness may be asked who was in actual possession. Cooper *v.* Slaughter, 175 Ala. 211, 57 S. 477.

Rule applies to surface owner who claims minerals severed from land. Gordon *v.* Park, 219 Mo. 600, 117 S. W. 1163.

Quantum of proof.—It is enough if evidence reasonably satisfied jury; it is not required that it shall be satisfied. Lawrence *v.* Co., 144 Ala. 524, 41 S. 612. A preponderance is sufficient. Cohasset *v.* Moors, 204 Mass. 173, 90 N. E. 978; Morrison *v.* Bomer, 195 Mo. 535, 94 S. W. 524; Simpson Bk. *v.* Smith, 52 Tex. Civ. 349, 114 S. W. 445. "Clear proof" not required. Heller *v.* Hawley, 8 O. C. C. (N. S.) 265. But in some cases it is said proof must be clear and positive (Barrs *v.* Brace, 38 Fla. 265, 20 S. 991; Gilbert *v.* Co., 53 Fla. 319, 43 S. 754; Lambert *v.* Hemler, 244 Ill. 254, 91 N. E. 435; Haigh *v.* Lenfesty, 239 Ill. 227, 87 N. E. 692), and that it will be strictly construed. Calhoun *v.* Moore, 79 Ark. 109, 94 S. W. 931; Nathan *v.* Dierssen, 146 Cal. 63, 79 P. 739; Roby *v.* Co., 211 Ill. 173, 71 N. E. 822; Lampman *v.* Van Alstyne, 94 Wis. 417, 69 N. W. 171; Fuller *v.* Worth, 91 Wis. 406, 64 N. W. 995; Pritchard *v.* Lewis, 125 Wis. 604, 104 N. W. 989, 1 L. R. A. (N. S.) 565.

If a parol gift of land is made the basis for a claim by adverse possession it must be shown by clear and convincing evidence. Raleigh *v.* Wells, 29 Utah 217, 81 P. 908.

Must also prove negative facts, as that successive owners of land were not under disability. Evans *v.* Scott, 37 Tex. Civ. 373, 83 S. W. 874; Wright *v.* Fanning (Tex. Civ.), 86 S. W. 786; Austin *v.* Hall, 93 Tex. 591, 57 S. W. 563; Dees *v.* Harrison (Tex. Civ.), 95 S. W. 1093, following, though doubting, the other cases cited; Landry *v.* Landry, 105 La. 362, 29 S. 900. *Contra.* Arnold *v.* Limeburger, 122 Ga. 72, 49 S. E. 812; Frankhoner *v.* Corder, 127 Ind. 164, 26 N. E. 766; Travis *v.* Hall, 95

Tex. 116, 65 S. W. 1078; Romine *v.* Littlejohn (Tex. Civ.), 106 S. W. 439.

Rule as to easements.—At common law long enjoyment of easement created presumption claim or use was adverse; hence it was not necessary for claimant to show he claimed it as a right. The other party had burden of showing use was permissive. Stewart *v.* Brumley (Ky. L. R.), 119 S. W. 798; Smith *v.* Pennington, 122 Ky. 355, 91 S. W. 730, 8 L. R. A. (N. S.) 149; O'Daniel *v.* O'Daniel, 88 Ky. 185, 10 S. W. 638; Wilkins *v.* Barnes, 79 Ky. 323; Newcome *v.* Crews, 98 Ky. 339, 32 S. W. 947; Anderson *v.* Southworth, 25 Ky. L. R. 776, 76 S. W. 391; Brown *v.* Barton, 26 Ky. L. R. 711, 82 S. W. 405. See infra, 646-12.

Heirs must show decedent's widow occupied land on which she lived as a homestead, and not adversely. Reno *v.* Blackburn, 24 Ky. L. R. 1976, 72 S. W. 775.

643-7 Stockley *v.* Cissna, 119 Fed. 812, 56 C. C. A. 324; Brannan *v.* Hewry (Ala.), 57 S. 967; Hardy *v.* Randall, 173 Ala. 516, 55 S. 997; Walker *v.* Wyman, 157 Ala. 478, 47 S. 1011; Lecroix *v.* Malone, 157 Ala. 434, 47 S. 725; Barry *v.* Madaris, 156 Ala. 475, 47 S. 152; City of St. Louis *v.* R. Co., 248 Mo. 10, 154 S. W. 55; Feller *v.* Lee, 225 Mo. 319, 124 S. W. 1129; Gordon *v.* Park, 219 Mo. 600, 117 S. W. 1163; Chicago, etc. R. Co. *v.* Erskine, 83 Neb. 95, 119 N. W. 1098.

Burden of proof.—If the facts to show prescription are difficult to prove and are more within knowledge of one party than the other, as where question is at what time a heavy building ceased to sink, burden is discharged by showing time within which such buildings cease to sink; that being done, burden shifts to opposite party to overcome prima facie case and rebut presumption of prescription. Chapman *v.* Assn., 108 La. 283, 32 S. 371. One who wishes to defeat the effect of adverse possession by showing his title was derived from government within statutory period has burden. Baty *v.* Elrod, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343. Onus is on party who seeks to show possession proved was permissive or subservient. Gardner *v.* Wright, 49 Or. 609, 91 P. 286; Horbach *v.* Boyd, 64 Neb. 129, 89 N. W. 644; Gurnsey *v.* Co., 6 Cal. App. 387, 92 P. 326. Same rule governs as to any other allegation made to defeat running of statute, as that use not continuous, or such as to substantially interfere with owner's rights. Gardner *v.* Wright, supra.

644-8 Allen *v.* Phillips, 87 Ark. 185, 112 S. W. 403.

644-9 Zimmerman Mfg. Co. *v.* Dunn, 163 Ala. 272, 50 S. 906; Quigg *v.* Zeugin, 82 Conn. 437, 74 A. 753 (title need not be claimed, nor denial of owner's title made); Alderman *v.* New Haven, 81 Conn. 137, 70 A. 626 (immaterial occupancy based on contract enforceable only in equity); Dallam *v.* Sanchez, 56 Fla. 779, 47 S. 871; Stewart *v.* Andrews, 239 Ill. 186, 87 N. E. 864; Ratliff *v.* Soward's Guardian, 152 Ky. 97, 153 S. W. 25; Butler *v.* Smith, 84 Neb. 78, 120 N. W. 1106; Jenkins *v.* Co., 15 N. M. 281, 107 P. 739; Rathbunville U. C. Assn. *v.* Betson, 208 N. Y. 364, 101 N. E. 892; McLain *v.* Bird, 120 N. Y. S. 1032 (under claim of title in fee); Dunn *v.* Taylor (Tex. Civ.), 143 S. W. 311; Haynes *v.* R. Co., 51 Tex. Civ. 49, 111 S. W. 427; City of Richmond *v.* Jones, 111 Va. 214, 68 S. E. 181.

Facts showing possession must be proved. Stricklin *v.* Moore, 106 Ark. 14, 151 S. W. 1009, 1183.

Proof of possession.—Statement that a party was "in possession" is mere conclusion of witness. Stricklin *v.* Moore, 106 Ark. 14, 151 S. W. 1009, 1183.

Evidence insufficient. Davis *v.* Seybold, 195 Fed. 402, 115 C. C. A. 304.

Occupancy for required time may be testified to by plaintiff if he does not rely on color of title. Gray *v.* Walker, 157 Cal. 381, 108 P. 278. Time occupancy began not essential if continuance for required period shown. Cohasset *v.* Moors, 204 Mass. 173, 90 N. E. 978.

Occupancy must be of land claimed. Rich *v.* Co., 147 Fed. 380, 77 C. C. A. 538.

What acts insufficient.—Title to wild lands cannot be acquired by merely taking a deed of a township or tract of timber land, running lines around it, keeping off trespassers and making occasional lumbering operations. Chandler *v.* Wilson, 77 Me. 76; Hudson *v.* Coe, 79 Me. 83, 8 A. 249, 1 Am. St. 288; Soper *v.* Lawrence, 98 Me. 268, 56 A. 908. Camping and hunting not sufficient. Nona M. Co. *v.* Wright, 101 Tex. 14, 102 S. W. 1118. Plowing fur-

rows around prairie land not enough. Jones *v.* Goss, 115 La. 926, 40 S. 357.

Color of title is not of itself sufficient. Brannan *v.* Henry, 175 Ala. 454, 57 S. 967.

644-10 McComb *v.* Saxe, 92 Ark. 321, 122 S. W. 987; Roberson *v.* Downing, 126 Ga. 175, 54 S. E. 1020; Carroll *v.* Rabberman, 240 Ill. 450, 88 N. E. 995; Kirby *v.* Kirby, 236 Ill. 255, 86 N. E. 259; Webster *v.* Co., 141 Ia. 325, 117 N. W. 665 (possession by mistake and without hostile intent ineffectual); Glover *v.* Sage, 87 Minn. 526, 92 N. W. 471; Ryan *v.* Lincoln, 85 Neb. 539, 123 N. W. 1021; Knight *v.* Denman, 64 Neb. 814, 90 N. W. 863; Bardtl *v.* Sharkey, 58 Or. 153, 113 P. 653; Holland *v.* Nance, 102 Tex. 177, 114 S. W. 346; Lathrop *v.* Levarn, 83 Vt. 1, 74 A. 331; Millbank *v.* Rowland, 63 Wash. 519, 115 P. 1053; Johnson *v.* Ingram, 63 Wash. 554, 115 P. 1073; Bowers *v.* Ledgerwood, 25 Wash. 14, 64 P. 936; Suksdorf *v.* Humphrey, 36 Wash. 1, 77 P. 1071; Unzelman *v.* Snohomish, 40 Wash. 588, 82 P. 911; Lohse *v.* Burch, 42 Wash. 156, 84 P. 722.

Intention to claim presumed. Gloyd *v.* Franck (Mo.), 154 S. W. 744.

Cannot be established by inference. Fleming *v.* Howell, 22 Colo. App. 382, 125 P. 551; Dupont *v.* Texas & N. O. R. Co. (Tex. Civ.), 158 S. W. 195. See Stokes *v.* Murray, 95 S. C. 120, 78 S. E. 741.

Overt act or conduct. Parsons *v.* Sharpe, 102 Ark. 611, 145 S. W. 537.

Evidence of intent is better shown by acts than words. Wasmund *v.* Harm, 36 Wash. 170, 78 P. 777.

Intention need not have existed at time of entry, but must exist before statute begins to run. Knight *v.* Denman, 64 Neb. 814, 90 N. W. 863; Cervena *v.* Thurston, 59 Neb. 343, 80 N. W. 1048. *Contra.* Purtle *v.* Bell, 225 Ill. 523, 80 N. E. 350.

Intent must be shared by all adverse claimants. Myers *v.* Frey, 102 Tex. 527, 119 S. W. 1142.

Knowledge of adverse claim of occupancy may be testified to by witness. Hays *v.* Lemoine, 156 Ala. 465, 47 S. 97.

645-11 Harden *v.* Watson (Ark.), 148 S. W. 596; Wagner *v.* Head, 94 Ark. 490, 127 S. W. 706; Penix *v.* Rice, 93 Ark. 176, 124 S. W. 747; McComb *v.* Saxe, 92 Ark. 321, 122 S. W. 987; Johnson *v.* Elder, 92 Ark. 30, 121 S. W. 1066; Jeffery *v.* Jeffery, 87 Ark. 496, 113 S. W. 27; Hope *v.* Shiver, 77 Ark. 177, 90 S. W. 1003; Silva *v.* Hawn, 10 Cal. App. 544, 102 P. 952; Alderman *v.* New Haven, 81 Conn. 137, 70 A. 626; Pennington *v.* Lewis, 4 Penne. (Del.) 447, 56 A. 378; Hyer *v.* Griffin, 55 Fla. 560, 46 S. 635; Kirby *v.* Kirby, 236 Ill. 255, 86 N. E. 259 (acts of most unequivocal kind required as between father and child); White *v.* Harris, 206 Ill. 584, 69 N. E. 519; Iowa, etc. R. Co. *v.* Homan, 151 Ia. 404, 131 N. W. 878; Salmon *v.* Martin, 156 Ky. 309, 160 S. W. 1058; Mounts *v.* Mounts, 155 Ky. 363, 159 S. W. 818 (possession of stranger presumed to be adverse); McCain *v.* Joiner, 151 Ky. 198, 151 S. W. 406 (possession of lessee); King *v.* Coal Co., 144 Ky. 660, 139 S. W. 863; Watts *v.* Bryant, 144 Ky. 14, 137 S. W. 780; Mahoning C. Co. *v.* Dowling (Ky. L. R.), 124 S. W. 370; Hillman L. I. Co. *v.* Marshall (Ky. L. R.), 119 S. W. 180; Vanzant *v.* Lumb. Co., 128 La. 923, 55 S. 577; Moran *v.* Stewart, 246 Mo. 462, 151 S. W. 439 (possession of tenant for life); Baker *v.* Thompson, 214 Mo. 500, 114 S. W. 497; Bruner Granitord Co. *v.* Lime & C. Co., 169 Mo. App. 295, 152 S. W. 601; Blake *v.* West, 89 Neb. 794, 132 N. W. 394; Field *v.* Lincoln, 85 Neb. 781, 124 N. W. 468; Jenkins *v.* Co., 15 N. M. 281, 107 P. 739; Rathbunville, etc. Assn. *v.* Betson, 208 N. Y. 364, 101 N. E. 892; Jacob *v.* Oyster Bay, 155 App. Div. 913, 140 N. Y. S. 1124; Hamlin *v.* P., 155 App. Div. 680, 140 N. Y. S. 643; Caldwell L. Co. *v.* Cloyd (N. C.), 81 S. E. 752; Stewart *v.* McCormick, 161 N. C. 625, 77 S. E. 761; Coquille Co. *v.* Johnson, 52 Or. 547, 98 P. 132; Johns *v.* Johns (Pa.), 90 A. 535; Campbell *v.* Ice Co., 126 Tenn. 524, 150 S. W. 427; McKinney *v.* Duncan, 121 Tenn. 265, 118 S. W. 683; Bender *v.* Brooks, 103 Tex. 329, 127 S. W. 168; Cleveland *v.* Smith (Tex. Civ.), 156 S. W. 247 (under statute); Cannon *v.* Oil Co. (Tex. Civ.), 138 S. W. 803; Cockrell *v.* Dallas (Tex. Civ.), 111 S. W. 977; Johnson *v.* Ingram, 63 Wash. 554, 115 P. 1073; Rhoades *v.* Barnes, 54 Wash. 145, 102 P. 884; Lohse *v.* Burch, 42 Wash. 156, 84 P. 722; Illinois S. Co. *v.* Budzisz, 115 Wis. 68, 86, 90 N. W. 1019; Board *v.* Patrick, 18 Wyo. 130, 104 P. 531.

What took place at the giving of the

deed and the negotiation for it, and what knowledge the defendant had of what he was procuring by his deed, is therefore relevant. Roy *v.* Moore, 83 Conn. 159, 82 A. 233.

Parol evidence is competent in favor of a claimant by inheritance though statute requiring filing of notice by others not complied with. Knight *v.* Hunter, 155 Ala. 238, 46 S. 235.

Proof of possession is not excused because owner knows somebody is asserting hostile paper title. Kennedy *v.* Sanders, 90 Miss. 524, 43 S. 913.

Adverse use of water cannot be initiated until person entitled to superior use is deprived of its benefits to such extent as to be informed of invasion of his rights. Britt *v.* Reed, 42 Or. 76, 70 P. 1029; Carson *v.* Hayes, 39 Or. 97, 65 P. 814.

Execution of lease to land involved is competent to show assertion of ownership. Staley *v.* Stone, 41 Tex. Civ. 299, 92 S. W. 1017.

Evidence of acts by third parties without consent of owner, immaterial. Smith *v.* Ford, 82 Conn. 653, 74 A. 910.

Occupation presumed hostile when one places permanent structures on land of another and uses it and them as owner. Pioneer I. & T. Co. *v.* Board, 35 Utah 1, 99 P. 150.

646-12 Barker *v.* Mobile El. Co., 173 Ala. 28, 55 S. 364; Montgomery & E. R. Co. *v.* Rutland, 165 Ala. 311, 51 S. 831; Rankin *v.* Dean, 157 Ala. 490, 47 S. 1015; Reagan *v.* Hodges, 70 Ark. 563, 69 S. W. 581; Illinois C. R. Co. *v.* Hatter, 207 Ill. 88, 69 N. E. 751; Walsh *v.* Doran, 145 Ia. 110, 123 N. W. 999; Wolford *v.* Smith, 146 Ky. 341, 142 S. W. 1055; Richie *v.* Owsley, 137 Ky. 63, 121 S. W. 1015; Paducah C. Co. *v.* Co., 135 Ky. 53, 121 S. W. 986; Warth *v.* Baldwin, 27 Ky. L. R. 339, 84 S. W. 1148; Montgomery County *v.* Bean, 26 Ky. L. R. 568, 82 S. W. 240; Weber *v.* Detroit, 159 Mich. 14, 123 N. W. 540 (of alley by constantly charging personalty); Omodt *v.* R. Co., 106 Minn. 205, 118 N. W. 798; Smith *v.* Duff, 39 Mont. 374, 102 P. 981; Rheinfort *v.* Abel (N. J.), 80 A. 1059; Breeden *v.* Moore, 82 S. C. 534, 64 S. E. 604; Ellwood *v.* Stallcup, 57 Tex. Civ. 343, 122 S. W. 906; Spaulding *v.* Collins, 51 Wash. 488, 99 P. 306; Gotoskey *v.* Grawunger (Tex. Civ.), 158 S. W. 249; Romine *v.* Littlejohn (Tex. Civ.), 106 S. W. 439; Morgan *v.* R. Co., 50 Wash. 480, 97 P. 510; Lohse *v.* Burch, 42 Wash. 156, 84 P. 722.

Possession for statutory period apparently as owner raises rebuttable presumption that possession was adverse. Craven *v.* Craven (Ind.), 103 N. E. 333.

Holders' failure to assert his title is not enough without adverse holding. Caledonia Co. Grammar School *v.* Howard, 84 Vt. 1, 77 A. 877.

Presumption that continuous and uninterrupted use of a right of way is adverse is overcome by failing to show it was established for claimant's benefit, or its use claimed as a right. Warth *v.* Baldwin, 27 Ky. L. R. 339, 84 S. W. 1148.

Must be under claim of right.—A party may claim adversely knowing his title is defective, but he must do so under claim of right or title. McDaniel *v.* Co., 152 Ala. 414, 44 S. 705.

As between grantor and grantee former, if he remains in possession, must make explicit disclaimer and notorious assertion of claim. Walsh *v.* Doran, 145 Ia. 110, 123 N. W. 999; Spaulding *v.* Collins, 51 Wash. 488, 99 P. 306.

The fact that holder said he was in possession would not prove that he was in fact in open, notorious adverse possession. McBride *v.* Lowe, 175 Ala. 408, 57 S. 832.

647-13 Baker *v.* White, 136 Ga. 541, 71 S. E. 871; Cousins *v.* White, 246 Mo. 296, 151 S. W. 737.

647-14 Barker *v.* Mobile El. Co., 173 Ala. 28, 55 S. 364; Lecroix *v.* Malone, 157 Ala. 434, 47 S. 725; Frick *v.* Harper, 155 Ala. 231, 46 S. 453; Doe *v.* McCullough, 155 Ala. 246, 46 S. 472; Montgomery & E. R. Co. *v.* Rutland, 165 Ala. 311, 51 S. 831; Henry *v.* Brown, 143 Ala. 446, 39 S. 325; Wagner *v.* Head, 94 Ark. 490, 127 S. W. 706; Jeffery *v.* Jeffery, 87 Ark. 496, 113 S. W. 27; Big Three M. & M. Co. *v.* Hamilton, 157 Cal. 130, 107 P. 301; Doe *v.* Roe (Del.), 80 A. 352; Vinton *v.* Powell, 136 Ga. 687, 71 S. E. 1119; Swank *v.* Co., 15 Ida. 353, 98 P. 297; Mounts *v.* Mounts, 155 Ky. 363, 159 S. W. 818; Weber *v.* Teague (Ky.), 149 S. W. 963; Watts *v.* Bryant, 144 Ky. 14, 137 S. W. 780; Richie *v.* Ousley, 137 Ky. 63, 121 S. W. 1015; Ashcraft *v.* Courtney (Ky. L. R.), 121 S. W. 625; Hillman L. & I. Co. *v.* Marshall (Ky. L. R.), 119 S. W. 180; Riley *v.* Roach (Ky.), 118 S. W. 321; Courtney *v.* Ash-

craft, 31 Ky. L. R. 1324, 105 S. W. 106; Gerrold *v.* Barnhart, 128 La. 1099, 55 S. 688; Merritt *v.* Westerman, 165 Mich. 535, 131 N. W. 66; Menter *v.* Church, 159 Mich. 21, 123 N. W. 585; Cohn *v.* Smith, 94 Miss. 517, 49 S. 611; Cousins *v.* White, 246 Mo. 296, 151 S. W. 737; Stone *v.* Perkins, 217 Mo. 586, 117 S. W. 717; Brown *v.* Hartford, 173 Mo. 183, 73 S. W. 140; Knight *v.* Denman, 64 Neb. 814, 90 N. W. 863; Jenkins *v.* Co., 15 N. M. 281, 107 P. 739; Rheinfort *v.* Abel (N. J.), 80 A. 1059; New York C. R. Co. *v.* Moore, 137 App. Div. 461, 121 N. Y. S. 884; Brainin *v.* R. Co., 136 App. Div. 393, 120 N. Y. S. 1093; Ricketson *v.* Village, 130 N. Y. S. 794; Monk *v.* Wilmington, 137 N. C. 322, 49 S. E. 345; Schrenk *v.* City, 31 Ohio C. C. 118, *aff.* 89 N. E. 1117; Johns *v.* Johns (Pa.), 90 A. 535; Huss *v.* Jacobs, 210 Pa. 145, 59 A. 991; C. *v.* Bierly, 37 Pa. Super. 496; Louisiana & T. L. Co. *v.* Kennedy, 103 Tex. 297, 126 S. W. 1110; Dunn *v.* Taylor, 102 Tex. 80, 113 S. W. 265; Dunn *v.* Taylor (Tex. Civ.), 113 S. W. 311; Fin & Feather Club *v.* Thomas (Tex. Civ.), 138 S. W. 150; Coler *v.* Alexander (Tex. Civ.), 128 S. W. 664; Moore *v.* Loggins (Tex. Civ.), 114 S. W. 183; Cockrell *v.* Dallas (Tex. Civ.), 111 S. W. 977; Kent *v.* Dobyns, 112 Va. 586, 72 S. E. 139; Marbury *v.* Jones, 112 Va. 389, 71 S. E. 1124; George *v.* R. Co., 38 Wash. 480, 80 P. 767; Zellmer *v.* Martin (Wis.), 147 N. W. 371; Illinois S. Co. *v.* Budzisz, 115 Wis. 68, 85, 90 N. W. 1019; Board *v.* Patrick, 18 Wyo. 130, 104 P. 531.

But need not have been continuous against one and the same person. Jones *v.* Devereaux, 90 S. C. 517, 73 S. E. 1027.

Evidence of occupation prior to foreclosure incompetent in favor of heir against purchaser under mortgage given by former's ancestor (Reagan *v.* Hodges, 70 Ark. 563, 69 S. W. 581), and so of occupation before judgment in ejectment. Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026. Judgment of restitution in forcible entry and detainer competent to show lack of continuous possession. George *v.* R. Co., 38 Wash. 480, 80 P. 767.

Entry by holder of legal title.—Temporary interruption of possession by a trespasser, if speedily redressed, is immaterial; but entry by holder of legal title under claim of right and holding jointly with adverse possessor interrupts his possession. Chastang *v.* Chastang, 141 Ala. 451, 463, 37 S. 799, 109 Am. St. 45. Disseisin not shown by entry to make surveys of enclosed land. Illinois S. Co. *v.* Paczocha, 139 Wis. 23, 119 N. W. 550.

Nature of work and local custom may determine sufficiency of occupation in case of a claim to severed mineral if actual possession by owning and operating mine is shown. Gordon *v.* Park, 219 Mo. 600, 117 S. W. 1163.

Deviation of private right of way may be shown. Lund *v.* Wilcox, 34 Utah 205, 97 P. 33.

Immaterial matters.—Abandonment is not shown by proving departure of tenant without landlord's knowledge. Saxton *v.* Corbett (Tex. Civ.), 122 S. W. 75. Foreclosure of tax lien, immaterial. Sellers *v.* Simpson, 53 Tex. Civ. 205, 115 S. W. 888. And so of an interruption by change of tenants. Mahoney *v.* R., 82 S. C. 215, 64 S. E. 228. And failure to use irrigating ditch when not necessary. Silva *v.* Hawn, 10 Cal. App. 544, 102 P. 952.

648-15 Butler *v.* Butler, 133 Ala. 377, 32 S. 579; Dean *v.* Dunn, 9 Cal. App. 352, 99 P. 380; Hooper *v.* Young, 10 Cal. App. 590, 102 P. 950; Nevin *v.* Disharoon, 6 Penne. (Del.) 278, 66 A. 362; Roby *v.* D. Co., 211 Ill. 173, 71 N. E. 822; Stalford *v.* Goldring, 197 Ill. 156, 64 N. E. 395; Lizer *v.* Clubine, 140 Ia. 246, 118 N. W. 409; McClenahan *v.* Stevenson, 118 Ia. 106, 91 N. W. 925; Lindsey *v.* Smith, 131 Ky. 176, 114 S. W. 779; Chenault *v.* Quisenberry, 26 Ky. L. R. 462, 81 S. W. 690; Parker *v.* Case, 155 Mich. 497, 119 N. W. 1081; Kipp *v.* Hagan, 108 Minn. 384, 122 N. W. 317; Glover *v.* Sage, 87 Minn. 526, 92 N. W. 471; Cousins *v.* White, 246 Mo. 296, 151 S. W. 737; Kirton *v.* Bull, 168 Mo. 622, 68 S. W. 927; Heckscher *v.* Cooper, 203 Mo. 278, 101 S. W. 658; Butler *v.* Smith, 84 Neb. 78, 120 N. W. 1106; Bone *v.* James, 82 Neb. 442, 118 N. W. 83 (license may be shown); Jenkins *v.* Co., 15 N. M. 281, 107 P. 739; Johnston *v.* Albuquerque, 12 N. M. 20, 72 P. 9; Jacob *v.* Oyster Bay, 155 App. Div. 913, 140 N. Y. S. 1124; P. *v.* Gloversville, 128 App. Div. 44, 112 N. Y. S. 387; Scheer *v.* R. Co., 127 App. Div. 267, 111 N. Y. S. 569; Morehouse *v.* Burgot, 22 O. C. C. 174; Bender *v.* Brooks, 103 Tex. 329, 127

S. W. 168; Sassman *v.* Collins, 53 Tex. Civ. 71, 115 S. W. 337; Raleigh *v.* Wells, 29 Utah 217, 81 P. 908; Demeritt *v.* Parker, 82 Vt. 59, 71 A. 833; Port Townsend *v.* Lewis, 34 Wash. 413, 75 P. 982; Kelley *v.* Salvas, 146 Wis. 543, 131 N. W. 436; Laffitte *v.* Superior, 142 Wis. 73, 125 N. W. 105; Pritchard *v.* Lewis, 125 Wis. 604, 104 N. W. 989.

Mortgagor in possession does not hold adversely to mortgagee as long as the relation exists. Willette *v.* Gifford, 46 Ind. App. 185, 92 N. E. 186.

Evidence to show hostility.—It may be shown that lands constituting part of a railroad right of way were platted, subdivisions marked, plats recorded, taxes paid by claimant and his rights locally recognized. Northern P. R. Co. *v.* Spokane, 45 Wash. 229, 88 P. 135.

Use of railroad right of way must be inconsistent with company's rights. Smith *v.* R. Co., 5 O. C. C. (N. S.) 194.

Non-exclusive use of wharf right. Montgomery *v.* Shaver, 40 Or. 244, 66 P. 923.

Parol evidence is competent to show deed conveying life estate was intended to convey the fee, and grantee took possession of land and occupied it exclusively, adversely and continuously with acquiescence of grantor. Breland *v.* O'Neal, 88 Miss. 449, 40 S. 865.

Acts of ownership exercised by holder of paper title during time of adverse possession may be proved. Kaaihue *v* Crabbe, 3 Haw. 768.

Need not be undisputed. Heller *v.* Hawley, 8 O. C. C. (N. S.) 265.

Slight acts indicating ownership in another, though consented to, are not conclusive against one claiming adversely. West *v.* Webster, 39 Tex. Civ. 272, 87 S. W. 196.

Claim of exclusive right may be inferred from manner of occupancy. Rennert *v.* Shirk, 163 Ind. 542, 72 N. E. 546.

Conveyance of a specific part of a tract is the most emphatic evidence of assertion of title. Dowdell *v.* Soc., 114 La. 49, 38 S. 16; York *v.* Hutcheson, 37 Tex. Civ. 367, 83 S. W. 895.

Acts done by owner.—Where proof is made of acts done on land by claimant it is proper to show owner was doing like acts thereon and extent of such acts. Chastang *v.* Chastang, 141 Ala. 451, 463, 37 S. 799, 109 Am. St. 45.

Dripping from eaves prevents use from being exclusive. Lins *v.* Seefeld, 126 Wis. 610, 105 N. W. 917.

It is sufficient if land is put to use in manner to apprise neighbors it is in exclusive use and enjoyment of another. Eckert *v.* Weilmuenster, 103 Ill. App. 490.

Conveyancer cannot testify of his opinion concerning validity of claimant's title. Luce *v.* Parsons, 192 Mass. 8, 77 N. E. 1032.

Acts of stranger to suit, done in pursuance of his own claim of title, cannot be proved. Morris *v.* Eagle, 94 Ark. 180, 126 S. W. 382. Evidence of possession by grantees of life tenant whose right was derived from him before falling in of life estate, immaterial. Brinkley *v.* Bell, 131 Ga. 226, 62 S. E. 67.

Recognition of government's title is not fatal as against any claimant under prior grant. Eastern Oregon L. Co. *v.* Brosnan, 173 Fed. 67, 97 C. C. A. 382; Boe *v.* Arnold, 54 Or. 52, 102 P. 290, *over.* three cases.

649-16 Frye *v.* Gullion, 143 Ia. 719, 121 N. W. 563; Crowe, etc. Co. *v.* Atkinson, 85 Kan. 357, 116 P. 499; Cahill *v.* Mangold, 151 Ky. 156, 151 S. W. 373; Heckescher *v.* Cooper, 203 Mo. 278, 101 S. W. 658; Sassman *v.* Collins, 53 Tex. Civ. 71, 115 S. W. 337; Kane *v.* Sholars, 41 Tex. Civ. 154, 90 S. W. 937.

If possession comports with usual management of like hands by their owners the evidence is sufficient. Lampman *v.* Van Alstyne, 94 Wis. 417, 69 N. W. 171; Illinois S. Co. *v.* Budzisz, 106 Wis. 499, 82 N. W. 534; Ill. S. Co. *v.* Jeka, 119 Wis. 122, 95 N. W. 97; Clithero *v.* Fenner, 122 Wis. 356, 99 N. W. 1027. It is competent to show why claimant was allowed to remain in possession. Brucke *v.* Hubbard, 74 S. C. 144, 158, 54 S. E. 249.

Third party may testify as to possession. Dorlan *v.* Westervitch, 140 Ala. 283, 37 S. 382.

Conclusion.—A statement that one was in open and notorious possession is a conclusion. Driver *v.* King, 145 Ala. 585, 40 S. 315.

Acts of ownership must be continuous and notorious.—Chastang *v.* Chastang, 141 Ala. 451, 37 S. 799, 109 Am. St. 45; Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026.

Insufficient acts.—Masting of hogs on land, or ranging of cattle, or conduct

ing a sugar camp, not sufficient. Courtney *v.* Asheraft, 31 Ky. L. R. 1324, 105 S. W. 106. And so of occasional cutting of timber. Combs *v.* Combs, 24 Ky. L. R. 1691, 72 S. W. 8.

Inclosure without use insufficient. Appel *v.* Childress, 53 Tex. Civ. 607, 116 S. W. 129.

649-17 Illinois S. Co. *v.* Jeka, 123 Wis. 419, 101 N. W. 399.

650-18 Merritt *v.* Westerman, 165 Mich. 535, 131 N. W. 66; Kingston *v.* Guck, 155 Mich. 264, 118 N. W. 967; Miskwabik D. Assn. *v.* Croze, 140 Mich. 194, 103 N. W. 558; Wier Lumb. Co. *v.* Conn (Tex. Civ.), 156 S. W. 276; Travis *v.* Hall, 37 Tex. Civ. 143, 83 S. W. 425; Illinois S. Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. 905.

651-19 Doe *v.* Roe (Del.), 80 A. 352; Pennington *v.* Lewis, 4 Penne. (Del.) 447, 56 A. 378; Abbott *v.* Perkinson, 144 Ky. 495, 139 S. W. 745; Fuller *v.* Mullins, 143 Ky. 639, 137 S. W. 243; Miller *v.* Goodin (Ky. L. R.), 124 S. W. 818; Frazer *v.* Seureau (Tex. Civ.), 128 S. W. 649; Illinois S. Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. 905.

Without color of title enclosure necessary. Albert Hanson Lumb. Co. *v.* Co., 130 La. 772, 58 S. 567.

Entire tract need not be continuously cultivated. Johnson *v.* Thomas, 23 App. Cas. (D. C.) 141, 151.

Land may be enclosed though fence in street, it seems. Howison *v.* Masson, 29 App. Cas. (D. C.) 338.

Inclosure and cultivation.—Cultivation is the equivalent of inclosure. Johnson *v.* Thomas, 23 App. Cas. (D. C.) 141, 151. Inclosure by fences connecting with natural barriers sufficient. Doniphan L. Co. *v.* Case, 87 Ark. 168, 112 S. W. 208.

Actual inclosure not necessary if evidence shows continuous, open, actual, exclusive and adverse possession. Howison *v.* Masson, 29 App. Cas. (D. C.) 338; Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026.

Cutting timber and paying taxes may be proved as circumstances to aid in determining fact and fixing extent of possession. Chastang *v.* Chastang, 141 Ala. 451, 37 S. 799, 109 Am. St. 45.

In Texas enclosing land does not show adverse possession; statute requires cultivation, use or enjoyment. Dunn *v.* Taylor, 102 Tex. 80, 113 S. W. 265; McDonald *v.* McCrabb, 47 Tex. Civ. 259, 105 S. W. 238.

Inclosure must be maintained and extend around land. Johnson *v.* Albuquerque, 12 N. M. 20, 72 P. 9.

Valuable improvements are strong proof of possession. Hill *v.* Co., 103 Ill. App. 41; Dowdell *v.* Soc., 114 La. 49, 38 S. 16.

652-21 Myers *v.* Mayhew, 32 App. Cas. (D. C.) 205; Nevin *v.* Disharoon, 6 Penne. (Del.) 278, 66 A. 362; Mitchell *v.* Crummey, 134 Ga. 383, 67 S. E. 1042 ("back-boxing" for turpentine purposes); Le Sourd *v.* Edwards, 236 Ill. 169, 86 N. E. 212 (submerged land); Kingston *v.* Guck, 155 Mich. 264, 118 N. W. 967; Shinnecock Hills, etc. R. Co. *v.* Aldrich, 132 App. Div. 118, 116 N. Y. S. 532; Bardin *v.* Ins. Co., 82 S. C. 358, 64 S. E. 165 (continuous use for fuel and timber); Illinois S. Co. *v.* Jeka, 123 Wis. 419, 101 N. W. 399; Illinois S. Co. *v.* Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. 905. See Dunn *v.* Taylor, 102 Tex. 80, 113 S. W. 265; Hardy O. Co. *v.* Burnham (Tex. Civ.), 124 S. W. 221.

Using wood lot to obtain wood for use, sufficient. Pitman *v.* Hill, 117 Wis. 318, 94 N. W. 40.

653-23 Marietta Fertilizer Co. *v.* Blair (Ala.), 56 S. 131; Mounts *v.* Mounts, 155 Ky. 363, 159 S. W. 818; Swafford *v.* Herd, 23 Ky. L. R. 1556, 65 S. W. 803; Kingston *v.* Guck, 155 Mich. 264, 118 N. W. 967.

Contra if remainder is held adversely to him. Curtis *v.* Warden, 144 Ky. 383, 138 S. W. 245.

Exception is made as to such part as may be in actual possession of another. Chastang *v.* Chastang, 141 Ala. 451, 463, 37 S. 799, 109 Am. St. 45; Courtney *v.* Asheraft, 31 Ky. L. R. 1321, 105 S. W. 106.

Extent of possession under color of title.—Claimant holding under paper color of title holds in accordance with boundaries fixed thereby. Chastang *v.* Chastang, 141 Ala. 451, 463, 37 S. 799, 109 Am. St. 45.

In Texas only so much as is actually occupied can be claimed. Thompson *v.* Dutton, 96 Tex. 205, 71 S. W. 544.

Boundaries must be shown.—One who holds adversely without paper color of title must show extent of his possession by proof as clear and definite as to the tract claimed as would be required if he were conveying it by deed.

Chastang *v.* Chastang, 141 Ala. 451, 463, 37 S. 799, 109 Am. St. 45; McDaniel *v.* Co., 152 Ala. 414, 44 S. 705.

653-24 Claim must extend to well-marked or well-defined boundary. Le Moyne *v.* Roundtree, 135 Ky. 40, 121 S. W. 960.

653-25 Original C. Co. *v.* Abbott, 167 Fed. 681; Alabama S. L. Co. *v.* Hogue, 164 Ala. 657, 51 S. 320 (permissive occupation by son of claimant); Roberson *v.* Downing, 126 Ga. 175, 54 S. E. 1020; Files *v.* Co., 123 La. 110, 48 S. 763; Murphy *v.* C., 187 Mass. 361, 73 N. E. 524; Jasper Tp. *v.* Martin, 161 Mich. 336, 126 N. W. 437; Omodt *v.* R. Co., 106 Minn. 205, 118 N. W. 798; Reno B. Co. *v.* Packard, 31 Nev. 433, 103 P. 415, 104 P. 801; McFarland *v.* Cornwell, 151 N. C. 428, 66 S. E. 454; Coquille Co. *v.* Johnson, 52 Or. 547, 98 P. 132; Beam *v.* Gardnor, 18 Pa. Super. 245; Sutton *v.* Whetstone, 21 S. D. 341, 112 N. W. 850; Thompson *v.* R. Co. (Tex. Civ.), 123 S. W. 616; Sassman *v.* Collins, 53 Tex. Civ. 71, 115 S. W. 337; Travis *v.* Hall, 37 Tex. Civ. 143, 83 S. W. 425; Pickens *v.* Stout, 67 W. Va. 422, 68 S. E. 354; Laffitte *v.* Superior, 142 Wis. 73, 125 N. W. 105.

To make tenant's possession inure to benefit of landlord existence of relation of landlord and tenant must be shown. Carlyle *v.* Pruett, 37 Tex. Civ. 384, 84 S. W. 372. Possession under lease is presumed to continue until it is shown lessee repudiated it. Jones *v.* Co., 52 Or. 311, 97 P. 625.

Tenant's open and notorious possession may be sufficient to raise presumption of notice from time it became adverse. Hanson *v.* Sommers, 105 Minn. 434, 117 N. W. 842.

Acknowledgment of tenancy may establish relation of landlord and tenant, but not actual possession by tenant; declarations to that effect are hearsay. Dunn *v.* Taylor, 102 Tex. 80, 113 S. W. 265. Acts of tenant's grantee, without actual surrender to landlord, may disseize latter and overthrow presumption in his favor. Illinois S. Co. *v.* Budzisz, 139 Wis. 281, 121 N. W. 362.

Extent of tenant's possession.—When a tenant is placed in possession of a definite part of a larger tract of land his possessor will not avail landlord beyond part so claimed and held; but if tenant's possession is not limited it will cover all land owned by landlord, regardless of part occupied. Bell *v.* Co., 155 Fed. 712, 84 C. C. A. 60. Tenant's possession of land not included in landlord's deed is simply a circumstance. Illinois C. R. Co. *v.* Hatter, 207 Ill. 88, 69 N. E. 751.

Adverse possession by wife of tenant. Wife of tenant in joint occupation of land with him cannot claim adversely to landlord without showing he had notice of her claim. Sizemore *v.* Trimble, 26 Ky. L. R. 8, 80 S. W. 477.

Length of tenant's possession may be shown by him. Hackett *v.* Webster, 97 Md. 404, 55 A. 480.

Lands must be identified.—Where land claimed without paper title is leased to different tenants the parts leased must be identified. Hackett *v.* Webster, 97 Md. 404, 55 A. 480.

When a question of fact.—If a judgment for possession is rendered against a tenant in possession, who subsequently leases the land, it is a question of fact whether, during the interim, his possession was that of lessor. Logan *v.* Robertson (Tex. Civ.), 83 S. W. 395.

Administrator's possession that of heirs.—Though administrator mistakenly assumes right to hold lands of decedent in his representative capacity, his possession is not adverse to heirs until knowledge he has repudiated his holding in that capacity is brought to them. Ashford *v.* Ashford, 136 Ala. 631, 34 S. 10.

Repudiation of license and licensor's knowledge of it must be shown by licensee. Weidensteiner *v.* Mally, 55 Wash. 79, 104 P. 143.

Possession of judgment debtor may be adverse to that of purchaser at judgment sale under usual conditions. Bosley *v.* Stewart, 140 Ia. 101, 117 N. W. 1103.

Purchaser in good faith from tenant may acquire title. Illinois S. Co. *v.* Budzisz, 139 Wis. 281, 119 N. W. 935.

654-26 See Himmelberger-H. L. Co. *v.* McCabe, 220 Mo. 154, 119 S. W. 357; Whealton & Wisherd *v.* Doughty, 112 Va. 649, 72 S. E. 112.

655-27 McComb *v.* Saxe, 92 Ark. 221, 122 S. W. 987; Paton *v.* Robinson, 81 Conn. 547, 71 A. 730; Albert Hanson Lumb. Co. *v.* Co., 130 La. 772, 58 S. 567; Houston Oil Co. *v.* Griffin (Tex. Civ.), 166 S. W. 902; Cochran *v.* Moerer, 47 Tex. Civ. 372, 105 S. W. 1138.

Sufficiency of proof.—Evidence showing survey of land for purpose of cutting it into blocks, numbering houses on it and exaction of leases from occupants proves entry of owner was made animo clamandi. Illinois S. Co. *v.* Budzisz, 115 Wis. 68, 86 N. W. 1019.

Entries by others than disseizers not material. Batchelder *v.* Robbins, 95 Me. 59, 49 A. 210.

Secret and undisclosed intention of one who claims to own land in going upon it is immaterial; effectiveness of his act depends upon whether it bore upon its face intention to resume possession. Murphy *v.* C., 187 Mass. 361, 371, 73 N. E. 524.

Interruption of use of water.—See Oregon C. Co. *v.* Co., 41 Or. 209, 69 P. 455, 93 Am. St. 701.

Fences down.—Failure to constantly maintain fences enclosing land does not interrupt adverse possession. Kane *v.* Sholars, 41 Tex. Civ. 154, 90 S. W. 937.

Unsuccessful suit immaterial.—McAllen *v.* Alonzo, 46 Tex. Civ. 449, 102 S. W. 475.

Void judgment inadmissible.—Barrett *v.* McKinney (Tex. Civ.), 93 S. W. 240.

656-28 Bradbury *v.* Dumond, 80 Ark. 82, 96 S. W. 390; Tudor Mfg. Co. *v.* Co., 5 O. C. C. (N. S.) 37.

Intention to return immaterial if party left no indicia of continuing possession. Hoyle *v.* Mann, 144 Ala. 516, 41 S. 835.

Abandonment is not shown by procuring a patent to portion of land adversely possessed; patent only evidentiary of fact land vacant. Asher *v.* Howard, 28 Ky. L. R. 1097, 91 S. W. 270. It is shown by removal of all improvements after a survey showing land had been inclosed by mistake. Noyes *v.* Douglas, 39 Wash. 314, 81 P. 724. No abandonment of highway in absence of estoppel. Morehouse *v.* Burgot, 22 O. C. C. 174. Absence from inclosed land for reasonable time is not abandonment, there being no proof of intention to give it that effect. Richards *v.* Haskins, 72 Neb. 195, 100 N. W. 151. Party who alleges abandonment must show it. Agnew *v.* Pawnee City, 79 Neb. 603, 113 N. W. 236.

657-29 Bell *v.* Co., 155 Fed. 712, 84 C. C. A. 60; Brown *v.* Hartford, 173 Mo. 183, 73 S. W. 140; Abels *v.* Joseph (Tex. Civ.), 148 S. W. 1154; Johnson *v.* Brown, 33 Wash. 588, 74 P. 677.

Evidence not showing abandonment of possession. Gaston *v.* May, 120 Minn. 154, 138 N. W. 1025.

Constructive possession of original owner is restored by abandonment. Trustees of Caledonia County Grammar School *v.* Howard, 84 Vt. 1, 77 A. 877.

658-30 Central C. & C. Co. *v.* Penny, 173 Fed. 340, 97 C. C. A. 600; Silva *v.* Hawn, 10 Cal. App. 541, 102 P. 952; Gurnsey *v.* W. Co., 6 Cal. App. 387, 92 P. 326; Quigg *v.* Zeugin, 82 Conn. 437, 74 A. 753; Hill *v.* Co., 103 Ill. App. 41; O'Flaherty *v.* Mann, 196 Ill. 304, 63 N. E. 727; Rennert *v.* Shirk, 163 Ind. 542, 72 N. E. 546; Murphy *v.* Newingham, 151 Ky. 360, 151 S. W. 930; Sawbridge *v.* Fergus Falls, 101 Minn. 378, 112 N. W. 385; Andrews *v.* Hastings, 85 Neb. 548, 123 N. W. 1035; Illinois S. Co. *v.* Bilot, 109 Wis. 418, 429, 84 N. W. 855, 85 N. W. 402.

As between grantor and grantee.—It is not required that a grantor remaining in possession give direct notice of his hostile claim, if acts done are so open, notorious and hostile as to clearly show intentions. Meeks *v.* Garner, 93 Ala. 17, 8 S. 378, 11 L. R. A. 196; Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306; McClenahan *v.* Stevenson, 118 Ia. 106, 91 N. W. 925; Kelly *v.* Palmer, 91 Minn. 133, 97 N. W. 578. See 646-12, supra.

Cost of land and improvements.—Claimant may show what he paid for land, cost of improvement put on it by his predecessor in title, and that latter brought action for trespass on it. Luce *v.* Parsons, 192 Mass. 8, 77 N. E. 1032.

659-31 Owen *v.* Moxom, 167 Ala. 615, 52 S. 527; Butler *v.* Hines, 101 Ark. 409, 142 S. W. 509; Rucker *v.* Rucker, 136 Ga. 830, 72 S. E. 241; Kirby *v.* Kirby, 236 Ill. 255, 86 N. E. 259; Goodall *v.* Drew, 85 Vt. 408, 82 A. 680.

Possession proved by evidence of character of possession and use and is not limited to declarations of claimant. Woodcock *v.* Heirs, 92 Neb. 723, 139 N. W. 646.

Uncorroborated testimony of claimant is insufficient. Delatour *v.* Wendt, 93 Neb. 175, 139 N. W. 1023.

Public declarations not essential. Green *v.* Horn, 128 App. Div. 686, 112 N. Y. S. 993.

Plaintiff was properly allowed on cross-examination to ask Cooper's wife, his co-defendant, if Cooper had hired a surveyor "to run out his holdings." And also to ask defendants' witness Turner,

who had surveyed section 45 at the instance of J. M. Cooper, as to the latter's statements made and instructions given to him at the time in regard to the running of the lines. Cooper *v.* Slaughter, 175 Ala. 211, 57 S. 477.

Declarations by deceased predecessor in title are hearsay and therefore inadmissible. Roy *v.* Moore, 85 Conn. 159, 82 A. 233.

659-32 Cooper *v.* Slaughter, 175 Ala. 211, 57 S. 477; Stricklin *v.* Moore, 106 Ark. 14, 15 S. W. 1009, 1183; Barton *v.* Johnson, 137 Ga. 332, 73 S. E. 516; Gascho *v.* Lennert, 176 Ind. 677, 97 N. E. 6; Griffith *v.* Griffith's Exr., 152 Ky. 185, 153 S. W. 229; City *v.* Nall, 144 Ky. 259, 137 S. W. 1090.

Evidence insufficient.—McKinnon *v.* Johnson, 59 Fla. 332, 52 S. 288.

Improvements.—Ver Stieg *v.* Wabash R. Co. (Mo.), 151 S. W. 431.

659-33 Blake *v.* West, 89 Neb. 794, 132 N. W. 394; Horbach *v.* Boyd, 64 Neb. 129, 89 N. W. 644; Lanham *v.* Bowlby, 79 Neb. 39, 112 N. W. 324; Stillman *v.* City, 129 N. Y. S. 515; Gardner *v.* Wright, 49 Or. 609, 91 P. 286; Nona M. Co. *v.* Wright, 101 Tex. 14, 102 S. W. 1118.

Testimony as to intent, if not fortified by acts, is not convincing. Bush *v.* Griffin, 76 Neb. 214, 107 N. W. 247; Knight *v.* Denman, 64 Neb. 814, 90 N. W. 863.

Sufficiency of acts.—Acts need not be such as will bring to owner knowledge of fact of adverse possession; it is enough they should be presumed to do so if he exercises reasonable care and diligence. Lawrence *v.* Co., 144 Ala. 524, 41 S. 612; Carney *v.* Hennessey, 74 Conn. 107, 49 A. 910, 92 Am. St. 199, 53 L. R. A. 699; Missouri L. & M. Co. *v.* Jewell, 200 Mo. 707, 98 S. W. 578; Williams *v.* Shepherdson, 4 Neb. (Unof.) 608, 95 N. W. 827. As between grantor and grantee acts of former in conveying land, causing himself to be named as owner upon maps and plats and openly and publicly claiming it as his own, will suffice. Horbach *v.* Boyd, 64 Neb. 129, 89 N. W. 644.

Not necessary knowledge be compelled. Lawrence *v.* Co., 144 Ala. 524, 41 S. 612.

Extent of encroachment, rather than use to which land is put, will determine sufficiency of occupancy as motive in the absence of color of title. Jones *v.* Weaver (Tex. Civ.), 122 S. W. 619.

660-34 Northern P. R. Co. *v.* Devine, 53 Wash. 241, 101 P. 841, absence of deed and proof of payment of taxes, significant.

660-35 Silva *v.* Hawn, 10 Cal. App. 544, 102 P. 952 (defendant must show use was permissive or without his knowledge); Lake Shore, etc. R. Co. *v.* Johnson, 157 Mich. 115, 121 N. W. 267; Triece *v.* South Haven, 154 Mich. 129, 117 N. W. 555; Girtman *v.* S. (Tex. Cr.), 164 S. W. 1008; Merriman *v.* Blalack, 57 Tex. Civ. 270, 122 S. W. 403; Laffitte *v.* Superior, 142 Wis. 73, 125 N. W. 105.

Insufficient evidence of adverse use. City *v.* Henson, 124 N. Y. S. 588.

If possession has been taken up to a partition fence, under claim of right, immaterial who erected fence. Sommer *v.* Compton, 52 Or. 173, 96 P. 124.

661-37 Ashford *v.* McKee (Ala.), 62 S. 879; Williams *v.* Lyon (Ala.), 61 S. 299.

Evidence of general reputation, not competent to show ownership or title. Henry *v.* Brown, 143 Ala. 446, 39 S. 325; Lambert *v.* Hemler, 244 Ill. 254, 91 N. E. 435.

661-38 Thompson *v.* Logan, 166 Ala. 45, 51 S. 985; Mears *v.* Co., 18 N. D. 384, 121 N. W. 916.

Statutory notice. Hurst *v.* Swango, 144 Ky. 22, 137 S. W. 794.

Acquiescence by owner in use of easement may be proved. Walling *v.* Eggers, 25 Ky. L. R. 1563, 78 S. W. 428.

Owner's knowledge.—In some cases the rule is thus stated: less proof of a general character is required when it appears possession and claim were in fact brought to owner's knowledge. Batchelder *v.* Robbins, 95 Me. 59, 49 A. 210.

Use of water.—See Davis *v.* Chamberlain, 51 Or. 304, 98 P. 154.

661-39 Little Rock, etc. R. Co. *v.* Rankin (Ark.), 156 S. W. 431; Morris *v.* Ferrell, 102 Ark. 679, 143 S. W. 583; Langhorst *v.* Rogers, 88 Ark. 318, 114 S. W. 915; Adams *v.* Fryer, 59 Fla. 112, 52 S. 611; Peters *v.* Tilghman, 111 Md. 227, 73 A. 726; Chilton *v.* Comanianni, 221 Mo. 685, 120 S. W. 1174; Cook *v.* Lumb. Co. (Tex. Civ.), 149 S. W. 716; Dunn *v.* Taylor (Tex. Civ.), 143 S. W. 311; Davis *v.* Adams (Tex. Civ.), 129 S. W. 150; Turner *v.* Ladd, 42 Wash. 274, 84 P. 866.

Continuity is a fact to which a wit-

ness may testify, and such evidence is not objectionable as being a mere conclusion or opinion. Olcott *v.* Squires (Tex. Civ.), 144 S. W. 314.

Appointment of receiver for corporation and such interruptions of use of its easement as were essential to its continued use are not fatal. Hindley *v.* R. Co., 42 Misc. 56, 85 N. Y. S. 561.

Interruption by trespassers immaterial. Gardner *v.* Wright, 49 Or. 609, 91 P. 286.

Unsuccessful suit not an interruption. Ibid; Moore *v.* Greene, 19 How. (U. S.) 69.

662–40 Suit *v.* Iron Co., 172 Ala. 101, 55 S. 639; Knight *v.* Hunter, 155 Ala. 238, 46 S. 235; Hoyle *v.* Mann, 144 Ala. 516, 41 S. 835; St. Louis, etc. Co. *v.* Mulkey, 100 Ark. 71, 139 S. W. 643; Collins *v.* Gray, 154 Cal. 131, 97 P. 142; Davis *v.* S., 9 Ga. App. 430, 71 S. E. 603; Godley *v.* Barnes, 132 Ga. 513, 64 S. E. 546; Richie *v.* Owsley, 137 Ky. 63, 121 S. W. 1015; Pickrell *v.* Carlisle, 135 Ky. 126, 121 S. W. 1029; Walling *v.* Eggers, 25 Ky. L. R. 1563, 78 S. W. 428; Files *v.* Co., 123 La. 110, 48 S. 763; Luce *v.* Parsons, 192 Mass. 8, 77 N. E. 1032; Merritt *v.* Westerman, 165 Mich. 535, 131 N. W. 66; Nall *v.* Conover, 223 Mo. 477, 122 S. W. 1039; Charles *v.* Pickens, 214 Mo. 212, 112 S. W. 551; So. Omaha *v.* Meehan, 71 Neb. 230, 98 N. W. 691; Bond *v.* Beverly, 152 N. C. 56, 67 S. E. 55; Bardin *v.* Ins. Co., 82 S. C. 358, 64 S. E. 165; Coler *v.* Alexander (Tex. Civ.), 128 S. W. 664; Bennette *v.* Collins, 54 Tex. Civ. 16, 116 S. W. 618 (though one of the predecessors did not know the exact limits of the land, it having been claimed and held as one tract); Williams *v.* R. Co., 52 Tex. Civ. 217, 114 S. W. 877 (though one of the parties may have been mistaken in the right under which he held); Harris *v.* Iglehart, 52 Tex. Civ. 6, 113 S. W. 170; Illinois S. Co. *v.* Paczocha, 139 Wis. 23, 119 N. W. 550; Clithero *v.* Fenner, 122 Wis. 356, 99 N. W. 1027; Bryant *v.* Cadle, 18 Wyo. 64, 104 P. 23. See Southern P. Co. *v.* Pigott, 93 Miss 281, 47 S. 381.

Deed not controlling.—Presumption deed covers all land conveyed is overcome by proof that grantor had acquired title by adverse possession to a strip adjoining that conveyed where he transferred possession to it in connection with land conveyed. Clithero *v.* Fenner, 122 Wis. 356, 99 N. W. 1027.

Payment of taxes may be combined with actual possession. Gaither *v.* Gage, 82 Ark. 54, 100 S. W. 80; Philadelphia Co. *v.* Palmer, 32 Wash. 455, 73 P. 501.

Possessions cannot be connected unless they are continuous notwithstanding privity. Dunn *v.* Taylor, 102 Tex. 80, 113 S. W. 265.

662–41 Henry *v.* Brown, 143 Ala. 446, 39 S. 325; Messer *v.* Bk., 149 Cal. 122, 84 P. 835; Hooper *v.* Stuart, 23 App. Cas. (D. C.) 431; Peters *v.* Tilghman, 111 Md. 227, 73 A. 726; City *v.* Truex, 235 Mo. 619, 139 S. W. 390; Moore *v.* Helvy, 235 Mo. 443, 138 S. W. 481; Chilton *v.* Comanianni, 221 Mo. 685, 120 S. W. 1174; Chicago, etc. R. Co. *v.* Erskine, 83 Neb. 95, 118 N. W. 1098; Zweibel *v.* Myers, 69 Neb. 294, 95 N. W. 597; Pohlman *v.* Church, 60 Neb. 364, 83 N. W. 201; Murray *v.* Romine, 60 Neb. 94, 82 N. W. 318; Holdrege *v.* Livingston, 79 Neb. 238, 112 N. W. 341; Montague *v.* Marunda, 71 Neb. 805, 99 N. W. 653; Johnston *v.* Case, 131 N. C. 491, 42 S. E. 957; Morehouse *v.* Burgot, 22 O. C. C. 174; Gardner *v.* Wright, 49 Or. 609, 91 P. 286; Brucke *v.* Hubbard, 74 S. C. 144, 160, 54 S. E. 249; Moore *v.* Loggins (Tex. Civ.), 114 S. W. 183; Yellow Poplar L. Co. *v.* Thompson, 108 Va. 612, 62 S. E. 358; Illinois S. Co. *v.* Budzisz, 106 Wis. 499, 82 N. W. 534, 80 Am. St. 54, 48 L. R. A. 830; Clithero *v.* Fenner, 122 Wis. 356, 99 N. W. 1027, 106 Am. St. 978; Closuit *v.* Co., 130 Wis. 258, 110 N. W. 222.

Grantor's possession of land not included in deed cannot inure to benefit of grantee unless possession delivered to him. Illinois S. Co. *v.* Hatter, 207 Ill. 88, 69 N. E. 751.

Claimant may be defeated by showing paramount outstanding title in third persons, though no privity be established between them and defendant. Waters *v.* Durrence, 119 Ga. 934, 47 S. E. 216.

Permissive possession cannot be tacked to adverse possession. Original C. M. Co. *v.* Abbott, 167 Fed. 681.

663–42 Walling *v.* Eggers, 31 Ky. L. R. 1009, 104 S. W. 360; Parker *v.* Wolf (Or.), 138 P. 463; Sommer *v.* Compton, 52 Or. 173, 96 P. 124; Illinois S. Co. *v.* Paczocha, 139 Wis. 23, 119 N. W. 550.

Under statutes the benefit of the rec-

ord and possession of a vendor does not inure to vendee unless his possession is under record of deed on which he relies. Logan *v.* Robertson (Tex. Civ.), 83 S. W. 395.

664-44 Oliver *v.* Williams, 163 Ala. 376, 50 S. 937.

Requirement of continuity is satisfied by proof of parol transfer. Murray *v.* Romine, 60 Neb. 94, 82 N. W. 318; So. Omaha *v.* Meehan, 71 Neb. 230, 98 N. W. 691; Illinois S. Co. *v.* Jeka, 119 Wis. 122, 95 N. W. 97.

664-45 Illinois S. Co. *v.* Paczocha, 139 Wis. 23, 119 N. W. 550.

665-47 Party claiming adverse possession must show other party was not prevented by law from asserting his rights during period in which title is claimed to have been obtained. Breeden *v.* Moore, 82 S. C. 534, 64 S. E. 604.

666 That the possession is in record owner is presumed from the record title of the land. Brannock *v.* McHenry, 252 Mo. 1, 158 S. W. 385.

No presumption that possession is adverse where statutory period has not expired. Illinois Steel Co. *v.* Tamms, 154 Wis. 340, 141 N. W. 1011.

666-48 Sloss-Sheffield S. & I. Co. *v.* Taff, 178 Ala. 382, 59 S. 658; Janks *v.* McMahon, 21 Cal. App. 781, 133 P. 21; Avery *v.* Lock, 55 Fla. 612, 46 S. 844; Kirby *v.* Kirby, 236 Ill. 255, 86 N. E. 259; Le Sourd *v.* Edwards, 236 Ill. 169, 86 N. E. 212; Carver *v.* Elmore, 147 Ky. 521, 144 S. W. 1062; Flagg *v.* Phillips, 201 Mass. 216, 87 N. E. 598; Sheldon *v.* R. Co., 161 Mich. 503, 126 N. W. 1056; Collins *v.* Colleran, 86 Minn. 199, 90 N. W. 364; Kelly *v.* Palmer, 91 Minn. 133, 97 N. W. 578; Stayton *v.* Hastain, 221 Mo. 712, 120 S. W. 763; Johns *v.* Johns (Pa.), 90 A. 535; Walker *v.* Killian, 62 S. C. 482, 40 S. E. 887; Chicago, etc. R. Co. *v.* Johnson (Tex. Civ.), 156 S. W. 253; Sowles *v.* Minot, 82 Vt. 344, 73 A. 1025; Thompson *v.* Camper, 106 Va. 315, 55 S. E. 674.

Adverse possession not presumed. Monk *v.* Wilmington, 137 N. C. 322, 49 S. E. 345; Parker *v.* Banks, 79 N. C. 480. *Contra.* Ruffin *v.* Overby, 88 N. C. 369.

666-49 Lecroix *v.* Malone, 157 Ala. 434, 47 S. 725; Gilbert *v.* Co., 53 Fla. 319, 43 S. 754; Barrs *v.* Brace, 38 Fla. 265, 20 S. 991; McBride *v.* Caldwell, 142 Ia. 228, 119 N. W. 741 (possession presumptively under deed); Roth *v.* Munzenmaier, 118 Ia. 326, 91 N. W. 1072; Bowling *v.* Co., 134 Ky. 249, 120 S. W. 317; Stone *v.* Perkins, 217 Mo. 586, 117 S. W. 717; Missouri, etc. Co. *v.* Jewell, 200 Mo. 707, 98 S. W. 578; Heckescher *v.* Cooper, 203 Mo. 278, 101 S. W. 658; Butler *v.* Smith, 84 Neb. 78, 120 N. W. 1106; Horbach *v.* Boyd, 64 Neb. 129, 89 N. W. 644; Troxell *v.* Johnson, 52 Neb. 46, 71 N. W. 968; Johanson *v.* R. Co., 73 N. J. L. 767, 64 A. 1061; Betjemann *v.* R. Co., 127 App. Div. 83, 111 N. Y. S. 567; Bland *v.* Beasley, 145 N. C. 168, 58 S. E. 993; Enderlin Inv. Co. *v.* Nordhagen, 18 N. D. 517, 123 N. W. 390; Sommer *v.* Compton, 52 Or. 173, 96 P. 124; Montgomery *v.* Shaver, 40 Or. 244, 66 P. 923; Love *v.* Turner, 71 S. C. 322, 51 S. E. 101; Hatch *v.* Lusignan, 117 Wis. 428, 94 N. W. 332.

Presumption when vendor in possession. If the evidence is not clear as to whether a vendor remained in possession for himself or for vendee it will be presumed his possession was by sufferance. McClenahan *v.* Stevens, 118 Ia. 106, 91 N. W. 925; Succession of Zebriska, 119 La. 1076, 44 S. 893, *dist.* Roe *v.* Bundy, 45 La. Ann. 398, 12 S. 759; Horbach *v.* Boyd, 64 Neb. 129, 89 N. W. 644; Gardner *v.* Wright, 49 Or. 609, 91 P. 286.

Subsequent entry by grantor.—But if grantor subsequently makes entry it is not to be presumed he does so in subordination to title granted, especially if several years intervened between grant and entry. Horbach *v.* Boyd, 64 Neb. 129, 89 N. W. 644; Gardner *v.* Wright, 49 Or. 609, 91 P. 286.

Dower right.—A widow whose dower is not assigned is presumed to possess in right of dower, notwithstanding remarriage. Reed *v.* Hackney, 69 N. J. L. 27, 54 A. 229.

667-50 Meurin *v.* Kopplin (Tex. Civ.), 100 S. W. 984.

667-51 U. S. *v.* Chaves, 159 U. S. 452; U. S. *v.* Benito, 1 P. R. Fed. 267; Love *v.* Turner, 71 S. C. 322, 51 S. E. 101; Riffle *v.* Skinner, 67 W. Va. 75, 67 S. E. 1075; Smith *v.* Cornelius, 41 W. Va. 59, 23 S. E. 599.

No presumption from fact state made second grant it reacquired title after first grant. Love *v.* Turner, 71 S. C. 322, 51 S. E. 101.

Grant to public may be presumed after forty years' use of land as highway. Diehl *v.* R. Co., 17 Pa. D. 961.

Deed may be presumed against actual

belief of jury. Cadwalder *v.* Price, 111 Md. 310, 73 A. 273.

668-52 Baynard *v.* Every Evening Ptg. Co. (Del.), 77 A. 885; Carino *v.* Government, 7 Phil. Isl. 132.

668-53 **Possession presumptively rightful.**—Langston *v.* Cothran, 78 S. C. 23, 58 S. E. 956. Every one is presumed to possess for himself. Succession of Zebriska, 119 La. 1076, 44 S. 893. Long continued possession coupled with notorious acts of ownership raise presumption of grant from record owner. U. S. *v.* Chavez, 175 U. S. 509; Doty *v.* Jameson, 29 Ky. L. R. 507, 93 S. W. 638; Flanagan *v.* Mathiesen, 70 Neb. 223, 97 N. W. 287; In re Mayor, 73 App. Div. 394, 77 N. Y. S. 31; Townsend *v.* Boyd, 217 Pa. 386, 66 A. 1099; Jenkins *v.* McMichael, 21 Pa. Super. 161; Carter *v.* Co., 22 Pa. Super. 162.

Good faith is presumed from adverse possession. Bowman *v.* Owens, 133 Ga. 49, 65 S. E. 156.

668-54 Fletcher *v.* Fuller, 120 U. S. 534; Penny *v.* Co., 138 Fed. 769, 71 C. C. A. 135; Albertina *v.* Kapiolani, 14 Haw. 321; Kapiolani *v.* Cleghorn, 14 Haw. 330; Rennert *v.* Shirk, 163 Ind. 542, 72 N. E. 546; Mounts *v.* Mounts, 155 Ky. 363, 159 S. W. 818; Gerstner *v.* Payne, 160 Mo. App. 289, 142 S. W. 794; Criswell *v.* Noble, 61 Misc. 483, 113 N. Y. S. 954; Ovig *v.* Morrison, 142 Wis. 243, 125 N. W. 449; Wilkins *v.* Nicolai, 99 Wis. 178, 74 N. W. 103; Meyer *v.* Hope, 101 Wis. 123, 77 N. W. 720.

Presumption of fact only.—Carlisle *v.* Gibbs, 44 Tex. Civ. 189, 98 S. W. 192. It may be neutralized by failure of claimant on cross-examination to testify positively as to claim of right or assertion of ownership. Ryan *v.* Lincoln, 85 Neb. 539, 123 N. W. 1021.

Burden of proof.—Any one disputing presumption has burden of establishing his contention. Meyer *v.* Hope, 101 Wis. 123, 77 N. W. 720; Closuit *v.* Co., 130 Wis. 258, 110 N. W. 222.

Under adverse possession by husband and wife he is presumed to be in possession. Drinkwater *v.* Crist, 83 Ark. 293, 103 S. W. 733. Presumption negatived by showing title in wife by recorded deed. Bowman *v.* Owens, 133 Ga. 49, 65 S. E. 156.

Actual possession under color of title presumed to continue if there is no evidence of abandonment. Buck *v.* R. Co., 159 Ala. 305, 48 S. 699.

It is presumed grantor who subsequently takes deed from stranger and enters on land he conveyed did so by virtue of conveyance to him. Chatham *v.* Lansford, 149 N. C. 363, 63 S. E. 81.

668-55 Craven *v.* Craven (Ind.), 103 N. E. 333; Hoffman *v.* Zollman, 49 Ind. App. 664, 97 N. E. 1015; Cahill *v.* Mangold, 151 Ky. 156, 151 S. W. 373; Burton-W. Co. *v.* Bk., 130 Ky. 389, 113 S. W. 445; Bruner Granitoid Co. *v.* Lime & C. Co., 169 Mo. App. 295, 152 S. W. 601; Oregon R. Co. *v.* Hertzberg, 26 Or. 216, 37 P. 1019; Williams *v.* Green, 111 Va. 205, 68 S. E. 253; Illinois S. Co. *v.* Budzisz, 106 Wis. 499, 514, 82 N. W. 534; Illinois S. Co. *v.* Jeka, 119 Wis. 122, 95 N. W. 97; Illinois S. Co. *v.* Bilot, 109 Wis. 418, 440, 84 N. W. 855, 85 N. W. 402, 82 Am. St. 905; Pitman *v.* Hill, 117 Wis. 318, 94 N. W. 40.

"A conveyance of real property may be established by circumstances such as long possession and enjoyment of it, and such circumstances may create a presumption of fact, but not a presumption of law." Masterson *v.* Harrington (Tex. Civ.), 145 S. W. 626, *quot.* Carlisle *v.* Gibbs, 44 Tex. Civ. 189, 98 S. W. 192.

No presumption trees conveyed by owner of land on which they stand belonged to him. Yellow Poplar L. Co. *v.* Thompson, 108 Va. 612, 62 S. E. 358.

669-56 **Relations of parties to each other will raise to presumption** use of property is permissive and not adverse —as between father and son. That presumption continues until there is open assertion of hostile title, other than mere possession, and knowledge thereof comes to owner, regardless of extent of dominion exercised by possessor. Collins *v.* Colleran, 86 Minn. 199, 90 N. W. 364; O'Boyle *v.* McHugh, 66 Minn. 390, 69 N. W. 37. Such presumption may be rebutted by proof parol gift of land was made to son. Malone *v.* Malone, 88 Minn. 418, 93 N. W. 605.

No presumption that claimant's actual possession began at date of his deed. Stockley *v.* Cissna, 119 Fed. 812, 56 C. C. A. 324.

Nor of occupation under void deed. Murphy *v.* C., 187 Mass. 361, 375, 73 N. E. 524.

Good faith presumed when claim of right under color of title shown. McBride *v.* Caldwell, 142 Ia. 228, 119 N. W. 741.

Possession presumed to have continued under deed if entry made under it. Feller *v.* Lee, 225 Mo. 319, 124 S. W. 1129.

669-57 Ashford *v.* McKee (Ala.), 62 S. 879; Lyon *v.* McGowan, 156 Ala. 462, 47 S. 342; Bradbury *v.* Dumond, 80 Ark. 82, 96 S. W. 390; Myers *v.* Berven (Cal.), 137 P. 260; Quigg *v.* Zeugin, 82 Conn. 437, 74 A. 753; New Domain O. & G. Co. *v.* Co., 134 Ky. 792, 121 S. W. 699; Winburn *v.* Witt, 134 Ky. 339, 120 S. W. 293; Daniel *v.* Middleton, 132 Ky. 172, 116 S. W. 721; Robinson *v.* Huffman (Ky.), 113 S. W. 458; Clark *v.* McAtee, 227 Mo. 152, 127 S. W. 37; Grimes *v.* Bryan, 149 N. C. 248, 63 S. E. 106; Smith *v.* R. Co., 5 O. C. C. (N. S.), 194; Parker *v.* Wolf (Or.), 138 P. 463; Washam *v.* Harrison (Tex. Civ.), 122 S. W. 52; Vann *v.* Denson, 56 Tex. Civ. 220, 120 S. W. 1020; Texas, etc. R. Co. *v.* Broom, 53 Tex. Civ. 78, 114 S. W. 655; Bryant *v.* Cadle, 18 Wyo. 64, 104 P. 23. Accepting deed is not inconsistent with adverse possession thereafter continued as begun. Frey *v.* Myers (Tex. Civ.), 113 S. W. 592.

670-58 Barry *v.* Madaris, 156 Ala. 475, 47 S. 152; Clarke *v.* Dunn, 161 Ala. 633, 50 S. 93; Roe *v.* Doe, 162 Ala. 151, 50 S. 230; Bradbury *v.* Dumond, 80 Ark. 82, 96 S. W. 390; Dangerfield *v.* Williams, 26 App. Cas. (D. C.) 508; Baxter *v.* Wetherington, 128 Ga. 801, 58 S. E. 467; Roberson *v.* Downing, 126 Ga. 175, 54 S. E. 1020; Godfrey *v.* Co., 228 Ill. 487, 81 N. E. 1089; Bellefontaine Co. *v.* Neidringhaus, 181 Ill. 426, 55 N. E. 184; Anderson *v.* Co. (Ky.), 128 S. W. 85; Dils *v.* Justice, 137 Ky. 822, 127 S. W. 472; Richie *v.* Owsley, 137 Ky. 63, 121 S. W. 1015; New Domain O. & G. Co. *v.* Co., 134 Ky. 792, 121 S. W. 699; Northup *v.* Sumner, 132 Ky. 156, 116 S. W. 699; Hillman L. & I. Co. *v.* Marshall (Ky.), 119 S. W. 180; Jones *v.* Goss, 115 La. 926, 40 S. 357; Murphy *v.* C., 187 Mass. 361, 375, 73 N. E. 524; Kingston *v.* Guck, 155 Mich. 264, 118 N. W. 967 (such evidence may consist of separate instruments if land conveyed and dealt with by grantee as single tract); Lang *v.* Co., 145 Mich. 370, 108 N. W. 678; Nall *v.* Conover, 223 Mo. 477, 122 S. W. 1039; Gore *v.* McPherson, 161 N. C. 638, 77 S. E. 835; Bond *v.* Beverly, 152 N. C. 56, 67 S. E. 55; Smith *v.* R. Co., 5 O. C. C. (N. S.) 194; Kittel *v.* Steger, 121 Tenn. 400, 117 S. W. 500; Rodriguez *v.* Priest (Tex. Civ.), 126 S. W. 1187; McCaleb *v.* Campbell (Tex. Civ.), 116 S. W. 111; Houston O. Co. *v.* Kimball (Tex. Civ.), 114 S. W. 662; Goad *v.* Walker (W. Va.), 80 S. E. 873; Ovig *v.* Morrison, 142 Wis. 243, 125 N. W. 449; Illinois S. Co. *v.* Bilot, 109 Wis. 418, 440, 84 N. W. 855, 85 N. W. 402, 82 Am. St. 905.

Certificate of survey. Le Moyne *v.* Litton (Ky.), 167 S. W. 912.

Description of property must be sufficient. Fore *v.* Berry, 94 S. C. 71, 78 S. E. 706.

In Georgia possession will not extend beyond land actually occupied unless deed recorded. Baxley *v.* Baxley, 117 Ga. 60, 43 S. E. 436.

672-59 New Haven T. Co. *v.* Camp, 81 Conn. 539, 71 A. 788; Wade *v.* McDougie, 59 W. Va. 113, 128, 52 S. E. 1026.

Extent of possession for wharfage purposes. Montgomery *v.* Shaver, 40 Or. 244, 66 P. 923.

Possession of timber.—If deed under which claim is asserted excepted timber on land conveyed possession of land would not affect right to timber. Weatherwax L. Co. *v.* Ray, 38 Wash. 545, 80 P. 775; Brodack *v.* Morsbach, 38 Wash. 72, 80 P. 275.

672-60 Glyn *v.* Howell (Eng.), (1909) 1 Ch. 666 (suggesting possible exceptions); Walker *v.* Wyman, 157 Ala. 478, 47 S. 1011; Matthews *v.* C. I. & R. Co., 157 Ala. 23, 47 S. 78; Tennessee C. Co. *v.* Linn, 123 Ala. 112, 26 S. 245, 82 Am. St. 108; Poole *v.* Oliver, 89 Ark. 578, 117 S. W. 747; Langhorst *v.* Rogers, 88 Ark. 318, 114 S. W. 915; Swank *v.* Co., 15 Ida. 353, 98 P. 297 (applying rule to possession under unrecorded deed against subsequent bona fide purchaser whose deed recorded); Bowling *v.* Co., 134 Ky. 249, 120 S. W. 317; Meade *v.* Ratliff, 133 Ky. 411, 118 S. W. 271; Smith *v.* R. Co., 5 O. C. C. (N. S.) 194; Holland *v.* Nance, 102 Tex. 177, 114 S. W. 346; Blaske *v.* Settegast (Tex. Civ.), 123 S. W. 220; Vann *v.* Denson, 56 Tex. Civ. 220, 120 S. W. 1020 (statutes sometimes affect the question); Wall *v.* Lubbock (Tex. Civ.), 118 S. W. 886; Downs *v.* Powell, 54 Tex. Civ. 119, 116 S. W. 873;

Simpson Bk. *v.* Smith, 52 Tex. Civ. 349, 111 S. W. 145; Williams *v.* R. Co., 52 Tex. Civ. 217, 111 S. W. 877; Sowles *v.* Minot, 82 Vt. 344, 73 A. 1025; Goad *v.* Walker (W. Va.), 80 S. E. 873; Lafitte *v.* Superior, 142 Wis. 73, 125 N. W. 105.

Authorities to the contrary.—See dissenting opinion in Tennessee C. Co. *v.* Linn, 123 Ala. 112, 26 S. 245, 82 Am. St. 108.

If deed in evidence, though claimant does not rely on it, he can not claim beyond its limits unless he establishes possession. South *v.* Deaton, 113 Ky. 312, 68 S. W. 137, 1105.

Deed does not extend to new land formed by accretion, though purporting to convey same in connection with principal tract. Stockney *v.* Cissna, 119 Fed. 812, 56 C. C. A. 324.

Color of title as affecting weight of evidence.—See Illinois S. Co. *v.* Bilot, 109 Wis. 118, 440, 84 N. W. 855, 85 N. W. 402, 82 Am. St. 905.

Rule where title void in part.—If title void as to part of land conveyed, occupation of part to which grantee had title will not give him constructive possession of that to which he had no title, except as he actually occupies it. Henry *v.* Brown, 143 Ala. 446, 39 S. 327; Mitchell *v.* Bond, 84 Miss. 72, 84, 36 S. 148.

Parol evidence competent to show how much land plaintiff claimed by virtue of adverse possession. Dorland *v.* Westgevitch, 140 Ala. 283, 37 S. 382.

673-61 Crist *v.* Boust, 26 Pa. Super. 543. See Mahoney *v.* R. Co., 82 S. C. 215, 64 S. E. 228; Lake *v.* Earnest, 53 Tex. Civ. 555, 116 S. W. 865.

Exception.—General rule does not govern where one takes a few acres in an uncultivated township for mere purpose of gaining title to entire township. Lowrence *v.* Co., 144 Ala. 524, 41 S. 612.

Adverse possession under deed will not extend to land of one not a party to deed, though it be included in deed held by claimant, no part being occupied. Walsh *v.* Wheelwright, 96 Me. 174, 189, 52 A. 649, *over.* Noyes *v.* Dyer, 27 Me. 468.

If by mistake wrong tract is conveyed and grantee occupies that which he was entitled to, his possession will result in title. Moore *v.* Crump, 81 Miss. 612, 27 S. 109.

674-62 Lewis *v.* Dillingham, 167 Fed. 779, 93 C. C. A. 267; Tennessee C. Co. *v.* Linn, 123 Ala. 112, 26 S. 245, 82 Am. St. 108; Powers *v.* Hatter, 152 Ala. 636, 44 S. 859; King *v.* Campbell, 89 Ark. 450, 116 S. W. 899; Roberts *v.* Merwin, 80 Conn. 347, 68 A. 377; Johnson *v.* Thomas, 23 App. Cas. (D. C.) 141; Richie *v.* Owsley, 137 Ky. 63, 121 S. W. 1015; Kountze *v.* Hatfield, 30 Ky. L. R. 589, 99 S. W. 262; Hackett *v.* Webster, 97 Md. 404, 55 A. 480; So. Omaha *v.* Meehan, 71 Neb. 230, 98 N. W. 691; Love *v.* Turner, 71 S. C. 322, 51 S. E. 101; Lowry *v.* McDaniel (Tex. Civ.), 124 S. W. 710; Thompson *v.* R. Co. (Tex. Civ.), 123 S. W. 616; White *v.* Eavenson, 46 Tex. Civ. 158, 101 S. W. 1029; Waller *v.* Leonard, 89 Tex. 507, 35 S. W. 1045; Webb *v.* Lyeria, 43 Tex. Civ. 124, 94 S. W. 1095; Wade *v.* McDougle, 59 W. Va. 113, 127, 52 S. E. 1026.

Payment of taxes.—As bearing on extent of claimant's possession it may be shown on what land he paid taxes. White *v.* Eavenson, 46 Tex. Civ. 158, 101 S. W. 1029.

Extent of adverse possession.—It is not required possessor, in absence of inclosure, be in a physical constant, visible occupancy by improvement of every part of the premises. It is enough if improvement made in one place suggests hostile possession of surrounding land. Texas, etc. R. Co. *v.* Broom, 53 Tex. Civ. 78, 114 S. W. 655 (and the whole be claimed and described in the pleading); Illinois S. Co. *v.* Jeka, 123 Wis. 419, 101 N. W. 399.

Possession of part of a lot extends to the whole if limits well defined. Washans *v.* Harrison (Tex. Civ.), 122 S. W. 52. Marking lines and fixing corners are relevant matters to show extent of claim. Texas, etc. R. Co. *v.* Broom, 53 Tex. Civ. 78, 114 S. W. 655.

In Kentucky constructive possession is recognized. New Domain O. & G. Co. *v.* Co., 134 Ky. 792, 121 S. W. 699.

674-63 Anniston *v.* Edmondson, 145 Ala. 557, 40 S. 505; Armstrong *v.* Wilcox, 57 Fla. 30, 49 S. 41; Hansen *v.* Owens, 132 Ga. 648, 64 S. E. 800 (if deed signed only by part of those in whom title vested conditions of adverse possession must be proved against those who did not sign it as though it had not been executed); Traver *v.* Deppen, 132 Ga. 798, 65 S. E. 177; Dodge *v.* Cowart, 131 Ga. 549, 62 S.

E. 987; Street *v.* Collier, 118 Ga. 470, 45 S. E. 294; Little *v.* Crawford, 13 Ida. 146, 88 P. 974; Illinois C. R. Co. *v.* Cavins, 238 Ill. 380, 87 N. E. 371; Burks *v.* Cox, 150 Ky. 511, 150 S. W. 662; Hatfield *v.* Hatfield (Ky.), 113 S. W. 59; Pryor *v.* Buffalo, 197 N. Y. 123, 90 N. E. 423; Green *v.* Horn, 128 App. Div. 686, 112 N. Y. S. 993; Brown *v.* Hutchinson, 155 N. C. 205, 71 S. E. 302; Hill *v.* Lane, 149 N. C. 267, 62 S. E. 1074; Carr *v.* Miller (Tex. Civ.), 123 S. W. 1158; Merriman *v.* Blalack, 56 Tex. Civ. 594, 121 S. W. 552; Knight *v.* Grim, 110 Va. 400, 66 S. E. 42 (condemnation proceedings); Goetter *v.* Moore, 53 Wash. 5, 101 P. 365 (sheriff's certificate of sale under foreclosure); Columbia, etc. R. Co. *v.* Seattle, 33 Wash. 513, 523, 74 P. 670; Pickens *v.* Stout, 67 W. Va. 422, 68 S. E. 354. But not if description contained therein is insufficient to locate land. McBride *v.* Lowe, 175 Ala. 408, 57 S. 832. **Its use** should be so limited. Lay *v.* Fuller, 178 Ala. 375, 59 S. 609.

Even though description of land is ambiguous. Brannan *v.* Henry, 175 Ala. 454, 57 S. 967.

The record of a deed showing that said deed was acknowledged before a notary public, but not showing that any notarial seal was attached is admissible as color of title. McBride *v.* Lowe, 175 Ala. 408, 57 S. 832.

Description insufficient. Rogers *v.* Cattle Co. (Tex. Civ.), 38 S. W. 656, *rev.* 39 S. W. 1081.

Color of title exists wherever there is a reasonable doubt regarding validity of apparent title. Cameron *v.* U. S. 148 U. S. 301. A patent to a deceased person is not color of title in favor of one not his heir if it is not shown he conveyed land. Anniston *v.* Edmondson, 145 Ala. 557, 40 S. 505. Antedated deed is color of title from date of execution. Anniston *v.* Edmondson, supra. Under Texas statute color of title is such a defective muniment of title as is not wanting in intrinsic fairness and honesty. Hussey *v.* Moser, 70 Tex. 42, 7 S. W. 606. A wife's deed of separate property does not constitute color of title in absence of a proper acknowledgment, but it may be shown by parol that acknowledgment was made. Veeder *v.* Gilmer, 47 Tex. Civ. 464, 105 S. W. 331. A deed not naming grantee is not admissible to prove color of title. Nelson *v.* Cooper, 108 Fed. 919, 48 C. C. A. 140.

Husband cannot claim deed to wife as color of title as against her. Poole *v.* Oliver, 89 Ark. 578, 117 S. W. 747.

674-64 United States *v.* One Lot of Land, 178 Fed. 334; Noble *v.* Saffold (Ala.), 62 S. 515; Crowder *v.* Co., 162 Ala. 151, 50 S. 230; Clarke *v.* Dunn, 161 Ala. 633, 50 S. 93; Hoyle *v.* Mann, 144 Ala. 516, 41 S. 835; Dorlan *v.* Westervitch, 140 Ala. 283, 37 S. 382; Reddick *v.* Long, 124 Ala. 260, 27 S. 402; Henry *v.* Brown, 143 Ala. 446, 39 S. 325; Fletcher *v.* Josephs, 105 Ark. 646, 152 S. W. 293; Johnson *v.* Elder, 92 Ark. 30, 121 S. W. 1066; Parker *v.* Betts, 47 Colo. 428, 107 P. 816; New Haven T. Co. *v.* Camp, 81 Conn. 539, 71 A. 788; Dangerfield *v.* Williams, 26 App. Cas. (D. C.) 508; Gilbert *v.* Co., 53 Fla. 319, 43 S. 754; Garbutt L. Co. *v.* Camp, 137 Ga. 592, 73 S. E. 841; Atlantic C. L. R. Co. *v.* Williams, 5 Ga. App. 647, 63 S. E. 671; Carpenter *v.* Fletcher, 239 Ill. 440, 88 N. E. 162 (official deed may be color of title independently of judgment); Hughes *v.* Wyatt (Ia.), 125 N. W. 334; Roth *v.* Munzenmaier, 118 Ia. 326, 91 N. W. 1072; McCash *v.* Penrod, 131 Ia. 631, 109 N. W. 180; Bryant *v.* Strunk (Ky), 151 S. W. 381 (void patent); Mitchell *v.* Bond, 84 Miss. 72, 36 S. 148; Dunnington *v.* Hudson, 217 Mo. 93, 116 S. W. 1083; Perkins L. & L. Co. *v.* Irvin, 200 Mo. 485, 98 S. W. 580; Criswell *v.* Noble, 61 Misc. 483, 113 N. Y. S. 954; Bond *v.* Beverly, 152 N. C. 56, 67 S. E. 55; McFarland *v.* Cornwall, 151 N. C. 428, 66 S. E. 454; Chatham *v.* Lonsford, 149 N. C. 363, 63 S. E. 81; Neal *v.* Davis, 53 Or. 423, 99 P. 69; Ford *v.* Ford, 24 S. D. 644, 124 N. W. 1108; Harris *v.* Iglehart, 52 Tex. Civ. 6, 113 S. W. 170; Alford *v.* Williams, 41 Tex. Civ. 436, 91 S. W. 636; Hassam *v.* Safford, 82 Vt. 444, 74 A. 197; Yellow Poplar L. Co. *v.* Thompson, 108 Va. 612, 62 S. E. 358 (if regular on its face); Schlossmacher *v.* Co., 52 Wash. 588, 100 P. 1103; Lara *v.* Sandell, 52 Wash. 53, 100 P. 166; Hamilton *v.* Witner, 50 Wash. 689, 97 P. 1084; Schlarb *v.* Castaing, 50 Wash. 331, 97 P. 289; Deepwater R. Co. *v.* Honaker, 66 W. Va. 136, 66 S. E. 104; Iguano L. & M. Co. *v.* Jones, 65 W. Va. 59, 64 S. E. 640; S. *v.* Lumb. Co., 64 W. Va. 673, 63 S. E. 372; Wade *v.* McDougle, 59 W. Va. 113, 127, 52 S. E. 1026; McCann *v.*

Welch, 106 Wis. 142, 81 N. W. 996; Hatch *v.* Lustman, 117 Wis. 428, 94 N. W. 332; Pitman *v.* Hill, 117 Wis. 318, 94 N. W. 40; Bryant *v.* Cadle, 18 Wyo. 64, 104 P. 23. *Contra* as to void award of school lands. Garrison *v.* Arnett (Tex. Civ.), 126 S. W. 611, *foll.* Smith *v.* Power, 23 Tex. 30; Howell *v.* Henry, 147 Ala. 13, 47 S. 132 (verbal contract and delivery by vendor to purchaser of deed from former's grantor); Pitcher *v.* Olson, 175 Mich. 320, 119 N. W. 3 (tax deed void on face); Work *v.* Mayes, 12 Ariz. 339, 100 P. 813 (it seems; but rule as stated in text applies to deed void for matters extrinsic to it, if it purports to convey land in question).

But see Good *v.* Walker (W. Va.), 80 S. E. 873.

Not if void for indefiniteness of description.—Hardy *v.* Randall, 173 Ala. 516, 55 S. 997.

It is not necessary that the deed be sufficient to pass title to be admitted as color of title. McBride *v.* Lowe, 175 Ala. 108, 57 S. 832.

**Deeds executed by married women and "not acknowledged, as required by law in order to render them effective as deeds. The record shows that the trial court did not admit them as muniments of title, but as circumstances or evidence shedding some light upon the nature of the possession held by Moses D. Arledge and his wife for a long period of time stated in the fourth finding, and we hold that that ruling was correct." Carr *v.* Alexander (Tex. Civ.), 149 S. W. 218.

Statutes to contrary exist.—Keith *v.* Guedry (Tex. Civ.), 114 S. W. 392. Prima facie evidence of title is required by some statutes, in which case a tax deed relied upon must be accompanied by evidence of authority to make sale. Carpenter *v.* Fletcher, 239 Ill. 440, 88 N. E. 162. Registration of deed required before it can become color of title. Breckenridge C. Co. *v.* Scott, 121 Tenn. 88, 114 S. W. 930.

Entry must be shown.—A deed offered to show color of title must be accompanied or followed by proof showing grantee entered and claimed under it. National Bk. *v.* Co., 108 Ala. 635, 19 S. 47; Henry *v.* Frohlichstein, 149 Ala. 320, 43 S. 126.

Certainty of description.—If deed describes land so as to enable a surveyor to ascertain and locate it, it is admissible (Dorlan *v.* Westervitch, 140 Ala. 283, 37 S. 382); otherwise not. Atlanta & S. W. P. R. Co. *v.* R. Co., 125 Ga. 529, 54 S. E. 736.

**Parol evidence is admissible to show a married woman's deed was in fact properly acknowledged though certificate defective. Immaterial action to correct certificate is barred. Veeder *v.* Gilmer (Tex. Civ.), 120 S. W. 584.

Notice of adverse claim required where conveyance void. Bowling *v.* Co., 134 Ky. 249, 120 S. W. 317.

676-65 *Comp.* Brinneman *v.* Scholem, 95 Ark. 65, 128 S. W. 584.

676-66 See New Haven T. Co. *v.* Camp, 81 Conn. 539, 71 A. 788.

Color of title to additional land acquired after possession begun may extend area of claim. Breckenridge C. Co. *v.* Scott, 121 Tenn. 88, 114 S. W. 930.

676-67 Riley *v.* Fletcher (Ala.), 64 S. 85 (tax records and tax deeds); Swindall *v.* Ford (Ala.), 63 S. 651; Lay *v.* Fuller, 178 Ala. 375, 59 S. 609 (deed); Gibson *v.* Huff (Colo.), 141 P. 510 (tax deed); Turner *v.* Neisler (Ga.), 80 S. E. 461; Maring *v.* Meeker, 263 Ill. 136, 105 N. E. 31; Plock *v.* Plock, 139 Ill. App. 416; Fore *v.* Berry, 94 S. C. 71, 78 S. E. 706; Hooper *v.* Acuff (Tex. Civ.), 159 S. W. 934; Johnson *v.* Bartlett, 50 Wash. 114, 96 P. 833 (certificate of sale and sheriff's deed).

Tax receipts competent to show assertion of title to exclusion of that claimed by defendant. Staley *v.* Stone, 41 Tex. Civ. 299, 92 S. W. 1017. But if not ancient, they must be proved. Chastang *v.* Chastang, 141 Ala. 451, 462, 37 S. 799, 109 Am. St. 45.

A bond for a deed is insufficient. Smith *v.* Tucker, 250 Ill. 50, 95 N. E. 45.

677-68 Watters *v.* Brown, 177 Ala. 78, 58 S. 291; Carney *v.* Hennessey, 74 Conn. 107, 49 A. 910, 92 Am. St. 199, 53 L. R. A. 699; Miller *v.* Goodin (Ky.), 124 S. W. 818; Murray *v.* Romine, 60 Neb. 94, 82 N. W. 318; Hesser *v.* Siepmann, 35 Wash. 14, 76 P. 295.

Parol contract for sale of land or a gift of it by parol and occupancy of it may be basis of adverse possession. Murphy *v.* Roney, 26 Ky. L. R. 634, 82 S. W. 396; Malone *v.* Malone, 88 Minn. 418, 93 N. W. 605. But privity existing between parties must be severed by assertion of adverse right clearly brought home to vendor. Mar-

bach *v.* Holmes, 105 Va. 178, 52 S. E. 828.

677-69 Myers *v.* Berven (Cal.), 137 P. 260.

678-70 Record of void proceedings. Quinn *v.* R. Co., 253 Mo. 48, 161 S. W. 820.

Complaint in intervention suit containing self-serving declarations is not admissible in favor of any one claiming under or through plaintiff. Sutton *v.* Whetstone, 21 S. D. 341, 112 N. W. 850.

678-71 Chess *v.* Grant, 163 Fed. 500, 90 C. C. A. 46; Jordan *v.* Smith (Ala.), 64 S. 317 (boundary line agreement); Suit *v.* Iron Co., 172 Ala. 101, 55 S. 639; Knight *v.* Hunter, 155 Ala. 238, 46 S. 235 (tax certificate, though not color of title, competent to show character of possession and explain failure to file statutory notice of adverse claim); Henry *v.* Frohlichstein, 149 Ala. 330, 43 S. 126; Cassin *v.* Nicholson, 154 Cal. 497, 98 P. 190; Nathan *v.* Dierssen, 146 Cal. 63, 79 P. 739; Scott *v.* Herrell, 31 App. Cas. (D. C.) 45; Wiggins *v.* Brewster, 131 Ga. 162, 62 S. E. 40; Daniels *v.* Dingman, 140 Ia. 386, 118 N. W. 373; Leverett *v.* Loeb, 117 La. 310, 41 S. 584; Caldwell L. Co. *v.* Cloyd (N. C.), 81 S. E. 752 (lease); Brown *v.* Hutchinson, 155 N. C. 205, 71 S. E. 302; Dill *v.* Westbrook, 226 Pa. 217, 75 A. 252 (admission of title in another); Surghenor *v.* Ducey (Tex. Civ.), 139 S. W. 22; Hassam *v.* Safford, 82 Vt. 444, 74 A. 197 (affirmative evidence showing grantee claims land need not be offered); Morgan *v.* R. Co., 50 Wash. 480, 97 P. 510.

The instrument must be relied on as the foundation of the claim. Van Matre *v.* Swank, 147 Wis. 93, 131 N. W. 982.

Record of a suit between plaintiff and defendant's grantor is competent to show latter's entry was under contract. Marbach *v.* Holmes, 105 Va. 178, 52 S. E. 828.

Widow's will made while in possession under her statutory right, not admissible in favor of her devisees. Allison *v.* Robinson, 136 Ala. 434, 34 S. 966.

Books, leases and orders of town officers indicating acts of ownership on part of town competent, in connection with proof of occupation by its lessees. Murphy *v.* C., 187 Mass. 361, 73 N. E. 524.

Adjustment of boundary line. — A town may prove by indenture between it and owner of land adjoining that in dispute an adjustment of boundary line and mutual release of claims to title. Murphy *v.* C., 187 Mass. 361, 73 N. E. 524.

Fragments of paper and wax obtained by defendant from his grantor and which former believed to be original grant from state, admissible though they could not be read. Mitchell *v.* Crummey, 134 Ga. 383, 67 S. E. 1042.

679-72 Patton *v.* Fox, 179 Mo. 525, 78 S. W. 804.

A deed from husband to wife, executed before marriage is competent to show extent of her claim whether or not title was shown to have been in him. Alford *v.* Williams, 41 Tex. Civ. 436, 91 S. W. 636.

Unrecorded deed admissible against holder of subsequent deed recorded where claimant in possession when later deed executed. Roberts *v.* Decker, 120 Wis. 102, 97 N. W. 519.

A map or plat if shown to be correct, is competent to identify land. Driver *v.* King, 145 Ala. 585, 595, 40 S. 315.

Legal or equitable title may be shown by either party. Pierce *v.* Co., 52 Tex. Civ. 205, 114 S. W. 857.

679-73 Mulder *v.* Stokes (Ala.), 63 S. 563; Anniston *v.* Edmondson, 145 Ala. 557, 40 S. 505; Godfrey *v.* Co., 228 Ill. 487, 498, 81 N. E. 1089; Davis *v.* Clinton, 25 Ky. L. R. 2021, 79 S. W. 259; Reed *v.* Hackney, 69 N. J. L. 27, 54 A. 229; Sutton *v.* Whetstone, 21 S. D. 341, 112 N. W. 850.

Not necessary to show that the purported grantor was in possession of the land. McBride *v.* Lowe, 175 Ala. 408, 57 S. 832.

Sheriff's deed to plaintiff's grantor not evidence of possession by plaintiff. Prevatt *v.* Harrelson, 132 N. C. 250, 43 S. E. 800.

Deed to record owner competent without proof grantor had title. Nathan *v.* Dierssen, 146 Cal. 63, 79 P. 739.

Land must be identified.—Deeds executed by one claiming title independently of paper evidence are competent to show he was asserting title, if accompanied by plats showing location of tracts conveyed. Hackett *v.* Webster, 97 Md. 404, 413, 55 A. 480.

679-74 Cooper *v.* Slaughter, 175 Ala. 211, 57 S. 477; Baker *v.* White, 136 Ga. 541, 71 S. E. 871; Vandalia R. Co. *v.* Assn. (Ind.), 103 N. E. 1071; Van-

dalia R. Co. *v.* Wheeler (Ind.), 103 N. E. 1029; Rennert *v.* Shirk, 163 Ind. 542, 72 N. E. 546; Cadwalader *v.* Price, 111 Md. 310, 73 A. 273; Merritt *v.* Westerman, 165 Mich. 535, 131 N. W. 66; Sawbridge *v.* Fergus Falls, 101 Minn. 378, 112 N. W. 385; Flanagan *v.* Mathiesen, 70 Neb. 223, 97 N. W. 287; Silverton *v.* Brown, 63 Or. 118, 128 P. 45; Wier Lumb. Co. *v.* Conn (Tex. Civ.), 156 S. W. 276; Smith *v.* Adoue & Lobit (Tex. Civ.), 154 S. W. 258 (accepting deed); Unknown Heirs of Criswell *v.* Robbins (Tex. Civ.), 152 S. W. 210; Staley *v.* Stone, 41 Tex. Civ. 299, 92 S. W. 1017; Pioneer I. & T. Co. *v.* Board, 35 Utah 1, 99 P. 150.

Also the acts of his predecessors in title. Roy *v.* Moore, 85 Conn. 159, 82 A. 223, cutting grass and cultivating garden.

Cutting timber.—Doe *v.* Roe (Del.), 80 A. 352.

Occasional cutting insufficient.—Muse *v.* Payne, 141 Ky. 30, 137 S. W. 788.

Execution of leases to land not in controversy may be shown to establish acts of ownership over whole tract. South *v.* Deaton, 113 Ky. 312, 68 S. W. 137, 1107.

Inventory and appraisement of estate not competent to show deceased exercised acts of ownership over land. Nathan *v.* Dierssen, 146 Cal. 63, 79 P. 739.

Correspondence looking to purchase of land, competent. Mears *v.* L. Co., 18 N. D. 384, 121 N. W. 916.

Claimant's inconsistent acts and admissions relevant. Pryc *v.* Gullion, 143 Ia. 719, 121 N. W. 563; Butler *v.* Smith, 84 Neb. 78, 120 N. W. 1106.

Parol or unsealed agreement entered into by possessor may be shown to have been made under mistake of fact. Lake Shore, etc. R. Co. *v.* Johnson, 157 Mich. 115, 121 N. W. 267.

680-75 Big Sandy I. & S. Co. *v.* Williams (Ala.), 63 S. 1011; Brannan *v.* Henry, 175 Ala. 454, 57 S. 967; Clark *v.* Dunn, 161 Ala. 633, 50 S. 93; Knight *v.* Hunter, 155 Ala. 238, 46 S. 225 (to show claim of ownership and extent of possession; not conclusive); Fenton *v.* Collum (Ark.), 150 S. W. 140; Taylor *v.* McCowen, 154 Cal. 798, 99 P. 351; Janke *v.* McMahon, 21 Cal. App. 781, 133 P. 21; Merwin *v.* Backer, 80 Conn. 338, 68 A. 373; Merwin *v.* Morris, 71 Conn. 555, 42 A. 855; Mitchell *v.* Crummey, 134 Ga. 383, 67 S. E. 1042; Bosley *v.* Stewart, 140 Ia. 101, 117 N. W. 1103 (not conclusive); Mahoning C. Co. *v.* Dowling (Ky.), 124 S. W. 370 (not sufficient of itself); Lake Shore, etc. R. Co. *v.* Johnson, 157 Mich. 115, 121 N. W. 267; Miskwabik D. Assn. *v.* Croze, 140 Mich. 194, 103 N. W. 558; Gaston *v.* May, 120 Minn. 154, 138 N. W. 1025; Nall *v.* Conover, 223 Mo. 477, 122 S. W. 1039; Stone *v.* Perkins, 217 Mo. 586, 117 S. W. 717 (payment of taxes and cutting timber evidence of ownership); Melain *v.* Bird, 120 N. Y. S. 1032 (as circumstance, weight of which is lessened if payment necessary to protect rights otherwise acquired); Mears *v.* L. Co., 18 N. D. 384, 121 N. W. 916; Cosgrove *v.* Franklin, 35 R. I. 527, 87 A. 544; Langston *v.* Cothran, 78 S. C. 23, 58 S. E. 956; Harris *v.* Wagnon (Tex.), 148 S. W. 606; Randolph *v.* Lewis (Tex. Civ.), 163 S. W. 647; Houston O. Co. *v.* Jones (Tex. Civ.), 161 S. W. 92 (nonpayment of taxes); Hooper *v.* Acuff (Tex. Civ.), 159 S. W. 934; Unknown Heirs of Criswell *v.* Robbins (Tex. Civ.), 152 S. W. 210; Schiele *v.* Kimball (Tex. Civ.), 150 S. W. 303; Staley *v.* Stone, 41 Tex. Civ. 299, 92 S. W. 1017.

Contra under contract *inter partes*. Chatfield *v.* Co., 88 Ark. 395, 114 S. W. 473.

See King *v.* Campbell, 89 Ark. 450, 116 S. W. 899.

Adverse possession.—Greenwich Coal & Com. Co. *v.* Learn, 234 Pa. 180, 83 A. 74.

Payment of taxes some evidence state has parted with title. Busby *v.* R. Co., 45 S. C. 312, 23 S. E. 50. It is a significant circumstance, inconsistent with any other theory than that payor claimed property. Dredla *v.* Patz, 78 Neb. 506, 111 N. W. 136; Pitman *v.* Hill, 117 Wis. 318, 94 N. W. 40. It may be shown who listed property for taxation and when the several parties paid taxes on it. Walling *v.* Eggers, 25 Ky. L. R. 1563, 78 S. W. 428. And when title is claimed by a town it may be shown that property not assessed. Murphy *v.* C., 187 Mass. 361, 371, 73 N. E. 524. Payment of taxes on entire tract held without color of title does not show possession of it. Hackett *v.* Webster, 97 Md. 404, 55 A. 480. Is not evidence of actual or constructive possession. Archibald *v.* R. Co., 157 N. Y. 574, 52 N. E. 567; Con-

solidated I. Co. *v.* Mayor, 166 N. Y. 92, 59 N. E. 713.

Reason for not paying taxes.—Witness may not testify of his uncommunicated reason for not paying taxes. Lawrence *v.* Co., 144 Ala. 524, 41 S. 612.

Fact land was assessed to a person is not proof he had paid taxes, or of ownership. Kennedy *v.* Sanders, 90 Miss. 524, 43 S. 913.

As against a claim of title by a city, acts of its officers in assessing land is good, if not the best, evidence it was possessed adversely to it. Mayor, etc. *v.* Rowe, 107 Md. 704, 67 A. 93.

It may be shown that the claimant did not return land for taxation. Driver *v.* King, 145 Ala. 585, 40 S. 315; Trustees *v.* Lulia, 16 Haw. 630. Fact land was not assessed to claimant is not controlling; he may have held under unrecorded deed or parol contract. Lusk *v.* Pelter, 101 Va. 790, 45 S. E 333. Significance attaches to nonpayment of taxes by claimant, and none can be given his supposition he had paid them. Standard Q. Co. *v.* Habishaw, 132 Cal. 115, 64 P. 113; Todd *v.* Weed, 84 Minn. 4, 86 N. W. 756.

Assessment books made from assessment lists are not conclusive as to whom land assessed. Claimant may testify he returned it for taxation, lists having been destroyed. Anniston *v.* Edmondson, 145 Ala. 557, 40 S. 505.

Inventory of property owned by claimant, though in handwriting of assessor, is competent to prove land not returned by him for taxation. Webb *v.* Lyeria, 43 Tex. Civ. 124, 94 S. W. 1095.

Parol testimony is sufficient to show payment of taxes. Roth *v.* Munzenmaier, 118 Ia. 326, 91 N. W. 1072.

Bringing suit before expiration of seven years from first payment interrupts statutory right resulting from payment during that period. Sibly *v.* England, 90 Ark. 420, 119 S. W. 820.

When land is assessed to actual owner such evidence is of less force. Curtiss & Yale Co. *v.* Minneapolis, 123 Minn. 344, 144 N. W. 150.

MISCELLANEOUS RULINGS.

Payment of taxes must be shown (Bradley L. Co. *v.* Miller, 94 Ark. 118, 126 S. W. 98; Swank *v.* Co., 15 Ida. 353, 98 P. 297; Illinois C. R. Co. *v.* Cavins, 238 Ill. 380, 87 N. E. 371), and continuously for required time (Seymour *v.* Dufur, 53 Wash. 646, 102 P. 756); and by claimant. Glowner *v.* DeAlvarez, 10 Cal. App. 194, 101 P. 432. Payment by him is sometimes presumed. Ryle *v.* Davidson (Tex. Civ.), 116 S. W. 823. Validity of tax paid must be shown by claimant. Sharpe *v.* Kellogg, 53 Tex. Civ. 543, 116 S. W. 401. It is not a conclusion for witness to state grantee of land paid taxes thereon for himself. Merriman *v.* Blalack, 57 Tex. Civ. 270, 122 S. W. 403. Payment of taxes on easement need not be shown if it was not assessed as such or in connection with land. Silva *v.* Hawn, 10 Cal. App. 544, 102 P. 952.

681-76 Big Sandy I. & S. Co. *v.* Williams (Ala.), 63 S. 1011; Chambers *v.* Morris, 159 Ala. 606, 48 S. 687; Knight *v.* Hunter, 155 Ala. 238, 46 S. 235; Lecroix *v.* Malone, 157 Ala. 434, 47 S. 725 (cannot have retroactive effect); Lawrence *v.* Co., 144 Ala. 524, 41 S. 612; Driver *v.* King, 145 Ala. 585, 40 S. 315; Henry *v.* Brown, 143 Ala. 446, 39 S. 325; Butler *v.* Hines, 101 Ark. 409, 142 S. W. 509; Russell *v.* Webb, 96 Ark. 190, 131 S. W. 456; Jeffery *v.* Jeffery, 87 Ark. 496, 113 S. W. 27; Carney *v.* Hennessey, 74 Conn. 107, 49 A. 910, 92 Am. St. 199, 53 L. R. A. 699; Wilson *v.* Johnson, 51 Fla. 370, 41 S. 395; Johnson *v.* Hayes, 139 Ga. 218, 77 S. E. 73; Bowman *v.* Owens, 133 Ga. 49, 65 S. E. 156; Godley *v.* Barnes, 132 Ga. 513, 64 S. E. 546 (fact of rendition of judgment in favor of one through whom plaintiff claimed against third party for trespass, not relevant, though it was otherwise as to bringing suit); Trustee *v.* Lulia, 16 Haw. 630; Lyons *v.* Stroud, 257 Ill. 350, 100 N. E. 973; Carroll *v.* Rabberman, 240 Ill. 450, 88 N. E. 995; Kirby *v.* Kirby, 236 Ill. 255, 86 N. E. 259; Howard *v.* Twibell, 179 Ind. 67, 100 N. E. 372; McClenahan *v.* Stevenson, 118 Ia. 106, 91 N. W. 925; Luce *v.* Parsons, 192 Mass. 8, 77 N. E. 1032; Parker *v.* Case, 155 Mich. 497, 119 N. W. 1081; Kipp *v.* Hagan, 108 Minn. 384, 122 N. W. 317 (not always error to exclude declarations); Booth *v.* Cheek, 253 Mo. 119, 161 S. W. 791 (admissions in petition); Zweibel *v.* Myers, 69 Neb. 294, 95 N. W. 597; Betjemann *v.* R. Co., 127 App. Div. 83, 111 N. Y. S. 567 (papers in condemnation by predecessors in title); Hindley *v.* R. Co., 42 Misc. 56, 85 N. Y. S. 561; Cole *v.* Lester, 48 Misc. 13, 96 N. Y. S. 67; Clary *v.* Hatton, 152

N. C. 107, 67 S. E. 258; Co-operative B. Bk. *v.* Hawkins, 30 R. I. 171, 73 A. 617; Mahoney *v.* R., 82 S. C. 215, 64 S. E. 228; Harris *v.* Wagnon (Tex. Civ.), 162 S. W. 2 (declarations of tenants); Henderson *v.* Co. (Tex. Civ.), 128 S. W. 671; Texas, etc. R. Co. *v.* Broom, 53 Tex. Civ. 78, 114 S. W. 655; Pardue *v.* Whitfield, 53 Tex. Civ. 63, 115 S. W. 306; Pioneer I. & T. Co. *v.* Board, 35 Utah 1, 99 P. 150; English *v.* Openshaw, 28 Utah 241, 78 P. 476; Lusk *v.* Pelter, 101 Va. 790, 45 S. E. 333; Morgan *v.* R. Co., 50 Wash. 180, 97 P. 510; Port Townsend *v.* Lewis, 34 Wash. 413, 75 P. 982; Northern P. R. Co. *v.* Spokane, 45 Wash. 229, 88 P. 135; Illinois S. Co. *v.* Paczocha, 139 Wis. 23, 119 N. W. 550; Illinois S. Co. *v.* Jeka, 119 Wis. 122, 95 N. W. 97; Kreckeberg *v.* Leslie, 111 Wis. 462, 87 N. W. 450.

See Barfield *v.* Hill, 163 N. C. 262, 79 S. E. 677.

The bare statement of occupant that he was holding for defendant and adversely will not suffice. Palmer *v.* Sims, 176 Ala. 59, 57 S. 704.

Self-serving declarations are not admissible. Strickland *v.* Strickland, 103 Ark. 183, 146 S. W. 501.

Character of occupancy.—The testimony quoted in the next two assignments, concerning declarations by the defendant and others, was properly admitted. As to the admission of such testimony, we have said: "His (the occupant's) own declarations while in possession of the premises as well as the understanding of his neighbors was proper evidence of the character of his claim." Kennedy *v.* Wible (Pa.), 11 A. 98. "Such declarations accompany his acts constitute part of the res gestæ, and as such are always received in evidence in questions of possession." Potts *v.* Everhart, 26 Pa. 493. "The character of possession of a party as stated by himself while in possession is part of the res gestæ." Susquehanna, etc. R. Co. *v.* Quick, 68 Pa. 189. These assignments are overruled. Greenwich C. & C. Co. *v.* Learn, 234 Pa. 180, 83 A. 74.

Unverified pleading not conclusive. Tennessee C. Co. *v.* Linn, 123 Ala. 112, 136, 26 S. 245, 82 Am. St. 108. Loose expressions in pleadings and testimony will not overcome tenor of evidence. Hooper *v.* Stuart, 23 App. Cas. (D. C.) 434.

Taking deed to land in dispute not act of mere licensee. Smith *v.* R. Co., 5 O. C. C. (N. S.) 194; Zweibel *v.* Myers, 69 Neb. 291, 95 N. W. 597. Accepting deed is not decisive of quality of grantee's prior possession. Price *v.* Greer, 89 Ark. 300, 116 S. W. 676. Negotiations to buy, not decisive of claimant's rights. Clithero *v.* Fenner, 122 Wis. 356, 99 N. W. 1027.

A sworn disclaimer of title in a tax return is strong proof against open, notorious and continuous possession. Mayor *v.* Rowe, 107 Md. 704, 67 A. 93.

Buying tax certificate and accepting redemption money from owner, through county treasurer, a recognition of owner's title. Zweibel *v.* Myers, 69 Neb. 294, 95 N. W. 597; Hull *v.* R. Co., 21 Neb. 371, 32 N. W. 162. *Contra,* if land assessed to unknown owner and person in possession was not under duty to pay tax. Silverstone *v.* Hanley, 55 Wash. 458, 104 P. 767, and cases cited.

Admission by will.—Ashford *v.* Ashford, 136 Ala. 631, 34 S. 10.

Declaration of third person acting for another, competent. Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026.

Agreement to resurvey is interruption of possession. Baty *v.* Elrod, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343.

Declarations made when land entered upon, immaterial. McKinley's Heirs *v.* Neely, 1 Phila. (Pa.) 118.

Petition of administrator for order to sell lands of his intestate for division among heirs, and orders and proceedings made and had thereupon are admissible to show he was administrator and held possession as such up to time his vendee was put in possession. Ashford *v.* Ashford, 136 Ala. 631, 34 S. 10.

Admissions do not constitute estoppel, but may be proved. Thomson *v.* Thomson, 93 Ky. 435, 20 S. W. 373; Murphy *v.* Roney, 26 Ky. L. R. 634, 82 S. W. 396. If in form of a stipulation may be used on subsequent trial of case if not limited. Nathan *v.* Dierssen, 146 Cal. 63, 79 P. 739. By tenant bind his successor. Neff *v.* Ryman, 100 Va. 521, 42 S. E. 314. By husband, immaterial as to wife. Baty *v.* Elrod, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343. A casual verbal admission will not overcome a presumption. Closuit *v.* Co., 130 Wis. 258, 110 N. W. 222. May overcome other significant evidence. Truman *v.* Raybuck, 207 Pa. 357, 56 A. 944. In-

admissible if inconsistent with acts of person claiming benefit thereof. Butler *v.* Butler, 133 Ala. 377, 32 S. 579. Admission of non-claim may be proved. Kane *v.* Sholars, 41 Tex. Civ. 154, 90 S. W. 937. But admission in nature of opinion, though competent, is not binding. Montgomery County *v.* Bean, 26 Ky. L. R. 568, 82 S. W. 240.

Non-payment of taxes immaterial on question of claimant's intent. Bush *v.* Griffin, 76 Neb. 214, 107 N. W. 247.

Disclaimer.—"A single lisp of acknowledgment by defendant that he claims no title fastens a character upon his possession which makes it unavailing for ages." Warren *v.* Frederichs, 83 Tex. 380, 18 S. W. 750; Texas W. R. Co. *v.* Wilson, 83 Tex. 153, 18 S. W. 325; Hand *v.* Swann, 1 Tex. Civ. 241, 21 S. W. 282; McDonald *v.* McCrabb, 47 Tex. Civ. 259, 105 S. W. 238.

Declarations of tenant to landlord competent on question of latter's knowledge of attornment to one claiming adverse possession. Laffitte *v.* Superior, 142 Wis. 73, 125 N. W. 105.

Constructive possession may be restricted by occupant's acts and declarations as by proof of parol agreement concerning extent of his claim, though such agreement does not include all land covered by instrument under which he claims. Haddock *v.* Leary, 148 N. C. 378, 62 S. E. 426.

Declarations against interest do not operate to affect subsequent change in character of declarant's possession. Criswell *v.* Noble, 61 Misc. 483, 113 N. Y. S. 954.

Failure to inventory land by wife of defendant's predecessor in title and by her administrator is not conclusive such predecessor and wife did not claim it adversely. Appel *v.* Childress, 53 Tex. Civ. 607, 116 S. W. 129.

Unnecessary allegations in pleadings, not decisive. Bryant *v.* Cadle, 18 Wyo. 64, 104 P. 23.

Declarations as to other land, immaterial. Texas, etc. R. Co. *v.* Broom, 53 Tex. Civ. 78, 114 S. W. 655.

682-77 Walling *v.* Eggers, 31 Ky. L. R. 1009, 104 S. W. 360; Whittaker *v.* Thayer (Tex. Civ.), 123 S. W. 1137 (statements by one claimant); Barrett *v.* McKinney (Tex. Civ.), 93 S. W. 240.

682-78 Shirey *v.* Whitlow, 80 Ark. 444, 97 S. W. 444; Lyons *v.* Stroud, 257 Ill. 350, 100 N. E. 973; Carroll *v.* Rabborman, 240 Ill. 450, 88 N. E. 995; Rennert *v.* Shirk, 163 Ind. 542, 72 N. E. 546; Riggs *v.* Riley, 113 Ind. 208, 15 N. E. 253; Logsdon *v.* Dingg, 32 Ind. App. 158, 69 N. E. 409; Wood *v.* Kuper, 150 Ind. 622, 50 N. E. 755; Stewart *v.* Brumley (Ky.), 119 S. W. 798; Lamoreaux *v.* Creveling, 103 Mich. 501, 61 N. W. 783; Sherrard *v.* Cudney, 134 Mich. 200, 96 N. W. 15; Baty *v.* Elrod, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343; Cole *v.* Lester, 48 Misc. 13, 96 N. Y. S. 67; Beam *v.* Gardner, 18 Pa. Super. 245; Whittaker *v.* Thayer (Tex. Civ.), 123 S. W. 1137; Ovig *v.* Morrison, 142 Wis. 243, 125 N. W. 449.

Admissions after title acquired.—Taking a lease explains previous possession and rebuts any claim it was adverse if this is done before bar of statute is complete. McClenahan *v.* Stevenson, 118 Ia. 106, 91 N. W. 925. The authorities are not in accord as to conclusive effect of so doing after statute has run. The affirmative is held in Vickery *v.* Benson, 26 Ga. 582; Church *v.* Burghardt, 8 Pick. (Mass.) 327; and negative in Shirey *v.* Whitlow, 80 Ark. 444, 97 S. W. 444; Price *v.* Greer, 89 Ark. 300, 118 S. W. 1009 (only tends to show character of prior possession); School Dist. *v.* Benson, 31 Me. 381, 52 Am. Dec. 618; Bradford *v.* Guthrie, 4 Brewst. (Pa.) 351.

Weight of acknowledgment after title complete is for jury. Shirey *v.* Whitlow, 80 Ark. 444, 97 S. W. 444.

683-80 Jeffery *v.* Jeffery, 87 Ark. 496, 113 S. W. 27; Emmett *v.* Perry, 100 Me. 139, 60 A. 872.

Declarations of decedent made on land, are competent to show location of his line, and it is immaterial what character of occupancy was. Emmett *v.* Perry, 100 Me. 139, 60 A. 872. May be proved against vendor relying upon decedent's occupancy, though he was in possession under unconsummated verbal contract. Walsh *v.* Wheelwright, 96 Me. 174, 52 A. 649. But declarations of decedent, not in possession and not claiming title, are inadmissible. Anniston City L. Co. *v.* Edmondson, 145 Ala. 557, 40 S. 505.

683-81 Powers *v.* Bk., 136 Cal. 486, 69 P. 151; Ball *v.* Loughbridge, 30 Ky. L. R. 1123, 100 S. W. 275.

683-82 Maxwell L. G. Co. *v.* Dawson, 151 U. S. 586; Anniston etc. Co. *v.* Edmondson, 145 Ala. 557, 40 S. 505; Watters *v.* Brown, 177 Ala. 78, 58 S. 291; Tennessee C. Co. *v.* Linn, 123 Ala.

112, 26 S. 247, 82 Am. St. 108; Henry v. Brown, 143 Ala. 446, 39 S. 325; Miswabik D. Assn. v. Croze, 140 Mich. 194, 103 N. W. 558; Spicer v. Spicer, 249 Mo. 582, 155 S. W. 832; Gardner v. Wright, 49 Or. 609, 91 P. 286; Northern P. R. Co. v. Spokane, 45 Wash. 229, 88 P. 135. See "Trespass to Try Title," infra, § 22.

Conclusion.—Testimony that possession was notorious is a conclusion. Acme B. Co. v. R. Co., 115 Ga. 494, 42 S. E. 8. But possession signifies occupancy. Nathan v. Dierssen, 146 Cal. 63, 79 P. 729. Conclusion as to when land acquired, incompetent. Lecroix v. Malone, 157 Ala. 434, 47 S. 725.

Recognition of rights.—Defendant's co-occupant may testify neither he nor his brothers recognized any other rights in land than those claimed by party asserting adverse possession. Merriman v. Blalack, 57 Tex. Civ. 270, 122 S. W. 403.

684-83 Jacobs v. Disharoon, 113 Md. 92, 77 A. 278. Opinion evidence as to validity of claim, inadmissible. Jacobs v. Disharoon, supra.

684-84 Scholler v. County, 55 Wash. 298, 104 P. 277; Board v. Patrick, 18 Wyo. 139, 104 P. 531.

General rules strictly applied in favor of owner.—If land originally set apart as a private way its use will be presumed to have been in harmony with parties' intent. Princeton v. Gustavson, 241 Ill. 566, 89 N. E. 653.

In addition to use of highway over vacant and unoccupied land, with consent of owner, there must be shown exercise of jurisdiction by highway authorities. Board v. Patrick, 18 Wyo. 139, 104 P. 531.

Claim of a county to land may be sustained by proof of orders made by its governing body concerning it through a series of years, and a map designating land as county property, map having been in county's possession many years. Victoria v. Victoria (Tex. Civ.), 94 S. W. 368, rev. on other questions, 101 S. W. 190.

684-85 Armstrong v. Wilcox, 57 Fla. 30, 49 S. 41; Ross v. McManigal, 61 Neb. 90, 84 N. W. 610; Beam v. Gardner, 18 Pa. Super. 245; Glezen v. Hasbrouck, 23 R. I. 601, 51 A. 219; Neff v. Ryman, 110 Va. 521, 42 S. E. 314.

Tenant may testify he claimed land as his own in action between his landlord and a stranger. South v. Deaton, 113 Ky. 312, 68 S. W. 137, 1105.

Tenant in possession may show superior title to that of landlord. Hyman v. Grant (Tex. Civ.) 114 S. W. 853.

Acceptance of void lease raises mere presumption of recognition of lessor's title, which is rebuttable by parol evidence showing lessee theretofore claimed to have a perfect title and rightful possession and asserted his rights to lessor. Broad v. Beatty, 73 Ark. 106, 83 S. W. 339.

Cestui que trust and trustee occupy relation of landlord and tenant—possession of one is that of the other. McClenahan v. Stevenson, 18 Ia. 106, 91 N. W. 925.

Entry under a record title adverse to landlord will ripen into title by adverse possession if not disturbed. Townsend v. Boyd, 217 Pa. 386, 66 A. 1099.

685-86 Hill v. Cherokee Co., 99 Ark. 84, 137 S. W. 553; Lambert v. Hemler, 244 Ill. 254, 91 N. E. 435; Carpenter v. Fletcher, 239 Ill. 440, 88 N. E. 162; Bush v. Fitzgeralds (Ky.), 125 S. W. 716; Vermillion v. Nickell (Ky.), 114 S. W. 270; Dahlem v. Abbott, 146 Mich. 605, 110 N. W. 47; Fenton v. Miller, 94 Mich. 204, 53 N. W. 957; Seibert v. Hope, 221 Mo. 630, 120 S. W. 770; Wilson v. Wilson, 31 O. C. C. 39; Beam v. Gardner, 18 Pa. Super. 245; Soriano v. Arrese, 1 P. R. Fed. 198; Wingo v. Ruddler, 103 Tex. 150, 124 S. W. 899; Stone v. Marshall, 52 Wash. 375, 100 P. 858; Ailes v. Hallam, 69 W. Va. 305, 71 S. E. 273; Logan v. Ward, 58 W. Va. 366, 52 S. E. 398, 5 L. R. A. (N. S.) 156.

Rule applies to grantee of mortgagor under warranty deed.—Co-operative B. Bk. v. Hawkins, 30 R. I. 171, 73 A. 617.

686-87 Singer v. Naron, 99 Ark. 446, 138 S. W. 958; Soper v. Lawrence, 98 Me. 268, 56 A. 908; Nickey v. Leader, 235 Mo. 30, 138 S. W. 18; Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67; Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870; Crowley v. Grant, 63 Or. 212, 127 P. 28; Cox v. Tompkinson, 39 Wash. 70, 80 P. 1005.

"The only question is the character and quantum of proof. Upon the general rule in the recent case of Nickey v. Leader, 235 Mo. 30, 138 S. W. 18, we said: 'The general rule is that the possession of one joint tenant is

the possession of all. This rule has its exceptions. Although the deed may in law create a joint tenancy, yet if one of the joint tenants is in actual possession, claiming the title as against co-tenants and the world, the statute of limitations will inure to the benefit of such claimant. Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443; Dunlap *v.* Griffith, 146 Mo. 283, 47 S. W. 917; Whitaker *v.* Whitaker, 157 Mo. 342, 58 S. W. 5; Hendricks *v.* Musgrove, 183 Mo. 300, 81 S. W. 1265.'" Allen *v.* Morris, 244 Mo. 357, 148 S. W. 905.

686-88 Rich *v.* Co., 147 Fed. 380, 77 C. C. A. 558; Cramton *v.* Rutledge, 163 Ala. 649, 50 S. 900; Sumner *v.* Hill, 157 Ala. 230, 47 S. 565; Cramton *v.* Rutledge, 157 Ala. 141, 47 S. 214; Baumgarten *v.* Mitchell, 10 Cal. App. 48, 101 P. 43; Craig *v.* Cox, 255 Ill. 564, 99 N. E. 647; Long *v.* Morrison, 251 Ill. 143, 95 N. E. 1075; Smith *v.* Tucker, 250 Ill. 50, 95 N. E. 45; Lambert *v.* Hemler, 244 Ill. 254, 91 N. E. 435 (evidence must be stronger than is required to establish ordinary adverse possession); Carpenter *v.* Fletcher, 239 Ill. 440, 88 N. E. 162; Kidd *v.* Bell (Ky.), 122 S. W. 232; Hamilton *v.* Steele (Ky.), 117 S. W. 378; Vermillion *v.* Nickell (Ky.), 114 S. W. 270; Bentley *v.* Callaghan, 79 Miss. 302, 30 S. 709; Collier *v.* Gault, 234 Mo. 457, 137 S. W. 884; Seibert *v.* Hope, 221 Mo. 630, 120 S. W. 770; Criswell *v.* Noble, 61 Misc. 483, 113 N. Y. S. 954; Cole *v.* Lester, 48 Misc. 13, 96 N. Y. S. 67; Clary *v.* Hatton, 152 N. C. 107, 67 S. E. 258; Dobbins *v.* Dobbins, 141 N. C. 210, 53 S. E. 870; Williamson *v.* Williamson, 53 Tex. Civ. 503, 116 S. W. 370; Hess *v.* Webb (Tex. Civ.), 113 S. W. 618; Frey *v.* Myers (Tex. Civ.), 113 S. W. 592; Cox *v.* Tompkinson, 39 Wash. 70, 80 P. 1005; Church *v.* S., 65 Wash. 50, 117 P. 711; Clark *v.* Beard, 69 W. Va. 213, 71 S. E. 188; Duffy *v.* Currence, 66 W. Va. 252, 66 S. E. 755; Logan *v.* Ward, 58 W. Va. 366, 52 S. E. 398, 5 L. R. A. (N. S.) 156.

Character of grantor's possession.—It may be shown in rebuttal of testimony tending to show notice to co-owners that grantor of claimant lived with her on the land, returned it for taxation and paid taxes on it as part of the estate he was administering, and after death of his grantee, held himself out as being in possession in his representative capacity. Ashford *v.* Ashford, 136 Ala. 631, 34 S. 10.

Knowledge of co-owner.—It is not competent for a witness to testify that one of the owners knew a co-owner was in possession claiming land as his own. Ashford *v.* Ashford, 136 Ala. 631, 34 S. 10.

In absence of acknowledgment of cotenancy, notice of adverse holding need not be given. Roberts *v.* Decker, 120 Wis. 102, 97 N. W. 519.

What facts sufficient.—Failure of cotenants to receive their share of rental value of premises, existence upon the records of deed purporting to convey to claimant full title to land and a mortgage thereon executed by him are sufficient to show co-tenants' rights are barred. McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996.

Stronger evidence is required than in other cases, but it need not be of a different kind. Rich *v.* Co., 147 Fed. 380, 77 C. C. A. 558; Cox *v.* Tomlinson, 39 Wash. 70, 80 P. 1005.

Burden is on party who alleges adverse possession. Rich *v.* Co., 147 Fed. 380, 77 C. C. A. 558.

687-89 Layton *v.* Campbell, 155 Ala. 220, 46 S. 775; Bowman *v.* Owens, 133 Ga. 49, 65 S. E. 156; Arnold *v.* Limeburger, 122 Ga. 72, 49 S. E. 812; Street *v.* Collier, 118 Ga. 470, 45 S. E. 294; Soriano *v.* Arrese, 1 P. R. Fed. 198.

Possession under deed to part may be notice of claim to larger part.—Toole *v.* Renfro, 52 Tex. Civ. 482, 114 S. W. 450.

688-90 Lambert *v.* Hemler, 244 Ill. 254, 91 N. E. 435; Pickens *v.* Stout, 67 W. Va. 422, 68 S. E. 354.

688-91 Eastham *v.* Gibbs (Tex. Civ.), 125 S. W. 372; McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996. *Comp.* Bush *v* Fitzgeralds (Ky.), 125 S. W. 716.

688-92 Lambert *v.* Hemler, 244 Ill. 254, 91 N. E. 435; Lewitzky *v.* Sotoloff, 224 Pa. 610, 73 A. 936.

Adverse possession may ripen into title to share of property to which possessor entitled. Sires *v.* Melvin, 135 Ia. 460, 113 N. W. 106.

689-93 Misenheimer *v.* Amos, 221 Mo. 362, 120 S. W. 602; Dillard *v.* Cochran (Tex. Civ.), 153 S. W. 662; Carr *v.* Alexander (Tex. Civ.), 149 S. W. 218; Hardy O. Co. *v.* Burnham (Tex. Civ.), 124 S. W. 221; Cox *v.* Tompkinson, 39 Wash. 70, 80 P. 1005.

689-94 Lund *v.* Nelson, 89 Neb. 449, 131 N. W. 919; Dobbins *v.* Dobbins, 141 N. C. 210, 53 S. E. 870; Whitaker *v.* Jenkins, 138 N. C. 476, 51 S. E. 104; Soriano *v.* Arrese, 1 P. R. Fed. 198; Williamson *v.* Williamson, 53 Tex. Civ. 503, 116 S. W. 370.

It is presumed possession was adverse from beginning and so continued. Dobbins *v.* Dobbins, 141 N. C. 210, 53 S. E. 870.

690-95 Sires *v.* Melvin, 135 Ia. 460, 113 N. W. 106; Wood *v.* Fleet, 36 N. Y. 499, 93 Am. Dec. 528; Rhea *v.* Craig, 141 N. C. 602, 54 S. E. 408; Honea *v.* Arledge, 56 Tex. Civ. 296, 120 S. W. 508; Long *v.* Long, 30 Tex. Civ. 368, 70 S. W. 587.

Disability of some of the parties during the time of possession does not rebut presumption as to ouster. Dobbins *v.* Dobbins, 141 N. C. 210, 53 S. E. 870.

Parol partitions may be proved. Oliver *v.* Williams, 163 Ala. 376, 50 S. 937.

690-97 Baxley *v.* Baxley, 117 Ga. 60, 43 S. E. 436; Weatherford *v.* Weatherford (Tex. Civ.), 153 S. W. 353 (fraudulent record).

Only moral fraud will prevent possession under color of title from becoming complete. Street *v.* Collier, 118 Ga. 470, 45 S. E. 294; Arnold *v.* Limeburger, 122 Ga. 72, 49 S. E. 812; Tarver *v.* Deppen, 132 Ga. 798, 65 S. E. 177.

691-98 Delay in bringing action to quiet title does not show bad faith. Laws *v.* Newkirk, 39 Colo. 78, 88 P. 861.

Claimant's good faith, presumed. Hughes *v.* Wyatt, 146 Ia. 392, 125 N. W. 334.

691-99 If possession began in good faith, fact it was afterwards held in bad faith, immaterial. Brewster *v.* Hewes, 113 La. 45, 36 S. 883.

692-1 Crowder *v.* Co., 162 Ala. 151, 50 S. 230; McDaniel *v.* Co., 152 Ala. 414, 44 S. 705; Boe *v.* Arnold, 54 Or. 52, 102 P. 290 (recognition of government's title does not bar occupant from asserting adverse possession as against claimant under prior grant); Hyman *v.* Grant (Tex. Civ.), 114 S. W. 853; McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996; Hatch *v.* Lusignan, 117 Wis. 428, 94 N. W. 332.

Motive immaterial.—Knight *v.* Denman, 64 Neb. 814, 90 N. W. 863.

692-2 Gunnison *v.* R. Co., 130 Fed. 259, 64 C. C. A. 505; Tarver *v.* Deppen, 132 Ga. 798, 65 S. E. 177; Ovig *v.* Morrison, 142 Wis. 243, 125 N. W. 449; Illinois S. Co. *v.* Budzisz, 139 Wis. 281, 119 N. W. 935; Pitman *v.* Hill, 117 Wis. 318, 94 N. W. 40. See Kirby *v.* Kirby, 236 Ill. 255, 86 N. E. 259.

Ancient deed not in plaintiff's chain of title inadmissible to show good faith. Callaway *v.* Beauchamp, 140 Ga. 207, 78 S. E. 846.

Good faith presumed where possession open and notorious under claim of right. Baxley *v.* Baxley, 117 Ga. 60, 43 S. E. 436; Godfrey *v.* Dixon, 228 Ill. 487, 499, 81 N. E. 1089; Blumer *v.* Co., 129 Ia. 32, 105 N. W. 342; Leverett *v.* Loeb, 117 La. 310, 41 S. 584; Brewster *v.* Hewes, 113 La. 45, 36 S. 883.

Evidence of good faith cannot be directly testified to by third person. Baxley *v.* Baxley, 117 Ga. 60, 43 S. E. 436. Claimant may testify he paid for land in good faith (Acme B. Co. *v.* R. Co., 115 Ga. 494, 42 S. E. 8); and as to bona fides of his original entry. Baxley *v.* Baxley, supra.

Facts showing good faith.—Gardner *v.* Wright, 49 Or. 609, 91 P. 286.

693-3 McBride *v.* Caldwell, 142 Ia. 228, 119 N. W. 741; circumstances may sustain claim of good faith. See Ramsey *v.* Wilson, 52 Wash. 111, 100 P. 177, good faith essential in absence of color of title.

Must act in good faith.—Jasperson *v.* Scharnikow, 150 Fed. 571, 80 C. C. A. 373.

Good faith, to support the prescription of ten years acquirendi causa, is based on the honest and positive belief of the possessor, founded on just reasons, that he is purchasing from the real owner. Doubt as to the title of the vendor as to his right to alienate is fatal to a claim of good faith. A doubt sufficient to induce the possessor to make an investigation of the title of his vendor is presumed to have continued down to the sale, in the absence of evidence tending to show its removal by adequate information derived from the records or other trustworthy sources. Knight *v.* Berwick L. Co., 130 La. 233, 57 S. 900. The good faith required is belief of purchaser he is buying land from owner, and, in establishing his good faith, he is not required to show his grantor's grantor

had title. Bennett *v.* Calmes, 116 La. 598, 40 S. 911.

Contrary doctrine.—Under statutes making bona fides of claimants a condition to recovery mere notice of adverse claim believed to be ill-founded will not bar a recovery; but it is otherwise as to actual notice of adverse claim superior and paramount to that obtained under paper title. Latta *v.* Clifford, 47 Fed. 614; Arnold *v.* Woodward, 14 Colo. 164, 23 P. 444; Hunt *v.* Dunn, 74 Ga. 120; Templet *v.* Baker, 12 La. Ann. 658; Brodack *v.* Morsbach, 38 Wash. 72, 80 P. 275. Entry under title acquired at a foreclosure sale is in good faith. Cox *v.* Thompkinson, 39 Wash. 70, 80 P. 1005.

693-4 Bell *v.* C. Co., 155 Fed. 712, 84 C. C. A. 60; Santana *v.* Marquez, 4 P. R. Fed. 87.

Older title prevails where both parties claim from common source. McAllen *v.* Alonzo, 46 Tex. Civ. 449, 102 S. W. 475.

Is a rule of evidence merely.—Mann *v.* Hossack (Tex. Civ.), 96 S. W. 767.

694-5 If both parties claim by adverse possession and there are no superior muniments of title, no presumption in favor of either party. Dorlan *v.* Westervitch, 140 Ala. 283, 37 S. 382.

If a portion of the land claimed under the older and better title interlocks with a junior grant, and there has been no actual adverse possession for the statutory period within such interlock, it is error to admit evidence of the junior claimant's possession within the boundaries claimed by him, outside of the interlock. Pardee *v.* Johnston, 70 W. Va. 347, 74 S. E. 721.

695-7 Shanline *v.* Wiltsie, 70 Kan. 177, 78 P. 436; Scott *v.* Williams, 74 Kan. 448, 87 P. 550; Kidd *v.* Bell (Ky.), 122 S. W. 232; Foard *v.* McAnnelly, 215 Mo. 371, 114 S. W. 990; Williams *v.* Shepherdson, 4 Neb. (Unof.) 608, 95 N. W. 827; Canfield *v.* Clark, 17 Or. 473, 21 P. 443, 11 Am. St. 845; Bowers *v.* Ledgerwood, 25 Wash. 14, 64 P. 936; Wilcox *v.* Smith, 38 Wash. 585, 80 P. 803; Suksdorf *v.* Humphrey, 36 Wash. 1, 77 P. 1071; Thornely *v.* Andrews, 45 Wash. 413, 88 P. 757; Fieldhouse *v.* Leisburg, 15 Wyo. 207, 88 P. 214. A devisee who takes possession of more land than is devised may acquire title to it though he acted under a mistake. Johnson *v.* Thomas, 23 App. Cas. (D. C.) 141.

696-8 Fisher *v.* Bennehoff, 121 Ill. 426, 13 N. E. 150; Dyer *v.* Eldridge, 136 Ind. 654, 36 N. E. 522; Ball *v.* Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Sharrard *v.* Cudney, 134 Mich. 200, 96 N. W. 15; Clark *v.* Thornburg, 66 Neb. 717, 92 N. W. 1056; Lindley *v.* Johnston, 42 Wash. 257, 84 P. 822; Wade *v.* McDougle, 59 W. Va. 113, 128, 52 S. E. 1026. See Foard *v.* McAnnelly, 215 Mo. 371, 114 S. W. 990.

696-9 Davis *v.* Grant, 173 Ala. 4, 55 S. 210; Lecroix *v.* Malone, 157 Ala. 434, 47 S. 725; Johnson *v.* Elder, 92 Ark. 30, 121 S. W. 1066; Wells *v.* Bentley, 87 Ark. 625, 113 S. W. 639; Searles *v.* De Ladson, 81 Conn. 133, 70 A. 589; Bayhouse *v.* Urquides, 17 Ida. 286, 105 P. 1066; Rennert *v.* Shirk, 163 Ind. 542, 551, 72 N. E. 546, *cit.*, many cases to same effect; Warden *v.* Addington, 131 Ky. 296, 115 S. W. 241; Milligan *v.* Fritts, 226 Mo. 189, 125 S. W. 1101; Andrews *v.* Hastings, 85 Neb. 548, 123 N. W. 1035; Sommer *v.* Compton, 52 Or. 173, 96 P. 124.

Parol testimony is competent to show who occupied and used the land. Carney *v.* Hennessey, 74 Conn. 107, 49 A. 910, 92 Am. St. 199, 53 L. R. A. 699.

697-10 St. Louis, etc. R. Co. *v.* Mulkey, 100 Ark. 71, 139 S. W. 643; Shirey *v.* Whitlow, 80 Ark. 444, 97 S. W. 444; Atkins *v.* Pfaffe, 136 Ia. 728, 114 N. W. 187; Weeks *v.* Upton, 99 Minn. 410, 109 N. W. 828; Logan *v.* Meads, 43 Tex. Civ. 477, 98 S. W. 210; McCormick *v.* Sorenson, 58 Wash. 107, 107 P. 1055; In re Seattle (Wash.), 100 P. 1013; Weingarten *v.* Shurtleff, 51 Wash. 602, 99 P. 739; Erickson *v.* Murlin, 39 Wash. 43, 80 P. 853; Bowers *v.* Ledgerwood, 25 Wash. 14, 64 P. 936.

Presumption is land was inclosed in good faith. Shirey *v.* Whitlow, 80 Ark. 444, 97 S. W. 444.

Rule not applied as against public with same liberality as against individual. See McClenehan *v.* Jesup, 144 Ia. 352, 120 N. W. 74.

699-11 Walker *v.* Wyman, 157 Ala. 478, 47 S. 1011; Wilson *v.* Hunter, 59 Ark. 626, 28 S. W. 419, 43 Am. St. 63; Shirey *v.* Whitlow, 80 Ark. 444, 97 S. W. 444; Logsdon *v.* Dingg, 32 Ind. App. 158, 69 N. E. 409; City *v.* Truex, 235 Mo. 619, 139 S. W. 390 (evidence held insufficient); Johnson *v.* Ingram, 63 Wash. 554, 115 P. 1073.

Acts and conduct of parties may be shown. Carney *v.* Hennessey, 74 Conn. 107, 49 A. 910, 92 Am. St. 199, 53 L. R. A. 699; Weeks *v.* Upton, 99 Minn. 410, 109 N. W. 828.

Burden.—Party who alleges existence of agreement to surrender possession on location of boundary must show its terms. Crosby *v.* Church, 45 Tex. Civ. 111, 99 S. W. 584.

Claim "by limitation" need not have been made at any time. Logan *v.* Meads, 43 Tex. Civ. 177, 98 S. W. 210.

Direct proof of knowledge of owner must be made showing possession is no longer held in subserviency to him. Notice given when seizin suspended is ineffectual. Lecroix *v.* Malone, 157 Ala. 434, 47 S. 725.

699-12 McDaniel *v.* Co., 152 Ala. 414, 44 S. 705; Henderson *v.* Co. (Tex. Civ.), 128 S. W. 671; Jones *v.* Weaver (Tex. Civ.), 122 S. W. 619 (noting conflicting local cases); McNaught-C. Imp. Co. *v.* May, 52 Wash. 632, 101 P. 237; Yesler *v.* Holmes, 39 Wash. 34, 80 P. 851. *Comp.* Hoencke *v.* Lomax, 102 Tex. 487, 119 S. W. 842.

699-13 Sellers *v.* Simpson, 53 Tex. Civ. 205, 115 S. W. 888.

699-14 Tennessee C. Co. *v.* Linn, 123 Ala. 112, 26 S. 245, 82 Am. St. 108; Work *v.* Mines, 12 Ariz. 339, 100 P. 813; Hardy *v.* Samuels, 92 Ark. 289, 122 S. W. 654; Johnson *v.* Elder, 92 Ark. 30, 121 S. W. 1066; Earle *v.* Bryant, 12 Cal. App. 553, 107 P. 1018; Myers *v.* Mayhew, 32 App. Cas. (D. C.) 205; Scott *v.* Herrell, 31 App. Cas. (D. C.) 45; Roberts *v.* Tift, 136 Ga. 901, 72 S. E. 234; Chicago, etc. R. Co. *v.* Johnson, 45 Ind. App. 162, 90 N. E. 507; Freemon *v.* Funk, 85 Kan. 473, 117 P. 1024; Safe Deposit & T. Co. *v.* Marburg, 110 Md. 410, 72 A. 839; Adams *v.* Gossom, 228 Mo. 536, 129 S. W. 16; Cervena *v.* Thurston, 59 Neb. 343, 80 N. W. 1048; Freedman *v.* Oppenheim, 187 N. Y. 101, 79 N. E. 841; Heller *v.* Cohen, 154 N. Y. 299, 48 N. E. 527; Baker *v.* Duff, 136 App. Div. 13, 120 N. Y. S. 184; Clarke *v.* Wollpert, 128 App. Div. 263, 112 N. Y. S. 547; Chatham *v.* Lansford, 149 N. C. 363, 63 S. E. 81; Neal *v.* Davis, 53 Or. 423, 99 P. 69; Gardner *v.* Wright, 49 Or. 609, 91 P. 286; Brunner F. Co. *v.* Payne, 54 Tex. Civ. 501, 118 S. W. 602; Goetter *v.* Moore, 53 Wash. 5, 101 P. 365; Harman *v.* Alt, 69 W. Va. 287, 71 S. E. 709; Riffle *v.* Skinner, 67 W. Va. 75, 67 S. E. 1075; Ovig *v.* Morrison, 142 Wis. 243, 125 N. W. 449; Lafflitte *v.* Superior, 142 Wis. 73, 125 N. W. 105; Illinois S. Co. *v.* Paczocha, 139 Wis. 23, 119 N. W. 500; Hatch *v.* Lusignan, 117 Wis. 428, 94 N. W. 332.

701-17 Cannon *v.* Oil Co. (Tex. Civ.), 138 S. W. 803; Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026.

Admissions made after the statutory period of adverse possession, by the adverse claimant cannot affect the title. Cook's Hereford Cattle Co. *v.* Barnhart (Tex. Civ.), 147 S. W. 662.

Abandonment ineffectual to divest title. Tarver *v.* Deppen, 132 Ga. 798, 65 S. E. 177.

Evidence to overcome title.—"But slight evidence to overcome title by prescription is required." Betjemann *v.* R. Co., 127 App. Div. 83, 111 N. Y. S. 567.

AFFIDAVITS.

703-1 Miller *v.* Caraker, 9 Ga. App. 255, 71 S. E. 9; S. *v.* Williams, 76 S. C. 135, 56 S. E. 783.

Verified complaint may be regarded as affidavit. S. *v.* Peterson, 29 Wash. 571, 70 P. 71. And verified deposition, and exhibit attached to affidavit. Chubbuck *v.* Beaty, 80 Kan. 789, 104 P. 558. But see Gawtry *v.* Doane, 51 N. Y. 84.

Administering oath and recital of fact in record do not show affidavit was made. Black *v.* Cochran, 21 Pa. C. C. 326.

704-3 Sellers *v.* S., 162 Ala. 35, 50 S. 340; Eytinge *v.* Ty., 12 Ariz. 131, 100 P. 443; Western P. Co. *v.* Fried, 33 Mont. 7, 81 P. 394; Benepe-O. Co. *v.* Scheidegger, 32 Mont. 424, 80 P. 1024; Shanholtzer *v.* Thompson, 24 Okla. 198, 103 P. 595.

Insufficient statement of facts may be helped by record of which affidavit is part. Wiley *v.* Carson, 15 S. D. 298, 89 N. W. 475; Flood *v.* Libby, 38 Wash. 366, 80 P. 533.

If affidavit jurisdictional in nature, departure from words of statute, hazardous. See Ayres *v.* Gartner, 90 Mich. 380, 51 N. W. 461; Hinkle *v.* Lovelace, 204 Mo. 208, 102 S. W. 1015; Nichols *v.* Nichols, 128 N. C. 108, 38 S. E. 296; Hopkins *v.* Hopkins, 132 N. C. 22, 43 S. E. 508; DeArmond *v.* DeArmond, 92 Tenn. 40, 20 S. W. 422.

Information and belief sufficient where cannot be made in any other form. Smith *v.* Collis, 42 Mont. 350, 112 P. 1070.

704-4 *Comp.* S. *v.* Collier, 171 Ind. 606, 86 N. E. 1015.

705-7 Vogelman *v.* Lewit, 48 Misc. 625, 96 N. Y. S. 207; Graham *v.* Smart, 42 Wash. 205, 84 P. 824.

706-8 O'Brien *v.* O'Brien, 16 Cal. App. 103, 116 P. 692; Pelegrinelli *v.* Co., 1 Cal. App. 593, 82 P. 695; Gay *v.* Torrance, 145 Cal. 144, 78 P. 540; Clark *v.* Jackson, 222 Ill. 13, 78 N. E. 6; S. *v.* Co., 77 Kan. 774, 95 P. 391; Hufty *v.* Wilson, 78 N. J. L. 241, 74 A. 137; Lawshe *v.* S., 57 Tex. Cr. 32, 121 S. W. 865; Griffiths *v.* Court, 35 Utah 443, 100 P. 1064.

Personal knowledge of facts recited must be stated (Shaw *v.* Ashford, 110 Mich. 534, 68 N. W. 281), unless they are evidenced by public records. Robinson *v.* Judge, 142 Mich. 70, 105 N. W. 25.

Amendment improper. — Moorhead *v.* Briggs, 152 Ill. App. 361.

707-9 Deputy *v.* Dollarhide, 42 Ind. App. 554, 86 N. E. 344.

Officer before whom extra-judicial oath taken may testify he did not administer it and explain how paper was signed by him and taken from his possession. Minor *v.* S., 55 Fla. 77, 46 S. 297.

707-10 McCain *v.* Bonner, 122 Ga. 842, 51 S. E. 36.

708-11 Green *v.* Rhodes, 8 Ga. App. 301, 68 S. E. 1090.

Absence of date in jurat not fatal. Paulson *v.* Beaman, 32 Can. Sup. 655.

Omission of seal of clerk.—Reclamation Dist. *v.* Snowball, 160 Cal. 695, 117 P. 905, rehearing denied, 118 P. 514.

Silence of jurat.—Not essential jurat state affidavit was sworn to in presence of or before notary who verifies fact by his certificate. That fact is presumed from statement affidavit was sworn to. Hosea *v.* S., 47 Ind. 180; C. *v.* Keefe, 7 Gray (Mass.) 332; Clement *v.* Bullens, 159 Mass. 193, 34 N. E. 173; Trice *v.* Jones, 52 Miss. 138. Like presumption is entertained when jurat fails to state by whom affidavit signed and sworn to. Briggs *v.* Yetzer, 103 Ia. 342, 72 N. W. 647; Black *v.* R. Co., 122 Ia. 32, 96 N. W. 984.

708-12 Colman *v.* Goodnow, 36 Minn. 9, 29 N. W. 338; Sebesta *v.* Court, 77 Neb. 249, 109 N. W. 166, *over.* Bantley *v.* Finney, 43 Neb. 794, 62 N. W. 213; Finane *v.* Co., 3 N. M. 256, 5 P. 725; Minor *v.* Marshall, 6 N. M. 194, 27 P. 481; Hill *v.* Co., 6 S. D. 160, 60 N. W. 752.

708-13 Fidelity Ins. Co. *v.* Co., 81 Fed. 439; Mitchum *v.* S., 56 Fla. 71, 47 S. 815; Miller *v.* Caraker, 9 Ga. App. 255, 71 S. E. 9; Cox *v.* Stern, 170 Ill. 442, 48 N. E. 906; James *v.* Logan, 82 Kan. 285, 108 P. 81; Bloomingdale *v.* Chittenden, 75 Mich. 305, 42 N. W. 836; Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10; Turner *v.* St. John, 8 N. D. 245, 78 N. W. 340; Ainslie *v.* Kohn, 16 Or. 363, 19 P. 97; S. *v.* Williams, 76 S. C. 135, 56 S. E. 783.

May be essential if affidavit be used as evidence, though not otherwise. Turner *v.* St. John, 8 N. D. 245, 78 N. W. 340.

Absence of seal.—If affidavit taken in open court absence of clerk's seal, immaterial. Hymer *v.* Holyfield (Tex. Civ.), 87 S. W. 722. And so generally if seal not required by statute. Meldrum *v.* U. S., 151 Fed. 177, 80 C. C. A. 545; Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164; Clement *v.* Bullens, 159 Mass. 193, 34 N. E. 173; Wiley *v.* Carson, 15 S. D. 298, 89 N. W. 475.

709-14 Pallady *v.* Beatty, 15 Okla. 626, 83 P. 428.

711-19 Meldrum *v.* U. S., 151 Fed. 177, 80 C. C. A. 545; Albright *v.* Co., 5 Penne. (Del.) 198, 62 A. 726; Abrams *v.* S., 121 Ga. 170, 48 S. E. 965; Melville *v.* S., 173 Ind. 352, 89 N. E. 490; Black *v.* R. Co., 122 Ia. 32, 96 N. W. 984.

712-23 Presumption that officer acts within jurisdiction and his acts are lawfully performed will prevail over prima facie presumption that venue of affidavit is place where oath administered. Turner *v.* Loomis, 146 Ia. 655, 125 N. W. 662; Salzer L. Co. *v.* Claflin, 16 N. D. 601, 113 N. W. 1036.

713-28 Singletary *v.* Watson, 136 Ga. 241, 71 S. E. 162; Lanning *v.* Haases, 89 Neb. 19, 130 N. W. 1008.

An attorney should not take, in a cause in which he is acting. Crawford *v.* Ferguson, 5 Okla. Crim. 377, 115 P. 278. But amendment by procuring verification by proper officer is permissible. Board of Comrs. *v.* Walter, 83 Kan. 743, 112 P. 599.

713-29 Robinson *v.* Cooper, 115 N. Y. S. 599; Bargna *v.* Bargna (Tex. Civ.), 123 S. W. 1143.

It is presumed deputy was de jure

deputy.—Southern R. Co. *v.* Hundley, 151 Ala. 378, 44 S. 127.

714-30 "J. P." signifies justice of peace. Abrams *v.* S., 121 Ga. 170, 48 S. E. 965.

714-31 Signature in firm name. Where affidavit purporting to have been sworn to before a firm was admitted to have been sworn to before a member of it, it was said to be at most an irregularity which could correct nunc pro tunc. Two Mountains Election Case, 31 Can. Sup. 437.

Seal of officer.—Cassidy *v.* Souster, 115 Mich. 491, 132 N. W. 292.

Omission of seal not fatal. Reclamation Dist. *v.* Snowball, 160 Cal. 695, 117 P. 907, rehearing denied, 118 P. 514.

Failure of certificate to show when officer's commission terminates, immaterial. Brown Mfg. Co. *v.* Gilpin, 120 Mo. App. 130, 96 S. W. 669; Baskowitz *v.* Guthrie, 99 Mo. App. 301, 73 S. W. 227.

Statement of counsel, made of his knowledge and unobjected to, accepted. Ellis *v.* Ellis, 134 Ga. 287, 67 S. E. 819.

714-33 Maniscalco *v.* Slamowitz, 123 App. Div. 690, 108 N. Y. S. 65.

715-34 Presumed affidavit taken and certificate made after person certifying became officer. Naudain *v.* Naudain, 1 Boyce (Del.) 248, 75 A. 609.

716-36 Abrams *v.* S., 121 Ga. 170, 48 S. E. 965; Black *v.* R. Co., 122 Ia. 22, 96 N. W. 984; Wiley *v.* Carson, 15 S. D. 298, 89 N. W. 475; Hansford *v.* Snyder, 63 W. Va. 198, 59 S. E. 975.

Judicial notice not taken of power of foreign officers. Tentonia L. & B. Co. *v.* Turnell, 19 Ind. App. 169, 49 N. E. 852. But such notice has been taken of seals of notaries. Brown Mfg. Co. *v.* Gilpin, 120 Mo. App. 130, 96 S. W. 669.

716-37 Singletary *v.* Watson, 136 Ga. 241, 71 S. E. 162; Shockley *v.* Turnell, 114 Ga. 378, 40 S. E. 270; Brunswick Co. *v.* Bingham, 107 Ga. 270, 33 S. E. 56; Ballew *v.* Broach, 121 Ga. 421, 49 S. E. 297; Howell *v.* Co., 121 Ga. 461, 49 S. E. 299; Jackson *v.* S., 161 Ind. 36, 67 N. E. 600; Bank *v.* Mulford, 48 Ind. App. 84, 93 N. E. 432; Metcalfe *v.* Carr, 133 Mich. 153, 94 N. W. 734; Parke *v.* Reeden, 117 N. Y. S. 945; Manheimer *v.* Dosh, 26 Misc. 857, 74 N. Y. S. 922; Connally *v.* Wallace, 51 W. Va. 181, 41 S. E. 167.

In Georgia certificate of foreign notary is sufficient if seal is attached. Simpson *v.* Wicker, 120 Ga. 418, 47 S. E. 965.

Under Illinois statute certificate of foreign notary must state he has authority to administer oaths. Henning *v.* Libke, 104 Ill. App. 303; Desnoyers S. Co. *v.* Bk., 188 Ill. 312, 58 N. E. 994.

In Minnesota same rule prevails. Wood *v.* R. Co., 42 Minn. 411, 44 N. W. 308, 7 L. R. A. 149.

In Nebraska a similar rule prevails; a United States consul abroad may take affidavits for use in state courts. Browne *v.* Palmer, 66 Neb. 287, 92 N. W. 315.

The New Jersey statute merely provides a mode of proof. Dilts *v.* Board of Excise Courts, 80 N. J. L. 475, 79 A. 315.

In New Mexico affidavit made before officer of another jurisdiction empowered to administer oaths is competent. Genest *v.* Assn., 11 N. M. 251, 67 P. 743.

In New York, by statute, affidavit purporting to be sworn to before foreign notary, if it has proper certificate annexed, is admissible. Isman *v.* Wayburn, 54 Misc. 86, 104 N. Y. S. 491.

In Texas affidavit may be made before foreign notary. Latimer *v.* R. Co., 40 Tex. Civ. 136, 88 S. W. 444.

In England same rule has long prevailed. O'Mealy *v.* Newell, 8 East 364, 103 Eng. Reprint 382; Walrond *v.* Van Moses, 8 Mod. 322, 88 Eng. Reprint 230; Haggitt *v.* Iniff, 5 De G., M. & G. 910, 43 Eng. Reprint 1124; Cole *v.* Sherard, 11 Exch. 482.

And so elsewhere.—U. S. *v.* Libby, 1 Woodb. & M. 221, 26 Fed. Cas. No. 15,597; Denmead *v.* Maack, 2 McArthur (D. C.) 472; Conolly *v.* Riley, 25 Md. 402.

Name of officer must be disclosed either in body of affidavit or by his signature to jurat. Sellers *v.* S., 162 Ala. 35, 50 S. 340.

717-39 Signing by affiant must be proved. Locklayer *v.* Locklayer, 139 Ala. 354, 35 S. 1008; Meadows *v.* Alexander, 1 Ga. App. 40, 57 S. E. 901; Hathaway *v.* Smith, 117 Ga. 946, 43 S. E. 984. Signature not necessary under some statutes. Holman *v.* S., 144 Ala. 95, 39 S. 646; Albritton *v.* Williams, 132 Ala. 647, 32 S. 636; Hotaling *v.* Brogan, 12 Cal. App. 500, 107 P. 711.

Variance.—It was stated in body of

affidavit that "Mrs. J. R." appeared; signature was "M. N. R.;" held to be affidavit of "M. N. R." Raley *v.* Warrenton, 120 Ga. 365, 47 S. E. 972.

Any officer may make when statute does not designate. Old Settler's Inv. Co. *v.* White, 158 Cal. 236, 110 P. 922.

719-45 In re African Farms (1906) 1 Ch. (Eng.) 640; Boston M. Co. *v.* Co., 123 Ga. 458, 51 S. E. 466; Wetzstein *v.* Co., 26 Mont. 193, 66 P. 943; Pallady *v.* Beatty, 15 Okla. 626, 83 P. 428. *Contra.* In re Chartereland S. & T. Co. (1900) 2 Ch. (Eng.) 870.

In divorce proceedings party must make affidavit. Hinkle *v.* Lovelace, 204 Mo. 208, 102 S. W. 1015.

Presumption.—If allegations are direct and positive it is presumed facts stated were within affiant's knowledge. Kinney *v.* Reeves, 142 Ala. 604, 39 S. 29; Birmingham R. Co. *v.* Barron, 150 Ala. 232, 43 S. 346.

719-46 A bookkeeper is not an agent. Merriman Co. *v.* Thomas, 103 Va. 24, 48 S. E. 490.

720-49 Statement that facts are within personal knowledge of attorney shows good reason for his being affiant. Pallady *v.* Beatty, 15 Okla. 626, 83 P. 428.

720-50 Birmingham R. Co. *v.* Barron (Ala.), 43 S. 346.

722-55 Johnson *v.* Tanner, 126 Ga. 718, 56 S. E. 80; Hicks *v.* Portwood, 129 Ga. 307, 58 S. E. 837; Horton *v.* Fulton, 130 Ga. 466, 60 S. E. 1059; Eaker *v* S., 4 Ga. App. 649, 62 S. E. 99.

722-56 **In civil action** may be used in criminal case. S. *v.* Pratt, 3 Penne. (Del.) 264, 51 A. 604.

In one action may be used in another. Yoki *v.* Bk., 87 Minn. 295, 91 N. W. 1101.

Caption immaterial if other facts show affiant intended affidavit to be used in a particular case. Johnson *v.* Tanner, 126 Ga. 718, 56 S. E. 80.

723-57 White Day F. Co. *v.* Bk. (Tex. Civ.), 114 S. W. 1159.

726-66 S. *v.* Harmon, 4 Penne. (Del.) 580, 60 A. 866; Yates *v.* S. (Tex. Cr.), 152 S. W. 1064 (cannot be made to take the place of a deposition); Houston O. Co. *v.* Kimball (Tex. Civ.), 114 S. W. 662.

726-67 See U. S. *v.* Zucca, 175 Fed. 578.

By party in interlocutory proceedings competent only to impeach affiant. Graham *v.* Smart, 42 Wash. 205, 84 P. 824.

Admissible in contempt proceedings (Warner *v.* Martin, 124 Ga. 387, 52 S. E. 446), and in discretion of court, on hearing application for temporary alimony (Rogers *v.* Rogers, 103 Ga. 763, 30 S. E. 659; Whitfield *v.* Whitfield, 127 Ga. 419, 56 S. E. 490); and in habeas corpus proceedings. Robertson *v.* Heath, 132 Ga. 310, 64 S. E. 73. May be used in proceedings before board for revocation of physician's license. Mathews *v.* Hedlund, 82 Neb. 825, 119 N. W. 19. Inadmissible on certiorari. Heinka *v.* Brown, 155 Mich. 559, 119 N. W. 1083.

Objection to affidavit should cover only so much of it as is incompetent. Leath *v.* Hinson, 117 Ga. 589, 43 S. E. 985.

Affidavits for relief on ground of surprice, mistake, excusable neglect, etc., are considered rather as parol testimony than as documentary evidence. Casto *v.* Shew, 32 Ind. App. 338, 68 N. E. 1041.

For continuance may be read as testimony of absent witness (Mise *v.* C., 25 Ky. L. R. 2207, 80 S. W. 457), and is entitled to same weight as if in form of deposition. Johnson *v.* C., 22 Ky. L. R. 1185, 61 S. W. 1005. May be used against accused. Risner *v.* C., 133 Ky. 11, 117 S. W. 318.

Failure to file.—It is within discretion of court to admit affidavits though not filed. Boston M. Co. *v.* Co., 123 Ga. 458, 51 S. E. 466.

Amount involved in appeal may be determined from affidavits. Falkners G. M. Co. *v.* McKinnery (1901), App. Cas. (Eng.) 581.

Not admissible in equity on the merits if objected to and previous consent not given. Herold *v.* Craig, 59 W. Va. 353, 53 S. E. 466.

Allegations on information and belief will not support motion to quash indictment unless state so agrees or trial court orders that it may be used as evidence. Smith *v.* Mississippi, 162 U. S. 592; Tarrance *v.* Florida, 188 U. S. 519.

Offered to contradict may be used for all purposes if subsequently put in evidence generally by opposing party. Connecticut Mut. L. Ins. Co. *v.* Hillmon, 188 U. S. 208.

Of third party, not evidence. W. U. T. Co. *v.* Gillis, 89 Ark. 483, 117 S. W.

719; Halliday *v.* Lambright, 29 Tex. Civ. 226, 68 S. W. 712.

Of husband, that deed to homestead made in good faith, competent to show holder of notes given in pursuance of affidavit was innocent purchaser. Cooper *v.* Ford, 29 Tex. Civ. 253, 69 S. W. 487.

As to value in replevin may be conclusive. Weyerhaeuser *v.* Foster, 60 Minn. 223, 61 N. W. 1129; Butts *v.* Woods, 4 N. M. 343, 16 P. 617; Park *v.* Robinson, 15 S. D. 551, 91 N. W. 344.

Assumed to be true where bias of presiding judge alleged. Rush *v.* Denhardt, 138 Ky. 238, 127 S. W. 785.

Uncontradicted affidavits may satisfy officer or affiants' authority to pay taxes for others. Lennon *v.* White (R. I.), 72 A. 998.

Effect of affidavit made by person not authorized. See "Objections," infra, 136-72.

Statutory affidavits, though made evidence, do not exclude other modes of proof. Varney *v.* Co., 64 W. Va. 417, 63 S. E. 203.

Contradiction of statements in affidavit of absent witness by other testimony is allowable, though it cannot be shown affiant, if present, would not have made them. Risner *v.* C., 133 Ky. 11, 117 S. W. 318.

Use in subsequent proceedings.—Test whether an affidavit used in former proceeding can be used in a second proceeding is whether or not the affiant can be prosecuted for perjury if the allegations prove to be false. In re Owsley, 153 App. Div. 90, 137 N. Y. S. 1040.

AFFIDAVITS OF MERITS AND DEFENSE.

See 1 STANDARD PROC. 643-722.

AFFRAY.

Definition.—See 1 STANDARD PROC. 724.

Indictment or information.—See 1 STANDARD PROC. 725-728.

Trial and conviction, various matters relating to, see 1 STANDARD PROC. 729-730.

728-11 Sufficiency of Evidence.—See Blackwell *v.* S., 119 Ga. 314, 46 S. E. 432.

728-13 Gamble *v.* S., 113 Ga. 701, 39 S. E. 301.

Highway is a public place, but not a house where people are gathered to dance, though it be "near" a highway. Gamble *v.* S., 113 Ga. 701, 39 S. E. 301.

Presence of seven persons makes place public. S. *v.* Fritz, 133 N. C. 725, 45 S. E. 957.

729-16 Conviction may be had for disturbing public peace, though no person testified he was disturbed. Stancliff *v.* U. S., 5 Ind. Ty. 486, 82 S. W. 882.

729-25 Coyle *v.* S. (Tex. Cr.), 72 S. W. 847.

AGE.

Age of tree, 738-28.

732-1 S. *v.* Gebhardt, 219 Mo. 708, 119 S. W. 350; Holmes *v.* S., 82 Neb. 406, 118 N. W. 99.

732-2 Crosby *v.* Ardoin (Tex. Civ.), 145 S. W. 709.

If good faith as to a person's age is a defense defendant must show it. Farr *v.* Waterman (Tex. Civ.), 95 S. W. 65.

Breach of warranty as to age must be shown by party alleging it. Bowen *v.* Ins. Co., 82 App. Div. 458, 81 N. Y. S. 840.

732-4 Hunt *v.* Council, 64 Mich. 671, 31 N. W. 576, 8 Am. St. 855.

Age of prosecutrix may be shown by informal, identified writing made by her neighbors, and evidence is admissible to show ages of her brothers and sisters. S. *v.* Neasby, 188 Mo. 467, 87 S. W. 468.

732-6 Boyett *v.* S., 130 Ala. 77, 30 S. 475.

Coffin plate, obituary notice and certificate of board of health, all resting on statements made by members of decedent's family, incompetent. Dinan *v.* Council, 201 Pa. 363, 50 A. 999.

733-7 S. *v.* Palmberg, 199 Mo. 233, 97 S. W. 566; Neill *v.* S., 49 Tex. Cr. 219, 91 S. W. 791; Smith *v.* S. (Tex. Cr.), 73 S. W. 401.

733-8 Verified certificate of parent is prima facie evidence of child's age and binds him in action against his master for negligence. Long *v.* Folwell, 18 Pa. Dist. 921.

733-9 Johnson *v.* Ins. Co., 134 Ga. 800, 68 S. E. 731; Bertram *v.* Witherspoon, 138 Ky. 116, 127 S. W. 533 (school census); Phillips *v.* Williams (Ky.), 114 S. W. 1191; Levels *v.* R.

Co., 196 Mo. 606, 94 S. W. 275; Perkins *v.* Baker (Okla.), 137 P. 661 (enrollment record); Rice *v.* Anderson, 39 Okla. 279, 134 P. 1120; Williams *v.* Joins, 34 Okla. 733, 126 P. 1013.

United States census reports.—Priddy *v.* Boice, 201 Mo. 309, 99 S. W. 1055; Murray *v.* Hive, 112 Tenn. 664, 80 S. W. 827.

Foreign census reports and board of health records.—Murray *v.* Hive, 112 Tenn. 664, 80 S. W. 827.

Statements made in a census taken of Indians, not competent to show age of one enumerated therein, law not providing for statement of that fact, though it was required by department under supervision of which census taken. Hegler *v.* Faulkner, 153 U. S. 109.

School register, kept under statute, competent. Levels *v.* R. Co., 196 Mo. 606, 94 S. W. 275; S. *v.* Day, 188 Mo. 359, 87 S. W. 465.

School enumeration lists admissible if made regularly; otherwise not. Levels *v.* R. Co., 196 Mo. 606, 94 S. W. 275.

Register of births.—Certified copy of entry in register, made under statute, is evidence of date, as well as of fact, of birth. In re Goodrich (1904), Prob. (Eng.) 138, *disap.* In re Wintle, L. R. 9 Eq. (Eng.) 373; Reg. *v.* Weaver, L. R. 2 C. C. (Eng.) 85. And so of certified copy of register of a parish of a Catholic church kept in accordance with its rules. Hancock *v.* Council, 67 N. J. L. 614, 52 A. 301.

733-10 Record of vital statistics inadmissible unless kept in pursuance of statute, custom of church or locality; if former, statute should be proved. Pirrung *v.* Council, 104 App. Div. 571, 93 N. Y. S. 575.

733-11 Hegler *v.* Faulkner, 153 U. S. 109; S. *v.* Scroggs, 123 Ia. 619, 96 N. W. 723; Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541; Waltz *v.* Benefit Fund, 78 Misc. 499, 139 N. Y. S. 1016; Bailey *v.* Fly, 35 Tex. Civ. 410, 80 S. W. 675.

Person who performed baptismal ceremony has been permitted to testify to date, and to refresh recollection from record he kept. S. *v.* Callahan, 18 S. D. 150, 99 N. W. 1100.

Entry in minute book of lodge, of which deceased a member, made prior to issue of policy to him and in usual course of business, not admissible. Connecticut L. Ins. Co. *v.* Schwenk, 94 U. S. 593.

Certificate of birth is not admissible in absence of proof it was contained in some record, or was a copy duly attested, or a verified transcript made under statute. Lee *v.* Co., 134 App. Div. 123, 118 N. Y. S. 852.

734-12 U. S. *v.* Bergantino, 3 Phil. Isl. 118.

734-13 Swift *v.* Rennard, 119 Ill. App. 173; Bertram *v.* Witherspoon, 138 Ky. 116, 127 S. W. 533 (if all parties dead and entry ancient); Clark *v.* C., 29 Ky. L. R. 154, 92 S. W. 573; Whalen *v.* Nisbet, 95 Ky. 464, 26 S. W. 188; Bryant *v.* McKinney, 29 Ky. L. R. 951, 96 S. W. 809; S. *v.* Bruton, 253 Mo. 361, 161 S. W. 751 (copy of family record); S. *v.* Hazlett, 14 N. D. 490, 105 N. W. 617; S. *v.* Goddard (Or.), 138 P. 243; Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. 715, 36 L. R. A. 271.

Grandfather's bible may be family bible. S. *v.* Hazlett, 14 N. D. 490, 105 N. W. 617.

Limited to original entries.—Bryant *v.* McKinney, 29 Ky. L. R. 951, 96 S. W. 809.

734-14 S. *v.* Miller, 71 Kan. 200, 80 P. 51; Shorten *v.* Judd, 56 Kan. 43, 42 P. 337, 54 Am. St. 587; Dupoyster *v.* Gagani, 84 Ky. 403, 1 S. W. 652; S. *v.* Snover, 63 N. J. L. 382, 43 A. 1059; Bigliben *v.* S. (Tex. Cr.), 151 S. W. 1044; Rowan *v.* S., 57 Tex. Cr. 625, 124 S. W. 668.

Harmless error to allow Bible record to be admitted in corroboration of uncontradicted testimony of mother. Davis *v.* Gaskins, 137 Ga. 450, 73 S. E. 579.

Record not admissible after parent has testified of child's age from independent recollection, even to refresh memory, if not made contemporaneously. S. *v.* Menard, 110 La. 1098, 35 S. 360; Rowan *v.* S., 57 Tex. Cr. 625, 124 S. W. 668. Is not best evidence. Loose *v.* S., 120 Wis. 115, 97 N. W. 526.

735-15 Edgar *v.* Gertison (Ky.), 112 S. W. 831; S. *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63; Koester *v.* Wks., 194 N. Y. 92, 87 N. E. 77; Ginsburgh *v.* Solomon, 123 N. Y. S. 246.

Declarations of person may be proved. P. *v.* Howard, 143 Cal. 316, 76 P. 1116; Swift *v.* Rennard, 119 Ill. App. 173; S. *v.* Hansford, 81 Kan. 300, 106 P.

748; Taylor *v.* Lodge, 101 Minn. 72, 111 N. W. 919. They are not convincing. Lake *v.* Combs, 84 Ark. 21, 104 S. W. 544, 1094.

If age is part of corpus delicti it cannot be proved solely on confession of accused. Winstrand *v.* P., 213 Ill. 72, 72 N. E. 748.

Testimony incompetent if opinion based on statements of others whose information was hearsay. P. *v.* Colbath, 141 Mich. 180, 104 N. W. 633.

735-16 Curry *v.* S., 68 Ala. 29; McCallum *v.* S., 119 Ga. 308, 46 S. E. 414; Mann *v.* P., 220 Ill. 86, 77 N. E. 95; Chicago *v.* Lewandouski, 190 Ill. 301, 60 N. E. 497; Travelers' Ins. Co. *v.* C., M., 27 Ky. L. R. 653, 85 S. W. 1090; C. *v.* Stevenson, 142 Mass. 466, 8 N. E. 341; Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541; Grand Lodge *v.* Bortes, 69 Neb. 631, 96 N. W. 186, 98 N. W. 715, 111 Am. St. 577; Pearce *v.* Kyger, 16 Lea (Tenn.) 521; Swink *v.* French, 11 Lea (Tenn.) 78, 47 Am. Rep. 277; Sheppard *v.* S., 56 Tex. Cr. 604, 120 S. W. 446, *crit.* the text (testimony based on information derived from stepfather, a member of family, inadmissible); Curry *v.* S., 50 Tex. Cr. 158, 94 S. W. 1058; Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. 715, 36 L. R. A. 271; S. *v.* Cain, 9 W. Va. 559; Loose *v.* S., 120 Wis. 115, 97 N. W. 526.

Presence of parents in court does not render person whose age is in question incompetent to testify thereof. S. *v.* Scroggs, 123 Ia. 649, 96 N. W. 723; S. *v.* Miller, 71 Kan. 200, 80 P. 51. But he must testify of his knowledge, and not to what parents said. Johnson *v.* S., 42 Tex. Cr. 298, 59 S. W. 898.

735-17 Reagan *v.* U. S., 202 Fed. 488, 491, 120 C. C. A. 627; Goff *v.* Murphy, 153 Ky. 634, 156 S. W. 95; Perkins *v.* Baker (Okla.), 137 P. 661; Duffey *v.* S. (Okla. Cr.), 135 P. 942; S. *v.* Walton, 53 Or. 557, 101 P. 389; Tate *v.* S. (Tex. Cr.), 150 S. W. 781; Gordon *v.* S. (Tex. Cr.), 150 S. W. 779; Sheppard *v.* S., 56 Tex. Cr. 604, 120 S. W. 446 (if parent of witness present).

Letter of brother not competent. Bowen *v.* Ins. Co., 68 App. Div. 342, 74 N. Y. S. 101.

Affidavit of father in suit in chancery not competent. Haines *v.* Guthrie, 13 Q. B. D. (Eng.) 818; Bowen *v.* Ins. Co., 68 App. Div. 342, 74 N. Y. S. 101.

Hearsay competent if based on information obtained from deceased relatives of party. Donley *v.* S., 44 Tex. Cr. 428, 71 S. W. 958.

736-19 Palmer *v.* S. (Ark.), 160 S. W. 204; Republic *v.* Parsons, 10 Haw. 601; S. *v.* Scroggs, 123 Ia. 649, 96 N. W. 723; Perkins *v.* C. (Ky.), 124 S. W. 794; S. *v.* Gebhart, 219 Mo. 708, 119 S. W. 350; Wells *v.* Seofield, 157 App. Div. 8, 141 N. Y. S. 657; Groves *v.* McNeil, 226 Pa. 345, 75 A. 600. See "Photographs," infra, 774-12.

Photograph inadmissible.—Dresch *v.* Elliott, 137 App. Div. 252, 122 N. Y. S. 14.

Comparison of persons.—It is not proper to put witnesses on the stand for sole purpose of having them testify of their age for purpose of comparison with one whose age is in question. Poynor *v.* Holzgraf, 35 Tex. Civ. 233, 79 S. W. 829.

Age not fixed by inspection, though appearance might be satisfying to jury. Wistrand *v.* P., 213 Ill. 72, 72 N. E. 748. Conclusion based on inspection does not overcome positive parol testimony. U. S. *v.* Bergantino, 3 Phil. Isl. 118. But it has been said age of Chinaman can be approximately fixed by inspection, which may overcome positive testimony. Ark Foo *v.* U. S., 128 Fed. 697, 63 C. C. A. 249.

Time female became woman may be shown. Howerton *v.* C., 129 Ky. 482, 112 S. W. 606.

737-20 People *v.* Bond, 13 Cal. App. 175, 109 P. 150; S. *v.* Trusty, 122 Ia. 82, 97 N. W. 989; Clark *v.* C., 29 Ky. L. R. 154, 92 S. W. 573; Levels *v.* R. Co., 196 Mo. 606, 94 S. W. 275; Adler *v.* Royal Neighbors, 90 Neb. 56, 132 N. W. 716; U. S. *v.* Bergantino, 3 Phil. Isl. 118; S. *v.* Callahan, 18 S. D. 145, 154, 99 N. W. 1099; Loose *v.* S., 120 Wis. 115, 97 N. W. 526.

By declarations ante lite motion.—Harvick *v.* Modern Woodmen, 158 Ill. App. 570.

Mother's silence in deposition as to age of son does not negative her subsequent testimony. Halliday *v.* Lambright, 29 Tex. Civ. 226, 68 S. W. 712.

Father may refresh recollection by memorandum made at time of child's birth though it is not produced; failure to produce it affects only weight of his testimony. Loose *v.* S., 94 Va. 146, 26 S. E. 421, 64 Am. St. 715, 36 L. R. A. 271.

Witness' knowledge.—A witness whose knowledge is based on a register of births, church records and acquaintance with party's family may testify. Mash *v.* P., 220 Ill. 86, 77 N. E. 92. As may one whose knowledge is based on publication of marriage banns. Grand Lodge *v.* Bartes, 69 Neb. 631, 96 N. W. 186, 98 N. W. 715, 111 Am. St. 577. It is presumed wife who lived with husband twenty years knows his age, and she will not be disqualified though her first information may have come from an incompetent source. Ibid. Though uncertain of his own and a brother's age a witness raised with latter may testify thereof approximately. Hancock *v.* Council, 69 N. J. L. 308, 55 A. 246.

Declaration of witness competent in rebuttal. S. *v.* Trusty, 122 Ia. 82, 97 N. W. 989.

Declarations of relatives incompetent if living unless they cannot be produced to testify. S. *v.* Trusty, 122 Ia. 82, 97 N. W. 989.

Declarations of deceased persons competent.—Travelers' Ins. Co. *v.* C. M., 27 Ky. L. R. 653, 85 S. W. 1090.

Proofs of death not conclusive as to age of insured, though verified Bowen *v.* Ins. Co., 68 App. Div. 342, 74 N. Y. S. 101.

Wife of accused not competent to prove age of her daughter, the prosecutrix. S. *v.* Deputy, 3 Penne. (Del.) 19, 50 A. 176.

Reason for false statement.—It is not competent for witness to state reason which induced deceased to make false statement as to his age Levels *v.* R. Co., 196 Mo. 606, 94 S. W. 275.

Proof of age may be based on knowledge of collateral facts occurring about time party born. Donley *v.* S., 44 Tex. Cr. 428, 71 S. W. 958; Curry *v.* S., 50 Tex. Cr. 158, 94 S. W. 1058.

737-22 P. *v.* Davidson, 240 Ill. 191, 88 N. E. 565; Bell *v.* Bearman, 37 Okla. 645, 133 P. 188.

Conclusions based on appearance and declarations not entitled to much weight. Supreme Conclave *v.* Saylor, 79 Miss. 62, 29 S. 790.

738-23 Ham *v.* S., 156 Ala. 645, 47 S. 126.

738-24 Smith *v.* S. (Ala.), 62 S. 184.

Witnesses who have known a person may testify of his age at time they first knew him, basing opinions on size and appearance. Donley *v.* S., 44 Tex. Cr. 428, 71 S. W. 958.

After fully stating means of knowledge and basis of opinion as to age of absent person any witness may give his opinion, notwithstanding parents of party have testified of his age. S. *v.* Grubb, 55 Kan. 678, 41 P. 951. *Contra.* Valley M. L. Assn. *v.* Teewalt, 79 Va. 421.

738-25 A physician well acquainted with her may testify of age of woman, opinion being based on appearance, size and development. Bice *v.* S., 37 Tex. Cr. 38, 38 S. W. 803.

738-27 S. *v.* Day, 188 Mo. 359, 87 S. W. 465; Hancock *v.* Council, 69 N. J. L. 308, 55 A. 246; S. *v.* Callahan, 18 S. D. 150, 99 N. W. 1100.

738-28 Age of a horse cannot be proved by works on veterinary science, nor solely by comparison by jury of horse in question with other horses. Brady *v.* Shirley, 14 S. D. 447, 85 N. W. 1002.

Comparative age of marks on trees may be shown by expert surveyor. Cochran *v.* Casey (Tex. Civ.), 128 S. W. 1145.

Age of tree may be shown by testimony of number of rings on a block of wood cut from it. Whitfield *v.* Co., 152 N. C. 211, 67 S. E. 512.

AGREED CASE.

See 1 STANDARD PROC. 734-768.

ALIBI.

741-2 S. *v.* Gulliver (Ia.), 142 N. W. 948; Bagley *v.* S. (Tex. Cr.), 150 S. W. 773.

741-3 P. *v.* Morris, 3 Cal. App. 1, 84 P. 463.

Defense affirmative in nature.—C. *v.* Gutshall, 22 Pa. Super. 269.

Evidence of, inadmissible in habeas corpus to test validity of imprisonment under writ of extradition. Ex parte Edwards, 94 Miss. 621, 44 S. 827.

Order of proof.—Having notice an alibi would be set up, state may prove in its case in chief by admission of defendant. S. *v.* Swisher, 186 Mo. 1, 84 S. W. 911.

743-7 "As much a traverse of the crime charged as any other defense, and proof tending to establish it, though not clear, may, nevertheless, with other facts of the case, raise doubt

enough to produce an acquittal." Turner v. Commonwealth, 86 Pa. 54, 27 Am. Rep. 683. As a fair illustration of what is here meant, there may in here in such testimony that which, being considered, might lessen the confidence which the jury otherwise might have in the correctness of the testimony of some opposing witness to a most important, perhaps controlling, circumstance, and leave them in doubt as to its occurrence, or as to the time and place where it occurred, if at all. Or, as here stated, it may be that this evidence being included and submitted to the jury for their consideration, because of its inclusion, upon a review of the whole case, the jury would not be left free of reasonable doubt as to the guilt of the accused." C. v. Andrews, 234 Pa. 597, 83 A. 412.

743-9 S. v. Worthen, 124 Ia. 408, 100 N. W. 330; C. v. Gutshall, 22 Pa. Super. 269.

744-10 Glover v. U. S., 147 Fed. 426, 77 C. C. A. 450; McDuffee v. S., 55 Fla. 125, 46 S. 721; S. v. De Geralmo, 83 N. J. L. 135, 83 A. 643.

744-11 Hatch v. S., 144 Ala. 50, 40 S. 113; P. v. Mar Gin Suie, 11 Cal. App. 42, 103 P. 951; P. v. Morris, 3 Cal. App. 1, 84 P. 463; P. v. Lang, 142 Cal. 482, 76 P. 232; Barr v. P., 30 Colo. 522, 71 P. 392; C. v. Tucker, 189 Mass. 457, 486, 76 N. E. 127; S. v. Brooks, 220 Mo. 74, 119 S. W. 353; S. v. King, 174 Mo. 647, 74 S. W. 627; S. v. Geralmo, 83 N. J. L. 135, 83 A. 643; S. v. Tapack (N. J. L.), 72 A. 962; Burns v. S., 75 O. 407, 79 N. E. 929; Tucker v. Ty., 17 Okla. 56, 87 P. 307; O'Hara v. S., 57 Tex. Cr. 577, 124 S. W. 95; Tinsley v. S., 52 Tex. Cr. 91, 106 S. W. 347.

745-12 Prater v. S., 107 Ala. 26, 18 S. 238; Parham v. S., 147 Ala. 57, 42 S. 1; S. v. Lee, 1 Boyce (Del.) 18, 74 A. 4; McRae v. S., 62 Fla. 74, 57 S. 348; Lewis v. S., 11 Ga. App. 102, 74 S. E. 708; Henderson v. S., 120 Ga. 504, 48 S. E. 167; Ryals v. S., 125 Ga. 266, 54 S. E. 168; Ransom v. S., 2 Ga. App. 826, 59 S. E. 101; Hauser v. P., 210 Ill. 253, 71 N. E. 416; S. v. Worthen, 124 Ia. 408, 100 N. W. 330; Wilburn v. Ty., 10 N. M. 402, 62 P. 968; C. v. Gutshall, 22 Pa. Super. 269; S. v. Ward, 61 Vt. 153, 17 A. 483; S. v. Hier, 78 Vt. 488, 63 A. 877.

See also S. v. Brauncis, 84 Conn. 222, 79 A. 70.

746-13 Hatch v. S., 144 Ala. 50, 40 S. 113, *over.* Pickens v. S., 115 Ala. 42, 22 S. 551; McRae v. S., 62 Fla. 74, 57 S. 348; Kirksey v. S., 11 Ga. App. 142, 74 S. E. 902; Henderson v. S., 120 Ga. 504, 48 S. E. 167; Ransom v. S., 2 Ga. App. 826, 59 S. E. 101; Hauser v. P., 210 Ill. 253, 71 N. E. 416; Briggs v. P., 219 Ill. 330, 76 N. E. 499; Wilburn v. Ty., 10 N. M. 402, 62 P. 968; C. v. Gutshall, 22 Pa. Super. 269; S. v. Powers, 72 Vt. 168, 47 A. 830.

746-14 S. v. Whitbeck, 145 Ia. 29, 123 N. W. 982; S. v. Worthen, 124 Ia. 408, 100 N. W. 330; S. v. Thomas, 135 Ia. 717, 109 N. W. 900.

747-15 See also S. v. Latimer, 88 S. C. 79, 70 S. E. 409.

747-17 Pope v. S. (Ala.), 66 S. 25; Rain v. S. (Ariz.), 137 P. 550; Jones v. P., 116 Ill. App. 64; S. v. Whitbeck, 145 Ia. 29, 123 N. W. 982; S. v. Snyder, 86 Vt. 449, 85 A. 984. *Contra,* as to act done by him if done for evidential use. C. v. Howard, 205 Mass. 128, 91 N. E. 397.

Self-serving declarations cannot be proved. Thornton v. S., 117 Wis. 338, 93 N. W. 1107.

Large scope is generally allowed accused in explanation of conduct which might otherwise be regarded as unfavorable. P. v. Mar Gin Suie, 11 Cal. App. 42, 103 P. 951.

Account books of defendant's physician, showing charges against him for visits on day in question, competent. Morrow v. S., 56 Tex. Cr. 519, 120 S. W. 491.

748-18 P. v. Welch, 143 Ill. App. 191.

Scope of proof.—If offense consists of a single act, alleged to have been done at a stated hour, proof need only cover time alleged. P. v. Morris, 3 Cal. App. 1, 84 P. 463. This is not inconsistent with rule that evidence must cover whole time of transaction. Barr v. P., 30 Colo. 522, 71 P. 392. Evidence need go no further than to show accused was not at place when event occurred. Fortson v. S., 125 Ga. 16, 53 S. E. 767. To entitle defense of alibi to consideration evidence must show that at very time in question accused was so far away, or circumstances were such he could not, with ordinary exertion, have reached place of crime so as to have been concerned in it. Mays v. S., 72 Neb. 723, 101 N. W. 979; Barbe v. Ty.,

16 Okla. 562, 86 P. 61; Tucker *v.* Ty., 17 Okla. 56, 87 P. 307. Proof must cover whole of time so as to render it impossible or highly improbable accused could have committed act. Briggs *v.* P., 219 Ill. 330, 345, 76 N. E. 499; Eckhardt *v.* P., 116 Ill. App. 408. *Comp.* P. *v.* Welch, 143 Ill. App. 191.

Length of confinement in prison is not material if not claimed that he was in prison at time of crime. S. *v.* Millican, 158 N. C. 617, 74 S. E. 107.

748-19 S. *v.* Brown, 247 Mo. 715, 153 S. W. 1027; S. *v.* Miles, 174 Mo. App. 181, 156 S. W. 758 (reasonable doubt); Burns *v.* S., 75 O. 407, 79 N. E. 929; Tucker *v.* Ty., 17 Okla. 56, 87 P. 307; S. *v.* Ward, 61 Vt. 153, 192, 17 A. 483.

Evidence of alibi is to be scanned with attention. S. *v.* Worthen, 124 Ia. 408, 100 N. W. 330; P. *v.* Portenga, 134 Mich. 247, 96 N. W. 17; P. *v.* Tice, 115 Mich. 219, 73 N. W. 108, 69 Am. St. 560.

749-20 Evans *v.* S., 13 Ga. App. 700, 79 S. E. 916; S. *v.* Fair, 35 Wash. 127, 76 P. 731.

The measure of proof, when the sufficiency of evidence offered to establish an alibi is the question, is simply that it shall be satisfactory—"such as flows fairly from a preponderance of the evidence. It need not be beyond doubt. Where the evidence raises a balancing question, and the mind is brought to determine its preponderance, there may be a doubt still existing in the mind, yet the actual weight may be with the prisoner; and this proof should be considered satisfactory." Com. *v.* Andrews, 234 Pa. 597, 83 A. 412, *citing* Meyers *v.* Com., 83 Pa. 131.

750-21 S. *v.* Brauneis, 84 Conn. 222, 79 A. 70; Thompson *v.* S., 6 Okla. Cr. 50, 117 P. 216.

Therefore after instruction upon reasonable doubt there should not be reversal because of failure to charge upon alibi. Schultz *v.* S., 88 Neb. 613, 130 N. W. 105.

751-22 LaToon *v.* Ty., 16 Haw. 351; Boyd *v.* S. (Tex. Cr.), 163 S. W. 67; Wright *v.* S., 56 Tex. Cr. 353, 120 S. W. 458 (declarations of accused prior to crime admissible to show fabrication of defense); Baines *v.* S., 43 Tex. Cr. 490, 66 S. W. 847.

752-24 U. S. *v.* Reyes, 4 P. R. Fed. 69.

"An alibi is the instinctive and favorite resort of conscious guilt as well as the natural defense of innocence; but an unsuccessful attempt to establish it is necessarily highly prejudicial to the accused, for the obvious reason that such a defense implies an admission of the truth of the facts alleged against him, and the correctness of the inference drawn from them if they remain uncontradicted." S. *v.* Terrio, 98 Me. 17, 28, 56 A. 217.

Use of false evidence, admission of guilt. S. *v.* Ward, 61 Vt. 153, 192, 17 A. 483.

753-25 S. *v.* King, 50 Wash. 312, 97 P. 247. *Comp.* S. *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982.

ALIENATING AFFECTIONS.

Husband's Right of Action.—See 1 STANDARD PROC. 770.

Wife's Right of Action.—See 1 STANDARD PROC. 771.

The complaint and answer and matters relating to the trial. See 1 STANDARD PROC. 774, *et seq.*

756 Record of previous divorce held inadmissible. Hostetter *v.* Green (Ky.), 167 S. W. 919.

Burden of proof on plaintiff to show malice on part of member of spouse's family. Pooley *v.* Dutton (Ia.), 147 N. W. 154; Baird *v.* Carle (Wis.), 147 N. W. 834.

756-1 Proof of marriage by certificate. Fratini *v.* Caslini, 66 Vt. 273, 29 A. 252.

756-2 Woldson *v.* Larson, 164 Fed. 548, 90 C. C. A. 422.

757-3 Lupton *v.* Underwood (Del.), 85 A. 965; Gregg *v.* Gregg, 37 Ind. App. 210, 75 N. E. 674; Jonas *v.* Hirshburg, 18 Ind. App. 581, 48 N. E. 656.

757-4 Pooley *v.* Dutton (Ia.), 147 N. W. 154; Sexton *v.* Sexton, 129 Ia. 487, 105 N. W. 314; Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639; McGregor *v.* McGregor (Ky.), 115 S. W. 802; Leucht *v.* Leucht, 129 Ky. 700, 112 S. W. 845.

Evidence of relations inadmissible where question of harmony not in issue. Hostetter *v.* Green, 150 Ky. 551, 150 S. W. 652.

Record of husband's conviction for assault upon wife inadmissible, he not having pleaded guilty. Fratini *v.* Caslini, 66 Vt. 273, 29 A. 252.

Wife may testify of husband's conduct. Notwithstanding statute protecting privileged communications, wife may testify of husband's conduct toward her before and after the wrong. Sexton *v.* Sexton, 129 Ia. 487, 105 N. W. 814; Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639.

Wife competent witness when plaintiff. Lockwood *v.* Lockwood, 67 Minn. 476, 490, 70 N. W. 784.

Husband not competent to testify against wife if she objects. Stanley *v.* Stanley, 27 Wash. 570, 68 P. 187.

Plaintiff may show his financial condition when he married and money expended for family. Frank *v.* Berry, 128 Ia. 223, 103 N. W. 358.

But the declarations of plaintiff to the conduct of the defendant or the state of affections of the alienated one, or the cause therefor, are not admissible. Weber *v.* Weber, 116 Minn. 494, 134 N. W. 124.

757-5 Rubenstein *v.* Rubenstein, 60 App. Div. 238, 69 N. Y. S. 1067; Townshend *v.* Townshend, 84 Vt. 315, 79 A. 388.

758-6 Jones *v.* Monson, 137 Wis. 478, 119 N. W. 179. See Magers *v.* Magers, 143 Ia. 750, 123 N. W. 330.

Defendant's self-serving declarations inadmissible if not part of res gestae. Eagon *v.* Eagon, 60 Kan. 697, 57 P. 942; Nevins *v.* Nevins, 68 Kan. 410, 75 P. 492.

Wife's remarks about husband, competent when she is plaintiff. Leucht *v.* Leucht, 129 Ky. 700, 112 S. W. 845. But declarations after going to her parents' home are not admissible if they are not the only defendants. Boland *v.* Stanley, 88 Ark. 562, 115 S. W. 163.

759-10 Saxton *v.* Barber (Or.), 139 P. 334, *cit.* ENCY. OF EV.

759-11 Dodge *v.* Rush, 28 App. Cas. (D. C.) 149; Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639 (recognizing rule of text so far as declarations to a third person are concerned, they not being part of res gestae); Brison *v.* McKellop (Okla.), 138 P. 154, *quot.* ENCY. OF EV.

But declarations made to plaintiff by her husband with reference to what defendants had said to him held inadmissible in "so far as these were explanatory of the husband's conduct, or indicated a reason for his leaving the plaintiff." Miller *v.* Miller, 154 Ia. 344, 134 N. W. 1058.

Declarations of husband to wife may be shown as illustrating father's attitude toward their living together. Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639; Williams *v.* Williams, 20 Colo. 51, 37 P. 614; White *v.* White, 140 Wis. 538, 122 N. W. 1051 (to show defendant's inducements for separating.) But such evidence should be strictly limited to showing relations of husband and wife, and effect of influence on mind of spouse whose affections alienated. They are not to be regarded as against defendant. Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639.

Husband's declarations to third party, in defendant's absence, competent to show effect of defendant's wrongful interference with his son and his efforts to estrange the couple. Nevins *v.* Nevins, 68 Kan. 410, 75 P. 492. Statements of one spouse to the other respecting hostility of defendants, made in their absence, not competent. Cochran *v.* Cochran, 196 N. Y. 86, 89 N. E. 470, *rev.* 127 App. Div. 319, 111 N. Y. S. 588. His declarations to a third person of his intention to leave his wife may be proved. Lockwood *v.* Lockwood, 67 Minn. 476, 490, 70 N. W. 784. Some courts hold his declarations as to reasons for separation competent. Baker *v.* Baker, 16 Abb. N. C. (N. Y.) 293; Remsen *v.* Hay, 14 N. Y. Wkly. Dig. 443.

Declarations made after action brought inadmissible. Stanley *v.* Stanley, 88 Ark. 562, 115 S. W. 163; Nevins *v.* Nevins, 68 Kan. 410, 75 P. 492.

Knowledge of husband or wife, derived from each other, cannot be shown. Leucht *v.* Leucht, 129 Ky. 700, 112 S. W. 845.

759-13 Angell *v.* Reynolds, 26 R. I. 160, 58 A. 625.

Admissions of plaintiff's wife, not made a party are inadmissible. Phelps *v.* Bergers, 92 Neb. 851, 139 N. W. 632.

760-14 Rinehart *v.* Bills, 82 Mo. 534; Saxton *v.* Barber (Or.), 139 P. 334 (conduct of wife toward husband).

Desertion of husband must be shown. Codoni *v.* Donati, 6 Cal. App. 83, 91 P. 423.

760-15 Callis *v.* Merriweather, 98 Md. 361, 57 A. 201; Rinehart *v.* Bills, 82 Mo. 534; Hanor *v.* Housel, 128 App.

Div. 801, 113 N. Y. S. 163 (wife's statement to husband concerning her conduct with defendant, not part of res gestae); Weston *v.* Weston, 86 App. Div. 159, 83 N. Y. S. 528; Saxton *v.* Barber (Or.), 139 P. 334; Keath *v.* Shiffer, 37 Pa. Super. 573.

Adultery may be established by circumstances from which it may be inferred. Powell *v.* Strickland, 163 N. C. 393, 79 S. E. 872.

Pleadings and orders in a divorce proceeding instituted by plaintiff's husband charging her with adultery are inadmissible. Miller *v.* Miller, 154 Ia. 344, 134 N. W. 1058.

Times and places can be proved only to extent plaintiff has complied with order requiring bill of particulars. Weston *v.* Weston, 86 App. Div. 159, 83 N. Y. S. 528. But in absence of a bill evidence of similar facts and circumstances prior to date alleged and connected with and explanatory of those stated is proper. Dodge *v.* Rush, 28 App. Cas. (D. C.) 149.

Adultery may be established by a preponderance of evidence. Sieber *v.* Pettit, 200 Pa. 58, 49 A. 763. Shown by proofs. Billings *v.* Albright, 66 App. Div. 239, 73 N. Y. S. 22.

Admission of adultery by wife in letter to defendant, written in plaintiff's presence, may be shown in contradiction of defendant's testimony, by a copy in her handwriting. Weston *v.* Weston, 86 App. Div. 159, 83 N. Y. S. 528.

Bad character of plaintiff's wife is immaterial unless knowledge thereof is brought home to him and he is shown to have consented to her acts. Frank *v.* Berry, 128 Ia. 223, 103 N. W. 358; White *v.* White, 76 Kan. 82, 90 P. 1087.

Relations existing between defendant and plaintiff's wife after separation of latter may be shown to interpret their prior conduct, there being reasonable cause to believe impropriety previously existed. Keath *v.* Shiffer, 37 Pa. Super. 573.

760-16 Lupton *v.* Underwood (Del.), 85 A. 965; Bailey *v.* Kennedy, 148 Ia. 715, 126 N. W. 181; Linder *v.* Warnock, 91 Kan. 272, 137 P. 962; Milewski *v.* Kurtz, 77 N. J. L. 132, 71 A. 107.

"**Over the objections of defendants,** the court allowed plaintiff to prove statements his wife made to witnesses other than the defendants and not in the presence of any of the defendants, which statements tended to show the effect produced on the mind of plaintiff's wife by the conduct of defendants. It is argued that such evidence should have been rejected as hearsay; but the point may be ruled against defendants on the ground that the evidence was admissible for the purpose of showing the feelings or mental condition of plaintiff's wife and her reason for failing to perform her marriage contract." Allen *v.* Forsythe, 160 Mo. App. 262, 142 S. W. 820.

Slight items of evidence admissible to show improper relations between parties. Dow *v.* Bulfinch, 192 Mass. 281, 78 N. E. 416.

Plaintiff wife may show state of her health at time of marriage, and that it was injuriously affected by that which led to interference by her husband's father; such testimony tends to show lack of cause for interference. She may also prove defendant's subsequent treatment of her as tending to show his motive for interfering with her and her husband's relations toward each other, and temporary leaving of defendant's home in pursuance of notice served upon her and her husband. Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639. All effects of abandonment may be shown. Lockwood *v.* Lockwood, 67 Minn. 476, 70 N. W. 784. Plaintiff's wife may show improper relations between her husband and defendant a considerable period before separation, the intimacy continuing till that occurred. Linck *v.* Vorhauer, 104 Mo. App. 368, 79 S. W. 478.

Admissions by defendant made after separation of plaintiff and her husband may be proved. White *v.* White, supra; Leucht *v.* Leucht, 129 Ky. 700, 112 S. W. 845. If made over a telephone there must be proof of identity. Dunham *v.* McMichael, 214 Pa. 485, 63 A. 1007.

Hearsay rule not relaxed in cases of this nature. Leucht *v.* Leucht, 129 Ky. 700, 112 S. W. 845.

760-17 Facts showing malice. Linder *v.* Warnock, 91 Kan. 272, 137 P. 962.

760-18 Miller *v.* Pierpont, 87 Conn. 406, 87 A. 785; Bailey *v.* Kennedy, 148 Ia. 715, 126 N. W. 181; Allen *v.* Forsythe, 160 Mo. App. 262, 142 S. W. 820; Hanor *v.* Housel, 128 App. Div. 801, 113 N. Y. S. 163; Brison *v.* McKellop (Okla.), 138 P. 154.

Occasion of plaintiff's husband's calls on defendant may be shown, and latter's course of conduct toward him, including act of her servant in ejecting husband from defendant's premises after suit brought. Hoxie *v.* Walker, 75 N. H. 308, 74 A. 183.

It is error to deny defendants the right to show by plaintiff's husband "that none of the defendants ever made any statements in his presence indicating other than the best of feelings toward" her. Miller *v.* Miller, 154 Ia. 344, 134 N. W. 1058.

Acts which negative defendant's hostility to plaintiff are admissible in his behalf. Miller *v.* Miller, 154 Ia. 344, 134 N. W. 1058.

Though plaintiff's wife divorced him he may show that shortly after she was engaged to marry defendant. Bergman *v.* Solomon, 143 Ky. 581, 136 S. W. 1010.

Relations between defendant and plaintiff's spouse after commencement of suit are admissible. Merrill *v.* Leisenring, 166 Mich. 219, 131 N. W. 538.

761-19 Dodge *v.* Rush, 28 App. Cas. (D. C.) 149; Nevins *v.* Nevins, 68 Kan. 410, 75 P. 492; Claxton *v.* Pool (Mo.), 167 S. W. 623; Rath *v.* Rath, 2 Neb. (Unof.) 600, 89 N. W. 612; Sieber *v.* Pettit, 200 Pa. 58, 49 A. 763.

761-20 White *v.* White, 76 Kan. 82, 90 P. 1087; Stanley *v.* Stanley, 27 Wash. 570, 68 P. 187.

Reputed wealth may be shown with regard to compensatory damages and actual wealth in connection with demand for exemplary damages. But if there is more than one defendant reputed wealth of one only cannot be shown. Leavell *v.* Leavell, 114 Mo. App. 24, 89 S. W. 55.

762-22 McGregor *v.* McGregor (Ky.), 115 S. W. 802; Tasker *v.* Stanley, 153 Mass. 148, 26 N. E. 417; Multer *v.* Knibbs, 193 Mass. 556, 79 N. E. 762.

Defendant's statements after wife left home may be proved. Christenson *v.* Thompson, 123 Ia. 717, 99 N. W. 591.

762-23 Eagon *v.* Eagon, 60 Kan. 697, 57 P. 942; Multer *v.* Knibbs, 193 Mass. 556, 79 N. E. 762; Leavell *v.* Leavell, 114 Mo. App. 24, 89 S. W. 55; Love *v.* Love, 98 Mo. App. 562, 73 S. W. 255; Reading *v.* Gazzam, 200 Pa. 70, 49 A. 889.

Familiar and suspicious conduct with plaintiff's husband admissible to show intent. Webber *v.* Benbow, 211 Mass. 366, 97 N. E. 758.

Wife may show defendant made improper advances toward her, and threatened her. White *v.* White, 76 Kan. 82, 90 P. 1087.

Defendant's appearance on being told of existence of rumor her house was being watched, presumably by plaintiff to ascertain if her husband went there, may be shown by witness who informed her of it. Hoxie *v.* Walker, 75 N. H. 308, 74 A. 183.

762-25 Boland *v.* Stanley, 88 Ark. 562, 115 S. W. 163; Love *v.* Love, 98 Mo. App. 562, 73 S. W. 255; Hodgkinson *v.* Hodgkinson, 43 Neb. 269, 61 N. W. 577.

763-27 Boland *v.* Stanley, 88 Ark. 562, 115 S. W. 163; Gregg *v.* Gregg, 37 Ind. App. 210, 75 N. E. 674; Corrick *v.* Dunham, 147 Ia. 320, 126 N. W. 150; Nevins *v.* Nevins, 68 Kan. 410, 75 P. 492; Multer *v.* Knibbs, 193 Mass. 556, 79 N. E. 762; Ickes *v.* Ickes, 237 Pa. 582, 85 A. 885; Weber *v.* Weber, 116 Minn. 494, 134 N. W. 124; Beisel *v.* Gerlach, 221 Pa. 232, 70 A. 721.

Good faith presumed (Busenback *v.* Busenback, 150 Ia. 7, 129 N. W. 332); and this plaintiff must overcome (Cornelius *v.* Cornelius, 233 Mo. 1, 135 S. W. 65).

No presumption parent acted for best interest of child arises where issue is solely as to whether parent did and said the things alleged, it not being claimed they were justifiable. Klein *v.* Klein, 31 Ky. L. R. 28, 101 S. W. 382.

Letters written by defendant's daughter to plaintiff not admissible to show defendant's motive. Beisel *v.* Gerlach, 221 Pa. 232, 70 A. 721.

763-28 Hossfeld *v.* Hossfeld, 188 Fed. 61, 110 C. C. A. 131; Workman *v.* Workman, 43 Ind. App. 382, 85 N. E. 997; Kelso *v.* Kelso, 43 Ind. App. 115, 86 N. E. 1001; Heisler *v.* Heisler, 151 Ia. 503, 131 N. W. 676; Multer *v.* Knibbs, 193 Mass. 556, 79 N. E. 762; Stanley *v.* Stanley, 27 Wash. 570, 68 P. 187; White *v.* White, 140 Wis. 538, 122 N. W. 1051; Jones *v.* Monson, 137 Wis. 478, 119 N. W. 179.

They may therefore show their reasons for objecting to plaintiff's associating with a certain party. Miller *v.* Miller, 154 Ia. 344, 134 N. W. 1058.

The same rule applies to other close

relatives. Luick *v.* Arends, 21 N. D. 614, 132 N. W. 353.

Not a conclusion for father to testify he did not advise his son to leave his wife. Leavell *v.* Leavell, 114 Mo. App. 24, 89 S. W. 55.

Evidence to show malice.—It may be shown, as a link in a chain of evidence to establish a purpose to effect a separation, that one of the husband's parents objected to plaintiff having children. Lockwood *v.* Lockwood, 67 Minn. 476, 489, 70 N. W. 784. Acts done or submitted to by plaintiff's wife without defendant's knowledge cannot be shown. Lane *v.* Spence, 70 Neb. 204, 97 N. W. 299.

Proof of malice and falsehood overcomes presumption of good faith. Railsback *v.* Railsback, 12 Ind. App. 659, 40 N. E. 276. It may be shown defendant made statements concerning plaintiff, the falsity of which he could easily have ascertained. Nevins *v.* Nevins, 68 Kan. 410, 75 P. 492.

764-29 Dodge *v.* Rush, 28 App. Cas. (D. C.) 149; Gregg *v.* Gregg, 37 Ind. App. 210, 75 N. E. 674; Burch *v.* Goodson, 85 Kan. 86, 116 P. 216; Adkins *v.* Kendrick, 131 Ky. 779, 115 S. W. 814 (testimony as to damages would be merely opinions); O'Gorman *v.* Pfeiffer, 145 App. Div. 237, 130 N. Y. S. 77; Billings *v.* Albright, 66 App. Div. 239, 73 N. Y. S. 22; Weston *v.* Weston, 86 App. Div. 159, 83 N. Y. S. 528; Reading *v.* Gazzam, 200 Pa. 70, 49 A. 889.

Loss of support is element of damage, though the only evidence shows circumstances and conditions of life of parties. Stanley *v.* Stanley, 32 Wash. 489, 73 P. 596.

Value of wife's services may be shown by husband. Rudd *v.* Dewey, 121 Ia. 454, 96 N. W. 973.

Injury to character an element of damage. Linck *v.* Vorhauer, 104 Mo. App. 368, 79 S. W. 478.

764-30 Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. 266; Gregg *v.* Gregg, 37 Ind. App. 210, 75 N. E. 674; Adkins *v.* Kendrick, 131 Ky. 779, 115 S. W. 814.

Mental anguish, disgrace, mortification are to be inferred; they need not be specially alleged. Nevins *v.* Nevins, 68 Kan. 410, 75 P. 492; Klein *v.* Klein, 31 Ky. L. R. 28, 101 S. W. 382.

Disposition made of plaintiff's children may be shown. Rudd *v.* Dewey, 121 Ia. 454, 96 N. W. 973.

Health of plaintiff wife after husband left and fact she was cared for by neighbors may be shown. Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639.

765-31 Keath *v.* Shiffer, 37 Pa. Super. 573, and apparent affection existing between husband and wife prior to separation.

765-32 Love *v.* Love, 98 Mo. App. 562, 73 S. W. 255; Phillips *v.* Thomas, 70 Wash. 533, 127 P. 97.

Value of defendant's property may be proved. Miller *v.* Pearce, 86 Vt. 322, 85 A. 620, 43 L. R. A. (N. S.) 332.

Financial standing and earning capacity of husband may be shown, though he is not a party. Harvey *v.* Harvey, 75 Neb. 557, 106 N. W. 660.

765-33 All facts and circumstances concerning relation of husband and wife to each other, in so far as they disclose their mutual love and affection, may be shown, as may effect of the wrong on their attitude toward each other. Her declarations and statements to him or in his presence may be shown; but not her declaration to a third party, they not being a part of res gestae. Billings *v.* Albright, 66 App. Div. 239, 73 N. Y. S. 22.

765-34 Lupton *v.* Underwood (Del.), 85 A. 965; De Ford *v.* Johnson, 152 Mo. App. 209, 133 S. W. 393; Phelps *v.* Bergers, 92 Neb. 851, 139 N. W. 632; Allen *v.* Besecker, 55 Misc. 366, 105 N. Y. S. 416; Churchill *v.* Lewis, 17 Abb. N. C. 226; Luick *v.* Arends, 21 N. D. 614, 132 N. W. 353; Angell *v.* Reynolds, 26 R. I. 160, 58 A. 625; Rudd *v.* Rounds, 64 Vt. 432, 25 A. 438.

Husband's improper relations with other women than defendant may be shown though wife not aware of them. Wolf *v.* Frank, 92 Md. 138, 48 A. 132; Angell *v.* Reynolds, 26 R. I. 160, 58 A. 625.

Plaintiff's income may be shown as may fact part of it applied to meet living expenses, these having been proved as ground of damage. Dunham *v.* McMichael, 214 Pa. 485, 63 A. 1007.

Wife's guilt.—Fact defendant was no more guilty than plaintiff's wife may be proved. Sieber *v.* Pettit, 200 Pa. 58, 49 A. 763.

766-35 Wife's bad character can be shown if specially pleaded. Frank *v.* Berry, 128 Ia. 223, 103 N. W. 358; Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639.

766-36 Hostetter *v.* Green (Ky.), 167 S. W. 919; Hendrick *v.* Biggar, 209 N. Y. 440, 103 N. E. 763.

Complaint by husband in action for divorce competent as a declaration. Stanley *v.* Stanley, 32 Wash. 489, 73 P. 596.

Institution and dismissal of divorce suit by plaintiff's husband may be shown. Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639.

Decree of divorce, granted since wrong complained of, competent to show severance of marital relations. Woldson *v.* Larson, 164 Fed. 548, 90 C. C. A. 422.

766-37 McNamara *v.* McAllister, 150 Ia. 243, 130 N. W. 26.

766-38 Woldson *v.* Larson, 164 Fed. 548, 90 C. C. A. 422; Gregg *v.* Gregg, 37 Ind. App. 210, 75 N. E. 674; Nevins *v.* Nevins, 68 Kan. 110, 75 P. 492; White *v.* White, 76 Kan. 82, 90 P. 1087; Leavell *v.* Leavell, 114 Mo. App. 24, 89 S. W. 55; White *v.* White, 140 Wis. 538, 122 N. W. 1051.

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769-7 Beardsley *v.* Irving, 81 Conn. 489, 71 A. 580.

ALTERATION OF INSTRUMENTS

Shifting of burden of proof, 773-1; *Effect of admission,* 773-1; *Burden of explaining apparent material alteration,* 773-1; *Altered papers admissible,* 779-32; *Distinction as to admissibility of altered executory or executed writings,* 779-33; *Alteration to conform to agreement,* 787-48.

Definition and Effect.—See 1 STANDARD PROC. 818-825.

Pleadings of plaintiff and defendant. See 1 STANDARD PROC. 826-834.

773-1 Calhoun *v.* McKay, 64 Fla. 226, 60 So. 182; Merritt *v.* Dewey, 218 Ill. 599, 75 N. E. 1066, 2 L. R. A. (N. S.) 217; Fudge *v.* Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; Hessig-Ellis D. Co. *v.* Todd Baker D. Co. (Ia.), 143 N. W. 509; University *v.* Hayes, 144 Ia. 690, 87 N. W. 664; Scott *v.* Thrall, 77 Kan. 688, 95 P. 563; Stevens *v.* Odlin, 109 Me. 417, 84 A. 899; Hatch *v.* Bayless, 164 Mo. App. 216, 146 S. W. 839; Musser *v.* Musser, 92 Neb. 387, 138 N. W. 599; Colby *v.* Foxworthy, 80 Neb. 239, 114 N. W. 174; Galloway *v.* Bartholomew, 44 Or. 75, 74 P. 467; Gettysburg Nat. Bk. *v.* Gage, 4 Pa. Super. 505; Slyfield *v.* Willard, 43 Wash. 179, 86 P. 392; Lawrence *v.* Meenach, 45 Wash. 632, 88 P. 1120. *Contra,* Foss *v.* McRae, 105 Me. 140, 73 A. 827. See Ripon H. Co. *v.* Haas, 141 Wis. 65, 123 N. W. 659.

Findings negativing alteration sustained by evidence. First Nat. Bk. *v.* Starch Co., 119 Minn. 51, 137 N. W. 179.

Shifting of burden of proof.—After plaintiff has made his case in chief defendant has burden of showing a non-apparent material alteration; evidence to that effect being introduced and not denied, plaintiff must show justification for the change. Merritt *v.* Dewey, 218 Ill. 599, 75 N. E. 1066, 2 L. R. A. (N. S.) 217.

Effect of admission.—Admission paper altered carries with it burden of showing change was not fraudulent. Robertson *v.* Vasey, 125 Ia. 526, 101 N. W. 271; Carey Mfg. Co. *v.* Watson, 58 W. Va. 189, 52 S. E. 515.

Burden of explaining material alteration.—If such alteration made party offering instrument must explain. Smith *v.* Weatherford, 92 Ark. 6, 121 S. W. 943; Kahai *v.* Kamai, 8 Haw. 694; Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107; Gage *v.* Chicago, 225 Ill. 218, 80 N. E. 127; Grand Lodge *v.* Young, 123 Ill. App. 628; University *v.* Hayes, 114 Ia. 690, 87 N. W. 664; Rambousek *v.* Council, 119 Ia. 263, 93 N. W. 277; Marshall *v.* Wilhite, 4 Ohio C. C. 203; Gettysburg Nat. Bk. *v.* Gage, 4 Pa. Super. 505; In re Potter, 16 Pa. Super. 576; Consumers' I. Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879. But if execution admitted and alteration alleged defendant must show alteration was made. Fudge *v.* Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895.

Effect of showing alteration.—If the execution is proved and alteration shown, plaintiff still has onus of proving the contract. Graham *v.* Middleby, 185 Mass. 349, 70 N. E. 416.

"The principle of the English cases is that where an alteration is so apparent on a bill or note as to raise a suspicion of doubt it becomes incumbent on the plaintiff to prove that it is still available and no burden rests on the defendant to disprove it." Farmers' Nat. Bk. *v.* McCall, 25 Okla. 600, 106 P. 866, cit. Johnson *v.* Duke, 2 Stark.

313, 3 E. C. L. 360; Henman *v.* Dickenson, 5 Bing. 183; Bishop *v.* Chambre, 3 C. & P. 55; Leykariff *v.* Ashford, 12 Moore 281.

774-3 Dennie *v.* Clark, 3 Cal. App. 760, 87 P. 59; Landis *v.* Morrissey, 69 Cal. 83, 10 P. 258; Goldsmith *v.* Newhouse, 19 Colo. App. 1, 72 P. 809; Howard P. Co. *v.* Glover, 7 Ga. App. 548, 67 S. E. 277; Hill *v.* I. R. Co., 7 Ga. App. 64, 66 S. E. 280; Scott *v.* Thrall, 77 Kan. 688, 95 P. 563; Patton *v.* Fox, 169 Mo. 97, 69 S. W. 287; Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675; Mobley *v.* Griffin, 104 N. C. 112, 10 S. E. 142; Helms *v.* Green, 105 N. C. 251, 11 S. E. 470, 18 Am. St. 893; Burnette *v.* Young, 107 Va. 184, 57 S. E. 641; Price *v.* Stanbra, 45 Wash. 143, 88 P. 115; Herring *v.* Lee, 22 W. Va. 661, 672. Parol evidence is admissible to prove original contract (Germania F. Ins. Co. *v.* Lange, 193 Mass. 67, 78 N. E. 746), and to show consent to alterations. S. *v.* Baird, 13 Ida. 126, 89 P. 298.

774-4 Acme F. Co. *v.* Tousey, 148 Mich. 697, 112 N. W. 484.

775-5 Howard P. Co. *v.* Glover, 7 Ga. App. 548, 67 S. E. 277; also that holder refused to give maker a copy; Scott *v.* Thrall, 77 Kan. 688, 95 P. 563; Gandy *v.* Bissell, 72 Neb. 356, 100 N. W. 803.

The understanding of parties as to scope of obligation assumed, not communicated, cannot be proved. Graham *v.* Middleby, 185 Mass. 349, 70 N. E. 416.

Admissions as to execution of main instrument do not affect right to prove alterations in it thereafter, no estoppel being shown. Dennie *v.* Clark, 3 Cal. App. 760, 87 P. 59.

776-8 Gray *v.* Freeman, 37 Tex. Civ. 556, 84 S. W. 1105.

776-9 See Graham *v.* Middleby, 185 Mass. 349, 70 N. E. 416.

Evidence to show alteration in record of city. Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675.

Court record.—Entry of acknowledgment of execution of a deed in open court, which described land conveyed, is competent on issue of alteration in description. Kalbach *v.* Mathis, 104 Mo. App. 300, 78 S. W. 684.

776-10 Hayes *v.* Wagner, 220 Ill. 256, 77 N. E. 211.

776-11 W. W. Kimball Co. *v.* Piper, 111 Ill. App. 82.

777-14 Houston *v.* Davis, 162 Ala. 122, 49 S. 869.

777-17 Gettysburg Nat. Bk. *v.* Gage, 4 Pa. Super. 505.

777-18 Kalbach *v.* Mathis, 104 Mo. App. 300, 78 S. W. 684.

777-19 Expert may not give opinion as to whether a person with a shaky hand could have made erasure in question, the evidence being such as to enable court to determine question. Scott *v.* Thrall, 77 Kan. 688, 95 P. 563.

777-20 Magnifying glass used by witnesses may be taken to jury room. Grand Lodge *v.* Young, 123 Ill. App. 628.

778-24 Fudge *v.* Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895. Alteration of paper not made basis of action may be shown without allegations. Howard P. Co. *v.* Glover, 7 Ga. App. 548, 67 S. E. 277.

778-25 Gaskins *v.* Allen, 137 N. C. 426, 49 S. E. 919.

778-26 Matthews *v.* DeWerff, 73 Ark. 625, 83 S. W. 327; Zimmer *v.* Farr, 225 Ill. 457, 80 N. E. 261; University *v.* Hayes, 114 Ia. 690, 87 N. W. 664; Phillips *v.* Big Sandy Co., 149 Ky. 555, 149 S. W. 957; Rogers *v.* Costigan, 25 Ky. L. R. 1349, 78 S. W. 121.

Possession of bond by obligee while it was altered and fact it was sued on in its changed form shows it was altered by or with his consent. Hilliboe *v.* Warner, 17 N. D. 594, 118 N. W. 1047.

778-29 See Dickenson *v.* Ramsey (Va.), 79 S. E. 1025.

Quantum of proof.—Plaintiff suing on note alleged to be altered is not bound to establish his good faith beyond reasonable doubt. Wood *v.* Skelley, 196 Mass. 114, 81 N. E. 872.

Admission in pleading, on assumption contract sued on was unaltered, is not provable in action on changed instrument. Koons *v.* Co., 203 Mo. 227, 101 S. W. 49.

If alterations material instrument should not be received without explanation. Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107.

Admissible for certain purposes.—Though altered paper is not admissible as basis of action, it is competent to show all the facts in relation to its execution as part of the original transaction, and changes made in it, in connection with evidence of all facts and circumstances, in action to recover original demand. Hayes *v.*

Wagner, 220 Ill. 256, 77 N. E. 211.

779-31 Shiffer *v.* Mosier, 225 Pa. 552, 74 A. 426. See Johnson *v.* Cooke, 85 Conn. 679, 84 A. 97.

779-32 Forbes *v.* Taylor, 139 Ala. 286, 35 S. 855; Howard P. Co. *v.* Glover, 7 Ga. App. 548, 67 S. E. 277; P. *v.* Foreman, 165 Ill. App. 13; Reeves *v.* Mercer, 155 Ill. App. 57; Hayes *v.* Wagner, 220 Ill. 256, 77 N. E. 211. *Contra.* Sunday *v.* Dietrich, 16 Pa. Super. 640; Williams T. Co. *v.* Cleaver, 38 Pa. Super. 376.

Paper admissible.—Upon its being shown no change has been made since paper came to him who offers it it should be received. Mulkey *v.* Long, 5 Ida. 213, 47 P. 949; S. *v.* Baird, 13 Ida. 126, 89 P. 298.

Altered papers admissible.—Though alteration be apparent, if it is not an unusual or extraordinary one, court may admit it after proof of execution. Graham *v.* Middleby, 185 Mass. 349, 70 N. E. 416. It is proper for court to determine, upon inspection and the evidence, whether further proof in explanation of alterations shall then be required before instrument admitted. His action in this respect rests upon sound discretion and is not subject to exception. Wood *v.* Skelley, 196 Mass. 114, 81 N. E. 872. *Contra* as to judgment. Bates *v.* Hall, 44 Colo. 360, 98 P. 3.

779-33 Jamison *v.* Auxier, 145 Ia. 654, 124 N. W. 606; Cavitt *v.* Robertson (Okla.), 142 P. 299; Zobrist *v.* Estes, 65 Or. 573, 133 P. 644.

Alterations may be explained by instrument itself or extrinsic evidence. Gage *v.* Chicago, 225 Ill. 218, 80 N. E. 127.

Distinction as to admissibility of altered executory or executed writings. There is a distinction as to admissibility of instruments evidencing executory contracts and those which evidence executed contracts, and that distinction extends to those parts of an instrument which are executory, though other parts of it are executed. The distinction is well illustrated by an altered conveyance of land containing covenants. The alteration does not divest title, but it destroys all the grantees' rights and the covenants and the paper as evidence of the covenants. And the mooted distinction turns upon the inquiry whether, in such case, the altered deed may still be adduced in evidence of the title which passed by it in its original form. The negative view is favored by Chelsey *v.* Frost, 1 N. H. 145; Babb *v.* Clemson, 10 Serg. & R. (Pa.) 419; Withers *v.* Atkinson, 1 Watts (Pa.) 236; Bliss *v.* McIntyre, 18 Vt. 466; Newell *v.* Mayberry, 3 Leigh (Va.) 250; Batchelder *v.* White, 80 Va. 103. Favoring or holding the opposing view are Doe *v.* Hirst, 3 Stark. (Eng.) 60; Pattison *v.* Luckley, L. R. 10 Ex. (Eng.) 330, 44 L. J. Ex. 180, 33 L. T. 360; Davidson *v.* Cooper, 11 M. & W. (Eng.) 778, 12 L. J. Ex. 467; Ward *v.* Lumley, 5 H. & N. (Eng.) 87, 29 L. J. Ex. 322, 1 L. T. 376; Hutchins *v.* Scott, 2 M. & W. (Eng.) 809, M. & H. 194, 6 L. J. Ex. 186; Alabama S. L. Co. *v.* Thompson, 104 Ala. 570, 16 S. 140, 53 Am. St. 80; Burgess *v.* Blake, 128 Ala. 105, 28 S. 963, 86 Am. St. 78; Burnett *v.* McCluey, 78 Mo. 676, 687; Jackson *v.* Gould, 7 Wend (N. Y.) 364; Lewis *v.* Payn, 8 Cow. (N. Y.) 71.

779-34 Whitehead *v.* Emmerich, 38 Colo. 13, 87 P. 790; Kahai *v.* Kamai, 8 Haw. 691; Abbott *v.* Abbott, 189 Ill. 488, 59 N. E. 958, 82 Am. St. 270; Pierce Co. *v.* Casler, 194 Mass. 423, 80 N. E. 494; Russell *v.* R. Co. (Mo. App.), 164 S. W. 164; Shiffer *v.* Mosier, 225 Pa. 552, 74 A. 426.

Maker of instrument may testify as to his intention concerning clause alleged to be altered as bearing upon his consent to alteration. Cabell *v.* McKinney, 31 Ind. App. 548, 68 N. E. 601.

779-35 Bishop *v.* Bishop (1905), 2 Ch. (Eng.) 455, *limit.* Pigot's Case, 11 Rep. 47; Aldous *v.* Cornwell, L. R. 3 Q. B. (Eng.) 573; Benton *v.* Clemmons, 157 Ala. 658, 47 S. 582; Manuel *v.* Flynn, 5 Cal. App. 319, 90 P. 463; Basey *v.* McKinney, 45 Ind. App. 422, 87 N. E. 693; King *v.* Bellamy, 82 Kan. 301, 108 P. 117; Leppert *v.* Flaggs, 101 Md. 71, 60 A. 450; Fisherdick *v.* Hutton, 44 Neb. 122, 62 N. W. 488.

Immaterial alterations fatal. Hunt *v.* Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Jones *v.* Crowley, 57 N. J. L. 222, 30 A. 871.

Rule as stated in corresponding note to Encyclopaedia adhered to. Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300.

780-36 Johnson *v.* Cooke, 85 Conn. 679, 84 A. 97 (receipts); Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107; Williams T. Co. *v.* Cleaver, 38 Pa. Super. 376; Consumers' I. Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879; Philip

Carey Mfg. Co. *v.* Watson, 58 W. Va. 189, 52 S. E. 515.

781-37 Benton *v.* Clemmons, 157 Ala. 658, 47 S. 582.

782-38 Material and fraudulent alteration prevents party responsible for it from establishing contract evidenced by altered paper by any other evidence. Philip Carey Mfg. Co. *v.* Watson, 58 W. Va. 189, 52 S. E. 515; Newell *v.* Mayberry, 3 Leigh (Va.) 250.

782-39 Doe *v.* McCullough, 155 Ala. 246, 46 S. 472; New York L. Ins. Co. *v.* Martindale, 75 Kan. 142, 88 P. 559; Adams *v.* Faircloth (Tex. Civ.), 97 S. W. 507; Barton, etc. Bk. *v.* Stephenson (Vt.), 89 A. 639.

783-40 Houston *v.* Davis, 162 Ala. 122, 49 S. 869.

783-42 Koons *v.* Co., 203 Mo. 227, 101 S. W. 49.

784-44 Pitt *v.* Little, 58 Wash. 355, 108 P. 941.

784-45 Fisherdick *v.* Hutton, 44 Neb. 122, 62 N. W. 488; Baldwin *v.* Bk. (Tex. Civ.), 124 S. W. 443.

785-48 Sanitary Dist. *v.* Allen, 178 Ill. 330, 53 N. E. 109.

Alteration to conform to agreement. One party to a contract may not, without consent of the other, alter paper evidencing contract after execution to make it conform to agreement. Merritt *v.* Dewey, 218 Ill. 599, 75 N. E. 1066, 2 L. R. A. (N. S.) 217, *foll.* Kelly *v.* Trumble, 74 Ill. 428, and correcting a misapprehension as to the scope of Ryan *v.* Bk., 148 Ill. 349, 35 N. E. 1120. In accord. Evans *v.* Foreman, 60 Mo. 449; Fay *v.* Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752. *Contra.* Osborn *v.* Hall, 160 Ind. 153, 66 N. E. 457, citing cases.

785-50 Hipp *v.* Ins. Co., 128 Ga. 491, 57 S. E. 892, 12 L. R. A. (N. S.) 319; Barnes-Smith Mer. Co. *v.* Tate, 156 Mo. App. 236, 137 S. W. 619.

787-54 King *v.* Edward Thompson Co. (Ind.), 104 N. E. 106.

787-56 Norwich Bk. *v.* Hyde, 13 Conn. 279; Bryant *v.* Oil Co., 13 Ga. App. 448, 79 S. E. 236; Merritt *v.* Boyden, 191 Ill. 136, 60 N. E. 907, 85 Am. St. 246; Hollen *v.* Davis, 59 Ia. 444, 13 N. W. 413, 44 Am. Rep. 688; Garrard *v.* Haddan, 67 Pa. 82.

788-59 Substitution of person who may execute lease material. Bryan *v.* Carter, 169 Ala. 515, 51 S. 999.

788-60 Fry *v.* Jenkins, 173 Ill. App. 486; Schubert *v.* Schubert, 168 Ill. App. 419; Barton, etc. Bk. *v.* Stephenson (Vt.), 89 A. 639 (striking out date and inserting another).

789-63 Bishop *v.* Bishop (1905), 2 Ch. (Eng.) 455; San Antonio Brew. Assn. *v.* Oil Co. (Tex. Civ.), 129 S. W. 373.

790-64 Shiffer *v.* Mosier, 225 Pa. 552, 74 A. 426.

790-67 In re Potter, 16 Pa. Super. 576; Burnette *v.* Young, 107 Va. 184, 57 S. E. 641.

791-69 Outcault Adv. Co. *v.* Hdw. Co. (Ark.), 161 S. W. 142; Germania F. Ins. Co. *v.* Lange, 193 Mass. 67, 78 N. E. 746.

794-78 Adding name of indorser immaterial under Neg. Inst. L. §126, 127. Ensign *v.* Fogg, 177 Mich. 317, 143 N. W. 82.

795-80 First Nat. Bk. *v.* Weidenbeek, 97 Fed. 896, 38 C. C. A. 131. Rule not varied because parties erased name of guarantor who became such without maker's knowledge. First Nat. Bk. *v.* Weidenbeek, supra.

798-89 Marshall *v.* Wilhite, 4 O. C. C. 203; Sunday *v.* Dietrich, 16 Pa. Super. 640; Holbart *v.* Lauritson (S. D.). 148 N. W. 19.

800-95 Addition of "surety" to name of one of the makers of note only affected their rights as between themselves. Galloway *v.* Bartholomew, 44 Or. 75, 74 P. 467.

801-3 Merchants' & Farmers' Bk. *v.* Dent, 102 Miss. 455, 59 So. 805.

802-7 Howard P. Co. *v.* Glover, 7 Ga. App. 548, 67 S. E. 277; Wash. Finance Corp. *v.* Glass, 74 Wash. 653, 134 P. 480, 46 L. R. A. (N. S.) 1043. *Contra* as to indorsement of partial payment. Hakes *v.* Russ, 175 Fed. 751, 99 C. C. A. 327.

804-9 Waugh *v.* Cook (Ark.), 167 S. W. 103; Shaw *v.* Probasco, 139 Ga. 481, 77 S. E. 577.

804-10 New York L. Ins. Co. *v.* Martindale, 75 Kan. 142, 88 P. 559.

Filling blank as to rate, and term of interest without authority of defendant is material. Ayres *v.* Walker, 54 Colo. 571, 131 P. 384.

804-12 Exchange Nat. Bk. *v.* Little (Ark.), 164 S. W. 731; Merritt *v.* Dewey, 218 Ill. 599, 75 N. E. 1066, 2 L. R. A. (N. S.) 217 (785-48); Levy *v.* Arons, 81 Misc. 165, 142 N. Y. S. 312.

805-14 McCormack, etc. Co. *v.* Blair, 146 Mo. App. 374, 124 S. W. 49.

806-21 Pensacola S. Bank *v.* Melton, 210 Fed. 57.
806-22 Bowers *v.* Rineard, 209 Pa. 545, 58 A. 912.
807-24 See Port Huron E. & T. Co. *v.* Sherman, 14 S. D. 461, 85 N. W. 1008 (place of payment under statute).
807-25 Morris *v.* Bk., 37 Tex. Civ. 97, 83 S. W. 36.
808-30 First Nat. Bank *v.* Liewer, 187 Fed. 16, 109 C. C. A. 70; Cavitt *v.* Robertson (Okla.), 142 P. 299.
808-32 Landt *v.* McCullough, 206 Ill. 214, 222, 69 N. E. 107; Pyle *v.* Ourlatt, 92 Ill. 209; Catlin C. Co. *v.* Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. 216; Eggmann *v.* Nutter, 155 Ill. App. 390; Shea *v.* Cutler, 147 Ia. 366, 126 N. W. 366; McCormack, etc. Co. *v.* Blair, 146 Mo. App. 374, 124 S. W. 49; Kalteyer *v.* Mitchell, 102 Tex. 390, 117 S. W. 792; Pope *v.* Taliaferro (Tex. Civ.), 115 S. W. 309; Stockand *v.* Hall, 54 Wash. 106, 102 P. 1037.
810-33 Blank for grantee's name in deed presumed filled by person authorized. Ormsby *v.* Johnson, 24 S. D. 494, 124 N. W. 436.
810-36 Rankin *v.* Tygard, 198 Fed. 795; McConnell *v.* Slappey, 134 Ga. 95, 67 S. E. 440 (if deed registered; registration presumed from admission in evidence); Pike County *v.* Sowards, 147 Ky. 37, 143 S. W. 745; James *v.* Holdam, 142 Ky. 450, 134 S. W. 435; Gunkel *v.* Seiberth, 27 Ky. L. R. 455, 85 S. W. 733; Ensign *v.* Fogg, 177 Mich. 317, 143 N. W. 82; Arnold *v.* Brechtel, 174 Mich. 147, 140 N. W. 610; Newland *v.* Soc., 137 Mich. 335, 100 N. W. 612; City of Carterville *v.* Luscombe, 165 Mo. App. 518, 148 S. W. 966; German-Am. Bk. *v.* Manning, 133 Mo. App. 294, 113 S. W. 251 (if alteration not of suspicious character); Kalbach *v.* Mathis, 104 Mo. App. 300, 78 S. W. 684; Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. 213; Jefferson Bk. *v.* Frankenstein, 110 N. Y. S. 1104; Wicker *v.* Jones (N. C.), 74 S. E. 801; In re Teed's Est., 225 Pa. 633, 74 A. 646 (alterations made by testator in will presumed made after execution); Ernster *v.* Christianson, 24 S. D. 103, 123 N. W. 711; Northwestern M. T. Co. *v.* Levtzow, 23 S. D. 562, 122 N. W. 600 (especially where instrument is act of public officer); Fletcher *v.* Bk. (Tex. Civ.), 126 S. W. 936; McKenzie *v.* Barrett, 43 Tex. Civ. 451, 98 S. W. 229; Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296; Kansas Mut. L. Ins. Co. *v.* Coalson, 22 Tex. Civ. 64, 54 S. W. 388.
Presumption applies to public records. Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675.
Slight evidence will overcome presumption alteration made before or at time instrument delivered. Rogers *v.* Page, 140 Fed. 596, 72 C. C. A. 164.
Presumption.—If alteration made by same hand and with same ink, it is presumed it was contemporaneous with execution of paper. Paul *v.* Leeper, 98 Mo. App. 515, 72 S. W. 715.
812-38 Hatfield S. School Dist. *v.* Knight (Ark.), 164 S. W. 1137; Klein *v.* Bk., 69 Ark. 140, 61 S. W. 572, 86 Am. St. 183; Gist *v.* Gans, 30 Ark. 285; Catlin *v.* Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. 216; Gage *v.* Chicago, 225 Ill. 218, 80 N. E. 127; Grand Lodge *v.* Young, 123 Ill. App. 628; Stayner *v.* Joyce, 120 Ind. 99, 22 N. E. 89; Willett *v.* Shepard, 34 Mich. 106; Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. 754, 4 L. R. A. 196; Stockand *v.* Hall, 54 Wash. 106, 102 P. 1037 (public records).
813-39 Kahai *v.* Kamai, 8 Haw. 694; Wheadon *v.* Turregano, 112 La. 931, 36 S. 808; Messi *v.* Frechede, 113 La. 679, 37 S. 600; Withers *v.* Hart, 96 Miss. 453, 51 S. 714; Cornog *v.* Wilson, 231 Pa. 281, 80 A. 174; Franklin T. Co. *v.* R. Co., 222 Pa. 96, 70 A. 949 (if it is shown when alterations made); Matson *v.* Jarvis (Tex. Civ.), 133 S. W. 941; Pope *v.* Taliaferro, 51 Tex. Civ. 217, 115 S. W. 309; Carey Mfg. Co. *v.* Watson, 58 W. Va. 189, 52 S. E. 515.
Rule applicable if alteration not essential to accomplish holder's purpose. In re Darrow's Est., 64 Misc. 224, 118 N. Y. S. 1082.
814-44 Baylis *v.* Kerrick, 64 Wash. 410, 116 P. 1082.
815-45 Jackson *v.* Day, 80 Miss. 800, 31 S. 536.
815-47 German-Am. Bk. *v.* Manning, 133 Mo. App. 294, 113 S. W. 251; Burton *v.* Ins. Co., 88 Mo. App. 392, 96 Mo. App. 204, 70 S. W. 172; Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675; Brinn *v.* Cohen, 107 N. Y. S. 37; Sunday *v.* Dietrich, 16 Pa. Super. 640.
Cutting off part of paper a suspicious circumstance. Burton *v.* Ins. Co., 88 Mo. App. 392, 96 Mo. App. 204, 70 S. W. 172.
Interlineation suspicious if it appears to be contrary to probable meaning of

instrument as it was originally, or if it be in a different writing from body of paper, or destroys its validity. Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675.

818-50 Rosenbloom *v.* Finch, 37 Misc. 818, 76 N. Y. S. 902.

819-58 Sprong *v.* Juni, 109 Minn. 85, 122 N. W. 1015.

821-62 Stringfellow *v.* Petty, 14 N. M. 14, 89 P. 258.

Where no issue as to ratification. Bakke *v.* Melby, 119 Minn. 504, 138 N. W. 950.

Shown by circumstances.—Matson *v.* Jarvis (Tex. Civ.), 133 S. W. 941.

821-63 Landt *v.* McCullough, 218 Ill. 607, 75 N. E. 1069.

Changes made must be satisfactorily accounted for. In re Potter, 16 Pa. Super. 576.

Alteration in deed executed to cure defects in prior deed may be explained by a comparison of them, both being admissible. Wilder *v.* Co., 216 Ill. 493, 75 N. E. 194.

822-64 Brunton *v.* Ditto, 51 Colo. 178, 117 P. 156.

822-65 Heard *v.* Tappan, 116 Ga. 930, 43 S. E. 375; Howard P. Co. *v.* Glover, 7 Ga. App. 548, 67 S. E. 277; Hill *v.* L. R. Co., 7 Ga. App. 64, 66 S. E. 280; Pahukula *v.* Parke, 6 Haw. 210; Holyfield *v.* Harrington, 84 Kan. 760, 115 P. 546; Leppert *v.* Flaggs, 101 Md. 71, 60 A. 450; Williams T. Co. *v.* Cleaver, 38 Pa. Super. 376; Carey Mfg. Co. *v.* Watson, 58 W. Va. 189, 52 S. E. 515.

Contra.—Farmers' Nat. Bk. *v.* McCall, 25 Okla. 600, 106 P. 866.

822-66 Heard *v.* Tappan, 116 Ga. 930, 43 S. E. 375; Howard P. Co. *v.* Glover, 7 Ga. App. 548, 67 S. E. 277; Pahukula *v.* Parke, 6 Haw. 210; Hayes *v.* Wagner, 220 Ill. 256, 77 N. E. 211; Reichert *v.* Co., 147 Ill. App. 140; Olive Street Bank *v.* Phillips (Mo.), 162 S. W. 721 (or for the court sitting as a jury); Cavitt *v.* Robertson (Okla.), 142 P. 299; Winters *v.* Mowrer, 1 Pa. Super. 47.

823-69 Hill *v.* Co., 7 Ga. App. 64, 66 S. E. 280; Winters *v.* Mowrer, 1 Pa. Super. 47; Consumers' I. Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879.

824-70 Winters *v.* Mowrer, 1 Pa. Super. 47. See as to question of intent under statute, Port Huron E. & T. Co. *v.* Sherman, 14 S. D. 461, 85 N. W. 1008.

824-71 Brunton *v.* Ditto, 51 Colo. 178, 117 P. 156.

824-72 Holyfield *v.* Harrington, 84 Kan. 760, 115 P. 546.

824-73 Stringfellow *v.* Petty, 14 N. M. 14, 89 P. 258.

Delivery of paper with knowledge of alteration a ratification. Baker *v.* Baker, 239 Ill. 82, 87 N. E. 868.

AMBIGUITY.

Understanding of parties. 826-1; *Deception of party to contract,* 832-13; *Evidence to show what covered by policy,* 846-43; *Extrinsic evidence concerning wills,* 852-60; *Intention as to unborn child,* 852-60; *Required proof,* 856-69.

826-1 Burlee D. D. Co. *v.* Besse, 130 Fed. 444, 64 C. C. A. 646; Union S. Co. *v.* Jones, 128 Fed. 672, 63 C. C. A. 224; United E. & C. Co. *v.* Broadnax, 136 Fed. 351, 69 C. C. A. 177; Kentucky, etc. Co. *v.* Ins. Co., 146 Fed. 695, 77 C. C. A. 121; Omaha C. & P. Co. *v.* Omaha, 172 Fed. 494; Noyes *v.* Marlott, 156 Fed. 753, 84 C. C. A. 409; Pendry *v.* Godwin (Ala.), 66 S. 43; Louisville R. Co. *v.* Higginbotham, 153 Ala. 334, 44 S. 872; Rhodes *v.* Purvis, 74 Ark. 227, 85 S. W. 235; Dugan *v.* Kelly, 75 Ark. 55, 86 S. W. 831; Law *v.* Assur. Co., 165 Cal. 394, 132 P. 590; United Iron Wks. *v.* Harbor Co. (Cal.), 141 P. 917; Hawley *v.* Kafitz, 148 Cal. 393, 83 P. 248, 3 L. R. A. (N. S.) 741; Cutten *v.* Pearsall, 146 Cal. 690, 81 P. 25; Levis *v.* Co., 1 Cal. App. 241, 81 P. 1086; Gardiner *v.* McDonogh, 147 Cal. 313, 81 P. 964; Peterson *v.* Chaix, 5 Cal. App. 525, 90 P. 948; First Nat. Bk. *v.* Londonderry Min. Co., 50 Colo. 85, 114 P. 313 (a bond); Bryan *v.* Bigelow, 77 Conn. 604, 60 A. 266; Whipple *v.* Geddis, 25 App. Cas. (D. C.) 333; Ross *v.* Savage (Fla.), 63 S. 148; Eberhardt *v.* Ins. Co. (Ga.), 80 S. E. 856; Columbus R. Co. *v.* City Mills Co., 135 Ga. 626, 70 S. E. 242; Byrd *v.* Co., 127 Ga. 30, 56 S. E. 86; Townsend *v.* Co., 127 Ga. 342, 56 S. E. 436; Blalock *v.* Ins. Co., 13 Ga. App. 486, 79 S. E. 374; Richards *v.* Ontai, 19 Haw. 451; Vail *v.* Ins. Co., 192 Ill. 567, 61 N. E. 651; Davis *v.* Ins. Co., 208 Ill. 375, 70 N. E. 359; Strauss *v.* Co., 169 Ill. App. 337; Cameron *v.* Sexton, 110 Ill. App. 381; Sanitary Dist. *v.* McMahon, 110 Ill. App. 510; Phillipy *v.* Homesteaders, 140 Ia. 562, 118 N. W. 880; Citizens' Bk. *v.*

Chambers, 129 Ia. 414, 105 N. W. 692; Green River Chem. Co. *v.* Town, 142 Ky. 609, 134 S. W. 1164; McCreary *v.* Skidmore, 30 Ky. L. R. 463, 99 S. W. 219; Smith *v.* Smith, 24 Ky. L. R. 1964, 72 S. W. 766; Gooding *v.* Ins. Co., 110 Me. 69, 85 A. 391; Louis Eckels & Sons Ice Mfg. Co. *v.* Cornell Econ. Co., 119 Md. 107, 86 A. 38; Neale *v.* Co., 186 Mass. 303, 71 N. E. 566; Landford *v.* Manchester, 196 Mass. 211, 81 N. E. 884; Scott *v.* Rorthlesberger (Mich.), 146 N. W. 307; Stockbridge Elev. Co. *v.* Booth, 165 Mich. 212, 130 N. W. 619; Helper *v.* Co., 138 Mich. 593, 101 N. W. 804; Bowins *v.* English, 138 Mich. 178, 101 N. W. 204; S. *v.* Fellows, 98 Minn. 179, 107 N. W. 542, 108 N. W. 825; Banks *v.* C. B. & Q. R. Co., 153 Mo. App. 469, 134 S. W. 1071; Rieger *v.* Co., 106 Mo. App. 513, 80 S. W. 969; Butte W. Co. *v.* Butte (Mont.), 138 P. 195; Wheeler *v.* Moore, 78 Neb. 484, 111 N. W. 120; Hill *v.* Hill, 74 N. H. 288, 67 A. 406, 12 L. R. A. (N. S.) 848; Finucane Co. *v.* Board, 190 N. Y. 76, 82 N. E. 737; Hamilton Trust Co. *v.* Shevlin, 156 App. Div. 307, 141 N. Y. S. 232; Williams *v.* Gridley, 110 App. Div. 525, 96 N. Y. S. 978; Pate *v.* Lumb. Co. (N. C.), 81 S. E. 132; Stewart *v.* R. Co., 141 N. C. 253, 53 S. E. 877; Sternbergh *v.* Brock, 225 Pa. 279; 74 A. 166; Kentucky Mfg. Co. *v.* Co., 77 S. C. 92, 57 S. E. 676; Conn *v.* Rosamond (Tex.), 161 S. W. 73; Henry *v.* Phillips (Tex.), 151 S. W. 533; Bergman Prod. Co. *v.* Brown (Tex. Civ.), 156 S. W. 1102; Robertson *v.* Warren, 45 Tex. Civ. 584, 100 S. W. 805; San Antonio, etc. R. Co. *v.* Timon, 45 Tex. Civ. 47, 99 S. W. 418; Moore *v.* Studebaker Bros. (Tex. Civ.), 136 S. W. 570; Smith *v.* R. Co. (Tex. Civ.), 105 S. W. 528; Grout *v.* Moulton, 79 Vt. 122, 64 A. 453; Stephen Putney Shoe Co. *v.* R. Co. (Va.), 81 S. E. 93; Wash. T. Co. *v.* Keyes (Wash.) 139 P. 638; Greene *v.* Malting Co., 153 Wis. 216, 140 N. W. 1130; Curtis L. & L. Co. *v.* Co., 137 Wis. 341, 118 N. W. 853; Balch *v.* Arnold, 9 Wyo. 17, 59 P. 434.

Rule extends to legal effect of writing. Union S. Co. *v.* Jones, 128 Fed. 672, 63 C. C. A. 224; Peterson *v.* Chaix, 5 Cal. App. 525, 90 P. 948.

Understanding of parties to unambiguous contract cannot be shown under statute providing that when terms of agreement have been intended in a different sense by parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it; neither can such understanding be shown because one of the parties resided in another state and contract was made in yet another, in which it would have been construed otherwise than in state of its performance. Inman M. Co. *v.* Co., 133 Ia. 71, 110 N. W. 287. See Capital City C. Co. *v.* Moody, 135 Ia. 444, 110 N. W. 903.

827 Distinction between patent and latent ambiguity is no longer the test of admissibility. Whidden & Co. *v.* Jordan, 215 Mass. 189, 102 N. E. 436.

827-3 In re Hill, 186 F. 569; Coalinga Oil Co. *v.* Oil Co., 16 Cal. App. 361, 116 P. 1107; Mendel *v.* Leader, 136 Ga. 442, 71 S. E. 753; City *v.* Railway Co., 144 Ky. 646, 139 S. W. 854; Mills P. Co. *v.* Co., 155 App. Div. 869, 140 N. Y. S. 655; Maris *v.* Adam (Tex. Civ.), 166 S. W. 475; Irrigation Co. *v.* Stubbs (Tex. Civ.), 137 S. W. 154; State *v.* Racine, etc. Co. (Tex. Civ.), 134 S. W. 400.

Where amounts in margin and body of a note disagree, parol evidence inadmissible. Bell *v.* Birmingham, 9 Ala. App. 212, 62 S. 971.

828-5 Teague *v.* Sowder, 121 Tenn. 132, 114 S. W. 484.

829-7 See Gillis *v.* Long, 8 O. N. P. (N. S.) 1.

830-9 Standard Scale & Supply Co. *v.* Reiter, 199 Fed. 91; Crosley *v.* Reynolds, 196 Fed. 640; Birmingham R. Co. *v.* Morris, 163 Ala. 190, 50 S. 198; Scott *v.* Dunkle, etc. Co., 106 Ark. 83, 152 S. W. 1025; Wood *v.* Kelsey, 90 Ark. 272, 119 S. W. 258; Bing *v.* Bk., 5 Ga. App. 578, 63 S. E. 652; Kelsey *v.* Clausen, 257 Ill. 402, 100 N. E. 984; Alexander *v.* Lumb. Co. (Ind.), 105 N. E. 45; Ginther *v.* Townsend, 114 Md. 122, 78 A. 908; Cawley *v.* Jean (Mass.), 105 N. E. 1007; Goldenberg *v.* Taglino (Mass.), 105 N. E. 883; Whidden & Co. *v.* Jordan, 215 Mass. 189, 102 N. E. 436; Bedford *v.* Kelley, 172 Mich. 492, 139 N. W. 250; Pittsburgh S. Co. *v.* Cottengin (Mo. App.), 165 S. W. 391; Simrall *v.* Am. M. S. Co., 172 Mo. App. 384, 158 S. W. 437; Pulitzer P. Co. *v.* McNichols, 170 Mo. App. 709, 153 S. W. 562; Gate City Nat. Bk. *v.* Chick, 170 Mo. App. 343, 156 S. W. 743; Stover *v.* Springfield, 167 Mo. App. 328, 152 S. W. 122; Thetford *v.* Co., 140 Mo. App. 254, 124 S. W. 39; New Jersey P. Co. *v.* Gluck, 79

N. J. L. 115, 74 A. 443; U. S. Co. *v.* Meenan, 211 N. Y. 39, 105 N. E. 106; Codman *v.* Adamson, 130 App. Div. 317, 114 N. Y. S. 408; Coles *v.* Saitta, 119 N. Y. S. 253; Hardy *v.* Ward, 150 N. C. 385, 64 S. E. 171; Cox *v.* Wilson, 25 Pa. Super. 635; Rawls *v.* Pool (Tex. Civ.), 135 S. W. 247; Couturie *v.* Roensch (Tex. Civ.), 134 S. W. 413, a note; Halverson *v.* Walker, 38 Utah 264, 112 P. 804.

Only where contract is ambiguous. White *v.* Shippee, 216 Mass. 23, 102 N. E. 948; Rochester Tumbler Wks. *v.* Mitchell Woodbury Co., 215 Mass. 194, 102 N. E. 438.

Prior negotiations regarded to ascertain whether parties intended clause in contract to provide for stipulated damage or penalty. U. S. *v.* Co., 205 U. S. 105. And to show balance of purchase money was to be paid out of profits of enterprise referred to in contract. Morrison *v.* Dickey, 122 Ga. 417, 50 S. E. 178.

Nature of instrument may be testified to though it is in evidence action not being based on it. P. *v.* Messer, 148 Mich. 168, 111 N. W. 854.

831-10 Shannon C. Co. *v.* Potter, 13 Ariz. 245, 108 P. 486. See Bowers *v.* Andrews, 52 Miss. 596; Martin *v.* Kitchen, 195 Mo. 477, 93 S. W. 780; Mudd *v.* Dillon, 166 Mo. 110, 65 S. W. 973; Gorham *v.* Settegast, 44 Tex. Civ. 254, 98 S. W. 665.

832-11 Hamilton C. Co. *v.* Co., 160 Fed. 75, 87 C. C. A. 231; Thomas *v.* Burke, 91 Ark. 595, 121 S. W. 1060; Kessler *v.* Clayes, 147 Mo. App. 88, 125 S. W. 799; Myers *v.* Persson, 94 Neb. 467, 143 N. W. 447; Ivey *v.* C. M., 143 N. C. 189, 55 S. E. 613.

832-13 Deserres *v.* Brault, 37 Can. Sup. 613; Harten *v.* Loffler, 212 U. S. 397; Wood *v.* Kelsey, 90 Ark. 272, 119 S. W. 258; First Nat. Bk. *v.* Warehouse Co. (Ga.), 82 S. E. 481; Cable Co. *v.* McFeeley, 7 Ga. App. 435, 66 S. E. 1103; Bing *v.* Bk., 5 Ga. App 578, 63 S. E. 652; Bareo *v.* Taylor, 5 Ga. App. 372, 63 S. E. 224; Salt etc. Co. *v.* Coal Co., 170 Ill. App. 268; Alexander *v.* Lumb. Co. (Ind.), 105 N. E. 45; Stahl *v.* Co., 45 Ind. App. 211, 90 N. E. 632; Prescott *v.* Hixon, 22 Ind. App. 139, 53 N. E. 391; Swartz *v.* Cohen, 11 Ind. App. 20, 38 N. E. 536; Putnam-H. Co. *v.* Hewins, 204 Mass. 426, 90 N. E. 983 (previous transactions); Derby D. Co. *v.* Co., 204 Mass. 461, 90 N. E. 543; Helper *v.* Co., 138 Mich. 593, 101 N. W. 804; Pittsburgh S. Co. *v.* Cottengin (Mo. App.), 165 S. W. 391; Kessler *v.* Clayes, 147 Mo. App. 88, 125 S. W. 799; Yost *v.* Silvers, 138 Mo. App. 524, 119 S. W. 971; United Surety Co. *v.* Meenan, 211 N. Y. 39, 105 N. E. 106; Ivey *v.* C. M., 143 N. C. 189, 55 S. E. 613; Roylance Co. *v.* Descalzo, 243 Pa. 180, 90 A. 55; Wesley *v.* Co., 30 R. I. 403, 75 A. 626; Generes *v.* Co. (Tex. Civ.), 163 S. W. 386; Caine *v.* Hagenbarth, 37 Utah 69, 106 P. 945; Manvell *v.* Weaver, 53 Wash. 408, 102 P. 36.

Deception of party to contract.—In Sellers *v.* R. Co., 77 S. C. 361, 57 S. E. 1102, the court, though ruling railroad ticket in question was unambiguous, said that when the judge, "in construing an instrument concludes that upon its face it is reasonably calculated to mislead a man of ordinary intelligence, then it becomes his duty to allow the introduction of parol testimony for the purpose of enabling the jury to determine whether the individual in the particular instance was misled."

Duration of policy.—Traders Ins. Co. *v.* Grand Army, 86 Miss. 135, 38 S. 779.

Property covered by policy.—Prudential F. Ins. Co. *v.* Alley, 104 Va. 356, 51 S. E. 812.

Applicable to official bonds.—Baker County *v.* Huntington, 46 Or. 275, 79 P. 187.

Silence of contract may be aided. Blake *v.* Miller, 135 Ia. 1, 112 N. W. 158; Savage *v.* Salem Mills, 48 Or. 1, 85 P. 69. But this is doubtful. Union S. Co. *v.* Jones, 128 Fed. 672, 63 C. C. A. 224; Gardiner *v.* McDonogh, 147 Cal. 313, 81 P. 964; Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1; Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380; Hei *v.* Heller, 53 Wis. 415, 10 N. W. 620; Wiener *v.* Whipple, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775.

Surrounding circumstances do not include prior representations, proposals and negotiations of a promissory character leading up to, and superseded by, written agreement. Union S. Co. *v.* Jones, 128 Fed. 672, 63 C. C. A. 224.

833-14 Fidelity & C. Co. *v.* Co., 94 Ark. 90, 125 S. W. 653; Gardiner *v.* McDonogh, 147 Cal. 313, 81 P. 964; East *v.* McClung, 49 Colo. 502, 113 P. 517; Hartwell Groc. Co. *v.* Co., 8 Ga. App. 727, 70 S. E. 48; Stockwell *v.*

Whitehead, 47 Ind. App. 423, 94 N. E. 736; Bartlow v. Smith, 165 Mich. 222, 130 N. W. 599 (contract engaging a broker to sell land); Ideal P. & Mfg. Co. v. Ins. Co., 107 Mo. App. 566, 152 S. W. 108 (insurance); Viernow v. Carthage, 139 Mo. App. 276, 123 S. W. 67.

See Coleman v. Kea (Ga.), 78 S. E. 420; Fountain v. Hagan Gas Engine & Mfg. Co., 140 Ga. 70, 78 S. E. 453.

833-15 Smith v. Johnson, 30 S. D. 280, 138 N. W. 18; First State Bank v. Powe (Tex. Civ.) 166 S. W. 382.

To determine who is maker of note. Holt v. Sweetser, 23 Ind. App. 237, 55 N. E. 264.

833-16 Callender Co. v. Flint, 187 Mass. 104, 72 N. E. 345; Darnell v. Lafferty, 132 Mo. App. 282, 88 S. W. 784; Great Western P. Co. v. Belcher, 127 Mo. App. 133, 104 S. W. 894.

834-17 Bender v. Barton (Ala.), 62 S. 722; In re Gaenler, 147 Cal. 457, 82 P. 68; Moayon v. Moayon, 114 Ky. 822, 72 S. W. 23, 102 Am. St. 303, 60 L. R. A. 415; Jennings v. Puffer, 203 Mass. 524, 89 N. E. 1036; Sleeper v. Nicholson, 201 Mass. 110, 87 N. E. 472; Burns v. Witter, 56 Or. 368, 108 P. 129; Whipple v. Lee, 58 Wash. 253, 108 P. 601.

Description of debt secured may be made certain. Boyes v. Masters, 17 Okla. 436, 89 P. 198.

834-18 Shafer v. Sloan, 3 Cal. App. 585, 87 P. 102; Chicago T. & T. Co. v. Co., 242 Ill. 468, 90 N. E. 282.

835-19 Elliott v. Coleman, 170 Ala. 122, 54 S. 491; Thompson v. McKenna, 32 Cal. App. 129, 162 P. 512; Crozer v. White, 9 Cal. App. 612, 100 P. 130; Wofford v. Dykes (Fla.), 64 S. 454; Howard v. Adkins, 167 Ind. 184, 78 N. E. 665; Tewksbury v. Howard, 138 Ind. 106, 37 N. E. 255; Richardson v. Shickley, 150 Ia. 393, 130 N. W. 407, to supply township; Maxwell v. McCall, 146 Ia. 687, 124 N. W. 760; Parks v. Baker, 81 Kan. 334, 105 P. 429; Herod v. Carter, 81 Kan. 236, 106 P. 32; Justice v. Justice (Ky.), 124 S. W. 351; Downs v. Eldredge (Mass.), 105 N. E. 449; Holden v. Crolly, 152 App. Div. 274, 136 N. Y. S. 52; Co-operative B. B. v. Hawkins, 30 R. I. 171, 73 A. 617; Shenandoah L. Co. v. Clarke, 106 Va. 107, 55 S. E. 561; Cook v. Hensler, 37 Wash. 302, 107 P. 178; Barkhausen v. R. Co., 142 Wis. 292, 124 N. W. 649.

See Pickens v. Pickens (W. Va.), 77 S. E. 365.

Evidence to show different boundary than that expressed in ambiguous deed is inadmissible. Van Ness v. Boinay 211 Mass. 340, 101 N. E. 979.

Price paid for land, its character and value and all other pertinent facts may be considered by the jury upon the inquiry for the intent of the parties. Mylius v. Lumber Co. (W. Va.), 81 S. E. 823.

Rule does not apply where deed accurately describes existing boundaries. Keiser v. Reading etc. Co., 43 Pa. Super. 130.

Letters and plats used in connection with making contract, competent to explain it. Bent v. Trimboli, 61 W. Va. 509, 56 S. E. 881.

Whether sale by acre or in gross may be shown by circumstances and situation of parties when deed executed and their subsequent conduct. Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506.

836-20 Thurman v. Leach (Ky.), 116 S. W. 300.

836-21 Bodfish v. Bodfish, 105 Me. 166, 73 A. 1033; Bigelow v. Percival, 148 N. Y. S. 242.

Where testator's intent doubtful. Griffith v. Witten (Mo.), 161 S. W. 708 Peck v. Peck, 76 Wash. 548, 137 Pac. 137.

837-22 Duensing v. Duensing (Ark.), 165 S. W. 956; In re Donnellan's Estate, 164 Cal. 14, 127 P. 166. See Youtsey v. Bowman, 6 Ohio N. P. (N. S.) 381.

837-23 Scruggs & Echols v. Riddle, 171 Ala. 350, 54 S. 641 (correspondence); Potthoff v. Safety etc. Co., 143 App. Div. 161, 127 N. Y. S. 994.

838-25 Stockwell v. Whitehead, 47 Ind. App. 423, 94 N. E. 736; Laclede C. Co. v. Co., 185 Mo. 25, 84 S. W. 76; Sleeper v. Nicholson, 201 Mass. 110, 87 N. E. 473; Smith Premier T. Co. v. Rowan, 143 N. C. 97, 55 S. E. 417.

Letters are not admissible to explain an ambiguity when the parties have set out the entire agreement in subsequent stipulations. Masser v. Gaston, 70 Wash. 685, 127 P. 470.

838-26 Parol evidence of statements made in negotiations preceding contract, not of a contractual character, is competent. Kilby Mfg. Co. v. Co., 122 Fed. 957, 66 C. C. A. 67; Lambert H. E. Co. v. Carmody, 79 Conn. 419, 65 A. 141; Okie v. Person, 23 App. Cas. (D.

C.) 170; Smith *v.* Co., 194 Mass. 193, 80 N. E. 527; Hebb *v.* Welsh, 185 Mass. 335, 70 N. E. 440; Shenandoah L. Co. *v.* Clarke, 106 Va. 100, 55 S. E. 561; Richardson *v.* Bk., 94 Va. 130, 26 S. E. 413; Knick *v.* Knick, 75 Va. 12. *Contra.* Titchenell *v.* Jackson, 26 W. Va. 460; Scraggs *v.* Hill, 37 W. Va. 706, 17 S. E. 185.

838-27 Hornet *v.* Dumbeck, 39 Ind. App. 482, 78 N. E. 691 (notwithstanding testimony contradicted one description in deed, if it enabled court more certainly to arrive at intention); Harris *v.* Oakley, 130 N. Y. 1, 28 N. E. 530.

839-28 Henry Paper Co. *v.* Columbus Paper Bag Co., 185 F. 464, 107 C. C. A. 534; Percy *v.* Co., 173 Fed. 534; Consolidated D. Mfg. Co. *v.* Holliday, 131 Fed. 384; Harten *v.* Loffler, 29 App. Cas. (D. C.) 490, 503; Mizell L. S. Co. *v.* McCaskill, 59 Fla. 322, 51 S. 547; Goodwillie *v.* E. Co., 241 Ill. 42, 89 N. E. 272; Chicago P. C. Co. *v.* Hofman, 168 Ill. App. 71; Cleveland, etc. R. Co. *v.* Gossett, 172 Ind. 525, 87 N. E. 723; Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683; Frazier *v.* Myers, 132 Ind. 71, 31 N. E. 536; Indiana N. G. & O. Co. *v.* Stewart, 45 Ind. App. 554, 90 N. E. 384; Beck Co. *v.* Evansville, 25 Ind. App. 662, 58 N. E. 859; Laclede C. Co. *v.* Co., 185 Mo. 25, 67, 84 S. W. 76; Camardella *v.* Holmes, 97 App. Div. 120, 89 N. Y. S. 616; Krebs H. Co. *v.* Livesley, 55 Or. 227, 104 P. 3; Missouri R. Co. *v.* Anderson, 36 Tex. Civ. 121, 81 S. W. 781; Virginia & K. R. Co. *v.* Heninger, 110 Va. 301, 65 S. E. 495; Virginia & K. R. Co. *v.* Heninger, 110 Va. 301, 67 S. E. 185; Glenn *v.* Co., 99 Va. 695, 40 S. E. 25; Shenandoah L. Co. *v.* Clarke, 106 Va. 100, 55 S. E. 561; S. *v.* Co., 56 Wash. 176, 105 P. 243; Nelson *v.* N. Co., 52 Wash. 177, 100 P. 325; Burton *v.* Douglass, 141 Wis. 110, 123 N. W. 631.

But not to contradict or modify it. Goldenberg *v.* Taglino (Mass.), 105 N. E. 883.

Unchallenged exercise of jurisdiction by county may be shown to establish its boundary. Puget Sound Nat. Bk. *v.* Fisher, 52 Wash. 246, 100 P. 724.

840-29 C. *v.* Sanderson, 40 Pa. Super 416.

840-30 Parks *v.* Baker, 81 Kan. 351, 105 P. 439; Nash *v.* Webber, 204 Mass. 419, 90 N. E. 872; Harris *v.* Oakley, 130 N. Y. 1, 28 N. E. 530; Co-operative B. Bk. *v.* Hawkins, 30 R. I. 171, 73 A. 617; Roberts *v.* Tuttle, 36 Utah 614, 105 P. 916; Winton *v.* McGraw, 60 W. Va. 98, 54 S. E. 506.

Previous user by grantee of land conveyed may be shown to aid in establishing extent of grant. Van Diemen's L. Co. *v.* Board, [1906] App. Cas. (Eng.) 92.

840-31 Direct evidence of intent inadmissible. Balch *v.* Arnold, 9 Wyo. 17, 59 P. 434.

841-32 Whitney *v.* Aronson, 21 Cal. App. 9, 130 P. 700; Lasar Mfg. Co. *v.* Pelligreen Const. & Inv. Co. (Mo. App.), 162 S. W. 691 ("furring"); Schultz *v.* Co., 46 Wash. 555, 90 P. 917.

842-34 Green River, etc., Co. *v.* Town, 142 Ky. 609, 134 S. W. 1164.

843-37 Atlantic, etc. R. Co. *v.* Dahlberg, etc. Co., 170 Ala. 617, 54 S. 168 (term used in a bill of lading); Southern R. Co. *v.* Cofer, 149 Ala. 565, 43 S. 102; Jones *v.* Anderson, 82 Ala. 302, 2 S. 911; Gardiner *v.* McDonogh, 147 Cal. 313, 81 P. 964; Daniel *v.* Co., 124 Ga. 1063, 53 S. E. 573; Morningstar *v.* Cunningham, 110 Ind. 328, 11 N. E. 593, 59 Am. Rep. 211; Willard *v.* R. Co., 108 Minn. 304, 122 N. W. 169; Corneil *v.* Co., 71 Mich. 350, 39 N. W. 7; Kuh *v.* Co., 59 Misc. 589, 112 N. Y. S. 410; Chicago, etc. R. Co. *v.* Dodson, 25 Okla. 822, 107 P. 921; Savage *v.* S. M., 48 Or. 1, 85 P. 69; Hirsh *v.* S. M., 40 Or. 601, 67 P. 949, 68 P. 733; Barnes *v.* Leidigh, 46 Or. 13, 79 P. 51; Edmonds *v.* Bk., 215 Pa. 547, 64 A. 671; Lovering *v.* Miller, 218 Pa. 212, 67 A. 209; C. *v.* Sanderson, 40 Pa. Super. 416; Richmond *v.* Barry, 109 Va. 274, 63 S. E. 1074; Peyser *v.* Co., 53 Wash. 633, 102 P. 750; Ryder G. Co. *v.* Garretson, 53 Wash. 71, 101 P. 498; Shrewsbury *v.* Tufts, 41 W. Va. 212, 23 S. E. 692.

Cannot contravene contract.—McCulsky *v.* Klosterman, 20 Or. 108, 25 P. 366, 10 L. R. A. 785; Holmes *v.* Whitaker, 23 Or. 319, 31 P. 705.

"Undivided bonds" may be identified by parol, including what was said when parties contracted. Crittenden *v.* Cobb, 156 Fed. 535.

Local meaning of gross ton.—Higgins *v.* Co., 120 Cal. 629, 52 P. 1080.

Usage as to computing weight by pound cannot be shown in contravention of statute. Hale *v.* Milliken, 5 Cal. App. 344, 90 P. 365.

Usage or custom may be shown to ex-

plain ambiguous terms. Peet *v.* Peet, 229 Ill. 341, 82 N. E. 376.

S44-38 It may be shown what mortality table insurer used when policy issued. Provident S. L. Soc. *v.* Bailey, 118 Ky. 36, 80 S. W. 452.

S44-39 Citizens' S. Bk. *v.* Chambers, 129 Ia. 411, 105 N. W. 692. *Comp.* Chicago, etc. R. Co. *v.* Dodson, 25 Okla. 822, 107 P. 921.

S44-40 Lindblom *v.* Fallett, 145 Fed. 805, 76 C. C. A. 369; Guano Co. *v.* Holleman, 12 Fed. 61; Briel *v.* Bank, 172 Ala. 475, 55 S. 808; Davis *v.* Stave Co. (Ark.), 168 S. W. 553; Pacpeke-Leicht Lumb. Co. *v.* Talley, 106 Ark. 400, 153 S. W. 833; Scott *v.* Dunkle B. & L. Co., 106 Ark. 83, 152 S. W. 1025; Harten *v.* Loffler, 29 App. Cas. (D. C.) 490; Murphy *v.* Schwaner, 84 Conn. 420, 80 A. 295; L'Engle *v.* Ins. Co., 48 Fla. 82, 37 S. 462; Jacobs *v.* Parodi, 50 Fla. 541, 39 S. 833; Louisville & N. R. Co. *v.* Flour Co., 136 Ga. 538, 71 S. E. 884; Harman *v.* P., 214 Ill. 454, 73 N. E. 760; Theater *v.* Taft, 156 Ill. App. 356; Giger *v.* Busch, 122 Ill. App. 13; Driscoll *v.* Penrod, 176 Ind. 19, 95 N. E. 313; Steele *v.* Buggy Co., 50 Ind. App. 635, 95 N. E. 435; Wolf *v.* Wolf, 152 Ia. 121, 131 N. W. 882; Jackson *v.* Hardin, 27 Ky. L. R. 1110, 87 S. W. 1119; Harris *v.* Ins. Co., 190 Mass. 361, 77 N. E. 493, 4 L. R. A. (N. S.) 1137; Miller *v.* Co., 150 Mich. 292, 114 N. W. 61; Sturges *v.* R. Co., 166 Mich. 231, 131 N. W. 706; Shivers *v.* Ins. Co., 99 Miss. 744, 55 S. 965; Sherrod *v.* Battle, 154 N. C. 345, 70 S. E. 834; Taylor *v.* Taylor, 7 O. N. P. (N. S.) 297; Schmucker *v.* Grain Co., 28 Okla. 721, 116 P. 184; Wiers *v.* Treese, 27 Okla. 774, 117 P. 182; Maryland Cas. Co. *v.* Mfg. Co., 93 S. C. 406, 76 S. E. 1089; Winfree *v.* Winfree (Tex. Civ.), 139 S. W. 36; Gravity C. Co. *v.* Sisk, 43 Tex. Civ. 194, 95 S. W. 724; Spencer *v.* Potter's Est., 85 Vt. 1, 80 A. 821; Wetzler *v.* Nichols, 53 Wash. 285, 101 P. 867, *cit.* the text; Belcher *v.* Big Four, etc. Co., 68 W. Va. 716, 70 S. E. 712 (size of car referred to in contract for royalties on coal); Chesapeake & O. R. Co. *v.* R. Co., 57 W. Va. 641, 672, 50 S. E. 890; Scraggs *v.* Hill, 37 W. Va. 706, 17 S. E. 185.

Rule applies to field notes of survey, and declarations of deceased patentee may be proved against his heirs. Warner *v.* Sapp (Tex. Civ.), 97 S. W. 125; Hamilton *v.* Blackburn, 43 Tex. Civ. 153, 95 S. W. 1094; Wilkins *v.* Clawson, 37 Tex. Civ. 162, 83 S. W. 732.

S45-41 La Brie *v.* McKim, 56 Tex. Civ. 322, 120 S. W. 1083.

Identity of actions.—If records of actions do not establish their identity parol evidence is competent to do so. Wiehe *v.* Atkins, 126 Ill. App. 1; Rubel *v.* Co., 101 Ill. App. 439; Wright *v.* Griffey, 147 Ill. 469, 35 N. E. 732; Leopold *v.* Chicago, 150 Ill. 568, 37 N. E. 892; Jordan *v.* McDonnell, 151 Ala. 279, 44 S. 101.

Party to action.—It may be shown by parol a person made himself a party. Cage *v.* Owens (Tex. Civ.), 103 S. W. 1191.

S46-42 Lowrey *v.* Hawaii, 206 U. S. 206; Barens *v.* Gates, 130 Fed. 364; Sewall *v.* Wood, 135 Fed. 12, 67 C. C. A. 580; Hannon *v.* Espalla, 148 Ala. 313, 42 S. 443; Pringle *v.* King, 9 Ariz. 76, 78 P. 367; Massey *v.* Dixon, 81 Ark. 337, 99 S. W. 383; Messenger *v.* Ins. Co., 47 Colo. 448, 107 P. 643; San Miguel M. Co. *v.* Stubbs, 39 Colo. 359, 90 P. 842; L'Engle *v.* Ins. Co., 48 Fla. 82, 37 S. 462; Morrison *v.* Dickey, 119 Ga. 698, 46 S. E. 863, 122 Ga. 417, 50 S. E. 178; Novelty Mfg. Co. *v.* Wiseberg, 126 Ga. 800, 55 S. E. 923; Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683; Morrison Mfg. Co. *v.* Bryson, 129 Ia. 645, 103 N. W. 1016, 106 N. W. 153; Jenkins *v.* Kirtley, 70 Kan. 801, 79 P. 671; Versailles *v.* Brown, 29 Ky. L. R. 1223, 96 S. W. 1108; Fidelity & C. Co. *v.* Co., 31 Ky. L. R. 725, 103 S. W. 297; Denis *v.* Tilton, 120 La. 226, 45 S. 112; Hodgens *v.* Sullivan, 209 Mass. 533, 95 N. E. 969; Smith *v.* Co., 194 Mass. 193, 80 N. E. 527; Hebb *v.* Welsh, 185 Mass. 335, 70 N. E. 440; Fullam *v.* Wright, 196 Mass. 474, 82 N. E. 711; Laclede C. Co. *v.* Co., 185 Mo. 25, 67, 84 S. W. 76; Tanenbaum *v.* Levy, 83 App. Div. 319, 82 N. Y. S. 171; New York H. W. Co. *v.* O'Rourke, 92 App. Div. 217, 86 N. Y. S. 1116; Sholl *v.* Prince Line, 109 App. Div. 591, 96 N. Y. S. 368; Watson *v.* Lamb, 75 O. 481, 79 N. E. 1075; Olympia B. Wks. *v.* Co., 56 Or. 87, 107 P. 969; Maryland Casualty Co. *v.* Co., 93 S. C. 406, 76 S. E. 1089 (policy of insurance); International R. Co. *v.* Jones, 41 Tex. Civ. 327, 91 S. W. 611; Carr *v.* Jones, 29 Wash. 78, 69 P. 646; Bent *v.* Trimboli, 61 W. Va. 509, 56 S. E. 881; Shrewsbury *v.* Tufts, 41 W. Va. 212, 23 S. E. 692; Perkins *v.* Owen, 123 Wis.

238, 101 N. W. 415; Excelsior W. Co. *v.* Messinger, 116 Wis. 549, 93 N. W. 459; Corbett *v.* Joannes, 125 Wis. 370, 104 N. W. 69; Loree *v.* Co., 134 Wis. 173, 114 N. W. 449.

Facts, circumstances and knowledge of parties existing when contract made and which may aid in understanding it may be proved. Loree *v.* Co., 134 Wis. 173, 114 N. W. 449.

Parties to contract may be identified by parol. Blake *v.* Miller, 135 Ia. 1, 112 N. W. 158; Schuster *v.* Snawder, 31 Ky. L. R. 254, 101 S. W. 1194; Wuertz *v.* Braun, 113 App. Div. 459, 99 N. Y. S. 340.

Term of teacher's contract. — Henry School Tp. *v.* Meredith, 32 Ind. App. 607, 70 N. E. 393.

A difference in supposed duplicates of contract may be solved by parol. Bowman *v.* Poppenberg, 53 Misc. 373, 103 N. Y. S. 245.

Maker of note signed by one who was president of a company and expressed in plural form may be shown to be the company's by proof payee had no account with president, and a memorandum showing he regarded company as his debtor. Dunbar B. & L. Co. *v.* Martin, 53 Misc. 312, 103 N. Y. S. 91.

Party to whom material was to be furnished and quantity he might need may be shown by parol. Laclede C. Co. *v.* Co., 185 Mo. 25, 67, 84 S. W. 76.

Assignor of judgment may testify of interest assigned. First N. Bk. *v.* Miller, 48 Or. 587, 87 P. 892.

Intent with which release executed may be shown. El Paso & S. R. Co. *v.* Darr (Tex. Civ.), 93 S. W. 166.

Indefinite consideration. — If writing states consideration indefinitely ambiguity may be removed. Burke *v.* Mead, 159 Ind. 252, 64 N. E. 880; Howard *v.* Adkins, 167 Ind. 184, 78 N. E. 665.

Blank may be filled in accordance with intention. Fresno C. & I. Co. *v.* Hart, 152 Cal. 450, 92 P. 1010; Leffler Co. *v.* Dickerson, 1 Ga. App. 63, 57 S. E. 911.

Memorandum is open to fuller explanation than formal contract. Wright *v.* Anderson, 191 Mass. 148, 77 N. E. 704.

846-43 Lindblom *v.* Fallett, 145 Fed. 805, 76 C. C. A. 369; Kilby Mfg. Co. *v.* Co., 132 Fed. 957, 66 C. C. A. 67; Georgia I. & C. Co. *v.* Co., 133 Ga. 326, 65 S. E. 775; Brackett *v.* Co., 127 Ga. 672, 56 S. E. 762; Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279; Martin *v.* Ferguson, 31 Ky. L. R. 590, 103 S. W. 257; Wolverine L. Co. *v.* Ins. Co., 145 Mich. 558, 108 N. W. 1088; Miller *v.* Co., 150 Mich. 292, 114 N. W. 61; Houston T. Co. *v.* Lee (Tex. Civ.), 97 S. W. 842.

Parol evidence is not competent to show a building not described in a policy was intended to be covered by it. Collins *v.* Ins. Co., 44 Minn. 440, 46 N. W. 906; Bromberg *v.* Assn., 45 Minn. 318, 47 N. W. 975. But it is admissible to show of what building described consisted—as that it included an annex as a substantial part of it. Boak F. Co. *v.* Co., 84 Minn. 419, 87 N. W. 932. And to show whether "warehouse" was applicable to "elevator." Fireman's Fund Ins. Co. *v.* Co., 2 Cal. App. 690, 84 P. 253.

847-44 Stone *v.* Mulvane, 217 Ill. 40, 75 N. E. 421; Polk P. Co. *v.* Smedley, 155 Mich. 249, 118 N. W. 984; Ferguson *v.* Connally, 33 Tex. Civ. 245, 76 S. W. 609.

847-45 Read P. Co. *v.* Co., 1 Ga. App. 420, 58 S. E. 122.

847-46 Albert *v.* R. Co., 107 Va. 256, 58 S. E. 575.

847-47 Hamilton *v.* Smith, 74 Conn. 374, 50 A. 884; Tyssowski *v.* Smith Co., 35 App. Cas. (D. C.) 403; Harten *v.* Loffler, 29 App. Cas. (D. C.) 490, 503; Leverett *v.* Bullard, 121 Ga. 534, 49 S. E. 591; Walden *v.* Walden, 128 Ga. 126, 57 S. 323; Aylett *v.* Keaweamahi, 8 Haw. 320; Nahaolelua *v.* Kaaahu, 10 Haw. 18; Howard *v.* Adkins, 167 Ind. 184, 78 N. E. 665; Kitzman *v.* Carl, 133 Ia. 340, 110 N. W. 587; Cummins *v.* Riordon, 84 Kan. 791, 115 P. 568; Mayberry *v.* Beck, 71 Kan. 609, 81 P. 191; Jackson *v.* Hardin, 27 Ky. L. R. 1110, 87 S. W. 1119; Temple *v.* Benson, 213 Mass. 128, 100 N. E. 63; Haskell *v.* Friend, 196 Mass. 198, 81 N. E. 962; Broadwell *v.* Morgan, 142 N. C. 475, 55 S. E. 340; Staub *v* Hampton, 117 Tenn. 706, 101 S. W. 776; Roberts *v.* Hart (Tex. Civ.), 165 S. W. 473; Wilkerson *v.* Ward (Tex Civ.), 137 S. W. 158; Raley *v.* Magendie (Tex. Civ.), 116 S. W. 174; Snow *v.* Gallup, 57 Tex. Civ. 572, 123 S. W. 222; St. Louis, etc. R. Co. *v.* Payne, 47 Tex. Civ. 194, 104 S. W. 1077; Missouri, etc. R. Co. *v.* Anderson, 36 Tex. Civ. 121, 81 S. W. 781; Edmunds *v.*

Barrow, 112 Va. 330, 71 S. E. 544; Brown *v.* Bremerton, 69 Wash. 474, 125 P. 785; Wetzler *v.* Nichols, 53 Wash. 285, 101 P. 867; Light *v.* Grant & Co. (W. Va.), 79 S. E. 1011; Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. 277.

Rule applied to tax list.—Chapman *v.* Zoberlein, 152 Cal. 216, 92 P. 188; Best *v.* Wohlford, 144 Cal. 733, 78 P. 293; Baird *v.* Monroe, 150 Cal. 560, 89 P. 352; Fox *v.* Townsend, 152 Cal. 51, 91 P. 1004, 1007; McCash *v.* Penrod, 131 Ia. 631, 109 N. W. 180.

Evidence of intention inadmissible in opposition to description in deed. Herman *v.* Dunman (Tex. Civ.), 95 S. W. 80.

Subsequent deed executed to validate void one may be explained. Davis *v.* Co., 151 Ala. 580, 44 S. 639; Larkin *v.* Trammel, 47 Tex. Civ. 548, 105 S. W. 552.

Applicable to sheriff's levy.—Reed *v.* Munn, 148 Fed. 737, 80 C. C. A. 215.

Explanation of inapt technical terms. McSurley *v.* Venters, 31 Ky. L. R. 963, 104 S. W. 365.

Terms of sale may be shown by proof of circumstances when deed made and conduct of parties under it. Winton *v.* McGraw, 60 W. Va. 98, 54 S. E. 506.

Meaning of privileges and appurtenances may be elucidated by proof of grantor's acts and declarations prior and subsequent to execution of deed. Fayter *v.* North, 30 Utah 156, 83 P. 742, 6 L. R. A. (N. S.) 410.

Limitation.—Parol evidence is not admissible both to describe land and apply description. Powers *v.* Rude, 14 Okla. 381, 79 P. 89; Ferguson *v.* Blackwell, 8 Okla. 189, 58 P. 647.

Estate intended to be conveyed may be shown by parol. Slusher *v.* Slusher, 31 Ky. L. R. 570, 102 S. W. 1188.

What may be shown.—"It is always competent to give in evidence existing circumstances, such as the actual condition and situation of the land, buildings, passages, water-courses and other local objects in order to give a definite meaning to language used in the deed, and to show the sense in which particular words were probably used by the parties, especially in matters of description." Clayton *v.* Court, 58 W. Va. 273, 52 S. E. 103, 2 L. R. A. (N. S.) 798, quoting from Salisbury *v.* Andrews, 19 Pick. (Mass.) 250.

Claims assumed by deed may be identified by parol. Gage *v.* Cameron, 212 Ill. 146, 164, 72 N. E. 204.

Acts of parties after conveyance of land may be proved. Howe *v.* Collins, 98 Me. 445, 57 A. 587.

S49-49 Hornet *v.* Dumbeck, 39 Ind. App. 482, 78 N. E. 691.

S49-50 Fulwood *v.* Fulwood, 161 N. C. 601, 77 S. E. 763. See Armstrong *v.* Ross, 61 W. Va. 38, 55 S. E. 895.

S49-51 Hall *v.* Conlee, 23 Ky. L. R. 177, 62 S. W. 899; Getchell *v.* Atherton, 104 Me. 198, 71 A. 767.

Erratum.—The words "a description applicable to" should be substituted for "the extrinsic of."

Deeds emanating for common grantor, though not conveying land in question, may be competent to show what particular part of an entire tract owned by him when they were executed was intended to be granted. Lee *v.* Giles, 124 Ga. 494, 52 S. E. 806.

S50-52 Polushie *v.* Zacklynski, 37 Can. Sup. 177; Davis *v.* Co., 151 Ala. 580, 44 S. 639; Blanchard *v.* Floyd, 93 Ala. 53, 9 S. 418; Nenage *v.* Burke, 43 Minn. 211, 45 N. W. 155; Walker *v.* Miller, 139 N. C. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157; Cobb *v.* Bryan (Tex. Civ.), 97 S. W. 513.

S50-54 Okie *v.* Person, 23 App. Cas. (D. C.) 170; Buffington *v.* McNally, 192 Mass. 198, 78 N. E. 309; Phillips *v.* Barnes, 105 Mo. App. 421, 80 S. W. 43; Dougherty *v.* Chestnutt, 86 Tenn. 1, 5 S. W. 444; Cockrell *v.* Egger (Tex. Civ.), 99 S. W. 568; O'Neill *v.* Ogden, 32 Utah 162, 89 P. 454; Pine Beach I. Co. *v.* Co., 106 Va. 810, 56 S. E. 822; Lovett *v.* Gas Co. (W. Va.), 79 S. E. 1007.

Evidence of conduct of parties under a lease cannot include dealings of lessee with one claiming adversely to him as tenant at will of lessor, latter not having authorized lessee's conduct. Walker I. Co. *v.* Co., 185 Mass. 463, 70 N. E. 937.

S51-55 Carroll *v.* Miner, 1 Pa. Super. 439 (writ levied admissible). Understanding of witness as to scope of levy cannot be proved. Carroll *v.* Miner, supra.

S52-57 In aid of process of construction and interpretation extrinsic evidence may be received for purpose of rightly understanding meaning of will. Thompson *v.* Betts, 74 Conn. 576, 51 A. 564.

Latent ambiguities generally. Murphy

v. Clancy (Mo.), 163 S. W. 915.

852-58 Northrop v. Lumber Co., 186 Fed. 770, 108 C. C. A. 640; McMahan v. Hubbard, 217 Mo. 624, 118 S. W. 481; Clark v. Goodridge, 51 Misc. 140, 100 N. Y. S. 824 (devise by street number included contiguous lot inclosed with it).

852-59 In re Metzger's Est., 222 Pa. 276, 71 A. 96; Hunter v. Hunter, 37 Pa. Super. 311 (condition stated is prerequisite to reception of parol evidence).

852-60 Extrinsic evidence concerning will.—A will which is certain in terms is not ambiguous because it does not dispose of all testator's lands. Taylor v. Horst, 23 Wash. 446, 63 P. 231. The meaning of local words or phrases used in a will executed abroad, which have a different meaning from same words or phrases in jurisdiction in which will is being construed, with which it may be presumed testator was familiar, may be shown by parol. Peet v. Peet, 229 Ill. 341, 82 N. E. 376. Testator's declarations incompetent to establish meaning of will. Ibid. "Evidence of such extrinsic circumstances as the testator's relations to persons, or the amount, character and condition of his estate, is sometimes admissible to explain ambiguities of description in his will, but never to determine the construction or the extent of the devises therein contained." Atkins v. Best, 27 App. Cas. (D. C.) 148.

Intention as to unborn child.—Though statute declares that unless it shall appear by the will of a testator, to whom a child is born after will made, it was the intention to disinherit such child, he shall share in the estate, parol evidence is admissible to show character of property devised, confidence of testator in his wife to manage it, ages of children and their relations to testator for purpose of ascertaining his intention concerning unborn child. Peet v. Peet, 229 Ill. 341, 82 N. E. 376; Hawhe v. R. Co., 165 Ill. 561, 46 N. E. 240. *Comp.* Lurie v. Radnitzer, 166 Ill. 609, 46 N. E. 1116, 57 Am. St. 157; Chicago, etc. R. Co. v. Wasserman, 22 Fed. 872, seems to be opposed to Illinois case, in which three judges dissented.

853-61 Taylor v. Taylor, 7 O. N. P. (N. S.) 297.

854-62 In re Pearson, 52 Misc. 273, 102 N. Y. S. 965; In re Knight, 20 Phila. (Pa.) 151.

Blank in will cannot be filled by parol —as a legacy to Mr. ———— (Baylis v. Attorney-General, 2 Atk. [Eng.] 239; Hunt v. Hort, 3 Bro. C. C. [Eng.] 312, 29 Eng. Reprint 554). Otherwise as to a partial blank—as my granddaughter—though testator had three granddaughters. In re Hubbuck [1905], Prob. (Eng.) 129. And so if there are words to which a reasonable meaning may be attached—as to Mrs. C., in which case it may be shown testator was accustomed to speak of a particular person by initial of her name. Abbot v. Massie, 3 Ves. (Eng.) 148; Clayton v. Lord Nugent, 13 M. & W. (Eng.) 200.

854-63 Condition of testator's family, estate and surroundings may be shown. Taylor v. McCowen, 154 Cal. 798, 99 P. 351.

Ambiguity in decree may be explained. Taylor v. McCowen, 154 Cal. 798, 99 P. 351.

Will of another testator competent to explain ambiguity if will in question copied from it. Taylor v. Taylor, 7 O. N. P. (N. S.) 297.

855-64 Parol evidence not admissible to create ambiguity in order to explain it by like evidence. Am. H. Co. v. Dolvin, 119 Ga. 186, 45 S. E. 983.

856-68 Allred v. S., 126 Ga. 537, 55 S. E. 178; Wolverine L. Co. v. Ins. Co., 145 Mich. 558, 108 N. W. 1088; Phillips v. Barnes, 105 Mo. App. 421, 80 S. W. 43; Bellis v. Henwood, 6 Pa. C. C. 78.

856-69 Testimony must be so clear and convincing as to put beyond dispute or all reasonable doubt exact meaning and intention party designs to convey by language used. Crozer v. White, 9 Cal. App. 612, 100 P. 130.

ANCIENT DOCUMENTS.

860-1 H. C. Cole & Co. v. W. Lea & Sons Co., 35 App. Cas. (D. C.) 355 (entries in account books); Anderson v. Cole, 234 Mo. 1, 136 S. W. 395 (warranty deed); Goodhue v. Cameron, 142 App. Div. 470, 127 N. Y. S. 120 (an agreement for building restrictions).

860-2 Wilson v. Snow, 228 U. S. 217, 33 Sup. Ct. 487, 57 L. ed. 807; McGuire v. Blount, 199 U. S. 142; Hyde v. McFaddin, 140 Fed. 433, 72 C. C. A. 655;

Sloss-Sheffield & Co. *v.* Lollar, 170 Ala. 239, 54 S. 272; Ford *v.* Ford, 27 App. Cas. (D. C.) 401; Wiener *v.* Zweib (Tex. Civ.), 128 S. W. 699 (lodge minutes); West *v.* Co., 56 Tex. Civ. 341, 120 S. W. 228; Riviere *v.* Wilkens, 31 Tex. Civ. 454, 72 S. W. 608. Papers executed twenty-two years after occurrence of matters to which they relate, not ancient. The Brig Juno, 36 Ct. Cl. 239.

S60-3 Sixteen years too short to raise presumption recitals in deed true. Lohse *v.* Burch, 42 Wash. 156, 84 P. 722.

S60-7 Wright *v.* Hull, 83 Ohio St. 385, 94 N. E. 813.

That paper was dated forty years before it was offered does not make it ancient, in absence of knowledge of its appearance or custody. Bunner *v.* Ison, 8 O. C. C. (N. S.) 260.

S60-9 "For instance, a deed less than 30 years old at the date of the filing of the suit, which becomes as much as 30 years old during the pendency of the suit and prior to the trial, may be introduced in evidence at the trial as an ancient deed, and without proof of its execution." Smith *v.* Worley, 10 Ga. App. 280, 73 S. E. 428.

S60-10 Broussard *v.* Guidry, 127 La. 708, 53 S. 964; Carter *v.* R. Co., 112 Md. 599, 77 A. 301; West *v.* Co., 56 Tex. Civ. 341, 120 S. W. 228 (date does not prove age).

S61-12 Stevens *v.* Smoker, 84 Conn. 369, 80 A. 788.

S61-13 McGuire *v.* Blount, 199 U. S. 142.

S61-14 Woodward *v.* Keck (Tex. Civ.), 97 S. W. 852.

S62-15 Hamilton *v.* Smith, 74 Conn. 374, 50 A. 884; Hedger *v.* Ward, 15 B. Mon. (Ky.) 106; Phillips *v.* Co., 181 Mass. 404, 68 N. E. 848; McCreary *v.* Coggeshall, 74 S. C. 42, 53 S. E. 978; Sims *v.* Sealy, 53 Tex. Civ. 518, 116 S. W. 630; Dutton *v.* Wright, 38 Tex. Civ. 372, 85 S. W. 1025.

Ancient deed, if found where it might be expected to be found, and if possession has been in conformity with it, admissible without proof of execution. When secondary evidence is admissible to establish title law is liberal in allowing introduction of ancient records as well as ancient deeds. Phillips *v.* Co., 181 Mass. 404, 68 N. E. 848.

S62-16 Swafford *v.* Herd, 23 Ky. L. R. 1556, 65 S. W. 803; Peterson *v.* Bauer, 83 Neb. 405, 119 N. W. 764; Bunner *v.* Ison, 8 O. C. C. (N. S.) 260.

Not always received though genuineness admitted.—Webb *v.* Ritter, 60 W. Va. 193, 220, 54 S. E. 484.

Laches immaterial.—Murphy *v.* Cady, 145 Mich. 33, 108 N. W. 493.

S62-17 McGuire *v.* Blount, 199 U. S. 142; Barker *v.* Elec. Co., 173 Ala. 28, 55 S. 364; Swafford *v.* Herd, 23 Ky. L. R. 1556, 65 S. W. 803; In re Butrick, 185 Mass. 107, 69 N. E. 1044; Coleman *v.* Bruch, 132 App. Div. 716, 117 N. Y. S. 582; Flores *v.* Hovel (Tex. Civ.), 125 S. W. 606; Riviere *v.* Wilkens, 31 Tex. Civ. 454, 72 S. W. 608.

S63-18 West *v.* Co., 56 Tex. Civ. 341, 120 S. W. 228.

S63-19 Longworth *v.* Nat. Bk. (App. Div.), 145 N. Y. S. 1051; Wright *v.* Hull, 83 Ohio St. 385, 94 N. E. 813; Peterson *v.* Bauer, 83 Neb. 405, 119 N. W. 764; Byrd *v.* Phillips, 120 Tenn. 14, 111 S. W. 1109.

S63-20 See Ardoin *v.* Cobb (Tex. Civ.), 136 S. W. 271.

S64-26 Jasper Tp. *v.* Martin, 161 Mich. 336, 126 N. W. 437; Coleman *v.* Bruch, 132 App. Div. 716, 117 N. Y. S. 582.

S65-27 McCreary *v.* Coggeshall, 74 S. C. 42, 53 S. E. 978.

S65-28 See S65-30.

S65-30 Letter written to individual concerning public land not regarded as being in improper custody in land office. Woodward *v.* Keck (Tex. Civ.), 97 S. W. 852.

S65-34 In re Butrick, 185 Mass. 107, 69 N. E. 1044.

S66-37 Flores *v.* Hovel (Tex. Civ.), 125 S. W. 606; Woodward *v.* Keck (Tex. Civ.), 97 S. W. 852.

S68-45 Possession of document for a century need not be accounted for if it is honest on its face and comes from legitimate custodians. Flores *v.* Hovel (Tex. Civ.), 125 S. W. 606.

S68-46 Ball *v.* Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Harlan *v.* Howard, 79 Ky. 373; In re Butrick, 185 Mass. 107, 69 N. E. 1044; Kansas City *v.* Scarritt, 169 Mo. 471, 487, 69 S. W. 283; Jackson *v.* Co. (Tex. Civ.), 128 S. W. 928; Jones *v.* Neal, 44 Tex. Civ. 112, 98 S. W. 417.

S71-58 If there is evidence of contemporaneous acts showing instruments genuine proof of possession not essential. Hodge *v.* Palms, 117 Fed. 396, 54 C. C. A. 570.

871-62 West *v.* Co., 56 Tex. Civ. 341, 120 S. W. 228 (may be considered corroborative circumstance as to genuineness of document).

872-64 Leverett *v.* Tift, 6 Ga. App. 90, 64 S. E. 317; Rule *v.* Richards (Tex. Civ.), 159 S. W. 386.

Other corroborative facts, such as references in later deeds, appointment of attorney in fact to recover land from adverse claimant and to sell it, and neighborhood belief as to ownership of land affected, considered. Jones *v.* Neal, 44 Tex. Civ. 412, 98 S. W. 417.

872-66 Nicholson *v.* Lumber Co., 156 N. C. 59, 72 S. E. 86.

873-68 Milwee *v.* Phelps, 53 Tex. Civ. 195, 115 S. W. 891.

873-69 O'Neal *v.* R. Co., 140 Ala 378, 37 S. 275; Yellow Pine L. Co. *v.* Jernigan, 56 Fla. 891, 47 S. 945; Sapp *v.* Cline, 131 Ga. 433, 62 S. E. 529. See Texas, etc. Co. *v.* Gwin, 29 Tex. Civ. 1, 67 S. W. 892, 68 S. W. 721.

873-71 Olwell *v.* Travis, 140 Wis. 547, 123 N. W. 111.

Scope of presumption. See O'Neal *v.* R. Co., 140 Ala. 378, 37 S. 275.

874-73 Bannan *v.* Henry (Ala.), 57 S. 967; West *v.* Co., 56 Tex. Civ. 341, 120 S. W. 228.

874-74 Morgan *v.* Tutt, 52 Tex. Civ. 301, 113 S. W. 958.

874-79 Ibid.

875-81 White *v.* Hutchings, 40 Ala. 253.

Unacknowledged and unwitnessed deed not admissible without proof of execution. O'Neal *v.* R. Co., 140 Ala. 378, 37 S. 275.

875-82 McConnell *v.* Slappey, 134 Ga. 95, 67 S. E. 440; Milwee *v.* Phelps, 53 Tex. Civ. 195, 115 S. W. 891; West *v.* Co., 56 Tex. Civ. 341, 120 S. W. 228.

877-94 Signature is presumed to be genuine. Townsend *v.* Perry, 124 N. Y. S. 143. And see Murphy *v.* Cady, 145 Mich. 33, 108 N. W. 493, as to pension vouchers.

By witness familiar with signature. Hamilton *v.* Smith, 74 Conn. 374, 50 A. 884.

877-95 McCreary *v.* Coggeshell, 74 S. C. 42, 61, 53 S. E. 978; Cantey *v.* Platt, 2 McCord (S. C.) 261; Askew *v.* Cantwell (Tex. Civ.), 146 S. W. 720.

878-97 Horgan *v.* Town, 32 R. I. 528, 80 A. 271; Skov *v.* Coffin (Tex. Civ.), 137 S. W. 450; McDonald *v.* Hanks, 52 Tex. Civ. 140, 113 S. W. 604; Sydnor *v.* Assn., 42 Tex. Civ. 138, 94 S. W. 451; Pardee *v.* Johnstone, 70 W. Va. 347, 74 S. E. 721.

878-99 Ryle *v.* Davidson (Tex. Civ.), 116 S. W. 823. See Gillean *v.* Witherspoon (Tex. Civ.), 121 S. W. 909.

879-5 Recital sale made under order of probate court establishes fact where records destroyed. Williams *v.* Cessna, 43 Tex. Civ. 315, 95 S. W. 1106.

879-6 Presumed signers of deed owned land conveyed. Foote *v.* Brown, 81 Conn. 218, 70 A. 699.

879-8 *Contra*, as to letter signed by agent. Robertson *v.* Brothers (Tex. Civ.), 139 S. W. 657.

879-9 Jones *v.* Neal, 44 Tex. Civ 412, 98 S. W. 417.

880-14 Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645; Jones *v.* Neal, 44 Tex. Civ. 412, 98 S. W. 417.

881-16 Crosby *v.* Ardoin (Tex. Civ.), 145 S. W. 709; Riviere *v.* Wilkens, 31 Tex. Civ. 454, 72 S. W. 608.

Copy must come from record authorized by law. Williamson *v.* Work, 33 Tex. Civ. 369, 77 S. W. 266.

In Texas rule applies only to documents duly acknowledged and recorded in state. Freeman *v.* Inst. (Tex. Civ.), 128 S. W. 629.

881-17 Ball *v.* Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275.

882-21 Rule same in Georgia.—Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645.

When original deed is assailed as a forgery, proof it is thirty years old, with proof of possession of it by grantee and other matters of corroboration, renders it admissible as ancient document. Riviere *v.* Wilkens, 31 Tex. Civ. 454, 72 S. W. 608; Williamson *v.* Work, 33 Tex. Civ. 369, 77 S. W. 266.

Age of record shown by extraneous evidence; record of deed is evidence it was filed for record. Riviere *v.* Wilkens, 31 Tex. Civ. 454, 72 S. W. 608.

882-23 Effect of original not destroyed by duplicate made on proof of loss of former. Jackson *v.* Co. (Tex. Civ.), 128 S. W. 928.

884-32 Flores *v.* Hovel (Tex. Civ.), 125 S. W. 606.

884-35 See West *v.* Co., 56 Tex. Civ. 341, 120 S. W. 228.

885-36 Ibid.; Woodward *v.* Keck (Tex. Civ.), 97 S. W. 852.

885-37 Jackson *v.* Co. (Tex. Civ.), 128 S. W. 928.

885-39 If affidavit of forgery is made under statute burden is upon party offering certified copy of ancient and recorded deed to show existence and genuineness of original. Chatman *v.* Hodnett, 127 Ga. 360, 56 S. E. 439; Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645.

886-45 Sydnor *v.* Assn., 42 Tex. Civ. 138, 94 S. W. 451; Webb *v.* Ritter, 60 W. Va. 193, 233, 54 S. E. 484.

886-46 Rollins *v.* R. Co., 73 N. J. L. 64, 62 A. 929; Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484; Wilson *v.* Braden, 56 W. Va. 372, 49 S. E. 409, 107 Am. St. 822.

886-52 Woodward *v.* Keek (Tex. Civ.), 97 S. W. 852. To show grantee was administrator (Gunn *v.* Turner, 13 Ont. L. R. [Can.] 158), or that person named was widow or sole heiress of decedent. Wilson *v.* Braden, 56 W. Va. 372, 49 S. E. 409, 107 Am. St. 822.

887-56 Fuller *v.* Saxton, 20 N. J. L. 61.

887-57 Woodward *v.* Keek (Tex. Civ.), 97 S. W. 852.

ANIMALS.

Opinions as to identity, 889-3; *Range animals,* 889-3; *Brand evidence of ownership prior to recording,* 890-4; *False branding,* 891-12; *Presumption of dog's viciousness,* 898-29; *Presumption of negligence in keeping dogs,* 898-29.

For a treatment of actions and matters of procedure under the following heads see the authority cited:

Injuries to Persons.—1 STANDARD PROC. 946-953.

Injuries to Other Animals.—1 STANDARD PROC. 953-958.

Contagious or Infectious Diseases.—1 STANDARD PROC. 958-965.

Injuring or Killing Animals.—1 STANDARD PROC. 965-974.

Driving from Range or Pasture.—1 STANDARD PROC. 975-976.

Agistment.—1 STANDARD PROC. 976-979.

Animals Running at Large.—1 STANDARD PROC. 979-983.

Marks and Brands.—1 STANDARD PROC. 983-985.

889-1 P. *v.* Romero, 12 Cal. App. 466, 107 P. 709; S. *v.* Brinkley, 55 Or. 134, 104 P. 893.

Brand is not prima facie evidence of ownership. Cuerth *v.* Arbogast (Mont.), 136 P. 383.

"It does not take a statute to make brands and marks on animals admissible in evidence—they are so by virtue of the rules governing evidence, and it has been held that cattle branded with the brand of the prosecuting witness is some evidence of his ownership. Underhill on Crim. Ev. 297; State *v.* Wolfley, 75 Kan. 406, 89 P. 1046, 93 P. 337, 11 L. R. A. (N. S.) 87, 12 Am. Cas. 412; People *v.* Romero, 12 Cal. App. 466, 107 P. 709. And it has also been held that the state may prove that an unrecorded brand was used for years by the party claiming ownership. Underhill, §297; Territory *v.* Meredith, 14 N. M. 288, 91 P. 731. And if brands and marks are admissible in the absence of a statute, then those provisions of the laws of 1874 and 1876, which render inadmissible records of a brand unless the record shows on what part of the animal the brand is placed, have no application to those counties not under the operation of that law." Dugat *v.* S. (Tex. Cr.), 148 S. W. 789.

Mark with unrecorded brand evidence of ownership (Hurst *v.* Ty., 16 Okla. 600, 86 P. 280), though statute declares such brand not to be lawful. S. *v.* Cardelli, 19 Nev. 319, 10 P. 433.

Proof of ownership not made by showing horses bore certain brands and one brand belonging to person alleged to be owner of horses. S. *v.* DeWolfe, 29 Mont. 415, 74 P. 1084. See Hurst *v.* Ty., 16 Okla. 600, 86 P. 280.

Not much weight given brands as evidence of title. Turnbow *v.* Beckstead, 25 Utah 468, 71 P. 1062.

889-3 P. *v.* Romero, 12 Cal. App. 466, 107 P. 709; S. *v.* Wolfley, 75 Kan. 406, 89 P. 1046, 93 P. 337, 11 L. R. A. (N. S.) 87; Ty. *v.* Valles, 15 N. M. 228, 103 P. 984; Brown *v.* Moss, 53 Or. 518, 101 P. 207.

Experiments to determine existence of brand may be made. See Young *v.* Kinney, 85 Neb. 131, 122 N. W. 679.

Opinions of experienced men competent to show whether or not a colt, whose conduct they have observed in connection with a certain mare, was her foal. Miller *v.* Ty., 9 Ariz. 123, 80 P. 321.

Range animals.—Evidence horse has run at large upon partially inclosed land in an open country shows he is within statute concerning burden of

proof in case of larceny of range animals. S. *v.* Eubank, 33 Wash. 293, 74 P. 378.

890-4 S. *v.* Dunn, 13 Ida. 9, 88 P. 235; Ty. *v.* Smith, 12 N. M. 229, 78 P. 42; Turner *v.* S. (Tex. Cr.), 160 S. W. 357; Powers *v.* S. (Tex. Cr.), 152 S. W. 909 (in criminal cases unrecorded brand is admissible to prove ownership).

Brand, when recorded, is evidence of ownership prior to time it was recorded if due diligence used in having it recorded. Ty. *v.* Meredith, 14 N. M. 288, 91 P. 731. Evidence of use of brand in another jurisdiction, long before time in question, is competent on question of owner's good faith in having it recorded, as well as to show defendant's knowledge of it as brand of owner. Ibid. But in Texas a certificate of registration recorded after theft is not admissible to prove ownership of the animal stolen; it is competent only to aid in establishing its identity. Turner *v.* S., 39 Tex. Cr. 322, 45 S. W. 1020.

890-5 Ty. *v.* Caldwell, 14 N. M. 535, 98 P. 167.

Effect of recordation.—Smith *v.* Cummings, 39 Utah 306, 117 P. 38.

890-6 Brown *v.* Moss, 53 Or. 518, 101 P. 207; Mooney *v.* S. (Tex. Cr.), 164 S. W. 828.

Offer to pay value of animal may be proved as tending to show ownership. Seaborn *v.* S. (Tex. Cr.), 90 S. W. 649.

Age of animal may be proved to show it was old enough to have been branded before defendant sold his brand to plaintiff. Belknap *v.* Belknap, 20 S. D. 482, 107 N. W. 692.

890-8 S. *v.* Dunn, 13 Ida. 9, 88 P. 235; Brown *v.* Moss, 53 Or. 518, 101 P. 207 (if record duly made); Turner *v.* S., 39 Tex. Cr. 322, 45 S. W. 1020.

Certified copy admissible.—Seaborn *v* S. (Tex. Cr.), 90 S. W. 649.

891-11 Bill of sale from third person claiming title admissible to prove ownership. Seaborn *v.* S. (Tex. Cr.), 90 S. W. 649.

891-12 *Contra* under Idaho statute. S. *v.* Dunn, 13 Ida. 9, 88 P. 235.

In a prosecution for branding colts with intent to steal them, state must prove ownership in prosecuting witness. Changes in brands of mares may be shown to prove ownership of their colts when connected with proof that mares recognized colts sometime after separation therefrom. Smith *v.* S., 17 Wyo. 481, 101 P. 847.

992-15 **Burden** is on defendant whose horse has been permitted to run at large to show contributory negligence on plaintiff's part. Decker *v.* McSorley, 111 Wis. 91, 86 N. W. 554.

Proof of running at large is made by showing animal was frequently at large prior to accident. Decker *v.* McSorley, 111 Wis. 91, 86 N. W. 554. See Donley *v.* Fowler, 147 Mich. 288, 110 N. W. 1097.

Suffering animal to be at large is shown by evidence he had broken through fence into plaintiff's premises on three prior occasions. Hadtke *v.* Grzyll, 130 Wis. 275, 110 N. W. 225.

Reputation of trespassing animal is not matter for proof. Montgomery *v.* Glasscock (Ky.), 121 S. W. 668.

892-16 Hayes *v.* Miller, 150 Ala. 621, 43 S. 818, 11 L. R. A. (N. S.) 748.

Rule applies to keepers.—Molloy *v.* Starin, 113 App. Div. 852, 99 N. Y. S. 603.

Rule applies to bees; but absolute liability attaching to owners of wild beasts in confinement does not extend to keeper of bees; it rests upon negligence. Petey Mfg. Co. *v.* Dryden, 5 Penne. (Del.) 166, 62 A. 1056; Parsons *v.* Manser, 119 Ia. 88, 93 N. W. 86, 97 Am. St. 283.

Doctrine of scienter no application to one who keeps a large number of bees near land of another; liability depends upon reasonableness of use made by defendant of his premises. Lucas *v.* Pettit, 12 Ont. L. R. (Can.) 448.

892-17 Hayes *v.* Miller, 150 Ala. 621, 43 S. 818, 11 L. R. A. (N. S.) 748; Parsons *v.* Manser, 119 Ia. 88, 93 N. W. 86, 97 Am. St. 283.

893-18 Domm *v.* Hollenbeck, 259 Ill. 382, 102 N. E. 782, 142 Ill. App. 439; Field *v.* Morrison, 142 Ill. App. 454; Fritsche *v.* Clemow, 109 Ill. App. 355; Emmons *v.* Stevane, 77 N. J. L. 570, 73 A. 544; Raible *v.* Co., 134 App. Div. 705, 119 N. Y. S. 138; Van Etten *v.* Noyes, 128 App. Div. 406, 112 N. Y. S. 888; Bogodonow *v.* Co., 91 N. Y. S. 331; Quigley *v.* Co., 27 Pa. Super. 116; Curtis *v.* Schlosser, 14 Pa. C. C. 600; Eddy *v.* R. Co., 25 R. I. 451, 56 A. 677; Johnston *v.* Co., 65 W. Va. 544, 64 S. E. 841.

Notice to agent imputable to owner. Brown *v.* Green, 1 Penne. (Del.) 535,

42 A. 991; O'Neill *v.* Blase, 94 Mo. App. 648, 68 S. W. 764; Lynch *v.* Kineth, 36 Wash. 368, 78 P. 923.

Liability not always dependent on knowledge.—If horse is where it should not be and does injury, proof of knowledge of his vicious propensity is not called for. Healey *v.* Ballantine, 66 N. J. L. 339, 49 A. 511; Eddy *v.* R. Co., 25 R. I. 451, 56 A. 677.

Plaintiff must show vicious character of horse which injured him, owner's knowledge thereof and his own ignorance. Haneman *v.* Co., 8 Cal. App. 698, 97 P. 695.

As between bailor and bailee for hire latter must show animal was vicious and that former knew or ought to have known thereof. This being done, bailor must satisfy jury of truth of opposing facts. Conn *v.* Hunsberger, 224 Pa. 154, 73 A. 324.

Custodian of animals unloaded in transit presumed to have done his duty in caring for them and in disinfecting premises in which they were confined. Eshleman *v.* Co., 222 Pa. 20, 70 A. 899.

Liability for keeping diseased animals is dependent upon knowledge of their condition and negligence in manner of keeping them. Eshleman *v.* Co., 222 Pa. 20, 70 A. 899.

S94-19 O'Connor *v.* Burns, 216 Mass. 590, 104 N. E. 573; Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844; Talmage *v.* Mills, 80 App. Div. 382, 80 N. Y. S. 637; McGurn *v.* Grubman, 37 Pa. Super. 454.

Declarations made by driver of horse, otherwise than as part of res gestate, insufficient to show owner had notice. Quigley *v.* Co., 27 Pa. Super. 116. Such declarations inadmissible. Harris *v.* Co., 43 Wash. 647, 86 P. 1125.

Identity of animal which inflicted injury may be shown by evidence that one of a similar description, driven to same wagon, had previously kicked at other persons. Tolnie *v.* Co., 59 App. Div. 332, 69 N. Y. S. 841.

S94-20 Dix *v.* Somerset Coal Co. (Mass.) 104 N. E. 433; Corcoran *v.* Kelly, 61 Misc. 323, 113 N. Y. S. 686 (subsequent muzzling of animal not evidence of previous knowledge of viciousness).

Evidence of viciousness.—After evidence of acts of viciousness given further evidence of reputation of animal is admissible to prove defendant's knowledge. Hence the manner in which he has been used and declarations of defendant may be proved. Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844.

Knowledge of tendency of horse to bite may be inferred from proof he was often muzzled. Poland *v.* Minshall, 96 N. Y. S. 200.

Expert testimony to show character of animal. Forsythe *v.* Kluckhohn (Iowa), 142 N. W. 225. Expert opinion inadmissible to show vicious propensities of a particular kind of animal for purpose of proving owner's knowledge respecting animal of that class. Johnston *v.* Co., 65 W. Va. 544, 64 S. E. 841.

Fact that animal is a watchdog.—Holt *v.* Myers, 47 Ind. App. 118, 93 N. E. 31, 1002.

S95-21 Subsequent conduct may be proved. Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844; Harris *v.* Co., 43 Wash. 647, 86 P. 1125.

S95-23 Forsythe *v.* Kluckhohn (Ia.), 142 N. W. 225.

Photograph inadmissible to show horse was gentle. Morgan *v.* Hendrick, 80 Vt. 284, 67 A. 702.

Knowledge of vicious character of animal may be shown by proof it was one of a herd of range animals, which were generally vicious. Harris *v.* Co., 187 Mass. 136, 72 N. E. 844.

Habits of horses.—Evidence of a horse's habits under similar conditions is competent. Johnstone *v.* Tuttle, 196 Mass. 112, 81 N. E. 886; Bemis *v.* Temple, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254; Broderick *v.* Higginson, 169 Mass. 482, 48 N. E. 269, 61 Am. St. 296; Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844; Buckley *v.* Co., 22 R. I. 358, 48 A. 7.

Owner may show peaceable disposition in rebuttal. Domm *v.* Hollenbeck, 259 Ill. 382, 102 N. E. 782.

Disposition and characteristics of horse may be shown by witnesses familiar with it before and after date in question. Putnam *v.* Ins. Co., 155 Mich. 134, 118 N. W. 922.

Burden is on plaintiff to show negligence in caring for domestic animal of dangerous propensities. Curtis *v.* Schlosser, 14 Pa. C. C. 600.

S96-24 O'Rourke *v.* Finch, 9 Cal. App. 324, 99 P. 392 (as by proof defendant had put collar on dog bearing latter's name and former's initials); McClain *v.* Assn., 17 Ida. 63, 104 P.

1015; Anderson *v.* Middlebrook, 202 Mass. 506, 89 N. E. 157; Meilke *v.* Schabble, 159 Mich. 163, 123 N. W. 552 (no other similar dog in vicinity).

Refusal of defendant to permit plaintiff to see dog after injury done is competent. Meilke *v.* Schabble, 159 Mich. 163, 123 N. W. 552.

License to keep dog is not evidence of ownership by licensee in absence of proof to connect him with issuance of it. Jordan *v.* Carberry, 185 Mass. 181, 69 N. E. 1062.

Burden of showing ownership on plaintiff. Laguttuta *v.* Chisolm, 65 App. Div. 326, 72 N. Y. S. 905.

Identity of dog may be shown by his habit of attacking sheep. Rumbaugh *v.* McCormick, 80 O. 211, 88 N. E 410.

896-25 *Comp.* McGurn *v.* Grubnau, 37 Pa. Super. 454.

Knowledge of viciousness of dog must be brought home to one who merely harbors it, though it is otherwise as to owner under statute. Alexander *v.* Crosby, 143 Ia. 50, 119 N. W. 717.

897-26 Slater *v.* Sorge, 166 Mich. 173, 131 N. W. 565.

Evidence of previous injury to others and the owner's knowledge thereof is inadmissible. Kleybolte *v.* Buffon (Ohio), 105 N. E. 192.

Kind of tricks dog may perform, not relevant where he has bitten a person. O'Rourke *v.* Finch, 9 Cal. App. 324, 99 P. 392.

In Louisiana the lightest fault on part of owner of a dog will render him liable to a person injured—some fault must be shown. Martinez *v.* Bernhard, 106 La. 368, 30 S. 901, 87 Am. St. 306, 55 L. R. A. 671. It is incumbent on owner to show dog had always been of a kind temper, had never attempted to bite, or given occasion to suspect he would bite; failing to do so, it is presumed owner at fault in not confining dog. Bentz *v.* Page, 115 La. 560, 39 S. 599.

Variance.—If it is alleged defendant kept a dog he knew was accustomed to bite, action is not sustained by proof defendant knew dog had a savage and ferocious disposition. Fritsche *v.* Clemow, 109 Ill. App. 355.

897-27 Merritt *v.* Matchett, 135 Mo. App. 176, 115 S. W. 1066 (knowledge presumed if dog harbored long time); Reynolds *v.* Hussey, 64 N. H. 64, 5 A. 458; Buchanan *v.* Stout, 123 N. Y. S. 724; McGurn *v.* Grubnau, 37 Pa. Super. 454. *Contra* Mabrey *v.* Haverstick, 175 Ill. App. 309.

Keeping dog chained is not evidence owner knew him to be vicious. Fritsche *v.* Clemow, 109 Ill. App. 355.

Doctrine of constructive notice not extended to actions against owners of dogs, particularly in absence of proof dog was of a savage and ferocious nature. Fettman *v.* Henecken, 91 N. Y. S. 773; Muller *v.* S. Shufeldt, 114 N. Y. S. 1012. But knowledge is not required if trespassing dog injures person or property. McClain *v.* Assn., 17 Ida. 63, 104 P. 1015.

Admission by killing after mischief done is evidence of dog's vicious disposition. Peeler *v.* McMillan, 91 Mo. App. 310. But killing by another than defendant cannot be proved unless latter's consent shown. Holmes *v.* Murray, 207 Mo. 413, 105 S. W. 1085.

Declarations concerning dog made to its owner by servant may be proved, as may owner's answer thereto for purpose of illustrating his attitude toward declarations. Buck *v.* Brady, 110 Md. 568, 73 A. 277.

897-28 Gladstone *v.* Brinkhurst, 70 N. J. L. 130, 56 A. 142; Boler *r.* Sorgenfrei, 86 N. Y. S. 180; Fitzgerald *v.* Warholy, 109 App. Div. 606, 96 N. Y. S. 243; Ayers *r.* Macoughtry, 29 Okla. 399, 117 P. 1088; Mann *v.* Weiand, 81 Pa. 243.

Scope of owner's knowledge.—Proof that dog has propensity to attack strangers is not cause for imputing to owner notice he is likely to injure person who is temporarily caring for him Emmons *r.* Stevane, 73 N. J. L. 349, 64 A. 1014. But knowledge that disposition of dog is such he is likely to commit injury similar to that complained of is sufficient to impose liability. Emmons *r.* Stevane, 77 N. J. L. 570, 73 A. 544.

Attacks on other dogs may be shown where a person has been molested. Rowe *r.* Ehrmauntraut, 92 Minn. 17, 99 N. W. 211. Previous attacks by dog may be shown to establish habit or propensity. Merritt *r.* Matchett, 135 Mo. App. 176, 115 S. W. 1066.

Evidence tendered under specific offer to show dog had attacked witness cannot be used on appeal to show its general behavior. Deitrich *r.* Kettering, 212 Pa. 356, 61 A. 927.

898-29 Presumption of knowledge.

It has been suggested, when a person keeps a dog for the purpose of guarding his property, it is not unreasonable to infer knowledge of its vicious propensity and negligence in allowing him to be at large. Hahnke *v.* Friederich, 140 N. Y. 224, 35 N. E. 487; Lagnttota *v.* Chisolm, 65 App. Div. 326, 72 N. Y. S. 905. In absence of proof dog was kept for such purpose or his owner knew of his viciousness, notice or negligence is not presumed because dog at large. Leonard *v.* Donoghue, 87 App. Div. 104, 84 N. Y. S. 69.

Negligence presumed if notice of dog's propensity to bite is proved. Silence of owner and wife on trial raises inference their testimony would have been unfavorable. Boler *v.* Sorgenfrei, 86 N. Y. S. 180.

898-30 Buck *v.* Brady, 110 Md. 568, 73 A. 277; Meilke *v.* Schabble, 159 Mich. 103, 123 N. W. 552; Brice *v.* Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. 454; Hahnke *v.* Friederich, 140 N. Y. 224, 35 N. E. 487; Grissom *v.* Hofins, 39 Wash. 51, 80 P. 1002.

Knowledge of member of family of owner of dog is knowledge of owner. Daval *v.* Barnaby, 75 App. Div. 154, 77 N. Y. S. 337; Boler *v.* Sorgenfrei, 86 N. Y. S. 180; Soronen *v.* VonPutsau, 112 App. Div. 137, 98 N. Y. S. 431.

Owner's knowledge not shown by proof employe gave warning concerning dog. Bogoloiow *v.* Co., 90 N. Y. S. 331.

898-31 Where absolute liability for injuries done by dogs is imposed evidence of their character or disposition is not admissible. Kelly *v.* Alderson, 19 R. I. 544, 37 A. 12; Carroll *v.* Marcoux, 98 Me. 259, 56 A. 848.

Witness may testify of dog's reputation though information came from one person. Fisher *v.* Weinholzer, 91 Minn. 22, 97 N. W. 426.

Identity of dog which did damage need not be shown if defendant kept a number of dogs much alike in appearance and disposition. McGurn *v.* Grubman, 37 Pa. Super. 154.

899-32 No presumption dog shown to have exhibited vicious propensities may not injure his keeper. Emmons *v.* Stevans, 77 N. J. L. 570, 73 A. 544.

Disposition of dog may not be proved by testimony respecting his face, it seems. Dooms *v.* Hollenback, 142 Ill. App. 129.

Unusual conduct of dog relevant on plaintiff's behalf though owner ignorant of particular instance if he knew it was acting strangely. Buck *v.* Brady, 110 Md. 568, 73 A. 277.

899-34 Buck *v.* Brady, 118 Md. 568, 73 A. 277 (if evidence tends to show dog which bit plaintiff had hydrophobia); Grissom *v.* Hofins, 39 Wash. 51, 80 P. 1002.

900-36 Miles *v.* Schrunk, 139 Ia. 563, 117 N. W. 971; Hunter *v.* Co., 98 N. Y. S. 234; Buster *v.* S. (Tex. Cr.), 163 S. W. 730 (insufficient defense).

Injury to child who had previously annoyed dog. Schilling *v.* Smith, 76 App. Div. 464, 78 N. Y. S. 586.

If negligence is alleged it must be proved. Cooper *v.* Cashman, 190 Mass. 75, 76 N. E. 461. In absence of statute conditioning right of action plaintiff need not prove, in first instance, freedom from negligence. Hussey *v.* King, 83 Me. 568, 22 A. 476.

900-37 Kelley *v.* Killourey, 81 Conn. 320, 70 A. 1031; Feldman *v.* Sellig, 110 Ill. App. 130; Garland *v.* Hewes, 101 Me. 549, 64 A. 914.

The prima facie case made by showing a dangerous animal was kept with knowledge of his propensity can be rebutted only by proof plaintiff, with such knowledge, wantonly excited him or voluntarily or unnecessarily put himself in way of animal. Hunter *v.* Co., 98 N. Y. S. 234.

Burden.—Under a statute giving right of action for injury done by dog without fault of plaintiff, burden is on latter to prove that he was free from negligence. Garland *v.* Hewes, 101 Me. 549, 64 A. 914. Defendant must show injury inflicted result of accident. Leach *v.* Lynch, 144 Mo. App. 391, 128 S. W. 795.

900-38 **Animals killed or injured by railroad train,** see Vol. 10, p. 513, et seq, and supplement.

900-39 Dees *v.* R. Co., 127 Mo. App. 353, 104 S. W. 485; Logan *v.* R. Co., 111 Mo. App. 674, 86 S. W. 565.

Quantum of proof.—If evidence is circumstantial it must negative every other reasonable hypothesis save of defendant's negligence. Gibson *v.* R. Co., 136 Ia. 415, 113 N. W. 927.

901-40 Dees *v.* R. Co., 127 Mo. App. 353, 104 S. W. 485.

901-42 Warrick *v.* Reinhard, 136 Ia. 27, 111 N. W. 983; Texas & P. R. Co. *v.* Slator (Tex. Civ.), 102 S. W. 156.

Proof of pedigree may be shown by printed register or book of pedigrees

if it is generally accepted as authoritative. Warrick *v.* Reinhard, 136 Ia. 27, 111 N. W. 983.

902-43 Columbus R. Co. *v.* Woolfolk, 128 Ga. 631, 58 S. E. 152.

902-44 St. Louis, etc. R. Co. *v.* Philpot, 72 Ark. 23, 77 S. W. 901; Ft. Worth, etc. R. Co. *v.* Hickox (Tex. Civ.), 103 S. W. 202.

Value of animal material as bearing upon its reputation and quality. Putnam *v.* Ins. Co., 155 Mich. 134, 118 N. W. 922.

903-45 Turner *v.* Stephens (Tex. Civ.), 155 S. W. 1009.

ANNUITIES.

See 1 STANDARD PROC. 987-992.

ANOTHER ACTION PENDING.

See 1 STANDARD PROC. 996-1040.

ANSWERS.

Answers Under the Codes.—See 1 STANDARD PROC. 1-75.

Answers In Equity.—See 4 STANDARD PROC. 151, *et seq.*

906-3 Monroe C. Co. *v.* Becker, 147 U. S. 47; Dravo *v.* Fabel, 132 U. S. 487; Pioneer Min. Co. *v.* Delamotte, 185 Fed. 752, 108 C. C. A. 90 (suit to enforce mechanic's lien); Kirkpatrick *v.* McBride, 202 Fed. 144, 120 C. C. A. 322 (effect of answer as evidence); Atlantic T. Co. *v.* Chapman, 145 Fed. 820, 76 C. C. A. 396; Fish *v.* Fish, 235 Ill. 396, 85 N. E. 662; Fields *v.* Colby Comr., 102 Mich. 449, 60 N. W. 1048; Gates *v.* Grand Rapids, 134 Mich. 96, 95 N. W. 998; Hudson *v.* Barham, 101 Va. 63, 43 S. E. 189, 99 Am. St. 884. *Contra.* Glade C. M. Co. *v.* Harris, 65 W. Va. 152, 63 S. E. 873 (only effect under code is to put plaintiff to proof of material allegations of his bill so far as they are challenged by answer). See Rogers *v.* Rogers, 66 Fla. 6, 62 S. 899.

Not available to prove affirmative defense. Coca Cola Co. *v.* Gay Ola Co., 200 Fed. 720, 119 C. C. A. 164; Austin Clothing Co. *v.* Posey (Miss.), 64 S. 5.

907-5 Goggins *v.* Risley, 13 Pa. Super. 316; McGary *v.* McDermott, 207 Pa. 620, 57 A. 46; Alexander *v.* Muse, 112 Tenn. 233, 79 S. W. 117.

910-6 Campbell *v.* Imp. Co., 229 U. S. 561, 33 Sup. Ct. 796, 57 L. ed. 1330; Kennedy *v.* Custer, 174 Fed. 972, 98 C. C. A. 584; Jacobs *v.* Van Sickle, 127 Fed. 62, 61 C. C. A. 598; Ford *v.* Taylor, 137 Fed. 149; Rogero *v.* Rogero, 66 Fla. 6, 62 S. 899; Mitchell *v.* Mason, 65 Fla. 208, 61 S. 579; Barnes & Jessup Co. *v.* Williams, 64 Fla. 190, 60 S. 787; Pinney *v.* Pinney, 46 Fla. 559, 35 S. 95; Mayo *v.* Hughes, 51 Fla. 495, 40 S. 499; Ocala F. & M. Wks. *v.* Lester, 49 Fla. 347, 369, 38 S. 56; Fish *v.* Fish, 235 Ill. 396, 85 N. E. 662 (if not impeached by its own improbability or inconsistent conduct or declarations of verifier); Teich *v.* Mach. Co., 177 Ill. App. 354; Miller *v.* Armstrong, 169 Ill. App. 185; Hannaman *v.* Wallace, 97 Ill. App. 46; Salsbury *v.* Ware, 183 Ill. 505, 56 N. E. 149; Evans *v.* Evans (N. J. Eq.), 59 A. 564; Thomas *v.* Herring (Pa.), 91 A. 500; Adrian *v.* Fink, 226 Pa. 448, 75 A. 676; Real Est. & M. Co. *v.* Cook, 223 Pa. 158, 72 A. 345; Galbraith *v.* Galbraith, 190 Pa. 225, 42 A. 683; McGary *v.* McDermott, 207 Pa. 620, 57 A. 46; Lance *v.* Lehigh, 16 Phila. (Pa.) 38; Berger *v.* Berger, 44 Pa. Super. 305; Hopkins *v.* Stoneroad, 21 Pa. Super. 168; Goggins *v.* Risley, 13 Pa. Super. 316; Bussier *v.* Weekey, 11 Pa. Super. 463; Haynor *v.* Haynor, 112 Va. 123, 70 S. E. 531.

But not so where denial goes only to legal effect of essential facts and not to existence. Matthaei *v.* Pownall, 235 Pa. 460, 84 A. 444.

Evidence of one witness, with corroborating circumstances, sufficient. Gundakor *v.* Ehrgott, 209 Pa. 284, 58 A. 476.

It is only where discovery is sought that two witnesses or one witness and corroborating circumstances are required to rebut answer, as to facts within defendant's knowledge, responsive to discovery sought. Toomer *v.* Warren, 123 Ga. 477, 51 S. E. 393.

910-7 Kirkpatrick *v.* McBride, 202 Fed. 144, 120 C. C. A. 322; Phelps *v.* Root, 78 Vt. 493, 63 A. 941; Veile *v.* Blodgett, 49 Vt. 270; Field *v.* Wilbur, 49 Vt. 157; McLane *v.* Johnson, 59 Vt. 237, 9 A. 837.

910-8 Gantt *v.* Cox, 199 Pa. 208, 48 A. 992; Haynor *v.* Haynor (Va.), 70 S. E. 531.

912-13 Cady *v.* Barnes, 208 Fed. 361.

915-21 **Testimony that is evasive or in conflict with answer** may, in connection with other circumstances, overcome effect of answer as evidence. Ocala, etc. *v.* Lester, 49 Fla. 347, 38 S. 56.

Contradictions of answer by testimony must be of a serious character to wholly overcome former. Rushbrook C. Co. *v.* Jenkins, 214 Pa. 517, 63 A. 891.

916-22 Nobles *v.* L'Engle, 58 Fla. 480, 51 S. 405.

917-29 Downey *v.* Moriarty, 81 Conn. 442, 71 A. 581; Hollander *v.* Co., 109 Md. 131, 71 A. 442; Brown *v.* Click, 65 W. Va. 459, 54 S. E. 613.

919-33 Southern L. & S. Co. *v.* Verdier, 51 Fla. 570, 40 S. 676; Mayo *v.* Hughes, 51 Fla. 495, 40 S. 499; Tyler *v.* Toph, 51 Fla. 597, 40 S. 624; Bussier *v.* Weekey, 14 Pa. Super. 463; Vashon *v.* Barrett, 105 Va. 490, 54 S. E. 705.

Defendant must prove unresponsive allegations.—Tyler *v.* Toph, 51 Fla. 597, 40 S. 624.

919-35 Godwin *v.* Phifer, 51 Fla. 441, 479, 41 S. 597.

If replication is filed the usual general denial must be proved by preponderance of testimony. Pinney *v.* Pinney, 46 Fla. 539, 35 S. 95; Parken *v.* Safford, 48 Fla. 290, 37 S. 567.

920-36 Northern P. R. Co. *v.* Boyd, 177 Fed. 804, 101 C. C. A. 18.

920-37 Mayo *v.* Hughes, 51 Fla. 495, 40 S. 499; McCoy *v.* Kane, 19 Pa. Super. 187; Rushbrook C. Co. *v.* Jenkins, 214 Pa. 517, 63 A. 891; Veile *v.* Blodgett, 49 Vt. 270.

Answer is responsive when it directly traverses substance of each material allegation of bill, is not made on information but on personal knowledge, and does not introduce new matter. Goggins *v.* Risley, 13 Pa. Super. 316. It is so when confined to such facts as are required by the bill and those inseparably connected with them, forming a part of one and the same transaction, whether it discharges or charges defendant. Maxwell *v.* Co., 45 Fla. 425, 34 S. 255; Southern L. & S. Co. *v.* Verdier, 51 Fla. 570, 40 S. 676. And see the title "Bills and Answers," 4 Standard Proc.

921-38 Davis *v.* Horne, 57 Fla. 396, 49 S. 505; Pinney *v.* Pinney, 46 Fla. 559, 35 S. 95; Veile *v.* Blodgett, 49 Vt. 270.

926-44 Maxwell *v.* Co., 45 Fla. 425, 34 S. 255.

926-47 Corporation *v.* Eden, 62 N. J. Eq. 542, 50 A. 606; Gantt *v.* Cox, 199 Pa. 208, 48 A. 992; Bussier *v.* Weekey, 11 Pa. Super. 463.

926-48 Mound City Co. *v.* Castleman, 177 Fed. 510; Lee *v.* Co., 44 Fla. 787, 796, 33 S. 456; Maxwell *v.* Co., 45 Fla. 425, 34 S. 255; Godwin *v.* Phifer, 51 Fla. 441, 459, 41 S. 597; Roach *v.* Glos, 181 Ill. 440, 54 N. E. 1022; Bowers *v.* McGavock, 114 Tenn. 138, 85 S. W. 893.

927-49 People's U. S. Bk. *v.* Gilson, 161 Fed. 286, 88 C. C. A. 332; Goddard *v.* R. Co., 104 Ill. App. 526.

928-51 Barton *v.* Alliance, 85 Md. 14, 33, 36 A. 658; Royston *v.* Horner, 75 Md. 557, 24 A. 25.

928-55 Barlow *v.* McDowell, 118 Ill. App. 506.

928-56 Klenk *v.* Byrne, 143 Fed. 1008; Mayo *v.* Hughes, 51 Fla. 495, 40 S. 499; Southern L. & S. Co. *v.* Verdier, 51 Fla. 570, 40 S. 676; Hoock *v.* Sloman, 145 Mich. 19, 108 N. W. 447; Greilick *v.* Rogers, 144 Mich. 313, 107 N. W. 885; Craft *v.* Schlag, 61 N. J. Eq. 567, 49 A. 431.

Entire answer must be used as admissions if any of it is used. Reager *v.* Chappelear, 104 Va. 14, 51 S. E. 170; Clinch, etc. Co. *v.* Harrison, 91 Va. 122, 21 S. E. 660.

Admissions in answer not mentioned in note of testimony nor in order of submission not evidence. Tait *v.* Co., 132 Ala. 193, 31 S. 623.

Admissions binding.—Millard *v.* Millard, 123 Ill. App. 264; Chicago, etc. R. Co. *v.* P., 120 Ill. App. 306.

928-57 Farley *v.* Kittson, 120 U. S. 303; General E. Co. *v.* Bullock, 138 Fed. 412; General E. Co. *v.* Co., 128 Fed. 738, 63 C. C. A. 448; Atlantic F. Co. *v.* Chapman, 145 Fed. 820, 76 C. C. A. 396; Besson *v.* Goodman, 147 Fed. 887.

928-59 People's U. S. Bk. *v.* Gilson, 161 Fed. 286, 88 C. C. A. 332; Braxton *v.* Liddon, 49 Fla. 280, 38 S. 717; Van Dyke *v.* Van Dyke, 26 N. J. Eq. 180.

929-61 People's U. S. Bk. *v.* Gilson, 161 Fed. 286, 88 C. C. A. 332; Mankey *v.* Willoughby, 21 App. Cas. (D. C.) 214; Parken *v.* Safford, 48 Fla. 290, 37 S. 567; Koebel *v.* Doyle, 256 Ill. 610, 100 N. E. 154; Marvel *v.* Fralinger, 67

N. J. Eq. 622, 63 A. 166. See Sixto *v.* Maldonado, 2 P. R. 454.

929-62 Campbell *v.* Imp. Co., 229 U. S. 561, 33 Sup. Ct. 796, 57 L. ed. 1330; Conly *v.* Nailor, 118 U. S. 127; Jacobs *v.* Van Sickle, 127 Fed. 62, 61 C. C. A. 598.

931-65 If unverified answer prayed for and body of bill contains interrogatories addressed to defendant, to which he makes verified answers, these are not more weighty than ex parte affidavit. Marvel *v.* Fralinger, 67 N. J. Eq. 622, 63 A. 166.

932-66 Verified answer, under amendment to equity rule 41, can be used on hearing of ex parte application for appointment of receiver with probative force of affidavit, and its allegations sustain the issue to same extent as in other cases. Ford *v.* Taylor, 137 Fed. 149. Answer not conclusive. Barron *v.* Meyers, 140 Mich. 431, 103 N. W. 842.

932-67 Delta & P. L. Co. *v.* Adams, 93 Miss. 340, 48 S. 190; Craft *v.* Schlag, 61 N. J. Eq. 567, 49 A. 431.

If complainant recognizes answer as sufficient for a hearing upon it and the bill, he waives formal defects in verifications. Lee *v.* Co., 44 Fla. 787, 796, 33 S. 456.

934-70 Baugher *v.* Conn, 1 Pa. C. C. 184; Veile *v.* Blodgett, 49 Vt. 270.

935-72 Gantt *v.* Cox, 199 Pa. 208, 48 A. 992.

937-78 Answer of one defendant is evidence against co-defendant where latter claims through person whose answer it is proposed to read when co-defendants jointly interested as partners or otherwise, and respondent refers in his own answer to that of his co-defendant for further information. First rule has no application where answer is of defendant who had parted with all interest in property involved when answer made and was not interested in result of suit, his infant co-defendants asserting their rights to the property. Sawyers *v.* Sawyers, 106 Tenn. 597, 61 S. W. 1022.

APPEAL BONDS.

For a treatment of the nature of appeal bonds and actions thereupon, see 2 STANDARD PROC. 76, *et seq.*

940-1 Recitals in bond of matters recited as being of record, if not supported by record, are of no avail. Parnass *v.* Ryerson, 128 Ill. App. 489.

940-2 Judicial notice taken of bond filed in court in which action pending. P. *v.* Ackermann, 146 Ill. App. 301.

In absence of verified plea of non est factum execution of bond cannot be denied. P. *v.* Ackermann, 146 Ill. App. 301.

Affidavit by party competent to show filing of lost bond, and affidavit of approving officer competent to show non-approval of bond. Fowler *v.* Newsom, 174 Ind. 104, 90 N. E. 9.

940-5 In absence of seal on bond executed by corporation, authority of officer who executed it may be shown by corporate records. Campbell *v.* Pope, 96 Mo. 468, 10 S. W. 187.

941-7 In absence of denial of the fact it will be presumed order of supersedeas issued in accordance with official duty. U. S. F. & G. Co. *v.* Boyd, 29 Ky. L. R. 598, 94 S. W. 35.

941-8 Introduction of bond by party who gave it almost equivalent to confession of judgment. Proudfoot *v.* Gudichsen, 102 Ill. App. 482.

941-21 Acts of justice in making out and certifying proceedings raises presumption bond was perfected. Mejia *v.* Alimorong, 4 Phil. Isl. 572.

942-30 In an action of debt upon appeal bond, a special traverse being pleaded, certified copy of court order is admissible to show appeal not finally dismissed, and it may be shown motion granted to reinstate it. Rogers *v.* Barth, 117 Ill. App. 323.

942-31 The costs are in the discretion of the court, and the discretion will not be interfered with unless abused. Comstock *v.* Redmond, 252 Ill. 522, 96 N. E. 1073. See the titles "Appeal Bonds" and "Costs" in STANDARD PROC.

APPEALS.

See 2 STANDARD PROC. 105-483.

APPEARANCES.

See 2 STANDARD PROC. 484-566.

APPRENTICES.

Form of indentures.—1 STANDARD PROC. 569-573.

Judicial proceedings to bind.—1 STANDARD PROC. 573-577.

Termination of relation.—1 STANDARD PROC. 577-579.

Actions civil and criminal.—1 STANDARD PROC. 580-587.

947-21 Fact accused is a practicing attorney shows he was not apprentice. Holmes *v.* S., 52 Neb. 446, 118 N. W. 90.

947-23 Failure to teach. Lejan *v.* Mach. Co. (Mich.), 144 N. W. 692.

ARBITRATION AND AWARD.

Proceedings before arbitrators.—See 2 STANDARD PROC. 795-800.

Relief from award.—See 2 STANDARD PROC. 626-632.

Enforcement of award.—See 2 STANDARD PROC. 632-667.

Action on original claim.—See 2 STANDARD PROC. 664-667.

951-9 Eau Claire *v.* Co., 137 Wis. 517, 119 N. W. 555.

952-14 Karapchinsky *v.* Rothbaum (Mo.), 163 S. W. 200; Hirst *v.* Funston (Tex. Civ.), 91 S. W. 319.

If duty of arbitrators required parties to submit evidence it is presumed they did so. Proctor & G. Co. *v.* Co., 128 Ga. 606, 622, 57 S. E. 879.

953-16 Beall *v.* Bd. of Trade, 164 Mo. App. 186, 148 S. W. 386; Slaughter *v.* Crisman & Nesbit (Tex. Civ.), 152 S. W. 205; Eau Claire *v.* W. Co., 137 Wis. 517, 119 N. W. 555.

955-22 Beall *v.* Bd. of Trade, 164 Mo. App. 186, 148 S. W. 386; Eau Claire *v.* W. Co., 137 Wis. 517, 119 N. W. 555.

955-24 Mason *v.* Assn., 23 S. D. 431, 122 N. W. 428.

Under California code exclusion of evidence must be shown to have prejudiced rights of complainant. Marson *v.* Wilcox, 140 Cal. 280, 73 P. 1001.

956-27 Vincent *v.* Ins. Co., 120 Ia. 272, 94 N. W. 478.

957-28 Marson *v.* Wilcox, 140 Cal. 280, 73 P. 1001; Wood *v.* Hinchey, 5 Haw. 157; English *v.* Dist., 105 Va. 21, 30 A. 503; Van Winkle *v.* Ins. Co., 57 W. Va. 286, 47 S. E. 82.

957-32 Tiffany *v.* Coffey, 142 Mo. App. 210, 125 S. W. 1178; Gray *v.* Staples, 149 S. C. 80, 62 S. E. 775.

958-37 Intermont R. & C. Co. *v.* Mellen, 37 Can. Sup. 154.

Award competent to show that one claiming to be a party thereto by verbal submission and such evidence may be met by oral or documentary proof. Love *v.* Ins. Co., 58 W. Va. 546, 52 S. E. 449.

Prior award between the parties, made under oral submission, may be proved by parol. Horne *v.* Hutchins, 71 N. H. 128, 51 A. 651.

Revocation of written submission cannot be shown by parol. Mand *v.* Patterson, 19 Ind. App. 649, 49 N. E. 974.

959-39 Copy of agreement for arbitration admissible under usual conditions; its execution may be proved by circumstantial evidence. Proctor & G. Co. *v.* Co., 128 Ga. 606, 617, 57 S. E. 879.

960-42 Parol submission void if title to land involved. Walden *v.* McKinnon, 157 Ala. 291, 47 S. 874.

960-46 Award can only be proved by the fact itself, and not by admissions or statements of arbitrators. Miller *v.* Carnes, 95 Minn. 179, 103 N. W. 877.

961-50 Award admissible to show what contract was, though, as construed by arbitrators, it was impossible of performance. E. E. Souther I. Co. *v.* Co., 109 Mo. App. 353, 84 S. W. 450.

964-58 Blakely O. & F. Co. *v.* Proctor, 134 Ga. 139, 67 S. E. 389; Schmidt *v.* Glade, 126 Ill. 485, 18 N. E. 762; Pinkstaff *v.* Steffy, 216 Ill. 406, 75 N. E. 163; Fore *v.* Berry, 94 S. C. 71, 78 S. E. 706; McKennie *v.* R. Co., 110 Va. 79, 65 S. E. 503; Eau Claire *v.* Co., 137 Wis. 517, 119 N. W. 555.

No more than verdict of a jury.—Clark Millinery Co. *v.* National, etc. Co., 160 N. C. 130, 75 S. E. 914.

Items of value used by appraisers may be shown by parol. Low Est. Co. *v.* Corp., 25 R. I. 352, 86 A. 881.

965-61 Evidence inadmissible to explain action of arbitrators in reconsidering original award and making second one. Brown *v.* Durham, 110 Mo. App. 421, 85 S. W. 120.

965-62 Eberhardt *v.* Ins. Co. (Ga.), 80 S. E. 856; Travelers' Ins. Co. *v.* Co., 141 Wis. 103, 123 N. W. 643.

965-65 Central, etc. Co. *v.* Co. (N. J.), 87 A. 237; Eau Claire *v.* Co., 137 Wis. 517, 119 N. W. 555. Testimony of arbitrators received, though not permitted to overcome award. Walden *v.* McKinnon, 150 Ala. 291, 47 S. 874.

967-69 Lehigh C. & N. Co. *v.* Zehner, 24 Pa. C. C. 134.

968-73 Evidence as to qualifications of umpire is immaterial if he did not

act. Kaplan *v.* Ins. Co., 73 N. J. L. 780, 65 A. 188.

969-77 Refusal of arbitrator to act may be shown. Lattin *v.* Gamble, 154 Mich. 177, 117 N. W. 575.

969-78 But a custom in conflict with the written contract of submission cannot be so shown. Proctor & Gamble Co. *v.* Blakeley Oil & F. Co., 137 Ga. 407, 73 S. E. 378.

969-81 Notice of meeting presumed given if arbitrators appeared at time and place appointed. Roesman *v.* Ins. Co., 3 Pa. C. C. 1.

970-83 Jensen *v.* Co., 27 Utah 66, 74 P. 427.

A transcript of the evidence given before arbitrators is competent to show what they considered. Jensen *v.* Co., 27 Utah 66, 74 P. 427.

Refusal to hear evidence concerning a certain matter may be shown. Harker *v.* Hough, 7 N. J. L. 428; Ruckman *v.* Ransom, 35 N. J. L. 565; Caldwell *v.* Brooks, 10 N. D. 575, 88 N. W. 700.

Omission from award of one of the items submitted cannot be shown by parol at law, no misconduct being alleged against arbitrators. Kaplan *v.* Ins. Co., 73 N. J. L. 780, 65 A. 188. "Even in equity, except in cases of accident or mistake, such decision is final unless corruption or misconduct be imputed to them." Kaplan *v.* Ins. Co., supra.

971-85 Corey Coal Co. *v.* Gas Co., 231 Pa. 24, 79 A. 812.

973-87 Jensen *v.* Co., 27 Utah 66, 74 P. 427.

Arbitrator may testify as to course of the argument before him, what claims made and admitted. Duke of Buccleuch *v.* Board, L. R. 5 H. of L. (Eng.) 418, 462. And basis on which valuation of assets and liabilities made. In re Southampton, 12 Ont. L. R. (Can.) 214.

974-93 Manson *v.* Wilcox, 140 Cal. 206, 73 P. 1004; Evans *v.* Edenfield, 7 Ga. App. 175, 66 S. E. 491, *foll.* South Carolina R. Co. *v.* Moore, 28 Ga. 398, 73 Am. Dec. 778; Corrigan *v.* Rockefeller, 67 O. 354, 66 N. E. 95.

975-98 Impeachment of award.—A paper containing opinion of arbitrators and signed and delivered by them with award, giving reasons for latter, if not referred to in award, made a part of it nor required by submission, is not admissible to impeach award. Corrigan *v.* Rockefeller, 67 O. 354, 66 N. E. 95; London D. Co. *v.* St. Pauls, 32 L. J. Q. B. (Eng.) 30.

Prejudice of arbitrator not shown by proof of service in a smaller capacity; nor improper conduct by error of judgment. Van Winkle *v.* Ins. Co., 55 W. Va. 286, 47 S. E. 82.

976-99 Shawhan *v.* Baker, 167 Mo. App. 25, 150 S. W. 1096. See Mason *v.* Assn., 23 S. D. 431, 122 N. W. 423.

Fraud may be shown by evidence creating a belief, not merely a suspicion—it need not be clear, cogent and convincing. Perry *v.* Ins. Co., 137 N. C. 402, 49 S. E. 889.

Unprofessional conduct of attorney for a party may be shown. Lattin *v.* Gamble, 154 Mich. 177, 117 N. W. 575.

976-2 Perry *v.* Ins. Co., 137 N. C. 402, 49 S. E. 889.

Gross inadequacy, shocking to moral sense, is evidence for jury on question of fraud and corruption or partiality and bias. Perry *v.* Ins. Co., 137 N. C. 402, 49 S. E. 889.

976-3 Stone *v.* Baldwin, 226 Ill. 338, 80 N. E. 890; Seaton *v.* Kendall, 171 Ill. 410, 49 N. E. 561.

977-4 Mississippi C. O. Co. *v.* Buster, 84 Miss. 91, 36 S. 146; Van Winkle *v.* Ins. Co., 55 W. Va. 286, 47 S. E. 82.

977-5 Cross *v.* Cross, 56 W. Va. 185, 49 S. E. 129.

977-8 Heritage *v.* S., 43 Ind. App. 595, 88 N. E. 114 (to show all did not deliberate).

977-9 Ratification. Stone *v.* Johnston, 167 Mo. App. 456, 151 S. W. 987.

978-13 Proctor & G. Co. *v.* Co., 128 Ga. 606, 621, 57 S. E. 879; Notley *v.* Davies, 5 Haw. 43; Heritage *v.* S., 43 Ind. App. 595, 88 N. E. 114; Vincent *v.* Ins. Co., 120 Ia. 272, 94 N. W. 458; Seibert *v.* Ins. Co., 132 Ia. 58, 106 N. W. 307; Central, etc. Co. *v.* Co. (N. J.), 87 A. 235; Kaplan *v.* Ins. Co., 73 N. J. L. 780, 65 A. 188; Caldwell *v.* Brooks, 10 N. D. 575, 88 N. W. 700; Gardner *v.* Lincoln, 5 Phila. (Pa.) 24; Sanders *v.* Newton, 57 Tex. Civ. 319, 124 S. W. 482; Ridgill *v.* Dupree (Tex. Civ.), 85 S. W. 1166; Jensen *v.* Co., 27 Utah 66, 74 P. 427; Van Winkle *v.* Ins. Co., 55 W. Va. 286, 47 S. E. 82.

978-14 Rolfe *v.* Ins. Co., 105 Me. 58, 72 A. 732.

Award made between others than parties and covering another subject-matter is not evidence. Multnomah County *v.* Co., 49 Or. 204, 89 P. 389.

ARSON.

For a treatment of procedural matters, see 3 STANDARD PROC. 1-29.

981-2 Corpus delicti not shown. Brown *v.* C., 87 Va. 215, 12 S. E. 472; S. *v.* Pienick, 46 Wash. 523, 90 P. 645.

Shown by circumstantial evidence.—S. *v.* Millmeier, 102 Ia. 692, 72 N. W. 275.

Absence of owner's consent need not be proved. Caddell *v.* S., 50 Tex. Cr. 380, 97 S. W. 705.

Attempt to commit arson. See S. *v.* Bobbitt, 228 Mo. 252, 128 S. W. 953, holding that the evidence satisfied the demands of the statute.

982-3 Davis *v.* S., 141 Ala. 62, 37 S. 676; S. *v.* Lockwood (Del.), 74 A. 2; S. *v.* Watson, 47 Or. 543, 85 P. 336.

Age and intelligence of accused and all surrounding circumstances regarded. S. *v.* Jackson, 3 Penne. (Del.) 15, 50 A. 270.

Intent essential element in prosecution for maliciously burning property to defraud insurer. Mai *v.* P., 224 Ill. 414, 79 N. E. 633. Unlawful intent presumed. S. *v.* Smith, 55 Or. 408, 106 P. 797.

Compulsion must be shown to have been imminent and rested on well founded apprehension of physical danger. Ross *v.* S., 169 Ind. 388, 82 N. E. 781.

982-4 Matthews *v.* S., 10 Ga. App. 302, 73 S. E. 404 (holding evidence insufficient to rebut presumption of accidental homicide); Williams *v.* S., 125 Ga. 741, 54 S. E. 661; Burley *v.* S., 6 Ga. App. 776, 65 S. E. 816; West *v.* S., 6 Ga. App. 105, 64 S. E. 130; S. *v.* Millmeier, 102 Ia. 692, 72 N. W. 275; S. *v.* Jones, 106 Mo. 302, 17 S. W. 366; S. *v.* Pienick, 46 Wash. 523, 90 P. 645.

Absence of explosive substance in house may be shown. Davis *v.* S., 141 Ala. 62, 37 S. 676.

982-5 Kahn *v.* S. (Ind.), 105 N. E. 385; Colbert *v.* S., 125 Wis. 423, 104 N. W. 61.

982-6 Anderson *v.* S. (Tex. Cr.), 159 S. W. 847; S. *v.* McLain, 43 Wash. 267, 86 P. 390.

982-8 Title to vacate private property must be shown by deed. Goldsmith *v.* S., 46 Tex. Cr. 556, 81 S. W. 710.

Allegation as to ownership must be proved. P. *v.* Butler, 62 App. Div. 508, 71 N. Y. S. 129. But not if house otherwise described and identified. P. *v.* Laverty, 9 Cal. App. 756, 100 P. 899.

Defendant's receipt for rent, competent. S. *v.* Watson, 47 Or. 543, 85 P. 336.

Certified copy of proceedings in bankruptcy showing appointment of complainant as trustee, sufficient. Morgan *v.* S., 120 Ga. 499, 48 S. E. 238.

982-9 Johnson *v.* S. (Ala.), 55 S. 268; Harrell *v.* S., 121 Ga. 607, 49 S. E. 703; S. *v.* Perry, 74 S. C. 551, 54 S. E. 764; Pinckard *v.* S., 62 Tex. Cr. 602, 138 S. W. 601.

Ownership of public house of worship need not be proved. S. *v.* Hunt, 190 Mo. 353, 88 S. W. 719.

Lease by owner does not constitute variance from allegation of ownership. Dunlap *v.* S., 50 Tex. Cr. 504, 98 S. W. 845.

983-10 If title in officer by virtue of law it may be proved without deed. Savage *v.* S., 8 Ala. App. 334, 62 S. 999; Morgan *v.* S., 120 Ga. 499, 48 S. E. 238; Hester *v.* S. (Tex. Cr.), 51 S. W. 932.

983-11 Allen *v.* S., 62 Tex. Cr. 501, 137 S. W. 1133.

983-12 Proof of identity of property burned may be sufficient without proving ownership. P. *v.* Davis, 135 Cal. 162, 67 P. 59.

983-14 Commission of offense by another than defendant may not be shown by declarations of the other; it is necessary to show perpetration by him of some act entering into the crime. McDonald *v.* S., 165 Ala. 85, 51 S. 629.

984-18 Clinton *v.* S., 56 Fla. 57, 47 S. 389 (owner may testify he knew of no others except accused who were hostile to him); Ward *v.* S. (Tex. Cr.), 158 S. W. 1126. *Contra.* Moore *v.* S., 51 Tex. Cr. 468, 103 S. W. 188.

Family hostilities may be shown and accounted for. Clinton *v.* S., 56 Fla. 57, 47 S. 389.

984-19 Ill-will toward people of town. S. *v.* Millican, 158 N. C. 617, 74 S. E. 107; S. *v.* Allen, 149 N. C. 458, 62 S. E. 597.

984-20 S. *v.* Barrett, 151 N. C. 665, 65 S. E. 894.

Reason for bad feeling existing between accused and prosecuting witness may be shown. S. *v.* Barrett, 151 N. C. 665, 65 S. E. 894.

984-21 Savage *v.* S., 8 Ala. App. 334, 62 S. 999.

984-22 *Contra.* McDonald *v.* S., 165 Ala. 85, 51 S. 629 (accused may cross-examine witness for state as to his relations with overseer of owner of burned property).

985-23 Mitchell *v.* S., 140 Ala. 118, 37 S. 76; S. *v.* Lockwood, 1 Boyce (Del.) 28, 74 A. 2; Kinchien *v.* S., 50 Fla. 102, 39 S. 467; P. *v.* Wagner, 180 N. Y. 58, 72 N. E. 577; S. *v.* Ledford, 133 N. C. 714, 45 S. E. 944; S. *v.* McLain, 43 Wash. 267, 86 P. 390.

Threats against officer of vessel burned may be proved. King *v.* Brown, 3 Haw. 114.

Conditional threats may be proved when there is evidence of bad feeling, though condition not operative. C. *v.* Crowe, 165 Mass. 139, 42 N. E. 563.

985-24 Threats against owner of property located so near to that which burned as to cause the latter to burn may be proved. Bond *v.* C., 83 Va. 581, 3 S. E. 149. *Contra* as to threats against owner's attorney. Clinton *v.* S., 56 Fla. 57, 47 S. 389.

986-28 S. *v.* Ruckman, 253 Mo. 487, 161 S. W. 705; S. *v.* Brand, 77 N. J. L. 486, 72 A. 131 (acts done months before fire).

Testimony accused said nothing about persons in the house and they could have been rescued if witness knew of their presence is incompetent in absence of anything to suggest commission of arson as cover for crime. S. *v.* Harvey, 130 Ia. 394, 106 N. W. 938.

986-29 Hinkle *v.* S., 174 Ind. 276, 91 N. E. 1090 (also recent application for additional insurance); Lane *v.* C., 134 Ky. 519, 121 S. W. 486; S. *v.* Corporale (N. J.), 89 A. 1034; Moore *v.* S. (Tex. Cr.), 146 S. W. 183; Dunlap *v.* S., 50 Tex. Cr. 504, 98 S. W. 845.

Parol proof of contents of a policy should not be allowed unless failure to produce it is excused. S. *v.* Harvey, supra. But if accused fails to produce it, agent who issued it may testify of its contents, and refresh memory from a record thereof. S. *v.* Mann, 39 Wash. 144, 81 P. 561.

That insurance held by a relative on an adjacent building also admissible. S. *v.* Gebhart, 70 W. Va. 232, 73 S. E. 964.

High rate of insurance in the town is admissible as bearing on motive for carrying large insurance. S. *v.* Gebhart, 70 W. Va. 232, 73 S. E. 964.

987-30 Terms of settlement with insurer may be proved. S. *v.* Brand, 77 N. J. L. 486, 72 A. 131.

Policy, when inadmissible.—People *v.* Goldberg, 146 App. Div. 335, 130 N. Y. S. 708.

987-31 P. *v.* White, 19 Cal. App. 555, 126 P. 505.

Agent who issued policy may testify property was not over insured. S. *v.* Harvey, 130 Ia. 394, 106 N. W. 938.

Sworn value of stock of goods as given in application for trader's license made shortly before fire may be proved. Hooker *v.* S., 98 Md. 145, 160, 56 A. 390.

987-33 Impressions complainant had informed defendant concerning insurance, not provable. P. *v.* Gotshall, 123 Mich. 474, 82 N. W. 274.

987-34 Value of property is to be fixed as of time it was insured. P. *v.* Helwig, 146 Cal. 601, 80 P. 1030.

Accused may show directions he gave as to use of insurance money when he left policy for collection. P. *v.* Fitzgerald, 156 N. Y. 253, 267, 50 N. E. 846.

987-35 P. *v.* Morley, 8 Cal. App. 372, 97 P. 84; S. *v.* Steinkraus, 244 Mo. 152, 148 S. W. 877 (distinguishing from a case where the charge is stealing or burglarizing the property of a corporation); Arnold *v.* S. (Tex. Cr.), 168 S. W. 122.

987-36 P. *v.* Morley, 8 Cal. App. 372, 97 P. 84; S. *v.* Steinkraus, 244 Mo. 152, 148 S. W. 877; Arnold *v.* S. (Tex. Cr.), 168 S. W. 122.

Defendant apparently considered it valid, and it was relevant evidence, though it may have been in fact void. S. *v.* Roth, 117 Minn. 404, 136 N. W. 12.

License to do business in state need not be shown. Smith *v.* S., 149 Wis. 63, 134 N. W. 1123.

988-38 Evidence is admissible to show that defendant's stock was really worth more than the state's inventory showed. S. *v.* Gebhart, 70 W. Va. 232, 73 S. E. 964.

988-40 Existence of mortgage on burned property and time of its payment may be shown. Joy *v.* Ins. Co., 32 Tex. Civ. 433, 74 S. W. 822.

Income of accused and its connection with destroyed property may be shown, he having insurance on personalty lost

in building. Dunlap *v.* S., 50 Tex. Cr. 504, 98 S. W. 845.

988-43 Evidence of threats by third person is incompetent, nothing being shown to implicate him. S. *v.* McLain, 43 Wash. 267, 86 P. 390.

988-44 S. *v.* Perry, 74 S. C. 551, 54 S. E. 764.

988-45 Davis *v.* S., 141 Ala. 62, 37 S. 676; Bines *v.* S., 118 Ga. 320, 45 S. E. 376; Williams *v.* S., 125 Ga. 711, 54 S. E. 661; Moon *v.* S., 12 Ga. App. 614, 77 S. E. 1088; Sims *v.* S., 12 Ga. App. 551, 77 S. E. 891; West *v.* S., 6 Ga. App. 105, 64 S. E. 130; Ratcliff *v.* S., 99 Miss. 277, 54 S. 947; Spears *v.* S., 92 Miss. 613, 46 S. 166 (footprints and tracking by bloodhounds sufficient).

Direct evidence of burning and circumstantial evidence from which jury could infer fire not accidental establishes corpus delicti independently of confession. Westbrook *v.* S., 91 Ga. 11, 16 S. E. 100; Bines *v.* S., 118 Ga. 320, 45 S. E. 376.

If burning conceded slight evidence it was result of incendiarism will render confession admissible. S. *v.* Rogoway, 45 Or. 601, 78 P. 987, 81 P. 234.

989-46 Davis *v.* S., 141 Ala. 62, 37 S. 676; P. *v.* Davis, 135 Cal. 102, 67 P. 59; P. *v.* Wagner, 180 N. Y. 58, 72 N. E. 577; S. *v.* Rogoway, 45 Or. 601, 78 P. 987, 81 P. 234; Joy *v.* Ins. Co., 32 Tex. Civ. 433, 74 S. W. 822; S. *v.* Mann, 39 Wash. 144, 81 P. 561.

Implied admissions, when they constitute the strongest evidence of commission of crime and defendant's guilt, should be proved beyond reasonable doubt. Dunlap *v.* S., 50 Tex. Cr. 504, 98 S. W. 845.

Acts and declarations of defendant's wife inadmissible. Ray *v.* S., 43 Tex. Cr. 234, 64 S. W. 1057. But where husband is being separately tried as accessory to his wife her admissions, if competent against her, may be proved. S. *v.* Mann, 39 Wash. 144, 81 P. 561.

Removal of property from burned building by accused may be shown; fact that fire was some days later only affects weight of such evidence. S. *v.* Mann, 39 Wash. 144, 81 P. 561.

Admission as to previous fires in other buildings, not competent in prosecution for arson to secure insurance money. P. *v.* Brown, 110 App. Div. 490, 96 N. Y. S. 957.

Declaration of purpose to escape from prison may be proved. Bines *v.* S., 118 Ga. 320, 45 S. E. 376.

Non-denial of inculpatory statements made by co-defendant relevant. P. *v.* Morley, 8 Cal. App. 372, 97 P. 84.

989-47 S. *v.* Gebhart, 70 W. Va. 232, 73 S. E. 961.

989-50 S. *v.* Harvey, 130 Ia. 394, 106 N. W. 938.

990-51 Cooley *v.* S., 7 Ala. App. 163, 62 S. 292 (evidence as to defendant's whereabouts before and after the fire); P. *v.* Morley, 8 Cal. App. 372, 97 P. 84.

Anger toward prosecutor after fire, change of shoes when he knew his tracks were being measured, etc. Dixon *v.* S., 11 Ga. App. 367, 75 S. E. 266.

"The defendant either intentionally or accidentally set fire to his property. If it was done accidentally, it is extremely probable that he would have mentioned that fact to the first acquaintance he met. When told that there was a fire in town, he pretended to be surprised and asked the location of the fire. This was as strong an indication of guilt on his part as the fact that he needlessly ran from the building when he saw it was burning. S. *v.* Steinkraus, 244 Mo. 152, 148 S. W. 877.

Refusal of defendant to allow examination of goods after fire cannot be shown in prosecution for arson to get insurance money. P. *v.* Brown, 110 App. Div. 490, 96 N. Y. S. 957.

990-52 Williams *v.* S., 11 Ga. App. 416, 75 S. E. 442.

Possession of goods by accessory cannot be shown unless defendant connected therewith. Ray *v.* S., 43 Tex. Cr. 234, 64 S. W. 1057.

990-53 Kahn *v.* S. (Ind.), 105 N. E. 285; Raymond *v.* C., 29 Ky. L. R. 785, 96 S. W. 515; P. *v.* Freeman (App. Div.), 145 N. Y. S. 1061; P. *v.* Butler, 62 App. Div. 508, 71 N. Y. S. 129; Smith *v.* S., 52 Tex. Cr. 80, 105 S. W. 501.

If threats made by accused against complaining witness and owner of other property, proof may be made of burning of latter, after circumstantial evidence received to connect defendant therewith, to show guilty agency or intent in setting fire to property in question. Mitchell *v.* S., 140 Ala. 118, 37 S. 76.

Proof of prior similar offense cannot be

made. S. *v.* Graham, 121 N. C. 623, 28 S. E. 409.

Former fires in property of same owner cannot be proved unless connection is shown between them and fire in question. P. *v.* Fitzgerald, 156 N. Y. 253, 50 N. E. 846.

Acquittal under charge of causing burning of other property is competent to rebut testimony indicated in preceding paragraph. Mitchell *v.* S., 140 Ala. 118, 37 S. 76; P. *v.* Fitzgerald, 156 N. Y. 253, 50 N. E. 846.

Incendiary fires subsequent to defendant's imprisonment cannot be shown. S. *v.* Millican, 158 N. C. 617, 74 S. E. 107.

990-54 P. *v.* Covitz, 262 Ill. 514, 104 N. E. 887; S. *v.* Thompson, 97 N. C. 496, 1 S. E. 921. See S. *v.* Allen, 149 N. C. 458, 62 S. E. 597.

Prior crime cannot be shown as against accessories before the fact, though arson alleged to have been committed to conceal it. S. *v.* McCall, 131 N. C. 798, 42 S. E. 894.

Confession as to having caused another fire at same time and as to larceny of horse, competent. S. *v.* Jones, 171 Mo. 401, 71 S. W. 680.

991-56 Kahn *v.* S. (Ind.), 105 N. E. 385; P. *v.* Freeman (App. Div.), 145 N. Y. S. 1061 (perpetration of like crimes).

Subsequent attempt may be proved. Kramer *v.* C., 87 Pa. 299. But other later offenses committed on property of complaining witness cannot be shown, accused's intent being declared by statute. S. *v.* Smith, 55 Or. 408, 106 P. 797.

Recent previous fires in premises may be shown if they occurred under suspicious circumstances. Hinkle *v.* S., 174 Ind. 276, 91 N. E. 1090.

991-57 McDonald *v.* S., 165 Ala. 85, 51 S. 629; P. *v.* Scott, 13 Cal. App. 301, 109 P. 498; S. *v.* Allen, 149 N. C. 458, 62 S. E. 597; U. S. *v.* Mendezona, 1 Phil. Isl. 696; Thomason *v.* S. (Tex. Cr.), 160 S. W. 359; Ward *v.* S. (Tex. Cr.), 158 S. W. 1126; Brown *v.* S. (Tex. Cr.), 150 S. W. 436; S. *v.* Gebhart, 70 W. Va. 232, 73 S. E. 964 (where the court details at length the facts sustaining conviction).

992-58 Shoes and proof of footprints. Davis *v.* S., 141 Ala. 62, 37 S. 676; Heidelbaugh *v.* S., 79 Neb. 499, 113 N. W. 145; Kreus *v.* S., 75 Neb. 294, 106 N. W. 27; Moore *v.* S., 51 Tex. Cr. 468, 103 S. W. 188. *Contra,* S. *v.* Lockwood, 1 Boyce (Del.) 28, 74 A. 2 (attempt).

992-59 Evidence of experiments is not competent to sustain a theory accused caused fire by certain means in absence of proof showing use of thing experimented by him. Hooker *v.* S., 98 Md. 145, 56 A. 390. Experiments under dissimilar conditions not of value. P. *v.* Gotshall, 123 Mich. 474, 82 N. W. 274.

992-60 Expert testimony incompetent on question of effect of opening doors and windows on the draft. P. *v.* Brown, 110 App. Div. 490, 96 N. Y. S. 957.

Opinion as to who made footprints incompetent if given by witness who has not qualified himself. Heidelbaugh *v.* S., 79 Neb. 499, 113 N. W. 145. But it is said identity of footprints may be established by opinions. S. *v.* Millmeier, 102 Ia. 692, 72 N. W. 275; Crumes *v.* S., 28 Tex. App. 516, 13 S. W. 868; S. *v.* Ward, 61 Vt. 153, 17 A. 483.

That fire chief had premises watched at night after fire, cannot be shown. P. *v.* Brown, 110 App. Div. 490, 96 N. Y. S. 957.

992-61 Circumstantial evidence insufficient. P. *v.* Scott, 13 Cal. App. 301, 109 P. 498; P. *v.* Bernstein, 250 Ill. 63, 95 N. E. 50; Scott *v.* C., 28 Ky. L. R. 911, 90 S. W. 960; S. *v.* Peters, 234 Mo. 572, 137 S. W. 878; S. *v.* Morney, 196 Mo. 43, 93 S. W. 1117; P. *v.* Wagner, 71 App. Div. 399, 75 N. Y. S. 950; P. *v.* Johnson, 70 App. Div. 308, 75 N. Y. S. 234; P. *v.* Goldberg, 146 App. Div. 335, 130 N. Y. S. 708; P. *v.* Fitzgerald, 156 N. Y. 253, 50 N. E. 846; S. *v.* Millican, 158 N. C. 617, 74 S. E. 107; Moore *v.* S. (Tex. Cr.), 146 S. W. 183 (where, under the theory upon which this case was submitted, it had to be shown beyond a reasonable doubt that defendant was guilty of burning the house in order that the insurance might be obtained); Jones *v.* C., 103 Va. 1012, 49 S. E. 663; S. *v.* Gebhart, 70 W. Va. 232, 73 S. E. 964.

Flight.—Williams *v.* S., 11 Ga. App. 416, 75 S. E. 442.

Insufficient evidence.—Chapman *v.* S., 157 Ind. 300, 61 N. E. 670.

Circumstantial evidence sufficient.—S. *v.* Millmeier, 102 Ia. 692, 72 N. W. 275; P. *v.* Wagner, 180 N. Y. 58, 72 N. E.

577; S. *v.* McLain, 43 Wash. 267, 86 P. 390.

Insufficient facts.—That tracks that might have been the defendant's were found near the house, and that the fire started outside. Bolden *v.* S., 98 Miss. 723, 54 S. 241.

Facts insufficient to convict. S. *v.* Ruckman, 253 Mo. 187, 161 S. W. 705.

Cannot convict without proof of criminal agency. Sims *v.* S. (Ga.), 79 S. E. 1133.

ASSAULT AND BATTERY.

Burden of Proof, 995; *Intention to do harm*, 995-1; *Consent to surgical operation*, 995-1; *Neglect to make outcry*, 997-5; *Social ostracism of plaintiff*, 997-5; *Plea of guilty, competent*, 997-7; *Contributory negligence*, 1002-39; *Declarations in answer to questions competent*, 1011-13; *Acts of third party*, 1015-47.

995 Burden of proof.—Plaintiff must establish his cause of action by a preponderance of evidence. Vansant *v.* Kowalewski (Del.), 90 A. 421.

For matter of procedure in criminal prosecutions and in civil actions, see 3 STANDARD PROC. 32-45.

995-1 Biggins *v.* Gulf, etc. R. Co., 102 Tex. 117, 113 S. W. 125; Palmer *v.* Smith, 147 Wis. 70, 132 N. W. 614.

One suing owner of apartment house for assault committed by janitor in ejecting him from the house may show that he went there "on invitation of a tenant to collect a bill," such evidence being essential and relevant to the plaintiff's cause of action. Brendlin *v.* Beers, 68 Misc. 310, 123 N. Y. S. 1062.

Sufficient evidence.—Kast *v.* Link, 90 Neb. 25, 132 N. W. 717.

Intention to do harm need not be shown; it is enough to prove assault and battery wrongful and unlawful, or result of negligence. Mercer *v.* Corbin, 117 Ind. 450, 20 N. E. 132; Mohr *v.* Williams, 95 Minn. 261, 104 N. W. 12; Vosburg *v.* Putney, 80 Wis. 523, 50 N. W. 403. Intent immaterial if act not justified or excusable or assented to by person on whom committed. Wrongful intent presumed if injury inflicted by violence. Schmitt *v.* Kurrus, 234 Ill. 578, 85 N. E. 261; Lutterman *v.* Romey, 143 Ia. 233, 121 N. W. 1040. Proof defendant was a lunatic does not absolve him from liability for compensatory damages. Feld *v.* Borodofski, 87 Miss. 727, 40 S. 816. See generally, as to intent, Gibeline *v.* Smith, 106 Mo. App. 545, 80 S. W. 961.

Consent to surgical operation on one ear does not justify operation on the other; it is for jury to find whether consent implied from circumstances. Mohr *v.* Williams, 95 Minn. 261, 104 N. W. 12.

Presumption of innocence attends defendant. McKinstry *v.* Collins, 76 Vt. 221, 56 A. 985. *Contra.* Kurz *v.* Doerr, 180 N. Y. 88, 72 N. E. 926, 86 App. Div. 507, 83 N. Y. S. 736.

Preponderance of evidence will justify recovery if assault and battery not of a character to be attended with infamy or in any way felonious. Solomon *v.* Buechele, 119 Ill. App. 595. In some cases rule is so declared without qualification (Clasen *v.* Pruhs, 69 Neb. 278, 95 N. W. 640; Blackmore *v.* Ellis, 70 N. J. L. 264, 57 A. 1047; Kurz *v.* Doerr, 180 N. Y. 88, 72 N. E. 926) though exemplary damages claimed. St. Ores *v.* McGlashen, 74 Cal. 148, 15 P. 452.

Time alleged not of essence of wrong. Bruske *v.* Neugent, 116 Wis. 488, 93 N. W. 454.

995-2 Subsequent independent assault, made on plaintiff by defendant's son, cannot be shown. Dornsife *v.* Ralston, 55 Or. 254, 106 P. 13.

One who has inflicted injury by violence has the burden of showing an innocent intent. Sumner *v.* Kinney (Tex. Civ.), 136 S. W. 1192.

996-3 Wells *v.* S. (Ark.), 157 S. W 389. Accidental striking of one person in malicious effort to hit another is malicious. Davis *v.* Collins, 69 S. C. 460, 48 S. E. 469.

996-4 Ulmer *v.* Seelman, 159 Mich. 253, 123 N. W. 1124; Wirsing *v.* Smith, 222 Pa. 8, 70 A. 906.

Plaintiff must show assault; that being done, it is presumed unlawful. Johnson *v.* Daily, 136 Mo. App. 534, 118 S. W. 530.

997-5 Miller-B. L. Co. *v.* Stewart, 166 Ala. 657, 51 S. 943; Birmingham, etc. Co. *v.* Mullen, 138 Ala. 614, 35 S. 701; LeLaurin *v.* Murray, 75 Ark. 232, 87 S. W. 131; Levidow *v.* Starin, 77 Conn. 600, 60 A. 123; Dannenberg *v.* Berkner, 118 Ga. 885, 45 S. E. 682; Chicago C. T. Co. *v.* Mahoney, 230 Ill. 562, 82 N. E. 868; Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23; Henderson *v.* Agon, 148 Mich. 252, 111 N. W. 778;

Shaefer *v.* R. Co., 98 Mo. App. 445, 72 S. W. 154; Robinson *v.* Stahl, 74 N. H. 310, 67 A. 577; O'Dell *v.* Bonta, 157 App. Div. 349, 142 N. Y. S. 179; Usher *v.* Severance, 86 Vt. 523, 86 A. 741; Dubois *v.* Roby, 84 Vt. 465, 80 A. 150; Yount *v.* Strickland, 17 Wyo. 526, 101 P. 942.

Previous threats may be proved on issue of self-defense, plaintiff being aggressor. Moran *v.* Vicroy, 24 Ky. L. R. 2415, 74 S. W. 244.

Threats need not be personal to plaintiff if they were so broad as to indicate general malice including him within its scope. Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23.

Neglect to make outcry does not create presumption against woman assaulted. Witzka *v.* Moudry, 83 Minn. 78, 85 N. W. 911. But silence may be proved, as may continuance of cordial relations between her and defendant, and any other facts not harmonizable with experience. Champagne *v.* Hamey, 189 Mo. 709, 88 S. W. 92.

Subject-matter of altercation which led to assault and battery may be shown. Robinson *v.* Stimer, 154 Mich. 244, 117 N. W. 634; Coruth *v.* Jones, 77 Vt. 441, 60 A. 814.

Prior provocation may be shown to explain res gestae. LeLaurin *v.* Murray, 75 Ark. 232, 87 S. W. 131.

Conduct after assault immaterial. Lenfest *v.* Robbins, 101 Me. 176, 63 A. 729. But it may be connected with the event. Shaefer *v.* R. Co., 98 Mo. App. 445, 72 S. W. 154. Evidence not confined to time of assault if exemplary damages claimed. Prentiss *v.* Shaw, 56 Me. 427; Lenfest *v.* Robbins, 101 Me. 176, 63 A. 729.

Trial of defendant not part of res gestae, and record of acquittal not admissible. Stevens *v.* Friedman, 58 W. Va. 78, 51 S. E. 132.

Social ostracism of plaintiff and family may be proved where wrong participated in by many. Britton *v.* Young, 36 Ind. App. 622, 74 N. E. 905, 76 N. E. 327.

Consent not a defense.—Morris *v.* Miller, 83 Neb. 218, 119 N. W. *Contra.* Smith *v.* Simon, 69 Mich. 481, 37 N. W. 548; Galbraith *v.* Fleming, 60 Mich. 403, 27 N. W. 581.

997-6 Irby *v.* Wilde, 155 Ala. 388, 46 S. 454 (declarations to third party as to what was done to plaintiff competent to show animus); Coruth *v.* Jones, 77 Vt. 441, 60 A. 814.

Disposition made of defendant's property after assault may be shown. Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724.

997-7 Satham *v.* Muffle (N. D.), 135 N. W. 797. Plea of guilty competent, but circumstances under which it was made may be shown. Wisnieski *v.* Vanek, 5 Neb. (Unof.) 512, 99 N. W. 258; McKinstry *v.* Collins, 76 Vt. 221, 56 A. 985; Yeska *v.* Swendrzynski, 133 Wis. 475, 113 N. W. 959.

Testimony of another party sued for same wrong not admissible against defendant, though it was alleged party first sued acted under defendant's direction. Murphy *v.* Cuff, 177 N. Y. 314, 69 N. E. 607.

997-8 Sellman *v.* Wheeler, 95 Md. 751, 54 A. 512.

Expressions indicating pain admissible if injuries latent. Treschman *v.* Treschman, 28 Ind. App. 206, 61 N. E. 961.

Declarations by plaintiff after assault, indicating hostility to one defendant, whom he is not charged with having assaulted, inadmissible. Rutledge *v.* Rowland, 161 Ala. 114, 49 S. 461.

997-9 Opinions as to extent of injuries competent. Rutledge *v.* Rowland, 161 Ala. 114, 49 S. 461 (medical witness); Monize *v.* Begaso, 190 Mass. 87, 76 N. E. 460; Willet *v.* Johnson, 13 Okla. 563, 76 P. 174. But conclusions are not. Shaefer *v.* R. Co., 98 Mo. App. 445, 72 S. W. 154.

Plaintiff's appearance may be shown. Barlow *v.* Hamilton, 151 Ala. 634, 44 S. 657.

998-10 Article of clothing worn by one of the parties during affray admissible. Morris *v.* Miller, 83 Neb. 218, 119 N. W. 458.

998-11 Reimenschneider *v.* Neusis, 175 Ill. App. 172; Treschman *v.* Treschman, 28 Ind. App. 206, 61 N. E. 961; Phelps *v.* R. Co. (Ia.), 143 N. W. 853; Stewart *v.* Watson, 133 Mo. App. 44, 112 S. W. 762 (character not involved); Rittenhoffer *v.* Cutter (N. J.), 83 A. 873 (on issue of excessive force by defendant in arresting plaintiffs); Coruth *v.* Jones, 77 Vt. 441, 60 A. 814; Barton *v.* Bruley, 119 Wis. 326, 96 N. W. 815; Paulson *v.* S., 118 Wis. 89, 94 N. W. 771.

998-12 Reimenschneider *v.* Neusis, 175 Ill. App. 172; Lenfest *v.* Robbins, 101 Me. 176, 63 A. 729; McCormick *v.* Schtrenck (Tex. Civ.), 130 S. W. 720.

998-13 Dannenberg *v.* Berkner, 118 Ga. 885, 45 S. E. 682; Christensen *v.* Holms (S. D.), 144 N. W. 919; Lowe *v.* Ring, 123 Wis. 107, 101 N. W. 381.

Defendant's disposition may be shown on cross-examination as to assault made on third person. Lee *v.* Longwell, 136 Mich. 458, 99 N. W. 379; Leedy *v.* Hoover, 160 Mich. 449, 125 N. W. 394; Ulmer *v.* Seelman, 159 Mich. 253, 123 N. W. 1124.

Character of plaintiff may be shown by specific instances and his reputed character by general reputation; first may be done though defendant had no knowledge of each instance. Spain *v.* Rakestraw, 79 Kan. 758, 101 P. 466; Henning *v.* Bartz, 1 O. C. C. (N. S.) 389; McQuiggan *v.* Ladd, 79 Vt. 90, 64 A. 503.

Remoteness of conduct not ground for excluding evidence, it being presumed there was no change. McQuiggan *v.* Ladd, 79 Vt. 90, 64 A. 503.

Cannot be proved by specific acts. Christensen *v.* Holm (S. D.), 144 N. W. 919.

998-15 Shaefer *v.* R. Co., 98 Mo. App. 445, 454, 72 S. W. 145.

Previous particular assaults and batteries committed by plaintiff cannot be proved to show injuries complained of were received in them, nor to prove his quarrelsome disposition. Lowe *v.* Ring, 123 Wis. 107, 101 N. W. 381.

998-16 Birmingham, etc. Co. *v.* Mullen, 138 Ala. 614, 35 S. 701; Stockham *v.* Malcolm, 111 Md. 615, 74 A. 569; Sellman *v.* Wheeler, 95 Md. 751, 54 A. 512; Ulmer *v.* Seelman, 159 Mich. 253, 123 N. W. 1124; Cameron *v.* Joslyn (Vt.), 90 A. 793.

Empty eye socket may be exhibited. Orscheln *v.* Scott, 90 Mo. App. 352.

Plaintiff's drunkenness may be shown, and fact he fell from a horse after assault and did not complain of injury until thereafter. Patrick *v.* Kenton, 23 Ky. L. R. 1408, 65 S. W. 157.

Physical condition of deceased wife of plaintiff, whose death resulted from assault, may be testified to by him. McKinstry *v.* Collins, 76 Vt. 221, 56 A. 985.

Complaints after assault may be proved. Stevens *v.* Friedman, 58 W. Va. 78, 51 S. E. 132.

Photograph of plaintiff taken after assault inadmissible unless correctness shown (Martin *v.* Moore, 99 Md. 41, 57 A. 671); of assailant, admissible. Henning *v.* Bartz, 1 O. C. C. (N. S.) 389.

Physical condition of child born after assault cannot be shown unless issue raised by pleadings, and then it must be shown to have been result of assault. Haupt *v.* Swenson, 125 Ia. 694, 101 N. W. 520.

Miscarriage.—Where plaintiff proves a miscarriage shortly after the assault, defendant may show other miscarriages prior to the assault. Singer S. M. Co. *v.* Methvin (Ala.), 63 S. 997.

999-17 Henning *v.* Bartz, 1 O. C. C. (N. S.) 389. Profert of assailant denied in discretion; relative size of men may be shown otherwise. McFarland *v.* S., 83 Ark. 98, 103 S. W. 169.

Burden is on defendant to show assault made in defense of son. Downs *v.* Jackson (Ky.), 128 S. W. 339.

Defendant's belief as to danger to his son from plaintiff may be testified to. Downs *v.* Jackson (Ky.), 128 S. W. 339.

Defendant's knowledge as to plaintiff's being armed cannot be gone into if latter gave no indication to defendant he was in danger. Stockham *v.* Malcolm, 111 Md. 615, 74 A. 569.

999-18 Swigart *v.* Ballou, 106 Ill. App. 226.

It is for jury to determine whether parent, guardian or teacher has administered unreasonable and cruel punishment to a child under his care. Clasen *v.* Pruhs, 69 Neb. 278, 95 N. W. 640, cit. cases and ref. to S. *v.* Jones, 95 N. C. 588, 59 Am. Rep. 282, as holding judgment of parent final unless malice shown. See S. *v.* Thornton, 136 N. C. 610, 48 S. E. 602.

1000-22 Sweet *v.* Boyd (Ia.), 98 N. W. 601.

Both parties in fault.—Lykins *v.* Hamrick, 141 Ky. 80, 137 S. W. 852.

Plea of general issue does not affect rule. Wells *v.* Englehart, 118 Ill. App. 217.

Defense must be specially pleaded. Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724.

1000-23 Godwin *v.* Collins (Fla.), 61 S. 752; Wells *v.* Englehart, 118 Ill. App. 217; Torian *v.* Terrell, 29 Ky. L. R. 306, 93 S. W. 10; Monize *v.* Begaso, 190 Mass. 87, 76 N. E. 460; Orscheln *v.* Scott, 90 Mo. App. 352, 366; Parish *v.* S. (Tex. Cr.), 153 S. W. 327; McQuig-

gan *v.* Ladd, 79 Vt. 90, 64 A. 503; Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081; Monson *v.* Lewis, 123 Wis. 583, 101 N. W. 1094; Williams *v.* Campbell (Wyo.), 133 P. 1071.

Contra, Reimenschneider *v.* Neusis, 175 Ill. App. 172.

Justification must be pleaded to admit evidence of it. Southern R. Co. *v.* Crone, 51 Ind. App. 300, 99 N. E. 762.

Burden is not upon defendant to establish justification under allegation wrong done without just cause or provocation, answer being a general denial. Cassidy *v.* Cady, 49 Misc. 478, 97 N. Y. S. 1046.

Defendant need not show he retreated or could not do so. Chabot *v.* Davis, 74 N. H. 403, 68 A. 409.

Anticipation of such defense by plaintiff does not impose on him burden of proof. Busalt *v.* Doidge, 91 Kan. 37, 136 P. 904.

Conclusion of witness he acted in self-defense is incompetent. It seems he may testify he believed he was in danger and attempted to prevent threatened injury. Evans *v.* Elwood, 123 Ia. 92, 98 N. W. 584.

Under plea of general issue self-defense cannot be proved. Barlow *v.* Hamilton, 151 Ala. 634, 44 S. 657; Blackmore *v.* Ellis, 70 N. J. L. 264, 17 A. 1047; Mangold *v.* Oft, 63 Neb. 397, 88 N. W. 507; Yeska *v.* Swendrzuski, 133 Wis. 475, 113 N. W. 959; Price *v.* Grzyll, 133 Wis. 623, 114 N. W. 100.

It is for jury to find whether force used in self-defense reasonably appeared necessary; honest belief of party is immaterial. McQuiggan *v.* Ladd, 79 Vt. 90, 64 A. 503.

1000-24 Justification not shown by proof of challenge to fight. Lizana *v.* Lang, 90 Miss. 469, 43 S. 477.

1000-27 It is for jury to find whether defendant acted reasonably. Chabot *v.* Davis, 74 N. H. 403, 68 A. 409.

1000-28 Milam *v.* Milam, 46 Wash. 468, 90 P. 595.

1001 Exemplary damages—evidence to show. Ellis *v.* Wahl (Mo.), 167 S. W. 582.

1001-32 Smith *v.* Fahey, 63 W. Va. 346, 60 S. E. 250.

Officer's return, though fortified by presumption in favor of performance of duty, is but prima facie evidence in his favor, notwithstanding plaintiff a party to action in which returned process issued. McKinstry *v.* Collins, 76 Vt. 221, 56 A. 985.

1001-33 Birmingham, etc. Co. *v.* Mullen, 138 Ala. 614, 35 S. 701; Levidow *v.* Starin, 77 Conn. 600, 60 A. 123; Doerhoefer *v.* Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7; Sellman *v.* Wheeler, 95 Md. 751, 54 A. 512.

Petition for opening highway is competent to show good faith on part of officers sued for assault committed in pursuance of assumed duty. Chase *v.* Watson, 75 Vt. 385, 56 A. 10.

1001-34 Cook *v.* Neely, 143 Mo. App. 632, 128 S. W. 233 (in mitigation of exemplary damages).

Damages presumed without proof of injury. Armstrong *v.* Rhoads, 4 Penne. (Del.), 151, 53 A. 435.

Of punitive but not of actual damage. Webb *v.* Brown, 63 Fla. 306, 58 S. 27.

Burden of proof.—Burden is on plaintiff to show damages resulting from defendant's wrongful act. Elijah *v.* Dowling, 49 Ind. App. 515, 97 N. E. 551.

1001-35 LeLaurin *v.* Murray, 75 Ark. 232, 87 S. W. 131; Shoemaker *v.* Jackson, 128 Ia. 488, 104 N. W. 503; Carson *v.* Singleton, 23 Ky. L. R. 1626, 65 S. W. 821.

Test is not of time, but of casual relation, and provocation happening a longer time previous than in ordinary cases may be shown in exceptional circumstances. Shoemaker *v.* Jackson, supra. See Ward *v.* White, 86 Va. 212, 9 S. E. 1021, 19 Am. St. 883.

Correspondence between families of parties cannot be proved to show defendant's mental condition when assault committed. Wirsing *v.* Smith, 222 Pa. 8, 70 A. 906.

Cause of injury may be shown to be attributable to alcoholism, but proof of isolated instance of drunkenness three months before assault is incompetent. Fielder *v.* R. Co., 51 Tex. Civ. 244, 112 S. W. 699.

1001-36 McNeil *v.* Mullin, 70 Kan. 634, 79 P. 168.

1001-37 Ambiguous acts, such as buying beer, use of vituperative language, etc., cannot be proved. Barton *v.* Bruley, 119 Wis. 326, 96 N. W. 815.

Declarations of wife to husband, some hours after indecent assault committed, may be shown. Hopkinson *v.* Perdue, 8 Ont. L. R. (Can.) 228.

1001-38 Plaintiff's quarrelsome disposition, having been proved on the

issue of self-defense, may be considered in mitigation of compensatory damages. Lowe *v.* Ring, 123 Wis. 107, 101 N. W. 381.

Defendant's intent immaterial in respect to compensatory damages. Walbridge *v.* Walbridge, 80 Kan. 567, 103 P. 89.

1002-39 Mitchell *v.* Gambill, 140 Ala. 316, 37 S. 290; LeLaurin *v.* Murray, 75 Ark. 232, 87 S. W. 131; Armstrong *v.* Rhoads, 4 Penne. (Del.) 151, 53 A. 435; Hubbard *v.* Perlie, 25 App. Cas. (D. C.) 477; Doerhoefer *v.* Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7; Mangold *v.* Oft, 63 Neb. 397, 88 N. W. 507; Palmer *v.* Winston, 131 N. C. 250, 42 S. E. 604; Daniel *v.* Giles, 108 Tenn. 242, 66 S. W. 1128; Barrette *v.* Carr, 75 Vt. 425, 56 A. 93.

In New York, Pennsylvania and Georgia the rule is otherwise. Kiff *v.* Youmans, 86 N. Y. 324, 40 Am. Rep. 545; Genung *v.* Baldwin, 77 App. Div. 584, 79 N. Y. S. 569; Robinson *v.* Rupert, 23 Pa. 523; Thompson *v.* Shelverton, 131 Ga. 714, 63 S. E. 220, *over.* Berkner *v.* Dannenberg, 116 Ga. 954, 43 S. E. 463.

Provocation of minor may prevent recovery from his father, unless negligence of latter is shown. Miller *v.* Moche, 111 La. 143, 35 S. 491.

Provocation may be contributory negligence though it falls short of justification. Missouri, etc. R. Co. *v.* Gerren, 57 Tex. Civ. 34, 121 S. W. 905.

1002-40 Mitchell *v.* Gambill, 140 Ala. 316, 37 S. 290; Armstrong *v.* Rhoads, 4 Penne. (Del.) 151, 53 A. 435; Hendle *v.* Geiler (Del.), 50 A. 632; Harvey *v.* Harvey, 124 La. 595, 50 S. 592; Stockham *v.* Malcolm, 111 Md. 615, 74 A. 569; Baltimore & O. R. Co. *v.* Strube, 111 Md. 119, 73 A. 697; Alabama & V. R. Co. *v.* Harz, 88 Miss. 681, 42 S. 201; Galvin *v.* Starin, 132 App. Div. 577, 116 N. Y. S. 919; Daniel *v.* Giles, 108 Tenn. 242, 66 S. W. 1128; McCormick *v.* Schtrenck (Tex. Civ.), 130 S. W. 720; Leachman *v.* Cohen (Tex. Civ.), 91 S. W. 809; Norfolk & W. R. Co. *v.* Brame, 109 Va. 422, 63 S. E. 1018.

If unlawful act of defendant caused plaintiff to use language complained of former cannot shield himself by proving its use. Robichand *v.* Maheux, 104 Me. 524, 72 A. 334.

1003-41 LeLaurin *v.* Murray, 75 Ark. 232, 87 S. W. 131; Lizana *v.* Lang, 90 Miss. 469, 43 S. 477; Davis *v.* Collins, 69 S. C. 460, 48 S. E. 469.

Not unless immediately preceding and connected with the assault. Long *v.* Seigel (Ala.), 58 S. 380, *cit.* Terry *v.* Eastland, 1 Stew. (Ala.) 156.

1003-42 Communicated threats which did not influence assault cannot be proved. Heffernan *v.* Lloyd, 145 Ill. App. 583.

In Kentucky rule changed by statute. Renfro *v.* Barlow, 131 Ky. 312, 115 S. W. 225.

1003-43 Irby *v.* Wilde, 155 Ala. 388, 46 S. 454 (exemplary damages); Doerhoefer *v.* Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7; Edwards *v.* Wessinger, 65 S. C. 161, 43 S. E. 518.

Proof of conviction and fine not competent to mitigate damages. Armstrong *v.* Rhoads, 4 Penne. (Del.) 151, 53 A. 435. *Contra* as to exemplary damages. Wirsing *v.* Smith, 222 Pa. 8, 70 A. 906.

1003-44 Record admissible to show plea of guilty, but not conclusive as to right to recover. Hendle *v.* Geiler (Del.), 50 A. 632; Wagner *v.* Gibbs, 80 Miss. 53, 31 S. 434. If unexplained such plea to a charge of having wilfully, maliciously and unlawfully committed offense justifies exemplary damages. Wagner *v.* Gibbs, supra.

Arrest of defendant being shown by plaintiff, former may prove his discharge. James *v.* R. Co., 80 App. Div. 364, 80 N. Y. S. 710.

1004-45 Schmitt *v.* Kurrus, 234 Ill. 578, 85 N. E. 261; Wagner *v.* Gibbs, 80 Miss. 53, 31 S. 434.

1004-46 Matson *v.* Matson, 105 Me. 152, 73 A. 867.

1004-47 Miller-B. L. Co. *v.* Stewart, 166 Ala. 657, 51 S. 943; Shupack *v.* Gordon, 79 Conn. 298, 64 A. 740; Berkner *v.* Dannenberg, 116 Ga. 954, 43 S. E. 463; Balt. etc. R. Co. *v.* Davis, 44 Ind. App. 375, 89 N. E. 403; Zell *v.* Dunaway, 115 Md. 1, 80 A. 215; Carmody *v.* Co., 122 Mo. App. 338, 99 S. W. 495; Cody *v.* Gremmler, 121 Mo. App. 359, 99 S. W. 46; Nickerson *v.* S. (Tex. Cr.), 154 S. W. 992; Dubois *v.* Roby, 84 Vt. 465, 80 A. 150; Hunt *v.* Di Bacco, 69 W. Va. 449, 71 S. E. 584; Stevens *v.* Friedman, 58 W. Va. 78, 51 S. E. 132.

1004-48 Barlow *v.* Hamilton, 151 Ala. 634, 44 S. 657; Hendle *v.* Geiler (Del.), 50 A. 632; Chicago C. T. Co.

v. Mahoney, 230 Ill. 562, 82 N. E. 868; Doerhoefer *v.* Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7; Warner *v.* Talbot, 112 La. 817, 36 S. 743; Henderson *v.* Agon, 148 Mich. 252, 111 N. W. 778; Wagner *v.* Gibbs, 80 Miss. 53, 31 S. 434; Kitteringham *v.* McClutchie (Miss.), 41 S. 65; Johnson *v.* Daily, 136 Mo. App. 534, 118 S. W. 530; Baxter *v.* Magill, 127 Mo. App. 392, 105 S. W. 679; Coorman *v.* R. Co., 127 App. Div. 315, 111 N. Y. S. 531; Kerley *v.* Germscheid, 20 S. D. 363, 106 N. W. 136; Smith *v.* Fahey, 63 W. Va. 346, 60 S. E. 250.

"**The plaintiff's testimony** that he felt humiliated in consequence of the assault and did not sleep any all night was rightly admitted. The insult and indignity inflicted upon him may well have occasioned distress of mind and injury to his feelings more serious than the physical damage, and the plaintiff was entitled to recover reasonable compensation therefor. Smith *v.* Holcomb, 99 Mass. 552; Meagher *v.* Driscoll, 99 Mass. 281, 96 Am. Dec. 758; Lopes *v.* Connolly, 210 Mass. 487, 97 N. E. 80." Burus *v.* Jones, 211 Mass. 475, 98 N. E. 29.

Injury to feelings may be found though there is no direct evidence. Morgan *v.* Langford, 126 Ga. 58, 54 S. E. 818; Stewart *v.* Watson, 133 Mo. App. 44, 112 S. W. 762.

Exemplary damages may be awarded if there has been oppression, fraud or malice, actual or presumed. St. Ores *v.* McGlashen, 74 Cal. 148, 15 P. 452.

1004-49 Lonergan *v.* Small, 81 Kan. 48, 105 P. 27 (mental suffering though no battery or bodily injury); Blackmore *v.* Ellis, 70 N. J. L. 264, 57 A. 1047; Lowe *v.* Ring, 123 Wis. 107, 115, 101 N. W. 381.

Malice may be inferred if defendant acted wantonly, grossly and outrageously. Chicago C. T. Co. *v.* Mahoney, 230 Ill. 562, 82 N. E. 868.

1004-50 Galvin *v.* Starin, 132 App. Div. 577, 116 N. Y. S. 919.

Injury to reputation cannot be recovered for as special damages unless it is pleaded. Sletten *v.* Madison, 122 Wis. 251, 99 N. W. 1020. But see Wolf *v.* Trinkle, 103 Ind. 355, 3 N. E. 110.

1004-51 Stark *v.* Epler, 59 Or. 262, 117 P. 276.

1004-52 Schmitt *v.* Kurrus, 140 Ill. App. 132; Baxter *v.* Magill, 127 Mo. App. 392, 105 S. W. 679; Willet *v.* Johnson, 13 Okla. 563, 76 P. 174; Thomas *v.* Williams, 139 Wis. 467, 121 N. W. 148.

In Kentucky rule is otherwise.—Givens *v.* Berkley, 21 Ky. L. R. 1653, 56 S. W. 158; Beavers *v.* Bowen, 24 Ky. L. R. 882, 70 S. W. 195.

1005-54 Shields Admr. *v.* Coke Co. (Ky.), 167 S. W. 918; Stockham *v.* Malcolm, 111 Md. 615, 74 A. 569.

Pecuniary condition of plaintiff at time of assault and after is immaterial, purpose for which evidence offered not being disclosed. McQuiggan *v.* Ladd, 79 Vt. 90, 104, 64 A. 503.

Money loaned out.—"While it is true that there are cases in other jurisdictions which allow such proof in cases of this character, yet this court, after maturely considering the matter have held that it is not proper to allow proof of the defendant's pecuniary condition in these actions for torts. Ware *v.* Cartledge, 24 Ala. 622, 624, 625, 60 Am. Dec. 489; Southern Car & Foundry Co. *v.* Adams, 131 Ala. 147, 159, 160, 32 South. 503." Long *v.* Seigel, 177 Ala. 338, 58 S. 380.

Professional standing and reputation of plaintiff and nature and extent of his practice before and after injury may be shown. Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23.

1005-55 Rutledge *v.* Rowland, 161 Ala. 114, 49 S. 461 (testimony as to time plaintiff laid up, proper as showing severity of assault); Hubbard *v.* Perlie, 25 App. Cas. (D. C.) 477; Evans *v.* Elwood, 123 Ia. 92, 98 N. W. 584; Doerhoefer *v.* Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7; Sellman *v.* Wheeler, 95 Md. 751, 54 A. 512; Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081.

Compensation for mental suffering, though physical injury not inflicted. Carmody *v.* Co., 122 Mo. App. 338, 99 S. W. 495.

Expenses incurred by married woman. Willet *v.* Johnson, 13 Okla. 563, 76 P. 174.

1005-56 Whitlock *v.* Mungiven (R. I.), 90 A. 756; Jacobs *v.* Williams, 67 W. Va. 377, 67 S. E. 1113.

Pain, loss of time and medical treatment, special damages. Irby *v.* Wilde, 150 Ala. 402, 43 S. 574.

Aggravation of plaintiff's disorder must be alleged. Lindsay *v.* R. Co., 141 Mich. 204, 104 N. W. 656.

Plaintiff's incapacity to work may be

shown. Elijah *v.* Dowling, 49 Ind. App. 515, 97 N. E. 551.

1006-57 P. *v.* McGee, 11 Cal. App. 99, 111 P. 264; S. *v.* Hines, 140 Mo. App. 289, 128 S. W. 248 (action against officer); S. *v.* Young, 52 Or. 227, 96 P. 1067; Black *v.* S. (Tex. Cr.), 113 S. W. 932; Moody *v.* S., 52 Tex. Cr. 232, 105 S. W. 1127; Greer *v.* S. (Tex. Cr.), 106 S. W. 359.

Evidence held sufficient to show that the assault was made by the defendant, and that, while it was not his purpose to use force, or to have sexual intercourse with the female against her will, she did not consent to or encourage the advances made by him. Campbell *v.* S., 10 Ga. App. 795, 74 S. E. 96.

Evidence held sufficient.—Butler *v.* S., 10 Ga. App. 463, 73 S. E. 685, assault with intent to murder.

Presumption is teacher properly exercised judgment in punishing pupil. S. *v.* Thornton, 136 N. C. 610, 48 S. E. 602; Greer *v.* S. (Tex. Cr.), 106 S. W. 359.

1006-58 Beyer *v.* R. Co. (Ala.), 64 S. 609; S. *v.* Tritch, 175 Mo. App. 262, 157 S. W. 843; S. *v.* Schmidt, 19 S. D. 585, 104 N. W. 259; Dool *v.* S. (Tex. Cr.), 150 S. W. 626.

Contra, Blankenship *v.* S. (Ala.), 65 S. 860.

Defendant must prove that he fought in self-defense. Blankenship *v.* S. (Ala.), 65 S. 860.

No burden on defendant to prove that act done in self defense was justifiable. S. *v.* McGrath, 119 Minn. 321, 138 N. W. 310.

1006-60 Defendant must show justification. Badger *v.* S., 5 Ga. App. 477, 63 S. E. 532.

1006-63 Johnson *v.* S. (Tex. Cr.), 156 S. W. 1164; Teasley *v.* S. (Tex. Cr.), 150 S. W. 784. In Georgia jury may find from their own knowledge that a pair of scissors is an instrument of like kind as a sword, dirk or knife. Norwood *v.* S., 3 Ga. App. 325, 59 S. E. 828.

1006-64 Henderson *v.* S., 55 Tex. Cr. 170, 115 S. W. 588 (and beyond reasonable doubt); Hext *v.* S., 48 Tex. Cr. 576, 90 S. W. 43.

1006-65 Great bodily injury.—It is for jury to find whether such injury intended, evidence may disclose circumstances under which it was inflicted and its nature and extent. Lambert *v.* S., 80 Neb. 562, 114 N. W. 775.

Declarations of intent to kill, firing in direction of person threatened, and flight sustain finding pistol was loaded. Marcotte *v.* Ty., 8 Ariz. 270, 71 P. 911.

1006-66 Presumption of intent to injure arises from infliction of injury. Thompson *v.* S. (Tex. Cr.), 89 S. W. 1081.

1006-67 S. *v.* Ockij (Ia.), 145 N. W. 486; Lambert *v.* S., 80 Neb. 562, 114 N. W. 775; Miller *v.* S. (Tex. Civ.), 150 S. W. 635.

Intent to injure presumed if man lays hands on woman without consent. Combs *v.* S., 55 Tex. Cr. 332, 116 S. W. 595.

1006-68 Lipscomb *v.* S., 130 Wis. 238, 109 N. W. 986.

Prima facie case is made by state when it proves gun was pointed at a person within shooting distance, with apparent purpose to fire, assailed person not knowing it was not loaded. Lipscomb *v.* S., 130 Wis. 238, 109 N. W. 986, *disap.* S. *v.* Napper, 6 Nev. 113; Lockland *v.* S., 45 Tex. Cr. 87, 73 S. W. 1054.

Assault committed by pointing unloaded pistol at another if accompanied by threat to shoot. Price *v.* U. S., 156 Fed. 950, 85 C. C. A. 247.

Discharge of pistol after assault may be shown. P. *v.* Wells, 145 Cal. 138, 78 P. 470.

1007-70 Vanhooser *v.* S., 55 Tex. Cr. 114, 113 S. W. 285.

What was done and said by those present during the commission of the assault, both as directly going to give character to the assault and as part of the res gestae. Wray *v.* S., 2 Ala. App. 139, 57 S. 144; Le Fevre *v.* Crossan (Del.), 84 A. 128.

1007-71 S. *v.* Thornhill, 177 Mo. 691, 76 S. W. 948; Grantland *v.* S. (Tex. Cr.), 146 S. W. 196; Gill *v.* S., 48 Tex. Cr. 39, 85 S. W. 1062; Davis *v.* S. (Tex. Cr.), 90 S. W. 646.

1007-72 Gardner *v.* S., 56 Tex. Cr. 594, 120 S. W. 895.

"Opprobrious words or abusive language used by the person assaulted or beaten at or near the time of the assault, not in the presence or hearing of the defendant, but communicated to the defendant before the assault, are admissible in evidence under Ala. Code, §6308 in extenuation or justification of the offense, as the jury may

determine." Spear *v.* S., 3 Ala. App. 52, 57 S. 510.

All the conversation may be proved (Fields *v.* S., 46 Fla. 84, 94, 35 S. 185); at least whatever was said relating to statement testified to on direct examination. S. *v.* Leuhrsman, 123 Ia. 476, 99 N. W. 140.

Self-serving declarations not admissible. Ellington *v.* S., 48 Tex. Cr. 387, 88 S. W. 361.

1007-73 Preston *v.* S. (Okla.), 139 P. 528; Hodges *v.* S. (Tex. Cr.), 166 S. W. 512.

1007-74 Stevens *v.* S., 84 Neb. 759, 122 N. W. 58; Caples *v.* S. (Tex. Cr.), 155 S. W. 267.

Physical conditions of accused immaterial.—Brooke *v.* S., 155 Ala. 78, 46 S. 491.

1007-75 Hodges *v.* S. (Tex. Cr.), 166 S. W. 512; Lacoume *v.* S. (Tex. Cr.), 143 S. W. 626; Whittle *v.* S. (Tex. Cr.), 95 S. W. 1084; Yeary *v.* S. (Tex. Cr.), 66 S. W. 1106.

1007-76 Republic Co. *v.* Passafume (Ala.), 61 S. 327; S. *v.* Nieuhaus, 217 Mo. 332, 117 S. W. 73; Lambert *v.* S., 80 Neb. 562, 114 N. W. 775; Marsden *v.* S., 59 Tex. Cr. 36, 126 S. W. 1160 (arrest of accused's father by prosecuting witness); S. *v.* Roby, 83 Vt. 121, 74 A. 638 (witness does not state opinion when he illustrates how defendant tried to catch prosecuting witness).

Custom as to right of way of loaded wagon not provable if one of the parties did not know of the load. Tubbs *v.* S., 50 Tex. Cr. 143, 95 S. W. 112.

Assaulted party armed.—Prosecuting witness may testify whether or not he was armed. Tuberville *v.* S. (Miss.), 38 S. 333.

Simultaneous assaults on prosecutor and wife may be shown. Gray *v.* S. (Tex. Cr.), 86 S. W. 764.

All physical effects of affray may be proved although two offenses established. Starr *v.* S., 160 Ind. 661, 67 N. E. 527; Scott *v.* S., 46 Tex. Cr. 305, 81 S. W. 950.

Acts of third party after assault immaterial. Majors *v.* S., 58 Tex. Cr. 39, 124 S. W. 663 (in absence of evidence of conspiracy); Moody *v.* S., 52 Tex. Cr. 232, 105 S. W. 1127.

Conduct of pupil assaulted under former teacher is immaterial. Greer *v.* S. (Tex. Cr.), 106 S. W. 359.

1008-77 S. *v.* Tucker, 75 Conn. 201, 52 A. 741; Starr *v.* S., 160 Ind. 661, 67 N. E. 527; Thompson *v.* S. (Tex. Cr.), 89 S. W. 1081; Yeary *v.* S. (Tex. Cr.) 66 S. W. 1106; Wilson *v.* S. (Tex. Cr.), 78 S. W. 232; Lockland *v.* S., 45 Tex. Cr. 87, 73 S. W. 1054. See Cole *v.* S., 2 Ga. App. 734, 59 S. E. 24.

Everything that occurred at the altercation preceding the assault was of the res gestae, and it was proper for plaintiff to prove the fact, if it were a fact, that defendant resented his wife's interference and slapped her. Knoche *v.* Knoche, 160 Mo. App. 257, 142 S. W. 766.

1008-78 Boykin *v.* S., 59 Tex. Cr. 267, 128 S. W. 382; Decker *v.* S., 58 Tex. Cr. 159, 124 S. W. 912; Gardner *v.* S., 56 Tex. Cr. 594, 120 S. W. 895; Roch *v.* S., 56 Tex. Cr. 557, 120 S. W. 448; Herd *v.* S., 50 Tex. Cr. 600, 99 S. W. 1119; Chambless *v.* S., 49 Tex. Cr. 354, 94 S. W. 220. But see S. *v.* McCann, 43 Or. 155, 72 P. 137.

Evidence was admissible that, immediately after the assault upon the prosecutor, the persons who committed the offense, at about the same place and as a part of the common purpose to drive the prosecutor, his wife, and other negroes out of the community, assaulted and beat the wife of the prosecutor. Gibson *v.* S., 11 Ga. App. 148, 74 S. E. 905.

Continuous assault may be shown. S. *v.* Koonse, 123 Mo. App. 655, 101 S. W. 139.

Declarations day after assault may be proved to show whether violence threatened or actually begun. S. *v.* McFadden, 42 Wash. 1, 84 P. 401.

1008-79 S. *v.* Nieuhaus, 217 Mo. 332, 117 S. W. 73; Stevens *v.* S., 84 Neb. 759, 122 N. W. 58; Saye *v.* S., 54 Tex. Cr. 430, 114 S. W. 804 (complaint by prosecutrix two weeks after indecent assault cannot be proved); S. *v.* Raymo, 76 Vt. 430, 57 A. 993.

Whether or not the witness Fulton had a pistol on his person the day before the trial while in court was entirely immaterial and irrelevant to the issues. Wray *v.* S., 2 Ala. App. 139, 57 S. 144.

The question asked this witness, "Did not Mr. Barber have a hatchet and expect outsiders?" called for testimony by the witness of the mental status of another person, and an objection to it was properly sustained. What the witness told an officer or others after the

assault was not admissible. Wray *v.* S., 2 Ala. App. 139, 57 S. 144.

1008-80 S. *v.* Kapelino, 20 S. D. 591, 108 N. W. 335; Martin *v.* S., 47 Tex. Cr. 174, 82 S. W. 657.

1008-81 Weapon probably used, admissible. S. *v.* Costello, 29 Wash. 366, 69 P. 1099.

1008-82 Proof of finding of other weapons than that alleged on person of defendant improper, but not fatal. P. *v.* Wells, 145 Cal. 138, 78 P. 470.

Experts and non-experts may give opinions as to instrument used. S. *v.* Nienhaus, 217 Mo. 332, 117 S. W. 73.

1008-83 Prosecutor's physical condition may be shown to aid jury in fixing fine. Beavers *v.* S., 151 Ala. 5, 44 S. 401.

1009-84 S. *v.* Quong, 8 Ida. 191, 67 P. 491; S. *v.* Nienhaus, 217 Mo. 332, 117 S. W. 73; S. *v.* Young, 52 Or. 227, 96 P. 1067; Whittle *v.* S. (Tex. Cr.), 95 S. W. 1084.

1009-85 Stevens *v.* S., 84 Neb. 759, 122 N. W. 58.

1009-87 Effect of admission.—If a plea of not guilty has been entered evidence of facts relevant to show guilt is competent though they are admitted in a plea of justification. S. *v.* Young, 52 Or. 227, 96 P. 1067.

Apprenended consequences of wounds inflicted may be testified to by complainant though he is not an expert. Decker *v.* S., 58 Tex. Cr. 159, 124 S. W. 912.

1009-88 Mayes *v.* S. (Tex. Cr.), 100 S. W. 386.

Gravity of the wounds, how long assaulted party in hospital and extent of his disability, competent on question of intent to murder. Hall *v.* S. (Ala.), 65 S. 427.

1009-90 Rice *v.* P. (Colo.), 136 P. 74 (after the assault); P. *v.* Reycraft, 156 Mich. 451, 120 N. W. 993.

1009-91 McDaniel *v.* S. (Ala.), 64 S. 641; P. *v.* Rader (Cal.), 141 P. 958; Garner *v.* S., 28 Fla. 113, 133, 9 S. 835; Fields *v.* S., 46 Fla. 84, 93, 35 S. 185; Starr *v.* S., 160 Ind. 661, 67 N. E. 527; Tuck *v.* Beliles, 153 Ky. 848, 156 S. W. 883 (threats against officer); Decker *v.* S., 58 Tex. Cr. 159, 124 S. W. 912; Roch *v.* S., 56 Tex. Cr. 557, 120 S. W. 448; Vanhooser *v.* S., 55 Tex. Cr. 114, 113 S. W. 285.

Person threatened need not be named; jury may determine who was referred to. Starr *v.* S., 160 Ind. 661, 67 N. E. 527.

1009-92 Whittle *v.* S. (Tex. Cr.), 95 S. W. 1084.

1009-93 Caples *v.* S. (Tex. Cr.), 155 S. W. 267.

1009-94 P. *v.* Reycraft, 156 Mich. 451, 120 N. W. 993.

1009-95 Intent must be shown to apply the force. Luther *v.* S., 177 Ind. 619, 98 N. E. 640 (a collision between automobile and bicycle), *cit.* Vanvactor *v.* S., 113 Ind. 276, 280, 15 N. E. 341, 3 Am. St. Rep. 645; Perkins *v.* Stein, 94 Ky. 433, 22 S. W. 649, 20 L. R. A. 861; Ponder *v.* S. (Tex. Cr.), 155 S. W. 244.

Intent inferred from manner of attack, weapon used and location and character of wound inflicted. Newport *v.* S., 140 Ind. 299, 39 N. E. 926; Starr *v.* S., 160 Ind. 661, 67 N. E. 527; Larkin *v.* S., 163 Ind. 375, 71 N. E. 959. And from doing act. S. *v.* Koonse, 123 Mo. App. 655, 101 S. W. 139; S. *v.* Thornton, 136 N. C. 610, 48 S. E. 602; S. *v.* Surry, 23 Wash. 655, 63 P. 557. Assault made by accused upon another person about time in question may be shown as bearing upon intent. S. *v.* Roby, 83 Vt. 121, 74 A. 638.

Intent not to be inferred where no physical injury done, though statute gives action for bodily pain, constraint, sense of shame or other disagreeable mental emotion. Tubbs *v.* S., 50 Tex. Cr. 143, 95 S. W. 112. It may be otherwise in case of indecent assaults upon women. Tubbs *v.* S., supra. And is otherwise where bodily injury inflicted. Thompson *v.* S. (Tex. Cr.), 89 S. W. 1081.

Circumstantial evidence competent to establish intent to provoke another to commit assault. Heard *v.* S., 38 Ind. App. 511, 78 N. E. 358.

Revenge is as reprehensible as malice. S. *v.* Thornton, 136 N. C. 610, 48 S. E. 602.

Presumption.—Where intention exists to assault a person and, by inadvertence, assault is made on another, it is presumed to have been done with unlawful intent. P. *v.* Wells, 145 Cal. 138, 78 P. 470; P. *v.* Suesser, 142 Cal. 354, 75 P. 1093.

Motive is not element of secret assault; it may be established to identify wrongdoer. S. *v.* Carmon, 145 N. C. 481, 59 S. E. 657.

Sufficient evidence of premeditation. Johnson *v.* S., 59 Tex. Cr. 263, 128 S. W. 614.

1009-96 Lamb *v.* S., 55 Tex. Cr. 323, 116 S. W. 588; S. *v.* Raymo, 76 Vt. 430, 57 A. 993; S. *v.* Davis, 72 Wash. 261, 130 P. 95 (altercations with plaintiff's brother).

Fear of defendant before and at time of assault may be shown but not by prior declarations. Lamb *v.* S., 55 Tex. Cr. 323, 116 S. W. 588; S. *v.* Raymo, 76 Vt. 430, 57 A. 993.

1009-97 Stanfield *v.* S., 3 Ala. App. 54, 57 S. 402.

Other crimes cannot be shown. Simpson *v.* S., 47 Tex. Cr. 578, 85 S. W. 16; Livingston *v.* S., 47 Tex. Cr. 405, 83 S. W. 1111.

Communications from defendant to plaintiff's wife not admissible. Waldrop *v.* S., 95 Miss. 287, 48 S. 609.

1010-98 Coleman *v.* S., 45 Tex. Cr. 120, 74 S. W. 24.

1010-3 Payment of fines for fighting cannot be proved by state on cross-examination. Pollok *v.* S. (Tex. Cr.), 101 S. W. 231.

1011-8 Brooke *v.* S., 155 Ala. 78, 46 S. 491 (reason for carrying cane); Ryan *v.* Ty., 12 Ariz. 208, 100 P. 770.

Action against officer immaterial charge on which arrest made dismissed without prosecution. S. *v.* Hines, 148 Mo. App. 289, 128 S. W. 248.

1011-13 Statements of young child, in answer to questions from mother, competent if part of res gestae, though child not competent to testify. Thomas *v.* S., 47 Tex. Cr. 534, 84 S. W. 823.

Complaint of defendant's conduct made in answer to an incidental question put to one child by another is competent to corroborate testimony of assaulted child, too young to give consent, and to show consistency of her conduct. King *v.* Osborne (1905), 1 K. B. (Eng.) 551. See Queen *v.* Lillyman (1896), 2 Q. B. (Eng.) 167.

1011-15 P. *v.* Scattura, 238 Ill. 313, 87 N. E. 332.

1012-19 Wilson *v.* S. (Tex. Cr.), 67 S. W. 106.

1012-22 **Confession of** prosecutrix to defendant as to intercourse with others may be proved. Wilson *v.* S. (Tex. Cr.), 67 S. W. 106.

Age of accused, if it be element of crime, must be shown by positive proof. Hartsell *v.* S., 55 Tex. Cr. 389, 116 S. W. 1159.

1012-24 Wilcox *v.* U. S., 7 Ind. Ty. 86, 103 S. W. 774; Lacoume *v.* S. (Tex. Cr.), 143 S. W. 626.

1012-25 Evidence as to official character is incompetent in favor of policeman charged with shooting suspected person he was trying to arrest. S. *v.* Surry, 23 Wash. 655, 63 P. 557.

1013-26 Lacoume *v.* S. (Tex. Cr.), 143 S. W. 626.

"Evidence of the bad character of one charged with crime, who has testified in his own behalf, must refer to a period prior to the making of the charge against him which is under investigation. Griffith *v.* S., 90 Ala. 583, 8 S. 812; Brown *v.* S., 46 Ala. 175; Underhill on Criminal Evidence (2d Ed.) §83." McGuire *v.* S., 2 Ala. App. 51, 57 S. 51.

1013-30 Collins *v.* S., 3 Ala. App. 64, 58 S. 80; Edmondson *v.* S., 1 Ga. App. 116, 57 S. E. 947; S. *v.* Kimbrell, 151 N. C. 702, 66 S. E. 208; Harrison *v.* S. (Tex. Cr.), 102 S. W. 412; Chapman *v.* S., 48 Tex. Cr. 18, 85 S. W. 1073.

1013-31 **Self-defense is not involved** in a prosecution under statute for assault with a cowhide, being then armed with a deadly weapon. S. *v.* Taylor, 50 Or. 449, 93 P. 252.

Party at fault, or one who voluntarily enters a combat, may not excuse himself on ground of self-defense unless he shows he withdrew therefrom. Starr *v.* S., 160 Ind. 661, 67 N. E. 527.

Duty to retreat.—S. *v.* Harrigan, 4 Penne. (Del.) 129, 55 A. 5.

1013-32 Boice *v.* S. (Ala.), 65 S. 83; Robey *v.* S. (Tex. Cr.), 163 S. W. 713; Menach *v.* S. (Tex. Cr.), 97 S. W. 503; Money *v.* S. (Tex. Cr.), 97 S. W. 90; Greer *v.* S. (Tex. Cr.), 106 S. W. 359.

Directions given teacher by school authorities, not provable to show absence of malice. S. *v.* Thornton, 136 N. C. 610, 48 S. E. 602.

1013-33 **Habit of people with** whom defendant associated of amusing themselves by throwing knives at each other cannot be proved. McCardell *v.* S. (Tex. Cr.), 77 S. W. 446.

Proof of heat of blood does not rebut statutory presumption of malice. C. *v.* Scanlon, 2 Pa. C. C. 605.

Declarations a few moments after assault, admissible. Humphrey *v.* S.,

55 Tex. Cr. 329, 116 S. W. 570; Faurie *v.* Lazelle, 205 N. Y. 526, 99 N. E. 80 (plaintiff's prior threat of bodily harm to defendant).

1013-34 Spear *v.* S., 3 Ala. App. 52, 57 S. 510. *Contra.* S. *v.* Kimbrell, 151 N. C. 702, 66 S. E. 208.

"Are you not mad with defendant because of a mortgage he has on your property?" was a legitimate and proper question to ask prosecuting witness on cross-examination. Wheat *v.* S., 2 Ala. App. 242, 57 S. 68.

1014-35 Jennings *v.* Appleman, 159 Mo. App. 12, 139 S. W. 817; P. *v.* Franzone, 211 N. Y. 284, 105 N. E. 407.

Warrant for defendant's arrest, sworn out by prosecuting witness, competent to show malice. S. *v.* Sullivan, 55 W. Va. 597, 47 S. E. 267. It is otherwise as to civil action to recover damages for same assault involved in a criminal case, and as to filing charges against defendant as an officer. S. *v.* Ratledge, 5 Penne. (Del.) 91, 58 A. 944.

1014-36 Roper *v.* U. S., 7 Ind. Ty. 185, 104 S. W. 581; S. *v.* Phillips, 233 Mo. 299, 135 S. W. 4.

Relations with previous wives on trial for wife beating.—Treadaway *v.* S., 61 Tex. Cr. 546, 135 S. W. 147.

1014-37 Stevens *v.* S., 84 Neb. 759, 122 N. W. 58; Lacoume *v.* S. (Tex. Cr.), 143 S. W. 626.

Assault and battery.—P. *v.* Durham, 170 Mich. 598, 136 N. W. 431.

Evidence of former assault, of which complainant knew, competent. Turner *v.* S., 5 O. C. C. 537.

Habit of prosecuting witness as to carrying arms may be shown. Fields *v.* S., 46 Fla. 84, 95, 35 S. 185.

1015-45 See P. *v.* Colletta, 65 App. Div. 570, 72 N. Y. S. 903.

1015-47 If there is a dispute as to who committed assault with a weapon defendant may show facts indicating a third party was possessed of a weapon shortly after assault. DeBlazio *v.* S., 139 Wis. 534, 121 N. W. 131.

1015-50 Shubert *v.* S., 127 Ga. 42, 55 S. E. 1045; Reese *v.* S. (Tex. Cr.), 98 S. W. 842.

1015-51 C. *v.* Brungess, 23 Pa. C. C. 13.

Right to use force in defense of another must be shown to have been exercised under circumstances justifying the other in using force in his own defense; it cannot be shown in defense of one who was about voluntarily to commit a felony with person assaulted. S. *v.* Young, 52 Or. 227, 96 P. 1067.

1015-52 Johnston *v.* U. S., 154 Fed. 445, 83 C. C. A. 299; Money *v.* S. (Tex. Cr.), 97 S. W. 90.

"While the evidence showed that at least two of the officers were armed when the difficulty occurred, and that they shot at the defendant, nevertheless the court refused to allow the officers to answer questions propounded to them by the defendant asking them if they were not armed when they came on his premises, where they carried such arms, etc. The defendant, in resisting the seizure of the flour and in resisting the arrest, armed himself with a gun, which he afterwards used in the difficulty, and we think that the above evidence which the defendant sought to introduce was at least competent because it tended to explain why the defendant procured his gun at the time of the threatened arrest." Levens *v.* S., 3 Ala. App. 45, 57 S. 497.

1015-53 S. *v.* Cleaveland, 82 Vt. 158, 72 A. 321. *Contra.* Hickey *v.* U. S., 168 Fed. 536, 93 C. C. A. 616; S. *v.* Bradbury, 67 Kan. 808, 74 P. 231.

Force may not be used to regain lost possession of chattels. Lockland *v.* S., 45 Tex. Cr. 87, 73 S. W. 1054.

1016-54 S. *v.* Scott, 142 N. C. 583, 55 S. E. 69; George *v.* S., 47 Tex. Cr. 545, 84 S. W. 1057.

1016-55 S. *v.* Scott, 142 N. C. 583, 55 S. E. 69.

1016-57 P. *v.* Craig, 152 Cal. 42, 91 P. 997; Gray *v.* S. (Tex. Cr.), 86 S. W. 764.

1016-59 Wray *v.* S., 2 Ala. App. 139, 57 S. 144; Butler *v.* S., 10 Ga. App. 463, 73 S. E. 685.

1017-70 P. *v.* Green, 155 Mich. 524, 119 N. W. 1087.

Influence of chastisement upon pupil cannot be shown by teacher. S. *v.* Thornton, 136 N. C. 610, 48 S. E. 602.

1018-73 Pendency of civil action may be shown in mitigation of fine. Caldwell *v.* S., 160 Ala. 96, 49 S. 679.

1018-74 Hall *v.* S. (Ala.), 65 S. 427.

1018-75 Menach *v.* S. (Tex. Cr.), 97 S. W. 503.

1018-79 Money *v.* S. (Tex. Cr.), 97 S. W. 90.

In Georgia opprobrious words may justify moderate assault. Price *v.* S.,

118 Ga. 60, 44 S. E. 820. But aggressor in their use cannot establish a defense to a violent battery by showing use of like words provoked by him. Sutton *v.* S., 2 Ga. App. 659, 58 S. E. 1108.

1018-81 **Verbal abuse and insult** may be shown only in mitigation of punishment. S. *v.* Leuhrsman, 123 Ia. 476, 99 N. W. 140.

Abusive editorial admissible under statute allowing proof of use of opprobrious words. Brooke *v.* S., 155 Ala. 78, 46 S. 491.

1019-82 Wilson *v.* S. (Tex. Cr.), 78 S. W. 232.

1019-84 S. *v.* McCann, 43 Or. 155, 72 P. 137.

1019-85 S. *v.* Thornton, 136 N. C. 610, 48 S. E. 602.

Character may, it seems, be proved if defendant a newcomer. Money *v.* S. (Tex. Cr.), 97 S. W. 90.

1019-88 Evidence of defendant's difficulties with a particular person cannot be elicited from him. Caldwell *v.* S., 160 Ala. 96, 46 S. 679.

1020-90 *Contra.* C. *v.* Collberg, 119 Mass. 350, 20 Am. Rep. 328; S. *v.* Roby, 83 Vt. 121, 74 A. 638 (because affair concerns public peace and dignity).

1020-91 King *v.* Osborne (1905), 1 K. B. (Eng.) 551.

1020-92 Protest and exclamation by child renders rule as to assent inapplicable. P. *v.* Colletta, 65 App. Div. 570, 72 N. Y. S. 903.

1020-97 Brooke *v.* S., 155 Ala. 78, 46 S. 491; Tuberville *v.* S. (Miss.), 38 S. 333.

1020-98 See Decker *v.* S., 58 Tex. Cr. 159, 124 S. W. 912.

ASSENT.

Capacity, 3-5; *Knowledge,* 3-5.

3-4 Keyes *v.* Co., 81 Vt. 420, 71 A. 201 (by principal informed of agent's acts).

3-5 Harper *v.* **Ins. Co.,** 6 Ga. App. 139, 64 S. E. 567.

Capacity to assent is to be determined with reference to particular transaction. Jacks *v.* Estee, 139 Cal. 507, 73 P. 247.

Knowledge of material facts a prerequisite. National Bk. *v.* Graham, 16 Colo. App. 498, 66 P. 684.

Presumption of knowledge.—See infra, 10-40.

3-6 McIntosh *v.* R. Co., 17 Ida. 100, 105 P. 66; Plaff *v.* Express Co., 251 Ill. 243, 95 N. E. 1089; New York & C. G. C. Co. *v.* Graham, 226 Pa. 348, 75 A. 657; Harris M. Co. *v.* Bryan (Tex. Civ.), 125 S. W. 999. *Contra,* in action by husband for alienation of wife's affections. Milewski *v.* Kurtz, 77 N. J. L. 132, 71 A. 107.

State must show absence of consent of owner to entry of burglarized premises. Brown *v.* L., 58 Tex. Cr. 336, 125 S. W. 915.

4-8 Payson *v.* Milan, 144 Ill. App. 204 (resolution of village board). See "Accounts," etc., supra, 163-20.

Assent evidenced by writing can only be overthrown by clear proof. Choctaw & M. R. Co. *v.* Newton, 140 Fed. 225, 71 C. C. A. 655.

4-9 McKell *v.* R. C., 175 Fed. 321, 99 C. C. A. 109; White *v.* R. Co., 145 Ia. 408, 124 N. W. 309; Royster *v.* Heck, 29 Ky. L. R. 634, 94 S. W. 8; Reddy *v.* Raymond, 194 Mass. 367, 80 N. E. 484 (by creditors to assignment); Graves *v.* Morgan, 182 Mass. 161, 65 N. E. 50; Taylor, etc. Co. *v.* Nichols (N. J. L.), 65 A. 695; Willson *v.* Co., 67 S. C. 467, 46 S. E. 279.

Direct testimony of witness as to his assent, competent. Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37; Davis *v.* S., 159 Ala. 104, 48 S. 694 (to act of another).

4-10 Watt *v.* Watt, 10 West. L. R. (Can.) 697 (silence as to terms upon which services to be rendered); Rudolph Wurlitzer Co. *v.* Dickinson, 153 Ill. App. 36, *aff.* in 247 Ill. 27, 93 N. E. 132; DeWolff *v.* Co., 106 Md. 472, 67 A. 1099; Centerville *v.* Jenter, 25 S. D. 314, 126 N. W. 575. See Southern R. Co. *v.* Johnson, 2 Ga. App. 36, 58 S. E. 333 (shipper must declare value of goods); Moore *v.* Thompson, 93 Mo. App. 336, 67 S. W. 680 (failure to repudiate after knowledge of assignment).

4-11 Wertz *v.* Mulloy, 144 Ill. App. 329.

5-17 Failure to object to doing what is prohibited is evidence of consent. S. *v.* Morgan, 134 Mo. App. 726, 115 S. W. 491.

5-18 Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181; King *v.* Kahn, 157 Ill. App. 251; Tanner *v.* Clapp, 139 Ill. App. 353 (affirmative action required); Lawson *v.* Crane, 83 Vt. 115, 74 A. 641.

5-19 See Hartford M. Co. *v.* Co. (Ky.), 121 S. W. 477.

6-24 Russell *v.* May, 77 Ark. 89, 90 S. W. 617; Whitaker *v.* Whitaker, 175 Mo. 1, 74 S. W. 1029; Peters *v.* Berkemeier, 184 Mo. 393, 83 S. W. 747; Lake *v.* Weaver, 76 N. J. Eq. 280, 74 A. 451; Whiting *v.* Hoglund, 127 Wis. 135, 106 N. W. 391. See infra, "Presumptions," 906-13.

8-35 See Buttrick L. Co. *v.* Collins, 202 Mass. 413, 89 N. E. 138; Harris M. Co. *v.* Bryan (Tex. Civ.), 125 S. W. 999; Ryan *v.* Co., 36 Utah 382, 104 P. 218; infra, "Sales," 508-95.

9-36 Henderson *v.* Mahoney, 31 Tex. Civ. 539, 72 S. W. 1019. See Webster *v.* Keck, 64 Neb. 1, 89 N. W. 410.

9-37 Prestwood *v.* Carlton, 162 Ala. 327, 50 S. 254 (in absence of fraud); Pratt *v.* Metzger, 78 Ark. 177, 95 S. W. 451; Whiting *v.* Davidge, 23 App. Cas. (D. C.) 156; Toledo C. S. Co. *v.* Garrison, 28 App. Cas. (D. C.) 243; Rounsaville *v.* Co., 127 Ga. 735, 56 S. E. 1030; Mower H. C. Co. *v.* Hill, 135 Ia. 600, 113 N. W. 466; Paris Mfg. Co. *v.* Carle, 116 Mo. App. 581, 92 S. W. 748; Johnston *v.* Ins. Co., 93 Mo. App. 580; Rose *v.* R. Co., 35 Mont. 70, 88 P. 767; Piper *v.* R., 75 N. H. 435, 75 A. 1041; Alexander *v.* Ferguson, 73 N. J. L. 479, 63 A. 998; Weddington *v.* Ins. Co., 141 N. C. 234, 54 S. E. 271; Reed *v.* Coughran, 21 S. D. 257, 111 N. W. 559; Farlow *v.* Chambers, 21 S. D. 128, 110 N. W. 94; Bostwick *v.* Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246.

Proof of fraud rebuts presumption of assent. Shook *v.* Co., 75 Kan. 301, 89 P. 653; St. Louis J. Co. *v.* Bennett, 75 Kan. 743, 90 P. 246; Western Mfg. Co. *v.* Cotton, 31 Ky. L. R. 1130, 104 S. W. 758; Bostwick *v.* Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246.

Intoxication.—See Kuhlman *v.* Wieben, 129 Ia. 188, 105 N. W. 445; Hauber *v.* Leibold, 76 Neb. 706, 107 N. W. 1042; Case Co. *v.* Meyers, 78 Neb. 685, 111 N. W. 602, 9 L. R. A. (N. S.) 970; Waldron *v.* Angleman, 71 N. J. L. 166, 58 A. 568; Fowler *v.* Co., 208 Pa. 473, 57 A. 959.

Mental incapacity.—Allen *v.* Allen, 79 Vt. 173, 64 A. 1110. See Jacks *v.* Estee, 139 Cal. 507, 73 P. 247.

Party unable to read.—In such cases fraud is more easily established. Muller *v.* Kelly, 116 Fed. 545; Am. J. Co. *v.* Witherington, 81 Ark. 134, 98 S. W. 695; Melle *v.* Candelora, 88 N. Y. S. 385; Hicks *v.* Harbison, 212 Pa. 437, 61 A. 958; Fulton *v.* Messenger, 61 W. Va. 477, 56 S. E. 830.

10-40 Cau *v.* R. Co., 194 U. S. 427; St. Louis, etc. R. Co. *v.* Puckett, 82 Ark. 603, 101 S. W. 762; Mears *v.* R. Co., 75 Conn. 171, 52 A. 610, 56 L. R. A. 472; Atlantic C. L. R. Co. *v.* Dexter, 50 Fla. 180, 39 S. 634; Pickham *v.* R. Co., 153 Ill. App. 281; Evansville, etc. R. Co. *v.* Kevekordes (Ind. App.), 69 N. E. 1022; Chicago, etc. Co. *v.* Dunlap, 71 Kan. 67, 80 P. 34; John Hood Co. *v.* Co., 191 Mass. 27, 77 N. E. 638; Phoenix Mfg. Co. *v.* R. Co., 196 Mo. 663, 94 S. W. 235; Florman *v.* Co., 79 N. J. L. 63, 74 A. 446; Nashville, etc. R. Co. *v.* Stone, 112 Tenn. 348, 79 S. W. 1031; St. Louis, etc. R. Co. *v.* McIntyre, 36 Tex. Civ. 399, 82 S. W. 346; Ullman *v.* R. Co., 112 Wis. 168, 88 N. W. 1103.

Contra. Baltimore, etc. R. Co. *v.* Fox, 113 Ill. App. 180; Elgin, etc. R. Co. *v.* Co., 98 Ill. App. 311; Wabash R. Co. *v.* Thomas, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.) 1041; Chicago, etc. R. Co. *v.* Farm, 194 Ill. 9, 61 N. E. 1095; Central R. Co. *v.* Hall, 124 Ga. 322, 52 S. E. 679.

See Carpenter *v.* R. Co., 6 Penne. (Del.) 15, 64 A. 252.

Assent presumed from repeated shipments.—Texas & P. R. Co. *v.* Byers (Tex. Civ.), 84 S. W. 1087.

Signature to bill of lading by shipper raises presumption of assent. O'Malley *v.* R. Co., 86 Minn. 380, 90 N. W. 974. See Missouri, etc. R. Co. *v.* Patrick, 5 Ind. Ty. 742, 88 S. W. 330.

To conditions on back of bill of lading.—Baltimore, etc. R. Co. *v.* Doyle, 142 Fed. 669, 74 C. C. A. 245.

10-41 Hailparn *v.* Co., 50 Misc. 566, 99 N. Y. S. 464.

Presentation of shipping order by agent.—Russell *v.* R. Co., 70 N. J. L. 808, 59 A. 150, 67 L. R. A. 433.

10-42 Coggswell *v.* Weir, 101 N. Y. S. 188; Olds *v.* R. Co., 107 App. Div. 26, 94 N. Y. S. 924.

11-46 Keyes-M. Co. *v.* R. Co., 113 Mo. App. 144, 87 S. W. 553; Hoover *v.* R. Co., 113 Mo. App. 688, 88 S. W. 769; Houston, etc. R. Co. *v.* Smith, 44 Tex. Civ. 299, 97 S. W. 836; Chicago, etc. R. Co. *v.* Halsell, 36 Tex. Civ. 522, 81 S. W. 1243. See Frasier *v.* R. Co., 73 S. C. 140, 52 S. E. 964.

Terms of oral contract may be proved by unsigned bill of lading. Missouri, etc. R. Co. *v.* Patrick, 144 Fed. 632, 75 C. C. A. 434.

No merger where time to read contract not given. McNeill *v.* R. Co. (Tex. Civ.), 86 S. W. 32.

11-47 Adams Exp. Co. *v.* Carnahan, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647; DeWolff *v.* Co., 106 Md. 472, 67 A. 1099; Southern Exp. Co. *v.* Stevenson, 89 Miss. 233, 42 S. 670. *Contra,* Southern Exp. Co. *v.* Briggs, 1 Ga. App. 294, 57 S. E. 1066.

Receipt book.—Assent presumed where receipt comes from a book kept by shipper and habitually used. Bernstein *v.* Weir, 40 Misc. 635, 83 N. Y. S. 48; Fried *v.* Co., 51 Misc. 669, 100 N. Y. S. 1007.

Delivery by agent.—Carrier must show agent's authority to make special contract. Adams Exp. Co. *v.* Adams, 29 App. Cas. (D. C.) 250; Hayes *v.* Co., 74 N. J. L. 537, 65 A. 1044; Woolsey *v.* R. Co., 106 App. Div. 228, 94 N. Y. S. 56.

Notice will not always raise presumption of assent. Adams Exp. Co. *v.* Bratton, 106 Ill. App. 563; Hayes *v.* Co., 74 N. J. L. 537, 65 A. 1044. See McMillan *v.* Co., 123 Ia. 236, 98 N. W. 629.

12-48 Remmel *v.* Griffin, 81 Ark. 269, 99 S. W. 70; Parsons *v.* Lane, 97 Minn. 98, 106 N. W. 485; Johnson *v.* Co., 73 N. H. 259, 60 A. 1009; Rayburn *v.* Co., 138 N. C. 379, 50 S. E. 762; Travelers' Ins. Co. *v.* Jones, 32 Tex. Civ. 146, 73 S. W. 978. *Contra.* Richardson *v.* Ins. Co., 143 Ill. App. 279.

Delivery of insurance application.—See Aetna I. Co. *v.* Ryan, 53 Misc. 614, 103 N. Y. S. 756; Hartford F. Ins. Co. *v.* Whitman, 75 O. St. 312, 79 N. E. 459.

12-52 Malone *v.* Co., 86 N. Y. S. 1039; Colvin *v.* Fargo, 47 Misc. 642, 94 N. Y. S. 377; Engberman *v.* Co., 84 N. Y. S. 201.

12-53 Saunders *v.* R. Co., 128 Fed. 15, 62 C. C. A. 523; Boling *v.* R. Co., 189 Mo. 219, 88 S. W. 35; Rose *v.* R. Co., 35 Mont. 70, 88 P. 767; Aplington *v.* Co., 110 App. Div. 250, 97 N. Y. S. 329; Jacobs *v.* R. Co., 19 Pa. Super. 13; Mogill *v.* R. Co., 25 Pa. Super. 164; Dagnall *v.* R. Co., 69 S. C. 110, 48 S. E. 97; Gulf, etc. R. Co. *v.* Riney, 41 Tex. Civ. 398, 92 S. W. 54.

Presumption from signature.—Daniels *v.* R. Co., 62 S. C. 1, 39 S. E. 762.

Immateriality of lack of signature. Freeman *v.* R. Co., 71 Kan. 827, 80 P. 592.

Limitation must be clearly expressed. Dow *v.* R. Co., 81 App. Div. 362, 80 N. Y. S. 941.

Posting notice in waiting room insufficient. Norman *v.* R. Co., 65 S. C. 517, 44 S. E. 83.

Pass.—Duncan *v.* R. Co., 113 Fed. 508; Boering *v.* R. Co., 20 App. Cas. (D. C.) 500; Holly *v.* R. Co., 119 Ga. 767, 47 S. E. 188; Dow *v.* R. Co., 81 App. Div. 362, 80 N. Y. S. 941.

Mileage book.—Kast *v.* R. Co., 28 Pa. Super. 107.

Excursion ticket.—Jacobs *v.* R. Co., 208 Pa. 535, 57 A. 982.

1000 mile ticket.—Spiess *v.* R. Co., 71 N. J. L. 90, 58 A. 116.

13-54 The Majestic, 166 U. S. 375; Little Rock, etc. R. Co. *v.* Record, 74 Ark. 125, 85 S. W. 421; McCollum *v.* R. Co., 31 Utah 494, 88 P. 663.

"Look on the back." Freeman *v.* R. Co., 71 Kan. 327, 80 P. 592.

13-55 Assent of director to wrongful incurring of indebtedness by corporation will not be presumed from negligence in attending to corporate business. Chick *v.* Fuller, 114 Fed. 22, 51 C. C. A. 648; Taylor *v.* C., 25 Ky. L. R. 374, 75 S. W. 244; Thomas *v.* Penniman, 105 Md. 475, 66 A. 291; Appleton *v.* Co., 65 N. J. Eq. 375, 54 A. 454; Williams *v.* Brewster, 117 Wis. 370, 93 N. W. 479.

13-57 Payment under contract may be shown as a circumstance though it is provided it shall not be an acceptance. Handy *v.* Bliss, 204 Mass. 513, 90 N. E. 864.

ASSIGNMENTS.

Evidence of indebtedness, 27-28.

For a discussion of remedies, parties, and pleadings, see 3 STANDARD PROC. 84, *et seq.*

15 Assignment by one of two corporations under same management. Gilbert *v.* Bk. (Ind. App.), 101 N. E. 395.

Second assignment to explain first. Missouri, etc. R. Co. *v.* Wood (Tex. Civ.), 152 S. W. 487.

16-1 Brandt *v.* Co., (1905) App. Cas. (Eng.) 454; In re Berkebile, 144 Fed. 572; Wooster *v.* Trowbridge, 120 Fed. 667, 57 C. C. A. 129; S. W. Com. Co.

v. Owesney, 10 Ariz. 49, 85 P. 724; Bauer *v.* S., 144 Cal. 740, 78 P. 280; Forsyth *v.* Ryan, 17 Colo. App. 511, 68 P. 1055; Andrews *v.* Co., 1 Ga. App. 560, 58 S. E. 130; Columbia F. & T. Co. *v.* Bk., 116 Ky. 364, 76 S. W. 156; Harlow *v.* Bartlett, 96 Me. 294, 52 A. 638; Leopuld *v.* Weeks, 96 Md. 280, 53 A. 937; Hovey *v.* R. Co., 135 Mich. 147, 97 N. W. 398; Ebel *v.* Piehl, 134 Mich. 64, 95 N. W. 1004; New Jersey P. Co. *v.* Gluck, 79 N. J. L. 115, 74 A. 443; Sullivan *v.* Visconti, 68 N. J. L. 543, 53 A. 598; Donovan *v.* Middlebrook, 95 App. Div. 365, 88 N. Y. S. 607; Harlow *v.* Co., 53 Or. 272, 100 P. 7; Zilke *v.* Woodley, 36 Wash. 84, 78 P. 299; Dickerson *v.* Spokane, 35 Wash. 414, 77 P. 730.

A question of fact.—See Forsyth *v.* Ryan, 17 Colo. App. 511, 68 P. 1055; Hixson Map Co. *v.* Co., 5 Neb. (Unof.) 388, 98 N. W. 872.

Extent of assignment, governed by intent. Chemical Co. *v.* McNair, 139 N. C. 326, 51 S. E. 949.

Unexpressed intention immaterial Provident Nat. Bk. *v.* Co., 45 Tex. Civ. 273, 100 S. W. 1024.

Direct testimony of assignor as to intent, proper. Nolan *v.* Nolan, 155 Cal. 476, 101 P. 520; Crocker *v.* Muller, 40 Misc. 685, 83 N. Y. S. 189.

Judicial notice taken of method by which money lenders take assignments of collateral and reassign same. Selleck *v.* Co., 117 N. Y. S. 964.

16-2 Wooster *v.* Trowbridge, 120 Fed. 667, 57 C. C. A. 129; Alabama I. Co. *v.* Smith, 155 Ala. 287, 46 S. 475; Bunnell *v.* Bronson, 78 Conn. 679, 63 A. 396. See Little *v.* Berry (Ky.), 113 S. W. 902 (entries must describe things assigned so they may be identified); Chemical Co. *v.* McNair, 139 N. C. 326, 51 S. E. 949.

16-3 Cushing *v.* Chapman, 115 Fed. 237; Forsyth *v.* Ryan, 17 Colo. App. 511, 68 P. 1055; Mathison *v.* Magnuson, 226 Ill. 368, 80 N. E. 885; National City Bk. *v.* Torrent, 130 Mich. 259, 89 N. W. 938; Interurban C. Co. *v.* Hayes, 191 Mo. 248, 89 S. W. 927; Cogan *v.* Co., 69 N. J. Eq. 358, 60 A. 408; Randel *v.* Vanderbilt, 75 App. Div. 313, 78 N. Y. S. 124, *aff.* 180 N. Y. 547, 73 N. E. 1131; Holmes *v.* Bell, 139 App. Div. 455, 124 N. Y. S. 301, *aff.* 200 N. Y. 586, 94 N. E. 1094.

Potential existence of debt sufficient to sustain parol equitable assignment. Campbell *v.* Co., 36 Tex. Civ. 641, 82 S. W. 794.

17-4 Forsyth *v.* Ryan, 17 Colo. App. 511, 68 P. 1055; Gray *v.* Bever, 122 Ill. App. 1; Bernstein *v.* Horth, 85 N. Y. S. 263; Haller *v.* Ingraham, 101 N. Y. S. 789; German Ins. Co. *v.* Gibbs, 42 Tex. Civ. 407, 92 S. W. 1068, 96 S. W. 760; Standifer *v.* Co. (Tex. Civ.), 94 S. W. 144.

17-5 Harlow *v.* Bartlett, 96 Me. 294, 52 A. 638; Coles *v.* Saitta, 71 Misc. 544, 130 N. Y. S. 857; Comer *v.* Flooro (Tex. Civ.), 88 S. W. 246; Davis & Goggin *v.* State Bk. (Tex. Civ.), 156 S. W. 321.

18-6 Alabama I. Co. *v.* Smith, 155 Ala. 287, 46 S. 475; Lutter *v.* Grosse, 26 Ky. L. R. 585, 82 S. W. 278; Armstrong *v.* Chisolm, 99 App. Div. 465, 91 N. Y. S. 299.

Check.—Fortier *v.* Delgado, 122 Fed. 604, 59 C. C. A. 180. See Provident Nat. Bk. *v.* Harnett & Co., 45 Tex. Civ. 273, 100 S. W. 1024.

Parol evidence competent to show third person was to have some benefit of assignment. King *v.* Miller, 53 Or. 53, 97 P. 542.

18-7 Andrews *v.* Frierson, 134 Ala. 626, 33 S. 6; W. U. T. Co. *v.* Ryan, 126 Ga. 191, 55 S. E. 21; Wamsley *v.* Ward, 61 W. Va. 65, 55 S. E. 998.

Claim for wages.—Western & A. R. Co. *v.* Co., 128 Ga. 74, 57 S. E. 100; Usher *v.* R. Co., 125 Ga. 809, 54 S. E. 704; Whitcomb *v.* Waterville, 99 Me. 75, 58 A. 68.

19-8 Wheelock *v.* Hull, 124 Ia. 752, 100 N. W. 863. See Columbia F. & T. Co. *v.* Bk., 116 Ky. 364, 76 S. W. 156; Campbell *v.* Grant Co., 36 Tex. Civ. 641, 82 S. W. 794; Wamsley *v.* Ward, 61 W. Va. 65, 55 S. E. 998.

20-9 Staninger *v.* Tabor, 103 Ill. App. 330; First State Bk. *v.* Thuet, 88 Minn. 364, 93 N. W. 1; Phinney *v.* S., 36 Wash. 236, 78 P. 927.

21-10 Kuhnes *v.* Cahill, 128 Ia. 594, 104 N. W. 1025; Columbia F. & T. Co. *v.* Bk., 116 Ky. 364, 76 S. W. 156; Pennell *v.* Ennis, 126 Mo. App. 355, 103 S. W. 147; Loan & S. Bk. *v.* Bk., 74 S. C. 210, 54 S. E. 364.

21-11 Bowker *v.* Haight & F. Co., 146 Fed. 257; Donohoe-K. Bkg. Co. *v.* R. Co., 138 Cal. 183, 71 P. 93; Love *v.* Stock Exch., 5 Ind. Ty. 202, 82 S. W. 721, 67 L. R. A. 617, *aff.* in Poland *v.* Love, 7 Ind. Ty. 42, 103 S. W. 759; Lonier *v.* Bk., 149 Mich. 483, 112 N.

W. 1119; Pennell *v.* Ennis, 126 Mo. App. 355, 103 S. W. 147; Balt. & O. R. Co. *v.* Bk., 102 Va. 753, 47 S. E. 837.

22-14 Donohoe-K. Bkg. Co. *v.* R. Co., 138 Cal. 183, 71 P. 93; Fulton *v.* Gesterding, 47 Fla. 150, 36 S. 56; Reviere *v.* Chambliss, 120 Ga. 714, 48 S. E. 122; Clark *v.* Bank, 72 Kan. 1, 82 P. 582; Borough *v.* Montgomery (N. J.), 60 A. 954; Izzo *v.* Ludington, 79 N. Y. S. 744, *aff.* 178 N. Y. 621, 70 N. E. 1100; Curtis L. Co. *v.* McLoughlin, 80 App. Div. 636, 80 N. Y. S. 1016; Nelson *v.* Nelson, 31 Wash. 116, 71 P. 749; Frederick *v.* Co., 47 Wash. 85, 91 P. 570.

23-16 See Slade *v.* Squier, 133 App. Div. 666, 118 N. Y. S. 278.

23-17 White *v.* R. Co., 145 Ia. 408, 124 N. W. 309; S. *v.* McClellan, 82 Vt. 361, 73 A. 993.

24-18 Duryea *v.* Harvey, 183 Mass. 429, 67 N. E. 351; Bone *v.* Holmes, 195 Mass. 495, 81 N. E. 290 (bond).

Non-delivery not evidence of fraud upon creditors. Young *v.* Upson, 115 Fed. 192.

25-21 Howe *v.* Howe, 97 Me. 422, 54 A. 908; Ebel *v.* Piehl, 134 Mich. 64, 95 N. W. 1004.

25-22 Holmes *v.* Seaman, 117 App. Div. 381, 102 N. Y. S. 616; Wray *v.* Miller, 120 N. Y. S. 787; Rettig *v.* Becker, 11 Pa. Super. 395; Moody *v.* Rowland, 46 Tex. Civ. 412, 102 S. W. 911.

Pre-existing debt as consideration. Bk. *v.* Bk., 3 Cal. App. 561, 86 P. 820.

Adequacy may be material.—Uncas P. Co. *v.* Corbin, 75 Conn. 675, 55 A. 165.

Assignment may be made as a gift. Ebel *v.* Piehl, 134 Mich. 64, 95 N. W. 1004; Henderson *v.* R. Co., 131 Mich. 438, 91 N. W. 630.

25-23 Detmer W. Co. *v.* Van Horn, 59 Misc. 163, 110 N. Y. S. 312.

Evidence of consideration, immaterial. Forsyth *v.* Ryan, 17 Colo. App. 511, 68 P. 1055; Quigley *v.* Welter, 95 Minn. 383, 104 N. W. 236; Wallace *v.* Leroy, 57 W. Va. 263, 50 S. E. 243. See Devine *v.* Warner, 76 Conn. 229, 56 A. 562; Campbell *v.* Co., 36 Tex. Civ. 641, 82 S. W. 794.

Absolute assignment may be shown to have been made as security. Protzman *v.* Joseph, 65 W. Va. 788, 65 S. E. 461.

26-24 Haviland *v.* Johnson (Or.), 139 P. 720.

26-26 Driscoll *v.* Driscoll, 143 Cal. 528, 77 P. 471; McGuire *v.* Murphy, 107 App. Div. 104, 94 N. Y. S. 1005.

Mere possession of written evidence of chose in action raises no presumption holder holds as assignee. Fitger *v.* Guthrie, 89 Minn. 330, 94 N. W. 888; Richardson *v.* Co. (Mo.), 69 S. W. 398.

Assent of assignee to payment to debtor, not presumed. President *v.* Thorp, 79 Conn. 194, 64 A. 205, 465.

Assignment of note presumed to have been made before it matured. Johnston *v.* Loar, 145 Ill. App. 443.

Assignment conclusive unless its execution denied in statutory manner. Winer *v.* Bk., 89 Ark. 435, 117 S. W. 232.

Denial puts burden on party making it to show at least an assignment in form; that being done, burden shifts to plaintiff to show fraud. People's S. Bk. *v.* Hoppe, 132 Mo. App. 449, 111 S. W. 1190.

26-27 Hoppes *v.* R. Co., 147 Ia. 580, 126 N. W. 783 (fact of assignment).

Burden is on party attacking executed assignment. Borchers *v.* Barckers, 143 Mo. App. 72, 122 S. W. 357.

Assignment prima facie evidence of holder's right to exercise privilege available to assignor. Mundt *v.* Nat. Bk., 35 Utah 90, 99 P. 454. Burden is on party claiming title to show rights granted under recorded assignment have revested in him. Snead *v.* Scheble, 175 Fed. 570, 99 C. C. A. 578.

Want of consideration must be proved by party alleging it. Driscoll *v.* Driscoll, 143 Cal. 528, 77 P. 471; Colorado F. & I. Co. *v.* Kidwell, 20 Colo. App. 8, 76 P. 922. But see Rettig *v.* Becker, 11 Pa. Super. 395.

Assignee must establish all facts upon which he bases his claim. Price *v.* Cushing, 135 Ia. 457, 110 N. W. 1030 (in assignment of profits, fact business was carried on at a profit must be shown); Virginia-C. C. Co. *v.* McNair, 139 N. C. 326, 51 S. E. 949 (in assignment of accounts, fact specific accounts come within general assignment must be shown. And see Wagenhurst *v.* Wineland, 20 App. Cas. (D. C.) 85 (equitable assignee); Reinhardt *v.* Mark, 29 Ky. L. R. 388, 93 S. W. 32 (assignment as security); Standifer *v.* Co. (Tex. Civ.), 94 S. W. 144; Darlington M. L. Co. *v.* Co., 35 Tex. Civ. 346, 80 S. W. 238 (authority of agent); Gulf, etc. R. Co. *v.* Eldredge, 35 Tex.

Civ. 167, 80 S. W. 556 (notice to debtor). Assignment must be shown by party who alleges it was made. Cushing *v.* Hartwig, 138 Mo. App. 114, 120 S. W. 109; Attoyac R. L. Co. *v.* Payne, 57 Tex. Civ. 327, 122 S. W. 278.

27-28 Sintes *v.* Commerford, 112 La. 706, 36 S. 656; Quigley *v.* Welter, 95 Minn. 383, 104 N. W. 236; Houser *v.* Richardson, 90 Mo. App. 134; Cogan *v.* Co., 69 N. J. Eq. 809, 64 A. 973; Campbell *v.* Co., 36 Tex. Civ. 641, 82 S. W. 794.

Debtor must show injury before he can complain of want of notice. Knickerbocker T. Co. *v.* Coyle, 139 Fed. 792; Columbia F. & T. Co. *v.* Bk., 116 Ky. 364, 76 S. W. 156; Neilsen *v.* Albert Lea, 91 Minn. 388, 98 N. W. 195; Shepherd *v.* R. Co., 29 Pa. Super. 291.

Evidence to establish notice.—Knickerbocker T. Co. *v.* Coyle, 139 Fed. 792, *over.* Third Nat. Bk. *v.* Atlantic City, 126 Fed. 413; Bunnell *v.* Bronson, 78 Conn. 679, 63 A. 396; President *v.* Thorp, 79 Conn. 194, 64 A. 205; Peterson *v.* Ball, 121 Ia. 544, 97 N. W. 79 (need not be in writing); Sintes *v.* Commerford, 112 La. 706, 36 S. 656.

Proof of recording is proof of notice to third persons. Fordyce *v.* McPhetrige, 71 Ark. 327, 73 S. W. 1096; Kansas City, etc. R. Co. *v.* Joslin, 74 Ark. 551, 86 S. W. 435; Bush *v.* R. Co., 76 Ark. 497, 89 S. W. 86; Whitcomb *v.* Waterville, 99 Me. 73, 58 A. 68; Cogan *v.* Co., 69 N. J. Eq. 358, 60 A. 408; Park Co. *v.* McDermott, 25 R. I. 93, 54 A. 924; Standifer *v.* Co. (Tex. Civ.), 94 S. W. 141; McConaghy *v.* Clark, 35 Wash. 689, 77 P. 1084.

Evidence of indebtedness is afforded by assignment containing itemized account thereof, if it is introduced generally. Preston *v.* Co., 11 Cal. App. 190, 104 P. 462.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

Assignee's knowledge of prior lien, 41-52.

Effect on Pending Actions.—See 3 STANDARD PROC. 49.

Actions and Proceedings by Creditors. See 3 STANDARD PROC. 49-71.

Actions and Proceedings By and Against Assignee.—See 3 STANDARD PROC. 72-82.

Remedies of Assignor.—See 3 STANDARD PROC. 82-83.

29-1 Common law assignment valid although statute in existence. Memphis S. Bk. *v.* Houchens, 115 Fed. 96, 52 C. C. A. 176; Luey *v.* Freeman, 93 Minn. 274, 101 N. W. 167; Young *v.* Stone, 61 App. Div. 364, 70 N. Y. S. 558, *aff.* 174 N. Y. 517, 66 N. E. 1118.

Assignment by operation of law.—In re Salmon, 143 Fed. 395; Pollock *v.* Jones, 124 Fed. 163, 61 C. C. A. 555; Smith *v.* McCadden, 138 Ala. 284, 36 S. 376; Locke *v.* Martin, 145 Ala. 274, 40 S. 387; Hines *v.* Hays, 26 Ky. L. R. 967, 82 S. W. 1007; Smith *v.* Huntsberry, 30 Ky. L. R. 867, 99 S. W. 911; Brookshier *v.* Ins. Co., 91 Mo. App. 599.

29-2 **Statute** must be strictly followed. Young *v.* Stone, 61 App. Div. 364, 70 N. Y. S. 558, *aff.* 174 N. Y. 517, 68 N. E. 1118.

Acknowledgment necessary. See Bloomingdale *v.* Weil, 29 Wash. 611, 70 P. 94.

Recording.—Huddleson *v.* Polk, 70 Neb. 483, 97 N. W. 624; Bingham *v.* Ozmun, 19 Okla. 225, 92 P. 147. See Peeples *v.* Woolen Mills (Tex. Civ.), 90 S. W. 61.

29-5 **Deed of trust.**—Heath *v.* Wilson, 139 Cal. 362, 73 P. 182.

Mortgage.—Smead *v.* Chandler, 71 Ark. 505, 76 S. W. 1066; Wylly-G. Co. *v.* Williams, 53 Fla. 872, 42 S. 910; Joas *v.* Jordan, 21 S. D. 379, 113 N. W. 73.

Bill of sale.—Young *v.* Stone, 61 App. Div. 364, 70 N. Y. S. 558, *aff.* 174 N. Y. 517, 68 N. E. 1118.

Change of control the test.—Ives *v.* Sanguinetti, 10 Ariz. 83, 85 P. 480; Tapp *v.* Williams, 83 Ark. 182, 103 S. W. 161.

31-9 Kaufman *v.* Simon, 80 Miss. 189, 31 S. 713; Hilliard *v.* Co., 76 Vt. 57, 56 A. 283.

32-15 Acceptance of assignee may be proved by signature to instrument. Reddy *v.* Raymond, 194 Mass. 367, 80 N. E. 484.

32-16 *Contra,* if assignment conditional upon acceptance. Nixon *v.* Wks., 51 Wash. 119, 99 P. 11.

33-20 Lacy *v.* Gunn, 144 Cal. 511, 78 P. 30; Royster *v.* Heck, 29 Ky. L. R. 634, 94 S. W. 8; Reddy *v.* Raymond, 194 Mass. 367, 80 N. E. 484; Weston *v.* Nevers, 72 N. H. 65, 54 A. 703.

Rescission of assent not manifested by

bringing action on claim. Lacy *v.* Gunn, 144 Cal. 511, 78 P. 30.

Time within which creditor may assent is of the essence. Moulton *v.* Bartlett, 195 Mass. 33, 80 N. E. 619; National Bk. *v.* Bailey, 179 Mass. 415, 60 N. E. 925.

34-21 Union S. Bk. & T. Co. *v.* Co., 20 Ind. App. 325, 47 N. E. 846; Pitman *v.* Marquardt, 20 Ind. App. 431, 50 N. E. 894.

34-26 Roberts *v.* Roberts, 102 Md. 131, 62 A. 161, 1 L. R. A. (N. S.) 782.

37-36 See Thompson *v.* Shaw, 104 Me. 85, 71 A. 370.

37-38 No presumption of fraudulent intent unless terms of deed preclude any other inference. Davis Co. *v.* Augustus, 105 Va. 843, 54 S. E. 985.

38-41 Davis Co. *v.* Augustus, 105 Va. 843, 54 S. E. 985. See Claflin Co. *v.* Harrison, 44 Fla. 218, 31 S. 818.

Retention of exempt property.—Long *v.* Campbell, 133 Ala. 353, 32 S. 591; Armour *v.* Doig, 45 Fla. 162, 34 S. 249.

Debtor to approve claims submitted. Davis Co. *v.* Augustus, 105 Va. 843, 54 S. E. 985.

Compromise of disputed claims.—Davis Co. *v.* Augustus, 105 Va. 843, 54 S. E. 985.

Allowance of attorney's fees to assignee.—Davis Co. *v.* Augustus, supra.

Stipulation for release of debtor from undischarged debts.—Davis Co. *v.* Augustus, 105 Va. 843, 54 S. E. 985.

41-52 Armour *v.* Doig, 45 Fla. 162, 34 S. 249; Hayes *v.* Ammon, 90 App. Div. 604, 85 N. Y. S. 607.

Evidence held insufficient. — Illinois G. Co. *v.* H.-R. Co., 166 Mich. 520, 131 N. W. 1125.

Assignee's knowledge of prior right or lien.—Burden of proof on person attacking deed. Liquid C. Co. *v.* Whitehead (Va.), 80 S. E. 104.

43-59 Davis Co. *v.* Augustus, 105 Va. 843, 54 S. E. 185.

Violation of promises in consideration of which time for payment of debts extended. Third Nat. Bk. *v.* Co., 66 App. Div. 293, 73 N. Y. S. 114.

Relationship of parties.—City Nat. Bk. *v.* Bridges, 128 N. C. 322, 38 S. E. 888.

Inadequacy of consideration.—Bishop *v.* Co., 30 Ky. L. R. 725, 99 S. W. 644.

Confession of judgment.—International T. Co. *v.* Bk., 101 Ill. App. 548.

Keeping assignment prepared for registration. Friedenwald Co. *v.* Sparger, 128 N. C. 446, 39 S. E. 64.

43-61 Jackson *v.* Sedgwick, 189 Fed. 508.

48-72 Bishop *v.* Co., 30 Ky. L. R. 725, 99 S. W. 644.

49-73 City Nat. Bk. *v.* Bridges, 128 N. C. 322, 38 S. E. 888.

50-77 Armour *v.* Doig, 45 Fla. 162, 34 S. 249.

Declarations admissible on proof of a conspiracy. City Nat. Bk. *v.* Bridges, 128 N. C. 322, 38 S. E. 888.

Compromise of creditors' claims, after assignment, not evidence of intent to defraud non-assenting creditors. Thompson *v.* Shaw, 104 Me. 85, 71 A. 370.

51-83 Ichenhauser Co. *v.* Landrum's Assignee, 153 Ky. 316, 155 S. W. 738.

ASSUMPSIT.

For a discussion of the remedy under the common law and under the codes, see 3 STANDARD PROC. 170, *et seq.*

53-1 Ruse *v.* Williams, 14 Ariz. 445, 130 P. 887.

Money had and received.—Harr *v.* Roome, 28 App. Cas. (D. C.) 214; McGee *v.* McGee, 125 Ill. App. 436; Pease *v.* Bamford, 96 Me. 23, 51 A. 234; Devries *v.* Hawkins, 70 Neb. 656, 97 N. W. 792; Musk *v.* Hall, 34 R. I. 126, 82 A. 593.

Services rendered.—Cox *v.* Peltier, 159 Ind. 355, 65 N. E. 6; Fry *v.* Fry, 119 Mo. App. 476, 94 S. W. 990; Babcock *v.* Anson, 106 N. Y. S. 642; McDermott *v.* Soc., 24 R. I. 527, 54 A. 58.

Services rendered relatives presumed gratuitous. Gill *v.* Donovan, 96 Md. 518, 54 A. 117; Begin *v.* Begin, 98 Minn. 122, 107 N. W. 149; Brown *v.* Cumming, 27 R. I. 369, 62 A. 378. See "Executors and Administrators," infra, 428-95; "Master and Servant," infra, 504-94.

The common counts.—Cummings *v.* Synnott, 120 Fed. 84, 56 C. C. A. 490; Turner *v.* Owen, 122 Ill. App. 501; Stucky *v.* Hardy, 15 Ind. App. 19, 41 N. E. 606; Ft. Wayne, etc. R. Co. *v.* Haberkorn, 15 Ind. App. 179, 44 N. E. 322; Franek *v.* McGilvray, 144 Mich. 318, 107 N. W. 886; Plefka *v.* R. Co., 147 Mich. 641, 111 N. W. 194; Henderson *v.* Koenig, 192 Mo. 690, 91 S. W. 88; McCullough *v.* Co., 213 Pa. 110, 62 A.

521; Reilly *v.* Co., 213 Pa. 595, 63 A. 273.

Recovery without proof of fixed price. Rumford Falls B. Co. *v.* Co., 96 Me. 90, 51 A. 810.

Proof under general issue.—McCrea *v.* Parsons, 112 Fed. 917, 50 C. C. A. 612; Ward *v.* Co., 98 Ill. App. 227.

Laying promise in declaration—necessity for.—Newport N. *v.* Potter, 122 Fed. 321, 58 C. C. A. 483; Potomac L. Co. *v.* Miller, 26 App. Cas. (D. C.) 230; Wo Sing *v.* Co., 16 Haw. 17; Brown *v.* Starbird, 98 Me. 292, 56 A. 902; Wheeling Co. *v.* Co., 62 W. Va. 288, 57 S. E. 826; Waid *v.* Dixon, 55 W. Va. 191, 46 S. E. 918.

What proof necessary to allow assumpsit on sealed instruments. Brown *v.* Ins. Co., 21 App. Cas. (D. C.) 325; Fry *v.* Talbot, 106 Md. 43, 66 A. 664; Conroy *v.* Co., 27 R. I. 467, 63 A. 356.

54-5 Wheeling Co. *v.* Co., 62 W. Va. 288, 57 S. E. 826.

Seal as surplusage.—Horner *v.* Beasley, 105 Md. 193, 65 A. 820.

54-6 Stewart Mfg. Co. *v.* Co., 67 N. J. L. 577, 52 A. 391; Hale *v.* Hale, 32 Pa. Super. 37; Harrison *v.* McMillan, 109 Tenn. 77, 69 S. W. 973.

Effect of waiver of tort.—Kleinbohe *v.* Hoffman House, 50 Misc. 127, 97 N. Y. S. 1122.

It is error to admit evidence of another agreement which "did not tend to impeach defendant, and was not admissible to show what were the terms of this special contract upon which plaintiff relied." Hoopengarner *v.* Stipe, 109 Mich. 307, 135 N. W. 244.

Under general issue any proof admissible showing no cause of action. Klair *v.* R. Co., 2 Boyce (Del.) 274, 78 A. 1085.

55-7 Richards *v.* Richman, 5 Penne. (Del.) 558, 64 A. 238; Continental C. Co. *v.* Maxwell, 127 Ill. App. 19; McKinnie *v.* Lane, 230 Ill. 544, 82 N. E. 878 (payment in property good).

58-13 Verification of plea casts burden of proving joint liability upon plaintiff. Martin *v.* Trainer, 125 Ill. App. 474.

58-16 Doe *v.* Allen, 1 Cal. App. 560, 2 P. 568; Watson *v.* Fagner, 208 Ill. 136, 70 N. E. 23.

59-19 Burton *v.* Co., 132 N. C. 17, 43 S. E. 480; Lawrence *v.* Hester, 93 N. C. 79. See Michigan Yacht Co. *v.* Busch, 143 Fed. 929, 75 C. C. A. 109; Cleveland, etc. R. Co. *v.* Moore, 170 Ind. 328, 82 N. E. 52.

59-20 Richards *v.* Richman, 5 Penne. (Del.) 558, 64 A. 238; Gill *v.* Donovan, 96 Md. 518, 54 A. 117.

60-23 Holloway *v.* Co., 151 Fed. 216, 80 C. C. A. 568; Massey *v.* Greenabaum, 5 Penne. (Del.) 20, 58 A. 804; Johnson *v.* Co., 16 Haw. 693; McKinnie *v.* Lane, 230 Ill. 544, 82 N. E. 878; McArthur *v.* Whitney, 202 Ill. 527, 67 N. E. 163; Oleese *v.* Co., 211 Ill. 539, 71 N. E. 1084; Ryan *v.* Hooton, 122 Ill. App. 514; Newman *v.* Lumley, 125 Ill. App. 382; Rubens *v.* Hill, 213 Ill. 523, 72 N. E. 1127; Weigand *v.* Cannon, 118 Ill. App. 635; Union Elev. R. Co. *v.* Nixon, 99 Ill. App. 502, 199 Ill. 235, 65 N. E. 314; Peden *v.* Scott, 35 Ind. App. 370, 73 N. E. 1099; Board *v.* Gibson, 158 Ind. 471, 63 N. E. 982; Stuckey *v.* Hardy, 15 Ind. App. 19, 41 N. E. 606; Cann *v.* Rector, 111 Mo. App. 164, 85 S. W. 994; Empire Co. *v.* Co., 51 W. Va. 474, 41 S. E. 917.

60-24 Newport N. *v.* Potter, 122 Fed. 321, 58 C. C. A. 483; Boyd *v.* Bargagliotti, 12 Cal. App. 228, 107 P. 150; Peden *v.* Scott, 35 Ind. App. 370, 73 N. E. 1099; Stucky *v.* Hardy, 15 Ind. App. 19, 41 N. E. 606; Risley *v.* Beaumont, 71 N. J. L. 372, 59 A. 145; Empire C. Co. *v.* Co., 51 W. Va. 474, 41 S. E. 917. See American Surety Co. *v.* C. Co. (Mo.), 166 S. W. 333 (action implied promise for reasonable compensation—contract admissible to show time of payment).

Where contract at an end or plaintiff wrongfully prevented from completing it, proof may be made under common counts. McGonigal *v.* Raughley, 6 Penne. (Del.) 61, 63 A. 801; Richards *v.* Richman, 5 Penne. (Del.) 558, 64 A. 238; Zapel *v.* Ennis, 104 Ill. App. 175; Cook *v.* R. Co., 28 Mont. 509, 73 P. 131; Viles *v.* Co., 79 Vt. 311, 65 A. 104.

Lease.—Rubens *v.* Hill, 115 Ill. App. 565, 213 Ill. 523, 72 N. E. 1127. See Leach *v.* Co., 110 Ill. App. 338.

Promissory note.—Federation W. G. Co. *v.* Co., 58 W. Va. 477, 52 S. E. 518.

Sealed instrument.—Strobridge L. Co. *v.* Gallagher, 2 Pa. C. C. 356.

Work not covered by specifications. Wilson *v.* Wilson, 106 Mo. App. 501, 80 S. W. 711. But see Streater T. Co. *v.* Co., 217 Ill. 577, 75 N. E. 546.

61-26 Clark *v.* Holway, 101 Me. 391,

64 A. 642; Miller *v.* Wilbur, 76 Vt. 73, 56 A. 280. See Wilson *v.* Taylor, 148 Ala. 672, 41 S. 824; McKenna *v.* McKenna, 118 Ill. App. 240; Shiland *v.* Loeb, 58 App. Div. 565, 69 N. Y. S. 11.

Verbal inducements offered defendant to enter into contract, irrelevant if fraud not alleged. Langston *v.* Co., 57 Fla. 92, 49 S. 155.

62-32 See Bryant *v.* Broadwell, 140 Cal. 490, 74 P. 33; Fry *v.* Talbott, 106 Md. 43, 66 A. 664; Babcock *v.* Anson, 106 N. Y. S. 642.

62-33 Smith *v.* Sharpe, 162 Ala. 433, 50 S. 381; Camp *v.* Behlow, 2 Cal. App. 699, 84 P. 251; Kitchen *v.* Clark, 120 Ill. App. 105; Thompson *v.* Hoppert, 120 Ill. App. 588; Ross *v.* Knox, 71 N. H. 249, 51 A. 910.

Prevention of performance — effect. Thompson *v.* Hoppert, 120 Ill. App. 588; Viles *v.* Co., 79 Vt. 311, 65 A. 104.

ATHEIST.

65-4 Jones *v.* S., 145 Ala. 51, 40 S. 947; C. *v.* Kauffman, 1 Pa. C. C. 410. See C. *v.* Geary, 9 Pa. C. C. 60.

65-5 Birmingham R. Co. *v.* Jung, 161 Ala. 461, 49 S. 434.

66-6 Clinton *v.* S., 53 Fla. 98, 43 S. 312; S. *v.* Blount, 124 La. 202, 50 S. 12; S. *v.* Williams, 111 La. 179, 35 S. 505, *over.* S. *v.* Washington, 49 La. Ann. 1602, 22 S. 841, 42 L. R. A. 553n; Gambrell *v.* S., 92 Miss. 728, 46 S. 138; S. *v.* Lu Sing, 34 Mont. 31, 85 P. 521; C. *v.* Kauffman, 1 Pa. C. C. 410.

67-7 S. *v.* King, 117 Ia. 484, 91 N. W. 768; Gambrell *v.* S., 92 Miss. 728, 46 S. 138.

Dying declaration may be affected by declarant's lack of religious belief. State *v.* Zorn, 202 Mo. 12, 100 S. W. 591. Should not be excluded. S. *v.* Hood, 63 W. Va. 182, 59 S. E. 971, 15 L. R. A. (N. S.) 448.

In New York a contrary rule is established. Brink *v.* Stratton, 176 N. Y. 150, 68 N. E. 148.

68-11 Interrogation of witness as to religious belief, proper. C. *v.* Kauffman, 1 Pa. C. C. 410.

ATTACHMENT.

Actions on bonds to discharge, 81-34; *Admissions and declarations,* 87-48; *Circumstantial evidence,* 87-48; *Action on claim bond,* 88-52; *Punitive damages,* 95-88; *Burden of proof in garnishment,* 96-92; *Admission of indebtedness,* 96-92. **For a full treatment** of the proceedings, see 3 STANDARD PROC. 216-846.

72-1 Brandly *v.* Co., 130 App. Div. 410, 114 N. Y. S. 896.

Clear proof necessary.—Gatward *v.* Wheeler, 10 Ida. 66, 77 P. 23; Brandenburgh *v.* Malcolm, 102 Ill. App. 302; Chazy M. L. Co. *v.* Deely, 84 N. Y. S. 396.

Defective affidavit "testimony." Price *v.* Cohen, 118 Ga. 261, 45 S. E. 225.

72-2 Refusal to pay may be shown. Pate *v.* Vardeman (Tex. Civ.), 158 S. W. 1183.

73-3 Elliott *v.* Co., 71 Kan. 665, 81 P. 500; Abel *v.* Duffy, 106 La. 260, 30 S. 833; Schoeneman *v.* Sowle, 102 Minn. 466, 113 N. W. 1061; First Nat. Bk. *v.* Anderson, 101 Minn. 107, 111 N. W. 947; Simmons H. Co. *v.* Co., 135 Mo. App. 266, 115 S. W. 467; Stone M. Co. *v.* McWilliams, 121 Mo. App. 319, 98 S. W. 828; Bowles L. S. Co. *v.* Hunter, 91 Mo. App. 333; Waller *v.* Deranleau, 4 Neb. (Unof.) 497, 94 N. W. 1038; Hill *v.* Atanasio, 127 N. Y. S. 344; Technical Press *v.* Silverman, 142 App. Div. 423, 126 N. Y. S. 833; Jonasson *v.* Herrick, 126 App. Div. 827, 111 N. Y. S. 69; Weil *v.* Quam, 21 N. D. 344, 131 N. W. 244; Lampher-Skinner Co. *v.* Same, 21 N. D. 348, 131 N. W. 246; Jones *v.* Hoefs, 14 N. D. 232, 103 N. W. 751; Young *v.* Clark, 32 O. C. C. 374; First S. Bk. *v.* Smith (Okla.), 140 P. 150; Williams *v.* Co., 13 Okla. 5, 73 P. 269; Dunn *v.* Launch, 13 Okla. 577, 76 P. 143; Nicholson *v.* Erickson, 56 Wash. 419, 105 P. 836.

75-7 In garnishment plaintiff must show check mailed by garnishee to his creditor and transferred by latter was not transferred in good faith. Brown *v.* Pillow, 174 Fed. 967, 98 C. C. A. 579.

75-8 Dale *v.* Beasley (Ga.), 81 S. E. 849; Peck *v.* Toland, 27 S. D. 406, 131 N. W. 402.

Evidence of attachments by other creditors inadmissible. Dale *v.* Beasley (Ga.), 81 S. E. 849.

Matters precedent to attachment, admissible. Dimmock *v.* Cole, 130 Mich. 601, 90 N. W. 333.

Non-residence. — Webb *v.* Wheeler, 79 Neb. 172, 112 N. W. 369.

76-11 Dimmock *v.* Cole, 130 Mich. 601, 90 N. W. 333.

77-15 Schnull *v.* Cuddy, 36 Ind. App. 262, 74 N. E. 1030.

79-25 Dunn *v.* Claunch, 13 Okla. 577, 76 P. 143 (may be made hearing).

Complaint and original affidavit constitute part of record upon motion to dissolve. Goldman *v.* Floter, 142 Cal. 388, 76 P. 58.

Ex parte affidavits not sufficient where application to discharge made by third person claimant. See U. S. *v.* Neely, 146 Fed. 764.

Oral admission at former trial, insufficient. Goldman *v.* Floter, 142 Cal. 388, 76 P. 58.

79-26 Williams *v.* Co., 13 Okla. 5, 73 P. 269.

80-27 Sparks *v.* Bell, 137 Cal. 415, 70 P. 281.

Motion based on judgment opens door for counter affidavits. Belmont *v.* Co., 80 App. Div. 537, 80 N. Y. S. 771.

Motion to vacate by judgment creditor of defendant opens door. Pfluke *v.* Papulias, 42 Misc. 18, 85 N. Y. S. 543; National Bk. *v.* Tasker, 1 Pa. C. C. 173.

80-28 See Young *v.* Clark, 32 O. C. C. 374.

80-29 Sparks *v.* Bell, 137 Cal. 415, 70 P. 281.

Weight of affidavits on appeal. Schoeneman *v.* Sowle, 102 Minn. 466, 113 N. W. 1061; Fremont B. Co. *v.* Pekarek, 4 Neb. (Unof.) 531, 95 N. W. 12.

81-31 *Contra.* Peters *v.* Snavely-Ashton, 144 Ia. 117, 120 N. W. 1048.

Recitals in bond as to sufficiency of affidavit conclude defendant. Bailey *v.* Co., 5 Cal. App. 740, 91 P. 416.

81-34 **Action on bonds to discharge.** In action on bond given to obtain discharge of attachment, plaintiff must prove due execution of bond (Pierce Co. *v.* Casler, 194 Mass. 423, 80 N. E. 494), release of attachment (Hesser *v.* Rowley, 139 Cal. 410, 73 P. 156), and other facts necessary to establish his right. Flegel *v.* Koss, 47 Or. 366, 83 P. 847.

Sheriff's records.—Hesser *v.* Rowley, 139 Cal. 414, 73 P. 156.

82 Defendant in possession cannot introduce evidence on behalf of claimant. Kent R. D. G. Co. *v.* Hodges, 175 Mo. App. 484, 161 S. W. 862.

Instrument reciting sale to claimant admissible. Pittman A. & P. *v.* Hamilton (Ia.), 140 N. W. 886.

82-36 Brande *v.* Gruber, 84 Neb. 808, 122 N. W. 57.

83-39 Kent R. D. G. Co. *v.* Hodges, 175 Mo. App. 484, 161 S. W. 862.

83-40 Collin C. G. Co. *v.* Andrews (Ark.), 162 S. W. 1098; Roberts *v.* Burr, 135 Cal. 156, 67 P. 46; Cohen *v.* Harris, 61 Fla. 137, 54 S. 905; Claflin *v.* Harrison, 44 Fla. 218, 31 S. 818; Am. Nat. Bk. *v.* Lee, 124 Ga. 863, 53 S. E. 268; People's Nat. Bk. *v.* Harper, 114 Ga. 603, 40 S. E. 717; Remington T. Co. *v.* McArthur, 145 Ia. 57, 123 N. W. 760; City Nat. Bk. *v.* Crahan, 135 Ia. 230, 112 N. W. 793; Nutlee, etc. Co. *v.* Marion Cripe & Co., 142 Ky. 810, 135 S. W. 292; Brown *v.* Johnson, 132 Ky. 70, 116 S. W. 273; Lemp B. Co. *v.* Mantz, 120 Md. 176, 87 A. 814; Johnson *v.* Mason (Mo.), 163 S. W. 260; Byrd *v.* Vanderburgh, 167 Mo. App. 112, 151 S. W. 184; Torreyson *v.* Turnbaugh, 105 Mo. App. 439, 79 S. W. 1002; Vermillion *v.* Parsons, 118 Mo. App. 260, 94 S. W. 298; Kelley-G. S. Co. *v.* Sally, 114 Mo. App. 222, 89 S. W. 889; Connersville B. Co. *v.* Lowery, 104 Mo. App. 186, 77 S. W. 771; Graham P. Co. *v.* Crowther, 92 Mo. App. 273; Cotton Mills *v.* Weil, 129 N. C. 452, 40 S. E. 218; Willard Mfg. Co. *v.* Tierney, 133 N. C. 630, 45 S. E. 1026.

Evidence sufficient. — McMullen *v.* Green (Tex. Civ.), 149 S. W. 762.

Proof of special interest and right to possession by claimant, sufficient. Roberts *v.* Burr, 135 Cal. 156, 67 P. 46.

Estoppel of claimant by holding out another as owner. Anheuser B. B. Co. *v.* Kickham, 119 Ill. App. 58.

Confusion of goods.—Claimant has burden of separating and identifying goods of debtor. Kelly-G. S. Co. *v.* Sally, 114 Mo. App. 222, 89 S. W. 889.

Loss of title by claimant who has proved he acquired it must be shown by plaintiff in attachment. Lipschitz *v.* Halperin, 53 Misc. 280, 103 N. Y. S. 202.

84-41 **Plaintiff must prove that he** is a creditor, and this by other evidence than the attachment papers. Clark *v.* Elev. Co., 175 Ill. App. 374.

84-42 **In garnishment proceedings** garnishee must show payment made from defendant's partnership account of demand against individual partner was on account of partnership and regular. Progressive L. Co. *v.* Rogers (Tex. Civ.), 120 S. W. 260.

Alabama rule.—Ringeman *v.* Wiggs, 146 Ala. 685, 40 S. 323; Roberts *v.* Ringe-

mann, 145 Ala. 678, 40 S. 81; British & A. Mtg. Co. *v.* Cody, 135 Ala. 622, 33 S. 832; Arnold *v.* Cofer, 135 Ala. 364, 33 S. 539.

85-43 See Lemp B. Co. *v.* Mantz, 120 Md. 176, 87 A. 814; Pelzer Mfg. Co. *v.* Pitts, 76 S. C. 349, 57 S. E. 29.

Plaintiff must show claimant's possession is result of fraud.—Stone *v.* Cassidy, 75 Ark. 603, 87 S. W. 621; Hicks *v.* Thomas, 114 La. 219, 38 S. 148; Torreyson *v.* Turnbaugh, 105 Mo. App. 439, 79 S. W. 1002; Handlan-B. Mfg. Co. *v.* Co., 124 Mo. App. 349, 101 S. W. 702.

86-45 Claflin *v.* Harrison, 44 Fla. 218, 31 S. 818; Connersville B. Co. *v.* Lowry, 104 Mo. App. 186, 77 S. W. 771; Ottumwa Nat. Bk. *v.* Totten, 114 Mo. App. 97, 89 S. W. 65. See supra, 79-25 as to ex parte affidavit. Wise *v.* Ferguson (Tex. Civ.), 138 S. W. 816.

87-46 Purchaser with notice of attachment lien. Stillman *v.* Hamer, 70 Kan. 469, 78 P. 836.

Mortgagee of pledged property.—Ottumwa Nat. Bk. *v.* Totten, 114 Mo. App. 97, 89 S. W. 65.

87-47 Arnold *v.* Cofer, 135 Ala. 364, 33 S. 539; Graham P. Co. *v.* Crowther, 92 Mo. App. 273.

87-48 Admissions and declarations. Declarations of attachment debtor concerning ownership of property, admissible only when he was in possession at the time. Roberts *v.* Ringemann, 145 Ala. 678, 40 S. 81; Ohde *v.* Hoffman (Ia.), 90 N. W. 750; Wright *v.* Tanner, 92 Minn. 94, 99 N. W. 422; Vermillion *v.* Parsons, 118 Mo. App. 260, 94 S. W. 298; Torreyson *v.* Turnbaugh, 105 Mo. App. 439, 79 S. W. 1002. All that was said and done at time property levied on may be proved. Montgomery M. Mfg. Co. *v.* Leith, 162 Ala. 246, 50 S. 210.

Declarations of agent of claimant.—See People's Nat. Bk. *v.* Harper, 114 Ga. 603, 40 S. E. 717.

Circumstantial evidence. — Ownership and possession of property claimed may be shown by either direct or circumstantial evidence. See Am. Nat. Bk. *v.* Lee, 124 Ga. 863, 53 S. E. 268; Rice *v.* Sally, 176 Mo. 107, 75 S. W. 398; Groesbeck *v.* Evans (Tex. Civ.), 83 S. W. 430.

Claimant may testify directly.—Lipschitz *v.* Halperin, 53 Misc. 280, 103 N. Y. S. 232.

Relationship of parties.—Wright *v.* Tanner, 92 Minn. 94, 99 N. W. 422.

Purchase at judicial sale does not estop claimant. Hagar *v.* Haas, 66 Kan. 333, 71 P. 822.

87-50 Amount received at sheriff's sale is admissible. Ohde *v.* Hoffman (Ia.), 90 N. W. 750.

88-51 Plaintiff need not prove himself a creditor of defendant. Faulkner *v.* Cook, 83 Ark. 205, 103 S. W. 384; Graham P. Co. *v.* Crowther, 92 Mo. App. 273.

88-52 Regularity and validity of levy admitted.—Claflin Co. *v.* Harrison, 44 Fla. 218, 31 S. 818. See Hawkins *v.* McAlister, 86 Miss. 84, 38 S. 225.

Grounds of attachment are admitted to exist. Wagner *v.* Wolf, 75 Neb. 780, 106 N. W. 1024.

In action on claim bond.—Claimant has burden of proving ownership of property. Goldstein *v.* Goldman, 74 App. Div. 356, 77 N. Y. S. 699.

89-60 Lord *v.* Wood, 120 Ia. 303, 94 N. W. 842; Tyler *v.* Bowen, 124 Ia. 452, 100 N. W. 505; Cohen *v.* Longarini, 207 Mass. 556, 93 N. E. 702; Wipperman Mercantile Co. *v.* Robbins, 23 N. D. 208, 135 N. W. 785; McFaddin *v.* Sims, 43 Tex. Civ. 598, 97 S. W. 335.

But where the action is by an assignee the burden of proving fraud in the assignment is on the defendant. Buckeye Nat. Bank *v.* Huff, 113 Va. 1, 75 S. E. 769.

Evidence held insufficient.—Eisely *v.* Bank, 89 Neb. 382, 131 N. W. 608.

Prima facie case established by proof property attached as property of debtor was in plaintiff's possession. Maziroff *v.* C. Bk., 135 Mich. 390, 97 N. W. 763. See Brown *v.* Bayer, 91 Minn. 140, 97 N. W. 736.

Burden of proving discharge under bond is on defendant. Waller *v.* Deranleau, 4 Neb. (Unof.) 497, 94 N. W. 1038.

Liability of corporation. — Carey *v.* Wolff, 72 N. J. L. 510, 63 A. 270.

89-61 Burden on claimant in action on his bond conditioned upon proof of his ownership. Ehrlich *v.* Sklamberg, 65 Misc. 5, 119 N. Y. S. 337.

Value of attorney's services must be proved. S. *v.* Flarsheim, 137 Mo. App. 1, 119 S. W. 17.

90-63 Vesper *v.* Crane Co., 165 Cal. 36, 130 P. 876 (but not evidence of malice).

Admissible on issue of good faith. Cline *v.* Hackbarth, 30 Tex. Civ. 591, 71 S. W. 48.

Lost writ.—Secondary evidence of lost writ is admissible. Hamilton *v.* Maxwell, 133 Ala. 233, 32 S. 13.

Falsity of affidavit may be shown; it is admissible though made by agent. Rainey *v.* Kemp, 54 Tex. Civ. 486, 118 S. W. 630.

90-65 Anvil Gold M. Co. *v.* Hoxsie, 125 Fed. 724, 59 C. C. A. 492; McGill *v.* Fuller, 45 Wash. 615, 88 P. 1038. See Waller *v.* Deranleau, 1 Neb. (Unof.) 497, 94 N. W. 1038.

90-66 Maxwell *v.* Speth, 9 Ga. App. 745, 72 S. E. 292.

91-67 See Peters *v.* Snavely-Ashton, 144 Ia. 147, 120 N. W. 1048.

91-68 Butterfield *v.* Kirtley, 115 Ia. 207, 88 N. W. 371.

By wife of attachment defendant. Cline *v.* Hackbarth, 30 Tex. Civ. 591, 71 S. W. 48.

91-69 Massena Sav. Bk. *v.* Garside, 151 Ia. 168, 130 N. W. 918; Lord *v.* Wood, 120 Ia. 303, 94 N. W. 842.

By agent of attachment plaintiff.—Carey *v.* Wolff, 72 N. J. L. 510, 63 A. 270.

91-70 See Bucki L. Co. *v.* Co., 121 Fed. 233, 57 C. C. A. 469; Voss *v.* Bender, 32 Wash. 566, 73 P. 697.

92-72 *Comp.* 81-31, supra.

92-73 **Delay in recording deed** is evidence of fraudulent disposition of property. Cline *v.* Hackbarth, 30 Tex. Civ. 591, 71 S. W. 48.

Plan to hold auction to obtain money to pay debts is strong evidence of fraudulent intent in removal of goods. Tullis *v.* McClary, 128 Ia. 493, 104 N. W. 505.

93-74 Upon issue of fraud by purchaser as to seller's creditors in obtaining property, evidence of attachment debtor's reputation as to solvency is admissible. Hooks *v.* Pafford, 34 Tex. Civ. 516, 78 S. W. 991.

94-76 Evidence debtor has never refused to pay is admissible. Tullis *v.* McClary, 128 Ia. 493, 104 N. W. 505.

94-78 *Comp.* Engelke & F. M. Co. *v.* Grunthal, 46 Fla. 349, 35 S. 17; Wehle *v.* Spelman, 25 Hun (N. Y.) 99.

94-81 Intent of levying officer, immaterial. Rainey *v.* Kemp, 54 Tex. Civ. 486, 118 S. W. 630.

94-83 See Vandiver *v.* Waller, 143 Ala. 411, 39 S. 136; Lord *v.* Wood, 120 Ia. 303, 94 N. W. 842; Wall *v.* Mfg. Co., 127 Ia. 979, 54 S. 300; S. *v.* Parsons, 109 Mo. App. 432, 84 S. W. 1019; Wallingford *v.* Kaiser, 110 App. Div. 503, 96 N. Y. S. 981; Low *v.* Ne Smith (Tex. Civ.), 77 S. W. 32; Hooks *v.* Pafford, 34 Tex. Civ. 516, 78 S. W. 991; Voss *v.* Bender, 32 Wash. 566, 73 P. 697; McGill *v.* Fuller, 45 Wash. 615, 88 P. 1038. But see Armentrout *v.* Baldwin (Ia.), 144 N. W. 1003.

Mere proof of issue and levy of writ will not warrant verdict for substantial damages. New Sharon C. Co. *v.* Knowlton, 132 Ia. 672, 108 N. W. 770. See Lawson *v.* Goodwin, 37 Tex. Civ. 484, 84 S. W. 279.

Loss of time element of damage. Tullis *v.* McClary, 128 Ia. 493, 104 N. W. 505.

Release of damages, admissible. Hayes *v.* Co., 27 Mont. 264, 70 P. 975.

Inventory and appraisement are evidence of value. Green *v.* McCracken, 64 Kan. 330, 67 P. 857.

Destruction of business.—Schwartzberg *v.* Bk., 84 Kan. 581, 115 P. 110.

Primitive damages, when recoverable. Maxwell *v.* Speth, 9 Ga. App. 745, 72 S. E. 292.

95-84 Sterling *v.* Bk., 120 Md. 396, 87 A. 697.

95-87 Vandiver *v.* Waller, 143 Ala. 411, 39 S. 136; Kilmer *v.* Gallaher, 120 Ia. 575, 95 N. W. 180; S. *v.* Parsons, 109 Mo. App. 432, 84 S. W. 1019. *Contra.* Chisenhall *v.* Hines (Tex. Civ.), 100 S. W. 362; McGill *v.* Fuller, 45 Wash. 615, 88 P. 1038.

In federal courts, rule existing in state in which case originated is applied. Fidelity Co. *v.* Bucki, 189 U. S. 135.

Need not be proved to have been actually paid. Oakes *v.* Smith, 121 Ga. 317, 48 S. E. 942; Plymouth Co. *v.* Co., 35 Mont. 23, 88 P. 565.

95-88 **Evidence of profits definitely ascertainable** is admissible. Hayes *v.* Co., 27 Mont. 264, 70 P. 975; Pittsburgh, etc. Co. *v.* Co., 143 N. C. 54, 55 S. E. 422; McGill *v.* Fuller, 45 Wash. 615, 88 P. 1038. And see Fidelity Co. *v.* Bucki, 189 U. S. 135; Vandiver *v.* Waller, 143 Ala. 411, 39 S. 136; Plymouth Co. *v.* Co., 35 Mont. 23, 88 P. 565; Hume *v.* Co. (Tex. Civ.), 72 S. W. 865.

Evidence of wantonness or recklessness is admissible to establish motive as a basis for punitive damages. Vandiver *v.* Waller, 143 Ala. 411, 39 S. 136; Tyler *v.* Bowen, 124 Ia. 452, 100 N. W. 505; Pittsburgh, etc. R. Co. *v.* Co., 143 N. C. 54, 55 S. E. 422; Harkleroad *v.*

Leonard, 28 Tex. Civ. 133, 67 S. W. 127.

Against corporations.—Corey *v.* Wolff, 72 N. J. L. 510, 63 A. 270.

Statute necessary.—McGill *v.* Fuller, 45 Wash. 615, 88 P. 1038.

95-89 *Comp.* Miller *v.* Baker, 25 Ky. L. R. 1858, 79 S. W. 187. *Contra.* Geller *v.* Rosenfeld, 123 N. Y. S. 628, cit. earlier New York cases.

96-91 Failure to use care to lessen injury may be shown. Pittsburgh, etc. R. Co. *v.* Co., 143 N. C. 54, 55 S. E. 422.

96-92 In proceedings against garnishee burden of proof on plaintiff (Prudential F. Co. *v.* Bank, 66 Or. 224, 133 P. 1191), to show existence of debt to defendant from garnishee. Trotter *v.* Blount, 162 Ala. 289, 50 S. 130. And that defendant is owner of funds in garnishee's hands, he having disclosed for whose account he holds them. Thompson *v.* Durand, 124 La. 381, 50 S. 407.

Burden is on garnishee to establish right to a credit where funds in his hands. Dolenty *v.* Co., 41 Mont. 105, 108 P. 921.

Admission of indebtedness when writ served is not overcome by evidence no debt existed at time of trial. Jenkins *v.* McGreever, 162 Ala. 305, 50 S. 142.

ATTENDANCE OF WITNESSES.

At bankruptcy proceedings, 105-31; *Of officers of foreign corporation,* 109-54; *Orders to produce,* 116-85.

100-1 Grisby C. Co. *v.* R. Co., 123 Fed. 751; International, etc. R. Co. *v.* Richmond, 28 Tex. Civ. 513, 67 S. W. 1029.

Waiver of defect in subpoena by voluntary appearance. In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161.

100-4 Strict construction of authority to take recognizances. Police justice cannot accept cash deposit in place of bail. McNamara *v.* Wallace, 97 App. Div. 76, 89 N. Y. S. 591.

Statute necessary.—Little *v.* Ter., 28 Okla. 467, 114 P. 699.

101-6 Adversary may be compelled to testify. Landon *v.* Morehead, 34 Okla. 701, 126 P. 1027. But see Bauer *v.* Bauer, 177 Mich. 169, 142 N. W. 1074.

101-7 Omission of ad testificandum clause not fatal. Norcross *v.* U. S., 209 Fed. 13.

Mere order by court to appear and testify, insufficient. In re Depue, 185 N. Y. 60, 77 N. E. 798.

Omission of name of case fatal.—In re Haines, 67 N. J. L. 442, 51 A. 929.

Reliance upon subpoena obtained by opposite party is not justified. S. *v.* Campbell, 73 Kan. 688, 720, 85 P. 784.

102-9 Subpoena issued in accordance with rules of circuit court of United States, proper. Despeaux *v.* R. Co., 147 Fed. 926. See Importers' & T. Nat. Bk. *v.* Lyons, 134 Fed. 510; P. *v.* Wyatt, 99 N. Y. S. 114, 186 N. Y. 383, 79 N. E. 330.

102-10 Ivey *v.* S., 4 Ga. App. 828, 62 S. E. 565 (need not be countersigned if issued by clerk).

Deputy sheriff cannot insert names. Manuel *v.* S., 45 Tex. Cr. 96, 74 S. W. 30.

Subpoena to testify as witness may be issued by attorney without application to court. Lowther *v.* Lowther, 115 App. Div. 307, 100 N. Y. S. 965.

102-12 Attendance before commissioner.—Bliss *v.* Milholland, 26 Pa. C. C. 129.

Notary public.—Burns *v.* Court, 140 Cal. 1, 73 P. 597, *over.* Lezinsky *v.* Court, 72 Cal. 510, 14 P. 104; McIntyre *v.* P., 227 Ill. 26, 81 N. E. 33.

Auditor.—Sizer *v.* Milton, 129 Ga. 143, 58 S. E. 1055.

Committing magistrate.—Farnham *v.* Colman, 19 S. D. 342, 103 N. W. 161.

Coroner.—Moore *v.* Co., 78 Neb. 561, 111 N. W. 469.

By attorney, in proceedings supplementary to execution, under New York procedure. See 102-10.

Receivers.—Fidelity & C. Co. *v.* Co., 72 N. J. Eq. 279, 65 A. 879.

Before referee in bankruptcy.—By virtue of the bankruptcy act of 1898, c. 541, and general orders in bankruptcy, No. 3 (89 Fed. IV) equity procedure for requiring attendance of witnesses out of court is followed and blank subpoenas issued by clerk may be filled by referee. In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161.

103-13 Leber *v.* U. S., 170 Fed. 881, 96 C. C. A. 57.

Before grand jury.—Coppenhaver *v.* S., 160 Ind. 540, 67 N. E. 453; In re Archer, 134 Mich. 408, 96 N. W. 442;

P. *v.* Sexton, 187 N. Y. 495, 80 N. E. 396.

103-15 In Ex parte Conrades, 185 Mo. 411, 85 S. W. 160, municipal council held to have power to appoint a committee to examine tax records, with power to subpoena witnesses.

103-16 Municipal committee. Yard's Case, 10 Pa. C. C. 41. *Contra* as to school committee. Morrison *v.* Lawrence, 186 Mass. 456, 72 N. E. 91.

103-17 See Ex parte Caldwell, 138 Fed. 487.

104-20 In re Edison, 68 N. J. L. 494, 53 A. 696; Robb's Petition, 11 Pa. C. C. 442.

104-21 **A commissioner appointed by foreign court** may subpoena witnesses. Bliss *v.* Millholland, 26 Pa. C. C. 129. *Comp.* In re Edison, 68 N. J. L. 494, 53 A. 696.

104-22 In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161.

104-23 See 102-12, supra, as to process in bankruptcy.

105-24 Under the national bankruptcy law court having jurisdiction may compel attendance of witnesses for examination by examiner in another district. In re Williams, 123 Fed. 321.

105-26 See Interstate Commerce Com. *v.* Baird, 194 U. S. 25.

105-27 Subpoena duces tecum not authorized. In re Outeault, 149 Fed. 228.

105-28 Carter *v.* R. Co. (Ala.), 61 S. 65; Friddle *v.* Braun, 7 Ala. App. 429, 61 S. 57; Climie *v.* County, 125 Ia. 292, 101 N. W. 98. *Comp.* Buckman *v.* R. Co., 121 Mo. App. 299, 98 S. W. 820.

105-29 Fidelity & C. Co. *v.* Co., 72 N. J. Eq. 279, 65 A. 879.

Subpoena in some states has no coercive force outside county.—See Anderson *v.* Co., 12 Ida. 418, 86 P. 41; Underwood *v.* Fosha, 73 Kan. 408, 85 P. 564; S. *v.* Romero, 117 La. 1003, 42 S. 482; S. *v.* Nix, 111 La. 812, 35 S. 917.

105-30 U. S. Rev. St., §876, lays down same rule. Blood *v.* Morrin, 140 Fed. 918; Magone *v.* Co., 135 Fed. 846.

105-31 Sec. 11 bankruptcy act modifies and limits general rule. No one may be forced to attend at a distance of more than one hundred miles nor leave the state of residence. In re Hemstreet, 117 Fed. 568; In re Cole, 123 Fed. 414. See In re Sturgeon, 139 Fed. 608, 71 C. C. A. 592.

106-33 Holt *v.* Nielson, 37 Utah 566, 109 P. 470. See Kotteamp *v.* County, 28 Pa. Super. 96.

106-38 Com. Title Ins. & T. Co. *v.* Slack, 18 Pa. C. C. 593.

106-39 Doyle *v.* Co., 124 Mo. App. 504, 101 S. W. 598; Godwin *v.* S., 44 Tex. Cr. 599, 73 S. W. 804.

Subpoena good only for term for which it issued.—Buckman *v.* R. Co., 121 Mo. App. 299, 98 S. W. 820. *Contra,* Brady *v.* S., 120 Ga. 181, 47 S. E. 535.

106-40 Finney *v.* Egan, 43 Or. 1, 72 P. 136. See In re Haines, 67 N. J. L. 442, 51 A. 929.

107-43 Service on agent of corporation must show it was doing business in state. Central Exch. *v.* Board, 125 Fed. 463, 60 C. C. A. 299.

Affidavit of service, necessary. In re Haines, 67 N. J. L. 442, 51 A. 929.

Service on person claiming to represent witness.—In re Depue, 185 N. Y. 60, 77 N. E. 798.

By telephone, improper. Ex parte Terrell (Tex. Cr.), 95 S. W. 536.

By telegraph proper.—Finney *v.* Egan, 43 Or. 1, 72 P. 136.

107-44 In re Marcus, 160 Fed. 229 (under bankruptcy act); S. *v.* Co., 194 Mo. 124, 91 S. W. 1062; In re Haines, 67 N. J. L. 442, 51 A. 929; In re Depue, 185 N. Y. 60, 77 N. E. 798; Finney *v.* Egan, 43 Or. 1, 72 P. 136; Com. Title Ins. & T. Co. *v.* Slack, 18 Pa. C. C. 593.

Physician cannot decline to testify for want of compensation. Dixon *v.* S., 12 Ga. App. 17, 76 S. E. 794.

Pennsylvania.—Fees in Adams county. Flemming *v.* Bush, 43 Pa. Super. 405.

Contract to pay witness for loss of time, void. Wright *v.* Somers, 125 Ill. App. 256. See Ramschasel's Est., 24 Pa. Super. 262.

Attendance of witness without service gives right to fees. Griggsby Const. Co. *v.* R. Co., 123 Fed. 751; Anderson *v.* Co., 12 Ida. 418, 86 P. 41; Climie *v.* County, 125 Ia. 292, 101 N. W. 98; Great Falls Co. *v.* Jenkins, 33 Mont. 417, 84 P. 74; Finney *v.* Egan, 43 Or. 1, 72 P. 136; International, etc. R. Co. *v.* Richmond, 28 Tex. Civ. 513, 67 S. W. 1029. *Contra,* Graeco-R. Church *v.* Cohen, 1 Alaska 32; Buckman *v.* R. Co., 121 Mo. App. 299, 98 S. W. 820.

Expert entitled to a reasonable fee, as such. Farmer *v.* Co., 86 Minn. 59, 90 N. W. 10. *Contra,* S. *v.* Bell, 212 Mo. 111, 111 S. W. 24; Philler *v.* County,

139 Wis. 211, 120 N. W. 829. See Schofield *v.* Little, 2 Ga. App. 286, 58 S. E. 666; Main *v.* County, 74 Neb. 155, 103 N. W. 1038.

Statutes allowing fees, strictly construed. Veidt *v.* R. Co., 109 Mo. App. 102, 82 S. W. 1122.

107-45 Leber *v.* U. S., 170 Fed. 881, 96 C. C. A. 57 (by accepting less than might have been demanded).

108-48 Chase *v.* Judge, 154 Mich. 271, 117 N. W. 660; S. *v.* Bell, 212 Mo. 111, 111 S. W. 24; In re Haines, 67 N. J. L. 442, 51 A. 929; In re Consol. Co., 80 Vt. 55, 66 A. 790.

108-51 In re Thaw, 166 Fed. 71, 91 C. C. A. 657.

109-54 Com. *v.* Klaus, 130 N. Y. S. 713.

New York statute unconstitutional as depriving witness of his liberty without due process of law. In re Com., 45 Misc. 46, 90 N. Y. S. 808.

Attendance of officers of foreign corporation.—In Missouri the court, in action for violation of anti-trust law, will upon application by the attorney-general issue an order to attorneys of record of defendant foreign corporations requiring the presence of such of their officers as are necessary, and if they fail to appear judgment will be given by default. S. *v.* Co., 194 Mo. 124, 91 S. W. 1062. *Comp.* Central Exch. *v.* Board, 125 Fed. 463, 60 C. C. A. 299.

109-55 Sherman *v.* Einhorn, 147 N. Y. S. 1077; Landon *v.* Morehead, 34 Okla. 701, 126 P. 1027.

110-56 Subpoena duces tecum gives counsel no right to inspect books ordered to be produced, but is for purpose of aiding witness in his testimony. Franklin *v.* Judson, 96 App. Div. 607, 88 N. Y. S. 904.

110-58 Subpoena duces tecum must follow statutory requirements. Gaynor *v.* Breweries Co., 154 App. Div. 881, 138 N. Y. S. 899.

110-60 Inherent power in court of equity. U. S. *v.* Assn., 148 Fed. 486.

Subpoena duces tecum before commissioner.—In re Edison, 68 N. J. L. 494, 53 A. 696, it was said to be doubtful whether it could be issued in connection with an order for attendance of witness before commissioner authorized to act by another state.

Court may ascertain whether documents have been produced for examination. Shull *v.* Boyd, 251 Mo. 452, 158 S. W. 313.

110-61 U. S. *v.* Assn., 148 Fed. 486.

Party.—Banks *v.* Co., 79 Conn. 116, 64 A. 14.

So it may issue to witness called before grand jury (In re Archer, 134 Mich. 408, 96 N. W. 442), **or before municipal investigating committee.** 103-15.

111-65 Crocker-W. Co. *v.* Bullock, 134 Fed. 241; Dancel *v.* Co., 128 Fed. 753; Miller *v.* Assn., 139 Fed. 864; Peterson *v.* Co., 140 Cal. 624, 74 P. 162; Kullman, etc. Co. *v.* Sup. Ct., 15 Cal. App. 276, 114 P. 589; Bentley *v.* P., 104 Ill. App. 353, 107 Ill. App. 245; Consol. Co. *v.* Jones, 120 Ill. App. 139; In re Archer, 134 Mich. 408, 96 N. W. 442; S. *v.* Wurdeman (Mo. App.), 158 S. W. 436.

Prima facie case of materiality must be established. U. S. *v.* Assn., 148 Fed. 486.

Subpoena must make reasonable demands.—Santa Fe P. R. Co. *v.* Davidson, 149 Fed. 603; McDonald *v.* Co., 143 Mich. 17, 106 N. W. 279.

111-66 Dorris *v.* Co., 215 Pa. 638, 64 A. 855.

112-67 U. S. *v.* Co., 146 Fed. 557. And see Hale *v.* Henkel, 201 U. S. 43; S. *v.* Co., 194 Mo. 124, 91 S. W. 1062; Ex parte Conrades, 185 Mo. 411, 85 S. W. 160; In re Consol. Co., 80 Vt. 55, 66 A. 790. Not violation of fourth amendment. Santa Fe P. R. Co. *v.* Davidson, 149 Fed. 603.

112-68 U. S. *v.* Co., 146 Fed. 557.

112-69 Rutter & Co. *v.* McLaughlin, 169 Ill. App. 430; Longowski *v.* R. Co., 153 Wis. 418, 141 N. W. 236.

114-73 The president of the United States may be required by subpoena duces tecum to produce documents in his possession. Schall *v.* Car Co., 123 Minn. 214, 143 N. W. 357 (dictum).

114-75 In re Consol. Co., 80 Vt. 55, 66 A. 790. Documents must be produced in court when objection to their incriminating nature may be made. U. S. *v.* Collins, 146 Fed. 553.

115-78 Trade secrets protected. Crocker-W. Co. *v.* Bullock, 134 Fed. 241.

115-81 U. S. *v.* Assn., 148 Fed. 486; S. *v.* Co., 194 Mo. 124, 91 S. W. 1062; In re Consol. Co., 80 Vt. 55, 66 A. 790.

On taking deposition in another district by commissioner, claim of privilege is

to be passed upon by court thereof. Crocker W. Co. v. Bullock, 134 Fed. 241.

116-84 Dancel v. Co., 128 Fed. 753; Crocker-W. Co. v. Bullock, 134 Fed. 241.

116-85 Parties in court having documents in their possession may be required to produce them by direct order. Banks v. Co., 79 Conn. 116, 64 A. 14. See Whitten v. Co., 141 N. C. 361, 54 S. E. 289.

116-86 Com. Title Ins. & T. Co. v. Slack, 18 Pa. C. C. 593; Holland v. Riggs, 53 Tex. Civ. 367, 116 S. W. 167.

A corporation is under no duty to produce its officer as adverse witness. Central Exch. v. Board, 125 Fed. 463, 60 C. C. A. 299.

Police board.—Plunkett v. Hamilton, 136 Ga. 72, 70 S. E. 781.

118-92 Wallace v. Co., 145 Ala. 682, 40 S. 89.

118-94 Dallas v. Lentz (Tex. Civ.), 81 S. W. 55.

118-95 Gardner v. U. S., 5 Ind. Ty. 150, 82 S. W. 704.

119-97 See Holland v. Riggs, 53 Tex. Civ. 367, 116 S. W. 167.

121-11 Kentucky Civ. Code Pr. §556 does not apply to witnesses outside the court's jurisdiction. Hey v. Emerson, 142 Ky. 767, 135 S. W. 294.

121-19 Under New York code a judge of a court of record may commit for failure to attend before a commissioner. In re Phillips, 70 Misc. 8, 127 N. Y. S. 1048.

122-30 Hoppe v. W. R. Ostander & Co., 183 Fed. 786.

123-43 Jones v. State, 99 Ark. 394, 138 S. W. 967; Pittman v. S., 51 Fla. 94, 41 S. 385 (full discussion); S. v. Auguste, 127 La. 1055, 54 S. 349; Romine v. S. (Okla. Cr.), 136 P. 775; Nichols v. S., 8 Okla. Cr. 550, 129 P. 673; S. v. Papa, 32 R. I. 453, 80 A. 12. See P. v. Ingersoll, 21 Cal. App. 763, 132 P. 1052.

Right is limited to witnesses within the court's jurisdiction. Redmond v. S., 4 Ala. App. 190, 59 S. 181.

Sixth amendment U. S. Const., applies only to federal courts. Pittman v. S., 51 Fla. 94, 41 S. 385; Anderson v. S., 8 Okla. Cr. 90, 126 P. 840.

Testimony must be shown to be admissible and material. S. v. Berger (La.), 99 N. W. 621; S. v. Pope, 78 S. C. 264, 58 S. E. 815.

Continuance, discretion of court as to, not allowed to infringe upon right to compulsory attendance of witnesses. Rodgers v. S., 144 Ala. 32, 40 S. 572.

Admission by prosecution as to what witnesses asked for by defendant would testify not ground for refusal of process. S. v. Fairfax, 107 La. 624, 31 S. 1011. *Comp.* Davis v. Co., 25 Ky. L. R. 1426, 77 S. W. 1101.

Attendance not guaranteed.—Smith v. S., 118 Ga. 61, 44 S. E. 817. See S. v. Pope, 78 S. E. 264, 58 S. E. 815.

At common law no compulsory process for attendance of witnesses. Pittman v. S., 51 Fla. 94, 41 S. 385.

Right to examine and consult privately, out of court, not covered by constitutional guaranty of process. S. v. Goodson, 116 La. 388, 40 S. 771.

126-44 Defendant entitled to compulsory process at expense of county. De Soto County Comrs. v. Howell, 51 Fla. 160, 40 S. 192.

126-48 Limited number of witnesses.—Upon a proper showing being made statutory limitation does not apply. S. v. Freddy, 117 La. 121, 41 S. 436.

All eye-witnesses to a murder need not be called. S. v. Stewart, 117 La. 476, 41 S. 798.

127-50 Goldsmith v. Haskell, 105 N. Y. S. 327; In re Greene, 35 R. I. 67, 85 A. 552.

Voluntary attendance.—A witness is protected though present voluntarily. See Underwood v. Fosha, 73 Kan. 408, 85 P. 564, for full discussion. *Contra*, Lewis v. Miller, 115 Ky. 623, 74 S. W. 691; Currie F. Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268.

127-51 U. S. v. Zavelo, 177 Fed. 536; Chittenden v. Carter, 82 Conn. 585, 74 A. 884 (though it has some interest in suit); Gillmore v. Gillmore, 91 Kan. 293, 137 P. 958; Bolz v. Crone, 64 Kan. 570, 67 P. 1108; Rains v. Smith, 155 Ky. 766, 160 S. W. 493; Diamond v. Earle (Mass.), 105 N. E. 363; Weale v. Judge, 158 Mich. 563, 123 N. W. 31; Finucane v. Warner, 194 N. Y. 160, 86 N. E. 1118; Ginsburg v. Heller, 80 Misc. 147, 140 N. Y. S. 1013; In re Greene, 35 R. I. 67, 85 A. 552; Breon v. Co., 83 S. C. 221, 65 S. E. 214 (attending reference as party and witness).

Agent of foreign corporation.—Kinsey v. Co., 94 N. Y. S. 455. *Contra*, Currie

F. Co. *v.* Krish, 24 Ky. L. R. 2471, 74 S. W. 268.

129-57 U. S. *v.* Zavelo, 177 Fed. 536. See Underwood *v.* Fosha, 73 Kan. 408, 85 P. 564.

Public policy.—Murray *v.* Wilcox, 122 Ia. 188, 97 N. W. 1087.

State comity.—Martin *v.* Bacon, 76 Ark. 158, 88 S. W. 863.

130-60 Goldsmith *v.* Haskell, 105 N. Y. S. 327.

130-65 Morrow *v.* Dudley, 144 Fed. 441.

Attendance at summary proceedings for dispossession of tenant, protected. Richardson *v.* Smith, 74 N. J. L. 111, 65 A. 162.

Attendance at judicial sale not protected. Greenleaf *v.* Bk., 133 N. C. 292, 45 S. E. 638, 63 L. R. A. 499.

130-68 Goldsmith *v.* Haskell, 105 N. Y. S. 327.

Attorneys exempt while in actual attendance on court. Greenleaf *v.* Bk., 133 N. C. 292, 45 S. E. 638, 63 L. R. A. 499.

130-69 Finucane *v.* Warner, 194 N. Y. 160, 86 N. E. 1118 (nor if he came into jurisdiction for purpose of testifying and doing other disconnected business).

130-71 Finucane *v.* Warner, 60 Misc. 336, 112 N. Y. S. 137.

131-73 Bolz *v.* Crone, 64 Kan. 570, 67 P. 1108. But see Dwelle *v.* Allen, 151 App. Div. 717, 136 N. Y. S. 216.

In Kentucky the rule relates solely to venue, and does not prevent service of subpoena issued by court of residence of witness. Linn *v.* Hagan, 27 Ky. L. R. 996, 87 S. W. 763.

131-75 Fields *v.* Ragelmeir, 7 O. N. P. (N. S.) 585.

131-76 In re Greene, 35 R. I. 67, 85 A. 552.

131-77 Non-resident.—Plaintiff may be served with process in another action based upon wrongfulness of original action. Iron Dyke, etc. Co. *v.* R. Co., 132 Fed. 208.

Privilege extends to one accused of crime who has come into state in obedience to a recognizance. Kaufman *v.* Garner, 173 Fed. 550, cit. cases and *disap.* Scott *v.* Curtis, 27 Vt. 762.

132-79 White *v.* Marshall, 23 O. C. C. 376.

132-80 Tendering issue of fact waives the privilege. White *v.* Marshall, 23 O. C. C. 376.

132-81 Delay of three weeks in applying to set aside service, not a waiver. Morrow *v.* Dudley, 144 Fed. 441.

Use of improper means to bring claimant of privilege in jurisdiction must be shown by him. McKenzie *v.* McKenzie, 238 Ill. 616, 87 N. E. 848.

132-82 Martin *v.* Bacon, 76 Ark. 158, 88 S. W. 863; Murray *v.* Wilcox, 122 Ia. 188, 97 N. W. 1087; Goldsmith *v.* Haskell, 105 N. Y. S. 327.

ATTORNEY AND CLIENT.

In criminal proceedings, 146-33; *Transactions between attorney and client*, 154-66; *Documentary evidence*, 157-76; *Loss of general retainer*, 164-92; *Liens*, 172-17.

136-1 Where attorneys obtain right to practice through and by reason of authority of highest court in state, judicial notice taken of their status. Nolan *v.* R. Co., 19 Okla. 51, 91 P. 1128.

Court will notice its order of disbarment. Danforth *v.* Egan, 23 S. D. 43, 119 N. W. 1021.

136-2 But license to practice is prima facie shown by evidence of years of practice. Markman *v.* Forster, 170 Ill. App. 262.

In proceedings before land department.—See Mulligan *v.* Smith, 32 Colo. 404, 76 P. 1063.

Collateral attack.—License to practice can be impeached collaterally only by what appears on face of record; parol evidence is inadmissible. Fish *v.* Co., 102 Mo. App. 6, 74 S. W. 641.

Presumption is disbarment correct, and being for violation of legal ethics, was because of ignorance and not through willfulness. Danforth *v.* Egan, 23 S. D. 43, 119 N. W. 1021.

136-3 Order of inferior as to moral character of applicant for admission, after objection, is only prima facie evidence. In re Application, 67 W. Va. 213, 67 S. E. 597.

136-4 Garfield *v.* U. S., 32 App. Cas. (D. C.) 109; In re Newby, 82 Neb. 235, 117 N. W. 691; In re Spenser, 143 App. Div. 229, 128 N. Y. S. 168; In re Gadsden, 89 S. C. 352, 71 S. E. 952.

Not a criminal proceeding.—In re Burnette, 73 Kan. 609, 85 P. 575; In re Parsons, 35 Mont. 478, 90 P. 163; S. *v.* Rossman, 53 Wash. 1, 101 P. 357 (so far as right to trial by jury concerned). Proceedings quasi criminal. S. *v.* Quarles, 158 Ala. 54, 48 S. 499.

In Illinois proceedings are started by information, and rules of criminal evidence apply. P. *v.* Sullivan, 218 Ill. 419, 75 N. E. 1005. Proceeding civil in character. Keithley *v.* Stevens, 238 Ill. 199, 87 N. E. 375.

136-5 P. *v.* Keegan, 30 Colo. 71, 69 P. 524 (prosecution must prove demand for money detained).

Evidence showing bad faith.—In re Radford, 168 Mich. 474, 134 N. W. 472.

Burden not sustained.—In re Lyons, 162 Mo. App. 688, 145 S. W. 844.

136-6 In re Burnette, 73 Kan. 609, 85 P. 575. See P. *v.* Kelsey, 32 Colo. 1, 75 P. 390; In re Leonard, 127 App. Div. 493, 111 N. Y. S. 905.

Defendant must sustain allegations that communication scandalous on its face not wilfully or maliciously published and was not false. Cobb *v.* U. S., 172 Fed. 641, 96 C. C. A. 477.

137-7 People *v.* Amos, 246 Ill. 299, 92 N. E. 857.

Sufficient explanation of apparent misconduct. In re Harding, 139 App. Div. 482, 125 N. Y. S. 264.

Power of court is summary and judicial; an investigation rather than action or suit. In re Durant, 80 Conn. 140, 67 A. 497. See In re Watt, 154 Fed. 678.

Manner of trial, to be determined by court, so long as there is no oppression. In re Durant, 80 Conn. 140, 67 A. 497.

Notice to defendant and opportunity to be heard, essential. Goode *v.* Steele, 8 Ida. 538, 69 P. 319.

Judgment for contempt not conclusive in subsequent action to disbar for same offense. P. *v.* O'Brien, 196 Ill. 250, 63 N. E. 667.

No reinvestigation where an attorney convicted of crime. In re Newby, 76 Neb. 482, 107 N. W. 850.

Conviction of crime alleged not a prerequisite. In re Smith, 73 Kan. 743, 85 P. 581; In re Thresher, 33 Mont. 441, 84 P. 876. *Comp.* In re Delmas, 139 Cal. xix, 72 P. 402.

Proof of conviction of crime which is basis of proceedings is sufficient. S. *v.* Gebhardt, 87 Mo. App. 542. See P. *v.* Burton, 39 Colo. 164, 88 P. 1063.

Where crime charged disbarment proceedings will not be begun pending trial. In re Newby, 76 Neb. 482, 107 N. W. 850.

Pardon granted one convicted of crime no defense. P. *v.* Burton, 39 Colo. 164, 88 P. 1063; P. *v.* Gilmore, 214 Ill. 569, 73 N. E. 737. But fact of pardon is to be considered. P. *v.* Payson, 215 Ill. 476, 74 N. E. 383.

Misconduct previous to admission may be shown. P. *v.* Propper, 220 Ill. 455, 77 N. E. 208; In re Platz (Utah), 132 P. 390.

Statute of limitations, no defense.—In re Smith, 73 Kan. 743, 85 P. 584. But see In re Elliott, 73 Kan. 151, 84 P. 750.

Manufactured evidence competent as admission.—P. *v.* Brown, 218 Ill. 301, 75 N. E. 907.

Depositions in another action, admissible to show consciousness of guilt. In re Durant, 80 Conn. 140, 67 A. 497.

Hearsay rule applies, but testimony of deceased witness in another trial is admissible where cross-examination was had by defendant, matters involved being substantially the same, although parties were not. In re Durant, 80 Conn. 140, 67 A. 497.

Judgment of sister state in disbarment proceedings, admissible. P. *v.* Miller, 195 Ill. 621, 63 N. E. 504. But not conclusive. In re Ebbs, 150 N. C. 44, 63 S. E. 190 (competent to show conduct).

Privileged communication, waiver.—In re Burnette, 73 Kan. 609, 85 P. 575. See In re Elliott, 73 Kan. 151, 84 P. 750.

Testimonial of good character signed by judges, inadmissible. P. *v.* Sullivan, 218 Ill. 419, 75 N. E. 1005.

Evidence may be heard before referee and reported to court. P. *v.* Mead, 29 Colo. 344, 68 P. 241; P. *v.* Frisch, 218 Ill. 275, 75 N. E. 904; S. *v.* Byrnes, 100 Minn. 76, 110 N. W. 341; In re Newby, 76 Neb. 482, 107 N. W. 850; In re Whittemore, 14 N. D. 487, 105 N. W. 232. *Contra,* In re Duncan, 64 S. C. 461, 42 S. E. 433.

Depositions may be used. P. *v.* Kelsey, 32 Colo. 1, 75 P. 390; S. *v.* McRae, 49 Fla. 389, 38 S. 605; S. *v.* Mosher, 128 Ia. 82, 103 N. W. 105; In re Burnette, 73 Kan. 609, 85 P. 575.

Witnesses properly examined in open court at instance of attorney. In re Duncan, 64 S. C. 461, 42 S. E. 433.

137-9 See In re Leonard, 127 App. Div. 493, 111 N. Y. S. 905.

Commission to take deposition of nonresident witness may be issued. In re

Spencer, 137 App. Div. 330, 122 N. Y. S. 190.

138-10 See Bar Assn. *v.* Casey, 196 Mass. 100, 81 N. E. 892. *Comp.* P. *v.* Matthews, 217 Ill. 94, 75 N. E. 444 (attorney can only be tried on charges alleged, proof of other acts is insufficient).

138-11 P. *v.* Robinson, 32 Colo. 241, 75 P. 922; P. *v.* Adams, 249 Ill. 524, 94 N. E. 950; In re Newby, 82 Neb. 235, 117 N. W. 691; In re Prinstein, 142 App. Div. 807, 127 N. Y. S. 629; In re Harrington, 130 N. Y. S. 920; In re Morehouse, 8 O. N. P. (N. S.) 179; In re Sherin, 27 S. D. 232, 130 N. W. 761. See In re Adriaans, 28 App. Cas. (D. C.) 515; P. *v.* Thornton, 228 Ill. 42, 81 N. E. 793; S. *v.* Rohrig (Ia.), 139 N. W. 908; Tudor *v.* C., 27 Ky. L. R. 87, 84 S. W. 522; In re Dodge, (Minn.), 100 N. W. 684; Commission *v.* Sullivan, 35 Okla. 745, 131 P. 703; Ex parte St. Rayner (Or.), 70 P. 537.

Evidence held sufficient.—Bar Assn. *v.* Scott, 209 Mass. 200, 95 N. E. 402.

Conviction of crime is sufficient.—S. *v.* Stringfellow, 128 La. 463, 54 S. 943.

More than preponderance of evidence necessary. In re Smith, 73 Kan. 743, 85 P. 584. Clear preponderance, both as to act and motive. Zachary *v.* S., 53 Fla. 94, 43 S. 925.

Reasonable certainty.—In re Parsons, 35 Mont. 478, 90 P. 163.

Clear and satisfactory.—P. *v.* Thornton, 228 Ill. 42, 81 N. E. 793.

Sworn accusation not sufficient in absence of other evidence, defendant not appearing. In re Burnette, 73 Kan. 609, 85 P. 575.

138-12 In re Dodge (Minn.), 100 N. W. 684; Commission *v.* Sullivan, 35 Okla. 745, 131 P. 703.

Statutory corroboration of witness against attorney charged with crime not essential. Extent to which corroboration required is for discretion of court. Attorney's conduct may corroborate. In re Hardenbrook, 135 App. Div. 634, 121 N. Y. S. 250.

Satisfactory settlement between attorney and client, not decisive as to former's conduct. P. *v.* Chamberlain, 242 Ill. 260, 89 N. E. 994.

139-13 Lake City E. L. Co. *v.* McCrary, 132 Ia. 624, 110 N. W. 19; Duff *v.* Combs, 132 Ky. 710, 117 S. W. 259 (notice of motion); Department *v.* Babcock, 84 N. Y. S. 604. See Van Gordon *v.* Goldamer, 16 N. D. 323, 113 N. W. 609.

139-15 Underfeed S. Co. *v.* Co., 165 Fed. 65; Aaron *v.* U. S., 155 Fed. 833, 84 C. C. A. 67; Brown *v.* Arnold, 131 Fed. 723; 67 C. C. A. 125; Harniska *v.* Dolph, 133 Fed. 158, 66 C. C. A. 224; Merriweather *v.* Co., 161 Ala. 441, 49 S. 916; Doe *v.* Abbott, 152 Ala. 243, 44 S. 637; Vandiever *v.* Conditt (Ark.), 162 S. W. 47; Pacific P. Co. *v.* Vizelich, 141 Cal. 4, 74 P. 352; Cherokee *v.* R. Co. (Ia.), 137 N. W. 1053; Walsh *v.* Doran, 145 Ia. 110, 123 N. W. 999; Hendrick *v.* Biggar, 66 Misc. 576, 122 N. Y. S. 162. See People's Bk. *v.* Rauer, 2 Cal. App. 445, 84 Pac. 329; Bigham *v.* Kistler, 114 Ga. 453, 40 S. E. 303; P. *v.* Parker, 231 Ill. 478, 83 N. E. 282; Uehlein *v.* Burk, 119 Ia. 742, 94 N. W. 243; Houston *v.* Wilcox, 121 Md. 91, 88 A. 32; Hirsh *v.* Fisher, 138 Mich. 95, 101 N. W. 48; Riley *v.* O'Kelly, 250 Mo. 647, 157 S. W. 566; Dexter Imp. Assn. *v.* College, 234 Mo. 715, 138 S. W. 40; Patterson *v.* Yancey, 97 Mo. App. 681, 71 S. W. 845; Davis *v.* Cohn, 96 Mo. App. 587, 70 S. W. 727; Ebel *v.* Stringer, 73 Neb. 249, 102 N. W. 466; Int. H. Co. *v.* Champlin, 155 App. Div. 847, 140 N. Y. S. 842; Cutting *v.* Jessmer, 101 App. Div. 283, 91 N. Y. S. 658; Austen *v.* Co., 85 N. Y. S. 362; Hookey *v.* Greenstein, 119 App. Div. 209, 104 N. Y. S. 621; Riebold *v.* Hartzell, 23 N. D. 264, 136 N. W. 247; Bacon *v.* Mitchell, 14 N. D. 454, 106 N. W. 129; Nolan *v.* R. Co., 19 Okla. 51, 91 P. 1128; McBurnett *v.* Lampkin, 45 Tex. Civ. 567, 101 S. W. 864; Texas & P. R. Co. *v.* McCarty, 29 Tex. Civ. 616, 69 S. W. 229.

Authority to bring suit, presumed. Brown *v.* French, 159 Ala. 645, 49 S. 255.

141-16 Aaron *v.* U. S., 155 Fed. 833, 84 C. C. A. 67; Doe *v.* Abbott, 152 Ala. 243, 44 S. 637; Bigham *v.* Kistler, 114 Ga. 453, 40 S. E. 303; Uehlein *v.* Burk, 119 Ia. 742, 94 N. W. 243; Riley *v.* O'Kelly, 250 Mo. 647, 157 S. W. 566; Bacon *v.* Mitchell, 14 N. D. 454, 106 N. W. 129; Nolan *v.* R. Co., 19 Okla. 51, 91 P. 1128. *Contra* if attack made by affidavit of client. Rosenthal *v.* Forman, 115 N. Y. S. 282.

Where attorney's authority has been denied, the burden shifts upon the attorney. Riley *v.* O'Kelly, 250 Mo. 647, 157 S. W. 566.

"The attorney's license is prima facie

evidence of his authority to appear for and represent any person in a litigation whom he professes to represent. The statement of the attorney that he does represent such party is prima facie sufficient and must stand until his authority is properly questioned. In order to properly question his authority, it is necessary for the applying party to state facts showing or tending to show want of authority." Pekin Stave & Mfg. Co. *v.* Ramey, 104 Ark. 1, 147 S. W. 83.

Authority to represent "cannot be legally questioned until facts or circumstances are shown by affidavit or otherwise sufficient to raise a legal presumption that he is not legally authorized to appear for the party he assumes to represent." Cartwell *v.* Menifee, 2 Ark. 356.

Conduct of client.—Teter *v.* Irwin, 69 W. Va. 200, 71 S. E. 115.

142-17 Horseshoe M. Co. *v.* Co., 147 Fed. 517, 77 C. C. A. 213; Munshall *v.* Mitchell (Mo.), 163 S. W. 912. See Bk. *v.* Maxey, 76 Ark. 472, 88 S. W. 968.

142-18 Doe *v.* Abbott, 152 Ala. 243, 44 S. 637; Walsh *v.* Doran, 145 Ia. 110, 123 N. W. 999 (it requires clear and satisfactory evidence to overcome presumption). See Mobile L. Imp. Co. *v.* Gass, 142 Ala. 520, 39 S. 229; Pacific P. Co. *v.* Vizelich, 141 Cal. 4, 74 P. 352; Bigham *v.* Kistler, 114 Ga. 453, 40 S. E. 303; Ebel *v.* Stringer, 73 Neb. 249, 102 N. W. 466.

Contra.—Presumption is conclusive in the absence of direct attack. Harrell *v.* Williams (Ga. App.), 80 S. E. 534.

143-20 Underfeed S. Co. *v.* Co., 165 Fed. 65. See Barkley C. Assn. *v.* McCune, 119 Mo. App. 349, 95 S. W. 295.

143-21 Walsh *v.* Doran, 145 Ia. 110, 123 N. W. 999.

Authority to represent one of several plaintiffs cannot be questioned collaterally. Riley *v.* O'Kelly, 250 Mo. 647, 157 S. W. 566.

143-24 Connor *v.* Hodges, 7 Ga. App. 153, 66 S. E. 546. *Comp.* "Conspiracy," infra, 407-2.

143-25 *Contra.* Hirsh *v.* Fisher, 138 Mich 95, 101 N. W. 48.

Attorney acting in justice's court acts as attorney in fact and not at law. Cutting *v.* Jessmer, 101 App. Div. 283, 91 N. Y. S. 658.

Plaintiff may be estopped from denying attorney's authority. Plank *v.* Hertha, 132 Ia. 213, 109 N. W. 732.

Waiver of right to rebut by laches. S. *v.* Harris, 14 N. D. 501, 105 N. W. 621.

Conclusive in favor of persons who have acquired rights. Williams *v.* Johnson, 112 N. C. 424, 17 S. E. 496, 31 Am. St. 513.

Confession of judgment presumed authorized. Lowellville C. M. Co. *v.* Zappio, 80 O. St. 458, 89 N. E. 97.

144-26 See S. *v.* Harris, 14 N. D. 501, 105 N. W. 621.

County.—Lake City E. L. Co. *v.* McCrary, 132 Ia. 624, 110 N. W. 19.

Presumption as to powers of deputy district attorney.—S. *v.* Guglielmo, 46 Or. 250, 79 P. 577, 80 P. 103.

144-28 Simmons *v.* Davenport, 140 N. C. 407, 53 S. E. 225.

But this rule does not place the burden on the attorney of showing that the original contract of employment was fairly obtained. Cooley *v.* Miller & Lux (Cal.), 142 P. 83.

As to the presumptions relative to subsequent contracts see Reilly *v.* Frias, 85 Misc. 162, 147 N. Y. S. 84.

Good faith of agreement based upon a contingent fee must be established by attorney. Hamilton *v.* Holmes, 48 Or. 453, 87 P. 154. But ordinary contract between attorney and client need not be affirmatively shown to have been fairly made. Clifford *v.* Braun, 71 App. Div. 432, 75 N. Y. S. 856; Werner *v.* Knowlton, 107 App. Div. 158, 94 N. Y. S. 1054.

Contingent fee of one-half not prima facie unconscionable. Ransom *v.* Cutting, 188 N Y. 447, 81 N. E. 324.

145-31 Prusa *v.* Everett, 86 Neb. 456, 125 N. W. 1076.

146-33 West Cove G. Co. *v.* Bartley, 105 Me. 293, 74 A. 730 (possession of execution, prima facie evidence of authority to act for creditor); Brasfield *v.* Young (Tex. Civ.), 153 S. W. 180.

Attorney presumed to have authority but he cannot complain if his authority is not recognized when he neglects to prove it when given an opportunity to do so. Munhall *v.* Mitchell (Mo.) 163 S. W. 912.

No presumption attorney in criminal proceeding appears by authority of prosecuting witness. Beiswanger *v.* Co., 98 Md. 287, 57 A. 202.

146-34 Sheehan *v.* Erbe, 103 App. Div. 7, 92 N. Y. S. 862.

Corporation liable for employment by director.—Germania, etc. Co. *v.* Hargis, 23 Ky. L. R. 874, 64 S. W. 516. See Union S. & G. Co. *v.* Tenney, 200 Ill. 349, 65 N. E. 688; Breathitt C., I. & L. Co. *v.* Gregory, 25 Ky. L. R. 1507, 78 S. W. 148.

Identity of two corporations may be shown. Randolph *v.* R. Co., 118 Mo. App. 460, 94 S. W. 309.

Retainer of one member of firm is proof of retainer of firm, in absence of other evidence. Lockwood *v.* Dillenbeck, 104 App. Div. 71, 93 N. Y. S. 321.

Bringing suit in name of a person is only prima facie evidence such person is client and party interested and may be rebutted. Tisdale *v.* Troy, 152 Ala. 566, 44 S. 601. On issue of who employed attorney a claim for services presented to one of the persons is admissible. Fairchild *v.* Whitmore, 6 Cal. App. 52, 91 P. 336.

Hearsay inadmissible.—Miner *v.* Rickey, 5 Cal. App. 451, 90 P. 718.

Attorney may testify as to whom he looked for his compensation. Bryant *v.* Runyan, 94 Neb. 570, 143 N. W. 815.

146-36 **Name of attorney on docket** as attorney for a party and that he ordered witnesses with knowledge of party, is competent to show employment. Higbee *v.* Spangler, 127 Mo. App. 220, 104 S. W. 1143.

District attorney ratified signing of information by another. S. *v.* Guglielmo, 46 Or. 250, 79 P. 577, 80 P. 103.

147-37 Dorr *v.* Dudley, 135 Ia. 20, 112 N. W. 203; Patterson *v.* Fleenor, 28 Ky. L. R. 582, 89 S. W. 705; Bissell *v.* Zorn, 122 Mo. App. 688, 99 S. W. 458; Tiffany *v.* Morgan (R. I.), 73 A. 465.

Conduct inducing attorney to believe services desired. Morris *v.* Kesterson (Tex. Civ.), 88 S. W. 277.

Evidence insufficient. Altkrug *v.* Horowitz, 111 App. Div. 420, 97 N. Y. S. 716; Kneeland *v.* Hurdy, 97 N. Y. S. 957.

On issue of existence of implied contract the result of services is immaterial. Davis *v.* Walker, 131 Ala. 204, 31 S. 554.

147-38 Markey *v.* R. Co., 185 Mo. 348, 84 S. W. 61.

147-39 **Contract** must be shown. Caldwell *v.* Bigger, 76 Kan. 49, 90 P. 1095; Lillis *v.* Co., 131 Mich. 301, 91 N. W. 165.

Evidence of receipt of benefit by stranger insufficient. Davis *v.* Trimble, 76 Ark. 115, 88 S. W. 920; Duckwall *v.* Williams, 29 Ind. App. 650, 63 N. E. 232; Forman *v.* Board, 119 La. 49, 43 S. 908; Trimble *v.* R. Co., 201 Mo. 372, 100 S. W. 7.

Estoppel of stranger.—Kelly *v.* Assn., 2 Cal. App. 460, 84 P. 321.

Estoppel of town.—Newton *v.* Hamden, 79 Conn. 237, 64 A. 229.

Failure by co-administrator to disclaim services. Ward *v.* Koenig, 106 Md. 433, 67 A. 236.

Circumstances surrounding trial may be a ratification. Van Gordon *v.* Goldamer, 16 N. D. 323, 113 N. W. 609.

Employment of counsel to assist attorney shown by knowledge of client of such fact. Allen *v.* Parish, 65 Kan. 496, 70 P. 351. See Emblem *v.* Bicksler, 34 Colo. 496, 83 P. 636; Dorr *v.* Dudley, 135 Ia. 20, 112 N. W. 203. *Comp.* In re Counsel, 32 Ct. Cl. (U. S.) 231; Lathrop *v.* Hallett, 20 Colo. App. 207, 77 P. 1095.

147-40 Welti *v.* Cohen, 157 App. Div. 65, 141 N. Y. S. 670.

147-43 Am. P. Co. *v.* Co., 78 N. J. L. 658, 75 A. 976. See Welti *v.* Cohen, 157 App. Div. 65, 141 N. Y. S. 670.

148-44 Opinion as to capacity in which attorney employed, not binding. Gage *v.* Billing, 12 Cal. App. 688, 108 P. 664.

148-45 **Parol evidence** inadmissible where there is a written agreement. Spurrier *v.* Bullard, 131 Ia. 123, 107 N. W. 1036.

Correspondence may establish relation. Union S. & G. Co. *v.* Tenney, 200 Ill. 349, 65 N. E. 688.

Filing warrant of attorney is required to be made on demand in some states. In such a case proof action originally brought with consent of plaintiff is not enough. Fisler *v.* Reach, 202 Pa. 74, 51 A. 599. See Gregory *v.* Hanna, 1 Haw. 118; C. *v.* R. Co., 27 Pa. C. C. 123.

Claim for services, presented insolvent corporation is admissible in action against third person for same services, as tending to show who was principal. Fairchild *v.* Whitmore, 6 Cal. App. 52, 91 P. 336. Complaint in another action brought to recover for services admissible to show on whose behalf they were rendered. Kiefer *v.* Lara, 56 Wash. 43, 104 P. 1102.

149-46 Letter from party to attor-

ney. Henderson *v.* Eckern, 115 Minn. 410, 132 N. W. 715.

149-47 Such a letter is inadmissible unless it constitutes part of res gestae, or is acquiesced in by opposite party. Duysters *v.* Crawford, 69 N. J. L. 614, 55 A. 823. See Marshall *v.* Piggott, 78 Neb. 722, 111 N. W. 592.

149-50 Underfeed S. Co. *v.* Co., 165 Fed. 65; Davis *v.* Walker, 131 Ala. 204, 31 S. 554; Lowellville C. M. Co. *v.* Zappio, 80 O. St. 458, 89 N. E. 97.

150-51 Clay *v.* Brown, 148 Mo. App. 541, 128 S. W. 803.

Admissions by agent.—Fowler *v.* Co., 18 S. D. 131, 99 N. W. 1095.

Declarations of attorney not admissible to prove employment. Worley *v.* Hineman, 6 Ind. App. 240, 33 N. E. 260.

Circumstantial evidence competent where it is claimed agreement existed not to charge for services—as intimate social relations between parties. Frost *v.* Lawrence, 138 App. Div. 105, 122 N. Y. S. 913.

150-52 Recital in judgment, not conclusive. Huttig-M. P. B. Co. *v.* Co., 140 Mo. App. 374, 124 S. W. 1094.

Evidence held sufficient.—Kast *v.* Miller & Lux, 159 Cal. 723, 115 P. 932.

150-53 But the burden of proof is on attorney to show appointment by alleged agent of party. Brewer *v.* Hartman, 116 Minn. 512, 134 N. W. 113.

Evidence held insufficient.—Smith *v.* Funk, 114 Minn. 367, 131 N. W. 377; Nat. Bk. of Com. *v.* Funk, 114 Minn. 525, 131 N. W. 378.

151-54 Where facts are not disputed negligence is a question for the court. Gabbert *v.* Evans (Mo.), 166 S. W. 635.

151-56 Priest *v.* Dodsworth, 235 Ill. 613, 85 N. E. 940; Lamprecht *v.* Bien, 125 App. Div. 811, 110 N. Y. S. 128; Meisenheimer *v.* Meisenheimer, 55 Wash. 32, 104 P. 159.

Negligence as a defense.—O'Donohoe *v.* Whitty, 2 Ont. 424, 20 Can. L. J. 146; Hubbard *v.* Ellithorpe, 135 Ia. 259, 112 N. W. 796.

Negligence in recoupment.—Keith *v.* Marcus, 181 Mass. 377, 63 N. E. 924.

152-59 *Comp.* Squier *v.* Barnes, 193 Mass. 21, 78 N. E. 731.

152-60 Plaintiff may show he would have recovered in the action in which defendant was employed but for his negligence. Lamprecht *v.* Bien, 125 App. Div. 811, 110 N. Y. S. 128.

154 Burden on attorney to show that contract was fair and reasonable. Morton *v.* Forsee; 219 Mo. 409, 155 S. W. 765.

154-64 Whinery *v.* Brown, 36 Ind. App. 276, 75 N. E. 605. See Boyett *v.* Payne, 141 Ala. 475, 37 S. 585; Vooth *v.* McEachen, 91 App. Div. 30, 86 N. Y. S. 431.

154-66 Transactions between attorney and client.—Relationship existing between attorney and client is fiduciary and confidential, and in all transactions between them by which attorney benefits he must show good faith and fairness. Mansfield *v.* Wallace, 217 Ill. 610, 75 N. E. 682; Klein *v.* Borchert, 89 Minn. 377, 95 N. W. 215; Sheehan *v.* Erbe, 103 App. Div. 7, 92 N. Y. S. 862; Landis *v.* Wintermute, 40 Wash. 673, 82 P. 1000; Young *v.* Murphy, 120 Wis. 49, 97 N. W. 496; Vanasse *v.* Reid, 111 Wis. 303, 87 N. W. 192.

No presumption of fraud because attorney takes conveyance of land in payment of fees. Lindt *v.* Linder, 117 Ia. 110, 90 N. W. 596.

Defendant must show amount of his lien. Weber *v.* Werner, 138 App. Div. 127, 122 N. Y. S. 943.

154-67 P. *v.* Co., 112 App. Div. 166, 98 N. Y. S. 290; Simmons *v.* Davenport, 140 N. C. 407, 53 S. E. 225; Carpenter *v.* Gibson, 82 Vt. 336, 73 A. 1030 (to show opinion given within reasonable time).

Performance of services and existence of debt must be proved by attorney. Loomis *v.* Mullins, 31 Ky. L. R. 231, 101 S. W. 913.

Retainer fee recoverable though no services performed. Union S. & G. Co. *v.* Tenney, 200 Ill. 349, 65 N. E. 688; Blair *v.* Co., 191 Mass. 333, 77 N. E. 762.

No joint employment.—Where there are several undertakings of the attorney to represent each of two corporations in a proposed combination, which did not materialize, and there being evidence that the services were necessarily separate up to the time of the attempted consolidation, and that there was no contract of joint employment. Citizens' Bk. of Tifton *v.* Fulwood & Murray, 11 Ga. App. 488, 75 S. E. 824.

155-68 Forbes *v.* R. Co., 150 Ia. 177, 129 N. W. 810.

Performance of useless work.—Leo *v.* Leyser, 36 Misc. 549, 73 N. Y. S. 941.

Full performance must be shown. Shaw

v. Threadgill, 53 Tex. Civ. 254, 115 S. W. 671.

155-69 See Watson *v.* Co., 118 Ga. 603, 45 S. E. 460; Bissell *v.* Zorn, 122 Mo. App. 688, 99 S. W. 458.

It is presumed client who compromises claim in hands of attorney on a percentage basis has collected it in full or made settlement equivalent to full payment. Coker *v.* Oliver, 4 Ga. App. 728, 62 S. E. 483.

155-71 Defendant must prove any new matter set up by him. Fuller *v.* Stevens (Ala.), 39 S. 623 (set-off); Weil *v.* Fineran, 78 Ark. 87, 93 S. W. 568 (fraud); Wessel *v.* Bishop, 76 Neb. 74, 107 N. W. 220 (part payment); Bogart *v.* Tannenbaum, 53 Misc. 310, 103 N. Y. S. 98 (gratuitous service).

156-72 See Fitch *v.* Martin, 84 Neb. 745, 122 N. W. 50.

156-73 See Roche *v.* Baldwin, 135 Cal. 522, 65 P. 459, 67 P. 903.

Proof can only be made of services alleged. Higgins *v.* Matlock (Tex. Civ.), 95 S. W. 571.

156-74 Davis *v.* Farwell, 80 Vt. 166, 67 A. 129.

156-75 *Comp.* Davis *v.* Fischer, 90 N. Y. S. 301.

Diaries of deceased attorney, admissible to prove services rendered. Burke *v.* Baker, 97 N. Y. S. 768. See Fisher *v.* Mayor, 67 N. Y. 73.

Account book not admissible to prove special contract. Batcheller *v.* Whittier, 12 Cal. App. 262, 107 P. 141.

157-76 Letters from defendant to attorney admissible to show services rendered, although they reflect on character of defendant's business. Stern *v.* Daniel, 47 Wash. 96, 91 P. 552.

157-77 What is a reasonable fee a question of fact. Lilly *v.* Merc. Co., 106 Ark. 571, 153 S. W. 820.

157-78 Dyrenforth *v.* Co., 240 Ill. 25, 88 N. E. 290; Youngerman *v.* Pugh, (Ia.), 125 N. W. 321.

That the charge made was usual and customary need not be shown. Kadison *v.* Brew. Co., 163 Ill. App. 276. But see Gilbert *v.* Lloyd, 170 Ill. App. 436.

Court may regard its knowledge of value of services.—Chicago W. C. Co. *v.* Kennedy, 141 Ill. App. 196. See also Lilly *v.* Merc. Co., 106 Ark. 571, 153 S. W. 820.

158-79 Boyd *v.* Daily, 85 App. Div. 581, 83 N. Y. S. 539. *Contra,* Cooper *v.* Bell, 127 Tenn. 142, 153 S. W. 844.

On appeal presumption is lower court followed established rule in estimating value of services. Ottofy *v.* Keyes, 91 Mo. App. 146; Forrester *v.* Co., 29 Mont. 397, 409, 74 P. 1088, 76 P. 211.

Sum agreed upon by parties to note assumed to be proper fee unless contrary is clearly shown. Plaintiff need not show express agreement between himself and attorney as to amount of latter's fee. McCornick *v.* Swem, 36 Utah 6, 102 P. 626.

158-80 No presumption attorney's lien equals amount of judgment out of which he seeks satisfaction; if there be any presumption it should be to contrary. Bloch *v.* Bloch, 136 App. Div. 770, 121 N. Y. S. 475.

Burden not on attorney to show contract for contingent fee, not prima facie exorbitant or was not fairly procured. Beagles *v.* Robertson, 135 Mo. App. 306, 115 S. W. 1042.

158-81 Fuller *v.* Stevens (Ala.), 39 S. 623; Heiberger *v.* Worthington, 23 App. Cas. (D. C.) 565; Beagles *v.* Robertson, 135 Mo. App. 306, 115 S. W. 1042; Scott *v.* Co., 79 N. J. L. 231, 75 A. 772; Carlisle *v.* Barnes, 102 App. Div. 573, 92 N. Y. S. 917; Myers *v.* Pearce, 23 O. C. C. 661. See In re Rapp, 77 Neb. 674, 110 N. W. 661.

Evidence fee unreasonable, not admissible unless so excessive as to appear grossly unfair. Burke *v.* Baker, 97 N. Y. S. 768.

Severable contract.—Boyd *v.* Daily, 85 App. Div. 581, 83 N. Y. S. 539.

Where express contract void evidence of reasonable value admissible. McCurdy *v.* Dillon, 135 Mich. 678, 98 N. W. 746; In re Snyder, 190 N. Y. 66, 82 N. E. 742.

Counsel employed to assist attorney is not bound by limitation upon fee if he does not know of it. Gates *v.* McClenahan (Ia.), 103 N. W. 969.

158-82 See Dempsey *v.* Wells, 109 Mo. App. 470, 84 S. W. 1015; Simmons *v.* Davenport, 140 N. C. 407, 53 S. E. 225.

Evidence admissible to show value of services based on amount of time consumed. Thompson *v.* Lumb. Co. (Nev.), 141 P. 69.

Claim of lien is not conclusive value of services was not greater than claim. Gilmore *v.* McBride, 156 Fed. 464, 84 C. C. A. 274.

Declaration of third persons, not under

oath, inadmissible. Miner *v.* Rickey, 5 Cal. App. 451, 90 P. 718.

Reasonable value is not to be determined by value to client. Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. 93.

Order of court allowing fees is not conclusive as to reasonableness against persons not parties. Hays *v.* Johnson, 30 Ky. L. R. 614, 99 S. W. 332.

Value of services in absence of any evidence may properly be found by court from its own knowledge and experience. Pearce *v.* Albright, 12 N. M. 202, 76 P. 286. Value must be determined upon sworn testimony, which is to be weighed by court in view of its own experience and knowledge. McMullen *v.* Reynolds, 209 Ill. 504, 70 N. E. 1041. See Dinkelspiel *v.* Pons, 119 La. 236, 43 S. 1018. Knowledge of court, acquired while at the bar, will be drawn upon to aid in determining whether verdict is for excessive sum. Stewart *v.* Beggs, 56 Fla. 858, 47 S. 932.

Retainer.—To determine reasonableness of retainer, ability and reputation of attorney, probability of extent of interference with other business, and subsequent business done for client may be shown. Blair *v.* Co., 191 Mass. 333, 77 N. E. 762.

161-85 Webster *v.* Loeb, 112 Mo. App. 139, 86 S. W. 463. See Bissell *v.* Zorn, 122 Mo. App. 688, 99 S. W. 458.

Account stated is conclusive of the value. Lane *v.* Taylor, 80 Ark. 469, 97 S. W. 441, 7 L. R. A. (N. S.) 924; Cusick *v.* Boyne, 1 Cal. App. 643, 82 P. 985.

In absence of other testimony, award of a greater amount than is set forth in account is error. Bates *v.* Dist., 45 Wash. 498, 88 P. 944.

Account rendered need not specify minor expenses. Treakle *v.* Vaughan, 83 Ark. 258, 103 S. W. 174; Taussig *v.* R. Co., 186 Mo. 269, 85 S. W. 378.

161-86 Reasonable retaining fee may be proved though not alleged. Aydelotte *v.* Bloom, 13 Cal. App. 56, 108 P. 877.

161-87 Stoddard *v.* Sagal, 86 Conn. 346, 85 A. 519; Currey *v.* Robinson (Kan.), 139 P. 1023; Morehead *v.* Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Smith *v.* Couch, 117 Mo. App. 267, 92 S. W. 1143; Forrester *v.* Co., 29 Mont. 397, 409, 74 P. 1088, 76 P. 211; Schlesinger *v.* Dunne, 36 Misc. 529, 73 N. Y. S. 1014; Heblich *v.* Slater, 217 Pa. 404, 66 A. 655.

162-88 In re Richmond's Est., 9 Cal. App. 413, 99 P. 558; Harding *v.* Harding, 132 Ky. 133, 116 S. W. 305; Forrester *v.* Co., 29 Mont. 397, 409, 74 P. 1088, 76 P. 211; Shufeldt *v.* Hughes, 55 Wash. 246, 104 P. 253.

Evidence of reasonable value is irrelevant where in a suit on a note statutory notice was not given. Shaw *v.* Probasco, 139 Ga. 481, 77 S. E. 577.

Securing legislation. — Hempstead *v.* New York, 86 App. Div. 300, 83 N. Y. S. 806.

Financial condition of judgment debtor admissible to show value of attorney's services in making collection. Boyett *v.* Payne, 141 Ala. 475, 37 S. 585.

Attorney improperly discharged may recover. O'Neal *v.* Allday (Tex. Civ.), 135 S. W. 253.

162-89 Morehead *v.* Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Trimble *v.* R. Co., 201 Mo. 372, 100 S. W. 7; Shufeldt *v.* Hughes, 55 Wash. 246, 104 P. 253.

163-90 Graves *v.* Sanders, 125 Fed. 690, 60 C. C. A. 422; In re Richmond's Est., 9 Cal. App. 413, 99 P. 558; Cusick *v.* Boyne, 1 Cal. App. 643, 82 P. 985; Desky *v.* Co., 13 Haw. 634; Graham *v.* Dillon, 144 Ia. 82, 121 N. W. 47; Harding *v.* Harding, 132 Ky. 133, 116 S. W. 305; Donaldson *v.* Allen, 213 Mo. 293, 111 S. W. 1128; Trimble *v.* R. Co., 201 Mo. 372, 100 S. W. 7; Smith *v.* Couch, 117 Mo. App. 267, 92 S. W. 1143; Schlesinger *v.* Dunne, 36 Misc. 529, 73 N. Y. S. 1014; Heblich *v.* Slater, 217 Pa. 404, 66 A. 655; Littell *v.* Saulberry, 40 Wash. 550, 82 P. 909; Shufeldt *v.* Hughes, 55 Wash. 246, 104 P. 253.

Value of land for which abstracts furnished. Morehead *v.* Anderson, 30 Ky. L. R. 1137, 100 S. W. 340.

164-91 Stewart *v.* Beggs, 56 Fla. 565, 47 S. 932; Trimble *v.* R. Co., 201 Mo. 372, 100 S. W. 7. See Smith *v.* Couch, 117 Mo. App. 267, 92 S. W. 1143; Forrester *v.* Co., 29 Mont. 397, 74 P. 1088, 76 P. 211.

Life imprisonment instead of death penalty in murder case. Weldon *v.* Finley, 31 Ky. L. R. 1050, 104 S. W. 701.

164-92 Germania, etc. Co. *v.* Hargis, 23 Ky. L. R. 874, 64 S. W. 516.

If attorney retained generally result of losing employment by those whose interests are adverse to his client's

may be considered. Mellon *v.* Fulton, 22 Okla. 636, 98 P. 911.

165-94 Fuller *v.* Stevens (Ala.), 39 S. 623; Crane *v.* Village, 157 Ill. App. 595; Chicago W. C. Co. *v.* Kennedy, 141 Ill. App. 196.

Scale of attorney's fees fixed by a bar association inadmissible in absence of preliminary proof of authenticity. Bingham *v.* Spruill, 97 Ill. App. 374.

166-95 Proof of same attorney's charges, in other matters, inadmissible. Fuller *v.* Stevens (Ala.), 39 S. 623.

166-96 Heblich *v.* Slater, 217 Pa. 404, 66 A. 655.

166-97 Smith *v.* Couch, 117 Mo. App. 267, 92 S. W. 1143.

167-1 Duckwall *v.* Williams, 29 Ind. App. 650, 63 N. E. 232; Thorp *v.* Ramsey, 51 Wash. 530, 99 P. 584.

168-3 Spencer *v.* Collins, 156 Cal. 298, 104 P. 320; Roche *v.* Baldwin, 135 Cal. 522, 65 P. 459; s. c., 143 Cal. 186, 76 P. 956; Fairchild *v.* Whitmore, 6 Cal. App. 52, 91 P. 336; Morehead *v.* Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Reed *v.* Reed, 24 Ky. L. R. 2438, 74 S. W. 207; Dinkelspiel *v.* Pons, 119 La. 236, 43 S. 1018; Kurtz *v.* Co., 37 Utah 313, 108 P. 14; Carpenter *v.* Gibson, 82 Vt. 336, 73 A. 1030.

See Lilly *v.* Merc. Co., 106 Ark. 571, 153 S. W. 820.

Court not bound by opinions of attorneys as to what constitutes reasonable charge. P. *v.* Gilbert (Ill.), 104 N. E. 1082.

What is a reasonable fee may be shown by testimony of reputable attorneys. In re Freund's Est., 171 Ill. App. 570.

168-5 Walker *v.* Co., 128 Ga. 831, 58 S. E. 475; Germania, etc. Co. *v.* Hargis, 23 Ky. L. R. 874, 64 S. W. 516.

Value of personal services of one of plaintiff firm need not be shown if those performed were so intermingled with all services as to make it difficult to value them separately. Thorp *v.* Ramsey, 51 Wash. 530, 99 P. 584.

169-7 Evidence as to per diem charge improper where services could not be computed on that basis. Hughes *v.* Ferriman, 119 Ill. App. 169.

169-11 See infra, "Value," 180-82.

170-12 Chicago attorney not an expert on reasonable charges in Arizona. Harmann *v.* Rose, 129 Ill. App. 337.

170-13 Expert testimony as to value of services may be presented by affidavits, in those cases in which their use is proper. Hutchinson *v.* Hutchinson, 105 Ill. App. 349.

171-14 Matters relating to ability of plaintiff may be brought out on cross-examination after opinion as to value of services rendered, based on what was done, has been given. Fuller, *v.* Stevens (Ala.), 39 S. 623.

172-15 Fuchs *v.* Tone, 218 Ill. 445, 75 N. E. 1014.

Facts must be in evidence.—Roche *v.* Baldwin, 135 Cal. 522, 65 P. 459; *s. c.*, 143 Cal. 186, 76 P. 956.

172-16 Morehead *v.* Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Fowler *v.* Co., 18 S. D. 131, 99 N. W. 1095.

Question to be asked expert is, what is usual and customary charge for such services. If there is no such charge it is proper to ask what they are reasonably worth. Maneaty *v.* Steele, 112 Ill. App. 19. See Sexton *v.* Bradley, 110 Ill. App. 495.

172-17 Spencer *v.* Collins, 156 Cal. 298, 104 P. 320; Lee *v.* Lomax, 219 Ill. 218, 76 N. E. 377; Sexton *v.* Bradley, 110 Ill. App. 495; Germania, etc. Co. *v.* Hargis, 23 Ky. L. R. 874, 64 S. W. 516; Morehead *v.* Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Dinkelspiel *v.* Pons, 119 La. 236, 43 S. 1018; Brownrigg *v.* Massengale, 97 Mo. App. 190, 70 S. W. 1103; Mack *v.* Miller, 87 App. Div. 359, 84 N. Y. S. 440; Schlesinger *v.* Dunne, 36 Misc. 529, 73 N. Y. S. 1014. See infra, "Value," 579-81.

Jurors may regard their knowledge and experience. Graham *v.* Dillon, 144 Ia. 82, 121 N. W. 47.

Court may use its own experience and knowledge.—Gates *v.* McClenahan (Ia.), 103 N. W. 969; Hutchinson *v.* Hutchinson, 105 Ill. App. 349.

Burden of proving right to lien and amount due, on party asserting lien. Walker *v.* Co., 128 Ga. 831, 58 S. E. 475.

173 **Adversary's attorney not to be called by a party.** Lupton *v.* Underwood (Del.), 85 A. 965.

Improper to make an attorney special counsel in order to render him incompetent as a witness for the adverse party. Flood *v.* Bollmeier (Ia.), 138 N. W. 1102.

173-18 Nix *v.* Thackaberry, 240 Ill. 352, 88 N. E. 811.

173-19 Except in case of statutory prohibition. In re Seymour's Will, 76 Misc. 371, 136 N. Y. S. 942.

173-20 Wilkinson *v.* P., 226 Ill. 135, 80 N. E. 699; Chicago U. T. Co. *v.* Ertrachter, 228 Ill. 114, 81 N. E. 816; Domm *v.* Hollenbeck, 142 Ill. App. 439; Smart *v.* Lodge No. 2, 6 O. C. C. (N. S.) 15.

Solicitor's testimony not given much weight if he has been engaged in furnishing evidence. Grindle *v.* Grindle, 240 Ill. 143, 88 N. E. 473.

Counsel for one party may be called as witness by other and testimony contradicted by counsel who called him. Logan *v.* Soc., 156 Mich. 537, 121 N. W. 485.

Attorneys justified in testifying to prevent possible miscarriage of justice and to rebut aspersions on professional reputation. Reavely *v.* Harris, 145 Ill. App. 545.

BAILMENTS.

177-1 Fleet *v.* Hertz, 98 Ill. App. 564 (discussion). See Ott *v.* Sweatman, 15 Pa. C. C. 97.

178-3 Burden is on those furnishing goods to person who later becomes bankrupt, to prove bailment. In re Wells, 140 Fed. 752. See In re Wood, 140 Fed. 964.

178-5 It is presumed property found in possession of a person belongs to him. In re Wood, 140 Fed. 964.

178-7 Parol evidence received to show whether transaction loan or deposit of money, although certificate of deposit issued. S. *v.* Bk., 136 Ia. 79, 113 N. W. 500.

178-10 See Potter *v.* Co., 101 Mo. App. 581, 73 S. W. 1005.

Testimony of warehouseman competent to aid in determining character of transaction. Savage *v.* Co., 48 Or. 1, 85 P. 69. See Thompson *v.* Jordan, 164 Ind. 551, 73 N. E. 1087.

179-17 See Jungelaus *v.* R. Co., 99 Minn. 515, 108 N. W. 1118.

180-24 Holstein *v.* Phillips, 146 N. C. 366, 59 S. E. 1037.

181-35 Bissell *v.* Harris, 1 Neb. (Unof.) 535, 95 N. W. 779.

Bank.—Sherwood *v.* Bk., 131 Ia. 528, 109 N. W. 9.

182-37 Bates *v.* Bk., 18 Ida. 429, 110 P. 277.

183-39 Evidence of local custom to receive goods admissible to prove bailment. Bates *v.* Bk., 18 Ida. 429, 110 P. 277.

183-40 Edgerton *v.* R. Co., 146 Ill. App. 199.

Shipper must show delivery to carrier, at customary place, during usual business hours. Spofford *v.* R. Co., 11 Pa. Super. 97.

Burden on state to prove delivery in prosecution for embezzlement. S. *v.* Sienkiewicz, 4 Penne. (Del.) 59, 55 A. 346.

183-43 It may be shown defendant was ostensibly proprietor of hotel and held himself out as such by advertisements, and fact he was not actual owner does not prevent him from being bailee for goods received. Ross *v.* Daugherty, 127 Ill. App. 572.

183-44 McCurdy *v.* Co., 94 Minn. 326, 102 N. W. 873.

Terms of disputed oral contract of storage.—Phenix Co. *v.* Co., 189 Mass. 82, 75 N. E. 258.

Parol evidence inadmissible to vary written contract of bailment. Savage *v.* Co., 48 Or. 1, 85 P. 69.

184-50 Value of article may be given to determine value of use. Carey *v.* Concrete Co., 88 Kan. 515, 129 P. 191.

185-60 No presumption that bailee insurer.—"But this does not mean that we must distort or ignore the language used by the parties; on the contrary, it is our duty to give it effect as showing their intention, unless there is something in the nature of the subject-matter or otherwise to indicate a different one. If the words used here are given effect as they must be, we are unable to see how defendant can escape liability for damage by fire to the motor while in its possession, for the contract expressly provided that he shall be responsible for any damage, barring ordinary wear and tear." Commercial Elec. Supply Co. *v.* Com. Co., 166 Mo. App. 332, 148 S. W. 995.

186-66 Phenix Co. *v.* Co., 189 Mass. 82, 75 N. E. 258.

187-69 Bailor may show bailee had knowledge goods would be damaged by freezing. Phenix Co. *v.* Co., 189 Mass. 82, 75 N. E. 258.

187-70 Proof of breed of cattle, admissible. Darr *v.* Donovan, 73 Neb. 424, 102 N. W. 1012.

Warehouseman presumed to know flour will be injured if it comes in contact with oil. Sibley Co. *v.* Co., 200 Ill. 354, 65 N. E. 676.

187-73 *Contra,* Barker *v.* Co., 79 Conn. 342, 65 A. 143.

187-74 Agistor's care measured by that of ordinarily prudent man. Darr *v.* Donovan, 73 Neb. 424, 102 N. W. 1012.

188-78 It must be first shown plaintiff knew of such advertisements and relied upon them. Moneyweight S. Co. *v.* Woodward, 29 Pa. Super. 142.

189-97 Edgerton *v.* R. Co., 146 Ill. App. 199; Emdin *v.* Haas, 92 N. Y. S. 312.

190-98 See McBride *v.* Wallace, 17 N. D. 495, 117 N. W. 857, for discussion; text referred to.

191-2 It is for jury to say whether evidence sufficient to shift burden. Balt. R. & H. Co. *v.* Kreiner, 109 Md. 361, 71 A. 1066.

191-5 Nature of property a material circumstance; if it is perishable presumption may not arise. Patterson *v.* Co., 53 Wash. 155, 101 P. 721.

192-6 Hackney *v.* Perry, 152 Ala. 626, 44 S. 1029; Dieterle *v.* Bekin, 143 Cal. 683, 77 P. 664; Rockhill *v.* Co., 237 Ill. 98, 86 N. E. 740; Hunter *v.* Ricke, 127 Ia. 108, 102 N. W. 826; Sherwood *v.* Bk., 131 Ia. 528, 109 N. W. 9; Baehr *v.* Downey, 133 Mich. 163, 94 N. W. 750; Yazoo, etc. R. Co. *v.* Hughes, 94 Miss. 242, 47 S. 662; Collier *v.* Co., 147 Mo. App. 700, 127 S. W. 435; Horton *v.* Co., 114 Mo. App. 357, 89 S. W. 363; Dixon *v.* McDonnell, 92 Mo. App. 479; Shropshire *v.* Sidebottom, 30 Mont. 406, 76 P. 941; Manson *v.* Assn. (N. J.), 60 A. 1120; Jackson *v.* McDonald, 70 N. J. L. 594, 57 A. 126; Bryant *v.* Auchmuty, 129 N. Y. S. 471; Openhym *v.* S. S. Co., 127 N. Y. S. 463; Hasbrouck *v.* R. Co., 122 N. Y. S. 123; Plesser *v.* Appel, 113 N. Y. S. 1034; Toplitz *v.* Timmins, 88 N. Y. S. 946; Polack *v.* O'Brien, 114 App. Div. 366, 100 N. Y. S. 385; Snell *v.* Cornwell, 93 App. Div. 136, 87 N. Y. S. 1; Simonoff *v.* Fox, 46 Misc. 249, 91 N. Y. S. 757; Terry *v.* R. Co., 81 S. C. 279, 62 S. E. 249; Watt *v.* Kilbury, 53 Wash. 446, 102 P. 403; Pregent *v.* Mills, 51 Wash. 187, 98 P. 328 (though bailment gratuitous).

See Wheeler *v.* Blumenthal, 107 N. Y. S. 57. *Comp.* McDonald *v.* Miser, 2 O. C. C. (N. S.) 313.

"Where goods are stored with a common carrier or warehouseman, and there is a failure to deliver upon proper demand, the owner need not show specific acts of negligence to make a prima facie case entitling him to recover. To escape liability, the burden is cast upon the defendant to show that the failure to deliver did not result through any negligence on its part. Terry *v.* Southern Railway Co., 81 S. C. 279, 62 S. E. 249, 18 L. R. A. (N. S.) 295, and note; Van Zile, Bail & Car. (2d ed.), §204. See, also, Hildebrand *v.* Carroll, 106 Wis. 324, 82 N. W. 145, 80 Am. St. Rep. 29. Defendant was unable to give any explanation of how the loss occurred. Under such circumstances, a presumption of negligence arises, sufficient to entitle plaintiff to recover. Browning *v.* Goodrich Trans. Co., 78 Wis. 391, 47 N. W. 428, 10 L. R. A. 415, 23 Am. St. Rep. 414; Bagley Elevator Co. *v.* Am. Ex. Co., 63 Minn. 142, 65 N. W. 264." Noetzel *v.* Co., 148 Wis. 106, 134 N. W. 381.

192-7 The Genessee, 138 Fed. 549, 70 C. C. A. 673; Swenson *v.* Snare, 145 Fed. 727; Powers *v.* Jughardt, 101 App. Div. 53, 91 N. Y. S. 556; Bean *v.* Ford, 65 Misc. 481, 119 N. Y. S. 1074. See Selesky *v.* Vollmer, 107 App. Div. 300, 95 N. Y. S. 130.

Loss by fire raises no such presumption. Lyman *v.* R. Co., 132 N. C. 721, 44 S. E. 550.

192-8 Massachusetts rule, as stated in text, followed. Hunter *v.* Ricke, 127 Ia. 108, 102 N. W. 826; McDonald *v.* Miser, 2 O. C. C. (N. S.) 313.

193-9 Thorn *v.* Straus, 78 Misc. 139, 137 N. Y. S. 927.

And in Missouri. Berger *v.* Co., 97 Mo. App. 127, 71 S. W. 102.

193-10 Brown *v.* Funck's Est., 89 Kan. 601, 132 P. 202; Shropshire *v.* Sidebottom, 30 Mont. 406, 76 P. 941. *Comp.* Dieterle *v.* Bekin, 143 Cal. 683, 77 P. 664.

194-11 Swenson *v.* Snare, 145 Fed. 727; Balt. R. & H. Co. *v.* Kreiner, 109 Md. 361, 71 A. 1066; Freeman *v.* Foreman, 141 Mo. App. 359, 125 S. W. 524; Polack *v.* O'Brien, 114 App. Div. 366, 100 N. Y. S. 385; Lyman *v.* R. Co., 132 N. C. 721, 44 S. E. 550; McDonald *v.* Miser, 2 O. C. C. (N. S.) 313; Light *v.* Miller, 38 Pa. Super. 408; Baker-L. Mfg. Co. *v.* Clayton, 46 Tex. Civ. 384, 103 S. W. 197.

194-12 Swenson *v.* Co., 160 Fed. 459, 87 C. C. A. 443; Terry & T. Co. *v.* Co., 168 Fed. 533, 93 C. C. A. 613; Nutt *v.* Davison, 54 Colo. 586, 131 P. 390; Union S. Co. *v.* Transf. Co. (Del.),

90 A. 407; Keith Co. *v.* Co. (Del.), 87 A. 715; Freeman *v.* Foreman, 141 Mo. App. 359, 125 S. W. 524; Davis *v.* Taylor, 92 Neb. 769, 139 N. W. 687; Farmen *v.* Co., 25 S. D. 96, 125 N. W. 575; Bagley *v.* Brack (Tex. Civ.), 154 S. W. 247.

See Phipps *v.* Hotel, 22 T. L. R. (Eng.) 49; Hunter *v.* Ricke, 127 Ia. 108, 102 N. W. 826; Selesky *v.* Vollmer, 107 App. Div. 300, 96 N. Y. S. 130; Hilsop *v.* Ordner, 28 Tex. Civ. 540, 67 S. W. 337; Hildebrand *v.* Carroll, 106 Wis. 324, 82 N. W. 145.

195-14 Shifting burden. See Balt. R. & H. Co. *v.* Kreiner, 109 Md. 361, 71 A. 1066. See Bryan *v.* R. Co., 169 Ill. App. 181.

195-15 Phipps *v.* Hotel, 22 Times L. R. (Eng.) 49; Carll *v.* Goldberg, 59 Misc. 172, 110 N. Y. S. 318.

195-16 Dieterle *v.* Bekin, 143 Cal. 683, 77 P. 664; Sherwood *v.* Bk., 131 Ia. 528, 109 N. W. 9; Shropshire *v.* Sidebottom, 30 Mont. 406, 76 P. 941; Bissell *v.* Harris (Neb.), 95 N. W. 779; Sulpho Co. *v.* Allen, 66 Neb. 295, 92 N. W. 354. See Snell *v.* Cornwell, 93 App. Div. 136, 87 N. Y. S. 1.

195-17 Edgerton *v.* R. Co., 146 Ill. App. 199; Bryan *v.* R. Co., 169 Ill. App. 181; Miles *v.* Hotel Co., 167 Ill. App. 440. *Comp.* Ford M. Co. *v.* Osburn, 140 Ill. App. 633.

195-18 Corbin *v.* Cleaning Co. (Mo.), 167 S. W. 1114; Levi *v.* R. Co., 157 Mo. App. 536, 138 S. W. 699.

196-19 Moultrie Compress Co. *v.* Cotton Co., 13 Ga. App. 617, 79 S. E. 589; Atlantic Coast Line R. Co. *v.* Bunn, 13 Ga. App. 753, 79 S. E. 947; Pickering *v.* Anderson, 12 Ga. App. 61, 76 S. E. 754; Netzow Mfg. Co. *v.* R. Co., 7 Ga. App. 163, 66 S. E. 399.

196-21 Ford M. Co. *v.* Osburn, 140 Ill. App. 633; Hunter *v.* Ricke, 127 Ia. 108, 102 N. W. 826; Wisecarver *v.* Long, 120 Ia. 59, 94 N. W. 467; Darby C. Co. *v.* Hoffberger, 111 Md. 84, 73 A. 565; Yazoo, etc. R. Co. *v.* Hughes, 94 Miss. 242, 47 S. 662; Allen *v.* Car Co., 71 Misc. 190, 128 N. Y. S. 419; Eshleman *v.* Co., 222 Pa. 20, 70 A. 899; Staley *v.* Gin Co. (Tex. Civ.), 163 S. W. 381; Colburn *v.* Art Assn. (Wash.), 141 P. 1153.

Loss through inevitable accident.—Bissell *v.* Harris (Neb.), 95 N. W. 779.

While proof tents were delivered to bailee in good, and returned in damaged, condition might establish a prima facie case of negligence, instruction bailee must account for damage need not be given. Baker-L. Mfg. Co. *v.* Clayton, 46 Tex. Civ. 384, 103 S. W. 197.

197-22 Sulpho Co. *v.* Allen, 66 Neb. 295, 92 N. W. 354.

198-24 Wisecarver *v.* Long, 120 Ia. 59, 94 N. W. 467; Darby C. Co. *v.* Hoffberger, 111 Md. 84, 73 A. 565.

198-26 Tendency of meat to deteriorate, matter of common knowledge. Patterson *v.* Co., 53 Wash. 155, 101 P. 721.

198-28 On the issue of negligence in storing butter evidence plaintiff's butter in other storage places kept well and butter of other persons stored with defendant was damaged is admissible. Rudell *v.* Co., 136 Mich. 528, 99 N. W. 756. On the issue of defendant's negligence, in supplying cattle with water, plaintiffs could show their cattle in another pasture and under care of another bailee were better supplied. Tuttle *v.* Moody (Tex. Civ.), 94 S. W. 134. *Comp.* Welch *v.* Fransioli, 46 Wash. 530, 90 P. 644.

199-30 General custom of agistors may be proved on question of negligence in not maintaining fences. Arrington *v.* Fleming, 117 Ga. 449, 43 S. E. 691, 97 Am. St. 169.

199-33 Proof other losses had recently occurred is proper, in connection with other facts, to determine whether defendant's diligence had been commensurate with circumstances. Netzow Mfg. Co. *v.* R. Co., 7 Ga. App. 163, 66 S. E. 399.

Defendant's reputation for carefulness may not be proved. McBride *v.* Wallace, 17 N. D. 495, 117 N. W. 857.

200-39 Ross *v.* Daugherty, 127 Ill. App. 572; Weaver *v.* Stables, 46 Wash. 65, 89 P. 154. See Haralson *v.* Hahl (Tex. Civ.), 85 S. W. 1008 (ordinary care).

202-51 Custom of warehousemen to insure property may be proved, and acts and dealings of defendant may be shown to establish its duty in that behalf. Custom of other warehousemen may be proved to show intention of parties in connection with proof of implied duty to insure, though defendant concealed fact of its con-compliance with custom. Paukszis *v.* Co., 212 Pa. 403, 61 A. 901 (books left at bindery); Broussard *v.* Co. (Tex. Civ.), 120 S. W. 587.

203-55 Williamson & Co. *v.* R. Co. (Tex. Civ.), 138 S. W. 807.

Failure to redeliver is evidence of negligence. Siegel *v.* Eisner, 138 N. Y. S. 174.

Where there is a conflict in the evidence, question of redelivery is for jury. Simonoff *v.* Fox, 46 Misc. 249, 91 N. Y. S 757.

203-57 Eytinge *v.* Transport Co., 145 N. Y. S. 1054.

Contra where goods removed from residence of husband and wife at former's request and subsequently delivered to him. Oakes *v.* Sloane, 135 App. Div. 354, 120 N. Y. S. 626.

Evidence insufficient.—Banco Minero *v.* Ross & Masterson (Tex. Civ.), 138 S. W. 224.

204-59 McCurdy *v.* Co., 94 Minn. 326, 102 N. W. 873. See Barker *v.* Co., 79 Conn. 342, 65 A. 143 (sentimental value for loss of household goods).

204-64 Negligent care of cattle; damage. Darr *v.* Donovan, 73 Neb. 424, 102 N. W. 1012.

Otherwise, where the obligation was to return the horse in as good condition as received. Langhren *v.* Barnard, 115 Minn. 276, 132 N. W. 301.

204-66 Proof of value must relate to time of sale, not to time owner intended to sell. Patterson *v.* Co., 53 Wash. 155, 101 P. 721.

204-69 Expert evidence admissible to prove value of lost household goods. Barker *v.* Co., 79 Conn. 342, 65 A. 143.

BANKRUPTCY.

Presumption against jurisdiction, 209-3; *Number of examinations,* 216-28; *Variance,* 228-66; *Obtaining property on false statement,* 232-78; *Ruling of referee on objections to evidence,* 232-80; *Evidence by bankrupt in support of petition,* 232-80; *Concealment of property,* 236-98.

For a full treatment of bankruptcy proceedings, see 3 STANDARD PROC. 881, *et seq.*

208-1 In re Electron Chem. Co., 208 Fed. 954; Cummins Grocer Co. *v.* Talley, 187 Fed. 507, 109 C. C. A. 273; In re Coddington, 118 Fed. 281; McGowan *v.* Knittel, 137 Fed. 453, 69 C. C. A. 595; In re Am. Pub. Co., 15 Okla. 177, 79 P. 762.

The burden of proving domicil of a corporation rests upon petitioner. In re Tennessee C. Co., 213 Fed. 33.

Evidence showing insolvency.—In re McCartney, 188 Fed. 815.

Involuntary appearance of debtor at hearing; effect. See Troy W. Wks. *v.* Vastbinder, 130 Fed. 232.

Appearance without bringing books shifts burden of proof to debtor. Bogen *v.* Protter, 129 Fed. 533, 64 C. C. A. 63.

Burden of proving partnership in proceedings against it. See Jones *v.* Burnham, 138 Fed. 986, 71 C. C. A. 240.

After a finding bankrupt was insane when transfers made creditors must show they were made during a lucid interval. In re Kehler, 159 Fed. 55, 86 C. C. A. 245.

209-2 See In re Crafts-Riordon Shoe Co., 185 Fed. 931.

209-3 Burden of proving that debtor belongs to the class which may be declared involuntary bankrupts, is upon claimant. Walker R. & H. Co. *v.* Co., 173 Fed. 771, 97 C. C. A. 495; In re Hudson River E. P. Co., 173 Fed. 934; In re Pilger, 118 Fed. 206; Philpot *v.* O'Brien, 126 Fed. 167, 61 C. C. A. 111. *Comp.* In re Trust Co., 152 Fed. 152, 81 C. C. A. 58.

210-5 In re Williams, 123 Fed. 321 (full discussion).

210-8 See In re McGowan, 134 Fed. 498.

Schedule filed by trustee inadmissible in action to recover preferences. Batchelder *v.* Nat. Bk. (Mass.), 105 N. E. 1052.

Evidence aliunde in involuntary proceedings may be produced to determine reason for appointment of trustee. In re Muir, 212 Fed. 495.

Great latitude where issue is fraudulent transfer. In re Luber, 152 Fed. 492.

Verified schedules of bankrupt competent. In re Mandel, 127 Fed. 863. They are not self-serving declarations. In re Strang, 166 Fed. 779.

Books of bankrupt competent, though not conclusive. In re Docker-F. Co., 123 Fed. 190.

Witness' private memorandum book, containing entries of money paid bank, of which witness president, competent in examination concerning "acts, conduct or property" of bankrupt. In re Wheeler & Co., 158 Fed. 603, 85 C. C. A. 425.

Record of state court in proceedings in which receiver appointed, admissible. Blue Mountain Co. *v.* Portner, 131 Fed. 57, 65 C. C. A. 295.

Post-dated checks and notes subsequently paid are evidence of preference. Brown *v.* Pelousky, 210 Mass. 502, 96 N. E. 1102.

Opened judgment, inadmissible. McGowan *v.* Knittel, 137 Fed. 453, 69 C. C. A. 595.

English practice.—On hearing petition petitioning creditor can require production of debtor's books and may call debtor. In re X. Y. (1902), 1 K. B. (Eng.) 98.

Charter of corporation is best, though not conclusive, evidence of character of its business. Transactions of its predecessor do not show that fact. Walker R. & H. Co. *v.* Co., 173 Fed. 771, 97 C. C. A. 495.

211-9 Admission in writing of inability to pay debts and willingness to be adjudged bankrupt is act of bankruptcy, and no proof of insolvency is necessary. In re Duplex R. Co., 142 Fed. 906. *Contra* if admission made in violation of injunction. In re Hudson River E. P. Co., 173 Fed. 934.

Claims presented against bankrupt, not competent as admissions of value of his stock. Jacobs *v.* U. S., 161 Fed 694, 88 C. C. A. 554.

Admission by corporation.—In re Moench & S. Co., 130 Fed. 685, 66 C. C. A. 37.

Admission of insolvency by debtor not necessarily admission of inability to pay debts and willingness to be adjudged bankrupt. In re Wilmington H. Co., 120 Fed. 179. *Comp.* Brinkly *v.* Smithwick, 126 Fed. 686.

As to competency and weight of declarations of bankrupt, see In re Foster, 126 Fed. 1014.

211-11 Adjudication of bankruptcy admissible as evidence of insolvency. Calkins *v.* Bk., 99 Mo. App. 509, 73 S. W. 1098. *Comp.* Swartz *v.* Frank, 183 Mo. 438, 82 S. W. 60.

212-12 Edelstein *v.* U. S., 149 Fed. 636, 79 C. C. A. 328; In re Billing, 145 Fed. 395; DeGraff *v.* Lang, 92 App. Div. 564, 87 N. Y. S. 78; Whitwell *v.* Wright, 115 N. Y. S. 48; Kruegel *v.* Murphy (Tex. Civ.), 126 S. W. 680.

Parol evidence is admissible to show that property of a bankrupt was held by him in trust, in an action to set aside a conveyance as fraudulent. Bailey *v.* Wood, 211 Mass. 37, 97 N. E. 902.

Adjudication is res judicata of bankrupt's residence as against creditor who acquiesced. In re Hintze, 134 Fed. 141.

213-15 In re Feilerman, 149 Fed. 244.

Alleged bankrupt for whose property receiver appointed must submit to examination even pending hearing on petition. In re Fleischer, 151 Fed. 81.

Right to examine extends to every creditor designated in schedule whether he has filed claim or not. In re Rose, 163 Fed. 636; In re Samuelson, 174 Fed. 911.

Writ of habeas corpus ad testificandum will not be issued to bring a bankrupt prisoner, confined under state process, before commissioner for examination except in case of necessity; his deposition may be taken. In re Thaw, 172 Fed. 288. Matter is for discretion of court, s. c. 166 Fed. 71, 91 C. C. A. 657.

213-18 In re Bryant, 188 Fed. 530.

Examination cannot be required before time bankrupt must answer. Skubinsky *v.* Bodek, 172 Fed. 332, 97 C. C. A. 116.

214-19 Testimony of bankrupt and others not admissible against claimant not notified it was to be taken. In re Hersey, 171 Fed. 1004.

214-21 Right of creditor to have examination of third person is not absolute. In re Andrews, 130 Fed. 383.

Refusal of referee to subpoena bankrupt's wife proper. In re Doherty, 135 Fed. 432.

Order for examination of witness may, in discretion of court, be made upon oral application. In re Abbey Press, 134 Fed. 51.

215-26 Certain latitude allowed in order to determine whether business is wife's or her husband's. In re Worrell, 125 Fed. 159.

216-28 Witness may be required to attend before referee for further examination. In re Hooks S. Co., 138 Fed. 954.

217-32 Listed creditor may obtain examination before he has proved claim. In re Kuffler, 153 Fed. 667. See 213-15.

217-33 Personal hearing by referee necessary. In re Wilde's Sons, 131 Fed. 142.

217-34 See U. S. *v.* Simon, 146 Fed. 89.

218-38 Bankrupt cannot be questioned concerning examination before

referee. Jacobs *v.* U. S., 161 Fed. 694, 88 C. C. A. 554.

219-43 In re Romine, 138 Fed. 837; In re Lipset, 119 Fed. 379; In re Sturgeon, 139 Fed. 608, 71 C. C. A. 592; Bk. *v.* Johnson, 143 Fed. 463, 74 C. C. A. 597.

Referee may exclude inadmissible evidence. In re Wilde's Sons, 131 Fed. 142.

Referee must certify objections to rulings for revision only in such matters as he is by law empowered to enter orders that may then become final. In re Romine, 138 Fed. 837.

Referee on objection should not excuse witness from answering questions. Dressel *v.* Co., 119 Fed. 531.

Objections must be taken before referee to obtain consideration on review. In re McCann I. Co., 171 Fed. 265.

219-44 In re Kaplan Bros., 213 Fed. 753. See In re Romine, 138 Fed. 837; In re Davidson, 143 Fed. 673.

Referee cannot punish for contempt. Bank *v.* Johnson, 143 Fed. 463, 74 C. C. A. 597.

220-46 Cross-examination of witnesses in proceedings in which persons summarily ordered to turn bankrupt's money over to temporary receiver. See In re Friedman, 161 Fed. 260, 88 C. C. A. 306.

222-49 President of bankrupt corporation may be required to disclose combination of safe alleged to contain assets. In re Hooks S. Co., 138 Fed. 954.

223-50 Jacobs *v.* U. S., 161 Fed. 694, 88 C. C. A. 554 (prior and subsequent).

Money acquired previous to filing petition.—Burden on bankrupt to account for same. Denial of possession insufficient. Good *v.* Kane, 211 Fed. 956 (C. C. A.)

224-56 U. S. *v.* Goldstein, 132 Fed. 789; In re Hooks S. Co., 138 Fed. 954. See U. S. *v.* Simon, 146 Fed. 89.

On general principle, see Burrel *v.* Montana, 194 U. S. 572.

If court convinced answer cannot incriminate bankrupt must answer. In re Levin, 131 Fed. 388.

Books of account must be turned over; their incriminating character is for court. In re Rosenblatt, 143 Fed. 663.

Immunity limited to such criminal proceedings as may arise out of conduct of business. Edelstein *v.* U. S., 149 Fed. 636, 79 C. C. A. 328.

225-57 In re Harris, 221 U. S. 274.

Preference presumed intentional where a transaction results in preference to creditor. Lazarus *v.* Eagen, 206 Fed. 518; Utah Assn. *v.* Furn. Co. (Utah), 136 P. 572. Bankrupt and transferee are presumed to know a preference would result. Hewitt *v.* Board Co., 214 Mass. 260, 101 N. E. 424.

226-58 Private papers need not be produced. In re Wheeler & Co., 151 Fed. 542.

226-59 Bankrupt's books of account, in possession of receiver, admissible against him on trial for conspiracy for concealing property. Kerrch *v.* United States, 171 Fed. 366, 96 C. C. A. 258.

227-60 Whitney *v.* Dresser, 200 U. S. 532; In re Crumling, 214 Fed. 503; Moore *v.* Crandall, 205 Fed. 689 (C. C. A); In re Schwarz, 200 Fed. 309; In re Dunlap C. Co., 171 Fed. 532 (a positive statement in affidavit not neutralized by ambiguous one in accompanying account); Baumhauer *v.* Austin, 186 Fed. 260, 108 C. C. A. 306; In re Furniture Co., 166 Fed. 516; In re Dresser, 135 Fed. 495, 68 C. C. A. 207; In re Carter, 138 Fed. 846. See Mason *v.* Co., 149 Fed. 898.

The burden is on the wife to establish the validity of a note to her from her bankrupt husband (In re Crumling, 214 Fed. 503), or to show that property was purchased with her separate estate (Woodford *v.* Rice, 207 Fed. 473) or to show the extent of her interest. Pope *v.* Cantwell, 206 Fed. 908.

Purchaser has burden of showing bona fides of sale. Bentley *v.* Young, 210 Fed. 202.

Insolvency of bankrupt at time of transfer—burden on trustee. Ogden *v.* Reddish, 200 Fed. 977; In re Carlile, 199 Fed. 612.

A petitioner seeking to establish a preferential payment has the burden of showing that the note was certified after notice of insolvency. In re Frazin, 201 Fed. 86 (C. C. A.).

Filing objections does not meet prima facie case made by verified statement of claim. In re Castle Braid Co., 145 Fed. 224.

Statutory form of proof must be strictly followed. In re Dunn, etc. Co., 132 Fed. 719.

Proof of judgments must be made, referee not being bound to search records. In re Rosenberg, 144 Fed. 442.

Taxes need not be proved as a claim. In re Prince, 131 Fed. 546.

Petitioning creditor whose claim allowed by court at time of adjudication of bankruptcy need not present it for allowance by referee; it is res judicata. Ayres v. Cone, 138 Fed. 778, 71 C. C. A. 144.

Proof of claim must be relied on or its efficacy as evidence on appeal is lost. In re McIntyre, 174 Fed. 627, 98 C. C. A. 381.

Allowed claim, inadmissible to support objections to claim of another party on account of same debt. In re Dunlap C. Co., 171 Fed. 532.

Consideration on which claim based must be shown whether indebtedness be on note or other writing. It cannot be shown by hearsay. In re Furniture Co., 166 Fed. 516.

227-61 Referee must consider credibility of witnesses, and is not required to allow a claim merely because testimony in favor of it is uncontradicted. In re Cannon, 133 Fed. 837.

228-64 In re Domenig, 128 Fed. 146, applying Pennsylvania statute.

228-66 General rules of variance apply, and claimant who has filed verified statement of claim cannot sustain it by evidence of indebtedness arising in a different manner. In re Lansaw, 118 Fed. 365.

228-68 Burden on trustee to establish set-off against established claim. In re Harper, 175 Fed. 412.

Pleadings as admissions.—See In re Carter, 138 Fed. 846. Failure to deny allegation of involuntary petition not res judicata as to claim of creditor against trustee or any creditor. In re Harper, 175 Fed. 412.

229-69 Composition approved by majority creditors is prima facie for best interests of all. In re Barde, 207 Fed. 654.

229-70 Self-serving declarations in petition to vacate order confirming a composition, disregarded. Troy v. Rudnick, 198 Mass. 563, 85 N. E. 177.

Practice of carriers in delivering mail wrongly addressed may be shown to prove creditors had notice of creditors' meeting notwithstanding notice wrongly addressed. Troy v. Rudnick, 198 Mass. 563, 85 N. E. 177.

229-71 In re Barde, 207 Fed. 654.

229-72 In re Miller, 212 Fed. 920; In re Cohen, 206 Fed. 457; In re Main, 205 Fed. 421; Garry v. Bk., 186 Fed. 461, 108 C. C. A. 439; In re Kolster, 146 Fed. 138; In re Jacobs, 144 Fed. 868; In re Eades, 143 Fed. 293, 74 C. C. A. 431; In re Hendrick, 138 Fed. 473; In re Keefer, 135 Fed. 885; In re Hamilton, 133 Fed. 823; In re Chamberlain, 125 Fed. 629; In re Baerncopf, 117 Fed. 975.

Evidence held insufficient to sustain burden. In re Taylor, 188 Fed. 479.

Burden of proof never shifts. In re Walder, 152 Fed. 489.

Preference.—In re Pangborn, 185 Fed. 673.

Exemptions.—In re Leland, 185 Fed. 830.

Failure to keep proper books of account raises a presumption that bankrupt intended to conceal his true financial condition. In re Barde, 207 Fed. 654.

230-73 In re Shear, 201 Fed. 460; Remmers v. Bk., 173 Fed. 484, 97 C. C. A. 490; In re Leslie, 119 Fed. 406. See In re Lewin, 155 Fed. 501.

Discharge denied.—In re Arenson, 195 Fed. 609.

Clearest proof of bankrupt's ability to turn over property should precede making of order requiring him so to do. Samel v. Dodd, 142 Fed. 68, 73 C. C. A. 254; In re Dickens, 175 Fed. 808. In other cases a fair preponderance has been sufficient. In re Cramer, 175 Fed. 879, cit. In re Cole, 144 Fed. 392, 75 C. C. A. 330.

Presumed judgment provable under statute was regularly scheduled, and burden is on party alleging fact to show it was not discharged. In re Peterson, 137 App. Div. 435, 121 N. Y. S. 738.

231-75 In re Goodhile, 130 Fed. 782. Comp. In re Alphin & L. C. Co., 131 Fed. 824; In re Wiesen, 135 Fed. 442.

In proceedings before referee to require bankrupt to turn over money same rule applies. In re Alphin & C. Co., 131 Fed. 824; In re Wiesen, 135 Fed. 442.

231-76 In re Goodhile, 130 Fed. 782. See In re Alphin & C. Co., 131 Fed. 824.

Testimony of bankrupt given at creditors' meeting admissible against him, though it proves a fraudulent concealment by him. In re Leslie, 119 Fed. 406.

231-77 Unexpected surplus from unlisted property. In re Hamilton, 133 Fed. 823.

Failure to list salary of public officer. In re Doherty, 135 Fed. 432.

232-78 Date of statement on which credit obtained immaterial, as is intention with which it was made; also immaterial credit given firm of which maker of statement a member. In re Terens, 172 Fed. 938.

232-80 See In re Halsell, 132 Fed. 562; In re Taplin, 135 Fed. 861; In re Walder, 152 Fed. 489.

Evidence need not be restricted to such as is competent to sustain specifications if it tends to show knowledge and intent. In re Isaacson, 175 Fed. 292.

Ruling of referee on objections to evidence. See In re Knaszak, 151 Fed. 503 (same rule applies as upon examination before referee; all testimony excluded must be taken down and made part of record).

Bankrupt may file papers in opposition to objections to his discharge; is not bound to do so. In re Hendrick, 138 Fed. 473.

232-81 Remmers *v.* Bk., 173 Fed. 484, 97 C. C. A. 490 (if objection is to falsity of his oath to schedules, proof need not be such as required to convict of perjury); Klein *v.* Powell, 174 Fed. 640, 98 C. C. A. 394; In re Hedley, 156 Fed. 314; Troeder *v.* Lorsch, 150 Fed. 710, 80 C. C. A. 376; In re Garrison, 149 Fed. 178, 79 C. C. A. 126; In re Cohen, 149 Fed. 908; In re Kolster, 146 Fed. 138; In re Jacobs, 144 Fed. 868; In re Hamilton, 133 Fed. 823; In re Chamberlain, 125 Fed. 629; In re Dauchy, 122 Fed. 688; In re Leslie, 119 Fed. 406.

A fair preponderance.—In re Doyle, 199 Fed. 247.

In rebuttal of objections on ground bankrupt knowingly and fraudulently concealed property he may show he acted on advice of counsel. Klein *v.* Powell, 174 Fed. 640, 98 C. C. A. 394.

232-82 See Rand *v.* Sage, 94 Minn. 344, 102 N. W. 864; Broadway T. Co. *v.* Manheim, 47 Misc. 415, 95 N. Y. S. 93; Bailey *v.* Gleason, 76 Vt. 115, 56 A. 537.

Burden on bankrupt to show either that debt duly scheduled or creditor had notice of proceedings. Wineman *v.* Fisher, 135 Mich. 604, 98 N. W. 404; Armstrong *v* Sweeney, 73 Neb. 775, 103 N. W. 436; Weidenfeld *v.* Tillinghast, 54 Misc. 90, 104 N. Y. S. 712; Graber *v.* Gault, 103 App. Div. 511, 93 N. Y. S. 76; Fields *v.* Rust, 36 Tex. Civ. 350, 82 S. W. 331. *Contra*, Laffoon *v.* Kerner, 138 N. C. 281, 50 S. E. 654.

Defendant must show demand in suit provable at time of discharge. Baker *v.* Hughes, 5 Ga. App. 586, 63 S. E. 587.

233-85 Rosenfeld *v.* Siegfried, 91 Mo. App. 169; Whitson *v.* Bk., 105 Mo. App. 605, 80 S. W. 327; New York Inst. *v.* Crockett, 117 App. Div. 269, 102 N. Y. S. 412; Custard *v.* Wigderson, 130 Wis. 412, 110 N. W. 263.

Certificate of discharge admissible as basis of proof debt was released by discharge. Nation *v.* Jones, 3 Ga. App. 83, 59 S. E. 330.

233-86 See In re Griffin, 154 Fed. 537.

236-95 Young *v.* Stevenson, 73 Ark. 480, 84 S. W. 623; First Nat. Bk. *v.* Masterson, 29 Okla. 76, 116 P. 162; Custard *v.* Wigderson, 130 Wis. 412, 110 N. W. 263.

236-96 Jensen *v.* Dorr, 159 Cal. 742, 116 P. 553; Santa Rosa Bk. *v.* White, 139 Cal. 703, 73 P. 577; Blumenthal *v.* Jones, 51 Fla. 396, 41 S. 533; Taylor *v.* Marshall, 153 Ill. App. 409; Adam *v.* McClintock, 21 N. D. 483, 131 N. W. 394. See Bailey *v.* Gleason, 76 Vt. 115, 56 A. 537.

236-97 Alling *v.* Straka, 118 Ill. App. 184; Van Norman *v.* Young, 228 Ill. 425, 81 N. E. 1060; Gatliff *v.* Mackey, 31 Ky. L. R. 947, 104 S. W. 379; Laffoon *v.* Kerner, 138 N. C. 281, 50 S. E. 654.

236-98 **It is presumed**, as against bankrupt, chose in action was scheduled among assets and discharge divested title. Zachmann *v.* Zachmann, 201 Ill. 380, 66 N. E. 256, 94 Am. St. 180; Bowman *v.* Little, 101 Md. 273, 61 A. 1084; Kruegel *v.* Murphy (Tex. Civ.), 126 S. W. 680. See McAllen *v.* Alonzo, 46 Tex. Civ. 449, 102 S. W. 475.

On the trial of bankrupt for concealing goods in fraud of his bankruptcy neither his schedules nor his testimony given before referee are admissible. Jacobs *v.* U. S., 161 Fed. 694, 88 C. C. A. 554; Johnson *v.* U. S., 163 Fed. 30, 89 C. C. A. 508. Trustee may testify property was found in places not disclosed to him by defendant. Johnson *v.* U. S., 170 Fed. 581, 95 C. C. A. 661.

BASTARDY

Presumptions, 242-6.

For procedure, see 4 STANDARD PROC. 54 *et seq.*

237-1 Bunel *v.* O'Day, 125 Fed. 303; Grant *v.* Stimpson, 79 Conn. 617, 66 A. 166; Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631; McRae *v.* S. (Miss.), 61 S. 977; Nelson *v.* Jones, 245 Mo. 579, 151 S. W. 80; In re Kennedy, 82 Misc. 214, 143 N. Y. S. 404; Powell *v.* S., 84 O. 165, 95 N. E. 660.

239-2 Chatham *v.* Mills, 137 Cal. 298, 70 P. 91, 92 Am. St. 175; Jones *v.* S., 11 Ga. App. 760, 76 S. E. 72; Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631; Lewis *v.* Sizemore, 25 Ky. L. R. 1354, 78 S. W. 122; Sergent *v.* Co., 112 Ky. 888, 66 S. W. 1036; Wallace *v.* Wallace, 73 N. J. Eq. 403, 67 A. 612; Timmann *v.* Timmann, 142 N. Y. S. 298; Mayer *v.* Davis, 119 App. Div. 96, 103 N. Y. S. 943; Tracy *v.* Frey, 95 App. Div. 579, 88 N. Y. S. 874; In re Grande's Est., 80 Misc. 450, 141 N. Y. S. 535; In re Kelly, 46 Misc. 541, 93 N. Y. S. 57; Ewell *v.* Ewell, 163 N. C. 233, 79 S. E. 509; In re Leaming, 25 Pa. C. C. 438. See Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719.

Where man and woman live as husband and wife. Skidmore *v.* Harris, 157 Ky. 756, 164 S. W. 98.

One of strongest presumptions of law. Adger *v.* Ackerman, 115 Fed. 124, 52 C. C. A. 568.

Proof to overcome need not remove every reasonable doubt. Godfrey *v.* Rowland, 16 Haw. 377.

Recognition by putative father not enough to overcome presumption of legitimacy. Bethany H. Co. *v.* Hale, 64 Kan. 367, 67 P. 848.

Proof of antenuptial conception does not overcome presumption. Zachmann *v.* Zachmann, 201 Ill. 380, 66 N. E. 256, 94 Am. St. 180.

Proof wife guilty of adultery during period of gestation does not rebut presumption. Godfrey *v.* Rowland, 16 Haw. 377; Canaan *v.* Avery, 72 N. H. 591, 58 A. 509.

Legitimacy or illegitimacy issue of fact, resting upon proof of impotency or non access of husband. S. *v.* Liles, 134 N. C. 735, 47 S. E. 750.

In Kentucky presumption is conclusive. Buckner *v.* Buckner, 120 Ky. 596, 87 S. W. 776.

241-3 Chatham *v.* Mills, 137 Cal. 298, 70 P. 91, 92 Am. St. 175; P. *v.* Case, 171 Mich. 282, 137 N. W. 55; Flint *v.* Pierce, 136 N. Y. S. 1056. See Wallace *v.* Wallace, 73 N. J. Eq. 403, 67 A. 612. *Contra.* Evans *v.* S., 165 Ind. 369, 74 N. E. 244, 75 N. E. 651.

242-4 Qualls *v.* S., 92 Ark. 200, 122 S. W. 498; Land *v.* S., 84 Ark. 199, 105 S. W. 90; P. *v.* Whittington, 143 Ill. App. 445; Gooding *v.* S., 39 Ind. App. 42, 78 N. E. 257; S. *v.* Wangler, 151 Ia. 555, 132 N. W. 22; Corcoran *v.* Higgins, 194 Mass. 291, 80 N. E. 231; S. *v.* McDonald, 152 N. C. 802, 67 S. E. 762; S. *v.* Liles, 134 N. C. 735, 47 S. E. 750; S. *v.* Addington, 143 N. C. 683, 57 S. E. 398; Anderson *v.* S. (Okla.), 140 P. 1142.

Wealth of defendant's father cannot be proved. S. *v.* Meier, 140 Ia. 540, 118 N. W. 792.

242-5 S. *v.* Goetz, 21 N. D. 569, 131 N. W. 514. See Shailer *v.* Bullock, 78 Conn. 65, 61 A. 65; *Comp.* Suckow *v.* S., 122 Wis. 156, 99 N. W. 440.

Evidence held sufficient.—S. *v.* Banik, 21 N. D. 417, 131 N. W. 262.

Opportunity, not presumptive of intercourse.—Walker *v.* S., 43 Ind. App. 605, 86 N. E. 502.

Statute imposing burden on defendant if mother files affidavit, valid. S. *v.* McDonald, 152 N. C. 802, 67 S. E. 762.

242-6 Alminowicz *v.* P., 117 Ill. App. 415; Priel *v.* Adams, 3 Neb. (Unof.) 305, 91 N. W. 536; Webb *v.* Hill, 115 N. Y. S. 267; S. *v.* Knutson, 18 S. D. 444, 101 N. W. 33; S. *v.* Reese (Utah), 135 P. 270.

Proof beyond reasonable doubt necessary. Menn *v.* S., 132 Wis. 61, 112 N. W. 38. See Busse *v.* S., 129 Wis. 171, 108 N. W. 64. *Comp.* Sonnenberg *v.* S., 124 Wis. 124, 102 N. W. 233.

Presumption is woman is single.—See S. *v.* Liles, 134 N. C. 735, 47 S. E. 750.

243-7 Brantley *v.* S. (Ala.), 65 S. 678; Evans *v.* S., 165 Ind. 369, 74 N. E. 244, 75 N. E. 651; Tout *v.* Woodin (Ia.), 137 N. W. 1001.

Evidence of previous intercourse with defendant not limited in time. Brantley *v.* S. (Ala.), 65 S. 678.

Accusation of paternity, made at trial, admissible as evidence of constancy of accusation. Baxter *v.* Gormley, 186 Mass. 168, 71 N. E. 575.

244-9 P. *v.* Whittington, 143 Ill.

App. 445; Alminowicz *v.* P., 117 Ill. App. 415.

Offer of defendant to take complainant to a doctor, admission and not offer of compromise. Gatzemeyer *v.* Peterson, 68 Neb. 832, 94 N. W. 974.

244-10 Brantley *v.* S. (Ala.), 65 S. 678; S. *v.* Meier, 140 Ia. 540, 118 N. W. 792.

244-12 P. *v.* Welch, 143 Ill. App. 191, *disap.* Robbins *v.* Smith, 47 Conn. 182; S. *v.* Lowell, 123 Ia. 427, 99 N. W. 125; Welch *v.* Clark, 50 Vt. 386.

Accusation made in travail, admissible. Johnson *v.* Walker, 86 Miss. 757, 39 S. 49, 109 Am. St. 733, 1 L. R. A. (N. S.) 470. *Comp.* Burns *v.* Donoghue, 185 Mass. 71, 69 N. E. 1060 (accusation in time of travail admissible, when constancy of accusation established). Constancy of accusation after sworn declaration made is essential. Drew *v.* Shannon, 105 Me. 562, 75 A. 122.

Previous declarations another was father, admissible to impeach. Zimmerman *v.* P., 117 Ill. App. 54.

246-13 S. *v.* Meier, 140 Ia. 540, 118 N. W. 792.

246-15 Impeachment by testimony given seduction trial. McCalman *v.* S., 121 Ga. 491, 49 S. E. 609.

247-16 Declaration of third person admissible to contradict him as witness. Walker *v.* S., 165 Ind. 94, 74 N. E. 614.

Declarations of complainant's attorney in defendant's absence, not competent if unauthorized. S. *v.* Meier, 140 Ia. 540, 118 N. W. 792.

247-17 P. *v.* Wilson, 136 Mich. 298, 99 N. W. 6; Koepke *v.* Delfs (Neb.), 146 N. W. 962; Clow *v.* Smith, 85 Neb. 668, 124 N. W. 140 (not necessarily prejudicial).

248-19 *Comp.* P. *v.* Wilson, 136 Mich. 298, 99 N. W. 6.

248-20 Brantley *v.* S. (Ala.), 65 S. 678; Allred *v.* S., 151 Ala. 125, 44 S. 60; Zimmerman *v.* P., 117 Ill. App. 54; S. *v.* Meier, 140 Ia. 540, 118 N. W. 792 (affidavits admitted by prosecutrix to be true, competent; Stahl *v.* S., 67 Kan. 864, 74 P. 238; Koepke *v.* Delfs (Neb.), 146 N. W. 962; S. *v.* O'Rourke, 85 Neb. 639, 124 N. W. 138; Clow *v.* Smith, 85 Neb. 668, 124 N. W. 140; Erickson *v.* Schmill, 62 Neb. 368, 87 N. W. 166; S. *v.* Reese (Utah), 135 P. 270.

Question of paternity for jury. Guthrie *v.* S., 2 Neb. (Unof.) 28, 96 N. W. 243.

Prostitute.—See Rinehart *v.* S., 23 Ind. App. 419, 55 N. E. 504.

Letter containing admission of intercourse, competent as contradicting complainant's denial of intercourse with others. Walker *v.* S., 165 Ind. 94, 74 N. E. 614.

Married women.—"Acts of intercourse between the mother and another than her husband are not admissible on the question of legitimacy of children born during the existence of the marriage relation, but the only testimony admissible to prove this fact is that the husband is impotent, or is absent from home for such length and at such time as would render it impossible that he is the father of the child, and the testimony of the mother and father is not admissible to prove that fact, but it must be proved by disinterested witnesses." Foote *v.* S. (Tex. Cr.), 144 S. W. 275.

251-23 Or that complainant herself had previously given birth to bastard. Tolbert *v.* S., 12 Ga. App. 685, 78 S. E. 131.

251-26 Kelly *v.* S., 133 Ala. 195, 32 S. 56, 91 Am. St. 25.

Belief of witness as to whether man whom he testified prosecutrix associated with was father of child may be inquired into on cross-examination in discretion of court. Clow *v.* Smith, 85 Neb. 668, 124 N. W. 140.

251-27 Clow *v.* Smith, 85 Neb. 668, 124 N. W. 140.

252-28 Cross-examination of defendant as to particular acts of misconduct should be limited to attack upon his veracity. Shailer *v.* Bullock, 78 Conn. 65, 61 A. 65.

252-29 *Contra.* Johnson *v.* Dahle, 85 Neb. 450, 123 N. W. 437, if not made as offer of compromise, competent to corroborate complainant.

Promise to marry held admissible. Brantley *v.* S. (Ala.), 65 S. 678.

252-30 See S. *v.* Lowell, 123 Ia. 427, 99 N. W. 125; Menn *v.* S., 132 Wis. 61, 112 N. W. 38.

Date of conception must be fixed definitely enough to permit defendant to prepare to meet charge. P. *v.* Wilson, 136 Mich. 298, 99 N. W. 6.

Where intercourse alleged was said to have occurred more recently than natural period of gestation would allow,

complainant must show child was of premature birth. Souchek *v.* Karr, 78 Neb. 488, 111 N. W. 150.

252-33 Qualls *v.* S., 92 Ark. 200, 122 S. W. 498. See S. *v.* Lowell , 123 Ia. 427, 99 N. W. 125; Stahl *v.* S., 67 Kan. 864, 74 P. 238; Koepke *v.* Delfs (Neb.), 146 N. W. 962; Erickson *v.* Schmill, 62 Neb. 368, 87 N. W. 166; Mayer *v.* Davis, 103 N. Y. S. 943.

Premature birth.—P. *v.* Bibb, 155 Ill. App. 371.

253-35 Experienced nurse may testify as to development of child. Souchek *v.* Karr, 78 Neb. 488, 111 N. W. 150.

In bastardy proceedings, where the question of the premature birth of the children is involved, it is not error to ask the mother to state generally the length of the child at the time of birth, and to use her answers as basis for hypothetical questions propounded to a physician, in order to elicit his opinion as to whether the children were in fact prematurely born. S. *v.* Banik, 21 N. D. 417, 131 N. W. 262.

253-36 McCalman *v.* S., 121 Ga. 491, 49 S. E. 609.

254-37 Later decisions generally hold it proper to exhibit child to jury. Kelley *v.* S., 133 Ala. 195, 32 S. 56, 91 Am. St. 25; Higley *v.* Bostick, 79 Conn. 97, 63 A. 786; Shailer *v.* Bullock, 78 Conn. 65, 61 A. 65; Smith *v.* Hawkins, 93 Miss. 588, 47 S. 429. See Land *v.* S., 84 Ark. 199, 105 S. W. 90; Stahl *v.* S., 67 Kan. 864, 74 P. 238; S. *v.* Paterson, 18 S. D. 251, 100 N. W. 162. *Contra.* S. *v.* Meier, 140 Ia. 540, 118 N. W. 792.

May exhibit child. Brantley *v.* S. (Ala.), 65 S. 678.

Presence of child in court not improper. Benes *v.* P., 121 Ill. App. 103; Johnson *v.* Walker, 86 Miss. 757, 39 S. 49, 109 Am. St. 733, 1 L. R. A. (N. S.) 470; Esch *v.* Grane, 72 Neb. 719, 101 N. W. 978; Johnson *v.* S., 133 Wis. 453, 113 N. W. 674.

254-38 Proof that father of different race not admissible to overcome presumption of legitimacy, as color will be referred to that of mother. Foote *v.* S. (Tex. Cr.), 144 S. W. 275, cit. Illinois, etc. *v.* Bonner, 75 Ill. 315.

255-39 Qualls *v.* S., 92 Ark. 200, 122 S. W. 498; Evans *v.* S., 165 Ind. 369, 74 N. E. 244, 75 N. E. 651; Clow *v.* Smith, 85 Neb. 668, 124 N. W. 140; Gatzemeyer *v.* Peterson, 68 Neb. 832, 94 N. W. 974; S. *v.* Reese (Utah), 135 P. 270.

Corroboration necessary.—See Harvey *v.* Anning, 67 J. P. (Eng.) 73, 87 L. T. N. S. 687.

255-40 S. *v.* Engstrom, 145 Ia. 205, 123 N. W. 948, interest in prosecutrix after learning her condition.

Intimacy of parties.—See Johnson *v.* Walker, 86 Miss. 757, 39 S. 49, 109 Am. St. 733, 1 L. R. A. (N. S.) 470; Priel *v.* Adams, 3 Neb. (Unof.) 305, 91 N. W. 536; Morgan *v.* Stone, 4 Neb. (Unof.) 115, 93 N. W. 743.

Previous intercourse.—P. *v.* Dupounce, 133 Mich. 1, 94 N. W. 388.

Conviction of fornication cannot be shown. McCalman *v.* S., 121 Ga. 491, 49 S. E. 609.

Testimony of father of complainant he carried message from her to defendant to come and marry her as he had promised to do, inadmissible. McCalman *v.* S., 121 Ga. 491, 49 S. E. 609.

256-42 Brantley *v.* S. (Ala.), 65 S. 678; S. *v.* Engstrom, 145 Ia. 205, 123 N. W. 948 (consultation with physician).

256-43 *Contra.* McCalman *v.* S., 121 Ga. 491, 49 S. E. 609.

Record of preliminary proceedings admissible to prove compliance with statute. McLaughlin *v.* Joy, 100 Me. 517, 62 A. 348.

256-44 Testimony of mother given at preliminary hearing admissible to impeach complainant. Morgan *v.* Stone, 4 Neb. (Unof.) 115, 93 N. W. 743.

256-45 McDonald *v.* Brown, 90 Neb. 676, 134 N. W. 263; S. *v.* O'Rourke, 85 Neb. 639, 124 N. W. 138 (it seems without reference to rules concerning competency, relevancy, etc.).

BELIEF

Declarations, 261-17.

258-2 See Ferguson *v.* Boyd, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064.

259-4 Bowers *v.* R. Co., 82 Kan. 95, 107 P. 777; Grout *v.* Stewart, 96 Minn. 230, 104 N. W. 966; Strasser *v.* Goldberg, 120 Wis. 621, 98 N. W. 554.

259-5 Goldman *v.* Hadley (Tex. Civ.), 122 S. W. 282.

260-8 Hill *v.* Page, 108 App. Div. 71, 95 N. Y. S. 465.

260-9 Downs *v.* Jackson (Ky.), 128 S. W. 339.

260-10 Ryan *v.* Ty., 12 Ariz. 208, 100 P. 770. *Contra,* as to belief concerning guilty party. Lemons *v.* S., 59 Tex. Cr. 299, 128 S. W. 416.

Testimony of accused as to belief concerning design of another, not admissible unless overt act on part of latter shown. S. *v.* Bouvg, 124 La. 1054, 50 S. 849.

260-14 Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215. See Lawshe *v.* S., 57 Tex. Cr. 32, 121 S. W. 865.

261-16 McBride *v.* Caldwell, 142 Ia. 228, 119 N. W. 741; P. *v.* Hoffman, 142 Mich. 531, 105 N. W. 838; Lindsay *v.* Bates, 223 Mo. 294, 122 S. W. 682; Bourassa *v.* R. Co., 75 N. H. 359, 74 A. 590 (habit of person injured by railroad to look for trains). See Eatman *v.* S., 48 Fla. 21, 37 S. 576.

261-17 Citizens' Bk. *v.* Warfield, 85 Neb. 328, 123 N. W. 315.

Declarations are some evidence of declarant's belief. In re Painter, 150 Cal. 498, 89 P. 98; Goldman *v.* Hadley (Tex. Civ.), 122 S. W. 282 (party defrauded).

261-19 In re Walker's Est. (1909), Prob. 115; Blossi *v.* R. Co., 144 Ia. 697, 123 N. W. 360 (understanding of another); S. *v.* Bessa, 115 La. 259, 38 S. 985 (belief of witness whether a man like accused or accused would commit such a crime inadmissible); Garland *v.* S., 112 Md. 83, 75 A. 631; Holt *v.* S., 58 Tex. Cr. 295, 125 S. W. 573; S. *v.* Quinn (Wash.), 105 P. 818 (of declarant as to his impending death). *Comp.* Speer *v.* Speer (Ia.), 123 N. W. 176.

261-20 Buzan *v.* S., 59 Tex. Cr. 213, 128 S. W. 388.

262-21 Metzger *v.* Manlove, 241 Ill. 113, 89 N. E. 249.

Issue of warrant for arrest of a person cannot be sworn in civil action because it rests on belief of party who acted as to guilt of the other. Buell *v.* Bk., 58 Wash. 407, 108 P. 951.

Impressions as to effect of slander, not competent. Linehan *v.* Nelson, 197 N. Y. 482, 90 N. E. 1114.

263-27 Dodson *v.* S. (Ala.), 63 S. 206; Montgomery M. Mfg. Co. *v.* Leith, 162 Ala. 246, 50 S. 210; Firemen's Fire Ins. Co. *v.* Hellner, 159 Ala. 447, 49 S. 297; Georgetown *v.* Groff, 136 Ky. 662, 121 S. W. 888; Gilliland *v.* County, 141 N. C. 482, 54 S. E. 413; Texas & P. R. Co. *v.* Henson, 56 Tex. Civ. 468, 121 S. W. 1127; S. *v.* Cottrell, 56 Wash. 543, 106 P. 179.

Statement, "map is correct or nearly so," does not destroy effect of evidence. Dickinson *v.* Smith, 134 Wis. 6, 114 N. W. 133.

Identification need not be positive. Jordan *v.* S., 50 Fla. 94, 39 S. 155; S. *v.* Richards, 126 Ia. 497, 102 N. W. 439; S. *v.* Barrington, 198 Mo. 23, 111, 95 S. W. 235.

265-32 Unreliability of memory may be shown on behalf of one accused of falsely testifying to belief. S. *v.* Coyne, 214 Mo. 344, 114 S. W. 8.

BENEFICIAL ASSOCIATIONS

Actions by and against, and pleadings therein. See 4 STANDARD PROC., 84 *et seq.*

266 The society has the burden of showing that it is acting within exceptions from liability as provided in its by-laws. Merin *v.* Aid Assn., 147 N. Y. S. 440.

266-1 See Bradford *v.* Assn., 26 App. Cas. (D. C.) 268; Lumbard *v.* Grant, 35 Misc. 140, 71 N. Y. S. 459.

Voluntary association is neither a partnership nor corporation. Ostrom *v.* Greene, 161 N. Y. 353, 55 N. E. 919.

267-2 Alabama T. Co. *v.* Smith, 155 Ala. 287, 46 S. 475.

267-4 See Scow *v.* League, 223 Ill. 32, 79 N. E. 42; Moore *v.* Council, 65 Kan. 452, 70 P. 352; Moon *v.* Flack, 74 N. H. 140, 65 A. 829, Williamson *v.* Randolph, 48 Misc. 96, 96 N. Y. S. 644; Franklin *v.* Burnham, 40 Misc. 566, 82 N. Y. S. 882; Beeman *v.* Lodge, 215 Pa. 627, 64 A. 792, 29 Pa. Super. 387; Marshall *v.* Assn., 18 Pa. Super. 644; Crow *v.* Council, 26 Pa. Super. 411; Spiritual & P. T. *v.* Vincent, 127 Wis. 93, 105 N. W. 1026.

Relation between members is contractual. Dingwall *v.* Assn., 4 Cal. App. 565, 88 P. 597; United B. *v.* Dinkle, 32 Ind. App. 273, 69 N. E. 707.

Association must show change in constitution or by-laws, which constitute contract, was made with consent of other party. Johnson *v.* Fountain, 135 N. C. 385, 47 S. E. 463. *Comp.* Head Camp *v.* Woods, 34 Colo. 1, 81 P. 261.

267-5 Fraternal Assn. *v.* Hitchcock, 121 Ill. App. 402 (by-laws contra public policy). See Froelich *v.* Assn., 93 Mo

App. 383; Rosenthal *v.* Reinfeld, 48 Misc. 652, 96 N. Y. S. 199; Thompson *v.* Brotherhood, 41 Tex. Civ. 176, 91 S. W. 834.

267-6 See Kalbitzer *v.* Goodhue, 52 W. Va. 435, 44 S. E. 264. But see Lumbard *v.* Grant, 35 Misc. 140, 71 N. Y. S. 459 (members of association can take renewal lease from it); Boston B. Assn. *v.* Club, 37 Misc. 521, 75 N. Y. S. 1076 (one member cannot enjoin association).

268-12 Knapp *v.* Brotherhood, 128 Ia. 566, 105 N. W. 63; Hudnall *v.* Modern Woodmen, 103 Mo. App. 356, 77 S. W. 84; Westerman *v.* Lodge, 196 Mo. 670, 94 S. W. 470; Shotliff *v.* Woodmen, 100 Mo. App. 138, 73 S. W. 326; Sovereign C. *v.* Carrington, 41 Tex. Civ. 29, 90 S. W. 921; Cosmopolitan Assn. *v.* Koegel, 104 Va. 619, 52 S. E. 166.

268-13 Littleton *v.* Council, 98 Md. 453, 56 A. 798; Cosmopolitan Assn. *v.* Koegel, 104 Va. 619, 52 S. E. 166.

269-14 Maxwell *v.* Assn., 104 N. Y. S. 815; Duffy *v.* Ins. Co., 142 N. C. 103, 55 S. E. 79; Beeman *v.* Lodge, 215 Pa. 627, 64 A. 792; Myers *v.* Soc., 29 Pa. Super. 492.

Knowledge of charter and by-laws by members, conclusively presumed. Burchard *v.* Assn., 139 Mo. App. 606, 123 S. W. 973.

269-15 See Sovereign C. *v.* Carrington, 41 Tex. Civ. 29, 90 S. W. 921.

Evidence as to family of assured inadmissible. Knights of Maccabees *v.* Shields, 156 Ky. 270, 160 S. W. 1043.

Constitution and by-laws furnished local lodge by supreme council, and used, need not be further authenticated. Home Circle *v.* Shelton (Tex. Civ.), 81 S. W. 84.

Parol evidence admissible to show whether member reinstated. United Order *v.* Hooser, 160 Ala. 334, 49 S. 354.

Officer may testify of his authority in respect to a particular matter, subject to cross-examination as to basis of testimony. United Order *v.* Hooser, 160 Ala. 334, 49 S. 354.

Ability to pay sick benefits, presumed. Strauss *v.* Thoman, 60 Misc. 72, 111 N. Y. S. 745.

270-16 Admission of insured evidence against beneficiary. Taylor *v.* Lodge, 101 Minn. 72, 111 N. W. 919; Callies *v.* Woodmen, 98 Mo. App. 521, 72 S. W. 713.

"**The only rule** for the admission and exclusion of testimony is that of common fairness." Barker *v.* Maccabees, 135 Mich. 499, 98 N. W. 24. *Comp.* Rose *v.* Patricians, 126 Mich. 577, 85 N. W. 1073.

Hearings of claims for benefits, if conducted fairly and according to rules will not be interfered with although rules governing suits not followed, since parties by their contract contemplated such procedure. Derry *v.* Maccabees, 135 Mich. 494, 98 N. W. 23.

Complete records, fairly kept, may not be contradicted by parol. Beasley *v.* Assn., 94 Ark. 499, 127 S. W. 974.

BEST AND SECONDARY EVIDENCE

Proceedings in which it is not required, 278-5; *Admission copy produced is correct,* 355-79.

276-1 Primary evidence is that which affords greatest certainty. Mendocino County *v.* Peters, 2 Cal. App. 24, 82 P. 1122.

Facts not shown by record.—"It is urged that the trial court erred in permitting the witness to answer on redirect examination the following question: 'Are there any doors or door sills in the building now that are not shown upon the plans and specifications under which the building was erected?' This question was objected to by appellant upon the ground that 'the plans and specifications speak for themselves, and are the best evidence,' which objection was overruled. The witness was not asked merely what doors or what door sills were shown by the plans and specifications, but was asked whether the building contained any other than those shown by such plans and specifications. This could not be determined from the plans and specifications alone, but involved an examination of the building also." Romona Oolitic Stone Co. *v.* Weaver (Ind. App.), 97 N. E. 441.

276-2 Weaver *v.* S., 1 Ala. App. 48, 55 S. 956; O'Connor *v.* United States, 4 Ga. App. 246, 75 S. E. 110; Szczech *v.* R. Co., 157 Ill. App. 150.

277-3 Smythe *v.* Lodge, 198 Fed. 967; Royal L. Co. *v.* Elsberry (Ala.), 64 S. 71; Hutto *v.* Garner, 7 Ala. App. 412, 61 S. 477; Atlanta, etc. R. Co. *v.*

Wood, 160 Ala. 657, 49 S. 426; Lee Line Steamers *v.* Craig (Ark.), 164 S. W. 274; In re Donnellan's Est., 164 Cal. 14, 127 P. 166; Spangenberg *v.* Nesbitt, 22 Cal. App. 274, 134 P. 343; Dale *v.* Christian, 140 Ga. 790, 79 S. E. 1127; Caudell *v.* Sav. Bank, 140 Ga. 713, 79 S. E. 776; Wilson *v.* Assn., 139 Ga. 170, 76 S. E. 998; Idaho F. L. Co. *v.* Co., 18 Ida. 1, 107 P. 989; P. *v.* Wiemers, 225 Ill. 17, 80 N. E. 45; Glos *v.* Talcott, 213 Ill. 81, 72 N. E. 707; Merchants Co. *v.* Egan, 222 Ill. 494, 78 N. E. 800; Young *v.* P., 221 Ill. 51, 77 N. E. 536; Fidelity & D. Co. *v.* Co., 133 Ky. 74, 117 S. W. 393; Johnson *v.* O'Neill (Mich.), 148 N. W. 364; Jordan *v.* R. Co. (Miss.), 65 S. 276; McLeod L. Co. *v.* Anderson (Miss.), 62 S. 274; Gulfport Mfg. Co. *v.* Bond, 95 Miss. 723, 49 S. 260; Hanson *v.* Neal, 215 Mo. 256, 114 S. W. 1073; Mathes *v.* Lumb. Co., 173 Mo. App. 239, 158 S. W. 729; Mahaney *v.* Carr, 175 N. Y. 454, 67 N. E. 903; Shelby *v.* Co., 121 N. Y. S. 619; Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519; Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782; Gt. West, etc. Co. *v.* Shumway, 25 N. S. 268, 141 N. W. 479; Jones *v.* Teller, 65 Or. 328, 133 P. 354; Scott *v.* R. Co., 43 Or. 26, 72 P. 594; Zimmerman *v.* R. Co., 242 Pa. 444, 89 A. 461; Figueras *v.* Vy Tiepco, 2 Phil. Isl. 488; Kleine Bros. *v.* Gidcomb (Tex. Civ.), 152 S. W. 462; Miller *v.* S. (Tex. Cr.), 144 S. W. 239; Campbell *v.* S. (Tex. Cr.), 129 S. W. 140; Patterson *v.* R. Co. (Tex. Civ.), 126 S. W. 336.

See Spicer *v.* S. (Ala.), 65 S. 972.

Primary evidence in custody of referee in bankruptcy. Schall *v.* Car Co., 123 Minn. 214, 143 N. W. 357.

Most conclusive proof of correctness does not render copy admissible unless sufficient grounds established. Security T. Co. *v.* Robb, 142 Fed. 78, 73 C. C. A. 302.

278-4 S. *v.* Carroll, 82 Conn. 321, 73 A. 780; Vaughan's S. Store *v.* Stringfellow, 56 Fla. 708, 48 S. 410; Compton *v.* Fender, 132 Ga. 483, 64 S. E. 475; East St. Louis *v.* R. Co., 238 Ill. 296, 87 N. E. 407; Garrett *v.* Winterich (Ind. App.), 87 N. E. 161; S. *v.* Salmon, 216 Mo. 466, 115 S. W. 1106; Keefe *v.* R., 75 N. H. 116, 71 A. 379; Durbrow *v.* Co., 77 N. J. L. 89, 71 A. 59; Doughty *v.* Funk, 24 Okla. 312, 103 P. 634; First Nat. Bk. *v.* Robinson (Tex. Civ.), 124 S. W. 177; Walker *v.* Skliris, 24 Utah 353, 98 P. 114; Chicago A. Co. *v.* Thacker, 65 W. Va. 143, 63 S. E. 770.

278-5 Proceedings to condemn land are comparatively informal, and it is not error to refuse to apply best evidence rule. Stafford Spr. R. Co. *v.* Co., 80 Conn. 37, 66 A. 775.

Best evidence not required on motion for nunc pro tunc order. Harris *v.* Jennings, 64 Neb. 80, 89 N. W. 625.

279-7 Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782.

Weakness of secondary evidence no bar. Campbell *v.* S., 123 Ga. 533, 51 S. E. 644.

279-8 McCray *v.* S., 134 Ga. 416, 68 S. E. 62.

279-9 See Montgomery *v.* Dormer, 181 Mo. 5, 79 S. W. 913.

280-11 Security T. Co. *v.* Robb, 142 Fed. 78, 73 C. C. A. 302.

280-12 Rule flexible.—Mattson *v.* R. Co., 98 Minn. 296, 108 N. W. 517.

The best evidence available to the producing party is required. Bosse *v.* Weik, 144 Mo. App. 468, 129 S. W. 419.

Witness may testify of his business though he holds license. Hogan *v.* Rosenthal, 127 App. Div. 312, 111 N. Y. S. 676.

280-13 St. Louis Hay, etc. Co. *v.* Iron Pipe Co., 167 Ala. 442, 52 S. 904; Evans *v.* R. Co., 149 Mo. App. 166, 129 S. W. 1050. See, as important departure from general rule, Hatzfeld *v.* Walsh (Tex. Civ.), 120 S. W. 525.

280-14 Failure of party to contract to provide evidence stipulated for is ground for admission of best evidence at command of other party. Eddington-G. C. Co. *v.* Turner (Ky.), 124 S. W. 800.

281-15 Council *v.* Mayhew 172 Ala. 295, 55 S. 314; Wells *v.* Louisville & N. R. Co. (Ala.), 59 S. 343 (question calling for contents of written report made by witness); Greene *v.* Hereford, 12 Ariz. 85, 95 P. 105 (employer's by-laws); Lupton *v.* Underwood (Del.), 85 A. 965; Skinner Mfg. Co. *v.* Douville, 57 Fla. 180, 49 S. 125; Burton *v.* Meinert, 136 Ga. 420, 71 S. E. 870; Mathews & Son *v.* Richards, 13 Ga. App. 412, 79 S. E. 227; Starling *v.* S., 5 Ga. App. 171, 62 S. E. 993; Keane *v.* Co. 17 Ida. 179, 105 P. 60; Ryan Car Co. *v.* Gardner, 154 Ill. App. 565; Hedenberg *v.* Nash, 144 Ill. App. 252; Louisville & N. R. Co. *v.* Pearcy (Ky.), 121 S. W. 1037; Coleman *v.* Consin, 128

La. 1094, 55 S. 686; Harper *v.* Davis, 115 Md. 349, 80 A. 1012; Gulfport Mfg. Co. *v.* Bond, 95 Miss. 723, 49 S. 260. Lampel Land, etc. Co. *v.* Spelling, 236 Mo. 33, 139 S. W. 345; Spencer *v.* Ins. Co., 112 Mo. App. 86, 86 S. W. 899; Burnham *v.* Stillings (N. H.), 79 A. 987; Burbrow *v.* Co., 77 N. J. L. 89, 71 A. 59; Mahaney *v.* Carr, 175 N. Y. 454, 67 N. E. 903; Pfaelzer *v.* Gassner, 116 N. Y. S. 15; Gt. West, etc. Co. *v.* Shumway, 25 N. D. 268, 141 N. W. 479; C. *v.* Snyder, 40 Pa. Super. 485; Trainor *v.* Lee, 34 R. I. 345, 83 A. 847 (testimony that no appropriation had been made to pay for services which were the subject of the suit); Mayfield *v.* R. Co., 85 S. C. 165, 67 S. E. 132; Isbell *v.* Whalen, 25 S. D. 445, 127 N. W. 476; Moore *v.* S. (Tex. Cr.), 146 S. W. 183; Houston, etc. R. Co. *v.* Washington (Tex. Civ.), 127 S. W. 1126; Keller *v.* Faickney, 42 Tex. Civ. 483, 94 S. W. 103; Sayre *v.* Woodyard, 66 W. Va. 288, 66 S. E. 320.

Unsigned contract of lease not best evidence. Edwards *v.* Assn. (Tex. Civ.), 166 S. W. 423.

Minutes of corporation. In re Mandelbaum, 80 Misc. 475, 141 N. Y. S. 319.

Title to real estate where written title declared upon. Brock *v.* Satchell, 130 La. 853, 58 S. 686.

Cards showing that railroad cars were weighed.—Joynes *v.* R. Co., 234 Pa. 321, 83 A. 318, involving rates.

"**The court refused to allow plaintiff** to testify that his colt was entitled to registry, because such testimony was not the best evidence. A certificate of registry would be the best evidence that the colt was entitled to registry. In the absence of such a certificate, if plaintiff desired to prove that the colt was so entitled, such proof should be made by offering the records on which a certificate of registry would be based." Loomis *v.* Besse, 148 Wis. 617, 135 N. W. 123.

"**No suggestion was made** that such papers were lost, nor that a predicate for the introduction of secondary evidence of their contents was desired to be laid. The question, on its face, did not indicate the relevancy, materiality, or pertinency of the matter inquired about. The court cannot be put in error for disallowing such a question." Sibley & Sibley *v.* Smith, 167 Ala. 158, 52 S. 27.

Judgment.—Livesey *v.* Besson, 82 N. J. L. 333, 82 A. 509.

282-17 In re Macauley, 158 Fed. 322; Washoe Copper Co. *v.* Junila, 43 Mont. 178, 115 P. 917; Bruce *v.* Bruce (Tex. Civ.), 89 S. W. 435; Taylor *v.* Woodmen, 42 Wash. 304, 84 P. 867.

282-18 Compromising memorandum. Young *v.* P., 221 Ill. 51, 77 N. E. 536.

282-19 Marine Bank *v.* Stirling, 115 Md. 90, 80 A. 736.

282-20 Varley D. M. Co. *v.* Ostheimer, 159 Fed. 655, 86 C. C. A. 523; Powers *v.* Hatter, 152 Ala. 636, 44 S. 859; Franklin *v.* Pritchard, 122 Ga. 605, 50 S. E. 342; West Pub. Co. *v.* Lasley, 165 Ill. App. 256; Doggett *v.* Greene, 163 Ill. App. 369; International Text Book Co. *v.* Maekhorn, 158 Ill. App. 543; Worthing *v.* Hall, 153 Ill. App. 587; McFadden *v.* Ross, 14 Ind. App. 312, 41 N. E. 607; Jenkins *v.* Lutz, 26 Ind. App. 150, 59 N. E. 288; Brier *v.* Davis, 122 Ia. 59, 96 N. W. 983; Markley *v.* Tel. Co., 151 Ia. 612, 132 N. W. 37; Gulliford *v.* McQuillen, 75 Kan. 454, 89 P. 927; Chas. H. Conner & Co. *v.* Mason, 143 Ky. 635, 137 S. W. 235; Conkling *v.* Nicholas, 133 Mich. 651, 95 N. W. 745; Baldwin *v.* Stribbling (Miss.), 57 S. 658; S. *v.* Lentz, 184 Mo. 223, 83 S. W. 970; Hoffman Co. *v.* R. Co., 119 Mo. App. 495, 94 S. W. 597; Larson *v.* Cox, 68 Neb. 44, 93 N. W. 1011; Heller *v.* Heine, 38 Misc. 816, 78 N. Y. S. 887; Barton-P. Co. *v.* Co., 18 Okla. 137, 89 P. 1128; Schager *v.* Dinneen (S. D.), 144 N. W. 719; Campbell *v.* S. 62 Tex. Cr. 561, 138 S. W. 607; St. Louis, etc. R. Co. *v.* Kennedy (Tex. Civ.), 96 S. W. 653; Vaillancourt *v.* R. Co., 82 Vt. 416, 74 A. 99; Hart *v.* Godkin, 122 Wis. 646, 100 N. W. 1057.

Postmark and date on letter. Kirkland *v.* S., 141 Ala. 45, 37 S. 352.

Books of account.—Eatman *v.* S. 48 Fla. 21, 37 S. 576; Willson *v.* Morse, 117 Ia. 581, 91 N. W. 823; Dick *v.* Biddle, 105 Md. 308, 66 A. 21; Davis *v.* Council, 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.) 722; Barrie *v.* R. Co., 125 Mo. App. 96, 102 S. W. 1078; Fitch *v.* Martin, 74 Neb. 538, 104 N. W. 1072; Rosenstock *v.* Dessar, 109 App. Div. 10, 95 N. Y. S. 1064; Smith *v.* Castle, 81 App. Div. 638, 81 N. Y. S. 18; La Rue *v.* Co., 17 S. D. 91, 95 N. W. 292; Berry *v.* Joiner, 45 Tex. Civ. 461, 101 S. W. 289; Fidelity, etc. Co. *v.* Co., 40 Tex. Civ. 489, 90 S.

W. 197; Rogers *v.* O'Barr (Tex. Civ.), 76 S. W. 593.

Telegram.—Whether telegram filed for transmission or one delivered to addressee is original, depends upon whether telegraph company is agent of one sending or of one to whom it is sent. Young *v.* P., 221 Ill. 51, 77 N. E. 536; Bond *v.* Hurd, 31 Mont. 314, 78 P. 579; Yeiser *v.* Cathers, 5 Neb. (Unof.) 204, 97 N. W. 840; Carlson *v.* Holm, 2 Neb. (Unof.) 38, 95 N. W. 1125; Buchanan *v.* Co. (Tex. Civ.), 100 S. W. 974; W. U. T. Co. *v.* Kapp, 35 Tex. Civ. 663, 80 S. W. 840; Cobb *v.* Co., 57 W. Va. 49, 49 S. E. 1005. See "Copies," vol. 3, p. 541.

Petitions.—P. *v.* R. Co., 231 Ill. 514, 83 N. E. 193; Siegel *v.* Liberty, 118 Wis. 599, 95 N. W. 402.

Insurance policy.—Hartford Ins. Co. *v.* Enoch, 72 Ark. 47, 77 S. W. 899; Tilley *v.* Cox, 119 Ga. 867, 47 S. E. 219; S. *v.* Harvey, 130 Ia. 394, 106 N. W. 938; Waller *v.* Cockfield, 111 La. 595, 35 S. 778; Speiser *v.* Ins. Co., 119 Wis. 530, 97 N. W. 207.

Railroad rules.—Central R. Co. *v.* Goodson, 118 Ga. 833, 45 S. E. 680; Barschow *v.* R. Co., 147 Mich. 226, 110 N. W. 1057.

Freight way-bills.—Haas *v.* Chubb, 67 Kan. 787, 74 P. 230; Keller *v.* R. Co., 10 Pa. Super. 240; Texas C. R. Co. *v.* Fowler (Tex. Civ.), 102 S. W. 732; Texas, etc. R. Co. *v.* Lynch, 39 Tex. Civ. 96, 87 S. W. 884.

Negotiable instruments. — Allen, etc. Co. *v.* Bk., 129 Ga. 748, 59 S. E. 813; Merrill *v.* Timbrell, 123 Ia. 375, 98 N. W. 879; Land Co. *v.* Whiteman, 92 Minn. 55, 99 N. W. 362.

Miscellaneous writings.—Baker *v.* Cotney, 150 Ala. 506, 43 S. 786; Marx *v.* Eley, 144 Ala. 659, 41 S. 411; McCarthy *v.* R. Co., 79 Conn. 73, 63 A. 725; Knott *v.* Peterson, 125 Ia. 404, 101 N. W. 173; Wheelock *v.* Hull, 124 Ia. 752, 100 N. W. 863; McGuire *v.* County, 133 Ia. 636, 111 N. W. 34; Atchison R. Co. *v.* Palmore, 68 Kan. 545, 75 P. 509, 64 L. R. A. 90; Pepper *v.* Pepper, 25 Ky. L. R. 155, 74 S. W. 739; Lane *v.* Bailey, 29 Mont. 548, 75 P. 191; Rathborne *v.* Hatch, 90 App. Div. 151, 85 N. Y. S. 768; Crane *v.* Bennett, 77 App. Div. 102, 79 N. Y. S. 66; Cobb *v.* Bryan (Tex. Civ.), 97 S. W. 513; Texas, etc. R. Co. *v.* Smith, 34 Tex. Civ. 571, 79 S. W. 614.

282-21 Wilson *v.* S. (Ala.), 39 S. 776; Hirsh *v.* Beverly, 125 Ga. 657, 54 S. E. 678; East St. Louis *v.* R. Co., 238 Ill. 296, 87 N. E. 407; Naugle *v.* Harreld, 100 Ill. App. 524; Chicago, etc. C. Co. *v.* Moran, 110 Ill. App. 664, 210 Ill. 9, 71 N. E. 38; C. *v.* Parlin, 118 Ky. 168, 80 S. W. 791; Watson *v.* Co., 31 Mont. 513, 79 P. 14; Schlitz B. Co. *v.* Grimmon, 28 Nev. 235, 81 P. 43; Robbins *v.* Bk., 90 N. Y. S. 288; Pringey *v.* Guss, 16 Okla. 82, 86 P. 292; Richardson *v.* Morris, 26 Pa. Super. 192; Cotton *v.* Wiley, 39 Pa. Super. 507; Flach *v.* Zanderson (Tex. Civ.), 91 S. W. 348; Reynolds *v.* Reynolds, 42 Wash. 107, 84 P. 579; Plano Mfg. Co. *v.* Bergmann, 102 Wis. 21, 78 N. W. 157.

Contract in writing the best evidence of its contents. Osgood *v.* Poole, 165 Ill. App. 63. See also Vol. 3, p. 526, n. 62.

Coupon railroad ticket.—McCollum *v.* R. Co., 31 Utah 494, 88 P. 663.

Specifications of written contract best evidence of extra work. Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211.

283-22 Parol evidence admissible to establish modification of contract under seal. Snow *v.* Greisheimer, 220 Ill. 106, 77 N. E. 110; Am. F. Co. *v.* Halstead, 165 Ind. 633, 76 N. E. 251.

283-23 Fuchs & L. Co. *v.* Kittredge, 242 Ill. 88, 89 N. E. 723; Pittsburgh, etc. R. Co. *v.* Brown, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625.

Bill of lading in duplicate.—"By making and delivering it in duplicate appellant not only consented that it was genuine, but that it was an original, and primary evidence, and it was not required, in order to admit one of the originals or a copy thereof when one original is lost, that there be notice to produce the other original, and when the loss of one original is shown, can it be said that a copy admitted by the pleadings cannot be shown, without notice to produce the other original? The reason for such rule is wholly wanting and forms an exception to the general rule. Totten *v.* Bucy, 57 Md. 446; Hubbard *v.* Russell, 24 Barb. (N. Y.) 404; Walker *v.* Southern Ry. Co. (1907) 76 S. C. 308, 56 S. E. 952; Dyer *v.* Fredericks (1874) 63 Me. 173; Cincinnati, etc. Co. *v.* Disbrow (1886) 76 Ga. 253; Breed *v.* Nagle, 46 Ga. 112; Johnson *v.* Haight (1816) 13 Johns.

(N. Y.) 470; Philipson *v.* Chase, 2 Camp. 110; Gotlieb *v.* Danvers (1796) 1 Esp. 455; Eisenhart *v.* Slaymaker (1826) 14 Serg. & R. (Pa.) 153; Jory *v.* Orchard (1799) 2 B. & P. 39." Pittsburgh, etc. R. Co. *v.* Brown, 178 Ind. 11, 97 N. E. 115, 98 N. E. 625.

284-24 So. R. Co. *v.* Brewster, 9 Ala. App. 597, 63 S. 790; Savannah Bk. & T. Co. *v.* Purvis, 6 Ga. App. 275, 65 S. E. 35; Anderson *v.* Stewart, 108 Md. 340, 70 A. 228 (absence of signature immaterial); First N. Bk. *v.* Jameson, 63 Or. 594, 128 P. 433.

Carbon copies as counterparts.—Hopkins *v.* S., 52 Fla. 39, 42 S. 52; Fremont Can. Co. *v.* R. Co. (Mich.), 146 N. W. 678; Hay *v.* Clay Co. (Mo. App.), 162 S. W. 666; Bond *v.* Sanford, 134 Mo. App. 477, 114 S. W. 570 (is practically an original); Cole *v.* Co., 216 Pa. 283, 65 A. 678; Chesapeake, etc. R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161.

See Le Master *v.* P., 54 Colo. 416, 131 P. 269, and Vol. 2, p. 385, n. 91, and supplement thereto.

Lease in duplicate.—Peaks *v.* Cobb, 192 Mass. 196, 77 N. E. 881.

Accident report.—Virginia-C. Chem. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725.

Bill of lading.—Walker *v.* R. Co., 76 S. C. 308, 56 S. E. 952.

284-25 Pierce *v.* Norton, 82 Conn. 441, 74 A. 686; McPhelemy *v.* McPhelemy, 78 Conn. 180, 61 A. 477; Reeder *v.* Jones, 6 Penne. (Del.) 66, 65 A. 571; Jordan *v.* S., 127 Ga. 278, 56 S. E. 422; Vizard *v.* Moody, 117 Ga. 67, 43 S. E. 426; S. *v.* O'Neil, 24 Ida. 582, 135 P. 60; Haines *v.* Goodlander, 73 Kan. 183, 84 P. 986; Title Guaranty & Surety Co. *v.* C., 146 Ky. 702, 143 S. W. 401; Louisville B. Co. *v.* R. Co., 25 Ky. L. R. 405, 75 S. W. 285; Stamper *v.* C., 30 Ky. L. R. 992, 100 S. W. 286; Davis *v.* Council, 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.) 722; Louisiana Pur. Ex. Co. *v.* Kuenzel, 198 Mo. App. 105, 82 S. W. 1099; Kannow *v.* Assn., 76 Neb. 330, 107 N. W. 563; Salem T. Co. *v.* Anson, 41 Or. 562, 67 P. 1015, 69 P. 675; Scott *v.* R. Co., 43 Or. 26, 72 P. 594; C. *v.* Clymer, 217 Pa. 302, 66 A. 560; Busby *v.* S., 51 Tex. Cr. 289, 103 S. W. 638.

See Gill *v.* Safe Co. (Mo. App.) 156 S. W. 811.

Preliminary proof of qualifications of witness. Wilson *v.* Wood, 127 Ga. 316, 56 S. E. 457.

Examination must be by custodian. Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844; Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132. But see In re Colton, 129 Ia. 542, 105 N. W. 1008.

Mere inferences of examiner not admissible. Mendel *v.* Boyd, 71 Neb. 657, 99 N. W. 493; Cobb *v.* Bryan (Tex. Civ.), 97 S. W. 513.

285-26 See Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844, 852, and vol. 10, p. 835, and supplement.

285-27 Birmingham W. Co. *v.* Ferguson, 164 Ala. 494, 51 S. 150; Mobile, etc. R. Co. *v.* Hawkins, 163 Ala 565, 51 S. 37; Woodall *v.* S., 145 Ala. 662, 39 S. 718; Curtis *v.* Parker, 136 Ala. 217, 33 S. 935; Williams *v.* S., 149 Ala. 4, 43 S. 720; Seymour *v.* S., 66 Fla. 133, 63 S. 7; Camp *v.* S., 58 Fla. 12, 50 S. 537; Wabash R. Co. *v.* Gretzinger (Ind.), 104 N. E. 69; Indianapolis R. Co. *v.* Waddington, 169 Ind. 448, 82 N. E. 1030; Davis *v.* W. Co. (Ky.), 127 S. W. 479; Johnson *v.* Carlin, 121 Minn. 176, 141 N. W. 4; Wehring *v.* Woodmen, 107 Minn. 25, 119 N. W. 245, Morgan *v.* Co., 105 Mo. App. 239, 79 S. W. 997; Levelsmeier *v.* R. Co., 114 Mo. App. 412, 90 S. W. 104; Hoisting Mach. Co. *v.* Wks., 84 N. J. L. 504, 87 A. 331; S. *v.* Hayes, 138 N. C. 660, 50 S. E. 623; Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800; Ledford *v.* Emerson, 138 N. C. 502, 51 S. E. 42; Empire Co. *v.* Hench, 219 Pa. 135, 67 A. 995; S. *v.* Sowell, 83 S. C. 278, 67 S. E. 316; Breeden *v.* Martens, 21 S. D. 357, 112 N. W. 960; Heidenheimer *v.* Beer (Tex. Civ.), 155 S. W. 352; Callaghan *v.* McGown (Tex. Civ.), 90 S. W. 319; International R. Co. *v.* Lynch (Tex. Civ.), 99 S. W. 160; In re Miller's Est., 36 Utah 228, 102 P. 996; Johnson *v.* R. Co., 35 Utah 285, 100 P. 390, cit. the text; Dixon P. F. Co. *v.* Grain Co., 71 W. Va. 715, 77 S. E. 362.

286-28 Wall *v.* S., 2 Ala. App. 157, 56 S. 57; Gulf Compress Co. *v.* Cotton Co., 172 Ala. 645, 55 S. 206; Burton *v.* Meinert & Miller, 136 Ga. 420, 71 S. E. 870; P. *v.* Peterson, 153 Ill. App. 480; Wabash R. Co. *v.* Gretzinger, (Ind.), 104 N. E. 69; Pittsburgh, etc. R. Co. *v.* Brown (Ind.), 97 N. E. 145; First Nat. Bank *v.* Hedgecock, 87 Neb. 220, 127 N. W. 171; Hartman *v.*

Dobar, 80 N. J. L. 250, 76 A. 347; Smith *v.* Ry. Co., 89 S. C. 415, 71 S. E. 989; S. *v.* Durham, 89 S. C. 134, 71 S. E. 847.

Institution of previous suit.—Fowler *v.* Pritchard, 148 Ala. 261, 41 S. 667.

Contents of record.—Daly *v.* Everett Co., 31 Wash. 252, 71 P. 1014.

Location of crossing within corporate limits.—Indianapolis R. Co. *v.* Waddington, 169 Ind. 448, 82 N. E. 1030.

Time section of train due at given point may be shown by parol. Meyers *v.* R. Co., 36 Utah 307, 104 P. 736.

286-29 Garrison *v.* Glass, 139 Ala. 512, 36 S. 725; St. Louis, etc. R. Co. *v.* Caldwell, 93 Ark. 286, 124 S. W. 1034; Larrabee *v.* Porter (Tex. Civ.), 166 S. W. 395. *Comp.* Wright *v.* Roberts, 116 Ga. 194, 42 S. E. 369.

287-32 Joyce *v.* Joyce, 80 Conn. 88, 67 A. 374; Ruemer *v.* Clark, 105 N. Y. S. 659; Graybill *v.* S. (Tex. Cr.), 97 S. W. 1046.

Explanation of testimony in chief allowed, although it involves witness' opinion as to his rights under written contract. Shields *v.* Norton, 143 Fed. 802, 74 C. C. A. 254.

Cross-examination to show discrepancy between a notice and testimony concerning it, inadmissible,—both being before court. Norman *v.* Corbley, 32 Mont. 195, 79 P. 1059.

287-34 *Comp.* Eads *v.* S., 17 Wyo. 490, 101 P. 946.

288-35 See Lester *v.* Hutson (Tex. Civ.), 167 S. W. 321.

288-36 Presumption of writing.—Allen *v.* Hopson, 119 Ky. 215, 83 S. W. 575, 26 Ky. L. R. 1148; Barschow *v.* R. Co., 147 Mich. 226, 110 N. W. 1057.

Parol evidence admissible if neither pleading nor evidence shows contract written. Union F. Co. *v.* Langford, 145 Ala. 667, 39 S. 765.

288-37 Kelly *v.* Levee Dist., 74 Ark. 202, 85 S. W. 249, 87 S. W. 638; Uzzell *v.* Lunney (Colo.), 104 P. 945; P. *v.* Joyce, 154 Ill. App. 13; Garrett *v.* Winterich (Ind. App.), 87 N. E. 161; Parson *v.* C., 33 Ky. L. R. 1051, 112 S. W. 617; Ruddock C. Co. *v.* Peyret, 113 La. 867, 37 S. 858; S. *v.* Hall, 158 Mo. App. 123, 138 S. W. 45; Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844; Campbell *v.* S., 59 Tex. Cr. 496, 129 S. W. 139; Matthews *v.* Thatcher, 33 Tex. Civ. 133, 76 S. W. 61; Patterson *v.* Knapp (Tex. Civ.), 99 S. W. 125; Clawson *v.* Wilkins (Tex. Civ.), 93 S. W. 1086. See Malvern *v.* Cooper, 108 Ark. 24, 156 S. W. 845; Boettger *v.* City (Wis.), 147 N. W. 66; "Records," infra, 809-92.

Assessment rolls best evidence of increase in valuation. Carlisle *v.* Co., 32 Wash. 284, 73 P. 349.

Nature of corporation must be determined from articles of incorporation. Gitzhoffen *v.* Hospital, 32 Utah 46, 88 P. 691, 8 L. R. A. (N. S.) 1161.

Records of city council.—Jackson *v.* Ellis, 116 Ga. 719, 43 S. 53.

Whether instrument recorded.—Seiver *v.* Galvin, 133 Wis. 391, 113 N. W. 680.

288-38 Northrop *v.* Chase, 76 Conn. 146, 56 A. 518; Cummins *v.* Hayden, 2 Houst. (Del.) 400; Vizard *v.* Moody, 117 Ga. 67, 43 S. E. 426; Kennedy *v.* Borah, 226 Ill. 243, 80 N. E. 767; Goslin *v.* C., 28 Ky. L. R. 683, 90 S. W. 223; Bonner *v.* C., 30 Ky. L. R. 992, 99 S. W. 1150; Ball *v.* Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Fontelieu *v.* Fontelieu, 116 La. 866, 41 S. 120; Hindle *v.* Healy, 204 Mass. 48, 90 N. E. 511; Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158; Quimby *v.* Ayres, 1 Neb. (Unof.) 70, 95 N. W. 464; Tuck *v.* Rottkowsky, 47 Misc. 386, 93 N. Y. S. 1112; Rosenberg *v.* Goldstein, 38 Misc. 753, 78 N. Y. S. 831; First Nat. Bk. *v.* Miller, 48 Or. 587, 87 P. 892; S. *v.* True, 116 Tenn. 294, 95 S. W. 1028; Southern R. Co. *v.* Seymour, 113 Tenn. 523, 83 S. W. 674; Gamble *v.* Martin (Tex.), 129 S. W. 388; Carden *v.* S. (Tex. Cr.), 138 S. W. 598; Grabill *v.* S. (Tex. Cr.), 97 S. W. 1046; Hagan *v.* Holderby, 62 W. Va. 106, 57 S. E. 289.

Original pleadings, not certified, are not admissible to prove a bankruptcy proceeding. Horton *v.* Haralson, 130 La. 100, 57 S. 643.

Justices' records best evidence. Davis *v.* S., 89 Miss. 21, 42 S. 542; S. *v.* Ireland, 89 Miss. 763, 42 S. 797. *Comp.* Eggert *v.* Allen, 119 Wis. 625, 96 N. W. 803.

Orders of court.—S. *v.* Thresher, 77 Conn. 70, 58 A. 460.

Abandoning pleading.—Smith *v.* R. Co. (Tex. Civ.), 105 S. W. 528.

Docket entries of referee.—Davis *v.* Ives, 75 Conn. 611, 54 A. 922.

Filing claim in probate court.—Gillespie *v.* Campbell, 149 Ala. 193, 43 S. 28.

Bill of particulars.—Idaho Co. *v.* Kalanquin, 8 Ida. 101, 66 P. 933.

Letters of administration regular on

face, presumed originals. Sharpe *v.* Hodges, 121 Ga. 798, 49 S. E. 775.

Original minutes of a superior court not admissible in the trial of an action in a city court over the objection that such minutes are not primary evidence. Traylor *v.* Epps, 11 Ga. App. 497, 75 S. E. 828, cit. Civ. Code 1910, §5753.

That one is a duly authorized trustee in bankruptcy should be proved by a certified copy of the bond given by him as such trustee, and not by parol evidence. Traylor *v.* Epps, 11 Ga. App. 497, 75 S. E. 828.

289-39 Mears *v.* Smith, 19 S. D. 79, 102 N. W. 295.

289-41 Pineland Club *v.* Robert, 171 Fed. 341, 96 C. C. A. 233; Sheffield *v.* Co., 3 Ga. App. 200, 59 S. E. 725.

Acts of school board.—Mendel *v.* Dist., 121 Wis. 80, 98 N. W. 932.

Judicial notice records kept at association meetings and are best evidence. Norwich Ins. Co. *v.* R. Co., 46 Or. 123, 78 P. 1025.

Corporation records as best evidence. Central E. Co. *v.* Sprague Co., 120 Fed. 925, 57 C. C. A. 197; Blanton *v.* Co., 120 Fed. 318; Nixon *v.* Goodwin, 3 Cal. App. 358, 85 P. 169; Garmany *v.* Lawton, 124 Ga. 876, 53 S. E. 669; Corcoran *v.* Co., 8 Ida. 651, 71 P. 127; Ehrlich *v.* Chevra Wizna, 86 N. Y. S. 820; Braxmar *v.* Stanton, 110 App Div. 167, 96 N. Y. S. 1096; S. *v.* Merchant, 48 Wash. 69, 92 P. 890. Not the only evidence. Empire S. Co. *v.* Co., 10 Ariz. 117, 85 P. 729; Selley *v.* Co., 119 Ia. 591, 93 N. W. 590; S. *v.* Farrier, 114 La. 579, 38 S. 460; Ismon *v.* Loder, 135 Mich. 345, 97 N. W. 769.

Lease, certified by corporation, original evidence under statute. Chicago, etc. R. Co. *v.* Weber, 219 Ill. 372, 76 N. E. 489.

Certified statement of book account not original evidence under statute. Coppes *v.* Assn. (Ind. App.), 67 N. E. 1022.

290-43 Tutwiler C., etc. Co. *v.* Wheeler, 149 Ala. 354, 43 S. 15; Arnold *v.* Cofer, 135 Ala. 364, 33 S. 539; Beardsley *v.* Hill, 77 Ark. 244, 91 S. W. 757; Hope *v.* Shiver, 77 Ark. 177, 90 S. W. 1003; Barrow *v.* Grant, 116 La. 952, 41 S. 220; Neely *v.* Co., 138 Mich. 469, 101 N. W. 664; Crane *v.* Waldron, 133 Mich. 73, 94 N. W. 593; Graham *v.* Warren, 81 Miss. 330, 33 S. 71; Houck *v.* Patty, 100 Mo. App. 302, 73 S. W. 389; Montpelier Co. *v.* Dist., 115 Wis. 622, 92 N. W. 439.

290-44 Harbison-W. R. Co. *v.* Scott (Ala.), 64 S. 547; Hardy *v.* Randall, 173 Ala. 516, 55 S. 997; Hunt *v.* Lavender, 140 Ga. 157, 78 S. E. 805; Winter *v.* Dibble, 251 Ill. 200, 95 N. E. 1093; Cosgrove *v.* Franklin, 35 R. I. 527, 87 A. 544; Jones *v.* Harris (Tex. Civ.), 139 S. W. 69; Trice's Heirs *v.* McCaleb (Tex. Civ.), 138 S. W. 792. See Volhard *v.* Volhard, 119 App. Div. 266, 104 N. Y. S. 578; Stephens *v.* Faus, 20 S. D. 367, 106 N. W. 56; Davis *v.* Ragland, 42 Tex. Civ. 400, 93 S. W. 1099.

Abstract of title, secondary evidence. Glos *v.* Talcott, 213 Ill. 81, 72 N. E. 707.

Record of deed, not best evidence of deed. Tucker *v.* Duncan, 224 Ill. 453, 79 N. E. 613.

Lease.—Southern R. Co. *v.* Leard, 146 Ala. 349, 39 S. 449.

Original competent though copy admitted. Tarver *v.* Deppen, 132 Ga. 798, 65 S. E. 177.

290-45 Rollins *v.* R. Co., 73 N. J. L. 64, 62 A. 929. See Dawson *v.* Orange, 78 Conn. 96, 61 A. 101.

Title bond.—Combs *v.* Krish, 27 Ky. L. R. 154, 84 S. W. 562; Jones *v.* Co., 29 Ky. L. R. 623, 94 S. W. 6.

Original patent best evidence. Butt *v.* Mastin, 143 Ala. 321, 39 S. 217.

Mortgage.—Brynjolfson *v.* Dagner, 15 N. D. 332, 109 N. W. 320.

Ownership of railroad cannot be shown by parol. Black *v.* R. Co., 110 Mo. App. 198, 85 S. W. 96.

Parol admissible to complete description. Howard *v.* Adkins, 167 Ind. 184, 78 N. E. 665.

290-46 Stephens *v.* Head, 138 Ala. 455, 35 S. 565; S. *v.* Songer, 76 Ark. 169, 88 S. W. 903; Creditors' Union *v.* Lundy, 16 Cal. App. 567, 117 P. 624; Reeder *v.* Jones, 6 Penne. (Del.) 66, 65 A. 571; East St. Louis *v.* R. Co., 238 Ill. 296, 87 N. E. 407; Thomson *v.* Caverley, 148 Ill. App. 295 (to show that debt sued upon was not scheduled in bankruptcy, the schedule should be produced); O'Brien *v.* Woburn, 184 Mass. 598, 69 N. E. 350; Cook *v.* R. Co., 78 Neb. 64, 110 N. W. 718; Cooke *v.* Comrs., 13 Okla. 11, 73 P. 270 (auditing of account by board of health); Cleburne *v.* Mfg. Co. (Tex. Civ.), 127 S. W. 1072; Hicks *v.* Pogue, 33 Tex. Civ. 333, 76 S. W. 786; De-

vanney *v.* Hanson, 60 W. Va. 3, 53 S. E. 603 (proceedings of city council); Rohloff *v.* Assn., 130 Wis. 61, 109 N. W. 989 (certificate of death). See Anniston L. Co. *v.* Edmondson, 141 Ala. 366, 37 S. 424; Ripton *v.* Brandon, 80 Vt. 234, 67 A. 541 (assessment books).

Affidavit of publication.—Hamilton *v.* Simon, 178 Fed. 130.

Where homestead claimed records of land office should be produced. Crawford County Bank *v.* Baker, 95 Ark. 438, 130 S. W. 556.

On change of venue the transcript is the best evidence, but if oral evidence is admitted without objection, a plea to the jurisdiction is properly overruled. Berg *v.* S., 64 Tex. Cr. 612, 142 S. W. 884.

Rates filed with interstate commerce commission.—Sloop *v.* R. Co. (Mo. App.), 84 S. W. 111; Summers *v.* R. Co. (Mo. App.), 79 S. W. 481.

Patent from land office.—Covington *v.* Berry, 76 Ark. 460, 88 S. W. 1005; Boynton *v.* Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20.

291-47 Brasch *v.* Co., 80 Ark. 425, 97 S. W. 445; Allen *v.* McKay, 139 Cal. 94, 72 P. 713; Denver *v.* Spencer, 34 Colo. 270, 82 P. 590, 2 L. R. A. (N. S.) 147 (action of park commissioners provable by parol); S. *v.* Cahill, 131 Ia. 155, 105 N. W. 691; Kinney *v.* Howard, 133 Ia. 94, 110 N. W. 282; S. *v.* Junkin, 79 Neb. 532, 113 N. W. 256 (records contradictory); Baker County *v.* Huntington, 46 Or. 275, 79 P. 187.

291-48 Northern Ala. R. Co. *v.* Feldman, 1 Ala. App. 334, 56 S. 16; Bates *v.* Hall, 44 Colo. 360, 98 P. 3; Bell *v.* Niles, 61 Fla. 114, 55 S. 392; P. *v.* Venard, 168 Ill. App. 254; Miller *v.* C., 33 Ky. L. R. 1001, 112 S. W. 598; P. *v.* Burke, 157 Mich. 108, 121 N. W. 282; General Conference Assn., etc. *v.* Assn., 156 Mich. 504, 132 N. W. 94; Mandelbaum *v.* R. Co., 90 N. Y. S. 377; Galvin *v.* Tibbs, 17 N. D. 600, 119 N. W. 39; Warren *v.* Warren (R. I.), 80 A. 593; Brasfield *v.* Young (Tex. Civ.), 153 S. W. 180; Gamble *v.* Martin (Tex.), 129 S. W. 386.

Judgment.—Carhart *v.* Oddenkirk, 20 Colo. App. 402, 79 P. 303.

Transcript of testimony.—Estes *v.* R. Co., 111 Mo. App. 1, 85 S. W. 909.

Admissions in pleadings.—Colborn *v.* Fry, 23 Ind. App. 485, 55 N. E. 621.

Proceedings before committing magistrate.—Bell *v.* S. (Miss.), 38 S. 795.

An original petition and order, filed in the superior court, not admissible in evidence on the trial of a case in a city court, over the objection that a certified copy of such petition and order should have been introduced. Traylor *v.* Epps, 11 Ga. App. 497, 75 S. E. 828, cit. Whitaker *v.* S., 11 Ga. App. 208, 75 S. E. 258.

Time of bringing action.—Mullenary *v.* Burton, 3 Cal. App. 263, 84 P. 159.

Parol evidence of service of process is secondary. Lipscomb *v.* Bk., 66 Kan. 243, 71 P. 583.

Construction of statute of foreign state proved by decisions of its highest court; not by opinions of lawyers. Clark *v.* Eltinge, 39 Wash. 696, 83 P. 901.

293-51 White *v.* Co., 119 Fed. 989; 121 Fed. 779, 58 C. C. A. 55; Lorenz *v.* U. S., 24 App. Cas. (D. C.) 337; Manning *v.* S., 46 Tex. Cr. 326, 81 S. W. 957.

But a copy of the record is inadmissible.—William M. Rice Institute *v.* Freeman (Tex. Civ.), 145 S. W. 688.

Record book is best evidence of the record. Brucke *v.* Hubbard, 74 S. C. 144, 54 S. E. 249.

293-52 Rex *v.* Yaldon, 17 Ont. L. R. 179; So. Bitulithic Co. *v.* Hughston (Ala.), 58 S. 450; United Order *v.* Hooser, 160 Ala. 334, 49 S. 354; Compton *v.* Fender, 132 Ga. 483, 64 S. E. 475; O'Neil *v.* Adams, 144 Ia. 385, 122 N. W. 976; Fidelity & D. Co. *v.* Co., 133 Ky. 74, 117 S. W. 393. See Eastman & Co. *v.* Watson, 72 Wash. 522, 130 P. 1144.

294-53 See Cook *v.* R. Co., 78 Neb. 64, 110 N. W. 718. *Comp.* Porter *v.* U. S., 7 Ind. Ty. 616, 104 S. W. 855.

294-54 Turner *v.* Markham, 155 Cal. 562, 102 P. 272; Calloway *v.* S., 50 Tex. Cr. 72, 94 S. W. 902.

295-56 Mauldin *v.* R. Co., 73 S. C. 9, 52 S. E. 677.

295-58 Blanton *v.* Co., 120 Fed. 318; Wall *v.* S., 2 Ala. App. 157, 56 S. 57; Weinstein & Sons *v.* Yielding & Co., 167 Ala. 347, 52 S. 591; Dorough *v.* Harrington, 148 Ala. 305, 42 S. 557; McCleskey *v.* Co., 147 Ala. 573, 42 S. 67 (meaning of "cipher words" established by parol); Louisville, etc. R. Co. *v.* Johnson, 135 Ala. 232, 33 S. 661 (population of town); Culver *v.* Caldwell, 137 Ala. 125, 34 S. 13 (mak-

ing examination of account provable by parol); S. *v.* Matlock, 5 Penne. (Del.) 401, 64 A. 259 (whether person voted may be proved by parol); Atlantic, etc. R. Co. *v.* Dexter, 50 Fla. 180, 39 S. 634, 111 Am. St. 116 (delivery to carrier need not be proved by bill of lading); Leon *v.* Kerrison, 47 Fla. 178, 36 S. 173 (ownership of chattel provable by parol); Cabaniss *v.* S., 8 Ga. App. 129, 68 S. E. 849; Mason *v.* S., 1 Ga. App. 534, 58 S. E. 139; Minn. L. Co. *v.* Hobbs, 122 Ga. 20, 49 S. E. 783 (statement lease existed provable by parol); Schneider *v.* R. Co., 177 Ill. App. 334; Louisville R. Co. *v.* Raymond, 135 Ky. 738, 123 S. W. 281; Ball *v.* Loughbridge, 30 Ky. L. R. 1123, 100 S. W. 275 (fact of litigation shown by parol); Landry *v.* Laplos, 113 La. 697, 37 S. 606 (adjudication at judicial sale provable by parol); Foster Mfg. Co. *v.* Co. (Mass.), 101 N. E. 1083; Minn. D. Co. *v.* Johnson, 96 Minn. 91, 104 N. W. 1149, 107 N. W. 740 (existence of tenancy provable by parol); Keylon *v.* R. Co., 114 Mo. App. 66, 89 S. W. 337; De Voe *v.* R. Co., 174 N. Y. 1, 66 N. E. 568; Lipschutz *v.* Weatherly, 140 N. C. 365, 53 S. E. 132 (sending reply telegrams shown by parol); Whitcomb *v.* Oller (Okla.), 137 P. 709; McCants *v.* Thompson, 27 Okla. 706, 115 P. 600; Leiter *v.* Dwyer P. Co., 66 Or. 474, 133 P. 1180; Oliver *v.* Hutchinson, 41 Or. 443, 69 P. 139, 1024; Mitchiner *v.* Co., 70 S. C. 522, 50 S. E. 190 (existence of quarantine); Oliver *v.* Co., 65 S. C. 1, 43 S. E. 307 (purchase of railroad ticket); Rowan *v.* S., 57 Tex. Cr. 625, 124 S. W. 668; Bink *v.* S., 48 Tex. Cr. 598, 89 S. W. 1075; Neblett *v.* Barron (Tex. Civ.), 160 S. W. 1167; Cartwright *v.* Canode (Tex. Civ.), 138 S. W. 792; Missouri Glass Co. *v.* Roberts (Tex. Civ.), 137 S. W. 433; Echols *v.* Co., 38 Tex. Civ. 65, 84 S. W. 1082 (when indebtedness contracted); Collins *v.* S., 47 Tex. Cr. 497, 84 S. W. 585 (defendant may be asked whether he had a liquor license); Phillips *v.* Welts, 40 Wash. 501, 82 P. 737 (minutes of county board not exclusive evidence of its doings).

See Cocke & Co. *v.* C. & I. Co. (Tex. Civ.), 155 S. W. 1019, and vol. 10, p. 832, et seq.

Execution issued. — Barnes *v.* Imhoff, 254 Mo. 217, 162 S. W. 152.

File mark.—Gove *v.* Armstrong (Vt.), 89 A. 868.

One who can testify of his own knowledge is a competent witness of the possession of goods by a carrier and of the dates of reception and delivery. Walker *v.* S., 11 Ga. App. 251, 74 S. E. 1100.

That an animal was registered.—Nat. State Bk. *v.* Ricketts (Tex. Civ.), 152 S. W. 646.

295-59 W. U. T. Co. *v.* Cline, 8 Ind. App. 364, 35 N. E. 564.

295-60 Gurley *v.* R. Co., 206 Mass. 534, 92 N. E. 714; Bissett *v.* Lumb. Co., 156 N. C. 162, 72 S. E. 205; Cristler *v.* Williams (Tex. Civ.), 130 S. W. 608; Star Grocer Co. *v.* Bradford, 70 W. Va. 496, 74 S. E. 509.

297-61 See Gordon *v.* Funkhouser, 100 Va. 675, 42 S. E. 677. *Comp.* Bush *v.* Co., 127 Ga. 308, 56 S. E. 430.

297-62 Doll *v.* Co., 33 Mont. 80, 81 P. 625.

297-63 Connor *v.* Nevada, 188 Mo. 148, 86 S. W. 256; Hoisting Mach. Co. *v.* Iron Wks., 84 N. J. L. 504, 87 A. 331; Empire Co. *v.* Hench, 219 Pa. 135, 67 A. 995; Polk *v.* S. (Tex. Cr.), 152 S. W. 907; Star Grocery Co. *v.* Bradford, 70 W. Va. 496, 74 S. E. 509.

Title to corporate office. — Empire Smelting Co. *v.* Gardiner, 10 Ariz. 117, 85 P. 729; Stovell *v.* Co., 38 Colo. 80, 87 P. 1071.

Where the tenure of office is only collaterally involved, the statement by a witness that he was president of a named corporation was not objectionable, on the ground that the minutes of the corporation, showing his election, constituted higher and better evidence of the fact. Knight *v.* Landis, 11 Ga. App. 536, 75 S. E. 834.

Corporate existence and nature.—Dick *v.* S., 107 Md. 11, 68 A. 286, 576; S. *v.* Wise, 186 Mo. 42, 84 S. W. 954.

297-64 Shepherd *v.* Sartain (Ala.), 64 S. 57; Drews *v.* Burton, 76 S. C. 362, 57 S. E. 176; Smith *v.* Bk., 43 Tex. Civ. 495, 95 S. W. 1111; House *v.* Holland, 42 Tex. Civ. 502, 94 S. W. 153.

Payment by check.—Armour & Co. *v.* Bluthenthal & Bickart, 9 Ga. App. 707, 72 S. E. 168.

298-66 Payment of claim made in writing may be testified to without producing claim. Rabon *v.* R. Co., 149 N. C. 59, 62 S. E. 743.

298-67 See Hagins *v.* Ins. Co., 72 S. C. 216, 51 S. E. 683.

298-68 Memorandum secondary evidence to witness' memory. Pugh *v.* Bell, 21 Cal. App. 530, 132 P. 286; P. *v.* Silvers, 6 Cal. App. 69, 92 P. 506; Manchester Assur. Co. *v.* R. Co., 46 Or. 162, 79 P. 60, 69 L. R. A. 475; S. *v.* Mann, 39 Wash. 144, 81 P. 561. But see Smith *v.* Plant, 216 Mass. 91, 103 N. E. 58.

298-69 *Comp.* Meyer *v.* Ins. Co., 127 Wis. 293, 106 N. W. 1087.

299-70 Sechrist *v.* Atkinson, 31 App. Cas. (D. C.) 1; P. *v.* Woodward, 71 Misc. 607, 130 N. Y. S. 854; Henry *v.* Wanamaker, 45 Pa. Super. 346; Rowan *v.* S., 57 Tex. Cr. 625, 124 S. W. 668 (age of child testified to by mother excludes entry of fact made by her); Laudermilk *v.* S., 47 Tex. Cr. 427, 83 S. W. 1107; Conover *v.* Co., 38 Wash. 172, 80 P. 281; Halverson *v.* Co., 35 Wash. 600, 77 P. 1058.

Qualifications of petitioners.—Ahern *v.* Dist., 39 Colo. 409, 89 P. 963.

Performance of religious ceremony of marriage.—Massueco *v.* Tomassi, 80 Vt. 186, 67 A. 551.

Proof of indebtedness.—Stein *v.* Board, 135 Ia. 539, 113 N. W. 339.

300-71 **Entry in family bible** not admissible to prove age, while maker alive. S. *v.* Miller, 71 Kan. 200, 80 P. 51.

Confession must be shown by testimony of person to whom made; not by stenographic copy. P. *v.* Silvers, 6 Cal. App. 69, 92 P. 506.

300-72 P. *v.* Balmain, 16 Cal. App. 28, 116 P. 303.

300-73 Piano *v.* S., 161 Ala. 88, 49 S. 803, mark or brand on stolen goods.

300-75 Oral identification of mutilated writing. Baltes Co. *v.* Sutton, 32 Ind. App. 14, 69 N. E. 179.

301-77 Size of footprint shown, without stick used to measure with. Weaver *v.* S., 46 Tex. Cr. 607, 81 S. W. 39.

Identification of land by copy of original plat. Chicago *v.* LeMoyne, 119 Fed. 662, 56 C. C. A. 278.

301-78 Pope *v.* S., 174 Ala. 63, 57 S. 245; Chambers *v.* S. (Ga.), 81 S. E. 880; Underwood *v.* C., 119 Ky. 384, 27 Ky. L. R. 8, 84 S. W. 310.

Refusal to produce article after demand cause for receiving secondary evidence of its value. Sullivan *v.* Girson, 39 Mont. 274, 102 P. 320.

301-79 Moore *v.* S., 159 Ala. 97, 48 S. 688; Cent. of Ga. R. Co. *v.* Mathis, 9 Ala. App. 643, 64 S. 197 (purchase of railroad ticket); Gaston *v.* R. Co., 120 Ga. 516, 48 S. E. 188; Slaughter *v.* Heath, 127 Ga. 747, 57 S. E. 69; Cabaniss *v.* S., 8 Ga. App. 29, 68 S. E. 849; Baltes Co. *v.* Sutton, 32 Ind. App. 14, 69 N. E. 179; Brusseau *v.* Co., 133 Ia. 245, 110 N. W. 577; S. *v.* Bennett (Ia.), 110 N. W. 150; S. *v.* McKinnon, 99 Me. 166, 58 A. 1028; A. J. Dwyer P. L. Co. *v* Whiteman, 92 Minn. 55, 99 N. W. 362; Rollins *v.* R. Co., 73 N. J. L. 64, 62 A. 929; Andrews *v.* Grimes, 148 N. C. 437, 62 S. E. 519; Phila. U. Agency *v.* Brown (Tex. Civ.), 151 S. W. 899; Wright *v.* Giles (Tex. Civ.), 129 S. W. 1163; Missouri etc. R. Co. *v.* Crum, 35 Tex. Civ. 609, 81 S. W. 72.

Receipt of telegram.—Postal Tel. Co. *v.* Thornton, 153 Ky. 176, 154 S. W. 1100.

Existence of instrument of record not provable by parol. Shannon *v.* Summers, 86 Miss. 619, 38 S. 345. But see Vol. 10, p. 829.

302-80 McLendon *v.* Rubenstein (Ala.), 61 S. 902; P. *v.* Barker, 144 Cal. 705, 78 P. 266; McCleary *v.* S. (Md.), 89 A. 1100.

Delivery of contract. Pecos & N. T. R Co. *v.* Cox (Tex. Civ.), 150 S. W. 265.

305-89 Byrd *v.* Beall, 161 Ala. 594, 50 S. 53; Hutchinson *v.* Plant (Mass.), 105 N. E. 1017; Cooley *v.* Collins, 186 Mass 507, 71 N. E. 979.

No presumption there is better evidence of a loan than admission of debtor. Schell *v.* Weaver, 225 Ill. 159, 80 N. E. 95.

306-90 P *v.* Giro, 197 N. Y. 152, 90 N. E. 432. For full discussion see Purinton *v.* Purinton, 101 Me. 250, 63 A. 925.

306-91 Brown *v.* Ins. Co., 14 Haw. 80; Purinton *v.* Purinton, 101 Me. 250, 63 A. 925.

The contents of the writing cannot be so proved.—In re Guinasso's Est., 13 Cal. App. 518, 110 P. 335.

306-92 C. *v.* Borasky, 214 Mass. 313, 101 N. E. 377; McIntosh *v.* Wales (Wyo.), 134 P. 274.

Testimony of person who witnessed weighing.—Richmond L. & R. Co. *v.* Blau, 210 Fed. 887.

307-93 Handwriting. Castor *v.* Bernstein, 2 Cal. App. 703, 84 P. 244.

307-94 Testimony of plaintiff as to

what occurred at former trial is not secondary to that of stenographer. Dickman *v.* MacDonald, 50 Misc. 531, 99 N. Y. S. 429.

308-97 Pittsburg, etc. R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022.

Best available.—Bosse *v.* Weik (Mo. App.), 129 S. W. 417.

308-98 Southern R. Co. *v.* Ins. Co., 177 Ala. 327, 58 S. 313; Bufford *v.* Little, 159 Ala. 300, 48 S. 697; Southern R. Co. *v.* Howell, 135 Ala. 639, 34 S. 6; Big Three M. & M. Co. *v.* Hamilton, 157 Cal. 130, 107 P. 301; Beach *v.* Schroeder, 47 Colo. 312, 107 P. 271; Carhart *v.* Oddenkirk, 20 Colo. App. 402, 79 P. 303; Patton *v.* Bk., 124 Ga. 965, 974, 53 S. E. 664; McAllister *v.* S., 7 Ga. App. 541, 67 S. E. 221; Mason *v.* Truitt, 257 Ill. 18, 100 N. E. 202; Peterson *v.* Co., 238 Ill. 403, 87 N. E. 345; U. S. etc. Ins. Co. *v.* Harvey, 129 Ill. App. 104; Kennedy *v.* Borah, 226 Ill. 243, 80 N. E. 767; W. U. T. Co. *v.* Cline, 8 Ind. App. 361, 35 N. E. 564; Walker *v.* Cornett (Ky.), 122 S. W. 841; Weibert *v.* Hanan, 136 App. Div. 388, 121 N. Y. S. 35; Ruemer *v.* Clark, 105 N. Y. S. 659; First Nat. Bk. *v.* Miller, 48 Or. 587, 87 P. 892; S. *v.* Winter, 83 S. C. 153, 65 S. E. 209; Berg *v.* S., 64 Tex. Cr. 612, 142 S. W. 884; Peck *v.* Morgan (Tex. Civ.), 156 S. W. 917; Hatzfeld *v.* Walsh (Tex. Civ.), 120 S. W. 525.

See Vol. 9, p. 119, n. 10, and Supp. thereto.

On appeal, must be considered when not objected to when offered. Doylestown Agr. Co. *v.* Lumb. Co., 109 Me. 301, 84 A. 146.

Grounds must be stated.—Tucker *v.* Duncan, 224 Ill. 453, 79 N. E. 613.

Call for papers not necessary. Mahaney *v.* Carr, 175 N. Y. 454, 67 N. E. 903.

Failure to object to want of notice. Considine *v.* Dubuque, 126 Ia. 283, 102 N. W. 102.

308-99 White *v.* Bk., 119 Ill. App. 354; Doll *v.* Co., 33 Mont. 80, 81 P. 627; McCormack *v.* Mandelbaum, 102 App. Div. 302, 92 N. Y. S. 425; Rosenberg *v.* Goldstein, 38 Misc. 753, 78 N. Y. S. 831. *Contra*, Mansfield *v.* Bell, 24 Pa. Super. 447.

Failure of party relying on best evidence to produce it precludes him from objecting to secondary evidence. Moore *v.* Kirby, 52 Tex. Civ. 200, 113 S. W. 632.

309-3 Perry *v.* S., 155 Ala. 93, 46 S. 470; Bickley *v.* Bickley, 136 Ala. 548, 34 S. 946; Columbia County Bk. *v.* Emerson, 101 Ark. 331, 142 S. W. 848; Bauer *v.* S., 144 Cal. 740, 78 P. 280; Mortgage Trust Co. *v.* Elliott, 36 Colo. 238, 84 P. 980; Skinner Mfg. Co. *v.* Douville, 57 Fla. 180, 49 S. 125; Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234; Johnson County Sav. Bk. *v.* Richardson, 9 Ga. App. 466, 71 S. E. 757; Pepper *v.* James, 7 Ga. App. 518, 67 S. E. 218; P. *v.* Nall, 242 Ill. 284, 89 N. E. 1012; S. *v.* Clark, 141 Ia. 297, 119 N. W. 719; Haas *v.* Chubb, 67 Kan. 787, 74 P. 230; C. *v.* Parlin Co., 118 Ky. 168, 80 S. W. 791; Huntoon *v.* Brendemuehl, 123 Minn. 54, 144 N. W. 426; Strand *v.* R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987; Zollman *v.* Tarr, 93 Mo. App. 234; Price *v.* Clevenger, 99 Mo. App. 536, 74 S. W. 894; Bradstreet *v.* Bk. Co., 89 Neb. 590, 131 N. W. 956; Sheridan Coal Co. *v.* Hull Co., 87 Neb. 117, 127 N. W. 218; Samuelson *v.* Co., 1 Neb. (Unof.) 815, 95 N. W. 809; Hall *v.* Callingham, 74 N. J. L. 211, 65 A. 123; Rosenberg *v.* Surety Co., 140 App. Div. 436, 125 N. Y. S. 257; March *v.* Wycoff, 111 N. Y. S. 669; Kann *v.* Weir, 95 N. Y. S. 584; Quinn *v.* R. Co., 91 App. Div. 489, 86 N. Y. S. 883; Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519; Tualatin Academy *v.* Keene, 59 Or. 496, 117 P. 424; Morris *v.* Co., 44 Tex. Civ. 488, 99 S. W. 178; Pennington *v.* Co., 34 Utah 223, 97 P. 115; Snyder *v.* Co., 65 W. Va. 1, 63 S. E. 616.

See American, etc. Co. *v.* Mercedes Co. (Tex. Civ.), 155 S. W. 286.

Photograph must be shown to be correct. Porter *v.* Buckley, 147 Fed. 140, 78 C. C. A. 138.

Primary evidence must have been admissible. Meyer *v.* Ins. Co., 127 Wis. 293, 106 N. W. 1087.

309-4 See Jones *v.* Neal, 44 Tex. Civ. 412, 98 S. W. 417.

310-6 S. *v.* Conroy, 126 Ia. 472, 102 N. W. 417; June *v.* Labadie, 132 Mich. 135, 92 N. W. 937; Nelson Mfg. Co. *v.* Shreve, 104 Mo. App. 474, 79 S. W. 488; First Nat. Bk. *v.* Wright, 104 Mo. App. 242, 78 S. W. 686; Interurban C. Co. *v.* Hayes, 191 Mo. 248, 89 S. W. 927; Whitwell *v.* Johnson, 2 Neb. (Unof.) 66, 96 N. W. 272; S. *v.* Freshwater, 30 Utah 442, 85 P. 417; Lee *v.* Follensby, 86 Vt. 401, 85 A. 915.

Evidence sufficient.—Curtsinger *v.* Mc-

Gown (Tex. Civ.), 149 S. W. 303.
Proof of delivery (Stonehill W. Co. *v.* Lupo, 110 N. Y. S. 408) and receipt of letters must be made. Hardin *v.* R. Co., 120 Mo. App. 203, 96 S. W. 681.
Letter received as reply presumed genuine. Loverin *v.* Baumgarner, 59 W. Va. 46, 52 S. E. 1000.
Need not be clear and convincing proof. S. *v.* Leasia, 45 Or. 410, 78 P. 328.
Telegram. — Authenticity must be shown. Yeiser *v.* Cathers, 5 Neb. (Unof.) 204, 97 N. W. 840; Peycke *v.* Shinn, 68 Neb. 343, 94 N. W. 135; Cobb *v.* Co., 57 W. Va. 49, 49 S. E. 1005.
310-8 Houston, etc. R. Co. *v.* De Berry, 34 Tex. Civ. 180, 78 S. W. 736.
310-9 McCleery *v.* Lewis, 104 Me. 33, 70 A. 540; Houghtalling *v.* Houghtalling (Ia.), 112 N. W. 197; Anders *v.* R. Co., 19 Pa. Super. 564; Davis *v.* Ragland, 42 Tex. Civ. 400, 93 S. W. 1099.
310-10 Borstelman *v.* Brohan, 81 N. J. Eq. 401, 87 A. 145.
310-11 Arbuckle *v.* Matthews, 73 Ark. 27, 83 S. W. 326; Phillips *v.* Co., 184 Mass. 404, 68 N. E. 848; Webster *v.* Purcell, 186 N. Y. 549, 79 N. E. 1118; Jones *v.* Neal, 44 Tex. Civ. 412, 98 S. W. 417; Dickinson *v.* Smith, 134 Wis. 6, 114 N. W. 133.
Lithograph map of great age and long use. Houston *v.* Finnigan (Tex. Civ.), 85 S. W. 470.
Rule in favor of ancient deed applies only to original. McCleery *v.* Lewis, 104 Me. 33, 70 A. 540.
311-12 Roberts *v.* Dover, 72 N. H. 147, 55 A. 895; Collins *v.* McGuire, 76 App. Div. 443, 78 N. Y. S. 527; Massucco *v.* Tomassi, 80 Vt. 186, 67 A. 551. See Galveston, etc. R. Co. *v.* Pennington (Tex. Civ.), 166 S. W. 464.
311-13 Northern A. R. Co. *v.* Key, 150 Ala. 641, 43 S. 794.
311-14 Kerr *v.* Woodmen, 117 Fed. 593, 54 C. C. A. 655; Board of Comrs. *v.* Tollman, 145 Fed. 753, 76 C. C. A. 317; Wall *v.* S. (Ala.), 56 S. 57; Stone *v.* Brick Co., 13 Cal. App. 203, 109 P. 103 (under C. C. P., §1937); Mortgage Trust Co. *v.* Elliott, 36 Colo. 238, 84 P. 980; Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234; Title Guaranty & Surety Co. *v.* Com., 146 Ky. 702, 143 S. W. 401; McCaughn *v.* Young, 85 Miss. 277, 37 S. 839, S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235; S. *v.* Leasia, 45 Or. 410, 78 P. 328; Robertson *v.* Brothers (Tex. Civ.), 139 S. W. 657; Kirby *v.* Blake, 53 Tex. Civ. 173, 115 S. W. 674.
Proof of handwriting of writer of letter. Whitwell *v.* Johnson, 2 Neb. (Unof.) 66, 96 N. W. 272.
311-16 Johnson *v.* Franklin (Tex. Civ.), 76 S. W. 611. *Comp.* Masterson *v.* Harris, 37 Tex. Civ. 145, 83 S. W. 428.
Parol evidence deed executed.—Baltes Land Co. *v.* Sutton, 32 Ind. App. 14, 69 N. E. 179.
"The instrument was subscribed by two witnesses, and no evidence was introduced tending to show that they were dead, or incompetent to testify. The plaintiffs should have produced the subscribing witnesses or have taken their depositions to prove the execution of the instrument." Columbia County Bk. *v.* Emerson, 101 Ark. 331, 142 S. W. 852.
312-18 Farmers' & M's. Bk. *v.* Co., 87 Ark. 607, 113 S. W. 793; Proctor, etc. Co. *v.* Co., 128 Ga. 606, 57 S. E. 879; Bright *v.* Allan, 203 Pa. 386, 53 A. 248; Rushing *v.* Lanier, 51 Tex. Civ. 278, 111 S. W. 1089; International H. Co. *v.* Campbell, 43 Tex. Civ. 421, 96 S. W. 93; Jones *v.* Neal, 44 Tex. Civ. 412, 98 S. W. 417.
312-19 See Arbuckle *v.* Matthews, 73 Ark. 27, 83 S. W. 326.
Recorded plat of survey in which land located, showing execution of deeds to grantee in lost deed and to third person, with deed to latter, admissible. Rushing *v.* Lanier, 51 Tex. Civ. 278, 111 S. W. 1089.
Statement of facts in case on file in supreme court showing deed from grantor to grantee in alleged lost deed had been received in evidence, competent. Rushing *v.* Lanier, 51 Tex. Civ. 278, 111 S. W. 1089.
312-20 Ming *v.* Olster, 195 Mo. 460, 92 S. W. 898. See Freeman *v.* Inst. (Tex. Civ.), 128 S. W. 629.
Presumptive evidence of existence of original. Sims *v.* Scheussler, 2 Ga. App. 466, 58 S. E. 693.
Recitals in ancient writings forming part of chain of title to the res, competent as tending to show execution of lost deed. Freeman *v.* Inst. (Tex. Civ.), 128 S. W. 629.
312-21 Mortgage Trust Co. *v.* Elliott, 36 Colo. 238, 84 P. 980; Rudgear *v.* Co., 108 Ill. App. 227. See Kirby *v.* Blake, 53 Tex. Civ. 173, 115 S. W. 674.

313-22 Pennington *v.* Co., 34 Utah 223, 97 P. 115.
313-23 Proctor & G. Co. *v.* Co., 128 Ga. 606, 57 S. E. 879.
313-24 Kriss *v.* Co., 121 Mo. App. 184, 98 S. W. 1086.
313-25 *Comp.* Rushing *v.* Lanier, 51 Tex. Civ. 278, 111 S. W. 1089. See Carpenter *v.* Jones, 76 Ark. 163, 88 S. W. 871; Kenniff *v.* Caulfield, 140 Cal. 34, 73 P. 803; Lancaster *v.* Lee, 71 S. C. 280, 51 S. E. 139; Carter *v.* Wood, 103 Va. 68, 48 S. E. 553.
313-26 Florida C. C. Bottling Co. *v.* Ricker, 136 Ga. 411, 71 S. E. 734; P. *v.* Wiemers, 225 Ill. 17, 80 N. E. 45; March *v.* Wycoff, 111 N. Y. S. 669; Brown *v.* S. (Tex. Cr.), 150 S. W. 436; Keenan *v.* Co., 57 Wash. 367, 106 P. 1122.
313-27 Farmers' & M's. Bk. *v.* Co., 87 Ark. 607, 113 S. W. 793; Cowart *v.* Fender, 137 Ga. 586, 73 S. E. 822.
313-28 McAllister *v.* S., 156 Ala. 122, 47 S. 161; Vaughan's S. Store *v.* Stringfellow, 56 Fla. 708, 48 S. 410, cit. the text.
313-29 Union Nat. Bk. *v.* Dean, 154 App. Div. 869, 139 N. Y. S. 835.
313-30 S. *v.* Clark, 141 Ia. 297, 119 N. W. 719; Lohnes *v.* Baker, 156 Mo. App. 397, 137 S. W. 282; Dyer *v.* McWhirter, 51 Tex. Civ. 200, 111 S. W. 1053.
313-31 Third person in possession absent from state, admissible. Webb *v.* Gray (Ala.), 62 S. 194.
313-32 Chicago, etc. R. Co. *v.* Risley, 55 Tex. Civ. 66, 119 S. W. 897.
Writing excluded for want of proof of execution.—Vischer *v.* R. Co., 256 Ill. 572, 100 N. E. 270.
316-33 See Hayes *v.* Wagner, 113 Ill. App. 299.
316-34 P. *v.* Ellenbogen, 114 App. Div. 182, 99 N. Y. S. 897.
316-35 Russo-Chinese Bk. *v.* Nat. Bk., 187 Fed. 80, 109 C. C. A. 398; Monett, etc. Co. *v.* Monett, 186 Fed. 360; In re Strang, 166 Fed. 779; St. Louis, etc. R. Co. *v.* Burrow, 89 Ark. 178, 116 S. W. 198; Arkansas, etc. Ins. Co. *v.* Woolverton, 82 Ark. 476, 102 S. W. 226; P. *v.* Murphy, 20 Cal. App. 398, 129 P. 603; In re Heywood's Est., 154 Cal. 312, 97 P. 825; Bauer *v.* S., 144 Cal. 710, 78 P. 280; Williams *v.* Richardson, 66 Fla. 234, 63 S. 446; Fambrough *v.* De Vane (Ga.), 82 S. E. 249; Atlantic etc. Co. *v.* Hill, 12 Ga. App. 392, 77 S. E. 316; Hicks *v.* Co., 12 Ga. App. 661, 78 S. E. 133; Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234; O'Neill Mfg. Co. *v.* Harris, 127 Ga. 640, 56 S. E. 739; Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. 392; Hiss *v.* Hiss, 228 Ill. 414, 81 N. E. 1056; North Am. R. & O. House *v.* McElligott, 227 Ill. 317, 81 N. E. 388; Concord A. H. Co. *v.* O'Brien, 228 Ill. 360, 81 N. E. 1038; Hoblit *v.* Howser, 171 Ill. App. 19; Boening *v.* N. Am. Union, 155 Ill. App. 528; Edwards Mfg. Co. *v.* Stoops (Ind. App.), 102 N. E. 980; Gibbs *v.* Potter, 166 Ind. 471, 77 N. E. 942; Wolf *v.* Wolf, 152 Ia. 121, 131 N. W. 882; Brier *v.* Davis, 122 Ia. 59, 96 N. W. 983; Considine *v.* Dubuque, 126 Ia. 283, 102 N. W. 102; Smith C. & Co. *v.* Stock Co. (Kan.), 140 P. 108; Barker *v.* R. Co., 88 Kan. 767, 129 P. 1151, 43 L. R. A. (N. S.) 1121; Walter *v.* Calhoun, 88 Kan. 801, 129 P. 1176; Drake *v.* Holbrook, 25 Ky. L. R. 1489, 78 S. W. 158; Winn P. Bk. *v.* Lumb. Co., 133 La. 382, 62 S. 907; U. S. Pegwood etc. Co. *v.* R. Co., 104 Me. 427, 72 A. 190 (railroad location); Cumberland etc. Co. *v.* De Witt, 120 Md. 381, 87 A. 927; Koch *v.* Wimbrow, 111 Md. 21, 73 A. 896; Safe Deposit Co. *v.* Turner, 98 Md. 22, 55 A. 1023; Gelder *v.* Welsh, 169 Mich. 490, 135 N. W. 280 (copy of a note); Conkling *v.* Nicholas, 133 Mich. 651, 95 N. W. 745; Jordan *v.* Co. (Miss.), 65 S. 276; Howie *v.* Platt, 83 Miss. 15, 35 S. 216; Ellison *v.* Dunlap (Mo.), 78 S. W. 155; Guilbert *v.* Kessinger, 173 Mo. App. 680, 160 S. W. 17; Hanna *v.* Ins. Co., 109 Mo. App. 152, 82 S. W. 1115; Morey *v.* Clopton, 103 Mo. App. 368, 77 S. W. 467; S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235, 260; Brookshier *v.* Co., 91 Mo. App. 599; Zollman *v.* Tarr, 93 Mo. App. 231; So. Omaha *v.* Wrzesinski, 66 Neb. 790, 92 N. W. 1045; Mack *v.* Mack, 94 Neb. 504, 143 N. W. 454; Risher *v.* Madsen, 94 Nev. 72, 142 N. W. 700; Bellknap *v.* Tillotson (N. J.), 88 A. 841; Corona K. Co. *v.* Lichtman, 84 N. J. L. 363, 86 A. 371; P. *v.* Schlessel, 127 App. Div. 510, 112 N. Y. S. 45; Brunnemer *v.* Cook, 89 App. Div. 406, 85 N. Y. S. 954; Commercial etc. Co. *v.* Wolfe (Okla.), 137 P. 704; Manchester Assur. Co. *v.* R. Co., 46 Or. 162, 79 P. 60, 69 L. R. A. 475; Boalsburg W. Co. *v.* Water Co., 240 Pa. 198, 87 A. 609; Mulhearn *v.* Roach, 24 Pa. Super. 483; Emory *v.* McCoy, 36 Pa. C. C. 396; Flint Motor Car Co. *v.* Everson, 34 R. I. 65, 82 A. 726; Talbert *v.*

Talbert (S. C.), 81 S. E. 644; La Rue *v.* Co., 17 S. D. 91, 95 N. W. 292; Stephens *v.* Faus, 20 S. D. 367, 106 N. W. 56; Asbeck *v.* S. (Tex. Cr.), 156 S. W. 925; Houston Pack. Co. *v.* Griffith (Tex. Civ.), 164 S. W. 431; Martin *v.* Reid (Tex. Civ.), 160 S. W. 1094; Rule *v.* Richards (Tex. Civ.), 159 S. W. 386; Waterman, etc. Co. *v.* Robins (Tex. Civ.), 159 S. W. 360; Hamilton *v.* S. (Tex. Cr.), 152 S. W. 1117; Floresville O. & Mfg. Co. *v.* R. Co., 55 Tex. Civ. 78, 118 S. W. 194; Johnson *v.* Franklin (Tex. Civ.), 76 S. W. 611; White *v.* R. Co. (Vt.), 89 A. 618; Wash. T. Co. *v.* Keyes (Wash.), 139 P. 638; Starwich *v.* Glass Co., 64 Wash. 42, 116 P. 459; Hudson *v.* Ellsworth, 56 Wash. 243, 105 P. 463; S. *v.* Champoux, 33 Wash. 339, 74 P. 557; Austin *v.* Calloway (W. Va.), 80 S. E. 369; Wilson *v.* McConnell (W. Va.), 77 S. E. 540; Bazelon *v.* Lyon, 128 Wis. 337, 107 N. W. 337; Kelly, etc. Co. *v.* Co., 120 Wis. 84, 97 N. W. 674.

See Birch River Boom & L. Co. *v.* Lumb. Co., 71 W. Va. 507, 76 S. E. 972.

"**There is no provison in the statutes of Texas** for the use of copies of the record of instruments, except in cases where a party to a suit shall file among the papers of the cause an affidavit stating that the instrument of writing has been lost, or that he cannot procure the original. Rev. Stats., art. 2312. Appellant had the right to object to the copies of the record of the instruments when offered in evidence, no matter how long they had been on file." Green *v.* Gregory (Tex. Civ), 142 S. W. 999.

"**It is an elementary principle** that parol evidence of the contents of a written instrument are inadmissible in evidence unless the loss or destruction of the instrument is accounted for by the person in whose hands it was at the time of the loss or destruction, if that person be living." Pittsburgh, etc. R. Co. *v.* Brown, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625.

"**It is held with us** that the operation of this rule is not necessarily affected by the fact that the proper custody of the written paper is no longer within the jurisdiction of the court." Greene *v.* Grocery Co., 159 N. C. 119, 74 S. E. 813.

"**This preliminary proof** of inability to produce an original document is addressed to the trial judge, who decides from such proof whether the evidence offered is the best evidence obtainable. If so, it is admitted, and is for the jury to pass upon." Gelder *v.* Welsh, 169 Mich. 490, 135 N. W. 280.

Lost pass.—International, etc. R. Co. *v.* Lynch (Tex. Civ.), 99 S. W. 160.

Ballots destroyed.—P. *v.* Davidson, 2 Cal. App. 100, 83 P. 161.

Lost pardon.—Yzaguirre *v.* S., 48 Tex. Cr. 514, 85 S. W. 14.

Lost bill of sale.—Shultis *v.* Rice, 114 Mo. App. 274, 89 S. W. 357.

318-37 Sims *v.* Scheussler, 2 Ga. App. 466, 58 S. E. 693; S. *v.* Horine, 70 Kan. 256, 78 P. 411; Miller *v.* Goodin (Ky.), 124 S. W. 818; Anderson *v.* Co., (Tex. Civ.), 120 S. W. 918; Day *v.* S., 51 Tex. Cr. 324, 101 S. W. 806.

Deed.—Carpenter *v.* Smith, 76 Ark. 447, 88 S. W. 976; Cox *v.* McDonald, 118 Ga. 414, 45 S. E. 401; Houston *v.* S., 124 Ga. 417, 52 S. E. 757; Fuller *v.* Keesee, 31 Ky. L. R. 1099, 104 S. W. 700; Graton *v.* Co., 189 Mo. 322, 87 S. W. 37; Lancaster *v.* Lee, 71 S. C. 280, 51 S. E. 139; Lockridge *v.* Corbett, 31 Tex. Civ. 676, 73 S. W. 96.

Tax deed.—Kries *v.* Co., 121 Mo. App. 184, 98 S. W. 1086.

Ballots.—Montgomery *v.* Dormer, 181 Mo. 5, 79 S. W. 913.

Schedule of debts filed by administrator. Rhodus *v.* Heffernan, 47 Fla. 206, 36 S. 572.

318-38 Flint River Lumb. Co. *v.* Smith, 134 Ga. 627, 68 S. E. 436; Choctaw, etc. R. Co. *v.* McAlester, 7 Ind. Ty. 520, 104 S. W. 821; Van Pelt *v.* Parry, 218 Mo. 680, 118 S. W. 425; Simpson Bk. *v.* Smith, 52 Tex. Civ. 349, 114 S. W. 445.

318-39 Hodge *v.* Palms, 117 Fed. 396, 54 C. C. A. 570; McBride *v.* Lowe (Ala.), 57 S. 832; Southern R. Co. *v.* Dickens, 163 Ala. 114, 50 S. 109; Brown *v.* Madden (Ga.), 81 S. E. 196; Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175; Bowland *v.* Co., 82 Kan. 84, 107 P. 797; Silva *v.* Newport, 31 Ky. L. R. 897, 104 S. W. 314; In re Ring, 104 Me. 544, 72 A. 548; Haynes *v.* S. (Tex. Civ.), 85 S. W. 1029.

"**Sections 35 and 36 of chapter 30, Hurd's Rev. St., 1909, entitled, 'Conveyances,'** provide for the introduction of the record of any deed, conveyance, or other writing concerning lands, in any case, in law or equity, in this state, upon the party so desiring to use such record, or his agent

or attorney, stating orally in court, or by affidavit to be filed, that the original of such instrument is lost or 'not in the power of the party wishing to use it on the trial of any such cause,' and that to the best of his knowledge said original deed was not intentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof. The affidavit provided for in the conveyance act is designed to lay the foundation for the introduction of the record of such instrument, but has no reference to the introduction of other secondary evidence where both the original instrument and the record thereof have been destroyed, and are not within the power of the party desiring to use the same. That situation is covered by section 29 of chapter 116, which is commonly known as the burnt records act, which was passed to meet the emergency caused by the Chicago fire in October, 1871." Wyman *v.* Chicago, 254 Ill. 202, 98 N. E. 266.

Judicial records.—Holford *v.* James, 136 Fed. 553, 69 C. C. A. 263; Kennedy *v.* Borah, 226 Ill. 243, 80 N. E. 767 (adoption proceedings); Smith *v.* Gowdy, 29 Ky. L. R. 832, 96 S. W. 566; Moulierre *v.* Coco, 116 La. 845, 41 S. 113; Fontelieu *v.* Fontelieu, 116 La. 866, 41 S. 120; Wise *v.* Co., 84 Miss. 200, 36 S. 244 (justice's judgment roll); Given *v.* Given, 25 Pa. Super. 467; Latta *v.* Wiley (Tex. Civ.), 92 S. W. 433; Houston, etc. R. Co. *v.* De Berry, 34 Tex. Civ. 180, 78 S. W. 736; Smith *v.* Ridley, 30 Tex. Civ. 158, 70 S. W. 235 (alias execution); Schroeder *v.* Klipp, 120 Wis. 245, 97 N. W. 909 (order of board).

318-41 Williams *v.* Miles, 73 Neb. 193, 102 N. W. 482, 106 N. W. 769; In re Rogers, 80 Vt. 259, 67 A. 726.

319-42 Norris *v.* Billingsley, 48 Fla. 102, 37 S. 564; Peaks *v.* Cobb, 192 Mass. 196, 77 N. E. 881.

319-43 Abstract of title inadmissible after proof of loss of original deed and record. Glos *v.* Wheeler, 229 Ill. 272, 82 N. E. 234.

319-44 See Brasch *v.* Co., 80 Ark. 427, 97 S. W. 445.

319-45 Blaha *v.* Borgman, 142 Wis. 43, 124 N. W. 1047.

Loss by fire after opportunity to produce. Rudgear *v.* Co., 206 Ill. 74, 69 N. E. 30.

319-46 Dennis *v.* Co., 6 Cal. App. 58, 91 P. 425; P. *v.* Hemple, 4 Cal. App. 120, 87 P. 227; Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625; Nelson *v.* Co., 20 S. D. 299, 105 N. W. 630.

321-51 Mahoney *v.* Co., 82 Conn. 280, 73 A. 766.

Alteration under misapprehension does not estop. Gibbs *v.* Potter, 166 Ind. 471, 77 N. E. 942.

321-52 Nelson *v.* Co., 20 S. D. 299, 105 N. W. 630; Blaha *v.* Borgman, 142 Wis. 43, 124 N. W. 1047.

322-53 Thistlethwaite *v.* Pierce, 30 Ind. App. 642, 66 N. E. 755.

322-54 Destruction by request of adverse party. Gould *v.* S., 71 Neb. 651, 99 N. W. 541.

322-58 Destruction in course of business. See Pittsburgh, etc. R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022.

323-59 Bell *v.* S., 156 Ala. 76, 47 S. 242; Chicago *v.* Mandel, 239 Ill. 559, 88 N. E. 226; Seaboard A. L. R. Co. *v.* Phillips, 108 Md. 285, 70 A. 232; S. *v.* Tucker, 234 Mo. 554, 137 S. W. 870; Bond *v.* Hurd, 31 Mont. 314, 78 P. 579; Barefoot *v.* Musselwhite, 153 N. C. 208, 69 S. E. 71; Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519; S. *v.* Denny, 17 N. D. 519, 117 N. W. 869; Dyer *v.* McWhirter, 51 Tex. Civ. 200, 111 S. W. 1053. **Loss of posted notices of sale, presumed after sale.** Hogan *v.* Morris, 7 Ga. App. 232, 66 S. E. 550; Taylor *v.* Boynton, 7 Ga. App. 233, 66 S. E. 550.

See Larsen *v.* All Persons, etc., 165 Cal. 407, 132 P. 751.

All the parties who offer the copy must make proof. James *v.* Ferguson, 92 S. C. 105, 75 S. E. 286, cit. Linning *v.* Crawford, 2 Bail. (S. C.) 296.

323-61 Empire S. S. Co. *v.* Lindenmeier, 54 Colo. 497, 131 P. 437; Garmany *v.* Lawton, 124 Ga. 876, 53 S. E. 669; Dewees *v.* Co., 96 Miss. 253, 50 S. 865; S. *v.* Leasia, 45 Or. 410, 78 P. 328; S. *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49.

General passenger agent can testify as to loss of ticket. Chiles *v.* R. Co., 69 S. C. 327, 48 S. E. 252.

323-62 Certificates of custodians of public records not exclusive. S. *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49.

324-63 Stuart *v.* Mitchum, 135 Ala. 546, 33 S. 670; Hedenberg *v.* Nash, 144 Ill. App. 252 (must be produced if possible); Burkhart *v.* Loughridge, 30 Ky.

L. R. 303, 98 S. W. 291; Liles *v.* Liles, 183 Mo. 326, 81 S. W. 1101; Christmon *v.* Postal Tel. Co., 159 N. C. 195, 74 S. E. 325.

Each and every custodian should be called. Huggins *v.* R. Co., 159 Ala. 189, 49 S. 299.

324-64 June *v.* Labadie, 132 Mich. 135, 92 N. W. 937; First Nat. Bk. *v.* Wright, 104 Mo. App. 242, 78 S. W. 686; Gould *v.* S., 71 Neb. 651, 99 N. W. 541; Wolf Co. *v.* Galbraith (Tex. Civ.), 94 S. W. 1100.

325-75 See Williams *v.* Cessna, 43 Tex. Civ. 315, 95 S. W. 1106.

Under one rule of court.—Cox *v.* McDonald, 118 Ga. 414, 45 S. E. 401.

327-76 See Balt. etc. R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523.

327-77 American etc. L. Co. *v.* Mercedes Co. (Tex. Civ.), 155 S. W. 286.

327-78 Williamson *v.* Work, 33 Tex. Civ. 369, 77 S. W. 266.

Affidavit of co-defendant not sufficient. Gann *v.* Roberts, 32 Tex. Civ. 561, 74 S. W 950.

327-82 Agee *v.* Ins. & R. E. Co., 165 Ala. 291, 51 S. 829. See Atchison R. Co. *v.* Palmore, 68 Kan. 545, 75 P. 509, 64 L. R. A. 90.

328-83 Rushing *v.* Lanier, 51 Tex. Civ. 278, 111 S. W. 1089.

Custom of party to destroy papers, relevant. Ware *v.* Childs, 82 Vt. 359, 73 A. 994.

328-85 Bickley *v.* Bickley, 136 Ala. 548, 34 S. 946; Hall *v.* Crowley, 12 Cal. App. 30, 106 P. 426; La Rue *v.* Co., 17 S. D. 91, 95 N. W. 292.

Admission by attorney of inability to produce. Union S. Co. *v.* Tenney, 200 Ill. 349, 65 N. E. 688.

329-89 Brown *v.* Harkins, 131 Fed. 63, 65 C. C. A. 301; Abingdon Mills *v.* Grogan, 167 Ala. 146, 52 S. 596; Uzzell *v.* Horn, 71 S. C. 426, 51 S. E. 253. See Kenworthy *v.* Slooman, 62 Ore. 604, 125 P. 273.

Rule stated.—Kenniff *v.* Caulfield, 140 Cal. 34, 73 P. 803.

Statement of circumstances sufficient. Atchison R. Co. *v.* Palmore, 68 Kan. 545, 75 P. 509, 64 L. R. A. 90.

330-90 June *v.* Labadie, 132 Mich. 135, 92 N. W. 937; Reeder *v.* Wilber, 18 S. D. 426, 100 N. W. 1099; Taliaferro *v.* Rice, 47 Tex. Civ. 3, 103 S. W. 464.

330-91 Cullinan *v.* Hosmer, 100 App. Div. 148, 91 N. Y. S. 607.

331-92 Agee *v.* Ins. & R. E. Co., 165 Ala. 291, 51 S. 829 (possibility of mistake need not be negatived); Empire S. S. Co. *v.* Lindenmeier, 54 Colo. 497, 131 P. 437.

331-93 Tagert *v.* S., 143 Ala. 88, 39 S. 293, 111 Am. St. 17; Butt *v.* Mastin, 143 Ala. 321, 39 S. 217; Saunders *v.* Co., 148 Ala. 519, 41 S. 982; Post *v.* Leland, 184 Mass. 601, 69 N. E. 361; Brigger *v.* Ins. Co., 77 N. Y. S. 362; Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519.

331-94 Price *v.* Oatman (Tex. Civ.), 77 S. W. 258.

332-95 In re Hedgepeth's Will, 150 N. C. 245, 63 S. E. 1025.

332-96 Agee *v.* Ins. & R. E. Co., 165 Ala. 291, 51 S. 829.

Slight evidence where card not intended to be preserved. Atchison R. Co. *v.* Palmore, 68 Kan. 545, 75 P. 509, 64 L. R. A. 90.

332-97 Carter *v.* Wood, 103 Va. 68, 48 S. E. 553.

Clear proof of lost deed. Houghtalling *v.* Houghtalling (Ia.), 112 N. W. 197.

333-99 McCaughn *v.* Young, 85 Miss. 277, 37 S. 839; Frugia *v.* Trueheart, 48 Tex. Civ. 513, 106 S. W. 736.

333-2 Wehring *v.* Woodmen, 107 Minn. 25, 119 N. W. 245, suggested foundation unnecessary.

333-3 Gossett *v.* Morrow, 4 Ala. App. 306, 58 S. 799; S. *v.* Bennett (Ia.), 110 N. W. 150; Peaks *v.* Cobb, 192 Mass. 196, 77 N. E. 881; Chiles *v.* R. Co., 69 S. C. 327, 48 S. E. 252.

334-4 Dupee *v.* Co., 117 Fed. 40, 54 C. C. A. 426; Agee *v.* Ins. & R. E. Co., 165 Ala. 291, 51 S. 829 (question for reviewable discretion of court); Stuart *v.* Mitchum, 135 Ala. 546, 33 S. 670; Alabama Const. Co. *v.* Meador, 143 Ala. 336, 39 S. 216; Kenniff *v.* Caulfield, 140 Cal. 34, 73 P. 803; Empire S. S. Co. *v.* Lindenmeier, 54 Colo. 497, 131 P. 437; Newton *v.* Donnelly, 9 Ind. App. 359, 36 N. E. 769; McCaughn *v.* Young, 85 Miss. 277, 37 S. 839; Liles *v.* Liles, 183 Mo. 326, 81 S. W. 1101; Strause *v.* Brauureuter, 14 Pa. Super. 125.

334-5 Owensboro Co. *v.* Hall, 149 Ala. 210, 43 S. 71; Tagert *v.* S., 143 Ala. 88, 39 S. 293, 111 Am. St. 17; Empire S. S. Co. *v.* Lindenmeier, 54 Colo. 497, 131 P. 437; Sheffield *v.* Co., 3 Ga. App. 200, 59 S. E. 725; Abersol *v.* Co., 106 Ill. App. 235; Byrd *v.* Collins, 159 N. C. 641, 75 S. E. 1073; Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519; Gladstone L. Co. *v.* Kelly, 64

Or. 163, 129 P. 763; Day *v.* S., 51 Tex. Cr. 324, 101 S. W. 806.

Diligence in search in places where document most likely to be found. Olcott *v.* Squires (Tex. Civ.), 144 S. W. 314.

Diligent and reasonable.—Randolph *v.* Hudson, 12 Okla. 516, 74 P. 946.

Statement of witness he did not have letter, insufficient. Bagnell T. Co. *v.* Goodrich, 82 Ark. 547, 102 S. W. 228.

Search for absent witness must be diligent before secondary evidence of former testimony admissible. Allen *v.* S., 84 Ark. 178, 105 S. W. 70.

334-6 Sims *v.* S., 155 Ala. 96, 46 S. 493 (every reasonable effort must be shown to have been made); McEntyre *v.* Hairston, 152 Ala. 251, 44 S. 417; Empire S. S. Co. *v.* Lindenmeier, 54 Colo. 497, 131 P. 437; S. *v.* Matlack, 5 Penne. (Del.) 401, 64 A. 259; Thomson *v.* R. Co., 131 Mich. 95, 90 N. W. 1037; Nelson Mfg. Co. *v.* Shreve, 104 Mo. App. 474, 79 S. W. 488.

Utmost good faith must be shown. Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771.

334-7 Zimmerman Mfg. Co. *v.* Dunn, 163 Ala. 272, 50 S. 906; Andrews *v.* S., 152 Ala. 16, 44 S. 696; Everett *v.* Hart, 20 Colo. App. 93, 77 P. 254; Empire S. S. Co. *v.* Lindenmeier, 54 Colo. 497, 131 P. 437; Denny *v.* Bk., 118 Ga. 221, 44 S. E. 982; Wolters *v.* Redward, 16 Haw. 25; Hedenberg *v.* Nash, 144 Ill. App. 252; Smith *v.* Garris, 131 N. C. 34, 42 S. E. 445; Southwestern T. & T. Co. *v.* Owens (Tex. Civ.), 116 S. W. 89. See Kenworthy *v.* Slooman, 62 Or. 604, 125 P. 273.

335-9 Sibley & Sibley *v.* Smith (Ala.), 52 S. 27; Bascomb *v.* Toner, 5 Ind. App. 229, 31 N. E. 856; Cullinan *v.* Hosmer, 100 App. Div. 148, 91 N. Y. S. 607.

336-11 Sims *v.* S., 155 Ala. 96, 46 S. 493; Saunders *v.* Co., 148 Ala. 519, 41 S. 982; Kenniff *v.* Caulfield, 140 Cal. 34, 73 P. 803; Everett *v.* Hart, 20 Colo. App. 93, 77 P. 254; Trust Co. *v.* Elliott, 36 Colo. 238, 84 P. 980; Guilford Co. *v.* Co., 23 App. Cas. (D. C.) 1; Randolph *v.* Hudson, 12 Okla. 516, 74 P. 946; Edgefield Mfg. Co. *v.* Co., 78 S. C. 73, 58 S. E. 969.

Predecessor in title.—Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918.

337-12 McEntyre *v.* Hairston, 152 Ala. 251, 44 S. 417; Koehler *v.* Schilling, 70 N. J. L. 585, 57 A. 154; Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519.

338-13 Ryan *v.* Shaneyfelt, 146 Ala. 683, 40 S. 223; O'Neill Mfg. Co. *v.* Harris, 127 Ga. 640, 56 S. E. 739; Orchard *v.* Collier, 171 Mo. 390, 71 S. W. 677; Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102; Thompson *v.* Chaffee, 39 Tex. Civ. 567, 89 S. W. 285; Day *v.* S., 51 Tex. Cr. 324, 101 S. W. 806.

Where writing executed in counterpart, search must be made in place of deposit of each part. Brown *v.* Harkins, 131 Fed. 63, 65 C. C. A. 301.

338-14 Samuelson *v.* Co., 1 Neb. (Unof.) 815, 95 N. W. 809.

339-16 See Menasha W. W. Co. *v.* Harmon, 128 Wis. 177, 107 N. W. 299.

339-17 Evidence on collateral question in which both parties are interested. Peters *v.* Ins. Co., 63 Ore. 382, 126 P. 1005.

339-18 Wolters *v.* Redward, 16 Haw. 25; Koehler *v.* Schilling, 70 N. J. L. 585, 57 A. 154; Peters *v.* Ins. Co., 63 Or. 382, 126 P. 1005; Taliaferro *v.* Rice, 47 Tex. Civ. 3, 103 S. W. 464.

339-19 Robinson *v.* Co., 110 Md. 382, 72 A. 828.

339-21 Pilcher *v.* Co., 6 Ala. App. 552, 60 S. 547.

340-25 See Leesville Mfg. Co. *v.* Wks., 75 S. C. 342, 55 S. E. 768.

Affidavit inadmissible.—Freeman *v.* Inst. (Tex. Civ.), 128 S. W. 629.

340-26 Alabama Const. Co. *v.* Meador, 143 Ala. 336, 39 S. 216; McEntyre *v.* Hairston, 152 Ala. 251, 44 S. 417; S. *v.* Matlack, 5 Penne. (Del.) 401, 64 A. 259. *Contra.* Thomson *v.* Chaffee, 39 Tex. Civ. 567, 89 S. W. 285.

342-30 Smith *v.* Garris, 131 N. C. 34, 42 S. E. 445.

Grantor in deed not presumed to have possession of it, and inquiry need not be made of him or his heirs or representatives. Freeman *v.* Inst. (Tex. Civ.), 128 S. W. 629.

342-31 Letters written by parties in answer to inquiries concerning lost instrument, admissible to show diligence though signatures not verified. McDonald *v.* Hanks, 52 Tex. Civ. 140, 113 S. W. 604.

342-32 Orchard *v.* Collier, 171 Mo. 390, 71 S. W. 677.

Sufficient if supported by other circumstances. Murphy *v.* Cochran (Ia.), 134 N. W. 1085.

343-36 Kenniff *v.* Caulfield, 140 Cal. 34, 73 P. 803; Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175; Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918; Smith *v.* High-

tower, 3 Ga. App. 197, 59 S. E. 593; Cox *v.* McDonald, 118 Ga. 414, 45 S. E. 401; Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979; Gelder *v.* Welsh, 163 Mich. 490, 135 N. W. 280; Liles *v.* Liles, 183 Mo. 326, 81 S. W. 1101; Chiles *v* R. Co., 69 S. C. 327, 48 S. E. 252; Leesville Mfg. Co. *v.* Wks., 75 S. C. 342, 55 S. E. 768; Taliaferro *v.* Rice, 47 Tex. Civ. 3, 103 S. W. 464.

Proof of loss, being for court, may be made in absence of jury. Degg *v.* S., 150 Ala. 3, 43 S. 484.

344-37 Turner *v.* Elliott, 127 Ga. 338, 56 S. E. 434; Koehler *v.* Schilling, 70 N. J. L. 585, 57 A. 154; Avery *v* Stewart, 134 N. C. 287, 46 S. E. 519.

Discretion of court must rest on evidence. If it all tends to show loss of original and reasonable diligence to procure it secondary evidence must be received. Freeman *v.* Inst. (Tex. Civ.), 128 S. W. 629.

344-38 Gossett *v.* Morrow, 4 Ala. App. 306, 58 S. 799; Robinson *v.* Co., 110 Md. 382, 72 A. 828; P. *v.* Dolan, 186 N. Y. 4, 78 N. E. 569.

344-39 Lamar *v.* King, 168 Ala. 285, 53 S. 279; Crawford *v.* McDonald, 84 Ark. 415, 106 S. W. 206; Le Master *v.* P., 54 Colo. 416, 131 P. 269; Florida F. Co. *v.* Sheffield, 56 Fla. 285, 48 S. 42; Gary *v.* S., 7 Ga. App. 501, 67 S. E. 207; P. *v.* Wiemers, 225 Ill. 17, 80 N. E. 45; Niquette *v.* Green, 81 Kan. 569, 106 P. 270; White *v.* White, 76 Kan. 82, 90 P. 1087; Mattson *v.* R. Co., 98 Minn. 296, 108 N. W. 517; Fosmark *v.* Assn., 23 S. D. 102, 120 N. W. 777; Chicago A. Co. *v.* Thacker, 65 W. Va. 143, 63 S. E. 770. See Cocke & Co. *v.* Big Muddy C. & I. Co. (Tex. Civ.), 155 S. W. 1021.

Great difficulty in production. Kolp *v.* Brazer (Tex. Civ.), 161 S. W. 899.

If prosecuting witness has control of letter in another jurisdiction he must produce it. S. *v.* Teasdale, 120 Mo. App. 692, 97 S. W. 995.

345-46 Rheinstein D. G. Co. *v.* McDougall, 149 N. C. 252, 62 S. E. 1085; William M. Rice Institute *v.* Freeman (Tex. Civ.), 145 S. W. 688. See Dist. Grand Lodge of Ala. *v.* Jones, 5 Ala. App. 367, 59 S. 313, where the question was considered but not determined.

346-47 Tilley *v.* Cox, 119 Ga. 867, 47 S. E. 219; Balt., etc. R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523; Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771; German-A. Assn. *v.* Droge (Ind. App.), 41 N. E. 397; Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979; Koehler *v.* Schilling, 70 N. J. L. 585, 57 A. 154.

Traced to hostile witness.—Stark *v.* Burke, 131 Ia. 684, 109 N. W. 206.

Where letters forgotten by witness, but are within jurisdiction, secondary evidence not admissible. S. *v.* McCoy, 70 Kan. 672, 79 P. 156.

Duplicate in possession of third person should be produced. Peaks *v.* Cobb, 192 Mass. 196, 77 N. E. 881.

Notice to produce may be given attorney of adverse party though writing is in custody of agent of party who desires to prove its contents. Rheinstein D. G. Co. *v.* McDougall, 149 N. C. 252, 62 S. E. 1085.

346-48 Stitzel *v.* Miller, 250 Ill. 72, 95 N. E. 53; Fuller *v.* Robinson, 230 Mo. 22, 130 S. W. 343; Barclay *v.* Deyerle, 53 Tex. Civ. 236, 116 S. W. 123.

346-49 Wise *v.* Spears, 172 Ala. 8, 55 S. 114.

346-50 When primary evidence is in possession of accused, secondary evidence is admissible. Tinsey *v.* S., 12 Ga. App. 422, 77 S. E. 369.

347-51 Contents of letter sent wife may be proved. De Leon *v.* Ty., 9 Ariz. 161, 80 P. 348.

347-52 See P. *v.* Rial (Cal.), 139 P. 661; P. *v.* Warfield, 261 Ill. 293, 103 N. E. 979.

347-53 Preston *v.* Hirsch, 5 Cal. App. 485, 90 P. 965; Smith *v.* Gowdy, 29 Ky. L. R. 832, 96 S. W. 566; Staunchfield *v.* Jeutter, 4 Neb. (Unof.) 847, 96 N. W. 642; Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844; Peeples *v.* Woolen Mills (Tex. Civ.), 90 S. W. 61; Seaborn *v.* S. (Tex. Cr.), 90 S. W. 649; Clement *v.* Graham, 78 Vt. 290, 63 A. 146.

Municipal ordinances are public records independent of statute. Florida C. R. Co. *v.* Seymour, 44 Fla. 557, 33 S. 424.

347-54 Dupee *v.* Co., 117 Fed. 40, 54 C. C. A. 426; Sellers *v.* Farmer, 151 Ala. 487, 43 S. 967; Ritter *v.* S., 70 Ark. 472, 69 S. W. 262; Blalock *v.* Ins. Co., 13 Ga. App. 486, 79 S. E. 374; Stewart Bros. *v.* Randall Bros., 138 Ga. 796, 76 S. E. 352; Proctor & G. Co. *v.* Co., 128 Ga. 606, 57 S. E. 879; Fuller *v.* Robinson, 230 Mo. 22, 130 S. W. 343; Wright *v.* R. Co., 118 Mo. App. 392, 94 S. W. 555; Price *v.* Clevenger, 99 Mo. App. 536, 74 S. W. 984; Hirsch *v.*

Co., 69 N. J. L. 509, 55 A. 645; Peters *v.* Ins. Co., 63 Or. 382, 126 P. 1005; Texas, etc. Co. *v.* Berlin (Tex. Civ.), 165 S. W. 62; Missouri, etc. R. Co. *v.* Gober (Tex. Civ.), 125 S. W. 383; Gulf, etc. R. Co. *v.* Harris (Tex. Civ.), 72 S. W. 71; Johnson *v.* R. Co., 35 Utah 285, 100 P. 390 (of party not within jurisdiction). *Comp.* Sterling *v.* R. Co., 38 Tex. Civ. 451, 86 S. W. 655.

349-56 McDonald *v.* Erbes, 231 Ill. 295, 83 N. E. 162; Interstate Inv. Co. *v.* Bailey, 29 Ky. L. R. 168, 93 S. W. 578; Roll *v.* Everett, 73 N. J. Eq. 697, 71 A. 263 (noting cases to contrary); Greene *v.* Grocery Co., 159 N. C. 119, 74 S. E. 813; Pringey *v.* Guss, 16 Okla. 82, 86 P. 292; Brown *v.* S. (Tex. Cr.), 150 S. W. 436. See Bruger *v.* Ins. Co., 129 Wis. 281, 109 N. W. 95, for discussion.

350-60 See Parker *v.* Ballard, 123 Ga. 441, 51 S. E. 465.

351-64 Records of foreign army. In re McClellan, 20 S. D. 498, 107 N. W. 681.

351-67 O'Connor *v.* United States, 11 Ga. App. 246, 75 S. E. 110.

352-71 Baer *v.* Co., 159 Ala. 491, 49 S. 92; Chicago, etc. R. Co. *v.* Fitzhugh, 82 Ark. 179, 100 S. W. 1149; Brownlee *v.* Reiner, 147 Cal. 641, 82 P. 324; Womble *v.* Wilbur, 3 Cal. App. 535, 86 P. 916; Cutter-T. Co. *v.* Clements, 5 Ga. App. 291, 63 S. E. 58; Sheffield *v.* Co., 3 Ga. App. 200, 59 S. E. 725; In re Rodriguez, 13 Haw. 202; Union S. Co. *v.* Tenney, 200 Ill. 349, 65 N. E. 688; International Text-Book Co. *v.* Mackhorn, 158 Ill. App. 543; Herman & Marks *v.* Haas (Ia.), 147 N. W. 740; Connecticut F. Ins. Co. *v.* Moore, 154 Ky. 18, 156 S. W. 867; Lyons Lumb. Co. *v.* Stewart, 147 Ky. 653, 145 S. W. 376; Musselman *v.* R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Muir *v.* Co., 155 Mich. 624, 119 N. W. 1079; De Witt & Co. *v.* Buford, 173 Mo. App. 78, 155 S. W. 884; Durbrow *v.* Co., 77 N. J. L. 89, 71 A. 59; King *v.* Co., 115 N. Y. S. 243; Ivey *v.* Mills, 143 N. C. 189, 55 S. E. 613; Hanson *v.* Lindstrom, 15 N. D. 584, 108 N. W. 798; Barton-P. Mfg. Co. *v.* Co., 18 Okla. 137, 89 P. 1128; Aaron *v.* R. Co., 68 S. C. 98, 46 S. E. 556; Leesville Mfg. Co. *v.* Wks., 75 S. C. 342, 55 S. E. 768; Nelson *v.* Co., 20 S. D. 299, 105 N. W. 630; W. U. T. Co. *v.* Kapp, 35 Tex. Civ. 663, 80 S. W. 840; Prieto *v.* Hunt (Tex. Civ.), 167 S. W. 4; Texas C. R. Co. *v.* Fowler (Tex. Civ.), 102 S. W. 732; Higgins *v.* Matlock (Tex. Civ.), 95 S. W. 571; Underwriters' F. Assn. *v.* Henry (Tex. Civ.), 79 S. W. 1072.

Subpoena duces tecum need not be resorted to. Guggenheim *v.* Reinhardt, 123 N. Y. S. 950.

Notice required although writing is one defendant could not be compelled to produce. S. *v.* Barnett, 110 Mo. App. 592, 85 S. W. 613.

Letter-press copy not admissible in absence of notice to produce original. King *v.* Co., 35 Tex. Civ. 653, 81 S. W. 114. But see 355-77, infra.

Letter traced to co-defendant.—Young *v.* P., 221 Ill. 51, 77 N. E. 536.

Notice not necessary if no reason to suppose letter is in his custody. Kelley, etc. Co. *v.* Co., 120 Wis. 84, 97 N. W. 674.

355-77 Norris *v.* Billingsley, 48 Fla. 102, 37 S. 564; Hayes *v.* Wagner, 113 Ill. App. 299; Peaks *v.* Cobb, 192 Mass. 196, 77 N. E. 881; Bryson *v.* Boyce, 41 Tex. Civ. 415, 92 S. W. 820. *Comp.* Thompson *v.* Ins. Co., 77 S. C. 294, 57 S. E. 848.

Carbon copy such a counterpart as to be admissible without notice to produce original. Cole *v.* Co., 216 Pa. 283, 65 A. 678. But see 352-71, supra.

355-79 Kinard *v.* S., 1 Ga. App. 146, 58 S. E. 263; Cleveland, etc. R. Co. *v.* Patton, 104 Ill. App. 550; Continental Ins. Co. *v.* Chew, 11 Ind. App. 330, 38 N. E. 417; White *v.* White, 76 Kan. 82, 90 P. 1087.

Admission copy produced is correct will excuse giving notice. Beard *v.* R. Co., 143 N. C. 136, 55 S. E. 505. See Ivey *v.* Mills, 143 N. C. 189, 55 S. E. 613.

355-80 Jordan *v.* Austin, 161 Ala. 585, 50 S. 70; Safe D. Co. *v.* Turner, 98 Md. 22, 55 A. 1023; Werre *v.* Thresher Co., 27 S. D. 486, 131 N. W. 721; Kohl *v.* Bradley, 130 Wis. 301, 110 N. W. 265.

356-81 Bickley *v.* Bickley, 136 Ala. 548, 34 S. 946; Lang *v.* Lang (Ia.), 135 N. W. 604.

357-84 Prieto *v.* Hunt (Tex. Civ.), 167 S. W. 4.

358-88 Thompson *v.* Ins. Co., 77 S. C. 294, 57 S. E. 848. See McMeekin *v.* R. Co., 82 S. C. 468, 64 S. E. 413.

361-98 Lang *v.* Lang (Ia.), 135 N. W. 604.

361-99 Yarborough *v.* Hughes, 139 N. C. 199, 51 S. E. 904; Hanson *v.* Lindstrom, 15 N. D. 584, 108 N. W. 798;

reters *v.* Ins. Co., 63 Or. 382, 126 P. 1005; Thompson *v.* Ins. Co., 77 S. C. 294, 57 S. E. 848; Harlan *v.* Harlan (Tex. Civ.), 125 S. W. 950; Presidio County *v.* Clarke, 38 Tex. Civ. 320, 85 S. W. 475.

362-7 Sellers *v.* S., 12 Ga. App. 687, 78 S. E. 196; Meredith *v.* S. (Tex. Cr.), 164 S. W. 1019; Counts *v.* S., 48 Tex. Cr. 629, 89 S. W. 972. See also Seymour *v.* S., 66 Fla. 133, 63 S. 7.

363-8 Nalley *v.* S., 11 Ga. App. 15, 74 S. E. 567.

363-11 Foster *v.* U. S., 178 Fed. 165, 101 C. C. A. 485.

365-16 Nelson *v.* Co., 20 S. D. 299, 105 N. W. 630; Loverin *v.* Bumgarner, 59 W. Va. 46, 52 S. E. 1000.

Notice to produce letters written to two named persons does not require production of letters written to one of them. Bryson *v.* Boyce, 41 Tex. Civ. 415, 92 S. W. 820.

366-20 Service before information filed, a nullity. S. *v.* Sherman, 137 Mo. App. 70, 119 S. W. 479.

366-21 Reasonable time all that is required. Meredith *v.* S. (Tex. Cr.), 164 S. W. 1019.

371-39 Party may testify that he handed the notice to his adversary. Pickett *v.* Frost, 7 Ala. App. 443, 61 S. 476.

372-45 Where defendant has no control over original. Lester *v.* Hutson (Tex. Civ.), 167 S. W. 321.

374-51 Pickett *v.* Frost, 7 Ala. App. 443, 61 S. 476; Atlantic C. L. R. Co. *v.* Hill, 12 Ga. App. 392, 77 S. E. 316; Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160; Cochburn *v.* Assn. (Ia.), 143 N. W. 1006; Cooley *v.* Gilliam, 80 Kan. 278, 102 P. 1091; Chicago, etc. Co. *v.* Benedict, 154 Ky. 675, 159 S. W. 526; Dick *v.* Biddle, 105 Md. 308, 66 A. 21; Spring Garden Ins. Co. *v.* Whayland, 103 Md. 699, 64 A. 925; First Nat. Bk. *v.* Co., 103 Minn. 82, 114 N. W. 265; Jordan *v.* R. Co. (Miss.), 65 S. 276; S. *v.* Poundstone, 140 Mo. App. 399, 124 S. W. 79; Sisk *v.* Ins. Co., 95 Mo. App. 695, 69 S. W. 687; Bissell *v.* Myton, 160 App. Div. 268, 145 N. Y. S. 591; Carr *v.* Ins. Co., 115 App. Div. 755, 101 N. Y. S. 158; P. *v.* Dolan, 186 N. Y. 4, 78 N. E. 569; Hess-M. Co. *v.* Brown, 84 N. Y. S. 168; Benbow *v.* Harvin, 92 S. C. 180, 75 S. E. 414; Stephens *v.* Faus, 20 S. D. 367, 106 N. W. 56; La Rue *v.* Co., 17 S. D. 91, 95 N. W. 292; Sargent *v.* Barnes (Tex. Civ.), 159 S. W. 366; Harlan *v.* Harlan (Tex. Civ.), 125 S. W. 950; McGaughey *v.* Bk., 41 Tex. Civ. 191, 92 S. W. 1003; Sheldon Co. *v.* Miller, 40 Tex. Civ. 460, 90 S. W. 206; Kothman *v.* Faseler (Tex. Civ.), 84 S. W. 390; International H. Co. *v.* Campbell, 43 Tex. Civ. 421, 96 S. W. 93; W. U. T. Co. *v.* Salter (Tex. Civ.), 95 S. W. 549; McCollum *v.* R. Co., 31 Utah 494, 88 P. 663; S. *v.* Mann, 39 Wash. 144, 81 P. 561; Nunn *v.* Jordan, 31 Wash. 506, 72 P. 124; Shine *v.* Culver, 42 Wash. 484, 85 P. 271; Loverin *v.* Bumgarner, 59 W. Va. 46, 52 S. E. 1000.

New York C. C. P. § 867 requiring plaintiff calling for the production of books to serve a subpoena duces tecum, affords a method whereby actual production may be obtained, but does not modify the rule allowing secondary evidence after the adversary disregards a notice to produce. Guggenheim *v.* Reinhardt, 123 N. Y. S. 950.

375-52 St. Louis & S. F. R. Co. *v.* Sutton (Ala.), 55 S. 989; Nalley *v.* S., 11 Ga. App. 15, 74 S. E. 567; Bradstreet *v.* Banking Co., 89 Neb. 590, 131 N. W. 956; Brown *v.* S., 62 Tex. Cr. 592, 138 S. W. 604.

"**In the case of Downing** *v.* **S.**, 136 S. W. 474, we discussed this question, and there held that a defendant could not be compelled to furnish papers in his possession to be used as evidence against him. Had the court attempted to require Mr. Gould to produce the papers described in the subpoena, it would present reversible error. However, in the same case, we hold that, if a paper is shown to be in the possession of a defendant, secondary evidence would be admissible. In this case it appears these papers were in the possession of defendant as manager of the Majestic Theater, and, when secondary evidence was offered, defendant objected on the ground that it was not the best evidence, which objection was by the court sustained. Then it was the state offered the subpoena giving defendant notice to produce these papers on the trial of this case, or secondary evidence would be offered. Defendant could not be required to produce them, but, when proper notice had been served on him, by his failure to do so, secondary evidence of the contents became admissible in evidence, and the court did not err in admitting

the testimony." Gould *v.* S. (Tex. Cr.), 146 S. W. 172.

376-53 Uzzell *v.* Horn, 71 S. C. 426, 51 S. E. 253; S. *v.* Freshwater, 30 Utah 442, 85 P. 447.

Denial of existence.—Hiss *v.* Hiss, 228 Ill. 414, 81 N. E. 1056.

Destruction of telegrams.—Hallet *v.* Aggergaard, 21 S. D. 554, 114 N. W. 696.

379-66 Merritt *v.* Jordan, 65 N. J. Eq. 772, 60 A. 183. *Comp.* Phenix Ins. Co. *v.* Jacobs, 23 Ind. App. 509, 55 N. E. 778.

Secondary evidence not struck out upon production of primary. Gulf etc. R. Co. *v.* Leatherwood, 29 Tex. Civ. 507, 69 S. W. 119.

Copy of lost instrument admissible subsequent to admission of parol evidence of contents. Hagey *v.* Schroeder, 30 Ind. App. 151, 65 N. E. 598; S. *v.* Clark, 61 W. Va. 625, 63 S. E. 402.

380-71 Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107.

380-73 Supreme Council *v.* Champe, 127 Fed. 541, 63 C. C. A. 282; Eatman *v.* S., 48 Fla. 21, 37 S. 576; Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712.

381-77 Wyman *v.* Chicago, 254 Ill. 202, 98 N. E. 266.

382-83 Baer *v.* Co., 159 Ala. 491, 49 S. 92 (discretion reviewable); Wehring *v.* Woodmen, 107 Minn. 25, 119 N. W. 245.

382-85 P. *v.* Christian, 144 Mich. 247, 107 N. W. 919; Patterson *v.* R. Co. (Tex. Civ.), 126 S. W. 336. See S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235, 260.

384-88 Barnett *v.* Lucas, 27 Ind. App. 441, 61 N. E. 683; Bk. *v.* Linzee, 166 Mo. 496, 65 S. W. 735; Griffin *v.* R. Co., 115 Mo. App. 349, 91 S. W. 1015; Davis *v.* Montgomery, 205 Mo. 271, 103 S. W. 979; Southern R. Co. *v.* Seymour, 113 Tenn. 523, 83 S. W. 674. Full discussion in Powers *v.* Hatter, 152 Ala. 636, 44 S. 859.

384-89 Kelley *v.* Dist., 74 Ark. 202, 85 S. W. 249, 87 S. W. 638; Parker *v.* Ballard, 123 Ga. 441, 51 S. E. 465; Kennedy *v.* Borah, 226 Ill. 243, 80 N. E. 767; Glos *v.* Wheeler, 229 Ill. 272, 82 N. E. 234; Martin *v.* Brand, 182 Mo. 116, 81 S. W. 443; Staunchfield *v.* Jeutter, 4 Neb. (Unof.) 847, 96 N. W. 642.

384-90 Robinson *v.* Co., 110 Md. 382, 72 A. 828. See P. *v.* Davidson, 2 Cal. App. 100, 83 P. 161.

385-91 See P. *v.* Christian, 144 Mich. 247, 107 N. W. 919; Nelson Mfg. Co. *v.* Shreve, 104 Mo. App. 474, 79 S. W. 488.

Carbon copies. Pratt *v.* Phelps (Cal.), 139 P. 906; Le Master *v.* P., 54 Colo. 416, 131 P. 269; Fremont Can. Co. *v.* R. Co. (Mich.), 146 N. W. 678; Hay *v.* Clay Co. (Mo. App.), 162 S. W. 666. See vol. 2, p. 284, n. 24, and supplement thereto.

Letter-press copies not duplicate originals. Menasha W. W. Co. *v.* Harmon, 128 Wis. 177, 107 N. W. 299.

385-92 Virginia etc. Co. *v.* Knight, 106 Va. 574, 56 S. E. 725.

Carbon copies duplicate originals. Hopkins *v.* S., 52 Fla. 39, 42 S. 52; International H. Co. *v.* Elfstrom, 101 Minn. 263, 112 N. W. 252; Wright *v.* R. Co., 118 Mo. App. 392, 94 S. W. 555; Chesapeake & O. R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161.

Triplicate bill of lading.—Walker *v.* R. Co., 76 S. C. 308, 56 S. E. 952.

Copy allowed by stipulation to be used in place of original becomes best evidence. McCarthy *v.* R. Co., 79 Conn. 73, 63 A. 725.

386-95 Stone *v.* Brick Co., 13 Cal. App. 203, 109 P. 103.

Constable testifying as to advertisement of sale. Bowman *v.* Kidd, 13 Ga. App. 351, 79 S. E. 167.

387-97 Campbell *v.* S., 123 Ga. 533, 51 S. E. 644.

May refresh memory by use of memorandum. S. *v.* Mann, 39 Wash. 144, 81 P. 561.

387-1 Brier *v.* Davis, 122 Ia. 59, 96 N. W. 983; Kelley, etc. Co. *v.* Co., 120 Wis. 84, 97 N. W. 674.

388-6 **Insurance policy, used previous year, admitted as a copy.** Edgefield Mfg. Co. *v.* Co., 78 S. C. 73, 58 S. E. 969.

Photographic reproductions admissible. In re McClellan, 20 S. D. 498, 107 N. W. 681.

Stenographer's notes of testimony should be shown to be correct. Degg *v.* S., 150 Ala. 3, 43 S. 484.

Mutilated original.—Senterfeit *v.* Sheakley, 71 S. C. 259, 51 S. E. 142.

389-9 Such negotiations may be proved by parol, though their substance embodied in writing, to show false representations. Van Wyk *v.* P., 45 Colo. 1, 99 P. 1009.

389-10 Rowan *v.* S., 57 Tex. Cr. 625, 124 S. W. 668.

390-12 Loew F. Co. *v.* Co., 164 Fed. 855, 90 C. C. A. 637; Bickerdike *v.* S., 144 Cal. 698, 78 P. 277; Houston *v.* S., 124 Ga. 417, 52 S. E. 757; Pardee *v.* Johnston, 70 W. Va. 347, 74 S. E. 721.

390-13 Winter *v.* Dibble, 251 Ill. 200, 95 N. E. 1093; Grant *r.* Mitchell, 156 N. C. 15, 71 S. E. 1087.

A person who merely heard it read cannot testify to it. In re Guinasso's Estate, 13 Cal. App. 518, 110 P. 335.

392 That witness was testifying under inducement or duress may be shown. P. *r.* Goldfarb, 152 App. Div. 473, 137 N. Y. S. 284.

BIAS

Of grand juror, 393-1; *Of judge,* 415-6.

393-1 Metallic Gold Min. Co. *r.* Watson, 51 Colo. 278, 117 P. 609.

Of grand juror.—Court may, in advance of action by grand jury, receive information on behalf of accused, from an amicus curiae, or any other legitimate source tending to show bias in any juror. Hall *v.* S., 7 Ga. App. 115, 66 S. E. 390.

393-2 Juror must be tested before the jury sworn. Jacobs *v.* S., 1 Ga. App. 519, 57 S. E. 1063.

394-3 Sullivan *r.* Padrosa, 122 Ga. 338, 50 S. E. 142.

Examination on motion mandatory upon court. Robinson *v.* Howell, 66 S. C. 326, 44 S. E. 931.

Request for examination, necessary. Tucker *v.* Mills, 76 S. C. 539, 57 S. E. 626.

394-4 Jarvis *v.* S., 138 Ala. 17, 34 S. 1025; Palmer *v.* S., 121 Tenn. 465, 118 S. W. 1022.

394-5 P. *r.* Collins, 166 Mich. 4, 131 N. W. 78.

Bias implied as between employer and employe. Crawford *r.* U. S., 212 U. S. 183.

394-6 Presumption in favor of competency. S. *r.* Hamilton, 74 Kan. 461, 87 P. 363.

Mind of court and not of juror must be satisfied challenged juror is free from bias. S. *r.* Caron, 118 La. 349, 42 S. 960.

Evidence raising a reasonable doubt of juror's impartiality is sufficient. Walsingham *r.* S., 61 Fla. 67, 56 S. 195.

395-9 See S. *v.* Caron, 118 La. 349, 42 S. 960.

395-13 Carroll *v.* Rys. Co., 157 Mo. App. 247, 137 S. W. 303; S. *r.* Tighe, 27 Mont. 327, 71 P. 3; Hoyt *v.* R. Co., 52 Wash. 672, 101 P. 367.

Inquiry to aid in determining upon peremptory challenge, improper. Dimmack *v.* Co., 58 W. Va. 226, 52 S. E. 101.

396-15 Scribner *v.* S., 3 Okla. Cr. 601, 108 P. 422.

396-16 Ventriss *r.* Coal Co., 155 Ill. App. 152; S. *r.* Banik, 21 N. D. 417, 131 N. W. 262.

396-18 Neglect to challenge grand juror, objection to whom known, a waiver. C. *r.* Craig, 19 Pa. Super. 81

397-19 Gregory *r.* S., 148 Ala. 566, 42 S. 829; Eytinge *r.* Ty., 12 Ariz. 131, 100 P. 443; Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142; Nobles *r.* S., 127 Ga. 212, 56 S. E. 125; S. *r.* Cornelius, 118 La. 146, 42 S. 754; Com. *r.* Phelps, 209 Mass. 396, 95 N. E. 868; Clay *r.* R. Co., 221 Pa. 439, 70 A. 807; S. *r.* Hayes, 69 S. C. 295, 48 S. E. 251; Yardley *r.* S., 50 Tex. Cr. 644, 100 S. W. 399.

397-20 Coppenhaver *r.* S., 160 Ind. 540, 67 N. E. 453; Ray *v.* S., 108 Tenn. 282, 67 S. W. 553.

Question as to whether juror would be influenced by appeal to higher law than of the land, improper. Fuller *r.* S., 50 Tex. Cr. 14, 95 S. W. 541.

397-21 Hardy *r.* U. S., 186 U. S. 224; Strickland *r.* S., 151 Ala. 31, 44 S. 90; Coleman *r.* S., 151 Ala. 20, 44 S. 184; Mann *r.* S., 134 Ala. 1, 32 S. 704; Johnson *r.* S., 44 Tex. Cr. 332, 71 S. W. 25.

Scruple against punitive damages. Yazoo R. Co. *r.* Roberts, 88 Miss. 80, 40 S. 481.

398-22 S. *r.* Croney, 31 Wash. 122, 71 P. 783.

Statement by juror man who committed crime ought to be punished, does not disqualify. S. *r.* Perioux, 107 La. 601, 31 S. 1016.

398-23 Effect of former conviction of accused may be inquired about. P. *r.* Hosier, 132 App. Div. 146, 116 N. Y. S. 911.

398-24 Patrick *r.* S., 45 Tex. Cr. 587, 78 S. W. 947.

Prejudice against railways.—Chicago, etc. R. Co. *r.* Fetzer, 113 Ill. App. 280; St. Louis, etc. R. Co. *r.* Hooser, 44 Tex. Civ. 229, 97 S. W. 708.

398-25 Prejudice against corpora-

tions. McManama *v.* Rys. Co., 175 Mo. App. 43, 158 S. W. 442.

399-26 Prejudice against liquor business does not disqualify in action for illegal sale. Ellis *v.* Brooks, 101 Tex. 591, 102 S. W. 94. See 402-48, infra.

399-27 S. *v.* Casey, 34 Nev. 151, 117 P. 5; S. *v.* Banik, 21 N. D. 417, 131 N. W. 262.

Prejudice against actions by non-residents.—Naylor *v.* R. Co., 66 Kan. 407, 71 P. 835.

399-28 Prejudice against defense of insanity. S. *v.* Croney, 31 Wash. 122, 71 P. 783.

399-29 Race prejudice.—S. *v.* Buford (Ia.), 139 N. W. 464. *Contra* as to race prejudice. S. *v.* Bethune, 86 S. C. 143, 67 S. E. 466.

Prejudice against negro.—Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142; Woodroe *v.* S., 50 Tex. Cr. 212, 96 S. W. 30.

Prejudice against Indians.—P. *v.* Chutnacut, 141 Cal. 682, 75 P. 340.

Not disqualified because regarding white men more credible than Chinese. Wise *v.* Tong Ong, 16 Haw. 457.

400-36 Heidbrink *v.* R. Co., 133 Mo. App. 40, 113 S. W. 223; Tarpey *v.* Madsen, 26 Utah 294, 73 P. 411.

Employe of stockholder not within rule. Dimmack *v.* Co., 58 W. Va. 226, 52 S. E. 101.

400-37 *Comp.* Eldorado C. Co. *v.* Swan, 227 Ill. 586, 81 N. E. 691; McCarthy *v.* Co., 232 Ill. 473, 83 N. E. 957; Kenny *v.* Co., 243 Ill. 185, 90 N. E. 372. See Clay *v.* R. Co., 221 Pa. 439, 70 A. 807.

Connection with indemnity insurance company may be inquired into. Marande *v.* R. Co., 124 Fed. 42, 59 C. C. A. 562; Vindicator M. Co. *v.* Firstbrook, 36 Colo. 498, 86 P. 313; Cripple Creek M. Co. *v.* Brabant, 37 Colo. 123, 87 P. 794; Brusseau *v.* Co., 133 Ia. 245, 110 N. W. 577; Foley *v.* Co., 119 Ia. 246, 93 N. W. 284; Swift *v.* Platte, 68 Kan. 1, 72 P. 271, *rev.* on rehearing 74 P. 635; Dow Wire Co. *v.* Morgan, 29 Ky. L. R. 854, 96 S. W. 530; Spooniek *v.* Co., 89 Minn. 354, 94 N. W. 1079; Antletz *v.* Smith, 97 Minn. 217, 106 N. W. 517; Vion *v.* Co., 99 Minn. 97, 108 N. W. 891; Grant *v.* R. Co., 100 App. Div. 234, 91 N. Y. S. 805; Faber *v.* Co., 124 Wis. 554, 102 N. W. 1049. *Comp.* Coolidge *v.* Hallaner, 126 Wis. 244, 105 N. W. 568; Howard *v.* Co., 129 Wis. 98, 108 N. W. 48; Chybowski *v.* Co., 127 Wis. 332, 106 N. W. 833. *Contra.* Eckhart *v.* Schaefer, 101 Ill. App. 500. Such question improper when asked without good reason. Hoyt *v.* Co., 112 App. Div. 755, 98 N. Y. S. 1031.

Relation as employe. Tucker *v.* Mills, 76 S. C. 539, 57 S. E. 626.

400-38 *Comp.* Imboden *v.* P., 40 Colo. 142, 90 P. 608.

401-40 Girard *v.* Co., 82 Conn. 271, 73 A. 747.

Direct interest presumed to disqualify notwithstanding jurors' testimony. Gershner *v.* Co., 93 Ark. 301, 124 S. W. 772.

401-44 Robinson *v.* Howell, 66 S. C. 326, 44 S. E. 931.

Cousin in third degree of wife of accused, excluded. S. *v.* Caron, 118 La. 349, 42 S. 960.

401-47 S. *v.* Fullerton, 90 Mo. App. 411; S. *v.* Tighe, 27 Mont. 327, 71 P. 3. See Noonan *v.* Coal Co., 173 Ill. App. 541.

402-48 See Starke *v.* S., 17 Wyo. 55, 96 P. 148.

Members of anti-saloon league qualified in a case of sale of liquors. S. *v.* Sultan, 142 N. C. 569, 54 S. E. 841. See 399-26.

402-50 P. *v.* Albers, 137 Mich. 678, 100 N. W. 908; Fugate *v.* S., 85 Miss. 86, 37 S. 557.

Contra as to testimony of witness employed to detect violations of law. Irvine *v.* S., 55 Tex. Cr. 347, 116 S. W. 591; Morrow *v.* S., 56 Tex. Cr. 519, 120 S. W. 491.

402-52 Desire of juror to sit cannot be gone into. Abby *v.* Wood, 43 Wash. 379, 86 P. 558.

Knowledge or ignorance concerning questions of law not subject of inquiry. P. *v.* Conklin, 175 N. Y. 333, 67 N. E. 624; Ryan *v.* S., 115 Wis. 488, 92 N. W. 271.

Questions upon matters as to which juror bound by court's instructions, improper. S. *v.* Perioux, 107 La. 601, 31 S. 1016.

402-54 Swift *v.* Platte, 68 Kan. 1, 72 P. 271, *rev.* on rehearing 74 P. 635; So. Covington, etc. R. Co. *v.* Weber, 26 Ky. L. R. 922, 82 S. W. 986.

403-61 P. *v.* Warner, 147 Cal. 546, 82 P. 196; S. *v.* King, 174 Mo. 647, 74 S. W. 627; Shane *v.* R. Co., 37 Mont. 599, 97 P. 958; Taylor *v.* S., 44 Tex. Cr. 547, 72 S. W. 396.

Effect of indictment upon mind of juror

cannot be investigated. Niezorawski *v.* S., 131 Wis. 166, 111 N. W. 250.

404-66 When existence of opinion will not disqualify. See Jarvis *v.* S., 138 Ala. 17, 34 S. 1025.

404-67 See Hughes *v.* S., 109 Wis. 397, 85 N. W. 333.

405-69 Counsel cannot insist on framing questions. Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142.

406-72 Jacobs *v.* S., 1 Ga. App. 519, 57 S. E. 1063; Johnson *v.* S., 44 Tex. Cr. 332, 71 S. W. 25.

Court may explain statutory questions. Sullivan *v.* Padrosa, 122 Ga. 338, 50 S. E. 142.

Reinquiry into competency may be made any time before reception of evidence. Warnack *v.* S., 7 Ga. App. 73, 66 S. E. 393.

Presumption is each juror questioned. P. *v.* Hosier, 132 App. Div. 146, 116 N. Y. S. 911.

406-73 Hoagland *v.* Canfield, 160 Fed. 146, 171; Grayson *v.* S., 162 Ala. 83, 50 S. 349; S. *v.* Malmberg, 14 N. D. 523, 105 N. W. 614; Sherley *v.* S. (Tex. Cr.), 163 S. W. 708; Whitehead *v.* S. (Tex. Cr.), 147 S. W. 583.

Bias does not disqualify.—Timma *v.* Timma, 72 Kan. 73, 82 P. 481.

Testimony incompetent until witness tendered. Cox *v.* S., 58 Fla. 33, 50 S. 875.

407-74 U. S. *v.* Post, 128 Fed. 950.

407-75 S. *v.* Joiner, 128 La. 876, 55 S. 560; Perry *v.* Centralia, 50 Wash. 670, 97 P. 802.

Details of difficulty inadmissible. Quaker Oats Co. *v.* Grice, 195 Fed. 441, 115 C. C. A. 343. See infra, 408-85.

407-76 Barron *v.* Anniston, 157 Ala. 399, 48 S. 58; Davidson *v.* S., 108 Ark. 191, 158 S. W. 1103; P. *v.* Wyatt, 11 Cal. App. 120, 104 P. 12; Hampton *v.* S., 50 Fla. 55, 39 S. 421; Walker *v.* Rome, 6 Ga. App. 59, 64 S. E. 310; Chicago, etc. R. Co. *v.* Smith, 226 Ill. 178, 80 N. E. 716; P. *v.* Peltz, 143 Ill. App. 181; Kennedy *v.* Murphy, 112 Ill. App. 607; Isaac *v.* U. S., 7 Ind. Ty. 196, 104 S. W. 588; S. *v.* Johnson (Ia.), 144 N. W. 303; P. *v.* Drolet, 157 Mich. 90, 121 N. W. 291; McFadden *v.* R. Co., 161 Mo. App. 652, 143 S. W. 884; S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035; Potter *v.* Browne, 197 N. Y. 288, 90 N. E. 812; Stockwell *v.* Brinton (N. D.), 142 N. W. 242; S. *v.* Malmberg, 14 N. D. 523, 105 N. W. 614; Cain *v.* S. (Tex. Cr.), 153 S. W. 147; Pope *v.* S. (Tex. Cr.), 143 S. W. 611; Clegg *v.* R. Co. (Tex. Civ.), 127 S. W. 1098; Olson *v.* R. Co., 24 Utah 460, 68 P. 148; Perry *v.* Centralia, 50 Wash. 670, 97 P. 802.

Accused may cross-examine witness for state where he denies bias but state cannot. Smith *v.* S., 12 Ga. App. 13, 76 S. E. 647.

Unless bias of witness has already been shown. P. *v.* Warfield, 261 Ill. 293, 103 N. E. 979; S. *v.* Nateisse, 133 La. 584, 63 S. 182.

Limit of cross-examination in discretion of court. Abelson *v.* R. Co., 84 Ark. 181, 105 S. W. 81; S. *v.* Hamilton, 74 Kan. 461, 87 P. 363; S. *v.* May, 172 Mo. 630, 72 S. W. 918; Glenn *v.* Co., 206 Pa. 135, 55 A. 860. Wide latitude proper. Williams *v.* R. Co., 42 Wash. 597, 84 P. 1129.

Unless witness uncontradicted.—Regester *v.* Regester, 104 Md. 1, 64 A. 286.

Ill feeling cannot be shown on cross-examination unless witness denies such feeling. Sasser *v.* S., 129 Ga. 541, 59 S. E. 255.

407-77 Brooks *v.* S., 8 Ala. App. 277, 62 S. 569.

407-78 See S. *v.* Dalton, 43 Wash. 278, 86 P. 590.

407-79 Coates *v.* S., 5 Ala. App. 182, 59 S. 323.

Opinions of others concerning issue cannot be received. S. *v.* Avant, 85 S. C. 570, 67 S. E. 908.

407-80 Wall *v.* S., 2 Ala. App. 157, 56 S. 57; Grayson *v.* S., 162 Ala. 83, 50 S. 349; Bonaparte *v.* S. (Fla.), 61 S. 633; Stewart *v.* S., 58 Fla. 97, 50 S. 642; Fields *v.* S., 46 Fla. 84, 35 S. 185; Atlanta, etc. R. Co. *v.* McManus, 1 Ga. App. 302, 58 S. E. 258; S. *v.* Seery, 129 Ia. 259, 105 N. W. 511; Jones *v.* Pelly (Ky.), 128 S. W. 305; Stockham *v.* Malcolm, 111 Md. 615, 74 A. 569; P. *v.* Drolet, 157 Mich. 90, 121 N. W. 291 (pendency of suit against accused); Hoagland *v.* Modern Woodmen, 157 Mo. App. 15, 137 S. W. 900; S. *v.* Wakely, 13 Mont. 427, 117 P. 95; S. *v.* Broadbent, 27 Mont. 342, 71 P. 1; Neumeyer *v.* Hooker, 131 App. Div. 592, 116 N. Y. S. 204; Taylor *v.* R. Co., 84 N. Y. S. 282; In re Steenwerth, 97 App. Div. 116, 89 N. Y. S. 654; Iaquinto *v.* Bauer, 104 App. Div. 56, 93 N. Y. S. 388; Stewart *v.* Stewart, 155 N. C. 341, 71 S. E. 308; Miller *v.* Ty., 15 Okla. 122, 85 P. 239; S. *v.* Finch, 54 Or. 482, 103 P. 505;

Renn *v.* S., 64 Tex. Cr. 639, 143 S. W. 167; Kemper *v.* S., 63 Tex. Cr. 1, 138 S. W. 1025; Streight *v.* S., 62 Tex. Cr. 453, 138 S. W. 742; Freeman *v.* Moreman (Tex. Civ.), 146 S. W. 1045; Knights *v.* Gillis (Tex. Civ.), 125 S. W. 338; O'Neal *v.* S. (Tex. Cr.), 146 S. W. 938; Norfolk, etc. R. Co. *v.* Birchfield, 105 Va. 809, 54 S. E. 879.

Indebtedness by witness for defendant to the latter. Hosey *v.* S., 5 Ala. App. 1, 59 S. 549.

Limits of such examination.—McGehee *v.* S., 171 Ala. 19, 55 S. 159.

Fact and manner of interest of witness may be inquired into. National E. Co. *v.* Fagan, 115 Ill. App. 590.

He may be asked whether he knew he had to establish a certain fact before he could recover. Kramer *v.* R. Co., 86 N. Y. S. 33.

It may be shown witness promised immunity. Reese *v.* S., 44 Tex. Cr. 34, 68 S. W. 283.

Refusal to allow inquiry into relation of attorney and client existing between witness and attorney for plaintiff, proper. Birmingham R. Co. *v.* Lintner, 141 Ala. 420, 38 S. 363.

"**There was no error** in allowing the solicitor, in cross-examining the defendant's witness Peters, to ask him if he was not connected with, or if he did not 'belong to,' a certain faction, when ill will between the factions had been shown." Collins *v.* S., 3 Ala. App. 64, 58 S. 80.

Recent litigation. — Missouri, etc. Ry. Co. *v.* Burk (Tex. Cr.), 146 S. W. 600.

"**On the cross-examination** by the defendant's counsel of the person charged to have been assaulted he was asked if before he went before the grand jury in this case, 'he had not employed lawyers to bring a damage suit against Mr. Hood, the sheriff, for an alleged assault and battery committed on him by Naftel, the deputy sheriff.' The question was not so framed as necessarily to indicate that the defendant had any connection with the matter inquired about. The inquiry may have been in regard to an occurrence long antedating the one under investigation, and the alleged assailant referred to in the question may have been another deputy sheriff having the same surname as the defendant; and this may have been suggested as a ground of objection to the question. The fact that the witness at some time in the past may have employed lawyers to sue the sheriff for an assault and battery alleged to have been committed by a deputy sheriff other than the defendant would have no tendency to prove that the witness had an interest or bias against the defendant." Naftel *v.* S., 3 Ala. App. 34, 57 S. 386.

108-81 Barden *v.* Cunningham, 136 Ala. 263, 34 S. 26; Cook *v.* S., 152 Ala. 66, 44 S. 549; Morris *v.* S. ((Ala.), 39 S. 608; Sanford *v.* S., 143 Ala. 78, 39 S. 370; Taylor *v.* S., 121 Ga. 348, 49 S. E. 303; Coffman *v.* S., 51 Tex. Cr. 178, 103 S. W. 1128.

Proper to show a difficulty had occurred between state's witness and defendant but not proof of details. Figueroa *v.* S. (Tex. Cr.), 159 S. W. 1188.

108-82 Porter *v.* P., 31 Colo. 508, 74 P. 879; P. *v.* Harper, 145 Mich. 402, 108 N. W. 689; S. *v.* Anslinger, 171 Mo. 609, 71 S. W. 1041.

Statement of witness in regard to reward offered, admissible. Mullins *v.* C., 23 Ky. L. R. 2433, 67 S. W. 821.

Questions insinuating improper conduct by witness, improper. P. *v.* Wyatt, 11 Cal. App. 120, 104 P. 12.

108-83 Hoagland *v.* Canfield, 160 Fed. 146, 171; P. *v.* Emmons, 7 Cal. App. 685, 95 P. 1032.

108-84 Alford *v.* S., 47 Fla. 1, 36 S. 436; Goss *v.* Goss, 102 Minn. 346, 113 N. W. 690; McFadden *v.* R. Co., 161 Mo. App. 652, 143 S. W. 884 (cit. this text); Creeping Bear *v.* S., 113 Tenn. 322, 87 S. W. 653; Cain *v.* S. (Tex. Cr.), 153 S. W. 147.

For full discussion of necessity of preliminary cross-examination, see P. *v.* Mallon, 116 App. Div. 425, 101 N. Y. S. 814.

Hostility can be shown by declarations only after inquiring with particularity as to time and place. Fagan *v.* Lantz, 156 Cal. 681, 105 P. 951; S. *v.* Bardelli, 78 Vt. 102, 62 A. 44.

108-85 Hoagland *v.* Canfield, 160 Fed. 146, 171; Grayson *v.* S., 162 Ala. 83, 50 S. 349; Paradise *v.* S., 131 Ala. 25, 31 S. 722; Robertson *v.* R. Co., 142 Ala. 216, 37 S. 831; Morris *v.* S., 146 Ala. 66, 41 S. 274; O'Neal *v.* Curry, 134 Ala. 216, 32 S. 697; Beal *v.* S., 138 Ala. 94, 35 S. 58; Hicks *v.* S., 4 Ala. App. 120, 59 S. 231; Stewart *v.* S., 58 Fla. 97, 50 S. 642; Eatman *v.* S., 48 Fla. 21, 37 S. 576; Fields *v.* S., 46 Fla. 84, 35 S. 185; Georgia, etc. R. Co. *v.* Stanley, 1 Ga. App. 487, 57 S. E.

1042; S. *v.* Crea, 10 Ida. 88, 76 P. 1013; Toledo, etc. R. Co. *v.* Stevenson, 122 Ill. App. 654; S. *v.* Johnson (Ia.), 144 N. W. 303; South Covington & C. R. Co. *v.* Raymer, 132 Ky. 187, 116 S. W. 281; Goss *v.* Goss, 102 Minn. 346, 113 N. W. 690; S. *v.* Horton, 247 Mo. 657, 153 S. W. 1051; S. *v.* Nieuhaus, 217 Mo. 332, 117 S. W. 73; S. *v.* Darling, 202 Mo. 150, 100 S. W. 631; Lambech *v.* Stiefel, 71 N. J. L. 320, 59 A. 460; Potter *v.* Browne, 197 N. Y. 288, 90 N. E. 812 (if witness admits hostility further inquiry not proper; if he qualifies denial, evidence of affirmative acts or declarations of hostility proper; party may not testify to his declarations made to witness); Salzman *v.* Mandel, 50 Misc. 634, 98 N. Y. S. 825; Johnson *v.* R. Co., 163 N. C. 431, 79 S. E. 690; Pope *v.* S. (Tex. Cr.), 143 S. W. 611; Hickley *v.* S., 62 Tex. Cr. 568, 138 S. W. 1051; Clegg *v.* R. Co. (Tex. Civ.), 127 S. W. 1098; Pollard *v.* S., 58 Tex. Cr. 299, 125 S. W. 390; Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804; Houston, etc. R. Co. *v.* McCarty, 40 Tex. Civ. 364, 89 S. W. 805; S. *v.* Carr, 65 W. Va. 81, 63 S. E. 766.

By any competent evidence P. *v.* Lustig, 206 N. Y. 162, 99 N. E. 183.

Expression of wish by prosecuting witness that defendant be sent to penitentiary. Earles *v.* S., 64 Tex. Cr. 537, 142 S. W. 1181.

Limits of such examination.—Miller *v.* S., 9 Ga. App. 599, 71 S. E. 1021.

Non-payment of physician's bill.—Lack Malleable Iron Co. *v.* Graham, 147 Ky. 161, 143 S. W. 1016.

Cross-examination to show hostility not a collateral inquiry. Cook *v.* S., 169 Ind. 430, 82 N. E. 1047; S. *v.* Malmberg, 14 N. D. 523, 105 N. W. 614. And see Kelly *v.* S., 2 Ala. App. 103, 57 S. 78.

Discharge from employment.—Houston, etc. R. Co. *v.* Wilson, 37 Tex. Civ. 405, 84 S. W. 274.

Deadly enmity toward defendant. Mackmasters *v.* S., 81 Miss. 374, 33 S. 2.

Attempted interference with other witnesses may be shown. Houston C. *v.* Dial, 135 Ala. 168, 33 S. 268; S. *v.* Koller, 129 Ia. 111, 105 N. W. 391; S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461.

Acts of hostility on part of witness competent. P. *v.* Row, 135 Mich. 505, 98 N. W. 13; Sapp *v.* S. (Tex. Cr.), 77 S. W. 456; S. *v.* Hamilton, 65 Kan. 183, 69 P. 162 (member of mob to hang accused).

Extent of hostile feeling may be gone into. Mackmasters *v.* S., 81 Miss. 374, 33 S. 2.

Cause of hostility may not be investigated. McDuffie *v.* S., 121 Ga. 580, 49 S. E. 708; Seymour *v.* Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691.

Hostility may be shown by any competent evidence.—Louisville, etc. R. Co. *v.* Sherrill, 152 Ala. 213, 44 S. 631 (statement of defendant's employe to witness); Gosdin *v.* Williams, 151 Ala. 592, 44 S. 611; Cross *v.* S., 147 Ala. 125, 41 S. 875 (warrant obtained by witness against prosecutor); Purdee *v.* S., 118 Ga. 798, 45 S. E. 606 (indictment against witness for assault on defendant); Brink *v.* Stratton, 176 N. Y. 150, 68 N. E. 148 (testimony of party); Collins *v.* McGuire, 76 App. Div. 443, 78 N. Y. S. 527 (pendency of suit against witness); Gumby *v.* R. Co., 65 App. Div. 38, 72 N. Y. S. 551, 171 N. Y. 635, 63 N. E. 1117.

Details of difficulties should not be gone into. Wright *v.* Anniston, 151 Ala. 465, 44 S. 151; Henderson *v.* S., 49 Tex. Cr. 269, 91 S. W. 569; S. *v.* Baird, 79 Vt. 257, 65 A. 101; Quaker Oats Co. *v.* Grice, 195 Fed. 441, 115 C. C. A. 343.

Declarations, however made, competent to show partiality or hostility. P. *v.* Ryan, 152 Cal. 364, 92 P. 853 (on cross-examination); Vaughn *v.* S., 52 Fla. 122, 41 S. 881; C. *v.* Howard, 205 Mass. 128, 91 N. E. 397; P. *v.* Thorne, 148 Mich. 203, 111 N. W. 741; Lambech *v.* Stiefel, 71 N. J. L. 320, 59 A. 460.

Hostility between relatives of witness and party.—Ill-feeling between father of minor witness and a party may be shown. Bennefield *v.* S., 134 Ala. 157, 32 S. 717. *Contra* as to witness' hostility toward defendant's father. Carroll *v.* R. Co., 200 Mass. 527, 86 N. E. 793; McQuiggan *v.* Ladd, 79 Vt. 90, 64 A. 503.

Intimate relationship with party unsuccessfully defended in criminal case by defendant is too remote to show hostility against him. S. *v.* Gilluly, 70 Wash. 1, 96 P. 512.

Extent of witness' interest in suit may be shown. P. *v.* Wenzel, 189 N. Y. 275, 82 N. E. 130.

Pending criminal suit involving matter

of the criminal case on trial. S. v. Decker, 161 Mo. App. 396, 143 S. W. 544.

For the jury to decide what weight shall be given to the proof of malice of witness. Jackson v. S., 5 Ala. App. 300, 57 S. 594.

109-88 S. v. Hanlon, 38 Mont. 557, 100 P. 1035.

It may be shown witness belongs to a certain crowd. Jackson v. S. (Tex. Cr.), 67 S. W. 497.

109-89 Where witness denies bias he cannot be cross-examined by party calling him as to bias. Smith v. S., 12 Ga. App. 13, 76 S. E. 647.

110-90 P. v. Peltz, 143 Ill. App. 181; Oldham v. C., 136 Ky. 789, 125 S. W. 242; South Covington R. Co. v. Constans, 25 Ky. L. R. 158, 74 S. W. 705; MacGuire v. Hughes, 126 App. Div. 637, 111 N. Y. S. 153 (rule has special application to expert witness); Missouri, etc. R. Co. v. Cherry, 44 Tex. Civ. 232, 97 S. W. 712. *Comp.* Citizens' R. & L. Co. v. Johns, 52 Tex. Civ. 489, 116 S. W. 62.

Previous attitude of witness on question at issue may be shown. Walker v. Rome, 6 Ga. App. 59, 64 S. E. 319.

110-91 Funderburk v. S., 145 Ala. 661, 39 S. 672; Brooks v. S., 8 Ala. App. 277, 62 S. 569; Frozzo v. P., 51 Colo. 323, 117 P. 150; Wetzel v. Firebaugh, 231 Ill. 190, 95 N. E. 1085; Dowd v. R. Co., 153 Ill. App. 85; S. v. Lortz, 186 Mo. 122, 84 S. W. 906; S. v. Broadbent, 27 Mont. 342, 71 P. 1; Creeping Bear v. S., 113 Tenn. 322, 87 S. W. 672.

That witness for defendant owed him money. Hosey v. S., 5 Ala. App. 1, 59 S. 549.

Activity in prosecution of suit. Miller v. S., 149 Fed. 339, 79 C. C. A. 268 (contribution of money); Borck v. S. (Ala.), 39 S. 580; S. v. Roller, 30 Wash. 692, 71 P. 718.

Advice of witness action be brought. Atlantic, etc. R. Co. v. Powell, 127 Ga. 482, 56 S. E. 1006.

Membership in same labor union may be shown. P. v. Cowan, 1 Cal. App. 403, 82 P. 339.

Hostile relations between husband and wife. Fisher v. Brady, 47 Misc. 101, 94 N. Y. S. 25.

Partizanship.—Brisco v. R. Co., 118 Mo. App. 688, 95 S. W. 276.

Fear as cause of bias.—Smith v. S., 44 Tex. Cr. 52, 68 S. W. 267.

110-93 Brown v. S., 119 Ga. 572, 46 S. E. 833; Sakolski v. Schenkel, 50 Misc. 151, 98 N. Y. S. 190; Sexton v. S., 48 Tex. Cr. 497, 88 S. W. 348. Witness concubine of deceased. S. v. Craft, 117 La. 213, 41 S. 550.

112-99 Loveman v. Brown, 138 Ala. 608, 35 S. 708.

Whether witness paid for attending (Southern R. Co. v. Morris, 143 Ala. 628, 42 S. 17); and how much is proper inquiry. Brown v. R. Co., 43 Misc. 374, 87 N. Y. S. 461.

Payment for investigations.—S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

Concealment by witness of fact he was surgeon of defendant. Glenn v. Co., 206 Pa. 135, 55 A. 860.

Physician employed to make examination for purpose of becoming a witness. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818. See also Chicago, etc. R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087.

Cross-examination of physician upon independent cases of same character, not allowed. Chicago, etc. R. Co. v. Schmitz, 113 Ill. App. 295, 211 Ill. 446, 71 N. E. 1050; Same v. Smith, 226 Ill. 178, 80 N. E. 716.

Likelihood of employe to be discharged. Missouri, etc. R. Co. v. Smith, 31 Tex. Civ. 332, 72 S. W. 418.

Rule employees should say nothing as to accidents. Toledo, etc. R. Co. v. Ward, 2 O. C. C. (N. S.) 256.

Relation of witness as employe.—United O. Co. v. Miller, 19 Colo. App. 46, 73 P. 627; Central R. v. Bagley, 121 Ga. 781, 49 S. E. 780; Illinois C. R. Co. v. Burke, 112 Ill. App. 415; Gulf, etc. R. Co. v. Hays, 40 Tex. Civ. 162, 89 S. W. 29.

Witness agent of party calling him. Louisville, etc. R. Co. v. Munford, 24 Ky. L. R. 416, 68 S. W. 635.

113-1 Birmingham R. Co. v. Rutledge, 142 Ala. 195, 39 S. 338.

Witness who is also plaintiff may be asked whether he instituted action because defendant compelled him to pay a debt. Lowe v. Ring, 123 Wis. 107, 101 N. W. 381. Fact witness is husband of washerwoman of deceased, too remote. Hall v. S., 137 Ala. 41, 34 S. 680.

Where president of defendant corporation attempted to effect a settlement with plaintiff contrary to express agreement not to do so—evidence of bias

admissible. Watson *v.* R. Co., 164 N. C. 176, 80 S. E. 175.

413-2 Elam *v.* Coal Co., 155 Ill. App. 375; Domestic Block Coal Co. *v.* Holden (Ind.), 103 N. E. 73; Isaac *v.* U. S., 7 Ind. Ty. 196, 104 S. W. 585; Kingston *v.* Roberts, 175 Mo. App. 69, 157 S. W. 1042; Hirsh *v.* Co., 92 N. Y. S. 794.

See Vol. 3, p. 770, n. 58, and supplement thereto.

Fact of witnesses being on bond of accused.—Ross *v.* S. (Tex. Cr.), 159 S. W. 1063.

Father of a co-defendant testifying for defendant, to show bias, may be asked if his son was indicted for the same offense. Wilson *v.* S. (Tex. Cr.), 158 S. W. 1114.

The court should be informed of the purpose of such questions, otherwise irrelevant. S. *v.* Panelli, 81 N. J. L. 346, 79 A. 1064.

The jury have the right both in civil and criminal cases to consider the interest which the witness may have in the result of the litigation. S. *v.* Decker, 161 Mo. App. 396, 143 S. W. 544, *citing* among other cases: Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689, 30 L. R. A. (N. S.) 846; S. *v.* Tawney, 81 Kan. 162, 105 P. 218, 135 Am. St. 355; S. *v.* Thornhill, 177 Mo. 691, 76 S. W. 948; Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637.

Interest as taxpayer.—Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622.

Pecuniary loss if defendant not convicted may be shown. Teston *v.* S., 50 Fla. 138, 39 S. 787.

Liability of witness for debt incurred. Nesbit *v.* Crosby, 74 Conn. 554, 51 A. 550.

Ultimate liability for accident. Hedlun *v.* Co., 16 S. D. 261, 92 N. W. 31; Perry *v.* Centralia, 50 Wash. 670, 97 P. 802.

Witness charged with commission of same crime.—Wilkerson *v.* S., 140 Ala. 165, 37 S. 265; S. *v.* Rosa, 71 N. J. L. 316, 58 A. 1010.

Prosecution of witness for similar offense may be shown. McCormack *v.* S., 133 Ala. 202, 32 S. 268.

414-3 Vindicator M. Co. *v.* Firstbrook, 36 Colo. 498, 86 P. 313.

Reward for conviction.—Cooley *v.* S., 7 Ala. App. 163, 62 S. 292.

414-4 Interest of witness in pending civil action in which accused is alleged to have committed perjury may be shown. S. *v.* Eaid, 55 Wash. 302, 104 P. 275.

414-5 Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181; Shoemaker *v.* S., 58 Tex. Cr. 518, 126 S. W. 887.

415-6 Nashville, C. & St. L. R. *v.* Crosby (Ala.), 62 S. 889; Birmingham, etc. Co. *v.* Norton, 7 Ala. App. 571, 61 S. 459; Sylvester *v.* S., 46 Fla. 166, 35 S. 142; Southern R. Co. *v.* S. (Ind. App.), 72 N. E. 174; Timma *v.* Timma, 72 Kan. 73, 82 P. 481; Missouri, etc. R. Co. *v.* Smith, 31 Tex. Civ. 332, 72 S. W. 418.

Size of contingent fee of attorney who volunteers as witness. New Omaha, etc. Co. *v.* Johnson, 67 Neb. 393, 93 N. W. 778.

Willingness to appear voluntarily for other party may be gone into. Wooley *v.* Bell, 33 Tex. Civ. 399, 76 S. W. 797.

Acts and declarations of judge may be proved to show his bias on a question of public interest. Affidavits of bias are to be taken as true. Wathen *v.* C., 133 Ky. 94, 116 S. W. 336. Facts not showing bias. See Johnston *v.* Dakan, 9 Cal. App. 522, 99 P. 729.

BIGAMY.

Definition.—See 4 STANDARD PROC. 89.

Jurisdiction and Venue.—See 4 STANDARD PROC. 90.

Indictment, Information and Complaint.—See 4 STANDARD PROC. 92, *et seq.*

Pleas and Defenses.—See 4 STANDARD PROC. 97.

416 **Evidence of issue inadmissible.** Harris *v.* S. (Tex. Cr.), 161 S. W. 125.

416-1 Reid *v.* S., 168 Ala. 118, 53 S. 254. See S. *v.* Allen, 113 La. 705, 37 S. 614; P. *v.* Goodrode, 132 Mich. 542, 94 N. W. 14; S. *v.* St. John, 94 Mo. App. 229, 68 S. W. 374; S. *v.* Goulden, 134 N. C. 743, 47 S. E. 450; C. *v.* Bernard, 27 Pa. C. C. 12; McCombs *v.* S., 50 Tex. Cr. 490, 99 S. W. 1017; Hearne *v.* S., 50 Tex. Cr. 431, 97 S. W. 1050 (proof must be beyond reasonable doubt).

Identity of parties to the two marriages must be clearly established. Goad *v.* S., 51 Tex. Cr. 393, 102 S. W. 121.

Common law marriage will sustain a conviction. Burks *v.* S., 50 Tex. Cr. 47, 94 S. W. 1040. *Contra.* Bates *v.* S., 9 O. C. C. (N. S.) 273.

416-2 Witt *v.* S., 5 Ala. App. 137, 59 S. 715; Richardson *v.* S., 103 Md. 112, 63 A. 317.

Second marriage while first wife alive must be established beyond reasonable doubt, and evidence of divorce granted for bigamy is inadmissible. S. *v.* Sharkey, 73 N. J. L. 491, 63 A. 866.

416-3 Lesueur *v.* S., 176 Ind. 448, 95 N. E. 239; S. *v.* Carr, 106 La. 708, 31 S. 289; S. *v.* Long, 143 N. C. 670, 57 S. E. 349.

Divorce must be proved by defendant. P. *v.* Sprot, 235 Ill. 230, 85 N. E. 267; C. *v.* Graymow, 27 Pa. C. C. 161.

Burden on defendant to show he did not know first wife was alive for seven prior years. S. *v.* Goulden, 134 N. C. 743, 47 S. E. 450.

Burden on state to prove defendant knowingly married another's wife. Brooks *v.* S., 74 Ark. 58, 84 S. W. 1033 (statute).

Where second marriage formally consummated it will not be presumed first dissolved; burden is on defendant to establish fact. Fletcher *v.* S., 169 Ind. 77, 81 N. E. 1083.

416-5 Apkins *v.* C., 148 Ky. 662, 147 S. W. 376; Edwards *v.* S. (Tex. Cr.), 166 S. W. 517.

Certificate of marriage sufficient. S. *v.* Rocker, 130 Ia. 239, 106 N. W. 645.

License admissible on issue of first marriage. De Lucenay *v.* S. (Tex. Cr.), 68 S. W. 796.

Record proof of marriage is admissible against objection defendant entitled to meet witness face to face. Sokel *v.* P., 212 Ill. 238, 72 N. E. 382. *Comp.* P. *v.* Goodrode, 132 Mich. 542, 94 N. W. 14.

Certified copy of unacknowledged marriage certificate incompetent if signature of signer and his authority to solemnize marriage not proved, though certificate recorded. P. *v.* Le Doux, 155 Cal. 535, 102 P. 517.

Record of divorce proceeding brought by former wife, in which accused did not deny marriage, admissible where divorce not granted until after his remarriage. Oliver *v.* S., 7 Ga. App. 695, 67 S. E. 886.

417-6 Cooper *v.* S. (Tex. Cr.), 160 S. W. 382.

First wife may testify to fact of marriage. Richardson *v.* S., 103 Md. 112, 63 A. 317. *Comp.* Barber *v.* P., 203 Ill. 343, 68 N. E. 93.

Testimony of person present at marriage in foreign country. Sokel *v.* P., 212 Ill. 238, 72 N. E. 382.

The return of the justice of the peace showing when he had performed the ceremony. Harris *v.* S. (Tex. Cr.), 167 S. W. 43.

417-7 Williams *v.* S., 151 Ala. 108, 44 S. 57; Caldwell *v.* S., 146 Ala. 141, 41 S. 473; LeGrand *v.* S., 88 Ark. 135, 113 S. W. 1028; Oliver *v.* S., 7 Ga. App. 695, 67 S. E. 886; S. *v.* Rocker, 130 Ia. 239, 106 N. W. 645; P. *v.* Goodrode, 132 Mich. 542, 94 N. W. 14; S. *v.* Long, 143 N. C. 670, 57 S. E. 349; S. *v.* Goulden, 134 N. C. 743, 47 S. E. 450; C. *v.* Henning, 10 Phila. (Pa.) 209.

Admission of defendant and cohabitation necessary. Confession alone insufficient. Johnson *v.* S. (Tex. Cr.), 150 S. W. 936.

Defendant's uncorroborated admissions, sufficient. McSein *v.* S., 120 Ga. 175, 47 S. E. 544.

417-8 Rice *v.* C., 31 Ky. L. R. 1351, 105 S. W. 123; S. *v.* St. John, 94 Mo. App. 229, 68 S. W. 374; P. *v.* Portman, 159 App. Div. 702, 145 N. Y. S. 189; Harris *v.* S. (Tex. Cr.), 167 S. W. 43 (identification).

Proof of common law marriage insufficient if statutory marriage relied on Burton *v.* S., 51 Tex. Cr. 196, 101 S. W. 226.

Conversation between first wife of accused and others in his absence cannot be proved. Knapp *v.* S., 54 Tex. Cr. 633, 114 S. W. 836.

417-9 S. *v.* Hughes, 35 Kan. 626, 12 P. 28, 57 Am. St. 195.

Marriage may be proved by direct or circumstantial evidence. S. *v.* Pendleton, 67 Kan. 180, 72 P. 527.

Such testimony sufficient. Le Grand *v.* S., 88 Ark. 135, 113 S. W. 1028.

417-10 See S. *v.* St. John, 94 Mo. App. 229, 68 S. W. 374.

Proof of cohabitation and recognition is admissible, but does not overcome presumption defendant is innocent. S. *v.* Hansbrough, 181 Mo. 348, 80 S. W. 900.

Marriage in fact must be shown. P. *v.* Le Doux, 155 Cal. 535, 102 P. 517.

418-11 Ferrell *v.* S., 45 Fla. 26, 34 S. 220; Sokel *v.* P., 212 Ill. 238, 72 N. E. 382. See S. *v.* Rocker, 130 Ia. 239, 106 N. W. 645; S. *v.* Kniffen, 44 Wash. 485, 87 P. 837.

Celebration of marriage raises rebuttable presumption marriage valid. Barber *v.* P., 203 Ill. 343, 68 N. E. 93.

418-12 P. *v.* Shaw, 259 Ill. 544, 102 N. E. 1031; Apkins *v.* Com., 148 Ky. 662, 147 S. W. 376.

418-13 State must prove by competent evidence first wife was living at date of second marriage. Dunlap *v.* S., 126 Tenn. 415, 150 S. W. 86, 41 L. R. A. (N. S.) 1061.

418-15 S. *v.* Rocker, 130 Ia. 239, 106 N. W. 645.

Wife living four and one-half years before second marriage. Cannot be presumed alive at time of second marriage. Dunlap *v.* S., 126 Tenn. 415, 150 S. W. 86, 41 L. R. A. (N. S.) 1061.

Belief in death of first wife, immaterial. S. *v.* Ackerly, 79 Vt. 69, 64 A. 450, 118 Am. St. 940.

419-16 Garner *v.* S. (Ala.), 64 S. 183; Harris *v.* S. (Tex. Cr.), 167 S. W. 43; Edwards *v.* S. (Tex. Cr.), 166 S. W. 517; Cooper *v.* S. (Tex. Cr.), 160 S. W. 382.

Testimony of eye-witness sufficient. McSein *v.* S., 120 Ga. 175, 47 S. E. 544. Of minister who performed ceremony, admissible. Kuehn *v.* S. (Tex. Cr.), 69 S. W. 526.

419-17 See S. *v.* Steupper, 117 Ia. 591, 91 N. W. 912.

419-18 Murphy *v.* S., 122 Ga. 149, 50 S. E. 48.

Second wife may testify to her own marriage after first marriage established, but not to first marriage. Barber *v.* P., 203 Ill. 543, 68 N. E. 93.

Treatment of accused by first wife, immaterial. Robinson *v.* S., 6 Ga. App. 696, 65 S. E. 792.

419-19 Evidence as to previous illicit relations and knowledge of family of woman of previous marriage held inadmissible in defense. S. *v.* MacRae, 83 N. J. L. 796, 85 A. 455.

Divorce decree inoperative. Witt *v.* S. (Ala.), 59 S. 715.

419-20 Garner *v.* S. (Ala.), 64 S. 183; Parnell *v.* S., 126 Ga. 103, 54 S. E. 804; P. *v.* Spoor, 235 Ill. 230, 85 N. E. 207; Cornett *v.* C., 134 Ky. 613, 121 S. W. 424 (may only be regarded in fixing punishment). See S. *v.* Goulden, 134 N. C. 743, 47 S. E. 150.

Honest belief in divorce no defense. Rice *v.* C., 31 Ky. L. R. 1351, 105 S. W. 123; Rogers *v.* C., 24 Ky. L. R. 119, 68 S. W. 14.

Fact women knew defendant had wife living at time, irrelevant. Richardson *v.* S., 103 Md. 112, 63 A. 317.

419-21 Robinson *v.* S., 6 Ga. App. 696, 65 S. E. 792; Baker *v.* S., 86 Neb. 775, 126 N. W. 300; U. S. *v.* de Los Reyes, 1 Phil. Isl. 375; Welch *v.* S., 46 Tex. Cr. 528, 81 S. W. 50. See Sundheimer *v.* Barron, 114 N. Y. S. 804; Thorp *v.* Ramsey, 51 Wash. 530, 99 P. 584.

Honest belief woman not married a defense under statute. Brooks *v.* S., 74 Ark. 58, 84 S. W. 1033.

420-22 Staley *v.* S., 89 Neb. 701, 131 N. W. 1028.

420-23 McCombs *v.* S., 50 Tex. Cr. 490, 99 S. W. 1017, 9 L. R. A. (N. S.) 1036.

Where evidence offered by defendant is sufficient to grant divorce but no divorce had been granted it is inadmissible. Harris *v.* S. (Tex. Cr.), 167 S. W. 43.

BILLS OF PARTICULARS.

For a full treatment of the use of bills of particulars and the procedure connected therewith, see 4 STANDARD PROC. 372, *et seq.*

421-1 Silva *v.* Blair, 141 Cal. 599, 75 P. 162; Stern *v.* R. Co., 98 App. Div. 619, 90 N. Y. S. 299; Weedon *v.* Weedon, 34 Pa. Super. 358.

Particularity required, as well as necessity for bill, rest in reviewable discretion of court. Neither the evidence nor names of witnesses need be disclosed. Bellingham *v.* Linck, 53 Wash. 208, 101 P. 843. All the evidence need not be disclosed. P. *v.* Depew, 237 Ill. 574, 86 N. E. 1090.

Insufficient bill may be accepted on second trial if accused fully informed on first trial. S. *v.* Ry., 149 N. C. 508, 62 S. E. 1088.

421-2 Kelsey *v.* Punderford, 76 Conn. 271, 56 A. 579; Royal P. Co. *v.* Van Ness, 53 Fla. 135, 43 S. 916; Lyell *v.* Walbach, 111 Md. 610, 75 A. 339.

As to effect of bill of particulars, see American Co. *v.* Kareney, 39 App. Cas. (D. C.) 223.

Failure to file excludes evidence as to any matter covered by the order. Ebling B. Co. *v.* Lipkowitz, 121 N. Y. S. 424. Failure to furnish further bill may be cause for excluding testimony or requiring service of amended bill. Osborn *v.* McArthur, 132 App. Div. 845, 117 N. Y. S. 750.

Scope of admissible testimony may be

enlarged by bill. Devine *v.* Co., 126 App. Div. 7, 110 N. Y. S. 119.

421-3 McKinnie *v.* Lane, 230 Ill. 544, 82 N. E. 878; Dixon *v.* Bunnell, 2 Misc. 560, 102 N. Y. S. 775; St. Louis B. Co. *v.* Aldridge, 112 App. Div. 803, 99 N. Y. S. 398.

421-4 Dunn *v.* Foley, 78 Conn. 670, 63 A. 122.

422-6 Pollak *v.* Gunter, 162 Ala. 317, 50 S. 155; S. *v.* Ry., 56 Fla. 670, 47 S. 986; Hoopes *v.* Crane, 56 Fla. 395, 47 S. 992; Yawger *v.* Backs, 119 Ill. App. 61.

Perfect exactness and agreement between bill and proof, not required. Devalinger *v.* Maxwell, 4 Penne. (Del.) 185, 54 A. 684; Stewart *v.* Knight, 166 Ind. 498, 76 N. E. 743.

422-7 Bill not sufficient evidence of price of goods sold to warrant verdict. U. S. P. Co. *v.* Gruhn, 86 N. Y. S. 730. If unverified it does not constitute affirmative proof of any fact as against the other party. Hesser, etc. Co. *v.* Co., 114 Wis. 651, 90 N. W. 1094.

Plaintiff's testimony on an essential point cannot be based on a bill signed by his attorney and which is not shown to have been seen by plaintiff. Crommette *v.* Berg, 111 N. Y. S. 666.

422-8 Campbell *v.* Rice, 22 Cal. App. 734, 136 P. 512. Bill made from plaintiff's book of original entry, competent. Wagoner U. Co. *v.* Jones, 134 Mo. App. 101, 114 S. W. 1049 (statute).

BILLS AND NOTES.

Expert testimony, 527-70; *Scope of parol evidence*, 537-20; *Subsequent increase of city's debt*, 542-37.

Form of Action — See 4 STANDARD PROC. 225.

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426-1 Presumption not conclusive. Fuller *v.* Shields, 3 Phila. (Pa.) 361.

427-4 Haslach *v.* Wolf, 73 Neb. 658, 103 N. W. 317.

428-7 Bk. *v.* Day, 145 Mo. App. 410, 132 S. W. 756.

Time indorsements made.—Redden *v.* Lambert, 132 La. 740, 36 S. 668.

428-12 Note dated and payable in New York, presumed to have been made and indorsed there. Chemical Nat. Bk. *v.* Kellogg, 183 N. Y. 92, 75 N. E. 1103.

428-14 Utah Nat. Bk. *v.* Jones, 109 App. Div. 526, 96 N. Y. S. 338. Jurisdiction in which suit brought presumed to be that in which note made if nothing to contrary appears. Grimes *v.* Tait, 21 Okla. 361, 99 P. 810.

429-16 Variance as to date of payment must have caused surprise. Black *v.* Epstein, 93 Mo. App. 459, 67 S. W. 736.

430 Burden of proving an extension was made with knowledge that appellant was accommodation maker is upon appellant. State Bank *v.* Brown, 179 Ill. App. 392.

Evidence of extension is admissible under general issue. State Bank *v.* Brown, 179 Ill. App. 392.

430-17 Leffler *v.* Dickerson, 1 Ga. App. 63, 57 S. E. 911.

430-18 Reams *v.* Thompson, 5 Ga. App. 226, 62 S. E. 1014; Myers *v.* Stein, 154 App. Div. 631, 139 N. Y. S. 762; Martin *v.* Daniel (Tex. Civ.), 164 S. W. 17.

431-21 Caskey *v.* Douglas (Tex. Civ.), 95 S. W. 562.

432-22 See First Nat. Bk. *v.* Webster, 242 Pa. 128, 88 Atl. 911.

432-23 Kellam *v.* Brode, 1 Cal. App. 315, 82 P. 213.

435-31 Baily *v.* Birkhofer, 123 Ia. 59, 98 N. W. 594.

436-32 Weyand *v.* Randall, 131 App. Div. 167, 115 N. Y. S. 279.

437-35 Bank named, presumption is in maker's home town. Baily *v.* Birkhofer, 123 Ia. 59, 98 N. W. 594.

440-44 If no place of payment indicated, evidence of place of residence of payee inadmissible. Ray *v.* Anderson, 119 Ga. 926, 47 S. E. 205.

440-45 Parol evidence inadmissible to clear up ambiguity, where only jurisdiction is involved and must be determined from face of note. Baily *v.* Birkhofer, 123 Ia. 59, 98 N. W. 594.

441 Where check part of comprehensive transaction. Rahe *v.* Yett (Tex. Civ.), 164 S. W. 30.

442-59 Howell *v.* Ware, 175 Fed. 742, 99 C. C. A. 318; Richards *v.* Hodges, 164 N. C. 183, 80 S. E. 439.

Also unexecuted contemporaneous parol agreement, differing from that stipulated, though there is no evidence of accident, fraud or mistake. Reed *v.* Kuntz, 17 Pa. Dist. 865.

443-61 Kerr *v.* Holden, 13 Ga. App.

9, 78 S. E. 682; Hensley *v.* Mitchell, 147 Ill. App. 161; Munch B. Co. *v.* De Matteis, 128 App. Div. 830, 112 N. Y. S. 1042; American Fertilizer Co. *v.* Sims, 90 S. C. 541, 73 S. E. 1036; Nixon *v.* Bk. (Tex. Civ.), 127 S. W. 882.

444-65 Word "dollars" inserted by court. Eldridge *v.* Kay, 124 Ill. App. 136.

445-74 Marginal figures and words cannot supply amount of note left blank. Chestnut *v.* Chestnut, 104 Va. 539, 52 S. E. 348, 2 L. R. A. (N. S.) 879.

Parol evidence inadmissible to vary sum stated in instrument. Bell *v.* Birmingham, 9 Ala. App. 212, 62 S. 971.

445-76 See McNinch *v.* Co., 23 Okla. 386, 100 P. 524.

Evidence to show agreement maker was liable only for one-half of note inadmissible in absence of fraud. Ford *v.* Drake, 46 Mont. 314, 127 P. 1019.

446-79 Declaration on order to pay "all sums of money due for lumber" not sustained by proof of order to pay "amount due on lumber shipped." Leatherbery *v.* Spottswood, 145 Ala. 655, 39 S. 588. Declaration on note of specified sum not sustained by proof of note with blank. Chestnut *v.* Chestnut, 104 Va. 539, 52 S. E. 348, 2 L. R. A. (N. S.) 879.

447-83 Cannot be assumed more interest was paid than was due. Henderson *v.* Lightner, 29 Ky. L. R. 301, 92 S. W. 945.

447-94 Remission of interest for first year. Tisdale *v.* Mallett, 73 Ark. 431, 84 S. W. 481.

447-95 *Contra.* Bing *v.* Bk., 5 Ga. App. 578, 63 S. E. 652.

448-98 See Viets *v.* Silver, 15 N. D. 51, 106 N. W. 35.

"Per annum" may be added by court in construing contract as to interest. Brooks *v.* Boyd, 1 Ga. App. 65, 57 S. E. 1093.

449-9 See Talbott *v.* Heinze, 25 Mont. 4, 63 P. 624; Kempner *v.* Patrick, 43 Tex. Civ. 216, 95 S. W. 51; Wash. T. Co. *v.* Keyes (Wash.), 139 P. 638.

Contemporaneous written agreement varying contract of indorsement. Crilly *v.* Gallice, 148 Fed. 835, 78 C. C. A. 525; New Blue Springs Co. *v.* DeWitt, 65 Kan. 665, 70 P. 647.

Clause written below note.—Black *v.* Epstein, 93 Mo. App. 459, 67 S. W. 736.

450-10 Southern Land & Material Co. *v.* Bank, 101 Ark. 266, 142 S. W. 178.

450-11 Burden is upon maker to establish a collateral agreement. Thompson *v.* Nat. Bk., 152 Ky. 133, 153 S. W. 205.

450-12 Graham *v.* Remmel, 76 Ark. 140, 88 S. W. 899 (insurance policy to be satisfactory); Heitmann *v.* Bk., 6 Ga. App. 584, 65 S. E. 590; Oakland Cem. *v.* Lakins, 126 Ia. 121, 101 N. W. 778; McNight *v.* Parsons, 136 Ia. 390, 113 N. W. 858 (conditional delivery); White *v.* Smith, 79 Kan. 96, 98 P. 766; Hill *v.* Hall, 191 Mass. 253, 77 N. E. 831 (note to become binding only if bonds sold by maker); Central Sav. Bk. *v.* O'Connor, 132 Mich. 578, 94 N. W. 11; Mendenhall *v.* Ulrich, 94 Minn. 100, 101 N. W. 1057; Musser *v.* Musser, 92 Neb. 387, 138 N. W. 599; Martin *v.* Mask, 158 N. C. 436, 74 S. E. 343; Starr Piano Co. *v.* Edgar, 31 O. C. C. 295; Earle *v.* Owings, 72 S. C. 362, 51 S. E. 980 (not containing all terms of transaction); Erwin *v.* Powder Co. (Tex. Cr.), 156 S. W. 1097; Baker *v.* Co., 109 Va. 776, 65 S. E. 656; Elwell *v.* Turney, 39 Wash. 615, 81 P. 1047 (clear preponderance necessary); Hodge *v.* Smith, 130 Wis. 326, 110 N. W. 192 *Contra,* Key *v.* Hickman (Tex. Civ.), 149 S. W. 275.

To show conditions attached to delivery. Straus *v.* State Bk., 164 Ill. App. 420.

452-14 Martin *v.* McCune, 8 Pa. Super. 84.

452-16 Forcite P. Co. *v.* Howley, 40 Pa. Super. 412.

453 Evidence to show payee said he would not press note. Pierce *v.* Avakian (Cal.), 139 P. 799.

Promise defeating note inadmissible. Thomson *v.* McLaughlin, 13 Ga. App. 334, 79 S. E. 182.

Evidence of conditions inconsistent with those expressed inadmissible. Ward *v.* Thompson, 13 Ga. App. 152, 78 S. E. 1012.

Evidence of contemporaneous oral agreement inadmissible. Clare Co. Sav. Bk. *v.* Featherly, 173 Mich. 292, 139 N. W. 61.

453-18 Maker may show in equitable suit note was given upon agreement there should be a further settlement allowing him benefit of credits claimed. Allen *v.* Co., 55 Tex. Civ. 249, 118 S. W. 1157.

453-19 Warner *v.* Bonds (Ark.), 163

S. W. 788; Vachon *v.* Straton (Can.), 10 West. L. R. 157 (time of payment); Croan *v.* Myers, 32 Ind. App. 143, 100 N. E. 380; Stewart *v.* Gardner, 152 Ky. 120, 153 S. W. 3; Federal Disc. Co. *v.* Fletcher & Ratliff (Miss.), 61 S. 308; Citizens' Bk. *v.* Martin, 171 Mo. App. 394, 156 S. W. 488; Montgomery *v.* Schwald (Mo. App.), 166 S. W. 831; Uvalde A. P. Co. *v.* Co., 135 App. Div. 201, 120 N. Y. S. 11; Faux *v.* Fuller, 232 Pa. 33, 81 A. 91; Cline *v.* Mill, 83 S. C. 204, 65 S. E. 272; Long *v.* Riley (Tex. Civ.), 139 S. W. 79; Anderson *v.* Mitchell, 51 Wash. 267, 98 P. 751. See Muller *v.* Swanton, 149 Cal. 249, 73 P. 994; Whitehead *v.* Emmerich, 38 Colo. 13, 87 P. 790; Hutchins *v.* Langley, 27 App. Cas. (D. C.) 234; Union Cent. Ins. Co. *v.* Wynne, 123 Ga. 470, 51 S. E. 389; Farrington *v.* Stuckey, 7 Ind. Ty. 364, 104 S. W. 647; Chapman *v.* Chapman, 132 Ia. 5, 109 N. W. 787; Begley *v.* Combs, 27 Ky. L. R. 1115, 87 S. W. 1081; Felch *v.* West Brookfield, 184 Mass. 309, 68 N. E. 227; Central Sav. Bk. *v.* O'Connor, 132 Mich. 578, 94 N. W. 11, and 139 Mich. 82, 102 N. W. 280; Oppenheimer *v.* Kruckman, 84 N. Y. S. 129; Jamestown Assn. *v.* Allen, 172 N. Y. 291, 64 N. E. 952; Guthrie, etc. Co. *v.* Rhodes, 19 Okla. 21, 91 P. 1119; Homewood Bk. *v.* Heckert, 207 Pa. 231, 56 A. 431.

Parol evidence to alter.—"No authority has been cited, and we think none can be found, which would allow the defendant to do what he has here done, namely, to make in writing a promise to pay, on which the money of a bank was paid out of its officers, and then prove by parol evidence that the written promise was no promise, and was to have no force or effect of any kind. Making the letter 'c' after the signature does not make the testimony competent. Even if the word 'conditional' had been written out, it might possibly have made competent parol evidence that the defendant's promise was made on some condition to be performed by the bank, that his promise made in the note was conditional, but it would not have made competent evidence that there was never any promise at all to pay, conditional or unconditional." Arthur *v.* Brown, 91 S. C. 316, 74 S. E. 652.

Renewal at maturity.—Wolf *v.* Wolf, 2 Pa. Super. 259.

Note not to be extended.—First Nat. Bk. *v.* Wells, 98 Mo. App. 573, 73 S. W. 293.

Payments to be made as goods delivered. Beattyville Bk. *v.* Roberts, 117 Ky. 689, 78 S. W. 901.

Payable out of dividends.—Fuller *v.* Law, 207 Pa. 101, 56 A. 333.

454-20 Earle *v.* Enos, 130 Fed. 467 (agreement not to hold accommodation maker); Stewart *v.* Gardner, 152 Ky. 120, 153 S. W. 3; Bass *v.* Sanborn, 119 Mo. App. 103, 95 S. W. 955; Ford *v.* Drake (Mont.), 127 P. 1019; Gerli *v.* Co., 78 N. J. L. 1, 73 A. 252; Anguish *v.* Blair, 160 App. Div. 52, 145 N. Y. S. 392; German Exch. Bk. *v.* Schnitzer, 72 Misc. 362, 130 N. Y. S. 223 (*rev.* 71 Misc. 261, 130 N. Y. S. 113); First Nat. Bk. *v.* Dick, 22 Pa. Super. 445; Citizens' Nat. Bk. *v.* Cammer (Tex. Civ.), 86 S. W. 625 (parol contract of indemnity shown).

If there is nothing but indorser's signature, in a suit by indorsee, whether mediate or remote, indorser cannot show by parol an agreement that indorsement was without recourse. Hawkins *v.* Shields, 100 Miss. 739, 57 S. 4.

Parol evidence.—Unconditional promissory note not defeated by proof of an oral contemporaneous agreement that the promisee would never attempt to enforce the promise. Sasser *v.* McGovern, 11 Ga. App. 88, 74 S. E. 797.

455-21 Butler *v.* Keller, 19 Pa. Super. 472.

Note to be returned upon failure of payee to pay certain dividends. Bank *v.* Bush, 140 Ga. 594, 79 S. E. 459.

455-22 Van Fossan *v.* Gibbs, 91 Kan. 866, 139 P. 174; Anguish *v.* Blair, 160 App. Div. 52, 145 N. Y. S. 392; Driscoll *v.* Colby, 145 N. Y. S. 681; Appleby *v.* Barrett, 28 Pa. Super. 349.

Payment only out of proceeds of sale. Nottingham *v.* Ackiss, 107 Va. 63, 57 S. E. 592. *Contra.* Evans *v.* Freeman, 142 N. C. 61, 54 S. E. 847.

456-25 Hughes *v.* Crooker, 148 N. C. 318, 62 S. E. 429.

Oral agreement reduced to writing. National Bk. *v.* Shaw, 218 Pa. 612, 67 A. 875.

456-26 Bothell *v.* Fletcher, 94 Ark. 100, 125 S. W. 645; Benton *v.* Sikyta, 84 Neb. 808, 122 N. W. 61.

457-33 Vandeventer *v.* Davis, 92 Ark. 291, 122 S. W. 766; Polheimus *v.* Co., 71 N. J. L. 570, 67 A. 303.

Accommodation note.—Burden of proving is upon maker. Spencer & Co. *v.* Brown, 143 N. Y. S. 994.

In the absence of mutual mistake an apparent indorser cannot show by parol that he was not an indorser. Gate City Nat. Bk. *v.* Schmidt (Mo. App.), 151 S. W. 101.

Presumption signatures affixed in order in which they appear. Beem *v.* Farrell, 135 Ia. 670, 113 N. W. 509.

457-36 Defendant not party to instrument. Schumacher *v.* Tel. Co. (Ia.), 142 N. W. 1034.

458-37 Sutherland *v.* County, 42 Misc. 38, 85 N. Y. S. 696; Clark *v.* Talbott (W. Va.), 77 S. E. 523.

460-41 Burkhalter *v.* Perry, 127 Ga. 428, 56 S. E. 631.

Evidence of agency.—Citizens' Nat. Bk. *v.* Ariss, 68 Wash. 448, 123 P. 593.

460-42 Briel *v.* Bk., 172 Ala. 475, 55 S. 808; Western S. Co. *v.* McMillen, 71 Neb. 686, 99 N. W. 512. See Daniel *v.* Glidden, 38 Wash. 556, 80 P. 811; English, etc. Co. *v.* Co., 70 Neb. 435, 97 N. W. 612.

Note signed by person as president, with corporation seal attached, presumptively note of corporation. Reed *v.* Fleming, 209 Ill. 390, 70 N. E. 667.

Presence of corporate seal immaterial. Daniel *v.* Glidden, 38 Wash. 556, 80 P. 811.

462-43 Smith *v.* Pitts, 167 Ala. 461, 52 S. 402.

The presumption is rebuttable.—Smith *v.* Pitts, 167 Ala. 461, 52 S. 402; Jackson *v.* Wood, 108 Ala. 209, 19 S. 312.

The burden of proof is on the wife to show that a debt evidenced by the note and mortgage signed by her and her husband was that of the husband merely, and that she executed them only as surety. Mills *v.* Hudmon, 175 Ala. 448, 57 S. 739.

Witness.—That one signed merely as a witness may be shown by parol. Thompson *v.* Wilkinson, 9 Ga. App. 367, 71 S. E. 678.

462-44 Ross *v.* De Campi, 110 Ala. 327, 36 S. 1003; Brady *v.* Brady, 110 Md. 656, 73 A. 567, quot. the text.

462-45 *Comp.* Columbia F. Co. *v.* Mitchell, 24 Ky. L. R. 1844, 72 S. W. 350.

This disposition of the proceeds of the note, and the arrangement under which the money was borrowed, is competent to show the true relations of the parties. Rogers *v.* Hazel, 147 Ky. 333, 144 S. W. 49.

462-46 Presumption joint guarantors should contribute equally. McDavid *v.* McLean, 202 Ill. 354, 66 N. E. 1075.

462-47 Trammel *v.* Wks., 121 Ga. 778, 49 S. E. 739; Brady *v.* Brady, 110 Md. 656, 73 A. 567, quot. the text. *Contra.* Hart *v.* Bk., 32 Ky. L. R. 338, 105 S. W. 934; Swearingen *v.* Tyler, 132 Ky. 458, 116 S. W. 331.

Position of signatures to be considered. Shead *v.* Moore, 31 Wash. 283, 71 P. 1010.

Third person signing above payee, presumed surety. Redden *v.* Lambert, 112 La. 740, 36 S. 668.

462-49 Hayes *v.* Blaker, 138 Mo. App. 24, 119 S. W. 1004 (presumption name of partnership indorsed on paper is made with authority and for firm advantage, not conclusive).

464-56 One joint maker not bound by admissions of the other. Hayman *v.* Lambden, 97 Md. 33, 54 A. 962. *Comp.* Nicholson *v.* Snyder, 97 Md. 415, 55 A. 484.

464-57 Western G. Co. *v.* Lackman, 75 Kan. 34, 88 P. 527; Knippenberg *v.* Co., 39 Mont. 11, 101 P. 159; Western S. Co. *v.* McMillen, 71 Neb. 686, 99 N. W. 512.

Parol evidence inadmissible to show indorser to be maker. Long *v.* Givin (Ala.), 66 S. 88; Hopkins *v.* Comm. Bk., 64 Fla. 310, 60 S. 183.

Ambiguity may be explained. Dunbar B. Co. *v.* Martin, 53 Misc. 312, 103 N. Y. S. 91.

465-58 Weagant *v.* Camden, 37 Okla. 508, 132 P. 487. *Contra,* where payee had knowledge. Phelps *v.* Weber, 84 N. J. L. 630, 87 A. 469.

466-59 Daugherty *v.* Wiles (Tex. Civ.), 156 S. W. 1089.

Inadmissible in the absence of suggestion in the note. Richards *v.* Warnekros, 14 Ariz. 488, 131 P. 154.

467-61 Rosnagle *v.* Armstrong, 17 Ida. 246, 105 P. 216; Lipsett *v.* Hassard, 158 Mich. 509, 122 N. W. 1091; Parker *v.* Mayes, 85 S. C. 419, 67 S. E. 539; Toon *v.* McCaw, 74 Wash. 335, 133 P. 469.

Parol evidence inadmissible to limit liability prima facie joint and several to mere several liability. City Deposit Bk. *v.* Green, 130 Ia. 384, 106 N. W. 942. Such evidence of custom inadmissible to show parties prima facie indorsers signed as makers. Harnett *v.*

Holdredge, 73 Neb. 770, 103 N. W. 277.

467-62 Campbell *v.* Hughes, 155 Ala. 591, 47 S. 45; Vandeventer *v.* Davis, 92 Ark. 604, 123 S. W. 766; Trammell *v.* Wks., 121 Ga. 778, 49 S. E. 739; Baggs *v.* Funkerburke, 11 Ga. App. 173, 74 S. E. 937; Hardy *v.* Boyer, 7 Ga. App. 472, 67 S. E. 205; Smith *v.* First Nat. Bk., 5 Ga. App. 139, 62 S. E. 826 (to show doing of act by holder of paper prejudicial to surety's rights); Gillett *v.* Nat. Bk. (Ind. App.), 104 N. E. 775; Candle *v.* Ford, 24 Ky. L. R. 1764, 72 S. W. 270 (knowledge of payee); Black *v.* McCarley, 31 Ky. L. R. 1198, 104 S. W. 987 (married woman as surety); Jennings *v.* Moore, 189 Mass. 197, 75 N. E. 214; Kaufman *v.* Barbour, 98 Minn. 158, 107 N. W. 1128; People's Nat. Bk. *v.* Scheplin, 73 N. J. L. 29, 62 A. 333; Hunter *v.* Harris, 63 Or. 505, 127 P. 786; Barden *v.* Hornthal, 151 N. C. 8, 65 S. E. 513; Willoughby *v.* Ball, 18 Okla. 535, 90 P. 1017; In re Taussig, 221 Pa. 62, 70 A. 291; Machan *v.* de la Trinidad, 3 Phil. Isl. 681; Windhorst *v.* Bergendahl, 21 S. D. 218, 111 N. W. 544; Clement Nat. Bk. *v.* Connelly (Vt.), 90 A. 794; Handsaker *v.* Pederson, 71 Wash. 218, 128 P. 230; Spencer *v.* Co., 53 Wash. 77, 101 P. 509 (notwithstanding it is recited all parties signing or indorsing bind themselves as principals.

Mere form of note does not determine relations of parties, parol evidence being admissible in explanation. Helvie *v.* McKain, 32 Ind. App. 507, 70 N. E. 178.

In action by creditor.—Shank *v.* Bk., 124 Ga. 508, 52 S. E. 621.

469-63 Dale *v.* Christian, 140 Ga. 790, 79 S. E. 1127; Hoyt *v.* Griggs (Ia.), 146 N. W. 745; Daugherty *v.* Wiles (Tex. Civ.), 156 S. W. 1089.

After notice.—Bishop *v.* Nat. Bk., 13 Ga. App. 38, 78 S. E. 947.

To prove maker and indorser were co-sureties.—Hunter *v.* Harris, 63 Or. 505, 127 P. 786.

"As between the signers of a note the true relation may be shown; that is, that one who appears to be principal is a surety, or vice versa, for the purpose of enforcing exoneration, subrogation, or any other equitable right as between them, which will not injuriously affect the payee who loaned his money without knowledge of the relation." Williams *v.* Lewis, 158 N. C. 571, 74 S. E. 17.

Accommodation maker.—Parol evidence admissible to show note to be accommodation paper. Spencer & Co. *v.* Brown, 143 N. Y. S. 994. See also Morgan *v.* Thompson, 72 N. J. L. 244, 62 A. 410.

Liability of indorsers.—Evidence is admissible to prove indorsers agreed upon a different order than that in which their indorsements occur. Goldman *v.* Goldberger, 208 Fed. 877 (C. C. A.).

470-64 Note signed by partners individually may be shown to be a firm note. In re Stoddard L. Co., 169 Fed. 190; Mock *v.* Stoddard, 177 Fed. 611, 101 C. C. A. 237; Young *v.* Stevenson, 73 Ark. 480, 84 S. W. 623.

Not admissible to prove renunciation by holder, as to one party, under negotiable instruments law. Baldwin *v.* Daly, 41 Wash. 416, 83 P. 724.

Signature of one apparently joint principal or surety may be shown to have been made as witness. Barco *v.* Taylor, 5 Ga. App. 372, 63 S. E. 224.

472-69 Indorser cannot be shown to have been maker or principal under allegation he was indorser only. Roessle *v.* Lancaster, 130 App. Div. 1, 114 N. Y. S. 387.

472-72 Luster *v.* Robinson, 76 Ark. 253, 88 S. W. 896; Kitchen *v.* Holmes, 42 Or. 252, 70 P. 830.

473-73 No presumption arises from fact check does not name payee it is in circulation without authority. P. *v.* Gorham, 9 Cal. App. 341, 99 P. 391.

473-74 Payee holding legal title in trust. Jones *v.* Day, 40 Tex. Civ. 158, 88 S. W. 424.

473-75 Johnson *v.* Bk., 134 Ia. 731, 112 N. W. 165.

474 Indorsers.—Parol evidence may be introduced to show their respective obligations as between themselves. Shea *v.* Vahey, 215 Mass. 80, 102 N. E. 119.

474-76 Parol evidence admissible to show indorsement made as trustee. Graham *v.* Troth, 69 Kan. 861, 77 P. 92.

475-84 McQuillan *v.* Eckerson (Mich.), 144 N. W. 510.

Delivery before maturity presumed. Exchange Bk. *v.* Veirs, 3 Cal. App. 71, 84 P. 455.

475-85 Gillespie *v.* Hester, 160 Ala. 441, 49 S. 580; Peevey *v.* Tapley, 148 Ala. 320, 42 S. 561; Ruth *v.* Krone, 10 Cal. App. 770, 103 P. 960; Baum *v.* Palmer, 165 Ind. 513, 76 N. E. 108;

Fudge *v.* Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; Digan *v.* Mandel, 167 Ind. 586, 79 N. E. 899; Damman *v.* Vollenweider, 126 Ia. 327, 101 N. W. 1130; Cox *v.* Cox, 25 Ky. L. R. 1934, 79 S. W. 220; Bass *v.* Wellesley, 192 Mass. 526, 78 N. E. 543; Harris *v.* Tinder, 109 Mo. App. 563, 83 S. W. 94; Ohio Nat. Bk. *v.* Gill, 85 Neb. 718, 124 N. W. 152 (notwithstanding evidence to show material alteration); Sears *v.* Daly, 43 Or. 346, 73 P. 5; Stoddard *v.* Lyon, 18 S. D. 207, 99 N. W. 1116; Bruce *v.* Wanzer, 18 S. D. 155, 99 N. W. 1102; Ritchie C. Bk. *v.* Bee, 62 W. Va. 457, 59 S. E. 181.

Burden to prove decedent's signature. Black *v.* Miller (Ia.), 138 N. W. 535.

Plea of non est factum does not shift burden to defendant. Ableman *v.* Haehnel (Ind. App.), 103 N. E. 869.

Execution must be proved under plea of non est factum. Memphis C. Co. *v.* Patton (Tex. Civ.), 106 S. W. 697. Effect of verified plea of non est factum. Home Nat. Bk. *v.* Hill, 165 Ind. 226, 74 N. E. 1086; Godman *v.* Henby, 37 Ind. App. 1, 76 N. E. 423; McCormick *v.* Higgins, 37 Ind. App. 107, 76 N. E. 775.

No presumption note regularly executed. Sears *v.* Daly, 43 Or. 346, 73 P. 5, except where no verified denial is made. Milwaukee T. Co. *v.* Van Valkenburgh, 132 Wis. 638, 112 N. W. 1083.

Instruments set up in answer. Sparks *v.* Co., 19 Okla. 55, 91 P. 839.

Plaintiff must show agency or ratification. Sears *v.* Daly, 43 Or. 346, 73 P. 5.

Question for jury.—Settles *v.* Moore, 149 Mo. App. 724, 129 S. W. 455.

476-86 Winfrey *v.* Ragan, 136 Mo. App. 250, 117 S. W. 83; Gandy *v.* Bissell, 72 Neb. 356, 100 N. W. 803; Madden *v.* Gaston, 137 App. Div. 294, 121 N. Y. S. 951; Moak *v.* Stevens, 45 Misc. 147, 91 N. Y. S. 903; Poess *v.* Bk., 43 Misc. 45, 86 N. Y. S. 857. *Comp.* Godman *v.* Henby, 37 Ind. App. 1, 76 N. E. 423.

Delivery presumed when not in possession of maker. Woltzen *v.* Wieman, 168 Ill. App. 220.

Conclusive presumption.—Massachusetts Nat. Bk. *v.* Snow, 187 Mass. 159, 72 N. E. 959.

Burden on plaintiff to prove notes were delivered to third person to be delivered to plaintiff upon a contingency. Jones *v.* Jones, 101 Me. 447, 64 A. 815.

Burden of proving nondelivery is on defendant. Lachenmaier *v.* Hanson, 196 Fed. 773, 116 C. C. A. 397.

477-89 Abuse of authority to fill blanks must be shown by maker; plaintiff must show they were filled within reasonable time. Madden *v.* Gaston, 137 App. Div. 294, 121 N. Y. S. 951.

Payee must show defendant indorsed note. Reedy E. Co. *v.* Silberstein, 114 N. Y. S. 785.

477-90 Taylor *v.* Taylor, 138 Mich. 658, 101 N. W. 832.

Declarations of maker denying execution, admissible. Pahukula *v.* Parke, 6 Haw. 210.

Admission signature over which note written is genuine does not admit note was executed. Mack *v.* Cole, 130 Mich. 84, 89 N. W. 564.

Possession by plaintiff is evidence of execution of note under some statutes. Smith & N. P. Co. *v.* Lydick, 110 Minn. 82, 124 N. W. 637.

477-91 Dillard *v.* Holtzendorf, 140 Ga. 17, 78 S. E. 414.

Circumstances surrounding alleged execution. Gandy *v.* Bissell, 72 Neb. 356, 100 N. W. 803.

Financial condition of parties at execution of note, where genuineness is involved. Schubert *v.* Schubert, 168 Ill. App. 419.

Comparison of signature to note with that upon will of deceased maker. Schubert *v.* Schubert, 168 Ill. App. 419.

Testimony of subscribing witness. Groff *v.* Groff, 209 Pa. 603, 59 A. 65. He need not be produced. Mississippi L. Co. *v.* Kelly, 19 S. D. 577, 104 N. W. 265.

Entries in account book must be contemporaneous. Wells *v.* Hobson, 91 Mo. App. 379.

Production of note signed by mark proves nothing. Clark *v.* Clark, 28 Ky. L. R. 1069, 91 S. W. 284.

477-92 Ayrhart *v.* Wilhelmy, 135 Ia. 290, 112 N. W 782.

478-94 Ratification of signature. Harmon *v.* Leberman, 39 Tex. Civ. 251, 87 S. W. 203.

478-96 Gasquet *v.* Pechin, 143 Cal. 515, 77 P. 481; Hunter *v.* Bk., 172 Ind. 62, 87 N. E. 734; Scheffer *v.* Fleischer, 158 Mich. 270, 122 N. W. 543; Ohio Nat. Bk. *v.* Gill, 85 Neb. 718, 124 N. W. 152; Faulkner *v.* Rocket, 33 R. I. 152,

80 A. 380. *Contra* if in hands of innocent holder for value, as where maker deprived of paper by theft. Worsham *r.* S., 56 Tex. Cr. 253, 120 S. W. 439.

Possession by payee supports finding of non-delivery. Stouffer *r.* Curtis, 198 Mass. 500, 85 N. E. 180.

179-99 Circumstances connected with transaction, whether preceding or accompanying delivery, may be shown. Hunter *r.* Bk., 172 Ind. 62, 87 N. E. 734.

179-1 Beach *r.* Nevins, 162 Fed. 129, 89 C. C. A. 129; Paulson *r.* Boyd, 137 Wis. 241, 118 N. W. 811.

Also to show non-delivery.—Norman *r.* McCarthy, 56 Colo. 290, 138 P. 28.

May be shown by circumstances.—Citizens' State Bk. *r.* Garceau (N. D.), 134 N. W. 882.

179-2 International Bk. *r.* Enderle, 133 Mo. App. 222, 113 S. W. 262 (date of discount and indorsement evidence of time note accepted).

179-3 *Contra,* Stone *r.* Goldberg, 6 Ala. App. 249, 60 S. 744 (as between the parties); Norman *r.* McCarthy (Colo.), 138 P. 28; Pidcock *r.* Crouch, 7 Ga. App. 299, 66 S. E. 971.

Delivery shown by proof of payee's acceptance and direction to agent to put note in former's safety deposit box, to which latter had key. Irwin *r.* Deming, 142 Ia. 299, 120 N. W. 645.

179-4 Santa Rosa Bk. *r.* Paxton, 149 Cal. 195, 86 P. 193.

Note not admissible without proof of authority of agent to sign it. Drechen *r.* Bk. (Tex.), 99 S. W. 850. *Contra* in absence of affidavit. Dexter *r.* Powell, 14 Pa. Super. 162.

180-5 Gates *r.* Co., 146 Ala. 692, 40 S. 509; Noble *r.* Gilliam, 136 Ala. 618, 33 S. 861; Tyson *r.* Bray, 117 Ga. 689, 47 S. E. 74; Bick *r.* Yates, 137 Mo. App. 268, 117 S. W. 670; Chestnut *r.* Chestnut, 104 Va. 539, 52 S. E. 318, 2 L. R. A. (N. S.) 879.

Effect of such statute.—Stewart *r.* Gleason, 23 Pa. Super. 325. It does not apply to action by indorsee against maker. Gunnar *r.* Sowers, 31 Colo. 164, 71 P. 1103.

Plea of non est factum sufficient to require proof of execution of lost note. Martin *r.* Co., 151 Ala. 289, 44 S. 112. If there is no plea question of execution of note should not be submitted. Walker *r.* Tomlinson, 44 Tex. Civ. 446, 98 S. W. 990; Ellis *r.* Co. (Tex. Civ.), 95 S. W. 689. A special plea setting up material alteration admits execution. Brown *r.* Johnson, 135 Ala. 608, 33 S. 683.

Affidavit of one of several joint and several makers requires proof of execution. First Nat. Bk. *r.* Shaw, 149 Mich. 362, 112 N. W. 904.

Rule applies in justice's courts whether or not defendant appears. O'Donnell *r.* Wade, 151 Mich. 103, 114 N. W. 871.

Under statute requiring defendant who intends to deny execution of note to file notice of such intent, evidence parties who were sued as co-makers did not sign as such is admissible without such notice. Lyndon Sav. Bk. *r.* Co., 75 Vt. 224, 54 A. 191.

Seal of corporation need not be affixed. Sheffield *r.* Bk., 2 Ga. App. 221, 58 S. E. 386.

Signature of neither maker nor indorser need be proved. Hibernia Bk. Co. *r.* Smith, 89 Miss. 298, 42 S. 345.

180-6 Under plea of non est factum defendant can prove alteration (Fudge *r.* Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895), and testimony of maker as to fact of execution is admissible (Mizell *r.* Farmers' Bk. [Ala.], 61 S. 272), as is evidence as to value of services for which note claimed to have been given. Dillard *r.* Holtzendorf, 140 Ga. 17, 78 S. E. 414.

Adoption of signature placed on note by another. Harris *r.* Tinder, 109 Mo. App. 563, 83 S. W. 94.

180-8 Patton *r.* Bk., 124 Ga. 965, 53 S. E. 664.

181-16 Presumption conclusive only when party receiving money in no way contributed to the fraud or mistake. Ford *r.* Bk., 74 S. C. 180, 54 S. E. 204.

Burden is on plaintiff to show acceptance, where it is denied. Carrara P. Co. *r.* Bk., 9 O. C. C. (N. S.) 150.

182-18 Ragsdale *r.* Gresham, 141 Ala. 308, 37 S. 367.

185-32 "Excepted" may be explained. Cortelyou *r.* Mahen, 22 Neb. 697, 36 N. W. 159, 3 Am. St. 284.

185-33 Payee's knowledge of fact draft was for his accommodation and drawer's liability under it may be shown by parol. Preas *r.* Vollintine, 53 Wash. 137, 101 P. 706.

As against one not beneficial owner of a bill maker may prove part payment if he has pleaded it. Haggard *r.* Bothwell (Tex. Civ.), 113 S. W. 965.

185-36 Pensacola St. Bk. *r.* Melton, 210 Fed. 57; Ruth *r.* Krone, 10 Cal.

App. 770, 103 P. 960; Keating *v.* Morrissey, 6 Cal. App. 163, 91 P. 677; Moore *v.* Gould, 151 Cal. 723, 91 P. 616; Pyle *v.* Gallagher, 6 Penne. (Del.) 407, 75 A. 373; Ellison *v.* Simmons, 6 Penne. (Del.) 200, 65 A. 591; Towles *v.* Tanner, 21 App. Cas. (D. C.) 530; Perry S. Bk. *v.* Elledge, 109 Ill. App. 179; Woodworth *v.* Veitch, 29 Ind. App. 589, 64 N. E. 932; Harris *v.* Pate, 7 Ind. Ty. 493, 104 S. W. 812; Zimbelman *v.* Finnegan, 141 Ia. 358, 118 N. W. 312; Bronston *v.* Lakes, 135 Ky. 173, 121 S. W. 1021; Power *v.* Hambrick, 25 Ky L. R. 30, 74 S. W. 660; Bear Creek L. Co. *v.* Bk., 120 Md. 566, 87 A. 1084; McQuillan *v.* Eckerson (Mich.), 144 N. W. 510; Holmes *v.* Farris, 97 Mo. App. 305, 71 S. W. 116; First Nat. Bk. *v.* Stallo, 145 N. Y. S. 747; Colborn *v.* Arbecam, 54 Misc. 623, 104 N. Y. S. 986; Moak *v.* Stevens, 45 Misc. 147, 91 N. Y. S. 903; Danner *v.* Hess, 19 Pa. Super. 182.

See Williams *v.* Hasshagen (Cal.), 137 P. 9; Harney *v.* McCann's Est., 175 Ill. App. 250.

Note under seal imports consideration both as to makers, indorsers, or sureties. Rogers *v.* Rogers, 6 Penne. (Del.) 267, 66 A. 374; Smith *v.* Hightower, 3 Ga. App. 197, 59 S. E. 593; In re Sunderland, 29 Pa. C. C. 267.

Due bill implies consideration. Doty *v.* Dickey, 29 Ky. L. R. 900, 96 S. W. 544; Locher *v.* Kuechenmiester, 120 Mo. App. 701, 98 S. W. 92.

Non-negotiable note does not import consideration. Joseph *v.* Catron, 13 N. M. 202, 81 P. 439, 1 L. R. A. (N. S.) 1120; Owens *v.* Blackburn, 146 N. Y. S. 966; Pfaff's Est., 31 Pa. C. C. 462.

Giving evidence by holder does not destroy presumption. In re Pinkerton, 49 Misc. 363, 99 N. Y. S. 492.

Burden on plaintiff to show consideration. Best *v.* Bk., 37 Colo. 149, 85 P. 1124.

When presumption not cogent.—Carman *v.* Carrico, 25 Ky. L. R. 2143, 80 S. W. 216.

If a valid consideration is admitted, it is not error to exclude evidence proving the consideration. Sweetser *v.* Jordan, 211 Mass. 393, 97 N. E. 768.

487-37 Bing *v.* Bk., 5 Ga. App. 578, 63 S. E. 652; MacFarlane *v.* Lowell, 9 Haw. 438; Dawson *v.* Wombles, 123 Mo. App. 340, 100 S. W. 547; Kramer *v.* Kramer, 90 App. Div. 176, 86 N. Y. S. 129; Gilpin *v.* Savage, 60 Misc. 605, 112 N. Y. S. 802.

The presumption is overthrown by proof of a confidential relation and the procurement of the note as a part and parcel of a transaction highly advantageous to the plaintiff. Parker *v.* Parker's Est. (Mo. App.), 164 S. W. 648.

Negotiable in form presumed to be based on sufficient consideration in absence of recital of "value received." Taylor *v.* Taylor, 138 Mich. 658, 101 N. W. 832.

Recital of invalid consideration.—Hickok *v.* Bunting, 92 App. Div. 167, 86 N. Y. S. 1059.

487-38 DeLeon *v.* Walters, 163 Ala. 499, 50 S. 934; Gates *v.* Co., 146 Ala. 692, 40 S. 509; Brown *v.* Johnson, 135 Ala. 608, 33 S. 683; Vaughan *v.* Bass (Ala. App.), 64 S. 543; Yellow Jacket G. & S. Min. Co. *v.* Holbrook (Cal. App.), 142 P. 128; Estes *v.* Ballard, 22 Cal. App. 344, 134 P. 361; Broughton *v.* Co., 13 Ga. App. 153, 78 S. E. 1024; De Lay *v.* Gault (Ga.), 81 S. E. 195; Copeland *v.* McClelland, 12 Ga. App. 785, 78 S. E. 479; Cooke Co. *v.* Pisano, 174 Ill. App. 609; Clement *v.* Bladworth, 166 Ill. App. 68; Holmes *v.* Horn, 120 Ill. App. 359; Brokaw *v.* McElroy (Ia.), 143 N. W. 1087; Culbertson *v.* Salinger (Ia.), 117 N. W. 6; Luke *v.* Koenen, 120 Ia. 103, 94 N. W. 278; Bronston *v.* Lakes, 135 Ky. 173, 121 S. W. 1021; Cox *v.* Cox, 25 Ky. L. R. 1934, 79 S. W. 220; Eckels Ice Mfg. Co. *v.* Econ. Co., 119 Md. 107, 86 A. 38; Farnsworth *v.* Fraser, 173 Mich. 296, 100 N. W. 400; No. Pac. R. Co. *v.* Holmes, 88 Minn. 389, 93 N. W. 606; Brown *v.* Roberts, 90 Minn. 314, 96 N. W. 793; Johnson *v.* Grayson, 230 Mo. 380, 130 S. W. 673; Glascock *v.* Glascock, 217 Mo. 362, 117 S. W. 67; Eitel *v.* Farr (Mo. App.), 165 S. W. 1191; Merchants' Nat. Bk. *v.* Brisch, 140 Mo. App. 246, 124 S. W. 76; Holmes *v.* Farris, 97 Mo. App. 305, 71 S. W. 116; Ford *v.* Drake, 46 Mont. 314, 127 P. 1019; Chapman *v.* Snyder, 1 Neb. (Unof.) 230, 95 N. W. 346; Emerson *v.* Sheffer, 113 App. Div. 19, 98 N. Y. S. 1057; N. Y. C. Co. *v.* Leonard, 48 Misc. 500, 96 N. Y. S. 187; Harris *v.* Buchanan, 100 App. Div. 403, 91 N. Y. S. 481; Atlantic T. Co. *v.* Co., 76 N. Y. S. 647; Columbia Conservatory of Music *v.* Dickenson (N. C.), 73 S. E. 990; Schneider *v.* Bechtold, 3 Phila.

(Pa.) 50; Gutta Percha & R. Co. *v.* Cleburne, 102 Tex. 36, 112 S. W. 1047 (*disap.* cases in intermediate courts); Rushing *v.* Nat. Bk. (Tex. Civ.), 162 S. W. 460; Lattimore *v.* Puckett (Tex. Civ.), 161 S. W. 351; Cleburne *v.* Co. (Tex. Civ.), 127 S. W. 1072; Masterson *v.* Heitzmann, 38 Tex. Civ. 476, 87 S. W. 227; Nicholson *v.* Neary (Wash.), 137 P. 402; Penn *v.* Vollintine, 53 Wash. 127, 101 P. 706; Pelton *v.* Co., 132 Wis. 219, 112 N. W. 29.

Comp. Huntington *v.* Shute, 180 Mass. 374, 62 N. E. 380, 91 Am. St. 309.

Burden on acceptor.—Ragsdale *v.* Gresham, 141 Ala. 308, 37 S. 367.

Breach of warranty as failure of consideration. Elmore *v.* Booth, 83 Ark. 47, 102 S. W. 393.

Action against decedent's estate. Kieseweiter *v.* Kress, 24 Ky. L. R. 1239, 70 S. W. 1005.

Preponderance of evidence necessary. Chicago, etc. Co. *v.* Ward, 113 Ill. App. 327.

Defendant must show extent to which consideration failed. Gutta Percha & R. Co. *v.* Cleburne, 102 Tex. 36, 112 S. W. 1047.

488-39 Tinker *v.* Co., 25 Okla. 160, 105 P. 323.

"Since the adoption of our negotiable instrument law, when defendant has made a prima facie showing that the note was without consideration, then the burden is on plaintiff to prove that he was an innocent holder for value; that is, that he had no knowledge of the want of consideration for the note just the same as where a prima facie showing that the note was procured by fraud has been made." Bird Tree State Bk. *v.* Dowler, 163 Mo. App. 65, 145 S. W. 843, *rel.* St. 1909, §§10,022, 10,023, and 10,024; Johnson Co. Sav. Bk. *v.* Mills, 145 Mo. App. 205, 127 S. W. 423; Jobes *v.* Wilson, 140 Mo. App. 251, 124 S. W. 548; Merchants' Nat. Bk. *v.* Brinch, 140 Mo. App. 246, 124 S. W. 76.

Violation of law.—Alabama Nat. Bk. *v.* Parker, 146 Ala. 518, 40 S. 987.

Usury.—Ferguson *v.* Bias, 47 Misc. 618, 94 N. Y. S. 149.

Satisfaction of gambling debt.—Pritchett *v.* Sheridan, 29 Ind. App. 81, 63 N. E. 865.

Illegality of part of consideration. Pritchett *v.* Sheridan, 29 Ind. App. 81, 63 N. E. 865.

Clear proof.—Yowell *v.* Walker, 118 La. 28, 42 S. 635.

488-41 Tinker *v.* Merc. Co., 231 U. S. 681, 34 Sup. Ct. 252; Harbison *v.* Hammons (Ark.), 167 S. W. 849; First Nat. Bk. *v.* Trognitz, 14 Cal. App. 176, 111 P. 402; Star Mills *v.* Bailey, 140 Ky. 191, 130 S. W. 1077; Seager *v.* Drayton (Mass.), 105 N. E. 461; Lombard *v.* Bryne, 194 Mass. 236, 80 N. E. 489; Cawthorpe *v.* Clark, 173 Mich. 267, 138 N. W. 1075; Van Arsdale *v.* Young, 21 Okla. 151, 95 P. 778; First Nat Bk. *v.* Paff, 240 Pa. 513, 87 A. 841, Hudson *v.* Moon (Utah), 130 P. 774.

Denial in answer casts burden on plaintiff. Ginn *v.* Dolan, 81 O. St. 121, 90 N. E. 141, *dist.* Dalrymple *v.* Wyker, 60 O. St. 108, 53 N. E. 713.

490-42 Creditor holding confidential relation has burden of proving consideration. In re Dutton, 205 Pa. 244, 54 A. 903.

490-47 Alexander *v.* Munroe, 54 Or. 500, 101 P. 903, 103 P. 514; Ireland *v.* Scharpenberg, 54 Wash. 558, 103 P. 801 (detached part of contract).

490-48 See Mizell *v.* Bank (Ala.), 61 S. 272.

Any competent evidence.—Clarke *v.* Co., 13 Ont. L. R. (Can.) 102.

Size of payee's bank account irrelevant. Coon *v.* Miller, 151 App. Div. 631, 136 N. Y. S. 226.

Surrounding circumstances.—Knee *v.* McDowell, 25 Pa. Super. 641.

Rules of board of trade admissible to prove illegality. McAyeal *v.* Gullett, 202 Ill. 214, 66 N. E. 1048.

Record of judgment declaring corporation illegal is admissible to show lack of consideration for a note given in payment for its stock. Todd *v.* Ferguson, 161 Mo. App. 624, 144 S. W. 158.

491-50 McKenney *v.* Ellsworth, 165 Cal. 326, 132 P. 75; Ward *v.* Thompson, 13 Ga. App. 152, 78 S. E. 1012; Herring *v.* Bk., 13 Ga. App. 492, 79 S. E. 359; Nunez Gin. & W. Co. *v.* Moore, 10 Ga. App. 350, 73 S. E. 432; Holmes *v.* Horn, 120 Ill. App. 359; Kessler *v.* Clayes, 147 Mo. App. 88, 125 S. W. 799; First Nat. Bk. *v.* Burney, 91 Neb. 269, 136 N. W. 37; Iowa Nat. Bk. *v.* Sherman, 23 S. D. 8, 119 N. W. 1010; McPeters *v.* English, 141 N. C. 491, 54 S. E. 417; Davis *v.* Evans, 142 N. C. 464, 55 S. E. 344; Jarvis *v.* Matson, 52 Tex. Civ. 170, 113 S. W. 326.

491-51 Birmingham T. & S. Co. *v.* Curry, 160 Ala. 370, 49 S. 319; Fidelity

T. C. Co. *v.* Ruby (Ariz.), 141 P. 117; Stanton *v.* Weldy, 19 Cal. App. 374, 126 P. 175; Bradley *v.* Bush, 11 Cal. App. 287, 104 P. 845; Pyle *v.* Gallagher, 6 Penne. (Del.) 407, 75 A. 373; Strickland *v.* Supp. Co. (Ga. App.), 82 S. E. 161; Watson *v.* Whitehead, 12 Ga. App. 660, 78 S. E. 50; Lacey *v.* Hutchinson, 5 Ga. App. 865, 64 S. E. 105 (though under seal); Clarke *v.* Newton, 235 Ill. 530, 85 N. E. 747 (without specially pleading it under common counts); Harper *v.* Davis, 115 Md. 349, 80 A. 1012; Cawthorpe *v.* Clark, 173 Mich. 267, 138 N. W. 1075; Kragnes *v.* Kragnes (Minn.), 145 N. W. 785; National C. Bk. *v.* Bowen, 109 Minn. 473, 124 N. W. 241; Marr *v.* Zeidler (Mo.), 129 S. W. 469; Great Northern M. Co. *v.* Bonewur, 128 App. Div. 831, 113 N. Y. S. 60; German Exch. Bk. *v.* Schnitzer, 72 Misc. 362, 130 N. Y. S. 223, *rev.* 71 Misc. 261, 130 N. Y. S. 113; Broadway T. Co. *v.* Fry, 40 Misc. 680, 83 N. Y. S. 103; Van Arsdale *v.* Young, 21 Okla. 151, 95 P. 778; First Nat. Bk. *v.* Powell (Tex. Civ.), 149 S. W. 1096; Preas *v.* Vollintine, 53 Wash. 137, 101 P. 706; Bradshaw *v.* Farnsworth, 65 W. Va. 28, 63 S. E. 755.

See Herrman *v.* Combs, 119 Md. 41, 85 A. 1044.

To show want or failure or illegality of consideration. Little *v.* Nat. Bk., 105 Ark. 281, 152 S. W. 281.

Contradiction of writing. — Burns *v.* Sparks, 26 Ky. L. R. 688, 82 S. W. 425.

Want of consideration between indorser and indorsee. Peabody *v.* Munson, 211 Ill. 324, 71 N. E. 1006.

493-54 Patton *v.* Bk., 124 Ga. 965, 53 S. E. 664.

493-55 First Nat. Bk. *v.* Powell (Tex. Civ.), 149 S. W. 1096.

Value of stock.—Richolson *v.* Ferguson (Kan.), 139 P. 1175.

493-56 Stringfellow *v.* Ivie, 73 Ala. 209; Pryor *v.* Music House, 134 Ga. 288, 67 S. E. 654; Nunez, etc. Co. *v.* Moore, 12 Ga. App. 73, 76 S. E. 758; Franklin State Bk. *v.* Gettle (Neb.), 146 N. W. 1017; Davis *v.* Sterns, 85 Neb. 121, 122 N. W. 672; Russell *v.* Tillman, 89 S. C. 256, 71 S. E. 836; Cent. Bk. & Tr. Co. *v.* Ford (Tex. Civ.), 152 S. W. 700; McCourt *v.* Peppard, 126 Wis. 326, 105 N. W. 809.

Want of consideration.—People's Nat. Bk. of Schepflin, 73 N. J. L. 29, 62 A. 333.

494-57 Dial *v.* McKay, 150 Ala. 118, 43 S. 218; Little *v.* Nat. Bk., 105 Ark. 281, 152 S. W. 281; Watson *v.* Whitehead, 12 Ga. App. 660, 78 S. E. 50; Aultman T. Co. *v.* Knoll, 71 Kan. 109, 79 P. 1074; German Am., etc. Co. *v.* McCulloch, 28 Ky. L. R. 133, 89 S. W. 5; Hoyle *v.* Shirley, 94 Miss. 466, 49 S. 177; Holmes *v.* Farris, 97 Mo. App. 305, 71 S. W. 116; National P. Bk. *v.* Saitta, 55 Misc. 93, 106 N. Y. S. 328.

494-58 Oral contract made when note executed, and which formed part of consideration, may be proved. Owensboro W. Co. *v.* Wilson, 79 Kan. 633, 101 P. 4.

494-60 Sebring *v.* Hazard, 128 Mich. 330, 87 N. W. 257; Currey *v.* Harden, 109 Mo. App. 678, 83 S. W. 770; Shepherd *v.* Padgitt, 91 Mo. App. 173; Iowa Nat. Bk. *v.* Sherman, 23 S. D. 8, 119 N. W. 1010. *Contra*, Pidcock *v.* Crouch, 7 Ga. App. 299, 66 S. E. 971 (if partial failure of consideration is relied on defendant must show its extent); Gutta Percha & R. Co. *v.* Cleburne, 102 Tex. 36, 112 S. W. 1047. *Comp.* Hathorn *v.* Wheelwright, 99 Me. 351, 59 A. 517.

495-63 Bronston *v.* Lakes, 135 Ky. 173, 121 S. W. 1021; Ditto *v.* Slaughter, 28 Ky. L. R. 1164, 92 S. W. 2.

Bill alleging gift not sustained by proof of consideration. Sellers *v.* Sellers (Ala.), 39 S. 990.

495-67 Woods *v.* Davis, 153 Ky. 99, 154 S. W. 905.

Cancellation by mistake.—McCormick *v.* Shea, 50 Misc. 592, 99 N. Y. S. 467.

Mistake in paying before due.—Collins *v.* Kelsey (Tex. Civ.), 97 S. W. 122.

495-68 Russell *v.* Scofield, 134 Wis. 21, 113 N. W. 1094.

496-69 Tribble *v.* Crestline Land Co., 167 Ala. 398, 52 S. 600; Harvey *v.* Squire (Mass.), 105 N. E. 355; Lewiston, etc. Co. *v.* Shackford, 213 Mass. 432, 100 N. E. 828; Minneapolis Brew. Co. *v.* Grathen, 111 Minn. 265, 126 N. W. 827; Champion F. & F. Co. *v.* Heskett, 125 Mo. App. 516, 102 S. W. 1050; Steven *v.* Henderson, 78 Neb. 173, 110 N. W. 646; Vaughan *v.* Exum, 161 N. C. 492, 77 S. E. 679; Garlitz *v.* Nat. Bk. (Tex. Civ.), 152 S. W. 1151; Pierce *v.* Stolhand, 141 Wis. 286, 124 N. W. 259.

Any affirmative defense.—Bk. *v.* Schlegel, 66 Kan. 509, 72 P. 210; Sears *v.* Daly, 43 Or. 346, 73 P. 5; Clark *v.* Eltinge, 34 Wash. 323, 75 P. 866.

Forgery.—Wilmington S. Bk. *v.* Waste, 76 Vt. 331, 57 A. 241; Towles *v.* Tanner, 21 App. D. C. 530.

Mental incompetency.—Rogers *v.* Rogers, 6 Penne. (Del.) 267, 66 A. 374; Ireland *v.* White, 102 Me. 233, 66 A. 477.

496-70 Bullard *v.* Smith, 28 Mont. 387, 72 P. 761.

Evidence held not sufficient to show that check was tainted in its inception with illegality or fraud, or obtained by duress. Southern Sand, etc. Co. *v.* Bank, 101 Ark. 266, 142 S. W. 178.

497-71 Merritt *v.* Dewey, 218 Ill. 599, 75 N. E. 1066 (material alteration); Fudge *v.* Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895 (subsequent alteration); Emerson *v.* Opp, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24 (alteration with consent of maker); Wing *v.* Martel, 95 Me. 535, 50 A. 705 (illegality); Allerton *v.* Grundy, 67 N. J. L. 55, 50 A. 352 (statutory defense).

497-72 Clear and satisfactory evidence required. Russell *v.* Seofield, 134 Wis. 21, 113 N. W. 1094.

497-73 Crabtree *v.* Sisk, 30 Ky. L. R. 572, 99 S. W. 268.

497-74 Surrounding circumstances as evidence of forgery. Gregory *v.* Gregory, 129 Ill. App. 96. They may be regarded as equivalent to another witness. Adams *v.* Ashman, 203 Pa. 536, 53 A. 375.

498-76 Thurman *v.* Ins. Co., 102 Miss. 77, 58 S. 777; Burns *v.* Goddard, 72 S. C. 355, 51 S. E. 915; Clark Co. *v.* Rice, 127 Wis. 451, 106 N. W. 231. See Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295; Freed *v.* Zuckerman, 145 N. Y. S. 977; First Nat. Bk. *v.* Chapman (Tex. Civ.), 161 S. W. 900.

Similar fraud on other persons, admissible. Yakima Val. Bk. *v.* McAllister, 37 Wash. 566, 79 P. 1119, 107 Am. St. 823, 1 L. R. A. 1075.

False representations. — Campbell *v.* Park, 128 Ia. 181, 101 N. W. 861.

Fraud alleged must be connected with note. Hoag *v.* Nanstad, 139 Wis. 455, 121 N. W. 125.

499-77 McNamara *v.* Douglas, 78 Conn. 219, 61 A. 368; Ditto *v.* Slaughter, 28 Ky. L. R. 1164, 92 S. W. 2; Mailloux *v.* Lambert (R. I.), 86 A. 886.

Mental capacity may be inquired into to determine effect of threats. Nebraska B. Co. *v.* Klee, 70 Neb. 383, 97 N. W. 476.

498-78 Maxfield *v.* Jones, 106 Ark. 346, 153 S. W. 584.

500-80 Brown *v.* Rape, 136 Ga. 584, 71 S. E. 802; Johnston *v.* Loar, 145 Ill. App. 443; White *v.* Smith, 79 Kan. 96, 98 P. 766; Deming Inv. Co. *v.* Wallace, 73 Kan. 291, 85 P. 139; Hiram Blow Stave Co.'s Trustee *v.* Paducah Co., 158 Ky. 833, 166 S. W. 615; Sebring *v.* Hazzard, 128 Mich. 330, 87 N. W. 257; Alexander *v.* Vidootsky, 49 Misc. 471, 97 N. Y. S. 992; Johnson County S. Bk. *v.* Chase, 151 N. C. 108, 65 S. E. 745; Faux *v.* Fitler, 223 Pa. 568, 72 A. 891 (breach of contemporaneous parol contract); Gandy *v.* Weckerby, 220 Pa. 285, 69 A. 858, 123 Am. St. 691; First Nat. Bk. *v.* Powell (Tex. Civ.), 149 S. W. 1096; Karner *v.* Ross, 43 Tex. Civ. 542, 95 S. W. 46. See Bank *v.* Bush, 140 Ga. 594, 79 S. E. 459; Shenandoah Bk. *v.* Gravette, 4 Neb. (Unof.) 591, 95 N. W. 691.

As against bona fide holder.—Lewiston, etc. Co. *v.* Shackford, 213 Mass. 432, 100 N. E. 828.

Indorsement obtained by fraud. Nethercutt *v.* Hopkins, 38 Wash. 577, 80 P. 798.

501-86 Counterclaim for fraud not sustained by evidence of breach of warranty. Halliwell Co. *v.* Stewart, 103 Mo. App. 182, 77 S. W. 124.

501-89 Vette *v.* Evans, 111 Mo. App. 588, 86 S. W. 504. *Contra.* Broyles *v.* Absher, 107 Mo. App. 168, 80 S. W. 703.

501-92 Wolfort *v.* Hochbaum, 89 Ark. 612, 117 S. W. 525; Tisdale *v.* Mallett, 73 Ark. 431, 84 S. W. 481; Blinn Co. *v.* McArthur, 150 Cal. 610, 89 P. 136; Downing *v.* Donegan, 1 Cal. App. 710, 82 P. 1111; Romines *v.* McFarland, 103 Ill. App. 269; Carver *v.* Forry, 158 Ind. 76, 62 N. E. 697; Hill *v.* Waight, 140 Ia. 584, 118 N. W. 877; Boyd *v.* Bk., 24 Ky. L. R. 756, 69 S. W. 961; Ewing *v.* Ewing, 26 Ky. L. R. 580, 82 S. W. 292; Taylor *v.* Taylor, 138 Mich. 658, 101 N. W. 832; Winfrey *v.* Matthews, 171 Mo. App. 713, 161 S. W. 583; Long *v.* Long, 167 Mo. App. 79, 150 S. W. 1135; McCauley *v.* Darrow, 36 Mont. 13, 91 P. 1059; Lynch *v.* Lyons, 131 App. Div. 120, 115 N. Y. S. 227; Royster G. Co. *v.* Marks, 135 N. C. 59, 47 S. E. 127; Satterlund *v.* Beal, 12 N. D. 122, 95 N. W. 518; Murphy *v.* Panter, 62 Or. 522, 125 P. 292;

Olson *v.* Day, 23 S. D. 150, 130 N. W. 883; cit. the text; Stone *v.* Pettus, 47 Tex. Civ. 14, 103 S. W. 413; Dodrill *v.* Gregory, 60 W. Va. 118, 53 S. E 922.

Contra. Ruth *v.* Krone, 10 Cal. App. 770, 103 P. 960.

Marking note paid raises no presumption as to payment. Comm. Bk. *v.* Varnum (Mo. App.), 162 S. W. 1080.

To prove authority of person paid. Dibble *v.* Law (Ga.), 80 S. E. 999.

Payment to other than holder. Edwards *v.* Savannah Trust Co., 13 Ga. App. 234, 79 S. E. 35.

Defendant introduced check given by plaintiff throwing burden on latter to prove payment thereof. Simon *v.* Krimko, 123 N. Y. S. 697.

Application of payment to note. Eastham *v.* Patty, 37 Tex. Civ. 336, 83 S. W. 885.

Presumption note unpaid at maturity remains so.—Dresser *v.* Co., 108 N. Y. S. 577.

Loss of note does not change rule. Walston *v.* Davis, 146 Ala. 510, 40 S. 1017.

Payment to, and authority of, agent. U. S. W. Co. *v.* Cooney, 214 Ill. 520, 73 N. E. 803.

Payment subsequent to date when due must be established by preponderance of probabilities. McKeen *v.* Cook, 73 N. H. 410, 62 A. 729.

Need not be proved beyond reasonable doubt. Walston *v.* Davis, 146 Ala. 510, 40 S. 1017.

Verified denial of payment and allegation defendant was indorser casts upon plaintiff burden of showing non-payment. Oexner *v.* Loehr, 133 Mo. App. 211, 113 S. W. 727.

502-93 Continental G. Co. *v.* Benton, 104 Ark. 367, 149 S. W. 528; Bray *v.* Bray, 128 Ia. 234, 103 N. W. 477; Ellis *v.* Blackerby, 25 Ky. L. R. 1557, 78 S. W. 181; Brady *v.* Brady, 110 Md. 656, 73 A. 567; Page Woven W. F. Co. *v.* Pool, 133 Mich. 323, 94 N. W. 1053; Gilpin *v.* Savage, 112 N. Y. S. 802; Engle *v.* Betz, 214 Pa. 185, 63 A. 457; Smith *v.* Cooley (Tex. Civ.), 164 S. W. 1050; Gray *v.* Tribue (Tex. Civ.), 118 S. W. 808. *Contra* if not indorsed unless it is shown to have been in payee's possession. Pool *v.* Anderson, 150 N. C. 624, 64 S. E. 593.

The burden of overcoming the presumption and making explanation is upon the one who surrendered the note. Continental Gin Co. *v.* Benton, 104 Ark. 367, 149 S. W. 528, cit. many earlier cases.

Notes admissible though not marked paid. Chouteau L. Co. *v.* Chrisman, 172 Mo. 610, 72 S. W. 1062.

Possession by indorser presumptive evidence he has performed his contract. Hill *v.* Buchanan, 71 N. J. L. 301, 60 A. 952. This does not change burden of proof. Dodrill *v.* Gregory, 60 W. Va. 118, 53 S. E. 922.

504-94 Sarraille *v.* Calmon, 142 Cal. 651, 76 P. 497; Aetna Ind. Co. *v.* Co., 11 Cal. App. 165, 104 P. 470; Bush *v.* Brandecker, 123 Mo. App. 470, 100 S. W. 48; Goff *v.* Byers, 70 Neb. 1, 96 N. W. 1037; Simon *v.* Krimko, 123 N. Y. S. 697; Hutton *v.* Pederson (Tex. Civ.), 153 S. W. 176.

Purchase money notes, though not recorded, in possession of payee at time of his death, and uncanceled, are admissible as having a tendency, if unexplained, to show that they were at that time living obligations. Shaw & Shaw *v.* Cleveland, 5 Ala. App. 333, 59 S. 534.

Possession by payee's legatee. Sturgis *v.* Baker, 39 Or. 541, 65 P. 810.

Possession by indorsee.—Murto *v.* Lemon, 19 Colo. App. 314, 75 P. 160.

504-95 Presumption of payment after lapse of time, rebuttable. Ayres *v.* Ayres, 69 N. J. Eq. 343, 60 A. 422. Illinois statute fixes limit at ten years. U. S., etc. Co. *v.* Cooney, 214 Ill. 520, 73 N. E. 803.

505-97 Custard *v.* Hodges, 155 Mich. 361, 119 N. W. 583.

Indorsement. — Iberia C. Co. *v.* Christen, 112 La. 451, 36 S. 491. Indorsement, showing overpayment. Gibbs *v.* Bk., 123 Ia. 736, 99 N. W. 703.

No presumption that indorsement of partial payment was made at the time it bears date, so as to remove the bar of the statute of limitations. Berryman *v.* Becker, 173 Mo. App. 346, 158 S. W. 899. See also Fry *v.* Smith, 160 Mo. App. 361, 142 S. W. 739.

507-98 Meredith *v.* Pemberton, 170 Mo. App. 100, 156 S. W. 70; Harrar *v.* Croney, 13 Pa. C. C. 193.

Presumption taking note of third person as payment, is rebuttable. Bryant *v.* Grady, 98 Me. 389, 57 A. 92; Paddock & F. Co. *v.* Simmons, 186 Mass. 152, 71 N. E. 298; In re Van Haagen, 8 Pa. C. C. 84.

Receiving non-negotiable note, not pre-

sumptive evidence of payment. Wade *v.* Curtis, 96 Me. 309, 52 A. 762.

508-99 Mogrel *v.* Primm, 6 Cal. App. 264, 91 P. 758; State Bk. *v.* Fel. Co., 125 Minn. 341, 146 N. W. 912. See Sarraille *v.* Calson, 142 Cal. 651, 76 P. 497, Hildebrandt *v.* Pallot, 46 Misc. 615, 92 N. Y. S. 804.

Novation.—Held *v.* Co., 97 App. Div. 301, 89 N. Y. S. 954.

Burden of proving note of third person received in payment is on debtor. Willow River L. Co. *v.* Co., 102 Wis. 636, 78 N. W. 762.

509-1 Mechanics' Nat. Bk. *v.* Kiekkopf, 22 Pa. Super. 128.

Burden of proving acceptance as payment is on debtor. Philadelphia *v.* Neill, 211 Pa. 353, 60 A. 1033.

510-2 Lynch *v.* Lyons, 131 App. Div. 120, 115 N. Y. S. 227; Baugher *v.* S., 1 Pa. C. C. 184.

Words implying a loan. Bush *v.* Brandecker, 123 Mo. App. 470, 100 S. W. 48.

510-3 Herron Co. *v.* Mawby, 5 Cal. App. 39, 89 P. 872. See Inter State Bk. *v.* Ringo, 72 Kan. 116, 83 P. 119; Goodall *v.* Norton, 88 Minn. 1, 92 N. W. 445.

Certified check as payment.—St. Regis P. Co. *v.* Co., 94 N. Y. S. 946.

Presumption is check is not payment. Citizens' Bk. *v.* Kretschmar, 91 Miss. 608, 44 S. 930; Meyer *v.* Doherty, 133 Wis. 398, 113 N. W. 671, 13 L. R. A. (N. S.) 247.

Endorsement "paid on check drawn on bank and payable to same bank" is prima facie evidence of receipt by bank of amount. Patterson *v.* Bk., 73 Neb. 384, 102 N. W. 765.

511-4 Keyser *v.* Hinkle, 127 Mo. App. 62, 105 S. W. 98. See Miners' Bk. *v.* Rogers, 123 Mo. App. 569, 100 S. W. 731; Omaha *v.* Clark, 66 Neb. 33, 92 N. W. 146. *Contra*, Steger *v.* Jackson, 31 Ky. L. R. 434, 102 S. W. 329.

Burden on person alleging receipt as satisfaction. Stevens *v.* Taylor (Tex. Civ.), 102 S. W. 791.

511-5 Question of intention.—First Nat. Bk. *v.* Bridley, 112 App. Div. 398, 98 N. Y. S. 445; Fuller B. Co. *v.* Waldron, 112 App. Div. 814, 99 N. Y. S. 567.

Novation.—Lauer *v.* Yetzer, 3 Pa. Super. 461.

Receipt and acceptance of renewal note, payment of original. Citizens', etc. Bk. *v.* Platt, 135 Mich. 267, 97 N. W. 694.

Burden upon defendant. Fuller B. Co. *v.* Waldron, 114 App. Div. 365, 99 N. Y. S. 920.

512-6 Authority implied from facts and circumstances. Dawson *v.* Wombles, 111 Mo. App. 532, 86 S. W. 271. But authority to collect interest does not support inference of right to collect principal. Higby *v.* Dennis, 40 Tex. Civ. 133, 88 S. W. 400.

513-8 Exch. Nat. Bk. *v.* Steele (Ark.), 158 S. W. 969; Thompson *v.* Buehler, 1 Neb. (Unof.) 590, 95 N. W. 854; Higby *v.* Dennis, 40 Tex. Civ. 133, 88 S. W. 400.

Authority to receive tender.—Stevens *v.* Taylor (Tex. Civ.), 102 S. W. 791.

513-9 Conclusions stated by party in conversation not evidence of contract. Red Line Mut. T. Co. *v.* Pharris, 82 Neb. 371, 117 N. W. 995.

514-12 Conner *v.* Martin, 46 Ind. App. 141, 92 N. E. 3.

Burden of proving settlement is on party alleging it. Bray *v.* Bray, 128 Ia. 234, 103 N. W. 477.

514-19 Gregory *v.* Jones, 101 Mo. App. 270, 73 S. W. 899.

Books of account of plaintiff's testator not admissible to prove payments on note to avoid statute of limitations. Small *v.* Rose, 97 Me. 286, 54 A. 726.

515-20 Identification of note as connected with account. Lyngar *v.* Shafer, 125 Mo. App. 398, 102 S. W. 630.

Proof of payment to show limitations have not run. Fowles *v.* Joslyn, 135 Mich. 333, 97 N. W. 790.

515-21 Connection between note and check alleged to have been accepted in part payment must be shown. Brown *v.* Carson, 132 Mo. App. 371, 111 S. W. 1181.

515-24 Stone *v.* Pettus, 47 Tex. Civ. 11, 103 S. W. 413.

Receipt most satisfactory evidence. Connelly *v.* Sullivan, 119 Ill. App. 469. It is subject to explanation. Dawson *v.* Wombles, 111 Mo. App. 532, 86 S. W. 271. Is admissible though not connected with transaction by direct evidence. Royster G. Co. *v.* Marks, 135 N. C. 39, 47 S. E. 127.

515-25 Bond *v.* Wilson, 131 N. C. 505, 42 S. E. 976.

515-27 Garner *v.* Garner, 70 S. C. 124, 50 S. E. 5.

Credit of payment proved by exhibiting

check. Hill *v.* Pettit, 23 Ky. L. R. 2001, 66 S. W. 188.

516-28 Barrickman *v.* Barrickman, 25 Ky. L. R. 1285, 77 S. W. 685.

516-29 Stumm *v.* Goetz, 79 Conn. 310, 64 A. 810; Conner *v.* Martin, 46 Ind. App. 141, 92 N. E. 3; Foss *v.* Smith, 79 Vt. 434, 65 A. 553.

Evidence corroborating a release. Herrman *v.* Combs, 119 Md. 41, 85 A. 1044.

Oral declarations of deceased maker showing payment, admissible to take case out of statute of limitations. Fowles *v.* Joslyn, 135 Mich. 333, 97 N. W. 790.

Possession of evidence of indebtedness and its correspondence with other papers evidencing transaction is proof of payment. Pool *v.* Anderson, 150 N. C. 624, 64 S. E. 593.

516-30 Evidence to show inability of defendant to pay, admissible. Dick *v.* Marvin, 188 N. Y. 426, 81 N. E. 162.

517-31 Declarations of maker, inadmissible. Pool *v.* Anderson, 150 N. C. 624, 64 S. E. 593.

517-33 Custard *v.* Hodges, 155 Mich 361, 119 N. W. 583; McCaffery *v.* Burkhardt, 97 Minn. 1, 105 N. W. 971; In re Gamble's Est., 91 Neb. 199, 135 N. W. 558.

517-34 Jones *v.* Taylor, 5 Ga. App. 161, 62 S. E. 992.

517-36 Parol evidence admissible to show note discharged by performance of undertaking which it was given to secure. Oakland Cem. *v.* Lakins, 126 Ia. 121, 101 N. W. 778.

Counterclaim in favor of payee not provable on issue of payment. Uvalde A. P. Co. *v.* Co., 135 App. Div. 391, 120 N. Y. S. 11.

518-37 Kennedy *v.* Gelders, 7 Ga. App. 241, 66 S. E. 620 (though payable to "executor of" a named state); Tullis *v.* McClary, 128 Ia. 493, 104 N. W. 505; Stanley *v.* Penny, 75 Kan. 179, 88 P. 875; Theard *v.* Gueringer, 115 La. 242, 38 S. 979; Marsters *v.* Co., 49 Or. 374, 90 P. 151, 12 L. R. A. (N. S.) 825. *Contra*, as to check where there is variance as to name of payee. Scarsdale P. Co. *v.* Carter, 63 Misc. 271, 116 N. Y. S. 731.

The same rule applies to a check. Havana Cent. R. Co. *v.* Trust Co., 198 N. Y. 422, 92 N. E. 12, *rev.* order, 135 App. Div. 313, 119 N. Y. S. 1035.

Prima facie case by production of note. Holmes *v.* Farris, 97 Mo. App. 305, 71 S. W. 116.

Notes not produced presumed negotiable. In re Williams, 120 Fed. 542.

Original payee in possession after several transfers. Dunlap *v.* Kelley, 105 Mo App. 1, 78 S. W. 664.

Implied warranty, where note is transferred by payee, it is genuine. Miller *v.* Stebbins, 77 Vt. 183, 59 A. 844.

Presumption note made for personal benefit of payee. McGuffin *v.* Coyle, 16 Okla. 648, 85 P. 954 (dissenting opinion, 86 P. 962), 6 L. R. A. (N. S.) 524.

Payee of lost note.—Embree *v.* Emerson, 37 Ind. App. 16, 74 N. E. 44, 1100.

Presumption not affected by blank indorsement of payee. Hughes *v.* Black (Ala.), 39 S. 984; Home Bk. *v.* Stewart, 78 Neb. 624, 110 N. W. 947.

518-38 Meyer *v.* Foster, 147 Cal. 166, 81 P. 402; Buck *v.* Co., 76 Vt. 75, 56 A. 285.

Unindorsed note payable to bearer found among effects of deceased, who was not payee, not presumed to have belonged to him. Hair *v.* Edwards, 104 Mo. App. 213, 77 S. W. 1089.

518-39 Catholic University *v.* Waggaman, 32 App. Cas. (D. C.) 307; Ramboz *v.* Stansbury, 13 Cal. App. 649, 110 P. 472; Murto *v.* Lemon, 19 Colo. App. 314, 75 P. 160; Gumaer *v.* Sowers, 31 Colo. 164, 71 P. 1103; Kavanagh *v.* Bk., 239 Ill. 404, 88 N. E. 171 (certificate of deposit); Woodward *v.* Donovan, 167 Ill. App. 503; Holmes *v.* Horn, 120 Ill. App. 359; Bennett *v.* Bk., 117 Ill App. 382; Adams *v.* Connelly, 118 Ill. App. 441; King *v.* Bellamy, 82 Kan. 301, 108 P. 117 (notwithstanding erasure of previous indorsements); Lowell *v.* Bickford, 201 Mass. 543, 88 N. E. 1; Smith & N. P. Co. *v.* Lydick, 110 Minn. 82, 124 N. W. 637; Hibernia Bk., etc. Co. *v.* Smith, 89 Miss. 298, 42 S. 345; Lipscomb *v.* Talbott, 243 Mo. 1, 147 S. W. 798; Cantrell *v.* Davidson (Mo. App.), 168 S. W. 271; Dawson *v.* Wombles, 123 Mo. App. 340, 100 S. W. 547; First Nat. Bk. *v.* Sprout, 78 Neb. 187, 110 N. W. 713; Sanford *v.* Litchenberger, 62 Neb. 501, 87 N. W. 305; Michigan Mut. L. Ins. Co. *v.* Klatt, 2 Neb. (Unof.) 872, 92 N. W. 325; Siegel *v.* Ochl, 110 N. Y. S. 216; Arons *v.* Ziegfeld, 52 Misc. 571, 102 N. Y. S. 898; Poess *v.* Bk., 43 Misc. 45, 86 N. Y. S. 857; Beaman *v.* Ward, 132 N. C. 68, 43 S. E. 545;

Bryn-olfson *v.* Osthus, 12 N. D. 12, 96 N. W. 261; Price *v.* Bk., 14 Okla. 268, 79 P. 303; Hutchings *v.* Reinhalter, 23 R. I. 518, 51 A. 129; Watford *v.* Windham, 64 S. C. 509, 42 S. E. 397; Curson *v.* Smith, 22 S. D. 561, 118 N. W. 705; Gray *v.* Altman (Tex. Civ.), 149 S. W. 760; Bynum *v.* Hobbs, 56 Tex. Civ. 557, 121 S. W. 860 (notwithstanding plaintiff's indorsement); Myrick, etc. Co. *v.* Jackson, 44 Tex. Civ. 553, 99 S. W. 145; Lodge *v.* Lewis, 32 Wash. 191, 72 P. 1009; Farmers' Nat. Bk. *v.* Howard, 71 W. Va. 57, 76 S. E. 122.

The same rule applies to negotiable bonds. Maxler *v.* Hawk, 233 Pa. 316, 82 A. 271.

Sufficient evidence of ownership to support suit. New Haven Mfg. Co. *v.* Co., 76 Conn. 126, 55 A. 604.

Presumption where note indorsed but interest coupon not. Milwaukee T. Co. *v.* Van Valkenburgh, 132 Wis. 638, 112 N. W. 1083.

Possession of drafts by bank.—National, etc. Bk. *v.* Bk., 172 N. Y. 102, 64 N. E. 799.

Check.—Cleary *v.* Co., 104 N. Y. S. 831.

Rule of court requiring verified plea, when ownership of indorsee disputed, does not change rule of evidence or increase plaintiff's burden. Hughes *v.* Black (Ala.), 39 S. 984.

Possession of note by plaintiff indorsee, who has himself indorsed, is prima facie evidence of ownership. Gumaer *v.* Jackson, 37 Colo. 39, 86 P. 887; Van Vliesingen *v.* Roth, 121 Ill. App. 600.

Payable to bearer.—Massachusetts Nat. Bk. *v.* Snow, 187 Mass. 159, 72 N. E. 959.

Possession of unindorsed note payable "to order," does not raise presumption of ownership. Baker *v.* Warner, 16 S. D. 295, 92 N. W. 393.

Valid delivery by all prior parties conclusively presumed under a statute. Burrell *v.* Tobin, 201 Mass. 1, 86 N. E. 923.

520-40 Stouffer *v.* Stoy, 46 Ind. App. 180, 91 N. E. 250; Pelletier *v.* Bk., 114 La. 174, 38 S. 132; Lynchburg M. Co. *v.* Bk., 109 Va. 659, 64 S. E. 980.

Defendant in denying the indorser's title pleaded the title would be a fraud within the bankruptcy title has not the burden of proof. Long *v.* Long, 167 Mo. App. 79, 150 S. W. 1145.

Denial of ownership in answer casts burden upon plaintiff indorsee. Payne *v.* Lieber, 3 Neb. (Unof.) 148, 91 N. W. 871; Overholt *v.* Dietz, 43 Or. 194, 72 P. 695.

520-41 Catholic University *v.* Waggaman, 32 App. Cas. (D. C.) 307; Cedar Rapids Nat. Bk. *v.* Beckham, 6 Ga. App. 571, 65 S. E. 359 (corporate seal not essential); Gillespie *v.* Bk., 20 Okla. 765, 95 P. 220; Lodge *v.* Lewis, 32 Wash. 191, 72 P. 1009; Swedish Am. Bk. *v.* Koebernick, 136 Wis. 473, 117 N. W. 1020.

Not conclusive.—Reed *v.* McCready, 170 Mich. 532, 136 N. W. 488.

Introduction of note, with indorsement, without proof of indorsement, raises presumption holder is only equitable owner. Tyson *v.* Joyner, 139 N. C. 69, 51 S. E. 803.

No presumption agent authorized to sign principal's name as accommodation indorser of his own notes. Wheeling L., etc. Co. *v.* Connor, 61 W. Va. 111, 55 S. E. 982.

521-42 Whiddon *v.* Sprague, 203 Mass. 526, 89 N. E. 917. *Contra,* if indorsement erased under circumstances discrediting payee's claim of title. Minneapolis T. M. Co. *v.* Gilruth, 109 Minn. 23, 122 N. W. 466. *Comp.* In re Church, 80 Vt. 228, 67 A. 549.

Burden of proof.—Nakagawa *v.* Okamoto, 164 Cal. 718, 130 P. 707.

Indorsement must be established. Zlotnick *v.* Greenfeld, 90 N. Y. S. 1086; Mayers *v.* McRimmon, 140 N. C. 640, 53 S. E. 447. Of itself imports no contract, and burden is upon indorsee to establish a contract. Lowry *v.* Tivy, 70 N. J. L. 457, 57 A. 267, 71 N. J. L. 681, 60 A. 1134. Need not be proved unless denied under oath. Neal *v.* Gray, 124 Ga. 510, 52 S. E. 622.

Possession of note purporting to be indorsed by payee is prima facie evidence it was so indorsed and therefore evidence of title. Huntley *v.* Hutchinson, 91 Minn. 244, 97 N. W. 971.

Burden of proving indorsement is upon claimant. Schele *v.* Wagner, 163 Ind. 20, 71 N. E. 127.

Undated indorsement presumed made at date of note. Murto *v.* Lemon, 19 Colo. App. 314, 75 P. 160.

Treasurer of corporation presumed authorized to indorse notes. Black *v.* Bk., 96 Md. 399, 54 A. 88.

521-44 If ownership denied by verified answer burden is on plaintiff, he not being payee, to prove assignment and ownership. Jones *v.* Wheeler, 23

Okla. 771, 101 P. 1112; Steinhilper *v.* Basnight, 153 N. C. 293, 69 S. E. 220.

522-15 Bruce *v.* Bank (Ala.), 64 S. 82; Citizens' Bk. *v.* Stewart, 22 Cal. App. 91, 133 P. 337; Catholic University *v.* Waggaman, 32 App. Cas. (D. C.) 307; Bryan *v.* Harr, 21 App. Cas. (D. C.) 190; Harrell *v.* Bk., 128 Ga. 504, 57 S. E. 869; Butler *v.* Bank, 13 Ga. App. 35, 78 S. E. 772; Kirby *v.* Bank, 12 Ga. App. 157, 76 S. E. 996; Citizens' Bk. *v.* Greene, 12 Ga. App. 49, 76 S. E. 795; Day *v.* Rogers, 7 Ga. App. 535, 67 S. E. 279; Parr *v.* Erickson, 115 Ga. 873, 42 S. E. 240; Keenan *v.* Blue, 240 Ill. 177, 88 N. E. 553; Newton *v.* Clarke, 235 Ill. 530, 85 N. E. 747 (though note received under common counts); Perry Bk. *v.* Elledge, 109 Ill. App. 179; Dewey *v.* Merritt, 106 Ill. App. 156; Harris *v.* Pate, 7 Ind. Ty. 493, 104 S. W. 812; Cox *v.* Cline, 139 Ia. 128, 117 N. W. 48; Ireland *v.* Shore, 91 Kan. 326, 137 P. 926; Youle *v.* Fosha, 76 Kan. 20, 90 P. 1090; Scott *v.* Co., 70 Kan. 498, 78 P. 823, 80 P. 955; Wilkins *v.* Usher, 29 Ky. L. R. 1232, 97 S. W. 37; Hilliard *v.* Taylor, 114 La. 883, 38 S. 594; First Nat. Bk. *v.* Person, 101 Minn. 30, 111 N. W. 730; Merchants' & F. Bk. *v.* Bank (Miss.), 64 S. 210; Hahn *v.* Bradley, 92 Mo. App. 399; Benedict *v.* Kress, 97 App. Div. 65, 89 N. Y. S. 607; Farmers' Bk. *v.* Riedlinger (N. D.), 146 N. W. 556; Wehrmann *v.* Beech, 7 O. C. C. (N. S.) 367; Price *v.* Bk., 14 Okla. 268, 79 P. 105; Lowry Nat. Bk. *v.* Seymour, 91 S. C. 305, 74 S. E. 648; Gibbs Mach. Co. *v.* Roper, 77 S. C. 39, 57 S. E. 667; Johnson Co. Sav. Bk. *v.* Co. (Tex. Civ.), 114 S. W. 402; Bk. *v.* Dooly, 113 Wis. 590, 89 N. W. 490; Hodge *v.* Smith, 130 Wis. 326, 110 N. W. 192.

See Carrollton Press B. Co. *v.* Davis (Tex. Civ.), 155 S. W. 1046.

Claimant producing bill of lading with indorsed draft attached. Willard Mfg. Co. *v.* Tierney, 133 N. C. 630, 65 S. E. 1026.

Presumption extends to all incidents attached, such as mortgage, or coupons for interest. Milwaukee T. Co. *v.* Van Valkenburgh, 132 Wis. 638, 112 N. W. 1083.

Presumption transfer was before maturity. Coney *v.* Mitamura, 19 Haw. 64; Cedar Rapids Nat. Bk. *v.* Bashara, 39 Okla. 482, 135 P. 1051; Daniel *v.* Spaeth (Tex. Civ.), 168 S. W. 509.

Presumption does not arise until indorsement is proved, where such indorsement is denied under oath. James *v.* Blackman, 68 Kan. 723, 75 P. 1017.

Presumption is indorsement made in regular course of business. Kerr *v.* Anderson, 16 N. D. 36, 111 N. W. 614.

Holder of note as collateral presumed to be holder for value. Black *v.* Bk., 96 Md. 399, 54 A. 88.

523-16 Washington & C. R. Co. *v.* Murray, 211 Fed. 440; First Nat. Bk. *v.* Moore, 148 Fed. 953, 78 C. C. A. 581; Bank of Morette *v.* Hale, 104 Ark. 388, 149 S. W. 845; Keathley *v.* Bkg. Co. (Ark.), 166 S. W. 953; Old Nat. Bk. *v.* Marcy, 79 Ark. 149, 95 S. W. 145; Citizens' Bk. *v.* Stewart, 22 Cal. App. 91, 133 P. 337; First Nat. Bk. *v.* Rupert, 178 Ind. 669, 100 N. E. 5; Hill *v.* Ward, 45 Ind. App. 458, 91 N. E. 38; Stotts *v.* Fairfield (Ia.), 145 N. W. 61; Callendar S. Bk. *v.* Loos, 142 Ia. 1, 120 N. W. 317; City Deposit Bk. *v.* Green, 130 Ia. 384, 106 N. W. 942; Grant *v.* Isett, 81 Kan. 246, 105 P. 1021; First Nat. Bk. *v.* McNairy, 122 Minn. 215, 142 N. W. 139; Birch Tree State Bk. *v.* Dowler, 163 Mo. App. 65, 145 S. W. 843; Johnson *v.* Machine Co., 144 Mo. App. 436, 129 S. W. 271; Reeves *v.* Letts, 143 Mo. App. 196, 128 S. W. 246; First Nat. Bk. *v.* Brown, 160 N. C. 23, 75 S. E. 1086; Evans *v.* Freeman, 142 N. C. 61, 54 S. E. 847; Price *v.* Bank, 14 Okla. 268, 79 P. 105; Stouffer *v.* Kelchner, 38 Pa. Super. 475; Johnson County S. Bk. *v.* Koch, 38 Pa. Super. 553; Daniel *v.* Spaeth (Tex. Civ.), 168 S. W. 509; Malone *v.* Bank (Tex. Civ.), 162 S. W. 369.

Comp. Merchants' Nat. Bk. *v.* Brisch, 140 Mo. App. 246, 124 S. W. 76.

But see Tischler *v.* Shurman, 49 Misc. 257, 97 N. Y. S. 360.

Contra, Stannard *v.* Mfg. Co., 93 Neb. 389, 140 N. W. 636.

Where plaintiff is put on inquiry, he must prove he made the inquiry and the burden is not on defendant to prove the contrary. Pensacola St. Bk. *v.* Melton, 210 Fed. 57.

But rule is otherwise when defense is defective title. Ireland *v.* Shore, 91 Kan. 326, 137 P. 926.

Rule as to shifting of burden of proof stated.—German Am. Nat. Bk. *v.* Lewis, 9 Ala. App. 352, 63 S. 741.

In action by purchaser of a note burden of showing plaintiff's knowledge of

a defense at time of purchase is on defendant. Bk. v. Hale (Ark.), 149 S. W. 845.

"This court has announced in numerous cases that, to defeat the rights of a bona fide holder for value of commercial paper, something more is required than proof of facts and circumstances which merely give rise to suspicion, or which may be sufficient to put a prudent person on inquiry. There must be proof of actual notice or knowledge of the defect in title, or bad faith on the part of the holder at the time he purchased the paper." Citizens' Trust & Sav. Bank v. Hackhouse, 91 S. C. 435, 74 S. E. 977.

When presumption arising from possession is rebutted the holder must show that he is the owner in good faith for value. Hawse v. Bk. (Va.), 75 S. E. 127. The same rule applies where the fraud is involved in putting the instrument into circulation. Boyce v. Bickford (Tex. Civ.), 145 S. W. 1082, *aff.* Hart v. West, 91 Tex. 184, 42 S. W. 344; 1 Dan. Neg. Inst. par. 817.

Contrary rule as to accommodation paper.—National Bk. v. Co., 117 App. Div. 370, 102 N. Y. S. 478.

Knowledge of collateral agreement. State Bk. v. Cook, 125 Ia. 111, 100 N. W. 72.

As between principal and agent, who is note broker, former must show latter took note in good faith and for value. In re Hopper-M. Co., 178 Fed. 351.

523-47 Nat. P. Bk. v. Saitta, 127 App. Div. 624, 111 N. Y. S. 927. *Comp.* Mercantile C. Co. v. Hilton, 191 Mass. 141, 77 N. E. 812.

524-48 Lockhart v. Wilson, 39 Can. Sup. 541; Mills v. Keep, 197 Fed. 369; Woodall v. Bk., 175 Ala. 576, 45 S. 194; Harbison v. Hammons (Ark.), 167 S. W. 849; Ark. Nat. Bk. v. Martin (Ark.), 167 S. W. 795; Hall v. Wells & Son (Cal. App.), 141 P. 54; Meyer v. Lovdal, 6 Cal. App. 269, 92 P. 326; Union C. Co. v. Bachman, 150 Cal. 159, 88 P. 708; Altschul v. Rogers, 22 Ida. 312, 126 P. 1048; McClay v. Towne, 178 Ill. App. 113; Fiscus v. Green, 180 Ill. App. 445; Point Tr. Co. v. Adams (Ind.), 101 N. E. 743; First Nat. Bk. v. Rupert, 178 Ind. 699, 100 N. E. 5; Ray v. Baker, 165 Ind. 74, 74 N. E. 609; Hill v. Wood, 45 Ind. App. 478, 91 N. E. 84; Farmers' & M. Bk. v. Shaffer (Ia.), 147 N. W. 551; Stotts v. Fairfield (Ia.), 145 N. W. 61; Bk. of Bushnell v. Buck (Ia.), 142 N. W. 1007; Arnd v. Aylesworth, 145 Ia. 185, 123 N. W. 1000; O'Connor v. Kleiman, 143 Ia. 435, 121 N. W. 1088 (it involves more than mere presumption arising from regular indorsement); State Bk. v. Cook, 125 Ia. 111, 100 N. W. 72; Keegan v. Rock, 128 Ia. 39, 102 N. W. 805; Tredick v. Walters, 81 Kan. 828, 106 P. 1067; Kennedy v. Gibson, 68 Kan. 612, 75 P. 1044; Abmeyer v. Bk., 76 Kan. 877, 92 P. 1109; Muir v. Edelen, 156 Ky. 212, 160 S. W. 1048; Asbury v. Taube, 151 Ky. 142, 151 S. W. 372; Campbell v. Bk., 137 Ky. 555, 126 S. W. 114; Wing v. Martel, 95 Me. 535, 50 A. 705; Berenson v. Conant, 214 Mass. 127, 101 N. E. 60; Lewiston, etc. Co. v. Shackford, 213 Mass. 432, 100 N. E. 828; Feigenspan v. McDonnell, 201 Mass. 341, 87 N. E. 624; Boles v. Harding, 201 Mass. 103, 87 N. E. 481; Savage v. Goldsmith, 181 Mass. 420, 63 N. E. 918; Stouffer v. Fletcher, 146 Mich. 341, 109 N. W. 684; Glines v. Bk., 132 Mich. 638, 94 N. W. 195; First State Bk. v. Pederson, 123 Minn. 374, 143 N. W. 980; Cochran v. Stein, 118 Minn. 323, 136 N. W. 1037; Robbins v. Co., 91 Minn. 491, 98 N. W. 331, 867; Mer. & F. Bk. v. Bank (Miss.), 64 S. 210; Hill v. Dillon (Mo. App.), 161 S. W. 881; Link v. Jackson, 164 Mo. App. 195, 147 S. W. 1114; Johnson County S. Bk. v. Mills, 143 Mo. App. 265, 127 S. W. 425; First State Bk. v. Hammond, 104 Mo. App. 403, 79 S. W. 493; Stewart v. Andes, 110 Mo. App. 243, 84 S. W. 1134; Hahn v. Bradley, 92 Mo. App. 299; Clifford Bkg. Co. v. Co., 195 Mo. 262, 94 S. W. 527; People's Tr. & S. Bk. v. Rork (Neb.), 148 N. W. 95; Ostenberg v. Kavka (Neb.), 145 N. W. 713; Central N. Bk. v. Ericson, 92 Neb. 396, 138 N. W. 563; Chapman v. Snyder, 1 Neb. (Unof.) 230, 95 N. W. 346, Lahrman v. Bauman, 76 Neb. 846, 107 N. W. 1008; Hallock v. Young, 72 N. H. 416, 57 A. 226; Louis DeJonge & Co. v. Co., 77 N. J. L. 233, 72 A. 439 (it may be shown corporate officer executed note without authority for personal purpose); Peterson v. Alton, 162 App. Div. 21, 147 N. Y. S. 280; Beck v. Maller, 141 App. Div. 243, 115 N. Y. S. 596; Bass v. Goldstein, 83 Misc. 412, 145 N. Y. S. 38; National Bk. v. Foley, 54 Misc. 126, 103 N. Y. S. 553; Orr v. Co., 45 Misc. 359, 92 N. Y. S. 521; Consolidation Nat. Bk. v. Kirkland, 99 App.

Div. 121, 91 N. Y. S. 353; German-A. Bk. *v.* Cunningham, 97 App. Div. 244, 89 N. Y. S. 836; Mitchell *v.* Baldwin, 88 App. Div. 265, 84 N. Y. S. 1043; Hall *v.* Whiton, 37 Misc. 756, 76 N. Y. S. 509; First Nat. Bk. *v.* Drug Co. (N. C.), 81 S. E. 993; Mer. & N. Bk. *v.* Branson (N. C.), 81 S. E. 410; Fidelity Tr. Co. *v.* Whitehead (N. C.), 80 S. E. 1065; Fidelity Tr. Co. *v.* Ellen, 163 N. C. 45, 79 S. E. 263; Third N. Bk. *v.* St. Louis, 163 N. C. 199, 79 S. E. 498; Am. N. Bk. *v.* Fountain, 118 N. C. 590, 32 S. E. 738; Singer Mfg. Co. *v.* Summers, 143 N. C. 102, 55 S. E. 522; Kerr *v.* Anderson, 16 N. D. 30, 111 N. W. 614; Tamlyn *v.* Peterson, 15 N. D. 488, 107 N. W. 1081; Schultheis *v.* Sellars, 223 Pa. 513, 72 A. 887; Grange Tr. Co. *v.* Brown, 49 Pa. Super. 274; Loeb *v.* Mellinger, 12 Pa. Super. 592; First Nat. Bk. *v.* Furman, 4 Pa. Super. 415; Reeper *v.* Greevy, 5 Pa. Super. 316; Cooks *v.* Co., 28 R. I. 41, 65 A. 641, 9 L. R. A. (N. S.) 193; Mee *v.* Carlson, 22 S. D. 365, 117 N. W. 1033; McGill *v.* Young, 16 S. D. 360, 92 N. W. 1066; Daniel *v.* Spaeth (Tex. Civ.), 168 S. W. 509; Ruth *v.* Cole (Tex. Civ.), 165 S. W. 530; Pope *v.* Beauchamp (Tex. Civ.), 159 S. W. 867; Boyce *v.* Bickford (Tex. Civ.), 145 S. W. 1082; Johnson Co. S. Bk. *v.* Co. (Tex. Civ.), 111 S. W. 402; Warren *v.* Smith, 35 Utah 455, 100 P. 1069; Pierson *v.* Huntington, 82 Vt. 482, 74 A. 88; Capital Sav. Bk. *v.* Bk., 77 Vt. 189, 59 A. 827; Peterson *v.* Nichols, 71 Wash. 656, 129 P. 373; City Nat. Bk. *v.* Mason, 58 Wash. 492, 108 P. 1071; Keene *v.* Behan, 40 Wash. 505, 82 P. 884.

Comp. Bradwell *v.* Pryor, 221 Ill. 602, 77 N. E. 1115.

See Bank *v.* Buck Bros. (Ia.), 142 N. W. 1004; Iowa City St. Bk. *v.* Friar (Tex. Civ.), 167 S. W. 261.

Or that he received it from a bona fide holder.—Ark. Nat. Bk. *v.* Martin (Ark.), 163 S. W. 795.

Rule does not apply to defense of failure of consideration. Sheffield *v.* Bk., 2 Ga. App. 221, 58 S. E. 386; Freitteberg *v.* Rubel, 123 Ia. 154, 98 N. W. 624; Chapman *v.* Snyder, 1 Neb. (Unof.) 230, 95 N. W. 340.

Consideration illegal.—See Tourneaux *v.* Gillis, 1 Cal. App. 346, 82 P. 627.

Partial failure of consideration as between original parties is not such defeat of title under Utah statute as relieves maker from showing indorsee's knowledge of lack of consideration. Colo B. Co. *v.* Sinclair, 34 Utah 454, 98 P. 411.

Gaming note.—Askegaard *v.* Dalen, 93 Minn. 354, 101 N. W. 503.

Note fraudulently placed in circulation. Merchant L. & T. Co. *v.* Welter, 205 Ill. 647, 68 N. E. 1082; McNight *v.* Parsons, 136 Ia. 390, 113 N. W. 878; Regester's Sons Co. *v.* Reed, 185 Mass. 226, 70 N. E. 52; Meudenhall *v.* Ulrich, 94 Minn. 100, 101 N. W. 1057; Southerland *v.* Mead, 80 App. Div. 103, 80 N. Y. S. 504.

Forgery.—Howie *v.* Lewis, 14 Pa. Super. 232.

Negotiable bonds.—McVicar R. T. Co. *v.* R. Co., 136 Fed. 678.

Check fraudulently certified.—Detroit Nat. Bk. *v.* T. Co., 145 Mich. 676, 108 N. W. 1092.

Purchaser of accepted draft.—Stouffer *v.* Fletcher, 146 Mich. 341, 109 N. W. 684.

Warehouse receipts.—National Bk. *v.* Chatfield, 118 Tenn. 481, 101 S. W. 765.

If indorser is not holder in due course burden is on him to show some person under whom he claims was such holder. Hawkins *v.* Young, 137 Ia. 281, 114 N. W. 1041.

Fraud must first be established by defendant.—First Nat. Bk. *v.* Person, 101 Minn. 30, 111 N. W. 730. Reason for rule is that proof of fraud suggests transfer made to another for use of first party. Hodge *v.* Smith, 130 Wis. 326, 110 N. W. 192.

Fraud practiced subsequent to inception of paper is within rule.—Parsons *v.* Co., 82 Conn. 333, 73 A. 785; Pierson *v.* Huntington, 82 Vt. 482, 74 A. 88.

Burden upon holder to explain his possession of instrument does not arise until a showing of fraud in procurement and circulation thereof is made. Cox *v.* Cline, 139 Ia. 128, 117 N. W. 48.

Very slight circumstances will throw the burden on plaintiff. "On proof of the loss or larceny of negotiable paper, the holder must affirmatively show that he took it in the usual course of business for value." Maxler *v.* Hawk, 233 Pa. 210, 82 A. 251.

In a suit to recover bonds, it appearing that the title of the one who "negotiated the bonds was defective, the burden of proof was upon the defendant to show that it acquired the title in due course. This includes proof that

it paid out the money agreed to be paid therefor or parted irrevocably with a valuable consideration. Hodge v. Smith, 150 Wis. 326, 137 N. W. 192.[1] Curry v. Bk., 149 Wis. 452, 136 N. W. 549.

525-50 Hankins v. Bk., 5 Ga. App. 680, 63 S. E. 848 (burden not met by showing note was in hands of payee shortly before it matured); Johnston v. Lear, 142 Ill. App. 442; Haslach v. Wolf, 72 Neb. 808, 102 N. W. 317.

525-52 Burden is on payee of certified check, in action against certifying bank, to show he is a bona fide holder and consideration for certification. First Nat. Bk. v. Co., 138 Mich. 94, 122 N. W. 647.

Defendant has burden, under negotiable instruments act, of proving want of good faith by plaintiff where custodian of notes wrongfully pledges them as substitute for other collateral held by plaintiff as security for pre-existing indebtedness of custodian. Voss v. Chamberlin, 139 Ia. 569, 117 N. W. 269.

525-53 Goetting v. Day, 87 N. Y. S. 510; Johnson County S. Bk. v. Co., 152 N. C. 142, 67 S. E. 258 (regardless of non-negotiability); Bode v. Werner, 4 O. C. C. (N. S.) 178. *Contra* in action by receiver of indorsee though allegation of ownership not denied by verified answer. Doughty v. Funk, 24 Okla. 312, 103 P. 654.

Ownership of indorsee not shown, as against drawer's denial of transfer by indorsements not authenticated. Federal D. Co. v. Beeler, 138 Mo. App. 54, 119 S. W. 981.

526-56 Date on which check charged against purchase of note not controlling as to time note bought. Irwin v. Deming, 142 Ia. 209, 120 N. W. 645.

526-58 Non-ownership of note by payee may be shown. Rhoades v. Ayscough, 137 Ia. 172, 114 N. W. 548.

Holder for collection.—Evidence showing holder acted in capacity of collecting agent admissible. Peterson v. Nichols, 71 Wash. 656, 129 P. 373.

526-60 Original note may be offered to prove by receiver of indorsee. Doughty v. Funk, 24 Okla. 312, 103 P. 654.

526-61 Lockhart v. Wilson, 30 Can. Sup. Ct. 501; Park v. Bastian, 10 Ga. App. 222, 73 S. E. 357; Iowa Nat. Bk. v. Carter, 144 Ia. 713, 123 N. W. 277; Bk. v. Parish, 143 Mo. App. 230, 127 S. W. 915; Hallock v. Woods, 77 N. H. 416, 37 A. 620; Mee v. Carlson, 72 S. D. 365, 117 N. W. 1033; Pierson v. Huntington, 82 Vt. 482, 74 A. 88 (absence of evidence of inquiry, convincing it was not made); Kipp v. Smith, 137 Wis. 234, 118 N. W. 848. See Custard v. Hodges, 156 Mich. 361, 119 N. W. 583; Nat. Bk. v. Romince, 136 Mo. App. 57, 117 S. W. 104; Jamieson v. Heim, 43 Wash. 153, 86 P. 165.

Circumstantial evidence is admissible. Citizens' Trust & Sav. Bk. v. Stackhouse, 91 S. C. 455, 74 S. E. 977, cit. earlier South Carolina cases.

Presumption from failure of plaintiff to testify. Aragon C. Co. v. Rogers, 105 Va. 51, 52 S. E. 843.

Evidence must show actual bad faith. Olnes v. Bk., 132 Mich. 638, 94 N. W. 195.

Knowledge of facts sufficient to put prudent man on inquiry not enough. First Nat. Bk. v. Moore, 148 Fed. 953, 78 C. C. A. 581.

Actual knowledge of payee's fraud may be shown by facts and circumstances. Stewart v. Andes, 110 Mo. App. 243, 84 S. W. 1134.

Any evidence tending to show bad faith, admissible. Perth Amboy Co. v. Chapman, 178 N. Y. 578, 70 N. E. 1104, 80 App. Div. 556, 81 N. Y. S. 38; McGill v. Young, 16 S. D. 360, 92 N. W. 1066; Capitol S. Bk. v. Bk., 77 Vt. 189, 59 A. 827. Opportunity of plaintiff to know facts concerning validity of the note may be shown. Johnson, etc. Bk. v. Walker, 82 Conn. 24, 72 A. 579.

Where plaintiff is admitted to be a purchaser for value without notice, evidence of fraud is inadmissible. First Nat. Bk. v. Bush, 102 Minn. 365, 113 N. W. 898.

Actual notice of specific facts must be proved. Reeves v. Letts, 143 Mo. App. 196, 128 S. W. 246. Proof must show holder bought with knowledge of such facts and circumstances as show want of honesty or existence of bad faith. Kavanagh v. Bk., 239 Ill. 404, 88 N. E. 171; First S. Bk. v. Borchers, 83 Neb. 520, 120 N. W. 142. Evidence must be clear. Johnson County S. Bk. v. Koch, 38 Pa. Super. 552.

Suspicious circumstances, to be sufficient to require investigation, must be of a substantial character and so strong and faith on part of indorsee in failing to make investigation may be reasonably inferred. Batesville Bk. v. Lehnert, 41 Ind. App. 477, 87 N. E. 990. Proof of merely suspicious circum-

stances will not affect rights of holder. Jefferson Bk. *v.* Co. (Tenn.), 123 S. W. 641. Knowledge of fraudulent conduct of payee concerning previous note plaintiff bought from him does not show bad faith, and proof of merely suspicious circumstances is not enough to defeat his right. Rice *v.* Barrington, 75 N. J. L. 806, 70 A. 169.

General reputation of seller admissible on issue of good faith of purchaser. First Nat. Bk. *v.* Chapman (Tex. Civ.), 164 S. W. 1129.

Good faith in dating undated note is essential to recovery. Bk. *v.* Day, 145 Mo. App. 410, 122 S. W. 756.

Order of proof.—It must be shown plaintiff is not a bona fide purchaser before any defense against original payee can be made. Stouffer *v.* Erwin, 81 S. C. 541, 62 S. E. 843.

526-62 Johnson County Bk. *v.* Rapp, 47 Wash. 30, 91 P. 382. *Contra* as to subsequent transactions. Bk. *v.* Tuttle, 144 Mo. App. 291, 127 S. W. 918. *Comp.* Hunt *v.* Van Burg, 75 Neb. 304, 106 N. W. 329.

Fraudulent business.—Loftin *v.* Hill, 131 N. C. 105, 42 S. E. 548.

Information obtained by purchaser in answer to inquiries may be shown. Hakes *v.* Russ, 175 Fed. 751, 99 C. C. A. 327.

Fraud practiced on maker by payee is immaterial unless holder had notice. Bk. *v.* Simmons, 96 Miss. 17, 49 S. 616.

527-64 Hogg *v.* Thurman, 90 Ark. 93, 117 S. W. 1070 (transferee competent to show sum paid); Johnson, etc. Bk. *v.* Walker, 82 Conn. 21, 72 A. 579; Detroit Nat. Bk. *v.* Co., 158 Mich. 537, 123 N. W. 28 (violation by purchaser of banking law is also relevant); Jones *v.* Wilson, 140 Mo. App. 281, 124 S. W. 548; Becker *v.* Hart, 135 App. Div. 785, 120 N. Y. S. 270.

527-65 Non-payment of interest before maturity of installments of principal may be shown. Ireland *v.* Scharpenberg, 54 Wash. 558, 103 P. 801.

527-66 **Fraud of payee** in procuring note may be shown against transferee who paid grossly inadequate consideration. Hogg *v.* Thurman (Tex. Civ.), 117 S. W. 1070.

Admission in superseded pleading, competent. Arnd *v.* Aylesworth, 147 Ia. 185, 123 N. W. 1000. See vol. 1, p. 427 et seq.

Holder's knowledge of agreement between original parties must be shown with reasonable degree of certainty. Heinbach *v.* Doubleday, 130 App. Div. 31, 114 N. Y. S. 278.

527-67 Goette *v.* Sutton, 128 Ga. 179, 57 S. E. 308.

Parol evidence inadmissible to vary contract of indorsement. Citizens' Bk. *v.* Jones, 121 Cal. 30, 53 P. 354.

527-69 Kinssel *v.* Ballou, 151 Cal. 751, 91 P. 620; Bradley *v.* Bush, 11 Cal. App. 287, 104 P. 845 (for cancellation); Torbert *v.* Montague, 38 Colo. 325, 87 P. 1145; Hopkins *v.* Merrill, 79 Conn. 626, 66 A. 171; West Yellow Pine Co. *v.* Kendrick, 9 Ga. App. 350, 71 S. E. 504; Aronson *v.* Nurenburg (Mass.), 105 N. E. 1056; Nesson *v.* Millen, 205 Mass. 515, 91 N. E. 935 (as between payee and indorser in blank before delivery); Jaster *v.* Currie, 59 Neb. 4, 94 N. W. 995; Smith *v.* Bayer, 46 Or. 143, 79 P. 197; Texas Baptist University *v.* Patton (Tex. Civ.), 145 S. W. 1063; Halbach *v.* Trester, 102 Wis. 330, 78 N. W. 759.

Parol evidence admissible "to show want or failure of consideration, or in cases of irregular indorsement (Thomas *v.* Jennings, 5 Smedes & M. 627; Polkinghorne *v.* Hendricks, 61 Miss. 306; Holmes *v.* Preston, 70 Miss. 152, 12 South. 202; Richardson *v.* Foster, 73 Miss. 12, 18 South. 573, 55 Am. St. Rep. 481; Pearl *v.* Cortright, 81 Miss. 300, 33 South. 72), or to impeach the original or present indorsement on the ground of fraud, nor to exclude the parol evidence to the effect that the indorsement was upon trust for some special purpose, as from a principal to an agent, or for collection merely, or as an escrow upon an express condition that has been complied with, and in cases of fraud, and perhaps in other instances." Hawkins *v.* Shields, 100 Miss. 739, 57 S. 4.

Parol evidence is inadmissible to alter the contract imported by the indorsement. Gate City Nat. Bk. *v.* Schmidt, 168 Mo. App. 153, 152 S. W. 101; Canadian Long Dist. Tel. Co. *v.* Seiber (Tex. Civ.), 159 S. W. 897; Abney *v.* Nat. Bk. (Tex. Civ.), 152 S. W. 731; First Nat. Bk. *v.* Powell (Tex. Civ.), 149 S. W. 1090. See Kerr *v.* Holder, 13 Ga. App. 9, 78 S. E. 682; Aronson *v.* Nurenburg (Mass.), 103 N. E. 1056.

Inadmissible to change status of one who appears to be regular indorser. Bradley *v.* Brown, 146 Ill. App. 297; Barringer *v.* Wilson, 97 Tex. 583, 80 S.

W. 594; Wing v. Reinert (Tex. Civ.), 120 S. W. 914; Riverview L. Co. v. Dame, 98 Va. 250, 35 S. E. 730.

Indorsement without recourse may be explained by parol. Carroll v. Nodine, 42 Or. 412, 69 P. 51.

But not that it was without recourse. Behrens v. Kirkland (Tex. Civ.), 143 S. W. 698. But see Security, etc., Co. v. Stuart (Tex. Civ.), 163 S. W. 396.

Special contract between indorsers may be shown by parol. Wilson v. Hendee, 74 N. J. L. 642, 66 A. 413.

527-70 Goodrich v. Wallace, 154 Ky. 706, 157 S. W. 920; Aronson v. Nurenberg (Mass.), 105 N. E. 1054; Lynch v. O'Brien (Va.), 79 S. E. 589.

Burden on indorser to show contract different from that imported by indorsement. Jensen v. Wilslef (Nev.), 132 P. 16.

Statements made between original parties at time of transaction may be proved against indorsee without knowledge of them if he was informed of defense of fraud before he purchased note. Jackson v. Jones, 94 Ark. 426, 127 S. W. 710.

Declarations of payee, made after it is shown he and his predecessor in title had knowledge of the consideration for which note given, admissible to impeach it. Boston v. Sikyta, 84 Neb. 808, 122 N. W. 61.

Interest of estate in note payable to "R., executor," may be shown by parol. Kennedy v. Gebbers, 7 Ga. App. 241, 66 S. E. 629.

Opinion of purchaser as to whether he bought in good faith and for value, inadmissible. Arnd v. Aylesworth, 145 Ia. 185, 122 N. W. 1060.

Expert testimony is competent to show it is customary for holder of paper to look to his indorser for payment rather than to proceed against maker. Johnson, etc., Bk. v. Walker, 82 Conn. 24, 72 A. 579.

528-71 Specific title alleged must be proved. Degan v. Mandel, 167 Ind. 536, 79 N. E. 499.

"It is argued that, inasmuch as the declaration alleges that Norris indorsed the note of Tuels & Shumate to the bank, and as the proof shows that he guaranteed the payment of the note, there is a real and substantial variance. As we have stated, the defendant's guaranty, the promissory note, and the guaranty of C. S. Norris to the bank were filed with the declaration. The defendant was thereby fully advised as to the cause of action, and fully protected from another recovery upon the same cause of action. Again, there is no variance as respects the guaranty sued on. That is the real cause of action; and the alleged variance is merely in a description of the nature of the act by which Norris became obligated to the bank. Under those circumstances, there was no substantial variance, and the prayer was properly refused. Cook v. Gill, 83 Md. 177, 34 Atl. 248; Borden Mining Company v. Barry, 17 Md. 419." Booth v. Bk., 116 Md. 668, 82 A. 652.

528-72 Note produced containing additional indorsements, no variance. De Clerque v. Campbell, 231 Ill. 442, 83 N. E. 224.

528-78 Presumed to have been presented during banking hours.—Archuleta v. Johnston, 53 Colo. 393, 127 P. 131.

528-79 Regular notarial certificate raises presumptions a presentment made at proper time. Columbian Bkg. Co. v. Bowen, 134 Wis. 218, 114 N. W. 451.

Presumed to be cashier's duty to attend to dishonor of note. First Nat. Bk. v. Bickel, 154 Ky. 11, 156 S. W. 856.

Demand presumed to have been on demand note when delivered. Van Vliet v. Kanter, 67 Misc. 48, 119 N. Y. S. 187.

529-84 Presumption notice mailed was received.—Wilson v. Peck, 66 Misc. 179, 121 N. Y. S. 344; Phoenix B. Co. v. Weiss, 23 Pa. Super. 519.

Presumption of due diligence in serving notice of protest, is rebuttable. Siegel v. Dolinsky, 56 Misc. 681, 107 N. Y. S. 678.

530-85 Dupont Co. v. Rooney, 63 Misc. 244, 117 N. Y. S. 220, after verified denial of non-receipt of notice.

Defendant indorser must prove presentment of demand note not made within reasonable time. German Am. Bk. v. Mills, 99 App. Div. 312, 91 N. Y. S. 142.

Burden is on defendant maker to show ability and willingness to pay at place of presentment specified—payee need not prove presentment. Florence O. Co. v. Bk., 38 Colo. 179, 88 P. 182.

530-86 Union Bank of Brooklyn v. Gobel, 123 N. Y. S. 585; Siegel v. Dolinsky, 56 Misc. 681, 107 N. Y. S.

678; Fuller B. Co. *v.* Waldron, 112 App. Div. 814, 99 N. Y. S. 561; Kutlick *v.* Glasser, 114 N. Y. S. 870; Grimes *v.* Tait (Okla.), 99 P. 810; Knight *v.* Co., 35 R. I. 383, 87 A. 165.

531-87 Presumption that prompt presentment would secure payment. Dorchester *v.* Bk. (Tex.), 163 S. W. 3.

531-88 Cassel *v.* Regierer, 111 N. Y. S. 601.

531-89 Usage allowing delay in demand. Merritt *v.* Jackson, 181 Mass. 69, 62 N. E. 987.

531-90 Nelson *v.* Kastle, 105 Mo. App. 187, 79 S. W. 730; Dehoust *v.* Lewis, 128 App. Div. 131, 112 N. Y. S. 559.

531-92 State Bk. *v.* McCabe, 135 Mich. 479, 98 N. W. 20.

532-95 Zollner *v.* Moffitt, 222 Pa. 644, 72 A. 285.

532-98 Rosenbaum *v.* Hazard, 233 Pa. 206, 82 A. 62.

532-99 Indorsers must show they were relieved from liability by failure to protest, where renewal note given and accepted. Citizens' C. & S. Bk. *v.* Platt, 135 Mich. 267, 97 N. W. 694.

532-2 Evidence sufficient to show notice by bank. Cent. Nat. Bk. *v.* Stoddard, 83 Conn. 332, 76 A. 472, under statute declaring when notice shall be deemed to have been given.

Certificate of protest not evidence of collateral facts. Nelson *v.* Kastle, 105 Mo. App. 187, 79 S. W. 730.

Testimony of notary, who has no independent recollection, based on inspection of his certificate. Nelson *v.* Grendahl, 13 N. D. 363, 100 N. W. 1093.

Injury from non-presentment—payment of another check subsequently drawn on same bank is competent to show check in question would have been paid if presented in due course. Kennedy *v.* Jones, 140 Ga. 302, 78 S. E. 1069.

532-3 See Second Nat. Bk. *v.* Smith, 118 Wis. 18, 94 N. W. 604.

Sufficiency of proof of giving notice of dishonor. Goucher *v.* Co., 116 Mo. App. 99, 91 S. W. 447.

Contemporaneous facts and circumstances, constituting a course of action, admissible upon question of waiver of presentment. Baumeister *v.* Kuntz, 73 Fla. 340, 42 S. 886.

Proof of protest, averred in declaration, need not be made unless put in issue. Bk. *v.* Wetzel, 58 W. Va. 1, 50 S. E. 886.

Judicial notice not taken of what constitutes reasonable hours on a business day. Columbian Bldg. Co. *v.* Bowen, 134 Wis. 218, 114 N. W. 434.

Admission held relevant on issue of presentation within reasonable time. Kennedy *v.* Jones, 140 Ga. 302, 78 S. E. 1069.

533-6 Certificate of protest evidence of demand. Ewen *v.* Wilbor, 208 Ill. 492, 70 N. E. 575.

Testimony of attorney inadmissible without showing contents, etc., of notices. Shaw *v.* Probasco, 139 Ga. 481, 77 S. E. 577.

534-7 Telephonic demand and refusal may be shown if maker waived right to have note exhibited. Colpan *v.* Savage, 70 Misc. 635, 112 N. Y. S. 802.

534-10 Torbert *v.* Montague, 38 Colo. 325, 87 P. 1145; Jenkinson Co. *v.* Eggers, 28 Pa. Super. 151.

535-12 Admissions of joint liability by one person in order to be of evidential value, if made after maturity, to show waiver of presentment and notice, or excuse for want thereof, must be shown to have been made with full knowledge of the discharge because of the indorsement and to have been unequivocal and unconditional. Jordan *v.* Reed, 77 N. J. L. 584, 71 A. 280.

535-16 Evidence of waiver inadmissible if not pleaded. Bayless *v.* Harris, 124 Mo. App. 234, 101 S. W. 617 (demand and notice alleged); Galbraith *v.* Shepard, 43 Wash. 698, 86 P. 1113.

Allegation of written protest not sustained by proof of oral protest. Kelley *v.* Theiss, 77 App. Div. 81, 78 N. Y. S. 1070.

535-17 Parol evidence admissible to show contract made by person signing on back of note before delivery. Elliott *v.* Moreland, 69 N. J. L. 216, 54 A. 224.

536-18 DeClerque *v.* Campbell, 231 Ill. 442, 83 N. E. 224; International Bk. *v.* Fiderlo, 123 Mo. App. 222, 113 S. W. 262; Siemans *v.* Ten Broeck, 97 Mo. App. 172, 70 S. W. 1092; Thompson *v.* Brown, 121 Mo. App. 524, 97 S. W. 242; Oexner *v.* Locke, 108 Mo. App. 412, 83 S. W. 690; Woodsville Guaranty Sav. Bk. *v.* Rogers, 86 Vt. 121, 83 A. 947.

Indorsements before delivery raise presumption parties are joint makers.

Keyser v. Warfield, 102 Md. 161, 62 A. 247.

537-19 Indorsement presumed made at place of indorser's residence. Grimes v. Tait (Okla.), 99 P. 819.

Rule that person who puts name on back of bill or note is presumably a second indorser, changed by negotiable instruments law. Haddock v. Haddock, 192 N. Y. 499, 85 N. E. 682.

537-20 First Nat. Bk. v. Rennard, 93 Ark. 270, 129 S. W. 442; Kissel v. Wentzel, 18 Colo. 296, 88 P. 1107; Hendley v. Lewis, 173 Mo. 116, 74 S. W. 971; Oleson v. Locke, 133 Mo. App. 217, 113 S. W. 727 (evidence must show note to be payee); Herrick v. Edwards, 106 Mo. App. 693, 81 S. W. 466; Haddock v. Haddock, 192 N. Y. 499, 85 N. E. 682 (under negotiable instruments law). Comp. Harnett v. Hokkridge, 72 Neb. 570, 102 N. W. 277; Lyndon S. Bk. v. Co., 77 Vt. 224, 54 A. 191.

Inadmissible to vary status of party whom law declares is indorser. Bancroft v. Kouts, 33 Fla. 340, 42 S. 868.

"Parol evidence tending to vary the liability of a blank indorser so as to make him liable as guarantor and relieve the holder of the obligation to make demand and give notice of dishonor is not admissible. It may be conceded that there are cases decided by this court in which the admissibility of such evidence has, at least by implication, been sustained, but we need not discuss them, for, if there ever was any such rule in this state, it has been abrogated by the adoption of the negotiable instruments act which has brought the law with us into conformity with that previously existing in other states and generally sustained by the weight of authority. Code Supp. 1907, [illegible]7, [illegible]3, 3[illegible]6, and note; Bancroft v. Kouts, 33 Fla. 340, 42 South. 868; Gibbs v. Guaraglia, 73 N. J. Law, 168, 67 Atl. 81; Mechanics' Bk. v. Gibbs (N. J.), 74 Atl. 708; Porter v. Moles, 151 Ia. 279, 131 N. W. 93. And see First Nat. Bk. v. Bethel, 143 Ky. 754, 137 S. W. 780.

In absence of special denial of genuineness of signature of third person to a note, signature is admitted under some statutes. Lowell v. Bickford, 201 Mass. 543, 88 N. E. 1.

Scope of parol evidence to show true relation and liability of parties whose names appear on bill or note in all respects between themselves, has been enlarged by negotiable instruments law. Haddock v. Haddock, 192 N. Y. 499, 85 N. E. 682.

Indorser may not prove representations made him by third party as coming from maker unless he shows latter's responsibility therefor. Ott v. Seward, 253 Pa. 620, 70 A. 882. Indorser cannot testify to his uncommunicated intention. Buckley Nat. Bk. v. Barry, 120 Wis. 96, 129 N. W. 275.

541-32 International H. Co. v. Gladney, 107 Ala. 548, 47 S. 733; Connor v. Hodges, 7 Ga. App. 103, 66 S. E. 340; Clarke v. Newton, 235 Ill. 530, 85 N. E. 747 (verified plea); De Cerque v. Campbell, 241 Ill. 132, 83 N. E. 224; Saftsker v. Lantz, 137 Mich. 441, 100 N. W. 681; Grimes v. Tait (Okla.), 99 P. 819; Corson v. Smith, 22 S. D. 501, 118 N. W. 705; Brousard v. Lawson (Tex. Civ.), 124 S. W. 712.

Indorsements not being part of note the introduction of the note does not carry with it the indorsements. Witt v. Segar Co., 66 Or. 144, 134 P. 316.

Proof of execution necessary under special plea. Peavey v. Tajdey, 148 Ala. 329, 42 S. 581.

Under statute it is held in absence of denial of genuineness of signature, burden is on defendant to prove non-execution. Gray v. Bennett (Fla.), 105 N. W. 377.

Statutory denial must be made by maker. People's S. Bk. v. Hoppe, 132 Mo. App. 449, 111 S. W. 1190.

541-33 Talbott v. Helge, 5 Ind. App. 575, 32 N. E. 788; Dreehen v. Bk. (Tex.), 99 S. W. 859.

Admission by payee note was made for excessive amount discredits evidentiary force of note. Hollins v. Co. (N. J. Eq.), 76 A. 1041.

Slight proof of condition at time of signing.—Wood v. Skelley, 196 Mass. 111, 81 N. E. 872.

541-36 M'Feeney v. Ellsworth, 165 Cal. 228, 132 P. 75.

542-37 Fisher v. Diehl, 94 Md. 112, 50 A. 422.

Non-negotiable note as evidence of indebtedness. Brown v. Woodward, 75 Conn. 254, 53 A. 112.

Note in an entirety and indorsements are not in evidence when it is received. Lister I. W. Co. v. Co., 137 Ala. 645, 37 S. 922.

Subsequent increase of city's debt.—A city may not prove matters occurring

subsequent to execution of note given by it to show amount of its indebtedness. Cleburne *v.* Mfg. Co. (Tex. Civ.), 127 S. W. 1072.

BLOODSTAINS

544-1 Davis *v.* S., 126 Ala. 44, 28 S. 617; Walker *v.* S., 153 Ala. 31, 45 S. 640; P. *v.* Antony, 146 Cal. 124, 79 P. 858; P. *v.* Hong Ah Duck, 61 Cal. 387; P. *v.* Olsen, 1 Cal. App. 17, 81 P. 676; Davis *v.* S., 122 Ga. 564, 50 S. E. 376; S. *v.* Rice, 7 Ida. 762, 66 P. 87; S. *v.* Brown, 168 Mo. 449, 68 S. W. 568; S. *v.* Heusack, 189 Mo. 295, 88 S. W. 21.

Existence of stains may be testified to without producing the articles. C. *v.* Pope, 103 Mass. 440. But where state has possession, it may be required to produce them before testimony can be given. Johnson *v.* S., 80 Miss. 798, 32 S. 49.

Absence of stains, although deceased bled profusely, is not important, and does not raise presumption, especially where defendant had opportunity to remove them. P. *v.* Jackson, 182 N. Y. 66, 74 N. E. 565. See Vaughn *v.* S., 130 Ala. 18, 30 S. 669.

Clothing with stains need not be identified by direct and conclusive evidence. P. *v.* Neufeld, 165 N. Y. 43, 58 N. E. 786. See S. *v.* Moore, 168 Mo. 432, 68 S. W. 378.

545-2 Walker *v.* S., 139 Ala. 56, 35 S. 1011 (on box in defendant's possession); P. *v.* Antony, 146 Cal. 124, 79 P. 858; Cole *v.* S., 48 Tex. Cr. 439, 88 S. W. 341.

547-7 Richards *v.* S., 82 Wis. 172, 51 N. W. 652.

Bloodstained clothes inadmissible where they would serve in no way to settle any issue. Melton *v.* S., 47 Tex. Cr. 451, 83 S. W. 822; Cole *v.* S., 45 Tex. Cr. 225, 75 S. W. 527; Crenshaw *v.* S., 48 Tex. Cr. 77, 85 S. W. 1147.

547-8 *Comp.* Walker *v.* S., 139 Ala. 56, 35 S. 1011. Existence of blood or stains may be testified to by any witness. S. *v.* Rice, 7 Ida. 762, 66 P. 87.

548-9 P. *v.* Neufeld, 165 N. Y. 43, 58 N. E. 786.

Presumption as to blood being human blood. M'Cabe *v.* C. (Pa.), 8 A. 45.

As evidence of identity.—See S. *v.* Alton, 105 Minn. 410, 117 N. W. 617.

548-10 McClain *v.* S. (Ala.), 62 S. 241 (bloodstains); S. *v.* Rice, 7 Ida. 762, 66 P. 87. See Key *v.* S. (Tex. Cr.), 161 S. W. 121, 130.

Evidence of result of examination by expert inadmissible, unless identity of article examined is established and it is shown it has not been tampered with. S. *v.* Hossack, 116 Ia. 194, 89 N. W. 1077; S. *v.* McAnarney, 70 Kan. 670, 79 P. 137; S. *v.* Garrington, 11 S. D. 178, 76 N. W. 326.

549-14 Bloodstains on clothes of defendant alleged to have committed rape. Roszczyniala *v.* S., 125 Wis. 414, 104 N. W. 113.

BONDS

554-1 U. S. Comp St. 1901, pp. 670, 671, now regulate this matter. U. S. *v.* Piersol, 145 Fed. 814, 76 C. C. A. 390; Laffan *v.* U. S., 122 Fed. 336, 58 C. C. A. 495.

Transcript need not contain all transactions of officer. Goff *v.* U. S., 22 App. Cas. (D. C.) 512.

557-18 Judgment against principal is inadmissible in action by sureties where it does not appear it was rendered for items chargeable against debtor during life of bond. U. S. *v.* Meade, 8 Ariz. 367, 76 P. 467.

558-24 Guilford G. Co. *v.* Co., 23 App. Cas. (D. C.) 1 (allegation of performance of conditions precedent not supported by proof of waiver); White *v.* Manning, 46 Tex. Civ. 298, 102 S. W. 1160 (misspelling word does not create variance).

559-29 Clerical errors do not create fatal variance. Hollister *v.* U. S., 145 Fed. 773, 76 C. C. A. 337.

560-36 See U. S. Fidelity Co. *v.* Fossati (Tex. Civ.), 81 S. W. 1028.

560-37 No variance where bond declared on described as bond of defendant and bond offered was joint and several bond of defendant and another. Magerstadt *v.* Rudolph, 108 Ill. App. 140.

561-39 Proof of authority of a mayor to execute a "note" does not sustain action on a bond. Gutta Percha Mfg. Co. *v.* Attalla (Ala.), 39 S. 719.

561-54 Gutta Percha Mfg. Co. *v.* Attalla (Ala.), 39 S. 719.

Where complaint is on bond proof of deed of trust is fatal variance. Union P. Co. *v.* Johnson, 150 Ala. 159, 43 S. 752.

564-55 Sharp *v.* S. (Ind. App.), 99 N. E. 1072.

564-62 Parsons *v.* Co., 82 Conn. 333, 73 A. 785; Allen *v.* Houck (Tex. Civ.), 92 S. W. 293 (liquor dealer's bond); Farr *v.* Waterman (Tex. Civ.), 95 S. W. 65 (good faith must be established by defendant); Burwell *v.* Burwell, 103 Va. 314, 49 S. E. 69 (defendant must show bond given by parent to child was obtained by fraud or undue influence). Sufficiency of sum named in appeal bond, presumed. Pitzpatrick *v.* Letten, 123 Ia. 748, 49 S. 491.

565-63 U. S. Fidelity & G. Co. *v.* Bk., 87 Ark. 348, 112 S. W. 957; Johnson *v.* Huggins, 7 Ga. App. 553, 67 S. E. 217; Leavitt *v.* Somerville, 105 Me. 517, 75 A. 74.

Proof in action on penal bond need not be beyond reasonable doubt. Cox *v.* Thompson, 37 Tex. Civ. 607, 85 S. W. 34.

565-66 Doty *v.* Braska (Ia.), 126 N. W. 1108.

566-70 Non-verified answer admits execution. Campbell *v.* Harrington, 93 Mo. App. 315. In foreclosure proceedings, though answer verified, execution and delivery of bonds is well proved by their production. McCormick *v.* Co., 239 Ill. 306, 87 N. E. 924.

566-72 Conlon *v.* Hornstra, 82 N. J. L. 355, 83 A. 182.

Authority of agent who executed certiorari bond, presumed. Bass *v.* Masters, 5 Ga. App. 288, 63 S. E. 24.

566-73 Presumption parties intended to execute such bond as law required. Chambers *v.* Cline, 60 W. Va. 588, 55 S. E. 999. On appeal, that undertaking was in due form and properly filed. La Dow *v.* Co., 11 Cal. App. 308, 104 P. 835.

567-75 Fletcher *v.* Hickman, 165 Fed. 403, 91 C. C. A. 353; Harbison *v.* Shirley, 139 Ia. 695, 117 N. W. 963.

Presumption is in favor of bonds issued by public officer charged with duty of ascertaining whether conditions precedent had been met. Green County *v.* Quinlan, 211 U. S. 582; Green County *v.* Thomas, 211 U. S. 598.

567-78 Minden C. Co. *v.* Hensley, 149 Ia. 168, 128 N. W. 1117, by agreement between parties not in bond.

567-81 Delivery of stay bond to clerk of court sufficiently shown by its production by him and docket entries. Nolan *v.* Co., 2 Cal. App. 1, 82 P. 1119.

568-82 Parsons *v.* Co., 82 Conn. 333, 73 A. 785.

568-84 As to delivery in escrow generally, see Blair *v.* Bk., 103 Va. 762, 50 S. E. 262.

569-87 Approval of bond by one officer leaves no room for presumption it was approved by another because he acted upon it. Huttig M. P. B. Co. *v.* Co., 140 Mo. App. 374, 124 S. W. 1094.

569-89 Necessity of producing minutes of court to show approval. U. S. Fidelity Co. *v.* Fossati (Tex. Civ.), 81 S. W. 1038.

569-91 Chamberlain *v.* Fernbach, 118 Ill. App. 145; Graham *v.* Middleby, 185 Mass. 349, 70 N. E. 416; Gein *v.* Little, 43 Misc. 421, 89 N. Y. S. 488; Consiline *v.* Gallagher, 31 Wash. 669, 72 P. 469.

570-94 In action on sheriff's bond recitals in judgment of main action prima facie evidence. Phillips *v.* Eggert, 133 Wis. 318, 113 N. W. 686.

570-96 Poverty or insolvency will not rebut presumption unless they show continued inability to pay. Guillon *v.* Redfield, 205 Pa. 293, 54 A. 886.

No presumption of payment until after twenty years; financial condition of parties, habit of plaintiff as to promptness in making collections and all relevant circumstances, admissible. Janvier *v.* Culbreth, 5 Penne. (Del.), 505, 62 A. 309.

570-98 Fidelity & D. Co. *v.* Robertson, 136 Ala. 379, 34 S. 933.

571-99 Burden of showing extension of time for performance is on party alleging it. U. S. *v.* Co., 82 Vt. 94, 71 A. 1106.

572-6 Conlon *v.* Hornstra, 82 N. J. L. 355, 83 A. 183.

572-7 Presidio County *v.* Co., 212 U. S. 58; S. *v.* Blease (S. C.), 79 S. E. 247.

Absence of recital in municipal bonds concerning compliance with precedent conditions does not affect presumption. Quinlan *v.* County, 157 Fed. 33, 84 C. C. A. 537.

572-8 Curtis *v.* McCune, 4 Neb. (Unof.) 483, 94 N. W. 984.

573-13 See Graham *v.* Middleby, 185 Mass. 349, 70 N. E. 416.

573-14 Washington, etc. R. Co. *v.* Co., 177 Fed. 396; McVicar R. T. Co. *v.* R. Co., 126 Fed. 678; Parsons *v.* Co., 80 Conn. 78, 66 A. 1024.

573-16 Burden is on holder whether fraud associated with inception of the

paper or occurred subsequently to prejudice of intermediate holder. Parsons *v.* Co., 82 Conn. 333, 73 A. 785, *disap.* Kinney *v.* Kruse, 28 Wis. 183.

573-18 Surmise and suspicion of alteration not enough to put purchaser on inquiry. Hibbs *v.* Brown, 112 App. Div. 214, 98 N. Y. S. 373.

574-20 Taber *v.* Boston, 190 Mass. 101, 76 N. E. 727 (bond purporting to contain entire agreement); Blair *v.* Bk., 103 Va. 762, 50 S. E. 262 (unwritten condition may be shown by parol where bond on its face incomplete); Coughran *v.* Hollister, 15 S. D. 318, 89 N. W. 647 (surrounding circumstances may be shown to make insufficient statutory bond effective as common law bond).

Terms of bond clear as to interest. First Nat. Bk. *v.* Min. Co., 50 Colo. 85, 114 P. 313.

574-21 McGuire *v.* Gerstley, 204 U. S. 489; Yazoo, etc. R. Co. *v.* Martin, 94 Miss. 700, 47 S. 667, 48 S. 739 (not to show priority); Orion K. Mills *v.* Co., 137 N. C. 565, 50 S. E. 304, 70 L. R. A. 167 (in absence of fraud, mistake or ambiguity preliminary negotiation cannot be proved); Fidelity Co. *v.* Harder, 212 Pa. 96, 61 A. 880 (evidence of parol contemporaneous agreement admissible where it was inducement to giving bond).

Parol evidence inadmissible to show condition upon which obligor signed. Bieber *v.* Gans, 24 App. Cas. (D. C.) 517; Wylie *v.* Bk., 63 S. C. 406, 41 S. E. 504.

574-22 Central L. Co. *v.* Kelter, 201 Ill. 503, 66 N. E. 543, 102 Ill. App. 333. See "Intoxicating Liquors," infra 704-79.

Admissible without proof of execution where execution not in issue. Penton *v.* Williams, 150 Ala. 153, 32 S. 211.

Bond of deceased, not impeached, is conclusive evidence of debt against administrator. Woody *v.* Schaaf, 106 Va. 799, 56 S. E. 807.

574-23 Recitals concerning performance of conditions precedent conclusive. Presidio County *v.* Co., 212 U. S. 58. *Contra* as to authority to issue municipal bonds. S. *v.* Dist., 18 N. D. 616, 120 N. W. 555.

Production of bond not excused because execution not denied. Fidelity & D. Co. *v.* Aultman, 58 Fla. 228, 50 S. 991.

575-26 Admissions of servant, principal in employe's bond, as to matters within scope of his employment, competent against surety. Guarantee Co. *v.* Ins. Co., 124 Fed. 170, 59 C. C. A. 376.

577-33 Town records admissible to show its indebtedness. Leavitt *v.* Somerville, 105 Me. 517, 75 A. 54.

578-35 See Sachs *v.* Co., 177 N. Y. 551, 69 N. E. 1130, 72 App. Div. 60, 76 N. Y. S. 325.

578-38 Opinion appeal bond given is inadmissible because a conclusion, though it was concealed, if such was the fact, bond was lost. Lacey *v.* Hendricks, 164 Ala. 289, 51 S. 157.

Though the instrument recites that it is signed and sealed, if the original in evidence shows no seal no presumption of seal can be raised. Dunlap *v.* Willett, 153 N. C. 317, 69 S. E. 222.

579-39 Wylie *v.* Bk., 63 S. C. 406, 41 S. E. 504.

Acknowledgment is prima facie proof of signing and sealing. Ramsay *v.* P., 97 Ill. App. 283.

579-42 Penton *v.* Williams, 150 Ala. 153, 32 S. 211, execution by mark without subscribing witness.

580-45 Proof of ratification. Central L. Co. *v.* Kelter, 201 Ill. 503, 66 N. E. 543, 102 Ill. App. 333.

580-46 U. S. Fidelity Co. *v.* Fossati (Tex. Civ.), 81 S. W. 1038, schedules of property signed by sureties and attached to bond admissible to prove execution by them.

Authenticated copy of liquor dealer's bond is prima facie evidence of existence and proper execution of such bond. Bulger *v.* Prenica, 93 Neb. 697, 142 N. W. 117.

580-50 Wylie *v.* Bk., 63 S. C. 406, 41 S. E. 504, delivery to third person as trustee for obligee.

581-51 Coughran *v.* Hollister, 15 S. D. 318, 89 N. W. 647 (parol evidence admissible); Tatum *v.* Tatum, 101 Va. 77, 43 S. E. 184 (surrounding circumstances admissible).

581-54 Ownership in third party may be shown to establish plaintiff's lack of good faith, though such party a corporation whose charter had been annulled and affairs wound up. Parsons *v.* Co., 82 Conn. 333, 73 A. 785.

581-56 Nagle *v.* U. S., 145 Fed. 302, 76 C. C. A. 181.

581-58 Laffan *v.* U. S., 122 Fed. 322, 58 C. C. A. 497; U. S. *v.* Pierson, 145 Fed. 814, 76 C. C. A. 390 (statement of account from books of treasury); Paducah *v.* Jones, 31 Ky. L. R. 1252,

104 S. W. 971 (sureties not estopped by confession of breach by principal).

Judgment in favor of defendant, in attachment, is conclusive attachment wrongful and of liability of obligors on bond. Anvil G. M. Co. *v.* Hoxsie, 125 Fed. 724, 59 C. C. A. 492.

Judgment against administrator is at least prima facie evidence of debt in action against his surety. American R. Co. *v.* U. S., 23 App. Cas. (D. C.) 535.

BOOKS

Census, 585-25; *Books containing pedigree of animals,* 586-30.

583-1 S. *v.* Bethune, 86 S. C. 143, 67 S. E. 466, trade catalogues.

583-4 Judicial notice may be taken on appeal of books of history and theology, although excluded by lower court. Hilton *v.* Roylance, 25 Utah 129 69 P. 660.

584-11 Cannot be read to jury to attack witness' veracity on ground he is a gypsy. York *v.* S., 57 Tex. Cr. 484, 123 S. W. 1112.

584-15 Banco De Sonora *v.* Co., 124 Ia. 576, 100 N. W. 532, 104 Am. St. 367, Bouvier's Law Dictionary admissible to prove rule of civil law.

585-18 See Scott *v.* R. Co., 43 Or. 26, 72 P. 594.

585-19 *Contra.* In re Ring, 104 Me. 544, 72 A. 548.

Williamson's History of Maine, admissible. Lazell *v.* Boardman, 103 Me. 292, 69 A. 97, slight weight on question of boundary.

History of Mormon Church, admissible. Hilton *v.* Roylance, 25 Utah 129, 69 P. 660.

585-20 Weather report admissible. Scott *v.* R. Co., 43 Or. 26, 72 P. 594.

585-24 City directory competent to prove persons were residents. P. *v.* Hoffman, 142 Mich. 531, 105 N. W. 838.

585-25 Census reports competent to prove facts of public nature, but not to prove details as to individuals and other private matters. Gregory *v.* Woodbery, 53 Fla. 566, 43 S. 564; Eubanks *v.* Alspaugh, 139 N. C. 520, 52 S. E. 207; Campbell *v.* Everhart, 139 N. C. 503, 52 S. E. 201; Gorham *v.* Settegast, 44 Tex. Civ. 274, 98 S. W. 865. See Priddy *v.* Boice, 201 Mo. 309, 99 S. W. 1055; Murray *v.* Hive, 112 Tenn. 664, 80 S. W. 827. See vol. 10, p. 740.

Population under federal census judicially noticed. Ferrell *v.* Ellis, 129 Ia. 644, 105 N. W. 993; Page *v.* McClure, 79 Vt. 83, 64 A. 451.

586-26 Publication in a newspaper is not evidence of a fact. Bergman *v.* Solomon, 143 Ky. 581, 136 S. W. 1010.

Copy of newspaper article published as interview with witness inadmissible. Southern P. Co. *v.* Cavin, 144 Fed. 348, 75 C. C. A. 350; Southern P. Co. *v.* Schuyler, 135 Fed. 1015, 68 C. C. A. 469.

Mercantile reports inadmissible to prove who compose a partnership, if on information given by firm. Marks *v.* Hardy, 25 Ky. L. R. 1909, 78 S. W. 1105.

586-27 Ray *v.* R. Co., 90 Kan. 244, 133 P. 847; Tri S. M. Co. *v.* Breisch, 145 Mich. 232, 108 N. W. 657; Houston Pack. Co. *v.* Griffith (Tex. Civ.), 144 S. W. 1139.

Circular letters sent out by commission men not proper basis for testimony as to market values. Texas & P. R. Co. *v.* Slator (Tex. Civ.), 102 S. W. 156. Such letters from mercantile association are not "prices current or commercial lists," and evidence of values within §1810, code of 1896. Kentucky Ref. Co. *v.* Connor, 145 Ala. 664, 39 S. 728.

Market reports need not be produced by witness who testifies concerning them. Texas & P. R. Co. *v.* Slator (Tex. Civ.), 102 S. W. 156.

586-28 Market reports in daily paper, regularly made and correctly kept, admissible, although editor had no personal knowledge of transactions. Moseley *v.* Johnson, 144 N. C. 274, 56 S. E. 922 (if relied on); Bullard *v.* Stewart, 46 Tex. Civ. 49, 102 S. W. 174.

"Standard price lists and market reports" shown to be in general circulation and relied on by commercial world and those engaged in trade admissible as evidence of market values of articles of trade. St. Louis, etc. R. Co. *v.* Pearce, 82 Ark. 353, 101 S. W. 760. See also vol. 13, p. 517.

586-29 *Contra,* K. & L. of A. *v.* Weber, 101 Ill. App. 488; Walsh *v.* Ins. Co., 30 Ia. 133; Mut. L. Ins. Co. *v.* Bratt, 55 Md. 200; Union P. Lodge *v.* Co., 79 Neb. 801, 113 N. W. 263.

Contra, by-laws may be proved by copy of its by-laws filed with insurance com-

missioner. Com. *v.* Merrill, 215 Mass. 204, 102 N. E. 446.

586-30 Pedigree of animal may be established by printed book of pedigree shown to be authoritative and kept by or in interest of breeders for information of public. Warrick *v.* Reinhard, 136 Ia. 27, 111 N. W. 983. *Contra* as to private catalogue of animal. Louisville, etc. R. Co. *v.* Frazee, 24 Ky. L. R. 1273, 71 S. W. 437.

587-31 Flemister *v.* Co., 140 Ga. 511, 79 S. E. 148; Weyh *v.* R. Co., 148 Ill. App. 165; Bruggeman *v.* R. Co. (Ia.), 123 N. W. 1007 (books on air brakes not competent to show distance at which trains moving at different rates of speed could be stopped); Illinois C. R. Co. *v.* Stith, 27 Ky. L. R. 596, 85 S. W. 1173 (professed tests of air brakes); Brown *v.* Newell, 132 App. Div. 548, 116 N. Y. S. 965.

Counsel cannot recount in detail statements in scientific books. Elliott *v.* Ferguson, 37 Tex. Civ. 40, 83 S. W. 56.

588-33 Rules of master car builders' association admissible to show proper construction of a car. Leas *v.* Co., 45 Tex. Civ. 162, 99 S. W. 859.

588-34 Opinion based on works of particular authors may be supported by giving their names. Scott *v.* R. Co., 43 Or. 26, 72 P. 594.

590-38 Denver City T. Co. *v.* Gawley, 23 Colo. 332, 129 P. 258 (cit. 2 ENCYCLOPÆDIA OF EVIDENCE); Brodie *v.* Lewistown, 164 Ill. App. 335; Chicago C. R. Co. *v.* Douglas, 104 Ill. App. 41; S *v.* Blackburn, 136 Ia. 743, 114 N. W. 531; S. *v.* Peterson, 110 Ia. 647, 82 N. W. 329; S. *v.* Carpenter, 124 Ia. 5, 98 N. W. 775; MacDonald *v.* R. Co., 219 Mo. 468, 118 S. W. 78, seemingly *over.* S. *v.* Soper, 148 Mo. 217, 49 S. W. 1007; Ward *v.* S. (Tex. Cr.), 159 S. W. 272; Montgomery *v.* S. (Tex. Cr.), 151 S. W. 813.

Reading from medical works inadmissible. Gorman-G. Drug Co. *v.* Watkins (Ala.), 64 S. 350.

590-39 Brodie *v.* Lewistown, 164 Ill App. 335; Traveler's Ins. Co. *v.* Davies, 152 Ky. 600, 153 S. W. 956.

Reasons reviewed.—Scott *v.* R. Co., 43 Or. 26, 72 P. 594.

Medical works not admissible to show views of their authors as to the matters in dispute. C. *v.* Jordan, 207 Mass. 259, 93 N. E. 809, cit. C. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

591-41 Birmingham R. Co. *v.* Moore, 148 Ala. 115, 42 S. 1024; Oakley *v.* S., 135 Ala. 29, 33 S. 693. See "Homicide," infra 635-56 (use of book to show preparation).

Technical medical terms may be noticed, but it is not error to receive in evidence a standard medical dictionary as aid to memory and understanding of court. S. *v.* Wilhite, 132 Ia. 226, 109 N. W. 730.

591-42 Oakley *v.* S., 135 Ala. 29, 33 S. 693.

591-46 Contents of medical books cannot be proved by witness testifying from memory. Chicago C. R. Co. *v.* Douglas, 104 Ill. App. 41.

591-48 S. *v.* Donovan, 128 Ia. 44, 102 N. W. 791.

591-49 Brown *v.* Co., 141 Mo. App. 382, 125 S. W. 236.

591-50 Etzkorn *v.* Oelwein, 142 Ia. 107, 120 N. W. 636. See McEvoy *v.* Lommel, 78 App. Div. 324, 80 N. Y. S. 71.

592-51 S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531; Harper *v.* Weikel, 28 Ky. L. R. 650, 89 S. W. 1125.

Contents of treatise cannot be put before jury by reading from it in cross-examination. S. *v.* Thompson, 127 Ia. 440, 103 N. W. 377; Foley *v.* R. Co., 157 Mich. 67, 121 N. W. 257 (expert).

592-52 Travelers' Ins. Co. *v.* Davies, 152 Ky. 600, 153 S. W. 956; MacDonald *v.* R. Co., 217 Mo. 468, 118 S. W. 78, if testimony based on book knowledge.

593-53 Denver City T. Co. *v.* Gawley (Colo.), 129 P. 258, *cit.* 2 ENCYCLOPÆDIA OF EVIDENCE 588-593.

593-54 Cronk *v.* R. Co., 123 Ia. 349, 98 N. W. 884.

593-55 S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531; Harper *v.* Weikel, 28 Ky. L. R. 650, 89 S. W. 1125.

593-56 See S. *v.* Moeller, 20 N. D. 114, 126 N. W. 568.

593-58 *Comp.* McEvoy *v.* Lommel, 78 App. Div. 324, 80 N. Y. S. 71.

BOOKS OF ACCOUNT

Party deceased, 629-8; *Comparison of entries,* 632-16; *Competent in criminal case,* 664-40; *Value of as evidence,* 687-34; *Expert testimony,* 690-44.

601-2 Exceptions. See Louisville & N. R. *v.* Daniel, 122 Ky. 276, 91 S. W. 691, 3 L. R. A. (N. S.) 1190. Shea *v.* Board, 124 Ia. 209, 99 S. 166.

601-5 Alabama I. Co. *v.* Smith, 155

Ala. 287, 46 S. 475; Miller & Graves *v.* Pratz, 179 Ill. App. 204 (member of plaintiff partnership); Graham *v.* Dillon, 144 Ia. 82, 121 N. W. 47, *dist.* Veiths *v.* Hagge, 8 Ia. 163 (at least where books have been used to refresh party's recollection as witness); Sheridan Coal Co. *v.* Hull Co., 87 Neb. 117, 127 N. W. 218; Anderson *v.* Kannow, 72 Neb. 32, 99 N. W. 824 (party may use book containing accounts with third person, kept by himself, in action against vendee of his business). See Harmon *v.* Decker, 41 Or. 587, 68 P. 11.

Books of receiver not books of a party. Smythe *v.* R. Co. (Vt.), 90 A. 901.

Requisites to authorize use, see Stark *v.* Burkitt, 103 Tex. 437, 129 S. W. 343.

Competent in Indiana when the entries are a part of the res gestae of the transaction under investigation. They are regarded as a part of the res gestae, when the items offered are original entries, made at or near the time of the transaction from reliable information derived from those in charge of the business or work on which the account is based. S. *v.* Bridge Co., 49 Ind. App. 544, 97 N. E. 803. See also Johnson *v.* Zimmerman, 42 Ind. App. 165, 84 N. E. 541.

602-6 Gill *v.* Staylor, 93 Md. 453, 49 A. 650; Zeigler *v.* Schmall, 110 N. Y. S. 906; Morgan *v.* Croasdill, 35 Pa. C. C. 465.

603-12 Based on necessity. Kossuth Co. Bk. *v.* Richardson, 132 Ia. 370, 106 N. W. 923; Proctor *v.* Proctor, 26 Ky. L. R. 348, 81 S. W. 272; Galbraith *v.* Starks, 117 Ky. 915, 79 S. W. 1191; In re Wheeler, 13 Phila. (Pa.) 370; Barnes *v.* Barnes, 106 Va. 319, 56 S. E. 172.

603-13 *Contra.* Morgan *v.* Croasdill, 35 Pa. C. C. 465. See Montgomery *v.* Pfluger, 3 Haw. 388.

603-15 Porter *v.* Bk., 155 Ia. 617, 136 N. W. 666.

604-16 Temple *v.* Magruder, 36 Colo. 390, 85 P. 832; Richardson *v.* Benes, 115 Ill. App. 532; Garlick *v.* Assn., 129 Ill. App. 402; Kossuth Co. Bk. *v.* Richardson (Ia.), 106 N. W. 923; Richardson *v.* Anderson, 109 Md. 641, 72 A. 485 (admissible without foundation if admitted to be correct); Wimmer *v.* Key, 87 Minn. 402, 92 N. W. 228; Cather *v.* Damerell, 5 Neb. (Unof.) 490, 99 N. W. 35; Goodyear Tire, etc. Co. *v.* Bacon, 91 Neb. 62, 135 N. W. 217; Donner *v.* S., 72 Neb. 263, 100 N. W. 305; McKenzie *v.* King, 14 N. M. 375; 93 P. 703; Jones *v.* DeMuth, 137 Wis. 120, 118 N. W. 542; Bazelon *v.* Lyon, 128 Wis. 337, 107 N. W. 337; Kelley *v.* Crawford, 112 Wis. 368, 88 N. W. 296; Milwaukee T. Co. *v.* Warren, 112 Wis. 505, 87 N. W. 801; Brown *v.* Warner, 116 Wis. 358, 93 N. W. 17.

Minnesota statute covers accounts between one of the parties and third person. Union, etc. Ins. Co. *v.* Prigge, 90 Minn. 370, 96 N. W. 917; Coleman *v.* Assn., 77 Minn. 31, 79 N. W. 588.

In Iowa, under Code, §4623, books of account, to be admissible in evidence against the party sought to be charged thereby, "must show a continuous dealing with persons generally or several items of charge at different times against the other party in the same book or set of books." Levi *v.* Levi, 156 Ia. 297, 136 N. W. 696.

605-17 See Baker *v.* Halleck, 128 Mich. 180, 87 N. W. 100.

606-18 Claimant incompetent to verify his book. Cather *v.* Damerell, 5 Neb. (Unof.) 490, 99 N. W. 35.

606-20 See Chapin *v.* Mitchell, 44 Fla. 225, 32 S. 875.

607-22 Keeping a clerk who has not such knowledge as would enable him to testify as to goods sold does not render books inadmissible. Van Name *v.* Barber, 115 App. Div. 593, 100 N. Y. S. 987.

607-23 Davie *v.* Roland, 3 Ala. App. 567, 57 S. 1034.

Comp. Hinkle *v.* Smith, 127 Ga. 437, 56 S. E. 464; Bush *v.* Fourcher, 3 Ga. App. 43, 59 S. E. 459.

607-24 See McKenzie *v.* King, 14 N. M. 375, 93 P. 703.

608-27 Southern R. Co. *v.* Cortner, 3 Ala. App. 400, 58 S. 84 (no excuse for absence of agent); Alabama I. Co. *v.* Smith, 155 Ala. 287, 46 S. 475; Pittsburg, etc. R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022; Trainor *v.* Assn., 204 Ill. 616, 68 N. E. 650; Garlick *v.* Assn., 129 Ill. App. 402; Richardson *v.* Benes, 115 Ill. App. 532; S. *v.* Bridge Co., 49 Ind. App. 544, 97 N. E. 803; Frick *v.* Kabaker, 116 Ia. 494, 90 N. W. 498; Wells *v.* Co. (Ky.), 114 S. W. 737. See S. *v.* Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; In re Receivership S. Co., 118 La. 242, 42 S. 789; Pettey *v.* Benoit, 193 Mass. 233, 79 N. E. 245; McKenzie *v.* King, supra;

Hurley *v.* Macey, 94 App. Div. 9, 87 N. Y. S. 924; State Bk. *v.* Brown, 96 App. Div. 441, 89 N. Y. S. 381; Jackson *v.* Moore, 39 Okla. 234, 134 P. 1114; Bouldin *v.* Co. (Tex. Civ.), 86 S. W. 795.

Clerk who made entries in books of bank need not verify them. Continental Nat. Bk. *v.* Bk., 108 Tenn. 374, 68 S. W. 497.

608-28 In re Furniture Co., 166 Fed. 516.

609-30 Jackson *v.* Moore, 39 Okla. 234, 134 P. 1114; Raski *v.* Wise, 56 Or. 72, 107 P. 984; Hardy *v.* Co., 110 Va. 910, 67 S. E. 522. See United G. Co. *v.* Dannelly, 93 S. C. 580, 77 S. E. 706, *cit.* 2 ENCYCLOPÆDIA OF EVIDENCE 607-9.

Contra, where entries made by one of the firm in action by the firm. Deland, etc. Co. *v.* Hanna, 112 Md. 528, 76 A. 850.

609-31 In a recent case in Indiana, after an exhaustive citation of authorities the court held that on the showing that entries were made by the authorized bookkeeper at the time of the transaction, from information obtained from those in charge of the work, that such bookkeeper was out of the jurisdiction, and the entries were proved to be in his handwriting, sheets of a loose-leaf ledger could be received as prima facie evidence. S. *v.* Bridge Co., 49 Ind. App. 544, 97 N. E. 803.

610-33 Davie *v.* Roland, 3 Ala. App. 567, 57 S. 1034; S. *v.* Bridge Co., 49 Ind. App. 544, 97 N. E. 803.

610-36 *Comp.* Swan *v.* Warner, 197 N. Y. 190, 90 N. E. 430.

611-37 Burton *v.* Phillips, 161 Ala. 664, 49 S. 848; Rouyer *v.* Miller, 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674; In re Bresler's Est., 155 Mich. 567, 119 N. W. 1104.

611-38 Davie *v.* Lloyd, 38 Colo. 250, 88 P. 446.

611-39 Davie *v.* Lloyd, 38 Colo. 250, 88 P. 446.

612-43 Graham *v.* Work (Ia.), 141 N. W. 428 (*cit.* 2 ENCYCLOPÆDIA OF EVIDENCE 612); Armstrong Clothing Co. *v.* Boggs, 90 Neb. 499, 133 N. W. 1122 (loose-leaf ledger). See United G. Co. *v.* Dannelly, 93 S. C. 580, 77 S. E. 706.

612-44 *Contra.* Donaldson *v.* Donaldson, 237 Ill. 318, 86 N. E. 604, 142 Ill. App. 21; U. S. *v.* Day, et al., 4 Phil. Isl. 93. *Comp.* Kelley *v.* Crawford, 112 Wis. 368, 88 N. W. 296.

Tablet of plain sheets of paper.—Lewis *v.* England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401.

Fly leaf of bible a book of account, Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625.

Stubs of check book admissible.—Tobin *v.* Portland Mills, 41 Or. 269, 68 P. 743, 1108.

613-48 Yick Wo *v.* Underhill, 5 Cal. App. 519, 90 P. 967; Bush *v.* Fourcher, 3 Ga. App. 43, 59 S. E. 459; Holden *v.* Spier, 65 Kan. 412, 70 P. 348; Lewis *v.* England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401.

Diary entries of attorney admissible. Burke *v.* Baker, 111 App. Div. 422, 97 N. Y. S. 768.

Time book of railroad construction. Jones *v.* Const. Co., 150 Ia. 194, 129 N. W. 830.

Sheets headed "cash account," and memorandum books, containing no debit or credit headings, and which refer to no particular person, and the items in which, for all that they show, may be chargeable to several persons, are not admissible. Covey *v.* Rogers, 84 Vt. 151, 78 A. 792.

613-49 Kossuth Bk. *v.* Richardson, 141 Ia. 738, 118 N. W. 906.

Ledger account inadmissible which contains no entries of payments admittedly made. Dugan *v.* Longstaff, 52 Misc. 288, 102 N. Y. S. 1120.

613-51 See Wilcox *v.* Downing (Conn.), 91 A. 262.

Sheets torn from a book inadmissiblo if no explanation made. Carroll *v.* School, 2 Phila. (Pa.) 260.

614-53 S. *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982; Hudson M. Co. *v.* Higgins (N. J.), 88 A. 1079.

615-56 Abbreviations may be explained. Kossuth Bk. *v.* Richardson, 141 Ia. 738, 118 N. W. 906.

615-57 *Contra.* Walker *v.* Skliris, 34 Utah 353, 98 P. 114.

Entries in Chinese, admissible. Yick Wo *v.* Underhill, 5 Cal. App. 519, 90 P. 967.

Dots and crosses may be used to indicate particular matters. Cather *v.* Damerell, 5 Neb. (Unof.) 490, 99 N. W. 35.

Entries consisting of hieroglyphics and signs, inadmissible. In re German, 16 Phila. (Pa.) 318; In re Kelley, 18 Pa. C. C. 117.

615-62 Place *v.* Baugher, 159 Ind. 232, 64 N. E. 852.

Entries must be made ante litam motam.—American Loco. Co., *v.* Hamblen (Mass.), 105 N. E. 371; Brooks Co. *v.* Wilson (Miss.), 105 N. E. 607. But the books are not rendered inadmissible because some of the entries were made after the suit was brought. Itasca Cedar & Tie Co. *v.* McKinley, 124 Minn. 183, 144 N. W. 768.

615-63 Thompson *v.* Cole, 6 Ala. App. 208, 60 S. 556; Donaldson *v.* Donaldson, 142 Ill. App. 21 (contemporaneously; rule applies to books of deceased); S. *v.* Bridge Co., 49 Ind. App. 544, 97 N. E. 803; Dodge *v.* Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153; Graham *v.* Work (Ia.), 141 N. W. 428; Kossuth Co. Bk. *v.* Richardson, 132 Ia. 370, 106 N. W. 923, 109 N. W. 809; Bader *v.* Schult, 118 Mo. App. 22, 94 S. W. 834; Wells *v.* Hobson, 91 Mo. App. 379; Meredith *v.* Irr. Co. (Mont.), 141 P. 643; Jackson *v.* Moore, 39 Okla. 234, 134 P. 1114; St. Louis, etc. R. Co. *v.* Zickafoose, 39 Okla. 302, 135 P. 406; Muskogee Elec. T. Co. *v.* McIntire, 37 Okla. 684, 133 P. 213; Raski *v.* Wise, 56 Or. 72, 107 P. 984; McKnight *v.* Newell, 207 Pa. 562, 57 A. 39; In re Barry, 18 Phila. (Pa.) 31; In re Groff, 14 Phila. (Pa.) 306; Kelley *v.* Crawford, 112 Wis. 368, 88 N. W. 296; Lewis *v.* England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401.

See Trainor *v.* Robyn (Ia.), 146 N. W. 450; Butchers', etc. Assn. *v.* City, 214 Mass. 254, 101 N. E. 426.

Time entries made may be proved by testimony of enterer as to custom. Mullenary *v.* Burton, 3 Cal. App. 263, 84 P. 159.

616-64 Kamm *v.* Rees, 177 Fed. 14, 100 C. C. A. 432; Murray *v.* Dickens, 149 Ala. 240, 42 S. 1031 (entries made once a week sufficient); Drumm F. C. Co. *v.* Edmisson, 17 Okla. 344, 87 P. 311 (entries made several days after delivery incompetent); Lemma *v.* Blanding, 139 Wis. 156, 120 N. W. 842 (whenever reported).

616-65 Powell *v.* C., 149 Ky. 415, 149 S. W. 889; Arnold *v.* Hussey (Me.), 88 A. 724; Brooks Co. *v.* Wilson (Mass.), 105 N. E. 607; American Loco. Co. *v.* Hamblen (Mass.), 105 N. E. 371; Lyons *v.* Corder, 253 Mo. 539, 162 S. W. 606; Meredith *v.* Irr. Co. (Mont.), 141 P. 643.

See Marks *v.* Box (Ind. App.), 103 N. E. 27; Schmidt *v.* Scanlon, 32 S. D. 608, 144 N. W. 128.

617-67 Benners *v.* Maloney, 3 Phila. (Pa.) 57.

617-69 Little *v.* Berry (Ky.), 113 S. W. 902.

618-72 Chandler *v.* Robinett, 21 Cal. App. 333, 131 P. 891; Putnam *v.* Grant, 101 Me. 240, 63 A. 816; McKnight *v.* Newell, 207 Pa. 562, 57 A. 39.

Entries must show what articles are basis of charge.—Chandler *v.* Robinett, 21 Cal. App. 333, 131 P. 891.

618-73 Ayer *v.* Sterneck, 18 Phila. (Pa.) 310.

620-81 Idol *v.* Co., 1 Cal. App. 92, 81 P. 665; Richardson *v.* Benes, 115 Ill. App. 532; Graham *v.* Work (Ia.), 141 N. W. 428; Montgomery Co. *v.* Bean, 26 Ky. L. R. 568, 82 S. W. 240; Dick *v.* Biddle, 105 Md. 208, 66 A. 21; Cameron L. Co. *v.* Somerville, 129 Mich. 552, 89 N. W. 346; Lyons *v.* Corder, 253 Mo. 539, 162 S. W. 606; Bader *v.* Schult, 118 Mo. App. 22, 94 S. W. 834; Donner *v.* S., 72 Neb. 263, 100 N. W. 305; In re Haas, 18 Phila. (Pa.) 185; Hardy *v.* C., 110 Va. 910, 67 S. E. 522; Stark *v.* Burkitt, 103 Tex. 437, 129 S. W. 343.

See Stewart Bros. *v.* Harris, 6 Ala. App. 518, 60 S. 445.

Must be book of original entry. Stone *v.* Brick Co., 13 Cal. App. 203, 109 P. 103.

621-84 Reyburn *v.* Bk. & Co., 96 C. C. A. 373, 171 Fed. 609; Donaldson *v.* Wilkerson, 170 Ala. 507, 54 S. 234 (entries first made on blotter); Norman P. S. Co. *v.* Ford, 77 Conn. 461, 59 A. 499; Pittsburg, etc. R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022; O'Heron *v.* Bridge Co., 177 Ill. App. 405; Davis Bros. *v.* R. Co., 168 Ill. App. 621; Indianapolis O. Co. *v.* Elec. Co., 52 Ind. App. 153, 100 N. E. 468; Wells *v.* Co. (Ky.), 114 S. W. 737; Affliek *v.* Stretcer, 136 Mo. App. 712, 119 S. W. 28; Corkran *v.* Taylor, 77 N. J. L. 195, 71 A. 124; Bradley *v.* McDonald, 157 App. Div. 572, 142 N. Y. S. 702; Weinberg *v.* Garren (Tex. Civ.), 155 S. W. 1013; Cascade L. Co. *v.* Co., 56 Wash. 503, 106 P. 158.

See The City of St. Joseph, 205 Fed. 284 (C. C. A.); Rieker *v.* Davis (Ia.), 139 N. W. 1110; Navarre *v.* Honea (Okla.), 139 P. 310; Taplin & Rowell *v.* Harris (Vt.), 90 A. 956.

Admissible although witness could not state which particular clerk made the

entry.—Presley Co. *v.* Ry. Co., 120 Minn. 295, 139 N. W. 609.

622-88 Kuennan *v.* Co., 159 Mich. 122, 123 N. W. 799; Afflick *v.* Streeter, 136 Mo. App. 712, 119 S. W. 28; Drumm F. Co. *v.* Bk., 107 Mo. App. 426, 81 S. W. 503; Corkran *v.* Taylor, 77 N. J. L. 195, 71 A. 124; VanName *v.* Barber, 115 App. Div. 593, 100 N. Y. S. 987 (entries taken from order book); Rogers *v.* O'Barr (Tex. Civ.), 81 S. W. 750.

First record made by person not employed by party immaterial. Itasca, etc. Co. *v.* McKinley, 124 Minn. 183, 144 N. W. 768.

623-89 Holloway *v.* Co., 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704; San Francisco T. Co. *v.* Gray, 11 Cal. App. 314, 104 P. 999; Bell T. Co. *v.* Geary, 143 Ill. App. 311; Hoogewerff *v.* Flack, 101 Md. 371, 61 A. 184 (ledger entries must be shown to be original); Clark *v.* Mulcahy, 190 Mass. 64, 76 N. E. 236; Pratt *v.* R. Co., 139 Mo. App. 502, 122 S. W. 1125; Stokes *v.* Fenner, 10 Phila. (Pa.) 14 (where accounts in day-book posted in ledger day-book admissible without producing ledger).

In Oregon, ledger containing transcript of merchant's day-book is admissible as book of original entries; it is otherwise as to entries therein made from statement of separate accounts of a party. Raski *v.* Wise, 56 Or. 72, 107 P. 984

623-90 See McGrath *v.* Stein, 148 Ala. 370, 42 S. 454; Armour P. Co. *v.* Co. (Ala.), 39 S. 680 (particular account must be specified); Harper *v.* Hammond, 13 Ga. App. 238, 79 S. E. 44; Bush *v.* Fourcher, 3 Ga. App. 43, 59 S. E. 459; S. *v.* Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; Taylor-W. Co. *v.* Atkinson, 127 Mich. 633, 87 N. W. 89; Hurley *v.* Macey, 94 App. Div. 9, 87 N. Y. S. 924; Lewis *v.* England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401 (ledger slips of original entries or explanatory of day slips, admissible).

624-91 Becker *v.* Donalson, 133 Ga. 864, 67 S. E. 92; Morgan *v.* Croasdill, 35 Pa. C. C. 465; Flint Motor Car Co. *v.* Everson 34 R. I. 65, 82 A. 726; Seaboard A. L. R. *v.* Comrs., 86 S. C. 91, 67 S. E. 1069.

Ledger admissible if day-book introduced (Hughes *v.* Clark, 109 Ill. App. 107) and if books of original entry destroyed. Burr *v.* Shute, 25 O. C. C. 735.

624-93 Ins. Co. *v.* Wannemacher, 15 Pa. Super. 580.

624-94 Handy *v.* Smith, 77 Conn. 165, 58 A. 694 (must be more than memoranda); Norman P. S. Co. *v.* Ford, 77 Conn. 461, 59 A. 499 (entry mere recital of past transactions, inadmissible); Wiggins *v.* Wilson, 123 Ill. App. 663.

625-97 Murray *v.* Dickens, 149 Ala. 240, 42 S. 1031; Montgomery Co. *v.* Bean, 26 Ky. L. R. 568, 82 S. W. 240; Bouldin *v.* Co. (Tex. Civ.), 86 S. W. 795. See Barker *v.* S., 73 Neb. 469, 103 N. W. 71.

Course of dealings to be shown. Titus *v.* Spencer, 145 N. Y. S. 40.

Mere memorandum of special contract, not proper entry. Batcheller *v.* Whittier, 12 Cal. App. 262, 107 P. 141.

626-98 Reiley *v.* Torkomian, 78 Conn. 645, 63 A. 516 (entries by attorney not accustomed to keep accounts); Kossuth Bk. *v.* Richardson, 132 Ia. 370, 106 N. W. 923, 109 N. W. 809; McKnight *v.* Newell, 207 Pa. 562, 57 A. 39 (must be regularly kept book).

626-99 See Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625.

626-1 Book of firm containing only its account with defendant, inadmissible. McKnight *v.* Newell, 207 Pa. 562, 57 A. 39.

627-2 Murray *v.* Dickens, 149 Ala. 240, 42 S. 1031; Alabama C. Co. *v.* Wagnon, 137 Ala. 388, 34 S. 352; Wright *v.* Charbonneau, 122 Ill. App. 52; S. *v.* Stephenson, 69 Kan. 405, 76 P. 909, 105 Am. St. 171; Drumm-F. Com. Co. *v.* Bk., 107 Mo. App. 426, 81 S. W. 503; Hurley *v.* Macey, 94 App. Div. 9, 87 N. Y. S. 924. See Collins *v.* Carlin, 106 App. Div. 204, 94 N. Y. S. 317; Bloomington M. Co. *v.* Co., 171 N. Y. 673, 64 N. E. 1118, 58 App. Div. 66, 68 N. Y. S. 699; Imhoff *v.* Fleurer, 2 Phila. (Pa.) 31; In re Barry, 18 Phila. (Pa.) 31; Atchison, etc. R. Co. *v.* Williams, 38 Tex. Civ. 405, 86 S. W. 38; Rogers *v.* O'Barr (Tex. Civ.), 81 S. W. 750.

Bookkeeper must have had personal knowledge of transaction. Union C. L. Ins. Co. *v.* Prigge, 90 Minn. 370, 96 N. W. 917.

Books kept by agent of plaintiff, admissible. Wright *v.* R. Co., 118 Mo. App. 392, 94 S. W. 555.

628-3 North Birmingham L. Co. *v.*

Sims, 157 Ala. 595, 48 S. 84; Chandler *v.* Robinett, 21 Cal. App. 333, 131 P. 891; Schnellbacher *v.* Co., 108 Ill. App. 486; Marks *v.* Box (Ind. App.), 103 N. E. 27; Stabler *v.* Clark, 155 Mich. 26, 118 N. W. 605; Rothenberg *v.* Herman, 90 N. Y. S. 431.

Contra by statute.—Brooks Co. *v.* Wilson (Mass.), 105 N. E. 607.

Testimony of clerk who has no personal knowledge, insufficient. Gould *v.* Hartley, 187 Mass. 561, 73 N. E. 656.

628-4 Mahoney *v.* Co., 82 Conn. 280, 73 A. 766; Pittsburg, etc. R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022.

629-5 *Comp.* Wells *v.* Co. (Ky.), 114 S. W. 737.

629-6 Foster *v.* United States, 178 Fed. 165, 101 C. C. A. 485; Holloway *v.* Co., 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704; United Walnut Co. *v.* Courtney, 96 Ark. 46, 130 S. W. 566; Temple *v.* Magruder, 36 Colo. 390, 85 P. 832 (statutory requirement); Cabaniss *v.* S., 8 Ga. App. 129, 68 S. E. 849; Lester W. S. Co. *v.* Co., 1 Ga. App. 244, 58 S. E. 212; West Chicago R. Co. *v.* Moras, 111 Ill. App. 531; Kossuth Co. Bk. *v.* Richardson, 132 Ia. 370, 106 N. W. 923, 109 N. W. 809; Illinois C. R. Co. *v.* Co., 95 Miss. 357, 49 S. 179; Meredith *v.* Irr. Co. (Mont.), 141 P. 643; McClatchey *v.* Anderson, 84 Neb. 783, 122 N. W. 67; Corkran *v.* Taylor, 77 N. J. L. 195, 71 A. 124 (proof may be made after items read); Raski *v.* Wise, 56 Or. 72, 107 P. 984; Stark *v.* Burkitt, 103 Tex. 437, 129 S. W. 343; Patterson *v.* R. Co. (Tex. Civ.), 126 S. W. 336; Mings *v.* Co. (Tex. Civ.), 106 S. W. 192.

See Wilcox *v.* Downing (Conn.), 91 A. 262, and infra, 638-43.

But in action against an officer of a national bank, since it is an offense to make false entries, the entries are presumed correct and its books may be admitted without further proof. And a general statement by an expert that the books were not correctly kept will not overcome such presumption. S. *v.* Cutts, 24 Ida. 329, 133 P. 115.

Book is prima facie evidence of the correctness of the entries. Navarre *v.* Honea (Okla.), 139 P. 310.

Court inspects to see if suspicion of fraud exists. Stewart Bros. *v.* Harris, 6 Ala. App. 518, 65 S. 445.

Account may be complete.—Capen *v.* Sheldon, 78 Vt. 39, 61 A. 864.

Books material on issue of fraud need not be verified when admitted against interest of party whose transactions are recorded. Kuh, etc. Co. *v.* Glucklick, 120 Ia. 504, 94 N. W. 1105.

629-8 Yick Wo *v.* Underhill, 5 Cal. App. 519, 90 P. 697; Idol *v.* Co., 1 Cal. App. 92, 81 P. 665; Handy *v.* Smith, 77 Conn. 165, 58 A. 694; Cottentin *v.* Meyer, 80 N. J. L. 52, 76 A. 341; Jackson *v.* Moore, 39 Okla. 234, 134 P. 1114. See Butcher's, etc. Assn. *v.* City, 214 Mass. 254, 101 N. E. 426.

Not as entries made by another.—Davie *v.* Roland, 3 Ala. App. 567, 57 S. 1034.

Party deceased. — Where party who made entry is deceased his executrix may introduce his book upon proof of his handwriting, without accompanying it with evidence as to time and manner in which entries made. Davie *v.* Lloyd, 38 Colo. 250, 88 P. 446.

Bona fides of entry may be shown by other pages of ledger. Morrow *v.* S., 56 Tex. Cr. 519, 120 S. W. 491.

630-11 Competency of wife to provo books. Cather *v.* Damerell, 5 Neb. (Unof.) 490, 99 N. W. 35.

630-13 Chapin *v.* Mitchell, 44 Fla. 225, 32 S. 875. *Comp.* Stuart *v.* Lord, 138 Cal. 672, 72 P. 142.

631-14 Yick Wo *v.* Underhill, 5 Cal. App. 519, 90 P. 697 (testimony of third persons admissible); In re Bresler's Est., 155 Mich. 567, 119 N. W. 1004; Cameron L. Co. *v.* Somerville, 129 Mich. 552, 89 N. W. 346; McKenzie *v.* King, 14 N. M. 375, 93 P. 703; Swan *v.* Warner, 197 N. Y. 190, 90 N. E. 430; VanName *v.* Barber, 115 App. Div. 593, 100 N. Y. S. 987; Hurley *v.* Macey, 94 App. Div. 9, 87 N. Y. S. 924.

Testimony of witnesses they settled bills rendered, which were correct copies of the books, is insufficient. Stone *v.* Cronin, 72 App. Div. 565, 76 N. Y. S. 605. See Rathborne *v.* Hatch, 80 App. Div. 115, 80 N. Y. S. 347.

632-16 Entries of distinct transactions claimed to be inaccurate on their face cannot be shown to prove inaccuracy of entries in question. Parsons *v.* Co., 82 Conn. 333, 73 A. 785.

632-18 Becker *v.* Donalson, 133 Ga. 864, 67 S. E. 92.

632-19 Presumption arising from testimony of those who dealt with party extends to all books kept by him, though they may not have contained accounts settled by witnesses. Mott *v.*

Ingalsbe, 136 App. Div. 140, 120 N. Y. S. 151.

632-20 Reyburn *v.* Co., 171 Fed. 609, 96 C. C. A. 373; Weinberg *v.* Garren (Tex. Civ.), 155 S. W. 1013.

General manager may verify books, instead of bookkeeper if element of personal knowledge is present. Pelican L. Co. *v.* Johnson, 44 Tex. Civ. 6, 98 S. W. 207.

633-23 Gould *v.* Hartley, 187 Mass. 561, 73 N. E. 656.

633-24 San Francisco T. Co. *v.* Gray, 11 Cal. App. 314, 104 P. 999; Ridenour *v.* Mines Co., 164 Mo. App. 576, 147 S. W. 852. See Standard T. Mach. Co. *v.* Co., 6 Ala. App. 188, 60 S. 481.

634-25 Weinberg *v.* Garren (Tex. Civ.), 155 S. W. 1013.

634-26 Ball-Thrash & Co. *v.* McCormick, 162 N. C. 471, 78 S. E. 303; St. Louis & S. F. R. Co. *v.* Ziekafoose, 39 Okla. 302, 135 P. 406; Muskogee Elec. T. Co. *v.* McIntire, 37 Okla. 684, 133 P. 213. See Hall Bros. *v.* Johnson (Ark.), 164 S. W. 278.

634-27 Nolan *v.* Salas, 7 Phil. Isl. 1. See Pac. M. L. Ins. Co. *v.* O'Neil, 36 Okla. 792, 130 P. 270.

634-28 Cameron L. Co. *v.* Somerville, 129 Mich. 552, 89 N. W. 346; St. Louis & S. F. R. Co. *v.* Zickafoose, 39 Okla. 302, 135 P. 406; Muskogee Elec. T. Co. *v.* McIntire, 37 Okla. 684, 133 P. 213; Bulkley *v.* Wood, 4 Pa. Super. 391; Charleston S. Inst. *v.* Bk., 73 S. C. 545, 54 S. E. 216. See United G. Co. *v.* Dannelly, 93 S. C. 580, 77 S. E. 706; Pioneer, etc. Co. *v.* Co., 70 Wash. 123, 126 P. 84.

634-30 Byrd *v.* Beall, 161 Ala. 594, 50 S. 53; McGrath *v.* Stein, 148 Ala. 370, 42 S. 454; Delahoyde *v.* P., 212 Ill. 554, 72 N. E. 732; S. *v.* Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; Richardson *v.* Anderson, 109 Md. 641, 72 A. 485 (express admission); Cameron L. Co. *v.* Somerville, 129 Mich. 552, 89 N. W. 346; Britain *v* Fender, 116 Mo. App. 93, 92 S. W. 179.

Copy of book, original having been admitted to be correct, not admissible. Fitch *v.* Martin, 74 Neb. 538, 104 N. W. 1072.

Such admissions bind surety. Hall *v.* Co., 77 Minn. 24, 79 N. W. 590.

635-32 See Dancel *v.* Co., 137 Fed. 157.

636-35 Court's discretion must be exercised in determining what is sufficient proof of verity of entries. Seaboard A. L. R. *v.* Comrs., 86 S. C. 91, 67 S. E. 1069.

Unvarying custom of corporation concerning making and filing of reports by agents is not sufficient to show its records correctly kept, though verified by circumstantial evidence. Patterson *v.* R. Co. (Tex. Civ.), 126 S. W. 336.

636-36 Wells *v.* Hays, 93 S. C. 168, 76 S. E. 195. Entry of disconnected items does not affect entries properly made. Yick Wo *v.* Underhill, 5 Cal. App. 519, 90 P. 967.

637-37 S. *v.* Bridge Co., 49 Ind. App. 544, 97 N. E. 803; Wells *v.* Hays, 93 S. C. 168, 76 S. E. 195.

637-40 Childress *v.* Co., 162 Ala. 371, 50 S. 322; Britain *v.* Fender, 116 Mo. App. 93, 92 S. W. 179. Coupon book proper item of charge on merchant's book. Rogers *v.* O'Barr (Tex. Civ.), 81 S. W. 750.

Shares of stock. — Fisk *v.* Sampson, 118 Minn. 525, 136 N. W. 315.

637-41 Shopkeepers' books not evidence of transactions in realty. Galbraith *v.* Starks, 117 Ky. 915, 79 S. W. 1191.

638-43 Amount and date of delivery may be established by book. Montgomery *v.* Pfluger, 3 Haw. 388.

Weights, measurements or quantities may be so shown. Wright *v.* Charbonneau, 122 Ill. App. 52.

Quantity of property delivered each day may be proved by entries in vendor's books, based on memoranda made by servants, without other proof of correctness of entries. Kuennan *v.* Co., 159 Mich. 122, 123 N. W. 799.

Orders for and receipt of materials may be shown by books. Cascade L. Co. *v.* Co., 56 Wash. 503, 106 P. 158.

638-45 Wells *v.* Co. (Ky.), 114 S. W. 737; Corkran *v.* Taylor, 77 N. J. L. 195, 71 A. 124. See Blom *v.* Codfish Co., 71 Wash. 41, 127 P. 596.

Carpenter cannot prove claim for nursing by book entries. In re Marsh, 28 Pa. C. C. 190.

Entries of workman's time in terms of money does not affect admissibility of books. Wisconsin S. Co. *v.* Steel Co., 203 Fed. 403, 121 C. C. A. 507.

640-49 Burke *v.* Baker, 111 App. Div. 422, 97 N. Y. S. 768. *Comp.* S. *v.* Lewis, 31 Wash. 75, 71 P. 778.

640-50 Temple *v.* Magruder, 36 Colo. 390, 85 P. 832; Hardenstein *v.* Brien, 96 Miss. 493, 50 S. 979; In re German,

16 Phila. (Pa.) 318. *Comp.* Kwiecinski *v.* Newman, 137 Mich. 287, 100 N. W. 391; Cather *v.* Damerell, 5 Neb. (Unof.) 490, 99 N. W. 35; In re Kelley, 18 Pa. C. C. 117.

640-51 Memorandum in book of original entries kept by physician, inadmissible. Hottle *v.* Weaver, 206 Pa. 87, 55 A. 838; Langolf *v.* Pfromer, 2 Phila. (Pa.) 17; In re Foreman, 20 Pa. C. C. 627.

641-56 Amount due for carriage of employes. Idol *v.* Co., 1 Cal. App. 92, 81 P. 665.

641-58 Rathborne *v.* Hatch, 80 App. Div. 115, 80 N. Y. S. 347 (books of agent as to purchase from or sales to third party by agent inadmissible in action by him against principal for commissions); In re Horner, 26 Pa. C. C. 383 (books of stock broker containing running account, not books of original entry).

641-59 Bill-broker. See Am. V. Co *v.* Wyman, 92 Mo. App. 294.

642-63 Jacobs *v.* Morgenthaler, 149 Mich. 1, 112 N. W. 492 (cit. the text).

643-64 In re Marsh, 28 Pa. C. C 190.

646-72 Wells *v.* Hays, 93 S. C. 168, 76 S. E. 195.

646-73 Proctor *v.* Proctor, 26 Ky. L. R. 348, 81 S. W. 272; Gregory *v.* Jones, 101 Mo. App. 270, 73 S. W. 899; Corless *v.* Carlisle, 137 App. Div. 611, 122 N. Y. S. 407 (inadmissible to corroborate witness who testified to entries); Brown *v.* Bronson, 93 App. Div. 312, 87 N. Y. S. 872; Simons *v.* Steele, 82 App. Div. 202, 81 N. Y. S. 737.

Entry of payment on note inadmissible. Gregory *v.* Jones, 101 Mo. App. 270, 73 S. W. 899. But on allegation of payment of note by delivery of lumber, entries in books admissible. Blackshear *v.* Dekle, 120 Ga. 766, 48 S. E. 311.

May be part of res gestae.—Wiggins *v.* Wilson, 123 Ill. App. 663.

647-74 Yick Wo *v.* Underhill, 5 Cal. App. 519, 90 P. 967; Rothschild *v.* Sessell, 103 Ill. App. 274. *Contra.* Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625; Lewis *v.* England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401.

Loan of large sum cannot be proved. Harmon *v.* Decker, 11 Or. 587, 68 P. 11, 1111.

647-75 Entry on merchant's books of money paid out for another, inadmissible. Mings *v.* Co. (Tex. Civ.), 106 S. W. 192.

648-77 Gregory *v.* Jones, 101 Mo. App. 270, 73 S. W. 899.

648-78 People's Nat. Bank *v.* Rhoades (Del.), 90 A. 409.

649-83 Money collected by defendant on behalf of plaintiff not subject of book account. Ins. Co. *v.* Wannemacher, 15 Pa. Super. 580.

649-85 Hill *v.* Hill, 29 Ky. L. R. 201, 92 S. W. 924; In re Bresler's Est., 155 Mich. 567, 119 N. W. 1101; In re Lear's Est., 146 Mo. App. 642, 124 S. W. 592 (conclusive if testator's will so directs).

Identification not necessary to extent required in ordinary books. Whisler *v.* Whisler, 117 La. 712, 89 N. W. 1110.

650-88 See VanName *v.* Barber, 115 App. Div. 593, 100 N. Y. S. 987.

650-89 Reyburn *v.* Co., 171 Fed. 609, 96 C. C. A. 373; People's Nat. Bk. *v.* Rhoades (Del.), 90 A. 409; Wells *v.* Hays, 93 S. C. 168, 76 S. E. 195. See Galbraith *v.* Starks, 117 Ky. 915, 79 S. W. 1191.

Promissory notes may be proper items of book charge where course of dealing of parties is to that effect Freehart *v.* Stanford, 77 Vt. 36, 58 A. 790.

Bank books admissible to rebut testimony of admission money had been received. Wagner *v.* Bk. (Ia.), 118 N. W. 523.

651-90 Page *v.* Hazelton, 74 N. H. 252, 66 A. 1049.

Limit is five dollars.—Brown *v.* Warner, 116 Wis. 358, 93 N. W. 17; Kellogg L. & M. Co. *v.* Co., 140 Wis. 341, 122 N. W. 737.

651-91 Wells *v.* Hays, 93 S. C. 168, 76 S. E. 195. Bank note register admissible if separately offered. Kossuth Bk. *v.* Richardson, 141 Ia. 738, 118 N. W. 906.

653-1 Delivery of goods may be proved by books. Bloomington M. Co. *v.* Co., 171 N. Y. 673, 64 N. E. 1118, 58 App. Div. 66, 68 N. Y. S. 699. Entry must purport to show delivery. In re Groff, 14 Phila. (Pa.) 306.

Charges against husband, though wife only is liable, may be introduced in action against both. Wilkins & Co. *v.* Sublette, 111 Minn. 339, 126 N. W. 1089.

653-2 Kamm *v.* Rees, 177 Fed. 14, 100 C. C. A. 432. Entries prima facie evidence to show for whom goods made and to whom credit given. Avery *v.*

Tucker, 137 Mo. App. 428, 118 S. W. 672.

653-3 Swan *v.* Warner, 197 N. Y. 190, 90 N. E. 430.

Book containing charges against husband admissible in action against him and wife though she only is liable. Wilkins *v.* Sublette, 111 Minn. 339, 126 N. W. 1089.

655-7 Thomson *v.* Flanegan, 6 Phila. (Pa.) 13.

Partnership books presumed to be correct as between partners if they have had access to them. Donaldson *v.* Donaldson, 237 Ill. 318, 86 N. E. 604.

655-8 In re Baizley, 25 Pa. C. C. 432. *Comp.* Pettey *v.* Benoit, 193 Mass. 233, 79 N. E. 245.

656-9 In re Wheeler, 13 Phila. (Pa.) 370.

657-14 Charge on books against wife not conclusive they were not sold on credit of husband. Taylor-W. Co. *v.* Atkinson, 127 Mich. 633, 87 N. W. 89.

657-16 Bouldin *v.* Co. (Tex. Civ.), 86 S. W. 795 (not evidence of quality, condition, or grade of goods sold); Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979 (not admissible to prove to whom credit given for payment of rent). But see Love *v.* Ramsey, 139 Mich. 47, 102 N. W. 279, and 653-2, supra, and 666-47, infra.

Books inadmissible to show credit given to agent personally, in payment of insurance premium. Horine *v.* Ins. Co., 27 Ky. L. R. 893, 87 S. W. 274. Books of person insured under credit policy best evidence of character of goods he dealt in. Philadelphia C. Co. *v.* Co., 133 Ky. 745, 118 S. W. 1004.

658-21 Jacobs *v.* Morgenthaler, 149 Mich. 1, 112 N. W. 492 (cit. the text); Deatherage *v.* Petruschke, 106 Minn. 20, 118 N. W. 153.

659-23 Tuffree *v.* Saint, 147 Ia. 361, 126 N. W. 373.

660-27 Deatherage *v.* Petrusohke, 106 Minn. 20, 118 N. W. 153.

660-28 *Comp.* Huebener *v.* Childs, 180 Mass. 483, 62 N. E. 729.

661-29 Smythe *v.* R. Co. (Vt.), 90 A. 901.

661-30 Anyone who has read or examined may so testify though he has not exclusive possession of the records. E. B. Martin & Sons *v.* Bk., 137 Ga. 285, 73 S. E. 387.

662-32 Perry S. B. *v.* Elledge, 99 Ill. App. 307.

662-34 Kamm *v.* Rees, 177 Fed. 14, 100 C. C. A. 432; Bush *v.* Fourcher, 3 Ga. App. 43, 59 S. E. 459; Wagner *v.* Bk. (Ia.), 118 N. W. 523. *Comp.* Tobler *v.* Austin (Tex. Civ.), 71 S. W. 407.

664-37 Moynahan *v.* Perkins, 36 Colo. 481, 85 P. 1132; Johnson *v.* S., 125 Ga. 243, 54 S. E. 184; Wilber *v.* Scherer, 13 Ind. App. 428, 41 N. E. 837; Wilmer *v.* Placide, 119 Md. 49, 86 A. 43; Mayberry *v.* Holbrook, 182 Mass. 463, 65 N. E. 849; Smaltz *v.* Newhof (Mich.), 144 N. W. 853; Lyons *v.* Corder, 253 Mo. 539, 162 S. W. 606; Ball-Thrash & Co. *v.* McCormick, 162 N. C. 471, 78 S. E. 303; Wells *v.* Hays, 93 S. C. 168, 76 S. E. 195; Brown *v.* S. (Tex. Cr.), 162 S. W. 339. See Burns *v.* Lee (Ga. App.), 80 S. E. 676. *Contra,* Dick *v.* Biddle, 105 Md. 308, 66 A. 21; Wagonseller *v.* Brown, 7 Pa. C. C. 663; Owen *v* Rothermel, 21 Pa. Super. 561 (must be of original entry); Hubbard C., etc. Co. *v.* Nichols (Tex. Civ.), 89 S. W. 795.

Party may refresh memory by entries made by bookkeeper. Fay *v.* Walsh, 190 Mass. 374, 77 N. E. 44.

664-38 Rathbone *v.* Hatch, 80 App. Div. 115, 80 N. Y. S. 347; Bloomington M. Co. *v.* Co., 171 N. Y. 673, 64 N. E. 1118, 58 App. Div. 66, 68 N. Y. S. 699; Jackson *v.* S., 49 Tex. Cr. 215, 91 S. W. 788.

Arrival and movement of cars. Pittsburg, etc. R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022.

664-39 Allen *v.* Gray, 63 Misc. 219, 115 N. Y. S. 928; S. *v.* Ross, 55 Or. 450, 104 P. 596.

Admissible against sureties of party to show prima facie case. Kuhl *v.* Chamberlain, 140 Ia. 546, 118 N. W. 776.

664-40 Page *v.* Hazelton, 74 N. H. 252, 66 A. 1049. See Worden *v.* U. S., 204 Fed. 1, 122 C. C. A. 315; Hill *v.* Hill, 115 La. 490, 39 S. 503; Cornell-Andrews S. Co. *v.* Corp., 215 Mass. 381, 102 N. E. 625.

Books kept by one accused of suffering or harboring a person to live, or room in a house of prostitution or assignation are admissible to show certain persons were inmates of such house. P. *v.* Lee, 237 Ill. 272, 86 N. E. 573. Competent as circumstance. Hardy *v.* C., 110 Va. 910, 67 S. E. 522. See infra, 667-52.

665-41 Wordan *v.* U. S., 204 Fed. 1, 122 C. C. A. 315; Becker *v.* Donalson, 133 Ga. 864, 67 S. E. 92; Kaleikini *v.* Waterhouse, 19 Haw. 359; Second B.,

etc. Assn. *v.* Cochrane, 103 Ill. App. 29; Howard *v.* Moore, 72 N. J. L. 329, 75 A. 435. See Taplin & Rowell *v.* Harris (Vt.), 90 A. 956.

Foundation necessary.—See Lindeke *v.* Co-op. Co. (Minn.), 148 N. W. 459.

Entries in logbook showing timber cut. Gulf R. C. Co. *v.* Crenshaw (Ala.), 65 S. 1010.

Entries by administrator. — American Surety Co. *v.* Gaskill's Admr. 85 Vt. 358, 82 A. 218.

Preliminary proof required.—See Globe S. Bk. *v.* Bk., 64 Neb. 413, 89 N. W. 1030.

665-42 Kipp *v.* Miller, 47 Colo. 598, 108 P. 164 (corporate books against stockholders); Milhollen *v.* Co., 137 Ia. 114, 112 N. W. 812. See Forbes Co. *v.* Leonard, 119 Ill. App. 629.

But if the entries are self-serving, book is inadmissible. Kaplan *v.* Lieberman, 140 N. Y. S. 1010. See Wilmer *v.* Placide, 119 Md. 49, 86 A. 43. *Contra*, Brooks Co. *v.* Wilson (Mass.), 105 N. E. 607; Blom *v.* Codfish Co., 71 Wash. 41, 127 P. 596.

666-43 Rio S. Bk. *v.* Amondson, 141 Wis. 82, 123 N. W. 634.

666-46 P. *v.* Rowland, 12 Cal. App. 6, 106 P. 428.

666-47 Lederer *v.* Morrow, 132 Mo. App. 438, 111 S. W. 902 (cit. the text); Schlicher *v.* Whyte, 74 N. J. Eq. 829, 71 A. 337; Cronk *v.* Crandall, 137 App. Div. 440, 121 N. Y. S. 805. See Succession of Magi, 107 La. 208, 31 S. 660.

Admissible as between lessor and lessee if rent is based on receipts. Standard A. & Mfg. Co. *v.* Champion, 76 N. J. L. 771, 72 A. 92.

667-50 State Bk. *v.* Brown, 96 App. Div. 441, 89 N. Y. S. 381, competent in action on bond of cashier; Secor *v.* S., 118 Wis. 621, 95 N. W. 942, admissible in action for embezzlement.

667-51 Behn *v.* Rosatzin, 5 Phil. Isl. 660.

667-52 In re Fountaine, L. R. (1909), 2 Ch. Div. 382; Becker *v.* Donalson, 133 Ga. 864, 67 S. E. 92; West Chicago R. Co. *v.* Moras, 111 Ill. App. 531; Rathbone *v.* Maltz, 155 Mich. 306, 118 N. W. 991; Sonnenfeld *v.* Rosenthal, 247 Mo. 238, 152 S. W. 321; Hutchins *v.* Berry, 75 N. H. 416, 75 A. 650; S. *v.* Kruse, 24 S. D. 174, 123 N. W. 71; Toutle L. Co. *v.* Lumb. Co., 78 Wash. 568, 139 P. 625.

See Worden *v.* U. S., 204 Fed. 1, 122 C. C. A. 315.

Books of defendant's physician admissible to show visits made defendant on day in question. Morrow *v.* S., 56 Tex. Cr. 519, 120 S. W. 491.

668-53 Kent *v.* Richardson, 8 Ida. 750, 71 P. 117; McKeen *v.* Bk., 24 R. I. 542, 54 A. 49.

670-62 Partnership books not admissible against estate of deceased partner. In re Fountaine (1909), 2 Ch. Div. 382.

672-73 Knapp *v.* Co., 199 Mo. 640, 98 S. W. 70, discussion.

672-74 U. S. *v.* Greene, 146 Fed. 793; Gross *v.* Tillinghast, 35 R. I. 298, 86 A. 721. For discussion see McKeen *v.* Bk., 24 R. I. 542, 54 A. 49; Duty *v.* Storrs (Tex. Civ.), 70 S. W. 357.

673-75 Account of business done, though kept by one who was not agent and did not own the property, may be admissible if kept because of moral duty; and, it seems, may be competent as declarations of deceased who had no interest to misrepresent. Hutchins *v.* Berry, 75 N. H. 416, 75 A. 650.

673-77 U. S. *v.* Greene, 146 Fed. 793; Chandler *v.* Robinett, 21 Cal. App. 333, 131 P. 891; Marks *v.* Box (Ind. App.), 103 N. E. 27; Powell *v.* C., 149 Ky. 415, 149 S. W. 889; Lyons *v.* Corder, 253 Mo. 539, 162 S. W. 606; Duty *v.* Storrs (Tex. Civ.), 70 S. W. 357.

Reasonably contemporaneous. — Thompson *v.* Cole, 6 Ala. App. 208, 60 S. 556.

674-81 Thompson *v.* Cole, 6 Ala. App. 208, 60 S. 556; Marks *v.* Box (Ind. App.), 103 N. E. 27. See Phillips *v.* U. S., 201 Fed. 259, 120 C. C. A. 149.

674-82 Arnold *v.* Hussey (Me.), 88 A. 724.

674-84 Chandler *v.* Robinett, 21 Cal. App. 333, 131 P. 891. *Comp.* Atchison, etc. Co. *v.* Williams, 38 Tex. Civ. 405, 86 S. W. 38.

674-85 Hutchins *v.* Berry, 75 N. H. 416, 75 A. 650; Duty *v.* Storrs (Tex. Civ.), 70 S. W. 357. See Fletcher *v.* Kidder, 163 Cal. 769, 127 P. 73; Arnold *v.* Hussey (Me.), 88 A. 724.

674-86 Powell *v.* C., 149 Ky. 415, 149 S. W. 889.

675-87 Thompson *v.* Cole, 6 Ala. App. 208, 60 S. 556.

Or by some one who has knowledge of correctness of entries or knowledge of transaction. See Phillips *v.* U. S., 201 Fed. 259, 120 C. C. A. 149.

676-90 Delbridge *v.* Assn., 98 Ill. App. 96.

677-91 Books of corporation required by law to be kept if identified, admissible against third persons without further authentication. Hurwitz *v.* Gross, 5 Cal. App. 614, 91 P. 109.

677-93 Lederer *v.* Marrow, 132 Mo. App. 438, 111 S. W. 902.

677-94 Books of corporation not per se evidence of indebtedness against it in action to charge directors. Minor *v.* Crosby, 76 App. Div. 561, 78 N. Y. S. 594.

678-95 See Girard T. Co. *v.* Loving, 71 Kan. 558, 81 P. 200 (not admissible to prove defendant a stockholder); Folsom Bldg., etc. Assn. *v.* Gogel, 24 Pa. Super. 539.

In action by corporation against members its books are admissible only under such circumstances as would render them admissible generally. Trainer *v.* Assn., 204 Ill. 616, 68 N. E. 650.

678-97 Lederer *v.* Marrow, 132 Mo App. 438, 111 S. W. 902. See Moore *v.* Rohrbacker, 30 Pa. Super. 568.

679-98 Queen City S. B. & T. Co. *v.* Reyburn, 163 Fed. 597. See infra, "Corporations," 655-95, et seq.

680-1 *Comp.* Harmon *v.* Decker, 41 Or. 587, 68 P. 11, 111. See "Husband and Wife," infra, 814-26. Where customer retains pass-book, without objection to account shown, his action tends to establish admission of correctness. Dewes B. Co. *v.* Kerwin, 107 Ill. App. 620.

680-5 Atlanta T., etc. Co. *v.* Close, 115 Ga. 939, 42 S. E. 265; Richey *v.* Bk. (Ia.), 121 N. W. 2 (admissible as part of transaction of settlement, if not to show debits of depositor's account); Lucks *v.* Bk., 148 Mo. App. 376, 128 S. W. 19; Security St. Bk. *v.* Fussell, 36 Okla. 527, 129 P. 746.

Time deposit made cannot be shown by passbook as between depositor and third person. Austrian *v.* Laubheim, 78 N. J. L. 178, 73 A. 226.

682-9 See Simpson *v.* Bk., 129 Fed. 257, 63 C. C. A. 371; Curry *v.* Lanning, 106 App. Div. 615, 94 N. Y. S. 535; Stokes *v.* Fenner, 10 Phila. (Pa.) 14; Lewis *v.* England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401.

Part of book inadmissible to show admission, the whole purporting to contain accounts between parties. Mulloy *v.* Mulloy, 131 Mo. App. 651, 111 S. W. 843. Page of ledger containing pencil entry, inadmissible. Carter *v.* Catchings (Miss.), 48 S. 515.

682-12 Cross-examination as to portions of accounts not put in evidence is proper. Deveneenzi *v.* Cassinelli, 28 Nev. 222, 81 P. 41.

Ledger used by party to refresh memory of witness is admissible in behalf of his adversary as part of cross-examination. Logan *v.* Freerks, 14 N. D. 127, 103 N. W. 426.

Admission of books of deceased person does not render opposite party competent to testify as to disclosed transactions. Whisler *v.* Whisler, 117 Ia. 712, 89 N. W. 1110.

682-13 Succession of Moise, 107 La. 717, 31 S. 990; Page *v.* Hazelton, 74 N. H. 252, 66 A. 1049.

684-19 Moore *v.* Phillips, 6 Pa. Super. 570; Walker *v.* Skliris, 34 Utah 353, 98 P. 114. See Owens *v.* First State Bk. (Tex. Civ.), 167 S. W. 798.

684-20 See Gleason *v.* Denson, 65 Or. 199, 132 P. 530.

684-24 Identity of two names may be shown. Imhoff *v.* Fleurer, 2 Phila. (Pa.) 35.

684-25 Cather *v.* Damerel, 5 Neb. (Unof.) 490, 99 N. W. 35.

Ledger entries admissible to explain marks in day slips. Lewis *v.* England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401.

"On contract" may be explained. Norman P. S. Co. *v.* Ford, 77 Conn. 461, 59 A. 499.

685-27 Hogarth S. Co. *v.* R. Co., 174 Fed. 278; Oberfelder *v.* Mattingly (Ky.), 120 S. W. 352; Sibley *v.* Maxwell, 203 Mass. 94, 89 N. E. 232; Smith *v.* Castle, 81 App. Div. 638, 81 N. Y. S. 18 (plaintiff may be cross-examined as to items).

685-28 **Irregularities** must be gross to keep books from jury. Bush *v.* Fourcher, 3 Ga. App. 43, 59 S. E. 459. They may warrant setting aside verdict. Barnes *v.* Barnes, 106 Va. 319, 56 S. E. 172.

Subpoena duces tecum unnecessary as basis for cross-examination, where books voluntarily produced. Elliott *v.* Moreland, 69 N. J. L. 216, 54 A. 224.

686-31 Bookkeeper's drinking habits may be shown. Seiber *v.* Co., 40 Tex. Civ. 600, 90 S. W. 516.

687-34 **Value of books as evidence** depends largely upon their condition and manner in which they are kept. They are not entitled to greater ef-

fect than testimony of witness with knowledge of what books contain. Omission to introduce any relevant books of original entry is ground for suspicion. Kossuth Bk. *v.* Richardson, 141 Ia. 738, 118 N. W. 906.

687-36 Pineland Club *v.* Robert, 213 Fed. 545; Harper *v.* Hammond, 13 Ga. App. 238, 79 S. E. 41; Dodge *v.* Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153; Cincinnati, etc. R. Co. *v.* Smith, 155 Ky. 481, 159 S. W. 987; Echols *v.* Co., 38 Tex. Civ. 65, 84 S. W. 1082 (testimony of witness as to when indebtedness evidenced by books accrued is primary evidence). But see Taylor *v.* Hodges, 65 Fla. 502, 62 S. 588.

688-37 Rogers *v.* O'Barr (Tex. Civ.), 76 S. W. 593, books best evidence of account.

688-38 Campbell *v.* Rice, 22 Cal. App. 734, 136 P. 512; Robinson *v.* S., 125 Ga. 247, 54 S. E. 189; Davis *v.* Council, 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.) 722; Pfaelzer *v.* Gassner, 116 N. Y. S. 15; Smith *v.* Castle, 81 App. Div. 638, 81 N. Y. S. 18; Drumm etc. Co. *v.* Edmisson, 17 Okla. 344, 87 P. 311; Holden *v.* Thurber (R. I.), 72 A. 729; Kell M. Co. *v.* Bank (Tex. Civ.), 155 S. W. 325; Houston, etc. R. Co. *v.* Washington (Tex. Civ.), 127 S. W. 1126; Fidelity & D. Co. *v.* Co., 40 Tex. Civ. 489, 90 S. W. 197; Bouldin *v.* Co. (Tex. Civ.), 86 S. W. 735.

See Blume *v.* Newman, 65 Fla. 281, 61 S. 590; Gt. West. L. Assur. Co. *v.* Shumway, 25 N. D. 268, 141 N. W. 479.

689-39 Stone *v.* Brick Co., 13 Cal. App. 203, 109 P. 103; Merritt *v.* Bush, 122 Ill. App. 189; Putnam *v.* Grant, 101 Me. 240, 63 A. 816; In re Holland, 18 Phila. (Pa.) 116.

Where loss of book alleged, next best evidence is book from which entries copied. Galbraith *v.* Starks, 117 Ky. 915, 79 S. W. 1191.

689-40 Wright *v.* R. Co., 118 Mo. App. 392, 94 S. W. 555; Sterling *v.* R. Co., 38 Tex. Civ. 451, 86 S. W. 655. Inconvenience caused by producing originals not ground for admitting copies. Iowa B. & L. Ass'n. *v.* Fitch, 142 Ia. 329, 120 N. W. 694.

689-41 See Stephan *v.* Metzger, 95 Mo. App. 669, 69 S. W. 625.

690-43 Washington H. Ex. *v.* Wilson, 152 N. C. 21, 67 S. E. 35 (books of foreign bank which could not be produced without stopping business); Missouri etc. R. Co. *v.* Gober (Tex. Civ.), 125 S. W. 383.

690-44 Lemon *v.* U. S., 164 Fed. 953, 90 C. C. A. 617 (books in court); Pierce *v.* Norton, 82 Conn. 441, 74 A. 686; Frick *v.* Kabaker, 116 Ia. 494, 90 N. W. 498; Shea *v.* Board, 124 La. 299, 50 S. 166; Roth T. Co. *v.* Co., 146 Mo. App. 1, 123 S. W. 513; Kannow *v.* Assn., 76 Neb. 330, 107 N. W. 563; Mendel *v.* Boyd, 71 Neb. 657, 99 N. W. 493; Salem L. & T. Co. *v.* Anson, 41 Or. 562, 67 P. 1015, 69 P. 675.

See Rollins *v.* Board, 90 Fed. 575, 33 C. C. A. 181; Northern P. R. Co. *v.* Keys, 91 Fed. 47; Crawford *v.* Roney, 126 Ga. 763, 55 S. E. 499; Smythe *v.* Evans, 209 Ill. 376, 70 N. E. 906; Plank *v.* Assn., 28 Ind. App. 259, 62 N. E. 652; Fidelity & D. Co. *v.* Co., 123 Ky. 74, 117 S. W. 393; Louisville B. Co. *v.* R. Co., 116 Ky. 258, 75 S. W. 285; Pfaelzer *v.* Gassner, 116 N. Y. S. 15.

Books must be offered in evidence. Cox *v.* Co., 38 Pa. Super. 545.

Summary should be placed at disposal of other party and opportunity given to examine records. Fidelity & D. Co. *v.* Co., 133 Ky. 74, 117 S. W. 393.

Rule of text applies where books lost. In re Strang, 166 Fed. 779.

Expert testimony showing result of examination of extensive accounts is sometimes received, as is testimony showing what books do not contain. In re Est. of Colton, 129 Ia. 542, 105 N. W. 1008; Iowa etc. B. & L. Assn. *v.* Fitch, 142 Ia. 329, 120 N. W. 694.

691-45 Barclay *v.* Deyerle, 53 Tex. Civ. 236, 116 S. W. 123.

692 Books not available—the memorandum slips supplemented by testimony of makers are admissible. Randle *v.* Barden (Tex. Civ.), 164 S. W. 1063.

692-46 Pfaelzer *v.* Gassner, 116 N. Y. S. 15; Barclay *v.* Deyerle, 53 Tex. Civ. 236, 116 S. W. 123.

692-47 LaRue *v.* Co., 17 S. D. 91, 95 N. W. 292, destruction admitted.

Notice unnecessary, where existence of book is denied. C. *v.* Sinclair, 195 Mass. 100, 80 N. E. 799. It must be in form of demand, and refusal to comply shown. Alabama I. Co. *v.* Smith, 155 Ala. 287, 46 S. 175.

692-49 Right to have books produced not affected by reception of sec-

ondary evidence of contents. Seaboard A. L. R. *v.* Earle, 86 S. C. 91, 67 S. E. 1069.

BOUNDARIES

Burden of proof, 695-2; *Actual location on ground,* 716-30; *Demonstrative evidence,* 718-40; *Personal knowledge—Indian reservation,* 722-72; *Municipal boundary,* 722-75.

695-1 Latig *v.* Scott, 17 Ida. 506, 107 P. 47; Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979; Guill *v.* O'Bryan (Tex. Civ.), 121 S. W. 593 (may be conclusive on patentee); Runkle *v.* Smith, 52 Tex. Civ. 186, 114 S. W. 865 (though only part of land covered by patent involved); Douglas L. Co. *v.* Thayer, 107 Va. 292, 58 S. E. 1101.

Patent best evidence of locus of land. Evans *v.* Bates, 155 Ky. 68, 159 S. W. 612.

Title derived from state need not be shown where both parties claim through same source. Handshoe *v.* Conley, 27 Ky. L. R. 277, 84 S. W. 1140.

Abstract of grant, certified admissible. Marshall *v.* Corbett, 137 N. C. 555, 50 S. E. 210.

Patent conclusive except against state. Millar *v.* Ward (Tex. Civ.), 124 S. W. 440.

Junior patents, calling for line of older competent to establish lines of latter. Thurman *v.* Leach (Ky.), 116 S. W. 300. If accepted and acted on by parties they may control boundaries if original indefinite. Babylon *v.* Darling, 117 N. Y. S. 250.

695-2 Lattig *v.* Scott, 17 Ida. 506, 107 P. 47.

Title not involved; possession will sustain proceeding. Jackson *v.* Williams, 152 N. C. 203, 67 S. E. 755.

Burden of proof is on plaintiff to show land in dispute is his. Thacker *v.* Wilson (Tex. Civ.), 122 S. W. 938.

But if defendant in action of trespass to try title sets up plea of boundary as affirmative defense he must sustain it though plaintiff failed to show his title. Gaffney *v.* Clark (Tex. Civ.), 118 S. W. 606.

Burden is on party claiming under a grant described by exterior boundaries and exceptions as to prior grants to show not only land claimed is within such boundaries, but that it does not lap over such grant. Charleroi T. & C. C. Co. *v.* Co. (Ky.), 116 S. W. 682.

696-5 Surveyor's plat is competent to correct calls in both certificate and patent. Hogg *v.* Lusk, 27 Ky. L. R. 840, 86 S. W. 1128.

Omission from patent may be supplied from original survey. Kerr *v.* De Laney, 28 Ky. L. R. 1140, 91 S. W. 286.

Judicial notice taken of method of issuing patents. Kimball *v.* McKee, 149 Cal. 435, 86 S. W. 1089; Stanford *v.* Bailey, 122 Ga. 404, 50 S. E. 161; Huxford *v.* Co., 124 Ga. 181, 52 S. E. 439.

697-11 Lee *v.* Giles, 124 Ga. 494, 52 S. E. 806; Morrison *v.* Holder, 214 Mass. 366, 101 N. E. 1067; Houston O. Co. *v.* Kimball (Tex.), 122 S. W. 533; Runkle *v.* Smith, supra; Cochran *v.* Casey(Tex. Civ.), 128 S. W. 1145. See Smith *v.* Stanley, 114 Va. 117, 75 S. E. 742. *Comp.* Clark *v.* Gallagher, 74 Vt. 331, 52 A. 539.

Deed of adjacent property.—Raughtigan *v.* Co., 86 Conn. 281, 85 A. 517; Temple *v.* Benson, 213 Mass. 128, 100 N. E. 63.

Unsigned deed, not admissible.—Briggs *v.* Gurganus, 152 N. C. 173, 67 S. E. 500.

Deeds between strangers sometimes admissible. Bristol Mfg. Co. *v.* Palmer, 82 Vt. 438, 74 A. 76.

697-12 Tripp *v.* Richter, 142 N. Y. S. 563; Sloan *v.* King, 29 Tex. Civ. 599, 69 S. W. 541. But see Morrison *v.* Holder, 214 Mass. 366, 101 N. E. 1067.

Calls in deed not controlled by line previously run. Elliott *v.* Jefferson, 133 N. C. 207, 45 S. E. 558.

697-13 San Miguel Co. *v.* Bonner, 33 Colo. 207, 79 P. 1025 (latent ambiguity in mining location certificate); Okie *v.* Person, 23 App. Cas. (D. C.) 170 (latent ambiguity in lease); Haskell *v.* Friend, 196 Mass. 198, 81 N. E. 962; Watson *v.* New York, 67 App. Div. 573, 73 N. Y. S. 1027, 175 N. Y. 475, 67 N. E. 1091; Allison *v.* Kenion, 163 N. C. 582, 79 S. E. 1110; Snow *v.* Gallup, 57 Tex. Civ. 572, 123 S. W. 222.

697-14 Carney *v.* Hennessey, 77 Conn. 577, 60 A. 129; Hornet *v.* Dumbeck, 39 Ind. App. 482, 78 N. E. 691 (two irreconcilable descriptions); Bentley *v.* Napier (Ky.), 122 S. W. 180; Ball *v.* Loughbridge, 30 Ky. L. R. 1123, 100 S. W. 275; Rounds *v.* Ham (Me.), 88 A. 892; Rix *v.* Smith, 145 Mich.

203, 108 N. W. 691; Broadwell *v.* Morgan, 142 N. C. 475, 55 S. E. 340 (to locate point of beginning); Zerbey *v.* Allan, 215 Pa. 383, 64 A. 587 (omitted course supplied); McKeon *v.* Roan (Tex. Civ.), 106 S. W. 404.

"To ascertain the proper construction to be given the deed, the trial court sought to discover the intent of the parties to the deed by permitting evidence to be introduced of the situation of the property and the surrounding circumstances at the time of the conveyance, and then looking at the terms of the deed in the light of the situation and surrounding circumstances. This accorded with our rule." Luce *v.* O. & G. Co., 86 Conn. 147, 84 A. 521.

Possession controls, when.—Abadie *v.* Lumb. Co., 128 La. 1014, 55 S. 658.

698-16 Collins *v.* McKay, 36 Mont. 123, 92 P. 295.

698-17 Luce *v.* O. & G. Co., 86 Conn. 147, 84 A. 521; Hubbard *v.* Whitehead, 221 Mo. 672, 121 S. W. 69; Trustees *v.* Coal Co., 241 Pa. 469, 88 A. 763; Gertzer *v.* Kammerer, 13 Phila. (Pa.) 190.

Where the description in a deed is of doubtful import the construction given by the parties may be shown by their acts. Morrison *v.* Holder, 214 Mass. 366, 101 N. E. 1067.

There is "a repugnancy or inconsistency between the description by metes and bounds and the broad and comprehensive language of the decree vesting in Mrs. Morse title to call of the White grant. In such case, the manifest intention of the parties should be given effect if it can be reasonably ascertained from the instruments upon which the title is founded, and to that end the report of the commissioners, surveyor's map, and field notes accompanying the same, should all be considered and construed together." Morse's Heirs *v.* Williams (Tex. Civ.), 142 S. W. 1186.

698-19 Bentley *v.* Napier (Ky.), 122 S. W. 180; Houston O. Co. *v.* Kimball (Tex.), 122 S. W. 533. See Wilson *v.* Co., 143 Fed. 705, 74 C. C. A. 529; Quade *v.* Pillard, 135 Ia. 359, 112 N. W. 646; Board *v.* Taylor, 133 Ia. 153, 108 N. W. 927; Goodson *v.* Fitzgerald, 40 Tex. Civ. 619, 90 S. W. 898.

Description in terms of quantity cannot vary a boundary by monuments and corners. Busbee *v.* Thomas (Ala.), 57 S. 587.

In the absence of deeds describing the boundaries neither natural objects nor marked trees, or both, constitute such a well-defined boundary as is contemplated by the law of adverse possession. Burt & Brabb Lumb. Co. *v.* Sackett, 147 Ky. 232, 144 S. W. 34.

699-22 But see Morrison *v.* Holder, 214 Mass. 366, 101 N. E. 1067.

699-24 Perkins *v.* Brinkley, 133 N. C. 348, 45 S. E. 652; Saxton *v.* Corbett (Tex. Civ.), 122 S. W. 75.

Deeds not referred to competent if lot last to be conveyed and all lots intended to be of same width. Kemedy *v.* Schwab, 38 Pa. Super. 638.

700-26 Vendee estopped by recitals. Krauth *v.* Hahn, 23 Ky. L. R. 1261, 65 S. W. 18.

700-27 Recitals in grant by state sufficient proof of regularity. Broadwell *v.* Morgan, 142 N. C. 475, 55 S. E. 340.

700-28 Rule extended to strangers on ground description of premises is not technically a recital. Bristol Mfg. Co. *v.* Palmer, 82 Vt. 458, 74 A. 76.

Recitals as to quantity, subordinate to actual boundaries. Canales *v.* Gonzalez, 3 P. R. Fed. 461.

700-31 Cooper *v.* Slaughter (Ala.), 57 S. 477; Taylor *v.* Rudy, 99 Ark. 128, 137 S. W. 574; Payne *v.* McBride, 96 Ark. 168, 131 S. W. 463; Wells *v.* Bentley, 87 Ark. 625, 113 S. W. 639; Abrams *v.* Wild (Ky.), 120 S. W. 357; Martin *v.* Conley, 30 Ky. L. R. 728, 99 S. W. 613; Breakey *v.* Woolsey, 149 Mich. 86, 112 N. W. 719; Hilgedick *v.* Gruebbel, 246 Mo. 140, 151 S. W. 731; Moreno *v.* Salazar (Tex. Civ.), 116 S. W. 391; Brown *v.* Johnson (Tex. Civ.), 73 S. W. 49; Harman *v.* Alt, 69 W. Va. 287, 71 S. E. 709.

Agreement must be executed.—Farr *v* Woolfolk, 118 Ga. 277, 45 S. E. 230; Uker *v.* Thieman, 132 Ia. 79, 107 N. W. 467; Le Comte *v.* Freshwater, 56 W Va. 336, 49 S. E. 238; Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026.

Lands must be contiguous.—Cavanaugh *v.* Wholey, 143 Cal. 164, 76 P. 979.

Revocation of agreement.—Geoghegan *v.* Turner, 26 Ky. L. R. 537, 82 S. W. 244.

Rule applies against state if it is unable to fix boundaries of its land. Fulton Lights etc. Co. *v.* S., 62 Misc. 189, 116 N. Y. S. 1000.

Consent or acquiescence must be shown. Board *v.* Board, 17 Wyo. 424, 100 P. 659.

Party walls.—See "Adjoining Land Owners," supra, 209-3.

701-32 Sherman *v.* King, 71 Ark. 248, 72 S. W. 571; Warden *v.* Addington, 131 Ky. 296, 115 S. W. 241.

Testimony clear and convincing.—Proctor *v.* Libby, 110 Me. 39, 85 A. 298.

Facts not amounting to an agreement. Alt *v.* Butz, 81 N. J. L. 156, 79 A. 881.

Evidence insufficient.—Hruby *v.* Lonseth, 63 Wash. 589, 116 P. 26.

Oral agreement must be accompanied by actual possession to agreed line, be otherwise executed or acquieseed in for seven years by acts or declarations of parties. Acquiescenee need not be shown by conventional agreement. Osteen *v.* Wynn, 131 Ga. 209, 62 S. E. 37.

Acquiescence in practical location of line for a long time, not disturbed. Moyer *v.* Langton, 37 Utah 9, 106 P. 508.

Agreement not conclusive if based on mistake. Kimes *v.* Libby, 87 Neb. 113, 126 N. W. 869.

701-33 Loustalot *v.* McKeel, 157 Cal. 634, 108 P. 707; Young *v.* Blakeman, 153 Cal. 477, 95 P. 888; Dierssen *v.* Nelson, 138 Cal. 394, 71 P. 456; Farr *v.* Woolfolk, 118 Ga. 277, 45 S. E. 230; Purtle *v.* Bell, 225 Ill. 523, 80 N. E. 350; Sonneman *v.* Mertz, 221 Ill. 362, 77 N. E. 550; Kitchen *v.* Chantland, 130 Ia. 618, 105 N. W. 367; Warden *v.* Addington (Ky.), 115 S. W. 241; Hocker *v.* Keeton (Ky.), 115 S. W. 784; Fields *v.* Sizemore, 32 Ky. L. R. 237, 105 S. W. 438; Frazier *v.* Co., 27 Ky. L. R. 815, 86 S. W. 983; Berry *v.* Evans, 28 Ky. L. R. 22, 89 S. W. 12; Amburgy *v.* Co., 28 Ky. L. R. 551, 89 S. W. 680; Lost Creek C. Co. *v.* Napier, 28 Ky. L. R. 369, 89 S. W. 264; Cheatham *v.* Hicks, 28 Ky. L. R. 66, 88 S. W. 1093; Ball *v.* Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Hoar *v.* Hennessy, 29 Mont. 253, 74 P. 452; Voigt *v.* Hunt (Tex. Civ.), 167 S. W. 745; McKeon *v.* Roan (Tex. Civ.), 106 S. W. 404; Lecomte *v.* Toudouze, 82 Tex. 208, 17 S. W. 1047, 27 Am. St. Rep. 870; Johnson *v.* Johnson, 65 Tex. 87; Cooper *v.* Austin, 58 Tex. 494.

Contra, Kirkpatrick *v.* McCracken, 161 N. C. 198, 76 S. E. 821.

Evidence held sufficient to establish boundary by parol agreement. Combs *v.* Stacy, 147 Ky. 222, 144 S. W. 24.

"**As qualifying and explaining** the rule, it is held that there must doubt exist as to the true division line, and, where the parties know the divisional line, such an agreement would not be binding, because it would be a parol conveyance of land and prohibited by the statute of frauds. Harn *v.* Smith, 79 Tex. 310, 15 S. W. 240, 23 Am. St. Rep. 340; Cook's Hereford Cattle Co. *v.* Barnhart (Tex. Civ.), 147 S. W. 662.

701-34 Long *v.* Cummings, 156 Ala. 577, 47 S. 109; Curless *v.* S., 172 Ind. 257, 87 N. E. 129; Seberg *v.* Bk., 141 Ia. 99, 119 N. W. 378; Parks *v.* Baker, 81 Kan. 351, 105 P. 439; Gordon *v.* Simmons, 136 Ky. 273, 124 S. W. 306; Harris *v.* Coppock, 18 O. Dec. 266; Bernheim *v.* Talbot, 54 Or. 30, 100 P. 1107; Roberts *v.* Blount (Tex. Civ.), 120 S. W. 933.

See Moore *v.* Mauney, 25 Ky. L. R. 2274, 80 S. W. 458.

Evidence of contents.—Lost title bond admissible. Honaker *v.* Shrader (Va.), 79 S. E. 391.

Conclusions of witnesses, unobjected to, considered in trial by court. Bean *v.* Bird (Tex. Civ.), 117 S. W. 177.

Exercise of jurisdiction by county may be shown and contemporaneous parol testimony is admissible if statute fixing boundaries, uncertain. Puget Sound Nat. Bk. *v.* Fisher, 52 Wash. 246, 100 P. 724.

702-35 Long *v.* Cummings, 156 Ala. 577, 47 S. 109; Adams *v.* Betz, 167 Ind. 161, 78 N. E. 649; Warden *v.* Addington (Ky.), 115 S. W. 241; Curley *v.* Starr, 30 Ky. L. R. 974, 99 S. W. 972; Alexander *v.* Parks, 24 Ky. L. R. 2113, 72 S. W. 1105.

702-36 Does not create estoppel between successors in title; competent in support of presumption agreed line was correct. Guill *v.* O'Bryan (Tex. Civ.), 121 S. W. 593.

702-37 Wells *v.* Bentley, 87 Ark. 625, 113 S. W. 639; Loustalot *v.* McKeel, 157 Cal. 634, 108 P. 707; Purtle *v.* Bell, 225 Ill. 523, 80 N. E. 350; Warden *v.* Addington, 131 Ky. 296, 115 S. W. 241; Hollinsworth *v.* Barrett, 28 Ky. L. R. 280, 89 S. W. 107; Gardner *v.* White, 24 Ky. L. R. 2444, 74 S. W. 206; Higginson *v.* Schaneback, 23 Ky. L. R. 2230, 66 S. W. 1040; Sheldon *v.* R. Co., 161 Mich. 503, 126 N. W. 1056; Foard *v.* McAnnelly, 215 Mo. 371, 114

S. W. 990; Lynch *v.* Egan, 67 Neb. 541, 93 N. W. 775; LeComte *v.* Freshwater, 56 W. Va. 336, 49 S. E. 238; Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026.

Where true line known, such agreement cannot be made. Lewis *v.* Ogram, 149 Cal. 307, 87 P. 60.

Inability of surveyors selected by parties to agree upon line shows it was uncertain. Clark *v.* Boosey, 52 Or. 448, 97 P. 754.

702-38 Randleman *v.* Taylor, 94 Ark. 511, 127 S. W. 723; Parks *v.* Baker, 81 Kan. 351, 105 P. 439; Louisiana & T. L. Co. *v.* Dupuy, 52 Tex. Civ. 46, 113 S. W. 973 (burden is on subsequent purchaser in action against other such purchasers from another vendor to show that at time of latter's purchase he had knowledge of agreement concerning boundary); Anderson *v.* Huebel, 133 Wis. 542, 113 N. W. 975.

702-39 Sheets *v.* Sweeney, 136 Ill. 336, 26 N. E. 648.

702-40 Dundas *v.* Dist., 155 Cal. 692, 102 P. 925; Raley *v.* Magendie (Tex. Civ.), 116 S. W. 174.

703-43 Randleman *v.* Taylor, 94 Ark. 511, 127 S. W. 723; Sonneman *v.* Mertz, 221 Ill. 362, 77 N. E. 550.

703-44 Hocker *v.* Keeton (Ky.), 115 S. W. 784; Bernheim *v.* Talbot, 54 Or. 30, 100 P. 1107.

703-45 Davis *v.* Grant, 173 Ala. 4, 55 S. 210; Brown *v.* Brown, 18 Ida. 345, 110 P. 269; Bayhouse *v.* Urquides, 17 Ida. 567, 105 P. 1066; Atwood *v.* Wheat (Ky.), 127 S. W. 511; Woodford *v.* Clay, 32 Ky. L. R. 922, 107 S. W. 269; Moser *v.* Dollner, 111 Minn. 464, 125 N. W. 275; Foard *v.* McAnnelly, supra; Albanesius *v.* Co., 75 N. J. L. 340, 67 A. 1025; Brew *v.* Nugent, 136 Wis. 336, 117 N. W. 813 (such evidence may be more decisive than that of surveyor who measured from distant monuments).

Building fence may be explained. Western U. O. Co. *v.* Newlove, 145 Cal. 772, 79 P. 542. Fence not original evidence of street lines. Winchester *v.* Payne, 10 Cal. App. 501, 102 P. 531.

703-46 Roberts *v.* Co., 42 Tex. Civ. 590, 92 S. W. 1060. See Chisholm *v.* Thompson (Pa.), 82 A. 67.

True boundary line not changed by construction of party wall by owners unless an agreement as to the line is shown. Fewell *v.* Kinsella (Tex. Civ.), 144 S. W. 1174, cit. Houghton *v.* Mendenhall, 50 Minn. 40, 52 N. W. 269.

703-47 Hubbard *v.* Whitehead, 221 Mo. 672, 121 S. W. 69. See Benz *v.* St Paul, 89 Minn. 31, 93 N. W. 1038; Parrish *v.* Williams (Tex. Civ.), 79 S. W. 1047; Mays *v.* Hinchman, 57 W. Va. 602, 50 S. E. 823.

Agreement implied from acts and declarations. Purtle *v.* Bell, 225 Ill. 523, 80 N. E. 350; Stumpe *v.* Kopp, 201 Mo. 112, 99 S. W. 1073. May be shown by circumstantial evidence. Roberts *v.* Blount (Tex. Civ.), 120 S. W. 933. Written agreement admissible. Samples *v.* Smyth, 30 Ky. L. R. 498, 98 S. W. 1047.

Survey made by grantor, marking of lines and corners and conveyance accordingly is a practical location. Lance *v.* Rumbough, 150 N. C. 19, 63 S. E. 257.

It is presumed where land is occupied by buildings up to agreed line grantee bought with regard to boundaries indicated. Young *v.* Blakeman, 153 Cal. 477, 95 P. 888.

Agreement executed by marked line or actual possession is notice to the world. Walker *v.* Cornett (Ky.), 122 S. W. 841.

703-49 Morgan *v.* Lewis, 30 Ky. L. R. 747, 99 S. W. 676; Lindley *v.* Johnston, 12 Wash. 257, 81 P. 822; Stark *v.* Dukring, 140 Wis. 521, 122 N. W. 1131.

703-50 Kincaid *v.* Vickers, 217 Ill. 423, 75 N. E. 527; Hanstein *v.* Ferrall, 149 N. C. 240, 62 S. E. 1070; First B. Soc. *v.* Wetherell (R. I.), 72 A. 641.

704-51 Beaumont L. Co. *v.* Carroll (Tex. Civ.), 111 S. W. 1059.

Statements of party admissible to prove agreement. Berry *v.* Evans, 28 Ky. L. R. 22, 89 S. W. 12.

704-52 Clapp *v.* Churchill, 164 Cal. 741, 130 P. 1061. Mutual understanding. Holden *v.* Crolly, 153 App. Div. 254, 138 N. Y. S. 22.

Burden not on defendant in replevin to show establishment of boundary line between parties' lands. Randleman *v.* Taylor, 94 Ark. 511, 127 S. W. 723.

Declaration of third party as to line to which he claims, not evidence it is the correct line. Rinkle *v.* Smith, 52 Tex. Civ. 180, 114 S. W. 865.

704-53 Lonstalot *v.* McKeel, 157 Cal. 624, 108 P. 707.

704-54 Deidrich *v.* Simmons, 75 Ark. 400, 87 S. W. 649; Humphrey *v.* Whitney, 17 Ida. 14, 103 P. 389; Steidl

v. Link, 246 Ill. 345, 92 N. E. 874; Adams *v.* Betz, 167 Ind. 161, 78 N. E. 649; Furst *v.* Satterfield, 44 Ind. App. 613, 89 N. E. 906; Young *v.* Hyland, 37 Utah 229, 108 P. 1124. See Foard *v.* McAnnelly, 215 Mo. 371, 114 S. W. 990.

Representations on paper in judicial proceedings and otherwise do not show agreement fixing lines. S. *v.* King, 64 W. Va. 546, 63 S. E. 468.

The effect of such acts and declarations may be rebutted. Mylius *v.* Lumb. Co., 69 W. Va. 346, 71 S. E. 404.

704-56 Scott *v.* Baird, 145 Mich. 116, 108 N. W. 737; Schiele *v.* Kimball (Tex. Civ.), 150 S. W. 302; Cochran *v.* Casey (Tex.), 128 S. W. 1145. See Henning *v.* Keiper, 37 Pa. Super. 488.

"Had there been no specific agreement, the evidence shows acquiescence in the line, accompanied by possession for a period of more than 10 years; and this alone would be conclusive evidence of an agreement, and would bind the parties." McCoy *v.* Paxton, 156 Ia. 194, 135 N. W. 1091, cit. Miller *v.* Mills Co., 111 Ia. 654, 82 N. W. 1038; Klinkner *v.* Schmidt, 114 Ia. 695, 87 N. W. 661.

704-57 Powell *v.* Allen, 155 Cal. 161, 99 P. 865; Bell *v.* Redd, 133 Ga. 5, 65 S. E. 90; Taylor *v.* Reising, 13 Ida. 226, 89 P. 943; Ward *v.* Middleton (Ky.), 124 S. W. 823; Thompson *v.* Borg, 90 Minn. 209, 95 N. W. 896; Aiken *v.* Boyd, 55 Wash. 696, 104 P. 1101.

Party claiming estoppel must show reliance upon representation and circumstances justifying it. Gaffney *v.* Clark (Tex. Civ.), 115 S. W. 330.

704-58 Paducah Co. *v.* Co., 135 Ky. 53, 121 S. W. 986; Cleveland etc. L. Co. *v.* Gauthier, 143 Mich. 296, 106 N. W. 862; Rozelle *v.* Lewis, 37 Pa. Super. 563; Horton *v.* Roghaar, 37 Utah 298, 108 P. 21. See Turner *v.* Creech, 58 Wash. 439, 108 P. 1084. Conveyance by reference to map and street as boundary, not conclusive between parties as to title to street. Ocean City H. Co. *v.* Sooy, 77 N. J. L. 527, 73 A. 236.

705 Evidence of surveyor's marks. Ashford *v.* McKee (Ala.), 62 S. 879.

705-60 Hodge *v.* Napier, 146 Ky. 479, 142 S. W. 1037; Hensley *v.* Co., 132 Ky. 112, 116 S. W. 316 (if referred to in patent); Jack *v.* Gerber, 35 Okla. 700, 132 P. 805; S. *v.* Sulflow (Tex. Civ.), 128 S. W. 652 (must be followed).

Contra where made only upon information, the deed being lost. Cartright *v.* Cartright, 70 W. Va. 507, 74 S. E. 655.

705-61 Knoll *v.* Randolph, 3 Neb. (Unof.) 599, 92 N. W. 195, 3 Neb. (Unof.) 603, 94 N. W. 964.

705-62 Daniel *v.* Co. (Ky.), 126 S. W. 108; Wilson Lumb. Co. *v.* Hutton, 152 N. C. 537, 68 S. E. 2.

Original plat admissible and of potent weight. Daniel *v.* Co. (Ky.), 126 S. W. 108; Bell County Co. *v.* Hendrickson, 24 Ky. L. R. 371, 68 S. W. 842.

705-63 Lattig *v.* Scott, 17 Ida. 506, 107 P. 47.

Field notes of deceased surveyor competent as declarations if authenticated. Collins *v.* Cullough, 222 Pa. 472, 71 A. 1077.

705-64 Enterprise T. Co. *v.* Collins, 222 Pa. 372, 71 A. 540; Kellogg *v.* Finn, 22 S. D. 578, 119 N. W. 545 (error in excluding not cured by secondary evidence of what was shown by field notes); Sullivan *v.* Solis, 52 Tex. Civ. 464, 114 S. W. 456. See Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979.

Conclusive under statute. Clark *v.* Boosey, 52 Or. 448, 97 P. 754.

Corrected field notes, approved by commissioner of general land office, prima facie evidence. Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979.

Must purport to be official acts of surveyor Stumpe *v.* Kopp, 201 Mo. 412, 99 S. W. 1073.

706-65 Ferry *v.* Fowler, 37 Utah 34, 106 P. 506 (original approved government survey conclusive): Maylahn *v.* Hanelt, 134 Wis. 18, 114 N. W. 102. See Moyer *v.* Langton, 37 Utah 9, 106 P. 508.

Survey conclusive as between holder of patent and homestead claimant. Murphy *v.* Tanner, 100 C. C. A. 125, 176 Fed. 537. Government survey conclusive where land in possession of private owners. Barringer *v.* Davis, 141 Ia. 119, 120 N. W. 65.

Official surveys control private surveys, especially after lapse of long period, so far as boundaries of city concerned. Marsha *v.* Co., 81 S. C. 135, 62 S. E. 4.

Surveys of adjacent tracts admissible to identify tract in controversy. Sullivan *v.* Solis, 52 Tex. Civ. 464, 114 S. W. 456.

Irregular surveys cannot be proved though made by officer. Clark *v.* McAtee, 227 Mo. 152, 127 S. W. 37 (noncompliance with statute); Talbot *v.* Smith, 56 Or. 117, 107 P. 480 (not made in accordance with land office rules, unreliable).

Surveys, a topographical model, photographic views and parol testimony received to establish boundary between counties. Sierra County *v.* County, 155 Cal. 1, 99 P. 371.

706-66 Sullivan *v.* Solis, 52 Tex. Civ. 461, 114 S. W. 156.

706-67 Dent *v.* Simpson, 81 Kan. 217, 105 P. 542; Hamilton *v.* Saunders (Tex. Civ.), 73 S. W. 1069.

706-71 Brown *v.* Metcalf, 215 Mass. 289, 102 N. E. 413; Runkle *v.* Smith, 32 Tex. Civ. 186, 114 S. W. 865 (lines run not binding). See In re Nelson, 88 Kan. 219, 128 P. 376.

As between parties.—Virginia C. & I. Co. *v.* Ison, 114 Va. 144, 76 S. E. 282.

Private survey of township presumed to conform to government survey. Taylor *v.* Reising, 13 Ida. 226, 89 P. 942.

Field notes cannot vary an express recital in a deed. New York Cent. & H. R. R. Co. *v.* Moore, 203 N. Y. 615, 97 N. E. 41.

706-72 In re Boundaries, 4 Haw. 239, 5 Haw. 94; Curless *v.* S., 172 Ind. 257, 87 N. E. 129, 88 N. E. 339; Wightman *v.* Campbell, 161 App. Div. 49, 14 N. Y. S. 666; S. *v.* King, 64 W. Va. 546, 63 S. E. 468 (not competent as admissions if survey and maps are made experimentally unless adoption shown).

707-73 DeLoney *v.* S., 88 Ark. 311, 115 S. W. 138 (boundaries of state); S. *v.* King, 64 W. Va. 546, 63 S. E. 468 (survey on which no patent issued). *Contra*, Dent *v.* Simpson, 81 Kan. 217, 105 P. 542 (to explain survey in controversy, and may be prima facie evidence). *Comp.* Board *v.* Board, 17 Wyo. 424, 100 P. 679.

707-75 S. *v.* King, 64 W. Va. 546, 63 S. E. 468.

707-76 Bain *v.* Peyton, 80 Kan. 376, 102 P. 251.

707-77 White *v.* Jefferson, 110 Minn. 270, 124 N. W. 373, 125 N. W. 262; Twombly *v.* Lord, 74 N. H. 211, 66 A. 486 (to establish boundary line). *Comp.* Cooperative B. Bk. *v.* Hawkins, 30 R. I. 251, 73 A. 617.

Admissible to explain testimony.—Rehfuss *v.* Hill, 243 Ill. 140, 90 N. E. 187.

Plat of private survey received. Baldwin *v.* Fisher, 110 Minn. 186, 124 N. W. 1094. They are not best evidence of location of streets, but serve as basis for parol testimony. International etc. R. Co. *v.* Marin, 53 Tex. Civ. 531, 116 S. W. 656.

707-78 Sears *v.* Carver, 133 Ga. 422, 65 S. E. 886 (reference to plat in return admeasuring dower); Barringer *v.* Davis, 141 Ia. 419, 120 N. W. 65; Toudouze *v.* Keller (Tex. Civ.), 118 S. W. 185; Schwede *v.* Heinrich, 29 Wash. 124, 69 P. 643; Neumeister *v.* Goddard, 125 Wis. 82, 103 N. W. 241. See Downey *v.* Hood, 203 Mass. 4, 89 N. E. 24.

Boundaries shown on government plat, indicating section corner, control description by quantity. Somers *v.* McMordie, 155 Cal. xvi, 99 P. 482.

Maps may not control if they are in nature of self-serving evidence. Webber *v.* Gillies, 112 N. Y. S. 397.

708-79 McNeely *v.* Laxton, 149 N. C. 327, 63 S. E. 278.

708-81 Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979.

708-82 Pereles *v.* Gross, 126 Wis. 122, 105 N. W. 217.

Plat inadmissible if survey calls for line of old and established patent certain in its calls. Bell *v.* Powers (Ky.), 121 S. W. 991.

708-83 Board *v.* Taylor, 133 Ia. 453, 108 N. W. 927.

708-84 Mylius *v.* Lumb. Co., 69 W. Va. 346, 71 S. E. 404.

Original map admissible where plat is ambiguous. McLane *v.* Grice (Tex. Civ.), 66 S. W. 709.

708-86 Hudson *v.* Webber, 104 Me. 429, 72 A. 184, if referred to in complaint.

Inadmissible against persons not parties to partition. Harper *v.* Anderson, 130 N. C. 538, 41 S. E. 1021.

Judgment in other action, between different parties, and involving adjacent land, admissible to aid in establishing boundaries of land located without survey. Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979.

709-87 Calls in senior survey control. Hill *v.* Dalton, 140 N. C. 9, 52 S. E. 273.

Calls in other survey not relevant if other means of identifying land available. Taft *v.* Ward (Tex. Civ.), 124 S. W. 437.

709-88 Hamilton *v.* Blackburn, 43 Tex. Civ. 153, 95 S. W. 1094.
Location of points at known distance from one in dispute may be shown. Hobbs *v.* Hobbs, 75 N. H. 590, 72 A. 290.
709-89 *Contra* if title claimed from survey. Andrews *v.* Wheeler, 10 Cal. App. 614, 103 P. 144.
709-90 S. *v.* Palacios (Tex. Civ.), 150 S. W. 229; Francis *v.* Patterson (Tex. Civ.), 143 S. W. 678.
Evidence to overcome presumption need not be direct but may be circumstantial. S. *v.* Palacios (Tex. Civ.), 150 S. W. 229.
710-96 Andrews *v.* Wheeler, 10 Cal. App. 614, 103 P. 144; Bates *v.* Baker, 31 Ky. L. R. 47, 101 S. W. 340 (report of surveyor appointed by court); Shive *v.* Garman, 30 Ky. L. R. 1368, 101 S. W. 300 (presumption survey made in accordance with will and acquiesced in is correct); Pettis Co. *v.* Reavis (Mo.), 165 S. W. 990; Carter *v.* Spracklin, 246 Mo. 116, 151 S. W. 451; Watkins *v.* Havighorst, 13 Okla. 128, 74 P. 318.
But where proved incorrect in some particulars the presumption ceases. Dolphin *v.* Klann, 246 Mo. 477, 151 S. W. 956.
"It is elementary that the line of a grant must be established by calls in its own field notes and that if there is no conflict in the calls found in the field notes of a survey, there is no reason for construction, and the calls must speak for themselves." Polk County *v.* Stevens (Tex. Civ.), 143 S. W. 204.
710-97 Pauly *v.* Broadnax, 157 Cal. 386, 108 P. 271 (must prevail if monuments unknown); Franklin *v.* Assn. (Tex. Civ.), 119 S. W. 1166. See Brown *v.* Co., 3 Cal. App. 474, 86 P. 744.
Lines presumed to run on ground in accordance with surveyor's report and plan. Adams *v.* Clapp, 99 Me. 169, 58 A. 1043.
710-98 Georgia T. Co. *v.* Talc. Co., 140 Ga. 245, 78 S. E. 905. See Burke *v.* Braumiller (Tex. Civ.), 150 S. W. 206.
Evidence held not sufficient to overcome presumption that plat gave correct dimensions of lot. Read *v.* Bartlett, 253 Ill. 76, 99 N. E. 345.
710-99 Morgan *v.* Renfro, 30 Ky. L. R. 533, 99 S. W. 311.
Presumption officers did duty in highway proceedings. Quinn *v.* Baage, 138 Ia. 426, 114 N. W. 205.
710-1 Christ *v.* Tent, 16 Okla. 375, 84 P. 1074.
But affidavits cannot be introduced to support exceptions to report. Schoen *v.* Harris (Ia.), 143 N. W. 1108.
711-2 Pauly *v.* Broadnax, 157 Cal. 386, 108 P. 271; Andrews *v.* Wheeler, 10 Cal. App. 614, 103 P. 144; Myrick *v.* Hembree, 136 Ky. 110, 123 S. W. 668; Frederitzie *v.* Boeker, 193 Mo. 228, 92 S. W. 227; Runkle *v.* Welty, 86 Neb. 680, 126 N. W. 139; Clark *v.* Thornburg, 66 Neb. 717, 92 N. W. 1056; Bock *v.* Porterfield, 80 Neb. 523, 114 N. W. 597; Hurn *v.* Alter, 80 Neb. 183, 113 N. W. 986; Green *v.* Horn, 128 App. Div. 686, 112 N. Y. S. 993; Whitfield *v.* Robertson, 152 N. C. 97, 67 S. E. 494 (influential); Philbrick *v.* S., 8 O. N. P. (N. S.) 374; Seward *v.* Casler, 24 Okla. 275, 103 P. 740; Trimwith *v.* Smith, 42 Or. 239, 70 P. 816; Collins *v.* Clough, 222 Pa. 472, 71 A. 1077 (calls for adjoining tracts conclusive they had been located); Propper *v.* Wohlwend, 16 N. D. 110, 112 N. W. 967; Taft *v.* Ward (Tex. Civ.), 124 S. W. 437; Thatcher *v.* Matthews (Tex. Civ.), 105 S. W. 1006; Thayer *v.* Co., 36 Wash. 63, 78 P. 200; Stangair *v.* Roads, 41 Wash. 583, 84 P. 405; Tucker *v.* Co., 18 Wyo. 97, 104 P. 529.
See Dent *v.* Simpson, 81 Kan. 217, 105 P. 542; Keefe *v.* R., 75 N. H. 116, 71 A. 379; Moyer *v.* Langton, 37 Utah 9, 106 P. 508; Grand Cent. M. Co. *v.* Co., 36 Utah 364, 104 P. 573.
Monuments control field notes and plats. Canavan *v.* Dugan, 10 N. M. 316, 62 P. 971.
Original corners conclusive though located incorrectly. Washington R. Co. *v.* Young, 29 Utah 108, 80 P. 382.
No presumption line, long acquiesced in, properly established. Atascosa County *v.* Alderman (Tex. Civ.), 91 S. W. 846.
Official character of stakes and monuments must be shown by party relying on them. Pauly *v.* Broadnax, 157 Cal. 386, 108 P. 271.
Monuments erected after conveyance do not affect parties' rights. Talbot *v.* Smith, 56 Or. 117, 107 P. 480.
Identification must be clear to give natural object or monument controlling weight. Goss *v.* Golinsky, 12 Cal. App. 71, 106 P. 604.
711-3 Spreckels *v.* Brown, 212 U. S.

208; Resurrection M. Co. *v.* Co., 129 Fed. 668, 64 C. C. A. 180; Meyer etc. Co. *v.* Steinfeld, 9 Ariz. 245, 80 P. 400; Chapman & Dewey Lumb. Co. *v.* Directors, 100 Ark. 94, 139 S. W. 627; Wheeler *v.* Benjamin, 136 Cal. 51, 68 P. 313; Meeker *v.* Simmons, 10 Cal. App. 270, 101 P. 683; Beniamina *v.* Clark, 3 Haw. 247; Barringer *v.* Davis, 141 Ia. 419, 120 N. W. 65; Liddle *v.* Blake, 131 Ia. 165, 105 N. W. 649; Taylor & Crate *v.* Forester, 148 Ky. 201, 146 S. W. 428; McCrosky *v.* Wilson, 144 Ky. 277, 138 S. W. 379; Combs *v.* Valentine, 144 Ky. 184, 137 S. W. 1080; Jones *v.* Hamilton, 137 Ky. 253, 125 S. W. 695 (otherwise if calls for artificial lines); Finley *v.* Meadows, 134 Ky. 70, 119 S. W. 216; Kendrick *v.* Burchett, 28 Ky. L. R. 342, 89 S. W. 239; Tarvin *v.* Co., 25 Ky. L. R. 2246, 80 S. W. 504; Chambers *v.* Tharp, 29 Ky. L. R. 271, 93 S. W. 627; Morgan *v.* Renfro, 30 Ky. L. R. 533, 99 S. W. 311; Hall *v.* Caplis, 109 La. 483, 33 S. 570; Stewart *v.* May, 111 Md. 162, 73 A. 460; Lyon County *v.* County, 34 Nev. 213, 117 P. 827; Mitchell *v.* Welborn, 149 N. C. 347, 63 S. E. 113; Harris *v.* Coppock, 18 O. Dec. 266; Wilson *v.* Sidle, 4 O. N. P. (N. S.) 465; Agnew *v.* Stroud, 45 Pa. Super. 82; Eshleman *v.* Rankin, 32 Pa. Super. 254; Rozelle *v.* Lewis, 37 Pa. Super. 563; Rook *v.* Greenewald, 22 Pa. Super. 641; Co-operative B. Bk. *v.* Hawkins, 30 R. I. 171, 73 A. 617; S. *v.* Sullivan (Tex. Civ.), 128 S. W. 652 (order varied slightly); Granberry *v.* Storey (Tex. Civ.), 127 S. W. 1122; Ridgell *v.* Atherton (Tex. Civ.), 107 S. W. 129; Bullion etc. M. Co. *v.* Co., 36 Utah 329, 103 P. 881; Wells *v.* Lagoria, 112 Va. 522, 71 S. E. 713; Hatcher *v.* R. Co., 109 Va. 357, 63 S. E. 999 (no presumption of conflict); Mylius *v.* Lumb. Co., 69 W. Va. 346, 71 S. E. 404; S. *v.* King, 64 W. Va. 546, 63 S. E. 468 (notwithstanding more conflict as to identity of monuments); Thompson *v.* Fuhrmann, 130 Wis. 375, 110 N. W. 286.

See Andrews *v.* Wheeler, 10 Cal. App. 614, 103 P. 141; McNeely *v.* Laxton, 149 N. C. 327, 63 S. E. 278; Hughes *v.* S., 57 Tex. Civ. 396, 122 S. W. 177. *Contra*, Crosby *v.* Stevenson (Tex. Civ.), 156 S. W. 1110.

712-4 Kentucky L. etc. Co. *v.* Crabtree, 113 Ky. 922, 70 S. W. 31; Arms *v.* City, 117 Mass. 29, 134 N. W. 298; Co-operative B. Bk. *v.* Hawkins, 30 R. I. 171, 73 A. 617; Wentzel *v.* Claussen, 26 S. D. 89, 127 N. W. 621; Cochran *v.* Casey (Tex.), 128 S. W. 1145; Masterson *v.* Ribble, 34 Tex. Civ. 270, 78 S. W. 358; Pilkerton *v.* Roberson, 110 Va. 136, 65 S. E. 835.

712-5 Barber *v.* Electric Co., 172 Ala. 28, 55 S. 364; Kimball *v.* McKee, 149 Cal. 435, 86 P. 1089; Goss *v.* Golinsky, 12 Cal. App. 71, 106 P. 604 (if marks of government survey obliterated and corners cannot be located measurements given in field notes control); Currier *v.* Jones, 121 Ia. 160, 96 N. W. 766; Rowell *v.* Weinemann, 119 Ia. 256, 93 N. W. 279; Rowell *v.* Clark, 119 Ia. 299, 93 N. W. 280; Daniel *v.* Co., 137 Ky. 535, 126 S. W. 108 ("one call of a patent is of as much dignity as another"); Finley *v.* Meadows, 134 Ky. 70, 119 S. W. 216; Bell Co. L. etc. Co. *v.* Hendrickson, 24 Ky. L. R. 371, 68 S. W. 842 (natural object not clearly identified); Chapman *v.* Hamblet, 100 Me. 454, 62 A. 215; Hubbard *v.* Whitehead, 221 Mo. 672, 121 S. W. 69; P. *v.* Hall, 43 Misc. 177, 88 N. Y. S. 276; Seabrook *v.* Co., 49 Or. 237, 89 P. 417; Christenson *v.* Simmons, 47 Or. 184, 82 P. 805; Crosby *v.* Stevenson (Tex. Civ.), 156 S. W. 1110; S. *v.* Palacios (Tex. Civ.), 150 S. W. 229; Love *v.* Jones (Tex. Civ.), 138 S. W. 1128; Grigsby *v.* Earle (Tex. Civ.), 138 S. W. 448; S. *v.* Sullivan (Tex. Civ.), 128 S. W. 652; Ramseaur *v.* Ball (Tex. Civ.), 125 S. W. 590 (calls for distance and course given effect); Goodson *v.* Fitzgerald, 40 Tex. Civ. 619, 90 S. W. 898; Hamilton *v* Blackburn, 43 Tex. Civ. 153, 95 S. W. 1094; Jaggers *v.* Stringer, 47 Tex. Civ. 571, 106 S. W. 151; Hatcher *v.* R. Co., 109 Va. 357, 63 S. E. 999 (*quot.* preceding four paragraphs of text); Green *v.* Pennington, 105 Va. 801, 54 S. E. 877; Davies *v.* Wickstrom, 56 Wash. 154, 105 P. 454. See Ramsey *v.* Morrow, 133 Ky. 486, 118 S. W. 296; Caldwell L. & L. Co. *v.* Erwin, 150 N. C. 41, 63 S. E. 356; Lance *v.* Rumbough, 150 N. C. 19, 63 S. E. 357 (exceptions to general rule); Jordan *v.* James, 53 Tex. Civ. 408, 115 S. W. 872 (call for nearest beginning point preferred) Tondouze *v.* Keller (Tex. Civ.), 118 S. W. 185; Stangair *v.* Roads, 41 Wash. 583, 84 P. 405.

Preference in calls should be given to those that indicate intention of grantor. S. *v.* Palacios (Tex. Civ.), 150 S. W. 229.

Monuments disregarded if line of survey not in doubt. Lillis *v.* Urrutia, 9 Cal. App. 557, 99 P. 992.

Course and distance control where, from definite beginning point, they will, with reasonable certainty, locate and identify the line. Guill *v.* O'Bryan (Tex. Civ.), 121 S. W. 593.

712-6 Wright *v.* Hurst, 122 Tenn. 656, 127 S. W. 701; Barrera *v.* Guerra (Tex. Civ.), 122 S. W. 902. See Pauly *v.* Broadnax, 157 Cal. 386, 108 P. 271; Poitevent *v.* Scarborough (Tex. Civ.), 117 S. W. 443.

Continuous line.—Jackson *v.* Assn., 51 W. Va. 482, 41 S. E. 920.

712-7 Liddle *v.* Blake, 131 Ia. 165, 105 N. W. 649.

712-8 Field notes prevail over plat made therefrom if there is conflict. Lillis *v.* Urrutia, 9 Cal. App. 557, 99 P. 992.

713 Where collaterally in issue, parol evidence is admissible to show municipal boundaries. Wabash R. Co. *v.* Gretzinger (Ind.), 104 N. E. 69. See also Missouri etc. R. Co. *v.* Bratcher, 54 Tex. Civ. 10, 118 S. W. 1091.

713-9 Vincent *v.* Blanton, 27 Ky. L. R. 489, 85 S. W. 703; Jones *v.* Burkitt (Tex. Civ.), 150 S. W. 275 (junior survey); McCaleb *v.* Campbell (Tex. Civ.), 116 S. W. 111; Keystone M. Co. *v.* Co. (Tex. Civ.), 96 S. W. 64. See Hornberger *v.* Giddings, 31 Tex. Civ. 283, 71 S. W. 989.

"The field notes are complete within themselves and contain no inconsistent calls, and can be identified by course and distance from its beginning corner. Its call from northeast corner 2,458 varas to a corner with its bearing trees shows that the surveyor actually stopped with the course and distance which would take precedence over an unmarked line, the presumption of law being that bearing trees, after the lapse of more than 50 years, have perished or been removed and that the call for an unmarked line not found at that point, and not accurately found on the ground elsewhere, was by mistake on the part of the surveyor who supposed that the line was or ought to be there. Oliver *v.* Mahoney, 61 Tex. 610; Moore *v.* Reiley, 68 Tex. 668, 5 S. W. 618; McAninch *v.* Freeman, 69 Tex. 445, 4 S. W. 369." Polk County *v.* Stevens (Tex. Civ.), 143 S. W. 204.

713-12 Presumption surveyor ran out lines of adjoining surveys called for. Stensoff *v.* Jackson, 40 Tex. Civ. 328, 89 S. W. 445.

713-14 Patentees presumed to have made entry and survey of vacant land with reference to well known older surveys; this presumption is strengthened by proof of understanding entries and surveys so made. Bell *v.* Powers (Ky.), 121 S. W. 991.

Recourse to lines and calls of junior surveyors can be had only when there is failure to locate or supply monuments. Collins *v.* Clough, 222 Pa. 472, 71 A. 1077.

Presumption city's grantee takes to center of street does not prevail where city owns fee. Webber *v.* Gillies, 112 N. Y. S. 397.

A meander line is not evidence of boundary unless in case of mistake or fraud. Barringer *v.* Davis, 141 Ia. 419, 120 N. W. 65.

713-15 Laurentide M. Co. *v.* Fortin, 39 Can. Sup. 680; Gilbert *v.* Finberg (Tex. Civ.), 156 S. W. 507. See Perry *v.* Sheldon, 30 R. I. 426, 75 A. 690.

Statutes declaring what surveys shall be evidence do not affect competency of surveyor not within them, who has surveyed premises, to testify to result of his survey. Hopper *v.* Hickman, 145 Mo. 411, 46 S. W. 973; Johnson *v.* Boonville, 85 Mo. App. 199; Sommer *v.* Compton, 52 Or. 173, 96 P. 124.

Practise to ask surveyors if they know the location of the line. Lobdell *v.* Northville, 151 App. Div. 384, 136 N. Y. S. 113.

713-16 Myrick *v.* Hembree, 136 Ky. 110, 123 S. W. 668; Fezler *v.* Gibson (Mo.), 166 S. W. 1096; Harris *v.* Coppock, 18 O. Dec. 266; Rozelle *v.* Lewis, 37 Pa. Super. 563 (marks and monuments fixed by parties); Myers *v.* Moody (Tex. Civ.), 122 S. W. 920.

Evidence of recollection many years after survey, not convincing. Seabrook *v.* Co., 54 Or. 172, 102 P. 795.

713-17. Grand Cent. M. Co. *v.* Co., 36 Utah 364, 104 P. 573.

714-18 North *v.* Jones (Ind. App.), 100 N. E. 84; Myers *v.* Moody (Tex. Civ.), 122 S. W. 920 (and that surveyor with him when he found line); Cochran *v.* Casey (Tex. Civ.), 128 S. W. 1145; Cent. M. Co. *v.* Co., 36 Utah 364, 104 P. 573.

714-19 Thurman *v.* Leach (Ky.), 116 S. W. 300; Myers *v.* Moody (Tex. Civ.), 122 S. W. 920. *Contra*, if survey unauthorized. De Loney *v.* S., 88 Ark.

311, 115 S. W. 138. See Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979.

714-20 Ratliff *v.* May, 27 Ky. L. R. 164, 84 S. W. 731; Guillory *v.* Allums (Tex. Civ.), 147 S. W. 685; Guill *v.* O'Bryan (Tex. Civ.), 121 S. W. 593; Matthews *v.* Thatcher, 33 Tex. Civ. 133, 76 S. W. 61.

Different monument cannot be substituted. Resurrection M. Co. *v.* Co., 129 Fed. 668, 64 C. C. A. 180.

Inadmissible to correct mistake in a call. Hamilton *v.* Blackburn, 43 Tex. Civ. 153, 95 S. W. 1094.

714-21 Court survey cannot correct mistake in government survey. Strunz *v.* Hood, 44 Wash. 99, 87 P. 45.

714-22 Full inquiry permissible where issue is as to correctness of private surveys. Humphrey *v.* Whitney, 17 Ida. 14, 103 P. 389.

Witness who testifies to following footsteps of surveyor must show knowledge of latter's marks. Goldman *v.* Hadley (Tex. Civ.), 122 S. W. 282.

Quantity of land obtained out of a survey is relevant to show line is not where party claims. Cochran *v.* Casey (Tex. Civ.), 128 S. W. 1145.

715-23 Guillory *v.* Allums (Tex. Civ.), 147 S. W. 685; Couch *v.* R. Co., 99 Tex. 464, 90 S. W. 860; Martin *v.* Mitchell, 32 Tex. Civ. 385, 74 S. W. 565; Ayers *v.* Beaty, 5 Tex. Civ. 491, 24 S. W. 366.

715-24 Rounds *v.* Ham (Me.), 88 A. 892; Roberts *v.* Hart (Tex. Civ.), 165 S. W. 473; Gilbert *v.* Finberg (Tex. Civ.), 156 S. W. 507; Kingsley *v.* Patterson (Tex. Civ.), 115 S. W. 105 (lines in adjacent surveys consulted if tied to those in question); Moreno *v.* S., 64 Tex. Cr. 660, 143 S. W. 156; Warner *v.* Sapp (Tex. Civ.), 97 S. W. 125; White *v.* Smith (Tex. Civ.), 67 S. W. 1028; Sloan *v.* King, 33 Tex. Civ. 537, 77 S. W. 48; Selkirk *v.* Watkins (Tex. Civ.), 105 S. W. 1161; Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154.

Field notes admissible.—Giddings *v.* Thompson (Tex. Civ.), 92 S. W. 1043.

Omitted course supplied from description in deed to adjoining lot. Zerbey *v.* Allan, 215 Pa. 383, 64 A. 587.

715-25 Resurrection M. Co. *v.* Co., 129 Fed. 668, 64 C. C. A. 180; Lecroix *v.* Malone, 157 Ala. 434, 47 S. 725; Andrew *v.* Wheeler, 10 Cal. App. 614, 103 P. 144 (otherwise if monuments not set; if deed calls for a corner as shown by a designated map evidence as to stakes set by surveyors of adjoining lands is admissible); Collins *v.* McKay, 36 Mont. 123, 92 P. 295; Reed *v.* Burrell, 77 Neb. 76, 108 N. W. 155; Nystrom *v.* Lee, 16 N. D. 561, 114 N. W. 178; Collins *v.* Clough, 222 Pa. 472, 71 A. 1077; White *v.* Amrhien, 14 S. D. 270, 85 N. W. 191; Douglas L. Co. *v.* Co., 107 Va. 292, 58 S. E. 1101; Stangair *v.* Roads, 41 Wash. 583, 84 P. 405; Brew *v.* Nugent, 136 Wis. 336, 117 N. W. 813.

Evidence of reputation as to location of lost monument inadmissible where it can be ascertained from a deed. Smith *v.* Trustees, 89 App. Div. 475, 86 N. Y. S. 34.

Extrinsic evidence admissible to locate beginning corners. Matthews *v.* Thatcher, 33 Tex. Civ. 133, 76 S. W. 61.

Opinions not admissible.—Lecroix *v.* Malone, 157 Ala. 434, 47 S. 725.

716-26 Davies *v.* Wickstrom, 56 Wash. 154, 105 P. 454.

716-27 Function of resurvey. Pereles *v.* Gross, 126 Wis. 122, 105 N. W. 217.

Evidence insufficient to sustain location. Ewell *v.* Hauser, 140 Ky. 459, 131 S. W. 186.

716-29 Survey not rejected because surveyor began at northern extremity instead of southern as original surveyor did. Shrake *v.* Laflin, 3 Neb. (Unof.) 189, 92 N. W. 184.

716-30 Morgan *v.* Renfro, 30 Ky. L. R. 533, 99 S. W. 311; Barrow *v.* Lyons, 38 Tex. Civ. 585, 86 S. W. 773.

Resurveys must be made according to instructions of general land office. Phillips *v.* Hink, 21 S. D. 561, 114 N. W. 699; Nystrom *v.* Lee, 16 N. D. 561, 114 N. W. 478.

Actual location of boundaries on ground may be shown by parol. Middlebrooks *v.* Sanders (Ala.), 61 S. 898.

717-31 Combs *v.* Valentine, 144 Ky. 184, 137 S. W. 1080; Morgan *v.* Lewis, 29 Ky. L. R. 197, 92 S. W. 970; Chambers *v.* Tharp, 29 Ky. L. R. 271, 93 S. W. 627; Asheville L. Co. *v.* Lang, 146 N. C. 311, 59 S. E. 703; Marshall *v.* Corbett, 137 N. C. 555, 50 S. E. 210.

717-32 Runkle *v.* Welty, 86 Neb. 680, 126 N. W. 139.

Survey must be construed by reference to calls in grant; these cannot be aided by reference to lines and calls in other surveys not mentioned in field notes. Coleman County *v.* Stewart (Tex. Civ.), 65 S. W. 383.

717-33 Monuments control courses

and distances given on plat. Brew *v.* Nugent, 130 Wis. 336, 117 N. W. 813.

717-35 McDonald *v.* McCrabb, 47 Tex. Civ. 259. 105 S. W. 238; Battles *v.* Barnett (Tex. Civ.), 100 S. W. 817.

717-36 Whitfield *v.* Roberson, 152 N. C. 97, 67 S. E. 494.

717-37 Leonard *v.* Forbing, 109 La. 220, 33 S. 203; S. *v.* Co., 119 Tenn. 47, 104 S. W. 437 (presumption as to permanency of boundary lines); Matthews *v.* Thatcher, 33 Tex. Civ. 133, 76 S. W. 61. See Hornberger *v.* Giddings, 31 Tex. Civ. 283, 71 S. W. 989.

That a lost corner was at a specified place. Taylor & Crate *v.* Forester, 148 Ky. 201, 146 S. W. 428.

717-38 See Lillis *v.* Urrutia, 9 Cal. App. 557, 99 P. 992.

718-40 Reed *v.* Burrell, 77 Neb. 76, 108 N. W. 155.

Possession for fifty years under an ancient deed is cogent evidence of the original boundaries. Busbee *v.* Thomas, 175 Ala. 423, 57 S. 587, cit. Owen *v.* Bartholomew, 9 Pick. (Mass.) 519; Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376.

Lost monuments presumed to have been at distances called for. Keystone M. Co. *v.* Co. (Tex. Civ.), 96 S. W. 64.

A stake found a long distance from land in question not admissible though stakes of original survey destroyed and it was found within territory surveyed originally with land in question. Pauly *v.* Broadnax, 157 Cal. 386, 108 P. 271.

Location and recognition of highway and line fences may be proved as indicating location of original monument. McAnich *v.* Hulse, 113 Ia. 58, 84 N. W. 914. But if boundaries of former and location of latter cannot be definitely established, original location of corner as shown by surveys based on other established corners of same survey will control. Leathers *v.* Oberlander, 139 Ia. 179, 117 N. W. 30.

718-41 Shaw *v.* Johnston, 17 Ida. 676, 107 P. 399; Sullivan *v.* R. Co., 251 Ill. 108, 95 N. E. 1081; White *v.* Jefferson, 110 Minn. 276, 124 N. W. 373, 125 N. W. 262 (otherwise if street vacated); Woolf *v.* Woolf, 131 App. Div. 751, 116 N. Y. S. 104.

See Mappin *v.* Liblerty, L. R. (1903), 1 Ch. Div. 118, 72 L. J. Ch. 63, 87 L. T. N. S. 523; Dickinson *v.* Co., 77 Ark. 570, 92 S. W. 21; Everett *v.* Fall River, 189 Mass. 513, 75 N. E. 946; Gray *v.* Kelley, 194 Mass. 533, 80 N. E. 651; Pell *v.* Pell, 35 Misc. 472, 71 N. Y. S. 1092, 169 N. Y. 607, 62 N. E. 1099, 73 N. Y. S. 81; Warren *v.* Gloversville, 80 N. Y. S. 912; Mott *v.* Eno, 97 App. Div. 580, 90 N. Y. S. 608; Paige *v.* R. Co., 178 N. Y. 102, 70 N. E. 213; Pittsburgh, etc. R. Co. *v.* Co., 208 Pa. 73, 57 A. 191; Carter *v.* Lebzelter, 45 Pa. Super. 478; Faulkner *v.* Rocket, 33 R. I. 152, 80 A. 380; Sweatman *v.* Bathrick, 17 S. D. 138, 95 N. W. 422; Wegge *v.* Madler, 129 Wis. 412, 109 N. W. 223.

Boundary on a way.—Lemay *v.* Furtado, 182 Mass. 280, 65 N. E. 395; Gould *v.* Wagner, 196 Mass. 270, 82 N. E. 10; McKenzie *v.* Gleason, 184 Mass. 452, 69 N. E. 1076.

Rule does not apply to railroad right of way. Couch *v.* R. Co., 99 Tex. 464, 90 S. W. 860.

Stream.—Walls *v.* Cunningham, 123 Wis. 346, 101 N. W. 696.

Quantity of land actually within description of deed is evidence to rebut presumption. Kennedy *v.* Co., 77 App. Div. 484, 78 N. Y. S. 937.

No presumption if conveyance by municipal authorities. Graham *v.* Stern, 51 App. Div. 406, 64 N. Y. S. 728, 168 N. Y. 517, 61 N. E. 891, 85 Am. St. 694.

Public highways which were such when New York was a Dutch colony are owned by public. Paige *v.* R. Co., 178 N. Y. 102, 70 N. E. 213; Lansing *v.* R. Co., 38 Misc. 384, 77 N. Y. S. 889.

Presumption of intention to convey fee to entire street where control ceases to be of importance to grantor. See Johnson *v.* Grenell, 112 App. Div. 620, 98 N. Y. S. 629, 188 N. Y. 407, 81 N. E. 161.

Exception is sometimes made where all the land originally granted by single owner. Seery *v.* Waterbury, 82 Conn. 567, 74 A. 908; Ames *v.* Hilton, 70 Me. 36. *Contra.* Fisher *v.* Smith, 9 Gray (Mass.) 441; McKenzie *v.* Gleason, 184 Mass. 452, 69 N. E. 1076, 100 Am. St. 566.

Private alleys within rule if opened. Saccone *v.* Co., 224 Pa. 554, 73 A. 971; Oliver *v.* Ormsby, 224 Pa. 564, 73 A. 973.

718-42 Winchester *v.* Payne, 10 Cal. App. 501, 102 P. 531; Huff *v.* Co., 195 Ill. 257, 63 N. E. 105; W. U. T. Co. *v.* Krueger, 36 Ind. App. 348, 74 N. E. 25; Hamlin *v.* Atty.-G., 195 Mass. 309, 81 N. E. 275; Van Winkle *v.* Van Winkle, 184 N. Y. 193, 77 N. E. 33;

Watson *v.* New York, 67 App. Div. 573, 73 N. Y. S. 1027, 175 N. Y. 475, 67 N. E. 1091; In re Opening of Fremont Ave., 71 Misc. 480, 130 N. Y. S. 510; Jacquemin *v.* Finnegan, 39 Misc. 628, 80 N. Y. S. 207; Tiction *v.* Palmer, 121 App. Div. 233, 105 N. Y. S. 790.

718-43 Boyd *v.* R. Co., 28 Pa. C. C. 314; Wiess *v.* Goodhue, 46 Tex. Civ. 142, 102 S. W. 793 (alley). Express words excluding highway necessary. Van Winkle *v.* Van Winkle, 39 Misc. 593, 80 N. Y. S. 612.

719-44 *Comp.* Trowbridge *v.* Ehrich, 116 App. Div. 457, 101 N. Y. S. 905.

719-45 Line of adjoining property may be shown. Borough *v.* Shapiro (N. J.), 90 A. 295.

719-46 Thompson *v.* Maloney, 199 Ill. 276, 65 N. E. 236, 93 Am. St. 133. See Owen *v.* Brookport, 208 Ill. 35, 69 N. E. 952; Smith *v.* Beloit, 122 Wis. 390, 100 N. W. 877.

719-47 Woolf *v.* Woolf, 131 App. Div. 751, 116 N. Y. S. 104.

Corresponding presumption as to private ways may be rebutted by evidence of acts of parties subsequent to conveyance. Frost *v.* Jacobs, 204 Mass. 1, 90 N. E. 357.

Best available evidence received in absence of official records. Winchester *v.* Payne, 10 Cal. App. 501, 102 P. 531.

719-48 Campbell *v.* Seattle, 59 Wash. 612, 110 P. 546.

720-50 Smith *v.* Stacey, 68 App. Div. 521, 73 N. Y. S. 1022.

Declarations of grantor, contemporaneous with deed, admissible. Rix *v.* Smith, 145 Mich. 202, 108 N. W. 691.

720-51 Andrews *v.* Wheeler, 10 Cal. App. 614, 103 P. 144; Clarke *v.* Case, 141 Mich. 148, 107 N. W. 893; Thacker *v.* Wilson (Tex. Civ.), 122 S. W. 938.

If evidence is such as to enable jury to pass upon the facts opinions not admissible. Keefe *v.* R., 75 N. H. 116, 71 A. 379.

720-53 Chappelle *v.* Roberts, 150 Ala. 457, 43 S. 489; Brumbrod *v.* McLaughlin, 213 Pa. 115, 62 A. 565 (engineer who made measurements can testify to location of boundary, though question calls for opinion). *Contra.* Goodson *v.* Fitzgerald, 52 Tex. Civ. 329, 113 S. W. 50 (surveyor's opinion line he ran was original).

Opinion of expert surveyor as to identity of certain trees as monuments or their correspondence with the calls of a patent, is admissible, but not his opinion as to location of the line. Winding Gulf C. Co. *v.* Campbell (W. Va.), 78 S. E. 384, *dist.* Mylins *v.* Lumb. Co., 69 W. Va. 346, 71 S. E. 404.

Rebuttal of expert opinion. Clark *v.* Gallagher, 74 Vt. 331, 52 A. 539.

Witness need not be a surveyor to testify to measurement of a lot made by himself. Gunkel *v.* Seiberth, 27 Ky. L. R. 455, 85 S. W. 733.

Opinions of other surveyors incompetent to show how lines should be run where surveyor who made them testified and calls of deeds are clear. Griffin *v.* Barbee, 29 Tex. Civ. 325, 68 S. W. 698.

Testimony of non-expert who located lines from government monuments will prevail over a resurvey not based on such monuments. Baty *v.* Elrod, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343.

Not reversible error to receive opinions based on facts fully stated. Andrews *v.* Wheeler, 10 Cal. App. 614, 103 P. 144.

Comparative age of marks on trees may be shown by expert surveyor. Cochran *v.* Casey (Tex. Civ.), 128 S. W. 1145.

721-57 Evidence of excessive acreage in adjacent surveys inadmissible where construction must be by courses and distances. Matthews *v.* Thatcher, 33 Tex. Civ. 133, 76 S. W. 61.

721-59 Camp *v.* League (Tex. Civ.), 92 S. W. 1062; Simmons *v.* Jamieson, 32 Wash. 619, 73 P. 700.

721-61 Rowell *v.* Weinemann, 119 Ia. 256, 93 N. W. 279.

Surveyor may testify line he ran corresponded with call in original survey. Hamilton *v.* Saunders (Tex. Civ.), 73 S. W. 1069.

721-62 See Perales *v.* Gross, 126 Wis. 122, 105 N. W. 217.

721-63 See Seberg *v.* Bk., 141 Ia. 99, 119 N. W. 378.

722-65 Cochran *v.* Casey (Tex.), 128 S. W. 1145.

722-69 Opinions based on statements made by surveyors, inadmissible. Rehfuss *v.* Hill, 243 Ill. 140, 90 N. E. 187.

But a witness may testify from personal knowledge as to location of the boundaries of an incorporated town and where certain people lived with reference to those limits. Such testimony while in the nature of a conclusion is not objectionable on that ground. Independent School Dist. *v.* Dist. No. 8 (Ia.), 144 N. W. 592. Testimony of residents as to whether a station was

within boundaries of Indian reservation is admissible. Stewart *v.* U. S., 211 Fed. 41 (C. C. A.).

Testimony of people familiar with changes in a river bed for fifty years is competent to show boundary line of a state formed by center of river. Coulthard *v.* McIntosh, 143 Ia. 389, 122 N. W. 233.

722-74 See De Loney *v.* S., 88 Ark. 311, 115 S. W. 138.

Statements in Williamson's History of Maine, admissible. Lazell *v.* Boardman, 103 Me. 292, 69 A. 97.

722-75 Proceedings of city council tending to show territory had been annexed to city admissible, in conjunction with proof of exercise of authority over same, to show such territory was in city, though ordinance providing for its annexation not offered. Missouri, etc. R. Co. *v.* Bratcher, 54 Tex. Civ. 10, 118 S. W. 1091.

723-76 Russell *v.* Robinson, 153 Ala. 327, 44 S. 1040; Elms *v.* Elliott, 120 La. 978, 57 S. 307; Puget Sound Nat. Bk. *v.* Fisher, 52 Wash. 246, 100 P. 724.

See Granberry *v.* S. (Ala.), 63 S. 975. See also 2-713; Wabash R. Co. *v.* Gretinger (Ind.), 104 N. E. 69.

723-77 Andrews *v.* Wheeler, 10 Cal. App. 614, 103 P. 144 (though subsequent to deed); Klinkner *v.* Schmidt, 114 Ia. 695, 87 N. W. 661.

Declarations of one apparently without knowledge, inadmissible. Smith *v.* Stanley, 114 Va. 117, 75 S. E. 742.

Testimony of old inhabitants inadmissible to establish public ownership of land to which plaintiff shows paper title. Dawson *v.* Orange, 78 Conn. 96, 61 A. 101.

723-80 Burden on party who claims title to land by reason of change in channel of watercourse constituting boundary between state to substantiate his claim. Plummer *v.* Marshall (Tex. Civ.), 126 S. W. 1162.

723-82 Morrison *v.* Holder, 214 Mass. 366, 101 N. E. 1067.

723-83 Hornsby *v.* Tucker (Ala.), 61 S. 928.

723-86 Sullivan *v.* Blount (N. C.), 80 S. E. 892; Locklear *v.* Paul, 163 N. C. 338, 79 S. E. 617 (comparatively remote).

724-87 Busbee *v.* Thomas, 175 Ala. 423, 57 S. 587; Southern I. Wks. *v.* R. Co., 131 Ala. 649, 31 S. 723; Rowell *v.* Weinemann, 119 Ia. 256, 93 N. W. 279; Scott *v.* Co. (Ky.), 122 S. W. 202; Kentucky L. Co. *v.* Crabtree, 113 Ky. 922, 70 S. W. 31; Peters *v.* Tilghman, 111 Md. 227, 73 A. 726; City of Maysville *v.* Truex, 235 Mo. 619, 139 S. W. 290; Brenstein *v.* R. Co., 119 N. Y. S. 1; Locklear *v.* Paul, 163 N. C. 338, 79 S. E. 617; Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782; Broadwell *v.* Morgan, 142 N. C. 475, 55 S. E. 340; Bland *v.* Beasley, 140 N. C. 628, 53 S. E. 443; Thacker *v.* Wilson (Tex. Civ.), 122 S. W. 938; Goodson *v.* Fitzgerald, 10 Tex. Civ. 619, 90 S. W. 898; Douglas L. Co. *v.* Thayer, 107 Va. 292, 58 S. E. 1101.

See Locklear *v.* Paul, 163 N. C. 338, 79 S. E. 617.

But not admissible to prove ownership. Sullivan *v.* Blount (N. C.), 80 S. E. 892.

Boundary must have been of such nature as to have provoked local discussion and general interest. Matthews *v.* Thatcher, 33 Tex. Civ. 133, 76 S. W. 61.

Witness may testify he had heard a stream designated by name given in one of the calls of the grant in question. McNeely *v.* Laxton, 149 N. C. 327, 63 S. E. 278.

"It is well established with us that, under certain restrictions, evidence of this character will be received on questions of private boundary. Its admission is based on the principle of necessity, and is to a large extent subject to what is sometimes termed the 'best evidence rule;' that is, it is competent when from lapse of time or unusual conditions better evidence of a relevant fact is not likely to be attainable." Per Hoke, J., in Lamb *v.* Copeland, 158 N. C. 136, 73 S. E. 797, where evidence of reputation as to a corner being at a pine stump was excluded because not ancient.

Reputation begun by person without knowledge inadmissible. State *v.* Dayton Lumber Co. (Tex. Civ.), 159 S. W. 391.

724-88 *Comp.* Thurman *v.* Leach (Ky.), 116 S. W. 300.

724-89 Justice *v.* Justice (Ky.), 124 S. W. 351.

Reputation originating seventeen years back not competent. Bland *v.* Beasley, 140 N. C. 628, 53 S. E. 443.

Disputed monuments may be corroborated by showing they correspond with lines of early settlers. Bridenbaugh *v.* Bryant, 79 Neb. 329, 112 N. W. 571.

724-90 Phillips *v.* Stewart, 29 Ky. L. R. 1199, 97 S. W. 6; Hagaman *v.* Bernhardt, 162 N. C. 381, 78 S. E. 209.

Reputation must be general.—Bland *v.* Beasley, supra. Testimony by four witnesses of a party's possession and cultivation of land for a series of years is not evidence of general reputation. Benton *v.* Allen, 132 Ga. 11, 63 S. E. 626.

725-91 Keefe *v.* R., 75 N. H. 116, 71 A. 379. *Contra* if monuments in existence. Philbrick *v.* S., 8 O. N. P. (N S.) 374.

725-95 Hamilton *v.* Smith, 74 Conn. 374, 50 A. 884; Phillips *v.* Stewart, 29 Ky. L. R. 1199, 97 S. W. 6. See Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782; Bullard *v.* Hollingsworth, 140 N. C. 634, 53 S. E. 441.

726-96 *Contra.* Keefe *v.* R., 75 N. H. 116, 71 A. 379, declarations of railroad foreman as to right of way, though not made on land, boundary of which not indicated, and he formerly owned plaintiff's land.

726-97 Rehfuss *v.* Hill, 243 Ill. 140, 90 N. E. 187 (or without jurisdiction); Caldwell L. & L. Co. *v.* Triplett, 151 N. C. 409, 66 S. E. 343; Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782; Bullard *v.* Hollingsworth, 140 N. C. 634, 53 S. E. 441; Hill *v.* Dalton, 140 N. C. 9, 52 S. E. 273.

Rule declarant must be dead applies to hearsay, but not to evidence of common reputation. Hemphill *v.* Hemphill, 138 N. C. 504, 51 S. E. 42.

Declaration need not be made when declarant on boundary if it relates to some monument or natural object, or be fortified by evidence of occupation and acquiescence tending to give land some definite location. Caldwell L. & L. Co. *v.* Triplett, 151 N. C. 409, 66 S. E. 343.

726-98 Togni *v.* Slocomb, 12 Cal. App. 723, 108 P. 723.

726-99 Driver *v.* King, 145 Ala. 585, 40 S. 315; Togni *v.* Slocomb, 12 Cal. App. 553, 108 P. 723; Thurman *v.* Leach (Ky.), 116 S. W. 300; Emmett *v.* Perry, 100 Mo. 159, 60 A. 872; Dibble *v.* Cole, 102 App. Div. 229, 92 N. Y. S. 938; Brenstein *v.* R. Co., 119 N. Y. S. 1; Fincannon *v.* Sudderth, 144 N. C. 587, 57 S. E. 337; Warner *v.* Sapp (Tex. Civ.), 97 S. W. 125; Matthews *v.* Thatcher, 33 Tex. Civ. 133, 76 S. W. 61; Hathaway *v.* Goslant, 77 Vt. 199, 59 A. 835.

Recitals in deed hearsay, and incompetent. Hemphill *v.* Hemphill, 138 N. C. 504, 51 S. E. 42.

Declarations of defendant against interest, admissible. Mannel *v.* Flynn, 5 Cal. App. 319, 90 P. 463. **Possession under verbal contract does not make declarations competent.** S. *v.* King, 64 W. Va. 546, 63 S. E. 468. **Otherwise as to declarations of tenant or equitable owner of adjoining land if paper title in landlord or trustee.** S. *v.* King, supra.

726-1 Cadwalader *v.* Price, 111 Md. 310, 73 A. 273; Hill *v.* Dalton, 140 N. C. 9, 52 S. E. 273.

Not convincing if inconsistent with declarant's prior acts. Preston *v.* Vanhoose (Ky.), 116 S. W. 279.

Declarations of living owner, made on land, competent against him and those who claim under him. Abbott *v.* Walker, 204 Mass. 71, 90 N. E. 405.

Admission of former owner.—Smith *v.* Stanley, 114 Va. 117, 75 S. E. 742.

726-2 Goodson *v.* Fitzgerald, 40 Tex. Civ. 619, 90 S. W. 898. But see Hagaman *v.* Bernhardt, 162 N. C. 381, 78 S. E. 209.

Contra. Table Rock L. Co. *v.* Branch, 150 N. C. 240, 63 S. E. 948.

727-3 Mellor *v.* Walmesley L. R. (1905), 2 Ch. Div. (Eng.) 164; Thurman *v.* Leach (Ky.), 116 S. W. 300; Keystone M. Co. *v.* Co. (Tex. Civ.), 96 S. W. 64.

728-9 But inadmissible to show original corners in absence of showing of knowledge. S. *v.* Lumber Co. (Tex. Civ.), 159 S. W. 391.

729-14 Morcom *v.* Baiersky, 16 Cal. App. 480, 117 P. 560; Fulton Light, etc. Co. *v.* S., 62 Misc. 189, 116 N. Y. S. 1000. See Hamilton *v.* Smith, 74 Conn. 374, 50 A. 884; Cravath *v.* Baylis, 113 App. Div. 666, 99 N. Y. S. 973; Camp *v.* League (Tex. Civ.), 92 S. W. 1062.

729-15 Thurman *v.* Leach (Ky.), 116 S. W. 300; Cadwalader *v.* Price, 111 Md. 310, 73 A. 273.

The phrase in old deeds, "John Smith's tract of land," implies "no assertion of title, but simply of reputation and recognition." Whitwell *v.* Spiker, 238 Mo. 629, 142 S. W. 248.

729-17 Table Rock L. Co. *v.* Branch, 150 N. C. 240, 63 S. E. 948; Hamilton *v.* Smith, 74 Conn. 374, 50 A. 884; Sullivan *v.* Blount (N. C.), 80 S. E. 892; Locklear *v.* Paul, 163 N. C. 338, 79 S. E. 617; Mechanics' Bk. & Tr. Co.

v. Whilden, 159 N. C. 280, 74 S. E. 1047; Bullard *v.* Hollingsworth, 140 N. C. 634, 53 S. E. 441; Hemphill *v.* Hemphill, 138 N. C. 504, 51 S. E. 42; Hill *v.* Dalton, 140 N. C. 9, 52 S. E. 273; Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782; Westfelt *v.* Adams, 131 N. C. 379, 42 S. E. 823.

729-18 Betts *v.* Gahagan, 212 Fed. 120 (C. C. A.); Southern I. Wks. *v.* R. Co., 131 Ala. 649, 31 S. 723; Collins *v.* Clough, 222 Pa. 472, 71 A. 1077.

730-19 Sufficient if monument described can be identified. Westfelt *v.* Adams, 131 N. C. 379, 42 S. E. 823.

730-22 *Comp.* Independent School Dist. *v.* Dist. No. 8 (Ia.), 144 N. W. 592.

BREACH OF PROMISE

Right of Action.—4 STANDARD PROC. 546.

Form of Action.—4 STANDARD PROC. 547.

Parties.—4 STANDARD PROC. 548.

Abatement and Survival.—4 STANDARD PROC. 548.

Statute of Limitations.—4 STANDARD PROC. 549.

The Complaint or Declaration.—4 STANDARD PROC. 549.

The Plea or Answer.—4 STANDARD PROC. 554.

The Process.—4 STANDARD PROC. 556.

734-3 Grubbs *v.* Pence, 24 Ky. L. R. 2183, 73 S. W. 785. See Birum *v.* Johnson, 87 Minn. 362, 92 N. W. 1.

734-8 Huggins *v.* Carey (Tex. Civ.), 149 S. W. 390.

735-10 Smith *v.* Compton, 67 N. J. L. 548, 52 A. 386.

736-12 Anderson *v.* Kirby, 125 Ga. 62, 54 S. E. 197; McKee *v.* Mouser, 131 Ia. 203, 108 N. W. 228; Massucco *v.* Tomassi, 78 Vt. 188, 62 A. 57, 80 Vt 186, 67 A. 551.

Evidence of the relations of the parties at a remote time may be excluded. Parrish *v.* Parrish, 67 Kan. 323, 72 P 844.

In Georgia plaintiff is incompetent as a witness. Graves *v.* Rivers, 123 Ga. 224, 51 S. E. 318.

736-13 Graves *v.* Rivers, 123 Ga. 224, 51 S. E. 318.

Origin and continuance of acquaintance may be shown. Hahn *v.* Bettingen, 84 Minn. 512, 88 N. W. 10.

736-14 McMaster *v.* Spencer, 129 Ill. App. 131; Johnson *v.* Levy, 122 La. 118, 47 S. 422; Hill *v.* Houser, 51 Tex. Civ. 359, 115 S. W. 112; Connolly *v.* Bollinger, 67 W. Va. 30, 67 S. E. 71.

Evidence of a conversation between the parties as to a child as affecting the conflicting testimony of the parties as to the marriage promise. Poe *v.* Arch, 26 S. D. 291, 128 N. W. 166.

736-15 But the understanding by members of family of plaintiff is not admissible as evidence of an agreement to marry. Nolan *v.* Glynn (Ia.), 142 N. W. 1029.

737-18 McKee *v.* Mouser, 131 Ia. 203, 108 N. W. 228.

738-23 Fletcher *v.* Ketcham (Ia.), 141 N. W. 916; Lauer *v.* Banning, 140 Ia. 319, 118 N. W. 446 (commission of rape; seduction shown to corroborate plaintiff); Sramek *v.* Sklenar, 73 Kan. 450, 85 P. 566; Duff *v.* Judson, 160 Mich. 386, 125 N. W. 371 (acts showing common law marriage); Baumle *v.* Verde, 33 Okla. 243, 124 P. 1083.

Evidence of seduction is not admissible to prove contract. Wrynn *v.* Downey, 27 R. I. 454, 63 A. 401, 4 L. R. A. (N. S.) 615.

Sexual intercourse may be shown in some states. Beans *v.* Denny, 141 Ia. 52, 117 N. W. 1091. *Contra.* Felger *v.* Etzell, 75 Ind. 418; Wrynn *v.* Downey, 27 R. I. 454, 63 A. 401, 4 L. R. A. (N. S.) 615. Corroboration as to such intercourse not essential. Beans *v.* Denny, supra.

739-24 Exhibition of presents made by defendant is not objectionable because one of them bore photograph of child alleged to have been his offspring, it not being offered to show resemblance. Hanson *v.* Johnson, 141 Wis. 550, 124 N W. 506.

739-26 Defendant's character—evidence not admissible. Young *v.* Corrigan, 208 Fed. 431.

739-27 Massucco *v.* Tomassi, 80 Vt. 186, 67 A. 551.

739-30 Kinsella *v.* Gallaher, 111 N. Y. S. 732; Hill *v.* Houser, 51 Tex. Civ. 359, 115 S. W. 112.

739-31 Cain *v.* Corley, 44 Tex. Civ. 224, 99 S. W. 168.

740-34 Hill *v.* Houser, 51 Tex. Civ. 359, 115 S. W. 112.

740-36 Plaintiff's declarations, during existence of engagement, of its existence competent to meet proof of declaration to effect plaintiff would

not marry defendant. Cooper *v.* Bower, 18 Kan. 156, 96 P. 79.

Defendant's conduct toward plaintiff with reference to the engagement cannot be shown by her declarations. Cooper *v.* Bower, supra.

740-38 Neighborhood understanding cannot be proved. Hinckley *v.* Jewett, 86 Neb. 464, 125 N. W. 1086.

741-40 Seduction not evidence of breach of contract. Wrynn *v.* Downey, 27 R. I. 454, 63 A. 401, 4 L. R. A. (N. S.) 615.

Offer of compromise, incompetent. Wrynn *v.* Downey, supra.

741-45 Necessity for, discussed. Clark *v.* Corey, 24 R. I. 137, 52 A. 811.

742-47 Grubbs *v.* Pence, 24 Ky. L. R. 2183, 73 S. W. 785.

742-48 Birum *v.* Johnson, 87 Minn. 262, 92 N. W. 1.

742-49 Request unnecessary if defendant denies promise to marry plaintiff. Hill *v.* Jones, 109 Minn. 370, 123 N. W. 927.

742-50 Insanity may be shown. O'Reilly *v.* Sweeney, 54 Misc. 408, 105 N. Y. S. 1033.

743-54 Williams *v.* Igel, 62 Misc. 354, 116 N. Y. S. 778.

744-58 Invalidity of divorce may be shown. Williams *v.* Igel, 62 Misc. 354, 116 N. Y. S. 778.

744-62 Disease must be such as to render making consummation of marriage impossible. Smith *v.* Compton, 67 N. J. L. 548, 52 A. 386.

745-63 See Beans *v.* Denny, 141 Ia. 52, 117 N. W. 1091.

Illness of plaintiff. — Where plaintiff went to doctor for treatment and report, at defendant's request the doctor may testify as to what he told plaintiff regarding her recovery. Lemke *v.* Franzenburg (Ia.), 141 N. W. 332.

Fact plaintiff has consumption may be shown. Grover *v.* Zook, 44 Wash. 189, 87 P. 235.

That plaintiff has become an invalid since the promise. Travis *v.* Schuehly, 68 Wash. 1, 122 P. 316.

745-67 Gross *v.* Hochstim, 72 Misc. 243, 130 N. Y. S. 315.

745-68 See Mickens *v.* Phillips (Va.), 71 S. E. 374.

746-71 Colburn *v.* Marble, 196 Mass. 376, 82 N. E. 28; McKane *v.* Howard, 202 N. Y. 181, 95 N. E. 642, rev. 128 App. Div. 680, 123 N. Y. S. 632.

746-72 Welker *v.* Metcalf, 209 Pa. 373, 58 A. 687.

747-74 That plaintiff had robbed witness in assignation house admissible to prove bad character. Young *v.* Corrigan, 208 Fed. 431.

747-75 Young *v.* Corrigan, 208 Fed. 431; Williams *v.* Fahn, 119 Ia. 746, 94 N. W. 262. See Colburn *v.* Marble, 196 Mass. 376, 82 N. E. 28.

747-76 Where defendant gives evidence of specific acts of unchastity plaintiff cannot prove a good reputation for chastity in rebuttal. Colburn *v.* Marble, 196 Mass. 376, 82 N. E. 28; McKane *v.* Howard, 123 N. Y. S. 632.

Where complaint directly tenders the issue that her good name and character were injured, and that she suffered damage to her reputation, and these allegations are substantially denied, plaintiff may show that until her relations with defendant became known her reputation for chastity was good. McKane *v.* Howard, 123 N. Y. S. 632.

748-78 Brown *v.* Bannister, 14 Haw. 34; Sramek *v.* Sklenar, 73 Kan. 450, 85 P. 566; Hiveley *v.* Golnick, 123 Minn. 198, 144 N. W. 212; Cain *v.* Corley, 44 Tex. Civ. 224, 99 S. W. 168.

748-79 Evidence of new promise proper. Parrish *v.* Parrish, 67 Kan. 323, 72 P. 844.

748-80 McMaster *v.* Spencer, 129 Ill. App. 131.

Renewed promises.—Cain *v.* Corley, 44 Tex. Civ. 224, 99 S. W. 168.

749-81 Offer of performance after plaintiff signified intention to terminate contract, not a defense. Connolly *v.* Bollinger, 67 W. Va. 30, 67 S. E. 71.

Criminal conduct of plaintiff, as obtaining money by false representations, is a good defense. Gross *v.* Hochstim, 72 Misc. 243, 130 N. Y. S. 315.

749-82 Katsura *v.* Saletopulos (Neb.), 146 N. W. 1022.

749-83 Poehlmann *v.* Kertz, 105 Ill. App. 249; Lauer *v.* Banning, 152 Ia. 99, 131 N. W. 782; Hanson *v.* Johnson, 141 Wis. 550, 124 N. W. 506 (birth of child, it seems, and length of courtship).

749-84 Brown *v.* Bannister, 14 Haw. 35.

749-85 McKenzie *v.* Gray, 143 Ia. 112, 120 N. W. 71; Herriman *v.* Layman, 118 Ia. 590, 92 N. W. 710; Fisher *v.* Oliver (Mo.), 134 S. W. 453; Hanson *v.* Johnson, 141 Wis. 550, 124 N. W. 506 (sales made).

Actual and reputed wealth considered. McKee *v.* Mouser, 131 Ia. 203, 108 N. W. 228.

750-86 Beans *v.* Denny, 141 Ia. 52, 117 N. W. 1091; Birum *v.* Johnson, 87 Minn. 362, 92 N. W. 1; Fisher *v.* Oliver (Mo.), 154 S. W. 453; Smith *v.* Compton, 67 N. J. L. 548, 52 A. 386. *Comp.* Johansen *v.* Modahl, 4 Neb. (Unof.) 411, 94 N. W. 532.

750-87 Thrush *v.* Fullhart, 210 Fed. 1 (C. C. A.); Lemke *v.* Franzenburg (Ia.), 141 N. W. 332.

Wealth of defendant's relatives, irrelevant. Spencer *v.* Simmons, 160 Mich. 292, 125 N. W. 9.

750-88 Smith *v.* Compton, 67 N. J. L. 548, 52 A. 386; Massucco *v.* Tomassi, 80 Vt. 186, 67 A. 551.

751-90 Inquiry as to wealth previous to time of promise, proper. Massucco *v.* Tomassi, 80 Vt. 186, 67 A. 551.

751-91 Fisher *v.* Kenyon, 56 Wash. 8, 104 P. 1127, wealth at time of trial may be shown if breach occurred only few months prior.

751-92 Massucco *v.* Tomassi, 78 Vt. 188, 62 A. 57, 80 Vt. 186, 67 A. 551.

751-97 Bay *v.* Sanborn, 189 Fed. 521.

751-98 Birum *v.* Johnson, 87 Minn. 362, 92 N. W. 1; Heasley *v.* Nichols, 38 Wash. 485, 80 P. 769.

752-1 Grubbs *v.* Pence, 24 Ky. L. R. 2183, 73 S. W. 785; S. *v.* Hyder (Mo.), 167 S. W. 524.

752-2 Cole *v.* S., 6 Ga. App. 798, 65 S. E. 839.

752-4 But self-serving declarations made by plaintiff in absence of defendant and the feelings of third persons toward plaintiff are not binding on defendant and are not admissible. Pearce *v.* Stace, 207 N. Y. 506, 101 N. E. 434.

752-5 Humiliation and injury to feelings. Katsura *v.* Saletopulos (Neb.), 146 N. W. 1022.

752-7 Beans *v.* Denny, 141 Ia. 52, 117 N. W. 1091.

Exemplary damages may be awarded. Jacoby *v.* Stark, 205 Ill. 34, 68 N. E. 557; Sneve *v.* Lunder, 100 Minn. 5, 110 N. W. 99.

753-8 That plaintiff contracted venereal disease from defendant cannot be shown. Churan *v.* Sebesta, 131 Ill. App. 330.

753-12 Smith *v.* Compton, 67 N. J. L. 548, 52 A. 386; Pearce *v.* Stace, 207 N. Y. 506, 101 N. E. 434.

753-16 Fletcher *v.* Ketcham (Ia.), 141 N. W. 916.

754-17 McCarty *v.* Heryford, 125 Fed. 46; Lanigan *v.* Neely, 4 Cal. App. 760, 89 P. 441; Harrison *v.* Carlson, 45 Colo. 55, 101 P. 76; Anderson *v.* Kirby, 125 Ga. 62, 54 S. E. 197; Graves *v.* Rivers, 123 Ga. 224, 51 S. E. 318; Poehlmann *v.* Kertz, 105 Ill. App. 249; Charan *v.* Sebasta, 131 Ill. App. 330; Lauer *v.* Banning, 152 Ia. 99, 131 N. W. 783; Dalrymple *v.* Green, 88 Kan. 673, 129 P. 1145; Sramek *v.* Sklenar, 73 Kan. 450, 85 P. 566; Johnson *v.* Levy, 122 La. 118, 47 S. 422; Hickey *v.* Kimball, 109 Me. 433, 84 A. 943; Clemons *v.* Seba, 131 Mo. App. 378, 111 S. W. 522.

Must be specially pleaded.—Herriman *v.* Layman, 118 Ia. 590, 92 N. W. 710.

Physical examination of plaintiff cannot be had. Pitt *v.* Dunlap, 54 Misc. 115, 105 N. Y. S. 846.

754-18 Wrynn *v.* Downey, 27 R. I. 454, 63 A. 401, 4 L. R. A. (N. S.) 615 (discussion).

754-21 Dalrymple *v.* Green, 88 Kan. 673, 129 P. 1145.

754-22 Evidence of suffering childbirth resulting from seduction is admissible. Booren *v.* McWilliams, 26 N. D. 558, 145 N. W. 410.

755-23 Fletcher *v.* Ketcham (Ia.), 141 N. W. 916.

755-24 Young *v.* Corrigan, 208 Fed. 431; Colburn *v.* Marble, 196 Mass. 376, 82 N. E. 28; Houser *v.* Carmody, 173 Mich. 121, 139 N. W. 9.

Must be pleaded in mitigation. Herriman *v.* Layman, 118 Ia. 590, 92 N. W. 710.

755-27 Settlement of previous suit between parties and resumption of illicit relations immediately thereafter may be proved; under such circumstances allowance of damages for seduction is for jury. Harrison *v.* Carlson, 45 Colo. 55, 101 P. 76.

755-29 Gross *v.* Hochstim, 72 Misc. 343, 130 N. Y. S. 315.

756-30 *Comp.* Colburn *v.* Marble, 196 Mass. 376, 82 N. E. 28.

756-33 Smith *v.* Compton, 67 N. J. L. 548, 52 A. 386.

757-38 Plaintiff's statement, after defendant's promise, she was engaged to another may be proved. Kirby *v.* Lower, 139 Mo. App. 677, 124 S. W. 34.

757-40 McCarty *v.* Heryford, 125 Fed. 46.

757-41 Heasley *v.* Nichols, 38 Wash. 485, 80 P. 769; Kendall *v.* Dunn, 71 W. Va. 262, 76 S. E. 454.

757-42 See Beans *v.* Denny, 141 Ia. 52, 117 N. W. 1091.

BRIBERY

Definition and Distinctions.—4 STANDARD PROC. 566.

Degree of Crime.—4 STANDARD PROC. 567.

Jurisdiction and Venue.—4 STANDARD PROC. 567.

Indictment and Information.—4 STANDARD PROC. 568.

760-1 S. *v.* Meysenbury, 171 Mo. 1, 71 S. W. 229; P. *v.* Van De Carr, 87 App. Div. 386, 84 N. Y. S. 461.

So far as admissibility of evidence is concerned, it is immaterial whether offense charged is bribery or being accessory to bribing of accused. S. *v.* Dulaney, 87 Ark. 17, 112 S. W. 158.

760-6 Tinkle *v.* Wallace, 167 Ind. 382, 79 N. E. 355; P. *v.* McGarry, 136 Mich. 316, 99 N. W. 147.

Circumstantial evidence warrants a conviction if it excludes every reasonable hypothesis but that of guilt. Vernon *v.* U. S., 146 Fed. 121, 76 C. C. A. 547.

Sufficient evidence detailed.—S. *v.* Wappenstein, 67 Wash. 502, 121 P. 989.

761-7 P. *v.* Duffy, 160 App. Div. 385, 145 N. Y. S. 699.

But the details of other crimes can be shown on a prosecution for bribing a witness to such crimes to leave the state. Harrison *v.* S. (Tex. Cr.), 151 S. W. 552.

761-9 See U. S. *v.* Dietrich, 126 Fed. 676.

761-10 See P. *v.* Hammond, 132 Mich. 422, 93 N. W. 1084; Rudolph *v.* S., 128 Wis. 222, 107 N. W. 466.

Attempt to suppress testimony or indu[illegible] perjury may be proved. P. *v.* Salsburg, 134 Mich. 537, 96 N. W. 936.

Language employed must show an offer. Evans *v.* S., 48 Tex. Cr. 620, 89 S. W. 1089.

761-11 S. *v.* Barr, 7 Penne. (Del.) 340, 79 A. 730; S. *v.* Woodward, 182 Mo. 391, 81 S. W. 857, 103 Am. St. 646; S. *v.* Miller, 182 Mo. 370, 81 S. W. 867; Lee *v.* S., 47 Tex. Cr. 620, 85 S. W. 804.

Promise to pay, sufficient. Schultz *v.* S., 127 Wis. 472, 104 N. W. 90.

762-15 U. S. *v.* Richards, 6 Phil. Isl. 545.

That agreement was carried out in a specific case may be shown. P. *v.* Furlong, 140 App. Div. 179, 125 N. Y. S. 164.

762-16 P. *v.* Furlong, 140 App. Div. 179, 125 N. Y. S. 164.

May be shown that action was taken. C. *v.* Klein, 42 Pa. Super. 66.

762-19 See Dunn *v.* S., 125 Wis. 181, 102 N. W. 935.

763-22 S. *v.* Merkle, 82 N. J. L. 172, 83 A. 186.

Contra, Minter *v.* S. (Tex. Cr.), 159 S. W. 286.

Facts indicating such agreement, admissible. S. *v.* Gardner, 88 Minn. 130, 92 N. W. 529.

763-23 U. S. *v.* Richards, 6 Phil. Isl. 545 (implied agreement sufficient).

763-25 See S. *v.* Gardner, 88 Minn. 130, 92 N. W. 529.

763-26 See C. *v.* Killion, 194 Mass. 153, 80 N. E. 222.

Statements of defendant as res gestae and not confession. P. *v.* McGarry, 136 Mich. 316, 99 N. W. 147.

763-27 C. *v.* Killion, 194 Mass. 153, 80 N. E. 222. See S. *v.* Woodward, 182 Mo. 391, 81 S. W. 857, 103 Am. St. 646.

763-28 See S. *v.* Campbell, 73 Kan. 688, 85 P. 784.

764-30 Haynes *v.* C., 104 Va. 854, 52 S. E. 358.

Evidence of solicitation for a bribe in another matter admissible to prove intent or motive (Higgins *v.* S., 157 Ind. 57, 60 N. E. 685), or establish a common scheme. S. *v.* Ames, 90 Minn. 183, 96 N. W. 330. Evidence of other like offenses, competent to show intent. S. *v.* Dulaney, 87 Ark. 17, 112 S. W. 158.

Other acts of conspirators, admissible to show purpose. S. *v.* Schnettler, 181 Mo. 173, 79 S. W. 1123.

764-31 See People *v.* Daily (Mich.), 141 N. W. 891.

Proceedings at meetings at which defendant was present admissible as res gestae. Chapline *v.* S., 77 Ark. 444, 95 S. W. 477; Butt *v.* S., 81 Ark. 173, 98 S. W. 723.

764-32 If agency and authority to pay money to a voter have been shown its payment by agent may be proved though defendant was absent. Lepinsky *v.* S., 7 Ga. App. 285, 66 S. E. 965.

764-33 *Comp.* Lee *v.* S., 47 Tex. Cr. 620, 85 S. W. 804.

That bribe-giver drew from bank approximately amount alleged to have been given as a bribe is inadmissible to corroborate her. P. *v.* Bissert, 71 App. Div. 118, 75 N. Y. S. 630, 172 N. Y. 643, 65 N. E. 1120.

764-34 Roden *v.* S., 5 Ala. App. 247, 59 S. 751.

765-37 Roden *v.* S., 5 Ala. App. 247, 59 S. 751 (though it tends to show different offenses); P. *v.* Kathan, 136 App. Div. 303, 120 N. Y. S. 1096. See Garner *v.* S., 50 Tex. Cr. 364, 97 S. W. 98; Dunn *v.* S., 125 Wis. 181, 102 N. W. 935.

Similar acts.—Roden *v.* S., 5 Ala. App. 247, 59 S. 751.

765-38 P. *v.* Salsbury, 134 Mich. 537, 96 N. W. 936; Lounder *v.* S., 46 Tex. Cr. 121, 79 S. W. 552.

Circumstantial evidence may connect defendant with person who received money. S. *v.* Ames, 90 Minn. 183, 96 N. W. 330.

767-43 See P. *v.* Jackson, 47 Misc. 60, 95 N. Y. S. 286.

767-49 See Evans *v.* S., 48 Tex. Cr. 620, 89 S. W. 1080.

768-53 Dunn *v.* S., 125 Wis. 181, 102 N. W. 935; Schutz *v.* S., 125 Wis. 452, 104 N. W. 90.

768-57 Johnson *v.* S., 49 Tex. Cr. 250, 92 S. W. 257; Ex parte Richards, 44 Tex. Cr. 561, 72 S. W. 838.

Act sought to be influenced must appear to have been within officer's power. P. *v.* McGarry, 136 Mich. 316, 99 N. W. 147; P. *v.* Mol, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871; P. *v.* Ellen, 138 Mich. 34, 100 N. W. 1008.

Valid law must be shown authorizing and requiring officer to act. S. *v.* Butler, 178 Mo. 272, 77 S. W. 560; S. *v.* Lehman, 182 Mo. 424, 81 S. W. 1118, 113 Am. St. 670, 66 L. R. A. 490. *Comp.* P. *v.* Jackson, 121 App. Div. 856, 106 N. Y. S. 1046.

Contract let need not be legal at time. S. *v.* Campbell, 73 Kan. 688, 85 P. 784.

768-58 Defendant's belief evidence of witness he attempted to bribe was contrary to facts, immaterial. Rex *v.* Silverman, 17 Ont. L. R. (Can.) 248.

769-59 S. *v.* Gardner, 88 Minn. 130, 92 N. W. 529.

Denial of witness that he knew of any bribery does not entitle him to immunity. S. *v.* Murphy, 128 Wis. 201, 107 N. W. 470; Rudolph *v.* S., 128 Wis. 222, 107 N. W. 466.

769-63 Evidence that accused offered to bribe first one and then another person in each other's presence within a few seconds of time is admissible. Haller *v.* S. (Tex. Cr.), 162 S. W. 872.

770-66 See C. *v.* Brown, 23 Pa. Super. 470.

Evidence as to good character of coconspirator, incompetent. Schultz *v.* S., 133 Wis. 215, 113 N. W. 428.

770-67 Prosecution may prove the reputation of house of defendant as disorderly house as tending to throw light on reason for attempted bribery. Haller *v.* S. (Tex. Cr.), 162 S. W. 872.

771-69 See P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364, 370.

Witness may be asked who gave him the money. C. *v.* Swift, 44 Pa. Super. 546.

771-71 P. *v.* Bissert, 71 App. Div. 118, 75 N. Y. S. 630, 172 N. Y. 643, 65 N. E. 1120.

771-72 Butt *v.* S., 81 Ark. 173, 98 S. W. 723.

771-73 P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364, 370; P. *v.* Duffy, 212 N. Y. 57, 105 N. E. 839 (corroboration by proving systematic payments).

Flight of witness not sufficient corroboration of testimony of accomplices. Birch *v.* S. (Tex. Cr.), 106 S. W. 344.

771-74 S. *v.* Wappenstein, 67 Wash. 502, 121 P. 989.

772-75 P. *v.* Mol, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871; P. *v.* McGarry, 136 Mich. 316, 99 N. W. 147; P. *v.* Salsbury, 134 Mich. 537, 96 N. W. 936. See S. *v.* Wappenstein, 67 Wash. 502, 121 P. 989; Schutz *v.* S., 125 Wis. 452, 104 N. W. 90; s. c., 133 Wis. 215, 113 N. W. 428.

Order of proof in discretion of court. Chapline *v.* S., 77 Ark. 444, 95 S. W. 477; Butt *v.* S., 81 Ark. 173, 98 S. W. 723; P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364, 370; S. *v.* Wappenstein, 67 Wash. 502, 121 P. 989.

Declarations of all parties present at time of transaction admissible, though they are not conspirators. S. *v.* Lehman, 182 Mo. 424, 81 S. W. 1118, 113 Am. St. 670, 66 L. R. A. 490.

BURDEN OF PROOF

Allegation of unknown details, 790-48.

775-1 Chicago, etc. T. Co. *v.* Mee, 218 Ill. 9, 75 N. E. 800, 2 L. R. A. (N. S.) 725; Toube *v.* Co., 63 Misc. 298, 116 N. Y. S. 673; Hughes *v.* R. Co. (N. J.), 89 A. 769. See Ruth *v.* Krone, 10 Cal. App. 770, 103 P. 960.

775-2 Mobley *v.* Lyon, 134 Ga. 125, 67 S. E. 668; Rapp *v.* Sarpy, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; Hughes *v.* R. Co. (N. J.), 89 A. 769;

S. v. [illegible], 129 Wis. 412, 102 N. W. [illegible]. See Foss v. McRae, 105 Me. 140, 73 A. 827.

776-3 Burden of proof matter of law, the burden of evidence one of fact. Hyer v. Co., 12 Ga. App. 837, 79 S. E. 58.

777-8 Alexander v. Woodson, 161 Ala. 561, 49 S. 883; Meyer v. Snell, 89 Ark. 208, 116 S. W. 208; Coleman v. S., 6 Ga. App. 403, 65 S. E. 46; Kwong L. Y. Co. v. Co., 15 Haw. 674; Gardner v. County, 15 Ida. 698, 99 P. 826; Siegmund v. Strauchein, 140 Ill. App. 454; Foss v. McRae, 105 Me. 140, 73 A. 827; Clifford v. Taylor, 204 Mass. 358, 90 N. E. 862; S. v. Nelson, 118 Minn. 424, 133 N. W. 1016; Dorsell v. Sparks (Mo.), 127 S. W. 103; Allen v. R. Co., 82 Neb. 726, 118 N. W. 655; Hughes v. R. Co. (N. J.), 89 A. 769. See Fenton v. Ames, 140 Ia. 169, 117 N. W. 251; Gaffney v. Tel. Co., 65 Wash 1, 117 P. 596.

Burden of proof a technical, legal phrase. Lawrence Prince v. Co., 112 Mo. App. [illegible], [illegible] S. W. [illegible].

Non-existence of alleged facts may be found where no evidence is introduced. Miller v. Pugh, 3 Cal. App. 325, 85 P. 159.

778-9 Plaintiff acquits himself by proving material averments of complaint. Thweatt v. Burns, 160 Ala. 386, 49 S. 457.

778-10 Ruth v. Krone, 10 Cal. App. 770, 103 P. 960; Steele v. Iron Co. (Ky.), 114 S. W. 311; Toube v. Co., 63 Misc. 298, 116 N. Y. S. 673.

778-12 Sotham v. Telegram Co. (Mo.), 144 S. W. 428.

779-13 Englehart v. Richter, 136 Ala. 562, 33 S. 939 (incompetency of witness); Smith v. S., 74 Ark. 397, 85 S. W. 1123 (confession voluntary); Sherman v. S., 2 Ga. App. 148, 58 S. E. 393 (evidence procured by search obtained after legal arrest); W. U. T. Co. v. Sloss, 45 Tex. Civ. 153, 100 S. W. 354 (law of foreign forum).

779-14 Askew v. S., 3 Ga. App. 79, 59 S. E. 311 (indictment subsequent to offense); Adams v. Kelly, 79 Kan. 564, 100 P. 506; Interstate, etc. Co. v. Co., 105 Va. 574, 54 S. E. 593 (rebutting presumption owner of surface owns all above and below); S. v. Newton, 39 Wash. 491, 81 P. 1002 (offense committed within period of limitations).

Burden of proving jurisdictional facts in federal courts is on complainant invoking. Chase v. Wetzlar, 225 U. S. 79, 32 Sup. Ct. 659, 56 L. ed. 990. See vol. 9, p. 941, n. 51, and supplement thereto.

779-15 Chicago, etc. R. Co. v. Davis, 172 Fed. 881, 97 C. C. A. 281; Roberts v. Padgett, 82 Ark. 331, 101 S. W. 753; Rosanti v. Ins. Co., 86 Conn. 15, 84 A. 109; Hyer v. Co., 12 Ga. App. 837, 79 S. E. 58; Gardner v. County, 15 Ida. 698, 99 P. 826; Welty v. S. (Ind.), 100 N. E. 73; Foss v. McRae, 105 Me. 140, 73 A. 827; Appeal of O'Brien, 100 Me. 156, 60 A. 880; Wylie v. Marinofsky, 201 Mass. 583, 88 N. E. 448; Errett v. Wheeler, 109 Minn. 157, 123 N. W. 414; Dorsell v. Sparks (Mo.), 127 S. W. 103; Allen v. R. Co., 82 Neb. 726, 118 N. W. 655; Vertrees v. County, 75 Neb. 332, 106 N. W. 331; Omaha St. R. Co. v. Boesen, 74 Neb. 764, 105 N. W. 303; Rapp v. Sarpy, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; Hughes v. R. Co. (N. J.), 89 A. 769; Lobdell v. Northville, 151 App. Div. 384, 136 N. Y. S. 113; Meyer v. Minsky, 128 App. Div. 589, 112 N. Y. S. 860; Ginn v. Dolan, 81 O. St. 121, 90 N. E. 141; Klunk v. R. Co., 74 O. St. 125, 77 N. E. 752; Southwestern T. & T. Co. v. Luckett (Tex. Civ.), 127 S. W. 856; Schuyler v. So. Pac. Co., 37 Utah 581, 109 P. 458.

Burden of proving affirmative defense does not shift. Supreme Tent v. Stensland, 105 Ill. App. 267.

Burden of evidence may shift, but burden of proof does not. Hyer v. Co., 12 Ga. App. 837, 79 S. E. 58.

780-16 Western U. Tel. Co. v. Brazier (Ala.), 65 S. 95; Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201; Reagan v. Murray, 176 Mich. 231, 142 N. W. 545. See vol. 2, p. 830, n. 15, and supplement thereto.

781-18 See Ruth v. Krone, 10 Cal. App. 770, 103 P. 960.

781-19 Grain D. Co. v. U. S., 204 Fed. 129, 122 C. C. A. 615; Liberty B. G. Min. Co. v. M. Co., 203 Fed. 795, 122 C. C. A. 113; Snell v. Derricott, 161 Ala. 259, 49 S. 895; Eagle I. Co. v. Baugh, 147 Ala. 613, 41 S. 663; Williams v. R. Co. (Ark.), 158 S. W. 967; Magill L. Co. v. Co., 90 Ark. 426, 119 S. W. 822; Rathbun v. White, 157 Cal. 248, 107 P. 309; Big Three M. & M. Co. v. Hamilton, 157 Cal. 130, 107 P. 301; Fidelity & D. Co. v. Co., 45 Colo. 443, 103 P. 383; Le Fevre v. Crossan (Del.), 84 A. 127; Getty v. R. Co., 25 Del. 551, 82 A. 788; Kennedy v. Woodmen, 243 Ill.

560, 90 N. E. 1084; Brown *v.* Cragg, 230 Ill. 299, 82 N. E. 569; Modern Woodmen of Am. *v.* Craiger, 175 Ind. 563, 92 N. E. 113; Green *v.* Carigianis (Mass.), 104 N. E. 571; Ranney *v.* Lewis (Mo.), 167 S. W. 601; Handlan *v.* Miller, 143 Mo. App. 101, 122 S. W. 751; Hughes *v.* R. Co. (N. J.), 89 A. 769; Kaplan *v.* Lieberman, 80 Misc. 226, 140 N. Y. S. 1010; Simon *v.* Krimko, 123 N. Y. S. 697; Koch *v.* Ellwood, 123 N. Y. S. 502; P. *v.* Baker, 123 N. Y. S. 493; Ainsfield Co. *v.* Rasmussen, 30 Utah 453, 85 P. 1002; Bush *v.* Co., 54 Wash. 212, 103 P. 45; Smith *v.* Smith, 140 Wis. 599, 123 N. W. 146; Sufferling *v.* Heyl, 139 Wis. 510, 121 N. W. 251 (use of the additional words "to a reasonable certainty," has been approved. Pelitier *v.* R. Co., 88 Wis. 521, 60 N. W. 250; Grotjan *v.* Rice, 124 Wis. 253, 102 N. W. 551; and failure to use them or equivalent terms has been condemned. Ward *v.* R. Co., 102 Wis. 215, 78 N. W. 442).

"Unless the plaintiff produces evidence of sufficient probative power to remove, in his favor, the cause of his injury from the realms of conjecture, he cannot recover. Hyer *v.* City of Janesville, 101 Wis. 371, 77 N. W. 729; Clark *v.* Franklin Farmers' Mut. F. I. Co., 111 Wis. 65, 86 N. W. 549; Stock *v.* Kern, 142 Wis. 219, 125 N. W. 447; Hart *v.* Neillsville, 141 Wis. 3, 15, 123 N. W. 125, 135 Am. St. Rep. 17; Baksalars *v.* Continental Casualty Co., 141 Wis. 43, 122 N. W. 721, 25 L. R. A. (N. S.), 241, 18 Ann. Cas. 1123. The cases cited and many more show how elementary the law is and how often it has been applied, that he upon whom the burden of proof rests, in a case like this, must go further than to merely show a possibility of the accident having been caused by actionable fault, or that it may or may not have been so caused—the evidence being as strongly on one side as the other, or merely giving rise to a conjecture that it may have been so caused. Any number of possibilities, as it is said, will not make one probability. A verdict can only rightly rest on the latter. Substitution of mere possibility for probability and supposition for facts and evidence of facts, and so reaching a conclusion to compensate an injured one at the expense of another, is a wrongful taking of the property of the latter and bestowal of it upon another." Yanike *v.* R. Co., 149 Wis. 554, 136 N. W. 329. See also Killian *v.* Killian, 175 Ala. 224, 57 S. 825.

Preponderance not necessary to rebut prima facie case. Toledo, etc. R. Co. *v.* Star Mills, 146 Fed. 953, 77 C. C. A. 203.

Where two reasonably probable theories of injury exist.—Peat *v.* R. Co., 128 Wis. 86, 107 N. W. 355.

Preponderance of witnesses not enough. Marcotte *v.* Sheridan, 91 N. Y. S. 744.

782-20 Miller *v.* Hammock, 93 Ark. 312, 124 S. W. 769; Cohasset *v.* Moors, 204 Mass. 173, 90 N. E. 978; Fraley *v.* Fraley, 150 N. C. 501, 64 S. E. 381; Cincinnati, etc. R. Co. *v.* Frye, 80 O. St. 289, 88 N. E. 642; Willett *v.* Kinney, 54 Or. 594, 104 P. 719; Gameson *v.* Gameson (Tex. Civ.), 162 S. W. 1169; Gurley *v.* R. Co. (Tex. Civ.), 124 S. W. 502 (need not disprove by negative evidence defendant's allegations).

Use of "clear" not fatal. Spreckels *v.* Brown, 212 U. S. 208.

782-21 Gillespie *v.* Hester, 160 Ala. 444, 49 S. 580 (reasonable satisfaction enough); Dorough *v.* Harrington, 148 Ala. 305, 42 S. 557; Mobley *v.* Lyon, 134 Ga. 125, 67 S. E. 668; Fraser-J. B. Co. *v.* Baird (Tex. Civ.), 128 S. W. 460.

782-22 Smiley *v.* Keith, 3 Ala. App. 354, 57 S. 127; International, etc. R. Co. *v.* Duncan, 55 Tex. Civ. 440, 121 S. W. 362 (use of "establish" condemned).

Evidence must not only be of greater convincing power, but must be such as to satisfy or convince jury of truth of contention. Anderson *v.* Co., 127 Wis. 273, 106 N. W. 1077.

783-25 Lyons *v.* Coke Co., 239 Mo. 626, 144 S. W. 503.

783-27 Rathbun *v.* White, 157 Cal. 248, 107 P. 309; Brodie *v.* Co., 87 Conn. 363, 87 A. 798; Courson *v.* Pearson, 132 Ga. 698, 64 S. E. 997; Chicago T. Co. *v.* Campbell, 110 Ill. App. 366; Cohasset *v.* Moors, 204 Mass. 173, 90 N. E. 978; List *v.* Chase, 80 O. St. 42, 88 N. E. 120; Moore *v.* Lehmann (Tex. Civ.), 165 S. W. 81; Bush *v.* Co., 54 Wash. 212, 103 P. 45; Moore *v.* Co., 65 W. Va. 552, 64 S. E. 721. See Boyce *v.* R. Co., 126 App. Div. 248, 110 N. Y. S. 393.

784-28 Schell *v.* R. Co., 134 Wis. 142, 113 N. W. 657.

784-30 Valentine *v.* R. Co., 155 Mich. 151, 225, 118 N. W. 970; McQuinn *v.* Moore, 225 Mo. 36, 123 S. W. 858 (parol agreement with decedent).

785-31 Thomas *v.* Tilley, 147 Ala. 189, 41 S. 874 (gift by deceased); Buffalo Z. Co. *v.* Cramp, 70 Ark. 525, 69 S. W. 572 (forfeiture); Deadman *v.* Yantis, 230 Ill. 243, 82 N. E. 592; Chicago, etc. R. Co. *v.* C., 87 Neb. 818, 124 N. W. 477; Ewell *v.* Forney, 39 Wash. 615, 81 P. 1047.

Burden of proof a relative term, and more than preponderance of evidence required. Liberty *v.* Haines, 103 Me. 182, 68 A. 758.

785-32 Allen *v.* Riddle, 141 Ala. 621, 37 S. 680; Lemp B. & F. Club *v.* Hackmann, 172 Mo. App. 349, 156 S. W. 791; Bingaman *v.* Bingaman, 85 Neb. 248, 122 N. W. 981; Redwood *v.* Rogers, 107 Va. 155, 57 S. E. 6; Lepley *v.* Andersen, 142 Wis. 668, 125 N. W. 433.

785-33 Lemp B. & F. Club *v.* Hackmann, 172 Mo. App. 349, 156 S. W. 791.

Mistake.—Haag & Bro. *v.* Mfg. Co., 153 Ky. 840, 156 S. W. 881.

786-34 Benefit of any doubt concerning cause of injury should be given defendant in tort action, it seems. Blumenthal *v.* Co., 18 Pa. Dist. 350.

786-36 Bingaman *v.* Bingaman, 85 Neb. 248, 122 N. W. 981.

787-37 Proceedings in disbarment. P. *v.* Sullivan, 218 Ill. 419, 75 N. E. 1066.

789-45 Snell *v.* Derricott, 161 Ala. 259, 49 S. 895; Modern Woodmen *v.* Craiger, 175 Ind. 563, 92 N. E. 113; Grella *v.* Lewis, 211 Mass. 71, 97 N. E. 745; Kramer *v.* Weigand, 91 Neb. 47, 135 N. W. 230; Fountain *v.* Bigham, 237 Pa. 35, 84 A. 131; Lay *v.* Linke, 122 Tenn. 433, 123 S. W. 746.

Defense of arson in action on policy. Benff *v.* Fire Assn., 59 Wash. 125, 109 P. 280.

789-46 See "Bankruptcy," supra, 232 81.

790-48 Grain D. Co. *v.* U. S., 204 Fed. 429, 122 C. C. A. 615; U. S. *v.* Greene, 146 Fed. 803; U. S. *v.* Richards, 149 Fed. 443; Alexis *v.* U. S., 129 Fed. 69, 63 C. C. A. 502; Roberson *v.* S. (Ala.), 62 S. 827; Little *v.* S., 145 Ala. 662, 39 S. 674; P. *v.* Wong Sang Ling, 3 Cal. App. 221, 84 P. 843; S. *v.* McCann (Del.), 66 A. 81; S. *v.* Brooks (Del.), 84 A. 387; S. *v.* Samuels, 6 Penne. (Del.) 36, 67 A. 104; S. *v.* Emory, 5 Penne. (Del.) 126, 58 A. 1026; Whitney *v.* S., 62 Fla. 73, 58 S. 230; Townsend *v.* S., 7 Ga. App. 811, 68 S. E. 333; Com. *v.* Cassidy, 209 Mass. 24, 95 N. E. 214; Lucas *v.* S., 75 Neb. 11, 105 N. W. 976; S. *v.* Lax, 71 N. J. L. 386, 59 A. 18; S. *v.* Jones, 71 N. J. L. 543, 60 A. 396; P. *v.* Glack, 188 N. Y. 167, 80 N. E. 1022; S. *v.* West, 152 N. C. 832, 68 S. E. 14; Rea *v.* S., 3 Okla. Cr. 281, 105 P. 386, 106 P. 982; S. *v.* Young, 52 Or. 227, 96 P. 1067; Wilson *v.* S., 60 Tex. Cr. 1, 129 S. W. 613; Steel *v.* S., 54 Tex. Cr. 388, 113 S. W. 15; S. *v.* Fletcher, 50 Wash. 503, 97 P. 242 (to show cause why information not filed within prescribed time); S. *v.* Pressler, 16 Wyo. 214, 92 P. 806. See "Reasonable Doubt," infra, 626-12, et seq. See vol. 6, p. 593, n. 66; vol. 9, p. 921, n. 72; vol. 10, p. 626, n. 12, and supplement thereto.

Defendant must be acquitted where evidence can be reconciled upon any reasonable hypothesis of his innocence. S. *v.* Hutchings, 30 Utah 319, 84 P. 893.

Each separate fact need not be proved beyond reasonable doubt. Pitts *v.* S., 140 Ala. 70, 37 S. 101. But where evidence is circumstantial, each material circumstance should be so proved. P. *v.* Weber, 149 Cal. 325, 86 P. 671.

Reasonable doubt may arise from want of evidence. Nix *v.* S. (Tex. Cr.), 74 S. W. 764.

Uncontradicted evidence is not conclusive. S. *v.* Momberg, 14 N. D. 291, 103 N. W. 566.

Government is not required to show that details stated in indictment as unknown were so in fact. Coffin *v.* U. S., 156 U. S. 432; Frisbie *v.* U. S., 157 U. S. 160; Jacobs *v.* U. S., 161 Fed. 694, 88 C. C. A. 554.

791-49 All incidental or subsidiary facts need not be proved beyond reasonable doubt. Osburn *v.* S., 164 Ind. 262, 73 N. E. 601.

791-50 McKinnie *v.* S., 44 Fla. 143, 32 S. 786.

Venue must be proved beyond reasonable doubt. Keeler *v.* S., 73 Neb. 141, 103 N. W. 64.

791-52 Sikes *v.* S., 120 Ga. 494, 48 S. E. 153; Fritz *v.* S., 178 Ind. 463, 99 N. E. 727; S. *v.* Kendall, 143 N. C. 659, 57 S. E. 340; S. *v.* Chastain, 85 S. C. 64, 67 S. E. 6.

792-53 Parrish *v.* S., 139 Ala. 16, 36 S. 1012; S. *v.* Mangano, 77 N. J. L. 544, 72 A. 366; S. *v.* Sappienza, 84 O. St. 63, 95 N. E. 381.

Drunkenness.—S. *v.* Yates, 132 Ia. 475, 109 N. W. 1005; S. *v.* Sparegrove, 134 Ia. 599, 112 N. W. 83.

Insanity.—P. *v.* Suesser, 142 Cal. 354,

75 P. 1093; S. *v.* Clark, 34 Wash. 485, 76 P. 98.

Alibi.—S. *v.* Thomas, 135 Ia. 717, 109 N. W. 900.

Proof to satisfaction of jury. S. *v.* Jones, 71 N. J. L. 543, 60 A. 396.

Defendant must show he is within terms of amnesty. U. S. *v.* Luzon, 2 Phil. Isl. 380.

792-54 S. *v.* Hancock, 151 N. C. 699, 66 S. E. 137.

792-55 Boatmen's Bk. *v.* Trower, 171 Fed. 964; Shaefer *v.* Co., 157 Fed. 896; Rosenthal *v.* Co., 157 Fed. 83, 84 C. C. A. 587; Kentucky D. & W. Co. *v.* Lillard, 160 Fed. 34, 87 C. C. A. 190; Couch *v.* Hutchinson, 2 Ala. App. 444, 57 S. 75; Robinson *v.* Griffin, 173 Ala. 372, 56 S. 124; Lamar *v.* King, 168 Ala. 285, 53 S. 279; Gulsby *v.* R. Co., 167 Ala. 122, 52 S. 392; Sun Ins. Co. *v.* Co., 164 Ala. 572, 51 S. 411; Miller *v.* Bk. & Tr. Co., 104 Ark. 99, 148 S. W. 513; Domphan Lumb. Co. *v.* Fix, 95 Ark. 623, 129 S. W. 289; Gauger *v.* Co., 88 Ark. 422, 115 S. W. 157; Lawlor *v.* Merritt, 81 Conn. 715, 72 A. 143; Pyles *v.* Co., 58 Fla. 348, 50 S. 872; Whitley *v.* Foster, 132 Ga. 32, 63 S. E. 698; Atlanta L. Co. *v.* Austin, 122 Ga. 374, 50 S. E. 124; Nagle *v.* Schnadt, 239 Ill. 595, 88 N. E. 178; Ind. Union T. Co. *v.* Kraemer (Ind.), 102 N. E. 141; Welker *v.* Appleman, 44 Ind. App. 699, 90 N. E. 35; Warner *v.* Warner, 30 Ind. App. 578, 66 N. E. 760; Miller *v.* Kroenert, 81 Kan. 590, 106 P. 459; Storm Bros. *v.* Bk., 148 Ky. 585, 147 S. W. 5 (negligence); Georgetown W., etc. Co. *v.* Neale, 137 Ky. 197, 125 S. W. 293; Jones *v.* Co., 29 Ky. L. R. 623, 94 S. W. 6; Wichers *v.* Fertilizer Co., 128 La. 1011, 55 S. 657; Campbell *v.* Campbell, 117 La. 402, 41 S. 696 (intervener); Pennington *v.* Gartley, 109 Me. 270, 83 A. 701; Ginn *v.* Almy, Ginn *v.* Mines Co., Ginn *v.* Wood, 212 Mass. 486, 99 N. E. 276; Wylie *v.* Marinofsky, 201 Mass. 583, 88 N. E. 448; Granite B. P. Co. *v.* Imp. Co., 168 Mo. App. 498, 151 S. W. 487; Hughes & Thurman *v.* Dodd, 164 Mo. App. 454, 146 S. W. 446; Deal *v.* R. Co. (Mo.), 129 S. W. 52; Dorrell *v.* Sparks (Mo.), 127 S. W. 103; Gibson *v.* Swofford, 122 Mo. App. 126, 97 S. W. 1007; Swain *v.* McMillan, 30 Mont. 433, 76 P. 943; Rapp *v.* County, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; Goerke Co. *v.* Diskon (N. J. Eq.), 75 A. 780; Liberty P. Co. *v.* Co., 178 N. Y. 219, 70 N. E. 501; Republic L. Ins. Co. *v.* Co., 130 App. Div. 618, 115 N. Y. S. 503; Hayden *v.* Joline, 122 N. Y. S. 629; Trubenbach *v.* Otten, 122 N. Y. S. 616; Pause *v.* Williams, 122 N. Y. S. 392; Roberts *v.* Little, 18 N. D. 608, 120 N. W. 565; Kroll *v.* Close, 82 O. St. 190, 92 N. E. 29; Joint Brd. of County Comrs. *v.* Whisler, 82 O. St. 234, 92 N. E. 21 (on appeal from county commissioners to probate court burden remains with petitioners to show ditch asked in public interest); Fifth Ave L. Soc. *v.* Phillips, 39 Okla. 799, 136 P. 1076; Peaslee *v.* Mfg. Co. (Or.), 135 P. 521; Spande *v.* Indemnity Co., 61 Or. 220, 117 P. 973, 122 P. 38; Behn *v.* Rosatzin, 5 Phil. Isl. 660; Neal *v.* R. Co., 92 S. C. 197, 75 S. E. 405; Banks *v.* Blake (Tex. Civ.), 143 S. W. 1183; Broocks *v.* Payne (Tex. Civ.), 124 S. W. 463; Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807; Lanford *v.* R. Co. (Va.), 73 S. E. 566; Butler Bros.-Hoff Co. *v.* R. Co. (Va.), 73 S. E. 441; Coates *v.* Marsden, 142 Wis. 106, 124 N. W. 1057.

Must prove allegations made in cross-complaint. Scott *v.* Dilley (Ind. App.), 101 N. E. 313.

To prove error in tax assessment.—P. *v.* Woodbury, 74 Misc. 130, 133 N. Y. S. 135.

When one alleges that his rights have been wilfully invaded, the burden is upon him to prove it. Hunter *v.* R. Co., 90 S. C. 507, 73 S. E. 1017.

In transaction between attorney and client, on question of fairness, burden on attorney. Bolles *v.* O'Brien, 63 Fla. 354, 59 S. 133.

Burden of proof is determined by pleadings and not by condition of proof. Adams *v.* Pease, 113 Ill. App. 356.

Where action is against two or more if burden as to either of them is on plaintiff, the court may give him burden in whole case. New Ellerslie Club *v.* Stewart, 29 Ky. L. R. 414, 93 S. W. 598.

793-56 Lee *v.* R. Co., 125 La. 236, 51 S. 182; Stamaty *v.* Pappadamitriu, 51 Wash. 221, 98 P. 613.

794-57 Huntley *v.* E. Corp., 211 Fed. 959 (C. C. A.); Roberts *v.* Padgett, 82 Ark. 331, 101 S. W. 753; Stephens *v.* Trust Co., 260 Ill. 364, 103 N. E. 190; Furst *v.* Satterfield, 44 Ind. App. 613, 89 N. E. 906; Walling *v.* Eggers, 25 Ky. L. R. 1563, 78 S. W. 428; Chaplin, etc. Co. *v.* County, 25 Ky. L. R. 1154, 77 S. W. 377; Dovey *v.* Lam, 117 Ky. 19, 77

S. W. 382; Power v. Turner, 37 Mont. 521, 97 P. 970; John Turl's Sons v. Co., 136 App. Div. 710, 121 N. Y. S. 478 (presumption arising from pleadings considered); Coffman v. Pub. Co., 65 Wash. 1, 117 P. 596. See infra, §12-24.

794-58 Hagan v. Taylor, 110 Va. 9, 65 S. E. 487.

794-59 Rosenthal v. Pine Hill, 157 Fed. 83, 84 C. C. A. 587; Berman v. Kling, 81 Conn. 403, 71 A. 507; Nash v. Cooney, 108 Ill. App. 211; Graves v. Garard, 44 Ind. App. 712, 90 N. E. 22 (though admissions made in affirmative paragraph of answer, which was general denial); Wilson v. Co., 142 Ia. 521, 119 N. W. 604; Boyles v. Bradley, 79 Kan. 844, 101 P. 477; New Ellerslie Club v. Stewart, 29 Ky. L. R. 414, 93 S. W. 598; List v. Chase, 80 O. St. 42, 88 N. E. 120; Clifton v. Weston, 51 W. Va. 250, 46 S. E. 360.

795-61 Mesa M. Co. v. Crosby, 98 C. C. A. 70, 174 Fed. 96; North Ala. Trac. Co. v. Taylor, 3 Ala. App. 456, 57 S. 146; Perryman & Co. v. Mfg. Co., 167 Ala. 414, 52 S. 644; Snell v. Derricott, 101 Ala. 259, 49 S. 895; St. Louis & S. F. R. Co. v. Co., 101 Ark. 611, 142 S. W. 820; Creditors Union v. Lundy, 16 Cal. App. 567, 117 P. 624; Bettens v. Hoover, 12 Cal. App. 313, 107 P. 329; Prince v. Kennedy, 3 Cal. App. 404, 85 P. 859; DeLaval Co. v. Steadman, 6 Cal. App. 651, 92 P. 877; Dieterle v. Bekin, 143 Cal. 683, 77 P. 664; Davis v. Horne, 57 Fla. 296, 49 S. 505; Northwestern F. Co. v. Co., 144 Ill. App. 92; Coates v. Miller, 99 Ill. App. 227; Sears v. Vaughan, 230 Ill. 372, 82 N. E. 881; Brotherhood of Painters v. Barton, 46 Ind. App. 160, 92 N. E. 64; Garretson v. Garretson, 43 Ind. App. 688, 88 N. E. 624; Gatlin v. Vant, 6 Ind. Ty. 254, 91 S. W. 38; Farmers Sav. Bk. v. Newton, 134 Ia. 49, 134 N. W. 436; Collier v. Monger, 75 Kan. 550, 89 P. 1011; Davey v. Lam, 117 Ky. 19, 77 S. W. 383; Bailey v. Porter, 30 Ky. L. R. 913, 99 S. W. 922; Stone v. R. Co., 212 Mass. 479, 99 N. E. 218; Penobscot L. & C. Co. v. Dacey, 147 Mo. App. 194, 126 S. W. 213; Christy v. Ins. Co., 122 N. Y. S. 740; Gusick v. Rosler, 67 Misc. 447, 122 N. Y. S. 78; Morgan v. New York, 147 App. Div. 104, 131 N. Y. S. 976; Dugert v. Tannenbaum, 53 Misc. 210, 103 N. Y. S. 98; Heltmann v. Ashley, 172 N. Y. 628, 65 N. E. 1110, 69 App. Div. 201, 69 N. Y. S. 1109; N. Y. Coal Co. v. Co., 86 O. St. 146, 99 N. E. 198 (action for royalty under a coal lease); Contes v. Steel Co., 234 Pa. 199, 83 A. 77; Central Altagracia v. Javierre, 3 P. R. Fed. 256; Heiden v. R. Co., 84 S. C. 117, 65 S. E. 987; Jones v. R. Co., 67 S. C. 181, 45 S. E. 188; Ainsfield Co. v. Rasmussen, 30 Utah 453, 85 P. 1002; Smith v. Reed, 141 Wis. 483, 124 N. W. 480.

Plea denying jurisdiction.—Chase v. Wetzlar, 197 Fed. 119.

That defendant should be credited with a payment on account. Chapman v. Meiling, 147 Ill. App. 411.

Plea of estoppel.—Hughes v. Williams (Mass.), 105 N. E. 1056; Locke v. Bowman, 168 Mo. App. 121, 151 S. W. 468; Pennsylvania, etc. Co. v. Schmidt, 155 Wis. 242, 144 N. W. 283.

Laches.—Woodlawn R. & D. Co. v. Hawkins (Ala.), 65 S. 183.

Burden on defendant to prove waiver of alleged unsoundness of animal sold in action by administrator of purchaser. Ramsey v. Hill, 92 S. C. 146, 75 S. E. 366.

Prima facie case held to shift burden to defendant. Render v. Trust Co., 196 Fed. 1, 115 C. C. A. 635.

To show effort to minimize damages. Ware Bros. v. Co., 133 N. Y. S. 60.

Defendant has burden of proving the matters set up in the notice of recoupment, in the way of defense. Hawthorne v. Murray (Del.), 84 A. 5. It is, however, not shown in this case in any way that the city of Enterprise, the defendant, was operating a dispensary under the Moody Law, making such purchase a *prohibited* act under section 9 of that law. The burden of proving this special plea rested upon the defendant. Hirsch & Spitz Mfg. Co. v. City of Enterprise, 5 Ala. App. 387, 59 S. 315.

Burden of showing an illegal consideration for the bond sued upon (as, compounding crime), is upon the defendant who sets it up to defeat liability. Fountain v. Bigham, 235 Pa. 35, 84 A. 131.

In tort actions.—Brubaker v. Bidstrup (Mo.), 147 S. W. 541.

Set-Off.—O'Neal v. Curry, 134 Ala. 216, 32 S. 697; Western C. Co. v. Hollenbeck, 72 Ark. 44, 80 S. W. 145; Holmes v. McKennan, 120 Ill. App. 329; Pocono, etc. Co. v. Co., 214 Pa. 640, 64 A. 398.

Recoupment.—Sayles v. Quinn, 196 Mass. 493, 82 N. E. 713; Truax v.

Heartt, 135 Mich. 150, 97 N. W. 394.
Counterclaim.—Simonoff *v.* Horwitz, 95 N. Y. S. 522. And see Saldal *v.* Jacobsen, 154 Ia. 630, 135 N. W. 18, action by contractor against owner for interference.
Payment.—Baehr *v.* Buell, 133 Wis. 119, 113 N. W. 433.
Contributory negligence.—Weil *v.* Fineran, 78 Ark. 87, 93 S. W. 568 (fraud); Murphy *v.* Bk., 82 Ark. 131, 100 S. W. 894 (appeal from judgment); Crawford *v.* Gose (Ind. App.), 82 N. E. 984; Clements *v.* Stapleton, 136 Ia. 137, 113 N. W. 546 (revocation of agreement); Osmers *v.* Furey, 32 Mont. 581, 81 P. 345 (justification of seizure); Vertrees *v.* County, 75 Neb. 332, 106 N. W. 331; Agnew *v.* Pawnee, 79 Neb. 603, 113 N. W. 236 (abandonment of way); Cady *v.* Co., 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260 (suicide as defense).
Burden as to particular facts may be regulated by statute. Lowden *v.* Co., 41 Ind. App. 614, 82 N. E. 941; Stewart *v.* R. Co., 136 Ia. 182, 113 N. W. 761; Kelsall *v.* R. Co., 196 Mass. 554, 82 N. E. 674. See Toledo, etc. R. Co. *v.* Star Mills, 146 Fed. 953, 77 C. C. A. 203.

795-62 Hunt *v.* Osborn, 40 Ind. App. 646, 82 N. E. 933; Wylie *v.* Marinofsky, 201 Mass. 583, 88 N. E. 448.
796-64 Weissman *v.* Ins. Co., 83 Conn. 716, 76 A. 1105; Michels *v.* West, 109 Ill. App. 418; Goodnough M. Co. *v.* Galloway, 48 Or. 239, 84 P. 1049; Daley *v.* Iselin, 212 Pa. 279, 61 A. 919; Banderer *v.* Gunther (Tex. Civ.), 87 S. W. 851.
796-65 Chicago, etc. R. Co. *v.* Jennings, 114 Ill. App. 622.
796-66 Gatlin *v.* Vaut, 6 Ind. Ty. 254, 91 S. W. 38.
796-67 Mesa M. Co. *v.* Crosby, 174 Fed. 96, 98 C. C. A. 70; Stephens *v.* Assn., 139 Mo. App. 369, 123 S. W. 63.
797-69 New York C. & H. R. Co. *v.* U. S., 165 Fed. 833, 91 C. C. A. 519; Petite *v.* Ins. Co., 142 Ia. 265, 120 N. W. 642; Dolenty *v.* Co., 41 Mont. 105, 108 P. 921; Hassam *v.* Safford, 82 Vt. 444, 74 A. 197 (good faith in mitigation of damages). See 805-93, infra.
797-70 Sinkovitz *v.* Co., 5 Ga. App. 788, 64 S. E. 93. See Chicago, etc. R. Co. *v.* Davis, 172 Fed. 861, 97 C. C. A. 281; Houston, etc. R. Co. *v.* Washington (Tex. Civ.), 127 S. W. 1126.
798-71 Dowdell *v.* Soc., 114 La. 49, 38 S. 16; Walker *v.* Carpenter, 144 N. C. 674, 57 S. E. 461.
798-74 Shattuck *v.* Costello, 8 Ariz. 22, 68 P. 529; Chaplin, etc. Co. *v.* Nelson, 25 Ky. L. R. 1154, 77 S. W. 377.
If payment is only issue left, burden is on defendant. Swift *v.* Mutter, 115 Ill. App. 371.
799-75 General denial and plea of payment. Cunningham *v.* Springer, 13 N. M. 259, 82 P. 232.
799-76 Liberty P. Co. *v.* Co., 178 N. Y. 219, 70 N. E. 501; Hollander *v.* Farber, 52 Misc. 507, 102 N. Y. S. 506.
799-77 Dorrell *v.* Sparks (Mo.), 127 S. W. 103.
800-81 Abhau *v.* Grassie, 262 Ill. 636, 104 N. E. 1020; Simon *v.* Krimko, 123 N. Y. S. 697. See vol. 2, p. 803, n. 87; vol. 9, p. 959, n. 21, and supplement thereto.
801-82 *Contra* under code. Holmes *v.* Warren, 145 Cal. 457, 78 P. 954; Petaluma P. Co. *v.* Singley, 136 Cal. 616, 69 P. 426.
802-83 P. *v.* Grass, 79 Misc. 457, 141 N. Y. S. 204.
803-86 Pollak *v.* Winter, 166 Ala. 255, 51 S. 998; Cleveland, etc. R. Co. *v.* Moore, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540; In re Ring, 104 Me. 544, 72 A. 548; Montague Compressed Air Co. *v.* City of Fulton, 166 Mo. App. 11, 148 S. W. 422; Schuyler *v.* Southern Pac. Co., 37 Utah 581, 109 P. 458.
803-87 W. U. Tel. Co. *v.* Brazier (Ala.), 65 S. 95; Freeman *v.* Blount, 172 Ala. 655, 55 S. 293; Hibernia S. & L. Soc. *v.* Farnham, 153 Cal. 578, 96 P. 9; Fidelity & D. Co. *v.* Co., 45 Colo. 443, 103 P. 383; Kiesel *v.* Bybee, 14 Ida. 670, 95 P. 20; Abhau *v.* Grassie, 262 Ill. 636, 104 N. E. 1020; Town of Cicero *v.* R. Co., 52 Ind. App. 298, 97 N. E. 389; Compton *v.* Benham (Ind. App.), 85 N. E. 365; Lambert *v.* Rice, 143 Ia. 70, 120 N. W. 96; Fulwider *v.* Co., 216 Mo. 582, 116 S. W. 508; Altman *v.* Cochrane, 131 App. Div. 232, 115 N. Y. S. 870; Atlantic T. Co. *v.* Co., 72 App. Div. 539, 76 N. Y. S. 647; Daley *v.* Iselin, 212 Pa. 279, 61 A. 919; Olympia B. Co. *v.* Asst., 53 Wash. 16, 101 P. 371. See vol. 2, p. 800, n. 81; vol. 9, p. 959, n. 21 and supplement thereto.
804-89 Dean *v.* R. Co. (Mass.), 105 N. E. 616; Posener *v.* Harvey (Tex. Civ.), 125 S. W. 256.
804-91 Richardson *v.* S., 77 Ark. 321, 91 S. W. 758. S. *v.* Connor, 142 N. C. 700, 55 S. E. 787.

804-92 W. U. Tel. Co. *v.* Brazier (Ala.), 65 S. 97; Freeman *v.* Blount, 172 Ala. 677, 55 S. 293; Davis *v.* Arnold, 143 Ala. 228, 39 S. 141; Gains *v.* S., 149 Ala. 29, 43 S. 137; Williams *v.* S., 12 Ga. App. 84, 76 S. E. 785; Blocker *v.* S., 12 Ga. App. 81, 76 S. E. 784; Abbas *v.* Grasse, 262 Ill. 636, 104 N. E. 1020 (cit. ENCYCLOPEDIA OF EVIDENCE); Swinhart *v.* R. Co., 207 Mo. 425, 105 S. W. 1043; Jolliffe *v.* R. Co., 52 Wash. 433, 100 P. 977. See vol. 3, p. 716, n. 34 and supplement thereto.

Relationship to felon as excuse. S. *v.* Miller, 182 Mo. 370, 81 S. W. 867.

"The rule has been applied to a shipment of goods by connecting lines of carriers, when a presumption arises that the carrier, in whose possession the goods are found in a damaged condition, caused the damage, it being all the proof the nature of the case permits to the plaintiff, and proof in exoneration of the carrier being more accessible to him than to the plaintiff." Bevill *v.* R. Co. (N. C.), 74 S. E. 349.

805-93 Williams *v.* S., 12 Ga. App. 84, 76 S. E. 785; S. *v.* Hathaway, 115 Mo. 36, 21 S. W. 1081; Blackman *v.* C., 124 Pa. 378, 17 A. 194. See vol. 3, p. 716, n. 34 and supplement thereto.

Licenses must be shown by party claiming under them. Morris *v.* U. S., 161 Fed. 672, 88 C. C. A. 532.

806-98 Norddeutscher Lloyd *v.* U. S., 213 Fed. 10 (C. C. A.); Stuart *v.* Reynolds, 204 Fed. 709 (C. C. A.); Prettyman *v.* U. S., 180 Fed. 30, 103 C. C. A. 384; U. S. *v.* Breese, 131 Fed. 915; Parrish *v.* S., 139 Ala. 16, 36 S. 1012; Henderson *v.* S., 91 Ark. 224, 120 S. W. 966; S. *v.* Samuels, 6 Penne. (Del.) 36, 67 A. 164; Blandon *v.* S., 6 Ga. App. 782, 65 S. E. 842; International H. Co. *v.* C., 137 Ky. 668, 126 S. W. 252; S. *v.* Webb, 216 Mo. 378, 115 S. W. 998; High *v.* S., 2 Okla. Cr. 161, 101 P. 115; Black *v.* S. (Tex. Cr.), 115 S. W. 944. See vol. 3, p. 472, n. 61 and supplement thereto.

807-99 Glover *v.* U. S., 147 Fed. 426, 77 C. C. A. 450, *rev.* 6 Ind. Ty. 262, 91 S. W. 41; Post *v.* U. S., 183 Fed. 1, 67 C. C. A. 569, 70 L. R. A. 880; S. *v.* Lax, 71 N. J. L. 386, 59 A. 18; Frasier *v.* U. S., 2 Okla. Cr. 627, 103 P. 373; C. *v.* Beckwith, 27 Pa. C. C. 481; Miller *v.* S. (Tex. Cr.), 141 S. W. 779; Harris *v.* S., 59 Tex. Cr. 469, 117 S. W. 829.

807-1 Stuart *v.* Reynolds, 204 Fed. 709 (C. C. A.). See vol. 3, p. 472, n. 61 and supplement thereto.

807-2 U. S. *v.* Heike, 175 Fed. 852; Reid *v.* McElderry (Ala.), 65 S. 421 (counterclaims); Elrod Lumb. Co. *v.* Moore (Ala.), 65 S. 175; Mercer E. Mfg. Co. *v.* Co., 87 Conn. 691, 89 A. 999; International H. Co. *v.* C., 137 Ky. 668, 126 S. W. 252; Wylie *v.* Marinofsky, 201 Mass. 583, 88 N. E. 148; S. *v.* Crowder, 107 Minn. 171, 119 N. W. 660; Austin C. Co. *v.* Posey (Miss.), 61 S. ; S. *v.* Reed, 140 Mo. App. 251, 124 S. W. 53; Rea *v.* S., 3 Okla. Cr. 281, 105 P. 386, 106 P. 982; Patton *v.* W. O. W., 65 Or. 33, 131 P. 521; C. *v.* Scott, 38 Pa. Super. 303; Hunter *v.* S. (Tex. Cr.), 126 S. W. 164.

Alibi.—Kuksey *v.* S., 11 Ga. App. 142, 74 S. E. 902. And see the title "Alibi."

807-3 See S. *v.* Harmon, 4 Penne. (Del.) 580, 60 A. 866.

808-5 Central of Ga. R. Co. *v.* McGuire, 10 Ga. App. 483, 73 S. E. 702; Kwong Lee Yuen Co. *v.* Co., 16 Haw. 674; Stephens *v.* Neilsen, 142 Ill. App. 263; Alabama, etc. R. Co. *v.* Groome, 97 Miss. 201, 52 S. 763; Berger *v.* Co., 136 Mo. App. 36, 116 S. W. 444; Rapp *v.* Sarpey Co., 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; Toube *v.* Co., 63 Misc. 298, 116 N. Y. S. 673; Colston *v.* Bean, 78 Vt. 283, 62 A. 1015.

808-6 Balt. R. & H. Co. *v.* Kreiner, 109 Md. 361, 71 A. 1066; Klunk *v.* R. Co., 71 O. St. 125, 77 N. E. 772. See Peoples' S. Bk. *v.* Hoppe, 152 Mo. App. 449, 111 S. W. 1130; Texas Co. *v.* Lacour (Tex. Civ.), 122 S. W. 424.

809-8 See Compton *v.* Benham (Ind. App.), 85 N. E. 365.

810-9 Klenpeter *v.* Castro, 11 Cal. App. 83, 104 P. 1009; Hyer *v.* Co., 12 Ga. App. 857, 70 S. E. 58; Chicago *v.* Dinsham Co., 161 Ill. App. 307; Miller *v.* S. (Miss.), 63 S. 269; Fulwider *v.* Co., 216 Mo. 182, 116 S. W. 508.

810-10 Price *v.* R. Co., 220 Mo. 435, 119 S. W. 992. Caution: Sewell *v.* R., 158 Mich. 407, 123 N. W. 2. Res ipsa loquitur rule does not change burden. Morrisett *v.* Mills, 151 N. C. 51, 65 S. E. 614.

810-11 Toledo, etc. R. Co. *v.* Mills Co., 146 Fed. 952, 77 C. C. A. 293; Cleveland, etc. R. Co. *v.* Hadley, 170 Ind. 264, 82 N. E. 1027, 84 N. E. 13, 16 L. R. A. (N. S.) 927 (presumption from res ipsa loquitur); Cover *v.* Hatton, 136 Ia. 62, 113 N. W. 470 (presumption resi-

dence continues); Model M. Co. *v.* Webb, 164 N. C. 87, 80 S. E. 232. See vol. 9, p. 885, n. 25; vol. 9, p. 889, n. 35; vol. 9, p. 897, n. 77; vol. 14, p. 744, n. 15; vol. 14, p. 754, n. 35, and supplement thereto.

811-12 S. *v.* Adams, 22 Ida. 485, 126 P. 401; North *v.* Jones (Ind. App.), 100 N. E. 84; Dunlap *v.* R. Co., 145 Mo App. 215, 129 S. W. 262. See vol. 9, p. 889, n. 33, 35 and supplement thereto.

Very slight circumstances will cast the burden of sustaining a contract upon the party asserting its validity, where the other party is old, feeble, illiterate, and weak-minded from any cause. Ruby *v.* Ewing, 49 Ind. App. 520, 97 N. E. 798.

811-13 Statutory prima facie evidence does not change burden. Cohasset *v.* Moors, 204 Mass. 173, 90 N. E. 978.

811-15 Hyer *v.* Co., 12 Ga. App. 837, 79 S. E. 58; Brown *v.* Funck's Est., 89 Kan. 601, 132 P. 202; Belden *v.* Belden, 139 App. Div. 437, 124 N. Y. S. 225; Winn *v.* Itzel, 125 Wis. 19, 103 N. W. 220. See Ginn *v.* Dolan, 81 O. St. 121, 90 N. E. 141; Hogan *v.* Leeper, 37 Okla. 655, 133 P. 190; Van Arsdale *v.* Dist., 23 Okla. 894, 101 P. 1121. See vol. 2, p. 836, n. 60 and supplement thereto.

811-16 Muncie W. Co. *v.* Finch, 150 Mich. 274, 113 N. W. 1107.

812-17 Chicago, etc. R. Co. *v.* White, 73 Neb. 870, 103 N. W. 661; Schumacher *v.* Co., 142 Wis. 631, 126 N. W. 46; Eichman *v.* Buchheit, 128 Wis. 385, 107 N. W. 325 (confusion of terms, "preponderance of evidence" and "burden of proof").

812-18 Chicago, etc. R. Co. *v.* Davis, 172 Fed. 861, 97 C. C. A. 281; Waterbury L. Co. *v.* Hinckley, 75 Conn. 187, 52 A. 739; Brown *v.* S., 125 Ga. 8, 53 S. E. 767; Harrison *v.* Russell, 17 Ida. 196, 105 P. 48; Toube *v.* Co., 63 Misc. 298, 116 N. Y. S. 673.

812-20 Nagle *v.* Schnadt, 239 Ill. 595, 88 N. E. 178; Gas Belt T. Co. *v.* Ward, 43 Ind. App. 537, 87 N. E. 1110; Bogart *v.* Tannenbaum, 53 Misc. 310, 103 N. Y. S. 98; Cincinnati, etc. R. Co. *v.* Frye, 80 O. St. 289, 88 N. E. 642; Pope *v.* Taliaferro, 51 Tex. Civ. 217, 115 S. W. 309; Banderer *v.* Gunther (Tex. Civ.), 87 S. W. 851.

812-21 *Contra,* Jenkins *v.* Jenkins, 83 S. C. 537, 65 S. E. 736.

Not important in equity case tried to court. Dreeland *v.* Pascoe, 39 Mont. 290, 102 P. 331.

Right to open and close regarded as curing erroneous ruling respecting burden of proof. Smith *v.* Boswell, 95 Ark. 66, 124 S. W. 264. See Atlanta L. Co. *v.* Austin, 122 Ga. 374, 50 S. E. 124.

812-23 Kelly *v.* Co., 134 Ky. 208, 119 S. W. 747.

812-24 Stephens *v.* Trust Co., 260 Ill. 364, 103 N. E. 190; Covell *v.* Bright, 157 Mich. 419, 122 N. W. 101; Will *v.* Tornabells, 3 P. R. Fed. 125. See vol. 2, p. 794, n. 57.

BURGLARY

Breaking and entering postoffice, 813-16; *Possession of tools,* 822-23; *Association with another,* 822-23.

Definition.—See 4 STANDARD PROC. 591.

Degree of Crime.—See 4 STANDARD PROC. 591.

Indictment or Information. — See 4 STANDARD PROC. 592.

813-1 Leonard *v.* S., 150 Ala. 89, 43 S. 214; Gibbs *v.* S., 8 Ga. App. 107, 68 S. E. 742; S. *v.* Harris, 18 Ida. 620, 111 P. 406; S. *v.* Callahan, 83 Kan. 418, 111 P. 445; S. *v.* Brady, 121 Ia. 561, 91 N. W. 801, 97 N. W. 62; Keeler *v.* S., 73 Neb. 441, 103 N. W. 64; Margary *v.* S., 60 Tex. Cr. 107, 131 S. W. 312; S. *v.* Hutchings, 30 Utah 319, 84 P. 893.

Evidence held sufficient.—P. *v.* O'Donnell, 16 Cal. App. 716, 117 P. 933; P. *v.* Roderiguez, 16 Cal. App. 358, 116 P. 986; S. *v.* Christy, 154 Ia. 514, 133 N. W. 1074; Collins *v.* Com., 146 Ky. 608, 143 S. W. 35; S. *v.* Hawkins, 155 N. C. 466, 71 S. E. 326; Lawrence *v.* S. (Tex. Cr.), 146 S. W. 928; Moray *v.* S. (Tex. Cr.), 145 S. W. 927; Hickman *v.* S. (Tex. Cr.), 145 S. W. 914; Williams *v.* S. (Tex. Cr.), 143 S. W. 634.

In S. *v.* Rogers, 156 Ia. 77, 137 N. W. 819, "the evidence was wholly circumstantial. It was clear and direct, however, as to the corpus delicti. It was also positive and direct as to the possession of the alleged stolen property by the defendants within a brief time after the alleged burglary. This was corroborated by the evidence of two witnesses, who claimed to have seen the horse and wagon of the defendants, between 12 and 2 a. m., in the immediate neighborhood. This rig was seen two or three times within a period

of two hours. At one time it was standing, with one man sitting therein. At a later time it was passing along the highway, with two men sitting therein."

Evidence held sufficient to sustain conviction of housebreaking. Mulligan v. Com., 144 Ky. 246, 137 S. W. 1062.

Evidence held insufficient.—McNair v. S., 61 Fla. 35, 55 S. 401.

Suspicion not enough.—Gross v. S. (Tex. Cr.), 147 S. W. 579; Lawrence v. S. (Tex. Cr.), 146 S. W. 928.

S14-2 Gunter v. S., 79 Ark. 432, 96 S. W. 181; Bruen v. P., 206 Ill. 417; 69 N. E. 24; Dunn v. C., 27 Ky. L. R. 113, 84 S. W. 321.

"House" inferred to be a dwelling. Williams v. S., 2 Ga. App. 394, 58 S. E. 549. See Cronan v. S., 113 Tenn. 539, 82 S. W. 477; Jackson v. S., 49 Tex. Cr. 215, 91 S. W. 788 (circumstantial evidence).

S14-3 Alsup v. S. (Tex. Cr.), 153 S. W. 624. See Holmes v. S. (Tex. Cr.), 156 S. W. 1172.

Contra where owner witness. Caddell v. S., 49 Tex. Cr. 133, 90 S. W. 1013. And where entry alleged to have been made with intent to steal. Circumstantial evidence may be sufficient if it excludes presumption of consent. Brown v. S., 58 Tex. Cr. 336, 125 S. W. 915.

Non-consent of but one person need be proved by state; consent of any other is matter of defense. Skaggs v. S., 56 Tex. Cr. 79, 119 S. W. 106. See also Whorton v. S. (Tex. Cr.), 151 S. W. 300.

S14-4 Bird v. S., 49 Tex. Cr. 96, 90 S. W. 651.

S14-5 McNair v. S., 61 Fla. 35, 55 S. 401; Jenkins v. S., 58 Fla. 62, 50 S. 782; Bird v. S., supra; Price v. S. (Tex. Civ.), 83 S. W. 187.

Conviction for burglarious entry with intent to commit rape sustained by evidence. Smith v. S., 60 Tex. Cr. 81, 131 S. W. 313.

S15-6 Bruen v. P., 206 Ill. 417, 69 N. E. 24; S. v. Sowell, 87 S. C. 278, 67 S. E. 316 (and proof of de facto existence of corporate owner); Alsup v. S. (Tex. Cr.), 153 S. W. 624.

Conduct of prosecuting witness after burglary cannot be shown. Johnson v. S. (Tex. Cr.), 76 S. W. 925.

Testimony of one witness sufficient. S. v. Hawkins, 155 N. C. 466, 71 S. E. 329.

S15-7 Hall v. S., 7 Ga. App. 115, 66 S. E. 390; S. v. Ward, 116 Minn. 516, 134 N. W. 115; Lewis v. S., 85 Miss. 75, 37 S. 497; S. v. McGuire, 193 Mo. 215, 91 S. W. 939; Blackwell v. S. (Tex. Cr.), 73 S. W. 960; Johnson v. S., 52 Tex. Cr. 201, 107 S. W. 52. See Monk v. S., 105 Ark. 12, 150 S. W. 133.

Proof of ownership need not be strict. S. v. Peebles, 178 Mo. 475, 77 S. W. 518; Scoville v. S. (Tex. Cr.), 81 S. W. 717 (occupancy and possession sufficient).

Evidence of identification of goods in possession of accused by third persons as theirs, improper; as is fact search warrant sued out, and third persons carried and secreted goods from burglarized premises. Elkins v. S., 57 Tex. Cr. 247, 122 S. W. 393.

S16-8 S. v. Baker, 148 Ia. 149, 126 N. W. 1120; Little v. C., 151 Ky. 520, 152 S. W. 569; Schwartz v. S., 55 Tex. Cr. 36, 114 S. W. 809.

Neither breaking nor deception need be shown. Pinson v. S., 91 Ark. 434, 121 S. W. 751 (statute).

Fact door was closed may be shown by witness who heard it close after another went out. S. v. Baker, 148 Ia. 149, 126 N. W. 1120.

S16-9 Sorenson v. U. S., 168 Fed. 785, 94 C. C. A. 181; Welch v. S., 156 Ala. 112, 46 S. 856; S. v. Wright, 6 Penne. (Del.) 251, 66 A. 364; Collins v. C., 146 Ky. 698, 143 S. W. 35; P. v. Evans, 150 Mich. 443, 114 N. W. 223; Kemplin v. S., 90 Neb. 655, 134 N. W. 275. See Williams v. S. (Tex. Cr.), 156 S. W. 938.

Actual force need not be proved. Hays v. S., 51 Tex. Cr. 111, 100 S. W. 926.

Breaking by detective without felonious intent, but at instigation of defendant, unlawful. C. v. Seybert, 4 Pa. C. C. 152.

S17-10 Dupree v. S., 148 Ala. 620, 42 S. 1004; Gilbert v. S., 116 Ga. 819, 43 S. E. 47; S. v. O'Brien (Ia.), 138 N. W. 895; S. v. Arthur, 135 Ia. 48, 109 N. W. 1083; S. v. Donavan, 125 Ia. 239, 101 N. W. 122; S. v. Swift, 120 Ia. 8, 94 N. W. 269; S. v. Peebles, 178 Mo. 475, 77 S. W. 518; S. v. Helms, 179 Mo. 280, 78 S. W. 592; S. v. Clark, 85 S. C. 273, 67 S. E. 300 (possession of skeleton keys, though it was not shown they would unlock the door of building, entered through window); S. v. Vierck, 23 S. D. 166, 120 N. W. 1098; Kubacak v. S., 59 Tex. Cr. 165, 127 S. W. 836; Lynne v. S., 53 Tex. Cr. 386,

111 S. W. 151 (possession of keys fitting burglarized house); Berry *v.* S. (Tex. Cr.), 91 S. W. 579; Green *v.* S., 49 Tex. Cr. 238, 90 S. W. 1115; Miller *v.* S. (Tex. Cr.), 77 S. W. 800; Winsky *v.* S., 126 Wis. 99, 105 N. W. 480.

Competent to show conditions of all doors and windows both immediately before and after the crime. S. *v.* Sorenson (Ia.), 138 N. W. 411.

Custom of owner.—S. *v.* Hart, 94 S. C. 214, 77 S. E. 862.

Cross-examination as to custom of closing door, proper. Adkinson *v.* S., 45 Fla. 1, 37 S. 522.

Means by which entry could be made may be shown. Welch *v.* S., 156 Ala. 112, 46 S. 856. Statement man could enter through opening of given size not conclusion. Welch *v.* S., supra.

Entry into room may be testified to by witness who had seen it. S. *v.* Shuford, 152 N. C. 809, 67 S. E. 923.

Non-consent may be proved after circumstances showing entry have been testified to. Kubacak *v.* S., 59 Tex. Cr. 165, 127 S. W. 836.

817-11 Keeler *v.* S., 73 Neb. 411, 103 N. W. 64; S. *v.* Thompson, 24 Utah 314, 67 P. 789; S. *v.* Gunderson, 56 Wash. 672, 106 P. 194.

Evidence sufficient to go to the jury. Griffith *v.* S., 62 Tex. Cr. 642, 138 S. W. 1016.

818-12 Date approximating that alleged may be proved. S. *v.* Daniels, 122 La. 261, 47 S. 599.

818-13 S. *v.* Richards, 29 Utah 310, 81 P. 142; Winsky *v.* S., 126 Wis. 99, 105 N. W. 480.

818-15 S. *v.* Wright, 6 Penne. (Del.) 251, 66 A. 361; S. *v.* Baker, 148 Ia. 149, 126 N. W. 1120; Taylor *v.* S. (Miss.), 37 S. 498.

818-16 S. *v.* Williams, 120 Ia. 36, 94 N. W. 255.

A conviction for larceny or other depredation upon a postoffice cannot be sustained where office kept in room used for other purposes, and separated therefrom by railing, unless intent to take money or property from space so separated is shown. Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181.

818-17 Russell *v.* S. (Ala.), 38 S. 291; P. *v.* Noon, 1 Cal. App. 44, 81 P. 746; Jenkins *v.* S., 58 Fla. 62, 50 S. 582; Walker *v.* S., 44 Fla. 466, 32 S. 954; S. *v.* Baker, 148 Ia. 149, 126 N. W. 1120; Brown *v.* S., 85 Miss. 27, 37 S. 497; S. *v.* Peebles, 178 Mo. 475, 77 S. W. 518; Moseley *v.* S., 43 Tex. Cr. 559, 67 S. W. 414; Vickery *v.* S., 62 Tex. Cr. 511, 137 S. W. 687; Williams *v.* S. (Tex. Cr.), 143 S. W. 634; Delmont *v.* S., 15 Wyo. 271, 88 P. 623, 1102.

Evidence showing intent may be slight. Black *v.* S. (Tex. Cr.), 165 S. W. 571.

Burglars tools. S. *v.* Hoerr, 88 Kan. 573, 129 P. 153.

"**The felonious intent** with which entrance into the room was effected may be inferred from the fact that a larceny was committed or attempted by the defendant therein. State *v.* Johnson, 33 Minn. 54, 21 N. W. 843. The time and circumstances of defendant's entrance into the room, and the acts done by him therein, as shown by the evidence, are amply sufficient to sustain a finding that his entrance into the room was not with the consent of the owner, but with a felonious intent." State *v.* Ward, 116 Minn. 516, 134 N. W. 115. See also Snodgrass *v.* S. (Tex. Cr.), 148 S. W. 1095.

820-18 Testimony as to other larcenies by defendant admissible to prove intent. P. *v.* Nagle, 137 Mich. 88, 100 N. W. 273.

820-19 See Long *v.* S., 81 Miss. 448, 33 S. 224; Bowman *v.* S. (Tex. Cr.), 155 S. W. 939.

820-20 P. *v.* Piner, 11 Cal. App. 542, 105 P. 780 (also to show fact of entry). *Contra* if other felony committed two weeks after burglary. Johnson *v.* S., 57 Tex. Cr. 488, 123 S. W. 1105. And also as to accused's connection with burglary on same day and with another on previous day, nothing in testimony he offered calling for such proof. Saldiver *v.* S., 55 Tex. Cr. 177, 115 S. W. 584.

Evidence of other crimes admissible to establish res gestae, prove a relevant or competent fact connecting defendant with crime charged, to explain intent of defendant, or make out his guilt by circumstances. Doyle *v.* S., 59 Tex. Cr. 39, 126 S. W. 1131; Glenn *v.* S. (Tex. Cr.), 76 S. W. 757; Perry *v.* S. (Tex. Cr.), 78 S. W. 513; Johnson *v.* S., 52 Tex. Cr. 201, 107 S. W. 52; Bright *v.* S. (Tex. Cr.), 74 S. W. 912; Herndon *v.* S., 50 Tex. Cr. 552, 99 S. W. 558.

Prior crime may be shown if accused asserts a false identity in his behalf. Baker *v.* S., 4 Ga. App. 649, 62 S. E. 99.

As to proof of other crimes generally, see "**Similar Transactions.**"

S21-21 Russell v. S. (Ala.), 38 S. 291; Leonard v. S., 130 Ala. 89, 43 S. 214; Henderson v. S., 1 Ala. App. 154, 55 S. 457; Rayland v. S., 71 Ark. 65, 70 S. W. 1029 (plat showing tracks, etc., admissible); Cook v. S., 80 Ark. 495, 97 S. W. 683 (previous attempt admissible); P. v. Lowrie, 4 Cal. App. 137, 87 P. 253 (evidence burglarious tools not found upon search of defendant's room, inadmissible); Jenkins v. S., 2 Ga. App. 084, 58 S. E. 1115; Miller v. P., 229 Ill. 376, 82 N. E. 391; Bruen v. P., 206 Ill. 417, 69 N. E. 24 (possession of keys of other buildings admissible); S. v. Leonard, 135 Ia. 371, 112 N. W. 784 (possession of burglarious tools by confederate); S. v. Arthur, 135 Ia. 18, 109 N. W. 1083; S. v. Williams, 120 Ia. 36, 94 N. W. 255; S. v. Toohey, 203 Mo. 671, 102 S. W. 530; Brott v. S., 70 Neb. 395, 97 N. W. 593 (actions of bloodhounds inadmissible); P. v. Loomis, 178 N. Y. 400, 70 N. E. 919 (evidence of former burglary incompetent); S. v. Burriss, 85 S. C. 327, 67 S. E. 306; Myers v. S. (Tex. Cr.), 144 S. W. 1134; Windham v. S., 59 Tex. Cr. 366, 128 S. W. 1130; Hollengshead v. S. (Tex. Cr.), 67 S. W. 114; Bartley v. S., 47 Tex. Cr. 41, 83 S. W. 190; McAnally v. S. (Tex. Cr.), 73 S. W. 404; Odell v. S. (Tex. Cr.), 71 S. W. 974; McCoy v. S., 48 Tex. Cr. 30, 85 S. W. 1072 (possession of skeleton key); S. v. Royce, 38 Wash. 111, 80 P. 268 (pawn ticket unlawfully taken from defendant, admissible). See P. v. Rainier, 127 App. Div. 47, 111 N. Y. S. 112; Alsup v. S. (Tex. Cr.), 153 S. W. 624.

That defendant was armed when arrested. S. v. Perry (Ia.), 145 N. W. 56.

Finding pistol.—Ingram v. S. (Ark.), 102 S. W. 66.

Possession of burglarious tools soon after offense may be shown. P. v. Courtney (Mich.), 144 N. W. 568.

Tracks of buggy and horse.—Pinkerton v. S. (Tex. Cr.), 109 S. W. 87.

Keys.—S. v. Hill, 16 Mont. 24, 126 P. 41. Testimony as to keys found is admissible without producing the keys. Hollis v. S. (Tex. Cr.), 153 S. W. 853.

S22-22 Bell v. S. (Miss.), 38 S. 320; S. v. DeWitt, 191 Mo. 51, 90 S. W. 77.

S22-23 Leonard v. S., 130 Ala. 89, 43 S. 214; Dupree v. S., 148 Ala. 620, 42 S. 1004; Russell v. S. (Ala.), 38 S. 291; Cowan v. S., 136 Ala. 101, 34 S. 193; S. v. Leonard, 135 Ia. 371, 112 N. W. 784; Kennedy v. S., 71 Neb. 765, 99 N. W. 645; Windham v. S., 59 Tex. Cr. 366, 128 S. W. 1130; S. v. Miller, 78 Wash. 268, 138 P. 896; S. v. Beeman, 51 Wash. 557, 99 P. 756; S. v. Deutherage, 35 Wash. 326, 77 P. 504.

A witness may be asked how a defendant looked when the goods he is charged with having stolen were taken from a place where they had been concealed, and were shown to him. Presley v. S., 63 Fla. 37, 57 So. 605.

Attempt to escape.—S. v. Rodgers, 40 Mont. 248, 106 P. 3; Kennedy v. S., 71 Neb. 765, 99 N. W. 645.

Articles found in defendant's home may be received to show his apparent occupation, as may evidence of the blowing of a safe previously in adjacent premises, and testimony respecting use of articles so found when used in combination with another ordinary article. The use ordinarily made of tools found in defendant's possession may be shown. C. v. Johnson, 199 Mass. 55, 85 N. E. 188. Defendant's knowledge of his possession of burglar's tools must be proved by state; it may be shown by his declarations and conduct. P. v. Jefferson, 161 Mich. 621, 126 N. W. 829.

Association with another.—When burglary is of a character to indicate more than one person was concerned in it, testimony showing accused, soon after crime, was in company with another possessed of articles tending to indicate guilt on his part, is competent. Baker v. S., 4 Ga. App. 649, 62 S. E. 95.

Subsequent dissimilar offense against complaining witness may not be proved. Windham v. S., 59 Tex. Cr. 366, 128 S. W. 1130.

S23-24 S. v. Bates, 182 Mo. 70, 81 S. W. 408; Keeler v. S., 73 Neb. 441, 103 N. W. 64; P. v. Rainier, 127 App. Div. 47, 111 N. Y. S. 112; Skaggs v. S., 56 Tex. Cr. 79, 119 S. W. 106; Blackwell v. S. (Tex. Cr.), 73 S. W. 960; Taylor v. S., 52 Tex. Cr. 190, 107 S. W. 78; Delmont v. S., 15 Wyo. 271, 88 P. 623, 1102.

Reasons given by accused for being in vicinity of burglarized premises and his appearance when seen there may be shown. P. v. Wieland, 10 Cal. App. 519, 102 P. 828.

S23-25 Dupree v. S., 148 Ala. 620, 42 S. 1004; S. v. Armstrong, 170 Mo. 106, 70 S. W. 871; Jackson v. S., 49 Tex.

Cr. 215, 91 S. W. 788; S. *v.* Royce, 38 Wash. 111, 80 P. 268.

Confession of petit larceny not admissible to prove burglary. Richardson *v.* S. (Miss.), 33 S. 441.

Statements of accused made soon after he was wounded on the premises, competent. Bronson *v.* S., 59 Tex. Cr. 17, 127 S. W. 175.

823-26 Welch *v.* S., 156 Ala. 112, 46 S. 856; McCormick *v.* S., 141 Ala. 75, 37 S. 377; Rain *v.* S. (Ariz.), 137 P. 550; Quong Yu *v.* S., 12 Ariz. 183, 100 P. 462; Gunter *v.* S., 79 Ark. 432, 96 S. W. 181; P. *v.* Lang, 142 Cal. 482, 76 P. 232; P. *v.* Lowrie, 4 Cal. App. 137, 87 P. 253; Thompson *v.* S., 58 Fla. 106, 50 S. 507; Jackson *v.* S., 49 Fla. 3, 38 S. 599; Gravitt *v.* S., 114 Ga. 841, 40 S. E. 1003, 88 Am. St. 63; Walker *v.* S., 5 Ga. App. 430, 63 S. E. 531; Flanagan *v.* P., 214 Ill. 170, 73 N. E. 347; Miller *v.* P., 229 Ill. 376, 82 N. E. 391; S. *v.* Stutches (Ia.), 144 N. W. 597; S. *v.* Donavan, 125 Ia. 239, 101 N. W. 122; S. *v.* Brundige, 118 Ia. 92, 91 N. W. 920; S. *v.* Williams, 120 Ia. 36, 94 N. W. 255; S. *v.* Swift, 120 Ia. 8, 94 N. W. 269; S. *v.* Raphael, 123 Ia. 452, 99 N. W. 151, 101 Am. St. 334; S. *v.* Steidley, 135 Ia. 512, 113 N. W. 333; S. *v.* Hoerr, 88 Kan. 573, 129 P. 153; Short *v.* C., 25 Ky. L. R. 451, 76 S. W. 11; P. *v.* Gregory, 130 Mich. 522, 90 N. W. 414; P. *v.* Nagle, 137 Mich. 88, 100 N. W. 273; S. *v.* Armstrong, 170 Mo. 406, 70 S. W. 874; S. *v.* Drew, 179 Mo. 315, 78 S. W. 594, 101 Am. St. 474 (monographic note); S. *v.* Toohey, 203 Mo. 674, 102 S. W. 530; S. *v.* Sparks, 40 Mont. 82, 105 P. 87; Carrano *v.* S., 3 O. C. C. (N. S.) 629; S. *v.* Burriss, 85 S. C. 327, 67 S. E. 306; S. *v.* Vierck, 23 S. D. 166, 120 N. W. 1098 (does not raise presumption of guilt); Overstreet *v.* S. (Tex. Cr.), 150 S. W. 899; Skaggs *v.* S., 56 Tex. Cr. 79, 119 S. W. 106; Johnson *v.* S., 52 Tex. Cr. 201, 107 S. W. 52; Strickland *v.* S. (Tex. Cr.), 78 S. W. 689; Mass *v.* S. (Tex. Cr.), 81 S. W. 46; Archibald *v.* S., 47 Tex. Cr. 153, 83 S. W. 189, Nightengale *v.* S., 50 Tex. Cr. 3, 95 S. W. 531; Branch *v.* C., 100 Va. 837, 41 S. E. 862; S. *v.* Beeman, 51 Wash. 557, 99 P. 756; Delmont *v.* S., 15 Wyo. 271, 88 P. 623, 1102.

Unexplained possession.—Roberts *v.* S., 60 Tex. Cr. 20, 129 S. W. 611.

"**Possession of stolen property**, no matter how long after the theft, that fact is admissible in evidence with other circumstances, and his explanation of his possession, if any is given, should be submitted to the jury, and this the court did in his charge." Moray *v.* S. (Tex. Cr.), 145 S. W. 592. But see P. *v.* Courtney (Mich.), 141 N. W. 508.

Possession by those connected with defendant. Pointer *v.* S., 145 Ala. 676, 41 S. 929; Holmes *v.* S. (Tex. Cr.), 157 S. W. 487.

Possession by confederate.—P. *v.* Wilson, 133 Mich. 517, 95 N. W. 536. Possession of goods by either defendant cannot be proved in absence of evidence showing their co-operation. Love *v.* S., 58 Tex. Cr. 270, 124 S. W. 932.

Possession by wife of defendant. Jenkins *v.* S., 2 Ga. App. 684, 58 S. E. 1115. But her possession three weeks after burglary cannot be proved, his possession of article not having been shown, and testimony as to its identity being inconclusive. Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181.

Possession must be exclusive.—P. *v.* Barker, 141 Cal. 705, 75 P. 306; S. *v.* Wright, 6 Penne. (Del.) 251, 66 A. 364.

Identification of property necessary. Jordan *v.* S., 119 Ga. 443, 46 S. E. 679; Stevens *v.* S. (Tex. Cr.), 95 S. W. 505. Must be shown beyond reasonable doubt. Rayfield *v.* S., 5 Ga. App. 816, 63 S. E. 920. Sufficiency of identification goes to weight and not to admissibility. Walker *v.* S. (Tex. Cr.), 151 S. W. 822.

Unlawful seizure no defense. S. *v.* Howard, 203 Mo. 600, 102 S. W. 504.

Possession of other stolen goods. S. *v.* Brady, 121 Ia. 561, 97 N. W. 62; Tucker *v.* S. (Miss.), 60 S. 65; S. *v.* Hullen, 133 N. C. 656, 45 S. E. 513; Stephens *v.* S. (Tex. Cr.), 154 S. W. 1001.

Possession may be explained.—Hampton *v.* S., 6 Ga. App. 778, 65 S. E. 816; Merriwether *v.* S., 55 Tex. Cr. 438, 116 S. W. 1148. Is prima facie evidence of guilt. P. *v.* Everett, 242 Ill. 628, 90 N. E. 226. Is not convincing unless property recently stolen, its possession by defendant personal, exclusive, unexplained and assertive of right. Leonard *v.* S., 57 Tex. Cr. 254, 122 S. W. 549.

825-27 McCormick *v.* S., 141 Ala. 75, 37 S. 377; Bradford *v.* S., 62 Tex. Cr. 424, 138 S. W. 118.

826-28 See S. *v.* Mahoney, 122 Ia. 165, 97 N. W. 1089.

Contents of burglarized building may be shown. Snell v. Derricott, 161 Ala. 259, 49 S. 895.

CANCELLATION OF INSTRUMENTS

S28-1 Mortimer v. McMullen, 102 Ill. App. 593, 202 Ill. 413, 67 N. E. 20; Skajewski v. Zantarski, 103 Minn. 27, 114 N. W. 247; Burrows v. Fitch, 62 W. Va. 116, 57 S. E. 283.

Fraudulent intent in contracting may be presumed and be ground for cancellation. Spangler v. Yarborough, 23 Okla. 806, 101 P. 1107.

S29-2 Derby v. Donahoe, 208 Mo. 684, 106 S. W. 632.

S29-3 McCaskill v. Co., 152 Ala. 349; 44 S. 405; Turner v. Washburn, 25 Ky. L. R. 2198, 80 S. W. 460.

S29-4 Smith v. Moore, 142 N. C. 277, 55 S. E. 275; Gardner v. McConlogue, 8 Pa. C. C. 424.

S29-5 Hensan v. Cooksey, 237 Ill. 620, 86 N. E. 1107.

S29-7 Ripperdan v. Weldy, 149 Cal. 607, 87 P. 276; Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56; Peterson v. Budge, 35 Utah 596, 102 P. 211. See Champeau v. Champeau, 132 Wis. 136, 112 N. W. 36.

S29-8 Best v. House (Ky.), 113 S. W. 849 (nor from failure of person with whom grantor lived in illicit relations to testify); Cooper v. Moore, 55 Misc. 102, 104 N. Y. S. 1049; Teter v. Teter, 59 W. Va. 449, 53 S. E. 779; Vance v. Davis, 118 Wis. 548, 95 N. W. 939.

S29-9 Britt v. Britt, 30 Pa. C. C. 217.

S30-12 Oklahoma M. Co. v. Greeson, 93 Ark. 295, 124 S. W. 257; Howerton v. Co., 82 Kan. 367, 108 P. 813; County Board v. Hensley, 147 Ky. 441, 144 S. W. 63 (infancy); Barnes v. Johnson, 33 Ky. L. R. 803, 111 S. W. 372; Moore v. Baker, 65 N. J. Eq. 104, 55 A. 106; Adams v. Hill (Tex. Civ.), 149 S. W. 342 (fraud); Koppe v. Koppe, 57 Tex. Civ. 204, 122 S. W. 68 (inadequacy of consideration); Harpold v. Moss (Tex. Civ.), 105 S. W. 1131.

S30-13 Lawler v. Merritt, 81 Conn. 715, 72 A. 143; Gillespie v. Co., 236 Ill. 188, 86 N. E. 219; Kilpatrick v. Wiley, 197 Mo. 124, 93 S. W. 213.

Knowledge of petitioner of coercion of wife by husband. Cage & Crow v. Perry (Tex. Civ.), 142 S. W. 75.

S30-15 Culbertson v. Sallinger (Ia.), 117 N. W. 6; Keegan v. Murray, 176 Mich. 231, 142 N. W. 545. See vol. 2, p. 780, n. 16 and supplement thereto.

Want of consideration must be proved by plaintiff. Englert v. Dale, 25 N. D. 587, 142 N. W. 169.

S30-17 U. S. v. Mills, 169 Fed. 686; Dorris v. McManus, 3 Cal. App. 576, 86 P. 909; Ehrich v. Brunshwiler, 241 Ill. 592, 89 N. E. 799; Mortimer v. McMullen, 102 Ill. App. 593, 202 Ill. 413, 67 N. E. 20; Church v. Marsh, 133 Ia. 51, 110 N. W. 161; Mays v. Pelly (Ky. L. R.), 125 S. W. 713; Skajewski v. Zantarski, 103 Minn. 27, 114 N. W. 247; Daugherty v. Gangloff (Mo.), 144 S. W. 434; Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573; Thomas v. Ryan, 24 S. D. 71, 123 N. W. 68; Shoemaker v. Drug Co., 112 Va. 612, 72 S. E. 121; Brown v. Click, 59 W. Va. 172, 53 S. E. 16; Burrows v. Fitch, 62 W. Va. 116, 57 S. E. 283; Boyle v. Robinson, 129 Wis. 567, 109 N. W. 623; Champeau v. Champeau, 132 Wis. 136, 112 N. W. 36; Winn v. Ittel, 125 Wis. 19, 103 N. W. 220.

Burden of proving knowledge of fraud, so as to set running statute of limitations, is upon defendant. Smith v. Linder, 77 S. C. 535, 58 S. E. 610.

S31-21 Harraway v. Harraway, 136 Ala. 499, 34 S. 836; Cannon v. Gilmer, 135 Ala. 302, 33 S. 659.

Where fraud is alleged there can be no recovery merely upon proof of mistake. Burk v. Johnson, 146 Fed. 209, 76 C. C. A. 567. See Miller v. Piatt, 33 Pa. Super. 547.

Husband benefiting by wife's deed. Chenvront v. Chenvront, 54 W. Va. 171, 46 S. E. 233.

S31-22 Hudson v. Hussey, 155 Ia. 140, 135 N. W. 626; Griffin v. Miller, 188 Mo. 327, 87 S. W. 455.

S31-23 Hudson v. Hussey, 155 Ia. 140, 135 N. W. 626; Hoag & Bro. v. Mfg. Co., 153 Ky. 840, 156 S. W. 884.

S31-24 Vance v. Davis, 118 Wis. 548, 95 N. W. 939.

S31-26 Taphorn v. Taphorn, 18 O. Dec. 748.

S31-27 Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56; Leach v. Hirshman, 90 Miss. 723, 44 S. 33; Jesse v. Brown, 83 Neb. 311, 119 N. W. 512; Krause v. Krause (N. J. Eq.), 55 A. 1095.

S31-28 Reese v. Shutte, 133 Ia. 681, 108 N. W. 525; Cooper v. Moore, 55 Misc. 102, 104 N. Y. S. 1049.

S32-30 Peck v. Bartelme, 220 Ill. 199, 77 N. E. 216; Johnson v. Watson, 169 Ill. App. 218; Corrette v. Church

(Ia.), 135 N. W. 43; Chadwell *v.* Reed, 198 Mo. 359, 95 S. W. 227; Teter *v.* Teter, 59 W. Va. 449, 53 S. E. 779.

Conveyance to stranger does not shift burden from children of grantor. Hayman *v.* Wakeham, 133 Mich. 363, 94 N. W. 1062.

832-33 Boggs *v.* Holloway, 158 Ala. 286, 47 S. 1017 (drunkenness); Hudson *v.* Hudson, 144 N. C. 449, 57 S. E. 162. See Reese *v.* Shutte, 133 Ia. 681, 108 N. W. 525.

832-34 Beach *v.* Wilton, 244 Ill. 413, 91 N. E. 492; Hensan *v.* Cooksey, 237 Ill. 620, 86 N. E. 1107; Maze *v.* Maze, 30 Ky. L. R. 679, 99 S. W. 336 (parties to ante-nuptial contract); Horner *v.* Bell, 102 Md. 435, 62 A. 736; Sheehan *v.* Erbe, 77 App. Div. 176, 79 N. Y. S. 43; Goodhue *v.* Goodhue, 3 O. N. P. (N. S.) 225; Owings *v.* Turner, 48 Or. 462, 87 P. 160; Peterson *v.* Budge, 35 Utah 596, 102 P. 211.

832-35 Hoeb *v.* Maschinot, 140 Ky. 330, 131 S. W. 23.

833-36 Western Mfg. Co. *v.* Cotton, 31 Ky. L. R. 1130, 104 S. W. 758. Subsequent declarations of grantor, inadmissible. Adair *v.* Craig, 135 Ala. 332, 33 S. 902.

Statements of widow (grantee) held irrelevant. De Nieff *v.* Howell, 138 Ga. 248, 75 S. E. 202.

833-37 Miles *v.* Shreve (Mich.), 146 N. W. 374; Nettleton *v.* Caryl, 20 Pa. Super. 250.

On issue of mental incapacity, grantor may be produced in court. Beach *v.* Kent, 142 Mich. 347, 105 N. W. 867.

833-39 Slingerland *v.* Slingerland, 109 Minn. 407, 124 N. W. 19; Griffin *v.* Nicholas, 224 Mo. 275, 123 S. W. 1063.

833-40 Rankin *v.* Rankin, 105 Tex. 451, 151 S. W. 527; Burrows *v.* Fitch, 62 W. Va. 116, 57 S. E. 283; Hale *v.* Hale, 62 W. Va. 609, 59 S. E. 1056, 14 L. R. A. (N. S.) 221.

833-41 Spencer *v.* Merwin, 80 Conn. 330, 68 A. 370; Fish *v.* Fish, 235 Ill. 396, 85 N. E. 662.

834-42 U. S. *v.* Collett, 159 Fed. 932, 87 C. C. A. 460 (homestead patent); Birchett *v.* Seale, 36 App. Cas. (D. C.) 586; Campbell *v.* Imp. Co., 36 App. Cas. (D. C.) 149; Brown *v.* Click, 59 W. Va. 172, 53 S. E. 16.

Preponderance of evidence sufficient to support finding of fraud. Moore *v.* Irish, 43 Wash. 640, 86 P. 942.

834-43 Campbell *v.* Imp. Co., 229 U. S. 561, 33 Sup. Ct. 796, 57 L. ed. 1330; Woolsey *v.* Haynes, 165 Fed. 391, 91 C. C. A. 341; Crooker *v.* White, 162 Ala. 476, 50 S. 227; Stapleton *v.* Haight, 137 Ia. 564, 113 N. W. 351; Glascock *v.* Glascock, 217 Mo. 362, 117 S. W. 67; Miller *v.* Piatt, 33 Pa. Super. 547. See Culton *v.* Asher, 149 Ky. 659, 149 S. W. 948.

Clear and decisive.—McCracken *v.* McBee, 96 Ark. 251, 131 S. W. 450.

834-44 See Ross *v.* Sheldon (Ky.), 119 S. W. 225.

834-46 Vanderbilt *v.* Bishop, 188 Fed. 971; U. S. *v.* Co., 172 Fed. 948; U. S. *v.* Mills, 169 Fed. 686 (must be clear, unequivocal and convincing); Mastin *v.* Noble, 157 Fed. 506, 85 C. C. A. 98; Treat *v.* Russell, 128 Fed. 847, 63 C. C. A. 575; Crooker *v.* White, 162 Ala. 476, 50 S. 227; Smith *v.* Collins, 148 Ala. 672, 41 S. 825; Long *v.* Long, 104 Ark. 562, 149 S. W. 662; McNutt *v.* McNutt, 76 Ark. 14, 88 S. W. 589; Pittenger *v.* Pittenger, 208 Ill. 582, 70 N. E. 699; Mortimer *v.* McMullen, 102 Ill. App. 593, 202 Ill. 413, 67 N. E. 20; Culton *v.* Asher, 149 Ky. 659, 149 S. W. 946; Hall *v.* Bollen, 148 Ky. 20, 145 S. W. 1136; Western Mfg. Co. *v.* Cotton & L., 31 Ky. L. R. 1130, 104 S. W. 758; Smith *v.* Humphreys, 104 Md. 285, 65 A. 57; Skajewski *v.* Zantarski, 103 Minn. 27, 114 N. W. 247; Bingaman *v.* Bingaman, 85 Neb. 248, 122 N. W. 981; Cannon *v.* Milner, 59 Or. 592, 117 P. 987; Shoemaker *v.* Drug Co., 112 Va. 612, 72 S. E. 121; Wilson *v.* Maxson, 56 W. Va. 194, 49 S. E. 123; Lockwood *v.* Allen, 113 Wis. 474, 89 N. W. 492; First Nat. Bk. *v.* Buetow, 123 Wis. 285, 101 N. W. 927.

Complainant cannot maintain case by own testimony. Marsh *v.* Cortis, 150 Fed. 121, 80 C. C. A. 75.

Preponderance sufficient. Fraley *v.* Fraley, 150 N. C. 501, 64 S. E. 351.

835-47 Selari *v.* Selari (Tex. Civ.), 124 S. W. 997.

835-49 Waymire *v.* Shipley, 52 Or. 464, 97 P. 807.

835-50 Deed of separate property by wife set aside. Cage & Crow *v.* Perry (Tex. Civ.), 142 S. W. 75.

835-51 Hagan *v.* Ward, 86 App. Div. 620, 83 N. Y. S. 436.

835-52 Dahlmann *v.* Gaugente, 238 Ill. 224, 87 N. E. 287; Hardy *v.* Dyas, 203 Ill. 211, 67 N. E. 852.

835-53 Fairchild *v.* Dement, 164 Fed. 200 (evidence must be strong enough to convict defendant of obtain-

ing property under false pretenses); Mitchell Mfg. Co. v. Kempner, 84 Ark. 349, 105 S. W. 889; Blomquest v. Gardner, 95 Miss. 30, 48 S. 724 ("most undoubted proof" required if witnesses who could clear up transaction dead). By fair preponderance of evidence. Severns v. Keck (Ia.), 140 N. W. 220.

S35-55 Scott v. Hackfeld, 17 Haw. 66.

The mistake must be mutual and the complainant must move promptly on its discovery. Columbia Malt. Co. v. D. Co., 150 Ky. 229, 150 S. W. 53.

S35-56 Hoover v. Gray, 91 Ark. 246, 120 S. W. 981.

S36-57 Taphorn v. Taphorn, 18 O. Dec. 748; Foster v. Long, 8 O. N. P. (N. S.) 75.

Uncorroborated testimony of grantor insufficient. Britt v. Britt, 30 Pa. C. C. 217.

S36-59 Hall v. Winam, 14 Haw. 306; Hoeb v. Maschinot, 140 Ky. 330, 131 S. W. 22.

S36-60 McCracken v. Mebee, 96 Ark. 251, 131 S. W. 450; Hogan v. Leeper, 37 Okla. 655, 133 P. 190. See vol. 2, p. 831, n. 15 and supplement thereto.

S36-61 Mental incapacity should be clearly established. Fehr v. Edwards, 129 Ia. 61, 105 N. W. 349.

S37-63 Sterling v. Sterling, 98 App. Div. 126, 90 N. Y. S. 306. See Chadwell v. Reed, 198 Mo. 359, 95 S. W. 227.

S37-64 Dawson v. Copeland, 173 Ala. 267, 55 S. 690; Hubbert v. Fagan, 99 Ark. 189, 138 S. W. 1001.

S37-65 Wavrnire v. Shipley, 52 Or. 491, 97 P. 807.

S37-66 Treat v. Russell, 128 Fed. 847, 63 C. C. A. 575; Del Campo v. Camarillo, 154 Cal. 647, 98 P. 1049; Bluett v. Wilse, 43 Wash. 492, 86 P. 873.

S37-67 Carter v. Walden, 136 Ga. 700, 71 S. E. 1047; Bushnell v. Loomis, 234 Mo. 371, 137 S. W. 257.

S37-68 Spaulding v. Spealheim, 14 N. D. 380, 104 N. W. 847.

CAPACITY

Professional capacity, S70-1; Productive capacity of land, S [illegible]

S39-1 Demaree v. C., 28 Ky. L. R. 1374, 91 S. W. 1131 (accused's lack of intelligence amounted almost to idiocy); Citizens' R. Co. v. Robertson, 41 Tex. Civ. 324, 91 S. W. 609.

Qualification to give opinion must be shown. Green v. State, 168 Ala. 90, 53 S. 286.

A brief inspection of a stranger is not enough. People v. Luis, 158 Cal. 185, 110 P. 580.

Capacity to form criminal intent by a boy of ten may be proved by testimony of person who knew him, to the effect he was bright mentally and talked with good sense. Neville v. S., 148 Ala. 681, 41 S. 1011.

Ability of person to converse intelligently cannot be testified by witness. Ames v. Ames, 75 Neb. 473, 106 N. W. 584.

Casual acquaintance does not qualify witness. S. v. Hogan, 145 Ia. 352, 124 N. W. 178.

S40-2 Ability to do right and abstain from doing wrong may be testified to by witness familiar with persons whose capacity is in issue. S. v. Crowe, 39 Mont. 174, 102 P. 579.

S40-3 Citizens' R. Co. v. Robertson, 41 Tex. Civ. 324, 91 S. W. 609 (opinions whether plaintiff had intelligence to appreciate danger of going on street car track without looking and listening, inadmissible).

S40-6 Judicial notice taken that persons engaged in business who can neither read nor write have memory acutely developed. P. v. Martin, 32 N. Y. S. 933.

S40-7 Saffer v. Mast, 223 Ill. 108, 79 N. E. 32; Searles v. Ins. Co., 148 Ia. 65, 126 N. W. 801; Simmons v. Kelsey, 76 Neb. 124, 107 N. W. 122. See Moore v. Gilbert, 99 C. C. A. 141, 175 Fed. 1; Nelson v. Thompson, 16 N. D. 295, 112 N. W. 1058. *Contra.* In re Coburn, 11 Cal. App. 604, 105 P. 924, *cit.* Shapter v. Pillar, 28 Colo. 209, 63 P. 302; Williams v. Livingston, 52 Tex. Civ. 275, 113 S. W. 786 (question of capacity to transact business is one of law).

S41-12 Johnson v. Highland, 124 Wis. 597, 102 N. W. 1085 (opinion whether person had knowledge and ability to steer engine safely). *Contra.* Worsley v. Ayres, 144 Ia. 676, 123 N. W. 353. See St. Louis S. & L. Co. v. U. S., 100 C. C. A. 640, 177 Fed. 178.

Experienced workman may testify to capacity in his employment. Horton v. R. Co., 161 Ala. 107, 49 S. 123.

842-13 Penn. C. Co. *v.* Bowen, 159 Ala. 165, 49 S. 305.

842-14 Failure where others have succeeded under like conditions is convincing evidence of incapacity. Biggs *v.* School City, 45 Ind. App. 572, 90 N. E. 105.

843-18 Competency of employe when he began work is relevant as to subsequent competency. Fisher *v.* Co., 141 Wis. 515, 124 N. W. 1005.

843-19 Louisville, etc. R. Co. *v.* Daniel, 28 Ky. L. R. 1146, 91 S. W. 691; Buffalo C. Co. *v.* Hodges, 30 Ky. L. R. 346, 98 S. W. 274 (habits of industry or laziness, admissible); Cameron M. Co. *v.* Anderson, 98 Tex. 156, 81 S. W. 282, 34 Tex. Civ. 105, 78 S. W. 8 (party injured, evidence admissible). *Comp.* Davis *v.* Kornman, 141 Ala. 479, 37 S. 789.

843-20 *Contra.* Atlanta, etc. R. Co. *v.* Haralson, 133 Ga. 231, 65 S. E. 437; as to opinion of another. Yergy *v.* R. Co., 39 Mont. 213, 102 P. 310. *Comp.* Missouri, etc. R. Co. *v.* Lasater, 53 Tex. Civ. 51, 115 S. W. 103. See Illinois C. R. Co. *v.* Andrews, 116 Ill. App. 8. Incapacity may be so proved.—So. Kansas R. Co. *v.* Sage (Tex. Civ.), 80 S. W. 1038.

843-21 Lake Shore, etc. R. Co. *v.* Teeters, 166 Ind. 335, 77 N. E. 599, 74 N. E. 1014 (testimony by party injured).

Opinion of plaintiff as to earning capacity as evidence of extent of injury. Patton *v.* Sanborn, 133 Ia. 650, 110 N. W. 1032.

843-22 Reiter-C. Mfg. Co. *v.* Hamlin, 141 Ala. 192, 40 S. 280; Southern C. Co. *v.* Bartlett, 137 Ala. 234, 34 S. 20; Bonneau *v.* R. Co., 152 Cal. 106, 93 P. 106; Chicago C. R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087; Waldie *v.* R. Co., 78 App. Div. 557, 79 N. Y. S. 922; Lewis *v.* Crane, 78 Vt. 216, 62 A. 60 (earnings shortly before). See Southern C. O. Co. *v.* Skipper, 125 Ga. 368, 79 S. E. 110.

844-23 Northern P. R. Co. *v.* Wendel, 156 Fed. 336, 84 C. C. A. 232; So. R. Co. *v.* Howell, 135 Ala. 639, 34 S. 6; W. Chicago R. Co. *v.* Dougherty, 209 Ill. 241, 70 N. E. 586; Bourke *v.* Butte Co., 33 Mont. 267, 83 P. 470; Galveston, etc. R. Co. *v.* Still, 45 Tex. Civ. 169, 100 S. W. 176; St. Louis, etc. R. Co *v.* Knowles, 44 Tex. Civ. 172, 99 S. W. 867; So. R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713.

Evidence of income derived in violation of law, inadmissible. Murray *v.* R. Co., 118 App. Div. 35, 102 N. Y. S. 1026.

844-24 Offer of higher wages and promotion, admissible. Montgomery *v.* R. Co., 73 S. C. 503, 53 S. E. 987. *Comp.* Mississippi, etc. R. Co. *v.* Hardy, 88 Miss. 732, 11 S. 505.

Testimony of engineer he had no business or trade, admissible. Southern K. R. Co. *v.* Sage (Tex. Civ.), 80 S. W. 1038.

845-25 Gulf, etc. R. Co. *v.* Sauter, 46 Tex. Civ. 309, 103 S. W. 201 (prospective musical talent, where fingers injured).

Evidence of vocation and earnings of father admissible to prove possible earning capacity of minor son. Fishburn *v.* R. Co., 127 Ia. 483, 103 N. W 481. *Comp.* Brown *v.* R. Co., 127 Mo. App. 199, 106 S. W. 83.

845-26 Phillips *v.* R. Co., L. R. 4 Q. B. D. (Eng.) 406, 5 Q. B. D. (Eng.) 78 (physician's practice); Comstock *v.* R. Co., 77 Conn. 65, 58 A. 465.

Character and magnitude of business shown. Burns *v.* Dunham, 148 Cal. 208, 82 P. 959; Heer *v.* Warren S., etc. Co., 118 Wis. 57, 94 N. W. 789.

845-27 Louisville, etc. R. Co. *v.* Daniel, 28 Ky. L. R. 1146, 91 S. W. 691.

Conviction of crime two years previous, inadmissible. Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493.

845-31 Morrow *v.* Co., 70 S. C. 242, 49 S. E. 573.

845-32 Elba *v.* Bullard, 152 Ala. 237, 44 S. 412.

846-34 Rebutting presumption.—In an action for services where defense was incapacity to perform them by reason of drunkenness, evidence was admissible of several arrests of plaintiff for drunkenness during period claimed, as bearing on quality and value of the services. Ralph *v.* Taylor (R. I.), 82 A. 279.

846-35 Acts done and officially certified to, strong evidence. U. S. *v.* Enriquez, 1 Phil. Isl. 24.

846-37 Development Co. *v.* King, 170 Fed. 923, 96 C. C. A. 139; Semet S. Co. *v.* Wilcox, 143 Fed. 839, 74 C. C. A. 635; St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 113; Epstein *v.* R. Co., 143 Mo. App. 135, 122 S. W. 366 (impotency); St. Louis S. R. Co. *v.* Norvell (Tex. Civ.), 115 S. W. 861.

Proof of act done may be so convincing

as to render direct testimony unnecessary. Duque v. S., 56 Tex. Cr. 214, 119 S. W. 687.

S46-38 Dunn v. Gunn, 149 Ala. 583, 42 S. 680; Southern R. Co. v. Dean, 128 Ga. 356, 57 S. E. 702; Van Arsdale v. Young, 21 Okla. 151, 95 P. 778; Reeves v. R. Co., 24 S. D. 84, 123 N. W. 498; Southern R. R. Co. v. Sage (Tex. Civ.), 80 S. W. 1038; Houston, etc. R. Co. v. Fanning, 40 Tex. Civ. 422, 91 S. W. 344 (party may testify that on account of injuries earning capacity has depreciated one-half). See also vol. 7, p. 424, n. 45.

S47-39 Federal B. Co. v. Reeves, 77 Kan. 111, 93 P. 627; Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273; Hartzler v. R. Co., 140 Mo. App. 665, 126 S. W. 760; Young v. Beveridge, 81 Neb. 180, 115 N. W. 766 (whether deceased was able to do the work of a common laborer is not a matter so exclusively within domain of medical science that witnesses acquainted with him . . . could not testify in reference thereto); Gulf, etc. R. Co. v. Adams (Tex. Civ.), 121 S. W. 876; Houston, etc. R. Co. v. Parnell, 56 Tex. Civ. 265, 120 S. W. 951, *disap.* Wells Fargo Exp. Co. v. Boyle, 39 Tex. Civ. 365, 87 S. W. 164. But see St. Louis R. Co. v. Dempsey, 40 Tex. Civ. 398, 89 S. W. 786; Jesse v. S., 46 Tex. Cr. 444, 80 S. W. 999.

See Britton v. Oil Co. (W. Va.), 81 S. E. 525.

Effect of injury.—San Antonio T. Co. v. Flory, 45 Tex. Civ. 233, 100 S. W. 200.

S48-40 Dixon v. S., 139 Ala. 104, 36 S. 784 (ability to walk without certain effects appearing); Houston E. Co. v. Faroux (Tex. Civ.), 125 S. W. 922; Ewing v. Co., 65 W. Va. 726, 65 S. E. 200. See Altig v. Altig, 137 Ia. 420, 114 N. W. 1056.

S48-42 Paepcke Leicht L. Co. v. Taller, 106 Ark. 400, 153 S. W. 833.

S49-46 Watch ticking test may be employed to ascertain extent to which hearing impaired. Wilson v. R. Co., 144 Ill. App. 604.

S50-48 **Professional capacity.**—Father may testify to elocutionary ability of daughter. Cleveland, etc. R. Co. v. Haller, 170 Ind. 204, 82 N. E. 1023, 16 L. R. A. (N. S.) 527.

Person who has negotiated for purchase of property may testify to his ability to buy it on terms offered. Jaffe v. Nagel, 114 N. Y. S. 905.

S50-50 Weight of opinion evidence as to the navigability of stream is overcome by testimony it has been navigated. Trullinger v. Howe, 53 Or. 219, 97 P. 548, 99 P. 880.

S51-51 Garrett v. Winterich, 44 Ind. App. 322, 87 N. E. 161.

S51-52 Blunck v. R. Co., 142 Ia. 146, 115 N. W. 1013, 120 N. W. 737 (that bridges and culverts insufficient to carry off flood water competent where it appears witnesses testified as to conditions within knowledge).

S51-59 Baker v. Cotney, 142 Ala. 566, 38 S. 131; Colorado Co. v. York, 38 Colo. 239, 88 P. 181.

S52-63 Testimony to physical fact observed by witness, not an opinion. Richmond v. Wood, 109 Va. 75, 63 S. E. 449.

S52-64 Size of car may be shown by testimony as to size of other cars in same series. Chicago, etc. R. Co. v. Howell, 208 Ill. 155, 70 N. E. 15.

S53-65 U. S. P. & F. Co. v. Granger, 162 Ala. 637, 50 S. 159; Penn. R. Co. v. Co., 111 Md. 356, 73 A. 571.

S54-69 Effect produced is evidence of capacity of thing which produced it. W. U. T. Co. v. Harris, 6 Ga. App. 260, 64 S. E. 1123.

S55-71 Romona O. S. Co. v. Shields, 173 Ind. 68, 88 N. E. 595.

S56-73 Beach v. Huntsman, 42 Ind. App. 205, 85 N. E. 523.

The capacity of the machine with which comparison is made must first be shown. Fairbanks Morse & Co. v. Heihn (S. D.), 136 N. W. 107.

S56-74 Walshe Mfg. Co. v. W. T. Smith Lumb. Co., 178 Ala. 472, 59 S. 455; Illinois Surety Co. v. Heating Co., 178 Ind. 208, 97 N. E. 158.

S57-75 Capacity of article at one time may show what it was originally. Monahan v. Co., 4 Ga. App. 680, 62 S. E. 127; Steele v. Andrews, 144 Ia. 360, 121 N. W. 17 (breeding capacity).

S58-80 **Productive capacity of land** similar in area and quality and cultivated in same way in year in question may be shown to establish capacity of latter. St. Louis, etc. R. Co. v. Hardie, 87 Ark. 475, 113 S. W. 31. It may be shown by what was produced on same land year prior to that in question. Sacchi v. Co., 13 Cal. App. 72, 108 P. 885.

CARRIERS

Interstate commerce, 864-1; *Ownership of means of transportation*, 864-3; *Reasonableness of demurrage charge*, 868-26; *Circumstantial evidence*, 879-64; *Connecting carriers*, 879-64; *Refusal to carry*, 901-15; *Freight rates*, 904-25; *Liability of carrier to shipper for demurrage*, 904-25; *Presumption arising from ticket*, 904-26; *Failure to furnish accommodations*, 907-42; *Carrier's rules*, 926-91; *Custom and usage*, 934-11; *Compelling passenger to ride in coach with colored people*, 941-31.

864-1 Baker *v.* R. Co., 145 Mo. App. 189, 129 S. W. 436; Brandom *v.* R. Co., 134 Mo. App. 89, 114 S. W. 540; Barasch *v.* Richards, 113 N. Y. S. 1005 (relations long existing between parties will overcome effect of neglect to make special contract).

In action against a carrier whose line is wholly in one state plaintiff must show that cars between which he was injured, and which were not coupled as required by act of congress, were engaged in interstate traffic. It is not enough to show defendant frequently received goods and passengers destined for another state. Johnson *v.* Co., 117 Fed. 462, 54 C. C. A. 508; Rosney *v.* R. Co., 135 Fed. 311, 68 C. C. A. 153 (*rev.* on another question, 196 U. S. 1); Rio Grande S. R. Co. *v.* Campbell, 44 Colo. 1, 96 P. 986; Winkler *v.* R. Co., 4 Penne. (Del.) 80, 53 A. 90.

864-3 Lloyd *v.* Co., 223 Pa. 148, 72 A. 516 (right to select those for whom service will be rendered, not conclusive); Kansas City S. R. Co. *v.* Co. (Tex. Civ.), 114 S. W. 436.

Ownership of means of transportation need not be proved.—Cownie G. Co. *v.* Co., 130 Ia. 327, 106 N. W. 749, 4 L. R. A. (N. S.) 1060. Facts not showing ownership. Brandom *v.* R. Co., 134 Mo. App. 89, 114 S. W. 540.

865-1 Southern R. Co. *v.* Langley (Ala.), 63 S. 545; Luckey *v.* R. Co., 133 Mo. App. 589, 113 S. W. 703; Texas & P. R. Co. *v.* Ray, 37 Tex. Civ. 622, 84 S. W. 691.

Claim of overcharge for feeding cattle not established. Hartwell R. Co. *v.* Kidd, 10 Ga. App. 771, 74 S. E. 310.

The burden is on the carrier to show compliance with the rate schedule of the interstate commerce commission since it is presumed that the commission has done its duty in directing the time, place and manner of publication. Hardaway *v.* R. Co., 90 S. C. 475, 73 S. E. 1020.

Bills of lading presumed to contain agreement of parties. Merchants' & M's. T. Co. *v.* Eichberg, 109 Md. 211, 71 A. 993.

Shipper need not prove payment of freight, nor the charge. Galveston, etc. R. Co. *v.* Piper, 52 Tex. Civ. 568, 115 S. W. 107.

Burden of showing illegality under interstate commerce act rests on carrier. Altschuler *v.* R. Co., 155 Wis. 146, 144 N. W. 294.

865-5 Southern Exp. Co. *v.* Saks, 160 Ala. 621, 49 S. 392 (rule applies to connecting carrier in absence of proof of agency, partnership or special contract); Almon *v.* R. Co. (Ia.), 144 N. W. 997; Bk. *v.* Co., 127 Ia. 1, 102 N. W. 107; Burrowes *v.* R. Co., 85 Neb. 497, 123 N. W. 1028; Fuller *v.* R. Co., 61 Misc. 599, 113 N. Y. S. 1001; Peele *v.* R. Co., 149 N. C. 390, 63 S. E. 66.

Production of receipt casts burden on carrier. Smith *v.* Co., 125 La. 763, 51 S. 841.

Delivery presumed where initial carrier's road physically touches connecting carrier's line and latter delivers some of the goods received by former. Southern R. Co. *v.* Nailon, 7 Ga. App. 430, 67 S. E. 116.

865-6 Clark *v.* R. Co., 189 N. Y. 93, 81 N. E. 766; Reel *v.* Exp. Co., 30 Pa. C. C. 304. *Contra*, if delivery at unusual place stipulated for and carrier knows fact. Illinois C. R. Co. *v.* Swanson, 92 Miss. 485, 46 S. 83. See Gulf, etc. R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968.

As to agency for connecting carrier, see Gulf, etc. R. Co. *v.* Nelson (Tex. Civ.), 139 S. W. 81.

Presumption limited to station at which he is employed. McManus *v.* Chicago, etc. R. Co., 156 Ia. 359, 136 N. W. 769.

865-7 St. Louis, etc. R. Co. *v.* Kilberry, 83 Ark. 87, 102 S. W. 894; Illinois Match Co. *v.* R. Co., 250 Ill. 396, 95 N. E. 492, *rev.* 153 Ill. App. 568; Wabash R. Co. *v.* Thomas, 222 Ill. 337, 78 N. E. 777; Chicago, etc. R. Co. *v.* Igo, 130 Ill. App. 373; Isham *v.* R. Co., 112 App. Div. 612, 98 N. Y. S. 609.

866-8 Reasonableness of charge must be shown by carrier in action to collect freight. Chicago, etc. R. Co. *v.* Co., 140 Mo. App. 52, 119 S. W. 973.

Consignee presumed owner.—Bk. of Ir-

win *v.* Exp. Co., 127 Ia. 1, 102 N. W. 107. See also Central Trust Co. *v.* R. Co., 156 Ia. 104, 135 N. W. 731; Fisher *v.* C., 147 Ky. 821, 145 S. W. 737.

S66-9 Estes *v.* R. Co., 49 Colo. 378, 113 P. 1095; Carpenter *v.* R. Co., 6 Penne. (Del.) 15, 64 A. 252; Adams Exp. Co. *v.* Adams, 29 App. Cas. (D. C.) 259; McIntosh *v.* R. Co., 17 Ida. 100, 105 P. 66; Coats *v.* R. Co., 239 Ill. 154, 87 N. E. 929; Cleveland, etc. R. Co. *v.* Potts, 33 Ind. App. 564, 71 N. E. 685 (bill of lading varying receipt); Chicago, etc. R. Co. *v.* Dunlap, 71 Kan. 67, 80 P. 34; Hill *v.* Co., 77 N. J. L. 19, 71 A. 683; Morgan *v.* Woolverton, 136 App. Div. 351, 120 N. Y. S. 1008; Patterson *v.* R. Co., 24 Okla. 747, 104 P. 31; Lacey *v.* R. Co., 63 Or. 596, 128 P. 999; Galveston, etc. R. Co. *v.* Jones (Tex. Civ.), 123 S. W. 737; Jenkins *v.* R. Co., 73 S. C. 289, 53 S. E. 480.

Carrier must show invalidity of contract for rates when sued for overcharge. Kansas City S. R. Co. *v.* Co., 79 Kan. 59, 99 P. 819.

A special contract limiting the carrier's liability will not be presumed from mere inference, custom or failure to object; but an express contract must be shown to have been entered into. Pacific Exp. Co. *v.* Rudman (Tex. Civ.), 145 S. W. 268.

To show no consideration for such contract, federal courts impose burden of proof upon plaintiff. Hamilton *v.* R. Co., 177 Mo. App. 145, 164 S. W. 248.

S66-10 Southern Exp. Co. *v.* Hanaw, 134 Ga. 445, 67 S. E. 944 (under code); Coats *v.* R. Co., 239 Ill. 154, 87 N. E. 929; Wabash R. Co. *v.* Thomas, 222 Ill. 337, 78 N. E. 777; Peoria P. Co. *v.* R. Co., 164 Ill. App. 646; Davis Bros. *v.* R. Co., 168 Ill. App. 261; Waxelbaum *v.* R. Co., 168 Ill. App. 66; Penn R. Co. *v.* Anda Co., 131 Ill. App. 426; Balt., etc. R. Co. *v.* Fox, 113 Ill. App. 180; Atchison, etc. R. Co. *v.* Bilinsky, 107 Ill. App. 504; Adams Exp. Co. *v.* Bratton, 106 Ill. App. 563; Powers Co. *v.* Wells, 93 Minn. 143, 100 N. W. 735; Morgan *v.* Woolverton, 136 App. Div. 351, 120 N. Y. S. 1008 (distinction between baggage express cases and ordinary express cases); Faulk *v.* R. Co., 82 S. C. 160, 64 S. E. 283.

S66-11 Cau *v.* R. Co., 194 U. S. 427; Inman *v.* R. Co., 179 Fed. 960 (if conditions appear on face and body of bill, assent presumed); Atlantic, etc. R. Co. *v.* Dexter, 70 Fla. 180, 39 S. 634, 111 Am. St. 116; Coats *v.* R. Co., 239 Ill. 154, 87 N. E. 929; Cleveland, etc. R. Co. *v.* Patton, 203 Ill. 376, 67 N. E. 804; Childers *v.* R. Co., 166 Ill. App. 391; Evansville, etc. R. Co. *v.* Kevekordes (Ind. App.), 69 N. E. 1022; Gerry *v.* Co., 100 Me. 519, 62 A. 498; DeWolff *v.* Co., 106 Md. 472, 67 A. 1099; Singer *v.* Co., 191 Mass. 499, 77 N. E. 882; Mires *v.* R. Co., 134 Mo. App. 379, 114 S. W. 1052; Hill *v.* Co., 78 N. J. L. 333, 74 A. 674; Florman *v.* Co., 79 N. J. L. 63, 74 A. 446; Zimmer *v.* R. Co., 137 N. Y. 460, 33 N. E. 642; Greenwald *v.* Weir, 130 App. Div. 696, 115 N. Y. S. 311; Royal C. Co. *v.* Weir, 48 Misc. 376, 95 N. Y. S. 575; Dobson *v.* R. Co., 38 Misc. 582, 78 N. Y. S. 82; Baker *v.* R. Co., 82 S. C. 146, 63 S. E. 611.

Contract signed by shipper.—Georgia, etc. R. Co. *v.* Greer, 2 Ga. App. 516, 58 S. E. 782.

S66-12 Perrin *v.* Co., 78 N. J. L. 515, 74 A. 462.

S67-13 Evansville, etc. R. Co. *v.* Kevekordes (Ind. App.), 69 N. E. 1022; U. S. Exp. Co. *v.* Joyce, 36 Ind. App. 1, 69 N. E. 1015; Chicago, etc. R. Co. *v.* Hare, 36 Ind. App. 422, 75 N. E. 867 (recitals prima facie evidence); Bartlett *v.* R. Co., 57 Wash. 16, 106 P. 487. *Comp.* Myers *v.* R. Co., 120 Mo. App. 288, 96 S. W. 787. *Contra,* McIntosh *v.* R. Co., 17 Ida. 100, 104 P. 66. Recital in contract, prima facie evidence of consideration. Mires *v.* R. Co., 134 Mo. App. 379, 114 S. W. 1052.

S67-14 St. Louis, etc. R. Co. *v.* Pearce, 82 Ark. 353, 101 S. W. 760; Kalina *v.* R. Co., 69 Kan. 172, 76 P. 438. *Contra* in action *ex delicto.* Brown *v.* R. Co., 135 Mo. App. 624, 117 S. W. 112. *Comp.* The Tampico, 151 Fed. 689; Hoye *v.* R. Co., 191 N. Y. 101, 83 N. E. 586; St. Louis, etc. R. Co. *v.* Franklin (Tex. Civ.), 129 S. W. 181.

Duty of shipper to give notice of his claim—burden of showing is on terminal carrier. Louisville & N. R. Co. *v.* Shepherd, 7 Ala. App. 496, 61 So. 14.

S67-15 St. Louis, etc. R. Co. *v.* Boshear (Tex. Civ.), 108 S. W. 1032; Texas, etc. R. Co. *v.* Crowley (Tex. Civ.), 86 S. W. 342; St. Louis, etc. R. Co. *v.* Honea (Tex. Civ.), 84 S. W. 267.

S67-16 Inman *v.* R. Co., 179 Fed. 960; Missouri, etc. R. Co. *v.* Co., 39 Tex. Civ. 298, 87 S. W. 871.

S67-17 **Shipper is presumed to know** that the rate is based on valuation where the bill of lading so specifies.

Adams Exp. Co. *v.* Crominger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314.

867-18 Knowledge of freight rates presumed where interstate carriers have complied with federal statute. Mires *v.* R. Co., 134 Mo. App. 379, 114 S. W. 1052.

Freight rates conclusively presumed established, published and filed. Burlington L. Co. *v.* R. Co., 151 N. C. 741, 67 S. E. 1130.

Contract recitals as to reduced rate, prima facie true. Freeman *v.* R. Co., 138 Mo. App. 322, 122 S. W. 1.

Under interstate commerce law burden of proving rate charged was excessive is on defendant who sets up counterclaim against carrier. Balt. & O. R. Co. *v.* LaDue, 128 App. Div. 594, 112 N. Y. S. 964.

868-19 St. Louis, etc. R. Co. *v.* Burrow, 89 Ark. 178, 116 S. W. 198 (notice from agent after goods burned); Rosenblum *v.* Weir, 113 N. Y. S. 520. See Silverman *v.* Weir, 114 N. Y. S. 6.

868-20 Kansas City S. R. Co. *v.* Co. (Tex. Civ.), 114 S. W. 436. See Lord *v.* Co., 105 Me. 255, 74 A. 117.

Carrier's custom concerning deliveries for immediate shipment may be proved. St. Louis, etc. R. Co. *v.* Burrow, 89 Ark. 178, 116 S. W. 198.

868-22 The only evidence in a common-law action to show excessive freight charges on interstate shipments, based on charges included in schedule filed, is previous decision of interstate commission, which must be proved. Robinson *v.* R. Co., 64 W. Va. 406, 63 S. E. 323.

"'Art. 4566. In all trials under the foregoing article the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them.' The foregoing statute so guards the commission from improper interference that the courts must regard its actions, when within the limits of its delegated powers, as being the result of a purpose to do justice between all parties, as having resulted in just and correct action, until it be shown by clear and satisfactory evidence to be otherwise. Railroad Commission *v.* Weld & Neville, 96 Tex. 409, 73 S. W. 529. The language 'clear and satisfactory evidence' limits the power of courts in setting aside rates, etc., to cases in which it may be established by evidence which leaves no reasonable doubt in the judicial mind that the rate or rule is unjust and unreasonable. Willis *v.* Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 812." Railroad Com. *v.* Chamber of Com., 105 Tex. 101, 145 S. W. 573.

Defendant's published tariffs filed with interstate commerce commission providing for different rate on shipment without limitations on its liability. New York P. & N. R. Co. *v.* Exchange (Md.), 89 A. 433.

Evidence as to local rates inadmissible in action for overcharge on through shipment. Texas & P. R. Co. *v.* Dickson Bros. (Tex. Civ.), 167 S. W. 33.

Evidence of former rates inadmissible. Texas & P. R. Co. *v.* Dickson Bros. (Tex. Civ.), 167 S. W. 33.

"It is not sufficient that we can see no reason for the differences; we must be able to clearly see a valid reason why the rates should not exist in that form." Railroad Com. *v.* Chamber of Com., 105 Tex. 101, 145 S. W. 573.

Schedule of rates, duly and legally certified, prima facie evidence of reasonableness. Cullen *v.* R. Co., 63 Fla. 122, 58 So. 182.

868-23 Contract of carriage need not be express. Southern R. Co. *v.* Johnson, 2 Ga. App. 36, 58 S. E. 333.

868-26 Reasonableness of demurrage charge may be shown by proof of general custom of carriers expressed in rules which are, or ought to be, known to parties dealing with a carrier. Erie R. Co. *v.* Waite, 62 Misc. 372, 114 N. Y. S. 1115.

869-27 Clark *v.* Clyde S. S. Co., 148 Fed. 243 (not conclusive); Central R. Co. *v.* Henderson, 152 Ala. 203, 44 S. 542 (receipt); Mussellam *v.* R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Seigfried *v.* R. Co., 147 Mo. App. 543, 126 S. W. 798; Sumrell *v.* R. Co., 152 N. C. 269, 67 S. E. 585; McMeekin *v.* R. Co., 82 S. C. 468, 64 S. E. 413; Gulf, etc. R. Co. *v.* Lowery (Tex. Civ.), 155 S. W. 992 (not conclusive).

869-28 Southern R. Co. *v.* Allison, 115 Ga. 635, 42 S. E. 15 (not admissible in behalf of carrier).

869-29 Correspondence between final and initial carrier who issued joint bill of lading concerning goods converted while in possession of one or the other of them, admissible as part of res ges-

tae. Seaboard A. L. R. Co. *r.* Phillips, 108 Md. 285, 70 A. 232.

Bill of lading issued by initial carrier, if introduced generally, may be evidence against connecting carrier as to quantity of goods shipped. Missouri, etc. R. Co. *r.* Co. (Tex. Civ.), 120 S. W. 1146.

869-32 Chicago, etc. R. Co. *r.* Pfeifer, 90 Ark. 524, 119 S. W. 642 (such evidence sufficient).

870-34 Missouri, etc. R. Co. *r.* Patrick, 144 Fed. 632, 75 C. C. A. 434 (unsigned bill of lading evidence of oral contract); Southern Exp. Co. *r.* Hill, 81 Ark. 1, 98 S. W. 871; St. Louis, etc. R. Co. *r.* Watkins, 45 Tex. Civ. 321, 100 S. W. 162 (circumstantial evidence).

871-37 Balt. & O. R. Co. *r.* Co., 51 Tex. Civ. 336, 111 S. W. 979.

872-40 Blalock *r.* Ins. Co., 13 Ga. App. 486, 79 S. E. 374; Mathes *r.* Lumb. Co., 173 Mo. App. 239, 158 S. W. 729; Ragsdale *r.* R. Co., 69 S. C. 429, 48 S. E. 466; Texas & P. R. Co. *r.* Lynch, 39 Tex. Civ. 96, 87 S. W. 884. See Walker *r.* R. Co., 76 S. C. 308, 56 S. E. 952.

Copy of paper served on carrier and identified by its agent, admissible if it fails to produce original. McMeekin *r.* R. Co., 82 S. C. 468, 64 S. E. 413.

Duplicate bill of lading admissible as primary evidence. So. R. Co. *r.* Brewster, 9 Ala. App. 597, 63 S. 799.

873-41 Parol evidence competent to prove delivery although bill of lading not produced. Atlantic, etc. R. Co. *r.* Dexter, 50 Fla. 180, 39 S. 634, 111 Am. St. 116.

Contract for carriage and its ratification by agent's superior may be shown by parol. Gulf, etc. R. Co. *r.* Cunningham, 51 Tex. Civ. 368, 113 S. W. 767. See also Smith *r.* R. Co., 163 N. C. 143, 79 S. E. 433.

Opinions competent to show whether machinery properly packed. Fuller *r.* R. Co., 61 Misc. 599, 113 N. Y. S. 1031.

873-43 New York M. & S. Co. *r.* Hamburg, etc., 171 Fed. 577; Inman *r.* R. Co., 159 Fed. 960; Williams *r.* R. Co. (Ala.), 58 S. 315; St. Louis, etc. R. Co. *r.* Jones, 93 Ark. 537, 125 S. W. 1025; Porteous *r.* Co., 112 Minn. 31, 127 N. W. 429; Minnesota & D. C. Co. *r.* R. Co., 108 Minn. 470, 122 N. W. 493; Blackmer *r.* R. Co., 137 Mo. App. 133, 119 S. W. 13; Whitnack *r.* R. Co., 82 Neb. 464, 118 N. W. 67; Jonasson *r.* weir, 130 App. Div. 528, 115 N. Y. S. 6; Thomas *r.* R. Co., 85 S. C. 537, 64 S. E. 220, 67 S. E. 908 (conclusive as to receipt of goods between carrier and transferee); San Antonio & A. P. R. Co. *r.* Timon, 45 Tex. Civ. 47, 99 S. W. 418; Tex. Cent. R. Co. *r.* Co. (Tex. Civ.), 130 S. W. 250.

Shipper may show agreement supplemental to bill of lading. Russell *r.* R. Co., 177 Mo. App. 186, 164 S. W. 164.

Value expressed in shipping receipt cannot be varied by parol. Cohen *r.* Exp. Co., 151 App. Div. 672, 136 N. Y. S. 489.

Carrier's knowledge of destination of property, though beyond its line, may be shown by parol. Gulf, etc. R. Co. *r.* Cunningham, supra.

"A bill of lading is of a dual character and effect; one is that of a receipt, and the other that of a contract. As a receipt, like other receipts, it is open to explanation or modification by parol evidence; as a contract it, like other contracts, must be construed according to its terms, and in the absence of fraud or mistake it is presumed that all oral negotiations respecting its terms and conditions are merged therein—that it forms the final and sole receptacle of the evidence, and of the agreement between the parties, as to the reception, rate, route, etc. L. & N. R. R. Co. *r.* Fulgham, 91 Ala. 555, 8 South. 803; McTyer *r.* Steele, 26 Ala. 487; Wayland *r.* Mosely, 5 Ala. 430, 39 Am. Dec. 335; Tallassee, etc. Co. *r.* Western Ry. Co., 128 Ala. 167, 29 South. 203." Alabama G. S. R. Co. *r.* Norris, 167 Ala. 311, 52 S. 891.

874-44 "The proof which was offered was, therefore, not admissible for the purpose of contradicting the bill of lading in these respects, but was admissible to show the other element—that the cotton which the plaintiff shipped was not of the grade he represented it to be—and this was a material element in fixing the liability of the carrier." Illinois Cent. R. Co. *r.* Doughty, 10 Ga. App. 317, 73 S. E. 541.

874-45 Bullock *r.* R. Co., 82 S. C. 375, 64 S. E. 234 (mistake in name of consignee). See Cohen *r.* R. Co., 44 Tex. Civ. 381, 98 S. W. 437.

Parol evidence competent to show consideration for limited liability contract different from that stated, or absence of consideration. Burgher *r.* R. Co., 139 Mo. App. 62, 120 S. W. 673.

Its admissibility is not affected by void stipulation. Trout *v.* R. Co. (Tex. Civ.), 11 S. W. 229, *disap.* R. Co. *v.* O'Laughlin (Tex. Civ.), 72 S. W. 610; Texas & P. R. Co. *v.* Edins, 36 Tex. Civ. 639, 83 S. W. 253.

875-47 Southern R. Co. *v.* Cofer, 149 Ala. 565, 43 S. 102; St. Louis, etc. R. Co. *v.* Furlow, 89 Ark. 404, 117 S. W. 517.

Parol contract as to route goods to be carried, binding. Davis *v.* R. Co., 81 S. C. 466, 62 S. E. 856.

875-48 Stearns *v.* R. Co., 148 Mich. 271, 111 N. W. 769; Cappel *v.* Weir, 45 Misc. 419, 90 N. Y. S. 394; Needy *v.* R. Co., 22 Pa. Super. 489.

Classification of freight.—Testimony which does not tend to vary the schedule rate, but merely to prove that defendant's experts previously were in the habit of classifying the same goods as claimed by the shipper, is admissible to contradict present evidence of said experts giving a different classification. Hardaway *v.* R. Co., 90 S. C. 475, 73 S. E. 1020.

Custom of noting on bill of lading condition of goods may be shown. Weinberg *v.* Weinberg, 163 Ill. App. 420.

876-49 Northern P. R. Co. *v.* Kempton, 138 Fed. 902, 71 C. C. A. 246 (contract silent as to time and manner of performance).

Subsequent parol agreement may be shown. Lincoln T. & A. Co. *v.* R. Co., 86 Neb. 338, 125 N. W. 603.

877-50 Southern Exp. Co. *v.* Hill, 84 Ark. 368, 105 S. W. 877 (receipt as evidence of marks as to destination); Musselman *v.* R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Illinois C. R. Co. *v.* Nelson, 30 Ky. L. R. 114, 97 S. W. 757 (testimony must be clear to overcome it); Strawn *v.* R. Co., 120 Mo. App. 135, 96 S. W. 488; Roy *v.* R. Co., 42 Wash. 572, 85 P. 53 (want of authority of agent to issue receipt may be shown although bill of lading negotiated). And see Swedish Am. Bk. *v.* R. Co., 96 Minn. 436, 105 N. W. 69.

"Bills of lading are both receipts and contracts to carry. So far as they acknowledge the delivery and acceptance of the goods, they are mere receipts. As to the rest, they are contracts, and are binding as such on the parties to them and the terms thereof cannot be varied by parol." Williams *v.* R. Co. (Ala.), 58 S. 315. See supra, 874-43.

877-51 Atlantic C. L. R. Co. *v.* Cohn, 6 Ga. App. 572, 65 S. E. 355; Missouri, etc. R. Co. *v.* Simonson, 64 Kan. 802, 68 P. 653, 91 Am. St. 248, 57 L. R. A. 765 (statute making bill of lading conclusive of weight of goods, unconstitutional); Peele *v.* R. Co., 149 N. C. 390, 63 S. E. 66.

877-52 St. Louis, etc. R. Co. *v.* Jamieson, 20 Okla. 654, 95 P. 417.

877-53 St. Louis, etc. R. Co. *v.* Bk., 87 Ark. 26, 112 S. W. 154; Central R. Co. *v.* Cook, 4 Ga. App. 698, 62 S. E. 464; Bettman *v.* R. Co., 167 Mo. App. 729, 151 S. W. 169; Franklin T. Co. *v.* R. Co., 222 Pa. 96, 70 A. 949 (between original parties, and others if bill marked "not negotiable"); Cafiero *v.* Welsh, 8 Phila. (Pa.) 130; Texas & P. R. Co. *v.* Kelly (Tex. Civ.), 74 S. W. 343 (by terminal carrier); Benson *v.* R. Co., 35 Utah 241, 99 P. 1072 (kind of goods).

877-54 Carrier cannot claim car overloaded where it was accepted after inspection, and bill of lading shows facts. Colsch *v.* R. Co. (Ia.), 117 N. W. 281.

878-56 Foley *v.* R. Co., 96 N. Y. S. 182; Thyll *v.* R. Co., 84 N. Y. S. 175. See Jean *v.* Flagg, 45 Misc. 421, 90 N. Y. S. 289.

878-58 St. Louis, etc. R. Co. *v.* Jamieson, 20 Okla. 654, 95 P. 417 (onus on delivering carrier).

Real condition of goods may be shown. Hartwell R. Co. *v.* Kidd, 10 Ga. App. 771, 74 S. E. 310.

878-59 Atlantic C. L. R. Co. *v.* Cohn, 6 Ga. App. 572, 65 S. E. 355.

878-61 St. Louis, etc. R. Co. *v.* Musgrove, 153 Ala. 274, 45 S. 229; Kansas City S. R. Co. *v.* Morrison (Ark.), 146 S. W. 853; Leonard Co. *v.* R. Co., 162 Ill. App. 190; St. Louis, etc. R. Co. *v.* Keys, 6 Ind. Ty. 396, 98 S. W. 138; Blackmer *v.* R. Co., 137 Mo. App. 479, 119 S. W. 1; Thaxter *v.* R. Co., 123 Mo. App. 636, 100 S. W. 1102; Walker *v.* R. Co., 137 N. C. 163, 49 S. E. 84; Watson *v.* R. Co., 145 N. C. 236, 59 S. E. 55 (under statute imposing penalty for delay plaintiff has burden).

Condition at time of receipt and delivery must be shown. Leonard Co. *v.* R. Co., 162 Ill. App. 190.

After proof of loss arising from carrier's negligence presumption as to other negligence in delay in delivery does not arise. Smith *v.* Pierson (Tex. Civ.), 151 S. W. 1113.

879-62 See Stanchfield W. Co. *v.* R. Co., 67 Ore. 396, 136 P. 34.

Non-arrival of goods after reasonable time shows loss. Southern R. Co. *v.* Montag, 1 Ga. App. 649, 57 S. E. 933.

Slight proof to show negligence causing delay in shipment. Muir *v.* R. Co., 168 Mo. App. 542, 154 S. W. 877.

879-63 Admissions by claim agent while adjusting plaintiff's claim may be proved. Rutland *v.* R. Co., 81 S. C. 448, 62 S. E. 865. Declarations of yard policeman, while discharging duties, competent as to cause of loss. Gulf, etc. R. Co. *v.* Cunningham, 51 Tex. Civ. 368, 113 S. W. 767.

Contra, by declarations within scope of duty. Dunie *v.* R. Co., 161 N. C. 520, 77 S. E. 756.

879-64 Circumstantial evidence.—Missouri, etc. R. Co. *v.* Simonson, 64 Kan. 802, 68 P. 653, 91 Am. St. 248, 57 L. R. A. 765 (fact seal on car unbroken is competent on issue whether carrier delivered all goods instructed to it).

Receipt of connecting carrier, averring damage to goods when received, not admissible to charge initial carrier. Hirsch *v.* R. Co., 99 N. Y. S. 431.

Carrier must show default in filing claim. Kelly *v.* R. Co., 84 S. C. 249, 66 S. E. 198.

879-65 Santa Fe, etc. R. Co. *v.* Co., 13 Ariz. 186, 108 P. 467 ("loss to be at shipper's risk"); Shockley *v.* R. Co., 109 Md. 123, 71 A. 437; Minnesota, etc. R. Co. *v.* R. Co., 108 Minn. 470, 122 N. W. 493; Yazoo, etc. R. Co. *v.* Cox (Miss.), 40 S. 547; Hickey *v.* R. Co., 174 Mo. App. 408, 160 S. W. 24; Cunningham *v.* R. Co., 167 Mo. App. 273, 149 S. W. 1151; Hughey *v.* Eyssell, 167 Mo. App. 563, 152 S. W. 434; Crockett *v.* R. Co., 147 Mo. App. 347, 126 S. W. 243; Fullbright *v.* R. Co., 118 Mo. App. 482, 94 S. W. 992; McFall *v.* R. Co., 117 Mo. App. 477, 94 S. W. 570 (presumption delay caused by wreck, negligent); Gude *v.* R. Co., 77 N. J. L. 391, 71 A. 1128; Burke *v.* R. Co., 134 App. Div. 413, 119 N. Y. S. 309; Brewster *v.* R. Co., 129 N. Y. S. 368; Harper F. Co. *v.* Co., 144 N. C. 639, 57 S. E. 458 (presumption of negligence from long delay); Texas & P. R. Co. *v.* Capper, 38 Tex. Civ. 61, 84 S. W. 694. See Bockserman *v.* R. Co., 169 Mo. App. 168, 152 S. W. 389; Ficklin *v.* R. Co. 117 Mo. App. 211, 93 S. W. 861; Ratliff *v.* R. Co., 118 Mo. App. 644, 94 S. W 1005; Sterling *v.* R. Co., 38 Tex. Civ 451, 86 S. W. 655.

Negligence, under the facts, held a question for the jury. Funsten Dried Fruit, etc. Co. *v.* R. Co., 163 Mo. App. 426, 143 S. W. 839.

And burden then shifts to carrier. Western & A. R. Co. *v.* Summerour, 139 Ga. 545, 77 S. E. 802.

Actions for delay.—See Sweany *v.* Missouri, etc. R. Co., 167 Mo. App. 137, 151 S. W. 198.

880-66 The Folmina, 212 U. S. 354 (if nature of injury shows damage to be prima facie within exceptions of bills shipper must show goods not within them because of carrier's fault); The Citta Di Messina, 169 Fed. 472; Taft *v.* Co., 133 Ia. 522, 110 N. W. 897; Haase F. Co. *v.* Co., 143 Mo. App. 42, 122 S. W. 362; Keller *v.* R. Co., 45 Pa. Super. 383.

Contributory negligence must be established by carrier. Cook *v.* R. Co., 78 Neb. 64, 110 N. W. 718.

880-67 Southern Exp. Co. *v.* Ramey, 164 Ala. 206, 51 S. 314; Louisville, etc. R. Co. *v.* Smitha, 145 Ala. 686, 40 S. 117; St. Louis S. R. Co. *v.* Wallace, 90 Ark. 138, 118 S. W. 412; Central R. *v.* Co., 6 Ga. App. 254, 64 S. E. 1128; Coweta County *v.* R. Co., 4 Ga. App. 94, 60 S. E. 1018; Ohlen *v.* R. Co., 2 Ga. App. 323, 58 S. E. 511; Pennsylvania R. Co. *v.* Co., 131 Ill. App. 426; Michigan C. R. Co. *v.* Osmus, 129 Ill. App. 79; Colsch *v.* R. Co. (Ia.), 117 N. W. 281 (failure to protect animals from weather); Adams Exp. Co. *v.* Walker, 119 Ky. 121, 83 S. W. 106, 67 L. R. A. 412; Johnson *v.* R. Co. (Me.), 88 A. 988; Pressley Co. *v.* R. Co., 117 Minn. 399, 136 N. W. 11; Whitaker *v.* R. Co., 115 Minn. 140, 131 N. W. 1061; New Orleans, etc. R. Co. *v.* Cole, 101 Miss. 173, 57 S. 556; Hahn *v.* R. Co., 141 Mo. App. 453, 125 S. W. 1185; Nairn *v.* R. Co., 126 Mo. App. 707, 106 S. W. 102; Alexander *v.* McNally, 112 Mo. App. 563, 87 S. W. 1; Magnus *v.* Platt, 62 Misc. 499, 115 N. Y. S. 824; Rieser *v.* Co., 45 Misc. 632, 91 N. Y. S. 170; Hoffberg *v.* Bumford, 88 N. Y. S. 940; Jones-L. Co. *v.* R. Co., 148 N. C. 580, 62 S. E 701; Meredith *v.* R. Co., 137 N. C. 478, 50 S. E. 1; Everett *v.* R. Co., 138 N. C. 68, 50 S. E. 557, 1 L. R. A. (N. S.) 985; St. Louis, etc. Co. *v.* Shepard, 40 Okla. 589, 139 P. 833; Lloyd *v.* Co., 223 Pa. 148, 72 A. 516; Harter *v.* R. Co., 85 S. C. 192, 67 S. E. 290; Kelly *v.* R. Co., 84

S. C. 249, 66 S. E. 198; Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; Nashville, etc. R. Co. *v.* Stone, 112 Tenn. 348, 79 S. W. 1031; Head *v.* Co. (Tex. Civ.), 126 S. W. 682; Gulf, etc. Co. *v.* Roberts (Tex. Civ.), 85 S. W. 479; Gulf, etc. Co. *v.* Co. (Tex. Civ.), 99 S. W. 430; St. Louis, etc. R. Co. *v.* McIntyre, 36 Tex. Civ. 399, 82 S. W. 346; Stolze *v.* R. Co., 148 Wis. 205, 134 N. W. 376.

Where a shipper proves delivery and loss negligence will be presumed unless the carrier is able to prove that the loss was within exceptions in the contract. Union Pac. R. Co. *v.* Stupeek, 50 Colo. 151, 114 P. 646.

Delivery to carrier in good condition and to consignee in damaged condition justifies recovery in absence of other proof. Vuille *v.* Pa. R. Co., 42 Pa. Super. 567.

Delay.—Unreasonableness must be shown by plaintiff. Kansas City So. R. Co. *v.* Mabry (Ark.), 165 S. W. 279. In action for negligent delay mere proof of delay insufficient. Hickey *v.* R. Co., 174 Mo. App. 408, 160 S. W. 24; McCrary *v.* R. Co., 109 Mo. App. 567, 83 S. W. 82. See Wyatt *v.* R. Co., 173 Mo. App. 210, 158 S. W. 720. But burden on carrier to show a wreck delaying shipment was not due to its negligence (Gregory *v.* R. Co., 174 Mo. App. 550, 160 S. W. 830) and to show diligence in forwarding perishable freight (Penn. R. Co. *v.* Clark, 118 Md. 514, 85 A. 613), and by statute carrier has burden of showing delay was not negligent. Texas Cent. R. Co. *v.* Co., 104 Tex. 603, 142 S. W. 1163. See also Tex. & P. R. Co. *v.* Dunford (Tex. Civ.), 152 S. W. 1129.

Goods delivered to carrier in good condition, and received in damaged condition. Armstrong Byrd & Co. *v.* R. Co., 26 Okla. 352, 109 P. 216.

Proof of delivery in injured condition must be accompanied with proof goods received by carrier in good condition. Lynch *v.* R. Co., 90 N. Y. S. 378.

Presumption not applicable where specific acts of negligence averred. Galm *v.* R. Co., 113 Mo. App. 591, 87 S. W. 1015.

881-68 Southern R. Co. *v.* Levy, 144 Ala. 614, 39 S. 95; Southern R. Co. *v.* Aldredge, 142 Ala. 368, 38 S. 805; Adams Exp. Co. *v.* Walker, 119 Ky. 121, 83 S. W. 106, 67 L. R. A. 412; Merritt C. Co. *v.* R. Co., 128 Mo. App. 420, 107 S. W. 462; Decker *v.* R. Co., 149 Mo. App. 534, 131 S. W. 118; Ziegler *v.* Freemen, 31 O. C. C. 342; Nemcof *v.* R. Co., 39 Pa. Super. 542; Tradewell *v.* R. Co., 150 Wis. 259, 136 N. W. 794. See McCord *v.* R. Co., 76 S. C. 469, 57 S. E. 477.

Delivery to carrier in good condition and failure of carrier to deliver justifies recovery of damages, but more may be necessary to sustain conversion. Taugher *v.* N. Pac. R. Co., 21 N. D. 111, 129 N. W. 747.

Even though held as mere bailee. Meyer *v.* R. Co., 92 S. C. 101, 76 S. E. 209.

Carrier has burden of proving its claim of ownership. Valentine *v.* R. Co., 187 N. Y. 121, 79 N. E. 849.

881-69 St. John *v.* R. Co., 168 Ill. App. 599; Robertson *v.* R. Co., 148 N. C. 323, 62 S. E. 413.

Carrier has burden of proving delivery. Dunie *v.* R. Co., 161 N. C. 520, 77 S. E. 756.

881-70 Jordon *v.* R. Co., 102 Miss. 21, 58 S. 595; Thompson *v.* R. Co., 136 Mo. App. 404, 117 S. W. 1193 (wreck of train); Weaver *v.* R. Co., 135 Mo. App. 210, 115 S. W. 500 (failure to follow shipping directions); Carleton *v.* Co., 137 App. Div. 225, 121 N. Y. S. 997 (acceptance of goods loaded under carrier's inspection). See Glazer *v.* Co., 113 N. Y. S. 979 (stipulation to deliver to another carrier).

Slight additional evidence will do. Wyatt *v.* Mo. Pac. R. Co., 173 Mo. App. 210, 158 S. W. 720; Holland *v.* R. Co., 139 Mo. App. 702, 123 S. W. 987.

In Virginia statute makes loss of, or injury to, property prima facie evidence of negligence. Southern Exp. Co. *v.* Jacobs, 109 Va. 27, 63 S. E. 17.

882-72 Williams *v.* R. Co., 117 Ga. 830, 43 S. E. 980; Merchants' & M's. T. Co. *v.* Eichberg, 109 Md. 211, 71 A. 993 (contract as to burden of proving negligence, valid); Bushnell *v.* R. Co., 118 Mo. App. 618, 94 S. W. 1001; Anderson *v.* R. Co., 93 Mo. App. 677, 67 S. W. 707; Johnson *v.* R. Co., 78 N. J. L. 529, 74 A. 496 (plaintiff introduced limited liability contract); Van Akin *v.* R. Co., 92 App. Div. 23, 87 N. Y. S. 871; Thyll *v.* R. Co., 84 N. Y. S. 175; Dobson *v.* R. Co., 38 Misc. 582, 78 N. Y. S. 82; Davenport *v.* R. Co., 10 Pa. Super. 47; Peterson *v.* R. Co., 19 S. D. 122, 102 N. W. 595; Nashville, etc. R. Co. *v.* Stone, 112 Tenn. 348, 79 S. W.

1031; Bartelt *v.* R. Co., 57 Wash. 16, 106 P. 487; Hecht *v.* R. Co., 132 Wis. 605, 113 N. W. 68. *Comp.* Georgia, etc. R. Co. *v.* Johnson, 121 Ga. 231, 48 S. E. 807; Norton *v.* Co., 123 Mo. App. 233, 100 S. W. 502; Rowan *v.* Wells, 80 App. Div. 31, 80 N. Y. S. 226; St. Louis, etc. R. Co. *v.* Brosius, 47 Tex. Civ. 647, 105 S. W. 1131; Texas & P. R. Co. *v.* Dishman, 38 Tex. Civ. 277, 85 S. W. 319.

But see McGrath *v.* R. Co., 121 Minn. 258, 141 N. W. 164.

Presumption of negligence from failure to deliver, arises even under special, limited liability contract. Georgia, etc. R. Co. *v.* Greer, 2 Ga. App. 516, 58 S. E. 782.

883-73 Louisville, etc. R. Co. *v.* Smitha, 145 Ala. 686, 40 S. 117; Gilchrist *v.* R. Co., 156 Ill. App. 117; Sinsabaugh *v.* R. Co., 149 Ill. App. 642; B. & O., etc. R. Co. *v.* Fox, 113 Ill. App. 180; Adams Exp. Co. *v.* Bratton, 106 Ill. App. 563; Wabash R. Co. *v.* Priddy, 179 Ind. 483, 101 N. E. 724; Chicago, etc. R. Co. *v.* Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; Westphalen *v.* R. Co., 152 Ia. 232, 132 N. W. 57; Moore *v.* R. Co., 151 Ia. 353, 131 N. W. 30; Powers *v.* R. Co., 130 Ia. 615, 105 N. W. 345; Cincinnati R. Co. *v.* Smith, 155 Ky. 481, 159 S. W. 987; Illinois Cent. R. Co. *v.* Howard & Callahan, 152 Ky. 308, 153 S. W. 427; Louisville & N. R. Co. *v.* McClintock, 151 Ky. 455, 152 S. W. 253; McCampbell *v.* R. Co., 150 Ky. 723, 150 S. W. 987; Cincinnati, etc. R. Co. *v.* Greening, 30 Ky. L. R. 1180, 100 S. W. 825; Louisville, etc. R. Co. *v.* Brown, 28 Ky. L. R. 722, 90 S. W. 567; Cole *v.* R. Co., 117 Minn. 33, 134 N. W. 296; Knowlton *v.* R. Co., 115 Minn. 71, 131 N. W. 858; Lay *v.* R. Co., 157 Mo. App. 467, 138 S. W. 884; Gillespie *v.* R. Co., 144 Mo. App. 508, 129 S. W. 277; Keyes-M. L. Co. *v.* R. Co., 105 Mo. App. 556, 80 S. W. 53; Nelson *v.* R. Co., 28 Mont. 297, 72 P. 642; Chicago, etc. R. Co. *v.* Slattery, 76 Neb. 721, 107 N. W. 1045; Jones *v.* R. Co., 148 N. C. 449, 62 S. E. 521; St. Louis, etc. Co. *v.* Shepard, 40 Okla. 589, 139 P. 823; Trace *v.* R. Co., 26 Pa. Super. 466; Mayfield *v.* R. Co., 84 S. C. 393, 66 S. E. 405; Martin *v.* R. Co. (Tex. Civ.), 139 S. W. 615; Houston & T. C. R. Co. *v.* Parker (Tex. Civ.), 138 S. W. 437; Kansas City, etc. R. Co. *v.* Bigham (Tex. Civ.), 138 S. W. 432; San Antonio & A. P. R. Co. *v.* Miller (Tex. Civ.), 137 S. W. 1191; Galveston, etc. R. Co. *v.* Jones (Tex. Civ.), 123 S. W. 737; International, etc. R. Co. *v.* Nowaski, 48 Tex. Civ. 144, 106 S. W. 437; Thomas *v.* Co. (Tex. Civ.), 95 S. W. 723; Rick *v.* Co., 39 Utah 130, 115 P. 991.

See St. Louis, etc. R. Co. *v.* Kilberry, 83 Ark. 87, 102 S. W. 894; Tiller & S. *v.* R. Co. (Ia.), 112 N. W. 631 (carrier must excuse delay); Wente *v.* R. Co., 79 Neb. 175, 112 N. W. 300; Penn. Co. *v.* Yoder, 1 O. C. C. (N. S.) 283; Texas, etc. R. Co. *v.* Drahn (Tex. Civ.), 157 S. W. 282.

Contra, where the negligence complained of is based on statute. Decker *v.* R. Co., 149 Mo. App. 534, 31 S. W. 118.

Backing an engine against the car in which the mare was standing with sufficient force to throw her down. Wood *v.* R. Co., 118 Minn. 362, 136 N. W. 1095.

Burden on shipper to show negligence. Texas, etc. R. Co. *v.* Drahn (Tex. Civ.), 157 S. W. 282.

"Where a common carrier accepts live stock for transportation, knowing at the time that the condition of its facilities is such that a loss will result to the shipper by the reason of the shipment, then such carrier will be responsible for the loss, because carrier will be negligent in undertaking the shipment under such conditions." St. Louis S. W. R. Co. *v.* Mitchell, 101 Ark. 289, 142 S. W. 168.

Condition of cattle.—"It was proper to admit evidence tending to show that the cattle had been properly fed and watered just before they were shipped, that they were then in good condition, and that ordinarily cattle transported by rail the distance from Scottsboro, Ala., to Atlanta, Ga., would be ready for the market as soon as they had been fed and watered after they had been delivered from the car." Southern R. Co. *v.* Proctor, 3 Ala. App. 413, 57 S. 513.

"The mere fact that there was delay in delivering the shipment on the market did not show negligence. Nothing appears in proof that the shipment did not reach East St. Louis until the afternoon of October 27th, a few hours later than the time in which it should have arrived. Such delay may have been caused by some accident or other cause beyond the defendant's control. Decker *v.* Railway, 149 Mo. App. 534,

131 S. W. 118; Ecton *v.* Railroad, 125 Mo. App. 223, 102 S. W. 575; Clark *v.* Railway, 138 Mo. App. 424, 122 S. W. 318; Otrich *v.* Railroad, 154 Mo. App. 420, 134 S. W. 665." Ridgeway *v.* R. Co., 161 Mo. App. 260, 143 S. W. 532.

Injury to animal while in custody of the defendant as a common carrier, places the burden upon the defendant to show that the injury happened without fault on its part, or under circumstances in which, under a valid provision of the contract of shipment, it was exempted from liability. Alabama G. S. R. Co. *v.* Gewin & Son, 5 Ala. App. 584, 59 S. 553.

883-74 Morse *v.* R. Co., 97 Me. 77, 53 A. 874; Illinois C. R. Co. *v.* Davis (Miss.), 43 S. 674; Foust *v.* Lee, 138 Mo. App. 722, 119 S. W. 505 (burden on shipper not onerous); Lewis *v.* R. Co., 71 N. J. L. 339, 59 A. 1117, 70 N. J. L. 132, 56 A. 128.

"Where a recovery is sought for sickness of live stock in transit, or for death resulting from sickness, the burden does not shift, but remains all the while upon the plaintiff; for the sickness, or death from sickness, of the animal may be due to a diseased condition existing at the time of or prior to its shipment, though undiscovered by its owner or the carrier, or may be due to atmospheric, climatic or other conditions over which the carrier has no control, and for which it would, in no event, be responsible. As said in McDowell *v.* L. & N. R. Co., 113 S. W. 519, the jury should not be left to speculate as to the cause of the injury. L. & N. R. Co. *v.* Warfield, 98 S. W. 313, 30 Ky. Law Rep. 352; McDowell *v.* L. & N. R. Co., 113 S. W. 519; L. & N. R. Co. *v.* Cecil, 145 Ky. 271, 140 S. W. 186." Illinois Cent. R. Co. *v.* Word, 149 Ky. 229, 147 S. W. 949.

884-75 Cau *v.* R. Co., 194 U. S. 427; Louisville & N. R. Co. *v.* McKenzie, 5 Ala. App. 605, 59 S. 345; Central R. Co. *v.* Burton, 165 Ala. 425, 51 S. 643; Louisville R. Co. *v.* Dunlap, 148 Ala. 23, 41 S. 826; Southern R. Co. *v.* Levy, 144 Ala. 614, 39 S. 95; Stockton L. Co. *v.* Co., 10 Cal. App. 197, 101 P. 541; Southern R. Co. *v.* Frank, 5 Ga. App. 574, 63 S. E. 656; Atlanta, etc. R. Co. *v.* Broome, 3 Ga. App. 641, 60 S. E. 355; Southern R. Co. *v.* Montag, 1 Ga. App. 649, 57 S. E. 933; Georgia So. R. Co. *v.* Johnson, 121 Ga. 231, 48 S. E. 807; Mahaffey *v.* R. Co., 147 Ill. App. 43; Shoot *v.* R. Co., 145 Ill. App. 532; McMillan *v.* R. Co., 147 Ia. 596, 124 N. W. 1069; Cownie G. Co. *v.* Co., 130 Ia. 327, 106 N. W. 749, 4 L. R. A. (N. S.) 1060; Chicago, etc. R. Co. *v.* Dunlap, 71 Kan. 67, 80 P. 34; Kalina *v.* R. Co., 69 Kan. 172, 76 P. 438; Louisville & N. R. Co. *v.* McClintock, 151 Ky. 455, 152 S. W. 253; Tower Co. *v.* R. Co., 184 Mass. 472, 69 N. E. 348; Wallace *v.* R. Co., 176 Mich. 128, 142 N. W. 558; Kansas City R. Co. *v.* Heard, 87 Miss. 378, 39 S. 1011; Libby *v.* R. Co., 137 Mo. App. 276, 117 S. W. 659; Hurst *v.* R. Co., 117 Mo. App. 25, 94 S. W. 794; McFall *v.* R. Co., 117 Mo. App. 477, 94 S. W. 570; Allen *v.* R. Co., 82 Neb. 726, 118 N. W. 655; Wabash R. Co. *v.* Sharpe, 76 Neb. 424, 107 N. W. 758; Chicago, etc. R. Co. *v.* Slattery, 76 Neb. 721, 107 N. W. 1045; Lyon *v.* R. Co. (N. C.), 81 S. E. 1; Parker *v.* R. Co., 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827; Duncan *v.* R. Co., 17 N. D. 610, 118 N. W. 826; St. Louis, etc. R. Co. *v.* Cox, 40 Okla. 258, 138 P. 144; Missouri R. Co. *v.* Walston (Okla.), 128 P. 909; Patterson *v.* R. Co., 24 Okla. 747, 104 P. 31; Menner *v.* Co., 7 Pa. Super. 335; Allam *v.* R. Co., 3 Pa. Super. 335; Deaver-J. Co. *v.* R. Co. (S. C.), 79 S. E. 709; Gilliland *v.* R. Co., 85 S. C. 26, 67 S. E. 20; Atchison, etc. R. Co. *v.* Word (Tex. Civ.), 159 S. W. 375; Gulf, etc. R. Co. *v.* Mills (Tex. Civ.), 143 S. W. 1179; Balt. & O. R. Co. *v.* Co., 51 Tex. Civ. 336, 111 S. W. 979; St. Louis, etc. R. Co. *v.* Brosius, 47 Tex. Civ. 647, 105 S. W. 1131; Fentiman *v.* R. Co., 44 Tex. Civ. 455, 98 S. W. 939; Jolliffe *v.* R. Co., 52 Wash. 433, 100 P. 977; Bosley *v.* R. Co., 54 W. Va. 563, 580, 46 S. E. 613; Struebing *v.* Co., 142 Wis. 657, 126 N. W. 21.

Act of God.—Ferguson *v.* R. Co., 91 S. C. 61, 74 S. E. 129.

885-76 Sturza *v.* Co., 113 N. Y. S. 974; Chicago, etc. R. Co. *v.* Logan (Okla.), 105 P. 343.

Burden on carrier to establish facts in mitigation of liability. Seaboard A. L. R. Co. *v.* Phillips, 108 Md. 285, 70 A. 232.

886-77 Cau *v.* R. Co., 194 U. S. 427; Washburn-C. Co. *v.* Johnston, 125 Fed. 273, 60 C. C. A. 187; Nat. R. M. Co. *v.* R. Co., 132 La. 615, 61 S. 708; Jones *v.* R. Co., 91 Minn. 229, 97 N. W. 893, 103 Am. St. 507; Elam *v.* R. Co. (Mo. App.), 93 S. W. 851; Grier *v.* R. Co., 108 Mo. App. 565, 84 S. W. 158; Arm-

strong, Byrd & Co. *v.* R. Co., 26 Okla. 352, 109 P. 216; Baker *v.* R. Co., 57 Tex. Civ. 25, 121 S. W. 907.

Proof of damage by act of God prima facie exonerates carrier. Armstrong, Byrd & Co. *v.* R. Co., 26 Okla. 352, 109 P. 216.

Plaintiff must prove his compliance with terms of contract. Westerfield *v.* Fargo, 80 Misc. 40, 141 N. Y. S. 544.

887-78 Wabash R. Co. *v.* Priddy, 179 Ind. 483, 101 N. E. 724; New Orleans, etc. R. Co. *v.* Cole, 101 Miss. 173, 57 S. 556.

888-79 Central R. Co. *v.* Hall, 124 Ga. 322, 52 S. E. 679; Southern Exp. Co. *v.* Bailey, 7 Ga. App. 331, 66 S. E. 960; Atlanta, etc. R. Co. *v.* Broome, 3 Ga. App. 641, 60 S. E. 355; Pittsburgh, etc. R. Co. *v.* Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996; Foekens *v.* Co., 99 Minn. 404, 109 N. W. 834 (perishable fruit); Brennisen *v.* R. Co., 101 Minn. 120, 111 N. W. 945, 100 Minn. 102, 110 N. W. 362; Lyon *v.* R. Co. (N. C.), 81 S. E. 1; Ferguson *v.* R. Co., 91 S. C. 61, 74 S. E. 129; Kansas City S. R. Co. *v.* Co. (Tex. Civ.), 114 S. W. 436 (loss by fire); Balt. & O. R. Co. *v.* R. Co. (Tex. Civ.), 111 S. W. 979.

889-80 "The presumption is based on the fact that the shipper usually has no other protection, and no other means of meeting any testimony of the railroad agents as to the place where the damage occurred." Parnell *v.* R. Co., 91 S. C. 270, 74 S. E. 491.

889-81 In Minnesota it is held that the rule as to what constitutes a prima facie case applies to perishable freight. B. Pressley Co. *v.* R. Co., 117 Minn. 399, 136 N. W. 11. And see Frakas *v.* R. Co., 87 S. C. 206, 69 S. E. 209.

889-82 Florence, etc. R. Co. *v.* Jensen, 48 Colo. 28, 108 P. 974; Eytinge & Co. *v.* Transport Co. (App. Div.), 145 N. Y. S. 1054.

Burden of showing ground of refusal to deliver on carrier. Jeans *v.* R. Co., 164 N. C. 224, 80 S. E. 242.

889-83 Ohlen *v.* R. Co., 2 Ga. App. 323, 58 S. E. 511; Cleveland, etc. R. Co. *v.* Schaefer, 47 Ind. App. 371, 90 N. E. 702; Cohn *v.* Platt, 48 Misc. 378, 95 N. Y. S. 535; Texas & P. R. Co. *v.* Kelly (Tex. Civ.), 74 S. W. 343.

Concealment by shipper of dangerous character of article shipped must be shown by carrier. International M. M. Co. *v.* Fels, 170 Fed. 275, 95 C. C. A. 471.

890-84 Sanborn *v.* R. Co., 205 Fed. 348 (C. C. A.); Central R. Co. *v.* Co., 159 Ala. 225, 49 S. 243; Kansas City S. R. Co. *v.* Carl, 91 Ark. 97, 121 S. W. 932; St. Louis & S. F. R. Co. *v.* Pearce, 82 Ark. 353, 101 S. W. 760; St. Louis, etc. Co. *v.* Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317; Kansas City S. R. Co. *v.* Embry, 76 Ark. 589, 90 S. W. 15; St. Louis, etc. R. Co. *v.* Birdwell, 72 Ark. 502, 82 S. W. 835; Way *v.* R. Co., 132 Ga. 677, 64 S. E. 1066 (loss of part of goods); Central R. Co *v.* Jones, 7 Ga. App. 165, 66 S. E. 492 (carrier who notifies consignee of arrival of goods and collects freight, presumed to be terminal carrier); Atlanta, etc. R. Co. *v.* Broome, 3 Ga. App. 641, 60 S. E. 355; Susong *v.* R. Co., 115 Ga. 361, 41 S. E. 566; Ruddell *v.* R. Co., 152 Ill. App. 218; Michigan C. R. Co. *v.* Co., 124 Ill. App. 158; Cleveland, etc. R. Co. *v.* Schaefer, 47 Ind. App. 371, 90 N. E. 502; Powers *v.* R. Co., 130 Ia. 615, 105 N. W. 345; Cincinnati, etc. R. Co. *v.* Greening, 30 Ky. L. R. 1180, 100 S. W. 825; Duvall *v.* R. Co., 135 La. , 65 S. 101; N. Y. & B. Transp. Line *v.* Co., 118 Md. 73, 84 A. 251; Bullock *v.* Co., 187 Mass. 91, 72 N. E. 256; Cote *v.* R. Co., 182 Mass. 290, 65 N. E. 400, 94 Am. St. 656; Paterson *v.* R. Co., 95 Minn. 57, 103 N. W. 621; Bockserman *v.* R. Co., 169 Mo. App. 168, 152 S. W. 389; Connelly *v.* R. Co., 133 Mo. App. 310, 113 S. W. 233; Jones *v.* R. Co., 115 Mo. App. 232, 91 S. W. 158; Gude *v.* R. Co., 77 N. J. L. 391, 71 A. 1128 (presumption dependent upon proof of condition of goods when shipped); Berkowitz *v.* R. Co., 109 App. Div. 878, 96 N. Y. S. 825; Price *v.* R. Co., 121 N. Y. S. 333; Barron *v.* R. Co., 8 O. N. P. (N. S.) 517; Lyon *v.* R. Co. (N. C.), 81 S. E. 1; Beville *v.* Co., 159 N. C. 227, 74 S. E. 349; Boss *v.* R. Co., 156 N. C. 70, 72 S. E. 93; Parnell *v.* R. Co., 91 S. C. 270, 74 S. E. 491; Lowry *v.* R. Co., 88 S. C. 310, 70 S. E. 806; Jenkins *v.* R. Co., 84 S. C. 361, 66 S. E. 415; Huggins *v.* R. Co., 79 S. C. 341, 60 S. E. 694; Cooper *v.* R. Co., 78 S. C. 81, 58 S. E. 930; Walker *v.* R. Co., 76 S. C. 308, 56 S. E. 952; Willett *v.* R. Co., 66 S. C. 477, 45 S. E. 93; Martin *v.* R. Co. (Tex. Civ.), 139 S. W. 615; Galveston, etc. R. Co. *v.* Jones (Tex. Civ.), 123 S. W. 737; St. Louis, etc. R. Co. *v.* Franklin (Tex. Civ.), 123 S. W. 1150; Cane Hill etc. Co. *v.* R. Co. (Tex. Civ.), 95 S. W. 751; Bibb *v.* R. Co., 37

Tex. Civ. 508, 84 S. W. 663; Gulf, etc. R. Co. *v.* Pitts, 37 Tex. Civ. 212, 83 S. W. 727; Ft. Worth, etc. R. Co. *v.* Shanley, 36 Tex. Civ. 291, 81 S. W. 1014; Houston, etc. R. Co. *v.* Bath, 40 Tex. Civ. 270, 90 S. W. 55; Texas & P. R. Co. *v.* Capper, 38 Tex. Civ. 61, 84 S. W. 694; Houston & T. C. R. Co. *v.* Scott, 99 Tex. 326, 89 S. W. 763; Texas & P. R. Co. *v.* Crowley (Tex. Civ.), 86 S. W. 342; St. Louis, etc. R. Co. *v.* Byers, 40 Tex. Civ. 533, 90 S. W. 720; Missouri, etc. R. Co. *v.* Mazzie, 29 Tex. Civ. 295, 68 S. W. 56; Stolze *v.* R. Co., 148 Wis. 205, 134 N. W. 376.

See Atlantic R. Co. *v.* Hill, 12 Ga. App. 392, 77 S. E. 316; Lacey *v.* R. Co., 63 Or. 596, 128 P. 999; Texas & P. R. Co. *v.* Tomlinson (Tex. Civ.), 166 S. W. 446. *Contra.* Rolfe *v.* R. Co., 144 Mich. 169, 107 N. W. 899; Reason *v.* R. Co., 150 Mich. 50, 113 N. W. 596; Crockett *v.* R. Co., 147 Mo. App. 347, 126 S. W. 243 (statute); Texas & P. R. Co. *v.* Scoggin, 40 Tex. Civ. 526, 90 S. W. 521 (presumption does not apply where shipper accompanies cattle); Texas, etc. R. Co. *v.* Gray, 45 Tex. Civ. 208, 99 S. W. 1125; Missouri, etc. R. Co. *v.* Clayton (Tex. Civ.), 84 S. W. 1069 (presumption is rebuttable); Texas & P. R. Co. *v.* Rankin (Tex. Civ.), 118 S. W. 823 (in action for diverting and delivering cattle not subject to quarantine pens). See infra, "Ships and Shipping," 759-94.

Goods not delivered to connecting carrier.—S. P. Co. *v.* C. H. Cox & Co. (Tex. Civ.), 136 S. W. 103.

Action for non-delivery—burden of proving delivery to connecting carrier is on plaintiff and initial carrier. Texas Cent. R. Co. *v.* Davies (Tex. Civ.), 153 S. W. 916.

Upon proof of delivery to one carrier in good condition the burden is on such carrier to prove that it delivered the goods to the next carrier in like condition. Lyon *v.* R. Co. (N. C.), 81 S. E. 1.

The presumption that goods remained in same condition as when received for shipment is sufficient to require terminal carrier to exonerate itself. Gulf, etc. R. Co. *v.* Jones, 1 Ind. Ty. 354, 37 S. W. 208; Jordan *v.* R. Co. (Miss.), 58 S. 595.

Burden on terminal carrier to show that the goods were injured while in the hands of some other carrier. Parnell *v.* R. Co., 91 S. C. 270, 74 S. E. 491.

Connecting carrier shown to have received part of bill of goods is presumed to have received all. Southern Exp. Co. *v.* Saks, 160 Ala. 621, 49 S. 392; McMeekin *v.* R. Co., 85 S. C. 381, 67 S. E. 745; Bradley *v.* R. Co., 77 S. C. 317, 57 S. E. 1101.

Burden on initial carrier to show damage did not occur on its line. Norfolk, etc. R. Co. *v.* Wilkinson, 106 Va. 775, 56 S. E. 808.

Part of damage having been traced to initial carrier, there is a presumption it is responsible for all. Cincinnati, etc. R. Co. *v.* Pless, 3 Ga. App. 400, 60 S. E. 8.

Initial carrier must show delay caused by connecting carrier. Watson *v.* R. Co., 145 N. C. 236, 59 S. E. 55.

Statutory presumption from failure to furnish shipper information on demand. Russell *v.* R. Co., 87 Miss. 806, 40 S. 1015.

Sufficiency of receipt under statute. Jonesville Mfg. Co. *v.* R. Co., 77 S. C. 480, 58 S. E. 422.

Effect of recitals in receipt given prior carrier. Southern R. Co. *v.* Waters, 125 Ga. 520, 54 S. E. 620.

If all carriers joined as defendants under statute plaintiff must show which of them inflicted damage. Blackmer *v.* R. Co., 137 Mo. App. 479, 119 S. W. 1; *s. c.* 137 Mo. App. 133, 119 S. W. 13 (though no objection made by final carrier to receipt of goods).

Interstate shipments taken out of rule by act of congress. Dodge *v.* R. Co., 111 Minn. 123, 126 N. W. 627; Florman *v.* Co., 79 N. J. L. 63, 74 A. 446. See Chicago, etc. R. Co. *v.* Miles, 92 Ark. 573, 123 S. W. 775; Kansas City S. R. Co. *v.* Carl, 91 Ark. 97, 121 S. W. 932; Otrich *v.* R. Co., 154 Mo. App. 420, 134 S. W. 665.

891-895 Gibson *v.* R. Co., 93 Ark. 439, 124 S. W. 1033; Philadelphia, etc. R. Co. *v.* Diffendal, 109 Md. 491, 72 A. 193; Dean *v.* R. Co., 148 Mo. App. 428, 128 S. W. 10; Blount *v.* R. Co., 119 N. Y. S. 65; St. Louis S. R. Co. *v.* Jackson, 55 Tex. Civ. 407, 118 S. W. 853; International, etc. R. Co. *v.* Welbourne (Tex. Civ.), 113 S. W. 780 (under statutes rule applies only to interstate shipments. If decay began on line of initial carrier it is liable though it continued on line of connecting carrier). **Presumption does not apply if** goods

partially damaged when received. Southern R. Co. *v.* Frank, 5 Ga. App. 574, 63 S. E. 656.

Proof carrier received goods in good condition casts burden on it to show delivery in like condition to connecting carrier. Orem F. Co. *v.* R. Co., 106 Md. 1, 66 A. 136.

S91-86 Colbath *v.* R. Co., 105 Me. 379, 74 A. 918; Beede *v.* R. Co., 90 Minn. 36, 95 N. W. 454.

S91-87 Philadelphia, etc. R. Co. *v.* Diffendal, 109 Md. 494, 72 A. 193; Willett *v.* R. Co., 66 S. C. 477, 45 S. E. 93 (expressman a connecting carrier).

S91-88 Walter *v.* R. Co., 142 Ala. 474, 39 S. 87; Illinois Cent. R. Co. *v.* Stevens, 29 Ky. L. R. 1079, 96 S. W. 888 (initial carrier must show it carried goods properly); Winslow *v.* R. Co., 79 S. C. 341, 60 S. E. 709.

Weight of presumption not great. See Georgia, etc. R. Co. *v.* Stanton, 5 Ga. App. 500, 63 S. E. 655; Southern R. Co. *v.* Frank, 5 Ga. App. 574, 63 S. E. 656.

S92-89 Philadelphia, etc. R. Co. *v.* Diffendal, 109 Md. 494, 72 A. 193; Connelly *v.* R. Co., 133 Mo. App. 310, 113 S. W. 233; Harper F. Co. *v.* Co., 144 N. C. 639, 57 S. E. 458.

Theory of presumption.—See Colbath *v.* R. Co., 105 Me. 379, 74 A. 918; Moore *v.* R. Co., 173 Mass. 335, 53 N. E. 816, 73 Am. St. 289.

Initial or intermediate carrier cannot invoke presumption. Galveston, etc. R. Co. *v.* Jones (Tex. Civ.), 123 S. W. 737.

Original carrier must show loss of goods by connecting carrier not result of failure to give shipping directions. Chartrand *v.* R. Co., 85 S. C. 479, 67 S. E. 741.

Presumption is terminal carrier would not have received goods in bad order. Ohlen *v.* R. Co., 2 Ga. App. 323, 58 S. E. 511; Southern R. Co. *v.* Frank, 5 Ga. App. 574, 63 S. E. 656.

S92-90 Atlantic R. Co. *v.* Dexter, 50 Fla. 180, 39 S. 634, 111 Am. St. 116; Seaboard A. L. R. Co. *v.* McRae (Ga. App.), 80 S. E. 211; Hanley *v.* R. Co., 154 Ia. 60, 134 N. W. 417; Illinois Cent. R. Co. *v.* Word, 149 Ky. 229; 147 S. W. 949; Cincinnati, etc. R. Co. *v.* Greening, 30 Ky. L. R. 1180, 100 S. W. 825; Cleve *v.* R. Co., 77 Neb. 166, 108 N. W. 982; St. Louis, etc. R. Co. *v.* Franklin (Tex. Civ.), 123 S. W. 1150. See Winslow *v.* R. Co., 170 Mo. App. 617, 157 S. W. 96; Needy *v.* R. Co., 22 Pa. Super. 489.

Presumption not changed.—Cole *v.* R. Co., 117 Minn. 33, 134 N. W. 296; Pecos, etc. R. Co. *v.* Brooks (Tex. Civ.), 145 S. W. 649.

Presence of shipper under no obligation to care for animals. Nelson *v.* R. Co., 28 Mont. 297, 72 P. 642.

And if so shown, the carrier is presumed negligent and has the burden of showing the contrary. St. Louis, etc. R. Co. *v.* Peery, 40 Okla. 432, 138 P. 1027.

S93-91 Gulf, etc. R. Co. *v.* Cunningham, 51 Tex. Civ. 368, 113 S. W. 767.

S93-94 Judd *v.* New York, 130 Fed. 991; Taft *v.* Co., 133 Ia. 522, 110 N. W. 897 (lack of ice in refrigerator car); Powers *v.* R. Co., 130 Ia. 615, 105 N. W. 345 (good condition on delivery to carrier); Foust *v.* Lee, 138 Mo. App. 722, 119 S. W. 505; Ratliff *v.* R. Co., 118 Mo. App. 644, 94 S. W. 1005; Anderson *v.* R. Co., 93 Mo. App. 677, 67 S. W. 707 (proof of delay, by circumstances); Peerless Mfg. Co. *v.* R. Co., 73 N. H. 328, 61 A. 511 (facilities for protecting yards from fire); Atchison, etc. R. Co. *v.* Davidson (Tex. Civ.), 127 S. W. 895 (time in which shipments made five years before); Missouri, etc. R. Co. *v.* McLean, 55 Tex. Civ. 130, 118 S. W. 161 (condition of perishable property when shipped and when destination reached competent to show improper construction of cars or improper refrigeration); So. Kansas R. Co. *v.* Bennett, 46 Tex. Civ. 379, 103 S. W. 1115 (injury to other cattle in same train); Chicago, etc. R. Co. *v.* Gillett (Tex. Civ.), 99 S. W. 712 (unusual delay is evidence of negligence); Carstens P. Co. *v.* R. Co., 58 Wash. 239, 108 P. 613 (nature and extent of injury to live stock).

In case of delay it is enough for plaintiff to show circumstances raising a fair inference of negligence, especially if defendant has means of explaining it. Gilbert *v.* R. Co., 132 Mo. App. 697, 112 S. W. 1002. Delay in connection with other facts, material. Holland *v.* R. Co., 133 Mo. App. 694, 114 S. W. 61.

S94-95 See Blount *v.* R. Co., 119 N. Y. S. 65.

S95-96 Plaintiff's intoxication irrelevant on issue of contributory negligence where horses escaped from pen because gate open. El Paso, etc. R. Co.

v. Lumbley, 56 Tex. Civ. 418, 120 S. W. 1050.

Failure of carrier to retain cars on its own road cannot be shown. St. Louis S. R. Co. *v.* Co., 88 Ark. 594, 115 S. W. 393.

896-1 Lake Erie & W. R. Co. *v.* Seeley, 43 Ind. App. 70, 86 N. E. 1002.

897-2 Southern Exp. Co. *v.* Fox (Ky.), 117 S. W. 270; Stone *v.* Co., 139 N. C. 193, 51 S. E. 894; Houston, etc. R. Co. *v.* Hill (Tex. Civ.), 128 S. W. 415 (place of delivery). See Penn. R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443 (usage as to delivery).

897-3 Lake Shore, etc. R. Co. *v.* Gibson, 8 O. C. C. (N. S.) 345. See Stockton L. Co. *v.* Co., 10 Cal. App. 197, 101 P. 541.

Custom of carrier, known to shipper, relevant on question of diversion of freight, bill of lading expressing delivery should be made at usual place. Smith *v.* R., 223 Pa. 118, 72 A. 264. Custom in preparing cars for shipment of stock may be proved if contract silent concerning it. Allen *v.* R. Co., 82 Neb. 726, 118 N. W. 655. Custom of defendant as to running trains on Sunday, relevant on issue of delay. Missouri, etc. R. Co. *v.* Howell (Tex. Civ.), 126 S. W. 899. Custom to accept verbal notice of claim for injury to goods may be shown. Blackmer *v.* R. Co., 137 Mo. App. 479, 119 S. W. 1. Custom as to disinfection of cars may be proved in prosecution for violating law concerning transportation of infected cattle. International, etc. R. Co. *v.* McCullough (Tex. Civ.), 118 S. W. 558. Carrier must show custom justifying delivering to other than consignee. Arkansas M. R. Co. *v.* Moody, 90 Ark. 70, 117 S. W. 757. Proof of unusual custom must be clear. Spiero *v.* R. Co., 117 N. Y. S. 1039.

898-5 *Comp.* Southern Exp. Co. *v.* Fox (Ky.), 117 S. W. 270.

Agent's declarations, within scope of employment, may be proved. Penn. R. Co. *v.* Co., 111 Md. 356, 73 A. 571.

898-6 Receipt showing acceptance of car in good order, admissible. Modern M. Co. *v.* R. Co., 140 Mich. 570, 104 N. W. 19.

898-7 St. Louis, etc. R. Co. *v.* Crowder, 82 Ark. 562, 103 S. W. 172; Dunnington & Co. *v.* R. Co., 153 Ky. 388, 155 S. W. 750; Marlatt *v.* R. Co., 154 App. Div. 388, 139 N. Y. S. 771; St. Louis, etc. R. Co. *v.* Frazar (Tex. Civ.), 97 S. W. 325; Missouri, etc. R. Co. *v.* Stanfield, 40 Tex. Civ. 385, 90 S. W. 517.

899-8 Southern R. Co. *v.* Railey, 26 Ky. L. R. 53, 80 S. W. 786 (assurance by agent when car would be delivered); Mussellam *v.* R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Louisville & N. R. Co *v.* Brown, 28 Ky. L. R. 772, 90 S. W. 567; Hill *v.* Co., 77 N. J. L. 19, 71 A. 683; Maller *v.* R. Co., 106 N. Y. S 784; St. Louis, etc. R. Co. *v.* Watkins, 45 Tex. Civ. 321, 100 S. W. 162.

899-10 Chicago, etc. R. Co. *v.* Kapp, 37 Tex. Civ. 203, 83 S. W. 233 (expert evidence admissible on question of reasonableness of time of movement); Missouri, etc. R. Co. *v.* Pettit, 54 Tex. Civ. 358, 117 S. W. 894.

900-12 Cause of delay shown by opinion testimony. Missouri, etc. R. Co. *v.* Howell (Tex. Civ.), 126 S. W. 899.

Customary time for making transfer of goods may be shown; but witness may not say whether shipment in question made within reasonable time. Hennigh *v.* R. Co., 143 Ill. App. 283.

Opinions of carrier's servants as to liability, inadmissible. Seaboard A. L. R. Co. *v.* Phillips, 108 Md. 285, 70 A. 232.

900-13 See Naas *v.* R. Co., 96 Minn. 84, 104 N. W. 717.

900-14 Conductor's record of train run, not admissible unless entries verified; if verified, it is competent to support his testimony. Jones *v.* R. Co., 148 N. C. 449, 62 S. E. 521. Conductors' reports as to movement of trains, transcribed from train books, competent original evidence as to time made notwithstanding separation from stubs, and latter not produced. Minnesota & D. C. Co. *v.* R. Co., 108 Minn. 479, 122 N. W. 493. See "Entries in Regular Course," vol. 5, pp. 250, 271, 278.

Loading sheet of connecting carrier competent in favor of initial carrier to show delivery. Glazer *v.* Co., 113 N. Y. S. 979.

Schedule of running time quoted to shipper, admissible to show delay. Geraty *v.* R. Co., 81 S. C. 367, 62 S. E. 444.

901-15 In action against carrier for refusal to carry defense of unforeseen increase in business which prevented supplying cars may be met by testimony of shippers showing how long

deficiency in cars had existed. Shoptaugh *v.* R. Co., 147 Mo. App. 8, 126 S. W. 752.

Official letters competent to show knowledge of carrier's inability to meet contract for cars with shipper. Midland Valley R. Co. *v.* Co., 91 Ark. 180, 120 S. W. 380.

901-16 U. S. Exp. Co. *v.* Long, 105 Ark. 130, 150 S. W. 576; Gulf C. T. Co. *v.* Dillard (Tex. Civ.), 163 S. W. 635; Gulf, C. & S. F. R. Co. *v.* Coulter (Tex. Civ.), 139 S. W. 16; Missouri, K. & T. R. Co. *v.* Harris (Tex. Civ.), 138 S. W. 1085; Texas & P. R. Co. *v.* Beal, 42 Tex. Civ. 588, 97 S. W. 329; Williams *v.* Co. (Tex. Civ.), 85 S. W. 1160 (partial failure of proof as to some alleged matters of damage, immaterial).

Delay in transportation.—Gulf, C. & S. F. R. Co. *v.* Nelson (Tex. Civ.), 139 S. W. 81.

Consignee presumed to be owner.—Central Trust Co. *v.* R. Co., 156 Ia. 104, 135 N. W. 721; Fisher *v.* C., 147 Ky. 821, 145 S. W. 737. See also Bk. of Irwin *v.* Exp. Co., 127 Ia. 1, 102 N. W. 107.

If shipper required by proviso in statute to file claim with carrier burden is on latter to show claim not filed or was excessive. Rabon *v.* R. Co., 149 N. C. 59, 62 S. E. 743.

To authorize a recovery for the loss of profits as damages.—See also Williamsport H. L. Co. *v.* R. Co., 71 W. Va. 741, 77 S. E. 333.

901-17 McKahan *v.* Exp. Co., 209 Mass. 270, 95 N. E. 785.

Contents of box shipped may be shown, though recovery cannot be had for some articles because of misdescription. Bottum *v.* R. Co., 72 S. C. 375, 51 S. E. 985, 2 L. R. A. (N. S.) 773.

Declaration of agent of one carrier not competent against other carriers to affect measure of recovery. Missouri etc. R. Co. *v.* Carpenter, 52 Tex. Civ. 585, 111 S. W. 909.

Sum goods would have brought had they reached destination in good condition may be shown. Penn. R. Co. *v.* Co., 111 Md. 356, 73 A. 571.

Special damages.—See infra, "Damages," 16.33.

But where evidence is insufficient to show a breach, evidence of damage suffered is inadmissible. St. Louis, etc. R. Co. *v.* True (Tex. Civ.), 159 S. W. 452.

In an action by initial carrier (with whom the contract was made), against the carrier causing the loss, to recover the amount in good faith paid to the shipper to settle the loss, the receipt from the latter is sufficient evidence of the amount of the claim. Kansas, etc. Co. *v.* R. Co. (Ark.), 163 S. W. 171.

901-18 Nashville C. & St. L. R. *v.* Hinds, 9 Ala. App. 534, 60 S. 459. See Southern Exp. Co. *v.* Owens, 146 Ala. 412, 41 S. 752; Wiehern *v.* U. S. Exp. Co., 83 N. J. L. 241, 83 A. 776; Pecos, etc. R. Co. *v.* Gray (Tex. Civ.), 145 S. W. 728. But see Cohen *v.* Exp. Co., 151 App. Div. 672, 136 N. Y. S. 489.

Conflict of testimony not sufficient to show misrepresentation. U. P. R. Co. *v.* Stupeck, 50 Colo. 151, 114 P. 646.

Value at place of delivery governs. Pfaff *v.* Exp. Co., 251 Ill. 243, 95 N. E. 1089. And see Chicago, etc. R. Co. *v.* Rogers (Tex. Civ.), 129 S. W. 1155. But in Chesapeake & O. R. Co. *v.* Magowan, 147 Ky. 12, 144 S. W. 80, the right of the shipper to recover the real value of the animals was held to depend on whether or not the carrier was deceived and misled into accepting them for transportation at the value stated, and this was a question for the jury. And see Willis *v.* Smith, 127 N. Y. S. 460 (cloth); Galveston, etc. R. Co. *v.* Quilhat (Tex. Civ.), 134 S. W. 261 (china and silverware).

Unverified accounts of sales by commission house competent to show, in connection with proof of market value, value of damaged goods sold on account of shipper. Missouri, etc. R. Co. *v.* Hopkins, 52 Tex. Civ. 166, 113 S. W. 306.

Cost of property may be shown. Balt & O. R. Co. *v.* Co., 51 Tex. Civ. 336, 111 S. W. 979.

902-19 Perkins *v.* Co., 199 Mass. 561, 85 N. E. 895; Texas C. R. Co. *v.* Watson, 54 Tex. Civ. 509, 118 S. W. 175; Texas & P. R. Co. *v.* Stephens (Tex. Civ.), 86 S. W. 933; Same *v.* Dishman, 38 Tex. Civ. 277, 85 S. W. 319; Gulf, etc. R. Co. *v.* Roberts (Tex. Civ.), 85 S. W. 479; Missouri, etc. R. Co. *v.* Allen, 39 Tex. Civ. 236, 87 S. W. 168; Southern Exp. Co. *v.* Jacobs, 109 Va. 27, 63 S. E. 17 (as against initial carrier).

Rule not uniform.—St. Louis, etc. R. Co. *v.* Co., 161 Ala. 332, 50 S. 81.

It is presumed where carrier knows destination of property it shipped,

though beyond its line, its value there was contemplated as measure of shipper's recovery. Gulf, etc. R. Co. *v.* Cunningham, 51 Tex. Civ. 368, 113 S. W. 767.

Value as delivered at terminus controls though shipper there changes destination. St. Louis, etc. R. Co. *v.* Lieurance, 80 Kan. 424, 102 P. 842.

902-20 Kansas City So. R. Co. *v.* Mabry (Ark.), 165 S. W. 279.

902-21 Marshall M. Co. *v.* R. Co., 126 Mo. App. 455, 104 S. W. 478 (value at place of shipment); Galveston, etc. R. Co. *v.* Crippen (Tex. Civ.), 147 S. W. 361; Atchison, etc. R. Co. *v.* Nation (Tex. Civ.), 92 S. W. 823; Texas, etc. R. Co. *v.* Ellerd, 38 Tex. Civ. 596, 87 S. W. 362; Texas, etc. R. Co. *v.* Hack Line, 46 Tex. Civ. 38, 101 S. W. 1042 (evidence of value proper where no market value obtainable); Atchison, etc. R. Co. *v.* Veale, 39 Tex. Civ. 37, 87 S. W. 202. *Comp.* Missouri, etc. R. Co. *v.* Wasson (Tex. Civ.), 126 S. W. 664. See this case for evidence competent to show absence of market.

Evidence as to value due to special circumstances inadmissible unless facts known to carrier. Louisville, etc. R. Co. *v.* Mink, 31 Ky. L. R. 833, 103 S. W. 294.

Evidence of price paid would be admissible. Chicago, etc. R. Co. *v.* Rogers (Tex. Civ.), 129 S. W. 1155.

Cost of returning livestock to point from which shipped relevant in connection with evidence that they could not be sold at point of delivery. Wyatt *v.* R. Co., 173 Mo. App. 210, 158 S. W. 720.

903-22 Cleveland, etc. R. Co. *v.* Patton, 203 Ill. 376, 67 N. E. 804; Euston & Co. *v.* R. Co., 147 Ill. App. 594; Cincinnati, etc. R. Co. *v.* Pendleton, 29 Ky. L. R. 721, 96 S. W. 434; Philadelphia, etc. R. Co. *v.* Diffindall, 109 Md. 494, 72 A. 193 (immaterial carrier had notice goods intended for market of that day); Chicago, etc. R. Co. *v.* Todd, 74 Neb. 712, 105 N. W. 83; Midland V. R. Co. *v.* Larson (Okla.), 138 P. 173; Rutland *v.* R. Co., 81 S. C. 448, 62 S. E. 865; Ft. Worth, etc. R. Co. *v.* Richards (Tex. Civ.), 105 S. W. 236; St. Louis, etc. R. Co. *v.* Berry, 42 Tex. Civ. 470, 93 S. W. 1107.

903-23 Missouri, etc. R. Co. *v.* Mulkey (Tex. Civ.), 159 S. W. 111.

903-24 Wyatt *v.* R. Co., 173 Mo. App. 210, 158 S. W. 720; Texas & P. R. Co. *v.* Coggin, 40 Tex. Civ. 583, 90 S. W. 523.

Opinions competent to show extent of depreciation in value of delay. Missouri, etc. R. Co. *v.* Pettit, 54 Tex. Civ. 358, 117 S. W. 894; St. Louis, etc. R. Co. *v.* Smith, 53 Tex. Civ. 42, 115 S. W. 882 (experts).

Condition of horses six weeks after shipment may be shown, it being connected with injury received. Southern Exp. Co. *v.* Jacobs, 109 Va. 27, 63 S. E. 17.

Previous injuries to animals irrelevant if recovered from. Gulf, etc. R. Co. *v.* Peacock (Tex. Civ.), 128 S. W. 463.

Rapidity of recovery of injured animals may be shown as bearing upon condition when injured. Ft. Worth, etc. R. Co. *v.* Word (Tex. Civ.), 111 S. W. 753.

Comparison of condition of animals shipped with those shipped previously, immaterial. Texas & P. R. Co. *v.* Stewart, 52 Tex. Civ. 514, 114 S. W. 413.

Shrinkage may be shown.—St. Louis S. F. R. Co. *v.* Rich (Tex. Civ.), 162 S. W. 1194.

Condition of livestock returned to point from which shipped held admissible under facts of case. Wyatt *v.* R. Co., 173 Mo. App. 210, 158 S. W. 720.

904-25 Freight rates.—It is presumed rates fixed by legislature are reasonable. S. *v.* R. Co., 19 N. D. 45, 120 N. W. 869. Burden is on carrier to impeach action of commission in fixing rates. Minneapolis, etc. R. Co. *v.* S., 186 U. S. 257; S. *v.* R. Co., 48 Fla. 146, 37 S. 657.

Evidence concerning reasonableness of rates must not be confined to article on which legislature has fixed rates, but includes all business done by carrier. S. *v.* R. Co., 19 N. D. 45, 120 N. W. 869. It must cover all its lines. St. Louis R. Co. *v.* Gill, 156 U. S. 649, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452; Interstate C. Co. *v.* R. Co., 118 Fed. 613.

Testimony as to rates charged in other states for like services is of but little value unless accompanied by proof of similarity of all elements entering problem. Smyth *v.* Ames, 169 U. S. 466, 64 Fed. 165; S. *v.* R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. 514; S. *v.* R. Co., 19 N. D. 45, 120 N. W. 869.

Liability of carrier to shipper for demurrage may be shown by testimony

of latter to existence of contract between him and another carrier. Carrier's knowledge of shipper's liability may be shown by proof of uniform usage on part of shippers to contract therefor. Southern R. Co. v. Lewis, 165 Ala. 451, 51 S. 863. Burden rests on carrier of proving delay was due to consignee's negligence. Bagley & Sewall Co. v. Co. (N. J.), 86 A. 1029.

Recovery of overcharge—lower rate charged other shippers admissible as admission against interest. Service, etc. Co. v. R. Co., 67 Or. 63, 135 P. 539.

Testimony before commission admissible. Pub. Service Com. Co. v. R. Co. (Md.), 90 A. 105.

Account of sales of damaged goods is admissible to show net sum realized. Penn. R. Co. v. Co., 111 Md. 356, 73 A. 571.

Exemplary damages may not be recovered on ground of wantonness or wilfulness if evidence not reasonably persuasive. Mayfield v. R. Co., 84 S. C. 393, 66 S. E. 405.

904-26 Lydon v. Co., 133 Fed. 830; Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935; Forbes v. Tel. Co., 135 Ia. 679, 113 N. W. 477 (person riding beyond original destination presumed to remain a passenger); Anderson v. R. Co., 196 Mo. 442, 93 S. W. 394.

If ticket is single contract to which carrier sole party it is presumed it was to be entirely performed by it, regardless of means of conveyance used Clemmens v. Co., 162 Fed. 815.

904-27 Broyles v. Co., 166 Ala. 616, 52 S. 81.

Trespasser.—Sessions v. S. P. Co., 159 Cal. 599, 114 P. 982.

"If any inference could arise from the evidence, that he was knowingly permitting her to ride without paying fare or having a pass, then it was proper to show that he, as agent of defendant, had no such authority whereby he could establish the relation of carrier and passenger between defendant and plaintiff. It was evidently competent under the issues of this case that its agent did not knowingly consent for plaintiff to ride as a passenger without paying her fare or to ride upon a pass issued to another and that he had no authority to do so." Broyles v. R. Co., 166 Ala. 616, 52 S. 81.

904-28 Winters v. R. Co., 163 Fed. 106; Birmingham R. etc. Co. v. McCurdy, 172 Ala. 488, 55 S. 616; Birmingham R. Co. v. Sawyer, 156 Ala. 199, 47 S. 67; Alabama C. R. Co. v. Bates, 149 Ala. 487, 43 S. 98; Kulpinsky v. Sampsell, 145 Ill. App. 242; Chicago, etc. R. Co. v. Lowenrosen, 125 Ill. App. 191, 222 Ill. 556, 78 N. E. 813; Alabama, etc. R. Co. v. Lowry, 100 Miss. 860, 57 S. 289; Hoskins v. R. Co., 39 Mont. 394, 102 P. 988 (mail carrier not on duty when injured); Lincoln T. Co. v. Webb, 73 Neb. 136, 102 N. W. 258; Mo. etc. R. Co. v. Brown (Tex. Civ.), 156 S. W. 519; Lugner v. R. Co., 146 Wis. 175, 131 N. W. 342.

A person may be a passenger although riding on a pass. Malott v. Weston, 51 Ind. App. 572, 98 N. E. 127.

Refusal to carry one qualified to become passenger must be justified by carrier. Connors v. Co., 204 Mass. 310, 90 N. E. 601.

"When a plaintiff brings an action for damages for an injury to himself while a passenger, the burden of proof is on the plaintiff to show, or, in other words, the plaintiff must make out, by the preponderance of the evidence (they mean the same thing), the relationship of carrier and passenger, and also the injury resulting from some agency or instrumentality of the carrier. When the plaintiff has done this, the burden of proof is shifted to the defendant; and the defendant must show that it was not negligent." Cameron v. Tel. Co., 90 S. C. 503, 74 S. E. 929.

904-29 Dysart v. R. Co., 122 Fed. 228, 58 C. C. A. 592; Southern P. Co. v. Svendsen, 13 Ariz. 111, 108 P. 262; Bergan v. R. Co., 82 Conn. 574, 72 A. 937 (conductor's authority to carry plaintiff as passenger must be shown); Vassor v. R. Co., 142 N. C. 68, 54 S. E. 849; Goodney v. R. Co., 51 Tex. Civ. 596, 113 S. W. 171; Missouri, etc., R. Co. v. Huff, 98 Tex. 110, 81 S. W. 525; Fischer v. R. Co., 52 Wash. 462, 100 P. 1005.

904-30 Wieland v. R. Co., 1 Cal. App. 313, 82 P. 226; East St. Louis Co. v. Zink, 229 Ill. 180, 82 N. E. 283 (custom to carry passengers in employes' car).

Public ignorance of rule forbidding passengers to ride in cupola of freight car and custom for them to ride there may be shown. Reed v. R. Co., 94 Miss. 639, 47 S. 670.

Conduct of employes in acting on contract may be proved. Leasum *v.* R. Co., 138 Wis. 593, 120 N. W. 510.

905-31 Missouri, etc. R. Co. *v.* Carlisle (Tex. Civ.), 145 S. W. 653.

Penalty for refusing to issue transfer may be recovered though evidence does not remove all reasonable doubt. Kerin *v.* R. Co., 53 Misc. 568, 103 N. Y. S. 769.

905-32 See Birmingham, etc. Co. *v.* Turner, 154 Ala. 542, 45 S. 671; Holt *v.* R. Co., 174 Mo. 524, 74 S. W. 631 (carrier must prove refusal to pay fare).

905-35 Consideration presumed given for ticket issued to third person. Denver, etc. R. Co. *v.* Derry, 47 Colo. 584, 108 P. 172.

906-36 Cent. of Ga. R. *v.* Mathis, 9 Ala. App. 643, 64 S. 197; Coine *v.* R. Co., 123 Ia. 458, 99 N. W. 134 (receipt issued by agent admissible in connection with parol evidence); Nickles *v.* R. Co., 74 S. C. 102, 54 S. E. 255 (that consideration given for pass may be shown by parol); Harris *v.* Ry., 52 Wash. 289, 100 P. 838 (custom to issue passes to other like employes and declaration of defendant's manager pass was part of consideration for services may be shown).

906-37 Pullman Co. *v.* Riley, 5 Ala. App. 561, 59 S. 761; Coine *v.* R. Co., 123 Ia. 458, 99 N. W. 134; Penn. Co. *v.* Loftis, 72 O. St. 288, 74 N. E. 179. *Comp.* Crabtree *v.* R. Co., 101 Me. 485, 64 A. 842; Chicago, etc. R. Co. *v.* Howell (Tex. Civ.), 166 S. W. 81; Missouri, etc. R. Co. *v.* Harrison, 97 Tex. 611, 80 S. W. 1139.

Statement of agent that passenger could make a through trip is admissible since it is the duty of a carrier, through those whom it has authorized to sell tickets over its line, to give its passengers such instructions and information as may be necessary for them to pursue their journey in comfort and safety and with dispatch, and the passenger has the right to rely upon the instructions and information given by such agents, acting within the scope or apparent scope of their authority. Hunter *v.* R. Co., 90 S. C. 507, 73 S. E. 1017.

Ticket signed by purchaser is contract and cannot be varied by parol. Bachman *v.* Co., 152 Fed. 403, 81 C. C. A. 529.

Statements of agent who sold ticket concerning regulations of another company referred to therein may be shown. Leyser *v.* R. Co., 138 Mo. App. 34, 119 S. W. 1068.

906-38 Cent. of Ga. R. Co. *v.* Campbell (Ala.), 64 S. 540. See Chiles *v.* R. Co., 69 S. C. 327, 48 S. E. 252.

906-39 Justis *v.* R. Co., 12 Cal. App. 639, 108 P. 328; Chicago C. R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087 (transfer). *Contra* as to baggage check. Bolles *v.* R. Co., 134 Mo. App. 696, 115 S. W. 459.

See St. Louis, etc. R. Co. *v.* Laurence, 106 Ark. 544, 153 S. W. 799.

Circulars of carrier whose regulations referred to in ticket issued by another carrier admissible to show rights of ticket holder. Leyser *v.* R. Co., 138 Mo. App. 34, 119 S. W. 1068.

Lease competent to show right of employe of lessee to ride on lessor's elevator. Sciolaro *v.* Asch, 129 App. Div 86, 113 N. Y. S. 446.

906-41 Chicago, etc. Co. *v.* O'Brien, 219 Ill. 303, 76 N. E. 341; Citizens' St. R. Co. *v.* Jolly, 161 Ind. 80, 67 N. E. 935; Chaffee *v.* R. Co., 196 Mass. 484, 82 N. E. 497. See Ball *v.* Co., 146 Ala. 309, 39 S. 584 (custom not to charge for infants); Wabash R. Co. *v.* Jellison, 124 Ill. App. 652; O'Donnell *v.* R. Co., 106 Ill. App. 287; Radley *v.* R. Co., 44 Or. 332, 75 P. 212; Lewis *v.* Co., 39 Tex. Civ. 625, 88 S. W. 489.

Circumstantial evidence may show employe was passenger. Enos *v.* R. Co., 28 R. I. 291, 67 A. 5.

Intent to take passage—possession of funds sufficient to pay fare, by decedent killed while waiting at station, admissible. Cent. of Ga. *v.* Bell (Ala.), 65 S. 835.

That passenger was in passenger zone of station, admissible. Cent. of Ga. *v.* Bell (Ala.), 65 S. 835.

907-12 See Brigham *v.* R. Co., 2 Cal. App. 522, 84 P. 306; Kramer *v.* R. Co., 114 App. Div. 804, 100 N. Y. S. 276.

Carrier's bulletins competent to show stock train carried passengers holding certain tickets. Collison *v.* R. Co., 239 Ill. 532, 88 N. E. 251.

Personal notice to plaintiff not to ride on vehicle of carrier as driver's guest may not be shown. Palmer T. Co. *v.* Smith, 137 Ky. 319, 125 S. W. 725.

Carrier sued for failure to provide accommodations may show unexpected extra demand therefor, and sufficiency of ordinary facilities. Chesapeake &

O. R. Co. v. Austin, 137 Ky. 611, 126 S. W. 144.

908-43 Walters v. R. Co., 82 Kan. 739, 109 P. 173; Hart v. R. Co., 80 Kan. 699, 102 P. 1101; Mageau v. R. Co., 102 Minn. 309, 113 N. W. 1016 (death caused by injury); Estes v. R. Co., 110 Mo. App. 725, 85 S. W. 627 (effect of accident on other persons, admissible); McArthur v. R. Co., 73 Misc. 292, 105 N. Y. S. 102 (no report of accident by defendant's employés); Sturges v. Co., 107 N. Y. S. 276.

In action for injuries by being thrown down by violent starting of train, jury may hear all proof as to plaintiff's condition after the injury. L. & N. R. Co. v. Kemp, 149 Ky. 344, 149 S. W. 833.

908-44 Penn. R. Co. v. McCaffrey, 149 Fed. 494, 79 C. C. A. 224; Culberson v. Co., 156 Ala. 116, 47 S. 237; Louisville & N. R. Co. v. Cornelius, 6 Ala. App. 386, 60 S. 740; Bonneau v. R. Co., 152 Cal. 466, 93 P. 106; Cody v. R. Co., 148 Cal. 90, 82 P. 666; Valente v. R. Co., 151 Cal. 534, 91 P. 481; Patterson v. R. Co., 147 Cal. 178, 81 P. 531; Reiss v. R. Co. (Del.), 67 A. 153; Kehan v. R. Co., 28 App. Cas. (D. C.) 108; Le Beau v. R. Co., 19 Ida. 711, 115 P. 502; Visscher v. R. Co., 256 Ill. 572, 100 N. E. 270; Chicago, etc. T. Co. v. Mee, 248 Ill. 9, 77 N. E. 800, 2 L. R. A. (N. S.) 725; Randall v. R. Co., 178 Ill. App. 36; Kock v. R. Co., 156 Ill. App. 402; Whattlesey v. R. Co., 121 Ia. 597, 90 N. W. 516, 97 N. W. 66; Walters v. R. Co., 82 Kan. 739, 109 P. 173; Brown v. R. Co., 81 Kan. 701, 106 P. 1061; White v. R. Co., 150 Ky. 681, 150 S. W. 837; Otte v. Traction Co., 132 La. 1052, 58 S. 879; Marsalis v. R. Co. 129 La. 146, 55 S. 744; Savage v. R. Co., 186 Mass. 253, 71 N. E. 331; Thurston v. R. Co., 187 Mich. 231, 150 N. W. 395; Allman v. R. Co., 187 Mo. App. 72, 187 S. W. 896; Hanke v. R. Co., 141 Mo. App. 612, 123 S. W. 522; Young v. R. Co. (Mo. App.), 84 S. W. 175; Taillon v. Mears, 29 Mont. 161, 74 P. 421; Lincoln T. Co. v. Shepherd, 74 Neb. 369, 107 N. W. 784; Omaha R. Co. v. Beeson, 74 Neb. 704, 105 N. W. 302; Lincoln T. Co. v. Brenkover, 77 Neb. 217, 109 N. W. 185; Same v. Webb, 72 Neb. 136, 102 N. W. 278; Boucher v. R., 76 N. H. 91, 79 A. 993; Peil v. R. Co., 77 N. J. L. 502, 72 A. 382; Dunn v. R. Co., 168 N. Y. 267; Gross v. R. Co., 70 Misc. 360, 99 N. Y. S. 428; Hallahan v. R. Co., 73 App. Div. 164, 76 N. Y. S. 751; Mo. etc. R. Co. v. Kirkpatrick (Tex. Civ.), 165 S. W. 500; Abilene etc. R. Co. v. Burleson (Tex. Civ.), 157 S. W. 1177; International etc. R. Co. v. Duncan, 55 Tex. Civ. 140, 121 S. W. 362; Domenico v. R. Co., 90 Tex. Civ. 60, 90 S. W. 69; Henty v. R. Co. (Tex. Civ.), 91 S. W. 365; Rambie v. R. Co., 45 Tex. Civ. 422, 100 S. W. 1022; Christensen v. R. Co., 35 Utah 137, 99 P. 676; Norfolk R. Co. v. Tomlinson (Va.), 81 S. E. 89; Norfolk & W. R. Co. v. Rhodes, 109 Va. 176, 63 S. E. 445.

Burden of showing duty of carrier to receive him does not rest on plaintiff. Trinity, etc. R. Co. v. Voss (Tex. Civ.), 160 S. W. 663. And see St. Louis, etc. R. Co. v. Laurence, 106 Ark. 544, 153 S. W. 799.

Injury inflicted by fellow passenger. St. Louis S. W. R. Co. v. Bradley, 99 Ark. 346, 138 S. W. 478.

Evidence held sufficient.—St. Louis I. M. & S. R. Co. v. Evans, 99 Ark. 69, 137 S. W. 568; Sorenson v. R. Co., 155 Ill. App. 606; Doll v. Traction Co., 153 Ill. App. 442; Allison v. R. Co., 157 Mo. App. 72, 137 S. W. 896; Kearney v. R. Co., 59 Or. 12, 112 P. 1083, 115 P. 593; Miller v. Transit Co., 231 Pa. 627, 80 A. 1108; Harrell v. R. Co., 89 S. C. 97, 71 S. E. 359; Rainey v. R. Co., 84 Vt. 521, 80 A. 723; Kline v. Ry. Co., 146 Wis. 134, 131 N. W. 427.

Evidence insufficient.—Kruck v. Connecticut Co., 81 Conn. 401, 80 A. 162; Krug v. R. Co., 155 Ill. App. 114; Kingsley v. R. Co., 81 N. J. L. 536, 80 A. 327; Hudson v. R. Co. (Tex. Civ.), 139 S. W. 617; Adams v. Ry. Co. (Tex. Civ.), 137 S. W. 437.

Injury from fall of elevator.—Griffen v. Manice, 174 N. Y. 505, 66 N. E. 1109, 71 App. Div. 371, 77 N. Y. S. 626. But see infra, 913-55.

Plaintiff must show fact on which he bases presumption of negligence. Kefauver v. R. Co., 122 Fed. 966. Injured trespasser must show defendant knew of his peril and thereafter failed to exercise care. Arkansas & L. R. Co. v. Sain, 90 Ark. 278, 119 S. W. 659.

909-45 St. Louis, etc. R. Co. v. Osborne, 93 Ark. 310, 129 S. W. 537; Douthitt v. R. Co., 136 Ga. 351, 71 S. E. 479; Alton L. & T. Co. v. Oller, 119 Ill. App. 181; Springer v. Schultz, 105 Ill. App. 544; Indianapolis, etc. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201; R. Co. v. Warren, 74 Kan. 244, 86 P.

131, 89 P. 656; LeBlanc *v.* Sweet, 107 La. 355, 31 S. 766, 90 Am. St. 303; Cincinnati T. Co. *v.* Holzenkamp, 74 O. St. 379, 78 N. E. 529, 6 L. R. A. (N. S.) 890; Palmer *v.* R. Co., 206 Pa. 574, 56 A. 49, 63 L. R. A. 507; Moore *v.* Tract. Co., 94 S. C. 249, 77 S. E. 928; Abilene etc. R. Co. *v.* Burleson (Tex. Civ.), 157 S. W. 1177. *Comp.* Renders *v.* R. Co., 144 Mich. 387, 108 N. W. 368. *Contra.*—Negligence must be proved, but under some statements of facts it may be inferred. Congdon *v.* R. Co. (Mich.), 146 N. W. 118.

Under a general allegation of negligence the plaintiff was allowed to show that the trolley pole of the car broke, and that a part of it fell upon and crushed through the roof of the car and injured a passenger. Kirkpatrick *v.* R. Co., 161 Mo. App. 515, 143 S. W. 865. And see Donovan *v.* R. Co., 157 Mo. App. 649, 138 S. W. 679.

Injury to shipper accompanying live stock. St. Louis, etc. R. Co. *v.* Loyd, 105 Ark. 340, 150 S. W. 864.

909-16 Birmingham R. etc. Co. *v.* McCurdy, 172 Ala. 488, 55 S. 616; St. Louis, etc. R. Co. *v.* Fambro, 88 Ark. 12, 114 S. W. 230 (statute); Walker *v.* Land Co., 15 Cal. App. 726, 115 P. 766; Atlantic, etc. R. Co. *v.* Crosby, 53 Fla. 400, 43 S. 318 (construing ch. 4071, p. 113, laws of 1891); Freeman *v.* R. Co., 117 Ga. 78, 43 S. E. 410; Reems *v.* R. Co., 126 La. 511, 52 S. 681; Spurlock *v.* Co., 118 La. 1, 42 S. 575 (*comp.* McGinn *v.* R. Co., 118 La. 811, 43 S. 450); United R. etc. Co. *v.* Woodbridge, 97 Md. 629, 55 A. 444; Hurck *v.* R. Co., 252 Mo. 39, 158 S. W. 581; Firebaugh *v.* Co., 40 Wash. 658, 82 P. 995, 2 L. R. A. (N. S.) 836.

See Florida, etc. Co. *v.* Carter (Fla.), 65 S. 254.

Contra.—Burden never shifts. Abilene, etc. R. Co. *v.* Burleson (Tex. Civ.), 157 S. W. 1179.

Failure to make scheduled connections and of conductor to inform passenger of opportunity to do so raises presumption of negligence. Taber *v.* R. Co., 81 S. C. 317, 62 S. E. 311.

By statute.—New Orleans etc. R. Co. *v.* Cole, 101 Miss. 173, 57 S. 556.

To rebut presumption carrier is not bound to satisfactorily account for cause of accident. Norfolk R. Co. *v.* Tomlinson (Va.), 81 S. E. 89.

909-17 Price *v.* R. Co., 75 Ark. 479, 88 S. W. 575, 112 Am. St. 79; Kohner *v.* Co., 22 App. Cas. (D. C.) 181, 62 L. R. A. 875; Chicago T. Co. *v.* Mominsen, 107 Ill. App. 353; Chicago, etc. Co. *v.* Crosby, 109 Ill. App. 644; McGinn *v.* R. Co., 118 La. 811, 43 S. 450; Yazoo, etc. R. Co. *v.* Humphrey, 83 Miss. 721, 36 S. 154; Trotter *v.* R. Co., 122 Mo. App. 405, 99 S. W. 508; Woas *v.* Co., 198 Mo. 664, 96 S. W. 1017, 7 L. R. A. (N. S.) 231; Lincoln T. Co. *v.* Heller, 72 Neb. 127, 100 N. W. 197, 102 N. W. 262; Lincoln T. Co. *v.* Webb, 73 Neb. 136, 102 N. W. 258; Gott *v.* R. Co., 110 App. Div. 18, 96 N. Y. S. 945; Goss *v.* R. Co., 48 Or. 439, 87 P. 149; Spear *v.* R. Co., 3 Pa. C. C. 472, *s. c.* 5 Pa. C. C. 393; Ault *v.* Cowan, 20 Pa. Super. 616 (carrier must be connected with injury); Anderson *v.* R. Co., 77 S. C. 434, 58 S. E. 149; Adams *v.* R. Co. (Tex. Civ.), 137 S. W. 437; Galveston, etc. R. Co. *v.* Crier, 45 Tex. Civ. 434, 100 S. W. 1177 (no presumption where facts show derailment caused by cyclone); Allen *v.* R. Co., 35 Wash. 221, 77 P. 204.

The mere fact of the accident is not sufficient to impose liability. Grand Rapids & Ind. R. Co. *v.* Co., 172 Mich. 270, 137 N. W. 551, *cit.* Le Baron *v.* Joslin, 41 Mich. 313, 2 N. W. 36; Renders *v.* Grand Trunk R. Co., 144 Mich. 387, 108 N. W. 368.

Fact of passenger's death, without showing cause, raises no presumption. Western M. R. Co. *v.* S., 95 Md. 637, 53 A. 969.

910-18 Hopper *v.* R. Co., 155 Fed. 273, 84 C. C. A. 21; Feitl *v.* R. Co., 113 Ill. App. 381; Bruff *v.* R. Co. (Ky.), 121 S. W. 475 (rule does not apply to prospective passenger); Dunlap *v.* R. Co., 145 Mo. App. 215, 129 S. W. 262; Goss *v.* R. Co., 48 Or. 439, 87 P. 149; Shelton *v.* R. Co., 86 S. C. 98, 67 S. E. 899; Sullivan *v.* R. Co., 85 S. C. 532, 67 S. E. 905; Missouri, etc. Ry. Co. *v.* Morgan & Bros. (Tex. Civ.), 146 S. W. 337; Christensen *v.* R. Co., 35 Utah 137, 99 P. 676; Norfolk & W. R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445.

While the burden is always upon the plaintiff to establish his right to recover by the preponderance of the evidence, in cases where the causes of the accident are peculiarly within the knowledge of the defendant, proof of the happening of the accident establishes a prima facie case which calls for rebuttal and explanation on the part of the defendant. The plaintiff

by proving the accident has adduced reasonable evidence, on which the jurors may, if they think fit, find a verdict for him. Wash. Va. R. Co. *v.* Bouknight, 113 Va. 696, 75 S. E. 1032.

911-49 Central R. Co. *v.* Brown, 165 Ala. 493, 51 S. 565; Southern R. Co. *v.* Cunningham, 123 Ga. 90, 50 S. E. 979; Dieckmann *v.* R. Co., 145 Ia. 250, 121 N. W. 676; Fitch *v.* Co., 124 Ia. 665, 100 N. W. 618; Louisville & N. R. Co. *v.* Beard, 28 Ky. L. R. 921, 90 S. W. 944 (passenger thrown from car by persons unknown); Wadsworth *v.* R. Co., 182 Mass. 572, 66 N. E. 421; Rice *v.* R. Co., 153 Mo. App. 35, 131 S. W. 374; Ray *v.* R. Co., 147 Mo. App. 332, 126 S. W. 543; Feil *v.* R. Co., 77 N. J. L. 502, 72 A. 362; Williford *v.* R. Co., 85 S. C. 301, 67 S. E. 302.

911-50 Denver Tramway Co. *v.* Hills, 50 Colo. 328, 116 P. 125; Vischer *v.* R. Co., 256 Ill. 572, 100 N. E. 270; Castelano *v.* R. Co., 149 Ill. App. 250; McFadden *v.* R. Co., 149 Ill. App. 298; Kuttner *v.* R. Co., 80 N. J. L. 11, 77 A. 470, *aff.* 81 N. J. L. 731, 80 A. 1135; Knaisch *v.* Joline, 123 N. Y. S. 412; Nelson *v.* R. Co., 92 S. C. 151, 75 S. E. 408; Paris, etc. R. Co. *v.* Robinson, 53 Tex. Civ. 12, 114 S. W. 658; Norvell *v.* R. Co., 67 W. Va. 467, 68 S. E. 288.

Presumption statutory.—Easley *v.* R. Co., 96 Miss. 396, 50 S. 491.

Assault by alleged officer.—Burden on passenger to show defendant's knowledge that assailant was not acting officially or was wrongfully acting colore officii. Nashville, etc. Co. *v.* Crosby (Ala.), 62 S. 889.

912-51 Hunterson *v.* Co., 205 Pa. 568, 55 A. 543. *Contra,* Miles *v.* R. Co., 90 Ark. 485, 119 S. W. 837. See Choctaw, etc. R. Co. *v.* Hickey, 81 Ark. 579, 99 S. W. 839; File *v.* R. Co., 7 Penne. (Del.) 463, 80 A. 623.

Safe place at stopping point.—The burden of showing negligence in this regard, and that such negligence is the proximate cause of plaintiff's injuries, is upon the plaintiff. Rist *v.* Transit, 236 Pa. 218, 84 A. 687.

912-52 Texas, etc. R. Co. *v.* Gardner, 114 Fed. 186, 52 C. C. A. 142; Dieckmann *v.* R. Co., 145 Ia. 250, 121 N. W. 676; Metropolitan R. Co. *v.* Warren, 74 Kan. 244, 86 P. 656, 86 P. 131; Williford *v.* R. Co., 85 S. C. 301, 67 S. E. 302 (insufficient lights at station and negligent placing of truck).

A start with no warning while many still boarding train.—Pennsylvania R. Co. *v.* Stockton, 184 Fed. 422, 106 C. C. A. 433.

"Plaintiff became a passenger the instant she started to board the car and it became the duty of the operators of the car not to start it until she had been given a reasonable opportunity to reach a place of comparative safety which, in this instance, owing to the crowded condition of the car, meant a place in the rear vestibule where she could stand and support herself by using the handholds. The jury were entitled to draw the inferences that plaintiff was injured by a premature start of the car while she was in an insecure position, and that the negligence in thus starting was the proximate cause of her injury." Conway *v.* R. Co., 161 Mo. App. 81, 142 S. W. 1101.

912-53 Griffin *v.* R. Co., 1 Cal. App. 678, 82 P. 1084; O'Callaghan *v.* Co., 242 Ill. 336, 89 N. E. 1005 (applying rule to scenic railroad in amusement park); Lake Erie & W. R. Co. *v.* Cotton, 45 Ind. App. 580, 91 N. E. 253; Evansville, etc. R. Co. *v.* Mills, 37 Ind. App. 598, 77 N. E. 608; Lancon *v.* R. Co., 127 La. 1, 53 S. 365; Ahern *v.* R. Co. 210 Mass. 506, 97 N. E. 72; Elliott *v.* R. Co., 157 Mo. App. 517, 138 S. W. 663; Redmon *v.* R. Co., 185 Mo. 1, 84 S. W. 26; Todd *v.* R. Co., 126 Mo. App. 684, 105 S. W. 671; Willis *v.* R. Co., 111 Mo. App. 580, 86 S. W. 567; Nocita *v.* R. Co., 89 Neb. 209, 131 N. W. 214; Lomas *v.* R. Co., 111 App. Div. 332, 97 N. Y. S. 658, *aff.* 188 N. Y. 628, 81 N. E. 1169; Tilton *v.* Co., 231 Pa. 63, 79 A. 877; Davis *v.* R. Co., 83 S. C. 66, 64 S. E. 1015; Missouri, etc. R. Co. *v.* Stone (Tex. Civ.), 125 S. W. 587 (injured in car standing in yard); Lewis *v.* R. Co. (Tex. Civ.), 124 S. W. 1006 (riding on freight train).

Comp. Yazoo, etc. R. Co. *v.* Humphrey, 83 Miss. 721, 36 S. 154; Young *v.* R. Co. (Mo. App.), 84 S. W. 175 (jerks on freight train); Hawk *v.* R. Co., 130 Mo. App. 658, 108 S. W. 1119; Bussell *v.* R. Co., 125 Mo. App. 441, 102 S. W. 613; White *v.* R. Co., 215 Pa. 462, 64 A. 676 (question for jury).

Where passenger was riding on platform burden on him to prove necessity therefor Alabama, G. S. R. Co. *v.* Gilbert, 6 Ala. App. 372, 60 S. 542.

Defendant may show the condition of the person thrown against plaintiff so

that the jury could say whether it was due to the condition of the person or the rapid running and lurching of the car. Birmingham R., L. & P. Co. *v.* Hunnicutt, 3 Ala. App. 448, 57 S. 262.

913-54 Fitch *v.* Co., 124 Ia. 665, 100 N. W. 618; Moser *v.* R. Co., 25 Ky. L. R. 154, 74 S. W. 1090; Partelow *v.* R. Co., 196 Mass. 24, 81 N. E. 894; Timms *v.* R. Co., 183 Mass. 193, 66 N. E. 797; St. Louis, etc. R. Co. *v.* Gosnell, 23 Okla. 588, 101 P. 1126; Wile *v.* R. Co., 72 Wash. 82, 129 P. 889. See Conroy *v.* R. Co., 139 Mich. 173, 102 N. W. 641, 104 N. W. 319; Rhea *v.* R. Co., 111 Minn. 271, 126 N. W. 823; Hirsch *v.* R. Co., 48 Misc. 527, 96 N. Y. S. 259; Flynn *v.* Co., 48 Misc. 529, 96 N. Y. S. 259; Johnson *v.* R. Co., 88 N. Y. S. 866.

913-55 Chicago, etc. R. Co. *v.* Pural, 127 Ill. App. 652, 224 Ill. 324, 79 N. E. 686; Wabash R. Co. *v.* Jellison, 124 Ill. App. 652; Morgan *v.* R. Co., 32 Ky. L. R. 330, 105 S. W. 961; Davis *v.* R. Co., 113 Ky. 267, 68 S. W. 140; Western M. R. Co. *v.* S., 95 Md. 637, 53 A. 969; Cooper *v.* Co., 224 Mo. 709, 123 S. W. 848 (unless specific acts of negligence alleged); Ferguson *v.* R. Co., 123 Mo. App. 590, 100 S. W. 537; Evers *v.* Co., 116 Mo. App. 130, 92 S. W. 118; Winter *v.* R. Co., 49 Misc. 131, 96 N. Y. S. 1009; Dougherty *v.* R. Co., 213 Pa. 346, 62 A. 926; Dearden *v.* R. Co., 33 Utah 147, 93 P. 271; Firebaugh *v.* Co., 40 Wash. 658, 82 P. 995, 2 L. R. A. (N. S.). 836.

Fall of elevator.—Hubener *v.* Heide, 73 App. Div. 200, 76 N. Y. S. 758. And see Springer *v.* Schultz, 105 Ill. App. 544; Orcutt *v.* Co., 201 Mo. 424, 99 S. W. 1062; Griffin *v.* Manice, 174 N. Y. 505, 66 N. E. 1109, 74 App. Div. 371, 77 N. Y. S. 626. But see "Negligence," vol. 8, p. 879, note 65, and supplement thereto.

Hand rail giving way. McCarty *v.* R. Co., 105 Mo. App. 596, 80 S. W. 7.

Gate on street car giving way. Aston *v.* Co., 105 Mo. App. 226, 79 S. W. 999.

Electric shock.—D'Arcy *v.* R. Co., 82 App. Div. 263, 81 N. Y. S. 952; Verrone *v.* Co., 27 R. I. 370, 62 A. 512.

No presumption where injury caused by burning out of fuse. R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087, 102 Ill. App. 202.

Bolt in cable slot.—Chicago U. T. Co. *v.* Crosby, 109 Ill. App. 644.

Collision from train breaking in two sections. Feldschneider *v.* R. Co., 122 Wis. 423, 99 N. W. 1034.

Heating of plate over wheel by friction. Powell *v.* R. Co., 88 App. Div. 133, 84 N. Y. S. 337.

Flying up of trap door.—Baum *v.* R. Co., 108 N. Y. S. 265.

Collapse of trap door.—Jorden *v.* R. Co., 122 Mo. App. 330, 99 S. W. 492.

Passenger's heel catching on step. Rattan *v.* R. Co., 120 Mo. App. 270, 96 S. W. 735.

Stepping on electrified plate in street car. McRae *v.* R. Co., 125 Mo. App. 562, 102 S. W. 1032.

914-58 Platform. Leveret *v.* R. Co., 110 La. 399, 34 S. 579.

914-59 Dinnigan *v.* Peterson, 3 Cal. App. 764, 87 P. 218; Minihan *v.* R. Co., 197 Mass. 367, 83 N. E. 871.

915-60 Ryckmon *v.* R. Co., 10 Ont. L. R. (Can.) 419; Shelton *v.* R. Co., 189 Fed. 153; Central R. Co. *v.* Geopp, 153 Ala. 108, 45 S. 65; St. Louis, etc. Co. *v.* Osborne, 95 Ark. 310, 129 S. W. 537; Valente *v.* R. Co., 151 Cal. 534, 91 P. 481; Sambuck *v.* R. Co., 138 Cal. xix, 71 P. 174; Elgin T. Co. *v.* Wilson, 217 Ill. 47, 75 N. E. 436; Penn. Co. *v.* Purvis, 128 Ill. App. 367; Chicago C. R. Co. *v.* Pural, 127 Ill. App. 652; Sedoff *v.* R. Co., 124 Ill. App. 609; Barker *v.* R. Co., 149 Ill. App. 520, *aff.* 243 Ill. 482, 90 N. E. 1057; Szezech *v.* R. Co., 157 Ill. App. 150; Wojczynska *v.* Co., 156 Ill. App. 587; Ind. U. Tr. Co. *v.* Maher, 176 Ind. 289, 95 N. E. 1012; New York, etc. R. Co. *v.* Callahan, 49 Ind. App. 223, 81 N. E. 670; Larkin *v.* R. Co., 118 Ia. 652, 92 N. W. 891; Mitchell *v.* R. Co., 138 Ia. 283, 114 N. W. 622; Southern R. Co. *v.* Brewer, 32 Ky. L. R. 1374, 108 S. W. 936, 32 Ky. L. R. 43, 105 S. W. 160; Chaffee *v.* R. Co., 196 Mass. 484, 82 N. E. 497; Savage *v.* R. Co., 186 Mass. 203, 71 N. E. 531; Kansas City, etc. R. Co. *v.* Nichols (Miss.), 38 S. 371; Partello *v.* R. Co., 240 Mo. 122, 145 S. W. 55; Hunt *v.* R. Co., 126 Mo. App. 79, 103 S. W. 1088; Magrane *v.* R. Co., 183 Mo. 119, 81 S. W. 1158; Haas *v.* R. Co., 111 Mo. App. 706, 90 S. W. 1155; Wilbur *v.* R. Co., 110 Mo. App. 689, 85 S. W. 671; Estes *v.* R. Co., 110 Mo. App. 725, 85 S. W. 627; Goodloe *v.* R. Co., 120 Mo. App. 194, 96 S. W. 482; Hamilton *v.* R. Co., 114 Mo. App. 504, 89 S. W. 893; Dempster *v.* R. Co., 37 Mont. 335, 96 P. 717; Murphy *v.* R. Co., 31 Nev. 120, 101 P. 322; Curtis *v.* R. Co., 151 N. C. 523,

66 S. E. 799; Rowdin v. R. Co., 208 Pa. 623, 57 A. 1125; Palmer v. R. Co., 206 Pa. 574, 56 A. 49, 63 L. R. A. 507; Enos v. R. Co., 28 R. I. 291, 67 A. 5; Simone v. Co., 28 R. I. 186, 66 A. 202, 9 L. R. A. (N. S.) 740; O'Clair v. Co., 27 R. I. 448, 63 A. 238; Sutton v. R. Co., 82 S. C. 345, 64 S. E. 401; Reeves v. R. Co., 21 S. D. 84, 123 N. W. 498; Harris v. Ry., 52 Wash. 289, 100 P. 838; Williams v. R. Co., 39 Wash. 77, 80 P. 1100; Howe v. Ry. Co., 30 Wash. 569, 70 P. 1100, 60 L. R. A. 949; Russell v. R. Co., 47 Wash. 500, 92 P. 288; Jordan v. Co., 47 Wash. 503, 92 P. 284. See infra, "Negligence," 832-67.

The maxim res ipsa loquitur applies.—Stauffer v. R. Co., 243 Mo. 305, 147 S. W. 1032; Meegan v. R. Co., 161 Mo. App. 45, 142 S. W. 1104.

With tree on right-of-way.—Rice v. Ry. Co., 153 Mo. App. 35, 131 S. W. 374.

Collision with car of another line.—Osgood v. Co., 137 Cal. 280, 70 P. 169, 92 Am. St. 171.

Presumption not waived by alleging cause with particularity. Lobb v. R. Co., 48 Wash. 238, 93 P. 420.

915-61 Chicago, etc. R. Co. v. Grimm, 25 Ind. App. 494, 57 N. E. 640; Clark v. R. Co., 24 Pa. Super. 609; International R. Co. v. Thompson, 34 Tex. Civ. 67, 77 S. W. 439.

915-62 St. Louis, etc. R. Co. v. Savage, 163 Ala. 55, 50 S. 113; Arkansas M. R. Co. v. Rambo, 90 Ark. 108, 117 S. W. 784; Sloan v. Co., 89 Ark. 574, 117 S. W. 551 (though shown cause is unaccountable); Chicago, etc. Co. v. Mee, 218 Ill. 9, 75 N. E. 800, 2 L. R. A. (N. S.) 725; Wolf v. Co., 119 Ill. App. 481; Chicago, etc. R. Co. v. Brandon, 77 Kan. 612, 95 P. 573; Thurston v. R. Co., 137 Mich. 231, 100 N. W. 395; Brower v. Service, 74 N. J. L. 193, 64 A. 1052; Munzer v. R. Co., 45 Misc. 568, 91 N. Y. S. 21; Bamberg v. R. Co., 53 Misc. 403, 103 N. Y. S. 297; Fagan v. Co., 27 R. I. 51, 60 A. 672; Freeman v. Davis (Tex. Civ.), 117 S. W. 186.

Comp. North Jersey, etc. R. Co. v. Purdy, 142 Fed. 955, 74 C. C. A. 125; Houghton v. R. Co., 1 Cal. App. 576, 82 P. 972; Jones v. R. Co., 99 Md. 64, 57 A. 620; Hamilton v. R. Co., 114 Mo. App. 504, 89 S. W. 893; Walters v. R. Co., 48 Wash. 233, 93 P. 419. *Contra.* Oliveira v. Co. (R. I.), 72 A. 817.

Presumption of negligence where immediate cause of injuries was plaintiff's jumping for fear of collision. Palmer v. R. Co., 206 Pa. 574, 56 A. 49, 63 L. R. A. 507.

915-63 Whittlesey v. R. Co., 121 Ia. 597, 90 N. W. 516; Western M. C. Co. v. Shivers, 101 Md. 391, 61 A. 618; Egan v. R. Co., 195 Mass. 159, 80 N. E. 696.

916-64 So. Pac. Co. v. Cavin, 144 Fed. 348, 75 C. C. A. 350; Minahan v. R. Co., 138 Fed. 37, 70 C. C. A. 463; Winters v. R. Co., 163 Fed. 106; So. Pac. Co. v. Hogan, 13 Ariz. 34, 108 P. 240; Arkansas C. R. Co. v. Janson, 90 Ark. 494, 119 S. W. 648; Bonneau v. R. Co., 152 Cal. 406, 93 P. 106; McGrew v. R. Co., 142 Ill. App. 210; Hill v. R. Co., 126 Ill. App. 152; Brimmer v. R. Co., 101 Ill. App. 198; Cincinnati, etc. R. Co. v. Bravard, 38 Ind. App. 422, 76 N. E. 899; Indiana, etc. T. Co. v. McKinney, 39 Ind. App. 86, 78 N. E. 203; Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201; Cronk v. R. Co., 123 Ia. 349, 98 N. W. 884; Louisville St. R. Co. v. Brownfield, 29 Ky. L. R. 1097, 96 S. W. 912; Reems v. R. Co., 126 La. 511, 52 S. 681; Brown v. R. Co., 88 Miss. 687, 41 S. 383; O'Gara v. Co., 204 Mo. 724, 103 S. W. 54; Bowlin v. R. Co., 125 Mo. App. 419, 102 S. W. 631; Heyde v. Co., 102 Mo. App. 537, 77 S. W. 127; Hoskins v. R. Co., 39 Mont. 394, 102 P. 988; Omaha St. R. Co. v. Boesen, 74 Neb. 764, 105 N. W. 303; Sherman v. R., 33 Nev. 385, 115 P. 909, *denying* rehearing, 111 P. 416; Swigelsky v. R. Co., 91 N. Y. S. 350; Klinger v. Co., 92 App. Div. 100, 87 N. Y. S. 864; Overcash v. Co., 144 N. C. 572, 57 S. E. 377; St. Louis, etc. R. Co. v. Nichols, 39 Okla. 522, 136 P. 159; Muskogee E. T. Co. v. McIntire, 37 Okla. 684, 133 P. 213; Illinois C. R. Co. v. Porter, 117 Tenn. 13, 94 S. W. 666; So. Pac. Co. v. Blake (Tex. Civ.), 128 S. W. 668; Galveston, etc. R. Co. v. Garcia, 45 Tex. Civ. 229, 100 S. W. 198; Norton v. R. Co. (Tex. Civ.), 108 S. W. 1044; Galveston, etc. R. Co. v. Green (Tex. Civ.), 91 S. W 380; Davis v. R. Co., 42 Tex. Civ. 55, 93 S. W. 222; St. Louis, etc. R. Co. v. Harkey, 39 Tex. Civ. 523, 88 S. W. 506; Parker v. R., 84 Vt. 329, 79 A. 865; Pate v. R. Co., 52 Wash. 166, 100 P. 324.

"**To prove that the accident was unavoidable,** the conductor and the engineer testified that the track and

equipment were apparently in good condition, but they did not know the cause of the wreck. The section foreman testified that the track was in first-class condition, and that he surfaced it a few days before the accident, but made no rail inspection. Such evidence is wholly insufficient to prove an unavoidable accident, or one which human prudence, can neither foresee nor prevent." Brannon *v.* R. Co., 129 La. 916, 57 S. 172.

918-65 *Comp.* Chicago, etc. Co. *v.* Leonard, 126 Ill. App. 189; Cassady *v.* R. Co., 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285; Hamilton *v.* R. Co., 114 Mo. App. 504, 89 S. W. 893; Logan *v.* R. Co., 183 Mo. 582, 82 S. W. 126; D'Arcy *v.* R. Co., 82 App. Div. 263, 81 N. Y. S. 952.

Fall of elevator.—Orcutt *v.* Co., 201 Mo. 424, 99 S. W. 1062. *Comp.* supra, 913-55.

918-66 Chicago City R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087.

Device for registering fares.—Weir *v.* R. Co., 112 App. Div. 109, 98 N. Y. S. 268.

Car window.—Cleveland, etc. R. Co. *v.* Hadley, 170 Ind. 204, 82 N. E. 1025, 16 L. R. A. (N. S.) 527. *Contra*, Strembel *v.* R Co., 110 App. Div. 23, 96 N. Y. S. 903.

Falling trolley pole.—Cincinnati T. Co. *v.* Holzenkamp, 74 O. St. 379, 78 N. E. 529, 6 L. R. A. (N. S.) 800.

918-70 It is presumed Pullman porter exercised control over interior of sleeping car with consent of railroad company. Louisville & N. R. Co. *v.* Church, 155 Ala. 329, 46 S. 457.

918-71 Louisville & N. R. Co. *v.* Church, 155 Ala. 329, 46 S. 457; Huddleston *v.* R. Co., 90 Ark. 378, 119 S. W. 280 (throwing mail sack by postal clerk and speed of train); Georgia R Co. *v.* Adams, 127 Ga. 408, 56 S. E. 409; Hebblethwaite *v.* R. Co., 192 Mass. 295, 78 N. E. 477; Smith *v.* Co., 120 Mo. App. 328, 97 S. W. 218; Allen *v.* R. Co., 35 Wash. 221, 77 P. 204.

Rear fender down. Whilt *v.* Public Service, 74 N. J. L. 141, 64 A. 972.

Sparks and cinders.—St. Louis, etc. R. Co. *v.* Parks (Tex. Civ.), 73 S. W. 439.

Piece of coal from tender. Louisville & N. R. Co. *v.* Reynolds, 24 Ky. L. R. 1402, 71 S. W 516.

Hand of conductor striking passenger in grasping for rail. Kohner *v.* Co., 22 App. Cas. (D. C.) 181, 62 L. R. A. 875.

919-72 See Spear *v.* R. Co., 5 Pa. C. C. 393.

Explosion on street car.—Patterson *v.* R. Co., 147 Cal. 178, 81 P. 531; Brod *v.* Co., 115 Mo. App. 202, 91 S. W. 993; Trotter *v.* R. Co., 122 Mo. App. 405, 99 S. W. 508; German *v.* R. Co., 107 App. Div. 354, 95 N. Y. S. 112.

919-75 No presumption where passenger alighted at street remote from home. Georgia R. Co. *v.* McAllister, 126 Ga. 447, 54 S. E. 957, 7 L. R. A. (N. S.) 1177.

919-76 Joyce *v.* R. Co., 147 Cal. 274, 82 P. 204; Colorado Spr. Co. *v.* Petit, 37 Colo. 326, 86 P. 121; Freeman *v* Tr. Co. (Del.), 80 A. 1001; Coyle *v.* R Co., 7 Penne. (Del.) 454, 80 A. 638; Reiss *v.* R. Co. (Del.), 67 A. 153; Masterson *v.* R. Co., 201 N. Y. 499, 94 N. E. 1086, *rev.* 120 N. Y. S. 1134; Blake *v.* R. Co., 57 W. Va. 300, 50 S. E. 408 *Comp.* Chicago, etc. R. Co. *v.* Winfrey, 67 Neb. 13, 93 N. W. 526; Barnes *v.* R. Co., 42 Misc. 622, 87 N. Y. S. 608.

See Louisville & N. R. Co. *v.* Dyer, 152 Ky. 264, 153 S. W. 194; Ft. Worth, etc R. Co. *v.* Taylor (Tex. Civ.), 153 S. W. 355.

Invitation to alight.—Kearney *v.* R. Co., 158 N. C. 521, 74 S. E. 593 stopping at usual place for passengers to leave train.

Engineer's offer to slacken speed to permit passenger to jump off at round house not admissible without proof of his authority to do so. Clark *v.* R. Co., 164 Cal. 363, 128 P. 1032.

920-77 Kefauver *v.* R. Co., 122 Fed. 966; St. Louis, etc. R. Co. *v.* Briggs, 87 Ark. 581, 113 S. W. 644 (statute); Barringer *v.* R. Co., 73 Ark. 548, 85 S. W. 94, 87 S. W. 814; Kansas City S. R. Co. *v.* Davis, 83 Ark. 217, 103 S. W. 603; Renfro *v.* R. Co., 2 Cal. App. 317, 84 P. 357; Boone *v.* Co., 139 Cal. 490, 73 P. 243; Cody *v.* R. Co., 148 Cal. 99, 82 P. 666; Denver, etc. T. Co. *v.* Rush, 19 Colo. App. 70, 73 P. 664; City & S. R. Co. *v.* Svedborg, 20 App Cas. (D. C.) 543; Kehan *v.* R. Co., 28 App. Cas. (D. C.) 108; Georgia R. Co. *v.* Reeves, 123 Ga. 697, 51 S. E. 610; Pierce *v.* R. Co., 9 Ga. App. 666, 72 S. E. 66; Winona & W. R. Co. *v.* Rousseau, 18 Ind. App. 248, 93 N. E. 1028; Chesapeake, etc. Co. *v.* Borders, 140 Ky. 548, 131 S. W. 388; Ill. Cent. R Co. *v.* Hurt, 142 Ky. 198, 134 S. W. 144; Houghton

r. R. Co., 26 Ky. L. R. 393, 81 S. W. 695; United R. Co. r. Woodbridge, 97 Md. 629, 55 A. 444; Bell r. R. Co., 125 Mo. App. 660, 103 S. W. 144; Lincoln T. Co. r. Shepherd, 74 Neb. 369, 104 N. W. 882, 107 N. W. 764; Paul r. R. Co., 30 Utah 41, 83 P. 563.

920-78 Louisville & N. R. Co. r. Beard, 28 Ky. L. R. 921, 90 S. W. 944; Western M. R. Co. r. S., 95 Md. 637, 53 A. 969; Mitchell r. R. Co., 132 Mo App. 143, 112 S. W. 291; Russell r. R Co., 125 Mo. App. 441, 102 S. W. 613; Erwin r. R. Co., 94 Mo. App. 289, 68 S. W. 88. *Comp.* Chicago, etc. R. Co. r. Mann, 78 Neb. 541, 111 N. W. 379.

Long delay in making connections raises presumption of negligence in favor of passenger thereby put to expense and loss of time. Mulligan r. R. Co., 84 S. C. 171, 65 S. E. 1040; Faber r. R. Co., 84 S. C. 201, 66 S. E. 292.

Evidence to overcome statutory presumption must clearly show how injury occurred and establish facts exonerating company. Easley r. R. Co., 96 Miss. 396, 50 S. 491.

920-79 Davis r. R. Co., 83 S. C. 66, 64 S. E. 1015 (failure to stop at flag station to permit passenger to alight). See Blumenthal r. Co., 129 Ia. 322, 105 N. W. 588.

Condition of cars after accident may be shown. Elgin, etc. R. Co. r. Wilson, 217 Ill. 47, 75 N. E. 436; International, etc. R. Co. r. Duncan (Tex. Civ.), 121 S. W. 362 (illness of another person in another compartment of coach may be shown on issue as to its unsanitary condition and connection therewith of plaintiff's illness).

922-82 As bearing upon rate of speed it may be shown train was behind time. St. Louis, etc. R. Co. r. Savage, 163 Ala. 55, 50 S. 113.

922-84 Lack of required appliances for elevator. Ohio, etc. Co. r. Beuris, 146 Ky. 612, 143 S. W. 16; Chesapeake & O. R. Co. r. Burke, 147 Ky., 694, 145 S. W. 370; Bullock r. Co., 24 R. I. 50, 52 A. 122; Parker r. R., 84 Vt. 329, 79 A. 865.

924-85 Gorman r. R. Co., 194 N. Y. 488, 87 N. E. 682.

924-86 St. Louis, etc. R. Co. r. Thurman (Ark.), 161 S. W. 1054; St. Louis, etc. Co. r. Evans, 99 Ark. 69, 137 S. W. 568; Chicago, etc R. Co. r. Brandon, 77 Kan. 612, 95 P. 573; Ohio & K. R Co. r. Beuris, 146 Ky. 612, 143 S. W. 16; Parker r. R., 84 Vt. 329, 79 A. 865. See Walling r. R. Co., 48 Tex Civ. 35, 106 S. W. 417.

That street car brakes previously held does not rebut presumption of negligence. Dougherty r. R. Co., 213 Pa. 346, 62 A. 926.

924-87 Cronk r. R. Co., 123 Ia. 349, 98 N. W. 884; Logan r. R. Co., 183 Mo. 582, 82 S. W. 126; Potomac, etc. R. Co. r. Chichester, 113 Va. 333, 74 S. E. 162.

924-88 Crowded condition of vehicle inadmissible in action for injury caused in alighting on dangerous platform. Seale r. R. Co., 214 Mass. 59, 100 N. E. 1020.

925-90 Evidence as to grades, curves and cuts in vicinity of collision, admissible as descriptive of situation. Harris r. R. Co., 52 Wash. 289, 100 P. 838.

Evidence of defendant's custom in discharging passengers, immaterial where there is conflict as to who was at fault. McKay r. Co., 51 Wash. 679, 99 P. 1030.

926-91 Texas Tr. Co. r. Hanson (Tex. Civ.), 143 S. W. 214; Bates r. R. Co., 140 Wis. 235, 122 N. W. 745 (safety of baggage room).

Excessive speed while passing switch. Texas, etc. R. Co. r. Clippenger, 47 Tex. Civ. 510, 106 S. W. 155.

Rules of carrier inadmissible either to show negligence or lack of it. Louisville & N. R. Co. r. Dyer, 152 Ky. 264, 153 S. W. 194. But see vol. 10, p. 570; vol. 14, p. 711. Admissible to show whether employes knew passenger carried beyond destination was on train and could have informed him of his destination. Louisville & N. R. Co. r. Seale, 160 Ala. 584, 49 S. 323. Not admissible if they require more of servants than law requires. Chicago, etc. R. Co. r. Lampman, 18 Wyo. 106, 104 P. 533.

927-92 Mitchell r. R. Co., 138 Ia. 283, 114 N. W. 622; Murray r. R. Co., 25 R. I. 209, 55 A. 491; Nickles r. R. Co., 74 S. C. 102, 54 S. E. 255.

It may be shown platform constructed like those in general use. Feil r. R. Co., 77 N. J. L. 502, 72 A. 362.

928-95 Fisher r. R., 75 N. H. 184, 72 A. 212 (platform on two levels; evidence others slipped as plaintiff did, though without injury, admissible in discretion of court). *Comp.* Overcash r. Co., 144 N. C. 572, 57 N. E. 377.

For limitations of this rule see Denver City Tramway Co. *v.* Hills, 50 Colo. 328, 116 P. 125.

Prior assaults.—Indianapolis St. R. Co. *v.* Dawson, 31 Ind. App. 605, 68 N. E. 909.

Alighting of other passengers without injury cannot be shown. Merryman *v.* R. Co., 135 Ia. 591, 113 N. W. 357.

929-96 *Contra*, Louisville & N. R. Co. *v.* Scale, 160 Ala. 584, 49 S. 323 (first time passenger carried beyond station). See Union T. Co. *v.* Sullivan, 38 Ind. App. 513, 76 N. E. 116. *Contra*, Denver City T. Co. *v.* Hills, 50 Colo. 328, 116 P. 125.

Evidence to show a collision of a different nature about the same time as accident complained of held inadmissible. Central of Ga. R. Co. *v.* Teasley (Ala.), 65 S. 981.

930-99 See Woas *v.* Co., 198 Mo. 664, 96 S. W. 1017.

Limited fitness and capacity of carrier may be shown, as may its principal business; evidence of customary care of well constructed and operated roads of same class, admissible on question of negligence. Campbell *v.* R. Co., 107 Minn. 358, 120 N. W. 375.

930-1 Central R. Co. *v.* Carleton, 163 Ala. 62, 51 S. 27; Emerson *v.* R. Co., 46 Mont. 454, 129 P. 319; Owens *v.* R. Co., 152 N. C. 429, 67 S. E. 993 (advice of conductor); Freeman *v.* Puckett, 56 Tex. Civ. 126, 120 S. W. 514 (conditions preventing passenger alighting).

Statements made afterwards inadmissible. Louisville & N. R. Co. *v.* Moore, 150 Ky. 692, 150 S. W. 849.

Acts occurring in another state may be shown in tort action. Taber *v.* R. Co., 81 S. C. 317, 62 S. E. 311.

932-2 Anderson *v.* R. Co., 134 Ky. 343, 120 S. W. 298; Marcum *v.* R. Co., 139 Mo. App. 217, 122 S. W. 1148 (injury inflicted after plaintiff alighted); Bolles *v.* R. Co., 134 Mo. App. 696, 115 S. W. 459 (exhibition of baggage check to conductor as evidence of good faith).

932-3 Louisville, etc. Co. *v.* Cornelius (Ala.), 62 S. 710; Trumbull *v.* Donahue, 18 Colo. App. 460, 72 P. 684; South C., etc. R. Co. *v.* Riegler, 26 Ky L. R. 666, 82 S. W. 382; Redmond *v.* R. Co., 185 Mo. 1, 84 S. W. 26. See Wagoner *v.* R. Co., 118 Mo. App. 239, 94 S. W. 293; Blackman *v.* R. Co., 68 N. J. L. 1, 52 A. 370; Weinstein *v.* R. Co., 52 Misc. 468, 102 N. Y. S. 512; Cain *v.* R. Co., 74 S. C. 89, 54 S. E. 244.

Declaration of agent as to past transaction in action for having to change cars. Louisville & N. R. Co. *v.* Thomason, 6 Ala. App. 365, 60 S. 506.

Conversation between engineer and conductor out of presence of plaintiff not admissible as part of res gestae. Stewart *v.* R. Co., 163 Ill. App. 652.

Acts and statements of agent may be proved in action for delay in transporting passengers. Mulligan *v.* R. Co., 84 S. C. 171, 65 S. E. 1040.

Contra as to self serving declarations in report. Conner *v.* R. Co., 56 Wash. 310, 105 P. 634.

933-4 Alabama City G. & A. R. Co. *v.* Sampley, 169 Ala. 372, 53 S. 142; Atlantic, etc. R. Co. *v.* Crosby, 53 Fla. 400, 43 S. 318. See Birmingham, etc. Co. *v.* Glenn (Ala.), 60 S. 111.

933-5 Opinions of bystanders not admissible. Texas, etc. R. Co. *v.* Marshall, 57 Tex. Civ. 538, 122 S. W. 946.

933-6 Pittsburgh, etc. R. Co. *v.* Haislup, 39 Ind. App. 394, 79 N. E. 1035; Indianapolis St. R. Co. *v.* Schmidt, 163 Ind. 360, 71 N. E. 201; Hutchcis *v.* R. Co., 128 Ia. 279, 103 N. W. 779; St Louis, etc. R. Co. *v.* Coats (Tex. Civ.), 103 S. W. 662; International, etc. R. Co. *v.* Hugen, 45 Tex. Civ. 326, 100 S. W. 1000.

933-8 Testimony as to unusual character of jar or shock, not objectionable as conclusion. St. Louis S. R. Co. *v.* Jackson, 93 Ark. 119, 124 S. W. 241.

934-11 Custom and usage of carrier in respect to leaving station where plaintiff became passenger, relevant on question of negligence in carrying him beyond destination. Louisville & N. R. Co. *v.* Scale, 160 Ala. 584, 49 S. 323.

934-12 Winters *v.* R. Co., 163 Fed. 106; Chicago, etc. T. Co. *v.* Lowenrosen, 125 Ill. App. 194, 222 Ill. 506, 78 N. E. 813; Hutchcis *v.* R. Co., 128 Ia. 279, 103 N. W. 779; Fitch *v.* Co., 124 Ia. 665, 100 N. W. 618; Jameson *v.* R. Co., 193 Mass. 560, 79 N. E. 750; Taillon *v.* Mears, 29 Mont. 161, 74 P. 421. *Comp.* Evansville, etc. R. Co. *v.* Mills, 37 Ind. App. 598, 77 N. E. 608.

Stockman must show he was rightfully riding in car. Lake Shore, etc. R. Co. *v.* Teeters(Ind. App.), 74 N. E. 1014.

935-14 Texas, etc. R. Co. *v.* Gardner, 114 Fed. 186, 52 C. C. A. 142; Miles *v.* R. Co., 90 Ark. 485, 119 S. W. 837;

Boone *v.* Co., 139 Cal. 490, 73 P. 243; MacFeat *v.* R. Co., 5 Penne. (Del.) 52, 62 A. 898; Union T. Co. *v.* Sullivan, supra; Harris *v.* R. Co., 32 Ind. App. 600, 70 N. E. 467; Pennsylvania Co. *v.* Fertig, 34 Ind. App. 459, 70 N. E. 834; Jones *v.* R. Co., 99 Md. 64, 57 A. 620; Cooper *v.* Co., 224 Mo. 709, 123 S. W. 848; Badovinac *v.* R. Co., 39 Mont. 454, 104 P. 543; Houston, etc. R. Co. *v.* Harris (Tex. Civ.), 120 S. W. 500; Selman *v.* R. Co. (Tex. Civ.), 101 S. W. 1030; Gulf, etc. R. Co. *v.* Booth (Tex. Civ.), 97 S. W. 128; Lewis *v.* Co., 39 Tex. Civ. 625, 88 S. W. 489, 112 S. W. 593; St. John *v.* R. Co. (Tex. Civ.), 80 S. W. 235; Bates *v.* R. Co., 140 Wis. 235, 122 N. W. 745.

Knowledge of rules.—Merrill *v.* R. Co., 178 Ill. App. 38.

Evidence insufficient.—Matthews *v.* R. Co., 119 Minn. 49, 137 N. W. 175.

936-15 Badovinac *v.* R. Co., 39 Mont. 454, 104 P. 543; Houston, etc. R. Co. *v.* Harris (Tex. Civ.), 120 S. W. 500.

Burden on plaintiff to show that in spite of contributory negligence carrier could have prevented injury. Richmond, etc. R. Co. *v.* Allen, 101 Va. 200, 43 S. E. 356.

936-16 "Knowledge may be inferred from widely posted notices, from the experience of the passenger in traveling, from the nature of the rule itself as according with the dictates of common prudence, and from other significant circumstances." Renaud *v.* R. Co., 210 Mass. 553, 97 N. E. 98.

936-19 Evidence sufficient.—C. & O. R. Co. *v.* Paris, 111 Va. 41, 68 S. E. 398.

937-20 Indianapolis Southern R. Co. *v.* Emmerson, 52 Ind. App. 403, 98 N. E. 895; Dieckmann *v.* R. Co., 145 Ia. 250, 121 N. W. 676; Norvell *v.* R. Co., 67 W. Va. 467, 68 S. E. 288.

939-21 Winters *v.* R. Co., 163 Fed. 106 (custom of riding on top of car).

939-22 Lexington R. Co. *v.* Herring, 29 Ky. L. R. 794, 96 S. W. 558.

It is not negligence per se for a passenger to attempt to alight from a car in motion unless the car was going so fast that the risk involved was so great that an ordinarily careful and prudent person would not accept it. Haskell *v.* R. Co., 161 Mo. App. 64, 142 S. W. 1091.

Custom of railroad known to passenger to keep place safe while train receiving passengers. Illinois C. R. Co. *v.* Proctor, 31 Ky. L. R. 494, 102 S. W. 826.

Instructions given passengers by conductor concerning conduct may be proved if right to eject for refusal to comply with reasonable regulations exists. Magill *v.* Ry., 84 S. C. 416, 66 S. E. 561.

939-23 Passenger's conduct in bringing about difficulty with employe may be shown as bearing on question of contributory negligence, though it might not have justified conduct of employe. Missouri, etc. R. Co. *v.* Gerren, 57 Tex. Civ. 34, 121 S. W. 905.

940-25 Auld *v.* R. Co., 136 Ga. 266, 71 S. E. 426.

940-27 Condition of place plaintiff alighted may be shown. Freeman *v.* Pucket, 56 Tex. Civ. 126, 120 S. W. 514.

940-28 See St. Louis S. R. Co. *v.* Anderson (Tex. Civ.), 125 S. W. 628, and *comp.* Bromley *v.* R. Co., 193 Mass. 453, 79 N. E. 775.

Forgetfulness of defect in walk may be shown, though not necessarily fatal. Chase *v.* R. Co., 134 Mo. App. 655, 114 S. W. 1141.

941-30 Ferguson *v.* R. Co., 144 Mo. App. 262, 128 S. W. 799; Berg *v.* R. Co., 146 Wis. 419, 131 N. W. 902.

Presumed trainmen acted within authority. Southern P. Co. *v.* Svendsen, 13 Ariz. 111, 108 P. 262; Golden *v.* R. Co., 39 Mont. 435, 104 P. 549.

941-31 Burden on plaintiff to show children of his, compelled to ride in coach set apart for colored people, were white. It is competent to show parentage of the children, reputation as to race of which they were members, their social standing and privileges exercised. Lee *v.* R. Co., 125 La. 236, 51 S. 182.

General habit or usual disposition of conductor, immaterial. Anderson *v.* R. Co., 134 Ky. 343, 120 S. W. 298.

Evidence of custom of brakemen to put persons off trains and defendant's knowledge thereof may establish authority so to do notwithstanding carrier's rules. Marcum *v.* R. Co., 139 Mo. App. 217, 122 S. W. 1148.

Passenger must show unreasonableness of time limit in ticket. Brian *v.* R. Co., 40 Mont. 109, 105 P. 489.

Conductor's duty may be testified to by him. Bradford *v.* R. Co., 93 Ark. 244, 124 S. W. 516.

Steamship company which ejects pas-

senger because of his diseased condition must prove its justification, and cannot rely on report of its physician. Mountford *v.* Co., 202 Mass. 345, 88 N. E. 782.

941-32 Church *v.* R. Co., 116 N. Y. S. 560 (diligence in calling for baggage); Houston, etc. R. Co. *v.* Anderson (Tex. Civ.), 147 S. W. 353.

Production of check with evidence of non-delivery, sufficient. Zeigler *v.* R. Co., 87 Miss. 367, 39 S. 811.

Plaintiff must prove delivery to carrier. Lustig *v.* Co., 38 Misc. 802, 78 N. Y. S. 885.

Assent from signing ticket limiting liability for loss of baggage. Rose *v.* R. Co., 35 Mont. 70, 88 P. 767.

Delivery established prima facie by production of check. Graham & M. Co. *v.* Young, 117 Ill. App. 257; Fasy *v.* Co., 77 App. Div. 469, 79 N. Y. S. 1103, 177 N. Y. 591, 70 N. E. 1098.

Baggage on street car. Sperry *v.* R. Co., 79 Conn. 565, 65 A. 962.

Judicial notice.—Drummer's sample trunks treated as personal baggage. Fleischman *v.* R. Co., 76 S. C. 237, 56 S. E. 974.

Warehouseman.—Evidence showing lack of reasonable opportunity to get baggage admissible to disprove relation of warehouseman. Wallace *v.* R. Co., 176 Mich. 128, 142 N. W. 558.

Evidence as to contents of trunk cannot be excluded on theory that the articles are not baggage. Question as to the character of the items as baggage cannot be raised by objection to evidence. "Plaintiff was entiled to prove the contents of the trunk and to connect the evidence as to such contents with evidence tending to show the purpose of the trip, the prevailing custom, and the other facts mentioned in the rule quoted with approval in the former majority opinion in this case." House *v.* R. Co., 32 S. D. 209, 142 N. W. 736.

942-33 Central R. Co. *v.* Jones, 150 Ala. 379, 43 S. 575, 9 L. R. A. (N. S.) 1240; Hubbard *v.* R. Co., 112 Mo. App. 459, 87 S. W. 52; Hasbrouck *v.* R. Co., 137 App. Div. 532, 122 N. Y. S. 123; Saleeby *v.* R. Co., 99 App. Div. 163, 90 N. Y. S. 1042; Heiden *v.* R. Co., 84 S. C. 117, 65 S. E. 987; McCoy *v.* R. Co., 84 S. C. 62, 65 S. E. 939; Fleischman *v.* R. Co., 76 S. C. 237, 56 S. E. 974.

See Southern R. Co. *v.* Edmundson, 123 Ga. 474, 51 S. E. 388; Campbell *v.* R. Co., 78 Neb. 479, 111 N. W. 126.

Baggage check is prima facie evidence of delivery of baggage. Lewis *v.* Co., 12 Ga. App. 191, 76 S. E. 1073.

Presumption of negligence from derailment. Thomas *v.* R. Co., 131 N. C. 590, 42 S. E. 964.

942-36 See Fasy *v.* Co., supra; Galveston, etc. R. Co. *v.* Schafermeyer, 31 Tex. Civ. 586, 72 S. W. 1037.

Baggage check issued by carrier is prima facie evidence of receipt of baggage. Park *v.* R. Co., 78 S. C. 302, 58 S. E. 931; Cone *v.* R. Co., 85 S. C. 524, 67 S. E. 779.

943-37 No presumption against connecting carrier where baggage shipped by another line as a distinct transaction and its condition when delivered is not shown. Sheble *v.* R. Co., 51 Wash. 359, 98 P. 745.

943-38 Advertisement signed by defendant's general passenger agent competent to show its servant was in charge of baggage car attached to excursion train. Burnes *v.* R. Co., 144 Mo. App. 71, 128 S. W. 236.

Custom of plaintiff to leave baggage in station unusual length of time and defendant's acquiescence therein may be proved. McCoy *v.* R. Co., 84 S. C. 62, 65 S. E. 939.

943-39 Chicago, etc. R. Co. *v.* Whitten, 90 Ark. 462, 119 S. W. 835 (loss of baggage); Norris *v.* R. Co., 84 S. C. 15, 65 S. E. 956 (fright caused by conduct of fellow passengers). *Contra*, if ticket converted after public altercation with holder. Harris *v.* R. Co., 77 N. J. L. 278, 72 A. 50. See International, etc. R. Co. *v.* Sammon, 35 Tex. Civ. 96, 79 S. W. 854.

Mental suffering may be shown to have been caused by unwarranted expulsion. McGhee *v.* Cashin (Ala.), 40 S. 63; Georgia S. & F. R. Co. *v.* Ransom, 5 Ga. App. 740, 63 S. E. 525.

Evidence as to damages for wrongful expulsion. Coine *v.* R. Co., 123 Ia. 458, 99 N. W. 134.

Mental suffering presumed from physical pain. International, etc. R. Co. *v.* Johnson, 43 Tex. Civ. 147, 95 S. W. 595; Galveston, etc. R. Co. *v.* Garcia, 45 Tex. Civ. 229, 100 S. W. 198.

Evidence concerning mental suffering must not go beyond natural and proximate consequences of injury. St. Louis, etc. R. Co. *v.* Buckner, 89 Ark. 58, 115 S. W. 923. Evidence of nervous break-

down if direct result of defendant's negligence, competent. Taber v. R. Co., 81 S. C. 317, 62 S. E. 311. Baseless apprehensions cannot be testified to. Missouri, etc. R. Co. v. Linton (Tex. Civ.), 126 S. W. 678. Distress of others than plaintiff, irrelevant in action for delay in transporting corpse. Missouri, etc. R. Co. v. Vandiver, 57 Tex. Civ. 470, 122 S. W. 977.

As to method of proving damage see "Damages"; "Injuries to Person."

Where insulting language is used by an employe toward passenger, the tone of voice used may be shown. Alabama G. S. R. Co. v. Pouncey, 7 Ala. App. 548, 61 S. 601.

That passenger did not pursue journey after an assault by defendant's servant, admissible. So. R. Co. v. Haynes (Ala.), 65 S. 339.

943-10 St. Louis, etc. R. Co. v. Foster, 46 Tex. Civ. 517, 103 S. W. 194. *Comp.* Caher v. R. Co., 75 N. H. 125, 71 A. 225. See Louisville, etc. Co. v. Gaddis, 31 Ky. L. R. 502, 102 S. W. 817; Tennessee, etc. R. Co. v. Brasher, 29 Ky. L. R. 1277, 97 S. W. 349; Chesapeake, etc. R. Co. v. Lynch, 28 Ky. L. R. 467, 89 S. W. 517.

That passenger was incumbered may be shown. Louisville & N. R. Co. v. Grimes (Ala.), 63 S. 554.

State of.—Louisville & N. R. Co. v. Grimes (Ala.), 63 S. 554.

Ejected passenger may show she was left a long distance from friends. Louisville & R. Co. v. Seale, 172 Ala. 480, 55 S. 237; Mountford v. Co., 202 Mass. 345, 88 N. E. 782. It may be shown what became of passenger immediately after reaching place of safety. Louisville & N. R. Co. v. Seale, 166 Ala. 584, 49 S. 323.

943-11 See Little Rock R. Co. v. Dobbins, 78 Ark. 575, 95 S. W. 788; Summerfield v. Co., 108 Mo. App. 718, 84 S. W. 172.

In action for assault by employe subsequent acts of same employe inadmissible. Butler v. Co., 13 Ga. App. 381, 79 S. E. 216.

Ill feeling between passenger and employe, inadmissible. Southern R. Co. v. Haynes (Ala.), 65 S. 339.

943-12 Southern R. Co. v. Hawkins, 28 Ky. L. R. 704, 89 S. W. 278.

943-13 Conductor's unnatural conduct in refusing to stop train for passenger to alight may sustain punitive damages. Owens v. R. Co., 152 N. C. 439, 67 S. E. 993.

Where delay occurred in delivering baggage, plaintiff may show all facts tending to disclose extent of his deprivation. James v. Co., 76 N. J. L. 582, 70 A. 131.

943-14 See Houston, etc. R. Co. v. Batchler, 37 Tex. Civ. 116, 83 S. W. 902.

CAUSE

Direct testimony, 951 20; *Efficiency of conditions*, 953 33; *Habits and character*, 957 45.

946-5 Wabash S. D. Co. v. Black, 126 Fed. 721, 61 C. C. A. 639; Green v. Shoemaker, 111 Md. 69, 73 A. 688; Furbush v. Co., 131 Mich. 234, 91 N. W. 135; McCahill v. Co., 135 App. Div. 322, 120 N. Y. S. 1; Bower v. Holbrook, 125 App. Div. 684, 110 N. Y. S. 164; Gulf C. R. Co. v. Boyce, 39 Tex. Civ. 195, 87 S. W. 395.

947-6 See "Insurance," infra, 552-41 et seq.

947-7 Knights T. Co. v. Crayton, 110 Ill. App. 618; Tackman v. Brotherhood, 132 Ia. 64, 106 N. W. 350 (presumption evidence); American B. Assn. v. Stough, 26 Ky. L. R. 1093, 83 S. W. 126; Aetna L. Ins. Co. v. Milward, 26 Ky. L. R. 789, 82 S. W. 364, 68 L. R. A. 285; Clemens v. R. N. of A., 14 N. D. 116, 103 N. W. 402; Stevens v. Co., 12 N. D. 463, 97 N. W. 862; Travelers Ins. Co. v. Rosch, 23 O. C. C. 491; Sovereign Camp v. Bochme, 44 Tex. Civ. 159, 97 S. W. 847. See "Insurance," infra, 552-41.

947-9 Rumbold v. Council, 103 Ill. App. 596; Hardinger v. Brotherhood, 72 Neb. 860, 101 N. W. 983, 103 N. W. 74.

947-10 O'Donnell v. R. Co., 205 Mass. 200, 90 N. E. 977; Waters P. O. Co. v. Deselms, 18 Okla. 107, 89 P. 212. See Bower v. Holbrook, 125 App. Div. 684, 110 N. Y. S. 164.

948-13 Burden on party seeking recovery to show cause. Beardsley v. Co., 176 Fed. 619.

948-14 Stollery v. R. Co., 243 Ill. 290, 90 N. E. 709; Knights T. Co. v. Crayton, 110 Ill. App. 648; National W. Co. v. Smith, 108 Ill. App. 477; Variety Mfg. Co. v. Landaker, 129 Ill. App. 630. *Contra*, Quatham v. Woodmen, 148 Mo. App. 33, 127 S. W. 651;

Sullivan *v.* Co., 51 Wash. 71, 97 P. 1109. *Comp.* Chambers *v.* Woodmen, 18 S. D. 173, 99 N. W. 1107.

949-16 National Council *v.* O'Brien, 112 Ill. App. 40 (death certificate from public records competent); Krapp *v.* Ins. Co., 143 Mich. 369, 106 N. W. 1107; Ohmeyer *v.* Circle, 91 Mo. App. 189 (certificate of death admissible); McKinstry *v.* Collins, 76 Vt. 221, 56 A. 985, *rev. s. c.* 74 Vt. 147, 52 A. 438 (public records incompetent). See Hoffman *v.* Ins. Co., 135 App. Div. 739, 119 N. Y. S. 978.

950-18 Robinson *v.* Omaha, 84 Neb. 642, 121 N. W. 969.

Subsequent changes in condition may be shown. Southern R. Co. *v.* Lewis, 165 Ala. 555, 51 S. 746.

950-19 Effect of change in condition of appliance which caused injury relevant. Dow *v.* Co., 157 Cal. 182, 106 P. 587.

951-20 See Spurlock *v.* Co., 118 La. 1, 42 S. 575.

Direct testimony.—Prosecutrix in action for seduction may testify she yielded to defendant because of promises (S. *v.* Bennett (Ia.), 110 N. W. 150), or his hypnotic suggestions. S. *v.* Donovan, 128 Ia. 44, 102 N. W. 791.

Witness may testify why he left place he was being treated. Brunswick, etc. R. Co. *v.* Hoodenpyle, 129 Ga. 174, 58 S. E. 705.

951-21 W. U. T. Co. *v.* Peagler, 163 Ala. 38, 50 S. 913; Southern R. Co. *v.* Taylor, 148 Ala. 52, 42 S. 625; Kight *v.* R. Co., 21 App. Cas. (D. C.) 494; Louisville & N. R. Co. *v.* Willis, 58 Fla. 307, 51 S. 134 (if witness stated he had no knowledge); Gerhard *v.* Co., 155 Mich. 618, 119 N. W. 904; Kendrick *v.* Furman, 80 Neb. 797, 115 N. W. 541 (water backing above dam); Fredericks *v.* R. Co., 225 Pa. 23, 73 A. 965; Wykoff *v.* Kerr, 24 S. D. 241, 123 N. W. 733 (purchase); Nichols *v.* R. Co., 25 Utah 249, 70 P. 996; Lounsbury *v.* Davis, 124 Wis. 432, 102 N. W. 941. *Contra*, Brinsfield *v.* Howeth, 110 Md. 520, 73 A. 289.

951-22 Bellamy *v.* S., 56 Fla. 43, 47 S. 868; Madisonville, etc. R. Co. *v.* Renfro (Ky.), 127 S. W. 508; Merritt *v.* Co., 215 Mo. 299, 115 S. W. 19 (depression of earth); Owen *v.* R. Co., 109 Mo. App. 608, 83 S. W. 92; Pullman Co. *v.* Hoyle, 52 Tex. Civ. 534, 115 S. W. 315; Hunter *v.* S., 54 Tex. Cr. 224, 114 S. W. 124; Texas & P. R. Co. *v.* Warner, 42 Tex. Civ. 280, 93 S. W. 489; Taylor *v.* R. Co., 36 Tex. Civ. 658, 83 S. W. 738; Walker *v.* Strosnider, 67 W. Va. 39, 67 S. E. 1087; Kunst *v.* Grafton, 67 W. Va. 20, 67 S. E. 74.

Result of common observation, admissible. McCabe *v.* Co., 39 Tex. Civ. 614 88 S. W. 387.

Fright of horses.—Foster *v.* Co., 141 Mich. 316, 104 N. W. 617; McCullough *v.* R. Co., 101 Mich. 234, 59 N. W. 618. Eye witness may testify loose wire caused horses to run away. Dublin, etc. Co. *v.* Frazier, 46 Tex. Civ. 288, 103 S. W. 197.

Non-experts may testify as to their knowledge of any other than alleged cause for person's physical condition. Missouri, etc. R. Co. *v.* Davis, 53 Tex. Civ. 547, 116 S. W. 423.

952-23 Arkansas S. R. Co. *v.* Wingfield, 94 Ark. 75, 126 S. W. 76; Perkins *v.* Co., 155 Cal. 712, 103 P. 190; McCabe *v.* Swift, 143 Ill. App. 404; Potvin *v.* Co., 156 Mich. 201, 120 N. W. 613; Crozier *v.* R. Co., 106 Minn. 77, 118 N. W. 256; White *v.* Ins. Co., 97 Mo. App. 590, 71 S. W. 707; S. *v.* Keeland, 39 Mont. 506, 104 P. 513; Gugler *v.* R. Co., 86 Neb. 586, 125 N. W. 1098; Hilmer *v.* Assn., 86 Neb. 285, 125 N. W. 535; Resnick *v.* Joline, 113 N. Y. S. 918; Multnomah Co. *v.* Co., 49 Or. 204, 89 P. 389; S. *v.* Kammel, 23 S. D. 465, 122 N. W. 420; Missouri, etc. R. Co. *v.* Howell (Tex. Civ.), 126 S. W. 899; Kortendiek *v.* Waterford, 142 Wis. 413, 125 N. W. 945.

Veterinary surgeon.—Welch *v.* Fransioli, 46 Wash. 530, 90 P. 644.

Cattle dealer.—St. Louis, etc. R. Co. *v.* White, 97 Tex. 493, 80 S. W. 77, *rev.* 76 S. W. 947.

Cattle expert.—Kennon *v.* S., 46 Tex. Cr. 359, 82 S. W. 518.

Building experts.—Pfeiman *v.* Co., 133 Mich. 212, 94 N. W. 757.

952-24 P. *v.* Hancock, 10 Cal. App. 450, 102 P. 543; P. G. Co. *v.* Porter, 192 Ill. App. 461; Fitzgerald *v.* Chicago, 144 Ill. App. 462 (*comp.* Fuhry *v.* R. Co., 144 Ill. App. 521); Dunn *v.* R. Co. 130 Ia. 580, 107 N. W. 616; Augusta O. Co. *v.* Co., 80 Kan. 261, 101 P. 1072; Balt. R. R. Co. *v.* Settler, 100 Md. 306, 59 A. 654; Tighe *v.* R. Co. (Mo. App.), 107 S. W. 1024 (cause of explosion); Power *v.* Turner, 37 Mont. 521, 97 P. 970; Schutz *v.* R. Co., 181 N. Y. 33, 73 N. E. 491; O'Doherty *v.* Co., 113 App. Div. 636, 99 N. Y. S. 351; Meehan *v.*

R. Co., 13 N. D. 432, 101 N. W. 183; Riser *v.* R. Co., 67 S. C. 419, 46 S. E. 47; Nickles *v.* R. Co., 74 S. C. 102, 54 S. E. 255.

Whether injuries such as would be produced by certain cause, improper question. MacFeat *v.* R. Co., 5 Penne. (Del.) 72, 62 A. 898.

952-25 Stewart *v.* R. Co., 136 Ky. 717, 125 S. W. 154; Gurley *v.* R. Co. (Tex. Civ.), 124 S. W. 502; Texas, etc. R. Co. *v.* Cochrane, 29 Tex. Civ. 383, 69 S. W. 984. *Comp.* Akin *v.* Co., 88 Minn. 119, 92 N. W. 537.

952-26 Castner Co. *v.* Davies, 154 Fed. 938, 83 C. C. A. 510; Erickson *v.* Co., 193 Mass. 119, 78 N. E. 761 (bursting of steam main).

952-27 McClaren *v.* Co., 166 Fed. 714, 92 C. C. A. 386; Frederick Mfg. Co. *v.* Devlin, 127 Fed. 71, 62 C. C. A. 53; Cochrell *v.* Co., 5 Ga. App. 317, 63 S. E. 244; Monarch T. Wks. *v.* Northern (Ky.), 124 S. W. 350.

952-28 Donk C. Co. *v.* Stroff, 200 Ill. 483, 66 N. E. 29.

952-29 Railway expert. Southern Kan. etc. Co. *v.* Sage, 43 Tex. Civ. 38, 94 S. W. 1074.

953-32 Smith *v.* S., 165 Ala. 50, 51 S. 610; Burkett *v.* S., 154 Ala. 19, 45 S. 682 (whether wound received caused death); Copeland *v.* S., 58 Fla. 26, 50 S. 621; P. *v.* Hagenow, 236 Ill. 514, 86 N. E. 379; Chalwick *v.* Ins. Co., 143 Mich. 481, 106 N. W. 1122; Mageau *v.* R. Co., 106 Minn. 375, 119 N. W. 200; Hartzler *v.* R. Co., 140 Mo. App. 667, 126 S. W. 760; Ward *v.* Ins. Co., 82 Neb. 499, 118 N. W. 70; Bower *v.* Holbrook, 125 App. Div. 684, 110 N. Y. S. 164; Flaherty *v.* Co., 20 Pa. Super. 446; Stegner *v.* Brotherhood, 24 S. D. 371, 123 N. W. 842; Endowment Rank *v.* Steele, 108 Tenn. 624, 69 S. W. 326; Ozark *v.* S., 51 Tex. Cr. 106, 100 S. W. 927.

953-33 Marbury *v.* R. Co., 176 Fed. 9, 99 C. C. A. 483 (testimony need not be positive in terms); Birmingham R. Co. *v.* Enslen, 144 Ala. 243, 39 S. 74; Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 So. 844; Jacksonville E. Co. *v.* Gabbage, 58 Fla. 287, 51 S. 189; Towaliga F. P. Co. *v.* Sims, 6 Ga. App. 749, 65 S. E. 844; Lauth *v.* Co., 241 Ill. 244, 91 N. E. 431; Shaughnessy *v.* Holt, 236 Ill. 485, 86 N. E. 256; Chicago R. Co. *v.* Foster, 128 Ill. App. 571, 226 Ill. 288, 80 N. E. 762 (dismissed); Travelers Ins. Co. *v.* Bingham, 32 Ky. L. R. 233, 105 S. W. 894; United R. & E. Co. *v.* Corbin, 109 Md. 442, 72 A. 606; Hull *v.* R., 158 Mich. 682, 123 N. W. 571; Lockard *v.* Van Alstyne, 155 Mich. 567, 120 N. W. 1; Franklin *v.* R. Co., 188 Mo. 533, 87 S. W. 930; Wood *v.* R. Co., 181 Mo. 433, 81 S. W. 152; Belmon *v.* R. Co., 185 Mo. 1, 84 S. W. 26; Murphy *v.* R. Co., 31 Nev. 120, 101 P. 322; S. *v.* White, 48 Or. 416, 87 P. 137; Mayor *v.* Klasing, 111 Tenn. 154, 76 S. W. 814; St. Louis S. R. Co. *v.* Taylor (Tex. Civ.), 123 S. W. 714; Hoyt *v.* Co., 52 Wash. 672, 101 P. 367; Barker *v.* R. Co., 51 W. Va. 123, 41 S. E. 148; Bucher *v.* R. Co., 139 Wis. 597, 120 N. W. 518.

Comp. Glasgow *v.* R. Co., 191 Mo. 347, 89 S. W. 917; Taylor *v.* R. Co., 185 Mo. 239, 84 S. W. 873; Newton *v.* R. Co., 106 App. Div. 415, 94 N. Y. S. 825.

Answer must not be speculative.—Huba *v.* R. Co., 85 App. Div. 199, 83 N. Y. S. 157; Higgins *v.* Co., 96 App. Div. 69, 89 N. Y. S. 76; Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311.

It is competent to show efficiency of agency to produce result in corroboration of other evidence result was so produced. Werner *v.* R. Co., 105 Wis. 300, 81 N. W. 416; Bucher *v.* R. Co., 139 Wis. 597, 120 N. W. 518. But such evidence is very remote, and has been held inadmissible. Briggs *v.* R. Co., 177 N. Y. 59, 69 N. E. 223, 101 Am. St. 718; Galveston R. Co. *v.* Powers, 101 Tex. 161, 105 S. W. 491.

953-34 St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 113; Clemons *v.* S., 48 Fla. 9, 37 S. 647 (whether wound could have been caused by blow from fist); Chicago *v.* Bork, 128 Ill. App. 357, 227 Ill. 60, 81 N. E. 27; Chicago *v.* Didier, 227 Ill. 571, 81 N. E. 698; Chicago, etc. Co. *v.* Roberts, 229 Ill. 481, 82 N. E. 401; Shaughnessy *v.* Holt, 236 Ill. 485, 86 N. E. 256; Chicago *v.* Saldman, 129 Ill. App. 282, 225 Ill. 625, 80 N. E. 349; Chicago, etc. R. Co. *v.* Foster, 128 Ill. App. 571, 226 Ill. 288, 80 N. E. 762; West Chicago S. R. Co. *v.* Dougherty, 209 Ill. 241, 70 N. E. 586; Logan *v.* Saw, 176 Mich. 537, 121 N. W. 485; Borkin *v.* Detroit, 141 Mich. 277, 104 N. W. 626; Ahern *v.* R. Co., 102 Minn. 425, 113 N. W. 1019; Decker *v.* R. Co., 102 Minn. 99, 112 N. W. 901; Smith *v.* Kansas City, 125 Mo. App. 150, 101 S. W. 1118; So. Omaha *v.* Sutliffe, 72 Neb. 740, 101 N. W. 997; Graham *v.* Badland Co., 97 App. Div.

141, 89 N. Y. S. 595; Wagner *v.* R. Co., 79 App. Div. 591, 80 N. Y. S. 191, 176 N. Y. 610, 68 N. E. 1125; Jones *v.* Co., 137 N. C. 337, 49 S. E. 355; Hickey *v.* R. Co. (Tex. Civ.), 95 S. W. 763; Lewis *v.* Crane, 78 Vt. 216, 62 A. 60; Hocking *v.* Spring Co., 131 Wis. 532, 111 N. W. 685; Schultz *v.* R. Co., 133 Wis. 420, 113 N. W. 658; Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051 (abnormal carriage).

Comp. Chicago *v.* France, 124 Ill. App. 648; Illinois C. R. Co. *v.* Smith, 111 Ill. App. 177, rev. 208 Ill. 608, 70 N. E. 628 (opinion by physicians injury was caused in certain way invasion of province of jury; Lutz *v.* R. Co., 123 Mo. App. 499, 100 S. W. 46; Riser *v.* R. Co., 67 S. C. 419, 46 S. E. 47.

953-35 Fuhry *v.* R. Co., 239 Ill. 548, 88 N. E. 221 (nervous conditions); DeCourcy *v.* Co., 140 Mo. App. 169, 120 S. W. 632.

954-36 *Contra* as to declarations not of res gestate. Western S. C. & F. Co. *v.* Bean, 163 Ala. 255, 50 S. 1012.

954-37 Southern R. Co. *v.* Lewis, 165 Ala. 555, 51 S. 746; In re Snowball's Est., 157 Cal. 301, 107 P. 598; Du Bois *v.* Luthmer (Ia.), 126 N. W. 147; Fidelity & C. Co. *v.* Cooper, 137 Ky. 544, 126 S. W. 111; Redmon *v.* R. Co., 185 Mo. 1, 84 S. W. 26; Ward *v.* Ins. Co., 82 Neb. 499, 118 N. W. 70; File *v.* Lancaster, 17 Pa. Dist. 144; Walters *v.* R. Co., 58 Wash. 293, 108 P. 593. *Contra* as to declarations of bystanders. Louisville R. Co. *v.* Johnson, 131 Ky. 277, 115 S. W. 207. See Missouri P. R. Co. *v.* Castle, 172 Fed. 841, 97 C. C. A. 124.

954-38 Wabash S. D. Co. *v.* Black, 126 Fed. 721, 61 C. C. A. 639; Northern Ala. R. Co. *v.* Counts, 166 Ala. 550, 51 S. 938 (prior condition); Barnett *v.* S., 165 Ala. 59, 51 S. 299; St. Louis, etc. R. Co. *v.* Hook, 83 Ark. 584, 104 S. W. 217; Bellamy *v.* S., 56 Fla. 43, 47 S. 868; Watkiss *v.* Chicago, 146 Ill. App. 562; Modern Woodmen *v.* Craiger (Ind. App.), 90 N. E. 84; Brown *v.* Co. (Ia.), 120 N. W. 732; Kansas City, etc. R. Co. *v.* Blaker, 68 Kan. 244, 75 P. 71, 64 L. R. A. 81; Metropolitan Ins. Co. *v.* Maddox (Ky.), 127 S. W. 503; Continental C. Co. *v.* Hunt, 28 Ky. L. R. 1006, 90 S. W. 1056; Glasgow *v.* R. Co., 191 Mo. 347, 89 S. W. 915 (habits of intoxication inadmissible where not shown to have any connection with diseased conditions alleged to be due to injury); Horst *v.* Lewis (Neb.), 103 N. W. 460 (no decrease in earnings may be shown to be due to fact boys stayed out of school to work); Clemens *v.* R. N. of A., 14 N. D. 116, 103 N. W. 402; Waters-P. O. Co. *v.* Deselms, 18 Okla. 107, 89 P. 212; Galveston, etc. R. Co. *v.* Jones (Tex. Civ.), 123 S. W. 737; Gulf R. Co. *v.* Harbison (Tex. Civ.), 88 S. W. 452; Missouri, K. & T. R. Co. *v.* Lynch, 40 Tex. Civ. 543, 90 S. W. 511; Fleming *v.* Pullen (Tex. Civ.), 97 S. W. 109; Mahoney *v.* R. Co., 75 Vt. 244, 62 A. 722.

See Standard Mills *v.* Cheatham, 125 Ga. 649, 54 S. E. 650; "Homicide," infra, 687-43; "Nuisance," infra, 15-20; "Railroads," infra, 541-32.

Careful habits of deceased.—Chicago & A. R. Co. *v.* Wilson, 128 Ill. App. 88, 225 Ill. 50, 80 N. E. 56; Wisenger *v.* Co., 119 Ill. App. 298.

Injury not caused as alleged. Hickey *v.* R. Co. (Tex. Civ.), 95 S. W. 763.

955-39 Heinmiller *v.* Winston, 131 Ia. 32, 107 N. W. 1102, 6 L. R. A. (N. S.) 150 (other horses frightened by steam shovel); Hinton *v.* R. Co., 83 Neb. 835, 120 N. W. 431; Fleming *v.* Pullen (Tex. Civ.), 97 S. W. 109.

General cause tending to bring about improper alignment of all machines upon same floor may be evidenced by fact other machines worked improperly. Standard Mills *v.* Cheatham, 125 Ga. 649, 54 S. E. 650.

"**It is a fallacy** to assume that a sequence of events of necessity indicates an interdependence of the one upon the other, or a casual relation between them." Thompson *v.* Williams, 104 Md. 195, 64 A. 26, fraudulent intent in a conveyance.

955-40 Sprague *v.* R. Co., 70 Kan. 339, 78 P. 828 (fires started by other locomotives); Baltimore, etc. R. Co. *v.* Sattler, 100 Md. 396, 59 A. 674 (injury to land of other persons in neighborhood by smoke); Van Doren *v.* Heap, 160 Mich. 199, 125 N. W. 11; McAuley *v.* C. Co., 39 Mont. 185, 102 P. 586; Hinton *v.* R. Co., 83 Neb. 835, 120 N. W. 431; Flansburg *v.* Co., 136 App. Div. 551, 121 N. Y. S. 156; Lamb *v.* R. Co., 217 Pa. 564, 66 A. 762. *Comp.* P. *v.* Oppenheimer, 156 Cal. 733, 106 P. 74; Welch *v.* Fransioli, 46 Wash. 330, 90 P. 644; Hansen *v.* Co., 41 Wash. 349, 83 P. 182.

956-41 Brown *v.* Co. (Ia.), 120 N. W. 733; cit. the text, Lamb *v.* Cudahy,

139 Ia. 688, 117 N. W. 1063; So. R. Co. v. Bailey, 26 Ky. L. R. 53, 80 S. W. 786; Marriott v. R. Co., 142 Mo. App. 204, 126 S. W. 233; Corcoran v. Co., 15 N. M. 9, 103 P. 645. See Huggard v. Co., 132 Ia. 724, 109 N. W. 475; Endres v. R. Co., 129 App. Div. 785, 114 N. Y. S. 631; Peterson v. R. Co., 19 S. D. 122, 102 N. W. 595; Missouri, K. & T. R. Co. v. Greenwood, 40 Tex. Civ. 252, 89 S. W. 810.

956-42 Kansas City, etc. R. Co. v. Perry, 65 Kan. 792, 70 P. 876; St. Louis, etc. R. Co. v. Noland, 75 Kan. 691, 90 P. 273; Foster v. R. Co., 143 Mo. App. 547, 128 S. W. 36.

957-43 Marbury v. R. Co., 176 Fed. 9, 99 C. C. A. 483; Blair v. R. Co., 243 Ill. 224, 90 N. E. 691; Simpkins v. Assn., 148 Ia. 543, 126 N. W. 192; Brownfield v. R. Co., 107 Ia. 254, 77 N. W. 1038; Brown v. Co., 143 Ia. 662, 120 N. W. 733; Gillis v. Co., 202 Mass. 222, 88 N. E. 779; Epstein v. R. Co., 143 Mo. App. 135, 122 S. W. 366; Flansburg v. Co., 136 App. Div. 551, 121 N. Y. S. 156; Ohrstrom v. Tacoma, 57 Wash. 121, 106 P. 629.

957-45 **Contract between defendant and third party** may be relevant. See "Street Railroads," infra, 134-88.

Habits and character, though such person would be apt to do an act, not competent to show he did it. C. v. Rivet, 205 Mass. 464, 91 N. E. 877.

CERTIFICATES

Impeachment, 963-2.

962-1 P. v. Whalen, 154 Cal. 472, 98 P. 194; Johnson v. S., 57 Fla. 18, 49 S. 40 (of hospital superintendent, not competent as to sanity of discharged inmate); Louisville R. Co. v. Raymond, 135 Ky. 738, 123 S. W. 281; Salts v. Ins. Co., 140 Mo. App. 142, 120 S. W. 714. See U. S. v. Hempstead, 153 Fed. 483; P. v. Willard, 150 Cal. 543, 89 P. 124 (of physician as to person's insanity).

Architect's certificate not admissible if it shows it is not based on personal inspection. Aetna Ind. Co. v. Fuller, 111 Md. 321, 73 A. 738.

Of baptism, evidence of legitimacy. Lolot's Succession, 122 La. 200, 47 S. 506.

Of death, made pursuant to statute, admissible and prima facie evidence of its material facts. These are not privileged. S. v. Pabst, 139 Wis. 561, 121 N. W. 351.

Of physician, not competent unless made so by statute. Louisville R. Co. v. Raymond, 135 Ky. 738, 123 S. W. 281.

963-2 American Hawaiian, etc. Co. v. Butler, 165 Cal. 497, 133 P. 280; Barbee v. Findlay, 221 Ill. 251, 77 N. E. 590; Snead v. Field, 124 Ill. App. 558; Concord Apart. House v. O'Brien, 128 Ill. App. 437, 228 Ill. 360, 81 N. E. 1038; Herbert v. Dewey, 191 Mass. 103, 77 N. E. 822. See Robins v. Goddard (1904), 2 Ch. D. (Eng.) 261, rev. (1905) 1 K. B. 294; "Conclusive Evidence," infra, 284-70.

No special form required.—Getchell, etc. Co. v. Peterson, 124 Ia. 599, 100 N. W. 550.

Competent to show performance of conditions precedent.—O'Loughlin v. Poli, 82 Conn. 427, 74 A. 763. Of architect may be prima facie evidence against employer if contract does not make it conclusive. Jefferson H. Co. v. Brumbaugh, 168 Fed. 867, 94 C. C. A. 279.

Private certificate of estoppel, witnessed and acknowledged, presumptively valid, and denial of execution by signer does not necessarily overcome presumption. Reilly v. Haseltine, 127 App. Div. 64, 111 N. Y. S. 457.

Impeachment.—A party who has agreed a certificate shall be evidence against him has burden of impeaching it. Where it is certified by physician injured person was able to resume duties extent of injuries may be shown and conditions when certificate made. Camden R. Co. v. Lester (Ky.), 118 S. W. 268.

Refusal to give, evidence of bad faith Aetna Ind. Co. v. Fuller, 111 Md. 321, 73 A. 738.

963-3 Wynne v. U. S., 217 U. S. 234; Lederer v. Sauke, 166 Fed. 810; Jonesboro, etc. R. Co. v. Dist., 80 Ark. 316, 97 S. W. 281; Whalen v. Gleeson, 81 Conn. 638, 71 A. 908; Arlington O. & G. Co. v. Swann, 13 Ga. App. 562, 79 S. E. 476; Brockway v. McClun, 243 Ill. 196, 90 N. E. 374; P. v. Plopper, 158 Ill. App. 250; S. v. Wheeler, 172 Ind. 578, 89 N. E. 1; Com. v. O'Bryan, etc. Co., 153 Ky. 406, 155 S. W. 1126; S. v. Dudenhefer, 122 La. 288, 47 S. 614; Smith Bros. v. Woodward (Neb.), 143 N. W. 196; Hoffman v. Ins. Co., 135 App. Div. 739, 119 N. Y. S. 978; Marlow v. Dist., 29 Okla. 304, 116 P. 797;

Robles *v.* Cooksey (Tex. Civ.), 70 S. W. 584.

Contra if certificate attached to paper purporting to be signed by agent, in absence of proof of authority. Whalen *v.* Gleeson, supra. See Brown *v.* R. Co., 209 Ill. 402, 70 N. E. 905.

Certificate by assistant not competent under statute making admissible the officer's certificate. Kimbro *v.* Bradshaw (Fla.), 65 S. 868.

Marriage certificate.—State *v.* McRae, 83 N. J. L. 796, 85 A. 455. See vol. 8, p. 468, n. 73, and supplement thereto.

Teacher's certificate.—Darter *v.* Board, 161 Ill. App. 284.

Of cause of death produced from public records. National Council *v.* O'Brien, 112 Ill. App. 40; Ohmeyer *v.* Circle, 91 Mo. App. 189.

Of clerk of court as to recording will. Hymer *v.* Holyfield (Tex. Civ.), 87 S. W. 722.

Of birth, by physician. Vanderbilt *v.* Mitchell, 72 N. N. J. Eq. 910, 67 A. 97, *rev.* 71 N. J. Eq. 632, 63 A. 1107.

Where officer authorized to certify only in absence of another officer, such absence must affirmatively appear. Smallwood *v.* Kimball, 129 Ga. 49, 58 S. E. 640.

Statute making certificate of commissioners in condemnation proceedings prima facie evidence, constitutional. Chicago T. T. Co. *v.* Chicago, 217 Ill. 343, 75 N. E. 499.

By statute certified copy of inspector of mines is prima facie evidence of facts recited. Andricus *v.* Co., 28 Ky. L. R. 704, 90 S. W. 233.

State weighmaster's certificate. S. *v.* Goffee, 192 Mo. 670, 91 S. W. 486.

Official certificate, reciting records of proper office indicated existence of deed corresponding to that lost, admissible where records destroyed long after execution of deed. McDonald *v.* Hanks, 52 Tex. Civ. 140, 113 S. W. 604.

964-5 Words added to certificate of acknowledgment do not affect mortgage. Burnside *v.* Mealer, 26 Ky. L. R. 79, 80 S. W. 785.

965-6 Ex parte Lung Foot, 174 Fed. 70; Equitable Mfg. Co. *v.* Co., 130 Ga. 67, 60 S. E. 262 (of notary as to execution of bond, inadmissible); Walker *v.* Shepard, 210 Ill. 100, 71 N. E. 422; Boyd *v.* R. Co., 103 Ill. App. 199 (as to non-existence of fact or record); Chicago, etc. Co. *v.* Vance, 64 Kan. 686, 68 P. 606; Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132; Marlow *v.* Dist., 25 Okla. 304, 116 P. 797; Bayless *v.* S., 121 Tenn. 75, 113 S. W. 1039; St. Louis F. Co. *v.* Beilharz (Tex. Civ.), 88 S. W. 512 (of forfeiture of corporate permit); Hudkins *v.* Bush, 69 W. Va. 194, 71 S. E. 106.

Cost certificate mere recital of facts under hand and seal of clerk and not admissible. Manning *v.* Ins. Co. (Mo.), 159 S. W. 750.

967-8 Such certificates are sometimes evidence; statute to that effect does not exclude parol proof of nonexistence of paper required to be filed. S. *v.* Littooy, 52 Wash. 87, 100 P. 170.

967-11 Hamilton *v.* McAuley, 27 Tex. Civ. 256, 65 S. W. 205.

968-15 Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064, *over. s. c.* (Tex. Civ.), 91 S. W. 606; Strickel *v.* Turberville, 28 Tex. Civ. 469, 67 S. W. 1058; Harper *v.* Dodd, 30 Tex. Civ. 287, 70 S. W. 223. See Foster *v.* Meyers, 117 La. 216, 41 S. 551; Pope *v.* Anthony, 29 Tex. Civ. 298, 68 S. W. 521.

Original assignments duly acknowledged and recorded of certificate of public land commissioner are admissible although there was no statute authorizing their being recorded. Richards *v.* Bussell, 70 Wash. 554, 127 P. 198, 129 P. 90.

970-20 Condren *v.* Gibbs, 94 Ark. 478, 127 S. W. 731; Jonesboro, etc. R. Co. *v.* Dist., 80 Ark. 316, 97 S. W. 281; Ekern *v.* McGovern, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796.

No presumption where two certificates issued to different persons for same office. P. *v.* Davidson, 2 Cal. App. 100, 83 P. 161.

970-21 **Of nomination,** prima facie evidence of facts recited. S. *v.* Blaisdell, 17 N. D. 575, 118 N. W. 225.

Of naturalization, inadmissible in proceeding to correct record unless it is sustained by it. In re O'Sullivan, 137 Mo. App. 214, 117 S. W. 651.

970-22 Woodworth *v.* McKee, 126 Ia. 714, 102 N. W. 777; Harper *v.* County, 33 Tex. Civ. 653, 77 S. W. 1044. *Comp.* James *v.* James, 35 Wash. 650, 77 P. 1080.

To affidavit taken in open court requires no seal. Hymer *v.* Holyfield (Tex. Civ.), 87 S. W. 722.

Absence of seal of state on certificate of secretary of state as to increase in corporate capitalization, immaterial.

Person & R. Co. v. Lipps, 219 Pa. 99, 67 A. 1081.

Certified copy of duly recorded deed need not indicate presence of seal thereon. East Coast L. Co. v. Co., 55 Fla. 270, 45 S. 826.

Of time mortgage received, not part of instrument, and must be identified and offered independently of paper on which endorsed. Ayre v. Hixson, 53 Or. 19, 98 P. 515.

Of justice of peace of another state, inadmissible unless official capacity and fact he executed certificate shown. Holtman v. Holtman (Ky.), 114 S. W. 1198.

970-23 Seal necessary to certificate of acknowledgment of deed. Peters v. Reichenbach, 114 Wis. 209, 90 N. W. 184.

972-32 See Browning v. Lovett, 29 Ky. L. R. 692, 94 S. W. 661; Williamson v. Musick, 60 W. Va. 59, 53 S. E. 796.

972-33 Commerce etc. Co. v. Morris, 27 Tex. Civ. 553, 65 S. W. 1118.

973-35 Harper v. Sidebottom, 130 Ky. 687, 113 S. W. 870; S. v. Dedenhefer, 122 La. 288, 47 S. 614; S. v. Quinn, 107 Minn. 503, 120 N. W. 1088; Smoot v. Assn., 138 Mo. App. 438, 120 S. W. 719; Mandel v. Weschler, 128 App. Div. 505, 112 N. Y. S. 813; Gilmore v. Lockwood, 57 Tex. Civ. 616, 124 S. W. 111; Barnes v. Williams, 102 Tex. 441, 119 S. W. 80 (acknowledgment of land).

Recitals not conclusive.—Columbian B. Assn. v. Lewis, 128 Ill. App. 195 (clear, convincing and satisfactory evidence necessary to overcome); Gritten v. Dickerson, 202 Ill. 372, 66 N. E. 1090; Duncan v. Duncan, 203 Ill. 461, 67 N. E. 762; Buster v. Warren, 35 Tex. Civ. 644, 80 S. W. 1063.

Of acknowledgment by married woman, impeached only by clear proof of fraud and burden is on her. Greenleaf-Johnson L. Co. v. Leonard, 142 N. C. 339, 59 S. E. 124.

973-36 P. v. Bingham, 127 App. Div. 742, 110 N. Y. S. 450 (inability to perform police duty); Ellgen v. Jackson, 53 Tex. Civ. 20, 118 S. W. 849. See Ellis v. Lehman, 48 Tex. Civ. 208, 106 S. W. 452.

Tax commissioner cannot contradict certificate. S. v. Baltimore, 105 Md. 1, 65 A. 269.

Justice of peace estopped from denying certificate. Matthews v. Dare, 20 Md. 248.

Certificate of state weighmaster cannot be made conclusive by statute. S. v. Geffre, 192 Mo. 670, 91 S. W. 486.

976-50 Galloway v. Bradburn, 119 Ky. 49, 82 S. W. 1013 (of officers of election prima facie correct); Browning v. Lovett, 29 Ky. L. R. 692, 94 S. W. 661 (election officer cannot impeach certificate); P. v. Wintermute, 194 N. Y. 99, 86 N. E. 818; Stafford v. Shepard, 57 W. Va. 84, 50 S. E. 1016 (ballots primary and higher evidence). See Williamson v. Musick, 60 W. Va. 59, 53 S. E. 796.

977-53 Kingsbury v. Nye, 9 Cal. App. 374, 99 P. 985; P. v. Willi, 147 Ill. App. 207; In re McConaughy, 106 Minn. 392, 119 N. W. 408.

978-54 See Hachnle B. Co. v. Board, 156 Mich. 493, 121 N. W. 209.

980-62 Ewen v. Wilbor, 99 Ill. App. 132, 208 Ill. 492, 70 N. E. 575 (certified copy of record of notary and not his certificate of protest required).

980-64 Patton v. Bk., 124 Ga. 965, 53 S. E. 661; Ewen v. Wilbor, 99 Ill. App. 132; Rolla State Bk. v. Pezoldt, 97 Mo. App. 404, 69 S. W. 51; Nelson v. Kastle, 105 Mo. App. 187, 79 S. W. 730; German-Am. Bk. v. Mills, 99 App. Div. 312, 91 N. Y. S. 142; Schlesinger v. Schultz, 110 App. Div. 356, 96 N. Y. S. 383; Solomon v. Cohen, 94 N. Y. S. 502; Nelson v. Crondahl, 13 N. D. 363, 100 N. W. 1092; Farmers' Nat. Bk. v. Marshall, 9 Pa. Super. 621; Second Nat. Bk. v. Smith, 118 Wis. 18, 94 N. W. 664; Columbian Bk. v. Bowen, 134 Wis. 218, 114 N. W. 451.

Copy of notarial certificate must, under statute, be filed with complaint. Mason v. Kilcourse, 71 N. J. L. 472, 59 A. 21.

982-69 Naftzger v. United States, 200 Fed. 494, 118 C. C. A. 598.

982-70 Schofield v. Palmer, 134 Fed. 753.

983-71 Schofield v. Palmer, 134 Fed. 753; Sublette Exch. Bk. v. Fitzgerald, 168 Ill. App. 240; Feigenspan v. McDonnell, 201 Mass. 344, 87 N. E. 624; Rolla State Bk. v. Pezoldt, 97 Mo. App. 404, 69 S. W. 51; Mason v. Kilcourse, 71 N. J. L. 472, 59 A. 21 (presentment and notice must be shown on face of certificate); Zellner v. Moffitt, 222 Pa. 544, 72 A. 282.

984-73 Nelson v. Kastle, 105 Mo. App. 187, 79 S. W. 730, lack of funds reason for non-payment.

Memorandum at bottom of certificate is not evidence if not referred to in it

or made part of it. Zollner *v.* Moffitt, 222 Pa. 644, 72 A. 285.

984-75 London & R. P. Bk. *v.* Carr, 54 Misc. 94, 105 N. Y. S. 679.

988-5 Second Nat. Bk. *v.* Smith, 118 Wis. 18, 94 N. W. 664 (sufficient if it identifies instrument and shows it has been dishonored).

988-10 Schlesinger *v.* Schultz, 110 App. Div. 356, 96 N. Y. S. 383; Columbian Bk. Co. *v.* Bowen, 134 Wis. 218, 114 N. W. 451 (presumption of presentment at proper time).

992-23 Solomon *v.* Cohen, 94 N. Y. S. 502.

995-33 Mason *v.* Kilcourse, 71 N. J. L. 472, 59 A. 21; Kupferberg *v.* Horowitz, 52 Misc. 488, 102 N. Y. S. 502 (every presumption is in favor of regularity of notary's protest and certificate).

995-34 Mason *v.* Kilcourse, 71 N. J. L. 472, 59 A. 21. See German Am. Bk. *v.* Mills, 99 App. Div. 312, 91 N. Y. S. 142.

997-42 Second Nat. Bk. *v.* Smith, 118 Wis. 18, 94 N. W. 664.

998-43 Siegel *v.* Dubinsky, 56 Misc. 681, 107 N. Y. S. 678; Scott *v.* Brown, 240 Pa. 328, 87 A. 431; Zollner *v.* Moffitt, 222 Pa. 644, 72 A. 285 (want of present recollection by notary of fact set out in certificate, not impeachment).

998-45 Nelson *v.* Grondahl, 13 N. D. 363, 100 N. W. 1093 (testimony of notary as to invariable custom, proper).

CHARACTER

Proof of reputation as bearing upon negligence, 3-3; *Of deceased person not a party*, 5-7; *Of co-defendant not on trial*, 7-13; *Of grantor*, 20-49; *Of stranger*, 34-98.

3-1 Moore *v.* Dozier, 128 Ga. 90, 57 S. E. 110. And see vol. 6, pp. 656, 770 et seq. and supplement thereto.

3-2 Lowman *v.* S., 161 Ala. 47, 50 S. 43; Moore *v.* Dozier, 128 Ga. 90, 57 S. E. 110; S. *v.* Gregory, 148 Ia. 152, 126 N. W. 1109; Spain *v.* Rakestraw, 79 Kan. 758, 101 P. 466; Leverich *v.* Frank, 6 Or. 212. Both real and reputed character are sometimes involved, and then the two are distinguished, as where defendant justifies assault and battery on ground of self-defense, claiming his conduct was affected by knowledge plaintiff was quarrelsome and dangerous. McQuiggan *v.* Ladd, 79 Vt. 90, 64 A. 503.

3-3 Columbia Nat. Bk. *v.* MacKnight, 29 App. Cas. (D. C.) 580; Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 629; Ratliff *v.* Daniel, 137 Ky. 55, 121 S. W. 1031; McKane *v.* Howard, 123 N. Y. S. 632; Mullinax *v.* Pyron (Tex. Civ.), 123 S. W. 1139 (plaintiff's reputation in action for money loaned where answer charged him with embezzlement; otherwise as to defendant's reputation for honesty); Texas M. R. *v.* Dean, 98 Tex. 517, 85 S. W. 1135. See "Non est Factum," infra 2-7.

"**Appellee offered evidence** to prove the general reputation for honesty of the persons who did the scaling and classification of the logs for appellee at the mill, to which appellant objected on the ground that their credibility had not been attacked. The objection was overruled and he excepted. Appellant's case, as stated in his petition, is grounded upon allegations of fraud practiced by these persons in scaling and classifying the logs, and in his testimony appellant did not hesitate to charge them with having stolen his logs. Their honesty was directly attacked, and we think the case falls fairly within the rule announced by this court in Houston Electric Co. *v.* Faroux, 125 S. W. 923, and Word *v.* Houston Oil Co., 144 S. W. 334, holding such evidence admissible, in the circumstances presented." Cudlipp *v.* Export Co. (Tex. Civ.), 149 S. W. 444.

As bearing on earning capacity. Cameron, etc. Co. *v.* Anderson, 98 Tex. 156, 81 S. W. 282.

Petitioner's character involved in habeas corpus proceedings to secure custody of minor children. Moore *v.* Dozier, 128 Ga. 90, 57 S. E. 110.

Proof of reputation of decedent is competent upon the issue as to his exercise of ordinary care in his calling, in absence of witnesses as to what was done just prior to accident. Illinois C. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435; Chicago, etc. R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 703; Illinois C. R. Co. *v.* Nowicki, 148 Ill. 29, 35 N. E. 358; Chicago & A. R. Co. *v.* Wilson, 128 Ill. App. 88. See infra, 20-50. But it has been held evidence of prudence is irrelevant in action to recover for death. McQuisten *v.* R. Co., 150 Mich. 332, 113 N. W. 1118; Schultz *v.* S., 133 Wis. 215, 113 N. W. 428.

Of conductor for politeness to passengers may be proved where recovery for mental suffering sought because of his conduct. Georgia S. & F. R. Co. *v.* Ransom, 5 Ga. App. 740, 63 S. E. 525.

4-4 Robinson *v.* Van Hooser, 196 Fed. 620, 116 C. C. A. 294; Title, etc. Co. *v.* Ingersoll, 153 Cal. 1, 94 P. 94; Consolidated S. Co. *v.* Morgan, 160 Ind. 241, 66 N. E. 696; Volker *v.* S., 177 Ind. 159, 97 N. E. 422; Porter *v.* Whitlock, 142 Ia. 66, 120 N. W. 649 (not competent to raise presumption act charged not done); Louisville & N. R. Co. *v.* Daniel, 28 Ky. L. R. 1146, 91 S. W. 691; Mattingly *v.* Shortell, 27 Ky. L. R. 426, 85 S. W. 215; Chesapeake & O. R. Co. *v.* Riddle, 24 Ky. L. R. 1687, 72 S. W. 22; Knights of Maccabees *v.* Shields, 156 Ky. 270, 160 S. W. 1043; Gould *v.* Bebee, 134 La. 123, 63 S. 848; Campbell *v.* Aarstad, 124 Minn. 284, 144 N. W. 956; Berry *v.* Jones (Miss.), 63 S. 341; Brewer *v.* Mullins, 97 Miss. 353, 52 S. 257; Ross *v.* Pant's Co., 170 Mo. App. 291, 156 S. W. 92; Hatch *v.* Bagless, 164 Mo. App. 216, 146 S. W. 839; Shoffner *v.* Fink, 163 Mo. App. 113, 145 S. W. 504; Milan Bk. *v.* Richmond, 235 Mo. 532, 139 S. W. 352; Stewart *v.* Watson, 133 Mo. App. 44, 112 S. W. 762; Noonan *v.* Luther, 206 N. Y. 105, 99 N. E. 178; McKane *v.* Howard, 202 N. Y. 181, 95 N. E. 642, *rev.* 123 N. Y. S. 632; Missouri, etc. R. Co. *v.* Hailey (Tex. Civ.), 156 S. W. 1119; Houston Elec. Co. *v.* Jones (Tex. Civ.), 129 S. W. 863; Donaldson *v.* Dobbs, 35 Tex. Civ. 439, 80 S. W. 1084; McElroy *v.* Phink, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025. See vol. 7, p. 176, n. 37 and supplement thereto. *Contra* under statute. Castle *v.* Clark, 45 Ind. App. 192, 90 N. E. 640. Evidence of character not admissible in civil action to meet evidence of specific wrongful acts. Colburn *v.* Marble, 196 Mass. 376, 82 N. E. 28.

Although plaintiff has alleged injury to his reputation, if he offers no evidence on the issue defendant cannot attack his reputation. Morningstar *v.* Co., 211 N. Y. 465, 105 N. E. 656.

Libel and slander.—See vol. 8, p. 270 et seq.

5-6 Reimenschneider *v.* Neusis, 175 Ill. App. 172; Phelps *v.* R. Co. (Ia.), 143 N. W. 853; Stewart *v.* Watson, 133 Mo. App. 44, 112 S. W. 762; Coruth *v.* Jones, 77 Vt. 441, 60 A. 814; Clement *v.* Skinner, 72 Vt. 159, 47 A. 788.

5-7 Good character of propounder of will provable against allegation will executed by reason of threats and fraud. Hannah *v.* Anderson, 125 Ga. 407, 54 S. E. 131.

Evidence of character of deceased person not a party may be competent on question of conspiracy to defraud. Continental Nat. Bk. *v.* Bk., 1 Tenn. Ch. App. 449, 488.

Evidence of reputation for honesty and integrity not admissible, no attack being made. Ellwood *v.* Walter, 103 Ill. App. 219, *dist.* Sprague *v.* Craig, 51 Ill. 288.

Where fraud is one of the inferences which might be drawn from the evidence, proof of character is admissible to rebut such presumption. Word *v.* O. Co. (Tex.), 144 S. W. 334.

5-8 Black *v.* Epstein, 221 Mo. 286, 120 S. W. 754; McHay *v.* Peterson, 52 Tex. Civ. 195, 113 S. W. 981.

6-9 Great W. L. I. Co. *v.* Sparks, 38 Okla. 395, 132 P. 1092; Luckenbach *v.* Thomas (Tex. Civ.), 166 S. W. 99. See vol. 6, p. 149, n. 75, n. 76, and supplement thereto.

6-10 Poe *v.* Poe, 93 Ark. 426, 124 S. W. 1029; Poler *v.* Poler, 32 Wash. 400, 73 P. 372.

6-11 S. *v.* Williams (Del.), 80 A. 1004; S. *v.* Holly, 155 N. C. 485, 71 S. E. 450.

"The rule itself is not merely merciful. It is both reasonable and just. There may be cases in which, owing to the peculiar circumstances in which a man is placed, evidence of good character may be all he can offer in answer to a charge of crime. Of what avail is a good character, which a man may have been a lifetime acquiring, if it is to benefit him nothing in his hour of peril?" Com. *v.* Andrews, 234 Pa. 597, 83 A. 412, *quot.* C. *v.* Cleary, 135 Pa. 64, 19 A. 1017, 8 L. R. A. 301.

6-12 Carson *v.* S., 128 Ala. 58, 29 S. 608; S. *v.* Denel, 63 Kan. 811, 66 P. 1037; Lewis *v.* S., 93 Miss. 697, 47 S. 467.

Such evidence especially appropriate if insanity is the defense. Maston *v.* S., 83 Miss. 647, 36 S. 70.

Of defendant's parents immaterial in murder case. Smith *v.* S., 142 Ala. 14, 39 S. 329.

7-13 Edgington *v.* U. S., 164 U. S. 361; U. S. *v.* Breese, 131 Fed. 915; Ware *v.* S., 91 Ark. 555, 121 S. W. 927; S. *v.* Cather, 121 Ia. 106, 96 N. W. 722;

Horton *v.* S., 84 Miss. 473, 36 S. 1033; Maston *v.* S., 83 Miss. 647, 36 S. 70; Gilbert *v.* S., 8 Okla. Cr. 543, 128 P. 1100, 129 P. 671; Saye *v.* S., 50 Tex. Cr. 569, 99 S. W. 551. But see Pettis *v.* S. (Tex. Cr.), 150 S. W. 790.

Admission may take place of evidence. Beard *v.* S., 44 Tex. Cr. 402, 71 S. W. 960.

Of co-defendant not on trial not provable on separate trial of co-indictee. Walls *v.* S., 125 Ind. 400, 25 N. E. 457; Omer *v.* C., 95 Ky. 353, 25 S. W. 594; Schultz *v.* S., 133 Wis. 215, 113 N. W. 428.

7-14 S. *v.* McGreevey, 17 Ida. 453, 105 P. 1047 (as to first two points only); S. *v.* King, 122 Ia. 1, 96 N. W. 712; S. *v.* Denel, 63 Kan. 811, 66 P. 1037; Dickinson *v.* S., 3 Okla. Cr. 151, 104 P. 923; C. *v.* Beingo, 217 Pa. 60, 66 A. 153; Phelan *v.* S., 114 Tenn. 483, 507, 88 S. W. 1040; Orange *v.* S., 47 Tex. Cr. 337, 83 S. W. 385. *Contra* as to last proposition. S. *v.* McGreevey, 17 Ida. 453, 105 P. 1047; Latimer *v.* S., 55 Neb. 609, 76 N. W. 207, 70 Am. St. 403; S. *v.* Van Kuran, 25 Utah 8, 69 P. 60.

7-15 S. *v.* Denel, 63 Kan. 811, 66 P. 1037; Phelan *v.* S., 114 Tenn. 483, 507, 88 S. W. 1040.

7-16 Hundley *v.* S., 173 Ind. 684, 91 N. E. 225; Maston *v.* S., 83 Miss. 647, 36 S. 70.

8-17 *Contra,* Keith *v.* S., 127 Tenn. 40, 152 S. W. 1029.

8-18 Witt *v.* S., 5 Ala. App. 137, 59 S. 715.

8-19 U. S. *v.* Wilson, 176 Fed. 806; Phillips *v.* S., 161 Ala. 60, 49 S. 794; Taylor *v.* S., 148 Ala. 565, 42 S. 997; P. *v.* Wilson (Cal. App.), 138 P. 971; Lynn *v.* S., 140 Ga. 387, 79 S. E. 29; Henderson *v.* S., 120 Ga. 504, 48 S. E. 167; Howell *v.* S., 124 Ga. 698, 52 S. E. 649; Culver *v.* S., 124 Ga. 822, 53 S. E. 316; Webb *v.* S., 6 Ga. App. 353, 64 S. E. 1001; Hundley *v.* S., 173 Ind. 684, 91 N. E. 225; S. *v.* Jones, 145 Ia. 176, 123 N. W. 960; Lewis *v.* S., 93 Miss. 697, 47 S. 467; Sweet *v.* S., 75 Neb. 263, 106 N. W. 31; S. *v.* MacQueen, 69 N. J. L. 522, 55 A. 1006; P. *v.* Hughson, 154 N. Y. 153, 47 N. E. 1092; P. *v.* Elliott, 163 N. Y. 11, 57 N. E. 103; P. *v.* Blatt, 136 App. Div. 717, 121 N. Y. S. 507; P. *v.* Childs, 85 N. Y. S. 627; S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969; C. *v.* Aston, 227 Pa. 106, 75 A. 1017; C. *v.* Beingo, 217 Pa. 60, 66 A. 153; C. *v.* Dingman, 26 Pa. Super. 615; S. *v.* Moyer, 58 W. Va. 146, 52 S. E. 30; Gerke *v.* S., 151 Wis. 495, 139 N. W. 404; Schutz *v.* S., 125 Wis. 452, 104 N. W. 90 (correcting dictum in Bernhardt *v.* S., 82 Wis. 23, 51 N. W. 1009); Grabowski *v.* S., 126 Wis. 447, 105 N. W. 805. *Contra,* Eggleston *v.* S., 129 Ala. 80, 30 S. 582; McClellan *v.* S., 140 Ala. 99, 37 S. 239; Simmons *v.* S., 158 Ala. 8, 48 S. 606.

11-20 Chicago *v.* Perdue, 147 Ill. App. 536; P. *v.* Blatt, 136 App. Div. 717, 121 N. Y. S. 507. *Contra.* Webb *v.* S., 6 Ga. App. 353, 64 S. E. 1001.

Proof of good character made after verdict, not cause for new trial. Washington *v.* S., 124 Ga. 423, 52 S. E. 910.

11-21 U. S. *v.* Breese, 131 Fed. 915; Caldwell *v.* S., 160 Ala. 96, 49 S. 679; P. *v.* Baldocchi, 10 Cal. App. 42, 101 P. 28; S. *v.* Naylor (Del.), 90 A. 880; S. *v.* Brooks (Del.), 84 A. 225; S. *v.* Dryden (Del.), 84 A. 1037; S. *v.* Miele, 1 Boyce (Del.) 33, 74 A. 8; S. *v.* Stewart, 6 Penne. (Del.) 435, 67 A. 786; S. *v.* Carr, 4 Penne. (Del.) 523, 57 A. 370; Lynn *v.* S., 140 Ga. 387, 79 S. E. 29; Henderson *v.* S., 120 Ga. 504, 48 S. E. 167; Fordham *v.* S., 125 Ga. 791, 54 S. E. 694; Culver *v.* S., 124 Ga. 822, 53 S. E. 316; Brazil *v.* S., 117 Ga. 32, 43 S. E. 460; Sweet *v.* S., 75 Neb. 263, 106 N. W. 31; P. *v.* Fisher, 136 App. Div. 57, 120 N. Y. S. 659; P. *v.* Ellenbogen, 99 N. Y. S. 897; Morris *v.* Ty., 1 Okla. Cr. 617, 99 P. 760; Cannon *v.* Ty., 1 Okla. Cr. 600, 99 P. 622; S. *v.* Hare, 87 O. St. 204, 100 N. E. 825; C. *v.* Aston, 227 Pa. 106, 75 A. 1017; C. *v.* Dingman, 26 Pa. Super. 615; Niezorawski *v.* S., 131 Wis. 166, 111 N. W. 250. **But see** Taylor *v.* S., 13 Ga. App. 715, 79 S. E. 924.

"We think that the plain meaning of the instruction which was given by the court is that if, upon the whole evidence, that of good character among the rest, the jury believed that the guilt of the defendant is proved beyond a reasonable doubt, then the defendant's good character would not constitute a defense. This is clearly the law, and we do not think that the court erred in giving the above instruction. People *v.* Sweeney, 133 N. Y. 609, 30 N. E. 1005; Remsen *v.* People, 43 N. Y. 6." Rhea *v.* S., 104 Ark. 162, 147 S. W. 463.

Proof of good character will not negative confession. S. *v.* Foster, 136 Ia. 527, 114 N. W. 36.

Of accused may be regarded in determining where truth lies as between conflicting witnesses. Maddox *v.* S., 118 Ga. 69, 44 S. E. 822.

Nature of offense and attitude of witnesses for accused toward it and him may affect weight due evidence of general good character. U. S. *v.* Clement, 171 Fed. 974.

12-22 Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039; S. *v.* King, 122 Ia. 1, 96 N. W. 712; Wilson, etc. Co. *v.* Atkinson, 162 N. C. 298, 78 S. E. 212; C. *v.* Dingman, 26 Pa. Super. 615; S. *v.* Stentz, 33 Wash. 444, 74 P. 588; Niezorawski *v.* S., 131 Wis. 166, 111 N. W. 250. See vol. 6, p. 49, n. 75 and supplement thereto.

Evidence of good character should not be depreciated by instructions. P. *v.* Piner, 11 Cal. App. 542, 105 P. 780.

12-23 Beck *v.* S. (Okla. Cr.), 132 P. 929; Edmons *v.* S. (Okla. Cr.), 132 P. 923.

Failure to give evidence of good character may be commented upon by state. S. *v.* Davis, 3 Penne. (Del.) 220, 50 A. 99.

A charge that defendant is a professional gambler must be proved by his acts and not his reputation as such. Mitchell *v.* S. (Okla. Cr.), 130 P. 1175.

13-24 Ware *v.* S., 91 Ark. 555, 121 S. W. 927; P. *v.* Smith, 9 Cal. App. 644, 99 P. 1111; S. *v.* Raymond (Conn.), 89 A. 1118; S. *v.* Nussenholtz, 76 Conn. 92, 55 A. 589; Clinton *v.* S., 53 Fla. 98, 43 S. 312; Ward *v.* S. (Ga. App.), 80 S. E. 295; Holmes *v.* S., 12 Ga. App. 359, 77 S. E. 187; P. *v.* Cleminson, 250 Ill. 135, 95 N. E. 157; Wilcox *v.* U. S., 7 Ind. Ty. 86, 103 S. W. 774; S. *v.* Thompson, 127 Ia. 440, 103 N. W. 377; Newman *v.* C., 28 Ky. L. R. 81, 88 S. W. 1089; S. *v.* Wellman, 253 Mo. 302, 161 S. W. 795; S. *v.* Beckner, 194 Mo. 281, 91 S. W. 892; P. *v.* Springer, 137 App. Div. 304, 122 N. Y. S. 194; S. *v.* Barrett, 151 N. C. 665, 65 S. E. 894 (error cured by accused's testimony in accordance with facts shown); Wilkerson *v.* S. (Okla. Cr.), 132 P. 1120; Porter *v.* S., 8 Okla. Cr. 64, 126 P. 699 (*cit.* 3 Encyclopædia of Evidence, p. 12); Kaufman *v.* S. (Tex. Cr.), 165 S. W. 193; McClary *v.* S. (Tex. Cr.), 165 S. W. 572; Puryear *v.* S., 50 Tex. Cr. 454, 98 S. W. 258; Moore *v.* S., 46 Tex. Cr. 54, 79 S. W. 565; Bays *v.* S., 50 Tex. Cr. 548, 99 S. W. 561; Melton *v.* S., 47 Tex. Cr. 451, 83 S. W. 822 (*over.* Martin *v.* S., 44 Tex. Cr. 279, 70 S. W. 973, and Everett *v.* S., 30 Tex. App. 682, 18 S. W. 674); S. *v.* Shaw, 75 Wash. 326, 135 P. 20; S. *v.* Grove, 61 W. Va. 697, 57 S. E. 296.

See vol. 6, p. 657, n. 75 and supplement thereto.

Order of proof.—Evidence as to character of co-defendant should not be received until there is some proof of his guilt. McLeod *v.* S., 128 Ga. 17, 57 S. E. 83.

Incidental reference to character of accused on his cross-examination, not fatal. S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402.

13-25 P. *v.* Connelly, 157 Mich. 260, 122 N. W. 80; S. *v.* Kelleher, 201 Mo. 614, 100 S. W. 470.

13-26 Carson *v.* S., 128 Ala. 58, 29 S. 608; Weaver *v.* S., 83 Ark. 119, 102 S. W. 713; Cook *v.* S., 46 Fla. 20, 35 S. 665; Frank *v.* S. (Ga.), 80 S. E. 1016; Ward *v.* S. (Ga. App.), 80 S. E. 295; Strickland *v.* S., 12 Ga. App. 640, 77 S. E. 1070; Brantley *v.* S., 133 Ga. 264, 65 S. E. 426; Smith *v.* S., 11 Ga. App. 89, 74 S. E. 711; S. *v.* Boyd, 178 Mo. 2, 76 S. W. 979; Biester *v.* S., 65 Neb. 276, 91 N. W. 416; S. *v.* Cloninger, 149 N. C. 567, 63 S. E. 154; Porter *v.* S., 8 Okla. Cr. 64, 126 P. 699 (*cit.* 3 Encyclopædia of Evidence, p. 12); Martoni *v.* S. (Tex. Cr.), 167 S. W. 349; Turner *v.* S. (Tex. Cr.), 163 S. W. 705; Streight *v.* S., 62 Tex. Cr. 453, 138 S. W. 472; Holloway *v.* S., 45 Tex. Cr. 303, 77 S. W. 14.

Negative evidence does not put character in issue. Posey *v.* U. S., 26 App. Cas. (D. C.) 302; S. *v.* Marfandille, 48 Wash. 117, 92 P. 939, 14 L. R. A. (N. S.) 346.

Emphatic denial of charge and vigorous characterization of prosecuting witness by defendant do not justify inquiry into his antecedents. King *v.* Rouse, L. R. (1904) 1 K. B. (Eng.) 184.

14-27 Scope of rebutting evidence limited by inquiry made by defendant respecting character. Cox *v.* S., 162 Ala. 66, 50 S. 398.

14-28 Worley *v.* S., 138 Ga. 336, 75 S. E. 240; S. *v.* Magill (N. D.), 122 N. W. 330; Hysaw *v.* S. (Tex. Cr.), 155 S.

W. 941. See vol. 6, p. 778, n. 23 and supplement thereto.

But antecedent history of deceased may be shown. S. *v.* Thomas, 151 Ia. 572, 132 N. W. 51.

Decedent's general character is inadmissible. Montgomery *v.* S., 2 Ala. App. 25, 56 S. 92.

Rule applies notwithstanding reception of evidence tending to show deceased had committed a crime. Kennedy *v.* S., 140 Ala. 1, 37 S. 90.

Rule not violated by testimony as to what witness knew of deceased. Bays *v.* S., 50 Tex. Cr. 548, 99 S. W. 561.

When relevant.—It is only when a showing of self-defense is made that reputation of deceased for rashness, viciousness and turbulence is material. S. *v.* Zorn, 202 Mo. 12, 100 S. W. 591. If self-defense is pleaded and circumstances are such defendant was presumed to know characteristics of deceased, a sufficient foundation is laid for proof of deceased's disposition and tendencies. P. *v.* Lamar, 148 Cal. 564, 83 P. 993.

Evidence as to size and strength of deceased is not connected with his character. Kelly *v.* P., 229 Ill. 81, 82 N. E. 198.

Under statute authorizing state to prove decedent's reputation, if defendant has proved threats, proof of reputation cannot be made if accused has not attacked it unless he shows knowledge of threats. Arnwine *v.* S., 50 Tex. Cr. 477, 99 S. W. 97, 50 Tex. Cr. 254, 96 S. W. 4.

Defendant's ignorance of general reputation of deceased does not prevent him showing what it was. S. *v.* Feeley, 194 Mo. 300, 92 S. W. 663 (*over.* S. *v.* Kennade, 121 Mo. 405, 26 S. W. 347).

If defendant aggressor he cannot attack deceased's character. Osburn *v.* S., 164 Ind. 262, 73 N. E. 601.

Testimony as to relations of deceased and defendant, incompetent on direct examination. S. *v.* Crea, 10 Ida. 88, 76 P. 1013.

In prosecution for rape defendant may show how bad complainant's character was. Neace *v.* C., 23 Ky. L. R. 125, 62 S. W. 733.

Character of deceased for peaceableness is not affected by evidence he claimed to have been robbed. Smith *v.* S., 142 Ala. 14, 39 S. 329.

14-29 Bryant *v.* S., 95 Ark. 239, 129 S. W. 295; Stevens *v.* S., 84 Neb. 759, 122 N. W. 58; P. *v.* Barnes, 202 N. Y. 77, 95 N. E. 15; Hysaw *v.* S. (Tex. Cr.), 155 S. W. 941. See vol. 6, p. 778, n. 23 and supplement thereto.

Of deceased.—Thrawley *v.* S., 153 Ind. 375, 55 N. E. 95. *Contra,* Kelley *v.* P., 229 Ill. 81, 82 N. E. 198; Carr *v.* S., 21 O. C. C. 43. Competent to meet issue raised by defendant. Martin *v.* S., 44 Tex. Cr. 279, 70 S. W. 973.

Of complaining witness, immaterial as corroborating evidence. Railey *v.* S., 58 Tex. Cr. 1, 121 S. W. 1120, 125 S. W. 576.

14-30 McAlister *v.* S., 99 Ark. 604, 139 S. W. 684; Jones *v.* C., 154 Ky. 640, 157 S. W. 1079; Anderson *v.* C., 144 Ky. 215, 137 S. W. 1063; Lane *v.* C., 134 Ky. 519, 121 S. W. 486; In re Klinzner's Will, 71 Misc. 620, 130 N. Y. S. 1059.

Judicial discretion should be used in the admission of disreputable conduct of witness not connected with trial. Castleberry *v.* S. (Okla. Cr.), 139 P. 132. See vol. 11, p. 636, n. 9 and supplement thereto.

14-31 Walters *v.* Lumb. Co. (N. C.), 81 S. E. 453; Cimini *v.* Zambarano (R. I.), 89 A. 295; Poulter *v.* S. (Tex. Cr.), 161 S. W. 475. See Dusek *v.* S., 48 Tex. Cr. 519, 89 S. W. 271.

Evidence as to the good reputation of wife of defendant cannot be given by the state where she is not a witness and her reputation is not a matter of issue, even where accused claims insanity from information as to her illicit relations with deceased. Brown *v.* S., 9 Ala. App. 15, 64 S. 170. See vol. 6, p. 779, n. 27 and supplement thereto.

14-32 Edwards *v.* Price, 162 N. C. 243, 78 S. E. 145; LaFollette, etc. Co. *v.* Minton, 117 Tenn. 415, 428, 101 S. W. 178.

Of plaintiff, called as witness by defendant, may not be attacked. O'Neil *v.* Adams, 144 Ia. 385, 122 N. W. 976.

14-33 McGuire *v.* S. (Ala.), 58 S. 60; Barnett *v.* S., 165 Ala. 59, 51 S. 299 Wingate *v.* S., 1 Ala. App. 40, 55 S. 953; Paxton *v.* S., 108 Ark. 316, 157 S. W. 396; Maloy *v.* S., 52 Fla. 101, 41 S. 791; Clinton *v.* S., 53 Fla. 98, 43 S. 312; De Boe *v.* Co., 146 Ky. 696, 143 S. W. 39; Bowman *v.* C., 146 Ky. 486, 143 S. W. 47; Newman *v.* C., 28 Ky. L. R. 81, 88 S. W. 1089; Calhoon *v.* C., 23 Ky. L. R. 1188, 64 S. W. 965; Barnes *v.* C., 24 Ky. L. R. 1143, 70 S. W. 827; S. *v.* Manuel, 133 La. 571, 63 S. 174;

S. v. Barrett, 240 Mo. 161, 144 S. W. 485; S. v. Priest, 215 Mo. 1, 114 S. W. 949; S. v. Barnett, 203 Mo. 640, 102 S. W. 506; S. v. Brooks, 202 Mo. 106, 100 S. W. 416; P. v. Nelson, 130 N. Y. S. 488; S. v. Cloninger, 149 N. C. 567, 63 S. E. 154; Campbell v. S., 62 Tex. Cr. 561, 138 S. W. 607; Green v. S., 62 Tex. Cr. 345, 137 S. W. 126; S. v. Thorne, 39 Utah 208, 117 P. 58.

Defendant's reputation for violence and turbulence, not provable to affect credibility as witness. S. v. Beckner, 194 Mo. 281, 91 S. W. 892; Dolan v. S., 81 Ala. 11, 1 S. 707.

Evidence of character of defendant as witness limited to his capacity as such. Fact he has been arrested does not show bad character. S. v. Nusenholtz, 76 Conn. 92, 55 A. 589; Newman v. C., 28 Ky. L. R. 81, 88 S. W. 1089.

General charcater of accused, who has testified in his own behalf, not in issue unles he has introduced testimony to sustain it. P. v. Hinksman, 192 N. Y. 421, 85 N. E. 676.

15-36 Norris v. S., 52 Tex. Cr. 166, 106 S. W. 136.

15-38 Central C. & C. Co. v. Penny, 173 Fed. 340, 97 C. C. A. 600; Barco v. Taylor, 5 Ga. App. 372, 63 S. E. 224 (harmless if objection not made); Dennis v. R. Co., 93 S. C. 295, 76 S. E. 711; Sullivan v. R. Co., 85 S. C. 532, 67 S. E. 905 (professional character of nonresident expert); Jones v. S. (Tex. Cr.), 167 S. W. 1110; Wilmot v. Foro (Tex. Civ.), 163 S. W. 1014; Wisnoski v. S. (Tex. Cr.), 153 S. W. 316; International, etc. R. Co. v. Lane (Tex. Civ.), 127 S. W. 1066 (expert); Simmonds v. Simmonds, 35 Tex. Civ. 151, 79 S. W. 630; Jones v. S., 52 Tex. Cr. 206, 106 S. W. 126; Casey v. S., 50 Tex. Cr. 392, 97 S. W. 496.

In Texas if witness attacked by laying predicate for his impeachment, or his character assailed, his reputation may be sustained before direct impeaching testimony offered. Harris v. S., 49 Tex. Cr. 338, 94 S. W. 227.

Disparaging remarks by court as to witness' credibility opens door for proof of character. Landers v. R. Co., 134 Mo. App. 80, 114 S. W. 543.

16-39 S. v. Beckner, 194 Mo. 281, 91 S. W. 892; S. v. Fogg, 206 Mo. 696, 105 S. W. 618; Pettis v. S. (Tex. Cr.), 150 S. W. 790.

16-40 Watson v. S., 155 Ala. 9, 46 S. 232; Brown v. S., 142 Ala. 287, 38 S. 268; Lesueur v. S., 176 Ind. 448, 95 N. E. 239; S. v. Maggard, 250 Mo. 335, 157 S. W. 354; Armfield v. R. Co., 162 N. C. 24, 77 S. E. 963; Tex. Tr. Co. v. Fearris (Tex. Civ.), 163 S. W. 1060; Quanah etc. Co. v. Johnson (Tex. Civ.), 159 S. W. 406; Hearn v. Harless (Tex. Civ.), 154 S. W. 613; Brown v. S., 52 Tex. Cr. 267, 106 S. W. 368.

16-41 Missouri, etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493.

Defendant may explain that indictments were dismissed and that he was not guilty where he had testified on cross-examination that he had been indicted a number of times. Cowart v. S. (Tex. Cr.), 158 S. W. 809.

16-42 Missouri, etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493; Alderson v. S., 53 Tex. Cr. 525, 111 S. W. 738; Wells F. & Co. v. Benjamin (Tex. Civ.), 165 S. W. 120; Harris v. S., 49 Tex. Cr. 338, 94 S. W. 227; Contreras v. T. Co. (Tex. Civ.), 83 S. W. 870; Fox v. Robbins (Tex. Civ.), 70 S. W. 597. But see Thompson v. S. (Tex. Cr.), 167 S. W. 345.

17-43 Title, etc. Co. v. Ingersoll, 153 Cal. 1, 94 P. 94; Adams v. R. Co. (Tex. Civ.), 122 S. W. 895.

18-44 Gilbert v. S., 80 Okla. Cr. 329, 127 P. 889; LaFollette, etc. Co. v. Minton, 117 Tenn. 415, 428, 101 S. W. 178; Chesapeake, etc. R. Co. v. Fortune, 107 Va. 412, 59 S. E. 1095.

Only where witness stranger to action. Goode v. S., 57 Tex. Cr. 220, 123 S. W. 597; Warren v. S., 51 Tex. Cr. 598, 103 S. W. 888; Jeffreys v. S., 51 Tex. Cr. 566, 103 S. W. 886; Harris v. S., 49 Tex. Cr. 338, 94 S. W. 227.

18-46 Houston, E. Co. v. Faroux (Tex. Civ.), 125 S. W. 922.

20-49 See Helton v. S. (Tex. Cr.), 125 S. W. 21.

Character of grantor for fairness and honesty in business cannot be shown in absence of attack to sustain truth of recital in deed executed by him; same rule applies to deceased grantor. Quinalty v. Temple, 176 Fed. 67, 99 C. C. A. 375.

20-50 Harper v. U. S., 170 Fed. 385, 95 C. C. A. 555; U. S. v. Wilson, 176 Fed. 806; Smith v. S., 142 Ala. 14, 39 S. 329; Ware v. S., 91 Ark. 535, 121 S. W. 927; P. v. Bond, 13 Cal. App. 175, 109 P. 150; P. v. Tibbs, 143 Cal. 100, 76 P. 904; P. v. Wade, 118 Cal. 672, 50 P. 841; S. v. Conlan, 3 Penne. (Del.) 218, 50 A. 95; McClure v. Co., 6 Ga.

App. 303, 65 S. E. 33; Wistrand *v.* P., 218 Ill. 323, 75 N. E. 891; Wilcox *v.* U. S., 7 Ind. Ty. 86, 103 S. W. 774; S. *v.* Cather, 121 Ia. 106, 96 N. W. 722; S. *v.* Frederickson, 81 Kan. 854, 106 P. 1061; S. *v.* Bessa, 115 La. 259, 38 S. 985; Jefferson *v.* S. (Miss.), 59 S. 8; Maston *v.* S., 83 Miss. 647, 36 S. 70; Horton *v.* S., 84 Miss. 473, 36 S. 1033; S. *v.* Anslinger, 171 Mo. 600, 71 S. W. 1041; P. *v.* Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718; S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969; Gregory *v.* S., 50 Tex. Cr. 73, 94 S. W. 1041; Orange *v.* S., 47 Tex. Cr. 337, 83 S. W. 385; S. *v.* Moyer, 58 W. Va. 146, 52 S. E. 30; Schultz *v.* S., 133 Wis. 215, 113 N. W. 428.

See Cox *v.* S., 162 Ala. 66, 50 S. 398.

Defendant's reputation for truth and veracity is inadmissible where the state did not attack his reputation for such. Jones *v.* S. (Tex. Cr.), 167 S. W. 1110.

Rule applies to civil actions where defendants seek to show plaintiff's character. Dannenberg *v.* Berkner, 118 Ga. 885, 45 S. E. 682; Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633.

One accused of negligent homicide may prove general reputation for caution and prudence. Saye *v.* S., 50 Tex. Cr. 569, 99 S. W. 551. See supra, 3-3.

General character for honesty and integrity is trait involved in bribery. Schultz *v.* S., 133 Wis. 215, 113 N. W. 428.

On trial of slander suit allegation plaintiff whipped her mother made it proper to show she quarreled with and ill-treated her. Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633.

In trial for larceny, improper to ask witness for defendant if he ever heard of his stealing. S. *v.* Briscoe, 3 Penne. (Del.) 7, 50 A. 271.

21-52 Ware *v.* S., 91 Ark. 555, 121 S. W. 927; S. *v.* Carpenter, 32 Wash. 254, 73 P. 357; Schultz *v.* S., 133 Wis. 215, 113 N. W. 428.

If reputation for violence and quarrelsomeness when drunk shown, state may show general reputation for peace, quiet and good citizenship. Hussey *v.* S., 87 Ala. 121, 6 S. 420; S. *v.* Feeley, 194 Mo. 300, 318, 92 S. W. 663.

Imprisonment may be shown. Henderson *v.* S., 5 Ga. App. 495, 63 S. E. 535.

21-53 Sweatt *v.* S., 156 Ala. 85, 47 S. 194; S. *v.* Jones, 4 Penne. (Del.) 109, 53 A. 858; S. *v.* Gregory, 148 Ia. 152, 126 N. W. 1109; S. *v.* Philpott (Mo.), 146 S. W. 1160; S. *v.* Beckner, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535; S. *v.* Barnett, 203 Mo. 640, 102 S. W. 506; Bishop *v.* S. (Tex. Cr.), 160 S. W. 705. See vol. 11, p. 688, n. 77 and supplement thereto.

On the issue as to custody of minor children proof of general reputation of mother for chastity is competent, as is proof of specific acts tending to show she is not proper person to have their custody. Moore *v.* Dozier, 128 Ga. 90, 57 S. E. 110.

Opinions not competent to show a person is not possessed of character essential for a particular purpose, at least if facts and circumstances can be given jury. Moore *v.* Dozier, supra; Sumner *v.* Sumner, 118 Ga. 590, 45 S. E. 509.

21-54 Cook *v.* S., 46 Fla. 20, 35 S. 665.

21-55 S. *v.* Melton (N. C.), 81 S. E. 602; S. *v.* Wilson, 150 N. C. 599, 73 S. E. 812. *Contra.* Sweatt *v.* S., 156 Ala. 85, 47 S. 194.

21-57 Harper *v.* U. S., 170 Fed. 385, 95 C. C. A. 555; Wistrand *v.* P., 218 Ill. 323, 75 N. E. 891; Wilcox *v.* U. S., 7 Ind. Ty. 86, 103 S. W. 774; Harper *v.* U. S., 7 Ind. Ty. 437, 104 S. W. 673; S. *v.* Griggsby, 117 La. 1046, 42 S. 497; Roch *v.* S., 52 Tex. Cr. 48, 105 S. W. 202; Serna *v.* S. (Tex. Cr.), 105 S. W. 795.

22-58 Story *v.* S., 178 Ala. 98, 59 S. 489; Armstrong *v.* Little, 4 Penne. (Del.) 255, 54 A. 742; S. *v.* Jones, 4 Penne. (Del.) 109, 53 A. 858; Maloy *v.* S., 52 Fla. 101, 41 S. 791; Eastman *v.* R. Co., 200 Mass. 412, 86 N. E. 793; Dunlap *v.* S., 50 Tex. Cr. 504, 98 S. W. 845; Myers *v.* S. (Tex. Cr.), 101 S. W. 1000; Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493; Contreras *v.* Co. (Tex. Civ.), 83 S. W. 870; Price *v.* Wakeham, 48 Tex. Civ. 339, 107 S. W. 132; S. *v.* Grove, 61 W. Va. 697, 57 S. E. 296.

Accused testifying as witness may be impeached as any other witness. Maloy *v.* S., 52 Fla. 101, 41 S. 791.

23-59 Paxton *v.* S., 108 Ark. 316, 157 S. W. 396; Calhoun *v.* C., 23 Ky. L. R. 1188, 64 S. W. 965.

23-61 Lowman *v.* S., 161 Ala. 47, 50 S. 43; Louisville, etc. R. Co. *v.* Steenberger, 24 Ky. L. R. 761, 69 S. W. 1094; Helm *v.* C., 26 Ky. L. R. 165, 81 S. W. 270; S. *v.* Beckner, 194 Mo. 281, 289, 91 S. W. 892; S. *v.* Grubb, 201 Mo.

585, 99 S. W. 1082, 1090; S. v. Oliphant, 128 Mo. App. 252, 107 S. W. 32; In re Spink's Est., 62 Misc. 158, 116 N. Y. S. 267; Sigmon v. Shell (N. C.), 81 S. E. 739; Powers v. S., 117 Tenn. 363, 97 S. W. 815.

24-62 S. v. Blackburn, 136 Ia. 743, 114 N. W. 531 (applying statute to prosecutrix).

25-64 De Boe v. C., 146 Ky. 696, 143 S. W. 39.

25-65 McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503.

25-66 Eggman v. Nutter, 155 Ill. App. 390.

25-67 Perry v. S., 149 Ala. 40, 43 S. 18; Bostick v. S., 1 Ala. App. 255, 55 S. 260; Kennedy v. Tr. Co., 34 Okla. 140, 126 P. 548.

26-68 Jackson v. S., 92 Ark. 71, 122 S. W. 101; S. v. Rivers, 82 Conn. 454, 74 A. 757; Lane v. C., 134 Ky. 519, 121 S. W. 486; York v. Everton, 121 Mo App. 640, 97 S. W. 604; S. v. Sibley 132 Mo. 102, 33 S. W. 167, 53 Am. St. 477; Bigliben v. S. (Tex. Cr.), 151 S. W. 1044. See vol. 10, p. 605, n. 56 and supplement thereto.

Evidence of notorious character for lewdness is proper where father sets up justification for homicide in protection of daughter; but questionable acts of which defendant ignorant cannot be shown. Gossett v. S., 123 Ga. 431, 51 S. E. 394.

26-69 Jackson v. S., 92 Ark. 71, 122 S. W. 101.

Evidence of general character of a decedent, given in civil action, may be met by evidence showing in what particulars character was bad. Ratliff v. Daniel, 137 Ky. 55, 121 S. W. 1034.

27-70 Jackson v. S., 177 Ala. 12, 59 S. 171; Black v. S., 5 Ala. App. 87, 59 S. 692; Styles v. S., 5 Ala. App. 36, 59 S. 698 (not relevant that deceased was "a straight man"); Hall v. S., 89 Ark. 569, 117 S. W. 753; Turner v. S., 131 Ga. 761, 63 S. E. 294; Owens v. S., 120 Ga. 209, 47 S. E. 545; Pollard v. S., 58 Tex. Cr. 299, 125 S. W. 390.

Such evidence is competent only when there is testimony tending to establish self-defense. Green v. S., 143 Ala. 2, 10, 39 S. 362 (*over.* Fields v. S., 47 Ala. 603).

It is not competent to show good moral character of deceased and his abstinence from use of profane language, to rebut testimony he used such language when he attacked defendant. Bowles v. Co., 103 Va. 816, 48 S. E. 527.

Questions as to character for peace and quiet should include characteristics of violence, turbulence and bloodthirstiness. Tribble v. S., 145 Ala. 23, 40 S. 938.

27-71 Ragland v. S., 178 Ala. 59, 59 S. 637; Robinson v. S., 5 Ala. App. 45, 59 S. 321; Carter v. S., 4 Ala. App. 72, 59 S. 222; S. v. Naylor (Del.), 90 A. 880; S. v. Holly, 155 N. C. 485, 71 S. E. 450; S. v. Moreaux, 254 Mo. 398, 162 S. W. 158; Powers v. S., 117 Tenn. 363, 97 S. W. 815. See vol. 7, p. 160 et seq.

Or to a time shortly prior to the offense. State v. Fitch (Mo. App.), 166 S. W. 639. See Gabbard v. C. (Ky.), 167 S. W. 942.

27-73 Powers v. S., 117 Tenn. 363, 97 S. W. 815.

28-74 S. v. Viscome, 78 Vt. 485, 63 A. 877.

28-75 S. v. Blassengame, 132 La. 250, 61 S. 219.

Should be limited to a reasonable time previous to, and connected with, offense. Lynch v. P., 33 Colo. 128, 79 P. 1015.

28-76 Oldham v. S. (Ark.), 137 S. W. 825; P. v. Tibbs, 143 Cal. 100, 76 P. 904. *Contra.* S. v. Blackburn (Ia.), 110 N. W. 275.

In criminal action for slander evidence as to character of prosecutrix at time of trial is inadmissible, offense having been committed a year before. Bowers v. S., 45 Tex. Cr. 185, 75 S. W. 299.

28-78 Wong Hoon Kan v. Lui Yan, 16 Haw. 734; Earley v. Winn, 129 Wis. 291, 109 N. W. 633.

Evidence of remote character, when admissible. Ward v. Thompson, 146 Wis. 376, 131 N. W. 1006.

Misdeeds of testator, long anterior to will, too remote. Graham v. Deuterman, 217 Ill. 235, 75 N. E. 480.

28-79 S. v. Blackburn, 136 Ia. 743, 114 N. W. 531; S. v. Starr, 244 Mo. 161, 148 S. W. 862 (quot. this text); Cooper v. S. (Tenn.), 138 S. W. 826.

To show character of person witnessing petition for consent to sale of intoxicating liquors at a particular time, it is competent to show his conduct before and after that time, if not too remote. Foster v. Crisman (Ia.), 144 N. W. 1021.

Rule applies though accused is witness; he cannot complain because time in-

quired about antedated commission of offense. S. *v.* Hayden, 131 Ia. 1, 107 N. W. 929.

Testimony as to habits of witness for sobriety is not too remote if only a year intervenes between time inquired about and taking his deposition, especially if he has removed from the community. Winn *v.* Woodmen, 138 Mo. App. 701, 119 S. W. 536.

29-83 Lynch *v.* P., 33 Colo. 128, 79 P. 1015.

Pleadings may limit scope of evidence. O'Neil *v.* Adams, 144 Ia. 385, 122 N. W. 976.

29-84 Alderson *v.* S., 53 Tex. Cr. 525, 111 S. W. 738, though he has resided there only six months.

29-85 S. *v.* Conlan, 3 Penne. (Del.) 218, 50 A. 95.

Reputation of defendant in various shops in which he had been employed. P. *v.* Buccufurri, 158 App. Div. 186, 143 N. Y. S. 62.

Where the person is a rover and the only reputation he has was acquired several years before, it may be shown. Clark *v.* Hendricks (Tex. Civ.), 164 S. W. 57.

Reputation in place where witness does business and passes most of his time may be shown, though he lives elsewhere. Atlantic R. Co. *v.* Reynolds, 117 Ga. 47, 43 S. E. 456.

30-86 P. *v.* Loris, 131 App. Div. 127, 115 N. Y. S. 236, town less than fourteen miles distant.

30-91 Pate *v.* S., 162 Ala. 32, 50 S. 357; P. *v.* Cord, 157 Cal. 562, 108 P. 511; Alford *v.* S., 47 Fla. 1, 36 S. 436; Kennedy *v.* Woodmen, 243 Ill. 560, 90 N. E. 1084; Douglass *v.* Agne, 125 Ia. 67, 99 N. W. 550; Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639; S. *v.* Prins, 117 Ia. 505, 91 N. W. 758; S. *v.* Norman, 135 Ia. 483, 113 N. W. 340; Craft *v.* Barron, 28 Ky. L. R. 98, 88 S. W. 1099; P. *v.* Mix, 149 Mich. 260, 112 N. W. 907; Lindsay *v.* Bates, 223 Mo. 294, 122 S. W. 682; P. *v.* Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718; Newell *v.* S. (Tex. Cr.), 145 S. W. 939.

Defendant, after offering evidence of good character, could not be cross-examined as to whether he had told certain persons he had shot a woman eleven years previously. Com. *v.* Croson, 243 Pa. 19, 89 A. 821. See vol. 7, p. 167, n. 21, and supplement thereto.

In S. *v.* Albanes, 109 Me. 199, 83 A. 548, "the respondent was permitted to introduce evidence of his general reputation for peaceableness in the community in which he then lived and had lived for a period of 10 years, but evidence of his reputation in another community which he had left ten years before was excluded. . . . If a person has lived but a short time in a community, it might be proper and even necessary to go to his former home in order to establish his reputation."

Erratum.—P. *v.* Hamilton, p. 32 top of first column, should be cited 29 Mich. 173.

Period of two and one-half years and distance of twelve miles, not too remote. P. *v.* Nunley, 142 Cal. 441, 76 P. 45.

32-92 S. *v.* Norman, 135 Ia. 483, 113 N. W. 340; S. *v.* Quinlan (N. J.), 91 A. 111.

33-93 Reputation seven years before issue arose and in another state, too remote. S. *v.* Shouse, 188 Mo. 473, 87 S. W. 480.

33-94 Craft *v.* Barron, 28 Ky. L. R. 98, 88 S. W. 1099; McQuiggan *v.* Ladd, 79 Vt. 90, 101, 64 A. 503.

It is not presumed witness of bad character is reforming. Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639.

33-96 Craft *v.* Barron, 28 Ky. L. R. 98, 88 S. W. 1099.

34-97 Douglass *v.* Agne, 125 Ia. 67, 99 N. W. 550; P. *v.* Mix, 149 Mich. 260, 112 N. W. 907; Lindsay *v.* Bates, 223 Mo. 294, 122 S. W. 682.

34-98 Proof of character of person not a party nor witness may be important in ascertaining motive of person in going to defendant's home, and of latter's knowledge of his purpose in so doing. Rumsey *v.* S., 126 Ga. 419, 55 S. E. 167. This may be true of character of person in whose defense or for whose protection a parent has acted. Gossett *v.* S., 123 Ga. 431, 51 S. E. 394. Proof of general repute of women who went to alleged disorderly house is competent to show accused knew of their character and nature of their business. S. *v.* Steen, 125 Ia. 307, 101 N. W. 96. See supra, 5-7.

34-99 Lowdon *v.* U. S., 149 Fed. 673, 79 C. C. A. 361; Mullen *v.* U. S., 106 Fed. 892, 46 C. C. A. 22; McKnight *v.* U. S., 97 Fed. 208, 38 C. C. A. 115; U. S. *v.* Guthrie, 171 Fed. 528; Wilhite *v.* S., 84 Ark. 67, 104 S. W. 531; P. *v.* Gleason, 122 Cal. 370, 55 P. 123; U. S. *v.* Neverson, 1 Mackey (D. C.) 152;

M'Clure *v.* Co., 6 Ga. App. 363, 65 S. E. 33; S. *v.* Gruber, 19 Ida. 692, 115 P. 1; Davidson *v.* S., 135 Ind. 254, 34 N. E. 972; Howard *v.* C., 114 Ky. 372, 70 S. W. 1055; Hester *v.* S., 65 Neb. 276, 91 N. W. 416; P. *v.* Pekarz, 185 N. Y. 470, 78 N. E. 294; P. *v.* Langley, 114 App. Div. 427, 100 N. Y. S. 123; Ackley *v.* P., 9 Barb. (N. Y.) 609; (but see P. *v.* Lingley, 207 N. Y. 396, 101 N. E. 170, 46 L. R. A. (N. S.) 342, wherein the court said: "The true doctrine, as it seems to me, is that there is no presumption one way or the other upon the question whether the general character of the accused is good or bad"); Brown *v.* S., 32 O. C. C. 93; Hays *v.* Ty. (Okla.), 52 P. 950.

No presumption arises as to character in absence of evidence. Griffin *v.* S., 165 Ala. 29, 50 S. 962; Dryman *v.* S., 102 Ala. 130, 15 S. 433; Gater *v.* S., 141 Ala. 10, 37 S. 692; Fields *v.* U. S., 27 App. Cas. (D. C.) 433, 448; S. *v.* Gartrell, 171 Mo. 489, 71 S. W. 1045; S. *v.* Anslinger, 171 Mo. 600, 71 S. W. 1041; P. *v.* Brasch, 193 N. Y. 46, 85 N. E. 809.

Presumption of good character may be overcome by preponderance of evidence. S. *v.* Roupetz, 73 Kan. 663, 85 P. 778.

35-1 Distinction between good character of accused for peace and quietness and good character of witness for truth and veracity. Durham *v.* S. (Tenn.), 163 S. W. 447.

"**As to the presumption of good character,** the prisoners are entitled to the presumption of having sustained good characters up to the time of the alleged murder, and this presumption remains in their favor unless the jury shall believe from the evidence that they in fact were not entitled to such reputation." U. S. *v.* Neverson, 1 Mackey (D. C.) 152.

35-2 Andrews *v.* S., 159 Ala. 14, 48 S. 838; S. *v.* Lambert, 104 Me. 394, 71 A. 1092; S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969.

35-3 Witness may give his opinion as to the character of the deceased. Roberson *v.* S., 175 Ala. 15, 57 S. 829.

35-4 Business honor of another may be testified to from witness' knowledge. Continental Nat. Bk. *v.* Bk., 1 Tenn. Ch. App. 449.

35-5 Spotswood *v.* Spotswood, 4 Cal. App. 711, 89 P. 362; P. *v.* Buccufurri, 178 App. Div. 186, 113 N. Y. S. 62.

35-6 Watson *v.* S. (Ala.), 61 S. 334; Maxwell *v.* S. (Ala. App.), 65 S. 732; Hughes *v.* S., 152 Ala. 5, 44 S. 694; S. *v.* Briscoe, 3 Penne. (Del.) 7, 50 A. 271; S. *v.* Coulan, 3 Penne. (Del.) 218, 50 A. 95; Sylvester *v.* S., 46 Fla. 166, 176, 35 S. 142; Nelms *v.* S., 123 Ga. 575, 51 S. E. 588; S. *v.* Blassengame, 132 La. 250, 61 S. 219; Pierce *v.* Cole, 110 Me. 134, 85 A. 567; S. *v.* Stone, 96 Minn. 482, 105 N. W. 187; P. *v.* Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718; P. *v.* Buccufurri, 158 App. Div. 186, 143 N. Y. S. 62; S. *v.* Magill, 19 N. D. 131, 122 N. W. 330; S. *v.* Thoemke, 11 N. D. 386, 92 N. W. 480; S. *v.* Roderick, 77 O. St. 301, 82 N. E. 1082; Keith *v.* S., 127 Tenn. 40, 152 S. W. 1029; McCormick *v.* Schtreuck (Tex. Civ.), 130 S. W. 720; Davidson *v.* Ryle, 103 Tex. 209, 124 S. W. 616, 125 S. W. 881; Bowers *v.* S., 45 Tex. Cr. 185, 75 S. W. 299; Allison *v.* Wood, 104 Va. 765, 52 S. E. 559.

Reputation cannot be shown by view taken of defendant by portion of community. Stevens *v.* C., 30 Ky. L. R. 290, 98 S. W. 284.

If personal opinion not basis of witness' testimony it is competent. McMillon *v.* Cook (Tex. Civ.), 118 S. W. 775.

36-7 Noel *v.* S., 161 Ala. 25, 49 S. 824; Banks *v.* S. (Ala.), 39 S. 921; S. *v.* Thompson, 127 Ia. 440, 103 N. W. 377; S. *v.* Frederickson, 81 Kan. 854, 106 P. 1061; Harris *v.* Co., 25 Ky. L. R. 297, 74 S. W. 1044; Hensley *v.* C., 31 Ky. L. R. 386, 102 S. W. 268; S. *v.* Stone, 96 Minn. 482, 105 N. W. 187; S. *v.* Colvin, 226 Mo. 446, 126 S. W. 448; S. *v.* Beckner, 194 Mo. 281, 91 S. W. 892; P. *v.* Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718; C. *v.* Brown, 23 Pa. Super. 470; S. *v.* LaMont, 23 S. D. 174, 120 N. W. 1104; Phillips *v.* S., 59 Tex. Cr. 534, 128 S. W. 1100; Connell *v.* S., 45 Tex. Cr. 142, 75 S. W. 512; Heffington *v.* S., 41 Tex. Cr. 315, 54 S. W. 755; S. *v.* Carpenter, 32 Wash. 254, 73 P. 357; Schultz *v.* S., 133 Wis. 215, 113 N. W. 428; Robinson *v.* S., 143 Wis. 205, 126 N. W. 750.

Testimony defendant carried a pistol at time offense committed is competent. S. *v.* Spaugh, 199 Mo. 147, 97 S. W. 901.

Accused cannot testify he had never before been arrested or accused of crime. S. *v.* Marfaudille, 48 Wash. 117, 92 P. 939, 14 L. R. A. (N. S.) 346. But admission of such testimony is not

reversible error. Posey *v.* U. S., 26 App. Cas. (D. C.) 302.

Particular acts of misconduct by defendant may be shown on cross-examination of his witnesses, as may fact they had heard of such acts. Holloway *v.* S., 45 Tex. Cr. 303, 77 S. W. 14. *Comp.* Connell *v.* S., 45 Tex. Cr. 142, 75 S. W. 512, which distinguishes Childers *v.* S., 30 Tex. App. 160, 16 S. W. 903, on ground parties strangers to each other, and defendant knew of specific act or declarations of deceased with regard to himself, which was provable.

37-8 Columbia Nat. Bk. *v.* MacKnight, 29 App. Cas. (D. C.) 580; Lyman *v.* Tribune, 13 Haw. 453; Colburn *v.* Marble, 196 Mass. 376, 82 N. E. 28; Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844; Smitley *v.* Pinch, 148 Mich. 670, 112 N. W. 686; Trousil *v.* Bayer, 85 Neb. 431, 123 N. W. 445; Houston, etc. R. Co. *v.* Swaneey (Tex. Civ.), 128 S. W. 677; Allison *v.* Wood, 104 Va. 765, 52 S. E. 559; Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633.

If real character of party is involved particular instances of its manifestation may be shown. McQuiggan *v.* Ladd, 79 Vt. 90, 101, 64 A. 503.

37-9 Mizell *v.* S. (Ala.), 63 S. 1000; Wimberley *v.* S., 13 Ga. App. 671, 79 S. E. 767; Warrick *v.* S., 125 Ga. 133, 53 S. E. 1027; Andrews *v.* S., 118 Ga. 1, 43 S. E. 852; Hendrickson *v.* C., 23 Ky. L. R. 1191, 64 S. W. 954; S. *v.* Roderick, 77 O. St. 301, 82 N. E. 1082.

Rule applies to prosecutrix for rape. S. *v.* Detwiler, 60 W. Va. 583, 55 S. E. 654.

Particular acts by prosecuting witness may be proved to show recklessness. Coleman *v.* S., 45 Tex. Cr. 120, 74 S. W. 24.

37-10 Coates *v.* S., 5 Ala. App. 182, 59 S. 323; Lowman *v.* S., 161 Ala. 47, 50 S. 43; Jackson *v.* S., 92 Ark. 71, 122 S. W. 101; In re Durant, 80 Conn. 140, 67 A. 497; Connell *v.* S., 9 Ga. App. 818, 72 S. E. 304; S. *v.* Blackburn (Ia.), 110 N. W. 275; Lane *v.* C., 134 Ky. 519, 121 S. W. 486; S. *v.* Blount, 124 La. 202, 50 S. 12; Boche *v.* S., 84 Neb. 845, 122 N. W. 72; Powers *v.* S., 117 Tenn. 363, 97 S. W. 815; Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215; Jones *v.* S., 51 Tex. Cr. 472, 101 S. W. 993.

Statute so provides.—S. *v.* White, 48 Or. 416, 87 P. 137.

39-11 Black *v.* S., 5 Ala. App. 87, 59 S. 692; Graham *v.* Deuterman, 217 Ill. 235, 75 N. E. 480; Neal *v.* S., 101 Miss. 122, 57 S. 419; S. *v.* Moody, 94 S. C. 26, 77 S. E. 713; Newell *v.* S. (Tex. Cr.), 145 S. W. 939; Kemper *v.* S., 63 Tex. Cr. 1, 138 S. W. 1025.

If letter written accused is admitted as bearing on his character answer thereto, though written by his attorney, is admissible. Crawford *v.* U. S., 212 U. S. 183.

39-12 Price *v.* Wakeham, 48 Tex. Civ. 339, 107 S. W. 132; Whitehead *v.* S., 61 Tex. Cr. 558, 137 S. W. 356.

39-13 Warrick *v.* S., 125 Ga. 133, 53 S. E. 1027; Clark *v.* C., 29 Ky. L. R. 154, 92 S. W. 573.

"Testimony which would tend to show that the deceased girl had had improper relations with another man or other men, and thus negative an inference of motive upon the part of this traverser for the perpetration of the abortion. The court uniformly refused to admit all testimony of this character as being immaterial to the issue before the jury. The question to be determined in the case was not the unchastity of the girl with any other man or men, but whether this traverser had committed an abortion upon her." Meno *v.* S., 117 Md. 435, 83 A. 759.

39-16 Exceptions made though rule recognized. Robinson *v.* S., 143 Wis. 205, 126 N. W. 750.

40-18 Brantley *v.* S., 133 Ga. 264, 65 S. E. 426.

40-20 Russell *v.* S., 77 Neb. 519, 110 N. W. 380; Bigliben *v.* S. (Tex. Cr.), 151 S. W. 1044. See S. *v.* Jones (Wash.), 142 P. 35, also vol. 10, p. 605, n. 56, and supplement thereto.

41-21 S. *v.* Stewart, 6 Penne. (Del.) 435, 67 A. 786; S. *v.* Lambert, 104 Me. 394, 71 A. 1092; Lee *v.* Andrews, 151 Mich. 5, 114 N. W. 672; P. *v.* Turney, 124 Mich. 542, 83 N. W. 273; Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78, 94.

41-24 P. *v.* Cord, 157 Cal. 562, 108 P. 511; S. *v.* Stewart, 6 Penne. (Del.) 435, 67 A. 786; S. *v.* Prins, 117 Ia. 505, 91 N. W. 758; S. *v.* Blackburn (Ia.), 110 N. W. 275; Hunneman *v.* Phelps, 199 Mass. 15, 85 N. E. 169; S. *v.* Boyd, 178 Mo. 2, 76 S. W. 979; Lamb *v.* Littman, 132 N. C. 978, 44 S. E. 646; Vaughan *v.* S., 51 Tex. Cr. 180, 101 S. W. 445; Wolff *v.* Co., 42 Tex. Civ. 30, 94 S. W. 1062; Stewart *v.* Profit (Tex. Civ.), 146 S. W. 563.

Membership in order not evidence of good reputation. Vaughn *v.* S., 51 Tex. Cr. 180, 101 S. W. 445.

42-25 Sacrini *v.* U. S., 38 App. Cas. (D. C.) 371; S. *v.* Anderson, 135 La.—, 65 S. 478; Sasser *v.* S. (Tex. Cr.), 166 S. W. 1160.

And see S. *v.* Frego (Ida.), 138 P. 1124; S. *v.* Thome, 83 N. J. L. 799, 85 A. 452.

Father may testify of character of son. Brown *v.* S., 142 Ala. 287, 38 S. 268; State *v.* Hamilton, 151 Ia. 533, 132 N. W. 41.

42-26 P. *v.* Cord, 157 Cal. 562, 108 P. 511; P. *v.* McCarthy, 14 Cal. App. 118, 111 P. 274.

42-28 S. *v.* Baker (Ia.), 135 N. W. 1097; S. *v.* Lambert, 104 Me. 435, 67 A. 786; P. *v.* Loris, 131 App. Div. 127, 115 N. Y. S. 236.

Opportunity for and intent of information is what is important. S. *v.* Cunningham, 130 Ia. 749, 58 S. 558; Stewart *v.* Profit (Tex. Civ.), 146 S. W. 563 (where witness lived seven miles away).

Ex parte certificate of character given by teacher inadmissible. Whatley *v.* S., 144 Ala. 68, 39 S. 1014. And so of certificate by army officer. Taylor *v.* S., 120 Ga. 857, 48 S. E. 361. And certificate given pursuant to law to school teacher. Russell *v.* S., 77 Neb. 519, 110 N. W. 380.

42-29 S. *v.* Newcomb, 58 Wash. 414, 109 P. 355. But see Joyner *v.* S., 12 Ga. App. 217, 77 S. E. 9.

42-30 McGuire *v.* S., 3 Ala. App. 40, 58 S. 60; Smitley *v.* Pinch, 148 Mich. 670, 112 N. W. 686.

"The witness could form an estimate by what he heard others say, without having a personal acquaintance, and that his knowledge of the reputation of defendant was limited to what others had communicated by some expression ('what they said') does not make the question objectionable. Reputation is the estimate in which others hold one, and this can only be made known or communicated by some expression —generally 'what they say.'" McGuire *v.* S., 3 Ala. App. 40, 58 S. 60.

42-31 Young *v.* Corrigan, 208 Fed. 431; Poe *v.* Poe, 93 Ark. 120, 124 S. W. 1129; Tingley *v.* Co., 151 Cal. 1, 89 P. 1097, 1107; Vickers *v.* P., 31 Colo. 491, 73 P. 845; Moore *v.* Dozier, 128 Ga. 90, 57 S. E. 110; P. *v.* Lewis, 131 App. Div. 127, 115 N. Y. S. 236; S. *v.* Miller, 75 Wash. 174, 130 P. 876.

43-32 Gordan *v.* S., 140 Ala. 29, 36 S. 1009; P. *v.* Overacker, 15 Cal. App. 620, 115 P. 756; P. *v.* Snyder, 173 Mich. 616, 139 N. W. 1036; Powers *v.* S., 147 Tenn. 363, 97 S. W. 815.

43-33 Personal observation qualifies witness to testify to character. S. *v.* Hosey, 54 Wash. 309, 103 P. 12.

43-34 Hinson *v.* S., 59 Fla. 20, 52 S. 194; Turner *v.* S., 131 Ga. 761, 63 S. E. 294; S. *v.* McClellan, 79 Kan. 11, 98 P. 209; S. *v.* Lambert, 104 Me. 394, 71 A. 1092; Brinsfield *v.* Howeth, 110 Md. 520, 73 A. 289; Day *v.* Ross, 154 Mass. 13, 27 N. E. 676; Smitley *v.* Pinch, 148 Mich. 670, 112 N. W. 686; Johnson *v.* S. (Miss.), 40 S. 324; Sinclair *v.* S., 87 Miss. 330, 39 S. 522; P. *v.* Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718; S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969; Corrigan *v.* Co., 225 Pa. 560, 74 A. 420; Milliken *v.* Long, 188 Pa. 411, 41 A. 540; Mitchell *v.* S., 51 Tex. Cr. 71, 100 S. W. 930; S. *v.* Hosey, 54 Wash. 309, 103 P. 12 (quot. the text); S. *v.* Underwood, 35 Wash. 558, 572, 77 P. 863; S. *v.* Cremeans, 62 W. Va. 134, 57 S. E. 405; Spencer *v.* S., 132 Wis. 509, 112 N. W. 462.

Negative evidence that neighbors have never heard anything against the party is admissible. S. *v.* Reed, 250 Mo. 379, 157 S. W. 316.

"There is no better evidence of a man's good reputation than that he has lived in a given community for a number of years, and that it was never brought in question." Dickson *v.* S. (Tex. Cr.), 146 S. W. 914.

44-35 General opinion of community in range of acquaintanceship of party inquired about, proper subject of inquiry. McMillon *v.* Cook (Tex. Civ.), 118 S. W. 775. "Character" may be used for "reputation." S. *v.* Tawney, 78 Kan. 855, 99 P. 268.

It is competent to ask a witness if he thinks he knows the general character of a witness who has been previously examined. Collins *v.* S., 3 Ala. App. 64, 58 S. 80.

44-36 Peacock *v.* S., 10 Ga. App. 402, 73 S. E. 404.

44-37 Smith *v.* S., 8 Ala. App. 187, 62 S. 573; Tingley *v.* Co., 151 Cal. 1, 89 P. 1097, 1107; Hinson *v.* S., 59 Fla. 20, 52 S. 194; Black *v.* Epstein, 221 Mo. 286, 120 S. W. 754; S. *v.* Thome, 83 N. J. L. 799, 85 A. 452.

45-38 S. *v.* Madison, 23 S. D. 584, 122 N. W. 647.

45-39 McMillon *v.* Cook (Tex. Civ.), 118 S. W. 775, error in refusing to do so not material if party does not avail himself of later opportunity.

Cross-examination may occur after witness has testified, and if his lack of qualification appears testimony will be stricken out. Vickers *v.* P., 31 Colo. 491, 73 P. 845.

45-41 Mitchell *v.* S., 148 Ala. 618, 42 S. 1014; Crawford *v.* S., 112 Ala. 1, 21 S. 214; P. *v.* Corey, 8 Cal. App. 720, 97 P. 907; Douglass *v.* S. (Tex. Cr.), 98 S. W. 840.

Witness who has testified to general bad character of another witness may testify as to whether he would believe latter on oath. Taylor *v.* S., 5 Ga. App. 237, 62 S. E. 1048.

47-46 Ross *v.* S., 139 Ala. 144, 36 S. 718.

47-47 Owens *v.* S., 120 Ga. 209, 47 S. E. 545; S. *v.* Osborne, 54 Or. 289, 103 P. 62. *Contra*, Simmons *v.* S., 58 Tex. Cr. 574, 126 S. W. 1157.

Witness may be asked as to defendant's disposition when intoxicated, he having been so when crime committed; but cannot be asked how often he drank. Cook *v.* S., 46 Fla. 20, 35 S. 665.

48-48 S. *v.* Naylor (Del.), 90 A. 880; P. *v.* Callahan, 130 N. Y. S. 1041; Clark *v.* Hendricks (Tex. Civ.), 164 S. W. 57; Simmons *v.* S., 58 Tex. Cr. 574, 126 S. W. 1157.

48-49 P. *v.* Tubbs, 147 Mich. 1, 110 N. W. 132; S. *v.* Fisher, 149 N. C. 557; 63 S. E. 153.

49-50 S. *v.* Osborne, 54 Or. 289, 103 P. 62.

Not concluded by testimony as to general reputation, but may show conduct varied. P. *v.* Lamar, 148 Cal. 564, 83 P. 993.

Silence of local newspapers cannot be shown to bolster up reputation. Berry *v.* Doolittle, 82 Vt. 471, 74 A. 97.

49-51 Stanfield *v.* S., 3 Ala. App. 54, 57 S. 402; Barnett *v.* S., 165 Ala. 59, 51 S. 299; Ross *v.* S., 139 Ala. 144, 36 S. 718; Carson *v.* S., 128 Ala. 58, 29 S. 608; Weaver *v.* S., 83 Ark. 119, 102 S. W. 713; P. *v.* Perry, 144 Cal. 748, 78 P. 284; P. *v.* Bartley, 12 Cal. App. 773, 108 P. 868; Cook *v.* S., 46 Fla. 20, 35 S. 665; Owens *v.* S., 120 Ga. 209, 47 S. E. 545; Dotson *v.* S., 136 Ga. 243, 71 S. E. 164; Moulder *v.* S., 9 Ga. App. 438, 71 S. E. 682; S. *v.* Richards, 126 Ia. 497, 102 N. W. 439; Spain *v.* Rake straw, 79 Kan. 758, 101 P. 466; Barnes *v.* C., 24 Ky. L. R. 1143, 70 S. W. 827; Newton *v.* C., 31 Ky. L. R. 327, 102 S. W. 264; S. *v.* Beckner, 194 Mo. 281, 91 S. W. 892; S. *v.* Kimmel, 156 Mo. App. 461, 137 S. W. 329; S. *v.* O'Kelley, 121 Mo. App. 178, 98 S. W. 804; McCormick *v.* S., 66 Neb. 337, 92 N. W. 606; S. *v.* Doris, 51 Or. 136, 94 P. 44; Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29; Fox *v.* S. (Tex. Cr.), 158 S. W. 1141; Green *v.* Dodge, 79 Vt. 73, 64 A. 499.

Accused may be asked as to particular wrong-doing. Carr *v.* S., 81 Ark. 589, 99 S. W. 831.

Violation of municipal ordinance, not material. See *v.* Wormser, 129 App. Div. 596, 113 N. Y. S. 1093.

49-52 Rutledge *v.* Rowland, 161 Ala. 114, 49 S. 461; Hardgraves *v.* S., 88 Ark. 261, 114 S. W. 216; Allred *v.* S., 126 Ga. 537, 55 S. E. 178; Lowrey *v.* R. Co., 90 Kan. 180, 133 P. 719; Crandall *v.* Greeves (Mo. App.), 168 S. W. 264; S. *v.* Osborne, 54 Or. 289, 103 P. 62; McMillon *v.* Cook (Tex. Civ.), 118 S. W. 775.

Witness' conception of what constitutes good character may be ascertained by hypothetical questions. S. *v.* Quick, 150 N. C. 820, 64 S. E. 168.

49-53 Maxwell *v.* S. (Ala. App.), 65 S. 732; Ragland *v.* S., 178 Ala. 59, 59 S. 637; Andrews *v.* S., 159 Ala. 14, 48 S. 858; P. *v.* Weber, 149 Cal. 325, 86 P. 671; P. *v.* Moran, 144 Cal. 48, 77 P. 777; Cook *v.* S., 46 Fla. 20, 35 S. 665; Hunter *v.* S., 133 Ga. 78, 65 S. E. 154; S. *v.* Kimes, 152 Ia. 240, 132 N. W. 180; S. *v.* Oteri, 128 La. 939, 55 S. 582; P. *v.* Huff, 173 Mich. 620, 139 N. W. 1033; S. *v.* Davidson, 172 Mo. App. 356, 157 S. W. 890; S. *v.* Boyd, 178 Mo. 2, 76 S. W. 979; S. *v.* Jones, 48 Mont. 505, 139 P. 441; P. *v.* Landiero, 192 N. Y. 304, 85 N. E. 132; Zeltner *v.* S., 32 O. C. C. 102; Williamson *v.* S. (Tex. Cr.), 167 S. W. 360; Bearden *v.* S., 44 Tex. Cr. 578, 73 S. W. 17.

50-54 S. *v.* Boyd, 178 Mo. 2, 76 S. W. 979; S. *v.* Doris, 51 Or. 136, 94 P. 44; cit. the text; Greenville *v.* Spencer, 77 S. C. 50, 57 S. E. 638.

50-55 Testimony deceased was prosecuted, improper. Bearden *v.* S., 44 Tex. Cr. 578, 73 S. W. 17.

50-56 P. *v.* Weber, 149 Cal. 325, 86 P. 671; Powers *v.* S., 117 Tenn. 363, 97 S. W. 815.

50-57 S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969.

51-58 *Contra*, S. *v.* Doris, 51 Or. 136, 94 P. 44.

51-59 Carson *v.* S., 128 Ala. 58, 29 S. 608.

51-61 Manley *v.* S., 62 Tex. Cr. 392, 137 S. W. 1137.

51-62 P. *v.* Casselman, 10 Cal. App. 234, 101 P. 693; S. *v.* Rodrigues, 115 La. 1004, 40 S. 438; Biester *v.* S., 65 Neb. 276, 91 N. W. 416; S. *v.* Madison, 23 S. D. 584, 122 N. W. 647.

51-63 *Compare* supra, 7-11 et seq.

May be sufficient to disprove charge of crime by discrediting witness upon whose testimony the charge rests. Taylor *v.* S., 13 Ga. App. 715, 79 S. E. 924.

52-64 S. *v.* Sigerella, 7 Penne. (Del.) 311, 82 A. 31; S. *v.* Collins, 5 Penne. (Del.) 263, 62 A. 224; Taylor *v.* S., 5 Ga. App. 237, 62 S. E. 1048; Miller *v.* P., 229 Ill. 376, 82 N. E. 391; S. *v.* King, 122 Ia. 1, 96 N. W. 712; Sweet *v.* S., 75 Neb. 263, 106 N. W. 31; Latimer *v.* S., 55 Neb. 609, 620, 76 N. W. 207, 70 Am. St. 403; P. *v.* Blatt, 136 App. Div. 717, 121 N. Y. S. 507; S. *v.* Cloninger, 149 N. C. 567, 63 S. E. 154; Baum *v.* S., 6 O. C. C. (N. S.) 515.

Jury may be instructed as to effect of character evidence. Ducett *v.* S. (Ala.), 65 S. 351.

52-65 Southern R. Co. *v.* Peek, 6 Ga. App. 43, 64 S. E. 308, as to matters with reference to which he is impeached.

Character evidence is to be considered in connection with all the evidence. Court may, but is not bound, to give special instruction concerning it. McCall *v.* S., 55 Fla. 108, 46 S. 321.

CHASTITY

54-1 **Chastity**, in law of seduction, means physical, rather than moral purity. P. *v.* Kehoe, 123 Cal. 224, 55 P. 911; Washington *v.* S., 124 Ga. 423, 52 S. E. 910.

If chastity of decedent is not attacked in homicide trial, proof thereof is not material. Bullard *v.* S., 127 Ga. 289, 56 S. E. 429; Burnett *v.* P., 204 Ill. 208, 226, 68 N. E. 505.

54-2 Wilhite *v.* S., 84 Ark. 67, 104 S. W. 531; Caldwell *v.* S., 73 Ark. 139, 83 S. W. 929, 108 Am. St. 28; Rucker *v.* S., 77 Ark. 23, 90 S. W. 151; McTyier *v.* S., 91 Ga. 245, 18 S. E. 140; Woodward *v.* S., 5 Ga. App. 447, 63 S. E. 573; Kerr *v.* U. S., 7 Ind. Ty. 486, 104 S. W. 809; Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. 421; S. *v.* Kelley, 191 Mo. 680, 90 S. W. 834; U. S. *v.* Alvarez, 1 Phil. Isl. 351; S. *v.* Turner, 82 S. C. 278, 64 S. E. 424; Blackburn *v.* S. (Tex. Cr.), 160 S. W. 687.

See vol. 11, p. 692, n. 93, and supplement thereto.

There is no presumption as to reformation, after proof of specific acts of unchastity, unless considerable period has intervened. Woodward *v.* Republic, 10 Haw. 416. Unchastity being proven, is presumed to continue. Kerr *v.* U. S., 7 Ind. Ty. 486, 104 S. W. 809.

55-3 P. *v.* Krusich, 93 Cal. 74, 28 P. 794; P. *v.* Samoset, 97 Cal. 448, 32 P. 529; P. *v.* O'Brien, 130 Cal. 1, 62 P. 297; In re Vandiveer, 4 Cal. App. 650, 88 P. 993; S. *v.* Timmens, 4 Minn. 325; S. *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642; S. *v.* Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. 656, 9 Am. Crim. 617; S. *v.* Preuss, 112 Minn. 108, 127 N. W. 438; S. *v.* Kelly, 245 Mo. 489, 150 S. W. 1057, 43 L. R. A. (N. S.) 476; S. *v.* McMahon, 234 Mo. 611, 137 S. W. 872; S. *v.* Kelley, 191 Mo. 680, 90 S. W. 834; S. *v.* De Witt, 186 Mo. 61, 84 S. W. 956; P. *v.* Weinstock, 140 N. Y. S. 453; Safford *v.* P., 1 Park. Cr. (N. Y.), 474; Kauffman *v.* P., 11 Hun (N. Y.), 82; Marshall *v.* Ty., 2 Okla. Cr. 136, 101 P. 139; Harvey *v.* Ty., 11 Okla. 156, 65 P. 837; S. *v.* Meister, 60 Or. 469, 120 P. 406.

See S. *v.* Kelly, 245 Mo. 489, 150 S. W. 1057, 43 L. R. A. (N. S.), 476 (note).

Presumption of innocence of defendant outweighs presumption of chastity. Walton *v.* S., 71 Ark. 398, 75 S. W. 1; S. *v.* Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. 656, 9 Am. Cr. 617; S. *v.* Kelly, 245 Mo. 489, 150 S. W. 1057, 43 L. R. A. (N. S.) 476.

Chastity not involved in prosecution for rape if prosecutrix under age of consent. P. *v.* Wilmot, 139 Cal. 103, 72 P. 838; P. *v.* Johnson, 106 Cal. 289, 39 P. 622; P. *v.* Harlan, 133 Cal. 16, 65 P. 9.

55-4 Caldwell *v.* S., 73 Ark. 139, 83 S. W. 929, 108 Am. St. 28; Wilhite *v.* S., 84 Ark. 67, 104 S. W. 531; Cooper *v.* S., 86 Ark. 30, 109 S. W. 1023; Polk *v.* S., 40 Ark. 482, 48 Am. Rep. 17; Telford *v.* United States, 7 Ind. Ty. 254, 104 S. W. 608; Kerr *v.* United States, 7 Ind. Ty. 486, 104 S. W. 809;

S. *v.* Drake, 128 Ia. 539, 105 N. W. 54; S. *v.* Burns (Ia.), 78 N. W. 681; S. *v.* Whalen, 98 Ia. 662, 68 N. W. 554; S. *v.* Bauerkemper, 95 Ia. 562, 64 N. W. 609; S. *v.* Hemm, 82 Ia. 609, 48 N. W. 971; S. *v.* McClintic, 73 Ia. 663, 35 N. W. 696; S. *v.* Wells, 48 Ia. 671; S. *v.* Bowman, 45 Ia. 418; S. *v.* Shean, 32 Ia. 88; S. *v.* Sutherland, 30 Ia. 570; S. *v.* Andre, 5 Ia. 389, 68 Am. Dec. 708; P. *v.* Brewer, 27 Mich. 134; Ferguson *v.* S., 71 Miss. 805, 15 So. 66, 16 So. 355, 42 Am. St. 492; Griffin *v.* S., 109 Tenn. 17, 70 S. W. 61; Knight *v.* S., 64 Tex. Cr. 541, 144 S. W. 967; Barker *v.* C., 90 Va. 820, 20 S. E. 776, 9 Am. Cr. 611; Mills *v.* C., 93 Va. 815, 22 S. E. 863; Flick *v.* C., 97 Va. 766, 34 S. E. 39.

See S. *v.* Kelly, 245 Mo. 489, 150 S. W. 1057, 43 L. R. A. (N. S.) 476, 478 (note).

Burden of proof is met by preponderance of evidence. Wilhite *v.* S., 84 Ark. 67, 104 S. W. 531. By raising reasonable doubt. Kerr *v.* U. S., 7 Ind. Ty. 486, 104 S. W. 809; Griffin *v.* S., 109 Tenn. 17, 70 S. W. 61.

55-5 S. *v.* Kelly, 245 Mo. 489, 150 S. W. 1057, 43 L. R. A. (N. S.) 476; Marshall *v.* Ty., 2 Okla. Cr. 136, 101 P. 139.

56-6 Story *v.* S., 178 Ala. 98, 59 S. 480; Lane *v.* C., 134 Ky. 519, 121 S. W. 486; Smitley *v.* Pinch, 148 Mich. 670, 112 N. W. 686; S. *v.* Poyner, 57 Wash. 489, 107 P. 181; S. *v.* Verto, 65 W. Va. 628, 64 S. E. 1025. See S. *v.* Drake, 128 Ia. 539, 105 N. W. 54; Marshall *v.* Ty., 2 Okla. Cr. 136, 101 P. 139.

General reputation of persons with whom prosecutrix associated not provable. Otherwise as to lewd and unchaste character of associates. Woodruff *v.* S., 72 Neb. 815, 101 N. W. 1114.

Unless specific acts are part of res gestae. Allen *v.* S. (Okla. Cr.), 134 P. 91.

57-7 S. *v.* Drake, 128 Ia. 539, 105 N. W. 54; Wilkerson *v.* S. (Miss.), 64 S. 420; Powell *v.* S. (Miss.), 20 S. 4; Winn *v.* Woodmen, 138 Mo. App. 701, 119 S. W. 536; Koepke *v.* Delfs (Neb.), 146 N. W. 962; Woodruff *v.* S., 72 Neb. 815, 101 N. W. 1114; P. *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040; Marshall *v.* Ty., 2 Okla. Cr. 136, 101 P. 139.

57-8 S. *v.* Craig, 52 Wash. 66, 100 P. 167.

58-10 Smitley *v.* Pinch, 148 Mich. 670, 112 N. W. 686.

58-11 Admissions after defendant seduced prosecutrix, not provable. Wilhite *v.* S., 84 Ark. 67, 104 S. W. 531. Circumstantial evidence may establish chastity. Marshall *v.* Ty., 2 Okla. Cr. 136, 101 P. 139.

CIRCUMSTANTIAL EVIDENCE

63-2 U. S. *v.* Greene, 146 Fed. 803; Buckler *v.* Kneezell (Tex. Civ.), 91 S. W. 367.

63-3 Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141; S. *v.* Tyre, 6 Penne. (Del.) 343, 67 A. 199; S. *v.* Collins, 5 Penne. (Del.) 263, 62 A. 224; Dunn *v.* S., 166 Ind. 694, 78 N. E. 198; Buckler *v.* Kneezell (Tex. Civ.), 91 S. W. 367.

64-5 P. *v.* Lonnen, 139 Cal. 634, 73 P. 586; P. *v.* Clark, 145 Cal. 727, 79 P. 434; Minor *v.* S., 55 Fla. 77, 46 S. 297; Brooks *v.* S., 12 Ga. App. 693, 78 S. E. 143; Harper *v.* S., 12 Ga. App. 651, 77 S. E. 915; Brannon *v.* S., 140 Ga. 787, 80 S. E. 7; Middleton *v.* S., 7 Ga. App. 1, 66 S. E. 22; S. *v.* Stevens, 119 Ia. 675, 94 N. W. 241; S. *v.* Hubbard, 223 Mo. 80, 122 S. W. 694; S. *v.* Foster, 14 N. D. 561, 105 N. W. 938; Star *v.* S. (Okla. Cr.), 131 P. 542; Price *v.* S. (Okla. Cr.), 131 P. 1102; Hendrix *v.* U. S., 2 Okla. Cr. 240, 101 P. 125; Ferrell *v.* S. (Tex. Cr.), 152 S. W. 901; Moore *v.* S., 58 Tex. Cr. 183, 127 S. W. 34; McKinney *v.* S., 48 Tex. Cr. 402, 88 S. W. 1012; S. *v.* Overson, 30 Utah 22, 83 P. 557.

Confession excuses charge on circumstantial evidence. Burk *v.* S., 50 Tex. Cr. 185, 95 S. W. 1061.

65-8 Sears *v.* Vaughan, 230 Ill. 572, 82 N. E. 881.

65-9 U. S. *v.* Greene, 146 Fed. 803; Osburn *v.* R. Co., 15 Ida. 478, 98 P. 627, cit. text generally.

65-10 See Collins *v.* Co., 113 Mo App. 336, 127 S. W. 611; Bower *v.* Bower, 78 N. J. L. 387, 74 A. 522.

66-12 Adams *v.* R. Co., 242 Ill. 191, 90 N. E. 382; North Chicago St. R. Co. *v.* Rodert, 203 Ill. 413, 67 N. E. 812; Modern Woodmen *v.* Craiger (Ind. App.), 90 N. E. 84; C. *v.* Asherowski, 196 Mass. 342, 82 N. E. 13; Bull Remedy Co. *v.* Clark, 109 Minn. 296, 124 N. W. 20; Bower *v.* Bower, 78 N. J. L. 387, 74 A. 522; Snowden *v.* Pell, 139 N. C. 497, 75 S. E. 721; Samples *v.* S. (Okla. Cr.), 134 P. 838; Cook *v.* S. (Okla. Cr.), 132 P. 507; Buckler *v.* Kneezell (Tex. Civ.), 91 S. W. 367.

See Victor *v.* Smilanich, 54 Colo. 479, 131 P. 392.

67-13 Vermont *v.* U. S., 174 Fed. 792, 98 C. C. A. 500; U. S. *v.* Wilson, 176 Fed. 806; Girard *v.* Co., 83 Conn. 20, 74 A. 1126; Harper *v.* Vickers, 7 Ga. App. 373, 66 S. E. 990; Adams *v.* R. Co., 243 Ill. 191, 90 N. E. 82; No Chicago St. R. Co. *v.* Rodert, 203 Ill. 413, 67 N. E. 812; O'Donnell *v.* R. Co., 205 Mass. 200, 90 N. E. 977; C. *v.* Asherowski, 196 Mass. 42, 82 N. E. 13; Bruckman *v.* R. Co., 110 Minn. 308, 125 N. W. 263; Setzler *v.* R. Co., 227 Mo. 454, 127 S. W. 1; Riggs *v.* Co., 134 App. Div. 672, 119 N. Y. S. 548; Hardy *v.* C., 110 Va. 910, 67 S. E. 522; Ohrstrom *v.* Tacoma, 57 Wash. 121, 106 P. 629; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

67-14 Green *v.* S., 91 Ark. 510, 121 S. W. 727; Texas T. & T. Co. *v.* Scott (Tex. Civ.), 127 S. W. 587.

67-16 C. *v.* Snyder, 40 Pa. Super. 485. See "Railroads," infra, 542-39.

67-17 Hindle *v.* Healy, 204 Mass. 48, 90 N. E. 511; Foster *v.* R. Co., 143 Mo. App. 547, 128 S. W. 36; Miller *v.* Co., 134 App. Div. 212, 118 N. Y. S. 885.

68-18 Great Northern R. Co. *v.* Johnson, 176 Fed. 328, 99 C. C. A. 618; Southern R. Co. *v.* Stewart, 164 Ala. 171, 51 S. 324; Neal *v.* R. Co., 129 Ia. 5, 105 N. W. 197; Duncan *v.* R. Co., 82 Kan. 230, 108 P. 101; Stephens *v.* Assn., 139 Mo. App. 369, 123 S. W. 63; S. *v.* Blake, 36 Utah 605, 105 P. 910. See Bender *v.* S. S. (1909), 2 K. B. 41; Marshall *v.* S. S. (1909), 2 K. B. 46.

68-19 Georgia R. & E. Co. *v.* Harris, 1 Ga. App. 714, 57 S. E. 1076; In re Van Ness' Will, 78 Misc. 592, 139 N. Y. S. 485; Early *v.* S., 50 Tex. Cr. 344, 97 S. W. 82.

Colorado statute provides no person shall suffer death penalty on conviction on circumstantial evidence alone. See Covington *v.* P., 36 Colo. 183, 85 P. 382, for evidence not of that nature.

69-23 Watson *v.* Adams (Ala.), 65 S. 528; S. *v.* Francis, 199 Mo. 671, 694, 98 S. W. 11.

70-31 Vernon *v.* U. S., 146 Fed. 121, 76 C. C. A. 547; U. S. F. & G. Co. *v.* Bk., 145 Fed. 273, 74 C. C. A. 553; Catholic University *v.* Waggaman, 32 App. Cas. (D. C.) 307; Georgia R & E. Co. *v.* Harris, 1 Ga. App. 714, 57 S. E. 1076; Evansville M. B. Co. *v.* Loge, 42 Ind. App. 461, 85 N. E. 979; Klumb *v.* Assn., 141 Ia. 519, 120 N. W. 81; Neal *v.* R. Co., 129 Ia. 5, 105 N. W. 197; Chicago, etc. R. Co. *v.* Wood, 66 Kan. 613, 72 P. 215; Dunlap *v.* R. Co., 145 Mo. App. 215, 129 S. W. 262; P. *v.* Razeziez, 206 N. Y. 249, 99 N. E. 557; Kimball *v.* O'Dell, 138 App. Div. 409, 122 N. Y. S. 755; S. *v.* Hembree, 54 Or. 463, 103 P. 1008; *cit.* the text; Crosby *v.* Ordoin (Tex. Civ.), 145 S. W. 709; S. *v.* Wells, 35 Utah 400, 100 P. 681.

In civil cases circumstantial evidence is insufficient if it is equally consistent with contention of both parties. Georgia, etc. R. Co. *v.* Harris, 1 Ga. App. 714, 57 S. E. 1076; Brister *v.* R. Co., 88 Miss. 431, 40 S. 325; Grayson v. Lofland, 21 Tex. Civ. 503, 52 S. W. 121; Brewer *v.* Cochran, 45 Tex. Civ. 179, 99 S. W. 1033. It need not rise to that degree of certainty which will exclude any and every other reasonable hypothesis; jury may decide between two or more theories. Chicago, etc. R. Co. *v.* Wood, 66 Kan. 613, 72 P. 215.

72-32 S. *v.* Tedder, 83 S. C. 437, 65 S. E. 449; Harris *v.* S. (Tex. Cr.), 148 S. W. 1074.

72-33 Edwards *v.* Ty., 8 Ariz. 342, 76 P. 458; P. *v.* Olsen, 1 Cal. App. 17, 81 P. 676; S. *v.* Cohen, 108 Ia. 208, 78 N. W. 857, 75 Am. St. 213; S. v. Harmann, 135 Ia. 167, 112 N. W. 632; S. *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634; Spick *v.* S., 140 Wis. 104, 121 N. W. 661. See S. *v.* Ready, 77 N. J. L. 329, 72 A. 445.

73-34 U. S. *v.* Greene, 146 Fed. 803, 832; Dunn *v.* S., 166 Ind. 694, 78 N. E. 198

73-35 Smith *v.* S., 137 Ala. 22, 34 S. 396; Spraggins *v.* S., 139 Ala. 93, 35 S. 1000; Duckworth *v.* S., 83 Ark. 192, 103 S. W. 601; Carr *v.* S., 81 Ark. 589, 99 S. W. 831; Carr *v.* Co., 29 R. I. 276, 70 A. 196.

74-36 Lewis *v.* S., 6 Ga. App. 205, 64 S. E. 701; S. *v.* Squires, 15 Ida. 545, 98 P. 413; Dunn *v.* S., 166 Ind. 694, 78 N. E. 198; Nash *v.* S., 8 Okla. Cr. 1, 126 P. 260; Walker *v.* S. (Okla. Cr.), 127 P. 895; S. *v.* Langford, 74 S. C 490, 55 S. E. 120; S. *v.* Wells, 35 Utah 400, 100 P. 681; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237.

Every incriminating circumstance which jury may consider as evidence of guilt must be established to moral certainty or beyond reasonable doubt. Lamb *v.* S., 69 Neb. 212, 217, 95 N. W. 1050. See 97-15 infra.

75-38 Richter *v.* R. Co., 145 Mo.

App. 1, 129 S. W. 1055. See S. *v.* Johnson, 14 N. D. 288, 103 N. W. 565.

75-39 See P. *v.* Darr, 262 Ill. 202, 104 N. E. 389.

75-40 Dunn *v.* S., 166 Ind. 694, 78 N. E. 198; S. *v.* Johnson, 14 N. D. 288, 103 N. W. 565; Fields *v.* R. Co., 113 Mo. App. 642, 88 S. W. 134. See Van Norman *v.* Brotherhood, 143 Ia. 536, 121 N. W. 1080. See also S. *v.* Wilson (Ia.), 144 N. W. 47.

76-42 S. *v.* Thompson, 127 Ia. 440, 103 N. W. 377; Haywood *v.* S., 90 Miss. 461, 43 S. 614. See U. S. *v.* Mulero, 4 P. R. Fed. 130.

76-44 Van Norman *v.* Brotherhood, 143 Ia. 536, 121 N. W. 1080.

77-46 Gordon *v.* S., 147 Ala. 42, 41 S. 847; Robertson *v.* L. S. Co. (Ia.), 145 N. W. 535; S. *v.* Foster, 14 N. D. 561, 105 N. W. 938; C. *v.* Kovovic, 209 Pa. 465, 58 A 857; S. *v.* Tedder, 83 S. C. 437, 65 S. E. 449; Spick *v.* S., 140 Wis. 104, 121 N. W. 664; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237.

77-47 In re Friedman, 164 Fed. 131; McCullough *v.* R. Co., 160 Mo. App. 342, 142 S. W. 357.

78-48 S. *v.* Collins, 5 Penne. (Del.) 263, 62 A. 224; Kennedy *v.* Ins. Co., 148 Ill. App. 273; S. *v.* Thompson, 127 Ia. 440, 103 N. W. 377; S. *v.* Sloan, 35 Mont. 367, 89 P. 829; S. *v.* Coleman, 17 S. D. 594, 615, 98 N. W. 175.

78-49 P. *v.* Hales (Cal.), 139 P. 667.

79-50 Anderson *v.* R. Co., 18 N. D. 462, 123 N. W. 281; Adams *v.* Hamilton, 53 Tex. Civ. 405, 116 S. W. 1169; Harvey *v.* Nutter, 66 W. Va. 208, 66 S. E. 363; Spick *v.* S., 140 Wis. 104, 121 N. W. 664; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237. See U. S. *v.* Mulero, 4 P. R. Fed. 130.

79-51 U. S. *v.* Greene, 146 Fed. 803, 832; Ragland *v.* S., 178 Ala. 59, 59 S. 637 (gun-wad); P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077; C. *v.* Kovovic, 209 Pa. 465, 58 A. 857; S. *v.* Rodman, 86 S. C. 154, 68 S. E. 343.

80-52 Hickory *v.* U. S., 151 U. S. 303; S. *v.* Rome, 64 Conn. 329, 30 A. 57; Slack *v.* Harris, 200 Ill. 96, 65 N. E. 669; S. *v.* Crofford, 121 Ia. 395, 96 N. W. 889; S. *v.* Foster, 14 N. D. 561, 105 N. W. 938.

81-53 S. *v.* Marren, 17 Ida. 766, 107 P. 993; Slack *v.* Harris; S. *v.* Foster, supra.

81-55 See S. *v.* Coleman, 17 S. D. 594, 615, 98 N. W. 175.

81-56 St. Louis, etc. R. Co. *v.* Owens, 103 Ark. 61, 145 S. W. 879; Wilkinson *v.* Ins. Co., 144 Ill. App. 38; Modern Woodmen *v.* Craiger (Ind. App.), 96 N. E. 84; In re Abel's Will, 136 App. Div. 788, 121 N. Y. S. 452. See Cal. Title Ins. Co. *v.* Kuckenbeiser, 20 Cal. App. 11, 127 P. 1039; Robertson *v.* U. S. Co. (Ia.), 145 N. W. 535; P. *v.* Razeziez, 206 N. Y. 249, 99 N. E. 557.

82-58 First Nat. Bank *v.* Harvey, 29 S. D. 284, 137 N. W. 365.

Admissible in misdemeanor cases as well as prosecutions for felony. Ostendorf *v.* S., 8 Okla. Cr. 360, 128 P. 143.

82-59 Rogers *v.* Ins. Co., 138 Cal. 285, 71 P. 384; S. *v.* Samuels, 6 Penne. (Del.) 36, 67 A. 164; Economy, etc. Co. *v.* Sheridan, 200 Ill. 439, 65 N. E. 1070, 103 Ill. App. 146; Slack *v.* Harris, 200 Ill. 96, 65 N. E. 669; Lemann Co. *v.* R. Co., 128 La. 1089, 55 S. 684; Taylor *v.* Hudson, 145 Mo. App. 377, 129 S. W. 262; Werre *v.* Thresher Co., 27 S. D. 486, 131 N. W. 721; Houston, etc. R. Co. *v.* Adams, 44 Tex. Civ. 288, 98 S. W. 222; Sanborn *v.* Walters, 145 Wis. 84, 129 N. W. 644.

Matters of greatest consequence, both civil and criminal. Ashford *v.* Pittman, 160 N. C. 45, 75 S. E. 943.

82-60 Vermont *v.* U. S., 174 Fed. 792, 98 C. C. A. 500; U. S. *v.* Greene, 146 Fed. 803; Stephens *v.* S., 1 Ala. App. 159, 55 S. 940; Hogue *v.* S., 93 Ark. 316, 124 S. W. 783; P. *v.* Besold, 154 Cal. 363, 97 P. 871; P. *v.* Mar Guin Suie, 11 Cal. App. 42, 103 P. 951; Ansmus *v.* P., 47 Colo. 167, 107 P. 204; McDonald *v.* C., 56 Fla. 74, 47 S. 485; Murphy *v.* S., 118 Ga. 780, 45 S. E. 609; S. *v.* Marren, 17 Ida. 766, 107 P. 993; S. *v.* Levy, 9 Ida. 483; 75 P. 227; P. *v.* Cotton, 250 Ill. 338, 95 N. E. 283; Everett *v.* P., 216 Ill. 478, 75 N. E. 188; Craig *v.* S., 171 Ind. 317, 86 N. E. 397; S. *v.* Whitbeck, 145 Ia. 29, 123 N. W. 892; S. *v.* Bulecheck (Ia.), 110 N. W. 929; C. *v.* Richmond, 207 Mass. 240, 93 N. E. 816; Morrison *v.* S., 88 Neb. 682, 130 N. W. 293 (burglary); S. *v.* McKay, 150 N. C. 813, 63 S. E. 1059; C. *v.* Kovovic, 209 Pa. 465, 58 A. 857; U. S. *v.* Perez, 2 Phil. Isl. 171; S. *v.* Tedder, 83 S. C. 437, 65 S. E. 449; S. *v.* Langford, 74 S. C. 460, 55 S. E. 120; S. *v.* Glover, 21 S. D. 465, 113 N. W. 625; Holder *v.* S., 119 Tenn. 178, 104 S. W. 225; Gossett *v.* S., 57 Tex. Cr. 42, 123 S. W. 428; Maroney *v.* S., 45 Tex.

Cr. 524, 78 S. W. 696; Hardy *v.* C., 110 Va. 910, 67 S. E. 522; S. *v.* Fillpot, 51 Wash. 223, 98 P. 659.

83-62 Van Wyk *v.* P., 15 Colo. 1, 99 P. 1009.

83-63 S. *v.* Crofford, 121 Ia. 395, 96 N. W. 889.

84-65 See Thompson *v.* S., 30 Tex. App. 325, 17 S. W. 448, *mod.* in McCandless *v.* S., 42 Tex. Cr. 655, 62 S. W. 745, and Holloway *v.* S., 45 Tex. Cr. 303, 77 S. W. 14.

85-67 Jackson *v.* S., 49 Tex. Cr. 215, 91 S. W. 788; Jordan *v.* S., 51 Tex. Cr. 646, 104 S. W. 904.

85-69 Grayson *v.* Lofland, 21 Tex. Civ. 503, 52 S. W. 121; Brewer *v.* Cochran, 45 Tex. Civ. 179, 99 S. W. 1033.

85-71 See also S. *v.* Concelia, 250 Mo. 411, 157 S. W. 778.

86-74 Perovich *v.* U. S., 205 U. S. 86; Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141; Vaughan *v.* S., 130 Ala. 18, 30 S. 609; Pappenburg *v.* S. (Ala. App.), 65 S. 418; P. *v.* Besold, 154 Cal. 363, 97 P. 871; P. *v.* Mar Gin Suie, 11 Cal. App. 42, 103 P. 951; P. *v.* Olsen, 1 Cal. App. 17, 81 P. 676; Ansmus *v.* P., 47 Colo. 167, 107 P. 204; S. *v.* Samuels, 6 Penne. (Del.) 36, 67 A. 164; Campbell *v.* S., 124 Ga. 432, 52 S. E. 914; Moore *v.* S. (Ga. App.), 80 S. E. 507; S. *v.* Levy, 9 Ida. 483, 75 P. 227; P. *v.* See, 258 Ill. 152, 101 N. E. 257; S. *v.* Blydenburg, 135 Ia. 261, 112 N. W. 634; S. *v.* Bulecheck (Ia.), 110 N. W. 929; S. *v.* Westcott, 130 Ia. 1, 104 N. W. 341; S. *v.* Heusack, 189 Mo. 295, 88 S. W. 21; S. *v.* Knapp, 70 O. St. 380, 71 N. E. 705; George *v.* U. S., 1 Okla. Cr. 307, 97 P. 1052, 100 Pac. 46; S. *v.* Coleman, 17 S. D. 594, 98 N. W. 175; Buel *v.* S., 104 Wis. 132, 80 N. W. 78; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237; Curran *v.* S., 12 Wyo. 553, 76 P. 577. See "Corpus Delecti," infra, 664-18.

87-77 P. *v.* Poole, 127 App. Div. 122, 111 N. Y. S. 278.

91-88 See Westbrook *v.* S., 91 Ga. 11, 16 S. E. 100.

92-89 McRae *v.* S., 62 Fla. 74, 57 S. 348; S. *v.* Concelia, 250 Mo. 411, 157 S. W. 778.

92-90 S. *v.* Hutchings, 30 Utah 319, 84 P. 893.

92-91 Union Pac. C. Co. *v.* U. S., 173 Fed. 737, 97 C. C. A. 578; U. S. *v.* Co., 172 Fed. 455; Vernon *v.* U. S., 146 Fed. 121, 76 C. C. A. 547; Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141; U. S. *v.* Richards, 149 Fed. 443; Ott *v.* S., 160 Ala. 29, 49 S. 810; Webb *v.* S. (Ala. App.), 65 S. 845; Perry *v.* S. (Ala. App.), 65 S. 683; Duckworth *v.* S., 83 Ark. 192, 103 S. W. 601; P. *v.* Besold, 154 Cal. 363, 97 P. 871; P. *v.* Staples, 149 Cal. 405, 86 P. 886; P. *v.* Muhly, 15 Cal. App. 416, 114 P. 1017; P. *v.* Taggert, 1 Cal. App. 423, 82 P. 396; S. *v.* Blackburn, 7 Penne. (Del.) 479, 75 A. 536; S. *v.* Samuels, 6 Penne. (Del.) 36, 67 A. 164; S. *v.* Tyre, 6 Penne. (Del.) 343, 67 A. 199; S. *v.* Collins, 5 Penne. (Del.) 263, 62 A 224; Cargile *v.* S., 136 Ga. 55, 70 S. E. 873; McNaughton *v.* S., 136 Ga. 600, 71 S. E. 1038; Murphy *v.* S., 118 Ga. 780, 45 S. E. 609; Lindsey *v.* S. (Ga. App.), 82 S. E. 378; Cranford *v.* S. (Ga. App.), 82 S. E. 356; Flannigan *v.* S., 13 Ga. App. 663, 79 S. E. 745; Brown *v.* S., 13 Ga. App. 144, 78 S. E. 868; Smith *v.* Atlanta, 12 Ga. App. 816, 78 S. E. 472; Flood *v.* S., 12 Ga. App. 702, 78 S. E. 268; Cannon *v.* S., 12 Ga. App. 637, 77 S. E. 920; Jamison *v.* S., 5 Ga. App. 305, 63 S. E. 25; S. *v.* Levy, 9 Ida. 483, 75 P. 227; S. *v.* Marren, 17 Ida. 766, 107 P. 993; P. *v.* Campagna, 240 Ill. 378, 88 N. E. 797; S. *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982; S. *v.* Blydenburg, 135 Ia. 261, 112 N. W. 634; S. *v.* Sweizewski, 73 Kan. 733, 85 P. 800; S. *v.* Terrio, 98 Me. 17, 31, 56 A. 217; Simmons *v.* S. (Miss.), 64 S. 721; Smith *v.* S., 101 Miss. 283, 57 S. 913; Permenter *v.* S., 99 Miss. 453, 54 S. 949; Williams *v.* S., 95 Miss. 671, 49 S. 513; S. *v.* Sharpless, 212 Mo. 176, 111 S. W. 69; S. *v.* Morney, 196 Mo. 43, 93 S. W. 1117; S. *v.* Hewsack, 189 Mo. 295, 88 S. W. 21; S. *v.* Chevigny, 48 Mont. 382, 138 P. 257; S. *v.* Allen, 34 Mont. 403, 87 P. 177; S. *v.* Sloan, 35 Mont. 367, 89 P. 829; Inklebarger *v.* S., 8 Okla. Cr. 316, 127 P. 707; Nash *v.* S., 8 Okla. Cr. 1, 126 P. 260; Star *v.* S. (Okla. Cr.), 131 P. 542; U. S. *v.* Reyes, 3 Phil. Isl. 3; C. *v.* Byers, 45 Pa. Super. 37; S. *v.* Wade, 95 S. C. 387, 79 S. E. 106; S. *v.* Hudson, 66 S. C. 394, 44 S. E. 968; S. *v.* Langford, 74 S. C. 460, 55 S. E. 120; S. *v.* Kammel, 23 S. D. 465, 122 N. W. 420; S. *v.* Coleman, supra; S. *v.* Glover, 21 S. D. 465, 113 N. W. 625; Williams *v.* S. (Tex. Cr.), 156 S. W. 938; McGee *v.* S. (Tex. Cr.), 155 S. W. 246; Manley *v.* S. (Tex. Cr.), 153 S. W. 1138; Rios *v.* S. (Tex. Cr.), 153 S. W. 308; Powers *v.* S. (Tex. Cr.), 152 S. W. 909; Earnest *v.* S. (Tex.

Cr.), 152 S. W. 638; Yarbrough *v.* S. (Tex. Cr.), 151 S. W. 545; Brown *v.* S. (Tex. Cr.), 150 S. W. 436; Griego *v.* S. (Tex. Cr.), 145 S. W. 613; Wheeler *v.* S., 61 Tex. Cr. 527, 136 S. W. 68; Brooks *v.* S., 56 Tex. Cr. 513, 120 S. W. 878; Strong *v.* S., 52 Tex. Cr. 133, 105 S. W. 785; Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102; S. *v.* Wells, 35 Utah 400, 100 P. 681; Spick *v.* S., 140 Wis. 104, 121 N. W. 664; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237; Buel *v.* S., 104 Wis. 132, 80 N. W. 78.

Countervailing hypotheses must be based on fact.—Cooper *v.* R. Co., 155 Wis. 614, 145 N. W. 203.

93-92 Union Pac. C. Co. *v.* U. S., 173 Fed. 737, 97 C. C. A. 578; Way *v.* S., 155 Ala. 52, 46 S. 273; P. *v.* Staples, 149 Cal. 405, 86 P. 866; S. *v.* Watson (Del.), 82 A. 1086; Elliott *v.* S., 138 Ga. 23, 74 S. E. 691; Harvey *v.* S., 8 Ga. App. 660, 70 S. E. 141; Sikes *v.* S., 120 Ga. 494, 48 S. E. 153; Cox *v.* S., 7 Ga. App. 22, 65 S. E. 1062; Riley *v.* S., 1 Ga. App. 651, 57 S. E. 1031; Sprouse *v.* C., 132 Ky. 269, 116 S. W. 344; S. *v.* Morney, 196 Mo. 43, 93 S. W. 1117; Ettien *v.* Drum, 39 Mont. 34, 101 P. 151; P. *v.* Gresser, 124 N. Y. S. 581; Sies *v.* S., 6 Okla. Cr. 142, 117 P. 504; U. S. *v.* Maano, 2 Phil. Isl. 718.

94-95 Perry *v.* S. (Ala. App.), 65 S. 683; Reed *v.* S., 97 Ark. 156, 133 S. W. 604; Roberts *v.* City of Covington, 11 Ga. App. 268, 75 S. E. 10; Thompson *v.* S., 5 Ga. App. 7, 62 S. E. 571; S. *v.* Scott, 177 Mo. 665, 76 S. W. 950; S. *v.* Morney, 196 Mo. 43, 93 S. W. 1117; S. *v.* Woodson, 175 Mo. App. 393, 162 S. W. 327; S. *v.* Hudson, 66 S. C. 394, 44 S. E. 968; S. *v.* Jackson, 68 S. C. 53, 46 S. E. 538; Brown *v.* S. (Tex. Cr.), 150 S. W. 436; Crosby *v.* Ardoin (Tex. Civ.), 145 S. W. 709; S. *v.* White, 66 W. Va. 45, 66 S. E. 20.

95-96 Long *v.* S., 5 Ga. App. 176, 62 S. E. 711; S. *v.* Clein, 154 Mo. App. 686, 136 S. W. 14.

95-99 Perovich *v.* U. S., 205 U. S. 86; Barker *v.* S., 126 Ala. 69, 28 S. 685; Butt *v.* S., 81 Ark. 173, 98 S. W. 723; Wolf *v.* P., 45 Colo. 532, 102 P. 20; S. *v.* Collins, 5 Penne. (Del.) 263, 62 A. 224; Delahoyde *v.* P., 212 Ill. 554, 72 N. E. 732; S. *v.* Francis, 199 Mo. 671, 692, 98 S. W. 11; S. *v.* Scott, supra; S. *v.* Morney, 196 Mo. 43, 93 S. W. 1117; Shumway *v.* S., 82 Neb. 152, 117 N. W. 407; S. *v.* Sanders, 75 S. C. 409, 56 S. E. 35; Horn *v.* S., 12 Wyo. 80, 73 P. 705.

See S. *v.* Clark, 145 Ia. 731, 122 N. W. 957; U. S. *v.* Villos, 6 Phil. Isl. 510, (proof of identity); S. *v.* Tedder, 83 S. C. 437, 65 S. E. 449.

95-2 S. *v.* Caseday, 58 Or. 429, 115 P. 287.

96-3 Parham *v.* S., 147 Ala. 57, 42 S. 1; Spraggins *v.* S., 139 Ala. 93, 35 S. 1000; S. *v.* Jenkins, 134 La. 185, 63 S. 869.

96-6 Jackson *v.* S., 118 Ga. 780, 45 S. E. 604.

Jury need not be so convinced they would be willing to act upon the evidence in matters of highest concern to their own interests. Bowen *v.* S., 140 Ala. 65, 37 S. 233.

96-7 See Spraggins *v.* S., 139 Ala. 93, 35 S. 1000.

96-8 Parham *v.* S., 147 Ala. 57, 42 S. 1; Bowen *v.* S., 140 Ala. 65, 37 S. 233; Strickland *v.* S., 151 Ala. 31, 44 S. 90; P. *v.* Olsen, 1 Cal. App. 17, 81 P. 676.

In a civil case not necessary every other hypothesis should be excluded than that relied upon. Brister *v.* R. Co., 88 Miss. 431, 40 S. 325.

96-9 Vernon *v.* U. S., 146 Fed. 121, 76 C. C. A. 547; U. S. *v.* Wilson, 176 Fed. 806; Bowen *v.* S., 140 Ala. 65, 37 S. 233; Strickland *v.* S., 151 Ala. 31, 44 S. 90; Campbell *v.* S., 124 Ga. 432, 52 S. E. 914; New *v.* S., 124 Ga. 143, 52 S. E. 160; Everett *v.* P., 216 Ill. 478, 75 N. E. 188; S. *v.* Shelton, 223 Mo. 118, 122 S. W. 732; S. *v.* Suitor, 43 Mont. 31, 114 P. 112; S. *v.* West, 152 N. C. 832, 68 S. E. 14.

97-10 Hayes *v.* U. S., 169 Fed. 101, 94 C. C. A. 449; Gordon *v.* S., 147 Ala. 42, 41 S. 847; Edwards *v.* Ty., 8 Ariz. 342, 76 P. 458; Lackey *v.* S., 67 Ark. 416, 55 S. W. 213; Duckworth *v.* S., 83 Ark. 192, 103 S. W. 601; Carr *v.* S., 81 Ark. 589, 99 S. W. 831; P. *v.* Olsen, 1 Cal. App. 17, 81 P. 676; Sikes *v.* S., 120 Ga. 494, 48 S. E. 153; Cargile *v.* S., 136 Ga. 55, 70 S. E. 873; S. *v.* Francis, 199 Mo. 671, 694, 98 S. W. 11; S. *v.* Sloan, 35 Mont. 267, 89 P. 829; S. *v.* Tedder, 83 S. C. 437, 65 S. E. 449; Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102; Young *v.* S., 47 Tex. Cr. 197, 82 S. W. 1035.

97-14 S. *v.* Clark, 145 Ia. 731, 122 N. W. 957. See Kincaid *v.* S., 13 Ga. App. 683, 79 S. E. 770. Instructions need

not be given unless requested. Spick v. S., 140 Wis. 104, 121 N. W. 664.

97-15 Mangum v. S., 5 Ga. App. 445, 63 S. E. 543.

It is improper to instruct that there can be no conviction on evidence of this character unless it is inconsistent with innocence, in a case where there is direct evidence that would justify conviction. McCoy v. S., 170 Ala. 10, 54 So. 428.

Error to instruct conviction may be had if evidence satisfies "guarded judgment" of jury. S. v. Allen, 34 Mont. 403, 87 P. 177; S. v. Sloan, 35 Mont. 367, 89 P. 829.

98-16 Haywood v. S., 90 Miss. 461, 43 S. 614; Parks v. S., 46 Tex. Cr. 100, 79 S. W. 301.

99-20 Hardy v. C., 110 Va. 910, 67 S. E. 522.

99-21 Calhoun v. S., 143 Ala. 11, 39 S. 378; Coleman v. S., 59 Miss. 484.

99-22 Chicago U. T. Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341; Martz v. Fullhart, 142 Mo. App. 348, 126 S. W. 964; Von Carlowitz v. Bernstein, 28 Tex. Civ. 8, 66 S. W. 464.

99-23 Graves v. Rivers, 123 Ga. 224, 51 S. E. 318; Warner v. Warner, 235 Ill. 448, 85 N. E. 630 (date of contract); Fleischman v. Co., 148 Mo. App. 117, 127 S. W. 660; St. Louis, etc. R. Co. v. Watkins, 45 Tex. Civ. 321, 100 S. W. 162; Walker v. Dickey, 44 Tex. Civ. 110, 98 S. W. 658.

99-24 A gift may be so shown. Lord v. Ins. Co., 27 Tex. Civ. 139, 65 S. W. 699.

100-25 Sending papers may be proven by circumstantial evidence. Cain v. Corley, 44 Tex. Civ. 224, 99 S. W. 168.

100-27 Value of use of vessel may be shown by such evidence. The North Star, 151 Fed. 168, 80 C. C. A. 536.

100-29 S. v. Sweizewski, 73 Kan. 733 85 P. 800; Roberts v. S., 59 Tex. Cr. 47, 126 S. W. 1129.

101-30 Cummings v. S. (Ga. App.), 81 S. E. 366; Stiles v. Stiles, 167 Ill. 576, 47 N. E. 867; Heyman v. Heyman, 219 Ill. 524, 71 N. E. 591. See supra, "Adultery," 628-23.

101-31 U. S. v. Greene, 146 Fed. 803 874.

101-36 Doyle v. U. S., 169 Fed. 625, 95 C. C. A. 153; Way v. S., 155 Ala. 52, 46 S. 273; Smith v. S., 8 Ala. App 187, 62 S. 575; Eaton v. S., 8 Ala. App. 136, 63 S. 41; Bailey v. S. (Ala. App.), 65 S. 422; Parker v. S., 98 Ark. 575, 137 S. W. 253; Owens v. S., 98 Ark. 609, 137 S. W. 256; P. v. Kizer, 22 Cal. App. 10, 133 P. 516, 521, 134 P. 346; P. v. Kirk (Cal. App.), 134 P. 346; P. v. Pouchot, 174 Ill. App. 1; Gabbard v. C. (Ky.), 167 S. W. 942; Osborne v. S., 99 Miss. 410, 55 S. 52, 54 S. 450; Danzer v. Nathan, 129 N. Y. S. 966; S. v. Inlow (Utah), 141 P. 530. See infra "Conspiracy," 408-8, and vol. 3, p. 408 et seq. and supplement thereto.

102-37 Hardesty v. U. S., 168 Fed. 25, 93 C. C. A. 419; In re Friedman, 164 Fed. 131; Elliott v. P., 56 Colo. 236, 138 P. 39; Kronfeld v. Missal, 87 Conn. 191, 89 A. 95; Ranch v. Lynch (Del.), 89 A. 134; Hessig-Ellis D. Co. v. Drug Co. (Ia.), 143 N. W. 569; Berry v. Ewen, 27 Ky. L. R. 467, 85 S. W. 227; Wigginton v. Minter, 28 Ky. L. R. 79, 88 S. W. 1082; Phillips v. Chase, 201 Mass. 444, 87 N. E. 755; Young v. Engdahl, 18 N. D. 166, 119 N. W. 169; Clough v. Dawson (Or.), 138 P. 233; McIndoo v. Wood (Tex. Civ.), 162 S. W. 488; Deepwater Council v. Reniek, 59 W. Va. 343, 53 S. E. 552. See infra, "Fraud," 20-58.

Good faith of purchaser may be so shown. Holland v. Nance, 102 Tex. 177, 114 S. W. 346.

103-38 The San Rafael, 141 Fed. 270, 72 C. C. A. 388; Omaha W. Co. v. Schamel, 147 Fed. 502, 78 C. C. A. 68; Monarch, etc. Co. v. DeVoe, 36 Colo. 270, 85 P. 633; Smith v. R. Co., 5 Ga. App. 219, 62 S. E. 1020; Slack v. Harris, 200 Ill. 96, 65 N. E. 669; Lundo v. Co., 139 Ia. 688, 117 N. W. 1063; Yongue v. R. Co., 133 Mo. App. 141, 112 S. W. 985; Fields v. R. Co., 113 Mo. App. 642, 88 S. W. 134; Minard v. R. Co., 74 N. J. L. 39, 64 A. 1054; St. Louis, etc. R. Co. v. Darnell (Okla.), 141 P. 785; Manning v. Co., 52 Or. 101, 96 P. 545; Thornton v. R. Co. (S. C.), 82 S. E. 433; Houston L. & P. Co. v. Barnes (Tex. Civ.), 152 S. W. 722; W. U. T. Co. v. Burton, 53 Tex. Civ. 378, 115 S. W. 364; Fleming v. Pullen (Tex. Civ.), 97 S. W. 109. See infra "Negligence," 904-29, also vol. 8, p. 904, n. 29, and supplement thereto.

Origin of fire.—In speaking of the necessity of using circumstantial evidence, it is but repeating matter of common knowledge to say that sparks thrown out in daylight are ordinarily

invisible. Trustees, etc. *v.* R. Co., 119 Minn. 181, 137 N. W. 970.

103-40 No. Chicago St. R. Co. *v.* Rodert, 203 Ill. 413, 67 N. E. 812; Chicago, etc. R. Co. *v.* Wood, 66 Kan. 613, 72 P. 215.

Evidence which merely raises suspicion need not be admitted. Houston, etc. R. Co. *v.* Swaneey (Tex. Civ.), 128 S. W. 677.

104-41 McInerney *v.* U. S., 143 Fed. 729, 74 C. C. A. 635; Hodge *v.* S., 98 Ala. 10, 13 S. 385, 39 Am. St. 17; Hargrove *v.* S., 147 Ala. 97, 41 S. 972; Ansmus *v.* P., 47 Colo. 167, 107 P. 204; McDonald *v.* S., 56 Fla. 74, 47 S. 485; S. *v.* Hogan, 144 Ia. 130, 122 N. W. 818; S. *v.* Nordall, 38 Mont. 327, 99 P. 960; P. *v.* Hill, 198 N. Y. 64, 91 N. E. 272; Vickers *v.* U. S., 1 Okla. Cr. 452, 98 P. 467; S. *v.* Burriss, 85 S. C. 327, 67 S. E. 306; Windham *v.* S., 59 Tex. Cr. 366, 128 S. W. 1130 (similarity of horse tracks); Roszczyniala *v.* S., 125 Wis. 414, 104 N. W. 113. See S. *v.* Alton, 105 Minn. 410, 117 N. W. 617; infra, "Identity," 928-75.

104-42 Vaughan *v.* S., 130 Ala. 18, 30 S. 669; Reynolds *v.* S. (Tex. Cr.), 160 S. W. 362. See infra, "Venue," 932-26, 27.

104-43 Vernon *v.* U. S., 146 Fed. 121, 76 C. C. A. 547; Harrison *v.* Anniston, 156 Ala. 620, 46 S. 980; Bloom *v.* S., 68 Ark. 336, 58 S. W. 41; C. *v.* Costley, 118 Mass. 1.

104-44 Murphree *v.* S., 55 Tex. Cr. 316, 115 S. W. 1189.

104-45 Ball *v.* C., 27 Ky. L. R. 448, 85 S. W. 226; Lanham *v.* Bowlby, 86 Neb. 148, 125 N. W. 149; Batte *v.* S., 57 Tex. Cr. 125, 122 S. W. 561.

105-46 P. *v.* Woods, 147 Cal. 265, 81 P. 652; Tollifson *v.* P., 49 Colo. 219, 112 P. 794; P. *v.* Furlong, 127 N. Y. S. 422 (bribery, under C. Cr. Pr. §399).

105-47 Howard *v.* C., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704.

105-48 Butts *v.* S. (Ga. App.), 82 S. E. 375; Holmes *v.* S. (Tex. Cr.), 157 S. W. 487.

106-50 S. *v.* Hetland, 141 Ia. 524, 119 N. W. 961.

107-53 Nichols *v.* S., 92 Ark. 421, 122 S. W. 1003; Beans *v.* Denny, 141 Ia. 52, 117 N. W. 1091. See S. *v.* Long (Mo.), 165 S. W. 748; De Rossett *v.* S. (Tex. Cr.), 168 S. W. 531.

108-59 Meisenheimer *v.* S., 73 Ark. 407, 84 S. W. 494; Holland *v.* C., 26 Ky. L. R. 790, 82 S. W. 596.

108-60 Bush *v.* S., 136 Ala. 85, 33 S. 878; Joiner *v.* S., 119 Ga. 315, 46 S. E. 412; Davis *v.* S., 122 Ga. 564, 40 S. E. 376; S. *v.* Westcott, 130 Ia. 1, 104 N. W. 341; S. *v.* Knapp, 70 O. St. 380, 71 N. E. 705; Curran *v.* S., 12 Wyo. 553, 76 P. 577.

108-61 P. *v.* Siemsen, 153 Cal. 387, 95 P. 863.

110-66 Jones *v.* U. S., 162 Fed. 417, 89 C. C. A. 303.

110-67 Lorenz *v.* U. S., 24 App. Cas. (D. C.) 337; Horn *v.* S. (Tex. Cr.), 150 S. W. 948; Hardy *v.* C., 110 Va. 910, 67 S. E. 522; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237. See Owens *v.* S., 65 Fla. 483, 62 S. 651.

110-68 U. S. *v.* Greene, 146 Fed. 803; P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804; P. *v.* Feinberg, 237 Ill. 348, 86 N. E. 584, cit. the text; S. *v.* Lambert, 104 Me. 394, 71 A. 1092; Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755; Holder *v.* S., 119 Tenn. 178, 104 S. W. 225; Horn *v.* S. (Tex. Cr.), 150 S. W. 948; Milwaukee, etc. Ins. Co. *v.* Frosch (Tex. Civ.), 130 S. W. 600.

112-69 Richards *v.* U. S., 175 Fed. 911, 99 C. C. A. 401; Streety *v.* S., 165 Ala. 71, 51 S. 415; Barker *v.* S., 126 Ala. 69, 28 S. 685; Gary *v.* S., 7 Ga. App. 501, 67 S. E. 207; S. *v.* Roberts, 201 Mo. 702, 728, 100 S. W. 484; Melton *v.* S. (Tex. Cr.), 158 S. W. 550; Decker *v.* S., 58 Tex. Cr. 159, 124 S. W. 912 (acts inconsistent with innocence); Barney *v.* Co., 85 Vt. 372, 82 A. 113.

That which is probable or possible may be testified of. Fields *v.* R. Co., 113 Mo. App. 642, 88 S. W. 134.

"The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the exclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry or to assist, though remotely, to a determination probably founded in truth." Daughter *v.* Boley, 63 Fla. 75, 58 S. 890, *cit.* White *v.* State, 59 Fla. 53, 52 So. 805.

113-78 Holder *v.* S., 119 Tenn. 178, 104 S. W. 225.

114-79 Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181; Smith *v.* S., 137 Ala. 22, 34 S. 396; Bowen *v.* S., 140 Ala. 65, 37 S. 233; Vaughn *v.* S., 130

Ala. 18, 30 S. 669; Graham *v.* S. (Ala. App.), 65 S. 717; Lorenz *v.* U. S., 24 App. Cas. (D. C.) 337.

114-82 Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181.

115-83 Thomas *v.* S. (Ala. App.), 65 S. 863.

115-86 S. *v.* Lambert, 104 Me. 394, 71 A. 1092.

116-89 P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804; P. *v.* Feinberg, 237 Ill. 348, 86 N. E. 584, *cit.* the text.

119-94 Sanderson *v.* S., 169 Ind. 301, 82 N. E. 525; S. *v.* Spaugh, 200 Mo. 571, 98 S. W. 55; C. *v.* Sanderson, 40 Pa. Super. 416 (acts antedating contract on which conspiracy based may be proved); C. *v.* Snyder, 40 Pa. Super. 485. See Carter *v.* S. (Ga.), 80 S. E. 995.

Wide range allowed in proving conspiracy.—Way *v.* S., 155 Ala. 52, 46 S. 273.

119-95 U. S. *v.* Greene, 146 Fed. 803, 826.

119-96 Jones *v.* U. S., 162 Fed. 417, 428, 89 C. C. A. 303; U. S. *v.* Greene, 146 Fed. 803, 826; Chapline *v.* S., 77 Ark. 444, 93 S. W. 477; Sanderson *v.* S., 169 Ind. 301, 82 N. E. 525. See U. S. *v.* Richards, 149 Fed. 443; P. *v.* Eldridge, 147 Cal. 728, 82 P. 442; P. *v.* Donnolly, 143 Cal. 394, 77 P. 177; McLeroy *v.* S., 125 Ga. 240, 54 S. E. 125; Tedford *v.* P., 219 Ill. 23, 76 N. E. 60; C. *v.* Sanderson, 40 Pa. Super. 416; C. *v.* Snyder, 40 Pa. Super. 485.

121-97 Podolski *v.* Stone, 186 Ill. 540, 58 N. E. 340.

121-99 Houston E. Co. *v.* Faroux (Tex. Civ.), 125 S. W. 922.

Reasonable latitude allowed in direct and cross-examination though matters not touched upon in direct examination. Fabian *v.* Traeger, 215 Ill. 220, 74 N. E. 131.

123-5 Pointer *v.* U. S., 151 U. S. 396; Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141.

"Its absence does not prove innocence; nor does the mere fact that it exists establish guilt. Motive is a circumstance for or against the defendant as the jury may find that it does not or does exist; and is to be weighed together with all other facts and circumstances in evidence." S. *v.* Aitken, 240 Mo. 254, 144 S. W. 499.

"Thus it was permissible to show that appellant was charged with crime in Dallas county, had escaped, resisted arrest in Van Zandt and Bowie counties, and the other circumstances introduced, for they all shed light on the actions of appellant at the time of this killing, and tending to show his motive in slaying deceased—to take life rather than suffer detection and arrest." Vines *v.* S. (Tex. Cr.), 148 S. W. 727.

123-6 Davis *v.* S., 122 Ga. 564, 50 S. E. 376; S. *v.* Levy, 9 Ida. 483, 75 P. 227; Sanderson *v.* S., 169 Ind. 301, 82 N. E. 525; S. *v.* Heusack, 189 Mo. 295, 88 S. W. 21; Holder *v.* S., 119 Tenn. 178, 104 S. W. 225; Schwantes *v.* S., 127 Wis. 160, 179, 106 N. W. 237.

A difficulty between deceased and brother of accused day before homicide may be proved. Sanders *v.* S., 134 Ala. 74, 32 S. 654.

Ill-feeling between fathers of deceased and accused may be shown. Rawlins *v.* S., 124 Ga. 31, 52 S. E. 1.

123-8 S. *v.* Coleman, 17 S. D. 594, 98 N. W. 175; Spiek *v.* S., 140 Wis. 104, 121 N. W. 664. See P. *v.* Staples, 149 Cal. 405, 86 P. 886.

124-9 P. *v.* Weber, 149 Cal. 325, 86 P. 671; S. *v.* Coleman, 17 S. D. 594, 98 N. W. 175.

124-10 S. *v.* Coleman, supra.

124-11 Bowen *v.* S., 140 Ala. 65, 37 S. 233; P. *v.* White, 176 N. Y. 331, 346, 68 N. E. 630; Turner *v.* S., 48 Tex. Cr. 585, 89 S. W. 975.

124-12 P. *v.* Cook, 148 Cal. 334, 83 P. 43; S. *v.* Stratford, 149 N. C. 483, 62 S. E. 882; Gallegos *v.* S., 48 Tex. Cr. 58, 85 S. W. 1150.

124-14 Thiede *v.* Ty., 159 U. S. 510; P. *v.* Staples, 149 Cal. 405, 86 P. 886; Roberts *v.* S., 123 Ga. 146, 51 S. E. 374.

125-15 Shaw *v.* S., 102 Ga. 660, 29 S. E. 477; Sanderson *v.* S., 169 Ind. 301, 82 N. E. 525; Whitney *v.* C., 24 Ky. L. R. 2524, 74 S. W. 257; S. *v.* Spaugh, 200 Mo. 571, 594, 98 S. W. 55; S. *v.* Coleman, 17 S. D. 594, 98 N. W. 175; Holder *v.* S., 119 Tenn. 178, 104 S. W. 225; Cortez *v.* S., 47 Tex. Cr. 10, 80 S. W. 812, 43 Tex. Cr. 384, 66 S. W. 453.

125-16 P. *v.* White, 176 N. Y. 331, 346, 68 N. E. 630.

126-18 Ray *v.* S., 147 Ala. 5, 41 S. 519; S. *v.* Samuels, 6 Penne. (Del.) 36, 67 A. 164; S. *v.* Ruck, 194 Mo. 416, 435, 92 S. W. 706. See infra, "Intent," 605-57, et seq.

126-19 C. *v.* Asherowski, 196 Mass. 342, 82 N. E. 13. See Davis *v.* S., 8 Ala. App. 211, 62 S. 382.

126-20 See S. *v.* Adams, 6 Penne. (Del.) 178, 65 A. 510; Herndon *v.* S., 50 Tex. Cr. 552, 99 S. W. 558.

126-21 Davis *v.* S., 8 Ala. App. 211, 62 S. 382; S. *v.* Adams, 138 N. C. 688, 50 S. E. 765. See infra, "Similar Transactions," 799-55, et seq.

127-23 Nobles *v.* S., 127 Ga. 212, 56 S. E. 125; Lipham *v.* S., 125 Ga. 52, 53 S. E. 817; Potter *v.* Clapp, 203 Ill. 592, 68 N. E. 81.

128 See vol. 6, p. 783 et seq, and supplement thereto.

128-30 Harris *v.* S., 177 Ala. 17, 59 S. 205; Davis *v.* S., 8 Ala. App. 211, 62 S. 382; Humphries *v.* S., 2 Ala. App. 1, 56 S. 72; Spraggins *v.* S., 139 Ala. 93, 35 S. 1000; Parham *v.* S., 147 Ala. 57, 42 S. 1; Mazzotte *v.* Ty., 8 Ariz. 270, 71 P. 911; S. *v.* Samuels, 6 Penne. (Del.) 36, 67 A. 164; Rawlins *v.* S., 124 Ga. 31, 52 S. E. 1; S. *v.* Thompson, 127 Ia. 440, 103 N. W. 377; S. *v.* Lovell, 235 Mo. 343, 138 S. W. 523; P. *v.* Vitusky, 155 App. Div. 139, 140 N. Y. S. 19; S *v.* Quen, 48 Or. 347, 86 P. 791. See P. *v.* Martin (Cal. App.), 125 P. 919; Perry *v.* S. (Tex. Cr.), 155 S. W. 263, and vol. 6, pp. 637, 710 et seq, and supplement thereto.

128-31 Perovich *v.* U. S., 205 U. S 86; S. *v.* Rosa, 72 N. J. L. 462, 62 A. 695.

A threat against "somebody."—P. *v* Riggins, 159 Cal. 113, 112 P. 862.

But inadmissible if threat could not have referred to person injured. S. *v.* McHamilton, 128 La. 498, 54 S. 971.

Threat against a class to which person injured belonged. S. *v.* Sharp, 233 Mo. 269, 135 S. W. 488; Williams *v.* S., 61 Tex. Cr. 356, 136 S. W. 771.

Ambiguous statements are to be interpreted by the jury. Poelinitz *v.* S., 1 Ala. App. 121, 55 S. 1028.

128-32 Wilson *v.* S., 63 Tex. Cr. 81, 138 S. W. 409.

129-33 Patterson *v.* S., 171 Ala. 2, 54 S. 696 (several months); S. *v.* Whitsell, 232 Mo. 511, 134 S. W. 555 (several years). Length of time is not important if the threats are connected by circumstances with the act charged. S. *v.* Kretschmar, 232 Mo. 29, 133 S. W. 16.

129-34 Disconnected threats may not be proved. Daniel *v.* S., 103 Ga. 202, 29 S. E. 767; Horton *v.* S., 110 Ga. 739, 35 S. E. 659.

Scope of evidence.—"Where guilty knowledge is the gist of the offense, anything going to show the existence of such knowledge is admissible, and it is immaterial when or from what source such knowledge was acquired." Bashinski *v.* S., 122 Ga. 164, 50 S. E. 54, 123 Ga. 508, 51 S. E. 499.

129-35 Lipsey *v.* P., 227 Ill. 364, 81 N. E. 348; Delahoyde *v.* P., 212 Ill. 554, 72 N. E. 732; C. *v.* Asherowski, 196 Mass. 342, 82 N. E. 13; Bailey *v.* Bee (W. Va.), 80 S. E. 454. And see vol. 8, p. 18 and supplement thereto.

129-36 Lipsey *v.* P., supra.

130-37 S. *v.* Clark, 85 S. C. 273, 67 S. E. 300. See vol. 6, p. 707, and supplement thereto.

Possession of poison by one charged with administering it at time of so doing must be shown. S. *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634; S. *v.* Francis, 199 Mo. 671, 98 S. W. 11.

130-38 S. *v.* Samuels, 6 Penne. (Del.), 36, 67 A. 164; Roberts *v.* S., 123 Ga. 146, 51 S. E. 374. Purchase of ammunition. Holder *v.* S., 119 Tenn. 178, 104 S. W. 225. See Davis *v.* S., 8 Ala. App. 211, 62 S. 382, also vol. 6, p. 633, and supplement thereto.

Prosecution for forgery.—Dugat *v.* S. (Tex. Cr.), 160 S. W. 376.

130-39 Perovich *v.* U. S., 205 U. S. 86; Baker *v.* S., 126 Ala. 69, 28 S. 685; Spraggins *v.* S., 139 Ala. 93, 35 S. 1000; Bowen *v.* S., 140 Ala. 65, 37 S. 233; Mazzotte *v.* Ty., 8 Ariz. 270, 71 P. 911; Schley *v.* S., 48 Fla. 53, 37 S. 518; Seats *v.* S., 122 Ga. 173, 50 S. E. 65; Campbell *v.* S., 124 Ga. 432, 52 S. E. 914; Bull *v.* C., 29 Ky. L. R. 949, 96 S. W. 817; S. *v.* Heusack, 189 Mo. 295, 88 S. W. 21; C. *v.* Kovovic, 209 Pa. 465, 58 A. 857; Younger *v.* S., 12 Wyo. 24, 73 P. 551.

131-40 S. *v.* Morney, 196 Mo. 43, 93 S. W. 1117.

131-42 See Seats *v.* S., 122 Ga. 173, 50 S. E. 65.

132-47 Grimes *v.* Greenblatt, 47 Colo. 495, 107 P. 1111; S. *v.* Perry, 124 La. 931, 50 S. 799.

132-48 Lewis *v.* S., 165 Ala. 83, 51 S. 308; S. *v.* Heusack, 189 Mo. 295, 88 S. W. 21; P. *v.* Smith, 172 N. Y. 210, 64 N. E. 814; S. *v.* Kammel, 23 S. D. 465, 122 N. W. 420. See infra, "Rape," 599-43; infra, "Timber," 524-20.

Conversation between assaulted person and another in presence of accused may be proved if he gave it as a reason for his conduct. S. *v.* Perry, 124 La. 931, 50 S. 799.

132-49 Whitney *v.* S., 24 Ky. L. R. 2524, 74 S. W. 257; S. *v.* Adams, 138 N. C. 688, 50 S. E. 765.

133-50 Mack *v.* S., 54 Fla. 55, 44 S. 706, 13 L. R. A. (N. S.) 373; S. *v.* Herbert, 63 Kan. 516, 66 P. 235; S. *v.* Hopkirk, 84 Mo. 278.

Identification of horse by sound of hoof beat. Holder *v.* S., 119 Tenn. 178, 104 S. W. 225.

Reproduction of sound by phonograph. See Boyne City, etc. R. Co. *v.* Anderson, 146 Mich. 328, 109 N. W. 429, 8 L. R. A. (N. S.) 306.

133-52 U. S. *v.* Cagaoaan, 7 Phil. Isl. 207.

134 And see generally, vol. 5, p. 491, vol. 6, p. 704, vol. 7, p. 929, and supplement thereto.

134-53 Smith *v.* S., 137 Ala. 22, 34 S. 396; Hargrove *v.* S., 147 Ala. 97, 41 S. 972; Jackson *v.* S., 118 Ga. 780, 45 S. E. 604; S. *v.* Height, 117 Ia. 650, 91 N. W. 935, 59 L. R. A. 437, 94 Am. St. 328, 342; S. *v.* Adams, 85 Kan. 435, 116 P. 608; S. *v.* Langford, 74 S. C. 460, 55 S. E. 120; Wilson *v.* S. (Tex. Cr.), 156 S. W. 204; Boyman *v.* S., 59 Tex. Cr. 23, 126 S. W. 1142; Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102; Jenkins *v.* S., 45 Tex. Cr. 173, 75 S. W. 312; Thompson *v.* S., 45 Tex. Cr. 397, 77 S. W. 449; Turner *v.* S., 48 Tex. Cr. 585, 89 S. W. 975.

And see vol. 6, p. 929 and supplement thereto; vol. 14, p. 661 and supplement thereto.

May state that tracks were made by shoes of certain size. Finney *v.* S. (Ala. App.), 65 S. 93.

The weight to be given to such evidence is a question for the jury. Moore *v.* S., 4 Ala. App. 65, 59 S. 189.

Waiver of privilege.—If defendant voluntarily surrenders shoes for purpose of comparing them with footprints he waives his constitutional privilege. S. *v.* Arthur, 129 Ia. 235, 105 N. W. 422.

Witness must express definite opinion or cannot testify as to tracks. Smith *v.* S., 45 Tex. Cr. 405, 77 S. W. 453; Parker *v.* S., 46 Tex. Cr. 461, 80 S. W. 1008.

May state as a fact that he saw prisoner's shoes compared with tracks. P. *v.* Barnnovich, 16 Cal. App. 427, 117 P. 572.

Must not give opinion as to whose tracks, but state facts, and leave rest to jury. Ragland *v.* S., 178 Ala. 59, 59 S. 637.

135-54 Lindsey *v.* S., 9 Ga. App. 299, 70 S. E. 1114; Holder *v.* S., 119 Tenn. 178, 104 S. W. 225.

135-55 Kinnan *v.* S., 86 Neb. 234, 125 N. W. 594; Weaver *v.* S., 46 Tex. Cr. 607, 81 S. W. 39; Parker *v.* S., 46 Tex. Cr. 461, 80 S. W. 1008.

136-60 P. *v.* Olsen, 1 Cal. App. 17, 81 P. 676; Davis *v.* S., 122 Ga. 564, 50 S. E. 376; S. *v.* Heusack, 189 Mo. 295, 88 S. W. 21; Roszczyniala *v.* S., 125 Wis. 414, 104 N. W. 113.

137-64 Perovich *v.* U. S., 205 U. S. 86; U. S. *v.* Greene, 146 Fed. 803, 873; Strickland *v.* S., 151 Ala. 31, 44 S. 90; Barker *v.* S., 126 Ala. 69, 28 S. 685; Minor *v.* City, 7 Ga. App. 817, 68 S. E. 314; S. *v.* Terrio, 98 Me. 17, 29, 56 A. 217; P. *v.* Giusto, 206 N. Y. 67, 99 N. E. 190.

138-66 Herndon *v.* S., 50 Tex. Cr. 552, 99 S. W. 558.

138-67 Jackson *v.* S., 118 Ga. 780, 45 S. E. 604; S. *v.* Langford, 74 S. C. 460, 55 S. E. 120; Curran *v.* S., 12 Wyo. 553, 76 P. 577; Younger *v.* S., 12 Wyo. 24, 73 P. 551.

Possession may be shown by circumstantial evidence. P. *v.* Nunley, 142 Cal. 105, 75 P. 676.

138-69 Lipsey *v.* P., 227 Ill. 364, 81 N. E. 348.

138-70 Bowen *v.* S., 140 Ala. 65, 37 S. 233; Strickland *v.* S., 151 Ala. 31, 44 S. 90; S. *v.* Barnes, 47 Or. 592, 85 P. 998; Buel *v.* S., 104 Wis. 132, 80 N. W. 78.

138-71 Turner *v.* S., 48 Tex. Cr. 585, 89 S. W. 975; Harris *v.* S., 62 Tex. Cr. 235, 137 S. W. 373; Ridge *v.* S., 61 Tex. Cr. 214, 134 S. W. 732 (property of deceased pawned by accused).

138-72 Davis *v.* S., 122 Ga. 564, 50 S. E. 376; C. *v.* Kovovic, 209 Pa. 465, 58 A. 857; Spates *v.* S., 62 Tex. Cr. 532, 138 S. W. 393; Ryan *v.* S., 64 Tex. Cr. 628, 142 S. W. 878.

138-73 Vaughn *v.* S., 130 Ala. 18, 30 S. 669; Bull *v.* C., 29 Ky. L. R. 949, 96 S. W. 817; Turner *v.* S., 48 Tex. Cr. 585, 89 S. W. 975.

139-75 Davis *v.* S., 8 Ala. App. 211, 62 S. 382; Russell *v.* Brooks, 92 Ark. 509, 122 S. W. 649; P. *v.* Olsen, 1 Cal.

App. 17, 81 P. 676; Holloway *v.* S., 54 Tex. Cr. 465, 113 S. W. 928 (change of hats); Holder *v.* S., 119 Tenn. 178, 104 S. W. 225; De Blazio *v.* S., 139 Wis. 534, 121 N. W. 131.

Resisting arrest.—Moreno *v.* State (Tex. Cr.), 160 S. W. 361.

140-77 P. *v.* Weber, 149 Cal. 325, 86 P. 671.

Evidence for accused.—Evidence of sayings and conduct of negro on next day after an alleged assault with intent to commit a rape held admissible in his favor. McCullough *v.* S., 11 Ga. App. 612, 76 S. E. 393.

Evidence admissible that accused inquired of witness whether she could swear as to her whereabouts "up to the discovery of the murder." McClain *v.* S. (Ala.), 62 S. 241.

140-80 Sweatt *v.* S., 156 Ala. 85, 47 S. 194; Davis *v.* S., 8 Ala. App. 211, 62 S. 382. See Love *v.* S. (Tex. Cr.), 150 S. W. 920 (rape). And see vol. 6, p. 701 et seq, and supplement thereto.

Departure of parties who had opportunity to commit the crime may be shown, though no accusation made. Haywood *v.* S., 90 Miss. 461, 43 S. 614.

140-81 Gent *v.* S., 57 Tex. Cr. 414, 123 S. W. 594.

140-82 U. S. *v.* Greene, 146 Fed. 803, 872; Mazzotte *v.* Ty., 8 Ariz. 270, 71 P. 911; Nichols *v.* S., 92 Ark. 421, 122 S. W. 1003; P. *v.* Staples, 149 Cal. 405, 86 P. 886; P. *v.* Easton, 148 Cal. 50, 82 P. 840; P. *v.* Brecker, 20 Cal. App. 205, 127 P. 666; P. *v.* Mar Gin Suie, 11 Cal. App. 42, 103 P. 951; Jackson *v.* S., 118 Ga. 780, 45 S. E. 604; Grant *v.* S., 122 Ga. 740, 50 S. E. 946; Hall *v.* S., 7 Ga. App. 115, 66 S. E. 390; Morello *v.* P., 226 Ill. 388, 400, 80 N. E. 903; S. *v.* Matheson, 130 Ia. 440, 103 N. W. 137; S. *v.* Spaugh, 200 Mo. 571, 599, 98 S. W. 55; S. *v.* Ryan, 47 Or. 338, 349, 82 P. 703, 1 L. R. A. (N. S.) 862; C. *v.* Kovovic, 209 Pa. 465, 58 A. 857; Gotcher *v.* S. (Tex. Cr.), 148 S. W. 574; Hunter *v.* S., 59 Tex. Cr. 439, 129 S. W. 125; Holloway *v.* S., 54 Tex. Cr. 465, 113 S. W. 928 (though person from whom he ran not an officer, not attempting to make arrest, and accused did not know who he was); S. *v.* Pettit, 74 Wash. 510, 133 P. 1014.

141-83 Russell *v.* Brooks, 92 Ark. 509, 122 S. W. 649 (civil action for fraud); S. *v.* Osborne, 54 Or. 289, 103 P. 62; Gent *v.* S., 57 Tex. Cr. 414, 123 S. W. 594 (proof of flight may be made by any one cognizant of it); S. *v.* Deatherage, 35 Wash. 326, 77 P. 504.

142-84 Gent *v.* S., 57 Tex. Cr. 414, 123 S. W. 594, complaint filed, capias and bail-bond admissible to show flight.

Character of clothing taken in flight may be shown. Beiser *v.* S. (Ala. App.), 65 S. 312.

142-87 Smith *v.* S., 165 Ala. 50, 51 S. 610; S. *v.* Langford, 74 S. C. 460, 55 S. E. 120.

Failure of accused to improve opportunity to escape is not provable. Kennedy *v.* S., 101 Ga. 559, 28 S. E. 979. Nor is fact he voluntarily surrendered himself, state not having shown flight. Vaughn *v.* S., 130 Ala. 18, 30 S. 669.

143-88 Bines *v.* S., 118 Ga. 320, 45 S. E. 376; Jamison *v.* P., 145 Ill. 357, 34 N. E. 486.

143-91 S. *v.* Spaugh, 200 Mo. 571, 600, 98 S. W. 55.

144-92 U. S. *v.* Greene, 146 Fed. 803; Grant *v.* S., 122 Ga. 740, 50 S. E. 946; S. *v.* Shaw, 73 Vt. 149, 50 A. 863.

Defendant may show that he returned voluntarily.—La Fell *v.* S. (Tex. Cr.), 153 S. W. 884.

144-94 Hall *v.* S., 7 Ga. App. 115, 66 S. E. 390; S. *v.* Simpson, 32 Nev. 138, 104 P. 244.

Improbable explanation.—Jobe *v.* S., 1 Ala. App. 112, 55 S. 430.

That others knew of accused's flight may not be shown by accused. Beiser *v.* S. (Ala. App.), 65 S. 312.

144-95 P. *v.* Easton, 148 Cal. 50, 82 P. 840.

145-2 U. S. *v.* Greene, 146 Fed. 803, 872; P. *v.* Mar Gin Suie, 11 Cal. App. 42, 103 P. 951.

Flight presumptive evidence of guilt. S. *v.* Poe, 123 Ia. 118, 98 N. W. 587. *Contra*, S. *v.* Hunt, 141 Mo. 626, 43 S. W. 389.

145-3 P. *v.* Staples, 149 Cal. 405, 86 P. 886.

145-4 Williams *v.* S., 5 Ala. App. 112, 59 S. 528; C. *v.* Devaney, 182 Mass. 33, 64 N. E. 402; Christy *v.* Ins. Assn., 123 N. Y. S. 740.

147-8 Choctaw & M. R. Co. *v.* Newton, 140 Fed. 225, 71 C. C. A. 635; Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039; Lauer *v.* Banning, 152 Ia. 99, 131 N. W. 783; Allen *v.* C., 26 Ky. L. R. 807, 82 S. W. 589; P. *v.* Salsbury, 134 Mich. 537, 96 N. W. 936; Standard O.

Co. *v.* S., 117 Tenn. 618, 672, 100 S. W. 705; Wills *v.* Co., 39 Tex. Civ. 483, 88 S. W. 265; Patch Mfg. Co. *v.* Lodge, 77 Vt. 294, 326, 60 A. 74; Carpenter *v.* Willey, 65 Vt. 168, 26 A. 188.

Burning of house after homicide.—S. *v.* Rasco, 239 Mo. 535, 144 S. W. 119.

Failure to enter business transaction in books may be shown. Lipsey *v.* P., 227 Ill. 364, 81 N. E. 348.

148-12 Vaughn *v.* S., 130 Ala. 18, 30 S. 669; Kennon *v.* S., 46 Tex. Cr. 359, 82 S. W. 518. See Elmore *v.* S. (Tex. Cr.), 162 S. W. 517.

Statement by associate.—A declaration made by one person connected with a crime committed jointly, in the presence of others so connected and a person not implicated, calls upon the others to make denial of it if it was false. Davis *v.* S., 114 Ga. 101, 39 S. E. 906.

Silence as admission, see vol. 1, p. 367, et seq, and supra "Admissions," 367-27 to 382-61.

148-14 See Payne *v.* S. (Okla.), 136 P. 201.

149-16 "It is permissible to permit a witness to state what he said in the presence of the accused, if the statement involves such an accusation as calls for a denial. Kirby *v.* State, 89 Ala. 63, 71, 8 South. 110; Raymond *v.* State, 154 Ala. 1, 45 South. 895. The statement of the witness, addressed to the defendant: 'You said he had a revolver drawn on you; how did you shoot him in the back?'—was certainly such an accusation as called for a denial." Powell *v.* S., 5 Ala. App. 75, 59 S. 530.

149-18 Vaughan *v.* S., 7 Okla. Cr. 685, 127 P. 264.

The weight of authority in this country, it is said, is with those courts which hold the mere fact of arrest is sufficient to render a statement made in presence of prisoner, to which he makes no reply, incompetent for the reason that no assent can be presumed under such circumstances, and that very surroundings of accused are such as to render it entirely proper and natural for him to keep silent in fear of misquotation or misconstruction. O'Hearn *v.* S., 79 Neb. 513, 113 N. W. 130. A contrary doctrine, it is said, seems to find support in Kelley *v.* P., 55 N. Y. 565, 14 Am. Rep. 342, and in Murphy *v.* S., 36 O. St. 628. The former case, however, has been somewhat weakened as authority by P. *v.* Smith, 172 N. Y. 210, 64 N. E. 814. To same effect as Nebraska case are Jackson *v.* C., 100 Ky. 239, 38 S. W. 422, 1091, 66 Am. St. 336; Porter *v.* C., 22 Ky. L. R. 1657, 61 S. W. 16.

150-21 S. *v.* Cancelia, 250 Mo. 411, 157 S. W. 778; S. *v.* Heusack, 189 Mo. 295, 88 S. W. 21; P. *v.* White, 176 N. Y. 331, 346, 68 N. E. 630.

151-22 S. *v.* Coleman, 17 S. D. 594, 98 N. W. 175.

CITIZENS AND ALIENS

Competency of witnesses in naturalization proceedings, 156-20; *Perjury in such proceedings,* 156-20; *Proof of good character,* 156-20; *Sufficiency of evidence,* 156-20; *Cancellation of certificate,* 156-20; *Abandonment of intention to become citizen,* 156-20; *Burden of proof,* 156-20; *Evidence in deportation proceedings,* 157-21.

Alien's right to sue, and liability to suit. See 1 STANDARD PROC. 786-802.

Question of Alienage, how raised. See 1 STANDARD PROC. 802.

Liability to punishment for crime. See 1 STANDARD PROC. 807.

Suits relating to real property.—See 1 STANDARD PROC. 808.

153-1 A residence shown to have been established is presumed to have continued until contrary proved. S. *v.* Jackson, 79 Vt. 504, 65 A. 657, 8 L. R. A. (N. S.) 1245.

153-2 Lucas *v.* U. S., 163 U. S. 612, 48 L. R. A. 282; Ehrlich *v.* Weber, 114 Tenn. 711, 88 S. W. 188; S. *v.* Jackson, supra.

Certificate of U. S. commissioner that Chinaman is native born, inadmissible. Lum Bing Wey *v.* U. S., 201 Fed. 379.

153-3 Minneapolis *v.* Reum, 56 Fed. 576, 6 C. C. A. 31; Pang Sho Yin *v.* U. S., 154 Fed. 660, 83 C. C. A. 484; U. S. *v.* Wong Kim Ark, 169 U. S. 649 (if parties not employed in official capacity under foreign government); Gaddie *v.* Mann, 147 Fed. 955; Ehrlich *v.* Weber, 114 Tenn. 711, 88 S. W. 188; S. *v.* Jackson, 79 Vt. 504, 65 A. 657, 8 L. R. A. (N. S.) 1245.

153-5 P. *v.* Quijada, 151 Cal. 243, 97 P. 689.

154-6 Burden of showing naturalization is not met by negative presump-

tions, nor opinions of witnesses. Richardson *v.* Amsdon, 85 N. Y. S. 342.

154-9 S. *v.* Jackson, 79 Vt. 504, 65 A. 657, 8 L. R. A. (N. S.) 1245.

Naturalization is not established by alien's affidavit he took up his citizenship in the United States. Richardson *v.* Amsdon, supra.

155-10 P. *v.* Quijada, 154 Cal. 243, 97 P. 689; Fay *v.* Taylor, 31 Misc. 32, 63 N. Y. S. 572.

Voting at lawful election in particular state, not conclusive evidence citizenship there. Gaddie *v.* Mann, 147 Fed. 955, *dist.* Shelton *v.* Tiffin, 6 How. (U. S.) 163.

No presumption arises as to citizenship from fact claimant made leases and did other acts respecting real estate which legally might only be done by a citizen. Richardson *v.* Amsdon, 85 N. Y. S. 342.

156-16 Records of commissioner of immigration not evidence of citizenship. Rodriguez Y Villafana *v.* Ledesma, 3 P. R. Fed. 349.

156-18 Buckley *v.* McDonald, 33 Mont. 483, 84 P. 1114; S. *v.* Jackson, 79 Vt. 504, 65 A. 657, 8 L. R. A. (N. S.) 1245; Devanney *v.* Hanson, 60 W. Va. 3, 53 S. E. 603.

156-19 Douthit *v.* Southern (Tex. Civ.), 155 S. W. 315.

156-20 Naturalization is prima facie proof of prior alienage. Peacock *v.* U. S., 125 Fed. 583, 60 C. C. A. 389.

Competency of witnesses in naturalization proceedings.—In proceedings for naturalization of aliens under act of June, 1906, a witness who vouches for applicant must have known him for five years continuously preceding filing of petition; it is not enough he had so known applicant five years before time of hearing. In re Welsh, 159 Fed. 1014. An American woman becomes an alien by marrying an alien, notwithstanding she continues to reside in the United States; hence she is incompetent as a witness in naturalization proceedings. In such a case a qualified substitute cannot be called as a witness. In re Martorana, 159 Fed. 1010. Petition for admission may be supported by other witnesses than those who verified it; nor need it be supported by persons within sec. 5 of the act if sufficient cause be shown for summoning others. In re Schatz, 161 Fed. 237. Only such witnesses may testify as have had their names posted for ninety days. In re O'Dea, 158 Fed. 703; U. S. *v.* Daly, 32 App. Cas. (D. C.) 525. *Contra*, In re Neugebauer, 172 Fed. 943, holding there may be a substitute of a witness if one whose name had been posted could not be produced.

Perjury.—The manifest of ship in which alien came to the United States is competent to show his testimony as to time of arrival is false, proof of identity being made. Such paper not sufficient to sustain a conviction, entry in it being based on defendant's unsworn statement. Sullivan *v.* U. S., 161 Fed. 252, 88 C. C. A. 289. An applicant for citizenship is not an accomplice with a witness who swears falsely in a proceeding for naturalization in such sense as requires jury to be cautioned concerning his testimony unless it appears such false testimony was given at applicant's solicitation or suggestion. Holmgren *v.* U. S., 156 Fed. 439, 84 C. C. A. 301. Knowledge of witness as to applicant's residence is to be tested by nature of latter's employment and absence from home. In re Schneider, 164 Fed. 335. Information acquired by correspondence does qualify witness to verify a petition. In re Toomey, 111 N. Y. S. 600.

Depositions may be taken in another state than that in which discharged soldier resides to prove his residence there. In re McNabb, 175 Fed. 511.

Good moral character of applicant for naturalization is not shown where it appears he continued to knowingly use a fraudulent certificate of naturalization. In re Di Clerico, 158 Fed. 905. Habitual and wilful violation of excise laws may be proved as affecting moral character of applicant. U. S. *v.* Hrasky, 240 Ill. 560, 88 N. E. 1031.

Burden of proof.—If statement in petition for naturalization as to vessel on which petitioner came to the United States is prima facie disproved he must make satisfactory explanation. In re Kestelman, 165 Fed. 265.

All the evidence is to be regarded in determining sufficiency of applicant's qualifications. Accurate knowledge of federal constitution and form of government, not essential. S. *v.* Court, 107 Minn. 444, 120 N. W. 898.

Cancellation of naturalization certificate on ground of fraud will not be granted on proof of convictions for

drunkenness if it is shown holder has reformed. U. S. *v.* Dwyer, 170 Fed. 686. It seems evidence must be of kind and force required to set aside judgment. U. S. *v.* Mansour, 170 Fed. 676.

Abandonment of intention.—Alien who has returned to his native country, after declaring intention to become a citizen, with intention of remaining there and who there exercised political privileges, is conclusively presumed to have abandoned his former intention, and cannot claim anything by virtue of such declaration. In re Cameron, 165 Fed. 112.

157-21 Evidence in deportation proceedings; right of alien to remain. Under statutes governing right of Chinese laborers to remain in the United States the evidence in favor thereof is limited to the certificate of residence provided for or proof of inability to procure it. U. S. *v.* Yee Gee You, 152 Fed. 157, 81 C. C. A. 409. Uncontradicted testimony is not conclusive. U. S. *v.* Sing Lee, 125 Fed. 627.

No presumption exists against Chinese who entered the United States without certificates in 1898 or prior thereto. U. S. *v.* Chin Sing, 153 Fed. 590.

Certificate conclusive as to occupation. U. S. *v.* Gin Hing, 8 Ariz. 416, 76 P. 639. As to persons who have not been residents the certificate is the only evidence in favor of their right to remain, and that, as to the government, is only prima facie. Wan Shing *v.* U. S., 140 U. S. 424; Li Sing *v.* U. S., 180 U. S. 486. But see U. S. *v.* Kol Lee, 132 Fed. 136. Rule not strictly applied to certificate granted Chinaman on his return from China, where he had been temporarily. In such a case certificate may be supplemented by parol testimony showing occupation of holder when formerly in this country. U. S. *v.* Quong Chee, 11 Ariz. 16, 89 P. 525.

A certificate of U. S. Commissioners certifying the right of Chinaman to remain in U. S., is not competent evidence of a judgment in bar of subsequent deportation proceeding. Ex parte Mac Fock, 207 Fed. 696; You Fook Hing *v.* U. S., 214 Fed. 77. Certificates admissible in subsequent deportation proceedings only when identity of Chinaman established. Lum Bing Wey *v.* U. S., 201 Fed. 379.

A certificate not conformable to law is not competent. Lee Yuen Sue *v.* U. S., 146 Fed. 670, 77 C. C. A. 96; U. S. *v.* Yong Yew, 83 Fed. 832; U. S. *v.* Chu Chee, 93 Fed. 797, 35 C. C. A. 613; U. S. *v.* Gin Hing, 8 Ariz. 416, 76 P. 639.

Sufficient evidence that a person is a native of China is furnished by his physical appearance and garb. Low Foon Yin *v.* U. S., 145 Fed. 791, 76 C. C. A. 355; U. S. *v.* Hung Chang, 134 Fed. 19, 67 C. C. A. 93.

Proof of identity may be made by witnesses who state their ability to testify thereof from experience, though they are not ethnologists. U. S. *v.* Hung Chang, supra. Identity must be shown by person who asserts he is described in judgment determining his right to remain. Ex parte Long Lock, 173 Fed. 208.

Age of Chinaman can be approximately arrived at from personal inspection, which may overcome positive testimony. Ark Foo *v.* U. S., 128 Fed. 697, 63 C. C. A. 249.

Burden is on Chinaman to prove right to enter or remain in United States. U. S. *v.* Lee You Wing, 211 Fed. 939; Lum Bing Wey *v.* U. S., 201 Fed. 379; Guan Lee *v.* U. S., 198 Fed. 596, 117 C. C. A. 304; Ex parte Lung Foot, 174 Fed. 70; U. S. *v.* Yee Gee You, 152 Fed. 157, 81 C. C. A. 409; U. S. *v.* Chin Sing, 153 Fed. 590; Low Foon Yin *v.* U. S., 145 Fed. 791, 76 C. C. A. 355; Lee Yuen Sue *v.* U. S., 146 Fed. 670, 77 C. C. A. 96; Chin Bak Kan *v.* U. S., 186 U. S. 193; Toy Tong *v.* U. S., 146 Fed. 343, 76 C. C. A. 621; Li Sing *v.* U. S., 180 U. S. 486; Lee Joe Yen *v.* U. S., 148 Fed. 682, 78 C. C. A. 427. It is on same party when he asserts citizenship or right to be deported to another country than China. U. S. *v.* Sing Lee, 125 Fed. 627; U. S. *v.* Hoy Way, 156 Fed. 247. But it has been ruled in a late case in the district court for New York that the government must show a Chinaman whom it seeks to deport is not entitled to remain. Ex parte Loung June, 160 Fed. 251.

The proof required is produced when it satisfies a rational mind dealing with a serious matter of personal concern. U. S. *v.* Lee Huen, 118 Fed. 442, 457; U. S. *v.* Hung Chang, 134 Fed. 19, 27, 67 C. C. A. 93. Evidence showing person sought to be deported is a Chinaman and not of the exempt class, supports presumption he was not born in

the United States. Ex parte Loung June, 160 Fed. 251.

It is presumed a person of Mongolian race coming to this country from China is an alien. To overcome such presumption and the demonstrative evidence afforded by his appearance the proof must be convincing. Ex parte Lung Wing Wun, 161 Fed. 211.

Record made by federal commissioner in deportation proceedings is not evidence of the facts on which his decision made. Ex parte Lung Wing Wun, 161 Fed. 211; Ex parte Lung Foot, 174 Fed. 70. See Ex parte Loung June, 160 Fed. 251.

Findings of immigration officer, affirmed by secretary of commerce and labor, if fairly made, are final and conclusive as to citizenship of a Chinese person claiming right to enter the United States by reason of being born therein. U. S. *v.* Ju Toy, 198 U. S. 253. Decision of inspector, after fair hearing and in good faith and on confirmation, is conclusive. Ex parte Lung Foot, 174 Fed. 70; Ex parte Chin Hen Lock, 174 Fed. 282. Conclusiveness of action of administrative officers extends to all questions of fact if hearing full and fair. Ex parte Long Lock, 173 Fed. 208.

Testimony of person to his place of Birth is hearsay, and not convincing unless corroborated. Ex parte Lung Wing Wun, 161 Fed. 211.

Admissions or statements voluntarily made by person whose deportation is sought in replying to questions by officers who arrested him, either before or after arrest, competent against him. U. S. *v.* Hung Chang, 134 Fed. 19, 67 C. C. A. 93. But positive testimony corroborated by circumstantial evidence is not overcome by inconsistent statements made to officer by one sought to be deported. Moy Suey *v.* U. S., 147 Fed. 697, 78 C. C. A. 85.

Chinese competent witness in proceedings under exclusion acts. U. S. *v.* Louie Juen, 128 Fed. 522; U. S. *v.* Sing Lee, 71 Fed. 680.

Deportation proceedings are civil in their nature, and refusal of defendant to testify may be considered against him. U. S. *v.* Hung Chang, 134 Fed. 19, 67 C. C. A. 93. But *comp.* Ark Foo *v.* U. S., 128 Fed. 697, 63 C. C. A. 249, where alleged alien was not requested to testify. Tom Wah *v.* U. S., 163 Fed. 1008, 90 C. C. A. 178. He may be compelled to testify.

Character of female as a prostitute when she entered the country is shown by her practice of prostitution within three years thereafter. Looe Shee *v.* North, 170 Fed. 566, 95 C. C. A. 646. See dissenting opinion in Keller *v.* U. S., 213 U. S. 138.

Undesirability of applicant for admission to United States must be established by a conviction or admission of alien where crime committed. United States *v.* Williams, 203 Fed. 155.

157-22 Ehrlich *v.* Weber, 114 Tenn. 711, 88 S. W. 188.

157-24 Richardson *v.* Amsdon, 85 N. Y. S. 342.

Citizenship not lost by removal.—S. *v.* Jackson, 79 Vt. 504, 65 A. 657, 8 L. R. A. (N. S.) 1245.

158-25 In re Cameron, 165 Fed. 112.

Foreign certificate of naturalization admissible. Newcomb *v.* Newcomb, 22 Ky. L. R. 286, 57 S. W. 2.

Recitals in deeds not very convincing as against long continued absence. Recitals in wills and codicils may be regarded; not controlling. Richardson *v.* Amsdon, 85 N. Y. S. 342.

158-27 Alienage of native born woman results from marriage to alien though her residence continues to be in the United States. In re Martorana, 159 Fed. 1010.

COMPETENCY

Prejudicial effect, 180-55; *Evidence obtained by means of judicial proceeding,* 181-65; *Obtained through incompetent witness,* 183-70; *Conceded facts,* 196-25; *Participation in fraud,* 211-5; *Competency of juror on subsequent trial,* 237-8; *Grand jurors,* 237-8; *Failure of witness to appear for taking deposition,* 240-19.

167-1 "Credible," as applied to subscribing witnesses, means competent to testify. Jones *v.* Grieser, 238 Ill. 183, 87 N. E. 295.

Competency distinguished from weight. Weakness of evidence does not render it incompetent. Rehfield *v.* Winters, 62 Or. 299, 125 P. 289.

168-2 Brown *v.* Brown, 77 Neb. 125, 108 N. W. 180; Bishop Co. *v.* Curran, 30 R. I. 504, 76 A. 275.

168-3 Pittsburgh, etc. R. Co. *v.*

Thompson, 82 Fed. 720, 27 C. C. A. 333, 54 U. S. App. 222; McKinstry *v.* Tuscaloosa, 172 Ala. 344, 54 S. 629 (moral idiocy); Birmingham R. Co. *r.* Jung, 161 Ala. 461, 49 S. 434; P. *r.* Tyree, 21 Cal. App. 701, 132 P. 784; Central Ga. P. Co. *r.* Cornwell, 139 Ga. 1, 76 S. E. 387; Cuesta *r.* Goldsmith, 1 Ga. App. 48, 57 S. E. 983; Empire L. Ins. Co. *r.* Einstein, 12 Ga. App. 380, 77 S. E. 209; S. *r.* Simes, 12 Ida. 310, 85 P. 914; P. *r.* Enright, 256 Ill. 221, 99 N. E. 936; Covington *v.* O'Meara (Ky.), 119 S. W. 187; S. *v.* William, 130 La. 280, 57 S. 927; S. *r.* Lee, 127 La. 1077, 54 S. 356; Slotofski *v.* R. Co., 215 Mass. 318, 102 N. E. 417; Bowdle *v.* R. Co., 103 Mich. 272, 61 N. W. 529, 50 Am. St. 366, 4 Am. Neg. Cas. 180; Cleveland *r.* Rowe, 99 Minn. 444, 109 N. W. 817; Paterson *r.* R. Co., 95 Minn. 57, 103 N. W. 621; S. *r.* Connors, 233 Mo. 348, 135 S. W. 444 (infancy); S. *r.* Whitsett, 232 Mo. 511, 134 S. W. 555 (sanity); S. *r.* Witherspoon, 231 Mo. 706, 133 S. W. 323; S. *r.* Berberick, 38 Mont. 423, 100 P. 209; Adams *r.* S., 5 Okla. Cr. 347, 114 P. 347 (on objection); Guthrie *r.* Shaffer, 7 Okla. 459, 54 P. 698; Valdez *r.* S. (Tex. Cr.), 160 S. W. 341; Mills *r.* Cook (Tex. Civ.), 57 S. W. 81; Oltmanus Bros. *v* Poland (Tex. Civ.), 142 S. W. 653; Henderson *r.* Co. (Tex. Civ.), 128 S. W. 671; Johnson *r.* C., 111 Va. 877, 69 S. E. 1104 (infancy).

See Gila Val. R. Co. *r.* Hall, 232 U. S. 94, 34 Sup. Ct. 229; S. *r.* Pryor, 74 Wash. 121, 132 P. 874, 46 L. R. A. (N. S.) 1028, 1029 (note).

Agreement of parties that instrument shall not be put in evidence does not oust court of jurisdiction to determine competency. Trustees *r.* Hoyle, 79 Misc. 301, 139 N. Y. S. 1098.

Rulings of law in an auditor's report properly excluded from the jury. Greene *v.* Corey, 210 Mass. 536, 97 N. E. 70.

Competency is regulated by the law of the forum. Bowers *r.* R. Co., 10 Ga. App. 367, 73 S. E. 677.

Child nine years old held competent. C. *r.* Marshall, 211 Mass. 86, 97 N. E. 632.

Competency a question for court both on law and facts. Degg *r.* S., 150 Ala. 3, 43 S. 484; P. *r.* Bradford, 1 Cal. App. 41, 81 P. 712; Hoch *r.* P., 219 Ill. 265, 76 N. E. 356; King *r.* Hanson, 13 N. D. 85, 99 N. W. 1085; Borneman *r.* R. Co., 19 S. D. 459, 104 N. W. 208. Whether witness understood nature and obligation of oath is for court. Freasier *r.* S. (Tex. Cr.), 84 S. W. 360.

169-6 Clark *r.* McAtee, 227 Mo. 152, 127 S. W. 37.

169-8 See King *r.* Hanson, 13 N. D. 85, 99 N. W. 1085.

169-9 Mullins *r.* C., 113 Va. 787, 75 S. E. 193.

170-10 When question of admissibility rests upon disputed facts court may submit evidence to jury with hypothetical instructions. King *r.* Hanson, 13 N. D. 85, 99 N. W. 1085.

174-18 S. *r.* Miller, 234 Mo. 588, 137 S. W. 887.

Statement of counsel.—Arnold *r.* Livingstone, 165 Ia. 601, 134 N. W. 101.

174-22 Whatever objection there may be to the form of a question, if the answer it elicits is competent evidence, the question is harmless. Kirkpatrick *r.* R. Co., 161 Mo. App. 515, 143 S. W. 865.

175-24 Standley *v.* Moss, 114 Ill. App. 612; S. *r.* O'Malley, 132 Ia. 696, 109 N. W. 491; Peters *v.* S. (Miss.), 63 S. 666; Birdwell *v.* U. S., 4 Okla. Cr. 472, 113 P. 205.

175-25 See Crutcher *r.* R. Co. (Mo. App.), 168 S. W. 826.

175-26 Hall *r.* Hilley, 139 Ga. 13, 76 S. E. 566; Le Moyne *r.* Meadors, 156 Ky. 832, 162 S. W. 526.

175-27 Bise *r.* U. S., 144 Fed. 374, 74 C. C. A. 1; Le Moyne *r.* Meadors, 156 Ky. 832, 162 S. W. 526; S. *r.* Whitsett, 232 Mo. 511, 134 S. W. 555; Cook *r.* Lane, 86 Vt. 253, 84 A. 864.

176-28 P. *r.* Enright, 256 Ill. 221, 99 N. E. 936; Ladd *r.* Williams, 104 Mo. App. 390, 79 S. W. 511.

176-35 Beville *r.* R. Co., 159 N. C. 227, 74 S. E. 349.

Court may call witnesses touching competency of alleged incompetent. S. *r.* Simes, 12 Ida. 310, 85 P. 914.

The mere statement of an attorney that a witness is incompetent does not make him so—the facts showing incompetency must be brought out in evidence. Thomas *v.* S. (Tex. Cr.), 146 S. W. 878.

177-36 See S. *r.* Simes, 12 Ida. 310, 85 P. 914; Yellow Pine Co. *r.* Lyons (Tex. Civ.), 159 S. W. 909; Kinch *r.* S. (Tex. Cr.), 156 S. W. 649.

177-39 Error to refuse to allow ex-

amination into competency of witness because she had testified on previous trial of case. Young *v.* S., 122 Ga. 725, 50 S. E. 996.

177-40 Covington *v.* O'Meara (Ky.), 119 S. W. 187.

177-43 Young *v.* S., 122 Ga. 725, 50 S. E. 996.

178-47 See S. *v.* Simes, 12 Ida. 310, 85 P. 914.

178-48 S. *v.* Simes, supra.

178-49 P. *v.* Tyree, 21 Cal. App. 701, 132 P. 784.

178-50 Miles *v.* R. Co., 90 Ark. 485, 119 S. W. 837; C. *v.* Marshall, 211 Mass. 86, 97 N. E. 632; McManus *v.* Co., 109 Minn. 355, 123 N. W. 1080.

"Whether or not witness was competent was a question of fact, determined by the trial court, and, as the court to interfere." Tyrrel *v.* S., 177 of the witness to testify, we cannot say that there has been such an abuse of discretion as would authorize this court to interfere." Tyrrel *v.* S., 177 Ind. 14, 97 N. E. 14.

"The effect upon a verdict and judgment of improper and incompetent evidence having been received in the trial court depends upon the facts in each case, and the determination in one case is not necessarily to be followed as a precedent in subsequent cases." Mance *v.* Hossington, 205 N. Y. 33, 98 N. E. 203.

When error cannot be based on admission of incompetent testimony. See Benson *v.* S., 103 Ark. 87, 145 S. W. 883; Wicker *v.* Jones, 159 N. C. 102, 74 S. E. 801.

Rejection of competent evidence is harmless error if the fact is proved aliunde. Hogans *v.* Demps, 63 Fla. 177, 58 S. 33.

179-51 Arnold *v.* Livingstone, 155 Ia. 601, 134 N. W. 101.

Under Civ. Code, §587, exceptions to depositions must be made before trial. Frazier & Foster *v.* Danner, 146 Ky. 76, 142 S. W. 216.

179-52 Becker *v.* Donalson, 133 Ga. 864, 67 S. E. 92.

180 Competent evidence, although highly prejudicial, is admissible. P. *v.* Warren, 259 Ill. 213, 102 N. E. 201.

180-55 Mere fact evidence may prejudice jury against accused is not ground of objection if it is otherwise competent. P. *v.* Soeder, 150 Cal. 12, 87 P. 1016; Ellington *v.* S., 48 Tex. Cr. 160, 87 S. W. 153; Ohrstrom *v.* Tacoma, 57 Wash. 121, 106 P. 629.

Subsequent developments do not affect rulings on evidence competent when offered. Courtney *v.* Co., 138 App. Div. 383, 122 N. Y. S. 721.

Cannot inquire into witness' competency after he has testified. P. *v.* Enright, 256 Ill. 221, 99 N. E. 936.

181-65 Adams *v.* New York, 192 U. S. 585; Firth S. Co. *v.* Steel Co., 199 Fed. 353; New York C. R. Co. *v.* U. S., 165 Fed. 833, 91 C. C. A. 519 (papers brought into court pursuant to irregular order obtained by party introducing them); P. *v.* Warren, 12 Cal. App. 730, 108 P. 725; P. *v.* Swaile, 12 Cal. App. 192, 107 P. 134; Imboden *v.* P., 40 Colo. 142, 90 P. 608; Young *v.* S., 12 Ga. App. 86, 76 S. E. 753; Mossman *v.* Thorson, 118 Ill. App. 574; Niswonger *v.* S., 179 Ind. 653, 102 N. E. 135, 46 L. R. A. (N. S.) 1; S. *v.* Wallace, 162 N. C. 622, 78 S. E. 1; S. *v.* Royce, 38 Wash. 111, 80 P. 268; S. *v.* Sutter, 71 W. Va. 371, 76 S. E. 811.

See Leatherman *v.* S., 11 Ga. App. 756, 76 S. E. 102; S. *v.* Griffin, 43 Wash. 591, 86 P. 951.

Evidence obtained by means of judicial proceeding is incompetent by U. S. Rev. St. §860. But right to object is confined to witness. Voluntary affidavits of justification on bond, not within statute. Radford *v.* U. S., 129 Fed. 49, 63 C. C. A. 491.

Purchase of liquor.—S. *v.* Spiker, 88 Kan. 644, 129 P. 195.

182-66 Adams *v.* New York, 192 U. S. 585; Hartman *v.* U. S., 168 Fed. 30, 94 C. C. A. 124; Hardesty *v.* U. S., 164 Fed. 420, 91 C. C. A. 1, 168 Fed. 25, 93 C. C. A. 417; U. S. *v* Wilson, 163 Fed. 338; Martin *v.* S., 1 Ala. App. 215, 56 S. 3; Duren *v.* Thomasville, 125 Ga. 1, 53 S. E. 814; Cooper *v.* S. (Ga. App.), 81 S. E. 364; Minor *v.* City, 7 Ga. App. 817, 68 S. E. 314; Cohen *v.* S., 7 Ga. App. 5, 65 S. E. 1096; Taylor *v.* S., 5 Ga. App. 237, 62 S. E. 1048; Eaker *v.* S., 4 Ga. App. 649, 62 S. E. 99 (though arrest made without warrant, if such compulsion not used as to deprive accused of volition); Jacobs *v.* P., 117 Ill. App. 195, 218 Ill. 500, 75 N. E. 1034; S. *v.* Schmidt, 71 Kan. 862, 80 P. 948; C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127; Gilmore *v.* S., 3 Okla. Cr. 434, 106 P. 801; S. *v.* Suiter, 78 Vt. 391, 63 A. 182; S. *v.* Krinski, 78

Vt. 142, 62 A. 37, *dist.* S. *v.* Slamon, 73 Vt. 212, 50 A. 1097, 87 Am. St. 711; S. *v.* Barr, 78 Vt. 97, 62 A. 43; S. *v.* Royce, 38 Wash. 111, 80 P. 268.

See Nixon *v.* S., 92 Neb. 115, 138 N. W. 136; Johnson *v.* S. (Tex. Cr.), 76 S. W. 925 (property taken from defendant when arrested, admissible), Rostczyniala *v.* S., 125 Wis. 414, 104 N. W. 113.

Testimony obtained from search of person of another cannot be objected to by defendant being separately tried. Jones *v.* S. (Ga. App.), 62 S. E. 182.

182-67 Adams *v.* New York, 192 U. S. 585; *dist.* Boyd *v.* U. S., 116 U. S. 616; P. *v.* LeDoux, 155 Cal. 535, 102 P. 517; Imboden *v.* P., 40 Colo. 142, 90 P. 608; Minor *v.* City, 7 Ga. App. 817, 68 S. E. 314; S. *v.* Aspara, 113 La. 940, 37 S. 883; P. *v.* Campbell, 160 Mich. 108, 125 N. W. 42; S. *v.* Rogne, 115 Minn. 204, 132 N. W. 5; Silva *v.* S., 6 Okla. Cr. 97, 116 P. 199; S. *v.* Madison, 23 S. D. 584, 122 N. W. 617; S. *v.* Royce, 38 Wash. 111, 80 P. 268. See Jackson *v.* S., 118 Ga. 780, 45 S. E. 604. *Contra.* Where defendant arrested under illegal warrant evidence obtained by search of person while in custody is not admissible. Pitts *v.* S. (Ga. App.), 80 S. E. 510; Underwood *v.* S., 13 Ga. App. 206, 78 S. E. 1103; Croy *v.* S., 4 Ga. App. 476, 61 S. E. 848; Glover *v.* S., 4 Ga. App. 455, 61 S. E. 862; Sherman *v.* S., 2 Ga. App. 686, 58 S. E. 1122, 2 Ga. App. 118, 58 S. E. 392; Hughes *v.* S., 2 Ga. App. 29, 58 S. E. 390 (*dist.* Duren *v.* Thomasville, 125 Ga. 1, 53 S. E. 814, on ground there search disclosed only incriminatory circumstances, while in case at bar it disclosed facts necessary to conviction); Evans *v.* S., 106 Ga. 519, 32 S. E. 659, 71 Am. St. 276 (*dist.* Williams *v.* S., 109 Ga. 511, 28 S. E. 624, 39 L. R. A. 264, on ground search made while defendant lawfully in custody); Hammock *v.* S., 1 Ga. App. 126, 58 S. E. 66. Same in case of illegal arrest for vagrancy. Gainer *v.* S., 2 Ga. App. 126, 58 S. E. 295; Jackson *v.* S., 7 Ga. App. 414, 66 S. E. 982, is in harmony. See Rogers *v.* S., 1 Ga. App. 691, 62 S. E. 96; Glover *v.* S., 4 Ga. App. 455, 61 S. E. 862. Incriminating facts discovered by illegal search, admissible against accused. Warren *v.* S., 6 Ga. App. 18, 64 S. E. 111.

Evidence obtained by necessary search while accused is in legal custody for another offense is competent against him. Pitts *v.* S. (Ga. App.), 80 S. E. 510.

182-68 *Contra,* S. *v.* Height, 117 Ia. 650, 91 N. W. 935, 59 L. R. A. 137; S. *v.* Sheridan, 121 Ia. 164, 96 N. W. 730 (evidence secured by wrongful search of defendant's house, under warrant issued without authority for sole purpose of obtaining evidence against him, incompetent).

183-70 Grant *v.* S., 124 Ga. 757, 53 S. E. 334, though one of parties to communication is incompetent to testify in rebuttal.

Evidence cannot be objected to merely because obtained through witness incompetent against objector. C. *v.* Johnson, 213 Pa. 432, 62 A. 1064.

Duress of witness renders testimony incompetent. S. *v.* Montgomery, 56 Wash. 443, 105 P. 1035.

183-71 Crawford *v.* S., 3 Ala. App. 1, 57 S. 393; Union S. & C. Co. *v.* Wagoner, 36 Colo. 375, 85 P. 836. *Comp.* Louisville & N. R. Co. *v.* Stiles (Ky.), 119 S. W. 786; Levan *v.* R. Co., 86 S. C. 514, 68 S. E. 770.

183-72 See Brown *v.* S., 85 Miss. 511, 37 S. 957; Manee *v.* Hossington, 205 N. Y. 33, 98 N. E. 203.

183-74 Warren L. S. Co. *v.* Farr, 142 Fed. 116, 73 C. C. A. 340; Smith *v.* S. (Ala.), 62 S. 864; Montgomery *v.* S., 2 Ala. App. 25, 56 S. 92; Wall *v.* S., 2 Ala. App. 157, 56 S. 57; Mitchell *v.* Smith, 86 Ark. 186, 111 S. W. 806; German-A. Ins. Co. *v.* Brown, 75 Ark. 251, 87 S. W. 135; Dow *v.* S., 77 Ark. 464, 92 S. W. 28; Zibbell *v.* S. P. Co., 160 Cal. 237, 116 P. 513; Kirby *v.* Thompson, 138 Ga. 541, 75 S. E. 625; Chicago *v.* Bundy, 210 Ill. 39, 71 N. E. 28; Cook *v.* Lantz, 116 Ill. App. 472; Policemen's Assn. *v.* Ryce, 115 Ill. App. 95, 213 Ill. 9, 72 N. E. 764; Indianapolis T. Co. *v.* Romans, 40 Ind. App. 184, 79 N. E. 1068; Scott *v.* Wilson (Ia.), 137 N. W. 1043; Nelson *v.* R. Co., 30 Ky. L. R. 1254, 100 S. W. 1181; S. *v.* Grubb, 201 Mo. 585, 99 S. W. 1083; Cobb *v.* Bryan (Tex. Civ.), 97 S. W. 513; Parker *v.* R. Co., 81 Vt. 329, 70 A. 865; Grabowski *v.* S., 126 Wis. 447, 105 N. W. 805.

See Boyett *v.* S., 8 Ala. App. 93, 62 S. 984.

Secondary evidence may be rebutted with like evidence. McCormack *v.*

Mandlebaum, 102 App. Div. 302, 92 N. Y. S. 425.

185-76 Thayer Export Lumb. Co. *v.* Naylor, 100 Miss. 841, 57 S. 227; Hellinger *v.* Grant, 69 Misc. 564, 127 N. Y. S. 893.

185-77 McCormack *v.* Mandlebaum, 102 App. Div. 302, 92 N. Y. S. 425.

186-80 Ahnert *v.* R. Co., 110 N. Y. S. 376.

186-81 Cooper *v.* S. (Tenn.), 138 S. W. 826.

186-82 Warren L. S. Co. *v.* Farr, 142 Fed. 116, 73 C. C. A. 340; Cross *v.* S., 147 Ala. 125, 41 S. 875; Louisville & N. R. Co. *v.* Stiles (Ky.), 119 S. W. 786; Mills *v.* Starin, 119 App. Div. 336, 104 N. Y. S. 230. See Jefferson Co. *v.* Co., 32 Colo. 176, 75 P. 1070, 64 L. R. A. 925; Yank *v.* Bordeaux, 29 Mont. 74, 74 P. 77; Jeffress *v.* R. Co., 158 N. C. 215, 73 S. E. 1013.

186-83 Union S. & C. Co. *v.* Wagoner, 36 Colo. 375, 85 P. 836 (admission of irrelevant or immaterial evidence gives no right to rebut same); Pichon *v.* Martin, 35 Ind. App. 167, 73 N. E. 1009.

Error in receiving incompetent evidence not cured by introduction of like testimony by opposing party unless scope of latter is equal to that received in first instance. P. *v.* Martin, 13 Cal. App. 96, 108 P. 1034.

187-87 See Parker *v.* R. Co., 84 Vt. 329, 79 A. 865. But see Port Townsend R. Co. *v.* Barbare, 46 Wash. 275, 89 P. 710.

188-89 Wrongfully excluded competent evidence, though not re-offered, may be considered in a trial by court. Webster *v.* Bear, 141 Mo. App. 531, 125 S. W. 815.

188-90 P. *v.* Hagenow, 236 Ill. 514, 86 N. E. 370; Schwing *v.* Dunlap, 130 La. 498, 58 S. 162; Tincknell *v.* Ketchman, 78 Misc. 419, 139 N. Y. S. 620.

188-91 Town of Meeker *v.* Fairfield, 25 Colo. App. 187, 136 P. 471 (*cit.* 3 ENCYCLOPÆDIA OF EVIDENCE 188); Morse *v.* C., 33 Ky. L. R. 394, 111 S. W. 714; Malkowski *v.* Olfs, 161 Mich. 303, 126 N. W. 199.

188-92 Becker *v.* Donalson, 133 Ga. 864, 67 S. E. 92. See Eagan *v.* Kenney, 75 N. H. 410, 75 A. 98.

If competent as to one party, competent as to the other. Miller *v.* Journal Co., 246 Mo. 722, 152 S. W. 40.

189-94 Central of Ga. R. Co. *v.* Brown, 138 Ga. 107, 74 S. E. 839; Gonzalus *v.* S., 7 Okla. Cr. 444, 123 P. 795.

189-95 McGuire *v.* S., 2 Ala. App. 218, 57 S. 57; Rittenberry *v.* Smyer, 164 Ala. 514, 51 S. 233; P. *v.* Hagenow, 236 Ill. 514, 86 N. E. 370. See Gibson *v.* Boston, 75 N. H. 405, 75 A. 103.

189-96 Porter *v.* S., 173 Ind. 694, 91 N. E. 340; Watkins *v.* C., 146 Ky. 449, 142 S. W. 1035.

190-2 Birmingham R., Light & Power Co. *v.* Long, 3 Ala. App. 510, 59 S. 382; Roy *v.* S., 102 Ark. 588, 145 S. W. 190; Graysonia-Nashville Lumber Co. *v.* Carroll, 102 Ark. 460, 144 S. W. 519; S. *v.* Aitken, 240 Mo. 254, 144 S. W. 499; Treadway *v.* S. (Tex. Cr.), 144 S. W. 655; Moore *v.* S. (Tex. Cr.), 144 S. W. 598.

192-9 Stipulation as to what absent witness would testify to is not waiver of incompetency of such testimony. S. *v.* Leuhrsman, 123 Ia. 476, 99 N. W. 140.

196-24 Admissions do not necessarily preclude party in favor of whom made from proving facts admitted. See supra, "Admissions," 464-12.

196-25 It is ordinarily within discretion of court to reject or receive evidence of a conceded fact. In re Mason's Will, 82 Vt. 160, 72 A. 329.

196-26 Kansas City R. Co. *v.* Leslie (Ark), 167 S. W. 83.

197-28 Maxey *v.* U. S., 207 Fed. 327 (C. C. A.); In re Hoffman, 199 Fed. 448.

197-30 U. S. *v.* Gywnne, 209 Fed. 993.

State statutes requiring corroboration of accomplice not applicable to Federal courts. Hanley *v.* U. S., 123 Fed. 849, 59 C. C. A. 153. But see U. S. *v.* Van Leuven, 65 Fed. 78.

198-31 British & A. Mo. Co. *v.* Worrill, 168 Fed. 120 (interest of witness not party).

198-32 Birmingham R. Co. *v.* Jung, 161 Ala. 461, 49 S. 434; P. *v.* Harrison, 18 Cal. App. 288, 123 P. 200; Walt *v.* P., 46 Colo. 136, 104 P. 89; Southern Collegiate Inst. *v.* Avery's Est., 157 Ill. App. 568; Covington *v.* O'Meara (Ky.), 119 S. W. 187; Pumphrey *v.* S., 84 Neb. 636, 122 N. W. 19 (adult Japanese); Moore *v.* Adams, 26 Okla. 48, 108 P. 392; Cole *v.* Barber, 33 R. I. 414, 82 A. 129; Batterton *v.* S., 52 Tex. Cr. 381, 107 S. W. 826. See S. *v.* Pryor, 74 Wash. 121, 132 P. 874, 46 L. R. A. (N. S.) 1028, 1030n.

A witness may not testify indirectly to that of which he is incompetent to testify directly. Sheldon *v.* Thornburg, 153 Ia. 622, 133 N. W. 1076.

No presumption child under fourteen years competent. S. *v.* Labriola, 75 N. J. L. 482, 67 A. 386.

Witness may be asked concerning his knowledge of matter of which inquiry made before he answers, if court consents. Sloss S. S. & I. Co. *v.* Green, 179 Ala. 178, 49 S. 301.

199-33 S. *v.* Vaughn, 223 Mo. 149, 122 S. W. 677; Moore *v.* Adams, 26 Okla. 48, 108 P. 292.

199-34 First Nat. Bk. *v.* Sandmeyer, 164 Ill. App. 141; Howard *v.* Strode, 242 Mo. 210, 146 S. W. 792; Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561 (at time testimony taken on examination offered on trial).

199-35 Rule applied to subscribing witness. Jones *v.* Grieser, 238 Ill. 183, 87 N. E. 295.

199-36 Intoxication at time of occurrence testified to goes only to credibility of witness. S. *v.* Sejours, 113 La. 676, 37 S. 599.

199-37 Competency of witnesses to will is dependent upon their status at time of execution. Fearn *v.* Postlethwaite, 240 Ill. 626, 88 N. E. 1057.

199-38 Strict construction.—Savage *v.* Modern Woodmen, 84 Kan. 63, 113 P. 802.

200-39 McKinstry *v.* Tuscaloosa, 172 Ala. 344, 54 S. 629; Covington *v.* O'Meara (Ky.), 119 S. W. 187; Barker *v.* Washburn, 200 N. Y. 280, 93 N. E. 978. See S. *v.* Pryor, 74 Wash. 121, 132 P. 874, 46 L. R. A. (N. S.) 1028n.

Competency of children.—The Missouri statute, in disqualifying certain persons to testify, among others, specifies, "a child under ten years of age, who appears incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." R. S. 1909, §6362. "It has been uniformly ruled that children ranging from five to nine years may be admitted as witnesses if it appears upon their preliminary examinations that they have sufficient intelligence to understand the questions put to them and are not otherwise incompetent. In all of those cases the examination of the witness, either by the court's initiative or upon the request of the adverse party, was had before the witness was sworn and admitted to testify. This is the correct practice, for the object of such an inquiry is to determine the personal competency of a person proposed as a witness; hence the demand therefor should be made before the witness has been sworn or admitted to testify." Davenport *v.* King Electric Co., 242 Mo. 111, 145 S. W. 454.

200-40 P. *v.* Tyree, 21 Cal. App. 701, 132 P. 784; P. *v.* Enright, 256 Ill. 221, 99 N. E. 936; Davenport *v.* Elec. Co., 242 Mo. 111, 145 S. W. 454; Holland *v.* Riggs, 53 Tex. Civ. 367, 116 S. W. 167; Finch *v.* S. (Tex. Cr.), 158 S. W. 510; S. *v.* Morasco (Utah), 128 P. 571. See Brown *v.* Armstrong, 239 Pa. 549, 87 A. 11, and infra, "Insanity," 479-5.

Mental condition of prosecuting witness may be inquired into without putting him on stand for purpose of showing why he was not called as witness. Evans *v.* S., 57 Tex. Cr. 174, 122 S. W. 392.

200-42 S. *v.* Butler (Ia.), 138 N. W. 383. Deaf mute seventeen years old, possessing intelligence of child of ten, competent. S. *v.* Smith, 203 Mo. 695, 102 S. W. 526.

201-43 Dobbins *v.* R. Co., 79 Ark 85, 95 S. W. 794.

201-45 Dobbins *v.* R. Co., 79 Ark. 85, 95 S. W. 794.

202-48 Previous illness and resulting present weakness, not material to competency of witness. Joseph *v.* S., 59 Tex. Cr. 82, 127 S. W. 171.

202-49 In re Jacob's Will, 76 Misc. 394, 137 N. Y. S. 155.

Bad reputation.—Raum *v.* Board, 155 Ky. 690, 160 S. W. 255.

202-50 Farrell *v.* S. (Ark.), 163 S. W. 768; Peters *v.* S. (Miss.), 63 S. 666.

202-53 Maker of contradictory oaths not incompetent. Curtis *v.* S., 9 Ala. App. 36, 63 S. 745.

203-55 Stone *v.* S., 118 Ga. 705, 45 S. E. 630; Trafton *v.* Osgood, 74 N. H. 98, 65 A. 397; Wells *v.* Ty., 15 Okla. 195, 81 P. 425; Wormley *v.* S. (Tex. Cr.), 143 S. W. 615.

The competency of witnesses is regulated by the law of the forum. Bowers *v.* R. Co., 10 Ga. App. 367, 73 S. E. 677.

Though sentence to life imprisonment witness not incompetent. Martin *v.* Ty., 14 Okla. 598, 78 P. 88.

203-56 U. S. *v.* Hughes, 175 Fed. 228 (federal courts in trial of criminal cases not affected by state laws); Bise

v. U. S., 5 Ind. Ty. 602, 82 S. W. 921; Roberson *v.* Woodfork, 155 Ky. 206, 159 S. W. 793; Illinois C. R. Co. *v.* McManus, 26 Ky. L. R. 675, 82 S. W. 399; Daly *v.* S. (Tex. Cr.), 162 S. W. 1152; Bradford *v.* S., 62 Tex. Cr. 424, 138 S. W. 118; Gulf, etc. R. Co. *v.* Johnson (Tex. Civ.), 86 S W. 34; Watson *v.* S., 48 Tex. Cr. 539, 89 S. W. 270; Quillen *v.* C., 105 Va. 874, 54 S. E. 333; S. *v.* Newland, 37 Wash. 428, 79 P. 983 (perjury).

See S. *v.* Champoux, 33 Wash. 339, 74 P. 557.

Prosecutrix in rape case not incompetent because testimony may tend to degrade her. S. *v.* George, 214 Mo. 262, 113 S. W. 1116.

Perjury alone disqualifies witness.—Price *v.* S. (Okla. Cr.), 131 P. 1102.

Conviction of felony.—Maxey *v.* U. S., 207 Fed. 327, 125 C. C. A. 77.

204-59 Curtis *v.* S., 9 Ala. App. 36, 63 S. 745.

204-60 Although punishment may in discretion of jury, be limited to imprisonment in county jail or fine, if confinement in penitentiary is a possible alternative, the offense is a felony and conviction disqualifies. Quillen *v.* C., 105 Va. 874, 54 S. E. 333.

204-62 Cabrera *v.* S., 56 Tex. Cr. 141, 118 S. W. 1054. See Williams *v.* S. (Tex. Cr.), 147 S. W. 571.

204-64 Maxey *v.* U. S., 207 Fed. 327, 125 C. C. A. 77. See C. *v.* Doe, 18 Pa. Dist. 611 (offenses against individuals which do not tend to corrupt channels of justice, not included).

205-65 Wynne *v.* S., 155 Ala. 99, 46 S. 459; Harwell *v.* S. (Ala. App.), 65 S. 702; S. *v.* Landrum, 127 Mo. App. 653, 106 S. W. 1111. See Menefee *v.* S., 59 Fla. 316, 51 S. 555; Robinson *v.* S., 50 Fla. 115, 39 S. 465; Illinois C. R. Co. *v.* McManus, 26 Ky. L. R. 675, 82 S. W. 399. See Williams *v.* S. (Tex. Cr.), 147 S. W. 571.

Conviction of perjury disqualifies. Hinton *v.* C., 134 Ky. 511, 121 S. W. 434.

205-66 O'Leary *v.* U. S., 158 Fed. 796, 86 C. C. A. 56; Michigan & A. L. Co. *v.* Bullington, 106 Ark. 25, 152 S. W. 999; Dial *v.* C., 142 Ky. 32, 133 S. W. 976 (perjury); Coleman *v.* S., 58 Tex. Cr. 451, 126 S. W. 573.

Person convicted but having sentence suspended is competent.. Espinoza *v.* S. (Tex. Cr.), 165 S. W. 208.

205-67 Gulf, etc. R. Co. *v.* Johnson, 98 Tex. 76, 81 S. W. 4; Espinoza *v.* S. (Tex. Cr.), 165 S. W. 208. But see s. c. (Tex. Civ.), 77 S. W. 648; Rice *v.* S., 50 Tex. Cr. 648, 100 S. W. 771 (even though time for moving for new trial passed).

206-68 Owen *v.* S., 86 Ark. 317, 111 S. W. 466.

206-69 **Pending motion for rehearing after affirmance, witness competent.** Bowles *v.* S. (Tex. Cr.), 150 S. W. 626.

206-71 See In re Ebbs, 150 N. C. 44, 63 S. E. 190.

206-72 S. *v.* Landrum, 127 Mo. App. 653, 106 S. W. 1111; Samuels *v.* C., 110 Va. 901, 66 S. E. 222 (conviction in federal court for same state not disqualification in state court).

Where statute disqualifies witness convicted "in any court in this state" it must appear conviction was in state. Robinson *v.* S., 50 Fla. 115, 39 S. 465.

206-73 Change in law removing disability cannot operate retrospectively. S. *v.* Landrum, 127 Mo. App. 653, 106 S. W. 1111.

"It does not make any difference when the party was convicted of a felony. Such conviction rendered him incompetent, and he remains incompetent, unless pardoned by proper authority." Price *v.* S. (Tex. Cr.), 147 S. W. 243.

206-74 S. *v.* Blount, 124 La. 202, 50 S. 12; Quillen *v.* C., 105 Va. 874, 54 S. E. 333. See Watson *v.* S., 48 Tex. Cr. 539, 89 S. W. 270 (promise by third party to sheriff to pay witness' fine insufficient to remove disability).

207-75 Thrash *v.* S., 79 Ark. 347, 96 S. W. 360; Vance *v.* S., 70 Ark. 272, 68 S. W. 37; Bise *v.* U. S., 5 Ind. Ty. 602, 82 S. W. 921, s. c. 144 Fed. 374, 74 C. C. A. 1; Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561; Moore *v.* Adams, 26 Okla. 48, 108 P. 392; Daly *v.* S. (Tex. Cr.), 162 S. W. 1152; Deckard *v.* S., 57 Tex. Cr. 359, 123 S. W. 417; Gulf, etc. R. Co. *v.* Johnson, 98 Tex. 76, 81 S W. 4; Grabill *v.* S. (Tex. Cr.), 97 S. W. 1046. *Contra*, S. *v.* Landrum, 127 Mo. App. 653, 106 S. W. 1111 (by statute infamy may be shown by witness' testimony).

207-76 Matthews *v.* S. (Tex. Cr.), 163 S. W. 723.

207-77 King *v.* S., 57 Tex. Cr. 363, 123 S. W. 135.

207-78 Hawkins *v.* U. S., 3 Okla.

Cr. 651, 108 P. 561. See Gulf, etc. R. Co. *v.* Johnson, 98 Tex. 76, 81 S. W. 4.

Admission on cross-examination, insufficient. Bise *v.* U. S., 5 Ind. Ty. 602, 82 S. W. 921, s. c. 144 Fed. 374, 74 C. C. A. 1; Vance *v.* S., 70 Ark. 272, 68 S. W. 37; Thrash *v.* S., 79 Ark. 347, 96 S. W. 360.

207-79 See Bise *v.* U. S., 5 Ind. Ty. 602, 82 S. W. 921. *Contra,* Daly *v.* S. (Tex. Cr.), 162 S. W. 1152.

208-82 U. S. *v.* Hughes, 175 Fed. 238 (legislative or executive); U. S. *v.* Rutherford, 2 Cranch C. C. 528, 27 Fed. Cas. No. 16,210; U. S. *v.* Jones, 26 Fed. Cas. No. 15,493; Yarborough *v.* S., 41 Ala. 405; P. *v.* Bowen, 43 Cal. 439, 13 Am. Rep. 148; Singleton *v.* S., 38 Fla. 297, 21 S. 21, 56 Am. St. 177, 34 L. R. A. 251; Roberson *v.* Woodfork, 155 Ky. 206, 159 S. W. 793; S. *v.* Benoit, 16 La. Ann. 273; Klein *v.* Dinkgrave, 4 La. Ann. 540; Perkins *v.* Stevens, 24 Pick. (Mass.), 277; S. *v.* Kelleher, 224 Mo. 145, 123 S. W. 551; S. *v.* Foley, 15 Nev. 64, 37 Am. Rep. 458; S. *v.* Blaisdell, 33 N. H. 388; Ty. *v.* Chavez, 8 N. M. 528, 45 P. 1107; P. *v.* Pease, 3 Johns Cas. (N. Y.) 333; Diehl *v.* Rodgers, 169 Pa. 316, 32 A. 424, 47 Am. St. 908; Howser *v.* Com., 51 Pa. 332; Jones *v.* Harris, 1 Strobh. L. (S. C.) 160; Perry *v.* S. (Tex. Cr.), 155 S. W. 263; Flowers *v.* S. (Tex. Cr.), 147 S. W. 1162; Wormley *v.* S. (Tex. Cr.), 143 S. W. 615; Bennett *v.* S., 24 Tex. App. 73, 5 S. W. 527, 5 Am. St. 875; Martin *v.* S., 21 Tex. App. 1, 17 S. W. 430; Thornton *v.* S., 20 Tex. App. 519; Carr *v.* S., 19 Tex. App. 635, 53 Am. Rep. 395.

See Thompson *v.* U. S., 202 Fed. 401, 120 C. C. A. 575, 47 L. R. A. (N. S.) 206.

208-84 Miller *v.* S., 46 Tex. Cr. 59, 79 S. W. 567.

208-85 See Thompson *v.* U. S., 202 Fed. 401, 120 C. C. A. 575.

211-5 In action between third persons grantor or grantee in deed is competent to impeach it on ground of his fraudulent conduct. Merck *v.* Merck, 82 S. C. 329, 65 S. E. 347.

211-6 British & A. M. Co. *v.* Worrill, 168 Fed. 120; Jackson *v.* Tribble, 156 Ala. 480, 47 S. 310; Provident, etc. Soc. *v.* King, 216 Ill. 416, 75 N. E. 166; Farrenkoph *v.* Holm, 142 Ill. App. 366; Louisville & M. R. Co. *v.* Hall, 143 Ky. 497, 136 S. W. 905; Fleming *v.* Gomein, 168 Mich. 541, 134 N. W. 969; Cole *v.* Waters, 164 Mo. App. 567, 147 S. W. 552; Wright *v.* Johnson, 108 Va. 853, 62 S. E. 948.

See Stewart *v.* Blalock Co., 139 Ga. 44, 76 S. E. 573; Citizens' Nat. L. Ins. Co. *v.* Ragan, 13 Ga. App. 29, 78 S. E. 683. But see Duffy *v.* Duffy, 243 Ill. 476, 90 N. E. 697; Jones *v.* Kelly, 94 S. C. 349, 78 S. E. 17.

Mortgagor of land subject to resulting trust may testify he informed mortgagee of existence of trust. Moultrie *v.* Wright, 154 Cal. 520, 98 P. 257.

Heir apparent may testify in action in which ancestor a party. In re Sloan's Est., 50 Wash. 86, 96 P. 684.

211-7 Hendrix *v.* U. S., 219 U. S. 79; S. *v.* Witherspoon, 231 Mo. 706, 133 S. W. 323. See Downing *v.* S., 61 Tex. Cr. 519, 136 S. W. 471.

Wife testifying for husband may be cross-examined. Brown *v.* S., 61 Tex. Cr. 334, 136 S. W. 265.

In adultery prosecution.—May testify. Heacock v. S., 4 Okla. Cr. 606, 113 P. 949, the offense being against spouse by statute. *Contra,* Sargent *v.* S., 61 Tex. Cr. 34, 133 S. W. 885.

211-8 Keely *v.* City, 49 Ind. App. 396, 97 N. E. 568; Sheldon *v.* Thornburg, 153 Ia. 622, 133 N. W. 1076; Lieber *v.* Lieber, 239 Mo. 1, 143 S. W. 458; Lockhard *v.* Vare, 230 Pa. 591, 79 A. 802.

This rule does not extend to testimony bearing on the existence of such incompetency. Keely *v.* City, 49 Ind. App. 396, 97 N. E. 568.

Interest of legatee may disqualify him in proceedings to contest will. Dougherty *v.* Gaffney, 239 Ill. 640, 88 N. E. 150.

Party in interest may contradict testimony of deceased party received in later trial. Tanner *v.* Clapp, 139 Ill. App. 353.

211-9. S. *v.* McCollum, 135 La. —, 65 S. 600. Not competent in police courts. Williams *v.* City, 11 Ga. App. 194, 74 S. E. 1039. See vol. 14, p. 641, et seq. and supplement thereto.

211-10 Christian *v.* S. (Tex. Cr.), 161 S. W. 101; Castenara *v.* S. (Tex. Cr.), 156 S. W. 1180.

Statements by him inadmissible also. Castenara *v.* S. (Tex. Cr.), 156 S. W. 1180.

Not incompetent until indicted.—Ponder *v.* S. (Tex. Cr.), 155 S. W. 244.

Article 771 of the Texas Code of Criminal Procedure provides: "Persons

charged as principals, accomplices or accessories, whether in the same indictment or different indictments, cannot be introduced as witnesses for one another.'' Ryan *v.* S. (Tex. Cr.), 142 S. W. 878.

211-11 Stanfield *v.* S. (Tex. Cr.), 165 S. W. 216; McKelvey *v.* S. (Tex. Cr.), 155 S. W. 932. See Bise *v.* U. S., 144 Fed. 374, 74 C. C. A. 1; Jackson *v.* S., 5 Ala. App. 306, 57 S. 594.

Competent for state.—Wong Din *v.* U. S., 135 Fed. 702, 68 C. C. A. 340; S. *v.* Cobley, 128 Ia. 114, 103 N. W. 99; S. *v.* Myers, 198 Mo. 225, 94 S. W. 242; P. *v.* Van Wormer, 175 N. Y. 188, 67 N. E. 299; Burdett *v.* S., 51 Tex. Cr. 345, 101 S. W. 988. *Contra,* S. *v.* White, 48 Or. 416, 87 P. 137.

212-12 Incompetent. S. *v.* White, 48 Or. 416, 87 P. 137; Coffman *v.* S., 51 Tex. Cr. 478, 103 S. W. 1128. See Burdett *v.* S., 51 Tex. Cr. 345, 101 S. W. 988.

213-13 Wells *v.* Ty., 15 Okla. 195, 81 P. 425.

213-14 S. *v.* White, 48 Or. 416, 87 P. 137.

213-15 S. *v.* Peters (Mo.), 167 S. W. 520; S. *v.* Myers, 198 Mo. 225, 94 S. W. 242; S. *v.* White, 48 Or. 416, 87 P. 137.

213-16 S. *v.* White, supra (dismissal discretionary).

215-20 By Indiana statute (Burns' St. 1908, §2111), an accomplice is a competent witness when he consents to testify. Schuster *v.* S. (Ind.), 99 N. E. 422.

215-22 Principals jointly indicted with accessory, though not on trial, but subject thereto, competent for state. S. *v.* Kennedy, 85 S. C. 146, 67 S. E. 152.

215-23 S. *v.* De Maio, 69 N. J. L. 590, 55 A. 644 (where court composed of single judge he cannot be called); Maitland *v.* Zanga, 14 Wash. 92, 44 P. 117. *Contra,* S. *v.* Court, 31 Mont. 197, 85 P. 870 (judge competent to prove irregularity in drawing jury).

217-29 S. *v.* Houghton, 45 Or. 110, 75 P. 887.

217-30 *Contra,* S. *v.* Houghton, 45 Or. 110, 75 P. 887.

217-32 *Contra,* S. *v.* Bringgold, 40 Wash. 12, 82 P. 132; Zitske *v.* Goldberg, 38 Wis. 216 (justice of peace may testify as to what took place before him). See Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803; Hughes *v.* R. Co., 126 Wis. 525, 106 N. W. 526.

218-34 Grand jurors may testify as to testimony heard by them. C. *v.* Gaines, 42 Pa. Super. 550.

218-36 Chicago R. Co. *v.* Collier, 1 Neb. (Unof.) 278, 95 N. W. 472. See Hughes *v.* R. Co., 126 Wis. 525, 106 N. W. 526.

218-37 Atkins *v.* S., 7 Ga. App. 201, 66 S. E. 479.

Discretion of court.—Right to call juror as witness rests somewhat in court's discretion. It must clearly appear party offering him exercised proper diligence before he was impaneled, and was not apprised that he knew anything material to the case. International R. Co. *v.* Foster, 45 Tex. Civ 334, 100 S. W. 1017.

Juror at inquest may be sworn. Reg. *v.* Winegarner, 17 Ont. (Can.) 208.

219-38 See Chicago R. Co. *v.* Collier, 1 Neb. (Unof.) 278, 95 N. W. 472.

219-40 Atkins *v.* S., 7 Ga. App. 201, 66 S. E. 479.

220-43 And so in Oregon. S. *v.* Finch, 54 Or. 482, 103 P. 505.

220-44 Birmingham Co. *v.* Moore, 148 Ala. 115, 42 S. 1024; Hull *v.* Larson, 14 Ariz. 492, 131 P. 668; Richards *v.* Sanderson, 39 Colo. 270, 89 P. 769; Scott *v.* S., 138 Ga. 29, 74 S. E. 687; McGlone *v.* Hauger (Ind. App.), 104 N. E. 116; Covington C. & B. Co. *v.* Hull, 28 Ky. L. R. 1038, 90 S. W. 1055; Battle Creek *v.* Haak, 139 Mich. 514, 102 N. W. 1005; Temple *v.* S. (Miss.), 62 S. 429; S. *v.* Sebastian, 215 Mo. 58, 114 S. W. 522; Devoy *v.* Co., 192 Mo. 197, 91 S. W. 140; Meisch *v.* Sippy, 102 Mo. App. 559, 77 S. W. 141; Hanor *v.* Housel, 128 App. Div. 801, 113 N. Y. S. 163; Star *v.* S. (Okla. Cr.), 131 P. 542; Chant *v.* S. (Tex. Cr.), 166 S. W. 513; Pickens *v.* Co., 58 W. Va. 11, 50 S. E. 872. See Baxter *v.* Beckwith, 25 Colo. App. 322, 137 P. 901; and infra, ''New Trial,'' 964-6, and vol. 8, p. 967, n. 10 and supplement thereto.

221-45 Voluntary affidavit to impeach verdict admissible in Arizona. Hull *v.* Larson, 14 Ariz. 492, 131 P. 668.

221-46 Chicago *v.* Saldman, 225 Ill. 625, 80 N. E. 349; Lee *v.* Co. (R. I.), 66 A. 835. See vol. 8, p. 967, n. 9, and supplement thereto.

222-47 Lee *v.* Co. (R. I.), 66 A. 835.

223-52 See Pickens *v.* Co., 58 W. Va. 11, 50 S. E. 872.

223-53 Wolfgram *v.* Schoepke, 123 Wis. 19, 100 N. W. 1054. See Chicago *v.* Saldman, 225 Ill. 625, 80 N. E. 349.

223-54 See vol. 8, p. 970, n. 16, and supplement thereto.

224-57 Hull *v.* Larson, 14 Ariz. 492, 131 P. 668. See Hyde *v.* U. S., 225 U. S. 347, 32 Sup. Ct. 793, 56 L. ed. 1114.

226-62 **Evidence competent to correct mistake in verdict.** McGlone *v.* Hauger (Ind. App.), 104 N. E. 116.

227-63 Competent to show answer agreed upon in special verdict opposite of that shown by written verdict. Wolfgram *v.* Schoepke, 123 Wis. 19, 100 N. W. 1054.

227-64 See Wolfgram *v.* Schoepke, supra.

229-73 Incompetent to testify to relationship to person interested in cause. Eaker *v.* S., 4 Ga. App. 649, 62 S. E. 99, *cit.* Bowden *v.* S., 126 Ga. 578, 55 S. E. 499.

230-77 *Contra.* Griffin *v.* S., 5 Ga. App. 43, 62 S. E. 685. See Chicago *v.* Saldman, 225 Ill. 625, 80 N. E. 349.

230-83 *Contra.* Pickens *v.* Co., 58 W. Va. 11, 50 S. E. 872, incompetent to show party treated to liquor. See Chicago *v.* Saldman, 225 Ill. 625, 80 N. E. 349.

232-87 Brown L. Co. *v.* Lehman, 134 Ia. 712, 112 N. W. 185 (competent to prove jury considered matter not properly before them). But see Clark *v.* Van Vleck, 135 Ia. 194, 112 N. W. 648, incompetent as to elements included in damages awarded.

Consideration by jury of foreman's statements as to matters not in evidence may be shown by juror's affidavit. Douglass *v.* Agne, 125 Ia. 67, 99 N. W. 550.

233-92 King *v.* Elton, 2 Cal. App. 147, 83 P. 261; S. *v.* O'Brien, 35 Mont. 482, 90 P. 514; Midgley *v.* Bergerman, 30 Utah 17, 83 P. 466; Pence *v.* Co., 27 Utah 378, 75 P. 934.

233-93 Black *v.* Co., 26 Utah 451, 73 P. 514.

234-94 Bailey *v.* S., 50 Tex. Cr. 398, 97 S. W. 694.

Statute renders juror's affidavit admissible in all cases. Galveston R. Co. *v.* Roberts (Tex. Civ.), 91 S. W. 375.

234-97 But see Bailey *v.* S., 50 Tex. Cr. 398, 97 S. W. 694.

234-98 Walton *v.* Co., 123 Fed. 209, 60 C. C. A. 155; Chicago *v.* Saldman, 225 Ill. 625, 80 N. E. 349; Pittsburg R. Co. *v.* Collins, 168 Ind. 467, 80 N. E. 415.

234-1 Birmingham L. & P. Co. *v.* Moore, 148 Ala. 115, 42 S. 1024; Birmingham R. & E. Co. *v.* Mason, 144 Ala. 387, 39 S. 590 (competent to show document improperly in jury room not read or considered); Hull *v.* Larson, 14 Ariz. 492, 131 P. 668; Covington Co. *v.* Hull, 28 Ky. L. R. 1038, 90 S. W. 1055; Star *v.* S. (Okla. Cr.), 131 P. 542.

236-2 **Conduct of beneficiary** giving testatrix reason to fear him, may be shown. Gillispie's Exr. *v.* Gillispie (Ky.), 128 S. W. 1078.

237-8 **Juror on former trial** may testify to what he saw during view by jury. Hull *v.* R. Co., 76 S. C. 278, 57 S. E. 28, 10 L. R. A. (N. S.) 1213; Hughes *v.* R. Co., 126 Wis. 525, 106 N. W. 526.

Grand jurors competent to show indictment found without testimony corroborating prosecutrix. Allen *v.* S., 162 Ala. 74, 50 S. 279.

237-9 Reavely *v.* Harris, 239 Ill. 526, 88 N. E. 238; Bartoletti *v.* Hoerner, 154 Ill. App. 336; Fletcher *v.* Ketchum (Ia.), 141 N. W. 916; Flood *v.* Bollmeier (Ia.), 138 N. W. 1102. See Sargent *v.* Johns, 206 Pa. 386, 55 A. 1051; supra, "Attorney and Client," 173-20.

An attorney at law, who drafts and prepares a deed for the signature of the grantor, in which deed the client of such attorney is named as grantee, is not, because of the existence of the relation of attorney and client between him and the grantee, incompetent as an attesting witness to the execution of the instrument. Madden *v.* Lampley, 137 Ga. 555, 73 S. E. 825, *cit.* Austin *v.* Assn., 122 Ga. 439, 50 S. E. 382.

238-10 British & A. M. Co. *v.* Worrill, 168 Fed. 120.

238-11 Wetzel *v.* Firebaugh, 251 Ill. 190, 95 N. E. 1085; Wilkinson *v.* P., 226 Ill. 135, 80 N. E. 699.

Attorney may examine himself.—Kintz *v.* Menz Lumb. Co., 47 Ind. App. 475, 94 N. E. 802. And see Normand's Est., 88 Neb. 767, 130 N. W. 571.

"An offer by a lawyer to testify in a case which he is conducting may be a breach of the rules which should govern his conduct as an attorney, and still may not offend the legal rules of evidence. Assuming that the defend-

ant's conduct in offering himself as a witness in the case before us was a violation of the rules of professional etiquette, he became amendable to reproof or punishment only as an attorney; and the fact that he had taken part in the examination of a witness did not in law disqualify him from testifying in the case in which he was a party defendant." Kaeser *v.* Bloomer, 85 Conn. 209, 82 A. 112.

238-12 Bishop *v.* Hilliard, 227 Ill. 382, 81 N. E. 403; Wicks *v.* Wheeler, 139 Ill. App. 412.

Counsel for adverse party may be called as witness. Loomis *v.* Co., 81 Conn. 343, 71 A. 358.

238-13 P. *v.* White, 251 Ill. 67, 95 N. E. 1036; Wilkinson *v.* P., 226 Ill. 135, 80 N. E. 699; Murphy *v.* S. (Md.), 87 A. 811; S. *v.* Shour, 196 Mo. 202, 95 S. W. 405; S. *v.* Greene, 38 Utah 389, 115 P. 181.

239-15 Strickland *v.* S., 151 Ala. 31, 44 S. 90; Reavely *v.* Harris, 145 Ill. App. 545; Palmer *v.* P., 112 Ill. App. 527; C. *v.* Ellis, 133 Ky. 625, 118 S. W. 973; Fouse *v.* S., 83 Neb. 258, 119 N. W. 478; Woods *v.* S. (Tex. Cr.), 151 S. W. 296; International, etc. R. Co. *v.* Hugen, 45 Tex. Civ. 326, 100 S. W. 1000; Hendelman *v.* Kahan, 50 Wash. 247, 97 P. 109. See McWhorter *v.* S., 118 Ga. 55, 44 S. E. 873; Phillips *v.* S., 121 Ga. 358, 49 S. E. 290; Davis *v.* S., 120 Ga. 843, 48 S. E. 305; S. *v.* Stewart, 63 W. Va. 597, 60 S. E. 591.

Where witness contradicted it is error to exclude his testimony in rebuttal because, in the interim, he violated rule of exclusion. Illinois, etc. R. Co. *v.* Ely, 83 Miss. 519, 35 S. 873.

In absence of misunderstanding or mistake testimony of witness for accused violating rule is properly excluded. Martin *v.* C., 30 Ky. L. R. 1196, 100 S. W. 872.

Waiver by failure to call attention to known violation of rule. Palmer *v.* P., 112 Ill. App. 527.

In Georgia rule changed. See 240-19, infra.

239-16 S. *v.* Pell, 140 Ia. 655, 119 N. W. 154. See Palmer *v.* P., 112 Ill. App. 527. Court officers who are witnesses may be exempted from order. Perkins *v.* C. (Ky.), 124 S. W. 794.

240-17 Taylor *v.* S., 132 Ga. 235, 63 S. E. 1116; Palmer *v.* P., 112 Ill. App. 527; S. *v.* High, 122 La. 521, 47 S. 878 (witness permitted by court to return); Brown *v.* McDaniel, 140 Mo. App. 522, 120 S. W. 642 (neglect to see order enforced is not fault of party); S. *v.* Benjamin (R. I.), 71 A. 65 (not summoned); Mitchell *v.* S., 55 Tex. Cr. 62, 114 S. W. 830 (not placed under rule); Hendelman *v.* Kahan, 50 Wash. 247, 97 P. 109.

240-19 Price *v.* U. S., 1 Okla. Cr. 291, 97 P. 1056. See Phillips *v.* S., 121 Ga. 358, 49 S. E. 290.

In Georgia same rule prevails. Thomas *v.* S., 7 Ga. App. 615, 67 S. E. 707.

Discretion of court not interfered with unless injury shown. Conley *v.* S., 55 Tex. Cr. 370, 116 S. W. 806.

Under statute providing interrogatories for taking a deposition shall be confessed if witness fails to appear, he is not disqualified to testify inconsistently therewith unless conditions upon which statute becomes operative complied with. Greene *v.* Hereford, 12 Ariz. 85, 95 P. 105.

241-21 Nelson *v.* S., 149 Ala. 26, 43 S. 18; Abbott *v.* S., 11 Ga. App. 43, 74 S. E. 621; Thompkins *v.* C., 28 Ky. L. R. 642, 90 S. W. 221; Schaumloeffel *v.* S., 102 Md. 470, 62 A. 803; S. *v.* Conway, 241 Mo. 271, 145 S. W. 441; S. *v.* Bailey, 190 Mo. 257, 88 S. W. 733 (especially where list of additional witnesses furnished before trial); S. *v.* Henderson, 186 Mo. 473, 85 S. W. 376; S. *v.* Myers, 198 Mo. 225, 94 S. W. 242; Spartanburg *v.* Parris, 85 S. C. 227, 67 S. E. 246. *Contra*, S. *v.* Barber, 13 Ida. 65, 88 P. 418 (statute); S. *v.* Kelliher, 49 Or. 77, 88 P. 867.

242-22 S. *v.* Walton (Mo.), 164 S. W. 211; S. *v.* Wilson, 223 Mo. 173, 122 S. W. 671; S. *v.* Carpenter, 56 Wash. 670, 106 P. 206.

Informations, not within statute. Donnelly *v.* S., 86 Neb. 345, 125 N. W. 618.

Statute does not apply to prosecuting attorney whose name is signed to information. S. *v.* Thompson, 76 Kan. 365, 91 P. 79, *cit.* S. *v.* Bundy, 71 Kan. 779, 81 P. 459, holding same as to witnesses whose sworn statements attached to information.

Indorsement may be made during trial without showing cause why it was not previously made. S. *v.* Le Pitre, 54 Wash. 166, 103 P. 27.

242-24 S. *v.* Whituah, 129 Ia. 211, 105 N. W. 432; Ossenkop *v.* S., 86 Neb. 539, 126 N. W. 72. *Contra*, S. *v.* Barber, 13 Ida. 65, 88 P. 418.

242-25 S. *v.* Benson (Ia.), 134 N. W. 851.

242-26 S. *v.* Butler (Ia.), 138 N. W. 383. See S. *v.* Mathews, 133 Ia. 398, 109 N. W. 616; S. *v.* La Rose, 54 Or. 555, 104 P. 299. *Comp.* Shaffer *v.* U. S., 24 App. Cas. (D. C.) 417.

242-27 P. *v.* Weil, 243 Ill. 208, 90 N. E. 731 (accused must show surprise); P. *v.* Lutzow, 240 Ill. 612, 88 N. E. 1049; P. *v.* Williams, 240 Ill. 633, 88 N. E. 1053; S. *v.* Pray, 126 Ia. 249, 99 N. W. 1065; Crenshaw *v.* Gardner, 25 Ky. L. R. 506, 76 S. W. 26 (exclusion of witness no abuse of discretion); P. *v.* Moore, 155 Mich. 107, 118 N. W. 742; S. *v.* Cambron, 20 S. D. 282, 105 N. W. 241; S. *v.* Sexton, 37 Wash. 110, 79 P. 634; S. *v.* Champoux, 33 Wash. 339, 74 P. 557.

243-29 Prosecutor's knowledge of name of witness when information filed must be shown. S. *v.* Frazer, 23 S. D. 304, 121 N. W. 790.

243-30 S. *v.* Thompson, 76 Kan. 365, 91 P. 79.

243-31 See S. *v.* Arthur, 135 Ia. 48, 109 N. W. 1083; S. *v.* Brown, 135 Ia. 40, 109 N. W. 1011.

Oral notice given defendant's counsel in his presence negatives claim of surprise. P. *v.* Weil, 243 Ill. 208, 90 N. E. 731.

244-33 Res gestae declarations, admissible as spontaneous statements, competent notwithstanding incompetency of declarant. Beal, etc. Co. *v.* Carr, 85 Ark. 479, 108 S. W. 1053.

245-35 Testimony of incompetent witness to uncontroverted fact, not prejudicial. Hume *v.* Hale, 146 Mo. App. 659, 125 S. W. 871.

COMPOUNDING OFFENSES

See the title "Compounding Crime," 5 STANDARD PROC. 189.

246-3 Acceptance of costs from parties charged with crime is some evidence of guilt of magistrate before whom they were arraigned. S. *v.* Furr, 121 N. C. 666, 28 S. E. 552.

246-4 Commission of crime must be shown. P. *v.* Bryon, 103 Cal. 675, 37 P. 754; S. *v.* Leeds, 68 N. J. L. 210, 52 A. 288; S. *v.* Hanson, 69 N. J. L. 42, 54 A. 841; S. *v.* Hodge, 112 N. C. 665, 55 S. E. 626.

Defendant's knowledge of offense compounded must be shown. S. *v.* Henning, 33 Ind. 189; P. *v.* Bryon, 103 Cal. 675, 37 P. 754.

246-5 Record of acquittal is at least prima facie evidence in favor of accused. S. *v.* Hanson, 69 N. J. L. 42, 54 A. 841. Not conclusive. P. *v.* Buckland, 13 Wend. (N. Y.) 592.

COMPROMISE AND SETTLEMENT

Action Upon Original Claim.—See 5 STANDARD PROC. 196.

Action on Agreement.—See 5 STANDARD PROC. 198.

Actions to Set Aside.—See 5 STANDARD PROC. 200.

249-1 Youmans *v.* Moore, 13 Ga. App. 119, 78 S. E. 862; Sutton *v.* Hurley, 12 Ga. App. 312, 77 S. E. 218; Danes *v.* Slitor, 118 Ia. 81, 91 N. W. 817. See Miller *v.* L. & B. Co. (Tex. Civ.), 151 S. W. 341.

250-2 Kunz, Marsh & Pendleton *v.* Ginocchio, 166 Ill. App. 531.

250-3 Lafrentz & Karstens *v.* Cavanaugh, 166 Ill. App. 306; Pierce & Son *v.* Davis, 155 Ky. 270, 159 S. W. 781; Biddlecom *v.* Assur. Co., 167 Mo. App. 581, 152 S. W. 103; Marx *v.* White Co., 148 N. Y. S. 262; Read Prtg. Co. *v.* Little & Ives Co., 146 N. Y. S. 194; Craigo *v.* Craigo, 22 S. D. 417, 118 N. W. 712 (subscribing and filing paper in public office). See Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912; Dailey *v.* Assn., 133 Mich. 403, 95 N. W. 326; Dunn *v.* Motor Car Co., 144 N. Y. S. 349; Missouri, etc. R. Co. *v.* Morgan (Tex. Civ.), 163 S. W. 992; Simons *v.* Hallidie Co., 73 Wash. 499, 131 P. 1169.

Check "in full payment to date" held as satisfaction.—Met. Shirt Waist Co. *v.* Kamioner, 138 N. Y. S. 1067.

Retention by attorney of check bearing a recital, "in full payment of a fee," is not an accord and satisfaction. Thayer *v.* Harbican, 70 Wash. 278, 126 P. 625.

251-5 Upton *v.* Co., 109 La. 670, 33 S. 725; Dixon *v.* Dixon, 107 Mo. App. 682, 82 S. W. 547.

Receipt admissible to show agreement. Cranor Smith L. Co. *v.* Frith (Ky.), 118 S. W. 367.

Retention of check was accord and satisfaction.—Neubacher *v.* Perry (Ind.), 103 N. E. 805.

251-6 Nichols *v.* Little (Ark.), 165 S. W. 301; Johnston *v.* Mulcahy, 4 Cal. App. 547, 88 P. 491; Upton *v.* Co., 109

La. 670, 33 S. 725; Kalus *v.* Bass (Md.), 89 A. 731; Lehmann *v.* Ins. Co. (Mo.), 167 S. W. 1047; Lenahan *v.* Casey, 46 Mont. 367, 128 P. 601; Koepke *v.* Delfs (Neb.), 146 N. W. 962; Renault F. S. Branch *v.* Sewall, 153 App. Div. 888, 138 N. Y. S. 313; Butterly *v.* Deering, 152 App. Div. 777, 137 N. Y. S. 836; Baynes *v.* Harris, 160 N. C. 397, 76 S. E. 230; City of Anadarko *v.* Argo, 35 Okla. 115, 128 P. 500; Missouri, etc. R. Co. *v.* Sullivan (Tex. Civ.), 157 S. W. 193; Rutan *v.* Huck, 30 Utah 217, 83 P. 833; Timm *v.* Timm, 34 Wash. 228, 75 P. 879; Lovett *v.* Gas Co. (W. Va.), 79 S. E. 1007.

Evidence of a former settlement of a similar controversy is inadmissible. Small *v.* Clarke (R. I.), 87 A. 184.

Sale of the property to a third party not admissible. McCullars *v.* Co., 169 Ala. 582, 53 S. 1025.

Terms of prior abrogated contract, immaterial. Dryenforth *v.* Co., 240 Ill. 25, 88 N. E. 290.

252-7 Johnson *v.* Berdo, 131 Ia. 524, 106 N. W. 609; Mullins *v.* Vanarsdall, 25 Ky. L. R. 1979, 79 S. W. 224; Burrows *v.* Williams, 52 Wash. 278, 100 P. 340.

253-8 Settlement by parents for injuries to child presumed to cover only claims in their favor up to time it was made. Meyers *v.* Zoll, 119 Ky. 480, 84 S. W. 543.

253-9 Greenlee *v.* Mosnat, 126 Ia. 330, 101 N. W. 1122.

Declarations of parties provable. Hunter *v.* Helsley, 98 Mo. App. 616, 73 S. W. 719.

255-11 Day *v.* Ewen, 140 Ky. 498, 131 S. W. 283.

256-12 Use of words "all accounts" does not make receipt conclusive. Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912.

256-13 Greenlee *v.* Mosnat, 126 Ia. 330, 101 N. W. 1122.

256-14 In re Roberts (1905), 1 Ch. (Eng.) 704; Illinois R. Co. *v.* Manion, 113 Ky. 7, 67 S. W. 40; Davenport *v.* Co., 112 La. 943, 36 S. 812; Wood *v.* Co., 223 Mo. 537, 123 S. W. 6 (duress); Bjorklund *v.* Co., 35 Wash. 439, 77 P. 727.

256-15 Illinois R. Co. *v.* Manion, 113 Ky. 7, 67 S. W. 40; Fidelity Co. *v.* Tinsley, 30 Ky. L. R. 1095, 100 S. W. 272; McCune *v.* Houston, 170 Mo. App. 50, 156 S. W. 90; Societe, etc. *v.* Loeb, 239 Pa. 264, 86 A. 798.

258-17 Hale *v.* Owensby, 133 Ga. 631, 66 S. E. 781; Johnson *v.* Berdo, 131 Ia. 524, 106 N. W. 609; Billau *v.* Kern (Ia.), 107 N. W. 307; Cunningham *v.* Belknap, 22 Ky. L. R. 1580, 60 S. W. 837; Wood *v.* Co., 223 Mo. 537, 123 S. W. 6; Tansey *v.* R. Co., 90 Mo. App. 101; Linton *v.* Cathers, 70 Neb. 598, 97 N. W. 799; Reimer *v.* Club, 84 N. Y. S. 561; Southard *v.* Curley, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. 642, 16 L. R. A. 561; Simpson *v.* Thompson, 43 Tex. Civ. 273, 95 S. W. 94; Maynard *v.* Bk., 56 Wash. 486, 106 P. 182; Burrows *v.* Williams, 52 Wash. 278, 100 P. 340 (testimony must remove all doubt).

A general settlement is an affirmative defense to be shown by party setting it up. Johnson *v.* Berdo, 131 Ia. 524, 106 N. W. 609; Barber *v.* Maden, 126 Ia. 402, 102 N. W. 120.

258-18 Price *v.* McEachern (Me.), 90 A. 486; Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912; Dixon *v.* Dixon, 107 Mo. App. 682, 82 S. W. 547; Solenberger *v.* Strickler, 110 Va. 273, 65 S. E. 566.

Burden of showing that there was a bona-fide controversy rests upon the one claiming that the payment of a less sum was an accord and satisfaction. Bergman Pro. Co. *v.* Brown (Tex. Civ.), 156 S. W. 1102.

258-19 See Grubbs *v.* Ferguson, 136 N. C. 60, 48 S. E. 551; Timm *v.* Timm, 34 Wash. 228, 75 P. 879.

Burden on party setting up settlement to prove its terms. Linnan *v.* Linnan, 131 La. 535, 59 S. 981.

259-20 See Wheeler *v.* Mach. Co., 175 Ill. App. 69; Murphy *v.* Lever, 147 Ill. App. 460; Mason *v.* R. Co., 131 Ia. 468, 109 N. W. 1; Home S. Bk. *v.* Otterbach, 135 Ia. 157, 112 N. W. 769; Fidelity Co. *v.* Tinsley, 30 Ky. L. R. 1095, 100 S. W. 272; Price *v.* McEachern (Me.), 90 A. 486; Vanderveen *v.* Ellis, 172 Mich. 615, 138 N. W. 255; Shanahan *v.* Ins. Co. (Minn.), 148 N. W. 269; Johnson *v.* R. Co., 101 Minn. 396, 112 N. W. 531; Schwiete *v.* Guerre, 175 Mo. App. 687, 158 S. W. 402; Platt & Frees Co. *v.* Scrivner (Neb.), 146 N. W. 953; Sundstrom *v.* S., 159 App. Div. 241; 144 N. Y. S. 390; Eng *v.* Cammann, 85 Misc. 27, 147 N. Y. S. 23; McNair *v.* Benson, 63 Or. 66, 126 P. 20; Fontaine *v.* Davis (Tex. Civ.), 161 S. W. 386; Conn *v.* Rosamond (Tex. Civ.), 161 S. W. 73; Maahs *v.* Lumb. Co., 156

Wis. 1, 145 N. W. 222; German-Am. Bk. *v.* Mfg. Co., 141 Wis. 314, 128 N. W. 48.
Evidence must show that amount was in dispute when compromised. Louisiana Lumb. Co. *v.* Lumb. Co., 9 Ala. App. 383, 63 S. 788.

259-21 Power *v.* Hambrich, 25 Ky. L. R. 30, 74 S. W. 660; Simpson *v.* Thompson, 43 Tex. Civ. 273, 95 S. W. 94.
Letters between attorney and client construed as not operating as a contract of settlement for fees. Shubert *v.* Rosenberger, 204 Fed. 934 (C. C. A.).

259-22 Dunbar *v.* Dunbar (Ark.), 163 S. W. 1159; Johnson *v.* Berdo, 131 Ia. 524, 106 N. W. 609; Austin *v.* Whitcher, 135 Ia. 733, 110 N. W. 910; Daley *v.* R. Co., 133 La. 270, 62 So. 903; Flora *v.* Chapman, 77 Neb. 741, 110 N. W. 664.

260-23 Scott *v.* Imp. Co. (Mo.), 164 S. W. 532.
Proof voters left a meeting without voting on a proposition because of intimidation is proper; as is evidence of reputation of claimant for peaceableness or otherwise. Gering *v.* Dist., 76 Neb. 219, 107 N. W. 250.
Mental capacity sufficient to make compromise. Fender *v.* Helterbrandt, 101 Ark. 335, 142 S. W. 184.
Evidence as to validity of claim settled, not admissible. Cowen *v.* Rouss, 40 Misc. 105, 81 N. Y. S. 276.

261-24 Kiler *v.* Wohletz, 79 Kan. 716, 101 P. 474. See Root *v.* Co., 82 Conn. 600, 74 A. 950.

261-25 Francois *v.* Realty Co., 134 La. 215, 63 S. 880.

262-26 Kahn *v.* Metz, 88 Ark. 363, 114 S. W. 911; Nath *v.* Nav. Co., 72 Wash. 664, 131 P. 251.

262-27 Gardner *v.* Ward, 99 Ark. 588, 138 S. W. 981; Van Syckle *v.* Thompson, 176 Mich. 112, 142 N. W. 556. See Bache *v.* Schauble, 154 Fed. 859.

262-28 Great Northern R. Co. *v.* Kasischke, 104 Fed. 440, 43 C. C. A. 626; Meyer *v.* Haas, 126 Cal. 560, 58 P. 1042; Pioneer Co. *v.* Romanowicz, 186 Ill. 9, 57 N. E. 864; Indiana R. Co. *v.* Fowler, 201 Ill. 152, 66 N. E. 394, 94 Am. St. 158; Hitchcock *v.* Davis, 87 Mich. 629, 45 N. W. 912; Schus *v.* Co., 85 Minn. 447, 89 N. W. 68, 89 Am. St. 571, 57 L. R. A. 297; Worcester L. Co. *v.* Heald, 78 N. J. L. 172, 72 A. 421; Burik *v.* Co., 66 N. J. L. 420, 49 A. 442; Bjorklund *v.* Co., 35 Wash. 439, 77 P. 727.

263-32 Abe Block & Co. *v.* Largent (Tex. Civ.), 135 S. W. 1078.

264-33 Kauffman *v.* Shaw, 10 Cal. App. 572, 102 P. 671.

CONCLUSIVE EVIDENCE

Proof of good character, 268-3; *Admission of guilt*, 268-3; *Account stated*, 268-3; *Articles of incorporation*, 268-4; *Certificate of acknowledgment*, 268-4; *Statement in contempt proceedings*, 268-4; *Judicial record*, 269-5; *First judgment conclusive as against foreign judgment*, 269-8; *Rule in New York and Missouri as to conclusiveness of judgments*, 273-18; *Effect of recitals in judgments*, 273-18; *Executive action*, 287-76; *Court's minutes*, 290-87.

268-3 Proof of good character is never conclusive of innocence. S. *v.* Jones, 32 Mont. 442, 80 P. 1095.
Admission of guilt of felony of which witness convicted is conclusive. Fuller *v.* S., 147 Ala. 35, 41 S. 774. But see infra, 290-91, 290-92.
Account stated not conclusive. Peebles *v.* Yates, 88 Miss. 289, 40 S. 996.

268-4 Articles of incorporation conclusive of nature and character of organization. Gould *v.* Fuller, 79 Minn. 414, 82 N. W. 673; Craig *v.* Assn., 88 Minn. 535, 93 N. W. 669. And of fact of organization. In re Milwaukee R. Co., 124 Wis. 490, 102 N. W. 401. But see dissenting opinion.
Certificates of acknowledgment conclusive in absence of fraud of mistake. Weisiger *v.* Mills, 28 Ky. L. R. 1208, 91 S. W. 689 (as to date); Ellis *v.* Lehman, 48 Tex. Civ. 308, 106 S. W. 453.
Statement in contempt proceedings by court of matters occurring in its presence imports verity. Mahoney *v.* S., 33 Ind. App. 655, 72 N. E. 151.
Authorized acts of corporation in determining necessity for condemning land conclusive upon that point, but not as to quantity needed. Wilson *v.* R. Co., 222 Pa. 541, 72 A. 235.

269-5 Ebner *v.* Heid, 2 Alaska 600.
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269-6 Henderson *v.* Denious, 186 Fed. 100, 108 C. C. A. 212; Brum *v.* Ivins, 154 Cal. 17, 96 P. 876; Lord *v.* Co., 52 Fla. 313, 42 S. 585; Oregon S. L. R. Co. *v.* Dist., 16 Ida. 578, 102 P. 904; Lang *v.* Dunn, 145 Ia. 363, 124 N. W. 192; Roberts *v.* Sandusky, 158 Mich. 521, 123 N. W. 39; Pierce *v.* Pierce, 139 Mo. App. 416, 122 S. W. 1147; New York *v.* R. Co., 193 N. Y. 543, 86 N. E. 565; Nicholas *v.* Lord, 193 N. Y. 388, 85 N. E. 1083; Salemonson *v.* Thompson, 13 N. D. 182, 101 N. W. 320; Fant *v.* Sullivan (Tex. Civ.), 124 S. W. 691; Bloom *v.* Oliver, 56 Tex. Civ. 391, 120 S. W. 1101; Cooper *v.* Co., 35 Utah 570, 102 P. 202.

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269-7 Messinger *v.* Anderson, 171 Fed. 785, 96 C. C. A. 445; U. S. *v.* Sommers, 171 Fed. 57, 96 C. C. A. 299; Dempster *v.* Lansingh, 244 Ill. 402, 91 N. E. 488; Pratt *v.* Griffin, 223 Ill. 349, 79 N. E. 102; Doyle *v.* Co., 80 Kan. 209, 102 P. 496; Dennis *v.* Alves (Ky.), 117 S. W. 286; Wells *v.* Blackman, 121 La. 394, 46 S. 437; Felgner *v.* Slingluff, 109 Md. 474, 71 A. 978 (under power of sale in mortgage); Lothrop *v.* Parke, 202 Mass. 104, 88 N. E. 666; Kennedy *v.* Ins. Co., 157 Mich. 411, 122 N. W. 134; Carpenter *v.* Auditor Genl., 144 Mich. 251, 107 N. W. 878; Cook *v.* Cook, 124 Mich. 430, 83 N. W. 96; Munroe *v.* Winegar, 128 Mich. 309, 87 N. W. 396; Sweatman *v.* Dean, 86 Miss. 641, 38 S. 231; Hutchinson *v.* Patterson, 226 Mo. 174, 126 S. W. 403; Miles *v.* Ballantine, 4 Neb. (Unof.) 171, 93 N. W. 708; Jones *v.* Danforth, 71 Neb. 722, 99 N. W. 495; Ward *v.* Ward, 130 App. Div. 27, 114 N. Y. S. 326; Eaves *v.* Mullen, 25 Okla. 679, 107 P. 433; Weatherford *v.* McKay, 59 Or. 558, 117 P. 969; Taylor *v.* Taylor, 54 Or. 560, 103 P. 524; Randal *v.* Gould, 225 Pa. 42, 73 A. 986; Vick *v.* Vick, 126 N. C. 300, 35 S. E. 257; Harris *v.* Mason, 120 Tenn. 668, 115 S. W. 1146; Crain *v.* Ins. Co., 56 Tex. Civ. 406, 120 S. W. 1098; Rye *v.* Co., 42 Tex. Civ. 185, 95 S. W. 622; Barrett *v.* McKinney (Tex. Civ.), 93 S. W. 240; Davis *v.* Ragland, 42 Tex. Civ. 400, 93 S. W. 1099; Floyd *v.* Watkins, 34 Tex. Civ. 3, 79 S. W. 612; Scudder *v.* Cox, 35 Tex. Civ. 416, 80 S. W. 872.

Judgment of partition under void statute cannot be attacked collaterally. Staats *v.* Wilson, 76 Neb. 204, 107 N. W. 230.

269-8 Matter of Riggs, 214 U. S. 9; Lui Lum *v.* U. S., 166 Fed. 106, 92 C. C. A. 90; In re Walrath, 175 Fed. 243; In re Harper, 133 Fed. 970; Cramer *v.* Co., 93 Fed. 636, 35 C. C. A. 508; Greenwich Ins. Co. *v.* Co., 142 Fed. 944, 74 C. C. A. 114; Pritchard *v.* Fowler, 171 Ala. 662, 55 S. 147; Roman *v.* Works, 156 Ala. 604, 47 S. 136 (no indebtedness in garnishment proceedings); Logan *v.* Co., 139 Ala. 548, 36 S. 729; Beckett *v.* Whittington, 92 Ark. 230, 122 S. W. 633; King *v.* Pauly, 159 Cal. 549, 115 P. 210; Fox *v.* Workman, 155 Cal. 201, 100 P. 246; Page *v.* Garver, 5 Cal. App. 383, 90 P. 481; Taggart *v.* Fugel, 46 Colo. 401, 105 P. 1090; U. S. Co. *v.* P., 44 Colo. 557, 98 P. 828; Dime Sav. Bk. *v.* McAlenney, 78 Conn. 208, 61 A. 476; Nalle *v.* Oyster, 36 App. Cas. (D. C.) 36; Lippitt *v.* Albany, 131 Ga. 629, 63 S. E. 33; Jones *v.* Smith, 120 Ga. 642, 48 S. E. 134; Johnson *v.* Klassett, 9 Ga. App. 733, 72 S. E. 174; Ward *v.* Museum, 241 Ill. 496, 89 N. E 731; P. *v.* Small, 237 Ill. 169, 86 N. E. 733; Wallace *v.* Tinney, 145 Ia. 478, 122 N. W. 936; Phillips *v.* Phillips, 69 Kan. 324, 76 P. 842; Smith *v.* Ruehl, 135 Ky. 264, 122 S. W. 145; Chadwick *v.* Stilphen, 105 Me. 242, 74 A. 50; Haney *v.* Auditor General, 165 Mich. 681, 131 N. W. 386; Miller *v.* Peter, 158 Mich. 336, 122 N. W. 780; Pieper *v.* MacLaren, 106 Minn. 30, 118 N. W. 60; Squaw Creek D. Dist. No. 1 *v.* Turney, 235 Mo. 80, 138 S. W. 12; Jones *v.* Hubbard, 193 Mo. 147, 90 S. W. 1137; Roth T. Co. *v.* Co., 146 Mo. App. 1, 123 S. W. 513; Podesta *v.* Binns, 69 N. J. Eq. 387, 60 A. 815; Newton *v.* Hunt, 134 App. Div. 325, 119 N. Y. S. 3, *mod.* 112 N. Y. S. 573, *aff.* 201 N. Y. 599, 95 N. E. 1134; Bryant *v.* Turner, 126 App. Div. 594, 110 N. Y. S. 596; Nammack *v.* Creelman, 130 N. Y. S. 211, *rev.* In re Nammack, 66 Misc. 523, 123 N. Y. S. 1063; Earp *v.* Minton, 138 N. C. 202, 50 S. E. 624; Boyd *v.* Wallace, 10 N. D. 78, 84 N. W. 760; Krebs H. Co. *v.* Livesley, 55 Or. 227, 104 P. 3; Haines *v.* Hall, 209 Pa. 104, 58 A. 125; Brandenburg *v.* Brooke, 45 Pa. Super. 490; Probate Court *v.* Williams, 30 R. I. 144, 73 A. 382; Earle *v.* Greenville, 84 S. C. 193,

65 S. E. 1050; Holland *v.* Nance, 102 Tex. 177, 114 S. W. 346; Kuck *v.* Dixon (Tex. Civ.), 127 S. W. 910; Barrette *v.* Whitney, 36 Utah 574, 106 P. 522; Holbrook *v.* Quinlan & Co., 84 Vt. 411, 80 A. 339; Hawes *v.* Trigg, 110 Va. 105, 65 S. E. 538; Krug *v.* Hendricks, 54 Wash. 209, 102 P. 1049; Morrison *v.* Berlin, 37 Wash. 600, 79 P. 1111; Kolpack *v.* Kolpack, 128 Wis. 169, 107 N. W. 457; Fulton *v.* Pomeroy, 111 Wis. 663, 87 N. W. 831.

Civil judgment not admissible in criminal case against same defendant. Wilcox *v.* S., 8 Ga. App. 536, 69 S. E. 1086.

A domestic judgment prior in time to judgment on same issue between same parties in another state, is conclusive of rights of parties, though prior judgment not pleaded in subsequent action. Grimm *v.* Barrington, 109 Mo. App. 35, 84 S. W. 357.

270-9 Mound City Co. *v.* Castleman, 187 Fed. 921, 110 C. C. A. 55, *aff.* 177 Fed. 510; Wood *v.* Browning, 176 Fed. 273, 100 C. C. A. 161; Mound City Co. *v.* Castleman, 117 Fed. 510; Hall & Farley *v.* Co., 173 Ala. 516, 56 S. 235; Merchant *v.* Gebhart, 94 Ark. 111, 125 S. W. 650; Allen *v.* Allen, 159 Cal. 197, 113 P. 160; Swamp L. Dist. *v.* Blumenberg, 156 Cal. 539, 106 P. 392; Bluthenthal *v.* Bigbie, 33 App. Cas. (D. C.) 209; National Bk. of Wilmington & Brandywine *v.* R. Co., 9 Del. Ch. 258, 81 A. 70; Prall *v.* Prall, 58 Fla. 496, 50 S. 867; Terriman *v.* Gillespie, 250 Ill. 369, 95 N. E. 495; South Park Comrs. *v.* Co., 248 Ill. 299, 96 N. E. 910; Keithley *v.* Stevens, 142 Ill. App. 406; In re Appleman (Ind.), 94 N. E. 566; United O. & G. Co. *v.* Alberson, 43 Ind. App. 626, 88 N. E. 359; United O. & G. Co. *v.* Ellsworth, 43 Ind. App. 670, 88 N. E. 362; Smith L. Co. *v.* Sisters, 146 Ia. 454, 125 N. W. 214; Jefferson, Noyes & Brown *v.* Bk., 144 Ky. 62, 138 S. W. 308; Elswick *v.* Matney, 132 Ky. 294, 116 S. W. 718; Stouffer *v.* Wolfkill, 114 Md. 603, 80 A. 300; Harrington *v.* Huff, 155 Mich. 139, 118 N. W. 924; Kimball *v.* R. Co., 91 Miss. 396, 48 S. 230; Thornton *v.* Natchez, 88 Miss. 1, 41 S. 498; Cantwell *v.* Johnson, 236 Mo. 575, 139 S. W. 365; Jones *v.* Edeman, 223 Mo. 312, 122 S. W. 1047; Gardner *v.* Co., 151 Mo. App. 666, 135 S. W. 1023; Pennington C. Bk. *v.* Bauman, 87 Neb. 25, 126 N. W. 654; S. *v.* Corron, 73 N. H. 434, 62 A. 1044; In re Walsh's Est. (N. J. L.), 74 A. 563; Bischoff *v.* Packard, 129 N. Y. S. 238; Kennedy *v.* New York, 127 App. Div. 89, 111 N. Y. S. 61; Rogers *v.* Co., 104 App. Div. 630, 93 N. Y. S. 1145; Brown *v.* Mathewson, 71 Misc. 110, 129 N. Y. S. 907; Bell *v.* Co., 150 N. C. 111, 63 S. E. 680; S. *v.* Willis, 19 N. D. 209, 121 N. W. 706; Strangward *v.* Co., 82 O. St. 121, 91 N. E. 988; El Reno City *v.* Co., 25 Okla. 648, 107 P. 163; In re Columbia, N. & L. R. Co., 89 S. C. 407, 71 S. E. 1013; Jenkins *v.* R. Co., 89 S. C. 408, 71 S. E. 1010; Greenwood D. Co. *v.* Co., 81 S. C. 516, 62 S. E. 840; Kelley *v.* Co., 22 S. D. 406, 118 N. W. 696; Keith *v.* Alger, 114 Tenn. 1, 85 S. W. 71; Richardson *v.* Trout (Tex. Civ.), 135 S. W. 677; Peacock *v.* Coltrane (Tex. Civ.), 116 S. W. 389; Findlay *v.* Longe, 81 Vt. 523, 71 A. 829; Miller *v.* Smith, 109 Va. 651, 64 S. E. 956; S. *v.* Super. Ct., 62 Wash. 556, 114 P. 427; Stay *v.* Stay, 53 Wash. 534, 102 P. 420; Chapman *v.* Parsons, 66 W. Va. 307, 66 S. E. 461; Boring *v.* Ott, 138 Wis. 260, 119 N. W. 865.

Comp. Kammann *v.* Barton, 23 S. D. 442, 122 N. W. 416.

Contra.—Hoffman *v.* Shoemaker, 69 W. Va. 233, 71 S. E. 198.

Matters not incidental or essential to issues, not concluded. Brennan *v.* Co., 45 Colo. 248, 100 P. 412.

Recital in decree cause retained for further proceedings, though made after a prior decree which said nothing of such retention, is conclusive. Settle *v.* Settle, 141 N. C. 553, 54 S. E. 445.

Finding decedent left property within jurisdiction, conclusive. Jordan *v.* R. Co., 125 Wis. 581, 104 N. W. 803.

271-10 Groton B. & M. Co. *v.* Co., 136 Fed. 27, 68 C. C. A. 577; Alaska C. Co. *v.* Debney, 2 Alaska 303; Hand *v.* Haughland, 87 Ark. 105, 112 S. W. 184; In re James' Est., 99 Cal. 374, 33 P. 1122, 37 Am. St. 60; Ropes *v.* Goldman, 52 Fla. 630, 42 S. 322; Curtis *v.* Mansfield, 132 Ga. 444, 64 S. E. 327; Plummer *v.* Wells, 6 Ind. Ty. 189, 90 S. W. 303; Wood *v.* Wood, 143 Ia. 440, 121 N. W. 1090; Boyd *v.* Taylor, 195 Mass. 272, 81 N. E. 277; Curtis *v.* Board, 154 Mich. 646, 118 N. W. 618; S. *v.* Whittier, 108 Minn. 447, 122 N. W. 319; Plains L. & I. Co. *v.* Lynch, 38 Mont. 271, 99 P. 817; Burke *v.* Assn., 25 Mont. 315, 64 P. 879, 87 Am. St. 416; Minnesota T. Mfg. Co. *v.* L'Heureux, 82 Neb. 692, 118 N. W. 565; Miles *v.* Ballantine, 4 Neb. (Unof.) 174, 93 N.

W. 708; Ayres *v.* Duggan, 57 Neb. 750, 78 N. W. 296; McDevitt *v.* Connell, 71 N. J. Eq. 119, 63 A. 504; In re Patrick, 136 App. Div. 450, 120 N. Y. S. 1006; May *v.* Getty, 140 N. C. 310, 53 S. E. 75; Altman *v.* Dist., 35 Or. 85, 56 P. 291, 76 Am. St. 468; Baker *v.* Baker, 26 Pa. Super. 553; Moore *v.* Hanscom (Tex.), 106 S. W. 876; Templeton *v.* Ferguson, 89 Tex. 47, 33 S. W. 329; Bouldin *v.* Miller, 87 Tex. 359, 28 S. W. 940; Chappell *v.* Chappell, 45 Wash. 652, 89 P. 166.

Court minutes and files inadmissible to impeach record. Ballerino *v.* Court, 2 Cal. App. 759, 84 P. 225.

271-11 White *v.* Martin, 2 Alaska 495; Baldwin *v.* Foster, 157 Cal. 643, 108 P. 714; Koehler *v.* Co., 146 Cal. 335, 80 P. 73; Smith *v.* Schlink, 44 Colo. 200, 99 P. 566; Medina *v.* Medina, 22 Colo. 146, 43 P. 1001; Huntington *v.* Co., 78 Conn. 35, 61 A. 59; Van Dyke *v.* Van Dyke, 125 Ga. 491, 54 S. E. 537; McFall *v.* Kirkpatrick, 236 Ill. 281, 86 N. E. 139; Ayres *v.* Deering, 76 Kan. 149, 90 P. 794; Clevenger *v.* Figley, 68 Kan. 699, 75 P. 1001; Disman *v.* Flippin (Ky.), 116 S. W. 740; S. *v.* Co., 109 Minn. 185, 123 N. W. 412; Alabama R. Co. *v.* Thomas, 86 Miss. 27, 38 S. 770; S. *v.* Broaddus, 216 Mo. 336, 115 S. W. 1018; Zielda F. I. Co. *v.* Co., 143 Mo. App. 357, 126 S. W. 788; Van Stewart *v.* Miles, 105 Mo. App. 242, 79 S. W. 988; Kazebeer *v.* Nunemaker, 82 Neb. 732, 118 N. W. 646; Clark *v.* Parks, 75 Neb. 676, 106 N. W. 770; Tonnele *v.* Wetmore, 195 N. Y. 436, 88 N. E. 1068; Reich *v.* Cochran, 105 App. Div. 542, 94 N. Y. S. 404; Union S. Bk. *v.* Co., 79 O. St. 89, 86 N. E. 478; Cierlinski *v.* Rys., 225 Pa. 312, 74 A. 172; Shepard *v.* Pesquera, 1 P. R. Fed. 516; Wilkins *v.* McCorkle, 112 Tenn. 688, 80 S. W. 834; Keller *v.* Co. (Tex. Civ.), 127 S. W. 888; Penn *v.* Case, 36 Tex Civ. 4, 81 S. W. 349; Campbell *v.* Upson (Tex. Civ.), 81 S. W. 358; S. *v.* Co., 55 Wash. 1, 103 P. 426; Ciccrello *v.* R. Co., 65 W. Va. 439, 64 S. E. 621.

Unauthorized appearance of attorney may not be shown. Scott *v.* Royston, 223 Mo. 568, 123 S. W. 454, opinion refers to many cases to contrary.

Death of party pending judgment does not affect rule, though fact not brought to court's notice. S. *v.* Riley, 219 Mo. 667, 118 S. W. 647. *Contra* if party dead when suit instituted. S. *v.* Riley, supra.

272-12 Higgins *v.* Eaton, 188 Fed. 938; Meyer R. Co. *v.* R. Co., 174 Fed. 731 (judgment of state court against federal receiver in federal court); Albright *v.* Mickey, 99 Ark. 147, 137 S. W. 568; McCarthy *v.* Troll, 90 Ark. 199, 118 S. W. 416; Murdock *v.* Murdock, 81 Conn. 681, 72 A. 290; Propper *v.* Owens, 136 Ga. 787, 72 S. E. 242; Hilton *v.* Stewart, 15 Ida. 150, 96 P. 579; Tomlin *v.* Woods, 125 Ia. 367, 101 N. W. 135; McCabe *v.* R. Co., 136 Ky. 674, 124 S. W. 892; Thompson *v.* Williamson, 67 N. J. Eq. 212, 58 A. 602; In re Curtiss, 137 App. Div. 584, 122 N. Y. S. 468; Marsh *v.* R. Co., 151 N. C. 160, 65 S. E. 911; Levison *v.* Blumenthal, 25 Pa. Super. 55; Morrow *v.* R. Co., 84 S. C. 224, 66 S. E. 186; Bryan *v.* Nash, 110 Va. 329, 66 S. E. 69.

Record of conviction, not conclusive in civil action. In re Ebbs, 150 N. C. 44, 63 S. E. 190.

272-13 Eau Claire Nat. Bk. *v.* Benson, 128 Fed. 277, 63 C. C. A. 591; Israel *v.* Israel, 130 Fed. 237; McHatton *v.* Rhodes, 143 Cal. 275, 76 P. 1036; In re Hancock's Est., 156 Cal. 804, 106 P. 58; Stull *v.* Veatch, 236 Ill. 207, 86 N. E. 227; MacDonald *v.* Dexter, 234 Ill. 517, 85 N. E. 209; Reilly *v.* Cooper, 119 Ill. App. 347; Leathe *v.* Thomas, 109 Ill. App. 434; Harmon *v.* Best, 174 Ind. 323, 91 N. E. 19 (federal judgment); Roberts *v.* Leutzke, 39 Ind. App. 577, 78 N. E. 635; Cuykendall *v.* Doe, 129 Ia. 453, 105 N. W. 698; Hazel *v.* Jacobs, 78 N. J. L. 459, 75 A. 903; Swing *v.* Kaufman, 115 N. Y. S. 143; Richardson & B. Co. *v.* Stove Co., 28 Utah 85, 77 P. 1.

Judgments of federal courts given same effect in state courts. Thornton *v.* Natchez, 88 Miss. 1, 41 S. 498.

272-14 Haddock *v.* Haddock, 201 U. S. 562; Harding *v.* Harding, 198 U. S. 317; Coram *v.* Ingersoll, 148 Fed. 169, 78 C. C. A. 303; Lamb *v.* Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558; Jordan *v.* Muse, 88 Ark. 587, 115 S. W. 162; Forrest *v.* Fey, 218 Ill. 165, 75 N. E. 789, 1 L. R. A. (N. S.) 740; Bleakley *v.* Barclay, 75 Kan. 462, 89 P. 906, 10 L. R. A. (N. S.) 230; Weyburn *v.* Watkins, 90 Miss. 728, 44 S. 145; El Capitan L. & C. Co. *v.* Lees, 13 N. M. 407, 86 P. 924; Gleason *v.* Ins. Co., 189 N. Y. 109, 81 N. E. 777; In re Curtiss, 134 App. Div. 547, 119 N. Y. S. 556; Johnson *v.* Co., 65 Misc. 332, 119 N. Y. S. 639; Blumle *v.* Kramer, 14 Okla. 366,

79 P. 215; Levison *v.* Blumenthal, 25 Pa. Super. 55.

Domestic judgment cannot be collaterally attacked if rendered during pendency of action in another state by judgment therein obtained, former not having been before foreign tribunal. In re McNeil's Est., 155 Cal. 333, 100 P. 1086.

Adjudication testimony insufficient to establish cause of action, no weight on retrial. Sticht *v.* Co., 195 N. Y. 70, 87 N. E. 801.

273-15 Edelstein *v.* U. S., 149 Fed. 636, 79 C. C. A. 328; Hibernia S. & L. Soc. *v.* Boyd, 155 Cal. 193, 100 P. 239; In re McNeil's Est., 155 Cal. 333, 100 P. 1086; Welsh *v.* Koch, 4 Cal. App. 571, 88 P. 604; Collins *v.* Maude, 144 Cal. 289, 77 P. 945; Mortgage T. Co. *v.* Redd, 38 Colo. 458, 88 P. 473; Roberts *v.* Leutzke, 39 Ind. App. 577, 78 N. E. 635; Maynard *v.* Waidlich, 156 Ind. 562, 60 N. E. 348; Mengel *v.* Mengel, 145 Ia. 737, 120 N. W. 72; Horner *v.* Schinstock, 80 Kan. 136, 101 P. 996; McDermott *v.* Gray, 198 Mo. 266, 95 S. W. 431; Kelly *v.* Gebhart, 180 Mo. 588, 79 S. W. 427; Carr *v.* Barnes, 138 Mo. App. 264, 120 S. W. 705; Gulling *v.* Bk., 29 Nev. 257, 89 P. 25; Palmer *v.* Board, 77 N. J. L. 143, 71 A. 285; Schlosser *v.* Beemer, 40 Or. 412, 67 P. 299; Bk. *v.* Richardson, 34 Or. 518, 54 P. 359, 75 Am. St. 664; Oviatt *v.* Brownell, 221 Pa. 452, 70 A. 785; Rye *v.* Co., 42 Tex. Civ. 185, 93 S. W. 622; Kruegel *v.* Stewart (Tex. Civ.), 81 S. W. 365.

See Roach *v.* Curtis, 115 App. Div. 765, 101 N. Y. S. 333.

Judge cannot testify as to grounds on which he acted.—Blue Mountain I. & S. Co. *v.* Portner, 131 Fed. 57, 65 C. C. A. 295.

Judgment entered pursuant to agreement by attorney unauthorizedly appointed by court to represent defendant, within rule. Barrett *v.* McKinney (Tex. Civ.), 93 S. W. 240.

Recitals as to issue joined, conclusive. Pabst B. Co. *v.* Erdreich, 158 Ala. 147, 48 S. 396.

273-16 S. *v.* Weber, 96 Minn. 422, 105 N. W. 490.

273-18 Blue Mountain I. & S. Co. *v.* Portner, 131 Fed. 57, 65 C. C. A. 295; Clay *v.* Bilby, 72 Ark. 101, 78 S. W. 749; Ballard *v.* Hunter, 74 Ark. 174, 85 S. W. 252; Johnson *v.* Lesser, 76 Ark. 465, 91 S. W. 763; Waldron *v.* Taenzer, 79 Ark. 16, 94 S. W. 925; In re Davis, 151 Cal. 318, 86 P. 183, 90 P. 711; Crawford *v.* McDonald, 88 Tex. 626, 33 S. W. 325; Davis *v.* Ragland, 42 Tex. Civ. 400, 93 S. W. 1099; Douglas *v.* S., 58 Tex. Cr. 122, 124 S. W. 933 (recital of service in judgment). *Contra*, Minnesota T. Mfg. Co. *v.* L'Heureaux, 82 Neb. 695, 118 N. W. 565 (when whole record shows service not made). See Cohen *v.* Portland Lodge, 152 Fed. 357, 81 C. C. A. 483; Babcock *v.* Wolffarth, 35 Tex. Civ. 512, 80 S. W. 642.

In New York and Missouri the want of jurisdiction to render particular judgment may always be directly or collaterally, except where jurisdiction depends on a fact litigated and is adjudged in favor of party who avers jurisdiction. O'Donoghue *v.* Boies, 159 N. Y. 87, 99, 53 N. E. 537. See Hinkle *v.* Lovelace, 204 Mo. 208, 102 S. W. 1015; Jewett *v.* Boardman, 181 Mo. 647, 81 S. W. 186; P. *v.* Connor, 142 N. Y. 130, 36 N. E. 807.

Recitals in judgments.—If judgment recites defendant had been served, balance of record cannot be received; but if it is silent as to service, or recites a citation which is void, or specifies method of citation, record is competent to sustain or overthrow it. Dunn *v.* Taylor, 42 Tex. Civ. 241, 94 S. W. 247; Lutcher *v.* Allen, 43 Tex. Civ. 102, 95 S. W. 572. Recital of jurisdictional facts raises presumption of regularity. Wallace *v.* Adams, 143 Fed. 716, 74 C. C. A. 540. If judgment silent as to necessary affidavit of service, but record affirmatively shows insufficient affidavit, presumption in favor of judgment is overthrown. Stoneman *v.* Bilby, 43 Tex. Civ. 293, 96 S. W. 50. Recital going beyond question as issue, disregarded. Gray *v.* Russell, 41 Tex. Civ. 526, 91 S. W. 235.

The record which may be consulted consists, at least, of petition, citation and return. Parol evidence incompetent. Lutcher *v.* Allen, 43 Tex. Civ. 102, 95 S. W. 572.

Silence of judgment as to jurisdictional facts not ground of collateral attack. Craig *v.* Somers, 55 N. J. L. 525, 27 A. 639; McDevitt *v.* Connell, 71 N. J. Eq. 119, 63 A. 504.

In case of a variance between the judgment and the return as to who was served, recital in judgment will prevail. Livingston *v.* Co., 77 Ark. 379, 91 S. W. 752.

274-19 Cormack *v.* Marshall, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787; Mahon *v.* P., 218 Ill. 171, 75 N. E. 768; Bleakley *v.* Barclay, 75 Kan. 462, 89 P. 906, 10 L. R. A. (N. S.) 230; Saco Brick Co. *v.* Mfg. Co., 207 Mass. 312, 93 N. E. 629; S. *v.* Wilson, 216 Mo. 215, 115 S. W. 549; Charles *v.* R. Co., 124 Mo. App. 293, 101 S. W. 680; S. *v.* Mulloy, 111 Mo. App. 679, 86 S. W. 569; Kolpack *v.* Kolpack, 128 Wis. 169, 107 N. W. 457.

Record decisive so far as its speaks, but so far as is consistent with it parol testimony is competent to show what was involved, considered and established. Stone *v.* R. Co., 75 Kan. 600, 90 P. 251; Gulling *v.* Bk., 29 Nev. 257, 89 P. 25.

Not conclusive as to domicil of decedent. Frame *v.* Thormann, 102 Wis. 17, 653, 79 N. W. 39, 176 U. S. 350.

Collateral issues not within doctrine. Lowe *v.* Ozmun, 3 Cal. App. 387, 86 P. 729.

Appointment of administrator may be attacked collaterally in a criminal case involving offense committed in connection therewith. U. S. *v.* Bradford, 148 Fed. 413.

Rule in suits for infringements of patents.—See Davis & R. Co. *v.* Co., 164 Fed. 191.

274-20 Coram *v.* Ingersoll, 148 Fed. 169, 78 C. C. A. 303; Haug *v.* R. Co., 102 Fed. 74, 42 C. C. A. 167; In re Reynolds, 133 Fed. 585; Prall *v.* Prall, 58 Fla. 496, 50 S. 867; Wolfe *v.* Co., 6 Ga. App. 410, 65 S. E. 62; Hunt *v.* Phillips, 131 Ky. 656, 115 S. W. 758; Marsh *v.* R. Co., 151 N. C. 160, 65 S. E. 911; El Reno City *v.* Co., 25 Okla. 648, 107 P. 163; Hodge *v.* Lumb. Corp., 90 S. C. 229, 71 S. E. 1009; Jefferson *v.* Scott (Tex. Civ.), 135 S. W. 705; S. *v.* Superior Court, 62 Wash. 556, 114 P. 427.

Judgment on demurrer not res adjudicata on the facts. St. Aubin *v.* City, 31 O. C. C. 106. But see S. *v.* Super. Ct., 62 Wash. 556, 114 P. 427 (dismissal on a ground, among others, that reached the merits).

274-21 Last Chance M. Co. *v.* Co., 157 U. S. 683; Plaut *v.* Co., 174 Fed. 852; Hearn *v.* Ayres, 77 Ark. 497, 92 S. W. 768; Brum *v.* Ivins, 154 Cal. 17, 96 P. 876; Sacramento Bk. *v.* Montgomery, 146 Cal. 745, 81 P. 138; County Bk. *v.* Jack, 148 Cal. 437, 83 P. 705; Robinson *v.* Blood, 151 Cal. 504, 91 P. 258; San Gabriel V. Bk. *v.* Co. (Cal. App.), 86 P. 727; Duffy *v.* Frankenberg, 144 Ill. App. 103; Tootle *v.* McClellan, 7 Ind. Ty. 64, 103 S. W. 766, 12 L. R. A. (N. S.) 941; Andres *v.* Schlueter, 140 Ia. 389, 118 N. W. 429; Tomlin *v.* Woods, 125 Ia. 367, 101 N. W. 135; Ruppin *v.* McLachlan, 122 Ia. 343, 98 N. W. 153; Fidelity & D. Co. *v.* Neely, 122 La. 1036, 48 S. 446 (compromise); Sodini *v.* Sodini, 94 Minn. 301, 102 N. W. 861; Bennett *v.* Dempsey, 94 Miss. 406, 48 S. 901; Burke *v.* Assn., 25 Mont. 315, 64 P. 879, 87 Am. St. 416; Kohly *v.* Fernandez, 118 N. Y. S. 163, *aff.* 201 N. Y. 561, 95 N. E. 1131; Monroe *v.* Turner, 114 App. Div. 634, 100 N. Y. S. 27; Phillips *v.* Min. Co., 27 S. D. 350, 131 N. W. 308.

Default judgment is conclusive only as to matters well pleaded. Pence *v.* Long, 38 Ind. App. 63, 77 N. E. 961; Allen *v.* Rice, 16 Ind. App. 572, 45 N. E. 800; Barton *v.* Anderson, 104 Ind. 578, 4 N. E. 420.

In New York jurisdiction to render domestic default judgment may be inquired into. In re McGarren, 112 App. Div. 503, 98 N. Y. S. 415.

274-22 Bk. of Pine Bluff *v.* Levi, 90 Ark. 166, 118 S. W. 250, order confirming judicial sale.

Ejectment.—Lyon *v.* Bursey, 36 App. Cas. (D. C.) 235; Witte *v.* Storm, 236 Mo. 470, 139 S. W. 384.

274-23 Griffis *v.* Bk. (Ind. App.), 79 N. E. 230; Howard *v.* Howard, 133 Ky. 568, 118 S. W. 367 (by agreement); Fluker *v.* De Grange, 117 La. 331, 41 S. 591; Harrington *v.* Dickinson, 155 Mich. 161, 118 N. W. 931; In re Dougherty's Est., 34 Mont. 336, 86 P. 38; Wabaska E. Co. *v.* Blue Springs, 84 Neb. 577, 122 N. W. 21; Boylan *v.* George, 133 App. Div. 514, 117 N. Y. S. 573 (interlocutory judgment in partition); Farmers' S. Bk. *v.* Stephenson, 23 Okla. 695, 102 P. 992 (confession); Dillen *v.* Dillen, 221 Pa. 435, 70 A. 806.

Civil judgment as evidence in criminal case. See Wilcox *v.* S., 8 Ga. App. 536, 69 S. E. 1086.

Interlocutory orders not subject to collateral attack. Harrah *v.* S., 38 Ind. App. 495, 76 N. E. 443, 77 N. E. 747; Gates *v.* Paul, 127 Wis. 628, 107 N. W. 492.

Judgments by confession within rule, and will be given effect in another state though its laws do not recognize

them. Cuykendall *v.* Doe., 129 Ia. 453, 105 N. W. 698.

Judgments by consent within principle. Harding *v.* Harding, 198 U. S. 317; O'Connell *v.* R. Co., 184 Ill. 308, 56 N. E. 355; Jones *v.* Hubbard, 193 Mo. 147, 90 S. W. 1137; Baldwin *v.* Rice, 44 Misc. 64, 89 N. Y. S. 738; Harris *v.* Harris, 82 Vt. 199, 72 A. 912.

274-24 Whitcomb *v.* White, 214 U. S. 15 (land department); Asbestos, etc. Co. *v.* Co., 184 Fed. 620; Leung Jun *v.* U. S., 171 Fed. 413, 96 C. C. A. 369; People's U. S. Bk. *v.* Gilson, 161 Fed. 286, 88 C. C. A. 332 (postmaster general); Emmons *v.* U. S., 175 Fed. 514 (land department); In re Herbst, 32 App. Cas. (D. C.) 269 (commissioner of patents); Carroll *v.* Hallwood, 31 App. Cas. (D. C.) 165; United G. Mines *v.* County, 12 Ariz. 217, 100 P. 774; Chapman & Co. *v.* Wilson, 91 Ark. 30, 120 S. W. 391; Teague *v.* Board, 156 Cal. 351, 104 P. 581 (city council's action on election petition); Northern Colo. I. Co. *v.* Pouppirt, 47 Colo. 490, 108 P. 23 (county commissioners and water rates); Oregon S. L. R. Co. *v.* Dist., 16 Ida. 578, 102 P. 904; Southern Indiana D. Co. *v.* Com., 172 Ind. 113, 87 N. E. 966; Davis *v.* Hert, 46 Ind. App. 242, 90 N. E. 634; School Dist. *v.* Wolf, 78 Kan. 805, 98 P. 237; Democratic Ex. Com. *v.* Dougherty, 134 Ky. 402, 120 S. W. 343 (party committee concerning primary election); Hatten *v.* Turman, 30 Ky. L. R. 194, 97 S. W. 770; S. *v.* Co., 109 Minn. 185, 123 N. W. 412 (state auditor's certificates of sale of land); In re Ford, 157 Mo. App. 141, 137 S. W. 32; S. *v.* Court, 137 Mo. App. 698, 119 S. W. 1010; Sowerwine *v.* Dist., 85 Neb. 687, 124 N. W. 118; S. *v.* Corron, 73 N. H. 434, 62 A. 1044; Sherburne *v.* Portsmouth, 72 N. H. 539, 58 A. 38; Pittsfield *v.* Exeter, 69 N. H. 336, 41 A. 82; McCarter *v.* Co., 78 N. J. L. 394, 75 A. 211; Shearman *v.* Cameron, 78 N. J. Eq. 532, 80 A. 545, *mod.* 76 N. J. Eq. 426, 74 A. 979; In re Heaney's Est., 125 App. Div. 619, 110 N. Y. S. 80; Thomas *v.* Gilbert (Or.), 101 P. 393 (comptroller of currency); Toye *v.* Dist., 225 Pa. 236, 74 A. 60; St. Louis, etc. R. Co. *v.* Thompson, 102 Tex. 89, 113 S. W. 144 (beneficial society); Ex parte Koen, 58 Tex. Cr. 279, 125 S. W. 401; S. *v.* Howard, 83 Vt. 6, 74 A. 392 (state auditor's allowance of claims); S. *v.* Heuston, 56 Wash. 268, 105 P. 474.

Contra as to allowance of claims by county commissioners. Bell County *v.* Felts (Tex. Civ.), 120 S. W. 1065. Church judicatories within rule. First P. Church *v.* Church, 245 Ill. 74, 91 N. E. 761.

Conclusiveness of finding by incorporators of amount subscribed for capital stock. See Louisiana P. E. Co. *v.* Knenzel, 108 Mo. App. 105, 82 S. W. 1099.

But one inquest on same body.—Morgan *v.* County, 3 Cal. App. 454, 86 P 720.

274-25 Victor Talking Mach. Co. *v.* Graphaphone Co., 189 Fed. 359, *aff.* 190 Fed. 1023; Manhattan T. Co. *v.* Traction Co., 188 Fed. 1006; Farr *v.* Land Co., 188 Fed. 10, 110 C. C. A. 160, *rev.* 170 Fed. 644; Connor *v.* Kimball, 186 Fed. 458, 107 C. C. A. 436; Street Grading Dist. No. 60 *v.* Hagadorn, 186 Fed. 451, 108 C. C. A. 429; Mankato *v.* Co., 142 Fed. 329, 73 C. C. A. 439; Hall & Farley *v.* Co., 173 Ala. 398, 56 S. 235; Marsh *v.* Fricke, 1 Ala. App. 649, 56 S. 110; Davis *v.* Beauchamp, 99 Ark. 404, 138 S. W. 636; Second Nat. Bk. *v.* Bk., 99 Ark. 386, 138 S. W. 472; Flowers *v.* Reece, 92 Ark. 611, 123 S. W. 773; Page *v.* Co., 145 Cal. 578, 79 P. 278; P. *v.* Curtice, 50 Colo. 503, 117 P. 357; Hull *v.* Burr, 61 Fla. 625, 55 S. 852; Clayton *v.* Clayton, 250 Ill. 433, 95 N. E. 480; Ferriman *v.* Gillespie, 250 Ill. 369, 95 N. E. 495; Hutchinson *v.* Hutchinson, 250 Ill. 170, 95 N. E. 143; McFall *v.* Kirkpatrick, 236 Ill. 281, 86 N. E. 139; International Forw. Co. *v.* F. Rosati & Co., 156 Ill. App. 339; Francis *v.* Bridges, 152 Ill. App. 630; Krotz *v.* Co., 34 Ind. App. 577, 73 N. E. 273; Weiser *v.* Ross, 150 Ia. 353, 130 N. W. 387 (privies); Buchanan *v.* Henry, 143 Ky. 628, 137 S. W. 222; Letcher *v.* Bk., 134 Ky. 24, 119 S. W. 236; Peck *v.* Co., 85 Kan. 126, 116 P. 365; Sherwood *v.* Graham, 128 La. 639, 55 S. 1; Timberlake *v.* Sup. Commandery, 208 Mass. 411, 94 N. E. 685; Bradford *v.* Borg, 114 Minn. 387, 131 N. W. 373; Swing *v.* Co., 105 Minn. 336, 117 N. W. 442; Minnesota D. Co. *v.* Johnson, 94 Minn. 150, 102 N. W. 381; Harris *v.* Silverman, 154 Mo. App. 694, 136 S. W. 23 (privies); McCarthy *v.* Benedict, 89 Neb. 293, 131 N. W. 598; Fred Krug B. Co. *v.* Healey, 71 Neb. 662, 99 N. W. 489, 101 N. W. 329; Lamberton *v.* Dinsmore, 75 N. H. 574, 78 A. 620; Faitoute *v.* Wright, 78 N. J. Eq. 560, 80 A. 559; Minzsheimer *v.* Doolittle, 60

N. J. Eq. 394, 45 A. 611; Thompson *v.* Williamson, 67 N. J. Eq. 212, 58 A. 602; Fulton, etc. Co. *v.* Co., 200 N. Y. 287, 93 N. E. 1052; Patterson *v.* Youngs, 129 N. Y. S. 673; Kahn *v.* Co., 129 N. Y. S. 137; Kowal *v.* Lehrman, 128 N. Y. S. 968; Newton *v.* Hunt, 134 App. Div. 325, 119 N. Y. S. 3, *mod.* 112 N. Y. S. 573, *aff.* 201 N. Y. 599, 95 N. E. 1134; Allred *v.* Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924; Teal *v.* Bk., 114 Minn. 435, 131 N. W. 486; Wilson *v.* Wilson, 31 O. C. C. 39; Andrews *v.* Donnelly, 59 Or. 138, 116 P. 569; Jenkins *v.* R. Co., 89 S. C. 408, 71 S. E. 1010; In re Columbia, etc. R. Co., 89 S. C. 407, 71 S. E. 1013; Campbell *v.* Upson, 98 Tex. 442, 84 S. W. 817; Wampler *v.* Harrell, 112 Va. 635, 72 S. E. 135. See "Judgments," infra, 817-91.

Death by wrongful act.—A widow who recovers cannot afterwards sue as administratrix under statute. Troxell *v.* D. L. & W. R. Co., 185 Fed. 540.

276-26 Wetmore *v.* Karrick, 205 U. S. 141; Old Wayne M. L. Assn. *v.* McDonough, 204 U. S. 8; Pennoyer *v.* Neff, 95 U. S. 714; Nat. Exch. Bk. *v.* Wiley, 195 U. S. 257; Phoenix B. Co. *v.* Castleberry, 131 Fed. 175, 65 C. C. A. 481; Davis *v.* Davis, 164 Fed. 281; Frawley *v.* Co., 124 Fed. 259; Alaska C. Co. *v.* Debney, 2 Alaska 303; Karrick *v.* Wetmore, 25 App. Cas. (D. C.) 415; Olson *v.* Co., 116 Ill. App. 573; Field *v.* Field, 215 Ill. 496, 74 N. E. 443; Tootle *v.* McClellan, 7 Ind. Ty. 64, 103 S. W. 766, 12 L. R. A. (N. S.) 941; Thornily *v.* Prentice, 121 Ia. 89, 96 N. W. 728; Chicago T. & T. Co. *v.* Smith, 185 Mass. 363, 70 N. E. 426; Gates *v.* Tebbetts, 83 Neb. 573, 119 N. W. 1120; Chicago R. Co. *v.* Co., 60 Neb. 722, 84 N. W. 97; Fogg *v.* Ellis, 61 Neb. 829, 86 N. W. 494; Aldrich *v.* Steen, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311; Grider *v.* Corbin, 116 App. Div. 818, 102 N. Y. S. 181; Taylor *v.* Syme, 162 N. Y. 513, 57 N. E. 83; Hope *v.* Seaman, 119 N. Y. S. 713; Baldwin *v.* Rice, 44 Misc. 64, 89 N. Y. S. 738; Fenton *v.* Ins. Co., 15 N. D. 365, 109 N. W. 363; Harris *v.* Hill, 54 Tex. Civ. 437, 117 S. W. 907; Barrett *v.* McKinney (Tex. Civ.), 93 S. W. 240; Humphrey *v.* Co., 41 Tex. Civ. 308, 93 S. W. 180; Dunn *v.* Taylor, 42 Tex. Civ. 241, 94 S. W. 347; Babcock *v.* Wolffarth, 35 Tex. Civ. 512, 80 S. W. 642; S. *v.* Wheeler, 43 Wash. 183, 86 P. 394.

If there has been actual service of process and court passed on plea of personal privilege its judgment in favor of jurisdiction will be binding on courts of another jurisdiction. Sipe *v.* Copwell, 59 Fed. 970, 8 C. C. A. 419; Jaster *v.* Currie, 198 U. S. 144; Tootle *v.* McClellan, 7 Ind. Ty. 64, 103 S. W. 766, 12 L. R. A. (N. S.) 941. *Contra.* Jones *v.* Jones, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. 447.

Inconsistent recitals in record open way to impeach affirmative statements by negative ones. Reizer *v.* Mertz, 223 Ill. 555, 565, 79 N. E. 283.

If the record discloses service insufficient it will not be presumed other or different service made. Johnson *v.* Hunter, 147 Fed. 133, 77 C. C. A. 359.

No presumption in favor of jurisdiction of justice of peace. Ferguson *v.* Basin, etc., 152 Cal. 712, 93 P. 867.

276-27 Roberts *v.* Leutzke, 39 Ind. App. 577, 78 N. E. 635; Am. Ins. Co. *v.* Mason, 159 Ind. 15, 64 N. E. 525; Brown *v.* Curtiss, 155 Mo. App. 376, 137 S. W. 24; S. *v.* Mitchell (Mo. App.), 115 S. W. 1098; Cizek *v.* Cizek (Neb.), 99 N. W. 28; Southern P. L. Co. *v.* Ward, 16 Okla. 131, 85 P. 459; Providence County S. Bk. *v.* Hughes, 26 R. I. 73, 58 A. 254; Alexander *v.* Montpelier, 81 Vt. 549, 71 A. 720.

Judgment must be within issues.—S. *v.* Haverly, 62 Neb. 767, 87 N. W. 959; Banking House *v.* Dukes, 70 Neb. 648, 97 N. W. 895.

276-28 Israel *v.* Israel, 148 Fed. 576, 79 C. C. A. 32; In re Rick's Est., 169 Cal. 467, 117 P. 539; Agnew *v.* Bk., 69 Neb. 654, 96 N. W. 189; Atlantic Coast Line R. Co. *v.* R. Co., 88 S. C. 434, 71 S. E. 34; First Nat. Bk. *v.* Campbell Co. (Tex Civ.), 133 S. W. 311.

276-29 Walsh *v.* Walsh, 4 Neb. (Unof.) 683, 95 N. W. 1025; Atlantic C. L. R. Co. *v.* R. Co., 88 S. C. 464, 71 S. E. 34.

276-30 Emmerson *v.* Merritt, 249 Ill. 538, 94 N. E. 955; Harper *v.* Martindale (Tex. Civ.), 135 S. W. 754.

276-31 Hilton *v.* Stewart, 15 Ida. 150, 96 P. 579; Hamilton *v.* McNeill, 150 Ia. 470, 129 N. W. 480; Canal C. Co. *v.* County (Ia.), 121 N. W. 556; Stewart L. Co. *v.* Downs, 142 Ia. 420, 120 N. W. 1067 (creditor not party); Weld *v.* Clarke, 209 Mass. 9, 95 N. E. 651; In re Whitney & Kitchen, 130 N. Y. S. 629; S. *v.* Willis, 19 N. D. 209, 124 N. 706.

Test is identity of rights involved Kay *v.* Gray, 30 Pa. Super. 450; Myers *v.* Co., 126 Pa. 582, 17 A. 891. See Montgomery *v.* Alden, 133 Ia. 675, 108 N. W. 234; Kolpack *v.* Kolpack, 128 Wis. 169, 107 N. W. 457.

277-32 Byne *v.* Mayor, 6 Ga. App. 48, 64 S. E. 285; New York *v.* Corn, 133 App. Div. 1, 117 N. Y. S. 514; Grand Forks *v.* Paulsness, 19 N. D. 293, 123 N. W. 878; Seattle *v.* Regan, 52 Wash. 262, 100 P. 731.

Rule does not apply in favor of city whose primary duty it is to keep streets in repair independently of relation between it and party in whose favor judgment rendered though such party indemnified city. Sutter *v.* Kansas City, 138 Mo. App. 105, 119 S. W. 1084

277-33 Rust Lumb. & Land Co. *v.* Wheeler, 189 Fed. 321, 111 C. C. A. 53; Bradley *v.* Rosenthal, 154 Cal. 420, 97 P. 875 (principal and agent); Eckles *v.* Des Moines, etc. Co., 152 Ia. 164, 130 N. W. 113; Vogemann *v.* Co., 131 App. Div. 216, 115 N. Y. S. 741.

277-34 Drennan *v.* Bunn, 124 Ill. 175, 16 N. E. 100, 7 Am. St. 354; Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. 392; Goldberg *v.* Co., 24 S. D. 49, 123 N. W. 266; Friend *v.* Ralston, 35 Wash. 422, 77 P. 794; Henry *v.* Co., 36 Wash. 553, 79 P. 42.

278-35 Landes *v.* Matthews, 136 Mo. App. 637, 118 S. W. 1185; Farwell *v.* Bean, 82 Vt. 172, 72 A. 731; Norfolk & W. R. Co. *v.* Mundy, 110 Va. 422, 66 S. E. 61. See infra, "Homesteads and Exemptions," 528-69.

279-36 Copley *v.* Ball, 100 C. C. A. 234, 176 Fed. 682; Murdock *v.* Murdock, 81 Conn. 681, 72 A. 290; Mansfield *v.* Hill, 56 Or. 400, 107 P. 471; Bryan *v.* Nash, 110 Va. 329, 66 S. E. 69; Horton *v.* Barto, 57 Wash. 477, 107 P. 191.

279-38 McDermott *v.* Gray, 198 Mo. 266, 285, 95 S. W. 431.

279-39 Churchill *v.* Jackson, 132 Ga. 666, 64 S. E. 691; Adams *v.* De Dominguez, 129 Ky. 599, 112 S. W. 663; Connor *v.* Paul, 138 Mo. App. 13, 119 S. W. 1006 (capacity of executors).

Conclusive as to assignment of dower. Briggs *v.* Manning, 80 Ark. 304, 97 S. W. 289. And on administrator's sureties. In action on his bond. Briggs *v.* Manning, supra.

279-40 Clapp *v.* Vatcher, 9 Cal. App. 462, 99 P. 549.

Conclusiveness limited to formal validity. In re Hasselbrook's Est., 128 App. Div. 874, 113 N. Y. S. 97.

279-41 Clapp *v.* Vatcher, 9 Cal. App. 462, 99 P. 549.

279-42 Clapp *v.* Vatcher, supra.

279-43 In re Davis, 151 Cal. 318, 86 P. 183, 90 P. 711.

Decree of distribution conclusive as to status of distributees. Est. of Nolan, 145 Cal. 559, 79 P. 428.

280-45 Admission to probate of authenticated copy of will within rule. Bryan *v.* Nash, 110 Va. 329, 66 S. E. 69.

280-46 Scott *v.* McNeal, 154 U. S. 34; Singo *v.* Fritz, 165 Ala. 658, 51 S. 867; Duncan *v.* Stewart, 25 Ala. 408; Stevenson *v.* Court, 62 Cal. 60; Thomas *v.* P., 107 Ill. 517; Perry *v.* St. Joseph, 29 Kan. 299; French *v.* Frazier, 7 J. J. Marsh. (Ky.) 425; Sav. Bk. *v.* Weeks, 110 Md. 78, 72 A. 475; Johnson *v.* Beazley, 65 Mo. 250; Morgan *v.* Dodge, 44 N. H. 255; S. *v.* White, 29 N. C. 116; Moore *v.* Smith, 11 Rich. (S. C.) 569; D'Arusment *v.* Jones, 4 Lea (Tenn.) 251; Withers *v.* Patterson, 27 Tex. 491; Andrews *v.* Avory, 14 Gratt. (Va.) 229; Wisconsin T. Co. *v.* Bk., 105 Wis. 464, 81 N. W. 642.

280-48 Conclusive as to residence of decedent. Balsewicz *v.* R. Co., 240 Ill. 238, 88 N. E. 734.

280-49 Hightower *v.* Hodges, 5 Ga. App. 408, 63 S. E. 541; Jordan *v.* Thornton, 5 Ga. App. 537, 63 S. E. 601; Andres *v.* Schlueter, 140 Ia. 389, 118 N. W. 429; Ward *v.* Schlosser, 111 Md. 528, 75 A. 116; Cutter *v.* Evans, 115 Mass. 27; Way *v.* Lewis, 115 Mass. 26; Ruggles *v.* Bernstein, 188 Mass. 232, 74 N. E. 366; S. *v.* Corron, 78 N. H. 434, 62 A. 1044 (noting that early opposing cases have been overruled); Blanding *v.* Cohen, 101 App. Div. 442, 93 N. Y. S. 93; C. *v.* Co., 224 Pa. 95, 73 A. 327.

Sureties on bonds in judicial proceedings are bound by judgment against principal. Price *v.* Carlton, 121 Ga. 12, 48 S. E. 721; Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251.

Judgment between maker and holder of note, conclusive between former and surety. Beh *v.* Bay, 127 Ia. 246, 103 N. W. 119; Bk. *v.* Ketchum, 66 Wis. 428, 29 N. W. 216.

281-50 Jenkins *v.* S., 76 Md. 255, 23 A. 608; Leppert *v.* Flaggs, 101 Md. 71, 60 A. 450.

In Georgia judgment against principal

is only prima facie evidence against sureties on administrators' and guardians' bonds. Price *v.* Carlton, 121 Ga. 12, 48 S. E. 721.

Suit for contribution not barred by judgment in action on bond against one surety and in favor of personal representatives of another. Comstock *v.* Keating, 115 Mo. App. 372, 91 S. W. 416.

Judgment discharging surety, conclusive against co-surety in suit by latter for contribution. Ruff *v.* Montgomery, 83 Miss. 185, 36 S. 67; Nelson *v.* Webster, 72 Neb. 332, 100 N. W. 411.

Judgment against principal and surety conclusive as to former's liability to latter. Reed *v.* Humphrey, 69 Kan. 155, 76 P. 390.

282-57 Newton *v.* Hunt, 59 Misc. 633, 112 N. Y. S. 573.

282-59 Alaska C. Co. *v.* Debney, 2 Alaska 303.

282-63 Clark *v.* Barber, 21 App. Cas. (D. C.) 274; Newton *v.* Hunt, 59 Misc. 633, 112 N. Y. S. 573.

283-64 Hilton *v.* Stewart, 15 Ida. 150, 96 P. 579; Rogers *v.* Rogers, 46 Ind. App. 506, 89 N. E. 901; McCormick *v.* McCormick, 82 Kan. 31, 107 P. 546; McHenry *v.* Bracken, 93 Minn. 510, 101 N. W. 960; Thelen *v.* Thelen, 75 Minn. 433, 78 N. W. 108; Guggenheim *v.* Wahl, 138 App. Div. 269, 122 N. Y. S. 941.

283-65 Andrews *v.* Andrews, 188 U. S. 14, 176 Mass. 92, 57 N. E. 333; German S. & L. Soc. *v.* Dormitzer, 192 U. S. 125; Bell *v.* Bell, 181 U. S. 175; Ingram *v.* Ingram, 143 Ala. 129, 42 S. 24, 111 Am. St. 31; In re Culp, 2 Cal. App. 70, 83 P. 89; Sammons *v.* Pike, 108 Minn. 291, 120 N. W. 540; Hall *v.* Hall, 122 N. Y. S. 401.

283-67 Field *v.* Field, 215 Ill. 496, 74 N. E. 443; Forrest *v.* Fey, 218 Ill. 165, 75 N. E. 789, 1 L. R. A. (N. S.) 740; In re Kimball, 155 N. Y. 62, 49 N. E. 331; Williams *v.* Igel, 62 Misc. 354, 116 N. Y. S. 778.

Not conclusive as to alimony.—Cureton *v.* Cureton, 132 Ga. 745, 65 S. E. 65.

284-68 Bell *v.* Bell, 181 U. S. 175; Beeman *v.* Kitzman, 124 Ia. 86, 99 N. W. 171.

284-69 Lanier *v.* Co., 88 Ark. 557, 115 S. W. 401; Sterling *v.* Hurd, 44 Colo. 436, 98 P. 174; McCoy *v.* Ahle, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; Board *v.* Newlin, 132 Ind. 27, 31 N. E. 465; Baltimore R. Co. *v.* Scholes, 14 Ind. App. 524, 43 N. E. 156; Pinickneff *v.* Johnson, 54 Wash. 156, 102 P. 1047. See Indianapolis N. T. Co. *v.* Brennan (Ind.), 87 N. E. 215.

Overwhelming weight of evidence must be adduced to show fraud or mistake. Mundy *v.* R. Co., 67 Fed. 633, 14 C. C. A. 583; Elliott *v.* R. Co., 74 Fed. 707, 21 C. C. A. 3; Choctaw, etc. R. Co. *v.* Newton, 140 Fed. 225, 71 C. C. A. 655. See Fruin-Bambrick C. Co. *v.* R. Co., 140 Fed. 465.

284-70 General F. Co. *v.* Wallace, 99 C. C. A. 204, 175 Fed. 650; Memphis T. Co. *v.* Wks., 166 Fed. 398, 93 C. C. A. 162; Choctaw etc. R. Co. *v.* Newton, 140 Fed. 225, 71 C. C. A. 655; Fruin-Bambrick C. Co. *v.* R. Co., 140 Fed. 465; Shriner *v.* Craft, 166 Ala. 146, 51 S. 884; Boston S. *v.* Schleuter, 88 Ark. 213, 114 S. W. 242; City St. Imp. Co. *v.* Marysville, 155 Cal. 419, 101 P. 308; Beattie *v.* McMullen, 82 Conn. 484, 74 A. 767; Concord A. H. Co. *v.* O'Brien, 228 Ill. 366, 81 N. E. 1038; Shea *v.* Board, 124 La. 299, 50 S. 166; Handy *v.* Bliss, 204 Mass. 513, 90 N. E. 864; Burgin *v.* Smith, 151 N. C. 561, 66 S. E. 607; Kettler B. Mfg. Co. *v.* O'Neil, 57 Tex. Civ. 568, 122 S. W. 900; Carnegie P. L. Assn. *v.* Harris, 43 Tex. Civ. 165, 97 S. W. 520; Kilgore *v.* Soc., 89 Tex. 465, 35 S. W. 145; Brin *v.* McGregor (Tex. Civ.), 45 S. W. 923; Butler Bros.-Hoff Co. *v.* R. Co., 113 Va. 28, 73 S. E. 441; Cornell *v.* Steele, 109 Va. 589, 64 S. E. 1038; Ilse *v.* Co., 55 Wash. 487, 104 P. 787.

285-72 S. *v.* Wheeler, 172 Ind. 578, 89 N. E. 1; Duncan *v.* Combs, 131 Ky. 330, 115 S. W. 222; S. *v.* Erickson, 39 Mont. 280, 102 P. 336 (except where constitution prescribes manner in which bills may be passed); Bloomfield *v.* Board, 74 N. J. L. 261, 65 A. 890; Fogg *v.* Ocean City, 72 N. J. Eq. 736, 66 A. 609; S. *v.* Groves, 80 O. St. 351, 88 N. E. 1096.

Enrollment record of commissioner to five civilized tribes, as to age and citizenship of Indians, conclusive. Campbell *v.* McSpadden, 34 Okla. 377, 127 P. 854.

286-73 Sacramento P. Co. *v.* Anderson, 1 Cal. App. 672, 82 P. 1069.

286-74 S. *v.* Bowman, 90 Ark. 174, 118 S. W. 711; Rogers *v.* S., 72 Ark. 565, 82 S. W. 169; Andrews *v.* P., 33 Colo. 193, 79 P. 1031; Wade *v.* Co., 51 Fla. 628, 41 S. 72; Stephens *v.* Board, 79 Kan. 153, 98 P. 790 (evidence af-

forded by journals must be conclusive); Missouri, etc. R. Co. *v.* Simons, 75 Kan. 130, 88 P. 551; S. *v.* Mead, 71 Mo. 266, *over.* Pacific R. Co. *v.* Governer, 23 Mo. 353, 66 Am. Dec. 673; S. *v.* Field, 119 Mo. 593, 24 S. W. 752; Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675; S. *v.* Dean, 84 Neb. 344, 121 N. W. 719; S. *v.* Frank, 60 Neb. 327, 83 N. W. 74; Colburn *v.* McDonald, 72 Neb. 431, 100 N. W. 961; Stetter *v.* S., 77 Neb. 777, 110 N. W. 761; Stratton *v.* S., 79 Neb. 118, 112 N. W. 361; In re Stickney, 185 N. Y. 107, 77 N. E. 993; New York *v.* Smith, 148 N. Y. 540, 42 N. E. 1088; Wittkowsky *v.* Board, 130 N. C. 90, 63 S. E. 275; Comrs. *v.* Co., 135 N. C. 62, 47 S. E. 411; Bk. *v.* Comrs., 119 N. C. 214, 25 S. E. 966; S. *v.* Rogers, 22 Or. 348, 364, 30 P. 74; Currie *v.* Co., 21 Or. 566, 28 P. 881; Portland *v.* Yick, 44 Or. 439, 75 P. 706.

287-75 Authenticated published statutes conclusive as to days on which acts therein approved. Gibson *v.* Anderson, 131 Fed. 39, 65 C. C. A. 277.

287-76 Mayor *v.* Simmons, 165 Ala. 359, 51 S. 638; Montgomery *v.* Gaston, 126 Ala. 425, 28 S. 497, 85 Am. St. 42, 51 L. R. A. 396; S. *v.* Brodie, 148 Ala. 381, 41 S. 180; S. *v.* Bk., 79 Conn. 141, 64 A. 5; Rash *v.* Allen, 24 Del. 444, 76 A. 370; Wade *v.* Co., 51 Fla. 628, 41 S. 72; S. *v.* Wheeler, 172 Ind. 578, 89 N. E. 1; Divison of Howard, 15 Kan. 154; County Seat of Linn Co., 15 Kan. 379; Durfee *v.* Harper, 22 Mont. 354, 56 P. 582; Palatine Ins. Co. *v.* R. Co., 34 Mont. 268, 85 P. 1032, *over.* S. *v.* Long, 21 Mont. 26, 52 P. 645; S. *v.* Co., 135 N. C. 62, 47 S. E. 411; Comrs. *v.* Co., 135 N. C. 62, 47 S. E. 411; Wilson *v.* Markley, 133 N. C. 616, 45 S. E. 1023; S. *v.* Smith, 44 O. St. 348, 7 N. E. 447, 12 N. E. 829; Capito *v.* Topping, 65 W. Va. 587, 64 S. E. 845 (time of adjournment); White *v.* Hinton, 3 Wyo. 753, 30 P. 953, 17 L. R. A. 66; S. *v.* Cahill, 12 Wyo. 225, 75 P. 433.

Journals must be explicit.—Enrolled statute imports absolute verity and is conclusive of its passage and validity unless journals show affirmatively, clearly, conclusively it was not passed regularly. In re Taylor, 60 Kan. 87, 55 P. 340; S. *v.* Andrews, 64 Kan. 174, 67 P. 870; Missouri, etc. R. Co. *v.* Simons, 75 Kan. 130, 88 P. 551. See Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675.

In Connecticut existence of act of which records kept by secretary of state are silent may be established by other evidence. S. *v.* Norwalk, 77 Conn. 257, 265, 58 A. 759; S. *v.* Bk., 79 Conn. 141, 64 A. 5.

Rule applies to official record of contents of ordinance. Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675; Fogg *v.* Ocean City S. Co., 72 N. J. Eq. 736, 66 A. 609. *Comp.* Richardson *v.* Young, 122 Tenn. 471, 125 S. W. 664.

Executive action in declaring existence of insurrection conclusive. Moyer *v.* Peabody, 212 U. S. 78.

288-77 King *v.* Davis, 137 Fed. 198; Hightower *v.* Hodges, 5 Ga. App. 408, 63 S. E. 541; Cully *v.* Shirk, 131 Ind. 76, 30 N. E. 882, 31 Am. St. 414; Tyler *v.* Davis, 37 Ind. App. 557, 75 N. E. 3; Goddard *v.* Harbour, 56 Kan. 744, 44 P. 1055, 54 Am. St. 608; Orchard *v.* Peake, 69 Kan. 510, 77 P. 281; Warren *v.* Wilner, 61 Kan. 719, 60 P. 745; Thomas *v.* Ireland, 88 Ky. 581, 11 S. W. 653; Sykes *v.* Keating, 118 Mass. 517; Sodini *v.* Sodini, 94 Minn. 301, 102 N. W. 861; Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481 (*over.* s. c. 161 Mo. 673, 61 S. W. 854); Newcomb *v.* R. Co., 182 Mo. 687, 81 S. W. 1069; Kerr *v.* R. Co., 113 Mo. App. 1, 87 S. W. 596; Bolles *v.* Bowen, 45 N. H. 124; Benwood Wks. *v.* Hutchinson, 101 Pa. 359; Bennethum *v.* Bowers, 133 Pa. 332, 19 A. 361; Ben Franklin Co. *v.* Co., 25 Pa. Super. 628; Philadelphia S. F. Soc. *v.* Purcell, 24 Pa. Super. 205; Barrows *v.* Co., 13 R. I. 48; McKinstry *v.* Collins, 76 Vt. 221, 56 A. 985; Columbian G. Co. *v.* Townsend, 74 Vt. 183, 52 A. 432; McDaniels *v.* De Groot, 77 Vt. 160, 59 A. 166; Preston *v.* Kindrick, 94 Va. 760, 27 S. E. 588; Talbott *v.* Co., 60 W. Va. 423, 55 S. E. 1009.

Amended return, made with or without notice, not open to collateral attack. Ranch *v.* Werley, 152 Fed. 509.

If return not full or explicit, inquiry into facts allowed. Park, etc. Co. *v.* Wks., 204 Pa. 453, 54 A. 334.

Informalities, including errors in name of person designated in return, will not support collateral attack on judgment. Sodini *v.* Sodini, 94 Minn. 301, 102 N. W. 861.

Cases reviewed.—Authorities reviewed in extenso in Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481.

In Illinois return may be contradicted only to excuse a default. Cooke *v.*

Haungs, 113 Ill. App. 501; Kline *v.* Kline, 104 Ill. App. 274.

If return open to construction parol evidence is competent to show what officer did. Jackson *v.* Tenney, 17 Okla. 495, 87 P. 867.

288-79 Hearn *v.* Ayres, 77 Ark. 497, 92 S. W. 768; McKinstry *v.* Collins, 76 Vt. 221, 56 A. 985.

288-80 Brum *v.* Ivins, 154 Cal. 17, 96 P. 876.

288-81 Spring Creek D. D. *v.* Commissioners, 238 Ill. 521, 87 N. E. 394; Miedreich *v.* Lauenstein, 172 Ind. 140, 86 N. E. 963; Taussig *v.* R. Co., 186 Mo. 269, 85 S. W. 378; Mound City E. Co. *v.* R. Co., 146 Mo. App. 463, 124 S. W. 27; Ewald *v.* Ortynsky, 77 N. J. Eq. 76, 75 A. 577; Burton *v.* Cooley, 22 S. D. 515, 118 N. W. 1028.

Return not conclusive as to official capacity of person who made it. Buck *v.* Hawley, 129 Ia. 406, 105 N. W. 688.

289-82 Mechanical A. Co. *v.* Castleman, 215 U. S. 437 (after removal to federal court, though conclusive in state court); National M. Co. *v.* Co., 11 Ariz. 108, 89 P. 535, 9 L. R. A. (N. S.) 1062; Hilt *v.* Heimberger, 235 Ill. 235, 85 N. E. 304 (conclusive as to good faith rights of third persons; but prima facie as to others); Goble *v.* Brenneman, 75 Neb. 309, 106 N. W. 440; Wilson *v.* Shipman, 34 Neb. 573, 52 N. W. 576, 33 Am. St. 660; Johnson *v.* Carpenter, 77 Neb. 49, 108 N. W. 161; Patterson *v.* Taylor, 78 N. J. L. 10, 73 A. 225 (applying the rule in Nebraska); Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Marin *v.* Potter, 15 N. D. 284, 107 N. W. 970.

In Kentucky by statute return may be questioned for fraud or mistake. See Utter *v.* Smith, 25 Ky. L. R. 2272, 80 S. W. 447.

289-84 Fraud on plaintiff's part need not be shown. National M. Co. *v.* Co., 11 Ariz. 108, 89 P. 535, 9 L. R. A. (N. S.) 1062.

289-85 Authorities reviewed in Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481.

290-87 Minutes of court do not import absolute verity if questioned at term during which proceedings had. Parol evidence is competent to show what was in fact done. Wilkins *v.* S., 93 Miss. 695, 47 S. 427.

290-88 Murphy *v.* Panter, 62 Or. 522, 125 P. 292. See Bellus *v.* Peters, 165 Cal. 112, 130 P. 1186.

290-89 Choctaw & M. R. Co. *v.* Newton, 140 Fed. 225, 71 C. C. A. 655; Winslow *v.* Co., 12 Cal. App. 530, 107 P. 1020; Pacific Mut. Ins. Co. *v.* Van Fleet, 47 Colo. 401, 107 P. 1087; Christian *v.* Co., 120 Ga. 314, 47 S. E. 923; Moultrie R. Co. *v.* Hill, 120 Ga. 730, 48 S. E. 143; Lasher *v.* Colton, 225 Ill. 234, 80 N. E. 122; U. S. B. Co. *v.* Ruddy, 203 Ill. 306, 67 N. E. 799; Highley *v.* Bk., 185 Ill. 565, 57 N. E. 436; P. *v.* Paul, 143 Ill. App. 566; Stearns *v.* R. Co. (Ia.), 148 N. W. 128; C. *v.* Co., 26 Ky. L. R. 121, 80 S. W. 772; Bailey *v.* Quarry Co., 169 Mich. 227, 134 N. W. 1098; McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668; Phelan *v.* Co., 227 Mo. 666, 127 S. W. 318; Buchanan *v.* Buchanan, 73 N. J. Eq. 544, 68 A. 780; Ingersoll *v.* English, 66 N. J. L. 463, 49 A. 737; Wendell *v.* Leo, 195 N. Y. 76, 87 N. E. 790; Alcolm Co. *v.* Brenack, 98 N. Y. S. 199; Manhattan L. Co. *v.* Weill, 98 N. Y. S. 686.

See Black *v.* Epstein, 221 Mo. 286, 120 S. W. 754.

In Massachusetts party calling adverse witness does not hold him out as credible. Emerson *v.* Wark, 185 Mass. 427, 70 N. E. 482.

290-90 U. S. *v.* Co., 172 Fed. 948; Reclamation Dist. *v.* Sherman, 11 Cal. App. 399, 105 P. 277 (witness' conclusion); Brosius *v.* Zinc Co., 149 Mo. App. 181, 130 S. W. 134; Zimmann *v.* Hotel Co. (Neb.), 146 N. W. 1030; Wendell *v.* Leo, 195 N. Y. 76, 87 N. E. 790; Murphy *v.* Panter, 62 Or. 522, 125 P. 292.

290-91 Theis *v.* Co., 34 Wash. 23, 74 P. 1004.

Admission by tender, conclusive. Wiener *v.* Auerbach, 98 N. Y. S. 686.

Written admission of service, conclusive. Franklin *v.* Co., 137 Fed. 737, 70 C. C. A. 171.

290-92 Evidence to be believed must be credible in itself, such as common experience and observation can approve as probable. Daggers *v.* Van Dyck, 37 N. J. Eq. 130; Buchanan *v.* Buchanan, 73 N. J. Eq. 544, 68 A. 780.

Testimony given by party to contract is not binding on plaintiff whose suit is based thereon, he not being a party thereto and being real party in interest. Georgetown W., etc. Co. *v.* Neale, 137 Ky. 197, 125 S. W. 293.

291-93 Christian *v.* Co., 120 Ga. 314, 47 S. E. 923; Chesapeake S. Co. *v.* Fos-

sett, 30 Ky. L. R. 1175, 100 S. W. 825. *Contra* New Eng. Syndicate *v.* Cutler (Ia.), 143 N. W. 1095.

291-94 See Schneider *v.* Sulzer, 212 Ill. 87, 72 N. E. 19.

291-95 Weil *v.* S., 48 Tex. Cr. 603, 90 S. W. 644.

Invalid clause in contract not binding on party who introduces it. Atchison, etc. R. Co. *v.* Smythe (Tex. Civ.), 119 S. W. 892.

291-96 Youmans *v.* S., 7 Ga. App. 101, 66 S. E. 383; Rose *v.* S., 171 Ind. 662, 87 N. E. 103; Jones *v.* Hickey, 80 Kan. 109, 102 P. 247; Gillespie *v.* S., 96 Miss. 856, 51 S. 811; Sprintz *v.* Saxton, 125 App. Div. 908, 109 N. Y. S. 1147; Seeman *v.* Levnie, 121 N. Y. S. 645; S. *v.* McDonald, 152 N. C. 802, 67 S. E. 762; Bowland *v.* Co., 18 O. Dec. 126; Columbia Valley T. Co. *v.* Smith, 56 Ore. 6, 107 P. 465; Ex parte Allen, 82 Vt. 365, 73 A. 1078; Wright *v.* Carson, 110 Va. 498, 66 S. E. 37; S. *v.* Dodson, 54 Wash. 31, 102 P. 872.

292-97 S. *v.* Anderson, 83 Conn. 55, 75 A. 81.

292-99 S. *v.* Thomas, 144 Ala. 77, 40 S. 271, 2 L. R. A. (N. S.) 1011, 113 Am. St. 17; Petersilie *v.* McLachlin, 80 Kan. 176, 101 P. 1014; Wright *v.* Hart, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338; Ex parte Allen, 82 Vt. 365, 73 A. 1078. *Contra,* Commission *v.* Assn., 109 Va. 565, 64 S. E. 1041. *Comp.* Santa Barbara County *v.* Yates, 13 Cal. App. 44, 108 P. 726.

292-1 Wilfong *v.* Co., 171 Fed. 51, 96 C. C. A. 293 (under statute of Washington); Wright *v.* Carson, 110 Va. 498, 66 S. E. 37.

293-6 Gibson *v.* Pekarek, 25 S. D. 281, 126 N. W. 597. *Contra,* Bradford *v.* Durham, 54 Or. 1, 101 P. 897 (regularity of proceedings).

Statute making report of viewers conclusive as to cost if improvement, valid. Murdock *v.* Pittsburg, 223 Pa. 280, 72 A. 701.

293-7 Exception exists under statute governing right to rebate of liquor license monies. P. *v.* Clement, 134 App. Div. 462, 119 N. Y. S. 374.

Failure of land owner to demand ground rent for twenty years may be made conclusive presumption of loss of title. Safe Deposit & T. Co. *v.* Marburg, 110 Md. 410, 72 A. 839.

Statute making retention by vendor of possession of subject of sale, conclusive evidence of fraud, assumed valid. Hoffman *v.* Owens, 31 Nev. 481, 103 P. 414, 104 P. 241.

CONFESSIONS

Inspection, 327-93.

297-1 Shelton *v.* S., 144 Ala. 106, 42 S. 30; Owens *v.* S., 120 Ga. 296, 48 S. E. 21; Spicer *v.* S., 21 Ky. L. R. 528, 51 S. W. 802.

A confession is in the nature of positive testimony so as to excuse a charge on circumstantial evidence. Burk *v.* S., 50 Tex. Cr. 185, 95 S. W. 1064.

298-3 Reid *v.* S., 168 Ala. 118, 53 S. 254; Shelton *v.* S., 144 Ala. 106, 42 S. 30; Folds *v.* S., 123 Ga. 167, 51 S. E. 305; Ransom *v.* S., 2 Ga. App. 826, 59 S. E. 101; S. *v.* Campbell, 73 Kan. 688, 85 P. 784; Wright *v.* C., 155 Ky. 750, 160 S. W. 476; Burnett *v.* S., 86 Neb. 11, 124 N. W. 927.

298-4 Shelton *v.* S., 144 Ala. 106, 42 S. 30; Tucker *v.* S., 64 Fla. 518, 59 S. 941; Owens *v.* S., 120 Ga. 296, 48 S. E. 21; Tipton *v.* S., 25 Ky L. R. 1547, 78 S. W. 174; Burnett *v.* S., 86 Neb. 11, 124 N. W. 927.

Confession must be unqualified.—S. *v.* Abrams, 131 Ia. 479, 108 N. W. 1041. If evidence conflicts concerning it, question is for jury. S. *v.* Westcott, 130 Ia. 1, 104 N. W. 341.

A confession in the words, "I don't deny the charge that my sister makes and it is true," held sufficient although it did not name the crime. Harris *v.* S., 64 Tex. Cr. 594, 144 S. W. 232.

298-5 Tucker *v.* S., 64 Fla. 518, 59 S. 941; Lowe *v.* S., 125 Ga. 55, 53 S. E. 1038; Ransom *v.* S., 2 Ga. App. 826, 89 S. E. 101.

Expressing out of court, a desire to plead guilty is equivalent to a confession. Abrams *v.* S., 121 Ga. 170, 48 S. E. 965.

Need not be specific as to details. Cook *v.* S., 124 Ga. 653, 53 S. E. 104.

May be too general to be competent. Young *v.* S., 6 O. C. C. (N. S.) 53.

298-6 "That one might be charged with theft in the examining trial, when he made a confession, and the grand jury subsequently indicted him for robbery, would not render the confession inadmissible when the evidence shows it is the same offense." Johnson *v.* S. (Tex. Cr.), 149 S. W. 190.

299-10 Baggett *v.* S. (Tex. Cr.), 144 S. W. 1136.

299-11 P. *v.* Sullivan, 3 Cal. App. 502, 86 P. 834; P. *v.* Philbon, 138 Cal. 530, 71 P. 650; P. *v.* Ah Lung, 2 Cal. App. 278, 83 P. 296; S. *v.* Blackburn, 7 Penne. (Del.) 479, 75 A. 536; Joiner *v.* S., 119 Ga. 315, 46 S. E. 412; S. *v.* Spiker, 131 Ia. 194, 108 N. W. 233; Collett *v.* C. (Ky.), 121 S. W. 426; Finch *v.* C., 29 Ky. L. R. 187, 92 S. W. 940; C. *v.* Dewhirst, 190 Mass. 293, 76 N. E. 1052; C. *v.* McCabe, 163 Mass. 98, 39 N. E. 777; C. *v.* Funai, 146 Mass. 570, 16 N. E. 458; O'Hearn *v.* S., 79 Neb. 513, 113 N. W. 130; S. *v.* Rosa, 72 N. J. L. 462, 62 A. 695; S. *v.* Brinkley, 55 Or. 134, 104 P. 893, 105 P. 798; C. *v.* Aston, 227 Pa. 112, 75 A. 1019; S. *v.* Nagle, 25 R. I. 105, 54 A. 1063; S. *v.* Sudduth, 74 S. C. 498, 54 S. E. 1013; Thurston *v.* S., 58 Tex. Cr. 308, 125 S. W. 31; Johnson *v.* S., 47 Tex. Cr. 523, 84 S. W. 824; Wright *v.* C., 109 Va. 847, 65 S. E. 19; Clay *v.* S., 15 Wyo. 42, 86 P. 17, 544.

Silence not admission if it was not voluntary, or the result of artifice. Geiger *v.* S., 70 O. St. 400, 71 N. E. 721.

One in official custody may keep silence without making admission. P. *v.* Smith, 172 N. Y. 210, 64 N. E. 814. *Contra*, P. *v.* Sullivan, 3 Cal. App. 502, 86 P. 834; P. *v.* Amaya, 134 Cal. 531, 66 P. 794. Statements of arresting officer need not be answered. P. *v.* Amaya, 134 Cal. 531, 66 P. 794.

300-12 O'Hearn *v.* S., 79 Neb. 513, 113 N. W. 130; S. *v.* McIntosh, 94 S. C. 439, 78 S. E. 327. *Contra*, Collett *v.* C. (Ky.), 121 S. W. 426.

300-13 Simmons *v.* S., 115 Ga. 574, 41 S. E. 983; Lumpkin *v.* S., 125 Ga. 24, 53 S. E. 810; P. *v.* Smith, 172 N. Y. 210, 233, 64 N. E. 814.

300-14 Jones *v.* S., 2 Ga. App. 433, 58 S. E. 559; Lumpkin *v.* S., 125 Ga. 24, 53 S. E. 810; Geiger *v.* S., 70 O. St. 400, 71 N. E. 721.

Manifestation of aversion by wife to husband accused of shooting her does not call upon him to ask explanation, she having declared him innocent. P. *v.* Smith, 172 N. Y. 210, 233, 64 N. E. 814.

Silence of accused when arrested cannot be shown. Ripley *v.* S., 58 Tex. Cr. 489, 126 S. W. 586. Not prejudicial if accused's refusal to testify is not so. U. S. *v.* Muyot, 2 Phil. Isl. 177.

301-15 Harrold *v.* S., 169 Fed. 47, 94 C. C. A. 415; Greenwood *v.* S., 107 Ark. 568, 156 S. W. 427; Adcock *v.* S., 73 Ark. 625, 83 S. W. 318; Smith *v.* S., 74 Ark. 397, 85 S. W. 1123; P. *v.* Siemsen, 153 Cal. 387, 95 P. 863; Martinez *v.* P., 55 Colo. 51, 132 P. 64; Reagan *v.* P., 49 Colo. 316, 112 P. 785; Wilburn *v.* S. (Ga.), 81 S. E. 444; Brannon *v.* S., 140 Ga. 787, 80 S. E. 7; Griner *v.* S., 121 Ga. 614, 49 S. E. 700; Ginn *v.* S., 161 Ind. 292, 68 N. E. 294; S. *v.* Neubauer, 145 Ia. 337, 124 N. W. 312 (though made in absence of counsel); S. *v.* Westcott, 130 Ia. 1, 104 N. W. 341; Wellington *v.* C., 158 Ky. 161, 164 S. W. 333 (voluntary confession admissible under Anti Sweating act); Dorsey *v.* C., 158 Ky. 447, 165 S. W. 405; Helm *v.* C., 156 Ky. 751, 162 S. W. 94; C. *v.* McClanahan, 153 Ky. 412, 155 S. W. 1131; Carpenter *v.* C., 29 Ky. L. R. 107, 92 S. W. 552; Van Dalsen *v.* C., 28 Ky. L. R. 238, 89 S. W. 255; S. *v.* Cauton, 131 La. 255, 59 S. 202; S. *v.* Robertson, 111 La. 35, 35 S. 375; S. *v.* Gianfala, 113 La. 463, 37 S. 30; Lowe *v.* S., 111 Md. 1, 73 A. 637 (plea of guilty); Green *v.* S., 96 Md. 384, 54 A. 104; S. *v.* Wilson, 223 Mo. 173, 122 S. W. 671; S. *v.* Jones, 171 Mo. 401, 71 S. W. 680; S. *v.* Hottman, 196 Mo. 110, 126, 94 S. W. 237; S. *v.* Church, 199 Mo. 605, 98 S. W. 16; S. *v.* Spaugh, 200 Mo. 571, 98 S. W. 55; S. *v.* Berberick, 38 Mont. 423, 100 P. 209; Heddendorf *v.* S., 85 Neb. 747, 124 N. W. 150; P. *v.* Rogers, 192 N. Y. 331, 85 N. E. 135; P. *v.* Kent, 41 Misc. 191, 83 N. Y. S. 948; S. *v.* Daniels, 134 N. C. 641, 46 S. E. 743; Wade *v.* S., 2 O. C. C. (N. S.) 189; S. *v.* Garrison, 59 Or. 440, 117 P. 657; C. *v.* Willis, 223 Pa. 576, 72 A. 857; C. *v.* Johnson, 217 Pa. 77, 66 A. 233; U. S. *v.* Jose, 6 Phil. Isl. 211; S. *v.* Perry, 74 S. C. 551, 54 S. E. 764; Sowers *v.* S., 55 Tex. Cr. 113, 113 S. W. 148; Turner *v.* S., 48 Tex. Cr. 585, 89 S. W. 975; Jackson *v.* C. (Va.), 81 S. E. 192; S. *v.* Poole, 42 Wash. 192, 84 P. 727; Horn *v.* S., 12 Wyo. 80, 73 P. 705.

See Mitsunage *v.* P., 54 Colo. 102, 129 P. 241; P. *v.* Bowman, 78 Misc. 425, 138 N. Y. S. 410.

And so must be inquired into with great care and caution. Wright *v.* S., 3 Ala. App. 24, 58 S. 68.

"A statement is voluntary unless made under the influence of a threat or menace which inspires dread or alarm, or induced by artifice or by a promise or inducement of some profit, benefit or amelioration of punishment." Anderson *v.* S., 133 Wis. 601, 114 N. W. 112; Hintz *v.* S., 125 Wis. 405, 104 N. W. 119.

Alleged involuntary confession forming part of transaction brought out by accused on cross examination, may be shown. Turner *v.* S. (Tex. Cr.), 163 S. W. 705.

"A confession is voluntary when it is not induced by a threat of harm or a promise of favor or reward held out by a person in authority." S. *v.* Potoniec, 117 Minn. 80, 134 N. W. 305.

Unfinished confession in form of newspaper article, although taken from person of accused, is, it seems, admissible. S. *v.* MacQueen, 69 N. J. L. 522, 55 A. 1006.

Involuntary admissions or confessions may be shown to contradict accused as witness. Smith *v.* S., 137 Ala. 22, 34 S. 396; Burgess *v.* S., 148 Ala. 654, 42 S. 681.

303-16 Rex *v.* Ryan, 9 Ont. L. R. (Can.) 137; Peck *v.* S., 147 Ala. 100, 41 S. 759; P. *v.* Silvers, 6 Cal. App. 69, 92 P. 506; Johnson *v.* S., 1 Ga. App. 129, 57 S. E. 934; C. *v.* Phillips, 26 Ky. L. R. 543, 82 S. W. 286; Owsley *v.* C., 31 Ky. L. R. 5, 101 S. W. 366; S. *v.* Alexander, 109 La. 557, 33 S. 600; Watts *v.* S., 99 Md. 30, 57 A. 542; S. *v.* Force, 69 Neb. 162, 95 N. W. 42; S. *v.* Nagle, 25 R. I. 105, 54 A. 1063; Knight *v.* S., 55 Tex. Cr. 243, 116 S. W. 56.

Advice by employe of prosecutor. Smith *v.* S., 125 Ga. 252, 54 S. E. 190.

Evidence of circumstances attending confession is admissible. Bishop *v.* S., 96 Miss. 846, 52 S. 21.

Confession not inadmissible because made while drunk. Pash *v.* C., 146 Ky. 390, 142 S. W. 700.

304-18 Watts *v.* S., 177 Ala. 24, 59 S. 270; Stevens *v.* S., 138 Ala. 71, 35 S. 122; Campbell *v.* S., 150 Ala. 70, 43 S. 743; Daniels *v.* S., 57 Fla. 1, 48 S. 747; Owsley *v.* C., 31 Ky. L. R. 5, 101 S. W. 366; C. *v.* Aston, 227 Pa. 112, 75 A. 1019; S. *v.* Landers, 21 S. D. 606, 114 N. W. 717; S. *v.* Vey, 21 S. D. 612, 114 N. W. 719; Poszczyniala *v.* S., 125 Wis. 414, 104 N. W. 113.

May be held voluntary on sufficient testimony though accused claims the contrary. Williams *v.* S. (Tex. Cr.), 144 S. W. 622.

The test is was inducement such as to result in fair risk of false confession. S. *v.* Sherman, 35 Mont. 512, 522, 90 P. 981.

Statutes exist regulating confessions as evidence. Ty. *v.* Matsumoto, 16 Haw. 267; Ginn *v.* S., 161 Ind. 292, 68 N. E. 294; Brown *v.* S., 55 Tex. Cr. 572, 118 S. W. 139.

305-19 Peck *v.* S., 147 Ala. 100, 41 S. 759; Hillburn *v.* S., 121 Ga. 344, 49 S. E. 318; Owsley *v.* C., 31 Ky. L. R. 5, 101 S. W. 366; S. *v.* Hernia, 68 N. J. L. 299, 53 A. 85; S. *v.* Nagle, 25 R. I. 105, 54 A. 1063. See Hauger *v.* U. S., 173 Fed. 54, 97 C. C. A. 372; Lindsey *v.* S., 66 Fla. 341, 63 S. 832, 50 L. R. A. (N. S.), 1077, 1084n.

305-20 P. *v.* Harrison, 261 Ill. 517, 104 N. E. 257; Hill *v.* S. (Tex. Cr.), 161 S. W. 118; Layton *v.* S., 52 Tex. Cr. 513, 107 S. W. 819. See O'Hearn *v.* S., 79 Neb. 513, 113 N. W. 130, favoring exclusion arguendo.

It is so provided by recent statute in Texas unless written statement contains evidence accused had been warned by person to whom confession made; it is not enough official certificate to statement so recites. Hiles *v.* S. (Tex. Cr.), 163 S. W. 717; Overstreet *v.* S. (Tex. Cr.), 150 S. W. 899; Windham *v.* S. (Tex. Cr.), 150 S. W. 613; Drake *v.* S. (Tex. Cr.), 151 S. W. 315; Cukierski *v.* S. (Tex. Cr.), 153 S. W. 313; Majors *v.* S., 63 Tex. Cr. 488, 140 S. W. 1095; Ayers *v.* S., 62 Tex. Cr. 428, 137 S. W. 1146; Burton *v.* S., 62 Tex. Cr. 402, 137 S. W. 1145; Henzen *v.* S., 62 Tex. Cr. 336, 137 S. W. 1141; Jenkins *v.* S., 60 Tex. Cr. 236, 131 S. W. 542. If accused is not under arrest, a confession reduced to writing is not a written confession within statute. Rogers *v.* S. (Tex. Cr.), 159 S. W. 40. All Statutory requirements must appear on face to have been complied with. Precise words of statute need not be used Cole *v.* S. (Tex. Cr.), 162 S. W. 880; Overstreet *v.* S. (Tex. Cr.), 150 S. W. 899. If confession be subsequently shown to be true, oral confession is admissible. Moran *v.* S. (Tex. Cr.), 166 S. W. 161; Lane *v.* S. (Tex. Cr.), 152 S. W. 897; Windham *v.* S. (Tex. Cr.), 150 S. W. 613; Boyman *v.* S., 59 Tex. Cr.

23, 126 S. W. 1142; Smith *v.* S., 53 Tex. Cr. 643, 111 S. W. 939. If accused is not (Stapleton *v.* S., 56 Tex. Cr. 422, 120 S. W. 866; Grant *v.* S., 56 Tex. Cr. 411, 120 S. W. 481; Williams *v.* S., 53 Tex. Cr. 2, 108 S. W. 371), or does not believe he is under arrest, confession may be oral. Torres *v.* S. (Tex. Cr.), 166 S. W. 523; Hiles *v.* S. (Tex. Cr.), 163 S. W. 717.

306-21 Shaw *v.* U. S., 180 Fed. 348, 103 C. C. A. 494; Lestes *v.* S., 170 Ala. 36, 54 S. 175; Green *v.* S., 168 Ala. 90, 53 S. 286; Martin *v.* S., 1 Ala. App. 215, 56 S. 3; Stevens *v.* S., 138 Ala. 71, 35 S. 122; Hamilton *v.* S., 147 Ala. 110, 41 S. 940; Crosby *v.* S., 93 Ark. 156, 124 S. W. 781; Hooker *v.* S., 75 Ark. 67, 86 S. W. 846; P. *v.* Russell, 19 Cal. App. 750, 127 P. 829; P. *v.* Siemsen, 153 Cal. 387, 95 P. 863; Reagan *v.* P., 49 Colo. 316, 112 P. 785; Lomax *v.* U. S., 37 App. Cas. (D. C.) 414; Brown *v.* U. S., 35 App. Cas. (D. C.) 548; Sims *v.* S., 59 Fla. 38, 52 S. 198; Williams *v.* S., 48 Fla. 65, 37 S. 521; Wilburn *v.* S. (Ga.), 81 S. E. 444; Folds *v.* S., 123 Ga. 167, 51 S. E. 305; Ivey *v.* S., 4 Ga. App. 828, 62 S. E. 565; Ginn *v.* S., 161 Ind. 292, 68 N. E. 294; S. *v.* Bennett, 143 Ia. 214, 121 N. W. 1021; S. *v.* Penney, 113 Ia. 691, 84 N. W. 509; S. *v.* Icenbice, 126 Ia. 16, 101 N. W. 273; S. *v.* Westcott, 130 Ia. 1, 104 N. W. 341; Pearsall *v.* C., 29 Ky. L. R. 222, 92 S. W. 589; Hathaway *v.* C., 26 Ky. L. R. 630, 82 S. W. 400; S. *v.* Turner, 122 La. 371, 47 S. 685; S. *v.* Lewis, 112 La. 872, 36 S. 788; S. *v.* Hogan, 117 La. 863, 42 S. 352; S. *v.* Rugero, 117 La. 1040, 42 S. 495; S. *v.* Baudoin, 115 La. 773, 40 S. 42; McCleary *v.* S. (Md.), 89 A. 1100; Toomer *v.* S., 112 Md. 285, 76 A. 118; Birkenfeld *v.* S., 104 Md. 253, 65 A. 1; P. *v.* Sartori, 168 Mich. 308, 134 N. W. 200; P. *v.* Owen, 154 Mich. 571, 118 N. W. 590; S. *v.* Willette, 46 Mont. 326, 127 P. 1013; S. *v.* McCord, 237 Mo. 242, 140 S. W. 885; S. *v.* Wilson, 223 Mo. 173, 122 S. W. 671; S. *v.* Wooley, 215 Mo. 620, 115 S. W. 417; S. *v.* Brooks, 220 Mo. 74, 119 S. W. 353; S. *v.* Church, 199 Mo. 605, 636, 98 S. W. 16; S. *v.* Jones, 171 Mo. 401, 71 S. W. 680; S. *v.* Armstrong, 203 Mo. 554, 102 S. W. 503; S. *v.* Berberick, 38 Mont. 423, 100 P. 209; S. *v.* Johnny, 29 Nev. 203, 87 P. 3; S. *v.* Hernia, 68 N. J. L. 299, 53 A. 85; S. *v.* MacQueen, 69 N. J. L. 522, 55 A. 1006; P. *v.* Garfalo, 207 N. Y. 141, 100 N. E. 698; P. *v.* Hill, 198 N. Y. 64, 91 N. E. 272; P. *v.* Rogers, 192 N. Y. 331, 85 N. E. 135 (words "private person" in statute concerning confessions includes officers in whose custody accused was when confession made); P. *v.* White, 176 N. Y. 331, 349, 68 N. E. 630; S. *v.* Drakeford, 162 N. C. 667, 78 S. E. 308; S. *v.* Daniels, 134 N. C. 641, 46 S. E. 743; S. *v.* Exum, 138 N. C. 599, 50 S. E. 283; S. *v.* Smith, 138 N. C. 700, 50 S. E. 859; S. *v.* Horner, 139 N. C. 603, 52 S. E. 136; S. *v.* Jones, 145 N. C. 466, 59 S. E. 353; Wade *v.* S., 2 O. C. C. (N. S.) 189; Anderson *v.* S., 8 Okla. Cr. 90, 126 P. 840; S. *v.* Humphrey, 63 Or. 540, 128 P. 824; S. *v.* Scott, 63 Or. 444, 128 P. 441; S. *v.* Blodgett, 50 Or. 329, 92 P. 820; S. *v.* Landers, 21 S. D. 606, 114 N. W. 717; S. *v.* Vey, 21 S. D. 612, 114 N. W. 719; Berry *v.* S., 58 Tex. Cr. 291, 125 S. W. 580; Reeves *v.* S., 47 Tex. Cr. 340, 83 S. W. 803; Fonseca *v.* S., 48 Tex. Cr. 28, 85 S. W. 1069; Bink *v.* S., 48 Tex. Cr. 598, 89 S. W. 1075; S. *v.* Blay, 77 Vt. 56, 58 A. 794; S. *v.* Poole, 42 Wash. 192, 84 P. 727; Hintz *v.* S., 125 Wis. 405, 104 N. W. 110; Stoddard *v.* S., 132 Wis. 520, 112 N. W. 453; Clay *v.* S., 15 Wyo. 42, 86 P. 17, 544.

See Belcher *v.* S. (Tex. Cr.), 161 S. W. 459.

Immaterial defendant under arrest for prior offense. Reinhard *v.* S., 52 Tex. Cr. 59, 106 S. W. 128. Legality of arrest is immaterial. Brown *v.* S., 3 Ga. App. 479, 60 S. E. 216.

307-22 Fouse *v.* S., 83 Neb. 258, 119 N. W. 478; Stoddard *v.* S., 132 Wis. 520, 112 N. W. 453.

307-23 Perovich *v.* U. S., 205 U. S. 86; Daniels *v.* S., 57 Fla. 1, 48 S. 747 (inadmissible unless clearly shown to have been voluntary and accused informed of his rights); Butler *v.* S., 64 Tex. Cr. 482, 142 S. W. 904; Bronson *v.* S., 59 Tex. Cr. 17, 127 S. W. 175 (no warning given). *Contra*, if inculpatory statements testified to by accused on trial. S. *v.* DeHart, 38 Mont. 211, 99 P. 438; Nunn *v.* S., 60 Tex. Cr. 86, 131 S. W. 320.

See Wilburn *v.* S. (Ga.), 81 S. E. 444; McCleary *v.* S. (Md.), 89 A. 1100.

Confession not inadmissible because made while a chain was locked around defendant's neck, the other end being

fastened to a pole and officer to whom confession made was only person with accused, and had a pistol in his pocket. McNish *v.* S., 47 Fla. 69, 36 S. 176. But *comp.* S. *v.* Westcott, 130 Ia. 1, 104 N. W. 341, and see S. *v.* Gorham, 67 Vt. 365, 31 A. 845.

Accused must be conscious of his arrest; officer's intent does not affect admissibility of confession. Elsworth *v.* S., 51 Tex. Cr. 38, 111 S. W. 963.

Whatever be intention of officer, if no arrest has been made, and defendant was not apprised of intention to arrest at time when he made statements, they are admissible. Hickman *v.* S. (Tex. Cr.), 145 S. W. 914.

Under Texas Statute if confessor delivers possession of stolen goods to officer in whose custody he is confession may be proved though warning not given. Martin *v.* S., 57 Tex. Cr. 595, 124 S. W. 681.

307-24 Owsley *v.* C., 31 Ky. L. R. 5, 101 S. W. 366; S. *v.* Thomas, 250 Mo. 189, 157 S. W. 330. See Lindsey *v.* S., 66 Fla. 341, 63 S. 832, 50 L. R. A. (N. S.) 1077, 1085n.

A confession signed by defendant after being written by another and read to defendant is admissible. Kelly *v.* S., 61 Tex. Cr. 663, 136 S. W. 58.

Prosecuting attorney may take confession by question and answer. S. *v.* Besancon, 128 La. 85, 54 S. 480.

308-25 Rex. *v.* Best [1909] 1 K. B. 692. *dsap.* Reg. *v.* Gavin, 15 Cox C. C. 656; Rex *v.* Rossi, 17 Can. Crim. Cas. 182; Shaw *v.* U. S., 180 Fed. 348, 103 C. C. A. 494; Lester *v.* S., 170 Ala 36, 54 S. 175; Reagan *v.* P., 49 Colo. 316, 112 P. 785; S. *v.* Penney, 113 Ia. 691, 84 N. W. 509; S. *v.* Novak, 109 Ia. 717, 79 N. W. 465; S. *v.* Besancon, 128 La. 85, 54 S. 480; S. *v.* Canton, 131 La. 255, 59 S. 202; Green *v.* S., 96 Md. 384, 54 A. 104; S. *v.* Banusik (N. J. L), 64 A. 994; Ty. *v.* Emilio, 14 N. M. 147, 89 P. 239; P. *v.* White, 176 N. Y. 331, 349, 68 N. E. 630; S. *v.* Bohanon, 142 N. C. 695, 55 S. E. 797; Berry *v.* S., 58 Tex. Cr. 291, 125 S. W. 580; Oliver *v.* S. (Tex. Cr.), 159 S. W. 235; Tarasinski *v.* S., 146 Wis. 598, 131 N. W. 889.

308-26 Brewer *v.* S., 72 Ark. 145, 78 S. W. 773; P. *v.* Heivner, 13 Cal. App. 768, 114 P. 411; Reagan *v.* P., 49 Colo. 316, 112 P. 785; Hilburn *v.* S., 121 Ga. 344, 49 S. E. 318; S. *v.* Westcott, 130 Ia. 1, 104 N. W. 341; S. *v.* Wooley, 215 Mo. 620, 115 S. W. 417; S. *v.* Johnny, 29 Nev. 203, 87 P. 3; P. *v.* Randazzio, 194 N. Y. 147, 87 N. E. 112; S. *v.* Allison, 24 S. D. 622, 124 N. W. 747; Hintz *v.* S., 125 Wis. 405, 104 N. W. 110; Roszczyniali *v.* S., 125 Wis. 414, 104 N. W. 113.

Persistent questions producing mental anguish, confession inadmissible. S. *v.* Thomas, 250 Mo. 189, 157 S. W. 330.

Confronting accused with his accomplice and reading latter's confession to him, not cause for excluding former's confession then and there made. P. *v.* Siemsen, 153 Cal. 387, 95 P. 863.

309-27 Peck *v.* S., 147 Ala. 100, 41 S. 759; S. *v.* Turner, 122 La. 371, 47 S. 685.

309-28 S. *v.* Turner, 122 La. 371, 47 S. 685; Birkenfeld *v.* S., 104 Md. 253, 65 A. 1; Green *v.* S., 96 Md. 384, 54 A. 104; S. *v.* Thomas, 250 Mo. 189, 157 S. W. 330; S. *v.* Blodgett, 50 Or. 329, 92 P. 820; S. *v.* Landers, 21 S. D. 606, 114 N. W. 717.

309-29 Sorenson *v.* U. S., 143 Fed. 820, 74 C. C. A. 468; P. *v.* Silvers, 6 Cal. App. 69, 92 P. 506; McNish *v.* S., 45 Fla. 83, 34 S. 219; De Vore *v.* S., 7 Ga. App. 197, 66 S. E. 484; S. *v.* Wood, 122 La. 1014, 48 S. 438; Johnson *v.* S. (Miss.), 65 S. 218; Mackmasters *v.* S., 82 Miss. 459, 34 S. 156; S. *v.* Dolan (N. J.), 90 A. 1034; S. *v.* Nagle, 25 R. I. 105, 54 A. 1063; Jackson *v.* C. (Va.), 81 S. E. 192.

See Lindsey *v.* S., 66 Fla. 341, 63 S. 832, 50 L. R. A. (N. S.) 1077, 1082n, 1086n.

Contra **under statute if threats not shown.** S. *v.* Barker, 56 Wash. 510, 106 P. 133.

The hope or fear may be induced by one person and resulting confession be made to another, in absence of former, without rendering it admissible, though person to whom confession made had no knowledge of acts or words of the other. Griner *v.* S., 121 Ga. 614, 49 S. E. 700.

310-30 King *v.* Paakaula, 3 Haw. 30; S. *v.* Jones, 171 Mo. 401, 71 S. W. 680; P. *v.* Scott, 195 N. Y. 224, 88 N. E. 35 (admissible unless made upon stipulation of district attorney there shall not be a prosecution). *Contra*, De Vore *v.* S., 7 Ga. App. 197, 66 S. E. 484.

State not responsible for remark made by bystander. Roszczyniala *v.* S., 125 Wis. 414, 104 N. W. 113.

311-31 P. *v.* Luis, 158 Cal. 185, 110 P. 580; P. *v.* Silvers, 6 Cal. App. 69, 92 P. 506; King *v.* Kamakana, 3 Haw. 313. See S. *v.* Coats, 174 Mo. 396, 74 S. W. 864; S. *v.* Perry, 74 S. C. 551, 54 S. E. 764.

Inducements made by third person in officer's presence ground for excluding confession. S. *v.* Sherman, 35 Mont. 512, 90 P. 981. And so by father of minor, no officer being present. S. *v.* Force, 69 Neb. 162, 95 N. W. 42. Inducements by police judge, not acted on, immaterial. Geiger *v.* S., 2 O. C C. (N. S.) 174, *rev.* on another question, 70 O. St. 400, 71 N. E. 721.

311-32 S. *v.* Brooks, 220 Mo. 74, 119 S. W. 353.

312-33 Confession voluntarily made one month after remarks inducing hope, competent. S. *v.* Vey, 21 S. D. 612, 114 N. W. 719.

312-35 White *v.* S., 70 Ark. 24, 65 S. W. 937; S. *v.* Hunter, 181 Mo. 316, 80 S. W. 955.

312-36 Sims *v.* S., 59 Fla. 38, 52 S. 198.

312-37 P. *v.* White, 176 N. Y. 331, 349, 68 N. E. 630.

Promise to protect from mob violence does not render confession inadmissible. Brewer *v.* S., 72 Ark. 145, 78 S. W. 773.

313-38 P. *v.* Luis, 158 Cal. 185, 110 P. 580; S. *v.* Brown, 2 Boyce (Del.) 405, 80 A. 146; Milner *v.* S., 124 Ga. 86, 52 S. E. 302; S. *v.* Williams, 129 La. 215; 55 S. 769; S. *v.* Johnny, 29 Nev. 203, 87 P. 3; Grimsinger *v.* S., 44 Tex. Cr. 1, 18, 69 S. W. 583.

313-39 Edmonson *v.* S., 72 Ark. 585, 82 S. W. 203; S. *v.* Willing, 129 Ia. 72, 105 N. W. 355; Johnson *v.* S. (Miss.), 65 S. 218; Maxwell *v.* S. (Miss.), 40 S. 615; S. *v.* Dolan (N. J.), 90 A. 1034; P. *v.* Garfalo, 207 N. Y. 141, 100 N. E. 698; Jackson *v.* S., 50 Tex. Cr. 302, 97 S. W. 312. See Lindsey *v.* S., 66 Fla. 341, 63 S. 832, 50 L. R. A. (N. S.) 1077, 1087n.

Refused because obtained after use of epithets by officers and after a night of solitary confinement. P. *v.* Loper, 159 Cal. 6, 112 P. 720.

314-41 Mathews *v.* S., 102 Miss. 549, 59 S. 842; U. S. *v.* Lozada, 4 Phil. Isl. 226.

Immaterial accused was in a calaboose surrounded by a crowd of white men, he being colored. Hilburn *v.* S., 121 Ga. 344, 49 S. E. 318.

314-42 Stevens *v.* S., 138 Ala. 71, 35 S. 122.

314-43 Violence made necessary by accused's acts does not affect competency of confession. Ty. *v.* Emilio, 14 N. M. 147, 89 P. 239.

314-44 Green *v.* C., 26 Ky. L. R. 1221, 83 S. W. 638; U. S. *v.* Baluyut, 1 Phil. Isl. 451 (infliction of violence on co-defendant).

Previous punishment may make confession inadmissible if it is probable apprehension of further punishment entertained. Hawkins *v.* S., 6 Ga. App. 109, 64 S. E. 289.

314-45 P. *v.* Lopet, 159 Cal. 6, 114 P. 720; Green *v.* C., 26 Ky. L. R. 1221, 83 S. W. 638.

315-47 See Hooker *v.* S., 75 Ark. 67, 86 S. W. 846.

Fear of mob violence is immaterial unless it existed prior to or contemporaneously with statement. Smith *v.* S., 142 Ala. 14, 39 S. 329.

315-48 McNish *v.* S., 45 Fla. 83, 34 S. 219.

Fear not shown by evidence jail was surrounded if accused did not hear conversation of those in crowd. Bettis *v.* S., 160 Ala. 3, 49 S. 781.

315-49 See Lindsey *v.* S., 66 Fla. 341, 63 S. 832, 50 L. R. A. (N. S.) 1077, 1088 (note).

315-50 P. *v.* Scott, 195 N. Y. 224, 88 N. E. 35, statute.

315-51 Rex *v.* White, 18 Ont. L. R. (Can.) 640; Rex *v.* Ryan, 9 Ont. L. R. (Can.) 137; P. *v.* Warren, 12 Cal. App 730, 108 P. 725; S. *v.* Westcott, 130 Ia. 1, 104 N. W. 341; S. *v.* Wilson, 172 Mo. 420, 72 S. W. 696; P. *v.* White, 176 N. Y. 331, 68 N. E. 630; S. *v.* Landers, 21 S. D. 606, 114 N. W. 717; Spencer *v.* S., 48 Tex. Cr. 580, 90 S. W. 638; Cortez *v.* S., 47 Tex. Cr. 10, 83 S. W. 812. But see Bram *v.* U. S., 168 U. S. 532.

316-52 See Tines *v.* C., 25 Ky. L. R. 1233, 77 S. W. 363; Geiger *v.* S., 70 O. St. 400, 71 N. E. 721.

In Texas a distinction is made where fraud practiced on accused has reference to crime itself. Cook *v.* S., 32 Tex. Cr. 27, 22 S. W. 23, 40 Am. St. 758.

316-54 Connors *v.* S., 95 Wis. 77, 69 N. W. 981; Roszczyniala *v.* S., 125 Wis. 414, 104 N. W. 113.

"**The circumstances under which it was procured** rendered it clearly competent under the statute. Code Cr. Proc. §395. In People *v.* Rogers, 192 N. Y. 3[illegible]

85 N. E. 135, 15 Ann. Cas. 177, this court sanctioned the admission of a confession which was obtained as the result of far more urgency by the captors of the prisoner than was exercised or attempted in the present case." P. *v.* Guizio, 206 N. Y. 67, 99 N. E. 190.

316-55 See Lindsey *v.* S., 66 Fla. 341, 63 S. 832, 50 L. R. A. (N. S.) 1077, 1088n; Jackson *v.* C. (Va.), 81 S. E. 192.

Persons in authority defined. Jackson *v.* C. (Va.), 81 S. E. 192.

318-56 Green *v.* S., 96 Md. 384, 54 A. 104; S. *v.* Jones, 171 Mo. 401, 71 S. W. 680; S. *v.* Banusik (N. J. L.), 64 A. 994; McDonald *v.* S., 55 Tex. Cr. 208, 116 S. W. 47; Henderson *v.* S. (Tex. Cr.), 95 S. W. 131.

Immaterial defendant not represented by counsel nor informed of right to remain silent. McCleary *v.* S. (Md.), 89 A. 1100; S. *v.* Washing, 36 Wash. 485, 78 P. 1019.

318-58 Jones *v.* S., 137 Ala. 12, 34 S. 681; Thayer *v.* S., 138 Ala. 39, 35 S. 406; Stevens *v.* S., 138 Ala. 71, 35 S. 122; Smith *v.* S., 142 Ala. 14, 39 S. 329; Richardson *v.* S., 145 Ala. 46, 41 S. 82; P. *v.* Siemsen, 153 Cal. 387, 95 P. 863; P. *v.* Walker, 140 Cal. 153, 73 P. 831; Thomas *v.* S., 58 Fla. 122, 51 S. 410; Tv. *v.* Matsumoto, 16 Haw. 267; Birkenfeld *v.* S., 104 Md. 253, 65 A. 1; C. *v.* Devaney, 182 Mass. 33, 64 N. E. 402; C. *v.* Corcoran, 182 Mass. 465, 65 N. E. 821; Dunmore *v.* S., 86 Miss. 788, 39 S. 69; S. *v.* Banusik (N. J. L.), 64 A. 994; Gilmore *v.* S., 3 Okla. Cr. 434, 106 P. 801; S. *v.* Humphrey, 63 Or. 540, 128 P. 824; S. *v.* Nagle, 25 R. I. 105, 54 A. 1063; S. *v.* Henderson, 74 S. C. 477, 55 S. E. 117; S. *v.* Vey, 21 S. D. 612, 114 N. W. 719; S. *v.* Blay, 77 Vt. 56, 58 A. 794.

See Rodriguez *v.* S., 58 Tex. Cr. 397, 126 S. W. 264 (statement to officer not in writing as required); Rex *v.* Godinho, 76 J. P. (Eng.) 16, 15 S. J. 807, 28 T. L. R. 3.

318-59 S. *v.* Wood, 122 La. 1014, 48 S. 438; Mathews *v.* S., 102 Miss. 549, 59 S. 842; S. *v.* Humphrey, 63 Or. 540, 128 P. 824; S. *v.* Henderson, 74 S. C. 477, 55 S. E. 117. Rule applies to post-office inspector in case of prisoners accused of violating postal laws. Sorensen *v.* U. S., 143 Fed. 820, 74 C. C. A. 468.

See S. *v.* Dye, 36 Nev. 143, 133 P. 935.

319-60 S. *v.* Alexander, 109 La. 557, 33 S. 600; S. *v.* Banusik (N. J. L.), 64 A. 994.

319-61 McNish *v.* S., 45 Fla. 83, 34 S. 219.

319-62 P. *v.* Silvers, 6 Cal. App. 69, 92 P. 506; Knight *v.* S., 55 Tex. Cr. 243, 116 S. W. 56.

319-63 S. *v.* Stebbins, 188 Mo. 387, 87 S. W. 460. See S. *v.* Landers, 21 S. D. 606, 114 N. W. 717.

Confession may be proved if attorney informed accused he cannot grant immunity. Howard *v.* C., 28 Ky. L. R. 737, 90 S. W. 578.

319-64 A slight assault made by a detective on accused two days prior to confession, not cause for excluding it. Ty. *v.* Matsumoto, 16 Haw. 267.

319-65 See C. *v.* Snyder, 224 Pa. 526, 73 A. 910.

320-67 Johnson *v.* S., 1 Ga. App. 129, 57 S. E. 934.

320-68 P. *v.* Piner, 11 Cal. App. 542, 105 P. 780.

320-69 See Owsley *v.* C., 31 Ky. L. R. 5, 101 S. W. 366.

321-72 Peck *v.* S., 147 Ala. 100, 41 S. 759; Owsley *v.* C., 31 Ky. L. R. 5, 101 S. W. 366; Watts *v.* S., 99 Md. 30, 57 A. 542; S. *v.* Church, 199 Mo. 605, 632, 98 S. W. 16. See Lindsey *v.* S., 66 Fla. 341, 63 S. 832, 50 L. R. A. (N. S.) 1077, 1082n; Green *v.* S., 96 Md. 384, 54 A. 104.

Mental condition immaterial as to admissibility. McDonald *v.* S., 55 Tex. Cr. 208, 116 S. W. 47.

322-73 See Birkenfeld *v.* S., 104 Md. 253, 65 A. 1.

322-74 Flowers *v.* S., 168 Ala. 147, 53 S. 276; Jackson *v.* S., 167 Ala. 77, 52 S. 730; Holland *v.* S., 162 Ala. 5, 50 S. 215; Jones *v.* S., 137 Ala. 12, 34 S. 681; Parrish *v.* S., 139 Ala. 16, 41, 36 S. 1012; Talbert *v.* S., 140 Ala. 96, 37 S. 78; Plant *v.* S., 140 Ala. 52, 37 S. 159; Davis *v.* S., 141 Ala. 62, 37 S. 676; Braham *v.* S., 143 Ala. 28, 38 S. 919; Reed *v.* S. (Ark.), 145 S. W. 206; Ince *v.* S., 77 Ark. 426, 93 S. W. 65; P. *v.* Weber, 149 Cal. 325, 86 P. 671; P. *v.* Fallon, 149 Cal. 287, 86 P. 698; P. *v.* Smith, 13 Cal. App. 627, 110 P. 333; P. *v.* Rowland, 12 Cal. App. 6, 106 P. 428; Daniels *v.* S., 57 Fla. 1, 48 S. 747; Goolsby *v.* S., 133 Ga. 427, 66 S. E. 159; Ranson *v.* S., 2 Ga. App. 826, 59 S. E. 101; S. *v.* Adams, 85 Kan. 435, 116 P. 608; S. *v.* Campbell, 73 Kan. 688, 85 P. 784; Locke *v.* C., 144 Ky. 232, 137 S. W. 1043; Richburger

v. S., 90 Miss. 806, 44 S. 772; S. *v.* Wilkins, 221 Mo. 444, 120 S. W. 22 (no foundation required); S. *v.* Keeland, 39 Mont. 506, 104 P. 513; S. *v.* Lu Sing, 34 Mont. 31, 85 P. 521; Fouse *v.* S., 83 Neb. 258, 119 N. W. 478; S. *v.* Schumacher, 21 N. D. 591, 132 N. W. 143; S. *v.* Anderson, 53 Or. 479, 101 P. 198; S. *v.* Nagle, 25 R. I. 165, 54 A. 1063; S. *v.* Angel, 93 S. C. 149, 76 S. E. 190; S. *v.* Vey, 21 S. D. 612, 114 N. W. 719; Hickman *v.* S. (Tex. Cr.), 145 S. W. 914; Germany *v.* S., 62 Tex. Cr. 276, 137 S. W. 130; Lane *v.* S., 59 Tex. Cr. 595, 129 S. W. 353; Keeton *v.* S., 59 Tex. Cr. 316, 128 S. W. 404; Reinhard *v.* S., 52 Tex. Cr. 59, 106 S. W 128; S. *v.* Blay, 77 Vt. 56, 58 A. 794; Lillystrom *v.* S., 146 Wis. 525, 132 N. W. 132; Anderson *v.* S., 133 Wis. 601, 114 N. W. 112; Roszczyniala *v.* S., 125 Wis. 414, 104 N. W. 113.

But compare Tillman *v.* S. (Ark.), 166 S. W. 582.

Not necessary to lay predicate.—Webb *v.* S. (Ala. App.), 65 S. 845. But see Wright *v.* S., 3 Ala. App. 24, 58 S. 68. "**What defendant said** about the killing, and his attitude and conduct with respect thereto, not being in the nature of direct confessions of guilt, however incriminatory they might be, were admissible against him without preliminary proof of their voluntary character." Watts *v.* S., 177 Ala. 24, 59 S. 270.

Must be voluntary in largest sense. Johnson *v.* S., 1 Ga. App. 129, 57 S. E. 934; Mill *v.* S., 3 Ga. App. 414, 60 S. E. 4.

Statements by accused to wife, overheard by third person, may be proved though she is incompetent as a witness. Ford *v.* S., 124 Ga. 793, 53 S. E. 335.

May be made before accusation.—Purdy *v.* S., 50 Tex. Cr. 318, 97 S. W. 480; S. *v.* Royce, 38 Wash. 111, 80 P. 268.

323-75 Rex *v.* Martin, 9 Ont. L. R. (Can.) 218; Piano *v.* S., 161 Ala. 88, 49 S. 803; Barddell *v.* S., 144 Ala. 54, 39 S. 975; Carr *v.* S., 81 Ark. 589, 99 S. W. 831; McCrory *v.* S., 11 Ga. App. 787, 76 S. E. 163; Wright *v.* C., 155 Ky. 750, 160 S. W. 476; S. *v.* Byrd, 41 Mont. 585, 111 P. 407.

323-76 S. *v.* Moore, 36 Utah 521, 105 P. 293, cit. the text.

324-78 Lismore *v.* S., 94 Ark. 207, 126 S. W. 853; P. *v.* Williams, 152 Mich. 518, 124 N. W. 555; S. *v.* Wenzel, 72 N. H. 396, 56 A. 918; Knapp *v.* S., 4 O. C. C. (N. S.) 184; S. *v.* Lawrence, 74 O. St. 38, 77 N. E. 266, Robinson *v.* S., 55 Tex. Cr. 42, 114 S. W. 811; Barnett *v.* S., 50 Tex. Cr. 538, 99 S. W. 556.

Letters not to be excluded entirely because they at the same time contained admissions of other crimes. S. *v.* Thuna, 59 Wash. 689, 109 P. 331.

Confession including crimes other than that involved is admissible as a whole if jury directed to disregard all that relates to any other crime. Gore *v.* P., 162 Ill. 259, 44 N. E. 500; Zuckerman *v.* P., 213 Ill. 114, 72 N. E. 741; S. *v.* Knapp, 70 O. St. 380, 71 N. E. 705. And so if independent crime part of same scheme. S. *v.* Jones, 171 Mo. 401, 71 S. W. 680; Campos *v.* S., 50 Tex. Cr. 289, 97 S. W. 100. In some cases no restriction seems to be imposed. See S. *v.* Poole, 42 Wash. 192, 84 P. 727; S. *v.* Dalton, 43 Wash. 278, 86 P. 590. Confession of guilt of misdemeanor, not provable to show a subsequent similar act committed with like intent, law having changed offense to felony and added to penalty. S. *v.* Wenzel, 72 N. H. 396, 56 A. 918. Confession of carnal intercourse with consent of prosecutrix, made when indictment for incest and rape pending, is admissible after dismissal of court for incest. Pilgrim *v.* S., 59 Tex. Cr. 231, 128 S. W. 128.

324-80 McGhee *v.* S., 171 Ala. 19, 55 S. 159; P. *v.* Weber, 149 Cal. 325, 86 P. 671; P. *v.* Jan John, 144 Cal. 284, 77 P. 950; P. *v.* Hutchings, 8 Cal. App. 550, 97 P. 325; S. *v.* Keeland, 39 Mont. 506, 104 P. 513. See Calloway *v.* S., 55 Tex. Cr. 262, 116 S. W. 575. Contra, if made before magistrate when under arrest. Daniels *v.* S., 57 Fla. 1, 48 S. 747. Statute provides for warning. Pierce *v.* S., 54 Tex. Cr. 424, 113 S. W. 148.

Comp. Wasserleben *v.* S. (Ala.), 63 S. 520.

324-81 Powers *v.* S., 138 Ga. 624, 75 S. E. 651; Thurman *v.* S. (Ga. App.), 81 S. E. 796; Turpin *v.* C., 140 Ky. 294, 130 S. W. 1086; S. *v.* Hogan, 117 La. 863, 42 S. 352; C. *v.* Devaney, 182 Mass. 33, 64 N. E. 402; P. *v.* Mulvaney, 171 Mich. 272, 137 N. W. 155; Serop *v.* S. (Tex. Cr.), 154 S. W. 557; S. *v.* Manley, 82 Vt. 556, 74 A. 231.

See McClain *v.* S. (Ala.), 62 S. 241.

"Like flight, the feigning of a state of mind which in itself, if genuine, would constitute a defense to the charge or, at least, a bar to the trial, is indicative of a disposition to evade justice, and tends to prove guilt. State v. Pritchett, 106 N. C., loc. cit. 670, 671, 11 S. E. 357." S. v. Stevens, 242 Mo. 439, 147 S. W. 97.

The district attorney may comment on the fact that, when defendant was arrested, the prosecuting witness had charged him with the offense, and he did not deny it. Adams v. S., 64 Tex. Cr. 501, 142 S. W. 918.

325-82 S. v. Adams, 6 Penne. (Del.) 178, 65 A. 510; P. v. Flannelly, 128 Cal 83, 60 P. 670; S. v. Phillips, 118 Ia 660, 92 N. W. 876; S. v. Fuller, 130 La. 249, 57 S. 906; S. v. Spaugh, 200 Mo. 571, 599, 98 S. W. 55; C. v. Biddle, 200 Pa. 647, 50 A. 261; Perry v. S. (Tex. Cr.), 155 S. W. 263; S. v. Shaw, 73 Vt. 149, 50 A. 863; S. v. Deatherage, 35 Wash. 326, 77 P. 504.

But see Caples v. S. (Tex. Cr.), 167 S. W. 730.

Exculpatory evidence is admissible in rebuttal. And refusal to admit it is not cured by the fact that the defendants themselves afterwards testified as to the circumstances and occurrences which preceded their flight, if the ruling is not modified or reversed. C. v. Goldberg, 212 Mass. 88, 98 N. E. 692.

325-83 Jones v. S., 174 Ala. 85, 57 S. 36; Bines v. S., 118 Ga. 320, 45 S. E. 376; P. v. Harris, 209 N. Y. 70, 102 N. E. 546; Delaney v. S., 48 Tex. Cr. 594, 90 S. W. 642.

325-84 C. v. Snyder, 224 Pa. 526, 73 A. 910; Calloway v. S., 55 Tex. Cr. 262, 116 S. W. 575. See Lindsey v. S., 66 Fla. 341, 63 S. 832, 50 L. R. A. (N. S.) 1077, 1083n.

326-85 *Contra.*—Calloway v. S., 55 Tex. Cr. 262, 116 S. W. 575.

Refusal to flee inadmissible unless state first proves flight or escape. Millner v. S. (Tex. Cr.), 162 S. W. 348.

326-86 Greenwood v. S., 107 Ark. 568, 156 S. W. 427; Reagan v. P., 49 Colo. 316, 112 P. 785; Byram v. P., 49 Colo. 533, 113 P. 528; S. v. Besancon, 128 La. 85, 54 S. 480; S. v. Howard, 127 La. 435, 53 S. 677; S. v. Hogan, 117 La. 863, 42 S. 352; S. v. Rugero, 117 La. 1040, 42 S. 495; S. v. Kwiatkowski, 83 N. J. L. 650, 85 A. 209; S. v. MacQueen, 69 N. J. L. 522, 55 A. 1006; S. v. Hernia, 68 N. J. L. 299, 73 A. 85; S. v. Armijo (N. M.), 135 P. 555.

Advice by counsel as to rights of accused need not be shown. P. v. Hill, 198 N. Y. 64, 91 N. E. 272.

326-88 Collins v. S., 57 Tex. Cr. 410, 123 S. W. 582; Alanis v. S. (Tex. Cr.), 81 S. W. 709; Binkley v. S., 51 Tex. Cr. 54, 100 S. W. 780.

Written confession must disclose warning given. Young v. S., 54 Tex. Cr. 417, 113 S. W. 276. See supra, 305-20, for rule under Texas statute.

327-90 McNish v. S., 45 Fla. 83, 34 S. 219; Henderson v. S. (Tex. Cr.), 95 S. W. 131.

327-91 Howell v. S., 66 Fla. 210, 63 S. 421; Curry v. S., 50 Tex. Cr. 158, 94 S. W. 1058; Jones v. S., 52 Tex. Cr 206, 106 S. W. 126; Buckner v. S., 52 Tex. Cr. 271, 106 S. W. 363.

Statute prohibits proof of words and acts of accused, if he has not been warned. Lasister v. S., 49 Tex. Cr 532, 94 S. W. 233.

Caution not necessary if confession made to officer before arrest. Brisby v. S. (Tex. Cr.), 90 S. W. 34. Though officer had search warrant. Gibson v. S., 47 Tex. Cr. 489, 83 S. W. 1119. And so if made as part of act of surrender, Gregory v. S., 50 Tex. Cr. 73, 94 S. W. 1041.

Confession and warning need not be simultaneous if former made under circumstances showing warning was in mind, though it was made to another person than one who gave caution. Stephens v. S., 49 Tex. Cr. 489, 93 S. W. 545. Rule same when made to officer who gave warning, only six or seven hours intervening. Johnson v. S., 47 Tex. Cr. 523, 84 S. W. 824. But intervention of week makes caution too remote, confession being made to another than person who gave warning. Barth v. S., 39 Tex. Cr. 381, 46 S. W. 228, 73 Am. St. 935; McDaniel v. S., 46 Tex. Cr. 560, 81 S. W. 301; Binkley v. S., 51 Tex. Cr. 54, 100 S. W. 780.

Statement to accused he would probably die soon does not avoid effect of caution. Jackson v. S., 49 Tex. Cr. 215, 91 S. W. 788.

327-92 Kennon v. S., 46 Tex. Cr. 359, 82 S. W. 518. *Contra,* Ayers v. S., 62 Tex. Cr. 428, 137 S. W. 1146.

327-93 C. v. Snyder, 224 Pa. 526, 73 A. 910; Delaney v. S., 48 Tex. Cr. 594,

90 S. W. 642; Herndon *v.* S., 50 Tex. Cr. 552, 99 S. W. 558; Salinas *v.* S. (Tex. Cr.), 102 S. W. 116.

It is insufficient merely to say to accused any statement he should make might be used for or against him. Adams *v.* S., 48 Tex. Cr. 90, 86 S. W. 334.

Confession after conviction may be proved on new trial though accused not warned after conviction, time between warning and confession having been brief. Yancey *v.* S., 45 Tex. Cr. 366, 76 S. W. 571.

Confession not public document and open to inspection by accused's counsel prior to trial. Goode *v.* S., 57 Tex. Cr. 220, 123 S. W. 597.

328-94 Knuckles *v.* S., 55 Tex. Cr. 6, 114 S. W. 825, compliance with statute requiring statement of offense to be made in confession and that warning given may be shown by written confession.

Written confession must conform to statute unless corroborated by facts stated therein and found to be true by subsequent events, such as finding secreted or stolen property. Boyman *v.* S., 59 Tex. Cr. 23, 126 S. W. 1142. Substantial compliance with statute, sufficient. Pilgrim *v.* S., 59 Tex. Cr. 231, 128 S. W. 128.

328-95 Sorenson *v.* U. S., 143 Fed. 820, 74 C. C. A. 468.

Verified confession, voluntarily made before proceedings begun, is not a deposition and is not affected by provision in constitution that accused shall not be compelled to testify against himself. P. *v.* Owen, 154 Mich. 471, 118 N. W. 590.

329-2 Inconsistencies in New York cases indicated in P. *v.* Owen, 154 Mich. 571, 118 N. W. 590.

330-3 King *v.* Kamakana, 3 Haw. 313; Zuckerman *v.* P., 213 Ill. 114, 72 N. E. 741; S. *v.* Michel, 111 La. 434, 35 S. 629; P. *v.* Maxfield, 146 Mich. 103, 108 N. W. 1087; S. *v.* Brooks, 220 Mo. 74, 119 S. W. 353; S. *v.* Hernia, 68 N. J. L. 299, 53 A. 85; P. *v.* Brasch, 193 N. Y. 46, 85 N. E. 809; P. *v.* White, 176 N. Y. 331, 68 N. E. 630; S. *v.* Spanos, 66 Or. 118, 134 P. 6; S. *v.* Middleton, 69 S. C. 72, 48 S. E. 35.

Proof of personal participation in crime unnecessary as preliminary to admission of confession. Daughtry *v.* S., 65 Fla. 415, 62 S. 345.

Confessions may be proved without preliminary testimony if circumstances show they were prima facie voluntary. Bush *v.* S., 136 Ala. 85, 33 S. 878; Heningsburg *v.* S., 153 Ala. 13, 45 S. 246. Preliminary examination may be denied if counsel does not claim he can show incompetency of testimony. P. *v.* Brasch, 193 N. Y. 46, 85 N. E. 809.

Proper objection to admission of involuntary confession must be made. P. *v.* Silvers, 6 Cal. App. 69, 92 P. 506; P. *v.* Farmer, 194 N. Y. 251, 87 N. E. 457 (confession proved without objection).

Proof officer held out no inducements to make confession permits reception of evidence of it, though there was no testimony concerning conduct of third person present. Richardson *v.* S., 145 Ala. 46, 41 S. 82.

331-4 Harrold *v.* S., 169 Fed. 47, 94 C. C. A. 415; Macon *v.* S. (Ala.), 60 S. 312; Saulsberry *v.* S., 178 Ala. 16, 59 S. 476; Barr *v.* S., 7 Ala. App. 96, 61 S. 40; Turner *v.* S., 4 Ala. App. 100, 58 S. 116; Plant *v.* S., 140 Ala. 52, 37 S. 159; Smith *v.* S., 142 Ala. 14, 38 S. 329; S. *v.* Stallings, 142 Ala. 112, 38 S. 261; Smith *v.* S., 74 Ark. 397, 85 S. W. 1123; McWhorter *v.* S., 118 Ga. 55, 44 S. E. 873; Hawkins *v.* S., 8 Ga. App. 705, 70 S. E. 53; S. *v.* Stebbins, 188 Mo. 387, 87 S. W. 460; P. *v.* Brasch, 193 N. Y. 46, 85 N. E. 809; P. *v.* Rogers, 192 N. Y. 331, 85 N. E. 135; U. S *v.* Pascual, 2 Phil. Isl. 457.

Proof held sufficient.—P. *v.* Benjamin, 158 Cal. 158, 110 P. 302; S. *v.* Canton, 131 La. 255, 59 S. 202.

Presumption that confession is involuntary may be overcome by circumstances indicating that it was voluntary. Green *v.* S., 168 Ala. 90, 53 S. 286.

Proof may be wholly circumstantial. Bush *v.* S., 136 Ala. 85, 33 S. 878.

"The circumstances surrounding the parties and the conversation itself show that all of the statements made by the defendant in that conversation were freely and voluntarily made." Williams *v.* S., 177 Ala. 34, 58 S. 921.

Jury need not be excluded during preliminary inquiry. S. *v.* Sherman, 35 Mont. 512, 90 P. 981; P. *v.* Brasch, 193 N. Y. 46, 85 N. E. 809; P. *v.* Randazzio, 194 N. Y. 147, 87 N. E. 112 (should hear testimony); Hintz *v.* S., 125 Wis. 405, 104 N. W. 110. *Contra,* S. *v.* Vey, 21 S. D. 612, 114 N. W. 719.

Conclusively presumed on habeas corpus proceedings admissibility of confession shown. Rex *v.* Graf, 19 Ont. L. R. (Can.) 238.

Court need not hear proof as to coercion, etc. Wilburn *v.* S. (Ga.), 81 S. E. 444; Lindsay *v.* S., 138 Ga. 818, 76 S. E. 369.

If reasonable doubt as to its voluntariness, should be rejected. Johnson *v.* S. (Miss.), 65 S. 218.

Inculpatory statements.—"The admissibility in evidence of inculpatory statements, and criminative evidence is governed by the same rules and determinable under the same principles as confessions proper." Wright *v.* S., 3 Ala. App. 24, 58 S. 68. But see Webb *v.* S. (Ala. App.), 65 S. 845.

331-5 S. *v.* Bennett, 143 Ia. 214, 121 N. W. 1021; P. *v.* Giro, 197 N. Y. 152, 90 N. E. 432; S. *v.* Blodgett, 50 Or. 329, 92 P. 820; Butler *v.* S., 64 Tex. Cr. 482, 142 S. W. 901; Pinckard *v.* S. (Tex. Cr.), 138 S. W. 601; Fry *v.* S., 58 Tex. Cr. 169, 124 S. W. 920; Gregory *v.* S., 50 Tex. Cr. 73, 94 S. W. 1041; Watson *v.* S., 48 Tex. Cr. 323, 87 S. W. 1158; Cortez *v.* S., 47 Tex. Cr. 10, 83 S. W. 812.

District attorney not bound to give warning where confession repeated to him for purpose of having it stenographically written. P. *v.* Randazzio, 194 N. Y. 147, 87 N. E. 112.

331-6 Proof may be made by person who heard warning. Rex *v.* White, 18 Ont. L. R. (Can.) 640 (overheard by witness); Henderson *v.* S. (Tex.), 95 S. W. 131. *Contra*, Burton *v.* S., 62 Tex. Cr. 402, 137 S. W. 1145; Henzen *v.* S., 62 Tex. Cr. 336, 137 S. W. 1141.

331-7 Proof held insufficient. Sample *v.* S., 1 Ala. App. 89, 56 S. 30.

332-9 S. *v.* Campbell, 129 Ia. 154, 105 N. W. 395.

332-11 Martinez *v.* P., 55 Colo. 51, 132 P. 64.

332-12 Holt *v.* S., 91 Ark. 576, 121 S. W. 1072 (applying converse of rule); Andrews *v.* P., 33 Colo. 193, 79 P. 1031; S. *v.* Foster, 136 Ia. 527, 114 N. W. 36 (inducements in morning, confession in afternoon); Pearsall *v.* C., 29 Ky. L. R. 222, 92 S. W. 589; Green *v.* C., 26 Ky. L. R. 1221, 83 S. W. 638; Howard *v.* C., 28 Ky. L. R. 727, 90 S. W. 578; S. *v.* Rogers, 117 La. 1049, 42 S. 495; S. *v.* Force, 69 Neb. 162, 95 N. W. 42; S. *v.* Middleton, 69 S. C. 72, 48 S. E. 35; Hintz *v.* S., 125 Wis. 405, 104 N. W. 110.

Error in admitting confession may not be prejudicial if it appears later substantially same confession made voluntarily and without improper influence which led to making of original. Andrews *v.* P., 33 Colo. 193, 79 P. 1031; Whitney *v.* C., 24 Ky. L. R. 2524, 74 S. W. 257.

333-13 McNish *v.* S., 45 Fla. 83, 34 S. 219; S. *v.* Force, 69 Neb. 162, 95 N. W. 42.

333-14 Turner *v.* S. (Ark.), 158 S. W. 1072; Smith *v.* S., 74 Ark. 397, 87 S. W. 1123; S. *v.* Westcott, 130 Ia. 1, 104 N. W. 341; C. *v.* Phillips, 26 Ky. L. R. 543, 82 S. W. 286; S. *v.* Wood, 122 La. 1014, 48 S. 438; Reason *v.* S., 94 Miss. 290, 48 S. 820; Mackmasters *v.* S., 82 Miss. 459, 34 S. 156; Johnson *v.* S., 48 Tex. Cr. 423, 88 S. W. 223.

Whether subsequent confessions made under previous influences operating on the mind, is for jury. Milner *v.* S., 124 Ga. 86, 52 S. E. 302.

333-15 S. *v.* Westcott, 130 Ia. 1, 104 N. W. 341; Banks *v.* S., 93 Miss. 700, 47 S. 437; Durham *v.* S. (Miss.), 47 S. 545; Mackmasters *v.* S., 82 Miss. 459, 34 S. 156; S. *v.* Force, 69 Neb. 162, 95 N. W. 42. Time between confessions is material in determining whether later one was result of influence which led to former. S. *v.* Force, supra. If repeated on the trial several days later all doubt as to competency is removed. Whitney *v.* C., 24 Ky. L. R. 2524, 74 S. W. 257; S. *v.* Johnny, 29 Nev. 203, 87 P. 3.

334-16 Ware *v.* S., 139 Ga. 109, 76 S. E. 857; Reigel *v.* Ins. Co., 165 Ill. App. 448; Marks *v.* Box (Ind. App.), 103 N. E. 27; S. *v.* Mitchell, 130 Ia. 697, 107 N. W. 804; S. *v.* Briggs, 122 Minn. 493, 142 N. W. 823; Little *v.* S., 87 Miss. 512, 40 S. 165; S. *v.* Athanas, 150 Mo. App. 588, 131 S. W. 373; S. *v.* Hill, 63 Or. 451, 128 P. 441; Wright *v.* S. (Tex. Cr.), 163 S. W. 976; Millner *v.* S. (Tex. Cr.), 162 S. W. 348; Salmon *v.* S. (Tex. Cr.), 154 S. W. 1023; Whorton *v.* S. (Tex. Cr.), 152 S. W. 1082.

334-17 S. *v.* Briggs, 122 Minn. 493, 142 N. W. 823.

334-18 Parker *v.* Conture, 63 Vt. 449, 21 A. 1102.

Is sometimes admission and explainable. Yeska *v.* Swendrzynski, 133 Wis. 475, 113 N. W. 959.

334-19 Confession of co-conspirator, after conspiracy closed, not admissible against another who remained silent, and who was warned any statement he made might be used against him. Couch *v.* S., 58 Tex. Cr. 505, 126 S. W. 866.

334-20 Harshaw *v.* S., 94 Ark. 343, 127 S. W. 745; S. *v.* Hopkins, 13 Wash. 5, 42 P. 627; S. *v.* Poole, 42 Wash. 192, 84 P. 727.

Statement before grand jury.—Browning *v.* S., 64 Tex. Cr. 148, 142 S. W. 1.

336-23 Sworn statement obtained by county attorney under pretense of desiring to use it against others, incompetent. Tines *v.* C., 25 Ky. L. R. 1233, 77 S. W. 363.

336-24 Green *v.* S., 124 Ga. 343, 52 S. E. 431; Anderson *v.* S., 133 Wis. 601, 114 N. W. 112. See Tiner *v.* S. (Ark.), 161 S. W. 195.

Held involuntary.—S. *v.* Brown, 2 Boyce (Del.) 405, 80 A. 146.

337-25 Wilson *v.* S., 110 Ala. 1, 20 S. 415, 55 Am. St. 17; Jones *v.* S., 120 Ala. 303, 25 S. 204; S. *v.* Finch, 71 Kan. 793, 81 P. 494; P. *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

337-26 Adams *v.* S., 129 Ga. 248, 58 S. E. 822.

Testimony of persons who knew they were suspected, though not formally charged, given without warning and without being represented by counsel, is not competent against them. Tuttle *v.* P., 33 Colo. 243, 79 P. 1035. But see S. *v.* Legg, 59 W. Va. 315, 53 S. E. 545 (holding sworn statement of one not accused, made at illegal hearing, competent).

338-27 Perkins *v.* C. (Ky.), 124 S. W. 794.

338-30 Butler *v.* S., 64 Tex. Cr. 482, 142 S. W. 904.

338-31 S. *v.* Blay, 77 Vt. 56, 58 A. 794.

338-32 S. *v.* May, 62 W. Va. 129, 57 S. E. 366.

339-35 Testimony given before grand jury in obedience to process may be proved. S. *v.* Campbell, 73 Kan. 688, 85 P. 784. If made under advice of counsel and subsequently affirmed under oath (Wade *v.* S., 2 O. C. C. (N. S.) 189); and after warning. Grimsinger *v.* S., 44 Tex. Cr. 1, 18, 69 S. W. 583. Warning need not be specific. Smith *v.* S., 48 Tex. Cr. 509, 90 S. W. 37.

340-37 S. *v.* Longstreth, 19 N. D. 268, 121 N. W. 1114, cit. the text; Smith *v.* S., 74 Ark. 397, 85 S. W. 1123.

341-38 Tuttle *v.* P., 33 Colo. 243, 79 P. 1035. See Reagan *v.* P., 49 Colo. 316, 112 P 785; Maki *v.* S., 18 Wyo. 481, 112 P. 334, 33 L. R. A. (N. S.) 464.

341-40 Johnson *v.* S., 119 Ga. 257, 45 S. E. 960; S. *v.* Height, 117 Ia. 650, 91 N. W. 935; S. *v.* Gebbia, 121 La. 1083, 47 S. 32; S. *v.* Brinkley, 55 Or. 134, 104 P. 893, 105 P. 708, cit. the text.

Admitting proof of facts disclosed by incompetent confession is not forbidden by usual clause against compelling accused persons to be witnesses against themselves. S. *v.* Middleton, 69 S. C. 72, 48 S. E. 35.

Confessor not incompetent witness against associates, though confession made under improper circumstances. Rawlins *v.* S., 124 Ga. 31, 45, 52 S. E. 1.

342-41 S. *v.* Moran, 131 Ia. 645, 109 N. W. 187; S. *v.* Height, 117 Ia. 650, 91 N. W. 935; C. *v.* Phillips, 26 Ky. L. R. 543, 82 S. W. 286; Ortez *v.* S. (Tex. Cr.), 151 S. W. 1056; Jones *v.* S., 50 Tex. Cr. 329, 96 S. W. 930. But compare Moran *v.* S. (Tex. Cr.), 166 S. W. 161.

Statement admissible if fruits of crime discovered by means of it. Gowans *v.* S. (Tex. Cr.), 145 S. W. 614 (when it was said that without doubt a statement showing innocent possession would be admissible); Baggett *v.* S. (Tex. Cr.), 144 S. W. 1136.

Facts discovered in consequence of voluntary incriminatory statement admissible, as are so much of the acts and declarations of accused as explain the facts and their discovery. Goolsby *v.* S., 133 Ga. 427, 66 S. E. 159.

343-42 Goolsby *v.* S., supra. See Lindsey *v.* S., 66 Fla. 341, 63 S. 832, 50 L. R. A. (N. S.), 1077, 1078 (note).

343-43 Harrold *v.* S., 169 Fed. 47, 94 C. C. A. 415; Godau *v.* S. (Ala.), 60 S. 908; Bush *v.* S., 136 Ala. 85, 33 S. 878; Kirby *v.* S., 5 Ala. App. 128, 59 S. 374; Iverson *v.* S., 99 Ark. 453, 138 S. W. 958; Smith *v.* S., 74 Ark. 397, 85 S. W. 1123; P. *v.* Loper, 159 Cal. 6, 112 P. 720; P. *v.* Siemsen, 153 Cal. 387, 95 P. 863; P. *v.* Warren, 12 Cal. App. 730, 108 P. 725; P. *v.* Cahill, 11 Cal. App. 685, 106 P. 115 (testimony on question not admissible after court has ruled confession voluntary); S. *v.* Wakefield (Conn.), 90 A. 230; Sims *v.* S., 59 Fla. 38, 52 S. 198; Thomas *v.*

S., 58 Fla. 122, 51 S. 410; Zuckerman v. P., 213 Ill. 114, 72 N. E. 741; Thurmann v. S., 169 Ind. 240, 82 N. E. 64; Howard v. C., 28 Ky. L. R. 737, 90 S. W. 578; Pearsall v. C., 29 Ky. L. R. 222, 92 S. W. 589; McCleary v. S. (Md.), 89 A. 1100; C. v. Antaya, 181 Mass. 326, 68 N. E. 331; C. v. Hudson, 185 Mass. 402, 70 N. E. 436; S. v. Berberick, 38 Mont. 423, 100 P. 269 (it is a question of fact); S. v. Sherman, 35 Mont. 512, 90 P. 981, *dist.* S. v. Tighe, 27 Mont. 327, 71 P. 3; S. v. Williams, 31 Nev. 360, 102 P. 974; S. v. MacQueen, 69 N. J. L. 522, 55 A. 1008; S. v. Hernia, 68 N. J. L. 299, 53 A. 85; P. v. Randazzio, 194 N. Y. 147, 87 N. E. 112; P. v. Schneider, 154 App. Div. 203, 139 N. Y. S. 101; S. v. Humphrey, 63 Or. 540, 128 P. 824; S. v. Rogoway, 45 Or. 601, 78 P. 987; S. v. Blodgett, 50 Or. 329, 92 P. 820; Berry v. S., 4 Okla. Cr. 202, 111 P. 676, 31 L. R. A. (N. S.) 849; C. v. Johnson, 217 Pa. 77, 66 A. 233; S. v. Middleton, 69 S. C. 72, 48 S. E. 35; S. v. Perry, 74 S. C. 351, 54 S. E. 764; S. v. Allison, 24 S. D. 622, 124 N. W. 747; S. v. Landers, 21 S. D. 606, 114 N. W. 717; S. v. Wells, 35 Utah 400, 100 P. 681, 136 Am. St. 1059; S. v. Washing, 36 Wash. 485, 78 P. 1019; Tarasinski v. S., 146 Wis. 508, 131 N. W. 889; Hintz v. S., 125 Wis. 405, 104 N. W. 110.

See Lindsey v. S., 66 Fla. 341, 63 S. 822, 50 L. R. A. (N. S.) 1077, 1078 (note).

Is a question of fact, first for court and ultimately for jury (P. v. Randazzio, 194 N. Y. 147, 87 N. E. 112); of fact for judge. S. v. Woods, 124 La. 738, 50 S. 671.

344-44 Harrold v. S., 169 Fed. 47, 94 C. C. A. 415 (must be shown beyond reasonable doubt); Sorenson v. U. S., 142 Fed. 820, 74 C. C. A. 468; Campbell v. S., 150 Ala. 70, 43 S. 743; S. v. Stallings, 142 Ala. 112, 38 S. 261; Smith v. S., 74 Ark. 397, 85 S. W. 1122; McCleary v. S. (Md.), 89 A. 1100; Watts v. S., 99 Md. 30, 57 A. 542; S. v. Allison, 24 S. D. 622, 124 N. W. 747 (whether objection made or not); Jackson v. C. (Va.), 81 S. E. 192.

See Lindsey v. S., 66 Fla. 341, 63 S. 822, 50 L. R. A. (N. S.) 1077, 1081 (note).

345-46 Gins v. S., 161 Ind. 292, 68 N. E. 281; Hauk v. S., 148 Ind. 528, 222, 46 N. E. 127, 47 N. E. 465; Thurman v. S., 169 Ind. 240, 82 N. E. 61; S. v. Icenbice, 126 Ia. 16, 101 N. W. 273; S. v. Grover, 96 Me. 363, 52 A. 757; S. v. Jones, 171 Mo. 401, 71 S. W. 680; S. v. Spaugh, 200 Mo. 571, 597, 98 S. W. 55; Herndon v. S., 50 Tex. Cr. 552, 99 S. W. 558.

345-47 King v. Paakaula, 3 Haw. 30; S. v. Icenbice, 126 Ia. 16, 101 N. W. 273; S. v. Stebbins, 188 Mo. 396, 87 S. W. 460.

345-49 S. v. Brown, 2 Boyce (Del.) 405, 80 A. 146; Adams v. S., 129 Ga. 248, 58 S. E. 822; Zuckerman v. P., 213 Ill. 114, 72 N. E. 741; S. v. Brooks, 220 Mo. 74, 119 S. W. 353; S. v. Williams, 31 Nev. 360, 102 P. 974; P. v. Kinney, 202 N. Y. 389, 95 N. E. 756; S. v. Wells, 35 Utah 400, 100 P. 681.

346-50 Jones v. S., 156 Ala. 175, 47 S. 100.

346-51 S. v. Armijo (N. M.), 135 P. 555; P. v. White, 176 N. Y. 331, 350, 68 N. E. 630.

In absence of motion to exclude confession of connected crime jury may consider testimony showing it was involuntary. Zuckerman v. P., 213 Ill. 114, 72 N. E. 741.

346-52 Wilson v. U. S., 162 U. S. 613; S. v. Brown, 2 Boyce (Del.) 405, 80 A. 146; S. v. Bennett, 143 Ia. 214, 121 N. W. 1021; S. v. Westcott, 130 Ia. 1, 101 N. W. 341; S. v. Foster, 136 Ia. 527, 114 N. W. 36; C. v. Hudson, 185 Mass. 402, 70 N. E. 436; P. v. Maxfield, 146 Mich. 103, 108 N. W. 1087; S. v. Brooks, 220 Mo. 74, 119 S. W. 353; Heddendorf v. S., 85 Neb. 747, 124 N. W. 150; S. v. Williams, 31 Nev. 360, 102 P. 974; P. v. Schermerhorn, 203 N. Y. 57, 96 N. E. 376; P. v. Randazzio, 194 N. Y. 147, 87 N. E. 112; P. v. Brasch, 193 N. Y. 46, 85 N. E. 809; C. v. Aston, 227 Pa. 112, 75 A. 1019; S. v. Allison, 24 S. D. 622, 124 N. W. 747; S. v. Montgomery, 26 S. D. 539, 128 N. W. 718; Johnson v. S., 49 Tex. Cr. 314, 94 S. W. 224; Campbell v. S., 63 Tex. Cr. 595, 141 S. W. 232, 1913 D. Ann. Cas. 858; Kelly v. S., 61 Tex. Cr. 663, 136 S. W. 58; Blocker v. S., 61 Tex. Cr. 413, 135 S. W. 130; Berry v. S., 58 Tex. Cr. 291, 125 S. W. 580; S. v. Wells, 35 Utah 400, 100 P. 681, 136 Am. St. 1059, 19 Ann. Cas. 631; S. v. Wells, 35 Utah 400, 100 P. 681; S. v. Wilson, 68 Wash. 464, 123 P. 795; Tarasinski v. S., 146 Wis. 508, 131 N. W. 889; Hintz v. S., 125 Wis. 405, 104 N. W

110; Clay *v.* S., 15 Wyo. 42, 86 P. 17, 544.

See Lindsey *v.* S., 66 Fla. 341, 63 S. 832, 50 L. R. A. (N. S.) 1077, 1078 (note).

If proof confession improperly obtained has been received, error presumed to have been cured by instruction. S. *v.* Moran, 131 Ia. 645, 109 N. W. 187.

347-53 Smith *v.* S., 139 Ga. 230, 76 S. E. 1016. See Overstreet *v.* S. (Tex. Cr.), 150 S. W. 899.

347-54 S. *v.* Williams, 31 Nev. 360, 102 P. 974.

347-55 Henley *v.* S., 3 Ala. App. 215, 58 S. 96; Bailey *v.* S., 50 Tex. Cr. 398, 97 S. W. 694.

Verified transcript of confession taken in shorthand, admissible. Lowe *v.* S., 125 Ga. 55, 53 S. E. 1038.

347-56 Confessions made to legal adviser, not an attorney, not privileged. S. *v.* Smith, 138 N. C. 709, 50 S. E. 859.

348-57 Rex *v.* Martin, 9 Ont. L. R. (Can.) 218; Strickland *v.* S., 151 Ala. 31, 44 S. 90; Wall *v.* S., 5 Ga. App. 305, 63 S. E. 27; Burnett *v.* P., 204 Ill. 208, 68 N. E. 505; S. *v.* Neubauer, 145 Ia. 337, 124 N. W. 312 (though it tends to show commission of other crimes); S. *v.* Briggs, 122 Minn. 823, 142 N. W. 823; S. *v.* Coats, 174 Mo. 396, 74 S. W. 864; S. *v.* Myers, 198 Mo. 225, 94 S. W. 242; P. *v.* Loomis, 76 App. Div. 243, 78 N. Y. S. 578; S. *v.* Knapp, 70 O. St. 380, 71 N. E. 705; Bailey *v.* S., 50 Tex. Cr. 398, 97 S. W. 694; McKinney *v.* S., 48 Tex. Cr. 402, 88 S. W. 1012; Follis *v.* S., 51 Tex. Cr. 186, 101 S. W. 242; Ex parte Martinez (Tex. Cr.), 145 S. W. 959.

Exculpatory statements contained in statement introduced by state, taken as true unless disproved. Snodgrass *v.* S. (Tex. Cr.), 148 S. W. 1095. And see Pratt *v.* S., 59 Tex. Cr. 635, 129 S. W. 364.

What witness said to accused, competent. Strickland *v.* S., 151 Ala. 31, 44 S. 90.

If more than one confession made all may be proved. Lowe *v.* S., 125 Ga. 55, 53 S. E. 1038; P. *v.* White, 176 N. Y. 331, 350, 68 N. E. 630.

So much as relates to other defendants not present when it was made should be withdrawn. Daniels *v.* S., 57 Fla. 1, 48 S. 747.

348-58 P. *v.* Luis, 158 Cal. 185, 110 P. 580; Green *v.* C., 26 Ky. L. R. 1221, 83 S. W. 638; S. *v.* Natcisse, 133 La. 584, 63 S. 182; Green *v.* S., 96 Md. 384, 54 A. 104; S. *v.* Berberick, 38 Mont. 423, 100 P. 209; S. *v.* Lu Sing, 34 Mont. 31, 85 P. 521; P. *v.* Giro, 197 N. Y. 152, 90 N. E. 432.

349-63 S. *v.* Busse, 127 Ia. 318, 100 N. W. 536; Frazier *v.* C. (Ky.), 114 S. W. 268; P. *v.* Bowen, 170 Mich. 129, 135 N. W. 824; S. *v.* West, 24 S. D. 530, 124 N. W. 751, cit. the text.

350-64 S. *v.* Coats, 174 Mo. 396, 74 S. W. 864.

350-66 Cook *v.* S. (Tex. Cr.), 160 S. W. 465. See S. *v.* Tighe, 27 Mont. 327, 71 P. 3 (statute).

350-67 Brewer *v.* S., 72 Ark. 145, 78 S. W. 773; S. *v.* Brinte, 4 Penne. (Del.) 551, 58 A. 258; S. *v.* Powell, 5 Penne. (Del.) 24, 61 A. 966; S. *v.* Coats, 174 Mo. 396, 74 S. W. 864; McKinney *v.* S., 48 Tex. Cr. 402, 88 S. W. 1012.

351-68 But where witness is unable to understand or fails to hear all of confession, testimony is not incompetent. Descrippo *v.* S., 8 Ala. App. 85, 62 S. 1004.

351-70 Lopez *v.* S. (Tex. Cr.), 166 S. W. 154; Knuckles *v.* S., 55 Tex. Cr. 6, 114 S. W. 825. See supra, 305-20.

Confession cannot be proved by parol if written and signed. S. *v.* Usher, 126 Ia. 287, 102 N. W. 101; S. *v.* Busse, 127 Ia. 318, 100 N. W. 536. *Contra* if not made before magistrate. P. *v.* Giro, 197 N. Y. 152, 90 N. E. 432. Oral testimony must be objected to. Wright *v.* S., 82 Miss. 421, 34 S. 4.

Confession in shorthand and transcribed is best proved by testimony of officer in whose presence it was made. Writing may be used to refresh his recollection. P. *v.* Silvers, 6 Cal. App. 69, 92 P. 506.

Written confession not inadmissible because it covers offenses with others than prosecutrix; as to these it will be disregarded. Wistrand *v.* P., 218 Ill. 323, 75 N. E. 891.

Must be in writing and signed. Calloway *v.* S., 55 Tex. Cr. 262, 116 S. W. 575; Gaston *v.* S., 55 Tex. Cr. 270, 116 S. W. 582. Unwritten confession, though admissible when made, is inadmissible after enactment of statute requiring all confessions to be in writing. Askew *v.* S., 59 Tex. Cr. 152, 127 S. W. 1037.

351-72 P. *v.* Luis, 158 Cal. 185, 110 P. 580.

If acknowledged orally admissible.—S. v. Harris, 74 Wash. 60, 132 P. 735.
If accused has signed confession voluntarily and with knowledge, it is immaterial it does not contain questions asked him. S. v. Brinte, 4 Penne. (Del.) 551, 58 A. 258.
Proof of confession in foreign language and translated. S. v. Abbatto, 64 N. J. L. 658, 47 A. 10; S. v. Banusik (N. J. L.), 64 A. 994.
Stenographer's verified transcript, admissible. P. v. Randazzio, 194 N. Y. 147, 87 N. E. 112.
351-73 Roberts v. S. (Tex. Cr.), 150 S. W. 627.
When required to be written, omissions cannot be supplied by parol. Overstreet v. S. (Tex. Cr.), 150 S. W. 630.
352-75 S. v. Brauner, 149 N. C. 559, 63 S. E. 169.
352-79 Skaggs v. S., 88 Ark. 62, 113 S. W. 346, cit. the text.
353-83 S. v. Murphy, 146 Mo. App. 707, 125 S. W. 557.
353-86 S. v. Barker, 56 Wash. 510, 106 P. 133.
No presumption statements against interest are true beyond that which permits proof of them. Being shown, the presumption no longer exists. Clay v. S., 15 Wyo. 42, 86 P. 17.
353-87 Jaynes v. P., 44 Colo. 535, 99 P. 325; S. v. Blackburn, 7 Penne. (Del.) 479, 75 A. 536; Murkey v. S., 47 Fla. 38, 37 S. 53; Jones v. S., 2 Ga. App. 433, 58 S. E. 559; McAllister v. S., 2 Ga. App. 654, 58 S. E. 1110; Burnett v. P., 204 Ill. 208, 68 N. E. 505; C. v. Devaney, 182 Mass. 33, 64 N. E. 402; S. v. Davis, 226 Mo. 493, 126 S. W. 470 (are presumed true); S. v. Berberick, 38 Mont. 423, 100 P. 209; S. v. Humphrey, 63 Or. 540, 128 P. 281; S. v. Hutchings, 30 Utah 319, 84 P. 893.
Weight not lessened by proof of performance of duty in general. S. v. Foster, 136 Ia. 527, 114 N. W. 36.
354-88 Rex v. Graf, 19 Ont. L. R. (Can.) 238; P. v. Carlson, 8 Cal. App. 730, 97 P. 827; Brown v. S., 44 Fla. 28, 32 S. 107; Mitchell v. S., 45 Fla. 76, 33 S. 1009; S. v. Wortman, 78 Kan. 847, 98 P. 217; Spears v. S., 92 Miss. 613, 46 S. 166.
354-89 Shelton v. S., 144 Ala. 106, 42 S. 30; West v. S., 6 Ga. App. 105, 64 S. E. 130; Moseby v. C. (Ky.), 113 S. W. 850; Sowers v. S., 55 Tex. Cr. 113, 113 S. W. 148. See S. v. Anderson, 53 Or. 479, 101 P. 198.
Binding on state if not impeached. Winkler v. S., 58 Tex. Cr. 564, 126 S. W. 1134.
355-90 Burnett v. P., 204 Ill. 208, 68 N. E. 505; S. v. Berberick, 38 Mont. 423, 100 P. 209.
Competent as tending to show condition of mind. Braham v. S., 143 Ala. 28, 39, 38 S. 919; Ince v. S., 77 Ark. 426, 93 S. W. 65.
355-91 S. v. Webb, 216 Mo. 378, 115 S. W. 998; S. v. Stebbins, 188 Mo. 287, 87 S. W. 460; Berry v. S., 58 Tex. Cr. 291, 125 S. W. 580.
355-94 S. v. Hogan, 117 La. 863, 42 S. 352; S. v. Church, 199 Mo. 605, 632, 98 S. W. 16; Jefferds v. P., 5 Park. Cr. (N. Y.) 522; P. v. Kent, 41 Misc. 191, 83 N. Y. S. 948.
356-95 P. v. Kent, supra.
356-96 Corroboration required. Rucker v. S., 2 Ga. App. 140, 58 S. E. 295; Griner v. S., 121 Ga. 614, 49 S. E. 700.
"Proof of a confession, when corroborated alone by evidence of the corpus delicti, will authorize a conviction in a criminal case, and the amount of corroboration necessary to support the conviction is in every case a question of fact for the jury. But even if incriminatory admissions, supplemented by other circumstances, be equivalent to a confession, the evidence that the accused confessed the commission of an offense would not be sufficient to authorize a conviction, unless all of the facts essential to establish that the alleged offense was in fact committed are satisfactorily proved." Harvey v. S., 8 Ga. App. 660, 70 S. E. 141.
356-97 Naftzger v. U. S., 200 Fed. 494, 118 C. C. A. 598; Williams v. S., 8 Ala. App. 394, 62 S. 371; Snow v. S. (Ga. App.), 81 S. E. 363; S. v. Kwiatkowski, 83 N. J. L. 650, 85 A. 209; Meek v. S. (Tex. Cr.), 160 S. W. 698. See Greenwood v. S., 107 Ark. 568, 156 S. W. 427; Moon v. State, 12 Ga. App. 614, 77 S. E. 1088; P. v. Gillman (App. Div.), 145 N. Y. S. 775.
356-98 Hyde v. U. S., 35 App. Cas. (D. C.) 451.
357-99 P. v. Brasch, 193 N. Y. 46, 85 N. E. 809; U. S. v. Sotelo, 1 Phil. Isl. 544 (asking for pardon and promising restitution); Follis v. S., 51 Tex. Cr. 186, 101 S. W. 242; Curran v. S., 12 Wyo. 553, 76 P. 577.
Discovery of revolver and money hidden near scene of crime, where ac-

cused had said he had hidden them. Accused led the officers to the spot. P. *v.* Giusto, 206 N. Y. 67, 99 N. E. 190.

Proof that others than those with whose death accused is charged were killed as part of same transaction is competent to corroborate confession as to death of all. P. *v.* Rogers, 192 N. Y. 331, 85 N. E. 135.

357-1 Johnson *v.* S., 142 Ala. 1, 37 S. 937; P. *v.* Eldridge, 3 Cal. App. 648, 86 P. 832; Williams *v.* S., 125 Ga. 741, 54 S. E. 661; Bines *v.* S., 118 Ga. 320, 45 S. E. 376; McAllister *v.* S., 2 Ga. App. 654, 58 S. E. 1110; C. *v.* Burgess, 28 Ky. L. R. 1128, 91 S. W. 266; Bolden *v.* S., 98 Miss. 723, 54 S. 241; Jenkins *v.* S., 98 Miss. 717, 54 S. 158; Knapp *v.* S., 4 O. C. C. (N. S.) 184; Follis *v.* S., 51 Tex. Cr. 186, 101 S. W. 242. See infra, "Corpus Delicti," 665-20.

359-2 Davis *v.* S., 141 Ala. 62, 37 S. 676; Meisenheimer *v.* S., 73 Ark. 407, 84 S. W. 494; Sanders *v.* S., 118 Ga. 329, 45 S. E. 365; Joiner *v.* S., 119 Ga. 315, 46 S. E. 412; Messel *v.* S., 176 Ind. 214, 95 N. E. 565; S. *v.* Coats, 174 Mo. 396, 74 S. W. 864; Cohoe *v.* S., 82 Neb. 744, 118 N. W. 1088; Shires *v.* S., 2 Okla. Cr. 89, 99 P. 1100; S. *v.* Knapp, 70 O. St. 380, 71 N. E. 705; Gallegos *v.* S., 49 Tex. Cr. 115, 90 S. W. 492; Curran *v.* S., 12 Wyo. 553, 76 P. 577.

359-3 Bradford *v.* S., 146 Ala. 150, 41 S. 471; Meisenheimer *v.* S., 73 Ark. 407, 84 S. W. 494; P. *v.* Jones, 123 Cal. 65, 55 P. 698; Gantling *v.* S., 41 Fla. 587, 26 S. 737; S. *v.* Icenbice, 126 Ia. 16, 101 N. W. 273; S. *v.* Westcott, 130 Ia. 1, 104 N. W. 341; Holland *v.* C., 26 Ky. L. R. 790, 82 S. W. 596; S. *v.* Banusik (N. J. L.), 64 A. 994; P. *v.* Brasch, 193 N. Y. 46, 85 N. E. 809; Knapp *v.* S., 4 O. C. C. (N. S.) 184; S. *v.* Rogoway, 45 Or. 601, 78 P. 987, 81 P. 234; Ashby *v.* S., 124 Tenn. 684, 139 S. W. 872; Meek *v.* S. (Tex. Cr.), 160 S. W. 698; Ex parte Patterson, 50 Tex. Cr. 271, 95 S. W. 1061; Bradshaw *v.* S., 49 Tex. Cr. 165, 94 S. W. 223; Gallegos *v.* S., 49 Tex. Cr. 115, 90 S. W. 492; Sowles *v.* S., 52 Tex. Cr. 17, 105 S. W. 178; Follis *v.* S., 51 Tex. Cr. 186, 101 S. W. 242; S. *v.* Blay, 77 Vt. 56, 58 A. 794.

Confession competent to show identity. S. *v.* Icenbice, 126 Ia. 16, 101 N. W. 273.

359-4 S. *v.* Powell (Mo.), 167 S. W. 559; S. *v.* Humphrey, 63 Or. 540, 128 P. 824; S. *v.* Blodgett, 50 Or. 329, 92 P. 820.

359-5 P. *v.* Hunt, 162 Ill. App. 471; S. *v.* Von Kutzleben, 136 Ia. 89, 113 N. W. 484; C. *v.* Johnson, 217 Pa. 77, 66 A. 233.

359-6 P. *v.* Luis, 158 Cal. 185, 110 P. 580; S. *v.* Adams, 6 Penne. (Del.) 178, 65 A. 510; Calvin *v.* S., 118 Ga. 73, 44 S. E. 848; Keith *v.* S., 157 Ind. 376, 61 N. E. 716; S. *v.* Von Kutzleben, 136 Ia. 89, 113 N. W. 484; S. *v.* Willing, 129 Ia. 72, 105 N. W. 355; C. *v.* Antaya, 184 Mass. 326, 68 N. E. 331; S. *v.* Sherman, 35 Mont. 512, 90 P. 981; C. *v.* Johnson, 217 Pa. 77, 66 A. 233; Beeker *v.* S., 91 Neb. 352, 136 N. W. 17; Herndon *v.* S., 50 Tex. Cr. 552, 99 S. W. 558; Clay *v.* S., 15 Wyo. 42, 86 P. 17, 544; Horn *v.* S., 12 Wyo. 80, 73 P. 705.

Confession made while defendant was drunk.—Pash *v.* C., 146 Ky. 390, 142 S. W. 700.

360-7 Wright *v.* S., 3 Ala. App. 24, 58 S. 68 (citing many Alabama cases); Hawkins *v.* S., 8 Ga. App. 705, 70 S. E. 53; King *v.* Marks, 1 Haw. 81. If inculpatory statements are proved it is proper to refuse to charge they should be considered with caution, though made jokingly. Horn *v.* S., 12 Wyo. 80, 73 P. 705.

See Gilmer *v.* S. (Ala.), 61 S. 377.

360-8 S. *v.* Blackburn, 7 Penne. (Del.) 479, 75 A. 536.

360-9 Jury should not be instructed as to weight to be given confession if corpus delicti established; and if instructed, language of code should be used. Chapman *v.* C., 33 Ky. L. R. 965, 112 S. W. 567. See S. *v.* Romeo (Utah), 128 P. 530.

360-10 S. *v.* Brown, 2 Boyce (Del.) 405, 80 A. 146; S. *v.* Brinte, 4 Penne. (Del.) 551, 58 A. 258; King *v.* Marks, 1 Haw. 81; P. *v.* Rische, 262 Ill. 596, 105 N. E. 8; S. *v.* Wortman, 78 Kan. 847, 98 P. 217; S. *v.* Romeo (Utah), 128 P. 530.

Confessions deliberately made and precisely identified are effectual proofs of guilt. Shelton *v.* S., 144 Ala. 106, 111, 42 S. 30.

361-11 Rex *v.* Martin, 9 Ont. L. R. (Can.) 218; Donnelly *v.* U. S., 228 U. S. 243, 33 Sup. Ct. 449, 57 L. ed. 820; Sorenson *v.* U. S., 143 Fed. 820, 74 C. C. A. 468; Cook *v.* P., 56 Colo. 477, 138 P. 756; S. *v.* Brinte, 4 Penne. (Del.) 551, 58 A. 258; S. *v.* Brown, 2 Boyce

(Del.) 435, 80 A. 146; P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804; Lunsford *v.* C., 23 Ky. L. R. 709, 63 S. W. 781; S. *v.* Lane (N. C.), 81 S. E. 620; S. *v.* Cobb, 164 N. C. 418, 79 S. E. 419; Koontz *v.* S. (Okla.), 139 P. 842; Ellis *v.* S., 8 Okla. Cr. 522, 128 P. 1095; Forrester *v.* S. (Tex. Cr.), 152 S. W. 1041. See Boswell *v.* S., 9 Ala. App. 23, 64 S. 188; Rex *v.* Christie, 30 L. T. (Eng.) 41.

Confession of a third person is admissible to impeach him if a witness; otherwise it is inadmissible. Davis *v.* S., 8 Okla. Cr. 515, 128 P. 1097.

Admissible if made in presence of co-defendant and assented to by him. Cook *v.* P., 56 Colo. 477, 138 P. 756.

Silence is not assent unless circumstances show party intended to commit himself by silence. Cook *v.* P., 56 Colo. 477, 138 P. 756.

In S. *v.* **Jackson** (Del.), 82 A. 824, each of the prisoners made written confessions, recounting his own acts and to an extent the acts of the other, with their consequent implications. "These confessions respectively constitute evidence only against him who made them, and not against his fellow, who cannot be bound or hurt by the statement of his associate made neither in his presence nor under oath in a judicial proceeding."

361-12 See Burk *v.* S., 50 Tex. Cr. 185, 95 S. W. 1064.

361-13 King *v.* Marks, 1 Haw. 81; S. *v.* Myers, 198 Mo. 225, 94 S. W. 242; Watson *v.* S., 48 Tex. Cr. 323, 87 S. W. 1158; Tarasinski *v.* S., 146 Wis. 508, 131 N. W. 889.

Where defendant admitted the truth of the confession of a co-conspirator, such confession is admissible against defendant. Novkovic *v.* S., 149 Wis. 665, 135 N. W. 165.

362-15 U. S. *v.* Castillo, 2 Phil. Isl. 17.

362-16 P. *v.* Anderson, 239 Ill. 168, 87 N. E. 917; Porter *v.* C., 22 Ky. L. R. 1657, 61 S. W. 16; Gardner *v.* S., 55 Tex. Cr. 394, 117 S. W. 140.

CONFUSION OF GOODS

364-4 See Meeks *v.* Co., 141 Mo. App. 618, 124 S. W. 1084.

364-7 Meeks *v.* Co., supra.

365-10 Wright *v.* Co., 128 Fed. 462; Baer *v.* Co., 159 Ala. 491, 49 S. 92; Mayer *v.* Wilkins, 37 Fla. 244, 19 S. 632; Post *v.* Bird, 28 Fla. 1, 9 S. 888; Mugge *v.* Jackson, 53 Fla. 323, 43 S. 91; First Nat. Bk. *v.* Schween, 127 Ill. 573, 20 N. E. 681, 11 Am. St. 174; Peterson *v.* Polk, 67 Miss. 163, 6 S. 615; Kelly-G. S. Co. *v.* Sally, 114 Mo. App. 222, 89 S. W. 889; Seaward *v.* Davis, 133 App. Div. 191, 117 N. Y. S. 468; Waddell *v.* Waddell, 36 Utah 435, 104 P. 743; Rose *v.* Sharpless, 33 Gratt. (Va.) 153.

366-11 First Nat. Bk. *v.* Henry, 159 Ala. 367, 49 S. 97; Ayre *v.* Hixson, 53 Or. 19, 98 P. 515.

Vendor who fraudulently commingles one quality of goods with another so they cannot be separated gives occasion for a verdict finding all of the inferior grade. Baer *v.* Co., 159 Ala. 491, 49 S. 92.

366-15 If a trustee has a perfect legal title to goods so that a creditor of his debtor cannot levy on them, such creditor, must identify the goods not covered by trustee's title. Weaver *v.* Neal, 61 W. Va. 57, 55 S. E. 909.

367-19 In re Brown & Co., 189 Fed. 432.

CONSIDERATION

Judgments, 400-10.

370-1 Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234; Bing *v.* Bk., 5 Ga. App. 578, 63 S. E. 652; Ruppert *v.* Frauenknecht, 146 Ill. App. 397; In re Brigham's Est., 144 Ia. 71, 120 N. W. 1054; White's Admr. *v.* White, 148 Ky. 492, 146 S. W. 1101; Prewitt *v.* Morgan (Ky.), 119 S. W. 174; Dackick *v.* Barich, 37 Mont. 490, 97 P. 931; Vulcan Iron Wks *v.* Co., 129 N. Y. S. 676; Porter *v.* Baldwin, 123 N. Y. S. 1043; Miles *v.* Hemenway, 59 Or. 318, 117 P. 273, *rev.* 111 P. 696; Shorett *v.* Signor, 58 Wash. 89, 107 P. 1033; Sixta *v.* Co., 148 Wis. 186, 134 N. W. 341; Walterman *v.* Norwalk, 145 Wis. 663, 130 N. W. 479; Jost *v.* Wolf, 130 Wis. 37, 110 N. W. 232.

370-2 Conclusive as to parties and privies, and consideration prima facie presumed as against others. Davis *v.* Jernigan, 71 Ark. 494, 76 S. W. 554; Ah Hoy *v.* Raymond, 19 Haw. 568; Woody *v.* Schaaf, 106 Va. 799, 56 S. E. 807; Watkins *v.* Robertson, 105 Va. 269, 54 S. E. 33. See Trout *v.* R. Co., 107 Va. 576, 59 S. E. 394.

Inadequacy to grantor of complainant in suit to quiet title must be shown by defendant who alleges it. Chandley *v.* Robinson (N. J. Eq.), 75 A. 180.

370-4 Atchison, etc. R. Co. *v.* Van Ordstrand, 67 Kan. 386, 73 P. 113; Illinois C. R. Co. *v.* Heath, 26 Ky. L. R. 19, 80 S. W. 502. *Contra,* Olston *v.* Co., 52 Or. 343, 96 P. 1095, 97 P. 538, statute.

370-5 Carwell *v.* Dennis, 101 Ark. 603, 143 S. W. 135; Willcox *v.* Priester, 68 S. C. 106, 46 S. E. 553; Chicago, etc. R. Co. *v.* Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. 39; Rapid T. R. Co. *v.* Smith, 98 Tex. 553, 86 S. W. 322.

Lack of consideration may be admitted in pleading. McClelland *v.* Bullis, 34 Colo. 69, 81 P. 771.

371-7 Kentucky C. M. Co. *v.* Mattingly, 133 Ky. 526, 118 S. W. 350, metal checks issued to employes.

371-8 Stone *v.* Goldberg, 6 Ala. App. 249, 60 S. 744; Williams *v.* Hall, 79 Cal. 606, 21 P. 965; Henke *v.* Assn., 100 Cal. 429, 31 P. 1089; Stanton *v.* Weldy, 19 Cal. App. 374, 126 P. 175; Cox *v.* Cox, 25 Ky. L. R. 1934, 79 S. W. 220; Fleming *v.* Mulloy, 143 Mo. App. 309, 127 S. W. 105; Ford *v.* Drake, 46 Mont. 314, 127 P. 1019; Noyes *v.* Young, 32 Mont. 226, 79 P. 1063; First Nat. Bk. *v.* Ins. Co., 16 N. M. 66, 113 P. 815; Ralls *v.* Parish (Tex. Civ.), 151 S. W. 1089.

See In re Seneca O. Co., 153 App. Div. 594, 138 N. Y. S. 78.

371-9 Brown *v.* Edsall, 23 S. D. 610, 122 N. W. 658; Ralls *v.* Parish (Tex. Civ.), 151 S. W. 1089.

371-10 McGue *v.* Rommel, 148 Cal. 539, 83 P. 1000; Denver, etc. R. Co. *v.* Derry, 47 Colo. 584, 108 P. 172; Clement *v* Bladworth, 166 Ill. App. 68; Holmes *v.* Horn, 120 Ill. App. 359; Luke *v.* Koenen, 120 Ia. 103, 94 N. W. 278; Williams C. Co. *v.* Shirley, 136 Ky. 303, 124 S. W. 327; Cox *v.* Cox, 25 Ky. L. R. 1934, 79 S. W. 220; Hamilton *v.* Hamilton, 127 App. Div. 871, 112 N. Y. S. 10; Western Mfg. Co. *v.* Freeman (Tex. Civ.), 126 S. W. 924. *Contra,* Star Mills *v.* Bailey, 140 Ky. 194, 130 S. W. 1077.

372-13 Ryan *v.* Hamilton, 205 Ill. 191, 201, 68 N. E. 781; Howard *v.* Adkins, 167 Ind. 184, 78 N. E. 665; Moore *v.* Harrison, 26 Ind. App. 408, 59 N. E. 1077; Baltes Co. *v.* Sutton, 32 Ind. App. 14, 69 N. E. 179; Foxworthy *v.* Adams, 136 Ky. 403, 124 S. W. 381; Strubbe *v.* Lewis, 25 Ky. L. R. 605, 76 S. W. 150; Scanlon *v.* Northwood, 147 Mich. 139, 110 N. W. 493; Noyes *v.* Young, 32 Mont. 226, 79 P. 1063; Lee *v.* Unkefer, 83 S. C. 199, 65 S. E. 989, 67 S. E. 246; Nickles *v.* R. Co., 74 S. C. 102, 54 S. E. 255; Ward *v.* S. (Tex. Cr.), 159 S. W. 272; Delta County *v.* Blackburn (Tex. Civ.), 90 S. W. 902.

Evidence showing the consideration of a note cannot vary the terms of the writing though it may alter its effect. Hentz & Co. *v.* Booz, 8 Ga. App. 577, 70 S. E. 108, immoral consideration shown.

It cannot be shown by parol that order drawn by contractor upon city was given for labor or material furnished, thereby making it a preferred claim, action being on the order. Dickerson *v.* Spokane, 35 Wash. 414, 77 P. 730.

373-14 Gifford *v.* Fox, 2 Neb. (Unof.) 30, 95 N. W. 1066; Walker *v.* Haggerty, 30 Neb. 120, 46 N. W. 221.

373-15 Citizens' R. Co. *v.* Heath, 29 Ind. App. 395, 62 N. E. 107; Stewart *v.* R. Co., 141 Ind. 55, 40 N. E. 67.

373-16 Loeb *v.* Flannery, 148 Ill. App. 471; Deming I. Co. *v.* Wallace, 73 Kan. 291, 85 P. 139; Harper *v.* Davis, 115 Md. 349, 80 A. 1012; German Exch. Bk. *v.* Schnitzer, 72 Misc. 362, 130 N. Y. S. 223, *rev.* 71 Misc. 261, 130 N. Y. S. 113.

Inadequate consideration.—See Bevins *v.* Lowe (Ky.), 167 S. W. 422.

373-17 Pearsall *v.* Henry, 153 Cal. 314, 95 P. 154; Wells *v.* Gress, 118 Ga. 566, 45 S. E. 418; Aultman *v.* Knoll, 71 Kan. 109, 79 P. 1074; Audit Co. *v.* Taylor, 152 N. C. 272, 67 S. E. 582; Burns *v.* Goddard, 72 S. C. 355, 51 S. E. 915; Morris *v.* Brown, 38 Tex. Civ. 266, 85 S. W. 1015.

"The rule does not rest upon the ground of fraud, accident, or mistake, and therefore it is unnecessary, in order to form a basis for the admission of such evidence, that the pleading should contain any allegation thereof. Taylor *v.* Merrill, 64 Tex. 494; G. C. & S. F. R. Co. *v.* Jones, 82 Tex. 156, 17 S. W. 534." Clayton *v.* Co. (Tex. Civ.), 146 S. W. 695.

As between indorsee and his immediate indorser consideration for endorsement is open to oral inquiry. Peabody *v.* Munson, 211 Ill. 324, 71 N. E. 1006.

Impossibility of performance of contract entered into may be shown. Ger-

man A. S. Co. *v.* McCulloch, 28 Ky. L. R. 133, 89 S. W. 5.

Order of proof.—"Failure of consideration cannot be shown without first showing the consideration." Independent Assn. *v.* Klett, 114 Ill. App. 1.

373-18 Wolfort *v.* Hockbaum, 89 Ark. 612, 117 S. W. 525; Penn. Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802; Ward *v.* Co., 123 N. Y. S. 918.

374-19 Penn. Co. *v.* Dolan, supra. A release expressing it was for sole consideration given in it is conclusive. Budro *v.* Burgess, 197 Mass. 74, 83 N. E. 318.

374-20 Davis *v.* Sterns, 85 Neb. 121, 122 N. W. 672.

374-22 Redmond *v.* Cass, 226 Ill. 120, 80 N. E. 708; Catlin C. Co. *v.* Lloyd, 180 Ill. 398, 54 N. E. 214; Wiltrout *v.* Showers, 82 Neb. 777, 118 N. W. 1080 (additional consideration).

Recital of consideration in deed dispenses with other proof thereof if it be not challenged. Gray *v.* Freeman, 37 Tex. Civ. 556, 84 S. W. 1105.

In Kentucky consideration may be proved or disproved in spite of recital. Prewitt *v.* Morgan (Ky.), 119 S. W. 174, statute.

374-23 Carwell *v.* Dennis, 101 Ark. 603, 143 S. W. 135; Sims *v.* Scheussler, 5 Ga. App. 850, 64 S. E. 99; Moore *v.* Putts, 110 Md. 490, 73 A. 149; Reynolds *v.* Stein, 117 N. Y. S. 985. *Contra* in absence of fraud or mistake. Maxwell *v.* McCall, 145 Ia. 687, 124 N. W. 769. *Comp.* Dackich *v.* Barich, 37 Mont. 490, 97 P. 931.

Payee may be shown.—Faust *v.* Faust, 144 N. C. 383, 57 S. E. 22.

375-26 Coppage *v.* Murphy, 24 Ky. L. R. 257, 68 S. W. 416; Koogle *v.* Cline, 110 Md. 587, 73 A. 672.

375-27 Weiss *v.* Heitkamp, 127 Mo. 23, 29 S. W. 709.

375-28 Cone *v.* Ins. Co., 139 Ia. 205, 117 N. W. 307 (recital does not raise conflict as against undisputed parol testimony).

376-29 Wiggington *v.* Minter, 28 Ky. L. R. 79, 88 S. W. 1082; Wilson *v.* Windsor, 24 Ky. L. R. 1343, 71 S. W. 495.

376-30 Berry *v.* Ewen, 27 Ky. L. R. 467, 85 S. W. 227.

376-31 Cincinnati T. W. Co. *v.* Matthews, 24 Ky. L. R. 2445, 74 S. W. 242.

376-32 Able *v.* Gunter, 174 Ala. 389, 57 S. 461; Magill L. Co. *v.* Co., 90 Ark. 426, 119 S. W. 822; Franklin *v.* Fields, 13 Ga. App. 463, 79 S. E. 366; Ryan *v.* Hamilton, 205 Ill. 191, 68 N. E. 781; Haulon *v.* Co. (Ind.), 102 N. E. 48; Doan *v.* Co. (Ind.), 98 N. E. 321; Am. C. & F. Co. *v.* Smock (Ind. App.), 91 N. E. 749; Benton *v.* Benton, 78 Kan. 366, 97 P. 378; Loftus *v.* Benjamin, 122 N. Y. S. 275.

376-33 Williams *v.* R. Co. (Ark.), 158 S. W. 967. If contract and complaint in harmony as to consideration plaintiff cannot show it was other than as stated. Ditto *v.* Slaughter, 28 Ky. L. R. 1164, 92 S. W. 2.

376-34 Herrin *v.* Abbe, 55 Fla. 769, 46 S. 183; Redmond *v.* Cass, 226 Ill. 120, 80 N. E. 708; Third Nat. Bk. *v.* Bk., 244 Mo. 554, 149 S. W. 495 (action on guaranty); Frase *v.* Lee, 152 Mo. App. 562, 134 S. W. 10 (agreement to pay debt secured by deed of trust, as part of purchase price of land); Kriling *v.* Cramer, 152 Mo. App. 431, 133 S. W. 655 (recital of part payment, proof of agreement to take note for balance); Ames *v.* Kinnear, 42 Wash. 80, 84 P. 629.

377-35 Cox *v.* Smith, 99 Ark. 218, 138 S. W. 978; Press Pub. Co. *v.* Agency, 44 Pa. Super. 428.

377-36 Keene *v.* Ins. Co., 213 Fed. 893; Gage *v.* Cameron, 212 Ill. 146, 72 N. E. 204; Howard *v.* Adkins, 167 Ind. 184, 78 N. E. 665; Burke *v.* Mead, 159 Ind. 252, 64 N. E. 880; Ivey *v.* Cotton Mills, 143 N. C. 189, 55 S. E. 613.

377-37 Linkswiler *v.* Hoffman, 109 La. 948, 34 S. 34; Taylor *v.* Ewing, 74 Wash. 214, 32 P. 1009.

377-38 Leftkovitz *v.* Bk., 152 Ala. 521, 44 S. 613; Wallace *v.* Meeks, 99 Ark. 350, 138 S. W. 638; Cheesman *v.* Nicholl, 18 Colo. App. 174, 70 P. 797; Wellmaker *v.* Wheatley, 123 Ga. 201, 51 S. E. 436; Southern Belt T. Co. *v.* Smith, 129 Ga. 578, 59 S. E. 215; Kehoe *v.* Co., 7 Ga. App. 236, 66 S. E. 547; Ludeke *v.* Sutherland, 87 Ill. 481; Penn. Co. *v.* Dolan, 6 Ind. App. 109, 82 N. E. 802; Reisterer *v.* Carpenter, 124 Ind. 30, 24 N. E. 371; Stolenburg *v.* Diercks, 117 Ia. 25, 90 N. W. 525; Trice *v.* Yoeman, 60 Kan. 742, 57 P. 955; Farquhar *v.* Farquhar, 194 Mass. 400, 80 N. E. 634; Sayre *v.* Burdick, 47 Minn. 367, 50 N. W. 245; Rogers *v.* Rogers (Miss.), 43 S. 434; Pile *v.* Bright, 156 Mo. App. 301, 137 S. W.

1017; Neville *v.* Hughes, 104 Mo. App. 455, 79 S. W. 735; Oregon M. Co. *v.* Kirkpatrick, 66 Or. 21, 133 P. 69; Hilgar *v.* Miller, 42 Or. 552, 72 P. 319; Sutherlin *v.* Bloomer, 50 Or. 398, 93 P. 135; Kahn *v.* Kahn, 94 Tex. 114, 58 S. W. 825; Rapid T. R. Co. *v.* Smith, 98 Tex. 553, 86 S. W. 322; Jost *v.* Wolf, 130 Wis. 37, 110 N. W. 232; Ohlert *v.* Alderson, 86 Wis. 433, 57 N. W. 88.

"When the consideration is contractual, parol evidence is no more admissible to vary that than it is any other part of the written instrument. This question was squarely settled by this court in Baum *v.* Lynn, 72 Miss. 932, 18 South. 428, 30 L. R. A. 441; Thompson *v.* Bryant, 75 Miss. 12, 21 South. 655, and English *v.* N. O. & N. E. R. R., 56 South. 665." Dodge *v.* Cutrer, 101 Miss. 844, 58 S. 208.

379-39 Edison E. I. Co. *v.* Co., 194 Mass. 258, 80 N. E. 479; McNinch *v.* Co., 23 Okla. 386, 100 P. 524. But see California P. Co. *v.* Co., 6 Cal. App. 507, 92 P. 509; Levine *v.* Carroll, 121 Ill App. 105; Henderson *v.* Tobey, 105 Ill. App. 154.

Recital in mortgage sum named in it is amount due mortgagee precludes parol evidence to show the contrary. Sturmdorf *v.* Saunders, 117 App. Div. 762, 102 N. Y. S. 1042.

379-40 Nunez Gin & W. Co. *v.* Moore, 10 Ga. App. 350, 73 S. E. 432; Redmond *v.* Cass, 226 Ill. 120, 80 N. E. 708. See Spence *v.* Ins. Co., 236 Ill. 444, 86 N. E. 104.

380-43 Abbeville Rice Mill *v.* Shambaugh, 115 La. 1047, 40 S. 453; Lawson *v.* Mullinix, 104 Md. 156, 64 A. 938; Budro *v.* Burgess, 197 Mass. 74, 83 N. E. 318; Watkins *v.* Robertson, 105 Va. 269, 54 S. E. 33; Woody *v.* Schaaf, 106 Va. 799, 56 S. E. 807.

380-44 Harms *v.* Fidelity Co., 172 Mo. App. 241, 157 S. W. 1046.

383-47 Pollack *v.* Gunter, 162 Ala. 317, 50 S. 155; Merced O. Co. *v.* Patterson, 153 Cal. 624, 96 P. 90; Hirsh *v.* Beverly, 125 Ga. 657, 54 S. E. 678; Thomson *v.* McLaughlin, 13 Ga. App. 334, 79 S. E. 182; Levine *v.* Carroll, 121 Ill. App. 105; Holmes *v.* Horn, 120 Ill. App. 359; Taft *v.* Myerscough, 92 Ill. App 560; Bullen *v.* Morrison, 98 Ill. App. 669; Rook *v.* Rook, 111 Ill. App. 498; Doan *v.* R. Co. (Ind.), 98 N. E. 321; Illinois C. R. Co. *v.* Fairchild, 48 Ind. App. 300, 91 N. E. 836; Dean *v.* Carpenter, 134 Ia. 275, 111 N. W. 815; Chantland *v.* Sherman, 148 Ia. 352, 125 N. W. 871; Perkins *v.* Drew (Ky.), 122 S. W. 526; Crafton *v.* Inge, 30 Ky. L. R. 313, 98 S. W. 325; Bracketts *v.* Boreing, 28 Ky. L. R. 386, 89 S. W. 496, Continental C. Co. *v.* Jasper, 28 Ky. L. R. 53, 88 S. W. 1078; Blackwell *v.* Blackwell, 196 Mass. 186, 81 N. E. 910; Yore *v.* Meshew, 146 Mich. 80, 109 N. W. 35; Anderman *v.* Meier, 91 Minn. 413, 98 N. W. 327; Langan *v.* Iverson, 78 Minn. 299, 80 N. W. 1051; Kessler *v.* Clayes, 147 Mo. App. 88, 125 S. W. 799; Goodman *v.* Smith, 94 Neb. 227, 142 N. W. 521; Karpf *v.* Borgenicht, 120 N. Y. S. 876; Dilcher *v.* Nellany, 52 Misc. 364, 102 N. Y. S. 264; Rochester F. B. Co. *v.* Browne, 55 App. Div. 444, 66 N. Y. S. 867, 179 N. Y. 542, 71 N. E. 1139 (no opinion); Satterfield *v.* Kindley, 144 N. C. 455, 57 S. E. 145; Davis *v.* Evans, 142 N. C. 464, 55 S. E. 344; McPeters *v.* English, 141 N. C. 491, 54 S. E. 417; Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301; Schwarz *v.* Lee Gon, 46 Or. 219, 80 P. 110; Townsend *v.* Lacock, 222 Pa. 330, 71 A. 187; Gill *v.* Ruggles (S. C.), 81 S. E. 519; Rawls *v.* Ins. Co. (S. C.), 81 S. E. 505; Syler *v.* Culp (Tex. Civ.), 138 S. W. 175; Morehead *v.* Hering, 53 Tex. Civ. 605, 116 S. W. 164; Wolff *v.* Love, 78 Wash. 561, 139 P. 597; Warwick *v.* Hitchings, 50 Wash. 140, 96 P. 960; Windsor *v.* R. Co., 37 Wash. 156, 79 P. 613; Mueller *v.* Cook, 126 Wis. 504, 105 N. W. 1054; Butt *v.* Smith, 121 Wis. 566, 99 N. W. 328; Lathrop *v.* Humble, 120 Wis. 331, 97 N. W. 905; Brader *v.* Brader, 110 Wis. 423, 85 N. W. 681; Jost *v.* Wolf, supra; Stickney *v.* Hughes, 12 Wyo. 397, 75 P. 945.

"The general rule seems to be more rigidly applied in contracts where the obligation of one party constitutes the consideration for the obligation of the other party than where the consideration for the conveyance is merely recited." Smith *v.* Graham (Tex. Civ.), 146 S. W. 661.

It may be shown a separate price was agreed upon for each article though stipulated price a gross sum. Aultman *v.* Lawson, 100 Ia. 569, 69 N. W. 865; Buckeye B. Co. *v.* Stables, 43 Wash. 49, 85 P. 1077; Field *v.* Austin, 131 Cal. 379, 63 P. 692; Curd *v.* Bowron, 32 Ky. L. R. 369, 105 S. W. 417.

Third party may show actual consideration paid or agreed to be paid if

his rights are affected thereby. Yoro *v.* Meshew, 116 Mich. 80, 109 N. W. 35; Witzel *v.* Znel, 90 Minn. 340, 96 N. W. 1124.

"The actual consideration, the property contemplated by the agreement, may be shown by parol even in variance of that stated in the writing." Walker *v.* Johnson, 116 Ill. App. 115.

383-48 Stamper *v.* Cornett (Ky.), 121 S. W. 623; Stringer *v.* Mfg. Co., 177 Mo. App. 234, 162 S. W. 645; Lafayette Tr. Co. *v.* Richards, 81 Misc. 338, 143 N. Y. S. 483; Holliday *v.* Pegram, 89 S. C. 73, 71 S. E. 367; International L. Co *v.* Parmer (Tex. Civ.), 123 S. W. 196.

"The distinction being observed between a consideration stated merely by way of recital and a consideration which constitutes a positive promise." Atl. Trust, etc. Co. *v.* Union Trust, etc Corp., 111 Va. 574, 69 S. E. 975 (action on penal bond), quoting with approval from previous opinion in same case, 110 Va. 286, 67 S. E. 182.

384-49 See *v.* Mallonee, 107 Mo. App. 721, 82 S. W. 557; Tipton *v.* Tipton, 47 Tex. Civ. 619, 105 S. W. 830; Windsor *v.* R. Co., 37 Wash. 156, 79 P. 613.

384-51 Barnett *v.* Hughey, 54 Ark. 195, 15 S. W. 461; Lloyd *v.* Sandusky, 203 Ill. 621, 68 N. E. 154; Rook *v.* Rook, 111 Ill. App. 398; Deaver *v.* Deaver, 137 N. C. 240, 49 S. E. 113.

Actual consideration may be shown by parol by defendants. Burroughs *v.* Pate, 166 Ala. 223, 51 S. 978.

385-53 Welch *v.* Brown, 46 Colo. 129, 103 P. 296; Way *v.* Greer, 196 Mass. 237, 81 N. E. 1002; Brightwell *v.* McAfee, 249 Mo. 502, 155 S. W. 820; Medical College, etc. *v.* University, 178 N. Y. 153, 70 N. E. 467; Schwarz *v.* Lee Gon, 46 Or. 219, 80 P. 110; Rawls *v.* Ins. Co. (S. C.), 81 S. E. 505; Furst *v.* Galloway, 56 W. Va. 246, 49 S. E. 146.

385-55 Rook *v.* Rook, 111 Ill. App. 398.

385-56 Magill L. Co. *v.* Co., 90 Ark. 426, 119 S. W. 822; Brosseau *v.* Lowy, 209 Ill. 405, 70 N. E. 901; Jones *v.* Sheppard, 145 Mo. App. 470, 122 S. W. 704; Jost *v.* Wolf, 130 Wis. 87, 110 N. W. 232; McCormick *v.* Herndon, 86 Wis. 449, 56 N. W. 1097.

386-57 Bashinski *v.* Swint, 133 Ga. 38, 65 S. E. 152; Wade *v.* Bent, 24 Ky. L. R. 1294, 71 S. W. 444; Grace *v.* Gill, 136 Mo. App. 186, 116 S. W. 442; Naylor *v.* Davis, 130 App. Div. 311, 114 N. Y. S. 248; Deaver *v.* Deaver, 137 N. C. 240, 49 S. E. 113; Scott *v.* Thomas, 104 Va. 330, 51 S. E. 829; Perkins *v.* McAuliffe, 105 Wis. 582, 81 N. W. 645.

Recital debts were to be paid may be shown to be ineffectual by proof that none existed. Medical College *v.* University, 178 N. Y. 153, 70 N. E. 467.

386-59 It cannot be so shown.—Morse *v.* Wellesley, 156 Mass. 95, 30 N. E. 77; Durkin *v.* Cobleigh, 156 Mass 108, 30 N. E. 474; Edison Co. *v.* Co., 194 Mass. 258, 80 N. E. 479.

Oral contract to discharge incumbrance cannot be made ground of recovery in action by grantor for consideration. Edison Co. *v.* Co., supra, *mod.* Preble *v.* Baldwin, 6 Cush. (Mass.) 549.

Parol evidence competent to show disposition of consideration for deed. Welch *v.* Brown, 46 Colo. 129, 103 P. 296.

387-60 Barton *v.* Assn., 29 Ky. L. R. 330, 93 S. W. 9; Shantz *v.* Shriner, 167 Mo. App. 635, 150 S. W. 727.

387-61 Hendon *v.* Morris, 110 Ala. 106, 20 S. 27; Ladd *v.* Co., 147 Ala. 173, 40 S. 610.

387-62 Lippincott *v.* Lawrie, 119 Wis. 573, 97 N. W. 179.

388-65 Baker *v.* Co. (Ala.), 65 S. 321.

388-67 Merced O. M. Co. *v.* Patterson, 153 Cal. 624, 96 P. 90 (agreement need not be embodied in deed); Reynolds *v.* Stein, 117 N. Y. S. 985; Miles *v.* Waggoner, 23 Pa. Super. 432; Texas Cent. R. Co. *v.* Eldredge (Tex. Civ.), 155 S. W. 1010 (consideration); Suderman-D. Co. *v.* Rodgers, 47 Tex. Civ. 67, 104 S. W. 193; Johnson *v.* Elmen, 94 Tex. 168, 59 S. W. 253, 86 Am. St. 845, 52 L. R. A. 162; Kampmann *v.* McCormick (Tex. Civ.), 99 S. W. 1147; Johnston *v.* McCart, 24 Wash. 19, 63 P. 1121.

389-68 Illinois C. R. Co. *v.* Fairchild, 48 Ind. App. 300, 91 N. E. 836 (employment of releasor); Burns *v.* Loftus, 32 Nev. 55, 104 P. 246.

389-69 Edwards *v.* Latimer, 183 Mo. 610, 82 S. W. 109; O'Day *v.* Conn, 131 Mo. 321, 32 S. W. 1109; Cameron *v.* Fraser, 94 N. Y. S. 1058; Windsor *v.* R. Co., 37 Wash. 156, 79 P. 613.

389-74 Brown *v.* S. (Okla. Cr.), 132 P. 359.

390-75 Martin *v.* Co. (Tex. Civ.),

66 S. W. 212; Moroney *v.* Coombes (Tex. Civ.), 88 S. W. 430.

390-76 St. Louis, etc. R. Co. *v.* Crandell, 75 Ark. 89, 86 S. W. 855; Brooks *v.* R. Co., 146 Cal. 134, 79 P. 843; Sherman *v.* Co., 82 Conn. 479, 74 A. 773; Herrin *v.* Abbe, 55 Fla. 769, 46 S. 183; Shackleford *v.* Orris, 135 Ga. 29, 68 S. E. 838; Booth *v.* Hynes, 54 Ill. 363; Harts *v.* Emery, 184 Ill. 560, 56 N. E. 865; Wabash R. Co. *v.* Grate (Ind. App.), 102 N. E. 155; Kinkead *v.* Peet, 136 Ia. 590, 111 N. W. 48; Allen *v.* Rees, 136 Ia. 423, 110 N. W. 583; Combs *v.* Combs, 130 Ky. 827, 114 S. W. 334 (by statute); Neurenberger *v.* Lehenbauer, 23 Ky. L. R. 1753, 66 S. W. 15; Crafton *v.* Inge, 30 Ky. L. R. 313, 98 S. W. 325; Ruch *v.* Ruch, 159 Mich. 231, 124 N. W. 52; Dodder *v.* Snyder, 110 Mich. 69, 67 N. W. 1101; Witzel *v.* Zuel, 90 Minn. 340, 96 N. W. 1124; Laclede L. Co. *v.* Freudenstein (Mo. App.), 161 S. W. 593; Edwards *v.* Latimer, 183 Mo. 610, 82 S. W. 109; O'Day *v.* Conn., 131 Mo. 321, 32 S. W. 1109; Staed *v.* Rossier, 157 Mo. App. 300, 137 S. W. 901. See *v.* Mallonee, 107 Mo. App. 721, 82 S. W. 557; Goodman *v.* Smith, 91 Neb. 227, 142 S. W. 521; Holmes *v.* Seaman, 72 Neb. 300, 100 N. W. 417, 101 N. W. 1030; First Nat. Bk. *v.* Bower, 5 Neb. (Unof.) 375, 98 N. W. 834; Voight *v.* Dowe, 74 N. J. Eq. 560, 70 A. 344; Friedman *v.* Ender, 116 N. Y. S. 461; Jones *v.* Jones, 164 N. C. 320, 80 S. E. 430; Grabow *v.* McCracken, 23 Okla. 612, 102 P. 84; Townsend *v.* Lacock, 222 Pa. 330, 71 A. 187; McGary *v.* McDermott, 207 Pa. 620, 57 A. 46; Henry *v.* Zurflieh, 203 Pa. 440, 53 A. 243; Willcox *v.* Priester, 68 S. C. 106, 46 S. E. 553; Uecker *v.* Zuercher, 54 Tex. Civ. 289, 118 S. W. 149; Mayer *v.* Wooten, 46 Tex. Civ. 327, 102 S. W. 423; Applegate *v.* Kilgore (Tex. Civ.), 91 S. W. 238; Ellis *v.* Lehman, 48 Tex. Civ. 308, 106 S. W. 453; Tipton *v.* Tipton, 47 Tex. Civ. 619, 105 S. W. 830; Martin *v.* Hall (Va.), 79 S. E. 320; Windsor *v.* R. Co., 37 Wash. 156, 79 P. 613; Ames *v.* Kinnear, 42 Wash. 80, 84 P. 629; Jost *v.* Wolf, 130 Wis. 37, 110 N. W. 232; Halvorsen *v.* Halvorsen, 120 Wis. 52, 97 N. W. 494.

If two pieces of land conveyed by same deed, consideration for each may be shown. Goette *v.* Sutton, 128 Ga. 179, 57 S. E. 308.

Amount paid for a conveyance may be shown as tending to establish a conspiracy for the ejection of the wife of one of the parties. McAllin *v.* McAllin, 77 Conn. 398, 59 A. 413.

391-77 Yates *v.* Burt, 161 Mo. App. 267, 143 S. W. 73; Cowden *v.* Cowden, 7 O. C. C. (N. S.) 277; Latimer *v.* Latimer, 53 S. C. 483, 31 S. E. 304 (as to last half of proposition in text).

391-78 Right confined to parties. Pope *v.* Taliaferro, 51 Tex. Civ. 217, 115 S. W. 309.

Time consideration recited paid may be shown. Morehead *v.* Allen, 131 Ga. 807, 63 S. E. 507.

392-79 St. Louis, etc. R. Co. *v.* Crandell, 75 Ark. 89, 86 S. W. 855; King *v.* Co., 148 App. Div. 110, 133 N. Y. S. 18; McGary *v.* McDermott, 207 Pa. 620, 57 A. 46; Larkin *v.* Trammel, 47 Tex. Civ. 548, 105 S. W. 552.

392-80 Redmond *v.* Cass, 226 Ill. 120, 80 N. E. 708; Howell *v.* Moores, 127 Ill. 67, 19 N. E. 863.

392-81 Harraway *v.* Harraway, 136 Ala. 499, 34 S. 836; O'Farrell *v.* O'Farrell, 56 Tex. Civ. 51, 119 S. W. 899; Larkin *v.* Trammel, 47 Tex. Civ. 548, 105 S. W. 552.

393-83 Am. Ins. Co. *v.* Bagley, 6 Ga. App. 736, 65 S. E. 787.

393-85 Morton *v.* Morton, 82 Ark. 492, 102 S. W. 213; Voigt *v.* Dowe, 74 N. J. Eq. 560, 70 A. 344.

393-86 Aultman *v.* Greenlee, 134 Ia. 368, 111 N. W. 1007; Edwards *v.* Latimer, 183 Mo. 610, 82 S. W. 109; Scudder *v.* Morris, 107 Mo. App. 634, 82 S. W. 217; Miles *v.* Waggoner, 23 Pa. Super. 432.

394-88 Whitman *v.* Corley, 72 S. C. 410, 52 S. E. 49; Martin *v.* Hall (Va.), 79 S. E. 320.

395-89 Barnett *v.* Hughey, 54 Ark. 195, 15 S. W. 464; Davis *v.* Jernigan, 71 Ark. 494, 76 S. W. 554; Louisville & N. R. Co. *v.* Willbanks, 133 Ga. 15, 65 S. E. 86 (permanent right of way over land conveyed for railroad use); Redmond *v.* Cass, 226 Ill. 120, 80 N. E. 708; Stannard *v.* R. Co., 220 Ill. 469, 77 N. E. 254; Loeb *v.* Flannery, 148 Ill. App. 471; Bobb *v.* Bobb, 89 Mo. 411, 4 S. W. 511; Weiss *v.* Heitkamp, 127 Mo. 23, 29 S. W. 709; Wishart *v.* Gerhart, 105 Mo. App. 112, 78 S. W. 1094; Martin *v.* Hall (Va.), 79 S. E. 320; Jost *v.* Wolf, 130 Wis. 37, 110 N. W. 232.

395-90 Barry *v.* Murphy, 24 Ky. L. R. 953, 70 S. W. 276.

395-91 See Kinkead *v.* Peet, 136 Ia. 30, 111 N. W. 48.

Receipt of consideration may be directly testified to by party. Masson, etc. R. Co. *v.* Rich, 51 Tex. Civ. 372, 112 S. W. 114.

Memorandum by party only admissible against him; it is not final. Friedman *v.* Ender, 116 N. Y. S. 461.

396-93 Witzel *v.* Zuel, 90 Minn. 340, 96 N. W. 1124; Mayer *v.* Wooten, 16 Tex. Civ. 327, 102 S. W. 423; Larkin *v.* Trammel, 47 Tex. Civ. 548, 105 S. W. 552; Warrick *v.* Hitchings, 50 Wash. 140, 96 P. 960.

Value of article sold may be shown to prove consideration for modification of contract. Fresno H. P. C. *v.* Turle, 111 N. Y. S. 839.

396-94 **Burden** is on party who asserts existence of consideration not stated. Harraway *v.* Harraway, 136 Ala. 499, 34 S. 836.

Opinion evidence not competent as to adequacy of consideration in action involving rights of vendor's creditors; inquiry should be as to value of the property. Lightman *v.* Epstein, 164 Ala. 660, 51 S. 164.

396-95 Way *v.* Greer, 196 Mass. 237, 81 N. E. 1002; St. Hubert Guild *v.* Quinn, 64 Misc. 336, 118 N. Y. S. 582; Keene *v.* Behan, 40 Wash. 505, 82 P. 884.

397-97 Mutual Life Ins. Co. *v.* Durden, 9 Ga. App. 797, 72 S. E. 295.

399-99 Rushing *v.* Nat. Bk. (Tex. Civ.), 162 S. W. 460; Keene *v.* Behan, 40 Wash. 505, 82 P. 884, and see vol. 13, p. 399 and supplement thereto.

399-1 Chinn *v.* Curtis, 24 Ky. L. R. 1763, 71 S. W. 923; Wilson *v.* Winsor, 24 Ky. L. R. 1343, 71 S. W. 495; Meyers *v.* Meyers, 21 Pa. Super. 603; Timms *v.* Timms, 54 W. Va. 414, 46 S. E. 141.

399-3 Harraway *v.* Harraway, 136 Ala. 499, 34 S. 836; Mutual Coal Co. *v.* Co., 130 N. Y. S. 169; Rushing *v.* Nat. Bk. (Tex. Civ.), 162 S. W. 460; Keene *v.* Behan, 40 Wash. 505, 82 P. 884; Stickney *v.* Hughes, 12 Wyo. 397, 75 P. 945.

399-4 Independent B. Assn. *v.* Klett, 114 Ill. App. 1.

Warranty deed competent to show, prima facie, grantor received price therein stated at time of its execution. Sanitary Dist. *v.* Pearce, 110 Ill. App. 592.

399-5 Johnson *v.* Mansfield (Tex. Civ.), 166 S. W. 927.

400-8 Ivy *v.* Ivy (Tex. Civ.), 128 S. W. 682.

400-10 **Good faith of purchaser,** not shown by recital of payment of consideration in bill of sale. Snellgrove *v.* Evans, 165 Ala. 322, 51 S. 560.

Judgment does not relate back and operate as evidence of consideration for instrument upon which it was rendered at time of its execution. Langley *v.* Pulliam, 162 Ala. 142, 50 S. 365.

Recitals in papers between third parties. See infra, "Vendor and Purchaser," 922 c9.

400-11 Keene *v.* Ins. Co., 213 Fed. 893; Wilson *v.* Winsor, 24 Ky. L. R. 1343, 71 S. W. 495; Allisons *v.* Ormdorff, 28 Ky. L. R. 1321, 92 S. W. 287; In re Baeder's Est., 224 Pa. 452, 73 A. 915.

401-15 McGue *v.* Rommel, 148 Cal. 539, 83 P. 1000; Stanton *v.* Weldy, 19 Cal. App. 374, 126 P. 175; Jones *v.* Bates, 161 Ill. App. 194; Gillett *v.* Nat. Bk. (Ind. App.), 104 N. E. 775; Brokaw *v.* McElroy (Ia.), 143 N. W. 1087, 50 L. R. A. (N. S.) 835; Kiesewetter *v.* Kress, 24 Ky. L. R. 405, 68 S. W. 633; Power *v.* Hambrick, 25 Ky. L. R. 30, 74 S. W. 660; Eckels, etc. Co. *v.* Co., 119 Md. 107, 86 A. 38; Ford *v.* Drake, 46 Mont. 314, 127 P. 1019; Rushing *v.* Nat. Bk. (Tex. Civ.), 162 S. W. 460; Key *v.* Hickman (Tex. Civ.), 149 S. W. 275; Masterson *v.* Co., 38 Tex. Civ. 476, 87 S. W. 227.

Same rule applies to holder of order for money. Bk *v.* Bk., 3 Cal. App. 561, 86 P. 820.

401-16 Stanton *v.* Weldy, 19 Cal. App. 374, 126 P. 175; Sere *v.* Darby, 118 La. 619, 43 S. 255; Way *v.* Greer, 196 Mass. 237, 81 N. E. 1002; Wolff *v.* Love, 78 Wash. 561, 139 P. 597. See Freeman *v.* Morrow (Tex. Civ.), 156 S. W. 284.

402-17 Hassell *v.* Bunge (Cal.), 139 P. 800.

402-19 Johnson *v.* Mansfield (Tex. Civ.), 166 S. W. 927.

402-20 Leftkovitz *v.* Bk., 152 Ala. 521, 44 S. 613.

403-21 Dial *v.* McKay, 150 Ala. 118, 43 S. 218; Johnson County Bk. *v.* Wootten, 118 Ga. 927, 45 S. E. 705; Blumer *v.* Schmidt (Ia.), 140 N. W. 751; Aultman *v.* Knoll, 71 Kan. 109, 79 P. 1074; McAfee *v.* Bk., 31 Ky. L. R. 863, 104 S. W. 287; Hardy P. Co. *v.* Spring, 27 Ky. L. R. 133, 84 S. W. 532; Martin

v. Mask, 158 N. C. 436, 74 S. E. 343; Russell *v.* Tillman, 89 S. C. 256, 71 S. E. 836; Kampmann *v.* McCormick (Tex. Civ.), 99 S. W. 1147.

403-23 Acme F. Co. *v.* Howerton, 141 Ia. 265, 119 N. W. 631.

403-24 Detmer W. Co. *v.* Van Horn, 59 Misc. 163, 110 N. Y. S. 312.

403-26 Carter *v.* Walden, 136 Ga. 700, 71 S. E. 1047; Wilson *v.* Winsor, 24 Ky. L. R. 1343, 71 S. W. 495.

404-30 Hathorn *v.* Wheelwright, 99 Me. 351, 59 A. 517; Patt *v.* Leavel, 161 Mo. App. 242, 143 S. W. 843; Schmidt *v.* Frey (N. J.), 90 A. 1123; Detering *v.* Boyles (Tex. Civ.), 155 S. W. 984. See Trustees, etc. *v.* Mebane (N. C.), 81 S. E. 1020.

CONSPIRACY

The Crime.—See 5 STANDARD PROC. 281-321.

The Civil Injury.—See 5 STANDARD PROC. 321-332.

407-1 Prettyman *v.* United States, 180 Fed. 30, 103 C. C. A. 384; S. *v.* Blake, 36 Utah 605, 105 P. 910. Knowledge proposed act was illegal need not be shown. Chadwick *v.* U. S., 141 Fed. 225, 72 C. C. A. 343.

In prosecution to affect prices by pooling state must show general conditions affecting market were normal, and but for the combination competition would have been fair. That being done, burden shifts to defendant to show exceptional conditions affecting market price of commodity in question. International H. Co. *v.* C., 137 Ky. 668, 126 S. W. 352.

407-2 James *v.* Evans, 149 Fed. 136, 80 C. C. A. 240; Woodruff *v.* Hughes, 2 Ga. App. 361, 58 S. E. 551; Lasher *v.* Littell, 202 Ill. 551, 67 N. E. 372; Bonney *v.* King, 201 Ill. 47, 66 N. E. 377; Hamilton *v.* Smith, 39 Mich. 222; Saxton *v.* Sebring, 96 App. Div. 570, 89 N. Y. S. 372; Lefler *v.* Fox, 92 N. Y. S. 227; Kujek *v.* Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. 670, 34 L. R. A. 156; Jones *v.* Monson, 137 Wis. 478, 119 N. W. 179.

Contra, Rice *v.* McAdams, 149 N. C. 29, 62 S. E. 774 (slander); Ballantine *v.* Cummings, 220 Pa. 621, 70 A. 546.

Comp. Clarkson *v.* Garvey (Mo. App.), 161 S. W. 664.

But such evidence is admissible to show that the persons who thus procure money have no right to keep it. Cowart *v.* Fender, 137 Ga. 586, 73 S. E. 822.

Conspiracy to cause breach of contract must be shown by party alleging it. Napier *v.* Spielman, 103 N. Y. S. 982; Lupinek *v.* Woytisek, 110 App. Div. 688, 97 N. Y. S. 471.

If several persons combine to advise another to break his contract with a third person, malicious intention to injure must be shown to justify a recovery. Glamorgan C. Co. *v.* Federation, (1903) 1 K. B. (Eng.) 118.

In prosecutions under Sherman act burden of proving conspiracy and damage is on plaintiff. Loder *v.* Jayne, 142 Fed. 1010.

No presumption attorney who represented some conspirators and advised payment of claims of all, was attorney of all. Burden of so showing is on plaintiff. McDaniel *v.* Traylor, 212 U. S. 428.

407-3 U. S. *v.* Cole, 153 Fed. 801; U. S. *v.* Richards, 149 Fed. 443; U. S. *v.* Maano, 2 Phil. Isl. 718.

But conspiracy will not be presumed to have been abandoned. S. *v.* Ferrell, 246 Mo. 322, 152 S. W. 33.

407-4 Jones *v.* U. S., 162 Fed. 417, 89 C. C. A. 303.

Overt act must be shown to establish conspiracy to hold a person in peonage. U. S. *v.* Cole, 153 Fed. 801. And to sustain conviction for defrauding government. U. S. *v.* Richards, 149 Fed. 443; Hyde *v.* Shine, 199 U. S. 62.

407-5 U. S. *v.* Kissel, 173 Fed. 823 (under Sherman anti trust act); Knight *v.* Miller, 172 Ind. 27, 87 N. E. 823; S. *v.* Loser, 132 Ia. 419, 104 N. W. 337; S. *v.* Dalton, 134 Mo. App. 517, 114 S. W. 1132.

Overt act is evidence of crime within jurisdiction where committed. C. *v.* Corlies, 8 Phila. (Pa.) 450.

408-7 Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039.

Confession of conspirator.—P. *v.* Ginsto, 206 N. Y. 67, 99 N. E. 190.

408-8 Richards *v.* U. S., 175 Fed. 911, 99 C. C. A. 401; Marrash *v.* U. S., 168 Fed. 225, 93 C. C. A. 511; Alkon *v.* U. S., 163 Fed. 810, 90 C. C. A. 116; Smith *v.* U. S., 157 Fed. 721, 85 C. C. A. 353; Chadwick *v.* U. S., 141 Fed. 225, 72 C. C. A. 343; Olson *v.* U. S., 133 Fed. 849, 67 C. C. A. 21; Bailey *v.* S. (Ala. App.), 63 S. 422; Eaton *v.* S., 8 Ala. App. 136, 63 S. 41; Smith *v.*

S., 8 Ala. App. 187, 62 So. 575; Jones v. S., 174 Ala. 53, 57 S. 31; Harmon v. S., 166 Ala. 28, 52 S. 348; Collins v. S., 138 Ala. 57, 34 S. 993; Dickerson v. S., 105 Ark. 72, 150 S. W. 119; Owens v. S., 98 Ark. 609, 137 S. W. 256; Parker v. S. (Ark.), 137 S. W. 273; Chaplin v. S., 77 Ark. 444, 95 S. W. 477; Butt v. S., 81 Ark. 173, 98 S. W. 723; P. v. Donnelly, 143 Cal. 394, 77 P. 177; P. v. Lawrence, 143 Cal. 148, 76 P. 893; P. v. Kizer, 22 Cal. App. 10, 133 P. 516, 521, 134 P. 346; Blackburn v. Lee (Ga.), 80 S. E. 995; Lynn v. S., 140 Ga. 387, 79 S. E. 29; Stevens v. S., 8 Ga. App. 217, 68 S. E. 874; P. v. Govitz, 262 Ill. 514, 104 N. E. 887; P. v. Warfield, 172 Ill. App. 1; P. v. Nall, 242 Ill. 284, 89 N. E. 1012; Miller v. John, 208 Ill. 173, 70 N. E. 27; Telford v. P., 219 Ill. 23, 76 N. E. 60; Christensen v. P., 114 Ill. App. 40; Eacock v. S., 169 Ind. 488, 82 N. E. 1039; Cook v. S., 169 Ind. 430, 82 N. E. 1047; Sanderson v. S., 169 Ind. 301, 82 N. E. 525; S. v. Caine, 134 Ia. 147, 111 N. W. 443; S. v. Walker, 124 Ia. 414, 100 N. W. 351; Gabbard v. C. (Ky.), 167 S. W. 942; C. v. Ellis, 133 Ky. 625, 118 S. W. 973; Lawrence v. S., 103 Md. 17, 63 A. 96; P. v. Salsbury, 134 Mich. 537, 96 N. W. 936; Osborne v. S., 99 Miss. 410, 55 S. 52, 54 S. 451; S. v. Fields, 234 Mo. 615, 138 S. W. 518; S. v. Spaugh, 200 Mo. 571, 591, 98 S. W. 55; S. v. Roberts, 201 Mo. 702, 100 S. W. 484; S. v. Sykes, 191 Mo. 62, 89 S. W. 871; S. v. Darling, 199 Mo. 168, 97 S. W. 592; O'Brien v. S., 69 Neb. 691, 96 N. W. 649; Ty. v. Leslie, 15 N. M. 240, 106 P. 378; Danzer v. Nathan, 129 N. Y. S. 966; Saxton v. Sebring, 96 App. Div. 570, 89 N. Y. S. 372; S. v. Hutchman, 86 O. St. 229, 99 N. E. 295; Washwood v. U. S. (Okla. Cr.), 136 P. 184; Walker v. S. (Okla. Cr.), 127 P. 896; S. v. Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862; Ballantine v. Cummings, 220 Pa. 621, 70 A. 546; C. v. Moyer, 32 Pa. Super. 548; U. S. v. Maass, 2 Phil. Isl. 718; Weatherred v. Finley, 37 Tex. Civ. 50, 121 S. W. 893; Cabrera v. S., 56 Tex. Cr. 141, 118 S. W. 1054; Ridley v. S., 51 Tex. Cr. 126, 100 S. W. 933; Patnode v. Westenhaver, 114 Wis. 460, 90 N. W. 467.

See P. v. Darr, 262 Ill. 202, 104 N. E. 389, 2nd vol. 3, p. 101, n. 36, and supplement thereto.

Defendant's financial embarrassment.—P. v. Darr, 262 Ill. 202, 104 N. E. 389.

Overt act may be considered in connection with other circumstances. U. S. v. Richards, 149 Fed. 443; Hyde v. U. S., 35 App. Cas. (D. C.) 451.

Failure to produce books and records of union. See Patch Mfg. Co. v. Lodge, 77 Vt. 294, 326, 60 A. 74.

Evidence withheld presumed unfavorable. Standard O. Co. v. S., 117 Tenn. 618, 672, 100 S. W. 705.

Value of property sought to be obtained, proper subject for proof. Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21.

409-9 Prettyman v. United States, 180 Fed. 30, 103 C. C. A. 384.

Express agreement need not be proved; tacit concurrence in intent to effect common purpose is enough. Butt v. S., 81 Ark. 173, 98 S. W. 723; P. v. Lawrence, 143 Cal. 148, 76 P. 893; Woodruff v. Hughes, 2 Ga. App. 361, 58 S. E. 551; P. v. Stauch, 240 Ill. 60, 88 N. E. 155; Eacock v. S., 169 Ind. 488, 82 N. E. 1039; S. v. Caine, 134 Ia. 147, 111 N. W. 443; Patnode v. Westenhaver, 114 Wis. 460, 90 N. W. 467.

Great latitude allowed in reception of circumstantial evidence. U. S. v. Greene, 146 Fed. 803; Lorenz v. U. S., 24 App. Cas. (D. C.) 337; S. v. Roberts, 201 Mo. 702, 728, 100 S. W. 484.

409-10 International H. Co. v. C., 137 Ky. 668, 126 S. W. 352.

409-11 Batman v. Cook, 120 Ill. App. 243; Lawrence v. S., 103 Md. 17, 63 A. 96; C. v. Sanderson, 40 Pa. Super. 416; U. S. v. Dercsin, 2 Phil. Isl. 536; Rhodes v. Mills, 87 S. C. 18, 68 S. E. 824; Patch Mfg. Co. v. Lodge, 77 Vt. 294, 326, 60 A. 74.

Proof of motive is competent (Sullivan v. P., 108 Ill. App. 328), but not always essential. Chadwick v. U. S., 141 Fed. 225, 72 C. C. A. 343.

409-12 Jones v. U. S., 179 Fed. 784, 103 C. C. A. 442; Loder v. Jayne, 142 Fed. 1000; U. S. v. Greene, 146 Fed. 803; Chadwick v. U. S., 141 Fed. 225, 72 C. C. A. 343; P. v. Warfield, 201 Ill. 293, 103 N. E. 979; P. v. Hotz, 261 Ill. 239, 103 N. E. 1097; P. v. Nall, 242 Ill. 284, 89 N. E. 1012; C. v. Ellis (Ky.), 118 S. W. 943; C. v. Stuart, 207 Mass. 362, 93 N. E. 885 (worthless deeds prepared to be given as purchase price of land); C. v. Sanderson, 40 Pa. Super. 416; Rhodes v. Granby Mills, 87 S. C. 18, 68 S. E. 824; S. v. Dix, 33 Wash.

405, 74 P. 570; S. v. Dilley, 44 Wash. 207, 87 P. 133.

Papers bearing seal of voluntary organization and purporting to come from a committee thereof, admissible, as are circulars bearing names of its officers and calculated to influence people who read them to take part in a strike. Patch Mfg. Co. v. Lodge, 77 Vt. 294, 313, 60 A. 74.

Contents of letter not provable if there is only signature and address to connect defendant with it. S. v. Conroy, 126 Ia. 472, 102 N. W. 417.

Information imparted to officer by letter written before execution of conspiracy cannot be proved, though names of defendants not disclosed. S. v. Schreiber, 79 N. J. L. 447, 75 A. 476.

Origin and authorship of circular letter must be proved; it is competent to show disavowal of it. Delaware, etc. R. Co. v. Union, 158 Fed. 541.

410-14 U. S. v. Breese, 173 Fed. 402; U. S. v. Cole, 153 Fed. 801; P. v. Zimmerman, 3 Cal. App. 84, 84 P. 446; Wilcox v. U. S., 7 Ind. Ty. 86, 103 S. W. 774; S. v. Hoerr, 88 Kan. 573, 129 P. 153; Goode v. S., 57 Tex. Cr. 220, 123 S. W. 597; Baker v. S., 45 Tex. Cr. 392, 77 S. W. 618.

Possession of defendant's watch by person who committed the offense, when arrested, admissible. Millner v. S. (Tex. Cr.), 162 S. W. 348.

Proof of acquaintance not entitled to great weight. S. v. Wheeler, 129 Ia. 100, 105 N. W. 374. But intimacy may be important if duties of parties required them to act as a check one upon the other. U. S. v. Greene, 146 Fed. 803.

410-15 Butt v. S., 81 Ark. 173, 98 S. W. 723.

411-17 S. v. Sutches (Ia.), 144 N. W. 597; S. v. Donavan, 125 Ia. 239, 101 N. W. 122; C. v. Leyshon, 44 Pa. Super. 507; Bowen v. S., 60 Tex. Cr. 595, 133 S. W. 256.

411-18 Wiley v. S., 92 Ark. 586, 124 S. W. 249.

411-19 **Local notoriety of a fact** may be shown to establish knowledge on part of party living in vicinity. Wright v. Stewart, 130 Fed. 905.

Reputation of trust.—It is not competent for legislature to declare that character of trust or combination may be established by proof of its general reputation. Hughes v. S., 9 O. C. C. (N. S.) 369, 378.

411-20 Hauger v. U. S., 173 Fed. 54, 97 C. C. A. 372; Collins v. S., 138 Ala. 57, 34 S. 993; Cumnock v. S., 87 Ark. 34, 112 S. W. 147; P. v. Zimmerman, 3 Cal. App. 84, 84 P. 446; S. v. Thompson, 69 Conn. 720, 38 A. 868; C. v. Ellis, 133 Ky. 625, 118 S. W. 973; Newton v. S., 62 Tex. Cr. 622, 138 S. W. 708.

411-21 Mays v. United States, 179 Fed. 610, 103 C. C. A. 168; Doyle v. U. S., 169 Fed. 625, 95 C. C. A. 153; Marrash v. U. S., 168 Fed. 225, 93 C. C. A. 511; Collins v. S., 138 Ala. 57, 34 S. 993; S. v. Thompson, 69 Conn. 720, 38 A. 868; P. v. Nall, 242 Ill. 284, 89 N. E. 1012; P. v. Salsbury, 134 Mich. 537, 96 N. W. 936; Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075; Danzer v. Nathan, 129 N. Y. S. 966; Henderson-S. Co. v. Polk, 149 N. C. 104, 62 S. E. 904; C. v. Lenhart, 40 Pa. Super. 572; U. S. v. Maano, 2 Phil. Isl. 718; Baker v. S., 45 Tex. Cr. 392, 77 S. W. 618.

Conversations with defendant two years previously showing motive, admissible, the lapse of time going to weight only. S. v. Lieberman, 80 N. J. L. 506, 79 A. 331.

Partner not liable for acts of co-partners if ignorant thereof. U. S. v. Cohn, 128 Fed. 615.

Concealment of property by bankrupt. See Cohen v. U. S., 157 Fed. 651, 85 C. C. A. 113.

413-22 Heike v. U. S., 227 U. S. 131, 33 Sup. Ct. 226, 57 L. ed. 450; Marrash v. U. S., 168 Fed. 225, 93 C. C. A. 511; Alkon v. U. S., 163 Fed. 810, 90 C. C. A. 116 (admission by one conspirator after date of conspiracy); Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21; Wright v. Stewart, 130 Fed. 905, 919; Ramsey v. Flowers, 72 Ark. 516, 80 S. W. 147; Eacock v. S., 169 Ind. 488, 82 N. E. 1039; Sanderson v. S., 169 Ind. 301, 82 N. E. 525; S. v. Allen, 34 Mont. 403, 87 P. 177; Standard O. Co. v. S., 117 Tenn. 618, 87 S. 100 S. W. 705; S. v. Mardesich (Wash.), 140 P. 573; Schultz v. S., 123 Wis. 215, 115 N. W. 428.

In a civil action fraudulent transactions like those pleaded are provable though plaintiff not concerned in them. Witliff v. Spreen, 51 Tex. Civ. 344, 112 S. W. 98.

413-23 Van Gesner v. U. S., 153 Fed.

46, 82 C. C. A. 180; Morning J. Assn. v. Duke, 128 Fed. 657, 63 C. C. A. 459; P. v. Zimmerman, 3 Cal. App. 84, 84 P. 446; Johnson v. P., 124 Ill. App. 213, 277; S. v. Crofford, 121 Ia. 395, 96 N. W. 889; Lawrence v. S., 103 Md. 17, 63 A. 96; S. v. Sykes, 191 Mo. 62, 89 S. W. 851; C. v. Zuern, 16 Pa. Super. 588.

Illicit relations of parties may be shown as a motive for co-operation in destroying result thereof. Barrow v. S., 121 Ga. 187, 48 S. E. 950.

Otherwise in presumption for conspiring to extort money as to the relations of complaining witness and one of the conspirators. Eacock v. S.,169 Ind. 488, 82 N. E. 1039; Sanderson v. S., 169 Ind. 301, 82 N. E. 525.

Purpose for which received. — Testimony as to other crimes not competent to show conspiracy, but may be considered when its existence is otherwise established for purpose of determining intent and motive. Wallace v. C., 41 Fla. 547, 26 S. 713; Baldwin v. S., 46 Fla. 115, 35 S. 220; Ty. v. Johnson, 16 Haw. 743, 758; Eacock v. S., supra; C. v. Valverdi, 218 Pa. 7, 66 A. 877; Wood P. Co. v. Bickel, 14 Phila. (Pa.) 152.

414-24 P. v. Summerfield, 48 Misc. 242, 96 N. Y. S. 502. See S. v. Loser, 132 Ia. 419, 104 N. W. 337.

414-25 P. v. Kizer, 22 Cal. App. 10, 123 P. 516, 521, 134 P. 346; S. v. Stockford, 77 Conn. 227, 58 A. 769; Wallace v. S., 41 Fla. 547, 26 S. 713; S. v. Donavan, 125 Ia. 239, 101 N. W. 122; C. v. Spencer, 6 Pa. Super. 256, 270.

Statute of limitations does not exclude evidence of acts antedating its bar if conspiracy continuing one and acts tend to show scheme and plan of conspirators. C. v. Donnelly, 10 Pa. Super. 116.

415-26 P. v. Nall, 242 Ill. 284, 89 N. E. 1012; S. v. Pasnau, 118 Ia. 501, 92 N. W. 682; U. S. v. Figueras, 2 Phil. Isl. 491.

415-27 President of union may testify of his understanding of purpose of strike. S. v. Stockford, 77 Conn. 227, 58 A. 769.

415-28 Rabens v. U. S., 146 Fed. 978, 77 C. C. A. 224; Johnson v. P., 124 Ill. App. 213, 238; Lowell v. P., 229 Ill. 417, 82 N. W. 226; S. v. Loser, 132 Ia. 419, 104 N. W. 337; S. v. Kennedy, 177 Mo. 98, 75 S. W. 979; C. v. Valverdi, 218 Pa. 7, 66 A. 877.

Verbal threats to blackmail must be proved as laid. Eacock v. S., 169 Ind. 488, 82 N. E. 1039.

If bill of particulars furnished, proof must be confined to its specifications. McDonald v. P., 126 Ill. 150, 18 N. E. 227.

416-29 Grunberg v. U. S., 145 Fed. 81, 76 C. C. A. 51; P. v. Club, 123 N. Y. S. 669.

Evidence of acts of each conspirator admissible though conspiracy not charged in express terms. Blanton v. U. S., 213 Fed. 320 (C. C. A.).

It need not be shown all defendants shared in benefit of wrongful act. Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21.

Fraud on particular person.—Though it be alleged defendants conspired to defraud A., it may be shown intent was to defraud any person; not a defense to show they did not know A. C. v. Rogers, 181 Mass. 184, 63 N. E. 421; P. v. Gilman, 121 Mich. 187, 80 N. W. 4, 80 Am. St. 490, 46 L. R. A. 218; S. v. Hillman, 42 Wash. 615, 85 P. 63. But *comp.* Rabens v. U. S., 146 Fed. 978.

416-30 Bradford v. U. S., 152 Fed. 617; Bailey v. S. (Ala. App.), 65 S. 422; Eaton v. S., 8 Ala. App. 136, 63 S. 41; P. v. McGarry, 136 Mich. 316, 99 N. W. 147.

Admissions long after date alleged may be shown. Lefler v. Fox, 92 N. Y. S. 227.

416-31 See Hughes v. S., 9 O. C. C. (N. S.) 369.

416-34 Crews v. C., 155 Ky. 122, 159 S. W. 638; Ballantine v. Cummings, 221 Pa. 621, 70 A. 546. See Weil, etc. Co. v. Cohn, 4 Pa. Super. 443.

417-35 Proof in civil action sufficient if it shows defendant pursued by their acts the same object, using the same means, one performing one part and the other or others another part so as to attain the end in view. Batman v. Cook, 120 Ill. App. 203.

Defendant's good faith in issuing and levying execution may be shown by proof of nature of plaintiff's indebtedness. Mayhew v. Smith, 42 Colo. 534, 95 P. 549.

417-36 Johnson v. P., 124 Ill. App. 213, 238; Wait v. C., 113 Ky. 821, 69 S. W. 697; Miller v. S., 139 Wis. 57, 119 N. W. 850.

417-37 Hitchman C. & C. Co. v. Mitchell, 202 Fed. 512; Jones v. U. S.,

179 Fed. 584, 103 C. C. A. 142; In re Friedman, 164 Fed. 131; Loder *v.* Jayne, 142 Fed. 1010; Wright *v.* Stewart, 130 Fed. 905; Gilley *v.* Denman (Ala.), 64 S. 97; Cumnock *v.* S., 87 Ark. 34, 112 S. W. 147; In re Strachan's Estate, 166 Cal. 162, 135 P. 296; McAllin *v.* McAllin, 77 Conn. 398, 59 A. 413; Kirksey *v.* S., 11 Ga. App. 142, 74 S. E. 902; Cohen *v.* Friedman, 259 Ill. 416, 102 N. E. 815; Miller *v.* John, 208 Ill. 173, 70 N. E. 27; Hendrickson *v.* C., 146 Ky. 742, 143 S. W. 433; C. *v.* Ellis, 133 Ky. 625, 118 S. W. 973; Standard O. Co. *v.* Doyle, 118 Ky. 662, 82 S. W. 271; Hellman *v.* Somerville, 212 Mo. 415, 111 S. W. 30; Cleland *v.* Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075; Am. Tr. Co. *v.* Chitty, 36 Okla. 479, 129 P. 51; Ball *v.* Danton, 64 Or. 184, 129 P. 1032; C. *v.* Donnelly, 40 Pa. Super. 116; Weil, etc. Co. *v.* Cohn, 4 Pa. Super. 443; Loftus *v.* Zier (Tex. Civ.), 162 S. W. 476; Cartwright *v.* Canode (Tex. Civ.), 138 S. W. 792; Dubois *v.* Roby, 84 Vt. 465, 80 A. 150.

"The rule is that the conspirators have jointly assumed to themselves as a body the attribute of individuality so far as regards the prosecution of the common design, thus rendering whatever is done or said in furtherance of that design a part of the res gestae and therefore the act of all." Longworth *v.* Stevens (Tex. Civ.), 145 S. W. 257.

Statement not in furtherance of the conspiracy is not admissible against co-conspirators. S. *v.* Podor, 154 Ia. 686, 135 N. W. 421.

Record of unions competent if common design exists. Patch Mfg. Co. *v.* Lodge, 77 Vt. 294, 326, 60 A. 74.

Must be in furtherance of conspiracy. Connecticut, etc. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668.

418-38 Jones *v.* U. S., 179 Fed. 584, 103 C. C. A. 142; West *v.* S., 168 Ala. 1, 53 S. 277; Way *v.* S., 155 Ala. 52, 46 S. 273, 398; Boswell *v.* S., 1 Ala. App. 178, 56 S. 21; P. *v.* Smith, 147 Ill. App. 146; Hendrickson *v.* C., 146 Ky. 742, 143 S. W. 433; Wishard *v.* S., 5 Okla. Cr. 610, 115 P. 796; S. *v.* Cline, 27 S. D. 573, 132 N. W. 160; Dowling *v.* S. (Tex. Cr.), 145 S. W. 606.

418-40 Chapline *v.* S., 77 Ark. 444, 95 S. W. 477; Sanderson *v.* S., 169 Ind. 301, 82 N. E. 525; Joyce *v.* S., 88 Neb. 599, 130 N. W. 291; S. *v.* Moeller, 20 N. D. 114, 126 N. W. 568 (also on basis of agency); S. *v.* Caseday, 58 Or. 429, 115 P. 287.

418-41 Latham *v.* U. S., 210 Fed. 159 (C. C. A.); Tresca *v.* U. S., 183 Fed. 736, 106 C. C. A. 174; Richards *v.* U. S., 175 Fed. 911, 99 C. C. A. 401; U. S. *v.* Richards, 149 Fed. 443; McClain *v.* S. (Ala.), 62 S. 241; Kennedy *v.* S. (Ala.), 62 S. 49; Smith *v.* S., 8 Ala. App. 187, 62 So. 575; Way *v.* S., 155 Ala. 52, 46 S. 273; Collins *v.* S., 138 Ala. 57, 34 S. 993; Ferguson *v.* S., 141 Ala. 20, 37 S. 448; Hanners *v.* S., 147 Ala. 27, 41 S. 973; Crowell *v.* S. (Ariz.), 136 P. 279; Knight *v.* S., 107 Ark. 634, 155 S. W. 516; Routt *v.* S., 107 Ark. 634, 155 S. W. 513; Childs *v.* S., 98 Ark. 430, 136 S. W. 285; Butt *v.* S., 81 Ark. 173, 98 S. W. 723; Chapline *v.* S., 77 Ark. 444, 95 S. W. 477; P. *v.* Scott, 22 Cal. App. 54, 133 P. 496; P. *v.* Carson, 155 Cal. 164, 99 P. 970; P. *v.* Zimmerman, 3 Cal. App. 84, 84 P. 446; Moore *v.* P., 31 Colo. 336, 73 P. 30; S. *v.* Stockford, 77 Conn. 227, 58 A. 769; S. *v.* Gannon, 75 Conn. 206, 216, 52 A. 727; Barrow *v.* S., 121 Ga. 187, 48 S. E. 950; Rawlins *v.* S., 124 Ga. 31, 52 S. E. 1; P. *v.* Covitz, 262 Ill. 514, 104 N. E. 887; P. *v.* Hotz, 261 Ill. 239, 103 N. E. 1007; P. *v.* Darr, 179 Ill. App. 130; P. *v.* Pouchot, 174 Ill. App. 1; Graff *v.* P., 208 Ill. 312, 70 N. E. 299; P. *v.* Smith, 144 Ill. App. 129, 147 id. 146; Christensen *v.* P., 114 Ill. App. 40; Enoch *v.* S., 169 Ind. 488, 82 N. E. 1039; Sanderson *v.* S., 169 Ind. 301, 82 N. E. 525; S. *v.* Lehlan (Ia.), 139 N. W. 475; S. *v.* Donavan, 125 Ia. 239, 101 N. W. 122; S. *v.* Caine, 134 Ia. 147, 111 N. W. 443; Burton *v.* C., 151 Ky. 587, 152 S. W. 545; Gambrell *v.* C., 130 Ky. 513, 113 S. W. 476; McIntosh *v.* C., 23 Ky. L. R. 1222, 64 S. W. 951; S. *v.* Gebbia, 121 La. 1083, 47 S. 32; S. *v.* Bolden, 109 La. 484, 33 S. 571; Lawrence *v.* S., 103 Md. 17, 63 A. 96; C. *v.* Cline, 213 Mass. 225, 100 N. E. 358; C. *v.* White, 208 Mass. 202, 94 N. E. 391; S. *v.* Rogers, 181 Mass. 184, 63 N. E. 421; P. *v.* Macgregor (Mich.), 144 N. W. 869; P. *v.* Mol, 137 Mich. 692, 100 N. W. 913; P. *v.* McGarry, 136 Mich. 316, 99 N. W. 147; S. *v.* Ferrell, 246 Mo. 322, 152 S. W. 33; S. *v.* Storage & F. Co., 246 Mo. 168, 151 S. W. 101; S. *v.* Bobbitt, 228 Mo. 252, 128 S. W. 953; S. *v.* Kennedy, 177 Mo. 98, 75 S. W. 979; S. *v.* Copeman, 186 Mo. 108, 84 S. W. 942; S. *v.* Hanlon, 38 Mont.

777, 100 P. 1035; S. *v.* Allen, 34 Mont. 403, 87 P. 177; Lamb *v.* S., 69 Neb. 512, 95 N. W. 1050; O'Brien *v.* S., 69 Neb. 691, 96 N. W. 649; Ty. *v.* Neatherlin, 13 N. M. 491, 85 P. 1044; P. *v.* Seidenshner, 210 N. Y. 341, 104 N. E. 620; P. *v.* Storrs, 207 N. Y. 147, 100 N. E. 730; Jones *v.* S. (Okla. Cr.), 137 P. 121; Washmood *v.* U. S. (Okla. Cr.), 136 P. 184; Bond *v.* S. (Okla. Cr.), 129 P. 666; Burns *v.* S., 8 Okla. Cr. 554, 129 P. 657; Walker *v.* S. (Okla. Cr.), 127 P. 895; Bowes *v.* S., 8 Okla. Cr. 277, 127 P. 883; Sturges *v.* S., 2 Okla. Cr. 362, 102 P. 57; S. *v.* Garrett (Ore.), 141 P. 1123; S. *v.* Horseman, 52 Or. 572, 98 P. 135; S. *v.* White, 48 Or. 416, 87 P. 137; Pacific L. S. Co. *v.* Gentry, 38 Or. 275, 61 P. 422; S. *v.* Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862; C. *v.* Stambaugh, 22 Pa. Super. 386; C. *v.* Zuern, 16 Pa. Super. 588; S. *v.* Kennedy, 85 S. C. 146, 67 S. E. 152; Standard O. Co. *v.* S., 117 Tenn. 618, 670, 100 S. W. 705; Walker *v.* S. (Tex. Cr.), 167 S. W. 339; Carter *v.* S. (Tex. Cr.), 165 S. W. 200; Coulter *v.* S. (Tex. Cr.), 162 S. W. 885; Nunez *v.* S. (Tex. Cr.), 156 S. W. 933; Wilson *v.* S. (Tex. Cr.), 155 S. W. 242; Wilson *v.* S. (Tex. Cr.), 154 S. W. 1015; Bass *v.* S., 59 Tex. Cr. 186, 127 S. W. 1020; Milo *v.* S., 59 Tex. Cr. 196, 127 S. W. 1025; Bowen *v.* S., 47 Tex. Cr. 137, 82 S. W. 520; Nelson *v.* S., 48 Tex. Cr. 274, 87 S. W. 143; Barnett *v.* S., 42 Tex. Cr. 302, 62 S. W. 765; Wallace *v.* S., 46 Tex. Cr. 341, 81 S. W. 966; S. *v.* Pettit, 74 Wash. 510, 133 P. 1014; S. *v.* Andrews, 71 Wash. 181, 127 P. 1102; S. *v.* Williams, 62 Wash. 286, 113 P. 780; S. *v.* Dilley, 44 Wash. 207, 87 P. 133; S. *v.* Dix, 33 Wash. 405, 74 P. 570; Miller *v.* S., 139 Wis. 57, 119 N. W. 850; Schutz *v.* S., 125 Wis. 452, 104 N. W. 90.

See Coleman *v.* S. (Ga.), 82 S. E. 228; S. *v.* Pettit, 77 Wash. 67, 137 P. 335.

Guilt of accused.—Not cause for excluding such evidence it tends to prove guilt of conspirator being tried. P. *v.* Stokes, 5 Cal. App. 205, 89 P. 997.

Only declarations in furtherance of objects of conspiracy may be proved, though made while it was pending. Miller *v.* U. S., 133 Fed. 337, 66 C. C. A. 399; P. *v.* Smith, 151 Cal. 619, 91 P. 511; S. *v.* Walker, 124 Ia. 414, 100 N. W. 354; Hughes *v.* S., 9 O. C. C. (N. S.) 369; Wells *v.* Ty., 14 Okla. 436, 78 P. 124; Choice *v.* S., 32 Tex. Cr. 285, 106 S. W. 387.

Acts and statements of alleged wife competent against husband in absence of proof of marriage. S. *v.* Miller, 191 Mo. 587, 90 S. W. 767.

In Texas acts or declarations of husband or wife charged as co-conspirator, provable against the other. Smith *v.* S., 48 Tex. Cr. 233, 89 S. W. 817.

Incrimination of person not on trial, not cause for excluding proof of acts and declarations of conspirator. S. *v.* Roberts, 201 Mo. 702, 729, 100 S. W. 484.

Inability to fix time and place of declarations does not render testimony incompetent. S. *v.* Allen, 34 Mont. 403, 87 P. 177.

Knowledge of one conspirator is knowledge of associates. P. *v.* Stokes, 5 Cal. App. 205, 89 P. 997.

But intent of one is not to be imputed to those associated with him later in absence of proof they had knowledge of it. Miller *v.* U. S., 133 Fed. 337, 66 C. C. A. 399.

A corporation is to be judged by acts committed by it as such, but in weighing them court will consider immediately proximate antecedent acts of individuals now comprising and controlling it. Rex *v.* Assn., 14 Ont. L. R. (Can.) 295.

Plea of guilty on part of one conspirator may be taken in open court in presence of panel. Grunberg *v.* U. S., 145 Fed. 81, 76 C. C. A. 51.

420-43 Ty. *v.* Neatherlin, 13 N. M. 491, 85 P. 1044; P. *v.* Micelli, 156 App. Div. 756, 142 N. Y. S. 102; S. *v.* Smith, 55 Or. 408, 106 P. 797. See S. *v.* Ruck, 194 Mo. 416, 432, 92 S. W. 706.

421-44 Bowen *v.* S., 47 Tex. Cr. 137, 82 S. W. 520.

421-45 Ferguson *v.* S., 141 Ala. 20, 37 S. 448; Rawlins *v.* S., 124 Ga. 31, 52 S. E. 1; S. *v.* Ruck, 194 Mo. 416, 432, 92 S. W. 706.

421-46 Loder *v.* Jayne, 142 Fed. 1010; West *v.* S., 168 Ala. 1, 53 S. 277; S. *v.* Thompson, 69 Conn. 720, 38 A. 868; Lasher *v.* Littell, 202 Ill. 551, 67 N. E. 372; Graff *v.* P., 208 Ill. 312, 70 N. E. 299; Miller *v.* John, 208 Ill. 173, 70 N. E. 27; S. *v.* Ottley, 147 Ia. 329, 126 N. W. 334; S. *v.* Caine, 134 Ia. 147, 111 N. W. 443; McIntosh *v.* C., 23 Ky. L. R. 1222, 64 S. W. 951; Chadwell *v.* Co., 24 Ky. L. R. 818, 69 S. W. 1082; Hall *v.* C., 31 Ky. L. R. 64, 101 S. W. 376; P. *v.* McGarry, 136 Mich. 316, 99 N. W. 147; S. *v.* Bobbitt,

228 Mo. 252, 128 S. W. 953; S. *v.* Darling, 199 Mo. 168, 97 S. W. 592; S. *v.* Gatlin, 170 Mo. 354, 70 S. W. 885; S. *v.* Miller, 191 Mo. 587, 90 S. W. 767; S. *v.* Allen, 34 Mont. 403, 87 P. 177; Cohn *v.* Saidel, 71 N. H. 558, 53 A. 800; S. *v.* Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862; Starr *v.* S., 5 Okla. Cr. 440, 115 P. 356; Long *v.* S., 55 Tex. Cr. 55, 114 S. W. 632; Smith *v.* S., 48 Tex. Cr. 233, 89 S. W. 817; S. *v.* Erickson, 54 Wash. 472, 103 P. 796; S. *v.* Dix, 33 Wash. 405, 74 P. 570; S. *v.* Dilley, 44 Wash. 207, 87 P. 133; S. *v.* Grove, 61 W. Va. 697, 57 S. E. 296.

But see Hughes *v.* S., 3 O. C. C. (N. S.) 369, 378. *Comp.* Routt *v.* S., 107 Ark. 643, 155 S. W. 513.

421-47 Jones *v.* U. S., 162 Fed. 417, 89 C. C. A. 303; U. S. *v.* Breese, 173 Fed. 402; P. *v.* Hayes, 9 Cal. App. 301, 99 P. 386; P. *v.* Smith, 144 Ill. App. 129; S. *v.* Bobbitt, 228 Mo. 252, 128 S. W. 953; S. *v.* Ruck, 194 Mo. 416, 432, 92 S. W. 706; S. *v.* Kennedy, 177 Mo. 98, 75 S. W. 979; S. *v.* Boatright, 182 Mo. 33, 81 S. W. 450; P. *v.* McKane, 143 N. Y. 455, 38 N. E. 950.

422-48 Consolidated G. Co. *v.* Hammond, 175 Fed. 641, 99 C. C. A. 195, civil conspiracy.

Acts and declarations of person not named in indictment as conspirator nor designated therein as unknown cannot be proved. Sullivan *v.* P., 108 Ill. App. 329; S. *v.* Carroll, 31 La. Ann. 860.

It is better practice to make all conspirators defendants or allege the conspiracy, parties to it, if known, and their purpose. S. *v.* Kennedy, 177 Mo. 98, 75 S. W. 979.

422-49 S. *v.* Ruck, 194 Mo. 416, 432, 92 S. W. 706; S. *v.* Boatright, 182 Mo. 33, 81 S. W. 450; S. *v.* Sykes, 191 Mo. 62, 89 S. W. 851.

422-50 Loder *v.* Jayne, 142 Fed. 1010; S. *v.* Stockford, 77 Conn. 227, 58 A. 769; Wait *v.* C., 113 Ky. 821, 69 S. W. 697.

422-51 Moore *v.* P., 31 Colo. 336, 73 P. 30; Spies *v.* P., 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320; Cooke *v.* P., 231 Ill. 9, 82 N. E. 863; Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039; Driggers *v.* P. S., 7 Ind. Ty. 752, 104 S. W. 1166; S. *v.* Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862; Smith *v.* S., 46 Tex. Cr. 267, 81 S. W. 936; Patch Mfg. Co. *v.* Lodge, 77 Vt. 294, 318, 60 A. 74.

Party sought to be affected by what was said and done must have knowledge and be engaged in promoting common cause. Loder *v.* Jayne, 142 Fed. 1010.

423-53 Jones *v.* U. S., 179 Fed. 584, 103 C. C. A. 142; P. *v.* Smith, 147 Ill. App. 146; P. *v.* Micelli, 156 App. Div. 756, 142 N. Y. S. 102; Gracy *v.* S., 57 Tex. Cr. 68, 121 S. W. 705; S. *v.* Erickson, 54 Wash. 472, 103 P. 796.

423-54 Knox *v.* S., 164 Ind. 226, 237, 73 N. E. 255; P. *v.* McGarry, 136 Mich. 316, 99 N. W. 147.

Writer of letter need not be identified. Ramsey *v.* Flowers, 72 Ark. 316, 80 S. W. 147.

Means used to secure documents in possession of defendant do not affect their admissibility. Lawrence *v.* S., 103 Md. 17, 63 A. 96.

423-55 Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039.

423-56 Documents must be produced. In England one who is charged with conspiring to induce workmen to break contract with plaintiff must produce material documents, though they may tend to incriminate him. National Assn. *v.* Smithies, (1906) App. Cas. 434.

Deposit slips and bank books admissible to show money deposited to defendant's personal account. Cooke *v.* P., 231 Ill. 9, 82 N. E. 863. Bank books admissible against officers of bank. P. *v.* Smith, 144 Ill. App. 129.

By-laws of association charged with attempt to restrain trade admissible to show identity of its members, nature and purposes of organization and object of its connection with another organization. P. *v.* Assn., 12 Cal. App. 471, 103 P. 712.

If contract introduced to show conspiracy, defendants may show it was superseded by an unobjectionable one. Perrin *v.* U. S., 169 Fed. 17, 94 C. C. A. 385.

423-57 Gambrell *v.* C., 130 Ky. 513, 113 S. W. 476.

Threats comprehend words or acts calculated and intended to cause ordinary person to fear injury to his person, business or property. S. *v.* Stockford, 77 Conn. 227, 58 A. 769. See Gray *v.* Council, 91 Minn. 171, 97 N. W. 663.

423-58 Driggers *v.* U. S., 7 Ind. Ty. 752, 104 S. W. 1166; Chadwell *v.* C., 24 Ky. L. R. 818, 69 S. W. 1082; S. *v.*

Gatlin, 170 Mo. 354, 70 S. W. 885; Smith v. S., 46 Tex. Cr. 267, 81 S. W. 936; Green v. S. (Tex. Cr.), 89 S. W. 838.

Threats against life of father of deceased and offer to pay persons to kill him may be shown, as may a peace bond given by accused at instance of father and indictment for assault with intent to murder, he being prosecutor. Rawlins v. S., 124 Ga. 31, 57, 52 S. E. 1.

424-60 Lathams v. U. S., 210 Fed. 159 (C. C. A.); Dolan v. U. S., 123 Fed. 52, 59 C. C. A. 176; Connecticut, etc. Ins. Co. v. Hillmon, 107 Fed. 834, 46 C. C. A. 668; Smith v. S., 8 Ala. App. 187, 62 S. 575; West v. S., 168 Ala. 1, 53 S. 277; Owens v. S., 98 Ark. 609, 137 S. W. 256; Parker v. S., 98 Ark. 175, 137 S. W. 253; Cumnock v. S., 87 Ark. 34, 112 S. W. 147; P. v. Kizer, 22 Cal. App. 10, 133 P. 516, 521, 133 P. 346; People v. Barkas, 255 Ill. 516, 99 N. E. 698; Brennan v. P., 113 Ill. App. 361; Kahn v. S. (Ind.), 105 N. E. 385; Enrock v. S., 169 Ind. 488, 82 N. E. 1044; Cook v. S., 169 Ind. 439, 82 N. E. 1047; Roberts v. Kendall, 3 Ind. App. 309, 29 N. E. 487; S. v. Walker, 124 Ia. 414, 100 N. W. 354; S. v. Crofford, 121 Ia. 393, 96 N. W. 889; S. v. Wheeler, 129 Ia. 100, 105 N. W. 371; S. v. Wilcox, 90 Kan. 80, 132 P. 982; Bowling v. C. (Ky.), 126 S. W. 360; Hines v. C., 23 Ky. L. R. 119, 62 S. W. 732; Stovall v. C., 23 Ky. L. R. 103, 62 S. W. 536; Kimble v. Gillard, 177 Mich. 250, 143 N. W. 79; Osborne v. S., 99 Miss. 440, 55 S. 52, *oter. sng. of creor*, 54 S. 450; S. v. Fields, 234 Mo. 615, 138 S. W. 518; S. v. Darling, 199 Mo. 168, 97 S. W. 592; S. v. Roberts, 204 Mo. 702, 727, 100 S. W. 484; S. v. Boatright, 182 Mo. 22, 81 S. W. 450; S. v. Faulkner, 175 Mo. 548, 75 S. W. 116; Joyce v. S., 88 Neb. 599, 130 N. W. 291; S. v. Ensworth (N. J.), 88 A. 1097; P. v. Jacobs, 158 App. Div. 293, 143 N. Y. S. 21; Washmon v. U. S. (Okla. Cr.), 138 P. 184; Baker v. S., 3 Okla. Cr. 529, 107 P. 527; S. v. Quan, 48 Or. 247, 86 P. 701; Ballantine v. Cummings, 230 Pa. 625, 79 A. 846; Pizzaro v. S., 28 Tex. Cr. 611, 127 S. W. 1091; Smith v. S., 46 Tex. Cr. 267, 284, 81 S. W. 936; Watson v. S., 48 Tex. Cr. 318, 87 S. W. 1041; Bibby v. S., 51 Tex. Cr. 125, 101 S. W. 243; Mower v. McCarthy, 79 Vt. 142, 64 A. 878; Schultz v. S., 135 Wis. 152, 161 N. W. 90; Schultz v. S., 133 Wis. 215, 113 N. W. 428.

See Walker v. S. (Tex. Cr.), 167 S. W. 339.

425-61 Patrick v. S., 104 Ark. 255, 149 S. W. 84; Wiley v. S., 92 Ark. 586, 124 S. W. 249; P. v. Edwards, 13 Cal. App. 551, 110 P. 342; Hicks v. S., 11 Ga. App. 265, 75 S. E. 12; Driggers v. U. S., 21 Okla. 60, 95 P. 612.

425-62 S. v. Crofford, 121 Ia. 393, 96 N. W. 889; Standard O. Co. v. Doyle, 118 Ky. 662, 82 S. W. 271.

425-64 Doyle v. U. S., 169 Fed. 625, 95 C. C. A. 153; Cohen v. U. S., 157 Fed. 651, 85 C. C. A. 113; Collins v. S., 138 Ala. 57, 34 S. 993; Butt v. S., 81 Ark. 173, 98 S. W. 723; P. v. Donnolly, 143 Cal. 394, 77 P. 177; P. v. Emmons, 7 Cal. App. 685, 95 P. 1032; Lorenz v. U. S., 24 App. Cas. (D. C.) 337; S. v. Gilmore, 151 Ia. 618, 132 N. W. 53; S. v. Walker, 124 Ia. 414, 100 N. W. 354; Allen v. C., 26 Ky. L. R. 807, 82 S. W. 589; Garland v. S., 112 Md. 83, 75 A. 631; P. v. McGarry, 136 Mich. 316, 90 N. W. 147; S. v. Fields, 234 Mo. 615, 138 S. W. 518; Hutchinson v. S., 8 O. C. C. (N. S.) 313; S. v. Caseday, 58 Or. 429, 115 P. 287; C. v. Zuern, 16 Pa. Super. 588; Patch Mfg. Co. v. Lodge, 77 Vt. 294, 320, 60 A. 74; S. v. Dilley, 44 Wash. 207, 87 P. 133.

See Smith v. S., 8 Ala. App. 187, 62 S. 575; P. v. Scott, 22 Cal. App. 54, 133 P. 496. And see vol. 9, p. 231, and supplement thereto.

"It is contended that proof of the conspiracy must first be made before the state can show acts of a co-conspirator; but this is drawing too artificial a line to be compatible with the proper administration of justice. The order of proof is in the discretion of the trial court, and the circumstances may be so interwoven as to make separate proof of the design and of the substantive act impossible. Clough v. State, 7 Neb. 320; Ream v. State, 52 Neb. 727, 73 N. W. 227; 3 Enc. of Evidence, 425, note 64. If the jury believed that the accused was present with Morrison at the time the burglary was committed, then, in view of all the other testimony with regard to their association together before and after the commission of the crime, the acts and declarations of Morrison in pursuance of the common purpose were properly received as evidence against him." Joyce v. S., 88 Neb. 599, 130 N. W. 291.

426-65 Lowman *v.* S., 161 Ala. 47, 50 S. 43.

426-66 Loder *v.* Jayne, 142 Fed. 1010; Wright *v.* Stewart, 130 Fed. 905; Chapline *v.* S., 77 Ark. 444, 95 S. W. 477; P. *v.* Carson, 155 Cal. 164, 99 P. 970; P. *v.* Stokes, 5 Cal. App. 205, 89 P. 997; Barrow *v.* S., 121 Ga. 187, 48 S. E. 950; Cook *v.* S., 169 Ind. 430, 82 N. E. 1047; S. *v.* Bolden, 109 La. 484, 33 S. 571; Lawrence *v.* S., 103 Md. 17, 63 A. 96; S. *v.* Miller, 191 Mo. 587, 90 S. W. 767; Cohn *v.* Saidel, 71 N. H. 558, 53 A. 800; Wells *v.* Ty., 14 Okla. 436, 78 P. 124; S. *v.* Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862; Proctor *v.* S., 54 Tex. Cr. 254, 112 S. W. 770; Bowen *v.* S., 47 Tex. Cr. 137, 82 S. W. 520; Schultz *v.* S., 133 Wis. 215, 113 N. W. 428.

Court must strike out declarations in absence of proof of conspiracy. Jenkins *v.* S., 35 Fla. 737, 18 S. 182, 48 Am. St. 267; S. *v.* Walker, 124 Ia. 414, 100 N. W. 354.

It is better to require proof of conspiracy before allowing declarations to be shown. S. *v.* Walker, 124 Ia. 414, 100 N. W. 354; Sturgis *v.* S., 2 Okla. Cr 302, 102 P. 57.

427-68 Garland *v.* S., 112 Md. 83, 75 A. 631; S. *v.* Roberts, 201 Mo. 702, 728, 100 S. W. 484; S. *v.* Donaldson, 35 Utah 96, 99 P. 447, *cit.* the text; Miller *v.* S., 139 Wis. 57, 119 N. W. 850.

427-69 Rex *v.* Cope, 1 Str. 144, 93 Eng Reprint 438 (stated in note to Cleveland *v.* Anderson, 66 Neb. 252, 250, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075); In re Friedman, 164 Fed. 131; Cook *v.* S., 169 Ind. 430, 82 N. E. 1047; S. *v.* Crofford, 121 Ia. 395, 96 N. W. 889; Chadwell *v.* C., 24 Ky. L. R. 818, 69 S. W. 1082; S. *v.* Gatlin, 170 Mo. 354, 70 S. W. 885; Sturgis *v.* S., 2 Okla. Cr. 302, 102 P. 57; Wells *v.* Ty., 14 Okla. 436, 78 P. 124; C. *v.* Zuern, 16 Pa. Super. 588; Schultz *v.* S., 133 Wis. 215, 113 N. W. 428.

It is sufficient if conspiracy established by prima facie evidence. Hutchinson *v.* S., 8 O. C. C. (N. S.) 313.

427-70 S. *v.* Walker, 124 Ia. 414, 100 N. W. 354; S. *v.* Wheeler, 129 Ia. 100, 105 N. W 374; S. *v.* Kennedy, 177 Mo 98, 119, 75 S. W. 979; S. *v.* Bostwight, 182 Mo. 33, 81 S. W. 150; Shields *v.* Bk., 138 N. C. 185, 50 S. E. 591; S. *v.* Marks, 70 S. C. 148, 50 S. E. 14; O'Quinn *v.* S., 55 Tex. Cr. 18, 115 S. W. 39; Wills *v.* Co., 39 Tex. Civ. 483, 88 S. W. 265.

See Bauer *v.* S., 3 Okla. Cr. 520, 107 P. 525.

Disconnected circumstances, as consistent with lawful, as unlawful, intent, not ground for admitting testimony in proof of conspiracy. Ballantine *v.* Cummings, 221 Pa. 621, 70 A. 546.

Proof of motive not enough. P. *v.* Farmer, 196 N. Y. 65, 89 N. E. 462.

428-72 S. *v.* Walker, 124 Ia. 414, 100 N. W. 354; S. *v.* Crofford, 121 Ia. 395, 96 N. W. 889; Chadwell *v.* C., 24 Ky. L. R. 818, 69 S. W. 1082; S. *v.* Kennedy, 177 Mo. 98, 119, 75 S. W. 979; S. *v.* Darling, 199 Mo. 168, 97 S. W. 592; Driggers *v.* U. S., 21 Okla. 60, 95 P. 612; Ballantine *v.* Cummings, 221 Pa. 621, 70 A. 546; C. *v.* Zuern, 16 Pa. Super. 588; Schultz *v.* S., 133 Wis. 215, 113 N. W. 428.

Formal ruling on sufficiency of evidence need not be made. Schultz *v.* S., 133 Wis. 215, 113 N. W. 428.

428-73 Hanners *v.* S., 147 Ala. 27, 41 S. 973; Boland *v.* Stanley, 88 Ark. 562, 115 S. W. 163; S. *v.* Crofford, 121 Ia. 395, 96 N. W. 889; Hall *v.* C., 29 Ky. L. R. 485, 93 S. W. 994; S. *v.* Darling, 199 Mo. 168, 97 S. W. 592; S. *v.* Kennedy, 177 Mo. 98, 119, 75 S. W. 979; C. *v.* Zuern, 16 Pa. Super. 588; Bowen *v.* S., 47 Tex. Cr. 137, 82 S. W. 520; Wallace *v.* S., 48 Tex. Cr. 318, 87 S. W. 1041; S. *v.* Dilley, 44 Wash. 207, 87 P. 133; Schultz *v.* S., 133 Wis. 215, 113 N. W. 428.

429-74 Sheppard *v.* S., 172 Ala. 363, 55 S. 514; S. *v.* Gilmore, 151 Ia 618, 132 N. W. 53; S. *v.* DeWolfe, 29 Mont. 415, 74 P. 1084; S. *v.* Allen, 34 Mont. 403, 87 P. 177; S. *v.* Moeller, 20 N. D. 114, 126 N. W. 568.

Preliminary acts may be shown. C. *v.* Sanderson, 40 Pa. Super. 416; C. *v.* Snyder, 40 Pa. Super. 485.

430-75 P. *v.* Warfield, 261 Ill. 293, 103 N. E. 979; S. *v.* Walker, 124 Ia. 414, 100 N. W. 354; S. *v.* Crofford, 121 Ia. 395, 96 N. W. 889; Driggers *v.* U. S., 21 Okla. 60, 95 P. 612; Wallace *v.* S., 48 Tex. Cr. 318, 87 S. W. 1041.

In Texas rule is broader than text states it. See Stevens *v.* S., 42 Tex. Cr. 154, 59 S. W. 547; Hudson *v.* S., 43 Tex. Cr. 420, 66 S. W. 685; Smith *v.* S., 21 Tex. App. 96, 17 S. W. 508, 48 Tex. Cr. 233, 89 S. W. 817; Harris *v.* S., 31 Tex. Cr. 411, 20 S. W. 916.

430-76 S. *v.* Allen, 34 Mont. 403, 87

P. 177. See S. v. Ryan, supra (126 66).
Declarations as to action to be taken not provable unless means to be used unlawful, object to be obtained not being so. Cranfill v. Hayden, 97 Tex. 544, 80 S. W. 609. Acts and declarations done and made prior to conspiracy, competent to show motive, purpose and intent. Smith v. S., 46 Tex. Cr. 267, 286, 81 S. W. 936.
Relation of parties, purpose of combination, preliminary steps taken to effectuate it, even prior to ascertainment of object, may be shown. P. v. Smith 147 Ill. App. 146.
It must be shown beyond reasonable doubt party whose silence is sought to be used against him heard and understood. O'Quinn v. S., 55 Tex. Cr. 18, 115 S. W. 39.

130-77 Fain v. U. S., 209 Fed. 525 (C. C. A.); Hauger v. U. S., 173 Fed. 74, 97 C. C. A. 372; Lowman v. S., 161 Ala. 47, 50 S. 43; Crowell v. S. (Ariz.), 120 P. 279; Routt v. S., 107 Ark. 634, 156 S. W. 513; Wiley v. S., 92 Ark. 581, 124 S. W. 249; P. v. Ayhens, 16 Cal. App. 618, 117 P. 789; P. v. Dresser, 16 Cal. App. 583, 117 P. 688; P. v. Smith, 151 Cal. 619, 91 P. 511; S. v. Brown, 2 Boyce (Del.) 405, 80 A. 147; Gray v. S., 13 Ga. App. 374, 79 S. E. 223; Suttles v. Sewell, 117 Ga. 214, 43 S. E. 486; P. v. Nall, 242 Ill. 284, 89 N. E. 1012; Kahn v. S. (Ind.), 107 N. E. 385; S. v. Gilmore, 151 Ia. 618, 132 N. W. 53; Lawrence v. S., 107 Md. 17, 63 A. 96; S. v. Bobbitt, 242 Mo. 273, 146 S. W. 799; S. v. Forshee, 199 Mo. 142, 97 S. W. 933; S. v. Kennedy, 177 Mo. 98, 75 S. W. 979; S. v. Smith, 33 Nev. 438, 117 P. 19; Lederer v. Adler, 46 Misc. 564, 92 N. Y. S. 827; Koontz v. S. (Okla. Cr.), 129 P. 842; Washmood v. U. S. (Okla. Cr.), 136 P. 184; Burns v. S., 8 Okla. Cr. 554, 129 P. 657; Wells v. S., 5 Okla. Cr. 22, 113 P. 210; Sturgis v. S., 2 Okla. Cr. 362, 102 P. 57; Ball v. Danton, 64 Or. 184, 129 P. 1032; S. v. Smith, 55 Or. 408, 106 P. 797; C. v. Zoern, 16 Pa. Super. 588; McIlvaine v. First Nat. Bk. (S. D.), 146 N. W. 574; Day v. S., 62 Tex. Cr. 413, 138 S. W. 427; Couch v. S., 58 Tex. Cr. 505, 126 S. W. 856; S. v. Justesen, 35 Utah 105, 99 P. 456; Miller v. S., 139 Wis. 57, 119 N. W. 850.
See P. v. Hayes, 9 Cal. App. 301, 99 P. 286.
Application of rule where conspiracy to defraud general and extends over long period. Exchange Bk. v. Moss, 149 Fed. 340, 79 C. C. A. 278.
Silence of accused when implicatory statements made by others charged as co-conspirators, not provable, parties being in custody. Merriweather v. C., 26 Ky. L. R. 793, 82 S. W. 592.

131-78 Ferguson v. S., 141 Ala. 20, 37 S. 448; Del Campo v. Camarillo, 154 Cal. 647, 98 P. 1049; Lorenz v. U. S., 24 App. Cas. (D. C.) 337; P. v. Darr, 262 Ill. 202, 104 N. E. 389; Ball v. Danton, 64 Or. 184, 129 P. 1032; S. v. Davis, 88 S. C. 229, 70 S. E. 811. But see Dobbs v. S., 54 Tex. Cr. 550, 113 S. W. 923.
Plea of guilty within rule S. v. Philips, 73 S. C. 236, 53 S. E. 370.

131-79 Smith v. P., 38 Colo. 509, 88 P. 453; Roberts v. Kendall, 3 Ind. App. 339, 29 N. E. 487; Higgins v. C., 142 Ky. 647, 134 S. W. 1135; C. v. Ellis, 133 Ky. 625, 118 S. W. 973; Overstreet v. S. (Tex. Cr.), 150 S. W. 630; Green v. S., 56 Tex. Cr. 599, 120 S. W. 1002; S. v. McCoy, 61 W. Va. 258, 57 S. E. 291; Novkovic v. S., 149 Wis. 665, 135 N. W. 465.
If made in presence of accused, not competent unless assented to. S. v. Philips, 73 S. C. 236, 53 S. E. 370.
Act done by one conspirator by direction of the other, after object accomplished, may be proved. Proctor v. S., 54 Tex. Cr. 254, 112 S. W. 770.

132-80 Coon v. S. (Ark.), 160 S. W. 226; P. v. Emmons, 7 Cal. App. 685, 95 P. 1032; Baldwin v. S., 46 Fla. 115, 35 S. 220; Gray v. S., 13 Ga. App. 374, 79 S. E. 223; Rawlins v. S., 124 Ga. 31, 52 S. E. 1; Knox v. S., 164 Ind. 226, 73 N. E. 255; C. v. Borasky, 214 Mass. 313, 101 N. E. 377; Lockhart v. Min. Co., 16 N. M. 223, 117 P. 833; Washmood v. U. S. (Okla. Cr.), 136 P. 184; Burns v. S., 8 Okla. Cr. 554, 129 P. 657.
In S. v. Anderson, 154 Ia. 701, 135 N. W. 405, "a witness was allowed to testify, over defendant's objection, that he met defendant and another person coming away from the car having with them some personal property such as a suit case, a shotgun, some razors, and some money, and that they admitted getting the property from the car. It is contended that the declarations of the person accompanying defendant at this time were not admissible against him, for it did not appear that they

were confederates at the time the statements were made, so that the declarations of the other person could be shown as against the defendant. But, in the first place, it clearly appears that these two persons had been together in the car, and were coming away from it together, having in their possession articles which they had taken from the car; and this was sufficient to indicate such confederation as to render admissible against the defendant the declarations of his confederate made in his presence."

432-81 Osborne *v.* S., 99 Miss. 412, 55 S. 52, *over.* error, 54 S. 450; Ty. *v.* Johnson, 16 Haw. 743, 755; C. *v.* Stuart, 207 Mass. 563, 93 N. E. 825; Lamb *v.* S., 69 Neb. 212, 95 N. W. 1050; O'Brien *v.* S., 69 Neb. 691, 96 N. W. 649; P. *v.* Weiss, 129 App Div. 671, 114 N. Y. S. 236; C. *v.* Znern, 16 Pa. Super. 588; Eggleston *v.* S., 59 Tex. Cr. 542, 128 S. W. 1105.

432-82 P. *v.* Jacobs, 158 App. Div. 293, 143 N. Y. S. 21; Schultz *v.* S., 133 Wis. 215, 113 N. W. 428.

Possession of fruits of conspiracy not cause for receiving evidence of declarations of a conspirator. Del Campo *v.* Camarillo, 154 Cal. 647, 98 P. 1049.

432-83 U. S. *v.* Greene, 146 Fed. 803; Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039; Allen *v.* C., 26 Ky. L. R. 807, 82 S. W. 589; P. *v.* Mol, 137 Mich. 692, 100 N. W. 913; S. *v.* Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862; Eggleston *v.* S., 59 Tex. Cr. 542, 128 S. W. 1105; S. *v.* Dilley, 44 Wash. 207, 87 P. 133.

In prosecution for conducting a strike it may be shown union paid counsel fees for defense of men charged with using violence. S. *v.* Stockford, 77 Conn. 227, 58 A. 769.

Act of third person in inducing witness to leave state may be proved if accused privy thereto. Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039.

433-84 Knox *v.* S., 164 Ind. 226, 73 N. E. 255; S. *v.* Ruck, 194 Mo. 416, 435, 92 S. W. 706; Kipper *v.* S., 45 Tex. Cr. 377, 77 S. W. 611.

434-88 Cumnock *v.* S., 87 Ark. 34, 112 S. W. 147 (or if two are tried together); Standard O. Co. *v.* S., 117 Tenn. 618, 662, 100 S. W. 705. See Rex *v.* Plummer, (1902) 2 K. B. (Eng.) 339.

Agent and corporate principal counted in two or more necessary to constitute conspiracy. Standard O. Co. *v.* S., 117 Tenn. 618, 662, 100 S. W. 705.

In Kentucky one of two conspirators may be convicted on testimony of the other though effect of witness' testimony be to secure his discharge under statute. Weber *v.* C., 24 Ky. L. R. 1726, 72 S. W. 30.

Discharge of one does not affect competency to testify against the other under Indiana statute. Williams *v.* S., 169 Ind. 384, 82 N. E. 790.

In a civil action there may be a recovery against one defendant. James *v.* Evans, 149 Fed. 136, 80 C. C. A. 240.

If any two conspirators guilty, acquittal of others is immaterial as to former. C. *v.* Valverdi, 218 Pa. 7, 66 A. 377.

434-92 Wilson *v.* S. (Tex. Cr.), 155 S. W. 242.

434-94 C. *v.* Rogers, 181 Mass. 184, 63 N. E. 421.

Discredited co-conspirator should be corroborated. S. *v.* Messner, 43 Wash. 206, 86 P. 636.

435-97 Wong Din *v.* U. S., 135 Fed. 702, 68 C. C. A. 340; Benson *v.* U. S., 146 U. S. 325; S. *v.* Storage Co., 246 Mo. 168, 151 S. W. 101

"If both men had been on trial, a third person, if he had seen these men making these maneuvers, would have been permitted to testify to all these facts to show they were acting together; and that one of the actors is detailing the matter does not alter the rule." Grant *v.* S. (Tex. Cr.), 148 S. W. 760.

Testimony of accomplice.—After prima facie proof of conspiracy sufficient to connect all defendants therewith, one of them may testify of facts and circumstances connected with commission of felony, showing his own and co defendants' connection therewith. Hudson *v.* S., 137 Ala. 60, 34 S. 854; P. *v.* Zimmerman, 3 Cal. App. 84, 84 P. 446; Baldwin *v.* S., 46 Fla. 115, 35 S. 220.

Fact one of the accused made involuntary confession does not disqualify him as witness, though it may affect his credibility. Rawlins *v.* S., 124 Ga. 31, 52 S. E. 1.

CONTEMPT

What is Contempt?—See 5 STANDARD PROC. 366.

Nature and Source of Power to Punish For.—See 5 STANDARD PROC. 368.

Proceedings.—See 5 STANDARD PROC. 382-410.

Judgment, Punishment, Commitment, Discharge, Review and Forms.—See 5 STANDARD PROC. 410-437.

439-1 Bessette *v.* Co., 194 U. S. 324; In re Nevitt, 117 Fed. 448, 54 C. C. A. 622; U. S. *v.* R. Co., 142 Fed. 176; U. S. *v.* Richards, 1 Alaska 613; Reymert *v.* Smith, 5 Cal. App. 380, 90 P. 470; McCarthy *v.* Hugo, 82 Conn. 262, 73 A. 778 (information and warrant proper though contempt committed in court's presence); Robinson *v.* P., 129 Ill. App. 527; Wells *v.* Court, 126 Ia. 340, 102 N. W. 106; Dunlavey *v.* Doggett, 38 Mont. 204, 99 P. 436; S. *v.* Clancy, 30 Mont. 133, 76 P. 10; Crites *v.* S., 74 Neb. 687, 105 N. W. 469; Poland *v.* Poland, 63 Wash. 597, 116 P. 2; Mylius *v.* McDonald, 61 W. Va. 405, 56 S. E. 602.

Illustration of civil contempt.—Red R. V. B. Corp. *v.* Grand Forks (N. D.), 146 N. W. 876, 878.

Proceedings to determine whether a person is guilty of a criminal contempt in connection with a civil action is a civil proceeding and not a criminal one. Hanbury *v.* Benedict, 160 App. Div. 662, 146 N. Y. S. 44.

Criminal in nature so far as rules of pleading concerned. Back *v.* S., 75 Neb. 603, 106 N. W. 787. And as to venue, S. *v.* Court, 24 Mont. 33, 60 P. 493, 89 P. 798.

439-2 Chicago, etc. R. Co. *v.* Gildersleeve, 165 Mo. App. 370, 147 S. W. 836; Staley *v.* Realty Co. (N. J.), 90 A. 1042.

439-3 Dermedy *v.* Jackson, 117 Ia. 620, 125 N. W. 228 (title not material); Typothetae *v.* Union, 117 N. Y. S. 144. See Hake *v.* P., 230 Ill. 174, 82 N. E. 561, for rule in chancery.

"Practice of entitling contempt proceeding."—Wright *v.* Suydam (Wash.), 141 P. 578.

How papers entitled.—If instituted against one not a party to the suit preliminary proceedings should be entitled as of that suit, and later papers, if guilt established, as in suit by government. Employer's T. Co. *v.* Council, 141 Fed. 679. It is otherwise where contempt act of party to cause; then it is a criminal misdemeanor and proceeding is independent of action in which writ issued. Bullock Co. *v.* Westinghouse, 129 Fed. 105, 63 C. C. A. 607. But it is not material, in such a case, how proceedings entitled. Robinson *v.* P., 129 Ill. App. 527; Hughes *v.* Ty., 10 Ariz. 119, 85 P. 1058, 6 L. R. A. (N. S.) 572. Should be entitled in name of people. Kanter *v.* Clerk, 108 Ill. App. 287; Burdette *v.* Munger, 144 Ill. App. 164. *Contra*, Manning *v.* Co., 242 Ill. 584, 90 N. E. 238.

In New York proceeding is special, independent of action or proceeding in which it may be taken. The rights of parties and rules of law same as in actions where same issues involved. In re Depue, 185 N. Y. 60, 77 N. E. 798.

In Wisconsin, Iowa, Connecticut and Wyoming proceeding is in action in which violated injunction issued. Gorham *v.* New Haven, 82 Conn. 153, 72 A. 1012; Ferguson *v.* Wheeler, 126 Ia. 111, 101 N. W. 638; My Laundry Co. *v.* Schmeling, 129 Wis. 597, 109 N. W. 540; Porter *v.* S., 16 Wyo. 131, 92 P. 385.

Separate docketing unnecessary when one is charged with violating injunction; if it is separately docketed the shorthand notes of testimony in one case may be used as the "written evidence" required by statute in the other. Hatlestad *v.* Court, 137 Ia. 146, 114 N. W. 628.

439-4 In re Fellerman, 149 Fed. 214; O'Neil *v.* P., 113 Ill. App. 195; S. *v.* Harris, 14 N. D. 501, 105 N. W. 621.

440-6 Bessette *v.* Co., 194 U. S. 324; In re Nevitt, 117 Fed. 448, 54 C. C. A. 622; Heinze *v.* Co., 129 Fed. 274, 63 C. C. A. 388; Flannery *v.* P., 225 Ill. 62, 80 N. E. 60; Hake *v.* P., 230 Ill. 174, 82 N. E. 561; O'Brien *v.* P., 216 Ill. 354, 75 N. E. 108, 108 Am. St. 219; Thompson *v.* R. Co., 48 N. J. Eq. 105, 21 A. 182; In re McCormick, 132 App. Div. 921, 117 N. Y. S. 70; S. *v.* Sieber, 49 Or. 1, 88 P. 313; Patterson *v.* Council, 31 Pa. Super. 112; Snow *v.* Snow, 13 Utah 15, 43 P. 620; Davidson *v.* Munsey, 29 Utah 181, 80 P. 743; S. *v.* Co., 55 Wash. 1, 103 P. 426, 107 P. 196; Geiger *v.* Geiger, 20 Wash. 181, 54 P. 1129.

Rule of reasonable doubt applies. Barnett F. Co. *v.* Crowe (N. J. Eq.), 74 A. 964.

440-7 Gorham *v.* New Haven, 82 Conn. 153, 72 A. 1012; Rucker *v.* S., 170 Ind. 635, 85 N. E. 356; French *v.* C., 30 Ky. L. R. 98, 97 S. W. 427; Emery *v.* S., 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124; Bowman

v. Seaman, 152 App. Div. 690, 137 N. Y. S. 568.

440-8 Hammond L. Co. *v.* Union, 149 Fed. 577; Ferriman *v.* P., 128 Ill. App. 230. See U. S. *v.* Huff, 206 Fed. 700.

Order to show cause or warrant of arrest may issue as court elects. S. *v.* Sieber, 49 Or. 1, 88 P. 313.

440-9 Oster *v.* P., 192 Ill. 473, 61 N. E. 469, 56 L. R. A. 462; S. *v.* Nicoll, 40 Wash. 517, 82 P. 895.

Punish on motion of district attorney for criminal contempt in persistent perjury blocking inquiry. U. S. *v.* Appel, 211 Fed. 495.

Formal answer may be filed if defendant so elects. Hammond L. Co. *v.* Union, 149 Fed. 577.

440-10 In re Johnson, 151 Fed. 207, 80 C. C. A. 259; Emery *v.* S., 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.), 1124; S. *v.* Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. 568; S. *v.* Crum, 7 N. D. 299, 74 N. W. 992.

440-11 Russell *v.* Judge, 136 Mich. 624, 99 N. W. 864.

440-12 S. *v.* Harris, 14 N. D. 501, 105 N. W. 621.

Discretionary with court to serve interrogatories. In re Slavin, 131 U. S. 267.

Verified return to rule accepted as true if not challenged. S. *v.* Farnum, 73 S. C. 193, 53 S. E. 85.

441-14 U. S. *v.* Huff, 206 Fed. 700; Oehler *v.* Levy, 168 Ill. App. 41, *aff.*, 256 Ill. 178, 99 N. E. 912; Drady *v.* Court, 126 Ia. 345, 102 N. W. 115. See Perry *v.* Kausz, 167 Ill. App. 250.

Changed by statute.—Herald-R. Pub. Co. *v.* Lewis (Utah), 129 P. 624.

Rule that disavowal of imputed intent relieves party applies only where intention to injure constitutes gravamen of offense. In re Gorham, 129 N. C. 481, 40 S. E. 311. No application where overt acts personally done. U. S. *v.* Shipp, 203 U. S. 563; Emery *v.* S., 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124. In Mississippi it will not purge constructive contempt. O'Flynn *v.* S., 89 Miss. 850, 43 S. 82, 9 L. R. A. (N. S.) 1119. See as favoring rule of discharge under affidavit, U. S. *v.* Carroll, 147 Fed. 947; Early *v.* P., 117 Ill. App. 608; Fishback *v.* S., 131 Ind. 304, 30 N. E. 1088; Anderson *v.* Co., 34 Ind. App. 100, 72 N. E. 277; S. *v.* Henthorn, 46 Kan. 613, 26 P. 937; S. *v.* Vincent, 46 Kan. 618, 620, 26 P. 939; Percival *v.* S., 45 Neb. 741, 64 N. W. 221, 50 Am. St. 568; Rosewater *v.* S., 47 Neb. 630, 66 N. W. 640; Hay *v.* Farnum, 73 S. C. 193, 53 S. E. 85. *Contra*, Sloan *v.* P., 115 Ill. App. 84; Drady *v.* Court, 126 Ia. 345, 102 N. W. 115; Marvin *v.* Court, 126 Ia. 355, 102 N. W. 119; Globe N. Co. *v.* C., 188 Mass. 449, 453, 74 N. E. 682; In re Chadwick, 109 Mich. 588, 67 N. W. 1071; Ty. *v.* Murray, 7 Mont. 251, 15 P. 145; Mackay *v.* S., 60 Neb. 143, 82 N. W. 372; In re Chartz, 29 Nev. 110, 85 P. 352, 5 L. R. A. (N. S.) 916; In re Young, 137 N. C. 552, 50 S. E. 220; Battle *v.* Co., 72 S. C. 322, 51 S. E. 873; Coleman *v.* S., 121 Tenn. 1, 113 S. W. 1045.

In Iowa statute gives contemner right to file explanation before he is found guilty. S. *v.* Court, 124 Ia. 187, 99 N. W. 712.

441-15 Employers' T. Co. *v.* Council, 141 Fed. 679; Stull *v.* P., 173 Ill. App. 512; O'Brien *v.* P., 216 Ill. 354, 75 N. E. 108, 108 Am. St. 219; Anderson *v.* Co., 34 Ind. App. 100, 72 N. E. 277.

In a court of chancery affidavits pro and con will be heard as well as any other legal evidence. Hake *v.* P., 230 Ill. 174, 82 N. E. 561. And so in a bankruptcy court. In re Fellerman, 149 Fed. 244.

441-16 Stull *v.* P., 173 Ill. App. 512.

441-19 *Contra.* Schweer *v.* Brown, 130 Fed. 328, 64 C. C. A. 574; In re Lasky, 163 Fed. 99, and cases cited. See In re Johnson, 151 Fed. 207, 80 C. C. A. 259.

Federal courts do not recognize the common law rule that one charged with contempt may purge himself and be discharged by filing a sworn answer denying the contempt, but they leave the question to be determined by the proofs on the hearing. U. S. *v.* Huff, 206 Fed. 700.

441-20 Matter of Depue, 185 N. Y. 60, 77 N. E. 798. See Burnett *v.* S., 8 Okla. Cr. 639, 129 P. 1110.

441-22 U. S. *v.* Carroll, 147 Fed. 947; Reymert *v.* Smith, 5 Cal. App. 380, 90 P. 470; Drady *v.* Court, 126 Ia. 345, 102 N. W. 115; Fellman *v.* Ins. Co., 116 La. 733, 41 S. 53; Ex parte Clark, 208 Mo. 121, 106 S. W. 990; Ex parte Hedden, 29 Nev. 352, 90 P. 737; In re Nejez, 54 Misc. 38, 104 N. Y. S. 505; Ex parte Terrell (Tex. Cr.), 95 S. W. 536; Mylius *v.* McDonald, 61 W. Va. 405, 56 S. E. 602.

See McCaully *v.* U. S., 25 App. Cas.

(D. C.) 404; Ex parte Sullivan (Okla. Cr.), 138 P. 815.

442-24 See Battle *v.* Co., 72 S. C. 322, 51 S. E. 873.

442-27 Hake *v.* P., 230 Ill. 174, 82 N. E. 561; Ferriman *v.* P., 128 Ill. App. 230; Brown *v.* Powers (Ia.), 134 N. W. 73; Bunting *v.* Powers, 144 Ia. 65, 120 N. W. 679, *cit.* the text; Ferguson *v.* Wheeler, 126 Ia. 111, 101 N. W. 638; S. *v.* Sieber, 49 Or. 1, 88 P. 313.

442-28 Ferriman *v.* P., 128 Ill. App. 230; In re Dunn, 85 Neb. 606, 124 N. W. 120.

443-29 York *v.* S., 89 Ark. 72, 115 S. W. 948. See In re Providence J. Co., 28 R. I. 489, 69 A. 428, 17 L. R. A. (N. S.) 582.

443-31 U. S. *v.* R. Co., 142 Fed. 176; Reymert *v.* Smith, 5 Cal. App. 380, 90 P. 470; Ex parte Shortridge, 5 Cal. App. 371, 90 P. 478; Kanter *v.* Clerk, 108 Ill. App. 287; Ex parte Shull, 221 Mo. 623, 121 S. W. 10; Crites *v.* S., 74 Neb. 687, 105 N. W. 469.

444-32 Garrigan *v.* U. S., 163 Fed. 16, 89 C. C. A. 494; S. *v.* Edwards, 15 S. D. 383, 89 N. W. 1011.

See Magu *v.* S., 99 Miss. 83, 54 S. 802, for interference with order of court, where the court refused to punish where guilt was not shown beyond a reasonable doubt.

444-34 Regularity of proceedings presumed if record silent. Mahoney *v.* S., 33 Ind. App. 655, 72 N. E. 151.

444-35 Ex parte Nelson, 251 Mo. 63, 157 S. W. 794.

444-36 Crites *v.* S., 74 Neb. 687, 105 N. W. 469. See Ex parte Winn, 105 Ark. 190, 150 S. W. 399.

Statement of matters that occurred in presence of judge in open court imports verity. Mahoney *v.* S., 33 Ind. App. 655, 72 N. E. 151.

Record must set out facts constituting contempt; statement of conclusion not enough. Crites *v.* S., supra; Ogden *v.* S., 3 Neb. (Unof.) 886, 93 N. W. 203.

Guilt may be shown by verified answer. Ferriman *v.* P., 128 Ill. App. 230.

445-37 In re Davison, 143 Fed. 673; In re Cole, 144 Fed. 392, 75 C. C. A. 330; U. S. *v.* Carroll, 147 Fed. 947; S. *v.* Court, 112 La. 182, 36 S. 315; Gordon *v.* S., 73 Neb. 221, 102 N. W. 458. See U. S. *v.* Huff, 206 Fed. 700; Poindexter *v.* S. (Ark.), 159 S. W. 197; Kemmerling *v.* S., 89 Neb. 98, 130 N. W. 988.

Not evidence or basis to punish for contempt that the guardian fails to obey a judgment to pay over money to ward under N. Y. C. C. P., §1241, subd. 4; Coffin *v.* Coffin, 161 App. Div. 215, 146 N. Y. S. 565.

446-38 Lamberson *v.* Court, 151 Cal. 458, 91 P. 100, 11 L. R. A. (N. S.) 619; P. *v.* Grogan, 178 Ill. App. 314.

If court directs information be filed the trial will take usual course, and findings will be tested by evidence in record. Connell *v.* S., 80 Neb. 296, 114 N. W. 294.

446-39 Ferriman *v.* P., 128 Ill. App. 230.

Attorney's disclaimer of contemptuous manner in presence of court.—Ex parte Winn, 105 Ark. 190, 150 S. W. 399.

447-40 Lack of malice of writer of article, and that proprietor of newspaper had no knowledge of article is admissible in mitigation of punishment. Ex parte Nelson, 251 Mo. 63, 157 S. W. 794.

448-45 See In re Smith, 54 Colo. 486, 131 P. 277.

448-46 Jones *v.* U. S., 209 Fed. 585 (C. C. A.); Garrigan *v.* U. S., 163 Fed. 16, 89 C. C. A. 494; U. S. *v.* Carroll, 147 Fed. 947; Sabin *v.* Fogarty, 70 Fed. 482; Herald-R. Pub. Co. *v.* Lewis (Utah), 129 P. 624.

449-47 In re Fellerman, 149 Fed. 244; Drakeford *v.* Adams, 98 Ga. 722, 25 S. E. 833.

Rules of evidence applicable to civil cases apply, notwithstanding element may have entered into act making it indictable, not being alleged nor proved. Flannery *v.* P., 225 Ill. 62, 71, 80 N. E. 60.

449-49 See P. *v.* Grogan, 178 Ill. App. 314.

450-50 In re Young, 137 N. C. 552, 50 S. E. 220.

Language of article unambiguous.—Publisher conclusively presumed to have meant what he stated. Ex parte Nelson, 251 Mo. 63, 157 S. W. 794.

450-51 P. *v.* Newburger, 98 App. Div. 92, 90 N. Y. S. 740; Wright *v.* Suydam (Wash.), 140 P. 578.

Contra, whether contempt, civil or criminal, if imprisonment may result. New Jersey P. Co. *v.* Martin, 166 Fed. 1010. See Garrigan *v.* U. S., 163 Fed. 16, 89 C. C. A. 494.

450-52 U. S. *v.* Collins, 146 Fed. 553. *Contra*, S. *v.* Sieber, 49 Or. 1, 88 P. 313, *disap.* Ex parte Gould, 99 Cal. 360,

33 P. 1112; S. *v.* Reilly, 40 Wash. 217, 82 P. 287.

450-53 Patterson *v.* Council, 31 Pa. Super. 112; Smith *v.* Smith, 77 S. C. 67, 57 S. E. 666.

450-54 See Hammond L. Co. *v.* Union, 149 Fed. 577.

450-55 Seastream *v.* Co., 72 N. J. Eq. 377, 65 A. 982; P. *v.* Marr, 88 App. Div. 422, 84 N. Y. S. 965.

451-58 Later acts than that charged cannot be shown. Otillio *v.* Otillio, 119 La. 965, 44 S. 799; S. *v.* Court, 112 La. 182, 36 S. 315; Ansley *v.* Stuart, 119 La. 1, 43 S. 892.

Other acts cannot be shown unless pleaded. S. *v.* Sieber, 49 Or. 1, 88 P. 313.

451-59 Violations of injunction after attachment issued may be shown if defendant will not be surprised. S. *v.* McCarley, 74 Kan. 874, 87 P. 743.

Second violation of injunction cause for increasing fine. Westinghouse *v.* Christensen, 130 Fed. 735.

451-60 Admission by silence. Toozer *v.* S., 5 Neb. (Unof.) 182, 97 N. W. 584; Nebraska, etc. Soc. *v.* S., 57 Neb. 765, 78 N. W. 267.

452-63 S. *v.* Harris, 14 N. D. 501, 105 N. W. 621.

452-69 Warner *v.* Martin, 124 Ga. 387, 52 S. E. 446; O'Neil *v.* P., 113 Ill. App. 195; Drady *v.* Court, 126 Ia. 345, 102 N. W. 115; Davidson *v.* Munsey, 29 Utah 181, 80 P. 743.

Violated decree need not be in evidence if referred to in statement of facts. Sawyer *v.* Oliver, 144 Ia. 382, 122 N. W. 950.

452-70 Otis *v.* Court, 148 Cal. 129, 82 P. 853.

452-72 Misstatement of conclusions of court, a contempt. In re Providence J. Co., 28 R. I. 489, 68 A. 428, 17 L. R. A. (N. S.) 582.

452-74 See Ex parte Nelson, 251 Mo. 63, 157 S. W. 794.

453-75 Fellman *v.* Ins. Co., 116 La. 723, 41 S. 49; S. *v.* Court, 37 Mont. 590, 97 P. 1032.

Under statute language must be specifically addressed to judge. Yoder *v.* C., 107 Va. 823, 57 S. E. 581.

Matter pending in court.—Immaterial, where publication attacks court or judge, whether case pending at time matter published. Ex parte McLeod, 120 Fed. 130; S. *v.* Shepherd, 177 Mo. 205, 76 S. W. 79; Ex parte Moore, 63 N. C. 397; Burdett *v.* C., 103 Va. 838, 48 S. E. 878. *Contra,* Ex parte Green, 46 Tex. Cr. 576, 81 S. W. 723.

454-78 Trial need not be in progress nor immediately to take place if indictment found. Globe Co. *v.* C., 188 Mass. 449, 74 N. E. 682.

In England, immaterial indictment not found. Rex *v.* Parke, (1903) 2 K. B. 432.

455-80 In re Fite, 11 Ga. App. 665, 76 S. E. 397.

455-83 **Distinctions between criticism and defamation.** — McDougall *v.* Sheridan, 23 Ida. 191, 128 P. 954.

457-87 See S. *v.* Shepherd, 177 Mo. 205, 76 S. W. 79.

457-88 Ex parte Shortridge, 5 Cal. App. 371, 90 P. 478; Christian H. *v.* P., 223 Ill. 244, 79 N. E. 72; P. *v* Cochran, 149 Ill. App. 369; Carr *v.* Court, 147 Ia. 663, 126 N. W. 791 (changed conditions); Coffey *v.* Gamble, 117 Ia. 545, 91 N. W. 813; Junius Hart P. H. *v.* Ingman, 119 La. 1017, 44 S. 850; Ex parte McRae, 45 Tex. Cr. 285, 77 S. W. 211; Porter *v.* S., 16 Wyo. 131, 92 P. 385.

Intent of publisher is no defense where article is contemptuous per se. McDougall *v.* Sheridan, 23 Ida. 191, 128 P. 954.

Not a defense to injunction that plaintiff resorted to a subterfuge to ascertain whether defendant was obeying writ. Ex parte Cash, 50 Tex. Cr. 623, 99 S. W. 1118.

457-90 **A conviction of contempt in another case** pending in same court is no bar to the maintenance of this case. Cohen *v.* Plumtree, 170 Ill. App. 311.

457-91 American L. Co. *v.* Co., 134 Fed. 129; Drew *v.* Hogan, 26 App. Cas. (D. C.) 55; S. *v.* McGahey, 12 N. D. 535, 97 N. W. 865; S. *v.* Scarborough, 70 S. C. 288, 49 S. E. 860; S. *v.* Pendergast, 39 Wash. 132, 81 P. 324; Powhatan C. & C. Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257.

An affidavit must show facts constituting a contempt or court has no jurisdiction. Strain *v.* Sup. Ct. (Cal.), 142 P. 62.

Lack of jurisdiction of contempt proceeding, a defense. Otis *v.* Court, 148 Cal. 129, 82 P. 853; Rogers *v.* Court, 145 Cal. 88, 78 P. 344; Hutton *v.* Court, 147 Cal. 156, 81 P. 409; Roberson *v.* P., 10 Colo. 119, 90 P. 79; Ex parte Hedden, 29 Nev. 352, 90 P. 737; S. *v.* Newton, 16 N. D. 151, 112 N. W. 52.

458-92 In re Johnson, 151 Fed. 207,

80 C. C. A. 259; Lewis *v.* Peck, 154 Fed. 273, 83 C. C. A. 211; P. *v.* Feenaughty, 51 Misc. 468, 101 N. Y. S. 700; Ex parte Garza, 50 Tex. Cr. 106, 95 S. W. 1059; S. *v.* Peterson, 29 Wash. 571, 70 P. 71.

458-93 U. S. *v.* R. Co., 142 Fed. 176; Ex parte Robinson, 144 Fed. 835, 75 C. C. A. 663; Pitcock *v.* S., 91 Ark. 527, 121 S. W. 742; Tebbetts *v.* P., 31 Colo. 461, 73 P. 869; Bachman *v.* Harrington, 184 N. Y. 458, 77 N. E. 657; Lindsay *v.* Allen, 113 Tenn. 517, 82 S. W. 648; Gulf, etc. R. Co. *v.* Co., 37 Tex. Civ. 334, 83 S. W. 1100.

458-94 Ex parte Fullen (N. M.), 128 P. 64; In re Depue, 185 N. Y. 60, 77 N. E. 798; P. *v.* Warner, 51 Hun 53, 3 N. Y. S. 768, 125 N. Y. 746, 37 N. E. 407 (*aff.* on opinion below); S. *v.* Pendergast, 39 Wash. 132, 81 P. 324.

458-95 Mellenry *v.* S., 91 Miss. 562, 44 S. 831, 16 L. R. A. (N. S.) 1062.

459-96 In re Skelly, 109 App. Div. 58, 95 N. Y. S. 1076; Jones *v.* Burgess, 109 App. Div. 888, 96 N. Y. S. 873.

459-97 U. S. *v.* Price, 1 Alaska 204; Gardiner *v.* Ross, 19 S. D. 497, 104 N. W. 220.

459-98 Order to show cause why decree should not be modified suspends decree and defendant is not in contempt for non-compliance with it. Comstock *v.* Comstock, 49 Misc. 599, 99 N. Y. S. 1057.

459-1 Huttig S. & D. Co. *v.* Fuelle, 143 Fed. 363; Blake *v.* Nesbet, 144 Fed. 279; Rodgers *v.* Pitt, 89 Fed. 424; Meeks *v.* S., 80 Ark. 579, 98 S. W. 378; Smith *v.* Schlink, 44 Colo. 200, 99 P. 566; Franklin Union *v.* P., 220 Ill. 355, 367, 77 N. E. 176; Flannery *v.* P., 225 Ill. 62, 80 N. E. 69; O'Brien *v.* P., 216 Ill. 354, 75 N. E. 108, 108 Am. St. 219; Christian H. *v.* P., 223 Ill. 244, 79 N. E. 72; Butler *v.* Champlin, 124 Ill. App. 29; Swedish Am. T. Co. *v.* Co., 208 Ill. 562, 70 N. E. 708; Kanter *v.* Clerk, 108 Ill. App. 287; Perry *v.* Pernet, 165 Ind. 67, 74 N. E. 609; Smith *v.* Miller, 28 Ky. L. R. 1205; 91 S. W. 1140; Miles *v.* S., 74 Neb. 684, 105 N. W. 301; Village of Haverstrom *v.* Bekerson, 158 App. Div. 419, 143 N. Y. S. 667; Lawson *v.* Tyler, 98 App. Div. 10, 90 N. Y. S. 188; In re Spies, 92 App. Div. 175, 86 N. Y. S. 1043; Schweig *v.* Schweig, 107 N. Y. S. 905; Ft. Worth D. Club *v.* Assn., 56 Tex. Civ. 102, 121 S. W. 213; Lytle *v.* R. Co., 41 Tex. Civ. 112, 90 S. W. 316; Ex parte Breeding (Tex. Cr.), 90 S. W. 634; Gulf, etc. R. Co. *v.* Co., 37 Tex. Civ. 334, 83 S. W. 1100; S. *v.* Nicoll, 40 Wash. 517, 82 P. 895; Vilter Mfg. Co. *v.* Humphrey, 132 Wis. 587, 112 N. W. 1095, 13 L. R. A. (N. S.) 591.

But see Powers *v.* Phillips, 166 Ill. App. 407.

Invalidity of order against remarriage in a divorce decree is complete defense to charge of contempt for its violation. People *v.* Prouty, (Ill.), 104 N. E. 387.

460-3 Seaward *v.* Paterson, (1897) 1 Ch. D. 545, 66 L. J. Ch. 267; Diamond D. & M. Co. *v.* Kelley, 130 Fed. 893; Hutchins *v.* Munn, 28 App. Cas. (D. C.) 271; Stolts *v.* Tuska, 82 App. Div. 81, 81 N. Y. S. 638; P. *v.* Marr, 88 App. Div. 422, 84 N. Y. S. 965.

Assertion of rights under decree makes asserter a party to it though its terms extend only to formal parties. S. *v.* Court, 34 Mont. 258, 86 P. 798.

460-4 Heinze *v.* Co., 129 Fed. 274, 63 C. C. A. 388; Lowenthal *v.* Hodge, 105 N. Y. S. 120; Stolts *v.* Tuska, supra; Lytle *v.* R. Co., 41 Tex. Civ. 112, 90 S. W. 316.

460-5 Allis C. Co. *v.* Union ,150 Fed. 155; Employers' T. Co. *v.* Council, 141 Fed. 679; Huttig S. & D. Co. *v.* Fuelle, 143 Fed. 363; O'Brien *v.* P., 216 Ill. 354, 75 N. E. 108, 108 Am. St. 219; Sloan *v.* P., 115 Ill. App. 84; Anderson *v.* Co., 34 Ind. App. 100, 72 N. E. 277; P. *v.* Marr, 181 N. Y. 463, 74 N. E. 431; Vilter Mfg. Co. *v.* Humphrey, 132 Wis. 587, 112 N. W. 1095, 13 L. R. A. (N. S.) 591.

Individual members of unincorporated labor organizations may be punished for contempt committed by it. Patterson *v.* Council, 31 Pa. Super. 112; P. *v.* Marr, 181 N. Y. 463, 74 N. E. 431.

In New York, because of statute, injunction has less scope than in many jurisdictions. See Rigas *v.* Livingston, 178 N. Y. 20, 70 N. E. 107.

461-6 Davis *v.* Co., 150 N. C. 84, 63 S. E. 178.

461-7 Diamond D. & M. Co. *v.* Kelley, 130 Fed. 893; Janney *v.* Pancoast, 124 Fed. 972.

Injunction against individuals does not affect them in their official capacities. Public S. Co. *v.* De Grote, 70 N. J. Eq. 454, 62 A. 65.

461-8 See In re Banning, 108 App. Div. 12, 95 N. Y. S. 467.

462-9 Egilbert *v.* Court, 6 Cal. App. 199, 91 P. 748; Bauter *v.* Court, 6 Cal. App. 195, 91 P. 749.

462-10 Ex parte S., 162 Ala. 181, 50 S. 143.

462-11 In re De Forest etc. Co., 154 Fed. 81; Young *v.* Rothrock, 121 Ia. 588, 96 N. W. 1105; S. *v.* Ilgner, 81 Kan. 203, 105 P. 14; Davis C. Co. *v.* Co., 157 Mich. 102, 121 N. W. 292 (verbal order); Terry *v.* S., 77 Neb. 612, 110 N. W. 733; Mocksville Lodge *v.* Gibbs, 159 N. C. 66, 74 S. E. 743.

Jailer who refuses to deliver prisoner under advice of judge not guilty though he violated order of court of co-ordinate jurisdiction with that over which judge presided, which order issued pursuant to mandate of highest state tribunal. Boone *v.* Riddle, 27 Ky. L. R. 828, 86 S. W. 978.

Intent, essential element. Hutton *v.* Court, 147 Cal. 156, 81 P. 409.

463-12 In re De Forest, etc. Co., 154 Fed. 81.

463-13 In re Seitz, 56 Misc. 616, 107 N. Y. S. 593.

463-14 Encyclopaedia B. Co. *v.* Assn., 130 Fed. 493; Siegert *v.* Eiseman, 157 Fed. 314; Watertown P. Co. *v.* Place, 51 App. Div. 633, 64 N. Y. S. 673.

No defense that defendant acted in good faith and no damage resulted to plaintiff although such matters are considered in mitigation of punishment. Red River V. B. Corp. *v.* Grand Forks (N. D.), 146 N. W. 876, 878.

Injunction restraining intimidation of workmen violated by casual observation. See Ideal Mfg. Co. *v.* Ludwig, 149 Mich. 133, 112 N. W. 723.

463-15 Encyclopaedia B. Co. *v.* Werner, 172 Fed. 1012. See U. S. *v.* R. Co., 142 Fed. 176.

Good faith presumed in case of a municipality where methods of carrying out order much at its discretion. Sponenburg *v.* Gloversville, 46 Misc. 290, 94 N. Y. S. 264.

464-20 "The mandate should be so clearly expressed, when applied to the act complained of, that the violation must appear by reasonable certainty." Saal *v.* R. Co., 106 N. Y. S. 996.

464-22 Seastream *v.* Co., (N. J. Eq.), 61 A. 1041.

464-23 Blaise *v.* Co., 124 La. 979, 50 S. 816.

464-24 Queen *v.* Green, 170 Fed. 611; Bowker *v.* Haight, 146 Fed. 256; In re Home D. Co., 147 Fed. 538; S. *v.* Richardson, 125 La. 644, 51 S. 673; Stolts *v.* Tuska, 82 App. Div. 81, 81 N. Y. S. 638; S. *v.* Nicoll, 40 Wash. 517, 82 P. 895.

Understanding between counsel and court cannot be proved. Buck *v.* Powers (Ia.), 121 N. W. 1042.

464-25 Westinghouse, etc. Co. *v.* Co., 128 Fed. 747; Carr *v.* Court, 147 Ia. 663, 126 N. W. 791; Coffey *v.* Gamble, 117 Ia. 545, 91 N. W. 813; Young *v.* Rothrock, 121 Ia. 588, 96 N. W. 1105; S. *v.* Richardson, 125 La. 644, 51 S. 673; Stolts *v.* Tuska, 82 App. Div. 81, 81 N. Y. S. 638; Ft. Worth D. Club *v.* Assn., 56 Tex. Civ. 162, 121 S. W. 213.

465-27 Opinions of lawyers as to validity of process, incompetent. Leber *v.* U. S., 170 Fed. 881, 96 C. C. A. 57.

465-28 Meeks *v.* S., 80 Ark. 579, 98 S. W. 378.

465-29 Powhatan C. & C. Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257; S. *v.* Harness, 42 W. Va. 414, 26 S. E. 270.

466-31 Young *v.* Rothrock, 121 Ia. 588, 96 N. W. 1105; S. *v.* Nicoll 40 Wash. 517, 82 P. 895. See Westinghouse, etc. Co. *v.* Co., 128 Fed. 747; Louisville & N. R. Co. *v.* Co., 31 Ky. L. R. 729, 103 S. W. 269.

Substantial compliance in abatement of nuisance may be shown. Saal *v.* R. Co., 106 N. Y. S. 996.

466-33 Effect given modification of order by agreement of parties. Goodsell *v.* Goodsell, 94 App. Div. 443, 88 N. Y. S. 161.

466-34 Am. T. Co. *v.* Wallis, 126 Fed. 464, 61 C. C. A. 342; In re Goldfarb, 131 Fed. 643; Zippe *v.* Zippe, 143 Ill. App. 638; Perry *v.* Pernet, 165 Ind. 67, 74 N. E. 609; McHenry *v.* S., 91 Miss. 562, 44 S. 831, 16 L. R. A. (N. S.) 1062; S. *v.* Court, 37 Mont. 485, 97 P. 841; Hershenstein *v.* Hahn, 77 N. J. L. 39, 71 A. 105; Grant *v.* Co., 125 App. Div. 833, 110 N. Y. S. 253; Lawson *v.* Tyler, 98 App. Div. 10, 90 N. Y. S. 188; Camden *v.* Safe, etc. Co. (Va.), 78 S. E. 596; Holcomb *v.* Holcomb, 53 Wash. 611, 102 P. 653.

Comp. Cahzin *v.* Cahzin, 112 N. Y. S. 525. See S. *v.* Court, 31 Mont. 511, 79 P. 13, only relief because of disability lies in obtaining modification of order.

Inability to produce books because not having possession of them.—In re Ironclad Mfg. Co., 201 Fed. 66, 119 C. C. A. 404.

467-35 Morrison *v.* Blake, 33 Pa. Super. 290.

Financial inability, arising from refusal to work, is a defense. Webb *v.* Webb, 140 Ala. 262, 37 S. 96.

467-36 Reifschneider *v.* Reifschneider, 241 Ill. 92, 89 N. E. 255; Metheany *v.* Judge, 142 Mich. 628, 106 N. W. 147; Lawson *v.* Tyler, 98 App. Div. 10, 90 N. Y. S. 188.

Question of ability only arises on motion to discharge contemnor. Schmohl *v.* Phillips, 138 App. Div. 279, 122 N. Y. S. 974; Typothetae *v.* Union, 138 App. Div. 293, 122 N. Y. S. 975. Uncorroborated affidavit of contemnor concerning inability, not cause for discharge. In re Canakos, 60 Misc. 63, 111 N. Y. S. 601.

468-39 In re Johnson Co., 151 Fed. 207, 80 C. C. A. 259.

468-40 P. *v.* Feenaughty, 51 Misc. 468, 101 N. Y. S. 700; Kalmanowitz *v.* Kalmanowitz, 108 App. Div. 296, 95 N. Y. S. 627; Conklin *v.* Conklin, 113 App. Div. 743, 99 N. Y. S. 310; Am. M. Co. *v.* Sire, 103 App. Div. 396, 92 N. Y. S. 1082; Gerson *v.* Berti, 87 N. Y. S. 458; General E. Co. *v.* Sire, 88 App. Div. 498, 85 N. Y. S. 141; S. *v.* Downing, 40 Or. 309, 58 P. 863, 66 P. 917.

468-41 Grant *v.* Greene, 121 App. Div. 756, 106 N. Y. S. 532; P. *v.* Feenaughty, 51 Misc. 468, 101 N. Y. S. 700; S. *v.* McGahey, 12 N. D. 535, 97 N. W. 865.

Doing what is forbidden with knowledge process has issued and preventing its service, a contempt. S. *v.* Court, 33 Mont. 359, 83 P. 641.

Ignorance of verbal order may excuse officer. Richards *v.* U. S., 126 Fed. 105, 61 C. C. A. 161.

Service of orders on attorney good if court has jurisdiction. Grant *v.* Greene, supra. *Contra,* if no jurisdiction of person. In re Depue, 185 N. Y. 60, 77 N. E. 798.

468-42 Blake *v.* Nesbet, 141 Fed. 279; Ritter *v.* Ulman, 78 Fed. 222, 24 C. C. A. 71; Seattle B. & M. Co. *v.* Hansen, 144 Fed. 1011; Westinghouse, etc. Co. *v.* Co., 130 Fed. 735; In re Wilk, 155 Fed. 943; Pitcock *v.* S., 91 Ark. 527, 121 S. W. 742; Anderson *v.* Hall, 128 Ga. 525, 58 S. E. 43; Bunting *v.* Powers, 144 Ia. 65, 120 N. W. 679; In re Coggshall, 100 Mo. App. 585, 75 S. W. 183.

Clerical error in injunction does not excuse violation. Ex parte Testard, 101 Tex. 250, 106 S. W. 319.

468-43 S. *v.* Court, 29 Mont. 230, 74 P. 412.

468-44 Westinghouse, etc. Co. *v.* Co., 128 Fed. 747; S. *v.* Court, 112 La. 182, 36 S. 315.

468-45 Informal dissolution of injunction may be shown. Coffey *v.* Gamble, 117 Ia. 545, 91 N. W. 813.

469-46 Ex parte Nelson, 251 Mo. 63, 157 S. W. 794. Unintentional error in publishing reports of court proceedings, not a defense. In re Providence J. Co., 28 R. I. 489, 68 A. 428, 17 L. R. A. (N. S.) 582.

469-47 Ex parte Nelson, 251 Mo. 63, 157 S. W. 794.

469-50 Ex parte Nelson, 251 Mo. 63, 157 S. W. 794.

470-52 **Where matter is abusive** or insulting, evidence language used was justified, not admissible. S. *v.* Reid, 118 La. 827, 43 S. 455.

Truth of published matter immaterial when it was calculated to influence result of pending case. Hughes *v.* Ty., 10 Ariz. 119, 85 P. 1058, 6 L. R. A. (N. S.) 572; Globe N. Co. *v.* C., 188 Mass. 449, 74 N. E. 682.

Intent immaterial.—Globe N. Co. *v.* C., supra; Telegram N. Co. *v.* C., 172 Mass. 294, 52 N. E. 445.

470-53 In re Cashman, 168 Fed. 1008 (must be shown beyond reasonable doubt); Hatfield *v.* King, 131 Fed. 791; Rutledge *v.* Waldo, 94 Fed. 265; Herald-R. Pub. Co. *v.* Lewis (Utah), 129 P. 624.

Evidence sufficient.—Aluminum Castings Co. *v.* Local No. 84, I. M. U., 197 Fed. 221.

Evidence insufficient.—Omeliah *v.* Mfg. Co., 195 Fed. 539.

470-54 In re Stavrahn, 174 Fed. 330, 98 C. C. A. 202; London G. & A. Co. *v.* Doyle, 134 Fed. 125; In re Cashman, 168 Fed. 1008; Zippe *v.* Zippe, 143 Ill. App. 638; In re Strong, 111 App. Div. 281, 97 N. Y. S. 459, *aff.,* without opinion, 186 N. Y. 584, 79 N. E. 1116; In re Geyer, 62 Misc. 443, 116 N. Y. S. 893; Croft *v.* Croft, 77 Wash. 620, 138 P. 6.

"Inability to produce certain books." In re Ironclad Mfg. Co., 201 Fed. 66, 119 C. C. A. 404.

It is prima facie evidence of contempt to fail to comply with order to pay alimony, and defendant must show inability. Shaffner *v.* Shaffner, 212 Ill. 492, 72 N. E. 447.

471-55 Jones *v.* U. S., 209 Fed. 585

(C. C. A.); In re Mize, 172 Fed. 945 (referee's order); Am. T. Co. *v.* Wallis, 126 Fed. 464, 61 C. C. A. 342; In re Goldfarb, 131 Fed. 643; General E. Co. *v.* McLaren, 140 Fed. 876; Hollister *v.* P., 116 Ill. App. 338; Connell *v.* S., 80 Neb. 296, 114 N. W. 294; Saal *v.* R. Co., 106 N. Y. S. 996; Kidd *v.* Corp., 113 Va. 612, 75 S. E. 145.

471-56 Sawyer *v.* Hutchinson, 149 Ia. 93, 127 N. W. 1089; Carr *v.* Court, 147 Ia. 663, 126 N. W. 791; S. *v.* Harris, 14 N. D. 501, 105 N. W. 621.

471-57 In re Davison, 143 Fed. 673; Wells *v.* Court, 126 Ia. 340, 102 N. W. 106; Sullivan *v.* Co., 222 Pa. 72, 70 A. 775. Evidence must be clear and conclusive. S. *v.* Small, 49 Or. 595, 90 P. 1110.

471-59 Shaffner *v.* Shaffner, 212 Ill. 492, 72 N. E. 447; S. *v.* Morton, 91 Kan. 908, 139 P. 409; Greenberg *v.* Polansky, 140 App. Div. 326, 125 N. Y. S. 176.

472-60 Preponderance of evidence sufficient. O'Brien *v.* P., 216 Ill. 354, 75 N. E. 108; McBride *v.* P., 225 Ill. 315, 80 N. E. 306.

472-61 Stuart *v.* Reynolds, 204 Fed. 709. See In re Kahn, 204 Fed. 581 (C. C. A.), and vol. 2, p. 806, n. 98; also p. 807, n. 1, and supplement thereto.

472-62 **Evidence insufficient to show contempt.**—In re Ironclad Mfg. Co., 201 Fed. 66, 119 C. C. A. 404; Ex parte Winn, 105 Ark. 190, 150 S. W. 399.

472-66 **Sufficient evidence** to convict of wilful contempt in publication on decision of court (McDougall *v.* Sheridan, 23 Ida. 191, 128 P. 954), to prove contempt in violation of habeas corpus judgment (Crawford *v.* Manning (Ga. App.), 76 S. E. 771), of violation of injunctional order. Red River Valley B. Corp. *v.* Grand Forks (N. D.), 146 N. W. 876.

Defendant has right to be confronted with witnesses against him. Staley *v.* Realty Co. (N. J.), 90 A. 1042.

474-67 Coon *v.* S. (Ala. App.), 65 S. 911.

475-69 Crocker *v.* Conrey, 140 Cal. 213, 73 P. 1006; Jones *v.* Mould, 151 Ia. 599, 132 N. W. 45.

Master in bankruptcy may compel testimony (In re Automatic M. Co., 204 Fed. 334), or production of books. In re Ironclad Mfg. Co., 201 Fed. 66, 119 C. C. A. 404.

475-72 See Ormond *v.* Ball, 120 Ga. 916, 48 S. E. 383.

476-74 Ferriman *v.* P., 128 Ill. App. 230; In re Archer, 134 Mich. 408, 96 N. W. 442.

476-77 See Ex parte Caldwell, 138 Fed. 487, *rev.* on another question, Carfer *v.* Caldwell, 200 U. S. 293.

477-79 **County board of equalization.** Ex parte Sanford, 236 Mo. 665, 139 S. W. 376.

478-80 Llewellyn's Case, 13 Pa. C. C. 126.

478-81 Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276.

State treated as valid for more than half a century. Ex parte Alexander, 163 Mo. App. 615, 147 S. W. 521.

478-82 In re Butler, 76 Neb. 267, 107 N. W. 572. See McIntyre *v.* P., 227 Ill. 26, 81 N. E. 33.

478-86 Ferriman *v.* P., 128 Ill. App. 230; S. *v.* Dalton, 43 Wash. 278, 86 P. 590.

478-87 In re Farkas, 204 Fed. 343.

479-90 McSwane *v.* Foreman, 167 Ind. 171, 78 N. E. 630.

Failure to appear before grand jury, direct contempt. Ferriman *v.* P., 128 Ill. App. 230.

479-91 Overend *v.* Court, 131 Cal. 280, 63 P. 372.

479-93 Egilbert *v.* Court, 6 Cal. App. 190, 91 P. 748; Consolidated C. Co. *v.* Jones, 120 Ill. App. 139.

Resignation of one who was a corporate officer, competent to show inability to produce corporate books. U. S. *v.* R. Co., 85 Fed. 955; Egilbert *v.* Court, supra.

Mere inconvenience to person subpoenaed as witness will not excuse failure to attend. Ferriman *v.* P., 128 Ill. App. 230.

480-94 In re Depue, 185 N. Y. 60, 77 N. E. 798.

481-96 A party is not bound to attend at his own house for examination as witness before trial, and may lock it and leave without waiving his right to have it considered his castle. McSwane *v.* Foreman, 167 Ind. 171, 78 N. E. 630.

481-97 In re Fellerman, 149 Fed. 244.

485-9 Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276.

485-10 Succession of Desina, 118 La. 278, 42 S. 936; In re Randall, 90 App. Div. 192, 85 N. Y. S. 1089; Lindsay *v.* Allen, 113 Tenn. 717, 82 S. W. 648.

Irrelevancy of question does not authorize witness to refuse to answer.

Ex parte Butt, 78 Ark. 262, 93 S. W. 992.

486-11 In re Automatic M. Co., 204 Fed. 331; Bowker *v.* Haight, 146 Fed. 256; Overend *v.* Court, 131 Cal. 280, 63 P. 372; In re Rogers, 129 Cal. 468, 62 P. 47; Consol. C. Co. *v.* Jones, 120 Ill. App. 139; Bentley *v.* P., 104 Ill. App. 353, 107 Ill. App. 245; Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276; Ex parte Parker, 74 S. C. 466, 55 S. E. 122.

Compelling answers in bankruptcy proceedings.—In re Farkas, 204 Fed. 343.

487-13 It is not good objection order served is too broad. Consol. R. Co. *v.* S., 207 U. S. 541.

487-14 Bowker *v.* Haight, 146 Fed. 256; In re Johnson Co., 151 Fed. 207, 80 C. C. A. 259; U. S. *v.* Praeger, 149 Fed. 474; Ex parte Butt, 78 Ark. 262, 93 S. W. 992; Rogers *v.* Court, 145 Cal. 88, 78 P. 341; Kanter *v.* Clerk, 108 Ill. App. 287; Louisville, etc. R. Co. *v.* Schwab, 31 Ky. L. R. 1313, 105 S. W. 110; In re Morse, 42 Misc. 664, 87 N. Y. S. 721; Walters *v.* R. Co., 48 Wash. 233, 93 P. 419.

Immunity under federal statutes.—See Hale *v.* Henkel, 201 U. S. 43; Nelson *v.* U. S., 201 U. S. 92.

Corporate privilege.—See Consol. R. Co. *v.* S., 207 U. S. 541.

Decision of court martial that questions put to civilian could be answered without incriminating him is not conclusive on civil courts. U. S. *v.* Praeger, 149 Fed. 474.

487-15 Elliott *v.* U. S., 23 App. Cas. (D. C.) 456; Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276.

488-16 **Objection to relevancy or competency of evidence sought may be made by witness though he is not a party; if he decides, whether he has been lawfully ordered to answer, he does so at his peril.** Ex parte Schoepf, supra.

Witness may not object to testimony, tendency or effect of which is no concern of his. Nelson *v.* U. S., 201 U. S. 92, 115. But see Penn *v.* R. Co., 122 Ga. 280, 50 S. E. 103.

489-17 In re Morse, 42 Misc. 664, 87 N. Y. S. 721.

Production of corporate books.—See Consolidated R. Co. *v.* S., 207 U. S. 541.

490-19 Ex parte Parker, 74 S. C. 466, 55 S. E. 122; Ex parte Wolters (Tex. Cr.), 144 S. W. 531.

493-27 **Advice of counsel answer might subject witness to prosecution is excuse if liability depends upon wilful refusal to answer.** U. S. *v.* Praeger, 149 Fed. 474.

494-31 In re Fellerman, 149 Fed. 244. **The test in examination concerning property of bankrupt is whether reasonable man would believe story told.** Ibid.

494-33 **General statement by one called to give deposition that, on advice of counsel, he will not answer, does not constitute contempt, no question being put.** Ex parte Green, 126 Mo. App. 309, 103 S. W. 593.

501-50 **Commitment must be in compliance with statute.** P. *v.* Court, 147 N. Y. 290, 41 N. E. 700; In re Depue, 185 N. Y. 60, 77 N. E. 789.

503-55 In re Debs, 158 U. S. 564; Otis *v.* Court, 148 Cal. 129, 82 P. 873; Ex parte Clark, 208 Mo. 121, 106 S. W. 990; Seastream *v.* Co., 72 N. J. Eq. 377, 65 A. 982; In re Young, 137 N. C. 552, 50 S. E. 220; Patterson *v.* Council, 31 Pa. Super. 112; Forbes *v.* Council, 107 Va. 853, 60 S. E. 81. See Pearson *v.* Jones, 170 Ill. App. 84.

Contra.—Merchants' Stock & Grain Co. *v.* Board of Trade, 187 Fed. 398, 109 C. C. A. 230.

Jurisdictional question raised by writ of error.—Merchants, etc. Co. *v.* Board of Trade, 201 Fed. 20, 120 C. C. A. 582.

No appeal from conviction for contempt in refusing to obey a subpoena. Pegram *v.* S. (Tex. Cr.), 161 S. W. 458.

Writ of error lies to circuit court of appeals to review a judgment adjudging person not a party to action in which disobeyed order made guilty of contempt. Bessette *v.* Conkey, 194 U. S. 324. And so where fine is imposed on one who was a party. Bullock, etc. Co. *v.* Co., 129 Fed. 105, 63 C. C. A. 607. Writ of error lies. Hurley *v.* C., 188 Mass. 443, 74 N. E. 677; Globe N. Co. *v.* C., 188 Mass. 449, 74 N. E. 682.

In Wisconsin appeal lies from order in civil proceeding for purpose of reviewing judgment concerning violation thereof. Vilter Mfg. Co. *v.* Humphrey, 132 Wis. 587, 112 N. W. 1095, 13 L. R. A. (N. S.) 591.

Legality of punishment imposed will be inquired into, but not the merits. French *v.* C., 30 Ky. L. R. 98, 97 S. W. 427.

503-56 See Hake *v.* P., 230 Ill. 174, 82 N. E. 561, rule in equity.

504-59 Ex parte Butt, 78 Ark. 262, 93 S. W. 992; P. *v.* Latimer, 160 Cal. 716, 117 P. 1051; Abbott *v.* Abbott (Cal. App.), 141 P. 939; Muscatine County *v.* Oliver (Ia.), 139 N. W. 1105; Brown *v.* Powers (Ia.), 134 N. W. 73; Jones *v.* Mould, 151 Ia. 599, 132 N. W. 45; Wells *v.* Court, 126 Ia. 340, 102 N. W. 106; Garrett *v.* Bishop, 113 Ia. 23, 84 N. W. 923; Coffey *v.* Gamble, 117 Ia. 545, 91 N. W. 813; Hanbury *v.* Beneliet, 160 App. Div. 662, 146 N. Y. S. 44; Herald-R. Pub. Co. *v.* Lewis (Utah), 129 P. 624.

See Ex parte Winn, 105 Ark. 190, 150 S. W. 399.

Judgment in habeas corpus proceedings does not bar a review on certiorari. Rogers *v.* Court, 145 Cal. 88, 78 P. 344.

505-61 In re Ayers, 123 U. S. 443, 485; Cuyler *v.* R. Co., 131 Fed. 95; Ex parte Shortridge, 5 Cal. App. 371, 90 P. 478; Elliott *v.* U. S., 23 App. Cas. (D. C.) 456; In re Jewett, 69 Kan. 830, 77 P. 567; Ex parte Clark, 208 Mo. 121, 106 S. W. 990.

508-65 Ex parte Brown, 3 Ariz. 411, 77 P. 489; Elliott *v.* U. S., 23 App. Cas. (D. C.) 456; Perry *v.* Pernet, 165 Ind. 67, 74 N. E. 609; P. *v.* Feenaughty, 51 Misc. 468, 101 N. Y. S. 700; Ex parte Testard, 101 Tex. 250, 106 S. W. 319.

508-66 Ex parte McCown, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N. S.) 603.

On waiving right to take testimony recitals in record become verities. Ex parte Clark, 208 Mo. 121, 106 S. W. 990.

Facts set out in commitment cannot be controverted. Ex parte Shortridge, 5 Cal. App. 371, 90 P. 478.

508-67 Carfer *v.* Caldwell, 200 U. S. 293.

509-70 In re Depue, 185 N. Y. 60, 77 N. E. 789; Mylius *v.* McDonald, 61 W. Va. 405, 56 S. E. 602.

509-72 Gay *v.* Thorpe, 1 Cal. App. 312, 82 P. 221; Powhatan C. & C. Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257.

CONTRACTS

Quantum of evidence to show parol, 512-1; *With decedent,* 512-1; *Over telephone,* 512-1; *Implied, by accepting services,* 512-2; *Issue as to whether contract in writing,* 512-5; *Rules of employer as affecting making of,* 512-5; *Post-contractual declarations competent,* 521-36; *Evidence of usual price as to terms,* 524-44.

512-1 U. S. C. Co. *v.* Pinkerton, 169 Fed. 536, 95 C. C. A. 34; McCoy *v.* S. 124 Ga. 218, 52 S. E. 434; Heartt *v.* Sherman, 229 Ill. 581, 82 N. E. 417; Wilford *v.* Bliss, 174 Ill. App. 28; Allen *v.* Stailey (Ky.), 119 S. W. 755; Smith *v.* Richardson, 31 Ky. L. R. 1082, 104 S. W. 705; Somerset Nat. Bk. *v.* Brinkley, 24 Ky. L. R. 2088, 72 S. W 1129; Bell *v.* Co., 205 Mo. 475, 103 S. W. 1014; Roberts *v.* Cox, 91 Neb. 553, 136 N. W. 831; Patterson *v.* Mikkelson, 86 Neb. 512, 125 N. W. 1104; Rice *v.* Neuman, 115 N. Y. S. 83 (party who has burden must prove every circumstance essential to his contention in same manner and to same extent as if whole issue rested upon proof of each individual and essential circumstance); Grossman *v.* Schenker, 206 N. Y. 466, 100 N. E. 39; Blair *v.* Minzesheimer 124 App. Div. 177, 108 N. Y. S. 799; Yetter *v.* Goolsby, 26 N. D. 403, 144 N. W. 1075; List *v.* Chase, 80 O. St. 42, 88 N. E. 120; Hartford Ins. Co. *v.* Whitman, 75 O. St. 312, 79 N. E. 459; Lipscomb *v.* Allen, 23 Okla. 818, 102 P. 86; Germantown D. Co. *v.* McCallum, 222 Pa. 554, 72 A. 885 (evidence to show modification of written contract by parol need only be convincing); Johnson *v.* Wanamaker, 17 Pa. Super. 301; Mosher *v.* Moyer, 22 Pa. C. C. 586; Fordtran *v.* Stowers, 52 Tex. Civ. 226, 113 S. W. 631; Ables *v.* Terrell (Tex. Civ.), 85 S. W. 1010; Taylor *v.* Ewing, 74 Wash. 214, 132 P. 1009; Anderson *v.* Arpin, 131 Wis. 34, 110 N. W. 788.

Burden of proof is on defendant to show withdrawal of offer before acceptance. American Case, etc. Co. *v.* Wetzler, 148 Wis. 168, 134 N. W. 489.

The fact that the plaintiff and defendant differed in their testimony as to the terms of the contract is not sufficient to show their minds had never met, but simply raised a conflict in the evidence as to what was the contract between the parties. Fincher *v.* Redman, 12 Ga. App. 241, 76 S. E. 1077.

Communication of acceptance of option to purchase given in lease; efforts to notify held equivalent to "actual knowledge." Rockland, etc. Lime Co.

v. Leary, 203 N. Y. 469, 97 N. E. 43.

A party seeking to avoid a contract by reason of incapacity has the burden of proof. Richardson v. Ins. Co., 109 Me. 117, 82 A. 1005.

"While one who seeks to avoid a contract on the ground of insanity has the burden of proving his position, when it is established that the contract has been made with a person mentally incapable of making a contract, the burden is so far shifted that the agreement will be set aside unless the same party, by proper proof, brings his case within the rule, as stated to wit, that he acted in ignorance of conditions; that no unfair advantage was taken; that the insane person is not able to restore the consideration or make adequate compensation therefor." Ipock v. R. R. Co., 158 N. C. 445, 74 S. E. 352, cit. Hosler v. Beard, 54 O. St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. 720; Bigelow on Finance, p. 378; Eaton's Equity, p. 317.

Real estate agent suing for commission. Davis v. Clausen, 2 Ala. App. 378, 57 S. 79.

Statements of agent.—Avery & Co. v. Turner, 3 Ala. App. 627, 57 S. 255.

Words used need not be shown to have been clearly expressed. Stobie v. Earp, 119 Mo. App. 73, 83 S. W. 1097; Zitske v. Grohn, 128 Wis. 159, 107 N. W. 20.

Quantum of evidence to show parol. Contract need not be shown to reasonable certainty; to reasonable satisfaction of jury is enough. Eagle I. Co. v. Baugh, 147 Ala. 613, 41 S. 663. Oral contract to convey land must be clearly shown. Watson v. Watson, 225 Ill. 412, 80 N. E. 332; Russell v. Sharp, 192 Mo. 270, 91 S. W. 134. Burden of showing parol contract as collateral to written one is heavy. Chaplin v. Gerald, 104 Me. 187, 71 A. 712.

Contract with decedent.—Clearest and most convincing evidence is essential to establish parol contract with deceased person. Rosseau v. Rouss, 180 N. Y. 116, 72 N. E. 916; Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Mahaney v. Carr, 175 N. Y. 451, 67 N. E. 903; Ide v. Brown, 178 N. Y. 26, 70 N. E. 101; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 267.

Contract over telephone is not proved by evidence of one of the parties to the conversation unless it shows recognition of voice of the other, it not being otherwise shown contract was made. Planters' Co. v. Co., 126 Ga. 621, 55 S. E. 495. See Young v. Co., 33 Wash. 225, 74 P. 375.

Evidence as to need of doing what is alleged to have been contracted for, immaterial. Morris v. Co., 150 Ala. 150, 43 S. 483.

Violation of Sunday law.—If a contract for advertising in a Sunday paper can be performed without violation of law, there is no legal presumption that it will not be so performed. Sheffield v. Balmer, 52 Mo. 474, 14 Am. Rep. 430.

For a case where it was held that the parties stipulated for Sunday labor, see Knapp & Co. v. Culbertson, 152 Mo. App. 147, 133 S. W. 55.

512-2 Union Pac. R. Co. v. Smelt. Co., 202 Fed. 720, 121 C. C. A. 182; Gjurich v. Fieg, 164 Cal. 429, 129 P. 464; Cummins v. Ennis, 4 Penne. (Del.), 424, 56 A. 377; Pye v. Perry (Mass.), 104 N. E. 460; McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728; National S. Co. v. Board, 36 Okla. 569, 129 P. 25; Barber v. Toomey, 67 Or. 452, 136 P. 343; Richardson v. Ins. Co., 66 Or. 353, 133 P. 773; Bagley v. Brack (Tex. Civ.), 154 S. W. 247.

Contract by estoppel.—Seevers v. Coal Co. (Ia.), 138 N. W. 793.

The existence of a binding contract is put in issue by defendant's denial and the burden is on the plaintiff to show such a contract was made. Breed v. Berenson, 216 Mass. 397, 103 N. E. 937.

Exception to rule recognized where services rendered and accepted in absence of existence of family relation. Fitzpatrick v. Dooley, 112 Mo. App. 165, 86 S. W. 719; McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728; Boweas v. Cooke, (1903) 2 K. B. (Eng.) 227.

It is presumed voluntary payment of money by father to child is a gift. Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597.

512-3 Boogher v. Roach, 25 App. Cas. (D. C.) 324.

512-4 Romero v. Co., 113 La. 110, 36 S. 907; Cook v. Littlefield, 98 Me. 299, 56 A. 899; Dowagiac Mfg. Co. v. Watson, 90 Minn. 100, 95 N. W. 884; Leary v. Moore, 48 Misc. 551, 96 N. Y. S. 266; Kneipper v. Richards, 7 O. C. C. (N. S.) 581.

Evidence of parties need not be corroborated. In re Strauch, 208 Fed. 842 (C. C. A.).

Where the contention of the defendants is that the entire contract between them and the plaintiff was in parol, and that the order given for the car of wire, which was shipped, was in part execution of the contract, while the plaintiff contends that there was no agreement outside of the written order, it was competent for both parties to introduce evidence in support of their contentions, and the rule excluding parol evidence, which adds to or varies a written contract, has no application. Am. Steel & Wire Co. *v.* Copeland, 159 N. C. 556, 75 S. E. 1002.

La. Civ. Code, art. 2227 requires that a contract for the payment of money above $500 must be proved by at least one credible witness and corroborating circumstances. Williams *v.* Congregation, etc., 128 La. 355, 54 S. 877.

Contract by corporation may be shown by parol if records silent. Selley *v.* Co., 119 Ia. 591, 93 N. W. 590; Nye *v.* Co., 2 Pa. Super. 384.

512-5 Brown *v.* Co., 150 Cal. 376, 89 P. 86; General H. S. *v.* R. Co., 79 Conn. 581, 65 A. 1065; Stobie *v.* Earp, 110 Mo. App. 73, 83 S. W. 1097; Osborne *v.* Walley, 8 Pa. Super. 193.

Parol evidence is prima facie competent to sustain contention contract was not in writing; if contrary is shown such evidence will be excluded. Kehlor *v.* Wilton, 99 Ill. App. 228; Blankenship *v.* Decker, 34 Mont. 292, 85 P. 1035.

Rules of employer concerning course to be taken with applications for employment immaterial so far as proof of contract is concerned. International H. Co. *v.* Campbell, 43 Tex. Civ. 421, 96 S. W. 93.

513-7 Putnam I. Co. *v.* King, 82 Kan. 216, 107 P. 559; Metropolitan C. Co. *v.* Co., 196 Mass. 72, 81 N. E. 645; North, etc. Co. *v.* Lynch, 196 Mass. 204, 81 N. E. 891.

Unsigned form of contract, assented to, competent to prove oral contract (Featherstone, etc. Co. *v.* Criswell, 36 Ind. App. 681, 75 N. E. 30), if assent shown. Holland *v.* Ryan, 92 N. Y. S. 242.

Written contract which imperfectly embodies parol agreement does not bar parol proof thereof so far as not inconsistent with it. Cooper *v.* Payne, 186 N. Y. 334, 78 N. E. 1076; Johnson *v.* Bk., 12 N. D. 336, 96 N. W. 288.

513-8 International H. Co. *v.* Campbell, 43 Tex. Civ. 421, 96 S. W. 93; Zitske *v.* Grohn, 128 Wis. 159, 107 N. W. 20. *Comp.* Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37.

513-9 Keane *v.* Co., 17 Ida. 179, 105 P. 60; Cornelius *v.* R. Co., 74 Kan. 599, 87 P. 751.

Consent to alteration of contract may be shown by testimony of assenter. Providence M. Co. *v.* Browning, 72 S. C. 424, 52 S. E. 117.

513-10 *Contra,* Gillian *v.* Schmidt, 131 Mo. App. 666, 111 S. W. 611. See infra, "Master and Servant," 496-24.

513-11 Existence of contract between a party and third person may be testified to by former. Southern R. Co *v.* Lewis, 165 Ala. 451, 51 S. 863.

Conduct may evidence acceptance if proposer has knowledge of it. Porter *v.* Everts, 81 Vt. 517, 71 A. 722.

513-12 Idaho M. Co. *v.* Kalanguin, 8 Ida. 101, 66 P. 933; Smith *v.* Richardson, 31 Ky. L. R. 1082, 104 S. W. 705; Winans *v.* Bunnell, 13 Pa. Super. 445; San Antonio, etc. R. Co. *v.* Timon, 102 Tex. 222, 114 S. W. 792; Chilcott *v.* Co., 45 Wash. 148, 88 P. 113.

Previous relations of parties may be shown as explanatory of later attitude. Selley *v.* Co., 119 Ia. 591, 93 N. W. 590.

514-13 Minick *v.* Gring, 1 Pa. Super. 484.

514-14 Manary *v.* Runyon, 43 Or. 495, 73 P. 1028; Chilcott *v.* Co., 45 Wash. 148, 88 P. 113.

Letters between parties admissible.—McDermott *v.* Fletcher, 155 App. Div. 615, 140 N. Y. S. 871.

515-15 Fordtran *v.* Stowers, 52 Tex. Civ. 226, 113 S. W. 631. See Boucher *v.* Thibeau, 75 N. H. 597, 74 A. 1047.

Subsequent admissions competent.—Jenning *v.* Rhode, 99 Minn. 335, 109 N. W. 597.

A paper prepared by one of the parties if not self-serving may be evidence of collateral facts. Glassberg *v.* Olson, 89 Minn. 195, 94 N. W. 554.

Self-serving declarations, made after performance by other party, cannot be proved. Dalby *v.* Maxfield, 244 Ill. 214, 91 N. E. 420.

515-16 Eagle Co. *v.* Baugh, 147 Ala. 613, 41 S. 663.

515-17 McNamara *v.* Douglas, 78 Conn. 219, 61 A. 368.

515-18 Hightower *v.* Ansley, 126 Ga. 8, 54 S. E. 939; Heartt *v.* Sherman, 229 Ill. 581, 82 N. E. 417; Leary *v.*

Moore, 48 Misc. 551, 96 N. Y. S. 266; Morgan *v.* Tims, 44 Tex. Civ. 308, 97 S. W. 832.

Oral admissions will sustain finding contract was made. Rigdon *v.* More, 226 Ill. 382, 80 N. E. 991. They are at least competent. Jenning *v.* Rhode, Morgan *v.* Tims, supra. If casually made not weighty. Russell *v.* Sharp, 192 Mo. 270, 91 S. W. 134. Admission contract made means legal contract. Early County *v.* Fiedler, 4 Ga. App. 208, 63 S. E. 353.

Admission by silence cannot be shown unless party called upon to speak. Pond *v.* Pond, 79 Vt. 352, 65 A. 97. It may be explained. Anderson *v.* Arpin, supra.

Admissions in form of receipts not conclusive as to terms of contract. Brown *v.* Co., 150 Cal. 376, 89 P. 86.

Are written admissions competent to establish contract required to be written? See Winders *v.* Hill, 144 N. C. 614, 617, 57 S. E. 456.

516-19 Kilpatrick *v.* Inman, 46 Colo. 514, 105 P. 1080; Leonard *v.* Gillette, 79 Conn. 664, 66 A. 502; Rogers *v.* Hart, 106 Ill. App. 393; Whitsett *v.* Bk., 138 Mo. App. 81, 119 S. W. 999; Stobie *v.* Earp, 110 Mo. App. 73, 83 S. W. 1097; McMorrow *v.* Dowell, 116 Mo. App. 289, 90 S. W. 728; Fitzpatrick *v.* Dooley, 112 Mo. App. 165, 85 S. W. 719; Broadwell *v.* Conover, 186 N. Y. 429, 79 N. E. 402; Walker *v.* Dickey, 44 Tex. Civ. 110, 98 S. W. 658.

Payment for services may be proved to show renewal of contract. Fish *v.* Marzluff, 128 Ill. App. 519.

Acceptance of option not required to be in writing may be proved by conduct. Eastman *v.* Dunn, 34 R. I. 416, 83 A. 1057.

517-20 See Albin *v.* Gheens, 31 Ky L. R. 4, 101 S. W. 297.

517-21 Kamm *v.* Rees, 177 Fed. 14, 100 C. C. A. 432 (plans made for a party to be used for his benefit and, to his knowledge, bearing his name are admissible to show he personally contracted for work to be done in pursuance of them); Idaho M. Co. *v.* Kalanquin, 8 Ida. 101, 66 P. 933; Ballard *v.* Co., 30 Ky. L. R. 1080, 100 S. W. 271; Shreveport T. Co. *v.* Mulhaupt, 122 La. 667, 48 S. 144; Boucher *v.* Thibeau, 75 N. H. 597, 74 A. 1047; Equitable Trust Co. *v.* Howe, 72 Misc. 46, 129 N. Y. S. 112; Webb *v.* Wolfard, 56 Or. 394, 108 P. 1005 (extent of party's interest in land as affecting contract with broker for its sale); Koenig *v.* Koenig, 140 Wis. 618, 123 N. W. 130 (existence of contract between defendant and third party).

518-22 Chaplin *v.* Gerald, 104 Me. 187, 71 A. 712; Jenning *v.* Rohde, 99 Minn. 335, 109 N. W. 597; Russell *v.* Sharp, 192 Mo. 270, 91 S. W. 134; Patterson *v.* Mikkelson, 86 Neb. 512, 125 N. W. 1104 (unreasonableness of claim); Axel *v.* Kraemer (N. J. L.), 70 A. 367; Blair *v.* Minzesheimer, 108 N. Y. S. 799.

Impossibility of performance may be proved. McNamara *v.* Douglas, 78 Conn. 219, 61 A. 368.

518-23 Evidence as to form of contracts made with third persons, immaterial. Stewart *v.* Exum, 132 Ga. 205, 64 S. E. 471.

Defendant's financial ability, immaterial. Hall *v.* Parry, 55 Tex. Civ. 40, 118 S. W. 561.

"On an issue as to whether or not a contract was made as claimed, any evidence which tends to render that fact probable or improbable is relevant, provided, of course, the evidence is not otherwise objectionable." Locke *v.* Krant, 85 Conn. 486, 83 A. 626, *cit.* 3 ENCYCLOPAEDIA OF EVIDENCE, pp. 516-518; Trull *v.* True, 33 Me. 367; Nickerson *v.* Gould, 82 Me. 512, 20 A. 86; Upton *v.* Winchester, 106 Mass. 330.

519-24 International H. Co. *v.* Campbell, 43 Tex. Civ. 421, 96 S. W. 93.

Circumstantial evidence competent to show whether party dealt with another as principal or agent. Doon *v.* Felton, 203 Mass. 267, 89 N. E. 539.

519-25 Brown *v.* Co., 150 Cal. 376, 89 P. 86; Romero *v.* Co., 113 La. 110, 36 S. 907; North P. & P. Co. *v.* Lynch, 196 Mass. 204, 81 N. E. 891; Stitt *v.* Co., 101 Minn. 93, 111 N. W. 948; Funk & Wagnells Co. *v.* Bruenn, 124 N. Y. S. 291; Littieri *v.* Freda, 241 Pa. 21, 88 A. 82; Johnson *v.* Wanamaker, 17 Pa. Super. 301; Passow *v.* Co., 54 Wash. 196, 103 P. 34.

By preponderance of evidence.—Williams *v.* R. Co. (Ark.), 158 S. W. 967.

Burden of showing terms is on party who relies on contract. Central E. Co. *v.* Co., 120 Fed 925, 57 C. C. A. 197.

Terms of parol agreement, in absence of direct evidence, are a matter for inference, and not of law. Lawrence *v.* Allalo, (1904) App. Cas. (Eng.) 17.

No presumption arises contract incomplete because parties disagree as to its terms. Johnson *v.* Wanamaker, 17 Pa. Super. 301. See supra, 512-1.

Promise to repay money may be shown as tending to establish terms of contract. Morse *v.* Odell, 49 Or. 118, 89 P. 139.

Charges made by others for like services, too remote and uncertain. Garberson *v.* Co., 51 Wash. 213, 98 P. 612.

Presumption favors fairness and honesty of agreements. Ruth *v.* Krone, 10 Cal. App. 770, 103 P. 960.

Compensation from others.—If plaintiff in action to recover for services is an officer of two corporations, for whom work was being done by defendant, it is competent to show, on the issue of the existence of a contract, they paid him compensation. Alabama S. Co. *v.* Dewy, 156 Ala. 530, 47 S. 55.

Conduct of parties may establish terms of contract. Perry *v.* Co., 8 Cal. App. 35, 95 P. 1128.

519-26 Featherstone, etc. Co. *v.* Criswell, 36 Ind. App. 681, 75 N. E. 30.

Correspondence subsequent to contract, not binding as to terms. Leary *v.* Moore, 48 Misc. 551, 96 N. Y. S. 266.

520-29 *Contra,* Bercher *v.* Gunter, 95 Ark. 155, 128 S. W. 1036.

Statements by witness to third party, incompetent. Cathcart *v.* Webb, 144 Ala. 559, 42 S. 25.

520-30 Mayhew *v.* Brislin, 13 Ariz. 102, 108 P. 253. *Contra* if nothing said. Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37. See Anderson *v.* Arpin, 131 Wis. 34, 110 N. W. 788.

Witness' uncommunicated idea of terms of contract cannot be shown. Stewart *v.* Exum, 132 Ga. 122, 64 S. E. 471.

Subsequent acts and declarations of parties may be shown. St. Louis, etc. R. Co. *v.* Clark, 90 Ark. 504, 119 S. W. 825.

520-31 Brookfield *v.* College, 139 Mo. App. 339, 123 S. W. 86.

Undisclosed thought of party, not competent. Valley P. Co. *v.* Wise, 93 Ark. 1, 123 S. W. 768.

520-32 Ivey *v.* Cotton Mills, 143 N. C. 189, 55 S. E. 613.

Previous disagreement, no tendency to show terms of subsequent contract. McIntosh *v.* McNair, 53 Or. 87, 99 P. 74.

520-33 Details of negotiations by agent.—Avery & Co. *v.* Turner, 3 Ala. App. 627, 57 S. 255.

521-35 Providence M. Co. *v.* Browning, 72 S. C. 424, 52 S. E. 117.

Incomplete contract between two of the parties and record entries showing confession of judgment and proceedings thereunder, admissible. Moore *v.* Bk., 139 Ala. 595, 609, 36 S. 777.

521-36 Batcheller *v.* Whittier, 12 Cal. App. 262, 107 P. 141 (rule applies to subsequent declaration of one party in absence of the other); Anderson *v.* Arpin, 131 Wis. 34, 110 N. W. 788. See Colonial S. Co. *v.* Larson, 47 Colo. 25, 105 P. 861.

Rule as stated in text does not apply to contract for continuous employment; in such case declarations of managing agent during course of employment may be proved to show terms of contract. Brown *v.* Co., 150 Cal. 376, 89 P. 86.

521-37 Hudson *v.* Rodgers, 121 Mo. App. 165, 98 S. W. 778; Morgan *v.* Tims, 44 Tex. Civ. 308, 97 S. W. 832; Chilcott *v.* Co., 45 Wash. 148, 88 P. 113.

522-39 *Contra,* Black *v.* Rinn, 226 Pa. 377, 75 A. 592.

Letters confirmatory of verbal contract, admissible. Putnam I. Co. *v.* King, 82 Kan. 216, 107 P. 559. But correspondence subsequent to contract, though containing statements of parties' understanding, is competent only as explainable admissions. Mahon *v.* Rankin, 54 Or. 328, 102 P. 608, 103 P. 53.

523-40 **Memorandum not admissible** unless it is clear it was intended to make such contract as it indicates, except to illustrate testimony and show negotiations. Tonopah L. Co. *v.* Riley, 30 Nev. 312, 95 P. 1001.

Printed matter examined by parties, not admissible if it was not a representation of work contracted for. Haydel *v.* Gould, 136 App. Div. 594, 121 N. Y. S. 194; Asbestolith Mfg. Co. *v.* Howland, 120 N. Y. S. 93.

523-41 Jost *v.* Wolf, 130 Wis. 37, 110 N. W. 232; Lathrop *v.* Humble, 120 Wis. 331, 97 N. W. 905.

523-42 Woodbridge I. Co. *v.* Corp., 81 Conn. 479, 71 A. 577; Guglielino *v.* Cahill, 185 Mass. 375, 70 N. E. 135; Daly *v.* Dallmeyer, 20 Pa. Super. 366; Johnson *v.* Wanamaker, 17 Pa. Super. 301; Wheeler *v.* Buck, 23 Wash. 679, 63 P. 566; Dimmick *v.* Collins, 24 Wash. 78, 63 P. 1101.

Character and extent of employer's business may be shown on issue as to salary stipulated to be paid for services. McCowan *v.* Co., 41 Wash. 675, 84 P. 614.

For services rendered one's mother "no presumption of a promise to pay will arise from the mere performance and acceptance of the service as it would in case of a stranger. There must be evidence of a promise in order to rebut the presumption of a gratuity. But such promise need not necessarily be evidence by a writing, or have been heard by witness. It may be inferred from other facts that there was an agreement." Cupp *v.* McCallister, 144 Mo. App. 111, 129 S. W. 435.

524-43 Financial ability of defendant, immaterial. Hall *v.* Parry, 55 Tex. Civ. 10, 118 S. W. 561. And so value of services to which contract related and terms on which others offered to perform them. Kelly *v.* Malone, 5 Ga. App. 618, 63 S. E. 639.

524-44 Dayton L. Co. *v.* Stockdale, 54 Tex. Civ. 611, 118 S. W. 805.

Evidence of usual price competent as to terms.—Evidence as to custom of paying commissions on goods sold to parties brought to a store, admissible, if uniform, notorious and reasonable. Heistand *v.* Bateman, 41 Colo. 20, 91 P. 1111. There being a controversy as to agreed compensation, evidence is competent to show what is usually paid for like services. Standard P. E. Co. *v.* Brumley, 149 Fed. 184, 79 C. C. A. 132.

In Wisconsin such evidence is inadmissible unless difference in price is so great reasonable value thereof, from standpoint of parties when contract made, may reasonably discredit the evidence on the one side and corroborate that on the other. Anderson *v.* Arpin, 131 Wis. 34, 110 N. W. 788. In that state and some others evidence of the value of services or property, subject of contract, is admissible if disparity in contentions of parties is large. Short *v.* Cure, 100 Mich. 418, 59 N. W. 173; Swain *v.* Cheney, 41 N. H. 232; Kidder *v.* Smith, 34 Vt. 294; Anderson *v.* Arpin, *supra*; Valley L. Co. *v.* Smith, 71 Wis. 264, 37 N. W. 412, 5 Am. St. 216; Ball *v.* Radford, 72 Wis. 462, 39 N. W. 882; Mygatt *v.* Tarbell, 85 Wis. 477, 55 N. W. 1031. Value of chattels mortgaged is relevant as to sum agreed to be paid as commission for loan. Leasure *v.* Boie, 142 Ia. 284, 120 N. W. 643. Evidence of value of corporate assets is competent to show value of stock and probability of price agreed to be paid for it. But testimony as to value of book accounts generally is not admissible to show value of those in question. McIntosh *v.* McNair, 53 Or. 87, 99 P. 74.

Silence of contract as to time for payments may be aided by proof of time usually fixed therefor in contracts for like services. Standard P. E. Co. *v.* Brumley, 149 Fed. 184, 79 C. C. A. 132. Admissibility of such evidence is largely within discretion of trial court, which will not be interfered with unless clearly wrong. Anderson *v.* Arpin, 131 Wis. 34, 110 N. W. 788.

Custom not pleaded cannot be shown in action on express contract. Johnson *v.* Buchanan, 54 Tex. Civ. 328, 116 S. W. 875.

524-46 Featherstone, etc. Co. *v.* Criswell, 36 Ind. App. 681, 75 N. E. 30; Provencher *v.* Moore, 105 Me. 87, 72 A. 880; Gillespie *v.* Bk., 20 Okla. 768, 95 P. 220; Cox *v.* Co., 38 Pa. Super. 515.

Custom of employer may be shown on issue as to term of contract for service. Arkadelphia L. Co. *v.* Asman, 85 Ark. 568, 107 S. W. 1171.

Exception.—See Bono *v.* Hayes, 154 Cal. 759, 99 P. 172; Moody *v.* Peirano, 4 Cal. App. 411, 88 P. 380.

525-47 Evidence of custom, inadmissible. Peyser *v.* Co., 53 Wash. 633, 102 P. 750.

525-49 See New York, etc. Co. *v.* Dist., 33 App. Cas. (D. C.) 377.

Not unilateral.—"The proof shows the writing was executed in duplicate copies, each of which was in the precise language of the other. One copy of the contract was signed by defendant and delivered to plaintiff. The other copy was signed at the same time by plaintiff, and delivered to defendant. In instituting the suit, plaintiff, of course, filed that copy of the contract of sale with her petition which was in her possession and that is the one signed by defendant. But, be this as it may, as the two papers were identical in all respects as to the terms of the contract and executed at the same time as above set forth, they evidenced but one contract, all of which was in writing, and this, too, signed

and executed by both parties." Ochler *v.* Conrad Schopp Fruit Co., 162 Mo. App. 446, 142 S. W. 811.

Burden of proof.—If contract is set out in complaint and there is no plea of non est factum, plaintiff is relieved of burden of proving its execution. Garrison *v.* Glass, 139 Ala. 512, 36 S. 725; Cutten *v.* Pearsall, 146 Cal. 690, 81 P. 25.

Presumption as to knowledge.—"Facts of public notoriety relating to the subject of a contract must be presumed to have been known to the parties at the time of making" it. Anse La Butte O. & M. Co. *v.* Babb, 122 La. 415, 47 S. 754.

Presumed contract of agency executed in which principal resided. Washington L. Ins. Co. *v.* Scott, 57 Misc. 492, 110 N. Y. S. 49.

Previous writing not admissible if it referred to contract subsequently executed. Pammel *v.* Ins. Co., 157 Mich. 204, 121 N. W. 760.

Contract admissible to disprove contention of party to it. Johnson *v.* Buchanan, 54 Tex. Civ. 328, 116 S. W. 875.

Failure to produce contract justifies resolving of doubt respecting it against party who claims its existence. Galveston, etc. R. Co. *v.* Jones (Tex. Civ.), 123 S. W. 737.

525-50 Party who introduces contract is bound by its terms. Burke *v.* R. Co., 134 App. Div. 413, 119 N. Y. S. 309.

526-60 Cave *v.* Hastings, L. R. 7 Q. B. D. (Eng.) 125; Boyl *v.* Midland Bureau (Ia.), 138 N. W. 384; Nelson *v.* Willey, 97 Md. 373, 55 A. 527; C. *v.* Snyder, 40 Pa. Super. 485 (book referred to in letter).

But evidence of another contract not referred to in contract, and to which defendant is not a party is inadmissible. Wentworth *v.* Mass. Market Co., 216 Mass. 374, 103 N. E. 1105.

All writings executed by and between parties on same day, admissible. Kampmann *v.* McCormick (Tex. Civ.), 99 S. W. 1147.

If contract evidenced be more than one writing, all papers to be read together and construed as one. Gould *v.* Co., 207 Ill. 172, 69 N. E. 896.

Meaning of "assets," as used in order of sale, may be shown by itemized inventory made for and used in connection with sale. Illinois S. Co. *v.* Co., 219 Ill. 403, 76 N. E. 574.

Prospectus, not referred to in contract, presumed not to be part of it. Idaho F. L. Co. *v.* Co., 18 Ida. 1, 107 P. 985.

526-62 Ivey *v.* Cotton Mills, 143 N. C. 189, 55 S. E. 613; Barton-P. Mfg. Co. *v.* Co., 18 Okla. 137, 89 P. 1128; Jones *v.* Harris (Tex. Civ.), 139 S. W. 69.

Making written contract may be shown by parol when contract only collaterally involved. S. *v.* McKinnon, 99 Me. 166, 58 A. 1028.

Independent transactions between payee and other parties, not relevant. Johnson County S. Bk. *v.* Koch, 38 Pa. Super. 553.

526-64 **Assignment of original contract** between plaintiff and other company indorsed on contract between that company and defendant admissible and raises a rebuttable presumption that defendant assumed the original contract. Wasson *v.* Coal Co., 199 Fed. 770, 118 C. C. A. 208.

Original contract competent though parties to later one the same. Welling *v.* Strickland, 161 Mich. 235, 126 N. W. 471.

527-65 Klemmer *v.* Birmingham (Can.), 11 West. L. Rep. 9; Joppa Mattress Co. *v.* Oil Co., 101 Ark. 548, 142 S. W. 831; Cummins *v.* Ennis, 4 Penne (Del.) 424, 56 A. 377; McAnsh, etc. Co. *v.* Moore F. Co., 178 Ill. App. 562; George town W., etc. Co. *v.* Neale, 137 Ky. 197, 125 S. W. 293; Tilden Co. *v.* Hair Co., 216 Mass. 323, 103 N. E. 916; Blakely *v.* Lumb. Co., 121 Minn. 280, 141 N. W. 179; Heidbrink *v.* Schaffner, 147 Mo. App. 632, 127 S. W. 418; Witt *v.* Ins. Co., 92 Neb. 763, 139 N. W. 639; Goetz *v.* Bk., 23 N. D. 643, 138 N. W. 10; Sherman Co. *v.* Champlin (R. I.) 89 A. 504; Dobson *v.* Zimmerman, 55 Tex. Civ. 394, 118 S. W. 236.

Burden of proof.—Kopczynski *v.* Logging Co., 71 Wash. 93, 127 P. 601.

Breach of a written contract to furnish board and food to plaintiff for the rest of her life. Evidence that she had been in need of food and that she had left the defendant's house because she was afraid of him is competent to show plaintiff had not furnished such food and she was justified in leaving the house. Soderlund *v.* Helman, 215 Mass. 542, 102 N. E. 899.

A contractor suing for extras has the burden of showing the work was extra

and defendant executed thereto. Leaf grower v. Yablonsky, 178 Ill. App. 19.

Where defendant alleges breach on part of plaintiff he must prove it and show damages. Hirol Lumb. Co. v. Moore (Ala.), 65 S. 175.

The agreement must first be established. Hogans v. Demps, 63 Fla. 177, 58 S. 33.

Conclusion of witness, incompetent. McCoy v. S., 124 Ga. 218, 52 S. E. 434.

Admission in answer, conclusive. Grant v. Pratt, 87 App. Div. 490, 84 N. Y. S. 983.

527-66 Escape from terms of contract because of condition subsequent in proviso can only be had when party claiming release shows facts entitling him thereto had come to pass. Javierre v. Central Altagracia, 217 U. S. 502.

528-70 See Weil v. Lester, 94 Ark. 195, 126 S. W. 712.

Party seeking recovery must show full performance, nothing being admitted, and plaintiff having put contract in evidence. Cincinnati, etc. R. Co. v. Baker, 130 Ill. App. 414; Vernon v. Co., 119 App. Div. 39, 103 N. Y. S. 876.

Acceptance of performance may be shown by instrument conveying thing originally granted. Thornburg v. Doolittle, 148 Ia. 520, 125 N. W. 1093.

Contract between brokers for division of commission unless sale made by one unaided by the other. Burden of proof on broker claiming sale was made with his assistance, where it appears sale was negotiated by other broker. Johnson v. Inv. Co., 93 Neb. 672, 141 N. W. 1022.

Burden on party claiming benefit to show performance. Hardaway W. Co. v. Bradley, 103 Ala. 596, 51 S. 21; List v. Close, 20 O. St. 12, 88 N. E. 120.

Performance of extra work must be shown by party seeking compensation—he must show it was extra, reasonableness of price and that was done in compliance with, or under waiver of, terms of contract. Caldwell v. Schmelzback, 175 Pa. 429.

Architects may testify as experts in respect to conformity of work with contract. Kettler B. Mfg. Co. v. O'Neil, 57 Tex. Civ. App. 158, 122 S. W. 906; Stark G. Co. v. Co., 57 Tex. Civ. App. 629, 122 S. W. 947.

Party may testify to furnished work and materials under contract. Mahoney v. Co., 82 Conn. 290, 73 A. 769.

Good faith of party charged with breach may be shown by facts indicating lack of intent to injure other party. Brown v. Edsall, 23 S. D. 610, 122 N. W. 658.

528-71 See Fleming v. Lunsford, 163 Ala. 540, 50 S. 921.

528-72 Mercer Elec. Mfg. Co. v. Mfg. Co., 87 Conn. 691, 89 A. 909; Lynch v. Co., 112 N. Y. S. 915; Hardeman King Lumb. Co. v. Hampton Bros., 104 Tex. 585, 142 S. W. 867; Van Dyke v. Cole, 81 Vt. 379, 70 A. 593.

It is a question of fact for the jury to determine whether a contract has been abandoned. Martin v. Spaulding, 40 Okla. 191, 137 P. 882.

Proof must be clear and show acts and conduct positive, unequivocal and inconsistent with rights under contract. May v. Getty, 140 N. C. 310, 53 S. E. 75.

Forfeiture.—Party who excuses nonperformance because contract wrongfully forfeited must sustain his allegations. Harley v. Dist., 226 Ill. 213, 80 N. E. 771.

529-73 Wilkinson v. McLeod, 80 Misc. 220, 140 N. Y. S. 1031; Boville v. Dalton Paper Mills, 86 Vt. 365, 85 A. 623. See Thompson v. Boudin, 135 App. Div. 872, 120 N. Y. S. 178.

Intent controlling factor, and must be shown by declaration or conduct. Parties may testify to their understanding and belief as to abandonment. Turner v. Markham, 155 Cal. 562, 102 P. 272.

Abandonment of covenants in building restrictions.—See Brigham v. Co., 74 N. J. Eq. 287, 70 A. 185.

529-74 Aetna Ind. Co. v. Fuller, 111 Md. 321, 73 A. 738.

529-75 Evidence of mistake does not show abandonment. Hardaway W. Co. v. Bradley, 103 Ala. 596, 51 S. 21.

529-76 Proof by circumstances. Thompson v. Stone, 43 Pa. Super. 69.

CONTRADICTION OF WITNESSES

530-2 Board of Trade v. Tucker, 202 Fed. 288; Atchison, etc. R. Co. v. Gaumer, 22 Colo. App. 495, 125 P. 589; Christian v. R. Co., 120 Ga. 314, 47 S. E. 923; P. v. Paul, 143 Ill. App. 566; Barton v. Barton, 142 Ky. 487, 134 S. W. 903; Bockermann v. Jewelry Co., 175 Mo. App. 279, 157 S. W. 835; S. v. Shapiro, 216 Mo. 259, 115 S. W. 1022; Masourides v. S., 86 Neb. 105,

125 N. W. 132; Moebius *v.* Williams, 84 N. J. L. 540, 87 A. 73; Clancy *v.* R. Co., 128 App. Div. 141, 112 N. Y. S. 541; De Noyelles *v.* Ins. Co., 78 Misc. 649, 138 N. Y. S. 855; C. *v.* Deitrick, 221 Pa. 7, 70 A. 275; Western U. Tel. Co. *v.* Vickery (Tex. Civ.), 158 S. W. 792; Boville *v.* Mills, 86 Vt. 305, 85 A. 623; Kohl *v.* Bradley Co., 130 Wis. 301, 110 N. W. 265.

Where plaintiff calls defendant as witness. Littmann *v.* Harris, 157 App. Div. 909, 142 N. Y. S. 341; appeal dismissed, 209 N. Y. 589, 103 N. E. 1126.

Party bound by testimony of his witness unless he produces contrary testimony. Cutter-T. Co. *v.* Clements, 5 Ga. App. 291, 63 S. E. 58.

In New York testimony of party given at instance of adverse party may be rebutted by other witnesses. Greenbaum *v.* Greenfield, 114 N. Y. S. 832 (under code).

531-3 Christian *v.* R. Co., 120 Ga. 314, 47 S. E. 923; Anderson *v.* Middlebrook, 202 Mass. 506, 89 N. E. 157.

531-4 In re Hurley, 204 Fed. 126; Mississippi G. Co. *v.* Franzen, 113 Fed. 791, 74 C. C. A. 135; Jebeles, etc. Co. *v.* Booze (Ala.), 62 S. 12; Dumas *v.* Clayton, 32 App. Cas. (D. C.) 566; Sauter *v.* Anderson, 112 Ill. App. 580; Cockburn *v.* Assn. (Ia.), 143 N. W. 1006; S. *v.* Beede, 151 Ia. 701, 130 N. W. 714; Left Fork C. Co. *v.* Owens' Admx., 165 Ky. 212, 159 S. W. 703; Southern R. Co. *v.* Goddard, 28 Ky. L. R. 523, 89 S. W. 675; C. *v.* Devaney, 182 Mass. 33, 64 N. E. 402; Rollison *v.* R. Co., 252 Mo. 525, 160 S. W. 994; Schumacher *v.* Brew. Co., 247 Mo. 141, 152 S. W. 13; Burton *v.* R. Co., 176 Mo. App. 14, 162 S. W. 1064; Beckermann *v.* Jewelry Co., 175 Mo. App. 279, 157 S. W. 855; Imhoff *v.* McArthur, 146 Mo. 371, 48 S. W. 456; Woburn N. Bk. *v.* Woods (N. H.), 89 A. 491; Koester *v.* Wks., 194 N. Y. 92, 87 N. E. 77; Webster *v.* R. Co., 158 App. Div. 210, 143 N. Y. S. 57; C. *v.* Mediate, 38 Pa. Super. 194; Eastern L. Co. *v.* Gill, 9 Pa. C. C. 620; Jeter *v.* S., 52 Tex. Cr. 212, 106 S. W. 371.

See Hopkins *v.* White, 20 Cal. App. 234, 128 P. 780, also vol. 3, p. 290, n. 89.

But see Alcolm Co. *v.* Brenack, 96 N. Y. S. 1055.

Matters elicited from hostile witness on cross-examination may be disproved. Long *v.* Sweeten (Md.), 90 A. 782.

By cross-examination.—Cobb, etc. Co. *v.* Hills, 208 Mass. 270, 94 N. E. 265. On a trial for embezzlement, defendant, an officer of a bank, testified on his own behalf and explained cash entries. On cross-examination a newspaper advertisement of the condition of the bank, for which defendant was responsible, was produced for identification by him, and was held proper in contradiction and to weaken his testimony. S. *v.* Morris, 58 Or. 397, 114 P. 470.

532-5 Compton *v.* S., 102 Ark. 213, 143 S. W. 897; Boles *v.* P., 37 Colo. 41, 86 P. 1030; Atlantic C. L. R. *v.* Crosby, 53 Fla. 100, 43 S. 318; Wilson *v.* R. Co. (Ia.), 142 N. W. 54; Cash *v.* Dennis (Ia.), 139 N. W. 929; S. *v.* Sweeney, 75 Kan. 265, 88 P. 1078; French *v.* C., 30 Ky. L. R. 98, 97 S. W. 427; Feltner *v.* C., 23 Ky. L. R. 1110, 64 S. W. 959; Smith *v.* C., 154 Ky. 613, 157 S. W. 1089; Finn *v.* Co., 101 Me. 279, 64 A. 490; Murphy *v.* S., 120 Md. 229, 87 A. 811; Dronenberg *v.* Harris, 108 Md. 597, 71 A. 81; Thomas *v.* Byron Tp., 168 Mich. 593, 134 N. W. 1021; S. *v.* Valle, 196 Mo. 29, 93 S. W. 1115; S. *v.* Murphy, 201 Mo. 691, 100 S. W. 414; Johnston *v.* Spencer, 51 Neb. 198, 70 N. W. 982; State *v.* Watson, 94 S. C. 458, 78 S. E. 324; S. *v.* Jones, 74 S. C. 456, 54 S. E. 1017; Keener *v.* S., 51 Tex. Cr. 590, 103 S. W. 904; Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156; Gulf, etc. R. Co. *v.* Matthews (Tex. Civ.), 89 S. W. 983; Comstock *v.* Jacobs, 84 Vt. 277, 78 A. 1017; Norfolk Co. *v.* Carr, 106 Va. 508, 56 S. E. 276; Robinson *v.* Kistler, 62 W. Va. 489, 59 S. E. 505; Farley *v.* Winn, 129 Wis. 291, 109 N. W. 633; Dunham *v.* Salmon, 120 Wis. 164, 109 N. W. 559.

See Moody *v.* Peirano, 4 Cal. App. 411, 88 P. 380.

Rule not absolute.—Salem News Pub. Co. *v.* Calica, 144 Fed. 905, 75 C. C. A. 673.

532-6 Quick *v.* Co., 205 N. Y. 330, 98 N. E. 480.

Evidence admissible for other purposes is not rendered inadmissible by its tendency to contradict other evidence of the party. C. *v.* Richmond, 207 Mass. 240, 93 N. E. 818.

Action for personal injuries.—Gulf, etc. R. Co. *v.* Williams (Tex. Civ.), 136 S. W. 327.

Attention of witness may be called to contradictions in direct testimony and that on cross-examination and explana-

tion asked. P. v. Rigby, 11 Cal. App. 775, 104 P. 840.

Unexpectedly hostile witness may be asked questions to refresh memory though they are in nature of cross examination. S. v. Kebler, 228 Mo. 367, 128 S. W. 721.

533-7 Choctaw R. Co. v. Newton, 140 Fed. 225, 249, 71 C. C. A. 655; P. v. Lolar, 8 Cal. App. 690, 97 P. 685; Womble v. Wilbur, 3 Cal. App. 535, 86 P. 816; Chicago R. Co. v. Gregory, 221 Ill. 591, 77 N. E. 1112; Cochburn v. Assn. (Ia.), 143 N. W. 1066; In re Schmidt's Will, 139 N. Y. S. 461; Holmes v. S. (Tex. Cr.), 157 S. W. 487. See also vol. 7, pp. 21-31.

Contradiction of witnesses, etc.—Brewster v. Miller, 31 S. D. 613, 141 N. W. 778.

Where plaintiff calls a witness previously called by defendant he may afterwards be impeached by plaintiff. Hutchinson v. Safety Gate Co., 247 Mo. 71, 152 S. W. 52.

Argument against integrity of witness is prohibited. Choctaw R. Co. v. Newton, 140 Fed. 225, 249, 71 C. C. A. 655.

Contradiction is not impeachment. Chicago R. Co. v. Ryan, 225 Ill. 287, 80 N. E. 116.

533-8 P. v. Cook, 148 Cal. 334, 83 P. 42; S. v. Fowler, 13 Ida. 217, 89 P. 737; Gray v. Good, 44 Ind. App. 476, 89 N. E. 408; Diffenderfer v. Scott, 5 Ind. App. 243, 32 N. E. 87; Dukes v. Davis, 30 Ky. L. R. 1048, 101 S. W. 390; Garrison v. C., 29 Ky. L. R. 411, 93 S. W. 594; Lindquist v. Dickson, 98 Minn. 360, 107 N. W. 958; Selover v. Bryant, 54 Minn. 424, 56 N. W. 58, 40 Am. St. 349, 21 L. R. A. 418; S. v. Soderstrom, 99 Minn. 224, 109 N. W. 113; P. v. Smith, 113 App. Div. 896, 99 N. Y. S. 118; Gould v. Ins. Co., 114 App. Div. 312, 99 N. Y. S. 823; S. v. Jennings, 48 Or. 482, 87 P. 524, 89 P. 421; Cf. v. Dietrich, 221 Pa. 7, 70 A. 277; Weaver v. S., 46 Tex. Cr. 607, 81 S. W. 29; Gallegos v. S., 48 Tex. Cr. 78, 85 S. W. 1150; Dallas R. Co. v. McAllister, 41 Tex. Civ. 121, 90 S. W. 932; Jeter v. S., 52 Tex. Cr. 212, 106 S. W. 371.

Contradicting witness.—Alexander v. S. (Tex. Cr.), 171 S. W. 807.

535-9 Blackmon v. R. Co. (Ala.), 64 S. 502; Louisville & N. Ry. Co. v. Stephenson, 3 Ala. App. 578, 60 S. 490. See Bauer v. Co., 197 Mo. 215, 94 S. W. 876.

Held error to read previous contradictory written statement of witness before the jury. Erdman v. S., 90 Neb. 642, 134 N. W. 258.

535-10 Jonesboro, etc. R. Co. v. Gal ner (Ark.), 106 S. W. 571; Derrick v. S., 92 Ark. 237, 122 S. W. 506; P. v. Duncan, 8 Cal. App. 186, 96 P. 414; In re Dolbeer's Est., 153 Cal. 652, 96 P. 266; P. v. Lukoszus, 242 Ill. 101, 89 N. E. 749; Liverpool, etc. Co. v. Wright, 158 Ky. 290, 161 S. W. 952; Detjen v. Brew. Co., 157 Mo. App. 614, 138 S. W. 696; S. v. Willette, 46 Mont. 326, 127 P. 1013; P. v. Willard, 159 App. Div. 19, 143 N. Y. S. 1032. See vol. 7, p. 31, n. 57 et seq and supplement thereto.

Must first show he was misled or surprised. In re Purcell's Est., 161 Cal. 360, 128 P. 932.

It is discretionary with the court to permit counsel to cross examine his own witness as to inconsistent statements made at former trial when he is surprised at testimony. Barker v. R. I. Co., 35 R. I. 406, 87 A. 174.

Contradiction not allowed to be shown as to matters not testified to or which witness failed to remember. In re De Lavegaa's Est., 165 Cal. 607, 133 P. 307.

Contradiction not allowed.—Pooler v. Smith, 73 S. C. 102, 52 S. E. 967; (*but comp.* S. v. Waldrop, 73 S. C. 60, 52 S. E. 793); O'Doherty v. Co., 113 App. Div. 636, 99 N. Y. S. 351, *dist.* Fall Brook Co. v. Hewson, 158 N. Y. 150, 52 N. E. 1095, 70 Am. St. 466, 43 L. R. A. 676, and Hubner v. R. Co., 77 App. Div. 290, 79 N. Y. S. 153, *aff.*, no opinion, 177 N. Y. 523, 69 N. E. 1124.

Rule extends to testimony of party's witness given on cross examination to surprise of party. Southern R. Co. v. Goddard, 28 Ky. L. R. 523, 89 S. W. 675.

Contradictory statements may be shown.—Brown v. S., 142 Ala. 287, 38 S. 265; Birmingham R. Co. v. Mason, 144 Ala. 287, 39 S. 590; Bradley v. Graham, 77 Conn. 211, 58 A. 698; Illinois R. Co. v. Wade, 206 Ill. 523, 69 N. E. 565.

Evidence competent only to contradict; not substantive against party contradicted. Pugin v. C., 24 Ky. L. R. 2291, 73 S. W. 783; Hutchins v. Murphy, 146 Mich. 621, 110 N. W. 52.

Failure to state facts supposed to be

beneficial, not cause for contradicting witness. P. *v.* Creeks, 141 Cal. 529, 75 P. 101; P. *v.* Cook, 148 Cal. 334, 83 P. 43; Cross *v.* Co., 55 Fla. 374, 46 S. 6; Feltner *v.* C., 23 Ky. L. R. 1119, 64 S. W. 959; Quinn *v.* S., 51 Tex. Cr. 155, 101 S. W. 248; Ozark *v.* S., 51 Tex. Cr. 106, 100 S. W. 927; Willis *v.* S., 49 Tex. Cr. 139, 90 S. W. 1100. In such case state cannot read testimony of witness on former trial and ask if it was not what he testified to and if it was not true. C. *v.* Co., 26 Ky. L. R. 121, 80 S. W. 772.

Witness may be asked as to statements made out of court for purpose of refreshing memory. White *v.* S., 87 Ala 24, 5 S. 829; P. *v.* Duncan, 8 Cal. App. 186, 96 P. 411; P. *v.* Izlar, 8 Cal. App. 600, 97 P. 685.

535-11 Lowry *v.* C., 119 Ky. 691, 63 S. W. 977; Dunk *v.* S., 84 Miss. 452, 36 S. 609; Beier *v.* Co., 197 Mo. 215, 94 S. W. 876; Claney *v.* Co., 192 Mo. 615, 91 S. W. 509; C. *v.* Wickett, 20 Pa. Super. 350; Gray *v.* Hartman, 6 Pa. Super. 195; Benson *v.* S., 51 Tex. Cr. 367, 103 S. W. 911.

536-12 Jonesboro, etc. R. Co. *v.* Gainer (Ark.), 166 S. W. 571; Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211; Diffenderfer *v.* Scott, 5 Ind. App. 243, 32 N. E. 87; C. *v.* Wickett, supra.

536-13 Word *v.* C., 151 Ky. 527, 152 S. W. 756.

COPIES

539-1 Madera R. Co. *v.* Co., 3 Cal. App. 668, 87 P. 27; Skinner Mfg. Co. *v.* Donville, 57 Fla. 180, 49 S. 125. See Fleet *v.* Hertz, 201 Ill. 594, 66 N. E. 878; Simonds *v.* Cash, 136 Mich. 558, 99 N. W. 754. See Great Western L. Co. *v.* Shumway, 25 N. D. 268, 141 N. W. 479. Isbell *v.* Whalen, 25 S. D. 445, 127 N. W. 476; Green *v.* Gregory (Tex. Civ.), 142 S. W. 999.

539-2 To show alterations. Ritter *v.* S., 70 Ark. 472, 69 S. W. 262. See Kimball Co. *v.* Piper, 111 Ill. App. 82.

539-3 Behrens *v.* Mountz, 37 Pa. Super. 326.

539-4 Burnett C. Co. *v.* Co., 164 Ala. 547, 51 S. 263; Kolp *v.* Brazer (Tex. Civ.), 161 S. W. 899.

Duplicate or triplicate, made by carbon, admissible as original. Hopkins *v.* S., 52 Fla. 39, 42 S. 52; Fremont Can Co. *v.* R. Co. (Mich.), 146 N. W. 678; International H. Co. *v.* Elfstrom, 101 Minn. 263, 112 N. W. 252 (distinguishing letter-press copies); S. *v.* Abbatalli, 78 N. J. L. 90, 73 A. 128; Cole *v.* Co., 216 Pa. 283, 65 A. 678 (notice); Virginia C. C. Co. *v.* Knight, 106 Va 674, 56 S. E. 727; Chesapeake & O. R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161. See 540-11, infra; Harmon *v.* Ty., 15 Okla. 147, 79 P. 765.

Bill of lading.—"Where duplicates are produced by mechanical means, all are duplicate originals, and any of them may be introduced in evidence without accounting for the non-production of the other. Federal Union, etc. Co. *v.* Indiana, etc. Co., 95 N. E. 1104; International Harvester Co. *v.* Elfstrom (1907), 101 Minn. 263, 112 N. W. 252, 12 L. R. A. (N. S.) 343, 118 Am. St Rep. 626, 11 Ann. Cas. 107, and cases cited and note. If the duplicates are originals, it is a necessary corollary upon proper proof of destruction or loss of an original, which is primary evidence, that the groundwork is laid for introducing a copy. The rule would, of course, be otherwise if it took different parts, to constitute the whole, as in an indenture at common law." Pittsburgh, etc. R. Co. *v.* Brown, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625.

Blue prints.—Lincoln S. Dist. *v.* Fiske, 61 Neb. 3, 84 N. W. 401.

540-6 People's Nat. Bk. *v.* Rhoades (Del.), 90 A. 409.

540-9 Where printed notice of reward posted best evidence is a notice posted, not a printed copy. Palatine Co. *v.* Co., 13 N. M. 241, 82 P. 382.

540-11 International H. Co. *v.* Elfstrom, 101 Minn. 263, 112 N. W. 252, 118 Am. St. 626, 12 L. R. A. (N. S.) 343; Chesapeake & O. R. Co. *v.* Stock, 104 Va. 97, 51 S. E. 161. See Lodigh & H. L. Co. *v.* Clark, 78 Ark. 539, 94 S. W. 686. *Contra*, Chesapeake & O. R. Co. *v.* Stock, supra. See Virginia C. C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 727.

When letter-press book is original, as when it is a weather bureau record, it is primary evidence. Chicago R. Co. *v.* Zapp, 209 Ill. 339, 70 N. E. 623.

Letter-book competent to prove contents. Continental Nat. Bk *v.* Moore, 83 App. Div. 419, 82 N. Y. S. 302.

Carbon copy, not original. McDonald *v.* Hanks, 32 Tex. Civ. 140, 113 S. W. 604, *et.* the text.

540-12 Letter press copies admissible to show destination of cars where way bills were lost. Barker *v.* R. Co.,

88 Kan. 767, 129 P. 1151, 42 L. R. A. (N. S.) 1121.

541-13 Lyons Lumb. Co. *v.* Stewart, 147 Ky. 655, 145 S. W. 376.

542-14 Copies furnished by agents are secondary evidence. W. U. T. Co. *v.* Kapp, 35 Tex. Civ. 663, 80 S. W. 849.

Message read to operator from memorandum by person who wrote it and transcribed on blank by former, inadmissible against company to show message accepted. Mims *v.* Co., 82 S. C. 247, 64 S. E. 230.

542-20 N. Y. & B. Transp. Line *v.* Co., 118 Md. 73, 84 A. 251; Glazer *v.* Co., 163 N. Y. S. 979; Patterson *v.* R. Co. (Tex. Civ.), 126 S. W. 336.

Copy inadmissible when original is not admissible. Tourtelot *v.* Booker (Tex. Civ.), 150 S. W. 293.

Photographic copy.—Stitcel *v.* Miller, 250 Ill. 73, 95 N. E. 53.

543-21 Hartford F. Ins. Co. *v.* Enoch, 72 Ark. 47, 77 S. W. 899; Van Valkenburgh *v.* Oltham, 12 Cal. App. 572, 108 P. 42; Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918; Naughton *v.* Sooy, 245 Ill. 225, 91 N. E. 1033; Rudgear *v.* Co., 246 Ill. 74, 69 N. E. 30; West Pub. Co. *v.* Lasley, 165 Ill. App. 276; Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 742; Peycke *v.* Shinn, 68 Neb. 343, 94 N. W. 135; Aetna Ins. Co. *v.* Du Parquet, 65 Misc. 551, 120 N. Y. S. 759; Miller *v.* Freeman (Tex. Civ.), 127 S. W. 802.

See Chicago, etc. Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38.

543-22 Le Master *v.* P., 51 Colo. 416, 131 P. 269; Proctor *v.* Blakely, 128 Ga. 696, 57 S. E. 879; Miller *v.* Streator, 136 Mo. App. 712, 119 S. W. 28.

543-23 Penny *v.* Dozier, 161 Ala. 292, 49 S. 969; Hartford F. Ins. Co. *v.* Enoch, 72 Ark. 47, 77 S. W. 899; Webster *v.* Bear, 141 Mo. App. 561, 125 S. W. 847.

Proper foundation for use of letter-press copy. Union S. & D. Co. *v.* Tenney, 201 Ill. 349, 65 N. E. 662.

Notice unnecessary if possession of original shown. Kohl *v.* Bradley, 130 Wis. 301, 110 N. W. 207.

543-25 Kolp *v.* Brazor (Tex. Cr.), 121 S. W. 899.

Impropriety in admitting copy when original is obtained, harmless. Larabee *v.* Larabee, 240 Ill. 576, 88 N. E. 1037.

543-26 Proctor *v.* Blakely, 128 Ga. 696, 57 S. E. 789.

543-27 Burnett C. Co. *v.* Co., 164 Ala. 547, 51 S. 263.

544-30 Brent *v.* Baldwin, 160 Ala. 635, 49 S. 343.

544-31 Printed blank supplemented by testimony as to what was filled into original, competent. Kenniff *v.* Caulfield, 140 Cal. 34, 73 P. 803.

544-32 Extracts from copies of cash drawer slips not admissible. Sonnenfeld *v.* Rosenthal, 247 Mo. 238, 152 S. W. 321.

544-33 Copies. Sullivan *v.* Fant (Tex. Civ.), 160 S. W. 612. See Ruddock C. Co. *v.* Peyret, 113 La. 867, 37 S. 858; William M. Rice Institute *v.* Freeman (Tex. Civ.), 145 S. W. 688.

A translation made from a copy is inadmissible when the original has not been shown to have been lost. Hamilton *v.* S. (Tex. Civ.), 152 S. W. 1117.

546-39 Rudd *v.* Buxton, 41 App. Cas. (D. C.) 353; Larabee *v.* Larabee, 240 Ill. 576, 88 N. E. 1037; Whitman *v.* Giesing, 221 Mo. 600, 123 S. W. 1052; Peycke *v.* Shinn, 68 Neb. 343, 94 N. W. 135; Sullivan *v.* Solis, 52 Tex. Civ. 464, 114 S. W. 456.

Evidence held insufficient.—Winter *v.* Dibble, 251 Ill. 200, 95 N. E. 1093.

547-41 Davis *v.* S., 54 Tex. Cr. 236, 111 S. W. 366. See 544-31, supra.

548-44 Burnett C. Co. *v.* Co., 164 Ala. 547, 51 S. 263; Aetna Ins. Co. *v.* Du Parquet, 65 Misc. 551, 120 N. Y. S. 759; Perry *v.* Sheldon, 30 R. I. 426, 75 A. 690; Blair *v.* Breeding, 57 Tex. Civ. 147, 121 S. W. 869.

Copy identified by defendant's agent, admissible if it fails to produce original. McMeekin *v.* R. Co., 82 S. C. 468, 64 S. E. 413.

548-46 Southwestern T. & T. Co. *v.* Owens (Tex. Civ.), 116 S. W. 89. *Contra*, Clarke *v.* Dunn, 161 Ala. 633, 50 S. 93 ("best judgment"); Winter *v.* Dibble, 251 Ill. 200, 95 N. E. 1093; Braintreet *v.* Banking Co., 89 Neb. 590, 131 N. W. 956.

549-49 Kenniff *v.* Caulfield, 140 Cal. 34, 73 P. 803.

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Remedies for Infringement.—See 5 Standard Proc. 597, *et seq.*

Miscellaneous Rules of Practice.—See 5 Standard Proc. 514.

Jurisdiction of Infringement Suits.—See 5 STANDARD PROC. 510.

Venue, Laches, Parties, Pleading.—See 5 STANDARD PROC. 511, *et seq.*

Decree or Judgment.—See 5 STANDARD PROC. 517.

551 Evidence sufficient to show that plates were made from type set within the United States, as required on copyright books. Huebsch *v.* Crist Co., 209 Fed. 885.

551-2 Mifflin *v.* Dutton, 190 U. S. 265; Huebsch *v.* Crist Co., 209 Fed. 885; Freeman *v.* Register, 173 Fed. 419. See Ginn *v.* A. Pub. Co., 209 Fed. 713.

551-3 Saake *v.* Lederer, 174 Fed. 135, 98 C. C. A. 571, (certificate does not per se establish copyright); Bosselman *v.* Richardson, 174 Fed. 622, 98 C. C. A. 127 (same).

551-4 Lederer *v.* Saake, 166 Fed. 810. **It must be alleged** specifically things required were done. Ford *v.* Co., 148 Fed. 642.

552-7 Filing title of magazine covers such articles in it as were written or owned by proprietor. Ford *v.* Co., supra. It covers all articles. Harper *v.* Co., 144 Fed. 491.

552-13 See Huebsch *v.* Crist Co., 209 Fed. 885.

552-18 Custom and course of business of complainant may be shown where large number of copyrights involved, and may give rise to presumption that, except as shown, law has been met. West Pub. Co. *v.* Thompson, 169 Fed. 833.

553 P. *v.* Weinstock, 140 N. Y. S. 453. See vol. 11, p. 692, n. 94, and supplement thereto.

553-19 Chautauqua School *v.* Natl. School, 211 Fed. 1014.

553-23 See 551-3, supra.

553-25 Mifflin *v.* Co., 190 U. S. 260. See Freeman *v.* Register, 173 Fed. 419; Merriam Co. *v.* Co., 146 Fed. 354, 76 C. C. A. 470 (notice of book copyrighted in England).

554-32 In Ontario certified copy of entry at Stationers' Hall is prima facie evidence of proprietorship under statute, and it is not required, to make a prima facie case, to prove facts making statute condition precedent to vesting of copyright in another than the author. Black *v.* Co., 8 Ont. L. R. (Can.) 9.

554-33 It is an inference of fact whether publisher of an encyclopaedia who employs and pays writers for preparing articles for it, which articles they copyright and publisher copyrights encyclopaedia, obtains exclusive right to produce the articles. In absence of special circumstances inference will be in favor of publisher. Lawrence & B. *v.* Allalo (1904), App. Cas. (Eng.) 17. But such circumstances exist where author of article published in magazine soon afterward enters it for copyright under his name. Mifflin *v.* Co., 190 U. S. 260.

Authorship immaterial to defendant in suit for penalties by person in whose name copyright taken. Lederer *v.* Saake, 166 Fed. 810.

554-34 Negative testimony of third persons, not persuasive as to authorship or non-publication. Bosselman *v.* Richardson, 174 Fed. 622, 98 C. C. A. 127.

555-36 In England right to copyright a photograph is in sitter, though negative may be property of photographer. Boucas *v.* Cooke (1903), 2 K. B. 227; Stackemann *v.* Paton (1906), 1 Ch. D. 774.

556-10 Davies *v.* Bowes, 209 Fed. 53; Lederer *v.* Saake, 166 Fed. 810.

556-12 West Pub. Co. *v.* Thompson, 169 Fed. 833.

Evidence held sufficient.—Da Prato Statuary Co. *v.* Giuliani Stat. Co., 189 Fed. 90.

556-15 Cadieux *v.* Beauchemin, 31 Can. Sup. 370.

557-51 West Pub. Co. *v.* Thompson, 169 Fed. 833; Sampson Co. *v.* Co., 134 Fed. 890.

558-61 Moffatt *v.* Gill, 86 L. T. (Eng.) 465; West Pub. Co. *v.* Thompson, supra; Hartford Co. *v.* Co., 146 Fed. 332; Sampson Co. *v.* Co., supra; Thompson Co. *v.* Co., 122 Fed. 922, 59 C. C. A. 148; Dun *v.* Merc. Agency 127 Fed. 173. See Social R. Assn. *v.* Murphy, 128 Fed. 116.

558-62 Sampson Co. *v.* Co., 134 Fed. 890.

558-63 Injunction may issue on proof that three pages of complainant's book were prepared for use as copy by defendant, in absence of clear proof of intention not to use them as such. Chicago Co. *v.* Co., 122 Fed. 189.

559-67 Cadieux *v.* Beauchemin, 31 Can. Sup. 370; West Pub. Co. *v.* Thompson, 169 Fed. 833; Encyclopaedia B. Co. *v.* Assn., 130 Fed. 460; Hubges *v.* Belasco, 130 Fed. 388; Hartford Co. *v.* Co., 146 Fed. 332.

559-69 See West Pub. Co. *v.* Thompson, 169 Fed. 833.

559-70 Encyclopaedia B. Co. *v.* Assn., 130 Fed. 160.

559-72 Encyclopaedia B. Co. *v.* Assn., supra.

560-81 Cadieux *v.* Beauchemin, 31 Can. Sup. 370.

560-88 Encyclopaedia B. Co. *v.* Assn., 130 Fed. 160.

561-93 Encyclopaedia B. Co. *v.* Assn., supra.

561-96 Exhibits by experts may be considered for certain purposes. West Pub. Co. *v.* Thompson, 169 Fed. 833.

561-97 George Bisel Co. *v.* Welsh, 131 Fed. 564.

562-98 Frank Shepard Co. *v.* Pub. Co., 185 Fed. 941; Cadieux *v.* Beauchemin, 31 Can. Sup. 370; Hartford Co. *v.* Co., 146 Fed. 332.

562-99 West Pub. Co. *v.* Thompson, 169 Fed. 833.

562-1 Trow Directory Co. *v.* Co., 122 Fed. 191; Chicago Co. *v.* Co., 122 Fed. 189.

562-2 Coincident errors may be explained. Gopsill *v.* Co., 149 Fed. 905.

562-5 West Pub. Co. *v.* Thompson, supra.

562-8 Defendant must justify use of copyrighted matter. West Pub. Co. *v.* Thompson, supra.

Efforts made to avoid infringement may be regarded in considering whether equitable relief shall be granted because of unwitting profit and use gained by defendant's writers notwithstanding precautions taken by him. West Pub. Co. *v.* Thompson, supra.

563-10 Hubges *v.* Belasco, 130 Fed. 388. See Sampson Co. *v.* Co., 134 Fed. 890, 906.

One must not bodily transmit result of another's labor from his sheets of a directory; but, having made an honest canvass, he may use such sheets to revise and check his own. Hartford Co. *v.* Co., 146 Fed. 332; Moffatt *v.* Gill, 86 L. T. (Eng.) 465; Sampson Co. *v.* Co., 134 Fed. 890, 906.

563-11 See Encyclopaedia B. Co. *v.* Assn., supra; Wooster *v.* Co., 147 Fed. 515, 77 C. C. A. 211.

563-14 Mifflin *v.* Dutton, 190 U. S. 265.

564-23 Notice need not be inscribed on original painting or statuary copyrighted, but only on copies. Werckmeister *v.* Co., 142 Fed. 827.

564-28 West Pub. Co. *v.* Thompson, 169 Fed. 833.

564-29 Mifflin *v.* Co., 190 U. S. 260; Mifflin *v.* Dutton, 190 U. S. 265.

Foreign publication of work of foreign author, with his consent, not abandonment of United States copyright as against non-consenting publishers here. Harper *v.* Co., 144 Fed. 491.

564-30 Conditions attendant upon public exhibition of painting may be shown on the issue of publication. Werckmeister *v.* Co., 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591.

565-33 Production of unpublished play does not affect author's common-law rights. Frohman *v.* Ferris, 238 Ill. 430, 87 N. E. 327.

565-36 Converse of rule recognized where complainant took no steps to see notice of copyright given by licensees. West Pub. Co. *v.* Thompson, supra.

565-41 Harper *v.* Co., 144 Fed. 491.

567-51 In case of a painting penalty may be recovered without showing infringing copies found in defendant's possession. Am. T. Co. *v.* Werckmeister, 146 Fed. 377, 76 C. C. A. 649.

567-52 See as to the rule when defendant a corporation. Am. T. Co. *v.* Werckmeister, supra.

CORONER'S INQUEST

Powers and Duties of Coroners.—See 5 STANDARD PROC. 522.

Who May Hold Inquest, and When, and Where.—See 5 STANDARD PROC. 524 *et seq.*

Matters Relating to the Jury.—See 5 STANDARD PROC. 527.

Procedure at Inquest.—See 5 STANDARD PROC. 528.

Autopsy and Inquisition.—See 5 STANDARD PROC. 529 *et seq.*

569-10 Garrett *v.* Co., 219 Mo. 65, 118 S. W. 68.

570-11 S. *v.* Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381.

570-12 P. *v.* Heacock, 10 Cal. App. 450, 102 P. 543; S. *v.* Squires, 15 Ida. 545, 98 P. 413. *Contra*, S. *v.* McNeil, 33 La. Ann. 1352.

Transcript of evidence of Chinese witness inadmissible unless its accuracy is verified. P. *v.* Ong Git (Cal. App.), 137 P. 283.

570-15 Process verbal is competent only to prove fact and cause of death, not accused's connection therewith. S.

v. Meyers, 120 La. 127, 44 S. 1008; S. *v.* Hopkins, 118 La. 99, 42 S. 660.

573-23 Accused's right to inspect testimony. See S. *v.* Hinkley, 81 Kan. 838, 106 P. 1088.

573-24 Foster *v.* Shepherd, 258 Ill. 164, 101 N. E. 411; Knights Templar Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066.

573-25 Stollery *v.* R. Co., 243 Ill. 290, 90 N. E. 709; Knights T. Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066; Newell *v.* R. Co., 179 Ill. App. 497; Variety Mfg. Co. *v.* Landaker, 129 Ill. App. 630; Nat. W. & C. Co. *v.* Smith, 108 Ill. App. 477.

Action on insurance policy—admission. See supra this volume, "Admissions," 539-49.

"**We have held** that a coroner's verdict is competent evidence for some purposes. Metzradt *v.* Insurance Co., 112 Iowa 526, 84 N. W. 498. The offer made by defendant, however, in the court below, was not the coroner's verdict alone. It offered "Exhibit 1," which consisted of the verdict and other papers, including the evidence of witnesses. Such other papers are not before us, and we cannot determine whether they were admissible or not." Dufree *v.* Wabash R. Co., 155 Ia. 544, 136 N. W. 695.

Coroner's verdict must be admitted as entirety, although jury may be instructed to disregard a portion thereof. O'Donnell *v.* R. Co., 127 Ill. App. 432; Chicago *v.* Cohen, 139 Ill. App. 244. Is prima facie evidence. Mittelstadt *v.* Woodmen, 143 Ia. 186, 121 N. W. 803.

573-26 Incompetent to prove negligence. Cox *v.* R. Co., 92 Ill. App. 15. *Contra*, Devine *v.* Rothschild, 178 Ill. App. 13, competent to prove any matter—but not conclusive.

574-27 In re Dolbeer, 149 Cal. 227, 86 P. 695; Rowe *v.* Such, 134 Cal. 573, 66 P. 862, 67 P. 760; Hollister *v.* Cordero, 76 Cal. 649, 18 P. 855; Central R. *v.* Moore, 61 Ga. 151; Aetna L. Ins. Co. *v.* Milward, 26 Ky. L. R. 589, 82 S. W. 364, 68 L. R. A. 285; Aetna L. Ins. Co. *v.* Kaiser, 24 Ky. L. R. 2454, 74 S. W. 203; Wasey *v.* Ins. Co., 126 Mich. 119, 85 N. W. 459; Chambers *v.* M. W. of Am., 18 S. D. 173, 99 N. W. 1107; Colquit *v.* S., 107 Tenn. 381, 64 S. W. 713; Boehme *v.* W. O. W. (Tex.), 84 S. W. 422, 36 Tex. Civ. 501, 85 S. W. 444; Sullivan *v.* Co., 51 Wash. 71, 97 P. 1109 (report of coroner under statute concerning vital statistics). See Grand Lodge *v.* Bamster, 80 Ark. 190, 96 S. W. 742. Fact of death, but not cause, may be shown by verdict. Queatham *v.* Woodmen, 148 Mo. App. 33, 127 S. W. 651.

574-29 Knights Templar Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066.

575-35 Bennett *v.* S., 66 Fla. 369, 63 S. 842.

575-38 Cox *v.* R. Co., 92 Ill. App. 15.

CORPORATIONS

Burden on state to show non user, 588-21; *Good faith of payment of part of capital stock*, 589-22; *Articles conclusive evidence*, 590-28; *Presumption as to time when organized*, 597-42; *Presumption as to assent of members of associations*, 598-46; *Identity of name*, 599-93; *Effect of acceptance of charter*, 601-62; *Terms of stock subscription*, 616-38; *Presumption arising from over-valuation of property*, 617-40; *Knowledge of by-laws*, 624-76; *Release of subscriber for stock*, 624-78; *Presumption in favor of authority of officers*, 625-88; *Seal attached to forged paper*, 627-93; *Testimony of officers not admission on re-trial*, 643-47; *Evidence of bona fides of stockholders seeking dissolution*, 658-17; *Proof of cause for dissolving*, 658-20; *Forfeiture of franchise*, 658-20.

In 5 STANDARD PROC. 546 *et seq.* will be found a treatment of the following matters: Capacity to sue and to be sued; Actions by corporations; Actions against corporations; Jurisdiction of actions; Venue of actions; Statutes of limitations; Parties; Process; Appearance; Attachment and garnishment; Pleading; Evidence; Trial; Judgment or decree; Execution; Appeals; Criminal liability; Special actions; Insolvent corporations; Foreign corporations.

584-2 Fuller *v.* Co., 16 Haw. 1.

The corporate existence of a railroad will be judicially noticed. Truehart *v.* S., 13 Ga. App. 661, 79 S. E. 755.

585-5 S. *v.* Co., 97 Me. 559, 55 A. 495; Gorham Mfg. Co. *v.* R. Co., 27 R. I. 35, 60 A. 638.

585-6 Judicial notice not taken of number of similar corporations doing business in state. S. *v.* R. Co., 51 Fla. 578, 40 S. 875.

585-7 See Truehart *v.* S., 13 Ga. App. 661, 79 S. E. 755. Seals not judicially noticed. Griffing B. Co. *v.*

Winfield, 53 Fla. 589, 43 S. 687.

586-9 Jersey City r. R. Co., 70 N. J. L. 360, 57 A. 445.

586-10 New York, etc. R. Co. r. Offield, 78 Conn. 1, 60 A. 740; C. r. R. Co., 31 Ky. L. R. 859, 104 S. W. 290.

586-14 Notice taken of divisions of Methodist Episcopal Church, of territory over which branches thereof exercise jurisdiction, and of articles of separation. Malone r. Lacroix, 144 Ala. 648, 41 S. 724.

586-15 Florsheim r. Fry, 109 Mo. App. 487, 84 S. W. 1023.

587-17 There is no presumption that plaintiff is a foreign corporation carrying on its business without a license, but it must be proved. Hubbard Zemurray S. S. Co. r. Crescio, 179 Ill. App. 56.

587-18 Campbell & Z. Co. r. Co., 129 Fed. 491; Wells Co. r. Co., 198 U. S. 177; Roberts r. Lewis, 144 U. S. 653; Southern P. Co. r. Denton, 146 U. S. 202; Spreyne r. Lodge, 117 Ill. App. 253; Fish r. Dispatch, 118 Ill. App. 284; Morrison r. R. Co., 166 Ind. 511, 76 N. E. 961; Pike r. Wathen, 25 Ky. L. R. 1264, 78 S. W. 137; Louisiana Nat. Bk. r. Henderson, 116 La. 413, 40 S. 779; Bledsoe r. Co. (Okla.), 139 P. 257; Goodale L. Co. r. Shaw, 41 Or. 544, 69 P. 546; Yankton Nat. Bk. r. Benson (S. D.), 146 N. W. 582. *Contra*, if answer not verified. McConnon & Co. r. Laursen, 22 N. D. 604, 135 N. W. 213.

Evidence only showing that the corporate name does not comply with the state law as to the use of the word "the" in it, settles its status as a foreign corporation. Austin r. King, 25 Colo. App. 363, 138 P. 57.

The burden of proof is upon the corporation asserting the exclusive right to a distinctive name, to establish that right. Independent Order, etc. r. Mack, 139 Ga. 837, 78 S. E. 336.

588-19 Harrill r. Davis, 168 Fed. 187, 94 C. C. A. 17.

588-21 State must show cause for ousting corporation of portion of its privileges because of non-user. S. r. Co., 98 Me. 214, 56 A. 763. See Heard r. Talbot, 7 Gray (Mass.) 113; S. r. Co., 8 R. I. 182; Atty. Gen. r. R. Co., 92 Wis. 604, 67 N. W. 1125.

589-22 Wells Co. r. Co., 198 U. S. 177; Elgin, etc. Co. r. Loveland, 132 Fed. 41; Martin r. Deetz, 102 Cal. 55, 36 P. 368, 41 Am. St. 171; Jones r. Co., 21 Colo. 283, 40 P. 457, 52 Am. St. 220, 29 L. R. A. 143; Loverin r. McLaughlin, 161 Ill. 417, 44 N. E. 99; Edwards r. Co., 190 Ill. 467, 60 N. E. 807; S. r. Co., 98 Me. 214, 56 A. 763; Perkins r. Sanders, 56 Miss. 733; Capps r. Co., 40 Neb. 470, 58 N. W. 956, 42 Am. St. 677, 24 L. R. A. 259; Card r. Moore, 68 App. Div. 327, 74 N. Y. S. 18, *aff.*, no opinion, 173 N. Y. 598, 66 N. E. 1105; Goodale L. Co. r. Shaw, 41 Or. 544, 69 P. 546; Guckert r. Hacke, 159 Pa. 303, 28 A. 249; Lawrie r. Silsby, 76 Vt. 240, 56 A. 1106.

Under statute requiring proof of payment in good faith of ten per cent. of capital stock before certificate issued, after deposit of the prescribed sum proved it is proper to show whether any previous arrangement had been made with custodian of money concerning it. P. r. Com., 127 App. Div. 480, 112 N. Y. S. 133.

589-23 Wells Co. r. Co., 198 U. S. 177.

590-25 Goodale L. Co. r. Shaw, 41 Or. 544, 69 P. 546, and cases cited in note 22, supra.

590-27 See S. r. Court, 44 Wash. 108, 87 P. 40, 45 Wash. 316, 88 P. 332.

590-28 Smith r. R. Co., 170 Ind. 382, 81 N. E. 501; Morrison r. R. Co., 166 Ind. 511, 76 N. E. 961. See Boca & L. R. Co. r. R. Co., 2 Cal. App. 546, 84 P. 298; S. r. Court, 42 Wash. 675, 85 P. 669.

Article conclusive evidence of existence of corporation and of bona fide intent to construct railroad authorized thereby. In re Milwaukee S. R. Co., 124 Wis. 490, 102 N. W. 401. It is said in dissenting opinion contrary is held in a number of cited cases.

591-29 Tulare r. Shepard, 185 U. S. 1; Webb r. S., 14 Ariz. 506, 131 P. 970; P. r. Morley, 8 Cal. App. 372, 97 P. 84; Foster r. Co., 243 Ill. 163, 90 N. E. 375; Lincoln Pk. r. Swatek, 105 Ill. App. 604; Lusk r. Riggs, 70 Neb. 718, 102 N. W. 88; Haas r. Bk., 41 Neb. 754, 60 N. W. 85; McCarter r. Ketcham, 72 N. J. L. 247, 62 A. 693; Leavengood r. McGee, 50 Or. 233, 91 P. 453; Thomas r. Wilcox, 18 S. D. 625, 101 N. W. 1072.

A corporation once shown to exist will be presumed to still exist until the contrary is shown. Yankton Nat. Bk. r. Benson (S. D.), 146 N. W. 582.

Personal liability of directors and officers under Illinois statute can only be avoided by showing corporation was such de jure. Butler r. Cleveland, 220

Ill. 128, 77 N. E. 99; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Gunderson v. Bk., 199 Ill. 422, 65 N. E. 326.

Charter conclusive as to corporate existence except as against state. First Nat. Bk. v. Rockefeller, 195 Mo. 15, 93 S. W. 761.

591-30 Tulare v. Shepard, 185 U. S. 1; Campbell & Z. Co. v. Co., 129 Fed. 491; Whipple v. Tuxworth, 81 Ark. 391, 99 S. W. 86; Martin v. Deetz, 102 Cal. 75, 36 P. 368, 41 Am. St. 151; Imperial B. Co. v. Board, 238 Ill. 100, 87 N. E. 167; Am. T. Co. v. R. Co., 157 Ill. 641, 42 N. E. 153; Marshall v. Keach, 227 Ill. 35, 81 N. E. 29; Standard Co. v. C., 29 Ky. L. R. 5, 91 S. W. 1128; Jones v. Hale, 32 Or. 465, 52 P. 311; Kwapil v. Co., 55 Wash. 583, 104 P. 824.

Certified copy of charter is proper evidence as to existence of corporation, together with the affidavits of the incorporators. Holt & Smith v. Plow Co. (Tex. Civ.), 150 S. W. 215.

Such proof is sufficient on a plea of nul tiel corporation. Cozzens v. R. Co., 166 Ill. 213, 46 N. E. 788; Marshall v. Keach, supra.

594-34 Lincoln Pk. v. Swatek, 105 Ill. App. 604; Eaton v. Walker, 76 Mich. 579, 43 N. W. 638.

594-35 Mears v. S., 84 Ark. 136, 104 S. W. 1095; Fields v. U. S., 27 App. Cas. (D. C.) 433; Morse v. C., 33 Ky. L. R. 894, 111 S. W. 714; Standard Co. v. C., 29 Ky. L. R. 5, 91 S. W. 1128; S. v. Stevens, 16 S. D. 309, 92 N. W. 420. See S. v. Weber, 31 Nev. 385, 103 P. 411.

Need not prove railroad company a corporation.—S. v. James, 135 La. —, 65 S. 248.

Act of legislature recognizing corporate existence is sufficient, and in a criminal prosecution where the ownership of the property stolen is alleged to be in said corporation is admissible in evidence under the sworn plea of the defendant denying corporate existence, and sufficient to make a prima facie case of the alleged corporate entity. West v. S., 168 Ala. 1, 53 S. 277.

Statute authorizing corporation need not have been in force when bona fide attempt to organize made, if it was in effect and granted all powers assumed when indictment found. S. v. Stevens, 16 S. D. 309, 92 N. W. 420.

Fact of incorporation must be shown if concern whose money embezzled may do business either as corporation or individuals. Morse v. C., 33 Ky. L. R. 894, 111 S. W. 714.

594-36 General reputation may be shown, and defendant's stationery is competent. Goodman v. C., 30 Ky. L. R. 519, 99 S. W. 252.

Illinois statute making user prima facie proof of corporate existence is not limited to domestic corporations. Gruff v. P., 108 Ill. App. 168; Kincaid v. P., 139 Ill. 213, 28 N. E. 1060.

Proof of incorporation by reputation is provided for in Arkansas (Mears v. S., 84 Ark. 136, 104 S. W. 1095), and in Utah. Testimony corporation organized under laws of certain states does not meet requirement. S. v. Brown, 33 Utah 109, 93 P. 52. Proof by reputation. Perry v. P., 38 Colo. 23, 87 P. 796.

595-37 Liverpool v. Ins. Co., 129 U. S. 397; Nashua Bk. v. Co., 189 U. S. 221; Valley L. Co. v. Driessel, 13 Ida. 662, 93 P. 765; Valley L. Co. v. Nickerson, 13 Ida. 682, 93 P. 24; Florsheim v. Fry, 109 Mo. App. 487, 84 S. W. 1023; Milwaukee G. E. Co. v. Gordon, 37 Mont. 209, 95 P. 995 (evidence must cover law of state in which organization effected authorizing same, mode of organization and custodianship of paper offered as evidence).

Burden on defendant to show that laws of state have not been complied with. Armsby Co. v. Raymond Bros., 90 Neb. 553, 134 N. W. 174.

Burden on defendant who fails to demur and sets up affirmative allegation in defense. Kiesel v. Bybee, 14 Ida. 670, 95 P. 20.

Fraudulent character of corporation must be shown by party alleging fact. Indian R. Mfg. Co. v. Wooten, 55 Fla. 745, 46 S. 185.

Proof of English corporation laws.—See Nashua Bk. v. Co., 189 U. S. 221.

595-38 Florsheim v. Fry, 109 Mo. App. 487, 84 S. W. 1023.

Prima facie proof, sufficient unless issue made. MacMillan Co. v. Stewart, 69 N. J. L. 212, 54 A. 240.

596-39 Utah N. Co. v. Marsh, 46 Colo. 211, 103 P. 302; Abbau v. Grossie, 262 Ill. 626, 104 N. E. 1020; Rogers v. McRea, 7 Ind. Ty. 468, 104 S. W. 803; Standard Co. v. Jasper, 76 Kan. 926, 92 P. 1094; Osborne v. Shilling, 68 Kan. 808, 74 P. 609; Pittsburgh C. Co. v.

Worthy, 158 Mich. 530, 123 N. W. 47, Tribble v. Halbert, 143 Mo. App. 524, 127 S. W. 618; Scientific A. Club v. Horchitz, 128 Mo. App. 575, 106 S. W. 1117; Parlin v. Boatman, 84 Mo. App. 67; Northern A. Co. v. Borgelt, 67 Neb. 282, 93 N. W. 226; Portland Co. v. Hall, 121 App. Div. 779, 106 N. Y. S. 649; South Bay v. Howey, 113 App. Div. 382, 98 N. Y. S. 969; S. v. Co., 15 N. D. 35, 106 N. W. 406; Kinney v. Yeoman, 15 N. D. 21, 106 N. W. 41; Hanson v. Lindstrom, 15 N. D. 584, 108 N. W. 798; White S. M. Co. v. Peterson, 23 Okla. 361, 100 P. 513; West Jersey I. Co. v. Armour, 12 Pa. Super. 443; Kelley v. Co., 22 S. D. 406, 118 N. W. 696; Acme M. Agency v. Rochford, 10 S. D. 203, 72 N. W. 466, 66 Am. St. 714; Kiblinger Co. v. Bk., 131 Wis. 595, 111 N. W. 709; Chickering C. v. White, 127 Wis. 83, 106 N. W. 797.

Contra, San Antonio v. Army (Tex. Civ.), 127 S. W. 860.

Demurrer lies if it is affirmatively shown foreign corporation has unauthorizedly done business. C. v. Hayden, 60 Neb. 636, 83 N. W. 922, 83 Am. St. 545.

Payment of tax in New York, a condition subsequent and non-compliance matter of defense. Parmele Co. v. Haas, 171 N. Y. 579, 64 N. E. 440; Wood v. Ball, 190 N. Y. 217, 83 N. E. 21; Halsey v. Jewett, 190 N. Y. 231, 83 N. E. 25.

Compliance need not be shown if it appears prima facie corporation engaged in interstate commerce. Zion Assn. v. Mayo, 22 Mont. 100, 55 P. 915.

Burden of showing corporation has done business locally is on party so alleging. Thomas v. Co., 67 Kan. 599, 73 P. 909; Praffine P. Co. v. Tarbox, 114 N. Y. S. 54 (forbidden business).

In action against agent of foreign corporation for embezzlement proof need not be made it had complied with local law. S. v. Tumey, 81 Ind. 559; S. v. Blakemore, 226 Mo. 560, 126 S. W. 429; C. v. Shober, 3 Pa. Super. 554; S. v. O'Brien, 94 Tenn. 79, 28 S. W. 311. *Contra* in action on agent's bond; but such neglect is not a defense to action for money had and received. Express Co. v. Lucas, 36 Ind. 361; Thorne v. Ins. Co., 80 Pa. 15. It seems to have been assumed proof of corporate existence was necessary in case of embezzlement. See S. v. Pittam, 32 Wash. 127, 72 P. 1042.

596-40 Denver, etc. R. Co. v. Wagner, 167 Fed. 75, 92 C. C. A. 527; Old Wayne Ins. Co. v. McDonough, 164 Ind. 321, 73 N. E. 703; Lehigh Val. Co. v. Gilmore, 93 Minn. 432, 101 N. W. 796, 106 Am. St. 443; Rock Island Co. v. Peterson, 93 Minn. 356, 101 N. W. 616.

596-41 U. S. R. Co. v. Butler, 132 Fed. 398; Manufacturers' C. Co. v. Blitz, 131 App. Div. 17, 115 N. Y. S. 402; Steel Tube Co. v. Riehl, 9 Pa. Super. 220; West Jersey I. Co. v. Armour, 12 Pa. Super. 443.

In New York there are differing statutes applying to separate classes of corporations (see Portland Co. v. Hall, 121 App. Div. 779, 106 N. Y. S. 649)

In action against foreign insurer, if substituted service made, it must be shown statute requiring appointment of agent has been complied with. McKeever v. Court, 106 N. Y. S. 1041.

Presumption.—Allegation plaintiff is a foreign corporation raises presumption it is of class which requires it to obtain license before doing business. Portland Co. v. Hall, supra.

597-42 Graefe v. Co., 224 Mo. 232, 123 S. W. 835.

If date of incorporation not shown, presumption is corporation organized under existing constitution. San Antonio T. Co. v. Altgelt (Tex. Civ.), 81 S. W. 106

598-46 It is conclusively presumed, where law provides for changing a voluntary association into a corporation, every person on becoming a member of former impliedly assented change might be made. Spiritual & P. T. v. Vincent, 127 Wis. 93, 105 N. W. 1026.

599-50 Payment of fee presumed where articles recorded. S. v. Court, 42 Wash. 675, 85 P. 669.

599-52 Borrero v. Luz Electrica, 1 P. R. Fed. 142.

Presumption is articles and certificate were regular as to contents. Avon Springs Co. v. Weed, 104 N. Y. S. 58. And facts stated in required affidavit were true. Cherry v. Co. (Tex. Civ. 115 S. W. 81

599-53 Anglo-Cal. Bk. v. Field, 146 Cal. 644, 80 P. 1080; Cribb v. Waycross, 82 Ga. 597, 9 S. E. 426; Mattox v. S., 115 Ga. 212, 41 S. E. 709; Van Winkle v. Mathews, 2 Ga. App. 249, 58 S. E. 396; Holcomb v. Co., 119 Ga. 466, 46 S. E. 671; Turner's Chapel v. Co., 121 Ga. 376, 49 S. E. 272; Georgia

Assn. *v.* Borchardt, 123 Ga. 181, 51 S. E. 429; Perkins Co. *v.* Shewmake, 119 Ga. 617, 46 S. E. 832; Gonsalves *v.* Watson, 16 Haw. 256; Hawaii M. Co. *v.* Andrade, 14 Haw. 500; Ohio O. Co. *v.* Detamore, 165 Ind. 243, 73 N. E. 906.

Identity of name raises presumption plaintiff is corporation mentioned in writing in suit, in absence of evidence showing it is not the only one bearing its name. Campbell & Z. Co. *v.* Co., 129 Fed. 491.

601-61 Organization under general law, presumed. Wisconsin R. Imp. Co. *v.* Pier, 137 Wis. 325, 118 N. W. 857.

601-62 Acceptance of charter raises presumption of assent to obligations to public therein imposed. P. *v.* R. Co., 145 Mich. 140, 108 N. W. 772.

602-71 It will be assumed "principal office" of domestic corporation is both its "principal place of business" and its "business address." Hurley *v.* Tucker, 128 App. Div. 580, 112 N. Y. S. 980.

602-72 Webb *v.* S., 14 Ariz. 506, 131 P. 970; Sierra, etc. Co. *v.* Bricker, 3 Cal. App. 190, 85 P. 665; Shober *v.* Blackford, 46 Mont. 194, 127 P. 329; Smith *v.* Soc., 118 App. Div. 678, 103 N. Y. S. 770; Leavengood *v.* McGee, 50 Or. 233, 91 P. 453.

See S. *v.* Moreaux, 254 Mo. 398, 162 S. W. 158; Pacific Drug Co. *v.* Hamilton, 71 Wash. 469, 128 P. 1069.

Competent to show good faith, though not filed. Warren *v.* Syfers, 23 Ind. App. 167, 55 N. E. 103.

602-74 See Shober *v.* Blackford, 46 Mont. 194, 127 P. 329.

603-78 Western I. Wks. *v.* Co., 30 Mont. 550, 77 P. 413; Montgomery *v.* R. Co., 73 S. C. 503, 53 S. E. 987.

603-79 P. *v.* Morley, 8 Cal. App. 372, 97 P. 84.

Receipt showing party contracted in corporate name is evidence against it. Sierra, etc. Co. *v.* Bricker, 3 Cal. App. 190, 85 P. 665. It is sufficient in criminal proceeding against corporation. Standard O. Co. *v.* Co., 29 Ky. L. R. 5, 91 S. W. 1128.

604-80 Pacific Drug Co. *v.* Hamilton, 71 Wash. 469, 128 P. 1069.

The existence of a corporation cannot be proved by a division superintendent testifying that it is a corporation. P. *v.* Burger, 259 Ill. 284, 102 N. E. 751.

Existence of corporation may be shown by general reputation (Louisville & N. R. Co. *v.* C., 154 Ky. 293, 157 S. W. 369; S. *v.* Moreaux, 254 Mo. 398, 162 S. W. 158), or by parol. S. *v.* Moreaux, supra.

604-81 Parol proof as to non-existence of records showing a corporation can only be made by custodian of such records. Cobb *v.* Bryan, 37 Tex. Civ 339, 83 S. W. 887.

604-83 Fields *v.* U. S., 27 App. Cas (D. C.) 433. See note 80, supra.

Parol evidence not competent to show merger of corporations. Pattison *v.* Co., 116 La. 963, 41 S. 224.

604-84 Love *v.* Ramsey, 139 Mich. 47, 102 N. W. 279. See Card *v.* Moore, 68 App. Div. 327, 74 N. Y. S. 18, *aff.*, no opinion, 173 N. Y. 598, 66 N. E. 1105.

604-85 Existence of foreign corporation, provable by parol, as is fact it is doing business in another state than that of its domicil. S. *v.* Pittam, 32 Wash. 137, 72 P. 1042. But see, on last point, Pattison *v.* Co., 116 La. 963, 41 S. 224.

604-86 Turner *v.* S. (Ark.), 158 S. W. 1072; Mears *v.* S., 84 Ark. 136, 104 S. W. 1095; S. *v.* Moreaux, 254 Mo. 398, 162 S. W. 158; S. *v.* Knowles, 187 Mo. 141, 168, 83 S. W. 1083.

In a criminal prosecution based on the assumption that defendant is a corporation, proof of corporate existence should not be made by oral evidence. S. *v.* Merchant, 48 Wash. 69, 92 P. 890. But if admitted without objection such evidence is sufficient. S. *v.* Pittam, 32 Wash. 137, 72 P. 1042.

Name of corporation may be shown by proof of reputation. Mears *v.* S., supra.

Proof foreign insurer issued policies and paid losses shows corporate existence. Graff *v.* P., 208 Ill. 312, 70 N. E. 299.

604-87 P. *v.* Morley, 8 Cal. App. 372, 97 P. 84; S. *v.* Rozeboom, 145 Ia. 620, 124 N. W. 783; S. *v.* Sowell, 85 S. C. 278, 67 S. E. 316.

605-89 S. *v.* Decker, 217 Mo. 315, 116 S. W. 1026.

605-93 A charter to The United S. B. S. does not tend to prove "Garfield Lodge No. 1 of the U. S. B. S." is a corporation. Spreyne *v.* Lodge, 117 Ill. App. 253.

605-94 Smith *v.* Soc., 118 App. Div. 678, 103 N. Y. S. 770; Riker *v.* Cornwell, 113 N. Y. 115, 20 N. E. 602.

Government patent to mining claim

may establish corporate existence of patentee. Galbraith v. Co., 143 Cal. 94, 76 P. 901; Altschul v. Casey, 45 Or. 182, 76 P. 1083.

A statute donating lands to a corporation and patent by federal government conveying land to it and conveyance of the same land by the grantee establish its existence, at least prima facie. Altschul v. Casey, supra.

603-96 Sierra, etc. Co. v. Bricker, 3 Cal. App. 190, 85 P. 665.

603-97 Pioneer H. Co. v. Farrin, 55 Or. 590, 107 P. 456 (prima facie evidence); Columbia Val. T. Co. v. Smith, 56 Or. 6, 107 P. 465. See Holt & Smith v. Plow Co. (Tex. Civ.), 150 S. W. 215.

606-98 Original charter, duly certified, is best evidence. Sumter T. W. Co. v. Assur. Co., 76 S. C. 76, 56 S. E. 654.

606-1 "Certified copy admissible under Texas statute." McKenzie v. Imperial Irr. Co. (Tex. Civ.), 166 S. W. 495.

608-2 Failure to index articles regularly filed, immaterial. Woodman v. Co., 125 Wis. 489, 103 N. W. 236, 104 N. W. 920.

609-7 Lowry Nat. Bk. v. Fickett, 122 Ga. 489, 50 S. E. 396; S. v. Court, 44 Wash. 108, 87 P. 40, 45 Wash. 316, 88 P. 332. See Shober v. Blackford, 46 Mont. 194, 127 P. 329.

Copies of annual reports, affidavit in a suit against the corporation, and contracts of the corporation may be evidence of its existence. Daily v. Marshall, 47 Mont. 377, 133 P. 681.

610-11 Books of bankrupt corporation produced by trustee, if free from suspicion, sufficiently identified. Lowry Nat. Bk. v. Fickett, 122 Ga. 489, 50 S. E. 396.

610-13 Cancellation of charter by secretary of state for failure to report is but prima facie evidence of nonuser. P. v. Rose, 207 Ill. 352, 69 N. E. 762.

611-14 By statute.—Northwestern Elec. Co. v. Zimmerman, 67 Or. 150, 135 P. 330.

There must be proof of user under charter. U. S. Mtg. Co. v. McClure, 42 Or. 190, 70 P. 543.

611-15 Milwaukee G. E. Co. v. Gordon, 37 Mont. 209, 95 P. 995, if it affirmatively appears great seal attached.

612-19 Certified copy of certificate designating agent, such certificate being filed in office of secretary of state, and reciting corporation was foreign, is evidence. Anglo C. Bk. v. Field, 146 Cal. 644, 80 P. 1080.

612-20 Campbell & Z. Co. v. Co., 129 Fed. 491; Anglo-C. Bk. v. Field, supra; Spreyne v. Lodge, 117 Ill. App. 253.

Written representation of corporate existence is sufficient (Marx v. Co., 6 Cal. App. 479, 92 P. 519); as receipt showing contract made in corporate name. Sierra, etc. Co. v. Bricker, 3 Cal. App. 190, 85 P. 665.

Fact admitted, presumed to continue until contrary shown. Anglo-C. Bk. v. Field, supra.

Admission by defendant he owed account does not admit corporate existence of plaintiff. Florsheim v. Fry, 109 Mo. App. 487, 84 S. W. 1023.

613-21 Fox v. Co., 140 Fed. 714; Simon v. Calfee, 80 Ark. 65, 95 S. W. 1011; Van Winkle, etc. Wks. v. Mathews, 2 Ga. App. 249, 58 S. E. 396; Chicago & A. R. Co. v. Glenny, 175 Ill. 238, 51 N. E. 896; Pittsburg, etc. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033; Ohio O. Co. v. Detamore, 165 Ind. 243, 73 N. E. 906; S. v. Co., 117 Ia. 524, 91 N. W. 974; S. v. Co., 95 N. C. 602; Herald v. Co., 15 Okla. 29, 79 P. 111.

Irrelevant denial, admission—as where it was alleged plaintiff was incorporated in A. and denied it was incorporated in C. Herring M. Co. v. Smith, 43 Or. 315, 72 P. 704, 73 P. 340.

614-22 Southern R. Co. v. Hundley, 151 Ala. 378, 44 S. 195; Zealy v. Co., 99 Ala. 579, 13 S. 118; Fuller v. Co., 16 Haw. 1; Montgomery v. R. Co., 73 S. C. 503, 53 S. E. 987; Faust v. R. Co., 74 S. C. 369, 54 S. E. 566; Steely v. Co., 55 Tex. Civ. 463, 119 S. W. 319 (failure to deny allegation); McCord-C. Co. v. Pritchard, 37 Tex. Civ. 418, 84 S. W. 388.

615-25 If there is no corporation because of failure to comply with conditions precedent and business as conducted could have been carried on by individuals, proof of user is of no importance. Elgin, etc. Co. v. Loveland, 132 Fed 41. Acts relied upon to show user must be unequivocal. Stanwood v. Co., 107 Ill. App. 569.

615-26 Stanwood v. Co., supra; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135.

615-27 McLeod *v.* College, 69 Neb. 550, 96 N. W. 265.

616-32 Mudgett *v.* Horrell, 33 Cal. 25; Merrill *v.* Timbrell, 123 Ia. 375, 98 N. W. 879; Somerset Nat. Bkg. Co. *v.* Adams, 24 Ky. L. R. 2083, 72 S. W. 1125; Hargadine-McKittrick, etc. Co. *v.* Breedlove, 36 Okla. 768, 130 P. 267. See Randall Ptg. Co. *v.* Water Co., 120 Minn. 268, 139 N. W. 606.

It is sufficient for the plaintiff to prove the subscription and assignment to him, and the burden does not rest upon him to prove that the stockholder has not paid the subscription. Hargadine-McKittrick, etc. Co. *v.* Breedlove, 36 Okla. 768, 130 P. 267.

In the case of a stockholder's liability, under statute, for corporate debts to the amount unpaid on stock, the creditor's right is merely to pursue the indebtedness of the stockholder to the corporation and the creditor claims through the corporation. If the evidence of the debt is binding on the corporation, it is competent in an action to recover against the stockholder. Stephens *v.* Fox, 83 N. Y. 313, shows further that the controlling feature of such a case and of Hastings *v.* Drew, 76 N. Y. 9, is that the defendant is pursued as a debtor of the corporation. On the other hand, Miller *v.* White, 50 N. Y. 137, and McMahon *v.* Macy 51 N. Y. 155, establish that if a defendant is not pursued as a debtor of the corporation or for any pre-existing liability of his own, but upon an original liability, or, in other words, if he is not a debtor to the corporation or is not liable for its assets, a prior judgment against the corporation is not admissible against him. Schenck Chem. Co. *v.* Co., 66 Misc. 597, 121 N. Y. S. 838.

Stock cancelled.—Decree in a previous case held to be an adjudication that defendant here was not a stockholder, and record in that case (in which this plaintiff brought suit against stockholder) held to show that plaintiff did not regard defendant here as stockholder. Hamilton *v.* Titus, 185 Fed. 140.

616-35 See Randall Ptg. Co. *v.* Water Co., 120 Minn. 268, 139 N. W. 606.

No presumption of payment arises between corporation and stockholder from making call for assessment. Crawford *v.* Roney, 126 Ga. 763, 55 S. E. 499.

Corporation must show amount of stock prescribed for. Ables *v.* Terrell (Tex. Civ.), 85 S. W. 1010.

Stockholders guilty of laches in informing themselves concerning corporate action, presumed to have knowledge thereof. Hill *v.* R. Co., 143 N. C. 539, 566, 55 S. E. 854.

Citizenship of members of corporation conclusively presumed, for purposes of federal jurisdiction, to be in state in which organization effected. Bruett *v.* Co., 174 Fed. 668.

Presumed entries in membership book of non-financial corporation made by authority and correct. Pope *v.* Whitridge, 110 Mo. 468, 73 A. 281.

Burden on defendant who pleads specially he withdrew his subscription for stock before plaintiff organized to show fact, plaintiff's incorporation being admitted, and to show notice thereof to plaintiff prior to organization. Steely *v.* Co., 55 Tex. Civ. 463, 119 S. W. 319.

616-37 Recital in certificates they are fully paid, conclusive on corporation. Westminster Nat. Bk. *v.* Wks., 73 N. H. 465, 62 A. 971.

616-38 It is presumed person to whom stock issued and for which he receipted was owner. Gillett *v.* Co., 230 Ill. 373, 82 N. E. 891. And that stock issued as fully paid, though not so, was to be paid for according to calls, and these were duly made. Wills *v.* Co., 52 Or. 70, 96 P. 528.

617-39 Hall & Farley *v.* Imp. Co., 173 Ala. 516, 56 S. 235; Davies *v.* Ball, 64 Wash. 292, 116 P. 833.

Burden on stockholder who has transferred stock to insolvent to avoid payment of assessment, to show solvency of second transferee. People's, etc. Bk. *v.* Rickard, 139 Cal. 285, 73 P. 858. Right to withdraw stock must be established by person asserting it. Hoyt *v.* Assn., 197 N. Y. 113, 90 N. E. 349.

617-40 McBride *v.* Farrington, 131 Fed. 797; Coit *v.* Co., 119 U. S. 343; Bole *v.* Murray, 233 Pa. 589, 82 A. 943; Whitehill *v.* Jacobs, 75 Wis. 474, 44 N. W. 630.

No evidence to show that defendant stockholder, president of the corporation, had paid his subscription by transfer of real property to the corporation. Ford, etc. Co. *v.* Clement, 97 Ark. 522, 135 S. W. 343.

Presumed action in issuing stock for services was fair. Turner *v.* Co., 2 Cal. App. 122, 83 P. 62.

A strong presumption of fraud arises where property of well known or easily ascertained value is taken at exaggerated value. That presumption will be conclusive unless rebutted by satisfactory explanatory evidence. Coleman *v.* Howe, 154 Ill. 458, 469, 39 N. E. 725, 45 Am. St. 133; Rumsey Mfg. Co. *v.* Kaime, 173 Mo. 551, 73 S. W. 470; National T. *v.* Gilfillan, 124 N. Y. 302, 26 N. E. 538; Macbeth *v.* Banfield, 45 Or. 553, 78 P. 693, 697. On the other hand, if nature of property and extent of over-valuation may have been possibly due to error in judgment, actual fraud must be shown, and regard may be had to nature of property, purposes for which it was accepted, and all conditions and circumstances attending the transaction. Macbeth *v.* Banfield, supra; Polhemus *v.* Polhemus, 114 App. Div. 781, 100 N. Y. S. 263.

617-41 Stockholder must show he desires to examine books in regard to or in connection with his interests as such. O'Hara *v.* Co., 69 N. J. L. 198, 54 A. 241.

617-42 Harrison *v.* Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954; Spangenberg *v.* Nesbitt, 22 Cal. App. 274, 134 P. 343; Tanner *v.* Nichols, 25 Ky. L. R. 2191, 80 S. W. 225; First State Bank *v.* Const. Co. (Tex. Civ.), 153 S. W. 680; S. *v.* Court, 45 Wash. 316, 88 P. 332.

618-49 Somerset Nat. Bkg. Co. *v.* Adams, 24 Ky. L. R. 2083, 72 S. W. 1125; Tabler *v.* Assn., 17 Ky. L. R. 815, 32 S. W. 602; Guilbert *v.* Kessinger, 173 Mo. App. 680, 160 S. W. 17; Clevenger *v.* Moore, 71 N. J. L. 148, 58 A. 88.

See Randolph Ptg. Co. *v.* Water Co., 120 Minn. 268, 139 N. W. 606.

Parol authority to sell stock may be shown. Somerset Nat. Bkg. Co. *v.* Adams, 24 Ky. L. R. 2083, 72 S. W. 1125.

618-50 Business Men's Assn. *v.* Williams, 137 Mo. App. 575, 119 S. W. 439; Rathbone *v.* Ayer, 121 App. Div. 235, 105 N. Y. S. 1041.

618-51 Chesapeake, etc. R. Co. *v.* R. Co., 57 W. Va. 641, 50 S. E. 890, 906, cases on point stated in text reviewed, and statement made that, except in a few instances, there was evidence other than appearance of defendant's name upon stock book to show his connection with company as stockholder.

618-53 Finding of incorporators, pursuant to articles, conclusive in absence of fraud. Louisiana P. E. Co. *v.* Kuenzel, 108 Mo. App. 105, 82 S. W. 1099.

Opinion of witness admissible. Ibid.

619-54 The corporate charter is prima facie evidence that persons named therein are members of the corporation at the time of its incorporation. Guilbert *v.* Kessinger, 173 Mo. App. 680, 160 S. W. 17.

619-55 Tierney *v.* Ledden, 143 Ia. 286, 121 N. W. 1050.

620-56 Chase *v.* R. Co., 38 Ill. 215; Guilbert *v.* Kessinger, 173 Mo. App. 680, 160 S. W. 17. See Chesapeake, etc. R. Co. *v.* R. Co., 57 W. Va. 641, 50 S. E. 890.

621-61 Haynes *v.* Griffith, 16 Ida. 280, 101 P. 728.

621-62 Stock books provided for by statute, not exclusive evidence of membership; any subscription paper is competent. Planters' etc. P. Co. *v.* Webb, 144 Ala. 666, 39 S. 562; Nebraska C. Co. *v.* Lednicky, 79 Neb. 587, 113 N. W. 245.

Statute declaring one to be a stockholder whose name appears on the books is not conclusive he is such; it means such shall presumptively be the fact when one knowingly or voluntarily permits his name so to appear. Welch *v.* Gillelen, 147 Cal. 571, 82 P. 248. See 622-68.

621-64 Certificate of secretary. In re Mandelbaum, 80 Misc. 475, 141 N. Y. S. 319.

622-66 Beckwith *v.* Co., 50 Or. 542, 93 P. 453, 16 L. R. A. (N. S.) 723.

Admissible to show recital of payment. Cunningham *v.* Co., 121 Fed. 720, 58 C. C. A. 140.

622-68 Retention of stock certificate erroneously issued, pending action to have it corrected, not evidence of ratification of erroneous entry on books. Welch *v.* Gillelen, 147 Cal. 571, 82 P. 248.

622-69 Guilbert *v.* Kessinger, 173 Mo. App. 680, 160 S. W. 17.

Membership may be shown by the sworn testimony of the corporation officers. Guilbert *v.* Kessinger, 173 Mo. App. 680, 160 S. W. 17.

622-70 A party having full knowledge may testify as to the ownership

of stock in spite of the rule that the stock books are the best evidence of such ownership. First State Bk. *v.* Const. Co. (Tex. Civ.), 153 S. W. 680.

622-71 Harrison *v.* Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954; Bradford *v.* Assn., 26 App. Cas. (D. C.) 268; Heartt *v.* Sherman, 229 Ill. 581, 82 N. E. 417; Guilbert *v.* Kessinger, 173 Mo. App. 680, 160 S. W. 1017; Lyell Ave. L. Co. *v.* Lighthouse, 137 App. Div. 422, 121 N. Y. S. 802; Pacific M. Co. *v.* Inman, 46 Or. 352, 80 P. 424.

Declaration of decedent against interest may be shown on issue as to existence of corporation, in action by his surviving partner against stockholders. Card *v.* Moore, 68 App. Div. 327, 74 N. Y. S. 18, *aff.*, no opinion, 173 N. Y. 598, 66 N. E. 1105.

622-72 Newmann *v.* Sexton, 156 Ill. App. 517; Lyell Ave. L. Co. *v.* Lighthouse, 137 App. Div. 422, 121 N. Y. S. 802.

Parol evidence competent to show agreement under which stock issued (Cunningham *v.* Co., 121 Fed. 720, 58 C. C. A. 140), and capacity in which subscription made. Bean *v.* Co., 134 Fed. 57, 67 C. C. A. 167.

Evidence as to understanding of parties concerning terms on which subscriptions made is of but little moment when all that remains to be done is to make settlement. Euston *v.* Edgar, 207 Mo. 287, 105 S. W. 773.

Financial condition of corporation, immaterial so far as a creditor, who has agreed to take stock, is concerned. He cannot testify as to what his course would have been if he had known of certain facts. Reid *v.* Co., 132 Mich. 528, 94 N. W. 3.

623-74 Unless directly attacked assessment, made either by directors or court, is conclusive of necessity therefor. Great Western T. Co. *v.* Purdy, 162 U. S. 329; Elizabethtown G. Co. *v.* Green, 49 N. J. Eq. 329, 24 A. 560. See Cumberland L. Co. *v.* Co., 64 N. J. Eq. 517, 54 A. 450.

623-75 Nashua S. Bk. *v.* Co., 189 U. S. 221; Campbell *v.* Co., 125 Fed. 207, 61 C. C. A. 317. See Jones *v.* Co., 32 Utah 140, 91 P. 273.

Evidence of previous assessments, competent to show course of dealing and meaning of contract as construed by parties. Moore *v.* Rohrbacker, 30 Pa. Super. 568.

Prima facie case for recovery of unpaid stock is made by proof of subscription and regular call for payment. Crawford *v.* Roney, 126 Ga. 763, 55 S. E. 499.

624-76 Amended articles binding on subscriber for stock regardless of his knowledge of them. Reid *v.* Co., 132 Mich. 528, 94 N. W. 3.

Knowledge of by-laws.—These are presumed to be known by members of corporation. Smoot *v.* Assn., 138 Mo. App. 438, 120 S. W. 719; Purdy *v.* Assn., 101 Mo. App. 91, 74 S. W. 486; Hill *v.* Co., 119 Mo. 9, 24 S. W. 223. If prejudicial change therein is alleged party so asserting must show fact. United Moderns *v.* Rathbun, 104 Va. 736, 52 S. E. 552.

One who subscribes for stock after corporation formed is bound by terms of certificate of incorporation. Brown *v.* Morfon, 71 N. J. L. 26, 58 A. 95.

624-78 Merrick *v.* Co., 111 Ill. App. 153; Stone *v.* Co., 59 Ill. App. 536.

Though contract of subscription can be released only by stockholders or directors, after being authorized, such release can be proved not only by records of company, but also by evidence showing such subscription was not regarded by company as binding upon it, and that subscriber not regarded by himself or by company as stockholder. Elliott *v.* Ashby, 104 Va. 716, 52 S. E. 383; Stuart *v.* R. Co., 32 Gratt. (Va.) 146.

624-82 Metropolitan, etc. M. Co. *v.* Webster, 193 Mo. 351, 92 S. W. 79.

624-83 Bradford *v.* Assn., 26 App. Cas. (D. C.) 268; Heartt *v.* Sherman, 229 Ill. 581, 82 N. E. 417.

Silence may be shown.—Pacific M. Co. *v.* Inman, 46 Or. 352, 80 P. 424.

Membership may be shown by proof of conduct; as, participating as stockholders, in the meetings of the corporation and in the conduct of its business and in paying calls assessed upon the stock. Guilbert *v.* Kessinger, 173 Mo. App. 680, 160 S. W. 17.

625-87 Stafford Spgs., etc. R. Co. *v.* Co., 80 Conn. 37, 66 A. 775; Carolina A. Co. *v.* Garlington, 85 S. C. 114, 67 S. E. 225.

Official relations of persons to corporation may be shown by proving they met in its office, transacted business there, and controlled its funds. Owyhee, etc. Co. *v.* Tautphas, 121 Fed. 342, 57 C. C. A. 557.

It is presumed corporation has officers and stockholders. Richards *v.* Co., 221 Mo. 149, 119 S. W. 953. That corporate action is legal. Whiting *v.* R. Co., 202 Mass. 298, 88 N. E. 907. But not that contract made to pay officer for services rendered corporation. Motley *v.* Bk. (Mich.), 118 N. W. 486.

625-88 In re Cullman, etc. Assn., 155 Fed. 372; Arbogast *v.* Bk., 125 Fed. 518, 60 C. C. A. 538; Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37; Conquerer, etc. Co. *v.* Ashton, 39 Colo. 133, 90 P. 1124; Extension, etc. Co. *v.* Skinner, 28 Colo. 237, 64 P. 198; Victori G. M. Co. *v.* Fraser, 2 Colo. App. 14, 29 P. 667; Capital City B. Co. *v.* Jackson, 2 Ga. App. 771, 59 S. E. 92; Blue Island B. Co. *v.* Fraatz, 123 Ill. App. 26; Illinois T. & S. Bk. *v.* Burlington, 79 Kan. 797, 101 P. 649; International Harv. Co. *v.* Co., 147 Ky. 655, 145 S. W. 393; Interstate, etc. Co. *v.* Welsh, 118 La. 676, 43 S. 274; Wagner *v.* Hospital, 32 Mont. 206, 79 P. 1054; Parmele *v.* Heenan, 75 Neb. 535, 106 N. W. 662; Trephagen *v.* Omaha, 69 Neb. 577, 96 N. W. 248; DeJonge *v.* Co., 77 N. J. L. 233, 72 A. 439; Bailey *v.* Lynch, 115 N. Y. S. 131; Gause *v.* Co., 124 App. Div. 438, 108 N. Y. S. 1080; Bradford B. Co. *v.* Gibson, 68 O. St. 442, 67 N. E. 888; Nat. Bk. *v.* Co., 233 Pa. 421, 82 A. 773; First Nat. Bk. *v.* Co., 226 Pa. 292, 75 A. 412; Am., etc. Co. *v.* Co., 218 Pa. 542, 67 A. 861; Wharton *v.* State Bk. (Tex. Civ.), 153 S. W. 639; Hurlbut *v.* Gainor, 45 Tex. Civ. 588, 103 S. W. 409; Tres Palacios, etc. Co. *v.* Eidman, 41 Tex. Civ. 542, 93 S. W. 698; Wheeling, etc. Co. *v.* Conner, 61 W. Va. 111, 55 S. E. 982; Meating *v.* Co., 113 Wis. 379, 89 N. W. 152.

Evidence insufficient to show authority in officers of corporation to make contract or to establish ratification or estoppel. Oldfield *v.* Brew. Co., 77 Wash. 158, 137 P. 469.

"Authority of president to contract" must be proved by person enforcing contract when the president was personally interested in such contract. Hilliard *v.* R. Co. (N. H.), 88 A. 993.

Evidence held sufficient.—Union Bank Note Co. *v.* Cement Co., 155 Mo. App. 349, 137 S. W. 18.

Authority conferred by board of directors may be proved by parol. Merchants' & Farmers' Bk. *v.* Co. (Ark.), 146 S. W. 508.

Shown in the answer and by testimony, the agreement being oral. Arizona Power Co. *v.* Killam, 13 Ariz. 291, 114 P. 561.

A plaintiff claiming that an officer of a corporation assumed payment of certain obligations, on behalf of the corporation, has the burden of proving such officer's authority to do so. Greenboro Nat. Bk. *v.* Ins. Co., 159 N. C. 200, 74 S. E. 579.

Appearance of authority.—Lord *v.* Co., 143 App. Div. 437, 128 N. Y. S. 451.

Rule not applied in case of emergency. Weinsberg *v.* Co., 135 Mo. App. 553, 116 S. W. 461; Hasler *v.* Co., 101 Mo. App. 136, 74 S. W. 465; Salter *v.* Co., 79 Neb. 373, 112 N. W. 600, 13 L. R. A. (N. S.) 545. *Comp.* King *v.* Co., 183 Mass. 301, 67 N. E. 330, and Harris *v.* Co., 91 N. Y. S. 317.

Agency and agent's powers inferred from circumstances. Reynolds *v.* R. Co., 114 Mo. App. 670, 90 S. W. 100; Jack *v.* Bk., 17 Okla. 430, 89 P. 219; Pine Beach I. Co. *v.* Co., 106 Va. 810, 56 S. E. 822.

Presumption of authority indulged. Willow Spgs. I. Co. *v.* Wilson, 74 Neb. 269, 104 N. W. 165. This case seems to follow the rule obtaining where municipalities are the contracting parties. Thus, in favor of a third person, no proof is necessary to show executive officer of corporation authorized to transfer note by assignment. Custom in transaction of business of particular corporations or of corporations generally has the force of law and raises for protection of third persons conclusive presumption of authority. Milwaukee T. Co. *v.* Van Valkenburgh, 132 Wis. 638, 112 N. W. 1083; St. Clair *v.* Rutledge, 115 Wis. 583, 92 N. W. 234, 95 Am. St. 964. Cashier of bank presumed to be its principal executive officer. Davenport *v.* Prentice, 126 App. Div. 451, 110 N. Y. S. 1056.

Nature of obligation assumed in instrument may be regarded in determining whether it was executed by corporation or officer thereof in individual capacity. Reed *v.* Fleming, 209 Ill. 390, 70 N. E. 667.

Burden on director whose vote in his interest determined question to show action just. Francis *v.* Co., 108 Md. 233, 70 A. 95.

626-89 Donaldson *v.* Co., 6 Cal. App. 641, 92 P. 1046; Merchants Bk. *v.* Nichols, 223 Ill. 41, 79 N. E. 38; Car-

roll *v.* Co., 111 Md. 252, 73 A. 665; Karsch *v.* Co., 82 App. Div. 230, 81 N. Y. S. 782; Greene *v.* Co., 84 N. Y. S. 591; Coney Island A. R. Co. *v.* Boyton, 87 App. Div. 251, 84 N. Y. S. 347; New York, etc. Co. *v.* Raub, 86 N. Y. S. 249; Bradford B. Co. *v.* Gibson, 68 O. St. 442, 67 N. E. 888; Dreeben *v.* Bk. (Tex.), 99 S. W. 850.

See McLellan Co. *v.* Land Co., 166 Cal. 736, 137 P. 1145; General H. S. *v.* R. Co., 79 Conn. 581, 65 A. 1065.

Agent called to prove contract may be cross-examined as to his power to make it. Am., etc. Co. *v.* Co., 218 Pa. 542, 67 A. 861.

Conclusions of witness, based on knowledge of character of agent's duties, not competent to show authority. International H. Co. *v.* Campbell, 43 Tex. Civ. 421, 96 S. W. 93.

626-90 Merchants' Bk. *v.* Co., 160 Ala. 435, 49 S. 782; Perryman & Co. *v.* Co., 167 Ala. 414, 52 S. 644; Forrester-D. L. Co. *v.* Evatt, 90 Ark. 301, 119 S. W. 282; Lowe *v.* Co., 157 Cal. 503, 108 P. 297; Freyberg *v.* Bk., 4 Cal. App. 403, 88 P. 378; Skinner Mfg. Co. *v.* Douville, 54 Fla. 251, 44 S. 1014; Grifling *v.* Winfield, 53 Fla. 589, 43 S. 687; Raleigh, etc. R. Co. *v.* Co., 122 Ga. 700, 50 S. E. 1008; Fulton, etc. Assn. *v.* Greenlea, 103 Ga. 376, 29 S. E. 932; Louisville R. Co. *v.* Tift, 100 Ga. 86, 27 S. E. 765; Minnesota L. Co. *v.* Hobbs, 122 Ga. 20, 49 S. E. 783; Valley L. Co. *v.* McGilvery, 16 Ida. 338, 101 P. 94 (terms of payment); Merchants' Nat Bk. *v.* Nichols, 223 Ill. 41, 79 N. E. 38; Lloyd & Co. *v.* Matthews, 119 Ill. App. 546; Chicago P. T. Co. *v.* Munsell, 107 Ill. App. 344; Manross *v.* Oil Co., 88 Kan. 237, 128 P. 385; Olivo etc. Co. *v.* Mullins, 153 Ky. 293, 155 S. W. 372; Johnson *v.* Johnson Bros., 108 Me. 272, 80 A. 741; Tuttle *v.* Co., 136 Mo. App. 309, 117 S. W. 86; Mook *v.* Tarr, 127 Mo. App. 311, 105 S. W. 1054; Rosenbaum *v.* Gilliam, 101 Mo. App. 126, 74 S. W. 507; McGowan C. Co. *v.* Co., 41 Mont. 211, 108 P. 635; Smith *v.* Bk., 72 N. H. 4, 54 A. 385; Karsch *v.* Co., 82 App. Div. 230, 81 N. Y. S. 782; Northwestern F. Co. *v.* Lee, 102 Wis. 426, 78 N. W. 584; Lowe *v.* Ring, 115 Wis. 575, 92 N. W. 238.

See Wales-Riggs Plantation *v.* Caston, 105 Ark. 641, 152 S. W. 282; People's S. Bk. *v.* Hine, 131 Mich. 181, 91 N. W. 130.

Presumption of authority from exercise of exclusive control of corporation's local business. Alabama, etc. Co. *v.* Rice (Ala.), 65 S. 402.

The burden of proof to show that a contract entered into by the president of the corporation was not authorized or ratified by the directors, is on the corporation. Ida County Sav. Bk. *v.* Johnson, 156 Ia. 234, 136 N. W. 225.

Where note is so signed it might either be that of a corporation or of persons whose signatures it bears and they make no representations it is their obligation, they may show it was executed as corporate obligation, without showing authority; at least where corporation has general power to execute such obligations. Western G. Co. *v.* Lackman, 75 Kan. 34, 88 P. 527.

It is presumed manager of corporation acted within his authority in demanding its property. Stovell *v.* Co., 38 Colo. 80, 87 P. 1071. (See as to authority of general manger, Raleigh, etc. Co. *v.* Co., 122 Ga. 700, 50 S. E. 1008. Presumption extends to matters within apparent scope of officer's authority, but not to extraordinary transaction. Lyon *v.* Co., 132 App. Div. 777, 117 N. Y. S. 648. It is not presumed officer communicated facts against interest. Woodworth *v.* Carroll (Minn.), 112 N. W. 1054.

Relevant facts.—As between corporation and third persons it is competent to show authority exercised by officers for it and actual or constructive knowledge and assent of directors. Smith *v.* Bk., 72 N. H. 4, 54 A. 385.

Note of corporation, made by officer to himself, presumptively void, but open to proof of good faith. Africa *v.* Co., 82 Minn. 283, 84 N. W. 1019, 83 Am. St. 424. Question is one of fairness and good faith, whether transaction for benefit, and in interests, of corporation. Savage *v.* Co., 98 Minn. 343, 108 N. W. 296; Taylor *v.* Mitchell, 80 Minn. 492, 83 N. W. 418.

627-91 In re Cullman, 155 Fed. 372; Capital City B. Co. *v.* Jackson, 2 Ga. App. 771, 59 S. E. 92; Wheeling, etc. Co. *v.* Conner, 61 W. Va. 111, 55 S. E. 982.

627-92 Commercial Nat. Bk. *v.* Bk., 97 Tex. 536, 80 S. W. 601.

627-93 Pacific S. Bk. *v.* Coats, 205 Fed. 618; Kirkpatrick *v.* Co., 135 Fed. 144; Graham *v.* Partee, 130 Ala. 310, 35 S. 1016; Collier *v.* Alexander, 142 Ala. 422, 38 S. 244; Sibly *v.* England,

90 Ark. 420, 119 S. W. 820; Potts D. Co. *v.* Benedict, 156 Cal. 322, 104 P. 432; Smith *v.* Jaccard, 20 Cal. App. 280, 128 P. 1023, 1026; McKee *v.* Cunningham, 2 Cal. App. 684, 84 P. 260; Watkins *v.* Glas, 5 Cal. App. 68, 89 P. 840; Bliss *v.* Harris, 38 Colo. 72, 87 P. 1076; Carr *v.* Co., 108 Ga. 757, 33 S. E. 190; Nelson *v.* Spence, 129 Ga. 35, 58 S. E. 697; Reed *v.* Fleming, 209 Ill. 390, 70 N. E. 667; Springer *v.* Bigford, 160 Ill. 495, 43 N. E. 751; Wisconsin L. Co. *v.* Co., 127 Ia. 350, 101 N. W. 742; Common Sense M. Co. *v.* Taylor, 247 Mo. 1, 152 S. W. 5; Wilson *v.* Neu, 1 Neb. (Unof.) 42, 95 N. W. 502; Gorder *v.* Co., 36 Neb. 548, 54 N. W. 830; Parker *v.* Co., 49 N. J. L. 465, 9 A. 682; Jourdan *v.* R. Co., 115 N. Y. 380, 22 N. E. 153; Quackenboss *v.* Ins. Co., 177 N. Y. 71, 69 N. E. 223; Imbrie *v.* Co., 130 App. Div. 675, 115 N. Y. S. 333; Brower *v.* Crimmins, 121 N. Y. S. 648; Gause *v.* Co., 108 N. Y. S. 1080; Edwards *v.* Co., 150 N. C. 173, 63 S. E. 740; Magee *v.* Paul (Tex. Civ.), 159 S. W. 325; Deepwater C. *v.* Renick, 59 W. Va. 343, 53 S. E. 552.

Deed reciting that corporate name was signed by president and seal attached by secretary, and it was so signed and followed by "(L. S.)," held prima facie evidence of authority. Cannon *v.* Gorham, 136 Ga. 167, 71 S. E. 142.

Performance.—An agent who has authority to make a contract will be presumed, nothing appearing to the contrary, to have power to attend to and accept the manner of performance. Redwine *v.* Co., 184 Fed. 851, 107 C. C. A. 175.

Sealed certificates, signed by one as president and attested by secretary, evidence person so named is president of corporation. Owyhee, etc. Co. *v.* Tautphas, 121 Fed. 343, 57 C. C. A. 537.

Seal is but prima facie evidence it was attached by authority. Gause *v.* Co., 196 N. Y. 134, 89 N. E. 476.

Actual seal must be attached. Raub *v.* Assn., 56 N. J. L. 262, 28 A. 384.

Presumption.—Letters "L. S." in record of deed sustain presumption original was sealed with corporate seal. Altschul *v.* Casey, 45 Or. 182, 76 P. 1082. No presumption where instrument signed by treasurer. Backer *v.* Co., 84 N. Y. S. 149.

Omission of corporate name, immaterial. Graham *v.* Partee, 139 Ala. 310, 35 S. 1016.

A forged certificate executed by secretary of corporation in due form and unauthorizedly bearing its seal, does not work estoppel against it in favor of innocent parties who advanced money to him, which he used for his own purposes. Ruben *v.* G. F. Co., App. Cas. (1906) (Eng.) 439, 2 K. B. (1904) 712; Rogers *v.* Co., 119 La. 714, 44 S. 442. *Contra*, Lucile Dreyfus M. Co. *v.* Willard, 46 Wash. 345, 89 P. 935.

Use of seal on note, not controlling. Second Nat. Bk. *v.* Trust Co., 83 Neb. 645, 120 N. W. 182.

628-94 Allen *v.* Alston, 147 Ala. 609, 41 S. 159. *Contra*, Valente *v.* Co., 119 App. Div. 127, 103 N. Y. S. 966.

In a deed where there is no reference to the seal and none is affixed, the deed is not admissible as prima facie evidence of authority of the officer to make the transfer. Bk. of Garfield *v.* Clark, 138 Ga. 798, 76 S. E. 95.

Absence of seal from paper not required to be sealed is of no significance. National M. C. Co. *v.* Co., 14 Ont. L. R. (Can.) 22; Fourth Nat. Bk. *v.* Co., 142 Fed. 257; Griffing *v.* Winfield, 53 Fla. 589, 43 S. 687; Sheffield *v.* Bk., 2 Ga. App. 221, 58 S. E. 386; B. S. Green Co. *v.* Blodget, 159 Ill. 169, 42 N. E. 176; Seiberling *v.* Miller, 207 Ill. 443, 69 N. E. 800; Brown *v.* Co., 86 Miss. 388, 38 S. 312; Strop *v.* Hughes, 123 Mo. App. 547, 101 S. W. 146; Cook *v.* Co., 28 R. I. 41, 65 A. 641, 9 L. R. A. (N. S.) 193; St. Clair *v.* Rutledge, 115 Wis. 583, 594, 92 N. W. 234.

Unsealed convenant, not admissible if not executed by secretary. Florida R. Co. *v.* Thomas, 55 Fla. 287, 45 S. 720

Abbreviation of name as "Mfg.," immaterial. Seiberling *v.* Miller, 207 Ill. 443, 69 N. E. 800.

Statute making instruments admissible without proof of signature, in absence of sworn denial, applies to those executed by corporations. London & N. A. M. Co. *v.* Co., 84 Minn. 144, 86 N. W. 872; La Plant *v.* Co., 102 Minn. 93, 112 N. W. 889.

Same rule if mortgage executed to corporate officers. Edwards *v.* Co., 150 N. C. 173, 63 S. E. 740.

Bad faith presumed in favor of stockholder where directors, owning a majority of shares, join in resolution vot-

ing themselves salaries. Davids *v.* Davids, 135 App. Div. 206, 120 N. Y. S. 350.

629-96 Winer *v.* Bk., 89 Ark. 435, 117 S. W. 232; Kelly *v.* Assn., 2 Cal. App. 460, 84 P. 321; Alton Mfg. Co. *v.* Inst., 243 Ill. 298, 90 N. E. 704 (records being silent); Rosehill C. Co. *v.* Dempster, 223 Ill. 567, 79 N. E. 276; Clarke *v.* Lexington, 24 Ky. L. R. 1755, 72 S. W. 286; York *v.* Mathis, 103 Me. 67, 68 A. 746; Cann *v.* Rector, 111 Mo. App. 164, 85 S. W. 994; American P. Co. *v.* Co., 78 N. J. L. 658, 75 A. 976; Crossley *v.* St. Philip Neri, 74 N. J. L. 653, 67 A. 27.

Where collateral to the issue.—Hoisting Mach. Co. *v.* Wks., 84 N. J. L. 504, 87 A. 331.

Sufficient evidence.—Smith *v.* Co., 15 Cal. App. 166, 113 P. 701.

Parol evidence admissible to show who is de facto secretary, though where the minutes of a corporation show who is the secretary they are the best evidence and must be produced. New Iberia Sugar Co. *v.* Lagarde, 130 La 387, 58 S. 16.

Acts of de facto officer binding.—Brown *v.* Co., 150 Cal. 376, 89 P. 86.

630-97 Brown *v.* Co., 86 Miss. 388, 38 S. 312.

Acquiescence or ratification.—Cannel Coal Co. *v.* Luna (Tex. Civ.), 144 S. W. 721.

Parol evidence competent to show who are de facto directors. Reed *v.* Harshall, 12 Cal. App. 697, 108 P. 719.

630-98 Union I. W. Co. *v.* Co., 157 Ala. 645, 47 S. 652 (by-laws); Clarke *v.* Lexington S., 24 Ky. L. R. 1755, 72 S. W. 286.

By-laws inadmissible to show a limitation of power of president with respect to oral contracts. McLellan Co. *v.* Land Co., 166 Cal. 736, 137 P. 1145.

630-1 Horseshoe M. Co. *v.* Co., 147 Fed. 517, 77 C. C. A. 213; In re Cullman, etc. Assn., 155 Fed. 372; Union I. W. Co. *v.* Co., 157 Ala. 645, 47 S. 652, (informal agreement); Postal T. Co *v.* Lenoir, 107 Ala. 640, 18 S. 266; Jameson *v.* Co., 2 Cal. App. 582, 84 P. 289; Castner *v.* Rinne, 31 Colo. 256, 72 P. 1052; Dreeben *v.* Bk. (Tex.), 99 S. W. 850.

Officer or agent may testify he is such. Kelly *v.* Assn., 2 Cal. App. 460, 84 P. 321. And of his authority. Freeman *v.* Co., 126 Mo. App. 124, 103 S. W. 565.

Letters written by agent, competent to show authority. Clarke *v.* Lexington S., 24 Ky. L. R. 1755, 72 S. W. 286.

630-2 Choctaw etc. R. Co. *v.* Rolfe, 76 Ark. 220, 88 S. W. 870; New Iberia S. Co. *v.* Lagarde, 130 La. 387, 58 S. 16. See Markham *v.* Loveland (Or.), 138 P. 483. *Contra* as to declarations of vice-president. Underwood *v.* Ins. Co., 152 N. C. 274, 67 S. E. 587.

Evasive answer as to authority of general manager is admission. Raleigh G. R. Co. *v.* Co., 122 Ga. 700, 707, 50 S. E. 1008.

631-3 Curtis *v.* Co., 89 App. Div. 61, 85 N. Y. S. 413.

Authority of officer to act for corporation may be proved by parol or circumstantial evidence. Markham *v.* Loveland (Or.), 138 P. 483.

631-4 Rennie *v.* Ins. Co., 176 Fed. 202, 99 C. C. A. 556; Arkansas S. R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802; Hill *v.* Morgan, 9 Ida. 718, 76 P. 323; Central L. Co. *v.* Kelter, 201 Ill. 503, 66 N. E. 543; Martin *v.* Logan, 30 Ky. L. R. 799, 99 S. W. 648; Gair Co *v.* Co., 124 La. 193, 50 S. 8 (proof of usage); Henderson *v.* Syndicate, 183 Mass. 443, 67 N. E. 427; Freeman *v.* Co., 126 Mo. App. 124, 103 S. W. 565; Leonardi *v.* Co., 127 App. Div. 192, 111 N. Y. S. 523; First Nat. Bk. *v.* Co., 226 Pa. 292, 75 A. 412 (it may be shown officer was also director, amount of stock he owned, and nature and extent of business he had done for company); Culver *v.* Co., 206 Pa. 481, 56 A. 29; Roebling *v.* Barre, 76 Vt. 131, 56 A. 530.

Making similar contracts by same agent is evidence of his power to make one in question. Pecos, etc. R. Co. *v.* Latham, 40 Tex. Civ. 78, 88 S. W. 392. If he was authorized to make them. Dreeben *v.* Bk. (Tex.), 99 S. W. 850.

Evidence as to whole course of conduct of alleged agent, as between him and directors and stockholders, admissible. Chestnut St. T. & S. F. Co. *v.* Co., 227 Pa. 235, 75 A. 1067.

Authority of representative of foreign corporation may be inferred from his office and fact declaration complained of made concerning matter relating to its affairs. Payton *v.* Co., 136 Mo. App. 577, 118 S. W. 531.

The shareholders may expressly or implicitly by acquiescence ratify an unauthorized act of an agent of a corporation, done within its corporate

powers. This may be proved by showing that all the shareholders of such corporation had notice or knowledge of the unauthorized act of one of its managers or agents, and either expressly consented thereto, or remained silent and took no steps to disaffirm the act within a reasonable time after receiving such notice or knowledge. Merchants & Farmers' Bank *v.* Lumb. Co., 103 Ark. 283, 146 S. W. 508.

631-6 Egbert *v.* Co., 126 Fed. 568; Owyhee, etc. Co. *v.* Tautphas, 121 Fed. 343, 57 C. C. A. 557; U. S. L. & H. Co. *v.* Elec. Co., 189 Fed. 382; Hall & Farley *v.* Imp. Co., 173 Ala. 398, 56 S. 235; West End *v.* Eaves, 152 Ala. 334, 44 S. 588; Arkansas S. R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802; Riley *v.* R. Co., 1 Cal. App. 488, 82 P. 689; Central L. Co. *v.* Kelter, 201 Ill. 503, 66 N. E. 543; Kennedy *v.* Lodge, 124 Ill. App. 55; Wolf Co. *v.* Bk., 107 Ill. App. 58; York *v.* Mathis, 103 Me. 67, 68 A. 746; Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23; Beacon T. Co. *v.* Souther, 183 Mass. 413, 67 N. E. 345; White *v.* R. Co., 194 Mass. 97, 80 N. E. 500, 8 L. R. A. (N. S.) 481; Cascarella *v.* Co., 151 Mich. 15, 114 N. W. 857; Agle *v.* Co., 29 Mont. 111, 74 P. 135; McVity *v.* Co., 90 App. Div. 109, 86 N. Y. S. 144; Hill *v.* R. Co., 143 N. C. 539, 55 S. E. 854; Guillaume *v.* Co., 48 Or. 400, 86 P. 883, 88 P. 586; Texas & G. R. Co. *v.* Whiteside, 55 Tex. Civ. 593, 119 S. W. 126; Nickelson *v.* Co., 39 Wash. 569, 81 P. 1059.

Ratification of settlement.—Belts *v.* R. Co., 150 Ia. 252, 129 N. W. 962.

Burden of showing ratification, on party alleging it. Wagner *v.* Hospital, 32 Mont. 206, 79 P. 1054.

As basis for showing ratification it is competent to prove making contract and performance under it. Peach River L. Co. *v.* Ayers, 41 Tex. Civ. 334, 91 S. W. 387.

Stronger proof of ratification is required as between officer and corporation than between it and third parties. Pacific V. & P. Wks. *v.* Smith, 152 Cal. 507, 93 P. 85.

Silence, conclusive if not explained. St. Louis etc. Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737. Immaterial if party knew of agent's lack of authority. Reid *v.* Co., 47 Or. 215, 83 P. 139.

Ratification presumed if notice of transaction comes to corporation while it is in progress and silence is maintained to detriment of party performing. St. Louis etc. Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737. Knowledge of president, that of corporation. Wolf Co. *v.* Bk., 107 Ill. App. 58.

Board of directors need not be apprised as a body of acts of agent; it is sufficient majority of them individually were informed of what had been done and took no steps to disaffirm it. Salem I. Co. *v.* C. I. M., 112 Fed. 239, 50 C. C. A. 213; Brown *v.* Co., 150 Cal. 376, 387, 89 P. 86; Scott *v.* Co., 144 Cal. 140, 77 P. 817, 103 Am. St. 72; Davis *v.* Co., 21 S. D. 173, 110 N. W. 113; Rowland *v.* Co., 44 Wash. 413, 87 P. 482.

Actual knowledge of acts done need not be shown if they were of so open a nature as that notice of them may be presumed to have come to corporation. Arkansas R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802; International H. Co. *v.* Campbell, 43 Tex. Civ. 421, 96 S. W. 93.

Acts of officer in representative capacity may be proved if there is evidence to show assent thereto. Arkansas R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802; St. Louis etc. R. Co. *v.* Bennett, 53 Ark. 208, 13 S. W. 742, 22 Am. St. 187.

631-7 Indianapolis St. R. Co. *v.* Ray, 167 Ind. 236, 78 N. E. 978.

632-10 Miller *v.* Payne, 150 Wis. 354, 136 N. W. 811.

A presumption arises that a check signed by a corporation is issued in connection with its business but this presumption is rebuttable, except as against creditors, by proof of a course of conduct between the corporation and its president showing an authorization by the corporation of the use of its checks for payment of personal debts by its president. Ehrlich *v.* Levine, 83 Misc. 136, 144 N. Y. S. 818.

632-11 Mine & S. S. Co. *v.* Bk., 173 Fed. 859, 98 C. C. A. 229; Bloom *v.* Agency, 91 Ark. 367, 121 S. W. 293; Edwards *v.* Assn. (N. J.), 68 A. 800; Man *v.* Boykin, 79 S. C. 1, 60 S. E. 17.

633-12 America L. Assn. *v.* Cook, 20 Kan. 19; Grand Lodge *v.* Brown, 160 Mich. 437, 125 N. W. 400; Porter *v.* Co., 29 Mont. 347, 74 P. 938; U. S. Mtg. Co. *v.* McClure, 42 Or. 190, 70 P. 543; Belch *v.* Co., 46 Wash. 1, 89 P. 174.

Ultra vires to be established by party setting it up. Knapp *v.* Coal Co., 85

Conn. 147, 81 A. 1063; Credit Co. *v.* Howe Mach. Co., 54 Conn. 357, 8 A. 472, 1 Am. St. 123. And see Wykes *v.* Co., 184 Fed. 752.

In the case of Railway *v.* McCarthy, 96 U. S. 258, 24 L. ed. 693, it is said: "'When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers.'" Hagerstown Brew. Co. *v.* Gates, 117 Md. 348, 83 A. 570, *quot.* from R. Co. *v.* McCarthy, 96 U. S. 258, 24 L. ed. 693, and citing this work.

634-13 Conclusively presumed local corporation knows of express limitation on powers of another such corporation. S. *v.* Bk., 136 Ia. 79, 113 N. W. 500.

634-14 Blue Island B. Co. *v.* Fraatz, 123 Ill. App. 26.

Burden of showing foreign corporation is doing busines in another state than of its domicile is upon party so asserting. Jameson *v.* Co., 2 Cal. App. 582, 84 P. 289.

635-16 Altschul *v.* Casey, 45 Or. 182, 76 P. 1083; Pitcher *v.* Co., 39 Wash. 608, 81 P. 1047.

635-17 See Westminster Nat. Bk. *v.* Wks., 73 N. H. 465, 62 A. 971.

Contra.—Mannington *v.* R. Co., 183 Fed. 133.

635-19 Porter *v.* Co., 29 Mont. 347, 74 P. 938; Krisch *v.* Co., 39 Wash. 381, 81 P. 855.

635-20 Charter of another corporation, referred to in plaintiff's admissible. Southern R. Co. *v.* Howell, 79 S. C. 281, 60 S. E. 677.

635-21 International B. Co. *v.* Co., 97 Minn. 513, 107 N. W. 735; S. *v.* Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; Craig *v.* Assn., 88 Minn. 535, 3 N. W. 669. See Minneapolis, etc. R. Co. *v.* Syndicate, 101 Minn. 132, 112 N. W. 13; First S. Bk. *v.* Const. Co. (Tex. Civ.), 153 S. W. 680; supra, "Bankruptcy," 210-8.

The purpose which the promoters and incorporators had in organizing the particular corporation may be inquired into independent of the recitals in the charter. First State Bank *v.* Const. Co. (Tex. Civ.), 153 S. W. 680.

Articles sole guide in determining character of corporation. Kalamazoo *v.* Kalamazoo, 124 Mich. 74, 82 N. W. 811; Gould *v.* Fuller, 79 Minn. 414, 82 N. W. 673; Craig *v.* Assn., 88 Minn. 535, 93 N. W. 669; P. *v.* Soc., 161 N. Y. 233, 55 N. E. 1063; Gitzhoffen *v.* Assn., 32 Utah 46, 88 P. 691, 8 L. R. A. (N. S.) 1161.

Declarations of employe inadmissible to show whether corporation charitable one. Bishop *v.* Treasurer, 37 Colo. 378, 86 P. 1021.

636-25 Hill *v.* R. Co., 143 N. C. 539, 55 S. E. 854.

636-27 Robinson *v.* Blood, 151 Cal. 504, 91 P. 258; Bell *v.* Co., 146 Cal. 699, 81 P. 17; Johnson *v.* R. Co., 227 Mo. 423, 127 S. W. 63.

636-30 Knapp *v.* Coal Co., 85 Conn. 147, 81 A. 1063; McMillan *v.* Miller, 177 Mich. 511, 143 N. W. 631; Graham *v.* Nav. Co. (Or.), 139 P. 337; First Nat. Bk. *v.* Co., 226 Pa. 292, 75 A. 412; Jones *v.* Co., 32 Utah 440, 91 P. 273.

637-31 Ward *v.* McPherson, 87 Ark. 521, 113 S. W. 42; Coombs *v.* Barker, 31 Mont. 526, 79 P. 1.

The directors have the burden of justifying a payment of additional salaries to themselves. Godley *v.* Co., 153 App. Div. 697, 139 N. Y. S. 236.

Burden heavily on officer who seeks to recover for services on implied contract. Dial *v.* Co., 52 Wash. 81, 100 P. 157. See Argo Mfg. Co. *v.* Parker, 52 Wash. 100, 100 P. 188.

637-32 Recital in minutes that directors were notified of meeting is, in absence of anything showing otherwise, sufficient proof. Turner *v.* Co., 2 Cal. App. 122, 83 P. 62, 70.

Burden on one who attacks sufficiency of notice or regularity of proceedings. Brookline Canning & P. Co. *v.* Evans, 163 Mo. App. 564, 146 S. W. 828.

638-36 Maxwell *v.* Assn., 104 N. Y. S. 815; Buck *v.* Co., 76 Vt. 75, 56 A. 285; Graebner *v.* Post, 119 Wis. 392, 96 N. W. 783; Germania I. M. Co. *v.* King, 94 Wis. 439, 69 N. W. 181.

Regular adoption of by-laws materially affecting rights of members must be shown. Van Atten *v.* Modern B., 131 Ia. 232, 108 N. W. 313.

By-laws best evidence of duties of manager. Greene *v.* Hereford, 12 Ariz. 85, 95 P. 105.

638-38 Weiss *v.* Haight, 148 Fed. 399; So. R. Co. *v.* Brewster, 9 Ala. App. 597, 63 S. 790; Lowe *v.* Co., 157 Cal. 503, 108 P. 297; Bundy *v.* Co., 149 Cal. 772, 87 P. 622; Cable Co. *v.* Walker, 127 Ga. 65, 56 S. E. 108; Vincent *v.*

Co., 113 Ill. App. 463; Masonic T. etc. Co. *v.* Langfelt, 117 Ill. App. 652; Drake *v.* Holbrook, 25 Ky. L. R. 1489, 78 S. W. 158; Pattison *v.* Co., 116 La. 963, 41 S. 224; Keel *v.* Juice Co., 176 Mich. 345, 142 N. W. 316; Hay *v.* Clay Co. (Mo. App.), 162 S. W. 666; Minea *v.* Coop. Co. (Mo. App.), 162 S. W. 741; Styles *v.* Mfg. Co., 164 N. C. 376, 80 S. E. 417; Lytton *v.* Mfg. Co., 157 N. C. 331, 72 S. E. 1055; Hildebrand *v.* Artisans, 50 Or. 159, 91 P. 542; Patterson *v.* Artisans, 43 Or. 333, 72 P. 1095; Whigham *v.* Foresters, 44 Or. 543, 75 P. 1067; Southern R. Co. *v.* Howell, 79 S. C. 281, 60 S. E. 677; Blair *v.* Bk., 103 Va. 762, 50 S. E. 262; Lynchburg T. Co. *v.* Booker, 103 Va. 594, 50 S. E. 148; White Hall Co. *v.* Hall, 102 Va. 284, 46 S. E. 290.

See Itasca Cedar & Tie Co. *v.* McKinley, 124 Minn. 183, 144 N. W. 768, 1135; Hilliard *v.* R. Co. (N. H.), 88 A. 993; Nahoum *v.* Marcoglou & Co., 146 N. Y. S. 1063; Auditorium Theatre Co. *v.* N. Co., 77 Wash. 277, 137 P. 489.

Not when outside the scope of their agency or authority, nor when not made in connection with the performance of their duties. Cannel Coal Co. *v.* Luna (Tex. Civ.), 144 S. W. 721.

Agent's declarations may be shown before agency established. General H. Soc. *v.* R. Co., 79 Conn. 581, 65 A. 1065.

639-39 Express delegation of authority may be inferred from circumstances. Betts *v.* Exchange, 144 Cal. 402, 77 P. 993.

639-41 A certificate of vice-president of the insurance company that decedent did not die from excessive use of alcoholic liquors is not admissible against the company unless evidence of authority of the vice president is produced. Parker *v.* Mfg. Co. (Or.), 138 P. 1061.

640-42 Muller *v.* Swanton, 140 Cal. 249, 73 P. 994; Continental Ins. Co. *v.* Cummings, 98 Tex. 115, 81 S. W. 705.

640-43 Musselman *v.* R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Southern R. Co. *v.* Railey, 26 Ky. L. R. 53, 80 S. W. 786; Faust *v.* R. Co., 74 S. C. 360, 54 S. E. 566; International, etc. R. Co. *v.* Shuford, 36 Tex. Civ. 251, 81 S. W. 1189.

640-44 See Reason *v.* R. Co., 150 Mich. 50, 113 N. W. 596.

641-45 Geo. Whitechurch, Ltd. *v.* Cavanagh, App. Cas. (1902) (Eng.) 117; Horseshoe M. Co. *v.* Co., 147 Fed. 517, 77 C. C. A. 213; Central E. Co. *v.* Sprague Co., 120 Fed. 925, 57 C. C. A. 197; Ferguson *v.* Basin C. M., 152 Cal. 712, 93 P. 867; Rosehill C. Co. *v.* Dempster, 223 Ill. 567, 79 N. E. 276; First S. Bk. *v.* Pederson, 123 Minn. 374, 143 N. W. 980; Black *v.* R. Co., 110 Mo. App. 198, 85 S. W. 96; Hilliard *v.* R. R. (N. H.), 88 A. 993; Gen. Proprietors, etc. *v.* Force (N. J. Eq.), 68 A. 914; Taylor *v.* Bk., 174 N. Y. 181, 66 N. E. 726, 95 Am. St. 564, 62 L. R. A. 783; Patterson *v.* White Co., 85 N. Y. S. 359; Lytton *v.* Mfg. Co., 157 N. C. 331, 72 S. E. 1055; Trout *v.* R. Co., 107 Va. 576, 59 S. E. 394.

Acts done by agent may be shown to establish authority. Faust *v.* R. Co., 74 S. C. 360, 54 S. E. 566.

Slight evidence will show ratification where corporation received benefit from service rendered. General H. S. *v.* R. Co., 79 Conn. 581, 65 A. 1065; Kansas City S. P. Co. *v.* Co., 123 Mo. App. 13, 99 S. W. 765; St. Louis, etc. Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737.

643-46 Employe may testify of his knowledge defendant was successor of another corporation. S. *v.* Co., 117 Ia. 524, 91 N. W. 794.

643-47 Vicksburg & M. R. *v.* O'Brien, 119 U. S. 99; Miller *v.* McKenzie, 126 Ga. 746, 55 S. E. 952; Moultrie L. Co. *v.* Co., 122 Ga. 26, 49 S. E. 729; Columbus R. Co. *v.* Peddy, 120 Ga. 589, 48 S. E. 149; Helbig *v.* Ins. Co., 120 Ill. App. 58; Robins M. Co. *v.* Murdock, 69 Kan. 596, 77 P. 596; Stone *v.* News Co., 153 Ky. 240, 154 S. W. 1092; Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23; Reason *v.* R. Co., 150 Mich. 50, 113 N. W. 596; Bemk *v.* Co., 128 Mich. 562, 87 N. W. 793; Minea *v.* Coop. Co. (Mo. App.), 162 S. W. 741; State Bk. *v.* Co., 208 N. Y. 492, 102 N. E. 591; P. *v.* Barker, 121 App. Div. 661, 106 N. Y. S. 336; Campbell *v.* Emslie, 101 App. Div. 369, 91 N. Y. S. 1069 (*aff.*, no opinion, 184 N. Y. 589, 77 N. E. 1183); National Bk. *v.* Byrnes, 84 App. Div. 100, 82 N. Y. S. 497 (*aff.*, no opinion, 178 N. Y. 561, 70 N. E. 1103); Wimmer *v.* R. Co., 92 App. Div. 258, 86 N. Y. S. 1052; Patterson *v.* Co., 85 N. Y. S. 359; Burns *v.* Co., 93 App. Div. 566, 87 N. Y. S. 883; Styles *v.* Mfg. Co., 164 N. C. 376, 80 S. E. 417; Matteson *v.* R Co., 218 Pa. 527, 67 A. 847.

Statements made as witnesses not admissible on retrial.—Vohs *v.* Shorthill, 124 Ia. 471, 100 N. W. 495. But examination of superintendent is in effect examination of corporation, and his testimony is competent as admission though he is at present at trial. Johnson *v.* Co., 126 Wis. 492, 105 N. W. 1048. It would be otherwise in case of mere employe. Hughes *v.* R. Co., 122 Wis. 258, 99 N. W. 897. The Wisconsin cases were ruled under statute providing for examination of officers, agents, etc., before trial. The rule they apparently favor does not extend to answer to interrogatories made by officer and agent in another case, the interrogatories being those of the corporation. "Testifying as a witness in a law suit is no part of the res gestae of the transaction involved in the litigation." Robert R. Sizer Co. *v.* Melton, 129 Ga. 143, 58 S. E. 1055. Same rule applies to testimony given in case in which corporation not a party. Arnold *v.* R. Co., 108 N. Y. S. 296.

644-49 Brown *v.* Co., 150 Cal. 376, 89 P. 86. See Aetna Ind. Co. *v.* Co., 147 Fed. 95, 78 C. C. A. 262.

645-50 Walker Mfg. Co. *v.* Knox, 136 Fed. 334, 69 C. C. A. 160; Hudson M. Co. *v.* Higgins (N. J.), 88 A. 1079.

645-51 Formal action by directors not necessary to ratify acts of promoter. Bond *v.* Pike, 101 Minn. 127, 111 N. W. 916.

645-54 Tabor *v.* Bk., 35 Colo. 1, 83 P. 1060; Cann *v.* Rector, 111 Mo. App. 164, 85 S. W. 994; Brinkerhoff Z. Co. *v.* Boyd, 192 Mo. 597, 91 S. W. 523; Wagner *v.* Hospital, 32 Mont. 206, 79 P. 1054; Farrell *v.* Co., 32 Mont. 416, 80 P. 1027; Westminster Nat. Bk. *v.* Co., 73 N. H. 465, 62 A. 971; Demarest *v.* Co., 71 N. J. L. 14, 58 A. 161; Hill *v.* R. Co., 143 N. C. 539, 55 S. E. 854; Duke *v.* Markham, 105 N. C. 131, 10 S. E. 1017; Pinchback *v.* Co., 137 N. C. 171, 49 S. E. 106; Guillaume *v.* Co., 48 Or. 400, 86 P. 883, 88 P. 586.

Amount of stock owned by director immaterial as to his authority. Allemong *v.* Simmons, 124 Ind. 199, 23 N. E. 768; Clement *v.* Co. (N. J. L.), 67 A. 82. But director who holds majority of stock may bind corporation. Huntington F. Co. *v.* McIlvaine, 41 Ind. App. 328, 82 N. E. 1001.

646-55 Separate assent of majority of directors will bind corporation under some circumstances. Scott *v.* Co., 144 Cal. 140, 77 P. 817; Buck *v.* Co., 76 Vt. 75, 56 A. 285; Roebling *v.* Barre, 76 Vt. 131, 56 A. 530.

646-58 Central E. Co. *v.* Sprague Co., 120 Fed. 925, 57 C. C. A. 197; Arizona M. & T. Co. *v.* Benton, 12 Ariz. 373, 100 P. 952; Northwestern P. Co. *v.* Whitney, 5 Cal. App. 105, 89 P. 981; National etc. Co. *v.* Co., 226 Ill. 28, 80 N. E. 556; Robin's M. Co. *v.* Murdock, 69 Kan. 596, 77 P. 596; Jeanerette R. & M. Co. *v.* Durocher, 123 La. 160, 48 S. 780; Cann *v.* Rector, 111 Mo. App. 164, 85 S. W. 994; Ex parte Rickey, 31 Nev. 82, 100 P. 134; Sword *v.* Ref. Cong., 29 Pa. Super. 626; Commercial Nat. Bk. *v.* Bk., 97 Tex. 536, 80 S. W. 601; Lewiston, etc. Co. *v.* Brown, 42 Wash. 555, 85 P. 47.

646-59 Guarantee Co. *v.* Co., 183 U. S. 402; Dunbar, etc. Co. *v.* Martin, 53 Misc. 312, 103 N. Y. S. 91; Valente *v.* Co., 119 App. Div. 127, 103 N. Y. S. 966.

Authority to deliver authorized bonds presumed. McCormick *v.* Co., 239 Ill. 306, 87 N. E. 924.

646-60 Egbert *v.* Co., 126 Fed. 568; Freyberg *v.* Bk., 4 Cal. App. 403, 88 P. 378; Farmers' Oil & G. Co. *v.* Co., 10 Ga. App. 416, 73 S. E. 428; Kennedy *v.* Lodge, 124 Ill. App. 55; Lloyd *v.* Matthews, 223 Ill. 477, 79 N. E. 172; Williams *v.* Harris, 198 Ill. 501, 64 N. E. 988; Tevis *v.* Hammersmith (Ind. App.), 81 N. E. 614; Johnson *v.* R. Co., 129 Ia. 281, 105 N. W. 509; Martin *v.* Logan, 30 Ky. L. R. 799, 99 S. W. 648; Berlin *v.* Cusachs, 114 La. 744, 38 S. 539; York *v.* Mathis, 103 Me. 67, 68 A. 746; Ruttle *v.* Co., 153 Mich. 300, 117 N. W. 168; Evans *v.* Co., 100 Mo. App. 670, 75 S. W. 178; Rapp *v.* Co., 87 N. Y. S. 459; Marshall *v.* R. Co., 73 S. C. 241, 53 S. E. 417; Russell *v.* Co., 49 Wash. 362, 95 P. 327; Roberts *v.* Co., 45 Wash. 464, 88 P. 946; Rowland *v.* Co., 44 Wash. 413, 87 P. 482; Meating *v.* Co., 113 Wis. 379, 89 N. W. 152.

Presumption conclusive under rule stated in text. St. Clair *v.* Rutledge, 115 Wis. 583, 92 N. W. 234.

Confession of judgment binding. Gilman *v.* Heitman, 137 Ia. 336, 113 N. W. 932; Manley *v.* Mayer, 68 Kan. 377, 75 P. 550; Ford *v.* Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. 902.

Presumption.—If president and general manager has long been accustomed to manage corporate affairs, it will be presumed he was authorized to

borrow money in its name. Cook *v.* Co., 28 R. I. 41, 65 A. 641, 650, 9 L. R. A. (N. S.) 193, *cf.* Martin *v.* Co., 122 N. Y. 165, 25 N. E. 303.

Authority of president may be shown by parol proof of usage and acquiescence of directors. Berlin *v.* Cusachs, 114 La. 744, 38 S. 539.

Testimony as to who was operating business at office of corporation competent. West *v.* Co., 7 Cal. App. 81, 93 P. 892.

Relaxation of former rule in favor of third persons dealing with officers exercising general supervision over corporate affairs is favored. Bacon *v.* Co., 130 App. Div. 737, 115 N. Y. S. 617, *disap.* Bangs *v.* Co., 15 App. Div. 522, 44 N. Y. S. 546.

Mental incapacity of president to contract must be clearly shown to have existed when contract made; also that fact not known to other officers or agents of company or, if known, they did not know he was assuming to act for it. Gilmore *v.* Samuels, 135 Ky. 706, 123 S. W. 271.

647-61 Geo. Whitechurch *v.* Cavanagh, (1902) App. Cas. (Eng.) 117; Longman *v.* Bath E. T., (1905) 1 Ch. (Eng.) 646; Ruben *v.* Gt. Fingall Con., (1906) App. Cas. (Eng.) 439 (*dist.* Shaw *v.* Co., 13 Q. B. D. (Eng.) 103; Oscar Bonner O. Co. *v.* Co., 150 Cal. 658, 89 P. 613; Farrell *v.* Co., 32 Mont. 416, 80 P. 1027; Harris *v.* Co., 76 N. J. L. 307, 70 A. 330; Maroney *v.* Cole, 52 Misc. 471, 103 N. Y. S. 760; Backer *v.* Co., 84 N. Y. S. 149; Bradford B. Co. *v.* Gibson, 68 O. St. 442, 67 N. E. 888; Dreeben *v.* Bk. (Tex.), 99 S. W. 850. "A secretary," says Lord Esher, "is a mere servant. His position is that he is to do what he is told and no person can assume that he has any authority to represent anything at all." Barnett *v.* Co., 18 Q. B. D. (Eng.) 815; Geo. Whitechurch *v.* Cavanagh, (1902) App. Cas. (Eng.) 117. See Rogers *v.* Co., 119 La. 714, 44 S. 442. In opposition is Lucile Dreyfus M. Co. *v.* Willard, 46 Wash. 247, 89 P. 925, making distinction between acts as secretary and as agent.

As to treasurer of charitable corporation, see Carleton Home *v.* R. Co., 182 N. Y. 47, 74 N. E. 571.

647-62 Estate *v.* So. Cal. R. R., 141 Cal. 402, 77 P. 307; Smith *v.* Co., 11 Cal. App. 253, 104 P. 706; Ring *v.* Co., 93 App. Div. 442, 87 N. Y. S. 682.

Disregard of charter provision by corporation may be shown, and secretary's act in contravention thereof held binding in favor of creditor. Blanc *v.* Bk., 114 La. 739, 38 S. 537.

Presumption favors secretary's authority to assign note. Swedish-Am. Bk. *v.* Koebernick, 136 Wis. 473, 117 N. W. 1020. And deposit of funds by treasurer. Smith *v.* Co., 170 Fed. 900, 96 C. C. A. 76.

647-63 National M. C. Co. *v.* Co., 14 Ont. L. R. (Can.) 22; Issaquah C. Co. *v.* Co., 126 Fed. 89, 61 C. C. A. 145; Arkansas R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802; Choctaw etc. R. Co. *v.* Rolfe, 76 Ark. 220, 88 S. W. 870; Scott *v.* Co., 144 Cal. 140, 77 P. 817; Brown *v.* Co., 150 Cal. 376, 89 P. 86; Preston *v.* Co., 11 Cal. App. 190, 104 P. 462; Riley *v.* R. Co., 1 Cal. App. 488, 82 P. 686; Golden Age etc. Co. *v.* Langridge, 39 Colo. 157, 88 P. 1070; Raleigh etc. R. Co. *v.* Co., 122 Ga. 709, 50 S. E. 1008; Gray L. Co. *v.* Harris, 127 Ga. 693, 56 S. E. 252; Metropolitan C. Co. *v.* Co., 196 Mass. 72, 81 N. E. 645; Henderson *v.* Raymond S., 183 Mass. 443, 67 N. E. 427; Southern R. Co. *v.* Howell, 79 S. C. 281, 60 S. E. 677; Western Cottage, etc. Co. *v.* Andersen, 97 Tex. 432, 79 S. W. 516; White Hall Co. *v.* Hall, 102 Va. 284, 46 S. E. 290; Lynchburg T. Co. *v.* Booker, 103 Va. 594, 50 S. E. 148; Batavian B. *v.* R. Co., 123 Wis. 389, 101 N. W. 687; Ford *v.* Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. 902.

Admission by manager of two corporations, signed by one of them, competent as against the other, it having led up to a contract by it. Walnut Ridge M. Co. *v.* Cohn, 79 Ark. 338, 96 S. W. 413; Huse *v.* Co., 121 Mo. App. 89, 97 S. W. 990.

Knowledge of directors of acts of manager may be shown when assent of a majority of them is proved. Scott *v.* Co., 144 Cal. 140, 77 P. 817.

647-64 Ferguson *v.* Basin, 152 Cal. 712, 93 P. 867; Centerville, etc. Co. *v.* Co., 140 Cal. 385, 73 P. 1079; Tres Palacios, etc. Co. *v.* Eidman, 41 Tex. Civ. 542, 93 S. W. 698.

Usual course of business is evidence as to power of manager. Richardson *v.* Devine, 193 Mass. 336, 79 N. E. 771.

647-65 See Stewart *v.* Wright, 147 Fed. 321, 77 C. C. A. 499.

648-67 Arkansas S. R. Co. *v.* Dickerson, 78 Ark. 483, 95 S. W. 802; Hay

v. Clay Co. (Mo. App.), 162 S. W. 666; Dunbar, etc. Co. *v.* Martin, 53 Misc. 312, 103 N. Y. S. 91. See Genefal H. S. *v.* R. Co., 79 Conn. 581, 65 A. 1065.

648-68 See Studebaker *v.* Rose, 65 Misc. 322, 119 N. Y. S. 970.

Circumstantial evidence, competent to show ambiguous obligation executed by president was obligation of the corporation. Dunbar, etc. Co. *v.* Martin, 53 Misc. 312, 103 N. Y. S. 91.

648-70 President's authority to mortgage corporate property may be shown by his acts in connection with affairs of corporation and inaction of governing body. Tyler Est. *v.* Hoffman, 146 Mo. App. 510, 124 S. W. 535.

648-75 Trickey *v.* Clark, 50 Or. 516, 93 P. 457.

649-76 International, etc. R. Co. *v.* Shuford, 36 Tex. Civ. 251, 81 S. W. 1189; Western Cottage, etc. Co. *v.* Anderson, 97 Tex. 432, 79 S. W. 516; Cleghon *v.* Co., 41 Tex. Civ. 531, 93 S. W. 1020.

649-77 Cresson, etc. Co. *v.* Stauffer, 148 Fed. 981, 78 C. C. A. 609. Manager may testify of solvency of corporation without first giving items on which statement is based. Campbell *v.* Park, 128 Ia. 181, 101 N. W. 861.

649-79 Doing business in foreign state is prima facie shown by proving sale and delivery of goods and maintenance of representatives and office therein. Warner I. Co. *v.* Sweet, 65 Misc. 57, 119 N. Y. S. 166.

650-80 Buffalo, etc. Co. *v.* Troendle, 30 Ky. L. R. 740, 99 S. W. 622.

650-81 See S. *v.* Knowles, 185 Mo. 141, 83 S. W. 1083.

By-laws competent to show contract not duly executed. North-Western P. Co. *v.* Whitney, 5 Cal. App. 105, 89 P. 891. Not admissible against stranger to show authority of officer with whom he contracted, no notice of them being given him. Rosenbaum *v.* Gilliam, 101 Mo. App. 126, 74 S. W. 507. If part are offered by one party, the other may offer the other part. McConnell *v.* Combination, 30 Mont. 239, 76 P. 194.

Constitution and by-laws published by parent society and used and supplied by local bodies to members, admissible without preliminary proof of adoption. Home Circle *v.* Shelton (Tex. Civ.), 81 S. W. 84.

650-82 Oregon, etc. R. Co. *v.* Grubissich (C. C. A.), 206 Fed. 577; Strickland *v.* Bk. of Cartersville (Ga.), 81 S. E. 886; Crandell *v.* Bank, 140 Ga. 713, 79 S. E. 776; Shelby *v.* Co., 121 N. Y. S. 619; Graham *v.* Co. (Or.), 139 P. 337.

See The Bainbridge, 199 Fed. 404, 118 C. C. A. 88; Smythe *v.* Lodge, 198 Fed. 967.

Secondary evidence admissible upon proper foundation being laid. Bk. of Garfield *v.* Clark, 138 Ga. 798, 76 S. E. 95.

Parol evidence is admissible to explain incomplete records. Watts *v.* Levee Dist. No. 1, 164 Mo. App. 263, 145 S. W. 129.

Records must be identified. McConnell *v.* Combination, 30 Mont. 239, 76 P. 194.

Presumed rules of railway company are in writing. Barschow *v.* R. Co., 147 Mich. 226, 110 N. W. 1057.

Admissible though kept by stockholder interested in suit. Morgan *v.* Co., 215 Pa. 443, 64 A. 633.

Minutes of illegal meeting examined in connection with record of regular meeting to ascertain intent. Ismon *v.* Loder, 135 Mich. 345, 97 N. W. 769.

Letter written by director present at board meeting, competent to prove action taken, records being silent. Golden Age M. Co. *v.* Langridge, 39 Colo. 157, 88 P. 1070.

651-83 Authentication of copies must conform to statute. Nixon *v.* Goodwin, 3 Cal. App. 358, 85 P. 169.

651-84 New Iberia Sugar Co. *v.* Lagarde, 130 La. 387, 58 S. 16; Danvers F. E. Co. *v.* Johnson, 93 Minn. 323, 101 N. W. 492.

Absence of revenue stamp, immaterial if not fraudulently omitted. S. *v.* R. Co., 117 Ia. 524, 91 N. W. 794.

Publications generally circulated among members of corporations, and purporting to contain its by-laws, admissible as prima facie evidence thereof. Knights *v.* Weber, 101 Ill. App. 488.

651-85 Statute making copies of papers, entries and records evidence, does not include contracts. Chicago, etc. Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38; Chicago, etc. Co. *v.* Weber, 121 Ill. App. 455.

Statute declaring acts and proceedings of corporations may be proved by sworn copy, does not extend to books of account, so as to allow their use in a manner varying from that of such

books of natural persons. Coppes *v.* Assn. (Ind. App.), 67 N. E. 1022.

652-87 Merchants & Farmers' Bank *v.* Lumb. Co., 103 Ark. 283, 146 S. W. 508, *cit.* Wolf *v.* Erwin & Wood Co., 71 Ark. 438, 75 S. W. 722; Stiewel *v.* Webb Press Co., 79 Ark. 45, 95 S. W. 915, 116 Am. St. Rep. 62; Golden Age M. Co. *v.* Langridge, 39 Colo. 157, 88 P. 1070; Caudell *v.* Bank, 140 Ga. 713, 79 S. E. 776; Garmany *v.* Lawtor, 124 Ga. 876, 53 S. E. 669; Ismon *v.* Loder, 135 Mich. 345, 97 N. W. 769; Kropp *v.* Co., 138 Mo. App. 49, 119 S. W. 1066; Smith *v.* Bk., 72 N. H. 4, 54 A. 385; Braxmar *v.* Stanton, 110 App. Div. 167, 96 N. Y. S. 1096; Whitlock *v.* Alexander, 160 N. C. 465, 76 S. E. 538; Boalsburg W. Co. *v.* Water Co., 240 Pa. 198, 87 A. 609.

If not entered in the minutes, or if the minutes are lost or destroyed after entry, it is competent to prove resolutions by those present at the meeting. Boalsburg W. Co. *v.* Water Co., 240 Pa. 198, 87 Atl. 609.

It is not presumed contract was set out verbatim in record; if such contract lost its contents may be proved by parol. Ellison *v.* Dunlap, 25 Ky. L. R. 1495, 78 S. W. 155.

Omissions supplied by oral testimony if it does not contradict the record. Hotchkiss *v.* Assn., 229 Ill. 248, 82 N. E. 257. Lurton *v.* Assn., 87 Ill. App. 395.

On a collateral issue parol evidence is admissible to show a person is officer of a corporation. Stovell *v.* Co., 38 Colo. 80, 87 P. 1071; Independent Assn. *v.* Somach, 102 N. Y. S. 495.

Intent of corporation as to future may be testified of by its president, although no formal action taken. New York, etc. R. Co. *v.* Offield, 78 Conn. 1, 60 A. 746.

Formal action constituting contract may be shown by parol if records silent. Iowa D. Co. *v.* Soners, 139 Ia. 72, 117 N. W. 300. Evidence must leave no doubt. Hawkshaw *v.* Lodge, 29 Fed. 770; Iowa D. Co. *v.* Soners, supra.

653-88 Nixon *v.* Goodwin, 3 Cal. App. 358, 85 P. 169; Shelby *v.* Co., 121 N. Y. S. 619 (declaration of dividend).

See Federal Tr Co. *v.* Spurlock, 34 Okla. 644, 26 P. 805.

Minutes are prima facie evidence, and parol testimony is competent to explain or supplement them. Hamill *v.* Council, 152 Pa. 537, 25 A. 645; Rose *v.* Kadisho, 215 Pa. 69, 64 A. 401.

655-94 See Louisiana, etc. Co. *v.* Knenzel, 108 Mo. App. 105, 114, 82 S. W. 1099.

Expert opinions as to corporation's net earnings, based on examination of books, incompetent. S. *v.* R. Co., 25 Nev. 186, 81 P. 99.

655-95 Central E. Co. *v.* Co., 120 Fed. 925, 57 C. C. A. 197; Lowry Nat. Bk. *v.* Fickett, 122 Ga. 489, 50 S. E. 396; Central L. Co. *v.* Kelter, 201 Ill. 503, 66 N. E. 543; Townsend *v.* Church, 6 Cush. (Mass.) 279; Durbrow *v.* Co., 77 N. J. L. 89, 71 A. 59; Fraker *v.* Hyde, 127 App. Div. 620, 111 N. Y. S. 757; Watson *v.* R. Co., 164 N. C. 176, 80 S. E. 175; Chesapeake, etc. R. Co. *v.* R. Co., 57 W. Va. 641, 50 S. E. 890.

Records of a meeting not drawn up by the secretary of the corporation or person properly authorized are not competent evidence to bind the corporation. Ney *v.* Tel. Co. (Ia.), 144 N. W. 383.

The rule is designed to protect, and limited to the protection of third parties and stockholders. It does not apply as against corporation on behalf of a faithless officer. Pacific, etc. Wks. *v.* Smith, 152 Cal. 507, 93 P. 85.

Books not entitled to much weight as against corporation in favor of custodian. National, etc. Co. *v.* Chicago Co., 226 Ill. 28, 80 N. E. 556.

Fraudulent entries not binding.—Brinkerhoff Z. Co. *v.* Boyd, 192 Mo. 597, 613, 91 S. W. 523.

Not conclusive.—653-88, supra.

655-96 Wheeler *v.* U. S., 226 U. S. 478, 33 Sup. Ct. 158, 57 L. ed. 309; Ehrlich *v.* Levine, 83 Misc. 136, 144 N. Y. S. 818; Wesp *v.* Muckle, 136 App. Div. 241, 120 N. Y. S. 976; Moore *v.* Rohrbacker, 30 Pa. Super. 568.

In an action for compensation a letter written to the corporation by its special counsel forming the basis of the action of the board is admissible, except the part which placed an estimate on the cost of the services. Paine *v.* Ref. Co. (Ky.), 167 S. W. 375.

Minutes competent to show intentions of corporation and stockholders. Somers *v.* Co., 50 Fla. 275, 39 S. 61; Fleming *v.* Reed, 77 N. J. L. 763, 72 A. 299. Informal record admissible if not transcribed. Chott *v.* Co., 114 Ill. App. 178. Competent against officer and his surety. Union Pac. *v.* Co., 79 Neb. 801,

113 N. W. 263. And against one who admitted previous membership to show his shares were not transferred. Plumb *v.* Bk., 48 Kan. 184, 29 P. 699.

656-97 Entries in books conclusive as to right to dividends and final distribution of assets. Campbell *v.* Assn., 76 N. J. Eq. 347, 74 A. 144.

656-98 Lowry Nat. Bk. *v.* Fickett, 122 Ga. 489, 50 S. E. 396.

Corporate books of account do not prove themselves. Shelby *v.* Co., 121 N. Y. S. 619.

656-99 Trainor *v.* Assn., 204 Ill. 616, 68 N. E. 650; Rudd *v.* Robinson, 126 N. Y. 113, 26 N. E. 1046.

Record evidence of correctness of contents and raises presumption matters not mentioned did not occur. Shelby *v.* Co., 121 N. Y. S. 619.

Not evidence against state in taxation proceedings. S. *v.* R. Co., 28 Nev. 186, 81 P. 99.

Business transactions with members on same footing as other transactions. Fleming *v.* Reed, 77 N. J. L. 563, 72 A. 299.

656-1 Mudgett *v.* Horrell, 33 Cal. 25; Coppes *v.* Assn. (Ind. App.), 67 N. E. 1022.

Books, other than stock subscription book, if unsupported, inadmissible. Girard, etc. Ins. Co. *v.* Loving, 71 Kan. 558, 81 P. 200; Hinsdale S. Bk. *v.* Co., 59 Kan. 716, 54 P. 1051.

656-2 Hughes Mfg. & L. Co. *v.* Wilcox, 13 Cal. App. 22, 108 P. 871 (prima facie only); Kipp *v.* Miller, 47 Colo. 598, 108 P. 164 (as admissions, whether books of original entry or not).

Books, competent against successor of corporation whose accounts they contain, having been in successor's possession. Dancel *v.* Co., 137 Fed. 157.

656-4 Wesp *v.* Muckle, 136 App. Div. 241, 120 N. Y. S. 976. *Contra* in action in which corporation not a party unless directors connected with entries. Thayer *v.* Schley, 137 App. Div. 166, 121 N. Y. S. 1064.

656-5 Nelson *v.* Spence, 129 Ga. 35, 58 S. E. 697.

656-7 Girard, etc. Ins. Co. *v.* Loving, 71 Kan. 558, 81 P. 200; Hinsdale S. Bk. *v.* Co., 59 Kan. 716, 54 P. 1051; Fleming *v.* Reed, 77 N. J. L. 563, 72 A. 299; Cook *v.* Williams, 85 N. Y. S. 1123; Eureka Hill M. Co. *v.* Co., 32 Utah 236, 90 P. 157. See Farjeon *v.* Co., 120 N. Y. S. 298.

Competent on question of ratification. Teeple *v.* Co., 137 Ia. 206, 114 N. W. 906.

Not competent in action respecting title to property to prove performance of acts, except as memoranda in connection with oral testimony based on personal knowledge, after which they are admissible to identify and prove character and terms of instruments referred to. Chesapeake, etc. R. Co. *v.* R. Co., 57 W. Va. 641, 50 S. E. 890.

656-8 Competent to show all stock has been subscribed. S. *v.* Court, 44 Wash. 108, 87 P. 40.

657-9 Oregon, etc. R. Co. *v.* Grubissich, 206 Fed. 577 (C. C. A.); Harrison *v.* Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954; Carey *v.* Williams, 79 Fed. 906, 25 C. C. A. 227; Foote *v.* Anderson, 123 Fed. 659, 61 C. C. A. 5; Signa I. Co. *v.* Greene, 88 Fed. 207, 31 C. C. A. 477.

Admissions not incompetent because recorded in books. Harrison *v.* Co., supra. Entries in book, assented to by party contracting with corporation, admissible. Rochester F. B. Co. *v.* Browne, 55 App. Div. 444, 66 N. Y. S. 867, *aff.*, no opinion, 179 N. Y. 542, 71 N. E. 1139.

657-12 Gardiner *v.* Bronx Nat. Bk., 142 N. Y. S. 713; Zobrist *v.* Estes, 65 Ore. 573, 133 P. 644.

The evidence of corporate action is the seal. Weeks *v.* Dominy, 161 App. Div. 414, 146 N. Y. S. 624.

657-13 Just *v.* Co., 16 Ida. 639, 102 P. 381.

Are only prima facie evidence.—S. *v.* Guertin, 106 Minn. 248, 119 N. W. 43. Omissions may be supplied by parol. Hughes Mfg. & L. Co. *v.* Wilcox, 13 Cal. App. 22, 108 P. 871.

657-14 Chesapeake, etc. R. Co. *v.* R. Co., 57 W. Va. 641, 50 S. E. 890.

Amendment to by-laws may be proved by parol if it is not shown to have been written. Flakne *v.* Ins. Co., 105 Minn. 479, 117 N. W. 785, *cit.* the text.

658-16 Action by directors may be explained by agreement entered into by corporation. Turner *v.* F. L. C., 2 Cal. App. 122, 83 P. 62, 70.

658-17 Bona fides of majority of stockholders of prosperous corporation will be inquired into on application for its dissolution after a vote in favor thereof. It may be shown such vote was had to enable them to control the business and organize a new corpora-

tion to carry it on. Theis v. Co., 34 Wash. 23, 74 P. 1004.

658-18 Williard v. R. Co., 124 Fed. 796; Pinchback v. Co., 137 N. C. 171, 49 S. E. 106.

658-19 Cleveland v. R., S O. N. P. (N. S.) 457.

658-20 Proof of cause for dissolving. It is proper in a suit to dissolve a corporation for having made excessive charges to introduce records in suits litigated between it and individuals affected by its charges; testimony of witness given upon the trial is also competent. S. v. Co., 107 La. 1, 31 S. 395.

More than a preponderance of evidence is necessary to justify dissolution of corporation on ground its purposes cannot be accomplished; it is not enough to show chances for its doing so are slim. Manufacturers' etc. Co. v. Cleary, 28 Ky. L. R. 359, 89 S. W. 248.

Forfeiture of franchise will not be adjudged, without showing that, to reasonable certainty, public has been injured by wilful abuse of franchise or financial situation of corporation is such it is reasonably sure it cannot perform its duties. Gainesville W. Co. v. Gainesville, 103 Tex. 394, 128 S. W. 370. See infra, "Insolvency," 494-31.

CORPUS DELICTI

660-1 Identity of deceased or his murderer is not part of the corpus delicti. S. v. Washelesky, 81 Conn. 22, 70 A. 62.

660-2 P. v. Ward, 145 Cal. 736, 79 P. 448; P. v. Frank, 2 Cal. App. 282, 83 P. 578; P. v. Hotz, 261 Ill. 239, 103 N. E. 1007; Hoch v. P., 219 Ill. 265, 76 N. E. 356; Smith v. C., 148 Ky. 60, 146 S. W. 4; Spears v. S., 92 Miss. 613, 46 S. 166, *over.* Sam v. S., 33 Miss. 347; S. v. Bowen, 247 Mo. 584, 153 S. W. 1033; S. v. Henderson, 186 Mo. 473, 85 S. W. 576; S. v. Pienick, 46 Wash. 523, 90 P. 645.

660-3 Age of accused is sometimes an element. Wistrand v. P., 213 Ill. 72, 72 N. E. 748.

660-4 Ausmus v. P., 47 Colo. 167, 107 P. 204; S. v. Knapp, 70 O. St. 380, 392, 71 N. E. 705; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

660-6 Tatum v. S., 1 Ga. App. 778, 57 S. E. 956.

661-8 Ex parte Patterson, 50 Tex. Cr. 271, 95 S. W. 1061; S. v. Merrill (W. Va.), 78 S. E. 699.

661-9 Perry v. S., 155 Ala. 93, 46 S. 470; Scott v. S., 141 Ala. 1, 37 S. 357; Johnson v. S., 142 Ala. 1, 37 S. 937; Williams v. S., 125 Ga. 741, 54 S. E. 661; Tatum v. S., 1 Ga. App. 778, 57 S. E. 956; Franklin v. S., 3 Ga. App. 342, 59 S. E. 835; Lucas v. S. (Tex. Cr.), 155 S. W. 527; S. v. Pienick, 46 Wash. 523, 90 P. 645; S. v. Merrill (W. Va.), 78 S. E. 699.

Larceny—corpus delicti not proven. Sanders v. S., 167 Ala. 85, 52 S. 417.

662-10 P. v. Mindeman, 157 Mich. 120, 121 N. W. 488. See Saulsberry v. S., 178 Ala. 16, 59 S. 476, where objections to evidence were overruled because this requirement had been complied with.

Order of proof, discretionary. S. v. Gebbia, 121 La. 1083, 47 S. 32.

662-11 S. v. Washelesky, 81 Conn. 22, 70 A. 62; S. v. Kesner, 72 Kan. 87, 82 P. 720; U. S. v. Barbosa, 1 Phil. Isl. 741.

Evidence that defendant committed the crime may be inseparable from proof of corpus delicti. Ducett v. S. (Ala.), 65 S. 351.

663-12 P. v. Spencer, 16 Cal. App. 756, 117 P. 1039; Ashby v. S., 124 Tenn. 684, 139 S. W. 872.

663-13 Scott v. S., 141 Ala. 1, 37 S. 357; Harshaw v. S., 94 Ark. 343, 127 S. W. 745; P. v. Swaile, 12 Cal App. 192, 107 P. 134; Ausmus v. P., 47 Colo. 167, 107 P. 204; Williams v. S., 123 Ga. 138, 51 S. E. 322; S. v. Alcorn, 7 Ida. 599, 64 P. 1014; S. v. Hill (La.), 65 S. 763.

663-14 Ridgell v. S., 156 Ala. 10, 47 S. 71; P. v. Barnnovich, 16 Cal. App. 427, 117 P. 572.

663-15 Ex parte Patterson, 50 Tex. Cr. 271, 95 S. W. 1061.

Sufficient evidence in a burglary case. Key v. S., 4 Ala. App. 76, 58 S. 946.

663-16 P. v. Hales (Cal. App.), 139 P. 667; Williams v. S., 125 Ga. 741, 54 S. E. 661; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; S. v. Kesner, 72 Kan. 87, 82 P. 720; S. v. Knapp, 70 O. St. 380, 393, 71 N. E. 705; Frazier v. U. S., 2 Okla. Cr. 657, 103 P. 373; U. S. v. Samarin, 1 Phil. Isl. 239; S. v. Hutchings, 30 Utah 319, 84 P. 893.

Amount of proof to establish corpus delicti must depend upon particular facts in each individual case. P. v. Goodwin, 263 Ill. 99, 104 N. E. 1018.

664-18 Perovich *v.* U. S., 205 U. S. 86; Pappenburg *v.* S. (Ala. App.), 65 S. 418 (its sufficiency being for the jury to determine); Truett *v.* S. (Ala. App.), 64 S. 529; James *v.* S., 8 Ala. App. 255, 62 S. 897, certiorari denied, 63 S. 1027; Perry *v.* S., 155 Ala. 93, 46 S. 470; Vaughn *v.* S., 130 Ala. 18, 30 S. 669; Dupree *v.* S., 148 Ala. 620, 42 S. 1004; Davis *v.* S., 141 Ala. 62, 37 S. 676; P. *v.* Besold, 154 Cal. 363, 97 P. 871; P. *v.* Fallon, 149 Cal. 287, 86 P. 689; P. *v.* Swaile, 12 Cal. App. 192, 107 P. 134; Ausmus *v.* P., 47 Colo. 167, 107 P. 204; Moore *v.* S. (Ga. App.), 80 S. E. 507; Campbell *v.* S., 124 Ga. 432, 52 S. E. 914; Ray *v.* S., 4 Ga. App. 67, 60 S. E. 816; Miles *v.* S., 129 Ga. 589, 59 S. E. 274; S. *v.* Keller, 8 Ida. 699, 70 P. 1051; P. *v.* Hotz, 261 Ill. 239, 103 N. E. 1007; P. *v.* See, 258 Ill. 152, 101 N. E. 257; P. *v.* Campagna, 240 Ill. 378, 88 N. E. 797 (if better evidence not obtainable); Hoch *v.* P., 219 Ill. 265, 76 N. E. 356; Lipsey *v.* P., 227 Ill. 364, 81 N. E. 348; Messel *v.* S., 176 Ind. 214, 95 N. E. 565; Strickland *v.* S., 171 Ind. 642, 87 N. E. 12; Sanderson *v.* S., 169 Ind. 301, 82 N. E. 525; S. *v.* Westcott, 130 Ia. 1, 104 N. W. 341; S. *v.* Nordmark, 84 Kan. 628, 114 P. 1068; Smith *v.* C., 148 Ky. 60, 146 S. W. 4; S. *v.* Vinton, 220 Mo. 90, 119 S. W. 370; S. *v.* Henderson, 186 Mo. 473, 85 S. W. 576; S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235; S. *v.* White, 189 Mo. 339, 87 S. W. 1188; S. *v.* Estes, 209 Mo. 288, 107 S. W. 1059; S. *v.* Keeland, 39 Mont. 506, 104 P. 513 (exception by statute in homicide cases); P. *v.* Poole, 127 App. Div. 122, 111 N. Y. S. 258; Wortman *v.* S., 9 Okla. Cr. 440, 132 P. 358; Jackson *v.* S. (Okla.), 139 P. 324; Shires *v.* S., 2 Okla. Cr. 89, 99 P. 1100; Stockbridge *v.* Ty., 15 Okla. 167, 79 P. 753; S. *v.* Williams, 46 Or. 287, 80 P. 655; S. *v.* Barnes, 47 Or. 592, 85 P. 998; C. *v.* Sheffer, 218 Pa. 437, 67 A. 761; Ashby *v.* S., 124 Tenn. 684, 139 S. W. 872; McMillan *v.* S. (Tex. Cr.), 165 S. W. 576; Austin *v.* S., 51 Tex. Cr. 327, 101 S. W. 1162; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237; Curran *v.* S., 12 Wyo. 553, 76 P. 577.

See vol. 3, p. 86, n 74.

The sufficiency of the proof depends largely upon the character of the individual case. P. *v.* Hales (Cal. App.), 139 P. 667.

The court in Mills *v.* S., 11 Ga. App. 383, 75 S. E. 266, thus states evidence held sufficient to establish corpus delicti in arson: It appears that the barn described in the indictment was destroyed by fire about 3 o'clock in the morning, that no fire had been left in or near the building on the night before it was burned, that while the fire was in progress an odor of kerosene oil emanated from the building, and an empty can which had contained such oil was found near by, and that tracks of a human being, leading to and from the barn were found, and the circumstances were such as to indicate that they were made after the barn was closed on the night before the burning.

See the title "Circumstantial Evidence."

"The criminal agency of another as the means is satisfactorily established by the crushed skull, the bloody club, the bloody ground and weeds, and the crushed grass, showing where the body had been dragged." Smith *v.* Co., 148 Ky. 60, 146 S. W. 4.

There is no merit in the suggestion that there was an absence of evidence tending to prove the corpus delicti. The evidence tending to show that a hole such as would be made by a bullet from a No. 41 pistol cartridge was found in the glass of a window of a passenger car forming part of a train of the Southern Railway Company, where there was no hole before, shortly after a report was heard similar to that of a pistol, furnished some basis for an inference that some one with a gun or pistol shot into or at a passenger car forming part of a train of that company, as alleged in the indictment. Turner *v.* S., 4 Ala. App. 100, 58 S. 116, per Walker, P. J.

Flight, not sufficient. Huey *v.* S., 7 Ga. App. 398, 66 S. E. 1023.

Bones of burned bodies, competent. Sprouse *v.* C., 132 Ky. 269, 116 S. W. 344.

665-19 Perovich *v.* U. S., 205 U. S. 86; Byram *v.* P., 49 Colo. 533, 113 P. 528; Williams *v.* S., 123 Ga. 138, 51 S. E. 322; S. *v.* Concelia, 250 Mo. 411, 157 S. W. 778; S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235; S. *v.* Clinkenbeard, 142 Mo. App. 146, 125 S. W. 827; P. *v.* Patrick, 182 N. Y. 131, 141, 74 N. E. 843; Brown *v.* S. (Okla. Cr.), 132 P. 359; S. *v.* Williams, 46 Or. 287, 80 P.

655; Schwantes v. S., 127 Wis. 169, 106 N. W. 237.

Cause of death need not be shown to make direct proof of death. S. v. Nordall, 38 Mont. 327, 99 P. 960.

665-20 Rosenfeld v. U. S., 202 Fed. 469, 120 C. C. A. 599; Naftzger v. U. S., 200 Fed. 494, 118 C. C. A. 598; Johnson v. S., 142 Ala. 1, 37 S. 937; McLemore v. S. (Ark.), 164 S. W. 119; Burrow v. S. (Ark.), 159 S. W. 1123; Greenwood v. S., 107 Ark. 568, 156 S. W. 427; Harshaw v. S., 94 Ark. 343, 127 S. W. 745; Hubbard v. S., 77 Ark. 126, 91 S. W. 11; P. v. Besold, 154 Cal. 363, 97 P. 871; P. v. Ward, 145 Cal. 736, 79 P. 448; P. v. Eldridge, 3 Cal. App. 648, 86 P. 832; S. v. Blackburn, 7 Penne. (Del.) 479, 75 A. 536; Sims v. S. (Ga. App.), 79 S. E. 1133; Sims v. S., 12 Ga. App. 551, 77 S. E. 891; Moon v. S., 12 Ga. App. 614, 77 S. E. 1088; Huey v. S., 7 Ga. App. 398, 66 S. E. 1023; (nor in rape case, by complaint of female, if not part of res gestae); Childs v. S., 10 Ga. App. 829, 74 S. E. 89; Boyd v. S., 4 Ga. App. 58, 60 S. E. 801; Bines v. S., 118 Ga. 320, 45 S. E. 376; Sanders v. S., 118 Ga. 329, 45 S. E. 365; Williams v. S., 125 Ga. 741, 54 S. E. 661; S. v. Keller, 8 Ida. 699, 70 P. 1051; S. v. Abrams, 131 Ia. 479, 108 N. W. 1041; Brown v. C. (Ky.), 118 S. W. 945; C. v. Hicks, 26 Ky. L. R. 511, 82 S. W. 265; Murray v. S. (Miss.), 61 S. 315; Bolden v. S., 98 Miss. 723, 54 S. 241 (arson); Stanley v. S., 82 Miss. 498, 34 S. 360; P. v. Gillman, 145 N. Y. S. 775; Shires v. S., 2 Okla. Cr. 89, 99 P. 1100; U. S. v. De la Cruz, 2 Phil. Isl. 148; Ellison v. S., 59 Tex. Cr. 3, 127 S. W. 542; S. v. Wells, 35 Utah 400, 100 P. 681; S. v. Marselle, 43 Wash. 273, 86 P. 586; Curran v. S., 12 Wyo. 553, 76 P. 577.

"There must be other testimony tending to establish that the crime has been committed, in order to make competent the confessions of the accused, made either by a plea of guilty before a justice of the peace or otherwise." Jenkins v. S., 98 Miss. 717, 54 S. 158.

Rule not absolute as to misdemeanors. S. v. Gilbert, 36 Vt. 145.

When age is part of corpus delicti, it cannot be proved by extra judicial confessions of accused, nor inspection of his person. Wistrand v. P., 213 Ill. 72, 72 N. E. 745.

Confession given little weight. Calvert v. S., 165 Ala. 99, 51 S. 311.

666-21 Rosenfeld v. U. S., 202 Fed. 469, 120 C. C. A. 599; Flower v. U. S., 116 Fed. 241, 53 C. C. A. 271; Davis v. S., 141 Ala. 62, 37 S. 676; Burrow v. S. (Ark.), 159 S. W. 1123; Ryan v. S., 100 Ala. 94, 14 S. 868; Harshaw v. S., 94 Ark. 343, 127 S. W. 745; Meisenheimer v. S., 73 Ark. 407, 84 S. W. 491; Hubbard v. S., 77 Ark. 126, 91 S. W. 11; P. v. Hatch, 163 Cal. 368, 125 P. 907; P. v. Fallon, 149 Cal. 287, 86 P. 689; Gantling v. S., 41 Fla. 587, 26 S. 737; Wilburn v. S. (Ga.), 81 S. E. 444; Sharp v. S., 7 Ga. App. 749, 67 S. E. 1124; P. v. Harrison, 261 Ill. 517, 104 N. E. 259; P. v. Hannibal, 259 Ill. 512, 102 N. E. 1042; Messel v. S., 176 Ind. 214, 95 N. E. 565; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; S. v. Skibiski, 245 Mo. 459, 150 S. W. 1038; S. v. Wooley, 215 Mo. 620, 115 S. W. 417; S. v. Coats, 174 Mo. 396, 74 S. W. 864; S. v. Knowles, 185 Mo. 141, 177, 83 S. W. 1083; Cohoe v. S., 82 Neb. 744, 118 N. W. 1088; S. v. Banusik (N. J. L.), 64 A. 994; P. v. Brasch, 193 N. Y. 46, 85 N. E. 809; S. v. Knapp, 70 O. St. 380, 393, 71 N. E. 705; Ashby v. S., 124 Tenn. 684, 139 S. W. 872; Follis v. S., 51 Tex. Cr. 186, 101 S. W. 242; Gallegos v. S., 49 Tex. Cr. 115, 90 S. W. 492.

Contra. P. v. Rowland, 12 Cal. App. 6, 106 P. 428.

Evidence of admissions and declarations of defendant sufficient to establish corpus delicti without outside evidence. P. v. Hatch, 163 Cal. 368, 125 P. 907.

666-22 P. v. Moran, 144 Cal. 48, 77 P. 777; S. v. Brinkley, 55 Or. 134, 104 P. 893, 105 P. 708.

666-23 Flowers v. S., 4 Ala. App. 221, 59 S. 238; S. v. Wilson (Ia.), 144 N. W. 47.

666-24 Wall v. S., 5 Ga. App. 305, 63 S. E. 27.

Plea of guilty on former trial received as sufficient evidence of guilt without proof of corpus delicti. S. v. Briggs, 68 Ia. 416, 27 N. W. 358. *Contra*, S. v. Meyers, 99 Mo. 107, 12 S. W. 516 (inadmissible). It is not conclusive. S. v. Abrams, 131 Ia. 479, 108 N. W. 1041; C. v. Ervine, 8 Dana (Ky.) 30.

Plea of guilty withdrawn and followed by plea of not guilty, inadmissible. P. v. Ryan, 82 Cal. 617, 23 P. 121.

CORROBORATION

Cannot be by accomplice, 675-28; *Evidence of complaints*, 731-12; *Statement in answer to question*, 731-12.

672-11 *Comp.* S. *v.* Frimatura, 121 La. 676, 46 S. 691.

Contract for more than five hundred dollars may be shown by testimony of one credible witness and corroborative circumstances. O'Neill *v.* Guyther, 123 La. 100, 48 S. 759.

672-14 Fields *v.* S., 2 Ga. App. 41, 58 S. E. 327.

674-20 S. *v.* Mungeon, 20 S. D. 612, 108 N. W. 552; S. *v.* Hicks, 6 S. D. 325, 60 N. W. 66.

674-21 Corroborative evidence may be substantive. Edwards *v.* R. Co., 132 N. C. 99, 43 S. E. 585.

Corroboration by witnesses does not always strengthen; as where details are stated long after their occurrence in substantially the same words. See Alexander *v.* Blackman, 26 App. Cas. (D. C.) 541; Am. B. T. Co. *v.* Co., 22 Blatchf. 531, 22 Fed. 309.

675-27 Discretion of court as to instruction. S. *v.* Carey, 76 Conn. 342, 56 A. 632.

675-28 Stanfield *v.* S., 3 Ala. App. 54, 57 S. 402; Allis *v.* Hall, 76 Conn. 322, 56 A. 637; S. *v.* Brown, 146 Ia. 113, 124 N. W. 899; S. *v.* Egbert, 125 Ia. 443, 101 N. W. 191; S. *v.* Carpenter, 124 Ia. 5, 98 N. W. 775; P. *v.* Nichols, 159 Mich. 355, 124 N. W. 25; Blue *v.* S., 86 Neb. 189, 125 N. W. 136; Jordan *v.* S., 59 Tex. Cr. 208, 128 S. W. 139; McKnight *v.* S., 50 Tex. Cr. 252, 95 S. W. 1056; Wallace *v.* S., 48 Tex. Cr. 318, 87 S. W. 1041; Thompson *v.* S. (Tex. Cr.), 78 S. W. 691; Barnard *v.* S. (Tex. Cr.), 76 S. W. 475.

When previous statements of a witness are admissible in corroboration. Stephenson *v.* Jackson (Tex. Civ.), 128 S. W. 1196.

Declaration of party forming part of res gestae, may be proved. Merrell *v.* Dudley, 139 N. C. 57, 51 S. E. 777.

A writing by one party received to corroborate him. Glassberg *v.* Olson 89 Minn. 195, 94 N. W. 554.

Husband and wife, independent witnesses. Herman *v.* Haldeman, 18 Pa. Dist. 333.

676-29 Brantley *v.* S., 133 Ga. 264, 65 S. E. 426, former testimony given as witness for state not admissible to corroborate testimony given in behalf of accused. But see S. *v.* Kincaid, 142 N. C. 657, 55 S. E. 647.

676-30 Bennett *v.* S., 160 Ala. 25, 49 S. 296; Rogers *v.* S., 88 Ark. 451, 115 S. W. 156; Haas *v.* Bonwit, 119 N. Y. S. 202; Langford *v.* Issenhuth, 28 S. D. 451, 134 N. W. 889; Seiwert *v.* S., 51 Tex. Cr. 404, 103 S. W. 932.

Defendant's plea of guilty to a charge of stealing other goods is not admissible to confirm his testimony in a civil action involving title to like property. Ball B. P. Co. *v.* Lane, 135 Mich. 275, 97 N. W. 727.

Declarations by party to third person received where party's testimony was contradicted and characters of both parties attacked. Cuthbertson *v.* Austin, 152 N. C. 336, 67 S. E. 749.

Self-corroboration, not allowable where

Corroboration by witnesses does not alburg Bk. *v.* George, 92 Ark. 472, 123 S. W. 654.

Acts of witnesses inconsistent with testimony may be shown in corroboration of probabilities in civil action. New York E. J. Pub. Co. *v.* Co., 110 N. Y. S. 391.

676-31 In re Finch, 23 Ch. D. (Eng.) 267; Thompson *v.* Coulter, 34 Can. Sup. 261; Fakes *v.* S. (Ark.), 166 S. W. 963; Reynolds *v.* R. Co., 38 Tex. Civ. 273, 85 S. W. 323. See Chapman *v.* Chapman, 131 Ga. 805, 63 S. E. 337.

677-32 Fakes *v.* S. (Ark.), 166 S. W. 963. Corroboration as to venue, proper. Knowles *v.* S., 44 Tex. Cr. 322, 72 S. W. 398.

677-33 Quong Yu *v.* Ty., 12 Ariz. 183, 100 P. 462; Cook *v.* S., 75 Ark. 540, 87 S. W. 1176; P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364; P. *v.* Balkwell, 143 Cal. 259, 76 P. 1017; Harrell *v.* S., 121 Ga. 607, 49 S. E. 703; S. *v.* Brown, 146 Ia. 113, 124 N. W. 899; Simpson *v.* C., 31 Ky. L. R. 769, 103 S. W. 332; P. *v.* Elliott, 155 App. Div. 486, 140 N. Y. S. 553; P. *v.* O'Farrell, 175 N. Y. 323, 67 N. E. 588; P. *v.* Kathan, 136 App. Div. 303, 120 N. Y. S. 1096; P. *v.* Colmey, 116 App. Div. 516, 101 N. Y. S. 1016; Hill *v.* Ty., 15 Okla. 212, 75 P. 757; Fisher *v.* Ty., 17 Okla. 455, 87 P. 301; Hicks *v.* S., 126 Tenn. 359, 149 S. W. 1055; Oates *v.* S. (Tex. Cr.), 149 S. W. 1194-1198, *cit.* Campbell *v.* S., 57 Tex. Cr. 301, 123 S. W. 583; Brown *v.* S., 57 Tex. Cr. 570, 124 S. W. 101; Jordan *v.* S., 62 Tex. Cr. 388, 137 S. W. 114; Spates *v.* S., 62 Tex. Cr. 532, 138 S. W. 393; King *v.* S., 57 Tex. Cr. 363,

123 S. W. 135; Shrewder v. S., 60 Tex. Cr. 659, 133 S. W. 281; Murphy v. S. (Tex. Cr.), 143 S. W. 616, not officially reported; Jones v. S. (Tex. Cr.), 141 S. W. 953; Gardner v. S., 55 Tex. Cr. 400, 117 S. W. 148; Bismark v. S., 45 Tex. Cr. 54, 73 S. W. 965; S. v. McCool, 53 Wash. 487, 102 P. 422.

Tendency must be direct.—It is erroneous to charge it is sufficient if corroborative evidence tends in any way to connect defendant with the offense. P. v. Compton, 123 Cal. 403, 56 P. 44.

Testimony of witness to be corroborated as to facts and circumstances of transaction is to be regarded in determining whether or not there is other evidence tending to connect defendant with the crime. S. v. Carpenter, 124 Ia. 5, 98 N. W. 775.

Contradiction of testimony of accomplice in some of its details immaterial if corroboration extends to main fact. Locklin v. S. (Tex. Cr.), 75 S. W. 305.

677-34 P. v. Morton, 139 Cal. 719, 73 P. 609.

677-35 P. v. Bunkers, 2 Cal. App. 197, 84 P. 364; S. v. Jones, 115 Ia. 113, 88 N. W. 196; P. v. Finucan, 80 App. Div. 407, 80 N. Y. S. 929.

"If it be such as to satisfy the jury that the witness spoke the truth in some material part of his testimony in which he is confirmed by unimpeachable evidence, this is sufficient if it leads to the conclusion that he also spoke the truth as to other matters for which there was no corroboration." S. v. Dorsey, 154 Ia. 298, 134 N. W. 946.

Rule same in civil cases.—Burnett v. Co., 1 Tenn. Ch. App. 18.

Evidence need not remove every reasonable doubt.—Lackey v. S., 67 Ark. 416, 55 S. W. 213; Mitchell v. S., 73 Ark. 291, 83 S. W. 1050; Lasater v. S., 77 Ark. 468, 94 S. W. 59.

678-36 U. S. v. Giuliani, 117 Fed. 594; P. v. Sullivan, 144 Cal. 471, 77 P. 1000; P. v. Morton, 139 Cal. 719, 73 P. 609; S. v. Knudtson, 11 Ida. 524, 83 P. 226; S. v. Bond, 12 Ida. 424, 86 P. 43; S. v. Brown (Ia.), 121 N. W. 513; Alderman v. Ty., 1 Okla. Cr. 502, 98 P. 1026; S. v. Mungeon, 20 S. D. 612, 108 N. W. 552; Wright v. S., 47 Tex. Cr. 433, 84 S. W. 593.

Evidence is not necessarily confined to points directly connecting defendant with crime. S. v. Gallivan, 75 Conn. 326, 53 A. 731.

In prosecution for conspiracy corroboration should extend to illegality of purpose. S. v. Messner, 43 Wash. 206, 86 P. 636.

678-39 See Dunn v. S. (Ind.), 67 N. E. 940.

678-40 Thompson v. Coulter, 34 Can. Sup. 261; S. v. Brown (Ia.), 121 N. W. 513; Tiffany v. Morgan (R. I.), 73 A. 465.

678-41 Delaney v. S., 48 Tex. Cr. 594, 90 S. W. 642.

679-42 Fields v. S., 2 Ga. App. 41, 58 S. E. 327; S. v. Ozias, 136 Ia. 175, 113 N. W. 761; S. v. Norris, 122 Ia. 154, 97 N. W. 999, 127 Ia. 683, 104 N. W. 282; Best v. C., 29 Ky. L. R. 137, 92 S. W. 555; Hill v. Ty., 15 Okla. 212, 79 P. 757; S. v. Johnson, 36 Wash. 294, 78 P. 903.

679-44 Sellers v. S., 7 Ala. App. 78, 61 S. 485; Harrison v. S., 144 Ala. 20, 40 S. 568; P. v. Siemsen, 153 Cal. 387, 95 P. 863; P. v. Assn., 12 Cal. App. 471, 107 P. 712; P. v. Woods, 147 Cal. 265, 81 P. 652; P. v. Manasse, 153 Cal. 10, 94 P. 92; Boles v. P., 37 Colo. 41, 86 P. 1030; S. v. Gallivan, 75 Conn. 326, 53 A. 731; Clay v. S., 122 Ga. 136, 50 S. E. 56; Barco v. Taylor, 5 Ga. App. 372, 63 S. E. 224; S. v. Dorsey, 154 Ia. 298, 134 N. W. 946; S. v. Fishel, 140 Ia. 460, 118 N. W. 762; S. v. Jones, 115 Ia. 113, 88 N. W. 196; Best v. C., 29 Ky. L. R. 137, 92 S. W. 555; Mann v. C., 25 Ky. L. R. 1964, 79 S. W. 230; Dean v. C., 25 Ky. L. R. 1876, 78 S. W. 1112; S. v. McDowell, 214 Mo. 334, 113 S. W. 1113; Lanham v. Bowlby, 86 Neb. 148, 125 N. W. 149; S. v. Spivey, 151 N. C. 676, 65 S. E. 995 (trailing by bloodhound); Warren v. S., 54 Tex. Cr. 443, 114 S. W. 380; Rogers v. S., 44 Tex. Cr. 350, 71 S. W. 18; Sexton v. S., 49 Tex. Cr. 253, 92 S. W. 37; Moore v. S., 47 Tex. Cr. 410, 83 S. W. 1117; Thomas v. S., 45 Tex. Cr. 111, 74 S. W. 36; Stiles v. S. (Tex. Cr.), 75 S. W. 511; S. v. Johnson, 36 Wash. 294, 78 P. 903; Curran v. S., 12 Wyo. 552, 76 P. 577. See Foster v. S. (Tex. Cr.), 150 S. W. 936.

Proof of motive may furnish corroboration. P. v. Galbo, 141 N. Y. S. 1078.

In Mills v. S., 11 Ga. App. 383, 75 S. E. 266, a witness for the state having testified that he bought intoxicating

liquor from the accused a large number of times during the two years immediately preceding the finding of the bill of indictment, it was not erroneous to admit, in corroboration of this evidence, the testimony of another witness that during this period he had seen the accused several times with "his pockets loaded with whiskey."

Proof of circumstances may cover a wide range; evidence is not to be excluded because it is somewhat remote and fragmentary. Howard *v.* C., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704.

Pursuit of accused by trained bloodhounds may be shown. S. *v.* Hunter, 143 N. C. 607, 56 S. E. 547.

679-48 But see National C. Co. *v.* Alexander, 75 Kan. 537, 89 P. 923.

Inconsistent acts of party may be shown. Fitzpatrick, etc. Co. *v.* McLaney, 153 Ala. 586, 44 S. 1023.

Acts of third parties, pursuant to instructions from litigant, may be proved in corroboration of his testimony. Brown *v.* Peterson, 25 App. Cas. (D. C.) 359.

680-50 P. *v.* Sciaroni, 4 Cal. App. 698, 89 P. 133; P. *v.* Koening, 99 Cal. 574, 34 P. 238; P. *v.* Morton, 139 Cal. 719, 73 P. 609; S. *v.* Egbert, 125 Ia. 443, 101 N. W. 191. *Comp.* S. *v.* Brown, 146 Ia. 113, 124 N. W. 899.

Time deposit made, etc. But see Miller *v.* Pierpont, 87 Conn. 406, 87 A. 785.

680-51 Proof of opportunity not sufficient. P. *v.* Sciaroni, 4 Cal. App. 698, 89 P. 133.

680-52 Batzold *v.* Upper, 4 Ont. L. R. (Can.) 116; P. *v.* Sullivan, 144 Cal. 471, 77 P. 1000; Smith *v.* S., 125 Ga. 296, 54 S. E. 127; S. *v.* Sells, 145 Ia. 675, 124 N. W. 776; S. *v.* Jones, 115 Ia. 113, 88 N. W. 196; Asher *v.* Howard, 28 Ky. L. R. 1097, 91 S. W. 270; S. *v.* Kruse, 24 S. D. 174, 123 N. W. 71.

682-63 Naftzger *v.* U. S., 200 Fed. 494, 118 C. C. A. 598; McLemore *v.* S. (Ark.), 164 S. W. 119; Greenwood *v.* S., 107 Ark. 568, 156 S. W. 427; Sims *v.* S. (Ga. App.), 79 S. E. 1133; Moon *v.* S., 12 Ga. App. 614, 77 S. E. 1088; S. *v.* Downing, 23 Ida. 540, 130 P. 461 (question for the jury); Murray *v.* S. (Miss.), 61 S. 315; P. *v.* Gillman, 145 N. Y. S. 775 (petit larceny); S. *v.* Marselle, 43 Wash. 273, 86 P. 586. See vol. 3, p. 665, n. 20.

684-64 Wilburn *v.* S. (Ga.), 81 S. E. 444; Chancey *v.* S. (Ga.), 80 S. E. 287; Sims *v.* S., 12 Ga. App. 551, 77 S. E. 891; State *v.* Skibiski, 245 Mo 459, 150 S. W. 1038; Wilson *v.* S. (Tex. Cr.), 157 S. W. 495. See Sanders *v.* S., 118 Ga. 329, 45 S. E. 365; Burk *v.* S., 50 Tex. Cr. 185, 95 S. W. 1064; vol. 2, p. 665, n. 20.

Confession may aid proof. Gray *v.* S., 44 Tex. Cr. 477, 72 S. W. 858; Kugadt *v.* S., 38 Tex. Cr. 681, 44 S. W. 989.

684-65 Burrow *v.* S. (Ark.), 159 S. W. 1163; Holland *v.* C., 26 Ky. L. R. 790, 82 S. W. 596; Burk *v.* S., 50 Tex. Cr. 185, 95 S. W. 1064.

Corroborative facts brought out by confession may be proved. Whitney *v.* C., 24 Ky. L. R. 2524, 74 S. W. 257.

684-66 Curran *v.* S., 12 Wyo. 553, 76 P. 577.

Complete proof not necessary.—P. *v.* Harrison, 261 Ill. 517, 104 N. E. 259.

The jury is the judge of sufficiency. S. *v.* Dorsey, 154 Ia. 298, 134 N. W. 946.

684-67 Hyde *v.* U. S., 35 App. Cas. (D. C.) 451 (conspiracy); Joiner *v.* S., 119 Ga. 315, 46 S. E. 412.

Though the evidence is strongly discredited—sufficient. Ivey *v.* S. (Ark.), 160 S. W. 208.

Any corroborating evidence which itself tends to connect the accused. Warren *v.* S. (Tex. Cr.), 149 S. W. 130, *following* P. *v.* Melvane, 39 Cal. 614.

685-72 S. *v.* Walsh, 25 S. D. 30, 125 N. W. 295.

686-76 Sam *v.* S., 33 Miss. 347, cited in original, *over.* by Spears *v.* S., 92 Miss. 613, 46 S. 166.

Sufficient if it be proved reasonably certain that the fire was of incendiary origin—in connection with defendant's confession. P. *v.* Hannibal, 259 Ill. 512, 102 N. E. 1042.

686-79 **Accused cannot be convicted** on the uncorroborated testimony of an accomplice. The corroboration must be as to the identity of the defendant as well as the commission of the crime. Reynolds *v.* S., 14 Ariz. 302, 127 P. 731; Hicks *v.* S., 126 Tenn. 359, 149 S. W. 1055.

686-80 If corpus delicti otherwise proved there may be conviction on the confession. Burk *v.* S., 50 Tex. Cr. 185, 95 S. W. 1064.

687-82 Cook *v.* S., 9 Ga. App. 208, 70 S. E. 1019, change of marks.

Defendant's possession of stolen property, unexplained, is sufficient to establish the corpus delicti together with his

confession. P. *v.* Goodwin, 263 Ill. 99, 104 N. E. 1018.

688-95 Baker *v.* S. (Ga. App.), 81 S. E. 805; C. *v.* Barton, 153 Ky. 465, 156 S. W. 113; S. *v.* Shaft (N. C.), 81 S. E. 932 (corroboration not essential); Jones *v.* S. (Okla. Cr.), 137 P. 124; Kaufman *v.* S. (Tex. Cr.), 159 S. W. 58; Perry *v.* S. (Tex. Cr.), 155 S. W. 263 (robbery); Foster *v.* S. (Tex. Cr.), 150 S. W. 936. See Stone *v.* S., 118 Ga. 705, 45 S. E. 630; Smith *v.* Co., 148 Ky. 60, 146 S. W. 4; Deary *v.* S., 62 Tex. Cr. 352, 137 S. W. 699.

It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to them. Sykes *v.* U. S., 201 Fed. 309 (C. C. A.).

In grand larceny no corroboration of accomplice necessary. S. *v.* Shaffer, 253 Mo. 320, 161 S. W. 805.

Evidence must tend to connect defendant with the commission of the offense. Nichols *v.* S. (Okla. Cr.), 133 P. 256 (violation of prohibition laws); Gillam *v.* S. (Okla. Cr.), 135 P. 441 (horse stealing); Kirk *v.* S. (Okla. Cr.), 135 P. 1156 (grand larceny); Head *v.* S. (Okla. Cr.), 131 P. 937 (violation of prohibition laws).

Slight circumstances may amount to sufficient corroboration. Anglin *v.* S. (Ga. App.), 81 S. E. 804.

The corroboration must be such as tends to connect the defendant with the crime. P. *v.* Sweeney, 161 App. Div. 221, 146 N. Y. S. 637; P. *v.* Evans, 81 Misc. 606, 143 N. Y. S. 49.

An accomplice's testimony must be corroborated in each essential detail. P. *v.* Willard, 159 App. Div. 19, 143 N. Y. S. 1032.

Corroboration not essential.—S. *v.* Fahey, 3 Penne. (Del.) 594, 54 A. 690; S. *v.* Wigger, 196 Mo. 90, 93 S. W. 390; S. *v.* Register, 133 N. C. 746, 46 S. E. 21.

Accessories after fact not within such statutes. S. *v.* Phillips, 18 S. D. 1, 98 N. W. 171.

688-97 S. *v.* Stevens, 133 Ia. 684, 110 N. W. 1037.

688-1 Perjured witness should be corroborated in case of felony. S. *v.* Fahey, 3 Penne. (Del.) 594, 54 A. 690.

689-6 P. *v.* Plath, 100 N. Y. 590, 3 N. E. 790; P. *v.* Page, 162 N. Y. 272, 56 N. E. 750.

689-7 Reg. *v.* Cramp, 14 Cox C. C. (Eng.) 390; S. *v.* Carey, 76 Conn. 342, 56 A. 632; Solander *v.* P., 2 Colo. 48; Thompson *v.* U. S., 30 App. Cas. (D. C.) 352, 12 A. & E. Ann. Cas. 1009; Seifert *v.* S., 160 Ind. 464, 67 N. E. 100, 98 Am. St. 349; S. *v.* Smith, 49 Ia. 26, 66 N. W. 428, 61 Am. St. 219; Peoples *v.* C., 87 Ky. 487, 9 S. W. 509, 810; C. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471; C. *v.* Boynton, 116 Mass. 343; C. *v.* Wood, 11 Gray 85; S. *v.* Pearce, 56 Minn. 226, 57 N. W. 652, 1065; S. *v.* Owens, 22 Minn. 238; S. *v.* Hyer, 39 N. J. L. 598 (see S. *v.* Murphy, 27 N. J. L. 112); P. *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616; P. *v.* Vedder, 98 N. Y. 630; P. *v.* Bliven, 11 N. Y. St. 495 *affd.* in 112 N. Y. 79, 19 N. E. 638, 8 Am. St. 701; P. *v.* Meyers, 107 N. Y. 671, 14 N. E. 608. (*Comp.* P. *v.* Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661; P. *v.* Costello, 1 Denio (N. Y.) 83); C. *v.* Bell, 4 Pa. Super. 187; Smartt *v.* S., 112 Tenn. 539, 80 S. W. 586; Hunter *v.* S., 38 Tex. Cr. 61, 41 S. W. 602 (see also Moore *v.* S., 37 Tex. Cr. 552, 40 S. W. 287. *Contra,* Wandell *v.* S. [Tex. Cr.], 25 S. W. 27); Watson *v.* S., 9 Tex. App. 237; Willingham *v.* S., 33 Tex. Cr. 98, 25 S. W. 424; Miller *v.* S., 37 Tex. Cr. 575, 40 S. W. 313; S. *v.* McLeod, 78 Wash. 175, 138 P. 648.

Accomplice in a moral and not a legal sense. S. *v.* Shaft (N. C.), 81 S. E. 932.

690-8 S. *v.* Crook, 16 Utah 212, 51 P. 1091.

Defendant's own testimony may furnish the necessary corroboration. P. *v.* Watson, 21 Cal. App. 692, 132 P. 836.

690-9 Sufficient if it tends to connect the defendant with the commission of the offense, although slight and entitled when standing alone to but little consideration. P. *v.* Watson, 21 Cal. App. 692, 132 P. 836.

Corroboration of victim of abortion may be required though she is not accomplice. S. *v.* Carey, 76 Conn. 342, 56 A. 632.

693-23 See P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364; P. *v.* Kathan, 136 App. Div. 303, 120 N. Y. S. 1096.

693-29 S. *v.* Wong Si Sam, 63 Or. 266, 127 P. 683.

Motive does not furnish corroboration.

P. *v.* Becker, 210 N. Y. 274, 104 N. E. 396.

694-31 Testimony of witness who perjured himself on former trial will not sustain conviction for felony. S. *v.* Fahey, 3 Penne. (Del.) 594, 54 A. 690.

694-32 S. *v.* Perry (Ia.), 105 N. W. 507.

694-33 S. *v.* Rennick, 127 Ia. 294, 103 N. W. 159; S. *v.* Tevis, 234 Mo. 276, 136 S. W. 339; Schwartz *v.* S., 65 Neb. 196, 91 N. W. 190; Bridges *v.* S., 80 Neb. 91, 113 N. W. 1048.

694-35 P. *v.* Stratton, 141 Cal. 604, 75 P. 166; Yother *v.* S., 120 Ga. 204, 47 S. E. 555; S. *v.* Mungeon, 20 S. D. 612, 108 N. W. 552; Wadkins *v.* S., 58 Tex. Cr. 110, 124 S. W. 959. See infra, "Incest," 449-41.

695-40 P. *v.* Koller, 142 Cal. 621, 76 P. 500; Bridges *v.* S., 80 Neb. 91, 113 N. W. 1048; S. *v.* Mungeon, 20 S. D. 612, 108 N. W. 552; Jordan *v.* S., 62 Tex. Cr. 388, 137 S. W. 114.

Continuous illicit relationship may be shown. P. *v.* Koller, 142 Cal. 621, 76 P. 500.

Other like acts between parties may be proven. Smith *v.* C., 109 Ky. 685, 60 S. W. 531.

Result of medical examination of prosecutrix may be given. P. *v.* Stratton, 141 Cal. 604, 75 P. 166.

696-43 S. *v.* Mungeon, 20 S. D. 612, 108 N. W. 552.

696-44 P. *v.* Smith, 3 Cal. App. 68, 84 P. 452; S. *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; S. *v.* Pratt, 21 S. D. 305, 112 N. W. 152; Holt *v.* S., 48 Tex. Cr. 559, 89 S. W. 838; Grady *v.* S., 49 Tex. Cr. 3, 90 S. W. 38; Billingsley *v.* S., 49 Tex. Cr. 620, 95 S. W. 520; Cleveland *v.* S., 50 Tex. Cr. 6, 95 S. W. 521.

Testimony on which charge based may be proved by one witness. Hambright *v.* S., 49 Tex. Cr. 162, 91 S. W. 232.

697-48 U. S. *v.* Hall, 44 Fed. 864, 10 L. R. A. 324; Powell *v.* S., 5 Ala. App. 150, 59 S. 328; S. *v.* Fahey, 3 Penne. (Del.) 594, 54 A. 690; Galloway *v.* S., 29 Ind. 442; Madigan *v.* Sturgis, 110 App. Div. 1, 96 N. Y. S. 1046; S. *v.* Pratt, 21 S. D. 305, 112 N. W. 152; Holt *v.* S., 48 Tex. Cr. 559, 89 S. W. 838; Cleveland *v.* S., 50 Tex. Cr. 6, 95 S. W. 521.

698-49 Stamper *v.* C., 30 Ky. L. R. 992, 100 S. W. 286; S. *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; S. *v.* Rutledge, 37 Wash. 523, 79 P. 1123.

Evidence must be more than sufficient to counterbalance oath of prisoner and presumption of innocence. S. *v.* Fahey, 3 Penne. (Del.) 594, 54 A. 690.

698-50 S. *v.* Pratt, 21 S. D. 305, 112 N. W. 152.

698-53 Defendant must be acquitted unless it be proven that he swore falsely by two witnesses or by one witness and strong corroborative circumstances. Partin *v.* C., 154 Ky. 701, 159 S. W. 542.

699-55 Boren *v.* U. S., 144 Fed. 801, 75 C. C. A. 531; U. S. *v.* Thompson, 31 Fed. 331; S. *v.* Richardson, 248 Mo. 563, 154 S. W. 735.

Corroboration required; evidence sufficient. P. *v.* Nichols, 108 App. Div. 362, 95 N. Y. S. 736.

699-57 Holt *v.* S., 48 Tex. Cr. 559, 89 S. W. 838; S. *v.* Rutledge, 37 Wash. 523, 79 P. 1123.

700-59 P. *v.* Smith, 3 Cal. App. 68, 84 P. 452.

700-60 Ex parte Metcalf, 8 Okla. Cr. 605, 129 P. 675.

701-62 Subornation of perjury. P. *v.* Metzler, 21 Cal. App. 80, 130 P. 1192.

701-63 State must prove which of two statements is false, and show that relied on for perjury as being false by evidence independent of contradictory statements of defendant or his sworn declaration. Billingsley *v.* S., supra.

702-65 Boren *v.* U. S., 144 Fed. 801, 75 C. C. A. 531.

704-76 Admissions must be explicit. Grady *v.* S., 49 Tex. Cr. 3, 90 S. W. 38.

705-78 P. *v.* Bonzani (Cal. App.), 111 Pac. 1062; P. *v.* Preston, 19 Cal. App. 675, 127 P. 660; P. *v.* Currie, 16 Cal. App. 731, 117 P. 941; P. *v.* Ah Lung, 2 Cal. App. 278, 83 P. 296; S. *v.* Brown, 85 Kan. 418, 116 P. 508; S. *v.* Swain, 239 Mo. 723, 144 S. W. 427; S. *v.* Welch, 191 Mo. 179, 89 S. W. 945; S. *v.* Dilts, 191 Mo. 665, 90 S. W. 782; S. *v.* Jones, 32 Mont. 442, 80 P. 1095; S. *v.* Fujita, 20 N. D. 555, 129 N. W. 360; Johnson *v.* S., 5 Okla. Cr. 1, 112 P. 760; S. *v.* Rash, 27 S. D. 185, 130 N. W. 91; Knowles *v.* S., 44 Tex. Cr. 322, 72 S. W. 398; Hill *v.* S. (Tex. Cr.), 77 S. W. 808; S. *v.* Fetterly, 33 Wash. 599, 74 P. 810; Brown *v.* S., 127 Wis. 193, 106 N. W. 536.

Assault with intent to rape.—S. *v.* McPherson (Or.), 138 P. 1076.

But if her testimony is contradictory and unconvincing it must be corroborated. S. *v.* Donnington, 246 Mo. 343, 151 S. W. 975.

706-79 Chaney *v.* C., 149 Ky. 464, 149 S. W. 923, admitting testimony of prosecutrix as to her age on authority of S. *v.* McClain, 49 Kan. 730, 31 P. 790; C. *v.* Phillips, 162 Mass. 504, 39 N. E. 109; S. *v.* Bowser, 21 Mont. 133, 53 P. 179, and other cases.

706-80 P. *v.* Crawford (Cal. App.), 141 Pac. 824; P. *v.* Scott (Cal. App.), 141 Pac. 945; Rivers *v.* S., 8 Ga. App. 703, 70 S. E. 50.

707-81 Herndon *v.* S., 2 Ala. App. 118, 56 S. 85.

707-82 See Burk *v.* S., 79 Neb. 241, 112 N. W. 573.

707-83 P. *v.* Ah Lung, 2 Cal. App. 278, 83 P. 296; Donovan *v.* S., 140 Wis. 570, 122 N. W. 1022 (especially if prosecutrix feeble-minded).

Corroboration required where prosecutrix's testimony is contradictory and her reputation for veracity is impeached and defendant's testimony is corroborated. S. *v.* Trego, 25 Ida. 625, 138 P. 1124.

707-84 Burk *v.* S., 79 Neb. 241, 112 N. W. 573; Klawitter *v.* S., 76 Neb. 49, 107 N. W. 121; Livinghouse *v.* S., 76 Neb. 491, 107 N. W. 854; Allen *v.* S. (Okla. Cr.), 134 P. 91.

A conviction in cases of either incest or rape may be had upon the uncorroborated evidence of the prosecutrix, but when the evidence of such prosecutrix is of a contradictory nature, or when applied to the admitted facts in the case her testimony is not convincing but leaves the mind of the court clouded with doubts, she must be corroborated, or the judgment cannot be sustained. S. *v.* Tevis, 234 Mo. 276, 136 S. W. 339, *cit.* S. *v.* Goodale, 210 Mo. 275, 290, 109 S. W. 9; S. *v.* Brown, 209 Mo. 413, 107 S. W. 1068.

In Georgia one accused of rape cannot testify, nor be convicted unless woman's testimony be corroborated. Davis *v.* S., 120 Ga. 433, 48 S. E. 180; Vanderford *v.* S., 126 Ga. 753, 55 S. E. 1025. Attempt to commit rape, not within rule. Fields *v.* S., 2 Ga. App. 41, 58 S. E. 327.

708-85 S. *v.* Sells, 145 Ia. 675, 124 N. W. 776; S. *v.* Egbert, 125 Ia. 443, 101 N. W. 191; P. *v.* Haischer, 81 App. Div. 559, 81 N. Y. S. 79; S. *v.* Gibson, 64 Wash. 131, 116 P. 872; S. *v.* McCool, 53 Wash. 487, 102 P. 422.

Testimony of mother of child upon whom rape was committed did not come within the rule. S. *v.* Ousley (Ia.), 147 N. W. 849.

708-87 S. *v.* Norris, 122 Ia. 154, 97 N. W. 999.

708-88 Evidence must tend to single out defendant and identify him. S. *v.* Egbert, 125 Ia. 443, 101 N. W. 191.

Fact of assault may be shown by testimony of prosecutrix. S. *v.* Bartlett, 127 Ia. 689, 104 N. W. 285; Duckett *v.* S. (Tex. Cr.), 150 S. W. 1177.

708-91 P. *v.* Ah Lung, 2 Cal. App. 278, 83 P. 296; S. *v.* Hetland, 141 Ia. 524, 119 N. W. 961; S. *v.* Whimpey, 140 Ia. 199, 118 N. W. 281; P. *v.* Shaw, 158 App. Div. 146, 142 N. Y. S. 782. See P. *v.* Farina, 134 App. Div. 110, 118 N. Y. S. 817; infra, "Rape," 601-18.

Sufficient corroboration if conflict resolved in favor of state. Hanks *v.* S., 88 Neb. 464, 129 N. W. 1011. But the corroboration must connect the defendant with the crime. S. *v.* Alva (N. M.), 134 P. 209.

Where evidence is incredible and improbable.—Morris *v.* S. (Okla. Cr.), 131 P. 731.

Must be corroborated as to every essential element of the crime and the connection therewith of the accused. P. *v.* Shaw, 158 App. Div. 146, 142 N. Y. S. 782.

Disposition and opportunity shown is sufficient. Kanert *v.* S., 92 Neb. 14, 137 N. W. 975.

Insufficient corroboration.—S. *v.* Cowing, 99 Minn. 123, 108 N. W. 851; Klawitter *v.* S., 76 Neb. 49, 107 N. W. 121; P. *v.* Haischer, 81 App. Div. 559, 81 N. Y. S. 79.

709-92 P. *v.* Ah Lung, 2 Cal. App. 278, 83 P. 296; Peckham *v.* P., 32 Colo. 140, 75 P. 422; S. *v.* Hetland, 141 Ia. 524, 119 N. W. 961; S. *v.* Norris, 122 Ia. 154, 97 N. W. 999; S. *v.* Bartlett, 127 Ia. 689, 104 N. W. 285; P. *v.* De Nigris, 157 App. Div. 798, 142 N. Y. S. 620; S. *v.* Stewart, 52 Wash. 61, 100 P. 153.

Other acts of illicit intercourse may be proved as corroborative of testimony of prosecutrix under age of consent. P. *v.* Williams, 133 Cal. 165, 65 P. 323;

P. *v.* Edwards, 130 Cal. 527, 73 P. 416; S. *v.* King, 117 Ia. 484, 91 N. W. 768; S. *v.* Borchert, 68 Kan. 360, 74 P. 1108; Smith *v.* C., 109 Ky. 685, 60 S. W. 531; Woodruff *v.* S., 72 Neb. 815, 101 N. W. 1114; Sykes *v.* S., 112 Tenn. 572, 82 S. W. 185; Taylor *v.* S., 22 Tex. App. 529, 3 S. W. 853, 58 Am. Rep. 656; S. *v.* Fetterly, 33 Wash. 599, 74 P. 810; Lanphere *v.* S., 114 Wis. 193, 89 N. W. 128. But proof of such acts after alleged date is not competent to corroborate person who may consent. P. *v.* Robertson, 88 App. Div. 198, 84 N. Y. S. 401.

Birth of child, not corroborative. S. *v.* Coffman, 112 Ia. 8, 83 N. W. 721; S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531; P. *v.* Robertson, 88 App. Div. 198, 84 N. Y. S. 401. It is given little weight if it occurred much before lapse of usual time unless shown to have been premature. Livinghouse *v.* S., 76 Neb. 491, 107 N. W. 854. Miscarriage may be proved. S. *v.* Fetterly, 33 Wash. 599, 74 P. 810.

709-93 Posey *v.* S., 143 Ala. 54, 38 S. 1019; S. *v.* Fishel, 140 Ia. 460, 118 N. W. 763; S. *v.* Carpenter, 124 Ia. 5, 98 N. W. 775; C. *v.* Cleary, 172 Mass. 175, 51 N. E. 746; S. *v.* Stines, 138 N. C. 686, 50 S. E. 851; S. *v.* Werner, 16 N. D. 83, 112 N. W. 60; Adams *v.* S., 52 Tex. Cr. 13, 105 S. W. 197; Brown *v.* S., 52 Tex. Cr. 267, 106 S. W. 368; S. *v.* Holcomb, 73 Wash. 652, 132 P. 416. **See** Warren *v.* S., 54 Tex. Cr. 443, 114 S. W. 380.

Error to charge the jury that they may take into consideration, on the question of corroboration of the testimony of the prosecutrix (a girl of seven) whether she made a prompt complaint. S. *v.* Rodesky (N. J.), 90 A. 1099.

Not corroborative within Penal Law §2013 P. *v.* Shaw, 158 App. Div. 146, 142 N. Y. S. 782.

709-94 S. *v.* Haugh, 156 Ia. 639, 137 N. W. 917; S. *v.* Sells, 145 Ia. 675, 124 N. W. 776; Loar *v.* S., 76 Neb. 148, 107 N. W. 229; Powers *v.* S., 138 Ga. 624, 75 S. E. 651.

Not sufficient.—S. *v.* Stewart, 52 Wash. 61, 100 P. 153.

710-95 Admissions not corroborative unless they relate to acts on date alleged or prior thereto. P. *v.* Robertson, 88 App. Div. 198, 84 N. Y. S. 401.

710-96 Burk *v.* S., 79 Neb. 241, 112 N. W. 573.

710-97 **Result of medical examination immediately** had is competent. Brown *v.* S., 52 Tex. Cr. 267, 106 S. W. 368. And so of examination six months later. P. *v.* Ah Lung, 2 Cal. App. 278, 83 P. 296.

Discoloration of garments may be shown. S. *v.* Norris, 127 Ia. 683, 104 N. W. 282.

710-98 S. *v.* Sells, 145 Ia. 675, 124 N. W. 776 (its significance depends upon circumstances); Mott *v.* S., 83 Neb. 226, 119 N. W. 461; S. *v.* Gibson, 64 Wash. 131, 116 P. 872; S. *v.* McCool, 53 Wash. 487, 102 P. 422. See infra, "Rape," 601-48.

Constant association of parties may be given weight. S. *v.* Norris, 122 Ia. 154, 97 N. W. 999.

711-99 Opportunity is not sufficient corroboration unless it was exclusive (S. *v.* Stevens, 133 Ia. 684, 110 N. W. 1037), or the result of defendant's proposed act and connected with other acts. S. *v.* Norris, supra.

711-1 Washington *v.* S., 124 Ga. 423, 52 S. E. 910.

711-4 Rex *v.* Daun, 12 Ont. L. R. (Can.) 227; Burnett *v.* S., 76 Ark. 295, 88 S. W. 956; Carrens *v.* S., 77 Ark. 16, 91 S. W. 30; Lasater *v.* S., 77 Ark. 468, 94 S. W. 59; S. *v.* Herrington, 147 Ia. 636, 126 N. W. 772; Terry *v.* S., 97 Miss. 472, 52 S. 483; S. *v.* Fogg, 206 Mo. 696, 105 S. W. 618; Lemmons *v.* S., 58 Tex. Cr. 269, 125 S. W. 400; Howe *v.* S., 51 Tex. Cr. 171, 102 S. W. 409.

Not required in civil action.—Beans *v.* Denny, 141 Ia. 52, 117 N. W. 1091. Nor in prosecution for having carnal knowledge of female under eighteen. S. *v.* Day, 188 Mo. 359, 87 S. W. 465.

The statutory allegation of the indictment that she was "of previous chaste character," and that the carnal knowledge was obtained "by virtue of a false or feigned promise of marriage," cannot be maintained on the testimony of the prosecutrix alone. The prosecutrix must be corroborated by evidence upon these two points. Such is the burden, so to speak, placed upon the state in cases of this character. Carter *v.* S., 99 Miss. 206, 54 S. 805.

712-5 **Sufficiency.**—Holland *v.* S. (Ala. App.), 66 S. 126.

712-6 S. *v.* Sublett, 191 Mo. 163, 90 S. W. 374.

712-10 It is sufficient if prosecutrix's testimony as to promise is corroborated by defendant's admissions, or facts and circumstances such as usually attend an engagement of marriage. S. *v.* Sublett, supra; S. *v.* Phillips, 185 Mo. 185, 83 S. W. 1080.

712-11 Long *v.* S., 100 Miss. 7, 56 S. 185; S. *v.* Holter, 30 S. D. 353, 138 N. W. 953; James *v.* S. (Tex. Cr.), 161 S. W. 472; Curry *v.* S. (Tex. Cr.), 151 S. W. 319; Nash *v.* S., 61 Tex. Cr. 259, 134 S. W. 709. See infra, "Seduction," 697-41.

713-15 Burnett *v.* S., 76 Ark. 295, 88 S. W. 956; Rucker *v.* S., 77 Ark. 23, 90 S. W. 151; Carrens *v.* S., 77 Ark. 16, 91 S. W. 30; Lasater *v.* S., 77 Ark. 468, 94 S. W. 59; S. *v.* Fogg, 206 Mo. 696, 105 S. W. 618; Chuck *v.* S. (Okla. Cr.), 132 P. 930; Spenrath *v.* S. (Tex. Cr.), 48 S. W. 192.

Corroboration as to promise not essential if prosecutrix corroborated so as to establish credibility. Weaver *v.* S., 142 Ala. 33, 39 S. 341; Rex *v.* Daun, 12 Ont. L. R. (Can.) 227.

Testimony not insufficient because it tends to prove act of intercourse subsequent to first of such acts if it was at time of, or subsequent to, promise. Rucker *v.* S., 77 Ark. 23, 90 S. W. 151.

In a prosecution for abandonment after seduction the prosecutrix need not be corroborated both as to the act of intercourse and the promise of marriage. James *v.* S. (Tex. Cr.), 167 S. W. 727.

714-16 Rex *v.* Burr, 13 Ont. L. R. (Can.) 485; S. *v.* Bruton, 253 Mo. 361, 161 S. W. 751; S. *v.* Kincaid, 142 N. C. 657, 55 S. E. 647; Gillespie *v.* S. (Tex. Cr.), 166 S. W. 135.

Need not be corroborated specifically as to promise of marriage or intercourse. De Rossett *v.* S. (Tex. Cr.), 168 S. W. 531.

714-17 S. *v.* Smith, 124 Ia. 334, 100 N. W. 40; S. *v.* Waterman, 75 Kan. 253, 88 P. 1074; S. *v.* Day, 188 Mo. 359, 87 S. W. 465; S. *v.* Fogg, 206 Mo. 696, 105 S. W. 618; Cole *v.* S. (Tex. Cr.), 156 S. W. 929.

Both the act of intercourse and the promise of marriage can be established by circumstantial evidence. Bost *v.* S., 64 Tex. Cr. 464, 144 S. W. 589.

Subsequent illicit acts may be proved. S. *v.* Robertson, 121 N. C. 551, 28 S. E. 59.

Subsequent promise to marry, corroborative of original promise. S. *v.* Waterman, 75 Kan. 253, 88 P. 1074.

Circumstances testified to by other witnesses. S. *v.* Long (Mo.), 165 S. W. 748.

714-18 Fine *v.* S., 45 Tex. Cr. 290, 77 S. W. 806.

Acts and declarations of accused may be sufficient. Rex *v.* Daun, 12 Ont. L. R. (Can.) 227.

714-19 Weaver *v.* S., 142 Ala. 33, 39 S. 341; Lasater *v.* S., 77 Ark. 468, 94 S. W. 59; S. *v.* Reinheimer, 109 Ia. 624, 80 N. W. 669; S. *v.* Waterman, 75 Kan. 253, 88 P. 1074.

Continuous association for two years is slight circumstance on which to base corroboration of testimony of engagement. Fine *v.* S., 45 Tex. Cr. 290, 77 S. W. 806; Spenrath *v.* S. (Tex. Cr.), 48 S. W. 192.

715-20 S. *v.* Fogg, 206 Mo. 696, 105 S. W. 618.

Manifestation and expression of desire and opportunity to gratify it, enough. King *v.* Burr, 13 Ont. L. R. (Can.) 485.

715-23 Weaver *v.* S., 142 Ala. 33, 39 S. 341; S. *v.* Phillips, 185 Mo. 185, 83 S. W. 1080; S. *v.* Sublett, 191 Mo. 163, 90 S. W. 374; S. *v.* Fogg, supra.

Appellant having married prosecutrix after prosecution for seduction to secure dismissal of that case is a virtual admission. James *v.* S. (Tex. Cr.), 167 S. W. 727.

Admission of promise to marry prosecutrix is competent and corroborative. Bray *v.* U. S., 39 App. Cas. (D. C.) 600.

715-24 Weaver *v.* S., supra; Whatley *v.* S., 144 Ala. 68, 39 S. 1014; Lasater *v.* S., 77 Ark. 468, 94 S. W. 59; Bishop *v.* S. (Tex. Cr.), 151 S. W. 821; Howe *v.* S., 51 Tex. Cr. 174, 102 S. W. 409.

Terms used in letter may be shown by witness who has read it though he cannot give its contents. Lasater *v.* S., supra.

Letters must be identified or proved by other testimony than that of prosecutrix. Carrens *v.* S., 77 Ark. 16, 91 S. W. 30.

716-25 S. *v.* McGinn, 109 Ia. 641, 80 N. W. 1068; S. *v.* Nugent, 134 Ia. 237, 111 N. W. 927; James *v.* S. (Tex. Cr.), 167 S. W. 727.

716-26 Date of child's birth corroborative of mother's testimony as to time of intercourse. Whatley *v.* S., 144 Ala. 68, 39 S. 1014.

716-27 Fine *v.* S., 45 Tex. Cr. 290, 77 S. W. 806.

716-28 **Statements of prosecutrix** to mother concerning engagement and seduction may be proved. S. *v.* Whitley, 141 N. C. 823, 53 S. E. 820.

Prosecutrix not compelled to submit to physical examination to furnish corroborative evidence for defendant. Bowers *v.* S., 45 Tex. Cr. 185, 75 S. W. 299.

Letters of defendant which prosecutrix alone testified to as being written by him to her will not furnish the corroboration which the law requires as she cannot corroborate herself. Bishop *v.* S. (Tex. Cr.), 151 S. W. 821.

716-29 Declarations by prosecutrix as to defendant's purpose to marry may be shown. S. *v.* Kincaid, 142 N. C. 657, 55 S. E. 647.

716-30 Preparation for marriage may be shown. S. *v.* Fogg, 206 Mo. 696, 105 S. W. 618.

718-43 Salchert *v.* Reinig, 135 Wis. 194, 115 N. W. 132.

719-47 Seduction may be proved. Lauer *v.* Banning, 140 Ia. 319, 118 N. W. 446.

719-49 Yerger *v.* Murdock, 126 La. 793, 52 S. 1028.

721-59 Jaquith Co. *v.* Shumway, 80 Vt. 556, 69 A. 157.

723-69 Divorce may be granted on uncorroborated evidence, though practice is otherwise. Curtis *v.* Curtis, 21 T. L. R. (Eng.) 676.

723-70 Sisk *v.* Sisk, 99 Ark. 94, 136 S. W. 987; Chappell *v.* Chappell, 83 Ark. 533, 104 S. W. 203; Hayes *v.* Hayes, 144 Cal. 625, 78 P. 19; Avery *v.* Avery, 148 Cal. 239, 82 P. 967; Blanchard *v.* Blanchard, 10 Cal. App. 203, 101 P. 536; Bell *v.* Bell, 15 Ida. 7, 96 P. 196 (by statute statements, admissions or testimony of both parties must be corroborated); Hutchinson *v.* Hutchinson, 53 Misc. 438, 104 N. Y. S. 1074; Tuttle *v.* Tuttle, 21 N. D. 503, 131 N. W. 460; Lohmuller *v.* Lohmuller (Tex. Civ.), 135 S. W. 751.

Sufficient if corroborative evidence tends to support the complaint, and unnecessary to corroborate each matter of testimony. Hertz *v.* Hertz (Minn.), 147 N. W. 825.

Applies to every essential element in the proofs. Williams *v.* Williams, 81 N. J. Eq. 17, 85 A. 611.

724-71 Lenoir *v.* Lenoir, 24 App. Cas. (D. C.) 160; May *v.* May, 71 Kan. 317, 80 P. 567.

724-73 Should be rarely granted unless there is some corroborative evidence. Gruner *v.* Gruner (Mo. App.), 165 S. W. 865.

725-77 Hayes *v.* Hayes, 144 Cal. 625, 78 P. 19; May *v.* May, supra.

Confession must be corroborated by independent facts and circumstances. Michalowricz *v.* Michalowricz, 25 App. Cas. (D. C.) 484.

725-79 McMullin *v.* McMullin, 140 Cal. 112, 73 P. 808; Michalowricz *v.* Michalowricz, supra; Bell *v.* Bell, 15 Ida. 7, 96 P. 196; May *v.* May, 71 Kan. 317, 80 P. 567.

726-81 Wood *v.* Wood (N. J. Eq.), 62 A. 429; Lister *v.* Lister, 65 N. J. Eq. 109, 55 A. 1093; Cotter *v.* Cotter (N. J. Eq.), 58 A. 73 (difficulty in obtaining evidence, immaterial).

All essential facts must be corroborated. Sterling *v.* Sterling, 71 N. J. Eq. 59, 63 A. 548.

Corroboration need not be by witnesses but may be furnished by surrounding circumstances. Robinson *v* Robinson (N. J. Eq.), 90 A. 311.

726-85 Ogden *v.* Ogden (Tex. Civ.), 144 S. W. 355.

727-86 **Insufficient corroboration.** Grady *v.* Grady (N. J. Eq.), 64 A. 440.

Refusing to become reconciled and so declaring to third parties is sufficient. McMullin *v.* McMullin, 140 Cal. 112, 73 P. 808.

Proof of continuance of separation not sufficient corroboration of desertion. Corder *v.* Corder (N. J. Eq.), 59 A 309; Kline *v.* Kline (N. J. Eq.), 61 A. 1060.

Testimony concerning condonation is corroborated by resumption of marital relations. Womack *v.* Womack, 73 Ark. 281, 83 S. W. 937, 1136.

727-87 **Anterior and subsequent improper familiarities** may be shown. Thayer *v.* Thayer, 101 Mass. 111; S. *v.* Way, 5 Neb. 283; Lanphere *v.* S., 114 Wis. 193, 89 N. W. 128.

Evidence of opportunity must be supplemented by proof of inclination. Hutchinson *v.* Hutchinson, 53 Misc. 438, 104 N. Y. S. 1074; Roth *v.* Roth,

90 App. Div. 87, 85 N. Y. S. 640, *aff.*, no opinion, 183 N. Y. 520, 76 N. E. 1107.

727-88 See Blue *v.* S., 86 Neb. 189, 125 N. W. 136.

Rule satisfied in Letts *v.* Letts, 79 N. J. Eq. 513, 84 A. 573.

727-91 Avery *v.* Avery, 148 Cal. 239, 82 P. 967; Tuttle *v.* Tuttle, 21 N. D. 503, 131 N. W. 460.

It is impossible to lay down any rule as to the degree of corroboration required, the statute only requiring some corroborating evidence. It must be sufficient when considered with other evidence in the case. De Cloedt *v.* De Cloedt, 24 Ida. 277, 133 P. 664.

727-92 See infra, "Divorce," 794-39, 795-42.

729-4 Admissions by decedent satisfy statute requiring corroborating testimony as to transactions with him. Batzold *v.* Upper, 4 Ont. L. R. (Can.) 116. Otherwise as to another note signed by deceased and witnessed only by plaintiff; his testimony was not sufficient. But a mortgage executed by deceased and identified by plaintiff and endorsed as registered was sufficient under a statute making registration prima facie evidence of execution. Thompson *v.* Thompson, 4 Ont. L. R. (Can.) 442.

730-7 A resulting trust in favor of a wife cannot be established by her own and husband's uncorroborated testimony as against his creditors. Burnett *v.* Co., 1 Tenn. Ch. App. 18.

Testimony need not go to the details; if it meets some important points it will be sufficient. Burnett *v.* Co., supra.

730-8 Receipt given by third party to grantor of a party, competent to sustain latter's testimony. Powers *v.* Hatter, 152 Ala. 636, 44 S. 859.

Memorandum written in presence of other party.—Athens Mfg. Co. *v.* Malcolm, 134 Ga. 600, 68 S. E. 329, following Reviere *v.* Powell, 61 Ga. 30, 34 Am. Rep. 94.

Negative evidence, proper. Potter *v.* R. Co., 136 Mo. App. 125, 117 S. W. 593.

Account book competent as part of transaction though inadmissible for purposes. Crawford *v.* U. S., 212 U. S. 183.

Caution must be exercised in receiving collateral facts to settle conflicting testimony. First Nat. Bk. *v.* Rush City, etc. Co., 119 Minn. 51, 137 N. W. 179.

Evidence of finding prosecutor's hat and tracks of persons near a certain place is competent to corroborate the prosecutor's testimony that he had been jerked from a buggy, held down, and shot and had lost his hat there. Wilson *v.* S. (Tex. Cr.), 155 S. W. 242.

730-9 Ability to pay may be shown to corroborate claim of payment. Dick *v.* Marvin, 188 N. Y. 426, 81 N. E. 162.

731-10 Accomplice need not be corroborated on every material fact, but it is enough if he be sufficiently corroborated to satisfy the jury that he spoke the truth with reference thereto and thus induced the belief that his entire testimony is true though not otherwise corroborated. S. *v.* O'Callaghan (Ia.), 138 N. W. 402, *cit.* S. *v.* Feuerhaken, 96 Ia. 299, 65 N. W. 299; S. *v.* Hall, 97 Ia. 400, 66 N. W. 725; S. *v.* Allen, 57 Ia. 431, 10 N. W. 805; S. *v.* Hennessy, 55 Ia. 299, 7 N. W. 641.

731-11 Mistake by witness in part of his testimony does not make corroborating evidence as to another part of it inadmissible. S. *v.* Easley, 118 La. 690, 43 S. 279.

731-12 Evidence of complaints made soon after the event is competent, if limited to the fact of making them. Hopt *v.* Utah, 110 U. S. 574; Oakley *v.* S., 135 Ala. 15, 33 S. 23, 135 Ala. 29, 33 S. 1019; Bray *v.* S., 131 Ala. 46, 31 S. 107; Posey *v.* S., 143 Ala. 54, 38 S. 1019; S. *v.* Egbert, 125 Ia. 443, 101 N. W. 191; Reddick *v.* S., 35 Tex. Cr. 463, 34 S. W. 274, 60 Am. St. 56.

Proof of long delayed complaints inadmissible. S. *v.* Griffin, 43 Wash. 591, 86 P. 951. It may be shown prosecutrix complained of accused's enforced attentions. Brown *v.* S., 52 Tex. Cr. 267, 106 S. W. 368.

Statement in answer to question. A statement made by a girl under the age of consent in reply to a question not of a suggestive or leading character may be shown in corroboration of her testimony. Rex *v.* Osborne (1905) 1 K. B. (Eng.) 551, *dist.* Reg. *v.* Merry, 19 Cox C. C. (Eng.) 442, on the ground it did not appear what nature of question was.

732-13 Tyrrel *v.* S., 177 Ind. 14, 97 N. E. 14; Strebin *v.* Lavengood, 163

Ind. 478, 71 N. E. 494; Wagner *v.* Bk. (Ia.), 118 N. W. 523; Gradington *v.* S. (Tex. Cr.), 155 S. W. 210; Gulf etc. R. Co. *v.* Franklin (Tex.), 155 S. W. 553; Pierce *v.* S. (Tex. Cr.), 154 S. W. 559; S. *v.* Constantine, 48 Wash. 218, 93 P. 317; Roane L. Co. *v.* Lovett (W. Va.), 78 S. E. 102.

Sufficiency of verification of employe's reports is for court's discretion. Strand *v.* R. Co., 101 Minn. 85, 111 N. W. 958.

Acts of party may corroborate testimony of witnesses. Bedsole *v.* R. Co., 151 N. C. 152, 65 S. E. 925.

Introduction of photographs corroborative. P. *v.* Ong Git (Cal. App.), 137 P. 283.

Impeachment of an accomplice.—Gusemano *v.* S. (Tex. Cr.), 155 S. W. 217.

733-14 Louisville R. Co. *v.* Varner, 129 Ga. 844, 60 S. E. 162; Lane *v.* S. (Tex. Cr.), 164 S. W. 378; Quigley *v.* R. Co. (Tex. Civ.), 142 S. W. 633; Downing *v.* S., 61 Tex. Cr. 519, 136 S. W. 471; M. K. & T. R. Co. *v.* Williams (Tex. Civ.), 133 S. W. 499; Davis *v.* S., 45 Tex. Cr. 292, 77 S. W. 451; Bowen *v.* S., 47 Tex. Cr. 137, 82 S. W. 520. *Comp.* Cox *v.* S., 58 Fla. 33, 50 S. 875.

Admission of such evidence improper but not ground for reversal. First Nat. Bk. *v.* Wells, 127 Fed. 818, 62 C. C. A. 134.

Testimony as to irrelevant matters offered solely to give support to previous statement of witness may be excluded. Toole *v.* Davis, 13 Ga. App. 122, 78 S. E. 865.

735-15 Campbell *v.* S. (Ala.), 62 S. 57; Fitzpatrick etc. Co. *v.* McLaney, 153 Ala. 586, 44 S. 1023; Moynahan *v.* Perkins, 36 Colo. 481, 85 P. 1132; S. *v.* Mulch, 17 S. D. 321, 96 N. W. 101. See Sivley *v.* Sivley, 96 Miss. 137, 51 S. 457; Wilson *v.* S. (Tex. Cr.), 158 S. W. 512.

Where appellant had testified he was informed of certain facts by his father it was error, to refuse to permit the father to testify that he had so told his son. Qualls *v.* S. (Tex. Cr.), 158 S. W. 539.

735-16 Inman *v.* Dudley, 146 Fed. 449, 76 C. C. A. 659; McCullars *v.* Co., 169 Ala. 582, 53 S. 1025; S. *v.* Fogg, 206 Mo. 696, 105 S. W. 618; First Nat. Bk. *v.* Blakeman, 19 Okla. 106, 91 P. 868; Bain *v.* S. (Tex. Cr.), 166 S. W. 505; Hill *v.* S., 52 Tex. Cr. 241, 106 S. W. 145; Green *v.* S., 49 Tex. Cr. 238, 90 S. W. 1115; Ft. Worth Belt R. Co. *v.* Cabell (Tex. Civ.), 161 S. W. 1083.

Manner in which attack made, immaterial. S. *v.* Exum, 138 N. C. 599, 612, 50 S. E. 283.

A written statement of facts prepared by the witness to inform his lawyer of the facts and circumstances, where the witness has not been impeached, is not admissible on re-direct examination to corroborate him. S. *v.* Turley (Vt.), 88 A. 562.

736-17 Spalding *v.* Laybourn (Ia.), 145 N. W. 521; Griffin *v.* Boston, 188 Mass. 475, 74 N. E. 687; Smith *v.* Plant, 216 Mass. 91, 103 N. E. 58; S. *v.* Werner, 16 N. D. 83, 112 N. W. 60; Jones *v.* S. (Okla. Cr.), 133 P. 249; C. *v.* Brown, 23 Pa. Super. 470; Glass *v.* Bennett, 89 Tenn. 478, 14 S. W. 1085; Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272; Kaufman *v.* S. (Tex. Cr.), 165 S. W. 193; Phillips *v.* S. (Tex. Cr.), 164 S. W. 1004; Houston & T. C. R. Co. *v.* Fox (Tex. Civ.), 166 S. W. 693; Anderson *v.* S., 50 Tex. Cr. 134, 95 S. W. 1037; Rice *v.* S., 50 Tex. Cr. 648, 100 S. W. 771; Craven *v.* S., 49 Tex. Cr. 78, 90 S. W. 311.

736-18 Sweeney *v.* Sweeney, 121 Ga. 293, 48 S. E. 984; P. *v.* Katz, 209 N. Y. 311, 103 N. E. 305; P. *v.* Katz, 154 App. Div. 44, 139 N. Y. S. 137; Kipper *v.* S., 45 Tex. Cr. 377, 77 S. W. 611; S. *v.* Turley (Vt.), 88 A. 562.

An accomplice may be thus sustained the same as any witness. Holmes *v.* S. (Tex. Cr.), 156 S. W. 1172.

Testimony of an accomplice.—Gusemano *v.* S. (Tex. Cr.), 155 S. W. 217; Holmes *v.* S. (Tex. Cr.), 156 S. W. 1172.

737-19 Houston T. & C. R. Co. *v.* Fox (Tex.), 166 S. W. 693. Circumstances corroborative of testimony may be proved. Elzy *v.* Co., 141 Ia. 407, 119 N. W. 705 (connected with transaction); Ball *v.* C., 27 Ky. L. R. 448, 85 S. W. 226.

737-20 Legere *v.* S., 111 Tenn. 368, 77 S. W. 1059; Anderson *v.* S., 50 Tex. Cr. 134, 95 S. W. 1037; White *v.* S., 42 Tex. Cr. 567, 62 S. W. 575. See Driggers *v.* U. S., 7 Ind. Ty. 752, 104 S. W. 1166.

Time statements made immaterial to their competency. S. *v.* Exum, 138 N. C. 599, 612, 50 S. E. 283. Provable if

made contemporaneously. Rice *v.* S., 50 Tex. Cr. 648, 100 S. W. 771.

738-22 Bowman *v.* Blankenship (N. C.), 81 S. E. 746; Phillips G. & O. Co. *v.* Co., 213 Pa. 183, 62 A. 830; Pyroleum A. Co. *v.* Williamsport, 169 Pa. 440, 32 A. 458.

Contemporaneous declarations are admissible as corroboration. Perrett *v.* S. S. Co., 131 La. 986, 60 S. 639.

738-23 Am. Agr. Chem. Co. *v.* Hogan, 213 Fed. 416; Southern P. Co. *v.* Schuyler, 135 Fed. 1015, 68 C. C. A. 409; Morison *v.* Co., 126 App. Div. 575, 110 N. Y. S. 801; S. *v.* Exum, 138 N. C. 599, 611, 50 S. E. 283; Jones *v.* S. (Okla. Cr.), 133 P. 249; Walker *v.* S. (Tex. Cr.), 163 S. W. 71; Weaver *v.* S. (Tex. Cr.), 150 S. W. 785; Carver *v.* S. (Tex. Cr.), 150 S. W. 914; Gradington *v.* S. (Tex. Cr.), 155 S. W. 210; Texas & P. R. Co. *v.* Tuck (Tex. Civ.), 116 S. W. 620; Akin *v.* S., 56 Tex. Cr. 324, 119 S. W. 863; Green *v.* S., 49 Tex. Cr. 238, 90 S. W. 1115; Mason *v.* R. Co. (Tex. Civ.), 151 S. W. 350; Hunter *v.* Lanius, 82 Tex. 82, 18 S. W. 201; Dean *v.* S., 47 Tex. Cr. 243, 83 S. W. 816; Hardin *v.* R. Co., 49 Tex. Civ. 184, 108 S. W. 490; Hill *v.* S., 52 Tex. Cr. 241, 106 S. W. 145; Holmes *v.* S., 52 Tex. Cr. 353, 106 S. W. 1160; Davis *v.* S., 45 Tex. Cr. 292, 77 S. W. 451; Cutchin *v.* City of Roanoke, 113 Va. 452, 74 S. E. 403.

Even though cross-examination shows an intention to impeach. Smith *v.* Plant, 216 Mass. 91, 103 N. E. 58.

Contradictory statements must be shown; attempt to show improbability of witness' statement, not impeachment. Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501.

739-24 In re McClellan, 21 S. D. 209, 111 N. W. 540 (modifying contrary expression in ruling in same case); S. *v.* Exum, 138 N. C. 599, 612, 50 S. E. 283; Davis *v.* Farwell, 80 Vt. 166, 67 A. 129. See Littieri *v.* Freda, 241 Pa. 21, 88 A. 82.

A letter written before maturity of the notes to another bank advising them of their purchase signed by the bank's president is admissible to corroborate his testimony. Nat. State Bk. *v.* Ricketts (Tex. Civ.), 152 S. W. 646.

740-26 This does not authorize the party calling the witness to give in evidence all the testimony of such witness at the former trial, but only so much thereof as explains, modifies, or is necessary to enable the court or jury by trying the cause to understand the statements introduced to impeach the witness. Tyrrel *v.* S., 177 Ind. 14, 97 N. E. 14.

740-27 Falkner *v.* S., 151 Ala. 77, 44 S. 409.

740-28 Edwards *v.* S., 61 Tex. Cr. 307, 135 S. W. 540.

Witness' reputation for truth and veracity may be shown where defendant has offered proof of statements made in contradiction of his testimony. Graham *v.* S., 153 Ala. 38, 45 S. 580; Holley *v.* S., 105 Ala. 100, 17 S. 102; Brown *v.* S., 142 Ala. 287, 38 S. 268; Bell *v.* Aiken, 1 Ga. App. 36, 57 S. E. 1001; Clark *v.* S., 117 Ga. 254, 43 S. E. 853; Browning *v.* R. Co., 118 Mo. App. 449, 94 S. W. 315; Berryman *v.* Cox, 73 Mo. App. 67; Warfield *v.* R. Co., 104 Tenn. 74, 55 S. W. 304, 78 Am. St. 911; R. Co. *v.* Minton, 117 Tenn. 415, 101 S. W. 178; Myers *v.* S. (Tex. Cr.), 101 S. W. 1000; Dunlap *v.* S., 50 Tex. Cr. 504, 98 S. W. 845; Contreras *v.* Co. (Tex. Civ.), 83 S. W. 870; Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493; Texas C. R. Co. *v.* Weideman (Tex. Civ.), 62 S. W. 810; Harris *v.* S., 49 Tex. Cr. 338, 94 S. W. 227; Chesapeake & O. R. Co. *v.* Fortune, 107 Va. 412, 59 S. E. 1095; Kraimer *v.* S., 117 Wis. 350, 93 N. W. 1097.

Contra, S. *v.* Hoffman, 134 Ia. 587, 112 N. W. 103; S. *v.* Owens, 109 Ia. 1, 79 N. W. 462.

Mere difference between witnesses, not such impeachment as makes proof of character competent. Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844; White *v.* Epperson, 32 Tex. Civ. 162, 73 S. W. 851.

740-29 Granberry *v.* S. (Ala.), 63 S. 975; Sills *v.* S., 2 Ala. App. 73, 57 S. 89; Birmingham R. L. Co. *v.* Hayes, 153 Ala. 178, 44 S. 1032; Burks *v.* S., 78 Ark. 271, 93 S. W. 983 (indicating varying opinions as to competency of such evidence); Peters *v.* S., 124 Ga. 80, 52 S. E. 147; McBride *v.* R. Co., 125 Ga. 515, 54 S. E. 674; Cook *v.* S., 124 Ga. 653, 53 S. E. 104; Cobb *v.* S., 11 Ga. App. 52, 74 S. E. 702; Chicago C. R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443; Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501; S. *v.* Cato, 116 La. 195, 40 S. 633; Weitzel *v.* Fowler, 143 Mich. 700, 107 N. W. 451; Head

v. S., 44 Miss. 731; S. *v.* Taylor, 134 Mo. 109, 35 S. W. 92; Kipp *v.* Silverman, 25 Mont. 296, 64 P. 884; State *v.* Brown, 240 Mo. 715, 153 S. W. 1027; S. *v.* Ludwig (N. J.) 88 A. 822; Cincinnati T. Co. *v.* Stephens, 75 O. St. 171, 79 N. E. 235; S. *v.* Malloy (S. C.), 78 S. E. 995; White *v.* S., 57 Tex. Cr. 196, 122 S. W. 391; McKnight *v.* S., 50 Tex. Cr. 252, 95 S. W. 1056; Houston & T. C. R. Co. *v.* Fox (Tex.), 166 S. W. 693; Lavigne *v.* Lee, 71 Vt. 167, 42 A. 1093.

Exceptions to the rule and reasons therefor. See Martin *v.* S., 119 Ala. 1, 25 S. 255; Yarborough *v.* S., 105 Ala. 43, 16 S. 758; Chicago City R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443; Waller *v.* P., 209 Ill. 284, 70 N. E. 681; Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501; Aetna I. Co. *v.* Eastman, 95 Tex. 34, 64 S. W. 863; Davis *v.* Davis, 44 Tex. Civ. 238, 98 S. W. 198.

Letters of agent, to principal not admissible to corroborate former's testimony against third person. Ins. Co. *v.* Guardiola, 129 U. S. 642; Inman *v.* Dudley, 146 Fed. 449, 76 C. C. A. 659.

741-30 Leedy *v.* Lehfeldt, 162 Fed. 304, 89 C. C. A. 184; New *v.* Young, 148 Ala. 253, 41 S. 523; Cathcart *v.* Morgan, 144 Ala. 559, 42 S. 25; Peadon *v.* S., 46 Fla. 124, 35 S. 204; Zuckerman *v.* R. Co., 117 App. Div. 378, 102 N. Y. S. 641; Dechert *v.* Co., 39 App. Div. 490, 57 N. Y. S. 225; Texas & P. R. Co. *v.* Tuck (Tex. Civ.), 116 S. W. 620; Chenault *v.* S., 46 Tex. Cr. 351, 81 S. W. 971; Welch *v.* S., 50 Tex. Cr. 28, 95 S. W. 1035; Bowen *v.* S., 47 Tex. Cr. 137, 82 S. W. 520; Hardin *v.* R. Co., 49 Tex. Civ. 184, 108 S. W. 490; Anderson *v.* S., 50 Tex. Cr. 134, 95 S. W. 1037; Ex parte McCoy, 47 Tex. Cr. 237, 82 S. W. 1044.

Error to allow witness to testify that immediately after flight of criminal she stated to her sister that she recognized defendant. Moore *v.* S., 102 Miss. 148, 59 S. 3, a rape case.

A witness cannot fortify his testimony by giving grounds or reason for it. Peirson *v.* R. Co., 191 Mass. 223, 77 N. E. 769.

Dying declarations cannot be corroborated by other statements of deceased. S. *v.* Hendricks, 172 Mo. 654, 73 S. W. 194.

741-31 See Brittain *v.* Westhall, 135 N. C. 492, 47 S. E. 616.

Declarations of party, corroborative if part of res gestate. Merrell *v.* Dudley, 139 N. C. 57, 51 S. E. 777.

742-32 P. *v.* Glover, 141 Cal. 233, 74 P. 745; Spearman *v.* Sanders, 121 Ga. 468, 49 S. E. 296; Hirsch I. & R. Co. *v.* Coleman, 227 Ill. 149, 81 N. E. 21; Long *v.* Davis, 136 Ia. 734, 114 N. W. 197; Dole *v.* Wooldredge, 142 Mass. 161, 7 N. E. 832; Hoggan *v.* Cahoon, 31 Utah 172, 87 P. 164; Bailey *v.* R. Co., 32 Wash. 640, 73 P. 679.

Silence in previous pleadings may be explained by showing it was owing to counsel. Gulf, etc. R. Co. *v.* Garren, 96 Tex. 605, 74 S. W. 897. See P. *v.* Glover, 141 Cal. 233, 74 P. 745.

A witness whose silence has been used to impeach him may corroborate it by showing consistent claims and statements made when their ultimate effect could not have been foreseen. National C. Co. *v.* Alexander, 75 Kan. 537, 89 P. 923.

Impeaching conduct may be explained. Lenfest *v.* Robbins, 101 Me. 176, 63 A. 729; Coleman *v.* Lewis, 183 Mass. 485, 67 N. E. 603.

Previous testimony may be explained by stating facts, but witness cannot say what he meant. Couch *v.* Couch, 141 Ala. 361, 37 S. 495. If part of testimony given on former trial is received witness may offer the other part. Casey *v.* S., 50 Tex. Cr. 392, 97 S. W. 496.

Demonstrative evidence, competent, as by exhibiting wounds. Andrews *v.* S., 159 Ala. 14, 48 S. 858.

742-33 Order of proof is discretionary. P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364, 370.

743-36 Quong Yu *v.* Ty., 12 Ariz. 183, 100 P. 462; P. *v.* O'Farrell, 175 N. Y. 323, 67 N. E. 588.

COUNTERFEITING

For matters relating to the indictment, see 6 STANDARD PROC. 1.

744-1 See Kaye *v.* U. S., 177 Fed. 147, 100 C. C. A. 567.

745-3 See S. *v.* Calhoun, 75 Kan. 259, 88 P. 1079.

747-5 Bryan *v.* U. S., 133 Fed. 495, 66 C. C. A. 363.

747-7 Schultz *v.* U. S., 200 Fed. 234, 118 C. C. A. 420; Tresca *v.* U. S., 183 Fed. 736, 106 C. C. A. 174.

748-9 Passing counterfeit not sufficient to show intent. Gallagher *v.* U. S., 144 Fed. 87, 75 C. C. A. 245.

CREDIBILITY

Exception to rule against distinguishing part of evidence, 753-3; *Power of committing magistrate*, 753-4; *Rules not applicable to administrative trials*, 753-4; *Trials before referee*, 753-4; *Province of judge in cases tried without jury*, 753-4; *Testimony in conflict with science and knowledge*, 753-5; *Inquiry as to religious faith*, 756-19; *Intoxication of witness*, 757-22; *Negative evidence not to be disregarded*, 758-28; *Testimony as to credibility*, 759-32; *Chastity*, 761-36; *Conference with attorney*, 766-48; *Coaching witness*, 766-53; *Inconsistent conduct in bringing action*, 774-75; *Relevancy of statements to contradict*, 774-75; *Precautionary measures after suit*, 774-75; *Explanation of instrument used to contradict*, 775-76; *Silence of witness on questions subsequently testified of*, 779-87; *Refusal to submit to physical examination*, 779-87; *Excusing perjury*, 779-88.

752-1 Stinson *v.* S. (Ala. App.), 64 S. 507; Tippecanoe L. T. Co. *v.* Jester (Ind.), 101 N. E. 915; P. *v.* Harrison, 261 Ill. 517, 104 N. E. 259; P. *v.* Archibald, 258 Ill. 383, 101 N. E. 582; P. *v.* Enright, 256 Ill. 221, 99 N. E. 936; P. *v.* Barker, 255 Ill. 516, 99 N. E. 915; S. *v.* Rom, 77 N. J. L. 248, 72 A. 431; Herndon *v.* R. Co., 162 N. C. 317, 78 S. E. 287; C. *v.* McKwayne, 221 Pa. 449, 70 A. 809 (interest of accused); Cartwright *v.* La Brie (Tex. Civ.), 144 S. W. 725; S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402.

If the testimony is susceptible of only one inference, the court should declare what that inference is. Sanders *v.* R. Co., 90 S. C. 331, 73 S. E. 356.

Instruction as to witness' demeanor must not be mandatory. Illinois C. R. Co. *v.* Burke, 112 Ill. App. 415.

Order in which evidence to be considered is for jury. No. Chicago R. Co. *v.* Wiswell, 68 Ill. App. 113.

Instruction as to weight to be given number of witnesses not favored, though code provides jury may consider number. Dickerson *v.* S., 121 Ga. 136, 48 S. E. 942. Jury may regard number regardless of statute. Eidem *v.* R. Co., 144 Ill. App. 320; Hodder *v.* Co., 217 Pa. 110, 66 A. 239. A charge is not necessary unless plaintiff contradicted by more than one witness. Eastman *v.* R. Co., 37 Pa. Super. 287.

752-2 Norfolk & W. R. Co. *v.* U. S., 101 C. C. A. 249, 177 Fed. 623; Chicago etc. R. Co. *v.* Anderson, 168 Fed. 901, 94 C. C. A. 241; Louisville & N. R. Co. *v.* Perkins, 144 Ala. 325, 39 S. 305; P. *v.* Van Ewan, 111 Cal. 144, 43 P. 520; P. *v.* Muhly, 11 Cal. App. 129, 104 P. 466; Lynch *v.* P., 33 Colo. 128, 79 P. 1015; McDuffee *v.* S., 55 Fla. 125, 46 S. 721; George S. & F. R. Co. *v.* Wisenbacker, 120 Ga. 656, 48 S. E. 146; Woodard *v.* S., 5 Ga. App. 447, 63 S. E. 573; Herrin & S. R. Co. *v.* Nolte, 243 Ill. 594, 90 N. E. 1097; Tri-City R. Co. *v.* Gould, 217 Ill. 317, 75 N. E. 493; Illinois C. R. Co. *v.* Burke, 112 Ill. App. 415; Kerling *v.* Van Dusen, 109 Minn. 481, 124 N. W. 235; Gaines *v.* S. (Miss.), 48 S. 182; S. *v.* Potts, 239 Mo. 403, 144 S. W. 495; S. *v.* Shelton, 223 Mo. 118, 122 S. W. 732; S. *v.* Barrington, 198 Mo. 23, 126, 95 S. W. 235; Clarence *v.* S., 86 Neb. 210, 125 N. W. 540; Holmes *v.* S., 85 Neb. 506, 123 N. W. 1043, *over*. Clary *v.* S., 61 Neb. 688, 85 N. W. 897; S. *v.* Skillman, 76 N. J. L. 464, 70 A. 83; Dobbins *v.* Dobbins, 141 N. C. 210, 53 S. E. 870; Hughes *v.* S., 3 Okla. Cr. 387, 106 P. 546; Crow *v.* S., 3 Okla. Cr. 428, 106 P. 556; S. *v.* Fuller, 52 Or. 42, 96 P. 456; St. Louis, etc. R. Co. *v.* Sproule, 45 Tex. Civ. 615, 101 S. W. 268; Barnett *v.* Ward (Tex. Civ.), 144 S. W. 697; Betts *v.* S. (Tex. Civ.), 144 S. W. 677; McCowan *v.* Co., 41 Wash. 675, 84 P. 614; Bodenheimer *v.* R. Co., 140 Wis. 623, 123 N. W. 148. See P. *v.* Ryan, 152 Cal. 364, 92 P. 853.

Contra, S. *v.* Warady, 77 N. J. L. 348, 72 A. 37.

Testimony of impeached witness may be called to jurors' attention, impeachment of no other witness being attempted. Stevens *v.* P., 215 Ill. 593, 74 N. E. 786.

Comments on conduct of witness when not on stand, improper. Cridland *v.* Crow, 221 Pa. 618, 70 A. 888.

753-3 Louisville & N. R. Co. *v.* Perkins, 141 Ala. 325, 39 S. 305; Still *v.* R. Co., 154 Cal. 559, 98 P. 672; Cowart *v.* S., 120 Ga. 510, 48 S. E. 198; Atlantic C. L. R. Co. *v.* O'Neill, 127 Ga. 685, 56 S. E. 986; Warrick *v.* S.,

125 Ga. 133, 53 S. E. 1027; S. *v.* Fleming, 17 Ida. 471, 106 P. 305; Cummins *v.* R. Co., 147 Ill. App. 291; Schoch *v.* Egan, 144 Ill. App. 214; Faulkner *v.* Birch, 120 Ill. App. 281; Gray *v.* R. Co., 143 Ia. 268, 121 N. W. 1097; Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639; Schick *v.* Warren M. Co., 82 Kan. 90, 107 P. 536; Carroll *v.* R. Co., 200 Mass. 527, 86 N. E. 793; Kincaid *v.* Jungkunz, 109 Minn. 400, 123 N. W. 1082; Huff *v.* Co., 213 Mo. 495, 111 S. W. 1145; Greenbrier D. Co. *v.* Van Frank, 147 Mo. App. 204, 126 S. W. 222; S. *v.* Walsworth, 54 Or. 371, 103 P. 516; Cordes *v.* S., 54 Tex. Cr. 204, 112 S. W. 943; Strause *v.* Co., 109 Va. 724, 65 S. E. 659; S. *v.* King, 50 Wash. 312, 97 P. 247.

Exception to rule against distinguishing part of evidence.—It is proper to say if the jury, upon all the evidence, believe the testimony as to the good character of certain witnesses and that it is sufficient to overcome the impeaching testimony, their testimony should be weighed in the light of proof of their character in connection with all the other evidence. Hammond *v.* S., 147 Ala. 79, 41 S. 761.

Effect of affidavit.—It is proper for court to inform jury affidavit in evidence, not required by law. Isaac *v.* U. S., 7 Ind. Ty. 196, 104 S. W. 588.

Written evidence excepted. Offutt *v.* Doyle (Ky.), 122 S. W. 156.

753-4 Brethauer *v.* Schorer, 81 Conn. 143, 70 A. 592; Illinois C. R. Co. *v.* Burke, 112 Ill. App. 415; Southern R. Co. *v.* S. (Ind. App.), 72 N. E. 174; P. *v.* O'Brien, 135 App. Div. 85, 119 N. Y. S. 78.

Committing magistrate has same right to judge of credibility of witnesses as jury. Ex parte Vandiveer, 4 Cal. App. 650, 88 P. 993.

Rules not applicable to administrative trials.—The rules of evidence governing judicial hearings are not always fully applicable to trials before administrative officers. P. *v.* Lewis, 111 App. Div. 375, 97 N. Y. S. 1057 (*aff.*, no opinion, 186 N. Y. 583, 79 N. E. 1113. In such trial officer must act only on the evidence. P. *v.* Roosevelt, 168 N. Y. 488, 61 N. E. 783.

In trials before a referee credibility of witnesses must be passed upon by him, subject to review by trial court. Harris *v.* Smith, 144 N. C. 430, 57 S. E. 122.

Province of judge in cases tried without jury.—The credibility of witnesses in cases tried without jury is solely for trial judge, and his findings are conclusive on appeal. In re Wickes, 139 Cal. 195, 72 P. 902; Casey *v.* Richards, 10 Cal. App. 57, 101 P. 36; Hayes *v.* Candee, 75 Conn. 131, 52 A. 826. Court may receive testimony of person found to be incapable of managing his own affairs. Wentz's Appeal, 76 Conn. 405, 56 A. 625. And may discredit any witness or multitude of witnesses. Allis *v.* Hall, 76 Conn. 322, 342, 56 A. 637; Lewis *v.* Lewis, 76 Conn. 586, 57 A. 735; Kimberly *v.* S., 4 Ga. App. 852, 62 S. E. 571 (continuance); Doon *v.* Felton, 203 Mass. 267, 89 N. E. 539; Tipton *v.* Christopher, 135 Mo. App. 619, 116 S. W. 1125. Uncontradicted testimony cannot be disregarded. Monn *v.* Warshawsky, 112 N. Y. S. 1062. Testimony may be so impossible, absurd and contradictory court may deem it a nullity though believed by jury. Graham *v.* R. Co., 143 Ia. 604, 119 N. W. 708. Court is not hampered in passing upon credibility by previous ruling on matters of evidence by reviewing court. Allen *v.* Bryant, 155 Cal. 256, 100 P. 704. Effect of written instruments, if not controlled by parol testimony, is for court. Cotner *v.* S., 173 Ind. 168, 89 N. E. 847.

Where evidence of arrest in another prosecution was introduced to affect accused's credibility the court should by an instruction limit the evidence to that purpose. Caples *v.* S. (Tex. Cr.), 167 S. W. 730.

But where evidence of bad reputation is introduced for another purpose the court should charge that it is not to be considered relative to the credibility of the accused as a witness. Williamson *v.* S. (Tex. Cr.), 167 S. W. 360.

753-5 Southwestern Co. *v.* Schmidt, 226 U. S. 162, 33 Sup. Ct. 68, 57 L. ed. 170; Waters *v.* Davis, 145 Fed. 912, 76 C. C. A. 144; U. S. *v.* Post, 128 Fed. 950; Nelson *v.* S. (Ala. App.), 65 S. 844; Snead *v.* S. (Ala. App.), 61 S. 473, 152 S. W. 161; Wilkerson *v.* S., 140 Ala. 165, 37 S. 265; Brown *v.* S., 142 Ala. 287, 38 S. 268; Hamilton *v.* S., 147 Ala. 110, 41 S. 940; Olden *v.* S. (Ala.), 58 S. 307; Boyle *v.* S. (Ark.), 161 S. W. 1049; Jones *v.* S., 105 Ark.

698; Bensen *v.* S., 103 Ark. 87, 145 S. W. 883; Fourche *v.* R., etc. Co., 101 Ark. 376, 142 S. W. 520; James *v.* S., 94 Ark. 514, 127 S. W. 733; P. *v.* Tyree, 21 Cal. App. 701, 132 P. 784; Frost *v.* R. Co., 165 Cal. 365, 132 P. 442; P. *v.* Oliver, 7 Cal. App. 601, 95 P. 172; P. *v.* Waysman, 1 Cal. App. 246, 81 P. 1087; P. *v.* Luis, 158 Cal. 185, 110 P. 580; Nat. F. Co. *v.* Maccia, 25 Colo. App. 441, 139 P. 22; Foster *v.* P., 56 Colo. 452, 139 P. 10; Victor *v.* Smilanich, 54 Colo. 479, 131 P. 392; Le Master *v.* P., 54 Colo. 416, 131 P. 269; Fincher *v.* P., 26 Colo. 169, 56 P. 902; Lynch *v.* P., 33 Colo. 128, 79 P. 1015; Boles *v.* P., 37 Colo. 41, 86 P. 1030; Hurley *v.* Ex. Co. (Conn.), 90 A. 932; Brodie *v.* Co., 87 Conn. 363, 87 A. 798; Schleifenbaum *v.* Rundbaken, 81 Conn. 623, 71 A. 899; Bradley *v.* Gorham, 77 Conn. 211, 58 A. 698; Keatley *v.* Fraternity, 2 Boyce (Del.) 511, 82 A. 294; S. *v.* Massey (Del.), 82 A. 243; Joseph *v.* Johnson (Del.), 82 A. 30; S. *v.* Stewart, 6 Penne. (Del.) 435, 67 A. 786; Hampton *v.* S., 50 Fla. 55, 39 S. 421; Peadon *v.* S., 46 Fla. 124, 35 S. 204; Edenfield *v.* S. (Ga. App.), 81 S. E. 253; Powell *v.* S. (Ga. App.), 81 S. E. 254; Lynn *v.* S., 140 Ga. 387, 79 S. E. 29; Cook *v.* S., 13 Ga. App. 308, 79 S. E. 87; Watson *v.* S., 13 Ga. App. 181, 78 S. E. 1014; Turner *v.* S., 131 Ga. 761, 63 S. E. 294; Patton *v.* S., 117 Ga. 230, 43 S. E. 533; Powell *v.* S., 120 Ga. 181, 47 S. E. 563, 122 Ga. 571, 50 S. E. 369; Sindy *v.* S., 120 Ga. 202, 47 S. E. 554; Robinson *v.* S., 128 Ga. 254, 57 S. E. 315; Chandler *v.* S., 124 Ga. 821, 53 S. E. 91; Boynton *v.* S., 11 Ga. App. 268, 75 S. E. 9; Solomon *v.* S., 10 Ga. App. 469, 73 S. E. 623; Patrick *v.* Henderson, 10 Ga. App. 283, 73 S. E. 559; Dukes *v.* C., 10 Ga. App. 473, 73 S. E. 554; P. *v.* Harrison, 261 Ill. 517, 104 N. E. 259; Rosenthal *v.* R. Co., 255 Ill. 552, 99 N. E. 672; P. *v.* White, 251 Ill. 67, 95 N. E 1036; Quigg *v.* P., 211 Ill. 17, 71 N. E. 886; Hauser *v.* P., 210 Ill. 253, 71 N. E. 416; Gardner *v.* Co., 142 Ill. App. 348; Southern R. Co. *v.* Limback (Ind.), 85 N. E. 354; Southern R. Co. *v.* S (Ind. App.), 72 N. E. 174; Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518, 72 N. E. 571; Cleveland, etc. Co. *v.* Harrison, 178 Ind. 324, 98 N. E. 729; Atoka C. & M. Co. *v.* Miller, 7 Ind. Ty. 104, 104 S. W. 555; Forsythe *v.* Kluckhohn (Ia.), 142 N. W. 225; Richards *v.* Watts, 147 Ia. 557, 126 N. W. 701; Murphy *v.* Hiltibridle, 132 Ia. 114, 109 N. W. 471; Lovell, etc. Co *v.* Justice, 147 Ky. 642, 144 S. W. 1079; Liverpool, etc. Co. *v.* Wright, 158 Ky. 290, 164 S. W. 952; Louisville Ry. Co. *v.* Parks, 154 Ky. 269, 157 S. W. 27; Postal Tel. Co. *v.* Thornton, 153 Ky. 176, 154 S. W. 1100; Shields' Admr. *v.* Rowland, 151 Ky. 136, 151 S. W. 408; So. Covington C. St. R. Co. *v.* Burns, 150 Ky. 348, 150 S. W. 343; Bannon *v.* Louisville Tr. Co., 150 Ky. 401, 150 S. W. 510; Ruark *v.* C., 150 Ky. 47, 150 S. W. 5; Chesapeake & O. R. Co. *v.* Com., 149 Ky. 386, 149 S. W. 826; C. & O. R. Co. *v.* Howard, 143 Ky. 218, 136 S. W. 153; Peacock D. Co. *v.* C., 25 Ky. L. R. 1778, 78 S. W. 893; Mussellam *v.* R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Hughes *v.* Williams (Mass.), 105 N. E. 1056; James *v.* R. Co., 213 Mass. 424, 100 N. E. 545; Johnson *v.* R. Co. (Me.), 88 A. 988; Payne *v.* Union, L. G., 136 Mich. 416, 99 N. W. 376; Daly *v.* Corliss, 114 Minn. 42, 129 N. W. 1048; Godfrey *v.* Co., 101 Miss. 565, 58 S. 534; Willie *v.* City of Browning (Mo. App.), 166 S. W. 1070; Keeline *v.* Sealy (Mo.), 165 S. W. 1088; Wack *v.* R. Co., 175 Mo. App. 111, 157 S. W. 1070; Shelton *v.* Metropolitan St. Ry. Co., 167 Mo. App. 404, 157 S. W. 493; Byrd *v.* Vanderburgh, 168 Mo. App. 112, 151 S. W. 184; Hutton *v.* R. Co., 166 Mo. App. 645, 150 S. W. 722; Furley *v.* R. Co., 166 Mo. App. 655, 150 S. W. 553; Distler *v.* R. Co., 163 Mo. App. 674, 147 S. W. 492; Snowden *v.* City of St. Joseph, 163 Mo. App. 667, 147 S. W. 492; Butts *v.* Co., 164 Mo. App. 307, 145 S. W. 120; Renfro *v.* Ins. Co., 148 Mo. App. 258, 129 S. W. 444; Hitt *v.* Hitt, 150 Mo. App. 631, 131 S. W. 369; S. *v.* Pipkin, 221 Mo. 453, 120 S. W. 17; S. *v.* Fogg, 206 Mo. 696, 105 S. W. 618; Schloemer *v.* Co., 204 Mo. 99, 102 S. W. 565; S. *v.* Wigger, 196 Mo. 90, 93 S. W. 390; S. *v.* Lortz, 186 Mo. 122, 84 S. W. 906; St. Victor *v.* Edwards, 155 Mo. App. 566, 134 S. W. 1105; Bowen *v.* Webb, 37 Mont. 479, 97 P. 839; Baker *v.* Co., 86 Neb. 227, 125 N. W. 587; S. *v.* Skillman, 76 N. J. L. 464, 70 A. 83; In re Kindberg's Will, 207 N. Y. 220, 100 N. E. 789; Bartholdi *v.* Hickson, 136 N. Y. S. 92; Sigel *v.* American S. Co., 161 App. Div. 54, 146 N. Y. S. 350; P. *v.* Santa-

gata, 130 App. Div. 225, 114 N. Y. S. 321; Walters *v.* R. Co., 178 N. Y. 50, 70 N. E. 98; Williams *v.* R. Co., 155 N. Y. 158, 49 N. E. 672; Fortune *v.* Hunt, 149 N. C. 358, 63 S. E. 82; Oelke *v.* S. (Okl. Cr.), 133 P. 1140; Ramillard *v.* S. (Okla.) Cr.), 133 P. 1132; Ritter *v.* S. (Okla. Cr.), 132 P. 913; Williams *v.* S. (Okla. Cr.), 131 P. 179; Morgan *v.* S. (Okla. Cr.), 130 P. 522; Bayless *v.* S. (Okla. Cr.), 130 P. 520; Roberts *v.* S., 8 Okla. Cr. 394, 127 P. 894; Gilbert *v.* S., 8 Okla. Cr. 329, 127 P. 889; Foster *v.* S., 8 Okla. Cr. 9, 126 P. 835; Deaton *v.* S., 7 Okla. Cr. 436, 123 P. 701; Bolman *v.* S., 2 Okla. Cr. 235, 101 P. 135; McIntosh *v.* McNair, 53 Or. 87, 99 P. 74; Coates *v.* Co., 234 Pa. 199, 83 A. 77; C. *v.* Payne, 242 Pa. 394, 89 A. 559; Brown *v.* Co., 239 Pa. 549, 87 A. 11; Sanson *v.* Co., 239 Pa. 505, 86 Atl. 1069; Loeb *v.* Mellinger, 12 Pa. Super. 592; Kelton *v.* Fifer, 26 Pa. Super. 603; Thomas *v.* Law, 25 id. 19; Gibbon *v.* R. I. Co. (R. I.), 91 A. 9; Beebe *v.* Greene, 34 R. I. 171, 82 A. 796; Sanders *v.* So. R., 90 S. C. 331, 73 S. E. 356; Gulf, etc. R. Co. *v.* Beezley (Tex. Civ.), 153 S. W. 651; Ross *v.* S. (Tex. Cr.), 159 S. W. 1063; Claussen *v.* S. (Tex. Cr.), 157 S. W. 477; Hamilton *v.* S. (Tex. Cr.), 153 S. W. 331; Robertson *v.* S. (Tex. Cr.), 150 S. W. 893; Snodgrass *v.* S. (Tex. Cr.), 150 S. W. 162; So. & K. R. Co. *v.* Wallace (Tex. Civ.), 152 S. W. 873; Thompson, etc. Co. *v.* Thomas (Tex. Civ.), 147 S. W. 296; Wooldridge *v.* S. (Tex. Cr.), 146 S. W. 550; Newell *v.* S. (Tex. Cr.), 145 S. W. 939; Freeman *v.* Grashel (Tex. Civ.), 145 S. W. 695; Gosch *v.* Vrana (Tex. Civ.), 145 S. W. 253; Baggett *v.* S. (Tex. Cr.), 144 S. W. 1136; Oliver *v.* S. (Tex. Cr.), 144 S. W. 604; Bost *v.* S., 64 Tex. Cr. 464, 144 S. W. 589; Johnson *v.* S., 64 Tex. Cr. 399, 142 S. W. 589; So. Kan. R. Co. *v.* Butler (Tex. Civ.), 131 S. W. 240; Williams *v.* Hennefield, 57 Tex. Civ. 54, 120 S. W. 567; Franks *v.* S., 48 Tex. Cr. 211, 87 S. W. 148; Equitable Soc. *v.* Kitts, 109 Va. 105, 63 S. E. 455; Thoresen *v.* Lumb. Co., 73 Wash. 99, 131 P. 645, 132 P. 860; Gibson *v.* R. Co., 61 Wash. 639, 112 P. 919; Money *v.* R. Co., 59 Wash. 120, 109 P. 307; Plattor *v.* Co., 44 Wash. 408, 87 P. 489; McGuire *v.* R. Co., 70 W. Va. 538, 74 S. E. 859; Keenan *v.* Donahoe, 70 W. Va. 600, 74 S. E. 859; Guidinger *v.* Mfg. Co., 148 Wis. 194, 134 N. W. 404; Bates *v.* R. Co., 140 Wis. 235, 122 N. W. 745; Murdica *v.* S. (Wyo.), 137 P. 574; Starke *v.* S., 17 Wyo. 55, 96 P. 148.

See also Lay *v.* Fuller, 178 Ala. 375, 59 S. 609; Smith *v.* Shadix, 5 Ala. App. 345, 59 S. 706; Grubbs *v.* S., 5 Ala. App. 49, 59 S. 350; Stokes *v.* S., 5 Ala. App. 159, 59 S. 310; Spinks *v.* S., 104 Ark. 641, 149 S. W. 54; Donovan *v.* Co. (Conn.), 84 A. 288; Bergh *v.* Spivalsowski (Conn.), 84 A. 329; Le Fevre *v.* Crossan (Del.), 84 A. 128; Brown *v.* Thayer, 212 Mass. 392, 99 N. E. 239; Courtney *v.* Mfg. Co., 122 N. Y. S. 721; Brenner *v.* Long Island R. Co. 122 N. Y. S. 274; Remer *v.* S., 3 Okla. Cr. 706, 109 P. 247; Edgar *v.* S., 59 Tex. Cr. 491, 129 S. W. 141; Money *v.* R. Co., 59 Wash. 120, 109 P. 307.

The jury may reject as untrue the exculpatory parts of the defendant's evidence, and to have given full credence to those parts of his testimony tending to show his guilt. Jackson *v.* S., 4 Ala. App. 199, 59 S. 231.

It is only when the facts are undisputed and when different minds cannot draw different conclusions therefrom that it becomes the court's duty to direct the verdict. Brigham *v.* R. Co., 104 Ark. 267, 149 S. W. 90.

Verdict will not be disturbed, unless demonstrably without any support in the testimony. Anderson *v.* Pub. Service Corp., 83 N. J. L. 19, 83 A. 769. **Kentucky.**—"It was formerly held that this court, where there was any evidence to sustain the conviction, was without power to reverse a judgment of conviction in a criminal case upon the absence of sufficient evidence, if there were any evidence. Pingston *v.* Commonwealth, 127 S. W. 493, and cases cited. Section 281 of the Criminal Code was so amended in 1910 (Laws 1910, c. 92) as that the court has now such right of reversal; but in construing the amended section we said: 'The credibility of the witness is for the jury, and this court will not disturb a verdict because the jury believed one set of witnesses rather than another. The verdict must be palpably against the evidence, or it cannot be disturbed.' Wilson *v.* Commonwealth, 140 Ky. 1, 130 S. W. 794."

Chaney *v.* C., 149 Ky. 464, 149 S. W. 923.

If testimony conflicting "they should accept that testimony which they think under all the facts and circumstances of the case is most worthy of credit and belief." S. *v.* Sigerella (Del.), 82 A. 31. And see McCartney *v.* R. Co., 2 Boyce (Del.) 191, 78 A. 771.

May reject testimony of plaintiff and inject that of defendant. May *v.* Ausley, 102 Ark. 679, 145 S. W. 195.

Rule applies specially to dying declarations where discrepancies may be the result of faulty recollection. C. *v.* Mika, 171 Pa. 273, 33 A. 65; C. *v.* Winkelman, 12 Pa. Super. 497, 513. And see Gurley *v.* S., 101 Miss. 100, 57 S. 565; S. *v.* Byrd, 41 Mont. 585, 111 P. 407.

"**The jury may go upon excursions** of discovery for truth within the field of evidence to the uttermost boundaries of reason, not boundaries set by any particular persons, or persons generally, but such as rational men of common sense might set without passing beyond the dividing line between the field of probabilities into that of mere guessing or conjecture." Samulski *v.* Co., 147 Wis. 285, 133 N. W. 142, *quoted* in Miekuczauski *v.* Co., 148 Wis. 153, 134 N. W. 369.

Court should not set aside verdict founded upon conflicting testimony provided there is sufficient evidence to support it, and it be not contrary to the overwhelming weight thereof. Whelan *v.* R. Co., 70 W. Va. 442, 74 S. E. 410.

The appellate court "cannot take the conflicting evidence introduced and the evidence that should have been admitted and now pass on the whole as jurors. That course would be virtually a denial of trial by jury." Painter *v.* Long, 69 W. Va. 765, 72 S. E. 1092.

"**It must take all the evidence** tending to establish the facts against the appellant and all reasonable and correct inferences from such facts as are proven, and, if from all this the verdict of the jury can be sustained, this court is bound thereby, and cannot on that ground reverse a judgment of conviction." Trimble *v.* S. (Tex. Cr.), 145 S. W. 929.

"**Where there are two theories,** one favorable and the other unfavorable to the accused, and the unfavorable side of the testimony would show a violation of the law, this court will not disturb the finding of the jury." Jordan *v.* S. (Tex. Cr.), 146 S. W. 881.

Jury not required to pass on credibility or truth of statement made by one subsequently examined as witness and which are given in evidence merely by way of contradicting and thereby impeaching his credibility. Smith *v.* S., 137 Ala. 22, 34 S. 396.

Testimony in conflict with science and knowledge.—If the evidence is clear, question is for court; if not, for jury. Walters *v.* R. Co., 178 N. Y. 50, 70 N. E. 98.

754-6 Sterling *v.* Cole, 12 Cal. App. 93, 106 P. 602; Rafter *v.* R. Co., 139 Ill. App. 81; Wormley *v.* S. (Tex. Cr.), 143 S. W. 615.

"**From its numbers,** the mode of their selection, and the fact that jurors come from all classes of society, they are better calculated to judge motives, weigh probabilities, and take what may be called a common-sense view of a set of circumstances, involving both act and intent, than any single man." Stringfellow *v.* Brazelton (Tex. Civ.), 142 S. W. 937.

"**One need not have a character** entirely above reproach in order to be credible; besides, the word 'credible' is an ordinary good English word, and needs no explanation or definition to the jury. Douglass *v.* State, 33 S. W. 228, and cases there cited." Barber *v.* S., 64 Tex. Cr. 96, 142 S. W. 577.

Knowledge of jurors in common with that of men generally may be regarded. Denver, etc. R. Co. *v.* Warring, 37 Colo. 122, 86 P. 305.

Not bound to discredit witness whose general reputation has been impeached. Peadon *v.* S., 46 Fla. 124, 35 S. 204; Ector *v.* S., 120 Ga. 513, 48 S. E. 315; Sindy *v.* S., 120 Ga. 202, 47 S. E. 554.

754-7 In re Meyer, 156 Fed. 432; Lewis *v.* Lewis, 76 Conn. 586, 57 A. 735; Bradley *v.* Gorham, 77 Conn. 211, 58 A. 698; Alexander *v.* Blackman, 26 App. Cas. (D. C.) 541; Kennedy *v.* Woodmen, 243 Ill. 560, 90 N. E. 1084; Howard *v.* R. Co., 32 Ky. L. R. 309, 105 S. W. 932; Giles *v.* Giles, 204 Mass. 383, 90 N. E. 595; P. *v.* Walker, 198 N. Y. 329, 91 N. E. 806; Sharp *v.* R. Co., 184 N. Y. 100, 76 N. E. 923; Becker *v.* Koch, 104 N. Y. 394, 10 N. E.

701; Manhattan Co. *v.* Phillips, 109 N. Y. 383, 17 N. E. 129; Cross *v.* Cross, 108 N. Y. 628, 15 N. E. 333; Dobbins *v.* Dobbins, 141 N. C. 210, 53 S. E. 870; Smucker *v.* R. Co., 6 Pa. Super. 521; Troxell *v.* Malin, 9 Pa. Super. 483; Appel *v.* Childress, 53 Tex. Civ. 607, 116 S. W. 129; Missouri, etc. R. Co. *v.* Harris, 45 Tex. Civ. 542, 101 S. W. 506; Brown *v.* Sherrod, 53 Wash. 132, 101 P. 481.

Absence of direct verbal contradiction does not make fact undisputed. Allis *v.* Hall, 76 Conn. 322, 340, 56 A. 637.

754-8 St. Louis S. R. Co. *v.* Trotter, 89 Ark. 273, 116 S. W. 227; Brethauer *v.* Schorer, 81 Conn. 143, 70 A. 592; Thurston *v.* McLellan, 34 App. Cas. (D. C.) 294; Armstrong *v.* Ballew, 118 Ga. 168, 44 S. E. 996; Detwiler *v.* Cox, 120 Ga. 638, 48 S. E. 142; Cotner *v.* S., 173 Ind. 168, 89 N. E. 847; Nason *v.* R. Co., 140 Ia. 533, 118 N. W. 751; White *v.* Hatton (Ia.), 113 N. W. 830; Strong *v.* Co., 202 Mass. 209, 88 N. E. 582; P. *v.* Mindeman, 157 Mich. 120, 121 N. W. 488; Carter *v.* Henderson, 224 Pa. 319, 73 A. 554; Chartrand *v.* R. Co., 85 S. C. 479, 67 S. E. 741; Mee *v.* Carlson, 22 S. D. 365, 117 N. W. 1033; Missouri, etc. R. Co. *v.* Harris, 45 Tex. Civ. 542, 101 S. W. 506; Sovereign Camp, etc. of the World *v.* Jackson (Tex. Civ.), 138 S. W. 1137; Hobart Nat. Bk. *v.* Fordtran (Tex. Civ.), 122 S. W. 413; Ross *v.* R. Co., 47 Tex. Civ. 24, 103 S. W. 708; Gulf, etc. R. Co. *v.* Baugh (Tex. Civ.), 43 S. W. 557; International, etc. R. Co. *v.* Johnson, 23 Tex. Civ. 160, 55 S. W. 772; Clopton *v.* C., 109 Va. 813, 63 S. E. 1022 (if witness not disinterested).

Contra if fact testified to by interested witness is one which opposing party is able to contradict and does not. San Antonio *v.* Rollins (Tex. Civ.), 127 S. W. 1166. *Comp.* Brown *v.* Johnson, 132 Ky. 70, 116 S. W. 273; Elkins *v.* Coal Co. (Ky.), 115 S. W. 203.

Unreasonable and incredible evidence not necessarily received as a sufficient basis for a legal judgment, simply because it is not contradicted by direct and positive testimony. Hughes *v.* Hughes, 109 Me. 564, 84 A. 647.

"The trial court was not compelled to accept that testimony, but had the right, as it seems was done, to give preference and credence to the testimony submitted by defendant." Bailey *v.* Dillard (Tex. Civ.), 147 S. W. 1165.

In a suit upon an indorsement of a note where defendant claimed procurement by fraud, and the burden of proving good faith was therefore upon plaintiff, who offered its cashier to testify the court directed verdict for plaintiff. "In directing a verdict for the plaintiff, the court, in effect, instructed the jury that they must believe that witness, and evidently, as we gather from the opinion refusing a new trial, relied as authority for this instruction upon Lonzer *v.* Lehigh Valley R. R. Co., 196 Pa. 610, 46 Atl. 937. We have many times said that, when the establishment of a question of fact depends upon oral testimony, the credibility of the witness or witnesses is for the jury alone, and it is their exclusive province to determine whether from such testimony the fact in dispute has been established. Grambs *v.* Lynch, 20 Wkly. Notes Cas. 376; Harlow *v.* Borough of Homestead, 194 Pa. 57, 45 Atl. 87; Bartlett *v.* Rothschild, 214 Pa. 421, 63 Atl. 1030; Fry *v.* National Glass Co., 219 Pa. 514, 69 Atl. 56. There is nothing in the case before us to take it out of the foregoing rule. What was said in Lonzer *v.* R. R. Co. seems, and especially of late, to be misunderstood. All that was there decided was that when testimony not in itself improbable is not at variance with any proved or admitted facts, or with ordinary experience, and comes from a witness whose candor there is no apparent ground for doubting, a jury will not be permitted to indulge in a capricious disbelief of such testimony. By 'candor' the learned justice who wrote the opinion unquestionably meant 'credibility,' and the credibility of a witness is always more or less affected by his interest in the matter in controversy. In the present case a fair inference to have been drawn by the jury was that the cashier of the bank was very much interested in the result of the suit." Second Nat. Bk. *v.* Hoffman, 229 Pa. 429, 78 A. 1002.

755-9 Hicklin *v.* Ty., 9 Ariz. 184, 80 P. 340; Alexander *v.* Blackman, 26 App. Cas. (D. C.) 541; Georgia S. & F. R. Co. *v.* Walker, 5 Ga. App. 155, 62 S. E. 720; Yeager *v.* R. Co., 148 Ia. 231,

123 N. W. 974; Reaves *v.* Baker, 33 Ky. L. R. 1004, 112 S. W. 609; McCarthy *v.* R. Co., 208 Mass. 512, 94 N. E. 749; O'Kelly *v.* R. Co., 94 Miss. 635, 47 S. 660; Bowen *v.* Webb, 37 Mont. 479, 97 P. 839; Harris *v.* Barrett, 75 N. J. Eq. 386, 72 A. 356; Gombert *v.* R. Co., 195 N. Y. 273, 88 N. E. 382; Voorhees *v.* Unger, 142 App. Div. 543, 127 N. Y. S. 11; Danko *v.* R. Co., 230 Pa. 295, 79 A. 511; Second Nat. Bk. *v.* Thompson, 41 Pa. Super. 200; Saucker *v.* R. Co., 6 Pa. Super. 521; Norfolk & W. R. Co. *v.* Holmes, 109 Va. 407, 64 S. E. 46; Pregent *v.* Mills, 51 Wash. 187, 98 P. 328.

May believe part and reject part. Graysonia Nashville Lumb. Co. *v.* Carroll, 102 Ark. 460, 144 S. W. 519.

A party.—"Generally, the credibility of a witness, who is a party to the action, and therefore interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. . . Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness." Eisenberg *v.* Leflowitz, 112 App. Div. 569, 127 N. Y. S. 595, *quot.* Hull *v.* Littauer, 102 N. Y. 569, 57 N. E. 102. See also Second Nat. Bk. *v.* Weston, 172 N. Y. 250, 64 N. E. 949.

Through interpreter.—"The jury could have found him to be an ignorant and unintelligent man, and that it was for them to determine the effect of any inconsistencies in what he said, especially in his cross-examination, and to penetrate his meaning where that was obscure." Mercier *v.* Boott Mills, 212 Mass. 15, 98 N. E. 581, *cit.* many Massachusetts cases.

755-11 Hydrick *v.* S., 103 Ark. 4, 145 S. W. 542.

Confession may be believed in part only. S. *v.* Powell, 5 Penne. (Del.) 24, 61 A. 966.

The jury hear and see the witnesses, and have a very much better opportunity of judging of their truthfulness than any court can have from a mere transcript in writing of that testimony. Crawford *v.* S. (Tex. Cr.), 147 S. W. 229.

755-12 Agreement as to main fact though diversity in details. Chesapeake, etc. Co. *v.* Magowan, 147 Ky. 422, 144 S. W. 80.

755-13 Walker *v.* Warner, 31 App. Cas. (D. C.) 76; Georgia, etc. Co. *v.* Cocke, 137 Ga. 720, 74 S. E. 244; Hughes *v.* Ferriman, 119 Ill. App. 169.

Irregularity in taking deposition, not cause for attacking credibility of deponent. Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405.

755-14 Jackson *v.* S. (Ala.), 57 S. 591; Talley *v.* S. (Ala.), 57 S. 445; Patton *v.* S., 156 Ala. 23, 46 S. 862; St. Louis, I. M. & S. R. Co. *v.* Ramsay, 96 Ark. 37, 131 S. W. 44; McCullough *v.* S., 10 Ga. App. 403, 73 S. E. 546; Lauth *v.* Co., 244 Ill. 244, 91 N. E. 431; Larson *v.* Glos, 235 Ill. 584, 85 N. E. 926; McFadden *v.* R. Co., 149 Ill. App. 298; White *v.* Hatton (Ia.), 113 N. W. 830; Flaherty *v.* R. Co., 42 Mont. 89, 111 P. 348; Kavanagh *v.* Wilson, 70 N. Y. 177; Steenburgh *v.* McRorie, 60 Misc. 510, 113 N. Y. S. 1118; Grand Fraternity *v.* Melton, 102 Tex. 390, 117 S. W. 788.

Verdicts must rest upon probabilities, not upon possibilities. Samulski *v.* Menasha P. Co., 147 Wis. 285, 133 N. W. 112.

Unimpeached and corroborated testimony ought not to be disregarded. Johnson *v.* Johnson, 81 Neb. 60, 115 N. W. 323.

755-15 Evidence must not be disregarded for speculative and unfounded reasons. Steber *v.* R. Co., 139 Wis. 10, 120 N. W. 502.

Unsworn statement of accused, made to jury, may be accepted as true, though testimony to contrary given. Hendrix *v.* S., 5 Ga. App. 819, 63 S. E. 939; Taylor *v.* S., 132 Ga. 235, 63 S. E. 1116.

Witness cannot testify of credibility of other witnesses. Davis *v.* Collins, 69 S. C. 460, 48 S. E. 469.

755-16 Sterling *v.* Cole, 12 Cal. App. 93, 106 P. 602; C. *v.* Winkelman, 12 Pa. Super. 497, 513; St. Louis, etc. R. Co. *v.* Sproule, 45 Tex. Civ. 615, 101 S. W. 268. *Contra* in divorce suits. Williams *v.* Williams, 136 Ky. 71, 123 S. W. 337.

No presumption witness has testified to the truth (Hauser *v.* P., 210 Ill. 253, 71 N. E. 416); neither does law presume perjury. Bleich *v.* P., 227 Ill. 80, 81 N. E. 36.

756-18 P. *v.* O'Brien, 135 App. Div. 85, 119 N. Y. S. 788.

756-19 Starks *v.* Schlensky, 128 Ill. App. 1.

Inquiry as to religious faith, improper Ibid; Louisville & N. R. Co. *v.* Mayes, 26 Ky. L. R. 197, 80 S. W. 1096; Bush *v.* C., 80 Ky. 244; White *v.* C., 96 Ky. 180, 28 S. W. 340; P. *v.* Most, 128 N. Y. 108, 27 N. E. 970; Brink *v.* Stratton, 176 N. Y. 150, 68 N. E. 148; Perry *v.* C., 3 Gratt. (Va.) 602. *Contra*, but a witness' belief must be shown by his previous voluntary statements. He cannot be required to divulge it. Searey *v.* Miller, 57 Ia. 613, 10 N. W. 912. Proof deceased was a materialist is competent to affect weight of his dying declarations. S. *v.* Elliott, 45 Ia. 486.

Evidence as to characteristics of race to which witness belongs, inadmissible. S. *v.* Lem Woon, 57 Or. 482, 107 P. 974.

757-22 P. *v.* Enright, 256 Ill. 221, 99 N. E. 936; Thayer *v.* Boyle, 30 Me. 475; Hoitt *v.* Moulton, 21 N. H. 586; Coleman *v.* R. Co., 138 N. C. 351, 50 S. E. 690.

See Equitable Powder Mfg. Co. *v.* R. Co., 105 Ark. 697, 150 S. W. 1028.

Intoxication of witness on occasion of which he testifies affects credibility. Armour Co. *v.* Skene, 153 Fed. 241, 82 C. C. A. 385; Morris *v.* S. (Ala.), 39 S. 608; Miller *v.* P., 216 Ill. 309, 74 N. E. 743; Pittsburgh, etc. R. Co. *v.* O'Conner, 171 Ind. 686, 85 N. E. 969; S. *v.* Sejours, 113 La. 676, 37 S. 599; S. *v.* Pemberton, 39 Mont. 530, 104 P. 556; Bliss *v.* Beck, 80 Neb. 290, 114 N. W. 162; Willis *v.* S., 43 Neb. 102, 61 N. W. 254; S. *v.* McCormick, 56 Wash. 469, 105 P. 1037; Schneider *v.* R. Co., 47 Wash. 45, 91 P. 565; Fink *v.* Thomas, 66 W. Va. 487, 66 S. E. 650. Judicial notice taken of fact intoxication productive of condition impairing credibility. Anderson *v.* Co., 78 N. J. L. 285, 73 A. 840.

Witness may be cross-examined as to his use of morphine to show that when he is testifying he is under the influence of the drug. Wilson *v.* U. S., 232 U. S. 563, 34 Sup. Ct. 347.

757-24 Williams *v.* U. S., 6 Ind. Ty. 1, 88 S. W. 334.

757-25 Evidence admissible to show that witness used cocaine to such an extent as to impair her mental and moral sensibilities. Anderson *v.* S. (Tex. Cr.), 144 S. W. 281.

757-26 Gallant *v.* S., 167 Ala. 60, 52 S. 739; Winn *v.* Woodmen, 138 Mo. App. 701, 119 S. W. 536. See Gordon *v.* Gilmore, 141 Ga. 347, 80 S. E. 1007; S. *v.* Swartz, 87 Kan. 852, 126 P. 1091; Left Fork C. Co. *v.* Owen's Admx., 155 Ky. 212, 159 S. W. 793.

The condition of the mind of a witness is always a matter of inquiry, as affecting credibility, when he is under the influence of intoxicants. Wallace *v.* S. (Tex. Cr.), 145 S. W. 925.

That witness was drinking a short time before the crime may be shown. Rogers *v.* S. (Okla. Cr.), 131 P. 941.

758-28 Culbert *v.* Wilmington & P. Traction Co. (Del.), 82 A. 1081; Idaho M. Co. *v.* Kalanquin, 8 Ida. 101, 66 P. 933; Parkin *v.* R. Co., 149 Ill. App. 421; Sargent *v.* Brotherhood, 148 Ia. 600, 127 N. W. 52.

Rule not absolute.—Chicago, etc. R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517.

Negative evidence not to be disregarded.—It is error to charge positive testimony is weightier than negative if one of the parties relies almost entirely on the latter, unless it is also charged credibility of witnesses be considered. Cowart *v.* S., 120 Ga. 510, 48 S. E. 198; Southern R. Co. *v.* O'Bryan, 115 Ga. 659, 42 S. E. 42; Atlantic, etc. R. Co. *v.* O'Neill, 127 Ga. 685, 56 S. E. 986; Warrick *v.* S., 125 Ga. 133, 53 S. E. 1027.

See Ware *v.* House (Ga.), 81 S. E. 118.

759-31 Bruder *v.* S. (Ark.), 161 S. W. 1067; King *v.* S., 106 Ark. 160, 152 S. W. 990; Georgia S. & F. R. Co. *v.* Ransom, 5 Ga. App. 740, 63 S. E. 825 (competent to show witness married and has grown daughters); Mussellam *v.* R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Tetrick *v.* Kansas, 128 Mo. App. 355, 107 S. W. 418; Sexton *v.* S., 48 Tex. Cr. 497, 88 S. W. 348; Bennett *v.* Co., 56 Wash. 407, 105 P. 825. Witness may be asked concerning his occupation if it be a disgraceful or vicious one; but, it seems, not otherwise. Atchison, etc. R. Co. *v.* Keller, 33 Tex. Civ. 358, 76 S. W. 801.

759-32 Character of witness for truth and veracity cannot be shown by his testimony. Glass *v.* S., 147 Ala. 50, 41 S. 727. Neither can witness testify to comparative worth of his

own and another witness' reputation Newman *v.* C., 28 Ky. L. R. 81, 88 S. W. 1089. Nor as to whether another witness mistaken in his testimony. Braham *v.* S., 143 Ala. 28, 38 S. 919; Page *v.* S., 88 Ark. 237, 114 S. W. 248. He may, on re-examination affirm truth of previous testimony. Smith *v.* S., 52 Tex. Cr. 344, 106 S. W. 1161. *Comp.* Wright *v.* S., 149 Ala. 28, 13 S. 575.

759-33 S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531; Lane *v.* C., 131 Ky. 519, 121 S. W. 486; S. *v.* Caron, 118 La. 349, 42 S. 960; Finlen *v.* Heinze, 32 Mont. 354, 80 P. 918; P. *v.* Casconc, 185 N. Y. 317, 78 N. E. 287; Irvine *v.* S. (Okla. Cr.), 133 P. 259; Mysgraves *v.* S., 3 Okla. Cr. 421, 106 P. 544 (so far as voluntary acts of witness concerned); U. S. *v.* Catajan, 5 Phil. Isl. 136; S. *v.* Sysinger, 25 S. D. 110, 125 N. W. 879 (change of name); Wilson *v.* S. (Tex. Cr.), 160 S. W. 967 (*cit.* Encyc. of Ev.); S. *v.* Columbus, 74 Wash. 290, 133 P. 455; Grant *v.* Co., 47 Wash. 112, 91 P. 553. See vol. 7, p. 177, n 41.

Ancient history.—"One of appellant's witnesses, on cross-examination, over appellant's objection, was forced to testify that something like fifteen or twenty years ago he was sent to the penitentiary for two years. This matter is made clear by proper bill of exceptions. This was error. The time is too remote. This question has been frequently before this court. White *v.* State, 57 Tex. Cr. R. 196, 122 S. W. 391; Brown *v.* State, 56 Tex. Cr. R. 389, 120 S. W. 444; Hanks *v.* State, 55 Tex. Cr. R. 451, 117 S. W. 150; Gardner *v.* State, 55 Tex. Cr. R. 400, 117 S. W. 148; Bogus *v.* State, 55 Tex. Cr. R. 126, 111 S. W. 823, 131 Am. St. Rep. 804; Winn *v.* State, 54 Tex. Cr. R. 538, 113 S. W. 918; Casey *v.* State, 50 Tex. Cr. R. 392, 97 S. W. 496." Spiller *v.* S., 61 Tex. Cr. 555, 135 S. W. 549.

Inquiry limited to character for truth and veracity.—Baker *v.* S., 51 Fla. 1, 40 S. 673; Dungan *v.* S., 135 Wis. 151, 115 N. W. 350; Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493.

Inquiry as to a witness' character for veracity need not be limited to recently acquired place of residence. Lake Co. *v.* Lewis, 29 Ind. App. 161, 64 N. E. 35; Gemmill *v.* S., 16 Ind. App. 154, 43 N. E. 909; Craft *v.* Barron, 28 Ky. L. R. 98, 88 S. W. 1099.

Bad moral character at time of testifying tends to discredit witness, regardless of how it was brought about. S. *v.* Haupt, 126 Ia. 152, 101 N. W. 739; S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531. *Contra*, Price *v.* Wakeham, 48 Tex. Civ. 339, 107 S. W. 132.

Credibility of affiants may be ascertained by their examination in court. White *v.* S., 83 Ark. 36, 102 S. W. 715.

Extent of turpitude.—Not only fact character of witness is bad may be shown, but degree of turpitude it has reached. Neace *v.* C., 23 Ky. L. R. 125, 62 S. W. 733.

Reputation of accused for doing like acts as that for which he is on trial, may be shown. S. *v.* Oliphant, 128 Mo. App. 252, 107 S. W. 32.

Fact of being under surveillance of officers while doing business may be shown. S. *v.* Nergaard, 124 Wis. 414, 102 N. W. 899.

Whereabouts of witness when arrested and what he was then doing may be shown. S. *v.* Cornelius, 118 La. 146, 42 S. 754.

Association of witness cannot be proved. Miller *v.* Ty., 149 Fed. 330, 338, 79 C. C. A. 268; Price *v.* Wakeham, 48 Tex. Civ. 339, 107 S. W. 132.

Mental conditions of witness to be regarded. Piper *v.* R., 75 N. H. 228, 72 A. 1024. But evidence of proceedings six years before is too remote. Hicks *v.* S., 165 Ind. 440, 75 N. E. 641. Confinement in insane hospital for months about time in question, relevant. In re Farkash, 8 O. N. P. (N. S.) 137.

Reputation for violence and turbulence not material. Dolan *v.* S., 81 Ala. 11, 1 S. 707; S. *v.* Beckner, 194 Mo. 281, 91 S. W. 892.

760-34 Crawford *v.* U. S., 212 U. S. 183; Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141; Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126; Gordon *v.* S., 140 Ala. 29, 36 S. 1009; Boyd *v.* S., 150 Ala. 101, 43 S. 204; Leonard *v.* S., 106 Ark. 449, 153 S. W. 590; Carr *v.* S., 81 Ark. 589, 99 S. W. 831; Hayes *v.* S., 126 Ga. 95, 54 S. E. 809; O'Donnell *v.* P., 110 Ill. App. 250 (under statute); Clifford *v.* Co., 232 Ill. 150, 83 N. E. 448; S. *v.* Greenburg, 59 Kan. 404, 53 P. 61; S. *v.* Roupetz, 73 Kan. 663, 85 P. 778; McCreary *v.* Co., 158 Ky. 612,

165 S. W. 981; Rosenberger *v.* Rosenberger, 150 Ky. 803, 150 S. W. 1023; Watson *v.* Kentucky, etc. Co., 137 Ky. 619, 129 S. W. 341; Henderson *v.* C., 28 Ky. L. R. 1212, 91 S. W. 1141; S. *v.* Clark, 117 La. 920, 42 S. 425; S. *v.* Barrett, 117 La. 1086, 42 S. 513; S. *v.* Knowles, 98 Me. 429, 59 A. 588; Richardson *v.* S., 103 Md. 112, 63 A. 317; C. *v.* Walsh, 196 Mass. 369, 82 N. E. 19; P. *v.* De Camp, 146 Mich. 533, 109 N. W. 1047; Dodds *v.* S. (Miss.), 45 S. 863; S. *v.* Kennedy, 207 Mo. 528, 106 S. W. 57; S. *v.* Oliphant, 128 Mo. App. 252, 107 S. W. 32; S. *v.* Forsha, 190 Mo. 296, 88 S. W. 746; S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235; S. *v.* Lawrence, 28 Nev. 440, 82 P. 614; S. *v.* Mount, 73 N. J. L. 582, 64 A. 124; S. *v.* Henson, 66 N. J. L. 601, 50 A 468; P. *v.* Cascone, 185 N. Y. 317, 334, 78 N. E. 287; Coleman *v.* R. Co., 138 N. C. 351, 50 S. E. 690; Cannon *v.* Ty., 1 Okla. Cr. 600, 99 P. 622; C. *v.* Barry, 8 Pa. C. C. 216; S. *v.* Babcock, 25 R. I. 224, 55 A. 685; S. *v.* Moody, 94 S. C. 26, 77 S. E. 713; Thompson *v.* S. (Tex. Cr.), 150 S. W. 181; (See Burnett & S. (Tex. Cr.), 165 S. W. 581); Choice *v.* S., 54 Tex. Cr. 517, 114 S. W. 132 (name of person wronged by witness cannot be given); Webb *v.* S., 47 Tex. Cr. 305, 83 S. W. 394; Wormley *v.* S. (Tex. Cr.), 143 S. W. 615; Sexton *v.* S., 48 Tex. Cr. 497, 88 S. W. 348; Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804; Williams *v.* S., 51 Tex. Cr. 361, 102 S. W. 1134; Dungan *v.* S., 135 Wis. 151, 115 N. W. 350; Colbert *v.* S., 125 Wis. 423, 104 N. W. 61; Koch *v.* S., 126 Wis. 470, 106 N. W. 531; Eads *v.* S., 17 Wyo. 490, 101 P. 946.

See vol. 7, p. 173, n. 35, and supplement thereto.

On a trial for abortion, the prosecuting witness had testified that she had been married for about a month, and it appeared that she had been pregnant for about three months. The defendant on cross-examination asked her who was the father of the child, and also to state whether or not any other man than her husband was the father of the child. The court sustained an objection to these questions, and we think rightly. The relevant issue in respect of her pregnancy was the fact of her being with child, and it was immaterial who was the father. If the questions were asked to degrade her, they would be equally inadmissible. P. *v.* Wah Iling, 15 Cal. App. 195, 114 P. 416.

Though that a witness is an habitual drunkard may be shown by way of impeachment (S. *v.* Grant, 79 Mo. 113, 49 Am. Rep. 218), it is not error to refuse an instruction calling the jury's attention to that fact when they have been instructed as to the credibility of any witness and told that they could take his character into consideration. S. *v.* Wright, 152 Mo. App. 510, 133 S. W. 664.

Occupation and companions may be shown where they indicate a want of moral character. Crawford *v.* Ferguson, 5 Okla. Cr. 377, 115 P. 278.

Rule applies to accused who testifies in his own behalf. C. *v.* Walsh, 196 Mass. 369, 82 N. E. 19; Williams *v.* S., 87 Miss. 373, 39 S. 1006; S. *v.* Spivey, 191 Mo. 87, 90 S. W. 81; S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235; Ferguson *v.* S., 72 Neb. 350, 100 N. W. 800; S. *v.* Lawrence, 28 Nev. 440, 82 P. 614; S. *v.* Mount, 73 N. J. L. 582, 64 A. 124; C. *v.* Barry, 8 Pa. C. C. 216; Brown *v.* S. (Tex. Cr.), 148 S. W. 808; Dungan *v.* S., 135 Wis. 151, 115 N. W. 350.

Discretion of court.—Such evidence should rarely be admitted; though court's discretion not lightly interfered with. S. *v.* Hill, 52 W. Va. 296, 43 S. E. 160.

Rule applies to proceedings to disbar attorney. Lansing *v.* R. Co., 143 Mich. 48, 106 N. W. 692.

Prosecutions under municipal ordinances are not criminal actions. A conviction thereunder is not conviction of a crime under Oregon statute (L. O. L., §863), providing the manner of impeaching a witness. S. *v.* Crawford, 58 Ore. 116, 113 P. 440, *cit.* Coble *v.* S., 31 O. St. 100; Koch *v.* S., 126 Wis. 470, 106 N. W. 531, 3 L. R. A. (N. S.) 1086.

Particulars of offense not provable. S. *v.* Mount, 73 N. J. L. 582, 64 A. 124.

Several felonies.—Witness may be asked concerning all felonies of which he has been convicted. P. *v.* Kelly, 146 Cal. 119, 79 P. 846.

Previous conviction of accused cannot be shown on cross-examination of wife to affect her credibility. S. *v.* Eder, 36 Wash. 482, 78 P. 1023.

In federal courts it is proper to show conviction for grave offense of less

grade than felony. Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141. It is discretionary with court to permit defendant to be asked if he has been confined in state prison. Lang *v.* U. S., 133 Fed. 201, 66 C. C. A. 255.

Decisions in various states are given below: In Alabama only conviction of infamous crime can be shown. Williams *v.* S., 144 Ala. 14, 40 S. 405; Wilkerson *v.* S., 140 Ala. 165, 37 S. 265; Gordon *v.* S., 140 Ala. 29, 36 S. 1009. Statutory felony is included. Fuller *v.* S., 147 Ala. 35, 41 S. 774. In Alaska conviction of misdemeanor may be shown. Ball *v.* U. S., 147 Fed. 32, 77 C. C. A. 126. In California only conviction of felony can be shown. Kennedy *v.* Lee, 147 Cal. 596, 82 P. 257. In Connecticut acts must be limited to such as indicate lack of veracity. Spiro *v.* Nitkin, 72 Conn. 202, 44 A. 13; Dore *v.* Babcock, 74 Conn. 425, 50 A. 1016; Smith *v.* Brockett, 69 Conn. 492, 38 A. 57; Shailer *v.* Bullock, 78 Conn. 65, 61 A. 65. In Illinois the conviction must be for such crime as, at common law, excluded convicted person from being witness. Pioneer F P. Co. *v.* Clifford, 125 Ill. App. 352; McLain *v.* Chicago, 127 id. 489. In the late Indian Territory conviction of larceny might be shown. McCoy *v.* U. S., 6 Ind. Ty. 415, 98 S. W. 144; Oxier *v.* U. S., 1 Ind. Ty. 85, 38 S. W. 331. In Kentucky only conviction of felony may be shown. Britton *v.* C., 29 Ky. L. R. 857, 96 S. W. 556; Farmer *v.* C., 28 Ky. L. R. 1168, 91 S. W. 682; Henderson *v.* C., supra; Welch *v.* C., 110 Ky. 105, 60 S. W. 948, 64 S. W. 262; C. *v.* Welch, 111 Ky. 530, 63 S. W. 984. In Maryland it is competent to prove orally conviction of witness for fast driving on the occasion which caused the litigation, evidence as to rate of speed being conflicting. Mattingly *v.* Montgomery, 106 Md. 461, 68 A. 205; McLaughlin *v.* Menecke, 80 Md. 83, 30 A. 603. In criminal cases only conviction for infamous crime may be shown. Richardson *v.* S., 103 Md. 112, 63 A. 317. In Massachusetts rule extends to any crime. C. *v.* Ford, 146 Mass. 131, 15 N. E. 153. In Minnesota no distinction made between crimes and misdemeanors. S. *v.* Sauer, 42 Minn. 258, 44 N. W. 115. In Mississippi statute covers misdemeanors as well as infamous crimes. Lewis *v.* S., 85 Miss. 35, 37 S. 497. Witness may be asked if he had been convicted, but not whether he had been imprisoned for cutting a white man's throat. Statute limits questions. Dodds *v.* S. (Miss.), 45 S. 863. In Missouri inquiry may be made as to convictions for like misdemeanors in another state. S. *v.* Oliphant, 128 Mo. App. 252, 107 S. W. 32. In Nevada evidence must be confined to convictions which affect veracity of witness—one for assault and battery cannot be shown. S. *v.* Huff, 11 Nev. 17. In New York conviction of any crime may be proved. P. *v.* Burns, 33 Hun (N. Y.) 296. But not conviction under ordinance. Arhart *v.* Stark, 27 N. Y. S. 301. In North Carolina conviction for forcible trespassing may be shown; but not for drunkenness. Coleman *v.* R. Co., 138 N. C. 351, 50 S. E. 690. In Ohio in civil cases witness may not be attacked except by showing reputation for want of veracity; the trial court may exclude cross-examination as to his record. Smith *v.* Johnson, 3 O. N. P. (N. S.) 8. In Oregon conviction for misdemeanor may be shown. S. *v.* Bacon, 13 Or. 143, 9 P. 393, 57 Am. Rep. 8. Fact cannot be proved on cross-examination. S. *v.* Bartmess, 33 Or. 110, 54 P. 167. In South Carolina questions should be limited to testing witness' character for accuracy, veracity or credibility. Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719. In Texas proof must not go beyond charges of felonies and such misdemeanors as impute moral turpitude. Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493; Hays *v.* S., 47 Tex. Cr. 149, 82 S. W. 511; Marks *v.* S. (Tex. Cr.), 78 S. W. 512; Webb *v.* S., 47 Tex. Cr. 305, 83 S. W. 394; Gray *v.* S. (Tex. Cr.), 86 S. W. 764. See Cecil *v.* S. (Tex. Cr.), 100 S. W. 330. Intoxication cannot be shown. Tally *v.* S., 48 Tex. Cr. 474, 88 S. W. 339. Nor simple assault. Gray *v.* S., supra. In Vermont witness may be asked if he has been convicted of misdemeanor, though statute provides conviction of crime involving moral turpitude may be shown. McGovern *v.* Hays, 75 Vt. 104, 53 A. 326. In Wisconsin conviction for misdemeanor may be shown, but not for violation of ordinance. Koch *v.* S., 126 Wis. 470, 106 N. W. 531, 3 L. R. A. (N. S.) 1086.

Missouri.—Rev. St. 1909, §6383, provides that "any person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility," etc. This section has been construed, and it is held that the term criminal offense includes misdemeanors. S. *v.* Blitz, 171 Mo. 530, 71 S. W. 1027; S. *v.* Arnold, 206 Mo. 597, 105 S. W. 641; S. *v.* Kennedy, 207 Mo. 528, 106 S. W. 57, *cit.* in S. *v.* Campbell (Mo.), 149 S. W. 1174.

But exclusion of such evidence is immaterial where the state admits the reputation of witness for truth and veracity is bad. Foster *v.* S. (Tex. Cr.), 150 S. W. 936.

Testimony may be explained on redirect examination. Hale *v.* S. (Ala. App.), 64 S. 530.

761-36 Venable *v.* Venable, 165 Ala. 621, 51 S. 833; Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689; Crawford *v.* Ferguson, 5 Okla. Cr. 377, 115 P. 278.

Chastity.—Credibility of female under age of consent cannot be attacked by proof of intercourse with others than defendant. P. *v.* Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. 360; S. *v.* Whitesell, 142 Mo. 467, 44 S. W. 332; S. *v.* Ogden, 39 Or. 195, 65 P. 449. And so with prosecutrix over that age. Pleasant *v.* S., 15 Ark. 624; S. *v.* McDonough, 104 Ia. 6, 73 N. W. 357; C. *v.* Regan, 105 Mass. 593; S. *v.* Smith, 18 S. D. 341, 100 N. W. 740 S. *v.* Vadnais, 21 Minn. 382; S. *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132. Inquiries as to chastity of witness, and not extending beyond it, improper. Perry *v.* S., 149 Ala. 40, 43 S. 18; Spicer *v.* S., 105 Ala. 123, 16 S. 706; Rheat *v.* S., 100 Ala. 119, 14 S. 853; Swint *v.* S., 154 Ala. 46, 45 S. 901; Baker *v.* S., 51 Fla. 1, 40 S. 673; S. *v.* Boudoin, 115 La. 837, 40 S. 239. Proof of reputation for lewdness, proper. Cripe *v.* S., 4 Ga. App. 832, 62 S. E. 567. Unchastity may be shown to affect credibility, and witness may show defendant caused her downfall. S. *v.* Craig, 52 Wash. 66, 100 P. 167. Volunteered testimony as to chastity, improper. Page *v.* S., 88 Ark. 237, 114 S. W. 248.

762-37 Wynne *v.* S., 155 Ala. 99, 46 S. 459; Gordon *v.* S., 140 Ala. 29, 36 S. 1009; Smith *v.* S., 74 Ark. 397, 85 S. W. 1123; P. *v.* Eldridge, 147 Cal. 782, 82 P. 442; McLain *v.* Chicago, 127 Ill. App. 489 (may be shown by witness); Farmer *v.* C., 28 Ky. L. R. 1168, 91 S. W. 682; S. *v.* Knowles, 98 Me. 429, 57 A. 588; Rittenberg *v.* Smith, 214 Mass. 343, 101 N. E. 989; P. *v.* DeCamp, 146 Mich. 533, 109 N. W. 1047 (records admissible); S. *v.* Forsha, 190 Mo. 296, 326, 88 S. W. 746 (record admissible though witness admitted plea of guilty to lesser offense than he in fact pleaded to); S. *v.* Barrington, 198 Mo. 23, 80, 95 S. W. 235; S. *v.* Kennedy, 207 Mo. 528, 106 S. W. 57; S. *v.* Woodward, 191 Mo. 617, 90 S. W. 90 (must be shown by record if conviction denied); S. *v.* Lawrence, 28 Nev. 440, 82 P. 614; P. *v.* Cascone, 185 N. Y. 317, 334, 78 N. E. 287; S. *v.* Babcock, 25 R. I. 224, 55 A. 685.

See vol. 7, p. 216, n. 46 *et seq*, and supplement thereto.

Cal. Code Civ. Proc., §2051, allows defendant, when he takes stand in his own behalf, to be asked on cross-examination if he has ever been convicted of a felony. P. *v.* Walker, 15 Cal. App. 400, 114 P. 1009, *cit.* P. *v.* Arnold, 116 Cal. 682, 48 P. 803; P. *v.* Crowley, 100 Cal. 498, 35 P. 84.

Shown on cross-examination by statute. Snyder *v.* S., 145 Ala. 33, 40 S. 978; S. *v.* Bartlett, 98 Me. 429, 57 A. 588; McLaughlin *v.* Mencke, 80 Md. 83, 30 A. 603; Clemens *v.* Conrad, 19 Mich. 170; S. *v.* Babcock, 25 R. I. 224, 55 A. 685; McGovern *v.* Hays, 75 Vt. 104, 53 A. 326.

Record must be introduced.—Hall *v.* Brown, 30 Conn. 551; James *v.* U. S., 7 Ind. Ty. 250, 104 S. W. 607; C. *v.* Walsh, 196 Mass. 369, 82 N. E. 19; Newcomb *v.* Griswold, 24 N. Y. 298. See next paragraph.

Conviction cannot be proved by evidence aliunde until denial by witness. Cook *v.* S., 85 Miss. 738, 38 S. 110. It may be shown by extrinsic evidence. S. *v.* Griggsby, 117 La. 1046, 42 S. 497.

Extra-judicial admissions of conviction cannot be shown. Fannin *v.* S., 51 Tex. Cr. 41, 100 S. W. 916, 10 L. R. A. (N. S.) 744. Admission conclusive. Fuller *v.* S., 147 Ala. 35, 41 S. 774.

Form of question should be such as statute indicates; not proper to ask if witness has been in penitentiary. S. *v.* Bryant, 97 Minn. 8, 105 N. W. 974; S. *v.* Spivey, 191 Mo. 87, 90 S. W. 81.

Witness' denial, conclusive. Shailer *v.*

Bullock, 78 Conn. 65, 61 A. 65; Oxier *v.* U. S., 1 Ind. Ty. 85, 38 S. W. 331; Coleman *v.* R. Co., 138 N. C. 351, 50 S. E. 690.

Proof of innocence.—Witness who has testified on cross examination as to imprisonment may show innocence on redirect examination. Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493.

Particular offense of which witness convicted may be shown. P. *v.* Chin Hane, 108 Cal. 597, 41 P. 697; P. *v.* Putnam, 129 Cal. 258, 61 P. 961; P. *v.* Eldridge, 147 Cal. 782, 82 P. 442; S. *v.* Pike, 65 Me. 111.

Remoteness.—Indictment more than twenty years before trial, too remote. Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804; Casey *v.* S., 50 Tex. Cr. 392, 97 S. W. 496. Not so with one found four years before. Hull *v.* S., 50 Tex. Cr. 607, 100 S. W. 403. Or six years. Davis *v.* S., 52 Tex. Cr. 629, 108 S. W. 667. Ten or fifteen years too remote. Davis *v.* S., supra; Bogus *v.* S., 55 Tex. Cr. 126, 114 S. W. 823 (fifteen years).

Docket entries competent to prove conviction if no extended record made. S. *v.* Knowles, 98 Me. 429, 57 A. 588. *Contra*, S. *v.* Powell, 5 Penne. (Del.) 24, 61 A. 966. But see vol. 10, p. 780.

Record must show witness was indicted (Leftridge *v.* U. S., 6 Ind. Ty. 305, 97 S. W. 1018); and return of indictment into court. Clifford *v.* Co., 232 Ill. 150, 83 N. E. 448.

Record of federal court sitting in another state, admissible. Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126.

Pardon of witness may be shown. O'Donnell *v.* P., 110 Ill. App. 250; Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493. *Contra*, Gallagher *v.* P., 211 Ill. 158, 71 N. E. 842.

Acquittal cannot be proved. P. *v.* Cascone, 185 N. Y. 317, 334, 78 N. E. 287.

Identity.—It is presumed, prima facie, name in judgment designates witness who bears such a name. Boyd *v.* S., 150 Ala. 101, 43 S. 204; Clifford *v.* Co., 232 Ill. 150, 83 N. E. 448.

Privilege of witness may be availed of. See Oxier *v.* U. S., 1 Ind. Ty. 85, 38 S. W. 331; McCoy *v.* U. S., 6 Ind. Ty. 415, 98 S. W. 144; Ex parte Holden, 29 Nev. 352, 90 P. 737.

Witness' conduct in connection with matter in litigation may discredit him. Engelke *v.* Engelke, 84 Neb. 134, 120 N. W. 1019.

762-38 Glover *v.* U. S., 147 Fed. 426, 77 C. C. A. 520; Balt. & O. R. Co. *v.* Rambo, 59 Fed. 75, 8 C. C. A. 6; Bise *v.* U. S., 141 Fed. 374, 74 C. C. A. 1; Miller *v.* Ty., 149 Fed. 330, 79 C. C. A. 268; P. *v.* Monreal, 7 Cal. App. 37, 93 P. 385; S. *v.* Stewart, 6 Penne. (Del.) 435, 67 A. 786; S. *v.* Wigger, 196 Mo. 90, 93 S. W. 390; Musgraves *v.* S., 3 Okla. Cr. 421, 106 P. 544; Williams *v.* S. (Tex. Cr.), 167 S. W. 360; Ballard *v.* S. (Tex. Cr.), 160 S. W. 716; Wade *v.* S., 48 Tex. Cr. 512, 90 S. W. 503; Eads *v.* S., 17 Wyo. 490, 101 P. 946.

See vol. 7, p. 257, n. 23, and supplement thereto.

The question, "You were turned out of jail two or three days before this, weren't you?" is improper, as the mere fact that witness may have been in jail cannot be considered to discredit him. Bell *v.* S., 170 Ala. 16, 54 S. 116.

Arrest may be shown.—Snyder *v.* S., 145 Ala. 33, 40 S. 978 (for crime as to which he testified); Goad *v.* S., 52 Tex. Cr. 444, 108 S. W. 680. But fact witness committed crime cannot be established otherwise than by proof of official action or confession. Goad *v.* S., supra.

Indictment admissible.—Lucas *v.* S., 49 Tex. Cr. 135, 90 S. W. 880; Lee *v.* S., 45 Tex. Cr. 51, 73 S. W. 407 (*over.* Brittain *v.* S., 36 Tex. Cr. 436, 37 S. W. 758, which held answer of witness conclusive. Formerly evidence of prior conviction was inadmissible. S. *v.* Ezell, 41 Tex. 35. That case was overruled by Lights *v.* S., 21 Tex. App. 308, 17 S. W. 428, which has been approved in several cases cited in Lee *v.* S., supra. Witness may be asked if he was indicted. Sexton *v.* S., 48 Tex. Cr. 497, 88 S. W. 348; Lucas *v.* S., supra. Indictment may be shown. Wilkerson *v.* S., 140 Ala. 165, 37 S. 265; Hayes *v.* S., 126 Ga. 95, 54 S. E. 809; S. *v.* Rosa, 71 N. J. L. 316, 58 A. 1010 *Contra*. Stanley *v.* Ins. Co., 70 Ark. 107, 66 S. W. 432; Kansas City S. R. Co. *v.* Belknap, 80 Ark. 587, 98 S. W. 366; P. *v.* Cascone, 185 N. Y. 317, 334, 78 N. E. 287.

762-39 White *v.* S., 61 Tex. Cr. 498, 135 S. W. 562. Mere accusation not provable if indictment not found Wade *v.* S., supra; Willis *v.* S., 49 Tex. Cr. 139, 90 S. W. 1100. Acts not le

gally investigated cannot be inquired about if they do not bear upon matter under investigation nor tend to show untruthfulness. Price *v.* S., 1 Okla. Cr. 358, 98 P. 447.

Declarations of stranger not admissible. Ducharme *v.* R. Co., 203 Mass. 384, 89 N. E. 561.

Oklahoma.—If a defendant takes stand in his own behalf state may show on cross-examination, as affecting his identity, that he had been convicted of felony or of any offense which indicates moral turpitude. Cowan *v.* S., 5 Okla. Cr. 313, 114 P. 627, *cit.* Slater *v.* U. S., 1 Okla. Cr. 275, 98 P. 110.

762-40 May *v.* U. S., 157 Fed. 1, 86 C. C. A. 575; Birmingham, etc. Co. *v.* Mason, 144 Ala. 387, 39 S. 590; Little Rock, etc. Co. *v.* Robinson, 75 Ark. 548, 87 S. W. 1029; Abelson *v.* R. Co., 84 Ark. 181, 105 S. W. 81; Brinkley, etc. Co. *v.* Cooper, 75 Ark. 325, 87 S. W. 645; Shailer *v.* Bullock, 78 Conn. 65, 61 A. 65; Pittman *v.* S., 51 Fla. 94, 41 S. 385; Georgia, etc. R. Co. *v.* Stanley, 1 Ga. App. 487, 57 S. E. 1042; Powell *v.* S., 122 Ga. 571, 50 S. E. 369; Stewart *v.* Stewart, 175 Ind. 412, 94 N. E. 564; Shotts *v.* McKinney, 39 Ind. App. 101, 79 N. E. 219; Wilson *v.* U. S., 5 Ind. Ty. 610, 82 S. W. 924; Isaac *v.* U. S., 7 Ind. Ty. 196, 104 S. W. 588; S. *v.* Caron, 118 La. 349, 42 S. 960; Greer *v.* R. Co., 193 Mass. 246, 79 N. E. 267; Jennings *v.* Rooney, 183 Mass. 577, 67 N. E. 665; Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82; Seymour *v.* Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691; Ward *v.* Meeds, 114 Minn. 18, 130 N. W. 2; Mefford *v.* R. Co., 121 Mo. App. 647, 97 S. W. 602; Rossenbach *v.* Foresters, 184 N. Y. 92, 76 N. E. 1085; Carey *v.* R. Co., 108 N. Y. S. 1034; C. *v.* Ezell, 212 Pa. 293, 61 A. 930; S. *v.* Stukes, 73 S. C. 386, 53 S. E. 643; Cain *v.* R. Co., 74 S. C. 89, 54 S. E. 244; Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719; S. *v.* Baird, 79 Vt. 257, 65 A. 101; Bertoli *v.* Smith, 69 Vt. 425, 38 A. 76; Williams *v.* R. Co., 42 Wash. 597, 84 P. 1129; Schneider *v.* R. Co., 47 Wash. 45, 91 P. 565; Dungan *v.* S., 135 Wis. 151, 115 N. W. 350; S. *v.* Nergaard, 124 Wis 414, 102 N. W. 899.

Great latitude proper when it is sought to show bias. Atlanta, etc. R. Co. *v.* McManus, 1 Ga. App. 302, 58 S. E. 258; Regester *v.* Regester, 104 Md. 1, 64 A. 286; Virginia, etc. Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976; Savage *v.* Bowen, 103 Va. 540, 49 S. E. 668.

Motive of party in assaulting witness, who afterwards left the jurisdiction, may be inquired into. Horsey *v.* Co., 47 Tex. Civ. 212, 104 S. W. 503.

Rule not applicable to cross-examination to show previous inconsistent statements as to principal question. Robinson *v.* R. Co., 189 Mass. 594, 76 N. E. 190.

"**The trial court ruled** that plaintiff's husband should answer the following question upon his cross-examination: "Q. How much did you pay for it (referring to the marker for his mother's grave)?" An examination of the record shows that an attempt was made by defendant to show by the witness that money had come into his hands to purchase a marker for his mother's grave, and that he had used it for other purposes. It was being used to affect his credibility as a witness. We think it was one of those questions that is so far within the discretion of the trial court that we cannot say that he was in error in directing it to be answered." Wolverton *v.* Village of Saranac, 171 Mich. 419, 137 N. W. 211.

Innuendo.—Witness should not be discredited by. Malone *v.* Stephenson, 94 Minn. 222, 102 N. W. 372.

Limitations.—See S. *v.* Mann, 39 Wash. 144, 81 P. 561.

Method of examination.—Contradictory statements at inquest cannot be shown without first proving witness was interrogated or had opportunity to state all he knew of the matter. Larrance *v.* P., 222 Ill. 155, 78 N. E. 50.

Conviction of contempt of court twelve years before trial, not competent. Farrell *v.* Phillips, 140 Wis. 611, 123 N. W. 117.

Acts and knowledge of person not witness, and not alleged to have influenced any witness, cannot be shown. P. *v.* Emmons, 7 Cal. App. 685, 95 P. 1032.

763-41 Hitch *v.* Riggin (Del.), 80 A. 975; Western A. R. Co. *v.* Henderson, 6 Ga. App. 385, 65 S. E. 48; Smith *v.* Vickery, 235 Mo. 413, 138 S. W. 502.

Admission of credibility.—A party who uses a witness may prove he was summoned by adversary. Richmond, etc. R. Co. *v.* Rubin, 102 Va. 809, 47 S. E. 834.

Unreasonable and inhuman conduct of witness does not, per se, justify disbelief of his testimony. Louisville &

N. R. Co. *v.* Perkins, 144 Ala. 325, 39 S. 305.

Refusal to answer interrogatories may be shown by deposition. Adams *v.* Hamilton, 53 Tex. Civ. 405, 116 S. W. 1169.

764-42 Snyder *v.* S., 86 Ark. 456, 111 S. W. 465; Spahn *v.* R. Co. (Del.), 83 A. 27; Linthicum *v.* Truitt, 2 Boyce (Del.), 338, 80 A. 245; Cecchi *v.* Lindsay, 1 Boyce (Del.) 185, 75 A. 376; Garrett *v.* R. Co., 6 Penne. (Del.) 29, 64 A. 254; Illinois C. R. Co. *v.* Burke, 112 Ill. App. 415; S. *v.* Thomas, 151 Ia. 572, 132 N. W. 51; Howard *v.* R. Co., 32 Ky. L. R. 309, 105 S. W. 932; Ty. *v.* Sais, 15 N. M. 171, 103 P. 989.

See Weaver *v.* S. (Tex. Cr.), 150 S. W. 785.

Hesitancy in answering not always to be regarded unfavorably. In re Donohue, 97 App. Div. 205, 89 N. Y. S. 871.

764-43 Posey *v.* S., 143 Ala. 54, 38 S. 1019; Vickery *v.* S., 50 Fla. 144, 38 S. 907; Saucier *v.* Mills, 72 N. H. 292, 56 A. 545; Palatine Ins. Co. *v.* R. Co., 13 N. M. 241, 82 P. 363; Tompkins *v.* Leary, 134 App. Div. 114, 118 N. Y. S. 810; Blake *v.* Malliet, 84 N. Y. S. 161; Rossenbach *v.* Foresters, 184 N. Y. 92, 76 N. E. 1085; S. *v.* Patchen, 37 Wash. 24, 79 P. 479; Standard Mfg. Co. *v.* Slot, 121 Wis. 14, 98 N. W. 923.

Credit of uncontradicted witness not subject to attack. Regester *v.* Regester, 104 Md. 1, 64 A. 286.

Testimony affecting credibility of witness who has not testified to anything material may be excluded. C. *v.* Min Sing, 202 Mass. 121, 88 N. E. 918.

764-44 Coburn *v.* S., 151 Ala. 100, 44 S. 58; Williams *v.* S., 144 Ala. 14, 40 S. 405; W. U. T. Co. *v.* Merrill, 144 Ala. 618, 39 S. 121; Main *v.* Radney (Ala.), 39 S. 981; Ont. Colo. Co. *v.* Mackenzie, 19 Colo. App. 298, 74 P. 791; Caven *v.* Co., 99 Me. 278, 59 A. 285; Mefford *v.* R. Co., 121 Mo. App. 647, 97 S. W. 602; S. *v.* Stukes, 73 S. C. 386, 53 S. E. 643; Sexton *v.* S., 48 Tex. Cr. 497, 88 S. W. 348; Waggoner *v.* Moore, 45 Tex. Civ. 308, 101 S. W. 1058; Rutherford *v.* S., 49 Tex. Cr. 21, 90 S. W. 172; Eureka Hill M. Co. *v.* Co., 32 Utah 236, 90 P. 157.

Referred to in argument.—Stanfield *v.* S., 3 Ala. App. 54, 57 S. 402.

Hypnotism.—Witness may be asked if husband had not hypnotized her. S. *v.* Exum, 138 N. C. 599, 50 S. E. 283.

Testimony of deceased witness may be proved by any person who heard it; but if it was taken in shorthand court may require it be read by reporter as means of testing his memory and veracity. Austin *v.* C., 30 Ky. L. R. 295, 98 S. W. 295.

765-46 Perrin *v.* Carbone, 1 Cal. App. 295, 82 P. 222; Cannon *v.* Ty., 1 Okla. Cr. 600, 99 P. 622; Carr *v.* Co., 29 R. I. 276, 70 A. 196; Eureka Hill M. Co. *v.* Co., 32 Utah 236, 90 P. 157.

765-47 Cal. Wine Asso. *v.* Ins. Co., 159 Cal. 49, 112 P. 858; Roche *v.* Baldwin, 143 Cal. 186, 76 P. 956; Iaquinto *v.* Bauer, 104 App. Div. 56, 93 N. Y. S. 388; Holt *v.* Nielson, 37 Utah 566, 109 P. 470; Mears *v.* Daniels, 84 Vt. 91, 78 A. 737.

General moral character.—S. *v.* Gregory, 148 Ia. 152, 126 N. W. 1109.

Depositions.—Before a deposition may be used to impeach a witness he must be given an opportunity to inspect it And the rule is the same where the purpose is to test his memory. Van Verth *v.* Co., 155 Mo. App. 299, 136 S. W. 724.

Almost any question may be put on cross-examination for this purpose. Stevens *v.* Beach, 12 Vt. 585, 36 Am. Dec. 359, per Redfield, J., *cit.* with approval in Mears *v.* Daniels, 84 Vt. 91, 78 A. 737.

Proof of fraud and collusion in obtaining former judgment on identical claim in suit is competent. Masters *v.* Seeley, 138 Fed. 719, 71 C. C. A. 409.

766-48 See S. *v.* Beckner, 194 Mo. 281, 91 S. W. 892; Edger *v.* Kupper, 110 Mo. App. 280, 85 S. W. 949; Mears *v.* Daniels, 84 Vt. 91, 78 A. 737, *cit.* Hathaway *v.* Goslant, 77 Vt. 199, 59 A. 835; Lowsit *v.* Co., 38 Wash. 290, 80 P. 431; Iverson *v.* McDonnell, 36 Wash. 73, 78 P. 202.

What may occur between witness and attorney of party who called him, immaterial unless it is sought to show actual fraudulent project considered or improper influence sought to be made operative on witness. Eads *v.* S., 17 Wyo. 490, 101 P. 946.

766-49 Snyder *v.* S., 86 Ark. 456, 111 S. W. 465; P. *v.* Currie, 14 Cal. App. 67, 111 P. 108; Zane *v.* Onativia, 139 Cal. 328, 73 P. 856; Grimbley *v.* Harrold, 125 Cal. 24, 57 P. 558, 73 Am. St. 19; Daly *v.* S. (Fla.), 64 S. 358; Patton *v.* S., 117 Ga. 230; 43 S. E. 533; Booth *v.* Beckley, 11 Haw. 518; Knapp *v.* S., 168 Ind. 153, 79 N. E. 1076; Fer-

guson *v.* Ferguson, 153 Ky. 742, 156 S. W. 413; Miller *v.* S. (Miss.), 35 S. 690; Unionville Produce Co. *v.* R. Co., 168 Mo. App. 168, 153 S. W. 63; Willson *v.* Law, 112 N. Y. 536, 20 N. E. 399; Nardi *v.* R. Co., 138 N. Y. S. 496; Eswein *v.* Hodgkinson, 138 N. Y. S. 531; Nelson *v.* S., 3 Okla. Cr. 468, 106 P. 647; Smucker *v.* R. Co., 6 Pa. Super. 521; Shannon *v.* Castner, 21 Pa. Super. 294; Loftus *v.* Sturgis (Tex. Cr.), 167 S. W. 14; Gulf etc. R. Co. *v.* Matthews, 100 Tex. 63, 93 S. W. 1068; S. *v.* Patchen, 37 Wash. 24, 79 P. 479; McCowan *v.* Co., 41 Wash. 675, 84 P. 614; Younger *v.* S., 12 Wyo. 24, 73 P. 551. Silence of witness when member of coroner's jury concerning a matter of which he testified may be shown. Parham *v.* S., 147 Ala. 57, 42 S. 1.

And see L. & N. R. Co. *v.* Trout, 138 Ga. 324, 75 S. E. 328; Busbey *v.* Hamilton, 131 La. 118, 59 S. 35; Anderson *v.* Farmers', etc. Co., 29 S. D. 450, 136 N. W. 1123.

A witness having testified that he had agreed to do certain work for plaintiff for nothing was properly asked on cross-examination as to the fair price for such work, as bearing upon the probability of his testimony. Mears *v.* Daniels, 84 Vt. 91, 78 A. 737.

Control over property and making payments thereon. Lyons *v.* F. Bk., 101 Ark. 368, 142 S. W. 856.

Not according to usual practice in transactions of kind under investigation. Hale *v.* Harris, 169 Mich. 172, 134 N. W. 1111.

766-50 Emrich F. Co. *v.* Byrnes, 44 Ind. App. 341, 87 N. E. 1042; Lauer *v.* Banning, 140 Ia. 319, 118 N. W. 446; Hoskovec *v.* R. Co., 85 Neb. 295, 123 N. W. 305; Jaffe *v.* Bk., 110 N. Y. S. 204; U. S. *v.* Figueras, 2 Phil. Isl. 491.

Courts not bound by testimony demonstrated to be false by other facts in case or by common knowledge of scientific facts. Sexton *v.* Met. St. R. Co., 245 Mo. 254, 149 S. W. 21.

766-51 Zibbell *v.* S. P. Co., 160 Cal. 237, 116 P. 513; Beatty *v.* Beatty, 151 Ky. 547, 152 S. W. 540.

Though not directly contradicted. Compton *v.* R. Co., 165 Mo. App. 287, 147 S. W. 842.

The accident could not have happened as insisted by plaintiff. Hackler *v.* R. Co., 161 Mo. App. 508, 144 S. W. 157; Marston *v.* Catterlin, 239 Mo. 390, 144 S. W. 475.

Witness may be permitted to explain. Hooper *v.* S. (Tex. Cr.), 169 S. W. 1187.

766-52 Missouri etc. R. Co. *v.* Collier, 157 Fed. 347, 88 C. C. A. 127; St. Louis S. R. Co. *v.* Oliphant, 93 Ark. 631, 125 S. W. 121; Scroggins *v.* R. Co., 138 Mo. App. 215, 120 S. W. 731; Clark *v.* Elec. Co. (N. J.), 91 A. 83; Kohlenberg *v.* Kohlenberg (N. J. Eq.), 74 A. 432; Union Bk. *v.* Mandel, 124 N. Y. S. 459.

Failure to assert claim at proper time and place is some evidence its assertion otherwise was afterthought. Nichols *v.* New Britain, 77 Conn. 695, 60 A. 655; Chicago, etc. R. Co. *v.* Steckman, 224 Ill. 500, 79 N. E. 602.

Testimony will not be regarded as incredible on appeal unless it is irreconcilable with established facts and circumstances. Byers *v.* Co., 159 Fed. 347, 86 C. C. A. 347. Court must be satisfied no reasonably intelligent man could credit it. Salchert *v.* Reinig, 135 Wis. 194, 115 N. W. 132.

766-53 Turner *v.* S., 160 Ala. 40, 49 S. 828; Braly *v.* R. Co., 9 Cal. App. 417, 99 P. 400; P. *v.* Waysman, 1 Cal. App. 246, 81 P. 1087; Barry *v.* McCollom, 81 Conn. 293, 70 A. 1035; Keatley *v.* Grand Fraternity, 2 Boyce (Del.) 511, 82 A. 294; S. *v.* Massey (Del.), 82 A. 243; Hauser *v.* P., 210 Ill. 253, 71 N. E. 416; Cotner *v.* S., 173 Ind. 168, 89 N. E. 847; Atoka, etc. Co. *v.* Miller, 7 Ind. Ty. 104, 104 S. W. 555; Gordon *v.* R. Co., 222 Mo. 516, 121 S. W. 80; Lehane *v.* R. Co., 37 Mont. 564, 97 P. 1038; P. *v.* O'Brien, 135 App. Div. 85, 119 N. Y. S. 788; Nelson *v.* S., 3 Okla. Cr. 468, 106 P. 647; C. *v.* Lenhart, 40 Pa. Super. 572; Smucker *v.* R. Co., 6 Pa. Super. 521; National Bk. *v.* Thomas, 30 R. I. 294, 74 A. 1092.

The ease with which their memories fail them when called by the opposite side for cross-examination. Nelson *v.* Halvorson, 117 Minn. 255, 135 N. W. 818. "**Caution in giving testimony**, it is true, often indicates that weight should be given to the testimony; but, where a witness deeply interested institutes an inquiry as to the one particular matter vital to his own interest —that is, whether a name has been indorsed on a paper, and examines the paper to find out—his testimony that to the best of his recollection the indorsement is not there, but that he has no independent recollection on the subject is not evidence but mere conjec-

ture." Lowry Nat. Bk. v. Seymour, 91 S. C. 305, 74 S. E. 648.

The want of accurate recollection may discredit their testimony and justify a jury in disregarding it altogether. Lautner v. Kann, 181 Pa. 334, 39 A. 55. The testimony of a witness, when read, may induce belief; but the manner and conduct of the witness on the stand may so discredit him as to justify the jury in excluding the testimony in the consideration of the case. It is the testimony impelling belief in the minds of the jury, and not the number of witnesses, which should control the decision of the disputed facts in the case. Kelley v. Lehigh Valley R. Co., 236 Pa. 110, 84 A. 754.

Coaching of witness may be shown. Heath v. Hagan, 135 Ia. 495, 113 N. W. 342.

767-54 Illinois C. R. Co. v. O'Neill, 177 Fed. 328, 100 C. C. A. 658; Louisville & N. R. Co. v. Perkins, 165 Ala. 471, 51 S. 870; Eutaw v. Botnick, 150 Ala. 429, 43 S. 739; Snyder v. S., 86 Ark. 456, 111 S. W. 465; Keatley v. Grand Fraternity, 2 Boyce (Del.) 511, 82 A. 294; Joseph v. Johnson (Del.), 82 A. 30; Tobias v. R. Co. (Del.), 80 A. 358; Garrett v. R. Co., 6 Penne. (Del.) 29, 64 A. 254; City of Dalton v. Humphries, 139 Ga. 556, 77 S. E. 799; State Nat. Bk. v. Ins. Co., 238 Ill. 148, 87 N. E. 396; Atoka, etc. Co. v. Miller, 7 Ind. Ty. 104, 104 S. W. 555; Schloemer v. Co., 204 Mo. 99, 102 S. W. 565; Scully v. R. (N. H.), 83 A. 512; Cowles v. Cowles, 81 Vt. 498, 71 A. 191.

And see Wilkes v. S., 11 Ga. App. 384, 75 S. E. 443; Lawrence v. S., 10 Ga. App. 786, 74 S. E. 300. But see Western & A. R. Co. v. Davis, 139 Ga. 493, 77 S. E. 576.

To confirm the witness's estimate of time he was allowed to observe the period on a watch and to testify that such a period was correct. Bruggeman v. R. Co., 154 Ia. 596, 134 N. W. 1079.

768-56 Gosdin v. Williams, 151 Ala. 592, 44 S. 611; Borck v. S. (Ala.), 39 S. 580; Kansas City S. R. Co. v. Belknap, 80 Ark. 587, 98 S. W. 366; Abelson v. R. Co., 84 Ark. 181, 105 S. W. 81. Sterling v. Cole, 12 Cal. App. 93, 106 P. 602; Toledo, etc. R. Co. v. Stevenson, 122 Ill. App. 654; Illinois C. R. Co. v. Burke, 112 Ill. App. 415; Atoka, etc. Co. v. Miller, supra; S. v. Rutledge, 135 Ia. 581, 113 N. W. 461; S. v. Tawney, 81 Kan. 162, 105 P. 218; S. v. Craft, 117 La. 213, 41 S. 550; S. v. Newcomb, 220 Mo. 54, 119 S. W. 435; Robinson v. Stahl, 74 N. H. 310, 67 A. 577; Page v. Hazelton, 74 N. H. 252, 66 A. 1049; S. v. Roberts (N. M.), 138 P. 208; S. v. Stukes, 73 S. C. 386, 53 S. E. 643; Curry v. S. (Tex. Cr.), 162 S. W. 851; Moore v. S. (Tex. Cr.), 144 S. W. 598; Pope v. S. (Tex. Cr.), 143 S. W. 611; Baughman v. S., 49 Tex. Cr. 33, 90 S. W. 166; Rutledge v. Co. (Tex. Civ.), 95 S. W. 749; S. v. Enid, 55 Wash. 302, 104 P. 275; S. v. Griffin, 43 Wash. 591, 86 P. 951; S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49. See infra, "Hearsay," 447-28.

See the title "Bias."

As, for example, on cross-examination of a defendant charged with deceit and false representations relating to the quality and character of land sold by him. Yanelli v. Littlejohn, 172 Mich. 91, 137 N. W. 723.

"Defendant may also prove facts which show motive on the part of the witness to testify against him, or which show that the witness is testifying under circumstances which make it necessary to testify against defendant in order to save himself. Watts v. State, 18 Tex. App. 384." Pope v. S. (Tex. Cr.), 143 S. W. 611.

Accomplice.—See Tollifson v. P., 49 Colo. 219, 112 P. 794, and the title "Accomplices."

Fraternal membership.—It may be shown one of the parties and his witnesses are members of same labor union. Huss v. Co., 210 Mo. 44, 108 S. W. 63; P. v. Cowan, 1 Cal. App. 411, 82 P. 339.

Attempt to corrupt judge on former trial may be shown. Finlen v. Heinze, 32 Mont. 354, 80 P. 918.

Courtship of witness and daughter of party for whom he testifies may be shown. S. v. Miles, 199 Mo. 530, 98 S. W. 25.

Declarations of prosecuting officer in another case to which witness a party, incompetent. Thompson v. U. S., 144 Fed. 14, 75 C. C. A. 172; Harrell v. S., 121 Ga. 607, 49 S. E. 703.

Dishonesty in transaction out of which suit arose may be proved. Lewter v. Lindley (Tex. Civ.), 89 S. W. 784.

Accused may show witness had made threats against him. S. v. Atkins, 77 Vt. 215, 59 A. 826.

Expectations of witness, though baseless, may be shown. Stevens *v.* P., 215 Ill. 593, 74 N. E. 786.

Violations of law under which party is being tried cannot be proved to affect credibility. Smith *v.* S., 161 Ala. 94, 49 S. 1029.

769-57 Louisville, etc. R. Co. *v.* Sherrill, 152 Ala. 213, 44 S. 631; Kansas City S. R. Co. *v.* Belknap, 89 Ark. 587, 98 S. W. 366; Pittman *v.* S., 51 Fla. 94, 41 S. 385; Smith *v.* Hockenberry, 146 Mich. 7, 109 N. W. 23; Magness *v.* S. (Miss.), 63 S. 352; S. *v.* Darling, 202 Mo. 150, 100 S. W. 631; Rippetoe *v.* R. Co., 138 Mo. App. 402, 122 S. W. 314; P. *v.* Mallon, 116 App. Div. 425, 101 N. Y. S. 814; S. *v.* Malmberg, 14 N. D. 523, 105 N. W. 614; Creeping Bear *v.* S., 113 Tenn. 322, 87 S. W. 653; Houston, etc. R. Co. *v.* McCarty, 40 Tex. Civ. 364, 89 S. W. 805; Lincoln *v.* Hemenway, 80 Vt. 530, 69 A. 153; Norfolk, etc. R. Co. *v.* Birchfield, 105 Va. 805, 54 S. E. 879; Schuster *v.* S., 80 Wis. 107, 49 N. W. 30. See Ferguson *v.* S., 72 Neb. 350, 100 N. W. 800; C. *v.* Ezell, 212 Pa. 293, 61 A. 930; Cockrell *v.* S., 60 Tex. Cr. 124, 131 S. W. 221.

Declarations out of court and in absence of one of the parties may be shown. Porch *v.* S., 51 Tex. Cr. 7, 99 S. W. 1122.

Letters written by witness, admissible, though they contain matter incompetent as evidence. P. *v.* Thorne, 148 Mich. 203, 111 N. W. 741.

Effort of witness to suppress testimony may be shown. Pearson *v.* S., 56 Tex. Cr. 607, 120 S. W. 1004.

Facts unknown to witness may not be proved. Reeves *v.* Ty., 2 Okla. Cr. 351, 101 P. 1039.

770-58 Lynn *v.* S., 140 Ga. 387, 79 S. E. 29; Brock *v.* Brock, 140 Ga. 590, 79 S. E. 473; Billings *v.* S., 8 Ga. App. 672, 70 S. E. 36; Gordon *v.* S., 7 Ga. App. 691, 67 S. E. 893; P. *v.* Harper, 145 Mich. 402, 108 N. W. 689; Lounsbury *v.* Knights, 128 App. Div. 394, 112 N. Y. S. 921; Tachini *v.* S., 59 Tex. Cr. 55, 126 S. W. 1139. See P. *v.* Gurowitz, 78 Misc. 511, 138 N. Y. S. 616. See also vol. 4, p. 625, and supplement thereto.

Friendship of witnesses for a party is not such interest as affects their credibility—pecuniary gain or loss is the test. Berkowitz *v.* Schlanger, 70 Misc. 239, 126 N. Y. S. 664.

"If a witness is employed to assist in catching violators of this or any other law, and is giving material testimony, the fact that he has been employed is admissible in evidence as going to show his bias, intent, or motive in the matter. The authorities were collated in the recent cases of Pope *v.* State, 143 S. W. 611, and Earle *v.* State, 142 S. W. 1181." Whitehead *v.* S. (Tex. Cr.), 147 S. W. 583.

770-59 P. *v.* Gardt, 258 Ill. 468, 101 N. E. 687; Riesen *v.* Riesen, 148 Ill. App. 460. See S. *v.* Bryant, 97 Minn. 8, 105 N. W. 974; U. S. *v.* Yu-To-Chay, 4 Phil. Isl. 613.

Postoffice inspectors, not detectives. Lorenz *v.* U. S., 24 App. Cas. (D. C.) 337.

Compensation not contingent.—It may be shown witness was a detective, but if compensation does not depend upon securing convictions amount of it need not be shown, there being nothing to indicate tenure of employment would be affected. White *v.* S., 121 Ga. 191, 48 S. E. 941.

Witness' lack of financial interest in result may be shown on redirect examination. Morrow *v.* S., 56 Tex. Cr. 519, 120 S. W. 491.

771-61 Provident Soc. *v.* King, 216 Ill. 416, 75 N. E. 166; Stevenson *v.* Co., 143 Ill. App. 397; Southern R. Co. *v.* S. (Ind. App.), 72 N. E. 174; Katz *v.* R. Co., 63 Misc. 315, 116 N. Y. S. 562 (offer to testify for compensation); C. *v.* Simon, 44 Pa. Super. 538; Shannon *v.* Castner, 21 Pa. Super. 294 (expert promised compensation in excess of legal fees); Pecos River R. Co. *v.* Harrington (Tex. Civ.), 99 S. W. 1050.

Facts shown on cross-examination may be rebutted on redirect examination. Tubb *v.* S., 55 Tex. Cr. 606, 117 S. W. 858.

771-62 Indiana U. T. Co. *v.* Pheanis, 43 Ind. App. 653, 85 N. E. 1040; Briscoe *v.* R. Co., 118 Mo. App. 668, 95 S. W. 276; Brown *v.* R. Co., 87 N. Y. S. 461. See In re Steenwerth, 97 App. Div. 116, 89 N. Y. S. 674.

Professional expert.—It may be shown witness frequently testified for one of the parties in like suits and received additional compensation. Chicago C. R. Co. *v.* Handy, 208 Ill. 81, 69 N. E. 917; Horton *v.* R. Co., 46 Tex. Civ. 639, 103 S. W. 467. But number of times witness has testified for or against either party may not be gone into.

Southern R. Co. *v.* Dickens, 161 Ala. 144, 49 S. 766.

Immaterial whether money paid exceeded legal fees or not. S. *v.* Mulch, 17 S. D. 321, 96 N. W. 101.

Amount paid detective and time payment made, though nothing further be due, may be shown. P. *v.* Loris, 131 App. Div. 127, 115 N. Y. S. 236.

771-63 Sylvester *v.* S., infra (witness not subpoenaed).

Witness may explain why he testified without being subpoenaed. Sylvester *v.* S., 46 Fla. 166, 35 S. 142.

Free transportation.—Fact witnesses were transported to place of trial free of charge and hotel bills paid tends to show bias. Moore *v.* R. Co., 137 Ala. 495, 34 S. 617.

Payment of a witness' legal demands does not justify adverse inference. Southern R. Co. *v.* Morris, 143 Ala. 628, 42 S. 17.

Payment of expense incurred by witness in coming from another state cannot be inquired into. Parrish *v.* S., 139 Ala. 16, 36 S. 1012.

Promised gratuities may be shown to have resulted in no harm and that none was intended. Dupuis *v.* Co., 146 Mich. 151, 109 N. W. 413.

771-64 U. S. *v.* Post, 128 Fed. 950; Nelson *v.* S. (Ala. App.), 65 S. 844; Alabama G. S. R. Co. *v.* Yount, 165 Ala. 537, 51 S. 737; Cook *v.* S., 152 Ala. 66, 44 S. 549; Gosdin *v.* Williams, 151 Ala. 592, 44 S. 611; Cross *v.* S., 147 Ala. 125, 41 S. 875; Sanford *v.* S., 143 Ala. 78, 29 S. 370; Funderburk *v.* S., 145 Ala. 661, 39 S. 672; Hanners *v.* S., 147 Ala. 27, 41 S. 973; Davidson *v.* S., 108 Ark. 191, 158 S. W. 1103; Ringer *v.* S., 74 Ark. 262, 85 S. W. 410; P. *v.* Ryan, 152 Cal. 364, 92 P. 853; Hampton *v.* S., 50 Fla. 55, 39 S. 421; Eatman *v.* S., 48 Fla. 21, 37 S. 576; Vaughn *v.* S., 52 Fla. 122, 41 S. 881; Sylvester *v.* S., 46 Fla. 166, 35 S. 142; McDuffie *v.* S., 121 Ga. 580, 49 S. E. 708; Atlanta, etc. R. Co. *v.* McManus, 1 Ga. App. 392, 58 S. E. 258; S. *v.* Barber, 13 Ida. 65, 88 P. 418; S. *v.* Crea, 10 Ida. 88, 76 P. 1013; Walker *v.* R. Co., 142 Ill. App. 372; National E. & S. Co. *v.* Fagan, 115 Ill. App. 590; Blair *v.* Blair, 125 Ill. App. 341; S. *v.* Koller, 139 Ia. 111, 105 N. W. 391; S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461; S. *v.* Seery, 129 Ia. 259, 105 N. W. 511; Strange *v.* C., 23 Ky. L. R. 1234, 64 S. W. 980; Stockham *v.* Malcolm, 111 Md. 615, 74 A. 569; Seymour *v.* Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691; S. *v.* Darling, 202 Mo. 150, 100 S. W. 631; Briscoe *v.* R. Co., 118 Mo. App. 668, 95 S. W. 276; Lambeck *v.* Stiefel, 71 N. J. L. 320, 59 A. 460; Potter *v.* Browne, 197 N. Y. 288, 90 N. E. 812; Brink *v.* Stratton, 176 N. Y. 150, 68 N. E. 148; Salzman *v.* Mandel, 98 N. Y. S. 825; P. *v.* Milks, 70 App. Div. 438, 74 N. Y. S. 1042; Lederer *v.* Lederer, 108 App. Div. 228, 95 N. Y. S. 623; Fischer *v.* Brady, 94 N. Y. S. 25; Carey *v.* R. Co., 108 N. Y. S. 1034; P. *v.* Wenzel, 189 N. Y. 275, 82 N. E. 130; S. *v.* Exum, 138 N. C. 599, 50 S. E. 283; S. *v.* Malmberg, 14 N. D. 523, 105 N. W. 614; C. *v.* Hartman, 31 Pa. Super. 364; Creeping Bear *v.* S., 113 Tenn. 322, 87 S. W. 653; Wilson *v.* S. (Tex. Cr.), 158 S. W. 1114; Durfee *v.* S. (Tex. Cr.), 165 S. W. 180; Earles *v.* S., 64 Tex. Cr. 537, 142 S. W. 1181; Shoemaker *v.* S., 58 Tex. Cr. 518, 126 S. W. 887; Houston, etc. R. Co. *v.* McCarty, 40 Tex. Civ. 364, 89 S. W. 805; Missouri, etc. R. Co. *v.* Cherry, 44 Tex. Civ. 232, 97 S. W. 712; Houston, etc. R. Co. *v.* Wilson, 37 Tex. Civ. 405, 84 S. W. 274; Wooley *v.* Bell, 33 Tex. Civ. 399, 76 S. W. 797; Brownlee *v.* S., 48 Tex. Cr. 408, 87 S. W. 1153; Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804; Hathaway *v.* Goslant, 77 Vt. 199, 59 A. 835; S. *v.* Griffin, 43 Wash. 591, 86 P. 951; S. *v.* Dalton, 43 Wash. 278, 86 P. 590; Lowe *v.* Ring, 123 Wis. 107, 101 N. W. 381.

See Allen *v.* Fincher (Ala.), 65 S. 946; P. *v.* Rice, 136 Mich. 619, 99 N. W. 860; P. *v.* Cahoon, 88 Mich. 456, 50 N. W. 384; Manley *v.* S. (Tex. Cr.), 153 S. W. 1138; Coffman *v.* S., 51 Tex. Cr. 478, 103 S. W. 1128.

"**The adverse side** may prove the declarations and acts of the witness which tend to show his bias, interest, prejudice, or any other mental state or status, which, fairly construed, might tend to affect his credibility." Irvin *v.* S. (Tex. Cr.), 148 S. W. 589.

Details of trouble inadmissible.—Walker *v.* R. Co., 149 Ill. App. 406.

Contra as to friendly feeling of prosecuting witness for accused. S. *v.* De Hart, 38 Mont. 211, 99 P. 438.

Hostility to deceased may be shown in trial for homicide. Glass *v.* S., 147 Ala. 50, 41 S. 727; Morris *v.* S. (Ala.), 39 S. 608; Cook *v.* S., 169 Ind. 430, 82 N. E. 1047; Sue *v.* S., 52 Tex. Cr. 122,

105 S. W. 804; Porch *v.* S., 50 Tex. Cr. 335, 99 S W. 102.

Hostility of persons who have had cause and opportunity to influence witness against accused may be shown. S. *v.* Coss, 53 Or. 462, 101 P. 193.

Hostility should be shown by direct and positive testimony. Carey *v.* R. Co., 108 N. Y. S. 1034; Gale *v.* R. Co., 76 N. Y. 594; Brink *v.* Stratton, 176 N. Y. 150, 68 N. E. 148.

Witness may explain grounds of expressed hostility. P. *v.* Wenzel, 189 N. Y. 275, 82 N. E. 130.

Party who called witness may show bias if the other brought out first material testimony. Fine *v.* R. Co., 91 N. Y. S. 43.

Nature of trouble between party and witness may be shown, but not details. Glass *v.* S., 147 Ala. 50, 41 S. 727. At least, if ill-will admitted. Wright *v.* Anniston, 151 Ala. 465, 44 S. 151; Proctor *v.* Pointer, 127 Ga. 134, 56 S. E. 111; S. *v.* Lee, 46 Or. 40, 79 P. 577. And if there is no such admission. McDuffie *v.* S., 121 Ga. 580, 49 S. E. 708; S. *v.* Seery, 129 Ia. 259, 105 N. W. 511; S. *v.* Malmberg, 14 N. D. 523, 105 N. W. 614. Justifiableness of hostility, immaterial. Seymour *v.* Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691.

Evidence of attempt to conciliate party against whom hositility shown, competent. C. *v.* Oakes, 187 Mass. 90, 72 N. E. 323.

Attempts to prevent others testifying may be shown. S. *v.* Koller, 129 Ia. 111, 105 N. W. 391; S. *v.* Thornhill, 177 Mo. 691, 76 S. W. 948.

Attempts to conceal fact witness knows material facts may be shown. Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156.

Time, place and occasion of hostile statements out of court must be shown. S. *v.* Bardelli, 78 Vt. 102, 62 A. 44. But collusion between witness and party may be shown without predicate. Chavigny *v.* Hava, 125 La. 710, 51 S. 696.

Hostility against party relatives, immaterial. McQuiggan *v.* Ladd, 79 Vt. 90, 64 A. 503.

Order of proof.—Ordinarily, proof of bias should be deferred until testimony given on the issues; but that may be varied. Fine *v.* R. Co., 91 N. Y. S. 43. See Brink *v.* Stratton, 176 N. Y. 150, 68 N. E. 148.

Unfriendliness not shown by evidence of refusal to pay an account. Pilcher *v.* Mule Co., 6 Ala. App. 552, 60 So. 547.

771-65 Illinois C. R. Co. *v.* O'Neill, 177 Fed. 328, 100 C. C. A. 658; Couch *v.* Couch, 141 Ala. 361, 37 S. 405; Eutaw *v.* Botnick, 150 Ala. 423, 43 S. 739; Vindicator, etc. Co. *v.* Firstbrook, 36 Colo. 498, 86 P. 313; Roberts *v.* R. Co., 262 Ill. 228, 104 N. E. 708; Kennedy *v.* Murphy, 112 Ill. App. 607; Marx & Son *v.* King, 177 Mich. 662, 144 N. W. 553; Smith *v.* Hockenberry, 146 Mich. 7, 109 N. W. 23; Ellis *v.* R. Co., 131 Mo. App. 395, 111 S. W. 839; Frank *v.* Symons, 35 Mont. 56, 88 P. 561; Poore *v.* R. R. (N. H.), 90 A. 791; Schon *v.* Harlan, 56 Misc. 518, 107 N. Y. S. 113; Hirsch *v.* Co., 92 N. Y. S. 794; Iaquinto *v.* Bauer, 104 App. Div. 56, 93 N. Y. S. 388; Miller *v.* Ty., 15 Okla. 422, 85 P. 239; Wyatt *v.* Moore (Tex. Civ.), 152 S. W. 1135; Crane *v.* Tel. Co. (Tex. Civ.), 152 S. W. 444; Dubinski E. Wks. *v.* Co. (Tex. Civ.), 111 S. W. 169; St. Louis, etc. R. Co. *v.* Sproule, 45 Tex. Civ. 615, 101 S. W. 268; Chicago, etc. R. Co. *v.* Longbottom (Tex. Civ.), 80 S. W. 542; Brown *v.* Sherrod, 53 Wash. 132, 101 P. 481. See also Ross *v.* Ross, 148 Ia. 729, 127 N. W. 1034; Star Mills *v.* Bailey, 140 Ky. 194, 130 S. W. 1077.

Party in interest.—Not competent to show insurance company is defending suit to which it is not a party. Sawyer *v.* Co., 90 Me. 369, 38 A. 333; Fuller Co. *v.* Darragh, 101 Ill. App. 664; Manigold *v.* Co., 81 App. Div. 381, 80 N. Y. S. 861; Wildrick *v.* Moore, 66 Hun 630, 22 N. Y. S. 1119; Cosselman *v.* Dunfee, 172 N. Y. 507, 65 N. E. 494; Iverson *v.* McDonnell, 36 Wash. 73, 78 P. 202; Lowsit *v.* Co., 38 Wash. 290, 80 P. 431.

Res inter alios actae.—Inquiry must not extend to acts or declarations of witness in his dealings with strangers. Chicago, etc. R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050.

771-66 P. *v.* Sheffield, 9 Cal. App. 130, 98 P. 67; Teston *v.* S., 50 Fla. 137, 39 S. 787; Hampton *v.* S., 50 Fla. 55, 39 S. 421; Taylor *v.* S., 121 Ga. 348, 49 S. E. 303; Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689; Isaac *v.* U. S., 7 Ind. Ty. 196, 104 S. W. 588; S. *v.* Tawney, 81 Kan. 162, 105 P. 218; P. *v.* Gerdvine, 210 N. Y. 184, 104 N. E. 129; Speight *v.* R. Co., 161 N. C. 80, 76 S. E.

684; Nelson *v.* S., 3 Okla. Cr. 468, 106 P. 647; McLeod *v.* R. Co., 93 S. C. 71, 76 S. E. 19; Kelly *v.* S. (Tex. Cr.), 151 S. W. 304; Foster *v.* S. (Tex. Cr.), 150 S. W. 936; Owens *v.* S. (Tex. Cr.), 96 S. W. 31; Sexton *v.* S., 48 Tex. Cr. 497, 88 S. W. 348; S. *v.* Bean, 77 Vt. 384, 60 A. 807.

Accused.—In P. *v.* Arnold, 248 Ill. 169, 93 N. E. 786, the court after instructing that the credibility of the defendant was a matter for the jury, and that they might consider, among other things, his interest, said: "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith or false and made only for the purpose of avoiding a conviction." Disapproving, the Supreme Court said: "When a person accused of crime becomes a witness, he is in the same position as any other witness, and any witness may be either disinterested or have an interest, near or remote. The interest of the defendant is of a different character from that of any other, and it is therefore proper to point him out in an instruction and to direct the jury to take into account his interest as affecting his credibility, but the court has no more right to disparage or discredit his testimony than that of any other witness. Such an instruction as this, concerning any other witness having an interest in the result of a case, would not be regarded as proper, and the instruction falls under the condemnation of Hellyer *v.* People, 186 Ill. 550, 58 N. E. 245. The words quoted were the ground for a reversal of the judgment in Donner *v.* State, 72 Neb. 263, 100 N. W. 305, 117 Am. St. Rep. 789."

Contribution of money to aid in prosecution may be shown, as may fact witness received retainer. Miller *v.* Ty., 149 Fed. 330, 79 C. C. A. 268. Mere solicitation to contribute, immaterial. Robinson *v.* S., 155 Ala. 67, 45 S. 916.

Voluntary statement showing extent of witness' interest, competent. Lowman *v.* S., 161 Ala. 47, 50 S. 43.

772-67 Daniels *v.* Stock, 23 Colo. App. 529, 130 P. 1031; S. *v.* Massey (Del.), 82 A. 243; Domestic, etc. Co. *v.* Holden (Ind. App.), 103 N. E. 73; McLendon *v.* S., 7 Ga. App. 687, 67 S. E. 846; S. *v.* Thomas, 151 Ia. 572, 132 N. W. 51; Wallace *v.* S., 91 Neb. 158, 135 N. W. 549; Hoxie *v.* Walker, 75 N. H. 308, 74 A. 183; Nat. Bk. *v.* Thomas, 30 R. I. 243, 74 A. 1092; S. *v.* Stukes, 73 S. C. 386, 53 S. E. 643; Bolt *v.* Bk. (Tex. Civ.), 145 S. W. 707; Tipton *v.* Tipton, 55 Tex. Civ. 192, 118 S. W. 842; Blankavag *v.* Co., 136 Wis. 380, 117 N. W. 852.

It may be shown witness volunteered. Sylvester *v.* S., 46 Fla. 166, 35 S. 142; Wabash R. Co. *v.* Ferris, 6 Ind. App. 30, 32 N. E. 112. But testimony of near relative who came from without jurisdiction and testified voluntarily is not without force. Timma *v.* Timma, 72 Kan. 73, 82 P. 481. See supra, 771.

772-68 Oldham *v.* C., 136 Ky. 789, 125 S. W. 242.

772-69 Monteith *v.* S., 161 Ala. 18, 49 S. 777; Hammond *v.* S., 147 Ala. 79, 41 S. 761; Shelton *v.* S., 144 Ala. 106, 42 S. 30; Prior *v.* Ty., 11 Ariz. 169, 89 P. 412; Halderman *v.* Halderman, 7 Ariz. 120, 60 P. 876; P. *v.* Ryan, 152 Cal. 364, 92 P. 853; P. *v.* Waysman, 1 Cal. App. 246, 81 P. 1087; P. *v.* Botkin, 9 Cal. App. 244, 98 P. 861; S. *v.* Dlugozrina, 7 Penne. (Del.) 151, 74 A. 1086 (also prosecutrix); S. *v.* Menz, 81 Kan. 197, 105 P. 24; P. *v.* Dumas, 161 Mich. 45, 125 N. W. 766; S. *v.* Brown, 216 Mo. 351, 115 S. W. 967; Holmes *v.* S., 85 Neb. 506, 123 N. W. 1043; S. *v.* Dixon, 149 N. C. 460, 62 S. E. 615; Hendrix *v.* U. S., 2 Okla. Cr. 240, 101 P. 125; S. *v.* Farr, 29 R. I. 72, 69 A. 5; Majors *v.* S., 58 Tex. Cr. 39, 124 S. W. 663; Younger *v.* S., 12 Wyo. 24, 73 P. 551.

772-70 Ludlow *v.* S., 156 Ala. 58, 47 S. 321; S. *v.* Judd, 132 Ia. 296, 109 N. W. 892; S. *v.* Newcomb, 220 Mo. 54, 119 S. W. 405 (instructions should be permissive); S. *v.* Lee, 85 S. C. 101, 67 S. E. 141 (state may show witness for it was defendant's putative father); Morrow *v.* S., 56 Tex. Cr. 519, 120 S. W. 491; Sexton *v.* S., 48 Tex. Cr. 497, 88 S. W. 348; Hardin *v.* S., 51 Tex. Cr. 559, 103 S. W. 401.

Illicit relations of defendant and witness may be proved. Perdue *v.* S., 126 Ga. 112, 54 S. E. 820; Brown *v.* S., 119 Ga. 572, 46 S. E. 833.

Proof witness is husband of a party must be made by direct evidence; admissions of strangers, not competent. Barton *v.* Bruley, 119 Wis. 326, 96 N. W. 815.

773-71 Ackley *v.* U. S., 200 Fed. 217, 118 C. C. A. 403; Perry *v.* S. (Miss.), 61 S. 466; S. *v.* Bobbitt, 228 Mo. 252,

128 S. W. 953; Link *v.* S. (Tex. Cr.), 164 S. W. 987.

773-72 Dumas *v.* Clayton, 32 App. Cas. (D. C.) 566; Sterling *v.* Cole, 12 Cal. App. 93, 106 P. 602; Detwiler *v.* Cox, 120 Ga. 638, 48 S. E. 142; Armstrong *v.* Ballew, 118 Ga. 168, 44 S. E. 996; Johnson *v.* Southern Ry. Co., 9 Ga. App. 661, 72 S. E. 66; Steve *v.* Co., 13 Ida. 384, 92 P. 363; Lauth *v.* Co., 244 Ill. 244, 91 N. E. 431; Larsen *v.* Co., 131 Ill. App. 286; Caldwell *v.* Turner, 129 La. 19, 55 S. 695; Alpena *v.* Mainville, 153 Mich. 732, 117 N. W. 338; Goss *v.* Goss, 102 Minn. 346, 113 N. W. 690; Alward *v.* Oakes, 63 Minn. 190, 65 N. W. 270; Miller *v.* Freeman (Tex. Civ.), 127 S. W. 302 (accident policies held by plaintiff in tort action); Texas & P. R. Co. *v.* Dishman, 41 Tex. Civ. 250, 91 S. W. 828; Ireland *v.* Scharpenberg, 54 Wash. 558, 103 P. 801; McCowan *v.* Co., 41 Wash. 675, 84 P. 614 (extent of interest as stockholder); Novak *v.* Co., 141 Wis. 298, 124 N. W. 282.

See P. *v.* Newman, 261 Ill. 11, 103 N. E. 589; Marx & Son *v.* King, 177 Mich. 662, 144 N. W. 553.

Failure to assert rights is a circumstance affecting credibility of witness who subsequently testifies thereto. Armstrong *v.* Ballew, 118 Ga. 168, 44 S. E. 996.

Assertion of legal rights by other suits cannot be proved to show prejudice of plaintiff. Texas & P. R. Co. *v.* Dishman, 41 Tex. Civ. 250, 91 S. W. 828.

773-73 Parham *v.* S., 147 Ala. 57, 42 S. 1; Louisville, etc. R. Co. *v.* Sherrill, 152 Ala. 213, 44 S. 631; Birmingham, etc. R. Co. *v.* Rutledge, 142 Ala. 195, 39 S. 338; Mobile Light & R. Co. *v.* Davis, 1 Ala. App. 338, 55 S. 1020; Murray *v.* Llewellyn, 4 Cal. App. 41, 87 P. 202; Capital C. Co. *v.* Holtzman, 27 App. Cas. (D. C.) 125; Central, etc. R. Co. *v.* Bagley, 121 Ga. 781, 49 S. E. 780; Chicago, etc. R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087; Merchants' Mut. T. Co. *v.* Hirschman, 43 Ind. App. 283, 87 N. E. 238; Gordon *v.* R. Co., 222 Mo. 516, 121 S. W. 80 (discharge of witness from service of party and pendency of application for reinstatement); Stockton *v.* R. Co., 177 Mo. App. 286, 164 S. W. 176; Sharp *v.* R. Co., 184 N. Y. 100, 76 N. E. 923; Schuster *v.* R. Co., 129 N. Y. S. 262; Iaquinto *v.* Paper, 104 App. Div. 56, 93 N. Y. S. 388; Glenn *v.* Co., 206 Pa. 135, 55 A. 860; McLeod *v.* R. Co., 93 S. C. 71, 76 S. E. 19; Cain *v.* R. Co., 74 S. C. 89, 54 S. E. 244; Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29; Clopton *v.* C., 109 Va. 813, 63 S. E. 1022; Norfolk, etc. R. Co. *v.* Birchfield, 105 Va. 809, 54 S. E. 879; Williams *v.* R. Co., 42 Wash. 597, 84 P. 1129; Stowe *v.* La Conner, 39 Wash. 28, 80 P. 856, 81 P. 97; Bodenheimer *v.* R. Co., 140 Wis. 623, 123 N. W. 148.

Witness' declarations may be shown to prove he is employe. Louisville, etc. R. Co. *v.* Munford, 24 Ky. L. R. 416, 68 S. W. 635. Fact he is such being shown, inquiry as to duty, immaterial. Parham *v.* S., 147 Ala. 57, 42 S. 1.

Witness' attempt to procure perjured testimony may be shown; but not attempts of others if neither party thereto testified. C. *v.* Min Sing, 202 Mass. 121, 88 N. E. 918.

774-74 Patterson *v.* S., 8 Ala. App. 420, 62 So. 1023; Pitcher *v.* Smith, 4 Ala. App. 444, 58 S. 672; Williams *v.* S., 144 Ala. 14, 40 S. 405; Merchants' Ins. Co. *v.* McAdams, 88 Ark. 550, 115 S. W. 175; St. Louis R. Co. *v.* Hutchinson, 79 Ark. 247, 96 S. W. 374; S. *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982; Valley Tp. *v.* Stiles, 77 Kan. 557, 95 P. 572; Lury *v.* R. Co., 205 Mass. 540, 91 N. E. 1018; U. S. *v.* Ramirez, 4 Phil. Isl. 549; Miner *v.* Co., 83 Vt. 311, 75 A. 653.

See Nichols & Shepard Co. *v.* Horstad (S. D.), 146 N. W. 566.

Contradiction as to immaterial fact is not material. Southern R. Co. *v.* Hundley, 151 Ala. 378, 44 S. 195.

The jury may accept the explanation of a witness as to why he has made contradictory statements. Solomon *v.* S., 10 Ga. App. 469, 73 S. E. 623.

Inconsistencies between statement as to location and distance, as indicated on a plat, do not affect the witnesses' credibility. Balt. & O. R. Co. *v.* S., 120 Md. 319, 87 A. 676.

Witness should be allowed to explain his inconsistent statements. Spearman *v.* S. (Tex. Cr.), 152 S. W. 921.

774-75 Brown *v.* S., 142 Ala. 287, 38 S. 268; Barddell *v.* S., 144 Ala. 54, 39 S. 975; Hammond *v.* S., 147 Ala. 79, 41 S. 761; Hughes *v.* S., 152 Ala. 5, 44 S. 694; Speakman *v.* Vest, 152 Ala. 623, 44 S. 1021; Morris *v.* S. (Ala.), 39 S. 608; Giddens *v.* Rutledge, 146 Ala. 232, 40 S. 759; Jones *v.* S., 145 Ala. 51, 40 S. 947; Snyder *v.* S., 145 Ala. 33, 40 S.

978; Alabama, etc. R. Co. *v.* Clarke, 145 Ala. 459, 39 S. 816; Schaffer *v.* Ty., 14 Ariz. 359, 127 P. 746; Rector *v.* Robins, 82 Ark. 424, 102 S. W. 209; Weaver *v.* S., 83 Ark. 119, 102 S. W. 713; Cage *v.* S., 73 Ark. 484, 84 S. W. 631; Keyes *v.* R. Co., 152 Cal. 437, 93 P. 88; P. *v.* Howard, 143 Cal. 316, 76 P. 1116; P. *v.* Scalamiero, 143 Cal. 343, 76 P. 1098; Colorado M. R. Co. *v.* McGarry, 41 Colo. 398, 92 P. 915; Denver, etc. R. Co. *v.* Mitchell, 42 Colo. 43, 94 P. 289; Joyce *v.* Joyce, 80 Conn. 88, 67 A. 374; Grant *v.* U. S., 28 App. Cas. (D. C.) 169; Davis *v.* Maloney (Del.), 84 A. 947; Adams *v.* S., 54 Fla. 1, 45 S. 494; Clinton *v.* S., 53 Fla. 98, 43 S. 312; Tinker *v.* S., 125 Ga. 743, 54 S. E. 662; Georgia, etc. Co. *v.* Andrews, 125 Ga. 85, 54 S. E. 76; Perdue *v.* S., 126 Ga. 112, 54 S. E. 820; Leake *v.* Co., 5 Ga. App. 102, 62 S. E. 729; Idaho P. M. Co. *v.* Green, 14 Ida. 249, 93 P. 954; Casey *v.* R. Co., 237 Ill. 140, 86 N. E. 606; P. *v.* Feinberg, 237 Ill. 348, 86 N. E. 584; Strong *v.* P., 119 Ill. App. 79; Edmunds Mfg. Co. *v.* McFarland, 118 Ill. App. 256; Gemmill *v.* S., 16 Ind. App. 154, 43 N. E. 909; Robbins *v.* Spencer, 140 Ind. 483, 38 N. E. 522, 40 N. E. 263; Bachman *v.* Cooper, 20 Ind. App. 173, 50 N. E. 394; Heintz *v.* Mueller, 27 Ind. App. 42, 59 N. E. 414; Indianapolis, etc. R. Co. *v.* Hubbard, 36 Ind. App. 160, 74 N. E. 535; Atoka C. & M. Co. *v.* Miller, 7 Ind. Ty. 104, 104 S. W. 555; Davis *v.* Bk., 6 Ind. Ty. 124, 89 S. W. 1015; Rhomberg *v.* Avenarius, 135 Ia. 176, 112 N. W. 548; S. *v.* Matheson, 130 Ia. 440, 103 N. W. 137; Gregory *v.* R. Co., 126 Ia. 230, 101 N. W. 761; Wright *v.* Schultz (Ky.), 122 S. W. 138 (lack of personal knowledge of fact stated); Cincinnati, etc. R. Co. *v.* Rodes, 31 Ky. L. R. 430, 102 S. W. 321; S. *v.* Mitchell, 119 La. 374, 44 S. 132; Chesapeake, etc. Co. *v.* Donahue, 107 Md. 119, 68 A. 507; Paquette *v.* Ins. Co., 193 Mass. 215, 79 N. E. 250; Robinson *v.* R. Co., 189 Mass. 594, 76 N. E. 190; Smith *v.* Hockenberry, 146 Mich. 7, 109 N. W. 23; Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694; S. *v.* Callahan, 100 Minn. 63, 110 N. W. 342; Rand *v.* Sage, 94 Minn. 344, 102 N. W. 864; Brace *v.* R. Co., 87 Minn. 292, 91 N. W. 1099; Sherrod *v.* S., 90 Miss. 836, 44 S. 813; Bowles *v.* S. (Miss.), 40 S. 165; Schloemer *v.* Co., 204 Mo. 99, 102 S. W. 565; S. *v.* Darling, 202 Mo. 150, 100 S. W. 631; S. *v.* Lockhart, 188 Mo. 427, 87 S. W. 457; S. *v.* Wertz, 191 Mo. 569, 90 S. W. 838; Villineuve *v.* R. Co., 73 N. H. 250, 60 A. 748; Page *v.* Hazelton, 74 N. H. 252, 66 A. 1049; Lambeck *v.* Stiefel, 71 N. J. L. 320, 59 A. 460; P. *v.* Longebodi, 154 App. Div. 793, 139 N. Y. S. 721; Schon *v.* Harlan, 56 Misc. 518, 107 N. Y. S. 113; Rossenbach *v.* Forresters, 184 N. Y. 92, 76 N. E. 1085; Walsh *v.* Co., 126 App. Div. 229, 110 N. Y. S. 523; Sutton *v.* Wanamaker, 95 N. Y. S. 525; Kay *v.* R. Co., 163 N. Y. 447, 57 N. E. 751; Burke *v.* Co., 98 App. Div. 219, 90 N. Y. S. 527; Lederer *v.* Lederer, 108 App. Div. 228, 95 N. Y. S. 623; Wadsworth *v.* Owens, 17 N. D. 173, 115 N. W. 667; Cincinnati T. Co. *v.* Stephens, 75 O. St. 171, 79 N. E. 235; Tucker *v.* Ty., 17 Okla. 56, 87 P. 307; Baker *v.* Moore, 29 Pa. Super. 301; Baldi *v.* Ins. Co., 24 Pa. Super. 275; S. *v.* Sanders, 75 S. C. 409, 56 S. E. 35; Sentell *v.* R. Co., 70 S. C. 183, 49 S. E. 215; Holder *v.* S., 110 Tenn. 178, 104 S. W. 225; Burnaman *v.* S. (Tex. Cr.), 159 S. W. 244; Lewandowski *v.* S., 44 Tex. Cr. 511, 72 S. W. 594; Contreras *v.* T. Co. (Tex. Civ.), 83 S. W. 870; Fox *v.* Robbins (Tex. Civ.), 70 S. W. 597; Smith *v.* S., 52 Tex. Cr. 27, 105 S. W. 182; Adams *v.* S., 52 Tex. Cr. 13, 105 S. W. 197; Larkin *v.* Trammel, 47 Tex. Civ. 548, 105 S. W. 552; International, etc. R. Co. *v.* Munn, 46 Tex. Civ. 276, 102 S. W. 442; Hood *v.* S. (Tex. Cr.), 101 S. W. 229; Campos *v.* S., 50 Tex. Cr. 289, 97 S. W. 100; Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29; Thompson *v.* S., 48 Tex. Cr. 16, 85 S. W. 1059; Bailey *v.* Fly, 35 Tex. Civ. 410, 80 S. W. 675; Dallas, etc. R. Co. *v.* McAllister, 41 Tex. Civ. 131, 90 S. W. 933; Larkin *v.* B. Co., 30 Utah 86, 83 P. 686; McQuiggan *v.* Ladd, 79 Vt. 90, 64 A. 503; Corbett *v.* Assn., 135 Wis. 505, 115 N. W. 365, 16 L. R. A. (N. S.) 177.

Rule applies to accused who testifies on his own behalf. Smith *v.* S., 137 Ala. 22, 34 S. 396; Smith *v.* S., 74 Ark. 397, 85 S. W. 1123; Clinton *v.* S., 53 Fla. 98, 43 S. 312.

No connection need be shown between inconsistent statement and res gestae. Denver, etc. R. Co. *v.* Mitchell, 42 Colo. 43, 94 P. 289; Schloemer *v.* Co., 204 Mo. 99, 102 S. W. 565; Sentell *v.* R. Co., 70 S. C. 183, 49 S. E. 215.

Absence of party.—Immaterial statements contradictory of testimony,

made in absence of party who seeks to show them. S. *v.* Mulhall, 199 Mo. 202, 97 S. W. 583, 7 L. R. A. (N. S.) 630.

Rule applies if witness indirectly answers question as to former statement. Chicago, etc. R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443. And if he does not directly deny making it. Chicago, etc. R. Co. *v.* Crose, 113 Ill. App. 547.

Weight of statements as compared with party's evidence. Severson *v.* Gremm, 124 Ia. 729, 100 N. W. 862.

Order of proof.—Contradictory written statement should be read when party offering it presents rebuttal evidence; but presenting it during witness' cross-examination is not serious error. Chicago, etc. R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443. It must be introduced before witness questioned concerning it. Villineuve *v.* R. Co., 73 N. H. 250, 60 A. 748. Error in excluding writing harmless if contents shown by parol. Chicago, etc. R. Co. *v.* Crose, 113 Ill. App. 547. Oral statements may be proved without asking witness whether he made them; he may explain later. Villineuve *v.* R. Co., supra.

Fact witness did not deny a statement made in his presence as to his opinion may be shown to affect testimony inconsistent with such opinion. Denver, etc. R. Co. *v.* Mitchell, 42 Colo. 43, 94 P. 289.

Tax statement made by property owner not admissible to contradict his testimony as to value of property described in it. Williams *v.* Brown, 137 Mich. 569, 100 N. W. 786, statute.

Inconsistent conduct in bringing action.—One may comply with conditions of a policy by giving notice of loss and bringing suit thereon without affecting credibility of his testimony as to cause of loss; he being without personal knowledge thereof. Blickley *v.* Luce, 148 Mich. 233, 111 N. W. 752. *Contra* in action for personal injuries. Fact suit brought may be shown by witness. Ruemer *v.* Clark, 121 App Div. 231, 105 N. Y. S. 659.

Statements as to opinions or estimates not competent to contradict. Southern R. Co. *v.* McNeill, 155 Fed. 756, 781; Van Houser *v.* S., 52 Tex. Cr. 572, 108 S. W. 386; Kirk *v.* S., 48 Tex. Cr. 624, 89 S. W. 1067. *Comp.* Atlanta, etc. R. Co. *v.* McManus, 1 Ga. App. 302, 58 S. E. 258, and S. *v.* Hogan, 117 La. 863, 42 S. 352 (non-expert witness as to sanity may be contradicted by proof of previous statements). Varying opinions expressed at different times, not necessarily inconsistent. Myers *v.* Manlove, 164 Ind. 128, 71 N. E. 893; Parker *v.* S., 46 Tex. Cr. 461, 80 S. W. 1008. Affidavit by party stating what he believed absent witness would swear to, not admissible. Baker *v.* S., 85 Ark. 300, 107 S. W. 983.

Witness must first be interrogated as to person, time and place. Keyes *v.* R. Co., 152 Cal. 437, 93 P. 88 (code); P. *v.* Pembroke, 6 Cal. App. 588, 92 P. 668; Bradley *v.* Gorham, 77 Conn. 211, 58 A. 698; Clinton *v.* S., 53 Fla. 98, 43 S. 312 (statute); Stancliff *v.* U. S., 5 Ind. Ty. 486, 82 S. W. 882; Lerum *v.* Geving, 97 Minn. 269, 105 N. W. 967; P. *v.* Mallon, 116 App. Div. 425, 101 N. Y. S. 814; McCulloch *v.* Dobson, 133 N. Y. 114, 30 N. E. 641 (doubted, Goss *v.* Goss, 102 Minn. 346, 113 N. W. 690); Loughlin *v.* Brassil, 187 N. Y. 128, 79 N. E. 854. Otherwise if witness a party Ruemer *v.* Clark, 121 App. Div. 231, 105 N. Y. S. 659.

Silence not contradiction if witness not called upon to speak. O'Connor *v.* Hogan, 140 Mich. 613, 104 N. W. 29.

Only such contradictory extra-judicial statements can be shown as are relevant.—Dillard *v.* U. S., 141 Fed. 303, 72 C. C. A. 451; Yelton *v.* Black, 26 Ky. L. R. 885, 82 S. W. 634; Brackett *v.* Co., 127 Ga. 672, 56 S. E. 762; Loranger *v.* Carpenter, 148 Mich. 549, 112 N. W. 125; Tucker *v.* Ty., 17 Okla. 56, 87 P. 307; Barton *v.* Bruley, 119 Wis. 326, 96 N. W. 815. Declarations may be proved though incompetent for other purposes. Keyes *v.* R. Co., 152 Cal. 437, 93 P. 88; S. *v.* Mitchell, 119 La. 374, 44 S. 132. Contradictory testimony in another case as to a matter peculiarly within knowledge of witness cannot be proved if it has no relevancy. Western C., etc. Co. *v.* Anderson, 45 Tex. Civ. 513, 101 S. W. 1061.

Precautionary measures after suit brought may be shown to affect credibility of testimony they were unnecessary. Frierson *v.* Frazier, 142 Ala. 232, 37 S. 825; Schloemer *v.* Co., 204 Mo. 99, 102 S. W. 565. But not to contradict witness. Loughlin *v.* Brassil, 187 N. Y. 128, 79 N. E. 854.

Statements of others in witness' presence cannot be shown unless he authorized them. Tucker *v.* Ty., 17 Okla. 56, 87 P. 307.

Variance between pleading and testimony of party does not per se affect weight of latter. Sheldon *v.* Crane, 146 Ia. 461, 125 N. W. 238.

Release executed by minor son, inadmissible. Hollinger *v.* R. Co., 225 Pa. 419, 74 A. 344.

775-76 Charlton *v.* Kelly, 156 Fed. 433, 84 C. C. A. 295; Pope *v.* S., 174 Ala. 63, 57 S. 245; Jones *v.* S., 145 Ala. 51, 40 S. 947; Bradley *v.* Gorham, 77 Conn. 211, 58 A. 698; Joyce *v.* Joyce, 80 Conn. 88, 67 A. 374; Reisch *v.* P., 229 Ill. 574, 82 N. E. 321; Raymond *v.* P., 226 Ill. 433, 80 N. E. 996; In re Barry, 219 Ill. 391, 76 N. E. 577; Lazarus *v.* Fredericks, 125 La. 619, 51 S. 663; Beers *v.* Co., 203 Mass. 254, 89 N. E. 557; P. *v.* Tubbs, 147 Mich. 1, 110 N. W. 132; Matthews *v.* S., 96 Miss. 169, 50 S. 561; Bell *v.* S., 90 Miss. 104, 43 S. 84; Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78; Bradford *v.* R. Co., 136 Mo. App. 705, 119 S. W. 32; S. *v.* Wells, 33 Mont. 231, 83 P. 476; Curlee *v.* Reeves, 85 Neb. 358, 123 N. W. 420; Brudie *v.* Sell Branch, 153 App. Div. 675, 138 N. Y. S. 657; P. *v.* Scanlon, 132 App. Div. 528, 117 N. Y. S. 57; Marshall *v.* Ty., 2 Okla. Cr. 136, 101 P. 139; U. S. *v.* Padlan, 7 Phil. Isl. 517; Swain *v.* S., 48 Tex. Cr. 98, 86 S. W. 335; Casey *v.* S., 50 Tex. Cr. 392, 97 S. W. 496; Clark *v.* Gurley, 48 Tex. Civ. 274, 106 S. W. 394; Randell *v.* S., 49 Tex. Cr. 261, 90 S. W. 1012; S. *v.* Trail, 59 W. Va. 175, 53 S. E. 17.

Such evidence should be carefully scrutinized. Husted *v.* Mead, 58 Conn. 55, 19 A. 233; Bradley *v.* Gorham, 77 Conn. 211, 58 A. 698.

Unsworn interpreter.—Immaterial ex parte affidavit made through unsworn interpreter. Davis *v.* Bk., 6 Ind. Ty. 124, 89 S. W. 1015.

Party who called witness may show inconsistent extrajudicial statements. Whitt *v.* C., 27 Ky. L. R. 50, 84 S. W. 340. State may show them by witness it brought before grand jury. S. *v.* Brown, 128 Ia. 24, 102 N. W. 799; S. *v.* Waldrop, 73 S. C. 60, 52 S. E. 793.

Formerly, in Alabama, it was proper to instruct that if any witness had made contradictory statements as to material facts jury might consider them as raising reasonable doubt of truth of testimony. Gregg *v.* S., 106 Ala. 44, 17 S. 321; Williams *v.* S., 114 Ala. 19, 21 S. 993. But these cases have been overruled. Brown *v.* S., 142 Ala. 287, 38 S. 268; Snyder *v.* S., 145 Ala. 33, 40 S. 978, *qualifying* Washington *v.* S., 58 Ala. 355.

A change of testimony which meets necessities of case as declared by reviewing court is a most suspicious circumstance. Czermak *v.* Wetzel, 109 N. Y. S. 698; Barry *v.* Co., 119 N. Y. S. 237.

Witness may explain seeming contradictions. Brown *v.* McBride, 129 Ga. 92, 58 S. E. 702; Spearman *v.* Sanders, 121 Ga. 468, 49 S. E. 296; Long *v.* Davis, 136 Ia. 734, 114 N. W. 197; Hood *v.* S., 52 Tex. Cr. 524, 107 S. W. 848; Comer *v.* Thornton, 38 Tex. Civ. 287, 86 S. W. 19; Harvey *v.* Ivory, 35 Wash. 397, 77 P. 725; Allen *v.* Ellis, 125 Wis. 565, 104 N. W. 739. And show former statement made under duress. Skeen *v.* S., 51 Tex. Cr. 39, 100 S. W. 770.

Explanation of instrument.—Parol evidence is competent to show what transpired at time witness signed a paper, introduced to impeach his credibility, to explain alleged inconsistency between it and his testimony. Joyce *v.* Joyce, 80 Conn. 88, 67 A. 374; Idaho P. Mo. *v.* Green, 14 Ida. 249, 93 P. 954; Villeneuve *v.* R. Co., 73 N. H. 250, 60 A. 748; Shreve *v.* Crosby, 72 N. J. L. 491, 63 A. 333; Reynolds *v.* R. Co., 38 Tex. Civ. 273, 85 S. W. 323. If fraud is alleged all that was said and done when paper signed may be shown. National E. & S. Co. *v.* Fagan, 115 Ill. App. 590.

Conduct inconsistent with testimony may be shown. Wefel *v.* Stillman, 151 Ala. 249, 44 S. 203; Philadelphia *v.* Dobbins, 24 Pa. Super. 136.

Judge's notes not admissible to show contradiction in testimony. Richards *v.* C., 107 Va. 881, 59 S. E. 1104.

Testimony formerly given not admissible if witness admits having given it. Dean *v.* S., 47 Tex. Cr. 243, 83 S. W. 816. But *comp.* Stinson *v.* C., 29 Ky. L. R. 733, 96 S. W. 463 (affidavit admissible after its making admitted and witness examined as to contents). See Beier *v.* Co., 197 Mo. 215, 233, 94 S. W. 876. If part of such testimony is read to contradict, witness may offer other part. Casey *v.* S., 50 Tex. Cr. 392, 97 S. W. 496.

Pleadings in former suits, admissible. Ackerman *v.* Larner, 116 La. 101, 40 S. 581; Texas, etc. R. Co. *v.* Moers (Tex. Civ.), 97 S. W. 1064. If verified

and not withdrawn. Lexington R. Co. *v.* Woodward, 32 Ky. L. R. 653, 106 S. W. 953.

Proof of contradictions of facts only affects testimony of witnesses contradicted. Korter *v.* R. Co., 87 Miss. 482, 40 S. 258. Such proof may be rebutted by evidence of reputation for truth and veracity. Swain *v.* S., 48 Tex. Cr. 98, 86 S. W. 335.

775-77 Epremiam *v.* Ward, 169 Fed. 691; Berus *v.* R. Co., 101 N. Y. S. 748; Dick *v.* Marvin, 188 N. Y. 426, 81 N. E. 162; Lincoln *v.* Hemenway, 80 Vt. 530, 69 A. 153.

In S. *v.* Codington, 80 N. J. L. 496, 78 A. 743, the court instructed: "You have a right to consider the defendant's lack of corroboration wherever he could have been corroborated. That does not prove that what he said is not so by any means; but you have a right to consider the fact that others who might have helped him to establish these things by corroboration were not called." The supreme court said: "This instruction we think is entirely justified by the opinion of this court in State *v.* Callahan, 76 N. J. Law 426, 69 Atl. 957. In that case it was held that the nonproduction of a witness who is presumptively able to explain the circumstances which constitute a prima facie case against the defendant may be considered by the jury in weighing the effect of evidence applicable to the matter in dispute, but that it does not raise any presumption of guilt or innocence. The principle upon which this rule rests is equally applicable to the conditions dealt with in the instruction complained of."

Self-corroboration not permitted. Southern P. Co. *v.* Schuyler, 135 Fed. 1015, 68 C. C. A. 409.

776-78 C. *v.* Miller, 31 Pa. Super. 317; Hudson *v.* S., 49 Tex. Cr. 24, 90 S. W. 177; Casey *v.* S., 50 Tex. Cr. 392, 97 S. W. 496. *Contra,* Burks *v.* S., 78 Ark. 271, 93 S. W. 983; P. *v.* Turner, 1 Cal. App. 420, 82 P. 397; McBride *v.* R. Co., 125 Ga. 515, 54 S. E. 674; Cook *v.* S., 124 Ga. 653, 53 S. E. 104; Cincinnati T. Co. *v.* Stephens, 75 O. St. 171, 79 N. E. 235.

Testimony on trial confirmed by that before grand jury. Burch *v.* S., 49 Tex. Cr. 13, 90 S. W. 168.

Corroborating proof should be confined to scope of contradictory statements. Hicks *v.* S., 165 Ind. 440, 75 N. E. 641.

776-79 Inman *v.* Dudley Co., 146 Fed. 449, 76 C. C. A. 659; Webb Granite & Constr. Co. *v.* R., 206 Mass. 572, 92 N. E. 717; Holmes *v.* S., 52 Tex. Cr. 352, 106 S. W. 1160; Dean *v.* S., 47 Tex. Cr. 243, 83 S. W. 816.

Character.—See McCullars *v.* Jacksonville, etc. Co., 169 Ala. 582, 53 S. 1025; Downing *v.* S., 61 Tex. Cr. 519, 136 S. W. 471, and the title "Character."

Previous statements may be shown to rebut evidence of improper motive. Sweeney *v.* Sweeney, 121 Ga. 293, 48 S. E. 984.

777-81 Louisville & N. R. Co. *v.* Perkins, 144 Ala. 325, 39 S. 305; Boles *v.* P., 37 Colo. 41, 86 P. 1030; Mann *v.* S., 124 Ga. 760, 53 S. E. 324; Troll *v.* United R. Co., 169 Mo. App. 260, 153 S. W. 504; Huff *v.* Co., 213 Mo. 495, 111 S. W. 1145; Daniel *v.* Lance, 29 Pa. Super. 454; Plattor *v.* Co., 44 Wash. 408, 87 P. 489.

777-83 Strehmann *v.* Chicago, 93 Ill. App. 206; Sedoff *v.* R. Co., 124 Ill. App. 609; McDonnell *v.* R. Co., 131 Ill. App. 227; Chicago, etc. R. Co. *v.* Kline, 220 Ill. 334, 77 N. E. 229.

777-84 Bell *v.* S., 170 Ala. 16, 43 S. 116; Venable *v.* Venable, 165 Ala. 621, 51 S. 833; Mills *v.* S., 1 Ala. App. 76, 55 S. 331; Brandt *v.* Krogh, 14 Cal. App. 39, 111 P. 275; Glenn *v.* R. Co., 121 Ga. 80, 48 S. E. 684; Georgia R. & B. Co. *v.* Andrews, 125 Ga. 85, 54 S. E. 76; P. *v.* Peltz, 143 Ill. App. 181; C. & O. R. Co. *v.* Howard, 143 Ky. 218, 136 S. W. 153; P. *v.* Laudiero, 192 N. Y. 304, 85 N. E. 132; Crow *v.* Crow (Or.), 139 P. 854; Lincoln *v.* Hemenway, 80 Vt. 530, 69 A. 153; Steber *v.* R. Co., 139 Wis. 10, 120 N. W. 502.

See Ducharme *v.* R. Co., 203 Mass. 384, 89 N. E. 561.

Materiality of testimony a question of law or mixed one of law and fact. Wilkinson *v.* P., 226 Ill. 135, 80 N. E. 699.

It is for court to decide whether rule of falsus in uno, falsus in omnibus, applies. Pumorlo *v.* Merrill, 125 Wis. 102, 103 N. W. 464.

Application of maxim not favored if there is probability of mistake. Pumorlo *v.* Merrill, supra.

778-85 Tennessee Coal, etc. Co. *v.* Cottrell, 172 Ala. 538, 55 S. 791; Gillespie *v.* Hester, 160 Ala. 444, 49 S. 583; Hamilton *v.* S., 147 Ala. 110, 41 S. 940; Denver, etc. R. Co. *v.* Warring, 37 Colo. 122, 86 P. 305; Johnson *v.* Far-

rell, 215 Ill. 542, 74 N. E. 760; Godair *v.* Bk., 225 Ill. 572, 80 N. E. 407; Overtoom *v.* R. Co., 181 Ill. 323, 54 N. E. 898; Matthews *v.* Granger, 196 Ill. 164, 63 N. E. 658; Chicago, etc. R. Co. *v.* Kline, supra; Walker *v.* R. Co., 142 Ill. App. 372; Doyle *v.* Burns, 123 Ia. 488, 99 N. W. 195; Turner *v.* S., 95 Miss. 879, 50 S. 629; Bell *v.* S., 90 Miss. 104, 43 S. 84; S. *v.* Martin, 77 N. J. L. 652, 73 A. 548; Cullen *v.* P. Co., 128 App. Div. 369, 112 N. Y. S. 934; Corrigan *v.* Co., 225 Pa. 560, 74 A. 420; Newell *v.* White, 29 R. I. 343, 73 A. 798; S. *v.* Raice, 24 S. D. 111, 123 N. W. 708; Allen *v.* R. Co., 145 Wis. 263, 129 N. W. 1094; Steber *v.* R. Co., 139 Wis. 10, 120 N. W. 502; Pumorlo *v.* Merrill, supra.

The maxim is not mandatory, but rather permissible inference jury may draw or not. Addis *v.* Rushmore, 74 N. J. L. 649, 65 A. 1036; P. *v.* Dinser, 49 Misc. 82, 98 N. Y. S. 314. *Contra,* Alexander *v.* Blackman, 26 App. Cas. (D. C.) 541.

Credible corroborating evidence is to be regarded. Prior *v.* Ty., 11 Ariz. 169, 89 P. 412; Hart *v.* Godkin, 122 Wis. 646, 100 N. W. 1057. Whether believed or not. Chicago, etc. R. Co. *v.* Kelly, 210 Ill. 449, 71 N. E. 355.

Part of testimony may be believed and other parts disbelieved. Louisville & N. R. Co. *v.* Perkins, 144 Ala. 325, 39 S. 305; In re Vandiveer, 4 Cal. App. 650, 88 P. 993.

Instruction may be in language of code.—P. *v.* Dobbins, 138 Cal. 694, 72 P. 339. But court may add false swearing must be wilful and material. P. *v.* Plyler, 121 Cal. 160, 53 P. 553. It need not make exception as to part of evidence corroborated. Burgess *v.* Alcorn, 75 Kan. 735, 90 P. 239.

Some things must of necessity be either true or false; and when a fact of that character is involved qualifying clause of text need not be given jury. Glenn *v.* R. Co., 121 Ga. 80, 48 S. E. 684.

Effect of such testimony is for jury. Rea *v.* S., 3 Okla. Cr. 269, 105 P. 381.

779-86 Wolf *v.* P., 45 Colo. 532, 102 P. 20; Humphreys *v.* Smith, 133 Ga. 456, 66 S. E. 158; Chicago & A. R. Co. *v.* Kelly, 210 Ill. 449, 71 N. E. 355; P. *v.* Arnold, 248 Ill. 169, 93 N. E. 786; Sedoff *v.* R. Co., 124 Ill. App. 609; John Hancock, etc. Ins. Co. *v.* Powell, 116 Ill. App. 151; Johnson *v.* Johnson, 187 Ill. 86, 58 N. E. 237; Jewell *v.* Kelley, 155 Mich. 301, 118 N. W. 987; Blankavag *v.* Co., 136 Wis. 389, 117 N. W. 852. See S. *v.* O'Rourke, 85 Neb. 639, 124 N. W. 138.

"While it is true that, when the jury is satisfied that a witness has corruptly sworn falsely to one material fact, his entire testimony may be rejected, there is nothing in the law saying that the entire testimony of such a witness must be rejected by the jury. The jury may accept as true a part of the testimony of such a witness, and reject the remainder. This case furnishes an apt illustration of this rule, and of the unquestioned power of the jury under such rule. The jury in returning a verdict for the appellee conclusively established the fact that they accepted as true the statement made by the mortgagor, on his direct examination, that he owned the horse, and rejected as untrue substantially all that he testified to with reference to the ownership of the horse on his cross-examination." Pilches *v.* Smith, 4 Ala. App. 444, 58 S. 672.

779-87 Sanders *v.* S., 54 Tex. Cr. 101, 112 S. W. 68.

Omission of witness on former occasion to refer to important matter of which he subsequently testified may be shown though he testified he was not questioned concerning it. Shirley *v.* S., 144 Ala. 35, 40 S. 269; S. *v.* Armstrong, 118 La. 480, 43 S. 57; S. *v.* Rosa, 71 N. J. L. 316, 58 A. 1010; S. *v.* Stines, 138 N. C. 686, 50 S. E. 851; Henderson *v.* S., 50 Tex. Cr. 604, 101 S. W. 208. Failure of accused to testify on previous trials growing out of same transaction and to deny testimony of state's witness is properly proved on a trial, after death of such witness, on which accused testified. Sanders *v.* S., 52 Tex. Cr. 156, 105 S. W. 893. It may be shown witnesses did not testify on former trial, and that facts have since occurred which caused them to be interested in result of suit. Dina *v.* S., 46 Tex. Cr. 402, 78 S. W. 229.

Silence may be shown though witness not bound to speak. Gulf, etc. R. Co. *v.* Matthews, 100 Tex. 63, 93 S. W. 1068. See Alabama, etc. R. Co. *v.* Brooks, 135 Ala. 401, 33 S. 181; S. *v.* McKinney, 31 Kan. 570, 3 P. 356; S. *v.* Morton, 107 N. C. 890, 12 S. E. 112, 10 L. R. A. 527; S. *v.* Burton, 94 N. C. 947; S. *v.* McQueen, 46 N. C. 177.

No inference to be drawn from refusal

of witness to testify at inquest because of assertion of privilege. Masterson *v.* Co., 204 Mo. 507, 103 S. W. 48. But see C. *v.* Smith, 163 Mass. 411, 40 N. E. 189, which seems to have been decided under a local rule.

Silence may be explained, and witness recalled after arguments begun. Carwile *v.* S., 148 Ala. 576, 39 S. 220; Lewandowski *v.* S., 44 Tex. Cr. 511, 72 S. W. 594.

Refusal to submit to physical examination by party seeking to recover for personal injuries may be shown and explained. Cedartown *v.* Brooks, 2 Ga. App. 583, 59 S. E. 836; Austin & N. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403. *Contra,* Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23.

Jury not required to disregard testimony of impeached witness. Pickett *v.* S., 91 Ark. 570, 121 S. W. 732; S. *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982.

779-88 Admission of falsity of testimony and stating opposite of it, giving as reason for perjury fear of conviction, may afford a moral explanation sufficient to satisfy jury, and if it is so later testimony may be believed with or without corroborating circumstances or confirmatory evidence. Chandler *v.* S., 124 Ga. 821, 53 S. E. 91.

CRIMINAL CONVERSATION

For a consideration of the right of action, form of action, and pleadings, see 6, STANDARD PROC., title "Criminal Conversation."

782-1 Snowman *v.* Mason, 99 Me. 490, 59 A. 1019; Hill *v.* Pomelear, 72 N. J. L. 528, 63 A. 269. See vol. 8, p. 441, n. 4, and supplement thereto.

The plaintiff's and wife's testimony is sufficient to prove the marriage. Vollmer *v.* Stregge (N. D.), 147 N. W. 797.

782-2 Stark *v.* Johnson, 43 Colo. 243, 95 P. 930, testimony of parties sufficient.

Certificate of marriage must be accompanied by proof of identity of persons, not of names merely. Snowman *v.* Mason, supra.

784-4 See vol. 8, p. 466, n. 66, and supplement thereto.

785-5 Dodge *v.* Rush, 28 App. Cas. (D. C.) 149. See Brunelle *v.* Ruell, 140 Mich. 256, 103 N. W. 602; Wheeler *v.* Abbott, 89 Neb. 455, 131 N. W. 942. See Ehrhart *v.* Bear, 51 Pa. Super. 39.

785-6 Burden is on plaintiff to establish each and every particular fact necessary to prove his cause of action by a preponderance of evidence. Ball *v.* Marquis, 122 Ia. 665, 98 N. W. 496, modifying opinion in same case, 92 N. W. 691.

786-9 Dodge *v.* Rush, 28 App. Cas. (D. C.) 149.

786-10 Grant *v.* Mitchell, 156 N. C. 15, 71 S. E. 1087.

786-11 Husband competent only to testify to marriage. Rust *v.* Oltmer, 74 N. J. L. 802, 67 A. 337; Hill *v.* Pomelear, 72 N. J. L. 528, 63 A. 269 (statute).

When wife plaintiff she cannot disclose declarations of husband concerning defendant. Dodge *v.* Rush, 28 App. Cas. (D. C.) 149.

787-12 Nor against him.—Grant *v.* Mitchell, 156 N. C. 15, 71 S. E. 1087.

787-14 Rust *v.* Oltmer, 74 N. J. L. 802, 67 A. 337.

Confession of wife, written in husband's absence and being in nature of recital, not admissible in his favor. Kohlhoss *v.* Mobley, 102 Md. 199, 210, 62 A. 236.

In Hawaii defendant's wife may testify against husband in civil action. Briggs *v.* Mills, 4 Haw. 450.

790-22 Purdy *v.* Robinson, 133 App. Div. 155, 117 N. Y. S. 295, bringing divorce action by wife on ground of adultery.

791-25 Kohlhoss *v.* Mobley, 102 Md. 199, 210, 62 A. 236.

Declarations of wife in husband's absence not competent to show his consent. Smith *v.* Hockenberry, 138 Mich. 129, 101 N. W. 207.

792 Testimony as to conduct prior to date alleged inadmissible.—Berney *v.* Adriance, 157 App. Div. 628, 142 N. Y. S. 748.

792-27 Rule same when wife plaintiff. Dodge *v.* Rush, 28 App. Cas. (D. C.) 149.

793 Conduct subsequent to bringing of action admissible in corroboration McCall *v.* Galloway, 162 N. C. 353, 78 S. E. 429.

793-31 Proof of criminal intimacy with others than defendant will not support inference husband connived thereat in absence of evidence bring ing knowledge of fact to him. Smith *v.* Hockenberry, supra.

793-32 Shannon *v.* Swanson, 208 Ill. 52, 69 N. E. 869.
793-33 Smith *v.* Hockenberry, supra.
795-42 Intolerable severity of husband previous to separation of plaintiff from his wife may be shown, but such proof goes only in reduction of damages. Jenness *v.* Simpson, 84 Vt. 127, 78 A. 886, *cit.* Dallas *v.* Sellers, 17 Ind. 479, 79 Am. Dec. 489; Lewis *v.* Roby, 79 Vt. 487, 65 A. 524, 118 Am. St. 984; Fratini *v.* Caslini, 66 Vt. 273, 29 A. 252, 44 Am. St. 843. See also the title "Alienating Affections."
795-45 Jenness *v.* Simpson, supra (condonation not bar).
796-46 Long *v.* Booe, 106 Ala. 570, 17 S. 716; Stark *v.* Johnson, 43 Colo. 243, 95 P. 930; Browning *v.* Jones, 52 Ill. App. 597; Smith *v.* Meyers, 52 Neb. 70, 71 N. W. 1006.
796-47 Hardy *v.* Bach, 173 Ill. App. 123.
796-48 Hardy *v.* Bach, 173 Ill. App. 123; Smith *v.* Hockenberry, 138 Mich. 129, 101 N. W. 207.
796-49 Association of wife with women of bad repute may be shown, as may fact wrongful acts charged were brought about by her under circumstances indicating discovery was anticipated. Smith *v.* Hockenberry, supra.
796-50 Remoteness dependent on circumstances. Grant *v.* Mitchell, 156 N. C. 15, 71 S. E. 1087.
797-52 Grant *v.* Mitchell, supra.
798-66 Shannon *v.* Swanson, 208 Ill. 52, 69 N. E. 869; Ward *v.* Thompson, 146 Wis. 376, 131 N. W. 1006.
Resulting expense or loss of service need not be shown. Shannon *v.* Swanson, supra; Ward *v.* Thompson, supra.

CROSS-EXAMINATION

Use of memoranda, 844-47; *Acts of counsel,* 845-52; *Name of witness,* 872-8; *Value of evidence,* 913-94.

807-1 Testimony of defendant's witness on cross-examination is not binding upon plaintiff. Lyman *v.* Dale, 156 Mo. App. 427, 136 S. W. 760.
807-2 Resurrection G. M. Co. *v.* Co., 129 Fed. 668, 64 C. C. A. 180; Mitchell S. B. G. Co. *v.* Grant, 143 Ala. 194, 38 S. 855; Florence *v.* Calmet, 43 Colo. 510, 96 P. 183; Atlanta, etc. R. Co. *v.* McManus, 1 Ga. App. 302, 58 S. E. 258; Idaho M. Co. *v.* Kalanquin, 8 Ida. 101, 66 P. 933; Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; P. *v.* Zito, 141 Ill. App. 534; Carpenter *v.* Woodmen (Ia.), 142 N. W. 411; Powell *v.* Morrill, 83 Neb. 119, 119 N. W. 9; Prout *v.* Co., 77 N. J. L. 719, 73 A. 486; Ritchey *v.* Pakas, 136 App. Div. 879, 121 N. Y. S. 834; S. *v.* Foster, 14 N. D. 561, 105 N. W. 938; Hobbs *v.* S., 53 Tex. Cr. 71, 112 S. W. 308 (wife who testified in favor of husband may be cross-examined); S. *v.* Mechan, 86 Vt. 246, 84 A. 862; Montanye *v.* Co., 127 Wis. 22, 105 N. W. 1043.
On cross-examination counsel is not required to state what he expects to prove by the witness. S. *v.* Bobbitt, 242 Mo. 273, 146 S. W. 799.
Erroneous exclusion of evidence on cross-examination is cured by the admission of evidence on direct examination tending to prove the same facts. Langford *v.* Issenhuth, 28 S. D. 451, 134 N. W. 889.
Constitutional right.—Right of accused to be confronted by witnesses against him imports right to cross-examine. Wray *v.* S., 154 Ala. 36, 45 S. 697, 15 L. R. A. (N. S.) 493. Right is as broad as the issue. Walton *v.* S., 87 Miss. 689, 39 S. 689. Exceptions exist as to dying declarations and to reception of testimony given on former trial by witness who has died, left the jurisdiction or become incapable of testifying, defendant having had the right to cross-examine on such trial. Wray *v.* S., 154 Ala. 36, 45 S. 697, 15 L. R. A. (N. S.) 493.
Right not limited by statute authorizing examination of party as if under cross-examination, if he offers himself as witness in his own behalf. Purse *v.* Purcell, 43 Colo. 50, 95 P. 291.
Pendency of another action arising out of same contract does not affect right to cross-examine a party. Walter *v.* Bradley, 64 Misc. 79, 117 N. Y. S. 977.
It is presumed prejudice resulted from denial or unjustifiable restriction of cross-examination, though party may call witness or others to prove desired facts. Resurrection G. M. Co. *v.* Co., 129 Fed. 668, 64 C. C. A. 180.
Cross-examination not to be denied because witness cannot be contradicted as to what occurred between her and her husband. Neace *v.* C., 23 Ky. L. R. 125, 62 S. W. 733.
Right to cross-examine a party to a proceeding in patent office is not lost

by his securing consent of the other to adjournment beyond such time as will permit service of subpoena on him. Lobel *v.* Cossey, 157 Fed. 664, 85 C. C. A. 142.

Unnecessary witness may be cross-examined. Nickelson *v.* Dial, 77 Kan. 8, 93 P. 606.

Maker of an affidavit for introduction of certified copy of a deed, which is positive in its terms and in conformity with statute, cannot be cross-examined as to truth of affidavit, though he testified generally. Glos *v.* Garrett, 219 Ill. 208, 76 N. E. 373.

807-3 Harris *v.* R. Co., 115 Mo. App. 527, 91 S. W. 1010.

Unconditional.—Right to cross-examine cannot be conditioned upon counsel's informing court and parties as to its object. Brown *v.* S., 88 Miss. 166, 40 S. 737.

Right limited to taking original evidence; does not extend to summary of it filed at close of complainant's evidence before a master. Goss P. P. Co. *v.* Scott, 148 Fed. 394.

808-4 Affiants whose depositions have been read may be cross-examined on coming into court thereafter. Elkins *v.* Coal Co. (Ky.), 115 S. W. 203.

808-5 Rule which prohibits proof of affirmative defenses on cross-examination extends only to such as are pleaded by party adverse to him who calls witness. It never applies to a cross-examination by which adverse party simply seeks to disprove, weaken or modify case against him made by witness. Resurrection G. M. Co. *v.* Co., 129 Fed. 668, 64 C. C. A. 180; Wendt *v.* R. Co., 4 S. D. 476, 57 N. W. 226.

808-8 Accused is not bound to cross-examine witness whose health is such that to do so may imperil his life. Direct testimony given by such witness, whom accused declined to cross-examine, stricken out. Wray *v.* S., 154 Ala. 36, 45 S. 697, 15 L. R. A. (N. S.) 193.

808-9 Watts *v.* S., 8 Ala. App. 115, 63 S. 15. Accused, whose testimony on former trial has been read, may cross-examine official reporter as to other statements therein which tended to explain, qualify, correct or enlighten concerning matters covered by testimony read. Miller *v.* P., 216 Ill. 309, 74 N. E. 743.

After actions consolidated and a party has testified in his own behalf and been cross-examined by plaintiff, it is competent to allow another party to cross-examine defendant in its interest. Sullivan *v.* Fugazzi, 193 Mass. 518, 79 N. E. 775.

A co-defendant whose purpose to abido its motion for direction of a verdict has been stated may cross-examine the other defendant's witnesses. Postal Tel.-C. Co. *v.* Likes, 225 Ill. 249, 80 N. E. 136.

Upon assessment of damages party in default may cross-examine concerning them, but not as to merits of action. First Nat. Bk. *v.* Miller, 139 Ill. App. 608, 235 Ill. 135, 85 N. E. 312.

809-11 One who desires to cross-examine witnesses who had testified before he became a party must move promptly or right will be waived. Eddleman *v.* Fasig, 128 Ill. App. 120.

809-12 Rex *v.* Hadwen, (1902) 1 K. B. (Eng.) 882.

Each party jointly indicted, if represented by separate counsel, may cross-examine witnesses for state. P. *v.* Billis, 58 Misc. 150, 110 N. Y. S. 387.

809-15 Judge may ask questions. Grant *v.* S., 122 Ga. 740, 50 S. E. 946. Should seldom interfere if party represented by competent counsel. Berwind-W. C. M. Co. *v.* Firment, 170 Fed. 151, 95 C. C. A. 1. Extent of questioning is within discretion; its abuse may be corrected. New York T. Co. *v.* Garside, 157 Fed. 521, 85 C. C. A. 285.

Court may properly examine to prevent being made instrument of injustice. Balsewicz *v.* C. B. & Q. R. Co., 240 Ill. 238, 88 N. E. 734.

So, in divorce suits, where there is some indication of collusion, the court may properly cross-examine witnesses to arrive at the truth and in the interest of the public, especially where the opposite party declines to cross-examine. Ingle *v.* Ingle (Tex. Civ.), 131 S. W. 241.

The court is under no duty to either party to ask any question of a witness, nor to persist in any question he may have propounded, though proper in itself, whether objected to or not. Brown *v.* L. & N. R. Co., 111 Ala. 275, 19 So. 1001, per McClellan, J.

See Glover *v.* U. S., 147 Fed. 426, 429, 77 C. C. A. 450, where court's examination was unfair.

Explanation of testimony in answer to question by court and excepted to may

be deferred to redirect examination. Ide *v.* R. Co., 83 Vt. 66, 74 A. 491.

809-17 Hanges *v.* Whitfield, 209 Fed. 675; Resurrection G. M. Co. *v.* Co., 129 Fed. 668, 64 C. C. A. 180; Sperry *v.* Moore, 42 Mich. 353, 4 N. W. 13.

See Ex parte Ung King Ieng, 213 Fed. 119.

Depositions admissible though deponent refused to answer questions on cross-examination. See Crossgrove *v.* Himmelrich, 54 Pa. 203; Shannon *v.* Castner, 21 Pa. Super. 294. *Comp.* Stonebreaker *v.* Short, 8 Pa. 155.

810-18 Gallagher *v.* Gallagher, 92 App. Div. 138, 87 N. Y. S. 343.

810-25 See 808-9.

811-28 Brownell *v.* Brownell, 42 Can. Sup. 368; Sandford *v.* S., 2 Ala. App. 81, 57 S. 134; Mitchell S. B. Co. *v.* Grant, 143 Ala. 194, 38 S. 855; Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844; King *v.* S., 106 Ark. 160, 152 S. W. 990; Witmer *v.* Dist. Ct., 155 Ia. 244, 136 N. W. 113; Baker *v.* Mathew, 137 Ia. 410, 115 N. W. 15; Clark *v.* Thorpe Bros., 117 Minn. 202, 135 N. W. 387. See Manross *v.* Oil Co., 88 Kan. 237, 128 P. 385.

811-29 P. *v.* Smith, 9 Cal. App. 224, 98 P. 546; Boles *v.* P., 37 Colo. 41, 86 P. 1030; Citizens' R. Co. *v.* Albright, 14 Ind. App. 433, 42 N. E. 238, 1028; Payne *v.* Goldbach, 14 Ind. App. 100, 42 N. E. 642; Dean *v.* C., 25 Ky. L. R. 1876, 78 S. W. 1112; Fuqua *v.* C., 118 Ky. 578, 81 S. W. 923; Howard *v.* C., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704; Squier *v.* Barnes, 193 Mass. 21, 78 N. E. 731; Wells *v.* Co., 108 Mo. App. 607, 84 S. W. 204; S. *v.* Foster, 14 N. D. 561, 105 N. W. 938; Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182.

811-30 Cowart *v.* S. (Ala. App.), 65 S. 666; Newman *v.* S., 160 Ala. 102, 49 S. 786; Burks *v.* S., 72 Ark. 461, 82 S. W. 490; Richardson *v.* S., 80 Ark. 201, 96 S. W. 752; P. *v.* Linares, 142 Cal. 17, 75 P. 308; Bundy *v.* Co., 149 Cal. 772, 781, 87 P. 622; Mutchmor *v.* McCarthy, 149 Cal. 603, 87 P. 85; In re Gird's Est., 157 Cal. 534, 108 P. 499; San Miguel C. G. Co. *v.* Bonner, 33 Colo. 207, 79 P. 1025; Thomas *v.* S., 47 Fla. 99, 36 S. 161; Hart *v.* S. (Ga. App.), 80 S. E. 909; Alabama C. Co. *v.* Co., 131 Ga. 365, 62 S. E. 160; Zetsche *v.* R. Co., 238 Ill. 240, 87 N. E. 412; Pittsburg, etc. R. Co. *v.* Banfill, 206 Ill. 553, 69 N. E. 499; Leimgruber *v.* Leimgruber, 172 Ind. 370, 86 N. E. 73 (repetition of direct testimony); Hoover *v.* S., 161 Ind. 348, 68 N. E. 591; S. *v.* Blee, 133 Ia. 725, 111 N. W. 19; Murphy *v.* Hoagland, 32 Ky. L. R. 839, 107 S. W. 303; Garland *v.* S., 112 Md. 83, 75 A. 631; Blackburn *v.* R. Co., 201 Mass. 186, 87 N. E. 579; Taylor *v.* Schofield, 191 Mass. 1, 77 N. E. 652; Merrill *v.* Tinkler, 160 Mich. 575, 125 N. W. 717; Brown *v.* Harris, 139 Mich. 372, 102 N. W. 960; S. *v.* Kebler, 228 Mo. 367, 128 S. W. 721; Norman *v.* Corbley, 32 Mont. 195, 79 P. 1059; Samaha *v.* Ins. Co., 84 N. J. L. 731, 87 A. 442; McCherry *v.* Snare, 130 App. Div. 241, 114 N. Y. S. 674; Raynolds *v.* Vinier, 109 N. Y. S. 293; Beadle *v.* Paine, 46 Or. 424, 80 P. 903; S. *v.* Burriss, 85 S. C. 327, 67 S. E. 306; Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215; Benson *v.* S., 51 Tex. Cr. 367, 103 S. W. 911; St. Louis, etc. R. Co. *v.* Rogers, 49 Tex. Civ. 304, 108 S. W. 1027; Washington *v.* S., 46 Tex. Cr. 184, 79 S. W. 811; Odegard *v.* Co., 130 Wis. 659, 110 N. W. 809.

Discourtesy to witness, improper. S. *v.* Miller, 43 Or. 325, 74 P. 658.

Admittedly useless questioning should be stopped. Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182.

812-31 Crawfordsville Trust Co. *v.* Ramsey, 178 Ind. 258, 98 N. E. 177.

Abuse of discretion.—McBride *v.* McBride, 142 Ia. 169, 120 N. W. 709.

812-32 Change in form of question may be suggested by court. Chandler *v.* S., 124 Ga. 821, 53 S. E. 91.

812-33 Abelson *v.* R. Co., 84 Ark. 181, 105 S. W. 81; Becker *v.* Donalson, 133 Ga. 864, 67 S. E. 92; Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; Woods *v.* Dailey, 211 Ill. 495, 71 N. E. 1068; Fuqua *v.* C., 118 Ky. 1, 80 S. W. 211; Record *v.* R. Co., 75 N. J. L. 311, 67 A. 1040; Shannon *v.* Castner, 21 Pa. Super. 294; Miller *v.* Neale, 137 Wis. 426, 119 N. W. 94 (subsequent cross-examination cures error).

Trade secrets need not be exposed. Worrell *v.* Co., 103 Va. 719, 49 S. E. 988.

Examination on admitted facts may be checked. Boles *v.* P., 37 Colo. 41, 86 P. 1030; Wooldridge *v.* S., 49 Fla. 137, 38 S. 3.

812-34 Wilson *v.* Hart, 129 Ill. App. 329; Prussian N. Ins. Co. *v.* Co., 113 Ill. App. 67; Faulkner *v.* Birch, 120 Ill. App. 281; Donk *v.* Tetherington, 128 Ill. App. 256; Wilson *v.* Hart, 129 Ill.

App. 329; Lanza *v.* Co., 124 Ia. 659, 100 N. W. 488; Ordonez *v.* Manda, 79 N. J. L. 236, 75 A. 740; Weinstein *v.* Co., 121 App. Div. 708, 106 N. Y. S. 517; S. *v.* Patchen, 37 Wash. 24, 79 P. 479.

Withdrawal of objection does not cure error of excluding competent testimony. Edmunds Mfg. Co. *v.* McFarland, 118 Ill. App. 256.

§12-35 Bowen *v.* White, 26 R. I. 68, 58 A. 252.

Postponement against objection, if witness not produced later, ground for new trial. Nichols *v.* Wentz, 78 Conn. 429, 62 A. 610.

§12-38 Direct examination contained in deposition is to be read before part containing cross-examination. Von Tobel *v.* Co., 32 Wash. 683, 73 P. 788.

§13-39 Southern R. Co. *v.* Cochran, 149 Ala. 673, 42 S. 100. See P. *v.* Jacobs, 243 Ill. 580, 90 N. E. 1092.

"**On cross-examination** of the defendant, touching a license being refused him by the city council, in reply to the question whether there was more than one reason, he said, 'I don't think I will have any trouble, Mr. B., getting my license after today.' To this the prosecuting attorney replied: 'No; I don't think you will have any chance.' Objection was made and exception taken to this remark, and the court at once ruled that it was objectionable. The witness' irresponsive answer, volunteering the opinion that he was about to be acquitted, naturally suggested the retaliatory retort. It was improper and objectionable, and the court so ruled. We think that the ruling cured any prejudicial effect which might be inferred from such ill-advised exchange of views between witness and counsel." P. *v.* Hock, 169 Mich. 87, 134 N. W. 1031.

§13-40 Time of cross-examination, within court's discretion. Corkran *v.* Taylor, 77 N. J. L. 195, 71 A. 124.

§13-41 S. *v.* Nugent, 116 La. 99, 40 S. 581.

Rule not binding on court so as to preclude cross-examination by counsel after party has put questions. Jackson *v.* Tribble, 156 Ala. 480, 47 S. 310.

§13-42 New York L. Ins. Co. *v.* Rankin, 162 Fed. 103, 89 C. C. A. 103; Van *v.* S., 140 Ala. 122, 37 S. 158; Burks *v.* S., 72 Ark. 461, 82 S. W. 490; P. *v.* Morton, 139 Cal. 719, 73 P. 609; Currelli *v.* Jackson, 77 Conn. 115, 58 A. 762; Chicago *v.* Didier, 131 Ill. App. 406; S. *v.* Boice, 114 La. 856, 38 S. 584; S. *v.* Williams, 111 La. 205, 35 S. 521; Leistikow *v.* Zuelsdorf, 18 N. D. 511, 122 N. W. 340; In re Esterbrook's Est., 83 Vt. 229, 75 A. 1; Livingston Mfg. Co. *v.* Rizzi Bros., 86 Vt. 419, 85 A. 912; S. *v.* Shea, 78 Wash. 342, 139 P. 203.

Question should not be too general and broad. Perry *v.* S., 8 Ala. App. 7, 62 So. 392.

Question should be direct not argumentative. P. *v.* Watson, 21 Cal. App. 692, 132 P. 836.

In C. *v.* Richmond, 207 Mass. 240, 93 N. E. 816, "one Clifford, a witness called by the commonwealth, having testified at length concerning the people in the house where the deceased met his death, and their actions and some of their conversation, and that one Drohan had said in reply to his question a short time before the lifeless body of the deceased was discovered that MacTavish was in the house, was asked on cross-examination: 'When was MacTavish again mentioned by any of you?' This question was properly excluded. It was indefinite as to persons, and appears to bear no relation to any issue in the case."

Question unnecesasrily complex in form and involved in meaning may be disallowed. Washington *v.* S., 155 Ala. 2, 46 S. 778; Todd *v.* Crete, 79 Neb. 677, 115 N. W. 307.

Assuming answer is untrue, not forbidden. Briggs *v.* P., 219 Ill. 330, 76 N. E. 499.

Effect of reading extracts from medical works and asking medical witness whether what is read corresponds with his judgment is to place before jury opinions of the author, which is not allowable. Lilley *v.* Parkinson, 91 Cal. 655, 27 P. 1091. But if jury is not aware questions are so read and questioner asserts he makes questions his own, the practice, though not commendable, will not work a reversal. P. *v.* Bowers, 1 Cal. App. 501, 82 P. 553.

A fact which testimony tends to prove may be made the basis of questions. Pelham *v.* Co., 156 Ala. 500, 47 S. 172.

§13-43 Crawfordsville Trust Co. *v.* Ramsey, 178 Ind. 258, 98 N. E. 177; Temple *v.* Duran (Tex. Civ.), 121 S. W. 253 (opinion as to testimony of opposing witness); Bell *v.* S., 48 Tex. Cr. 256, 87 S. W. 1160; Russell *v.* Co., 49 Wash. 362, 95 P. 327 (as to what wit-

ness would have done under other circumstances). Witness's belief may be asked for. See supra, "Bastardy," 251-26.

814-14 See Withey *v.* Co. (Ia.), 145 N. W. 923.

814-15 Rollings *v.* S., 160 Ala. 82, 49 S. 329; In re Loucks' Est., 160 Cal. 551, 117 P. 673.

Argumentative questions properly rejected. Birmingham, etc. Co. *v.* Reno (Ala.), 65 S. 787.

Complicated hypothetical questions may be excluded. Smith *v.* Co., 82 Conn. 116, 72 A. 577.

814-16 S. *v.* Wakely, 43 Mont. 427, 117 P. 95.

It may be assumed answers are untrue. Briggs *v.* P., 219 Ill. 330, 76 N. E. 499.

814-17 Wyman *v.* R. Co., 158 Fed. 957, 86 C. C. A. 161; Burks *v.* S., 72 Ark. 461, 82 S. W. 490; Georgia R. & E. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944; Newman *v.* C., 28 Ky. L. R. 81, 88 S. W. 1089; S. *v.* Fournier, 108 Minn. 402, 122 N. W. 329; Malone *v.* Stephenson, 94 Minn. 222, 102 N. W. 372; Trent *v.* P. Co., 141 Mo. App. 437, 126 S. W. 235; S. *v.* Cottrell, 56 Wash. 543, 106 P. 179 (notwithstanding objections sustained, questions being repeated). See Weber *v.* R. Co., 142 Ill. App. 550; P. *v.* Pindar, 210 N. Y. 191, 104 N. E. 133; infra, "Former Conviction," 871-2.

Questions containing insinuations of other offenses committed by defendant are improper. Hager *v.* S. (Okla. Cr.), 133 P. 263.

Prejudicial questions by judge, condemned by clause in constitution forbidding comment on the facts. S. *v.* De Pasquale, 39 Wash. 260, 81 P. 689.

Questions must not be too general. Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639.

Materiality depends on answers. Phillips *v.* S., 59 Tex. Cr. 534, 128 S. W. 1100.

814-18 Lauchheimer *v.* Jacobs, 126 Ga. 261, 55 S. E. 55; S. *v.* Steele, 226 Mo. 583, 126 S. W. 406; Day *v.* Hunnicutt (Tex. Civ.), 160 S. W. 134; Bell *v.* S., 48 Tex. Cr. 256, 87 S. W. 1160. See Daly *v.* S. (Fla.), 64 S. 858; Englefield *v.* R. Co. (Tex. Civ.), 159 S. W. 1033.

Leading questions may be put by party who called unwilling witness. Becker *v.* Koch, 104 N. Y. 394, 10 N. E. 701; P. *v.* Kelly, 113 N. Y. 647, 21 N. E. 122; P. *v.* Sexton, 187 N. Y. 495, 509, 80 N. E. 396.

814-19 P. *v.* Overacker, 15 Cal. App. 620, 115 P. 756.

814-20 Layne *v.* R. Co., 66 W. Va. 607, 67 S. E. 1103.

815-56 Generality of question as to time or persons, ground of objection. Merrill *v.* Tinkler, 160 Mich. 575, 125 N. W. 717.

Vague questions concerning mental state of witness at time of occurrence in issue, objectionable. El Paso, etc. R. Co. *v.* Lumbley, 56 Tex. Civ. 418, 120 S. W. 1050.

816-57 Savage *v.* Bowen, 103 Va. 540, 49 S. E. 668.

816-58 Bone *v.* S., 8 Ala. App. 59, 62 S. 455; Troup *v.* S., 160 Ala. 125, 49 S. 332; DeWitt *v.* Co., 7 Cal. App. 774, 96 P. 397; Thomas *v.* S., 47 Fla. 99, 36 S. 161; Hirsch *v.* Coleman, 227 Ill. 149, 81 N. E. 21, 128 Ill. App. 245.

816-62 See Richards *v.* Co., 107 Va. 881, 59 S. E. 1104.

816-63 Harris *v.* R. Co., 115 Mo. App. 527, 91 S. W. 1010.

817-65 Agent or employe of a party cannot be called for cross-examination unless offered as witness. Whistler *v.* Cowan, 4 O. C. C. (N. S.) 625, *aff.*, no opinion.

818-73 Oliver *v.* Oliver (Ala.), 65 S. 373; Jones *v.* S. (Ala.), 61 S. 434; Bruton *v.* Co. (Ky.), 118 S. W. 1001; S. *v.* Monroe, 133 La. 612, 63 S. 241; Detroit Nat. Bk. *v.* Co., 145 Mich. 656, 673, 108 N. W. 1092; Reding *v.* Reding, 143 Mo. App. 659, 127 S. W. 936; Harris *v.* R. Co., 115 Mo. App. 527, 91 S. W. 1010; Ayers *v.* R. Co., 190 Mo. 228, 88 S. W. 608; Fulton Bk. *v.* Stafford, 2 Wend. (N. Y.) 483; Bunch *v.* R. Co., 91 S. C. 139, 74 S. E. 363; Martoni *v.* S. (Tex. Cr.), 167 S. W. 349; Montgomery *v.* S. (Tex. Cr.), 151 S. W. 813. See Empire C. Co. *v.* Gravlee, 9 Ala. App. 657, 64 S. 207; Strebin *v.* Lavengood, 163 Ind. 478, 493, 71 N. E. 494.

A witness cannot be cross-examined as to matters concerning which there is nothing in evidence. Ralph *v.* Taylor (R. I.), 82 A. 279.

The rule in Missouri "is that a witness is on the stand for all purposes and may be cross-examined about matters not referred to in the examination in chief. Ayers *v.* R. Co., 190 Mo. 228, 88 S. W. 608. The rule makes no dis-

tinction between expert and nonexpert evidence.'' Conway *v.* R. Co., 161 Mo. App. 81, 142 S. W. 1101.

Difference in rules affects only order of proof. See Ayers *v.* R. Co., supra.

Witness must give evidence before he can be cross-examined. Harris *v.* R. Co., 115 Mo. App. 527, 91 S. W. 1010. But in South Carolina witness who has been sworn may be cross-examined though not examined in chief. Mason *v.* R. Co., 58 S. C. 70, 36 S. E. 440

819-76 Collins *v.* Flynn, 155 Ky. 717, 160 S. W. 496; Chenoweth *v.* Sutherland, 141 Mo. App. 272, 124 S. W. 1055; Ayers *v.* R. Co., 190 Mo. 228, 88 S. W. 608.

In an action for personal injuries, where plaintiff called defendant's chauffeur to show that at time of accident he was in defendant's service so as to bind defendant, he may be cross-examined for purpose of showing that he was at the time acting without the scope of his employment. Colwell *v.* Stopper Co. (R. I.), 82 A. 388.

820-77 Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755. See Hamilton *v.* Smith, 141 N. Y. S. 577; Ivy *v.* Ivy (Tex. Civ.), 128 S. W. 682.

820-78 Other reasons given in Harris *v.* R. Co., 115 Mo. App. 527, 91 S. W. 1010.

820-79 Link *v.* S. (Tex. Cr.), 164 S. W. 987.

820-80 Stevens *v.* P., 215 Ill. 593, 74 N. E. 786.

821-85 S. *v.* Kritchman, 84 Conn. 152, 79 A. 75; Stein *v.* Co., 152 Ill. App. 392; Schwing *v.* Dunlap, 130 La. 498, 58 S. 162; S. *v.* Lee, 228 Mo. 480, 128 S. W. 987; Bunch *v.* R. Co., 91 S. C. 139, 74 S. E. 363; Holt *v.* Nielson, 37 Utah 566, 109 P. 470.

See Potter *v.* Shauf (Ala.), 65 S. 778; Empire I. Co. *v.* Lynch (Ala.), 62 S. 216; Farlow *v.* S., 7 Ala. App. 137, 61 S. 474.

The trial court may and should exercise a sound discretion in limiting the cross-examination of plaintiff's witnesses who testify as to the value of the property, when it is sought by such cross-examination to draw out a detailed description of various other properties in the same vicinity. Wichman *v.* R. Co., 84 Kan. 339, 114 P. 212.

Wide latitude allowed in hypothetical cross-examination. Moennich *v.* City, 147 Ill. App. 553.

821-87 Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778; Morgan *v.* Co., 138 Ky. 637, 128 S. W. 1064; Matla *v.* Co., 160 Mich. 639, 125 N. W. 708; Harper *v.* Town, 152 N. C. 723, 68 S. E. 228; Ward *v.* S. (Tex. Cr.), 159 S. W. 272.

Liberal examination to ascertain truth and test veracity perfectly allowable. Frequent repetition to be regulated by court. P. *v.* Lustig, 206 N. Y. 162, 99 N. E. 183.

822-88 Wills *v.* Russell, 100 U. S. 621; Hales *v.* R. Co., 200 Fed. 533, 118 C. C. A. 627; Grand Trunk W. R. Co. *v.* Reddick, 160 Fed. 898, 88 C. C. A. 80; Harrold *v.* S., 169 Fed. 47, 94 C. C. A. 415; Aeolian Co. *v.* Co., 157 Fed. 320; Aeolian Co. *v.* R. Co., 176 Fed. 811 (equity rule 67, no bearing); Seymore *v.* Co., 58 Fed. 957, 7 C. C. A. 593; Montgomery *v.* Ins. Co., 97 Fed. 913, 38 C. C. A. 553; O'Connell *v.* Co., 118 Fed. 989, 55 C. C. A. 483; McKnight *v.* U. S., 122 Fed. 926, 61 C. C. A. 112; Resurrection G. M. Co. *v.* Co., 129 Fed. 668, 64 C. C. A. 180; Snedecor *v.* Pope, 143 Ala. 275, 39 S. 318; Western R. *v.* Cleghorn, 143 Ala. 392, 39 S. 133; St. Louis, etc. R. Co. *v.* Raines, 90 Ark. 398, 119 S. W. 665; P. *v.* O'Bryan, 165 Cal. 55, 130 P. 1042; P. *v.* Oppenheimer, 156 Cal. 733, 106 P. 74; P. *v.* Darr, 3 Cal. App. 50, 84 P. 457; P. *v.* Mathews, 139 Cal. 527, 73 P. 416; P. *v.* Manasse, 153 Cal. 10, 94 P. 92; P. *v.* Schmitz, 7 Cal. App. 330, 94 P. 407, 419; Yordi *v.* Yordi, 6 Cal. App. 20, 91 P. 348; Donaldson *v.* P., 33 Colo. 333, 80 P. 906; Padgett *v.* S., 64 Fla. 389, 59 S. 946; Jenkins *v.* S., 58 Fla. 62, 50 S. 582; Lewis *v.* S., 55 Fla. 54, 45 S. 998; Stone *v.* White, 55 Fla. 510, 45 S. 1032; Peadon *v.* S., 46 Fla. 124, 35 S. 204; Fields *v.* S., 46 Fla. 84, 35 S. 185; Surrency *v.* S., 48 Fla. 59, 37 S. 575; Starke *v.* S., 49 Fla. 41, 37 S. 850; Hampton *v.* S., 50 Fla. 55, 77, 39 S. 421; Godwin *v.* R. Co., 120 Ga. 747, 48 S. E. 139; Piipiilani *v.* Houghtailing, 11 Haw. 100; Kalaukoa *v.* Henry, 11 Haw. 430; Booth *v.* Beckley, 11 Haw. 518; Mengelkamp *v.* Co., 259 Ill. 305, 102 N. E. 756; Kellan *v.* Kellan, 258 Ill. 256, 101 N. E. 614; Larabee *v.* Larabee, 240 Ill. 576, 88 N. E. 1037; Dick *v.* Zimmerman, 207 Ill. 636, 69 N. E. 754; Chicago R. Co. *v.* Creech, 207 Ill. 400, 69 N. E. 919; Streator I. T. Co. *v.* Co., 217 Ill. 577, 75 N. E. 546; Staunton Co. *v.* Bub,

218 Ill. 125, 75 N. E. 770; Davis Bros. v. R. Co., 168 Ill. App. 621; Hammond v. Woodruff, 168 Ill. App. 368; P. v. Dietmeyer, 164 Ill. App. 405; Meyer v. Johnson, 122 Ill. App. 87; Chicago R. Co. v. Strong, 230 Ill. 58, 82 N. E. 335; Elgin, etc. T. Co. v. Brown, 129 Ill. App. 62; Citizens' L. & B. Assn. v. Weaver, 127 Ill. App. 252; Guilfoil Co. v. Clark (Ind. App.), 99 N. E. 777; Osborn v. S., 164 Ind. 262, 73 N. E. 601; Eacock v. S., 169 Ind. 488, 82 N. E. 1039; Hoover v. S., 161 Ind. 348, 68 N. E. 591; Indianapolis & M. R. T. Co. v. Walsh, 45 Ind. App. 42, 90 N. E. 138; Zenor v. Smith, 150 Ia. 424, 130 N. W. 382; Beans v. Denny, 141 Ia. 52, 117 N. W. 1091; Frick v. Kabaker, 116 Ia. 494, 90 N. W. 498; S. v. Campbell, 129 Ia. 154, 105 N. W. 395; Stutsman v. Sharpless, 125 Ia. 335, 101 N. W. 105; Goldstein v. Morgan, 122 Ia. 27, 96 N. W. 897; Kuhn v. Johnson, 91 Kan. 188, 137 P. 990; Kerr v. Kerr, 85 Kan. 460, 116 P. 880; Coon v. R. Co., 75 Kan. 282, 89 P. 682; S. v. McCollum, 135 La. —, 65 S. 600; S. v. Pousson, 134 La. 279, 63 S. 902; S. v. Thompson, 116 La. 829, 41 S. 107; Hagerstown Brew. Co. v. Gates, 117 Md. 348, 83 A. 570; Rock Creek S. Co. v. Boyd, 111 Md. 189, 73 A. 662; Balt. R Co. v. Deck, 102 Md. 669, 62 A. 958; Gleason v. Daly, 194 Mass. 348, 80 N. E. 486; Ross v. R. Co., 102 Minn. 249, 113 N. W. 573; S. v. Bell, 212 Mo. 111, 111 S. W. 24; Cuerth v. Arbogast, 48 Mont. 209, 136 P. 383; S. v. Whitworth, 47 Mont. 424, 133 P. 364; Piper v. Murray, 43 Mont. 230, 115 P. 669; Shandy v. McDonald, 38 Mont. 393, 100 P. 203; Borden v. Lynch, 34 Mont. 503, 87 P. 609; Svetkovic v. R. Co. (Neb.), 147 N. W. 990; Citizens' Bk. v. Warfield, 85 Neb. 328, 123 N. W. 317; Emley v. Citizens' Bk., 76 Neb. 794, 107 N. W. 1014; Anderson v. Berrum, 36 Nev. 463, 136 P. 973; Nash v. McNamara, 30 Nev. 111, 93 P. 405; S. v. Shillman, 76 N. J. L. 464, 70 A. 83; Risley v. Ocean City, 75 N. J. L. 840, 69 A. 192; S. v. Brady, 71 N. J. L. 360, 59 A. 6; Blumquist v. Snare, 135 App. Div. 709, 119 N. Y. S. 728; Carter v. Boyle, 57 Misc. 564, 109 N. Y. S. 1102; Woods v. Faurot, 14 Okla. 171, 77 P. 345; Harrold v. Ty., 18 Okla. 395, 89 P. 292; Kelly v. Inv. Co., 66 Or. 1, 133 P. 828; McIntosh v. McNair, 63 Or. 57, 126 P. 9; Webb v. Wolfard, 56 Or. 394, 108 P. 1005; Multnomah County v. Co., 49 Or. 204, 89 P. 389; Morse v. Odell, 49 Or. 118, 89 P. 139; Smith v. Co., 239 Pa. 496, 86 A. 1067; Illig v. Co., 238 Pa. 324, 86 A. 196; Berkey v. Co., 229 Pa. 417, 78 A. 1004; Binder v. Co., 33 Pa. Super. 411; Quigley v. Thompson, 211 Pa. 107, 60 A. 506; C. v. Hyde, 39 Pa. Super. 261; Weldon v. Co., 27 Pa. Super. 257; C. v. Scouton, 20 Pa. Super. 503; Hastings v. Speer, 15 Pa. Super. 115; Carr v. Co., 29 R. I. 276, 70 A. 196; Mohr v. Ins. Co., 32 R. I. 177, 78 A. 554; Totten v. Stevenson, 29 S. D. 71, 135 N. W. 715; Buchanan v. Randall, 21 S. D. 44, 109 N. W. 513; Johnson v. S., 63 Tex. Cr. 50, 138 S. W. 1021; Young v. S., 59 Tex. Cr. 137, 127 S. W. 1058; Webb v. S., 47 Tex. Cr. 305, 83 S. W. 394; Anderson v. R. Co., 35 Utah 509, 101 P. 579; Fraser v. Blanchard, 83 Vt. 136, 73 A. 995; Hathaway v. Goslant, 77 Vt. 199, 59 A. 835; Lambert v. Armentrout, 65 W. Va. 375, 64 S. E. 260; McHolm v. Iron Co., 147 Wis. 381, 132 N. W. 585; Dralle v. Reedsburg, 140 Wis. 319, 122 N. W. 771; Spencer v. S., 132 Wis. 509, 112 N. W. 462; Dunham v. Salmon, 130 Wis. 164, 109 N. W. 959; Johnston v. Abresch, 123 Wis. 139, 101 N. W. 395; Nagle v. Hake, 123 Wis. 256, 101 N. W. 409; Jenkins v. S. (Wyo.), 134 P. 269. And see Norton v. U. S., 205 Fed. 601 (C. C. A.); Foster v. U. S., 178 Fed. 165; Gankyo Mitsunaga v. P. (Colo.), 129 P. 241; P. v. Barrett, 261 Ill. 232, 103 N. E. 969; Many Blanc & Co. v. Jacobson, 149 Ill. App. 240. Leinen v. Joslin (Ia.), 142 N. W. 988; State v. Hoerr, 88 Kan. 573, 129 P. 153; Snyder v. Chinook, 48 Mont. 484, 138 P. 1090; S. v. Byrd, 41 Mont. 585, 111 P. 407; Sherman v. Pac. Co., 33 Nev. 385, 111 P. 416; Ward v. S. (Tex. Cr.), 159 S. W. 272; Northcutt v. S. (Tex. Cr.), 158 S. W. 1004; Kirby v. S. (Tex. Cr.), 150 S. W. 455; Dixon v. Russell, 156 Wis. 161, 145 N. W. 761; Graves v. Lumb. Co., 151 Wis. 99, 138 N. W. 86.

Equity rule requiring all testimony to be recorded, regardless of objection, does not enlarge scope of rule in text. Young v. Welch Mfg. Co., 201 Fed. 563.

Party calling witness vouches for credibility, and so it would be unfair not to confine him to the subjects of the direct examination. "If it is desired to examine the witness as to other matters, the proper practice is to make him his own witness. The only exception to this rule is to show bias or

prejudice and to lay the foundation to admit evidence of prior contradictory statements." Ferry-Hallock Co. *v.* Orange, etc. Co., 185 Fed. 816, per Rellstab, D. J., quoting Aeolian Co. *v.* Standard, etc. C., 176 Fed. 811.

Introduction of exhibits, within rule, Kroetch *v.* Co., 9 Ida. 277, 74 P. 868.

Rule not stricken applied where evidence taken by consent in one action for use in another, or under statutory notice. Story *v.* Nidiffer, 146 Cal. 549, 80 P. 692; Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295; Hunter *v.* Voigt, 8 Pa. Super. 484. It is sometimes relaxed because of necessity or convenience. Montgomery *v.* Ins. Co., 97 Fed. 913, 38 C. C. A. 553; Goddard *v.* Mills, 75 Fed. 818, 21 C. C. A. 530; Saffer *v.* U. S., 87 Fed. 329, 31 C. C. A. 1.

824-89 Collins *v.* Co., 110 Ia. 304, 118 N. W. 401; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651; Jewett *v.* Bryant, 159 Mich. 345, 123 N. W. 1097; Quigley *v.* Thompson, 211 Pa. 107, 60 A. 506; Pinckard *v.* S., 62 Tex. Cr. 602, 138 S. W. 601; Woodward *v.* S., 42 Tex. Cr. 188, 58 S. W. 135; Stewart *v.* S., 52 Tex. Cr. 273, 106 S. W. 685; Weaver *v.* S., 46 Tex. Cr. 607, 81 S. W. 39.

Rule relaxed in court's discretion. Cate *v.* Fife, 80 Vt. 494, 68 A. 1.

Witness who has testified in rebuttal can only be cross-examined on rebuttal testimony. S. *v.* Heidelberg, 120 La. 300, 45 S. 256.

825-90 Harrold *v.* S., 169 Fed. 47, 94 C. C. A. 415; Aeolian Co. *v.* R. Co., 176 Fed. 811; Mannel *v.* Flynn, 5 Cal. App. 319, 90 P. 463; Padgett *v.* S., 64 Fla. 389, 59 S. 946; Peadon *v.* S., 46 Fla. 124, 35 S. 204; Hampton *v.* S., 50 Fla. 55, 39 S. 421; Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039; Seifert *v.* Schaible, 81 Kan. 323, 105 P. 529; Vanzant *v.* Lumb. Co., 128 La. 923, 55 S. 577; Anderson *v.* Berrum, 36 Nev. 463, 136 P. 973; Nash *v.* McNamara, 30 Nev. 114, 93 P. 405; Woods *v.* Faurot, 14 Okla. 171, 77 P. 346; In re Shadle, 30 Pa. Super. 151; Field *v.* Schuster, 26 Pa. Super. 82; Layne *v.* R. Co., 66 W. Va. 607, 67 S. E. 1103.

Rule does not apply to wife of accused if she is not competent witness against him. Stewart *v.* S., 52 Tex. Cr. 273, 106 S. W. 685. See Jones *v.* S., 38 Tex. Cr. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. 719.

825-91 Roden *v.* S., 3 Ala. App. 204, 58 S. 73; P. *v.* Delbos, 146 Cal. 734, 81 P. 131; P. *v.* Maughs, 8 Cal. App. 107, 96 P. 407; Florence *v.* Calmet, 43 Colo. 370, 96 P. 183; Donnelly *v.* R. Co., 131 Ill. App. 302; Harrold *v.* Ty., 18 Okla. 395, 89 P. 202.

Rule strictly applied where wife cannot be required to testify against husband and has testified in his behalf. Jones *v.* S., 51 Tex. Cr. 472, 101 S. W. 993.

Full inquiry allowed as to time, place and circumstances relating to material transaction. Faulkner *v.* Birch, 120 Ill. App. 281.

825-92 Bispham *v.* Turner, 83 Ark. 331, 103 S. W. 1135; S. *v.* Branch, 151 Mo. 622, 641, 52 S. W. 390; Anderson *v.* R. Co., 161 Mo. 411, 61 S. W. 874; Ayers *v.* R. Co., 190 Mo. 228, 88 S. W. 608; Valentini *v.* Ins. Co., 106 App. Div. 487, 94 N. Y. S. 758; Mautner *v.* Brody, 120 N. Y. S. 734; S. *v.* Merrill, 85 Vt. 35, 80 A. 819; Quigley *v.* Thompson, 211 Pa. 107, 60 A. 506; Norfolk & W. R. Co. *v.* Thomas, 110 Va. 622, 66 S. E. 817.

See Moore *v.* Oil Co., 155 App. Div. 375, 140 N. Y. S. 53.

Permission to examine witness of adversary as his own lies within the discretion of court. Reeves & Co. *v.* Younglove (Ia.), 145 N. W. 502.

So impeachment as to such matters by party thus making witness his own should not be permitted. Marshall *v.* U. S., 197 Fed. 511, 117 C. C. A. 65.

826-96 Establishing a defense by cross-examination of plaintiff's witness is proper if general rule as to limits of inquiries is observed. Garlich *v.* R. Co., 131 Fed. 837, 67 C. C. A. 237; Resurrection G. M. Co. *v.* Co., 129 Fed. 668, 64 C. C. A. 180.

826-98 Levine *v.* Carroll, 121 Ill. App. 105; Gemmill *v.* S., 16 Ind. App. 154, 43 N. E. 909; S. *v.* White, 251 Mo. 178, 158 S. W. 32; Hager *v.* S. (Okla. Cr.), 133 P. 263; Quigley *v.* Thompson, 211 Pa. 107, 60 A. 506; Christian *v.* S. (Tex. Cr.), 161 S. W. 101; Marsh *v.* S., 54 Tex. Cr. 144, 112 S. W. 320.

830-4 Cross-examination of subscribing witnesses to will, not limited to what occurred when it was executed. Nichols *v.* Wentz, 78 Conn. 429, 62 A. 610.

830-5 S. *v.* Teasdale, 120 Mo App. 692, 700, 97 S. W. 995.

S31-6 Jacobs *v.* U. S., 161 Fed. 694, 88 C. C. A. 554; Aachen, etc. Co. *v.* G. Co. (Ala. App.), 64 S. 635; Eaton *v.* S., 8 Ala. App. 136, 63 S. 41; Louisville, etc. Co. *v.* Kay, 8 Ala. App. 762, 62 S. 1014; St. Louis, etc. R. Co. *v.* Raines, 90 Ark. 398, 119 S. W. 665; Denver City T. Co. *v.* Lomovt, 53 Colo. 292, 126 P. 276; Booth *v.* Beckley, 11 Haw. 518; Chicago R. Co. *v.* Creech, 207 Ill. 400, 69 N. E. 919; Illinois C. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435; Prussian Nat. Ins. Co. *v.* Co., 113 Ill. App. 67; Indianapolis S. R. Co. *v.* Shea, 45 Ind. App. 608, 90 N. E. 329; Rutherford *v.* R. Co., 142 Ia. 744, 121 N. W. 703; S. *v.* Latham, 131 La. 533, 59 S. 981; Gleason *v.* Daly, 194 Mass. 348, 80 N. E. 486; Corkran *v.* Taylor, 77 N. J. L. 195, 71 A. 124; S. *v.* Reilly, 25 N. D. 339, 141 N. W. 720; Wirth *v.* Richter, 63 Or. 114, 126 P. 987; McIntosh *v.* McNair, 63 Or. 57, 126 P. 9; Littieri *v.* Freda, 241 Pa. 21, 88 A. 82; Quigley *v.* Thompson, 211 Pa. 107, 60 A. 506; Glenn *v.* Co., 206 Pa. 135, 55 A. 860; Anderson *v.* R. Co., 35 Utah 509, 101 P. 579; S. *v.* Coyle (Utah), 126 P. 305; Miller *v.* Pearce, 86 Vt. 322, 85 A. 620; S. *v.* Meehan, 86 Vt. 246, 84 A. 862; Williams *v.* Norton, 81 Vt. 1, 69 A. 146; Worrell *v.* Co., 103 Va. 719, 49 S. E. 988; Savage *v.* Bowen, 103 Va. 540, 49 S. E. 668; S. *v.* Hazzard, 75 Wash. 5, 134 P. 514; Reynolds *v.* Car Co., 75 Wash. 1, 134 P. 512; Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633.

See Daniels *v.* Stock, 21 Cal. App. 651, 126 P. 281; First N. Bk. *v.* Shank, 53 Colo. 446, 128 P. 56.

"It is very difficult for the trial judge to carry all of the testimony in a case in his head, and frequently he is in doubt as to what is strictly in reply, and valuable time would be consumed in ascertaining what has been testified to when that is the case. I see no reason why the judge should not allow the testimony to be introduced and the other side allowed to reply to it. This certainly would cure any objection to it and render the admission to it harmless, as to it being in reply." S. *v.* Wooten, 92 S. C. 61, 75 S. E. 213, as to a former conviction.

S31-7 Roden *v.* S., 3 Ala. App. 193, 58 S. 74; Ahmi *v.* Waller, 15 Haw. 497; Brennen *v.* Co., 241 Ill. 610, 89 N. E. 756; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651; Wirth *v.* Richter, 63 Or. 114, 126 P. 987; Krebs H. Co. *v.* Livesley, 55 Or. 227, 104 P. 3.

See Hopkins *v.* S. (Okla. Cr.), 130 P. 1101.

S31-8 Hale *v.* Hale, 169 Ill. App. 272.

S31-9 Collins *v.* Co., 140 Ia. 304, 118 N. W. 401. See P. *v.* Schmitz, 7 Cal. App. 330, 94 P. 407, 419; Bell *v.* Prewitt, 62 Ill. 361; Hughes *v.* Co., 104 Pa. 207; Weldon *v.* Co., 27 Pa. Super. 257.

Improper cross-examination by co-defendant who escaped liability, not cause for reversing judgment in favor of plaintiff. Schmitt *v.* R. Co., 239 Ill. 494, 88 N. E. 275.

Discretion of court is limited to proof of relevant facts of a simple character, and is solely for convenience to avoid necessity for recalling witness. It does not extend so far as to permit converting non-expert witness into an expert. Carr *v.* Co., 29 R. I. 276, 70 A. 196.

Error without prejudice not cause for reversal. S. *v.* Kyle, 177 Mo. 659, 76 S. W. 1014; Bohan *v.* Avoca, 154 Pa. 404, 26 A. 604; Osborne *v.* Walley, 8 Pa. Super. 193; Hunter *v.* Voigt, 8 Pa. Super. 484; Montgomery *v.* S., 45 Tex. Cr. 373, 77 S. W. 788; Denny *v.* Kleeb, 40 Wash. 634, 82 P. 920. See Bassett *v.* Const. Co., 213 Fed. 810 (C. C. A.).

S32-11 Turley *v.* Thomas, 31 Nev. 181, 101 P. 568 (applying rule conversely); Port Townsend *v.* Lewis, 34 Wash. 413, 75 P. 982.

Party cannot complain of evidence he brought out on cross-examination. Jackson-V. D. Co. *v.* Moore, 22 Ky. L. R. 1749, 61 S. W. 368; Pacific Exp. Co. *v.* Needham (Tex. Civ.), 94 S. W. 1070. See Cunningham *v.* S. (Tex. Cr.), 166 S. W. 519.

S32-12 Brennen *v.* Coal Co., 147 Ill. App. 263, judgment *aff.*, 241 Ill. 610, 89 N. E. 756; Humboldt *v.* Watkins, 123 Ill. App. 62; Balt. R. Co. *v.* Deck, 102 Md. 669, 62 A. 958; Hastings *v.* Speer, 15 Pa. Super. 115; Woodstock Mfg. Co. *v.* Co., 84 S. C. 306, 66 S. E. 194; Morotock Ins. Co. *v.* Co., 94 Va. 361, 26 S. E. 850; Worrell *v.* Co., 103 Va. 719, 49 S. E. 988; Norman *v.* Hopper, 38 Wash. 415, 80 P. 551; Dralle *v.* Reedsburg, 140 Wis. 319, 122 N. W. 771.

S32-13 Harter *v.* Whitebread, 38 Pa. Super. 10.

S32-14 St. Louis, etc. R. Co. *v.* Cundiff, 171 Fed. 319, 96 C. C. A. 211; Pritchard *v.* Fowler, 171 Ala. 662, 55 S.

147; Tiner *v.* S. (Ark.), 158 S. W. 1087; Sexton *v.* S., 91 Ark. 589, 121 S. W. 1075; S. *v.* Rivers, 82 Conn. 454, 74 A. 757; Chicago, etc. R. Co. *v.* Howell, 208 Ill. 155, 70 N. E. 15; P. *v.* Janos, 157 Ill. App. 307; Campbell *v.* Eichorst, 122 Ill. App. 609; Markley *v.* Co., 151 Ia. 612, 132 N. W. 37; S. *v.* Bellard, 132 La. 491, 61 S. 537; S. *v.* Myers, 221 Mo. 598, 121 S. W. 131; Cuerth *v.* Arbogast, 48 Mont. 209, 136 P. 383; Moss *v.* Goodhart, 47 Mont. 257, 131 P. 1071; Barrish *v.* Orben, 78 N. J. L. 128, 73 A. 529; Rogers *v.* S., 8 Okla. Cr. 226, 127 P. 365; Matteson *v.* R. Co., 218 Pa. 527, 67 A. 847; Hunter *v.* Hunter, 37 Pa. Super. 311; J. W. Bishop Co. *v.* Curran, 30 R. I. 501, 76 A. 275; Milne *v.* Co., 29 R. I. 504, 72 A. 716; Davis *v.* S., 57 Tex. Cr. 165, 121 S. W. 1108. See Bassett *v.* Const. Co., 213 Fed. 810 (C. C. A.); Stewart *v.* U. S., 211 Fed. 41, 127 C. C. A. 477; Smith *v.* S. (Ala.), 62 S. 864.

834-15 Hoagland *v.* Canfield, 160 Fed. 146; Southern R. Co. *v.* Dickens, 161 Ala. 144, 49 S. 766; Gershner *v.* Co., 93 Ark. 301, 124 S. W. 772; In re Snowball's Est., 157 Cal. 301, 107 P. 598; P. *v.* Gallagher, 100 Cal. 466, 35 P. 80; P. *v.* Schmitz, 7 Cal. App. 330, 94 P. 407, 419; Lanigan *v.* Neely, 4 Cal. App. 763, 89 P. 441; Gillespie *v.* Salmon, 2 Cal. App. 501, 84 P. 310; P. *v.* Davis, 1 Cal. App. 8, 81 P. 716, 88 P. 1101; P. *v.* Buckley, 143 Cal. 375, 77 P. 169; Purse *v.* Purcell, 43 Colo. 50, 95 P. 291 (as where value of services has been testified of, inquiry is proper as to what they were and occasion for rendering them); Kendall *v.* Luther, 82 Conn. 523, 74 A. 879; Pollock *v.* Thomas, 63 Fla. 251, 58 S. 48; Atlantic R. Co. *v.* Crosby, 53 Fla. 400, 43 S. 318; Ching Lum *v.* Lam Man Ben, 19 Haw. 363 (witness who has testified he is married may be asked if he has two wives); Gagnon *v.* Molden, 15 Ida. 727, 99 P. 965; Drum *v.* Capps, 240 Ill. 524, 88 N. E. 1020; Levine *v.* Carroll, 121 Ill. App. 105; Donk *v.* Tetherington, 128 Ill. App. 256; Hughes *v.* Ferriman, 119 Ill. App. 169; Prussian Nat. Ins. Co. *v.* Co., 113 Ill. App. 67; O'Connor Co. *v.* Gillaspy, 170 Ind. 428, 83 N. E. 738 (fact defendant in personal injury case insured, he having shown payment by himself of plaintiff's medical bills); Henderson *v.* Henderson, 165 Ind. 666, 75 N. E. 269; Smith *v.* S., 165 Ind. 180, 74 N. E. 983; Osborn *v.* S., 164 Ind. 262, 73 N. E. 601; S. *v.* Harvey, 130 Ia. 394, 106 N. W. 938; Brown *v.* R. Co., 118 La. 87, 42 S. 656; Martin *v.* Moore, 99 Md. 41, 57 A. 671; Hickey *v.* Co., 33 Mont. 46, 81 P. 806; Mahoney *v.* Dixon, 34 Mont. 454, 87 P. 452; Zalenka *v.* Co., 82 Neb. 511, 118 N. W. 103; Devencenzi *v.* Cassinelli, 28 Nev. 222, 81 P. 41; Schnase *v.* Goetz, 18 N. D. 594, 120 N. W. 553; Hogan *v.* Klabo, 13 N. D. 319, 100 N. W. 847; Beadle *v.* Paine, 46 Or. 424, 80 P. 903; S. *v.* Miller, 43 Or. 325, 74 P. 658; Glenn *v.* Co., 206 Pa. 135, 55 A. 860; American C. F. Co. *v.* W. Co., 218 Pa. 512, 67 A. 861; Pittsburg Co. *v.* Monroe, 79 S. C. 564, 61 S. E. 92; McCarley *v.* Co., 75 S. C. 390, 56 S. E. 1; Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182; Gelber *v.* S., 56 Tex. Cr. 460, 120 S. W. 863; Montgomery *v.* S., 45 Tex. Cr. 373, 77 S. W. 788; Richardson *v.* Baker, 83 Vt. 204, 75 A. 151; Nelson *v.* Stange, 140 Wis. 657, 123 N. W. 152; Speliopoulos *v.* Schick, 129 Wis. 556, 109 N. W. 568. See Boyett *v.* S., 8 Ala. App. 93, 62 S. 984; Colman *v.* Looper, 94 Neb. 270, 143 N. W. 295.

Opinion may be required. — Witness who has stated what cars may be coupled without going between them may be asked his opinion as to necessity of going between those in question. Huggins *v.* R. Co., 148 Ala. 153, 41 S. 856.

Immaterial testimony elicited would show violation of law. P. *v.* Farrell, 137 Mich. 127, 100 N. W. 264.

Any fact showing plaintiff has no cause of action may be proved. Grasinger *v.* Lucas, 24 S. D. 42, 123 N. W. 77.

Matters a little removed from res gestae may be gone into under some circumstances. Hitchner W. P. Co. *v.* R. Co., 168 Fed. 602, 93 C. C. A. 598.

835-18 Fadley *v.* R. Co., 153 Fed. 514, 82 C. C. A. 464; Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126; Swint *v.* S., 3 Ala. App. 93, 57 S. 394; Burks *v.* S., 72 Ark. 461, 82 S. W. 490; In re Hayden, 1 Cal. App. 75, 81 P. 668; Huyck *v.* Rennie, 151 Cal. 411, 90 P. 929; Womble *v.* Wilbur, 3 Cal. App. 535, 86 P. 916; P. *v.* Zimmerman, 3 Cal. App. 84, 84 P. 446; Glasco *v.* S., 137 Ga. 336, 73 S. E. 578; Faulkner *v.* Birch, 120 Ill. App. 281; Osburn *v.* S., 164 Ind. 262, 275, 73 N. E. 601; Louisville R. Co. *v.* Wood, 113 Ind. 544, 557, 14

N. E. 572, 16 N. E. 197; Witmer *v.* Dist. Ct., 175 Ia. 244, 136 N. W. 113; Little *v.* Assn., 134 Ia. 440, 134 N. W. 1087; Georgetown W., etc. Co. *v.* Neale, 137 Ky. 197, 125 S. W. 293; S. *v.* Heidelberg, 120 La. 300, 45 S. 256; S. *v.* Nugent, 116 La. 99, 40 S. 581; Chenoweth *v.* Sutherland, 141 Mo. App. 272, 124 S. W. 1055; Whipple *v.* Farrelly, 136 App. Div. 587, 121 N. Y. S. 117; Weinstein *v.* Co., 121 App. Div. 708, 106 N. Y. S. 517; Hogan *v.* Klabo, 13 N. D. 319, 100 N. W. 847; S. *v.* Farr, 29 R. I. 72, 69 A. 5; S. *v.* Boyleston, 84 S. C. 374, 66 S. E. 1047; Ganow *v.* Ashton, 32 S. D. 548, 143 N. W. 383; Cohen & Co. *v.* Rittimann (Tex. Civ.), 139 S. W. 59; First Nat. Bk. *v.* Pearce (Tex. Civ.), 126 S. W. 285; Brittain *v.* S., 47 Tex. Cr. 597, 85 S. W. 278.

See Westinghouse, etc. Co. *v.* Hubert, 175 Mich. 508, 141 N. W. 600.

It is the duty of the witness to disclose the names of witnesses to the injury which he had learned by inquiry. S. *v.* Theisen (Mo.), 142 S. W. 1088.

Reasons for doing act testified of in direct examination may be given. Hughes *v.* R. Co., 126 Wis. 525, 106 N. W. 726.

Exception where wife is led to state matters incriminative of husband. Webb *v.* S., 47 Tex. Cr. 305, 83 S. W. 394.

836-19 Thompson *v.* U. S., 144 Fed. 14, 75 C. C. A. 172; Crosby *v.* Emerson, 142 Fed. 712, 74 C. C. A. 45; Drake *v.* S., 110 Ala. 9, 20 S. 450; Simmons *v.* S., 145 Ala. 61, 40 S. 660; Letcher *v.* S., 145 Ala. 669, 39 S. 922; Wefel *v.* Stillman, 151 Ala. 249, 44 S. 203; Brownlee *v.* Reiner, 147 Cal. 641, 82 P. 324; In re Hayden, 1 Cal. App. 75, 81 P. 668; Osburn *v.* S., 164 Ind. 262, 275, 73 N. E. 691; Norton *v.* Clark, 253 Ill. 557, 97 N. E. 1079; S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461 (so provided by statute); Hurst *v.* Mechlin (Ky.), 119 S. W. 807; Neace *v.* C., 23 Ky. L. R. 125, 62 S. W. 733; Herron *v.* C., 23 Ky. L. R. 782, 64 S. W. 432; Bess *v.* C., 26 Ky. L. R. 820, 82 S. W. 576; S. *v.* Lee, 130 La. 477, 58 S. 155; Koogle *v.* Cline, 110 Md. 587, 73 A. 672; Gibney *v.* Allen, 156 Mich. 301, 120 N. W. 811; S. *v.* Schenk, 223 Mo. 429, 142 S. W. 962 (even if it covered a promise of marriage); S. *v.* Howard, 30 Mont. 518, 77 P. 79; S. *v.* Glatzmayer, 79 N. J. L. 228, 77 A. 740; P. *v.* Bingham, 121 App. Div. 593, 106 N. Y. S. 330; Weinstein *v.* Co., 121 App. Div. 708, 106 N. Y. S. 517; S. *v.* Moeller, 20 N. D. 114, 126 N. W. 568; Glenn *v.* Co., 206 Pa. 135, 55 A. 860; Wyres *v.* S. (Tex. Cr.), 166 S. W. 1150; Barbee *v.* S., 58 Tex. Cr. 129, 124 S. W. 961; Houston, etc. Co. *v.* Wilson (Tex. Civ.), 165 S. W. 560; Missouri, etc. R. Co. *v.* Lindsey (Tex. Civ.), 101 S. W. 863; Lahue *v.* S., 51 Tex. Cr. 159, 101 S. W. 1008; Jewett *v.* Buck, 78 Vt. 353, 63 A. 136; Bruce *v.* Bevis, 56 Wash. 547, 106 P. 129; Farley *v.* Winn, 129 Wis. 291, 109 N. W. 633; Smith *v.* R. Co., 127 Wis. 253, 106 N. W. 829; Baxter *v.* Krainik, 126 Wis. 421, 105 N. W. 803.

See Owens *v.* S., 65 Fla. 483, 62 S. 651.

Rule applies though affirmative defense be made. Resurrection G. M. Co. *v.* Co., 129 Fed. 668, 64 C. C. A. 180.

Declarations in favor of party may be shown on cross-examination if part of conversation brought out in chief. Wilson *v.* Gordon, 73 S. C. 155, 53 S. E. 79.

836-20 Braham *v.* S., 143 Ala. 28, 38 S. 919; Graham *v.* Middleby, 185 Mass. 349, 70 N. E. 416; Kurowski *v.* S., 143 Wis. 210, 126 N. W. 546.

836-21 Thompson *v.* S., 84 Miss. 758, 36 S. 389; Goltra *v.* Penland, 45 Or. 254, 77 P. 129; Ah Doon *v.* Smith, 25 Or. 89, 34 P. 1093; In re Esterbrook's Est., 83 Vt. 229, 75 A. 1 (to refresh recollection). See Giering *v.* Sauer, 120 Md. 295, 87 A. 774.

836-22 All a conversation, part of which has been elicited by one party on cross-examination, may be called for by the other. S. *v.* Colvin, 226 Mo. 446, 126 S. W. 448.

837-24 Miller *v.* P., 216 Ill. 309, 74 N. E. 743; S. *v.* Wilson, 223 Mo. 173, 122 S. W. 671.

838-27 Lockport *v.* Licht, 123 Ill. App. 426; Miller *v.* P., 216 Ill. 309, 74 N. E. 743; Crawfordsville Trust Co. *v.* Ramsey, 178 Ind. 258, 98 N. E. 177; S. *v.* Butler, 155 Ia. 204, 135 N. W. 628.

838-28 Examination of court reporter not limited to questions put in chief. Ibid.

Testimony given by witness on former trial cannot be inquired about on cross-examination of another witness, former not having testified on retrial. Walter *v.* Joline, 136 App. Div. 426, 120 N. Y. S. 1025.

838-29 Palmer *v.* S., 165 Ala. 129, 51 S. 378; Northern A. R. Co. *v.* Mansell, 138 Ala. 548, 36 S. 459; De Yam-

port *v.* S., 139 Ala. 53, 36 S. 772; P. *v.* Scalamiero, 143 Cal. 343, 76 P. 1098; P. *v.* Davis, 1 Cal. App. 8, 81 P. 716, 88 P. 1101; Reese *v.* Bell, 138 Cal. xix, 71 P. 87; P. *v.* Dowell, 141 Cal. 493, 75 P. 45; Brown *v.* S., 46 Fla. 159, 35 S. 82; Luin *v.* Co., 138 Ia. 268, 115 N. W. 1024; S. *v.* Hibner, 115 Ia. 48, 87 N. W. 741; Truax *v.* Co., 149 Ky. 699, 149 S. W. 1033; P. *v.* Frost (Mich.), 146 N. W. 174; Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295; Novotny *v.* Danforth, 9 S. D. 301, 68 N. W. 749; Reagan *v.* S. (Tex. Cr.), 157 S. W. 483; Weaver *v.* S. (Tex. Cr.), 150 S. W. 785; Berry *v.* Doolittle, 82 Vt. 471, 74 A. 97.

See Powell *v.* R. Co. (Mo.), 164 S. W. 628; Howard *v.* S. (Tex. Cr.), 163 S. W. 429.

838-30 Louisville & N. R. Co. *v.* Smith, 163 Ala. 141, 50 S. 241; Smith *v.* S., 142 Ala. 14, 39 S. 329; Wefel *v.* Stillman, 151 Ala. 249, 44 S. 203; P. *v.* Buckley, 143 Cal. 375, 77 P. 169; P. *v.* Morales, 143 Cal. 550, 77 P. 470; Doudell *v.* Shoo, 20 Cal. App. 424, 129 P. 478; Perrin *v.* Carbone, 1 Cal. App. 295, 82 P. 222; Womble *v.* Wilbur, 3 Cal. App. 535, 546, 86 P. 916; Brown *v.* Woodward, 75 Conn. 254, 53 A. 112; Norman P. S. Co. *v.* Ford, 77 Conn. 461, 59 A. 499; Cook *v.* S., 46 Fla. 20, 35 S. 665; Chicago R. Co. *v.* Creech, 207 Ill. 400, 69 N. E. 919; Prussian Nat. Ins. Co. *v.* Co., 113 Ill. App. 67; Edmunds Mfg. Co. *v.* McFarland, 118 Ill. App. 256; S. *v.* McKenzie, 228 Mo. 385, 128 S. W. 948; Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689; S. *v.* Meier, 140 Ia. 540, 118 N. W. 792; Marine Bk. *v.* Stirling, 115 Md. 90, 80 A. 736; Gardner *v.* R. Co., 204 Mass. 213, 90 N. E. 534; S. *v.* Crowe, 39 Mont. 174, 102 P. 579; Anderson *v.* Berrum, 36 Nev. 463, 136 P. 973; S. *v.* Glatzmayer, 79 N. J. L. 238, 75 A. 740; Colloty *v.* Schuman, 73 N. J. L. 92, 62 A. 186; S. *v.* Roberts (N. M.), 138 P. 208; S. *v.* Hazlett, 14 N. D. 490, 105 N. W. 617; Quigley *v.* Thompson, 211 Pa. 107, 60 A. 506; Glenn *v.* Co., 206 Pa. 135, 55 A. 860; James *v.* S., 63 Tex. Cr. 75, 138 S. W. 612; Southwestern T. & T. Co. *v.* Owens (Tex. Civ.), 116 S. W. 89; Anderson *v.* R. Co., 35 Utah 509, 101 P. 579; S. *v.* Manley, 82 Vt. 556, 74 A. 231; Keeley *v.* R. Co., 139 Wis. 448, 121 N. W. 167.

See Jamison *v.* S., 7 Ala. App. 3, 60 S. 944; Glasspoole *v.* Lumb. Co., 22 Cal. App. 338, 134 P. 349; S. *v.* Bilyeu, 61 Or. 177, 129 P. 768; *Comp.* Creech *v.* S. (Tex. Cr.), 158 S. W. 277.

Exhibition of articles to witness proper. Byers *v.* R. Co., 222 Pa. 547, 72 A. 245.

Answers to cross-examination may be disproved. Howard *v.* S. (Tex. Cr.), 163 S. W. 429.

839-31 Gillespie *v.* Salmon, 2 Cal. App. 501, 84 P. 310; Hampton *v.* S., 50 Fla. 55, 39 S. 341; Evans *v.* Co., 129 Ga. 961, 48 S. E. 358; S. *v.* Myers, 221 Mo. 598, 121 S. W. 131; Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295; National Park Bk. *v.* Bk., 115 N. Y. S. 222; Hogen *v.* Klabo, 13 N. D. 319, 100 N. W. 817; Weaver *v.* S., 46 Tex. Cr. 607, 81 S. W. 39.

Limitation does not exclude questions tending to show improbability of statements in direct examination. Shannon *v.* Castner, 21 Pa. Super. 294.

840-32 Williams *v.* S. (Tex. Cr.), 147 S. W. 571.

840-35 Mann *v.* Darden, 171 Ala. 142, 54 S. 554; Chandler *v.* Higgins, 156 Ala. 511, 47 S. 281; Long-L. H. Co. *v.* Ewing, 8 Ala. App. 657, 62 S. 341; Volusia County Bk. *v.* Bigelow, 45 Fla. 638, 33 S. 704; Fabian *v.* Traeger, 215 Ill. 220, 74 N. E. 131; Silverstone *v.* Corp., 176 Mich. 525, 142 N. W. 776; McNair *v.* Parr, 177 Mich. 327, 143 N. W. 42; Ward *v.* Cook, 158 Mich. 283, 122 N. W. 785; Pinch *v.* Hotaling, 142 Mich. 521, 106 N. W. 69; Nicolay *v.* Mallery, 62 Minn. 119, 64 N. W. 108; Kolbe *v.* Boyle, 99 Minn. 110, 108 N. W. 847; Adams *v.* Cook, 82 Neb. 684, 118 N. W. 662; Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295; P. *v.* Noblett, 96 App. Div. 293, 89 N. Y. S. 181, *aff.*, no opinion, 184 N. Y. 612, 77 N. E. 1193.

"**Where a plaintiff charging fraud,** to prove some fact material to his side of the cause, calls to the witness stand one of the alleged perpetrators of such alleged fraud, although not a party to the suit, but makes no inquiry of the witness as to the intention with which an act testified to was done, such plaintiff does not open the way for the defendant, who is also charged as a participator in such fraud to cross-examine his alleged confederate in alleged fraud under this rule permitting broad latitude on cross-examination. If there actually was any fraud in the alleged transaction, the secrets and circumstances thereof were within the

knowledge of the participators therein, and they were not in need of this broad latitude on cross-examination to discover their own fraud. Under such circumstances, the plaintiff should not be bound by the statements of such a witness on cross-examination, when plaintiff had not opened the way therefor. The permissibility of such broad latitude on cross-examination is very largely within the discretion of the trial court. Kerr *v.* Melum, 27 S. D. 208, 130 N. W. 83.

841-36 See Long L. H. Co. *v.* Ewing, 8 Ala. App. 657, 62 S. 341.

841-37 A like rule applies where it is claimed personal injuries are feigned. Chicago U. T. Co. *v.* Miller, 212 Ill. 49, 72 N. E. 25.

841-38 Tetrick *v.* Kansas City, 128 Mo. App. 355, 107 S. W. 418; Lord *v.* Rumrill, 130 App. Div. 279, 114 N. Y. S. 488 (plaintiff who claims note given him by deceased father may be asked concerning strained relations between them a long time prior to father's death).

Right to cross-examine lost by failure to appear. Floren *v.* Larson, 29 S. D. 63, 135 N. W. 672.

Plaintiff in a personal injury case cannot be asked as to his willingness to submit to a physical examination. Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23. *Contra*, though court powerless to compel examination. Austin, etc. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403.

841-39 National Coal Co. *v.* Mining Co., 168 Mich. 198, 132 N. W. 88; Manor Nat. Bk. *v.* Lowery, 242 Pa. 559, 89 A. 678; Floren *v.* Larson, 29 S. D. 63, 135 N. W. 672. See Ferrell *v.* Prame, 206 Fed. 278 (C. C. A.).

Claim agent of carrier sued for injury. S. *v.* Theisen (Mo.), 142 S. W. 1088.

Michigan Act. No. 307, P. A. 1909, was before the supreme court in Jones *v.* Pere Marquette R. Co., 168 Mich. 1, 133 N. W. 993, where it was pointed out that, except provision was made that the party calling such witnesses should not be bound by and might contradict, their testimony, no other right was conferred making them the witnesses of the opposite party. See Johnson *v.* Co., 169 Mich. 651, 135 N. W. 1069.

South Dakota has a statute identical with that of Minnesota, as to which it has been ruled that the object of the statute was to permit a party to call his adversary at the trial without making him his own witness, and elicit from him, if possible, material facts within his knowledge by a cross-examination precisely as if he had already been examined on his own behalf in chief. Suter *v.* Page, 64 Minn. 444, 67 N. W. 67; In re Brown, 38 Minn. 112, 35 N. W. 726. The act was not designed to affect the competency of witnesses (Wolford *v.* Farnham, 44 Minn. 159, 46 N. W. 295; National German-American Bank of St. Paul *v.* Laurence, 77 Minn. 282, 79 N. W. 1016, 80 N. W. 363; Lloyd *v.* Simons, 90 Minn. 237, 95 N. W. 903), nor to affect the order of trial, or the rule which forbids a party to make out his case by cross-examining the witness of the adverse party (Schmidt *v.* Schmidt, 47 Minn. 451, 50 N. W. 598). See Langford *v.* Issenhuth, 28 S. D. 451, 134 N. W. 889.

Does not include nominal party.—Allen *v.* Eneroth, 118 Minn. 476, 137 N. W. 16.

843-42 International Harvester Co. *v.* Voboril, 187 Fed. 973, 110 C. C. A. 311; United Cigar Stores Co. *v.* Young, 36 App. Cas. (D. C.) 390; Allen *v.* Assn. (Ia.), 143 N. W. 574; P. *v.* Tice, 131 N. Y. 651, 30 N. E. 494; Schwoebel *v.* Fugina, 14 N. D. 375, 104 N. W. 848; Ward *v.* Thompson, 146 Wis. 376, 131 N. W. 1006; Winn *v.* Itzel, 125 Wis. 19, 103 N. W. 220; Sullivan *v.* Collins, 107 Wis. 291, 83 N. W. 310.

In California, *etc.* Assn. *v.* Lilly, 184 Fed. 570, 106 C. C. A. 550, plaintiff "was introduced as a witness to testify as to his own acts. He was sworn to testify to the whole truth. He produced in evidence the statement of account which he had sent to the defendant, together with the answer of the defendant thereto, which, on its face, was an assent to the statement and an acknowledgment of the debt. He testified that no payment had been made on the account or on the items of storage therein specified. In presenting those papers he vouched for their truth, and he thereby asserted that the goods had been sold and delivered as represented in the statement. He was examined in such a way as to have him avoid testifying to the important facts which went to the merit of the controversy, facts which were peculiarly within his own knowledge. In such a case why should the defendant be re-

quired to make the plaintiff a witness for the defense and be compelled to give credit to the plaintiff's testimony as to the very existence of his own cause of action?''

A nominal party should, it seems, be classed as an ordinary witness. Winn *v.* Itzel, 125 Wis. 19, 103 N. W. 220.

843-43 Baltimore & O. R. Co. *v.* Thornton, 188 Fed. 868, 110 C. C. A. 502; Sloss-S. S. & I. Co. *v.* House, 157 Ala. 663, 47 S. 572; Allen *v.* Assn. (Ia.), 143 N. W. 574; Grand Rapids B. Co. *v.* Pettis, 159 Mich. 679, 124 N. W. 577; Risley *v.* Ocean City, 75 N. J. L. 840, 69 A. 192; Dubois *v.* Roby, 84 Vt. 465, 80 A. 150; Kinnane *v.* Conroy, 52 Wash. 631, 101 P. 223. See Just *v.* Co., 16 Ida. 639, 102 P. 381.

Good faith of plaintiff in bringing suit may be tested in court's discretion. Chicago, etc. R. Co. *v.* Steckman, 224 Ill. 500, 79 N. E. 602.

843-44 Borden *v.* Lynch, 34 Mont. 503, 87 P. 609; S. *v.* Schnepel, 23 Mont. 523, 59 P. 927.

843-45 Watts *v.* S., 8 Ala. App. 115, 63 S. 15; Stratton Mass. Gold Mines Co. *v.* Stratton, 206 Mass. 117, 92 N E. 34.

Where counsel is surprised at testimony of his witness, he has not right of cross-examination. P. *v.* Tielke, 259 Ill. 88, 102 N. E. 229.

Court may permit state to cross-examine its unwilling and hostile witnesses. S. *v.* Robinson, 126 Ia. 69, 101 N. W. 634; P. *v.* Sexton, 187 N. Y. 495, 80 N. E. 396.

Exception.—It is an exception to the rule which permits a party to cross-examine his own witness. Where he proves to be hostile extent of examination is in sound discretion of court. S. *v.* Hamilton, 74 Kan. 461, 87 P. 363; S. *v.* Spidle, 42 Kan. 441, 22 P. 620.

844-46 Bethel *v.* Pawnee (Neb.), 145 N. W. 363.

844-47 Extent of cross-examination within court's sound discretion. S. *v.* Hamilton, 74 Kan. 461, 87 P. 363.

See vol. 8, p. 160, n. 46, and supplement thereto.

Memoranda of a transaction with reference to which cross-examination of a party has been conducted is admissible as part thereof. Morrin *v.* Manning, 205 Mass. 205, 91 N. E. 308.

In cases of fraud parties may be treated as witnesses on cross examination, and questioned as to all relevant circumstances. Dumas *v.* Clayton, 32 App. Cas. (D. C.) 566.

844-48 Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126; Adams *v.* S. (Ala.), 61 S. 352; Barden *v.* S., 145 Ala. 1, 40 S. 948; Swope *v.* S., 4 Ala. App. 83, 58 S. 809; Jones *v.* S., 174 Ala. 85, 57 S. 36; Montgomery *v.* S., 2 Ala. App. 25, 56 S. 92; Carothers *v.* S., 75 Ark. 574, 88 S. W. 585; Weaver *v.* S., 83 Ark. 119, 102 S. W. 713; P. *v.* Schmitz, 7 Cal. App. 330, 94 P. 407, 419; Wilson *v.* S., 47 Fla. 118, 36 S. 580; Newman *v.* C., 28 Ky. L. R. 81, 88 S. W. 1089; S. *v.* Waldron, 128 La. 559, 54 S. 1009; P. *v.* Dannenberg, 176 Mich. 337, 142 N. W. 347; P. *v.* Fritch, 170 Mich. 258, 136 N. W. 493; P. *v.* Klise, 156 Mich. 373, 120 N. W. 989; S. *v.* Keener, 225 Mo. 488, 125 S. W. 747 (truth of direct testimony may be tested); Poston *v.* S., 83 Neb. 240, 119 N. W. 520; S. *v.* Urie, 35 Nev. 268, 129 P. 305; Ex parte Hedden, 29 Nev. 352, 90 P. 737; P. *v.* Morrison, 195 N. Y. 116, 88 N. E. 21; S. *v.* Lem Woon, 57 Or. 482, 107 P. 974; C. *v.* Swartz, 40 Pa. Super. 370; S. *v.* Rowell, 75 S. C. 494, 56 S. E. 23; S. *v.* Raice, 24 S. D. 111, 123 N. W. 708; Fluewellian *v.* S., 59 Tex. Cr. 334, 128 S. W. 621; S. *v.* Thorne, 39 Utah 208, 117 P. 58; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237.

845-50 Demonstration of situation of parties to a homicide and manner of use of weapons may be required of accused. S. *v.* Hunter, 82 S. C. 153, 63 S. E. 685.

845-52 Inquiry proper concerning knowledge of act of counsel for accused as a circumstance bearing on authorization of it by latter. Eads *v.* S., 17 Wyo. 490, 101 P. 946.

845-53 P. *v.* Buckley, 143 Cal. 375, 77 P. 169; P. *v.* Maughs, 8 Cal. App. 107, 96 P. 407.

845-54 Newman *v.* C., 28 Ky. L. R. 81, 88 S. W. 1089; Morgan *v.* C., 24 Ky. L. R. 2117, 72 S. W. 1098; Ferguson *v.* S., 72 Neb. 350, 100 N. W. 800; S. *v.* Deal, 52 Or. 568, 98 P. 165.

Absence of witnesses for state who testified at previous trials may not be gone into if there is nothing to show accused's responsibility therefor. Askew *v.* S., 59 Tex. Cr. 152, 127 S. W. 1037.

846-56 Harrold *v.* S., 169 Fed. 47, 94 C. C. A. 415; Kirby *v.* S., 151 Ala. 66, 44 S. 38; P. *v.* Manasse, 153 Cal. 10, 94 P. 92; Day *v.* S., 54 Fla. 25, 44

S. 715; Torgeson *v.* Lumb. Co., 123 Minn. 476, 144 N. W. 154; S. *v.* Rodgers, 40 Mont. 248, 106 P. 3; Poston *v.* S., 83 Neb. 240, 119 N. W. 520; Ferguson *v.* S., 72 Neb. 350, 100 N. W. 800; Reagan *v.* S., 57 Tex. Cr. 642, 124 S. W. 685 (intent of accused); S. *v.* Williams, 36 Utah 273, 103 P. 250; S. *v.* Peeples, 71 Wash. 451, 129 P. 108; S. *v.* Cottrell, 56 Wash. 543, 106 P. 179.

Exception, where defendant is adverse witness, state is not confined strictly to examination in chief and is allowed considerable latitude. Daly *v.* S. (Fla.), 64 S. 358.

846-57 P. *v.* Zimmerman, 3 Cal. App. 84, 84 P. 446; S. *v.* Rhys, 40 Mont. 131, 105 P. 494; Harrold *v.* Ty., 18 Okla. 395, 89 P. 202.

Silence of party who testifies to a previous attack upon him may be shown. Long *v.* S., 48 Tex. Cr. 175, 88 S. W. 203.

Scope of inquiry.—If accused denies guilt a wide latitude of cross-examination is permissible. P. *v.* Mullings, 83 Cal. 138, 23 P. 229, 17 Am. St. 223; P. *v.* Morton, 139 Cal. 719, 73 P. 609; S. *v.* Rodgers, 40 Mont. 248, 106 P. 3; S. *v.* Howard, 30 Mont. 518, 77 P. 50; S. *v.* Duncan, 7 Wash. 336, 35 P. 117, 38 Am. St. 888.

Attempt to break jail may be inquired about. Charba *v.* S., 48 Tex. Cr. 316, 87 S. W. 829.

Accused's knowledge of condition of witness for him may be gone into (Long *v.* S., 72 Ark. 427, 81 S. W. 387), as may his knowledge of character of witness. Brittain *v.* S., 47 Tex. Cr. 597, 85 S. W. 278.

Attempt to induce witness to leave jurisdiction may be shown. Carothers *v.* S., 75 Ark. 574, 88 S. W. 585; Ferguson *v.* S., 72 Neb. 350, 100 N. W. 800.

Scope of examination, within reviewable discretion of court. C. *v.* Racco, 225 Pa. 113, 73 A. 1067.

847-58 Some statutes provide cross-examination of accused to test credibility shall not be restricted by examination in chief. S. *v.* Cloninger, 149 N. C. 567, 63 S. E. 154.

848-59 P. *v.* Smith, 9 Cal. App. 644, 99 P. 1111. See S. *v.* Lem Woon, 57 Or. 482, 107 P. 974.

Accused's attempt to induce witness to testify falsely may be shown. S. *v.* Deal, 52 Or. 568, 98 P. 165.

850-62 Phillips *v.* S. (Ala. App.), 65 S. 673; Birmingham R. Co. *v.* Norton, 7 Ala. App. 571, 61 S. 459; Kelly *v.* S., 2 Ala. App. 103, 57 S. 78; Gosdin *v.* Williams, 151 Ala. 592, 44 S. 611; P. *v.* Wong Chuey, 117 Cal. 624, 49 P. 833; Hampton *v.* S., 50 Fla. 55, 39 S. 421; Dayton Folding Box Co. *v.* Danciger, 161 Mo. App. 640, 143 S. W. 855; Gordon *v.* R. Co., 222 Mo. 516, 121 S. W. 80; Moss *v.* Goodhart, 47 Mont. 257, 131 P. 1071; Gilbert *v.* S., 8 Okla. Cr. 543, 128 P. 1100, 129 P. 671; Green *v.* S. (Tex. Civ.), 154 S. W. 1003; Missouri, etc. R. Co. *v.* Burk (Tex. Civ.), 146 S. W. 600; Owens *v.* S. (Tex. Cr.), 96 S. W. 31; Sexton *v.* S., 48 Tex. Cr. 497, 88 S. W. 348; Shoemaker *v.* S., 58 Tex. Cr. 518, 126 S. W. 887; Perry *v.* Centralia, 50 Wash. 670, 97 P. 802.

Such testimony is never collateral or irrelevant. O'Neal *v.* S. (Tex. Cr.), 146 S. W. 938, *cit.* Judge Davidson in Earles *v.* S., 64 Tex. Cr. 537, 142 S. W. 1181, and Pope *v.* S. (Tex. Cr.), 143 S. W. 611.

Rule no application where testimony uncontradicted. Regester *v.* Regester, 104 Md. 1, 64 A. 286.

850-63 Pickett *v.* Frost, 7 Ala. App. 413, 61 S. 476; Hampton *v.* S., 50 Fla. 55, 39 S. 421; Gilbert *v.* S., 8 Okla. Cr. 543, 128 P. 1100, 129 P. 671; Green *v.* S., 54 Tex. Cr. 3, 111 S. W. 933.

850-64 Dodson *v.* S. (Ala. App.), 65 S. 206; Phillips *v.* S., 161 Ala. 60, 49 S. 794 (witness should first be asked state of his feeling for party against whom he is called); Ringer *v.* S., 74 Ark. 262, 85 S. W. 410; Bonaparte *v.* S., 65 Fla. 287, 61 S. 633; Padgett *v.* S., 64 Fla. 389, 59 S. 946; Chicago R. Co. *v.* Schaefer, 121 Ill. App. 334, 347; S. *v.* Johnson (Ia.), 144 N. W. 303; Nolan *v.* Glynn (Ia.), 142 N. W. 1029; S. *v.* Lindquist, 110 Minn. 12, 124 N. W. 215; Lukert *v.* Eldridge (Mont.), 139 P. 999; Cuerth *v.* Arbogast, 48 Mont. 209, 136 P. 383; Gilbert *v.* S., 8 Okla. Cr. 543, 128 P. 1100, 129 P. 671; Creeping Bear *v.* S., 113 Tenn. 322, 87 S. W. 653; Curry *v.* S. (Tex. Cr.), 162 S. W. 851; Cain *v.* S. (Tex. Cr.), 153 S. W. 147.

See Nort *v.* S. (Ariz.), 138 P. 543; Poulter *v.* S. (Tex. Cr.), 161 S. W. 475.

851-65 Birmingham etc. P. Co. *v.* Rutledge, 142 Ala. 195, 39 S. 338; P. *v.* Cowan, 1 Cal. App. 411, 82 P. 339; Gilbert *v.* S., 8 Okla. Cr. 543, 128 P. 1100, 129 P. 671; S. *v.* Lem Woon, 57 Or. 482, 107 P. 974; Shannon *v.* Cast-

ner, 21 Pa. Super. 294; In re Esterbrook's Est., 83 Vt. 229, 75 A. 1.

Statement of witness he killed deceased discredited by showing he was anxious to relieve his brother. Hardin *v.* S., 51 Tex. Cr. 559, 103 S. W. 401.

851-66 McSwean *v.* S. (Ala. App.), 64 S. 543; Jackson *v.* S., 156 Ala. 93, 47 S. 77; Gainey *v.* S., 141 Ala. 72, 37 S. 355; Rowell *v.* Crothers, 75 Conn. 124, 52 A. 818; Stewart *v.* S., 58 Fla. 97, 50 S. 642; Blair *v.* Blair, 125 Ill. App. 341; S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035; S. *v.* Malmberg, 14 N. D. 523, 105 N. W. 614; Gilbert *v.* S., 8 Okla. Cr. 543, 128 P. 1100, 129 P. 671; Curry *v.* S. (Tex. Cr.), 162 S. W. 851.

Particulars cannot be inquired into. Gainey *v.* S., 141 Ala. 72, 37 S. 355.

The particulars and causes of the hostile feeling, when shown, may be inquired into as bearing on the fairness and truthfulness of the witness (State *v.* Dee, 14 Minn. 35); and the jury should be properly cautioned and instructed as to the only purpose for which such testimony can be considered by them. P. *v.* Durham, 170 Mich. 598, 136 N. W. 431.

852-67 Hicklin *v.* Ty., 9 Ariz. 184, 80 P. 340; Hammock *v.* S., 7 Ala. App. 112, 61 S. 471; Crook *v.* Co., 32 App. Cas. (D. C.) 490; Dale *v.* Beasley (Ga.), 81 S. E. 849; S. *v.* Phillips, 105 Minn. 375, 117 N. W. 508; P. *v.* Becker, 210 N. Y. 274, 104 N. E. 396; Rossenbach *v.* Forresters, 184 N. Y. 92, 76 N. E. 1085; Brown *v.* S. (Tex. Cr.), 160 S. W. 374; Anastasakas *v.* Co., 57 Wash. 453, 107 P. 342.

852-68 P. *v.* Manasse, 153 Cal. 10, 94 P. 92; West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377; Isaac *v.* U. S., 7 Ind. Ty. 196, 104 S. W. 588; S. *v.* Brown, 146 Ia. 113, 124 N. W. 899 (hope of immunity); S. *v.* Tawney, 81 Kan. 162, 105 P. 218; Seaborn *v.* Co., 25 Ky. L. R. 2203, 80 S. W. 223; Rouse *v.* S. (Miss.), 65 S. 501; Miller *v.* Freeman (Tex. Civ.), 127 S. W. 302; Virginia etc. W. Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976; Savage *v.* Bowen, 103 Va. 540, 49 S. E. 668.

853-69 Simmons Mfg. Co. *v.* Eskridge, 168 Fed. 675, 94 C. C. A. 161; Nickerson *v.* S., 6 Ala. App. 27, 60 S. 446; St. Louis etc. R. Co. *v.* Clements, 82 Ark. 3, 99 S. W. 1106; In re Coburn, 165 Cal. 202, 131 P. 352; Van Valkenburgh *v.* Oldham, 12 Cal. App. 572, 108 P. 42; Tollifson *v.* P., 49 Colo. 219, 227, 112 P. 794 (*cit.* 3 Encyc. of Ev. 853); Wrisley Co. *v.* Burke, 203 Ill. 259, 67 N. E. 818; Chicago T. Co. *v.* Ertrachter, 130 Ill. App. 602; Domestic etc. Co. *v.* Holden (Ind. App.), 103 N. E. 73; S. *v.* Steele, 226 Mo. 583, 126 S. W. 406; Lukert *v.* Eldridge (Mont.), 139 P. 999; Moss *v.* Goodhart, 47 Mont. 257, 131 P. 1071; S. *v.* Roberts (N. M.), 138 P. 208; De Graff *v.* S., 2 Okla. Cr. 519, 103 P. 538; Glenn *v.* Co., 206 Pa. 135, 55 A. 860; Ballard *v.* S. (Tex. Cr.), 160 S. W. 716; Stowe *v.* Co., 39 Wash. 28, 80 P. 856, 81 P. 97.

See Reynolds *v.* Min. Co., 90 Kan. 208, 133 P. 844; S. *v.* Tudor, 47 Mont. 185, 131 P. 632.

Special latitude proper on cross-examination of "approver" to show inducements to him, though they were unauthorized. Stevens *v.* P., 215 Ill. 593, 74 N. E. 786; P. *v.* Christy, 65 Hun 349, 20 N. Y. S. 278; Allen *v.* S., 10 O. St. 287; P. *v.* Langtree, 64 Cal. 256, 30 P. 813; S. *v.* Kent, 4 N. D. 577, 62 N. W. 631; P. *v.* Moore, 96 App. Div. 56, 89 N. Y. S. 83, *aff.*, no opinion, 181 N. Y. 524, 73 N. E. 1129; Metropolitan R. Co. *v.* Walsh, 197 Mo. 392, 94 S. W. 860.

Claiming reward for arresting accused may not be gone into. Smith *v.* S., 90 Miss. 111, 43 S. 465.

854-70 Wabash S. D. Co. *v.* Black, 126 Fed. 721, 61 C. C. A. 639; McSwean *v.* S. (Ala. App.), 64 S. 543; Birmingham etc. Co. *v.* Glenn (Ala.), 60 S. 111; Houston B. Co. *v.* Dial, 135 Ala. 168, 33 S. 268; Sylvester *v.* S., 46 Fla. 166, 174, 35 S. 142; Teston *v.* S., 50 Fla. 137, 138, 39 S. 787; Stevens *v.* P., 215 Ill. 593, 74 N. E. 786; S. *v.* Decker, 161 Mo. App. 396, 143 S. W. 544; Ballard *v.* S. (Tex. Cr.), 160 S. W. 716; Horton *v.* R. Co., 46 Tex. Civ. 639, 103 S. W. 467; Denison & S. R. Co. *v.* Powell, 35 Tex. Civ. 454, 80 S. W. 1054; Williams *v.* R. Co., 42 Wash. 597, 84 P. 1129; S. *v.* Carr, 65 W. Va. 81, 63 S. E. 766.

See Nashville etc. Co. *v.* Crosby (Ala.), 62 S. 889.

Salary of employe may be inquired about. Cleveland etc. R. Co. *v.* Hadley, 170 Ind. 204, 82 N. E. 1025, 16 L. R. A. (N. S.) 527.

854-71 Armour *v.* Skene, 153 Fed. 241, 82 C. C. A. 385; Nicholson *v.* S., 150 Ala. 80, 43 S. 365 (habit as to use of profane language); Huoncker *v.* Merkey, 102 Pa. 462. See Woods *v.* Dailey, 211 Ill. 495, 71 N. E. 1068; Stevens *v.* P., 215 Ill. 593, 74 N. E. 786.

Knowledge of consequences of perjury may be inquired into. S. *v.* Armstrong, 118 La. 480, 43 S. 57.

Accomplice who has plead guilty and testified against co-defendant, subject to broad cross-examination. P. *v.* Schmitz, 7 Cal. App. 330, 94 P. 407.

854-72 Wilmoth *v.* Hamilton, 127 Fed. 48, 61 C. C. A. 584; Birmingham R. & E. Co. *v.* Mason, 144 Ala. 387, 39 S. 590; Glass *v.* S., 147 Ala. 50, 41 S. 727; Shirley *v.* S., 144 Ala. 35, 40 S. 269; Banks *v.* S. (Ala.), 39 S. 921; P. *v.* Ah Lean, 7 Cal. App. 626, 95 P. 380; Perrin *v.* Carbone, 1 Cal. App. 295, 82 P. 222; Ontario C. G. M. Co. *v.* Mackenzie, 19 Colo. App. 298, 74 P. 791; Atlanta etc. R. Co. *v.* McManus, 1 Ga. App. 302, 58 S. E. 258; Boyd *v.* Gandall, 11 Haw. 322; Chicago R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087; Toledo, etc. R. Co. *v.* Stevenson, 122 Ill. App. 654; Humboldt *v.* Watkins, 123 Ill. App. 62; Chicago City R. Co. *v.* Schaefer, 121 Ill. App. 334; Swift *v.* Rennard, 119 Ill. App. 173; Crawfordsville Trust Co. *v.* Ramsey, 178 Ind. 258, 98 N. E. 177; O'Daniel *v.* Smith, 23 Ky. L. R. 1822, 66 S. W. 284; C. *v.* Middleby, 187 Mass. 342, 73 N. E. 208; Stowell *v.* Co., 139 Mich. 18, 102 N. W. 227; S. *v.* Conway, 241 Mo. 271, 145 S. W. 441; Farmers' & M. Bk. *v.* Richards, 119 Mo. App. 18, 93 S. W. 290; S. *v.* Rogers, 31 Mont. 1, 77 P. 293; Mahoney *v.* Dixon, 34 Mont. 454, 87 P. 452; Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295; Hitt *v.* Alberts, 75 N. J. L. 537, 68 A. 237; Rossenbach *v.* Forresters, 184 N. Y. 92, 76 N. E. 1085; S. *v.* Hazlett, 14 N. D. 490, 105 N. W. 617; Holloway *v.* S., 54 Tex. Cr. 465, 113 S. W. 928; Anson *v.* R. Co., 42 Tex. Civ. 437, 94 S. W. 94; In re Esterbrook's Est., 83 Vt. 229, 75 A. 1; Hathaway *v.* Goslant, 77 Vt. 199, 59 A. 835.

"If the state's witness had testified truthfully on his direct examination, the defendant was undoubtedly guilty, and the defense necessarily must rest upon discrediting or showing the falsity of the testimony of this witness. Under such circumstances the range of cross-examination should not be restricted within bounds so narrow as not to embrace questions affording the defendant a reasonable opportunity to test the accuracy, and show, if he can, the falsity of the statements of the witness as to his whereabouts, etc., just prior to or immediately after the transaction in question. The defense depended upon showing that the testimony of the state's witness was a fabrication, and the defendant's right of cross-examination, if so abridged and confined to such limits as to be useless to him, amounts to a denial of an absolute and valuable right; for, while the court has a large discretion as to the range and extent to be permitted on cross-examination, the discretion does not extend to the denial of cross-examination going to substantial matters within legitimate bounds. The power of cross-examination should not be curtailed to an extent that it would not serve its purpose of being an 'efficacious means available for the exposure of artful fabrications of falsehood by witnesses in our courts of justice.' Davis *v.* Hays, 89 Ala. 563, 8 South. 131." Garner *v.* S., 4 Ala. App. 155, 58 S. 123.

Attempt to conceal fact of material knowledge may be shown. Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156.

855-73 Masters *v.* Seeley, 138 Fed. 719, 71 C. C. A. 409 (previous recovery on same claim set aside for fraud and collusion); Parrish *v.* S., 139 Ala. 16, 36 S. 1012; Smiley *v.* Hooper, 147 Ala. 646, 41 S. 660; Zane *v.* De Onativia, 139 Cal. 328, 73 P. 856; P. *v.* Schmitz, 7 Cal. App. 330, 94 P. 407; P. *v.* Manasse, 153 Cal. 10, 94 P. 92; Lanigan *v.* Neely, 4 Cal. App. 760, 89 P. 441; Fields *v.* S., 46 Fla. 84, 35 S. 185; Prior *v.* Oglesby, 50 Fla. 248, 39 S. 593; Booth *v.* Beckley, 11 Haw. 518; McLean *v.* Lewiston, 8 Ida. 472, 484, 69 P. 478; Indiana U. T. Co. *v.* Pheanis, 43 Ind. App. 653, 85 N. E. 1040; S. *v.* Taylor, 75 Kan. 417, 89 P. 672; Malone *v.* Stephenson, 94 Minn. 222, 102 N. W. 372; Yeager *v.* Cassidy, 12 Pa. Super. 232; Germain F. Co. *v.* Roberts, 8 Pa. Super. 500; S. *v.* Mulch, 17 S. D. 321, 96 N. W. 101; Benson *v.* S., 51 Tex. Cr. 367, 103 S. W. 911.

See Indianapolis & M. R. T. Co. *v.* Walsh, 45 Ind. App. 42, 90 N. E. 138.

Influence exerted over witness, and efforts made by third party to induce him to testify against accused, relevant. Liles *v.* S., 58 Tex. Cr. 310, 125 S. W. 921.

May be restricted when it affects one not a witness. S. *v.* Peterson, 98 Minn. 210, 108 N. W. 6; Malone *v.* Stephenson, 94 Minn. 222, 102 N. W. 372.

Cause, nature and extent of bias of or inducement held out to, witness may be inquired into. S. *v.* Malmberg, 14 N. D. 523, 105 N. W. 614. Basis of bias must be shown. Nagle *v.* Schnadt, 239 Ill. 595, 88 N. E. 178. Inquiry must be confined to witness' connection with case on trial. Chicago, etc. R. Co. *v.* Smith, 226 Ill. 178, 80 N. E. 716; Chicago, etc. R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050.

Special latitude proper on cross-examination of prosecutrix in cases involving sexual offenses. P. *v.* Mitchell, 5 Cal. App. 45, 89 P. 853.

Predicate for such testimony not required. Alford *v.* S., 47 Fla. 1, 36 S. 436.

857-74 Nashville Int. R. *v.* Barnum, 212 Fed. 634 (C. C. A.); S. *v.* Findling, 123 Minn. 413, 144 N. W. 142; Wellman *v.* Carpenter (N. J.), 86 A. 497; S. *v.* Malmberg, 14 N. D. 523, 105 N. W. 614; C. *v.* Bell, 4 Pa. Super. 187; S. *v.* Frazer, 23 S. D. 304, 121 N. W. 790 (extent rests in court's discretion). See Marx & Son *v.* King, 177 Mich. 662, 144 N. W. 553.

Domestic relations of witness should not be inquired about where they do not affect his credibility. Chicago C. R. Co. *v.* Uhter, 212 Ill. 174, 184, 72 N. E. 195; Malone *v.* Stephenson, 94 Minn. 222, 102 N. W. 372.

Inquiry into collateral matters may be stopped. Georgetown W., etc. Co. *v.* Neale, 137 Ky. 197, 125 S. W. 293; S. *v.* Bouvy, 124 La. 1054, 50 S. 849; S. *v.* High, 116 La. 79, 40 S. 538; Record *v.* R. Co., 75 N. J. L. 311, 67 A. 1040.

Court's discretion is broad.—Cleveland etc. R. Co. *v.* Hadley, 170 Ind. 204, 82 N. E. 1025, 16 L. R. A. (N. S.) 527. Abuse of it must be shown. Sweeney *v.* S., 59 Tex. Cr. 370, 128 S. W. 390.

Request of prosecutor for leniency for accused is not evidence in subsequent case in which he testifies. Thompson *v.* U. S., 144 Fed. 14, 75 C. C. A. 172.

857-75 Southern R. Co. *v.* Lester, 151 Fed. 573, 81 C. C. A. 53; Walker *v.* S. (Ala. App.), 64 S. 528; Smith *v.* Allen, 7 Ala. App. 397, 62 S. 296; Sloss-Sheffield Steel & I. Co. *v.* Stewart, 172 Ala. 516, 55 S. 785; St. Louis, etc. R. Co. *v.* Phillips, 165 Ala. 504, 51 S. 638; Alabama, etc. R. Co. *v.* Brooks, 135 Ala. 401, 33 S. 181; Smiley *v.* Hooper, 147 Ala. 646, 41 S. 660; Birmingham, etc. R. Co. *v.* Moore, 148 Ala. 115, 42 S. 1024 (lack of recollection); Birmingham R. E. Co. *v.* Mason, 144 Ala. 387, 39 S. 590; Smith *v.* S., 142 Ala. 14, 39 S. 329; Posey *v.* S., 143 Ala. 54, 38 S. 1019; Atlantic C. L. R. Co. *v.* Jones, 132 Ga. 189, 63 S. E. 834; S. *v.* Trego, 25 Ida. 625, 138 P. 1124; Pate *v.* Coal Co., 158 Ill. App. 578; Moennich *v.* City, 147 Ill. App. 553; Chicago U. T. Co. *v.* Ertrachter, 228 Ill. 114, 81 N. E. 816; Illinois R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435; Lake Erie, etc. R. Co. *v.* Moore (Ind.), 97 N. E. 203; Terre Haute E. Co. *v.* Watson, 33 Ind. App. 124, 70 N. E. 993; Wiar *v.* R. Co. (Ia.), 144 N. W. 703; Salinger *v.* Co., 147 Ia. 484, 126 N. W. 362; Polley *v.* Oil Co., 89 Kan. 272, 131 P. 577; S. *v.* Ross, 77 Kan. 341, 94 P. 270; Am. Assn. *v.* Stough, 26 Ky. L. R. 1093, 83 S. W. 126; S. *v.* Bellard, 132 La. 491, 61 S. 537; Bragg *v.* R. Co., 192 Mo. 331, 91 S. W. 527; Moss *v.* Goodhart, 47 Mont. 257, 131 P. 1071; Colloty *v.* Schuman, 73 N. J. L. 92, 62 A. 186; Reid *v.* Linck, 206 Pa. 109, 55 A. 849; Blue *v.* Co., 60 Or. 122, 117 P. 1094; Walling *v.* S., 59 Tex. Cr. 279, 128 S. W. 624; Waggoner *v.* Moore, 45 Tex. Civ. 308, 101 S. W. 1038; Benson *v.* S., 51 Tex. Cr. 367, 103 S. W. 911; O'Connell *v.* Storey (Tex. Civ.), 105 S. W. 1174; Southern R. Co. *v.* Blanford, 105 Va. 373, 387, 54 S. E. 1; Virginia W. Co. *v.* Chalkley, 98 Va. 62, 34 S. E. 976; Buckles *v.* Reynolds, 58 Wash. 485, 108 P. 1072; Coman *v.* Wunderlich, 122 Wis. 138, 99 N. W. 612. But see Eaton *v.* S., 8 Ala. App. 136, 63 S. 41; S. *v.* Latham, 131 La. 533, 59 S. 981; S. *v.* Angel, 93 S. C. 149, 76 S. E. 190; Englefield *v.* R. Co. (Tex. Civ.), 159 S. W. 1033; Davis *v.* Fain (Tex. Civ.), 152 S. W. 218; Oates *v.* S., 51 Tex. Cr. 449, 103 S. W. 859.

Full inquiry allowed concerning conferences of conspirators in manufacturing a harmonious story. P. *v.* Becker, 210 N. Y. 274, 104 N. E. 396.

In McGuffin *v.* S., 178 Ala. 40, 59 S. 635, to test the accuracy of witness' statement that he was too drunk to remember anything, he was asked, "Where did you get that Swiss rifle?"

To ask a defendant on the stand if he did not abandon his first wife is improper in view of the fact that it was upon a matter not referred to in his examination in chief. "The credibility of a defendant as a witness cannot be attacked in that manner. State *v.* Barrington, 198 Mo. 23, 95 S. W. 235." S.

v. Lovitt, 243 Mo. 510, 147 S. W. 484.
Broad range of questioning permitted to ascertain meaning of testimony. Nichols *v.* New Britain, 77 Conn. 695, 60 A. 655; Hofacre *v.* Monticello, 128 Ia. 239, 103 N. W. 488.
Physician may be asked to name authorities supporting statement testified to by him. Chicago U. T. Co. *v.* Ertrachter, 228 Ill. 114, 81 N. E. 816.
Statements of witness as to what his testimony would be may be shown; but not statements of another to him. Ontario G. M. Co. *v.* MacKenzie, 19 Colo. App. 298, 74 P. 791.
Commission of another crime by defendant may be shown if necessary to full cross-examination of witnesses. S. *v.* Patchen, 37 Wash. 24, 79 P. 479.
Full inquiry as to reliability of dogs used to trail an alleged criminal proper. Richardson *v.* S., 145 Ala. 46, 41 S. 82.
Defenses of party may not be anticipated. Roche *v.* Baldwin, 143 Cal. 186, 76 P. 956.
Test of accuracy of witness' testimony as to time, made by holding watch, should be so made jury can judge of accuracy of answers. Dilburn *v.* R. Co., 156 Ala. 228, 47 S. 210.
Discretion of court.—Stewart *v.* Stewart, 175 Ind. 412, 94 N. E. 564.

857-75*a* Lukert *v.* Eldridge (Mont.), 139 P. 999; Murphy *v.* Co., 31 Nev. 120, 101 P. 322; Phillips *v.* S., 59 Tex. Cr. 534, 128 S. W. 1100. See Harris *v.* S. (Tex. Cr.), 161 S. W. 125.

858-76 Councill *v.* Mayhew, 172 Ala. 295, 55 S. 314; Chicago U. T. Co. *v.* Ertrachter, 228 Ill. 114, 81 N. E. 816; Vohs *v.* Shorthill, 130 Ia. 538, 107 N. W. 417; Carr *v.* Co., 26 R. I. 180, 58 A. 678; McGovern *v.* Hays, 75 Vt. 104, 53 A. 326.
In P. *v.* Driggs, 14 Cal. App. 507, 112 P. 577, a trial for forgery, questions to test qualifications of witnesses were disallowed when such witnesses "testified not as experts from comparison, but based their opinions solely upon familiarity and acquaintance with Charnock's signature. They were not examined in chief as to the exemplars and no foundation was laid qualifying these witnesses as experts."
Broad range of inquiry proper on cross-examination of experts. Trull *v.* Woodmen, 12 Ida. 318, 85 P. 1081.

859-77 Parrish *v.* S., 139 Ala. 16, 36 S. 1012; Houston Co. *v.* Dial, 135 Ala. 168, 33 S. 268; Williams *v.* S., 45 Fla. 128, 34 S. 279; Vohs *v.* Shorthill, 130 Ia. 538, 107 N. W. 417.
Though evidence may not be relevant to the fact in issue, it is competent if relevant to facts relevant to such fact. Zane *v.* De Onativia, 139 Cal. 328, 73 P. 856.

859-78 Judgment not reversed for excluding such questions. Gregory *v.* S., 148 Ala. 566, 42 S. 829; Zwangizer *v.* Newman, 83 N. Y. S. 1071.

859-79 Gordon *v.* R. Co., 222 Mo. 516, 121 S. W. 80 (accuracy of record by witness on which he based testimony); Sherman *v.* R. Co., 33 Nev. 385, 111 P. 416; Davis *v.* S. (Tex. Cr.), 163 S. W. 442.
Witness who has testified to purchase of beer from defendant, which he drank, cannot be asked to drink from a bottle proffered him and then state whether it is of the kind purchased. S. *v.* Snyder, 67 Kan. 801, 74 P. 231.

860-80 Louisville etc. R. Co. *v.* Mayes, 26 Ky. L. R. 197, 80 S. W. 1096; White *v.* C., 96 Ky. 180, 28 S. W. 340.
Christian Scientists.—Where physical and mental suffering of a party is involved it is competent to show he is a Christian Scientist. Ft. Worth, etc. R. Co. *v.* Travis, 45 Tex. Civ. 117, 99 S. W. 1141.
Form of oath.—It is proper to ask witness as to manner in which he considers administration of oath binding. Birmingham Co. *v.* Mason, 137 Ala. 342, 34 S. 207.

860-82 Olson *v.* U. S., 133 Fed. 849, 67 C. C. A. 21; Granberry *v.* S. (Ala.), 62 S. 52; Gilmer *v.* S. (Ala.), 61 S. 377; Pearson *v.* Co., 10 Cal. App. 245, 101 P. 681; P. *v.* Schmitz, 7 Cal. App. 330, 94 P. 407, 419. See P. *v.* Allen, 166 Cal. 723, 137 P. 1148; Alexander *v.* Righter, 240 Pa. 22, 87 A. 427.
If rule of employer is relied upon as reason for conclusion an event could not have happened, its violation by witnesses may be shown. Hitchner Co. *v.* R. Co., 158 Fed. 1011.
If reasons given for witness' testimony in midst of cross-examination his subsequent testimony is to be considered in connection therewith. P. *v.* Easton, 148 Cal. 50, 82 P. 840.

860-83 See Ferguson *v.* S., 72 Neb. 350, 100 N. W. 800.

860-84 Central of Ga. R. Co. *v.* Bagley, 173 Ala. 611, 55 S. 894; Davis *v.* Anderson, 163 Ala. 385, 50 S. 1002; Bir-

mingham Co. *v.* Mason, 144 Ala. 387, 39 S. 590; Chicago, etc. R. Co. *v.* Steckman, 224 Ill. 500, 79 N. E. 602; Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689; Terre Haute Co. *v.* Watson, 33 Ind. App. 124, 70 N. E. 993; Houk *v.* Branson, 17 Ind. App. 119, 45 N. E. 78; S. *v.* Thomas, 151 Ia. 572, 132 N. W. 51; S. *v.* Wren, 121 La. 55, 46 S. 99; S. *v.* Sweet, 81 N. J. L. 250, 79 A. 1054; Neumeyer *v.* Hooker, 131 App. Div. 592, 116 N. Y. S. 204; S. *v.* Longstreth, 19 N. D. 268, 121 N. W. 1114; Hathaway *v.* Goslant, 77 Vt. 199, 59 A. 835; McGovern *v.* Hays, 75 Vt. 104, 53 A. 326; S. *v.* Blaine, 64 Wash. 122, 116 P. 660; Buckles *v.* Reynolds, 58 Wash. 485, 108 P. 1072; Henderson *v.* Coleman, 19 Wyo. 183, 115 P. 439, rehearing *denied*, 115 P. 1136.

See also Crain *v.* S., 166 Ala. 1, 52 S. 31; Neal *v.* S., 178 Ind. 154, 98 N. E. 872; P. *v.* Mulvaney, 171 Mich. 272, 137 N. W. 155 (inquiry as to relations of parties who had lived together for some time where both were involved in transaction); Holt *v.* Nielson, 37 Utah 566, 109 P. 470.

861-85 S. *v.* Kimes, 152 Ia. 240, 132 N. W. 180; S. *v.* Oteri, 128 La. 939, 55 S. 582; S. *v.* Smith, 250 Mo. 274, 157 S. W. 307.

State may cross-examine witnesses as to reputation though it has announced no attack would be made on defendant. P. *v.* Wright, 4 Cal. App. 704, 89 P. 364.

861-86 Reg. *v.* Wood, 5 Jur. (Eng.) 225; Harrison *v.* S. (Ala.), 40 S. 57; Weaver *v.* S., 83 Ark. 119, 102 S. W. 713; P. *v.* Perry, 144 Cal. 748, 78 P. 284; P. *v.* Moran, 144 Cal. 48, 77 P. 777; P. *v.* Silva, 20 Cal. App. 120, 128 P. 348; Cook *v.* S., 46 Fla. 20, 35 S. 665; Frank *v.* S. (Ga.), 80 S. E. 1016; Dotson *v.* S., 136 Ga. 243, 71 S. E. 164; Ozburn *v.* S., 87 Ga. 173, 13 S. E. 247; Baehner *v.* S., 25 Ind. App. 597, 58 N. E. 741; S. *v.* Richards, 126 Ia. 497, 102 N. W. 439; S. *v.* Le Blanc, 116 La. 822, 41 S. 105; S. *v.* O'Kelley, 121 Mo. App. 178, 98 S. W. 804; S. *v.* Brown, 181 Mo. 192, 79 S. W. 1111; P. *v.* Callahan, 151 App. Div. 666, 136 N. Y. S. 407; S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660; S. *v.* Ogden, 39 Or. 195, 65 P. 449; S. *v.* Merriman, 34 S. C. 16, 12 S. E. 619; Stull *v.* S., 47 Tex. Cr. 547, 84 S. W. 1059; McCray *v.* S., 38 Tex. Cr. 609, 44 S. W. 170; Hall *v.* S., 43 Tex. Cr. 479, 66 S. W. 783; Brittain *v.* S., 47 Tex. Cr. 597, 85 S. W. 278.

Details of affair in which defendant concerned cannot be given. S. *v.* Beckner, 194 Mo. 281, 91 S. W. 892.

If only reputation is inquired about in examination in chief, inquiry may not be made on cross-examination as to witness' actual character. Green *v.* Dodge, 79 Vt. 73, 64 A. 499.

Knowledge of rumors of specific acts may be shown. P. *v.* Weber, 149 Cal. 325, 86 P. 671; Leavell *v.* Leavell, 114 Mo. App. 24, 89 S. W. 55; S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660.

It is competent to prove sentiment as to reputation is divided. Way *v.* S., 155 Ala. 52, 46 S. 273.

In Alabama cross-examination of witness to character must be confined to ascertaining how person whose character in issue is generally regarded; particular acts or course of conduct cannot be inquired about. Way *v.* S., 155 Ala. 52, 46 S. 273; Moulton *v.* S., 88 Ala. 116, 6 S. 758, 6 L. R. A. 301; Thompson *v.* S., 100 Ala. 70, 14 S. 878.

Indictment of party whose good character testified of cannot be asked about. Harris *v.* C., 25 Ky. L. R. 297, 74 S. W. 1044. But it had been previously held competent to show defendant had been accused of certain misdemeanors, delinquencies and unneighborly conduct. Barnes *v.* C., 24 Ky. L. R. 1143, 70 S. W. 827.

Cross-examination based on unproved facts, improper. P. *v.* Elliott, 163 N. Y. 11, 57 N. E. 103.

863-87 Moulder *v.* S., 9 Ga. App. 438, 71 S. E. 682; McCreary *v.* C., 158 Ky. 612, 165 S. W. 981; P. *v.* Callahan, 130 N. Y. S. 1041.

Specific acts of later date than was covered by testimony in chief cannot be shown. S. *v.* Wertz, 191 Mo. 569, 90 S. W. 838.

863-88 Andrews *v.* S., 118 Ga. 1, 43 S. E. 852. And see Hawkins *v.* S. (Ga.), 80 S. E. 711.

Rule applies to accused whose direct examination tended to show he was peaceable, industrious and law-abiding. P. *v.* Buckley, 143 Cal. 375, 77 P. 169.

Distinction should be made between defendant's character as witness and as man. In latter respect it cannot be put in issue except by him. S. *v.* Beckner, 194 Mo. 281, 91 S. W. 892.

863-89 Spohr *v.* Chicago, 206 Ill.

441, 69 N. E. 515; Sanitary Dist. *v.* McMahon, 110 Ill. App. 510; Cleveland, etc. R. Co. *v.* True (Ind. App.), 100 N. E. 22; Gay *v.* Co., 148 N. C. 336, 62 S. E. 436; Missouri, etc. R. Co. *v.* Rich, 51 Tex. Civ. 312, 112 S. W. 114; Hengy *v.* R. Co. (Tex. Civ.), 109 S. W. 402.

863-90 Rogers *v.* Petrified B. M., 158 Fed. 799, 86 C. C. A. 59; Kahn *v.* Co., 139 Cal. 340, 73 P. 164; Rosenstein *v.* R. Co., 78 Conn. 29, 60 A. 1061; West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377; Chicago R. Co. *v.* Kelly, 221 Ill. 498, 77 N. E. 916; Eldorado, etc. R. Co. *v.* Everett, 225 Ill. 529, 80 N. E. 281; Indianapolis T. Co. *v.* Shepherd, 35 Ind. App. 601, 74 N. E. 904; Holmes *v.* Rivers, 145 Ia. 702, 124 N. W. 801; Lemon *v.* McBride, 134 Mich. 295, 96 N. W. 453; Reed *v.* Ins. Co., 78 N. J. L. 549, 74 A. 477 (price at which witness sold property two years before it burned); McNulty *v.* Pickelmann, 141 N. Y. S. 521; Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182; Eastern Texas R. Co. *v.* Scurlock, 97 Tex. 305, 78 S. W. 490; Gulf, etc. R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968; Panhandle & G. R. Co. *v.* Kirby (Tex. Civ.), 108 S. W. 498; Texas, etc. R. Co. *v.* Newsome, 44 Tex. Civ. 513, 98 S. W. 646.

Owner of damaged property may be asked what he will take for it. Chicago, etc. R. Co. *v.* Carr (Tex. Civ.), 89 S. W. 35.

865-91 Enterprise L. Co. *v.* Porter, 165 Ala. 579, 51 S. 723. See Louisville & N. R. Co. *v.* Smith, 163 Ala. 141, 50 S. 241.

866-92 Chicago *v.* Marsh, 238 Ill. 254, 87 N. E. 319; Raapke *v.* Co., 82 Neb. 716, 118 N. W. 652; Matteson *v.* R. Co., 40 Pa. Super. 234.

Witness who was commissioner in valuing another piece of land may be asked as to award made for it. St. Louis, etc. R. Co. *v.* B. Co., 198 Mo. 698, 96 S. W. 1011.

866-93 Metroplitan R. Co. *v.* Walsh, 197 Mo. 392, 416, 94 S. W. 860; Roberts *v.* City, 239 Pa. 339, 86 A. 926.

866-94 Chenoweth *v.* Sutherland, 141 Mo. App. 272, 124 S. W. 1055 (failure of disinterested witness to testify on former trial); O'Connor *v.* Co., 106 Mo. App. 215, 80 S. W. 304; S. *v.* Madison, 23 S. D. 584, 122 N. W. 647.

Insulting and humiliating questions which serve no other purpose are to be condemned, and, if repeated after adverse ruling should constitute misconduct to be punished. P. *v.* Brown, 254 Ill. 260, 98 N. E. 535.

867-95 Burks *v.* S., 72 Ark. 461, 82 S. W. 490; S. *v.* Seigenthaler, 121 Mo. App. 510, 97 S. W. 271; P. *v.* Werner, 174 N. Y. 132, 66 N. E. 667; Pollok *v.* S. (Tex. Cr.), 101 S. W. 231. See S. *v.* Frazer, 23 S. D. 304, 121 N. W. 790.

867-96 S. *v.* Madison, 23 S. D. 584, 122 N. W. 647.

868-97 Burks *v.* S., 72 Ark. 461, 82 S. W. 490; O'Connor *v.* Co., 106 Mo. App. 215, 80 S. W. 314; S. *v.* Carpenter, 32 Wash. 254, 73 P. 357. See Avery *v.* S., 121 Md. 229, 88 A. 148. But see P. *v.* Veld, 154 App. Div. 752, 139 N. Y. S. 788.

Inquiry as to specific acts allowed. S. *v.* Abbott, 65 Kan. 139, 69 P. 160; S. *v.* Pugh, 75 Kan. 792, 90 P. 242; Finlen *v.* Heinze, 32 Mont. 354, 80 P. 918.

870-98 *Contra,* in prosecution for rape, complainant being under age of consent. S. *v.* Rivers, 82 Conn. 454, 74 A. 757.

Specific acts may be shown on cross-examination only. Dore *v.* Babcock, 74 Conn. 425, 50 A. 1016; Spiro *v.* Witkins, 72 Conn. 202, 44 A. 13; Shailer *v.* Bullock, 78 Conn. 65, 61 A. 65. They must affect witness' character for veracity. Shailer *v.* Bullock, supra.

In Texas it may be shown witness is a prostitute. McCray *v.* S., 38 Tex. Cr. 609, 44 S. W. 170; Hall *v.* S., 43 Tex. Cr. 479, 66 S. W. 783; Brittain *v.* S., 47 Tex. Cr. 597, 85 S. W. 278.

But not that moral character bad or who he associated with. Price *v.* Wakeham, 48 Tex. Civ. 339, 107 S. W. 132.

Full cross-examination proper if disreputable conduct has been gone into on examination in chief. S. *v.* Brown, 118 La. 373, 42 S. 969.

In Connecticut only such acts as affect credibility may be shown. Shailer *v.* Bullock, 78 Conn. 65, 61 A. 65.

Acts of witness affecting physical and mental condition at time of occurrence involved may be shown; inquiries may not extend beyond necessity of case. Joseph *v.* S., 59 Tex. Cr. 82, 127 S. W. 171.

870-99 Shailer *v.* Bullock, 78 Conn. 65, 61 A. 65; Am. W. Co. *v.* R. Co., 190 Mass. 152, 76 N. E. 658; P. *v.* Veld, 154 App. Div. 752, 139 N. Y. S. 788.

870-1 Benton *v.* S., 78 Ark. 284, 94 S. W. 688; Garvin *v.* Garvin, 87 Kan. 97, 123 P. 717; P. *v.* Stilwell, 81 Misc.

456, 142 N. Y. S. 628; S. *v.* Nergaard, 124 Wis. 414, 102 N. W. 899. *Contra,* S. *v.* Crowe, 39 Mont. 174, 102 P. 579 (statute).

Arrest of witness for crime concerning which he testifies on trial of another may be shown. Snyder *v.* S., 145 Ala. 33, 40 S. 978.

Former convictions of accused cannot be shown as predicate for introducing testimony given by him on former trials. S. *v.* Strodemier, 40 Wash. 608, 82 P. 915.

Illegal sale of liquor may be gone into though no conviction had. S. *v.* Denny, 17 N. D. 519, 117 N. W. 869.

870-2 Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126. *Contra,* Terrell *v.* S., 55 Tex. Cr. 282, 116 S. W. 569.

Commission of act not involving moral turpitude cannot be inquired about of accused. Knight *v.* S., 55 Tex. Cr. 243, 116 S. W. 56.

871-3 Benton *v.* S., 78 Ark. 284, 94 S. W. 688; Stanley *v.* Ins. Co., 70 Ark. 107, 66 S. W. 432; Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689; P. *v.* Morrison, 195 N. Y. 116, 88 N. E. 21 (whether witness party or not); Porter *v.* S., 8 Okla. Cr. 64, 126 P. 699; Musgraves *v.* S., 3 Okla. Cr. 421, 106 P. 544; Marks *v.* S. (Tex. Cr.), 78 S. W. 512; McDonald *v.* Humphries (Tex. Civ.), 146 S. W. 712.

Previous trial of accused cannot be shown solely to bringing fact to attention of jury. S. *v.* Thompson, 14 Wash. 285, 44 P. 533; S. *v.* Bokien, 14 Wash. 403, 44 P. 889; S. *v.* Gottfreedson, 24 Wash. 398, 64 P. 523; S. *v.* Carpenter, 32 Wash. 254, 73 P. 357; S. *v.* Eder, 36 Wash. 482, 78 P. 1023.

871-4 Kansas City R. Co. *v.* Belknap, 80 Ark. 587, 98 S. W. 366; P. *v.* Gotshall, 123 Mich. 474, 82 N. W. 274; P. *v.* Dowell, 136 Mich. 306, 99 N. W. 23.

871-5 Ty. *v.* Boyd, 16 Haw. 660; Damron *v.* S., 58 Tex. Cr. 255, 125 S. W. 396; Thompson *v.* S. (Tex. Cr.), 150 S. W. 181. See vol. 3, p. 760, and supplement thereto.

871-6 Prior arrests cannot be shown. Stewart *v.* S., 37 Tex. Cr. 135, 38 S. W. 1143.

872-7 Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126; Roden *v.* S., 3 Ala. App. 197, 58 S. 71 (*cit.* Code §4009); Wynne *v.* S., 155 Ala. 99, 46 S. 459; P. *v.* Carson, 155 Cal. 164, 99 P. 970; P. *v.* Soeder, 150 Cal. 12, 87 P. 1016; P. *v.* Sears, 119 Cal. 267, 51 P. 325; Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689 (actual guilt may be inquired about); S. *v.* Plomondon, 75 Kan. 853, 90 P. 254; Farmer *v.* Co., 28 Ky. L. R. 1168, 91 S. W. 682; Henderson *v.* C., 28 Ky. L. R. 1212, 91 S. W. 1141; Balt. & O. R. Co. *v.* Strube, 111 Md. 119, 73 A. 697 (conviction of assault for which damages sought); S. *v.* Gordon, 105 Minn. 217, 117 N. W. 483; Brown *v.* S., 96 Miss. 534, 51 S. 273 (any and all convictions); S. *v.* Mount, 72 N. J. L. 365, 61 A. 259; Coleman *v.* R. Co., 138 N. C. 351, 50 S. E. 690 (forcible trespass); Schnase *v.* Goetz, 18 N. D. 594, 120 N. W. 553; Key *v.* S. (Okla. Cr.), 135 P. 950; S. *v.* Benjamin (R. I.), 71 A. 65; Stull *v.* S., 47 Tex. Cr. 547, 84 S. W. 1059; Sexton *v.* S., 48 Tex. Cr. 497, 88 S. W. 348; Kipper *v.* S., 45 Tex. Cr. 377, 77 S. W. 611; Scoville *v.* S. (Tex. Cr.), 77 S. W. 792; S. *v.* Strodemier, 40 Wash. 608, 82 P. 915; S. *v.* Champoux, 33 Wash. 339, 74 P. 557.

See vol. 7, p. 209, et seq.; vol. 7, p. 211, n. 27, and supplement thereto.

Contra, if appeal from convictions pending. Jennings *v.* S., 55 Tex. Cr. 147, 115 S. W. 587, discrediting S. *v.* Holder, 153 N. C. 606, 69 S. E. 66; Levine *v.* S., 35 Tex. Cr. 647, 34 S. W. 969; Dickey *v.* S. (Tex. Cr.), 56 S. W. 627.

Particular crime need not be specified. S. *v.* Fox, 70 N. J. L. 353, 57 A. 270.

872-8 Hanrahan *v.* Chicago, 145 Ill. App. 38; Henderson *v.* C., 28 Ky. L. R. 1212, 91 S. W. 1141; Pace *v.* C., 89 Ky. 204, 12 S. W. 271; Lockard *v.* C., 87 Ky. 201, 8 S. W. 266; S. *v.* Bartlett, 98 Me. 429, 57 A. 588; S. *v.* Babcock, 25 R. I. 224, 55 A. 685; Elmore *v.* S. (Tex. Cr.), 78 S. W. 520; McGovern *v.* Hays, 75 Vt. 104, 53 A. 326. *Contra,* Musgraves *v.* S., 3 Okla. Cr. 421, 106 P. 544.

Infamous offense.—In some states only conviction of infamous offense can be shown. S. *v.* Grant, 144 Mo. 56, 45 S. W. 1102; S. *v.* Taylor, 98 Mo. 240, 11 S. W. 570; O'Connor *v.* Co., 106 Mo. App. 215, 80 S. W. 304.

Nature of offense.—A witness who testified he had been in the penitentiary and then was in jail, may be asked for what offense he is being punished. S. *v.* Howard, 30 Mont. 518, 77 P. 50.

Name of witness.—Court may, in its discretion, refuse to compel witness who admits he is going under assumed name and has been a convict, to dis-

close name. S. *v.* Jones, 53 Wash. 142, 101 P. 708.

872-9 Busby *v.* S. (Okla. Cr.), 136 P. 598. Question should not be unrestricted as to time. Stull *v.* S., 47 Tex. Cr. 547, 84 S. W. 1059.

873-11 Balt. R. Co. *v.* Rambo, 59 Fed. 75, 8 C. C. A. 6; Bise *v.* U. S., 144 Fed. 374, 74 C. C. A. 1; Glover *v.* U. S., 147 Fed. 426, 77 C. C. A. 450; Hall *v.* Brown, 30 Conn. 551; S. *v.* Stockford, 77 Conn. 227, 58 A. 769; James *v.* U. S., 7 Ind. Ty. 250, 104 S. W. 607; Hendrickson *v.* C., 23 Ky. L. R. 1191, 64 S. W. 954; C. *v.* Walsh, 196 Mass. 369, 82 N. E. 19; S. *v.* Howard, 30 Mont. 518, 77 P. 50; Newcomb *v.* Griswold, 24 N. Y. 298; Kirschner *v.* S., 9 Wis. 140.

Rule applies to parties as well as to witnesses. C. *v.* Walsh, 196 Mass. 369, 82 N. E. 19; S. *v.* Chappell, 179 Mo. 324, 78 S. W. 585.

Record of federal court in another state admissible. Indictment is part of judgment roll to prove former conviction. Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126.

873-13 Lang *v.* U. S., 133 Fed. 201, 66 C. C. A. 255; Le Master *v.* P., 54 Colo. 416, 131 P. 269; Tollifson *v.* P., 49 Colo. 219, 232, 112 P. 794, *quot.* 3 ENCYCLOPÆDIA OF EVIDENCE 873; Shailer *v.* Bullock, 78 Conn. 65, 61 A. 65; Cockrill *v.* R. Co., 90 Kan. 650, 136 P. 322; S. *v.* Moberly, 90 Kan. 837, 136 P. 324; Lunde *v.* R. Co., 177 Mich. 374, 143 N. W. 45; Redseeker *v.* Wade (Or.), 138 P. 485; S. *v.* Nergaard, 124 Wis. 414, 102 N. W. 899.

Conviction twenty years before examination, too remote. Dyer *v.* S. (Tex. Cr.), 77 S. W. 456.

874-14 Fourth Nat. Bk. *v.* Albaugh, 188 U. S. 734; Lueders *v.* U. S., 210 Fed. 419 (C. C. A.); Sun Ins. Office *v.* Mitchell (Ala.), 65 S. 143; Parrish *v.* S., 139 Ala. 16, 36 S. 1012; Rector *v.* Robins, 82 Ark. 424, 102 S. W. 209; Doudell *v.* Shoo, 20 Cal. App. 424, 129 P. 478; P. *v.* Glaze, 139 Cal. 154, 72 P. 965; P. *v.* Scalamiero, 143 Cal. 343, 76 P. 1098; Pollock *v.* Thomas, 63 Fla. 251, 58 S. 48; S. *v.* Bellard, 132 La. 491, 61 S. 537; P. *v.* Tubbs, 147 Mich. 1, 110 N. W. 132; Brace *v.* R. Co., 87 Minn. 292, 91 N. W. 1099; S. *v.* Beesskove, 34 Mont. 41, 85 P. 376; Lambeck *v.* Stiefel, 71 N. J. L. 320, 59 A. 460; Sperbeck *v.* R. Co. (N. J.), 64 A. 1012; P. *v.* Callahan, 151 App. Div. 666, 136 N. Y. S. 407; P. *v.* Werner, 174 N. Y. 132, 66 N. E. 667; S. *v.* Coss, 53 Or. 462, 101 P. 193 (without laying predicate); Jacoby *v.* Ins. Co., 10 Pa. Super. 366; Fidler *v.* Rehmeyer, 34 Pa. Super. 275; Hobbs *v.* S., 53 Tex. Cr. 71, 112 S. W. 308; Weaver *v.* S., 46 Tex. Cr. 607, 81 S. W. 39; Jeter *v.* S., 52 Tex. Cr. 212, 106 S. W. 371; Larkin *v.* Co., 30 Utah 86, 83 P. 686; S. *v.* Katon, 47 Wash. 1, 91 P. 250; S. *v.* Hill, 45 Wash. 694, 89 P. 160.

See Lopez *v.* S. (Tex. Cr.), 166 S. W. 154.

"It is always the privilege of a party on cross-examination to test the accuracy of the statements of the witness, by asking him if he has not on a particular occasion made a certain statement contradictory to his present testimony. The fact that the previous testimony was in writing does not change the rule, nor is it necessary to introduce the writing in the first instance. If the witness requests to see the writing, it would have to be shown to him; but the defendant could not introduce it for any purpose." Grasselli Chem. Co. *v.* Davis, 166 Ala. 471, 52 S. 35.

Exclusion is not error where their tendency to impeach is not apparent. In re Bean's Will, 85 Vt. 452, 82 A. 734.

If neither time nor place specified court may exclude question. Bradley *v.* Gorham, 77 Conn. 211, 58 A. 698; Cronkrite *v.* Trexler, 187 Pa. 100, 41 A. 22.

Silence under circumstances which would have induced a statement may be shown. Alabama, etc. R. Co. *v.* Brooks, 135 Ala. 401, 33 S. 181; P. *v.* Manasse, 153 Cal. 10, 94 P. 92.

Relevancy of contradictory statements. They must relate to a material fact in issue. Ferguson *v.* S., 72 Neb. 350, 100 N. W. 800; Trussell *v.* Co., 20 Pa. Super. 423; C. *v.* Scouton, 20 Pa. Super. 503.

Conduct inconsistent with party's contention may be shown. S. *v.* Stockford, 77 Conn. 227, 58 A. 769; Hofacre *v.* Monticello, 128 Ia. 239, 103 N. W. 488.

875-15 Nearee *v.* C., 23 Ky. L. R. 125, 62 S. W. 733; S. *v.* Campbell, 134 La. 828, 64 S. 765; Hickey *v.* S., 51 Tex. Cr. 230, 102 S. W. 417; McLin *v.* S., 48 Tex. Cr. 549, 90 S. W. 1107.

Improper to ask witness if he swore before as now; attention should be specifically called to the contradictory

statement. Andrews *v.* S., 118 Ga. 1, 43 S. E. 852.

875-16 Shirley *v.* S., 144 Ala. 35, 40 S. 269; Hunkins *v.* Kent, 151 Mich. 482, 115 N. W. 410; P. *v.* Camoroto, 133 App. Div. 260, 117 N. Y. S. 655 (error to exclude such questions); Brown *v.* Brown, 110 App. Div. 913, 96 N. Y. S. 1002; Richards *v.* C., 107 Va. 881, 59 S. E. 1104.

Affidavit for continuance, competent. Weaver *v.* S., 83 Ark. 119, 102 S. W. 713.

Questions may be based on deposition not in evidence. Warth *v.* Loewenstein, 219 Ill. 222, 76 N. E. 379.

Method of questioning.—Cross-examiner should first show witness had opportunity to testify of matters as to which it is sought to contradict him. Larrance *v.* P., 222 Ill. 155, 78 N. E. 50.

Coroner's minutes not the only evidence of what was testified to before jury. Briggs *v.* P., 219 Ill. 330, 76 N. E. 499.

Discrepancies explainable.—Jacoby *v.* Ins. Co., 10 Pa. Super. 366. But they may be proved without giving opportunity to explain if court thinks proper. Weaver *v.* S., 46 Tex. Cr. 607, 81 S. W. 39.

876-17 Lefkowitz *v.* Reich, 98 N. Y. S. 695.

Pleadings party did not see and contents of which he did not know, not admissible. In re Townsend, 122 Ia. 246, 97 N. W. 1108.

876-18 Ramsey *v.* Smith, 138 Ala. 333, 35 S. 325; Lanigan *v.* Neely, 4 Cal. App. 760, 89 P. 441; Gasquet *v.* Pechin, 143 Cal. 515, 77 P. 481; Chicago C. R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443; Beard *v.* R., 143 N. C. 136, 55 S. E. 505; Kann *v.* Bennett, 223 Pa. 36, 72 A. 342; In re Bean's Will, 85 Vt. 452, 82 A. 734; S. *v.* Strodemier, 40 Wash. 608, 82 P. 915.

Witness need not be shown paper nor need it be introduced. Warth *v.* Loewenstein, 219 Ill. 222, 76 N. E. 379; P. *v.* Salsbury, 134 Mich. 537, 96 N. W. 936; S. *v.* Rowell, 75 S. C. 494, 56 S. E. 23.

Paper containing inconsistent statement should be presented in rebuttal, and not on cross-examination, though it will not be ground for reversal to follow latter course. Chicago C. R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443.

Entire writing received. Jones *v.* U. S., 162 Fed. 417, 89 C. C. A. 303.

877-19 The Saranac, 132 Fed. 936; L. & N. R. Co. *v.* Quinn, 146 Ala. 330, 39 S. 756; Shailer *v.* Bullock, 78 Conn. 65, 61 A. 65; Atlantic, etc. R. Co. *v.* Crosby, 53 Fla. 400, 43 S. 318; Neal *v.* S., 178 Ind. 154, 98 N. E. 872; Wilson *v.* R. Co. (Ia.), 142 N. W. 54; S. *v.* Alexander, 89 Kan. 422, 131 P. 139; Louisville R. Co. *v.* Frick, 158 Ky. 450, 165 S. W. 649; Feltner *v.* C., 23 Ky. L. R. 1110, 65 S. W. 959; S. *v.* Bellard, 132 La. 491, 61 S. 537; Provencher *v.* Moore, 105 Me. 87, 72 A. 880; P. *v.* Williams, 159 Mich. 518, 124 N. W. 555; Campbell *v.* Aarstad, 124 Minn. 284, 144 N. W. 956; Miss. Cent. R. Co. *v.* Dacus, 97 Miss. 768, 53 S. 398; S. *v.* Prince (Mo.), 167 S. W. 535; Nickolizack *v.* S., 75 Neb. 27, 105 N. W. 895; Ferguson *v.* S., 72 Neb. 350, 100 N. W. 800; State *v.* Mor (N. J.), 89 A. 755; S. *v.* Robertson (N. C.), 81 S. E. 689; Coleman *v.* R., 138 N. C. 351, 50 S. E. 690; Payne *v.* S. (Okla. Cr.), 136 P. 201; Launikitas *v.* Tract. Co., 241 Pa. 458, 88 A. 703; Lancaster *v.* Alden, 26 R. I. 170, 58 A. 638; Ballard *v.* S. (Tex. Cr.), 160 S. W. 716; Stevens *v.* S. (Tex. Cr.), 150 S. W. 944; Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156; S. *v.* Coyle (Utah), 126 P. 305; Norfolk R. Co. *v.* Carr, 106 Va. 508, 56 S. E. 276; Peterson *v.* Co., 71 W. Va. 334, 76 S. E. 664; Freeman *v.* Co., 150 Wis. 93, 135 N. W. 540.

See Falasto *v.* U. S., 211 Fed. 329 (C. C. A.); Toothman *v.* U. S., 203 Fed. 218, 121 C. C. A. 424. See also vol. 7, p. 81, n. 62, and supplement thereto.

Matter of substantive proof.—S. *v.* Johnson (Ia.), 144 N. W. 303.

" '**The test of whether a fact** inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea?' In the case of McArthur *v.* State, 59 Ark. 431, 27 S. W. 628; Mr. Justice Riddick, speaking for the court, said: 'The general rule is that, when a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question; but this limitation only applies to answers on the cross-examination.' This rule has been uniformly followed by this court.'' Peters *v.* S., 103 Ark. 119, 146 S. W. 491, *quot.* from 1 Whart. Ev. §599, and *cit.* Butler *v.* S., 34 Ark. 480; Denver City T. Co. *v.* Lomovt, 53 Colo. 292, 126 P. 276;

S. *v.* Swartz, 87 Kan. 852, 126 P. 1091; S. *v.* Bellard, 132 La. 491, 61 S. 537. See also Campbell *v.* Aarstad, 124 Minn. 284, 144 N. W. 956; Magness *v.* S. (Miss.), 63 S. 352; S. *v.* Prince (Mo.), 167 S. W. 535; Peterson *v.* Co., 71 W. Va. 334, 76 S. E. 664.

878-20 Schnase *v.* Goetz, 18 N. D. 594, 120 N. W. 553; S. *v.* Carpenter, 32 Wash. 254, 73 P. 357.

Irresponsive answers to irrelevant questions may be stricken out. In re McKenna, 143 Cal. 580, 77 P. 461. Right waived by allowing them to stand unobjected to and continuing cross-examination along same line. P. *v.* Myring, 144 Cal. 351, 77 P. 975.

879-22 S. *v.* Stockford, 77 Conn. 227, 58 A. 769; S. *v.* Drummond, 70 Wash. 260, 126 P. 541.

880-23 Boche *v.* S., 84 Neb. 845, 122 N. W. 72.

880-25 Wray *v.* S., 2 Ala. App. 139, 57 S. 144; S. *v.* Brown (Ia.), 121 N. W. 513; S. *v.* Laird, 79 Kan. 681, 100 P. 637; S. *v.* Avant, 85 S. C. 570, 67 S. E. 908. See Mathieson A. Wks. *v.* Mathieson, 150 Fed. 241, 80 C. C. A. 129; Cross *v.* Aby, 55 Fla. 311, 45 S. 820; Am. W. Co. *v.* R. Co., 190 Mass. 152, 76 N. E. 658; Hedger *v.* S., 144 Wis. 279, 128 N. W. 80.

882-26 St. Louis, etc. R. Co. *v.* Pell, 89 Ark. 87, 115 S. W. 957; Weatherbee *v.* Byam, 160 Mich. 600, 125 N. W. 686. And see S. *v.* Byrd, 41 Mont. 585, 111 P. 407.

883-27 If acts of former grantee of land relied upon to show adverse possession, witnesses who have testified thereof may be asked if he had not performed like acts on lands to which he did not claim title. Cross *v.* Aby, 55 Fla. 311, 45 S. 820.

885-30 Neimeyer *v.* R. Co., 143 Ia. 127, 121 N. W. 522.

885-31 S. *v.* Potts, 239 Mo. 403, 144 S. W. 495; Ex parte Holden, 29 Nev. 372, 90 P. 737; S. *v.* Robertson (N. C.), 81 S. E. 689; Early *v.* S., 56 Tex. Cr. 492, 120 S. W. 431.

In action for malicious prosecution growing out of removal of property, plaintiff may be asked as to previous removal of other like articles from same place. O'Daniel *v.* Smith, 23 Ky. L. R. 1822, 66 S. W. 284.

887-33 King *v.* S., 106 Ark. 160, 152 S. W. 990.

887-35 S. *v.* Robertson (N. C.), 81 S. E. 689.

887-36 P. *v.* Mullings, 83 Cal. 138, 23 P. 229, 17 Am. St. 223; P. *v.* Wells, 100 Cal. 459, 34 P. 1078; Fields *v.* S., 46 Fla. 84, 35 S. 185; Adkinson *v.* S., 48 Fla. 1, 37 S. 522; S. *v.* Rogers, 31 Mont. 1, 77 P. 293; Walters *v.* R. Co., 48 Wash. 233, 93 P. 419; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237.

"A witness, when he takes the stand, should be at all times protected by the court from questions which tend in any way to subject him to needless embarrassment, humiliation, or ridicule. Reversals have occurred because courts have, at times, disregarded the above wholesome requirement. Amos *v.* State, 96 Ala. 120, 11 South. 424; Downey *v.* State, 115 Ala. 108, 22 South. 479." Roden *v.* S., 3 Ala. App. 193, 58 S. 74.

Distinction made if witness voluntarily states he has been arrested; he may then be asked what for. Matusevitz *v.* Hughes, 26 Mont. 212, 66 P. 939, 68 P. 467.

888-37 P. *v.* Fleming, 166 Cal. 357, 136 P. 291; P. *v.* Smith, 9 Cal. App. 644, 99 P. 1111; Grant *v.* S., 122 Ga. 740, 50 S. E. 916; S. *v.* Harris, 153 Ia. 592, 133 N. W. 1078.

See P. *v.* Darr, 262 Ill. 202, 104 N. E. 389; S. *v.* O'Callaghan (Ia.), 138 N. W. 402; Avery *v.* S., 121 Md. 229, 88 A. 148; Schmidt *v.* Schmidt, 216 Mass. 572, 104 N. E. 471; Hall *v.* Widger, 158 App. Div. 239, 143 N. Y. S. 118.

890-40 Aronson *v.* Baldwin (Mich.), 146 N. W. 206. See Filasto *v.* U. S., 211 Fed. 329 (C. C. A.); Gens *v.* Reibstein, 143 N. Y. S. 1103.

891-41 Campbell *v.* Aarsted, 124 Minn. 284, 144 N. W. 956; S. *v.* Potts, 239 Mo. 403, 144 S. W. 495; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237.

892-44 Morris *v.* McClellan, 154 Ala. 639, 45 S. 641; Lauchheimer *v.* Jacobs, 126 Ga. 261, 55 S. E. 55; S. *v.* Bond, 12 Ida. 424, 86 P. 43; Baehner *v.* S., 25 Ind. App. 597, 58 N. E. 741. See S. *v.* Robertson (N. C.), 81 S. E. 689.

893-47 P. *v.* Smith, 9 Cal. App. 644, 99 P. 1111; South Bend *v.* Hardy, 98 Ind. 577; Baehner *v.* S., 25 Ind. App. 597, 58 N. E. 741; S. *v.* Williams, 36 Utah 273, 103 P. 250.

894-50 S. *v.* Andrews, 82 Vt. 314, 73 A. 586.

894-52 If absolute immunity is guaranteed, witness must testify. Ex parte Holden, 29 Nev. 372, 90 P. 737.

895-55 Lauchheimer *v.* Jacobs, 126 Ga. 261, 55 S. E. 55.

895-56 Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754; Mahanke *v.* Cleland, 76 Ia. 401, 41 N. W. 53; Ex parte Hedden, 29 Nev. 352, 90 P. 737; Meade *v.* Assn., 119 App. Div. 761, 104 N. Y. S. 523.

Privilege does not extend to incriminating corporation of which witness is officer. Hale *v.* Henkel, 201 U. S. 43; Nelson *v.* U. S., 201 U. S. 92; Meade *v.* Assn., 119 App. Div. 761, 104 N. Y. S. 523.

902-69 Fulton *v.* Co., 145 Ala. 331, 40 S. 393; Perrin *v.* Carbone, 1 Cal. App. 295, 82 P. 222; Halper *v.* Wolff, 82 Conn. 552, 74 A. 890 (party who has testified as to value of property may be asked as to amount of insurance he carried on it); Schleuter *v.* Sherman Bros., 169 Ill. App. 386; Stanton *v.* Barnes, 72 Kan. 541, 544, 84 P. 116; Paquet *v.* R. Co., 127 App. Div. 415, 111 N. Y. S. 504; Texas Baptist Univ. *v.* Patton (Tex. Civ.), 145 S. W. 1063.

Silence of plaintiff in personal injury case as to prior injury may be gone into. Brace *v.* R. Co., 87 Minn. 292, 91 N. W. 1099.

Right to call a party as witness of adverse party does not affect right to cross-examine party who is witness in his own behalf. Purse *v.* Purcell, 42 Colo. 50, 95 P. 291.

Inquiry as to what party might have done under supposed circumstances, immaterial. Russell *v.* Co., 49 Wash. 362, 95 P. 327.

902-70 Long *v.* S., 72 Ark. 427, 81 S. W. 387; Daly *v.* S. (Fla.), 64 S. 358.

903-71 Morris *v.* McClellan, 154 Ala. 639, 45 S. 641, comment may be made on party's refusal to testify.

903-72 Taylor *v.* McFatter (Tex. Civ.), 109 S. W. 395; Wallen *v.* Wallen, 107 Va. 131, 57 S. E. 596.

903-73 Mutchmor *v.* McCarty, 149 Cal. 603, 87 P. 85; Lanigan *v.* Neely, 4 Cal. App. 760, 89 P. 441; Gorman *v.* Fitts, 80 Conn. 531, 69 A. 357; Eastman *v.* R. Co., 200 Mass. 412, 86 N. E. 793; Taylor *v.* McFatter (Tex. Civ.), 109 S. W. 395; Reynolds *v.* Car Co., 75 Wash. 1, 134 P. 512.

Cross-examination unduly restricted. Snell *v.* Roach, 150 Ala. 469, 43 S. 189.

904-76 Sawyer *v.* U. S., 202 U. S. 150; Fitzpatrick *v.* U. S., 178 U. S. 304; Bettis *v.* S., 160 Ala. 3, 49 S. 781; Miller *v.* S., 146 Ala. 686, 40 S. 342; S. *v.* Foley, 247 Mo. 607, 153 S. W. 1010; S. *v.* Zdanowicz, 69 N. J. L. 619, 55 A. 743; P. *v.* Tice, 131 N. Y. 651, 30 N. E. 494; P. *v.* Cosmides, 133 App. Div. 103, 117 N. Y. S. 718; Harrold *v.* Ty., 18 Okla. 395, 89 P. 202; C. *v.* Swartz, 40 Pa. Super. 370; Bays *v.* S., 50 Tex. Cr. 548, 99 S. W. 561.

Disclosure of secret process may be compelled. S. *v.* Heffernan, 28 R. I. 20, 65 A. 284.

Flight of accused may be shown. Untreinor *v.* S., 146 Ala. 26, 41 S. 285. And other conduct after commission of crime. Barden *v.* S., 145 Ala. 1, 40 S. 948.

Accused in prosecution for violation of excise law may be asked if he had internal revenue license. Davis *v.* S., 145 Ala. 69, 40 S. 663.

Under English act of 1898 accused who has testified on his own behalf cannot be asked concerning prior convictions unless nature or conduct of defense has cast discredit on character of prosecutor or his witnesses. A vigorous defense may be made without opening door for such evidence. Rex *v.* Bridgwater, (1905) 1 K. B. (Eng.) 131; Rex *v.* Preston (1909), 1 K. B. 568.

905-77 Talley *v.* S., 174 Ala. 101, 57 S. 445; Crawford *v.* S. (Ala.), 57 S. 393; Barden *v.* S., 145 Ala. 1, 40 S. 948; Smith *v.* S., 137 Ala. 22, 34 S. 396; Corothers *v.* S., 75 Ark. 574, 88 S. W. 585 (efforts to silence hostile testimony); P. *v.* Manasse, 153 Cal. 10, 94 P. 92; P. *v.* Craig, 152 Cal. 42, 91 P. 997; P. *v.* Soeder, 150 Cal. 12, 87 P. 1016; P. *v.* Weber, 149 Cal. 325, 86 P. 671; S. *v.* Wasson, 126 Ia. 320, 101 N. W. 1125; S. *v.* Buffington, 71 Kan. 804, 81 P. 465; Stout *v.* C., 29 Ky. L. R. 627, 94 S. W. 15; S. *v.* Campisi, 123 La. 815, 49 S. 535; S. *v.* Feazell, 116 La. 264, 40 S. 698; S. *v.* Heidelberg, 120 La. 300, 45 S. 256; Lawrence *v.* S., 103 Md. 17, 63 A. 96; Ferguson *v.* S., 72 Neb. 350, 100 N. W. 800; S. *v.* Zdanowicz, 69 N. J. L. 619, 55 A. 743; Busby *v.* S. (Okla. Cr.), 136 P. 598; Keeton *v.* S., 59 Tex. Cr. 316, 128 S. W. 404; Moore *v.* S., 52 Tex. Cr. 364, 107 S. W. 355 (immaterial cross-examination disclosed accused afflicted with discreditable disease); S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402 (though character incidentally touched upon).

Prosecution for assault.—"The prosecuting attorney was permitted to ask defendant on cross-examination, over the objection of his counsel, if he had not been engaged in the unlawful sale

of intoxicating liquors at Leslie, and if he had not paid the federal tax on the sale of liquors. Defendant denied that he had been engaged in the unlawful sale of liquors, but said that he had been selling "near beer," and had paid the federal tax, as he explained, to protect himself in case some of the liquor he sold did not stand the test. It was competent for the state to interrogate the defendant, on cross-examination, as to his conduct in engaging in the illegal sale of liquor. This was competent for the purpose of affecting his credibility as a witness. Hollingsworth v. S., 53 Ark. 390, 14 S. W. 41. As a part of the examination, it was proper for him to be asked whether he held a federal tax receipt. We think all this testimony had some legitimate tendency affecting his credibility, and that there was no error in permitting it." Haukins v. S., 103 Ark. 28, 145 S. W. 524.

Ordinary rules apply. P. v. Tice, 131 N. Y. 651, 30 N. E. 194.

Accused may be asked as to knowledge of abandoned defense.—Smith v. S., 52 Tex. Cr. 27, 105 S. W. 182. And as to number of times he had testified in case, and whether at one of the trials his testimony was same as at the instant one. Hickey v. S., 51 Tex. Cr. 230, 102 S. W. 417. And concerning association with persons known to him to have been convicted of felony. Long v. S., 72 Ark. 427, 81 S. W. 387. And as to motives in doing admitted act. Eatman v. S., 139 Ala. 67, 36 S. 16. May be asked as to anything forming part of res gestae, though answer may tend to incriminate him in another prosecution. Pate v. S., 150 Ala. 10, 43 S. 343.

908-78 P. v. Mohr, 157 Cal. 732, 109 P. 476; Terrell v. S., 55 Tex. Cr. 282, 116 S. W. 569.

On a trial for larceny it was improper, on the examination of the defendant, to ask him if he was known as "Hangman" Johnston, and if he had not hanged 43 men. Johnston v. S., 101 Miss. 397, 58 S. 97.

Involuntary confessions may be proved by way of contradiction. Smith v. S., supra; Hicks v. S., 99 Ala. 169, 13 S. 375; Harrold v. Ty., 18 Okla. 395, 89 P. 202.

Expression of purpose to continue to violate law cannot be shown. P. v. Werner, 174 N. Y. 132, 66 N. E. 667.

Improper conduct of like nature of which party accused may not be inquired of. S. v. La Mont, 23 S. D. 174, 120 N. W. 1104.

908-79 Balliet v. U. S., 129 Fed. 689, 64 C. C. A. 291; S. v. Oden, 130 La. 598, 58 S. 351; S. v. Wertz, 191 Mo. 569, 90 S. W. 838; S. v. Foley, 247 Mo. 607, 153 S. W. 1010; S. v. Brown, 181 Mo. 192, 79 S. W. 1111; Nicholizack v. S., 75 Neb. 27, 105 N. W. 895. See infra, "Impeachment of Witnesses," 62-94.

If questions implying accusations not testified of in chief are answered in negative exception will not be given effect. Sawyer v. U. S., 202 U. S. 150.

Rules limiting questions to examination in chief applied so as to include impeaching questions relating to matters not inquired about thereon. Harrold v. Ty., 18 Okla. 395, 89 P. 202; P. v. Tice, 131 N. Y. 651, 30 N. E. 494.

General character of accused not in issue though he is a witness, unless he has offered testimony concerning it. S. v. Beckner, 191 Mo. 281, 91 S. W. 892.

No privilege exists as to cross-examination on matters testified to on chief examination. Poston v. S., 83 Neb. 240, 119 N. W. 520.

Cross-examination on volunteered statement, proper. Morgan v. Co., 138 Ky. 637, 128 S. W. 1064.

909-80 S. v. Larkins, 5 Ida. 200, 47 P. 945; S. v. Fuller, 142 Ia. 598, 121 N. W. 3; S. v. Bellard, 132 La. 491, 61 S. 537; S. v. Kyle, 177 Mo. 659, 76 S. W. 1014; S. v. Miller, 43 Or. 325, 74 P. 658. See P. v. Scalamiero, 143 Cal. 343, 76 P. 1098, as to scope under code; also P. v. Morales, 143 Cal. 550, 77 P. 470; P. v. Buckley, 143 Cal. 375, 77 P. 169; P. v. Teshara, 141 Cal. 633, 75 P. 338; S. v. Miller, 43 Or. 325, 74 P. 658.

Such statutes as are referred to in the text contemplate a fair scope of questions to test accuracy of subject matter concerning which accused testified in chief (P. v. Zimmerman, 3 Cal. App. 84, 84 P. 446), or to which he referred in his testimony in chief. S. v. Miller, 190 Mo. 449, 89 S. W. 377.

909-81 This is a rule of trial procedure and it is better not to refer to it in the charge; but such a reference, if made, is not ordinarily ground for new trial. Cargile v. S., 137 Ga. 775, 74 S. E. 621.

909-82 S. *v.* Kight, 106 Minn. 371, 119 N. W. 56; S. *v.* Quirk, 101 Minn. 334, 112 N. W. 409; P. *v.* Meadows, 136 App. Div. 226, 121 N. Y. S. 17; Harrold *v.* Ty., 18 Okla. 395, 89 P. 202.

910-84 If pages of a book in witness' handwriting are used to refresh his memory, he may be asked if he wrote all the book. Bistritz *v.* Ins. Co., 105 N. Y. S. 116.

910-85 C. *v.* Swartz, 40 Pa. Super. 370.

Ability of witness to identify his signature is proper matter for inquiry. He is not entitled to see papers to which signature attached and which are used as comparison before answering as to genuineness of paper. Brown *v.* Woodward, 75 Conn. 254, 53 A. 112. But witness who did not sign may decline to answer unless he is allowed to examine documents. Taylor *v.* Taylor, 138 Mich. 658, 101 N. W. 832.

Discretion of court.—Cross-examination as to records to show a specific mistake in them as to collateral matter is within discretion of court. Am. W. Co. *v.* Co., 190 Mass. 152, 76 N. E. 658.

Inquiries as to connected papers, proper. Womble *v.* Wilbur, 3 Cal. App. 535, 86 P. 916.

Identification of papers may be required. Hildebrand *v.* United Artisans, 50 Or. 159, 91 P. 542.

Inspection of paper by adverse party not necessary. S. *v.* Rowell, 75 S. C. 494, 56 S. E. 23.

912-87 Rector *v.* Robins, 82 Ark. 424, 102 S. W. 209; Logan *v.* Freerks, 14 N. D. 127, 103 N. W. 426.

913-88 After direct examination concerning account in defendant's book, which had been introduced, cross-examination concerning other accounts in it is proper. Devencenzi *v.* Cassinelli, 28 Nev. 222, 81 P. 41.

Paper should be produced before witnesses questioned as to its contents. Louisville, etc. R. Co. *v.* Taylor, 31 Ky. L. R. 1142, 104 S. W. 776.

Party who introduces paper may be cross-examined as to its draftsman and knowledge of contents when he signed it. Ruderman *v.* Schwartz, 100 N. Y. S. 1017.

If letter destroyed writer may be cross-examined as to correctness of a purported copy though proof it was such not made. Gorman *v.* Fitts, 80 Conn. 531, 69 A. 357.

913-89 Foley *v.* Co., 69 N. J. L. 481, 55 A. 803.

913-90 S. *v.* Wolfley, 75 Kan. 406, 89 P. 1046, 93 P. 337.

913-91 Duffey *v.* Co., 147 Ia. 225, 124 N. W. 609; S. *v.* Wolfley, 75 Kan. 406, 89 P. 1046, 93 P. 337; Stout *v.* C., 29 Ky. L. R. 627, 94 S. W. 15; Sperbeck *v.* R. Co. (N. J.), 64 A. 1012.

913-92 S. *v.* Wolfley, 75 Kan. 406, 89 P. 1046, 93 P. 337; S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660.

Explanation of testimony of first cross-examination may be made. Nichols *v.* New Britain, 77 Conn. 695, 60 A. 655.

913-94 Testimony elicited on cross-examination may satisfy burden of proof resting on party who brought it out. Pindar *v.* Jenkins, 128 App. Div. 711, 113 N. Y. S. 588.

CUMULATIVE EVIDENCE

915-1 Patterson *v.* R. Co., 147 Cal. 178, 81 P. 531; Smith *v.* Smith (Ia.), 140 N. W. 659; Bousman *v.* Stafford, 71 Kan. 648, 81 P. 184; Mobile & O. R. Co. *v.* Caldwell, 32 Ky. L. R. 447, 106 S. W. 236; P. *v.* Jones, 115 N. Y. S. 800; Garza *v.* S. (Tex. Cr.), 145 S. W. 590; Durbin *v.* Co., 108 Va. 468, 62 S. E. 339. See Harlan *v.* Supply Co. (Tex. Civ.), 160 S. W. 1142.

Upon an issue not contested.—Edwards *v.* S., 61 Tex. Cr. 307, 135 S. W. 540.

Touching a fact admitted by opponent and found by court in favor of party offering. Brown *v.* Brown, 208 Mass 290, 94 N. E. 465.

Questions are properly excluded which tend merely to waste the time of the court in useless repetition either in substance or detail, in the absence of any statement that a different answer is expected. S. *v.* Kritchman, 84 Conn. 152, 79 A. 75.

Additional entry in book received in evidence, entries in which were introduced, cumulative. Selleck *v.* Head, 77 Conn. 15, 58 A. 224.

916-2 The issue being whether an engineer could have stopped a train in time to avoid doing injury, testimony of another engineer he had made a test with a train similar to that in use when harm done, and had stopped one hundred feet within necessary dis-

tance, cumulative. Flint *v.* R. Co., 29 Ky. L. R. 1149, 97 S. W. 736.

916-3 Waller *v.* Graves, 20 Conn 305; Grow *v.* S., 5 Ga. App. 70, 62 S. E. 669; Howland *v.* Jacobs, 2 Haw. 155; Junget *v.* Aurora, 177 Ill. App. 435; Bousman *v.* Stafford, 71 Kan. 648, 81 P. 184; Parker *v.* Hardy, 24 Pick. (Mass.) 246; In re Colbert, 31 Mont. 461, 78 P. 971, 80 P. 248; Guyot *v.* Butts, 4 Wend. (N. Y.) 579; In re McClellan, 21 S. D. 209, 111 N. W. 540 (*mod.* opinion in s. c., 20 S. D. 498, 107 N. W. 681); St. Louis S. R. Co. *v.* Smith, 38 Tex. Civ. 507, 86 S. W. 943; Tucker *v.* Co., 18 Wyo. 97, 104 P. 529. See Epstein *v.* R. Co., 143 Mo. App. 135, 122 S. W. 366.

But where the evidence offered is respecting a new and distinct fact, although it tends to establish the same general result sought to be established by evidence given at the trial, such new evidence is not cumulative, and if otherwise competent, should be received. Kroger *v.* Ryan, 83 O. St. 299, 94 N. E. 428.

If evidence bears on question at issue in a different way it may not be cumulative—as where it tends to establish a condition at a different date from that shown by accepted testimony on original trial, though it corroborates plaintiff concerning condition at time cause of action arose. Brennan *v.* Seattle, 39 Wash. 640, 81 P. 1092. See McCreery R. Co. *v.* Bk., 104 N. Y. S. 959.

920-4 Howland *v.* Jacobs, 2 Haw. 155; Torian *v.* Terrell, 29 Ky. L. R. 306, 93 S. W. 10; Foss *v.* Smith, 79 Vt. 434, 65 A. 553; Anderson *v.* Co., 131 Wis. 34, 110 N. W. 788. See Smith *v.* Smith (Ia.), 140 N. W. 659; Goldie *v.* Corder, 35 Okla. 247, 129 P. 3.

921-5 *Contra*, Pierce *v.* Farrar (Tex. Civ.), 126 S. W. 932. See Million *v.* Million, 31 Ky. L. R. 1156, 104 S. W. 768.

Admissions of like character cumulative, though made by living predecessor in title of him whose declarations proved. Stewart *v.* Doak, 58 W. Va. 172, 52 S. E. 95.

922-6 See Wells *v.* Gunn, 33 Colo. 217, 79 P. 1029.

923-9 See Wells *v.* Gunn, supra.

923-13 Dent *v.* Simpson, 81 Kan. 217, 105 P. 542.

923-15 *Contra*, Magan *v.* C. (Ky.), 119 S. W. 734.

924-18 Ray *v.* Baker, 165 Ind. 74, 74 N. E. 649; Tucker *v.* Co., 18 Wyo. 97, 104 P. 529. See Vandeventer P. Co. *v.* Co., 127 Mo. App. 312, 105 S. W. 653.

925-20 Newly discovered evidence offered as a ground for a new trial is not rendered cumulative by the fact that evidence of the same character and directed to the same point, but to the opposite effect, was introduced at the trial by the successful party. Haughton *v.* Bilson, 84 Kan. 129, 113 P. 400, *cit.* this text.

925-23 Moynahan *v.* Perkins, 36 Colo. 481, 85 P. 1132. *Contra*, Sluman *v.* Dolan, 24 S. D. 32, 123 N. W. 72.

926-24 McClintock *v.* R. Co., 83 S. C. 58, 64 S. E. 1009; Armstrong *v.* Burt (Tex. Civ.), 138 S. W. 172; Dubois *v.* Roby, 84 Vt. 465, 80 A. 150.

He who has burden of proof may offer cumulative evidence. Campbell *v.* Campbell, 30 R. I. 63, 73 A. 354.

926-25 Owen *v.* S., 86 Ark. 317, 111 S. W. 466; Dorman *v.* S., 48 Fla. 18, 37 S. 561; Gardner *v.* U. S., 5 Ind. Ty. 150, 82 S. W. 704; Leonora Nat. Bk. *v.* Ragland, 32 Ky. L. R. 1403, 108 S. W. 854; S. *v.* Buhler, 132 La. 1065, 62 S. 145; S. *v.* Olds, 217 Mo. 305, 116 S. W. 1080; Riverside L. Co. *v.* Schmidt, 130 Mo. App. 227, 109 S. W. 71; Bosley *v.* S. (Tex. Cr.), 153 S. W. 878; Goode *v.* S., 57 Tex. Cr. 220, 123 S. W. 597; Houston, etc. R. Co. *v.* Ollis, 37 Tex. Civ. 231, 83 S. W. 850; Benson *v.* Hamilton, 34 Wash. 201, 75 P. 805. See Jones *v.* S., 8 Okla. Cr. 576, 129 P. 446.

Testimony of witnesses in criminal case, not cumulative to that of accused though of same tenor. Gathright *v.* S. (Tex. Cr.), 85 S. W. 1076; Morgan *v.* S., 54 Tex. Cr. 542, 113 S. W. 931.

927-26 Missouri K. & T. R. Co. *v.* Pitkin (Tex. Civ.), 158 S. W. 1035; Laudermilk *v.* S., 47 Tex. Cr. 427, 83 S. W. 1107. See P. *v.* Brewer, 19 Cal. App. 742, 127 P. 808; P. *v.* Maruyama, 19 Cal. App. 290, 125 P. 924.

927-27 Phoenix Ins. Co. *v.* Wintersmith, 30 Ky. L. R. 369, 98 S. W. 987.

927-28 Pace *v.* S. (Tex. Cr.), 153 S. W. 132.

929-34 On trial of a civil case for damages from negligent fire the substance of the complaint was the petitioner's inability to have certain evidence which a continuance would enable him to procure, and the question has been argued as one of newly dis-

covered evidence. The petitioner contends that the new evidence is merely corroborative of that given on the trial by the petitioner in describing an examination he made soon after the fire, and that it does not appear but that the same facts might have been shown by some of those who fought or watched the fire at different stages of its progress. It is evident that an accurate plan, showing completely and in detail the course and spreading of the several fires, produced in connection with the testimony of witnesses who had made a particular examination of the premises for the purpose of testifying fully as to the source and extent of the injury, would be something quite different from any evidence which the petitioner could possibly produce in the circumstances in which the case was tried. Kilby *v.* Erwin, 84 Vt. 266, 78 A. 1021.

929-36 Miller-Brent L. Co. *v.* Stewart, 166 Ala. 657, 51 S. 943; Moynahan *v.* Perkins, 36 Colo. 481, 85 P. 1132; Vaughan's S. S. *v.* Stringfellow, 56 Fla. 708, 48 S. 410; Daniel *v.* C., 154 Ky. 601, 157 S. W. 1127; Weeks *v.* R. Co., 190 Mass. 563, 77 N. E. 654; Haapa *v.* Ins. Co., 150 Mich. 467, 114 N. W. 380; Johnson *v.* Co., 143 Mo. App. 441, 127 S. W. 692; S. *v.* Lane, 82 S. C. 144, 63 S. E. 612; Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979.

Right of party to prove his case, not affected by admission. Terre Haute E. Co. *v.* Kieley, 35 Ind. App. 180, 72 N. E. 658.

929-37 St. Louis, etc. R. Co. *v.* Clark, 90 Ark. 504, 119 S. W. 825; Fuhry *v.* R. Co., 239 Ill. 548, 88 N. E. 221; Hinckley *v.* Somerset, 145 Mass. 326, 338, 14 N. E. 166; Bk. *v.* Tuttle, 144 Mo. App. 294, 127 S. W. 918; Struthers *v.* Potter, 30 R. I. 444, 75 A. 867; Lufkin L. & L. Co. *v.* Noble (Tex. Civ.), 127 S. W. 1093; Marsden *v.* S., 59 Tex. Cr. 36, 126 S. W. 1160.

929-38 W. U. T. Co. *v.* Gillis, 89 Ark. 483, 117 S. W. 749; In re Gird's Est., 157 Cal. 543, 108 P. 499; Higgins *v.* R. Co., 5 Cal. App. 748, 91 P. 344; Fidelity & D. Co. *v.* Co., 45 Colo. 443, 103 P. 383; Atlantic, etc. R. Co. *v.* Crosby, 53 Fla. 409, 43 S. 318; Robishaw *v.* Piano Co., 179 Ill. App. 163; New England Syndicate *v.* Cutler (Ia.), 143 N. W. 1095; Thompson *v.* Mfg. Co. (Ia.), 141 N. W. 912; Strand *v.* Co., 136 Ia. 68, 113 N. W. 488; Spencer *v.* C. (Ky.), 122 S. W. 800; Burt-B. L. Co. *v.* Crawford, 27 Ky. L. R. 798, 86 S. W. 702; Mitton *v.* Elev. Co., 124 Minn. 65, 144 N. W. 434; Peters *v.* Tilghman, 111 Md. 227, 73 A. 726; Welsh *v.* Co., 161 Mich. 16, 125 N. W. 692; Johnson *v.* Co., 92 Minn. 393, 100 N. W. 225; Commerce Trust Co. *v.* Hettinger (Mo. App.), 168 S. W. 911; Siegelman *v.* Jones, 103 Mo. App. 172, 77 S. W. 307; Young *v.* Kinney, 85 Neb. 131, 122 N. W. 679; P. *v.* Stilwell, 81 Misc. 456, 142 N. Y. S. 628; Rowland *v.* Hall, 121 App. Div. 459, 106 N. Y. S. 55; S. *v.* Moeller, 23 N. D. 114, 126 N. W. 568; Class & Nachod Brew. Co. *v.* Rago, 240 Pa. 470, 87 A. 704; Muntz *v.* Co., 222 Pa. 621, 72 A. 247; Pastor *v.* Gaspar, 2 Phil. Isl. 592; Carr *v.* Co., 26 R. I. 180, 58 A. 678; S. *v.* Boyleston, 84 S. C. 574, 66 S. E. 1047; Sherman G. & E. Co. *v.* Belden (Tex. Civ.), 115 S. W. 897; Missouri, etc. R. Co. *v.* Garrett (Tex. Civ.), 96 S. W. 53 (of witness on former trial); Camp *v.* League (Tex. Civ.), 92 S. W. 1062; Skow *v.* R. Co., 141 Wis. 21, 123 N. W. 138.

See Am. Lumb. Co. *v.* Exler, 239 Pa. 153, 86 A. 798; Satler Lumb. Co. *v.* Exler, 239 Pa. 135, 86 A. 793.

Inquiry into collateral matters may be restricted. Leavitt *v.* Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. (N. S.) 855.

929-39 Miles *v.* R. Co., 90 Ark. 485, 119 S. W. 837; Perkins *v.* Rice, 187 Mass. 28, 72 N. E. 323; Ogden *v.* Camp, 78 Neb. 806, 113 N. W. 524; Metropolitan Life Ins. Co. *v.* Hayslett, 111 Va. 107, 68 S. E. 256. See Brill *v.* Barnett, 98 N. Y. S. 755.

Failure to offer cumulative evidence in its order, cause for excluding it in absence of explanation. Beatson *v.* Bowers, 174 Ind. 601, 91 N. E. 922.

930-40 Ala. Steel & Wire Co. *v.* Thompson, 166 Ala. 460, 52 S. 75; U. S. O. & L. Co. *v.* Bell, 153 Cal. 781, 96 P. 901; Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29.

930-41 White *v.* Boston, 186 Mass. 65, 71 N. E. 75, where specified number examined party may not obtain expert opinion on cross-examination from one not called as an expert.

In patent cases one competent expert witness on each side, sufficient. Am. S. Co. *v.* Co., 158 Fed. 978, 86 C. C. A. 182.

931-42 Swope *v.* Seattle, 36 Wash. 113, 78 P. 607, three as to value of land.

Court may limit number of witnesses to be used in a given point, but the order should be made in advance of trial, or before the party to be affected has introduced his testimony upon the point. Ruby *v.* C. M. & St. P. R. Co., 150 Ia. 128, 129 N. W. 817, *cit.* Everett *v.* R. Co., 59 Ia. 243, 13 N. W. 109.

931-44 S. *v.* Bowerman, 140 Mo. App. 410, 124 S. W. 11.

931-46 Manley *v.* S., 62 Tex. Cr. 392, 137 S. W. 1137.

932-47 In re Winslow's Will, 146 Ia. 67, 124 N. W. 895; Austin *v.* Smith (Ia.), 109 N. W. 289; Montgomery *v.* Morton, 143 Ky. 793, 137 S. W. 540; Clark Co. *v.* Rice, 127 Wis. 451, 106 N. W. 231.

A party has no cause of complaint because a large number of witnesses testified against him. Taylor *v.* Co., 145 N. C. 383, 59 S. E. 139.

Court not bound by order limiting number of witnesses. Brady *v.* Shirley, 18 S. D. 608, 101 N. W. 886.

932-48 Sulkowski *v.* Zynda, 160 Mich. 7, 124 N. W. 536. See Eaton *v.* C. Co., 157 Ky. 159, 162 S. W. 807; Hauptmann *v.* N. Y. Edison Co., 145 N. Y. S. 696.

933-51 Must not be done in midst of trial after one party has examined three or four of the witnesses allowed on the question of damages. St. Louis, etc. R. Co. *v.* Aubuchon, 199 Mo. 352, 97 S. W. 867.

933-52 St. Louis, etc. R. Co. *v.* Aubuchon, 199 Mo. 352, 97 S. W. 867. See Johnsen *v.* Johnsen, 78 Wash. 423, 139 P. 189, 1200.

936-58 Atlantic, etc. R. Co. *v.* Crosby, 53 Fla. 400, 43 S. 318, 334.

937-60 Southern R. Co. *v.* Clay, 130 Ga. 563, 61 S. E. 226.

937-62 Daniels *v.* United States, 196 Fed. 459, 116 C. C. A. 233; Girardino *v.* Birmingham (Ala.), 60 S. 871; Geter *v.* Co., 149 Ala. 578, 43 S. 367; Chase *v.* Co., 2 Alaska 82; High *v.* Ty., 12 Ariz. 146, 100 P. 448; Hobart Lee T. Co. *v.* Keck, 89 Ark. 122, 116 S. W. 183; Long *v.* McDaniel, 76 Ark. 292, 88 S. W. 964; Plumlee *v.* R. Co., 85 Ark. 488, 109 S. W. 315; Shaufelberger *v.* Mattix, 85 Ark. 193, 107 S. W. 380; In re Louck's Est., 160 Cal. 551, 117 P. 673; Patterson *v.* R. Co., 147 Cal. 178, 81 P. 531; James *v.* Co., 10 Cal. App. 785, 103 P. 1082; P. *v.* Davis, 1 Cal. App. 8, 81 P. 716, 88 P. 1101; Kataoka *v.* Hanselman, 150 Cal. 673, 89 P. 1082; Wood *v.* Moulton, 146 Cal. 317, 80 P. 92; In re Doolittle, 153 Cal. 29, 94 P. 240; Selleck *v.* Head, 77 Conn. 15, 58 A. 224; Broadhurst *v.* Hill, 140 Ga. 211, 78 S. E. 838; Puryear *v.* Stansell, 11 Ga. App. 784, 76 S. E. 166; Cone *v.* Cone, 138 Ga. 606, 75 S. E. 644; Kirk *v.* S., 9 Ga. App. 829, 72 S. E. 282; Georgia R. & B. Co. *v.* Adams, 127 Ga. 408, 56 S. E. 409; Norman *v.* Goode, 121 Ga. 449, 49 S. E. 268; Clark *v.* S., 5 Ga. App. 605, 63 S. E. 606; Sparks *v.* Bedford, 4 Ga. App. 13, 60 S. E. 809; DeVane *v.* R. Co., 4 Ga. App. 136, 60 S. E. 1079; Hall *v.* Jensen, 14 Ida. 165, 93 P. 962; P. *v.* Harris, 263 Ill. 406, 105 N. E. 303; P. *v.* Darr, 179 Ill. App. 130; Cunningham *v.* R. Co., 179 Ill. App. 505; Kelly *v.* R. Co., 175 Ill. App. 196; P. *v.* Probst, 237 Ill. 390, 86 N. E. 588; Daugherty *v.* Reveal (Ind. App.), 102 N. E. 381; Winona I. R. Co. *v.* Williard (Ind. App.), 101 N. E. 1022; Broderick *v.* R. Co., 47 Ind. App. 224, 94 N. E. 231; Indianapolis, etc. R. Co. *v.* Edwards, 36 Ind. App. 202, 74 N. E. 553; Bracken *v.* Johnson (Ia.), 140 N. W. 892; Buswell *v.* Buswell, 146 Ia. 52, 124 N. W. 770; Hanousek *v.* Marshalltown, 130 Ia. 550, 107 N. W. 603; Arenschield *v.* R. Co., 128 Ia. 677, 105 N. W. 200; Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209; Hemmer *v.* Burger, 127 Ia. 614, 103 N. W. 957; Farrell *v.* R. Co., 137 Ia. 309, 114 N. W. 1063; Simmons *v.* Shaft., 91 Kan. 553, 138 P. 614; Daly *v.* Gregg, 91 Kan. 506, 138 P. 614; Jones *v.* C., 158 Ky. 533, 165 S. W. 673; Cox *v.* C. (Ky.), 118 S. W. 282; Stowers *v.* Singer (Ky.), 67 S. W. 822; Black *v.* C., 24 Ky. L. R. 1974, 72 S. W. 772; Curry *v.* C., 25 Ky. L. R. 281, 74 S. W. 1077; Phoenix Ins. Co. *v.* Wintersmith, 30 Ky. L. R. 369, 98 S. W. 987; Metropolitan Ins. Co. *v.* Ford, 31 Ky. L. R. 513, 102 S. W. 876; Flint *v.* R. Co., 29 Ky. L. R. 1149, 97 S. W. 736; Dayton *v.* Hirth, 27 Ky. L. R. 1209, 87 S. W. 1136; Mobile & O. R. Co. *v.* Caldwell, 32 Ky. L. R. 447, 106 S. W. 236; S. *v.* Edwards (La.), 65 S. 634; S. *v.* Turner, 122 La. 371, 47 S. 685; National Sur. Co. *v.* Grant, 177 Mich. 348, 143 N. W. 5; Branch *v.* Klatt, 172 Mich. 31, 138 N. W. 263; Cummings *v.* Baker, 141 Mich. 536, 104 N. W. 979; Wunder *v.* Turner,

120 Minn. 13, 138 N. W. 770; Austin *v.* Moffett, 113 Minn. 290, 129 N. W. 388; Strand *v.* R. Co., 101 Minn. 85, 112 N. W. 987, 111 N. W. 958; Tew *v.* Webster, 103 Minn. 110, 114 N. W. 647; Gardner *v.* R. Co., 167 Mo. App. 605, 152 S. W. 98; National S. & E. Wks. *v.* Wicks, 144 Mo. App. 249, 128 S. W. 775; Blado *v.* Draper, 89 Neb. 787, 132 N. W. 410; Cheever *v.* Ins. Co., 86 App. Div. 331, 83 N. Y. S. 732; DiLorenzo *v.* DiLorenzo, 111 App. Div. 920, 97 N. Y. S. 644; Aden *v.* Doub, 146 N. C. 10, 59 S. E. 162; Boos *v.* Ins. Co., 22 N. D. 11, 132 N. W. 222; S. *v.* Brandner, 21 N. D. 310, 130 N. W. 941; Preston *v.* S. (Okla. Cr.), 139 P. 528; Calvert *v.* S. (Okla. Cr.), 135 P. 737; Stern *v.* Volz, 52 Or. 597, 98 P. 148; Rivera *v.* Co., 3 P. R. Fed. 455; Esleeck *v.* Capwell (R. I.), 72 A. 819; Whipple *v.* McCormick (R. I.), 68 A. 428; Eastwood *v.* Caplan (S. D.), 142 N. W. 249; S. *v.* Raice, 24 S. D. 111, 123 N. W. 708; Hahn *v.* Dickinson, 19 S. D. 373, 103 N. W. 642; Thompson & T. L. Co. *v.* Platt (Tex. Civ.), 154 S. W. 268; Berger *v.* Kirby (Tex. Civ.), 135 S. W. 1122; Groves *v.* S., 57 Tex. Cr. 241, 122 S. W. 258; St. Louis, etc. R. Co. *v.* Ross (Tex. Civ.), 89 S. W. 1105; Taylor *v.* R. Co., 36 Tex. Civ. 658, 83 S. W. 738; Northern Texas T. Co. *v.* Lewis, 37 Tex. Civ. 197, 83 S. W. 894; Virginia C. Wks. *v.* Delca, 109 Va. 333, 64 S. E. 41; Kincaid *v.* Co., 57 Wash. 334, 106 P. 918; Benson *v.* Hamilton, 34 Wash. 201, 75 P. 805; S. *v.* Underwood, 35 Wash. 558, 77 P. 863; Goshorn *v.* Co., 65 W. Va. 250, 64 S. E. 22; Stewart *v.* Doak, 58 W. Va. 172, 52 S. E. 95; Lemke *v.* Hage, 142 Wis. 178, 125 N. W. 440.

See Little *v.* S. (Ark.), 165 S. W. 256; In re Walden's Est., 166 Cal. 446, 137 P. 35; S. *v.* Clark (Ia.), 144 N. W. 596; New England Syndicate *v.* Cutler (Ia.), 143 N. W. 1095; Smith *v.* Smith (Ia.), 140 N. W. 659; Lawson *v.* C., 152 Ky. 113, 153 S. W. 56; Adam Roth Groc. Co. *v.* Hotel Monticello (Mo. App.), 166 S. W. 1125; Stahlman *v.* U. R. Co. (Mo. App.), 166 S. W. 312; Harlan *v.* Supply Co. (Tex. Civ.), 160 S. W. 1142; Fant *v.* Sullivan (Tex. Civ.), 152 S. W. 515. But see Spencer *v.* S. (Tex. Cr.), 153 S. W. 858.

Parol evidence.—In some courts rule is emphasized when newly discovered evidence is parol. Louisville & N. R. Co. *v.* Ueltschi, 31 Ky. L. R. 931, 104 S. W. 320.

Finding original paper, supposed to be lost, and copy of which was used, not cause for varying rule. Ray *v.* Baker, 165 Ind. 74, 74 N. E. 619.

940-63 P. *v.* McCullough, 210 Ill. 488, 518, 71 N. E. 602; Martinatis *v.* P., 223 Ill. 117, 79 N. E. 55; Cwiklik *v.* Hrejsa, 167 Ill. App. 268; United B. Co. *v.* O'Donnell, 124 Ill. App. 24; Kuhn *v.* Williams, 124 Ill. App. 390; Pratt *v.* Davis, 118 Ill. App. 161; Kellogg *v.* Finn, 22 S. D. 578, 119 N. W. 545; Keck *v.* Woodward, 53 Tex. Civ. 267, 116 S. W. 75.

Distinguished from corroborative evidence.—"Cumulative evidence is evidence of the same kind as that already given to the same point. Evidence of any disputed fact having been offered by showing particular circumstances, any evidence which only shows the same circumstances is purely cumulative. Evidence which would tend to establish the disputed fact by other circumstances is not cumulative, but corroborative. * * * All cumulative evidence is necessarily corroborative, but all corroborative evidence may not be cumulative." L. N. O. & T. R. Co. *v.* Crayton, 69 Miss. 152, 12 S. 271, quoted in Williams *v.* S., 99 Miss. 274, 54 S. 857.

941-64 L. N. O. & T. R. Co. *v.* Crayton, 69 Miss. 152, 12 S. 271; S. *v.* Reilly, 25 N. D. 339, 141 N. W. 720.

941-65 Cahill *v.* Stone Co. (Cal.), 138 P. 712; Smith *v.* Hyer, 11 Cal. App. 597, 105 P. 787; Button *v.* Button, 80 Conn. 157, 67 A. 478; Saylors *v.* S., 9 Ga. App. 227, 70 S. E. 975; Buchholtz *v.* Radcliffe, 129 Ia. 27, 105 N. W. 336; Major *v.* Garrott, 157 Ky. 468, 163 S. W. 463; Harp *v.* C. (Ky.), 119 S. W. 1191; Owsley *v.* Owsley, 25 Ky. L. R. 1186, 77 S. W. 397, 25 Ky. L. R. 1194, 77 S. W. 394; Torian *v.* Terrell, 29 Ky. L. R. 306, 93 S. W. 10 (*comp.* Flint *v.* R. Co., 29 Ky. L. R. 1149, 97 S. W. 736); Crigler *v.* Newman, 29 Ky. L. R. 27, 91 S. W. 706; Cahill *v.* Mullins, 31 Ky. L. R. 72, 101 S. W. 336; Louisville *v.* Oberle, 26 Ky. L. R. 845, 82 S. W. 626; Million *v.* Million, 31 Ky. L. R. 1156, 104 S. W. 768; Louisville & N. R. Co. *v.* Ueltschi, 31 Ky. L. R. 931, 104 S. W. 320; Hanson *v.* Bailey, 96 Minn. 274, 104 N. W. 969; Devoy *v.* Co., 192 Mo. 197, 91 S. W. 140; Parkins *v.* R. Co., 79 Neb. 788, 113 N. W. 265;

Rogers *v.* S., 77 Vt. 454, 61 A. 489; Wilson *v.* Keekley, 107 Va. 592, 59 S. E. 383.

941-66 Marks *v.* Shoup, 2 Alaska 66; Miller *v.* Scoble, 8 Cal. App. 344, 97 P. 93; Colorado Spgs., etc. R. Co. *v.* Fogelsong, 42 Colo. 311, 94 P. 356; Denmord *v.* Hillyer, 129 Ga. 698, 59 S. E. 806; Dougherty *v.* S., 7 Ga. App. 91, 66 S. E. 276; Clements *v.* Stapleton, 136 Ia. 137, 113 N. W. 546; Louisville B. & I. Co. *v.* Hart, 29 Ky. L. R. 310, 92 S. W. 951; Mitchell *v.* Emmons, 104 Me. 76, 71 A. 321; Bunker *v.* Foresters, 97 Minn. 361, 107 N. W. 392; Howard *v.* Assn., 110 Mo. App. 574, 85 S. W. 608; Vandeventer F. Co. *v.* Co., 127 Mo. App. 312, 105 S. W. 653; Parkins *v.* R. Co., 79 Neb. 788, 113 N. W. 265; Kraus *v.* Clark, 81 Neb. 575, 116 N. W. 164; Williams *v.* Miles, 73 Neb. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769; German Nat. Bk. *v.* Edwards, 63 Neb. 604, 88 N. W. 657; St. Paul H. Co. *v.* Faulhaber, 77 Neb. 477, 109 N. W. 762; McCreery R. Co. *v.* Bk., 104 N. Y. S. 959; O'Hara *v.* R. Co., 102 App. Div. 398, 92 N. Y. S. 777; P. *v.* Jones, 115 N. Y. S. 800; Schnitzler *v.* Co., 93 N. Y. S. 1119; Hagen *v.* R. Co., 109 App. Div. 218, 91 N. Y. S. 914; Flock *v.* Kaufman, 107 N. Y. S. 752; Crenshaw *v.* R. Co., 140 N. C. 192, 52 S. E. 731; Herndon *v.* R. Co., 121 N. C. 498, 28 S. E. 144; McDonald *v.* Lawton (R. I.), 67 A. 451; Shepard *v.* R. Co., 27 R. I. 135, 61 A. 42; McDonald *v.* R. I. Co., 26 R. I. 467, 59 A. 391; Texas, etc. R. Co. *v.* Scarborough, 101 Tex. 436, 108 S. W. 804; Shannon *v.* Tacoma, 41 Wash. 220, 83 P. 186; Goldsworthy *v.* Linden, 75 Wis. 24, 43 N. W. 656; Kennedy *v.* Plank, 120 Wis. 197, 97 N. W. 895; Anderson *v.* Co., 131 Wis. 35, 110 N. W. 788.

See Gunsten *v.* Green, 153 Wis. 413, 141 N. W. 239.

On a trial for assault where ill-feeling between parties was already apparent, evidence to prove a threat made by complainant against defendant is not ground for new trial. Williams *v.* Terr., 13 Ariz. 306, 114 P. 556, *cit.* S. *v.* Kearley, 26 Kan. 77.

Regarded as true.—For purposes of motion for new trial newly discovered evidence, though denied by affidavit, assumed to be true. In re McClellan, 21 S. D. 209, 111 N. W. 550; Goldsworthy *v.* Linden, 75 Wis. 24, 43 N. W. 656. Conflicting affidavits present a question of fact. Arkadelphia L. Co. *v.* Posey, 74 Ark. 377, 85 S. W. 1127; Wilson *v.* Keekley, 107 Va. 592, 59 S. E. 383.

In Georgia code provides for new trials on extraordinary grounds. Such motions are viewed less favorably than original motions, and are not granted unless newly discovered evidence decisive. See Norman *v.* Goode, 121 Ga. 449, 49 S. E. 268.

942-67 Marks *v.* Shoup, 2 Alaska 66; High *v.* Ty., 12 Ariz. 146, 100 P. 448; Arkadelphia L. Co. *v.* Posey; Norman *v.* Goode, supra; Hall *v.* Jensen, 14 Ida. 165, 93 P. 962; Henry *v.* Heldmaier, 129 Ill. App. 86; Warman-B.-C. Co. *v.* Co., 36 Ind. App. 259, 75 N. E. 672; Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209; S. *v.* Stanley (Ia.), 104 N. W. 284; Stowers *v.* Singer (Ky.), 67 S. W. 822; Crigler *v.* Newman, 29 Ky. L. R. 27, 91 S. W. 706; Emmet *v.* Perry, 100 Me. 139, 60 A. 872; McNeal *v.* Hunter, 72 Neb. 579, 101 N. W. 236; Kraus *v.* Clark, 81 Neb. 575, 116 N. W. 164; Armstrong *v.* Aragon, 13 N. M. 19, 79 P. 291; Hagen *v.* R. Co., 100 App. Div. 218, 91 N. Y. S. 914; Levy *v.* Hatch, 92 N. Y. S. 287; Gay *v.* Mitchell, 146 N. C. 509, 60 S. E. 426; El Paso S. W. R. Co. *v.* Barrett, 46 Tex. Civ. 14, 101 S. W. 1025, 121 S. W. 570; St. Louis, etc. R. Co. *v.* Ross (Tex. Civ.), 89 S. W. 1105; San Antonio F. Co. *v.* Drish, 38 Tex. Civ. 214, 85 S. W. 440; Halbert *v.* Co. (Tex. Civ.), 107 S. W. 592; Conwill *v.* R. Co., 85 Tex. 96, 19 S. W. 1017; Reynolds *v.* Hassam, 80 Vt. 501, 68 A. 645.

New trial should not be granted where party claiming surprise was negligent in not moving for a continuance. Kroger *v.* Ryan, 83 O. St. 299, 94 N. E. 428.

943-68 St. Louis, etc. R. Co. *v.* Wiggins, 48 Tex. Civ. 449, 107 S. W. 899.

943-69 Tillar *v.* Liebke, 78 Ark. 324, 95 S. W. 769; St. Louis S. R. Co. *v.* Byrne, 73 Ark. 377, 84 S. W. 469; Whitehead *v.* Breckenridge, 5 Ind. Ty. 133, 82 S. W. 698; Heath *v.* Cook (R. I.), 68 A. 427; Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29; Norfolk, etc. R. Co. *v.* Spencer, 104 Va. 657, 52 S. E. 310.

943-70 Plumlee *v.* R. Co., 85 Ark. 488, 109 S. W. 515; Bunn *v.* Hargraves, 3 Ga. App. 518, 60 S. E. 223; Miller *v.* Thigpen, 125 Ga. 113, 54 S. E. 194; Rogers *v.* Daniels, 116 Ill. App. 515;

Stowers *v.* Singer (Ky.), 67 S. W. 822; Phoenix Ins. Co. *v.* Wintersmith, 30 Ky. L. R. 369, 98 S. W. 987; Louisville & N. R. Co. *v.* Ueltschi, 31 Ky. L. R. 931, 104 S. W. 320; Libby *v.* Barry, 15 N. D. 286, 107 N. W. 972; Heyrock *v.* McKenzie, 8 N. D. 601, 80 N. W. 762; Smith *v.* Ins. Co., 21 S. D. 433, 113 N. W. 94; El Paso, etc. R. Co. *v.* Murtle, 49 Tex. Civ. 273, 108 S. W. 998; Flynt *v.* Taylor (Tex. Civ.), 91 S. W. 864; Houston L. & P. Co. *v.* Hooper, 46 Tex. Civ. 257, 102 S. W. 133; Wilson *v.* Keckley, 107 Va. 592, 59 S. E. 383; Seattle L. Co. *v.* Sweeney, 43 Wash. 1, 85 P. 677.

Exceptions.—See Illinois C. R. Co. *v.* McManus, 24 Ky. L. R. 81, 67 S. W. 1000; Hanson *v.* Bailey, 96 Minn. 274, 104 N. W. 969.

Newly-discovered evidence of convictions of a witness is merely cumulative of impeaching evidence offered on the trial. S. *v.* Whitsett, 232 Mo. 511, 134 S. W. 555.

943-71 Wells *v.* Gunn, 33 Colo. 217, 79 P. 1029; O'Hara *v.* R. Co., 102 App. Div. 398, 92 N. Y. S. 777; Schnitzler *v.* Co., 93 N. Y. S. 1119; S. *v.* DeMarias, 27 S. D. 303, 130 N. W. 782; Brennan *v.* Seattle, 39 Wash. 640, 81 P. 1092.

944-72 Chapman *v.* R. Co., 102 App. Div. 176, 92 N. Y. S. 304; Beers *v.* R. Co., 101 App. Div. 308, 91 N. Y. S. 957; Hughes *v.* Co. (R. I.), 67 A. 450; Tucker *v.* Co., 18 Wyo. 97, 104 P. 529.

944-75 Riley *v.* Co., 117 N. Y. S. 974.

New trials not favored. S. *v.* Bybee, 149 Mo. 632, 51 S. W. 470.

947-80 "For equity to set aside a verdict at law on account of newly discovered evidence, the evidence discovered must be decisive of the controversy." Robinson *v.* Veal, 79 Ga. 633, 7 S. E. 159. See Wimpy *v.* Gaskill, 79 Ga. 620, 7 S. E. 156; Norman *v.* Goode, 121 Ga. 449, 49 S. E. 268.

CUSTOMS AND USAGES

See 6 STANDARD PROC., corresponding title.

949-1 New Roads O. & Mfg. Co. *v.* Kline, 154 Fed. 296, 83 C. C. A. 1; Butler *v.* Co., 1 Alaska 246; Wilmington C. R. Co. *v.* White, 6 Penne. (Del.) 363, 66 A. 1009; Thompson & Co. *v.* Gosserand, 131 La. 1056, 60 S. 682; Prudochl *v.* Randall, 108 Minn. 185, 121 N. W. 913; Harrison *v.* Birrell, 58 Or. 410, 115 P. 141; Fleischman *v.* R. Co., 76 S. C. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519; S. *v.* Metcalf, 18 S. D. 393, 100 N. W. 923, 67 L. R. A. 331 (of political parties); Houston, etc. R. Co. *v.* Lee (Tex. Civ.), 123 S. W. 154; Prince *v.* Prince, 64 Wash. 552, 117 P. 255; O'Brien L. Co. *v.* Wilkinson, 123 Wis. 272, 101 N. W. 1050; Vogt *v.* Schienebeck, 122 Wis. 491, 100 N. W. 820.

See Rohrbach *v.* Hammill (Ia.), 143 N. W. 872; S. *v.* Power Co., 119 Minn. 225, 137 N. W. 1104, 41 L. R. A. (N. S.) 1181.

950-3 *Comp.* Scott *v.* Jacobs, 31 Okla. 109, 126 P. 780.

950-4 Globe & R. F. Ins. Co. *v.* Moffat, 154 Fed. 13, 83 C. C. A. 91; Sanders *v.* Brown, 145 Ala. 665, 39 S. 732; Wilmington C. R. Co. *v.* White, 6 Penne. (Del.) 363, 66 A. 1009; Morris *v.* Jamieson, 205 Ill. 87, 103, 68 N. E. 742; Schultz *v.* Ford, 133 Ia. 402, 109 N. W. 614; Oriental L. Co. *v.* Co., 103 Va. 730, 50 S. E. 270; Columbian B. Co. *v.* Bowen, 134 Wis. 218, 114 N. W. 451.

Judicial notice taken of custom of appropriating water rights on public domain. Parkersville D. Dist. *v.* Wattier, 48 Or. 332, 86 P. 775; Speake *v.* Hamilton, 21 Or. 3, 26 P. 855; Lewis *v.* McClure, 8 Or. 274 (*over.* by case first cited); Isaacs *v.* Barber, 10 Wash. 124, 38 P. 871, 45 Am. St. 772, 30 L. R. A. 665.

951-5 Hammond *v.* Co., 107 Md. 295, 68 A. 496.

951-6 See Clark *v.* Milling Co., 165 Ill. App. 177.

951-7 Puritas Laundry Co. *v.* Green, 15 Cal. App. 654, 115 P. 660; Knollin *v.* Co., 51 Colo. 355, 117 P. 999; Rochelle, etc. Co. *v.* Fisher, 13 Ga. App. 621, 79 S. E. 584; Douglas *v.* Rogers, 10 Ga. App. 486, 73 S. E. 700; Commercial Bk. *v.* Co., 120 Ga. 74, 47 S. E. 589; Lauchheimer *v.* Jacobs, 126 Ga. 261, 55 S. E. 55; Watson *v.* Hazelhurst, 127 Ga. 298, 56 S. E. 459; Stewart *v.* Cook, 118 Ga. 541, 45 S. E. 398; Northern Produce Exch. *v.* Ablon, 169 Ill. App. 633; Haas Lumb. Co. *v.* Harty Bros., 169 Ill. App. 323; Klaub *v.* Vokoun, 169 Ill. App. 434; Swern *v.* Churchill, 155 Ill. App. 505; Plover Sav. Bk. *v.* Moodie, 135 Ia. 685, 110 N. W. 29; Todd *v.* Howell, 47 Ind. App. 665, 95 N. E. 279; Rastetter *v.* Reynolds,

160 Ind. 133, 66 N. E. 612; Everitt *v.* Co., 25 Ind. App. 287, 57 N. E. 281; Tilden Co. *v.* Hair Co., 216 Mass. 323, 103 N. E. 916; Tower *v.* Co., 184 Mass. 472, 69 N. E. 348; Karwick *v.* Pickands, 171 Mich. 463, 137 N. W. 219; Welch Co. *v.* Elevator Co., 122 Minn. 432, 142 N. W. 828; Baker *v.* Barker, 118 Minn. 419, 137 N. W. 7; Staroske *v.* Pub. Co., 235 Mo. 67, 138 S. W. 36; New Eng. B. Co. *v.* Flint (N. H.), 90 A. 789; Rhodesia Mfg. Co. *v.* Tombacher, 129 N. Y. S. 420; Erie R. Co. *v.* Waite, 62 Misc. 372, 114 N. Y. S. 1115; S. *v.* Reilly, 25 N. D. 339, 141 N. W. 720; Savage *v.* Co., 48 Or. 1, 85 P. 69; Penn. R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124; Ankeny *v.* Young, 52 Wash. 235, 100 P. 736; O'Brien L. Co. *v.* Wilkinson, 123 Wis. 272, 101 N. W. 1050; Vollmar & Below Co. *v.* Co., 146 Wis. 412, 131 N. W. 899; Gehl *v.* Co., 105 Wis. 573, 81 N. W. 666, 116 Wis. 263, 93 N. W. 26. See infra, "Physicians and Surgeons, 850-81, and this title 957-27.

Custom must be shown to have been uniform and well established. Taylor *v.* Sawmill Co., 105 Ark. 518, 152 S. W. 150.

Age of custom immaterial if parties knew of it. Rastetter *v.* Reynolds, 160 Ind. 133, 66 N. E. 612. See Edelstein *v.* Schuler (1902), 2 K. B. (Eng.) 144, 154.

952-8 Joynson *v.* Hunt, 93 L. T. (Eng.) 470, 21 T. L. R. 692; Grace *v.* Ins. Co., 109 U. S. 278; Kalamazoo C. Co. *v.* Simon, 129 Fed. 1005, 64 C. C. A. 166; De Witt *v.* Berry, 134 U. S. 306; Jenkins S. S. Co. *v.* Preston, 186 Fed. 609, 108 C. C. A. 473; Hammett *v.* Chase, 158 Fed. 203; The Mary S. Bradshaw, 155 Fed. 696; Carbon S. Co. *v.* Ennis, 114 Fed. 260, 52 C. C. A. 146; Noyes *v.* Marlott, 156 Fed. 753, 84 C. C. A. 409; Moore *v.* U. S., 196 U. S. 157; Florence W. Wks. *v.* Co., 145 Ala. 677, 40 S. 49; Leonhart *v.* Assn., 5 Cal. App. 19, 89 P. 847; Fish *v.* Correll, 4 Cal. App. 521, 88 P. 489; Vardeman *v.* Ins. Co., 125 Ga. 117, 54 S. E. 66; Currie *v.* Syndicate, 104 Ill. App. 165; Whipple *v.* Tucker, 123 Ill. App. 223; Independent Torpedo Co. *v.* Oil Co., 48 Ind. App. 124, 95 N. E. 592; Shedd *v.* Co., 48 Ind. App. 23, 95 N. E. 316; Covington *v.* Co., 28 Ky. L. R. 636, 89 S. W. 1126; Birely *v.* Dodson, 107 Md. 229, 68 A. 488; Hammond *v.* Co., 107 Md. 295, 68 A. 496; Denton *v.* Gill, 102 Md. 386, 62 A. 627, 3 L. R. A. (N. S.) 465; Johnson *v.* Norcross Bros., 209 Mass. 445, 95 N. E. 833; Stearns *v* R. Co., 148 Mich. 271, 111 N. W. 769; J. Schlitz B. Co. *v.* Grimmon, 28 Nev. 235, 81 P. 43; Voorhees Rubber Co. *v.* Co., 31 O. C. C. 557; Stovall *v.* Gardner (Tex. Civ.), 103 S. W. 405; California Pine Box, etc. Co. *v.* Orchard Co., 39 Utah 325, 117 P. 35.

Also by actions which show disregard of a custom. Kansas City M. & O. R. Co. *v.* West (Tex. Civ.), 149 S. W. 206.

Where an agent here was expressly authorized to purchase for "spot cash" upon his own inspection. No repugnant custom was admissible to vary or control his authority. Citizens' Nat. Bk. *v.* Ariss, 68 Wash. 448, 123 P. 593, *cit.* Boardman *v.* Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196.

Express stipulation in contract, not always conclusive against existence of custom. In re Arbitration between Walkers (1904), 2 K. B. (Eng.) 152.

953-9 Smith *v.* Co., 82 Conn. 116, 72 A. 577 (though custom not universal or general); Everitt *v.* Co., 25 Ind. App. 287, 57 N. E. 281; Sawyer *v.* Deicken, 56 Misc. 634, 107 N. Y. S. 560; Bremerman *v.* Hayes, 9 Pa. Super 8. See infra, 957-27.

"The customs and usages of a particular trade will not be admitted in evidence against one who is not in that trade, since he is not presumed to be familiar with such customs and usages; but 'when both parties to a contract are engaged in the particular trade they will be presumed to have knowledge of such custom. It is not necessary in such a case to prove actual knowledge, or that the custom is so general or universal that knowledge may be presumed.' Smith & Co. *v.* Russell Lumber Co., 82 Conn. 116, 72 Atl. 577. If a general usage to carry goods on deck [of a ship] exists, underwriters who are doing business in the particular trade must take notice of it; and their contracts must be construed with reference to such usage.' Insurance Co. *v.* Reymershoffer, 56 Tex. 238. 'The law seems to be that when there is nothing in the agreement to exclude the inference the parties are always presumed to contract with reference to the usage or custom which prevails in the particular trade or business to which the contract relates.'

Bowles *v.* Driver, 112 S. W. 440. See, also, Harbet *v.* Neill, 49 Tex. 152; Heyworth *v.* Miller Grain Co., 174 Mo. 171, 73 S. W. 498." Holder *v.* Swift (Tex. Civ.), 147 S. W. 690.

953-10 Fleming *v.* Wells, 45 Colo. 255, 101 P. 66 (but not otherwise); Soper *v.* Tyler, 77 Conn. 104, 58 A. 699; Stern *v.* Simons, 77 Conn. 150, 58 A. 696; Arrington *v.* Fleming, 117 Ga. 449, 43 S. E. 691; Hughes *v.* Knott, 138 N. C. 105, 50 S. E. 586; Morris *v.* Supplee, 208 Pa. 253, 57 A. 566; Traders Ins. Co. *v.* Dobbins, 114 Tenn. 227, 86 S. W. 383; Kempner *v.* Patrick, 43 Tex. Civ. 216, 95 S. W. 51; Ankeny *v.* Young, 52 Wash. 235, 100 P. 736.

Custom of a particular market. Smith *v.* Bloom (Ia.), 141 N. W. 32.

954-11 Smart *v.* Haase, 79 Conn. 587, 65 A. 972; Steidtmann *v.* Lay Co., 234 Ill. 84, 84 N. E. 640; Samuels *v.* Oliver, 130 Ill. 73, 22 N. E. 499; Taylor *v.* Bailey, 169 Ill. 181, 48 N. E. 200; Doell *v.* Schrier, 36 Ind. App. 253, 75 N. E. 600; Biggs *v.* Langhammer, 103 Md. 94, 63 A. 198; Tower *v.* Co., 184 Mass. 472, 69 N. E. 348; Heyworth *v.* Co., 174 Mo. 171, 73 S. W. 498; C. *v.* Sanderson, 40 Pa. Super. 416. See Snoqualmi R. Co. *v.* Moynihan, 179 Mo. 629, 78 S. W. 1014; Bixby *v.* Bruce, 69 Neb. 78, 95 N. W. 34.

See Ross *v.* Northrup, King & Co., 156 Wis. 327, 144 N. W. 1124.

Acceptance of usage, if one of the parties not a member of trade or circle in which it prevails, must be shown, either by proof of actual knowledge or that it was so generally known in the community his knowledge may be inferred. New Roads O. & Mfg. Co. *v.* Kline, 154 Fed. 296, 83 C. C. A. 1.

954-12 Ennis Brown Co. *v.* Hurst, 1 Cal. App. 752, 82 P. 1056.

Ignorance of one who indorses and negotiates a check as to usage of banks in presenting it for payment cannot prevent application of statute making such usage a factor on question of diligence. Plover Sav. Bk. *v.* Moodie, 135 Ia. 685, 110 N. W. 29.

955-14 Guggenheim *v.* Hoffman, 128 Ill. App. 289; Collins *v.* Mechling, 1 Pa. Super. 594; Martin *v.* Co., 81 S. C. 432, 62 S. E. 833; Bowles *v.* Rice, 107 Va. 51, 57 S. E. 575.

Custom of business houses, not binding upon one who has no notice unless it is notorious. San Antonio M. & S. Co. *v.* Josey (Tex. Civ.), 91 S. W. 598.

956-15 Kentucky D. & W. Co. *v.* Lillard, 160 Fed. 34, 87 C. C. A. 190; Lillard *v.* Co., 134 Fed. 168, 67 C. C. A. 74; Globe & R. F. Ins. Co. *v.* Moffat, 154 Fed. 13, 83 C. C. A. 91 (meaning of "noon" in policy); Kauffman *v.* Raeder, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; Loval *v.* Wolf (Ala.), 60 S. 298; Ball *v.* Co., 146 Ala. 309, 39 S. 584; Henderson-B. L. Co. *v.* Cook, 149 Ala. 226, 42 S. 838; W. U. T. Co. *v.* Bowman, 141 Ala. 175, 37 S. 493; Heistand *v.* Bateman, 41 Colo. 20, 91 P. 1111; Chicago, etc. Co. *v.* Hyslop, 227 Ill. 308, 81 N. E. 379; Chisholm *v.* Co., 160 Ill. 101, 43 N. E. 796; Guggenheim *v.* Hoffman, 128 Ill. App. 289; Peet *v.* Peet, 229 Ill. 341, 82 N. E. 376; Chicago, etc. R. Co. *v.* Reyman (Ind.), 73 N. E. 587; Hichhorn *v.* Bradley, 117 Ia. 130, 90 N. W. 592; Thayer *v.* Co., 121 Ia. 121, 96 N. W. 718; Sherwood *v.* Bk., 131 Ia. 528, 109 N. W. 9; Rochester G. Ins. Co. *v.* Ins. Co., 27 Ky. L. R. 1155, 87 S. W. 1115 (meaning of "noon" in policy); Shute *v.* Bills, 191 Mass. 433, 78 N. E. 96; Floyd *v.* Mann, 146 Mich. 356, 109 N. W. 679; Riley-W. G. Co. *v.* Co., 129 Mo. App. 325, 108 S. W. 628; Newhall *v.* Appleton, 114 N. Y. 140, 21 N. E. 105; Blalock *v.* Clark, 137 N. C. 140, 49 S. E. 88; Gulf, etc. R. Co. *v.* Leatherwood, 29 Tex. Civ. 507, 69 S. W. 119; Fort P. Co. *v.* Dissen, 45 Tex. Civ. 403, 101 S. W. 477; Morgan *v* Barber (Tex. Civ.), 99 S. W. 730; Consol., etc. R. Co. *v.* Gonzales, 50 Tex. Civ. 79, 109 S. W. 946; Anderson *v.* Lewis, 64 W. Va. 297, 61 S. E. 160.

Usage at place of performance may be shown though contract made elsewhere. Globe & R. F. Ins. Co. *v.* Moffat, 154 Fed. 13, 83 C. C. A. 91; Moore *v.* U. S., 196 U. S. 157.

Evidence of customary charge for services is competent on issue as to mistake in written contract. Mercer *v.* Co., 32 Ky. L. R. 230, 105 S. W. 441.

Custom of employes not binding on corporate employer unless recognized by governing officials. Southern R. Co. *v.* Hobbs, 118 Ga. 227, 45 S. E. 23. But proof of a uniform course tends to show it was authorized. Leighton & H. S. Co. *v.* Snell, 217 Ill. 152, 75 N. E. 462. Concurrence by employer must be shown. South Chicago C. R. Co. *v.* Dufresne, 200 Ill. 456, 65 N. E. 1075. See No. Chicago S. R. Co. *v.* Kaspers, 186 Ill. 246, 57 N. E. 849. As

between employer and employes, former presumed to know of manner in which latter long performed their duties. Atchison, etc. R. Co. *v.* Sowers (Tex. Civ.), 99 S. W. 190. And a custom for protection of workmen may acquire force of a rule. Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29; Gulf, etc. R. Co. *v.* Winter, 38 Tex. Civ. 8, 85 S. W. 477. Custom of employes in running a train at speed in excess of that permitted may be shown as between stranger and company McKerley *v.* R. Co. (Tex. Civ.), 85 S. W. 499. But occasional like acts are not competent to show revocation or abandonment of company's rule. Louisville & N. R. Co. *v.* Scanlon, 22 Ky. L. R. 1400, 60 S. W. 643. *Comp.* Kane *v.* R. Co., 142 Fed. 682, 73 C. C. A. 672, and Biles *v.* R. Co., 143 N. C. 78, 55 S. E. 512; Texas, etc. R. Co. *v.* Conway, 44 Tex. Civ. 68, 98 S. W. 1070.

In actions for negligence proof is competent to show usual precautions taken to prevent injury or loss. Thayer *v.* Co, 121 Ia. 121, 96 N. W. 718; Crooker *v.* Co., 34 Wash. 191, 75 P. 632; Rasmussen *v.* Co., 133 Wis. 205, 113 N. W. 453; Bodie *v.* R. Co., 61 S. C. 468, 39 S. E. 715. General custom of men in a certain employment as to manner of doing work may be shown (Leque *v.* Co., 133 Wis. 547, 113 N. W. 946), if it does not contradict common knowledge nor prove a custom obviously dangerous. Boyce *v.* Co., 119 Wis. 642, 97 N. W. 563, *over.* Colf *v.* R. Co., 87 Wis. 273, 58 N. W. 408. But evidence of general custom of railway companies as to construction, maintenance and operation of roads is not always admissible. See McDermott *v.* Severe, 25 App. Cas. (D. C.) 276; Weaver *v.* R. Co., 3 App. Cas. (D. C.) 436. And if admissible, is not controlling. Rickerd *v.* R. Co., 141 Fed. 905, 73 C. C. A. 139. A workman who does not know of a custom cannot show its non-observance. Bourbonnais *v.* Co., 184 Mass. 250, 68 N. E. 232.

Proof of custom among workmen in selection of appliances, immaterial. Geldard *v.* Marshall, 47 Or. 271, 83 P. 867, 84 P. 803.

Custom of carrier in calling stations may be shown by passenger. Kansas C. S. R. Co. *v.* Belknap, 80 Ark. 587, 98 S. W. 366.

956-16 Harris *v.* Fall, 177 Fed. 79, 100 C. C. A. 497; Byrd *v.* Beall, 150 Ala. 122, 43 S. 749; Gould *v.* Co., 147 Ala. 629, 41 S. 675; Corey *v.* Struve, 16 Cal. App. 310, 116 P. 975; Bacon F. Co. *v.* Blessing, 122 Ga. 369, 50 S. E. 139; First Nat. Bk. *v.* Mackey, 157 Ill. App. 408; Bk. *v.* Miller, 105 Ill. App. 224; Swern *v.* Churchill, 155 Ill. App. 505; Rake *v.* Townsend (Ia.), 102 N. W. 499; Kenyon *v.* Co., 135 Mich. 103, 97 N. W. 407; Moritz *v.* Herskovitz, 46 Wash. 192, 89 P. 560.

Usage as to giving notice of arrival or making delivery of goods on holidays is chargeable to shipper who sends goods to agent at place where usage prevails. Illinois C. R. Co. *v.* Carter, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527; Penn. R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124. See Savings Bk. *v.* Bk., 98 Tenn. 337, 39 S. W. 338.

It is presumed insurance company knows local meaning of "winter season," used in rider. Barker *v.* Ins. Co., 136 Mich. 626, 99 N. W. 866. See Soper *v.* Tyler, 77 Conn. 104, 58 A. 699.

Same rule applies where parties not strangers.—A trade usage by which words given unusual or arbitrary significance in a particular line of business generally or in locality in which parties reside must be shown to be of such definite character and such general acceptance that knowledge thereof by both parties may be reasonably inferred. Citizens State Bk. *v.* Chambers, 129 Ia. 414, 105 N. W. 692.

956-17 McCall *v.* Herrin, 118 Ga. 522, 45 S. E. 442; Greer *v.* R. Co., 193 Mass. 246, 79 N. E. 267; Sinclair *v.* S., 45 Tex. Cr. 487, 77 S. W. 621.

Rights of ignorant stranger not affected by carrier's custom. Atlantic & B. R. Co. *v.* Anderson, 118 Ga. 288, 45 S. E. 271.

Principals not chargeable with notice of custom of factors (Leibhardt *v.* Wilson, 38 Colo. 1, 88 P. 173), or traveling salesmen (Gould *v.* Co., 147 Ala. 629, 41 S. 675), or brokers (Robbins *v.* Maher, 14 N. D. 228, 103 N. W. 755; Chilberg *v.* Lyng, 128 Fed. 899, 63 C. C. A. 451); unless it was contemplated contracts should be made according to usage. Bibb *v.* Allen, 149 U. S. 481.

956-18 Pickett *v.* R. Co., 138 Ga. 177, 74 S. E. 1027; Atkinson *v.* Kirkpatrick, 90 Kan. 515, 135 P. 579; Ireland *v.* Clark, 109 Me. 239, 83 A. 667; Fellows *v.* Dorsey, 171 Mo. App. 289, 157 S. W. 995; Hart *v.* Cort, 83 Misc. 44, 144 N. Y. S. 627; Sultan *v.* Oil

Barrels, 16 Phila. (Pa.) 542; Houston, etc. R. Co. *v.* Anderson (Tex. Civ.), 147 S. W. 353; Russell *v.* Ferguson, 77 Vt. 433, 60 A. 802; Oriental L. Co. *v.* Co., 103 Va. 730, 50 S. E. 270; Bowles *v.* Rice, 107 Va. 51, 57 S. E. 575; Provincial Ins. Co. *v.* Connolly, 5 Can. Sup. Ct. 258.

956-20 Penland *v.* Ingle, 138 N. C. 456, 50 S. E. 850; Pratt *v.* Bk., 12 Phila. (Pa.) 378.

956-21 Clear and definite. Gulf, etc. Co. *v.* Howell (Fla.), 65 S. 661.

956-22 The Gualala, 178 Fed. 402, 102 C. C. A. 548; Lemke *v.* Hage, 142 Wis. 178, 125 N. W. 440.

Question is for jury though evidence not clear, uncontradictory and distinct. Hichhorn *v.* Bradley, 117 Ia. 130, 90 N. W. 592.

956-23 Doubt must be eliminated. Thompson *v.* Taylor, 15 Phila. (Pa.) 250.

Question for jury.—Miller *v.* Fischer, 142 App. Div. 172, 126 N. Y. S. 996.

If there is some proof question for jury. Henderson B. L. Co. *v.* Cook, 149 Ala. 226, 42 S. 838.

General knowledge of custom must be shown by proof of its existence long enough to have become known. Merchants' G. Co. *v.* Co., 89 Ark. 591, 117 S. W. 767.

956-24 Must testify of custom, not of meaning of contract. Col., etc. Co. *v.* Atl. Glass Co., 43 Pa. Super. 367.

Elements.—A custom to be binding must be uniform, long established and generally acquiesced in, and so well known as to induce belief parties contracted with reference to it. Newton R. Wks. *v.* Co., 100 Ill. App. 421; Currie *v.* Syndicate, 104 Ill. App. 165; Am. Ins. Co. *v.* France, 111 Ill. App. 310; Strange *v.* Carrington, 116 Ill. App. 410. It must be reasonable. Penland *v.* Ingle, 138 N. C. 456, 50 S. E. 850. But usage need only be old enough to be well established in the trade or place. Currie *v.* Syndicate, supra. See Byrd *v.* Beall, 150 Ala. 122, 43 S. 749; Wilmington C. R. Co. *v.* White, 6 Penne. (Del.) 363, 66 A. 1009.

Law and fact.—Sufficiency of usage is for court; whether facts establish it is for jury. Currie *v.* Syndicate, 104 Ill. App. 165; Tower *v.* Co., 184 Mass. 472, 69 N. E. 348; Oriental L. Co. *v.* Co., 103 Va. 730, 50 S. E. 270; In re Arbitration between Walkers (1904), 2 K. B. (Eng.) 152. Knowledge of custom of which it is not presumed parties had notice is for jury. New Roads O. & Mfg. Co. *v.* Kline, 154 Fed. 296, 83 C. C. A. 1.

A regular usage for the inhabitants of a parish to have a churchway through the demesne of a manor within the parish is, prima facie, a parochial custom, and is not restricted to part of the inhabitants of the parish. A regular usage of twenty years, unexplained and uncontradicted, is sufficient to warrant jury in finding existence of immemorial custom, and from such usage, unless contrary appears, jury ought to presume immemorial existence of the right. Brocklebank *v.* Thompson (1903), 2 Ch. (Eng.) 344. See Foster *v.* Council (1906), 1 K. B. (Eng.) 648.

Declarations of deceased predecessor in title, made in private record, concerning notice caused by him to have been given respecting use of such way is not competent to overcome effect of such usage. Brocklebank *v.* Thompson (1903), 2 Ch. (Eng.) 344.

Ancient court records are good evidence freeholders of a manor had the right to take stone from the waste to be used on their respective tenements. Heath *v.* Deane (1905), 2 Ch. (Eng.) 86.

Local custom to be proved as alleged. First Nat. Bank of Hastings *v.* Bk., 56 Neb. 149, 76 N. W. 430; Oriental Lumb. Co. *v.* Lumb. Co., 103 Va. 730, 50 S. E. 270.

In an action against a carrier an averment of loss occurring by a breach of contract is not sustained by proof of a loss sustained by breach of a usage. American Lead Pencil Co. *v.* R. Co., 124 Tenn. 57, 134 S. W. 613.

957-25 Illinois C. R. Co. *v.* Panebiango, 227 Ill. 170, 81 N. E. 53; Donk Co *v.* Thil, 228 Ill. 233, 81 N. E. 857; Smith *v.* Bloom (Ia.), 141 N. W. 32; Postal T. C. Co. *v.* Co., 136 Ky. 843, 122 S. W. 852; Glantz *v.* R. Co., 90 Neb. 606, 134 N. W. 242; Miller *v.* Fischer, 142 App. Div. 172, 126 N. Y. S. 996; Essington Enamel Co. *v.* Ins. Co., 45 Pa. Super. Ct. 550; Louisville & N. R. Co. *v.* Co., 125 Tenn. 658, 148 S. W. 671; Russell *v.* Ferguson, 77 Vt. 433, 60 A. 802.

Evidence held insufficient.—Saitta *v.* S. S. Co., 130 N. Y. S. 375.

Facts may be proved from which it may be inferred custom is in very gen-

eral or common use. Chattanooga M. Co. *v.* Hargraves, 111 Tenn. 476, 78 S. W. 105.

957-26 Gibbon *v.* Pease, (1905) 1 K. B. (Eng.) 810; Devonald *v.* Rosser, 93 L. T. (Eng.) 274, 21 T. L. R. 595; Chilberg *v.* Lyng, 128 Fed. 899, 63 C. C. A. 451 (contrary to public policy); Byrd *v.* Beall, 150 Ala. 122, 43 S. 749 (see opinion for numerous instances of unreasonableness); Heistand *v.* Bateman, 41 Colo. 20, 91 P. 1111; Johnson *v.* Co., 16 Haw. 693; Quin *v.* Herhold, 100 Ill. App. 320; Eckstein *v.* Schleimer, 62 Misc. 635, 116 N. Y. S. 7; Penland *v.* Ingle, 138 N. C. 456, 50 S. E. 850; Missouri, etc. R. Co. *v.* Tarwater, 33 Tex. Civ. 116, 75 S. W. 937.

Evidence inadmissible to show a custom relative to the business of a corporation contrary to its by-laws. Order of U. C. T. *v.* Young, 212 Fed. 132 (C. C. A.).

Reasonableness of custom is for jury. In re Arbitration between Walkers (1904), 2 K. B. (Eng.) 152. If custom benefits public it may not be unreasonable because it injures an individual. Mercer *v.* Denne, L. R. (1904) 2 Ch. (Eng.) 534, 74 L. J. Ch. 71, 91 L. T. 513, 53 W. R. 55.

957-27 Barnard *v.* Kellogg, 10 Wall. (U. S.) 383; Bridgeman *v.* U. S., 140 Fed. 577, 72 C. C. A. 145; Mobile, etc. R. Co. *v.* Co., 165 Ala. 610, 51 S. 956; Lansing W. Co. *v.* Montgomery, 91 Ark. 600, 121 S. W. 1052; Citizens B. *v.* Co., 80 Ark. 601, 96 S. W. 997; Fidelity & D. Co. *v.* Butler, 130 Ga. 225, 60 S. E. 851, 16 L. R. A. (N. S.) 994; Coady *v.* Ship Lewis, 1 Haw. 545 (maritime law); Kahinu *v.* Aea, 6 Haw. 68 (former custom of natives cannot affect nature of property); Turner *v.* Co., 223 Ill. 629, 79 N. E. 306; Delaware & H. C. Co. *v.* Mitchell, 113 Ill. App. 429 (to vary terms of contract); Entwhistle *v.* Henke, 113 Ill. App. 572; National F. Ins. Co. *v.* Hanberg, 215 Ill. 378, 74 N. E. 377; Clark *v.* Allaman, 71 Kan. 206, 80 P. 571; Louisville, etc. R. Co. *v.* Woolfork, 30 Ky. L. R. 569, 99 S. W. 294; Randall *v.* Smith, 63 Me. 105, 18 Am. Rep. 200; Shute *v.* Bills, 191 Mass. 433, 78 N. E. 96; Calvert *v.* Schultz, 143 Mich. 441, 106 N. W. 1123; Empey *v.* Lovell, 117 Minn. 520, 134 N. W. 289; Southwest M. R. Co. *v.* Co., 138 Mo. App. 129, 119 S. W. 982; Crockford *v.* S., 73 Neb. 1, 102 N. W. 70; Wyatt *v.* Wanamaker, 58 Misc. 429, 110 N. Y. S. 900; Jones *v.* Co., 225 Pa. 641, 74 A. 613; Ollesheimer *v.* Foley, 42 Tex. Civ. 252, 95 S. W. 688.

See Continental L. & T. Co. *v.* Miller (Tex. Civ.), 161 S. W. 927.

Custom of medical men to render services to one another without charge may be proved on the issue as to existence of implied contract. Bremerman *v.* Hayes, 9 Pa. Super. S. As may their custom to charge fees for consultation to patient and not attending physician who requested service. Baer *v.* Williams, 75 N. J. L. 30, 66 A. 961.

Proof of the practice of the legislative and executive branches of government for a long series of years may be regarded in construing a constitutional provision of doubtful meaning. S. *v.* South Norwalk, 77 Conn. 257, 58 A. 759.

Custom may be void for uncertainty. See In re Arbitration between Walkers, L. R. (1904) 2 K. B. (Eng.) 152; Kalamazoo C. Co. *v.* Simon, 129 Fed. 1005, 64 C. C. A. 166. But variation in use of privileges claimed under custom may not render it void. Mercer *v.* Denne, L. R. (1904) 2 Ch. (Eng.) 534, 74 L. J. Ch. 71, 91 L. T. 513, 53 W. R. 55.

Custom not provable to excuse non-performance of contract. Henry *v.* Ins. Co. (Tex. Civ.), 103 S. W. 836.

And when stipulations excusing liability are made, proof of custom to show party is within them must not antedate the contract. Lima L. & M. Co. *v.* Co., 155 Fed. 77, 83 C. C. A. 593.

958-28 St. Louis, I. M. & S. R. Co. *v.* Wirbel, 108 Ark. 437, 158 S. W. 118; Schultz *v.* Ford, 133 Ia. 402, 109 N. W. 614; Nagle *v.* Hake, 123 Wis. 256, 101 N. W. 409. See Roach W. Gro. Co. *v.* Dreyfus (Ark.), 162 S. W. 1101; St. Louis, etc. R. Co. *v.* Lloyd (Ark.), 160 S. W. 851; Turlock Fruit Juice Co. *v.* Pacific, etc. Co., 71 Wash. 128, 127 P. 842.

958-29 Ames M. Co. *v.* Co., 125 Fed. 332; Vaughan's S. S. *v.* Stringfellow, 56 Fla. 708, 48 S. 410; Burch *v.* Co., 125 Ga. 153, 53 S. E. 1008; Tower *v.* Co., 184 Mass. 472, 69 N. E. 348; S. *v.* Hughes, 31 Nev. 270, 102 P. 562 (knowledge may be largely acquired through statements of others engaged in the trade); Collins *v.* Mechling, 1 Pa. Super. 594; Wall *v.* Melton (Tex. Civ.), 94 S. W. 358; San Antonio T. Co. *v.* Lambkin (Tex. Civ.), 99 S. W. 574; Parlett *v.* Dunn, 102 Va. 459, 46 S. E.

467; Richmond L. Wks. *v.* Ford, 94 Va. 627, 27 S. E. 509.

See Schmidt *v.* Scanlan, 32 S. D. 608, 144 N. W. 128.

Testimony may be based on local observations.—Crooker *v.* Co., 34 Wash. 191, 75 P. 632.

Teacher of experience may testify to customary time of engaging teachers Peacock *v.* Coltrane, 44 Tex. Civ. 530, 99 S. W. 107.

Experienced private secretary to government officer and chief clerk in the office may testify of usage therein. Lorenz *v.* U. S., 24 App. Cas. (D. C.) 337.

Qualified testimony as to usage, not an opinion. Thayer *v.* Co., 121 Ia. 121, 96 N. W. 718. But *comp.* Schermer *v.* McMahon, 108 Mo. App. 36, 82 S. W. 535.

Assuming existence of custom and acting on it by witnesses who have not tested it nor heard of it from others does not show its existence. Duling *v.* R. Co., 66 Md. 120, 6 A. 592; Russell *v.* Ferguson, 77 Vt. 433, 60 A. 802.

959-30 Hawaiian A. Co. *v.* Norris, 12 Haw. 229; Schermer *v.* McMahan, 108 Mo. App. 36, 82 S. W. 535; Rosenstein *v.* McCutcheon, 155 App. Div. 278, 140 N. Y. S. 315; Nagle *v.* Hake, 123 Wis. 256, 101 N. W. 409.

Expert evidence, competent to show ordinary usage and proper method in dealing with dangerous agencies. Bardsley *v.* Gill, 218 Pa. 56, 66 A. 1112; Parlett *v.* Dunn, 102 Va. 459, 46 S. E. 467.

And usual and customary charge for exchange, as well as custom as to charging interest for amount for which drafts have been drawn. Sullivan *v.* Owens (Tex. Civ.), 90 S. W. 690.

Evidence of particular transactions may be shown to contradict witness testifying to general custom. Rose *v.* Lewis, 157 Ala. 521, 48 S. 105.

959-31 Horst *v.* Lovdal, 113 App. Div. 277, 98 N. Y. S. 996; Collins *v.* Mechling, 1 Pa. Super. 594; Prigg *v.* Preston, 28 Pa. Super. 272; Smith *v.* Co., 38 Wash. 454, 80 P. 779 (as to duties of mine employe must be limited to mine in question). But in Dossett *v.* Co., 40 Wash. 276, 82 P. 273, it was held competent to receive evidence of customs or rules in force in other mills of same kind and capacity concerning duties of employes of character alleged to have caused injury sued for. Questions must not be indefinite. Cook *v.* Co., 197 Mass. 7, 83 N. E. 325. See also Tarnowski *v.* R. Co. (Ind.), 104 N. E. 16.

It is sufficient if custom is shown to be generally recognized and observed by those engaged in the kind of transactions to which it applies within region where it is claimed to exist; not essential it be observed in every individual transaction. Traders Ins. Co. *v.* Dobbins, 114 Tenn. 227, 86 S. W. 383. But existence of general custom is not shown by testimony of witnesses from single locality. National F. Ins. Co. *v.* Hanberg, 215 Ill. 378, 74 N. E. 377; Muren C. & I. Co. *v.* Howell, 107 Ill. App. 1 (testimony should not be limited to a county).

959-32 Collins *v.* Mechling, 1 Pa. Super. 594; Prigg *v.* Preston, 28 Pa. Super. 272; Lawson *v.* Crane, 83 Vt. 115, 74 A. 641.

Proof must not be remote from occurrence in question. S. *v.* Hoffman, 120 La. 949, 45 S. 951.

959-33 Lauchheimer *v.* Jacobs, 126 Ga. 261, 55 S. E. 55; Hichhorn *v.* Bradley, 117 Ia. 130, 90 N. W. 592; Jones *v.* Herrick, 141 Ia. 615, 118 N. W. 444; Dickinson *v.* City, 75 N. Y. 65; Penland *v.* Ingle, 138 N. C. 456, 50 S. E. 850. See Southern R. Co. *v.* Lewis, 165 Ala. 451, 51 S. 863.

960-35 Biggs *v.* Langhammer, 103 Md. 94, 63 A. 198.

Question for jury.—Burton *v.* Jennings, 185 Fed. 382, 107 C. C. A. 438; Carr *v.* D. L. & W. R. Co., 81 N. J. L. 532, 79 A. 322.

960-36 Loval *v.* Wolf (Ala.), 60 S. 298; Ennis Brown Co. *v.* Hurst, 1 Cal. App. 752, 82 P. 1056; Stern *v.* Simons, 77 Conn. 150, 58 A. 696; Youman's Jewelry Co. *v.* Bank (Ga.), 80 S. E. 1005; Thomas *v.* Charles (Ky.), 119 S. W. 752; McKown *v.* Gettys, 25 Ky. L. R. 2070, 80 S. W. 169; Birely *v.* Dodson, 107 Md. 229, 68 A. 488; New England Box Co. *v.* Flint (N. H.), 90 A. 789; Tweedie T. Co. *v.* Craig, 159 App. Div. 192, 144 N. Y. S. 64; Drummond *v.* Norton Co., 156 App. Div. 126, 141 N. Y. S. 29.

960-37 Gardner *v.* Co. (1903), App. Cas. (Eng.) 229, (1901) 2 Ch. 198; Borden & Co. *v.* Lumb. Co., 7 Ala. App. 335, 62 S. 245; Jones *v.* Co., 109 N. Y. S. 706.

961-38 Custom of street car operators to give funeral processions right of way may be shown on issue of negli-

gence. Wilmington C. R. Co. *v.* White, 6 Penne. (Del.) 363, 66 A. 1009.

961-39 Chicago, etc. R. Co. *v.* Lindeman, 143 Fed. 946, 75 C. C. A. 18; Loyal *v.* Wolf (Ala.), 60 S. 298; Broyles *v.* R. Co., 166 Ala. 616, 52 S. 81; Eady *v.* Co., 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650; Peoples Sav. Bk. *v.* Smith, 114 Ga. 185, 39 S. E. 920; International S. Co. *v.* Tennant, 144 Ill. App. 30; Eckstein *v.* Schleimer, 62 Misc. 635, 116 N. Y. S. 7; Barnard & Bunker *v.* Houser (Or.), 137 P. 227; Smith *v.* Landa, 45 Tex. Civ. 446, 101 S. W. 470; Charles Syer & Co. *v.* Lester (Va.), 82 S. E. 122; Zartner *v.* George, 156 Wis. 131, 145 N. W. 971; Lemke *v.* Hage, 142 Wis. 178, 125 N. W. 440.

See Yorty *v.* S. (Ala. App.), 65 S. 914; O'Gallagher *v.* Lockhart, 263 Ill. 489, 105 N. E. 297; Stevens *v.* Wisconsin F. L. Co., 124 Minn. 421, 145 N. W. 173; Instances may be shown of departure from custom (S. *v.* R., 58 N. H. 410; Parrott *v.* R., 140 N. C. 546, 53 S. E. 432) if they are not too remote. Instances of non-observance by other employes may not be shown if investigation would be unduly prolonged. S. *v.* R., 58 N. H. 410.

If custom relied upon is not general, residents of locality in which it is alleged to be established may testify they have no knowledge of it. Prigg *v.* Preston, 28 Pa. Super. 272.

961-40 Southern R. Co. *v.* Wooley, 158 Ala. 447, 48 S. 369; Sloss S. Co. *v.* Smith (Ala.), 40 S. 91; St. Louis, I. M. & S. R. Co. *v.* Wirbel, 108 Ark. 437, 158 S. W. 118; St. Louis, I. M. & S. R. Co. *v.* Bailey, 140 Ky. 194, 130 S. W. 1077; McDonough *v.* Co., 111 App. Div. 585, 98 N. Y. S. 90; Chicago, etc. R. Co. *v.* Dodson, 25 Okla. 822, 107 P. 921; Texas C. R. Co. *v.* Waldie (Tex. Civ.), 101 S. W. 517; Parlett *v.* Dunn, 102 Va. 459, 46 S. E. 467; Nagle *v.* Hake, 123 Wis. 276, 101 N. W. 409.

Though it is true no single instance may prove a custom, evidence by different witnesses, though ignorant as to the general customs, as to the custom in the particular establishments in which they are employed is proper as the basis for a finding as to what such general custom is. Bardsley *v.* Gill, 218 Pa. 56, 66 A. 1112.

"It is only where the evidence clearly establishes a fixed habit or custom that it possesses any evidentiary force." Proof of any number of independent, usurious transactions by appellant bank would not tend to establish the usurious character of the contracts under investigation, unless such course of dealing was the established custom of the bank." Nocona Nat. Bank *v.* Bolton (Tex. Civ.), 143 S. W. 242.

961-41 See Snipps *v.* R. Co. (Ia.), 146 N. W. 468.

Notarial certificate is prima facie proof paper was presented in accordance with custom. Columbian B. Co. *v.* Bowen, 134 Wis. 218, 114 N. W. 451.

Custom of employer as to hiring men by year may be shown. Arkadelphia L. Co. *v.* Asman, 85 Ark. 568, 107 S. W. 1171.

Weight to be given as between connecting carriers.—Presumption that, as between connecting carriers, the last is the negligent one, is not overcome by proof it was their custom, where freight discharged at a joint station, not to regard it as delivered to last carrier until record of it made in its books. Kansas City S. R. Co. *v.* Embry, 76 Ark. 589, 90 S. W. 15.

Direct evidence.—No instruction required. Benton *v.* S., 9 Ga. App. 291, 71 S. E. 8; S. *v.* Harbour, 27 S. D. 42, 129 N. W. 565; Wilson *v.* S., 61 Tex. Cr. 628, 136 S. W. 447; Martinez *v.* S., 61 Tex. Cr. 29, 133 S. W. 881; Sellers v. S., 61 Tex. Cr. 140, 134 S. W. 348.

DAMAGES

Presumption as to liquidated, 8-12; *Notice of claim*, 11-19; *Quantum of proof*, 11-19; *Compensation for pain*, 11-19; *Comparative value of goods*, 11-19; *Injury to trees; scope of inquiry*, 14-32; *Facts provable as between vendor and vendee*, 16-34; *On breach of contract to locate a depot*, 16-34; *Entirety of*, 17-36; *Belief of plaintiff in Christian Science*, 19-41; *Expenses to lessen or prevent*, 20-42; *Profits resulting from contract of agency*, 22-48; *Loss of earning capacity*, 24-53; *Profits of business*, 25-54; *Contract for long time*, 25-54; *On breach of contract to convey land*, 25-54; *Breach of partnership contract*, 25-54; *Breach of contract for concessions*, 25-54; *Injury to growing crops*, 27-61.

4-1 W. U. T. Co. *v.* Totten, 141 Fed. 733, 72 C. C. A. 591; Price *v.* Mfg. Co., 132 Ga. 246, 64 S. E. 87; Hicks *v.* Co.,

13 Ga. App. 154, 78 S. E. 1096; Nordhaus *v.* R. Co., 147 Ill. App. 274; Grace *v.* Strong, 127 Ill. App. 336; S. *v.* Dickmann, 146 Mo. App. 396, 124 S. W. 29; Lampert *v.* D. Co., 119 Mo. App. 693, 100 S. W. 659.

There is no presumption of damage in an action for an alleged injury to person. Beck *v.* Baltimore, etc. R. Co., 233 Pa. 344, 82 A. 466.

No presumption of mental anguish on part of stepmother because of negligence in advising her of death of stepson. Harrison *v.* Co., 143 N. C. 147, 55 S. E. 435.

4-2 Beattie *v.* R. Co., 84 Conn. 555, 80 A. 709; Cothran *v.* Witham, 123 Ga. 190, 51 S. E. 285; Grau *v.* Grau, 37 Ind. App. 635, 77 N. E. 816; Clark *v.* Exp. Co., 130 Ia. 254, 106 N. W. 642; Green *v.* D. Co., 113 La. 869, 37 S. 858; Hasselbusch *v.* Mohnking, 76 N. J. L. 691, 73 A. 961; Phillips *v.* Crosby, 70 N. J. L. 785, 59 A. 142; Mortimer *v.* Otto, 206 N. Y. 89, 99 N. E. 189; Coppola *v.* Kraushaar, 102 App. Div. 306, 92 N. Y. S. 436; Story L. Co. *v.* R. Co., 151 N. C. 23, 65 S. E. 460; Smith *v.* Gunn, 57 Tex. Civ. 339, 122 S. W. 919; Hotel Co. *v.* Co., 41 Wash. 620, 84 P. 402; Kiblinger Co. *v.* Bk., 131 Wis. 595, 111 N. W. 709.

Burden of proof.—Albaugh Bros. Dover & Co. *v.* Lynas, 47 Ind. App. 30, 93 N. E. 678, *aff.* 90 N. E. 908.

It is presumed marketable property could have been sold at market price. Floyd *v.* Mann, 146 Mich. 356, 109 N. W. 679. And that parties who have agreed to erect a building and carry a stock of goods therein contracted with reference to what is usual and customary in the locality. Iowa-M. L. Co. *v.* Conner, 136 Ia. 674, 112 N. W. 820.

4-3 Carrying a woman passenger beyond station and compelling her to alight in distressing and dangerous circumstances. Missouri, K. & T. R. Co. *v.* Maxwell, 104 Tex. 632, 143 S. W. 1147.

Same rule applies to personal torts. Davis *v.* R. Co., 117 La. 320, 41 S. 587. And in case of fraud. Thompson *v.* Newell, 118 Mo. App. 405, 94 S. W. 557.

Increase in value of land because of legal wrong does not prevent recovery of nominal damages. Crabtree C. M. Co. *v.* Hamby, 28 Ky. L. R. 687, 90 S. W. 226; 1 Sutherland on Damages (3d ed.), §2.

It is presumed employment of physicians results in expense and their help may be needed in future, continuance of suffering being shown. Webster *v.* R. Co., 42 Wash. 361, 85 P. 2.

5-4 Washington T. Co. *v.* Downey, 26 App. Cas. (D. C.) 258; Dorn *v.* Cooper, 139 Ia. 742, 117 N. W. 1, 118 N. W. 35; Ott *v.* Co., 40 Wash. 308, 82 P. 403.

6-6 Leifer Mfg. Co. *v.* Gross, 93 Ark. 277, 124 S. W. 1039; George *v.* Drawdy, 56 Fla. 303, 47 S. 939; Shaw *v.* Jones, 133 Ga. 446, 66 S. E. 240; Milledgeville W. Co *v.* Fowler, 129 Ga. 111, 58 S. E. 643; National Refrigerator, etc. Co. *v.* Parmalee, 9 Ga. App. 725, 72 S. E. 191; Palmer *v.* Ingram, 2 Ga. App. 200, 58 S. E. 362 (immaterial there is neither plea nor answer); Seventh St. P. M. Co. *v.* Schaefer, 30 Ky. L. R. 623, 99 S. W. 341; Haynes *v.* Nye, 185 Mass. 507, 70 N. E. 932; Sessinghaus Mill Co. *v.* Hanebrink, 247 Mo. 212, 152 S. W. 354; Parkins *v.* R. Co., 76 Neb. 242, 107 N. W. 260; New York B. N. Co. *v.* Co., 92 App. Div. 427, 87 N. Y. S. 200; Rau *v.* Weyand, 89 App. Div. 200, 85 N. Y. S. 916; Kann *v.* Bennett, 223 Pa. 36, 72 A. 342; Bigham *v.* R. Co., 223 Pa. 106, 72 A. 318; Hawkins *v.* Hubbell, 127 Tenn. 312, 154 S. W. 1146; Bradford *v.* Co., 115 Tenn. 610, 92 S. W. 1104, 9 L. R. A. (N. S.) 979; Van Alstyne *v.* Morrison, 33 Tex. Civ. 670, 77 S. W. 655; Davidson *v.* Munsey, 29 Utah 181, 80 P. 743; Revett *v.* Co., 56 Wash. 559, 106 P. 176; Hotel Co. *v.* Co., 41 Wash. 620, 84 P. 402; Sproul *v.* Huston, 42 Wash. 106, 84 P. 631; Herrick Imprvt. Co. *v.* Kelly, 65 Wash. 16, 117 P. 765. And see Boyd *v.* Lincoln, etc. R. Co., 89 Neb. 840, 132 N. W. 529; Gorham Co. *v.* United Eng., etc. Co., 202 N. Y. 342, 95 N. E. 805.

Evidence as to dividends paid is admissible to show amount of damage for failure to deliver stock. Garner *v.* Kratzer (Ia.), 145 N. W. 72.

Presumption indulged party to contract would have so acted as to protect himself from increased expenditure but for wrong done him. Michigan L. Co. *v.* L. Co., 53 Wash. 604, 102 P. 450.

Burden on defendant.—If contract price for services is prima facie measure of damages after performance, burden is on party in default to show damages were less. Ware *v.* Co., 192 N. Y. 439, 85 N. E. 666.

Absolute certainty, not required. Wil-

kinson v. Dunbar, 149 N. C. 20, 62 S. E. 748.

Presumption of penalty rather than of liquidated damages.—Evans v. Mosely, 81 Kan. 322, 114 P. 374.

7-7 California N. & I. Co. v. Co., 176 Fed. 533, 100 C. C. A. 21; Lynch v. Chew, 159 Fed. 182; The Loch Trool, 150 Fed. 429; Sloss-Sheffield Steel & I. Co. v. Stewart, 172 Ala. 516, 55 S. 785; Smith v. New Decatur, 166 Ala. 334, 51 S. 984; Saunders v. Collins, 56 Fla. 534, 47 S. 958; Postal T. Co. v. Peyton, 124 Ga. 746, 52 S. E. 803; Gardner v. Tel. Co. (Ga. App.), 81 S. E. 259; Roseborough v. Whittington, 15 Ida. 100, 96 P. 437; Tarr v. R. Co., 14 Ida. 192, 93 P. 957; Illinois C. R. Co. v. Trustees, 212 Ill. 406, 72 N. E. 39; Wea Tp. v. Cloyd, 46 Ind. App. 49, 91 N. E. 979; Coalgate Co. v. Isherwood, 7 Ind. Ty. 139, 104 S. W. 565; Freeman v. Strobehn, 122 Ia. 157, 97 N. W. 1094; Uncle Sam O. Co. v. Forrester, 79 Kan. 610, 100 P. 512; Louisville & N. R. Co. v. McClain, 23 Ky. L. R. 1878, 66 S. W. 391; Nicholson v. Merritt, 23 Ky. L. R. 2281, 67 S. W. 5; Deal v. R. Co., 144 Mo. App. 691, 129 S. W. 52; Edwards v. Lee, 147 Mo. App. 38, 126 S. W. 194; Whitfield v. Co., 152 N. C. 211, 67 S. E. 512; Harrison v. Co., 143 N. C. 147, 55 S. E. 435; Gulf T. & W. R. Co. v. Lowrie (Tex. Civ.), 144 S. W. 367; International, etc. R. Co. v. Doolan, 56 Tex. Civ. 503, 120 S. W. 1118 (expenditures); Woodhouse v. Powles, 43 Wash. 617, 86 P. 1063.

And see Oehmen v. Portmann, 153 Mo. App. 240, 133 S. W. 104.

Damage from water.—Plaintiff must show actual damage to recover for alleged injury to his land from the flow of water thereon. Killian v. Killian, 175 Ala. 224, 57 S. 825.

"We are not prepared to admit that loss of wages, doctor's bill, and hospital expenses are such damages as need to be specially pleaded to be recoverable in this action." Bettman v. Shiauer, 113 Va. 24, 73 S. E. 436.

Value of services.—Weigel v. Brown, 194 Fed. 824, 115 C. C. A. 442.

Cost of medicine and nursing.—Frankhouse v. Butcher, 141 Mo. App. 660, 129 S. W. 425.

Substantial damages presumed in favor of next of kin sustaining lineal relation to one whose death caused by negligence. Dukeman v. R. Co., 237 Ill. 104, 86 N. E. 712. See Newton v. Brown, 152 N. C. 200, 67 S. E. 514.

Extent of damage must be shown. Birmingham R. Co. v. Camp, 161 Ala. 156, 49 S. 846.

Loss or damage in money need not be shown, but facts from which amount may be inferred. Melone v. R. Co., 151 Cal. 113, 91 P. 522; St. Louis S. R. Co. v. Acker, 44 Tex. Civ. 560, 99 S. W. 121; Gulf, etc. R. Co. v. Booth (Tex. Civ.), 97 S. W. 128.

Mental suffering, inferred from severe physical injury. Galveston, etc. R. Co. v. Garrett, 44 Tex. Civ. 406, 98 S. W. 932.

8-8 Wrongdoer need not have contemplated effects of act. Cowan v. Co., 122 Ia. 379, 98 N. W. 281.

Malice and wantonness need not be shown though alleged, it being also alleged act done unlawfully. Rice F. Co. v. R. Co., 35 Wash. 535, 77 P. 839.

Admission as to damage sustained, binding. Curtis v. R. & N. Co., 36 Wash. 55, 78 P. 133.

Permanent injury shown. Hoober v. New Holland, etc. Co., 43 Pa. Super. 262.

Exactitude in proof not essential to recovery of damages exceeding nominal sum. Baker v. Hutchinson, 147 Ala. 636, 41 S. 809. This view has special application to injuries done infants (McDermott v. Severe, 25 App. Cas. [D. C.] 276), and where future pain and suffering involved as result of physical injury, proof of which is itself sufficient. Kirkham v. Co., 39 Wash. 415, 81 P. 869.

8-12 Gropp v. Perkins, 148 Ky. 183, 146 S. W. 389; Myers-Goldberg N. Co. v. Grossman, 167 Mo. App. 722, 151 S. W. 163.

If stipulation concerning damages is held to be a penalty, damages must be proved. Coen v. Birchard, 124 Ia. 394, 100 N. W. 48.

Presumption as to liquidated damages. It is presumed where a forfeiture is unqualifiedly specified as a penalty it was the intention to provide for a penalty and not for stipulated damages. Caesar v. Rubinson, 174 N. Y. 492, 67 N. E. 58; Small v. Burke, 92 App. Div. 338, 86 N. Y. S. 1066; Wilkinson v. Colley, 164 Pa. 35, 30 A. 286; Knickerbocker I. Co. v. Montgomery, 21 Pa. C. C. 409; Keck v. Bieber, 148 Pa. 645, 24 A. 170; Schmid v. Eppers, 17 Pa. Dist. 1064. A mere receipt of deposit

money is presumed to evidence payment as security. Weinberg *v.* Greenberger, 47 Misc. 117, 93 N. Y. S. 530; Brodfeld *v.* Schlanger, 104 N. Y. S. 369. If damages resulting from non-performance of contract will amount to sum named as a penalty for its breach party claiming such sum as stipulated damages has burden of showing the fact. Small *v.* Burke, 92 App. Div. 338, 86 N. Y. S. 1066. And if stipulation purports to liquidate damages burden of showing such was not the intent is upon party so claiming. Kelly *v.* Fejervary, 111 Ia. 693, 83 N. W. 791; Selby *v.* Matson, 137 Ia. 97, 114 N. W. 609, 14 L. R. A. (N. S.) 1210. If damages resulting from breach of contract cannot to be shown with any degree of certainty presumption is in favor of liquidated damages. Moyses *v.* Schendorf, 142 Ill. App. 293. Burden on defendant to show validity of stipulation. Sherman *v.* Gray, 11 Cal. App. 348, 104 P. 1004.

Intent governs in determining whether liquidated damages or penalty stipulated for; all circumstances surrounding the transaction considered in connection with writing. Traut-D. Const. Co. *v.* Hartman, 112 N. Y. S. 919; Cerero *v.* Co., 111 N. Y. S. 615.

8-13 Coghlin *v.* La Fonderie, 34 Can. Sup. 153; Norfolk & P. T. Co. *v.* Miller, 174 Fed. 607, 98 C. C. A. 453; W. U. T. Co. *v.* Cashman, 132 Fed. 805, 65 C. C. A. 607; Philadelphia, etc. R. Co. *v.* Green, 110 Md. 32, 71 A. 986; Adams *v.* Mfg. Co., 29 R. I. 333, 71 A. 180 (acts must have amounted to criminality); Ellis *v.* Wahl (Mo. App.), 167 S. W. 582; Wehmeyer *v.* Mulvihill, 150 Mo. App. 197, 130 S. W. 681; Prince *v.* Ins. Co., 77 S. C. 187, 57 S. E. 766 (breach of contract).

It is error to submit the issue of punitive damages to the jury in the absence of testimony which would warrant a verdict therefor. Hunter *v.* R. Co., 90 S. C. 507, 73 S. E. 1017.

In Givens *v.* **Co.,** 91 S. C. 417, 74 S. E. 1067, "evidence was admitted over defendant's objection to prove remote and speculative damages, the court holding that the complaint alleged a wilful and wanton violation of the contract which, if proved, would entitle plaintiff to punitive damages. This was error. Punitive damages are not recoverable for breach of contract except where the breach is accompanied by an intent to defraud the other party to the contract. Welborn *v.* Dixon, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407. There is no allegation of fraud in this case. Therefore punitive damages are not recoverable, notwithstanding the allegation of a willful and wanton violation of the contract by the defendant."

Evidence sufficient.—Nelson *v.* R. Co., 92 S. C. 151, 75 S. E. 408; Bennett *v.* R. Co., 92 S. C. 72, 75 S. E. 277.

Malice, presumed.—Nicholson *v.* Merritt, 23 Ky. L. R. 2281, 67 S. W. 5; Shoemaker *v.* Sonju, 15 N. D. 518, 108 N. W. 42. It is not necessary it exist if wrong done wilfully, wantonly or recklessly. Thomasson *v.* R. Co., 72 S. C. 1, 51 S. E. 443. Denial of statutory right may justify punitive damages. Park *v.* Mills, 75 S. C. 560, 56 S. E. 234.

Threats will not sustain exemplary damages. Waggoner *v.* Snody, 98 Tex. 512, 85 S. W. 1134.

9-14 Chicago, etc. R. Co. *v.* Whitten, 90 Ark. 462, 119 S. W. 835; Louisville & N. R. Co. *v.* Mount, 31 Ky. L. R. 210, 101 S. W. 1182.

9-15 Neafie *v.* Co., 72 N. J. L. 340, 62 A. 1129.

9-16 Duffy *v.* Frankenberg, 144 Ill. App. 103; International H. Co. *v.* Co., 146 Ia. 172, 122 N. W. 951 (to some amount); Cole *v.* Gray, 70 Kan. 705, 79 P. 654; Olson *v.* Riddle, 22 N. D. 144, 132 N. W. 655; Beckham *v.* Collins, 54 Tex. Civ. 241, 117 S. W. 431 (actual damages); Seal *v.* Holcomb, 48 Tex. Civ. 330, 107 S. W. 916; Girard *v.* Moore, 86 Tex. 675, 26 S. W. 945; Lightfoot *v.* Murphy, 47 Tex. Civ. 112, 104 S. W. 511; Malin *v.* McCutcheon, 33 Tex. Civ. 387, 76 S. W. 586; Rogers *v.* O'Barr (Tex. Civ.), 76 S. W. 593.

Contra, Vlasservitch *v.* R. Co., 85 S. C. 291, 67 S. E. 306; Fields *v.* Mills, 77 S. C. 546, 58 S. E. 608, 122 Am. St. 593, 11 L. R. A. (N. S.) 822.

A safe and salutary rule.—Day *v.* Becker (Tex. Civ.), 145 S. W. 1197.

Exemplary damages warranted.—Kittrell *v.* Irwin (Tex. Civ.), 149 S. W. 199.

Money extent of actual damages need not be found to sustain judgment for exemplary damages. McConathy *v.* Deck, 34 Colo. 461, 83 P. 135. Proof of nominal damages resulting from substantial injury will support exemplary damages. Robinson *v.* Goings, 63

Miss. 500; Favorite *v.* Cottrill, 62 Mo. App. 119. Nominal damages will support recovery of punitive damages. Louisville & N. R. Co. *v.* Smith, 141 Ala. 335, 37 S. 490; Goodson *v.* Stewart, 154 Ala. 660, 46 S. 239.

10-18 Howard S. Co. *v.* Wells, 176 Fed. 512, 100 C. C. A. 70 (ability to have prevented or mitigated); In re Duquesne I. L. Co., 176 Fed. 785; Am. China D. Co. *v.* Boyd, 148 Fed. 258; Lillard *v.* Co., 134 Fed. 168, 67 C. C. A. 74; Western U. T. Co. *v.* Co. (Ala.), 65 S. 962; Pickles *v.* Ansonia, 76 Conn. 278, 56 A. 552; Baxter *v.* Camp, 71 Conn. 245, 41 A. 803; Nat. Refrig., etc. Co. *v.* Parmalee, 9 Ga. App. 725, 72 S. E. 191; Mimms *v.* Betts Co., 9 Ga. App. 718, 72 S. E. 271; Bell-Knox C. Co. *v.* Gregory, 152 Ky. 415, 153 S. W. 465; Hermann *v.* Co., 144 Mo. App. 147, 129 S. W. 414; Ramsey *v.* Co., 72 N. J. Eq. 165, 65 A. 461; Deri *v.* Bk., 65 Misc. 531, 120 N. Y. S. 813; Cleveland-C. S. Co. *v.* Co., 148 N. C. 533, 62 S. E. 637; Huntington E. P. Co. *v.* Parsons, 62 W. Va. 26, 57 S. E. 253, 9 L. R. A. (N. S.) 1130; Star Pub. Co. *v.* Knosher & Co., 62 Wash. 215, 113 P. 569.

When one sues for the breach of a contract, the measure of his recovery is prima facie full payment at the contract rate; but the defendant may mitigate damages by showing that the plaintiff, by the exercise of ordinary care and diligence, could have rendered his net loss less than that amount; the burden being upon the defendant to allege and prove this defensive matter. The ultimate measure of damage, after all the facts have been heard, is the net loss incurred by the plaintiff by reason of the defendant's refusal to permit continued performance of the contract. Mimms *v.* Betts Co., 9 Ga. App. 718, 72 S. E. 271.

Aggravation of injuries by neglect must be shown by defendant. Birmingham R. L. & P. Co. *v.* Anderson, 163 Ala. 72, 50 S. 1021.

Practicability of lessening damages must be shown by wrongdoer. International, etc. R. Co. *v.* Sandlin, 57 Tex. Civ. 151, 122 S. W. 60.

Plaintiffs' habits.—Felske *v.* Detroit, etc. R. Co., 166 Mich. 367, 130 N. W. 676.

To be relevant on issue of mitigation, facts and circumstances must relate to matters that are reasonable and which party might be expected to exercise. Mayrant *v.* Columbia, 82 S. C. 273, 64 S. E. 416.

11-19 Patton *v.* R. Co., 179 U. S. 658; W. U. T. Co. *v.* Totten, 141 Fed. 533, 72 C. C. A. 591; Chicago, etc. R. Co. *v.* Heil, 154 Fed. 626, 83 C. C. A. 400; Fleming *v.* Pullen (Tex. Civ.), 97 S. W. 109. But *comp.* Blunck *v.* R. Co. (Ia.), 115 N. W. 1013. As to sufficiency of evidence, see New York F. Co. *v.* Wynkoop, 29 App. Cas. (D. C.) 594; Mitchell *v.* Co., 43 Wash. 195, 86 P. 405; Harris *v.* Mt. Vernon, 41 Wash. 444, 83 P. 1023.

Though it be presumed mental suffering is connected with bodily pain, it cannot be presumed what cause of pain was. Houston, etc. R. Co. *v.* Reasonover, 36 Tex. Civ. 274, 81 S. W. 329.

Notice of claim.—Party who alleges notice of demand has not been duly given must show the fact. Texas & P. R. Co. *v.* Crowley (Tex. Civ.), 86 S. W. 342.

Extent of plaintiff's interest in property owned jointly must be shown by him. Waggoner *v.* Snody, 98 Tex. 512, 85 S. W. 1134.

Quantum of proof.—Fact and extent of loss or injury must be shown with reasonable certainty. Lake Drummond *v.* Co., 142 Fed. 41, 73 C. C. A. 227; Calkins *v.* Co., 150 Cal. 426, 88 P. 1094; Dean *v.* Standifer, 37 Tex. Civ. 181, 83 S. W. 230. Same rule applies to prospective damages. Chicago, etc. R. Co. *v.* DeClow, 124 Fed. 142, 61 C. C. A. 31; Chicago, etc. R. Co. *v.* Lindeman, 143 Fed. 946, 75 C. C. A. 18; Chicago, etc. R. Co. *v.* Newsome, 154 Fed. 665, 83 C. C. A. 422; The North Star, 151 Fed. 168, 80 C. C. A. 536; Melone *v.* R. Co., 151 Cal. 113, 91 P. 522; Cordiner T. Co. *v.* Co., 5 Cal. App. 400, 91 P. 436; Chicago, etc. R. Co. *v.* Ulrich, 213 Ill. 170, 72 N. E. 815; Huggard *v.* Co., 132 Ia. 724, 109 N. W. 475; Wilkerson *v.* R. Co., 126 Mo. App. 613, 105 S. W. 24; Garard *v.* Co., 207 Mo. 242, 105 S. W. 767; Nixon *v.* R. Co., 79 Neb. 550, 113 N. W. 117. Prospective damages may be recovered if it is shown they are reasonably probable to occur. Galveston, etc. R. Co. *v.* Paschall, 41 Tex. Civ. 357, 92 S. W. 446; Tipton *v.* Tipton, 47 Tex. Civ. 619, 105 S. W. 830; St. Louis S. R. Co. *v.* Garber (Tex. Civ.), 108 S. W. 742; St. Louis S. R. Co. *v.* Hawkins, 49 Tex. Civ. 545, 108 S. W. 736.

Compensation for pain.—"It is well settled that as to mental and physical pain and humiliation it is unnecessary to submit any evidence as to the value thereof and the amount of damages to compensate therefor, but that the same is a question entirely and exclusively for the jury." Tarr *v.* R. Co., 14 Ida. 192, 93 P. 957. Proof as to extent of damage in tort actions need not be direct and positive. Wood *v.* Monteleone, 118 La. 1005, 43 S. 657.

Comparative value of goods.—Where damages are sought for injury to goods the testimony as to value of those damaged must cover a sufficient quantity to enable jury to make an intelligent comparison between their present and previous value. Keroes *v.* Weaver, 27 App. Cas. (D. C.) 384. Proof twenty per cent. of goods furnished were defective and those tested were fairly representative of all, is sufficient to show all were of that nature. Forster *v.* Co., 130 Wis. 281, 110 N. W. 226. Value of missing parcels, part of a large lot of unequal value, will be assumed, as against their possessor, to be of average value of the whole. First Nat. Bk. *v.* R. Co., 97 Tex. 201, 77 S. W. 410.

Testimony to show loss of profits in future of a business which has not been profitable must clearly show a change in conditions favorable thereto. Des Allemands L. Co. *v.* Co., 117 La. 1, 41 S. 332.

11-20 Pihlman *v.* Connery, 111 N. Y. S. 654. *Contra*, Rourke *v.* R. Co., 221 Mo. 46, 119 S. W. 1094.

11-21 Swanson *v.* R. Co., 116 Ia. 304, 89 N. W. 1088; Chicago, etc. R. Co. *v.* Mosher, 76 Kan. 599, 92 P. 554.

Proof of injury to reputation need not be very specific. Columbia Nat. Bk. *v.* MacKnight, 29 App. Cas. (D. C.) 580.

Statement of person's condition since being injured is rather of the nature of a collective fact that an opinion. Mobile L. & R. Co. *v.* Walsh, 146 Ala. 295, 40 S. 560.

Value of services a party could render if he had not been injured may be testified of, reasons being given. City E. R. Co. *v.* Smith, 121 Ga. 663, 49 S. E. 724.

12-24 Richner *v.* Co., 44 Colo. 302, 98 P. 178; Muncie P. Co. *v.* Martin, 164 Ind. 30, 72 N. E. 882; Blunck *v.* R. Co. (Ia.), 115 N. W. 1013; Willitts *v.* R. Co., 88 Ia. 281, 55 N. W. 313, 21 L. R. A. 608; South Omaha *v.* Ruthjen, 71 Neb. 545, 99 N. W. 240; St. Louis S. R. Co. *v.* Allen (Tex. Civ.), 117 S. W. 923; Ft. Worth, etc. R. Co. *v.* Bk., 36 Tex. Civ. 293, 81 S. W. 1050.

Purpose for which trees are valuable may be shown by opinions. Union P. R. Co. *v.* Murphy, 76 Neb. 545, 107 N. W. 757.

12-25 Sloss-Sheffield, etc. Co. *v.* Webb (Ala.), 63 S. 518; Tennessee C., etc. Co. *v.* McMillion, 161 Ala. 130, 49 S. 880; Atlanta, etc. R. Co. *v.* Brown, 158 Ala. 607, 48 S. 73, *cit.* the text; Liefer Mfg. Co. *v.* Gross, 93 Ark. 277, 124 S. W. 1039; McCrary *v.* Pritchard, 119 Ga. 876, 47 S. E. 341; McGuire *v.* Mfg. Co., 23 Ida. 608, 131 P. 654; City of Lexington *v.* Chenault, 151 Ky. 774, 152 S. W. 939; Helton *v.* Asher, 135 Ky. 751, 123 S. W. 285 (difference in value before and after may be stated); Owen *v.* R. Co., 109 Mo. App. 608, 83 S. W. 92; Power *v.* Turner, 37 Mont. 521, 97 P. 950; Patten *v.* Lynett, 133 App. Div. 746, 118 N. Y. S. 185; Am. P. F. Co. *v.* Elliott, 151 N. C. 393, 66 S. E. 451; Raymond *v.* Edelbrock, 15 N. D. 231, 107 N. W. 194; Pacific L. S. Co. *v.* Murray, 45 Or. 103, 76 P. 1079; International, etc. R. Co. *v.* Fickey (Tex. Civ.), 125 S. W. 327; De Wald *v.* Ingle, 31 Wash. 616, 72 P. 469; Berg *v.* Co., 38 Wash. 342, 80 P. 528.

See Nelson T. Co. *v.* Nelson, 216 Mass. 30, 102 N. E. 926; Bilhimer *v.* R. Co., 137 Mo. App. 675, 119 S. W. 502.

A witness should be required to state the facts and show what the damage is under the law. The witness should not be left to testify as to the law and facts, nor to testify in general terms, but the question should be so framed as to enable the witness to tell what the damage is under the criterion of damages governing the case. Haven Malleable Castings Co. *v.* Co., 146 Ky. 135, 142 S. W. 227.

This question was properly excluded: How much do you consider is your loss in being deprived of the use of your automobile from April till June 22d, when you could run it? Flint Motor Car Co. *v.* Everson, 34 R. I. 65, 82 A. 726.

13-26 Clark *v.* R. Co., 142 Cal. 614, 76 P. 507.

13-27 Statement of extent of damage to articles does not invade province of the jury. Kates Transfer & Ware-

house Co. *v.* Klassen, 6 Ala App. 301, 59 S. 355.

14-28 Seaboard A. L. R. Co. *v.* Brown, 158 Ala. 630, 48 S. 48, *aff.* the text.

14-29 Atlanta & B. Air Line R. *v.* Wood, 160 Ala. 657, 49 S. 426; Linforth *v.* Co., 156 Cal. 58, 103 P. 320; Suehr *v.* Dist., 149 Ill. App. 328, *aff.* 242 Ill. 496, 90 N. E. 197; Madisonville, etc. R. Co. *v.* Renfro (Ky.), 127 S. W. 508; Whitfield *v.* Co., 152 N. C. 211, 67 S. E. 512 (damage to land by cutting timber under specified size); Hutchinson *v.* Co., 49 Wash. 469, 95 P. 1023 (amount of loss suffered for each of three years by crops because of failure to furnish water).

14-30 Montana R. *v.* Warren, 137 U. S. 348; The Mobila, 147 Fed. 882; St Louis, etc. R. Co. *v.* Edwards, 78 Fed. 745, 24 C. C. A. 300; St. Louis, etc. R. Co. *v.* Co., 161 Ala. 332, 50 S. 81; Tennessee C., etc. Co. *v.* McMillion, 161 Ala. 130, 49 S. 880; Miller *v.* Luckey, 132 Ga. 581, 64 S. E. 658; Roseborough *v.* Whittington, 15 Ida. 100, 96 P. 437 (amount of damage to range by sheep); Muncie P. Co. *v.* Martin, 164 Ind. 30, 72 N. E. 882; Jefferies *v.* R. Co., 147 Ia. 124, 124 N. W. 367; Richardson *v.* Sioux City, 136 Ia. 436, 113 N. W. 928; Rourke *v.* R. Co., 221 Mo. 46, 119 S. W 1094 (expert opinion); McCrary *v.* R. Co., 109 Mo. App. 567, 83 S. W. 82; Sullivan *v.* Girson, 39 Mont. 274, 102 P. 320; Watson *v.* Co., 31 Mont. 513, 79 P. 14; Hart *v.* R. Co., 83 Neb. 652, 120 N. W. 176; Wilkinson *v.* Dunbar, 149 N. C. 20, 62 S. E. 748 (estimate of difference between cost of performance and contract price); Duffy *v.* Power Co. (Pa.), 88 A. 935; St. Louis S. R. Co. *v.* Allen (Tex. Civ.), 117 S. W. 923; Webb *v.* Daggett, 39 Tex. Civ. 390, 87 S. W. 743 (amount of deterioration in value of improvements); St Louis S. R. Co. *v.* Crabb (Tex. Civ.), 80 S. W. 408; Gibson *v.* Wheldon, 82 Vt. 75, 72 A. 909; Ingram *v.* Co., 35 Wash. 191, 77 P. 31; Hurxthal *v.* Co., 65 W. Va. 346, 64 S. E. 355; Wolf *v.* R. Co., 140 Wis. 337, 122 N. W. 743.

Testimony showing value of the colt immediately before and after the operation. Loomis *v.* Besse, 148 Wis. 647, 135 N. W. 123.

Assessment of property by officer, who fixed its value, not admission. Boyer *v.* R. Co., 97 Tex. 107, 76 S. W. 441.

14-31 Neal *v.* Wks., 131 Ga. 701, 63 S. E. 221; Hartford D. Co. *v.* Calkins, 109 Ill. App. 579; Bilhimer *v.* R. Co., 137 Mo. App. 675, 119 S. W. 502; Power *v.* Turner, 37 Mont. 521, 97 P. 950 (it seems); French *v.* Co., 50 Wash. 257, 97 P. 60 (not cause for reversal).

Opinion as to land damage, competent if based solely on what witness saw. Winnett *v.* Co., 37 Pa. Super. 204.

14-32 McCune *v.* R. Co., 154 Fed. 63, 83 C. C. A. 175; Horton *v.* R. Co., 161 Ala. 107, 49 S. 423 (if property injured it is competent to show disposition made of it); Montgomery S. R. Co. *v.* Hastings, 138 Ala. 432, 35 S. 412 (change in disposition of horse affecting value); Ballenger *v.* Shumate (Ala. App.), 65 S. 416; St. Louis, etc. R. Co. *v.* Hutchinson, 101 Ark. 424, 142 S. W. 527; Sacchi *v.* Co., 13 Cal. App. 72, 108 P. 885; Freeman *v.* Co. (Del.), 80 A. 1001; File *v.* R. Co., 7 Penne. (Del.) 463, 80 A. 623; Brown *v.* Bannister, 14 Haw. 34; Deering *v.* Barzak, 227 Ill. 71, 81 N. E. 1 (loss of virility); Postal T. Co. *v.* Likes, 225 Ill. 249, 80 N. E. 136 (loss of virility); Wea Tp. *v.* Cloyd, 46 Ind. App. 49, 91 N. E. 959; Illinois C. R. Co. *v.* Wilson, 31 Ky. L. R. 789, 103 S. W. 364 (mental suffering resulting from false imprisonment); Field *v.* Co., 67 Or. 126, 135 P. 320; Missouri, etc. R. Co. *v.* McLean, 55 Tex. Civ. 130, 118 S. W. 161 (sale of damaged property for best price obtainable); Thompson *v.* Brotherhood, 41 Tex. Civ. 176, 91 S. W. 834 (expulsion of member); McClure *v.* Campbell, 42 Wash. 252, 84 P. 825 (manner of tenant's eviction as basis for recovery for mental suffering); Kelley *v.* Co., 129 Wis. 84, 97 N. W. 674; Partridge *v.* R. Co., 184 Fed. 211, 107 C. C. A. 49; Gulf Comp. Co. *v.* Jones Cotton Co., 172 Ala. 645, 55 S. 206; Nat. Refrig., etc. Co. *v.* Parmalee, 9 Ga. App. 725, 72 S. E. 191; Dykstra *v.* Grand Rapids, etc. R. Co., 165 Mich. 13, 130 N. W. 320; Blasband *v.* Phila., etc. Co., 42 Pa Super. 325; St. Louis, etc. R. Co. *v.* Taylor (Tex. Civ.), 134 S. W. 819. See infra, "Railroads," 575-91.

That injuries will result fatally is admissible on plaintiff's behalf. Atlantic, etc. R. Co. *v.* Thompson, 211 Fed. 889 (C. C. A.).

Evidence that the plaintiff had been studying music with the intention of becoming a singer for hire, in connec-

tion with evidence of injury to her voice, had some bearing upon the question of her earning capacity. Halloran *v.* R. Co., 211 Mass. 132, 97 N. E. 631, *cit.* Ballou *v.* Farnum, 11 Allen (Mass.) 73, 77; McGarrahan *v.* R., 171 Mass. 211, 50 N. E. 610.

In action for dishonoring a check proof may be made of subsequent checks so treated. Columbia Nat. Bk. *v.* MacKnight, 29 App. Cas. (D. C.) 580. But not of previous dishonor of check. Sprowl *v.* Bk., 27 Ky. L. R. 874, 86 S. W. 1117.

Injury to reputation, not inflicted by breach of contract to loan money. Carsey *v.* Farmer, 25 Ky. L. R. 1965, 79 S. W. 245.

Injury to trees; scope of inquiry. Where trees destroyed or injured the courts are not agreed as to admissibility of evidence to show effect of wrong on whole premises. The weight of authority seems to favor the right to do so. Montgomery *v.* Locke, 72 Cal. 75, 13 P. 401; Burdick *v.* R. Co., 87 Ia. 384, 54 N. W. 439; Chicago, etc. R. Co. *v.* Mosher, 76 Kan. 599, 92 P. 554; Louisville & N. R. Co. *v.* Beeler, 31 Ky. L. R. 750, 103 S. W. 300; Illinois C. R. Co. *v.* Riney, 21 Ky. L. R. 1056, 54 S. W. 1100; Illinois C. R. Co. *v.* Scheible, 24 Ky. L. R. 1708, 72 S. W. 325; Cincinnati, etc. R. Co. *v.* Falconer, 30 Ky. L. R. 152, 97 S. W. 727; Stoner *v.* R. Co., 45 La. Ann. 115, 11 S. 875; Union P. R. Co. *v.* Murphy, 76 Neb. 545, 107 N. W. 757; Alberts *v.* Husenetter, 77 Neb. 699, 110 N. W. 657; Fremont *v.* R. Co., 30 Neb. 70, 46 N. W. 217; White *v.* R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824; Bailey *v.* R. Co., 3 S. D. 531, 54 N. W. 596, 19 L. R. A. 653; N. & W. R. Co. *v.* Bohannon, 85 Va. 293, 7 S. E. 236; Gilman *v.* Brown, 115 Wis. 1, 91 N. W. 227.

Contra, Dwight *v.* R. Co., 132 N. Y. 199, 30 N. E. 398, 28 Am. St. 563, 15 L. R. A. 612.

In some states evidence may be given of value of trees in place or of diminished value of estate. Atchison, etc. R. Co. *v.* Geiser, 68 Kan. 281, 75 P. 68; Mogollon G. & C. Co. *v.* Stout, 14 N. M. 245, 91 P. 724.

Unsuccessful efforts to sell damaged property for a stated price cannot be shown. Howard *v.* Fabj, 42 Tex. Civ. 42, 93 S. W. 225.

Value of vessel sunk by collision, not surveyed, and injured by unskilful handling and subsequently exposed to weather must be shown by her value prior to collision and immediately after sinking. Price at which she sold in damaged condition is not evidence to fix recovery. California N. & I. Co. *v.* Co., 176 Fed. 533, 100 C. C. A. 21.

Value of article when delivered for repairs and value it would have had if they had been made, irrelevant in action for breach of contract to make them. Anthony *v.* Moore, 135 App. Div. 203, 120 N. Y. S. 402.

Evidence of damage to timber, competent though measure of damages is lessened value of land. Miller *v.* Neale, 137 Wis. 426, 119 N. W. 94.

Evidence of market value of building, admissible to show difference in value as constructed and as it would have been if built according to contract. Fleming *v.* Lunsford, 163 Ala. 540, 50 S. 921.

If numerous parcels of property damaged by same cause, particular damage to each need not be proved. Grenada C. C. Co. *v.* Atkinson, 94 Miss. 93, 47 S. 644.

Discretionary power of court.—Allen *v.* R. Co., 145 Wis. 263, 129 N. W. 1094.

Purchase price as value.—Allen *v.* R. Co., supra.

Value of farm and sugar trees.—Kilby *v.* Erwin, 84 Vt. 266, 78 A. 1021.

Destruction of crop.—Hilligoss *v.* R. Co., 84 Kan. 372, 114 P. 383.

Value of orchard property before and after fire.—Missouri & N. A. R. Co. *v.* Phillips, 97 Ark. 54, 133 S. W. 191.

Earning capacity.—A. L. Clark Lumb. Co. *v.* St. Coner, 97 Ark. 358, 133 S. W. 1132; Washington *v.* R. Co., 14 Cal. App. 685, 112 P. 904.

Earning capacity long prior to injury. Hobel *v.* R. & L. Co., 229 Pa. 507, 79 A. 119.

Loss of earnings.—Western R. Co. *v.* Wallace, 170 Ala. 584, 54 S. 533.

Habits of plaintiff.—Felske *v.* R. Co., 166 Mich. 367, 130 N. W. 676.

Weight of injured person.—Rapid Transit R. Co. *v.* Williams (Tex.), 136 S. W. 267.

Condition two years after accident. Brown *v.* Tr. Co., 230 Pa. 498, 79 A. 713.

Short of expectancy of life.—Larsen *v.* Tel. Co., 164 Mich. 295, 129 N. W. 894, 17 Det. Leg. N. 1173.

16-33 Hadley *v.* Baxendale, 9 Exch. (Eng.) 341; Taber L. Co. *v.* O'Neal,

160 Fed. 596, 87 C. C. A. 498; Lillard *v.* Co., 134 Fed. 168, 67 C. C. A. 74; Chicago, etc. R. Co. *v.* Miles, 92 Ark. 573, 123 S. W. 775 (cattle were to be shipped to a certain place for sale at auction on a given day, carrier having notice of all facts. It was competent to show demand at sale not met by cattle offered; condition of plaintiff's cattle as compared with those sold, and price at which sales made, price plaintiff's cattle would have brought and price obtained for them at private sale); Richner *v.* Co., 44 Colo. 302, 98 P. 178; Swift *v.* Redhead, 147 Ia. 94, 122 N. W. 140; Lewis *v.* Holmes, 109 La. 1030, 34 S. 66 (failure to complete bridal trousseau, humiliation of bride and inability to accept social invitations); South Gardiner L. Co. *v.* Bradstreet, 97 Me. 165, 53 A. 1110; Myers *v.* Bender, 46 Mont. 497, 129 P. 330; Osterling *v.* Co. (N. H.), 83 A. 887; Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718; Story L. Co. *v.* R. Co., 151 N. C. 23, 65 S. E. 460.

See Carlson *v.* Co., 40 Mont. 434, 107 P. 419.

If from nature of contrast damages cannot be accurately shown jury must estimate from all facts and circumstances shown. Thayer Moore, etc. Co. *v.* Campbell, 164 Mo. App. 8, 147 S. W. 545.

Additional expense plaintiff was put to in cutting, hauling and banking the logs over what he was to pay under the contract, had not defendant wrongfully interfered with its performance. Mealey *v.* Lumb. Co., 118 Minn. 427, 136 N. W. 1090.

Price paid for property.—If property which fails to comply with warranty under which it was sold is bought at a price less than agreed upon, evidence of the price paid is admissible. Petrified B. M. Co. *v.* Rogers, 150 Fed. 445.

Pleadings in injunction suit, competent to show what damages contemplated when supersedeas bond issued. Wayeross A. L. R. Co. *v.* R. Co., 119 Ga. 983, 47 S. E. 582.

Defendant's knowledge of special circumstances when contract made must be shown by plaintiff; form of action does not affect rule. Towles *v.* R. Co., 83 S. C. 501, 65 S. E. 638; Green *v.* R. Co., 83 S. C. 498, 65 S. E. 639.

16-34 Bixby-Theisen Co. *v.* Evans, 174 Ala. 571, 57 S. 39; Williams *v.* Co., 136 N. C. 82, 48 S. E. 559; Harrison *v.* Co., 143 N. C. 147, 55 S. E. 435.

Facts provable as between vendor and vendee.—As against one who has broken a contract to supply springs to an established manufacturer of vehicles for use the latter may show even a general knowledge by former of manner of conducting the business; custom of operating the factory and extent to which default interfered therewith; effect of default; ordinary and usual capacity of factory; supply of material on hand and of available labor; sales in excess of ability to supply in consequence of default; inability to procure such springs; vendor's promises to supply them, thereby inducing suspension of efforts to obtain them elsewhere, and expenses incurred in efforts made for that purpose. On the other hand, it was not proper for manufacturer to show money value of time lost by employes; profits on vehicles ordered but not sold, nor wilfulness on vendor's part in non-fulfilling his contract. Kelley *v.* Co., 120 Wis. 84, 97 N. W. 674. *Comp.* Connersville W. Co. *v.* Co., 166 Ind. 123, 76 N. E. 294.

Testimony of sureties as to nature of damages they understood a supersedeas bond would cover, irrelevant. Wayeross A. L. R. Co. *v.* R. Co., supra.

On breach of contract to locate depot on land it may be shown what similar lands contiguous to that of plaintiff's and situated along defendant's road sold for and advantages of land in question for business and suburban uses, and also value location of depot as agreed would have given such land. Iowa-M. L. Co. *v.* Conner, 136 Ia. 674, 112 N. W. 820 (breach of contract to build store); Louisville, etc. R. Co. *v.* Whipps, 118 Ky. 121, 80 S. W. 507; Paducah *v.* Allen, 111 Ky. 361, 63 S. W. 981; Watterson *v.* R. Co., 74 Pa. 208.

Breach of marriage contract cannot be shown as result of failure to have gowns ready in time. Coppola *v.* Kraushaar, 102 App. Div. 306, 92 N. Y. S. 436.

17-35 Such evidence as is indicated in text regarded as admission of liability. See Howland *v.* Bartlett, 86 Ga. 669, 12 S. E. 1068; Grimes *v.* Keene, 52 N. H. 330; Missouri P. R. Co. *v.* Lehmberg, 75 Tex. 61, 12 S. W. 832;

Missouri P. R. Co. *v.* Kellerman, 39 Tex. Civ. 274, 87 S. W. 401.

Sum paid by consignee of property to purchaser in settlement of suit may be shown by party responsible for depreciation in value in suit by consignee. St. Louis, etc. R. Co. *v.* Co. (Tex. Civ.), 87 S. W. 355.

17-36 Galucha *v.* Naso, 147 Ia. 309, 126 N. W. 146; Treat *r.* Hiles, 81 Wis. 280, 50 N. W. 896; Guetzkow B. Co. *r.* Andrews, 92 Wis. 214, 66 N. W. 119; McCall *v.* Icks, 107 Wis. 232, 83 N. W. 300.

The rule that all detriment proximately caused by a wrongful act may be recovered in a single action applies as well to special as to general damages; hence evidence concerning effects of wrong after action begun is competent. Shoemaker *r.* Sonjn, 15 N. D. 518, 108 N. W. 42, 3 Sutherland on Damages (3rd ed.), §844; Hicks *r.* Drew, 117 Cal. 305, 49 P. 189; Chicago etc. R. Co. *v.* Heil, 154 Fed. 626, 83 C. C. A. 400. Where damages assessable up to rendition of verdict may be proved if they are the natural and proximate consequences of wrong complained of and do not constitute a new cause of action. Wilcox *r.* Plummer, 4 Pet. (U. S.) 172; Fifth Nat. Bk. *r.* R. Co., 28 Fed. 231; Cooper *v.* Sillers, 30 App. Cas. (D. C.) 567; Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618; Fowle *v.* Co., 107 Mass. 352.

17-37 Jenkins *r.* Kirtley, 70 Kan. 801, 79 P. 671 (arrest of defendant after action begun for breach of contract); R. Co. *v.* Higdon, 111 Tenn. 121, 76 S. W. 895 (abatable nuisance).

17-38 Wilkinson *r.* Dunbar, 149 N. C. 20, 62 S. E. 748 (breach of contract); Hawk *v.* Co., 149 N. C. 10, 62 S. E. 752.

Agreement between indemnitor and indemnitee, made after action brought, may be proved, though not binding except as fixing maximum of recovery. Oriental L. Co. *v.* Co., 103 Va. 730, 50 S. E. 270.

18-39 North Ala. Tr. Co. *v.* Daniel, 3 Ala. App. 428, 57 S. 120; Lowe *v.* Co., 157 Cal. 503, 108 P. 297; Louisville & N. R. Co. *v.* Forrest, 6 Ga. App. 766, 65 S. E. 808; Dunnigan *v.* Ellis, 162 Ill. App. 185; Louisville & N. R. Co. *v.* Miller, 134 Ky. 716, 121 S. W. 648; Philadelphia, etc. R. Co. *v.* Green, 110 Md. 32, 71 A. 986 (treatment of plaintiff in lockup and its condition); Speaks *r.* R. Co., 90 S. C. 358, 73 S. E. 625; Gold *v.* Campbell, 54 Tex. Civ. 269, 117 S. W. 463. See infra, "Street Railroads," 152-73.

Death.—"If the killing was unlawful—that is, neither justified nor excused in law—circumstances which tend to mitigate the moral wrong ought not to affect the recovery of such actual pecuniary loss as appellants have suffered. Exemplary damages, however, are given in punishment of the offender, and it is entirely proper that such evidence be received and considered by the jury upon this issue." Holland *v.* Closs (Tex. Civ.), 146 S. W. 671 (improper relations with a relative of deceased).

Other independent acts cannot be shown as ground for recovering exemplary damages unless they are pleaded. Central R. Co. *v.* Co., 122 Ga. 646, 50 S. E. 473 (discrimination in freight rates); Leavitt *v.* Cutler, 37 Wis. 46 (seduction and breach of promise).

Words used after damage inflicted, competent to show malice. Martin *v.* Garlock, 82 Kan. 266, 108 P. 92.

18-40 Louisville & N. R. Co. *v.* Allnutt, 150 Ky. 831, 151 S. W. 14; Temple *r.* Duran (Tex. Civ.), 121 S. W. 253. See infra, "Street Railroads," 154-83.

19-41 Hanson *v.* Tel. Co. (Ia.), 146 N. W. 460; Louisville & N. R. Co. *v.* Carothers, 23 Ky. L. R. 1673, 65 S. W. 833, 66 S. W. 385; Mendell *v.* Willyoung, 42 Misc. 210, 85 N. Y. S. 647; Roberts *r.* Baldwin, 155 N. C. 276, 71 S. E. 319; Pacific L. S. Co. *v.* Murray, 45 Or. 103, 76 P. 1079; Leachman *v.* Cohen (Tex. Civ.), 91 S. W. 809 (provocation in assault and battery); Tex. & P. R. Co. *r.* Lynch, 39 Tex. Civ. 96, 87 S. W. 884 (refusal to pay fare unjustly demanded); Hardin *v.* R. Co. (Tex. Civ.), 88 S. W. 440; Houston etc. R. Co. *r.* Batchler, 37 Tex. Civ. 116, 83 S. W. 902 (insult); Nelson *v.* Snoyenbos, 155 Wis. 590, 145 N. W. 179.

Contributory negligence may be shown under federal employer's liability act in mitigation of damages. Hall *r.* R. Co., 169 Ill. App. 12. See infra, "Master and Servant," 544-26.

Benefit of property.—It may be shown oil well shot was one of a system of wells and shooting caused increased flow of oil and added to value of the system. Donnan *v.* Co., 26 Pa. Super. 324.

Scope of evidence must extend to all elements of defense and tend to prove all essential facts. Huntington E. P. Co. *v.* Parsons, 62 W. Va. 26, 57 S. E. 253, 9 L. R. A. (N. S.) 1130.

Offer to marry plaintiff after action brought for breach of contract to do so, cannot be shown in mitigation. Heasley *v.* Nichols, 38 Wash. 485, 80 P. 769.

Occurrence of subsequent event, without fault on defendant's part, which would have destroyed crop in question may be shown. In such case there would have been nothing left as a basis on which to prove the damage done. International, etc. R. Co. *v.* Jackson, 47 Tex. Civ. 26, 103 S. W. 709.

Breach of shipping articles.—It cannot be shown by parol that ship-owner who deviated from voyage specified gave crew notice of what voyage would be. Turtle *v.* Co., 154 Fed. 146.

Belief of plaintiff in Christian Science may be shown in action to recover for physical and mental suffering. Fort Worth, etc. R. Co. *v.* Travis, 45 Tex. Civ. 117, 99 S. W. 1141.

In action for conversion defendant may claim a forfeiture of property unlawfully carried by plaintiff without proving judgment of conviction, it being provided it shall become forfeited immediately upon being taken. McConathy *v.* Deck, 34 Colo. 461, 83 P. 135.

Evidence of good faith by trespassers on public land. See Anderson *v.* U. S., 152 Fed. 87, 81 C. C. A. 311.

Plaintiff's character may be shown as affecting probable loss of earnings. Carlton *v.* R. Co., 128 Mo. App. 451, 106 S. W. 1100; Abbot *v.* Tolliver, 71 Wis. 64, 36 N. W. 622. *Contra.* St. Louis, etc. R. Co. *v.* Smith, 34 Tex. Civ. 612, 79 S. W. 340. And on question of indignity and humiliation undergone. Boyle *v.* Case, 18 Fed. 880. See Kingston *v.* R. Co., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131 (habits of plaintiff).

Application of money paid under default judgment, resulting from defendant's neglect, to debt owing by plaintiff may be shown. S. *v.* Dickmann, 146 Mo. App. 396, 124 S. W. 29.

20-42 Wicker *v.* Hoppock, 6 Wall. (U. S.) 94; Warren *v.* Stoddart, 105 U. S. 224; Howard S. Co. *v.* Wells, 176 Fed. 512, 100 C. C. A. 70; Lillard *v.* Co., 134 Fed. 168, 67 C. C. A. 74; U. S. *v.* Withers, 130 Fed. 696, 65 C. C. A. 16; Mabb *v.* Stewart, 147 Cal. 413, 81 P. 1073; Nat. Ref., etc. Co. *v.* Parmalee, 9 Ga. App. 725, 72 S. E. 191; Aikin *v.* Perry, 119 Ga. 263, 46 S. E. 93; Swift *v.* Redhead, 147 Ia. 94, 122 N. W. 140; Joiner *v.* R. Co., 128 La. 1050, 55 S. 670; Glasgow *v.* R. Co., 191 Mo. 347, 89 S. W. 915; Mahoney *v.* Kansas City, 106 Mo. App. 39, 79 S. W. 1168; Larkin *v.* Hecksher, 51 N. J. L. 133, 16 A. 703, 3 L. R. A. 137; Ramsey *v.* Co., 72 N. J. Eq. 165, 65 A. 461; Brown *v.* Weir, 95 App. Div. 78, 88 N. Y. S. 479; Foehr *v.* R. Co., 40 Pa. Super. 7; Western U. Co. *v.* Johnsey, 49 Tex. Civ. 487, 109 S. W. 251; Wells *v.* R., 82 Vt. 108, 71 A. 1103; Virginian R. Co. *v.* Hurt, 112 Va. 622, 72 S. E. 110; Harding *v.* Timber Co., 64 Wash. 224, 116 P. 635; Kellogg *v.* Malick, 125 Wis. 239, 103 N. W. 1116; Northern S. Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066.

Evidence must be limited to such acts and expenditures as are reasonable. The Baltimore, 8 Wall. (U. S.) 377; The Falcon, 19 Wall. (U. S.) 75; Eisele *v.* Oddie, 128 Fed. 941; Sanitary Dist. *v.* McMahon, 110 Ill. App. 510; Brazell *v.* Cohn, 32 Mont. 556, 81 P. 339; Ramsey *v.* Co., 72 N. J. Eq. 165, 65 A. 461; Welliver *v.* Co., 23 Pa. Super. 79; Pecos River R. Co. *v.* Latham, 40 Tex. Civ. 78, 88 S. W. 392.

Expenses prudently incurred in effort to lessen or prevent loss may be proved. McKenzie *v.* Mitchell, 123 Ga. 72, 51 S. E. 34; Atwood *v.* Co., 185 Mass. 557, 71 N. E. 72; Missouri, etc. R. Co. *v.* Allen, 39 Tex. Civ. 236, 87 S. W. 168; Griffith *v.* Co., 55 W. Va. 604, 48 S. E. 442; Kelley *v.* Co., 120 Wis. 84, 97 N. W. 674. As may effect of efforts looking thereto, if prudently made, though they result in adding to damage. Chicago C. R. Co. *v.* Saxby, 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164; Joliet *v.* Le Pla, 109 Ill. App. 336; Seeton *v.* Dunbarton, 73 N. H. 134, 59 A. 944.

Facilities afforded by wrong-doer whereby damages could have been reduced may be shown. Vencill *v.* R. Co., 132 Mo. App. 722, 112 S. W. 1030.

Burden is on party in default to show when injured party should have abandoned faith in his promises to mend conditions and become actor in preventing further injury. Kentucky D. & W. Co. *v.* Lillard, 160 Fed. 34, 87 C. C. A. 190.

20-43 See Sun Mfg. Co. *v.* Egbert, 37 Tex. Civ. 512, 84 S. W. 667.

20-44 Mimms *v.* Betts Co., 9 Ga. App. 718, 72 S. E. 271; Ryan Car Co. *v.* Gardner, 154 Ill. App. 565; Hussey *v.* Holloway (Mass.), 104 N. E. 471, Harrington-Wiard Co. *v.* Mfg. Co., 166 Mich. 276, 131 N. W. 559; Martin *v.* Clegg, 163 N. C. 528, 79 S. E. 1105; Hammond *v.* Mfg. Co., 146 Wis. 485, 131 N. W 1097; Richey *v.* Ins. Co., 140 Wis. 486, 122 N. W. 1030 (earnings of agent after discharge).

Plaintiff may absolve himself from consequence of neglect to lessen damage by showing reliance on defendant's promise to perform his contract. Lillard *v.* Co., 134 Fed. 168, 67 C. C. A. 74; Kelley *v.* Co., 120 Wis. 84, 97 N. W. 674.

Conclusion of witness he did his best to lessen damage may be received in connection with the facts. Brower *v.* W. U. T. Co., 81 Kan. 109, 105 P. 497.

21-45 Linforth *v.* Co., 156 Cal. 58, 103 P. 320; Silva *v.* Bair, 141 Cal. 599, 75 P. 162; Suehr *v.* Sanitary Dist., 149 Ill. App. 328, *aff.* 242 Ill. 496, 90 N. E. 197; Broadstreet *v.* Hall, 32 Ind. App. 122, 69 N. E. 415; Taylor *v.* R. Co., 166 Mo. App. 131, 148 S. W. 470.

Price at which rejected goods sold by vendor, immaterial. Merchants' G. Co. *v.* Co., 89 Ark. 591, 117 S. W. 767.

Testimony tending to prove a condition of plaintiff, attributable and attributed to the injury, affecting his health and involving probable future ill consequences. Marshall *v.* R. Co., 171 Mich. 180, 137 N. W. 89, *cit.* Brininstool *v.* R. Co., 157 Mich. 172, 121 N. W. 728.

"**It was not improper** to permit the plaintiff to prove that her two little children were still in the buggy, from which she and her husband had just alighted, when the mule was caused to run away. This fact was part of the situation properly to be taken into account in considering the effect upon the plaintiff of such an occurrence." Spearman *v.* McCrary, 4 Ala. App. 473, 58 S. 927.

"**There are** many elements of damage not susceptible of mathematical reduction to terms of money. In such cases the amount of the resulting damage is to a greater or less extent, a matter of opinion, founded upon the facts in evidence, and such inferences as may be legitimately drawn therefrom. Whether or not the fact tends to support the inference is in proper circumstances a question of law; and it is upon some such ground that appellate courts have reserved to themselves the power to judicially declare in such cases that the jury has exceeded its limit, however dim and shadowy it may be, and to refuse to sustain its action." Campbell *v.* R. Co., 243 Mo. 141, 147 N. W. 788.

"**In tort** the plaintiff must recover i a single action all of his damage. The consequences of an injury cannot be definitely predicted. The plaintiff should be permitted to prove those results which are likely to happen, that is, those which are reasonably probable, for that is but establishing results which under like circumstances generally come to pass." Johnson *v.* C. Co., 85 Conn. 438, 83 A. 530, *cit.* many cases.

21-46 U. S. v. Behan, 110 U. S. 338; Howard *v.* Co., 139 U. S. 199; Hitchcock *v.* Anthony, 83 Fed. 779, 28 C. C. A. 80; Atlanta, etc. R. Co. *v.* Wood, 160 Ala. 657, 49 S. 426; Ramsey *v.* Meade, 37 Colo. 465, 86 P. 1018; New Market Co. *v.* Embry, 20 Ky. L. R. 1130, 48 S. W. 980; Raymond *v.* Phipps, 215 Mass. 559, 102 N. E. 905; Duvall *v.* Ferwerda, 146 Mich. 13, 108 N. W. 1115; Emerson *v.* Co., 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445; White *v.* Leatherberry, 82 Miss. 103, 34 S. 358; Roth T. Co. *v.* Co., 146 Mo. App. 1, 123 S. W. 513; Shallenberger *v.* Co., 223 Pa. 220, 72 A. 500; Chicago, etc. R. Co. *v.* Calvert, 41 Tex. Civ. 236, 91 S. W. 825; Gibson *v.* Wheldon, 82 Vt. 175, 72 A. 909; Viles *v.* Co., 79 Vt. 311, 65 A. 104; Altschuler *v.* R. Co., 155 Wis. 146, 144 N. W. 294; Kelley *v.* Co., 120 Wis. 84, 97 N. W. 674.

Under plea of recoupment same damage may be shown as in action for breach of contract. Viles *v.* Co., supra.

In an action for personal injuries loss of services which have a certain and definite value may be proved. Walsh *v.* R. Co., 204 N. Y. 58, 97 N. E. 408.

Average Net Earnings.—Quarnberg *v.* City, 29 S. D. 377, 137 N. W. 405. Subject to right to cross-examine. Carron *v.* Wood, 10 Mont. 500, 26 P. 388.

22-47 Alkahest L. S. *v.* Curry, 6 Ga. App. 625, 65 S. E. 580; Ryan Car Co. *v.* Gardner, 154 Ill. App. 565; Simplex

R. A. Co. *v.* Co., 173 Ind. 1, 88 N. E. 682; Morgan *v.* Sutlive, 148 Ia. 318, 126 N. W. 175; Enterprise Mfg. Co. *v.* Campbell (Ky.), 121 S. W. 1040; Shea *v.* Board, 124 La. 299, 50 S. 166; Bartow *v.* R. Co., 73 N. J. L. 12, 62 A. 489; De Palma *v.* Weinman, 15 N. M. 68, 103 P. 782; Am. Exch. Nat. Bk. *v.* Goubert, 67 Misc. 602, 124 N. Y. S. 817, American P. F. Co. *v.* Elliott, 151 N. C. 393, 66 S. E. 451; Sparrevohn *v.* Fisher, 2 Phil. Isl. 676; McMeekin *v.* R. Co., 82 S. C. 468, 64 S. E. 413; Gold *v.* Campbell, 54 Tex. Civ. 269, 117 S. W. 463; Wells *v.* R., 82 Vt. 108, 71 A. 1103; Kirk *v.* Co., 58 Wash. 283, 108 P. 604.

Not to prove profits under the guise of earnings. Walsh *v.* R. Co., 204 N. Y. 58, 97 N. E. 408. In Masterton *v.* Village of Mt. Vernon, 58 N. Y. 391, 396, where the plaintiff, a dealer in teas, which was a business requiring expert knowledge and skill, was permitted to prove his profits from year to year. There the rule was thus stated: "The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others. These are circumstances the jury have a right to consider in fixing the value of his time. But they ought not to be permitted to speculate as to the uncertain profits of commercial ventures, in which the plaintiff, if uninjured, would have been engaged."

22-48 So. Memphis L. Co. *v.* Lumb. Co., 210 Fed. 257 (C. C. A.); Pennsylvania S. Co. *v.* R. Co., 198 Fed. 721, 117 C. C. A. 503; Kenney *v.* Knight, 127 Fed. 403; Metzer *v.* Brincat, 154 Ala. 397, 45 S. 633; Bennett Lumb. Co. *v.* Cypress Co., 105 Ark. 421, 151 S. W. 275; Hurley *v.* Oliver, 91 Ark. 427, 121 S. W. 920; Hodgkins *v.* Dunham, 10 Cal. App. 690, 103 P. 351; Silka *v.* Quinn, 46 Colo. 596, 105 P. 1104; Muller *v.* Wks., 49 Fla. 189, 38 S. 64; Tygart *v.* Albritton, 5 Ga. App. 412, 63 S. E. 521; Favar *v.* Park, 144 Ill. App. 86; Dady *v.* Condit, 209 Ill. 488, 70 N. E. 1088; Holliday *v.* Co., 43 Ind. App. 342, 87 N. E. 249; Brown *v.* Hadley, 43 Kan. 267, 23 P. 492 (anticipated profits from cows); Town *v.* Lincoln, 56 Kan. 145, 42 P. 706 (removal of stock and business); Fredonia G. Co. *v.* Bailey, 77 Kan. 296, 94 P. 258 (established business); Currie F. Co. *v.* Krish, 24 Ky. L. R. 2471, 74 S. W. 268; Am. B. Co. *v.* Co., 32 Ky. L. R. 873, 107 S. W. 279; Bates M. Co. *v.* Wks., 113 Ky. 372, 68 S. W. 423; Horn *v.* Carroll, 28 Ky. L. R. 839, 90 S. W. 559; Janney Mfg. Co. *v.* Banta, 26 Ky. L. R. 1089, 83 S. W. 130; Jefferson S. Co. *v.* Co., 122 La. 983, 48 S. 428; Loughery *v.* Huxford, 206 Mass. 324, 92 N. E. 328; Gaffey *v.* Co., 202 Mass. 48, 88 N. E. 330; Herron *v.* Raupp, 156 Mich. 162, 120 N. W. 584; Independent B. Assn. *v.* Burt, 109 Minn. 323, 123 N. W. 932; Morrow *v.* R. Co., 140 Mo. App. 200, 123 S. W. 1034; Rhodes *v.* Co., 105 Mo. App. 279, 79 S. W. 1145; Carlson *v.* Co., 40 Mont. 434, 107 P. 419; Beekwith *v.* New York, 121 App. Div. 462, 106 N. Y. S. 175; Nash *v.* Co., 123 App. Div. 148, 108 N. Y. S. 336; Ashkanazy *v.* Sachs, 110 N. Y. S. 929; Wilkinson *v.* Dunbar, 149 N. C. 20, 62 S. E. 748; Lefffer *v.* Whitten, 8 O. C. C. (N. S.) 192 (contract for personal services); Toledo *v.* Libbie, 19 O. C. C. 704, 51 O. St. 562 (like contract); Wilson *v.* Wernwag, 217 Pa. 82, 66 A. 242; Imperial C. Co. *v.* Co., 138 Pa. 45, 20 A. 937; Puritan C. Co. *v.* Clark, 204 Pa. 556, 54 A. 350; Singer Mfg. Co. *v.* Christian, 211 Pa. 534, 60 A. 1087; Cope *v.* Co., 39 Pa. Super. 134; Chisholm & M. Mfg. Co. *v.* Co., 111 Tenn. 202, 77 S. W. 1062; Reagan R. B. Co. *v.* Co., 55 Tex. Civ. 509, 121 S. W. 526; Mudge *v.* Adams, 37 Tex. Civ. 186, 83 S. W. 722; Wolf *v.* Galbraith, 35 Tex. Civ. 505, 80 S. W. 648; Church *v.* Co., 58 Wash. 262, 108 P. 596; Belch *v.* Co., 46 Wash. 1, 89 P. 174; Chase *v.* Smith, 35 Wash. 631, 77 P. 1069 (personal labor); Bare *v.* Coke Co. (W. Va.), 80 S. E. 941; Smith *v.* Co., 66 W. Va. 599, 66 S. E. 746; Richey *v.* Ins. Co., 140 Wis. 486, 122 N. W. 1030; Stumm *v.* Co., 140 Wis. 528, 122 N. W. 1032. See also Lautz Co. *v.* Glenn, 183 Fed. 666. See infra, "Landlord and Tenant," 68-67.

Sub-contracts contemplated by parties, properly admitted. Mead *v.* Kalberg, 70 Wash. 517, 127 P. 185.

On breach of contract of sole agency for certain territory for a term of years, compensation to be by commission, extent and volume of business done by plaintiff and his successor may be shown. Wells *v.* Assn., 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A. 33; Mueller *v.* Bethesda, 88 Mich. 390, 50 N. W.

319; Emerson *v.* Co., 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445; Russell *v.* Brannen, 41 Neb. 567, 59 N. W. 901; Wakeman *v.* Co., 101 N. Y. 205, 4 N. E. 264; Pittsburg G. Co. *v.* Co., 184 Pa. 36, 39 A. 223. *Comp.* In re English Ins. Co., L. R. 5 Ch. App. (Eng.) 737; Pellet *v.* Ins. Co., 104 Fed. 502, 43 C. C. A. 669; Union *v.* Barton, 77 Ala. 148; Howe *v.* Bryson, 44 Ia. 159 (*mod.* by Hichhorn *v.* Bradley, 117 Ia. 130, 90 N. W. 592).

23-49 Haven Malleable Castings Co. *v.* C. Co., 146 Ky. 135, 142 S. W. 227; Patten *v.* Lynett, 133 App. Div. 746, 118 N. Y. S. 185.

The difference between the price agreed upon and the amount it would have cost the plaintiff to complete the work. J. B. Anderson & Co. *v.* Brammer, 4 Ala. App. 596, 58 S. 941.

23-50 Iron City T. *v.* Welisch, 128 Fed. 693, 63 C. C. A. 245; Central C. & C. Co. *v.* Hartman, 111 Fed. 96, 49 C. C. A. 244; Smith *v.* Curran, 138 Fed. 150; Nichols *v.* Rasch, 138 Ala. 372, 35 S. 409; Southern R. Co. *v.* Coleman, 153 Ala. 266, 44 S. 837; Milheim *v.* Baxter, 46 Colo. 155, 103 P. 376; Favar *v.* Park, 144 Ill. App. 86; Connersville W. Co. *v.* Co., 166 Ind. 123, 76 N. E. 294; Morgan *v.* Sutlive, 148 Ia. 318, 126 N. W. 175; Schillinger Co. *v.* Co. (Ia.), 116 N. W. 132; Atchison R. Co. *v.* Thomas, 70 Kan. 409, 78 P. 861; Gas Co. *v.* Co., 56 Kan. 614, 44 P. 621; Carsey *v.* Farmer, 117 Ky. 826, 79 S. W. 245; Weick *v.* Dougherty, 28 Ky. L. R. 930, 90 S. W. 966; Armistead *v.* R. Co., 108 La. 171, 32 S. 456; Des Allemands L. Co. *v.* Co., 117 La. 1, 41 S. 332; South Gardiner L. Co. *v.* Bradstreet, 97 Me. 165, 53 A. 1110; Winslow E. & M. Co. *v.* Hoffman, 107 Md. 621, 69 A. 394; Gossage *v.* R. Co., 101 Md. 698, 61 A. 692; First Nat. Bk. *v.* Carroll, 35 Mont. 302, 88 P. 1012; Benyaker *v.* Scherz, 103 App. Div. 192, 92 N. Y. S. 1089; Le Herisse *v.* Meehan, 129 N. Y. S. 609; Harper F. Co. *v.* Co., 148 N. C. 87, 62 S. E. 145; Callahan *v.* Co., 17 Okla. 544, 87 P. 331; Hoskins *v.* Scott, 52 Or. 271, 96 P. 1112; McNeil *v.* Co., 207 Pa. 493, 56 A. 1067; Standard S. Co. *v.* Carter, 81 S. C. 181, 62 S. E. 150 (new enterprise). See infra, "Landlord and Tenant," 68-67.

24-51 Clyde C. Co. *v.* R. Co., 226 Pa. 391, 75 A. 596, subsequent contract of which defendant had no knowledge. See Chicago, etc. R. Co. *v.* Calvert, 41 Tex. Civ. 236, 91 S. W. 825.

In such a case notice of contract must be shown to have been given defendant. Baker & L. Mfg. Co. *v.* Clayton, 40 Tex. Civ. 586, 90 S. W. 519; Bliss *v.* Co., 131 Fed. 51, 65 C. C. A. 289; Pine Bluffs I. W. *v.* Boling, 75 Ark. 469, 88 S. W. 306.

Net value of standing timber purchased by plaintiff for purpose of executing contract between the parties for manufacture of staves cannot be shown to prove profits he would have made in executing contract. Gibson *v.* Purifoy, 56 Tex. Civ. 379, 120 S. W. 1047.

Binding contracts may be proved to show loss of profits. Hoskins *v.* Scott, 52 Or. 271, 96 P. 1112.

24-52 Sloss-S. S. & I. Co. *v.* Mitchell, 161 Ala. 278, 49 S. 851; Enlow *v.* Hawkins, 71 Kan. 633, 81 P. 189; Probst *v.* Hinesley, 133 Ky. 64, 117 S. W. 389; Nelson T. Co. *v.* Nelson, 216 Mass. 30, 102 N. E. 926; Walsh *v.* R. Co., 204 N. Y. 58, 97 N. E. 408; Bowen *v.* King, 146 N. C. 385, 59 S. E. 1044; Johnson *v.* R. Co., 140 N. C. 574, 5 S. E. 362; Beebe *v.* Greene, 34 R. I. 171, 82 A. 796.

See also Ford, etc. Co. *v.* Clement, 97 Ark. 522, 135 S. W. 343; Gardner *v.* Springfield, etc. Co., 154 Mo. App. 666, 135 S. W. 1023; McLane *v.* R. Co., 230 Pa. 29, 79 A. 237; Gulf, etc. R. Co. *v.* Coulter (Tex.), 139 S. W. 16.

Uncertainty of proof not always ground for denying recovery. American F. L. M. Co. *v.* Brown, 54 Tex. Civ. 448, 118 S. W. 1106.

24-53 Sacchi *v.* Co., 13 Cal. App. 72, 108 P. 885; Kentucky H. Co. *v.* Hood, 133 Ky. 383, 118 S. W. 337; McCausey *v.* Hoek, 159 Mich. 570, 124 N. W. 570; Standard A. & Mfg. Co. *v.* Champion, 76 N. J. L. 771, 72 A. 92; De Palma *v.* Weinman, 15 N. M. 68, 103 P. 782; Lehman *v.* Coffee Co., 146 Wis. 213, 131 N. W. 362.

Contra, Gottheim *v.* R. Co., 111 N. Y. S. 678. See Chicago C. R. Co. *v.* Flynn, 131 Ill. App. 502; Botkin *v.* Miller, 190 Mass. 411, 77 N. E. 49; Bates *v.* Warrick, 76 N. J. L. 108, 69 A. 185.

Loss of profits not provable in personal injury cases. Jordan *v.* R. Co., 124 Ia. 177, 99 N. W. 693; Mitchell *v.* R. Co., 138 Ia. 283, 114 N. W. 622. *Contra.* Muench *v.* Heinemann, 119 Wis. 441, 96 N. W. 800.

Acceptance of bid.—Person with whom plaintiff would have contracted but for defendant's negligence may testify such person's bid would have been accepted if received. Texas & W. T. Co. *v.* Mackenzie, 36 Tex. Civ. 178, 81 S. W. 581.

Earning capacity may be shown by proof of character of business conducted, time given it and returns received. 3 Sutherland on Damages (3d ed.), §945; Mitchell *v.* R. Co., 138 Ia. 283, 114 N. W. 622; Chicago, etc. R. Co. *v.* Posten, 59 Kan. 449, 53 P. 465; New Jersey Exp. Co. *v.* Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; Goodhart *v.* R. Co., 177 Pa. 1, 35 A. 191, 55 Am. St. 705; Simpson *v.* R. Co., 210 Pa. 101, 59 A. 693 (profits of business as distinguished from profits of capital); Wallace *v.* R. Co., 195 Pa. 127, 45 A. 685, 52 L. R. A. 32; El Páso E. Co. *v.* Murphy, 49 Tex. Civ. 586, 109 S. W. 489; Heer *v.* Co., 118 Wis. 57, 94 N. W. 789.

Profits made in leased premises may be shown to fix value of lease. Hayes *v.* Atlanta, 1 Ga. App. 25, 57 S. E. 1087; Bass *v.* West, 110 Ga. 698, 36 S. E. 244.

25-54 Lazier G. E. Co. *v.* Du Bois, 130 Fed. 834, 65 C. C. A. 172 (average profits for sixteen months sufficient basis for computing profits during remaining eight months); Brown *v.* Assn., 173 Fed. 927; St. Louis, etc. Co. *v* Osborne, 95 Ark. 310, 129 S. W. 537; Chicago U. T. Co. *v.* Brethauer, 223 Ill. 521, 79 N. E. 287 (income derived from personal effort); McCausey *v.* Hoek, 159 Mich. 570, 124 N. W. 570; Roth T. Co. *v.* Co., 146 Mo. App. 1, 123 S. W. 513; Blaustein *v.* Pincus, 47 Mont. 202, 131 P. 1064; Standard A. & Mfg. Co. *v.* Champion, 76 N. J. L. 771, 72 A. 92; W. U. T. Co. *v.* Auslet, 53 Tex. Civ. 264, 115 S. W. 624; S. *v.* Friedman (W. Va.), 81 S. E. 830; Treat *v.* Hiles, 81 Wis. 280, 50 N. W. 896; Kelley *v.* Co., 120 Wis. 84, 97 N. W. 674; Forster *v.* Co., 130 Wis. 281, 110 N. W. 226.

See Diamond R. Co. *v.* Harryman, 41 Colo. 415, 92 P. 922, 15 L. R. A. (N. S.) 775 (proof of commissions earned under one employer not competent to show value of lost time when working for another under different conditions); Chicago R. Co. *v.* Flynn, 131 Ill. App. 502; Haas *v.* R. Co., 128 Mo. App. 79 106 S. W. 599 (previous earnings inadmissible). And see Gardner *v.* Springfield, etc. Co., 154 Mo. App. 666, 135 S. W. 1023. *Comp.* Hobel *v.* Mahoning, etc. Co., 229 Pa. 507, 79 A. 119.

Past profits admissible. Maguire *v* Kiesel, 86 Conn. 453, 85 A. 689.

Amount for which sub-contractors undertook to do the work plaintiff prevented from doing is not proof of his loss. Brodie *v.* Fost, 108 N. Y. S. 414.

Business profits cannot be shown if facts disclose such a preponderance of business element over personal equation or such admixture of the two that question of personal earnings cannot be safely or properly segregated from returns upon capital invested. Kronold *v.* New York, 186 N. Y. 40, 78 N. E. 572; Weir *v.* R. Co., 188 N. Y. 416, 81 N. E. 168. See Masterton *v.* Mt. Vernon, 58 N. Y. 391. In the first case cited and in Fraser *v.* Buffalo, 123 App. Div. 159, 108 N. Y. S. 127, personal earnings so predominated over other factors as to permit proof of lost profits.

Contract for long time.—The profits realized on a contract for two years do not afford a safe criterion on which to base profits for the next three years. Des Allemands L. Co. *v.* Co., 117 La. 1, 41 S. 332.

On breach of contract to convey land evidence of its fair market value for subdivision into building lots is competent, expectation of demand therefor having affected price. It is also competent to show sales of like property in the vicinity, though some of them not for cash and not consummated. Dady *v.* Condit, 209 Ill. 488, 70 N. E. 1088, 104 Ill. App. 507.

A vendee who desires to recoup damages because of delay in supplying property whereby he was unable to secure rent for the premises in which it was to be used must show a contract for their lease; not enough to show arrangement with lessees. American T. Co. *v.* Siegel, 221 Ill. 145, 77 N. E. 588.

Rule does not apply to person not in business when injury done. Fisher *v.* Jansen, 128 Ill. 549, 21 N. E. 598.

On breach of contract of partnership profits made may be shown, as may prosperity and growth of community during term of partnership, and plaintiff's skill and ability. Ramsay *v.* Meade, 37 Colo. 465, 86 P. 1018.

On partial breach of contract granting concessions it was competent to show profits made thereon in previous years and during time instant contract in effect; kind of people plaintiffs were, their ability to do business, nature of business and other circumstances. Nash *v.* Co., 123 App. Div. 148, 108 N. Y. S. 336; Wakeman *v.* Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676.

Extent of injury done business by breach of contract not to compete therein may be shown by proof of amount of business done; evidence may cover period since action begun. Galucha *v.* Naso, 147 Ia. 309, 126 N. W. 146.

Sufficiency of evidence.—Testimony of party, coupled with record of cash register, receipts during corresponding months of previous years and proof of approximate cost of what was sold, are a sufficient basis for recovery of lost profits. Hendler *v.* Quigley, 38 Pa. Super. 39. Average earnings of established business prior to interruption, a safe standard by which to measure loss of profits. Morrow *v.* R. Co., 140 Mo. App. 200, 123 S. W. 1034. Parol evidence showing loss in lump sum resulting to a business in which books of account presumably kept and in possession of plaintiffs is insufficient to show extent of loss. Morrow *v.* R. Co., 140 Mo. App. 200, 123 S. W. 1034.

Agent's earnings under contract may be proved, as may his prospects. Richey *v.* Ins. Co., 140 Wis. 486, 122 N. W. 1030.

Outstanding contracts may be shown if their fulfillment prevented. McCausey *v.* Hoek, 159 Mich. 570, 124 N. W. 570; Cope *v.* Co., 39 Pa. Super. 134 (though informal).

25-55 Currie F. Co. *v.* Krish, 24 Ky. L. R. 2471, 74 S. W. 268; Bredemeier *v.* Supply Co., 64 Or. 576, 131 P. 312; Hoskins *v.* Scott, 52 Or. 271, 96 P. 1112; Ballou *v.* Ballou, 30 R. I. 286, 74 A. 1089; Anderson, etc. Co. *v.* Co., 23 Tex. Civ. 328, 57 S. W. 575. *Comp.* infra, "Landlord and Tenant," 67-63. *Contra,* Long *v.* Kaufman Co., 128 La. 767, 55 S. 348.

Profits of same party in a like business under similar conditions admissible as bearing upon question of prospective damages. Jacobs *v.* Cromwell, 216 Mass. 182, 103 N. E. 383.

Profits derived by infringer of trademark not necessarily proof plaintiff's damages were that sum. Davidson *v.* Munsey, 29 Utah 181, 80 P. 743.

Loss of profits by others in same business, in same locality and resulting from like cause may be shown. Metzger *v.* Brincat, 154 Ala. 397, 45 S. 633.

Statements by persons who have ceased to do business with plaintiff cannot be proved unless made since wrong done. Price *v.* Co., 132 Ga. 246, 64 S. E. 87.

25-56 Nash *v.* Co., 123 App. Div. 148, 108 N. Y. S. 336.

25-57 Hardaway-W. Co. *v.* Bradley, 163 Ala. 596, 51 S. 21 (cost of doing work contracted for may be shown); Viernow *v.* Carthage, 139 Mo. App. 276, 123 S. W. 67; May *v.* Breunig, 120 N. Y. S. 98; Church *v.* Co., 58 Wash. 262, 108 P. 596.

26-58 Enlow *v.* Hawkins, 71 Kan. 633, 81 P. 189; Fredonia G. Co. *v.* Bailey, 77 Kan. 296, 94 P. 258; Brown *v.* Hadley, 43 Kan. 267, 23 P. 492. See Patten *v.* Lynett, 133 App. Div. 746, 118 N. Y. S. 185.

Opinions as to rental value may not be based upon profit to be made nor rest upon hearsay knowledge as to capacity of property. Munson *v.* Co., 118 App. Div. 398, 103 N. Y. S. 502. Opinion without data, not convincing. Morgan *v.* Sutlive, 148 Ia. 318, 126 N. W. 175.

Quantum of proof.—If loss of profits shown with reasonable certainty, such proof will not be neutralized by evidence of remote or doubtful contingencies. Barrett *v.* Co., 55 W. Va. 395, 47 S. E. 154; Smith *v.* Co., 66 W. Va. 599, 66 S. E. 746.

Contractor may testify what his profits on a contract would have been. Texas & W. T. Co. *v.* Mackenzie, 36 Tex. Civ. 178, 81 S. W. 581.

Field of inquiry on breach of contract for services in sale of securities covers all surrounding circumstances. Church *v.* Co., 58 Wash. 262, 108 P. 596.

Subsequent circumstances.—Where it has been shown weather was favorable for use of threshing outfit during time it was delayed in transportation and, but for delay, extensive use could have been made of it, subsequent state of weather may be shown to disclose extent of profits lost. St. Louis, etc. R. Co. *v.* Brown, 56 Tex. Civ. 74, 120 S. W. 213.

Expense of maintaining mine and cost of mining as affected by breach of contract to furnish cars for shipment

of product may be shown to establish lost profits. Midland Valley R. Co. *v.* Co., 91 Ark. 180, 120 S. W. 380.

26-59 Southern R. Co. *v.* Reeder, 152 Ala. 227, 44 S. 699; St. Louis, etc. R. Co. *v.* Saunders, 85 Ark. 111, 107 S. W. 194 (loss of crops so immature as to be without market value); Sacchi *v.* Co., 13 Cal. App. 72, 108 P. 885; Elzy *v.* Co., 141 Ia. 407, 119 N. W. 705; Wiggins *v.* R. Co., 129 Mo. App. 369, 108 S. W. 574; Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718; DeWitt Allen A. Co. *v.* Canavan, 113 N. Y. S. 1002; Rogers *v.* Bemus, 69 Pa. 432; Pennypacker *v.* Jones, 106 Pa. 237; Martin *v.* R. Co., 70 S. C. 8, 48 S. E. 616; Acker *v.* Knoxville, 117 Tenn. 224, 96 S. W. 973.

See also So. R. Co. *v.* Branch, 9 Ga. App. 310, 71 S. E. 696.

Rental value of entire mill may be shown unless it is made to appear a separate part of it could be used for another purpose while delay to furnish machinery continued. Such value may be based on use to which mill has been put, notwithstanding defendant undertook to put in machinery to adapt it to a different use. Munson *v.* Co., 118 App. Div. 398, 103 N. Y. S. 502.

Effect of wrong on business.—One who claims damage for injury to business and has testified on cross-examination to an increase thereof since the wrong, may show there has been a general increase in local business. Boyer *v.* R. Co., 97 Tex. 107, 79 S. W. 441.

Value of use of property employed in established business may be shown where business interrupted by failure to supply material. Kelley *v.* Co., 120 Wis. 84, 97 N. W. 674. But see Callahan *v.* Co., 17 Okla. 544, 87 P. 331.

27-60 Chicago *v.* Pulcyn, 129 Ill. App. 179; Ventura H. Co. *v.* Co. (Ky.), 128 S. W. 292; Crabtree C. M. Co. *v.* Hamby, 28 Ky. L. R. 687, 90 S. W. 226; Werger *v.* Steffens, 90 Neb. 51, 132 N. W. 719; Texas S. L. R. Co. *v.* Clifford (Tex. Civ.), 94 S. W. 168; Magee *v.* R. Co. (Tex. Civ.), 95 S. W. 1092.

27-61 Tubbs *v.* Roberts, 40 Colo. 493, 92 P. 220; Palmer *v.* Ingram, 2 Ga. App. 200, 58 S. E. 362; Blunck *v.* R. Co. (Ia.), 115 N. W. 1013; Carter *v.* R. Co., 128 Mo. App. 57, 106 S. W. 611; Hunt *v.* R. Co., 126 Mo App. 261, 103 S. W. 133; Anderson *v.* R. Co., 129 Mo. App. 384, 108 S. W. 605; Fleming *v.* Pullen (Tex. Civ.), 97 S. W. 109; Dunlap *v.* Co., 43 Tex. Civ. 269, 95 S. W 43.

Damage caused by destroying part of a field of growing corn may be shown by proving amount and value of crop raised on the other part, less cost of harvesting and marketing, the two parts being alike. Hunt *v.* R. Co., 126 Mo. App. 261, 103 S. W. 133. *Comp.* Gresham *v.* Taylor, 51 Ala. 505; Horres *v.* Co., 57 S. C. 189, 35 S. E. 500, 52 L. R. A. 36; Lampley *v.* R. Co., 63 S. C. 462, 41 S. E. 517.

27-62 Proof of rental value is to be made of land as of time wrong done and in condition it then was. Blunck *v.* R. Co. (Ia.), 115 N. W. 1013. Lease between parties of property wrongfully detained for year preceding detention, though rent thereunder payable in a share of crops, admissible in action on supersedeas bond given to stay writ of restitution. Kendall *v.* Uland, 83 Neb. 527, 120 N. W. 152.

27-63 W. U. T. Co. *v.* Cashman, 132 Fed. 805, 65 C. C. A. 607; National B. Co. *v.* Nolan, 138 Fed. 6, 70 C. C. A. 436; Davis *v.* Kornman, 141 Ala. 479, 37 S. 789; Washington T. Co. *v.* Downey, 26 App. Cas. (D. C.) 258; Southern R. Co. *v.* Phillips, 136 Ga. 282, 71 S. E. 414; Chicago, etc. R. Co. *v.* Spence, 213 Ill. 220, 72 N. E. 796 (plaintiff's salary in another employment years prior to injury); Stockham *v.* Malcolm, 111 Md. 615, 74 A. 569; Phillips *v.* Thomas, 70 Wash. 533, 127 P. 97.

"**Under the rule declared** in Bube *v.* Birmingham R., L. & P. Co., 140 Ala. 276, 37 S. 285, 103 A. 33, among other decisions here, the financial condition of the child is a proper element of the inquiry, in order that the jury may determine from the whole evidence the loss likely to be entailed upon the parent in consequence of the child's injury; but this does not render proper an investigation of the source of the child's estate, if such it has." Reeves *v.* Mills Co., 166 Ala. 645, 52 S. 142.

Evidence of plaintiff's financial condition may be given if he is entitled to recover punitive damages. Bolles *v.* R. Co., 134 Mo. App. 696, 115 S. W. 459; Beck *v.* Dowell, 111 Mo. 506, 20 S. W. 209, 33 Am. St. 547; Baxter *v.* Magill, 127 Mo. App. 392, 105 S. W. 679.

27-64 Same rule applies to tort ac-

tions. Story *v.* Green, 164 Cal. 768, 130 p. 870; Indianapolis Trac. & Term. Co. *v.* Henby, 178 Ind. 239, 97 N. E. 313; Bowe *v.* Bowe, 26 O. C. C. 409, s. c. 5 O. C. C. (N. S.) 233; Riverside & Dan River Cotton Mills Co. *v.* Carter, 113 Va. 346, 74 S. E. 183; Singer M. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320. And see So. R. Co. v. Phillips, 136 Ga. 282, 71 S. E. 414; Madigan *v.* Schaghticoke, 128 N. Y. S. 800.

28-66 Greenberg *v.* Assn., 140 Cal. 357, 73 P. 1050; White *v.* White, 76 Kan. 82, 90 P. 1087; Mertens *v.* Mueller, 119 Md. 525, 87 A. 501; Nelson *v.* Halvorson, 117 Minn. 255, 135 N. W. 818; Carmichael *v.* Co., 162 N. C. 333, 78 S E. 507; King *v.* Hanson, 13 N. D. 85, 99 N. W. 1085; Hiers *v.* R. Co., 79 S C. 115, 60 S. E. 1110; Calder *v.* So. R. Co., 89 S. C. 287, 71 S. E. 841.

28-68 Shield's Admr. *v.* Rowland, 151 Ky. 136, 151 S. W. 408; Baxter *v.* Magill, 127 Mo. App. 392, 105 S. W. 679; Willet *v.* Johnson, 13 Okla. 563, 76 P. 174.

28-70 Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320.

Wealth of one of several defendants not provable. Singer Mfg. Co. *v.* Bryant, supra. Wealth of defendant's principal stockholders, irrelevant. Humphries *v.* R. Co., 84 S. C. 202, 65 S. E. 1051.

29-77 Birmingham R. Co. *v.* Thomason (Ala. App.), 63 S. 65; Simpson *v.* Foundation Co., 201 N. Y. 479, 95 N. E. 10, *rev.* 118 N. Y. S. 1142; St. Louis, etc. R. Co. *v.* Thompson, 102 Tex. 89, 113 S. W. 144 (conspiracy to expel member of benefit society).

When inadmissible.—Frick *v.* R. Co., 154 Ill. App. 277.

Death of plaintiff's parents may be shown as affecting mental suffering as result of libel. Washington T. Co. *v.* Downey, 26 App. Cas. (D. C.) 258.

Number of children one has and cares for competent to show capacity to work. Lord *v.* R. Co., 74 N. H. 295, 67 A. 639.

In action for breach of promise plaintiff may show her home surroundings were disagreeable and defendant knew fact when engagement made, and this independently of punitive damages. Heasley *v.* Nichols, 38 Wash. 485, 80 P. 769.

29-78 Sotham *v.* T. Co., 238 Mo. 606, 144 S. W. 428.

29-79 Sotham *v.* Co., supra.

Professional standing of plaintiff in action for assault and battery, false arrest and malicious prosecution may be shown, as well as nature and extent of practice before and after injury. Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23; Phillips *v.* R. Co., 4 Q. B. D. (Eng.) 406, 5 Q. B. D. 78, 42 L. T. R. 6 (net earnings for three years).

Amount paid by client, evidence of value of services of attorney as against third party liable therefor. Curtley *v.* Soc., 51 Wash. 242, 98 P. 667.

30-80 Smith *v.* Curran, 138 Fed. 150; Hardaway-W. Co. *v.* Bradley, 163 Ala. 596, 51 S. 21; Leifer Mfg. Co. *v.* Gross, 93 Ark. 277, 124 S. W. 1039 (cost of removing and replacing defective materials in building); Von Berg *v.* Goodman, 85 Ark. 605, 109 S. W. 1006; McKenzie *v.* Mitchell, 123 Ga. 72, 51 S. E. 34; Trosper C. Co. *v.* Rader, 154 Ky. 670, 159 S. W. 536; Illinois C. R. Co. *v.* Doss, 137 Ky. 659, 126 S. W. 349; Aetna Ind. Co. *v.* Fuller, 111 Md. 321, 73 A. 738; Hetherington & Sons *v.* Firth, 210 Mass. 8, 95 N. E. 961; Morrow *v.* R. Co., 140 Mo. App. 200, 122 S. W. 1034; Claudius *v.* Co., 109 Mo. App. 346, 84 S. W. 354; Holt *v.* Ins. Co., 76 N. J. L. 585, 72 A. 301; Beckwith *v.* New York, 121 App. Div. 462, 106 N. Y. S. 175; Enderlien *v.* Kulaas, 25 N. D. 385, 141 N. W. 511; Bredemeier *v.* Supply Co., 64 Or. 576, 131 P. 312; Martin *v.* R. Co., 70 S. C. 8, 48 S. E. 616; Peacock *v.* Coltrane (Tex. Civ.), 116 S. W. 389; Chicago, etc. R. Co. *v.* Calvert, 41 Tex. Civ. 236, 91 S W. 825.

See also Bacigalupi *v.* Phoenix, etc. Co., 14 Cal. App. 632, 112 P. 892; Hanrahan *v.* Baltimore, 114 Md. 517, 80 A 312.

Expenses of travel.—Buford *v.* Graden, 5 Ala. App. 421, 59 S. 368.

30-81 Murphy *v.* R. Co., 108 N. Y. S. 1021; Kaniuk *v.* Co., 96 N. Y. S. 129; Reid *v.* R. Co., 93 N. Y. S. 533; Asheboro *v.* R. Co., 148 N. C. 261, 62 S. E. 1091; Eastern R. Co. *v.* Tuteur, 127 Wis. 382, 105 N. W. 1067 (payments after breach of contract or for Sunday labor not recoverable).

Attorneys' fees, when recoverable. Mendel *v.* Leader, 136 Ga. 442, 71 S. E. 753.

Sum charged must be shown to be reasonable. Goodson *v.* R. Co., 94 N. Y. S. 10.

Amount paid by vendee for property which vendor failed to deliver, not evidence of difference in market value at contract price and market price when delivery should have been made. Pierce *v.* Waller (Tex. Civ.), 102 S. W. 1173.

Increased cost of manufacturing goods need not be shown by records of business. Phoenix P. Co. *v.* U. S., 111 Md. 549, 75 A. 394.

Evidence of expenses, inadmissible if recovery of profits sought. Tygart *v.* Albritton, 5 Ga. App. 412, 63 S. E. 521.

31-82 **Approximate evidence** of sum expended, sufficient. Jemo *v.* Co., 55 Wash. 595, 104 P. 820.

If purchases are made preparatory to entering upon performance of contract, value of goods may not be recovered in absence of evidence showing their worth for use elsewhere. May *v.* Breunig, 120 N. Y. S. 98.

Price paid for other goods cannot be shown unless vendee bound to purchase them in order to fix his damages, which need not be done where in case of refusal to deliver goods of quality contracted for. Strohmeyer *v.* Co., 130 App. Div. 102, 114 N. Y. S. 287.

31-84 Jesel *v.* Benas, 177 Mo. App. 708, 160 S. W. 528; Keats *v.* Co., 29 Pa. Super. 480 (estimate two years after injury and based on plaintiff's description of it).

31-85 Sloss-S. S. & I. Co. *v.* Mitchell, 161 Ala. 278, 49 S. 851; Atlanta, etc. R. Co. *v.* Wood, 160 Ala. 657, 49 S. 426 (also increased cost of operating; but cost of restoration cannot be shown unless defendant responsible for entire damage); Southern R. Co. *v.* Reeder, 152 Ala. 227, 44 S. 699; Linforth *v.* Co., 156 Cal. 58, 103 P. 320; Calwell *v.* Canton, 81 Conn. 288, 70 A. 1025 (in connection with evidence of added value because of repairs); Pickles *v.* Ansonia, 76 Conn. 628, 56 A. 552; Berry *v.* Campbell, 118 Ill. App. 646; Richardson *v.* Webster City, 111 Ia. 427, 82 N. W. 920; Richardson *v.* Sioux City, 136 Ia. 436, 113 N. W. 928; Smith *v.* R. Co., 127 Mo. App. 160, 105 S. W. 10; Cunningham *v.* Dickerson, 104 Mo. App. 410, 79 S. W. 492; Green *v.* R. Co., 156 Mo. App. 259, 137 S. W. 611; Layton *v.* County, 83 Neb. 628, 120 N. W. 179; DePalma *v.* Weinman, 15 N. M. 68, 103 P. 782; Rogers *v.* R. Co., 84 N. Y. S. 974; McPhillips *v.* Fitzgerald, 76 App. Div. 15, 78 N. Y. S. 631, 177 N. Y. 543, 69 N. E. 1126 (no opinion); Wade *v.* Sugar Co., 65 Or. 488, 132 P. 710; Wilson *v.* R. Co., 55 Wash. 656, 104 P. 1114; Brown *v.* Blaine, 41 Wash. 287, 83 P. 310; McLain *v.* Automobile Co. (W. Va.), 79 S. E. 731.

Hire and feed of another horse to replace injured one, competent items of expenditure. Powell *v.* Hill (Tex. Civ.), 152 S. W. 1125.

Expenditures for hiring another automobile to replace damaged one during repairs, admissible. Cardozo *v.* Bloomingdale, 79 Misc. 605, 140 N. Y. S. 377.

Rule applies to personal torts (Shoemaker *v.* Sonju, 15 N. D. 518, 108 N. W. 42) if expenditures reasonable. Metropolitan S. R. Co. *v.* Wishert (Tex. Civ.), 89 S. W. 460; Dallas S. R. Co. *v.* McAllister, 41 Tex. Civ. 131, 90 S. W. 933; St. Louis S. R. Co. *v.* Haynes (Tex. Civ.), 86 S. W. 934; Dallas S. R. Co. *v.* Ison, 37 Tex. Civ. 219, 83 S. W. 408.

Price for which animals sold a month after injury and after being fitted for market, not evidence of value immediately after they reached destination in injured condition. Cleveland, etc. R. Co. *v.* Patton, 203 Ill. 376, 67 N. E. 804.

Price paid for property, in connection with evidence of condition when destroyed, shows damage sustained. Atlanta, etc. R. Co. *v.* Minchew, 7 Ga. App. 566, 67 S. E. 678.

Expense of protecting property may be shown. Atlanta, etc. R. Co. *v.* Brown, 158 Ala. 607, 48 S. 73.

32-86 Sloss-Sheffield, etc. Co. *v.* Mitchell (Ala.), 61 S. 934; Southern H. & S. Co. *v.* Co., 158 Ala. 596, 48 S. 357; Keats *v.* Co., 29 Pa. Super. 480; Donnan *v.* Co., 26 id. 324; Sullivan *v.* Anderson, 81 S. C. 478, 62 S. E. 862; Wilson *v.* R. Co., 55 Wash. 656, 104 P. 1114.

Expense must have been incurred and be definitely shown. Harndon *v.* Stultz, 124 Ia. 734, 100 N. W. 851.

Testimony based on personal knowledge need not be supplemented by vouchers. Drews *v.* Burton, 76 S. C. 362, 57 S. E. 176.

Depreciation in value of land may be shown where injury permanent, and the inquiry may be directed to its comparative value for purpose to which it has been put. Texas & P. R. Co. *v.* Prude, 39 Tex. Civ. 144, 86 S. W. 1046; Gulf, etc. R. Co. *v.* Blue, 46 Tex. Civ. 239, 102 S. W. 128; Wiggins *v.* R. Co.,

129 Mo. App. 369, 108 S. W. 574; Nuckolls *v.* Powell (Tex. Civ.), 90 S. W. 933; *Contra* if injury temporary. Gulf, etc. R. Co. *v.* Roberts (Tex. Civ.), 86 S. W. 1052. Injury to contents of residence may be shown to prove depreciation. Texas S. L. R. Co. *v.* Clifford (Tex. Civ.), 94 S. W. 168. The question of depreciation is determinable by existing conditions; opinions as to future may bring, immaterial. Dennis *v.* R. Co. (Tex. Civ.), 94 S. W. 1092. But depreciation in value of land is not limited to uses to which it has been put if it is available for other uses. McGroarty *v.* Co., 212 Pa. 53, 61 A. 570.

Cost of property may be shown but is not proof of value at time it was lost. The Mobila, 147 Fed. 882; The Lucille, 169 Fed. 719 (without market value); Linforth *v.* Co., 156 Cal. 58, 103 P. 320.

In admiralty if repairs made to a vessel restore her strength and usefulness evidence her market value is less than before collision is inadmissible. The Loch Trool, 150 Fed. 429; Sawyer *v.* Oakman, 7 Blatch. 290, 21 Fed. Cas. No. 12,402.

Expenses of litigation not recoverable for breach of contract unless bad faith or fraud shown. McKenzie *v.* Mitchell, 123 Ga. 72, 51 S. E. 34.

32-87 Duff *v.* Read, 74 Kan. 730, 88 P. 263.

If punitive damages are recoverable expenses of action may be considered though not proved. Titus *v.* Corkins, 21 Kan. 519.

One who seeks to be reimbursed for expenditures must show clearly and explicitly occasion and amount thereof. San Fernando, etc. R. Co. *v.* Humphrey, 130 Fed. 298, 64 C. C. A. 544.

32-88 Kendall *v.* Uland, 83 Neb. 527, 120 N. W. 152; Cullen *v.* Dickenson (S. D.), 144 N. W. 656.

Motive immaterial in action for breach of contract. Baumgarten *v.* Co., 159 Fed. 275; Ford *v.* Ferguson, 120 Ga. 708, 48 S. E. 180; Kelley *v.* Co., 120 Wis. 84, 97 N. W. 674. *Contra*, if fraud proved. Welborn *v.* Dixon, 70 S. C. 108, 49 S. E. 232; Prince *v.* Ins. Co., 77 S. C. 187, 57 S. E. 766.

32-89 Walbridge *v.* Walbridge, 80 Kan. 567, 103 P. 89; Magnolia M. Co. *v.* Gale, 189 Mass. 124, 75 N. E. 219; White *v.* Kincaid, 149 N. C. 415, 63 S. E. 109; Oneal *v.* Weisman, 39 Tex. Civ. 592, 88 S. W. 290; Woodhouse *v.* Powles, 43 Wash. 617, 86 P. 1063.

32-90 Farrow *v.* Hoffecker, 7 Penne. (Del.) 223, 79 A. 920; Dunshee *v.* Oil Co., 152 Ia. 618, 132 N. W. 371; Yazoo & M. V. R. Co. *v.* Hardie, 100 Miss. 132, 55 S. 42, 967; Magagnos *v.* R. Co., 128 App. Div. 182, 112 N. Y. S. 637; Pegues Mercantile Co. *v.* Brown (Tex. Civ.), 145 S. W. 280; Moore *v.* Duke, 84 Vt. 401, 80 A. 194.

33-91 Ducett *v.* S. (Ala.), 65 S. 351; Brown *v.* Thompson, 75 N. J. L. 832, 70 A. 172.

34-94 Brown *v.* Bannister, 14 Haw. 34 (breach of promise to marry); Stevens *v.* Anthony, 82 Kan. 179, 107 P. 557 (under act making cities liable for damages by mobs); Texas M. R. Co. *v.* Dean, 98 Tex. 517, 85 S. W. 1135 (unlawful arrest,—damages sought for shame and humiliation).

Particular acts of misconduct committed after cause of action arose, not provable. Columbia Nat. Bk. *v.* MacKnight, 29 App. Cas. (D. C.) 580.

General reputation of wife for unchastity at time of marriage is not provable in action for alienation of husband's affections if it had no effect in causing separation. White *v.* White, 76 Kan. 82, 90 P. 1087.

34-95 Nashville, etc. R. Co. *v.* Miller, 120 Ga. 453, 47 S. E. 959; Illinois C. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435, 109 Ill. App. 468; Citizens', etc. Co. *v.* Whipple, 32 Ind. App. 203, 69 N. E. 557; Louisville & N. R. Co. *v.* Carothers, 23 Ky. L. R. 1673, 65 S. W. 833, 66 S. W. 385; Gray *v.* R. Co., 215 Mass. 143, 102 N. E. 71; Erhart *v.* R. Co., 136 Mo. App. 617, 118 S. W. 657; Illinois C. R. Co. *v.* Porter, 117 Tenn. 13, 94 S. W. 666; Gulf, etc. R. Co. *v.* Wittnebert (Tex. Civ.), 104 S. W. 424; Missouri, etc. R. Co. *v.* Flood, 35 Tex. Civ. 197, 79 S. W. 1106.

Evidence that the defendant in an action for negligence is insured in a casualty company is incompetent and its admission justifies an order for a new trial of the action. Simpson *v.* Foundation Co., 201 N. Y. 479, 490, 95 N. E. 10. Such evidence almost always is quite unnecessary to the plaintiff's case, and its effect cannot but be highly dangerous to the defendant's; for it conveys the insidious suggestion to the jurors that the amount of their verdict for the plaintiff is immaterial to the defendant. It was a highly im-

proper attempt on the plaintiff's part to inject a foreign element of fact into his case, which might affect the jurors' minds, if in doubt upon the merits, by the consideration that the judgment would be paid by an insurance company. Akin *v.* Lee, 206 N. Y. 20, 99 N. E. 85.

A tort-feasor through whose negligence an injury is sustained cannot be accorded any benefits of an accident policy, for which it has paid nothing in mitigation of the damages allowed by law for tort. Tex. Cent. R. Co. *v.* Cameron (Tex. Civ.), 149 S. W. 710.

Defendant's insurance is immaterial. Prewitt-S. Mfg. Co. *v.* Woodall, 115 Tenn. 605, 90 S. W. 623.

Settlement by injured person with accident insurer cannot be proved to show extent of injury. Puget Sound R. *v.* Van Pelt, 168 Fed. 206, 93 C. C. A. 492.

35-99 **Statutory claim for compensation,** admissible to show maximum damage. Hubbard *v.* County, 140 Ia. 520, 118 N. W. 912.

35-1 Oklahoma, C. & T. R. Co. *v.* Scarborough, 43 Tex. Civ. 338, 95 S. W. 1089; Coleman *v.* Lytle, 49 Tex. Civ. 42, 107 S. W. 562; Wilson *v.* Nav. Co., 71 Wash. 102, 127 P. 847.

DEATH AND SURVIVORSHIP

40-1 Alexander *v.* Alexander, 36 App. Cas. (D. C.) 78; Donovan *v.* Major, 253 Ill. 179, 97 N. E. 231; Chicago, etc. R. Co. *v.* Young, 67 Neb. 568, 93 N. W. 922; Dietrich *v.* Dietrich, 128 App. Div. 564, 112 N. Y. S. 968; Rosenblum *v.* Eisenberg, 108 N. Y. S. 350; Hall *v.* Hall, 122 N. Y. S. 401; Grier *v.* Canada, 119 Tenn. 17, 107 S. W. 970. *Comp.* In re Aldersey, 74 L. J. Ch. 548 (1905), 2 Ch. 181, 92 L. T. 826.

40-2 Groff *v.* Groff, 36 App. Cas. (D. C.) 560; Heagany *v.* Union, 143 Mich. 186, 106 N. W. 700; In re Truman, 27 R. I. 209, 61 A. 598. See infra, "Insurance," 546-24.

Preponderance required.—Kennedy *v.* Modern Woodmen, 149 Ill. App. 471, *aff.*, 243 Ill. 560, 90 N. E. 1084.

40-3 Iberia C. Co. *v.* Thorgeson, 116 La. 218, 40 S. 682. See Sterrett *v.* Samuel, 108 La. 346, 32 S. 428.

41-4 **Presumption of continued life** of man of twenty-three, two years after disappearance, not sufficiently strong to remove reasonable doubt from a title. Van Williams *v.* Elias, 106 App. Div. 288, 94 N. Y. S. 611.

Absence for forty-three years of a man over thirty, of dissipated habits,—presumption of life ends. McNulty *v.* Mitchell, 41 Misc. 293, 84 N. Y. S. 89.

Seven years.—Conn., etc. Ins. Co. *v.* King, 47 Ind. App. 587, 93 N. E. 1046.

41-6 In re Aldersey, 74 L. J. Ch. 548 (1905), 2 Ch. 181, 92 L. T. 826; Stevenson *v.* Montgomery, 263 Ill. 93, 104 N. E. 1075; Donovan *v.* Major, 253 Ill. 179, 97 N. E. 231; Kennedy *v.* Woodmen, 243 Ill. 560, 90 N. E. 1084; Policemen's B. Assn. *v.* Ryce, 115 Ill. App. 95, 213 Ill. 9, 72 N. E. 764, 104 Am. St. 199; Connecticut Mut. L. Ins. Co. *v.* King, 47 Ind. App. 587, 93 N. E. 1046 (statutory provision); Magness *v.* Woodmen, 146 Ia. 1, 123 N. W. 169; Ironton B. Co. *v.* Tucker, 26 Ky. L. R. 532, 82 S. W. 241; Chew *v.* Tome, 93 Md. 244, 48 A. 701; Turner *v.* Williams, 202 Mass. 500, 89 N. E. 110; George *v.* Clark, 186 Mass. 426, 71 N. E. 809; Behlmer *v.* A. O. U. W., 109 Minn. 305, 123 N. W. 1071; Spahr *v.* Ins. Co., 98 Minn. 471, 108 N. W. 4; Gilroy *v.* Brady, 195 Mo. 205, 93 S. W. 279; Chapman *v.* Kullman, 191 Mo. 237, 89 S. W. 924; Bradley *v.* Woodman, 146 Mo. App. 428, 124 S. W. 69 (regardless of exposure to special peril); S. *v.* Lagoni, 30 Mont. 472, 76 P. 1044; Holdrege *v.* Livingston, 79 Neb. 238, 112 N. W. 341; Vreeland *v.* Vreeland, 78 N. J. Eq. 256, 79 A. 336; Spiltoir *v.* Spiltoir, 72 N. J. Eq. 50, 64 A. 96; In re Sanford, 100 App. Div. 479, 91 N. Y. S. 706; In re Losee, 46 Misc. 363, 94 N. Y. S. 1082; Sizer *v.* Severs (N. C.), 81 S. E. 685; In re Freeman's Est., 227 Pa. 154, 75 A. 1063; In re McCausland, 213 Pa. 189, 62 A. 789, 110 Am. St. 540; In re Rhodes, 10 Pa. C. C. 386; In re Truman, supra; In re Hackett, 27 R. I. 587, 65 A. 268; Holland *v.* Nance, 102 Tex. 177, 114 S. W. 346; Sovereign Camp, etc. *v.* Ruedrich (Tex. Civ.), 158 S. W. 170; Miller *v.* Woodmen, 140 Wis. 505, 122 N. W. 1126; Security Bk. *v.* Equitable, etc. Soc., 112 Va. 462, 71 S. E. 647.

See In re Oag & Order of C. H. C., 23 Ont. W. R. 796; 4 Ont. W. N. 643; 9 D. L. R. 771; Goset *v.* Goset (Ark), 164 S. W. 759; In re Benjamin, 139 N. Y. S. 1091; Wells *v.* Margraves (Tex. Civ.), 164 S. W. 881.

Presumption applies only to absentees. The absentee cannot presume person remaining at home to be dead. Modern Woodmen *v.* Ghromley (Okla.), 139 P. 306.

43-7 Fuller *v.* L. Ins. Co., 199 Fed. 897, 118 C. C. A. 227; Kennedy *v.* Woodmen, 243 Ill. 560, 90 N. E. 1084; Magness *v.* Woodmen, 146 Ia. 1, 123 N. W. 169; Spahr *v.* Ins. Co., 98 Minn. 471, 108 N. W. 4; Grimes *v.* Miller, 221 Mo. 636, 121 S. W. 21; Duff *v.* Duff, 156 Mo. App. 247, 137 S. W. 909; Bradley *v.* Woodmen (Mo. App.), 124 S. W. 69; In re Benjamin, 77 Misc. 434, 137 N. Y. S. 758; In re Jones' Estate, 70 Misc. 154, 128 N. Y. S. 477; Ancient Order, etc. *v.* Mooney, 230 Pa. 16, 79 A. 233; In re McCann, 31 Pa. C. C. 535.

"If after his disappearance it is shown that he has located in a new country and intended to desert his family, the presumption is immediately overcome. To create a new presumption of death it must appear that he has disappeared from his new and last home. Davie *v.* Briggs, 97 U. S. 628, 24 L. ed. 1086; Miller *v.* W. O. W., 140 Wis. 505, 122 N. W. 1126, 28 L. R. A. (N. S.) 178, 133 Am. St. Rep. 1095, where the cases are collected." Wright *v.* Jones, 23 N. D. 191, 135 N. W. 1120.

43-9 Singer *v.* Naron, 99 Ark. 446, 138 S. W. 958.

43-10 In re McNeil, 12 Ont. L. R. (Can.) 208; Heagany *v.* Union, 143 Mich. 186, 106 N. W. 700; Holdrege *v.* Livingston, 79 Neb. 238, 112 N. W. 341; Groff *v.* Groff, 36 App. Cas. (D. C.) 560.

43-11 Hansen *v.* Owens, 132 Ga. 648, 64 S. E. 800; Donovan *v.* Twist, 105 App. Div. 171, 93 N. Y. S. 990. See Ironton B. Co. *v.* Tucker, 26 Ky. L. R. 532, 82 S. W. 241.

Continued absence from state for seven years must be conclusively shown or conceded before presumption arises. Bradley *v.* Woodmen, 146 Mo. App. 428, 124 S. W. 69.

44-12 Metropolitan Life Ins. Co. *v.* Lyons, 50 Ind. App. 534, 98 N. E. 824; Renard *v.* Bennett, 76 Kan. 848, 93 P. 261.

Removal from state, not enough. Gorham *v.* Settegast, 44 Tex. Civ. 254, 98 S. W. 665.

44-13 Wills *v.* Palmer, 53 W. R. (Eng.) 169 (death presumed after seven years, although reasons existed for concealment); Hansen *v.* Owens, 132 Ga. 648, 64 S. E. 800; Donovan *v.* Major, 253 Ill. 179, 97 N. E. 231; Modern Woodmen *v.* Gerdom, 72 Kan. 391, 82 P. 1100, 2 L. R. A. (N. S.) 809; Iberia C. Co. *v.* Thorgeson, 116 La. 218, 40 S. 682; Washington *v.* Filer, 127 La. 862, 54 S. 128; In re Wagener, 143 App. Div. 286, 128 N. Y. S. 164; In re Bd. of Education, 173 N. Y. 321, 66 N. E. 11; In re Wolff, 16 Phila. (Pa.) 213 (absence to escape punishment for crime insufficient).

44-14 Hansen *v.* Owens, 132 Ga. 648, 64 S. E. 800; Policemen's B. Assn. *v.* Ryce, 115 Ill. App. 95, 213 Ill. 9, 72 N. E. 764, 104 Am. St. 199; Holdrege *v.* Livingston, 79 Neb. 238, 112 N. W. 341; Spiltoir *v.* Spiltoir, 72 N. J. Eq. 50, 64 A. 96; Modern Woodmen *v.* Ghromley (Okla.), 139 P. 306; Gorham *v.* Settegast, 44 Tex. Civ. 254, 98 S. W. 665.

Failure to investigate reports person claimed to be dead had been seen may be excused by showing they originated in unreliable source. Kennedy *v.* Woodmen, 243 Ill. 560, 90 N. E. 1084.

44-15 In re Ross, 140 Cal. 282, 73 P. 976; Brown *v.* Grand Lodge, 13 Cal. App. 537, 110 P. 351; Garden *v.* Garden, 2 Houst. (Del.) 574; Hansen *v.* Owens, 132 Ga. 648, 64 S. E. 800; Stevenson *v.* Montgomery, 263 Ill. 93, 104 N. E. 1075; Hitz *v.* Ahlgren, 170 Ill. 60, 48 N. E. 1068; Whiting *v.* Nicholl, 46 Ill. 230, 92 Am. Dec. 248; Modern Woodmen *v.* Graber, 128 Ill. App. 585; Kennedy *v.* M. W., 149 Ill. App. 471, *aff.*, 243 Ill. 560, 90 N. E. 1084; Renard *v.* Bennett, 76 Kan. 848, 93 P. 261; Shriver *v.* S., 65 Md. 278, 4 A. 679; Hyde Park *v.* Canton, 130 Mass. 505; Bailey *v.* Bailey, 36 Mich. 181; Bradley *v.* Woodmen, 146 Mo. App. 428, 124 S. W. 69; Thomas *v.* Thomas, 16 Neb. 553, 20 N. W. 846; Brown *v.* Jewett, 18 N. H. 230; In re Bd. of Education, 173 N. Y. 321, 66 N. E. 11; Gall *v.* Gall, 114 N. Y. 109, 21 N. E. 106; Dietrich *v.* Dietrich, 128 App. Div. 564, 112 N. Y. S. 968; Sizer *v.* Severs (N. C.), 81 S. E. 685; Morrison's Est., 183 Pa. 155, 38 A. 895; Hackett's Appeal, 27 R. I. 587, 65 A. 268; Hess *v.* Webb (Tex. Civ.), 113 S. W. 618.

See Modern Woodmen *v.* Gerdom, 72 Kan. 391, 82 P. 1100, 2 L. R. A. (N. S.) 809n; Sovereign Camp *v.* Ruedrich (Tex. Civ.), 158 S. W. 170.

Contra, Miller *v.* Woodmen, 140 Wis. 505, 122 N. W. 1126. *Comp.* In re Harrington, 140 Cal. 244, 294, 73 P. 1000, 74 P. 136 (no inquiry necessary by wife where husband absent ten years); Modern Woodmen *v.* Gerdom, 72 Kan. 391, 82 P. 1100 (circumstances determine diligence required).

Rule as to extent of inquiry stated.—Modern Woodmen *v.* Ghromley (Okla.), 139 P. 306.

Inquiries after suit brought may be proved. Kennedy *v.* Woodmen, 243 Ill. 560, 90 N. E. 1084.

45-16 Renard *v.* Bennett, 76 Kan. 848, 93 P. 261.

45-17 Modern Woodmen *v.* Graber, 128 Ill. App. 585.

46-18 Williams *v.* Post, 158 App. Div. 818, 143 N. Y. S. 1027. See In re Harrington, 140 Cal. 244, 294, 73 P. 1000, 74 P. 136.

Five years.—Goset *v.* Goset (Ark.), 164 S. W. 759.

The unexplained absence of a person for seven years will establish a presumption of death—but if less time has elapsed, he is presumed to be alive. This was an action on an insurance policy. Springmeyer *v.* Woodmen, 162 Mo. App. 338, 143 S. W. 872.

46-20 Alexander *v.* Alexander, 36 App. Cas. (D. C.) 78; Groff *v.* Groff, 36 App. Cas. (D. C.) 560; The San Rafael, 141 Fed. 270, 72 C. C. A. 388; Springmeyer *v.* Woodmen, 144 Mo. App. 483, 129 S. W. 273; Coe *v.* National Council (Neb.), 147 N. W. 112; In re Wagener, 143 App. Div. 286, 128 N. Y. S. 164. See Spiltoir *v.* Spiltoir, 72 N. J. Eq. 50, 64 A. 96. Death shown three years after disappearance. In re Matthews, 67 L. J. P. 11, 77 L. T. (N. S.) 630.

"**Formerly the character of evidence** necessary to establish death short of the seven years period was that the person claimed to be dead must have been exposed to some peril or afflicted with some serious disease. But other character of evidence will now answer the purpose, as that the person was of good habits, comfortably and happily situated in life, of cheerful temperament, pleasantly and happily associated with friends and family, and other facts incompatible with his desertion and remaining away from family and friends without communicating with them. In such way a case may be built up of such convincing strength as to overcome the usual presumption of the continuance of life." Johnson *v.* Woodmen (Mo.), 147 S. W. 510.

"**The rule seems to be well established** in this country that where one, steady in his habits, successful in his profession or business, contented and respected, having a fixed residence and pleasant domestic relations, suddenly disappears, and no tidings of him are received, such circumstances, if satisfactory to the jury, may warrant them in finding his death at or about the time of his disappearance." Springmeyer *v.* Woodmen, 144 Mo. App. 483, 129 S. W. 273.

Indiana.—Burns' Ann. St. §§2747-8, relate exclusively to the settlement of the estates of absentees. Metropolitan Life Ins. Co *v.* Lyons, 50 Ind. App. 534, 98 N. E. 824.

47-22 In re Sanford, 100 App. Div. 479, 91 N. Y. S. 706; Freeman's Est., 18 Pa. Dist. 194 (subject to modification by evidence absentee exposed to imminent peril). See Sovereign Camp *v.* Ruedrich (Tex. Civ.), 158 S. W. 170.

Declaration of intention to commit suicide and precedent act in conformity with it raises presumption of death at or about time declaration made. Harmstad's Est., 18 Pa. Dist. 786.

47-23 Policemen's B. Assn. *v.* Ryce, 115 Ill. App. 95, 213 Ill. 9, 72 N. E. 764, 104 Am. St. 199; Carpenter *v.* Woodmen (Ia.), 142 N. W. 411; Caldwell *v.* Woodmen, 89 Kan. 11, 130 P. 642; Spahr *v.* Ins. Co., 98 Minn. 471, 108 N. W. 4; Johnson *v.* Woodmen, 163 Mo. App. 728, 147 S. W. 510; Duff *v.* Duff, 156 Mo. App. 247, 137 S. W. 909; Springmeyer *v.* Woodmen, 144 Mo. App. 483, 129 S. W. 273; Chapman *v.* Kullman, 191 Mo. 237, 89 S. W. 924; Bradley *v.* Woodmen (Mo. App.), 124 S. W. 69; In re Losee, 46 Misc. 363, 94 N. Y. S. 1082 (time of death reckoned from decree adjudging party dead); Security Bank *v.* Equitable, etc. Society, 112 Va. 462, 71 S. E. 647.

"**It is not indispensable** that the proof offered for that purpose should show the missing person was subject to any specific peril at any particular time. It is enough to adduce evidence of any other circumstances calculated to shorten life before the lapse of seven years." Springmeyer *v.* Woodmen, 144 Mo. App. 483, 129 S. W. 273.

Presumption of legitimacy raises further presumption remarriage after disappearance of husband was not before

death of first husband. In re McCausland, 213 Pa. 189, 62 A. 780, 110 Am. St. 540.

48-24 Springmeyer *v.* Woodmen, 144 Mo. App. 483, 129 S. W. 273; Butler *v.* I. O. F., 53 Wash. 118, 101 P. 481.

Absentee's condition in life, character, habits and domestic relations are relevant as are declarations when he left home. Rumors as to cause of his leaving, inadmissible. Bradley *v.* Woodmen, 146 Mo. App. 428, 124 S. W. 69.

48-25 Spahr *v.* Ins. Co., 98 Minn. 471, 108 N. W. 4; Bradley *v.* Woodmen, supra.

48-26 Magness *v.* Woodmen, 146 Ia. 1, 123 N. W. 169; Samberg *v.* Knights, 158 Mich. 568, 123 N. W. 25 (letters written to absentee's wife); Behlmer *v.* A. O. U. W., 109 Minn. 305, 123 N. W. 1071; Duff *v.* Duff, 156 Mo. App. 247, 137 S. W. 909.

Probate proceedings raise presumption of death. Keenon *v.* Burkhardt (Tex. Civ.), 162 S. W. 483.

Circumstantial evidence is sufficient. Duff *v.* Duff, 156 Mo. App. 247, 137 S. W. 909.

"That the absentee was exposed to some specific peril; that he sailed in a vessel which had never been heard from, though many months overdue; that he was last seen as a passenger on an ocean steamer in mid-ocean, at night, and was never seen or heard of afterward, though diligent search was made the next morning; that he made threats to commit suicide prior to his disappearance; that the condition of his health was desperate; that he was afflicted with some disease likely to undermine his constitution—these are circumstances which may be considered as tending to raise a just inference of death. The health, age, habits, disposition, manner of life, pecuniary circumstances, and family relations of a person who has disappeared are all proper for consideration in determining whether he probably died before the expiration of seven years. Here no circumstances are shown from which a legitimate inference of death can be drawn. A vigorous, large, healthy, fifteen year old boy, of a cheerful disposition and fond of sight-seeing, about the beginning of the World's Fair in Chicago, left his home suddenly and without warning, and did not come back. Such an act would, of course, give his family occasion for apprehension, but not necessarily of death. Of itself, it could create at the time no presumption of his death, and it could not grow into a presumption, unless aided by proof of other circumstances, none of which appear in this case. Donovan *v.* Major, 253 Ill. 179, 97 N. E. 231. See Wells *v.* Margraves (Tex. Civ.), 164 S. W. 881.

48-27 A. O. U. W. *v.* Marshall, 18 Ont. L. R. 129; Carter *v.* Ins. Co., 158 Mo. App. 368, 138 S. W. 49; Martin *v.* Woodmen, 158 Mo. App. 468, 139 S. W. 231; Adams *v.* Ins. Co., 158 Mo. App. 564, 138 S. W. 921; Johnston *v.* Garvey, 139 App. Div. 659, 124 N. Y. S. 278, *aff.* 95 N. E. 1130.

Evidence held insufficient.—Groff *v.* Groff, 36 App. Cas. (D. C.) 560.

50-28 Harvey *v.* Casualty Co., 200 Fed. 925, 119 C. C. A. 221; The San Rafael, 141 Fed. 270, 72 C. C. A. 388; Supreme Council *v.* Boyle, 10 Ind. App. 301, 37 N. E. 1105; Springmeyer *v.* Woodmen, 144 Mo. App. 483, 129 S. W. 273; McNulty *v.* Mitchell, 41 Misc. 293, 84 N. Y. S. 89; Travelers' Ins. Co. *v.* Rosch, 23 O. C. C. 491. *Comp.* S. *v.* Lagoni, 30 Mont. 472, 76 P. 1044.

Unsigned death certificates, not evidence. Lucas *v.* Co., 186 Mo. 448, 85 S. W. 359.

Coroner's process-verbal admissible to prove fact and cause of death only. S. *v.* Meyers, 120 La. 127, 44 S. 1008.

50-29 Metropolitan Life Ins. Co. *v.* Lyons, 50 Ind. App. 534, 98 N. E. 824; Hess *v.* Webb (Tex. Civ.), 113 S. W. 618.

As well as of the time when such death occurred. Metropolitan Life Ins. Co. *v.* Lyons, 50 Ind. App. 534, 98 N. E. 824, *cit.* Morrill *v.* Foster, 33 N. H. 379; American Life, etc. Co. *v.* Rosenagle, 77 Pa. 507; Mason *v.* Fuller, 45 Vt. 29.

General repute to knowledge of family, competent. Welch *v.* R. Co., 182 Mass. 84, 64 N. E. 695.

50-30 Lalor *v.* Tooker, 130 App. Div. 11, 114 N. Y. S. 403 (surrogate's records); S. *v.* Pabst, 139 Wis. 561, 121 N. W. 351 (statutory death certificate). *Contra,* as to certificate of health officer. Rohloff *v.* Assn., 130 Wis. 61, 109 N. W. 989.

50-31 *Contra,* Chambers *v.* Morris, 159 Ala. 606, 48 S. 687 (to render declarations of member of family of deceased admissible to show death it must appear declarant is dead). *Comp.* Iberia C. Co. *v.* Thorgeson, 116 La. 218,

40 S. 682; Lynch *v.* R. Co., 208 Mo. 1, 106 S. W. 68. See Johnston *v.* Garvey, 139 App. Div. 659, 124 N. Y. S. 278.

Rumors of death or survivorship may not be proved. Kennedy *v.* Woodmen, 243 Ill. 560, 90 N. E. 1084.

Certificate of physician as to cause of patient's death, inadmissible. Robinson *v.* Commandery, 77 App. Div. 215, 79 N. Y. S. 13, 177 N. Y. 564, 69 N. E. 1130, no opinion.

50-32 Sims *v.* Boynton, 32 Ala. 353; Peterkin *v.* Inloes, 4 Md. 175; Munro *v.* Merchant, 26 Barb. (N. Y.) 383; McElroy *v.* Soc., 2 Pa. C. C. 643; Steele's Unknown Heirs *v.* Belding (Tex. Civ.), 148 S. W. 592, cit. this text. *Contra,* Marks *v.* Bk., 107 N. Y. S. 491. See Brown *v.* Truax, 58 Or. 572, 115 P. 597.

51-33 Fearnley *v.* Fearnley, 44 Colo. 417, 98 P. 819; Banton *v.* Crosby, 95 Me. 429, 50 A. 86; Harris *v.* Bk., 49 Misc. 458, 97 N. Y. S. 1044 (declarations of administrator, insufficient); Donovan *v.* Twist, 105 App. Div. 171, 93 N. Y. S. 990 (under facts, insufficient); Hughes *v.* S. (Tex. Cr.), 152 S. W. 912; Wall *v.* Lubbock, 52 Tex. Civ. 405, 118 S. W. 886.

51-36 Preponderance, sufficient. Kennedy *v.* Woodmen, 243 Ill. 560, 90 N. E. 1084.

Certificate of death filed in another state not prima facie evidence of death in absence of proof that the statutes of that state are similar to those of forum. Thompson *v.* R. Co., 71 Wash. 436, 128 P. 1070.

51-38 See Grand Lodge *v.* Miller, 8 Cal. App. 25, 96 P. 22; In re Loucks' Estate, 160 Cal. 551, 117 P. 673.

52-40 Y. W. C. H. *v.* French, 187 U. S. 401; Policemen's B. Assn. *v.* Ryce, 115 Ill. App. 95, 213 Ill. 9, 72 N. E. 764, 104 Am. St. 199; Aley *v.* R. Co., 211 Mo. 460, 111 S. W. 102; St. John *v.* Institute, 191 N. Y. 254, 83 N. E. 981 (see s. c. 117 App. Div. 698, 102 N. Y. S. 808); Dunn *v.* Co., 63 Misc. 225, 118 N. Y. S. 491.

Presumption death was simultaneous. Walton *v.* Burchel, 121 Tenn. 715, 121 S. W. 391.

52-41 St. John *v.* Institute, supra.

52-42 In re Loucks' Est., 160 Cal. 551, 117 P. 673.

52-43 In re Phillips, 12 Ont. L. R. (Can.) 48; St. John *v.* Institute, 191 N. Y. 254, 83 N. E. 981; In re Gerdes, 50 Misc. 88, 100 N. Y. S. 440 (*rev.* on the facts); In re McInnes, 119 App. Div. 440, 104 N. Y. S. 147; In re Lott, 65 Misc. 422, 121 N. Y. S. 1102. See Farrelly *v.* Bk., 92 App. Div. 529, 87 N. Y. S. 54.

Preponderance of evidence.—In re Loucks' Est., 160 Cal. 551, 117 P. 673.

53-48 St. John *v.* Institute, 191 N. Y. 254, 83 N. E. 981; In re McInnes, 119 App. Div. 440, 104 N. Y. S. 147; In re Gerdes, 50 Misc. 88, 100 N. Y. S. 440.

DEBT

62-33 Foster *v.* P., 121 Ill. App. 165.

62-24 Defendant may show any fact bearing upon question of what work done was reasonably worth, as if the action were covenant broken or assumpsit. Seretto *v.* R. Co., 101 Me. 140, 63 A. 651.

63-34 Adams *v.* Co., 29 R. I. 333, 71 A. 180.

67-52 More than preponderance necessary in action to recover statutory penalty. Atchison R. Co. *v.* P., 227 Ill. 270, 81 N. E. 342.

DECLARATIONS

71-2 Receivable for all purposes, independently of its value. Taylor *v.* Witham, 3 Ch. D. (Eng.) 605. The only difference in respect to oral, as against written, declarations is in weight to which they are severally entitled. Reg. *v.* Overseers, 1 B. & S. 763, 101 E. C. L. 761.

Origin of rule.—See Smith *v.* Moore, 142 N. C. 277, 286, 55 S. E. 275, 7 L. R. A. (N. S.) 684.

71-5 Taylor *v.* Witham, 3 Ch. D. (Eng.) 605; Massee F. L. Co. *v.* Sirmans, 122 Ga. 297, 50 S. E. 92; McBrayer *v.* Walker, 122 Ga. 245, 50 S. E. 95; Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755; Randall *v.* Claflin, 194 Mass. 560, 80 N. E. 594; Hall *v.* Reinherz, 192 Mass. 52, 77 N. E. 880; O'Driscoll *v.* R. Co., 180 Mass. 187, 62 N. E. 3; Taylor *v.* A. O. U. W., 101 Minn. 72, 111 N. W. 919; Keystone Mills *v.* Co. (Tex. Civ.), 96 S. W. 64 (surveyor's field notes).

73-6 Donnelly *v.* Rees, 141 Cal. 56, 74 P. 433.

73-7 Locklayer *v.* Locklayer, 139 Ala.

354, 35 S. 1008; Wilson *v.* Gordon, 73 S. C. 155, 53 S. E. 79.

73-8 Scully *v.* Scully, 154 App. Div. 359, 139 N. Y. S. 622.

73-11 McIntosh *v.* Fisher, 125 Ill. App. 511.

73-12 Goyette *v.* Keenan, 196 Mass. 416, 82 N. E. 427; White *v.* Poole, 74 N. H. 71, 65 A. 255; Collins *v.* Clough, 222 Pa. 472, 71 A. 1077. Inadmissible to identify easement though made on land at time of conveyance. Peck *v.* Clark, 142 Mass. 436, 8 N. E. 335.

74-13 Keefe *v.* R., 75 N. H. 116, 71 A. 379; Caldwell L. & L. Co. *v.* Triplett, 151 N. C. 409, 66 S. E. 343; Powers *v.* Silsby, 41 Vt. 288, *mod.* Wood *v.* Willard, 37 Vt. 377, 86 Am. Dec. 716. See Brenstein *v.* R. Co., 119 N. Y. S. 1. **Declarations concerning** title may be shown though not made on the land. Knight *v.* Hunter, 155 Ala. 238, 46 S. 235.

74-15 See Massee-F. L. Co. *v.* Sirmans, 122 Ga. 297, 50 S. E. 92.

74-17 Higham *v.* Ridgway, 10 East 109, 103 Eng. Reprint 717, 3 Am. L. Cas. (9th Am. ed. 1); S. *v.* Draughon, 151 N. C. 667, 65 S. E. 913; Smith *v.* Moore, 142 N. C. 277, 286, 55 S. E. 275, 7 L. R. A. (N. S.) 684; Williams *v.* Mower, 29 S. C. 332, 7 S. E. 505; Griffin *v.* Forrester, 80 S. C. 220, 61 S. E. 389; Wilson *v.* Gordon, 73 S. C. 155, 53 S. E. 79.

Written declaration admissible though it contains irrelevant matter. Randall *v.* Claflin, 194 Mass. 560, 80 N. E. 594.

74-18 Dixon *v.* Dixon (Md.), 90 A. 846; Escallier *v.* R. Co., 46 Mont. 238, 127 P. 458; Townsend *v.* Perry, 130 N. Y. S. 951; Garrett *v.* Rutherford, 108 Va. 478, 62 S. E. 389.

75-20 Succession of Zacharie, 119 La. 150, 43 S. 988.

Proof of declarations is specially distrusted when used to establish a contract with decedent. Rosenwald *v.* Middlebrook, 188 Mo. 58, 86 S. W. 200; Reed *v.* Morgan, 100 Mo. App. 713, 73 S. W. 381; Curd *v.* Brown, 148 Mo. 82, 49 S. W. 990.

75-21 Expressions favorable to such evidence are to be found. See Smith *v.* Moore, 142 N. C. 277, 286, 55 S. E 275, 7 L. R. A. (N. S.) 684.

75-23 Sasser *v.* Herring, 14 N. C. 340; Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782.

May outweigh modern maps and leave question free from reasonable doubt. Brenstein *v.* R. Co., 119 N. Y. S. 1.

76-26 Succession of Zacharie, 119 La. 150, 43 S. 988 (contemporaneous of memoranda and action conformatory of declaration); Taylor *v.* A. O. U. W., 101 Minn. 72, 111 N. W. 919.

76-27 Donnelly *v.* Rees, 141 Cal. 56, 74 P. 433.

76-29 Peck *v.* Clark, 142 Mass. 436, 8 N. E. 335.

77-31 Jarchon *v.* Grosse, 257 Ill. 36, 100 N. E. 290; Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782. *Comp.* text with statement under 84-62, infra, and Hathaway *v.* Goslant, 77 Vt. 199, 59 A. 835.

77-33 Rule admitting declarations is not to be extended. Hartford *v.* Maslen, 76 Conn. 599, 615, 57 A. 740.

78-34 Fincannon *v.* Sudderth, 144 N. C. 587, 592, 57 S. E. 337; Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782; Warner *v.* Sapp (Tex. Civ.), 97 S. W. 125; Russell *v.* Hunnicutt, 70 Tex. 657, 8 S. W. 500; Keystone Mills Co. *v.* Co. (Tex. Civ.), 96 S. W. 64; Hathaway *v.* Goslant, 77 Vt. 199, 59 A. 835; S. *v.* King, 64 W. Va. 546, 63 S. E. 468. And see Faulkner *v.* Rocket, 33 R. I. 152, 80 A. 380.

81-45 Hartford *v.* Maslen, 76 Conn. 599, 615, 57 A. 740 (or supposed to be dead, or who are not available as witnesses); Sullivan *v.* Blount (N. C.), 80 S. E. 892; Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782; Mechanics' Bank & Trust Co. *v.* Whilden, 159 N. C. 280, 74 S. E. 1047; Hemphill *v.* Hemphill, 138 N. C. 504, 51 S. E. 43.

81-46 Hartford *v.* Maslen, 76 Conn. 599, 615, 57 A. 740; Turgen *v.* Woodward, 83 Conn. 537, 78 A. 577.

84-61 Sullivan *v.* Blount (N. C.), 80 S. E. 892; Caldwell L. & L. Co. *v.* Triplett, 151 N. C. 409, 66 S. E. 343; Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782; Pilkerton *v.* Roberson, 110 Va. 136, 65 S. E. 835.

84-62 It has been said necessity for such evidence must exist in absence of proof in ordinary way by living witnesses. Hartford *v.* Maslen, 76 Conn. 599, 615, 57 A. 740.

84-63 Hathaway *v.* Goslant, 77 Vt. 199, 59 A. 835. But see Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782. It is sometimes said declarant must have been aged as well as disinterested. Smith *v.* Headrick, 93 N. C. 210.

84-64 Justice *v.* Justice (Ky.), 124

S. W. 351; Cadwalader *v.* Price, 111 Md. 310, 73 A. 273; Sullivan *v.* Blount (N. C.), 80 S. E. 892; Caldwell L. & L. Co. *v.* Triplett, 151 N. C. 409, 66 S. E. 343; Mechanics' Bank & Trust Co. *v.* Whilden (N. C.), 74 S. E. 1047. And see Turgeon *v.* Woodward, 83 Conn. 537, 78 A. 577.

Declarant need not have been wholly disinterested. Child *v.* Kingsbury, 46 Vt. 47; Turner-Falls Co. *v.* Burns, 71 Vt. 354, 45 A. 896; Hathaway *v.* Goslant, 77 Vt. 199, 59 A. 835. Self-serving declarations, inadmissible. Table Rock L. Co. *v.* Branch, 150 N. C. 240, 63 S. E. 948.

Must be consistent.—Declarations of surveyor which state object was found by him in two places, valueless. Keystone Mills Co. *v.* Co. (Tex. Civ.), 96 S. W. 64.

87-75 Merriweather *v.* Co., 161 Ala. 441, 49 S. 916; Locklayer *v.* Locklayer, 139 Ala. 354, 35 S. 1008 (as to race); Togni *v.* Slocomb, 12 Cal. App. 733, 108 P. 723; Stoddard *v.* Newhall, 1 Cal. App. 111, 81 P. 666; Murdock *v.* Adamson, 12 Ga. App. 275, 77 S. E. 181 (*cit.* 4 ENCYCLOPEDIA OF EVIDENCE); Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969; Am. S. Co. *v.* Wood, 2 Ga. App. 641, 58 S. E. 1116; Hueni *v.* Freehill, 125 Ill. App. 345; Keesling *v.* Powell, 149 Ind. 372, 49 N. E. 265 (declaration of deputy county treasurer as to payment of taxes); Dean *v.* Wilkerson, 126 Ind. 338, 26 N. E. 55; Gordon *v.* Munn, 87 Kan. 624, 125 P. 1; Taylor *v.* A. O. U. W., 101 Minn. 72, 111 N. W. 919; Gettins *v.* Kelley, 212 Mass. 171, 98 N. E. 684; U. S., etc. Co. *v.* Adams (Miss.), 63 S. 192; S. *v.* Fraser, 161 Mo. App. 333, 143 S. W. 545; Cobb *v.* Macfarland, 87 Neb. 408, 127 N. W. 377; Keefe *v.* R., 75 N. H. 116, 71 A. 379; Tiffany *v.* Morgan (R. I.), 73 A. 465; Schauer *v.* Von Schauer (Tex. Civ.), 138 S. W. 145; Kirby *v.* Boaz (Tex. Civ.), 121 S. W. 223; Smith *v.* Hanson, 34 Utah 171, 96 P. 1087, cit. the text.

Privity of deceased with parties does not affect admissibility of declarations. Smith *v.* Hanson, supra.

The rule has to be applied with caution.—"The fact of the declaration having been against interest ought clearly to appear. In the present case, we are very doubtful whether there was such opposition of interest. True the acknowledgment of owing a debt is, in general, against the interest of the speaker; but the motive of pecuniary interest may in particular cases yield to some stronger motive. In the present case, the deceased, at the time he is said to have made the statement in question, had just been cursed and abused by the accused in the presence of a crowd because of the non-payment of the debt, and may well have made the statement by way of assertion, or vindication, of his own manhood, in order to show that he had not been intimidated into paying the debt." S. *v.* Lazarone, 130 La. 1, 57 S. 532.

89-76 See Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755. Under statutes, Conn. declarations are not provable unless action is against decedent's representatives. Mooney *v.* Mooney, 80 Conn. 446, 68 A. 985. Under statutes, Mass. declarations must have been made in good faith. This cannot be assumed when declaration relates to state of employe's accounts unless it is known to be true. Glidden *v.* Co., 198 Mass. 109, 84 N. E. 143.

89-77 Hall *v.* Reinherz, 192 Mass. 52, 77 N. E. 880.

89-79 Memorandum not made in course of declarant's business or duty, not admissible. Tome Inst. *v.* Davis, 87 Md. 591, 41 A. 166.

89-80 Declarations of deceased agent competent against principal. Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969.

90-83 Knight *v.* Hunter, 155 Ala. 238, 46 S. 235; Stoddard *v.* Newhall, 1 Cal. App. 111, 81 P. 666; Oliver *v.* Warren, 16 Cal. App. 164, 116 P. 312; Allen *v.* Shires, 47 Colo. 433, 107 P. 1070; Shackelford *v.* Orris, 135 Ga. 31, 68 S. E. 838; Kirby *v.* Kirby, 236 Ill. 255, 86 N. E. 259; In re Bremer's Est., 151 Ia. 449, 131 N. W. 667; S. *v.* Draughon, 151 N. C. 667, 65 S. E. 913; Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111; Wonsetler *v.* Wonsetler, 23 Pa. Super. 321; Ruedas *v.* O'Shea (Tex. Civ.), 127 S. W. 891.

See also Butts *v.* Butts, 84 Kan. 475, 114 P. 1048; Ware *v.* Bennett, 143 Ky. 532, 137 S. W. 743.

91-84 Drawdy *v.* Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190; Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306; Vannice *v.* Dungan, 41 Ind. App. 27, 83 N. E. 250; McDaneld *v.* McDaneld, 136 Ind. 603, 36 N. E. 286; Johnson *v.* Cole, 178 N. Y. 364, 70 N. E. 873; Naylor *v.* Parker (Tex. Civ.). 139 S. W. 93.

91-85 Cross *v.* Iler, 103 Md. 592, 64 A. 33; Taylor *v.* A. O. U. W., 101 Minn. 72, 111 N. W. 919; Conroy *v.* Sharman (Tex. Civ.), 134 S. W. 244; S. *v.* King, 64 W. Va. 546, 63 S. E. 468.

Inadmissible in action by widow to recover for death of declarant, if not part of res gestae. Jacksonville E. Co. *v.* Sloan, 52 Fla. 257, 42 S. 516. And so in action by father to recover for death of son. Penn. Co. *v.* Long, 94 Ind. 250; Bradford *v.* Downs, 126 Pa. 622, 17 A. 884.

Recital in deed of receipt of purchase money, inadmissible against claimants under prior deed. Ryle *v.* Davidson, 102 Tex. 227, 115 S. W. 28.

91-86 Georgia *v.* Fitzgerald, 108 Ga. 507, 34 S. E 316; Dickinson *v.* Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664; Chaput *v.* R. Co., 194 Mass. 218, 80 N. E. 597; Dixon *v.* Wks., 90 Minn. 492, 97 N. W. 375; Witmer *v.* Co., 112 App. Div. 698, 98 N. Y. S. 781; Smith *v.* R. Co., 34 Tex. Civ. 209, 78 S. W. 556. If admissible, not conclusive. Camden A. R. Co. *v.* Williams, 61 N. J. L. 646, 40 A. 634.

91-87 Mooney *v.* Mooney, 80 Conn. 446, 68 A. 985; McIntosh *v.* Fisher, 125 Ill. App. 511; Caldwell *v.* Caldwell, 24 Pa. Super. 230; Schauer *v.* Von Schauer (Tex. Civ.), 138 S. W. 145.

Declarations as to intentions inadmissible.--Barnum *v.* Reed, 136 Ill. 388, 26 N. E. 572. But if there has been delivery of things given under circumstances which may or may not constitute a gift, declarations prior and subsequent to delivery may be proved. McIntosh *v.* Fisher, supra.

91-88 McDonald *v.* McDonald, 86 Mo App. 122; Nelson *v.* Nelson, 90 Mo. 460, 2 S. W. 413; Gunn *v.* Thruston, 130 Mo. 339, 32 S. W. 654; Strode *v.* Beall, 105 Mo. App. 495, 79 S. W. 1019; Hicks *v.* Hicks, 9 O. C. C. (N. S.)413 (*aff.*, no opinion, 81 N. E. 1187).

It is not competent in action for partition, to prove declarations of deceedent that transfers made by him were gifts. Johnson *v.* Cole, 178 N. Y. 364, 70 N. E. 873.

92-89 McClellan *v.* Grant, 83 App. Div. 599, 82 N. Y. S. 208, 181 N. Y. 581, 74 N. E. 1119 (no opinion); Leary *v.* Corvin, 63 App. Div. 151, 71 N. Y. S. 335.

92-91 Burton *v.* Phillips, 161 Ala. 664, 49 S. 848 (joint liability); Massee-F. L. Co. *v.* Sirmans, 122 Ga. 297, 50 S. E. 92; Schell *v.* Weaver, 225 Ill. 159, 80 N. E. 95; S *v.* Lazarone, 130 La. 1, 57 S. 532; Hoffa *v.* Hoffa, 38 Pa. Super 356.

It is not presumed there is better evidence of existence of a debt than declarations of debtor, no contention being made to that effect. Schell *v.* Weaver, supra.

Declaration of indebtedness not provable against declarant's wife who has mortgaged separate estate to secure debt. McGowan *v.* Davenport, 134 N. C. 526, 47 S. E. 27.

92-93 Grove's Est., 38 Pa. Super. 424.

93-95 Declarations as to execution of deed, not inadmissible because what was in fact such was represented to be a will, nor because declarant's estate was for life only. Smith *v.* Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684.

93-97 Walnut Ridge Co. *v.* Cohn, 79 Ark. 338, 96 S. W. 413; Kaliamotes *v.* Wardwell (Me.), 89 A. 313; Goyette *v.* Keenan, 196 Mass. 416, 82 N. E. 427; Smith *v.* Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684.

93-98 *Contra,* Walnut Ridge Co. *v.* Cohn, 79 Ark. 338, 96 S. W. 413.

94-8 Putnam *v.* Harris, 193 Mass. 58, 78 N. E. 747; Smith *v.* Moore, supra.

Held to bear internal evidence that they were made upon the personal knowledge of the declarant. Marston *v.* Reynolds, 211 Mass. 590, 98 N. E. 601, *citing* Dickinson *v.* Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664; White *v.* Boston Elev. R. Co., 208 Mass. 193, 94 N. E. 278.

Duty of declarant to know facts stated permits proof of them. Massee-F. L. Co. *v.* Sirmans, supra; Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969.

95-9 Ownership of land, boundaries of which in dispute, not essential to show declarant's knowledge at time declarations made. Keefe *v.* R., 75 N. H. 116, 71 A. 379.

95-14 Coffey *v.* Allison, 107 Ark. 153, 154 S. W. 202; Hughes *v.* Redus, 90 Ark. 149, 118 S. W. 414; Yordi *v.* Yordi, 6 Cal. App. 20, 91 P. 348; Rulofson *v.* Billings, 140 Cal. 452, 74 P. 35; Bollinger *v.* Wright, 143 Cal. 292, 76 P. 1108; Drawdy *v.* Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190; Massee-F. L. Co. *v.* Sirmans, 122 Ga. 297, 50 S. E. 92; Ryder *v.* Ryder, 244 Ill. 297, 91 N. E. 451; Oswald *v.* Nehls,

233 Ill. 438, 84 N. E. 619; Baker *v.* Baker, 43 Ind. App. 26, 86 N. E. 864; Drefahl *v.* Bk., 132 Ia. 563, 107 N. W. 179; Ware *v.* Bennett, 143 Ky. 743, 137 S. W. 532; Landy *v.* Moritz, 33 Ky. L. R. 223, 109 S. W. 897; Howard *v.* Maxwell, 30 Ky. L. R. 448, 98 S. W. 1013; Peters *v.* Tilghman, 111 Md. 227, 73 A. 726 (declarations of guardian inadmissible); Coleman *v.* McGowan, 149 Mich. 624, 113 N. W. 17; White *v.* Poole, 74 N. H. 71, 65 A. 255; M'Carthy *v.* Stanley, 151 App. Div. 358, 136 N. Y. S. 386; Wallace *v.* Wallace, 137 N. Y. S. 43; Park *v.* Park, 39 Pa. Super. 212; Tiffany *v.* Morgan (R. I.), 73 A. 465; Griffin *v.* Forrester, 80 S. C. 220, 61 S. E 389; Carlisle *v.* Gibbs, 57 Tex. Civ. 592, 123 S. W. 216; Duren *v.* Bottoms (Tex. Civ.), 129 S. W. 376; Corbett *v.* Weaver, 59 Wash. 248, 109 P. 803.

See Moore *v.* Palmer, 14 Wash. 134, 44 P. 142 (exceptional case); Oliver *v.* Warren, 16 Cal. App. 164, 116 P. 312; Rucker *v.* Rucker, 136 Ga. 830, 72 S. E. 241.

Communications between principal and agent.—Royle Mining Co. *v.* Co., 161 Mo. App. 185, 142 S. W. 438.

Of a partner made to strangers to either of the parties to the suit, and when neither of them was present, and of such a nature as to be favorable to a claim of the declarant that he was the sole proprietor of the business in reference to which he spoke. Letson *v.* Hall, 4 Ala. App. 537, 58 S. 740.

Declaration to the effect that he was the owner of the property made by the predecessor in title to the defendant are inadmissible. Roy *v.* Moore, 85 Conn. 159, 82 A. 233.

A memorandum of a broker of a listing of property is inadmissible in an action for his commission. Langford *v.* Issenhuth, 28 S. D. 451, 134 N. W. 889.

The declaration of a deceased, made subsequent to a gift, which are inconsistent with the gift, are not generally competent as affirmative evidence of the statements made to prove fraud or undue influence. Gick *v.* Stumpf, 204 N. Y. 413, 97 N. E. 865.

97-15 Halvorsen *v.* Co., 87 Minn. 18, 91 N. W. 28; Smith *v.* Hansom, 34 Utah 171, 96 P. 1087.

98-16 Lyon *v.* Rieker, 141 N. Y. 225, 36 N. E. 189; Smith *v.* Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684.

98-17 See supra, "Books of Account," 673-75.

99-21 Tiffany *v.* Morgan (R. I.), 73 A. 465.

100-22 Leonardo *v.* Santiago, 7 Phil. Isl. 491; Syler *v.* Culp (Tex. Civ.), 138 S. W. 175.

101-24 Nutter *v.* O'Donnell, 6 Colo. 253; Wilson *v.* Patrick, 34 Ia. 362; Harrison *v.* Harrison, 80 Neb. 103, 113 N. W. 1042; Hagaman *v.* Bernhardt, 162 N. C. 381, 78 S. E. 209; Grove's Est., 38 Pa. Super. 424 (unless made in presence of adverse party); Wonsetler *v.* Wonsetler, 23 Pa. Super. 321 (if made in absence of person in whose favor disserving declaration was). *Comp.* with Foster *v.* Nowlin, 4 Mo. 18, stated in the Encyclopaedia on page and in note number given; Turner *v.* Belden, 9 Mo. 797, which disapproves the former.

Statements should be balanced, and if those in favor of interest are equal to or preponderate over those against interest proof of declaration should not be made (Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165; Hollis *v.* Sales, 103 Ga. 75, 29 S. E. 482); otherwise if those against interest preponderate over those in favor of it. Massee-F. L. Co. *v.* Sirmans, 122 Ga. 297, 50 S. E. 92.

101-26 Jones *v.* C. Co., 29 Ky. L. R. 623, 96 S. W. 6; Johnson *v.* Burks, 103 Mo. App. 221, 77 S. W. 133. *Comp.* S. *v.* Draughon, 151 N. C. 667, 65 S. E. 913.

102-31 Harvick *v.* Modern Woodmen, 158 Ill. App. 570.

102-32 It is said the test is not whether declarations made ante litem motam, but whether made under circumstances justifying conclusion there was no probable motive to falsify. Halvorsen *v.* Co., 87 Minn. 18, 91 N. W. 28. Same theory recognized in Smith *v.* Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684. See Rollins *v.* Wicker, 154 N. C. 559, 70 S. E. 934.

102-33 Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969.

May be proved if made after giving statutory notice of injury, action not being formally begun until process issued. Dickinson *v.* Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664.

103-36 Close *v.* Chicago, 257 Ill. 47, 100 N. E. 215.

103-39 Boeck *v.* Milke, 141 Ia. 713,

118 N. W. 874 (entitled to little weight); Collins *v.* Harrell, 219 Mo. 279, 118 S. W. 432.

104-43 Goyette *v.* Keenan, 196 Mass. 416, 82 N. E. 427; White *v.* Poole, 74 N. H. 71, 65 A. 255; Hentzler *v.* Weniger, 32 Pa. Super. 164.

105-45 McRae *v.* S., 62 Fla. 74, 57 S. 348.

It is to be inferred from admission of the evidence, in absence of exceptions, preliminary conditions have been met. Dixon *v.* R. Co., 179 Mass. 242, 60 N. E. 581; Dickinson *v.* Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664.

105-46 Slight evidence of declarant's death, admissible. Wren *v.* Howland, 33 Tex. Civ. 87, 75 S. W. 894.

105-49 Order in which evidence received is within court's discretion. Putnam *v.* Harris, 193 Mass. 58, 78 N. E. 747.

106-52 Circumstances may afford, in case of written declarations, sufficient proof of identity of name, residence, and person for whose benefit instruments designed. Taylor *v.* A. O. U. W., 101 Minn. 72, 111 N. W. 919.

106-60 McBrayer *v.* Walker, 122 Ga. 245, 50 S. E. 95; Randall *v.* Claflin, 194 Mass. 560, 80 N. E. 594; Taylor *v.* A. O. U. W., 101 Minn. 72, 111 N. W. 919. See S. *v.* Inv. Co., 70 Wash. 381, 126 P. 895.

Death of one of the parties who heard declaration does not affect right to prove it by the other. Hueni *v.* Freehill, 125 Ill. App. 345.

108-68 McGowan *v.* Davenport, 134 N. C. 526, 47 S. E. 27; Bryant *v.* Morris, 69 N. C. 444.

Interest does not disqualify witness from testifying to declarations. Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782.

DEDICATION

Revocation of offer, 129-42.

110-1 City of Camden *v.* A. C. Co., 210 Fed. 818; East Birmingham R. Co. *v.* Co., 160 Ala. 461, 49 S. 448; Ft. Smith, etc. Dist. *v.* Scott (Ark.), 163 S. W. 1137; Frauenthal *v.* Slaten, 91 Ark. 350, 121 S. W. 395; Los Angeles *v.* McCollum, 156 Cal. 148, 103 P. 914; City of Savannah *v.* Supply Co., 140 Ga. 353, 78 S. E. 906; Penick *v.* County, 131 Ga. 385, 62 S. E. 300; Hanson *v.* Proffer, 23 Ida. 705, 132 P. 573; Hailey *v.* Riley, 14 Ida. 481, 95 P. 686; Princeton *v.* Gustavson, 241 Ill. 566, 89 N. E. 653; German Bk. *v.* Brose, 32 Ind. App. 77, 69 N. E. 300; O'Malley *v.* Co., 141 Ia. 186, 119 N. W. 601; Quirk *v.* Miller, 129 La. 1071, 57 S. 521; Brown *v.* Dickey, 106 Me. 97, 75 A. 382; Mayor, etc. *v.* Yost, 121 Md. 366, 88 A. 342; Stover *v.* Steffey, 115 Md. 524, 81 A. 33; Vance *v.* Village, 161 Mich. 528, 126 N. W. 978; Riverside Tp. *v.* R. Co., 74 N. J. L. 476, 66 A. 433; In re Austin Place, 125 App. Div. 821, 110 N. Y. S. 525; Milliken *v.* Denny, 141 N. C. 224, 53 S. E. 867; Jones *v.* Teller, 65 Or. 328, 133 P. 354; Parrott *v.* Stewart, 64 Or. 254, 132 P. 523; Kuck *v.* Wakefield, 58 Or. 549, 115 P. 428; Waters *v.* Phila., 208 Pa. 189, 57 A. 523; Atlas Lumb. Co. *v.* Quirk, 28 S. D. 643, 135 N. W. 172; McKinney *v.* Duncan, 121 Tenn. 265, 118 S. W. 683; Atlanta *v.* R. Co. (Tex. Civ.), 120 S. W. 923; DeGeorge *v.* Goosby, 33 Tex. Civ. 187, 76 S. W. 66; Brown *v.* R. Co., 36 Utah 257, 102 P. 740; Humphrey *v.* Krutz, 77 Wash. 152, 137 P. 806; Provident Trust Co. *v.* Spokane, 63 Wash. 92, 114 P. 1030; Knox *v.* Roehl, 153 Wis. 239, 140 N. W. 1121.

See Burk *v.* Santa Cruz, 163 Cal. 807, 127 P. 154; Klein *v.* Reinhardt, 163 Ill. App. 257; Cleveland, etc. R. Co. *v.* Christie, 178 Ind. 691, 100 N. E. 299; Drimmel *v.* Kansas City (Mo. App.), 168 S. W. 280; Green *v.* Miller, 161 N. C. 24, 76 S. E. 505; Davis *v.* Young (Tex. Civ.), 148 S. W. 1116.

Evidence insufficient.—Granite Bituminous Paving Co. *v.* McManus, 244 Mo. 184, 148 S. W. 621; Sechrist *v.* Dallastown, 45 Pa. Super. 105.

111-2 Necessary evidence. — Intent must be clearly established. San Francisco *v.* Grote, 120 Cal. 59, 52 P. 127, 41 L. R. A. 335, 65 Am. St. 155 (plainly manifested); Chicago *v.* Wildman, 240 Ill. 215, 88 N. E. 559 (clearly and unequivocally); Princeton *v.* Gustavson, supra (satisfactory, clear and unequivocal); Bethel *v.* Pruett, 215 Ill. 162, 74 N. E. 111; Stacy *v.* Co., 223 Ill. 546, 79 N. E. 133; O'Malley *v.* Co., 141 Ia. 186, 119 N. W. 601 (unequivocal and convincing, if parol dedication relied upon); Alexandria *v.* Thigpen, 120 La. 293, 45 S. 253; Klug *v.* Jeffers, 88 App. Div. 246, 85 N. Y. S. 423; Cincinnati, etc. R. Co. *v.* Roseville, 76 O. St. 108, 81 N. E. 178; Webber *v.* Toledo, 23 O. C. C. 237; International, etc.

R. Co. *v.* Cuneo, 47 Tex. Civ. 622, 108 S. W. 714; West Point *v.* Bland, 106 Va. 792, 56 S. E. 802.

Implied dedication must be shown by positive and unequivocal testimony. Long permissive use of open and wild land is not proof of intention. McKinney *v.* Duncan, 121 Tenn. 265, 118 S. W. 683. Strict, cogent and convincing evidence required to show dedication by user even in civil actions; in criminal prosecution for obstructing a highway its existence must be shown beyond reasonable doubt. S. *v.* Hood, 143 Mo. App. 313, 126 S. W. 992.

111-3 Mann *v.* Bergmann, 203 Ill. 406, 67 N. E. 814; Clement *v.* Paris (Tex. Civ.), 154 S. W. 624; Menczer *v.* Poage, 55 Tex. Civ. 415, 118 S. W. 863; West Point *v.* Bland, 106 Va. 792, 56 S. E. 802. See New Orleans *v.* Land Co., 131 La. 1092, 60 S. 695.

Dedication of easement may be by parol. Halley *v.* Court, 25 Ky. L. R. 1471, 78 S. W. 149.

111-4 Ft. Smith, etc. Dist. *v.* Scott (Ark.), 163 S. W. 1137; Penick *v.* County, 131 Ga. 385, 62 S. E. 300; Quick *v.* Cotman, 124 Ia. 102, 99 N. W. 301; Brown *v.* Dickey, 106 Me. 97, 75 A. 382; Drimmel *v.* Kansas City (Mo. App.), 168 S. W. 280; Jones *v.* Teller, 65 Or. 328, 133 P. 354; Parrott *v.* Stewart, 64 Or. 254, 132 P. 523; Clement *v.* Paris (Tex. Civ.), 154 S. W. 624; Cockrell *v.* Dallas (Tex. Civ.), 111 S. W. 977; Champ *v.* County Ct. (W. Va.), 78 S. E. 361.

See Burk *v.* City of Santa Cruz, 163 Cal. 807, 127 P. 154. And see Cardano *v.* Wright, 159 Cal. 610, 115 P. 227; Palmer *v.* Chicago, 248 Ill. 201, 93 N. E. 765; Reecius *v.* Weber, 142 Ky. 157, 134 S. W. 145.

Silent acquiescence of the abutting owners to the use of a strip as a highway for 50 years amounts to a dedication. Christianson *v.* Caldwell, 152 Wis. 135, 139 N. W. 751.

Testimony of owner as to intent admissible, but will not prevail against acts or declarations. Lovington *v.* Adkins, 232 Ill. 510, 83 N. E. 1043; Seidschlag *v.* Antioch, 207 Ill. 280, 69 N. E. 949; Bethel *v.* Pruett, 215 Ill. 162, 74 N. E. 111 (owner may testify as to intent, but may be contradicted by declarations); West Point *v.* Bland, 106 Va. 792, 56 S. E. 802 (entries on corporation's books, insufficient). Testimony as to intent inadmissible if inconsistent with import of owner's conduct. Los Angeles *v.* McCollum, 156 Cal. 148, 103 P. 914.

112-5 Los Angeles *v.* McCollum, 156 Cal. 148, 103 P. 914; Hanson *v.* Proffer, 23 Ida. 705, 132 P. 573; Watertown *v.* Troeh, 25 S. D. 21, 125 N. W. 501; Olson Land Co. *v.* Seattle, 76 Wash. 142, 136 P. 118.

112-6 Kimball *v.* City, 253 Ill. 105, 97 N. E. 257; Miller *v.* Comrs., 125 Ill. App. 431; Edwards & W. Co. *v.* County, 117 Ia. 335, 90 N. W. 1006; (parol admissible); Raymond *v.* Wichita, 70 Kan. 523, 79 P. 323; Naylor *v.* Harrisonville, 207 Mo. 341, 105 S. W. 1074; Bosque Co. *v.* Alexander, 41 Tex. Civ. 528, 93 S. W. 238; Lynchburg Co. *v.* Guill, 107 Va. 86, 57 S. E. 644.

113-7 Cochran *v.* Purser, 152 Ala. 354, 44 S. 579; Davis *v.* S., 9 Ga. App. 430, 71 S. E. 603; Larkin *v.* Ryan, 25 Ky. L. R. 613, 76 S. W. 168; Burrier *v.* Rice, 25 Ky. L. R. 661, 76 S. W. 169; Magruder *v.* Potter, 25 Ky. L. R. 1336, 77 S. W. 919; Wathen *v.* Howard, 27 Ky. L. R. 7, 84 S. W. 303; Brandt *v.* Olson, 79 Neb. 612, 113 N. W. 151; Dover *v.* Brackenridge, 75 N. J. L. 204, 67 A. 689.

See Heiminck *v.* Edmonton, 28 Can. Sup. 501; U. S. *v.* Rindge, 208 Fed. 611; Bothwell *v.* Co. (Colo.), 90 P. 1127 (presumption in favor of regularity of alleged statutory dedication); Georgetown *v.* Hambrick, 31 Ky. L. R. 1276, 104 S. W. 997 (presumption highway dedicated to be used in usual way); Parrott *v.* Stewart, 64 Or. 254, 132 P. 523.

Remainderman's authority to dedicate land for public road presumed as against deceased tenant for life who may not have known of its user. Farquhar *v.* Council (1909), 1 Ch. 12.

Conclusive presumption of common law dedication arises where consent given to use of land for burial purposes for more than twenty years. Roundtree *v.* Hutchinson, 57 Wash. 414, 107 P. 345. Long continued use by public raises conclusive presumption. Leverone *v.* Weakley, 155 Cal. 395, 101 P. 304. Presumption arising from maintenance of fences along highway, not conclusive where land between them is in excess of quantity required for road uses. Neale *v.* S., 138 Wis. 484, 120 N. W. 345. A call for a narrow alley justifies presumption it extended through

the block. Alexander *v.* Tebeau, 132 Ky. 487, 116 S. W. 356.

No presumption use, however long continued, adverse. O'Malley *v.* L. Co., 141 Ia. 186, 119 N. W. 601 (statute). No presumption from unauthorized and unratified acts of tenant. Cockrell *v.* Dallas (Tex. Civ.), 111 S. W. 977.

Dedication of cul de sac as public highway not presumed from user without expenditures. Atty. Gen. *v.* Antrobus (1905), 2 Ch. D. (Eng.) 188; Whitehouse *v.* Hugh (1906), 1 Ch. D. (Eng.) 253. Intent to dedicate cul de sac, not presumed. Watertown *v.* Troeh, 25 S. D. 21, 125 N. W. 501.

113-8 In re Van Alst Ave., 143 App. Div. 564, 128 N. Y. S. 371; Kuck *v.* Wakefield, 58 Or. 549, 115 P. 428.

Assertion of right, unless public user protested against or stopped, affords ground for assuming existence of such user. Coats *v.* Council (1909), 2 Ch. 579.

114-9 Palmer *v.* N. P. R. Co., 11 Ida. 583, 83 P. 947; Wickre *v.* Independence, 31 S. D. 623, 141 N. W. 973; Culmer *v.* Salt Lake, 27 Utah 252, 75 P. 620.

Enclosing portions of strip in dispute at each end is immaterial, though it was done with knowledge of authorities who did not interfere. Coats *v.* Council (1909), 2 Ch. 579.

115-10 See Newton *v.* Dunkirk, 121 App. Div. 296, 106 N. Y. S. 125.

115-11 Attorney General *v.* Co., 143 Ala. 291, 39 S. 303.

115-13 German Bk. *v.* Brose, 32 Ind App. 77, 69 N. E. 300, not conclusive.

If presumption of dedication bottomed on acts of owner it may overcome his testimony as to purposes for which land left uninclosed. Kendall-S. Co. *v.* County, 84 Neb. 654, 121 N. W. 960.

116-14 West End *v.* Eaves, 152 Ala. 334, 44 S. 588; Mobile *v.* Fowler, 147 Ala. 403, 41 S. 468; Wilson *v.* Co., supra; Mt. Vernon *v.* Young, 124 Ia. 517, 100 N. W. 694; Hall *v.* Leeper (Ky.), 121 S. W. 683; Brown *v.* Dickey, 106 Me. 97, 75 A. 382; Victoria *v.* County (Tex.), 128 S. W. 109 (also extent of dedication).

Burden not sustained.—Bloede *v.* City, 115 Md. 594, 81 A. 67; Stover *v.* Steffey, 115 Md. 524, 81 A. 33.

Burden on complainant to show public user for more than twenty years not inconsistent with private ownership. Canton Co. *v.* Baltimore, 104 Md. 582, 65 A. 324.

Evidence must be positive and unequivocal. Vance *v.* Pewamo, 161 Mich. 528, 126 N. W. 978.

Subsequent deeds by dedicator, immaterial. McClenehan *v.* Jesup, 144 Ia. 352, 120 N. W. 74.

116-16 Hogan *v.* Burneson, 44 Pa. Super. 409; Atlanta *v.* R. Co. (Tex. Civ.), 120 S. W. 923.

Silence of deed and oral negotiations of parties may be persuasive as to intent. In re Austin Place, 125 App. Div. 821, 110 N. Y. S. 525.

117-18 Dougan *v.* Greenwich, 77 Conn. 444, 59 A. 505 (title in town in corporate capacity need not be shown); Winthrop Harbor *v.* Gurdes, 257 Ill. 596, 101 N. E. 199; Nelson *v.* Randolph, 222 Ill. 531, 78 N. E. 914.

118-19 Rhodes *v.* Perusse, 41 Can. Sup. 264; Los Angeles *v.* McCollum, 156 Cal. 148, 103 P. 914; Baker City, etc. Co. *v.* Baker City, 58 Or. 306, 113 P. 9; Shertzer *v.* Co., 52 Wash. 492, 100 P. 982; Ralls *v.* Parish (Tex. Civ.), 151 S. W. 1089.

Receipt for money for strip of land, admissible. Menczer *v.* Poage, 55 Tex. Civ. 415, 118 S. W. 863.

Exceptions in deeds need not be expressly stated to be for benefit of public. Dougan *v.* Greenwich, 77 Conn. 444, 59 A. 505.

Recitals in deeds as evidence against dedication. San Antonio *v.* Rowley, 48 Tex. Civ. 376, 106 S. W. 753; Davies *v.* Epstein, 77 Ark. 221, 92 S. W. 19.

118-20 Rhodes *v.* Perusse, 41 Can. Sup. 264; Grand T. R. Co. *v.* Toronto, 37 Can. Sup. 210; East Birmingham R. Co. *v.* Co., 160 Ala. 461, 49 S. 448; Simon *v.* Pemberton (Ark.), 165 S. W. 297; Dougan *v* .Greenwich, 77 Conn. 444, 59 A. 505; Ellis *v.* City, 138 Ga. 181, 75 S. E. 99; McClenehan *v.* Jesup, 144 Ia. 352, 120 N. W. 74; Wallace *v.* Cable, 87 Kan. 835, 127 P. 5; Alexander *v.* Tebeau, 132 Ky. 487, 116 S. W. 356; Mason *v.* Ross, 75 N. J. Eq. 136, 71 A. 141; Gillman *v.* Bloomfield, 78 N. J. L. 67, 73 A. 604; Board *v.* R. Co., 74 N. J. L. 480, 65 A. 1035; Palmer *v.* G. Co., 115 App. Div. 677, 101 N. Y. S. 347; Bailliere *v.* Co., 150 N. C. 627, 64 S. E. 754; C. *v.* Llewellyn, 14 Pa. Super. 214 (deeds not conclusive).

Not inconsistent with intent to dedicate land conveyed according to government descriptions, and without reservation or exception of part dedicated. S. *v.* Transue, 131 Mo. App. 323, 111 S. W. 523.

120-21 McGregor *v.* Watford, 13 Ont. L. R. 10; Rudolph *v.* Birmingham (Ala.), 65 S. 1006; Southern, etc. R. Co. *v.* Davis (Ala.), 64 S. 606; Gadsden *v.* Strother, 172 Ala. 56, 55 S. 189; Weiss *v.* Taylor, 144 Ala. 440, 39 S. 519; Mobile *v.* Fowler, supra; Jackson *v.* Birmingham, 154 Ala. 464, 45 S. 660; Thorpe *v.* Clanton, 10 Ariz. 94, 85 P. 1061; Frauenthal *v.* Slaten, 91 Ark. 350, 121 S. W. 395; Davies *v.* Epstein, 77 Ark. 221, 92 S. W. 19; Smith *v.* Smith, 21 Cal. App. 378, 131 P. 890; Danielson *v.* Sykes, 157 Cal. 686, 109 P. 87; Myers *v.* Kenyon, 7 Cal. App. 112, 93 P. 888; Poole *v.* Comrs., 9 Del. Ch. 192, 80 A. 683; S. *v.* Southard, 6 Penne. (Del.) 247, 66 A. 372; Marshall *v.* Lynch, 256 Ill. 522, 100 N. E. 289; Mann *v.* Bergmann, 203 Ill. 406, 67 N. E. 814; Ingraham *v.* Brown, 231 Ill. 256, 83 N. E. 156; Nelson *v.* Randolph, 222 Ill. 531, 78 N. E. 914; Clarke *v.* Club, 44 Ind. App. 426, 88 N. E. 100; Strunk *v.* Pritchett, 27 Ind. App. 582, 61 N. E. 973; Newport Pressed Brick & Stone Co. *v.* Plummer, 149 Ky. 534, 149 S. W. 905; City of Shreveport *v.* Simon, 132 La. 69, 60 S. 795; City of New Orleans *v.* Land Co., 131 La. 1092, 60 So. 695; Flournoy *v.* Breard, 116 La. 224, 40 S. 684; Northport, etc. Assn. *v.* Andrews, 104 Me. 342, 71 A. 1027; Bloede *v.* City, 115 Md. 594, 81 A. 67; Stover *v.* Steffey, 115 Md. 524, 81 A. 33; Shearer *v.* Reno, 36 Nev. 443, 136 P. 705; Board, etc. *v.* R. Co. (N. J.), 89 A. 773; Camden *v.* McAndrews & Forbes Co. (N. J.), 88 A. 1034; Buffalo *v.* R. Co., 83 Misc. 144, 144 N. Y. S. 578; In re Bragaw St., 141 N. Y. S. 987; Green *v.* Miller, 161 N. C. 24, 76 S. E. 505; Milliken *v.* Denny, 141 N. C. 224, 53 S. E. 867; City of Silverton *v.* Brown, 63 Or. 418, 128 P. 45; Oliver *v.* Synhorst, 58 Or. 582, 115 P. 594, *aff.* 109 P. 762; Oregon City *v.* R. Co., 44 Or. 165, 74 P 924; Bell *v.* Steel Co., 243 Pa. 83, 89 A. 813; Tesson *v.* Porter Co., 238 Pa. 504, 86 A. 278; Jessop *v.* Kittanning, 225 Pa. 583, 74 A. 553; Roaring Springs Townsite Co. *v.* Tel. Co. (Tex. Civ.), 164 S. W. 50; San Antonio *v.* Rowley, 48 Tex. Civ. 376, 106 S. W. 753; Tyler *v.* Boyette, 43 Tex. Civ. 573, 96 S. W. 935; Tuttle *v.* Sowadzki (Utah), 126 P. 959; Elkins *v.* Donohoe (W. Va.), 81 S. E. 1130; Knox *v.* Rochl, 153 Wis. 239, 140 N. W. 1121; Lins *v.* Seefeld, 126 Wis. 610, 105 N. W. 917.

See Curtiss & Yale Co. *v.* Minneapolis, 123 Minn. 344, 144 N. W. 150; C. Shoe Mfg. Co. *v.* R. Co., 240 Pa. 519, 87 A. 968; Clement *v.* City of Paris (Tex. Civ.), 154 S. W. 624. *Comp.* C. R. I. & P. R. Co. *v.* Hayes, 49 Colo. 333, 113 P. 315.

Filing of plat completes dedication.—Hanson *v.* Proffer, 23 Ida. 705, 132 P. 573.

Revocation before acceptance.—Iowa Cent. R. Co. *v.* Homan, 151 Ia. 404, 131 N. W. 878; Drucker *v.* Village, 31 O. C. C. 466, *aff.* 91 N. E. 1142.

No dedication where owner makes map showing street on neighbor's land. Klug *v.* Jeffers, 88 App. Div. 246, 85 N. Y. S. 423.

Owner estopped from denying representations of plat. King *v.* Dugan, 150 Cal. 258, 88 P. 925; Harmison *v.* Prestonburg, 32 Ky. L. R. 864, 107 S. W. 337.

121-22 Rhodes *v.* Perusse, 41 Can. Sup. 264; East Birmingham R. Co. *v.* F. Co., 160 Ala. 461, 49 S. 448; Los Angeles *v.* McCollum, 156 Cal. 148, 103 P. 914; McGourin *v.* Springs, 51 Fla. 502, 41 S. 541; P. *v.* R. Co., 239 Ill. 42, 87 N. E. 946 (map recognized by public officers authorized to plat land); Hunter *v.* Des Moines, 144 Ia. 541, 123 N. W. 215; Alexander *v.* Tebeau (Ky.), 116 S. W. 356; Northport, etc. Assn. *v.* Andrews, 104 Me. 342, 71 A. 1027; Berrien Springs *v.* Ferguson, 154 Mich. 472, 118 N. W. 262; Board *v.* R. Co., 74 N. J. L. 480, 65 A. 1035; Finucan *v.* Ramsden, 95 App. Div. 626, 88 N. Y. S. 430; Bailliere *v.* Atlantic, etc. Co., 150 N. C. 627, 64 S. E. 754; Wright *v.* Oberlin, 23 O. C. C. 509; Morse *v.* Whitcomb, 54 Or. 412, 102 P. 788 (admissible to corroborate testimony as to defendant's statement tract would be opened as street); Barnett *v.* Borough, 37 Pa. Super. 97; Pullman *v.* Houston (Tex. Civ.), 125 S. W. 69; Heard *v.* Connor (Tex. Civ.), 84 S. W. 605; Houston *v.* Finnigan (Tex. Civ.), 85 S. W. 470; Weidemeyer *v.* Reitch, 49 Tex. Civ. 166, 108 S. W. 167 (map not conclusive); Osborne *v.* Seattle, 52 Wash. 323, 100 P. 850; Wilson *v.* McConnell (W. Va.), 77 S. E. 540. See Adoue *v.* La Porte (Tex. Civ.), 124 S. W. 134.

In Idaho statute gives acknowledged and recorded plat effect of deed. Shaw *v.* Johnston, 17 Ida. 676, 107 P. 399.

If water constitutes a separate estate from land and is not supplied in con-

nection with it until after plats filed they are not evidence of dedication of water right subsequently located and required. Hailey *v.* Riley, 14 Ida. 481, 95 P. 686.

122-23 Quirk *v.* Miller, 129 La. 1071, 57 S. 521.

122-24 Paragould *v.* Lawson, 88 Ark. 478, 115 S. W. 379; Alexandria *v.* Thigpen, 120 La. 293, 45 S. 253; Menczer *v.* Poage, 55 Tex. Civ. 415, 118 S. W. 863; Olson Land Co. *v.* City, 76 Wash. 142, 136 P. 118; Osborne *v.* Seattle, 52 Wash. 323, 100 P. 850.

122-25 Poole *v.* Lake Forest, 238 Ill. 305, 87 N. E. 320; Mt. Vernon *v.* Young, 124 Ia. 517, 100 N. W. 694; Columbia, etc. R. Co. *v.* Seattle, 33 Wash. 513, 74 P. 670 (plat construed in connection with statute). See Chicago, etc. R. Co. *v.* Hayes, 49 Colo. 333, 113 P. 315.

123-26 East Birmingham R. Co. *v.* Co., 160 Ala. 461, 49 S. 448 (presumption of innocence arising from violation of statute because of non-designation of open spaces indicated on map may be rebutted); Los Angeles *v.* McCollum, 156 Cal. 148, 103 P. 914; P. *v.* R. Co., 239 Ill. 42, 87 N. E. 946; Kimball *v.* City, 253 Ill. 105, 97 N. E. 257; Atlas Lumb. Co. *v.* Quirk, 28 S. D. 643, 135 N. W. 172.

123-27 Gordon County *v.* Calhoun, 128 Ga. 781, 58 S. E. 360; Edwards Co. *v.* County, 117 Ia. 365, 90 N. W. 1096 (public square); Daughters *v.* Comrs., 81 Kan. 548, 106 P. 297; Vinton *v.* Lyons, 131 La. 673, 60 S. 54; New Orleans *v.* Land Co., 131 La. 1092, 60 S. 695; Kansas City, etc. R. Co. *v.* Baker, 183 Mo. 312, 82 S. W. 85 (reserved for depot grounds); Borough *v.* Polak, 76 N. J. Eq. 212, 75 A. 753; Sanborn *v.* Amarillo, 42 Tex. Civ. 115, 93 S. W. 473 (park).

See Hutchinson *v.* Danley, 88 Kan. 437, 129 P. 163. And see Bartlett *v.* Harmon, 107 Me. 451, 78 A. 842.

Subsequent writings executed by dedicator, irrelevant, and so of acts of his grantees in accepting them. East Birmingham R. Co. *v.* Co., 160 Ala. 461, 49 S. 448.

124-28 Sanford *v.* Sanford, 157 Ill. App. 350; S. *v.* De Vall, 157 Mo. App. 587, 138 S. W. 667.

124-29 Rhodes *v.* Perusse, 41 Can. Sup. 264; Schneider *v.* Sulzer, 212 Ill. 87, 72 N. E. 19 (acts and declarations cannot be shown if they contradict plat); Kansas City *v.* Burke (Kan.), 141 P. 562; Halley *v.* Court, 25 Ky. L. R. 1471, 78 S. W. 149; Gillman *v.* Bloomfield, 78 N. J. L. 67, 73 A. 604; Newton *v.* Dunkirk, 121 App. Div. 296, 106 N. Y. S. 125; Tise *v.* Co., 146 N. C. 374, 59 S. E. 1012; Morse *v.* Whitcomb, 54 Or. 412, 102 P. 788; Poindexter *v.* Schaffner (Tex. Civ.), 162 S. W. 22; Champ *v.* County Ct. (W. Va.), 78 S. E. 361. See Board ex rel. Feitz *v.* McPhearson, 172 Mo. App. 369, 157 S. W. 857 See also Cordano *v.* Wright, 159 Cal. 610, 115 P. 227.

If the dedication rests in parol, parol testimony is sufficient. Humphrey *v.* Krutz, 77 Wash. 152, 137 P. 806.

124-30 S. *v.* Southard, 6 Penne. (Del.) 247, 66 A. 372; Benton *v.* St. Louis, 217 Mo. 687, 118 S. W. 418; Board ex. rel. Feitz *v.* McPhearson, 172 Mo. App. 369, 157 S. W. 857; Kendall-S. Co. *v.* County, 84 Neb. 654, 121 N. W. 960; Cassidy *v.* Sullivan, 75 Neb. 847, 106 N. W. 1027; Moore *v.* Fowler, 58 Or. 292, 114 P. 472; Humphrey *v.* Krutz, 77 Wash. 152, 137 P. 806.

125-31 Michigan, etc. R. Co. *v.* R. Co., 42 Ind. App. 66, 83 N. E. 650; S. *v.* Transue, 131 Mo. App. 323, 111 S. W 523; Larson *v.* R. Co., 19 S. D. 284, 103 N. W. 35.

125-32 Permanent character of obstructions in old highway in form of improvements, admissible to show dedication of new road. Davis *v.* R. Co., 31 Utah 307, 88 P. 2.

125-33 West End *v.* Eaves, 152 Ala. 334, 44 S. 588 (express common law dedication may rest in parol); Davies *v.* Epstein, 77 Ark. 221, 92 S. W. 19; Poole *v.* Comrs., 9 Del. Ch. 192, 80 A. 683; Ellis *v.* City, 138 Ga. 181, 75 S. E. 99; Thompson *v.* McPherson (Ky.), 124 S. W. 272; S. *v.* Transue, 131 Mo. App. 323, 111 S. W. 523; Anderson *v.* Nelson, 86 Neb. 752, 126 N. W. 314; Morse *v.* Whitcomb, 54 Or. 412, 102 P. 788; Kuck *v.* Wakefield, 58 Or. 549, 115 P. 428.

126-34 Perry *v.* Weaver, 11 Ga. App. 186, 74 S. E. 1005 (obstruction removed); Comrs. of Highways *v.* Bruner, 163 Ill. App. 657; Cleveland C. C. & St. L. R. Co. *v.* Christie, 178 Ind. 691, 100 N. E. 299; Gillespie *v.* Duling, 41 Ind. App. 217, 83 N. E. 728; Foulke *v.* City, 145 Ia. 471, 122 N. W. 823; S. R. Co. *v.* Caplinger, 151 Ky. 749, 152 S. W. 947; Vance *v.* Village, 161 Mich. 528, 126 N. W. 978; Waters *v.* Philadelphia, 208 Pa. 189, 57 A. 523; Brown *v.*

Curran (R. I.), 83 A. 515; Centerville *v.* Jenter, 25 S. D. 314, 126 N. W. 575; Ft. Worth & D. C. R. Co. *v.* Ayers (Tex. Civ.), 149 S. W. 1068.

Record of user unnecessary. Wellsville *v.* Hallock, 139 N. Y. S. 961; Southern R. Co. *v.* Caplinger, 151 Ky. 749, 152 S. W. 947.

126-35 Southern R. Co. *v.* Pomona, 144 Cal. 339, 77 P. 929; P. *v.* Myring, 144 Cal. 351, 77 P. 975; Hartley *v.* Vermillion, 141 Cal. 339, 74 P. 987; Hailey *v.* Riley, 14 Ida. 481, 95 P. 686; Dover *v.* Brackenridge, 75 N. J. L. 204, 67 A. 689. And see In re Rutland, 70 Misc. 82, 128 N. Y. S. 94.

127-36 Poole *v.* Lake Forest, 238 Ill. 305, 87 N. E. 320; Johnson *v.* Robertson, 156 Ia. 64, 135 N. W. 585; Driskill *v.* Morehead, 147 Ky. 107, 143 S. W. 753; Downing *v.* Benedict, 147 Ky. 8, 143 S. W. 756; Smith *v.* Nofsinger, 86 Neb. 834, 126 N. W. 659. See Ft. Worth, etc. R. Co. *v.* Ayers (Tex. Civ.), 149 S. W. 1068. See also Moragne *v.* Gadsden, 170 Ala. 124, 54 S. 518; N. Y. C., etc. R. Co. *v.* Ryan, 71 Misc. 241, 129 N. Y. S. 55.

After long user, burden is on defendant to show use only permissive. Magruder *v.* Potter, 25 Ky. L. R. 1336, 77 S. W. 919; Chenault *v.* Gravitt, 27 Ky. L. R. 403, 85 S. W. 184; Smoot *v.* Wainscott, 28 Ky. L. R. 233, 89 S. W. 176.

127-37 Lieber *v.* P., 33 Colo. 493, 81 P. 270; Downing *v.* Benedict, 147 Ky. 8, 143 S. W. 756. See U. S. *v.* Rindge, 208 Fed. 611.

128-38 Attorney-General *v.* Co., 143 Ala. 291, 39 S. 303; Cincinnati, etc. R. Co. *v.* Roseville, 76 O. St. 108, 81 N. E. 178.

128-39 Burks *r.* Ferriell, 26 Ky. L. R. 35, 80 S. W. 483; Canton Co. *r.* Baltimore, 104 Md. 582, 65 A. 324; Williams *r.* Hudson, 130 Wis. 297, 110 N. W. 239. *Comp.* International, etc. R. Co. *r.* Cuneo, 47 Tex. Civ. 622, 108 S. W. 714.

Non-acquiescence.—In re Third Ave., 130 N. Y. S. 80.

Adverse user for twenty years, conclusive evidence. Riverside *v.* R. Co., 74 N. J. L. 476, 66 A. 433.

Estoppel from user.—Ray *v.* Nally, 28 Ky. L. R. 421, 89 S. W. 486.

128-40 Healey *r.* Atlanta, 125 Ga. 736, 54 S. E. 749; Chapman *r.* Sault Ste. M., 146 Mich. 23, 109 N. W. 53.

Area dedicated must be ascertained from user and acts of former owner. Extension of user does not enlarge area. Victoria *v.* County (Tex.), 128 S. W. 109. Conditions existing when dedication made, determinative of extent, though subsequent acts of authorities may be regarded as bearing upon original intention. Victoria *v.* County (Tex. Civ.), 115 S. W. 67.

Grading street and putting up sign posts, insufficient to prove acquiescence of owners. Mitchell *v.* Denver, 33 Colo. 37, 78 P. 686.

128-41 Lieber *v.* P., 33 Colo. 493, 81 P. 270.

The rule in South Carolina "is that a prescriptive right arises in favor of the public after the continuous use of a road for 20 years, when it runs through cultivated land, but that, when it passes over unineloscd wood land, it must also be shown that the user was adverse. State *r.* Sartor, 2 Strob. 60; State *v.* Floyd, 39 S. C. 23, 17 S. E. 505; State *r.* Tyler, 54 S. C. 294, 32 S. E. 422; Earle *r.* Poat, 63 S. C. 439, 41 S. E. 525; Kirby *v.* Railway, 63 S. C. 494, 41 S. E. 765; State *v.* Toale, 74 S. C. 425, 54 S. E. 608; Comrs. *v.* Mfg Co., 76 S. C. 382, 57 S. E. 201; Moragne *r.* Railway, 77 S. C. 437, 58 S. E. 150; State *r.* Washington, 80 S. C. 376, 61 S. E. 896. When, however, the same person is owner, both of the arable land and the wood land, and the public has acquired a prescriptive right over the cultivated land, this is a circumstance to be considered by the jury in determining whether the use of the road through the wood land was adverse." S. *r.* Rodman, 86 S. C. 154, 68 S. E. 343.

129-42 Poole *v.* Lake Forest, 238 Ill. 305, 87 N. E. 320; Bethel *r.* Pruett. 215 Ill. 162, 74 N. E. 111; Gillespie *r.* Duling, 41 Ind. App. 217, 83 N. E. 728 (slight variations, immaterial); Smith *r.* Nofsinger, 86 Neb. 834, 126 N. W. 659; Provident Trust Co. *v.* Spokane, 63 Wash. 92, 114 P. 1030.

Revocation of offer of dedication may be shown by acts inconsistent with use for which it is claimed land dedicated. Myers *v.* Oceanside, 7 Cal. App. 87, 93 P. 686.

130-44 Cincinnati, etc. R. Co. *r.* Roseville, 76 O. St. 108, 81 N. E. 178; Columbia, etc. R. Co. *v.* Seattle, 33 Wash. 513, 74 P. 670.

Evidence may show that a railroad dedicated part of its right of way as a street. Cleveland, etc. R. Co. *r.*

Christie, 178 Ind. 691, 100 N. E. 299.

130-45 Savannah *v.* S. Supply Co., 140 Ga. 353, 78 S. E. 906; Sioux City *v.* R. Co., 129 Ia. 694, 106 N. W. 183. See Mayor, etc. *v.* Supply Co., 140 Ga. 353, 78 S. E. 906, 48 L. R. A. (N. S.) 469, n.

131-49 Myers *v.* Oceanside, 7 Cal. App. 87, 93 P. 686; Phillips *v.* Stamford, 81 Conn. 403, 71 A. 361 (use need not be extensive); Poole *v.* Comrs., 9 Del. Ch. 192, 80 A. 683; Vorhes *v.* Ackley, 127 Ia. 658, 103 N. W. 998 (presumption acceptance is of all land tendered); Louisville *v.* Tompkins (Ky.), 122 S. W. 174 (conclusive presumption); Riley *v.* Buchanan, 116 Ky. 625, 76 S. W. 527, 63 L. R. A. 242; Darling *v.* Mayor, 73 N. J. Eq. 318, 67 A. 709 (burden of proving acceptance upon city alleging it); Chapman *v.* Sault Ste. M., 146 Mich. 23, 109 N. W. 53; Oliver *v.* Synhorst, 58 Or. 582, 115 P. 594, *aff.* 109 P. 762. See Rhodes *v.* Perusse, 41 Can. Sup. 264.

Acceptance of dedication by city held unnecessary. Ralls *v.* Parish (Tex. Civ.), 151 S. W. 1089.

Formal acceptance of a dedication is not necessary. New Orleans *v.* Land Co., 131 La. 1092, 60 S. 695.

131-50 Poole *v.* Lake Forest, 238 Ill. 395, 87 N. E. 320; Stacy *v.* Co., 223 Ill. 546, 79 N. E. 133; City of Jackson *v.* Laird, 99 Miss. 476, 55 S. 41.

See New Orleans *v.* Land Co., 131 La. 1092, 60 So. 695; In re Bragaw St., 141 N. Y. S. 987.

132-51 Grand Trunk R. Co. *v.* Toronto, 37 Can. Sup. 210; Delaware, etc. R. Co. *v.* Syracuse, 157 Fed. 700; Ellis *v.* City, 138 Ga. 181, 75 S. E. 99; Healey *v.* Atlanta, 125 Ga. 736, 54 S. E. 749; Davis *v.* S., 9 Ga. App. 430, 71 S. E. 603; Chicago, M. & St. P. R. Co. *v.* Chicago, 264 Ill. 24, 105 N. E. 702; P. *v.* Johnson, 237 Ill. 237, 86 N. E. 676; Gillespie *v.* Duling, 41 Ind. App. 217, 83 N. E. 728; Pittsburg, etc. R. Co. *v.* Warrum, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356; German Bk. *v.* Brose, 32 Ind. App. 77, 69 N. E. 300; Southern R. Co. *v.* Caplinger, 151 Ky. 749, 152 S. W. 947; Vance *v.* Pewamo, 161 Mich. 528, 126 N. W. 978; Benton *v.* St. Louis, 217 Mo. 687, 118 S. W. 418; Butte *v.* Mikosowitz, 39 Mont. 350, 102 P. 593; Eldridge *v.* Collins, 75 Neb. 65, 105 N. W. 1085; Brandt *v.* Olson, 79 Neb. 612, 113 N. W. 151 (improvements need not be shown); Borough *v.* Polak, 76 N. J. Eq. 212, 73 A. 753; Comrs. *v.* R. Co., 74 N. J. L. 480, 65 A. 1035; Oregon City *v.* R. Co., 44 Or. 165, 74 P. 924; C. *v.* Llewellyn, 14 Pa. Super. 214; Watertown *v.* Troeh, 25 S. D. 21, 125 N. W. 501 (user only).

See Smith *v.* Steel Co. (Ala.), 62 S. 766; Drimmel *v.* Kansas City (Mo. App.), 168 S. W. 280; Doyle *v.* Chattanooga (Tenn.), 161 S. W. 997. See also Zagame *v.* New Orleans, 128 La. 388, 54 S. 916.

User by public without official action, not enough. Smith *v.* Smythe, 197 N. Y. 457, 90 N. E. 1121. See also In re Lawrence St., 136 N. Y. S. 845.

Acceptance of land for highway need not be shown. Sowadzki *v.* County, 36 Utah 127, 104 P. 111, statute.

Proof must be unequivocal and convincing. Vance *v.* Pewamo, 161 Mich. 528, 126 N. W. 978.

132-52 Rhodes *v.* Perusse, 41 Can. Sup. 264 (acceptance by corporation need not be shown unless dedication is to it); Phillips *v.* Stamford, 81 Conn. 408, 71 A. 361; Penick *v.* County, 131 Ga. 385, 62 S. E. 300; Miller *v.* Comrs., 125 Ill. App. 431; Clarke *v.* Club, 44 Ind. App. 426, 88 N. E. 100; Strunk *v.* Pritchett, 27 Ind. App. 582, 61 N. E. 973; Riley *v.* Buchanan, 116 Ky. 625, 76 S. W. 527, 63 L. R. A. 242; Cassidy *v.* Sullivan, 75 Neb. 847, 106 N. W. 1027; Sanborn *v.* Amarillo, 42 Tex. Civ. 115, 93 S. W. 473 (acceptance by public evidenced by individuals). See Knox *v.* Roehl, 153 Wis. 239, 140 N. W. 1121.

Common law method of acceptance sufficient, where statute not complied with. Arnold *v.* Orange, 73 N. J. Eq. 280, 66 A. 1052.

Necessity for acceptance.—Moore *v.* Fowler, 58 Or. 292, 114 P. 472.

Assumed town had beginning about time plat thereof recorded, although not incorporated until long thereafter. Exira *v.* Whitted, 140 Ia. 576, 118 N. W. 917.

No definite period of user necessary. Palmer *v.* Chicago, 248 Ill. 201, 93 N. E. 765.

Extent of user.—See McClenehan *v.* Jesup, 144 Ia. 352, 120 N. W. 74.

133-53 Penick *v.* County, 131 Ga. 385, 62 S. E. 300; Mayor *v.* Johnson, 2 Ga. App. 378, 58 S. E. 518; Village of Winthrop Harbor *v.* Gurdes, 257 Ill. 596, 101 N. E. 199; Chmielewicz *v.* R. Co., 167 Ill. App. 383; Raymond *v.*

Wichita, 70 Kan. 523, 79 P. 323; Burks *v.* Ferriell, 26 Ky. L. R. 35, 80 S. W. 483; Berrien Springs *v.* Ferguson, 154 Mich. 472, 118 N. W. 262; Gleason *v.* Stonehouse, 149 Mich. 611, 113 N. W. 315; Twedell *v.* City of St. Joseph, 167 Mo. 547, 152 S. W. 432; Hemphill *v.* City, 162 Mo. App. 566, 142 S. W. 817; St. Louis, etc. R. Co. *v.* Co., 190 Mo. 246, 88 S. W. 634; Scheffer *v.* Hardin, 140 Mo. App. 13, 124 S. W. 569; Arnold *v.* Orange, 73 N. J. Eq. 280, 66 A. 1052; In re Bragaw St., 141 N. Y. S. 987; Wellsville *v.* Hallock, 139 N. Y. S. 961; La Grange *v.* Brown (Tex. Civ.), 161 S. W. 8.

And see Wade *v.* Cornelia, 136 Ga. 89, 70 S. E. 880; Gable *v.* Cedar Rapids, 150 Iowa 108, 129 N. W. 737; Jeffuss *v.* Greenville, 154 N. C. 490, 70 S. E. 919.

Only such acts as tend to show acceptance for purpose indicated considered. Myers *v.* Oceanside, 7 Cal. App. 87, 93 P. 686.

133-54 Acceptance of some of streets tendered, evidence of intention to accept others as needed. Parriott *v.* Hampton, 134 Ia. 157, 111 N. W. 440. See Miller *v.* Grandey, 45 Pa. Super. 159.

134-55 Venice *v.* Co., 216 Ill. 345, 75 N. E. 105; City of New Orleans *v.* Carrollton Land Co., 131 La. 1092, 60 S. 695; Darling *v.* Mayor, 73 N. J. Eq. 318, 67 A. 709; Finucan *v.* Ramsden, 95 App. Div. 626, 88 N. Y. S. 430; Palmer *v.* Co., 115 App. Div. 677, 101 N. Y. S. 347; Houston *v.* Finnigan (Tex. Civ.), 85 S. W. 470.

See Hall *v.* City of Olean, 82 Misc. 300, 143 N. Y. S. 664; In re Bragaw St., 141 N. Y. S. 987; Silverton *v.* Brown, 63 Or. 418, 128 P. 45.

134-56 Los Angeles *v.* McCollum, 156 Cal. 148, 103 P. 914; Chicago, M. & St. P. R. Co. *v.* Chicago, 264 Ill. 24, 105 N. E. 702; Klein *v.* Rheinhardt, 163 Ill. App. 257; Menoher *v.* Grairty, 148 Ia. 695, 127 N. W. 1087; Hunter *v.* Des Moines, 144 Ia. 541, 123 N. W. 215 (resolution sufficient though ordinance provided acceptance should be thereby only); Burroughs *v.* City, 134 Ia. 429, 109 N. W. 876; Cassidy *v.* Sullivan, 75 Neb. 847, 106 N. W. 1027 (acceptance need not be by public authorities, but may be by public itself); Schmidt *v.* Spaeth (N. J.), 90 A. 1002; Atlantic City *v.* Co., 73 N. J. Eq. 721, 70 A. 345 (writing or use and improvement of property); In re Bragaw St., 141 N. Y. S. 987; Palmer *v.* Co., 115 App. Div. 677, 101 N. Y. S. 347; Stillman *v.* City, 129 N. Y. S. 515; Richmond *v.* Co., 102 Va. 165, 45 S. E. 877; Wilson *v.* McConnell (W. Va.), 77 S. E. 540. *Comp.* Cincinnati C. Co. *v.* Roseville, 76 O. St. 108, 81 N. E. 178 (acceptance by city must be shown by acts of its proper officers and not public user); Lynchburg Co. *v.* Guill, 107 Va. 86, 57 S. E. 644 (must appear of record).

Formal action on the part of the representatives of the public having authority over highways. Schmidt *v.* Spaeth, 82 N. J. L. 575, 83 A. 242.

135-57 Borough *v.* Polak, 76 N. J. Eq. 212, 75 A. 753; Watertown *v.* Troeh, 25 S. D. 21, 125 N. W. 501 (injunction).

Pleadings do not operate as acceptance of tender. Darling *v.* Mayor, 73 N. J. Eq. 318, 67 A. 709.

Proof of acceptance must be unequivocal, clear, satisfactory. P. *v.* Johnson, 237 Ill. 237, 86 N. E. 676.

135-58 Pitcairn *v.* Chester, 135 Fed. 587; McKenzie *v.* Haines, 123 Wis. 557, 102 N. W. 33. See Casey *v.* Chicago, 263 Ill. 147, 104 N. E. 1025; Iglehart *v.* R. Co., 241 Ill. 268, 89 N. E. 431; Kelley *v.* Jones, 110 Me. 360, 86 A. 252. *Comp.* Sanbon *v.* Amarillo, 42 Tex. Civ. 115, 93 S. W. 473.

An ordinance declaring the dedication vacated negatives acceptance. Klein *v.* Reinhardt, 163 Ill. App. 257.

Mayor's declarations, not relevant if he is not charged with duty respecting street. McClenehan *v.* Jesup, 144 Ia. 352, 120 N. W. 74.

Building permits, not admission defendant had interest in surface of street described therein when issued after easement vested in city. Butte *v.* Mikosowitz, 39 Mont. 350, 102 P. 593.

Revocation before acceptance.—Iowa, etc. R. Co. *v.* Homan, 151 Iowa 404, 131 N. W. 878.

Revocation before incorporation of village. Drucker *v.* Home City, 31 O. C. C. 466.

Non-compliance with statute. Ricketson *v.* Saranac Lake, 73 Misc. 52, 130 N. Y. S. 794.

DEEDS

145-1 Dunson *v.* Heun, 178 Ala. 152, 59 S. 54; Met. Tr. & Sav. Bk. *v.* Perry, 259 Ill. 183, 102 N. E. 218; Tucker *v.*

Glew (Ia.), 139 N. W. 565; Spurlock *v.* Spurlock, 149 Ky. 822, 149 S. W. 1132; Durkin *v.* Ward, 66 Or. 335, 133 P. 345 (*cit.* 4 ENCYC. OF EV. 145).

The contrary obtains in the case of deeds to effect a voluntary distribution. Thurston *v.* Tubbs, 257 Ill. 465, 100 N. E. 947.

Intent to convey.—Los Angeles *v.* Hannon, 159 Cal. 37, 112 P. 878.

Existence of fraud.—Devlin *v.* Devlin, 89 S. C. 268, 71 S. E. 966.

145-2 See Hill *v.* Nelms, 86 Ala. 442, 5 S. 796; Farrior *v.* Co., 88 Ala. 275, 7 S. 200; Einstein *v.* Shouse, 24 Fla. 490, 5 S. 380; Watkins *v.* Nugen, 118 Ga. 372, 45 S. E. 262; Stuart *v.* Dutton, 39 Ill. 91; Collins *v.* Cornwell, 131 Ind. 20, 30 N. E. 796; Smith *v.* James, 131 Ind. 131, 30 N. E. 902; S. *v.* Young, 23 Minn. 551; Smith *v.* Williams, 38 Miss. 48; Wells *v.* Lamb, 19 Neb. 355, 27 N. W. 229; Brown *v.* Westerfield, 47 Neb. 399, 66 N. W. 439, 53 Am. St. 532; Keenan *v.* Keenan, 58 Hun 605, 12 N. Y. S. 747; Gaskill *v.* King, 34 N. C. 211, 221; Koppelmann *v.* Koppelmann, 94 Tex. 40, 57 S. W. 570.

Execution as used in a statute making acknowledgment prima facie evidence of execution includes both signing and delivery. Tucker *v.* Helgren, 102 Minn. 382, 113 N. W. 912. See Little *v.* Dodge, 32 Ark. 453; Clark *v.* Child, 66 Cal. 87, 4 P. 1058. *Comp.* Young *v.* Clarendon, 132 U. S. 340. But see Nielson *v.* Schuckman, 53 Wis. 638, 11 N. W. 44.

Burden on party who alleges that deed absolute in form was executed for temporary purposes. Ivy *v.* Ivy (Tex. Civ.), 128 S. W. 682.

Presumed that deed was executed on day of its date; if it is fair on its face, mere suggestion of fraud or falsity does not shift burden of proof. Nelson *v.* Brown, 164 Ala. 397, 51 S. 360.

Presumption in favor of validity of deed where the grantee may acquire title to land if that depends upon place of execution. Rachels *v.* Co., 95 Ark. 6, 128 S. W. 348.

Existence of deed sometimes presumed though no writing upon which presumption may rest. McCollum *v.* Home, 54 Tex. Civ. 348, 117 S. W. 886.

145-3 Buffington *v.* Thompson, 98 Ga. 416, 25 S. E. 516; Stallings *v.* Newton, 110 Ga. 875, 36 S. E. 227. See Solt *v.* Anderson, 67 Neb. 103, 93 N. W. 205; Tiernan *v.* Fenimore, 17 O. 545.

146-4 See Landt *v.* McCullough, 130 Ill. App. 515 (verified denial necessary); Tucker *v.* Helgren, 102 Minn. 382, 113 N. W. 912; Burk *v.* Pence, 206 Mo. 315, 104 S. W. 23.

146-5 Hayes *v.* Martin, 97 Ark. 643, 134 S. W. 626; Davis *v.* Judson, 159 Cal. 121, 113 P. 147.

146-6 Felton *v.* Brown, 102 Ark. 658, 145 S. W. 552; Hellard *v.* Nance (Ky.), 114 S. W. 277; Merrill *v.* Bradley (Tex. Civ.), 121 S. W. 561; Thompson *v.* Schoner, 58 Wash. 642, 109 P. 116.

Presumption as to date of execution. S. *v.* Dana, 59 Wash. 30, 109 P. 191.

146-8 See Wilson *v.* Wilson, 82 Neb. 562, 120 N. W. 147.

147-16 Vagueness or uncertainty in description does not render deed inadmissible unless identification is impossible. Walker *v.* Lee, 51 Fla. 360, 40 S. 881. But where location of land is impossible, deed is inadmissible even as color of title. Whitehead *v.* Pitts, 127 Ga. 774, 56 S. E. 1004.

148-19 Defective acknowledgment by wife not cause for excluding deed otherwise in proper form in absence of testimony that locus was separate property or homestead. Colville *v.* Colville (Tex. Civ.), 118 S. W. 870.

150-26 Burns *v.* U. S., 160 Fed. 631, 87 C. C. A. 533 (absence of record of conveyance of land by grantor); Blount *v.* Blount, 158 Ala. 242, 48 S. 581; Zeitlow *v.* Zeitlow, 84 Kan. 713, 115 P. 573.

Evidence sufficient. — Thompson *v.* Schoner, 58 Wash. 642, 109 P. 116.

151-27 Moore *v.* Riddle (N. J.), 87 A. 227.

151-28 Presumed seal was attached to original. Rule *v.* Richards (Tex. Civ.), 149 S. W. 1073.

151-29 Blount *v.* Blount, 158 Ala. 242, 48 S. 581; Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645; West *v.* Co., 56 Tex. Civ. 341, 120 S. W. 228; Williamson *v.* Work, 33 Tex. Civ. 369, 77 S. W. 266 (affidavit sufficient). See Gann *v.* Roberts, 32 Tex. Civ. 561, 74 S. W. 950. But see Elliott *v.* Sheppard, 179 Mo. 382, 78 S. W. 627.

Genuineness of signature presumed from acknowledgment, attestation and recordation, and burden on party alleging grantor's incapacity to write to show that latter authorized another to write his signature. Hansen *v.* Owens, 132 Ga. 648, 64 S. E. 800.

151-30 Reputation as forger of land titles competent evidence of forgery. Loring *v.* Jackson, 43 Tex. Civ. 306, 95 S. W. 19.

152-32 Le Blanc *v.* Jackson (Tex. Civ.), 161 S. W. 60; Surghenor *v.* Ducey (Tex.), 139 S. W. 22; Hayward L. Co. *v.* Bonner, 56 Tex. Civ. 208, 120 S. W. 577.

Execution of a deed may be proved by circumstantial evidence. Groesbeck *v.* Wiest (Tex. Civ.), 157 S. W. 258; Cowsert *v.* Schooler (Mo.), 167 S. W. 447; Schooler *v.* Schooler (Mo.), 167 S. W. 444.

Payment of taxes on land claimed to have been conveyed by husband to divorced wife may be shown, as may the reason the former applied for reduction of alimony. Watkins *v.* Watkins, 39 Mont. 367, 102 P. 860.

152-33 Freeman *v.* Inst. (Tex. Civ.), 128 S. W. 629.

Execution of deed may be proved by admissions. Groesbeck *v.* Wiest (Tex. Civ.), 157 S. W. 258.

But where deed must be witnessed, grantor's declarations are not competent primary evidence although statute provides that execution may be proved by his "testimony" without producing or accounting for subscribing witnesses. Sledge *v.* Singley, 139 Ala. 346, 37 S. 98.

152-36 Ayer *v.* Dillard, 45 Fla. 179, 33 S. 714 (deed by governor and secretary of state); Iguano L. & M. Co. *v.* Jones, 65 W. Va. 59, 64 S. E. 640.

152-37 Spears *v.* Weddington, 146 Ky. 434, 142 S. W. 679.

152-41 Guardian's deed presumptive evidence (under statute) of regularity of sale but not of existence of all prerequisities to valid sale. Teague *v.* Swasey, 46 Tex. Civ. 151, 102 S. W. 458.

152-42 Winn *v.* Coggins, 53 Fla. 327, 42 S. 897; Castleman *v.* Phillipsburg Co., 1 Tenn. Ch. App. 9.

153-43 Mitchell *v.* Denver, 33 Colo. 37, 78 P. 686 (tax deed); Kimmel *v.* Meier, 106 Ill. App. 251 (sheriff's deed prima facie evidence).

153-46 See Tompkins *v.* Co., 160 Fed. 303, 87 C. C. A. 427.

Indorsement of court's approval of deed dispenses with production of order of court approving it. Conley *v.* Co. (Ky.), 113 S. W. 504.

154-49 Presumption after long lapse of time. Tarvin *v.* Walker, 25 Ky. L. R. 2246, 80 S. W. 504.

155-54 Greve *v.* Co., 8 Cal. App. 275, 96 P. 904.

155-57 Brannan *v.* Henry, 142 Ala. 698, 39 S. 92.

156-61 De Nieff *v.* Howell, 138 Ga. 248, 75 S. E. 202; McLaughlin *v.* McLaughlin, 241 Ill. 366, 89 N. E. 645; Francis *v.* Society, 149 Ia. 158, 126 N. W. 1027; Collins *v.* Committee, 140 Ky. 510, 131 S. W. 262; McDermeitt *v.* Keesler, 240 Mo. 278, 144 S. W. 414; Hacker *v.* Hoover, 89 Neb. 317, 131 N. W. 734; West *v.* West, 84 Neb. 169, 120 N. W. 925; Caddell *v.* Caddell (Tex. Civ.), 131 S. W. 432. See also Magaw *v.* Huntley, 36 App. Cas. (D. C.) 26; Fish *v.* Poorman, 85 Kan. 237, 116 P. 898; McGuire *v.* Arnett, 143 Ky. 802, 137 S. W. 508. See "Insanity," infra, 462-57. *Contra* where grantee stands in confidential relation. Hoeb *v.* Maschinot, 140 Ky. 330, 131 S. W. 23.

Evidence insufficient to show competency of grantor. Hays *v.* Dillard (Ala.), 57 S. 695; Davis *v.* Davis, 29 S. D. 420, 137 N. W. 283.

Time of incapacity.—Brown *v.* Brown, 209 Mass. 388, 95 N. E. 796.

Effect of age.—Howard *v.* Howard, 112 Va. 566, 72 S. E. 133.

Degree of capacity.—Wampler *v.* Harrell, 112 Va. 635, 72 S. E. 135.

Nature of evidence.—Du Bose *v.* Kell, 90 S. C. 196, 71 S. E. 371.

156-63 Bolster *v.* Lambert, 67 Ore. 134, 135 P. 325. But the son's giving a mortgage to father on premises described by deed rebuts presumption. Hess *v.* Stockard, 99 Minn. 504, 109 N. W. 1113.

Deed in chain of title signed by one Chrast and "Fannie" Chrast, certified in acknowledgment to be his wife, is admissible as deed of his wife "Frances" Chrast without showing identity of "Fannie" with "Frances." Chrast *v.* O'Connor, 41 Wash. 360, 83 P. 238.

157-69 Parol evidence competent to show description of grantees as husband and wife is untrue. Hubatka *v.* Meyerhofer, 79 N. J. L. 264, 75 A. 454.

157-70 Bouvier-Iaeger Coal Co. *v.* Sypher, 186 Fed. 644; Farr *v.* Chambless, 175 Ala. 659, 57 S. 458; Hill *v.* Kreiger, 250 Ill. 408, 95 N. E. 468; Riegel *v.* Riegel, 243 Ill. 626, 90 N. E. 1108; Pethtel *v.* Pethtel, 45 Ind. App. 664, 90 N. E. 102; Terry *v.* Glover,

235 Mo. 544, 139 S. W. 337; O'Brien *v.* O'Brien, 19 N. D. 713, 125 N. W. 307. And see Maxwell *v.* Maxwell, 98 Ark. 466, 136 S. W. 172; Sifford *v.* Cutler, 248 Ill. 340, 94 N. E. 156; Cassidy *v.* Holland, 27 S. D. 287, 130 N. W. 771.

Evidence sufficient.—Price *v.* Hagle (Mich.), 137 N. W. 253.

Merely giving a deed to a stranger with an injunction to keep it, does not authorize him to deliver it to the grantee. Culver *v.* Carroll, 175 Ala. 469, 57 S. 767.

Delivery a mixed question of law and fact to be determined from a consideration of the words and acts of the parties in connection with the circumstances surrounding the transaction. Johnston *v.* Kramer, 203 Fed. 733; Weigand *v.* Rutschke, 253 Ill. 260, 97 N. E. 641.

Presumption.—Bouvier-Iaeger Coal Co. *v.* Sypher, 186 Fed. 644.

Execution of second deed. — King *v.* Slater, 96 Ark. 589, 133 S. W. 173.

157-71 May be shown by parol. Shute *v.* Shute, 82 S. C. 264, 64 S. E. 145; In re Braley's Est., 85 Vt. 351, 82 A. 5. See Graham *v.* Suddeth, 97 Ark. 283, 133 S. W. 1033; Cumberland, etc. Co. *v.* Mt. Vernon, 176 Ind. 177, 94 N. E. 714; Noble *v.* Noble, 151 Ia. 698, 130 N. W. 114; Hild *v.* Hild, 129 Ia. 649, 106 N. W. 159; Pettierew *v.* Greenshields, 61 Wash. 614, 112 P. 749.

Time of delivery.—Shoemaker *v.* Chapman, etc. Co., 112 Va. 612, 72 S. E. 121.

Voluntary settlement presumption of delivery.—In such cases the presumption in favor of the delivery of deeds is greater than in ordinary cases of bargain and sale. Linn *v.* Linn, 261 Ill. 606, 104 N. E. 229; Lines *v.* Willey, 253 Ill. 440, 97 N. E. 843; Weigand *v.* Rutschke, 253 Ill. 260, 97 N. E. 641; Cowsert *v.* Schooler (Mo.), 167 S. W. 447; Schooler *v.* Schooler (Mo.), 167 S. W. 444.

157-72 Stiles *v.* Breed, 151 Ia. 86, 130 N. W. 376.

158-73 Smith *v.* Moore, 149 N. C. 185, 62 S. E. 892. See McCune *v.* Goodwillie, 204 Mo. 306, 102 S. W. 997.

158-74 Morrison *v.* Fletcher, 119 Ky. 488, 84 S. W. 548; Guggenheimer *v.* Lockridge, 39 W. Va. 457, 19 S. E. 874. See Sheehy *v.* Scott, 128 Ia. 551, 104 N. W. 1139; Rennebaum *v.* Rennebaum, 78 N. J. Eq. 427, 79 A. 309; Stonehill *v.* Hastings, 202 N. Y. 115, 94 N. E. 1068.

158-75 Morton *v.* Morton, 82 Ark. 492, 102 S. W. 213; Fisher *v.* Fisher (Cal. App.), 137 P. 1094; Thompson *v.* McKenna, 22 Cal. App. 129, 133 P. 512; Drinkwater *v.* Hollar, 6 Cal. App. 117, 91 P. 664; Central Tr. Co. *v.* Stoddard, 4 Cal. App. 647, 88 P. 806; Walker *v.* Warner, 31 App. Cas. (D. C.) 76; Kaaihue *v.* Crabbe, 3 Haw. 768; Lines *v.* Willey, 253 Ill. 440, 97 N. E. 843; In re Brigham's Est., 144 Ia. 71, 120 N. W. 1054; Nowlen *v.* Nowlen, 122 Ia. 541, 98 N. W. 383; Hild *v.* Hild, 129 Ia. 649, 106 N. W. 159; Fish *v.* Poorman, 85 Kan. 237, 116 P. 898; Pittmon *v.* Flowers, 131 Ky. 804, 115 S. W. 786; Wilbur *v.* Grover, 140 Mich. 187, 103 N. W. 583; Tucker *v.* Helgren, 102 Minn. 382, 113 N. W. 912; Wilson *v.* Wilson, 85 Neb. 167, 122 N. W. 856; Leonard *v.* Fleming, 13 N. D. 629, 102 N. W. 308; Pierson *v.* Fisher, 48 Or. 223, 85 P. 621; Irvin *v.* Johnson, 56 Tex. Civ. 492, 120 S. W. 1085; Jackson *v.* Lamar, 58 Wash. 383, 108 P. 946; Chase *v.* Woodruff, 133 Wis. 555, 113 N. W. 973.

See Brock *v.* Stines, 258 Ill. 346, 101 N. E. 585; Hild *v.* Hild, 129 Ia. 649, 106 N. W. 159.

Deed blank as to grantee.—Clemmons *v.* McGeer, 63 Wash. 446, 115 P. 1081.

Offer of deed at trial raises presumption of delivery. Phillips *v.* Menotti (Cal.), 139 P. 796.

159-76 *Contra* if agent was grantor and paper had not been recorded though found among grantee's papers after grantor's death. Smith *v.* Moore, 149 N. C. 185, 62 S. E. 892.

Delivery through third person.—Terry *v.* Glover, 235 Mo. 544, 139 S. W. 337. And see In re Bell's Est., 150 Ia. 725, 130 N. W. 798.

159-77 Tipton *v.* Tipton, 55 Tex. Civ. 192, 118 S. W. 842.

159-78 Potter *v.* Barringer, 236 Ill. 224, 86 N. E. 233; In re Brigham's Est., 144 Ia. 71, 120 N. W. 1054; McAllister *v.* Richardson (Miss.), 60 S. 570; Pierson *v.* Fisher, 48 Or. 223, 85 P. 621. See vol. 4, p. 250, n. 23.

159-80 Wilson *v.* Wilson, 83 Neb. 562, 120 N. W. 147 (unacknowledged deed of decedent proved by subscribing witness).

160-81 Drinkwater *v.* Hollar, 6 Cal. App. 117, 91 P. 664; Doe *v.* Roe (Del.), 81 A. 47; Elliott *v.* Murray, 225 Ill.

107, 80 N. E. 77; Fogarty *v.* Stange, 72 Misc. 225, 129 N. Y. S. 610; Devlin *v.* Devlin, 89 S. C. 268, 71 S. E. 966.

160-82 Central Tr. Co. *v.* Stoddard, 4 Cal. App. 647, 88 P. 806 (when rights of third persons have intervened); Walker *v.* Warner, 31 App. Cas. (D. C.) 76; Potter *v.* Barringer, 236 Ill. 224, 86 N. E. 233; Blake *v.* Ogden, 223 Ill. 204, 79 N. E. 68; In re Brigham's Est., 144 Ia. 71, 120 N. W. 1054; Jackson *v.* Lamar, 58 Wash. 383, 108 P. 946. See Konser *v.* Konser, 219 Ill. 466, 76 N. E. 846 (evidence sufficient to rebut); Hild *v.* Hild, 129 Ia. 649, 106 N. W. 159; Cameron *v.* Gray, 202 Pa. 566, 52 A. 132.

Circumstances rebutting presumption. Fogarty *v.* Stange, 72 Misc. 225, 129 N. Y. S. 610.

In absence of claim of fraud the evidence, while it should be clear and satisfactory, need not establish absolute non-delivery beyond all reasonable controversy. Chase *v.* Woodruff, 133 Wis. 555, 113 N. W. 973.

Wrongful conduct of grantee not presumed. Wilson *v.* Wilson, 85 Neb. 167, 122 N. W. 856.

161-83 *Comp.* Clark *v.* Clark, 56 Or. 218, 107 P. 23.

Grantee's failure to record deed does not overcome presumption. In re Brigham's Est., 144 Ia. 71, 120 N. W. 1054.

161-84 Hearn *v.* Purnell, 110 Md. 458, 72 A. 906; McGuire *v.* Clark, 85 Neb. 102, 122 N. W. 675; Smith *v.* Moore, 149 N. C. 185, 62 S. E. 892; Rountree *v.* Rountree, 85 S. C. 383, 67 S. E. 471. But see Henry *v.* Henry, 215 Ill. 205, 74 N. E. 126; and infra, 166-99 and 168-1.

Further in support of text, see Wagner *v.* Kirchberg, 166 Mich. 411, 131 N. W. 1114; Cassidy *v.* Holland, 27 S. D. 287, 130 N. W. 771.

Not conclusive.—Cribbs *v.* Walker, 74 Ark. 104, 85 S. W. 244.

Deed found amongst dead grantor's papers presumed not to have been delivered. Shelter *v.* Stewart, 133 Ia. 329, 107 N. W. 319, 110 N. W. 582.

Deed not recorded until after his death. "From the time of the death of his wife he continued to occupy, pay taxes on, assert ownership of and retain control over the premises up to the time of his death, making final disposition of it in his last will. When his wife died, their two children were of age, married, and had homes of their own. It is claimed that he was unfriendly with them, which is denied. His will indicates a very unkindly feeling. This was a pure question of fact. We think that whether he occupied the premises in recognition of, or hostile to, the title of his children, was for the jury to decide from the conflicting testimony, under proper instructions." Tyler *v.* Wright (Mich.), 137 N. W. 212.

162-85 Hill *v.* Kreiger, 250 Ill. 408, 95 N. E. 468; Cribbs *v.* Walker, 74 Ark. 104, 85 S. W. 244. See Ward *v.* Conklin, 232 Ill. 553, 83 N. E. 1058.

Grantor's possession may be explained. Good *v.* Williams, 81 Kan. 388, 105 P. 433.

Voluntary settlements.—The intention of the grantor to have the title vest immediately in the grantee is regarded as more important in voluntary settlements than the manual possession of the deed, and the retention of the deed by the grantor is not conclusive against its validity if there are no other circumstances showing that the grantor did not intend to be absolute. Weigand *v.* Rutsehke, 253 Ill. 260, 97 N. E. 641.

163-90 Gernon *v.* Sisson, 21 Cal. App. 123, 131 P. 85; Long *v.* McHenry, 45 Pa. Super. 530; Glade C. M. Co. *v.* Harris, 65 W. Va. 152, 63 S. E. 873. See Boye *v.* Andrews, 10 Cal. App. 494, 102 P. 551, and vol. 4, p. 250, n. 23.

164-91 Childs *v.* Williams, 212 Fed. 151 (C. C. A.); Russell *v.* May, 77 Ark. 89, 90 S. W. 617; Bowman *v.* Owens, 133 Ga. 49, 65 S. E. 156; Buck *v.* Garber, 261 Ill. 378, 103 N. E. 1059; Hathaway *v.* Cook, 258 Ill. 92, 101 N. E. 227; Hill *v.* Kreiger, 250 Ill. 408, 95 N. E. 468; Ackman *v.* Potter, 239 Ill. 578, 88 N. E. 231; Abrams *v.* Beale, 224 Ill. 496, 79 N. E. 671; Blake *v.* Ogden, 223 Ill. 204, 79 N. E. 68; Calkins *v.* Calkins, 220 Ill. 111, 77 N. E. 102; Townsend *v.* Millican (Ind. App.), 101 N. E. 112; Firemen's Ins. Co. *v.* Dunn, 22 Ind. App. 332, 53 N. E. 251; Burch *v.* Nicholson (Ia.), 137 N. W. 1066; Webb *v.* Webb, 130 Ia. 457, 104 N. W. 438; Davis *v.* Hall, 128 Ia. 647, 105 N. W. 122; McCrum *v.* McCrum, 127 Ia. 540, 103 N. W. 771; Collings *v.* Collings, 29 Ky. L. R. 51, 92 S. W. 577; Morrison *v.* Fletcher, 119 Ky. 488, 84 S. W. 548; Hartman *v.* Thompson, 104 Md. 389, 65 A. 117; Dayton *v.* Stewart, 99 Md. 643, 59 A. 281; Draper *v.* Brown, 153

Mich. 120, 117 N. W. 213; Derry *v.* Fielder, 216 Mo. 176, 115 S. W. 412; McCune *v.* Goodwillie, 204 Mo. 306, 102 S. W. 997; Peters *v.* Berkemeier, 184 Mo. 393, 83 S. W. 747 (if recorded at instance of grantor); Ford *v.* Gale, 155 App. Div. 675, 140 N. Y. S. 541; Smithwick *v.* Moore, 145 N. C. 110, 58 S. E. 908; Wetherington *v.* Williams, 134 N. C. 276, 46 S. E. 728; Sparkman *v.* Jones, 81 S. C. 453, 62 S. E. 870 (delivery to recording officer); Williams *v.* Neill (Tex. Civ.), 152 S. W. 693; Morgan *v.* Morgan, 82 Vt. 243, 73 A. 24; Smith *v.* Smith, 116 Wis. 570, 93 N. W. 452. See Hildebrand *v.* Willig, 64 N. J. Eq. 249, 53 A. 1035; Buchanan *v.* Clark, 164 N. C. 56, 80 S. E. 424, and infra, "Delivery," p. 255, n. 37 and supplement thereto.

Possession by grantee under a recorded deed raises presumption. Little *v.* Little, 23 Colo. App. 518, 130 P. 1022.

Rebuttable.—Clark *v.* Harper, 215 Ill. 24, 74 N. E. 61; Wilenou *v.* Handlon, 207 Ill. 104, 69 N. E. 892.

165-92 Stephens *v.* Stephens, 108 Ark. 53, 156 S. W. 837; Allen *v.* Allen, 157 Ill. App. 362; Burch *v.* Nicholson (Ia.), 137 N. W. 1066; Fitzgerald *v.* Tvedt, 142 Ia. 40, 120 N. W. 465; Davis *v.* Hall, 128 Ia. 647, 105 N. W. 122; Atkins *v.* Co. (Ky.), 124 S. W. 879 (lodging deed for record equivalent to recordation if delay in recording not result of action by grantor). But see Firemen's F. Ins. Co. *v.* Dunn, 22 Ind. App. 332, 53 N. E. 251; Cameron *v.* Gray, 202 Pa. 566, 52 A. 132; Smith *v.* Smith, 116 Wis. 570, 93 N. W. 452.

Continuance in possession tends to rebut presumption. Wilenou *v.* Handlon, supra.

166-93 Morehead *v.* Allen, 131 Ga. 807, 63 S. E. 507; Hoyt *v.* Northrup, 256 Ill. 604, 100 N. E. 164; Abrams *v.* Beale, 224 Ill. 496, 79 N. E. 671; Baker *v.* Hall, 214 Ill. 364, 73 N. E. 351; Chambers *v.* Chambers, 227 Mo. 262, 127 S. W. 86; Nelson *v.* Wickham, 86 Neb. 46, 124 N. W. 908; Stonehill *v.* Hastings, 135 App. Div. 48, 119 N. Y. S. 897. See Stephens *v.* Stephens, 108 Ark. 53, 156 S. W. 837.

166-96 Boye *v.* Andrews, 10 Cal. App. 494, 102 P. 551 (deed, after delivery to grantee, was returned to grantor and by latter delivered to his executor with directions to record after grantor's death, which was done); Creighton *v.* Roe, 218 Ill. 619, 75 N. E. 1073; Collins *v.* Smith, 144 Ia. 200, 122 N. W. 839. But see Abrams *v.* Beale, 224 Ill. 496, 79 N. E. 671; Konser *v.* Konser, 219 Ill. 466, 76 N. E. 846.

Suspicious circumstances in connection with recordation may overcome its effect. Engelke *v.* Engelke, 84 Neb. 134, 120 N. W. 1019.

167-97 Coulson *v.* Scott, 167 Ala. 606, 52 S. 436; Kirby *v.* Kirby, 236 Ill. 255, 86 N. E. 259; McGuire *v.* Clark, 85 Neb. 102, 122 N. W. 675.

Recording contrary to grantor's instructions and subsequent to delivery to grantee by officer, ineffectual. Morgan *v.* Morgan, 82 Vt. 243, 73 A. 24.

167-98 Abrams *v.* Beale, 224 Ill. 496, 79 N. E. 671; Creighton *v.* Roe, supra. *Comp.* Wilcox *v.* Drought, 71 App. Div. 402, 75 N. Y. S. 960; Stonehill *v.* Hastings, 135 App. Div. 48, 119 N. Y. S. 897.

Does not establish delivery if grantee uninformed as to execution and recording. Gillen *v.* Gillen, 238 Ill. 218, 87 N. E. 388.

167-99 Thurston *v.* Tubbs, 257 Ill. 465, 100 N. E. 947; Riegel *v.* Riegel, 243 Ill. 626, 90 N. E. 1108; Coleman *v.* Coleman, 216 Ill. 261, 74 N. E. 791; McCord *v.* Bright, 44 Ind. App. 275, 87 N. E. 654. See Wilenou *v.* Handlon, 207 Ill. 104, 69 N. E. 892; Hill *v.* Kreiger, 250 Ill. 408, 95 N. E. 468.

Where deed is voluntary conveyance presumptions of delivery are much stronger, even though grantee be an adult. Henry *v.* Henry, 215 Ill. 205, 74 N. E. 126. See also Baker *v.* Hall, supra; Kirkwood *v.* Smith, 212 Ill. 395, 72 N. E. 427.

168-1 Abrams *v.* Beale, 224 Ill. 496, 79 N. E. 671. See Morehead *v.* Allen, 131 Ga. 807, 63 S. E. 507.

168-3 Flynn *v.* Flynn, 17 Ida. 147, 104 P. 1030; Ackman *v.* Potter, 239 Ill. 578, 88 N. E. 231; Fitzgerald *v.* Tvedt, 142 Ia. 40, 120 N. W. 465; Chambers *v.* Chambers, 227 Mo. 262, 127 S. W. 86; Bates *v.* Winters, 138 Wis. 673, 120 N. W. 498. See Riegel *v.* Riegel, 243 Ill. 626, 90 N. E. 1108; Chastek *v.* Souba, 93 Minn. 418, 101 N. W. 618.

169-4 Flynn *v.* Flynn, 17 Ida. 147, 104 P. 1030; Long *v.* McHenry, 45 Pa. Super. 530.

Quantum of evidence.—Fish *v.* Poorman, 85 Kan. 237, 116 P. 898.

169-5 Napier *v.* Elliott, 152 Ala. 248, 44 S. 552; Zeithlow *v.* Zeithlow, 84

Kan. 713, 115 P. 573; Doty *v.* Barker, 78 Kan. 636, 97 P. 964. See Stevens *v.* Haile (Tex. Civ.), 162 S. W. 1025.

Non-delivery of other deeds covering all other lands of grantor and executed contemporaneously with plaintiff's deed, may be shown in connection with advice given grantor as to effect of making and recording them. Napier *v.* Elliott, 162 Ala. 129, 50 S. 148.

169-6 Napier *v.* Elliott, 152 Ala. 248, 44 S. 552; Brown *v.* North, 141 Ia. 399, 119 N. W. 629; Terry *v.* Glover, 235 Mo. 544, 139 S. W. 337; Felt *v.* Felt, 155 Mich. 237, 118 N. W. 953; O'Brien *v.* O'Brien, 19 N. D. 713, 125 N. W. 307. See also Patterson *v.* Patterson, 251 Ill. 153, 93 N. E. 1051.

169-7 Walker *v.* Warner, 31 App. Cas. (D. C.) 76, destruction of will in favor of grantee previous to execution of deed.

170-9 *Contra* as to declarations made years afterwards. Napier *v.* Elliott, 162 Ala. 129, 50 S. 148. See Baker *v.* Baker, 9 Cal. App. 737, 100 P. 892.

170-11 Chambers *v.* Chambers, 227 Mo. 262, 127 S. W. 86; Clark *v.* Clark, 56 Or. 218, 107 P. 23.

Cannot testify to secret intent not to deliver, at variance with his acts. Wilbur *v.* Grover, 140 Mich. 187, 103 N. W. 583.

170-13 Cartright *v.* Cartright, 70 W. Va. 507, 74 S. E. 655.

170-14 Cribbs *v.* Walker, 74 Ark. 104, 85 S. W. 244; Chambers *v.* Chambers, 227 Mo. 262, 127 S. W. 86; Ward *v.* Ward, 86 Neb. 744, 126 N. W. 305.

171-16 Boye *v.* Andrews, 19 Cal. App. 494, 102 P. 551; Goodman *v.* Griffith, 238 Mo. 706, 142 S. W. 259.

171-17 See Wilbur *v.* Grover, 140 Mich. 187, 103 N. W. 583; Roup *v.* Roup, 136 Mich. 385, 99 N. W. 389.

171-18 Potter *v.* Barringer, 236 Ill. 224, 86 N. E. 233, weight of grantor's declarations.

172-20 Grantee's statements on receiving deed, though grantor not present, admissible as verbal acts. Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209.

172-21 Chew *v.* Jackson, 45 Tex. Civ. 656, 102 S. W. 427. See Russell *v.* Mitchell, 223 Ill. 438, 79 N. E. 141.

Testimony to the best of witness' belief is competent. Brinkley *v.* Bell, 131 Ga. 226, 62 S. E. 67.

Witness may deny delivery where he has burden of establishing such negative fact. Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209. See Brooks *v.* Sioux City, 114 Ia. 641, 87 N. W. 682.

172-22 Walker *v.* Warner, 31 App. Cas. (D. C.) 76 (but subsequent conduct is not basis for an inference as to parties' prior intent); Morehead *v.* Allen, 131 Ga. 807, 63 S. E. 507; Scarborough *v.* Holder, 127 Ga. 256, 56 S. E. 293; Gillen *v.* Gillen, 238 Ill. 218, 87 N. E. 388 (joint conveyance and division of purchase money); Phelps *v.* Pratt, 225 Ill. 85, 80 N. E. 69, 9 L. R. A. (N. S.) 945; Nelson *v.* Wickham, 86 Neb. 46, 124 N. W. 938; Clark *v.* Clark, 56 Or. 218, 107 P. 23.

See Merki *v.* Merki, 113 Ill. App. 518, only admissible where delivery doubtful.

Alleged delivery may be rebutted by evidence that on day of grantor's death the alleged grantee was seen to take bundle of papers from decedent's trunk. Napier *v.* Elliott, 152 Ala. 248, 44 S. 552.

Acts of third parties cannot be proved. Napier *v.* Elliott, 162 Ala. 129, 50 S. 148; Draper *v.* Brown, 153 Mich. 120, 117 N. W. 213.

172-24 Grantor's enjoyment of the property during life may be accounted for. Walker *v.* Warner, 31 App. Cas. (D. C.) 76.

173-25 Daughdrill *v.* Lockhart (Ala.), 61 S. 802; Eaton *v.* Wilkins, 163 Cal. 742, 127 P. 71; Daneri *v.* Gazzola, 2 Cal. App. 351, 83 P. 455; McBrayer *v.* Walker, 122 Ga. 245, 50 S. E. 95; Calligan *v.* Calligan, 259 Ill. 52, 102 N. E. 247; Kimball *v.* City, 253 Ill. 105, 97 N. E. 257; Redmond *v.* Cass, 226 Ill. 120, 80 N. E. 708; In re Brigham's Est., 144 Ia. 71, 120 N. W. 1054 (regardless of time it was recorded); Crabtree *v.* Crabtree, 136 Ia. 430, 113 N. W. 923; Miller *v.* Peter, 158 Mich. 336, 122 N. W. 780; Ford *v.* Gale, 155 App. Div. 675, 140 N. Y. S. 541; Hall *v.* Kane, 122 N. Y. S. 967; Hall *v.* Conklin, 138 App. Div. 450, 122 N. Y. S. 967; Fortune *v.* Hunt, 149 N. C. 358, 63 S. E. 82; Leonard *v.* Fleming, 13 N. D. 629, 102 N. W. 308; Oehler *v.* Walsh, 7 O. C. C. (N. S.) 572; Beall *v.* Chatham (Tex. Civ.), 117 S. W. 492; S. *v.* Dana, 59 Wash. 30, 109 P. 191; Douthat *v.* Roberts (W. Va.), 80 S. E. 819.

But see Wheelock *v.* Harding, 4 Pa. Super. 21; Cassidy *v.* Holland, 27 S. D. 287, 130 N. W. 771.

174-26 Boye *v.* Andrews, 10 Cal. App. 494, 102 P. 551.

174-28 Daneri *v.* Gazzola, 2 Cal. App. 351, 83 P. 455; Wheelock *v.* Harding, 4 Pa. Super. 21; Shoemaker *v.* Drug Co., 112 Va. 612, 72 S. E. 121.

175-29 Calligan *v.* Calligan, 259 Ill. 52, 102 N. E. 247; Bennett *v.* Millard, 142 Ill. App. 282; Ewers *v.* Smith, 98 App. Div. 289, 90 N. Y. S. 575; Harriman L. Co. *v.* Hilton, 121 Tenn. 308, 120 S. W. 162.

175-30 Calligan *v.* Calligan, 259 Ill. 52, 102 N. E. 247; Crabtree *v.* Crabtree, 136 Ia. 430, 113 N. W. 923 (*cit.* the text); Gerardi *v.* Christie, 148 Mo. App. 75, 127 S. W. 635. See Tucker *v.* Glew (Ia.), 139 N. W. 565; Barber A. P. Co. *v.* Field, 174 Mo. App. 11, 161 S. W. 364. *Contra.* Kirby *v.* Cartwright, 48 Tex. Civ. 8, 106 S. W. 742.

Circumstances held to show delivery on date of first of two acknowledgments. Bogart *v.* Moody, 35 Tex. Civ. 1, 79 S. W. 633.

176-33 But see Ford *v.* Gale, 155 App. Div. 675, 140 N. Y. S. 541.

176-36 Fortune *v.* Hunt, 149 N. C. 358, 63 S. E. 82. Parol evidence inadmissible to show that deed complete on its face was conditionally delivered to grantee. Dorr *v.* Midelburg, 65 W. Va. 778, 65 S. E. 97.

177-37 Ashley *v.* Ashley, 93 Ark. 324, 124 S. W. 778; Moore *v.* Trott, 156 Cal. 353, 104 P. 578; Bruner *v.* Hart, 59 Fla. 171, 51 S. 593, quot. the text; Flynn *v.* Flynn, 17 Ida. 147, 104 P. 1030; Callerand *v.* Piot, 241 Ill. 120, 89 N. E. 266; Pethel *v.* Pethel, 45 Ind. App. 664, 90 N. E. 102 (reservation of control by grantor is fatal to claim of grantee); Wagner *v.* Kirchberg, 166 Mich. 411, 131 N. W. 1114; Hoagland *v.* Beckley, 158 Mich. 565, 123 N. W. 12; Terry *v.* Glover, 235 Mo. 544, 139 S. W. 337; Svanda *v.* Svanda, 86 Neb. 203, 125 N. W. 585; Rowley *v.* Bowyer, 75 N. J. Eq. 80, 71 A. 398 (sufficient in absence of anything indicating contrary purpose); Stonehill *v.* Hastings, 202 N. Y. 115, 94 N. E. 1068, *aff.* 135 App. Div. 48, 119 N. Y. S. 897; Sewell *v.* Ins. Co., 131 App. Div. 131, 115 N. Y. S. 345; Fortune *v.* Hunt, 149 N. C. 358, 63 S. E. 82 (retaining control is decisive); Maxwell *v.* Harper, 51 Wash. 351, 98 P. 756; Klabunde *v.* Casper, 139 Wis. 491, 121 N. W. 137. See In re Crocker's Est., 148 Ia. 104, 126 N. W. 962.

No presumption of delivery.—Thomas *v.* Sullivan, 138 Mich. 265, 101 N. W. 528, *cit.* Trask *v.* Trask, 90 Ia. 318, 57 N. W. 841; Mitchell *v.* Ryan, 3 O. St. 377.

Presumption in favor of bona fide purchaser from grantee, that the instrument is what it purports to be, and that all conditions of escrow have been complied with. Dempwolf *v.* Greybill, 213 Pa. 163, 62 A. 645; Blight *v.* Schenck, 10 Pa. 285, 51 Am. Dec. 478.

Financial condition of grantor at time he delivered a deed is immaterial. Phillips *v.* Henry (Tex. Civ.), 124 S. W. 184.

Surrender of control over deed is vital question (Young *v.* McWilliams, 75 Kan. 243, 89 P. 12), though control of land was subsequently attempted by conveying it. Norton *v.* Collins, 81 Kan. 33, 105 P. 26.

Delivery of second deed to third person for a different grantee presumed to have been made under the same conditions as first deed. Burnham *v.* Burnham, 58 Misc. 385, 111 N. Y. S. 252.

177-38 Svanda *v.* Svanda, 86 Neb. 203, 125 N. W. 585. *Contra,* Phillips *v.* Henry (Tex. Civ.), 124 S. W. 184. See Baker *v.* Baker, 9 Cal. App. 737, 100 P. 892.

177-39 Manning *v.* Foster, 49 Wash. 541, 96 P. 233.

Incompetent to show that grantor, on the day deed was delivered to a third person, exhibited it to the grantee or that latter was told by a stranger about the deed. Pethel *v.* Pethel, 45 Ind. App. 664, 90 N. E. 102.

Written instructions given custodian of deed cannot be affected by grantor's subsequent declarations. Moore *v.* Trott, 156 Cal. 353, 104 P. 578.

Presumption is in favor of delivery. Gould *v.* Hurley, 75 N. J. Eq. 512, 73 A. 129.

177-40 Callerand *v.* Piot, 241 Ill. 120, 89 N. E. 266. See Riegel *v.* Riegel, 243 Ill. 626, 90 N. E. 1108 (opinion of custodian).

177-41 Matheson *v.* Matheson, 139 Ia. 511, 117 N. W. 755; Bradford *v.* Durham, 54 Or. 1, 101 P. 897. See Maxwell *v.* Harper, 51 Wash. 351, 98 P. 756.

"**His continued custody of them,** especially with the knowledge of the grantor, was relevant to the conclusion that the grantor had delivered them to him for the benefit of his wife and

daughter, rather than for some private and temporary purpose of his own. And it was competent to thereby rebut the counter inference that the jury might have drawn had the deeds been returned to the grantor." Napier *v.* Elliott (Ala.), 58 S. 435.

Parol proof may be made of condition on which deed was deposited in escrow if there was a preexisting valid contract to convey. Nichols *v.* Oppermann, 6 Wash. 618, 34 P. 162. And, it seems, without regard to such contract. Manning *v.* Foster, 49 Wash. 541, 96 P. 233, 18 L. R. A. (N. S.) 337, 126 Am. St. 876. See King *v.* Upper, 57 Wash. 130, 106 P. 612; Campbell *v.* Thomas, 42 Wis. 437, 24 Am. Rep. 427.

Conclusion of holder inadmissible. Baker *v.* Baker, 9 Cal. App. 737, 100 P. 892.

177-42 Riegel *v.* Riegel, 243 Ill. 626, 90 N. E. 1108; Colee *v.* Colee, 122 Ind. 109, 23 N. E. 687, 17 Am. St. 345; Strothers *v.* Woodcox, 142 Ia. 648, 121 N. W. 51; Atkins *v.* Co. (Ky.), 124 S. W. 879; Akers *v.* Shoemaker, 31 Ky. L. R. 482, 102 S. W. 842; Chambers *v.* Chambers, 227 Mo. 262, 127 S. W. 86 (not conclusive). See Marshall *v.* Hartzfelt, 98 Mo. App. 178, 71 S. W. 1061

177-43 Fenton *v.* Fenton (Mo.), 168 S. W. 1152.

177-44 Pittmon *v.* Flowers, 131 Ky. 804, 115 S. W. 786.

177-45 Strothers *v.* Woodcox, 142 Ia. 648, 121 N. W. 51. See Taylor *v.* Sanford (Tex. Civ.), 150 S. W. 262; Jones *v.* Caird, 153 Wis. 384, 141 N. W. 228.

178-47 Russell *v.* May, 77 Ark. 89, 90 S. W. 617; Chapin *v.* Nott, 203 Ill. 341, 67 N. E. 833; Matheson *v.* Matheson, 139 Ia. 511, 117 N. W. 755 (delivery to third person); White *v.* Watts, 118 Ia. 549, 92 N. W. 660; Houlton *v.* Houlton, 119 Md. 180, 86 A. 514; Lewis *v.* Jacobs, 153 Mich. 664, 117 N. W. 325; Dunlap *v.* Dunlap, 94 Mich. 11, 53 N. W. 788; Brown *v.* Westerfield, 47 Neb. 399, 66 N. W. 439, 58 Am. St. 532; Lake *v.* Weaver, 76 N. J. Eq. 280, 74 A. 451; Parsons *v.* McCumber, 14 N. D. 213, 103 N. W. 626; Wood *v.* City (Vt.), 82 A. 671 (*cit.* Moore *v.* Giles, 49 Conn. 570; County Grammar School *v.* Howard, 84 Vt. 1, 77 A. 877); In re Braley's Est., 85 Vt. 351, 82 A. 5; Guggenheimer *v.* Lockridge, 39 W. Va. 457, 19 S. E. 874; Whiting *v.* Hoglund, 127 Wis. 135, 106 N. W. 391.

See Morrison *v.* Fletcher, 119 Ky. 488, 84 S. W. 548; Taylor *v.* Sanford (Tex. Civ.), 150 S. W. 262. But see Ward *v.* Coal Co., 152 Ky. 228, 153 S. W. 217; Wood *v.* Rigg, 152 Ky. 242, 153 S. W. 214.

The law presumes a grantee in a deed to be a bona fide purchaser. Young *v.* Waggoner, 50 Ind. App. 202, 98 N. E. 145.

The acceptance of a deed may be inferred from circumstances. Wood *v.* City (Vt.), 82 A. 671, *cit.* Gould *v.* Day, 94 U. S. 405; Creeden *v.* R. Co., 193 Mass. 280, 79 N. E. 344, 9 Ann. Cas. 1121; Blackwell *v.* Blackwell, 196 Mass. 186, 81 N. E. 910, 12 Ann. Cas. 1070.

178-48 Voluntary settlement.—Knowledge by grantee unnecessary. Baker *v.* Hall, 214 Ill. 364, 73 N. E. 351.

179-49 Russell *v.* May, 77 Ark. 89, 90 S. W. 617; White *v.* Watts, 118 Ia. 549, 92 N. W. 660 (especially where deed imposes no burden on grantee); Dunlap *v.* Dunlap, 94 Mich. 11, 53 N. W. 788; Parsons *v.* McCumber, 14 N D. 213, 103 N. W. 626.

179-50 An incomplete deed, held by attorney of grantee for signature of grantor, not presumed to have been accepted. Traurig *v.* Gelb, 76 N. J. L. 825, 70 A. 352.

180-51 Hill *v.* Kreiger, 250 Ill. 408, 95 N. E. 468; Taylor *v.* Sanford (Tex. Civ.), 150 S. W. 262. See Russell *v.* May, 77 Ark. 89, 90 S. W. 617.

181-52 Bingham *v.* Bingham, 105 Minn. 271, 117 N. W. 488.

181-54 Russell *v.* May, supra; Collings *v.* Collings, 29 Ky. L. R. 51, 92 S. W. 577; Morrison *v.* Fletcher, 119 Ky. 488, 84 S. W. 548 (if grant beneficial); Hartman *v.* Thompson, 104 Md. 389, 65 A. 117; McCune *v.* Goodwillie, 204 Mo. 306, 102 S. W. 997; Peters *v.* Berkemeier, 184 Mo. 393, 83 S. W. 747. See Kaaihue *v.* Crabbe, 3 Haw. 768; Wood *v.* Howk, 25 Ky. L. R. 2109, 79 S. W. 1184; Wilcox *v.* Drought, 71 App. Div. 402, 75 N. Y. S. 960; Stonehill *v.* Hastings, 135 App. Div. 48, 119 N. Y. S. 897.

182-58 Lake *v.* Weaver, 76 N. J. Eq. 280, 74 A. 451.

182-59 Demand for possession and assertion and exercise of ownership are clear indications of acceptance. Stonehill *v.* Hastings, supra. State of the title may be shown where deed has been accepted conditionally. Pul-

lis *v.* Somerville, 218 Mo. 624, 117 S. W. 736.

182-60 Louisville & N. R. Co. *v.* Ramsay, 134 Ga. 107, 67 S. E. 652; Aldeguer *v.* Hoskyn, 2 Phil. Isl. 500; Ferguson *v.* Booth (Tenn.), 160 S. W. 67; Swainson *v.* Scott, 111 Tenn. 140, 76 S. W. 909; Broocks *v.* Payne (Tex. Civ.), 124 S. W. 463. See Dennis *v.* Strunk, 32 Ky. L. R. 1230, 108 S. W. 957; Ralls *v.* Parish (Tex. Civ.), 151 S. W. 1089; Merriman *v.* Blalack, 56 Tex. Civ. 594, 121 S. W. 552; Rowland L. Co. *v.* Barrett, 70 W. Va. 703, 75 S. E. 57. *Comp.* New Haven T. Co. *v.* Camp, 81 Conn. 539, 71 A. 788.

Recital of heirship.—Lanier *v.* Hebard, 123 Ga. 626, 51 S. E. 632; Lohse *v.* Burch, 42 Wash. 156, 84 P. 722; Mace *v.* Duffy, 39 Wash. 597, 81 P. 1053.

Recitals in deed to third person, through whom both parties claim title, which deed is a muniment of title, are binding upon both. Colville *v.* Colville (Tex. Civ.), 118 S. W. 870.

Self-serving recitals are valueless except to show claim of grantor. White *v.* McCullough, 56 Tex. Civ. 383, 120 S. W. 1093.

183-61 See Houston O. Co. *v.* Kimball (Tex. Civ.), 114 S. W. 662, recital part of description.

Presumed that former deed was surrendered where later one recites that it was in lieu of it. Breckenridge C. Co. *v.* Scott, 121 Tenn. 88, 114 S. W. 930.

183-62 Harton *v.* Little (Ala.), 57 S. 851; Jackson *v.* Tribble, 156 Ala. 480, 47 S. 310; Washington County R. Co. *v.* Co., 104 Me. 527, 72 A. 491, quot. the text. See Arnold *v.* Watson, 91 Ark. 328, 121 S. W. 354.

Instrument creating the power of sale may provide that recitals in deed shall be evidence. Ward *v.* Forrester, 35 Tex. Civ. 319, 80 S. W. 127.

184-69 Gordon *v.* Simmons, 136 Ky. 273, 124 S. W. 306.

184-71 Vadeboncoeur *v.* Hannon, 159 Ala. 617, 49 S. 292; Kelley *v.* Dist., 74 Ark. 202, 85 S. W. 249, 87 S. W. 638 (statute); Iguana L. & M. Co. *v.* Jones, 65 W. Va. 59, 64 S. E. 640. See infra, "Title," 555-64.

Receiver's deed.—Recital of authority not evidence against stranger. Hagan *v.* Holderby, 62 W. Va. 106, 57 S. E. 289.

184-72 Caenio *v.* Baens, 5 Phil. Isl. 742 (of facts occasioning execution and date of deed); Gibson *v.* Pekarek, 25 S. D. 281, 126 N. W. 597; Hill *v.* Moore, 121 Tenn. 182, 113 S. W. 788 (statute has changed rule of Castleman *v.* Co., 1 Tenn. Ch. App. 9).

A tax deed is prima facie evidence of the regularity of the sale and also of the title in the person to whom the deed has been executed. Kentucky Lands Inv. Co. *v.* Simmons, 146 Ky. 588, 143 S. W. 43.

184-73 Liberal presumptions indulged to sustain recitals in tax deeds. Kessler *v.* Polkosky, 81 Kan. 69, 105 P. 7.

Recitals presumed true after lapse of long time and destruction of records. Hardin County *v.* Co. (Tex. Civ.), 112 S. W. 822.

185-74 Antognoli *v.* O'Have Zedek, 139 Ill. App. 142; Bryan *v.* Straus, 157 Mich. 49, 121 N. W. 301. See Shelton *v.* Franklin, 224 Mo. 342, 123 S. W. 1084; Griffin *v.* Franklin, 224 Mo. 667, 123 S. W. 1092. Recitals evidence under statute, and liberally construed. Cutting *v.* Harrington, 104 Me. 96, 71 A. 374.

Recitals in sheriff's deed, though prima facie evidence, are not sufficient to supply defects in a judicial record silent as to jurisdictional facts. Cooper *v.* Gunter, 215 Mo. 558, 114 S. W. 943.

185-75 Recital in ancient deed competent. Gunn *v.* Turner, 13 Ont. L. R. (Can.) 158.

185-76 Graden *v.* Mais, 77 Kan. 702, 95 P. 412, conclusive as to issuance of order relating to notice.

185-77 See Sapp *v.* Cline, 131 Ga. 433, 62 S. E. 529.

185-78 Recitals in a receiver's deed do not entitle it to admission in evidence where sale was made under judicial order. Hutchinson *v.* Patterson, 226 Mo. 174, 126 S. W. 403.

187-87 Uvalde County *v.* Oppenheimer, 53 Tex. Civ. 137, 115 S. W. 904.

187-92 Smith *v.* Steiner, 172 Ala. 79, 55 S. 606; Hickory *v.* R. Co., 137 N. C. 189, 49 S. E. 202; Rankin *v.* Moore, 46 Tex. Civ. 44, 101 S. W. 1049; Robertson *v.* Brothers (Tex. Civ.), 139 S. W. 657.

187-94 A special warranty not evidence of grantor's knowledge of recorded deed affecting his title. Houston O. Co. *v.* Kimball, 103 Tex. 94, 122 S. W. 533.

187-95 Gunn *v.* Turner, 13 Ont. L. R. (Can.) 158 (by statute); McMahon *v.* Stratford, 83 Conn. 386, 76 A. 983;

Mist *v.* Kapiolani, 13 Haw. 523; Boagni *v.* Co., 111 La. 1063, 36 S. 129; Sparhawk *v* Bullard, 1 Mete. (Mass.) 95; Morris *v.* Callanan, 105 Mass. 129; Norris *v.* Hall, 124 Mich. 170, 82 N. W. 832; Young *v.* Schulenberg, 165 N. Y. 385, 59 N. E. 135; Dorff *v.* Schmunk, 197 Pa. 298, 47 A. 113; Sims *v.* Meacham, 2 Bail. (S. C.) 101; Watkins *v.* Smith, 91 Tex. 589, 45 S. W. 560; Wiener *v.* Zweib (Tex. Civ.), 128 S. W. 699; Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484 (of heirship). See supra, "Best and Secondary Evidence," 312-20. *Contra* Lanier *v.* Hebard, 123 Ga. 626, 51 S. E 632.

188-97 See Schreyer *v.* Schreyer, 43 Misc. 520, 89 N. Y. S. 508. But see Gardiner *v.* Gardiner, 134 Mich. 90, 95 N. W 973.

188-99 Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; Weis *v.* Bach, 146 Ia. 320, 125 N. W. 211; Kruse *v.* Conklin, 82 Kan. 358, 108 P. 856; Doty *v.* Bitner, 82 Kan. 551, 108 P. 858; Carlisle *v.* King (Tex Civ.), 122 S. W. 581. See Diggs *v.* Henson (Mo.), 163 S. W. 565; Campbell *v.* Everhart, 139 N. C. 503. 52 S. E. 201; Ryle *v.* Davidson (Tex Civ.), 116 S. W. 823.

189-6 Voorhies *v.* Voorhies, 120 N. Y. S 677; C. *v.* Donnelly, 40 Pa. Super. 116 (a stockholder and officer of corporation not stranger to deed under which it claimed title); Naval *v.* Enriquez, 3 Phil. Isl. 669; Davidson *v.* Ryle. 103 Tex. 209, 124 S. W. 616. Warranty deed raises presumption of consideration. Holloway *v.* Vincent, 143 Mo. App. 434, 128 S. W. 1009.

189-7 *Contra* in case of warranty deed. Holloway *v.* Vincent, supra.

190-9 Delivery prima facie evidence of consideration. Boye *v.* Andrews, 10 Cal. App. 494, 102 P. 551.

190-12 Bass *v.* Starnes, 108 Ark. 357, 158 S. W 136; Good *v.* Land & Lumb. Co., 107 Ark. 118, 153 S. W. 1107; Brawley *v.* Copelin, 106 Ark. 256, 153 S. W. 101; Morton *v.* Morton, 82 Ark. 492, 102 S W. 213; St. Louis, etc. R. Co. *v.* Crandell, 75 Ark. 89, 86 S. W. 855; Pavlovski *v.* Klassing, 134 Ga. 704, 68 S. E. 511; Wabash R. Co. *v.* Grate (Ind. App.), 102 N. E. 155; Shoenhair *v.* Merrill (Ia.). 145 N. W. 919; Sutcliffe *v.* Pence, 156 Ia. 643, 137 N. W. 1026; Chantland *v.* Sherman, 148 Ia. 352, 125 N. W. 871, Rhodes *v.* Walker (Ky.), 115 S. W. 257; Crafton *v.* Inge, 30 Ky. L. R. 313, 98 S. W. 325; Curd *v.* Bowron, 32 Ky. L. R. 369, 105 S. W. 417; Holloway *v.* Vincent, 143 Mo. App. 434, 128 S. W. 1009; Wiltrout *v.* Showers, 82 Neb. 777, 118 N. W. 1080; Harman *v.* Fisher, 90 Neb. 688, 134 N. W. 246; Faust *v.* Faust, 144 N. C. 383, 57 S. E. 22; Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301; Shehy *v.* Cunningham, 81 O. St. 289, 90 N. E. 805; Alston *v.* Pierson (Tex. Civ.), 158 S. W. 1165; Hussey *v.* Titterington (Tex. Civ.), 146 S. W. 714; Tipton *v.* Tipton, 55 Tex. Civ. 192, 118 S. W. 842; McKee *v.* R. E. Co., 114 Va. 639, 77 S. E. 515; Jost *v.* Wolf, 130 Wis. 37, 110 N. W. 232; Mueller *v.* Cook, 126 Wis. 504, 105 N. W. 1054.

The actual consideration for a deed may always be shown, as also can the want of consideration. The consideration clause of a deed is always open to explanation. Goodman *v.* Griffith, 238 Mo. 706, 142 S. W. 259.

In an action not between the parties to the deed, but by one of them against his cotenants for the purchase price received for plaintiff's benefit; the demand therefore amounted to an assertion that the consideration named in the deed was not the true consideration, and there was no error in receiving extinsic evidence on the subject. Parker *v.* Parker, 155 Ia. 65, 135 N. W. 71, *cit.* Chantland *v.* Sherman, 148 Ia. 352, 125 N. W. 871.

192-13 Reis *v.* Epperson, 143 Mo. App. 90, 122 S. W. 353.

192-14 Dillivan *v.* Bk. (Ia.), 124 N. W. 350.

193-19 Fowlkes *v.* Lea, 84 Miss. 509, 36 S. 1036; Singletary *v.* Goeman (Tex. Civ.), 123 S. W. 436.

Immaterial as to a subsequent mortgagee with knowledge. Wilson *v.* Shocklee, 94 Ark. 301, 126 S. W. 832.

193-21 Ferguson *v.* Booth (Tenn.), 160 S. W. 67.

194-23 Bass *v.* Starnes, 108 Ark. 357, 158 S. W. 136; Brawley *v.* Copelin, 106 Ark. 256, 153 S. W. 101; Redmond *v.* Cass, 226 Ill. 120, 80 N. E. 708; Shelangowski *v.* Schraek (Ia.), 143 N. W. 1081; Sutcliffe *v.* Pence, 156 Ia. 643, 137 N. W. 1026; Ebling *v.* Ebling, 176 Mich. 602, 142 N. W. 1066. See Gougenheims *v.* Ermann, 118 La. 577, 43 S. 170; Jost *v.* Wolf, 130 Wis. 37. 110 N. W. 232.

196-27 P. *v.* Newbold, 260 Ill. 196, 103 N. E. 69.

196-28 But see Forester *v.* Van

Auken, 12 N. D. 175, 96 N. W. 301.

196-29 *Contra*, Sutor *v.* R. Co. (Tex. Civ.), 125 S. W. 943.

196-30 Wiltrout *v.* Showers, 82 Neb. 177, 118 N. W. 1080.

197-31 Felker *v.* Rice (Ark.), 161 S. W. 162.

197-35 Hardage *v.* Durrett (Ark.), 160 S. W. 883; Mandler *v.* Starks (Okla.), 131 P. 912.

202-56 St. Louis, etc. R. Co. *v.* Crandell, 75 Ark. 89, 86 S. W. 855, contract to erect depot on right of way granted.

203-58 Whitman *v.* Corley, 72 S. C. 410, 52 S. E. 49.

204-60 Love and affection shown though valuable consideration only recited. Harman *v.* Fisher, 90 Neb. 688, 134 N. W. 246.

204-62 Stirman *v.* Crabtree (Ky.), 122 S. W. 194; Whitman *v.* Corley, 72 S. C. 410, 52 S. E. 49.

206-79 McCleery *v.* Lewis, 104 Me. 33, 70 A. 540, in favor of grantee.

206-80 Florida F. Co. *v.* Sheffield, 56 Fla. 285, 48 S. 42; Denny *v.* Bk., 118 Ga. 221, 44 S. E. 982; Reeder *v.* Wilber, 18 S. D. 426, 100 N. W. 1099.

206-81 Merrill *v.* Bradley (Tex. Civ.), 121 S. W. 561.

207-82 See Kenniff *v.* Caufield, 140 Cal. 34, 73 P. 803.

207-84 Rucker *v.* Jackson (Ala.), 60 S. 139.

207-87 See infra, 212-28; 218-57, et seq.

207-88 Kapuniai *v.* Kek, 3 Haw. 560; Capell *v.* Fagan, 30 Mont. 507, 77 P. 55; Poland *v.* Porter, 44 Tex. Civ. 334, 98 S. W. 214; Davis *v.* Ragland, 42 Tex. Civ. 400, 93 S. W. 1099. See Sellers *v.* Farmer, 151 Ala. 487, 43 S. 967.

207-90 Poland *v.* Porter, 44 Tex. Civ. 334, 98 S. W. 214.

207-91 Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645; Jante *v.* Culbreth (Tex. Civ.), 101 S. W. 279 (execution and delivery).

208-95 Presumption is that recorded deed was executed. Young *v.* Engdahl, 18 N. D. 166, 119 N. W. 169.

208-97 Milwee *v.* Phelps, 53 Tex. Civ. 195, 115 S. W. 891; Frugia *v.* Trueheart, 48 Tex. Civ. 513, 106 S. W. 736.

209-6 Texas L. & C. Co. *v.* Walker, 47 Tex. Civ. 543, 105 S. W. 545.

210-8 See McMillan *v.* Co., 133 Ga. 760, 66 S. E. 943.

210-9 Texas L. & C. Co. *v.* Walker, supra.

210-10 Anderson *v.* Co. (Tex. Civ.), 120 S. W. 918.

210-13 Farmers' & Ms.' Bk. *v.* Co., 87 Ark. 607, 113 S. W. 793.

210-14 Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918; Interstate Co. *v.* Bailey, 29 Ky. L. R. 468, 93 S. W. 578; Davis *v.* Ragland, 42 Tex. Civ. 400, 93 S. W. 1099. See Larsens *v.* All Persons, etc., 165 Cal. 407, 132 P. 751.

210-17 Cox *v.* McDonald, 118 Ga. 414, 45 S. E. 401; McDonald *v.* Hanks, 52 Tex. Civ. 140, 113 S. W. 604.

But secondary evidence of previous deeds in chain of title is not admissible where no inquiry has been made of immediate predecessor in title of party offering the evidence. Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918.

211-18 Sellers *v.* Farmer, 151 Ala. 487, 43 S. 967.

211-21 See Bower *v.* Cohen, supra.

211-22 Hall *v.* Crowley, 12 Cal. App. 30, 106 P. 426; Young *v.* Engdahl, 18 N. D. 166, 119 N. W. 169.

Curative deed given by trustee in place of lost deed is circumstantial evidence of latter's existence. Simmons *v.* Hewitt (Tex. Civ.), 87 S. W. 188.

211-26 Veatch *v.* Gray, 41 Tex. Civ. 145, 91 S. W. 324.

Mutilated record of deed admissible if land can be identified from it. Ryle *v.* Davidson (Tex. Civ.), 116 S. W. 823.

212-27 Lancaster *v.* Lee, 71 S. C. 280, 51 S. E. 139; Shifflet *v.* Morelle, 68 Tex. 382, 4 S. W. 843.

213-32 *Comp.* Dennis *v.* Strunk, 32 Ky. L. R. 1230, 108 S. W. 957. *Contra*, Swainson *v.* Scott, 111 Tenn. 140, 76 S. W. 909, recitals of previous grant in old deeds, properly admitted in evidence as links in chain of title, are not evidence of the grant recited as against strangers to the deeds.

Recital of previous deed circumstantial evidence of lost deed in connection with undisputed claim of ownership although possession of property conveyed had never been taken by either grantor or grantee. Brewer *v.* Cochran, 45 Tex. Civ. 179, 99 S. W. 1033.

213-34 Capell *v.* Fagan, 30 Mont. 507, 77 P. 55.

214-39 Masterson *v.* Harrington (Tex. Civ.), 145 S. W. 626.

215-47 **Evidence must be clear and**

conclusive.—Carter *v.* Wood, 103 Va. 68, 48 S. E. 553.

Where fraud is alleged evidence of execution and loss of original should be clear and satisfactory. Lancaster *v.* Lee, 71 S. C. 280, 51 S. E. 139.

216-51 Capell *v.* Fagan, 30 Mont. 507, 77 P. 55, consideration, if recited, must be proved. See Kapuniai *v.* Kekupu, 3 Haw. 560.

218-57 Hutcheson *v.* Massie (Tex. Civ.), 159 S. W. 315.

219-59 Swango *v.* Greene, 155 Ky. 227, 159 S. W. 692. See Jenkins *v.* McMichael, 21 Pa. Super. 161; Poland *v.* Porter, 44 Tex. Civ. 334, 98 S. W. 214.

Actual possession not essential. Brewer *v.* Cochran, 45 Tex. Civ. 179, 99 S. W. 1033.

220-60 Jenkins *v.* McMichael; Poland *v.* Porter, supra.

222-66 See Brewer *v.* Cochran, 45 Tex. Civ. 179, 99 S. W. 1033.

223-69 But see Capell *v.* Fagan, 30 Mont. 507, 77 P. 55.

223-70 But where grantor has testified he did not execute an alleged deed, his previous contrary statements introduced to impeach him are not sufficient to show its execution. Hutchins *v.* Murphy, 146 Mich. 621, 110 N. W. 52.

224-73 Burden rests upon plaintiff, a subsequent purchaser, to prove covenant was for the benefit of subsequent purchasers. Sailer *v.* Podolski (N. J.). 88 A. 967.

226-80 See Fifth Ave. L. Soc. *v.* Phillips, 39 Okla. 799, 136 P. 1076.

Burden rests on covenantee to establish the covenant of warranty. Fifth Ave. L. Soc. *v.* Phillips, supra.

227-81 Except where **covenantor** had notice and opportunity to defend the action resulting in eviction. McMullen *v.* Butler, 117 Ga. 845, 45 S. E. 258.

227-82 Smith *v.* Keeley, 146 Ia. 660, 125 N. W. 699; DeSteaguer *v.* Pitman, 54 Tex. Civ. 316, 117 S. W. 481.

227-83 Burden on grantor to show acceptance of title notwithstanding grantee's knowledge of a defect. New York & C. G. C. Co. *v.* Graham, 226 Pa. 348, 75 A. 657.

227-84 McKillip *v.* Burton's Admr., 82 Vt. 403, 74 A. 78.

229-93 Grantee must establish his defense under covenant the obligation of which he denies. Beck *v.* Heckman, 140 Ia. 351, 118 N. W. 510.

229-95 Deeds to adjacent lots competent to show restriction on block. Lowrance *v.* Woods, 54 Tex. Civ. 233, 118 S. W. 551.

229-97 Brodie *v.* Co., 166 Ala. 170, 51 S. 861, papers admissible though not so executed as to pass any part of fee.

229-99 See Anthony *v.* Rockefeller, 102 Mo. App. 326, 76 S. W. 491.

Parol evidence not admissible to show that lease was not to be regarded as incumbrance. Simons *v.* Co., 159 Mich. 241, 123 N. W. 1132.

231-10 See Lloyd *v.* Sandusky, 203 Ill. 621, 68 N. E. 154.

Grantee's knowledge relevant only on parties intent as to scope of covenant. New York & C. G. C. Co. *v.* Graham, 226 Pa. 348, 75 A. 657.

Grantee may prove damages as of the time of judicial eviction where his grantor has conveyed the land to another by subsequent deed which was recorded previous to the prior deed, though grantee knew the facts. Madden *v.* Co., 16 Ida. 59, 100 P. 358.

233-20 Combs *v.* Combs, 130 Ky. 827, 114 S. W. 334; King *v.* Tr. Co., 148 App. Div. 110, 133 N. Y. S. 18.

234-23 Lloyd *v.* Sandusky, 203 Ill. 621, 68 N. E. 154.

234-24 Burroughs *v.* Pate, 166 Ala. 223, 51 S. 978; Redmond *v.* Cass, 226 Ill. 120, 80 N. E. 708.

235-30 See Lloyd *v.* Sandusky, supra.

236-31 Stanton *v.* Freeman, 19 Cal. App. 464, 126 P. 377.

238-39 Carpenter *v.* Carpenter, 88 Ark. 169, 113 S. W. 1032; Sachse *v.* Loeb, 45 Tex. Civ. 536, 101 S. W. 450. See Baumgarten *v.* Chipman, 30 Utah 466, 86 P. 411.

Judgment establishing dower.—McCrillis *v.* Thomas, 110 Mo. App. 699, 85 S. W. 673.

238-40 Sachse *v.* Loeb, supra. See Baumgarten *v.* Chipman, supra.

239-42 Browning *v.* Stillwell, 42 Misc. 346, 86 N. Y. S. 707; Norfolk & W. R. Co. *v.* Mundy, 110 Va. 422, 66 S. E. 61. See supra, "Conclusive Evidence," 278-35.

240-44 Burns *v.* Vereen, 132 Ga. 349, 64 S. E. 113.

241-52 Olmstead *v.* Rawson, 188 N. Y. 517, 81 N. E. 456.

DELIVERY.

Book accounts, 262-67.

245-1 Farr *v.* Chambless, 175 Ala. 659, 57 S. 458; Lee *v.* Ins. Co., 203 Mass. 299, 89 N. E. 529; Sarasohn *v.* Kamaiky, 120 App. Div. 110, 105 N. Y. S. 53; O'Brien *v.* O'Brien, 19 N. D. 713, 125 N. W. 307; Sears *v.* Daly, 43 Or. 346, 73 P. 5.

Burden of showing delivery is on person suing for reformation of a deed. Tucker *v.* Glew (Ia.), 139 N. W. 565.

Evidence held sufficient to show delivery of lumber in pursuance of sale. McDermott *v.* Lumb. Co., 102 Ark. 344, 144 S. W. 524.

246-5 Bartholomew *v.* Fell (Kan.), 139 P. 1016.

246-8 Towne *v.* Towne, 6 Cal. App. 697, 92 P. 1050 (strong evidence required); Pierson *v.* Fisher, 48 Or. 223, 85 P. 621.

247-9 Wilbur *v.* Grover, 140 Mich. 187, 103 N. W. 583 (manual, presumed to be legal, delivery); Shoemaker *v.* Chapman Drug Co., 112 Va. 612, 72 S. E. 121.

Time of delivery.—Hoover *v.* Bankers' Life Assn. (Ia.), 136 N. W. 117.

Presumption of delivery as of time of its date. Ewers *v.* Smith, 98 App. Div. 289, 90 N. Y. S. 575; Ranken *v.* Donovan, 115 App. Div. 651, 100 N. Y. S. 1049.

Time of execution of contract bears directly on question of time of delivery. Wright *v.* Hawes (Ky.), 121 S. W. 611.

247-10 See Sheehy *v.* Scott, 128 Ia. 551, 104 N. W. 1139.

247-11 Cribbs *v.* Walker, 74 Ark. 104, 85 S. W. 244; Hill *v.* Kreiger, 250 Ill. 408, 95 N. E. 468; Barber *v.* Co., 129 Ill. App. 45; Zeitlow *v.* Zeitlow, 84 Kan. 713, 115 P. 573; Dodsworth *v.* Sullivan, 95 Minn. 39, 103 N. W. 719; Terry *v.* Glover, 235 Mo. 544, 139 S. W. 337; Coulson *v.* Coulson, 180 Mo. 709, 79 S. W. 473; Sarasohn *v.* Kamaiky, 193 N. Y. 203, 86 N. E. 20; Sappingfield *v.* King, 49 Or. 102, 89 P. 142, 8 L. R. A. (N. S.) 1066; Koester *v.* Co., 24 S. D. 546, 134 N. W. 740.

And see Bouvier, etc. Co. *v.* Sypher, 186 Fed. 644; Stonehill *v.* Hastings, 202 N. Y. 115, 94 N. E. 1068.

249-12 Russell *v.* May, 77 Ark. 89, 90 S. W. 617; Waite *v.* Grubbe, 43 Or. 406, 73 P. 206.

249-14 Long *v.* McHenry, 45 Pa Super. 530. *Comp.* Ward *v.* Ward, 144 Fed. 308.

249-15 A deed will not be presumed to have been delivered until after date of its acknowledgment. Barber A. P. Co. *v.* Field, 174 Mo. App. 11, 161 S. W. 364. But see supra, 175-30, and infra, 250-23.

Acknowledgment of delivery makes a prima facie case. Cable Co. *v.* Rathgeber, 21 S. D. 418, 113 N. W. 88.

249-16 Sarasohn *v.* Kamaiky, 193 N. Y. 203, 86 N. E. 20; Long *v.* McHenry, 45 Pa. Super. 530.

249-17 Daneri *v.* Gazzola, 2 Cal. App. 351, 83 P. 455.

250-18 Cribbs *v.* Walker, 74 Ark. 104, 85 S. W. 244. See Bisard *v.* Sparke, 133 Mich. 587, 95 N. W. 728.

Where the delivery is in escrow upon performed conditions the burden is on the grantee to prove the conditions and their performance. Kavanaugh *v.* Kavanaugh, 260 Ill. 179, 103 N. E. 65.

250-20 Cribbs *v.* Walker, 74 Ark. 104, 85 S. W. 244 (interest reserved by grantor).

250-21 O'Neal *v.* Woodmen, 130 Ky. 68, 113 S. W. 52 (possession of mutual benefit certificate for correction of error by society, delivery to member). See Chew *v.* Jackson, 45 Tex. Civ. 656, 102 S. W. 427.

250-22 Carr *v.* Howell, 154 Cal. 372, 97 P. 885; Rose *v.* Ins. Co., 240 Ill. 45, 88 N. E. 204 (acceptance of application for insurance and placing policy in hands of agent); Coulson *v.* Coulson, 180 Mo. 709, 79 S. W. 473.

250-23 Morton *v.* Morton, 82 Ark. 492, 102 S. W. 213; Phillips *v.* Menotti (Cal.), 139 P. 796; Fisher *v.* Fisher (Cal. App.), 137 P. 1094; Thompson *v.* McKenna, 22 Cal. App. 129, 133 P. 512; Van Valkenburgh *v.* Oldham, 12 Cal. App. 572, 108 P. 42; Towne *v.* Towne, 6 Cal. App. 697, 92 P. 1050; Potter *v.* Barringer, 236 Ill. 224, 86 N. E. 233; Blake *v.* Ogden, 223 Ill. 204, 79 N. E. 68; Wilbur *v.* Grover, 140 Mich. 187, 103 N. W. 583; Gardner *v.* Co., 110 Minn. 291, 125 N. W. 264; McAllister *v.* Richardson (Miss.), 60 S. 570 (see vol. 4, p. 159, n. 78); Preston *v.* Albee, 120 App. Div. 89, 105 N. Y. S. 33; Ehrlich *v.* Sklamberg, 65 Misc. 5, 119 N. Y. S. 337; Ex parte Williams 149 N. C. 436, 63 S. E. 108 (delivery of pardon to attorney); Pierson *v.*

Fisher, 48 Or. 223, 85 P. 621; Devlin *v.* Devlin, 89 S. C. 268, 71 S. E. 966; Clemmons *v.* McGeer, 63 Wash. 446, 115 P. 1081.

See supra, "Deeds," 158-75.

Where found in possession after grantor's death. Brock *v.* Stines, 258 Ill. 346, 101 N. E. 585.

Presumed to have been delivered on its date. Daughdrill *v.* Lockhart (Ala.), 61 S. 802; Eaton *v.* Wilkins, 163 Cal. 742, 127 P. 71; Gernon *v.* Sisson, 21 Cal. App. 123, 131 P. 85; Calligan *v.* Calligan, 259 Ill. 52, 102 N. E. 247; Ford *v.* Gale, 155 App. Div. 675, 140 N. Y. S. 541.

A presumption of delivery arising from possession cannot overcome the presumption of innocence of an accused where a material element of a criminal charge is involved. P. *v.* Scott, 22 Cal. App. 54, 133 P. 496. See vol. 9, p. 892, n. 44.

A deed in grantee's possession is presumed to have been delivered at its date. Gernon *v.* Sisson, 21 Cal. App. 123, 131 P. 85. See vol. 4, p. 163, n. 90.

252-24 Crabtree *v.* Crabtree, 136 Ia. 430, 113 N. W. 923; Leonard *v.* Fleming, 13 N. D. 629, 102 N. W. 308 (presumption of delivery on date of deed).

Possession by plaintiff of copy certified to by defendant of bilateral agreement in possession of scrivener, presumptive evidence it was given him by latter. Sarasohn *v.* Kamaiky, 193 N. Y. 203, 86 N. E. 20.

252-25 Nowlen *v.* Nowlen, 122 Ia. 541, 98 N. W. 383.

252-28 Terry *v.* Glover, 235 Mo. 544, 139 S. W. 337.

Delivery of a deed with instructions to deposit it in a safety deposit box to which both grantor and grantee had access is not sufficient delivery to pass title. Elliott *v.* Merchants' Bank, 21 Cal. App. 536, 132 P. 280.

See King *v.* Fragley, 19 Cal. App. 735, 127 P. 813.

253-29 Dodd *v.* Kemnitz, 74 Neb. 634, 104 N. W. 1069.

Circumstantial evidence may suffice. Douthat *v.* Roberts (W. Va.), 80 S. E. 819.

Presumption conclusive in favor of indorsee of check. Buzzell *v.* Tobin, 201 Mass. 1, 86 N. E. 923, statute.

254-30 Jackson *v.* Lamar, 58 Wash. 383, 108 P. 946.

254-32 Central T. Co. *v.* Stoddard, 4 Cal. App. 617, 88 P. 806; Hild *v.* Hild, 129 Ia. 649, 106 N. W. 159.

Evidence of two witnesses present when deed was executed not sufficient to overcome the presumption. Thompson *v.* McKenna, 22 Cal. App. 129, 133 P. 512.

Scrivener's possession of bilateral executed agreement is, if not presumptive evidence of delivery, important. Sarasohn *v.* Kamaiky, 193 N. Y. 203, 86 N. E. 20.

254-33 Henry *v.* Henry, 215 Ill. 205, 74 N. E. 126; Benton L. Co. *v.* Zeitler, 182 Mo. 251, 81 S. W. 193 (dealing with property as owner, evidence of delivery of deed).

254-34 Certificate of deposit need not be indorsed. Rinard *v.* Lasley, 143 Ill. App. 450.

255-36 Sparkman *v.* Jones, 81 S. C. 453, 62 S. E. 870.

255-37 Felker *v.* Rice (Ark.), 161 S. W. 162; Russell *v.* May, 77 Ark. 89, 90 S. W. 617; Buck *v.* Garber, 261 Ill. 378, 103 N. E. 1059; Hathaway *v.* Cook, 258 Ill. 92, 101 N. E. 227; Hill *v.* Kreiger, 250 Ill. 408, 95 N. E. 468; Konser *v.* Konser, 219 Ill. 466, 76 N. E. 846; Blake *v.* Ogden, 223 Ill. 204, 79 N. E. 68; Dewitt *v.* Shea, 203 Ill. 393, 67 N. E. 761; Townsend *v.* Millican (Ind. App.), 101 N. E. 112; Burch *v.* Nicholson (Ia.), 137 N. W. 1066; Webb *v.* Webb, 130 Ia. 457, 104 N. W. 438; Luckhart *v.* Luckhart, 120 Ia. 248, 94 N. W. 461; McCrum *v.* McCrum, 127 Ia. 540, 103 N. W. 771; Collings *v.* Collings, 29 Ky. L. R. 51, 92 S. W. 577; Morrison *v.* Fletcher, 119 Ky. 488, 84 S. W. 548; Holman *v.* Lewis, 107 Me. 28, 76 A. 956; Hartman *v.* Thompson, 104 Md. 389, 65 A. 117; Peters *v.* Berkemeier, 184 Mo. 393, 83 S. W. 717; Whitaker *v.* Whitaker, 175 Mo. 1, 74 S. W. 1029; Pilkins *v.* Hans, 87 Neb. 7, 126 N. W. 864; Preston *v.* Albee, 120 App. Div. 89, 105 N. Y. S. 33; Ford *v.* Gale, 155 App. Div. 675, 140 N. Y. S. 541; Van Gaasbeek *v.* Staples, 87 App. Div. 271, 83 N. Y. S. 225, 177 N. Y. 524, 69 N. E. 1132; Fortune *v.* Hunt, 149 N. C. 358, 63 S. E. 82; Smithwick *v.* Moore, 145 N. C. 110, 58 S. E. 908; Williams *v.* Neill (Tex. Civ.), 152 S. W. 693; Belgarde *v.* Carter (Tex. Civ.), 146 S. W. 964; Ford *v.* Boone, 32 Tex. Civ. 550, 75 S. W. 353; Whiting *v.* Hoglund, 127 Wis. 135, 106 N. W. 391. See vol. 4, p. 164, n. 91.

256-40 Childs *v.* Williams, 212 Fed.

151 (C. C. A.); Napier *v.* Elliott, 146 Ala. 213, 40 S. 752; Creighton *v.* Roe, 218 Ill. 619, 75 N. E. 1073; Wilcnow *v.* Handlon, 207 Ill. 104, 69 N. E. 892; Clark *v.* Harper, 215 Ill. 24, 74 N. E. 61; Davis *v.* Hall, 128 Ia. 647, 105 N. W. 122 (clear proof necessary); Coppage *v.* Murphy, 24 Ky. L. R. 257, 68 S. W. 416; Morrison *v.* Fletcher, 119 Ky. 488, 84 S. W. 548; McCune *v.* Goodwillie, 204 Mo. 306, 102 S. W. 997; Hildebrand *v.* Willig, 64 N. J. Eq. 249, 53 A. 1035; Fortune *v.* Hunt, 149 N. C. 358, 63 S. E. 82; Wetherington *v.* Williams, 134 N. C. 276, 46 S. E. 728; Johnson *v.* Johnson, 38 Tex. Civ. 385, 85 S. W. 1023.

Evidence must be clear and satisfactory. Stephens *v.* Stephens, 108 Ark. 53, 156 S. W. 837.

Evidence must be satisfactory.—Burch *v.* Nicholson (Ia.), 137 N. W. 1066.

Estoppel may result against grantor. Jetter B. Co. *v.* Kurzel, 59 Misc. 271, 112 N. Y. S. 239.

257-45 Title G. & S. Co. *v.* Bk., 89 Ark. 471, 117 S. W. 537; Sarasohn *v.* Kamaiky, 193 N. Y. 203, 86 N. E. 20.

258-46 New Haven T. Co. *v.* Camp, 81 Conn. 539, 71 A. 788; Luckhart *v.* Luckhart, 120 Ia. 248, 94 N. W. 461 (recital of consideration as evidence of delivery); Schreyer *v.* Schreyer, 43 Misc. 520, 89 N. Y. S. 508. See Gardiner *v.* Gardiner, 134 Mich. 90, 95 N. W. 973.

258-47 Ward *v.* Ward, 144 Fed. 308. *Comp.* Lange *v.* Cullinan, 205 Ill. 365, 68 N. E. 934.

259-48 Wilcnow *v.* Handlon, 207 Ill. 104, 69 N. E. 892; Abrams *v.* Beale, 224 Ill. 496, 79 N. E. 671 (presumption does not arise where grantee competent adult).

259-49 Baker *v.* Hall, 214 Ill. 364, 73 N. E. 351; Henry *v.* Henry, 215 Ill. 205, 74 N. E. 126; Thompson *v.* Calhoun, 216 Ill. 161, 74 N. E. 775; Kirkwood *v.* Smith, 212 Ill. 395, 72 N. E. 427; Chapin *v.* Nott, 203 Ill. 341, 67 N. E. 833; Schooler *v.* Schooler (Mo.), 167 S. W. 444; Cowsert *v.* Schooler (Mo.), 167 S. W. 447.

259-51 Collings *v.* Collings, 29 Ky. L. R. 51, 92 S. W. 577; Benton Co. *v.* Zeitler, 182 Mo. 251, 81 S. W. 193.

259-52 See Hansen *v.* Rolison, 156 Mich. 83, 120 N. W. 574.

Failure to object, a delivery.—Conchegull *v.* Hyams, 2 Phil. Isl. 51.

259-53 Constructive delivery of liquors by carrier under Wilson act. See Heymann *v.* R. Co., 203 U. S. 270; S. *v.* Liquors, 104 Me. 463, 72 A. 331.

259-54 In re Levin, 173 Fed. 119 (unindorsed bill of lading); Cronin *v.* Bk., 201 Mass. 146, 87 N. E. 484; Smith *v.* R. Co., 145 Mo. App. 394, 122 S. W. 342; Western M. S. Co. *v.* Quinn, 40 Mont. 156, 105 P. 732; Patrick *v.* Watson, 55 Wash. 76, 104 P. 144 (bill of sale).

Parties' intent final.—Florence, etc. R Co. *v.* Jensen, 48 Colo. 28, 108 P. 974.

259-55 In re Cole, 171 Fed. 297; Brod *v.* Dering, 139 Ill. App. 107; National Union Bk. *v.* Shearer, 225 Pa. 470, 74 A. 351 (unindorsed warehouse receipt); Third Nat. Bk. *v.* Hays, 119 Tenn. 729, 198 S. W. 1060 (delivery of bill of lading is symbolic).

260-56 Davidson S. S. Co. *v.* U S., 142 Fed. 315, 73 C. C. A. 425; Armstrong *v.* Ins. Co., 121 Ia. 362, 96 N. W. 954 (deposit in mail, delivery); Long Bell L. Co. *v.* Nyman, 145 Mich. 477, 108 N. W. 1019; Opet *v.* Denzer (Tex. Civ.), 93 S. W. 527.

260-58 Cash *v.* Ins. Co., 111 Minn. 538, 126 N. W. 526; Hamilton *v.* Hamilton, 127 App. Div. 871, 112 N. Y. S. 10 (payments).

260-61 Central T. Co. *v.* Stoddard, 4 Cal. App. 647, 88 P. 806; Simons *v.* Daly, 9 Ida. 87, 72 P. 507; Emmons *v.* Harding, 162 Ind. 154, 70 N. E. 142; Chastek *v.* Souba, 93 Minn. 418, 101 N. W. 618; Johnson *v.* Craig, 37 Okla. 378, 130 P. 581.

Delivery of a deed is a matter of intention. Roepke *v.* Nutzmann (Neb.), 146 N. W. 939; Rennebaum *v.* Rennebaum, 79 N. J. Eq. 654, 83 A. 1118.

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260-62 Kenniff *v.* Caulfield, 140 Cal. 34, 73 P. 803; Ebel *v.* Piehl, 134 Mich. 64, 95 N. W. 1004; Schooler *v.* Schooler (Mo.), 167 S. W. 444; Cowsert *v.* Schooler (Mo.), 167 S. W. 447; Rosenblum *v.* Weir, 113 N. Y. S. 520; Jante *v.* Culbreth (Tex. Civ.), 101 S. W. 279; Butts *v.* Richards, 152 Wis. 318, 140 N. W 1. See Van der Aa *v.* Van Brunen, 208 Ill. 108, 70 N. E. 33; Texas M. R. Co. *v.* Edwards, 56 Tex. Civ. 643, 121 S. W. 570; Carson *v.* Co., 133 Wis.

85, 113 N. W. 393 (circumstances may outweigh direct evidence).

Delivery of a deed is a matter of intention and may be proved by circumstantial evidence. Miles *v.* Robertson (Mo.), 167 S. W. 1000.

261-63 Loval *v.* Wolf (Ala.), 60 S. 298; Loud *v.* Collins, 12 Cal. App. 786, 108 P. 880 (venue in date line is but prima facie evidence); De Laval Co. *v.* Steadman, 6 Cal. App. 651, 92 P. 877; Norman *v.* McCarthy, 56 Colo. 290, 138 P. 28; Gress Co. *v.* Berry, 2 Ga. App. 207, 58 S. E. 384; Potter *v.* Barringer, 236 Ill. 224, 86 N. E. 233; S. *v.* Wahl, 137 Mo. App. 651, 119 S. W. 453; Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576 (parol evidence admissible to prove non-delivery); Johnson *v.* Craig, 37 Okla. 378, 130 P. 581; Pecos & N. T. R. Co. *v.* Cox (Tex. Civ.), 150 S. W. 265. See supra, "Deeds," 177-41; infra, "Parol Evidence," 491-72.

Acts, words, or circumstances accompanying intent sufficient to establish delivery. Stephens *v.* Stephens, 108 Ark. 53, 156 S. W. 837.

Custom of carrier as to place of delivery may be shown. Gates *v.* R. Co., 158 Mich. 477, 122 N. W. 1078.

261-64 Napier *v.* Elliott, 146 Ala. 213, 40 S. W. 752; Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209 (declarations of deliveree admissible); Ehrlich *v.* Sklamberg, 65 Misc. 5, 119 N. Y. S. 337; Am. Nat. Bk. *v.* Bk., 52 Tex. Civ. 519, 114 S. W. 176.

261-65 Cribbs *v.* Walker, 74 Ark. 104, 85 S. W. 244 (declarations against interest, admissible); Chew *v.* Jackson, 45 Tex. Civ. 656, 102 S. W. 427.

262-67 Delivery proved by entries in books of account. Pettey *v.* Benoit, 193 Mass. 233, 79 N. E. 245; Bloomington M. Co. *v.* Co., 171 N. Y. 673, 64 N. E. 1118; In re Groff, 14 Phila. (Pa.) 306.

262-68 Dodd *v.* Kemnitz, 74 Neb. 634, 104 N. W. 1069; Stiebel *v.* Gros berg, 137 App. Div. 275, 121 N. Y. S. 923; Parker *v.* Naylor (Tex. Civ.), 151 S. W. 1096; Leftwich *v.* Early (Va.), 79 S. E. 384; Blair *v.* Bk., 103 Va. 762, 50 S. E. 262; Paulson *v.* Boyd, 137 Wis. 241, 118 N. W. 841. See Hendry *v.* Cartwright, 14 N. M. 72, 89 P. 309.

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264-1 McFadden *v.* Co., 18 N. D. 93, 118 N. W. 242.

265-3 Smokeless F. Co. *v.* Seaton, 105 Va. 170, 52 S. E. 829.

265-4 Schlimbach *v.* McLean, 83 App. Div. 157, 82 N. Y. S. 516, 178 N. Y. 600, 70 N. E. 1108.

265-6 Munroe *v.* Adamo, 136 Ky. 252, 124 S. W. 296.

266-7 Letter referring to previous demand, not a demand, and incompetent. Hightower *v.* Ansley, 126 Ga. 8, 54 S. E. 939.

266-8 Sherrod *v.* Ins. Co., 139 N. C. 167, 51 S. E. 910.

266-9 Hopkins *v.* Co., 33 Wash. 181, 73 P. 1113.

DEMONSTRATIVE EVIDENCE

Phonograph, 279-54; *Animals*, 279-55; *Sameness of condition*, 292-25.

272-2 S. *v.* Hunter, 82 S. C. 153, 63 S. E. 685. See Clark *v.* R. Co., 177 N. Y. 359, 69 N. E. 647.

272-3 Hausler *v.* Co., 144 Ill. App. 643; Cox *v.* Louisville & A. R. Co., 137 Ky. 388, 125 S. W. 1056.

273-4 Phillips *v.* S., 156 Ala. 140, 47 S. 245; Linforth *v.* Co., 156 Cal. 58, 103 P. 320; Beattie *v.* McMullen, 82 Conn. 484, 74 A. 767; Sprouse *v.* C., 132 Ky. 269, 116 S. W. 344 (evidence of corpus delicti); Sturgis *v.* S., 2 Okla. Cr. 362, 102 P. 57; Wilson *v.* S., 58 Tex. Cr. 104, 124 S. W. 943.

273-8 Right to exhibit injured member cannot be exercised if plaintiff's deposition read on ground of absence. Lapointe *v.* Co., 75 N. H. 294, 73 A. 406.

273-9 Bloch *v.* Ins. Co., 132 Wis. 150, 112 N. W. 45.

Shoe may be used in describing tracks. S. *v.* Langford, 74 S. C. 460, 55 S. E. 120.

Skeleton may be used by physician to illustrate testimony. Chicago & A. R. Co. *v.* Walker, 217 Ill. 605, 75 N. E. 520.

Admissible to impeach testimony describing article. Wilson *v.* S., 58 Tex. Cr. 104, 124 S. W. 943.

273-11 American T. Co. *v.* Polacsek, 170 Fed. 117; Bush *v.* S., 168 Ala. 77, 53 S. 266; Rollings *v.* S., 160 Ala. 82, 49 S. 329; Pauly *v.* Broadnax, 157 Cal. 386, 108 P. 271; West *v.* S., 55 Fla.

200, 46 S. 93; Farrell *v.* Haze, 157 Mich. 374, 122 N. W. 197. See S. *v.* Lem Woon, 57 Or. 482, 107 P. 974, 112 P. 427.

See Svetkovic *v.* R. Co. (Neb.), 145 N. W. 990; Flege *v.* S., 93 Neb. 610, 142 N. W. 276.

Bloody clothing inadmissible if there is no question as to location of wounds, their effect or character. Melton *v.* S., 47 Tex. Cr. 451, 83 S. W. 822; Cole *v.* S., 45 Tex. Cr. 225, 75 S. W. 527; Christian *v.* S., 46 Tex. Cr. 47, 79 S. W. 562; Lucas *v.* S., 50 Tex. Cr. 219, 95 S. W. 1055.

Clothing worn by person assaulted on the night of the alleged assault was offered solely "for the purpose of showing the amount of loss of blood and the condition of his clothing after the commission of the act." "The nature of the wounds and the location of the wounds being undisputed, it would hardly be admissible to permit the clothing to be introduced solely for the purpose of showing the amount of the loss of blood, as this would not aid the jury in determining whether he was guilty of assault to murder or aggravated assault." Lacoume *v.* S. (Tex. Cr.), 143 S. W. 626.

274-12 Trego *v.* Arave, 20 Ida. 38, 116 P. 119; Garvik *v.* R. Co., 124 Ia. 691, 100 N. W. 498.

274-13 Proper on cross-examination. Byers *v.* R. Co., 222 Pa. 547, 72 A. 245.

274-17 Pittsburgh, etc. R. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033; S. *v.* Danforth, 73 N. H. 215, 60 A. 839. *Comp.* Wistrand *v.* P., 213 Ill. 72, 72 N. E. 748.

275-20 Private examination of person of defendant by jury improper. Garvik *v.* R. Co., 124 Ia. 691, 100 N. W. 498.

275-21 Rollings *v.* S., 160 Ala. 82, 49 S. 329; S. *v.* Moore, 80 Kan. 232, 102 P. 475; Sprouse *v.* C. (Ky.), 116 S. W. 344; Tolliver *v.* S., 53 Tex. Cr. 329, 111 S. W. 655; Missouri, etc. R. Co. *v.* Lynch, 40 Tex. Civ. 543, 90 S. W. 511; Dunkin *v.* Hoquiam, 56 Wash. 47, 105 P. 149.

275-22 Rollings *v.* S., 160 Ala. 82, 49 S. 329; Flege *v.* S., 93 Neb. 610, 142 N. W. 276; Cirello *v.* Co., 88 N. Y. S. 932; S. *v.* Mariano (R. I.), 91 A. 21; Campbell *v.* S., 111 Wis. 152, 86 N. W. 855. *Comp.* Sprouse *v.* C., supra. See Clark *v.* R. Co., 177 N. Y. 359, 69 N. E. 647 (plaintiff may not perform acts, while witness, to show effects of disease alleged to have been caused by injury complained of); Adams *v.* S., 48 Tex. Cr. 452, 93 S. W. 116.

276-25 S. *v.* Aspara, 113 La. 940, 37 S. 883; P. *v.* Van Wormer, 175 N. Y. 188, 67 N. E. 299; P. *v.* Adams, 176 N. Y. 351, 68 N. E. 636; Roszczyniala *v.* S., 125 Wis. 414, 104 N. W. 113; Thornton *v.* S., 117 Wis. 338, 93 N. W. 1107, 98 Am. St. 924.

276-26 C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127; Younger *v.* S., 80 Neb. 201, 114 N. W. 170; S. *v.* Madison, 23 S. D. 584, 122 N. W. 647. *Contra*, Sherman *v.* S., 2 Ga. App. 148, 58 S. E. 393, 1122; Hammond *v.* S., 2 Ga. App. 384, 58 S. E. 509.

276-27 S. *v.* Fuller, 34 Mont. 12, 85 P. 369.

276-28 Watts *v.* S., 8 Ga. App. 205, 68 S. E. 863; Canon *v.* S., 59 Tex. Cr. 398, 128 S. W. 141; Teter *v.* Ins. Corp. (W. Va.), 82 S. E. 201; Paulson *v.* S., 118 Wis. 89, 94 N. W. 771. See S. *v.* Larkin, 250 Mo. 218, 157 S. W. 600.

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277-29 Phillips *v.* S., 156 Ala. 140, 47 S. 245; Harris *v.* S., 9 Ala. App. 87, 64 S. 352; Gordon *v.* S., 7 Ga. App. 691, 67 S. E. 893; S. *v.* Giroux, 75 Kan. 695, 90 P. 249; S. *v.* Lindquist, 110 Minn. 12, 124 N. W. 215; Sturgis *v.* S., 2 Okla. Cr. 362, 102 P. 57; Sharp *v.* S. (Tex. Cr.), 160 S. W. 369.

277-30 Union *v.* S., 7 Ga. App. 27, 66 S. E. 24.

277-32 Plank from floor with bullet hole therein. P. *v.* Barrett, 22 Cal. App. 780, 136 P. 520.

277-33 McElwaine *v.* C., 154 Ky. 242, 157 S. W. 6; Kelly *v.* S. (Tex. Cr.), 151 S. W. 304; Canon *v.* S., 59 Tex. Cr. 398, 128 S. W. 141.

277-34 Rain *v.* S. (Ariz.), 137 P. 550. See S. *v.* Hill, 46 Mont. 24, 126 P. 41.

277-36 P. *v.* Wilson (Cal.), 138 P. 971; P. *v.* Hutchings, 8 Cal. App. 550, 97 P. 325; P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804; S. *v.* Clark (Ia.), 147 N. W. 152; Lyon *v.* C., 29 Ky. L. R. 1020, 96 S. W. 857; Fletcher *v.* C., 29 Ky. L. R. 955, 96 S. W. 855; S. *v.* Hill, 46 Mont. 24, 126 P. 41; Coleman *v.* S. (Tex. Cr.), 150 S. W. 1177; Turner *v.* S., 48 Tex. Cr. 585, 89 S. W.

975; State *v.* Mewhinney (Utah), 134 P. 632.

277-37 Hill *v.* S., 146 Ala. 51, 41 S. 621; Linforth *v.* Co., 156 Cal. 58, 103 P. 320; P. *v.* Claudius, 8 Cal. App. 597, 97 P. 687 (costume worn by inmate of house of prostitution); D. C. *v.* Duryee, 29 App. Cas. (D. C.) 327 (hitching post); P. *v.* Nylin, 236 Ill. 19, 86 N. E. 156 (vessels used for measuring); Warren *v.* R. Co., 141 Mich. 298, 104 N. W. 613 (defective electric insulators); Lamb *v.* S., 69 Neb. 212, 95 N. W. 1050 (hides of animals).

The furnishings of a room.—Hughes *v.* S., 126 Tenn. 40, 148 S. W. 543.

Pieces of cross-ties, though the whole ties would be better evidence of their condition. Adams *v.* Crim (Ala.), 58 S. 442.

277-38 Beattie *v.* McMullen, 82 Conn. 484, 74 A. 767 (building stone); St. Louis, etc. R. Co. *v.* Ewing (Tex. Civ.), 126 S. W. 625.

277-39 Moss *v.* S., 152 Ala. 30, 44 S. 598; P. *v.* Byrne, 160 Cal. 217, 116 P. 521; P. *v.* Weber, 149 Cal. 325, 86 P. 671; S. *v.* Sherouk, 78 Conn. 718, 61 A. 897; Roberts *v.* S., 123 Ga. 146, 51 S. E. 374 (curtain pole); P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804; S. *v.* Schneck, 85 Kan. 334, 116 P. 823; S. *v.* Wilson, 223 Mo. 173, 122 S. W. 671; S. *v.* Casey, 34 Nev. 154, 117 P. 5; P. *v.* Flanigan 174 N. Y. 356, 66 N. E. 988 (iron bar and rope used in attempted escape resulting in homicide); Potts *v.* S., 56 Tex. Cr. 39, 118 S. W. 535; Hickey *v.* S., 51 Tex. Cr. 230, 102 S. W. 417; Alarcon *v.* S. (Tex. Cr.), 90 S. W. 179; Jackson *v.* S., 48 Tex. Cr. 648, 90 S W. 34; S. *v.* Quinn, 56 Wash. 295, 105 P. 818. See Sanchez *v.* S. (Tex. Cr.), 149 S. W. 124.

A pistol after the witness had stated that it was either the one which defendant had on him, or one just like it. McGuffin *v.* S. (Ala.), 59 S. 635, where, later, the prisoner identified the pistol as his.

Weapons admissible although indictment charges use of other instruments. S. *v.* Romano, 41 Wash. 241, 83 P. 1.

277-40 P. *v.* Mar Gin Suie, 11 Cal. App. 42, 103 P. 951; Osburn *v.* S., 164 Ind. 262, 73 N. E. 601; Rieen *v.* S., 63 Tex. Cr. 89, 138 S. W. 403.

278-41 Watson *v.* S., 52 Tex. Cr. 85, 105 S. W. 509.

278-42 Crumpton *v.* S., 167 Ala. 4, 52 S. 605; Barnett *v.* S., 165 Ala. 59, 51 S. 299; Pate *v.* S., 150 Ala. 10, 43 S. 343; P. *v.* Manassee, 153 Cal. 10, 94 P. 92 (apparel of assaulted witness); S. *v.* McGuire, 84 Conn. 470, 80 A. 761; S. *v.* Jackett, 85 Kan. 427, 116 P. 509; S. *v.* Moore, 80 Kan. 232, 102 P. 475; Cox *v.* Louisville & N. R. Co., 137 Ky. 388, 125 S. W. 1056; S. *v.* Craft, 118 La. 117, 42 S. 718; Morris *v.* S., 6 Okla. Cr. 29, 115 P. 1030; Bennefield *v.* U. S., 2 Okla. Cr. 44, 100 P. 34; Durfee *v.* S. (Tex. Cr.), 165 S. W. 180; Ward *v.* S. (Tex. Cr.), 159 S. W. 272; Peters *v.* S. (Tex. Cr.), 155 S. W. 212; Venters *v.* S., 47 Tex. Cr. 280, 83 S. W. 832; S. *v.* Drummond, 70 Wash. 260, 126 P. 541. See vol. 6, p. 671, and supplement thereto.

"**A shirt,** or other garment, is not admissible unless it serves some useful purpose in depicting to the jury the location of the wound, or the attitude of the parties at the time of the difficulty, but if the shirt served the purpose of enabling the jury to better pass on the question of whether the state's or appellant's contention as to the attitude of deceased at the time he was killed was correct, there was no error in admitting it, if it was admitted in evidence. In the case of Milo *v.* State, 59 Tex. Cr. R. 196, 127 S. W. 1028, this court held that it is permissible to introduce bloody clothing when its introduction serves to illustrate some point or solve some question, or throw light upon the matter connected with the proper solution of the case, and when the clothing, in the light of the whole case, would aid the jury in arriving at the very truth of the matter, the court should not hesitate to admit its production. See also Adams *v.* State, 48 Tex. Cr. R. 463, 93 S. W. 116; Sue *v.* State, 52 Tex. Cr. R. 126, 105 S. W. 804; Dobbs *v.* State, 54 Tex. Cr. R. 555, 113 S. W. 923; Long *v.* State, 46 S. W. 640; Williams *v.* State, 60 Tex. Cr. R. 453, 132 S. W. 345; King *v.* State, 13 Tex. App. 280." Welch *v.* S. (Tex. Cr.), 147 S. W. 572.

278-43 P. *v.* Bond, 13 Cal. App. 175, 109 P. 150.

278-46 No. Alabama R. Co. *v.* Mansell, 138 Ala. 548, 36 S. 459; S. *v.* Brannan, 206 Mo. 636, 105 S. W. 602; Keen *v.* R. Co., 129 Mo. App. 301, 108 S. W. 1125; Morris *v.* Miller, 83 Neb. 218, 119 N. W. 458; Weber *v.* R. Co., 57 Misc. 157, 107 N. Y. S. 965; Milo *v.*

S., 59 Tex. Cr. 196, 127 S. W. 1025.

278-47 S. *v.* Rubaka, 82 Conn. 59, 72 A. 566 (human blood spots on clothing when defendant arrested); S. *v.* Shereuk, 78 Conn. 718, 61 A. 897; S. *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982; F. Bimel Co. *v.* Harter, 51 Ind. App. 267, 98 N. E. 360; S. *v.* Aspara, 113 La. 940, 37 S. 883; S. *v.* Vey, 21 S. D. 612, 114 N. W. 719; S. *v.* Landers, 21 S. D. 606, 114 N. W. 717; Cordes *v.* S., 54 Tex. Cr. 204, 112 S. W. 943; Boyd *v.* S., 50 Tex. Cr. 138, 94 S. W. 1053; S. *v.* Inlow (Utah), 141 P. 530; Roszczyniala *v.* S., 125 Wis. 414, 104 N. W. 113.

279-48 S. *v.* Bailey, 79 Conn. 589, 65 A. 951 (skull); Sprouse *v.* C., 132 Ky. 269, 116 S. W. 344 (bones of burned body); Ty. *v.* Lobato, 17 N. M. 666, 134 P. 222; P. *v.* Way, 119 App. Div. 344, 104 N. Y. S. 277 (jaw bone of decedent); P. *v.* Gillette, 191 N. Y. 107, 83 N. E. 680 (foetus removed at autopsy); S. *v.* Mariano (R. I.), 91 A. 21; Campbell *v.* S., 111 Wis. 152, 86 N. W. 855 (skull).

279-49 Anderson *v.* Seropian, 147 Cal. 201, 81 P. 521 (amputated hand); St. Louis, etc. R. Co. *v.* Mathis, 101 Tex. 342, 107 S. W. 530 (fragments of bone from plaintiff's head).

279-50 Muncie P. Co. *v.* Martin, 164 Ind. 30, 72 N. E. 882.

279-52 Gardner *v.* Paulson, 117 Ill. App. 17.

279-54 P. *v.* Maughs, 149 Cal. 253, 86 P. 187; 8 Cal. App. 107, 96 P. 407 (if correct as far as it goes though immaterial objects not shown); Lush *v.* Parkersburg, 127 Ia. 701, 104 N. W. 336; McKeon *v.* Mfg. Co., 147 N. Y. S. 1012; Coolidge *v.* New York, 99 App Div. 175, 90 N. Y. S. 1078; Parks *v.* Miller, 185 N. Y. 529, 77 N. E. 1192; Geist *v.* Rapp, 206 Pa. 411, 55 A. 1063.

Wooden model of surface of land not admitted. Hunter *v.* Sanitary Dist., 179 Ill. App. 172.

Reproduction of noise made by train, by means of phonograph, allowed. Boyne City, etc. R. Co. *v.* Anderson, 146 Mich. 328, 109 N. W. 429.

279-55 Animals. Grenwell *v.* Gouveria, 14 Haw. 636 (heifer); Bender *v.* Appelbaum, 108 N. Y. S. 318 (horse, admissible); Richardson *v.* S., 49 Tex. Cr. 391, 94 S. W. 1016 (profert of jennet, in action for sodomy, denied).

279-56 Lindsay *v.* S., 138 Ga. 818, 76 S. E. 369.

279-57 Andrews *v.* S., 159 Ala. 14, 48 S. 858; Houston *v.* R. Co., 118 Mo. App. 464, 94 S. W. 560; Alarcon *v.* S. (Tex. Cr.), 90 S. W. 179; Mayes *v.* S. (Tex. Cr.), 100 S. W. 386 (scar in the back).

280-60 McIlwain *v.* Gaebe, 128 Ill. App. 209; Missouri, etc. R. Co. *v.* Moody, 35 Tex. Civ. 46, 79 S. W. 856.

280-61 Continental C. Co. *v.* Wynne, 36 Okla. 325, 129 P. 16.

280-63 Pittsburgh, etc. R. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033.

280-64 "**Plaintiff was allowed**, over defendant's objection, to get up and show how she said she could walk with and without her crutches. Counsel said to her: 'I wish you would take your crutches, Miss Willis, and step on the floor there and show the jury, the best you can, how you can move around the house [the courtroom].' A demonstration followed. Then counsel said: 'Let me take your crutches, and [you] show the jury the best you can move around the house [the courtroom].' And another demonstration followed. This was going too far." Willis *v.* City of Browning, 161 Mo. App. 461, 143 S. W. 516.

280-65 Johnson *v.* Coal Co., 173 Ill. App. 414; Dow W. & I. Wks. *v.* Smith (Ky.), 124 S. W. 819; Ford *r.* Co., 30 Ky. L. R. 698, 99 S. W. 609; Chicago etc. R. Co. *r.* Krayenbuhl, 70 Neb. 766, 98 N. W. 44; Ewing *r.* Co., 65 W. Va. 726, 65 S. E. 200.

280-66 Garvick *v.* R. Co., 124 Ia. 691, 100 N. W. 498; S. *r.* Stevens, 133 Ia. 684, 110 N. W. 1037. See supra, "Breach of Promise," 739-24.

Barn door with carved initials on it, admissible. S. *v.* Kent, 83 Vt. 28, 74 A. 389.

280-67 P. *v.* Claudius, 8 Cal. App. 597, 97 P. 687; Stewart *v.* Driscoll, 56 Colo. 316, 139 P. 18; C. *r.* Howard, 205 Mass. 128, 91 N. E. 397; Sharp *v.* S. (Tex. Cr.), 160 S. W. 369; Kelly *v.* S. (Tex. Cr.), 151 S. W. 304. See Corley *r.* S. (Tex. Cr.), 155 S. W. 227.

The exhibition of plaintiff's person was criticised in Landro *v.* R. Co., 117 Minn. 306, 135 N. W. 991, but held not reversible error under the circumstances.

Injury not disputed.—Turon *v.* Chicago C. R. Co., 152 Ill. App. 351.

280-68 Smith *v.* S. (Ala.), 62 S. 864; Pope *v.* S., 174 Ala. 63, 57 S. 245;

Rollings *v.* S., 160 Ala. 82, 49 S. 329; D. C. *v.* Duryee, 29 App. Cas. (D. C.) 327 (upon issue of condition and appearance of hitching post, admissible); Lamb *v.* S., 69 Neb. 212, 95 N. W. 1050 (hides of stolen steers to show fact of death and place of sale); Gulf etc. R. Co. *v.* Boyce, 39 Tex. Civ. 195, 87 S. W. 395 (parts of railroad ties, to show they were rotten); Adams *v.* S., 48 Tex. Cr. 452, 93 S. W. 116 (bloody clothes, to show size of knife blade which did cutting); Moore *v.* S., 51 Tex. Cr. 468, 103 S. W. 188 (shoes, to show footprints made by defendant).

Flange of car wheel is admissible as illustrative of piece which was examined at time of accident. South Covington & C. St. R. Co. *v.* Finan's Admx., 153 Ky. 340, 155 S. W. 742.

Proximity of firearm to wound may be shown by burnt condition or powder stain on clothing. Flege *v.* S., 93 Neb. 610, 142 N. W. 276.

281-69 Beattie *v.* McMullen, 82 Conn. 484, 74 A. 767; Berbarry *v.* Tombacher, 162 N. C. 497, 77 S. E. 412; Choctaw El. Co. *v.* Clark, 28 Okla. 399, 114 P. 730; Armstrong Pack. Co. *v.* Clem (Tex. Civ.), 151 S. W. 576; Bloch *v.* Ins. Co., 132 Wis. 150, 112 N. W. 45.

281-71 Rollings *v.* S., 160 Ala. 82, 49 S. 329; S. *v.* Craft, 118 La. 117, 41 S. 718; Keen *v.* R. Co., 129 Mo. App. 301, 108 S. W. 1125; P. *v.* Way, 119 App. Div. 344, 104 N. Y. S. 277; Thomas *v.* S., 45 Tex. Cr. 111, 74 S. W. 36.

281-72 Pate *v.* S., 150 Ala. 10, 43 S. 343; Gardner *v.* Paulson, 117 Ill. App. 17; Ward *v.* S. (Tex. Cr.), 159 S. W. 272; Missouri, etc. R. Co. *v.* Lynch, 40 Tex. Civ. 543, 90 S. W. 511; Clark *v.* S., 51 Tex. Cr. 519, 102 S. W. 1136; St. Louis etc. R. Co. *v.* Mathis, 101 Tex. 342, 107 S. W. 530.

281-73 Rain *v.* S. (Ariz.), 137 P. 550.

281-74 No. Alabama R. Co. *v.* Mansell, 138 Ala. 548, 36 S. 459; Anderson *v.* Seropian, 147 Cal. 201, 81 P. 521; Herron *v.* C., 23 Ky. L. R. 782, 64 S. W. 432; S. *v.* Aspara, 113 La. 940, 37 S. 883; Alarcon *v.* S. (Tex. Cr.), 90 S. W. 179; Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804.

281-75 Turner *v.* C., 28 Ky. L. R. 487, 89 S. W. 482; Flege *v.* S., 93 Neb. 610, 142 N. W. 276; S. *v.* Hunter, 82 S. C. 153, 63 S. E. 685; Johnson *v.* S. (Tex. Cr.), 167 S. W. 733; Reagan *v.* S. (Tex. Cr.), 157 S. W. 483; Kelly *v.* S. (Tex. Cr.), 151 S. W. 304; Canon *v.* S., 59 Tex. Cr. 398, 128 S. W. 141; Welch *v.* S. (Tex. Cr.), 147 S. W. 572.

281-78 See Adams *v.* S., 9 Ala. App. 89, 64 S. 371.

282-79 Smith *v.* S. (Ala.), 62 S. 184; South Covington & C. St. R. Co. *v.* Finan's Admx., 153 Ky. 340, 155 S. W. 742; Spurlock *v.* Shreveport Co., 118 La. 1, 42 S. 575 (where demonstrative evidence is peculiarly valuable, it ought to be produced); McKeon *v.* Mfg. Co., 147 N. Y. S. 1012; Clevenger *v.* Blount (Tex. Cr.), 114 S. W. 868; Lucas *v.* S., 50 Tex. Cr. 219, 95 S. W. 1055.

282-80 P. *v.* Ah Lee, 164 Cal. 350, 128 P. 1035; Union *v.* S., 7 Ga. App. 27, 66 S. E. 24; S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235; Flege *v.* S., 93 Neb. 610, 142 N. W. 276; Krens *v.* S., 75 Neb. 294, 106 N. W. 27; P. *v.* Way, 119 App. Div. 344, 104 N. Y. S. 277; Bender *v.* Applebaum, 108 N. Y. S. 318; Boyd *v.* S., 50 Tex. Cr. 138, 94 S. W. 1053; S. *v.* Kent, 83 Vt. 28, 74 A. 389.

282-82 See First Nat. Bank *v.* Casey (Ia.), 138 N. W. 897.

Profert of person not allowed to show height and size. Lindsay *v.* S., 138 Ga. 818, 76 S. E. 369.

Infant of two and one-half years may be put in evidence to establish facts of birth and prior unlawful intercourse. Watson *v.* Taylor (Okla.), 131 P. 922.

282-83 Jones *v.* S., 156 Ala. 175, 47 S. 100.

282-84 Watts *v.* S., 8 Ala. App. 264, 63 S. 18; Smith *v.* Hawkins, 93 Miss. 588, 47 S. 429; S. *v.* Danforth, 73 N. H. 215, 60 A. 839; S. *v.* Russell, 64 Or. 247, 129 P. 1051. But see Bilkovic *v.* Loeb, 156 App. Div. 719, 141 N. Y. S. 279.

Child may be exhibited to jury.—Anderson *v.* Aupperle, 51 Or. 556, 95 P. 330.

284-85 Benson *v.* Raymond, 142 Mich. 357, 105 N. W. 870, 108 N. W. 660, admissible to prove mental capacity of grantor.

284-87 Republic I. & S. Co. *v.* Yanuszka, 166 Fed. 684, 92 C. C. A. 280; Keen *v.* R. Co., 129 Mo. App. 301, 108 S. W. 1125.

284-88 Moss *v.* S., 152 Ala. 30, 44 S. 598; P. *v.* Hutchings, 8 Cal. App. 550, 97 P. 325; Tijan *v.* Steel Co., 158 Ill. App. 30, *aff.* 250 Ill. 554, 95 N. E. 627; Goodrich *v.* R. Co., 148 Ill. App. 579; Ewald *v.* R. Co., 107 Ill. App.

294 (exhibition of injured legs within discretion of court); Chicago Tel. S. Co. *v.* Co., 134 Ia. 252, 111 N. W. 935; Withey *v.* R. Co., 141 Mich. 412, 104 N. W. 773; Barfoot *v.* White Star Line, 170 Mich. 349, 136 N. W. 437.

284-89 Wolf *v.* Crook, 163 Ill. App. 511; Flege *v.* S., 93 Neb. 610, 142 N. W. 276; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401. See S. *v.* Stevens, 133 Ia. 684, 110 N. W. 1037.

284-91 P. *v.* Carson, 155 Cal. 164, 99 P. 970; S. *v.* Moore, 80 Kan. 232, 102 P. 475; Wilson *v.* S., 58 Tex. Cr. 104, 124 S. W. 943.

284-92 See Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462.

285-93 McFarland *v.* S., 83 Ark. 98, 103 S. W. 169.

285-95 Doubt expressed as to whether skull might be exhumed and produced. Moss *v.* S., 152 Ala. 30, 44 S. 598.

285-97 S. *v.* Height, 117 Ia. 650, 91 N. W. 935.

286-98 Texas C. R. Co. *v.* Wheeler, 52 Tex. Civ. 603, 116 S. W. 83, young girl cannot be compelled to answer question as to willingness to submit wounds to examination before consulting her father.

286-99 McFarland *v.* S., 83 Ark. 98, 103 S. W. 169; Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462.

286-1 Defendant in open court admitted that he (defendant) had shot the complainant three times in the back with a pistol, and that each of said shots produced serious and dangerous wounds. "The witness was testifying with reference to the nature and character of the wounds received by the injured party, and the injured party, who was in the courtroom, stood up by the doctor, and the doctor raised his shirt and pointed out the place of entrance of each bullet and the direction each bullet took. The court further says that there was no explanation of any operation performed by Dr. Faulk, and nothing said or done, except to point out the place of entrance of each bullet, and explain the direction it took and the seriousness of the injury, etc. This testimony was inadmissible. For a case in point, see Graves *v.* State, 58 Tex. Cr. R. 42, 124 S. W. 676; and for cases deciding practically the same question on the exhibition of clothes, see Cole *v.* State, 45 Tex. Cr. R. 232, 75 S. W. 527; Christian *v.* State, 46 Tex. Cr. R. 47, 79 S. W. 562; Melton *v.* State, 47 Tex. Cr. R. 451, 83 S. W. 822; Crenshaw *v.* State, 48 Tex. Cr. R. 77, 85 S. W. 1147; Puryear *v.* S., 50 Tex. Cr. R. 462, 98 S. W. 258; Lucas *v.* State, 50 Tex. Cr. R. 220, 95 S. W. 1065. Other cases might be cited, but these are sufficient. This testimony was of a prejudicial nature, and did not serve to elucidate any question." Chapman *v.* S. (Tex. Cr.), 147 S. W. 580.

286-5 Hauger *v.* U. S., 173 Fed. 54, 97 C. C. A. 372; Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181; Clefford *v.* P., 229 Ill. 633, 82 N. E. 343; S. *v.* Raseo, 239 Mo. 535, 144 S. W. 449; Stab *v.* Schonberg, 24 N. D. 532, 140 N. W. 105; Sturgis *v.* S., 2 Okla. Cr. 362, 102 P. 57; S. *v.* Spanos, 66 Or. 118, 134 P. 6; S. *v.* Kent, 83 Vt. 28, 74 A. 389; Jenkins *v.* S. (Wyo.), 134 P. 260. See Atlantic, etc. R. Co. *v.* T. McElmurray (Ga. App.), 80 S. E. 680; S. *v.* Cerciello (N. J.), 90 A. 1112.

Evidence showing that only difference between model and original article was that one was made of wood, the other of leather laid a proper foundation for admission of model. Texas Mach. & S. Co. *v.* Ayers Co. (Tex. Civ.), 150 S. W. 750.

Formal finding of connection, unnecessary. S. *v.* Sherouk, 78 Conn. 718, 61 A. 897.

Examination by opposite party and his attorney. Wendling *v.* C., 143 Ky. 587, 137 S. W. 205.

287-6 P. *v.* Muhly, 11 Cal. App. 129, 104 P. 466; Jenkins *v.* S. (Wyo.), 134 P. 260. *Comp.* P. *v.* Mar Gin Suie, 11 Cal. App. 42, 103 P. 951.

Hearsay admissible to connect defendant with articles offered if followed by unobjectionable testimony. S. *v.* Quinn, 56 Wash. 295, 105 P. 818.

287-7 Ex parte Richardson (Ala.), 58 S. 909 (gun); Andrews *v.* S., 159 Ala. 14, 48 S. 858; P. *v.* Byrne, 160 Cal. 217, 116 P. 521; Colorado M. R. Co. *v.* McGarry, 41 Colo. 398, 92 P. 915; Hayward *v.* Maroney, 85 Conn. 261, 85 A. 379; Harper *v.* S. (Ga. App.), 81 S. E. 817; Register *v.* S., 10 Ga. App. 623, 74 S. E. 429; People *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804; Dudley *v.* Wabash R. Co., 167 Mo. App. 647, 150 S. W. 737; P. *v.* Bonier, 189 N. Y. 108, 81 N. E. 949; Lightle *v.* S., 2 Okla. Cr. 334, 101 P. 608; S. *v.* Landers, 21 S. D. 606, 114 N. W. 717; Venters *v.* S.,

47 Tex. Cr. 280, 83 S. W. 832; S. *v.* Nelson, 39 Utah 238, 117 P. 71; S. *v.* Drummond, 70 Wash. 260, 126 P. 541; Roszcyniala *v.* S., 125 Wis. 414, 104 N. W. 113.

See McGuffin *v.* S., 178 Ala. 40, 59 S. 635; Ozark *v.* S., 51 Tex. Cr. 106, 100 S. W. 927.

Evidence of identity insufficient.—S. *v.* Allen, 23 Ida. 772, 131 P. 1112; Dowell *v.* S. (Ind.), 101 N. E. 815; Sykes *v.* Village of Portland, 177 Mich. 290, 143 N. W. 326.

Error in admitting unidentified article, cured by its subsequent identification. Davis *v.* S., 159 Ala. 104, 48 S. 694.

"Over objection the court allowed the rifle and the cartridges to be introduced in evidence, but stated that, unless it was afterwards connected, he would exclude the evidence. Said Fletcher Powers afterwards testified that he was within two or three feet of Brown Horton when he was killed; that it was dark, and he saw Horton call, 'Hands up!' and Horton and the man in front of him fired about the same time; that the other party whirled and ran off, that, just after daylight, he and the posse continued their pusuit of the defendant, in the direction the man had gone; that, after crossing over the bridge, and not far therefrom, they found an empty 44 shell which had been freshly fired, and this shell was picked up and delivered to Sheriff Palmer. This was enough to justify the court in overruling the motion of the defendant, after the state had closed, to exclude the rifle. The jury had a right to examine it, compare its caliber with the empty shell found, and from these and other circumstances determine whether the rifle and cartridge were the defendant's, and whether the shot which killed Horton came from the rifle in the hands of defendant." Ex parte Richardson (Ala.), 58 S. 909.

Not necessary to show that shoes found in defendant's room were worn by him on day of crime. S. *v.* Rasco, 239 Mo. 535, 144 S. W. 449.

In a prosecution for unlawfully selling cocaine, a package claimed to be the one sold may be exhibited though it was not taken from vendee in defendant's presence. S. *v.* Burno, 158 N. C. 632, 74 S. E. 462.

288-8 S. *v.* Roby, 83 Vt. 121, 74 A. 638. See Hein *v.* Mildebrandt, 134 Wis. 582, 115 N. W. 121.

288-10 S. *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982; Clark *v.* S., 51 Tex. Cr. 519, 102 S. W. 1136.

Should be preserved with care.—Erdman *v.* S., 90 Neb. 642, 134 N. W. 258, an explosive.

288-11 Connor *v.* R. Co., 149 Mo. App. 675, 129 S. W. 777; Bennefield *v.* U. S., 2 Okla. Cr. 44, 100 P. 34.

289-12 Stewart *v.* Driscoll, 56 Colo. 316, 139 P. 18.

Rent in garment must be shown to have been in same condition immediately after transaction. Chicago T. Co. *v.* Korando, 129 Ill. App. 620.

Radiator of automobile.—See Neel *v.* Smith (Ia.), 147 N. W. 183.

All the bones in controversy should be produced. Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264.

"If appellant was relying upon the claim that it was not shown to be in the same condition as at the time it was removed, he should have called that to the attention of the court or interrogated the witness concerning it." P. *v.* Bond, 13 Cal. App. 175, 109 P. 150.

289-13 S. *v.* Craft, 118 La. 117, 42 S. 718.

289-14 S. *v.* McGuire, 84 Conn. 470, 80 A. 761; S. *v.* Craft, supra (delay in production of clothing of deceased goes to its weight and not admissibility); S. *v.* Brannan, 206 Mo. 636, 105 S. W. 602 (clothes washed admissible); P. *v.* Flanigan, 174 N. Y. 356, 66 N. E. 988 (slight change immaterial); Cordes *v.* S., 54 Tex. Cr. 204, 112 S. W. 943; Hickey *v.* S., 51 Tex. Cr. 230, 102 S. W. 417 (bullet found 100 days after killing, admissible).

289-15 S. *v.* Cook, 13 Ida. 45, 88 P. 240, (*cit.* the text); Annapolis, etc. Co. *v.* Fredericks, 112 Md. 449, 77 A. 53; Self *v.* S., 90 Miss. 58, 43 S. 945 (skull two years after death, inadmissible).

290-17 Mayor *v.* Thomas, 130 Ga. 153, 60 S. E. 461; Lush *v.* Town, 127 Ia. 701, 104 N. W. 336. See Daniels *v.* Stock, 22 Colo. App. 529, 130 P. 1031; Berbarry *v.* Tombacher, 162 N. C. 497, 47 S. E. 412; Parker *v.* S. (Tex. Cr.), 75 S. W. 30; Wilson *v.* S., 49 Tex. Cr. 50, 90 S. W. 312 (stick alleged to be similar to one with which assault committed, original being lost, is admissible); Ide *v.* R. Co., 83 Vt. 66, 74 A. 401; Harris *v.* Seattle, etc. R. Co., 65 Wash. 27, 117

P. 601; Benson *v.* Mfg. Co., 147 Wis. 20, 132 N. W. 633. And see Burroughs *v.* Curtiss, etc. Co., 58 Or. 270, 114 P. 103.

290-18 Inadmissible unless proved to be part of bulk in question. S. *v.* Nelson, 39 Utah 238, 117 P. 71.

291-19 Whaley *v.* Vannatta, 77 Ark. 238, 91 S. W. 191 (object offered must be satisfactorily identified as sample); Muncie P. Co. *v.* Martin, 164 Ind. 30, 72 N. E. 882.

291-20 Trego *v.* Arave, 20 Ida. 38, 116 P. 119.

291-21 Question as to accuracy of model goes to its weight and not its admissibility. Coolidge *v.* New York, 99 App. Div. 175, 90 N. Y. S. 1078; Parks *v.* Miller, 185 N. Y. 529, 77 N. E. 1192.

In court's discretion.—Everson *v.* Casualty Co., 208 Mass. 214, 94 N. E. 459.

291-22 Graves *v.* S., 58 Tex. Cr. 42, 124 S. W. 676.

292-25 Sameness of condition. See Garvick *v.* R. Co., 124 Ia. 691, 100 N. W. 498.

292-28 Improper for prosecutor to wear injured party's coat with holes in it while addressing jury. Corley *v.* S. (Tex. Cr.), 155 S. W. 227.

293-35 U. S., etc. Co. *v.* Granger, 172 Ala. 546, 55 S. 244.

293-36 Sampson *v.* St. Louis, etc. R. Co., 156 Mo. App. 419, 138 S. W. 98.

294-40 Chicago & A. R. Co. *v.* Walker, 217 Ill. 605, 75 N. E. 520, physician may use skeleton to explain testimony.

294-41 Chicago & A. R. Co. *v.* Walker, supra (physician may use skeleton to explain injury); Houston *v.* R. Co., 118 Mo. App. 464, 94 S. W. 560; Stephens *v.* Elliott, 36 Mont. 92, 92 P. 45; Missouri, etc. R. Co. *v.* Lynch, 40 Tex. Civ. 543, 90 S. W. 511.

295-42 Ex parte Richardson (Ala.), 58 S. 909; Hall *v.* S. (Ala. App.), 65 S. 427; P. *v.* Weber, 149 Cal. 325, 86 P. 671; D. C. *v.* Duryee, 29 App. Cas. (D. C.) 327; Clark *v.* S., 5 Ga. App. 605, 63 S. E. 606; Vance *v.* Drug Co., 149 Ill. App. 499; Sampson *v.* R. Co., 156 Mo. App. 419, 138 S. W. 98; Potts *v.* S., 56 Tex. Cr. 39, 118 S. W. 535; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401.

Article may remain in view of jury during trial. S. *v.* Moore, 80 Kan. 232, 102 P. 475.

295-43 Sampson *v.* R. Co., 156 Mo. App. 419, 138 S. W. 98, hands of plaintiff.

295-44 S. *v.* Wallace, 78 Conn. 677, 63 A. 448 (magnifying photograph); Cotton *v.* R. Co., 191 Mass. 103, 77 N. E. 698 (use of microscope discretionary. See Flora *v.* Powrie, 23 App. Cas. (D. C.) 195.

295-45 Missouri, etc. R. Co. *v.* Moody, 35 Tex. Civ. 46, 79 S. W. 856. See Ford *v.* Co., 30 Ky. L. R. 698, 99 S. W. 609.

295-47 Schulenberg *v.* S., 79 Neb. 65, 112 N. W. 304; Reed *v.* Ty., 1 Okla. Cr. 481, 98 P. 583 (may smell and inspect).

Such act not prejudicial to accused. Brownson *v.* S., 93 Ark. 20, 123 S. W. 762.

296-49 Parker *v.* S. (Tex. Cr.), 75 S. W. 30 (same rule in Texas).

296-50 Phillips *v.* S., 156 Ala. 140, 47 S. 245 (bottle may be taken to jury room).

296-51 Garvick *v.* R. Co., 124 Ia. 691, 100 N. W. 498 (private examination of person of defendant, improper); S. *v.* Lindquist, 110 Minn. 12, 124 N. W. 215.

In Morris *v.* **Miller,** 83 Neb. 218, 119 N. W. 458, article taken by mistake; improper, but not ground of prejudice.

296-52 See S. *v.* Graham, 116 La. 779, 41 S. 90.

297-54 Rose *v.* Harllee, 69 S. C. 523, 48 S. E. 541 (paper is sufficient evidence description of property was in writing and not printed).

297-57 Wistrand *v.* P., 213 Ill. 72, 72 N. E. 748.

297-58 See P. *v.* Weber, 149 Cal. 325, 86 P. 671; Missouri, etc. R. Co. *v.* Moody, 35 Tex. Civ. 46, 79 S. W. 856 (comparison of injured limb with uninjured one, proper).

297-59 S. *v.* Danforth, 73 N. H. 215, 60 A. 839.

298-61 See S. *v.* Giroux, 75 Kan. 695, 90 P. 249.

DEPOSITIONS

See the title "Depositions" in 6 STANDARD PROC.

Rules of court requiring deposition at hearing on motions, 314-18; *Availability of other testimony,* 334-80; *When testimony is incompetent, irrelevant or privileged,* 342-4; *Mistake in putting interrogatories,* 417-87; *Compulsion by auxiliary court,* 420-96; *Filing after submission,* 477-14; *Withdrawing for amend-*

ment, 481-33; *Adoption of former testimony*, 526-17; *Express waiver confined to action where made*, 558-42.

307-1 Crenshaw *v.* Miller, 111 Fed. 450; U. S. *v.* Clark, 25 Fed. Cas. No. 14,803; The Sallie P. Linderman, 22 Fed. 557; Broyles *v.* Buck, 37 Fed. 137; Stimpson *v.* Brooks, 23 Fed. Cas. No. 13,454; Indianapolis W. Co. *v.* Co., 65 Fed. 534; Mattingly *v.* Nichols, 133 Cal. 332, 65 P. 748; P. *v.* Robles, 117 Cal. 681, 49 P. 1042; Baker *v.* Magrath, 106 Ga. 419, 32 S. E. 370; Woods *v.* S., 134 Ind. 35, 33 N. E. 901; Fuller *v.* Hogdon, 25 Me. 243; In re Liter, 19 Mont. 474, 48 P. 753; S. *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270; Hughes *v.* R. Co., 122 Wis. 258, 99 N. W. 897.

A deposition is not a written instrument. Peabody A. C. Co. *v.* Yandell, 179 Ind. 222, 100 N. E. 758.

309-5 Westinghouse M. Co. *v.* Co., 170 Fed. 430, 95 C. C. A. 600.

311-6 Clark *v.* Callahan, 105 Md. 600, 66 A. 618, 10 L. R. A. (N. S.) 616, statute authorizing taking testimony of non-residents applies to equity suits as well as law actions.

311-8 Hutchins *v.* Hutchins, 41 App. Cas. (D. C.) 367.

312-12 Tuttle *v.* Pockert, 147 Ia. 41, 125 N. W. 841; Ex parte Alexander, 163 Mo. App. 615, 147 S. W. 521.

Under Massachusetts statute a cause is "pending" in the supreme court when it is there on appeal from the probate court. Moore *v.* Stoddard, 206 Mass. 395, 92 N. E. 502.

313-14 See S. F. Gas & E. Co. *v.* Court, 155 Cal. 30, 99 P. 359.

313-15 Deposition taken in accordance with statute, applying only to county courts, may be used in circuit court. In re Arrowsmith, 206 Ill. 352, 69 N. E. 77, *dist.* In re Noble, 124 Ill. 266, 15 N. E. 850.

314-16 In re Wogan, 103 Mo. App. 146, 77 S. W. 490. See Midland Co. *v.* Bk., 34 Ind. App. 107, 72 N. E. 290; In re Lee, 41 Misc. 642, 85 N. Y. S. 224.

In bankruptcy proceedings, depositions may be taken. In re Washington S. & B. Co., 210 Fed. 984 (C. C. A.).

Rules of court requiring deposition at hearing on motions.—See Importers' Bk. *v.* Lyons, 134 Fed. 510; Despeaux *v.* R. Co., 147 Fed. 926.

New York statute authorizing depositions extends to actions for claims against estates. Deery *v.* Byrne, 120 App. Div. 6, 104 N. Y. S. 836.

Proceeding under Chinese exclusion act, not criminal, and defendant entitled to take depositions de bene esse under U. S. Rev. St. §863. In re Lam Jung Sing, 150 Fed. 608 *dist.* and *disap.* U. S. *v.* Hom Hing, 48 Fed. 635.

Disbarment proceedings.—S. *v.* Mosher, 128 Ia. 82, 103 N. W. 105 (depositions admitted); *dist.* In re Attorney, 83 N. Y. 164, and *foll.* In re Welleome, 23 Mont. 259, 58 P. 711. Such proceedings, not criminal and depositions are admissible. S. *v.* McRae, 49 Fla. 389, 38 S. 605; In re Burnette, 73 Kan. 609, 85 P. 575.

Contempt proceedings for violation of injunction, not criminal, and depositions admissible. Davidson *v.* Munsey, 29 Utah 181, 80 P. 743.

Orphans' court.—Statute providing for taking depositions in any cause "in any of the civil courts of record," includes orphans' court. In re Irvine's Est., 209 Pa. 321, 58 A. 617.

314-18 On motions for new trial. Davis *v.* Co., 53 Misc. 1, 102 N. Y. S. 868.

316-20 See S. *v.* Jackson, 111 La. 343, 35 S. 593. But see Rex *v.* Brooks, 11 Ont. L. R. (Can.) 525; S. *v.* Woods, 71 Kan. 658, 81 P. 184; S. *v.* Tomblin, 57 Kan. 841, 48 P. 144.

Affidavits as depositions.—"The court admonished the jury that they should receive the testimony, and give it the same weight and effect as though the witnesses were present and testified in person. We have in a number of cases upheld the constitutionality of the statute. It provides among other things as follows: 'The court may, when, from the nature of the case, it shall be of opinion that the ends of justice require it, grant a continuance, unless the attorney for the Commonwealth will admit the truth of the matter which it is alleged in the affidavit such absent witness or witnesses would testify to.' Crim. Code, §189. We cannot say that the court abused a sound discretion in refusing to so rule, or in ruling that the affidavit might be read as the deposition of the absent witnesses. No facts were shown warranting the conclusion that the just effect of the testimony of the witnesses could not be had without their presence in court. This was essential. To hold that the court without such facts being shown

should have required the affidavit to be admitted as true would be practically to nullify the amendment of the statute which was designed to enable the commonwealth to secure a trial of cases of this sort by admitting the affidavit to be read as the testimony of the absent witnesses, unless the presence of the witnesses is necessary to a fair trial." Bowling *v.* C., 148 Ky. 9, 145 S. W. 1126.

Grand jury.—See P. *v.* Dundon, 113 App. Div. 369, 98 N. Y. S. 1048.

317-21 See P. *v.* Droste, 160 Mich. 66, 125 N. W. 87.

318-24 Temporarily in jurisdiction. Blood *v.* Morrin, 140 Fed. 918.

320-31 In federal courts bill lies where defendant threatens, but refuses to bring suit and complainant can prove his case only by testimony of persons designated. Westinghouse M. Co. *v.* Co., 170 Fed. 430, 95 C. C. A. 600.

320-32 Magone *v.* Co., 135 Fed. 846.

Judicial notice of distance.—Blood *v.* Morrin, 140 Fed. 918.

320-33 Place of actual residence of witness, rather than domicile, governs right to take deposition. Frost *v.* Barber, 173 Fed. 848.

320-34 State laws govern use of depositions in federal courts when taken in perpetuam rei memoriam. Ohio C. M. Co. *v.* Hutchings, 172 Fed. 201, 96 C. C. A. 653.

321-35 Party desiring issuance of dedimus protestatem must show well-grounded apprehension of failure or delay of justice. Magone *v.* Co., 135 Fed. 846. See Zych *v.* Co., 127 Fed. 723.

Reasons for allegation it is believed complainant will be deprived of testimony he seeks must be set out or facts stated from which court can find whether belief reasonably well founded. Westinghouse Co. *v.* Co., 165 Fed. 992.

321-36 Smith *v.* Co., 154 Fed. 786; Hartman *v.* Feenaughty, 139 Fed. 887; Zych *v.* Co., 127 Fed. 723.

Depositions in federal courts may be taken according to practice of state where court sitting. Magone *v.* Co., 135 Fed. 846, and cases supra.

321-38 Johnson *v.* Co., 58 Misc. 353, 110 N. Y. S. 1098. See Smith *v.* Park, 27 Ky. L. R. 351, 84 S. W. 1167; Auto Club *v.* Canavan, 128 App. Div. 426, 112 N. Y. S. 785; In re Tweedie Co., 105 App. Div. 426, 94 N. Y. S. 167; Hebron *v.* Work, 101 App. Div. 463, 92 N. Y. S. 149; Vaughn *v.* Schenker, 123 N. Y. S. 535; Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928 (witness unable to talk or remain in court).

Recital in affidavit is only prima facie evidence that just grounds exist. Wanner *v.* Judge, 169 Mich. 231, 134 N. W. 993.

Under Utah statute testimony of person injured and not expected to recover may be taken and perpetuated for benefit of those entitled to sue for his death. Ohio C. M. Co. *v.* Hutchings, 172 Fed. 201, 96 C. C. A. 653.

322-39 Sealy *v.* Williston (Ky.), 117 S. W. 959 (twenty miles).

322-43 Pine Bluff & W. R. Co. *v.* McCaskill, 88 Ark. 177, 114 S. W. 208.

Secretary of corporation defendant, not a "party." Armstrong *v.* R. Co., 52 Or. 437, 97 P. 715.

323-47 Doherty *v.* Healy, 36 Colo. 460, 86 P. 323, statute applies to parties out of state as well as other witnesses. See Ordway *v.* Radigan, 114 App. Div. 538, 100 N. Y. S. 121.

Non-resident parties.—Clark *v.* Callahan, 105 Md. 600, 66 A. 618, 10 L. R. A. (N. S.) 616.

325-48 Blood *v.* Morrin, 140 Fed. 918; Hartman *v.* Feenaughty, 139 Fed. 887; Owensboro City R. Co. *v.* Rowland, 152 Ky. 175, 153 S. W. 206; W. U. T. Co. *v.* Williams, 33 Ky. L. R. 1062, 112 S. W. 651; Curtis *v.* Stix Baer (Mo. App.), 162 S. W. 1049. See Smith *v.* Cooley (Tex. Civ.), 164 S. W. 1050.

Examination of party before trial according to state statutes cannot be had in federal courts unless it is proper case for taking deposition. Hanks *v.* Co., 194 U. S. 303; Blood *v.* Morrin, 140 Fed. 918. See Zych *v.* Co., 127 Fed. 723.

New Jersey.—In 1902 a supplement to the evidence act was passed (1902, p. 459) which provides that if a material witness or a party be absent from the state, whether the residence of such witness or party be within or without the state, it shall be lawful for a court, in its discretion on such terms as the court or judge may direct, to award and issue, under the seal of the court, a commission. Baelde *v.* Imp. Co. (N. J.), 83 A. 485.

325-49 Vaughn *v.* Schenker, 123 N. Y. S. 535.

326-50 St. John *v.* Judge, 161 Mich. 299, 126 S. W. 218. *Contra* as to depositions to perpetuate testimony. Vib-

bard *v.* Co., 66 Misc. 224, 122 N. Y. S. 1068.

326-51 Conflict in New York cases concerning right to take depositions to ascertain if cause of action exists against other parties, is noted in In re Besch, 121 N. Y. S. 769, which holds in affirmative, *foll.* In re Nolan, 70 Hun 536, 24 N. Y. S. 238.

326-52 Jacobs *v.* Co., 45 Misc. 56, 90 N. Y. S. 824; Beard *v.* Beard, 66 Or. 526, 33 P. 795; Dixon *v.* Dixon (W. Va.), 79 S. E. 1016.

327-53 S. *v.* Naud, 73 N. H. 531, 63 A. 673, defendant bound over to await action of grand jury cannot take deposition of prosecuting witness.

327-54 Freeman *v.* Brown, 151 N. C. 111, 65 S. E. 743; Missouri, etc. R. Co. *v.* Browning (Tex. Civ.), 166 S. W. 34; James *v.* Piggott, 70 W. Va. 435, 74 S. E. 667. See Union *v.* Sonnefield, 113 La. 436, 37 S. 20; Jacobs *v.* Co., supra.

328-56 Caraway *v.* Co., 163 Fed. 189, 90 C. C. A. 59, in absence of emergency.

Moving party need not show action was at issue as to all defendants. Boyes *v.* Bossard, 87 App. Div. 605, 84 N. Y. S. 563. Under statute allowing taking of deposition after answer filed, fact that it was taken before answer verified, does not justify suppression. Weisiger *v.* Mills, 28 Ky. L. R. 1208, 91 S. W. 689.

For contemplated motion.—Under statute authorizing issuance of open commission for deposition to be used on issues of fact "joined," commission will not issue for testimony to be used on merely contemplated motion to punish for contempt. Gardner *v.* Royerofters, 103 N. Y. S. 637. *Contra,* In re Dolbeer, 149 Cal. 227, 86 P. 695 (under statute authorizing taking of deposition "when the witness is about to leave the country where the case is to be tried and will probably continue absent when the testimony is required," a deposition taken during trial, properly admitted after proof witness absent from state); Hallenborg *v.* Greene, 120 App. Div. 813, 105 N. Y. S. 664 (statute); Mercantile Bk. *v.* Sire, 100 App. Div. 459, 91 N. Y. S. 418. See Hebron *v.* Work, 101 App. Div. 463, 92 N. Y. S. 149 (party).

330-63 Parramore *v.* Parramore, 61 Fla. 701, 55 S. 795.

330-66 Lyle *v.* Sarvey, 104 Va. 229, 51 S. E. 228.

332-73 Sheibley *v.* Ashton, 130 Ia. 195, 106 N. W. 618. *Comp.* Fitzsimons *v.* Richardson & Co., 86 Vt. 229, 84 A. 811.

333-76 Laches. See infra, 336-86.

333-77 See Fitzsimons *v.* Richardson & Co., 86 Vt. 229, 84 A. 811.

334-78 In equity action order of court, not required. Tinning *v.* Mumm, 146 Ia. 263, 125 N. W. 203.

334-79 Clearwater Merc. Co. *v.* Roberts, 51 Fla. 176, 40 S. 436; Baelde *v.* Imp. Co. (N. J.), 83 A. 485; Trowbridge *v.* Townsend, 79 Misc. 65, 140 N. Y. S. 503; American B. P. Co. *v.* Geiger, 76 Misc. 571, 137 N. Y. S. 148.

Mandamus to compel issuance by clerk proper where all steps preliminary to issuance been taken, since it is merely a ministerial act. S. *v.* McRae, 49 Fla. 389, 38 S. 605.

334-80 Ferguson *v.* Mullican, 11 Ont. L. R. 35 (strong showing must be made by a plaintiff desiring to take his own deposition, and same in case of defendant who leaves jurisdiction pending action); S. *v.* Wetter, 11 Ida. 433, 83 P. 341. See Collector *v.* Judge, 12 Haw. 99. But see Oakes *v.* Riter, 118 App. Div. 772, 103 N. Y. S. 849.

Mere possibility the witness may return, not sufficient ground for vacating order of examination. Klaw *v.* Press Co., 151 App. Div. 720, 136 N. Y. S. 224.

Evidence sought must be such as would be admissible at the trial. Dwight *v.* Gibb, 129 N. Y. S. 961, 965, 966.

Application in support of motion for new trial, properly refused where it appears the alleged facts do not exist or witness has no knowledge of them. Davis *v.* Co., 53 Misc. 1, 102 N. Y. S. 868. See also Mercantile T. Co. *v.* Calvet R., 46 Misc. 16, 20, 93 N. Y. S. 238, 241.

Availability of other testimony does not justify denial of application especially where that sought would be more complete and reliable. Boyes *v.* Bossard, 87 App. Div. 605, 84 N. Y. S. 563.

Privileged testimony.—Fact testimony desired may be privileged does not justify denial of application. Cullinan *v.* Dwight, 51 Misc. 221, 100 N. Y. S. 896.

335-82 See In re Sentell, 53 Misc. 165, 104 N. Y. S. 477.

335-83 Middleby's Est., 242 Pa. 39, 88 A. 773.

336-84 Ferguson *v.* Mullican, 11

Ont. L. R. 35; Schulte *v.* Petruzzi, 153 App. Div. 889, 137 N. Y. S. 1103.

336-86 Schulte *v.* Petruzzi, 153 App. Div. 889, 137 N. Y. S. 1103. Delay in making application not material if non-prejudicial. Tirpak *v.* Hoe, 53 Misc. 529, 103 N. Y. S. 798. But see Valentine *v.* Rose, 45 Misc. 342, 90 N. Y. S. 389; Wilcox *v.* Stern, 89 App. Div. 14, 85 N. Y. S. 159. No laches where facts, though known to party, not disclosed to attorney because importance not appreciated. Davis *v.* Co., 53 Misc. 1, 102 N. Y. S. 868. Nor where party compelled to go abroad to gain information as to knowledge possessed by witness. Roth *v.* Mautner, 115 App. Div. 148, 100 N. Y. S. 707.

In criminal case defendant should make application when arraigned; he cannot await his pleasure. Clearwater M. Co. *v.* Roberts, 51 Fla. 176, 40 S. 436.

337-88 Change of commission.—Although order made for issuance of open commission at instance of proponent of will, if latter resists allowance from estate to special guardian of infant contestant to defray expense of securing a representation at the taking in of a foreign jurisdiction court may change commission to one on written interrogatories. In re Sentell, 53 Misc. 165, 104 N. Y. S. 477.

Costs.—Deery *v.* Byrne, 120 App. Div. 6, 104 N. Y. S. 836 (payment in advance of reasonable expense of adverse party where witnesses out of state); Gowans *v.* Jobbins, 91 N. Y. S. 842 (open commission for deposition out of state ordered on condition of depositing or giving security for same to cover actual expenses of attorney, with alternative of written interrogatories).

337-89 P. *v.* Goodman, 43 Misc. 508, 89 N. Y. S. 522. *Comp.* Wilcox *v.* Stern, 89 App. Div. 14, 85 N. Y. S. 159.

338-92 Davis *v.* Co., 53 Misc. 1, 102 N. Y. S. 868; Meres *v.* Emmons, 103 App. Div. 381, 92 N. Y. S. 1099; Hebron *v.* Work, 101 App. Div. 463, 92 N. Y. S. 149.

339-95 Tirpak *v.* Hoe, 53 Misc. 529, 103 N. Y. S. 798 (but must show why not made by party); Fox *v.* Peacock, 97 App. Div. 500, 90 N. Y. S. 137 (same); Williams *v.* Smith, 29 R. I. 562, 72 A. 1093. See Downing *v.* McKillop, 117 N. Y. S. 961.

Information and belief.—Roth *v.* Mautner, supra. But see Ordway *v.* Radigan, 114 App. Div. 538, 100 N. Y. S. 121; Vincent *v.* Kilmer, 107 App. Div. 499, 95 N. Y. S. 343.

339-96 See Davis *v.* Co., 53 Misc. 1, 102 N. Y. S. 868, refusal of third person to make affidavit.

339-98 Downing *v.* McKillop, 117 N. Y. S. 961 (absence); Pergoli *v.* Lyman, 92 N. Y. S. 788 (facts not conclusions must be stated); Davis M. Co. *v.* Robinson, 42 Misc. 52, 85 N. Y. S. 574; Sullivan *v.* Mfg. Co., 129 N. Y. S. 598.

Affidavit on information and belief must show sources thereof and reason why not made by one personally familiar with facts. Tirpak *v.* Hoe, 53 Misc. 529, 103 N. Y. S. 798; Vincent *v.* Kilmer, 107 App. Div. 499, 95 N. Y. S. 343. *Comp.* Moriata *v.* Raymond, 54 Misc. 271, 105 N. Y. S. 973.

Oral cross-examination.—Special circumstances justifying, must appear in record by affidavit. Woodward *v.* Skinner, 92 N. Y. S. 259.

340-99 Harden *v.* Hoops, 137 App. Div. 299, 121 N. Y. S. 1086.

Exact residence of the alleged non-resident witness need not be stated, especially if unknown. Dambmann *v.* R. Co., 110 App. Div. 165, 97 N. Y. S. 91. Street and number need not be stated. Tirpak *v.* Hoe, 53 Misc. 529, 103 N. Y. S. 798.

341-1 Wertheimer *v.* Favalora, 116 La. 490, 40 S. 848 (not required in city court of New Orleans).

Unnecessary to state testimony is to be used on trial; it is sufficient fact inferentially appears. Jacobs *v.* R. Co., 45 Misc. 56, 90 N. Y. S. 824.

342-4 Moriata *v.* Raymond, 54 Misc. 271, 105 N. Y. S. 973 (affidavit, sufficient).

When testimony incompetent, irrelevant or privileged application denied (P. *v.* Goodman, 43 Misc. 508, 89 N. Y. S. 522); but not merely because it may be privileged (see supra 334-80).

343-10 Wright *v.* Sparks, 127 Ga. 365, 56 S. E. 442; Pergoli *v.* Lyman, 92 N. Y. S. 788.

Twenty-four hours' notice, sufficient in absence of prejudice where non-resident witness only temporarily in jurisdiction. In re Tweedie T. Co., 105 App. Div. 426, 94 N. Y. S. 167.

Statute requiring clerk to make copies of notice and interrogations and deliver them to sheriff for service does not require copies to be certified. El

Paso, etc. R. Co. *v.* Vizard, 39 Tex. Civ. 534, 88 S. W. 457.
See Park *v.* Zellars, 139 Ga. 585, 77 S. E. 922.

344-15 Presumption is citation served though not returned with deposition. Carpenter *v.* Gibson, 82 Vt. 336, 73 A. 1030.

345-16 Hebron *v.* Work, 101 App. Div. 463, 92 N. Y. S. 149.

346-22 Ordway *v.* Radigan, 114 App. Div. 538, 100 N. Y. S. 121, and if commission is to be open order should so state, as well as whether it is to be an oral or written interrogation.

346-25 Spurr *v.* Co., 117 App. Div. 816, 102 N. Y. S. 1065.

346-27 Osborne *v.* Barber, 105 App. Div. 236, 93 N. Y. S. 833 (order must show reason for shortening notice).

348-37 McClure *v.* McClintock, 150 Ky. 265, 150 S. W. 332.

348-38 See In re Wogan, 103 Mo. App. 146, 77 S. W. 490; In re Lee, 41 Misc. 642, 85 N. Y. S. 224 (New Jersey practice).

Admission lies in the discretion of the court. Hall & Farley *v.* Imp. Co., 173 Ala. 398, 56 S. 235.

348-39 Manning *v.* S., 46 Tex. Cr. 326, 81 S. W. 957.

348-40 Where style of case appears in body of commission, attested by the clerk with his seal, fact it is not endorsed with number and style of case and marked "issued" followed by official signature of issuing officer is not such defect as requires quashing. St. Louis, etc. R. Co. *v.* Kennedy (Tex. Civ.), 96 S. W. 653.

349-41 See Grant Bros. *v.* U. S., 232 U. S. 647, 34 Sup. Ct. 452.

351-50 See Morton *v.* Clark (Ala. App.), 65 S. 408.

351-51 But see Indiana B. Pub. Co. *v.* Ayer, 34 Ind. App. 284, 72 N. E. 151.

356-70 A nullity unless properly certified. New York Press Co. *v.* Salter, 129 La. 51, 55 S. 706; Lamchick *v.* Ackerman, 130 N. Y. S. 144.

357-73 Clerk issues commission without order after notice of filing interrogatories. St. Louis R. Co. *v.* Smith, 38 Tex. Civ. 507, 86 S. W. 943.

358-74 See Haish *v.* Dreyfus, 111 Ill. App. 44.

358-79 Shannon Mfg. Co. *v.* Co. (Del.), 56 A. 367 (form of letters rogatory and order for issuance of commission); Hutchins *v.* Hutchins, 41 App. Cas. (D. C.) 367.

Federal court has power to issue letters rogatory to obtain testimony in foreign jurisdictions. De Villeneuve *v.* Morning Journal Ass'n., 206 Fed. 70.

359-80 See Post *v.* Schooner, 1 Haw. 286. But see In re Smith, 79 Misc. 77, 139 N. Y. S. 522.

359-81 See Chaskin *v.* Mackay, 130 App. Div. 50, 114 N. Y. S. 457.

360-84 Authority of supreme court of D. C. to order oral deposition is confined to the sovereignty of the United States. Hutchins *v.* Hutchins, 41 App. Cas. (D. C.) 367.

Where open commission without interrogatories granted for taking a deposition in remote jurisdiction, counsel for adverse party were permitted to give notice of their election not to attend, in which case they were to have the right to make objections and prepare cross-interrogatories after direct testimony returned; witnesses to be produced for cross-examination on reasonable notice. Maryland T. Co. *v.* Co., 149 Fed. 443.

360-86 See Palmer *v.* Husbands, 134 Ky. 152, 119 S. W. 762.

Oral examination by commissioner.—Where statute authorizes issuance of commission directing commissioner to examine witness touching his knowledge of anything relating to matter in controversy, interrogatories need not be attached. Hendricks *v.* Co., 124 Mo. App. 157, 101 S. W. 675.

Narrative form, not cause for rejecting deposition. S. *v.* Stevens, 19 N. D. 249, 123 N. W. 888.

360-87 Collector *v.* Judge, 12 Haw. 99.

360-88 Issuance of commission for oral examination outside state, discretionary, dependent on adequacy of written interrogatories to disclose the facts. Deery *v.* Byrne, 120 App. Div. 6, 104 N. Y. S. 836. Must be supported by strong showing of necessity. Depue *v.* Depue, 115 App. Div. 466, 101 N. Y. S. 412.

362-91 Texas, etc. R. Co. *v.* Daugherty, 33 Tex. Civ. 267, 76 S. W. 605, answer not hearsay.

Must be pertinent to issues.—Zeggio *v.* Robinson, 155 App. Div. 893, 139 N. Y. S. 1070; In re Smith, 80 Misc. 628, 142 N. Y. S. 151.

By statute interrogatories may be written in English and foreign lan-

guages where witness ignorant of English. Roth *v.* Mautner, 114 App. Div. 904, 100 N. Y. S. 1140.

362-92 S. *v.* Taylor, 57 W. Va. 228, 50 S. E. 247.

363-93 Interrogatory not necessarily leading unless it suggests desired answer. Missouri, etc. R. Co. *v.* Baker 35 Tex. Civ. 542, 81 S. W. 67. Although question contains words "whether or not," it may be leading. S. *v.* Taylor, supra.

363-97 Gulf, etc. R. Co. *v.* Hall, 34 Tex. Civ. 535, 80 S. W. 133.

Greater liberality as to form of interrogatories should be allowed than where witness testifies orally. Phinazee *v.* Bunn, 123 Ga. 230, 51 S. E. 300.

363-98 General and final interrogatory, such as "state fully how this contract arose, giving all the details of the transaction," is not permissible where neither it nor preceding questions indicate character of testimony to be elicited so that cross interrogatories may be framed. Taylor *v.* Co., 127 Ga. 138, 56 S. E. 292.

364-99 Walker *v.* Warner, 31 App. Cas. (D. C.) 76.

364-2 Extent of cross-examination. Where deposition taken pursuant to statute requiring merely notice of time and place and permitting adverse party to put interrogatories, examination by latter is not governed by strict rules of cross-examination. Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295.

Effect of agreement to use in other actions.—Where it is agreed that deposition taken by oral examination at instance of one party may be used in other actions, such deposition when introduced by the adverse party becomes his evidence in chief and his cross-examination is not objectionable because it violates strict rule confining cross-examination to matters brought out in examination in chief. Crosby *v.* Wells, supra.

364-3 Macon, etc. Co. *v.* Yesbik, 13 Ga. App. 407, 79 S. E. 243.

366-10 Haish *v.* Dreyfus, 111 Ill. App. 44.

366-14 Edwards *v.* Edwards, 142 Ala. 267, 39 S. 82.

367-16 But see Toronto Ass'n. *v.* Houston, 9 Ont. L. R. 527.

368-17 If interrogatory is challenged, inserting party has burden of showing pertinency. In re Hernandez's Will, 158 App. Div. 815, 144 N. Y. S. 150.

Justice settling interrogatories has no power to pass upon objections. Spurr *v.* Co., 106 N. Y. S. 1009. But cross interrogatories which are a gross abuse of the right will be disallowed. Treadwell *v.* Greene, 89 App. Div. 60, 85 N. Y. S. 318.

368-18 In re Smith, 80 Misc. 628, 142 N. Y. S. 151; American Inst. *v.* Randolph, 141 N. Y. S. 949.

369-22 Depositions taken before coroner incompetent. Grant *v.* R. Co., 176 Ill. App. 292.

371-28 Olmsted *v.* Edson, 71 Neb. 17, 98 N. W. 415.

371-35 Notary of another state is authorized by statute to take depositions, although not competent by laws of his own state. Midland S. Co. *v.* Bk., 34 Ind. App. 107, 72 N. E. 290. At common law he could not administer oaths or take depositions, and presumptively this is the law of another state. Ibid.

Absence of seal of foreign notary does not affect admissibility of deposition, his authority being presumed. Carpenter *v.* Gibson, 82 Vt. 336, 73 A. 1030.

371-36 Alcorn *v.* Gieseke, 158 Cal. 396, 111 P. 98; Alcorn *v.* Brandeman, 158 Cal. 410, 111 P. 104; Alcorn *v.* Howard, 158 Cal. 411, 111 P. 104; Owings *v.* Turner, 48 Or. 462, 87 P. 160 (special reference in equity).

372-39 Bledsoe *v.* Jones, 145 Ala. 685, 40 S. 111.

373-40 Clegg *v.* R. Co. (Tex. Civ.), 127 S. W. 1098.

373-41 Redmond *v.* R. Co., 225 Mo. 721, 126 S. W. 159; S. *v.* McDonald, 59 Or. 520, 117 P. 281; Clegg *v.* R. Co., 104 Tex. 280, 137 S. W. 109, *aff.* (Tex. Civ.), 127 S. W. 1098.

374-42 Knickerbocker I. Co. *v.* Gray, 165 Ind. 140, 72 N. E. 869.

374-43 Redmond *v.* R. Co. (Ky.), 126 S. W. 159, nor partner in any respect.

374-44 Relation of attorney and client between officer or those whom he serves and party in whose behalf deposition taken is disqualification. Huntington C. L. Co. *v.* Co., 44 Ind. App. 84, 87 N. E. 1047; Younce *v.* Lumb. Co., 155 N. C. 239, 71 S. E. 329.

375-47 Fact commissioner to whom letters rogatory directed took deposition without order of court, not such

irregularity as to require suppression. Post *v.* Schooner, 1 Haw. 286.

375-50 Butts County *v.* Hixon, 135 Ga. 26, 68 S. E. 786.

376-57 De Renzes *v.* De Renzes, 115 La. 675, 39 S. 805 (commission addressed to "any judge, justice of the peace, or Louisiana commissioner" cannot be executed by notary); German Fire Ins. Co. *v.* Gibbs, 42 Tex. Civ. 407, 92 S. W. 1068 (commission addressed to any notary of C. cannot be executed by a notary of N.); Kroell *v.* S., 139 Ala. 1, 36 S. 1025.

378-60 New *v.* Young, 144 Ala. 420, 39 S. 201.

379-63 De Renzes *v.* De Renzes, 115 La. 675, 39 S. 805.

380-67 Hosch L. Co. *v.* Weeks, 123 Ga. 336, 51 S. E. 439; Succession of Derigny, 128 La. 853, 55 S. 552; Shallow *v.* Roux, 109 Me. 567, 84 A. 999; S. *v.* Co. (Neb.), 110 N. W. 874; Houston & W. T. R. Co. *v.* Lacy (Tex. Civ.), 153 S. W. 414.

Order as substitute for notice.—S. *v.* Mosher, 128 Ia. 82, 103 N. W. 105.

Two depositions noticed for same time at different places.—Party notified may attend at one and disregard the other. Ivey *v.* Mills, 143 N. C. 189, 55 S. E. 613.

382-69 *Contra,* Hosch L. Co. *v.* Weeks, 123 Ga. 336, 51 S. E. 439.

382-70 Babcock *v.* Ormsby, 18 S. D. 358, 100 N. W. 759.

"The statutes I have referred to allow depositions to be taken on notice, and the provision that such notice must be served three days before the day set for taking the depositions is one that may be waived and the time may be shortened by the agreement of the parties. Lamport by his attorney expressly agreed in writing to shorten the time, and neither Lamport, who was the adverse party, nor the petitioner, who is not a party to the suit, will be permitted to assail the notice on this ground." Ex parte Alexander, 163 Mo. App. 615, 147 S. W. 521.

382-71 Johnson *v.* Porterfield, 150 Ala. 532, 43 S. 228, nor can he question legality of notice.

382-72 Nature of evidence to be given or called for need not be shown by notice. McPhelemy *v.* McPhelemy, 78 Conn. 180, 61 A. 477.

383-73 Name of court in which deposition to be used need not be stated otherwise than as that in which action pending. Moore *v.* Shannon, 137 Ky. 604, 126 S. W. 136.

383-77 Chase *v.* Watson, 75 Vt. 385, 56 A. 10.

384-80 Thibodeaux *v.* Thibodeaux, 112 La. 906, 36 S. 800; Ex parte Green, 126 Mo. App. 309, 103 S. W. 503.

385-84 Thibodeaux *v.* Thibodeaux, supra.

387-89 Notice must state day and between what hours of day deposition will be taken, and, if not completed on that day, taking will continue at same place and between same hours from day to day. Ex parte Green, 126 Mo. App. 309, 103 S. W. 503.

387-90 Hartman *v.* Thompson, 104 Md. 389, 65 A. 117; Donaldson *v.* Winningham, 54 Wash. 19, 102 P. 879.

387-91 Hartman *v.* Thompson, supra.

387-92 Babcock *v.* Ormsby, 18 S. D. 358, 100 N. W. 759, since preparation might not otherwise be possible.

387-95 Edwards *v.* Edwards, 142 Ala. 267, 39 S. 82.

387-96 Non-residence of witness and materiality of testimony need not be stated where not required to be by statute. Ferguson *v.* R. Co., 74 N. J. L. 691, 67 A. 602.

388-1 Bollinger *v.* Bollinger, 153 Cal. 190, 94 P. 770, failure of copy of affidavit to show name of officer who administered oath.

389-3 But see Indiana Pub. Co. *v.* Ayer, 34 Ind. App. 284, 72 N. E. 151.

389-4 Waiver of objection to failure to name witness by appearing and taking part in examination. Babcock *v.* Ormsby, 18 S. D. 358, 100 N. W. 759.

389-5 Helgerson *v.* Mitchell, 32 S. D. 595, 144 N. W. 117; Squier *v.* Mitchell, 32 S. D. 342, 143 N. W. 277.

390-6 Zinser *v.* Sanitary Dist., 175 Ill. App. 9.

Law of state where action pending governs length of notice. In re Wogan, 103 Mo. App. 146, 77 S. W. 490.

391-7 McCall *v.* Jacobson, 139 Mich. 455, 102 N. W. 969.

Fact witness is about to leave jurisdiction; that insufficiency was called to attention of opposing counsel and time required for and conveniences of travel are facts to be considered. McCall *v.* Jacobson, supra.

392-8 Robertson L. Co. *v.* Clarke, 24 N. D. 134, 138 N. W. 984.

Four days sufficient where twenty-four hours ample time to go to place of taking. McCall *v.* Jacobson, supra.

395-9 But see In re Wogan, 103 Mo. App. 146, 77 S. W. 490.

395-11 McCall Co. *v.* Jacobson, 139 Mich. 455, 102 N. W. 969, reviewable if all facts and circumstances known to trial court, known to appellate court.

397-20 Millspaugh *v.* R. Co., 138 Mo. App. 31, 119 S. W. 993; King & Co. *v.* Hancock, 114 Va. 596, 77 S. E. 510.

One party properly notified and subpoenaed cannot object to giving deposition on ground his co-parties not notified. In re Shawmut Co., 94 App. Div. 156, 87 N. Y. S. 1059.

On opposite party.—On a will contest service of notice by contestant on principal beneficiary under will, sufficient, under statute requiring service on "opposite party," there being no attorney of record and record not showing who was proponent. In re Jones, 130 Ia. 177, 106 N. W. 610.

398-23 Co-parties not affected by deposition need not be notified. Louisville Rock Co. *v.* Cain, 26 Ky. L. R. 849, 82 S. W. 619.

399-25 Swink *v.* Anthony, 107 Mo. App. 601, 81 S. W. 915, construing "where," in statute to mean "if," and not as showing place of service.

399-26 Miles *v.* Caraker, 82 Ark. 198, 101 S. W. 174 (in case of resident parties only); Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484 (same). See Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381; Cahill *v.* Pintony, 4 Munf. (Va.) 371.

Failure of attorney to object not a waiver. Webb *v.* Ritter, supra. *Contra*, Hunt *v.* Crane, supra.

400-27 Swink *v.* Anthony, 107 Mo. App. 601, 81 S. W. 915 (of resident party); Diedrichs *v.* Diedrichs, 68 Neb 534, 94 N. W. 536 (even though party never received notice and is unrepresented at taking). But see King & Co. *v.* Hancock, 114 Va. 596, 77 S. E. 510.

401-28 Miles *v.* Caraker, supra (but not when party notified is a resident); Webb *v.* Ritter, supra (same).

402-31 Missouri, K. & T. R. Co. *v.* Goodrich (Tex. Civ.), 149 S. W. 1176.

404-46 Service by mail. Proof necessary to support. See Stokes *v.* Hardy, 71 N. J. L. 116, 58 A. 650.

405-48 Acknowledgment of attorney is conclusive proof of service. Cohen *v.* Reichman (Ind. App.), 102 N. E. 284.

405-49 Indiana Pub. Co. *v.* Ayer, 34 Ind. App. 284, 72 N. E. 151.

Fact a non-resident witness is temporarily within jurisdiction does not prevent taking his deposition de bene esse. Blood *v.* Morrin, 140 Fed. 918.

407-51 But see Simmons *v.* Simmons (Neb.), 146 N. W. 951.

407-52 Extension of time. Jackson *v.* Min. Co., 186 Fed. 643.

408-54 But see Ex parte Green, 126 Mo. App. 309, 103 S. W. 503.

408-56 Flowers *v.* Poorman, 43 Ind. App. 528, 87 N. E. 1107.

Waiver of objection.—See infra, 547-89.

408-57 Officer should keep record showing cause and necessity of adjournment. Ex parte Green, 126 Mo. App. 309, 103 S. W. 503.

Deposition taken after continuance, without notice, suppressed. Bauer *v.* S., 144 Cal. 740, 78 P. 280.

409-58 See Ex parte Green, supra.

409-62 Notary may continue the taking of testimony to enable counsel of party whose deposition is being taken to attend. In re Wogan, 103 Mo. App. 146, 77 S. W. 490.

410-70 In re Butler, 76 Neb. 267, 107 N. W. 572; Armstrong *v.* R. Co., 52 Or. 437, 97 P. 715.

Where a non-resident temporarily in state has been subpoenaed to appear before a state judge for taking of his deposition in a case in the federal court, upon his return home and failure to appear, the judge has no jurisdiction to issue an attachment to compel his attendance. S. *v.* Kennan, 33 Wash. 247, 74 P. 381.

410-71 S. *v.* Dickman, 175 Mo. App. 543, 157 S. W. 1012; Old Line Bankers' L. I. Co. *v.* Witt, 92 Neb. 743, 139 N. W. 641.

On removal to federal court special commissioner appointed to take depositions for which notice previously given has authority given by state law to enforce attendance by attachment. Zych *v.* American Co., 127 Fed. 723.

410-72 Finn *v.* Court, 145 Ia. 157, 123 N. W. 1066. See infra, 420-97.

Commissioner may apply to court in own name. Van Dyke *v.* Doughty, 174 Mich. 351, 140 N. W. 627.

A statute providing for striking out answer of defendant who refuses to ap-

pear for taking of his deposition is unconstitutional. Summerville *v.* Kelliher, 144 Cal. 155, 77 P. 889.

Justice of the peace has no power to punish for contempt where he is merely officer before whom deposition is to be taken for use in superior court. Gay *v.* Thorpe, 1 Cal. App. 312, 82 P. 221.

Subpoena duces tecum.—On order of court clerk may issue such subpoena in proceeding to take deposition de bene esse. Crocker-W. Co. *v.* Bullock, 134 Fed. 241. But an order is necessary, and to obtain it a showing of competency and materiality of issuance must be made. Daneel *v.* Co., 128 Fed. 753. Notary cannot issue such subpoena. Daneel *v.* Co., supra.

412-73 Subpoena may, upon application of witness, be vacated or modified. In re Waterman, 113 App. Div 910, 99 N. Y. S. 1150; In re Great N. C. Co., 50 Misc. 467, 100 N. Y. S. 564 (quashed for lack of jurisdiction).

412-75 See In re Arrowsmith, 206 Ill. 352, 69 N. E. 77.

413-76 See Gulf, etc. R. Co. *v.* Luther, 40 Tex. Civ. 517, 90 S. W. 44 (presence of party and counsel and suggestions by latter to witness did not require suppression); Tarlton *v.* Orr, 40 Tex. Civ. 410, 90 S. W. 534.

In absence of statute or rule providing otherwise presence of counsel is not objectionable. In re Arrowsmith, 206 Ill. 352, 69 N. E. 77.

413-78 But see Leventhal *v.* Hollamon (Tex. Civ.), 165 S. W. 6.

414-79 See Tarlton *v.* Orr, supra.

415-82 *Contra,* Tarlton *v.* Orr, 40 Tex. Civ. 410, 90 S. W. 534.

Absence of notary when testimony taken by stenographer, waived by failure to object before trial. Abbott *v.* Co., 112 Mo. App. 550, 87 S. W. 110.

417-87 **Where deposition taken on ex parte interrogatories** additional questions cannot properly be propounded at taking, and answers will be excluded at trial. Sparks *v.* Taylor (Tex. Civ.), 87 S. W. 740.

See Crawford *v.* Kline, 74 N. J. L. 203, 65 A. 441 (error in date).

418-88 Carpenter *v.* Woodmen (Ia.), 142 N. W. 411; P. *v.* City Prison, 139 N. Y. S. 828; McManus *v.* Durant, 142 App. Div. 775, 127 N. Y. S. 497; Clayton *v.* Clayton, 71 W. Va. 656, 77 S. E. 137. Effect of failure of moving party to appear, see supra, 382-69.

418-89 Woodward *v.* Skinner, 92 N. Y. S. 259 (proper when special circumstances justifying are shown); Burnham *v.* Stoutt, 35 Utah 250, 99 P. 1070.

419-90 Cross-examination at trial. See supra, 360-84.

420-92 Buckeye P. Co. *v.* Powder Co., 205 Fed. 827; Finn *v.* Court, 145 Ia. 157, 123 N. W. 1066. But see Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276, witness may refuse at his peril.

Discretion of the court.—New York Press Co. *v.* Salter, 129 La. 51, 55 S. 706.

Production of documents.—Same rules as in case of examination at trial. Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276.

420-93 Whether question is irrelevant and immaterial is for notary. Ex parte Gfeller, 178 Mo. 248, 77 S. W. 552. See also In re Randall, 90 App. Div. 192, 85 N. Y. S. 1089.

420-95 Carey *v.* Donohue, 209 Fed. 328 (C. C. A.); Finn *v.* Court, 145 Ia. 157, 123 N. W. 1066; Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276.

Superintendent need not produce reports of accident made by conductor and motorman, nor need he disclose their names. Ex parte Schoepf, supra, *rev.* 6 O. C. C. 590. But see Petition of Bradley, 71 N. H. 54, 51 A. 264 (infra, 421-99). Claim of privilege must be properly made. Ex parte Gfeller, 178 Mo. 248, 77 S. W. 552.

420-96 Ex parte Gfeller, supra; Olmsted *v.* Edson, 71 Neb. 17, 98 N. W. 415; Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276.

Witness must be questioned before he can be put in contempt. Preliminary statement he will refuse to answer questions on advice of counsel is not sufficient. Ex parte Green, 126 Mo. App. 309, 103 S. W. 503.

Compulsion by auxiliary court.—Where deposition is taken in jurisdiction other than that of pending action courts of former will compel witness to answer. In re Wogan, 103 Mo. App. 146, 77 S. W. 490. Except where claim of privilege made such auxiliary courts will not inquire into the competency, relevancy or materiality of the matter called for, but will compel its production unless it clearly and affirmatively appears such matter cannot be competent or relevant. Dowagiac Mfg. Co. *v.* Lochren, 143 Fed. 211, 74 C. C. A. 341. All testimony must be produced so that it may be before primary or

a higher tribunal. Butte & B. C. Co. *v.* Co., 139 Fed. 843; Perry *v.* Co., 138 Fed. 836; In re Randall, 90 App. Div. 192, 85 N. Y. S. 1089, *aff.* in 177 N. Y. 400, 69 N. E. 721.

420-97 Finn *v.* Court, 145 Ia. 157, 123 N. W. 1066; Lawson *v.* Rowley, 185 Mass. 171, 69 N. E. 1082 (justice of peace).

Court may compel production of books. In re Bolster, 59 Wash. 655, 110 P. 547.

Witness justifying his refusal on ground of privilege is entitled to hearing before being compelled to answer. Crocker-W. Co. *v.* Bullock, 134 Fed. 241.

Where deposition is taken before judge of superior court he may punish for contempt in refusing to answer, and may be compelled by mandamus to do so without further proceedings. Crocker *v.* Conrey, 140 Cal. 213, 73 P. 1006.

421-98 Van Dyke *v.* Daughty, 174 Mich. 351, 140 N. W. 627.

See Crocker-W. Co. *v.* Bullock, 134 Fed. 241; Dancel *r.* Co., 128 Fed. 753 (showing of materiality necessary); Fancher *v.* Kenner (Ark.), 161 S. W. 166; Fenn *v.* R. Co., 122 Ga. 280, 50 S. E. 103 (witness not punished for refusing to answer illegal and impertinent questions). Materiality of testimony must be shown before answer compelled. St. John *v.* Judge, 161 Mich. 299, 126 N. W. 218.

421-99 Fishing for evidence.—See Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276.

A corporation party's servants and agents whose duty is to procure and report in writing names of witnesses to an accident, cannot refuse to disclose information so obtained although statute protects a "party" from compulsory disclosure of names of his witnesses and manner in which he proposes to prove his case. Petition of Bradley, 71 N. H. 54, 51 A. 264. *Comp.* 420-95, supra.

422-3 Morris *v.* Co., 44 Tex. Civ. 488, 99 S. W. 178; Garner *v.* Risinger, 35 Tex. Civ. 378, 81 S. W. 343 (answer to cross interrogatory sufficient). And see Pratt Consol. Coal Co. *v.* Davidson, 173 Ala. 667, 55 S. 886.

423-4 Court has discretion. Missouri, etc. R. Co. *v.* Davis, 53 Tex. Civ. 547, 116 S. W. 423. See Varley, etc. Co. *v.* Ostheimer, 186 Fed. 171, 108 C. C. A. 303.

424-6 Refusal to answer, unless excused, must be taken as confession of interrogatory. Locust *v.* Randle, 46 Tex. Civ. 544, 102 S. W. 946. But see Davis *v.* Davis, 44 Tex. Civ. 238, 98 S. W. 198.

425-13 Missouri, etc. R. Co. *v.* Davis, 53 Tex. Civ. 547, 116 S. W. 423.

426-18 Scope of examination limited by order under which deposition taken. Fuchs & L. Co. *v.* Kittredge, 146 Ill. App. 350.

427-19 Keckler *v.* Brotherhood, 77 Neb. 301, 109 N. W. 157.

428-26 W. U. T. Co. *v.* Corso, 28 Ky. L. R. 290, 89 S. W. 212; Cushman *v.* Wooster, 45 N. H. 410.

If defendant assents to writing of deposition in shorthand he cannot object it is not reduced to writing. Rex *v.* Warilow, 17 Ont. L. R. 284.

428-27 See Hendricks *v.* Co., 124 Mo. App. 157, 101 S. W. 675.

429-30 Keckler *v.* Brotherhood, 77 Neb. 301, 109 N. W. 157.

429-31 Keckler *v.* Brotherhood, supra.

Stipulation for reduction to writing by witness personally is sufficiently complied with where he dictated answers to one who wrote them on a typewriter, manuscript being then read to and signed by him. Glenn *v.* Zenovitch, 128 Ga. 596, 58 S. E. 26.

429-33 Ebersole *r.* Ass'n., 147 Ala. 177, 41 S. 150; Succession of Segura, 134 La. 84, 63 S. 640.

May be written by any disinterested person in presence of officer. Keckler *v.* Brotherhood, 77 Neb. 301, 109 N. W. 157.

Employing stenographer.—W. U. T. Co. *v.* Corso, 28 Ky. L. R. 290, 89 S. W. 212 (act done under immediate supervision of officer is done by him); Gallagher *v.* Cotton, 74 N. H. 1, 64 A. 583 (rule of court).

Clerk or stenographer of attorney of party taking deposition, not disinterested. Knickerbocker I. Co. *v.* Gray, 165 Ind. 140, 72 N. E. 869.

430-36 Succession of Segura, 134 La. 84, 63 S. 640.

431-43 In re Kaplan Bros., 213 Fed. 753 (C. C. A.); Auman *v.* Cunfer, 31 Pa. C. C. 6. See, however, Schnabel *v.* Alliance, etc., 79 Misc. 624, 140 N. Y. S. 369.

Entire deposition should be read over to or by witness who may correct it

Nasser *v.* Gaston, 70 Wash. 685, 127 P. 470.

432-45 Boggs *v.* Min. Co., 162 N. C 393, 78 S. E. 274; Nasser *v.* Gaston, 70 Wash. 685, 127 P. 470.

432-46 Powell *v.* Hunter (Mo.), 165 S. W. 1009; Auman *v.* Cunfer, 31 Pa. C. C. 6.

Alteration after signing, fatal. Chicago R. Co. *v.* Schaefer, 121 Ill. App. 334.

433-47 Brinkley *v.* Bell, 131 Ga. 226, 62 S. E. 67; Boggs *v.* Min. Co., 162 N. C. 393, 78 S. E. 274. See Potomac B. Wks. *v.* Barber, 103 Md. 509, 63 A. 1068 (absence of statute).

Proved by stenographer.—In re Kaplan Bros., 213 Fed. 753 (C. C. A.).

433-49 If transcription signed, immaterial shorthand report not signed. Williams *v.* Smith, 29 R. I. 562, 72 A. 1093.

433-50 In re Kaplan Bros., 213 Fed. 733 (C. C. A.).

Signature need not be made in presence of party if he was voluntarily absent. Williams *v.* Smith, 29 R. I. 562, 72 A. 1093.

434-52 Signatures of all witnesses at end of several depositions, following separate certificate by each to truth of testimony, sufficient. Potomac B. Wks. *v.* Barber, supra.

434-55 Waiver results from consent deposition be taken in shorthand. Rex *v.* Warilow, 17 Ont. L. R. 284; St. Louis, etc. Ry. Co. *v.* Webster, 99 Ark. 265, 137 S. W. 1103.

434-56 Williams *v.* Smith, supra (need not be sworn to by notary who transcribed testimony).

Statutory requirement as to verification of transcript of shorthand notes and signature of officer must be met. In re Royston (Can.), 10 West. L. R. 513.

435-59 On information and belief, sufficient. Senter *v.* Teague (Tex. Civ.), 164 S. W. 1045.

436-64 Fact form of oath is dictated by one of the parties, immaterial where notary administers it. Breeden *v.* Martens, 21 S. D. 357, 112 N. W. 960.

436-68 Southern B. Ass'n. *v.* Ins. Co., 23 Pa. Super. 88.

When witness refreshes recollection from copies of his transcribed stenographic notes of proceedings of which he has no independent recollection, proper procedure is not to annex copies but for witness to incorporate in his answers facts shown by notes. In re Tifft, 115 App. Div. 915, 101 N. Y. S. 1072. See In re Waterman, 110 App. Div. 115, 97 N. Y. S. 169 (books produced by witness); In re Lee, 41 Misc. 642, 85 N. Y. S. 224 (same); In re Randall, 90 App. Div. 192, 85 N. Y. S. 1089.

437-72 Separation of deposition and exhibits at a former trial does not affect admissibility. Roll *v.* Howell, 9 Ala. App. 171, 62 S. 463.

Statute requiring exhibits proved or referred to by deponent to be inclosed, sealed and directed to clerk, mandatory. Crane Co. *v.* Neel, 104 Mo. App. 177, 77 S. W. 766.

438-73 Although record on appeal contains no copy of documents referred to in deposition as filed, it will be presumed they were filed. Speer *v.* Duff, 27 Ky. L. R. 292, 84 S. W. 1140.

438-75 Exhibits not referred to in certificate but referred to in deposition and attached thereto are admissible. Crosswhite *v.* Brew. Co. (Ala.), 65 S. 298.

Failure to attach exhibits to deposition not fatal where they are identified by notary over his signature and by other witnesses present at taking. Black *v.* Webber, 1 Neb. (Unof.) 468, 96 N. W. 606.

439-79 But see Smith *v.* Morris (Ala.), 61 S. 276; Roberts *v.* Nav. Co., 132 La. 446, 61 S. 522.

441-84 Manders' Com. *v.* Hospital, 27 Ky. L. R. 254, 84 S. W. 761, aiding certificate by caption. See Columbus R. Co. *v.* Patterson, 143 Fed. 245, 73 C. C. A. 603.

442-87 Baird *v.* Smith, 124 Ga. 251, 52 S. E. 655 (wrong county in preamble or heading of answers).

442-88 *Comp.* St. Louis, etc. R. Co. *v.* Kennedy (Tex. Civ.), 96 S. W. 653.

444-95 See P. *v.* Dean (Cal. App.), 139 P. 904.

445-97 Where caption gives correct style and number of case, and both interrogatories and commission show court where case pending, and certificate shows deposition taken in answer to interrogatories, this is sufficient. McFaddin *v.* Sims, 43 Tex. Civ. 598, 97 S. W. 335.

447-4 Younce *v.* Lumb. Co., 155 N. C. 239, 71 S. E. 329; Rouse *v.* Sarratt, 74 S. C. 575, 54 S. E. 757.

448-6 Keckler *v.* Brotherhood, 77

Neb. 301, 109 N. W. 157, taken at time and place named in notice.

451-12 Under §10,142 Mich. C. L. 1897, no affidavit of the facts essential to give jurisdiction is required. It is sufficient if they are set out in the notice. Patterson *v.* R. Co., 54 Mich. 91, 19 N. W. 761; Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520; Wanner *v.* Judge, 169 Mich. 231, 134 N. W. 993.

452-18 Haggin *v.* Rogers, 29 Ky L. R. 1263, 97 S. W. 362 (which, if either, party present); Gallagher *v.* Cotton, 74 N. H. 1, 64 A. 583.

Presence of accused or his counsel need not be shown. S. *v.* Vanella, 40 Mont. 326, 106 P. 364.

453-19 Error in name not fatal if aided by caption, both parties having been present and participated. Columbus R. Co. *v.* Patterson, 143 Fed. 245, 73 C. C. A. 603.

453-20 Variance in name.—Abramson *v.* Horner, 115 Md. 232, 80 A. 907.

454-22 Griffin *v.* Humphrey (Tex. Civ.), 138 S. W. 1111; Missouri, etc. R. Co. *v.* Graves, 57 Tex. Civ. 395, 122 S. W. 458. *Contra* if written interrogatories used. Wisegarver *v.* Yinger (Tex. Civ.), 122 S. W. 925. See Tembly *v.* Co., 229 Ill. 540, 82 N. E. 336.

Sufficiently shown by caption alone. Manders' Com. *v.* Hospital, 27 Ky. L. R. 254, 84 S. W. 761.

457-33 See Knickerbocker I. Co. *v.* Gray, 165 Ind. 140, 72 N. E. 869.

Typewritten deposition, not inadmissible because there is nothing to show it was written by officer or witness in his presence or was read over to witness. Edgefield Mfg. Co. *v.* Co., 78 S. C. 73, 58 S. E. 969.

457-34 Keckler *v.* Brotherhood, 77 Neb. 301, 109 N. W. 157; F. A. Patrick & Co. *v.* Nurnberg, 21 N. D. 377, 131 N. W. 254; Patterson & Stevenson Co. *v.* Nurnberg, 21 N. D. 416, 131 N. W. 256.

458-36 Ibid. See Knickerbocker I. Co. *v.* Gray, 165 Ind. 140, 72 N. E. 869.

458-37 Edgefield Mfg. Co. *v.* Co., 78 S. C. 73, 58 S E. 969.

459-38 Certificate deposition, after being read to witness, was "by him corrected" satisfies statute providing it must be corrected by deponent "in any particular if desired." Short *v.* Frink, 151 Cal. 83, 90 P. 200.

459-41 Missouri, etc. R. Co. *v.* Graves, 57 Tex. Civ. 395, 122 S. W. 458.

Certificate must show answers signed and sworn to before commissioner. McFaddin *v.* Sims, 43 Tex. Civ. 598, 97 S. W. 335.

460-44 But see Riser *v.* R. Co., 67 S. C. 419, 46 S. E. 47.

460-46 Knickerbocker I. Co. *v.* Gray, 165 Ind. 140, 72 N. E. 869.

460-47 Knickerbocker I. Co. *v.* Gray, supra, deposition written by disinterested person.

463-59 See Missouri, etc. R. Co. *v.* Graves, 57 Tex. Civ. 395, 122 S. W. 458.

464-68 Although signature to certificate does not recite official capacity of officer this may sufficiently appear from signature on another page of deposition. Kinkade *v.* Howard, 18 S. D. 60, 99 N. W. 91.

464-69 Henry *v.* Caswell (Cal. App.), 136 P. 726.

465-70 Seal unnecessary by statute although deposition taken without commission. Hanley *v.* R. Co., 59 W. Va. 419, 53 S. E. 625.

Notary presumed to have seal.—Gharst *v.* Co., 115 Mo. App. 403, 91 S. W. 453.

Seal improperly placed.—Kinkade *v.* Howard, 18 S. D. 60, 99 N. W. 91, sufficient though below jurat on preceding page.

465-71 Gharst *v.* Co., 115 Mo. App. 403 (absence of foreign notary's seal not fatal where clerk of court certifies to his signature and official capacity), *foll.* Pape *v.* Wright, 116 Ind. 502, 19 N. E. 459.

465-72 Temby *v.* Co., 229 Ill. 540, 82 N. E. 336 (though commission describes him as notary of another state); North Am. Ins. Co. *v.* Williamson, 118 Ill. App. 670.

465-73 *Contra.* Texas & P. R. Co. *v.* Mosley, 103 Tex. 79, 124 S. W. 90 (Tex. Civ.), 124 S. W. 485 (statute).

466-75 North Am. Ins. Co. *v.* Williamson, supra.

Certificate need not be attached; may be produced at trial. Bishop *v.* Hilliard, 227 Ill. 382, 81 N. E. 403.

Presumption of identity of officer taking deposition with one named in certificate of official character. Bishop *v.* Hilliard, supra.

467-77 See Brinkley *v.* Bell, 131 Ga. 226, 62 S. E. 67.

468-79 Notary of another state. Midland S. Co. *v.* Bk., 34 Ind. App. 107, 72 N. E. 290.

468-82 See Hanley *v.* R. Co., 59 W. Va. 419, 53 S. E. 625 (statute).

469-84 Statute requiring exhibits be enclosed, mandatory. Crane Co. *v.* Neel, 104 Mo. App. 177, 77 S. W. 766.

469-85 Atlanta, etc. Co. *v.* Pope, 9 Ga. App. 647, 72 S. E. 63.

469-86 Riser *v.* R. Co., 67 S. C. 419, 46 S. E. 47; Hagins *v.* Ins. Co., 72 S. C. 216, 51 S. E. 683 (failure to seal and endorse justifies suppression); Wisegarver *v.* Yinger (Tex. Civ.), 122 S. W. 925.

Writing name across seal.—Texas R Co. *v.* Felker, 40 Tex. Civ. 604, 90 S. W. 530.

Envelope broken in transmission, ground for continuance for retaking. Order of Com. T. *v.* Barnes, 72 Kan. 293, 309, 80 P. 1020, 82 P. 1099.

470-87 Jenkins *v.* R. Co., 83 S. C. 473, 65 S. E. 636; Weinberg *v.* R. Co., 83 S. C. 470, 65 S. E. 637.

470-88 Hartford Ins. Co. *v.* Beeton, 103 Tex. 236, 125 S. W. 883, seal to certificate to deposition may cure deficit. See St. Louis B. & M. R. Co. *v.* Jenkins (Tex. Civ.), 163 S. W. 621.

471-93 Jenkins *v.* R. Co., 83 S. C. 473, 65 S. E. 636; Wisegarver *v.* Yinger (Tex. Civ.), 128 S. W. 1190, *deny.* rehear. 122 S. W. 925.

473-97-98 The Saranac, 132 Fed. 936 (deposition not delivered by officer personally nor sealed and mailed to him, but brought into court during trial, excluded).

474-1 See Riser *v.* R. Co., 67 S. C. 419, 46 S. E. 47. Forwarding by express is proper under statute authorizing delivery by private conveyance and requiring affidavit by person by whom depositions sent they were not opened by himself or any one else in transit. Standard O. Co. *v.* Doyle, 118 Ky. 662, 82 S. W. 271.

474-2 White *v.* R. Co., 123 Ga. 353, 51 S. E. 411; Texas R. Co. *v.* Felker, 40 Tex. Civ. 604, 90 S. W. 530; Wisegarver *v.* Yinger (Tex. Civ.), 122 S. W. 925.

Not now required.—Missouri, etc. R. Co. *v.* Neaves (Tex. Civ.), 127 S. W. 1090.

Where receipt was not full and stamp on letter was partially blurred, a motion to suppress raised a question of fact on which evidence outside of deposition and envelope could be received. St. Louis, etc. R. Co. *v.* Harkey, 39 Tex. Civ. 523, 88 S. W. 506.

475-3 Vinton *v.* Powell, 136 Ga. 687, 71 S. E. 1119.

476-9 Kane *v.* Sholars, 41 Tex. Civ. 154, 90 S. W. 937, statute providing for return "without delay" is directory, and, in absence of prejudice, suppression denied.

Reasonableness of time for making return is for court. If there has been unusual delay and case submitted, it will not be reopened. Fell *v.* McIlhenny, 123 La. 364, 48 S. 991.

476-11 Stevenson *v.* R. Co., 157 Ky. 561, 163 S. W. 747. Waiver of filing. Clark *v.* Clark, 76 N. H. 430, 83 A. 515.

Refusal to order filing.—Officer taking deposition may be compelled to file it upon payment of fees. But if no showing of value or relevancy of its contents is made, refusal to order filing, not error. Little & H. Inv. Co. *v.* Pigg, 29 Ky. L. R. 809, 96 S. W. 455.

Re-filing is essential to use of withdrawn deposition. Peycke *v.* Shinn, 68 Neb. 343, 94 N. W. 135.

477-13 Martin *v.* R. Co., 81 Kan. 344, 105 P. 451.

477-14 Potter *v.* Campbell (Ky.), 167 S. W. 404; McCall *v.* Jacobson, 139 Mich. 455, 102 N. W. 969 (statute providing time within which objections must be made does not limit time for filing).

Statute providing deposition shall remain with clerk ten days before trial does not require filing within that time, but entitles adverse party to continuance; voluntarily going to trial is waiver. Clark *v.* Callahan, 105 Md. 600, 66 A. 618, 10 L. R. A. (N. S.) 616.

Filing after submission of case, but two months before decision, where not objected to does not justify court in refusing to consider deposition. Helm *v.* Bk., 106 Va. 603, 56 S. E. 598.

Before final hearing.—Statute providing deposition taken and returned before final hearing "may be" read does not give absolute right to have read deposition taken just before hearing. Fulmer C. Co. *v.* R. Co., 57 W. Va. 470, 50 S. E. 606.

478-20 City of Louisville *v.* Laufer, 140 Ky. 457, 131 S. W. 192. See Zinser *v.* Sanitary Dist., 175 Ill. App. 9.

Presumption exists that deposition was filed before case was called for trial. Houston, etc. R. Co. *v.* Lacy (Tex. Civ.), 153 S. W. 414.

479-21 Although statute requires filing within thirty days after taking, failure does not require exclusion of

deposition where continuance ordered on account of it and no injury resulted. Ferguson *v.* Lederer, 128 Ia. 286, 103 N. W. 794.

479-22 Trinidad A. Mfg. Co. *v.* Co., 86 Neb. 623, 126 N. W. 293.

Failure to mark deposition "filed," immaterial. Fire Ass'n. *v.* Masterson (Tex. Civ.), 83 S. W. 49. See McKie *v.* S., 74 Kan. 21, 85 P. 827; Manning *v.* S., 46 Tex. Cr. 326, 81 S W. 957.

480-31 See White *v.* R. Co., 123 Ga. 353, 51 S. E. 411.

481-32 Lake Erie, etc R. Co. *v.* Huffman, 177 Ind. 126, 97 N. E. 434.

481-33 Withdrawal for amendments. See infra, 484-99 et seq.

483-42 Natl. Sur. Co. *v.* Door Co. (Tex. Civ.), 158 S. W. 1177.

484-43 Warth *v.* Loewenstein, 121 Ill. App. 71, after suppression.

484-44 **Before deposition is read.** Waysmith *v.* City (Neb.), 146 N. W. 971.

484-47 White *v.* R. Co., 123 Ga. 353, 51 S. E. 411.

484-49 Risley *v.* Harlow, 48 Misc. 277, 96 N. Y. S. 728; Gray *v.* Phillips, 54 Tex. Civ. 148, 117 S. W. 870.

Amendment.—Where amendment not made in court it should be done so as to guard against alteration. Hence, removal from files by party, though under order of court, and return by private communication to the officer, justifies suppression. Chicago R. Co. *v.* Schaefer, 121 Ill. App. 334. See Borders *v.* Barber, 81 Mo. 636.

To attach exhibit proved by deponent. Crane Co. *v.* Neel, 104 Mo. App. 177, 77 S. W. 766. See White *v.* R. Co., supra.

485-56 Gray *v.* Phillips, 54 Tex. Civ. 148, 117 S. W. 870.

Adding certificate and signature.—See Risley *v.* Harlow, 48 Misc. 277, 96 N. Y. S. 728.

486-59 Haggin *v.* Rogers, 29 Ky. L. R. 1263, 97 S. W. 362; Gallagher *v.* Cotton, 74 N. H. 1, 64 A. 583.

486-71 Later correction upon notice. Rump *v.* Woods, 50 Ind. App. 347, 98 N. E. 369.

488-79 Party desiring should act promptly both in asking permission and in actually retaking before trial after getting order therefor. Louisville R. Co. *v.* Cain, 26 Ky. L. R. 849, 82 S. W. 619.

488-80 See Pennsylvania S. R. Co. *v.* Co., 171 Fed. 579; Louisville R. Co. *v.* Cain, supra.

489-89 Smith *v.* Co., 132 App. Div. 916, 116 N. Y. S. 730.

490-90 See In re Tifft, 115 App. Div. 915, 101 N. Y. S. 1072.

490-91 Leave of court for taking second deposition is unnecessary if not required by statute. Peycke *v.* Shinn, 68 Neb. 343, 94 N. W. 135.

Interrogatories on file should not be used in re-taking deposition without further notice; and suppression of depositions so taken will not be injurious unless it is shown to have been materially different from that contained in original. First Nat. Bk. *v.* Thomas (Tex. Civ.), 118 S. W. 221.

491-93 Maryland C. Co. *v.* Chew, 92 Ark. 276, 122 S. W. 642, **if not taken** by agreement.

491-94 Central C. & C. Co. *v.* Penny, 173 Fed. 340, 97 C. C. A. 600; Gustus *v.* Murdock, 154 Ill. App. 270; Penn. R. Co. *v.* Co., 131 Ill. App. 426; Bartlett *v.* Slusher, 117 Ill. App. 138; St. Bernard Co. *v.* Southard, 25 Ky. L. R. 638, 76 S. W. 167 (except where deponent incompetent for one party); Chesapeake S. Co. *v.* Fossett, 30 Ky. L. R. 1175, 100 S. W. 825; McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668; Jefferson Bk. *v.* Refrigerating Co., 236 Mo. 407, 139 S. W. 545; Wilson *v.* Salisbury, 167 Mo. App. 191, 151 S. W. 194; Keller *v.* R. Co., 78 Neb. 604, 111 N. W. 384; Wallace *v.* Leber, 69 N. J. L. 312, 55 A. 475; Cudlip *v.* Co., 180 N. Y. 85, 72 N. E. 925, 87 App. Div. 633, 84 N. Y. S. 1122; Kalkhoff *v.* Church, 121 N. Y. S. 713; Providence M. Co. *v.* Browning, 70 S. C. 148, 49 S. E. 325; Continental Bk. *v.* Bk., 1 Tenn. Ch. App. 449; Ivy *v.* Ivy, 51 Tex. Civ. 397, 112 S. W. 110.

Portions read cannot be objected to by him. Worthing *v.* Hall, 153 Ill. App. 587.

"**When used by either** they are subject to the same objections that are applicable to any other testimony. Whoever introduces the depositions makes them his testimony, whether he took them or not, and a party is not immune from lawful and proper objections to depositions because his opponent had them taken. Such a rule would put the taker of depositions at the mercy of witnesses." Galveston, etc.

R. Co. *v.* Young & Webb (Tex. Civ.), 148 S. W. 1113.

494-98 See First Nat. Bk. *v.* Edwards (Tex. Civ.), 81 S. W. 541; Everett *v.* Kemp (Tex. Civ.), 80 S. W. 534.

494-1 Magee *v.* Paul (Tex. Civ.), 159 S. W. 325; Von Tobel *v.* Co., 32 Wash. 683, 73 P. 788.

Subject to any valid objection by the other party. Galveston, etc. R. Co. *v.* Young & Webb (Tex. Civ.), 148 S. W. 1113, *cf.* McCutcheon *v.* Jackson (Tex.), 40 S. W. 177; Railway *v.* Ritter, 16 Tex. Civ. App. 482, 41 S. W. 753; Telegraph Co. *v.* Lovely, 29 Tex. Civ. App. 584, 69 S. W. 128; In re Smith, 31 Minn. 136, 26 N. W. 934; City of Bloomington *v.* Osterle, 139 Ill. 120, 28 N. E. 1068; Reed *v.* Holloway (Tex. Civ.), 127 S. W. 1189.

Rule does not affect right of party offering deposition to read answers to cross interrogatories. Kalkhoff *v.* Church, 121 N. Y. S. 713.

Part of deposition may be used as cross-examination of deponent who has testified orally. McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668.

Party using deposition of other party or part of it is bound by the evidence, and adverse party may make same objections he could, had his opponent taken the deposition, even to impeaching the witness. Penn. R. Co. *v.* Co., 131 Ill. App. 426, holding the party taking deposition having omitted to read a portion thereof, it could not be read by adverse party.

Right of party offering to object.—The party offering the deposition taken by the adverse party is not estopped to object to a question calling for the conclusion of witness, although statute provides evidence is that of party offering deposition. Madera R. Co. *v.* Co., 3 Cal. App. 668, 87 P. 27; In re Von Ness' Will, 78 Misc. 592, 139 N. Y. S. 485.

The party who propounded the question may object to the answer when offered by the adverse party. Magee *v.* Paul (Tex. Civ.), 159 S. W. 325.

494-2 Cudlip *v.* Co., 180 N. Y. 85, 72 N. E. 925, 87 App. Div. 633, 84 N. Y. S. 1122. See also Kramer *v.* Kramer, 80 App. Div. 20, 80 N. Y. S. 184; Von Tobel *v.* Co., supra. Party cannot object to answers to his own questions except in so far as they are incompetent. First Nat. Bk. *v.* Edwards (Tex. Civ.), 81 S. W. 541. *Contra.* Party who has called for copies of books and records, which have been attached to and made a part of the deposition, cannot, when it is introduced by adverse party, object originals are best evidence. Madera R. Co. *v.* Co., 3 Cal. App. 668, 87 P. 27.

495-4 Bloomington *v.* Osterle, 139 Ill. 120, 28 N. E. 1068; Chesapeake S. Co. *v.* Fossett, 30 Ky. L. R. 1175, 100 S. W. 825.

495-6 Lee *v.* Follensby, 86 Vt. 401, 85 A. 915. Cross-petitioner may read to prove admissions made by decedent when a party. Culbertson *v.* Salinger (Ia.), 117 N. W. 6.

496-21 Cable Co. *v.* Mathers (W. Va.), 79 S. E. 1079.

497-22 In re Arrowsmith, 206 Ill. 352, 69 N. E. 77.

497-23 Miller *v.* Co., 121 Ill. App. 56.

498-29 One who interpleads is charged with knowledge of state of record, and depositions previously on file cannot be objected to by him merely because he was not notified of the taking. Miller *v.* Campbell, 13 Okla. 75, 74 P. 507. But although intervener adopts unauthorized pleadings filed in his name, depositions taken before he became a party are not competent against him. Rogers *v.* Tompkins (Tex. Civ.), 87 S. W. 379; Flores *v.* Hovel (Tex. Civ.), 125 S. W. 606.

498-30 Meeks *v.* Co., 141 Mo. App. 648, 124 S. W. 1084; Flores *v.* Hovel, supra; St. Louis, etc. R. Co. *v.* Grocery Co. (Tex. Civ.), 144 S. W. 1194.

Against privy subsequently made party competent. See Union L. & F. Co. *v.* Sonnefield, 113 La. 436, 37 S. 20; Owens *v.* Owens, 84 Miss. 673, 37 S. 149.

499-32 Sayre *v.* Woodyard, 66 W. Va. 288, 66 S. E. 320.

499-33 Tinning *v.* Mumm, 146 Ia. 263, 125 N. W. 203, taken for hearing on application for temporary injunction may be used on final hearing whether previously used or not.

499-34 Miles *v.* Court of Honor, 173 Ill. App. 187; Hartis *v.* R. Co., 236 N. C. 162, 78 S. E. 161; Freeman *v.* Brown, 151 N. C. 111, 65 S. E. 743; Edwards *v.* R. Co., 21 S. D. 504, 110 N. W. 832 ("many other actions proceeding upon the same matter, between the same parties"). See Roll *v.* Howell, 9 Ala. App. 171, 62 S. 463; Andrieus *v.* C. Co., 28 Ky. L. R. 704, 90 S. W. 233.

Deposition taken in one case before consolidation competent against party to the other who filed cross-interrogatories. Kothman *v.* Fasceler (Tex. Civ.), 84 S. W. 390.

501-35 Castleberry *v.* Bussey (Tex. Civ.), 166 S. W. 14; Rucker *v.* Carr (Tex. Civ.), 163 S. W. 632.

502-36 St. Louis, etc. R. Co. *v.* Hengst, 36 Tex. Civ. 217, 81 S. W. 832, *dist.* People's Nat. Bk. *v.* Mulkey, 94 Tex. 395, 60 S. W. 753.

502-39 In re Murphy's Est., 43 Mont. 353, 116 P. 1004; Central Bk. *v.* Thayer, 184 Mo. 61, 82 S. W. 142; Reed *v.* Gold, 102 Va. 37, 45 S. E. 868. See Hartis *v.* R. Co., 162 N. C. 236, 78 S. E. 164.

503-40 Same subject-matter. See Heyworth *v.* Co., 174 Mo. 171, 73 S. W. 498; Miller *v.* Gillispie, 54 W. Va. 450, 46 S. E. 451.

503-41 Hendricks *v.* Calloway, 211 Mo. 536, 111 S. W. 60. But see Stevenson *v.* R. Co., 157 Ky. 561, 163 S. W. 747.

503-42 See Miller *v.* Gillispie, 54 W. Va. 450, 46 S. E. 451.

504-43 Alexander *v.* Edgerly, 92 Minn. 263, 99 N. W. 896; Hendricks *v.* Calloway, 211 Mo. 536, 111 S. W. 60; Central Bk. *v.* Thayer, 184 Mo. 61, 82 S. W. 142; Roberts *v.* Powell, 210 Pa. 594, 60 A. 258; Edwards *v.* R. Co., 21 S. D. 504, 110 N. W. 832; Parlin & O. Co. *v.* Vawter, 39 Tex. Civ. 520, 88 S. W. 407; Miller *v.* Gillispie, supra (deposition taken by defendant in action by one creditor to set aside conveyance cannot be used by same defendant in similar action by another creditor).

One who, though not nominally a party, hires attorneys to represent him in, and conducts the defense to, an action is a party, and depositions introduced therein are competent against him in another action. Brownlee *v.* Bunnell, 31 Ky. L. R. 669, 103 S. W. 284. Inadmissible against one not a party when taken Hendricks *v.* Calloway, supra. **In Morris *v.* Parry,** 110 Mo. App. 675, 85 S. W. 620, a bill was filed to perpetuate as the testimony of one then deceased his deposition given in another action in which issues were similar but parties different. Overruling of a demurrer was error.

505-44 Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598; Southern Bk. *v.* Nichols, 202 Mo. 309, 100 S. W. 613; Profile & F. Co. *v.* Bickford, 72 N. H. 73, 54 A. 699. See Central Bk. *v.* Thayer, 184 Mo. 61, 82 S. W. 142.

506-51 See Andrieus *v.* Co., supra; Central Bk. *v.* Thayer, supra.

In absence of surprise or prejudice, failure to file is immaterial. Edwards *v.* R. Co., 21 S. D. 504, 110 N. W. 832, *foll.* Adams *v.* Raigner, 69 Mo. 363.

506-52 Stipulation in former action between same parties and involving same subject-matter for taking depositions and dispensing with formalities does not extend to a subsequent action and authorize introduction of deposition. Armeny *v.* Co., 111 Ill. App. 621.

Mental condition of deponent may be shown by his deposition. Newman *v.* Thompson, 134 Ga. 137, 67 S. E. 662.

507-54 St. John *v.* Judge, 161 Mich. 299, 126 N. W. 218.

507-56 Lyttle *v.* Denny, 222 Pa. 395, 71 A. 841. See S. *v.* Zarlenga, 14 Ida. 305, 94 P. 55.

509-62 Handy Co. *v.* Smith, 77 Conn. 165, 58 A. 694; Hobbs *v.* C., 156 Ky. 847, 162 S. W. 104; Black *v.* Epstein, 221 Mo. 286, 120 S. W. 754; Flannery *v.* Co., 70 N. J. L. 715, 59 A. 157; Charron *v.* Fuel Co., 143 Wis. 437, 128 N. W. 75; Anderson *v.* Co., 127 Wis. 273, 106 N. W. 1077; Hughes *v.* R. Co., 122 Wis. 258, 99 N. W. 897 (examination of employe of corporation party), *dist.* Meier *v.* Paulus, 70 Wis. 165, 35 N. W. 301, holding examination of party before trial admissible notwithstanding his presence at trial.

Discretionary with court whether to admit or exclude deposition of witness sworn and put under the rule. Fire Assn. *v.* Masterson (Tex. Civ.), 83 S. W. 49.

Party-officer of corporation.—Deposition of officer of a corporation party is not admissible if he is present at trial though parties expressly excepted from statute requiring proof of absence and inability to attend. Miners' & M. Bk. *v.* Co., 113 App. Div. 194, 99 N. Y. S. 98.

510-63 Midland Valley R. Co. *v.* Ennis (Ark.), 159 S. W. 214.

511-64 Admission discretionary with court. Wilson *v.* Wilson, 35 Tex. Civ. 192, 79 S. W. 839.

511-65 Flannery *v.* Co., supra (motion to strike out must be promptly made, and showing of surprise at ability of witness to appear).

Error in reading interrogatories, cured

by withdrawing objections and receiving testimony of party to whom they were to have been put. Clevenger *v.* Blount (Tex. Civ.), 114 S. W. 868.

511-66 Providence M. Co. *v.* Browning, 70 S. C. 148, 49 S. E. 325.

Defendant whose interests are hostile to his co-defendant is an adverse party, and his deposition may be read by such co-defendant notwithstanding deponent's presence at the trial. Hetzel *v.* Easterly, 96 App. Div. 517, 89 N. Y. S. 154.

511-68 So. R. Co. *v.* Dickson, 138 Ga. 371, 75 S. E. 462.

If the opposite party desires to cross-examine the witness it is his privilege to call him to the stand for that purpose. Seaboard Airline R. Co. *v.* Hunt, 10 Ga. App. 273, 73 S. E. 588.

If deponent can only testify to the matter of the deposition at instance of adverse party he may offer his deposition, taken by latter, but not offered, though he is in court and competent to testify. Ivy *v.* Ivy, 51 Tex. Civ. 397, 112 S. W. 110.

512-70 Where party taking deposition failed to read it, and permitted the adversary to read it and supplement it by oral examination of deponent, no ground of objection existed. Continental Bk. *v.* Bk., 1 Tenn. Ch. App. 449, 497.

512-71 Seaboard Airline R. Co. *v.* Hunt, 10 Ga. App. 273, 73 S. E. 588.

512-73 S. *v.* Hoerr, 88 Kan. 573, 129 P. 153; Hobbs *v.* C., 156 Ky. 847, 162 S. W. 104. See P. *v.* Becker, 210 N. Y. 274, 104 N. E. 396.

Where witness is cross-examined as to his statements in deposition he may introduce the portions of it containing such statements. Wilson *v.* Wilson, 35 Tex. Civ. 192, 79 S. W. 839.

512-75 Black *v.* Epstein, 221 Mo. 286, 120 S. W. 754, though third person added as defendant.

512-77 Columbus R. Co. *v.* Patterson, 143 Fed. 245, 73 C. C. A. 603; St. Louis U. Tr. Co. *v.* Merritt, 158 Mo. App. 648, 139 S. W. 824; Foringer *v.* Co., 223 Pa. 425, 72 A. 797 (if no reason shown for non-attendance at court). See Le Master *v.* P., 54 Colo. 416, 131 P. 269; Masonic L. Assn. *v.* Robinson, 156 Ky. 371, 160 S. W. 1078. But see Loventhal *v.* Hollamon (Tex. Civ.), 165 S. W. 6.

515-83 Carter *v.* R. Co. (Ala.), 61 S. 65; S. *v.* Zarlenga, 14 Ida. 305, 94 P. 55; Funk *v.* Ins. Co., 87 Kan. 568, 125 P. 35; Hobbs *v.* C., 156 Ky. 847, 162 S. W. 104.

516-84 Absence of deponent may be proved to the grand jury and not the justice. P. *v.* Dundon, 113 App. Div. 369, 98 N. Y. S. 1048.

On appeal it will be assumed testimony authorized reception of deposition. Alaska-T. G. M. Co. *v.* Chency, 162 Fed. 593, 89 C. C. A. 351.

518-87 Wright *v.* R. Co. (Ark.), 163 S. W. 1151; Hobbs *v.* Co., 156 Ky. 847, 162 S. W. 104; Clark *v.* Phillips, 65 Misc. 166, 119 N. Y. S. 360.

Mental incompetency is ground. See Atwood *v.* Atwood, 86 Conn. 579, 86 A. 29.

518-88 In re Dolbeer, 149 Cal. 227, 86 P. 695; Hobbs *v.* C., 156 Ky. 847, 162 S. W. 104; P. *v.* Droste, 160 Mich. 66, 125 N. W. 87.

Extent and nature of physician's practice does not justify taking his deposition under statute authorizing depositions of witness who by reason of age, sickness or "other cause" shall be unable or likely to be unable to attend court. American Exp. Co. *v.* Bradford, 82 Miss. 130, 33 S. 843.

519-89 S. *v.* Zarlenga, 14 Ida. 305, 94 P. 55. See In re Dolbeer, 149 Cal. 227, 86 P. 695 (only in case of depositions within state); Stone *v.* Co., 36 Colo. 370, 85 P. 327 (same); S. *v.* McDonald, 59 Or. 520, 117 P. 281. See Missouri, etc. R. Co. *v.* Sullivan (Tex. Civ.), 157 S. W. 193.

Proof of continued age or infirmity required though parties stipulated copy may be used in place of original. Carter *v.* Wakeman, 45 Or. 427, 78 P. 362.

Discretion of court governs. S. *v.* McDonald, 55 Or. 419, 104 P. 967.

520-90 In re Dolbeer, 149 Cal. 227, 86 P. 695; Heinzerling *v.* Agen, 49 Wash. 647, 96 P. 223.

Absence at time of trial need not be shown (Talcott *v.* Freedman, 140 Mich. 32, 103 N. W. 535, *dist.* Emlaw *v.* Emlaw, 20 Mich. 11, change in statute), especially where deposition shows witness non-resident when testimony taken. Chicago, etc. R. Co. *v.* Krayenbuhl, 70 Neb. 766, 98 N. W. 44; Hanley *v.* R. Co., 59 W. Va. 419, 53 S. E. 625. See Hayes *v.* Brandt, 80 Ark. 592, 98 S. W. 368.

521-91 Taylor *v.* Taylor, 138 Mich.

658, 101 N. W. 832, where deposition shows deponent eighty years old and unable to travel, it cannot be presumed cause for taking removed.

521-93 See In re Dolbeer, 149 Cal. 227, 86 P. 695; Stone *v.* Co., 36 Colo. 370, 85 P. 327; Carter *v.* Wakeman, 45 Or. 427, 78 P. 362.

522-2 Statute providing facts authorizing reading of deposition may be established by testimony of deponent or officer who took it. Doyle *v.* Co., 124 Mo. App. 504, 101 S. W. 598.

523-6 Separate offer of exhibits unnecessary.—Lee *v.* Nat. Bank (Ia.), 144 N. W. 630.

523-7 Lowrance *v.* Richardson, 23 Okla. 343, 100 P. 529.

Order for taking deposition not vacated because it and affidavit defective. Clark *v.* Phillips, 65 Misc. 166, 119 N. Y. S. 360.

524-10 Answer to stricken interrogatory, not cause for excluding deposition, answer being stricken out. Burnham *v.* Stoutt, 35 Utah 250, 99 P. 1070.

525-14 Bad condition of papers received through mail, not cause for excluding depositions if no indicia of fraud. DeChamps *v.* R. Co., 84 S. C. 358, 66 S. E. 414.

525-15 Pratt, etc. Co. *v.* Davidson, 173 Ala. 667, 55 S. 886; Williams *v.* Smith, 29 R. I. 526, 72 A. 1093.

Similarity of answers to same questions by several deponents, not cause for suppressing depositions. St. Louis, etc. R. Co. *v.* White (Tex. Civ.), 103 S. W. 673.

526-16 Physical and mental competency assumed in absence of extrinsic evidence. Williams *v.* Smith, 29 R. I. 526, 72 A. 1093.

Ex parte deposition of litigant alleged to be competent, inadmissible. Holland *v.* Riggs, 53 Tex. Civ. 367, 116 S. W. 167.

526-17 Lindsay *v.* Bates, 223 Mo. 294, 122 S. W. 682.

Although witness is shown what purports to be a copy of his testimony in another proceeding, says it is true and adopts it as part of his testimony, such copy is hearsay. Bonnie Co. *v.* Perry, 25 Ky. L. R. 1560, 78 S. W. 208.

526-18 Varley Duplex Magnet Co. *v.* Ostheimer, 186 Fed. 171, 108 C. C. A. 303.

Irresponsive answers excluded. Central T. G. Co. *v.* Co., 45 Tex. Civ. 199, 99 S. W. 1144 (uncalled for explanation of letters attached to deposition).

527-20 Cumulative testimony may be received in discretion of court. Williams *v.* Smith, 29 R. I. 526, 72 A. 1093.

Under section 6413, Mo. R. S., 1909, the only ground of objection which the court could sustain when the objection was first made in the court, would be to their competency or relevancy. Objections to the form of question must be made at the time the depositions are taken. Campbell *v.* Hayden, 164 Mo. App. 252, 145 S. W. 103, *cit.* Warlick *v.* Peterson, 58 Mo. 408; Patton *v.* St. Louis & S. F. R. Co., 87 Mo. 117, 56 Am. Rep. 446; Williamson *v.* Brown, 195 Mo. 313, 93 S. W. 791. And see Champlin *v.* R. Co. (R. I.), 82 A. 481.

527-21 Dambmann *v.* R. Co., 55 Misc. 60, 106 N. Y. S. 221.

Motion to suppress is properly denied if part of deposition admissible. Griggs *v.* Corson, 71 Kan. 884, 81 P. 471.

Part may be received to show admissions; adverse party may read relevant omitted parts. Culbertson *v.* Salinger (Ia.), 117 N. W. 6.

528-24 Baltimore & O. R. Co. *v.* Dever, 112 Md. 296, 75 A. 352.

Inadmissibility of testimony on direct examination renders answers on cross-examination inadmissible. Bertenshaw *v.* Laney, 77 Kan. 497, 94 P. 805.

528-25 Cross-examination of witnesses examined in chief by party who took deposition and exhibits produced and identified on cross-examination, admissible. Crites *v.* Woodmen, 84 Neb. 378, 121 N. W. 591.

528-26 Husband and wife. Howard *v.* Strode, 242 Mo. 210, 146 S. W. 792.

530-33 Rogers *v.* Tompkins (Tex. Civ.), 87 S. W. 379; Boyd *v.* Gore, 143 Wis. 531, 128 N. W. 68.

530-36 Central C. & C. Co. *v.* Penny, 173 Fed. 340, 97 C. C. A. 600; Penn. R. Co. *v.* Co., 131 Ill. App. 426; Farmers' & M. Bk. *v.* Wood, 143 Ia. 635, 118 N. W. 282; Cetofonte *v.* Co., 78 N. J. L. 662, 75 A. 913. See In re Van Ness' Will, 78 Misc. 592, 139 N. Y. S. 485.

Excluding part not erroneous if contents otherwise proved. Koch *v.* Wimbrow, 111 Md. 21, 73 A. 896.

531-37 North Alabama Tr. Co. *v.* Daniel, 3 Ala. App. 428, 57 S. 120 (where portions excluded on motion

were not read); Birmingham R., L. & P. Co. *v.* Oden, 164 Ala. 1, 51 S. 240 (as predicate for impeachment); Metteer *v.* Smith, 156 Cal. 572, 105 P. 735; Baker *v.* Temple, 160 Mich. 318, 125 N. W. 63.

Deposition taken from files of another action to be read as admission must be introduced as entirety. Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

531-38 Crotty *v.* R. Co., 169 Fed. 593, 95 C. C. A. 91; Walter *v.* Sperry, 86 Conn. 474, 85 A. 739; Lee *v.* Nat. Bank (Ia.), 144 N. W. 630; Bowen *v.* Durant, 25 N. D. 11, 140 N. W. 728.

Isolated excerpts cannot be read even by cross-examining party. Gussner *v.* Hawks, 13 N. D. 453, 101 N. W. 898.

531-40 Scherer *v.* Everest, 168 Fed. 822, 94 C. C. A. 346. See McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668.

531-41 Central C. & C. Co. *v.* Penny, 173 Fed. 340, 97 C. C. A. 600; Crotty *v.* R. Co., 169 Fed. 593, 95 C. C. A. 91; Scherer *v.* Everest, 168 Fed. 822, 94 C. C. A. 346; Walter *v.* Sperry, 86 Conn. 474, 85 A. 739; Farmers & M.' Bk. *v.* Wood, 143 Ia. 635, 118 N. W. 282; McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668; Birge F. Co. *v.* R. Co., 53 Tex. Civ. 55, 115 S. W. 333. But see Penn. R. Co. *v.* Co., 131 Ill. App. 426.

Adverse party limited to other parts related to same subject. Bacon *v.* Grosse, 165 Cal. 481, 132 P. 1027.

Cross-interrogatories. — Doggett *v.* Greene, 254 Ill. 134, 98 N. E. 219.

532-42 If a large number of depositions must be taken to prove amount of money paid a summary of them may be made for presentation to jury. Fidelity & D. Co. *v.* Co., 133 Ky. 74, 117 S. W. 393.

533-44 Madera R. Co. *v.* Co., 3 Cal. App. 668, 87 P. 27, inadmissible conclusion.

Unanswered interrogatories, not admissible. Murphy *v.* R. Co., 92 Ark. 159, 122 S. W. 636.

533-46 Withdrawal of interrogatories, not objected to, against objection not permitted. Alabama G. S. R. Co. *v.* Hardy, 131 Ga. 238, 62 S. E. 71.

533-47 Giving deposition to jury discretionary. Smith *v.* S., 142 Ala. 14, 39 S. 329, refusal proper where only part admissible.

535-54 Deposition not suppressed because witness refused to answer questions or produce evidence. Scherer *v.* Everest, 168 Fed. 822, 94 C. C. A. 346.

Notes of stenographer may be read. Crandall *v.* Greeves (Mo. App.), 168 S. W. 264.

536-55 McClure *v.* Assn., 141 Ia. 350, 118 N. W. 269; Tomlinson C. Mfg. Co. *v.* Townsend, 153 N. C. 244, 69 S. E. 145. See supra, 360-84; Gt. W., etc. Co. *v.* Shumway, 25 N. D. 268, 141 N. W. 479.

All objections to interrogatories except pertinency should be reserved until the trial. In re Smith, 80 Misc. 628, 142 N. Y. S. 151.

All objection to deposition is waived by party introducing it and making it his own. Freeman *v.* Grashel (Tex. Civ.), 145 S. W. 695.

A motion to suppress part of a deposition was filed on the day of trial. "If it should be treated as a motion to suppress the deposition on account of its form or the manner of its taking, it was filed too late. Rev. Civ. St., art. 2289; Ellis *v.* Lewis, 45 Tex. Civ. 248, 100 S. W. 189, and cases there cited. If the motion was intended as an objection to the admissibility of the deposition as testimony, the objection was premature and otherwise insufficient. The court cannot be called upon at that stage of the trial to pass upon the admissibility of testimony, but should wait till it is offered in evidence. When offered, no objection, except such as attacks the admissibility, can be considered. In sustaining the objection to such testimony at the proper time, the court does not suppress the deposition, but merely excludes that portion to which the objection relates. When the deposition referred to in the motion was later offered in evidence upon this trial, no objection was made. It therefore appears in the record as having been admitted without objection on the part of the appellant. The assignment is without merit." Marshall, etc. R. Co. *v.* Petty (Tex. Civ.), 145 S. W. 1195.

536-56 Tinning *v.* Mumm, 146 Ia. 263, 125 N. W. 203. See Young *v.* Corrigan, 208 Fed. 431.

Stipulation of parties.—St. Louis, I. M. & S. R. Co *v.* Webster, 99 Ark. 265, 137 S. W. 1103.

536-57 See Ralph *v.* Taylor (R. I.), 85 A. 941.

536-58 Wooten *v.* Disc. Co., 7 Ala. App. 351, 62 S. 263; Miss. L. Co. *v.* Smith, 152 Ala. 537, 44 S. 475 (where

interrogatories filed, objections must be made before trial); Greenlaw L. & T. Co. *v.* Chambers, 46 Colo. 587, 105 P. 1091; Tri-City R. Co. *v.* Brennan, 108 Ill. App. 471; Louisville, etc. Co. *v.* Leaf, 40 Ind. App. 214, 79 N. E. 1066 (by statute motion to suppress must be made before trial); Christensen *v.* Peterson (Ia.), 144 N. W. 315; Hardenburg *v.* Roberts, 146 Ia. 696, 125 N. W. 818; Andricus *v.* Co., 28 Ky. L. R. 704, 90 S. W. 233 (objections going to exclusion of deposition); Robertson *v.* Sebastian, 30 Ky. L. R. 883, 99 S. W. 933 (objections to form and manner of taking); Abbott *v.* Co., 112 Mo. App. 550, 87 S. W. 110 (objection to absence of notary when stenographer took answers, waived by failing to object before trial, although no rule of court provided when motions to suppress should be filed); Yearsley *v.* Blake, 85 Neb. 736, 124 N. W. 161; Womack *v.* Gross, 135 N. C. 378, 47 S. E. 464; DeBow *v.* Wollenberg, 52 Or. 404, 96 P. 536; Chicago, etc. Co. *v.* Trout (Tex. Civ.), 152 S. W. 1137. See Standard, etc. Co. *v.* Supply Co., 6 Ala. App. 188, 60 S. 481; Woodward *v.* Tyng & Co. (Md.), 91 A. 166; El Paso R. Co. *v.* Barrett, 46 Tex. Civ. 14, 101 S. W. 1025. In Seamster *v.* S., 74 Ark. 579, 86 S. W. 434, predecessor of prosecuting attorney stipulated defendant might take a deposition before any notary; deposition was taken before a justice of the peace and filed six days before trial. Failure to object before trial, a waiver.

Doctrine of waiver by failure to object cannot be invoked against party offering evidence. Putnam L. & D. Co. *v.* Elser (Tex. Civ.), 159 S. W. 190.

Where statute requires filing before trial, motion to suppress too late when filed with clerk after jury ordered called. Walters *v.* Rock, 18 N. D. 45, 115 N. W. 511.

Objections to form and manner of taking must be made before trial if deposition filed one day previous thereto. This includes all objections except such as question the admissibility of the evidence because of its intrinsic character or the incompetency of the witness. Ellis *v.* Lewis, 45 Tex. Civ. 248, 100 S. W. 189 (*dist.* Sparks *v.* Taylor (Tex. Civ.), 87 S. W. 740); St. Louis R. Co. *v.* Harkey, 39 Tex. Civ. 523, 88 S. W. 506. Objection to questions not part of the interrogatories and to the answers thereto unlawfully appended is not to form or manner of taking. Sparks *v.* Taylor, supra. Want of service of notice of interrogatories goes to manner and form of taking. Texas R. Co. *v.* Murtishaw, 34 Tex. Civ. 447, 78 S. W. 953.

538-59 Canon *v.* Green, 56 Fla. 211, 47 S. 935; Casley *v.* Mitchell, 121 Ia. 96, 96 N. W. 725; Freeman *v.* Brown, 151 N. C. 111, 65 S. E. 743; Missouri, etc. R. Co. *v.* Browning (Tex. Civ.), 166 S. W. 34. See Gress Co. *v.* Berry, 2 Ga. App. 207, 58 S. E. 384.

Before or during first term of court after filing. Missouri, etc. R. Co. *v.* Browning (Tex. Civ.), 166 S. W. 34; Borden *v.* Co. (Tex. Civ.), 99 S. W. 128; W. U. T. Co. *v.* Corso, 28 Ky. L. R. 290, 89 S. W. 212 (court sitting continuously—term, sixty days).

Waiver.—Simons *v.* Cash, 136 Mich. 558, 99 N. W. 754, failure of deposition to show notice of taking and of officer to attach exhibits, waived by non-compliance with statute requiring objections to be filed three days after notice of filing.

Application to criminal cases. — See supra, 536-58.

538-61 King & Co. *v.* Hancock, 114 Va. 596, 77 S. E. 510.

538-62 Nasser *v.* Gaston, 70 Wash. 685, 127 P. 475.

539-63 Stewart *v.* Beggs, 56 Fla. 565, 47 S. 932; Palatine Ins. Co. *v.* Co., 13 N. M. 241, 82 P. 363; Womack *v.* Gross, 135 N. C. 378, 47 S. E. 464 (name of commissioner omitted); Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928.

539-64 *Contra,* Bishop *v.* Hilliard, 227 Ill. 382, 81 N. E. 403; Sheibley *v.* Ashton, 130 Ia. 195, 106 N. W. 618. See Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928. Waiver of irregularities results from stipulation submitting case on the deposition. Steele *v.* Crabtree (Ia.), 120 N. W. 720.

540-66 Cohen *v.* Reichman (Ind. App.), 102 N. E. 284; Cayouette *v.* Co., 136 Wis. 634, 118 N. W. 204.

540-67 Cumberland G. Mfg. Co. *v.* De Witt, 120 Md. 381, 87 A. 927.

541-71 New *v.* Young, 144 Ala. 420, 39 S. 201 (by cross-examination); Redmond *v.* R. Co., 225 Mo. 721, 126 S. W. 159. *Contra,* Knickerbocker I. Co. *v.* Gray, 165 Ind. 140, 72 N. E. 869.

Knowledge of disqualification essential to waiver or estoppel and cannot be presumed though commissioner member

of firm which appeared as attorneys of record. Bledsoe *v.* Jones, 145 Ala. 685, 40 S. 111.

541-72 Bledsoe *v.* Jones, supra (ignorance of grounds for suppression excuses failure to move promptly); Huntington C. L. Co. *v.* Co., 44 Ind. App. 84, 86 N. E. 857; Louisville, etc. Co. *v.* Leaf, 40 Ind. App. 214, 79 N. E. 1066.

542-75 Kelly *v.* Assn., 2 Cal. App. 460, 84 P. 321; Real Estate T. Co. *v.* Co., 102 Md. 41, 61 A. 228 (statute); Ivey *v.* Mills, 143 N. C. 189, 55 S. E. 613; Williams *v.* Smith, 29 R. I. 562, 72 A. 1093 (use of deposition on trial); Babcock *v.* Ormsby, 18 S. D. 358, 100 N. W. 759 (failure to name witness, waived).

543-81 Kelly *v.* Assn., 2 Cal. App. 460, 84 P. 321; Koedt *v.* Josephsen, 158 Ill. App. 388; McClure *v.* Assn., 141 Ia. 350, 118 N. W. 269 (after agreement); El Paso R. Co. *v.* Barrett, 46 Tex. Civ. 14, 101 S. W. 1025.

544-84 Canon *v.* Green, 56 Fla. 211, 47 S. 935.

545-85 Toronto I. E. Assn. *v.* Houston, 9 Ont. L. R. 527, master no power to strike out or modify interrogatories.

545-86 Floral C. Co. *v.* Dillon, 83 Conn. 65, 75 A. 82; Redmond *v.* R. Co., 225 Mo. 721, 126 S. W. 159; Williamson *v.* Brown, 195 Mo. 313, 93 S. W. 791; Campbell *v.* Hayden, 164 Mo. App. 252, 145 S. W. 103.

546-87 Technical objections to interrogatories disregarded if answers competent. Bryant *v.* Woodmen, 86 Neb. 372, 125 N. W. 621.

546-88 Crosswhite *v.* Brew. Co. (Ala. App.), 65 S. 298; Walker *v.* Warner, 31 App. Cas. (D. C.) 76; Benedict *v.* Dakin, 243 Ill. 384, 90 N. E. 712; Illinois R. Co. *v.* Panebiango, 227 Ill. 170, 81 N. E. 53; Smith *v.* Swigart, 149 Ill. App. 21; St. Louis, etc. R. Co. *v.* Adams, 55 Tex. Civ. 245, 118 S. W. 1155.

547-89 Sheibley *v.* Ashton, 130 Ia. 195, 106 N. W. 618 (taken during term time).

Objection to postponement waived where five days' notice of taking given, and agent of party notified made no objection. Missouri, etc. R. Co. *v.* Williams, 43 Tex. Civ. 549, 96 S. W. 1087.

547-90 Breeden *v.* Martens, 21 S. D. 357, 112 N. W. 960.

547-92 Attendance at taking and failure to object is waiver as to form of testimony. Paterson *v.* R. Co., 95 Minn. 57, 103 N. W. 621.

547-96 McIlwain *v.* Gaebe, 128 Ill. App. 209 (attaching exhibit after close of deposition); Oliver *v.* Co., 45 Or. 77, 76 P. 1086.

549-2 Olson *v.* Brundage, 139 Ill. App. 559.

550-5 Groot *v.* R. Co., 34 Utah 152, 96 P. 1019.

550-6 Sealy *v.* Williston (Ky.), 117 S. W. 959.

550-10 Columbus R. Co. *v.* Patterson, 143 Fed. 245, 73 C. C. A. 603 (too late on appeal); S. *v.* Vanella, 40 Mont. 326, 106 P. 364.

Objection waived when not interposed till after reading (Schlag *v.* Gooding, 98 Minn. 261, 108 N. W. 11), or when not specific. Hetzel *v.* Easterly, 96 App. Div. 517, 89 N. Y. S. 154.

551-14 Bentley *v.* Bentley, 72 Neb. 803, 101 N. W. 976.

Testimony taken on cross-examination after objection to competency is not competent even on behalf of cross-examining party where examination in chief excluded. Bentley *v.* Bentley, supra.

552-15 St. Louis, etc. R. Co. *v.* Sizemore, 53 Tex. Civ. 491, 116 S. W. 403

552-16 Canon *v.* Green, 56 Fla. 211, 47 S. 935.

552-18 Robertson *v.* Sebastian, 30 Ky. L. R. 883, 99 S. W. 933.

553-21 Wooten *v.* Disc. Co., 7 Ala. App. 351, 62 S. 263; Miss. L. Co. *v.* Smith, 152 Ala. 537, 44 S. 475; Torreyson *v.* R. Co., 144 Mo. App. 626, 129 S. W. 409; Kolp *v.* Brazer (Tex. Civ.), 161 S. W. 899; Henderson *v.* Co. (Tex. Civ.), 128 S. W. 671. See Williams *v.* Smith, 29 R. I. 562, 72 A. 1093.

554-23 Not suppressed because answers not full if deponent did not try to evade giving full answers, remedy by further deposition. W. U. T. Co. *v.* Douglass (Tex. Civ.), 124 S. W. 488.

554-26 Miss. L. Co. *v.* Smith, 152 Ala. 537, 44 S. 475; Williams *v.* Co., 126 Ill. App. 109.

554-28 Carville *v.* Franklin, 164 Ala. 543, 51 S. 396; Love *v.* McElroy, 106 Ill. App. 294; Illinois R. Co. *v.* Panebiango, 227 Ill. 170, 81 N. E. 53; In re Schaffner's Est. (Kan.), 141 P. 251; Robertson *v.* Sebastian, 30 Ky. L. R. 883, 99 S. W. 933; Raymond *v.* Edel-

brock, 15 N. D. 231, 107 N. W. 194. See infra, "Striking Out Testimony," 162-10. But where, after notice order is obtained for deposition and production of letter, which order is complied with, introduction of letter cannot be objected to as privileged. Bankers' Assn. *v.* Nachod, 120 App. Div. 732, 105 N. Y. S. 773; Marshall, etc. R. Co. *v.* Petty (Tex. Civ.), 145 S. W. 1195.

After reading.—Objection to a responsive answer must be made before it is read in evidence. De Arellanes *v.* Arellanes, 151 Cal. 443, 90 P. 1059. It will not afterwards be stricken out on motion because answer to cross-interrogatories shows it to be based on hearsay. Kirby L. Co. *v.* Chambers, 41 Tex. Civ. 632, 95 S. W. 607. *Comp.* Norman P. S. Co. *v.* Ford, 77 Conn. 461, 59 A. 499.

Objection by party offering. — See supra, 494-1.

556-30 Mundt *v.* Bk., 35 Utah 90, 99 P. 454.

556-31 Daugharty *v.* Drawdy, 134 Ga. 650, 68 S. E. 472.

556-32 In re Smith, 80 Misc. 628, 142 N. Y. S. 151.

Answers to cross-interrogatories may not be withdrawn for technical reasons. Fairbanks *v.* Stites (Tex. Civ.), 125 S. W. 636.

556-33 Thomas *v.* Boyd, 108 Va. 584, 62 S. E. 346.

557-35 It is proper to overrule a motion to suppress made after jury sworn, and reserve ruling until deposition offered. Hilt *v.* Griffin, 77 Kan. 783, 90 P. 808.

557-36 S. *v.* Henecken, 174 Fed. 624, 98 C. C. A. 378. See Norman P. S. Co. *v.* Ford, 77 Conn. 461, 59 A. 499.

557-37 Canon *v.* Green, 56 Fla. 211, 47 S. 935; Ivey *v.* Mills, 143 N. C. 189, 55 S. E. 613.

558-38 Need not be made before trial. Epstein *v.* R. Co., 143 Mo. App. 135, 122 S. W. 366, statute.

558-39 Williamson *v.* Brown, 195 Mo. 313, 93 S. W. 791 (objections at taking must be renewed at trial); Armstrong *v.* Coal Co., 67 W. Va. 589, 69 S. E. 195.

558-42 Waiver of irregularity in taking is confined to action in which it was made. Reed *v.* Gold, 102 Va. 37, 45 S. E. 868.

559-44 Sealy *v.* Williston (Ky.), 117 S. W. 959.

In criminal case failure to object at trial to introduction of depositions not included within stipulations, not waiver of ground of objection. Rex *v.* Brooks, 11 Ont. L. R. (Can.) 525.

561-46 Abbott *v.* Co., 112 Mo. App. 550, 87 S. W. 110; Oliver *v.* Co., 45 Or. 77, 76 P. 1086; Babcock *v.* Ormsby, 18 S. D. 358, 100 N. W. 759 (for defect in notice); Houston, etc. R. Co. *v.* Lacy (Tex. Civ.), 153 S. W. 414; Hord *v.* R. Co., 33 Tex. Civ. 163, 76 S. W. 227 (irregularity in taking and return); Groot *v.* R. Co., 34 Utah 152, 96 P. 1019. See Missouri, etc. R. Co. *v.* Browning (Tex. Civ.), 166 S. W. 34.

Mistake in reducing to writing is objected to by motion to suppress and by introducing deponent at trial to correct statements. Hord *v.* R. Co., 33 Tex. Civ. 163, 76 S. W. 727.

562-49 West Dis. Co. *v.* Co., 152 Fed. 1023; Crosswhite *v.* Brew. Co. (Ala. App.), 65 S. 298; Lucy *v.* Davis, 163 Cal. 611, 126 P. 490; Short *v.* Frink, 151 Cal. 83, 90 P. 200 (rule same as where witness testifies viva voce); Frey *v.* Stangl, 148 Ia. 522, 125 N. W. 868 (part of answer); S. *v.* Simmons, 74 Kan. 799, 88 P. 57 (objectionable portion must be pointed out); Louisville & C. P. Co. *v.* Bottorff, 25 Ky. L. R. 1324, 77 S. W. 920; Hilleboe *v.* Warner, 17 N. D. 594, 118 N. W. 1047; Ueland *v.* Dealy, 11 N. D. 529, 89 N. W. 325; Ward *v.* Cameron, 97 Tex. 466, 80 S. W. 69.

563-51 P. *v.* Mullaley, 16 Cal. App. 44, 116 P. 88.

563-52 King *v.* Green, 7 Cal. App. 473, 94 P. 777.

563-55 Oliver *v.* Co., 45 Or. 77, 76 P. 1086.

564-58 S. *v.* Jackson, 111 La. 343, 35 S. 593.

564-62 Potomac B. Wks. *v.* Barber, 103 Md. 509, 63 A. 1068.

564-63 Texas R. Co. *v.* Coutourie, 135 Fed. 465, 68 C. C. A. 177.

566-65 See Louisville & C. P. Co. *v.* Bottorff, 25 Ky. L. R. 1324, 77 S. W. 920.

566-67 Objection to each question and answer amounts only to a general objection, and is properly overruled if deposition contains some legal evidence. Hammond *v.* Vetsburg, 56 Fla. 369, 48 S. 419.

566-68 Williams *v.* Smith, 29 R. I. 562, 72 A. 1093.

567-69 **Time of filing.**—See supra, 536-58, 538-59; White *v.* R. Co., 123 Ga. 353, 51 S. E. 411 (compliance waived where counsel admitted the irregularities at trial); Ostenson *v.* Severson, 126 Ia. 197, 101 N. W. 789 (objections not filed, waived); Robertson *v.* Sebastian, 30 Ky. L. R. 883, 99 S. W. 933 (all objections to form and manner of taking); Andricus *v.* Co., 28 Ky. L. R. 704, 90 S. W. 233; W. U. T. Co. *v.* Corso, 28 Ky. L. R. 290, 89 S. W. 212; Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928; Borden *v.* Co. (Tex. Civ.), 99 S. W. 128 (in writing).

567-70 Andricus *v.* Co., W. U. T. Co. *v.* Corso, supra.

567-72 White *v.* R. Co., 123 Ga. 353, 51 S. E. 411.

DESCENT AND DISTRIBUTION.

Recitals in deed, 577-6; *Recognition in will,* 578-8; *Pretermitted child,* 579-18.

576-1 Hansen *v.* Owens, 132 Ga. 648, 64 S. E. 800. See Ironton F. B. Co. *v.* Tucker, 26 Ky. L. R. 532, 82 S. W. 241.

Devolution statutory.—National Safe Dep. Co. *v.* Stead, 250 Ill. 584, 95 N. E. 973.

576-2 Gayheart *v.* Sibley, 23 Ky. L. R. 2307, 66 S. W. 1041. See Kosmerl *v.* Mueller, 91 Minn. 196, 97 N. W. 660.

Widow claiming property must prove marriage to decedent. In re Davis, 204 Pa. 602, 54 A. 475.

Consanguinity.—Suman *v.* Harvey, 114 Md. 241, 79 A. 197.

576-3 See Houston *v.* McKinney, 54 Fla. 600, 45 S. 480.

576-4 McKernan *v.* Co., 86 N. Y. S. 191.

Brothers and children of deceased brothers are not, prima facie, heirs. Sorenson *v.* Sorenson, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

577-5 See Howard *v.* Evans, 24 App. Cas. (D. C.) 127; Gayheart *v.* Sibley, 23 Ky. L. R. 2307, 66 S. W. 1041.

Burden of showing intestacy is upon him who alleges it. Boye *v.* Andrews, 10 Cal. App. 494, 102 P. 551.

577-6 Ford *v.* Ford, 117 Ill. App. 502. See Mace *v.* Duffy, 39 Wash. 597, 81 P. 1053.

Recitals in deed incompetent against strangers. Mace *v.* Duffy, supra; Lohse *v.* Burch, 42 Wash. 156, 84 P. 722.

577-7 Morse *v.* Pickler, 28 S. D. 612, 134 N. W. 809.

Mother of claimant, divorced from his deceased father, is competent to establish his heirship. Lyon *v.* Lash, 79 Kan. 342, 99 P. 598.

578 **Impossibility of issue** not presumed. Morris *v.* Boyd (Ark.), 162 S. W. 69.

578-8 See Krekel *v.* Guenzler (Ky.), 124 S. W. 848.

Recognition in will as son of testator not sufficient proof of relationship. In re Wharton, 218 Pa. 296, 67 A. 414.

578-9 Claimant may testify who were his parents. Hubatka *v,* Meyerhofer, 79 N. J. L. 264, 75 A. 454.

General and notorious recognition of an illegitimate child, required by statute, not shown by neighborhood rumor or report. Murphy *v.* Murphy, 146 Ia. 255, 125 N. W. 191.

578-10 Close *v.* Co., 195 N. Y. 92, 87 N. E. 1005; Modern Woodmen *v.* Ghromley (Okla.), 139 P. 306.

Competency of heirs to inherit not presumed. In re Clarke, 131 App. Div. 688, 116 N. Y. S. 101.

After lapse of long period, no claim having been made, presumed that decedent died without issue. Barson *v.* Mulligan, 191 N. Y. 306, 84 N. E. 75, *rev.* 120 App. Div. 879, 105 N. Y. S. 1106; McNulty *v.* Mitchell, 41 Misc. 293, 84 N. Y. S. 89.

Presumption of regularity as to judicial proceedings for adoption of person as heir. In re Marchant, 121 Wis. 526, 99 N. W. 320.

578-13 De Gentile *v.* Co., 130 La. 705, 58 S. 517; Barson *v.* Mulligan, 191 N. Y. 306, 84 N. E. 75; Ferry *v.* Sampson, 112 N. Y. 415, 20 N. E. 387; Chase *v.* Woodruff, 133 Wis. 555, 113 N. W. 973. See Johnson *v.* Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748.

578-14 Stuart *v.* Harper (Tex. Civ.), 143 S. W. 712.

Claim of relationship repudiated by decedent must be established by clear evidence. In re Dundas, 213 Pa. 628, 63 A. 45.

Preponderance of evidence sufficient. Smith *v.* Smith, 140 Wis. 599, 123 N. W. 146.

Disqualification of heir must be shown by party alleging it. Brown's Est., 36 Pa. C. C. 13.

579-16 In re Clarke, 131 App. Div. 688, 116 N. Y. S. 101.

579-18 Burden on pretermitted child to show his omission from will not intentional. Brown *v.* Brown, 77 Neb. 125, 108 N. W. 180.

581-28 In a collateral attack presumption in favor of validity of probate proceedings. Berryman *v.* Biddle, 48 Tex. Civ. 624, 107 S. W. 922.

582-31 See Nelson *v.* Nelson, 29 Ky. L. R. 885, 96 S. W. 794; Rylie *v.* Stammire (Tex. Civ.), 77 S. W. 626.

583-35 Failure to deny under oath the execution of administrator's deed does not admit validity of court proceedings. O'Keefe *v.* Behrens, 73 Kan. 469, 85 P. 555.

584-40 Joining in a sale of land, the certificate of title to which has been assigned by their ancestor, is evidence that grantors inherited it from such ancestor and tended to estop them from denying his right to assign the certificate. Vann *v.* Denson, 56 Tex. Civ. 220, 120 S. W. 1020.

585-44 Appeal of Melony, 78 Conn. 334, 62 A. 151; Ireland *v.* Dyer, 133 Ga. 851, 67 S. E. 195; Brennaman *v.* Schell, 212 Ill. 356, 72 N. E. 412; Baum *v.* Palmer, 165 Ind. 513, 76 N. E. 108; Plowman *v.* Nicholson, 81 Kan. 210, 106 P. 279; In re Bresler's Est., 155 Mich. 567, 119 N. W. 1104; In re Reinoehl, 212 Pa. 359, 61 A. 943. See also Cotton *v.* Citizens' Bk., 97 Ark. 568, 135 S. W. 340; Wentworth *v.* Wentworth, 75 N. H. 547, 78 A. 646; Tart *v.* Tart, 154 N. C. 502, 70 S. E. 929.

585-45 Elliott *v.* Leslie, 30 Ky. L. R. 743, 99 S. W. 619.

585-46 Re Esmond's Est., 154 Ill. App. 357; Lord *v.* Lord, 127 La. 699, 53 S. 961.

586-49 Cotton *v.* Citizens' Bk., 97 Ark. 568, 135 S. W. 340.

587-51 Mossestad *v.* Gunderson, 140 Ia. 290, 118 N. W. 374; Plowman *v.* Nicholson, 81 Kan. 210, 106 P. 279; Ex parte Griffin, 142 N. C. 116, 54 S. E. 1007; Morrison *v.* Morrison, 43 Tex. Civ. 339, 96 S. W. 100.

588-53 McCabe *v.* Brosenne, 107 Md. 490, 69 A. 259; Strode *v.* Beall, 105 Mo. App. 495, 79 S. W. 1019; In re Robinson, 45 Misc. 551, 92 N. Y. S. 967; Ex parte Griffin, supra; Heyward *v.* Middleton, 65 S. C. 493, 43 S. E. 956; Morrison *v.* Morrison, supra.

As a basis for this presumption it must be shown that the child received the money for its own use. Stephens *v.* Smith, 127 Mo. App. 18, 106 S. W. 533.

589-55 Ireland *v.* Dyer, 133 Ga. 851, 67 S. E. 195; McCabe *v.* Brosenne, 107 Md. 490, 69 A. 259. See In re Bresler's Est., 155 Mich. 567, 119 N. W. 1104.

Conveyance to both son-in-law and daughter presumed an advancement. Crafton *v.* Inge, 30 Ky. L. R. 313, 98 S. W. 325.

590 Advancement not presumed where husband purchases property in his own name with his wife's money. Johnson *v.* Foust (Ia.), 139 N. W. 451.

590-60 See Hesler *v.* Cady, 79 Neb. 691, 113 N. W. 147.

590-63 *Contra*, Hill *v.* Hill, 29 Ky. L. R. 201, 92 S. W. 924.

591-65 Baum *v.* Palmer, 165 Ind. 513 76 N. E. 108; Lodge *v.* Fitch, 72 Neb. 652, 101 N. W. 338. See Schmidt *v.* Schmidt, 123 Wis. 295, 101 N. W. 678.

Contrary intention expressed in note. In re Esmond's Est., 154 Ill. App. 357.

592-66 See Baum *v.* Palmer, 165 Ind. 513, 76 N. E. 108.

592-67 Hicks *v.* Hicks, 9 O. C. C. (N. S.) 413.

593-69 Patton *v.* Walker (Ky.), 118 S. W. 312.

594-70 Recital that payment is made as an advancement not conclusive. Schweitzer *v.* Schweitzer, 26 Ky. L. R. 888, 82 S. W. 625.

594-71 Lowe *v.* Wiseman, 46 Ind. App. 405, 91 N. E. 364; Derry *v.* Fielder, 216 Mo. 176, 115 S. W. 412; Schlicher *v.* Keeler (N. J.), 62 A. 4; Shehy *v.* Cunningham, 81 O. St. 289, 90 N. E. 805; Seed *v.* Jennings, 47 Or. 464, 83 P. 872.

Contra.—Otherwise in absence of statute. In re Kennedy's Est., 154 Ia. 460, 135 N. W. 53.

594-72 *Comp.* Cowden *v.* Cowden, 7 O. C. C. (N. S.) 277.

594-73 Sewell *v.* Everett, 57 Fla. 529, 49 S. 187.

594-76 White *v.* White, 64 W. Va. 30, 60 S. E. 885.

595-77 Stauffer *v.* Martin, 43 Ind. App. 675, 88 N. E. 363 (recital of money consideration imports payment); Crafton *v.* Inge, 30 Ky. L. R. 313, 98 S. W. 325.

595-78 Ex parte Griffin, 142 N. C. 116, 54 S. E. 1007.

598-89 Smith *v.* Smith, 144 Ill. 299,

33 N. E. 35; Dorman *v.* Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. 210; Brennaman *v.* Schell, 212 Ill. 356, 72 N. E. 412 (same rule where mother pays purchase price and land is conveyed to daughter); Moore *v.* Scruggs, 131 Ia. 692, 109 N. W. 205 (no presumption where title is taken by child without parents' knowledge); Nelson *v.* Nelson, 29 Ky. L. R. 885, 96 S. W. 794; Herbert *v.* Alvord, 75 N. J. Eq. 428, 72 A. 946.

60-96 Brennaman *v.* Schell, supra.

60-98 McCabe *v.* Brosenne, 107 Md. 490, 69 A. 259.

60-1 Herbert *v.* Alvord, supra.

60-2 Subsequent transfer to parent destroys presumption. Stark *v.* Burke, 131 Ia. 684, 109 N. W. 206.

60-9 Herbert *v.* Alvord, 75 N. J. Eq. 428, 72 A. 946.

Antecedent or contemporaneous acts or facts, or those occurring so soon after purchase as to be fairly considered parts of the transaction, are admissible. Brennaman *v.* Schell, 212 Ill. 356, 72 N. E. 412.

60-12 Hill *v.* Hill, 29 Ky. L. R. 201, 92 S. W. 924.

60-16 Note given by son-in-law a receipt of an advancement to decedent's daughter. Strode *v.* Beall, 105 Mo. App. 495, 79 S. W. 1019.

60-21 In re Bresler's Est., 155 Mich. 567, 119 N. W. 1104.

60-23 See Lodge *v.* Fitch, 72 Neb. 652, 101 N. W. 338.

60-24 Charge upon decedent's book, in form of loan, insufficient to show advancement. Ludington *v.* Patton, 121 Wis. 649, 99 N. W. 614.

60-26 Schmidt *v.* Schmidt, 123 Wis. 295, 101 N. W. 678.

60-30 Inadmissible if made in wife's absence. Herbert *v.* Alvord, 75 N. J. Eq. 428, 72 A. 946.

60-31 McCabe *v.* Brosenne, 107 Md. 490, 69 A. 259; In re Reinoehl, 212 Pa. 359, 61 A. 943.

61-32 See Arthur *v.* Arthur, 143 Wis. 126, 126 N. W. 550, under statute.

62-33 Strode *v.* Beall, 105 Mo. App. 495, 79 S. W. 1095; Hicks *v.* Hicks, 9 O. C. C. (N. S.) 413.

62-35 Elliott *v.* Co., 243 Ill. 614, 90 N. E. 1104.

63-38 Johnson *v.* Cole, 178 N. Y. 364, 70 N. E. 873.

63-39 Appeal of Melony, 78 Conn. 334, 62 A. 151 (inadmissible to show change of loan into advancement); Lowe *v.* Wiseman, 46 Ind. App. 405, 91 N. E. 364 (remoteness); Stauffer *v.* Martin, 43 Ind. App. 675, 88 N. E. 363 (rule stated without the qualifications in the text); Hill *v.* Hill, 29 Ky. L. R. 201, 92 S. W. 924.

Contra, where declarant executed series of conveyances in pursuance of general plan. Whatever was said in delivering one deed bore upon his purpose with respect to deeds previously delivered. Plowman *v.* Nicholson, 81 Kan. 210, 106 P. 279. See Sewell *v.* Everett, 57 Fla. 529, 49 S. 187.

64-40 Herbert *v.* Alvord, 75 N. J. Eq. 428, 72 A. 946, unless part of the res gestae.

65-46 McCabe *v.* Brosenne, 107 Md. 490, 69 A. 259.

66-48 Stephens *v.* Smith, 127 Mo. App. 18, 106 S. W. 533; In re Reinoehl, 212 Pa. 359, 61 A. 943; Heyward *v.* Middleton, 65 S. C. 493, 43 S. E. 956.

67-51 Schlicher *v.* Keeler (N. J.), 62 A. 4 (ineffective attempt by intestate to dispose of residue of property); White *v.* White, 64 W. Va. 30, 60 S. E. 885.

67-52 Hickey *v.* Davidson, 129 Ia. 384, 105 N. W. 678, to show change from debt to advancement.

70-59 In re Lear's Est., 146 Mo. App. 642, 124 S. W. 592 (book entries conclusive if testator so directs in his will); Hoak *v.* Hoak, 5 Watts (Pa.) 80.

Under Maine statute a written agreement as to value is conclusive upon that question. Hilton *v.* Hilton, 103 Me. 92, 68 A. 595.

70-60 Statement in will conclusive. Schell's Est., 15 Pa. C. C. 372, 3 Pa. Dist. 738; In re Aird's Est., 12 Ch. Div. 291; Younce *v.* Flory, 77 O. St. 71, 83 N. E. 305. See In re Kelsey, 74 L. J. Ch. Div. 701.

70-61 By statute, in Iowa, the value of an advancement is to be estimated as of the time decedent died. Eastwood *v.* Crane, 125 Ia. 707, 101 N. W. 481.

Value computed as of time advancement made. Ward *v.* Johnson, 30 Ky. L. R. 240, 417, 97 S. W. 1110.

Recital of purpose to equalize portions of children, is conclusive as to equalization. Darby *v.* Darby, 118 La. 328, 42 S. 953. But see Boblett *v.* Barlow, 26 Ky. L. R. 1076, 83 S. W. 145.

Extent of property conveyed by husband to wife is immaterial to overcome presumption in favor of advancement. Herbert *v.* Alvord 75 N. J. Eq. 428, 72 A. 946.

621-62 Lord *v.* Lord, 127 La. 699, 53 S. 961. *Comp.* Tart *v.* Tart, 154 N. C. 502, 70 S. E. 929.

621-64 See In re Park, 4 Pa. C. C. 560.

622-65 Cowden *v.* Cowden, 7 O. C. C. (N. S.) 277.

622-66 Stephens *v.* Smith, 127 Mo. App. 18, 106 S. W. 533.

622-67 Dorman *v.* Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. 210.

622-68 But see Herbert *v.* Alvord, 75 N. J. Eq. 428, 72 A. 946.

622-70 Lodge *v.* Fitch, 72 Neb. 652, 101 N. W. 338.

623-72 Elliott *v.* Co., 243 Ill. 614, 90 N. E. 1104; Boden *v.* Mier, 71 Neb. 191, 98 N. W. 701; Schmidt *v.* Schmidt, 123 Wis. 295, 101 N. W. 678; Ludington *v.* Patton, 121 Wis. 649, 99 N. W. 614.

DETECTIVES AND INFORMERS.

626-1 Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181.

The fact that the witnesses were detectives and had resorted to infamous means to procure evidence goes only to their credibility. Boyle *v.* S. (Ark.), 161 S. W. 1049.

Weight inspectors. — No presumption arises against the credibility of weight inspectors from the mere fact that they are such. New York *v.* Gurowitz, 78 Misc. 511, 138 N. Y. S. 616.

Evidence competent notwithstanding occupation. Venable *v.* Atlanta, 8 Ga. App. 575, 70 S. E. 28.

Post-office inspectors not detectives, and it is not error to refuse to give instructions cautioning jury against testimony of detectives. Lorenz *v.* U. S., 24 App. Cas. (D. C.) 337.

626-2 Clark *v.* S., 5 Ga. App. 605, 63 S. E. 606.

626-3 Walker *v.* S. (Ala. App.), 64 S. 528; McGehee *v.* S., 171 Ala. 19, 55 S. 159; Elam *v.* Majestic, etc. Co., 155 Ill. App. 375; S. *v.* Wakely, 43 Mont. 427, 117 P. 95; Stewart *v.* Stewart, 155 N. C. 341, 71 S. E. 308. Reference to previous testimony. Kemper *v.* S., 63 Tex Cr. 1, 138 S. W. 1025.

The weight to be given to the testimony of a detective, fully cross examined and corroborated and whose evidence the court instructed the jury to scrutinize carefully is for the jury to determine. S. *v.* Emmons, 63 Or. 535, 127 P. 791.

Where compensation of the detective not dependent upon conviction it is not error to refuse to allow cross-examination as to the amount thereof. White *v.* S., 121 Ga. 191, 48 S. E. 941; Clark *v.* S., 5 Ga. App. 605, 63 S. E. 606. See Jaynes *v.* P., 44 Colo. 535, 99 P. 325, discretionary rule of practice.

628-12 Lynn *v.* S., 140 Ga. 387, 79 S. E. 29; P. *v.* Newbold, 260 Ill. 196, 103 N. E. 69, *rev.* 178 Ill. App. 63; P. Gardt, 175 Ill. App. 80, *affd.* 258 Ill. 468, 101 N. E. 687.

Such an instruction is argumentative. Harmon *v.* S., 8 Ala. App. 311, 62 S. 438.

General remarks of a court in an instruction as to private detectives, law abiding people and those inclined to break the laws are argumentative and error. P. *v.* Dupree, 175 Mich. 632, 141 N. W. 672.

629-14 See Clement *v.* Stratton, 136 App. Div. 83, 120 N. Y. S. 624.

629-17 S. *v.* Kimmel, 156 Mo. App. 461, 137 S. W. 329; Looper *v.* S. (Tex. Cr.), 167 S. W. 342. *Comp.* P. *v.* Ruef, 14 Cal. App. 576, 114 P. 48, 54.

Purpose of question to appear. S. *v.* Panelli, 81 N. J. L. 346, 79 A. 1064.

630-19 S. *v.* Spiker, 88 Kan. 644, 129 P. 195; S. *v.* O'Brien, 35 Mont. 482, 90 P. 514; Albright *v.* S. (Tex. Cr.), 164 S. W. 1001; Marmer *v.* S., 47 Tex. Cr. 424, 84 S. W. 830; Terry *v.* S., 46 Tex. Cr. 75, 79 S. W. 320. And see S. *v.* Wright, 152 Mo. App. 510, 133 S. W. 664.

Courts will hesitate to grant an injunction, on testimony of detectives, but where it is impossible to obtain the testimony of disinterested persons such testimony should be properly weighed. Hennessy *v.* Assn., 212 Fed. 308.

630-21 Newton *v.* S., 62 Tex. Cr. 622, 138 S. W. 708.

630-23 S. *v.* Wakely, 43 Mont. 427, 117 P. 95.

Testimony of witnesses acting as decoys is competent, and conviction on this kind of evidence will be sustained. S. *v.* Tudor, 47 Mont. 185, 131 P. 632;

In re Wellcome, 23 Mont. 450, 59 P. 445.

631-24 P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364; Porter *v.* P., 31 Colo. 508, 74 P. 879; S. *v.* Kimmel, 156 Mo. App. 461, 137 S. W. 329; S. *v.* Smith, 33 Nev. 438, 117 P. 19; S. *v.* Douglas, 26 Nev. 196, 65 P. 802; S. *v.* Hoxsie, 15 R. I. 1, 22 A. 1059, 2 Am. St. 838; Sanchez *v.* S., 48 Tex. Cr. 591, 90 S. W. 641. See also C. *v.* Wasson, 42 Pa. Super. 38.

631-25 P. *v.* Bunkers, 2 Cal. App. 197, 84 P. 364 (bribery); S. *v.* Smith, 33 Nev. 438, 117 P. 19.

Necessity for corroboration.—Deary *v.* S., 62 Tex. Cr. 352, 137 S. W. 699.

631-28 C. *v.* Wasson, 42 Pa. Super. 38.

Joint indictment.—P. *v.* Kosta, 14 Cal. App. 696, 112 P. 907; Hays *v.* S., 9 Ga. App. 829, 72 S. E. 285.

DIAGRAMS

635-1 **X-ray photograph.**—Dean *v.* Wabash R. Co., 229 Mo. 425, 129 S. W. 953.

635-2 Hisler *v.* S., 52 Fla. 30, 42 S. 692.

635-3 Garrison *v.* Glass, 139 Ala. 512, 36 S. 725; White *v.* R. Co., 6 Penne. (Del.) 105, 63 A. 931; Austin *v.* Whitcher, 135 Ia. 733, 110 N. W. 910.

It is error to receive in evidence an unverified plat representing the exact location of moving objects in the street at the precise time plaintiff was struck by defendant's automobile. Strasser *v.* Stabeck, 112 Minn. 90, 127 N. W. 384.

635-6 Koon *v.* R. Co., 69 S. C. 101, 48 S. E. 86.

635-7 Atlanta R. Co. *v.* R. Co., 125 Ga. 529, 54 S. E. 736, blue print plat admissible.

635-8 Ragland *v.* S., 71 Ark. 65, 70 S. W. 1039; S. *v.* Cummings, 189 Mo. 626, 88 S. W. 706; Marcy *v.* Parker, 78 Vt. 73, 62 A. 19.

635-11 Ty. *v.* Emilio, 14 N. M. 147, 89 P. 239; S. *v.* Remington, 50 Or. 99, 91 P. 473. See Corning *v.* Dollmeyer, 123 Ill. App. 188; Strasser *v.* Stabeck, 112 Minn. 90, 127 N. W. 384.

636-15 Chicago, etc. R. Co. *v.* Pettit, 111 Ill. App. 172; S. *v.* Remington, supra.

Recitals on a diagram which jury might regard as evidence render it inadmissible. Corning *v.* Dollmeyer, supra.

636-20 Pauly *v.* Broadnax, 157 Cal. 386, 108 P. 271; Rehfuss *v.* Hill, 243 Ill. 140, 90 N. E. 187; Ayres *v.* Patton, 51 Tex. Civ. 186, 111 S. W. 1079; Hanson *v.* R. Co., 75 Wash. 342, 134 P. 1058; Spokane *v.* Patterson, 46 Wash. 93, 89 P. 402, 8 L. R. A. (N. S.) 1104; Franklin *v.* Engel, 34 Wash. 480, 76 P. 84.

Diagram drawn on floor.—St. Louis, etc. R. Co. *v.* Long (Okla.), 137 P. 1156.

County surveyor may introduce and explain a diagram of the premises where homicide occurred. P. *v.* Watson, 165 Cal. 645, 133 P. 298.

636-21 Reinke *v.* Sanitary Dist., 260 Ill. 380, 103 N. E. 236.

And to enable the plaintiff to testify more intelligibly and the jury to better understand the subject-matter about which the witness was testifying. Cubbage *v.* Estate of Conrad Youngerman, 155 Ia. 39, 134 N. W. 1074.

A physician "called to give medical attention immediately after the shooting, illustrated his testimony with a diagram which he had made of the man's body and the location of the wounds, and at the end of the testimony this diagram was introduced in evidence over defendant's objection. We can see no well-founded objection to this, as the diagram was a part of Dr. Russell's testimony, and was authenticated by him. It was not introduced as independent testimony, but merely as a part of the testimony of the witness, and it was competent for the purpose of showing the precise location of the wounds." Hankins *v.* S., 103 Ark. 28, 145 S. W. 524.

637-22 Smith *v.* Sanitary Dist., 260 Ill. 453, 103 N. E. 254; S. *v.* Finch, 54 Or. 482, 103 P. 505; Stanley *v.* C., 109 Va. 796, 63 S. E. 10.

637-23 Cubbage *v.* Estate, 155 Ia. 39, 134 N. W. 1074.

Error to send to jury room a map of lots with prices marked where lots sold. Chicago, etc. R. Co. *v.* Heidenreich, 254 Ill. 231, 98 N. E. 567.

637-24 McWhorter *v.* S., 9 Ala. App. 70, 64 S. 158; Ty. *v.* Emilio, 14 N. M. 147, 89 P. 239.

637-25 Hankins *v.* S., 103 Ark. 28, 145 S. W. 524; Georgia R. & B. Co. *v.* City, 134 Ga. 871, 68 S. E. 703; Dean *v.* R. Co., 229 Mo. 425, 129 S. W. 953.

638-30 Pauley *v.* Broadnax, 157 Cal.

386, 108 P. 271. See West *v.* S., 53 Fla. 77, 43 S. 445.

638-33 Agee *v.* Ins. Co., 165 Ala. 291, 51 S. 829; Ragland *v.* S., 71 Ark. 65, 70 S. W. 1039; West *v.* S., 53 Fla. 77, 43 S. 445; Seidschlag *v.* Antioch, 109 Ill. App. 291; Zinser *v.* Sanitary Dist., 175 Ill. App. 9; Lenoir *v.* Bk., 87 Miss. 559, 40 S. 5; Ruppert *v.* R. Co., 25 Pa. Super. 613.

639-34 S. *v.* Cummings, 189 Mo. 626, 88 S. W. 706.

State might introduce diagram of interior of the car in which homicide occurred as corrected by testimony of the conductor. Jones *v.* S. (Ala.), 61 S. 434.

639-35 Noel *v.* S., 161 Ala. 25, 49 S. 824; Reinke *v.* Sanitary Dist., 260 Ill. 380, 103 N. E. 236; Moore *v.* R. Co. (Ia.), 123 N. W. 324; P. *v.* Mindeman, 157 Mich. 120, 121 N. W. 488; Marcy *v.* Parker, 78 Vt. 73, 62 A. 19.

Plaintiff's surveyor used certain chalks and plans prepared from actual knowledge, to testify as to the location and boundaries of part of adjoining lots. Morrison *v.* Holder, 214 Mass. 366, 101 N. E. 1067.

639-36 Hisler *v.* S., 52 Fla. 30, 42 S. 692; Ty. *v.* Price, 14 N. M. 262, 91 P. 733.

639-37 P. *v.* Hutchings, 8 Cal. App. 550, 97 P. 325. See S. *v.* Finley, 245 Mo. 465, 150 S. W. 1051.

639-38 Smith *v.* Sanitary Dist., 260 Ill. 453, 103 N. E. 254; S. *v.* Parr, 54 Or. 316, 103 P. 434.

639-40 Jarvis *v.* S., 138 Ala. 17, 34 S. 1025; Co-operative B. Bk. *v.* Hawkins, 30 R. I. 171, 73 A. 617.

Diagram need not have been made by witness testifying with regard to it. Koon *v.* R. Co., 69 S. C. 101, 48 S. E. 86. If made by a disinterested person, at direction of district attorney, it is admissible. S. *v.* Remington, 50 Or. 99, 91 P. 473.

Plat not offered as official survey need not have been made by official surveyor. Garrison *v.* Glass, 139 Ala. 512, 36 S. 725.

Though made after suit brought, admissible. Ruppert *v.* R. Co., 25 Pa. Super. 613.

639-42 See Hisler *v.* S., 52 Fla. 30, 42 S. 692.

640-44 Napier *v.* Matheson, 86 S. C. 428, 68 S. E. 673.

640-47 Failure to object to introduction is admission of correctness. Schneider *v.* Sulzer, 212 Ill. 87, 72 N. E. 19.

640-48 Fletcher *v.* Dixon, 113 Md. 101, 77 A. 326; Carter *v.* R. Co., 112 Md. 599, 77 A. 301; Williamson *v.* R. Co., 115 Mo. App. 72, 90 S. W. 401; Koon *v.* R. Co., 69 S. C. 101, 48 S. E. 86; Mahoney *v.* R., 82 S. C. 215, 64 S. E. 228; Ayres *v.* Patton, 51 Tex. Civ. 186, 111 S. W. 1079; Hassam *v.* Safford, 82 Vt. 444, 74 A. 197. See Ragland *v.* S., 71 Ark. 65, 70 S. W. 1039; Peru *v.* Bartels, 214 Ill. 515, 73 N. E. 755; Cowles *v.* Lovin, 135 N. C. 488, 47 S. E. 610.

640-49 Haberer *v.* Walzer, 109 Ill. App. 371; S. *v.* Cummings, 189 Mo. 626, 88 S. W. 706 (diagram of room).

Minor inaccuracies merely affect weight. Ty. *v.* Price, 14 N. M. 262, 91 P. 733.

Diagram made from actual measurements, admissible. Seidschlag *v.* Antioch, 109 Ill. App. 291. But a plat representing horizontal and vertical distances by different scale is inadmissible. White *v.* R. Co., 6 Penne. (Del.) 105, 63 A. 931; C. *v.* R. Co., 23 Pa. Super. 235.

640-50 Noel *v.* S., 161 Ala. 25, 49 S. 824 (exact relative distances need not be shown); Marcy *v.* Parker, 78 Vt. 73, 62 A. 19 (omission of immaterial objects). See Alaska-T. G. M. Co. *v.* Cheney, 162 Fed. 593, 88 C. C. A. 351.

641-56 Morcom *v.* Baiersky, 16 Cal. App. 480, 117 P. 560; Franklin *v.* Engel, 34 Wash. 480, 76 P. 84. See Atlanta, etc. R. Co. *v.* R. Co., 125 Ga. 529, 54 S. E. 736; Ty. *v.* Emilio, 14 N. M. 147, 89 P. 239 (correctness of diagram may be shown by cross-examination of witness who made it).

Correctness of diagram may be shown after it has been admitted. Jarvis *v.* S., 138 Ala. 17, 34 S. 1025.

641-57 West *v.* S., 53 Fla. 77, 43 S. 445; Hassam *v.* Safford, 82 Vt. 444, 74 A. 197 (decision not ordinarily reviewable).

641-59 Noel *v.* S., 161 Ala. 25, 49 S. 824; S. *v.* Remington, 50 Or. 99, 91 P. 473.

Maker may explain diagram.—Fletcher *v.* Dixon, 113 Md. 101, 77 A. 326.

641-61 Witness may locate lines and localities by means of a diagram presented to him. Oliver *v.* Oliver (Ala.), 65 S. 373.

Land plats admissible to identify prop-

erty. Black *v.* R. Co., 237 Ill. 500, 86 N. E. 1065.

642-62 Crawford *v.* S., 117 Ga. 247, 43 S. E. 762 (need not have been introduced in evidence).

642-63 Rabberman *v.* Comrs., 116 Ill. App. 26.

Inspection by a juror of a diagram previously admitted will not be presumed prejudicial. P. *v.* Antony, 146 Cal. 124, 79 P. 858.

Juror may make a diagram in jury room to explain his opinions, provided it is based solely upon the evidence. P. *v.* Gallaner, 3 Cal. App. 431, 86 P. 814. See also Railey *v.* S., 58 Tex. Cr. 1, 121 S. W. 1120, drawing diagram from personal knowledge not fatal error.

Diagram admitted to illustrate testimony is not in evidence, and should not go to the jury. Carman *v.* R. Co., 32 Mont. 137, 79 P. 690.

642-65 See C. *v.* R. Co., 23 Pa. Super. 235.

642-66 Jones *v.* S. (Ala.), 61 S. 434; West *v.* S., 53 Fla. 77, 43 S. 445.

642-67 Ty. *v.* Price, 14 N. M. 262, 91 P. 733.

642-69 Descriptive words on map may make it incompetent. Zinser *v.* Sanitary Dist., 175 Ill. App. 9.

Removal of marks on the edge of a diagram, which formed no part of it, immaterial to its admissibility. Adams *v.* Co., 29 R. I. 333, 71 A. 180.

In Close *v.* Ann Arbor R. Co., 169 Mich. 392, 135 N. W. 346, a red line upon a map of premises involved was, by the court, struck out on request of counsel, and the map admitted without the line, though without causing the line to be erased. The supreme court said that the meaning of such line had been fully described by witness, and it was "altogether improbable that the jury misapprehended the real facts."

DIRECT EVIDENCE

644-1 U. S. *v.* Greene, 146 Fed. 803, 824; P. *v.* Chadwick, 4 Cal. App. 63, 87 P. 384; S. *v.* Blackburn, 7 Penne. (Del.) 479, 75 A. 536.

644-2 McKinney *v.* S., 48 Tex. Cr. 402, 88 S. W. 1012.

644-4 U. S. *v.* Greene, 146 Fed. 803, 824; Haywood *v.* S., 90 Miss. 461, 43 S. 614.

645-9 Slack *v.* Harris 200 Ill. 96, 65 N. E. 669; S. *v.* Thompson, 127 Ia. 440, 103 N. W. 377; Atchison, etc. R. Co. *v.* Colliati, 75 Kan. 56, 88 P. 534; S. *v.* Coleman, 17 S. D. 594, 98 N. W. 175; S. *v.* Foster, 14 N. D. 561, 105 N. W. 938 (no legal distinction between).

Direct testimony contradictory of and in opposition to conceded and undisputed physical facts must be disregarded. Rattan *v.* R. Co., 120 Mo. App. 270, 96 S. W. 735.

646-10 P. *v.* Chadwick, 4 Cal. App. 63, 87 P. 384, 389; Cook *v.* U. S., 26 App. Cas. (D. C.) 427; Nance *v.* S., 126 Ga. 95, 54 S. E. 932; Sweat *v.* C., 29 Ky. L. R. 1067, 96 S. W. 843; S. *v.* Rutledge, 37 Wash. 523, 79 P. 1123.

Rule does not apply to a prosecution for subornation of perjury. Boren *v.* U. S., 144 Fed. 801, 75 C. C. A. 531.

646-11 See P. *v.* Chadwick, supra.

That prosecutrix in rape case was not wife of defendant should be shown by direct evidence. Smith *v.* S., 44 Tex. Cr. 137, 68 S. W. 995.

648-18 Lack of owner's consent to burglary—direct evidence necessary if available. Brown *v.* S., 58 Tex. Cr. 336, 125 S. W. 915.

DIRECT EXAMINATION

Argumentative question, 654-17; *Leading questions to expert witness,* 659-29; *Vague and indefinite questions,* 673-68; *Hypothesizing incompetent matters,* 674-71; *Irresponsiveness; who may object,* 679-87.

651-1 Trial judge may question witness. Caswell *v.* S., 5 Ga. App. 483, 63 S. E. 566. See infra, "Examination of Witnesses," 381-10.

651-2 Johnson *v.* Shaw, 204 Mass. 165, 90 N. E. 518 (a rule of court expressing that the examination of a witness shall be by one counsel only does not govern where two actions brought by different attorneys against different persons are consolidated and tried upon different theories); Bouma *v.* Dubois, 169 Mich. 422, 135 N. W. 322. See also Maddox *v.* Eatonton, 8 Ga. App. 817, 70 S. E. 214.

652-8 S. *v.* Cobb, 164 N. C. 418, 79 S. E. 419.

A witness testifying in support of an account may, in court's discretion, testify as to all items in response to a general question. A separate question

for each item is not necessary. Kincaide *v.* Cavanagh, 198 Mass. 34, 84 N. E. 307.

652-10 P. *v.* Davis, 6 Cal. App. 229, 91 P. 810; Horton *v.* S., 123 Ga. 145, 51 S. E. 287 (the practice is to be commended rather than condemned); Dean *v.* C., 25 Ky. L. R. 1876, 78 S. W. 1112; Pumphrey *v.* S., 84 Neb. 636, 122 N. W. 19. But see Wallach *v.* R. Co., 111 App. Div. 273, 97 N. Y. S. 717, counsel may have testimony elicited by question so that he may object rather than move to strike out.

In Browning *v.* S., 64 Tex. Cr. 148, 142 S. W. 1, where the prosecuting witness was asked to "tell the jury why it was you submitted to intercourse with him (meaning defendant) and give your reasons for doing it."

653-11 *Contra,* Collender *v.* Reardon, 121 N. Y. S. 531, specific statements made to impeaching witness must be called for.

653-13 P. *v.* Loverkamp, 165 Ill. App. 532.

Questions not susceptible of definite answers. Birmingham, etc. R. Co. *v.* Hayes, 153 Ala. 178, 44 S. 1032.

Ambiguous, uncertain and indefinite question improper. P. *v.* Lee, 13 Cal. App. 48, 108 P. 738; Schmoe *v.* Cotton, 167 Ind. 364, 79 N. E. 184; Carr *v.* Co., 29 R. I. 276, 70 A. 196. Scope of question must not be too broad. Beecham *v.* Wetherbee, 160 Mich. 585, 125 N. W. 702.

654-15 If irrelevant evidence would be responsive to question an objection may be sustained. Phillip *v.* S., 162 Ala. 14, 50 S. 194.

654-17 Bell *v.* S., 48 Tex. Cr. 256, 87 S. W. 1160.

Argumentative question is improper. See Stone *v.* Stone, 191 Mass. 371, 77 N. E. 845.

654-18 Harrison *v.* Thackaberry, 248 Ill. 512, 94 N. E. 172.

654-19 Fleming *v.* Lunsford, 163 Ala. 540, 50 S. 921; Fulgham *v.* Carter, 142 Ala. 227, 37 S. 932; Gordon *v.* S., 140 Ala. 29, 36 S. 1009; P. *v.* Jones, 160 Cal. 358, 117 P. 176; Bradbury *v.* S. Norwalk, 80 Conn. 298, 63 A. 321; Sylvester *v.* S., 46 Fla. 166, 35 S. 142; Prather *v.* R. Co., 221 Ill. 190, 77 N. E. 430; Chicago C. R. Co. *v.* Shaw, 220 Ill. 532, 77 N. E. 139; Beggs *v.* Cable Co., 176 Ill. App. 406; Reeves *v.* R. Co., 164 Ill. App. 611; Harper *v.* C. Co., 142 Ill. App. 594; Indianapolis, etc. R. Co. *v.* Bennett, 39 Ind. App. 141, 79 N. E. 389; Huntington *v.* Lusch, 33 Ind. App. 476, 70 N. E. 402; Withey *v.* Fowler Co. (Ia.), 145 N. W. 923; Collins *v.* Co. (Ia.), 115 N. W. 497; Rosenkovitz *v.* R. Co., 108 Md. 306, 70 A. 108; Luckenbach *v.* Seiple, 72 N. J. L. 476, 63 A. 244; Busch *v.* Robinson, 46 Or. 539, 81 P. 237; Williamson *v.* R. Co., 57 Tex. Civ. 502, 122 S. W. 897; Cleveland *v.* Taylor, 49 Tex. Civ. 496, 108 S. W. 1037; Godsoe *v.* S., 52 Tex. Cr. 626, 108 S. W. 388; Garrett *v.* S., 52 Tex. Cr. 255, 106 S. W. 389; Seago *v.* White, 45 Tex. Civ. 539, 100 S. W. 1015; St. Louis, etc. R. Co. *v.* Conrad (Tex. Civ.), 99 S. W. 209; Ft. Worth, etc. R. Co. *v.* Jones, 38 Tex. Civ. 129, 85 S. W. 37; Dallas E. Co. *v.* Mitchell, 33 Tex. Civ. 424, 76 S. W. 935; Sayre *v.* Woodyard, 66 W. Va. 288, 66 S. E. 320; Hein *v.* Mildebrandt, 134 Wis. 582, 115 N. W. 121.

See Bingham *v.* Davidson, 141 Ala. 551, 37 S. 738; Phillips *v.* S. (Ala. App.), 65 S. 444; Mabry *v.* Randolph, 7 Cal. App. 421, 94 P. 403; Kankakee *v.* R. Co., 258 Ill. 368, 101 N. E. 592; Emanuel *v.* Co., 47 Misc. 378, 94 N. Y. S. 36; Brand *v.* Co., 95 App. Div. 64, 88 N. Y. S. 460; Ft. Worth, etc. R. Co. *v.* Walker, 48 Tex. Civ. 86, 106 S. W. 400; St. Louis, etc. R. Co. *v.* Hall (Tex. Civ.), 81 S. W. 571, 106 S. W. 194; Hickey *v.* S., 51 Tex. Cr. 230, 102 S. W. 417; Moore *v.* S., 49 Tex. Cr. 499, 96 S. W. 321; Gulf, etc. R. Co. *v.* Tullis, 41 Tex. Civ. 219, 91 S. W. 317; Coons *v.* S., 49 Tex. Cr. 256, 91 S. W. 1085; Brock *v.* United Mod., 36 Tex. Civ. 12, 81 S. W. 340; Denison etc. R. Co. *v.* Jewell, 35 Tex. Civ. 454, 80 S. W. 1054; Galveston etc. R. Co. *v.* Walker (Tex. Civ.), 76 S. W. 228.

655-20 Southern Cotton Oil Co. *v.* Campbell, 106 Ark. 379, 153 S. W. 256; P. *v.* Hodge, 141 Mich. 312, 104 N. W. 599. See S. *v.* Manigan (Ia.), 145 N. W. 869; S. *v.* Alexander, 89 Kan. 422, 131 P. 139; Rodriquez *v.* S. (Tex. Cr.), 158 S. W. 537; Coley *v.* S. (Tex. Cr.), 150 S. W. 789.

Asking whether witness knew of the raising of a fund to buy liquor not leading. Hinsman *v.* S. (Ga. App.), 81 S. E. 367.

Where an affirmative answer is not more strongly suggested than a negative the question is not leading. U. S. Gypsum Co. *v.* Shields (Tex. Civ.), 106 S. W. 724.

Whether or not question propounded in this form is leading. See Hunter *v.* Malone, 49 Tex. Civ. 116, 108 S. W. 709; Bryan P. Co. *v.* R. Co. (Tex. Civ.), 110 S. W. 99; Missouri, etc. R. Co. *v.* Hendricks, 49 Tex. Civ. 314, 108 S. W. 745; El Paso E. R. Co. *v.* Ruckman, 49 Tex. Civ. 25, 107 S. W. 1158; Gibson *v.* S., 47 Tex. Cr. 489, 83 S. W. 1119.

Answered by yes or no not necessarily leading. Balt. & O. R. Co. *v.* S., 107 Md. 642, 69 A. 439, 72 A. 340; Woodruff *v.* S., 72 Neb. 815, 101 N. W. 1114; International etc. R. Co. *v.* Drought (Tex. Civ.), 100 S. W. 1011; St. Louis, etc. R. Co. *v.* Lowe (Tex. Civ.), 97 S. W. 1087. See St. Louis, etc. R. Co. *v.* Conrad (Tex. Civ.), 99 S. W. 209. See vol. 8, p. 152, n. 7.

656-22 S. *v.* Price, 158 N. C. 641, 74 S. E. 587.

658-23 St. Louis S. R. Co. *v.* Langston (Tex. Civ.), 125 S. W. 334.

For example.—"Did you see any danger there before the accident?" Tavares *v.* Dewing, 33 R. I. 424, 82 A. 133.

Not objectionable.—"Now, tell the jury whether or not either of them, Moody or Charles, attempted or did anything toward him? A. No, sir; not one of them didn't attempt to do a thing. Q. Did they have anything in their hands? No, sir. Q. Did you have anything? A. No, sir. Q. Did you attempt to do anything? A. No, sir." "Each question," said the court, "could be answered 'yes' or 'no,' but they did not suggest to the witness which answer to give. If they had been answered in the affirmative, it would have taken another question to have ascertained what they did or what they had." Wells *v.* S. (Tex. Cr.), 145 S. W. 950.

658-24 Black *v.* S. (Tex. Cr.), 160 S. W. 720; St. Louis, S. R. Co. *v.* Smith (Tex. Civ.), 153 S. W. 391; Jenkins *v.* S. (Wyo.), 134 P. 260.

658-25 Missouri K. & T. R. Co. *v.* Hedric (Tex. Civ.), 154 S. W. 633.

659-27 Bolton *v.* S., 146 Ala. 691, 40 S. 409; Woodruff *v.* S., 72 Neb. 815, 101 N. W. 1114.

659-29 In re Wright-Dana Hdw. Co., 199 Fed. 632; Baldi *v.* Co., 173 Fed. 781, 97 C. C. A. 505; Bishop *v.* S. (Ala.), 61 S. 820; Fleming *v.* Lunsford, 163 Ala. 540, 50 S. 921; Anniston Mfg. Co. *v.* R. Co., 145 Ala. 351, 40 S. 965; Wester *v.* S., 142 Ala. 56, 38 S. 1010; Taylor *v.* S., 82 Ark. 540, 102 S. W. 367; Heinrich *v.* Heinrich, 2 Cal. App. 479, 84 P. 326; Lupton *v.* Underwood (Del.), 85 A. 965; Am. S. Co. *v.* Works, 31 App. Cas. (D. C.) 304; West Stokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377; Smith *v.* Co., 155 Ill. App. 148; Marks *v.* Box (Ind.), 103 N. E. 27; In re Martin's Will (Ia.), 142 N. W. 74; Engleking *v.* R. Co., 187 Mo. 158, 86 S. W. 89; Buckman *v.* R. Co., 227 Pa. 277, 75 A. 1069; Fox *v.* S. (Tex. Cr.), 158 S. W. 1141; Early & Clement Grain Co. *v.* Waco (Tex. Civ.), 137 S. W. 431; Rockwell *v.* Hudgens, 57 Tex. Civ. 504, 123 S. W. 185; St. Louis R. Co. *v.* Crabb (Tex. Civ.), 80 S. W. 408; Sayre *v.* Woodyard, 66 W. Va. 288, 66 S. E. 320; Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311.

See Seeley *v.* Seeley, 64 N. J. Eq. 1, 53 A. 387.

Leading questions to expert witness.—"It is ordinarily permissible to ask an expert witness a leading question when his opinion is sought upon a matter about which by reason of his professional knowledge and skill he has peculiar information." Galveston, etc. Co. *v.* Powers (Tex. Civ.), 101 S. W. 250.

660-30 King, etc. Co. *v.* Bowen, 7 Ala. App. 462, 61 S. 22; Sylvester *v.* S., 46 Fla. 166, 35 S. 142; Georgetown *v.* Groff (Ky.), 124 S. W. 888.

660-32 Galveston, etc. R. Co. *v.* Alberti, 47 Tex. Civ. 32, 103 S. W. 699. But see Vanderbilt *v.* R. Co., 71 N. J. L. 67, 58 A. 91 (the mischief done by leading question cannot be repaired by substituting a proper one after objection). *Comp.* Ft. Worth, etc. R. Co. *v.* Jones, 38 Tex. Civ. 129, 85 S. W. 37.

660-33 S. *v.* Walker, 133 Ia. 489, 110 N. W. 925 (paramour of one charged with homicide); Hackney *v.* Co., 75 Neb. 793, 106 N. W. 1016 (bankrupt); Gardner *v.* S., 5 Okla. Cr. 531, 115 P. 607; Warren *v.* Warren, 33 R. I. 71, 80 A. 593; Moore *v.* S. (Tex. Cr.), 144 S. W. 598; Hanson *v.* R. Co., 75 Wash. 342, 134 P. 1058.

Though witness claims to be friendly to a party, if his conduct shows the contrary leading questions may be put. Missouri, etc. R. Co. *v.* McAnaney, 36 Tex. Civ. 76, 80 S. W. 1062.

A co-party who is in reality adverse to party calling may be cross-examined if necessary to elicit the facts. North Am. etc. House *v.* McElligott, 227 Ill. 317, 81 N. E. 388.

661-34 Taylor *v.* S., 82 Ark. 540, 102 S. W. 367; Nalley *v.* S., 11 Ga. App. 15, 74 S. E. 567; Chicago & A. R. Co. *v.* Walker, 118 Ill. App. 397; Davis *v.* Mach. Wks., 175 Mich. 61, 140 N. W. 986; S. *v.* Draughn, 140 Mo. App. 263, 124 S. W. 20; Zilver *v.* Co., 106 App. Div. 582, 94 N. Y. S. 714; P. *v.* Sexton, 187 N. Y. 495, 80 N. E. 396; Ostendorf *v.* S., 8 Okla. Cr. 360, 128 P. 143.

See Jones *v.* S. (Tex. Cr.), 163 S. W. 81.

662-35 Brady *v.* Co., 80 N. J. L. 471, 79 A. 287.

662-37 Wickham *v.* P., 41 Colo. 345, 93 P. 478; Barker *v.* S., 1 Ga. App. 286, 57 S. E. 989; S. *v.* Cambron, 20 S. D. 282, 105 N. W. 241 (not error for court to state, in presence of jury, that leading questions are allowed because witness is unwilling); Wilson *v.* S. (Tex. Cr.), 154 S. W. 571; Sweeney *v.* S., 59 Tex. Cr. 370, 128 S. W. 390; Littler *v.* Dielmann, 48 Tex. Civ. 392, 106 S. W. 1137; Burch *v.* S., 49 Tex. Cr. 13, 90 S. W. 168; Hill *v.* S. (Tex. Cr.), 77 S. W. 808; S. *v.* Dalton, 43 Wash. 278, 86 P. 590. See also C. *v.* Ramsey, 42 Pa. Super. 25; Layton *v.* S., 61 Tex. Cr. 507, 135 S. W. 557 (hostile witness).

Prosecutrix in rape case.—S. *v.* Fowler, 13 Ida. 317, 89 P. 757; S. *v.* Waters, 132 Ia. 481, 109 N. W. 1013; S. *v.* Newman, 93 Minn. 393, 101 N. W. 499; S. *v.* Bateman, 198 Mo. 212, 94 S. W. 843; Blair *v.* S., 72 Neb. 501, 101 N. W. 17; Woodruff *v.* S., 72 Neb. 815, 101 N. W. 1114; Ham *v.* S. (Tex. Cr.), 78 S. W. 929; Hill *v.* S. (Tex. Cr.), 77 S. W. 808.

In such cases, "where the witness is young and is obliged to testify concerning matters which every instinct of womanly modesty prompts her to conceal, the rule is well established that leading questions are almost always necessary in order to get at the facts. A child who would testify glibly as to such matters would be justly regarded with suspicion." Smits *v.* S., 145 Wis. 601, 130 N. W. 525.

663-40 S. *v.* Fowler, 13 Ida. 317, 89 P. 757; Campion *v.* Lattimer, 70 Neb. 245, 97 N. W. 290; Strnad *v.* M. Co., 142 N. Y. S. 314. And see California, etc. Assn *v.* Commercial, etc. Ins. Co., 159 Cal. 49, 112 P. 858.

Feeble-minded witness.—S. *v.* Simes, 12 Ida. 310, 85 P. 914.

663-41 S. *v.* Fowler, 13 Ida. 317, 89 P. 757; McCann *v.* P., 226 Ill. 562, 80 N. E. 1061; Christensen *v.* Thompson, 123 Ia. 717, 99 N. W. 591; Asplund *v.* Min. Co., 177 Mich. 529, 143 N. W. 633; S. *v.* Williams, 31 Nev. 360, 102 P. 974; Diaz *v.* S., 62 Tex. Cr. 317, 137 S. W. 377; Merriman *v.* Blalack, 56 Tex. Civ. 594, 121 S. W. 552.

Where witness is sufficiently familiar with the English language to answer questions intelligently, leading questions are improper. Craddick *v.* S., 48 Tex. Cr. 385, 88 S. W. 347.

663-43 See S. *v.* Megorden, 49 Or. 259, 88 P. 306; Campbell *v.* S., 62 Tex. Cr. 561, 138 S. W. 607; S. *v.* Brandner, 21 N. D. 310, 130 N. W. 941.

In discretion of court.—McCrary *v.* S., 137 Ga. 784, 74 S. E. 536.

Youth and inexperience of witnesses for state in rape case held to justify considerable latitude in the form of the questions. S. *v.* Sheets, 127 Ia. 73, 102 N. W. 415. See also McCann *v.* P., 226 Ill. 562, 80 N. E. 1061; Ham *v.* S. (Tex. Cr.), 77 S. W. 808.

664-44 Gray *v.* Kelley, 190 Mass. 184, 76 N. E. 724.

664-46 Scope.—Kimball *v.* No. El. Co., 159 Cal. 225, 113 P. 156.

664-48 Reeves *v.* R. Co., 164 Ill. App. 611.

665-49 Preliminary questions may be leading. Hefferlin *v.* Karlman, 29 Mont. 139, 74 P. 201.

666-50 C. *v.* Dorr, 216 Mass. 314, 103 N. E. 902; Woodruff *v.* S., 72 Neb. 815, 101 N. W. 1114; Jenkins *v.* S. (Wyo.), 135 P. 749. See Rodriguez *v.* S. (Tex. Cr.), 158 S. W. 537.

"Some suggestion must necessarily be given a witness as to what part of a subject it is desired to elicit an answer, and a different rule would lead to interminable delay, and the mazy wanderings of the witness in the fields of evidence would be anything but conducive to the proper administration of law." Freeman *v.* Grashel (Tex. Civ.), 145 S. W. 695.

668-52 But see Briggs *v.* P., 219 Ill. 330, 76 N. E. 499 (leading question by state's attorney to make witness emphasize previous testimony, improper); Edwards *v.* S., 61 Tex. Cr. 307, 135 S. W. 540.

Not error to exclude.—Jones *v.* S. (Ala.), 61 S. 434; Louisville & N. R. Co. *v.* Dilburn, 178 Ala. 600, 59 S. 438; Hosey *v.* S., 5 Ala. App. 1, 59 S. 549; Andreos *v.* Hinson (Ia.), 137 N. W. 1004; Wagner *v.* S., 119 Md. 559, 87

A. 407; Samaha *v.* Ins. Co., 84 N. J. L. 731, 87 A. 442; In re Smith's Will, 163 N. C. 464, 79 S. E. 977; Doudell *v.* Shoo, 20 Cal. App. 424, 129 P. 478; Jodoin *v.* Archambault, 35 R. I. 316, 86 A. 507.

668-53 Hyde *v.* United States, 35 App. Cas. (D. C.) 451; Deming *v.* Ins. Co., 169 Ill. App. 96; In re Hock's Will, 129 N. Y. S. 196; Wilson *v.* S. (Tex. Cr.), 154 S. W. 571; So. Pac. Co. *v.* C. H. Cox & Co. (Tex. Civ.), 136 S. W. 103; Warren *v.* Warren, 33 R. I. 71, 80 A. 593; Samson *v.* Ward, 147 Wis. 48, 132 N. W. 629.

Reference to former testimony of witness proper in discretion of court, where witness is reluctant or his memory is clouded. Ashby *v.* Co., 111 Mo. App. 79, 85 S. W. 957. But see C. *v.* Co., 26 Ky. L. R. 121, 80 S. W. 772.

Use of memorandum.—Cohen *v.* Harris, 61 Fla. 137, 54 S. 905; Stein *v.* Electric Co., 152 Ill. App. 392; Gardner *v.* G. & E. Co., 154 Mo. App. 666, 135 S. W. 1023; C. *v.* Klein, 42 Pa. Super. 66; Covey *v.* Rogers, 84 Vt. 151, 78 A. 792. See title "Refreshing Memory."

669-56 S. *v.* Dudley, 147 Ia. 645, 126 N. W. 812; S. *v.* Waters, 132 Ia. 481, 109 N. W. 1013; Missouri, etc. R. Co. *v.* McCutcheon, 33 Tex. Civ. 557, 77 S. W. 232; Loescher *v.* S., 142 Wis. 260, 125 N. W. 459.

Bastardy action.—Johnson *v.* S., 133 Wis. 453, 113 N. W. 674.

To fix date of facts to which witness had deposed. Rowe *v.* S., 2 Ala. App. 238, 57 S. 72.

670-60 Shaneyfelt *v.* S., 8 Ala. App. 370, 62 S. 331; Bachelder *v.* Morgan (Ala.), 60 S. 815; Pratville Cotton Mills Co. *v.* McKinney, 178 Ala. 554, 59 S. 498; Cooper *v.* Slaughter, 175 Ala. 211, 57 S. 477; Southern H. & S. Co. *v.* Co., 165 Ala. 582, 51 S. 789; Barlow *v.* Hamilton, 151 Ala. 634, 44 S. 657; W. U. T. Co. *v.* Westmoreland, 150 Ala. 654, 43 S. 790; Southern, etc. Co. *v.* Campbell, 106 Ark. 379, 153 S. W. 256; Ward *v.* S., 85 Ark. 179, 107 S. W. 677; Derrick *v.* S., 92 Ark. 237, 122 S. W. 506; Taylor *v.* S., 82 Ark. 540, 102 S. W. 367; P. *v.* Anthony, 20 Cal. App. 586, 129 P. 968; P. *v.* Weber, 149 Cal. 325, 86 P. 671; P. *v.* Nunley, 142 Cal. 441, 76 P. 45; Winslow *v.* Co., 12 Cal. App. 530, 107 P. 1020; Shaffer *v.* U. S., 24 App. Cas. (D. C.) 417; Penton *v.* S., 64 Fla. 411, 60 S. 343; Padgett *v.* S., 64 Fla. 389, 59 S. 946; Teston *v.* S., 50 Fla. 138, 39 S. 787; Wade *v.* S., 13 Ga. App. 142, 78 S. E. 863; Grusin *v.* S., 10 Ga. App. 149, 75 S. E. 350; Higdon *v.* Williamson, 140 Ga. 187, 78 S. E. 767; Lyles *v.* S., 130 Ga. 294, 60 S. E. 578; Peterson *v.* S., 6 Ga. App. 491, 65 S. E. 311; Barker *v.* S., 1 Ga. App. 286, 57 S. E. 989; Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. 934; Riordan *v.* R. Co., 178 Ill. App. 323; Demereski *v.* Co., 149 Ill. App. 513; Chicago C. R. Co. *v.* Benson, 108 Ill. App. 193; Purcell etc. Mills *v.* Bell, 7 Ind. Ty. 717, 104 S. W. 944; Breiner *v.* Nugent, 136 Ia. 322, 111 N. W. 446; S. *v.* Drake, 128 Ia. 539, 105 N. W. 54; Rosenkovitz *v.* Co., 108 Md. 306, 70 A. 108; C. *v.* Cline, 213 Mass. 225, 100 N. E. 358; P. *v.* Sartori, 168 Mich. 308, 134 N. W. 200; S. *v.* Bateman, 198 Mo. 212, 94 S. W. 843; S. *v.* Woodward, 191 Mo. 617, 90 S. W. 90; S. *v.* Knost, 207 Mo. 18, 105 S. W. 616; Ainlay *v.* S., 89 Neb. 721, 132 N. W. 120; Woodruff *v.* S., 72 Neb. 815, 101 N. W. 1114; Ty. *v.* Meredith, 14 N. M. 288, 91 P. 731; P. *v.* Way, 119 App. Div. 344, 104 N. Y. S. 277; McKeel *v.* Holloman, 163 N. C. 132, 79 S. E. 445; Roberts *v.* Co., 84 S. C. 283, 66 S. E. 298; S. *v.* Williams, 76 S. C. 135, 56 S. E. 783; Koon *v.* R. Co., 69 S. C. 101, 48 S. E. 86; Ganow *v.* Ashton, 32 S. D. 458, 143 N. W. 383; Pecos, etc. R. Co. *v.* Gray (Tex. Civ.), 145 S. W. 728; Berry *v.* Doolittle, 82 Vt. 471, 74 A. 97; Flint *v.* C., 114 Va. 820, 76 S. E. 308; Von Tobel *v.* Co., 32 Wash. 683, 73 P. 788; Loescher *v.* S., 142 Wis. 260, 125 N. W. 459. See also S. *v.* Brandner, 21 N. D. 310, 130 N. W. 941.

"**It is often proper,** and frequently necessary, to ask leading questions to develop the facts, and it was entirely competent in this case after the doctor had answered that he was not positive that the plates disclosed anything abnormal to ask him directly whether, as he read the plates, or the pictures, there was indicated the deposit of any foreign substance in the muscles." Wilkins *v.* R., 169 Mich. 437, 135 N. W. 350.

Striking out a leading question after answer without objection is a proper method of exercising discretion. Luckenbach *v.* Sciple, 72 N. J. L. 476, 63 A. 244.

671-61 Hart *v.* U. S., 183 Fed. 368, 105 C. C. A. 588; Birmingham, etc. Co. *v.* Wiggins, 170 Ala. 540, 54 S. 189;

Mulkey *v.* S., 5 Okla. Cr. 75, 113 P. 532.

671-62 Merriweather *v.* Co., 161 Ala. 441, 49 S. 916; Camp *v.* S., 58 Fla. 12, 50 S. 537; Teston *v.* S., 50 Fla. 138, 39 S. 787; Reyes *v.* S., 49 Fla. 17, 38 S. 257; Luckenbach *v.* Sciple, 72 N. J. L. 476, 63 A. 244; Stantorn *v.* Webster Tp., 170 Mich. 428, 136 N. W. 421; S. *v.* Van Ness, 82 N. J. L. 181, 83 A. 195. See Hefferlin *v.* Karlman, 29 Mont. 139, 74 P. 201.

672-64 Caswell *v.* S., 5 Ga. App. 483, 63 S. E. 566; Barker *v.* S., 1 Ga. App. 286, 57 S. E. 989 (only in extreme cases if at all); McBride *v.* Co., 125 Ga. 515, 54 S. E. 674; Chicago & A. R. Co. *v.* Walker, 118 Ill. App. 397; Maguire *v.* P., 219 Ill. 16, 76 N. E. 67; Breiner *v.* Nugent, 136 Ia. 322, 111 N. W. 446 (in rare instances only will a case be reversed because of leading questions); S. *v.* Drake, 128 Ia. 539, 105 N. W. 54; Coleman *v.* C. Co., 174 Mich. 231, 140 N. W. 539; S. *v.* Bateman, 198 Mo. 212, 94 S. W. 843; Woodruff *v.* S., 72 Neb. 815, 101 N. W. 1114; Roberts *v.* Co., 84 S. C. 283, 66 S. E. 298; Long *v.* S., 58 Tex. Cr. 209, 127 S. W. 208.

An abuse of discretion appears where the testimony of prosecutrix in a rape case, apparently a willing witness, was all elicited by very leading questions. S. *v.* Hazlett, 14 N. D. 490, 105 N. W. 617.

673-65 See infra, "Leading Questions," 161-52.

673-67 Georgetown *v.* Groff (Ky.), 124 S. W. 888.

673-68 Vague and indefinite questions.—It is not error to exclude questions which are too vague and indefinite as to time, place or circumstance to show their materiality and relevany. Strickland *v.* S., 151 Ala. 31, 44 S. 90; Parham *v.* S., 147 Ala. 57, 42 S. 1; Crew *v.* Heard, 146 Ala. 463, 40 S. 337; Sanford *v.* S., 143 Ala. 78, 39 S. 370; Roche *v.* Baldwin, 143 Cal. 186, 76 P. 956; East Coast L. Co. *v.* Ellis-Y. Co., 55 Fla. 256, 45 S. 826; Strand *v.* Co., 136 Ia. 68, 113 N. W. 488; S. *v.* Woodard, 132 Ia. 675, 108 N. W. 753. See Slaughter *v.* Heath, 127 Ga. 747, 57 S. E. 69. But see Birmingham etc. Co. *v.* Martin, 148 Ala. 8, 42 S. 618.

Should not assume facts which may not be shown directly.—S. *v.* Jones (Mont.), 139 P. 441.

674-70 Lollar *v.* S., 167 Ala. 112, 52 S. 745.

674-71 Mutual L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200; Cole *v.* Barber (R. I.), 82 A. 129. See Branch *v.* Klatt, 173 Mich. 31, 138 N. W. 263.

Discretion of court.—Reid *v.* S. Co. (Me.), 90 A. 609.

Hypothesizing incompetent matters. Questions are improper which hypothesize the existence of facts, evidence of which is excluded by the policy of the law. Taylor *v.* S., 49 Fla. 69, 38 S. 380; S. *v.* Jones, 48 Mont. 505, 139 P. 441. But a question may properly hypothesize facts competent in themselves but as to which the witness himself would be incompetent to testify. Cowdery *v.* McChesney, 124 Cal. 363, 57 P. 221.

674-72 Hanson *v.* Neal, 215 Mo. 256, 114 S. W. 1073; Houston, etc. R. Co. *v.* Johnson (Tex. Civ.), 118 S. W. 1150; Yount *v.* Strickland, 17 Wyo. 526, 101 P. 942.

674-73 Fleming *v.* S., 150 Ala. 19, 43 S. 219; Alabama L. Co. *v.* Cross, 152 Ala. 562, 44 S. 563; Brannan *v.* Henry, 142 Ala. 698, 39 S. 92; Currelli *v.* Jackson, 77 Conn. 115, 58 A. 762; S. *v.* Clark (Ia.), 144 N. W. 596; White *v.* R. Co., 145 Ia. 408, 124 N. W. 309; S. *v.* Flanigan, 111 Md. 481, 74 A. 818; Hans *v.* Transfer Co., 90 Neb. 834, 134 N. W. 943; Bernstein *v.* Lester, 84 N. Y. S. 496; Nelson *v.* Hunter, 140 N. C. 598, 53 S. E. 439; Dewey *v.* Komar, 21 S. D. 117, 110 N. W. 90; S. *v.* Winslow, 39 Utah 403, 85 P. 433.

The existence of supposed facts into which the policy of the law permits no inquiry cannot be assumed. Taylor *v.* S., 49 Fla. 69, 38 S. 380.

674-74 Fallon *v.* City, 17 S. D. 570, 97 N. W. 1009; Hiles *v.* S. (Tex. Cr.), 163 S. W. 717; Missouri etc. R. Co. *v.* Linton (Tex. Civ.), 126 S. W. 678; Swan *v.* R. Co. (Utah), 127 P. 267. See P. *v.* Jacobs, 243 Ill. 580, 90 N. E. 1092.

Question as to defendants knowledge of a disputed fact held not to assume the existence of such fact. Kelly *v.* Elec. Co., 167 Ill. App. 210.

Error cured by subsequent proof of assumed fact. S. *v.* Williams, 31 Nev. 360, 102 P. 974.

675-78 Meighan *v.* Co., 165 Ala. 591, 51 S. 775; White *v.* R. Co., 145 Ia. 408, 124 N. W. 309; S. *v.* Flanigan, 111

Md. 481, 74 A. 818; Rogers *v.* S., 8 Okla. Cr. 226, 127 P. 365; S. *v.* Buchanan, 32 R. I. 490, 79 A. 1114. *Contra,* Standard O. Co. *v.* Leach (Ky.), 128 S. W. 885.

General questions permitting of either legal or illegal answers are improper. Beall *v.* Johnstone, 140 Ala. 339, 37 S. 297; Ross *v.* S., 139 Ala. 144, 36 S. 718. See Mathieson *v.* Mathieson, 150 Fed. 241, 80 C. C. A. 129; Braham *v.* S., 143 Ala. 28, 38 S. 919.

Withdrawal of improper question and instruction to disregard it cures error. Fraser *v.* Blanchard, 83 Vt. 136, 73 A. 995.

675-79 Louisville & N. R. Co. *v.* Zeigler, 167 Ala. 237, 52 S. 599; Lightman *v.* Epstein, 164 Ala. 660, 51 S. 164; U. S. Ins. Co. *v.* Batt, 49 Ind. App. 277, 97 N. E. 195; Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176; Vaillancourt *v.* R. Co., 82 Vt. 416, 74 A. 99; Cate *v.* Fife, 80 Vt. 404, 68 A. 1.

Witnesses should state what they have observed. Lang *v.* Lang (Ia.), 135 N. W. 604.

Conclusions.—"His testimony is that he rented the land for his wife and children and himself; but if he had testified that he rented it as their agent, only, it would be only the statement of a legal conclusion." Morgan *v.* Pope, 254 Ill. 96, 98 N. E. 248.

Inadmissible conclusions.—Cooper *v.* Barut, 123 Ia. 32, 98 N. W. 356.

Question must call for knowledge of witness unless his opinion would be proper. Vernon *v.* Wedgeworth, 148 Ala. 490, 42 S. 749.

Characterizing acts of accused by prosecuting attorney and witness as "cruel conduct," improper. S. *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634. *Comp.* S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461.

676-81 See Connecticut R. P. Co. *v.* Dickinson, 75 N. H. 353, 74 A. 585.

676-82 Asking question of doubtful propriety, if not persistently repeated, is not cause for reversal. P. *v.* Gregory, 8 Cal. App. 738, 97 P. 912.

677-83 Inquiry as to whether witness is religious is improper; but if general in form may not be prejudicial. Perkins *v.* Co., 155 Cal. 712, 103 P. 190.

677-84 Mizell *v.* S. (Ala.), 63 S. 1000; S. *v.* Jones (Mont.), 139 P. 441; Fleming *v.* S., 150 Ala. 19, 43 S. 219; P. *v.* Melnick, 263 Ill. 24, 104 N. E. 1111; Georgetown W. etc. Co. *v.* Neale, 137 Ky. 197, 125 S. W. 293; Dolby *v.* Laramore, 121 Md. 618, 89 A. 442; S. *v.* Jones, 48 Mont. 505, 139 P. 441; Hodges *v.* Wilson (N. C.), 81 S. E. 340; Canham *v.* R. I. Co., 35 R. I. 177, 85 A. 1050; Continental Ins. Co. *v.* Cummings (Tex. Civ.), 95 S. W. 48.

See Texas & P. R. Co. *v.* Coutourie, 135 Fed. 465, 68 C. C. A. 177; Ashford *v.* McKee (Ala.), 62 S. 879; Marinoni *v.* S. (Ariz.), 136 P. 626; Arkadelphia L. Co. *v.* Asman, 85 Ark. 568, 107 S. W. 1171; Riddle *v.* Gibson, 29 App. Cas. (D. C.) 237; Morello *v.* P., 226 Ill. 388, 80 N. E. 903; Hammond etc. R. Co. *v.* Antonia, 41 Ind. App. 335, 83 N. E. 766; S. *v.* Howard, 83 N. J. L. 636, 87 A. 436; Pecos, etc. R. Co. *v.* Bishop (Tex. Civ.), 154 S. W. 305; Travelers' P. A. *v.* Roth (Tex. Civ.), 108 S. W. 1039; Moore *v.* Woodson, 44 Tex. Civ. 503, 99 S. W. 116; Smith *r.* S. (Tex. Cr.), 99 S. W. 100; Walker *v.* Dickey, 44 Tex. Civ. 110, 98 S. W. 658; Sherman O. & C. Co. *r.* Co. (Tex. Civ.), 77 S. W. 961; Hertzog *r.* Logging Co., 73 Wash. 197, 131 P. 806. See also Sheldon *r.* Wilbur, 32 R. I. 192, 78 A. 631.

An answer is not inadmissible merely because irresponsive if it is relevant. Reagan *v.* R. Co., 72 N. H. 298, 56 A. 314; S. *v.* Poyner, 57 Wash. 489, 107 P. 181. See Massucco *v.* Tomassi, 80 Vt. 186, 67 A. 551.

An improper answer to a proper question if made by a party is error, but not if made by a third person without fault of the court or examining party. Holman *v.* Edson, 81 Vt. 49, 69 A. 143.

For the court.—Larson *r.* Webster Co., 150 Ia. 344, 130 N. W. 165.

678-85 Birmingham, etc. Co. *v.* King, 149 Ala. 504, 42 S. 612; Gilliland S. *v.* Martin, 149 Ala. 672, 42 S. 7; Ramsey *v.* Smith, 138 Ala. 333, 35 S. 325; Cooper *v.* Barut, 123 Ia. 32, 98 N. W. 356; S. *v.* Flanigan, 111 Md. 481, 74 A. 818; Seivert *v.* Galvin, 133 Wis. 391, 113 N. W. 680. See infra, "Striking Out Evidence," 159-7. *Comp.* Atwood *v.* Atwood, 84 Conn. 169, 79 A. 59. And see Singer, etc. Co. *r.* Phipps, 49 Ind. App. 116, 94 N. E. 793.

Where court limited the testimony as to certain time, and witness is asked what a person was doing at such time and in his answer does not specify the time the answer will not be stricken

ont. Woodburn *v.* Aplin, 64 Or. 610, 131 P. 516.

678-86 Aurora *v.* Plummer, 122 Ill. App. 143; La Rosa *v.* Wilner, 51 Misc. 580, 101 N. Y. S. 193; Houston & T. C. R. Co. *v.* Lee, 104 Tex. 82, 133 S. W. 868.

Where question is argumentative and calculated to provoke irresponsive answer, the propounder cannot complain. Hoffman *v.* Lemm (Tex. Civ.), 106 S. W. 712.

679-87 Only examining party may object to answer as irresponsive. In re Dunahugh, 130 Ia. 692, 107 N. W. 925; S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461; Christensen *v.* Thompson, 123 Ia. 717, 99 N. W. 591. But see Ramsey *v.* Smith, 138 Ala. 333, 35 S. 325.

679-88 P. *v.* Robertson, 6 Cal. App. 514, 92 P. 498.

Irresponsive matter may be allowed to stand in court's discretion if relevant. Lowman *v.* S., 161 Ala. 47, 50 S. 43.

679-89 S. *v.* Allen, 23 Ida. 772, 131 P. 1112; Barnett *v.* R. Co., 167 Ill. App. 87.

679-93 P. *v.* Ryan, 152 Cal. 354, 92 P. 853 (refusal to allow recall not error); P. *v.* Rigby, 11 Cal. App. 275, 104 P. 840; Chicago C. R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087; United B. Co. *v.* O'Donnell, 124 Ill. App. 24; Stout *v.* C., 29 Ky. L. R. 627, 94 S. W. 15; McQueen *v.* C., 28 Ky. L. R. 20, 88 S. W. 1047 (allowing state to recall defendant); S. *v.* Johnson, 116 La. 30, 40 S. 521; Piehl *v.* Piehl, 138 Mich. 515, 101 N. W. 628 (to explain testimony); In re Abee, 146 N. C. 273, 59 S. E. 700 (exercise of discretion not reviewable); Benson *v.* S., 51 Tex. Cr. 367, 103 S. W. 911; Reyes *v.* S. (Tex. Cr.), 102 S. W. 1156; Upton *v.* S., 48 Tex. Cr. 289, 88 S. W. 212. See Maddox *v.* Eatonton, 8 Ga. App. 817, 70 S. E. 214.

Although there is a dispute between counsel as to testimony of witness, failure of court to recall him is not error where not requested by jury. Scott *v.* S. (Tex. Cr.), 81 S. W. 47.

Recalling to administer oath, proper. Southern R. Co. *v.* Ellis, 123 Ga. 614, 51 S. E. 594.

To lay foundation for impeachment the court may in its discretion permit the state to recall a witness for defendant, and the state by so doing does not make witness its own. Hammond *v.* S., 147 Ala. 79, 41 S. 761. See also Thomas *v.* S., 47 Fla. 99, 36 S. 161. But see Hauser *v.* P., 210 Ill. 253, 71 N. E. 416.

Further examination may be disallowed. Currie *v.* R. Co., 81 Conn. 3[illegible]. 71 A. 356.

New matter.—Colombo *v.* S., 2 Boyce (Del.) 28, 78 A. 595.

By court.—Edwards *v.* Seattle, etc. R. Co., 62 Wash. 77, 113 P. 563.

680-94 Andrews *v.* S., 159 Ala. 14, 48 S. 858; Nashville, etc. R. *v.* Moore, 148 Ala. 63, 41 S. 984; Parrish *v.* S., 139 Ala. 16, 36 S. 1012; Braham *v.* S., 143 Ala. 28, 38 S. 919; Lanigan *v.* Neely, 4 Cal. App. 760, 89 P. 441; Powely *v.* Swenson, 146 Cal. 471, 80 P. 722; Sprinks *v.* Clark, 147 Cal. 439, 82 P. 45; P. *v.* Linares, 142 Cal. 17, 75 P. 308; Pyles *v.* Co., 58 Fla. 348, 50 S. 872; Thomas *v.* S., 47 Fla. 99, 36 S. 161; American C. & F. Co. *v.* Hill, 226 Ill. 227, 80 N. E. 784; Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; S. *v.* Castigno, 71 Kan. 851, 80 P. 630; Reis *v.* Co., 179 Mo. 1, 77 S. W. 734; Deitch *v.* Feder, 86 N. Y. S. 802; Tucker *v.* Mills, 76 S. C. 539, 57 S. E. 626; Watson *v.* S., 52 Tex. Cr. 85, 105 S. W. 509; Williams *v.* S., 51 Tex. Cr. 361, 102 S. W. 1134; Sanpere *v.* Sanpair, 57 Wash. 524, 107 P. 369.

Witness should not be asked to repeat his testimony. Texas & N. O. R. Co. *v.* Walker (Tex. Civ.), 125 S. W. 99. But question may be reanswered on redirect examination for greater certainty. Hill *v.* S., 156 Ala. 3, 46 S. 864.

680-96 Larabee *v.* Larabee, 240 Ill. 576, 88 N. E. 1037.

680-97 P. *v.* Garwood, 11 Cal. App. 665, 106 P. 113.

680-99 Austin *v.* Smith (Ia.), 109 N. W. 289; In re Seattle (Wash.), 100 P. 330; Clark Co. *v.* Rice, 127 Wis. 451, 106 N. W. 231 (patent case). See also Ruby *v.* R. Co., 150 Ia. 128, 129 N. W. 817; but *comp.* P. *v.* Arnold, 248 Ill. 169, 93 N. E. 786.

Number of experts should be limited (American S. Co. *v.* Co., 158 Fed. 978, patent case); and a party cannot evade a limiting order by extracting on cross-examination an opinion from his opponent's witness not called as an expert. White *v.* Boston, 186 Mass. 65, 71 N. E. 75.

An arbitrary limitation on the number of witnesses upon the main issue is unreasonable and improper. St. Louis etc. R. Co. *v.* Aubuchon, 199 Mo. 352,

97 S. W. 867. An abuse of discretion is cause for reversal. Campbell *v.* Campbell, 30 R. I. 63, 73 A. 354.

Statute declaring number whose fees shall be paid by public does not necessitate limitation. S. *v.* Bowerman, 140 Mo. App. 410, 124 S. W. 41.

Rule of court imposing limit of five witnesses as to any question of fact or issue does not refer to ultimate fact at issue. Hoskins *v.* R. Co., 39 Mont. 394, 102 P. 988.

681-1 Stockholder is not a party. In re Seattle (Wash.), 100 P. 330.

DISCOVERY

See the title "Discovery," in 7 STANDARD PROC.

685-3 Bill cannot be maintained for discovery alone. Brown *v.* Corey, 191 Mass. 189, 77 N. E. 838; Vogelsong *v.* Co., 147 Mo. App. 578, 127 S. W. 804 (need for dispensed with by provision for depositions); DeBevoise *v.* Co., 67 N. J. Eq. 742, 58 A. 91.

685-4 Balfour *v.* Bk., 156 Fed. 500.

686-8 Brown *v.* Pegram, 149 Fed. 515; Coleman *v.* Elliott, 147 Ala. 689, 40 S. 666; Bowdish *v.* Metzger, 71 Kan. 753, 81 P. 484; Bomer Bros. *v.* Warren Co. (Miss.), 60 S. 328; Singer M. Co. *v.* Bowne, 81 N. J. Eq. 157, 85 A. 449. See Smith *v.* Judge, 158 Mich. 588, 123 N. W. 34; Straus *v.* Peck, 126 N. Y. S. 628.

Proper in aid of another bill.—Shelton *v.* Timmons (Ala.), 66 S. 9.

Discovery may be had on a supplemental bill. Napier *v.* Westerhoff, 153 Fed. 985.

688-17 Cassatt *v.* Co., 150 Fed. 32, 81 C. C. A. 80; Sugar Beets P. Co. *v.* Co., 161 Fed. 215. See U. S. *v.* Co., 133 Fed. 274, 66 C. C. A. 652. § 724 Rev. St. does not authorize the production of inanimate objects (Mut. L. Ins. Co. *v.* Griesa, 156 Fed. 398); but does authorize compulsory exhibition of books before trial. Carpenter *v.* Winn, 165 Fed. 636, 91 C. C. A. 301, *appr.* Bloede *v.* Bancroft, 98 Fed. 175, and *disap.* Cassatt *v.* Co., 150 Fed. 32, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99.

689-18 Oro Water L. & P. Co. *v.* Oroville, 162 Fed. 975; Brown *v.* McDonald, 133 Fed. 897, 67 C. C. A. 59 (*over.* s. c. 130 Fed. 964; reconsidered and approved in Kurtz *v.* Brown, 152 Fed. 372, 81 C. C. A. 498); McMullen L. Co. *v.* Strother, 136 Fed. 295, 69 C. C. A. 433. See Huey *v.* Brown, 171 Fed. 641, 96 C. C. A. 443; Schaefer *v.* Power Co., 157 Fed. 896; Gray *v.* Schneider, 119 Fed. 474.

State laws concerning discovery are inapplicable to federal courts within the state. Smith *v.* Co., 154 Fed. 786.

690-19 Court of admiralty may compel discovery. The Washtenaw, 163 Fed. 372.

690-20 S. *v.* Co., 129 Mo. App. 206, 107 S. W. 1112. See Wright *v.* Court, 139 Cal. 469, 73 P. 145; Rice *v.* Peters, 58 Misc. 381, 111 N. Y. S. 5; Hammer *v.* Garrett (Tex. Civ.), 133 S. W. 1058.

690-21 Rosenau *v.* Powell, 173 Ala. 123, 55 S. 789; Nixon *v.* Co., 150 Ala. 602, 43 S. 805, 9 L. R. A. (N. S.) 1255 (full discussion). *Contra,* Stark Rolling Mill Co. *v.* Guaranty Co., 31 O. C. C. 4.

690-22 Frost *v.* S., 124 Ala. 85, 27 S. 251; Union Col. Co. *v.* Court, 149 Cal. 790, 87 P. 1035; Garden City S. Co. *v.* P., 118 Ill. App. 372.

693-27 See Beem *v.* Farrell, 135 Ia. 670, 113 N. W. 509.

Discovery not granted if on examination of defendant production of his books can be compelled. Strauss *v.* Von Tobel, 131 App. Div. 823, 116 N. Y. S. 95.

693-28 Prewett *v.* Bk., 66 W. Va. 184, 66 S. E. 231.

694-29 Griesa *v.* Ins. Co., 169 Fed. 509, 94 C. C. A. 635; Atkinson *v.* Adams, 163 Fed. 671; State *v.* R. Co., 136 Ga. 619, 71 S. E. 1055; Fogarty *v.* Fogarty, 128 App. Div. 275, 112 N. Y. S. 744; Tillinghast *v.* Westcott, 30 R. I. 334, 75 A. 306. See Richardson *v.* Coal Co., 203 Fed. 743; Curran *v.* Oppenheimer, 143 App. Div. 271, 128 N. Y. S. 9.

Laches.—Dunfee *v.* Dunfee, 129 N. Y. S. 142.

696-32 See Zimmel's Case, 13 Pa. C. C. 460.

Exhumation and inspection of human body may be ordered in aid of an action at law. Mut. L. Ins. Co. *v.* Griesa, 156 Fed. 398.

696-33 Mut. L. Ins. Co. *v.* Griesa, supra. See S. *v.* Water Co. (N. J.), 89 A. 1039.

696-34 Streeter *v.* Braman, 76 N. J. Eq. 371, 74 A. 659, enjoining pending proceeding in another court.

696-35 Nor where suit is pending before a special commissioner and other remedies are available. The Washtenaw, 163 Fed. 372.

696-36 Brown *v.* McDonald, 133 Fed. 897, 67 C. C. A. 59 (*over.* s. c. 130 Fed. 964; *appr.* in Kurtz *v.* Brown, 152 Fed. 372, 81 C. C. A. 498); Brown *v.* Magee, 146 Fed. 765; Noyes *v.* Thorpe, 73 N. H. 481, 62 A. 787 (*cit.* authorities pro and con); Hurricane T. Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421. See Huey *v.* Brown, 171 Fed. 641, 96 C. C. A. 443.

697-38 U. S. *v.* Co., 133 Fed. 274, 66 C. C. A. 652; Garden City S. Co. *v.* P., 118 Ill. App. 372.

Prayer must require verified answer. Streeter *v.* Braman, 76 N. J. Eq. 371, 74 A. 659.

698-41 Brown *v.* Palmer, 157 Fed. 797, partner is not a stranger to the action.

698-43 Murdock *v.* McCutchen, 154 App. Div. 854, 140 N. Y. S. 41. See Brown *v.* McDonald, 130 Fed. 964.

Rule does not apply to brokers who have purchased stocks for clients if they have not been transferred on the books. The receiver of the corporation may compel discovery of purchasers' names in order that he may enforce their liability for assessments. Brown *v.* Huey, 166 Fed. 483. In accord are Brown *v.* McDonald, 133 Fed. 897, 67 C. C. A. 59, 68 L. R. A. 462; Kurtz *v.* Brown, 152 Fed. 372, 81 C. C. A. 498; Brown *v.* Palmer, 157 Fed. 797.

699-44 Munson *v.* Ins. Co., 55 W. Va. 423, 47 S. E. 160. See Calahan *v.* Mfg. Co., 201 Fed. 607.

700-47 Gulf C. Co. *v.* Co., 157 Ala. 32, 47 S. 251.

700-48 Complainant need not state what the officer knows. Nixon *v.* Co., 150 Ala. 602, 43 S. 805, 9 L. R. A. (N. S.) 1255, full discussion.

700-51 See Smith *v.* Reid, 17 Ont. L. R. 265.

Information must have been demanded and refused. Taylor & Mc. C. Co. *v.* Hartman, 222 Pa. 172, 70 A. 1001.

701-53 Pollak *v.* Co., 138 Ala. 644, 35 S. 645; Bowdish *v.* Metzger, 71 Kan. 753, 81 P. 484; Raymond *v.* Blanegrass, 36 Mont. 449, 93 P. 648, 15 L. R. A. (N. S.) 976; Larkey *v.* Gardner, 105 Va. 718, 54 S. E. 886; Prewett *v.* Bk., 66 W. Va. 184, 66 S. E. 231.

Discovery granted where by fraud or deceit facts are in possession of defendant. McMullen L. Co. *v.* Strother, 136 Fed. 295, 69 C. C. A. 433. And so where there is confusion and uncertainty as to liability between defendants as the result of their acts. Miss. C. Co. *v.* Levy, 83 Miss. 774, 36 S. 281.

702-54 Larkey *v.* Gardner, 105 Va. 718, 54 S. E. 886.

702-55 Necessity must exist. Miller *v.* Moise, 168 Fed. 949; Ex parte Snow, 75 N. H. 7, 70 A. 120.

703-57 Affidavit must state facts showing basis for belief alleged. Brickner *v.* Sulzbacher, 130 App. Div. 393, 114 N. Y. S. 958.

703-58 Clark *v.* Robinet, 24 Ont. W. R. 309, 4 Ont. W. N. 1092, 10 D. L. R. (Can.) 826; Oro Water L. & P. Co. *v.* Oroville, 162 Fed. 975; Utah C. Co. *v.* R. Co., 145 Fed. 981; Pollak *v.* Co., 138 Ala. 644, 35 S. 645; Union C. C. Co. *v.* Court, 149 Cal. 790, 87 P. 1035 (whereabouts of known defendants immaterial, although service of process was impossible); Copper King *v.* Robert, 76 N. J. Eq. 251, 74 A. 292; Christman *v.* Keck, 138 App. Div. 654, 122 N. Y. S. 676 (offer to produce papers at trial reason for refusing inspection); Cuca *v.* Co., 138 App. Div. 421, 122 N. Y. S. 732 (inspection of place and appliances causing injury three years before); Prewett *v.* Bk., 66 W. Va. 184, 66 S. E. 231; Grand Lodge *v.* Dist. Court, 150 Ia. 398, 130 N. W. 117; Wallace *v.* Bacon, 143 App. Div. 211, 128 N. Y. S. 130. See infra, "Supplementary Proceedings," 232-11.

Inspection of writings may be permitted in aid of technical defense. Title G. & S. Co. *v.* Co., 66 Misc. 157, 121 N. Y. S. 226.

Absence of documents from jurisdiction not cause for denying an application for their production. Copper King *v.* Robert, 76 N. J. Eq. 251, 74 A. 292.

The defense need not be an affirmative one. Iroquois H. & A. Co. *v.* Co., 126 App. Div. 814, 111 N. Y. S. 172.

704-59 Carroll *v.* R. Co., 200 Mass. 527, 86 N. E. 793; Funger *v.* Co., 132 App. Div. 837, 117 N. Y. S. 799.

704-60 Oro Water L. & P. Co. *v.* Oroville, 162 Fed. 975.

705-61 In re Romine, 138 Fed. 837; Lerner *v.* Kraus, 147 N. Y. S. 32; Crum *v.* Wright, 82 Misc. 419, 143 N. Y. S. 1080; Ex parte Schoepf, 75 O. St. 1, 77 N. E. 276; Graham *v.* Co., 2 O. N. P.

(N. S.) 612; Shaffer *v.* Kinkelin, 1 Phila. (Pa.) 465.

Interrogatories improper to obtain names of witnesses. Watkins *v.* Cope, 84 N. J. L. 143, 86 A. 545.

Allowable to secure photographs of forged papers. Corbet *v.* Inst., 122 N. Y. S. 268.

707-63 Bill must show recoverable case. Munson *v.* Ins. Co., 55 W. Va. 423, 47 S. E. 160.

707-65 Where reference to the action at law is insufficient bill may be amended. Noyes *v.* Thorpe, 73 N. H. 481, 62 A. 787.

707-67 S. *v.* Court, 56 Wash. 649, 106 P. 150.

Disclosure of address of client. In re Trainer, 130 N. Y. S. 682.

Special master may be appointed. Motley *v.* Co., 174 Fed. 734.

Partner not privileged as to information obtained through confidential relations with co-partner. Brown *v.* Palmer, 157 Fed. 797.

709-72 Noyes *v.* Thorpe, 73 N. H. 481, 62 A. 787.

710-77 Riddle *v.* Blackburne, 125 App. Div. 893, 110 N. Y. S. 748.

Inspection of books of going concern must be carefully guarded. Coslow *v.* Mawhinney, 122 N. Y. S. 270.

711-83 Attorney may be obliged to give the name and adress of client. In re Malcom, 129 App. Div. 226, 113 N. Y. S. 666.

711-85 Verification by attorney proper where complainant absent from state. Kinney *v.* Reeves, 142 Ala. 604, 39 S. 29.

Direct and positive averments in bill raise a presumption that attorney's affidavit was made upon knowledge. Kinney *v.* Reeves, supra.

712-91 In a bill seeking an accounting and discovery, discovery is, prima facie, merely incidental to the accounting and if right to latter is not disclosed bill will be bad on demurrer. Elk B. Co. *v.* Neubert, 213 Pa. 171, 62 A. 782; Holland *v.* Hallahan, 211 Pa. 223, 60 A. 735.

713-95 Sufficiency of plea. Stuckes *v.* Candy Co., 158 Mo. App. 342, 138 S. W. 352.

715-99 Effect of failure to answer. Gottlieb-Knox-Amiss Ins. Agency *v.* Co., 128 La. 697, 55 S. 21.

715-2 Southern R. Co. *v.* Hayes (Ala.), 62 S. 874.

716-3 See Horner *v.* Bell, 102 Md. 435, 62 A. 736.

717-8 Bacharach *v.* Bartlett, 81 N. J. Eq. 253, 87 A. 70.

717-9 Bacharach *v.* Bartlett, 81 N. J. Eq. 253, 87 A. 70.

Answers on information and belief not required where they would require a tedious and expensive investigation. Park *v.* Bruen, 147 Fed. 884.

Subsequently obtaining information before trial necessitates the disclosure which was avoided by plea of ignorance. Louisville & N. R. Co. *v.* Bell, 134 Ky. 139, 119 S. W. 782.

717-10 See Victor Bloede Co. *v.* Carter, 148 Fed. 127.

718-11 Must plead lack of information. Bacharach *v.* Bartlett, 81 N. J. Eq. 253, 87 A. 70.

720-25 Victor Bloede Co. *v.* Carter, supra; McFarland *v.* Bk., 132 Fed. 399.

720-26 Utah C. Co. *v.* R. Co., 145 Fed. 981; Millard *v.* Millard, 123 Ill. App. 264, 221 Ill. 86, 77 N. E. 595; Patek *v.* Patek, 166 Mich. 446, 131 N. W. 1101.

DISORDERLY HOUSE

In 7 STANDARD PROC. the following matters are treated under this title; Definition; remedies for suppressing; jurisdiction and summary punishment; indictment, information and complaint; bill of particulars; consolidation of cases; questions of law and fact; variance; instructions.

724 Burden of proof is on state to show the inmates were prostitutes plying their vocation in such house or resorting thereto for that purpose (Bowman *v.* S. [Tex. Cr.], 164 S. W. 846), or that the defendant was the keeper thereof. Patterson *v.* S. (Okla. Cr.), 132 P. 693.

724-1 Mossman *v.* Ft. Collins, 40 Colo. 270, 90 P. 605; Wilder *v.* S., 3 Ga. App. 443, 60 S. E. 112; Arenz *v.* C., 31 Ky. L. R. 321, 102 S. W. 238; Mosher *v.* S., 62 Tex. Cr. 42, 136 S. W. 467.

Bawdy house and house of ill fame are synonymous. Patterson *v.* S. (Okla. Cr.), 132 P. 693.

Unlawfully selling liquors is not, by itself, the keeping of a disorderly house. S. *v.* Goff, 74 N. J. L. 247, 65 A. 854.

A place where practices contrary to statute are habitually carried on is a disorderly house, regardless of whether

they contain an element of criminality or of moral turpitude. S. *v.* Martin, 77 N. J. L. 652, 73 A. 548.

Place maintained for taking usurious interest, a disorderly house. S. *v.* Diamant, 73 N. J. L. 131, 62 A. 286.

Lack of disturbance of neighbors, no defense. S. *r.* Porter, 130 Ia. 690, 107 N. W. 923 (keeping for gain not necessary); Walker *r.* C., 117 Ky. 727, 79 S. W. 191; S. *v.* Ireton, 89 Minn. 340, 94 N. W. 1078. See also Walt *r.* P., 46 Colo. 136, 104 P. 89.

725-2 Coleman *r.* S., 5 Ga. App. 766, 64 S. E. 828; S. *r.* Gill, 150 Ia. 210, 129 N. W. 821; P. *r.* Pasquale, 206 N. Y. 598, 100 N. E. 413; Hogue *r.* S. (Tex. Cr.), 151 S. W. 805.

Insufficient evidence.—P. *r.* Drum, 127 App. Div. 241, 110 N. Y. S. 1096.

726-3 Ramsey *r.* Smith, 138 Ala. 333, 35 S. 325; Lismore *r.* S., 94 Ark. 207, 126 S. W. 853 (insufficient to convict); S. *r.* Anderson, 82 Conn. 111, 72 A. 648 (such evidence may establish a prima facie case, but is of no value if the reputation is unfounded in fact); Jones *r.* S. (Ga. App.), 82 S. E. 470; Ward *r.* S. (Ga. App.), 80 S. E. 295; Coleman *r.* S., 5 Ga. App. 766, 64 S. E. 828; Jones *r.* S., 2 Ga. App. 433, 58 S. E. 559; Mimbs *r.* S., 2 Ga. App. 387, 58 S. E. 499; S. *r.* Burns, 145 Ia. 588, 124 N. W. 600 (in a prosecution for resorting to, occupying and resorting to a house of ill fame); S. *r.* Shaw, 125 Ia. 422, 101 N. W. 109; S. *r.* Steen, 125 Ia. 307, 101 N. W. 96; King *r.* C., 154 Ky. 829, 159 S. W. 593; S. *r.* Hoelcher, 163 Mo. App. 352, 143 S. W. 850; Ty. *r.* McGrath, 16 N. M. 202, 114 P. 364; S. *r.* Harris, 14 N. D. 501, 105 N. W. 621; S. *r.* Thomas, 56 Or. 170, 108 P. 135; C. *r.* Murr, 7 Pa. Super. 391; C. *r.* Sarves, 17 Pa. Super. 407; C. *r.* Bunnell, 20 Pa. Super. 51; Jones *r.* S. (Tex. Cr.), 162 S. W. 1142; Golden *r.* S. (Tex. Cr.), 160 S. W. 957; Johnson *r.* S. (Tex. Cr.), 153 S. W. 875; Tacchini *r.* S. (Tex. Cr.), 126 S. W. 1139; Owens *r.* S., 53 Tex. Cr. 1, 108 S. W. 379; Wimberly *v.* S., 53 Tex. Cr. 11, 108 S. W. 384; Gordon *v.* S., 60 Tex. Cr. 570, 133 S. W. 255.

Reputation alone is not sufficient. Putman *r.* S. (Okla. Cr.), 132 P. 916, 46 L. R. A. (N. S.) 593, *cit.* and *quot.* Encyclopædia of Evidence.

The statutory offense is not keeping a house reputed to be a bawdy house, but one which is so in fact; the gist being keeping the house irrespective of its fame. Patterson *v.* S. (Okla. Cr.), 132 P. 963.

By statute such evidence is made competent.—P. *r.* Pasquale, 206 N. Y. 598, 100 N. E. 413.

Reputation may be proved by witnesses cognizant of the fact (Hitchings *r.* S. (Tex. Cr.), 143 S. W. 1164); but is not sufficient to convict. Watson *r.* S., 10 Ga. App. 794, 74 S. E. 89.

Common fame not sufficient proof of character of house. Botts *r.* U. S., 155 Fed. 50, 83 C. C. A. 646; Hall *r.* U. S., 155 Fed. 52, 84 C. C. A. 215; McConnell *r.* S., 2 Ga. App. 445, 58 S. E. 546; Jones *r.* S., 2 Ga. App. 443, 58 S. E. 559. But admissible to prove ownership under statute expressing that "common fame" is admissible to show reputation of house. S. *v.* McGinnis, 56 Or. 163, 108 P. 132.

Reputation prior to time pleaded admissible if connected with time laid. P. *r.* Wheeler, 142 Mich. 212, 105 N. W. 607; Frazier *v.* S., 47 Tex. Cr. 24, 81 S. W. 532.

Statute allowing proof of reputation constitutional. S. *r.* Wilson, 124 Ia. 264, 99 N. W. 1060. Is not exclusive of other modes of proof. S. *r.* Cambron, 20 S. D. 282, 105 N. W. 241.

727-4 Ward *r.* S. (Ga. App.), 80 S. E. 295; Coleman *r.* S., 5 Ga. App. 766, 64 S. E. 828; McConnell *r.* S., 2 Ga. App. 445, 58 S. E. 546; Winslow *r.* S., 5 Ind. App. 306, 32 N. E. 98; S. *r.* Burns, 145 Ia. 588, 124 N. W. 600, *cit.* the text; Walker *r.* C., 117 Ky. 727, 79 S. W. 191; S. *r.* Keithley, 142 Mo. App. 417, 127 S. W. 406; S. *r.* Price, 115 Mo. App. 656, 92 S. W. 174; S. *r.* Kelly, 76 N. J. L. 576, 70 A. 342 (conversations in absence of proprietor and reputation of women who visited house); P. *r.* Pasquale, 206 N. Y. 598, 100 N. E. 413; P. *r.* Jones, 129 App. Div. 772, 113 N. Y. S. 1097 (though after date pleaded); C. *r.* Murr, 5 Pa. Super. 391; C. *r.* Sarves, 17 Pa. Super. 407; C. *r.* Bunnell, 20 Pa. Super. 51; C. *r.* Brink, 49 Pa. Super. 620; S. *r.* Cambron, 20 S. D. 282, 105 N. W. 241; Smith *r.* S. (Tex. Cr.), 162 S. W. 835; Key *r.* S. (Tex. Cr.), 160 S. W. 354; Hickman *r.* S., 59 Tex. Cr. 88, 126 S. W. 1149; Stone

v. S., 47 Tex. Cr. 575, 85 S. W. 808; Wimberly *v.* S., 53 Tex. Cr. 11, 108 S. W. 384; Wilson *v.* S., 61 Tex. Cr. 628, 136 S. W. 447.

Evidence that previous to time when prosecutrix was taken to house it had not been used as a disorderly house is relevant in a trial for pandering. Boyle *v.* S. (Ark.), 161 S. W. 1049.

Evidence that defendant admitted she ran the house and had five girls and the reputation of the girls and the house was bad was sufficient to sustain a conviction. City of Columbia *v.* Stout (Mo. App.), 167 S. W. 1153.

Conduct and conversation not in presence of accused is inadmissible. P. *v.* Newbold, 260 Ill. 196, 103 N. E. 69.

That policeman arrested twelve prostitutes in the house and they all pleaded guilty is admissible. Dimitri *v.* S. (Tex. Cr.), 155 S. W. 535.

Lewd character of defendant's daughter who lived in the house admissible. Jones *r.* S. (Okla. Cr.), 133 P. 1134.

"**Evidence to establish** the character of a bawdy house must in most cases be inferential from the nature of the case. State *v.* Dudley, 56 Mo. App. 450. Evidence that the inmates of the house were prostitutes strongly conduces to show that it was a bawdy house. State *v.* Barnard, 64 Mo. App. 260; State *v.* Horn, 83 Mo. App. 47; State *v.* Price, 115 Mo. App. 656, 92 S. W. 174. And with evidence of slight additional circumstances it will be sufficient to sustain a conviction. State *v.* Horn, 83 Mo. App. 47; Ramey *v.* State, 39 Tex. Cr. R. 200, 45 S. W. 489." S. *v.* Hoelcher, 163 Mo. App. 352, 143 S. W. 850.

Circumstantial evidence may establish the character of house. Botts *v.* U. S., 155 Fed. 50, 83 C. C. A. 646; S. *v.* Porter, 130 Ia. 690, 107 N. W. 923. And see last preceding paragraph.

Sufficiency.—S. *v.* Gill, 150 Ia. 210, 129 N. W. 821; City of Anderson *v.* Gist, 88 S. C. 543, 71 S. E. 50; Sullivan *v.* S., 61 Tex. Cr. 657, 136 S. W. 456; Wilson *v.* S., 61 Tex. Cr. 628, 136 S. W. 447; Layton *v.* S., 61 Tex. Cr. 507, 135 S. W. 557.

Specific acts not provable. S. *v.* Baans, 77 N. J. L. 123, 71 A. 111.

729-5 Boyle *v.* S. (Ark.), 161 S. W. 1049; Owens *v.* S., 53 Tex. Cr. 1, 108 S. W. 379. *Contra*, Mimbs *v.* S., 2 Ga. App. 387, 58 S. E. 499; S. *v.* Price, 115 Mo. App. 656, 92 S. W. 174.

Reputation of accused is admissible, but not opinion as to character of house. P. *v.* Newbold, 260 Ill. 196, 103 N. E. 69.

729-6 Rosencranz *v.* U. S., 155 Fed. 38, 83 C. C. A. 634; Jones *v.* S., 2 Ga. App. 433, 58 S. E. 559; Mash *v.* P., 220 Ill. 86, 77 N. E. 92; S. *v.* Cambron, 20 S. D. 282, 105 N. W. 241; Frazer *v.* S., 47 Tex. Cr. 24, 81 S. W. 532; Stone *v.* S., 47 Tex. Cr. 575, 85 S. W. 808. See Bates *v.* S., 45 Tex. Cr. 420, 76 S. W. 462; Wimberly *v.* S., 53 Tex. Cr. 11, 108 S. W. 384.

Where husband and wife lived together on property belonging to her it is no defense that the title was in the wife. Key *v.* S. (Tex. Cr.), 160 S. W. 354.

Harboring prostitutes.—S. *v.* Wilson, 124 Ia. 264, 99 N. W. 1060.

Declaration of conspirator.—Raymond *v.* P., 226 Ill. 433, 80 N. E. 996.

Admission by a defendant that his co-defendant was his housekeeper makes competent latter's offers to secure women for visitors, though made in defendant's absence. Hickman *v.* S., 59 Tex. Cr. 88, 126 S. W. 1149.

Payment of taxes on certain fixtures in building. Sweeney *v.* S., 59 Tex. Cr. 370, 128 S. W. 390.

730-7 S. *v.* Olds, 217 Mo. 305, 116 S. W. 1080; Key *v.* S. (Tex. Cr.), 160 S. W. 354. See S. *v.* Emblem, 66 W. Va. 360, 66 S. E. 499.

Conversation of a detective with two girls in the house which accused did not hear, was inadmissible to prove accused permitted acts of character referred to in conversation P. *v.* Newbold, 260 Ill. 196, 103 N. E. 69.

Evidence of two men that they met two girls on the street and the latter told them to go to accused's house and engage rooms for Mary and Ethel; that they did so and that accused took them to the rooms and later the girls came there, is admissible as part of the res gestae. Hearne *v.* S. (Tex. Cr.), 165 S. W. 596.

That a prostitute plied her vocation in the house and paid $1.50 rent a day is competent in a prosecution for knowingly permitting property to be used as a house of prostitution. Clyman *v.* S. (Tex. Cr.), 155 S. W. 231.

Arrest and conviction of a person for frequenting defendant's house is admissible as showing his knowledge of the character of the inmates. Jones *v.* S. (Okla. Cr.), 133 P. 1134.

Proof of actual knowledge essential to conviction. S. *v.* Mausert (N. J.), 89 A. 1011.

Where the evidence not only tends to show the lewd character of the women who visited and stayed at the house boat and the frequent visits of men, but that the defendant had avowed to the marshal her purpose to run the place as a bawdy house and later practically confessed to the police officer that she was doing so and asserted she would continue to do so, this was held sufficient to establish not only the character of the house as a bawdy house, but that she was the keeper of it. S. *v.* Hoelcher, 163 Mo. App. 352, 143 S. W. 850.

Reputation of house.—S. *v.* Homaki, 40 Wash. 629, 82 P. 873.

730-8 S. *v.* Steen, 125 Ia. 307, 101 N. W. 96; Jones *v.* S. (Okla. Cr.), 133 P. 1134; S. *v.* Emblem, 56 W. Va. 678, 49 S. E. 554.

730-9 Meadows *v.* C., 31 Ky. L. R. 1159, 104 S. W. 954; P. *v.* Jones, 191 N. Y. 291, 84 N. E. 61. See Majors *v.* P., 38 Colo. 437, 88 P. 636; P. *v.* Jones, 129 App. Div. 772, 113 N. Y. S. 1097 (similar crimes in same house may be shown).

Transcripts of record of municipal court showing five men and women were convicted of patronizing a disorderly house of defendant is incompetent, as it was a proceeding under city ordinance and different from the present proceeding under the revised statutes. P. *v.* Newbold, 260 Ill. 196, 103 N. E. 69.

Leasing house for immoral purpose. Contract for sale of premises leased as a house of ill-fame may be shown by parol circumstances to be a sham. S. *v.* Emblem, 56 W. Va. 678, 49 S. E. 554.

DISTURBING OF PUBLIC ASSEMBLAGES

See the title "Disturbing Public Assembly" in 7 STANDARD PROC., for a treatment of the following matters: Former jeopardy; misjoinder of defendants; indictment, information and complaint; variance; questions for jury; instructions.

731 Whether a congregation of persons constitutes a religious meeting is a question of fact. Cline *v.* S. (Okla. Cr.), 130 P. 510.

731-1 Disturbance of school. See S. *v.* Packenham, 40 Wash. 403, 82 P. 597.

732-5 Taylor *v.* S., 1 Ga. App. 539, 57 S. E. 1049; S. *v.* Dahlstrom, 90 Minn. 72, 95 N. W. 580.

732-6 Stafford *v.* S., 154 Ala. 71, 45 S. 673; S. *v.* Jones, 77 S. C. 385, 58 S. E. 8.

733-8 Continuance of riotous acts after dispersal of congregation may be shown. S. *v.* Jones, 77 S. C. 385, 58 S. E. 8.

Declaration by participant, competent. S. *v.* Jones, supra.

733-9 That witness ceased to attend Sunday school because of acts of defendant is admissible. Deskin *v.* S., 49 Tex. Cr. 439, 93 S. W. 742.

733-10 See Shirley *v.* S., 1 Ga. App. 143, 57 S. E. 912; Cummings *v.* S., 8 Ga. App. 534, 69 S. E. 918.

Intoxication.—Harrell *v.* S., 9 Ga. App. 624, 71 S. E. 1030.

734-11 Folds *v.* S., 123 Ga. 167, 51 S. E. 305; Tanner *v.* S., 126 Ga. 77, 54 S. E. 914; Taylor *v.* S., 1 Ga. App. 539, 57 S. E. 1049.

734-12 Stafford *v.* S., 154 Ala. 71, 45 S. 673; Clark *v.* S. (Tex. Cr.), 78 S. W. 1078.

734-13 See Denny *v.* S., 52 Tex. Cr. 158, 105 S. W. 798.

734-15 Christmas celebration comes within the statutory protection given to religious meetings. Stafford *v.* S., 154 Ala. 71, 45 S. 673.

735-18 Folds *v.* S., 123 Ga. 167, 51 S. E. 305.

735-19 Tanner *v.* S., 126 Ga. 77, 54 S. E. 914. *Comp.* C. *v.* Underkoffer, 11 Pa. C. C. 589.

735-20 Stafford *v.* S., 154 Ala. 71, 45 S. 673; Brown *v.* S. (Ga. App.), 80 S. E. 26.

737-22 Presence of people at a private residence upon invitation may be shown by one charged with swearing in public place. Austin *v.* S., 57 Tex. Cr. 623, 124 S. W. 636, 639.

737-24 S. *v.* Dahlstrom, 90 Minn. 72, 95 N. W. 580.

737-26 Dismissal of religious assembly may be shown though those present were still in building. S. *v.* Leonard, 141 Mo. App. 416, 125 S. W. 234.

DIVORCE

Effect of statutory presumption of death, 767-9.

See 7 STANDARD PROC., title "Divorce," for a treatment of the following matters: Nature of remedy; jurisdiction; venue; parties; interlocutory proceedings; process; pleadings; variances; trials; dismissal and discontinuance; decree; abatement and revival; appeal and error; alimony, counsel fees and suit money; disposition of property.

744-1 Bancroft *v.* Bancroft (Del.), 85 A. 561; P. *v.* Case, 241 Ill. 279, 89 N. E. 638. See Peretti *v.* Peretti, 165 Cal. 717, 134 P. 322.

The court may elicit evidence tending to defeat the divorce, although no answer has been made, and may require plaintiff to subpoena defendant. Grenzeback *v.* Grenzeback, 118 Mo. App. 280, 94 S. W. 567.

744-2 The general rules relating to the introduction of evidence and the weight to be given it govern divorce suits. Reed *v.* Reed, 101 Mo. App. 176, 70 S. E. 505.

744-3 Balswic *v.* Balswic, 179 Ill. App. 118; Gruner *v.* Gruner (Mo. App.), 165 S. W. 865; Rogers *v.* Rogers, 81 N. J. Eq. 311, 88 A. 370; Luper *v.* Luper (Or.), 96 P. 1099. See Roth *v.* Roth, 90 App. Div. 87, 85 N. Y. S. 640; Taft *v.* Taft, 80 Vt. 256, 67 A. 703 (weighing presumption of innocence in favor of accused).

Same degree of proof required in divorce from bed and board as in absolute divorce. Macomber *v.* Macomber, 35 R. I. 372, 87 A. 170.

Impotency.—Burden of proof upon party asserting. Kinkaid *v.* Kinkaid, 256 Ill. 548, 100 N. E. 217; Tierney *v.* Tierney, 169 Mich. 600, 135 N. W. 654 (burden not sustained).

745-1 Williams *v.* Williams, 136 Ky. 71, 123 S. W. 337; Case *v.* Case, 159 Mich. 491, 122 N. W. 538; Longbotham *v.* Longbotham, 119 Minn. 139, 137 N. W. 387; Sarson *v.* Sarson, 74 N. J. Eq. 564, 70 A. 663; Post *v.* Post, 71 Misc. 44, 129 N. Y. S. 754; Rindlaub *v.* Rindlaub, 19 N. D. 352, 125 N. W. 479; Russell *v.* Russell, 37 Pa. Super. 348 (must be strong and convincing in absence of proof of bodily harm); Fitzgerald *v.* Fitzgerald (Tex. Civ.), 168 S. W. 452; Ingle *v.* Ingle (Tex.), 131 S. W. 241; Holm *v.* Holm (Utah), 139 P. 937; Dawkins *v.* Dawkins (W. Va.), 79 S. E. 822. See Tillis *v.* Tillis, 55 W. Va. 198, 46 S. E. 926.

"Full and satisfactory" evidence required. Bingham *v.* Bingham (Tex. Civ.), 149 S. W. 214.

Evidence sufficient.—Delsa *v.* Raymond, 126 La. 126, 52 S. 240; Giusto *v.* Giusto, 80 N. J. Eq. 355, 84 A. 617.

If answer sworn to there can be no divorce unless it is overcome by two witnesses, or by one witness and corroborating circumstances. Ford *v.* Ford, 63 Fla. 422, 58 S. 131.

746-7 Admissions of wife's adultery cannot be excluded merely because they tend to establish the child's illegitimacy. Bancroft *v.* Bancroft (Del.), 85 A. 561.

746-8 Bailey *v.* S., 105 Ark. 228, 150 S. W. 1030; Shelton *v.* Shelton, 102 Ark. 54, 143 S. W. 110.

747-10 Hayes *v.* Hayes, 144 Cal. 625, 78 P. 19; Bancroft *v.* Bancroft (Del.), 85 A. 561; Michalowicz *v.* Michalowicz, 25 App. Cas. (D. C.) 484; May *v.* May, 71 Kan. 317, 80 P. 567; Graves *v.* Graves, 88 Miss. 677, 41 S. 384.

747-11 Hooper *v.* Hooper (N. C.), 81 S. E. 933. See Schlater *v.* Le Blanc, 121 La. 919, 46 S. 921.

Admissions.—Under statute providing that the "cause shall be heard independently of the admissions of either party in the pleadings or otherwise," admissions are inadmissible. Trough *v.* Trough, 59 W. Va. 464, 53 S. E. 630. See also Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340.

But see *contra,* Michalowicz *v.* Michalowicz, 25 App. Cas. (D. C.) 484. And see Bancroft *v.* Bancroft (Del.), 85 A. 561. Such evidence is competent to defeat a divorce. Cralle *v.* Cralle, 79 Va. 182; Tillis *v.* Tillis, 55 W. Va. 198, 46 S. E. 926.

747-12 Kientz *v.* Kientz, 104 Ark. 381, 149 S. W. 86, *cit.* Rie *v.* Rie, 34 Ark. 37; Kurtz *v.* Kurtz, 38 Ark. 119; Brown *v.* Brown, 38 Ark. 324; Scarborough *v.* Scarborough, 54 Ark. 20, 14 S. W. 1098; Hayes *v.* Hayes, 144 Cal. 625, 78 P. 19; Michalowicz *v.* Michalowicz, 25 App. Cas. (D. C.) 484; May *v.* May, 71 Kan. 317, 80 P. 567; Rosenerance *v.* Rosenerance, 127 Mich. 322, 86 N. W. 800; Earl *v.* Earl, 81 N. J. Eq. 444, 86 A. 940; Timmann *v.* Timmann, 142 N. Y. S. 298; Diederichs *v.* Diederichs, 44 Misc. 591, 90 N. Y. S. 131. See De LaRama *v.* De LaRama, 201 U. S. 303; Clark *v.* Clark, 86 Minn. 249, 90 N. W.

390; Feinberg *v.* Feinberg, 70 N. J. Eq. 420, 62 A. 562.

748-14 A party is bound by his admission in the pleadings in divorce suits as in other actions. Doeme *v.* Doeme, 96 App. Div. 284, 89 N. Y. S. 215 (residence); Kappner *v.* Kappner, 35 Pa. C. C. 199.

749-17 McGee *v.* McGee, 161 Mo. App. 40, 143 S. W. 77; Miller *v.* Miller, 89 Neb. 239, 131 N. W. 203; Dickinson *v.* Dickinson (Tex. Civ.), 138 S. W. 205. See Bernou *v.* Bernou, 15 Cal. App. 341, 114 P. 1000; Percival *v.* Percival, 106 App. Div. 111, 94 N. Y. S. 909; Heath *v.* Heath, 44 Pa. Super. 118. See Miller *v.* Miller, 67 Or. 359, 136 P. 15.

749-18 Emens *v.* Emens, 46 Ind. App. 22, 91 N. E. 747. See infra, 794-37, and Adams *v.* Adams (Can.), 11 West L. Rep. 358; Winans *v.* Winans, 205 Mass. 388, 91 N. E. 394; Heer *v.* Heer, 72 N. J. Eq. 617, 65 A. 1013; Lyon *v.* Lyon, 30 Pa. C. C. 342; Austin *v.* Austin, 4 Pa. C. C. 368. But see Clopton *v.* Clopton, 11 N. D. 212, 91 N. W. 46.

Plaintiff's evidence.—Williams *v.* Williams, 78 N. J. Eq. 13, 78 A. 693.

Resident freeholders.—West *v.* West, 38 Ind. App. 659, 78 N. E. 987; Rosniakowski *v.* Rosniakowski, 34 Ind. App. 128, 72 N. E. 485; Cummins *v.* Cummins, 30 Ind. App. 671, 66 N. E. 915.

Proof cannot be waived.—Gamblin *v.* Gamblin, 52 Tex. Civ. 479, 114 S. W. 408.

Proof by two witnesses must be made if statute so directs. Blauser *v.* Blauser, 44 Ind. App. 117, 87 N. E. 152.

750-19 Casley *v.* Mitchell, 121 Ia. 96, 96 N. W. 725; Dietrich *v.* Dietrich, 128 App. Div. 564, 112 N. Y. S. 968; Johannesen *v.* Johannesen, 70 Misc. 361, 128 N. Y. S. 892.

750-20 Houlton *v.* McGuirk, 122 La. 359, 47 S. 681; Gruner *v.* Gruner (Mo. App.), 165 S. W. 865.

Testimony of one witness sufficient. Overing *v.* Provensal, 117 La. 653, 42 S. 211.

750-21 Plaintiff's testimony sufficient where allegation of marriage is admitted. Statute requiring corroboration does not apply in such case. Clopton *v.* Clopton, 11 N. D. 212, 91 N. W. 46.

751-23 See Wilkerson *v.* Wilkerson, 3 Cal. App. 204, 84 P. 784.

751-24 Stackhouse *v.* Stackhouse, 88 Neb. 184, 129 N. W. 257.

751-25 Kientz *v.* Kientz, 104 Ark. 381, 149 S. W. 86, where the evidence could not be said to show more than indiscretion. And see Warfield *v.* Warfield, 97 Ark. 125, 133 S. W. 606.

751-26 See P. *v.* Teal, 196 N. Y. 372, 89 N. E. 1086.

751-27 Buswell *v.* Buswell, 146 Ia. 52, 124 N. W. 770.

Commission of act between dates pleaded with same person may be shown to explain previous relations of the parties. Kinney *v.* Kinney, 149 N. C. 321, 63 S. E. 97.

752-30 Krous *v.* Krous, 41 App. Cas. (D. C.) 200; Baker *v.* Baker, 136 Ky. 617, 124 S. W. 866; Mathews *v.* Guillaune, 130 La. 459, 58 S. 149; Clark *v.* Clark, 78 N. J. Eq. 304, 81 A. 1126; Moyer *v.* Moyer, 78 N. J. Eq. 588, 81 A. 1111; McNeir *v.* McNeir, 129 N. Y. S. 481.

Evidence held insufficient.—Bottom *v.* Bottom, 143 Ky. 666, 137 S. W. 198; Wolff *v.* Wolff, 128 La. 724, 55 S. 333.

Rape committed by a husband is adultery on his part. Johnson *v.* Johnson, 78 N. J. Eq. 507, 80 A. 119.

"In a proceeding of this character it certainly would not be expected that the parties at fault would admit their guilt, but, on the contrary, it is to be expected that they both would deny the allegation, however true it might be. It must, therefore, be apparent that, if a prima facie case is made, something more than the mere denials of the guilty parties will be needed to meet the burden." Moyer *v.* Moyer, 78 N. J. Eq. 588, 81 A. 1111.

752-31 Heyman *v.* Heyman, 210 Ill. 524, 71 N. E. 391; Lorenson *v.* Lorenson, 155 Ill. App. 35; Baker *v.* Baker, 136 Ky. 617, 124 S. W. 866; Davidson *v.* Davidson, 134 App. Div. 958, 119 N. Y. S. 141; McCune *v.* McCune, 31 Pa. Super. 248; Taft *v.* Taft, 80 Vt. 256, 67 A. 703; Huff *v.* Huff (W. Va.), 80 S. E. 846. See Jones *v.* Jones, 124 Ill. App. 201; Waer *v.* Waer (N. J.), 90 A. 1039. And see the title "Circumstantial Evidence."

752-32 Taft *v.* Taft, supra; Axtell *v.* Axtell, 119 N. Y. S. 644.

752-33 See Roth *v.* Roth, 90 App. Div. 87, 85 N. Y. S. 640.

753-34 Keville *v.* Keville, 106 N. Y. S. 993.

754-36 See Lee *v.* Lee, 77 N. J. Eq. 91, 75 A. 562.

754-37 See Heyman *v.* Heyman, 210 Ill. 524, 71 N. E. 591; Zumbiel *v.* Zumbiel, 24 Ky. L. R. 590, 69 S. W. 708; Hutchinson *v.* Hutchinson, 53 Misc. 438, 104 N. Y. S. 1074; Taft *v.* Taft, 80 Vt. 256, 67 A. 703.

754-38 Lenpold *v.* Lenpold (Ia.), 146 N. W. 55. See Rasch *v.* Rasch, 105 Md. 503, 66 A. 499.

755-41 Hall *v.* Hall, 43 Or. 619, 75 P. 141.

Evidence of adultery, procured by subterfuge, is admissible. Hyman *v.* Hyman, 139 N. Y. S. 65.

755-42 Kappner *v.* Kappner, 35 Pa. C. C. 199, silence or vague remark insufficient as admission.

755-43 Lenpold *v.* Lenpold (Ia.), 146 N. W. 55; Kohlenberg *v.* Kohlenberg (N. J. Eq.), 74 A. 432.

756-44 Since filing bill (Spurlock *v.* Spurlock, 80 Ark. 37, 96 S. W. 753), if not far removed from the time alleged. Axtell *v.* Axtell, 119 N. Y. S. 644.

756-45 Axtell *v.* Axtell, 119 N. Y. S. 644. But see Hutchinson *v.* Hutchinson, 53 Misc. 438, 104 N. Y. S. 1074; Gust *v.* Gust, 70 Wash. 695, 127 P. 292.

756-46 Farrow *v.* Farrow, 70 N. J. Eq. 777, 60 A. 1103 (opportunity without proof of inclination is insufficient); Farrier *v.* Farrier (N. J.), 58 A. 1079 (Same); Graham *v.* Graham, 157 App. Div. 52, 141 N. Y. S. 766; Lunham *v.* Lunham, 133 App. Div. 215, 117 N. Y. S. 396.

756-47 Kerr *v.* Kerr, 134 App. Div. 141, 118 N. Y. S. 801.

757-53 See Brown *v.* Brown, 62 N. J. Eq. 29, 49 A. 589.

757-54 Houlton *v.* McGuirk, 122 La. 359, 57 S. 681.

758-59 Rector *v.* Rector, 78 N. J. Eq. 386, 79 A. 295.

759-67 Houlton *v.* McGuirk, 122 La. 359, 47 S. 681; Roth *v.* Roth, 90 App. Div. 87, 85 N. Y. S. 640; Taft *v.* Taft, 80 Vt. 256, 67 A. 703.

759-68 Earl *v.* Earl, 81 N. J. Eq. 444, 86 A. 940. See Rosenberger *v.* Rosenberger, 150 Ky. 803, 150 S. W. 1023.

Erratum.—This note number is placed before the wrong subject-matter in the original notes. It should be inserted before the case of Carter *v.* Carter in the reading note headed "Contrary Expressions."

760-69 Yates *v.* Yates (N. Y.), 105 N. E. 195.

760-70 Poe *v.* Poe, 93 Ark. 426, 124 S. W. 1029.

The character of the defendant is not in issue because he is charged with adultery, and evidence thereof is inadmissible. Van Horn *v.* Van Horn, 5 Cal. App. 719, 91 P. 260; Talley *v.* Talley, 215 Pa. 281, 64 A. 523, 29 Pa. Super. 535. *Comp.* infra, 788-10.

760-73 Lorenson *v.* Lorenson, 155 Ill. App. 35; Wells *v.* Johnson, 122 La. 385, 47 S. 690; Yates *v.* Yates (N. Y.), 105 N. E. 195. *Contra,* if nothing more than receipt shown; contents must be confirmed in some manner by recipient. Kappner *v.* Kappner, 35 Pa. C. C. 199.

To show impure character of woman. Mathews *v.* Guillaune, 130 La. 459, 58 S. 149.

Such letters must, however, be properly proved. Donnelly *v.* Donnelly, 25 Ky. L. R. 1543, 78 S. W. 182.

Letters found in possession of defendant are not admissible unless shown to be part of a correspondence or to have been sanctioned in some way. Jones *v.* Jones, 124 Ill. App. 201.

761-74 Wells *v.* Johnson, 122 La. 385, 47 S. 690.

762-80 See Heyman *v.* Heyman, 210 Ill. 524, 71 N. E. 591.

Proof of non-access must be strong and conclusive. Wallace *v.* Wallace, 73 N. J. Eq. 403, 67 A. 612.

762-81 Timmann *v.* Timmann, 142 N. Y. S. 298. See Bancroft *v.* Bancroft (Del.), 85 A. 561.

762-82 Kerr *v.* Kerr, 134 App. Div. 141, 118 N. Y. S. 801; Pasquarelle *v.* Pasquarelle, 18 Pa. Dist. 526.

763-84 See Wilson *v.* Wilson, 97 Ark. 643, 134 S. W. 963; Baker *v.* Baker, 195 Pa. 407, 46 A. 96.

763-86 See Davis *v.* Davis, 151 Cal. 548, 91 P. 485.

763-87 Baker *v.* Baker, 136 Ky. 617, 124 S. W. 866.

763-88 Johanson *v.* Johanson, 12 Cal. App. 635, 108 P. 55, evidence of such a visit two months after suit brought inadmissible if it stands alone.

764-91 See Matthews *v.* Matthews (N. J.), 58 A. 1047.

765-1 Morgan *v.* Morgan, 102 Ark. 679, 143 S. W. 584; Craig *v.* Craig, 90 Ark. 40, 117 S. W. 765; Carter *v.* Carter, 140 Ky. 228, 130 S. W. 1102; Taylor *v.* Taylor, 112 Md. 666, 77 A. 133; Donley *v.* Donley, 150 Mo. App. 660, 131 S. W. 356; Bordeaux *v.* Bordeaux, 43 Mont. 102, 115 P. 25.

Attitude of plaintiff's mother with whom plaintiff had domiciled his wife.

Geisinger *v.* Conners, 130 La. 922, 58 S. 815.

765-2 Ward *v.* Ward, 7 Penne. (Del.) 364, 75 A. 611.

Subsequent conduct showed acquiescence in separation. Creasey *v.* Creasey, 167 Mo. App. 68, 151 S. W. 219.

Criminal conduct of defendant not connected with desertion cannot be shown. Wheeler *v.* Wheeler, 101 Md. 427, 61 A. 216; Von Bernuth *v.* Von Bernuth, 76 N. J. Eq. 487, 74 A. 700.

765-4 Craig *v.* Craig, 90 Ark. 40, 117 S. W. 765; Louis *v.* Louis, 134 Mo. App. 566, 114 S. W. 1150; Luper *v.* Luper (Or.), 96 P. 1099; Kelly *v.* Kelly, 51 Pa. Super. 603.

Later letters.—Bordeaux *v.* Bordeaux, 43 Mont. 102, 115 P. 25.

766-6 Matthews *v.* Matthews, 112 Md. 582, 77 A. 249; Cooper *v.* Cooper, 37 Pa. Super. 246 (presumed to have been by agreement); Kipp *v.* Kipp, 77 N. J Eq. 585, 78 A. 682.

Evidence insufficient.—Dawson *v.* Thornton, 134 Ga. 476, 68 S. E. 73.

Burden on complainant to establish desertion. Johnson *v.* Johnson, 107 Ark. 262, 154 S. W. 503; Hayes *v.* Hayes, 144 Cal. 625, 78 P. 19 (persistent refusal of intercourse); Trimmer *v.* Trimmer, 215 Ill. 121, 74 N. E. 96; Carey *v.* Carey, 25 Pa. Super. 223 (for statutory period); Tillis *v.* Tillis, 55 W. Va. 198, 46 S. E. 926; and that he was not at fault. Adair *v.* Adair, 31 Ky. L. R. 956, 104 S. W. 365.

When living in the same house the parties are presumptively living as husband and wife, and it requires very clear and convincing evidence to show the contrary. Womack *v.* Womack, 73 Ark. 281, 83 S. W. 937.

766-8 Living in adultery for several years after separation by agreement is evidence of husband's intent to desert, but not conclusive. Clark *v.* Clement, 71 N. H. 5, 51 A. 256.

Failure to follow husband to his domicile is sufficient. Winkles *v.* Powell, 173 Ala. 46, 55 S. 536.

Evidence held sufficient.—Kirby *v.* Kirby, 157 Ill. App. 564; Brokaw *v.* Brokaw, 66 Misc. 307, 123 N. Y. S. 17.

767-9 Hagman *v.* Hagman, 38 Pa. Super. 519. See King *v.* King, 122 La. 582, 47 S. 909.

Effect of statutory presumption of death.—A statute raising presumption of death from seven years' absence in any action in which death comes in question, has no application to divorce suit where an absconding party has been absent and not heard from for seven years. Spiltoir *v.* Spiltoir, 72 N. J. Eq. 50, 64 A. 96, *dist.* and *disap.* Burkhardt *v.* Burkhardt, 63 N. J. Eq. 479, 52 A. 296.

767-10 Burns *v.* Burns, 38 Pa. Super. 221.

767-12 See Ward *v.* Ward, 7 Penne. (Del.) 364, 75 A. 611.

Consent implied from circumstances. Borden *v.* Borden, 165 Cal. 469, 137 P. 27.

Visiting and corresponding with a husband after knowledge of his continued adultery is evidence of wife's consent to continuation of separation begun by agreement. Clark *v.* Clement, 71 N. H. 5, 51 A. 256.

Consent may be shown under a general denial. Patrick *v.* Patrick, 139 Wis. 463, 121 N. W. 130.

768-13 Keesey *v.* Keesey, 160 Cal. 727, 117 P. 1054. See Canning *v.* Canning (Vt.), 89 A. 1088.

768-14 See Purnell *v.* Purnell (N. J. Eq.), 70 A. 187. See Gruner *v.* Gruner (Mo. App.), 165 S. W. 865.

Sincere offer.—The offer to return, or to take back a party must be sincere. Creasey *v.* Creasey, 167 Mo. App. 68, 151 S. W. 219.

Insincere offer to return.—Peretti *v.* Peretti, 165 Cal. 717, 134 P. 322.

Burden is on wife who has refused to live in home provided to show that she informed husband of willingness to return. Purnell *v.* Purnell, supra.

768-15 Pendency of a libel for divorce on same ground set up in instant suit is evidentiary only as to the nature of the abandonment. Easter *v.* Easter, 75 N. H. 270, 73 A. 30.

769-17 Tarrant *v.* Tarrant, 156 Mo. App. 725, 137 S. W. 56; Suydam *v.* Suydam, 79 N. J. Eq. 144, 80 A. 1057.

Misconduct by party abandoned subsequent to abandonment is irrelevant on issue of justification. Garcia *v.* Garcia, 60 Misc. 198, 111 N. Y. S. 1017.

Evidence insufficient.—"If it be assumed that ordinarily such occurrences as those to which the wife has testified would be sufficient in themselves to justify her in living apart from her husband, we have here to consider the important fact that the defendant, with full knowledge in advance of the marriage that her prospective husband would not give up his daughters as she

had proposed, and with thorough appreciation of their sensitiveness to her presence in the place their deceased mother had so lately filled, voluntarily assumed whatever possibilities of discord the situation offered, and then contributed by her own attitude in the home to the domestic difficulties of which she complains. In view of these conditions, we do not think that the acts of discourtesy to which she refers were sufficiently serious to entitle her to demand the separation of the father from his daughters as an absolute and peremptory condition of the performance of her marital obligations.'' Buckner *v.* Buckner, 118 Md. 101, 84 A. 156.

769-18 Record of conviction of husband for desertion is persuasive, though not conclusive, evidence in favor of the wife. Carey *v.* Carey, 25 Pa. Super. 223.

The pendency of a divorce suit is an evidentiary fact, bearing on the question whether the absence complained of is such an abandonment as the statute makes a cause for a divorce, but it is not necessarily decisive of the case, and there is no presumption that it was brought in good faith. Redford *v.* Redford, 162 Mo. App. 127, 144 S. W. 125.

Record of a suit between the parties on issue of adultery is admissible to justify abandonment only to the extent it contains admissions by defendant. Garcia *v.* Garcia, 60 Misc. 198, 111 N. Y. S. 1017.

769-19 De Cloedt *v.* De Cloedt, 24 Ida. 277, 133 P. 664; Haver *v.* Haver, 102 Minn. 235, 113 N. W. 382 (quarrels over complainant's conduct with others); Hauber *v.* Hauber, 170 Mo. App. 71, 156 S. W. 54; Herriford *v.* Herriford, 169 Mo. App. 641, 155 S. W. 855; Dimmitt *v.* Dimmitt, 167 Mo. App. 94, 150 S. W. 1107; Andrew *v.* Andrew, 53 Or. 531, 99 P. 938; Russell *v.* Russell, 37 Pa. Super. 348. But see Smith *v.* Smith, 119 Ga. 239, 46 S. E. 106.

Separation as a result of cruelty.—Miller *v.* Miller, 89 Neb. 239, 131 N. W. 203.

Whatever directly tends to show a course of treatment which rendered the condition of complainant intolerable is admissible, and the whole conduct of defendant toward her during the period of alleged mistreatment should be considered. Schulze *v.* Schulze, 33 Pa. Super. 325; Fay *v.* Fay, 27 Pa. Super. 328.

Where crime committed by defendant is alleged as cruelty, it is unnecessary to prove all its elements. Galigher *v.* Galigher, 49 Or. 155, 89 P. 146.

Assault made on wife in presence of husband by his paramour is irrelevant unless he made the act his own. Holt *v.* Holt, 204 Mass. 25, 90 N. E. 392.

770-20 Rector *v.* Rector, 78 N. J. Eq. 386, 79 A. 295; Lohmuller *v.* Lohmuller (Tex. Civ.), 135 S. W. 751; Haynor *v.* Haynor, 112 Va. 123, 70 S. E. 531.

770-21 Dimmitt *v.* Dimmitt, 167 Mo. App. 94, 150 S. W. 1107. See Hauber *v.* Hauber, 170 Mo. App. 71, 156 S. W. 54. But see Smith *v.* Smith, 119 Ga. 239, 46 S. E. 106.

Indignities.—Sisk *v.* Sisk, 99 Ark. 94, 136 S. W. 987.

770-22 Anderson *v.* Anderson, 152 Ky. 773, 154 S. W. 1. See Rosenberger *v.* Rosenberger, 150 Ky. 803, 150 S. W. 1023. But see Smith *v.* Smith, 119 Ga. 239, 46 S. E. 106.

770-24 Fitzgerald *v.* Fitzgerald (Tex. Civ.), 168 S. W. 452. See Orton *v.* Orton, 159 Mich. 236, 123 N. W. 1103; Weller *v.* Weller, 154 Mo. App. 6, 133 S. W. 128.

771-26 But see Avery *v.* Avery, 148 Cal. 239, 82 P. 967; Shoup *v.* Shoup, 106 Ill. App. 167.

772-28 Cooper *v.* Cooper, 51 Ind. App. 374, 99 N. E. 782.

772-29 Dickson *v.* Dickson, 102 Ark. 635, 145 S. W. 529; McClenahan *v.* McClenahan, 2 Boyce (Del.) 599, 80 A. 677; Cureton *v.* Cureton, 132 Ga. 745, 65 S. E. 65; Rowe *v.* Rowe, 84 Kan. 696, 115 P. 553; Tower *v.* Tower, 134 App. Div. 670, 119 N. Y. S. 506; Augenstein *v.* Augenstein, 45 Pa. Super. 258; Maxwell *v.* Maxwell, 69 W. Va. 414, 71 S. E. 571.

See Herriford *v.* Herriford, 169 Mo. App. 641, 155 S. W. 855; Ryan *v.* Ryan (Tex. Civ.), 114 S. W. 464.

Evidence held sufficient.—Seeger *v.* Seeger, 154 Ill. App. 38; Rosenberger *v.* Rosenberger, 150 Ky. 803, 150 S. W. 1023; Hull *v.* Hull, 168 Mo. App. 220, 153 S. W. 531; Anderson *v.* Anderson, 89 Neb. 570, 131 N. W. 907; Gould *v.* Gould, 63 Wash. 484, 115 P. 1041.

Evidence held insufficient.—Bailey *v.* S., 105 Ark. 228, 150 S. W. 1030; Bottom *v.* Bottom, 143 Ky. 666, 137 S. W. 198; Goodson *v.* Goodson, 89 Neb. 452,

131 N. W. 972; Howell *v.* Howell, 89 Neb. 243, 131 N. W. 216.

Actual violence not requisite.—Carr *v.* Carr, 171 Ala. 600, 55 S. 96; Miller *v.* Miller, 89 Neb. 239, 131 N. W. 203.

Intoxication, indifference, refusal of money on several occasions, and one or two instances of ill-feeling, not enough in view of mercenary character of marriage. Tierney *v.* Tierney, 169 Mich. 600, 135 N. W. 654.

773-30 "The plaintiff's health was in no wise impaired by any mental suffering she may have endured from this alleged misconduct of the defendant, and her condition was not thereby rendered unbearable. Her testimony shows that his curses and profanity rendered her unhappy, but it does not show that this made living with him intolerable. On the contrary, she testified that he often apologized for his cursing and misconduct and begged her forgiveness. She continued to live with him without any complaint." Kientz *v.* Kientz, 104 Ark. 381, 149 S. W. 86.

773-31 MacDonald *v.* MacDonald, 155 Cal. 665, 102 P. 927. See Harrison *v.* Harrison, 115 La. 817, 40 S. 232; Herriford *v.* Herriford, 169 Mo. App. 641, 155 S. W. 855.

773-32 Dickinson *v.* Dickinson (Tex. Civ.), 138 S. W. 205. See Andrew *v.* Andrew, 53 Or. 531, 99 P. 938.

774-33 See Rosenberger *v.* Rosenberger, 150 Ky. 803, 150 S. W. 1023.

774-36 Heath *v.* Heath, 44 Pa. Super. 118.

775-39 See Haver *v.* Haver, 102 Minn. 235, 113 N. W. 382.

775-43 See Page *v.* Page, 43 Wash. 293, 86 P. 582.

Occasional intoxication insufficient. Lentz *v.* Lentz, 171 Mich. 509, 137 N. W. 229; Rapp *v.* Rapp, 149 Mich. 218, 112 N. W. 709.

Habitual use of intoxicants is insufficient unless accompanied by intoxication. Schaub *v.* Schaub, 117 La. 727, 42 S. 249.

775-44 Tarrant *v.* Tarrant, 156 Mo. App. 725, 137 S. W. 56.

Conflict of evidence, burden not sustained. Tierney *v.* Tierney, 169 Mich. 600, 135 N. W. 654.

776-47 Bell *v.* Bell, 105 Ark. 194, 150 S. W. 1031.

776-49 Randall *v.* Randall, 175 Ill. App. 392; Libbe *v.* Libbe, 157 Mo. App. 701, 138 S. W. 685; Wilson *v.* Wilson, 89 Neb. 749, 132 N. W. 401; Redding *v.* Redding (N. J. Eq.), 85 A. 712; Greims *v.* Greims, 80 N. J. Eq. 233, 83 A. 1001; Staples *v.* Staples (Tex.), 136 S. W. 120; Hall *v.* Hall, 69 W. Va. 175, 71 S. E. 103.

Evidence insufficient to prove condonation. Dimmitt *v.* Dimmitt, 167 Mo. App. 94, 150 S. W. 1107.

777-51 Rademacher *v.* Rademacher, 74 N. J. Eq. 570, 70 A. 687.

778-56 Greims *v.* Greims, 80 N. J. Eq. 233, 83 A. 1001, 79 A. 1048.

778-57 Johnson *v.* Johnson, 78 N. J. Eq. 597, 80 A. 119.

778-59 Whinnery *v.* Whinnery, 21 Cal. App. 159, 130 P. 1065; Jones *v.* Jones, 59 Or. 308, 117 P. 414.

Does not excuse subsequent misconduct. Skinner *v.* Skinner, 47 Ind. App. 670, 95 N. E. 128; Anderson *v.* Anderson, 89 Neb. 570, 131 N. W. 907.

Executory promise insufficient.—Anderson *v.* Anderson, 89 Neb. 570, 131 N. W. 907.

779-60 Truitt *v.* Truitt, 154 Ill. App. 242; Root *v.* Root, 164 Mich. 638, 130 N. W. 194.

780-67 Merely watching suspected spouse is not enough. Lehman *v.* Lehman, 78 N. J. Eq. 316, 79 A. 1060.

780-69 If adultery is charged defendant may prove complainant's adultery in defense. Talley *v.* Talley, 29 Pa. Super. 535.

780-70 Letts *v.* Letts, 79 N. J. Eq. 630, 82 A. 845; De Marco *v.* De Marco, 116 App. Div. 304, 101 N. Y. S. 600 (adultery). See Rogers *v.* Rogers, 81 N. J. Eq. 479, 86 A. 935.

781-73 Ignorance of fraud for which annulment asked. Domschke *v.* Domschke, 122 N. Y. S. 892.

781-75 Robertson *v.* Robertson, 137 Mo. App. 93, 119 S. W. 533; Rumping *v.* Rumping, 41 Mont. 33, 108 P. 10 (necessity for); Robinson *v.* Robinson (N. J.), 88 A. 951; Oram *v.* Oram, 77 N. J. Eq. 1, 75 A. 994.

In Carnes *v.* **Carnes,** 138 Ga. 1, 74 S. E. 785, the plaintiff charged abandonment by her husband. There was no charge of adultery. He alleged exemplary conduct on his part, and that she went to her father's home, and after a time refused to answer his letters. She testified that she found in his pocket certain letters. They were from another woman, and were of a very affectionate character. They were not inadmissible on the ground that they

were licentious in character and intended to show that the defendant was guilty of adultery, and that they could not be admitted in evidence on the affidavit of the wife as to the finding of them.

782-79 Ex parte Jones, 172 Ala. 186, 55 S. 491; Wood *v.* Wood, 56 Fla. 882, 47 S. 560.

783-80 Robinson *v.* Robinson (N. J.), 88 A. 951.

783-82 Reifschneider *v.* Reisfschneider, 241 Ill. 92, 89 N. E. 255.

Admissions may be as effective as cohabitation for purpose of granting temporary alimony. Oram *v.* Oram, 77 N. J. Eq. 1, 75 A. 994.

783-84 Yangeo *v.* Rhode, 1 Phil. Isl. 404.

783-85 Ex parte Joutsen, 154 Cal. 540, 98 P. 391; Oram *v.* Oram, supra, dist. Vreeland *v.* Vreeland, 18 N. J. Eq. 43.

784-86 Righter *v.* Righter (Ky.), 114 S. W. 786; Lake *v.* Lake, 194 N. Y. 179, 87 N. E. 87; Greenberg *v.* Greenberg, 134 App. Div. 419, 119 N. Y. S. 227; Heyman *v.* Heyman, 119 App. Div. 182, 104 N. Y. S. 227. *Contra,* Rumping *v.* Rumping, 41 Mont. 33, 108 P. 10, nor good faith.

784-87 Standley *v.* Standley, 143 Ill. App. 278.

784-90 Alimony granted. Libbe *v.* Libbe, 157 Mo. App. 701, 138 S. W. 685.

785-91 See Schireman *v.* Schireman, 7 Pa. C. C. 110, affidavit in denial of affidavits by husband are unnecessary.

785-92 Suydam *v.* Suydam, 79 N. J. Eq. 144, 80 A. 1057.

785-94 Arendall *v.* Arendall, 61 Fla. 496, 54 S. 957; Vey *v.* Vey, 150 Ia. 166, 129 N. W. 801; Des Champlain *v.* Des Champlain, 164 Mich. 511, 129 N. W. 702; Clark *v.* Clark, 114 Minn. 22, 129 N. W. 1052; Suydam *v.* Suydam, supra.

Prospective resources, as affected by will of a decedent, may be shown. Reifschneider *v.* Reifschneider, 144 Ill. App. 119.

Husband not compelled to testify to his means. Nissen *v.* Farquhar, 121 La. 642, 46 S. 679.

786-96 Jackson *v.* Burns, 112 La. 854, 36 S. 756, after divorce (but *contra* where alimony is sought pendente lite. Nissen *v.* Farquhar, supra); Rutledge *v.* Rutledge (Mo. App.), 119 S. W. 489; Suydam *v.* Suydam, 79 N. J. Eq. 144, 80 A. 1057; Pringle *v.* Pringle, 55 Wash. 93, 104 P. 135. See Robertson *v.* Robertson, 137 Mo. App. 93, 119 S. W. 533; Graves *v.* Graves, 128 N. Y. S. 499; Schiereman *v.* Schiereman, 7 Pa. C. C. 110.

786-99 But see Hawkins *v.* Hawkins, 193 N. Y. 409, 86 N. E. 468.

Wife not bound to show that she resides at place fixed by court. Nissen *v.* Farquhar, 121 La. 642, 46 S. 679.

786-1 Schneider *v.* Kohn, 24 Ky. L. R. 924, 70 S. W. 287 (court must hear evidence); Wallace *v.* Wallace, 75 N. H. 217, 72 A. 1033 (presumed that allowance for counsel fees was inclusive). See Borah *v.* Borah, 105 Ark. 697, 150 S. W. 112. And see Martin *v.* Martin, 150 Ia. 223, 129 N. W. 816; Rivers *v.* Rivers (Tex.), 133 S. W. 524.

787-2 See Schireman *v.* Schireman, 7 Pa. C. C. 110.

Necessity for allowing counsel fees must be shown. Lake *v.* Lake, 136 App. Div. 47, 119 N. Y. S. 686.

787-3 See Taylor *v.* Taylor, 73 N. J. Eq. 745, 70 A. 323.

787-4 Shehan *v.* Shehan, 152 Ky. 191, 153 S. W. 243. See Cottrell *v.* Cottrell, 24 Ky. L. R. 2417, 74 S. W. 227 (husband's resources and physical condition); Myers *v.* Myers, 88 Neb. 656, 130 N. W. 254; Tower *v.* Tower, 134 App. Div. 670, 119 N. Y. S. 506 (sum allowed wife in separation agreement good basis); Edleman *v.* Edleman, 125 Wis. 270, 104 N. W. 56 (same); Minahan *v.* Minahan, 145 Wis. 514, 130 N. W. 476.

Changed situation of parties is material on an appplication to revise a decree for alimony. Camp *v.* Camp, 158 Mich. 221, 122 N. W. 521.

The court should consider the condition, situation and standing of the parties, financially and otherwise, duration of marriage, amount and value of husband's estate, source from which it came, and how far, if at all, the wife contributed thereto. Metcalf *v.* Metcalf, 73 Neb. 79, 102 N. W. 79.

787-5 Sebastian *v.* Rose, 135 Ky. 197, 122 S. W. 120 (also his resources at time of trial, reasonable expectancy and earning capacity); Mills *v.* Mills, 88 Neb. 596, 130 N. W. 419.

Division of property.—Manner of accumulation, and nature of property, should be considered, and evidence bearing thereon received. See Rayles *v.* Rayles, 91 Neb. 505, 136 N. W. 733;

Miller *v.* Miller, 91 Neb. 500, 136 N. W. 729, and 7 STANDARD PROC., title "Divorce."

The benefit inuring to wife under a void contract with husband will be regarded. Lake *v.* Lake, 136 App. Div. 47, 119 N. Y. S. 686.

788-8 Sebastian *v.* Rose, 135 Ky. 197, 122 S. W. 120, wife's condition and children's needs relevant. See White *v.* White, 152 Ky. 769, 154 S. W. 33.

788-10 See Van Horn *v.* Van Horn, 5 Cal. App. 719, 91 P. 260; Crabtree *v.* Crabtree, 27 Ky. L. R. 435, 85 S. W. 211; Masterson *v.* Masterson, 24 Ky. L. R. 1352, 71 S. W. 490; Hauber *v.* Hauber, 170 Mo. App. 71, 156 S. W. 54.

General reputation for morality cannot be proved until attacked. Breedlove *v.* Breedlove, 27 Ind. App. 560, 61 N. E. 797. *Contra*, Brown *v.* Brown, 71 Kan. 868, 81 P. 199, reputation for chastity.

The character of the relatives with whom the parties would be compelled to live and into whose society and custody the children would be brought is a relevant circumstance. Bush *v.* Bush (Tex. Civ.), 103 S. W. 217.

788-12 See Miller *v.* Bearb, 134 La. 893, 64 S. 822; Given *v.* Given, 25 Pa. Super. 467; Ueeker *v.* Thiedt, 133 Wis. 148, 113 N. W. 447.

789-14 Sisk *v.* Sisk, 99 Ark. 94, 136 S. W. 987.

789-16 Usual presumption of credibility does not apply. Williams *v.* Williams, 136 Ky. 71, 123 S. W. 337; Moyer *v.* Moyer, 78 N. J. Eq. 588, 81 A. 1111.

789-17 See Harrison *v.* Harrison, 115 La. 817, 40 S. 232; Schaab *v.* Schaab, 66 N. J. Eq. 334, 57 A. 1090; Castilow *v.* Castilow, 60 W. Va. 586, 55 S. E. 592.

790-18 See Bauer *v.* Bauer, 177 Mich. 169, 142 N. W. 1074; E. W. M. *v.* J. C. M., 2 Tenn. Ch. App. 463.

790-20 Miller *v.* Miller (Ind. App.), 104 N. E. 588. See May *v.* May, 71 Kan. 317, 80 P. 567; Wood *v.* Wood (N. J. Eq.), 62 A. 429; Schaab *v.* Schaab, 66 N. J. Eq. 334, 57 A. 1090; Lyon *v.* Lyon, 30 Pa. C. C. 342 (incompetent when defendant has not been personally served or does not appear and defend).

791-21 But see E. W. M. *v.* J. C. M., 2 Tenn. Ch. App. 463.

The necessity of admitting spouse's testimony as to privileged communications has been held sufficient to justify breaking the rule. Schweikert *v.* Schweikert, 108 Mo. App. 477, 83 S. W. 1095.

791-22 E. W. M. *v.* J. C. M., supra.

791-24 See Lenoir *v.* Lenoir, 24 App. Cas. (D. C.) 160.

792-28 See Timmann *v.* Timmann, 142 N. Y. S. 298; Suffin *v.* Suffin, 104 N. Y. S. 839; Hooper *v.* Hooper (N. C.), 81 S. E. 933.

Defendant may testify to facts showing husband's participation in a conspiracy to bring about the adulterous act. O'Hara *v.* O'Hara, 136 App. Div. 378, 120 N. Y. S. 982.

792-31 Pasquarelle *v.* Pasquarelle, 18 Pa. Dist. 526 (may be called for cross-examination subject to exercise of the privilege forbidding incriminating testimony). But see Schaab *v.* Schaab, 66 N. J. Eq. 334, 57 A. 1090.

793-34 Bell *v.* Bell, 105 Ark. 194, 150 S. W. 1031; Shelton *v.* Shelton, 102 Ark. 54, 143 S. W. 110; Chappell *v.* Chappell, 83 Ark. 533, 104 S. W. 203; Borden *v.* Borden, 165 Cal. 469, 137 P. 27; Berry *v.* Berry, 145 Cal. 784, 79 P. 531; Lenoir *v.* Lenoir, 24 App. Cas. (D. C.) 160; Hertz *v.* Hertz (Minn.), 147 N. W. 825; Gruner *v.* Gruner (Mo. App.), 165 S. W. 865; Haines *v.* Haines, 79 Neb. 684, 113 N. W. 125; Robinson *v.* Robinson (N. J.), 90 A. 311; Rogers *v.* Rogers, 81 N. J. Eq. 479, 86 A. 935; Williams *v.* Williams, 81 N. J. Eq. 17, 85 A. 611; Peterson *v.* Peterson (N. J. Eq.), 74 A. 965. See Snouffer *v.* Snouffer, 150 Ia. 58, 129 N. W. 326; Olson *v.* Olson, 27 Pa. Super. 128.

Desertion. — Corroboration necessary. Foote *v.* Foote, 71 N. J. Eq. 273, 65 A. 205; Heer *v.* Heer, 72 N. J. Eq. 617, 65 A. 1013; Grady *v.* Grady (N. J.), 64 A. 440 (constructive desertion by forcing spouse to leave home); Sharp *v.* Sharp, 72 N. J. Eq. 231, 64 A. 985; Sterling *v.* Sterling, 71 N. J. Eq. 59, 63 A. 548; Wood *v.* Wood (N. J. Eq.), 62 A. 429; Snedaker *v.* Snedaker (N. J.), 62 A. 942; Kline *v.* Kline (N. J. Eq.), 61 A. 1060 (corroboration merely as to continuance of the desertion is not sufficient); Corder *v.* Corder (N. J.), 59 A. 309 (same); Hunt *v.* Hunt (N. J.), 59 A. 642 (same); Sabin *v.* Sabin (N. J.), 59 A. 627; Farrier *v.* Farrier (N. J.), 58 A. 1079; Lister *v.* Lister, 65 N. J. Eq. 109, 55 A. 1093, 66 N. J. Eq. 434, 57 A. 1132 (constructive desertion); Currier *v.* Currier, 68 N. J. Eq., 797, 64 A. 1133; Seeley *v.*

Seeley, 64 N. J. Eq. 1, 53 A. 387. See "Corroboration."

Difficulty or impossibility of corroboration does not justify relaxation of rule. Lenoir *v.* Lenoir, 24 App. Cas. (D. C.) 160; Kline *v.* Kline (N. J. Eq.), 61 A. 1060; Cotter *v.* Cotter (N. J.), 58 A. 73.

793-35 Murphy *v.* Murphy, 150 Mich. 97, 113 N. W. 583 (*foll.* Rosecrance *v.* Rosecrance, 127 Mich. 322, 86 N. W. 800, which holds that statute forbidding a decree solely on declarations of parties does not refer to their testimony); Stone *v.* Stone, 134 Mo. App. 242, 113 S. W. 1157; Krug *v.* Krug, 22 Pa. Super. 572; Baker *v.* Baker, 195 Pa. 407, 46 A. 96; Christman *v.* Christman, 7 Pa. C. C. 595 (impotency); Barrow *v.* Barrow (Tex. Civ.), 97 S. W. 120.

793-36 Blanchard *v.* Blanchard, 10 Cal. App. 203, 101 P. 536; May *v.* May, 71 Kan. 317, 80 P. 567; Beatty *v.* Beatty, 151 Ky. 547, 152 S. W. 540; Clopton *v.* Clopton, 11 N. D. 212, 91 N. W. 46; Tuttle *v.* Tuttle, 21 N. D. 503, 131 N. W. 460.

794-37 See MacDonald *v.* MacDonald, 155 Cal. 665, 102 P. 927.

Residence.—Sabin *v.* Sabin (N. J.), 59 A. 627; Hunter *v.* Hunter, 64 N. J. Eq. 277, 53 A. 221.

794-38 Robinson *v.* Robinson (N. J.), 90 A. 311; Foote *v.* Foote, 71 N. J. Eq. 273, 65 A. 205. See Hall *v.* Hall, 43 Or. 619, 75 P. 141.

Facts occurring previous to a reconciliation may be proved as corroborative of the grounds of action in subsequent suit. Schlater *v.* Le Blanc, 121 La. 919, 46 S. 921.

794-39 Corroboration as to mental suffering may be obtained from surrounding circumstances. Macdonald *v.* MacDonald, 155 Cal. 665, 102 P. 927.

795-40 See Richardson *v.* Richardson, 50 Vt. 119.

795-42 Hertz *v.* Hertz (Minn.), 147 N. W. 825; Kline *v.* Kline (N. J. Eq.), 61 A. 1060 (corroboration merely as to continuance of desertion not sufficient); Corder *v.* Corder (N. J.), 59 A. 309 (same). See Williams *v.* Williams, 81 N. J. Eq. 17, 85 A. 611.

When collusion is excluded, corroboration need not be as extensive, since the purpose of the statute is to avoid danger of collusion. Clopton *v.* Clopton, 11 N. D. 212, 91 N. W. 46, *foll.* California cases, and holding a physician's testimony as to having treated plaintiff sufficient corroboration of cruel conduct.

Acts not constituting cause for divorce may be sufficient. Blanchard *v.* Blanchard, 10 Cal. App. 203, 101 P. 536.

795-43 Avery *v.* Avery, 148 Cal. 239, 82 P. 967 (corroboration in every particular not required); Andrews *v.* Andrews, 120 Cal. 184, 52 P. 298 (same); Hertz *v.* Hertz (Minn.), 147 N. W. 825.

No other or different rule is applied to divorce cases than applies to other cases in which corroboration is required. Clark *v.* Clark, 86 Minn. 249, 90 N. W. 390.

795-45 Hall *v.* Hall, 43 Or. 619, 75 P. 141.

796-46 Moyer *v.* Moyer, 78 N. J. Eq. 588, 81 A. 1111. See Delaney *v.* Delaney, 69 N. J. Eq. 602, 61 A. 266.

Corroboration by paramour.—Matthews *v.* Matthews (N. J.), 58 A. 1047; Brown *v.* Brown, 62 N. J. Eq. 29, 49 A. 589.

796-48 Million *v.* Million, 106 Mo. App. 680, 80 S. W. 290; Baker *v.* Baker, 195 Pa. 407, 46 A. 96.

796-50 Letts *v.* Letts, 79 N. J. Eq. 630, 82 A. 845.

The rule does not apply where witness is not shown to be a prostitute or of loose character. Delaney *v.* Delaney, 69 N. J. Eq. 602, 61 A. 266; Storms *v.* Storms, 71 N. J. Eq. 549, 64 A. 700. But see Jewell *v.* Jewell, 96 App. Div. 633, 89 N. Y. S. 166.

797-51 But see McCune *v.* McCune, 31 Pa. Super. 248.

798-55 Enders *v.* Enders, 83 Misc. 593, 145 N. Y. S. 450.

798-56 The correct rule is that such testimony is to be weighed and considered like other testimony, and the fact that witness is hired should be considered by the triers. Taft *v.* Taft, 80 Vt. 256, 67 A. 703.

798-58 Farrow *v.* Farrow, 70 N. J. Eq. 777, 60 A. 1103. See McCartan *v.* Filkins, 134 La. 795, 64 S. 714.

799-61 See Chavigny *v.* Hava, 125 La. 710, 51 S. 696, not incompetent against parent even though rehearsed.

DOCUMENTARY EVIDENCE

Production for inspection under statutes. 820-1: *privilege against production, see "Witnesses."*

804-10 S. *v.* Co., 129 Mo. App. 206, 107 S. W. 1112.

805-13 Harmening *v.* Howland, 25 N. D. 38, 141 N. W. 131.
Mechanic's lien claim a "public record." Nofziger Lumb. Co. *v.* Solomon, 13 Cal. App. 621, 110 P. 474.
806-16 Production of original not ordinarily compelled. Bluefield *v.* McClaugherty, 64 W. Va. 536, 63 S. E. 363.
807-21 S. *v.* Co., 129 Mo. App. 206, 107 S. W. 1112; Hub C. Co. *v.* Club, 74 N. H. 282, 67 A. 574 (inspection by creditor).
807-27 Where creditor has absolute right to inspect corporation books, purpose is immaterial. S. *v.* Co., supra; Hub C. Co. *v.* Club, supra.
808-33 See The Pachare, 81 L. J. P. 143. L. R. (1912) Pro. Div. 179, 107 L. T. 252, 12 Asp. M. C. 222.
808-36 Alabama G I. School *v.* Reynolds, 143 Ala. 579, 42 S. 114; Long *v.* Miller, 17 Pa. Dist. 578. See Marcum's Admr. *v.* Marcum, 154 Ky. 401, 157 S. W. 1101.
808-37 Cohn *v.* Hessel, 95 App. Div. 548, 88 N. Y. S. 1057.
Where employes' remuneration is based upon net profits inspection allowed as of right. Thomas *v.* Co., 113 App. Div. 494, 99 N. Y. S. 297. See Sivins *v.* Mooney, 54 Misc. 66, 104 N. Y. S. 503.
Action by state for regulation of monopolies, governed by same rules. P. *v.* Co., 54 Misc. 67, 105 N. Y. S. 650.
809-38 See U. S. *v.* Assn., 148 Fed 486; Daneel *v.* Co., 128 Fed. 753.
809-39 See Banks *v.* R. Co., 79 Conn. 116, 64 A. 14.
Omnibus subpoena discountenanced. Miller *v.* Assn., 139 Fed. 864.
Order for examination of party before trial may be accompanied by subpoena duces tecum. Crompton *v.* Dobbs, 119 App. Div. 331, 104 N. Y. S. 698.
Necessity of papers should be shown if order for examination before trial issued. Wilson *v.* Nevins, 63 Misc. 380, 118 N. Y. S. 421.
809-40 Barthe *v.* Huard, 42 Can. Sup. 406; Banks *v.* R. Co., 79 Conn. 116, 64 A. 14; Evans *v.* St. Louis, etc. R. Co., 149 Mo. App. 166, 129 S. W. 1050; Moore *v.* Co., 43 Misc. 618, 88 N. Y. S. 133; Dunn *v.* Co., 46 Misc. 602, 92 N. Y. S. 787; P. *v.* Co., 54 Misc. 67, 105 N. Y. S. 650; Whitten *v.* Co., 141 N. C. 361, 54 S. E. 289; McGeary *v.* Brown, 23 S. D. 573, 122 N. W. 605.
Documentary evidence in possession of party at trial, ordered to be produced instanter. Moore *v.* R. Co., 1 Ga. App. 514, 58 S. E. 63.
Order for production of corporate books is well served on the corporation; subpoena duces tecum must be served on some officer. In re Consol. R. Co., 80 Vt. 55, 66 A. 790, 207 U. S. 541.
810-41 Parker *v.* Wells, 84 Ark. 172, 105 S. W. 75. See Ferguson *v.* Bien, 49 Misc. 450, 97 N. Y. S. 986 (application denied for laches); Caldwell *v.* Ins. Co., 114 App. Div. 377, 99 N. Y S. 984.
810-42 Bissell *v.* Myton, 160 App. Div. 268, 145 N. Y. S. 591. See Dorris *v.* Co., 215 Pa. 638, 64 A. 855; Kolp *v.* Brazer (Tex. Civ.), 161 S. W. 899.
Right to object. — Fraternal Relief Assn. *v.* Edwards, 9 Ga. App. 43, 70 S. E. 265.
810-43 Star L. Assn. *v.* Moore, 4 Penne. (Del.) 308, 55 A. 946.
No notice necessary when instrument was wrongfully obtained by adverse party. Prieto *v.* Hunt (Tex. Civ.), 167 S. W. 4.
Notice to produce does not require production of certified copies where originals destroyed. Wells W. Co. *v.* Ins. Co., 209 Pa. 488, 58 A. 894.
Notice before trial not always necessary. Hill *v.* Houser (Tex. Civ.), 115 S. W. 112.
810-44 Landt *v.* McCullough, 206 Ill. 214, 60 N. E. 107. *Comp.* Jacobs *v* Co., 112 App. Div. 655, 98 N. Y. S. 541
811-46 Maffi *v.* Stephens (Tex. Civ.), 93 S. W. 158.
811-49 Klair *v.* R. Co., 2 Boyce (Del.), 274, 78 A. 1085.
811-50 Upon an examination of a party before trial, production and inspection of documents is obtained by subpoena duces tecum and not under the original order. Knickerbocker T. Co. *v.* Schroeder, 109 N. Y. S. 1024; Gee *v.* Pendas, 87 App. Div. 157, 84 N. Y. S. 32; Coin Nov. Co. *v.* Lindenborn, 106 N. Y. S. 508.
811-51 Barthe *v.* Huard, 42 Can. Sup. 406; Kullman Saltz & Co. *v.* Solano Co., 15 Cal. App. 276, 114 P. 589. *Comp.* Birchal *v.* Crisp & Co., 82 L. J. Ch. 442, L. R. (1913) 2 Ch. Div. 375, 109 L. T. 275.
May be enforced against any person in court. Atlantic C. L. R. Co. *v.* Hill, 12 Ga. App. 392, 77 S. E. 316.
Inspection against foreign corporation. National Dist. Co. *v.* Van Emden, 120 App. Div. 746, 105 N. Y. S. 657.

Officers of corporation, not "parties" to action against it and need not produce documents. Cassatt *v.* Co., 150 Fed. 32, 81 C. C. A. 80.

Corporation itself, as distinguished from its officers, may be ordered to produce documents. In re Consol. R. Co., 80 Vt. 55, 66 A. 790.

812-52 Muller *v.* Philadelphia, 104 N. Y. S. 781; Dorris *v.* Co., 215 Pa. 638, 64 A. 855.

812-53 Bridgeport *v.* Co., 81 Conn. 84, 70 A. 650.

When attorney not compelled to produce papers.—Ex parte Snow, 75 N. H. 7, 70 A. 120.

812-56 Rylee *v.* Bk., 7 Ga. App. 489, 67 S. E. 383; Beck *v.* Bohm, 95 App. Div. 273, 88 N. Y. S. 584 (for inspection and photographing allowed).

Production for inspection of corporate books, not allowed, under §872, N. Y. Code Civ. Proc., except as a basis for refreshing memory of witness. Hart *v.* Co., 41 Misc. 436, 84 N. Y. S. 1065; In re Thompson, 95 App. Div. 542, 89 N. Y. S. 4; In re Sands, 98 App. Div. 148, 90 N. Y. S. 749; Boyle *v.* Co., 46 Misc. 191, 94 N. Y. S. 27; Bruen *v.* Co., 106 App. Div. 248, 94 N. Y. S. 304; Ryan *v.* R. Co., 108 N. Y. S. 371.

Where inspection appears to be for benefit of court, as well as applicant, it should be ordered Edmonds *v.* Co., 117 App. Div. 486, 102 N. Y. S. 636.

813-57 Chesapeake & O. R. Co. *v.* Swartz, 115 Va. 723, 80 S. E. 568. See S. *v.* Simon, 131 La. 520, 59 S. 975.

813-58 Harbaugh *v.* Co., 110 App. Div. 633, 97 N. Y. S. 350; Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276; Dorris *v.* Co., 215 Pa. 638, 64 A. 855; Am. C. & F. Co. *v.* Co., 221 Pa. 529, 70 A. 867.

813-59 Wynn *v.* Taylor, 109 Ill. App. 603.

813-63 Elmsley *v.* Miller, 10 Ont. L. R. 343.

813-64 DeKoven *v.* Ziegfeld, 52 Misc. 93, 101 N. Y. S. 586. And see Boyle *v.* Boston El. R. Co., 208 Mass. 41, 94 N. E. 247.

814-67 See Am. B. Co. *v.* Co., 153 Fed. 943; International C. M. Co. *v.* R. Co., 152 Fed. 557; Blum *v.* S., 94 Md. 375, 51 A. 26; State *v.* Tucker, 234 Mo. 554, 137 S. W. 870.

Document must be produced; claim of privilege is personal to witness and must be made under oath at the hearing. In re Consol. R. Co., 80 Vt. 55, 66 A. 790, 207 U. S. 541; U. S. *v.* Collins, 146 Fed. 553. See "Witnesses."

814-68 Atchison, etc. R. Co. *v.* Burks, 78 Kan. 515, 96 P. 950, mover must show his right before order granted; subsequent proof cannot validate order unauthorizedly made. See Utah Co. *v.* R. Co., 145 Fed. 981; Netter *v.* Stoeckle, 4 Penne. (Del.) 345, 56 A. 604.

814-70 Lee *v.* Winans, 99 App. Div. 297, 90 N. Y. S. 960; Hirshfield *v.* Rosenthal, 99 N. Y. S. 912.

814-71 Carrington *v.* Brooks, 121 Ga. 250, 48 S. E. 970.

815-73 Dun *v.* Co., 133 Fed. 1004.

815-75 Formal application and notice unnecessary. McGeary *v.* Brown, 23 S. D. 573, 122 N. W. 605, statute.

815-76 Notice at trial.—Production enforced, dependent on ability to produce. Lupton *v.* Underwood (Del.), 85 A. 965.

816-78 Dancel *v.* Co., 128 Fed. 753; Columbian B. & L. Assn. *v.* Leeds, 128 Ill. App. 195; Wagner *v.* Co., 89 N. Y. S. 323.

816-79 Cent. R. Co. *v.* Lewis, 2 Ga. App. 428, 58 S. E. 674; Iowa Loan & Trust Co. *v.* District Court, 149 Ia. 66, 127 N. W. 1114.

816-80 P. *v.* Emmons, 7 Cal. App. 685, 95 P. 1032; Am. C. & F. Co. *v.* Co., 221 Pa. 529, 70 A. 867.

817-82 Am. B. Co. *v.* Co., 153 Fed. 943; Martin *v.* Co., 87 App. Div. 472, 84 N. Y. S. 711.

Inspection pursuant to contract ordered although necessity is not shown. Fidelity & C. Co. *v.* Seagrist, 79 App. Div. 614, 80 N. Y. S. 277; Ballenberg *v.* Wahn, 103 App. Div. 34, 92 N. Y. S. 830. See U. S. *v.* Co., 108 App. Div. 361, 95 N. Y. S. 726.

In New York authority to combine in one order a requirement for examination of a party and production of books, applies only to a case where a corporation is to be examined; in other cases a subpoena duces tecum should be obtained. Gee *v.* Pendas, 87 App. Div. 157, 84 N. Y. S. 32; Coin Nov. Co. *v.* Lindenborn, 106 N. Y. S. 508.

Production for inspection not to be ordered if documents can be obtained by subpoena duces tecum (Preston Nat. Bk. *v.* Judge, 137 Mich. 152, 100 N. W. 393; Ashley *v.* Judge, 138 Mich. 44, 100 N. W. 1005), unless trust relation exists giving right to discovery (Eddy *v.* Judge, 114 Mich. 668, 72 N. W. 890; Anti-K. Co. *v.* Judge, 120 Mich.

250, 79 N. W. 186), or contract sued upon gives the right. London G. Co. *v.* Judge, 146 Mich. 477, 109 N. W. 1049.

817-84 Ridgely *v.* Richards, 130 Fed. 387; S. *v.* Wurdeman, 176 Mo. App. 540, 158 S. W. 436.

817-85 Wynn *v.* Taylor, 109 Ill. App. 603.

818-86 Ridgely *v.* Richard, 130 Fed. 387; Netter *v.* Stoeckle, 4 Penne. (Del.) 345, 56 A. 604; Atchison, etc. R. Co. *v.* Burks, 78 Kan. 515, 96 P. 950. See Daneel *v.* Co., 128 Fed. 753; Memphis T. Assn. *v.* Smathers, 114 App. Div. 376, 99 N. Y. S. 1057.

818-88 U. S. *v.* Assn., 154 Fed. 268; In re Consol. R. Co., 80 Vt. 55, 66 A. 790, 207 U. S. 541. See Home Ins. Co. *v.* Overturf, 35 Ind. App. 361, 74 N. E. 47.

818-89 Branan *v.* R. Co., 119 Ga. 738, 46 S. E. 882; Snyder *v.* Co., 113 App. Div. 840, 99 N. Y. S. 644.

818-90 Santa Fe P. R. Co. *v.* Davidson, 149 Fed. 603; Snyder *v.* Co., supra; Am. C. & F. Co. *v.* Co., 221 Pa. 529, 70 A. 867. See P. *v.* Co., 104 N. Y. S. 858, 105 N. Y. S. 650.

818-91 Daneel *v.* Co., 128 Fed. 753; Utah C. Co. *v.* R. Co., 145 Fed. 981; Cameron L. Co. *v.* Droney, 132 Fed. 304; U. S. *v.* Assn., 154 Fed. 268; Kamber *v.* Co., 52 Misc. 640, 102 N. Y. S. 804; Peck *v.* Peck, 57 Misc. 94, 107 N. Y. S. 925; Dorris *v.* Co., 215 Pa. 638, 64 A. 855 (diary); Nat. Exch. Bk. *v.* Lubrano, 29 R. I. 64, 68 A. 944.

819-92 U. S. *v.* Assn., supra; Long *v.* Miller, 17 Pa. Dist. 578 (proof need not be positive).

819-93 Cameron L. Co. *v* Droney, 132 Fed. 304; S. *v.* Court, 29 Mont. 363, 74 P. 1078; S. *v.* Court, 30 Mont. 206, 76 P. 206 (need not show information could not be otherwise obtained); Martin *v.* Co., 87 App. Div. 472, 84 N. Y. S. 711; Danenberg *v.* Heller, 88 App. Div. 548, 85 N. Y. S. 90; Snyder *v.* Co., 113 App. Div. 840, 99 N. Y. S. 644; Sivins *v.* Mooney, 104 N. Y. S. 502.

819-94 In re Iron Clad Mfg. Co., 201 Fed. 66, 119 C. C. A. 404; Am. B. Co. *v.* Co., 153 Fed. 943; Com. *v.* Harvester Co., 148 Ky. 37, 145 S. W. 1132; Romero *v.* Co., 113 La. 110, 36 S. 907; Schlesinger *v.* Ellinger, 134 Wis. 397, 114 N. W. 825. See Lester *v.* Hutson (Tex. Civ.), 167 S. W. 321.

819-96 Bk. *v.* Booth (Can.), 10 West. L. Rep. 94; U. S. *v.* Assn., 154 Fed. 268; Cent. R. Co. *v.* Lewis, 2 Ga. App. 428, 58 S. E. 674.

819-97 Bank of Commerce *v.* Newberry, 71 Wash. 422, 128 P. 1064. See Nat. Exch. Bk. *v.* Lubrano, 29 R. I. 64, 68 A. 944.

Production of deed for inspection and photographing not required to be at photographer's, but at clerk's office. Beck *v.* Bohm, 95 App. Div. 273, 88 N. Y. S. 584.

Secondary evidence makes production of original unnecessary. People's B. & L. Assn. *v.* Rutz, 138 Mich. 440, 123 N. W. 6.

819-98 Sonnenfeld *v.* Rosenthal, 247 Mo. 238, 152 S. W. 321.

820-1 Production for inspection before trial authorized by statute. Schaefer *v.* Co., 157 Fed. 896; Am. B. Co. *v.* Co., 153 Fed. 943; Cameron L. Co. *v.* Droney, 132 Fed. 304. *Contra*, Cassatt *v.* Co., 150 Fed. 32, 81 C. C. A. 80; Swedish-A. Co. *v.* Co., 208 Ill. 562, 70 N. E. 768; Harris *v.* Richardson, 92 Minn. 353, 100 N. W. 92; S. *v.* Court, 29 Mont. 363, 74 P. 1078; Mills *v.* Co., 139 N. C. 524, 52 S. E. 200; Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276; Lawson *v.* Co., 44 Wash. 26, 86 P. 1120; Roberts *v.* Francis, 123 Wis. 78, 100 N. W. 1076.

820-2 *Comp.* Cameron L. Co. *v.* Droney, 132 Fed. 304; Mills *v.* Co., 139 N. C. 524, 52 S. E. 200.

820-3 Banks *v.* R. Co., 79 Conn. 116, 64 A. 14; Netter *v.* Stoeckle, 4 Penne. (Del.) 345, 56 A. 604; Beck *v.* Bohm, 95 App. Div. 273, 88 N. Y. S. 584. *Comp.* Caldwell *v.* Ins. Co., 114 App. Div. 377, 99 N. Y. S. 984.

820-4 Order against foreign corporation may provide for furnishing copies of its books, and their inspection at its home office. Nat. Dist. Co. *v.* Van Emden, 120 App. Div. 746, 105 N. Y. S. 657.

820-5 See Sargent *v.* Barnes (Tex. Civ.), 159 S. W. 366.

820-8 Swedish-A. Co. *v.* Co., 208 Ill. 562, 70 N. E. 768; Dunn *v.* Co., 46 Misc. 602, 92 N. Y. S. 787; In re Consol. R. Co., 80 Vt. 55, 66 A. 790, 207 U. S. 541. *Comp.* Consol. C. Co. *v.* Co., 120 Ill. App. 139.

Applicant may take copies of documents produced. Omerod *v.* Wks. (1905), 1 Ch. (Eng.) 505.

Failure to produce corporate books, a contempt.—Pray *v.* Blanchard, 93 App. Div. 423, 88 N. Y. S. 650.

821-10 Goss *v.* Aug. Weiman & Co., 5 Ala. App 404, 59 S. 364; Lawson *v.* Co., 44 Wash. 26, 86 P. 1120.

821-11 Carter *v.* R. Co., 3 Ga. App. 34, 59 S. E. 209.

821-12 See Roberts *v.* Francis, 123 Wis. 78, 100 N. W. 1076. And see Pinto *v.* Seely, 22 Cal. App. 318, 135 P. 43.

Evidence admissible to rebut adverse inferences.—Chandler *v.* Prince (Mass.), 105 N. E. 1076.

Document may be used at terms subsequent to that at which it was ordered to be produced if cause continued. American Ins. Co. *v.* Bailey, 6 Ga. App. 424, 65 S. E. 160.

821-13 But see Saal *v.* Katz, 81 Misc. 239, 142 N. Y. S. 516.

821-14 Becomes evidence of both parties. Eckels, etc. Co. *v.* Co., 119 Md. 107, 86 A. 38.

822-17 Rylee *v.* Bk., 7 Ga. App. 489, 67 S. E. 383; Avery *v.* Lee, 117 App. Div. 244, 102 N. Y. S. 12 (writings showing authority of attorney employed as an attorney in fact, not privileged); Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276 (reports made in anticipation of suit and in possession of counsel, privileged).

822-18 Atlantic, etc. R. Co. *v.* Hill, 12 Ga. App. 392, 77 S. E. 316. Production and inspection of other articles of personalty than "books, documents, or other papers," cannot be compelled. Pina Maya-S. Co. *v.* Co., 55 Misc. 325, 105 N. Y. S. 482. See Mut. L. Ins. Co. *v.* Griesa, 156 Fed. 398. A picture is not a "book, document or other paper," although to the extent a signature upon it comes in question, it may be so. Wilson *v.* Collins, 57 Misc. 363, 109 N. Y. S. 660.

Notary cannot issue subpoena duces tecum in connection with taking a deposition de bene esse. Dancel *v.* Co., 128 Fed. 753.

Power of interstate commerce commission.—Harriman *v.* Commission, 211 U. S. 407.

State power over foreign corporation records.—See Hammond P. Co. *v.* Arkansas, 212 U. S. 322.

823-27 Holman *v.* Lewis, 107 Me. 28, 76 A. 956. See Hodge *v.* S. (Ala. App.), 65 S. 676; Carney *v.* Averill, 110 Me. 172, 85 A. 494.

824-38 Winn *v.* Whitehouse, 96 Ark. 42, 131 S. W. 70; Winn *v.* Scraper, 96 Ark. 647, 131 S. W. 72; Muldoon *v.* R. Co., 98 App. Div. 169, 91 N. Y. S. 65.

Judge's minutes.—Mahaska Co. *v.* Bennett, 150 Ia. 216, 129 N. W. 838.

Copy.—Black, etc. Dist. *v.* Marple, 19 Ida. 176, 112 P. 766.

825-41 In re Peterson's Est., 22 N. D. 480, 134 N. W. 751.

825-42 New York, etc. Co. *v.* Dist., 33 App. Cas. (D. C.) 377.

825-46 Opinion appearing in Federal Reporter, not admissible. W. U. T. Co. *v.* Bradford, 52 Tex. Civ. 392, 114 S. W. 686.

826-49 Mayhew *v.* Brislin, 13 Ariz. 102, 108 P. 253.

826-50 See New York, etc. Co. *v.* Dist., 33 App. Cas. (D. C.) 377.

Letters cannot be read to jury as part of unsworn statement accused may make unless their genuineness shown. Woodard *v.* S., 5 Ga. App. 447, 63 S. E. 573.

826-51 See Parker *v.* U. S., 203 Fed. 950, 122 C. C. A. 252; Jewell B. Co. *v.* Mfg. Co., 257 Ill. 238, 100 N. E. 920.

826-52 See Ballew *v.* S. (Ga. App.), 81 S. E. 396.

826-53 Clarke *v.* Stowe, 132 Ga. 621, 64 S. E. 786.

827-54 Parker *v.* U. S., 203 Fed. 950, 122 C. C. A. 252; Sibley *v.* Smith, 167 Ala. 158, 52 S. 27; Winn *v.* Whitehouse, 96 Ark. 42, 131 S. W. 70; Winn *v.* Scraper, 96 Ark. 647, 131 S. W. 72; Denver, etc. Co. *v.* Gast, 54 Colo. 17, 129 P. 233; Wood *v.* Holah, 79 Conn. 215, 64 A. 220; Whitaker *v.* S., 138 Ga. 139, 75 S. E. 254; S. *v.* Barr, 90 Neb. 766, 134 N. W. 525; Durbow *v.* Co., 77 N. J. L. 89, 71 A. 59; Hill *v.* Co., 74 N. J. L. 338, 68 A. 94; Goodman *v.* Schwab, 136 App. Div. 583, 121 N. Y. S. 69; Pacific L. S. Co. *v.* Isaacs, 52 Or. 54, 96 P. 460. See So. R. Co. *v.* Langley (Ala.), 63 S. 545.

Unnecessary that contract be in effect to be admissible. Trogdon *v.* Co. (Mont.), 139 P. 792.

Letters of Railroad Commission.—Printed copies of letters were sought to be introduced in evidence, presumably under Texas Rev. St., art. 4573, which provides that, "upon application of any person, the commission shall furnish certified copies of any classification, rates, rules, regulation, or orders, and such certified copies or printed copies published by authority of the commission shall be admissible in evidence in any suit and sufficient

to establish the fact that any charge, rate, rule, order, or classification therein contained, and which may be in issue in the trial, is the official act of the commission. This article of the statute is a rule of evidence and, according to our construction of it, none of the letters sought to be introduced were admissible in evidence. The railroad commission, like a commissioners' court, board of trustees, or any other official body, cannot act through its individual members but must act as a body. Jackson-Foxworth Lumber Co. *v.* Hutchinson County, 88 S. W. 412. The letters sought to be introduced were certainly not certified copies of any rules or orders, and if admissible at all must come under that part of the act providing for printed copies published by authority of the commission. In our opinion they were not admissible as printed copies of any orders made by the commission because they did not purport to be the official act of the commission, but merely letters signed by one of the commissioners." Quanah, etc. R. Co. *v.* Drummond (Tex. Civ.), 147 S. W. 728.

Certificate added to compilation of ordinances after its admission. Thomas *v.* Yazoo, 95 Miss. 395, 48 S. 821. Issue as to forgery of deed raised by affidavit of stranger. Houston O. Co. *v.* Kimball (Tex. Civ.), 114 S. W. 662.

Presumption in civil action is against forgery, and it is not weakened because no claim made under the instrument; presumption strengthens with lapse of time. Houston O. Co. *v.* Kimball, supra.

827-55 Parrish *v.* C., 136 Ky. 77, 123 S. W. 339; Lancaster *v.* Ames, 103 Me. 87, 68 A. 533, 17 L. R. A. (N. S.) 229 (reply letter admissible); Peycke *v.* Shinn, 76 Neb. 364, 107 N. W. 386 (id.); W. U. T. Co. *v.* O'Fiel, 47 Tex. Civ. 40, 104 S. W. 406 (railroad time card). See In re Hock's Will, 129 N. Y. S. 196.

By statute in South Carolina the production of original bonds prima facie evidence of their execution. Richland Co. *v.* Owens (S. C.), 75 S. E. 549.

827-56 Stone *v.* Golberg, 6 Ala. App. 249, 60 S. 744; Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348; Kauffman *v.* Baillie, 46 Wash. 248, 89 P. 548.

827-57 Specific denial of execution. See Illinois S. Co. *v.* Paczocha, 139 Wis. 23, 119 N. W. 550.

827-58 Waterbury Nat. Bk. *v.* Reed, 231 Ill. 246, 83 N. E. 188. See Owens *v.* Bridges, 13 Ga. App. 419, 79 S. E. 225; Watson *v.* R. Co., 164 N. C. 176, 80 S. E. 175.

827-59 Nashville, etc. Ry. *v.* Peavler, 134 Ga. 618, 68 S. E. 432 (city code); Glos *v.* Holmes, 228 Ill. 436, 81 N. E. 1064; S. *v.* Bartholomew, 176 Ind. 182, 95 N. E. 417; Succession of Derigny, 128 La. 853, 55 S. 552; Healy *v.* Hoy, 115 Minn. 321, 132 N. W. 208; Ore., etc. Co. *v.* Coolidge, 59 Or. 5, 116 P. 93; Horgan *v.* Town, 32 R. I. 528, 80 A. 271; Bruce *v.* Wanzer, 20 S. D. 277, 105 N. W. 282; Hamon *v.* Foust, 127 Tenn. 32, 150 S. W. 418; Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064. See Glos *v.* Stern, 213 Ill. 325, 72 N. E. 1057; Glos *v.* Dyche, 214 Ill. 417, 73 N. E. 757; Chicago, etc. R. Co. *v.* Grantham, 165 Ind. 279, 75 N. E. 265; Craw *v.* Abrams (Neb.), 97 N. W. 296; Cunningham *v.* Ponca City, 27 Okla. 858, 113 P. 919; Bybee *v.* Embree (Tex. Civ.), 135 S. W. 203.

Certified copy on loss of original. Lee *v.* Pearson, 138 Ga. 646, 75 S. E. 1051; Black, etc. Dist. *v.* Marple, 19 Ida. 176, 112 P. 766.

The genuineness of the signature of the secretary of state and that of the governor is presumed from the great seal being affixed. Fowler *v.* Development Co., 158 N. C. 48, 73 S. E. 488.

828-60 Albany Nat. Bank *v.* Georgia Bank Co., 137 Ga. 776, 74 S. E. 267 (chattel mortgage recorded); Murphy *v.* Cady, 145 Mich. 33, 108 N. W. 493; Lamar *v.* S., 49 Tex. Cr. 563, 95 S. W. 509; Slaughter *v.* Cooper (Tex. Civ.), 107 S. W. 897; Chrast *v.* O'Connor, 41 Wash. 360, 83 P. 238. See Jim Pearce Co. *v.* Fisher, 170 Ala. 456, 54 S. 164. But see Hamon *v.* Foust, 127 Tenn. 32, 150 S. W. 418.

Papers and documents in a bankruptcy proceeding must be authenticated by the referee before they can be introduced in evidence in another proceeding, or, where they have been forwarded to the clerk of the bankruptcy court they should be certified by him. Horton *v.* Harralson, 130 La. 100, 57 S. 643.

Copy certified by collector of internal revenue.—"It is said that this certificate was incompetent for the reason that there was no showing that the record itself could not have been pro-

duced; it being located in Detroit and within the jurisdiction of the court. The record which was certified by the internal revenue collector was one which he is required to keep by the laws of the United States. He is also required to furnish certified copies of the same to the prosecuting officers of any state, county, or municipality making application therefor. Section 3240, Rev. Stat. U. S., as amended by act of June 21, 1906, c. 3509, 34 Stat. 387 (U. S. Comp. St. Supp. 1911, p. 942). The record itself would have been admissible on the question of the respondent's guilt (People *v.* Moore, 155 Mich. 107, 118 N. W. 742), and we can see no reason why a certified copy of the record should not be admissible when certified in accordance with our statute for the admission of public records, where the removal of them from their usual place of custody would work an inconvenience to the public service. C. L. 1897, §10,169." P. *v.* Lalonde, 171 Mich. 286, 137 N. W. 74.

828-61 Glos *v.* Holmes, 228 Ill. 436, 81 N. E. 1064; S. *v.* Schaeffer, 74 Kan. 390, 86 P. 477; Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78; Smithers *v.* Lowrance (Tex. Civ.), 93 S. W. 1064. See Star L. Assn. *v.* Moore, 4 Penne. (Del.) 308, 55 A. 946; Stanley *v.* Hill, 135 Ga. 711, 70 S. E. 577; Lane, etc. Co. *v.* Storm Lake, 151 Ia. 130, 130 N. W. 924.

Ordinance purporting to be published in pamphlet by authority, admissible. Southern R. Co. *v.* Weatherlow, 153 Ala. 171, 44 S. 1019; Illinois C. R. Co. *v.* Warriner, 229 Ill. 91, 82 N. E. 246; Ft. Worth, etc. R. Co. *v.* Hawes, 48 Tex. Civ. 487, 107 S. W. 556; St. Louis, etc. R. Co. *v.* Garber (Tex. Civ.), 108 S. W. 742. See infra, "Municipal Corporations," 824-66.

Record may be identified by custodian who holds two offices in either capacity. P. *v.* R. Co., 243 Ill. 217, 90 N. E. 730.

828-62 Barringer *v.* Dauernheim, 127 La. 679, 53 S. 923; Straub *v.* Becker, 127 N. Y. S. 310. See vol. 10, p. 1032.

828-63 Reid *v.* S., 168 Ala. 118, 53 S. 254; McLin Co. *v.* Worden, 99 Miss. 547, 55 S. 358; Goss *v.* Herman, 20 N. D. 295, 127 N. W. 78; Halfhill *v.* Malick, 145 Wis. 200, 129 N. W. 1086. See vol. 10, p. 1014, et seq., and supplement thereto.

Not applicable to United States courts. Edwards *v.* Smith (Tex. Civ.), 137 S. W. 1161.

829-64 Law *v.* S., 2 Ala. App. 257, 56 S. 79; Pirrung *v.* Council, 104 App. Div. 571, 93 N. Y. S. 575. See vol. 10, p. 1032.

829-65 Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181; Zimmerman Mfg. Co. *v.* Dunn, 163 Ala. 272, 50 S. 906; Chicago M. & L. Co. *v.* Co., 94 Ark. 183, 126 S. W. 380; P. *v.* Lanterman, 9 Cal. App. 674, 100 P. 720; Gaston *v.* S., 9 Ga. App. 824, 72 S. E. 285; Thompson *v.* Wilkinson, 9 Ga. App. 367, 71 S. E. 678; Brown *v.* Rape, 136 Ga. 584, 71 S. E. 802; Brown *v.* Bass, 132 Ga. 41, 63 S. E. 788; Equitable Mfg. Co. *v.* Co., 130 Ga. 67, 60 S. E. 262; Stevenson *v.* Co., 143 Ill. App. 397; Lane *v.* C., 134 Ky. 519, 121 S. W. 486; Succession of Sallier, 115 La. 97, 38 S. 929; DiGiorgio Co. *v.* R. Co., 104 Md. 693, 65 A. 425; Virtue *v.* Mfg. Co., 123 Minn. 17, 142 N. W. 930, 1136; Hicks *v.* Surety Co., 169 Mo. App. 479, 155 S. W. 71; Scotland County Nat. Bk. *v.* Hohn, 146 Mo. App. 699, 125 S. W. 539; Walden *v.* Assn., 89 Neb. 546, 131 N. W. 962; In re Pirie, 198 N. Y. 209, 91 N. E. 587; Goldstein *v.* Schwartz, 148 N. Y. S. 256; Eminent Household *v.* Prater, 37 Okla. 568, 133 P. 48; S. *v.* Pirkey, 22 S. D. 550, 118 N. W. 1042; Sullivan *v.* Fant (Tex. Civ.), 160 S. W. 612; Gulf, etc. R. Co. *v.* Lampkin, 53 Tex. Civ. 524, 116 S. W. 128.

See Norton *v.* Woodward & Co. (Ala.), 64 S. 609; Swindall *v.* Ford (Ala.), 63 S. 651; Black *v.* Terry, 157 Ky. 600, 163 S. W. 737; Beckler's Ex. *v.* Cumberland, 150 Ky. 257, 150 S. W. 335; Line *v.* Line, 119 Md. 403, 86 A. 1032; Supreme Lodge *v.* Mims (Tex. Civ.), 167 S. W. 835; Security, etc. Co. *v.* Stuart (Tex. Civ.), 163 S. W. 396; Groesbeck *v.* Wiest (Tex. Civ.), 157 S. W. 258; Ferrell *v.* S. (Tex. Cr.), 152 S. W. 901; S. W. Surety Ins. Co. *v.* Anderson (Tex. Civ.), 152 S. W. 816; Nelson *v.* Co., 52 Wash. 177, 100 P. 325; infra, "Insurance," 542-16. *Contra,* if letters introduced to prove diligence as foundation for secondary evidence. McDonald *v.* Hanks, 52 Tex. Civ. 140, 113 S. W. 604.

Execution of written instrument introduced to prove collateral fact need not be formally proved. S. *v.* Waldrop, 73 S. C. 60, 52 S. E. 793.

Execution of deed introduced to show color of title need not be proved. Brannan *v.* Henry, 142 Ala. 698, 39 S. 92.

Recognition and use of books containing by-laws, sufficient proof of authentication. Star L. Assn. *v.* Moore, 4 Penne. (Del.) 308, 55 A. 946.

Denial of execution in verified pleading, not final if other evidence raises an issue. Henderson *v.* Co. (Tex. Civ.), 128 S. W. 671.

As to proof of private writings, see "Written Instruments," vol. 14, p. 733, et seq.

Constitution of unincorporated society may be received after proof paper on which it was written was found and kept in its archives and acted upon by society, without other proof of its adoption; and proof that all doings of the society is contained in a book is sufficient to authorize its reception in favor of a non-member to show its organization and acts. Tarbell *v.* Gifford, 82 Vt. 222, 72 A. 921.

Sufficiency of foundation is for reviewable discretion of court. Bull Remedy Co. *v.* Clark, 109 Minn. 396, 124 N. W. 20.

Letter shown to have been received in due course in reply to a letter sent writer may be received without further evidence of authenticity if no objection made. Helwig *v.* Aulabaugh, 83 Neb. 542, 120 N. W. 162.

829-66 Holland *v.* Riggs, 53 Tex. Civ. 367, 116 S. W. 167. See Richards *v.* Co., 145 Ala. 657, 39 S. 615; Leftkovitz *v.* Bk., 152 Ala. 521, 44 S. 613; S. *v.* Matlack, 5 Penne. (Del.) 401, 64 A. 259.

Circumstantial evidence may establish execution of writing. International H. Co. *v.* Campbell, 43 Tex. Civ. 421, 96 S. W. 93.

In foreign language.—Mitchell *v.* Robinson (Tex.), 136 S. W. 501.

829-67 Touart *v.* Rickert, 163 Ala. 362, 50 S. 896; Tucker *v.* Helgren, 102 Minn. 382, 113 N. W. 912; Murray *v.* Foskett, 114 Minn. 44, 130 N. W. 14.

A contract conveying interest in a business and retaining a lien, which was acknowledged and filed with the county records of liens, is admissible. Hawkins *v.* Western Nat. Bk. (Tex. Civ.), 146 S. W. 1191.

829-68 Malsby *v.* Gamble, 61 Fla. 310, 54 S. 166.

829-69 Webb *v.* Till, 134 Ga. 388, 67 S. E. 1034, unless affidavit of forgery filed. See Lewis *v.* Glass (Ala.), 39 S. 771; Bale *v.* Todd, 123 Ga. 99, 50 S. E. 990; Vickers *v.* Hawkins, 128 Ga. 794, 58 S. E. 44.

Failure to formally introduce deed not cause for reversing judgment if parties treated it as in evidence. Maxwell *v.* McCall, 145 Ia. 687, 124 N. W. 760.

Sworn translation required of instrument in foreign tongue. Noble *v.* Cates, 230 Mo. 189, 130 S. W. 302.

829-70 Nelson *v.* Bock, 84 N. J. L. 123, 85 A. 1009; Boyle *v.* Knauss, 81 N. J. L. 330, 79 A. 1025; Boswell *v.* Bk., 16 Wyo. 161, 92 P. 624, 93 P. 661. *Contra,* Ballow *v.* Collins, 139 Ala. 543, 36 S. 712; Lewis *v.* Glass (Ala.), 39 S. 771; Miss. L. Co. *v.* Kelly, 19 S. D. 577, 104 N. W. 265.

As to proof of attested instruments, see vol. 14, p. 757, et seq.

830-71 Merck *v.* Merck, 89 S. C. 347, 71 S. E. 969; Hightower *v.* Taylor (Tex. Civ.), 126 S. W. 621.

830-73 Swindall *v.* Ford (Ala.), 63 S. 651; Akins *v.* Adams (Mo.), 164 S. W. 603; In re Pirie (N. Y.), 91 N. E. 587. See Knolhoff *v.* Mark (Or.), 136 P. 893.

That subsequent to the date of the certificate as to filing a mortgage was taken from the clerk's office to procure the affidavit before the notary by the subscribing witness, does not render the mortgage inadmissible. Albany Nat. Bk. *v.* Georgia & Co., 137 Ga. 776, 74 S. E. 267.

830-74 Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37; Terry *v.* Broadhurst, 127 Ga. 212, 56 S. E. 282; Worman *v.* Seybert, 78 N. J. L. 176, 73 A. 529 (proof of handwriting, prima facie evidence of execution of paper).

831-76 Louisville & N. R. Co. *v.* Price, 159 Ala. 213, 48 S. 814, receipt signed by agent's mark.

831-78 Barker *v.* Elec. Co., 173 Ala. 28, 55 S. 364; Campbell *v.* Bates, 143 Ala. 338, 39 S. 144; De Gentile *v.* Shingle Co., 130 La. 705, 58 S. 517; In re Butrick, 185 Mass. 107, 69 N. E. 1044; Nicholson *v.* Lumb. Co., 156 N. C. 59, 72 S. E. 86; Robertson *v.* Brothers (Tex. Civ.), 139 S. W. 657; Dickinson *v.* Smith, 134 Wis. 6, 114 N. W. 133. See Anderson *v.* Cole, 234 Mo. 1, 136 S. W. 395; Goodhue *v.* Cameron, 142 App. Div. 470, 127 N. Y. S. 120; Wright *v.* Hull, 83 O. St. 385, 94 N. E. 813.

Account book entries.—H. C. Cole & Co. *v.* W. Lea & Sons Co., 35 App. Cas. (D. C.) 355.

Its admission is not conclusive of its genuineness. Daugharty *v.* Drawdy, 134 Ga. 650, 68 S. E. 472.

Recital in ancient document.—Ardoin *v.* Cobb (Tex.), 136 S. W. 271.

831-80 P. *v.* Lanterman, 9 Cal. App. 674, 100 P. 720; Ruckman *v.* Co., 139 Mo. App. 256, 123 S. W. 69; Koloff *v.* R. Co., 71 Wash. 543, 129 P. 398. See vol. 14, p. 776, n. 24, and supplement thereto. *Comp.* Lewiston, etc. Dep. Co. *v.* Shackford, 213 Mass. 432, 100 N. E. 828. *Contra* as to freight bills. Beach *v.* Schroeder, 47 Colo 312, 107 P. 271.

By statute authenticated copy of bond is prima facie evidence of execution. Bulger *v.* Prenica, 93 Neb. 697, 142 N. W. 117.

Freight receipt.—Southern Exp. Co. *v.* Hill, 81 Ark. 1, 98 S. W. 371; Bell *v.* R. Co., 125 Ga. 510, 54 S. E. 532.

Tax receipt.—Chastang *v.* Chastang, 141 Ala. 451, 37 S. 799.

Chattel mortgage. — Becker *v.* Bowen (Tex. Civ.), 79 S. W. 45.

Minutes of proceedings of association. General Prop. *v.* Force, 72 N. J. Eq. 56, 68 A. 914.

Bill of sale.—Jaquith Co. *v.* Shumway, 80 Vt. 556, 69 A. 157.

Indorsement on mortgage. Hodge *v.* Hudson, 139 N. C. 358, 51 S. E. 954.

Promissory note.—Patton *v.* Bk., 124 Ga. 965, 53 S. 664.

Record of marriage.—Murphy *v.* P., 213 Ill. 154, 72 N. E. 779.

Hospital records.—Cashin *v.* R. Co., 185 Mass. 543, 70 N. E. 930.

Marriage certificate. — Broadrick *v.* Broadrick, 25 Pa. Super. 225.

Letters received by a party through the mail, purporting to have been addressed to him by the other party with reference to relevant matters, and in response to letters written by the addressee, are admissible without further proof of their authorship. Allen *v.* Bk., 129 Ga. 748, 59 S. E. 813; City Nat. Bk. *v.* Jordan, 139 Ia. 499, 177 N. W. 758; Ex parte Denning, 50 Tex. Cr. 629, 100 S. W. 401.

Telegrams.—Same rule applies. Edwards *v.* Erwin, 148 N. C. 429, 62 S. E. 545.

833-81 Patton *v.* Bk., 124 Ga. 965, 53 S. E. 664; Henderson *v.* Co. (Tex. Civ.), 128 S. W. 671 (evidence should be heard in absence of jury). See Jarecki Co. *v.* Ryan, 114 Minn. 38, 129 N. W. 1055; McGrath *v.* Noreross, 78 N. J. Eq. 120, 79 A. 85.

Proof of authorization of letters written by another must more than raise conjecture, suspicion or possibility. Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181.

833-83 P. *v.* Lemmon, 256 Ill. 631, 100 N. E. 200.

833-87 Wall *v.* S., 2 Ala. App. 157, 56 S. 57; P. *v.* Peterson, 153 Ill. App. 480.

834-92 Wall *v.* S., 2 Ala. App. 157, 56 S. 57; Western C. Co. *v.* Anderson, 45 Tex. Civ. 513, 101 S. W. 1061.

835-97 S. *v.* Nilson, 56 Wash. 289, 105 P. 829.

835-1 Paper not inadmissible because of memorandum on its margin. McCreery *v.* Ollendorff, 116 N. Y. S. 30.

835-4 Lanier *v.* Hebard, 123 Ga. 626, 51 S. E. 632; Frugia *v.* Trueheart, 48 Tex. Civ. 513, 106 S. W. 736.

All of a document must be offered. Wallace *v.* Dorris, 218 Pa. 534, 67 A. 858. See Closson *v.* Bligh, 41 Ind. App. 14, 83 N. E. 263; 840-21.

835-5 Entry by clerk admissible. Mitchell *v.* Inman (Tex. Civ.), 156 S. W. 290.

836-7 See vol. 10, p. 795, et seq.

Inadmissible unless a proper return is attached. Black Hills B. Co. *v.* Ins. Co. (S. D.), 141 N. W. 358.

839-16 See Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175; Kozee *v.* C., 139 Ky. 66, 129 S. W. 327; In re Acker, 70 N. J. Eq. 669, 62 A. 556.

839-17 See Hagan *v.* Holderby, 62 W. Va. 106, 57 S. E. 289.

839-18 See Strecker *v.* Railson, 16 N. D. 68, 111 N. W. 612, 8 L. R. A. (N. S.) 1099.

840-19 Brandt *v.* Public Bk., 123 N. Y. S. 807. See Crawford *v.* Roney, 126 Ga. 763, 55 S. E. 499.

840-21 Part of private document may be sufficient if it contains all that is relevant. St. Louis, etc. R. Co. *v.* May, 53 Tex. Civ. 257, 115 S. W. 900.

840-22 See Gabriel *v.* Bk., 145 Cal. 266, 78 P. 736.

Mutilated book excites suspicion. Crane *v.* Brewer, 73 N. J. Eq. 558, 68 A. 78.

Patent is prima facie evidence of utility of article patented. Waymire *v.* Shipley, 52 Or. 464, 97 P. 807.

Private document does not bind party introducing it so as to exclude all evi-

dence relating to it. Hoffman *v.* Henricks, 21 Okla. 479, 96 P. 589.

841-23 See Lanier *v.* Hebard, 123 Ga. 626, 51 S. E. 632; Tifft *v.* Greene, 211 Ill. 389, 71 N. E. 1030; Koch *v.* Streuter, 232 Ill. 594, 83 N. E. 1072; Rice *v.* Woolery, 38 Okla. 199, 132 P. 817; Cockrell *v.* Schmitt, '20 Okla. 207, 94 P. 521; Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484; Hudkins *v.* Bush, 69 W Va. 194, 71 S. E. 106. But see South Memphis L. Co. *v.* Lumb. Co., 210 Fed. 257, 127 C. C. A. 75.

Recitals in judgment not evidence against third persons. Parlin & O. Co. *v.* Vawter, 39 Tex. Civ. 520, 88 S. W. 407. See Swainson *v.* Scott, 111 Tenn. 140, 76 S. W. 909.

841-24 Disha's Admr *v.* Harrison County, 141 Ky. 692, 133 S. W. 545.

842-25 Am. T. & S. Bk. *v.* Co., 165 Fed. 34, 91 C. C. A. 72; Wagner *v.* Allemania, 71 Misc. 448, 128 N. Y. S. 629.

842-28 Wells *v.* Blackman, 121 La. 394, 46 S. 437; Russell *v.* Seofield, 134 Wis. 21, 113 N. W. 1094.

Sworn copies of records cannot be impeached by parol. Glos *v.* Holmes, 228 Ill. 436, 81 N. E. 1064.

DOMICIL.

Weight of presumption, 855-24.

846-1 Graves *v.* Georgetown, 154 Ky. 207, 157 S. W. 33; Helm *v.* C., 135 Ky. 392, 122 S. W. 196; Erwin *v.* Benton, 120 Ky. 536, 87 S. W. 291; Miller *v.* Woodmen, 140 Wis. 505, 122 N. W. 1126.

Definition.—Holt *v.* Hendee, 248 Ill. 288, 93 N. E. 749.

846-2 Gaddie *v.* Mann, 147 Fed. 955; Succession of Simmons, 109 La. 1095, 34 S. 101; Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40; Mather *v.* Cunningham, 105 Me. 326, 74 A. 809; In re Wise's Est., 146 N. Y. S. 789; Aetna Nat. Bk. *v.* Kramer, 142 App. Div. 444, 126 N. Y. S. 970; Miller *v.* Woodmen, 140 Wis. 505, 122 N. W. 1126.

847-3 Gaddie *v.* Mann, supra; P. *v.* Noir, 207 Ill. 180, 69 N. E. 905; S. *v.* Scott, 171 Ind. 349, 86 N. E. 409; Schmoll *v.* Schenck, 40 Ind. App. 581, 82 N. E. 805; Farrow *v.* Farrow (Ia.), 143 N. W. 856; Glotfelty *v.* Brown, 148 Ia. 124, 126 N. W. 797; Shirk *v.* Twp., 137 Ia. 230, 114 N. W. 884; In re Colton, 129 Ia. 542, 105 N. W. 1008; In re Titterington, 130 Ia. 356, 106 N. W. 761; Cover *v.* Hatten, 136 Ia. 63, 113 N. W. 470; Graves *v.* Georgetown, 154 Ky. 207, 157 S. W. 33; First Nat. Bk. *v.* Hinton, 123 La. 1018, 49 S. 692; Ballard *v.* Puleston, 113 La. 235, 36 S. 951; Whately *v.* Hatfield, 196 Mass. 393, 82 N. E. 48; Watkinson *v.* Watkinson, 68 N. J. Eq. 632, 60 A. 931, 69 L. R. A. 397; Guggenheim *v.* City, etc. 80 N. J. L. 246, 76 A. 338; Wacker *v.* Wacker, 154 App. Div. 495, 139 N. Y. S. 78; In re Wise's Est., 146 N. Y. S. 789; Post *v.* Post, 71 Misc. 44, 129 N. Y. S. 754; Watson *v.* R. Co., 152 N. C. 215, 67 S. E. 502; Pickering *v.* Winch, 48 Or. 500, 87 P. 763; Burleigh *v.* Hecht, 22 S. D. 301, 117 N. W. 367; Stewart *v.* Kleinschmidt, 51 Wash. 90, 97 P. 1105; Duxstad *v.* Duxstad, 17 Wyo. 411, 100 P. 112.

Presumption rebuttable by slight circumstances. Holtan *v.* Beck, 20 N. D. 5, 125 N. W. 1048.

848-4 See Redfearn *v.* Hines, 123 Ga. 391, 51 S. E. 407; Donaldson *v.* S., 167 Ind. 553, 78 N. E. 182.

848-5 Eisele *v.* Oddie, 128 Fed. 941; Mather *v.* Cunningham, 105 Me. 326, 74 A. 809; S. *v.* Wurdeman, 129 Mo. App. 263, 108 S. W. 144; In re Lowry, 18 Pa. C. C. 591 (place of residence of little weight); Savage *v.* Umphries (Tex. Civ.), 118 S. W. 893; Pendleton *v.* C., 110 Va. 229, 65 S. E. 536; Miller *v.* Woodmen, 140 Wis. 505, 122 N. W. 1126.

The city has the burden of proof that defendant was a resident and had his domicil therein in an action to recover taxes. Graves *v.* Georgetown, 154 Ky. 207, 157 S. W. 33.

Residence and domicil distinguished. O'Brien *v.* O'Brien, 16 Cal. App. 103, 116 P. 692; Oglesby *v.* Turner, 127 La. 1093, 54 S. 400.

"**The presumption of the law** is that where a person actually lives is his domicil, though this is a rebuttable presumption. Anderson *v.* Watt, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. ed. 1078. But it is also true that, Mr. Harrison having by his pleadings raised the question of the jurisdiction of the court by an allegation that he was a resident of a different jurisdiction, the burden was upon him to show the lack of jurisdiction of circuit court." Harrison *v.* Harrison, 117 Md. 607, 84 A. 57.

Presumption appellant is resident of

county in which suit brought. Traders' Ins. Co. *v.* Humphrey, 207 Ill. 540, 69 N. E. 875.

850-6 In re Grant's Est., 83 Misc. 257, 144 N. Y. S. 567; In re Bremme, 13 Pa. C. C. 177.

850-7 *Comp.* Winans *v.* Atty. Gen. (1904) App. Cas. (Eng.) 287 (Lord Macnaghten's opinion); Donaldson *v.* S., 167 Ind. 553, 78 N. E. 182; Hibbert *v.* Hibbert, 72 N. J. Eq. 778, 65 A. 1028.

850-8 Whately *v.* Hatfield, 196 Mass. 393, 82 N. E. 48.

850-9 See Whately *v.* Hatfield, supra.

Voluntary change.—Hindorff *v.* Sovereign Camp, 150 Ia. 185, 129 N. W. 831.

850-10 In re Titterington, 130 Ia. 356, 106 N. W. 761.

850-11 Sailor in service does not lose legal residence. Radford *v.* Radford, 26 Ky. L. R. 652, 82 S. W. 391.

851-13 Boyle *v.* Griffin, 84 Miss. 41, 36 S. 141.

Last domicil of infant's deceased father, fixes domicil of infant. Nunn *v.* Robertson, 80 Ark. 350, 97 S. W. 293; Young *v.* Hiner, 72 Ark. 299, 79 S. W. 1062; In re Bunting, 30 Utah 251, 84 P. 109.

Domicil of parent, not necessarily domicil of minor child. Wirsig *v.* Scott, 79 Neb. 322, 112 N. W. 655. *Comp.* Beekman *v.* Beekman, 53 Fla. 858, 43 S. 923; In re Bunting, supra.

851-14 Smith *v.* Young, 136 Mo. App. 65, 117 S. W. 628.

Child awarded to custody of mother, in divorce proceedings, takes her domicil. Toledo T. Co. *v.* Cameron, 137 Fed. 48, 69 C. C. A. 28.

852-15 Nunn *v.* Robertson, 80 Ark. 350, 97 S. W. 293.

852-17 Smith *v.* Smith, 35 Ind. App. 610, 74 N. E. 1008; First Nat. Bk. *v.* Hinton, 123 La. 1018, 49 S. 692; Wacker *v.* Wacker, 154 App. Div. 495, 139 N. Y. S. 78; Callahan *v.* Callahan, 65 Misc. 172, 121 N. Y. S. 39.

853-18 Gordon *v.* Yost, 140 Fed. 79; Wilcox *v.* Nixon, 115 La. 47, 38 S. 890; White *v.* Glover, 116 N. Y. S. 1059. See Miner *v.* Morgan, 83 Neb. 400, 119 N. W. 781; Elwell *v.* Elwell, 70 Misc. 61, 128 N. Y. S. 495.

After a valid decree of separation is no presumption wife's domicil follows that of husband. Percival *v.* Percival, 106 App. Div. 111, 94 N. Y. S. 909, 186 N. Y. 587, 79 N. E. 1114.

Domicil of matrimony continues to be domicil of deserted wife until she acquires another. Hibbert *v.* Hibbert, 72 N. J. Eq. 778, 65 A. 1028.

Husband's wrongful acts cannot forfeit wife's matrimonial domicil. Duxstad *v.* Duxstad, 17 Wyo. 411, 100 P. 112.

854-20 Gaddie *v.* Mann, 147 Fed. 955; Carwile *v.* Jones, 38 Mont. 590, 101 P. 153; Grant *v.* Lawrence, 37 Utah 450, 108 P. 931 (presumption of fact only). See Forlaw *v.* Co., 124 Ga. 261, 32 S. E. 898; Barfield *v.* Coker, 73 S. C. 181, 53 S. E. 170; McCord *v.* Rosene, 39 Wash. 1, 80 P. 793; Buchholz *v.* Buchholz, 63 Wash. 213, 115 P. 88. *Contra,* Estopinal *v.* Michel, 121 La. 879, 46 S. 907.

The family of an unmarried man consists of any group of persons forming a distinct domestic body. S. *v.* Hays, 105 Minn. 399, 117 N. W. 615.

855-24 Presumptions as to domicil are mere inferences or presumptions of fact, and not legal or conclusive. Donaldson *v.* S., 167 Ind. 553, 78 N. E. 182.

856-25 P. *v.* Moir, 207 Ill. 180, 69 N. E. 905; Mather *v.* Cunningham, 105 Me. 326, 74 A. 809; Bechtel *v.* Bechtel, 101 Minn. 511, 112 N. W. 883; Pickering *v.* Winch, 48 Or. 500, 87 P. 763.

Domicil is a mixed question of law and fact. Quinn *v.* Nevills, 7 Cal. App. 231, 93 P. 1055; Forlaw *v.* Co., 124 Ga. 261, 32 S. E. 898; Stallings *v.* Stallings, 127 Ga. 464, 56 S. E. 469.

856-26 Rockland *v.* Deer Isle, 105 Me. 155, 73 A. 885 (poll tax). See Schmoll *v.* Schenck, 40 Ind. App. 581, 82 N. E. 805; Loeser *v.* Jorgenson, 137 Mich. 220, 100 N. W. 450. May be persuasive in connection with other facts. Helm *v.* C., 135 Ky. 392, 122 S. W. 196.

Personal taxes.—Babcock *v.* Slater, 212 Mass. 434, 99 N. E. 173.

856-27 Gaddie *v.* Mann, 147 Fed. 955; Bradley *v.* Davis, 156 Cal. 267, 104 P. 302; Quinn *v.* Nevills, 7 Cal. App. 231, 93 P. 1055; In re Titterington, 130 Ia. 356, 106 N. W. 761; Estopinal *v.* Vogt, 121 La. 883, 46 S. 908; Mandeville *v.* Huston, 15 La. Ann. 281; Loeser *v.* Jorgensen, 137 Mich. 220, 100 N. W. 450; Lewis *v.* Beach, 112 N. Y. S. 200. See McCord *v.* Rosene, 39 Wash. 1, 80 P. 793.

857-29 See Watkinson *v.* Watkinson, 68 N. J. Eq. 632, 60 A. 931, 69 L. R. A. 397.

Conviction of crime in a county is not prima facie evidence accused was a resident thereof. Thomas *v.* County, 175 Mo. 68, 74 S. W. 999.

857-31 German S. & L. Soc. *v.* Dormitzer, 192 U. S. 125; Winans *v.* Atty Gen. (1904), App. Cas. (Eng.) 287.

Patent to government land in another state issued under homestead law, admissible to show patentee was resident therein. Des Moines S. Bk. *v.* Kennedy, 142 Ia. 272, 120 N. W. 742.

857-32 Holyoke *v.* Holyoke Est, 110 Me. 469, 87 A. 40.

857-33 Helm *v.* C., 135 Ky. 392, 122 S. W. 196 (sex, status and surroundings regarded); Kelson *v.* R. Co., 146 Mich. 563, 109 N. W. 1057; In re White, 116 App. Div. 183, 101 N. Y. S. 551; Pickering *v.* Winch, 48 Or. 500, 87 P. 763.

858-36 Winans *v.* Atty. Gen. (1904), App. Cas. (Eng.) 287.

858-37 Eisele *v.* Oddie, 128 Fed. 941; Gaddie *v.* Mann, 147 Fed. 955; Lewis *v.* R. Co., 82 Kan. 351, 108 P. 95; Kapigian *v.* Minassian, 212 Mass. 412, 99 N. E. 264, *cit.* Carriere *v.* Lumb. Co., 203 Mass. 322, 89 N. E. 544; Marcy *v.* R. Co., 210 Mass. 197, 96 N. E. 130; Watson *v.* R. Co., 152 N. C. 215, 67 S. E. 502; Savage *v.* Umphries (Tex. Civ.), 118 S. W. 893 (immaterial he could not testify as to time he decided to permanently remain). See McMakin *v.* C., 25 Ky. L. R. 2195, 80 S. W. 188.

Intention is not controlling unless conformable acts shown. Bradfield *v.* Bradfield, 154 Mich. 115, 117 N. W. 588.

858-38 Estopinal *v.* Michel, 121 La. 879, 46 S. 907; Estopinal *v.* Vogt, 121 La. 883, 46 S. 908; S. *v.* Snyder, 182 Mo. 462, 82 S. W. 12; Barfield *v.* Coker, 73 S. C. 181, 53 S. E. 170.

858-39 Not conclusive. Dean *v.* Dunn, 9 Cal. App. 352, 99 P. 380.

"To establish a change of domicil, fact and intent must concur. Holmes *v.* Greene, 7 Gray 299, 301. The mere desire to have a domicil in a certain place with the intention that it shall be so is not enough, where, as here, there is no actual change of abode and apparently no intention of performing any of the acts which are necessary to constitute such a change." Babcock *v.* Slater, 212 Mass. 434, 99 N. E. 173.

858-40 P. *v.* Moir, 207 Ill. 180, 69 N. E. 905; Schmoll *v.* Schenck, 40 Ind. App. 581, 82 N. E. 805; In re Dalrymples, 215 Pa. 367, 64 A. 554.

Removal of family, important; continuing intention to return may be shown. McDowell *v.* Co., 135 Mo. App. 276, 115 S. W. 1028.

School district plat not conclusive as to residence of party who lives on designated tract of land. Buckingham *v.* Angell, 238 Ill. 564, 87 N. E. 285.

Judgment in habeas corpus proceedings awarding custody of orphan to grandfather, admissible to show child's domicil. Churchill *v.* Jackson, 132 Ga. 666, 64 S. E. 691.

859-41 Flemister Gro. Co. *v.* Lumb. Co., 10 Ga. App. 702, 73 S. E. 1077; Gaar *v.* Arneal, 82 Kan. 208, 107 P. 558; Wright *v.* R. Co., 151 N. C. 529, 66 S. E. 588; Holtan *v.* Beck, 20 N. D. 5, 125 N. W. 1048.

Intent of party to remove to a place to which he was subsequently taken is relevant to the question whether subsequent removal was voluntary, and this regardless of how long he intended to remain in place he purposed to remove to. In re Murray's Est., 145 Ia. 368, 124 N. W. 193.

859-43 Holyoke *v.* Est., 110 Me. 469, 87 A. 40.

860-45 In re Titterington, 130 Ia. 356, 106 N. W. 761; Knox *v.* Montville, 98 Me. 493, 57 A. 792.

860-48 Canadian P. R. Co. *v.* Wenham, 146 Fed. 207.

860-50 Sheehan *v.* Scott, 145 Cal. 684, 79 P. 350; S. *v.* Scott, 171 Ind. 349, 86 N. E. 409.

May be shown by facts and circumstances.—Farrow *v.* Farrow (Ia.), 143 N. W. 856.

861-53 Town of Roxburg *v.* Town, etc., 85 Conn. 196, 82 A. 193.

861-54 Gaar *v.* Arneal, 82 Kan. 208, 107 P. 558.

862-57 Rockland *v.* Deer Isle, 105 Me. 155, 73 A. 885, statement in libel for divorce. See In re Dalrymples, 215 Pa. 367, 64 A. 554.

Admission in pleadings in a divorce suit, not sufficient. Bradfield *v.* Bradfield, 154 Mich. 115, 117 N. W. 588.

Letters admissible.—Thorn *v.* Thorn, 28 App. Cas. (D. C.) 120.

863-58 In re Bassett, 189 Fed. 410; Sullivan *v.* Kenney, 148 Ia. 361, 126 N. W. 349; Kinder *v.* Scharff, 125 La. 594, 51 S. 654; First Nat. Bk. *v.* Hinton, 123 La. 1018, 49 S. 692 (evidence must be positive and satisfactory);

Holyoke *v.* Est., 110 Me. 469, 87 A. 40; Mather *v.* Cunningham, 105 Me. 326, 74 A. 809; Bradfield *v.* Bradfield, 154 Mich. 115, 117 N. W. 588. And see Holt *v.* Hendee, 248 Ill. 288, 93 N. E. 749; Aetna Nat. Bk. *v.* Kramer, 142 App. Div. 444, 126 N. Y. S. 970.

863-59 See Ginn *v.* Cannon, 119 Ga. 475, 46 S. E. 631.

DOWER.

865-1 Dower claim in property conveyed by husband during lifetime must be clearly established. Saunders *v.* Hamilton, 26 Ky. L. R. 851, 82 S. W. 630.

866-5 Hilton *v.* Snyder, 37 Utah 384, 108 P. 698.

866-6 Frampton *v.* Stevens, L. R. 21 Ch. (Eng.) 164; Barrett *v.* Failing, 111 U. S. 523; Clarkson *v.* Washington, 38 Okla. 4, 131 P. 935. See Starbuck *v.* Starbuck, 173 N. Y. 503, 66 N. E. 193.

866-8 Record evidence of marriage not necessary. Casley *v.* Mitchell, 121 Ia. 96, 96 N. W. 725; McFadden *v.* McFadden, 32 Pa. Super. 534.

867-14 Dixon *v.* Harris, 32 Ky. L. R. 275, 105 S. W. 451.

869-16 Plaintiff seeking dower need not show title further back than a conveyance in fee to deceased husband. McFadden *v.* McFadden, supra.

869-19 Sanford *v.* Sanford, 157 Ill. App. 350.

871-22 See Putney *v.* Vinton, 145 Mich. 219, 108 N. W. 655.

872-35 King *v.* King, 184 Mo. 99, 82 S. W. 101.

872-39 King *v.* King, supra.

873-42 King *v.* King, supra.

873-44 Cowdrey *v.* Cowdrey, 72 N. J. Eq. 951, 67 A. 111, 12 L. R. A. (N. S.) 1176.

874-45 Cowdrey *v.* Cowdrey, supra.

875-51 See Grober *v.* Clements, 71 Ark. 565, 76 S. W. 555; In re Taylor, 5 Ind. Ty. 219, 82 S. W. 727.

Where divorce was presumed.—Clarkson *v.* Washington, 38 Okla. 4, 131 P. 935.

876-56 Rieger *v.* Schaible, 81 Neb. 33, 115 N. W. 560, 17 L. R. A. (N. S.) 866.

876-58 Colbert *v.* Rings, 231 Ill. 404, 83 N. E. 274.

876-59 Rieger *v.* Schaible, supra; Cummings *v.* Cummings, 25 R. I. 528, 57 A. 302.

878-64 Stromme *v.* Rieck, 107 Minn. 177, 119 N. W. 948. See Carling *v.* Peebles, 215 Ill. 96, 74 N. E. 87; Hanna *v.* Gay, 117 Ky. 695, 78 S. W. 915; Bush *v.* Piersol, 183 Mo. 500, 81 S. W. 1224; Fisher *v.* Fisher, 89 S. C. 175, 71 S. E. 863.

879-71 Fowler *v.* Chadima, 134 Ia. 210, 111 N. W. 808.

879-73 *Comp.* Dooley *v.* Greening, 201 Mo. 343, 100 S. W. 43.

880-80 In re Taylor, 5 Ind. Ty. 219, 82 S. W. 727; Bechtel *v.* Barton, 147 Mich. 318, 110 N. W. 935.

882-96 Britt *v.* Gordon, 132 Ia. 431, 108 N. W. 319; Jenkins *v.* Rhodes, 106 Va. 564, 56 S. E. 332.

883-97 Higgins *v.* Higgins, 219 Ill. 146, 76 N. E. 86; Wallace *v.* Wallace, 137 Ia. 169, 114 N. W. 913; Collings *v.* Collings, 29 Ky. L. R. 51, 92 S. W. 577; Goff *v.* Goff, 60 W. Va. 9, 53 S. E. 769.

883-99 Rankin *v.* Rankin, 111 Ill. App. 403; Hyatt *v.* O'Connell, 130 Ia. 567, 107 N. W. 599; Harris *v.* Langford, 26 Ky. L. R. 1096, 83 S. W. 566; Delaney *v.* Manshum, 146 Mich. 525, 109 N. W. 1051. *Contra*, as to nonresident wife if husband acts in good faith. McKelvey *v.* McKelvey, 79 Kan. 82, 99 P. 238.

Execution of deed with husband evidence of willingness to release. Krah *v.* Wassmer, 75 N. J. Eq. 109, 71 A. 404.

883-1 Election is conclusive; but remaining in family homestead few years after widowhood began is not. Phillips *v.* Williams, 130 Ky. 773, 113 S. W. 908. Presumption arising from act may be rebutted by widow's declarations. Gray *v.* Wright, 142 Ia. 225, 119 N. W. 612. Election, not evidenced by widow's remaining in possession of homestead pursuant to written agreement of heirs. Hemping *v.* Hemping, 141 Ia. 535, 120 N. W. 111.

883-3 In re Baker's Est., 81 Vt. 505, 71 A. 190.

Election presumed, though record silent. In re Vogt's Est., 154 Cal. 508, 98 P. 265.

884-11 Re S., 14 Ont. L. R. (Can.) 536; Grober *v.* Clements, 71 Ark. 565, 76 S. W. 555; In re Taylor, 5 Ind. Ty. 219, 82 S. W. 727, *rev.* in 145 Fed. 169, 75 C. C. A. 139, sub nom, Daniels *v.* Taylor; Ferguson *v.* Ferguson, 153 Ky. 742, 156 S. W. 413.

885-12 Hicks *v.* Hicks, 142 N. C. 231, 55 S. E. 106.

886-14 See Fowler *v.* Chadima, 134 Ia. 210, 111 N. W. 808.

Estoppel may arise from verbal representations. Morgan *v.* Spark, 32 Ky. L. R. 1196, 108 S. W. 233. And see Hyatt *v.* O'Connell, 130 Ia. 567, 107 N. W. 599.

886-17 Lucas *v.* Whitacre, 121 Ia. 251, 96 N. W. 776.

887-18 Grober *v.* Clements, 71 Ark. 565, 76 S. W. 555; Lucas *v.* Whitacre, supra; Wallace *v.* Wallace, 137 Ia. 169, 114 N. W. 913; Britt *v.* Gordon, 132 Ia. 431, 108 N. W. 319.

887-21 Arnold *v.* R. Co., 32 Pa. Super. 452.

887-23 Arnold *v.* R. Co., supra.

888-29 Mistake or fraud may be shown in including lands in a decree for sale. Lohmeyer *v.* Durbin, 206 Ill. 574, 69 N. E. 523.

DURESS.

Effect of, 907-42; *Burden and sufficiency of proof*, 909-49.

See 7 STANDARD PROC., title "Duress."

892-1 Wakley *v.* King, 112 App. Div. 765, 98 N. Y. S. 957; International L. Co. *v.* Parmer (Tex. Civ.), 123 S. W. 196.

Question of consent to marriage alleged to have been procured by threats. Quealy *v.* Waldron, 126 La. 258, 52 S. 479.

Payment of note without objection not to be declared ratification thereof notwithstanding prior duress. Brown *v.* Worthington, 99 Ark. 588, 142 S. W. 1082.

893-2 Gardner *v.* Ward, 99 Ark. 588, 138 S. W. 981.

Presumption of ordinary firmness "unless it is shown that by reason of age or other sufficient cause he is weak or infirm. Union National Bank *v.* Dersham, 15 Wkly. Notes Cas. 541." Sulzner *v.* Cappeau-Lemley & Miller Co., 234 Pa. 162, 83 A. 103.

893-3 International Harvester Co. *v.* Voboril, 187 Fed. 973, 110 C. C. A. 311; Callendar S. Bk. *v.* Loos, 142 Ia. 1, 120 N. W. 317; Williamson-H. Co. *v.* Ackerman, 77 Kan. 502, 94 P. 807; Nebraska Mut. B. Assn. *v.* Klee, 70 Neb. 383, 97 N. W. 476; Gray *v.* Freeman, 37 Tex. Civ. 556, 84 S. W. 1105.

894-6 Medearis *v.* Granberry, 38 Tex. Civ. 187, 84 S. W. 1070.

895-10 Royal *v.* Goss, 154 Ala. 117, 45 S. 231.

896-13 Hintz *v.* Hintz, 222 Ill. 248, 78 N. E. 565; Pray *v.* Pray, 128 La. 1037, 55 S. 666; Bishop *v.* Howe, 117 N. Y. S. 996; Anderson *v.* Anderson, 17 N. D. 275, 115 N. W. 836; Redford *v.* Weller, 27 S. D. 334, 131 N. W. 296; Harris *v.* Cary, 112 Va. 362, 71 S. E. 551; Walla Walla F. Ins. Co. *v.* Spencer, 52 Wash. 369, 100 P. 741. And see Huston *v.* Smith, 248 Ill. 396, 94 N. E. 63; Dickson *v.* Fowler, 114 Md. 344, 79 A. 519; Ring *v.* Ring, 127 App. Div. 411, 111 N. Y. S. 713.

Burden of proof.—Mullen *v.* Co., 69 W. Va. 790, 72 S. E. 1089.

Evidence held insufficient.—Jenkins S. S. Co. *v.* Preston, 186 Fed. 609, 108 C. C. A. 473; Hawthorne *v.* Mfg. Co., 50 Colo. 342, 116 P. 122; Krouse *v.* Krouse, 48 Ind. App. 3, 95 N. E. 262; Kelly *v.* Board, 85 Kan. 38, 116 P. 477; Kochman *v.* Karp, 130 N. Y. S. 175.

Threat to turn off water supply is proof of duress. Chicago *v.* Ins. Co., 248 Ill. 40, 75 N. E. 803. Absence of threats, conclusive. Roloson *v.* De Hart, 134 Mo. App. 633, 114 S. W. 1122.

Rule applied to prosecution under peonage statute.—Corrupt conduct need not be shown. U. S. *v.* Clement, 171 Fed. 974.

897-14 Bond *v.* Kidd, 122 Ga. 812, 50 S. E. 934; Paulson *v.* Barger, 132 Ia. 547, 109 N. W. 1081; Lilienthal *v.* Co., 118 App. Div. 205, 102 N. Y. S. 1051; Cincinnati, etc. R. Co. *v.* County, 120 Tenn. 1, 113 S. W. 361; Walla Walla F. Ins. Co. *v.* Spencer, 52 Wash. 369, 100 P. 741; Batavian Bk. *v.* North, 114 Wis. 637, 90 N. W. 1016. See also United States Banking Co. *v.* Veale, 84 Kan. 385, 114 P. 229; Ott *v.* Pace, 43 Mont. 82, 115 P. 37; Ward *v.* Baker (Tex. Civ.), 135 S. W. 620.

898-15 Bond *v.* Kidd, 1 Ga. App. 798, 57 S. E. 944; James *v.* Dalbey, 107 Ia. 463, 78 N. W. 51; Bollinger *v.* Gettysburg, 6 Pa. C. C. 369; Thorne *v.* Farrar, 57 Wash. 441, 107 P. 347. *Comp.* Nebraska Cent. B. & L. Assn. *v.* McCandless, 83 Neb. 536, 120 N. W. 134.

Threat to institute criminal proceedings amounts to duress if crime committed was not to injury of threatener. Thompson *v.* Hicks (Tex. Civ.), 100 S. W. 357.

899-16 International Harvester Co. *v.* Voboril, 187 Fed. 973, 110 C. C. A. 311; Henry *v.* Bk., 131 Ia. 97, 107 N. W. 1034; International L. Co. *v.* Parmer (Tex. Civ.), 123 S. W. 196. See Deshong *v.* New York, 74 App. Div. 234, 77 N. Y. S. 563, 176 N. Y. 475, 68 N. E. 880.

899-17 Rose *v.* Owen, 42 Ind. App. 137, 85 N. E. 129; Kwentsky *v.* Sirovy, 142 Ia. 385, 121 N. W. 27 (immaterial whether person threatened guilty or innocent); Gill *v.* Gill (Ky.), 124 S. W. 875; Ring *v.* Ring, 127 App. Div. 411, 111 N. Y. S. 713.

899-18 Murray, etc. Co. *v.* Sullivan, 15 Cal. App. 475, 115 P. 259.

900-19 McCarthy *v.* Taniska, 84 Conn. 377, 80 A. 84.

900-20 Blankenmiester *v.* Blankenmiester, 106 Mo. App. 390, 80 S. W. 706. *Comp.* Mullin *v.* Leamy, 80 N. J. L. 484, 79 A. 257.

900-21 Bailey *v.* Devine, 123 Ga. 653, 51 S. E. 603.

901-22 Bailey *v.* Devine, supra.

901-23 U. S. Bkg. Co. *v.* Veale, 84 Kan. 385, 114 P. 229.

902-24 Ring *v.* Ring, 127 App. Div. 411, 111 N. Y. S. 713.

Circumstances antedating and during marriage, as well as declarations of deceased wife, competent. Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755.

Decree of divorce based on cruelty establishes duress in action to set aside. Schultze *v.* Schultze, 73 N. J. Eq. 597, 75 A. 824.

902-25 Frazer *v.* S., 159 Ala. 1, 49 S. 245; Gill *v.* Gill (Ky.), 124 S. W. 875; Gray *v.* Freeman, 37 Tex. Civ. 556, 84 S. W. 1105; Neb. Mut. B. Assn. *v.* Klee, 70 Neb. 383, 97 N. W. 476; Detwiler *v.* Co., 17 Phila. (Pa.) 300. See Standard B. Co. *v.* Co., 10 Cal. App. 746, 103 P. 938.

902-26 See Connolly *v.* Bouck, 174 Fed. 312, 98 C. C. A. 184; Moore *v.* Putts, 110 Md. 490, 73 A. 149; Hardaway *v.* R. Co., 90 S. C. 475, 73 S. E. 1020.

Threatened illegal destruction or loss or withholding of property is duress. Harlan *v.* Gladding, 7 Cal. App. 49, 93 P. 400; Whitt *v.* Blount, 124 Ga. 671, 53 S. E. 205; Foote *v.* De Poy, 126 Ia. 366, 102 N. W. 112; Tandy *v.* Elmore, 113 Mo. App. 409, 87 S. W. 614. See Rowland *v.* Watson, 4 Cal. App. 476, 88 P. 495; Dawson *v.* Ins. Co., 6 Pa. C. C. 214; Sanborn *v.* Bush, 41 Tex. Civ. 24, 91 S. W. 883.

903-27 Delta County Bk. *v.* McGranahan, 37 Wash. 307, 79 P. 796.

903-28 Martin *v.* Evans, 163 Ala. 657, 50 S. 997; Bailey *v.* Devine, 123 Ga. 653, 51 S. E. 603; Henry *v.* Bk., 131 Ia. 97, 107 N. W. 1034 (against brother); Williamson-H. Co. *v.* Ackerman, 77 Kan. 502, 94 P. 807; Neb. Mut. B. Assn. *v.* Klee, 70 Neb. 383, 97 N. W. 476 (against son-in-law); Ball *v.* Ward, 76 N. J. Eq. 8, 74 A. 158; Gray *v* Freeman, 37 Tex. Civ. 556, 84 S. W. 1105; Medearis *v.* Granberry, 38 Tex. Civ. 187, 84 S. W. 1070.

904-29 Puff *v.* Puff, 31 Ky. L. R. 939, 104 S. W. 332; Avakian *v.* Avakian, 69 N. J. Eq. 89, 60 A. 521.

905-30 Hintz *v.* Hintz, 222 Ill. 248, 78 N. E. 565; Anderson *v.* Anderson, 17 N. D. 275, 115 N. W. 836; Walla Walla F. Ins. Co. *v.* Spencer, 52 Wash. 369, 100 P. 741 (ratification by directors).

Later ratification.—Brown *v.* Worthington, 152 Mo. App. 351, 133 S. W. 93.

905-32 Bryan *v.* Hobbs, 72 Ark. 635, 83 S. W. 341; Buck *v.* Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034. See Lilienthal *v.* Co., 118 App. Div. 205, 102 N. Y. S. 1051.

906-37 On issue of duress value of interests of parties and consideration paid is immaterial. Bartek *v.* Kolacek (Tex. Civ.), 99 S. W. 114.

906-38 Bond *v.* Kidd, 122 Ga. 812, 50 S. E. 934, 1 Ga. App. 798, 57 S. E. 944; Timson *v.* Co., 220 Mo. 580, 119 S. W. 565.

907-39 England *v.* Fawbush, 204 Ill. 384, 68 N. E. 526.

907-42 Effect of duress on party upon whom exerted may be testified to by him. International L. Co. *v.* Parmer (Tex. Civ.), 123 S. W. 196.

908-43 Moore *v.* Putts, 110 Md. 490, 73 A. 149.

908-45 Act of wife in keeping house of ill fame, not presumed to have been result of husband's coercion. P. *v.* Wheeler, 142 Mich. 212, 103 N. W. 607; S. *v.* Keithley, 142 Mo. App. 417, 127 S. W. 406.

909-48 Anderson *v.* Anderson, 17 N. D. 275, 115 N. W. 836.

909-49 Burden is on party alleging duress; clear and satisfactory evidence is required to establish it. Anderson

v. Anderson, supra; Claxton *v.* Lovett, 129 Ga. 300, 58 S. E. 830; Buck *v.* Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034.

DYING DECLARATIONS.

Evidence in chief, 953-75; *Compulsory production*, 1013-27; *Weight*, 1017-42.

915-1 Nordgren *v.* P., 211 Ill. 425, 71 N. E. 1042; P. *v.* Buettner, 233 Ill. 272, 84 N. E. 218; S. *v.* Harris, 112 La. 937, 36 S. 810; P. *v.* Morse, 196 N. Y. 306, 89 N. E. 816.

915-2 Nordan *v.* S., 143 Ala. 13, 39 S. 406; Lucas *v.* C., 153 Ky. 424, 155 S. W. 721; Addington *v.* S., 8 Okla. Cr. 703, 130 P. 311.

916-3 Zipperian *v.* P., 33 Colo. 134, 79 P. 1018; Pyle *v.* S., 4 Ga. App. 811, 62 S. E. 540; Brom *v.* P., 216 Ill. 148, 73 N. E. 790; Coyle *v.* C., 29 Ky. L. R. 340, 93 S. W. 584; Reeves *v.* S. (Miss.), 64 S. 836.

916-4 Gardner *v.* S., 55 Fla. 25, 45 S. 1028.

917-5 Rex *v.* Perry [1909], 2 K. B. 697; Parker *v.* S., 165 Ala. 1, 51 S. 260; P. *v.* Dallen, 21 Cal. App. 770, 132 P. 1064; Brom *v.* P., 216 Ill. 148, 73 N. E. 790; Nordgren *v.* P., 211 Ill. 425, 71 N. E. 1042; C. *v.* Johnson, 158 Ky. 579, 165 S. W. 984; Kelly *v.* C. (Ky.), 119 S. W. 809; S. *v.* Monich, 74 N. J. L. 522, 64 A. 1016; S. *v.* Shouse (N. C.), 81 S. E. 333; Bilton *v.* Ty., 1 Okla. Cr. 566, 99 P. 163; C. *v.* Spahr, 211 Pa. 542, 60 A. 1084; Brown *v.* S., 54 Tex. Cr. 121, 112 S. W. 80; S. *v.* Peacock, 58 Wash. 41, 107 P. 1022. See S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402.

918-6 But see S. *v.* Valencia (N. M.), 140 P. 1119. *Contra*, Pyle *v.* S., 4 Ga. App. 811, 62 S. E. 540.

918-7 McEwen *v.* S., 152 Ala. 38, 44 S. 619; Prov. Govt. *v.* Hering, 9 Haw. 181; Brom *v.* P., 216 Ill. 148, 74 N. E. 790; S. *v.* Knoll, 69 Kan. 767, 77 P. 580; Coyle *v.* C., 29 Ky. L. R. 340, 93 S. W. 584; P. *v.* Brecht, 120 App. Div. 769, 105 N. Y. S. 436; S. *v.* Watkins, 159 N. C. 480, 75 S. E. 22; S. *v.* Peacock, 58 Wash. 41, 107 P. 1022.

Not conclusive.—The jury are to weigh them like any other evidence and give them such weight only as they think proper. S. *v.* Watkins, 159 N. C. 480, 75 S. E. 22.

Error to instruct that a dying declaration is entitled to the same credibility as if the declarant had been examined under oath as a witness and testified in court to the same facts. S. *v.* Dipley, 242 Mo. 461, 147 S. W. 111.

"No reasonable request for a statement of the circumstances under which a mortal injury was inflicted and no reasonable or proper insistence upon such statement, where such insistence is essential to diagnosis by a physician or as a protection against prosecution, will be sufficient to exclude a dying declaration." S. *v.* Law, 150 Wis. 313, 136 N. W. 803, 137 N. W. 457.

919-8 Jones *v.* S., 130 Ga. 274, 60 S. E. 840; Prov. Govt. *v.* Hering, 9 Haw. 181; S. *v.* Colvin, 226 Mo. 446, 126 S. W. 448; P. *v.* Winkelman, 12 Pa. Super. 497; Payne *v.* S., 45 Tex. Cr. 564, 78 S. W. 934.

921-10 Mulkey *v.* S., 5 Okla. Cr. 75, 113 P. 532.

922-14 Key *v.* S., 8 Ala. App. 2, 62 S. 335; Scott *v.* S., 75 Ark. 142, 86 S. W. 1004; P. *v.* Smith, 164 Cal. 451, 129 P. 785; Findley *v.* S., 125 Ga. 579, 54 S. E. 106; Darby *v.* S., 9 Ga. App. 700, 72 S. E. 182; C. *v.* Johnson, 158 Ky. 579, 165 S. W. 984; S. *v.* Daniels, 115 La. 59, 38 S. 894; Ashley *v.* S. (Miss.), 37 S. 960; Fannie *v.* S., 101 Miss. 378, 58 S. 2; S. *v.* Watkins, 159 N. C. 480, 75 S. E. 22; S. *v.* McCoomer, 79 S. C. 63, 60 S. E. 237; Drake *v.* S. (Tex. Cr.), 143 S. W. 1157; Wilson *v.* S., 49 Tex. Cr. 50, 90 S. W. 312.

923-15 Devereaux *v.* S., 140 Ga. 225, 78 S. E. 849; Park *v.* S., 126 Ga. 575, 55 S. E. 489; Lee *v.* S., 2 Ga. App. 481, 58 S. E. 676; Cobb *v.* S., 11 Ga. App. 52, 74 S. E. 702.

923-16 Sanders *v.* S., 2 Ala. App. 13, 56 S. 69; Robinson *v.* S., 99 Ark. 208, 137 S. W. 831; C. *v.* DeLeo, 242 Pa. 510, 89 A. 584.

924-17 Rex *v.* Magyar, 7 Terr. L. R. 491, 4 W. L. R. 396; Harper *v.* S., 129 Ga. 770, 59 S. E. 792; S. *v.* Brown, 111 La. 696, 35 S. 818; S. *v.* Watkins, 159 N. C. 480, 75 S. E. 22; C. *v.* Latampa, 226 Pa. 23, 74 A. 736.

"It is not always necessary that the deceased should declare himself that he believes that he is about to pass away; but that all the circumstances and surroundings in which he is placed should indicate that he is fully under the influence of the solemnity of such a belief." S. *v.* Laughter, 159 N. C.

488, 74 S. E. 913, *cit.* S. *v.* Quick, 150 N. C. 820, 64 S. E. 168, and S. *v.* Bagley, 158 N. C. 608, 73 S. E. 995.

925-18 Sanders *v.* S., 2 Ala. App. 13, 56 S. 69; Thompson *v.* S., 137 Ga. 164, 73 S. E. 363; Edwards *v.* S., 79 Neb. 251, 112 N. W. 611.

925-19 Walker *v.* S. (Ala.), 64 S. 351; Kirklin *v.* S., 168 Ala. 83, 53 S. 253; McEwen *v.* S., 152 Ala. 38, 44 S. 619 (three days); Newton *v.* S., 51 Fla. 82, 41 S. 19 (five days); Daniel *v.* Com., 154 Ky. 601, 157 S. W. 1127; Burton *v.* C., 24 Ky. L. R. 1162, 70 S. W. 831 (eleven days).

From Friday morning until the following Wednesday evening. "In the interval, deceased, according to the state's witness Weatherly, repeatedly stated his belief that he would never get up, that he would never get well, and finally that he would die. He made no response to the efforts of his kinsmen and friends to encourage him, and at no time, so far as appears, did he express a hope of recovery. In the evening of the day before his death, deceased made a statement to the witness Weatherly of the circumstances under which defendant had shot him, and this statement repeated by the witness, was received as a dying declaration over defendant's objection. In this we do not find error. It was not necessary, say our cases, that the declaration should have been made in articulo mortis; nor that the deceased should have said, in so many words, that he was in extremis, that death impended, or that he had no hope of recovery. It is necessary, however, that the court should be clearly satisfied, upon a close and cautious scrutiny of the facts upon which admissibility depends, that the declarant was impressed with the conviction that he could not recover." Lewis *v.* S. (Ala.), 59 S. 580.

925-20 Maloy *v.* S., 8 Ala. App. 73, 62 S. 961; Fogg *v.* S., 81 Ark. 417, 99 S. W. 537; P. *v.* Dallen, 21 Cal. App. 770, 132 P. 1064; P. *v.* Glover, 141 Cal. 233, 74 P. 745; P. *v.* Shehadey, 12 Cal. App. 648, 108 P. 146; Weaver *v.* P., 47 Colo. 617, 108 P. 331; Brennan *v.* P., 37 Colo. 256, 86 P. 79; S. *v.* Van Winkle (Del.), 86 A. 310; S. *v.* Fleetwood, 6 Penne. (Del.) 153, 65 A. 772; Bennett *v.* S., 66 Fla. 369, 63 S. 842; Copeland *v.* S., 58 Fla. 26, 50 S. 621; Gardner *v.* S., 55 Fla. 25, 45 S. 1028; Perdue *v.* S., 135 Ga. 277, 69 S. E. 184; Smith *v.* S., 9 Ga. App. 403, 71 S. E. 606; Sutherland *v.* S., 121 Ga. 190, 48 S. E. 915; P. *v.* Buettner, 233 Ill. 272, 84 N. E. 218; Williams *v.* S., 168 Ind. 87, 79 N. E. 1079; S. *v.* Dyer, 147 Ia. 217, 124 N. W. 629; S. *v.* Knoll, 69 Kan. 767, 77 P. 580; Eversole *v.* C., 157 Ky. 478, 163 S. W. 496; Cornett *v.* C., 156 Ky. 795, 162 S. W. 112; Begley *v.* C., 154 Ky. 30, 156 S. W. 886; Kelly *v.* C. (Ky.), 119 S. W. 809; Bricker *v.* C., 31 Ky. L. R. 596, 102 S. W. 1175; Johnson *v.* C., 32 Ky. L. R. 1117, 107 S. W. 768; S. *v.* Daniels, 115 La. 59, 38 S. 894; S. *v.* Lovell, 235 Mo. 343, 138 S. W. 523; S. *v.* Gow, 235 Mo. 307, 138 S. W. 648; S. *v.* Colvin, 226 Mo. 446, 126 S. W. 448; P. *v.* Brecht, 120 App. Div. 769, 105 N. Y. S. 436; S. *v.* Tate, 161 N. C. 280, 76 S. E. 713; S. *v.* Baldwin, 155 N. C. 494, 71 S. E. 212; Wade *v.* S., 2 O. C. C. (N. S.), 189; Addington *v.* S., 8 Okla. Cr. 703, 130 P. 311; Ryan *v.* S., 8 Okla. Cr. 623, 129 P. 685; Morris *v.* S., 6 Okla. Cr. 29, 115 P. 1030; Nelson *v.* S., 3 Okla. Cr. 468, 106 P. 647; S. *v.* Gallman, 79 S. C. 229, 60 S. E. 682; Gant *v.* S. (Tex. Cr.), 165 S. W. 142; Corbitt *v.* S. (Tex. Cr.), 163 S. W. 436; Christian *v.* S. (Tex. Cr.), 161 S. W. 101; Figaroa *v.* S., 58 Tex. Cr. 611, 127 S. W. 103; Lyles *v.* S., 48 Tex. Cr. 119, 86 S. W. 763. And see P. *v.* Wong Loung, 159 Cal. 520, 114 P. 829; Johnson *v.* S., 88 Neb. 328, 129 N. W. 281; P. *v.* Madas, 201 N. Y. 349, 94 N. E. 857; S. *v.* Smalls, 87 S. C. 550, 70 S. E. 300.

Where deceased prefaced her dying declaration as to whether she thought she would get better by the remark "I don't know," it was held that her later answers showed she had given up all hopes of recovery. S. *v.* Mueller, 122 Minn. 91, 141 N. W. 1113.

Consciousness of impending death is the equivalent of an oath. Pressley *v.* S., 166 Ala. 17, 52 S. 337.

"The deceased, at the time of making the declaration, must have had no hope, however slight, of recovery. Bell *v.* State, 72 Miss. 507, 17 South. 232. Such does not appear to have been the situation of deceased here, when this declaration was made. All that this evidence can be said to prove is that deceased realized that he was bleeding to such an extent that he would die if the flow of blood was not quickly

stopped." Fannie *v.* S., 101 Miss. 378, 58 S. 2.

"All the circumstances and surroundings in which he is placed should indicate that he is fully under the influence of the solemnity of such a belief." S. *v.* Bagley, 158 N. C. 608, 73 S. E. 995.

Statements additional to signed statement. Ryan *v.* S., 64 Tex. Cr. 628, 142 S. W. 878.

928-21 Sims *v.* S., 139 Ala. 74, 36 S. 138.

Existence of hope of recovery for jury. S. *v.* Fuller, 56 Or. 42, 96 P. 456.

928-22 Sims *v.* S., supra. See Wilson *v.* S., 49 Tex. Cr. 50, 90 S. W. 312; S. *v.* Crean, 43 Mont. 47, 114 P. 603. *Comp.* Patterson *v.* S., 171 Ala. 2, 54 S. 696.

928-23 P. *v.* Hayes, 9 Cal. App. 301, 99 P. 386; S. *v.* Uzzo, 6 Penne. (Del.) 212, 65 A. 775; McGowan *v.* C. (Ky.), 117 S. W. 387.

929-25 Rex *v.* Perry (1909), 2 K. B. 697, *disap.* Reg. *v.* Osman, 15 Cox C. C. 1; S. *v.* Byrd, 41 Mont. 585, 111 P. 407; S. *v.* Fuller, 52 Or. 42, 96 P. 456; S. *v.* Bridgham, 51 Wash. 18, 97 P. 1096. See S. *v.* Luther, 150 Ia. 158, 129 N. W. 801; S. *v.* Crean, 43 Mont. 47, 114 P. 603; S. *v.* McCoomer, 79 S. C. 63, 60 S. E. 237.

929-26 P. *v.* White, 251 Ill. 67, 95 N. E. 1036; Brom *v.* P., 216 Ill. 148, 74 N. E. 790; Brown *v.* C., 26 Ky. L. R. 1269, 83 S. W. 645; S. *v.* Craig, 190 Mo. 332, 88 S. W. 641; P. *v.* Del Vermo, 192 N. Y. 470, 85 N. E. 690. See C. *v.* Latampa, 226 Pa. 23, 74 A. 736; Craven *v.* S., 49 Tex. Cr. 78, 90 S. W. 311.

929-27 P. *v.* Hayes, 9 Cal. App. 301, 99 P. 386; Brom *v.* P., 216 Ill. 148, 74 N. E. 790; Biggs *v.* C., 150 Ky. 675, 150 S. W. 803; C. *v.* Griffith, 149 Ky. 405, 149 S. W. 825; Coyle *v.* C., 29 Ky. L. R. 340, 93 S. W. 584; S. *v.* Gianfala, 113 La. 463, 37 S. 30; Fannie *v.* S., 101 Miss. 378, 58 S. 2; P. *v.* Brecht, 120 App. Div. 769, 105 N. Y. S. 436; Bilton *v.* T., 1 Okla. Cr. 566, 99 P. 163; Craven *v.* S., 49 Tex. Cr. 78, 90 S. W. 311; Phillips *v.* S., 50 Tex. Cr. 127, 94 S. W. 1051; Bowles *v.* C., 103 Va. 816, 48 S. E. 527. See S. *v.* Roberts, 28 Nev. 350, 82 P. 100; S. *v.* Thompson, 49 Or. 46, 88 P. 583.

930-29 Laug *v.* S., 166 Ala. 22, 52 S. 340; Brandon *v.* S., 99 Miss. 784, 56 S. 165.

930-30 S. *v.* Knoll, 69 Kan. 767, 77 P. 580.

930-31 P. *v.* Buettner, 233 Ill. 272, 84 N. E. 218; Thomas *v.* S., 49 Tex. Cr. 632, 95 S. W. 1069; Johnson *v.* S. (Tex. Cr.), 149 S. W. 165. See Barnett *v.* S., 136 Ga. 65, 70 S. E. 868.

931-32 Rose *v.* S., 144 Ala. 114, 42 S. 21; S. *v.* Knoll, 69 Kan. 767, 77 P. 580; S. *v.* Vest, 254 Mo. 458, 162 S. W. 615.

931-34 Sims *v.* S., 139 Ala. 74, 36 S. 138; Brom *v.* P., 216 Ill. 148, 74 N. E. 790 (written declaration).

933-35 Jones *v.* S., 88 Ark. 579, 115 S. W. 166; Willis *v.* S., 49 Tex. Cr. 139, 90 S. W. 1100; Jones *v.* S., 52 Tex. Cr. 303, 106 S. W. 345.

933-36 Robinson *v.* S., 10 Ga. App. 462, 73 S. E. 622; S. *v.* Blount, 124 La. 202, 50 S. 12; C. *v.* Reed, 5 Phila. (Pa.) 528.

933-37 Hunter *v.* S., 54 Tex. Cr. 224, 114 S. W. 124 (boy of ten); Craven *v.* S., 49 Tex. Cr. 78, 90 S. W. 311.

933-38 Non-expert may testify as to mental capacity of declarant. Lyles *v.* S., 48 Tex. Cr. 119, 86 S. W. 763.

934-40 Keith *v.* C., 29 Ky. L. R. 158, 92 S. W. 599. See Anderson *v.* S., 122 Ga. 161, 50 S. E. 46; S. *v.* Roberts, 28 Nev. 350, 82 P. 100.

935-41 Walker *v.* S., 139 Ala. 56, 35 S. 1011; Edwards *v.* S., 79 Neb. 251, 112 N. W. 611; Roberts *v.* S., 48 Tex. Cr. 378, 88 S. W. 221. See Phillips *v.* S., 50 Tex. Cr. 481, 98 S. W. 868.

935-43 C. *v.* Spahr, 211 Pa. 542, 60 A. 1084.

935-44 Want of religious belief of declarant no ground for exclusion. S. *v.* Hood, 63 W. Va. 182, 59 S. E. 971, 15 L. R. A. (N. S.) 448. And see S. *v.* Zorn, 202 Mo. 12, 100 S. W. 591.

936-45 Gambrell *v.* S., 92 Miss. 728, 46 S. 138.

936-46 Price *v.* U. S., 1 Okla. Cr. 291, 97 P. 1056.

937-47 Lyles *v.* S., 48 Tex. Cr. 119, 86 S. W. 763.

938-49 S. *v.* Uzzo, 6 Penne. (Del.) 212, 65 A. 775; P. *v.* Hotz, 261 Ill. 239, 103 N. E. 1007; Green *v.* S., 89 Miss. 331, 42 S. 797; Offitt *v.* S., 5 Okla. Cr. 48, 113 P. 554.

939-50 Dumas *v.* S., 159 Ala. 42, 49 S. 224.

939-51 Brown *v.* S., 54 Tex. Cr. 121,

112 S. W. 80; Craven *v.* S., 49 Tex. Cr. 78, 90 S. W. 311.

939-52 If there is an issue question for jury. Jackson *v.* S., 55 Tex. Cr. 79, 115 S. W. 262.

940-53 Jewell *v.* Mfg. Co., 166 Mo. App. 555, 149 S. W. 1045.

The tendency is toward the reception rather than the rejection of such evidence, experience having shown that more harm results from its exclusion than from its admission. Thurston *v.* Fritz, 91 Kan. 468, 138 P. 625; Fish *v.* Poorman, 85 Kan. 237, 116 P. 898.

941-54 Friedman *v.* R. Co., 7 Phila. (Pa.) 203. See 6 STANDARD PROC., title "Death."

941-55 Rhea *v.* S., 104 Ark. 162, 147 S. W. 463; P. *v.* Cipolla, 155 Cal. 224, 100 P. 252; Johnson *v.* S., 136 Ga. 804, 72 S. E. 233; P. *v.* Schiavi, 96 App. Div. 479, 89 N. Y. S. 564; C. *v.* Reed, 5 Phila. (Pa.) 528.

"As the exception can only be sustained upon the ground of necessity, the declaration is admissible only in indictments for homicide, and is restricted to the act of killing and the circumstances immediately attending the act and forming a part of the res gestae." S. *v.* Laughter, 159 N. C. 488, 74 S. E. 913, *cit.* State *v.* Jefferson, 125 N. C. 712, 34 S. E. 648.

Admissible before grand jury.—S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402. Inadmissible on prosecution for incest. P. *v.* Stison, 140 Mich. 216, 103 N. W. 542.

942-57 On prosecution for manslaughter dying declaration cannot be used as evidence to establish assault, though defendant could be convicted of lesser crime. P. *v.* Schiavi, 96 App. Div. 479, 89 N. Y. S. 564.

942-58 *Comp.* Edwards *v.* S., 79 Neb. 251, 112 N. W. 611.

Pennsylvania act of 1895 makes declarations admissible in cases of criminal abortion. C. *v.* Keene, 7 Pa. Super. 293; C. *v.* Winkelman, 12 Pa. Super. 497.

943-59 P. *v.* Hotz, 261 Ill. 239, 103 N. E. 1007; S. *v.* Gow, 235 Mo. 307, 138 S. W. 648.

Where death an essential ingredient of crime.—S. *v.* Meyer, 65 N. J. L. 237, 47 A. 486, 86 Am. St. 634, 52 L. R. A. 346, *rev.* 64 N. J. L. 382, 47 A. 779.

Abortion cases.—S. *v.* Fleetwood, 6 Penne. (Del.) 153, 65 A. 772; P. *v.* Buettner, 233 Ill. 272, 84 N. E. 218; Seifert *v.* S., 160 Ind. 464, 67 N. E. 100; Hawkins *v.* S., 98 Md. 355, 57 A. 27; S. *v.* Barnes, 75 N. J. L. 426, 68 A. 145; S. *v.* Fuller, 52 Or. 42, 96 P. 456. See supra, "Abortion," 67-77.

944-60 Wife's declarations admissible against husband. Rice *v.* S., 54 Tex. Cr. 149, 112 S. W. 299.

Where a wife and mother-in-law are killed.—In a prosecution for killing the wife a dying declaration of the mother-in-law is inadmissible. S. *v.* Simon, 131 La. 520, 59 S. 975.

945-62 Johnson *v.* S., 63 Fla. 16, 58 S. 540; Taylor *v.* S., 120 Ga. 857, 48 S. E. 361; Miliken *v.* S., 8 Ga. App. 478, 69 S. E. 915.

945-63 P. *v.* Shehadey, 12 Cal. App. 648, 108 P. 146; Knight *v.* S., 12 Ga. App. 111, 76 S. E. 1047; Moody *v.* S., 1 Ga. App. 772, 58 S. E. 262; S. *v.* Horn, 204 Mo. 528, 103 S. W. 69; Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156.

The rule of caution applies to jury more particularly than to court. Carter *v.* S., 2 Ga. App. 254, 58 S. E. 532.

946-64 Gardner *v.* S., 55 Fla. 25, 45 S. 1028.

947-65 Norwood *v.* S. (Ala. App.), 65 S. 851; Dumas *v.* S., 159 Ala. 42, 49 S. 224; Robinson *v.* S., 99 Ark. 208, 137 S. W. 831; Fogg *v.* S., 81 Ark. 417, 99 S. W. 537; P. *v.* Cord, 157 Cal. 562, 108 P. 511; P. *v.* Thomson, 145 Cal. 717, 79 P. 435; P. *v.* Profumo, 23 Cal. App. 376, 138 P. 109; Harris *v.* P., 55 Colo. 407, 135 P. 785; Brennan *v.* P., 37 Colo. 256, 86 P. 79; Copeland *v.* S., 58 Fla. 26, 50 S. 621; Thompson *v.* S., 137 Ga. 164, 73 S. E. 363; Smith *v.* S., 9 Ga. App. 403, 71 S. E. 606; P. *v.* White, 251 Ill. 67, 95 N. E. 1036; Gipe *v.* S., 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.); 419; Williams *v.* S., 168 Ind. 87, 79 N. E. 1079; Allen *v.* C., 134 Ky. 110, 119 S. W. 795; Coyle *v.* C., 29 Ky. L. R. 340, 93 S. W. 584; S. *v.* Blount, 124 La. 202, 50 S. 12; Guest *v.* S., 96 Miss. 871, 52 S. 211; S. *v.* Gow, 235 Mo. 307, 138 S. W. 648; S. *v.* Colvin, 226 Mo. 446, 126 S. W. 448; S. *v.* Zorn, 202 Mo. 12, 100 S. W. 591; S. *v.* Crone, 209 Mo. 316, 108 S. W. 555; P. *v.* Stacy, 119 App. Div. 743, 104 N. Y. S. 615; P. *v.* Brecht, 120 App. Div. 769, 105 N. Y. S. 436; Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561; Willoughby *v.* Ty., 16 Okla. 577, 86 P. 56; S. *v.* Fuller, 52 Or. 42, 96 P. 456 (a prima facie case is sufficient); S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N.

S.) 660 (*cit.* the text); C. *v.* Winkelman, 12 Pa. Super. 497; S. *v.* Long, 93 S. C. 502, 77 S. E. 61; S. *v.* McCoomer, 79 S. C. 63, 60 S. E. 237; S. *v.* Franklin, 80 S. C. 332, 60 S. E. 953; Bateson *v.* S., 46 Tex. Cr. 34, 80 S. W. 88.

Mixed question of law and fact for trial judge. Bennett *v.* S., 66 Fla. 369, 63 S. 842.

Must refer to the statement offered. Coatney *v.* S., 61 Fla. 19, 55 S. 285.

"**The court must ascertain** the primary facts relative to their admissibility and become satisfied that the requisite predicate has been established. When, from the testimony, the court is satisfied that the statements made by the deceased were dying declarations, it becomes its duty to admit them in evidence. It is then the province of the jury to determine the circumstances under which they were made and the weight and credit that should be given to them." Rhea *v.* S., 104 Ark. 162, 147 S. W. 463.

"**Having once decided** that it is competent, that the party was of the frame of mind required by the law to authorize the admission of his dying declarations, the power of the court over that question is at an end." Gurley *v.* S., 101 Miss. 190, 57 S. 565.

Whether deceased made alleged declaration is for jury. C. *v.* Lawson, 25 Ky. L. R. 2187, 80 S. W. 206.

949-66 Jones *v.* S., 88 Ark. 579, 115 S. W 166; Harris *v.* P., 55 Colo. 407, 135 P. 785; Brennan *v.* P., 37 Colo. 256, 86 P. 79; S. *v.* Van Winkle (Del.), 86 A. 310; Johnson *v.* S., 88 Neb. 328, 129 N. W. 281; S. *v.* Monich, 74 N. J. L. 522, 64 A. 1016.

The competency of dying declarations is for the trial court. The credibility and weight is for the jury. Gilmer *v.* S. (Ala.), 61 S. 377.

949-67 Tolliver *v.* S. (Ark.), 167 S. W. 703; P. *v.* Profumo, 23 Cal. App. 376, 138 P. 109; Hawkins *v.* S., 141 Ga. 212, 80 S. E. 711; Anderson *v.* S., 122 Ga. 161, 50 S. E. 46; Findley *v.* S., 125 Ga. 579, 54 S. E. 106; Bird *v.* S., 128 Ga. 253, 57 S. E. 320; McMillan *v.* S., 128 Ga. 25, 57 S. E. 309; Wimbish *v.* S., 13 Ga. App. 653, 79 S. E. 744; McDonald *v.* S., 12 Ga. App. 526, 77 S. E. 655; Knight *v.* S., 12 Ga. App. 111, 76 S. E. 1047; Moody *v.* S., 1 Ga. App. 772, 58 S. E. 262; Carter *v.* S., 2 Ga. App. 254, 58 S. E. 532; Jones *v.* S., 130 Ga. 274, 60 S. E. 840; Robinson *v.* S., 130 Ga. 361, 60 S. E. 1005. See Willoughby *v.* Ty., 16 Okla. 577, 86 P. 56.

950-68 Motley *v.* S., 105 Ark. 608, 152 S. W. 140; P. *v.* Thomson, 145 Cal. 717, 79 P. 435; S. *v.* Nowells, 135 Ia. 53, 109 N. W. 1016; Coyle *v.* C., 29 Ky. L. R. 340, 93 S. W. 584; S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660; C. *v.* Sullivan, 13 Phila. (Pa.) 410.

951-69 Willoughby *v.* Ty., 16 Okla. 577, 86 P. 56; Hinton *v.* S. (Tex. Cr.), 100 S. W. 772. *Contra*, S. *v.* Zorn, 202 Mo. 12, 100 S. W. 591.

951-70 Coyle *v.* C., 29 Ky. L. R. 340, 93 S. W. 584; S. *v.* Finley, 240 Mo. 465, 150 S. W. 1051; Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561.

951-71 S. *v.* Zorn, 202 Mo. 12, 100 S. W. 591.

952-72 S. *v.* Minor, 193 Mo. 597, 92 S. W. 466.

952-73 Allen *v.* C., 134 Ky. 110, 119 S. W. 795 (jury should be instructed so much of declaration as did not relate to circumstances of homicide should not be considered); Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561 (as to first proposition only); S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402.

953-75 Dying declaration, evidence in chief. Wagner *v.* C., 32 Ky. L. R. 1185, 108 S. W. 318. See infra, "Order of Proof," 252-65.

953-76 S. *v.* Crean, 43 Mont. 47, 114 P. 603.

What deceased said to his wife concerning financial affairs and his provision for her future are prejudicial and inadmissible. Hays *v.* S. (Tex. Cr.), 164 S. W. 841.

954-77 S. *v.* Gallman, 79 S. C. 229, 60 S. E. 682. See S. *v.* Zorn, 202 Mo. 12, 100 S. W. 591.

954-78 S. *v.* Daniels, 115 La. 59, 38 S. 894; C. *v.* Winkelman, 12 Pa. Super. 497.

955-80 Heningburg *v.* S., 153 Ala. 13, 45 S. 246; S. *v.* Bridgham, 51 Wash. 18, 97 P. 1096.

955-81 Delaney *v.* S., 148 Ala. 586, 42 S. 815. *Contra*, S. *v.* Quinn, 56 Wash. 295, 105 P. 818. *Comp.* Davis *v.* S., 120 Ga. 843, 48 S. E. 305; S. *v.* Franklin, 80 S. C. 332, 60 S. E. 953.

955-82 Deceased, "after having been informed by the doctor of her condition, and impending death, she was asked by Carroll, the detective, 'Do

you realize that you are going to die?' And she shook her head, 'Yes.' This conversation apparently took place on the 19th of December, 1910, and she died on Sunday following, December 25th. The requisites for the admissibility of the dying declaration were complied with.'' Meno *v.* S., 117 Md. 435, 83 A. 759.

956-83 Jones *v.* S., 88 Ark. 579, 115 S. W. 166; Ward *v.* S., 85 Ark. 179, 107 S. W. 677; P. *v.* Cord, 157 Cal. 562, 108 P. 511; Weaver *v.* P., 47 Colo. 617, 108 P. 331; Lyens *v.* S., 133 Ga. 587, 66 S. E. 792; Prov. Govt. *v.* Hering, 9 Haw. 181; Brom *v.* P., 216 Ill. 148, 74 N. E. 790; Eversole *v.* C., 157 Ky. 478, 163 S. W. 496; Arnett *v.* C., 114 Ky. 593, 71 S. W. 635; C. *v.* Hargis, 30 Ky. L. R. 510, 99 S. W. 348; Kennedy *v.* C., 30 Ky. L. R. 1063, 100 S. W. 242; Pennington *v.* C., 24 Ky. L. R. 321, 68 S. W. 451; Burton *v.* C., 24 Ky. L. R. 1162, 70 S. W. 831; S. *v.* Colvin, 226 Mo. 446, 126 S. W. 448; S. *v.* Roberts, 28 Nev. 350, 82 P. 100; S. *v.* Hennessy, 29 Nev. 320, 90 P. 221; Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561; S. *v.* Gray, 43 Or. 446, 74 P. 927; C. *v.* Winkelman, 12 Pa. Super. 497; Connell *v.* S., 46 Tex. Cr. 259, 81 S. W. 746; S. *v.* Bridgham, 51 Wash. 18, 97 P. 1096.

957-85 S. *v.* Fuller, 52 Or. 42, 96 P. 456.

957-86 Rex *v.* Sunfield, 15 Ont. L. R. 252; S. *v.* Brady, 124 La. 951, 50 S. 806.

958-87 Sanders *v.* S., 2 Ala. App. 13, 56 S. 69; Ex parte Key, 5 Ala. App. 274, 59 S. 331; S. *v.* Watkins, 159 N. C. 480, 75 S. E. 22; S. *v.* Ju Nun, 53 Or. 1, 97 P. 96; Drake *v.* S. (Tex. Cr.), 143 S. W. 1157; Morgan *v.* S., 54 Tex. Cr. 542, 113 S. W. 934.

It is proper to allow the declarations to be proved, if the deceased was in fact in articulo mortis, and the circumstances were such as that he must know this to be so. Washington *v.* S., 137 Ga. 218, 73 S. E. 512. And see Josey *v.* S., 137 Ga. 769, 74 S. E. 282.

Consciousness of his condition may be inferred from the nature of the wounds or from other circumstances. Jefferson *v.* S., 137 Ga. 382, 73 S. E. 499.

May be shown directly by the express language of the declarant; it may also be inferred from his wounded condition and evident danger, from expressions or statements made to him or in his hearing by physicians or others in attendance, from his manner and conduct, and other circumstances shown in the case. Rhea *v.* S., 104 Ark. 162, 147 S. W. 463.

''**That he said** he could tell from his breathing that he was shot through the lung, and repeatedly stated, 'I guess they have got me.' '' S. *v.* Dipley, 242 Mo. 461, 147 S. W. 111.

959-88 S. *v.* Daniels, 115 La. 59, 38 S. 894.

960-90 Lewis *v.* S., 178 Ala. 26, 59 S. 577; Naugher *v.* S., 6 Ala. App. 3, 60 S. 458; Parker *v.* S., 165 Ala. 1, 51 S. 260; Gregory *v.* S., 140 Ala. 16, 37 S. 259; Starks *v.* S., 137 Ala. 9, 34 S. 687; Smith *v.* S., 145 Ala. 17, 40 S. 957; Walker *v.* S., 146 Ala. 45, 41 S. 878; Gregory *v.* S., 148 Ala. 566, 42 S. 829; Logan *v.* S., 149 Ala. 11, 43 S. 10; Brown *v.* S., 150 Ala. 25, 43 S. 194; Pate *v.* S., 150 Ala. 10, 43 S. 343; P. *v.* Cord, 157 Cal. 562, 108 P. 511; Zipperian *v.* P., 33 Colo. 134, 79 P. 1018; McMillan *v.* S., 128 Ga. 25, 57 S. E. 309; Harper *v.* S., 129 Ga. 770, 59 S. E. 792; Grant *v.* S., 118 Ga. 804, 45 S. E. 603; Williams *v.* S., 168 Ind. 87, 79 N. E. 1079; S. *v.* Dyer, 147 Ia. 217, 124 N. W. 629; S. *v.* Bonar, 71 Kan. 800, 81 P. 484; Asher *v.* C., 28 Ky. L. R. 1342, 91 S. W. 662; S. *v.* McCollum, 135 La. ——, 65 S. 600; S. *v.* Brady, 124 La. 951, 50 S. 806; S. *v.* Gianfala, 113 La. 463, 37 S. 30; Hawkins *v.* S., 98 Md. 355, 57 A. 27; Jackson *v.* S., 94 Miss. 83, 47 S. 502; Pryor *v.* S. (Miss.), 39 S. 1012; S. *v.* Colvin, 226 Mo. 446, 126 S. W. 448; S. *v.* Brown, 188 Mo. 451, 87 S. W. 519; S. *v.* Kellcher, 201 Mo. 614, 100 S. W. 470; S. *v.* Hennessy, 29 Nev. 320, 90 P. 221; S. *v.* Monich, 74 N. J. L. 522, 64 A. 1016; S. *v.* Biango, 75 N. J. L. 284, 68 A. 125; S. *v.* Barnes, 75 N. J. L. 426, 68 A. 145; P. *v.* Governale, 193 N. Y. 581, 86 N. E. 554; S. *v.* Quick, 150 N. C. 820, 64 S. E. 168; S. *v.* Teachey, 138 N. C. 587, 50 S. E. 232; S. *v.* Boggan, 133 N. C. 761, 46 S. E. 111; Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561; C. *v.* Rhoads, 23 Pa. Super. 512; S. *v.* McCoomer, 79 S. C. 63, 60 S. E. 237; Douglas *v.* S., 58 Tex. Cr. 122, 124 S. W. 933; Lewis *v.* S., 48 Tex. Cr. 614, 89 S. W. 1073; Rice *v.* S., 49 Tex. Cr. 569, 94 S. W. 1024; Patterson *v.* S., 49 Tex. Cr. 613, 95 S. W. 129; S. *v.* Bridgham, 51 Wash. 18, 97 P. 1096. See

Rex *v.* Perry (1909), 2 K. B. 697.

961-91 Rex *v.* Abbott, 67 J. P. (Eng.) 151 (see digest of this case in Am. Digest 1904B, col. 2203); S. *v.* Knoll, 69 Kan. 767, 77 P. 580; Coyle *v.* C., 29 Ky. L. R. 340, 93 S. W. 584; S. *v.* Gianfala, 113 La. 463, 37 S. 30.

Lapse of considerable time after expression of expectation of death and making declaration weakens weight to be given such expression. Craven *v.* S., 49 Tex. Cr. 78, 90 S. W. 311.

962-92 Weaver *v.* P., 47 Colo. 617, 108 P. 331; Lyens *v.* S., 133 Ga. 587, 66 S. E. 792.

963-93 Parker *v.* S. (Ala. App.), 65 S. 90; C. *v.* Hargis, 30 Ky. L. R. 510, 99 S. W. 348; S. *v.* Bordelon, 113 La. 690, 37 S. 603.

"Boys he has killed me."—Smith *v.* S. (Ala.), 62 S. 864.

963-94 Heningburg *v.* S., 153 Ala. 13, 45 S. 246; McEwen *v.* S., 152 Ala. 38, 44 S. 619; House *v.* S., 94 Miss. 107, 48 S. 3.

Deceased's statement that he would not get well.—Scoggin *v.* S. (Ark.), 159 S. W. 211.

Where he said he was a dead man, could not live, and was going to die. Ryan *v.* S., 8 Okla. Cr. 623, 129 P. 685.

Where deceased had told third person he was "mighty bad and bound to die"—sufficient foundation. S. *v.* Finley, 245 Mo. 465, 150 S. W. 1051.

964-95 Rowsey *v.* C., 25 Ky. L. R. 841, 76 S. W. 409.

964-96 Copeland *v.* S., 58 Fla. 26, 50 S. 621 (declaration poison administered and it was useless to send for doctor); S. *v.* Bohanon, 142 N. C. 695, 55 S. E. 797 ("I don't know what my wife and children will do!"); Long *v.* S., 48 Tex. Cr. 175, 88 S. W. 203 (this is mighty bad). See Jones *v.* S., 88 Ark. 579, 115 S. W. 166.

965-97 See Kennedy *v.* C., 30 Ky. L. R. 1063, 100 S. W. 242.

966-98 Tibbs *v.* S., 138 Ky. 558, 128 S. W. 871.

967-2 Rex *v.* Sunfield, 15 Ont. L. R. 252; P. *v.* Cord, 157 Cal. 562, 108 P. 511; Hunter *v.* S., 54 Tex. Cr. 224, 114 S. W. 124.

967-3 P. *v.* Brecht, 120 App. Div. 769, 105 N. Y. S. 436.

968-4 Jarvis *v.* S., 138 Ala. 17, 34 S. 1025; Stevens *v.* S., 138 Ala. 71, 35 S. 122; Ex parte Key, 5 Ala. App. 274, 59 S. 331; P. *v.* Buettner, 233 Ill. 272, 84 N. E. 218; S. *v.* Klute (Ia.), 140 N. W. 864; S. *v.* Dyer, 147 Ia. 217, 124 N. W. 629; Begley *v.* C., 154 Ky. 30, 156 S. W. 886; House *v.* S., 94 Miss. 107, 48 S. 3; S. *v.* Craig, 190 Mo. 332, 88 S. W. 641; S. *v.* Barnes, 75 N. J. L. 426, 68 A. 145; S. *v.* Ju Nun, 53 Or. 1, 97 P. 96; S. *v.* Gray, 43 Or. 446, 74 P 927; S. *v.* Thompson, 49 Or. 46, 88 P. 583; C. *v.* Rhoads, 23 Pa. Super. 512; Douglas *v.* S., 58 Tex. Cr. 122, 124 S. W. 933; S. *v.* Quinn, 56 Wash. 295, 105 P. 818; S. *v.* Mayo, 42 Wash. 540, 85 P. 251.

Although physician told deceased "he could not live" there is nothing to show that deceased understood or realized he was going to die and the declaration is inadmissible. Reeves *v.* S. (Miss.), 64 S. 836.

Where deceased expressed concurrence in the doctor's statement he was going to die. McDaniels *v.* S. (Ark.), 167 S. W. 96; Brookins *v.* S. (Tex. Cr.), 158 S. W. 521.

969-5 Pitts *v.* S., 140 Ala. 70, 37 S. 101; Thompson *v.* S., 137 Ga. 164, 73 S. E. 363; S. *v.* Brady, 124 La. 951, 50 S. 806; S. *v.* Monich, 74 N. J. L. 522, 64 A. 1016; P. *v.* Stacy, 119 App. Div. 743, 104 N. Y. S. 615; C. *v.* Latampa, 226 Pa. 23, 74 A. 736; Hunter *v.* S., 54 Tex. Cr. 224, 114 S. W. 124.

970-6 Newton *v.* S., 51 Fla. 82, 41 S. 19; P. *v.* Warren, 239 Ill. 213, 102 N. E. 201.

970-7 Subsequent hope of recovery not cause for excluding declaration if hope proves groundless. P. *v.* Cord, 157 Cal. 562, 108 P. 511.

971-8 McEwen *v.* S., 152 Ala. 38, 44 S. 619; Brennan *v.* P., 37 Colo. 256, 86 P. 79; Anderson *v.* S., 122 Ga. 161, 50 S. E. 46; Oliver *v.* S., 129 Ga. 777, 59 S. E. 900; Harper *v.* S., 129 Ga. 770, 59 S. E. 792; Jones *v.* S., 130 Ga. 274, 60 S. E. 840; Robinson *v.* S., 130 Ga. 361, 60 S. E. 1005; Gipe *v.* S., 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419; Williams *v.* S., 168 Ind. 87, 79 N. E. 1079; Tibbs *v.* C., 138 Ky. 558, 128 S. W. 871; Rowsey *v.* C., 25 Ky. L. R. 841, 76 S. W. 409; Fuqua *v.* C., 118 Ky. 578, 81 S. W. 923; Arnet *v.* C., 114 Ky. 593, 71 S. W. 635; S. *v.* Brown, 188 Mo. 451, 87 S. W. 519; S. *v.* Kelleher, 201 Mo. 614, 100 S. W. 470; S. *v.* Roberts, 28 Nev. 350, 82 P. 100; S. *v.* Barnes, 75 N. J. L. 426, 68 A. 145; S. *v.* Gray, 43 Or. 446, 74 P. 927.

972-9 Weaver *v.* P., 47 Colo. 617, 108 P. 331; Asher *v.* C., 28 Ky. L. R.

1342, 91 S. W. 662; Douglas *v.* S., 58 Tex. Cr. 122, 124 S. W. 933.

973-11 Sending for doctor to relieve pain does not affect admissibility of declaration where it appears declarant had given up hope of recovery. Pitts *v.* S., 140 Ala. 70, 37 S. 101. See S. *v.* Gianfala, 113 La. 463, 37 S. 30; S. *v.* Bordelon, 113 La. 690, 37 S. 603; S. *v.* Howard, 120 La. 311, 45 S. 260; Mathedy *v.* C., 14 Ky. L. R. 182, 19 S. W. 977.

Expression of relief from pain does not imply expectation of recovery. S. *v.* Roberts, 28 Nev. 350, 82 P. 100.

Submitting to operation as a last chance does not prevent use of declarations. S. *v.* Thompson, 49 Or. 46, 88 P. 583.

973-13 Tibbs *v.* C., 138 Ky. 558, 128 S. W. 871 (conduct may outweigh declarations). *Comp.* P. *v.* Wong Loung, 159 Cal. 520, 114 P. 829.

974-14 Reeves *v.* S. (Miss.), 64 S. 836. *Comp.* S. *v.* Daniels, 115 La. 59, 38 S. 894.

974-15 P. *v.* Stacy, 119 App. Div. 743, 104 N. Y. S. 615.

974-16 S. *v.* Colvin, 226 Mo. 446, 126 S. W. 448; C. *v.* De Leo, 242 Pa. 510, 89 A. 584.

975-19 Grubbs *v.* S., 13 Ga. App. 31, 78 S. E. 775. See S. *v.* Daniels, 115 La. 59, 38 S. 894; Ward *v.* S., 85 Ark. 179, 107 S. W. 677.

976-21 S. *v.* Kelleher, 201 Mo. 614, 109 S. W. 470. See S. *v.* Zorn, 202 Mo. 12, 100 S. W. 591.

976-22 P. *v.* Buettner, 233 Ill. 272, 84 N. E. 218.

Use of cuss words by declarant, not cause for excluding declaration. S. *v.* Brady, 124 La. 951, 50 S. 806.

976-23 S. *v.* Nowells, 135 Ia. 53, 109 N. W. 1016; S. *v.* Brown, 188 Mo. 451, 87 S. W. 519; S. *v.* Craig, 190 Mo. 332, 88 S. W. 641; S. *v.* Monich, 74 N. J. L. 522, 64 A. 1016; P. *v.* Stacy, 119 App. Div. 743, 104 N. Y. S. 615; S. *v.* Quick, 150 N. C. 820, 64 S. E. 168; S. *v.* Smalls, 87 S. C. 550, 70 S. E. 300.

Converse of rule applied.—S. *v.* Colvin, 226 Mo. 446, 126 S. W. 448.

Lapse of time between statement and death, not material. Kelly *v.* C. (Ky.), 119 S. W. 809.

976-24 Cleveland *v.* C., 31 Ky. L. R. 115, 101 S. W. 931.

976-25 P. *v.* Buettner, 233 Ill. 272, 84 N. E. 218; Kelly *v.* C. (Ky.), 119 S. W. 809; S. *v.* Craig, 190 Mo. 332, 88 S. W. 641.

977-26 S. *v.* Biango, 75 N. J. L. 284, 68 A. 125.

Declarant's expressed opinion he should not recover must be supported by testimony else his declaration is not admissible. Bilton *v.* Ty., 1 Okla. Cr. 566, 99 P. 163.

978-28 Ex parte Key, 5 Ala. App. 274, 59 S. 331; S. *v.* Nowells, 135 Ia. 53, 109 N. W. 1016; P. *v.* Brecht, 120 App. Div. 769, 105 N. Y. S. 436.

Prima facie case is all that is necessary to make statement admissible. Gibbons *v.* S., 137 Ga. 786, 74 S. E. 549.

Held admissible.—Deceased stated to the nurse that they "had killed him." He asked if he was in any danger of dying, and said that if he was not he did not wish his people to know his condition. The doctor told that he was suffering from a severe internal hemorrhage; that he did not have "more than one chance in a hundred of living;" that they would have to cut open his abdomen, and were not willing to do so without his consent; and that he had better communicate with his people. Thereupon he asked Dr. Hilliard to send a telegram to them. The deceased, who had been quiet, then opened his eyes and said, "Who shot me?" Dr. Landress answered, "The officer at Black Mountain shot you," to which the deceased replied: "Why did he shoot me? I have done nothing to be shot for." Dr. Fletcher also testified as to the critical condition of the deceased at that moment, who "knew his condition" and was about to be put upon the operating table, and who died that night. S. *v.* Watkins, 159 N. C. 480, 75 S. E. 22.

978-29 Oliver *v.* S., 129 Ga. 777, 59 S. E. 900.

978-30 Moore *v.* S., 146 Ala. 687, 40 S. 345, testimony of two witnesses sufficient.

979-31 Prima facie proof sufficient. Cook *v.* S., 134 Ga. 347, 67 S. E. 812; S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402.

979-32 Gardner *v.* S., 55 Fla. 25, 45 S. 1028.

980-33 McEwen *v.* S., 152 Ala. 38, 44 S. 619; Gardner *v.* S., supra; Gipe *v.* S., 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419; Williams *v.* S., 168 Ind. 87, 79 N. E. 1079; Martin *v.* C., 25 Ky.

L. R. 1928, 78 S. W. 1104; S. *v.* Monich, 74 N. J. L. 522, 64 A. 1016; S. *v.* Fuller, 52 Or. 42, 96 P. 456; S. *v.* McCoomer, 79 S. C. 63, 60 S. E. 237; S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402.

981-34 S. *v.* Brown, 188 Mo. 451, 87 S. W. 519.

981-35 S. *v.* Harris, 112 La. 937, 36 S. 810, "that's all right; Bill Harris is my friend, and I don't want nothing done to him," inadmissible because not a narrative statement.

982-36 See Williams *v.* S., 168 Ind. 87, 79 N. E. 1079.

982-41 Zipperian *v.* P., 33 Colo. 134, 79 P. 1018.

982-42 Gipe *v.* S., 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419. See S. *v.* Roberts, 28 Nev. 350, 82 P. 100; P. *v.* Madas, 201 N. Y. 349, 94 N. E. 857; S. *v.* Vance, 38 Utah 1, 100 P. 434.

983-44 Rex *v.* Sunfield, 15 Ont. L. R. 252; Greer *v.* S., 156 Ala. 15, 47 S. 300; Smith *v.* S., 9 Ga. App. 403, 71 S. E. 606; Park *v.* S., 126 Ga. 575, 55 S. E. 489; S. *v.* Law, 150 Wis. 313, 136 N. W. 803. See S. *v.* Fleetwood, 6 Penne. (Del.), 153, 65 A. 772; S. *v.* Uzzo, 6 Penne. (Del.) 212, 65 A. 775; Hawkins *v.* S., 98 Md. 355, 57 A. 27; Ward *v.* S. (Tex. Cr.), 159 S. W. 272.

983-45 Gipe *v.* S., 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419; Phillips *v.* S., 50 Tex. Cr. 481, 98 S. W. 868; Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156. *Comp.* Craven *v.* S., 49 Tex. Cr. 78, 90 S. W. 311.

Statute excluding leading questions applied.—Lockhart *v.* S., 53 Tex. Cr. 589, 111 S. W. 1024.

984-47 See S. *v.* Williams, 28 Nev. 395, 82 P. 353.

984-48 Pate *v.* S., 150 Ala. 10, 43 S. 343; Harper *v.* S., 129 Ga. 770, 59 S. E. 792; S. *v.* Gianfala, 113 La. 463, 37 S. 30.

985-51 Interruption is unimportant if declaration subsequently finished. Park *v.* S., 126 Ga. 575, 55 S. E. 489.

987-54 Kirby *v.* S., 151 Ala. 66, 44 S. 38; Weaver *v.* P., 47 Colo. 617, 108 P. 331; Cleveland *v.* C., 31 Ky. L. R. 115, 101 S. W. 931; Hendrickson *v.* C., 24 Ky. L. R. 2173, 73 S. W. 764.

987-55 Heningburg *v.* S., 153 Ala. 13, 45 S. 246; Weaver *v.* P., supra; S. *v.* Biango, 75 N. J. L. 284, 68 A. 125; Bennett *v.* S., 47 Tex. Cr. 52, 81 S. W. 30.

987-56 S. *v.* Byrd, 41 Mont. 585, 111 P. 407.

Special scrutiny need not be given declaration because written by one who represented state on trial of accused. Parker *v.* S., 165 Ala. 1, 51 S. 260.

987-57 Kirby *v.* S., 151 Ala. 66, 44 S. 38.

"**The law on this subject** is fully discussed by this court in Mitchell *v.* State, 82 Ark. 324, 101 S. W. 763, and the ruling of the trial court in permitting the witness to testify from his recollection as to the whole of the declaration, whether reduced to writing or not, and in declining to require the witness to produce the writing, was not in conflict with the principles we have announced in the case above cited. It does not appear that the writing was read to the declarant and signed by him; and it was not competent as original evidence." Jackson *v.* S., 103 Ark. 21, 145 S. W. 559.

988-58 May be in form of affidavit. S. *v.* Bonar, 71 Kan. 800, 81 P. 484.

That statement by deceased taken down by a justice was used by him as a criminal complaint does not affect its admissibility. Zipperian *v.* P., 33 Colo. 134, 79 P. 1018.

988-59 Rex *v.* Magyar, 7 Terr. L. R. 491, 4 W. L. R. 396; Fuqua *v.* C., 118 Ky. 578, 81 S. W. 923; Sailsberry *v.* C., 32 Ky. L. R. 1085, 107 S. W. 774; Cooper *v.* S., 89 Miss. 351, 42 S. 666. *Contra*, S. *v.* Byrd, 41 Mont. 585, 111 P. 407.

989-60 An introductory statement by prosecuting attorney as to decedent's belief that he was mortally wounded does not render the declaration inadmissible. Updike *v.* S., 9 Okla. Cr. 124, 130 P. 1107.

989-61 Updike *v.* S., 9 Okla. Cr. 124, 130 P. 1107; S. *v.* Clark, 61 W. Va. 625, 63 S. E. 402.

990-63 Sailsberry *v.* C., 32 Ky. L. R. 1085, 107 S. W. 774. See Heningburg *v.* S., 153 Ala. 13, 45 S. 246; Gardner *v.* S., 55 Fla. 25, 45 S. 1028; Fuqua *v.* C., 118 Ky. 578, 81 S. W. 923.

990-64 See Kirby *v.* S., 151 Ala. 66, 44 S. 38; S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660.

Signing unnecessary where declarations read and approved by declarant. Zipperian *v.* P., 33 Colo. 134, 79 P. 1018.

991-65 See Sailsberry *v.* C., 32 Ky.

L. R. 1085, 107 S. W. 774; C. *v.* Rhoads, 23 Pa. Super. 512.

991-66 S. *v.* Van Winkle (Del.), 86 A. 310.

Former statements, reaffirmed by declarant, must be identified with a high degree of certainty. S. *v.* Peacock, 58 Wash. 41, 107 P. 1022.

Parol testimony declaration was sworn to, harmless, that fact appearing on the paper. S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402.

991-67 Gardner *v.* S., 55 Fla. 25, 45 S. 1028; Cleveland *v.* C., 31 Ky. L. R. 115, 101 S. W. 931; C. *v.* Smith, 213 Mass. 563, 100 N. E. 1010; S. *v.* Fuller, 52 Or. 42, 96 P. 456; Corbitt *v.* S. (Tex. Cr.), 163 S. W. 436; Drake *v.* S. (Tex. Cr.), 143 S. W. 1157; Bateson *v.* S., 46 Tex. Cr. 34, 80 S. W. 88; Connell *v.* S., 46 Tex. Cr. 259, 81 S. W. 746; S. *v.* Hood, 63 W. Va. 182, 59 S. E. 971, 15 L. R. A. (N. S.) 448.

991-68 Coatney *v.* S., 61 Fla. 19, 55 S. 285; Robinson *v.* S., 10 Ga. App. 462, 73 S. E. 622; Guest *v.* S., 96 Miss. 871, 52 S. 211; Boyd *v.* S., 84 Miss. 414, 36 S. 525; C. *v.* Spahr, 211 Pa. 542, 60 A. 1084; Hinton *v.* S. (Tex. Cr.), 100 S. W. 772.

"**He always seemed** to hate me because mamma looked up to me. He did not like me to come home on a visit, and always had it in for me." This was held "part of the res gestate of the facts stated, and certainly not a conclusion of the witness." Lane *v.* S., 59 Tex. Cr. 595, 129 S. W. 353.

"**If, from the physical facts,** it necessarily appears that the deceased could not have known or had the knowledge of the matters he declares as facts, then it follows that they are matters merely of belief or opinion, and therefore inadmissible. Baker *v.* State, 85 Ark. 300, 107 S. W. 983." Rhea *v.* S., 104 Ark. 162, 147 S. W. 463.

"**Whether deceased** had a warrant or capias for the defendant, and whether, under the deputy sheriff's appointment, he had authority of law for his arrest of the defendant, were material questions in the case. The argument for appellant proceeds at several points upon the idea that the evidence showed without conflict that deceased had no warrant. As we read the record, deceased, in his dying declaration, testified that he had a writ for defendant. This, as we have said, was competent evidence of the fact. There was, then, no error in that ruling of the court which permitted the state to show that the sheriff of the county had delivered the capias for defendant to Springle, the deputy on whose request the deceased was attempting to arrest the defendant." Lewis *v.* S., 178 Ala. 26, 59 S. 577.

992-70 Pitts *v.* S., 140 Ala. 70, 37 S. 101; Walker *v.* S., 147 Ala. 699, 41 S. 176; Rhea *v.* S., 104 Ark. 162, 147 S. W. 463.

"**If defendant offers in evidence only** such parts of the statement as relate to the offense for which he is being prosecuted that the state would not be entitled, for this reason alone, to introduce other parts of the statement referring to a different transaction occurring several years before. If the former difficulty tended to show malice, intent, or throws any light on the difficulty for which defendant is being prosecuted, it would be admissible; otherwise it would not." Hinton *v.* S. (Tex. Cr.), 144 S. W. 617.

992-72 S. *v.* Horn, 204 Mo. 528, 103 S. W. 69; S. *v.* Hood, 63 W. Va. 182, 59 S. E. 971, 15 L. R. A. (N. S.) 448.

993-73 House *v.* S., 94 Miss. 107, 48 S. 3. See Baker *v.* S., 85 Ark. 300, 107 S. W. 983 ("I would not have done my fellow-man that way," inadmissible); Johnson *v.* C., 32 Ky. L. R. 1117, 107 S. W. 768; Walton *v.* S., 87 Miss. 296, 39 S. 689 (opinion of declarant as to why she was shot); S. *v.* Minor, 193 Mo. 597, 92 S. W. 466 (intent of to rob deceased); S. *v.* Fuller, 52 Or. 42, 96 P. 456 (statement as to necessity of using means employed to produce abortion on declarant, admissible); Manley *v.* S., 62 Tex. Cr. 392, 137 S. W. 1137.

Where deceased merely stated that he was to blame and did not recite facts which he did, it must be considered a mere opinion and not admissible. S. *v.* Finley, 245 Mo. 465, 150 S. W. 1051.

993-74 Motley *v.* S., 105 Ark. 608, 152 S. W. 140; C. *v.* Smith, 213 Mass. 563, 100 N. E. 1010.

994-75 S. *v.* Uzzo, 6 Penne. (Del.) 212, 65 A. 775.

994-79 Greer *v.* S., 156 Ala. 15, 47 S. 300; Nelson *v.* S., 3 Okla. Cr. 468, 106 P. 647; U. S. *v.* Palanca, 5 Phil. Isl. 269.

995-81 Rex *v.* Sunfield, 15 Ont. L. R. 252; King *v.* S. (Ark.), 162 S. W. 1087; S. *v.* Brady, 124 La. 951, 50 S. 806; Nelson *v.* S., 3 Okla. Cr. 468, 106 P.

647; U. S. *v.* Palanca, 5 Phil. Isl. 269; Graham *v.* S., 57 Tex. Cr. 104, 123 S. W. 691.

Declarations admissible to identify guilty parties. S. *v.* Roberts, 28 Nev. 350, 82 P. 100.

996-82 See P. *v.* Moran, 144 Cal. 48, 77 P. 777.

998-84 P. *v.* Hotz, 261 Ill. 239, 103 N. E. 1007.

998-85 Rice *v.* S., 49 Tex. Cr. 569, 94 S. W. 1024. But see C. *v.* Griffith, 149 Ky. 405, 149 S. W. 825.

998-86 S. *v.* Klute (Ia.), 140 N. W. 864; Beaty *v.* Com., 140 Ky. 230, 130 S. W. 1107. *Comp.* Gardner *v.* S., 55 Fla. 25, 45 S. 1028.

Action without design or premeditation.—Offitt *v.* S., 5 Okla. Cr. 48, 113 P. 554.

Shorthand rendering of facts not inadmissible as a conclusion—as that accused was trying to get out his gun. Gaines *v.* S., 58 Tex. Cr. 631, 127 S. W. 181.

999-87 Washington *v.* S. (Ga.), 73 S. E. 512; House *v.* S., 94 Miss. 107, 48 S. 3; Lockhart *v.* S., 53 Tex. Cr. 589, 111 S. W. 1024. See Rose *v.* S., 144 Ala. 114, 42 S. 21; Pennington *v.* C., 24 Ky. L. R. 321, 68 S. W. 151.

999-88 Jones *v.* S., 130 Ga. 274, 60 S. E. 840; Wright *v.* C., 109 Va. 847, 65 S. E. 19.

1000-89 McMillan *v.* S., 128 Ga. 25, 57 S. E. 309; Johnson *v.* C., 32 Ky. L. R. 1117, 107 S. W. 768; S. *v.* Peace, 121 La. 1071, 47 S. 28; S. *v.* Gianfala, 113 La. 463, 37 S. 30; Craft *v.* S., 57 Tex. Cr. 257, 122 S. W. 547; Wilson *v.* S., 49 Tex. Cr. 50, 90 S. W. 312. *Comp.* Wagner *v.* C., 32 Ky. L. R. 1185, 108 S. W. 318.

"The statement that he was 'not doing a thing' is not a conclusion but a statement of a fact." Henson *v.* C., 139 Ky. 173, 129 S. W. 566.

Statement that accused shot deceased because she asked him for a match Gibbons *v.* S., 137 Ga. 786, 74 S. E. 549.

Motive of accused may be shown by declaration. S. *v.* Brady, 124 La. 951, 50 S. 806.

1000-90 Spicer *v.* S. (Ala.), 65 S. 972; Norwood *v.* S. (Ala. App.), 65 S. 851; Wilson *v.* S., 140 Ala. 43, 37 S. 93; P. *v.* Cipolla, 155 Cal. 224, 100 P. 252; Burroughs *v.* U. S., 6 Ind. Ty. 164, 90 S. W. 8; Lucas *v.* C., 153 Ky. 424, 155 S. W. 721; Guest *v.* S., 96 Miss. 871, 52 S. 211; S. *v.* Colvin, 226 Mo. 446, 126 S. W. 448; S. *v.* Kelleher, 201 Mo. 614, 100 S. W. 470; C. *v.* Spahr, 211 Pa. 542, 60 A. 1084; Craven *v.* S., 49 Tex. Cr. 78, 90 S. W. 311; Wakefield *v.* S., 50 Tex. Cr. 124, 94 S. W. 1046; Richards *v.* C., 107 Va. 881, 59 S. E. 1104.

See P. *v.* Glover, 141 Cal. 233, 74 P. 745; Wade *v.* S., 2 O. C. C. (N. S.) 189; Mulkey *v.* S., 5 Okla. Cr. 75, 113 P. 532. *Comp.* Bateson *v.* S., 46 Tex. Cr. 34, 80 S. W. 88; Connell *v.* S., 46 Tex. Cr. 259, 81 S. W. 746.

Statement should be limited to the cause of death and the person who killed him. Hawkins *v.* S., 141 Ga. 212, 80 S. E. 711.

A broader rule is favored in S. *v.* Fuller, 52 Or. 42, 96 P. 456, "so as to include in the dying declarations, as testimony which might have been given by the declarant, if living and appearing as a witness at the trial, statements of other facts, occurring or existing coincident with the commission of the homicide, and tending to establish every essential element of the crime as charged." See Lister *v.* S., 1 Tex. App. 739.

1001-91 Flannigan *v.* S., 135 Ga. 221, 69 S. E. 171.

1002-96 Richards *v.* C., 107 Va. 881, 59 S. E. 1104. *Comp.* Boyd *v.* S., 84 Miss. 414, 36 S. 525 (declaration impliedly contradicting theory of suicide); Edwards *v.* S., 79 Neb. 251, 112 N. W. 611; S. *v.* Mayo, 42 Wash. 540, 85 P. 251 (need not identify assailant; it is sufficient if it adds a link in chain of evidence). And see Walker *v.* S., 139 Ala. 56, 35 S. 1011.

1003-97 P. *v.* Morse, 196 N. Y. 306, 89 N. E. 816.

Question asked decedent by person to whom declarations made may be shown to aid in identifying person of whom decedent spoke. Greer *v.* S., 156 Ala. 15, 47 S. 300.

1003-98 Must point out the cause of the death and circumstances. Matters of conclusion and opinion are not admissible. S. *v.* Klute (Ia.), 140 N. W. 864.

1004-2 S. *v.* Horn, 204 Mo. 528, 103 S. W. 69, that declarant fired in self-defense, inadmissible.

1005-4 S. *v.* Spivey, 191 Mo. 87, 90 S. W. 81.

1005-6 S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660, *cit.* the

text. See S. *v.* Mills, 79 S. C. 187, 60 S. E. 664; Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156.

1005-7 P. *v.* Cyty, 11 Cal. App. 702, 106 P. 257 (expectation of trouble with accused); Nordgren *v.* P., 211 Ill. 425, 71 N. E. 1042; P. *v.* Alexander, 161 Mich. 645, 126 N. W. 837; S. *v.* Kelleher, 224 Mo. 145, 123 S. W. 551; S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660, *cit.* the text.

1006-9 Smith *v.* S., 145 Ala. 17, 40 S. 957; Walker *v.* S., 146 Ala. 45, 41 S. 878; Starks *v.* S., 137 Ala. 9, 34 S. 687; P. *v.* Glover, 141 Cal. 233, 74 P. 745; Seifert *v.* S., 160 Ind. 464, 67 N. E. 100; Burroughs *v.* U. S., 6 Ind. Ty. 164, 90 S. W. 8; Rowsey *v.* C., 25 Ky. L. R. 841, 76 S. W. 409; S. *v.* Brown, 188 Mo. 451, 87 S. W. 519; S. *v.* Bohanon, 142 N. C. 695, 55 S. E. 797.

1008-13 P. *v.* White, 251 Ill. 67, 95 N. E. 1036.

1009-14 Written declarations, supposed lost, on being found during trial, may be received in lieu of parol testimony concerning them. S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402.

1010-16 Daniel *v.* C., 154 Ky. 601, 157 S. W. 1127.

Discrepancy in testimony of witness between statement upon preliminary investigation and when he is testifying before jury, affects only his credibility. Carter *v.* S., 2 Ga. App. 254, 58 S. E. 532.

1010-19 Gardner *v.* S., 55 Fla. 25, 45 S. 1028; Cleveland *v.* C., 31 Ky. L. R. 115, 101 S. W. 931; Long *v.* S., 48 Tex. Cr. 175, 88 S. W. 203.

Typewritten declaration, signed by declarant, is primary evidence as compared with notes taken by the person who prepared the declaration. Hendrickson *v.* C., 24 Ky. L. R. 2173, 73 S. W. 764.

1011-20 Sims *v.* S., 139 Ala. 74, 36 S. 138; Jarvis *v.* S., 138 Ala. 17, 34 S. 1025; Jackson *v.* S., 103 Ark. 21, 145 S. W. 559; Mitchell *v.* S., 82 Ark. 324, 101 S. W. 763; Allen *v.* C., 134 Ky. 110, 119 S. W. 795; Sailsberry *v.* C., 32 Ky. L. R. 1085, 107 S. W. 774; Fuqua *v.* C., 118 Ky. 578, 81 S. W. 923.

1011-21 S. *v.* Barnes, 75 N. J. L. 426, 68 A. 145.

1012-24 Park *v.* S., 126 Ga. 575, 55 S. E. 489.

1012-25 Kirby *v.* S., 151 Ala. 66, 44 S. 38; Jarvis *v.* S., 138 Ala. 17, 34 S. 1025; Mixon *v.* S., 7 Ga. App. 805, 68 S. E. 315.

It was proper to permit witness to state that deceased said his written dying declaration was correct upon having been read over to him. Phillips *v.* S. (Ala. App.), 65 S. 444.

1012-26 Pate *v.* S., 150 Ala. 10, 43 S. 343; Zipperian *v.* P., 33 Colo. 134, 79 P. 1018; Odom *v.* S., 13 Ga. App. 687, 79 S. E. 858; S. *v.* Gianfala, 113 La. 463, 37 S. 30; Dick *v.* S. (Okla. Cr.), 139 P. 322; Addington *v.* S., 8 Okla. Cr. 703, 130 P. 311; Morris *v.* S., 6 Okla. Cr. 29, 115 P. 1030; S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660; Hunter *v.* S., 59 Tex. Cr. 439, 129 S. W. 125; Long *v.* S., 48 Tex. Cr. 175, 88 S. W. 203.

Written declaration should not be taken to jury box, if declaration is also introduced. S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660.

1013-27 Gardner *v.* S., 55 Fla. 25, 45 S. 1028; Cleveland *v.* C., 31 Ky. L. R. 115, 101 S. W. 913; S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660. *Comp.* C. *v.* Spahr, 211 Pa. 542, 60 A. 1084; Arnwine *v.* S., 50 Tex. Cr. 254, 96 S. W. 4.

Defendant is entitled to have whole statement read.—Parker *v.* S., 5 Ala. App. 64, 59 S. 518.

Compulsory production at preliminary hearing.—Accused cannot, by mandamus, compel committing magistrate to order production of written dying declaration, in the hands of the prosecuting attorney, by subpoena duces tecum. Farnham *v.* Colman, 19 S. D. 342, 103 N. W. 161.

Declarations must be proved in their entirety though parts not admissible if standing alone. S. *v.* Blount, 124 La. 202, 50 S. 12.

1013-28 Parker *v.* S., 165 Ala. 1, 51 S. 260; S. *v.* Van Winkle (Del.) 86 A. 310; Nordgren *v.* P., 211 Ill. 425, 71 N. E. 1042; S. *v.* Smith, 80 Kan. 470, 102 P. 1098; C. *v.* Lawson, 25 Ky. L. R. 2187, 80 S. W. 206; S. *v.* Dipley, 242 Mo. 461, 147 S. W. 111; Morris *v.* S., 6 Okla. Cr. 29, 115 P. 1030; S. *v.* Fuller, 52 Or. 42, 96 P. 456; Wright *v.* C., 109 Va. 847, 65 S. E. 19.

Declarations of other parties to third persons cannot be introduced to impeach a dying declaration. Phillips *v.* S. (Ala. App.), 65 S. 444.

Dying declarations may be impeached by proving contradictory statements made by the deceased. Washington *v.* S., 137 Ga. 218, 73 S. E. 512.

May be ignored because of inherent weakness. O'Neal *v.* S. (Miss.), 48 S 225.

1014-31 Nordgren *v.* P., 211 Ill. 425, 71 N. E. 1042; Bilton *v.* Ty., 1 Okla. Cr. 566, 99 P. 163.

1014-32 Gambrell *v.* S., 92 Miss. 728, 46 S. 138; S. *v.* Zorn, 202 Mo. 12, 100 S. W. 591.

But declaration should not be excluded. S. *v.* Hood, 63 W. Va. 182, 59 S. E. 971, 15 L. R. A (N. S.) 448.

1015-34 S. *v.* Reed, 250 Mo. 379, 157 S. W. 316. See Hall *v.* S., 124 Ga. 649, 52 S. E. 891; Nordgren *v.* P., 211 Ill. 425, 71 N. E. 1042. *Contra*, S. *v.* Tomassi, 75 N. J. L. 739, 69 A. 214, bad character for truth and veracity admissible, but not general bad character.

Declaration may be impeached by showing conviction of declarant for felony—but not for a misdemeanor—and pardon cannot be shown. Martin *v.* C., 25 Ky. L. R. 1928, 78 S. W. 1104.

1015-35 Gregory *v.* S., 140 Ala. 16, 37 S. 259; Washington *v.* S., 137 Ga. 218, 73 S. E. 512; Pyle *v.* S., 4 Ga. App. 811, 62 S. E. 540; Dunn *v.* P., 172 Ill. 582, 50 N. E. 137; Lyles *v.* S., 64 Tex. Cr. 621, 142 S. W. 592; McCorquodale *v.* S. (Tex. Cr.), 98 S. W. 879. See S. *v.* Fleetwood, 6 Penne. (Del.) 153, 65 A. 772; Coyle *v.* C., 29 Ky. L. R. 340, 93 S. W. 584.

Contradictory statements need not be introduced after manner of impeaching evidence; witness may be asked to state directly what statements declarant made. S. *v.* Mayo, 42 Wash. 540, 85 P. 251.

1015-36 S. *v.* Charles, 111 La. 933, 36 S. 29; S. *v.* Fuller, 52 Or. 42, 96 P. 456.

Contradictory statements made by decedent at about same time, admissible. S. *v.* Uzzo, 6 Penne. (Del.) 212, 65 A. 775.

1015-37 Nordgren *v.* P., 211 Ill. 425, 71 N. E. 1042; S. *v.* Charles, 111 La. 933, 36 S. 29. *Contra*, S. *v.* Mills, 79 S. C. 187, 60 S. E. 664.

1016-39 Allen *v.* C., 134 Ky. 110, 119 S. W. 795.

1017-42 Lewis *v.* S., 178 Ala. 26, 59 S. 577. Same weight is to be given a dying declaration admitted in evidence as to declarant's testimony rendered in court. S. *v.* Fleetwood, 6 Penne. (Del.) 153, 65 A. 772; S. *v.* Adams, 6 Penne. (Del.) 178, 65 A. 510. See Solomon *v.* S., 2 Ga. App. 92, 58 S. E. 381. *Contra*, Nordgren *v.* P., 211 Ill. 425, 71 N. E. 1042; S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660.

Same weight should be given declarations whether they favor state or defendant. S. *v.* Uzzo, 6 Penne. (Del.) 212, 65 A. 775.

Instruction declaration should be carefully weighed because there was no cross-examination, proper. S. *v.* Davis, 134 N. C. 633, 46 S. E. 722. See Zipperian *v.* P., 33 Colo. 134, 79 P. 1018; S. *v.* Crone, 209 Mo. 316, 108 S. W. 555; S. *v.* Hendricks, 172 Mo. 654, 73 S. W. 194; C. *v.* Kenne, 7 Pa. Super. 293; S. *v.* Mayo, 42 Wash. 540, 85 P. 251. Cautionary instructions should be given. Denton *v.* S., 6 Ga. App. 3, 63 S. E. 1132.

Weight as evidence is for jury. Fogg *v.* S., 81 Ark. 417, 99 S. W. 537; C. *v.* Lawson, 25 Ky. L. R. 2187, 80 S. W. 206; Coyle *v.* C., 29 Ky. L. R. 340, 93 S. W. 584; S. *v.* Davis, 134 N. C. 633, 46 S. E. 722; S. *v.* Fuller, 52 Or. 42, 96 P. 456; C. *v.* Winkelman, 12 Pa. Super. 497.

Dying declarations are "testimony and to be considered with all the other testimony in the case." Findley *v.* S., 125 Ga. 579, 54 S. E. 106.

Instruction that a dying declaration had "sanctity of truth," reversible error. Robinson *v.* S., 130 Ga. 361, 60 S. E. 1005.

If part shown to be false, the whole is to be distrusted. P. *v.* Thomson, 145 Cal. 717, 79 P. 435.

Corroboration is necessary to warrant conviction where declaration is given in evidence on a prosecution for abortion under statute. C. *v.* Keene, 7 Pa. Super. 293.

EJECTMENT

Evidence showing location, 29-86; *Good faith in making improvements*, 29-87; *Recovery for improvements*, 41-27.

4-1 Davis *v.* Seybold, 195 Fed. 402, 115 C. C. A. 304; Jackson *v.* Tribble, 156 Ala. 480, 47 S. 310; Hudson *v.*

Vaughn, 147 Ala. 690, 40 S. 757; Collier *v.* Alexander, 142 Ala. 422, 38 S. 244; Winn *v.* Whitehouse, 96 Ark. 42, 131 S. W. 70; Taylor *v.* Robinson, 94 Ark. 560, 127 S. W. 972; Carpenter *v.* Jones, 76 Ark. 163, 88 S. W. 871; Dowdle *v.* Wheeler, 76 Ark. 529, 89 S. W. substituted as plaintiff); Center Bridge 1002; Mallory *v.* Brademyer, 76 Ark. 538, 89 S. W. 551; Cassin *v.* Nicholson, 154 Cal. 497, 98 P. 190 (disconnected title cannot be proved by one who is substituted as plaintiff); Center Bridge Co. *v.* Co., 86 Conn. 585, 86 A. 11; Foote *v.* Brown, 81 Conn. 218, 70 A. 699; Thomas *v.* Young, 79 Conn. 493, 65 A. 955; Doe *v.* Roe, 2 Boyce (Del.) 348, 80 A. 352, 81 A. 47; Roe *v.* Doe (Del.), 80 A. 250; Nevin *v.* Disharoon, 6 Penne. (Del.) 278, 66 A. 362; Geter *v.* Simmons, 62 Fla. 194, 57 S. 354; Florida F. Co. *v.* Sheffield, 56 Fla. 285, 48 S. 42; Ropes *v.* Minshew, 51 Fla. 299, 41 S. 538; Roberts *v.* Tift, 136 Ga. 901, 72 S. E. 234; Delay *v.* Felton, 133 Ga. 15, 65 S. E. 122; Hamilton *v.* Rogers, 126 Ga. 27, 54 S. E. 926; Krause *v.* Nolte, 217 Ill. 298, 75 N. E. 362; Phelps *v.* Nazworthy, 226 Ill. 254, 80 N. E. 756; Jose *v.* Hunter (Ind. App.), 103 N. E. 392; Furst *v.* Satterfield, 44 Ind. App. 613, 89 N. E. 906; Coulthard *v.* McIntosh, 143 Ia. 389, 122 N. W. 233; Ison *v.* Halcomb, 136 Ky. 523, 124 S. W. 813; Young *v.* Duggin, 30 Ky. L. R. 634, 99 S. W. 655; Mullins *v.* Southwood, 32 Ky. L. R. 1246, 108 S. W. 324; Joseph *v.* Bonaparte, 118 Md. 591, 85 A. 962; Neil *v.* Tubb, 241 Mo. 666, 145 S. W. 766; City of St. Louis *v.* Co., 235 Mo. 1, 138 S. W. 641; Hough *v.* Co., 127 Mo. App. 570, 106 S. W. 547; Link *v.* Campbell, 72 Neb. 307, 100 N. W. 409, 104 N. W. 939; Mayor, etc. *v.* Co. (N. J.), 87 A. 639; Harrison *v.* Gallegos, 13 N. M. 1, 79 P. 300; P. *v.* Inman, 197 N. Y. 200, 90 N. E. 438; Aubuchon *v.* R. Co., 122 N. Y. S. 581; Brock *v.* Wells, 165 N. C. 170, 81 S. E. 130; Barfield *v.* Hill, 163 N. C. 262, 79 S. E. 677; Finch *v.* Finch, 131 N. C. 271, 42 S. E. 615; Harper *v.* Anderson, 132 N. C. 89, 43 S. E. 588; Bivings *v.* Gosnell, 133 N. C. 574, 45 S. E. 942; Mitchell *v.* Garrett, 140 N. C. 397, 53 S. E. 226; McCollum *v.* Chisholm, 146 N. C. 18, 59 S. E. 160; McCaskill *v.* Walker, 147 N. C. 195, 61 S. E. 46; Perkiomen R. Co. *r.* Kremer, 218 Pa. 641, 67 A. 913; Crist *r.* Boust, 26 Pa. Super. 543; Dexter *r.* Arzuaga, 4 P. R. Fed. 344; Baxter *r.* Brown, 26 R. I. 381, 59 A. 73; Love *v.* Turner, 71 S. C. 322, 51 S. E. 101; Gibson *v.* Pekarek, 25 S. D. 281, 126 N. W. 597; Sutton *r.* Whetstone, 21 S. D. 341, 112 N. W. 850; Harris *r.* Mason, 120 Tenn. 668, 115 S. W. 1146; Masterson I. Co. *r.* Foote (Tex. Civ.), 163 S. W. 642; Marbury *v.* Jones, 112 Va. 389, 71 S. E. 1124; McMurray *r.* Dixon, 105 Va. 605, 54 S. E. 481; Carter *v.* Wood, 103 Va. 68, 48 S. E. 553; Bugg *r.* Seay, 107 Va. 648, 60 S. E. 89; Stockland *r.* Hall, 54 Wash. 106, 102 P. 1037; Helm *r.* Johnson, 40 Wash. 420, 82 P. 402; Bryant L. Co. *r.* Wks., 48 Wash. 574, 94 P. 110; Meyers *r.* R. Co., 132 Wis. 401, 112 N. W. 673.

See Sinclair *r.* Huntley, 131 N. C. 243, 42 S. E. 605.

Title by adverse possession is sufficient. Rheinfort *r.* Abel (N. J.), 80 A. 1059.

As against a trespasser plaintiff must prove a prima facie title. De Land *r.* Co., 225 Ill. 212, 80 N. E. 125.

Burden not affected by defendant's pleadings. See Adams *r.* Child, 28 Nev. 169, 88 P. 1087.

5-2 North *r.* Graham, 235 Ill. 178, 85 N E. 267; Sheridan *r.* Cardwell, 145 App. Div. 609, 130 N. Y. S. 638, *aff.* 141 App. Div. 854, 126 N. Y. S. 781; Seymour *r.* Dufur, 53 Wash. 646, 102 P. 756.

At commencement of action.—Brown *r.* Hutchinson, 155 N. C. 205, 71 S. E. 302.

5-3 Jones *r.* Wild (Ala.), 65 S. 349; Lay *r.* Fuller, 178 Ala. 375, 59 S. 609; Mobile D. Co. *r.* Mobile, 146 Ala. 198, 40 S. 205; Maney *r.* Dennison (Ark.), 163 S. W. 783; Empire R. & C. Co. *r.* Howell, 24 Colo. App. 416, 133 P. 1124; Stevens *r.* Smoker, 84 Conn. 569, 80 A. 788; Barton *r.* Johnson, 137 Ga. App. 332, 73 S. E. 516; Jose *r.* Hunter (Ind. App.), 103 N. E. 392; Frazier *r.* Cox (Ky.), 125 S. W. 148; Bryan *r.* Hodges, 151 N. C. 413, 66 S. E. 345; Bell *r.* Bearman, 37 Okla. 645, 133 P. 188; Nicholson *r.* Villepigue, 97 S. C. 130, 81 S. E. 494.

Where the plaintiff asserts title under a grant that contains exclusions the burden of proof is on him to show the land claimed is outside the excluded land. Miller *r.* Breathitt Co., 152 Ky. 390, 153 S. W. 468.

Sufficient evidence.—Smith *r.* Donalson,

137 Ga. App. 465, 73 S. E. 577; Childers *v.* Belcher, 142 Ky. 605, 134 S. W. 1129; City of St. Louis *v.* Agr. Co., 235 Mo. 1, 138 S. W. 641; City of St. Louis *v.* Furnace Co., 235 Mo. 1, 138 S. W. 641.

Insufficient proof.—Bond *v.* Hunt, 135 Ga. 733, 70 S. E. 572; Albert Hanson Lumb. Co. *v.* Co., 130 La. 772, 58 S. 567; Kelpe *v.* Kuppertz, 235 Mo. 479, 139 S. W. 335; Marbury *v.* Jones, 112 Va. 389, 71 S. E. 1124; Nassa *v.* Seaborg, 64 Wash. 164, 116 P. 658.

Degree of proof.—Plaintiff's case must be established by a preponderance of evidence. Rittmaster *v.* Brisbane, 19 Colo. 371, 35 P. 736; Nevin *v.* Disharoon, 6 Penne. (Del.) 278, 66 A. 362; Robinson *v.* Nail, 2 Ind. Ty. 509, 52 S. W. 49; Thorn *v.* Lister, 129 Ia. 223, 105 N. W. 434; Patterson *v.* Hansel, 4 Bush (Ky.) 654; Page *v.* Simpson, 188 Pa. 393, 41 A. 638. He must prove it beyond reasonable doubt. Doe *v.* Jones, 7 U. C. Q. B. (Can.) 385; Goodin *v.* Goodin, 172 Mo. 40, 72 S. W. 502; Jackson *v.* Etz, 5 Cow. (N. Y.) 314.

Preponderance only required.—Doe *v.* Roe (Del.), 80 A. 352.

Burden not shifted by showing a prima facie title; this merely imposes upon defendant the duty of "going forward" with the evidence. Moore *v.* McClain, 141 N. C. 473, 54 S. E. 382. *Comp.* Warrior R. Co. *v.* Co., 154 Ala. 135, 45 S. 53, holding, where plaintiff shows a prima facie right, defendant must prove a better title.

Prima facie case is made by one who shows possession of his ancestor under a deed, and a deed to himself under sale by order of probate court for division between heirs. Williams *v.* Williams, 170 Ala. 143, 54 S. 107.

6-4 Feller *v.* Lee, 225 Mo. 319, 124 S. W. 1129, rule not applicable where common title infirm.

Action by city to recover street.—City of Gadsden *v.* Strother, 172 Ala. 56, 55 S. 189.

6-5 National M. & M. Co. *v.* Piccolo, 54 Wash. 617, 104 P. 128.

General rule does not apply if defendant obtained possession as tenant of plaintiff. Card *v.* Deans, 84 Neb. 4, 120 N. W. 440.

Another exception is made in favor of landlord as against tenant; latter may not question former's title when possession given; he may show subsequent loss of it. P. *v.* Inman, 197 N. Y. 200, 90 N. E. 438.

7-6 Dodge *v.* Co., 158 Ala. 91, 48 S. 383 (though defendant has color of title); Florida F. Co. *v.* Sheffield, 56 Fla. 285, 48 S. 42; Delay *v.* Felton, 133 Ga. 15, 65 S. E. 122; Moody *v.* Macomber, 159 Mich. 657, 124 N. W. 549.

A present right must exist. Demps *v.* Hogan, 57 Fla. 60, 48 S. 998.

Priority of possession, in absence of legal title in either party, entitles him showing it to judgment. Presumption of possession attached to legal title is neutralized by proof of conveyance. Roe *v.* Doe, 159 Ala. 614, 48 S. 1033; P. *v.* Inman, supra.

7-7 Hudson *v.* Vaughn, 147 Ala. 690, 40 S. 757.

8-11 Skinner Mfg. Co. *v.* Wright, 56 Fla. 561, 47 S. 931; Hellard *v.* Nance (Ky.), 114 S. W. 277; Killackey *v.* Killackey, 156 Mich. 127, 120 N. W. 680. *Contra* if title claimed by adverse possession. Riffle *v.* Skinner, 67 W. Va. 75, 67 S. E. 1075.

Contra, if defendant is a mere trespasser.—Robinson *v.* Hillman, 36 App. Cas. (D. C.) 576.

Unnecessary to show connection when plaintiff's evidence shows either he or a prior grantor was once in possession. Krause *v.* Nolte, 217 Ill. 298, 75 N. E. 362.

Later tax title is preferred; holder of prior title must show defects in former. Floyd *v.* Co., 222 Pa. 257, 71 A. 13.

8-12 Cape Girardeau, etc. R. Co. *v.* R. Co., 222 Mo. 461, 121 S. W. 300.

8-14 Foote *v.* Brown, 81 Conn. 218, 70 A. 699; Skinner Mfg. Co. *v.* Wright, 56 Fla. 561, 47 S. 931; Graham *v.* Peacock, 131 Ga. 785, 63 S. E. 348; Welborn *v.* Kimmerling, 46 Ind. App. 98, 89 N. E. 517; Harris *v.* Mason, 120 Tenn. 668, 115 S. W. 1146; Taylor *v.* Russell, 65 W. Va. 632, 64 S. E. 923; Harley *v.* Harley, 140 Wis. 282, 122 N. W. 761.

But see Wood *v.* Irving (Ia.), 140 N. W. 880.

Immediate rights to possession.—Bush *v.* Fuller, 173 Ala. 511, 55 S. 1000.

9-13 Jones *v.* Wild (Ala.), 65 S. 349; Neville *v.* Cheshire, 163 Ala. 390, 50 S. 1005; McCord *v.* Welch, 105 Ark. 119, 150 S. W. 566; Stricklin *v.* Moore, 98 Ark. 30, 135 S. W. 360; Percifull *v.* Platt, 36 Ark. 456; Krause *v.* Nolte, 217 Ill. 298, 75 N. E. 362; Taylor *v.* Rus-

sell, 65 W. Va 632, 64 S. E. 923; Wilburn *v.* Land, 138 Wis. 36, 119 N. W. 803.

9-16 Coppock *v.* Austin, 34 Ind. App. 319, 72 N. E. 657; Brown *v.* Hutchinson, 155 N. C. 205, 71 S. E. 302.

9-17 Jackson *v.* Tribble, 156 Ala. 480, 47 S. 310; Gonella *v.* Simmons, 10 Cal. App. 257, 101 P. 685 (no reference to statute); Whitehead *v.* Callahan, 44 Colo. 396, 99 P. 57; Ohio River J. P. Co. *v.* Co., 222 Pa. 573, 72 A. 271.

Necessity of recovery for purpose of administration may be shown by administrator against heir. Graham *v.* Peacock, 131 Ga. 785, 63 S. E. 348.

10-18 Watkins *v.* Co. (Ky.), 119 S. W. 225; Trustees *v.* R. Co. (N. J.), 89 A. 773; Trustees *v.* R. Co. (N. J.), 89 A. 776; Johnson *v.* McCoy, 112 Va. 580, 72 S. E. 123; McAvoy *v.* Franklin, 146 Wis. 390, 131 N. W. 823. See Seymour *v.* Dufur, 53 Wash. 646, 102 P. 756.

Unless plaintiffs connect themselves, by proper evidence, with such common source, showing superior title thereto, they have failed to make out a prima facie case, and are not entitled to recover. Hirschfield *v.* Ater (Tex. Civ.), 149 S. W. 202.

In such event, irregularities in conveyances anterior to the common source become immaterial because they are common in both litigants and affect the common stem of the title only. The question is no longer, Has plaintiff a good legal title against the whole world? it is rather, Has he a better title than defendant beginning with the common source and coming down to the time of the suit? Howell *v.* Sherwood, 242 Mo. 513, 147 S. W. 810.

Common grantor in general. Brinkley *v.* Bell, 126 Ga. 480, 55 S. E. 187; Gaulbaugh *v.* Rouse, 31 Ky. L. R. 1195, 104 S. W. 959; Carter *v.* Wood, 103 Va. 68, 48 S. E. 553; Marbach *v.* Holmes, 105 Va. 178, 52 S. E. 828.

A prima facie case is made by introducing deed describing the land and a plat thereof, identifying property and proving possession under deed. Cottrell *v.* Pickering, 32 Utah 62, 88 P. 696.

Presumption deed produced on notice from custody of one grantee of a common grantor is the one under which such grantor claims title. Brinkley *v.* Bell, 126 Ga. 480, 55 S. E. 187.

11-19 Robinson *v.* Hillman, 36 App. Cas. (D. C.) 576; Kelpe *v.* Kuppertz, 235 Mo. 479, 139 S. W. 335; Sloan *v.* Chitwood, 217 Mo. 462, 116 S. W. 1086; Warren *v.* Williford, 148 N. C. 474, 62 S. E. 697.

11-20 Plaintiff must connect both titles with the common source if he shows title therefrom. Caruthers *v.* Hadley (Tex. Civ.), 115 S. W. 80.

11-21 Warren *v.* Williford, supra.

11-22 Bursey *v.* Lyon, 32 App. Cas. (D. C.) 231; Gaulbaugh *v.* Rouse, 31 Ky. L. R. 1195, 104 S. W. 959; Steadman *v.* Steadman, 143 N. C. 345, 55 S. E. 784.

Error in admitting improper evidence of such title is harmless. Investment Co. *v.* Trueman, 63 Fla. 184, 57 S. 663

11-23 Vary *v.* Sensabaugh, 156 Ala. 459, 47 S. 196.

12-24 Carter *v.* Smith, 142 Ala. 414, 38 S. 184.

12-25 Declarations of husband not admissible against wife in ejectment where plaintiff claims under execution against husband and the answer sets up that wife was true owner. Madden *v.* Stegman, 88 Kan. 29, 127 P. 524.

12-26 A marshal's deed given under execution against third persons is inadmissible to defeat a possessory title of a plaintiff in ejectment where the execution defendant had no title or interest in the land. Nash *v.* Rawlett, 41 App. Cas. (D. C.) 456.

13-27 Extent of interest of joint grantors in conveyed land must be shown by plaintiff who claims under them; no presumption their interests were equal. Taylor *v.* Meeks, 133 Ga. 385, 65 S. E. 850.

13-28 Nash *v.* Rawlett, 41 App. Cas. (D. C.) 456.

13-30 *Contra,* Hurley *v.* Charles, 110 Va. 27, 65 S. E. 468.

Parol evidence competent to show nonperformance of conditions precedent by defendant under deeds relied upon. Maxwell *v.* Co., 95 Miss. 466, 48 S. 610.

Payment of taxes by person charged, not evidence of ownership as against holder of prima facie title in possession. Maney *v.* Burke, 92 Ark. 84, 122 S. W. 111.

13-31 Ashford *v.* McKee (Ala.), 62 S. 879; Hope *v.* Brown, 74 Wash. 421, 133 P. 612.

Possession accompanying title is sufficient as against parties not in actual

possession when plaintiff acquired title. Foote *v.* Brown, 81 Conn. 218, 70 A. 699.

13-32 Vendor in possession.—Widow of vendee makes prima facie case when she introduces deed and proves she is widow and sole heir of vendee who left no debts, and that there is no administration. Gatlin *v.* Peacock, 135 Ga. 582, 69 S. E. 913.

In Baxter *v.* Patenaude, 32 R. I. 197, 78 A. 625, the paper title of defendant was held as good as that of plaintiff, and such possession as had existed was held to have been in ancestors in title of defendant.

13-33 Oliver *v.* Oliver (Ala.), 65 S. 373; Owen *v.* Moxon, 167 Ala. 615, 52 S. 327; Gay *v.* Hester, 164 Ala. 651, 51 S 329; Jose *v.* Hunter (Ind. App.), 103 N. E. 392; McDermitt *v.* Forbes (W. Va.), 80 S. E. 356.

Deed supplemented by oral testimony. Winding Gulf C. Co. *v.* Campbell (W. Va.), 78 S. E. 384.

Deeds in plaintiff's chain of title admissible and also mortgages tending to show acts of ownership. Ashford *v.* McKee (Ala.), 62 S. 879; Jeffreys *v.* Jeffreys (Ala.), 62 S. 797.

Plaintiff may rely on recitals in defendant's deed. Davis *v.* Clay (Ky.), 167 S. W. 915.

Deeds uncertain and vague in description are admissible if they are capable of being made certain. Mulder *v.* Stokes (Ala.), 63 S. 563.

A person claiming under a sheriff's deed must show a valid judgment. Wheeler *v.* Strickland, 178 Ala. 360, 60 S. 59.

A deed conveying a wife's separate property (with no privy examination as to her) signed by wife and husband is not admissible in a partition action. Sipe *v.* Herman, 161 N. C. 107, 76 S. E. 556.

Sheriff's deed inadmissible where it does not convey title to anyone who took possession thereunder. Coursey *v.* Coursey, 141 Ga. 65, 80 S. E. 462.

A written agreement making no mention of lot is inadmissible, though there was an oral agreement but not referred to in document. Hunnicutt *v.* Head (Ala.), 60 S. 831.

Deed not tending in remotest degree to show title in plaintiff is inadmissible. Joseph *v.* Bonaparte, 118 Md. 591, 85 A. 962.

Deed admissible though adverse possession by grantor alleged. Westmoreland *v.* Plant, 89 Ark. 147, 116 S. W. 188.

If recorded before trial. Abbott *v.* Lapoint, 82 Vt. 246, 73 A. 166. It must be accompanied by proof of grantor's prima facie title (Florida F. Co. *v.* Sheffield, 56 Fla. 285, 48 S. 42); or possession. Roe *v.* Doe, 159 Ala. 614, 48 S. 1033. All deeds in plaintiff's chain of title admissible. Sloan *v.* Chitwood, 217 Mo. 462, 116 S. W. 1086. Deed referring to grantor's deed, admissible to identify property. Steele *v.* Bryant, 132 Ky. 569, 116 S. W. 755. Common source of title may be shown by deed though order purporting to confirm it detached. It is presumed deeds not in record on appeal, properly admitted. Steele *v.* Bryant, supra.

Burden on party who asserts validity of deed attacked by affidavit to show it is genuine. Sapp *v.* Cline, 131 Ga. 433, 62 S. E. 529.

14-34 Koons *v.* Hartman, 7 Watts (Pa.) 20.

Judgment must have been rendered in such suit either on verdict or non-suit to make record admissible. Umlauff *v.* Bowers, 20 Pa. C. C. 430; Velott *v.* Lewis, 102 Pa. 326. Record of prior ejectment in which there was a verdict, but no judgment, inadmissible. Velott *v.* Lewis, supra.

Record of pending ejectment which had proceeded no further than a plea filed, inadmissible. Umlauff *v.* Bowers supra; Houseman *v.* Co., 214 Pa. 552, 64 A. 379.

14-36 Deed not inadmissible because it does not define boundaries of land conveyed. Cadwalader *v.* Price, 111 Md. 310, 73 A. 273.

15-41 *Contra*, Hughes *v.* Rose, 163 Ala. 368, 50 S. 899, under plea of "not guilty."

Conditions precedent to right to tax deed must be proved by evidence outside deed; no presumption they have been met. Warren *v.* Williford, 148 N. C. 474, 62 S. E. 697.

16-42 Patent admissible (Stoner *v.* Royar, 200 Mo. 444, 98 S. W. 601), though defective in description, if it contains enough to identify the land (Fenwick *v.* Gill, 38 Mo. 510), or dated after demise laid. McCraven *v.* Doe, 23 Miss. 100.

Certified copy of patent admissible though the record shows original had been vacated. Maxwell *v.* Lloyd, 1 Har. & M. (Md.), 212. But patent and

patent certificate issued after commencement of action, are inadmissible. Laurissini *v.* Doe, 25 Miss. 177, 57 Am. Dec. 200. In action by A against B a patent certificate to A's legal representatives is not evidence of title in A. Mattingly *v.* Hayden, 1 Mo. 439.

16-43 **Patent issued on recent survey** may be evidence of admission by defendant that land not within prior proved surveys. Steele *v.* Bryant, 132 Ky. 569, 116 S. W. 755.

16-45 Demars *v.* Hickey, 13 Wyo. 371, 80 P. 521.

17-47 Usual duplicate receipt of receiver of federal land office is sufficient evidence of title except as against one having patent to the land or some person claiming under him. Oldfather *v.* Ericson, 79 Neb. 1, 112 N. W. 356.

17-48 Tax receipt admissible. Mitchell *v.* Hamilton (S. C.), 82 S. E. 425.

Certificate showing final proof and right to a patent, admissible. Russell *v.* Holman, 156 Ala. 432, 47 S. 205.

17-49 Weatherford *v.* McKay, 59 Or. 558, 117 P. 969.

Tract book, competent to show title passed from government. Witherington *v.* White, 165 Ala. 316, 51 S. 726.

18-50 Cottrell *v.* Pickering, 32 Utah 62, 88 P. 696; Wood *v.* Earls, 39 Wash. 21, 80 P. 837. See also Swainson *v.* Scott, 111 Tenn. 140, 76 S. W. 909.

18-51 Hicks *v.* Burgess (Ala.), 64 S. 290; Bass *v.* Ramos, 58 Fla. 161, 50 S. 945; Wall *v.* R. Co., 138 Ga. 347, 75 S. E. 253; Delay *v.* Felton, 133 Ga. 15, 65 S. E. 122; La Barre *v.* Co., 130 La. 134, 57 S. 655; Runkle *v.* Welty, 78 Neb. 571, 574, 113 N. W. 160, *aff.* 111 N. W. 463; Aubuchon *v.* R. Co., 137 App. Div. 834, 122 N. Y. S. 581; Baxter *v.* Brown, 26 R. I. 381, 59 A. 73. See Swainson *v.* Scott, 111 Tenn. 140, 76 S. W. 909.

Whether or not the plaintiff has ever been in possession is a question for the jury. Nicholson *v.* Villepigue, 97 S. C. 130, 81 S. E. 494.

In Sheridan *v.* Caldwell, 141 App. Div. 854, 126 N. Y. S. 781, plaintiff proved neither seizing nor possession within 20 years, in herself or either of her predecessors in title, and was not entitled to recover under Code Civ. Proc., §365.

Claim of title by adverse possession must be supported by proof of every element necessary to constitute title. Crist *v.* Boust, 26 Pa. Super. 543.

When title derived from common source plaintiff must show a better one than defendant or actual prior possession. Harrison *v.* Gallegos, 13 N. M. 1, 79 P. 300.

18-53 Kilpatrick *v.* Trotter (Ala.), 64 S. 589; Stevens *v.* Smoker, 84 Conn. 569, 80 A. 788; Moss *v.* Chappell, 126 Ga. 196, 54 S. E. 968; Jackson *v.* Strickland, 127 Ga. 106, 56 S. E. 107; Glanz *v.* Ziabek, 233 Ill. 22, 84 N. E. 36; Terhune *v.* Porter, 212 Ill. 595, 72 N. E. 820; Chicago T. R. Co. *v.* Winslow, 216 Ill. 166, 74 N. E. 815; Licari *v.* Carr, 84 N. J. L. 345, 86 A. 421.

Presumption may be rebutted by evidence showing character of land, time and manner of possession and other circumstances. Bass *v.* Ramos, 58 Fla. 161, 50 S. 945.

19-54 Whitehead *v.* Pitts, 127 Ga. 774, 56 S. E. 1004; Closuit *v.* Co., 130 Wis. 258, 110 N. W. 222.

The grantor of plaintiff may testify that he went into possession under his deed. McBride *v.* Lowe, 175 Ala. 408, 57 S. 832.

19-55 Smith *v.* Steiner & Lobman, 172 Ala. 79, 55 S. 606.

If title is proved possession need not be unless adverse possession shown. Keamalu *v.* Luhau, 7 Haw. 324; Rose *v.* Smith, 5 Haw. 377.

As well as paper title. Aubuchon *v.* R. Co., 137 App. Div. 834, 122 N. Y. S. 581.

19-56 Dondero *v.* O'Hara, 3 Cal. App. 633, 86 P. 985; Bass *v.* Ramos, 58 Fla. 161, 50 S. 945; Moss *v.* Chappell, supra; Whitham *v.* Ellsworth, 259 Ill. 243, 102 N. E. 223; Galligher *v.* Kelliher, 58 Or. 557, 115 P. 596, *denying* rehear. 114 P. 943; Caffrey *v.* McFarland, 1 Phila. (Pa.) 555; Dieze *v.* Tackler, 7 Phila. (Pa.) 220; Cottrell *v.* Pickering, 32 Utah 62, 88 P. 696; McMurray *v.* Dixon, 105 Va. 605, 54 S. E. 481; Dicus *v.* Major, 72 Wash. 398, 130 P. 474; McDermitt *v.* Forbes, 69 W. Va. 268, 71 S. E. 193.

Plaintiff's right to recover can only be resisted by showing defendant had title in himself or authority to enter under plaintiff's title. McMurray *v.* Dixon, 105 Va. 605, 54 S. E. 481.

Possession of ancestor sufficient where it was continued by tenant of the heirs until title by adverse possession perfected. Beam *v.* Gardner, 18 Pa. Super. 245.

21-58 Continuity of prior possession must be shown, or, at least, its non-abandonment. Ensley *v.* Coolbaugh, 160 Mich. 299, 125 N. W. 279.

21-59 Busbee *v.* Thomas, 175 Ala. 423, 57 S. 587; Walling *v.* Eggers, 25 Ky. L. R. 1563, 78 S. W. 428; Crain *v.* Peterman, 200 Mo. 295, 98 S. W. 600; Cottrell *v.* Pickering, 32 Utah 62, 88 P 696; Angell *v.* Fletcher, 76 Vt. 359, 57 A. 964.

A quit-claim deed from heirs of a person claiming possessory rights and from their grantees may be received in evidence. Nash *v.* Rawlett, 41 App. Cas. (D. C.) 456.

Evidence of plaintiff's entries upon the land and its cutting of timber is inadmissible without some evidence of defendant's knowledge thereof, to charge defendant with notice of plaintiff's claim. Christopher *v.* Lumb. Co., 175 Ala. 484, 57 S. 837.

Since possession of growing timber independently of any possession of the land itself, is a legal impossibility, the statement of a witness that plaintiff's agent was in possession of the timber, though not in possession of the land itself, was a mere conclusion, which should have been excluded. Christopher *v.* Lumb. Co., 175 Ala. 484, 57 S. 837.

Local custom to cut timber on lands without license cannot be proved. Wilson *v.* Jernigan, 57 Fla. 277, 49 S. 44.

Declarations of occupant as to source of his authority to occupy, admissible. Russell *v.* Holman, 156 Ala. 432, 47 S. 205.

21-60 Ely *v.* Pace, 139 Ala. 293, 35 S. 877; Whitham *v.* Ellsworth, 259 Ill. 243, 102 N. E. 223; Haden *v.* Goodwin, 217 Mo. 662, 117 S. W. 1129.

Where defendants pleaded sole seisin it is unnecessary to prove possession. Ditmore *v.* Rexford, 165 N. C. 620, 81 S. E. 994.

Possession not put in issue by plea of not guilty. Glos *v.* Spitzer, 226 Ill. 82, 80 N. E. 743.

No presumption as to defendant's possession merely because he appeared at the trial. Kreamer *v.* Voncida, 213 Pa. 74, 62 A. 518.

23-63 Zerres *v.* Vanina, 134 Fed. 610; Bridenbaugh *v.* Bryant, 79 Neb. 329, 112 N. W. 571.

Actual possession of defendant or dispossession of plaintiff must be shown if plea of disclaimer interposed. Ely *v.* Pace, 139 Ala. 293, 35 S. 877.

Burden where plea of not guilty interposed is limited to plaintiff's proof of title and right of possession in one of the alleged lessors. Collier *v.* Doe, 142 Ala. 422, 38 S. 244.

23-64 Where defendant files general denial. Empire R. & C. Co. *v.* Millet, 24 Colo. App. 464, 135 P. 127.

24-68 Cochran *v.* Kimbrough, 157 Ala. 454, 47 S. 709; Stratton *v.* Murray, 25 Colo. App. 395, 138 P. 1015; Dallam *v.* Sanchez, 56 Fla. 779, 47 S. 871 (admits nothing but possession at time suit begun).

24-69 Jacobson *v.* Hayday, 83 N. J. L. 537, 83 A. 902.

24-72 Admissions of defendant against interest may be proved. Conselyea *v.* Van Dorn, 129 App. Div. 520, 114 N. Y. S. 61.

Plaintiff may show agreement with common grantor to list land for taxes, and how rents should be applied and that defendant had tried to purchase land. Nance *v.* Rourk, 161 N. C. 646, 77 S. E. 757.

Judgment in action for forcible entry, conclusive as to defendant's possession; plaintiff may show delivery pursuant thereto without producing writ of restitution. Haden *v.* Goodwin, 217 Mo. 662, 117 S. W. 1129.

Defendant's testimony may supply evidence of his possession. Gough *v.* Center, 57 Wash. 276, 106 P. 774.

25-74 Sipe *v.* Herman, 161 N. C. 107, 76 S. E. 556; Crane *v.* R. Co., 66 Or. 317, 133 P. 810.

26-77 Furst *v.* Satterfield, 44 Ind. App. 613, 89 N. E. 906.

26-78 Talley *v.* Co., 24 Okla. 472, 103 P. 591.

Demand not necessary in action brought by heirs of vendor in an executory contract for sale of land where defendants continued in possession unlawfully after their right had terminated and they were asserting full title in themselves. Chavez *v.* de Bergere, 231 U. S. 482, 34 Sup. Ct. 144.

Written demand is admissible in evidence even though delivered to defendant while sheriff was present with the writ in his pocket. The commencement of the suit is not the issuance of the writ but the service of it. Bean *v.* Atkins (Vt.), 89 A. 643.

27-80 Demand need not be shown if

general issue is only plea. Carroll *v.* Rabberman, 240 Ill. 450, 88 N. E. 995.

27-81 Maxwell L. G. Co. *v.* Dawson, 151 U. S. 586, 7 N. M. 133, 34 P. 191; Busbee *v.* Thomas, 175 Ala. 423, 57 S. 587; Lodge *v.* Wilkerson, 165 Ala. 302, 51 S. 609; Chastang *v.* Chastang, 141 Ala. 451, 37 S. 799; Stoffelo *v.* Molina, 8 Ariz. 211, 71 P. 912; Pace *v.* Crandell, 74 Ark. 417, 86 S. W. 812; Winchester *v.* Payne, 10 Cal. App. 501, 102 P. 531; Phelps *v.* Nazworthy, 226 Ill. 254, 80 N. E. 756; Crouch *v.* Wainscott, 28 Ky. L. R. 1026, 97 S. W. 289 (processioners' report prima facie evidence as to boundaries); Heiney *v.* Nolan, 75 N. J. L. 397, 67 A. 1008; Brown *v.* King, 107 N. C. 313, 12 S. E. 137; Harper *v.* Anderson, 132 N. C. 89, 43 S. E. 588; Dexter *v.* Arzuaga, 4 P. R. Fed. 344; Tellico Mfg. Co. *v.* Mitchell (Tenn.), 1 S. W. 514; Adams *v.* Cumby, 111 Va. 545, 70 S. E 3 (a question of boundary line of a city lot, reversed because insufficient evidence to sustain judgment for plaintiff); Lundell *v.* Allen, 57 Wash. 150, 106 P. 626; Milk *v.* Edgell, 69 W. Va. 421, 71 S. E. 574; Ronk *v.* Higginbotham, 54 W. Va. 137, 46 S. E. 128.

Sufficiency of description.—Williams *v.* Perry, 136 Ga. 453, 71 S. E. 886.

Common reputation as to the number of acres in a certain tract of land is not admissible. Busbee *v.* Thomas, 175 Ala. 423, 57 S. 587.

Identity cannot be predicated on size of tracts of land shown in assessment lists. Floyd *v.* Co., 222 Pa. 257, 71 A. 13.

27-83 Swindall *v.* Ford (Ala.), 63 S. 651; Le Moyne *v.* Litton (Ky.), 167 S. W. 912; Fuller *v.* Keesee, 31 Ky. L. R. 1099, 104 S. W. 700; Kentucky, etc. Co. *v.* C., 128 Ky. 610, 108 S. W. 931; Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. 725; Virginia, etc. Co. *v.* Co., 101 Va. 723, 45 S. E. 291; Rock House F. L. Co. *v.* Gray (W. Va.), 80 S. E. 821.

Burden shifts to defendant after plaintiff has shown land is within his patent and not within any prior excepted patent. Steele *v.* Bryant, 132 Ky. 569, 116 S. W. 755.

28-84 Dorlan *v.* Westervitch, 140 Ala. 283, 37 S. 382, 103 Am. St. 35; Birdwell *v.* Brown, 48 Ga. 179; Conrad *v.* Sackett, 8 Kan. App. 635, 56 P. 507; Lenoir *v.* Bk., 87 Miss. 559, 40 S. 5.

Conclusion of witness, inadmissible. Hamilton *v.* Trust, 39 Mont. 269, 102 P. 335.

Opinion based on surveyor's statements, not admissible. Rehfuss *v.* Hill, 243 Ill. 140, 90 N. E. 187.

Declarations of deceased owner may show identity of property. Hunter *v.* Hunter, 37 Pa. Super. 311.

28-85 Pace *v.* Crandall, 74 Ark. 417, 86 S. W. 812. See Hester *v.* Keen, 141 Ga. 832, 82 S. E. 250.

29-86 Evidence to show location. Plats, locations and surveys, admissible to establish location and boundaries. Driver *v.* King, 145 Ala. 585, 40 S. 315. Surveyor's notes and returns admissible for same purpose. Lanning *v.* Case, 4 Wash. (C. C.) 169, 14 Fed. Cas. No. 8,072; Galbraith *v.* Elder, 8 Watts (Pa.) 81; Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680.

Unofficial survey not admissible to apply a patent to lands not described therein without proving original location of warrant. Payne *v.* Howard, 107 Pa. 579. Survey made by court's order in another suit between other parties, not admissible. Surget *v.* Little, 5 Sm. & M. (Miss.) 319. Surveyor general's report to commissioner of general land office, detailing history of operations in making surveys, not admissible. Clark *v.* Hammerle, 36 Mo. 620.

To determine location of water front. A map purporting to have been made by order of harbor commissioners, but not shown to have been adopted, inadmissible; but county surveyor's unofficial diagram admissible to show what party offering it claimed to be the true location of water front. P. *v.* Klumpke, 41 Cal. 263.

To show location of object not indicated on a map, plat or survey, evidence not admissible. Carroll *v.* Norwood, 1 Har. & J. (Md.) 167; Neal *v.* Hopkins, 87 Md. 19, 39 A. 322.

Documentary evidence in general, including tax receipts, abstracts of grants, copies of plans to show the general location, levies, entries, bonds for title, etc., are admissible to identity, or to describe or aid in describing property in controversy. Newman *v.* Co., 80 Fed. 228, 25 C. C. A. 382 (bonds for title); Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. 391 (copies of

plans to show general locations); Sanscrainte *v.* Torongo, 87 Mich. 69, 49 N. W. 497 (tax receipts); St. Louis Pub Schools *v.* Risley, 40 Mo. 356; McLenan *v.* Chisholm, 64 N. C. 323 (abstracts or grants); Beeson *v.* Hutchison, 4 Watts (Pa.) 442 (levies); Sulphur M. Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232; (extracts from land books in connection with tax receipts); Camden *v.* Haskill, 3 Rand. (Va.) 462 (entries); Chapman *v.* Doe, 2 Leigh (Va.) 329. But documents which fail to describe the land or to accurately describe it are inadmissible. Morring *v.* Tipton, 126 Ala. 350, 28 S. 562; Barron *v.* Barron, 122 Ala. 194, 25 S. 55; Hart *v.* Williams, 189 Pa. 31, 41 A. 983. See Hammond *v.* Norris, 2 Har. & J. (Md.) 130; Burke *v.* Jackson, 57 Hun 320, 10 N. Y. S. 577, 11 N. Y. S. 2.

Extrinsic evidence is admissible to establish identity or to aid in arriving at description of property. McElrath *v.* Haley, 48 Ga. 641; Neal *v.* Hopkins, 87 Md. 19, 39 A. 322; Crooks *v.* Whitford, 47 Mich. 283, 11 N. W. 159; Kron *v.* Daugherty, 9 Pa. Super. 163. But not to show surveyor's failure to comply with instructions. Gittings *v.* Hall, 1 Har. & J. (Md.) 14, 2 Am. Dec. 502.

29-87 Brannan *v.* Henry, 175 Ala. 454, 57 S. 967.

Plaintiff's evidence may relieve defendant. McCreary *v.* Co., 148 Ala. 247, 41 S. 822.

Good faith in making improvements. Defendant must establish that improvements for which he claims compensation were made in good faith when there was good reason to, and he did, believe he owned the land. He may show length of possession, assertion of absolute ownership, conveyance under which he held, amount paid for land and advice of counsel as to title. Faison *v.* Kelly, 149 N. C. 282, 62 S. E. 1086.

29-88 See Sonnemann *v.* Mertz, 221 Ill. 362, 77 N. E. 550.

Defendant must show disqualification of plaintiff's grantor to hold title. Gough *v.* Center, 57 Wash. 276, 106 P. 774.

29-89 Lindblom *v.* Rocks, 146 Fed. 660, 77 C. C. A. 86; Farr *v.* Perkins, 173 Ala. 500, 55 S. 923; Coulson *v.* Scott, 167 Ala. 606, 52 S. 436; Ely *v.* Pace, 139 Ala. 293, 35 S. 877; Nevin *v.* Disharoon, 6 Penne. (Del.) 278, 66 A. 362; Sonnemann *v.* Mertz, 221 Ill. 362, 77 N. E. 550; Watkins *v.* Co. (Ky.), 119 S. W. 225; Young *v.* Duggin, 30 Ky. L. R. 634, 99 S. W. 655; McQuinn *v.* Moore, 225 Mo. 36, 123 S. W. 858 (immaterial affirmative relief not asked); McBrayer *v.* Blanton, 157 N. C. 320, 72 S. E. 1070; Westfeldt *v.* Adams, 159 N. C. 409, 74 S. E. 1041; Altschul *v.* Casey, 45 Or. 182, 76 P. 1083; McMurray *v.* Dixon, 105 Va. 605, 54 S. E. 481; Russell *v.* Gay, 33 Wash. 83, 73 P. 795; Wood *v.* Earls, 39 Wash. 21, 80 P. 837.

30-90 South Grand Rapids Imp. Co. *v.* R. Co., 142 Mich. 620, 105 N. W. 1121; Wood *v.* Praul, 217 Pa. 293, 66 A. 528. See Lloyd *v.* Oates, 143 Ala. 231, 38 S. 1022.

31-92 In Brown *v.* Loeb, 177 Ala. 106, 58 S. 330, on cross-examination, defendant asked plaintiff, J. Loeb, testifying for himself, the following objectionable question: "At the time this mortgage was made, did this woman, Millie Brown, owe you anything?" Defendant also asked the plaintiff, Loeb, this question: "Did Millie Brown and James Brown, at the time you say this mortgage was made, owe I. Loeb and J. Loeb anything?"

Adverse possession a defense. Brannan *v.* Henry, 142 Ala. 698, 39 S. 92; Krause *v.* Nolte, 217 Ill. 298, 75 N. E. 362.

Record in prior suit to establish highway over land, competent to prove act of ownership by defendant's grantor and negative such act by plaintiff, though he was not a party to such suit. Chess *v.* Grant, 163 Fed. 500, 90 C. C. A. 46.

32-93 Davis *v.* Anderson, 163 Ala. 385, 50 S. 1002; Cassin *v.* Nicholson, 154 Cal. 497, 98 P. 190; Wienecke *v.* Deputy, 31 Ind. App. 621, 68 N. E. 921; McQuinn *v.* Moore (Mo.), 123 S. W. 858; Stone *v.* Perkins, 217 Mo. 586, 117 S. W. 717 (if equitable defense not pleaded judgment in former action is not a bar, though between same parties and same issues raised except such defense); Tillson *v.* Holloway, 94 Neb 635, 143 N. W. 939; Zenske *v.* Zenske, 55 Or. 65, 103 P. 648 (equitable defense may be pleaded, and vendee in possession may introduce written contract under which he entered; parol contract may not be proved as basis of estoppel); Sullivan *v.* Moore, 84 S. C. 426, 65 S. E. 108 (estoppel by conduct); Brown *v.* Haley, 56 Wash. 218, 105 P.

478; Harley *v.* Harley, 140 Wis. 282, 122 N. W. 761.

33-97 Equitable defense must be distinctly proved. Bolen *v.* Hoven, 150 Ala. 448, 43 S. 736; McCauley *v.* Fulton, 44 Cal. 355; Williams *v.* Milligan, 183 Pa. 386, 38 A. 1015; Reagan *v.* Curran, 226 Pa. 265, 75 A. 362 (irrevocable parol license must be shown by evidence of same character as is required to take parol sale or gift out of operation of statute of frauds).

33-98 If a parol contract with decedent is relied on, its existence, terms and conditions and compliance therewith must be shown beyond reasonable doubt. McGuinn *v.* Moore, 225 Mo. 36, 123 S. W. 858.

33-99 Zeuske *v.* Zeuske, 55 Or. 65, 103 P. 648.

Declarations by plaintiff as to extent of land claimed are not admissible to show estoppel unless defendant knew of them. Chase *v.* Woodruff, 138 Wis. 641, 120 N. W. 499.

33-2 Dodge *v.* Co., 158 Ala. 91, 48 S. 383; Bursey *v.* Lyon, 33 App. Cas. (D. C.) 231; Steelman *v.* Lafferty, 112 Va. 494, 71 S. E. 524.

34-3 Holtzclaw *v.* Miley, 172 Ala. 15, 55 S. 150; Davis *v.* Davis, 157 Ky. 536, 163 S. W. 468; Frazier *v.* Cox (Ky.), 125 S. W. 148 (instrument relied on competent without one referred to in it); Gibson *v.* Pekarek, 25 S. D. 281, 126 N. W. 597.

34-4 Rule in Kansas.—McBride *v.* Steinweden, 72 Kan. 508, 83 P. 822. See Duffey *v.* Rafferty, 15 Kan. 9; Hollenback *v.* Ess, 31 Kan. 87, 1 P. 275.

Lease from plaintiff to defendant, admissible to create estoppel, notwithstanding allegation former possessed himself of premises after lease terminated. Thomas *v.* Young, 81 Conn. 702, 71 A. 1100.

35-5 Stevens *v.* Smoker, 84 Conn. 569, 80 A. 788. But see Risher *v.* Madsden, 94 Neb. 72, 142 N. W. 700.

36-8 Tenant in possession may not dispute landlord's title. Stevens *v.* Smoker, supra.

36-9 After acquired title may be shown if set up. Gibson *v.* Pekarek, 25 S. D. 281, 126 N. W. 597.

36-13 Brinkley *v.* Bell, 126 Ga. 480, 55 S. E. 187.

The burden of proof of proving a paramount title is on defendant after plaintiff has established a prima facie title. Foster *v.* Elledge, 106 Ark. 342, 153 S. W. 819.

Defendant has burden of proof in showing that all heirs had been settled with except himself and that land in question was his share. Hynds *v.* Hynds, 253 Mo. 20, 161 S. W. 812.

Rule in South Carolina.—Defendant may prove by parol that he claims a common source of title with plaintiff. Pineland Club *v.* Robert, 213 Fed. 545 (C. C. A.).

37-15 See Jackson *v.* Tribble, 156 Ala. 480, 47 S. 310.

Mortgage constituting a link in defendant's chain of title, admissible. Davis *v.* Anderson, 163 Ala. 385, 50 S. 1002.

Lease executed by party under whom defendant claims and who is alleged to have title by adverse possession, admissible. Scott *v.* Herrell, 31 App. Cas. (D. C.) 45.

39-20 Estoppel only arises by possession under lease. James Co. *v.* Hutchinson (W. Va.), 80 S. E. 768.

Where deceased landlord's personal representative brings suit defendant is not precluded from disputing intestate's title by leases taken by him from intestate's widow and heirs. Thomas *v.* Young, 79 Conn. 493, 65 A. 955.

40-22 *Contra*, Scott *v.* Herrell, 31 App. Cas. (D. C.) 45.

Execution of leases of the land by administrator of deceased, which latter devised to his widow, may be shown to have been done by him as her principal. Foote *v.* Brown, 81 Conn. 218, 70 A. 699.

40-23 Stratton *v.* Murray, 25 Colo. App. 395, 138 P. 1015; Carr *v.* Mouzon, 93 S. C. 161, 76 S. E. 201.

41-27 See Crane *v.* R. Co., 66 Or. 317, 133 P. 810. Burden of showing to what extent the value of land has been enhanced by improvements is on party claiming compensation therefor. Cost to him or thir value is not measure of recovery. Adams *v.* Kells, 79 Kan. 564, 100 P. 506.

ELECTIONS

How votes were counted, 73-22; *Defects in voting machine*, 120-7; *Existence of person impersonated*, 132-70; *Audit of candidate account*, 133-77.

45-1 Parol evidence competent to show that primary election was held

on given day for particular purpose. Lepinsky *v.* S., 7 Ga. App. 285, 66 S. E. 965.

45-2 In re McConaughy, 106 Minn. 392, 119 N. W. 408.

45-3 Woodruff *v.* Chapin, 83 Conn. 330, 76 A. 294.

46-4 Statute only directory. S. *v.* Scott, 171 Ind. 349, 86 N. E. 409.

46-5 Casey *v.* Bryce, 173 Ala. 129, 55 S. 810; In re Boswell, 179 Ind. 292, 100 N. E. 833; S. *v.* Thornburg, 177 Ind. 178, 97 N. E. 534.

Result of special elections not noticed unless law requires it to be made a matter of judicial record. Gay *v.* Eugene, 53 Or. 289, 100 P. 306. But *comp.* Savage's Case, 84 Va. 582, 5 S. E. 563; Thomas *v.* C., 90 Va. 92, 17 S. E. 788.

The fact of election.—S. *v.* Barr, 7 Penne. (Del.) 71, 79 A. 730.

46-6 Ballots themselves best evidence.—Rottner *v.* Buchner, 260 Ill. 475, 103 N. E. 454; Constant *v.* Shockey, 259 Ill. 496, 102 N. E. 1068; Marrero *v.* Middleton, 131 La. 432, 59 S. 863; Marrero *v.* Middleton, 131 La. 372, 59 S. 791; Tingley *v.* Phelps, 74 Wash. 73, 132 P. 738.

46-8 People *v.* Willi, 147 Ill. App. 207; Scholl *v.* Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal *v.* Barth, 31 Ky. L. R. 363, 102 S. W. 263. See Marrero *v.* Middleton, 131 La. 432, 59 S. 863.

Returns are conclusive upon a city board of canvassers. Stearns *v.* S., 23 Okla. 462, 100 P. 909.

47-9 Condren *v.* Gibbs, 94 Ark. 478, 127 S. W. 731; Merkley *v.* Trainor, 142 Cal. 265, 75 P. 656; Galloway *v.* Bradburn, 119 Ky. 49, 82 S. W. 1013; McEuen *v.* Cary, 29 Ky. L. R. 931, 96 S. W. 850; Allen *v.* Wildman, 38 Okla. 652, 134 P. 1102 (in the absence of fraud); Stafford *v.* Sheppard, 57 W. Va. 84, 50 S. E. 1016.

In Indiana, "the policy of the election law subsequent to the act of 1881 and prior to 1909 was clearly to render the return of the election board and the canvassing boards conclusive except for fraud, and except as to the protested, disputed, and uncounted ballots, and prima facie evidence of the result of an election, and this has been the view of the courts." S. *v.* Thornburg, 177 Ind. 178, 97 N. E. 534, *cit.* cases.

In Missouri, "the adoption of the local option law is established prima facie by the state by the production of a certified copy of the result of the election, as spread upon the records of the county court in compliance with that law and proof that the requisite subsequent publication of the result was made. State *v.* Searey, 111 Mo. 236, 20 S. W. 186; State *v.* Kimmel, 156 Mo. App. 461, 137 S. W. 329; State *v.* O'Kelley, 156 Mo. App. 493, 137 S. W. 332." S. *v.* Wilson, 161 Mo. App. 301, 143 S. W. 534.

"The board of canvassers were acting under a statute (Rev. §4356) which made it their duty 'to judicially determine the result of the election,' and having found as a fact that the relator received 433 votes in Broadbay, and that the defendant was duly elected, the referee properly held that this made out a prima facie case for the defendant. Bynum *v.* Comrs., 101 N. C. 412, 8 S. E. 136; Gatling *v.* Boone, 98 N. C. 573, 3 S. E. 392; Wallace *v.* Salisbury, 147 N. C. 58, 60 S. E. 713." Jones *v.* Flynt, 159 N. C. 87, 74 S. E. 817.

47-10 Roland *v.* Walker, 244 Ill. 129, 91 N. E. 80 (if ballots tampered with); Lucas *v.* Avis, 28 Ky. L. R. 184, 89 S. W. 1; Galloway *v.* Bradburn, 119 Ky. 49, 82 S. W. 1013 (certificate best evidence to show how vote cast if ballots tampered with).

47-11 See Arie *v.* S., 23 Okla. 166, 100 P. 23.

47-12 In re McConaughy, 106 Minn. 392, 119 N. W. 408, except as against collateral attack.

48-13 Atty.-General *v.* Board, 166 Mich. 61, 131 N. W. 163. See Haehnle B. Co. *v.* Board, 156 Mich. 493, 121 N. W. 209.

48-18 Election officers cannot impeach own returns generally. Smith *v.* Rauh, 32 O. C. C. 515.

49-19 Sullivan *v.* Orange County Comrs., 59 Fla. 630, 52 S. 517; S. *v.* Thornburg, 177 Ind. 178, 87 N. E. 534; Scholl *v.* Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal *v.* Barth, 31 Ky. L. R. 363, 102 S. W. 263; Browning *v.* Lovett, 29 Ky. L. R. 692, 94 S. W. 661. See Eldridge *v.* Nickerson, 192 Mass. 409, 78 N. E. 461 (town election—recount not allowed after recordation of result and adjournment—exceptions); Clary *v.* Hurst, 104 Tex. 423, 138 S. W. 566, question certified from 136 S. W. 840.

Ballots and election returns are public documents, and admissible on clerk's

certificate. S. *v.* Baker, 35 Nev. 1, 126 P. 345.

50-21 Averyt *v.* Williams, 8 Ariz. 355, 76 P. 463; Condren *v.* Gibbs, 94 Ark. 478, 127 S. W. 731; Merkley *v.* Trainor, 142 Cal. 262, 75 P. 656; Garms *v.* P., 108 Ill. App. 631; Lucas *v.* Avis, 28 Ky. L. R. 182, 89 S. W. 1; McEuen *v.* Cary, 29 Ky. L. R. 931, 96 S. W. 850; Scholl *v.* Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal *v.* Barth, 31 Ky. L. R. 363, 102 S. W. 263; Edwards *v.* Logan, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257 (ballots primary evidence by statute); Lester *v.* Fogarty, 30 Ky. L. R. 759, 99 S. W. 910; Lane *v.* Bailey, 29 Mont. 548, 75 P. 191 (identified ballot best evidence); Eufaula *v.* Gibson, 22 Okla. 507, 98 P. 565; Stafford *v.* Board, 57 W. Va. 84, 50 S. E. 1016.

See McCardle *v.* Barstow, 145 Cal. 135, 78 P. 371.

50-22 Chatham *v.* Mansfield, 1 Cal. App. 298, 82 P. 343; Roland *v.* Walker, 244 Ill. 129, 91 N. E. 80; Browning *v.* Lovett, 29 Ky. L. R. 692, 94 S. W. 661; Williamson *v.* Musick, 60 W. Va. 59, 53 S. E. 706.

50-23 See Moon *v.* Harris, 122 Minn. 138, 142 N. W. 12.

Ballots not preserved as provided by statute are inadmissible. Farrell *v.* Heiberg, 262 Ill. 407, 104 N. E. 835; Thornhill *v.* Wear, 13 La. 739, 60 S. 228

Statute mandatory, ballots inadmissible if formalities not complied with. Neely *v.* Rice, 29 Ky. L. R. 1142, 97 S. W. 737.

51-25 "Before ordering such recount, he should be satisfied that the petitioner's claim is made in good faith, and upon reasonable grounds; but what evidence should be considered sufficient for that purpose is a matter resting largely in the judgment and discretion of the trial judge, and it will ordinarily not be reviewed upon an appeal to this court." Donovan *v.* Davis, 85 Conn. 394, 82 A. 1025, *quot.* from Conaty *v.* Gardner, 75 Conn. 48, 52 A. 416.

52-28 Doak *v.* Briggs, 139 Ia. 520, 116 N. W. 114; Wheeler *v.* Lawrence, 78 Kan. 878, 99 P. 228; Stafford *v.* Sheppard, 57 W. Va. 84, 50 S. E. 1016.

52-29 Chatham *v.* Mansfield, 1 Cal. App. 298, 82 P. 343; Garms *v.* P., 108 Ill. App. 631; Choisser *v.* York, 211 Ill. 56, 71 N. E. 940; Doak *v.* Briggs, 139 Ia. 520, 116 N W. 114; Browning *v.* Lovett, 29 Ky. L. R. 692, 94 S. W. 661.

52-30 Brents *v.* Smith, 250 Ill. 521, 95 N. E. 484. See Potter *v.* Campbell (Ky.), 167 S. W. 404.

Contestant must make preliminary proof. West *v.* Sloan, 238 Ill. 330, 87 N. E. 323.

53-31 Garms *v.* P., 108 Ill. App. 631.

53-32 Choisser *v.* York, 211 Ill. 56, 71 N. E. 940; Murphy *v.* Lentz, 131 Ia. 328, 108 N. W. 530. See Potter *v.* Campbell (Ky.), 167 S. W. 404.

53-33 Choisser *v.* York, 211 Ill. 56, 71 N. E. 940 (ballots accessible to unauthorized persons); Murphy *v.* Lentz, 131 Ia. 328, 108 N. W. 530; S. *v.* Barr, 90 Neb. 766, 134 N. W. 525. See Potter *v.* Campbell (Ky.), 167 S. W. 404.

"**By reason of the claim** that there was no statute in force authorizing a recount, and that the handling and use of the ballots and papers since the election, their being carried from Dunkirk to Portland on the occasion of the recount, and the packages had been opened by unauthorized persons, and the possibility that the ballots might have been handled or tampered with, appellant contends that the papers and ballots have not been preserved with such care that the ballots could have any force as evidence, and that their value as evidence is thereby destroyed, and objection to their introduction is made on this ground, as to most of them, which will be hereafter designated as the general objection to avoid repetition. The objections seem to us to go rather to their weight than to their admissibility. What are claimed to be the original ballots are before us. In the absence of any specific evidence as to their having been tampered with, we are bound to presume that they have been honestly preserved, as they came from the hands of the inspectors." S. *v.* Thornburg (Ind.), 97 N. E. 534.

54-34 Huston *v.* Anderson, 145 Cal. 320, 78 P. 626; Bass *v.* Leavitt, 11 Cal. App. 582, 105 P. 771; Choisser *v.* York, 211 Ill. 56, 71 N. E. 940 (seals upon packages containing ballots broken—ballots disfigured and removed from wires upon which strung); Murphy *v.* Lentz, 131 Ia. 328, 108 N. W. 530; Lester *v.* Fogarty, 30 Ky. L. R. 759, 99 S. W. 910; Galloway *v.* Bradburn, 26 Ky. L. R. 977, 82 S. W. 1013; McEuen *v.* Cary, 29 Ky. L. R. 931, 96 S. W. 850; Hamilton *v.* Young, 26 Ky. L. R. 447, 81 S. W. 682; Browning *v.* Lovett, 29 Ky. L. R. 692, 94 S. W. 661.

See Moorhead *v.* Arnold, 73 Kan. 132, 84 P. 742; Potter *v.* Campbell (Ky.), 167 S. W. 404; Tschetter *v.* Ray, 28 S. D. 604, 134 N. W. 796; Stafford *v.* Sheppard, 57 W. Va. 84, 50 S. E. 1016; Williamson *v.* Musick, 60 W. Va. 59, 53 S. E. 706.

54-35 West *v.* Sloan, 238 Ill. 330, 87 N. E. 323; Garms *v.* P., 108 Ill. App. 631; Murphy *v.* Lentz, 131 Ia. 328, 108 N. W. 530; Galloway *v.* Bradburn, 26 Ky. L. R. 977, 82 S. W. 1013; Stafford *v.* Sheppard, 57 W. Va. 84, 50 S. E. 1016.

55-38 Hamilton *v.* Young, 26 Ky. L. R. 447, 81 S. W. 682.

55-40 Murphy *v.* Lentz, 131 Ia. 328, 108 N. W. 530; McEuen *v.* Cary, 29 Ky. L. R. 931, 96 S. W. 850; Lester *v.* Fogarty, 30 Ky. L. R. 759, 99 S. W. 910.

55-41 West *v.* Sloan, 238 Ill. 330, 87 N. E. 323; O'Neal *v.* Barth, 31 Ky. L. R. 363, 102 S. W. 263; Scholl *v.* Bell, 31 Ky. L. R. 335, 102 S. W. 248, *cit.* local cases.

55-42 West *v.* Sloan, 238 Ill. 330, 87 N. E. 323.

56-43 Huston *v.* Anderson, 145 Cal. 320, 78 P. 626; Murphy *v.* Lentz, 131 Ia. 328, 108 N. W. 530; McEuen *v.* Cary, 29 Ky. L. R. 931, 96 S. W. 850. See Ogg *v.* Glover, 72 Kan. 247, 83 P. 1039.

57-46 Murphy *v.* Lentz, 131 Ia. 328, 108 N. W. 530; S. *v.* Patterson, 84 O. St. 89, 95 N. E. 780.

57-47 Averyt *v.* Williams, 8 Ariz. 355, 76 P. 463; Huston *v.* Anderson, 145 Cal. 320, 78 P. 626; Murphy *v.* Lentz, 131 Ia. 328, 108 N. W. 530; McEuen *v.* Cary, 29 Ky. L. R. 931, 96 S. W. 850; Murchie *v.* Clifford (N. M.), 79 P. 901. See Bass *v.* Leavitt, 11 Cal. App. 582, 105 P. 771.

58-50 P. *v.* Wintermute, 106 N. Y. S. 1076, use of voting machine.

After due destruction of ballots voters cannot be heard to testify how they voted. Condren *v.* Gibbs, 94 Ark. 478, 127 S. W. 731.

58-51 P. *v.* Wintermute, 106 N. Y. S. 1076, ballot as indicated by machine.

59-53 P. *v.* Wintermute, supra.

62-65 See Savage *v.* Umphries (Tex. Civ.), 118 S. W. 893.

62-67 See Savage *v.* Umphries, supra.

62-68 Presumed that mutiliation occurred after ballot was voted. Savage *v.* Umphries, supra.

64-77 In re Fergus Falls Election (Minn.), 135 N. W. 1002.

64-80 Held insufficient.—In re Fergus Falls Election, supra.

69-98 Thomasville *v.* Co., 122 Ga. 399, 50 S. E. 169.

69-99 Condren *v.* Gibbs, 94 Ark. 478, 127 S. W. 731; Echerd *v.* Viele, 164 N. C. 122, 80 S. E. 408.

69-1 Illinois Trust & S. Bk. *v.* Burlington, 79 Kan. 797, 101 P. 649; Lannon *v.* Ring, 107 Minn. 453, 120 N. W. 1082 (conclusive as to names and number of persons who voted in absence of clear proof of fraud).

69-6 Poll book and tally sheet are competent to show number of votes cast. Seesholtz *v.* Johnstown, 6 O. N. P. (N. S.) 187.

70-7 Glover *v.* Morris, 122 Ga. 768, 50 S. E. 956; Brents *v.* Smith, 250 Ill. 521, 95 N. E. 484; S. *v.* Scott, 171 Ind. 349, 86 N. E. 409; Smith *v.* Rauh, 32 Ohio C. C. 515; Moss *v.* Hunt, 40 Okla. 20, 135 P. 282.

Parol evidence is ordinarily incompetent to establish result of election. Scholl *v.* Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal *v.* Barth, 31 Ky. L. R. 363, 102 S. W. 263.

70-8 P. *v.* Davidson, 2 Cal. App. 100, 83 P. 161; Strebin *v.* Lavengood, 163 Ind. 478, 71 N. E. 494; S. *v.* Markley, 9 O. C. C. (N. S.) 561 (contents of destroyed ballots proved by parol). But see Scholl *v.* Bell, 31 Ky. L. R. 335, 102 S. W. 248 (a lost or destroyed ballot cannot be supplied); O'Neal *v.* Barth, 31 Ky. L. R. 363, 102 S. W. 263. See S. *v.* Songer, 76 Ark. 169, 88 S. W. 903.

70-9 Brents *v.* Smith, 250 Ill. 521, 95 N. E. 484; Martin *v.* McGarr, 27 Okla. 653, 117 P. 323.

71-12 To deduct illegal votes from one party it must be shown that they were cast and counted for such party. Scholl *v.* Bell, 31 Ky. L. R. 335, 102 S. W. 248.

See also Duff *v.* Crawford, 30 Ky. L. R. 323, 97 S. W. 1124; O'Neal *v.* Barth, 31 Ky. L. R. 363, 102 S. W. 263. Burden of showing such facts is on contestant. Combs *v.* Combs, 30 Ky. L. R. 161, 97 S. W. 1127.

72-18 Buckingham *v.* Angell, 238 Ill. 564, 87 N. E. 285; Strebin *v.* Lavengood, 163 Ind. 478, 71 N. E. 494; Vansant *v.* McPherson, 155 Ky. 34, 159 S. W. 630; Lane *v.* Bailey, 29 Mont. 548, 75 P. 191; P. *v.* Wintermute, 106 N. Y. S. 1076; S. *v.* Markley, 9 O. C. C. (N. S.) 561.

73-21 Skain *v.* Milward, 138 Ky. 200, 127 S. W. 773; Montgomery *v.* Dormer, 181 Mo. 5, 79 S. W. 913; Frazier *v.* Yardley, 181 Mo. 18, 79 S. W. 1195; S. *v.* Markley, 9 O. C. C. (N. S.) 561 (if a witness discloses that he voted and it is shown to be an illegal vote, he may be compelled to answer as to whom he voted for).

Secret illegal ballots.—Impossible to show for whom such were cast where voter exercises privilege against self-incrimination. Scholl *v.* Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal *v.* Barth, 31 Ky. L. R. 363, 102 S. W. 263.

73-22 Lane *v.* Bailey, 29 Mont. 548, 75 P. 191.

Election judges may testify how illegal votes were counted. Montgomery *v.* Dormer, 181 Mo. 5, 79 S. W. 913.

74-24 Widmayer *v.* Davis, 231 Ill. 42, 83 N. E. 87; Welsh *v.* Shumway, 232 Ill. 54, 83 N. E. 549; Scholl *v.* Bell, 31 Ky. L. R. 335, 102 S. W. 248 (direct or circumstantial evidence admissible).

74-26 McCormick *v.* Jester, 53 Tex. Civ. 306, 115 S. W. 278 (circumstantial evidence may overcome presumption of regularity).

In a prosecution for procuring one to vote, knowing him not to be qualified, it is proper to admit the registry book, the law requiring that the names of persons voting shall be checked upon that list at the time they vote. S. *v.* Carroll, 82 N. J. L. 227, 82 A. 304.

75-32 Hansen *v.* Village (Minn.), 148 N. W. 276; Horton *v.* Sullivan, 35 R. I. 242, 86 A. 314.

76-43 *Comp.* Farmer *v.* Pace (Ky.), 116 S. W. 324.

77-47 Farmer *v.* Pace, supra (taking ballot from box that voter might mark it).

79-59 McCormick *v.* Jester, 53 Tex. Civ. 306, 115 S. W. 278.

79-66 Marrero *v.* Middleton, 131 La. 432, 59 S. 863.

80-72 A witness may not be compelled to testify whether or not he was registered. Ham *v.* S., 156 Ala. 645, 47 S. 126.

80-73 Marrero *v.* Middleton, 131 La. 432, 59 S. 863.

81-74 West *v.* Sloan, 238 Ill. 330, 87 N. E. 323.

81-75 S. *v.* Keating, 202 Mo. 197, 109 S. W. 648.

81-78 Linger *v.* Balfour (Tex. Civ.), 149 S. W. 795.

81-81 McCormick *v.* Jester, 53 Tex. Civ. 306, 115 S. W. 278.

Testimony of non-resident searchers hearsay. S. *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49.

81-82 See Lane *v.* Bailey, 29 Mont. 548, 75 P. 191.

82-84 The residence of the parents of a person who voted is immaterial. Ham *v.* S., 156 Ala. 645, 47 S. 126.

83-95 Burden is on party alleging that voter was not qualified because of his father's citizenship. Savage *v.* Umphries (Tex. Civ.), 118 S. W. 893.

83-97 Bigham *v.* Clubb, 42 Tex. Civ. 312, 95 S. W. 675.

83-3 Sullivan *v.* Orange Co. Comrs., 59 Fla. 630, 52 S. 517; Marrero *v.* Middleton, 131 La. 432, 59 S. 863; Savage *v.* Umphries (Tex. Civ.), 118 S. W. 893 (proof of non-payment need not extend to both state and county). See Letchworth *v.* Flinn, 108 Ark. 301, 157 S. W. 402; Echerd *v.* Viele, 164 N. C. 122, 80 S. E. 408.

83-4 Lennon *v.* Board, 29 R. I. 329, 71 A. 305, 29 L. R. A. 456, 72 A. 398. But see Barron *v.* White, 29 R. I. 482, 72 A. 644.

83-5 McCormick *v.* Jester, 53 Tex. Civ. 306, 115 S. W. 278.

83-6 See Savage *v.* Umphries (Tex. Civ.), 118 S. W. 893; McCormick *v.* Jester, 53 Tex. Civ. 306, 115 S. W. 278. (burden on person claiming exemption).

Presumptions as to payment. Shepherd *v.* Sartain (Okla.), 64 S. 57.

84-8 Tinkle *v.* Wallace, 167 Ind. 382, 79 N. E. 355.

84-9 S. *v.* Bunnell, 131 Wis. 198, 110 N. W. 177.

84-11 Tinkle *v.* Wallace, 167 Ind. 382, 79 N. E. 355.

84-12 Butler *v.* Roberson, 158 Ky. 101, 164 S. W. 340.

84-13 See P. *v.* Fabian, 192 N. Y. 443, 85 N. E. 672.

85-19 Disqualification of a class of voters—how shown. Coggeshall *v.* Des Moines, 138 Ia. 730, 117 N. W. 309.

85-20 Southworth *v.* Board, 238 Ill. 190, 87 N. E. 403, notice of special election.

85-23 Elvick *v.* Groves, 17 N. D. 561, 118 N. W. 228, if there was an unauthorized change of polling place evidence that no injury followed is inadmissible.

86-29 Vigil *v.* Garcia, 36 Colo. 430, 87 P. 543.

87-32 Vigil *v.* Garcia, 36 Colo. 430, 87 P. 543.
Use of intoxicants by election officers. See infra, 104-16.

88-37 Vigil *v.* Garcia, 36 Colo. 430, 87 P. 543; Sullivan *v.* Orange County Comrs., 59 Fla. 630, 52 S. 517; Boyle *v.* McCown, 97 S. C. 15, 81 S. E. 310.

88-38 Sullivan *v.* Orange Co. Comrs., 59 Fla. 630, 52 S. 517.

89-40 County *v.* Buckley, 85 Miss. 713, 38 S. 104; Boyle *v.* McCown, 97 S. C. 15, 81 S. E. 310.

90-46 Peebles *v.* Co., 143 Ill. App. 370.

90-48 Gantt *v.* Brown, 238 Mo. 560, 142 S. W. 422.

92-59 See Vigil *v.* Garcia, 36 Colo. 430, 87 P. 543.

95-73 May be used to refresh memory. Wilson *v.* Lewis (Ala. App.), 65 S. 919.

98-90 Taylor *v.* Sparks (Ky.), 118 S. W. 970; Hendersonville *v.* Jordan, 150 N. C. 35, 63 S. E. 167.

98-91 McCormick *v.* Jester, 53 Tex. Civ. 306, 115 S. W. 278.

101-95 Williamson *v.* Musick, 60 W. Va. 59, 53 S. E. 706.

101-96 Hogins *v.* Bullock, 92 Ark. 67, 121 S. W. 1064; Brumby *v.* Marietta, 132 Ga. 408, 64 S. E. 321 (irregularities in registration).

101-97 Coleman *v.* Board, 131 Ga. 643, 63 S. E. 41; S. *v.* Election Bd., 29 Okla. 31, 116 P. 168; Senter *v.* Board, 64 W. Va. 499, 63 S. E. 284; Williamson *v.* Musick, 60 W. Va. 59, 63 S. E. 706; Pratley *v.* S., 17 Wyo. 371, 99 P. 1116.

102-1 Taylor *v.* Sparks (Ky.), 118 S. W. 970; Bauer *v.* Board, 157 Mich. 395, 122 N. W. 121; Younts *v.* Comrs., 151 N. C. 582, 66 S. E. 575; Ardmore *v.* S., 24 Okla. 862, 104 P. 913; Grove *v.* Haskell, 24 Okla. 707, 104 P. 56; Roesch *v.* Henry, 54 Or. 230, 103 P. 439; S. *v.* Salt Lake, 35 Utah 25, 99 P. 255.

103-3 Hendersonville *v.* Jordan, 150 N. C. 35, 63 S. E. 167; In re Krickbaum's Election, 221 Pa. 521, 70 A. 852; Savage *v.* Umphries (Tex. Civ.), 118 S. W. 893.

103-5 S. *v.* Barnes, 22 Okla. 191, 97 P. 997.

103-6 S. *v.* Salt Lake, 35 Utah 25, 99 P. 255.

103-10 Savage *v.* Umphries (Tex. Civ.), 118 S. W. 893, if result not affected.

104-11 Whitcomb *v.* Chase, 83 Neb. 360, 119 N. W. 673.

104-14 Wightman *v.* Tecumseh, 157 Mich. 326, 122 N. W. 122 (form of ballot); Grove *v.* Haskell, 24 Okla. 862, 104 P. 913 (informal ballots).

104-16 The weight otherwise accorded the result of election officers' labors is lessened by their illegal use of liquor. McEuen *v.* Cary, 29 Ky. L. R. 931, 96 S. W. 850.

104-17 Receiving votes of non-residents is not ground for setting aside an election unless they affected the result. Skelton *v.* Ulen, 217 Mo. 383, 117 S. W. 32.
Failure to prohibit electioneering and the approach of unauthorized persons near polling place is not fatal. Brumby *v.* Marietta, 132 Ga. 408, 64 S. E. 321.

104-18 S. *v.* Ross, 161 Mo. App. 671, 143 S. W. 510; S. *v.* Rinke, 140 Mo. App. 645, 121 S. W. 159; Guernsey *v.* McHaley, 52 Or. 555, 98 P. 158; Ex parte Gulledge, 57 Tex. Cr. 156, 122 S. W. 21; Eggborn *v.* Board, 109 Va. 94, 63 S. E. 424.

105-22 See Vigil *v.* Garcia, 36 Colo. 430, 87 P. 543.

105-24 Savage *v.* Umphries (Tex. Civ.), 118 S. W. 893.

107-35 Rampendahl *v.* Crump, 24 Okla. 873, 105 P. 201. See Vigil *v.* Garcia, 36 Colo. 430, 87 P. 543.

108-39 A two-thirds vote.—Bauch *v.* City, 165 Mo. App. 486, 148 S. W. 1003.

108-41 Burden is on party claiming rights under bonds voted at a special election to show that a majority of taxpayers voted therefor. Smith *v.* Police Jury, 125 La. 724, 51 S. 701.
Bribery is not shown by proof of sum expended by campaign committees. Skain *v.* Milward, 138 Ky. 200, 127 S. W. 773.

110-48 S. *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49; S. *v.* Conness, 106 Wis. 425, 82 N. W. 288, *appr.* S. *v.* Olin, 23 Wis. 309.

110-50 Declarations as to residence inadmissible. Ham *v.* S., 156 Ala. 645, 47 S. 126.

110-53 Hill *v.* Howell, 70 Wash. 603, 127 P. 211. See Pease *v.* S. (Tex. Civ.), 155 S. W. 657.

110-54 Hill *v.* Howell, 70 Wash. 603,

127 P. 211; S. *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49.

111-59 Sullivan *v.* Orange Co., 59 Fla. 630, 52 S. 517; Taylor *v.* Cundiff (Ky.), 118 S. W. 379; Lucas *v.* Avis, 28 Ky. L. R. 184, 89 S. W. 1; Seward *v.* Co., 201 Mass. 453, 87 N. E. 749; S. *v.* Ross, 161 Mo. App. 671, 143 S. W. 510; Carwile *v.* Jones, 38 Mont. 590, 101 P. 153; Rodwell *v.* Rowland, 137 N. C. 617, 50 S. E. 319; Altgelt *v.* Callaghan (Tex. Civ.), 144 S. W. 1166; Pratley *v.* S., 17 Wyo. 371, 99 P. 1116. See Mundfordville M. Co. *v.* Dist., 155 Ky 382, 159 S. W. 954.

111-60 **Assent of non-voting electors presumed.**—Treat *v.* De Jean, 22 S. D. 505, 118 N. W. 709. But see S. *v.* Stakke, 22 S. D. 228, 117 N. W. 129.

111-61 Primary election presumed to have been regularly called and held when question is but collaterally involved. Lepinsky *v.* S., 7 Ga. App. 285, 66 S. E. 965.

112-63 P. *v.* Davidson, 2 Cal. App. 100, 83 P. 161; Donovan *v.* Davis, 85 Conn. 394, 82 A. 1025; Galloway *v.* Bradburn, 26 Ky. L. R. 977, 82 S. W. 1013; Lucas *v.* Avis, 28 Ky. L. R. 184, 89 S. W. 1; Lannon *v.* Ring, 107 Minn. 453, 120 N. W. 1082; In re McConaughy, 106 Minn. 392, 119 N. W. 408; Harris *v.* Palmer, 25 Okla. 770, 108 P. 385.

Contestee cannot claim benefit of presumption if his evidence has overthrown it as to certain counties for a cause which may have been equally as effective in other counties. In re McConaughy, 106 Minn. 392, 119 N. W. 408.

113-66 It cannot be presumed on demurrer that electors were not influenced by an improper promise by a candidate because it was legally impossible that the promise should be fulfilled. Bush *v.* Head, 154 Cal. 277, 97 P. 512.

113-67 Shepherd *v.* Sartain (Ala.), 64 S. 57; Skain *v.* Milward, 138 Ky. 200, 127 S. W. 773; Combs *v.* Combs, 30 Ky. L. R. 161, 97 S. W. 1127; Scholl *v.* Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal *v.* Barth, 31 Ky. L. R. 363, 102 S. W. 263; In re McConaughy, 106 Minn. 392, 119 N. W. 408; Rodwell *v.* Rowland, 137 N. C. 617, 50 S. E. 319 (that no notice of election given); Humphreys *v.* Humphreys, 162 Mo. App. 408, 142 S. W. 757; Briggs *v.* Ghrist, 28 S. D. 562, 134 N. W. 321; Ralls *v.* Parish (Tex. Civ.), 151 S. W. 1089. *Comp.* Wiley *v.* McDowell, 55 Colo. 236, 133 P. 757.

In contesting nomination, burden rests on contestant.—In re Brown's Nomination Papers, 237 Pa. 570, 85 A. 872.

113-68 Welsh *v.* Shumway, 232 Ill. 54, 83 N. E. 549.

113-69 Welsh *v.* Shumway, 232 Ill. 54, 83 N. E. 549.

113-71 See Scholl *v.* Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal *v.* Barth, 31 Ky. L. R. 363, 102 S. W. 263.

Burden on contestant.—Skain *v.* Milward, 138 Ky. 200, 127 S. W. 773.

114-75 See Eufaula *v.* Gibson, 22 Okla. 507, 98 P. 565.

114-77 Identity of ballot intentionally exposed by elector must be shown by party seeking its exclusion. Harris *v.* Palmer, 25 Okla. 770, 108 P. 385.

114-78 The presumption being based on the provisions as to stealing and custody of the ballots does not apply when voting machines are used, there being no similar provisions as to their custody and care. Trumbull *v.* Board, 140 Mich. 529, 103 N. W. 993.

115-79 Averyt *v.* Williams, 8 Ariz. 355, 76 P. 463; Huston *v.* Anderson, 145 Cal. 320, 78 P. 626.

115-80 Huston *v.* Anderson, supra.

116-82 Carwile *v.* Jones, 38 Mont. 590, 101 P. 153, that mutilation occurred after ballot left voter's hands.

116-84 Bates *v.* Crumbaugh, 114 Ky. 447, 71 S. W. 75.

116-85 Shepherd *v.* Sartain (Ala.), 64 S. 57; S. *v.* Fitzsimmons (Del.), 82 A. 598; Rawl *v.* McCown (S. C.), 81 S. E. 958.

116-86 Letchworth *v.* Flinn, 108 Ark. 301, 157 S. W. 402.

No presumption that student in college town is entitled to vote therein. Welsh *v.* Shumway, 232 Ill. 54, 83 N. E. 549.

116-87 Rawl *v.* McCown (S. C.), 81 S. E. 958.

120-7 Bates *v.* Crumbaugh, 114 Ky. 447, 71 S. W. 75, same rule applicable as in contests over property rights.

Defects in voting machine.—It may be shown that a voting machine worked defectively and that it recorded a result inconsistent with the testimony of voters. But tests on it made in the presence of the jury were not competent to show the average loss made by one candidate over that of his com-

petitor. P. *v.* Wintermute, 194 N. Y. 99, 86 N. E. 818, *rev.* 106 N. Y. S. 1076.

120-8 Gantt *v.* Brown, 238 Mo. 560, 142 S. W. 422, *over.* S. *v.* Spencer, 164 Mo. 23, 63 S. W. 1112, and Montgomery *v.* Dormer, 181 Mo. 5, 79 S. W. 913.

121-9 Dobbs *v.* Hardin, 137 Ga. 191, 73 S. E. 582; White *v.* Slama, 89 Neb. 65, 130 N. W. 978.

121-11 Tinkle *v.* Wallace, 167 Ind. 382, 79 N. E. 355.

121-13 Illegal voters are not protected by the rule of secrecy and may be forced to testify how they voted. P. *v.* Turpin, 49 Colo. 234, 112 P. 539.

123-25 P. *v.* Wintermute, 194 N. Y. 99, 86 N. E. 818, not inadmissible because violating secrecy of ballot.

Record of voting machine may be used to contradict testimony of voters. P. *v.* Wintermute, 194 N. Y. 99, 86 N. E. 818.

124-28 Where certificates are issued to two for same office rule does not apply. P. *v.* Davidson, 2 Cal. App. 100, 83 P. 161.

124-30 Certificate conclusive upon collateral attack. Davis *v.* Hert, 46 Ind. App. 242, 90 N. E. 634.

124-31 Ham *v.* S., 156 Ala. 645, 47 S. 126 (as against a contestant); P. *v.* Wintermute, 194 N. Y. 99, 86 N. E. 818; S. *v.* Midgett, 151 N. C. 1, 65 S. E. 441.

125-34 Board *v.* Klein, 79 Kan. 209, 99 P. 222.

125-35 Conclusive against collateral attack. Kingsbury *v.* Nye, 9 Cal. App. 574, 99 P. 985.

125-36 P. *v.* Wintermute, 194 N. Y. 99, 86 N. E. 818, record of voting machine.

126-37 McEuen *v.* Cary, 29 Ky. L. R. 931, 96 S. W. 850.

126-39 Humphreys *v.* Humphreys, 162 Mo App. 408, 142 S. W. 757.

126-40 *Contra,* Browning *v.* Lovett, 29 Ky. L. R. 692, 94 S. W. 661.

126-41 Buckley *v.* McDonald, 33 Mont. 483, 84 P. 1114. See Hoy *v.* S., 168 Ind. 506, 81 N. E. 509; Breeden *v.* Martens, 21 S. D. 357, 112 N. W. 960.

127-45 Shepherd *v.* Sartain (Ala.), 64 S. 57; Weller *v.* Muenninghoff, 155 Ky. 77, 159 S. W. 632; Ledbetter *v.* Kimsey, 38 Okla. 671, 134 P. 868. See Tazwell *v.* Davis, 64 Or. 325, 130 P. 400.

128-46 Weller *v.* Muenninghoff, 155 Ky. 77, 159 S. W. 632; S. *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49.

128-48 S. *v.* McElhinney, 199 Mo. 67, 97 S. W. 159; Buckley *v.* McDonald, 33 Mont. 483, 84 P. 1114 (alienage of contestee); P. *v.* Wintermute, 106 N. Y. S. 1076.

129-49 Taylor *v.* Weir, 155 Ky. 72, 159 S. W. 646; Montgomery *v.* Chelf, 26 Ky. L. R. 638, 82 S. W. 388; Browning *v.* Lovett, 29 Ky. L. R. 692, 94 S. W. 661; Combs *v.* Combs, 30 Ky. L. R. 161, 97 S. W. 1127; Stephens *v.* Nacey (Mont.), 141 P. 649; Jones *v.* Flynt, 159 N. C. 87, 74 S. E. 817; Allen *v.* Wildman, 38 Okla. 652, 134 P. 1102; Ledbetter *v.* Kimsey, 38 Okla. 671, 134 P. 868; Tazwell *v.* Davis, 64 Or. 325, 130 P. 400; McCormick *v.* Jester, 53 Tex. Civ. 306, 115 S. W. 278; S. *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49.

More than suspicion necessary. Hill *v.* Mottley, 142 Ky. 385, 134 S. W. 469.

Promises as constituting bribery.—Burden on relator to show influence on voter. S. *v.* Bunnell, 131 Wis. 198, 110 N. W. 177. See Hoy *v.* S., 168 Ind. 506, 81 N. E. 509.

129-50 McCormick *v.* Jester, 53 Tex. Civ. 306, 115 S. W. 278; S. *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49; People *v.* Town, 16 Cal. App. 169, 116 P. 702. See Snyder *v.* Blake, 35 Okla. 294, 129 P. 34.

129-52 **Voters qualified.** — Warrener *v.* Lambrecht (Tex. Civ. App.), 146 S. W. 633.

130-53 The failure of a committee of a political party to be sworn before calling an election is not sufficient evidence of irregularity. Montgomery *v.* Chelf, 26 Ky. L. R. 638, 82 S. W. 388.

130-54 Burden to show improper rejection. Starkweather *v.* Dawson, 14 Cal. App. 666, 112 P. 736.

130-55 Stewart *v.* Wurts, 143 Ky. 39, 135 S. W. 434.

130-58 **Bystanders may testify** whether ballots were correctly counted. C. *v.* Edgerton, 200 Mass. 318, 86 N. E. 768.

Result of recount may be shown by any one who made it or followed it, though made in the absence of and without notice to accused. C. *v.* Edgerton, 200 Mass. 318, 86 N. E. 768.

In prosecution for fraudulent registration under fictitious name it may be shown accused had registered under his

real name in another precinct. General registration of voters at a stated time may be proved by testimony of officer of election. S. *v.* Clancy, 228 Mo. 474, 128 S. W. 754.

131-59 S. *v.* Matlack, 5 Penne. (Del.) 401, 64 A. 259 (copy of oath administered); C. *v.* Edgerton, 200 Mass. 318, 86 N. E. 768 (tally sheets); S. *v.* Carroll, 83 N. J. L. 792, 85 A. 1134.

Registry list prima facie evidence of right to vote. P. *v.* Aeritelli, 57 Misc. 574, 110 N. Y. S. 430.

Ballots cast at primary election can not be produced. S. *v.* Taylor, 220 Mo. 618, 119 S. W. 373, statute.

131-61 **The secretary of the election board** may testify that a general registration of voters was held at a given time, and oral testimony is competent to show location of place of registration. S. *v.* Thavanot, 225 Mo. 545, 125 S. W. 473.

Copy of election laws sent to the board of which defendant was a member held not admissible. C. *v.* Scott, 38 Pa. Super. 303.

131-62 S. *v.* Savre, 129 Ia. 122, 105 N. W. 387, illegal voting.

Legal advice or precautions taken by accused, who induced a voter to remove into a precinct with intent to illegally vote therein, is immaterial. S. *v.* Reed, 52 Or. 377, 97 P. 627.

131-63 **General registration** of voters on certain days may be shown by the supervising officer. S. *v.* Tiernan, 223 Mo. 142, 122 S. W. 728; S. *v.* Exmicions, 223 Mo. 61, 122 S. W. 730.

132-66 S. *v.* McGrath, 228 Mo. 413, 128 S. W. 966, uncertain testimony will not overcome it.

132-70 **Existence of person impersonated** in prosecution for impersonating another is presumed if his name appears in registration book. S. *v.* Fielder, 210 Mo. 188, 109 S. W. 580.

Defendant must establish the legal or reasonable cause excusing him for nonperformance of duty. C. *v.* Scott, 38 Pa. Super. 303.

132-71 Unnecessary to prove compliance with preliminary statutory requirements. P. *v.* Walker, 179 Ill. App. 455.

132-72 People *v.* Osborn, 170 Mich. 143, 135 N. W. 921; S. *v.* Walsh, 203 Mo. 605, 102 S. W. 513 (prosecution for illegal registration—fraudulent intent must be shown); S. *v.* Carroll, 82 N. J. L. 227, 82 A. 304.

132-73 But see S. *v.* Matlack, 5 Penne. (Del.) 401, 64 A. 259, in prosecution against election officers witness may testify that he voted, as against an objection that the registration book was the best evidence.

133-75 S. *v.* Whalen, 234 Mo. 539, 137 S. W. 881. See S. *v.* Armstrong, 203 Mo. 554, 102 S. W. 503.

133-77 Liability for failure to deliver returns shown. C. *v.* Kloss, 38 Pa. Super. 307.

Audit of candidate's account.—In proceeding to audit expense account of candidate evidence that a person to whom he intrusted money used it illegally must be accompanied with offer to show defendant's knowledge and consent. Bechtel's Election Expenses, 39 Pa. Super. 292.

EMBEZZLEMENT.

See the title "**Embezzlement**" in 7 STANDARD PROC.

135-1 Compton *v.* S., 102 Ark. 213, 143 S. W. 897; P. *v.* Rowland, 12 Cal. App. 6, 106 P. 428, *dist.* P. *v.* Walker, 142 Cal. 90, 75 P. 658 (holding evidence of accused's general indebtedness, not admissible. In former case evidence received to show accused bank cashier engaged in stock gambling and had but little property in his own name); S. *v.* Jones, 25 Ida. 587, 138 P. 1116; S. *v.* Sage, 22 Ida. 489, 126 P. 403; S. *v.* Barber, 90 S. C. 565, 73 S. E. 771; Mortimore *v.* S., 60 Tex. Cr. 69, 130 S. W. 1004.

See S. *v.* Jones, 25 Ida. 587, 138 P. 1116; Stone *v.* Case, 34 Okla. 5, 124 P. 960, 43 L. R. A. (N. S.) 1168, 1190n.

An auditor's report gathered from diverse and numerous books and based partly on hearsay is, however, inadmissible. Dickey *v.* S. (Tex. Cr.), 144 S. W. 271.

135-2 Leach *v.* S., 46 Tex. Cr. 507, 81 S. W. 733; Bowden *v.* S., 46 Tex. Cr. 69, 79 S. W. 539. See S. *v.* Coster, 170 Mo. App. 539, 156 S. W. 773, 157 S. W. 85; S. *v.* Buchanan, 43 Wash. 400, 86 P. 650.

135-3 Garner *v.* S., 51 Tex. Cr. 578, 105 S. W. 187.

135-4 Sharp *v.* S., 7 Ga. App. 749, 67 S. E. 1124, admission and corroborative circumstances.

136-5 Brock *v.* U. S., 149 Fed. 173,

79 C. C. A. 121; S. *v.* Ross, 55 Or. 450, 104 P. 596.

Embezzlement by check.—See Poteet *v.* S. (Tex. Cr.), 153 S. W. 863.

136-6 Higbee *v.* S., 74 Neb. 331, 104 N. W. 748. See S. *v.* Weber, 31 Nev. 385, 103 P. 411; S. *v.* Bickford (N. D.), 147 N. W. 407.

136-7 *Contra,* King *v.* Swinton, 1 Haw. 92, mere deficiency in accounts without proof of conversion or deceit is not sufficient.

Proof accused a broker, not determinative of guilt as a broker. C. *v.* King, 202 Mass. 379, 88 N. E. 454.

136-8 Bowden *v.* S., 46 Tex. Cr. 69, 79 S. W. 539; McCrary *v.* S., 51 Tex. Cr. 496, 103 S. W. 926; Wilkinson *v.* S., 49 Tex. Cr. 304, 91 S. W. 589.

137-9 See S. *v.* Ross, 55 Or. 450, 104 P. 596.

137-10 S. *v.* Shour, 196 Mo. 202, 95 S. W. 405; S. *v.* Wise, 186 Mo. 42, 84 S. W. 954; S. *v.* Moyer, 58 W. Va. 146, 52 S. E. 30. See Ferrell *v.* S. (Tex. Cr.), 152 S. W. 901.

138-11 See S. *v.* Hall, 45 Mont. 498, 125 P. 639; S. *v.* Castleton (Mo.), 164 S. W. 492; S. *v.* Morris, 58 Or. 397, 114 P. 476.

138-12 Sherrick *v.* S., 167 Ind. 345, 79 N. E. 193; S. *v.* Meeker, 72 N. J. L. 210, 61 A. 381; Secor *v.* S., 118 Wis. 621, 95 N. W. 942 (shortage in accounts).

138-13 Hanna *v.* Minnesota Mut. Life Ins. Co., 241 Mo. 383, 145 S. W. 412; S. *v.* Meeker, 72 N. J. L. 210, 61 A. 381; Manovitch *v.* S., 50 Tex. Cr. 260, 96 S. W. 1; Robinson *v.* C., 104 Va. 888, 52 S. E. 690; S. *v.* Moyer, 58 W. Va. 146, 52 S. E. 30.

Conversion of all sums alleged need not be proved. Hagood *v.* S., 5 Ga. App. 80, 62 S. E. 641.

Under statute permitting general allegation of embezzlement, proof of more than one act, permissible. P. *v.* Messer, 148 Mich. 168, 111 N. W. 854.

138-14 S. *v.* Laughlin, 180 Mo. 342, 79 S. W. 401; S. *v.* Shour, 196 Mo. 202, 95 S. W. 405; S. *v.* Blackley, 138 N. C. 620, 50 S. E. 310; Nat. Bk. *v.* Pittsburgh, 223 Pa. 328, 72 A. 794; C. *v.* Smith, 4 Pa. Super. 1; S. *v.* Millard, 30 S. D. 169, 138 N. W. 366; Irby *v.* S. (Tex. Cr.), 155 S. W. 543; Busby *v.* S., 51 Tex. Cr. 289, 103 S. W. 638; Manovitch *v.* S., 50 Tex. Cr. 260, 96 S. W. 1; Burk *v.* S., 50 Tex. Cr. 185, 95 S. W. 1064. See S. *v.* Lanning, 134 La. 209, 63 S. 878; S. *v.* Buchanan, 43 Wash. 400, 86 P. 650.

No embezzlement unless money came into possession of defendant. S. *v.* Russell, 98 Miss. 64, 53 S. 954.

After receipt of funds by public officer shown burden is on him to show payment. Busby *v.* S., supra. A collector cannot be convicted without proof of payment of or on accounts delivered to him; failure to explain non-delivery of them or non-payment of money, not sufficient evidence of guilt. U. S. *v.* Muyot, 2 Phil. Isl. 177.

By executor.—C. *v.* Levi, 44 Pa. Super. 253.

139-15 P. *v.* Carlson, 8 Cal. App. 730, 97 P. 827; S. *v.* Ross, 55 Or. 450, 104 P. 596 (entry on books of bank of which defendant officer); S. *v.* Grills, 35 R. I. 70, 85 A. 281; Secor *v.* S., 118 Wis. 621, 95 N. W. 942.

139-16 **Check on which money was received,** admissible as essential link in chain of evidence. S. *v.* Ingram, 124 La. 106, 49 S. 995.

Receipts for money paid by others, admissible, it having been shown defendant failed to make payments made by them. S. *v.* Nilson, 56 Wash. 289, 105 P. 829.

Bills placed in defendant's hands for collection, admissible. Hagood *v.* S., 5 Ga. App. 80, 62 S. E. 641.

Official certificates, evidence by statute. S. *v.* Dudenhefer, 122 La. 288, 47 S. 614.

139-17 Teston *v.* S., 50 Fla. 137, 39 S. 787.

140-22 P. *v.* Fisher, 16 Cal. App. 271, 116 P. 688; S. *v.* Moreaux, 254 Mo. 398, 162 S. W. 158; P. *v.* Damron, 160 App. Div. 424, 145 N. Y. S. 239; P. *v.* Fitzgerald, 130 App. Div. 124, 114 N. Y. S. 476; S. *v.* Blackley, 138 N. C. 620, 50 S. E. 310 (demand not necessary under statute); S. *v.* Ross, 55 Or. 450, 104 P. 596; S. *v.* Leonard, 56 Wash. 83, 105 P. 163; S. *v.* Moyer, 58 W. Va. 146, 52 S. E. 30; Prinslow *v.* S., 140 Wis. 131, 121 N. W. 637; Milbrath *v.* S., 138 Wis. 354, 120 N. W. 252.

140-23 S. *v.* Ensley, 177 Ind. 483, 97 N. E. 113; S. *v.* Weber, 31 Nev. 385, 103 P. 411; S. *v.* Deutsch, 77 N. J. L. 292, 72 A. 5; S. *v.* Moyer, 58 W. Va. 146, 52 S. E. 30.

141-25 Ty. *v.* Wright, 16 Haw. 123. See P. *v.* Rowland, 12 Cal. App. 6, 106 P. 428.

142-26 Ty. *v.* Wright, 16 Haw. 123;

Milbrath *v.* S., 138 Wis. 354, 120 N. W. 252 (relations of defendant with corporation formed after receipt of money). See S. *v.* Nilson, 56 Wash. 289, 105 P. 829.

142-27 Bode *v.* S., 80 Neb. 74, 113 N. W. 996. See S. *v.* Shour, 196 Mo. 202, 95 S. W. 405.

Entries made on books of bank under directions of accused, admissible. P. *v.* Rowland, 12 Cal. App. 6, 106 P. 428.

142-28 U. S. *v.* Breese, 173 Fed. 402; S. *v.* Lyons (Del.), 80 A. 976; King *v.* Swinton, 1 Haw. 92; White *v.* Co., 144 Ia. 92, 121 N. W. 1104; Taylor *v.* C., 119 Ky. 731, 75 S. W. 244; Money-weight S. Co. *v.* McCormick, 109 Md. 170, 72 A. 537; S. *v.* Barnes, 108 Minn. 227, 122 N. W. 4; Farmers' Bk. *v.* Co., 133 Mo. App. 705, 113 S. W. 1147; S. *v.* Deutsch, 77 N. J. L. 292, 72 A. 5; S. *v.* Dunn, 138 N. C. 672, 50 S. E. 772; S. *v.* Summers, 141 N. C. 841, 53 S. E. 856; S. *v.* McDonald, 133 N. C. 680, 45 S. E. 582; Busby *v.* S., 51 Tex. Cr. 289, 103 S. W. 638; Robinson *v.* C., 104 Va. 888, 52 S. E. 690; S. *v.* Moyer, 58 W. Va. 146, 52 S. E. 30. See Miller *v.* U. S., 41 App. Cas. (D. C.) 52; S. *v.* Pingel, 128 Ia. 515, 105 N. W. 58.

143-29 Eatman *v.* S., 48 Fla. 21, 37 S. 576; King *v.* Swinton, 1 Haw. 92; Dunavant *v.* C., 144 Ky. 210, 137 S. W. 1051; Maddox *v.* S. (Tex. Cr.), 156 S. W. 206; Taylor *v.* S., 50 Tex. Cr. 377, 97 S. W. 473; S. *v.* Coyle (Utah), 126 P. 305; S. *v.* Jakubowski, 77 Wash. 78, 137 P. 448. See S. *v.* Strasser, 83 N. J. L. 691, 85 A. 227.

Criminal intent not involved. S. *v.* Ross, 55 Or. 450, 104 P. 596, statute.

Under federal statutes a postmaster who negligently fails to account for stamps is guilty. Griffin *v.* Zuber, 52 Tex. Civ. 288, 113 S. W. 961.

Evidence showing bona fides.—Taylor *v.* S., 50 Tex. Cr. 377, 97 S. W. 473; S. *v.* Moyer, 58 W. Va. 146, 52 S. E. 30.

143-30 P. *v.* Blair, 19 Cal. App. 688, 127 P. 657; Le Master *v.* P., 54 Colo. 416, 131 P. 269; Trueheart *v.* S., 13 Ga. App. 661, 79 S. E. 755; McCrory *v.* S., 11 Ga. App. 787, 76 S. E. 163; Sharp *v.* S., 7 Ga. App. 749, 67 S. E. 1124; Ty. *v.* Wright, 16 Haw. 123; S. *v.* Jones, 25 Ida. 587, 138 P. 1116; S. *v.* Sage, 22 Ida. 489, 126 P. 403; McCracken *v.* P., 209 Ill. 215, 70 N. E. 749; Zuckerman *v.* P., 213 Ill. 114, 72 N. E. 741; S. *v.* Schmucher (Ia.), 143 N. W. 1110; Taylor *v.* C., 119 Ky. 731, 75 S. W. 244; Hanna *v.* Ins. Co., 241 Mo. 383, 145 S. W. 412; P. *v.* Montgomery, 152 App. Div. 1, 136 N. Y. S. 610; Leach *v.* S., 46 Tex. Cr. 507, 81 S. W. 733; S. *v.* Moyer, 58 W. Va. 146, 52 S. E. 30. See P. *v.* Messer, 148 Mich. 168, 111 N. W. 854; S. *v.* Shour, 196 Mo. 202, 95 S. W. 405.

Burden of proving fraudulent intent upon the state. S. *v.* Boggs (Ia.), 147 N. W. 934.

Presenting false check for purpose of concealing a deficit, sufficient. U. S. *v.* Osborn, 4 Phil. Isl. 352; U. S. *v.* Coates, 4 Phil. Isl. 581.

Use of money, though inability to replace it existed, not proof of intent. U. S. *v.* Coates, 4 Phil. Isl. 581.

Replacing money, after denying liability, does not prove intent. U. S. *v.* Gutierrez, 4 Phil. Isl. 493.

Insolvent condition.—Agar *v.* S., 176 Ind. 234, 94 N. E. 819.

144-31 U. S. *v.* Breese, 173 Fed. 402; Russell *v.* S. (Ark.), 166 S. W. 540; S. *v.* Lyons (Del.), 80 A. 976; Patterson *v.* U. S., 39 App. Cas. (D. C.) 84; Orr *v.* S., 6 Ga. App. 628, 65 S. E. 582; Morse *v.* C., 33 Ky. L. R. 894, 111 S. W. 714; S. *v.* Laughlin, 180 Mo. 342, 79 S. W. 401; S. *v.* Lentz, 184 Mo. 223, 83 S. W. 970; S. *v.* Merkel, 189 Mo. 315, 87 S. W. 1186; S. *v.* Ross, 55 Or. 450, 104 P. 596; S. *v.* Geyer, 80 N. J. L. 45, 77 A. 805; S. *v.* Moyer, 58 W. Va. 146, 52 S. E. 30.

"A deliberate diversion of the moneys being shown, it required but slight evidence in the facts and circumstances to satisfy the jurors as to the existence of the felonious, or criminal, intent." P. *v.* Meadows, 199 N. Y. 1, 92 N. E. 128.

Criminal character of such other similar acts must appear before evidence of them is admissible. S. *v.* Disbrow, 130 Ia. 19, 106 N. W. 263. See Gassenheimer *v.* U. S., 26 App. Cas. (D. C.) 432; C. *v.* House, 6 Pa. Super. 92.

145-33 Walsh *v.* U. S., 174 Fed. 615, 98 C. C. A. 461; Ross *v.* S., 92 Ark. 481, 123 S. W. 756; Storms *v.* S., 81 Ark. 25, 98 S. W. 678; Gassenheimer *v.* U. S., 26 App. Cas. (D. C.) 432; S. *v.* Hight, 150 N. C. 817, 63 S. E. 1043 (other property of complaining witness); Lawshe *v.* S., 57 Tex. Cr. 32, 121 S. W. 865; Leach *v.* S., 46 Tex. Cr.

707, 81 S. W. 733. *Contra* under circumstances (Morse *v.* C., 33 Ky. L. R. 894, 111 S. W. 714), unless other offenses alleged. S. *v.* Laechelt, 18 N. D. 88, 118 N. W. 240.

It is error to admit evidence of the conversion of other funds as a predicate to justify the conviction of the particular act charged. Dickey *v.* S. (Tex. Cr.), 144 S. W. 271.

General shortage in bank cashier's accounts may be shown. P. *v.* Rowland, 12 Cal. App. 6, 106 P. 428.

Other embezzlements, irrelevant. S. *v.* Deutsch, 77 N. J. L. 292, 72 A. 5.

Dissimilar offenses may be shown. S. *v.* Nilson, 56 Wash. 289, 105 P. 829. *Contra*, Bailey *v.* C., 130 Ky. 301, 113 S. W. 140.

145-34 Simpson *v.* P., 47 Colo. 612, 108 P. 169; S. *v.* Dougherty (Del.) 86 A. 736; Tipton *v.* S., 53 Fla. 69, 43 S. 684; S. *v.* Laughlin, 180 Mo. 342, 79 S. W. 401. See DeLeon *v.* Ty., 9 Ariz. 161, 80 P. 348; Pope *v.* S. (Tex. Cr.), 158 S. W. 527.

Brokers are agents.—P. *v.* Meadows, 199 N. Y. 1, 92 N. E. 128.

Not necessary money embezzled should have been voluntarily placed in hands of accused. Roland *v.* C., 134 Ky. 170, 119 S. W. 760.

146-35 S. *v.* Lyons (Del.), 80 A. 976; Basley *v.* S., 10 Ga. App. 470, 73 S. E. 624; S. *v.* Fellows, 98 Minn. 179, 107 N. W. 542, 108 N. W. 825; S. *v.* Dunn, 138 N. C. 672, 50 S. E. 772; Buddeke *v.* S., 31 O. C. C. 529, *aff.*, 94 N. E. 1115. See P. *v.* West, 146 Mich. 537, 109 N. W. 1041.

147-36 S. *v.* Hall, 45 Mont. 498, 125 P. 639.

147-37 S. *v.* Hall, 45 Mont. 498, 125 P. 639.

147-38 Hartnett *v.* S., 56 Tex. Cr. 281, 119 S. W. 855.

147-40 See S. *v.* Dunn, 138 N. C. 672, 50 S. E. 772.

148-42 Barr *v.* S. (Ala. App.), 65 S. 197.

No defense that attorney had not been admitted to bar.—Price *v.* S. (Okla. Cr.), 137 P. 736.

Some latitude proper in admission of testimony as to intent. Frink *v.* S., 56 Fla. 62, 47 S. 514.

Burden on accused to overcome effect of official certificate made evidence by statute. S. *v.* Dudenhefer, 122 La. 288, 47 S. 614.

148-43 P. *v.* Damron, 160 App. Div. 424, 145 N. Y. S. 239.

148-45 Morse *v.* C., 33 Ky. L. R. 894, 111 S. W. 714; S. *v.* Fellows, 98 Minn. 179, 107 N. W. 542, 108 N. W. 825; Com. *v.* Kleckner, 45 Pa. Super. 179.

149-46 See Morse *v.* C., 33 Ky. L. R. 894, 111 S. W. 714; S. *v.* Jones, 114 Mo. App. 343, 89 S. W. 366 (admissible to remove prejudicial inference).

149-48 Russell *v.* S. (Ark.), 166 S. W. 540; S. *v.* Lentz, 184 Mo. 223, 83 S. W. 970; S. *v.* Summers, 141 N. C. 841, 53 S. E. 856. See Morrow *v.* C., 157 Ky. 486, 163 S. W. 452; S. *v.* Merkel, 189 Mo. 315, 87 S. W. 1186.

Offer to make settlement before indicted inadmissible evidence. S. *v.* Alford, 135 La. —, 65 S. 548.

149-49 Wall *v.* S., 2 Ala. App. 157, 56 S. 57; S. *v.* Lentz, 184 Mo. 223, 83 S. W. 970; S. *v.* Summers, 141 N. C. 841, 53 S. E. 856; S. *v.* Bickford (N. D.), 147 N. W. 407; S. *v.* Baxter (Ohio), 104 N. E. 331; Busby *v.* S., 51 Tex. Cr. 289, 103 S. W. 638; Robinson *v.* C., 104 Va. 888, 52 S. E. 690. See S. *v.* Pingel, 128 Ia. 515, 105 N. W. 58; S. *v.* Merkel, supra.

150-50 Non-action by public officer, not a defense. U. S. *v.* Breese, 173 Fed. 402.

Fraudulent or unauthorized acts of bank directors, not a defense to managing officers. U. S. *v.* Breese, 173 Fed. 402.

EMINENT DOMAIN.

156-1 Imperial Irr. Co. *v.* Jayne (Tex.), 138 S. W. 575, *rev.* 127 S. W. 1137.

156-2 Washington Water Power Co. *v.* Waters, 186 Fed. 572.

158-8 Henderson *v.* Lexington, 33 Ky. L. R. 703, 111 S. W. 318; Brown *v.* Water Dist., 108 Me. 227, 79 A. 907; Boston *v.* Talbot, 206 Mass. 82, 91 N. E. 1014; Loomis *v.* Hartz, 165 Mich. 662, 131 N. W. 85; Miller *v.* Pulaski, 109 Va. 137, 63 S. E. 880.

159-9 Richland S. Tp. *v.* Overmyer, 164 Ind. 382, 73 N. E. 811; Neitzel *v.* Ry. Co., 65 Wash. 100, 117 P. 864.

159-10 Kaw Valley Drainage Dist. *v.* Water Co., 186 Fed. 315, 108 C. C. A. 393; Kaw Valley Drainage Dist. *v.* Trust Co., 186 Fed. 324, 108 C. C. A. 402; Macfarland *v.* Elverson, 32 App.

Cas. (D. C.) 81; Grafton *v.* R. Co., 16 N. D. 313, 113 N. W. 598; Miller *v.* Pulaski, supra. See Boston *v.* Talbot, 206 Mass. 82, 91 N. E. 1014.

160-11 Sexauer *v.* Co., 173 Ind. 342, 90 N. E. 474 (presumption in favor of legislative action not conclusive); Boston *v.* Talbot, 206 Mass. 82, 91 N. E. 1014; Grafton *v.* R. Co., 16 N. D. 313, 113 N. W. 598; Seattle *v.* Byers, 54 Wash. 518, 103 P. 791.

160-12 Washington Water Power Co. *v.* Waters, 186 Fed. 572.

161-13 Miller *v.* Pulaski, 109 Va. 137, 63 S. E. 880.

161-14 Kaschke *v.* Camfield, 46 Colo. 60, 102 P. 1061; City of Gary *v.* Much (Ind. App.), 95 N. E. 609, *deny.* rehear. 94 N. E. 583; S. *v.* Superior Court, 64 Wash. 189, 116 P. 855.

162-16 Kaschke *v.* Camfield, 46 Colo. 60, 102 P. 1061; Fay *v.* Macfarland, 32 App. Cas. (D. C.) 295; Kinney *v.* Co., 173 Ind. 252, 90 N. E. 129; Kansas City, etc. R. Co. *v.* Davis, 197 Mo. 669, 95 S. W. 881; Cook *v.* Borough of Manasquan, 80 N. J. L. 206, 76 A. 310; Illinois Cent. R. Co. *v.* Quarry Co. (S. D.), 144 N. W. 724. See Boalsburg W. Co. *v.* Water Co., 240 Pa. 198, 87 A. 609.

163-18 Burden on defendant. Caretta R. Co. *v.* Co., 62 W. Va. 185, 57 S. E. 401.

166-26 Slider *v.* Co., 42 Ind. App. 304, 85 N. E. 372; Cumberland T. Co. *v.* R. Co, 117 La. 199, 41 S. 492.

Articles conclusive of corporation's existence. In re Milwaukee, etc. R. Co., 124 Wis. 490, 102 N. W. 401.

Subscription for all capital stock must be shown. S. *v.* R. Co., 54 Wash. 530, 103 P. 809, statute.

166-28 Articles of incorporation, not conclusive of right to exercise eminent domain; evidence aliunde competent to show actual object of corporation. Walker *v.* Co., 160 Fed. 856, 87 C. C. A. 66.

168-32 Appropriation of funds by public, not involved before award made. Macfarland *v.* Elverson, 32 App. Cas. (D. C.) 81.

168-35 See Walker *v.* Co., 160 Fed. 856, 87 C. C. A. 66.

That condemnation is sought for a private purpose may be shown. City of Kirkwood *v.* Cronin (Mo.), 168 S. W. 674.

Use of proposed highway by large number of people need not be shown; immaterial that benefits of it may not be equal. Heath *v.* Sheetz, 164 Ind. 665, 74 N. E. 505. See S. *v.* Court, 42 Wash. 675, 85 P. 669.

169-36 Walker *v.* Co., 160 Fed. 856, 87 C. C. A. 66 (in case of doubt legislative determination not disturbed); Smith *v.* Dist., 229 Ill. 155, 82 N. E. 278.

169-37 Madera R. Co. *v.* Co., 3 Cal. App. 668, 87 P. 27; Heath *v.* Sheetz, 164 Ind. 665, 74 N. E. 505; McMillan *v.* Noyes, 75 N. H. 258, 72 A. 759. See Caretta R. Co. *v.* Co., 62 W. Va. 185, 57 S. E. 401. But see Deemer *v.* R. Co., 212 Pa. 491, 61 A. 1014, holding burden to be on plaintiff in proceeding to restrain railroad from taking private property for private use, to show proposed use private.

Presumed exercise of power by municipality is for public use; otherwise as to private corporation. Henderson *v.* Lexington, 33 Ky. L. R. 703, 111 S. W. 318; Louisville N. & R. Co. *v.* Louisville, 131 Ky. 108, 114 S. W. 743. See 169-38.

169-38 In re 21st St. (Mo.), 96 S. W. 201 (evidence admissible to show use not to be public).

Recital in ordinance use is public, not conclusive. Oral or documentary evidence, admissible to show purpose. Kansas City *v.* Hyde, 196 Mo. 498, 96 S. W. 201.

Action by municipal authorities in seeking land for street purposes, sufficient. Seattle *v.* Byers, 54 Wash. 518, 103 P. 791.

Previous adjudication of public character of use, conclusive. Sultan, etc. Co. *v.* Co., 31 Wash. 558, 72 P. 114.

170-39 Chicago *v.* Lehman, 262 Ill. 468, 104 N. E. 829. See Laguna Dist. *v.* Co., 5 Cal. App. 166, 89 P. 993 (determination by trustees as to necessity for drainage, conclusive by statute); City of Gary *v.* Much (Ind. App.), 95 N. E. 609, *deny.* rehear. 94 N. E. 583; Illinois Cent. R. Co. *v.* Quarry Co. (S. D.), 144 N. W. 724.

170-42 Rome *v.* Co., 113 App. Div. 547, 100 N. Y. S. 357; S. *v.* Superior Ct., 64 Wash. 189, 116 P. 855; S. *v.* Co., 42 Wash. 632, 85 P. 344.

171-44 Laguna Dist. *v.* Co., 5 Cal. App. 166, 89 P. 993; Texas & P. R. Co. *v.* Co., 125 La. 371, 51 S. 294; Grafton *v.* R. Co., 16 N. D. 313, 113 N. W.

598. See Grand Rapids *v.* Coit, 149 Mich. 668, 113 N. W. 362.

That land to be condemned joined two public parks may be shown. Spokane *v.* Merriam (Wash.), 141 P. 358.

172-45 Tracy *v.* R. Co., 80 Ky. 259; Yazoo, etc. Co. *v.* Sugar Co., 135 La. —, 65 S. 638; Louisiana, etc. Co. *v.* Co., 115 La. 328, 39 S. 1; Pere M. R. Co. *v.* Co., 154 Mich. 290, 117 N. W. 733 (allegation of condemnor being traversed, notwithstanding statute provides owner may show cause against petition); R. Co. *v.* Co., 132 N. C. 644, 44 S. E. 358; Wisconsin R. *v.* University, 52 Wis. 537, 8 N. W. 491.

Where prior adjudication is relied upon to defeat the condemnation defendant must show there are no new facts or circumstances which warrant the taking. Laguna Dist. *v.* Co., 5 Cal. App. 166, 89 P. 993.

Engineer in charge of railroad surveys may testify to necessity. S. *v.* Court, 56 Wash. 249, 105 P. 639.

172-46 Morgan's, etc. S. S. Co. *v.* Planting Co., 130 La. 78, 57 S. 635; S. *v.* Superior Court, 59 Wash. 621, 110 P. 429; S. *v.* Superior Court, 59 Wash. 598, 110 P. 428; North Coast R. Co. *v.* R. Co., 48 Wash. 529, 94 P. 112; S. *v.* Court, 54 Wash. 365, 103 P. 469; 44 Wash. 476, 87 P. 521. See S. *v.* Court, 47 Wash. 166, 91 P. 637.

173-47 Absence of right to cross streets, immaterial to right to condemn land accessible only by their use. S. *v.* Court, 55 Wash. 64, 104 P. 148.

Evidence condemnor had proposed to exchange land in question for other land does not bear upon necessity for it to obtain former. S. *v.* Court, supra.

173-48 U. S. *v.* Burley, 172 Fed. 615; Scranton G. & W. Co. *v.* R. Co., 225 Pa. 152, 73 A. 1097; Chicago, etc. R. Co. *v.* Mason, 23 S. D. 564, 122 N. W. 601; In re Mercer St., 55 Wash. 116, 104 P. 133.

Conclusive in favor of city, in absence of fraud. Tacoma *v.* Titlow, 53 Wash. 217, 101 P. 827.

174-49 S. *v.* Superior Court, 64 Wash. 189, 116 P. 855.

174-50 *Contra,* Richland Tp. *v.* Overmyer, 164 Ind. 382, 73 N. E. 811.

Condemnor's good faith in selecting route for its road may be tested by evidence that there was, over property in question, a location equally as practicable, feasible and advantageous as that chosen, and by proof of specially injurious consequence which adherence to that location would inflict upon land owner. On these questions expert testimony is admissible. Piedmont C. Mills *v.* Co., 131 Ga. 129, 62 S. E. 52. Condemnor may show it offered to buy land over which it desired to locate its route. Piedmont C. Mills *v.* Co., supra.

Contracts between individuals and condemnor binding former to pay part or all expense of condemnation, not always conclusive against public use. Hairston *v.* R. Co., 208 U. S. 598; St. L., etc. R. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 438; Chicago D. & C. Co. *v.* Garrity, 115 Ill. 155, 3 N. E. 448. Their terms may, however, give them that effect. Pere M. R. Co. *v.* Co., 154 Mich. 290, 117 N. W. 733.

174-51 See S. *v.* Court, 55 Wash. 64, 104 P. 148.

Damaging effect of proposed improvement upon any portion of public relevant. Board *v.* Brown, 159 Mich. 148, 123 N. W. 562.

Interests of strangers to proceedings, irrelevant. McDonald *v.* Judge, 159 Mich. 367, 123 N. W. 1112.

175-55 See Chicago, etc. R. Co. *v.* Mason, 23 S. D. 564, 122 N. W. 601.

175-56 New Haven W. Co. *v.* Russell, 86 Conn. 361, 85 A. 636.

175-57 Richland S. Tp. *v.* Overmyer, 164 Ind. 382, 73 N. E. 811; Board *v.* Jackson, 113 La. 124, 36 S. 912 (defendant may show plaintiffs seek to expropriate too large an area of land and may prove every prejudicial error about to be committed. This must be sustained by a very decided preponderance of evidence).

176-58 Action of condemnor, prima facie evidence quantity of land specified is needed. Wilson *v.* R. Co., 222 Pa. 541, 72 A. 235.

177-59 Stafford, etc. R. Co. *v.* Co., 80 Conn. 37, 66 A. 775; Smith *v.* Dist., 229 Ill. 155, 82 N. E. 278; Slider *v.* Co., 42 Ind. App. 304, 85 N. E. 372.

178-63 Carolina, etc. R. Co. *v.* Co., 132 N. C. 644, 44 S. E. 358.

180-67 Southern Ill., etc. Co. *v.* Stone, 194 Mo. 175, 92 S. W. 475; Waverly *v.* Co., 127 App. Div. 440, 111 N. Y. S. 541 (refusal of owner to negotiate).

180-68 Kaschke *v.* Camfield, 46 Colo. 60, 102 P. 1061.

Inability of condemnor to pay award, immaterial to owner if he refuses to accept orders issued. Bishop *v.* New Haven, 82 Conn. 51, 72 A. 646.

181-76 Number of witnesses may be limited. West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377.

182-78 New Bern *v.* Wadsworth, 151 N. C. 309, 66 S. E. 144, title not in issue unless pleaded.

183-79 Lindner *v.* R. Co., 116 La. 262, 40 S. 697; Abernathy *v.* R. Co., 150 N. C. 97, 63 S. E. 180.

Presumption of payment of damages when action therefor is not begun until twenty years after taking. Carter *v.* Co., 208 Pa. 565, 57 A. 988.

184-80 Chicago, etc. R. Co. *v* Glos, 239 Ill. 24, 87 N. E. 881.

186-86 Meaning of "owner."—New York Cent. & H. R. Co. *v.* Mathews, 144 App. Div. 732, 129 N. Y. S 828, *aff.* 70 Misc. 567, 128 N. Y. S. 138.

186-87 In re Bensel, 144 App. Div. 751, 129 N. Y. S. 682.

186-88 New Bern *v.* Wadsworth, 151 N. C. 309, 66 S. E. 144; Dilts *v.* R. Co., 222 Pa. 516, 71 A. 1072; Jeffery *v.* R. Co., 138 Wis. 1, 119 N. W. 879.

187-90 Building owned by lessee. Musanti *v.* S., 131 N. Y. S. 20.

187-91 Cornell-Andrews Smelting Co. *v.* R. Corporation, 209 Mass. 298, 95 N. E. 887.

190-2 Indianapolis & C. T. Co. *v.* Wiles, 174 Ind. 236, 91 N. E. 161; In re Walton Ave., 131 App. Div. 696, 116 N. Y. S. 471 (discontinuance of streets).

Burden on owner of fee in street, disconnected from abutting property, to show it is worth more than nominal sum. In re Decatur St., 133 App. Div. 321, 117 N. Y. S. 855.

Consequence of uncertainty in testimony concerning damages cannot be thrown upon moving party. Detroit *v.* R., 156 Mich. 106, 120 N. W. 600.

191-3 Rule prevails in Colorado. Kaschke *v.* Camfield, 46 Colo. 60, 102 P. 1061. And Texas. Stephenville, etc. R. Co. *v.* Moore, 51 Tex. Civ. 205, 111 S. W. 758.

192-4 Postal Tel. Co. *v.* R. Co., 211 Fed. 824 (C. C. A.). But see Wichita Falls & W. R. Co. *v.* Wyrick (Tex. Civ.), 158 S. W. 570.

In Kentucky condemnor has burden. Calor O. & G. Co. *v.* Franzell (Ky.), 122 S. W. 188.

193-7 Cornell-A. S. Co. *v.* R. Co., 202 Mass. 585, 89 N. E. 118; W. A. Manda *v.* City, 82 N. J. L. 686, 82 A. 869; In re Simmons, 124 N. Y. S. 738; In re Block, etc., 66 Misc. 488, 122 N. Y. S. 321; In re Hamilton Place, 122 N. Y. S. 660 (when title vests); Wichita Falls, etc. R. Co. *v.* Wyrick (Tex. Civ.), 147 S. W. 730.

194-8 Gate City Terminal Co. *v.* Thrower, 136 Ga. 456, 71 S. E. 903; Louisiana R. Co. *v.* Sarpy, 125 La. 388, 51 S. 433; Tri-State T. & T. Co. *v.* Cosgriff, 19 N. D. 771, 124 N. W. 75; Faulk *v.* R. Co., 28 S. D. 1, 132 N. W. 233; Gray's Harbor, etc. R. Co. *v.* Kauppinen, 53 Wash. 238, 101 P. 835. See Southern R. Co. *v.* Michaels, 126 Tenn. 702, 151 S. W. 53.

194-9 Kansas City S. R. Co. *v.* Boles, 88 Ark. 533, 115 S. W. 375.

195-10 Portneuf I. Co. *v.* Budge, 16 Ida. 116, 100 P. 1046.

Property is "taken" when owner excluded from use and possession. Bishop *v.* New Haven, 82 Conn. 51, 72 A. 646.

195-11 See McDougald *v.* R. Co., 9 Cal. App. 236, 98 P. 685.

196-12 Stephenville, etc. R. Co. *v.* Moore, 56 Tex. Civ. 553, 121 S. W. 882, under facts.

196-13 Pool *v.* R. Co., 157 Ill. App. 24.

196-14 Central, etc. R. Co. *v.* Feldman, 152 Cal. 303, 92 P. 849; Calor, etc. Gas Co. *v.* Franzell, 128 Ky. 715, 109 S. W. 328; W. A. Manda *v.* City, 82 N. J. L. 686, 82 A. 869; In re East River Gas Co., 119 App. Div. 350, 104 N. Y. S. 239; In re Simmons, 68 Misc. 65, 124 N. Y. S. 744; Cleveland, etc. R. *v.* Gorsuch, 8 O. C. C. (N. S.) 297; Gray's Harbor B. Co. *v.* Lownsdale, 54 Wash. 83, 102 P. 1041; Port Townsend, etc. R. Co. *v.* Barbare, 46 Wash. 275, 89 P. 710; Guyandot, etc. R. Co. *v.* Buskirk, 57 W. Va. 417, 50 S. E. 521. See infra, "Value," 534-58, proof of value of toll bridge.

Price paid for adjoining tracts immaterial. Cleveland, etc. R. Co. *v.* Smith, 177 Ind. 524, 97 N. E. 164.

Peculiarity of situation and fitness for purpose. Gurdon, etc. R. Co. *v.* Vaught, 97 Ark. 234, 133 S. W. 1019.

Amount paid to others not competent when tracts not similarly situated and consequential damage not the same. Simons *v.* R. Co., 128 Ia. 139, 103 N. W. 129.

196-15 St. Louis, etc. R. Co. *v.* Maxfield, 94 Ark. 135, 126 S. W. 83; New

York, etc. R. Co. *v.* New Haven, 81 Conn. 581, 71 A. 780 (under existing conditions); Central of Georgia Power Co. *v.* Preston, 137 Ga. 347, 73 S. E. 505; Atlanta T. C. Co. *v.* Co., 132 Ga. 537, 64 S. E. 563; South Park Comrs. *v.* Ayer, 237 Ill. 211, 86 N. E. 704 (not competent to show difficulty of making other property available for a use to which that in question adapted); Hartshorn *v.* R. Co., 216 Ill. 392, 75 N. E. 122; Louisville & N. R. Co. *v.* Club, 155 Ky. 452, 159 S. W. 983; Weiss *v.* Comrs., 152 Ky. 552, 153 S. W. 967; Yazoo, etc. R. Co. *v.* Teissier, 134 La. 958, 64 S. 866; Sargent *v.* Merrimac, 196 Mass. 171, 81 N. E. 970, 11 L. R. A. (N. S.) 996; Minneapolis, etc. T. Co. *v.* Friendshuh, 108 Minn. 492, 122 N. W. 451; Conan *v.* Ely, 91 Minn. 127, 97 N. W. 737; Board *v.* Lee, 85 Miss. 508, 37 S. 747; Philbrook *v.* Co., 75 N. H. 599, 74 A. 873; N. Y. Tel. Co. *v.* Brick, 154 App. Div. 845, 139 N. Y. S. 748; In re Simmons, 130 App. Div. 356, 114 N. Y. S. 575; Wadsworth L. Co. *v.* Tract. Co., 162 N. C. 314, 78 S. E. 297; Creighton *v.* Comrs., 143 N. C. 171, 55 S. E. 511; Harrisburg, etc. T. Co. *v.* County, 225 Pa. 467, 74 A. 340; Cox *v.* R. Co., 215 Pa. 506, 64 A. 729; Keim *v.* City, 32 Pa. Super. 613; Crystal City & U. R. Co. *v.* Boothe (Tex. Civ.), 126 S. W. 700; Tacoma *v.* Power Co., 57 Wash. 420, 107 P. 199; Chicago, etc. R. Co. *v.* Alexander, 47 Wash. 131, 91 P. 626. See Ft. Worth *v.* Charbonneau (Tex. Civ.), 166 S. W. 387.

Destruction of platting value. Wichita, etc. R. Co. *v.* Holloman, 28 Okla. 419, 114 P. 700.

All the facts as to the condition of the property and its surroundings, its improvements and capabilities may be shown and considered in estimating its value. In re Clinton St. Police Station Site, 123 N. Y. S. 198.

Value of land for platting cannot be shown, where value for inconsistent special uses proved. Tacoma *v.* Wetherby, 57 Wash. 295, 106 P. 903.

Evidence of value of separate tracts as building lots, not admissible, if they have no market value as such, to show value as an entirety. In re Simmons, 117 N. Y. S. 64.

197-16 St. Louis, etc. R. Co. *v.* Co., 204 Mo. 565, 103 S. W. 519; In re Simmons, supra.

Where buildings concerned, rule not applicable. Cleveland, etc. R. *v.* Gorsuch, 8 O. C. C. (N. S.) 297, value of building and land separate from each other may be shown and aggregate should be taken. But see *contra* Matter of Simmons, 58 Misc. 581, 109 N. Y. S. 1036; In re Blackwell's Isl. Bridge, 108 N. Y. S. 366, 118 N. Y. S. 1095. See also In re New York, 56 Misc. 311, 106 N. Y. S. 1003.

Profits which might be made on land by a possible use of it may not be shown. Tacoma *v.* P. Co., 57 Wash. 420, 107 P. 199.

197-17 In re Board, 128 App. Div. 103, 112 N. Y. S. 619; First P. Church *v.* Pittsburg, 223 Pa. 165, 72 A. 347.

197-18 Evidence as to who owns the property, immaterial. Tacoma *v.* P. Co., 57 Wash. 420, 107 P. 199.

197-19 U. S. *v.* Co., 122 Fed. 581, 58 C. C. A. 279; Central, etc. R. Co. *v.* Feldman, 152 Cal. 303, 92 P. 849; City of Los Angeles *v.* Co., 15 Cal. App. 676, 115 P. 654; New Haven County *v.* Parish, 82 Conn. 378, 73 A. 789 (loss of legacy because of condemnation); Central Ga. P. Co. *v.* Stone, 139 Ga. 416, 77 S. E. 565; West Chicago P. Comrs. *v.* Boal, 232 Ill. 248, 83 N. E. 824; Halstead *v.* R. Co., 48 Ind. App. 96, 95 N. E. 439; Tracy *v.* Mt. Pleasant (Ia.), 146 N. W. 78; In re Simmons, 130 App. Div. 356, 114 N. Y. S. 575; Gray's Harbor B. Co. *v.* Lownsdale, 54 Wash. 83, 102 P. 1041. See Calor, etc. Gas Co. *v.* Franzell, 128 Ky. 715, 109 S. W. 328; In re East River Gas Co., 119 App. Div. 350, 104 N. Y. S. 239.

197-20 Flemister *v.* Power Co., 140 Ga. 511, 79 S. E. 148. See Sargent *v.* Merrimac, 196 Mass. 171, 81 N. E. 970, 11 L. R. A. (N. S.) 996.

In Tracy *v.* City of Mt. Pleasant (Ia.), 146 N. W. 78, the court said: "That the owner may show that his property is peculiarly adapted for the particular purpose for which sought to be taken is established by the overwhelming weight of authority. Mississippi, etc. Boom Co. *v.* Patterson, 98 U. S. 403, 25 L. ed. 206; Brown *v.* Forest Water Co., 213 Pa. 440, 62 A. 1078; Currie *v.* Railway Co., 52 N. J. L. 381, 20 A. 56, 19 Am. St. Rep. 452; Little Rock Junction Co. *v.* Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; In re Application Thos. Gilroy, Commissioner, 85 Hun 424, 32 N. Y. Supp. 891; In re Daly, Commissioner, 72 App. Div. 394, 76 N. Y. Supp. 28; McKinney *v.*

Nashville, 102 Tenn. 131, 52 S. W. 781, 73 Am. St. Rep. 859. Moreover, the weight of authority is to this effect: That proof properly may be received of the value of the property for the specific purpose for which dedicated. If its value for any other purpose may be shown, as seems generally to be held, there is no ground for excluding it, when the purpose is that designed by the party seeking to condemn. Johnson *v.* Railway, 111 Ill. 413; Cohen *v.* Railway, 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242; Webster *v.* Railway, 116 Mo. 114, 22 S. W. 474. As to whether he may go farther and prove its market value for such purpose, the decisions are in conflict."

199-24 Wadsworth L. Co. *v.* Tract. Co., 162 N. C. 314, 78 S. E. 297. Foot front value of fee and lease of land, lease having eighty years to run, not matter for proof. Ground rent may be capitalized on a percentage basis to ascertain value of property; value of reversion may be ignored. Chicago, etc. R. Co. *v.* Inst., 239 Ill. 197, 87 N. E. 933.

Use made of highway for agricultural purposes by abutting owner, irrelevant. Tri-State T. & T. Co. *v.* Cosgriff, 19 N. D. 771, 124 N. W. 75.

200-28 New York Cent., etc. R. Co. *v.* Untermyer, 133 App. Div. 146, 117 N. Y. S. 443.

201-30 Central of Ga. Power Co. *v.* Preston, 137 Ga. 347, 73 S. E. 505; West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377; Postal Tel. Co. *v.* Patton, 153 Ky. 187, 154 S. W. 1073; Yellowstone P. R. Co. *v.* Co., 34 Mont. 545, 87 P. 963; In re Opening of Tremont Ave., 71 Misc. 480, 130 N. Y. S. 510; Lehigh Val. R. Co. *v.* S., 66 Misc. 432, 123 N. Y. S. 378; Railroad *v.* Co., 137 N. C. 330, 49 S. E. 350; St. Louis, etc. R. Co. *v.* Oliver, 17 Okla. 589, 87 P. 423; Galbraith *v.* Co., 2 Pa. Super. 359; Watkins *v.* County (Tex. Civ.), 72 S. W. 872; S. *v.* Court, 44 Wash. 108, 87 P. 40; Krier *v.* R. Co., 139 Wis. 207, 120 N. W. 847.

Evidence showing no damage.—City of Tacoma *v.* Hansen, 59 Wash. 594, 110 P. 426.

202-31 Kansas City S. R. Co. *v.* Boles, 88 Ark. 533, 115 S. W. 375; Scott *v* R. Co., 222 Pa. 634, 72 A. 282.

202-32 Prather *v.* Co., 221 Ill. 190, 77 N. E. 430; Glendenning *v.* Stahley, 173 Ind. 674, 91 N. E. 234; Louisiana, etc. Co. *v.* Co., 115 La. 328, 39 S. 1; In re R. Co., 77 N. J. L. 239, 72 A. 39; City of Seattle *v.* Atwood, 59 Wash. 112, 109 P. 326.

Division of property by road of another company, immaterial, if it is used, and is only useable, for mining purposes. Missouri, etc. R. Co. *v.* Schmuck, 79 Kan. 545, 100 P. 282.

203-34 Patterson *v.* R. Co., 178 Fed 649, 102 C. C. A. 95; Birmingham R. Co. *v.* Oden, 146 Ala. 495, 41 S. 129; New York, etc. R. Co. *v.* New Haven, 81 Conn. 581, 71 A. 780; Chicago, etc R. Co. *v.* Kelly, 221 Ill. 498, 77 N. E. 916; Hartshorn *v.* R. Co., 216 Ill. 392, 75 N. E. 122; Chiles *v.* Traction Co., 158 Ill. App 508; Richardson *v.* Centerville, 137 Ia. 253, 114 N. W. 1071; Watkins *v.* R. Co., 137 Ia. 441, 113 N. W. 924; Sallden *v.* Little Falls, 102 Minn. 358, 113 N. W. 884; New York, etc. R. Co. *v.* Siebrecht, 130 N. Y. S. 1005; Musanti *v.* S., 131 N. Y. S. 20; Matter of Simmons, 58 Misc. 581, 109 N. Y. S. 1036; Abernathy *v.* R. Co., 150 N. C. 97, 63 S. E. 180; St. Louis, etc. R. Co. *v.* Oliver, 17 Okla. 589, 87 P. 423; Baker *v.* R. Co., 236 Pa. 479, 84 A. 959; Galbraith *v.* Co., 2 Pa. Super. 359; Hope *v.* R. Co., 211 Pa. 401, 60 A. 996; Cox *v.* R. Co., 215 Pa. 506, 64 A. 729; Moudy Mfg. Co. *v.* R. Co., 215 Pa. 110, 64 A. 373; Boyer & L. *v.* R. Co., 97 Tex. 107, 76 S. W. 441; Texas, etc. R. Co. *v.* Clifford (Tex. Civ.), 94 S. W. 168; Pochila *v.* R. Co., 31 Tex. Civ. 398, 72 S. W. 255.

The purposes for which the property was reasonably adapted immediately before and just after such acts were done may and should be considered in determining, by the rule stated, the quantum of damages. Texarkana & Ft. S. R. Co. *v.* Sabine Tram. Co. (Tex. Civ.), 129 S. W. 199.

204-37 In re Board, 128 App. Div. 103, 112 N. Y. S. 619 (purpose for which property taken); Weinschenk *v.* R. Co., 233 Pa. 442, 82 A. 750; Abernathy *v.* R. Co., supra; Gray's Harbor B. Co. *v.* Lownsdale, 54 Wash. 83, 102 P. 1041.

Any and every purpose for which the waters of a spring could be used. Record of former proceedings to condemn land, the parties being same, admissible where proceedings abandoned before confirmation. Fay *v.* Dist., 33 App. Cas. (D. C.) 366.

204-38 Blunck *v.* R. Co., 142 Ia. 146,

120 N. W. 737; St. Louis, etc. R. Co. *v.* Pfau, 212 Mo. 398, 111 S. W. 10.

205-39 Value per yard of gravel and sand and estimate of number of cubic yards thereof on tract of land, too speculative. Chicago, etc. R. Co. *v.* Mason, 23 S. D. 564, 122 N. W. 601.

Cost of raising house and lot to conform to newly established grade of street, immaterial. Edsall *v.* Borough, 220 Pa. 591, 70 A. 429.

206-40 Cent. Ga. R. Co. *v.* Stone, 139 Ga. 416, 77 S. E. 565; City of Geneseo *v.* Schultz, 257 Ill. 273, 100 N. E. 926; Chicago, etc. R. Co. *v.* Kelly, 221 Ill. 498, 77 N. E. 916; Indianapolis S. R. Co. *v.* Shea, 45 Ind. App. 608, 90 N. E. 329; Detroit *v.* R., 156 Mich. 106, 120 N. W. 600; Brown *v.* R. Co., 76 N. J. L. 795, 71 A. 271; In re East 161st St., 159 App. Div. 662, 144 N. Y. S. 717; Galbraith *v.* Co., 2 Pa. Super. 359.

206-42 Wichita Falls, etc. R. Co. *v.* Wyrick (Tex. Civ.), 147 S. W. 730.

207-43 City of Geneseo *v.* Schultz, 257 Ill. 273, 100 N. E. 926; Cutter *v.* Boston, 200 Mass. 400, 86 N. E. 789 (percentage of depreciation); Knapheide *v.* County, 215 Mo. 516, 114 S. W. 960; White *v.* R. Co., 222 Pa. 534, 71 A. 1081; Galbraith *v.* R. Co., 2 Pa. Super. 359; Friday *v.* R. Co., 204 Pa. 405, 54 A. 339; Leiby *v.* Co., 205 Pa. 631, 55 A. 782; Hope *v.* R. Co., 211 Pa. 401, 60 A. 996; Myers *v.* R. Co., 19 Phila. (Pa.) 468; Taber *v.* R. Co., 28 R. I. 269, 67 A. 9; Wray *v.* R. Co., 113 Tenn. 544, 82 S. W. 471; Wolf *v.* R. Co., 140 Wis. 337, 122 N. W. 743.

And Louisiana, it seems. Boagni *v.* R. Co., 124 La. 840, 50 S. 748.

209-44 Bragan *v.* Co., 163 Ala. 93, 51 S. 30. *Contra,* Enterprise L. Co. *v.* Porter, 165 Ala. 579, 51 S. 723. See Louisville & N. R. Co. *v.* Louisville (Ky.), 122 S. W. 849.

210-45 Washington, etc. R. Co. *v.* Newman, 41 App. Cas. (D. C.) 439; Central Ga. P. Co. *v.* Stone, 139 Ga. 416, 77 S. E. 565; Knapheide *v.* County, 215 Mo. 516, 114 S. W. 960.

211-47 Central Ga. R. Co. *v.* Stone, 139 Ga. 416, 77 S. E. 565; Kankakee *v.* R. Co., 263 Ill. 589, 105 N. E. 731; Hamory *v.* R. Co., 222 Pa. 631, 72 A. 227. See Western Newspaper Union *v.* Des Moines (Ia.), 140 N. W. 367.

Evidence to show improper basis. Where it appeared opinions of land owner's witnesses were based mainly, if not exclusively, on two sales of local property, defendant may show such sales were made under special circumstances and prices realized greatly exceeded market value. Henkel *v.* R. Co., 213 Pa. 485, 62 A. 1085. See Hope *v.* R. Co., 211 Pa. 401, 60 A. 996.

Assessed value may be asked on cross-examination. Gayle *v.* Court, 155 Ala. 204, 46 S. 261.

Price paid for land and at which it was offered may be inquired about. Enterprise L. Co. *v.* Porter, 155 Ala. 426, 46 S. 773.

212-49 Widman Inv. Co. *v.* City, 191 Mo. 459, 90 S. W. 763; In re Seattle, 57 Wash. 178, 106 P. 755.

212-50 See infra, "Value."

213-51 See Louisville & N. R. Co. *v.* Louisville (Ky.), 122 S. W. 849. Immaterial witness would not care to own farm after part condemned. Dilts *v.* R. Co., 222 Pa. 516, 71 A. 1072.

213-52 Cutter *v.* Boston, 200 Mass. 400, 86 N. E. 798; Galbraith *v.* R. Co., 2 Pa. Super. 359. See Pennsylvania, etc. R. Co. *v.* Schwartz, 75 N. J. L. 801, 70 A. 134; Manhattan B. Co. *v.* Seattle, 52 Wash. 226, 100 P. 330.

213-53 Evidence of occurrences during prior unsuccessful negotiations of parties, irrelevant. Darien & W. R. Co. *v.* McKay, 132 Ga. 672, 64 S. E. 785.

214-55 Indianapolis & W. R. Co. *v.* Branson, 172 Ind. 383, 86 N. E. 834. See Southern, etc. Co. *v.* Stone, 194 Mo. 175, 92 S. W. 475.

214-56 Louisville & W. R. Co. *v.* Louisville, 131 Ky. 108, 114 S. W. 743.

214-57 *Contra,* Detroit *v.* R., 156 Mich. 106, 120 N. W. 600 (where question is as to effect of other separations of street grades upon local property, and also as to slope of other streets); Rourke *v.* R. Co., 221 Mo. 46, 119 S. W. 1094.

215-58 Madera R. Co. *v.* Co., 3 Cal. App. 668, 87 P. 27; Rourke *v.* R. Co., 221 Mo. 46, 119 S. W. 1094; Dennis *v.* R. Co. (Tex. Civ.), 94 S. W. 1092.

"**It having been shown** that the witness Atteberry was a neighbor of appellee, that he was acquainted with appellee's land and the way in which the railroad crossed it, had been on the land both before and after the construction of the road, and that the same railway ran across his land and within a few yards of his door, appel-

lant sought to elicit from this witness testimony as to the effect upon the comfort of his home and upon the value of his land occasioned by the smoke, dust and noise from passing trains. It has been held that, where the witness' property is similarly situated, he may testify as to the effect of the construction of the railroad has had upon his property. Kirby *v.* P. & G. Ry., 39 Tex. Civ. App. 252, 88 S. W. 281; Cluck *v.* Railway, 34 Tex. Civ. App. 452, 79 S. W. 80; C. & M. Ry. Co. *v.* Ritter, 1 White & W. Civ. Cas. Ct. App., §267; Calvert W. & B. V. Ry. Co. *v.* Smith et ux., 68 S. W. 68; G., C. & S. F. Ry. *v.* Brugger, 24 Tex. Civ. App. 367, 59 S. W. 556." Wichita Falls, etc. R. Co. *v.* Wyrick (Tex. Civ.), 147 S. W. 730.

216-60 McMillan *v.* R. Co., 1 Pa. Super. 648; Galbraith *v.* R. Co., 2 Pa. Super. 359 (testimony admissible as to ridges and depressions left on property).

Method of making improvement may be shown. In re Board, 128 App. Div. 103, 112 N. Y. S. 619.

216-61 Central of Ga. Power Co. *v.* Preston, 137 Ga. 347, 73 S. E. 505; Klopp *v.* R. Co., 142 Ia. 474, 119 N. W. 373.

216-63 New York Cent., etc. R. Co. *v.* Domproff, 63 Misc. 211, 116 N. Y. S. 924.

Charter of condemnor and its traffic arrangements with other roads and evidence of probable location of freight yards, competent. Pierce *v.* R. Co., 137 Wis. 550, 119 N. W. 297.

Plans and profiles presented by condemnor inadmissible on behalf of public corporation unless approved by it. Edsall *v.* Borough, 220 Pa. 591, 70 A. 429.

217-67 Edsall *v.* Borough, supra.

217-68 Acts of individual members of public governing body cannot be proved unless authorized. Edsall *v.* Borough, supra.

218-70 Myers *v.* R. Co., 19 Phila. (Pa.) 468; Cox *v.* R. Co., 215 Pa. 506, 64 A. 729 (incorrect map not admissible); Gorgas *v.* R. Co., 215 Pa. 501, 64 A. 680 (map inadmissible which does not include all land for which damages to be assessed).

218-72 **Photographs** admissible to show condition of property at time of condemnation. Hubbell *v.* Des Moines (Ia.), 147 N. W. 908.

219-75 Indianapolis & C. T. Co. *v.* Wiles, 174 Ind. 236, 91 N. E. 161; Dilts *v.* R. Co., 222 Pa. 516, 71 A. 1072; Jeffery *v.* R. Co., 138 Wis. 1, 119 N. W. 879 (offer beyond requirements of statute, inadmissible).

219-76 Superiority of another available easement cannot be shown to affect plaintiff's recovery for easement taken. Stein *v.* R. Co., 132 Ky. 322, 116 S. W. 733.

221-77 Long Distance T. & T. Co. *v.* Schmidt, 157 Ala. 391, 47 S. 731; In re Board, 128 App. Div. 103, 112 N. Y. S. 619; Jeffery *v.* R. Co., 138 Wis. 1, 119 N. W. 879.

Non-occupancy of property fifteen months after change of grade, too remote. Bragan *v.* Co., 163 Ala. 93, 51 S. 30.

Opinion property could not be rented, not admissible. Bragan *v.* Co., supra.

222-79 Sacramento S. R. Co. *v.* Heilbron, 156 Cal. 408, 104 P. 979; Boston *v.* Boston, 195 Mass. 338, 81 N. E. 244; Galbraith *v.* R. Co., 2 Pa. Super. 359; Cox *v.* R. Co., 215 Pa. 506, 64 A. 729; Moudy Mfg. Co. *v.* R. Co., 215 Pa. 110, 64 A. 373; Jeffery *v.* R. Co., 138 Wis. 1, 119 N. W. 879.

223-80 Sacramento S. R. Co. *v.* Heilbron, 156 Cal. 408, 104 P. 979 (money value for any special purpose may not be shown, though adaptability of land therefor may be); Sexton *v.* Co., 200 Ill. 244, 65 N. E. 638; Louisiana R. & N. Co. *v.* Sarpy, 125 La. 388, 51 S. 433; Cox *v.* R. Co., 215 Pa. 506, 64 A. 729; Moudy Mfg. Co. *v.* R. Co., 215 Pa. 110, 64 A. 373; Dennis *v.* R. Co. (Tex. Civ.), 94 S. W. 1092.

223-81 Bishop *v.* New Haven, 82 Conn. 51, 72 A. 646; Choctaw, etc. R. Co. *v.* True, 35 Tex. Civ. 309, 80 S. W. 120 (damages to wind-mill); Manhattan B. Co. *v.* Seattle, 52 Wash. 226, 100 P. 330.

Liability of gas pipes to burst.—Cincinnati Gas Transp. Co. *v.* Cartee, 149 Ky. 89, 147 S. W. 925.

224-82 Cornell-A. S. Co. *v.* R. Co., 202 Mass. 585, 89 N. E. 118.

Condemnor may show how property can be made available for uninterrupted use. In re Mercer St., 55 Wash. 116, 104 P. 133.

224-84 Mayor *v.* Co., 104 Md. 485, 65 A. 353; Detroit *v.* R., 156 Mich. 106,

120 N. W. 600; Cincinnati Iron S. Co. *v.* R. Co., 9 O. C. C. (N. S.) 103.

225-85 Fifty Associates *v.* Boston, 201 Mass. 585, 88 N. E. 427 (physical injury to building and cost of precautions to limit it); Detroit *v.* R., 156 Mich. 106, 120 N. W. 600; Edgewater etc. R. Co. *v.* Co., 76 N. J. L. 789, 72 A. 85; Dilts *v.* R. Co., 222 Pa. 516, 71 A. 1072; Watkins *v.* County (Tex. Civ.), 72 S. W. 872; Milwaukee T. Co. *v.* Milwaukee, 151 Wis. 224, 138 N. W. 707; Pierce *v.* R. Co., 137 Wis. 550, 119 N. W. 297 (for limited purpose).

What inadmissible.—Appeals of Newton, 84 Conn. 234, 79 A. 742.

Value of property after adaption to changed condition, matter for proof on defendant's behalf. Barnett *v.* Borough. 37 Pa. Super. 97.

225-86 New York, etc. R. Co. *v.* New Haven, 81 Conn. 581, 71 A. 780 (expense of support for tracks); Louisville & N. R. Co. *v.* Louisville (Ky.), 122 S. W. 849. *Contra* where done pursuant to statute. New York, etc. R. Co. *v.* Rhodes, 171 Ind. 521, 86 N. E. 840.

Prior right of way though of less width than avenue proposed may be shown in connection with defendant's evidence of necessary expenses. Chicago, etc. R. Co. *v.* Chicago, 217 Ill. 343, 75 N. E. 499.

226-89 New York, etc. R. Co. *v.* Rhodes, 171 Ind. 521, 86 N. E. 840.

Damage caused by preventing laying of third track over condemned crossing cannot be shown unless there is evidence of purpose to lay it. Louisville & N. R. Co. *v.* Louisville (Ky.), 122 S. W. 849.

Compensation not allowable for safety gates, sign board, cattle guards, fences, flagman, and other expenses necessary for public protection, nor for added liability for damages. Louisville, etc. Co. *v.* Louisville, 131 Ky. 108, 114 S. W. 743.

226-92 Lewis *v.* R. Co., 223 Ill. 223, 79 N. E. 41; Caldwell *v.* R. Co., 111 App. Div. 164, 97 N. Y. S. 588; Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182; Texas, etc. R. Co. *v.* Clifford (Tex. Civ.), 94 S. W. 168; Magee *v.* R. Co. (Tex. Civ.), 95 S. W. 1092.

227-95 See infra, "Value," 435-76.

227-98 Cornell-A. S. Co. *v.* R. Co., supra; Robinson *v.* R. Co., 143 Mo. App. 270, 126 S. W. 994; Bost *v.* County, 152 N. C. 531, 67 S. E. 1066.

Making crossings over railway by party injured may be shown by defendant. Cincinnati R. Co. *v.* Miller, 36 Ind. App. 26, 72 N. E. 827.

Inability of lessee to remove personalty from premises cannot be shown. Cornell-A. S. Co. *v.* R. Co., 202 Mass. 585, 89 N. E. 118.

227-99 Chiles *v.* Traction Co., 158 Ill. App. 508; Chicago *v.* Puleyn, 129 Ill. App. 179.

227-1 Savannah, etc. R. Co. *v.* Williams, 133 Ga. 679, 66 S. E. 942; Atlantic, etc. R. Co. *v.* McKnight, 125 Ga. 328, 54 S. E. 148; St. Louis, etc. R. Co. *v.* Guswelle, 236 Ill. 214, 86 N. E. 230; Chicago *v.* Puleyn, 129 Ill. App. 179; Helmer *v.* R. Co., 122 La. 141, 47 S. 443; Cornell-A. S. Co. *v.* R. Co., 202 Mass. 585, 89 N. E. 118; Cotton *v.* R. Co., 191 Mass. 103, 77 N. E. 698; Pierson *v.* R. Co., 191 Mass. 223, 77 N. E. 769; Boyne City, etc. R. Co. *v.* Anderson, 146 Mich. 328, 109 N. W. 429 (phonographic reproductions of noises made by trains admitted); Wayne *v.* R. Co., 231 Pa. 512, 80 A. 1097; Texas, etc. R. Co. *v.* Clifford (Tex. Civ.), 94 S. W. 168; Houston, etc. R. Co. *v.* Wilson (Tex. Civ.), 165 S. W. 560. *Contra* if inconveniences common to general public and special damages claimed. Willock *v.* R. Co., 222 Pa. 590, 72 A. 237. But see Smith *v.* R. Co., 39 Wash. 355, 81 P. 840, holding injurious effects must be of a physical nature; injuries arising from noise, fumes, smoke or odors necessarily incident to operation of trains are damnum absque injuria.

228-2 Smith *v.* R. Co., supra.

228-3 Richardson *v.* Centerville, 137 Ia. 253, 114 N. W. 1071.

228-4 Wright *v.* Co., 75 N. H. 3, 70 A. 290, probable consequences of overflowing land.

228-9 New Jersey, etc. R. Co. *v.* Tutt, 168 Ind. 205, 80 N. E. 420; Louisiana R. & N. Co. *v.* Sarpy, 125 La. 388, 51 S. 433.

229-12 Long Distance T. & T. Co. *v.* Schmidt, 157 Ala. 391, 47 S. 731 (destroyed trees); Missouri, etc. R. Co. *v.* Bratton, 92 Ark. 563, 124 S. W. 231; Herrin & S. R. Co. *v.* Nolte, 243 Ill. 594, 90 N. E. 1097; Klopp *v.* R. Co., 142 Ia. 474, 119 N. W. 373 (loss of crossing caused by taking additional land, though another required to be made); Edgewater, etc. R. Co. *v.* Co.,

76 N. J. L. 789, 72 A. 85; In re Board, 128 App. Div. 103, 112 N. Y. S. 619; Bost *v.* County, 152 N. C. 531, 67 S. E. 1066 (destruction of spring); Tri-State T. & T. Co. *v.* Cosgriff, 19 N. D. 771, 124 N. W. 75; Choctaw, etc. R. Co. *v.* True, 35 Tex. Civ. 309, 80 S. W. 120 (obstruction of view).

Burning of building after construction of road, deposit of money and before trial cannot be shown. Stephenville, etc. R. Co. *v.* Moore, 56 Tex. Civ. 553, 121 S. W. 882.

229-13 Pierce *v.* R. Co., 137 Wis. 550, 119 N. W. 297 (for limited purpose). *Contra,* Indianapolis & W. R. Co. *v.* Branson, 172 Ind. 383, 86 N. E. 834, statute.

229-14 St. Louis, etc. R. Co. *v.* Oliver, 17 Okla. 589, 87 P. 423. *Comp.* Yazoo, etc. R. Co. *v.* Jennings, 90 Miss. 93, 43 S. 469.

229-15 Chicago S. R. Co. *v.* Nolin, 221 Ill. 367, 77 N. E. 435; Beckman *v.* R. Co., 85 Neb. 228, 122 N. W. 994; St. Louis, etc. R. Co. *v.* Oliver, 17 Okla. 589, 87 P. 423. *Comp.* Yazoo, etc. R. Co. *v.* Jennings, supra. *Contra,* Indianapolis, etc. T. Co. *v.* Larrabee, 168 Ind. 237, 80 N. E. 413, 10 L. R. A. (N. S.) 1003.

230-17 St. Louis, etc. R. Co. *v.* Guswelle, 236 Ill. 214, 86 N. E. 230; Chicago S. R. Co. *v.* Nolin, 221 Ill. 367, 77 N. E. 435; Blunck *v.* R. Co., 142 Ia. 146, 120 N. W. 737; St. Louis, etc. R. Co. *v.* Pfau, 212 Mo. 398, 111 S. W. 10; St. Louis, etc. R. Co. *v.* Co., 198 Mo. 698, 96 S. W. 1011; Beckman *v.* R. Co., 85 Neb. 228, 122 N. W. 994;; St. Louis, etc. R. Co. *v.* Oliver, 17 Okla. 589, 87 P. 423. *Contra,* Indianapolis, etc. R. Co. *v.* Hill, 172 Ind. 402, 86 N. E. 414; Indianapolis, etc. T. Co. *v.* Larrabee, supra.

"**The danger** to which live stock upon the farm will be exposed, and the danger from fire to buildings, fences, crops or grass, in so far as it affects the market value of the farm, may properly be considered, but such dangers cannot be considered by the jury as elements of damage aside from the effect they may have upon the market value of the land. It is to be borne in mind that compensation is not to be given for increased exposure to fire nor for increased insurance rates, nor for probable losses by fire in the future for which no recovery can be had, but simply for depreciation in the market value of the property by reason of the danger from fire. The evidence should therefore be limited to showing all the facts in regard to the situation of the property and improvements, relatively to the railroad." Wichita Falls, etc. R. Co. *v.* Wyrick (Tex. Civ.), 147 S. W. 730.

231-21 See Boyne City R. Co. *v.* Anderson, 146 Mich. 328, 109 N. W. 429.

231-22 Chicago S. R. Co. *v.* Nolin, 221 Ill. 367, 77 N. E. 435; St. Louis, etc. R. Co. *v.* Oliver, 17 Okla. 589, 87 P. 423.

232-23 Indianapolis & C. T. Co. *v.* Wiles, 174 Ind. 236, 91 N. E. 161; New Jersey, etc. R. Co. *v.* Tutt, 168 Ind. 205, 80 N. E. 420.

232-25 Indianapolis & C. T. Co. *v.* Wiles, supra; Indianapolis & W. R. Co. *v.* Branson, 172 Ind. 383, 86 N. E. 834.

232-26 Broadway C. M. Co. *v.* Smith, 136 Ky. 725, 125 S. W. 157.

Inconvenience to third persons not considered.—Fisher *v.* Groff (Ind.), 105 N. E. 470.

232-27 Glendenning *v.* Stahley, 173 Ind. 674, 91 N. E. 234.

233-28 St. Louis, etc. R. Co. *v.* Vaughan, 71 Ark. 643, 72 S. W. 575; Calor O. & G. Co. *v.* Franzell (Ky.), 122 S. W. 188; Mayor *v.* Co., 104 Md. 485, 65 A. 353; Swenson *v.* Board, 95 Minn. 161, 103 N. W. 895.

234-31 Stephenville, etc. R. Co. *v.* Moore, 51 Tex. Civ. 205, 111 S. W. 758.

Testimony as to duty of lessee to diminish damage to which he is subjected must be based on his lease rights. Cornell-A. S. Co. *v.* R. Co., 202 Mass. 585, 89 N. E. 118.

Incidental damages caused by construction are presumed to have been compensated for whether land conveyed or condemned. Libby *v.* R. Co., 82 Vt. 316, 73 A. 593.

235-33 Enterprise L. Co. *v.* Porter, 155 Ala. 426, 46 S. 773; Cape Girardeau, etc. R. Co. *v.* Blechle, 234 Mo. 471, 137 S. W. 974; Southern, etc. Co. *v.* Stone, 194 Mo. 175, 92 S. W. 475; Bost *v.* County, 152 N. C. 531, 67 S. E. 1066; Cox *v.* R. Co., 215 Pa. 506, 64 A. 729; Taber *v.* R. Co., 28 R. I. 269, 67 A. 9.

Enhanced value for purposes due to construction of railroad cannot be shown where property never used for such purposes. Romano *v.* R. Co., 87 Miss. 721, 40 S. 150.

235-34 Watkins *v.* R. Co., 137 Ia. 441, 113 N. W. 924. See Seattle, etc. R. Co. *v.* Roeder, 30 Wash. 244, 70 P. 498.

236-35 *Contra,* In re New Street, 63 Misc. 495, 117 N. Y. S. 409, *foll.* In re City of New York, 190 N. Y. 350, 83 N. E. 299, 16 L. R. A. (N. S.) 355. See New York C., etc. R. Co. *v.* Domproff, 63 Misc. 211, 116 N. Y. S. 924.

237-36 Fifty Associates *v.* Boston, 201 Mass. 585, 88 N. E. 427; Swenson *v.* Board, 95 Minn. 161, 103 N. W. 895; Guyandot, etc. R. Co. *v.* Buskirk, 57 W. Va. 417, 50 S. E. 521. See St. Louis, etc. R. Co. *v.* Stewart, 201 Mo. 491, 100 S. W. 583; New York, etc. R. Co. *v.* Siebrecht, 130 N. Y. S. 1005.

238-37 Hartshorn *v.* R. Co., 216 Ill. 392, 75 N. E. 122.

238-38 Swenson *v.* Board, 95 Minn. 161, 103 N. W. 895; Railroad *v.* Co., 137 N. C. 330, 49 S. E. 350.

241-43 Tacoma *v.* Wetherby, 57 Wash. 295, 106 P. 903, *cit.* the text.

242-51 Metropolitan R. Co. *v.* Walsh, 197 Mo. 392, 94 S. W. 860; Manhattan R. Co. *v.* Stuyvesant, 126 App. Div. 848, 111 N. Y. S. 222 (dissimilar estates). *Contra,* Louisiana R. Co. *v.* Morere, 116 La. 997, 41 S. 236.

243-58 See City of Sedro-Woolley *v.* Willard, 71 Wash. 646, 129 P. 372.

243-59 Martin *v.* R. Co., 220 Ill. 97, 77 N. E. 86; In re Simmons, 132 App. Div. 574, 116 N. Y. S. 952; Seattle, etc. R. Co. *v.* Roeder, 30 Wash. 244, 70 P. 498. See Columbia H. R. Co. *v.* Macfarland, 31 App. Cas. (D. C.) 112.

A view adds to reluctance of appellate court to disturb award because of damages. Columbia, etc. Co. *v.* Hutchinson, 56 Wash. 323, 105 P. 636.

244-60 Hingham *v.* U. S., 161 Fed 295, 88 C. C. A. 341; Guinn *v.* R. Co., 131 Ia. 680, 109 N. W. 209; In re Hamilton Place, 122 N. Y. S. 660.

Knowledge obtained by view may be acted upon in determining credibility of testimony. American States S Co. *v.* R. Co., 139 Wis. 199, 120 N. W. 844.

244-61 Tacoma *v.* Power Co., 57 Wash. 420, 107 P. 199. *Comp.* Herrin & S. R. Co. *v.* Nolte, 243 Ill. 594, 90 N. E. 1097. Weight of verdict increased by view. Bragan *v.* Co., 163 Ala. 93, 51 S. 30.

All testimony must be regarded, including that obtained by view. West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377.

Verdict cannot rest solely on view but must be supported by the evidence. East St. L., etc. R. Co. *v.* Trust Co., 248 Ill. 559, 94 N. E. 149, *disap.* Guyer *v.* Davenport, etc. R. Co., 196 Ill. 370, 63 N. E. 732.

244-62 Rule under rapid transit act. In re Board, 197 N. Y. 81, 90 N. E. 456.

Other evidence must be considered. "Since the commissioners are now required to report their proceedings to the court, with the minutes of the testimony taken by them (Greater New York Charter [Laws 1901, c. 466], § 1438), they are required to consider the written evidence, and that their awards are open to review. The commissioners, therefore, could not disregard the testimony of the witnesses, nor could they base their awards upon information derived wholly from a view of the premises." In re Hamilton Place, 122 N. Y. S. 660.

The view is for the purpose of enabling them to better understand the evidence. In re Block, etc., 66 Misc. 488, 122 N. Y. S. 321.

245-63 In re Simmons, 132 App. Div. 574, 116 N. Y. S. 952.

246-64 In re Hamilton Place, 122 N. Y. S. 660 (knowledge and experience of individual commissioners applied to evidence); In re Block, etc., 66 Misc. 488, 122 N. Y. S. 321 (as where commissioners must report proceedings with minutes of testimony taken).

246-65 Commissioners' certificate made after report, competent to show certain testimony disregarded before award made. In re Croton Falls, 129 App. Div. 707, 114 N. Y. S. 75.

247-68 Halstead *v.* R. Co., 48 Ind. App. 96, 95 N. E. 439; Kansas City S. R. Co. *v.* Termier, 85 Kan. 11, 116 P. 256; Kansas City S. R. Co. *v.* Imp. Co. (Mo.), 166 S. W. 296; Cape Girardeau & C. R. Co. *v.* Bleehle, 234 Mo. 471, 137 S. W. 974; St. Louis, etc. R. Co. *v.* Pfau, 212 Mo. 398, 111 S. W. 10; Wichita, etc. Co. *v.* Munsell (Okla.), 132 P. 906; Crystal City & U. R. Co. *v.* Boothe (Tex. Civ.), 126 S. W. 700.

248-73 See Chicago, etc. R. Co. *v.* Liebel, 27 Ky. L. R. 716, 86 S. W. 549 (burden on party excepting); In re East River Gas Co., 119 App. Div. 350, 104 N. Y. S. 239; In re Summit, 84

App. Div. 455, 82 N. Y. S. 1027; In re Guilford, 85 App. Div. 207, 83 N. Y. S. 312.

249-74 Evidence on appeal from the award is limited by the appeal. Minneapolis, etc. T. Co. *v.* St. Martin, 108 Minn. 494, 122 N. W. 452.

ENTRIES IN REGULAR COURSE OF BUSINESS

Preliminary showing, 258-7; *Log books,* 275-75; *Lodge records,* 275-75.

256-3 Remington M. Co. *v.* Co., 6 Penne. (Del.) 288, 66 A. 465; Cummings *v.* Ins. Co., 153 Ia. 579, 134 N. W. 79; Morrow *v.* R. Co., 140 Mo. App. 200, 123 S. W. 1034; Bouldin *v.* Co. (Tex. Civ.), 86 S. W. 795.

257-4 Marks *v.* Box (Ind. App.), 103 N. E. 27; Lyons *v.* Corder, 253 Mo. 539, 162 S. W. 606.

257-5 Louisville, etc. R. Co. *v.* Daniel, 28 Ky. L. R. 1146, 91 S. W. 691; Firemen's Ins. Co. *v.* R. Co., 138 N. C. 42, 50 S. E. 452.

In case of death, admissible at least for the purpose of showing where such person was at the date which such entry bears. This proposition is in the nature of an exception to the rule against hearsay testimony, and is based upon the fact of necessity and also upon the uniform reliability of such entries. Howard *v.* Strode, 242 Mo. 210, 146 S. W. 792.

258-7 Cummings *v.* Ins. Co., 153 Ia. 579, 134 N. W. 79; Swedish-Am. Bk. *v.* R. Co., 96 Minn. 436, 105 N. W. 69; Strand *v.* R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987 (whether entry sufficiently verified is for court).

Check stubs are mere memoranda. Leask *v.* Hoagland, 205 N. Y. 171, 98 N. E. 395.

Preliminary showing.—Entries must be authenticated. St. Louis, etc. R. Co. *v.* Co., 78 Ark. 1, 93 S. W. 58; Dorr C. Co. *v.* R. Co., 128 Ia. 359, 103 N. W. 1003; S. *v.* Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; Strand *v.* R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987; Einstein *v.* Co., 118 Mo. App. 184, 94 S. W. 296; Bouldin *v.* Co. (Tex. Civ.), 86 S. W. 795; Atchison, etc. R. Co. *v.* Williams, 38 Tex. Civ. 405, 86 S. W. 38; Jackson *v.* S., 49 Tex. Cr. 248, 91 S. W. 574. See Itasca, etc. Co. *v.* McKinley, 124 Minn. 183, 144 N. W. 768. Their correctness must be established. Hastie *v.* Burrage, 69 Kan. 560, 77 P. 268; Hoogewerff *v.* Flack, 101 Md. 371, 61 A. 184; Jackson *v.* S., supra; Missouri, etc. R. Co. *v.* Morrison, 42 Tex. Civ. 598, 94 S. W. 173. See Missouri, etc. R. Co. *v.* Patterson (Tex. Civ.), 164 S. W. 442. Entries made by various employes must be shown to be correct by each of such persons, unless they are dead or beyond the jurisdiction. State Bk. *v.* Brown, 96 App. Div. 441, 89 N. Y. S. 381; Layton *v.* Kraft, 111 App. Div. 842, 98 N. Y. S. 72.

258-12 Merywethers *v.* Youmans, 81 Kan. 309, 105 P. 545; Hastie *v.* Burrage, 69 Kan. 560, 77 P. 268; Sims *v.* Ice Co., 109 Md. 68, 71 A. 522; Wright *v.* R. Co., 118 Mo. App. 392, 94 S. W. 555. See First B. Church *v.* Harper, 191 Mass. 196, 77 N. E. 778 (entry by clerk of unincorporated religious society in his account book, admissible in behalf of society); Texas, etc. R. Co. *v.* Birdwell (Tex. Civ.), 86 S. W. 1067.

259-13 Collins *v.* Assn., 112 Mo. App. 209, 86 S. W. 891; Wallabout Bk. *v.* Peyton, 123 App. Div. 727, 108 N. Y. S. 42; Fruit D. Co. *v.* Sturges, 7 O. C. C. (N. S.) 445; Taplin *v.* Marcy, 81 Vt. 428, 71 A. 72.

259-14 Big Thompson, etc. Co. *v.* Mayne (Colo.), 91 P. 44; Metropolitan L. Ins. Co. *v.* Moravec, 116 Ill. App. 271; Marks *v.* Box (Ind. App.), 103 N. E. 27; Leask *v.* Hoagland, 205 N. Y. 171, 98 N. E. 395; Missouri, etc. R. Co. *v.* Davis, 24 Okla. 677, 104 P. 34; Fruit D. Co. *v.* Sturges, 7 O. C. C. (N. S.) 445; C. *v.* Berney, 28 Pa. Super. 61; King *v.* Co., 84 S. C. 73, 65 S. E. 944; Taplin *v.* Marcy, 81 Vt. 428, 71 A. 72; Griffin *v.* R. Co. (Vt.), 89 A. 220. See Young *v.* S., 9 Ala. App. 55, 64 S. 171. "**Where we know** nothing more of a book entry than that it was made by a person, since deceased, in the regular course of an employment, we should not give trustworthiness to its statement of facts further than as their import is of matters presumably within the personal knowledge of the person who made the entry by reason of that employment." Leask *v.* Hoagland, 205 N. Y. 171, 98 N. E. 395.

260-15 Marks *v.* Box (Ind. App.), 103 N. E. 27; Louisville, etc. R. Co. *v.* Daniel, 122 Ky. 256, 29 Ky. L. R. 1146, 91 S. W. 691, 3 L. R. A. (N. S.) 1190; Union, etc. Ins. Co. *v.* Prigge, 90 Minn. 370, 96 N. W. 917; Firemen's Ins. Co.

v. R. Co., 138 N. C. 42, 50 S. E. 452. See St. Louis, etc. R. Co. *v.* Thirlwell, 88 Kan. 275, 128 P. 199.

Comp. Layton *v.* Kraft, supra (entries of baptisms by clerk of religious corporation composed of several congregations in charge of different pastors, admissible although no rule of church requiring entries made was shown).

260-16 Matko *v.* Daley, 10 Ariz. 175, 85 P. 721; Merywethers *v.* Youmans, 81 Kan. 309, 105 P. 545; Gould *v.* Hartley, 187 Mass. 561, 73 N. E. 656; Collins *v.* Carlin, 106 App. Div. 204, 94 N. Y. S. 317; Manchester Assur. Co. *v.* Co., 46 Or. 162, 79 P. 60; C. *v.* Berney, 28 Pa. Super. 61. See St. Louis, etc. R. Co. *v.* Thirlwell, 88 Kan. 275, 128 P. 199.

Person making report to enterer need not be produced. St. Louis, etc. R. Co. *v.*, Co., 78 Ark. 1, 93 S. W. 58; S. *v.* Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; Louisville, etc. R. Co. *v.* Daniel, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190; Louisville B. Co. *v.* R. Co., 116 Ky. 258, 75 S. W. 285; Donovan *v.* R. Co., 158 Mass. 450, 33 N. E. 583; Drumm-F. Co. *v.* Bk., 107 Mo. App. 426, 81 S. W. 503; Firemen's Ins. Co. *v.* R. Co., 138 N. C. 42, 50 S. E. 452, 107 Am. St. 517; Wells Co. *v.* Ins. Co., 209 Pa. 488, 59 A. 894; Atchison, etc. R. Co. *v.* Williams, 38 Tex. Civ. 405, 86 S. W. 38. See Grunberg *v.* U. S., 145 Fed. 81, 76 C. C. A. 51; International, etc. R. Co. *v.* Startz, 42 Tex. Civ. 85, 94 S. W. 207.

"If element of personal knowledge is present, it can make no difference on principle that the bookkeeper himself is dead or otherwise absent." Pelican L. Co. *v.* Johnson, 44 Tex. Civ. 6, 98 S. W. 207.

261-17 "That they made truthful reports thereof will be presumed until at least some evidence is introduced to impeach the presumption, of which there is nothing in this record. The record is admissible on the principle that books of account of the ordinary merchant are admissible, because it is the best evidence of which the case in its nature is susceptible." Pac. Telephone & Tel. Co. *v.* Huetter, 68 Wash. 442, 123 P. 607.

261-18 Marks *v.* Box (Ind. App.), 103 N. E. 27; Monarch Mfg. Co. *v.* R. Co., 127 Ia. 511, 103 N. W. 493; Louisville, etc. R. Co. *v.* Daniel, 28 Ky. L. R. 1146, 91 S. W. 691; Bouldin *v.* Co. (Tex. Civ.), 86 S. W. 795. See Casley *v.* Mitchell, 121 Ia. 96, 96 N. W. 725; Dorr C. Co. *v.* R. Co., 128 Ia. 359, 103 N. W. 1003.

262-19 Mellor *v.* Walmesley, (1905) 2 Ch. D. (Eng.) 164; Mercer *v.* Denne, (1905) 2 Ch. D. (Eng.) 538, 558.

262-20 *Comp.* Big Thompson, etc. Co. *v.* Mayne (Colo.), 91 P. 44; S. *v.* Hall, 16 S. D. 6, 91 N. W. 325 (postmaster's record of advices received and money orders drawn admissible though not required to be kept by law).

262-21 Mercer *v.* Denne, (1905) 2 Ch. D. (Eng.), 538, 558; U. S. *v.* Greene, 146 Fed. 793; Marks *v.* Box (Ind. App.), 103 N. E. 27; Hastie *v.* Burrage, 69 Kan. 560, 77 P. 268; Missouri, etc. R. Co. *v.* Morrison, 42 Tex. Civ. 598, 94 S. W. 173; Bouldin *v.* Co. (Tex. Civ.), 86 S. W. 795; Griffin *v.* R. Co (Vt.), 89 A. 220. See Northwestern E. Co. *v.* R. Co., 121 Minn. 321, 141 N. W. 298.

263-22 Norman Co. *v.* Ford, 77 Conn. 461, 59 A. 499; Schnellbacher *v.* Co., 108 Ill. App. 486.

263-23 Granger *v.* Farrant (Mich.), 146 N. W. 218.

263-26 Morrow *v.* R. Co., 140 Mo. App. 200, 123 S. W. 1034.

263-27 U. S. *v.* Greene, 146 Fed. 793; St. Louis, etc. R. Co. *v.* Gibson (Ark.), 168 S. W. 1129; Sims *v.* Co., 109 Md. 68, 71 A. 522; Griffin *v.* R. Co. (Vt.), 89 A 220. See Remington M. Co. *v.* Co., 6 Penne. (Del.) 288, 66 A. 465; Collins *v.* Assn., 112 Mo. App. 209, 86 S. W. 891.

264-28 Fruit D. Co. *v.* Sturges, 7 O. C. C. (N. S.) 445.

264-30 Missouri, etc. R. Co. *v.* Davis, 24 Okla. 677, 104 P. 34. See St. Louis, etc. R. Co. *v.* Gibson (Ark.), 168 S. W. 1129.

264-31 S. *v.* Bridge Co., 49 Ind. App. 544, 97 N. E. 803; Haas *v.* Chubb, 67 Kan. 787, 74 P. 230; Howard *v.* Strode, 242 Mo. 210, 146 S. W. 792. See Griffin *v.* R. Co. (Vt.), 89 A. 220.

265-32 Godfrey *v.* Rowland, 17 Haw. 577; Sims *v.* Co., 109 Md. 68, 71 A. 522; Griffin *v.* R. Co. (Vt.), 89 A. 220.

Dead, incapacitated from testifying, or beyond the jurisdiction of the court. S. *v.* Bridge Co., 49 Ind. App. 544, 97 N. E. 803, *cit.* many cases.

266-35 Griffin *v.* R. Co. (Vt.), 89 A. 220.

266-36 U. S. *v.* Greene, 146 Fed. 793; Madunkeunk, etc. Co. *v.* Co., 102 Me. 257, 66 A. 537; C. *v.* Berney, 28 Pa. Super. 61; Griffin *v.* R. Co., supra.

Modern rule.—"We think that the extension of the exception to such regular entries, in the life-time of the entrant, if verified and adopted by him, is sustained by principle and the weight of authority." Remington M. Co. *v.* Co., 6 Penne. (Del.), 288, 65 A. 465. See the following cases, in which entries were admitted although enterer was neither dead nor inaccessible: S. *v.* Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; Northwestern E. Co. *v.* R. Co., 121 Minn. 321, 141 N. W. 298; State Bk. *v.* Brown, 96 App. Div. 441, 89 N. Y. S. 381; Fruit D. Co. *v.* Sturges, 7 O. C. C. (N. S.) 445; Franklin *v.* R. Co., 74 S. C. 332, 54 S. E. 578.

Illness preventing attendance in court sufficient. Griffin *v.* R. Co. (Vt.), 89 A. 220.

Admissible if entrant is present at trial.—Morks *v.* Box (Ind. App.), 103 N. E. 27.

267-37 Haas *v.* Chubb, 67 Kan. 787, 74 P. 230; Hoogewerff *v.* Flack, 101 Md. 371, 61 A. 184.

Books in which weights as shown on slips were entered are original entries rather than the slips. S. *v.* Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; Wright *v.* R. Co., 118 Mo. App. 392, 94 S. W. 555; Atchison, etc. R. Co. *v.* Williams, 38 Tex. Civ. 405, 86 S. W. 38.

267-38 *Comp.* Linden *v.* Thieriot, 96 App. Div. 256, 89 N. Y. S. 273.

268-39 See U. S. *v.* Greene, 146 Fed. 793; C. *v.* Berney, 28 Pa. Super. 61.

268-41 Hill *v.* Hill, 29 Ky. L. R. 201, 92 S. W. 924.

269-46 Attorney's diaries admissible in favor of his executrix, as evidence of services rendered. Burke *v.* Baker, 111 App. Div. 422, 97 N. Y. S. 768.

270-47 P. *v.* Martel, 21 Cal. App. 573, 132 P. 600. See Lester-W. S. Co. *v.* Co., 1 Ga. App. 244, 58 S. E. 212.

270-53 Discount register of bank competent as between bank and a third person. Wallabout Bk. *v.* Peyton, 123 App. Div. 727, 108 N. Y. S. 42.

271-56 See Haas *v.* Chubb, 67 Kan. 787, 74 P. 230.

Car record of carrier competent to show non-delivery. Swedish-Am. Bk. *v.* R. Co., 96 Minn. 436, 105 N. W. 69.

272-62 Godfrey *v.* Rowland, 17 Haw. 577; Collins *v.* Assn., 112 Mo. App. 209, 86 S. W. 891; Layton *v.* Kraft, 111 App. Div. 842, 98 N. Y. S. 72. See Hancock *v.* Legion, 67 N. J. L. 614, 52 A. 301.

272-63 Casley *v.* Mitchell, 121 Ia. 96, 96 N. W. 725. See vol. 10, p. 738, n. 99 and supplement thereto.

273-66 Osborne *v.* R. Co. (Vt.), 88 A. 512.

274-69 C. *v.* Berney, 28 Pa. Super. 61. *Comp.* Strand *v.* R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987; Manchester Assur. Co. *v.* Co., 46 Or. 162, 79 P. 60.

274-70 Cummings *v.* Ins. Co., 153 Ia. 579, 134 N. W. 79.

275-75 Log books.—Ordinarily a ship's log book is not competent in support of the party who makes the entries unless first called for and used by the adverse party. The Kentucky, 148 Fed. 500; Cobb *v.* Makee, 1 Haw. 85.

Lodge records regularly kept by order of lodge are evidence in action between lodge and its members and their privies. Union P. Lodge *v.* Co., 79 Neb. 801, 113 N. W. 263.

275-76 Hagerthy *v.* Webber, 100 Me. 305, 61 A. 685; Madunkeunk, etc. Co. *v.* Co., 102 Me. 257, 66 A. 537.

276-81 Nature of disease for which patient was treated may be shown by entries in deceased physician's book. Knapp *v.* Co., 199 Mo. 640, 98 S. W. 70.

276-82 State Bk. *v.* Brown, 96 App. Div. 441, 89 N. Y. S. 381.

Books kept by employe of principal competent against surety of agent. Union C. L. Ins. Co. *v.* Prigge, 90 Minn. 370, 96 N. W. 917.

277-87 Mellor *v.* Walmesley, (1905) 2 Ch. D. (Eng.) 164.

278-89 See Wisconsin Steel Co. *v.* Steel Co., 203 Fed. 403, 121 C. C. A. 507. But see P. *v.* Hammond, 177 Mich. 416, 143 N. W. 244.

278-90 Jonesboro, etc. R. Co. *v.* Wks., 117 Mo. App. 153, 94 S. W. 726; Collins *v.* Carlin, 106 App. Div. 204, 94 N. Y. S. 317. See Schnellbacher *v.* Co., 108 Ill. App. 486.

Entries in time-book of third person incompetent to show that at that time enterer could not have been working for plaintiff. Matko *v.* Daley, 10 Ariz. 175, 85 P. 721.

278-92 Louisville, etc. R. Co. *v.* Daniel, 28 Ky. L. R. 1146, 91 S. W. 691; Louisville, etc. R. Co. *v.* Hall, 29 Ky.

L. R. 584, 94 S. W. 26; Firemen's Ins. Co. *v.* R. Co., 138 N. C. 42, 50 S. E. 452; Cathey *v.* R. Co. (Tex. Civ.), 124 S. W. 217. See St. Louis, etc. R. Co. *v.* Gibson (Ark.), 168 S. W. 1129; Louisville & N. R. Co. *v.* Daniel, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1194.

ESCAPE

282-2 C. *v.* Filburn, 119 Mass. 297; Jenkins *v.* S., 49 Tex. Cr. 470, 93 S. W. 554; Vaughan *v.* S., 9 Tex. App. 563.

State must show that prisoner was trying to escape before accused could be convicted for aiding. S. *v.* Christian, 253 Mo. 386, 161 S. W. 736.

282-3 Presumed that writ under which defendant was held was duly issued. S. *v.* Clark, 32 Nev. 145, 104 P. 593.

282-4 But see S. *v.* Wedin (N. J.), 89 A. 753.

283-5 See Saylor *v.* C., 29 Ky. L. R. 337, 93 S. W. 48.

283-7 See S. *v.* King, 71 Kan. 287, 80 P. 606.

284-11 Mandate of appellate court reversing conviction and discharging accused, admissible to show his innocence. S. *v.* Pishner (W. Va.), 81 S. E. 1046.

285-13 Confession competent to prove attempt to escape. Bradford *v.* S., 146 Ala. 150, 41 S. 471. See Johnson *v.* S., 122 Ga. 172, 50 S. E. 65.

Acquiescence or co-operation of the prisoner need not be shown. Maxey *v.* S., 76 Ark. 276, 88 S. W. 1009. See C. *v.* Rodman, 34 Pa. Super. 607.

Attempt to escape punishable (Bradford *v.* S., 146 Ala. 150, 41 S. 471, 42 S. 960), but not established by proof that prisoner obtained necessary tools. S. *v.* Hurley, 79 Vt. 28, 64 A. 78.

285-16 Defendant's acts may be proved to show intent. S. *v.* Clark, 32 Nev. 145, 104 P. 593.

287-25 Regularity of papers and orders of court is a defense to an action against sheriff as for an escape. Levy *v.* Melody, 50 Misc. 509, 99 N. Y. S. 153.

287-26 Maxey *v.* S., 76 Ark. 276, 88 S. W. 1009; S. *v.* Johnson, 136 Ia. 228, 113 N. W. 832.

Avoidance of unmerited punishment, no defense. Johnson *v.* S., 122 Ga. 172, 50 S. E. 65.

Alternative sentence and subsequent payment of fine is no defense. Johnson *v.* S., supra.

ESCHEAT

See corresponding title in 8 STANDARD PROC.

290-1 S. *v.* Heirs, 113 Tenn. 298, 86 S. W. 717. See S. *v.* Mizis, 48 Or. 165, 85 P. 611, 86 P. 361, sufficiency of proof to start running of statute of limitations.

290-2 See S. *v.* Simmons, 46 Or. 159, 79 P. 498.

291-5 See In re Miner, 143 Cal. 194, 76 P. 968; Louisville Board *v.* King, 32 Ky. L. R. 687, 107 S. W. 247.

Inquest of office unnecessary if deceased an alien. Richardson *v.* Amsdon, 85 N. Y. S. 342.

292-6 Donaldson *v.* S. (Ind.), 101 N. E. 485. See S. *v.* Knott, 54 Fla. 138, 44 S. 744.

294-16 Novak *v.* Orphan's Home (Md.), 90 A. 997. See Seitz *v.* Messerschmidt, 117 App. Div. 401, 102 N. Y. S. 732; In re Sullivan, 48 Wash. 631, 94 P. 483, 95 P. 71.

296-22 Louisville Board *v.* King, 32 Ky. L. R. 687, 107 S. W. 247 (burden on state to show real estate of corporation not necessary to its business); S. *v.* Heirs, 113 Tenn. 298, 86 S. W. 717.

296-23 Richardson *v.* Amsdon, 85 N. Y. S. 342, burden on claimant to show he is heir of a resident alien.

296-25 Declarant must have been a member of family of deceased. Lowenfeld *v.* Ditchett, 114 App. Div. 56, 99 N. Y. S. 724.

EVIDENCE

299-1 See Kring *v.* S., 107 U. S. 221; Hubbell *v.* U. S., 15 Ct. Cl. 546, 606 (dissenting opinion); U. S. *v.* Lee Huen, 118 Fed. 442; Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405; P. *v.* Bowers (Cal.), 18 P. 660; Brightwood R. Co. *v.* O'Neal, 10 App. Cas. (D. C.) 205; Hotchkiss *v.* Newton, 10 Ga. 560; Tift *v.* Jones, 77 Ga. 181, 3 S. E. 399; Nelson *v.* Johnson, 18 Ind. 329; Roberts *v.* S., 25 Ind. App. 366, 58 N. E. 203; S. *v.* Thomas, 50 La. Ann. 148, 23 S.

250; Auditor Gen. *v.* Supervisors, 89 Mich. 552, 51 N. W. 483; O'Brien *v.* S., 69 Neb. 691, 96 N. W. 649; Cook *v.* New Durham, 64 N. H. 419, 13 A. 650; Page *v.* Hazelton, 74 N. H. 252, 66 A. 1049; Lapham *v.* Marshall, 51 Hun 36, 3 N. Y. S. 601; Wheeler *v.* Court, 21 R. I. 49, 41 A. 574; Holland *v.* Ingram, 6 Rich. L. (S. C.) 50; Carter *v.* Co., 34 Utah 315, 97 P. 334; S. *v.* Ward, 61 Vt. 153, 17 A. 483; Wyoming L. & G. Co. *v.* Co., 3 Wyo. 386, 24 P. 193.

As used in an instruction (McWilliams *v.* Rodgers, 56 Ala. 87; Lamb *v.* S., 69 Neb. 212, 95 N. W. 1050) or request for an instruction. Appeal of Crandall, 63 Conn. 365, 28 A. 531, 38 Am. St. 375.

A comparison by the jury of the handwriting in two documents, one admitted to be genuine, is a "means sanctioned by law for ascertaining the truth" respecting a question of fact, to-wit, the genuineness of the other. Castor *v.* Bernstein, 2 Cal. App. 703, 84 P. 244.

300-2 McWilliams *v.* Rodgers, supra. See Doctor Jack *v.* Ty., 2 Wash. Ty. 101, 3 P. 832.

300-3 Documents may be in evidence without being formally introduced if a statute so declares. Fowler *v.* Newsom, 174 Ind. 104, 90 N. E. 9. See Mann *v.* Higgins, 83 Cal. 66, 23 P. 206; Oliveros *v.* S., 120 Ga. 237, 47 S. E. 627; Carroll *v.* Baucker, 43 La. Ann. 1078, 1194, 10 S. 187; Noyes *v.* Pugin, 2 Wash. 653, 27 P. 548; Ex parte Brenner, 3 Wyo. 412, 26 P. 993.

302-7 Carter *v.* Co., 34 Utah 315, 97 P. 334.

Term "testimony" in bill of exceptions.—Gazette P. Co. *v.* Morss, 60 Ind. 153; Central T. Co. *v.* S., 110 Ind. 203, 10 N. E. 922, 12 N. E. 136; Kleyla *v.* S., 112 Ind. 146, 13 N. E. 255; Knapp *v.* Scherck, 2 O. C. C. (N. S.) 589.

Testimony and evidence are used synonymously. Jones *v.* Seattle, 51 Wash. 245, 98 P. 743.

An attorney's professional statement to court is equivalent to testimony of a witness. In re Winslow's Will (Ia.), 122 N. W. 971.

Uncontradicted statement of accused to jury is without probative effect. Robinson *v.* S., 6 Ga. App. 696, 65 S. E. 792.

303-8 Prima facie evidence is such as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose. Tift *v.* R. Co., 138 Fed. 753; Thomas *v.* Williamson, 51 Fla. 332, 40 S. 831.

303-9 The right to offer oral testimony to establish a cause of action cannot be successfully denied. Halprin *v.* Sarner, 117 N. Y. S. 995.

EXAMINATION BEFORE COMMITTING MAGISTRATE

Competency of witness, 317-43; *Impeachment of evidence,* 324-81; *Weight of evidence,* 326-3; *Presumption,* 326-3.

306-1 S. *v.* Pigg, 80 Kan. 481, 103 P. 121; Van Buren *v.* S., 65 Neb. 223, 91 N. W. 201; S. *v.* Beaverstad, 12 N. D. 527, 97 N. W. 548; S. *v.* McGinley, 153 Wis. 5, 140 N. W. 332. See Carson *v.* S., 80 Neb. 619, 114 N. W. 938.

307-3 S. *v.* Pigg, supra; Porch *v.* S., 51 Tex. Cr. 7, 99 S. W. 1122. See Quinton *v.* S. (Okla. Cr.), 139 P. 705.

307-4 The filing of an information is basis of presumption that examination has been had or waived. Canard *v.* S., 2 Okla. Cr. 505, 103 P. 737.

307-5 Van Buren *v.* S., 65 Neb. 223, 91 N. W. 201; Harris *v.* County, 16 N. D. 204, 112 N. W. 971 (preliminary not a trial).

307-6 See S. *v.* McLain, 13 N. D. 368, 102 N. W. 407.

308-7 Depositions of witnesses preliminary to issue of warrant may be taken in secret. P. *v.* Wyatt, 113 App. Div. 111, 99 N. Y. S. 114.

308-9 In re Mitchell, 1 Cal. App. 396, 82 P. 347; In re Stilts, 74 Kan. 805, 87 P. 1134; Jahnke *v.* S., 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; In re Kelly, 28 Nev. 491, 83 P. 223; P. *v.* Schneider, 154 App. Div. 203, 139 N. Y. S. 104; P. *v.* Shenk, 142 N. Y. S. 1081. See S. *v.* Beaverstad, 12 N. D. 527, 97 N. W. 548; Ex parte Patterson, 50 Tex. Cr. 271, 95 S. W. 1061; Ex parte Richards, 44 Tex. Cr. 561, 72 S. W. 838.

Report of coroner's jury may be sufficient. In re Joerns, 51 Misc. 395, 100 N. Y. S. 503.

Uncorroborated testimony of accomplice is insufficient to show probable cause. S. *v.* Smith, 138 Ala. 111, 35 S. 42.

Fugitive from justice, on being arrested, is given a sufficient examination where his identity is established

as the person called for in the warrant of arrest. S. *v.* Aucoin, 111 La. 51, 35 S. 381.

308-10 P. *v.* Coombs, 9 Cal. App. 262, 98 P. 686; Ex parte Squires, 13 Ida. 624, 92 P. 754 (guilt need not be established beyond a reasonable doubt); P. *v.* Shenk, 142 N. Y. S. 1081; S. *v.* Beaverstad, 12 N. D. 527, 97 N. W. 548.

Burden of proof is on state. Ex parte Patterson, 50 Tex. Cr. 271, 95 S. W. 1061.

Sufficiency of evidence is presumed. P. *v.* Assn., 12 Cal. App. 471, 107 P. 712.

Complainant need not be called as a witness; statute requiring his examination is directory. Lundstrum *v.* S., 140 Wis. 141, 121 N. W. 883.

308-11 Pereles *v.* Weil, 157 Fed. 419; S. *v.* Beaverstad, 12 N. D. 527, 97 N. W. 548.

309-12 Jahnke *v.* S., 68 Neb. 154, 94 N. W. 158, 104 N. W. 154 (plea of abatement that no sufficient preliminary examination was had); S. *v.* Beaverstad, supra; Ex parte Patterson, 50 Tex. Cr. 271, 95 S. W. 1061.

310-15 In re Sly, 9 Ida. 779, 76 P. 766; Ex parte Squires, 13 Ida. 624, 92 P. 754. See S. *v.* Jeffries, 210 Mo. 302, 109 S. W. 614; Montgomery *v.* S., 128 Wis. 183, 107 N. W. 14.

310-19 S. *v.* Beaverstad, 12 N. D. 527, 97 N. W. 548.

311-21 S. *v.* McLain, 13 N. D. 368, 102 N. W. 407 (waiver by voluntary absence); S. *v.* Rabens, 79 S. C. 542, 60 S. E. 442, 1110 (waiver by failure to appear in person).

311-22 Farnham *v.* Colman, 19 S. D. 342, 103 N. W. 161, 1 L. R. A. (N. S.) 1135.

311-23 Farnham *v.* Colman, supra, dying declaration need not be produced by state.

312-26 Retracted testimony against accused is not admissible. U. S. *v.* Caligagan, 2 Phil. Isl. 433.

313-27 Quinlan *v.* C., 149 Ky. 476, 149 S. W. 892; Lake *v.* C., 31 Ky. L. R. 1232, 104 S. W. 1003; S. *v.* Britton, 131 La. 877, 60 S. 379; P. *v.* Qualey, 210 N. Y. 202, 104 N. E. 138; Washmood *v.* U. S. (Okla. Cr.), 136 P. 184; Driggers *v.* U. S., 21 Okla. 60, 95 P. 612; Gamboa *v.* S. (Tex. Cr.), 155 S. W. 249; Irving *v.* S. (Tex. Cr.), 150 S. W. 611; Dowd *v.* S., 52 Tex. Cr. 563, 108 S. W. 389.

Lack of representation by counsel immaterial. Butler *v.* S., 83 Ark. 272, 103 S. W. 382.

314-28 Straler *v.* S. (Okla. Cr.), 138 P. 395; Porch *v.* S., 51 Tex. Cr. 7, 99 S. W. 1122.

314-30 Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561.

Insufficient.—C. *v.* Lenousky, 206 Pa. 277, 55 A. 977.

314-31 Cases cited are overruled in Porch *v.* S., 51 Tex. Cr. 7, 99 S. W. 1122; adhered to in Hobbs *v.* S., 53 Tex. Cr. 71, 112 S. W. 308.

315-32 Francis *v.* S. (Ala.), 65 S. 969; Wilson *v.* S., 140 Ala. 43, 37 S. 93; Shirley *v.* S., 144 Ala. 35, 40 S. 269; Eyer *v.* S. (Ark.), 164 S. W. 756; Petty *v.* S., 76 Ark. 515, 89 S. W. 465; Butler *v.* S., 83 Ark. 272, 103 S. W. 382; P. *v.* Buckley, 143 Cal. 375, 77 P. 169; P. *v.* Garnett, 9 Cal. App. 194, 98 P. 247; P. *v.* Louie Dene, 20 Cal. App. 137, 128 P. 339; P. *v.* Pembroke, 6 Cal. App. 588, 92 P. 668; S. *v.* Bollero, 112 La. 850, 36 S. 754; S. *v.* Butler, 247 Mo. 685, 153 S. W. 1042; P. *v.* Gilhooley, 108 App. Div. 234, 95 N. Y. S. 636, *aff.* 187 N. Y. 551, 80 N. E. 1116; Edwards *v.* S., 9 Okla. Cr. 306, 131 P. 956; Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561; S. *v.* Heffernan, 24 S. D. 1, 123 N. W. 87; Millner *v.* S. (Tex. Cr.), 162 S. W. 348; Gamboa *v.* S. (Tex. Cr.), 155 S. W. 249; Whorton *v.* S. (Tex. Cr.), 152 S. W. 1082; Hughes *v.* S. (Tex. Cr.), 152 S. W. 912; Hobbs *v.* S., 53 Tex. Cr. 299, 117 S. W. 811, 53 Tex. Cr. 71, 112 S. W. 308 (immaterial that there is independent testimony covering same matter); Nixon *v.* S., 53 Tex. Cr. 325, 109 S. W. 931; S. *v.* Inlow (Utah), 141 P. 530. See C. *v.* Lenousky, 206 Pa. 277, 55 A. 977.

Must be absent from state permanently. S. *v.* Britton, 131 La. 877, 60 S. 379.

Rule in California.—P. *v.* Sierp, 116 Cal. 249, 48 P. 88; P. *v.* Clark, 151 Cal. 200, 90 P. 549; P. *v.* Barker, 144 Cal. 705, 78 P. 266.

315-35 S. *v.* Harmon, 70 Kan. 476, 78 P. 805; S. *v.* Banks, 111 La. 22, 35 S. 370; P. *v.* Gilhooley, 108 App. Div. 234, 95 N. Y. S. 636, *aff.* 187 N. Y. 551, 80 N. E. 1116.

316-37 Mitchell *v.* S., 114 Ala. 1, 22 S. 71; Bardin *v.* S., 143 Ala. 74, 38 S. 833; S. *v.* Banks, 111 La. 22, 35 S. 370; S. *v.* Aspara, 113 La. 940, 37 S. 883; S. *v.* Sejours, 113 La. 676, 37 S. 599.

316-39 S. *v.* Britton, 131 La. 877, 60 S. 379.

316-40 Wray *v.* S., 154 Ala. 36, 45 S. 697, 15 L. R. A. (N. S.) 493 (where witness was so sick that he was allowed to answer but one question, defendant refusing to cross-examine, there was no confrontation); S. *v.* Wheat, 111 La. 860, 35 S. 955 (evidence inadmissible where a continuance would probably result in obtaining presence of witness); Spencer *v.* S., 132 Wis. 509, 112 N. W. 462 (sickness must be permanent—full discussion of authorities).

317-43 U. S. *v.* Castillo, 2 Phil. Isl. 17.

Testimony at preliminary hearing admissible if witness cannot be brought to court then or at subsequent time. S. *v.* Britton, 131 La. 877, 60 S. 379.

Deposition inadmissible except for impeachment. P. *v.* Miner, 138 Mich. 290, 101 N. W. 536.

Subsequent and continuing incompetency of witness renders former testimony inadmissible. Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561.

317-44 See Quinlan *v.* C., 149 Ky. 476, 149 S. W. 892; Gamboa *v.* S. (Tex. Cr.), 155 S. W. 249.

Evidence reviewed and held sufficient. Paxton *v.* S., 108 Ark. 316, 157 S. W. 396; Edwards *v.* S., 9 Okla. Cr. 306, 131 P. 956; Millner *v.* S. (Tex. Cr.), 162 S. W. 348; Whorton *v.* S. (Tex. Cr.), 152 S. W. 1082.

Clear proof necessary.—Dorman *v.* S., 48 Fla. 18, 37 S. 561; Nixon *v.* S., 53 Tex. Cr. 325, 109 S. W. 931. See Allen *v.* S., 84 Ark. 178, 105 S. W. 70.

Failure to put under bonds an absconding witness is not lack of due diligence. P. *v.* Flannery, 3 Cal. App. 41, 84 P. 461.

Order of proof.—The court may allow deposition of absent witness to be read before entire predicate for its admission has been laid. P. *v.* Grill, 151 Cal. 592, 91 P. 515.

Scope of predicate.—It must be shown, inter alia, otherwise than by the writings that examination was had and that witness whose purported testimony is offered was sworn and testified. Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561.

Insufficient evidence.—Bell *v.* S., 156 Ala. 76, 47 S. 242.

318-45 P. *v.* Witty, 138 Cal. 576, 72 P. 177; P. *v.* Lewandowski, 143 Cal. 574, 77 P. 467; P. *v.* Melandrez, 4 Cal. App. 396, 88 P. 372; S. *v.* Sejours, 113 La. 676, 37 S. 599. *Comp.* Bardin *v.* S., 143 Ala. 74, 38 S. 833.

Return must be supplemented by other evidence of diligence. S. *v.* McClellan, 79 Kan. 11, 98 P. 209.

Extra-legal return not competent. Driggers *v.* U. S., 21 Okla. 60, 95 P. 612.

318-46 P. *v.* Barker, 144 Cal. 705, 78 P. 266; P. *v.* Grill, 151 Cal. 592, 91 P. 515; S. *v.* Aspara, 113 La. 940, 37 S. 883; S. *v.* Bollero, 112 La. 850, 36 S. 754.

318-47 Driggers *v.* U. S., 21 Okla. 60, 95 P. 612.

318-49 Degg *v.* S., 150 Ala. 3, 43 S. 484 (presence of jury not necessary); P. *v.* Lewandowski, 143 Cal. 574, 77 P. 467.

318-50 P. *v.* Melandrez, 4 Cal. App. 396, 88 P. 372; Dorman *v.* S., 48 Fla. 18, 37 S. 561.

319-51 See S. *v.* Aspara, 113 La. 940, 37 S. 883.

319-52 See P. *v.* Gilhooley, 108 App. Div. 234, 95 N. Y. S. 636, *aff.* 187 N. Y. 551, 80 N. E. 1116.

319-56 Petty *v.* S., 76 Ark. 515, 89 S. W. 465; Butler *v.* S., 83 Ark. 272, 103 S. W. 382; Snelling *v.* S., 49 Fla. 34, 37 S. 917 (testimony of stenographer given after refreshing memory from a transcript made from notes); S. *v.* Harmon, 70 Kan. 476, 78 P. 805 (by attorney who represented state at hearing); Spencer *v.* S., 132 Wis. 509, 112 N. W. 462 (by testimony of examining magistrate). Proof of the testimony is essential. U. S. *v.* Caligagan, 2 Phil. Isl. 433.

319-57 See S. *v.* Harmon, 70 Kan. 476, 78 P. 805.

320-58 S. *v.* Harmon, supra.

321-65 S. *v.* Aspara, 113 La. 940, 37 S. 883; S. *v.* Legg, 59 W. Va. 315, 53 S. E. 545; Spencer *v.* S., 132 Wis. 509, 112 N. W. 462.

Transcript from stenographic notes is admissible. P. *v.* Garnett, 9 Cal. App. 194, 98 P. 247 (if certified); Lake *v.* C., 31 Ky. L. R. 1232, 104 S. W. 1003. See Petty *v.* S., 76 Ark. 515, 89 S. W. 465.

321-66 See Wilson *v.* S., 140 Ala. 43, 37 S. 93.

Deposition upon which warrant was issued inadmissible at trial where no op-

portunity to cross-examine witness. P. *v.* Warden, 139 N. Y. S. 828.

322-68 Sanford *v.* S., 143 Ala. 78, 39 S. 370. But see Willis *v.* U. S., 6 Ind. Ty. 424, 98 S. W. 147.

323-72 Descriptive interpolations by reporter must be omitted in reading deposition. P. *v.* Witty, 138 Cal. 576, 72 P. 177. And see P. *v.* Lewandowski, 143 Cal. 574, 77 P. 467, statutory deposition cannot usually be added to by testimony of witnesses.

323-76 Falkner *v.* S., 151 Ala. 77, 44 S. 409; Angling *v.* S., 137 Ala. 17, 34 S. 846; S. *v.* Mounkes, 88 Kan. 193, 127 P. 637; P. *v.* Miner, 138 Mich. 290, 101 N. W. 536; Westlake *v.* Min. Co., 48 Mont. 120, 136 P. 38.

323-77 *Comp.* P. *v.* Smith, 114 App. Div. 513, 100 N. Y. S. 259.

On cross-examination witness is entitled to see record of the evidence or have it read to him. Moss *v.* S., 152 Ala. 30, 44 S. 598.

324-79 See Tiner *v.* S. (Ark.), 158 S. W. 1087. Examining magistrate may read from his memorandum although his memory is not thereby refreshed. Bell *v.* S., 90 Miss. 104, 43 S. 84.

324-80 Midland V. R. Co. *v.* Ennis (Ark.), 159 S. W. 214.

324-81 Impeachment of evidence. Customary foundation must be laid notwithstanding the absence of the witness. P. *v.* Witty, 138 Cal. 576, 72 P. 177; P. *v.* Compton, 132 Cal. 484, 64 P. 849; P. *v.* Pembroke, 6 Cal. App. 588, 92 P. 668.

In corroboration of an impeached witness his written and verified statement made at the hearing is admissible in so far as it relates to the controverted point. Falkner *v.* S., 151 Ala. 77, 44 S. 409.

324-82 P. *v.* Warner, 147 Cal. 546, 82 P. 196; P. *v.* Buckley, 143 Cal. 375, 77 P. 169.

Stenographer need not be official reporter of any court; his qualifications need not affirmatively appear; that he is an employe of district attorney does not render him incompetent. P. *v.* Nunley, 142 Cal. 441, 76 P. 45.

324-83 Signed testimony of witness admissible without further identification. Wadsworth *v.* S., 9 Okla. Cr. 84, 130 P. 808.

325-84 Stenographer's signature to transcript insufficient without his testimony as to correctness of transcript. Degg *v.* S., 150 Ala. 3, 43 S. 484.

325-88 S. *v.* Morgan, 27 Utah 103, 74 P. 526 (failure to file not ground for a continuance).

325-90 P. *v.* Buckley, 143 Cal. 375, 77 P. 169.

325-91 Francis *v.* S. (Ala.), 65 S. 969. See Dowd *v.* S., 52 Tex. Cr. 563, 108 S. W. 389.

325-93 Where the part of transcript containing the testimony in issue was correctly certified, it is immaterial that another portion of it was defective. P. *v.* Pembroke, 6 Cal. App. 588, 92 P. 668.

326-94 Lake *v.* C., 31 Ky. L. R. 1232, 104 S. W. 1003. See Butler *v.* S., 83 Ark. 272, 103 S. W. 382; Petty *v.* S., 76 Ark. 515, 89 S. W. 465; Dowd *v.* S., 52 Tex. Cr. 563, 108 S. W. 389.

326-95 P. *v.* Deane, 23 Cal. App. 745, 139 P. 904.

Certificate of stenographer takes place of certificate of magistrate as to the correctness of the evidence. S. *v.* Carlson, 23 Ida. 545, 130 P. 463.

Sole method of proof of deposition is by certificate of reporter. P. *v.* Buckley, 143 Cal. 375, 77 P. 169.

326-97 *Comp.* P. *v.* Lewandowski, 143 Cal. 574, 77 P. 467, explaining cases cited in text.

326-98 See P. *v.* Ong Git, 23 Cal. App. 148, 137 P. 283.

326-2 P. *v.* Vitusky, 155 App. Div. 139, 140 N. Y. S. 19.

326-3 Weight of evidence.—Such evidence, when used at the trial, is secondary, and it is error to instruct jury to consider it as though witness was present in person and testifying. Degg *v.* S., 150 Ala. 3, 43 S. 484.

Presumption of regularity.—See P. *v.* Warner, 147 Cal. 546, 82 P. 196 (that proceedings leading up to commitment were regularly conducted); P. *v.* Witty, 138 Cal. 576, 72 P. 177 (that stenographer properly transcribed evidence); P. *v.* Clark, 151 Cal. 200, 90 P. 549; P. *v.* Buckley, 143 Cal. 375, 77 P. 169.

327-4 Jones *v.* S., 137 Ala. 12, 34 S. 681; Freeman *v.* C., 31 Ky. L. R. 639, 103 S. W. 274; S. *v.* King, 162 N. C. 580, 77 S. E. 301; U. S. *v.* Caligagan, 2 Phil. Isl. 433 (though retracted); S. *v.* Blay, 77 Vt. 56, 58 A. 794; S. *v.* Carpenter, 32 Wash. 254, 73 P. 357; S. *v.* Washing, 36 Wash. 485, 78 P.

1019; Lundstrum *v.* S., 140 Wis. 141, 121 N. W. 883.

327-6 Angling *v.* S., 137 Ala. 17, 34 S. 846, testimony of defendant admissible as being in the nature of a judicial confession.

327-7 Spicer *v.* S. (Tex. Cr.), 154 S. W. 548.

327-8 Tiner *v.* S. (Ark.), 158 S. W. 1087; S. *v.* Finch, 71 Kan. 793, 81 P. 494. *Contra,* Tuttle *v.* P., 33 Colo. 243, 79 P. 1035. *Comp.* S. *v.* May, 62 W. Va. 129, 57 S. E. 366. And see S. *v.* Legg, 59 W. Va. 315, 53 S. E. 545.

328-10 See supra, "Confessions," 301-15.

328-12 S. *v.* Finch, 71 Kan. 793, 81 P. 494. *Contra,* Tuttle *v.* P., 33 Colo. 243, 79 P. 1035, full discussion of authorities in both cases.

329-15 See S. *v.* King, 162 N. C. 580, 77 S. E. 301.

329-16 S. *v.* Parker, 132 N. C. 1014, 43 S. E. 830. Rule recognized. Kirkpatrick *v.* S., 57 Tex. Cr. 17, 121 S. W. 511.

329-18 S. *v.* Vaughan, 156 N. C. 615, 71 S. E. 1089; Miller *v.* S. (Tex. Cr.), 91 S. W. 582; S. *v.* Blay, 77 Vt. 56, 58 A. 794. *Comp.* Henderson *v.* S. (Tex. Cr.), 95 S. W. 131.

329-19 McNish *v.* S., 45 Fla. 83, 34 S. 219.

329-21 Rason *v.* S., 57 Tex. Cr. 10, 121 S. W. 512.

EXAMINATION OF PARTIES BEFORE TRIAL

State statutes not applicable to federal courts, 335-1; *Examination during trial,* 361-18.

335-1 Lasher *v.* Bolton's Sons, 161 App. Div. 381, 146 N. Y. S. 321; Horlick's M. M. Co. *v.* Spiegel Co., 155 Wis. 201, 144 N. W. 272.

State statutes not applicable to federal courts.—Ex parte Fisk, 113 U. S. 713; National C. R. Co. *v.* Leland, 77 Fed. 242, 94 Fed. 502, 37 C. C. A. 372; Hanks D. Assn. *v.* Co., 194 U. S. 303; Blood *v.* Morrin, 140 Fed. 918.

335-2 Brooke *v.* Boyd (Wash.), 141 P. 357. See Beem *v.* Farrell, 135 Ia. 670, 113 N. W. 509; Brown *v.* Corey, 191 Mass. 189, 77 N. E. 838; Ellinger *v.* Society, 125 Wis. 643, 104 N. W. 811.

336-5 Sullivan *v.* R. Co., 152 Wis. 574, 140 N. W. 316; Ellinger *v.* Society, supra. See Heller, Hirst & Co. *v.* Mfg. Co., 155 App. Div. 211, 140 N. Y. S. 117.

Party in foreign country may be examined. Hite *v.* Keene, 137 Wis. 625, 119 N. W. 303.

New York courts now liberally interpret their code provisions. See Goldmark *v.* Co., 111 App. Div. 526, 97 N. Y. S. 1078; McKeand *v.* Locke, 115 App. Div. 174, 100 N. Y. S. 704.

"Orders for such examinations are upheld with much greater freedom than was formerly the case." Bergstrom *v.* Ridgway Co., 138 App. Div. 178, 123 N. Y. S. 29.

336-6 Heckendorn *v.* Romadka, 138 Wis. 416, 120 N. W. 257.

Motive of party immaterial.—Ellinger *v.* Soc., 138 Wis. 390, 120 N. W. 235.

337-8 Turck *v.* Chisholm, 53 Misc. 110, 103 N. Y. S. 1095.

337-9 Tanenbaum *v.* Lippmann, 89 App. Div. 17, 85 N. Y. S. 122; Mithertz *v.* Co., 64 Misc. 460, 118 N. Y. S. 610 (ability to subpoena and stipulation to appear); Turck *v.* Chisholm, 53 Misc. 110, 103 N. Y. S. 1095; Bender *v.* Bork, 52 Misc. 295, 102 N. Y. S. 152; Wagner *v.* Haight, 89 N. Y. S. 323.

Application not defeated because bill of particulars could have been obtained. Tirpak *v.* Hoe, 53 Misc. 532, 13 N. Y. S. 795. See Goldmark *v.* Co., 111 App. Div. 526, 97 N. Y. S. 1078; McKeand *v.* Locke, 115 App. Div. 174, 100 N. Y. S. 704; Hill *v.* McKane, 115 App. Div. 537, 101 N. Y. S. 411. Nor because defendant could be subpoenaed to attend trial (Grant *v.* Greene, 118 App. Div. 850, 103 N. Y. S. 674; McKeand *v.* Locke, supra; Goldmark *v.* Co., supra); or because a trial of the issues prior to an interlocutory judgment is necessary and will disclose all facts. Griffen *v.* Davis, 99 App. Div. 65, 90 N. Y. S. 491.

337-10 *Comp.* Phipps *v.* R. Co., 133 Wis. 153, 113 N. W. 456, statute giving right to examine former employe of corporation, but not of an individual, unconstitutional.

337-12 In re Sands, 112 App. Div. 649, 98 N. Y. S. 459. See Hite *v.* Keene, 137 Wis. 625, 119 N. W. 303.

Attempted examination of a party at his own house, ineffectual. McSwane *v.* Foreman, 167 Ind. 171, 78 N. E. 630.

338-13 Standard Trad. Co. *v.* Seybold, 7 Ont. L. R. (Can.) 39.

338-14 Phipps *v.* R. Co., 133 Wis. 153, 113 N. W. 456.

338-17 Wagner *v.* Haight, 89 N. Y. S. 323; American Food P. Co. *v.* Mill. Co., 151 Wis. 385, 138 N. W. 1123. See Ellinger *v.* Soc., 138 Wis. 390, 120 N. W. 235.

339-18 Bender *v.* Bork, 52 Misc. 295, 102 N. Y. S. 152; Wessel *v.* Schwarzler, 144 App. Div. 587, 129 N. Y. S. 521; *s. c.*, 144 App. Div. 289, 129 N. Y. S. 522; Berger *v.* Herbert, 81 Misc. 360, 142 N. Y. S. 2.

339-20 Tirpak *v.* Hoe, 53 Misc. 532, 13 N. Y. S. 795; Shonts *v.* Thomas, 102 N. Y. S. 324.

Claim of privilege not cause for denying order. Ely *v.* Perkins, 127 App. Div. 823, 112 N. Y. S. 122.

339-22 *Contra*, Hanks D. Assn. *v.* Co., 194 U. S. 303; Frost *v.* Barber, 173 Fed. 847.

340-23 **Under Ontario act** a court outside jurisdiction within which examination is to be held has no power to command a witness' attendance for purpose of cross-examination. Bank *v.* Booth (Can.), 10 West. L. Rep. 94.

340-24 **Cause of action** must prima facie exist. Schultz *v.* Strauss, 127 Wis. 325, 106 N. W. 1066.

Issues must be joined if complaint served. Sprague *v.* Currie, 129 App. Div. 365, 113 N. Y. S. 789.

340-25 See Louda *v.* Revillon, 99 App. Div. 431, 91 N. Y. S. 194.

340-27 Nashville, etc. R. Co. *v.* Karthaus, 150 Ala. 633, 43 S. 791; Beer I. Co. *v.* Boross, 136 App. Div. 649, 121 N. Y. S. 342; Koplin *v.* Hoe, 108 N. Y. S. 602.

As to defendant's right to an examination of plaintiff in action to recover for injuries to person, see Wood *v.* Hoffman, 121 App. Div. 636, 106 N. Y. S. 308.

341-30 Closson *v.* Bligh, 41 Ind. App. 14, 83 N. E. 263. See Western I. Co. *v.* Bank, 23 Colo. App. 143, 128 P. 476; Eastern R. Co. *v.* Tuteur, 127 Wis. 382, 105 N. W. 1067.

Possibility of claim of privilege not sufficient to cause denial of examination. Niehoff *v.* S., 134 App. Div. 473, 119 N. Y. S. 247.

Parties and persons who are not parties should not not be included in same order. Diefendorf *v.* Fenn, 125 App. Div. 651, 110 N. Y. S. 68.

Adverse co-defendants may be examined by defendant. Weidenfeld *v.* Hollins, 41 Misc. 616, 85 N. Y. S. 217.

341-31 See Bradley *v.* Bradley, 137 App. Div. 751, 122 N. Y. S. 626. The relatrix in a bastardy action is not a party. Walker *v.* S., 43 Ind. App. 605, 86 N. E. 502.

341-32 Berniek *v.* McClure, 107 Minn. 9, 119 N. W. 247.

342-33 See Moffat *v.* Leonard, 8 Ont. L. R. 519; Garland *v.* Clarkson, 9 Ont. L. R. 281.

342-34 Vano *v.* Co., 13 Ont. L. R. 421.

342-36 **Examination of employe** of a party may be allowed if it is shown that the party seeking it cannot otherwise comply with an order requiring him to give a bill of particulars. Hill *v.* Bloomingdale, 136 App. Div. 651, 121 N. Y. S. 370. When examination of one not a party allowed. Chartered Bk. *v.* Ins. Co., 136 App. Div. 646, 121 N. Y. S. 399.

Under the Ontario practice a non-resident officer of a foreign corporation cannot be examined. Perrins *v.* Wks., 8 Ont. L. R. 634. Attorney of a foreign corporation may be examined as an officer thereof. McNeil *v.* Lewis, 16 Ont. L. R. 652.

342-37 *Contra*, Strodl *v.* Co., 63 Misc. 54, 116 N. Y. S. 570.

Former corporate officers may be examined. Chittenden *v.* Co., 132 App. Div. 169, 116 N. Y. S. 829. *Contra*, Chartered Bk. *v.* Ins. Co., 136 App. Div. 646, 121 N. Y. S. 399.

342-38 Chartered Bk. *v.* Ins. Co., *supra*, if corporation is not a party.

343-39 *Contra*, Harbaugh *v.* Co., 110 App. Div. 633, 97 N. Y. S. 350; Johnson *v.* Co., 126 Wis. 492, 105 N. W. 1048; Hughes *v.* R. Co., 122 Wis. 258, 99 N. W. 897.

The practice is for the order to authorize examination of the party; if the party is a corporation the order may provide that certain of its officers may be examined. Jacobs *v.* R. Co., 112 App. Div. 657, 98 N. Y. S. 542; Herrman *v.* Tapley, 64 Misc. 466, 118 N. Y. S. 803. See Mithertz *v.* Co., 64 Misc. 460, 118 N. Y. S. 610.

Examination of officer of a corporation as such, apart from the corporation, not authorized. Meade *v.* Assn., 119 App. Div. 761, 104 N. Y. S. 523; Jacobs *v.* Co., 112 App. Div. 657, 98 N. Y. S.

542; Shumaker *v.* Doubleday, 116 App. Div. 302, 101 N. Y. S. 587.

Director may be examined, though he has severed his connection with corporation since alleged transaction. Societe Generale *v.* Co. (1904), 1 K. B. (Eng.) 794; Kirchoffer *v.* Co., 7 Ont. L. R. 295. *Contra,* Cantin *v.* Co., 8 Ont. L. R. 531. But directors who became such subsequent to transaction cannot be examined. Hart *v.* Co., 41 Misc. 436, 84 N. Y. S. 1065; In re Thompson, 95 App. Div. 542, 89 N. Y. S. 4 (president).

343-40 *Contra,* Hughes *v.* R. Co., 122 Wis. 258, 99 N. W. 897.

343-41 Examination should be limited to officers having personal knowledge. Solar B. P. Co. *v.* Co., 128 App. Div. 550, 112 N. Y. S. 1013.

343-43 Davies *v.* Bk., 12 Ont. L. R. 557.

344-48 In re Cohen, 53 Misc. 400, 104 N. Y. S. 1027.

345-49 See Boyle *v.* Co., 46 Misc. 191, 94 N. Y. S. 27.

Examination of intended party only for purpose of perpetuating testimony. In re Schlotterer, 105 App. Div. 115, 93 N. Y. S. 895.

Incidental disclosure of a cause of action against another person not ground for denial. In re Sands, 112 App. Div. 649, 98 N. Y. S. 459.

Examination of a defendant not allowed, to determine upon whom summons can be served to obtain jurisdiction over another defendant. Grant *v.* Co., 118 App. Div. 853, 103 N. Y. S. 676.

Interrogatories may be propounded when the issue is presented by an answer in abatement. Paul *v.* R. Co., 33 Ind. App. 157, 69 N. E. 1024.

345-50 Issues must be joined. Diefendorf *v.* Fenn, 125 App. Div. 651, 110 N. Y. S. 68.

345-51 Examination before trial a provisional remedy. Phipps *v.* R. Co., 133 Wis. 153, 113 N. W. 456.

345-52 Examination not allowed to enable a party to prepare for trial. Diefendorf *v.* Fenn, 125 App. Div. 651, 110 N. Y. S. 68.

345-53 Koppel *v.* Hatch, 50 Misc. 626, 98 N. Y. S. 619; Ellinger *v.* Society, 125 Wis. 643, 104 N. W. 811 (allowed in aid of a "claim" urged in defense of a proceeding).

346-54 Chittenden *v.* Co., 132 App. Div. 169, 116 N. Y. S. 829.

346-55 Diefendorf *v.* Fenn, 125 App. Div. 651, 110 N. Y. S. 68.

347-57 Rosenthal *v.* Jackson, 125 App. Div. 895, 110 N. Y. S. 786 (to ascertain existence of cause of action); Connors *v.* Collier, 65 Misc. 169, 119 N. Y. S. 513; Knight *v.* Morgenroth, 93 App. Div. 424, 87 N. Y. S. 693. See Storer *v.* Harris, 141 N. Y. S. 897. *Comp.* Istok *v.* Senderling, 118 App. Div. 162, 103 N. Y. S. 13. *Contra.* Gratz *v.* Parker, 137 Wis. 104, 118 N. W. 637.

347-58 Brichta *v.* Simon, 152 App. Div. 832, 137 N. Y. S. 751; White *v.* Co., 134 App. Div. 948, 118 N. Y. S. 1057; Akhurst *v.* Co., 64 Misc. 445, 119 N. Y. S. 561 (absolute necessity must be shown if it is sought to take deposition of one not a party after action begun); F. Garia *v.* Salomon, 84 N. Y. S. 508; Richardson & B. Co. *v.* Schiff, 93 App. Div. 368, 87 N. Y. S. 672; Grant *v.* Greene, 118 App. Div. 850, 103 N. Y. S. 674; Ellinger *v.* Society, 138 Wis. 390, 120 N. W. 235. See McCormack *v.* Coddington, 98 App. Div. 13, 90 N. Y. S. 218; Griffen *v.* Davis, 99 App. Div. 65, 90 N. Y. S. 491; Wagner *v.* Co., 89 N. Y. S. 323.

"Necessary" and "material" not synonymous. Koplin *v.* Hoe, 108 N. Y. S. 602.

347-59 Irving *v.* Higgins, 131 App. Div. 184, 115 N. Y. S. 254.

Positive allegations in the complaint not construed as showing that the facts are within knowledge of plaintiff. Istok *v.* Senderling, 118 App. Div. 162, 103 N. Y. S. 13.

348-61 Tanenbaum *v.* Lippmann, 89 App. Div. 17, 85 N. Y. S. 122. See Schnabel *v.* Bank, 137 N. Y. S. 725. *Contra,* Niehoff *v.* Co., 134 App. Div. 473, 119 N. Y. S. 247.

Ability to procure from others the same evidence no reason for refusing examination. Grant *v.* Greene, 118 App. Div. 850, 103 N. Y. S. 674; Turck *v.* Chisholm, 53 Misc. 110, 103 N. Y. S. 1095; McKeand *v.* Locke, 115 App. Div. 174, 100 N. Y. S. 704; Goldmark *v.* Co., 111 App. Div. 526, 97 N. Y. S. 1078. See also Cherbuliez *v.* Parsons, 108 N. Y. S. 321.

348-62 Oppenheimer *v.* Van Raalte, 151 App. Div. 601, 136 N. Y. S. 197; Heller, Hirsch & Co. *v.* Mfg. Co., 155 App. Div. 211, 140 N. Y. S. 117; Gee *v.* Pendas, 87 App. Div. 157, 84 N. Y. S. 32; Watt *v.* Feltman, 111 App. Div. 314, 97 N. Y. S. 737; Lyon *v.* Gloeck-

ner, 80 Misc. 642, 141 N. Y. S. 851; Grant *v.* Leopold, 61 Misc. 79, 113 N. Y. S. 167; Williams *v.* Snowman, 142 N. Y. S. 225. See Thompson *v.* Alden, 135 App. Div. 57, 119 N. Y. S. 742; Mason *v.* Pub. Co., 154 App. Div. 651, 139 N. Y. S. 639; Meredith *v.* Dodd, 145 N. Y. S. 662.

Under the New York Code order for examination of party cannot embrace an order for the production of books and papers, except in the single case of corporate books, which may be used to refresh memory. Gee *v.* Pendas, 87 App. Div. 157, 84 N. Y. S. 32; Hart *v.* Co., 111 Misc. 436, 84 N. Y. S. 1065; Knickerbocker Tr. Co. *v.* Schroeder, 109 N. Y. S. 1024; Coin N. Co. *v.* Lindenborn, 106 N. Y. S. 508; In re Thompson, 95 App. Div. 542, 89 N. Y. S. 4. See Shumaker *v.* Doubleday Co., 116 App. Div. 302, 101 N. Y. S. 587; Harbaugh *v.* Co., 110 App. Div. 633, 97 N. Y. S. 350; Boyle *v.* Co., 46 Misc. 191, 94 N. Y. S. 27; Bruen *v.* Co., 106 App. Div. 248, 94 N. Y. S. 304.

349-64 Sufrin *v.* Imp. Co., 153 App. Div. 887, 138 N. Y. S. 382; Richards *v.* Whiting, 127 App. Div. 208, 111 N. Y. S. 21; Goldmark *v.* Co., 111 App. Div. 526, 97 N. Y. S. 1078; Kaminer *v.* Co., 72 Misc. 356, 130 N. Y. S. 138; Strodl *v.* Co., 63 Misc. 54, 116 N. Y. S. 570. See Sullivan *v.* R. Co., 152 Wis. 574, 140 N. W. 316; American Food P. Co. *v.* Mill. Co., 151 Wis. 385, 138 N. W. 1123.

349-65 Presumption of knowledge by person to be examined justifies an order. Anderson *v.* Lisman, 130 App. Div. 134, 114 N. Y. S. 348.

349-66 Smyth *v.* Lichtenstein, 137 App. Div. 310, 122 N. Y. S. 73; Grant *v.* Co., 118 App. Div. 853, 103 N. Y. S. 676. See Edmundson *v.* Co. (1905), 2 K. B. (Eng.) 523; Plymouth Mut. Soc. *v.* Assn. (1906), 1 K. B. 403.

Interrogatories may be used to elicit answers on which to strike out a pleading as sham. Paul *v.* R. Co., 33 Ind. App. 157, 69 N. E. 1024.

349-67 Hagerty *v.* Co., 138 App. Div. 905, 122 N. Y. S. 843; Waitzfelder *v.* Co., 120 App. Div. 144, 104 N. Y. S. 796; Whitney *v.* Rudd, 100 App. Div. 492, 91 N. Y. S. 429.

350-69 Ehrich *v.* Co., 52 Misc. 641, 103 N. Y. S. 1023; McCormack *v.* Coddington, 98 App. Div. 13, 90 N. Y. S. 218.

350-70 **Where both purposes stated in petition,** examination denied. Frear *v.* Duryea, 151 App. Div. 687, 136 N. Y. S. 264.

350-71 Mendelson *v.* Newborg, 155 App. Div. 892, 139 N. Y. S. 1052; Badger B. Mfg. Co. *v.* Daly, 137 Wis. 601, 119 N. W. 328.

Examination not allowed to enable plaintiff to state amount of damages. Mendelson *v.* Newborg, 155 App. Div. 892, 139 N. Y. S. 1052.

Examination not necessary to frame complaint for an accounting. Pierce *v.* Co., 121 App. Div. 501, 106 N. Y. S. 28; Boskowitz *v.* Sulzbacher, 121 App. Div. 878, 106 N. Y. S. 865.

351-72 Thompson *v.* Haigh, 134 App. Div. 614, 119 N. Y. S. 331; Gardner *v.* Hopper, 124 App. Div. 654, 109 N. Y. S. 95.

351-75 In re Cohen, 53 Misc. 400, 104 N. Y. S. 1027. *Comp.* Hill *v.* McKane, 115 App. Div. 537, 101 N. Y. S. 411.

In Wisconsin examination may be had though affidavits show plaintiff does not know that cause of action exists; but *contra,* where it is so shown that no cause of action does or can exist. Gratz *v.* Parker, 137 Wis. 104, 118 N. W. 637.

352-77 Right exists if affidavit shows that plaintiff may recover. Heckendorn *v.* Romadka, 138 Wis. 416, 120 N. W. 257.

353-78 Ellett *v.* Young, 95 App. Div. 417, 88 N. Y. S. 661 (examination of agent to discover principal not allowed); In re Cohen, 53 Misc. 400, 104 N. Y. S. 1027.

353-79 White *v.* Assn. (1905), 1 K. B. (Eng.) 653; Plymouth Mut. Soc. *v.* Assn. (1906), 1 K. B. (Eng.) 403; Massey-H. Co. *v.* Co., 11 Ont. L. R. (Can.) 227; Union C. Co. *v.* Court, 149 Cal. 790, 87 P. 1035; Minihan *v.* R. Co., 197 Mass. 367, 83 N. E. 871; Watkins *v.* Cape, 84 N. J. L. 143, 86 A. 545; N. Y. Assets Realty Co. *v.* Pforzheimer, 158 App. Div. 700, 143 N. Y. S. 898; Hirsh *v.* Blair, 152 App. Div. 941, 137 N. Y. S. 753; Williams *v.* Snowman, 142 N. Y. S. 225; Schuler *v.* Woodward, 137 App. Div. 576, 122 N. Y. S. 404; George I. R. & Bros. *v.* Leary, 130 N. Y. S. 156; Graham *v.* Co., 2 O. N. P. (N. S.) 612; Horlick's M. M. Co. *v.* Spiegel Co., 155 Wis. 201, 144 N. W. 272. See Playfair *v.* Cormack, 24 O. W. R. 56, 4 O. W. N. 817, 9 D. L. R. 455; Hirsh *v.* Blair, 152 App. Div. 941, 137

N. Y. S. 753; Rochester Const. Co. *v.* Mach. Co., 145 N. Y. S. 930; Weber *v.* Columbia, 154 App. Div. 881, 138 N. Y. S. 878.

Any specific facts supporting defense of general denial may be called for. Grebenstein *v.* Co., 205 Mass. 431, 91 N. E. 411.

353-80 Higgins *v.* Co., 137 App. Div. 823, 122 N. Y. S. 465. See Yellow T. Co. *v.* Gaynor, 159 App. Div. 899, 144 N. Y. S. 599.

Examination not permitted to learn wealth of defendant in divorce action where his guilt is not yet established. Reynolds *v.* Reynolds, 81 Misc. 362, 142 N. Y. S. 1.

354-81 Knight *v.* Co., 55 Fla. 301, 45 S. 1025; Solar B. P. Co. *v.* Co., 128 App. Div. 550, 112 N. Y. S. 1013 (court may limit scope of order on its own motion).

354-82 Gavin *v.* Co., 122 App. Div. 643, 107 N. Y. S. 272; Hart *v.* Co., 41 Misc. 436, 84 N. Y. S. 1065; Ellinger *v.* Soc., 138 Wis. 390, 120 N. W. 235. See McDonald *v.* Morse, 96 App. Div. 406, 89 N. Y. S. 176.

Examination not allowed as to matters alleged in the answer which set up a new cause of action. Weidenfeld *v.* Hollins, 41 Misc. 616, 85 N. Y. S. 217; Oakes *v.* Co., 119 App. Div. 358, 104 N. Y. S. 244 (incompetent evidence cannot be considered material); Tirpak *v.* Hoe, 53 Misc. 532, 103 N. Y. S. 795 (as to manner in which injuries were received, their nature and extent, proper). See Potter *v.* Village, 112 App. Div. 91, 98 N. Y. S. 186; Muldoon *v.* R. Co., 98 App. Div. 169, 91 N. Y. S. 65 (to determine whether train which killed deceased was operated by defendant proper).

354-83 See Williams *v.* Snowman, 142 N. Y. S. 225.

355-84 Knight *v.* Co., 55 Fla. 301, 45 S. 1025; Wakeley *v.* R. Co. (Mass.), 105 N. E. 436; Watkins *v.* Cope, 84 N. J. L. 143, 86 A. 545; Skelly *v.* Mortimer, 154 App. Div. 921, 138 N. Y. S. 1100; Kerr *v.* Hammond, 153 App. Div. 681, 138 N. Y. S. 619; Schulte *v.* Petruzzi, 153 App. Div. 889, 137 N. Y. S. 1103; Locomobile Co. *v.* Nichols, 140 N. Y. S. 1041; Williams *v.* Snowman, 142 N. Y. S. 225; Cully *v.* R. Co., 35 Wash. 241, 77 P. 202.

Employe's report to defendant containing names of witnesses of accident, etc., need not be disclosed. Spinney *v.* R. Co., 188 Mass. 30, 73 N. E. 1021 (statute).

355-85 Watkins *v.* Cope, 84 N. J. L. 143, 86 A. 545; Elson *v.* Ungerger, 146 N. Y. S. 533 ("not to discover name of witness"); Sperry *v.* Co., 135 App. Div. 285, 120 N. Y. S. 362; Wood *v.* Hoffman, 121 App. Div. 636, 106 N. Y. S. 308; Knight *v.* Morgenroth, 93 App. Div. 424, 87 N. Y. S. 693; Merrill *v.* Woolworth, 53 Misc. 253, 103 N. Y. S. 57; Jones *v.* Goode, 7 O. C. C. (N. S.) 589. See M'Kenna *v.* Tully, 109 App. Div. 598, 96 N. Y. S. 561; Ehrich *v.* Root, 122 App. Div. 719, 107 N. Y. S. 846; Hartog, etc. Co. *v.* Wks., 124 App. Div. 627, 109 N. Y. S. 113 (items and details going to make up damages, not necessary to plaintiff's case). *Comp.* Edelstein *v.* Goldfield, 92 N. Y. S. 243; Lewis *v.* Buffalo, 115 App. Div. 735, 100 N. Y. S. 1052 (result of investigation as to the cause of action made by defendant, not necessary to plaintiff's case); Wood *v.* Wks., 114 App. Div. 108, 99 N. Y. S. 677 (extent of authority of agent, necessary); Reed *v.* Smith, 122 App. Div. 795, 107 N. Y. S. 893 (examination to identify letters and telegrams, the basis of an action, proper); Gavin *v.* Co., 122 App. Div. 643, 107 N. Y. S. 272; Nocito *v.* Acierno, 122 App. Div. 45, 106 N. Y. S. 785 (not discover name of witness).

355-86 Graham *v.* Co., 2 O. N. P. (N. S.) 612.

355-87 Rogers *v.* Adler, 137 App. Div. 197, 121 N. Y. S. 941; McCormack *v.* Coddington, 98 App. Div. 13, 90 N. Y. S. 218.

356-89 Grebenstein *v.* Co., 205 Mass. 431, 91 N. E. 411 (names of witnesses or manner of proving case); Reusens *v.* Arkenburgh, 136 App. Div. 653, 121 N. Y. S. 353. *Comp.* Cherbuliez *v.* Parsons, 123 App. Div. 814, 108 N. Y. S. 321.

356-92 See McKergow *v.* Comstock, 11 Ont. L. R. (Can.) 637.

Pleadings determine scope of examination. Northern Ins. Co. *v.* Wood, 118 N. Y. S. 1043.

356-93 Pleading a good defense is not cause for denying examination. Schweinburg *v.* Altman, 131 App. Div. 795, 116 N. Y. S. 318.

356-94 Horlick's M. M. Co. *v.* Spiegel Co., 155 Wis. 201, 144 N. W. 272. A general examination may be allowed in discretion of court where party seeking it has been deprived of the only

witness whose testimony could establish his defense. Alden *v.* O'Brien, 138 App. Div. 249, 122 N. Y. S. 910, *foll.* Herbage *v.* Utica, 109 N. Y. 81, 16 N. E. 62.

357-95 Garia *v.* Salomon, 84 N. Y. S. 508.

358-96 Bailey *v.* Matthews, 156 N. C. 78, 72 S. E. 92.

358-97 Cherbuliez *v.* Parsons, 123 App. Div. 814, 108 N. Y. S. 321; Waitzfelder *v.* Co., 120 App. Div. 144, 104 N. Y. S. 796.

Affidavit must set out facts showing materiality and necessity. Reynolds *v.* Callan, 134 App. Div. 732, 119 N. Y. S. 135.

358-98 See Schulte *v.* Petruzzi, 153 App. Div. 889, 137 N. Y. S. 1103.

358-1 Boskowitz *v.* Sulzbacher, 121 App. Div. 878, 106 N. Y. S. 865; Boskowitz *v.* Ulmann, 121 App. Div. 887, 106 N. Y. S. 870; Grant *v.* Greene, 118 App. Div. 850, 103 N. Y. S. 674; Mitchell *v.* Co., 124 App. Div. 325, 108 N. Y. S. 953.

359-5 Attorney may make affidavit for non-resident plaintiff. Reed *v.* Smith, 122 App. Div. 795, 107 N. Y. S. 893. His personal knowledge must be alleged. Independent S. Dist. *v.* Dist., 148 Ia. 154, 125 N. W. 184.

359-6 Boyd *v.* McGuire, 137 App. Div. 937, 122 N. Y. S. 263, must show cause of action. See American Food P. Co. *v.* Mill. Co., 151 Wis. 385, 138 N. W. 1123.

Affidavit must state that no previous application has been made. Mitchell *v.* Greene, 121 App. Div. 677, 106 N. Y. S. 449; Hirshfield *v.* Co., 51 Misc. 644, 99 N. Y. S. 912 (must be addressed to judge and not court).

Statement of conclusions not enough. Segschneider *v.* Co., 134 App. Div. 217, 118 N. Y. S. 1000.

359-7 Mitchell *v.* Co., 124 App. Div. 325, 108 N. Y. S. 953. See Meade *v.* Assn., 119 App. Div. 761, 104 N. Y. S. 523.

360-10 In re Cohen, 53 Misc. 400, 104 N. Y. S. 1027. See Knight *v.* Co., 55 Fla. 301, 45 S. 1025.

360-11 Donalson *v.* R. Co., 119 App. Div. 513, 104 N. Y. S. 178.

360-13 But see Durand *v.* Ins. Co., 14 Quebec P. R. 243.

360-16 Examination of non-resident party must be by a commission. Gilroy *v.* Co., 55 Misc. 32, 106 N. Y. S. 171. See Heller, Hirsh & Co. *v.* Mfg. Co., 155 App. Div. 211, 140 N. Y. S. 117.

361-17 Interrogatories may be annexed to the petition or answer, subsequently to their filing, in discretion of court. Free *v.* Co., 135 Ia. 69, 110 N. W. 143.

Application pending demurrer to complaint, premature. Frear *v.* Duryea, 151 App. Div. 687, 136 N. Y. S. 264.

Laches of applicant does not affect his right to examination. Goldmark *v.* Co., 111 App. Div. 526, 97 N. Y. S. 1078; Boyle *v.* Co., 46 Misc. 191, 94 N. Y. S. 27. *Comp.* Whitney *v.* Rudd, 100 App. Div. 492, 91 N. Y. S. 429.

361-18 Knight *v.* Co., 56 Fla. 301, 45 S. 1025. See Miller *v.* Nevins, 115 App. Div. 139, 100 N. Y. S. 703; Osborne *v.* Barber, 105 App. Div. 236, 93 N. Y. S. 833.

Examination during trial provided for by statute, but will not be allowed for a cause existing and known to the other party before trial commenced. Hebron *v.* Work, 101 App. Div. 463, 92 N. Y. S. 149.

361-19 Time for answering may be extended by court. Independent S. Dist. *v.* Dist., 148 Ia. 154, 125 N. W. 184.

Separate orders should provide for examination of party and one not a party. Chartered Bk. *v.* Ins. Co., 136 App. Div. 646, 121 N. Y. S. 399.

Place for holding examination must be within jurisdiction of court granting order. Powell *v.* R. Co. (Can.), 11 West. L. Rep. 613.

361-20 Skohny *v.* Richter, 132 App. Div. 680, 117 N. Y. S. 297, limited to matters in issue.

361-21 Gavin *v.* Co., 122 App. Div. 643, 107 N. Y. S. 272.

362-22 Authority of defendant to operate a railroad must be proved by the evidence prescribed by law. Muldoon *v.* R. Co., 98 App. Div. 169, 91 N. Y. S. 65.

362-23 Court should select questions which may properly be answered. Gavin *v.* Co., 122 App. Div. 643, 107 N. Y. S. 272.

362-25 Sparks *v.* Reeves, 165 Ala. 352, 51 S. 574 (answers should be made to such interrogatories as do not call for incriminating testimony, and objections filed to such as do); Chappell *v.* Chappell, 116 App. Div. 573, 101 N. Y. S. 846; Shogry *v.* Naser, 80 Misc. 145, 140 N. Y. S. 1014. See Chambers

v. Jaffray, 12 Ont. L. R. (Can.), 377, party must answer incriminatory questions—another law prohibiting use of such answers against him.

Cannot inspect books, but witness may refresh memory from books. Williams *v.* Snowman, 142 N. Y. S. 225.

May ask if he possesses relevant documents.—Stapley *v.* R. Co., 22 W. L. R. 1.

Statements to prosecuting officers, privileged. Schultz *v.* Strauss, 127 Wis. 325, 106 N. W. 1066.

Trade secrets privileged. Jones *v.* Goode, 7 O. C. C. (N. S.) 589.

Privilege of witness does not excuse him from incriminating a corporation of which he is an officer. Nelson *v.* U. S., 201 U. S. 92; Meade *v.* Assn., 119 App. Div. 761, 104 N. Y. S. 523.

363-27 See Jones *v.* Goode, 7 O. C. C. (N. S.) 589.

Production of all papers relating to controversy cannot be compelled by such order. Regan *v.* Co., 129 App. Div. 315, 113 N. Y. S. 738.

363-28 See Nat. Assn. *v.* Smithies (1906), App. Cas. (Eng.) 434.

363-29 Thompson *v.* Alden, 135 App. Div. 57, 119 N. Y. S. 742; Reynolds *v.* Reynolds, 81 Misc. 362, 142 N. Y. S. 1; Meade *v.* Assn., supra. *Comp.* Ely *v.* Perkins, 57 Misc. 361, 108 N. Y. S. 613.

364-32 Duty of corporation in answering interrogatories to select agent familiar with facts. Cleveland, etc. R. Co. *v.* Miller, 165 Ind. 381, 74 N. E. 509; Clarkson *v.* Bk., 9 Ont. L. R. (Can.) 317.

364-33 Cleveland, etc. R. Co. *v.* Miller, supra. But see Southern R. Co. *v.* Hayes (Ala.), 62 S. 874.

365-35 Large number of interrogatories may be grouped according to point at issue, and one answer made to each group. Pearce *v.* Co., 48 Wash. 38, 92 P. 773.

366-36 Prestwood *v.* Carlton, 162 Ala. 327, 50 S. 254.

366-40 See Central Texas Co. *v.* Co., 45 Tex. Civ. 199, 99 S. W. 1144, third person witness.

367-41 City Deposit Bk. *v.* Green, 138 Ia. 156, 115 N. W. 893; Sparks *v.* Taylor, 99 Tex. 411, 90 S. W. 485 (notice of intention to state new matter need not be given previous to examination).

367-44 Self-serving and unresponsive statements, stricken out. Garrison *v.* Glass, 139 Ala. 512, 36 S. 725.

367-45 Rogers *v.* Cement Co., 23 O. W. R. 264, 4 O. W. N. 299, 6 D. L. R. 858, 909; McWilliams *v.* Co., 10 Ont. L. R. 639; McSwane *v.* Foreman, 167 Ind. 171, 78 N. E. 630; Houser *v.* Laughlin (Ind. App.), 104 N. E. 309; Free *v.* Co., 135 Ia. 69, 110 N. W. 143; Givens *v.* Exp. Co. (Miss.), 64 S. 737; Eastern R. Co. *v.* Tuteur, 127 Wis. 382, 105 N. W. 1067. See Parsons *v.* Francis, 24 W. L. R. 938, 4 W. W. R. 1015, 1216, 11 D. L. R. 847; Knapp *v.* Order, 36 Wash. 601, 79 P. 209.

Procedure before referee or justice on refusal of party to answer question. Guenther *v.* Ridgway, 159 App. Div. 74, 143 N. Y. S. 961.

368-51 Failure to appear for cross-examination cause for striking out testimony given on direct examination. Beardsworth *v.* Whitehead, 137 App. Div. 306, 122 N. Y. S. 31.

370-59 Rosenau *v.* Powell, 173 Ala. 123, 55 S. 789; Locust *v.* Randle, 46 Tex. Civ. 544, 102 S. W. 946; Connell *v.* Nickey (Tex. Civ.), 167 S. W. 313.

371-61 Morrison *v.* Rutledge, 22 W. L. R. 364, 22 Man. L. R. 645, 3 W. W. R. 121, 8 D. L. R. 325. Judgment for damages cannot go unless answers to the interrogatories disclose amount thereof. Independent S. Dist. *v.* Dist., 148 Ia. 154, 125 N. W. 184.

371-62 See Cusachs *v.* Dugue, 113 La. 261, 36 S. 960.

Amended answer filed without leave, containing facts sought to be elicited by interrogatories, will prevent judgment by default for failure to answer them. Free *v.* Co., supra.

Where deposition of party refusing to answer interrogatories is subsequently taken, touching same matters they will not be taken as confessed. Huntsberry *v.* Smith, 28 Ky. L. R. 877, 90 S. W. 601.

371-63 Free *v.* Co., 135 Ia. 69, 110 N. W. 143; Donaldson *v.* Dobbs, 35 Tex. Civ. 439, 80 S. W. 1084; Sanborn *v.* Bush, 41 Tex. Civ. 24, 91 S. W. 883; Baldwin *v.* Richardson, 39 Tex. Civ. 406, 87 S. W. 746.

372-66 City Deposit Bk. *v.* Green, 138 Ia. 156, 115 N. W. 893.

Leave to file further answers or further time in which to answer, discretionary. Spinney *v.* R. Co., 188 Mass. 30, 73 N. E. 1021.

373-67 Southern R. Co. *v.* Hayes (Ala.), 62 S. 874; Calvert *v.* Calvert (Ala.), 60 S. 261.

373-68 Southern R. Co. *v.* Hayes, supra.

373-70 Beem *v.* Farrell, 135 Ia. 670, 113 N. W. 509.

Answers not introduced, not evidence. Birmingham R., etc. Co. *v.* Haggard, 155 Ala. 343, 46 S. 519.

374-73 Southern R. Co. *v.* Hayes (Ala.), 62 S. 874.

Cannot read to jury statement that party refused to answer questions until ordered by court. Harrington *v.* R. Co., 214 Mass. 563, 101 N. E. 977.

375-79 Keit *v.* Garden Co., 147 N. Y. S. 11; Johnson *v.* Co., 126 Wis. 492, 105 N. W. 1048 (examination of officer of corporation is examination of a party).

Party answering interrogatories cannot use them at trial primarily. Beem *v.* Farrell, supra.

Deposition of corporation agent of employe.—The rule that a party's deposition is admissible though he is present at the trial does not apply to deposition of agent or employe of a corporation party. Hughes *v.* R. Co., 122 Wis. 258, 99 N. W. 897, *dist.* Meier *v.* Paulus, 70 Wis. 165, 35 N. W. 301.

376-84 Answers to interrogatories may be used in a second suit in another forum, where same subject-matter is involved between same parties. Allen, McI. Co. *v.* Bk., 129 Ga. 748, 59 S. E. 813.

Irresponsiveness, not cause for striking answers. Sullivan T. Co. *v.* R. Co., 163 Ala. 125, 50 S. 941. But irresponsive matter stricken out when offered by party in answer to whose question it was given on motion of other party. Birmingham R. L. & P. Co. *v.* Morris, 163 Ala. 190, 50 S. 198.

377-87 Sackstaeder *v.* Kast, 31 Ky. L. R. 1304, 105 S. W. 435. See Minihan *v.* R. Co., 197 Mass. 367, 83 N. E. 871. *Comp.* Laredo *v.* Perkins, 132 La. 660, 61 S. 728.

EXAMINATION OF WITNESSES

Examination by juror, 381-10.

380-1 Barlew *v.* S., 5 Ala. App. 290, 57 S. 601; Fugua *v.* C., 118 Ky. 578, 81 S. W. 923; Dowler *v.* Co., 71 W. Va. 417, 76 S. E. 845. See Maddox *v.* Eatonton, 8 Ga. App. 817, 70 S. E. 214; Dean *v.* C., 25 Ky. L. R. 1876, 78 S. W. 1112 (allowing witness to make narrative statement before counsel permitted to propound question, not error).

This is especially true where conflict is sharp and where the case is tried with acerbity on both sides, and numerous objections, interruptions, and arguments intervene all through the progress of the trial, and where it is manifest certain witnesses on one side or the other knowingly testify falsely. P. *v.* Hoek, 169 Mich. 87, 134 N. W. 1031.

It is error for the circuit judge to undertake to direct the manner in which the plaintiff should conduct his case and examine his witnesses before the magistrate. McKnight *v.* Dyson, 91 S. C. 337, 74 S. E. 753.

Several counsel.—Limiting examination of each witness to one counsel, proper in discretion of court. S. *v.* Nugent, 116 La. 99, 40 S. 581.

Explaining testimony.—Witness may explain his testimony. Hawaii *v.* Kapea, 11 Haw. 293; Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; Pacific E. L. Co. *v.* Co., 46 Or. 194, 80 P. 105. And counsel may question him for this purpose. Texas M. R. *v.* Ritchey, 49 Tex. Civ. 409, 108 S. W. 732.

Extent of examination into collateral matters discretionary with court. Carey *v.* R. Co., 124 App. Div. 524, 108 N. Y. S. 1034.

Deaf witness may be handed written questions after they have been read over. Harrison *v.* Thackaberry, 248 Ill. 512, 94 N. E. 172.

380-2 Penry *v.* Dozier, 161 Ala. 292, 49 S. 909; Nashville, etc. R. Co. *v.* Moore, 148 Ala. 63, 41 S. 984; Parrish *v.* S., 139 Ala. 16, 36 S. 1012; P. *v.* Casselman, 10 Cal. App. 234, 101 P. 693; Jones *v.* S., 65 Fla. 111, 61 S. 185; Thomas *v.* S., 47 Fla. 99, 36 S. 161; American C. Co. *v.* Hill, 226 Ill. 227, 80 N. E. 784; Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; S. *v.* Caron, 118 La. 349, 41 S. 960 (repeating previous testimony); Tucker *v.* Mills, 76 S. C. 539, 57 S. E. 626. But see Carnes *v.* C., 27 Ky. L. R. 1205, 87 S. W. 1123, improper to compel defendant to repeat several times answers from which jury may draw erroneous conclusions.

380-3 Steltemeier *v.* Barrett (Mo. App.), 122 S. W. 1095.

Court may admonish female witness to answer, however unpleasant it may be to her. Jones *v.* S., 138 Ga. 136, 74 S. E. 1001.

381-8 Stroh *v.* R. Co., 25 Ky. L. R. 1868, 78 S. W. 1120; Teel *v.* R. Co., 66 W. Va. 315, 66 S. E. 470. See Benson *v.* S., 51 Tex. Cr. 367, 103 S. W. 911.

381-10 Kettenbach *v.* U. S., 202 Fed. 377, 120 C. C. A. 505; Dutton *v.* Ty., 13 Ariz. 7, 108 P. 224; Arkansas C. R. Co. *v.* Craig, 76 Ark. 258, 88 S. W. 878; Gillis *v.* Bowman, 132 Ga. 762, 64 S. E. 1096; Hart *v.* S. (Ga. App.), 80 S. E. 909; S. *v.* Caron, 118 La. 349, 41 S. 960; (without regard to objections); Townsend *v.* Joplin, 139 Mo. App. 394, 123 S. W. 474; Dreyfus *v.* R. Co., 124 Mo. App. 585, 102 S. W. 53; S. *v.* Knowles, 185 Mo. 141, 83 S. W. 1083; P. *v.* Dinser, 49 Misc. 82, 98 N. Y. S. 314; Miller *v.* Ty., 15 Okla. 422, 85 P. 239; Howard *v.* Ty., 15 Okla. 199, 79 P. 773; S. *v.* Anderson, 85 S. C. 229, 67 S. E. 237; Davis *v.* S. (Tex. Cr.), 158 S. W. 283; Ingle *v.* Ingle (Tex. Civ.), 131 S. W. 241; Washington *v.* S., 46 Tex. Cr. 184, 79 S. W. 811 (interruption of cross-examination by asking witness if she understood); Edwards *v.* Seattle, etc. R. Co., 62 Wash. 77, 113 P. 563; Komp *v.* S., 129 Wis. 20, 108 N. W. 46.

See First State Bk. *v.* Hare (Tex. Civ.), 152 S. W. 501. But see S. *v.* Gauthreaux, 134 La. 690, 64 S. 680.

Expediting trial.—"As a practice, it is, of course, unwise for the trial judge to interfere with the examination of witnesses, but, on the other hand, he has a perfect right to do so if he can thereby expedite the trial or assist the witness in giving his testimony and elicit the facts. It does not appear that the rulings of the court complained of in this connection were erroneous; and an examination of the record satisfies us that the trial judge did not do anything calculated to prejudice the jury as against the appellant." Cedar Rapids Nat. Bank *v.* Carlson, 156 Ia. 343, 136 N. W. 659.

Making Testimony Clear.—"If a witness, expert or ordinary, ecclesiastical or lay, makes use of language that does not convey a distinct and clear meaning to the mind of the court, it is fair to presume that ordinarily it will not have a clearer meaning in the minds of the jurors. It is not only the right, but it is the duty, of the judge presiding in the trial of a case to lend his aid in the elicitation of the truth from witnesses, and to see that the same is not concealed, obscured, or buried in a mass of unintelligible verbiage, or in technical expressions, meaningless to a layman, when the same can be reduced to the simple terms of everyday language without detriment, and he may always inquire of an expert or other witness what he means by a certain expression he has used for the purpose of allowing the witness to clarify his meaning by the selection and use of other words." Beebe *v.* Greene, 34 R. I. 171, 82 A. 796.

Detrimental effect of testimony elicited by judge does not render action error. Johnson *v.* Leffler, 122 Ga. 670, 50 S. E. 488.

Improper for court in a criminal case to catechise witness at length as to whether he was sure of facts testified to positively and suggest he might be mistaken and could correct his testimony if he were. Glover *v.* U. S., 147 Fed. 426, 77 C. C. A. 450.

Examination by Juror.—Court may permit a juror in criminal case to ask questions. S. *v.* Kendall, 143 N. C. 659, 57 S. E. 340.

382-11 S. *v.* Hazlett, 14 N. D. 490, 105 N. W. 617 (same); Komp *v.* S., 129 Wis. 20, 108 N. W. 46 (right should be carefully exercised and questions should not betray bias or prejudice nor indicate to jury, judge's opinion on the facts); First State Bk. *v.* Hare (Tex. Civ.), 152 S. W. 501. See Grant *v.* S., 122 Ga. 740, 50 S. E. 946; S. *v.* Coyle (Utah), 126 P. 305.

382-12 Brown *v.* S., 11 Ga. App. 164, 74 S. E. 1002 (new trial granted in accordance with Pen. Code, §1058); Consol. C. Co. *v.* Shepherd, 112 Ill. App. 458; S. *v.* Ludwig (N. J.), 88 A. 822.

Where accused did not attack reputation of deceased as a violent and dangerous man the court could not ask questions proving or disproving such. Hysaw *v.* S. (Tex. Cr.), 155 S. W. 941.

382-13 Rowland *v.* Gregg, 122 Ga. 819, 50 S. E. 949; Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318 (error to question expert so as to show that he regarded testimony as improbable or erroneous); Joyner *v.* S., 12 Ga. App. 217, 77 S. E. 9; In re Flint, 157 Mich. 593, 122 N. W. 279; Dreyfus *v.* R. Co., 124 Mo. App. 585, 102 S. W. 53 (should be careful to conceal opinion as to credi-

bility of witness or merits of case). See Isaac *v.* U. S., 7 Ind. Ty. 196, 104 S. W. 588; Miller *v.* Ty., 15 Okla. 422, 85 P. 239; Howard *v.* Ty., 15 Okla. 199, 79 P. 773.

382-14 Richardson *v.* S., 7 Ga. App. 627, 67 S. E. 682; Joyner *v.* S., 12 Ga. App. 217, 77 S. E. 9; Owens *v.* S., 11 Ga. App. 419, 75 S. E. 519; Koontz *v.* S. (Okla. Cr.), 139 P. 842. See Cox *v.* Goodman, 139 Ga. 25, 76 S. E. 357.

Though a judge should not conduct examination, if he does so and does not indicate by questions or conduct his opinion of the merits of the case, no such error would be presented as would or should cause a reversal of the case. Wragg *v.* S. (Tex. Cr.), 145 S. W. 342, *cit.* Harrell *v.* S., 39 Tex. Cr. 204, 45 S. W. 581.

382-15 P. *v.* Rardin, 255 Ill. 9, 99 N. E. 59; Townsend *v.* Joplin, 139 Mo. App. 394, 123 S. W. 474; Merchants Bk. *v.* Goodfellow (Utah), 140 P. 759. In P. *v.* Baskin, 254 Ill. 509, 98 N. E. 957, the prosecutor announced during the trial that there was a witness who should be examined, but that the state did not feel that it should call him, and asked the court to call him that both sides might cross-examine. The supreme court said that ordinarily it is not good practice for the trial judge in a criminal case to examine witness, under some circumstances it is his duty to do so. See also P. *v.* Cleminson, 250 Ill. 135, 95 N. E. 157; P. *v.* Bernstein, 250 Ill. 63, 95 N. E. 50.

382-17 Smith *v.* S., 11 Ga. App. 89, 74 S. E. 711; Gillis *v.* Bowman, 132 Ga. 762, 64 S. E. 1096; Townsend *v.* Joplin, 139 Mo. App. 394, 123 S. W. 474; Seeley *v.* Seeley, 64 N. J. Eq. 1, 53 A. 387 (master to whom divorce suit referred). See Cox *v.* Goodman, 139 Ga. 25, 76 S. E. 357.

383-18 Private examination of witnesses by court pursuant to agreement of parties, cannot be objected to. Dawson *v.* Dawson, 40 Wash. 656, 82 P. 937.

EXECUTORS AND ADMINISTRATORS

Possession of realty by administrator; appointment prima facie evidence of right, 399-46.

390-5 See Sayles *v.* Court, 27 R. I. 563, 65 A. 272 (evidence as to number of counsel petitioner had had, irrelevant against her).

In the case of an executor he may cast burden of showing his authority upon those who will be benefited by probate of the will or assume it himself. Dodd *v.* Anderson, 197 N. Y. 466, 90 N. E. 1137.

A release of inheritable interest by petitioner may be shown to defeat his application. In re Davis, 106 Cal. 453, 39 P. 756.

Application by creditor.—Einstein *v.* Latimer, 46 Ga. 315.

391-12 Serra *v.* Go Huna, 6 Phil. Isl. 479, may be inferred from papers acted upon by both sides.

391-13 Deubler *v.* Hart, 139 Ga. 773, 78 S. E. 176; Rogers *v.* Tompkins (Tex. Civ.), 87 S. W. 379.

392-15 Whiton *v.* Balch, 203 Mass. 576, 89 N. E. 1045, personal liability of executor.

392-19 Sharpe *v.* Hodges, 121 Ga. 798, 49 S. E. 775; Shaw *v.* R. Co., 101 App. Div. 246, 91 N. Y. S. 746.

393-22 Connor *v.* Paul, 138 Mo. App. 13, 119 S. W. 1006; Fischer *v.* Giddings, 43 Tex. Civ. 393, 95 S. W. 33; Rogers *v.* Tompkins (Tex. Civ.), 87 S. W. 379.

Copy of the pleadings and judgment in proceedings appointing representative need not accompany copy of letters; latter admissible though filed after institution of action by representative. Taylor *v.* McKee, 121 Ga. 223, 48 S. E. 943.

393-23 Gibson *v.* S., 251 Mo. 480, 158 S. W. 322.

394-27 Campbell *v.* Hughes, 155 Ala. 591, 47 S. 45, must be certified according to act of congress.

394-28 Admission of ancillary appointment does not preclude proof of it by decree. Jones *v.* Downs, 82 Conn. 33, 72 A. 589.

395-29 Goss *v.* R. Co., 137 Ky. 398, 125 S. W. 1061; S. *v.* Morrison (Mo.), 148 S. W. 907. See Shaw *v.* R. Co., 101 App. Div. 246, 91 N. Y. S. 746.

396-32 McKenna *v.* Cosgrove, 41 Wash. 332, 83 P. 240.

396-33 Sharpe *v.* Hodges, 121 Ga. 798, 49 S. E. 775; Lee *v.* Allen, 100 Md. 7, 59 A. 184; Baccelli *v.* Co., 138 App. Div. 623, 122 N. Y. S. 849; Rogers *v.* Tompkins (Tex. Civ.), 87 S. W. 379.

397-35 It is presumed in support of an appointment there were assets in

jurisdiction; contrary may be shown. Vance *v.* R. Co., 138 N. C. 460, 50 S. E. 860.

397-36 See Balsewicz *v.* R. Co., 144 Ill. App. 219.

397-38 Decker *v.* Fahrenholtz, 107 Md. 515, 68 A. 1048.

398-39 Burden on party alleging renunciation. Rowell *v.* Adams, 83 S. C. 124, 65 S. E. 207.

398-41 See Collier *v.* Kilcrease, 27 Ark. 10; Hassey *v.* Keller, 1 Dem. Sur. (N. Y.) 577; In re Luce, 3 Pa. Super. 289 (sufficiency of proof of petitioner's marriage); Wilson *v.* Hoss, 3 Humph. (Tenn.) 142.

Where revocation of letters granted to strangers was sought by a sister of decedent who left surviving other relatives, burden of proving the legality of their appointment was upon defendants. Slay *v.* Beck, 107 Md. 357, 68 A. 573.

398-42 Existence of will not presumed. In re Cameron, 47 App. Div. 120, 62 N. Y. S. 187, 166 N. Y. 610, 59 N. E. 1120.

Removal of administrator.—Evidence showing bad faith admitted. Scott *v.* Smith (Ind. App.), 82 N. E. 556.

398-43 It is presumed administrator was relieved because administration completed and funds paid over in order that testamentary trustee might be appointed. Nutt *v.* S., 96 Miss. 473, 51 S. 401.

398-44 Emelle *v.* Spinner, 20 Wyo. 507, 126 P. 397. See Stewin *v.* Thrift, 30 Wash. 36, 70 P. 116 (minor child). *Contra*, In re O'Neill, 11 Pa. C. C. 491 (widow's exemption). And see In re Guyger, 8 Pa. C. C. 308, evidence as to marriage being conflicting, presumption of innocence operated in favor of widow.

The value of estate may be shown as it is controlling factor, so may situation in life of widow and children and their previous manner of living. In re Strauch, 95 Minn. 304, 104 N. W. 535. See In re Pugsley, 27 Utah 489, 76 P. 560; In re Drasdo, 36 Wash. 478, 78 P. 1022.

Poverty of mother who has custody of minor children, material only as to amount to be allowed. In re Snowball's Est., 156 Cal. 235, 104 P. 446.

399-45 See Brown *v.* Cresap, 61 W. Va. 315, 56 S. E. 603.

399-46 Mayer *v.* Kornegay, 163 Ala. 371, 50 S. 880; Little *v.* Marx, 145 Ala. 620, 39 S. 517; Richards *v.* Blaisdell, 12 Cal. App. 101, 106 P. 732.

Evidence held sufficient.—Ditton *v.* Hart, 175 Ind. 585, 95 N. E. 119.

Under statute giving to both executors and administrators the right to the possession of the estate realty pending time of settlement, appointment of administrator is prima facie evidence of his right to possession, the burden being upon heir to show such possession is unnecessary. Kern *v.* Cooper, 91 Minn. 121, 97 N. W. 648, 97 Minn. 509, 106 N. W. 962.

400-48 Depositions of disinterested witnesses unnecessary to prove debts. Hunt *v.* Curtis, 151 Ala. 507, 44 S. 54. Necessary to show insufficiency of personalty. Little *v.* Marx, 145 Ala. 620, 39 S. 517.

400-49 Judicial allowance of claim is prima facie evidence of its validity on an application to sell realty. Milburn *v.* East, 128 Ia. 101, 102 N. W. 1116.

400-52 Opinion evidence personalty is insufficient to pay debts, not admissible. Hunt *v.* Curtis, 151 Ala. 507, 44 S. 54.

Judgment of probate court, conclusive. Mayer *v.* Kornegay, 163 Ala. 371, 50 S. 880.

400-53 Odell *v.* House, 144 N. C. 647, 57 S. E. 395 (private sale).

400-54 Haring *v.* Shelton, 103 Tex. 10, 122 S. W. 13. *Comp.* Clark *v.* Adkisson, 241 Ill. 109, 89 N. E. 265.

401-55 Weeks *v.* Co., 133 Ga. 472, 66 S. E. 168.

401-56 Hughes *v.* Wright (Tex. Civ.), 97 S. W. 525.

401-57 Recital in deed as evidence of order of sale. See Cruse *v.* O'Gwin, 48 Tex. Civ. 48, 106 S. W. 757.

401-58 Parol testimony, not admissible to sustain deed executed by one of three executors by showing other two were inactive. Weeks *v.* Co., 133 Ga. 472, 66 S. E. 168.

402-62 Fuhrman *v.* Fuhrman, 115 Md. 436, 80 A. 1082. Se Cruse *v.* O'Gwin, 48 Tex. Civ. 48, 106 S. W. 757. "**The court**, after the lapse of sixty years, must presume that the probate judge knew the law, and in fact did appoint a guardian ad litem for the minor heirs before admitting the will to probate, and required the person named as executor in the will to file

a bond before entering upon the duties of his trust, and duly issued letters testamentary to him after he became entitled to receive the same, and that the proceedings in the probate court were regular." Chandler *v.* Co., 148 Wis. 5, 134 N. W. 148.

404-67 Order of sale, prima facie evidence of administrator's right to recover land from grantee to heir of intestate. Cochran *v.* Bugg, 131 Ga. 588, 62 S. E. 1048.

404-68 See McKenna *v.* Cosgrove, 41 Wash. 332, 83 P. 240.

405-70 See Cruse *v.* O'Gwin, 48 Tex. Civ. 48, 106 S. W. 757.

408-83 Succession of Barry, 130 La. 401, 58 S. 20; McLain *v.* Pate (Tex. Civ.), 124 S. W. 718.

409-88 Miller *v.* McDowell, 69 Kan. 453, 77 P. 101.

410-91 Unreceipted bills for services, found among decedent's papers, not admissible. In re McFarland, 18 Pa. C. C. 596.

411-97 See In re Duke, 57 Misc. 541, 109 N. Y. S. 1087; Roberge *v.* Bonner, 94 App. Div. 342, 88 N. Y. S. 91; In re Seybert, 5 Pa. C. C. 35.

412-98 In re Rhoades, 29 Pa. C. C. 512.

413-4 **Decedent's books** showing partial payments, competent for claimant. Greenwood *v.* Judson, 109 App. Div. 398, 96 N. Y. S. 147.

Claimant's books, exhibited to and approved by decedent, competent. Britian *v.* Fender, 116 Mo. App. 93, 92 S. W. 179.

413-8 In re O'Mara, 31 Pa. C. C. 469.

414-11 Bannigan *v.* Woodbury, 158 Mich. 206, 122 N. W. 531.

414-14 Vitty *v.* Peaslee, 76 Vt. 402, 57 A. 967.

415-18 See In re McPherran, 212 Pa. 425, 61 A. 954.

416-27 Squire *v.* Ordemann, 194 N. Y. 394, 87 N. E. 435.

Executor's report, showing receipt of personalty, sufficient to require inventory. In re Duncanson's Est., 141 Ia. 564, 120 N. W. 88.

417-33 Bond is conclusive only as against a defense of no assets set up in suit thereon, or in suit against executor to recover against the estate, or in suit upon his independent personal promise to pay. In suit for waste executor may show what assets were and how used. Lothrop *v.* Parke, 202 Mass. 104, 88 N. E. 666.

418-36 Leimgruber *v.* Leimgruber, 172 Ind. 370, 86 N. E. 73; Bowen *v.* O'Hair, 29 Ind. App. 466, 64 N. E. 672; Schele *v.* Wagner, 163 Ind. 20, 71 N. E. 127; Bartholomew *v.* Adams, 143 Ia. 354, 121 N. W. 1026; Cottrell *v.* Barnes, 28 Ky. L. R. 1014, 90 S. W. 1048; In re Mara, 137 N. Y. S. 151; In re Peterson's Est., 64 Misc. 217, 118 N. Y. S. 1077; Jenkins *v.* Jenkins, 83 S. C. 537, 65 S. E. 736 (burden of showing note was forged does not rest upon objector until prima facie case made by plaintiff); Brown *v.* Cresap, 61 W. Va. 315, 56 S. E. 603. *Contra,* under statute. Graham *v.* McKinney, 147 Ia. 164, 125 N. W. 840. But see In re Brown, 210 Pa. 499, 60 A. 149, holding burden on representative to prove money shown to have been received by decedent shortly before death as a loan or for investment had been repaid or accounted for.

On a claim for services claimant must show their rendition and value and contract by decedent to pay. Circumstances and relations of parties may be such as to raise implied contract or they may be such as to negative existence of any contract. Hunt *v.* Osborn, 40 Ind. App. 646, 82 N. E. 933. See McMorrow *v.* Dowell, 116 Mo. App. 289, 90 S. W. 728; Dunn *v.* Currie, 141 N. C. 123, 53 S. E. 533.

Note in decedent's possession.—Where a note executed by decedent to claimant was found among decedent's papers after death and contained indorsements of payments, its delivery was sufficiently shown although claimant had no previous knowledge of its existence, decedent having acted for many years as claimant's general agent without detailed accounting. Indiana T. Co. *v.* Byram, 36 Ind. App. 6, 72 N. E. 670, 73 N. E. 1094.

Consideration for note executed by decedent is presumed. In re Royer, 217 Pa. 626, 66 A. 854. *Comp.* Farnsworth *v.* Fraser, 137 Mich. 296, 100 N. W. 400. See also Chicago T. & T. Co. *v.* Ward, 113 Ill. App. 327; Kiesewetter *v.* Kress, 24 Ky. L. R. 1239, 70 S. W. 1065. As to effect on presumption of additional evidence as to consideration, see In re Pinkerton, 49 Misc. 363, 99 N. Y. S. 492.

A promise to pay for services, unless implied from acceptance, must be

proved; it is error to charge representative has burden of proving they were gratuitous. Hunt *v.* Osborn, 40 Ind. App. 646, 82 N. E. 933.

The general rule that execution need not be proved where not denied under oath, applies to a claim against an estate based on promissory note. De Clerque *v.* Campbell, 231 Ill. 442, 83 N. E. 224.

Funeral expenses, presumed to have been incurred on credit of estate. Rice *v.* R. Co., 195 Mass. 507, 81 N. E. 285.

418-37 Dakota Nat. Bk. *v.* Kleinschmidt (S. D.), 144 N. W. 934; Whitmire *v.* Powell (Tex. Civ.), 117 S. W. 433.

Burden of proving every essential fact. Dakota Nat. Bk. *v.* Kleinschmidt (S. D.), 144 N. W. 934.

Proof unnecessary when presentation and disallowance admitted. Harrington *v.* Co., 35 Mont. 530, 90 P. 748.

418-40 Bloom *v.* Oliver, 56 Tex. Civ. 391, 120 S. W. 1101, after allowance, presumed claim was within exception cutting off bar of statute.

Not assumed, after long period, law as to time for presenting claims, disregarded. McKillop *v.* Burton's Admr., 82 Vt. 403, 74 A. 78.

419-42 Kornegay *v.* Mayer, 135 Ala. 141, 33 S. 36.

419-46 White *v.* Devendorf, 127 App. Div. 791, 111 N. Y. S. 815, evidence to contrary closely scrutinized in cases of doubtful legality.

Date of filing claim, if deferred till last day, may be shown as evidence claimant regarded it as stale. Gandy *v.* Bissell, 81 Neb. 102, 115 N. W. 571.

420-49 Burden on party who questions claim allowed. In re Nelson, 63 Misc. 627, 118 N. Y. S. 673.

420-51 Baehr *v.* Buell, 133 Wis. 119, 113 N. W. 433.

Payments by decedent to claimant from time to time for services rendered presumptively amount to full payment, and claimant must show the contrary by clearest and most convincing evidence. His own testimony must be corroborated by disinterested witnesses. Rose *v.* Leask, 124 App. Div. 799, 109 N. Y. S. 484. See Lucas *v.* Boss, 110 App. Div. 220, 97 N. Y. S. 112; In re Rorer, 5 Pa. C. C. 73; In re Panick, 28 Pa. C. C. 71.

Payment for part of the services rendered, at the usual rate, raises no presumption payments intended to cover other services. Fry *v.* Fry, 119 Mo. App. 476, 94 S. W. 990.

420-55 Proper disbursement of funds admittedly received by decedent as agent must be shown by representative. Stout *v.* Perry, 152 N. C. 312, 67 S. E. 757.

420-56 Contestee must show improper allowance to administrator. Shiels *v.* Nathan, 12 Cal. App. 604, 108 P. 34.

421-57 De Monco *v.* Means, 47 Colo. 457, 107 P. 1107; Apthorp *v.* Thurston, 153 App. Div. 572, 138 N. Y. S. 41. See Simpson *v.* Schuetz, 31 Ind. App. 151, 67 N. E. 457; Stafford *v.* Brown, 120 App. Div. 156, 104 N. Y. S. 801; Lucass *v.* Boss, 110 App. Div. 220, 97 N. Y. S. 112; Linden *v.* Thieriot, 105 App. Div. 405, 94 N. Y. S. 246; Schultz *v.* Carrard, 94 N. Y. S. 740; In re Goss, 98 App. Div. 489, 90 N. Y. S. 769; In re Seybert, 5 Pa. C. C. 35.

Action against an estate for board rendered deceased, evidence of the entertainment of guests by claimant and evidence of amount of money in possession of deceased at time she went to live with plaintiff were immaterial. White *v.* Almy, 34 R. I. 29, 82 A. 397.

Corroboration of claimant's testimony required by statute. See Thompson *v.* Coulter, 34 Can. Sup. 261; Bull *v.* Payne, 47 Or. 580, 84 P. 697. But only as to merits of claims; not to preliminary questions of presentation and disallowance. Bull *v.* Payne, supra.

And a statute requiring some other "competent or satisfactory" evidence does not mean evidence which alone would be sufficient. Goltra *v.* Penland, 45 Or. 254, 77 P. 129. See Thompson *v.* Coulter, 34 Can. Sup. 261. Corroboration may be by circumstances. Thompson *v.* Coulter, supra.

A suspicious claim must be supported by very strong proof. Richards *v.* McLain, 118 La. 424, 43 S. 38. See Barrow *v.* Grant, 116 La. 952, 41 S. 220.

Single disinterested witness. — The ordinary rule that a fact testified to by a disinterested witness, who is not discredited, if his testimony does not conflict with other evidence, is to be taken as established has no application to claims against an estate. Walbaum *v.* Heaney, 104 App. Div. 412, 93 N. Y.

S. 640. *Contra,* In re Banes, 4 Pa. C. C. 495.

Conclusive evidence is not required; only a preponderance. Roberge *v.* Bonner, 185 N. Y. 265, 77 N. E. 1023.

Contracts to be enforced after death must be established by strong and convincing evidence. Hamlin *v.* Stevens, 177 N. Y. 39, 69 N. E. 118; Roberge *v.* Bonner, 94 App. Div. 342, 88 N. Y. S. 91.

Proof of deposition only is necessary on final trial if claim is controverted. Cottrell *v.* Barnes, 28 Ky. L. R. 1014, 90 S. W. 1048.

Execution of deed by decedent to avoid payment of claim and fact it was not recorded until after his death, may be shown. Gandy *v.* Bissell, 81 Neb. 102, 115 N. W. 571.

Subsequent agreement by decedent to pay, admissible to show recognition of liability. Bull *v.* Payne, 47 Or. 580, 84 P. 697.

Previous amended pleadings showing claim as first made to be much smaller, admissible where it is resisted as excessive (Hoyt *v.* Hoyt, 137 Ia. 563, 115 N. W. 222. *Comp.* Pollitz *v.* Wickersham, 150 Cal. 238, 88 P. 911), and conduct of claimant inconsistent with claim may be shown (Tripp *v.* Macomber, 187 Mass. 109, 72 N. E. 361), as that he failed to include it in bill rendered for other services subsequently performed. Place *v.* Place, 106 N. Y. S. 781. See In re Brown, 6 Pa. C. C. 428.

421-58 Graham *v.* McKinney, 147 Ia. 164, 125 N. W. 840; Russell *v.* Amlot, 132 App. Div. 584, 116 N. Y. S. 1080; Scheu *v.* Blum, 119 App. Div. 825, 104 N. Y. S. 887.

Uncorroborated testimony of interested witnesses, not sufficient to prove parol contract. Rosseau *v.* Rouss, 180 N. Y. 116, 72 N. E. 916.

Allowance of claim by commissioners, prima facie evidence in favor of claimant. Warren *v.* Sheehan, 156 Mich. 432, 120 N. W. 810.

421-59 Wheeler *v.* Bettis (Ky.), 116 S. W. 252; Ryan *v.* Halligan, 136 App. Div. 65, 120 N. Y. S. 646 (admissions of decedents); In re Cummiskey's Est., 224 Pa. 509, 73 A. 916. See Lancaster *v.* O'Brien, 136 Ky. 598, 124 S. W 854; In re Duke, 57 Misc. 541, 109 N. Y. S. 1087; Maisenhelder *v.* Crispell, 105 App. Div. 219, 94 N. Y. S. 707.

Implied admission does not result from retention of bill by executor without action. Coombs *v.* Joerg, 125 App. Div. 615, 110 N. Y. S. 6.

422-60 Wheeler *v.* Bettis (Ky.), 116 S. W. 252.

422-61 See Taylor *v.* Coriell, 66 N. J. Eq. 262, 57 A. 810.

423-63 Langrell *v.* Wright, 2 Boyce (Del.) 311, 80 A. 235. See Lancaster *v.* O'Brien, 136 Ky. 598, 124 S. W. 854, for facts excusing detailed and positive affidavit.

423-64 Cottrell *v.* Barnes, 28 Ky. L. R. 1014, 90 S. W. 1048, affidavit makes prima facie case where claim is not controverted. See In re Goss, 98 App. Div. 489, 90 N. Y. S. 769.

423-65 Schubert *v.* Schubert, 168 Ill. App. 419; Leimgruber *v.* Leimgruber, 172 Ind. 370, 86 N. E. 73; Williams *v.* Williams, 109 Me. 537, 85 A. 43. See Leonard *v.* Gillette, 79 Conn. 664, 66 A. 502; Henderson *v.* Henderson, 165 Ind. 666, 75 N. E. 269; Tripp *v.* Macomber, 187 Mass. 109, 72 N. E. 361; Page *v.* Hazelton, 74 N. H. 252, 66 A. 1049.

To rebut a claim for money alleged to have been furnished decedent, evidence that his bank account showed no deposit of such sum is admissible. Wright *v.* Davis, 72 N. H. 448, 57 A. 335. See Tripp *v.* Macomber, supra.

424-67 But see Zimmerman *v.* Beatson, 39 Ind. App. 664, 80 N. E. 165, 79 N. E. 518.

Punctuality in payment. — Decedent's reputation as a man who paid promptly is not admissible to show payment. Hammer *v.* Crawford (Mo. App.), 93 S. W. 348.

Meretricious relations not presumed where deceased was an old man with no family and claimant his housekeeper for many years. In re Royer, 217 Pa. 626, 66 A. 854.

That decedent was methodical and accurate in his business habits and accustomed to making written evidence of everything he did is not admissible to negative alleged loan to him, of which there was no written evidence. Kinney *v.* McFaul, 122 Ia. 452, 98 N. W. 276.

General relation of claimant and decedent may be shown as preliminary. Kinney *v.* McFaul, supra.

Claimant's note to decedent, though not relied on as a counterclaim or set-

off, admissible as a circumstance tending to negative claim. Leask *v.* Dew, 102 App. Div. 529, 92 N. Y. S. 891.

Declarations of decedent, admissible. In re Brown's Est., 60 Misc. 35, 112 N. Y. S. 599.

424-68 Will of testator competent as circumstantial evidence showing hostility toward an alleged payee of a note. Schubert *v.* Schubert, 168 Ill. App. 419.

425-70 Decedent's declarations of intention, or attempt, to add a codicil to his will giving claimant a certain sum, inadmissible to show value of services. Luizzi *v.* Brady, 140 Mich. 73, 103 N. W. 574.

425-73 Morrow *v.* Frankish (Del.), 89 A. 740.

A check from decedent is not evidence of loan to payee, presumption being it was payment of a sum due. Kilmer *v.* Quackenbush, 125 App. Div. 352, 109 N. Y. S. 444.

425-74 Checks of decedent prior to his making note in suit, not evidence of payment. In re Royer, 217 Pa. 626, 66 A. 854.

425-75 A verified claim is not a pleading and is admissible against claimant where his action is based on a different claim subsequently filed. Pollitz *v.* Wickersham, 150 Cal. 238, 88 P. 911.

Statements to third persons, before presenting claim, as to the amount thereof, admissible against claimant. Sanguinetti *v.* Pelligrini, 2 Cal. App. 294, 83 P. 293.

425-76 Verified claim of claimant's husband for services of same character, not admissible. Ellis *v.* Baird, 31 Ind. App. 295, 67 N. E. 960.

426-79 Allowance of claim by administrator in one state, not evidence in its favor in another, and judgment in one state is res inter alios acta as to administrator not a party thereto. Richards *v.* Blaisdell, 12 Cal. App. 101, 106 P. 732.

426-80 In re Duke, 57 Misc. 541, 109 N. Y. S. 1087; In re Voldemar, 4 Pa. C. C. 577; In re Koecker, 9 Pa. C. C. 238; In re Conaughton, 12 Pa. C. C. 590; In re Coulston, 14 Pa. C. C. 243; In re Black, 29 Pa. C. C. 174; In re McQuinn, 18 Phila. (Pa.) 78. See In re Sayers, 8 Pa. C. C. 32.

In action against an estate for board of deceased, evidence of accommodations furnished deceased at a prior time was immaterial. White *v.* Almy, 34 R. I. 29, 82 A. 397.

Law implies both a request and a promise to pay for accepted services unless circumstances raise presumption they were gratuitous. Hunt *v.* Osborn, 40 Ind. App. 646, 82 N. E. 933. See Dunn *v.* Currie, 141 N. C. 123, 53 S. E. 533.

Testimony of an interested witness, insufficient. Austin *v.* Kuehn, 211 Ill. 113, 71 N. E. 841; Mulhern *v.* Carrard, 94 N. Y. S. 741 (claimant's).

Claim for compensation for extra services must be proved most clearly. Grossman *v.* Thunder, 212 Pa. 274, 61 A. 904.

Stenographer's claim for services does not require a higher degree of proof than ordinary cases. In re Brown, 210 Pa. 499, 60 A. 149.

Admissions of claimant competent against him. Ellis *v.* Baird, 31 Ind. App. 295, 67 N. E. 960.

Decedent's attempt to make claimant beneficiary of his insurance policy prior to the alleged employment, irrelevant. Scheu *v.* Blum, 119 App. Div. 825, 104 N. Y. S. 887.

426-81 Hoffman *v.* Condon, 134 App. Div. 205, 118 N. Y. S. 899; Scheu *v.* Blum, supra. See Kane *v.* Smith, 109 App. Div. 163, 95 N. Y. S. 818.

Parol evidence is admissible.—Bowman *v.* Shelton, 175 Mo. App. 696, 158 S. W. 404.

Must be corroborated by disinterested witnesses. Butcher *v.* Geissenhainer, 125 App. Div. 272, 109 N. Y. S. 159.

It is presumed payment for board and nursing made at stated intervals in accordance with common habit and usage. In re Cummiskey's Est., 224 Pa. 509, 73 A. 916, 18 Pa. Dist. 43.

426-82 Taylor *v.* Thieman, 132 Wis. 38, 111 N. W. 229. See Luizzi *v.* Brady, 140 Mich. 73, 103 N. W. 574, and infra, 429-1.

426-83 Character and extent of services may be shown. Elwell *v.* Roper, 72 N. H. 585, 58 A. 507.

Value of estate no bearing on value of service not connected therewith. McGrew *v.* O'Donnell, 28 Ky. L. R. 1366, 92 S. W. 301.

427-84 Statements of decedent as to property he was to give claimant, admissible to show services were not gratuitous, but not to prove their value. McGrew *v.* O'Donnell, supra.

Valuation placed by parties upon services may be considered although not constituting a contract. Chandler *v.* Baker, 191 Mass. 579, 78 N. E. 387.

427-85 What was paid others for attending decedent during his last illness is irrelevant. Gillespie *v.* Campbell, 149 Ala. 193, 43 S. 28.

427-86 Opinions, competent. In re McNamara's Est., 155 Mich. 585, 119 N. W. 1074.

427-87 Fry *v.* Fry, 119 Mo. App. 476, 94 S. W. 990; Cummiskey's Est., 18 Pa. Dist. 43 (may excuse evidence of demand for payment). See McMorrow *v.* Dowell, 116 Mo. App. 289, 90 S. W. 728.

Entry in book of account not admission or recognition of claim for board. Heinz *v.* Jacobi, 76 N. J. L. 189, 68 A. 1069.

Inadmissible for representative if made after termination of employment. Elwell *v.* Roper, 72 N. H. 585, 58 A. 507.

Self-serving declarations of decedent competent by statute against claimant. Tripp *v.* Macomber, 187 Mass. 109, 72 N. E. 361. But generally they are incompetent (Coleman *v.* McGowan, 149 Mich. 624, 113 N. W. 17), unless made in presence of claimant. Dean *v.* Carpenter, 134 Ia. 275, 111 N. W. 815.

427-88 Hull *v.* Thoms, 82 Conn. 647, 74 A. 925, admissions by intestate and wife as to value of property.

Inadmissible in support of express contract to pay during life. Scheu *v.* Blum, 119 App. Div. 825, 104 N. Y. S. 887. See In re Duke, 57 Misc. 541, 109 N. Y. S. 1087.

Ex parte declarations, inadmissible. Bettinghouse *v.* Bettinghouse, 156 Mich. 169, 120 N. W. 617.

427-89 De Monco *v.* Means, 47 Colo. 457, 107 P. 1107; White *v.* Devendorf, 127 App. Div. 791, 111 N. Y. S. 815. See Rosseau *v.* Rouss, 180 N. Y. 116, 72 N. E. 916; In re Riemensberger, 29 Pa. Super. 596, and supra, 409-88, et seq.

427-90 Admissibility not dependent upon acknowledgment of terms of contract set out by plaintiff if they tend to show its existence or existence of an obligation. Forsythe *v.* Thompson, 157 Mich. 669, 122 N. W. 219.

427-91 Yeager's Est., 18 Pa. Dist. 980. See In re Dailey, 43 Misc. 552, 89 N. Y. S. 538; In re Murphey, 26 Pa. C. C. 256.

427-92 Hoffman *v.* Condon, 134 App. Div. 205, 118 N. Y. S. 899; In re Robinson, 5 Pa. C. C. 578. See Rose *v.* Leask, 124 App. Div. 799, 109 N. Y. S. 484; Koebel *v.* Beetson, 112 App. Div. 639, 98 N. Y. S. 408.

428-93 See Patteson *v.* Carter, 147 Ala. 522, 41 S. 133.

428-94 Cummiskey's Est., 18 Pa. Dist. 43; Longwell *v.* Microw, 130 Wis. 208, 109 N. W. 943. See Humble *v.* Humble, 152 Ky. 160, 153 S. W. 249.

428-95 Patteson *v.* Carter, 147 Ala. 522, 41 S. 133; Williams *v.* Walden, 82 Ark. 136, 100 S. W. 898; Hoskins *v.* Saunders, 80 Conn. 19, 66 A. 785; Lewis *v.* Hershey, 45 Ind. App. 104, 90 N. E. 332; Dowell *v.* Dowell, 137 Ky. 167, 125 S. W. 283; Wallace *v.* Denny, 28 Ky. L. R. 978, 90 S. W. 1046; Foley *v.* Dillon, 32 Ky. L. R. 222, 105 S. W. 461; Lowe *v.* Lowe, 111 Md. 113, 73 A. 878; Rose *v.* Mays, 139 Mo. App. 246, 122 S. W. 769; Birch *v.* Birch, 112 Mo. App. 157, 86 S. W. 1106; McMorrow *v.* Dowell, 116 Mo. App. 289, 90 S. W. 728; More *v.* Shepard, 133 App. Div. 471, 117 N. Y. S. 1095; Conway *v.* Cooney, 111 App. Div. 864, 98 N. Y. S. 171; In re Milligan, 112 App. Div. 373, 98 N. Y. S. 480; In re Dailey, 43 Misc. 552, 89 N. Y. S. 538; Taylor *v.* Thieman, 132 Wis. 38, 111 N. W. 229 (adopted son).

See McGrew *v.* O'Donnell, 28 Ky. L. R. 1366, 92 S. W. 301; In re Trinick, 22 Pa. C. C. 282. But see Dance *v.* Magruder, 26 Ky. L. R. 220, 80 S. W. 1120.

Demand for payment, although refused because of poverty and services were continued, rebuts presumption. In re Cridland, 8 Pa. C. C. 6.

428-96 See Bosley *v.* Monahan, 137 Ia. 650, 112 N. W. 1102; McMorrow *v.* Dowell, supra; Birch *v.* Birch, supra; Koebel *v.* Beetson, 112 App. Div. 639, 98 N. Y. S. 408. But see McClure *v.* Lenz, 40 Ind. App. 56, 80 N. E. 988.

Relationship alone is not sufficient to rebut implied contract to pay for services. In re Michael, 5 Pa. C. C. 321; In re Brown, 6 Pa. C. C. 428.

And where a sister in failing health and precarious conditions goes to a brother's house, of necessity and at her request and not his invitation, there is no presumption his services were

gratuitous. In re Lillich, 9 Pa. C. C. 25.

428-97 Succession of Daste, 125 La. 657, 51 S. 677 (foster parent); Pearre *v.* Smith, 110 Md. 531, 73 A. 141. See Patteson *v.* Carter, 147 Ala. 522, 41 S. 133; In re Rorer, 5 Pa. C. C. 73; Hodge *v.* Hodge, 47 Wash. 196, 91 P. 764, 11 L. R. A. (N. S.) 873.

Household membership important as bearing upon application of presumption. Weessies *v.* Van Dyke's Est., 159 Mich. 180, 123 N. W. 608.

429-98 Rule not applicable to step-son-in-law and stepmother-in-law. Hardiman *v.* Crick, 131 Ky. 358, 115 S. W. 236.

429-99 Dowell *v.* Dowell, 137 Ky. 167, 125 S. W. 283; Hialey *v.* Hialey, 157 Mich. 45, 121 N. W. 465; Haines' Est., 17 Pa. Dist. 420; Taylor *v.* Thieman, 132 Wis. 38, 111 N. W. 229, 122 Am. St. 943; Millis *v.* Thayer, 139 Wis. 480, 121 N. W. 124. See In re McGlinchey, 27 Pa. C. C. 169.

Corroboration of plaintiff's testimony, necessary. Succession of Daste, 125 La. 657, 51 S. 677.

429-1 Patteson *v.* Carter, 147 Ala. 522, 41 S. 133; Dance *v.* Magruder, 26 Ky. L. R. 220, 80 S. W. 1120; Lowe *v.* Lowe, 111 Md. 113, 73 A. 878; McKenna *v.* Twombly, 206 Mass. 62, 91 N. E. 1023; Weessies *v.* Van Dyke's Est., 159 Mich. 180, 123 N. W. 608; Brinton *v.* Thomas, 138 Mo. App. 64, 119 S. W. 1016; Fry *v.* Fry, 119 Mo. App. 476, 94 S. W. 990; Freeman *v.* Brown, 151 N. C. 111, 65 S. E. 743. See Story *v.* McCormick, 70 Kan. 323, 78 P. 819; infra, "Master and Servant," 506-15. But see Ramsey *v.* Keith, 25 Ky. L. R. 582, 76 S. W. 142.

Express contract may be proved to rebut presumption services were gratuitous, although action based on implied contract. Hoskins *v.* Saunders, 80 Conn. 19, 66 A. 785. *Comp.* Leonard *v.* Gillette, 79 Conn. 664, 66 A. 502, and supra, 426-82.

Contract presumed, in absence of legal obligation. In re Enos' Est., 61 Misc. 594, 115 N. Y. S. 863.

Execution of a note by one of the parties who claims a sum in excess of it was due from payee, not conclusive there was not implied agreement maker and wife were not to be paid for their services. Brinton *v.* Thomas, 138 Mo. App. 64, 119 S. W. 1016.

429-2 Facts and circumstances constituting implied contract, sufficient. Hodge *v.* Hodge, 47 Wash. 196, 91 P. 764, 11 L. R. A. (N. S.) 873. See Griffith *v.* Robertson, 73 Kan. 666, 85 P. 748.

429-4 Appeal of Gillette, 82 Conn. 500, 74 A. 762; Walker *v.* Ganote (Ky.), 116 S. W. 689; Lowe *v.* Lowe, 111 Md. 113, 73 A. 878; McKenna *v.* Twombly, 206 Mass. 62, 91 N. E. 1023; Rose *v.* Mayes, 139 Mo. App. 246, 122 S. W. 769; In re Stiles, 64 Misc. 658, 120 N. Y. S. 714; Koebel *v.* Beetson, 112 App. Div. 639, 98 N. Y. S. 408; In re Dailey, 43 Misc. 552, 89 N. Y. S. 538. See Hill *v.* Hill, 45 Ind. App. 99, 90 N. E. 331; Bettinghouse *v.* Bettinghouse, 156 Mich. 169, 120 N. W. 617; In re Lafferty, 13 Pa. C. C. 82.

A moral obligation to support decedent arising from conveyances by latter's husband to claimant, if relevant to show probability services were intended to be gratuitous, is so remote as to make exclusion of evidence discretionary. Hoskins *v.* Saunders, 80 Conn. 19, 66 A. 785.

Claimant's expectation of payment may be shown by his direct testimony. Story *v.* McCormick, 70 Kan. 323, 78 P. 819.

Special allegation as to gratuitous nature of services, necessary. Saddler *v.* Pickard, 142 Ia. 691, 121 N. W. 374.

430-5 Hialey *v.* Hialey, 157 Mich. 45, 121 N. W. 465, not competent to show deceased expected to leave estate to son.

430-6 McCoy *v.* McCoy (Ky.), 125 S. W. 177; Hialey *v.* Hialey, supra; Glass's Est., 36 Pa. C. C. 457.

Admission of indebtedness bars testimony to show it was incurred. Brinton *v.* Thomas, 138 Mo. App. 64, 119 S. W. 1016.

430-7 See In re Flaacke (N. J.), 64 A. 1020; In re Cozine, 113 App. Div. 22, 98 N. Y. S. 1041; In re McCann, 28 Pa. C. C. 46.

430-9 Smythe *v.* Evans, 209 Ill. 376, 70 N. E. 906.

431-12 Carney *v.* Hawkins, 34 R. I. 297, 83 A. 327.

Affidavits not proper in lieu of parol testimony. In re Sloane, 135 App. Div. 703, 119 N. Y. S. 667.

431-13 Burden on administratrix who opposes compulsory accounting because

of posthumous birth of child to show it was born alive. In re Smith's Est., 136 App. Div. 10, 120 N. Y. S. 124.

431-14 See Wood *v.* Farwell, 195 Mass. 559, 81 N. E. 294.

431-17 See In re Ollschlager's Est., 50 Or. 55, 89 P. 1049.

432-19 Williams *v.* Williams, 109 Me. 537, 85 A. 43. See Kirby *v.* Moore, 30 Ky. L. R. 1020, 99 S. W. 1156; Moseley *v.* Johnson, 144 N. C. 257, 274, 56 S. E. 922.

Burden to refute fraud.—Taylor *v.* Taylor, 259 Ill. 524, 102 N. E. 1086.

Burden on final accounting.—In re Williams' Est., 47 Mont. 325, 132 P. 421.

Where property inventoried as belonging to decedent burden is on representative, as against other beneficiaries, to prove it does not belong to the estate. In re Bayley, 67 N. J. Eq. 566, 59 A. 215.

Representative's knowledge of condition and amount of estate prior to decedent's death is a circumstance against him on issue of conversion of a portion thereof. Morawick *v.* Martineck, 32 Ky. L. R. 971, 107 S. W. 759.

432-22 Presumption of retention of possession. In re Hagerstown Trust Co., 119 Md. 224, 86 A. 982.

432-23 In re Hough, 119 La. 435, 44 S. 190; Dronenburg *v.* Harris, 108 Md. 597, 71 A. 81; Seaward *v.* Davis, 133 App. Div. 191, 117 N. Y. S. 468.

It is presumed, under some circumstances, assets not disclosed in first accounting were previously in executor's possession. In re Heaney's Est., 125 App. Div. 619, 110 N. Y. S. 80.

432-24 Burden of proving existence of debt due estate from representative is upon party alleging it; burden of showing payment or that amount due accounted for is upon representative. In re Mall's Est., 80 Neb. 233, 114 N. W. 156.

433-26 Moseley *v.* Johnson, 144 N. C. 257, 274, 56 S. E. 922. See Wachsmuth *v.* Ins. Co., 147 Ill. App. 510.

433-27 Any debts due estate may be shown by beneficiaries; burden is then on representative to show they are non-collectible or their proceeds have been accounted for. Mann *v.* Baker, 142 N. C. 235, 55 S. E. 102.

435-33 In re Frey, 73 N. J. Eq. 346, 67 A. 192 (payment); In re Douglass, 25 Pa. C. C. 566. See Wood *v.* Farwell, 195 Mass. 559, 81 N. E. 294; In re Wiley (N. J.), 65 A. 212.

Disbursements before appointment not approved on testimony of representative, especially when it and the assignment shows that on the face of the record the legal claim or right is in another whose rights are not foreclosed. In re Heeney, 3 Cal. App. 548, 86 P. 842.

Claimant's affidavit cannot be used by representative to prove claim. In re Goss, 98 App. Div. 489, 90 N. Y. S. 769.

435-35 In re Dittrich, 120 App. Div. 504, 105 N. Y. S. 303; In re Milligan, 112 App. Div. 373, 98 N. Y. S. 480; In re Cozine, 104 App. Div. 182, 93 N. Y. S. 557.

Where he has paid his own claim burden is on representative to prove its validity. In re Cozine, 113 App. Div. 22, 98 N. Y. S. 1041.

435-37 In re Brown's Est., 60 Misc. 35, 112 N. Y. S. 599. *Contra* if claim allowed on personal knowledge of representative without usual formalities. Ibid.

436-38 See Milburn *v.* East, 128 Ia. 101, 102 N. W. 1116; Herndon *v.* McDowell, 28 Ky. L. R. 512, 89 S. W. 539. *Comp.* Brown *v.* Cresap, 61 W. Va. 315, 56 S. E. 603.

436-40 Order for payment of claim not protection to executor if his fraudulent conduct secured it. Whittemore *v.* Coleman, 144 Ill. App. 109.

436-41 In re Roach's Est., 50 Or. 179, 92 P. 118.

Monument.—As bearing on question of reasonableness administratrix should be allowed to show that she paid for the monument that deceased selected, there being no creditors. In re Niles, 142 App. Div. 198, 126 N. Y. S. 1066.

437-47 In re Davis, 35 Mont. 273, 88 P. 957.

437-50 See Clarke *v.* Garrison, 25 Ky. L. R. 1999, 79 S. W. 240.

438-51 French *v.* Way, 93 S. C. 522, 76 S. E. 617; Rice *v.* Tilton, 14 Wyo. 101, 82 P. 577 (returned checks of administrator sufficient vouchers if received without objection).

438-53 "Upon appeal from a decree allowing an administrator's or executor's account by the probate court, the administrator or executor who presented the account for allowance in the probate court is 'the party holding

the affirmative' under rule 14 (law rules) of the superior court, and should proceed in due form at the outset to present his account and the vouchers showing his expenditures, or other evidence in support of the items of the account as to which the appeal is claimed, so that the court may at the outset have evidence before it as to the contested items. Unless this procedure is followed, there is no evidence before the court upon which it can act as to the allowance or disallowance of the contested items, or upon which the appellants are required to offer any testimony (unless by stipulation as above referred to, which in this case there is nothing to show)." Carney *v.* Hawkins, 34 R. I. 297, 83 A. 327.

439-57 Rice *v.* Tilton, 14 Wyo. 101, 82 P. 577.

439-59 **Burden on contestant** to disprove vouchers. In re Percival's Est., 79 Misc. 567, 141 N. Y. S. 180.

440-64 **Affidavit of representative** attached to his account is not sufficient to sustain its allowance. Succession of Le Sage, 112 La. 857, 36 S. 757.

Representative competent to prove payment of a claim for which he claims credit, and his uncontradicted testimony is sufficient. In re Frey, 73 N. J. Eq. 346, 67 A. 192.

Check prematurely drawn in favor of legatee, not presumptive evidence of payment of legacy, notwithstanding correspondence between sum due and that specified in check. Squire *v.* Ordemann, 194 N. Y. 394, 87 N. E. 435.

441-67 Appeal of Gardner, 81 Conn. 171, 70 A. 653; S. *v.* Morrison (Mo.), 148 S. W. 907.

Presumed representative performed his duty. McCreery *v.* Bk., 55 W. Va. 663, 47 S. E. 890.

441-68 But see In re Roach's Est., 50 Or. 179, 92 P. 118.

442-69 In re Miller, 64 Misc. 232, 119 N. Y. S. 52.

442-71 Leach *v.* R. Co., 137 Ky. 292, 125 S. W. 708. See Swaine *v.* Hemphill, 165 Mich. 561, 131 N. W. 68; In re Roach's Est., 50 Or. 179, 92 P. 118 (opinion as to adequacy of security, competent).

That other prudent business men made similar investments, not admissible to disprove negligence and mismanagement of representative. Brigham *v.* Morgan, 185 Mass. 27, 69 N. E. 418.

443-75 See In re Silkman, 121 App. Div. 202, 105 N. Y. S. 872.

443-79 Lothrop *v.* Parke, 202 Mass. 104, 88 N. E. 666; In re Fletcher's Est., 83 Neb. 156, 119 N. W. 232 (not conclusive); Epperson *v.* Jackson, 83 S. C. 157, 65 S. E. 217.

444-81 In re Mall's Est., 80 Neb. 233, 114 N. W. 156.

444-82 In re Hermann's Est., 226 Pa. 543, 75 A. 731; In re Fleming, 25 Pa. C. C. 269; Epperson *v.* Jackson, 83 S. C. 157, 65 S. E. 217; Roush *v.* Griffith, 65 W. Va. 752, 65 S. E. 168.

445-85 Inventory of community property as belonging to decedent, not inconsistent with devisee's adverse possession of it as against widow. Frey *v.* Myers (Tex. Civ.), 113 S. W. 592.

445-86 Not competent to show decedent conveyed property. Lim-Ching-Co. *v.* Terariray, 5 Phil. Isl. 120.

445-88 Routledge *v.* Elmendorf, 54 Tex. Civ. 174, 116 S. W. 156.

446-90 Pennington *v.* Newman, 36 Okla. 594, 129 P. 693, *quot.* ENCYCLOPÆDIA OF EVIDENCE.

446-92 See In re Eichhorn, 7 Pa. C. C. 433.

Papers filed in case usually sufficient evidence to enable court to fix executor's compensation. In re Watts' Est., 108 Md. 696, 71 A. 316.

447-93 Jones *v.* Downs, 82 Conn. 33, 72 A. 589; In re Metcalf's Est., 143 Ia. 310, 120 N. W. 104; In re New Jersey T. Co., 73 N. J. Eq. 628, 68 A. 811; Rich *v.* Morisey, 149 N. C. 37, 62 S. E. 762; Owens *v.* Owens, 109 Va. 432, 63 S. E. 990. But see In re Ward, 152 Mich. 218, 116 N. W. 23.

448-94 Lothrop *v.* Parke, 202 Mass. 104, 88 N. E. 666.

449-1 In re Richmond's Est., 9 Cal. App. 402, 99 P. 554 (except as to clerical mistake plainly shown); s. c., 9 Cal. App. 413, 99 P. 558; Henry *v.* Doyle, 82 O. St. 113, 91 N. E. 990.

450-5 Whittemore *v.* Coleman, 239 Ill. 450, 88 N. E. 228.

450-13 In re Fischer's Est., 158 Mich. 1, 122 N. W. 257.

"**If the will discloses** that it was the intention of the testator to reward the executor for his services by the legacy, it is conclusive on the executor; and if he accept the position and administer

the estate by virtue of his appointment as executor he must accept the reward for his services named in the will. Of course this does not apply to administrators with the will annexed. They are entitled to reasonable compensation for their services, regardless of any declaration made by the testator in his will fixing commissions for administering the estate. They hold the office by virtue of the law; while an executor is appointed by the will.'' In re Fox's Est., 235 Pa. 105, 83 A. 613.

Lapse of twenty years raises inconclusive presumption of settlement and distribution. Hodges *v.* Co., 128 Ga. 733, 58 S. E. 354.

Payment of legacy not presumed until twenty years from accrual of right to it. Paterson, etc. Assn. *v.* Blauvelt, 72 N. J. Eq. 725, 66 A. 1055. Nor in favor of third person against legatee. Outlaw *v.* Garner, 139 N. C. 190, 51 S. E. 925.

451-15 Waiver of right to compensation must be shown by party so alleging. Shufeldt *v.* Hughes, 55 Wash 246, 104 P. 253.

451-18 Werborn *v.* Austin, 82 Ala. 498, 8 S. 280. See Greenlees *v.* Greenlees, 62 Ala. 330; McGehee *v.* McGehee, 41 La. Ann. 657, 6 S. 253; Donaldson *v.* Raborg, 28 Md. 34; Norris' Appeal, 71 Pa. 106; In re Hedderly, 28 Pa. C. C. 64. But see Fuller *v.* Cushman, 170 Mass. 286, 49 S. E. 631; Glen *v.* Kimbrough, 58 N. C. 173; Blackwell *v.* Blackwell, 86 Tex. 207, 24 S. W. 389; Main *v.* Brown, 72 Tex. 505, 10 S. W. 571, 13 Am. St. 823.

452-22 Bernhardt *v.* Taylor, 223 Pa. 307, 72 A. 620. See Briggs *v.* Manning, 80 Ark. 304, 97 S. W. 289; Rice *v.* Tilton, 14 Wyo. 101, 82 P. 577.

Letters, conclusive of necessity of administration, but not of administrator's right to possess himself of property exempt from administrative proceedings. Bertig *v.* Higgins, 89 Ark. 70, 115 S. W. 935.

Judicial order allowing claim does not conclude devisees; it establishes prima facie case against them. In re Jones' Est. (Kan.), 103 P. 772.

453-26 Where administrator administers realty as well as personalty, a judgment in a suit by him concerning the realty binds the heirs. Gunn *v.* James, 120 Ga. 482, 48 S. E. 148.

453-28 Park *v.* Mullins, 124 Ga. 1072, 53 S. E. 568. See Brock *v.* Kirkpatrick, 72 S. C. 491, 52 S. E. 592.

454-29 See James *v.* Gibson, 73 Ark. 440, 84 S. W. 485.

455-39 *Comp.* Benker *v.* Meyer, 154 Fed. 290, 83 C. C. A. 270.

456-41 *Contra,* Brown *v.* Fletcher, 146 Mich. 401, 109 N. W. 686.

456-43 No presumption administrator, shown to have converted a given amount, has not converted or did not receive other assets, where no accounting made. In re McCauley, 49 Misc. 209, 99 N. Y. S. 238.

456-45 Misappropriation of funds, presumed from failure to account. Fassbender *v.* Co., 66 Misc. 6, 122 N. Y. S. 442.

456-46 Record of administration is evidence as to the manner and result thereof against sureties. Wiemann *v.* Mainegra, 112 La. 305, 36 S. 358.

457-54 See S. *v.* Dickson, 213 Mo. 66, 111 S. W. 817, as to evidence admissible on issue of due care, in sale of stocks.

457-61 Johnson *v.* Huggins, 7 Ga. App. 553, 67 S. E. 217 (unbarred dormant judgment, together with entry of nulla bona made prior to dormancy); Wiemann *v.* Mainegra, 112 La. 305, 36 S. 358 (not conclusive).

A devastavit is prima facie established by the record of a judgment against the representative as such and entries on execution issued thereon showing no property of the estate. Worthy *v.* Battle, 125 Ga. 415, 54 S. E. 667.

457-62 Briggs *v.* Manning, 80 Ark. 304, 97 S. W. 289; S. *v.* Goggin, 191 Mo. 482, 90 S. W. 379 (who have had notice).

EXHIBITS.

See the title ''**Exhibits**'' in 8 STANDARD PROC.

Consent of counsel, 462-5.

461-1 Farmers, etc. Bk. *v.* Whinfield, 24 Wend. (N. Y.) 419.

461-2 Watson *v.* Watson (Ky.), 121 S. W. 626.

461-3 Dolwell *v.* Co., 90 Ark. 287, 119 S. W. 262; In re Thomas' Est., 155 Cal. 488, 101 P. 798 (use of magnifying glass not objectionable though not used on trial); Palmer *v.* Smith, 76 Conn. 210, 56 A. 516 (only such papers should

be allowed to go to jury as may serve to enlighten them); Foley *v.* Everett, 142 Ill. App. 250; Chicago, etc. R. Co. *v.* Spence, 115 Ill. App. 465, 213 Ill. 220, 72 N. E. 796 (photographs and skiagraphs within statute authorizing "papers read in evidence other than depositions" to go to jury); McKaig *v.* Jordan, 172 Ind. 84, 87 N. E. 974; S. *v.* Young, 134 Ia. 505, 110 N. W. 292; Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755; S. *v.* Olson, 95 Minn. 104, 103 N. W. 727 (bottle of liquor); Carman *v.* R. Co., 32 Mont. 137, 79 P. 690 (map used at trial but not put in evidence may not be taken to jury room); Webb *v.* S. (Tex. Cr.), 154 S. W. 1013; Warren *v.* S. (Tex. Cr.), 149 S. W. 130 (letter with other papers in case); Hall *v.* Cook (Tex. Civ.), 117 S. W. 449; Johnson *v.* C., 102 Va. 927, 46 S. E. 789; S. *v.* Champoux, 33 Wash. 339, 74 P. 557.

See Howard *v.* S. (Tex. Cr.), 163 S. W. 429.

Cautionary directions by court. Higgins *v.* L. A., etc. Co., 159 Cal. 651, 115 P. 313, which states the rule fully and explains the statute.

Transcript of testimony may be furnished jury in court's discretion. S. *v.* Rubaka, 82 Conn. 59, 72 A. 566, statute. Not error to refuse to permit jury to take testimony of former trial. Ruder *v.* Nat. Council, 124 Minn. 431, 145 N. W. 118.

Although it is better practice to read exhibits in court before taking them to the jury room, defendant may waive reading. Winters *v.* U. S., 201 Fed. 845, 120 C. C. A. 175.

Written statement used for impeachment cannot be taken to jury room. Nelson *v.* R. Co., 170 Ill. App. 119.

462-4 Toledo T. Co. *v.* Cameron, 137 Fed. 48, 69 C. C. A. 28; Tridell *v.* Munhall, 124 Fed. 802 (Pennsylvania practice); Anderson *v.* S., 160 Ala. 79, 49 S. 460; Carty *v.* Co., 2 Cal. App. 646, 84 P. 267; Powley *v.* Swensen, 146 Cal. 471, 80 P. 722; Taylor *v.* Co., 28 Ky. L. R. 1348, 92 S. W. 292; Farrell *v.* Haze, 157 Mich. 374, 122 N. W. 197; Stone Mill Co. *v.* McWilliams, 121 Mo. App. 319, 98 S. W. 828; Suiter *v.* R. Co., 84 Neb. 256, 121 N. W. 113; C. *v.* R. Co., 23 Pa. Super. 235; First Presby. Church *v.* Elliott, 65 S. C. 251, 43 S. E. 674.

Court may of its own motion and must, at request of either party, submit exhibits to jury. S. *v.* Young, 134 Ia. 505, 110 N. W. 292; German, etc. *v.* Bk., 101 Ia. 530, 70 N. W. 769, 63 Am. St. 399.

462-5 Buster B. Co. *v.* Co. (Mo. App.), 126 S. W. 988.

Under §425, Code of Crim. Proc. (N. Y.) exhibits can be taken into jury room only upon consent of defendant and counsel for people. P. *v.* Dolan, 186 N. Y. 4, 78 N. E. 569, 116 Am. St. 521.

463-7 Smith *v.* S., 142 Ala. 14, 39 S. 329 (criminal case); Shedden *v.* Stiles, 121 Ga. 637, 49 S. E. 719 (answers to interrogatories); Fottori *v.* Vesella, 27 R. I. 177, 61 A. 143.

463-8 Hall *v.* Cook (Tex. Civ.), 117 S. W. 449, statute.

463-9 Wintermute *v.* Co., 53 Wash. 539, 102 P. 443, immaterial depositions unintentionally taken.

463-10 Koosa *v.* Warten, 158 Ala. 496, 48 S. 544.

463-12 Written evidence of absent witness, given at preliminary hearing, may, in discretion of court, be taken by jury. Shirley *v.* S., 144 Ala. 35, 40 S. 269.

463-13 Koosa *v.* Warten, 158 Ala. 496, 48 S. 544 (error to refuse if exhibit covers forty-two items); Blackburn *v.* R. Co., 201 Mass. 186, 87 N. E. 579; Fottori *v.* Vessella, 27 R. I. 177, 61 A. 143.

464-18 Tridell *v.* Munhall, 124 Fed. 802; Rickeman *v.* Ins. Co., 120 Wis. 655, 98 N. W. 960. See Welliver *v.* Co., 23 Pa. Super. 79.

Court in discretion may refuse to allow each party to submit to jury, to take with them, a statement of the respective amounts claimed. Adriaans *v.* Reilly, 27 App. Cas. (D. C.) 167.

464-20 Volume of state reports containing mortality and annuity tables may be taken by jury if they are cautioned not to use it for any other purpose. Atlantic, etc. R. Co. *v.* Taylor, 125 Ga. 454, 54 S. E. 622.

Examination of code by juror, ground for reversal. Henson *v.* S., 110 Tenn. 47, 72 S. W. 960.

465-21 Harshaw *v.* S., 94 Ark. 343, 127 S. W. 745. *Contra*, S. *v.* Crea, 10 Ida. 88, 76 P. 1013 (statute allows only papers to be taken out by jury).

Clothing of deceased may be taken to jury room, but its use should be con-

fined to purpose for which it was introduced Puryear *v.* S., 50 Tex. Cr. 454, 98 S. W. 258.

Photograph of building may be taken and examined through magnifying glass. S. *v.* Wallace, 78 Conn. 677, 63 A. 448.

465-23 Practice of permitting pleadings in civil actions to be taken out, not commended. Powley *v.* Swensen, 146 Cal. 471, 80 P. 722; Elgin, etc. R. Co. *v.* Wilson, 217 Ill. 47, 75 N. E. 436; Mattson *v.* R. Co., 98 Minn. 296, 108 N. W. 517. See Hanchett *v.* Haas, 125 Ill. App. 111, 219 Ill. 546, 76 N. E. 845; Willoughby *v.* Willoughby, 70 S. C. 516, 50 S. E. 208; Franklin *v.* R. Co., 74 S. C. 332, 54 S. E. 578.

Writings should be delivered to jury in presence of defendant and counsel. Bowles *v.* C., 103 Va. 816, 48 S. E. 527.

466-24 Birmingham Co. *v.* Mason, 144 Ala. 387, 39 S. 590; Palmer *v.* Smith, 76 Conn. 210, 56 A. 516; Warth *v.* Loewenstein, 121 Ill. App. 71 (exhibit with immaterial memorandum previously excluded); West Chicago R. Co. *v.* Buckley, 200 Ill. 260, 65 N. E. 708 (declaration, one count of which withdrawn in presence of jury); Elgin, etc. T. Co. *v.* Wilson, 217 Ill. 47, 75 N. E. 436 (counts of declaration to which demurrers sustained); West *v.* Co., 56 Tex. Civ. 341, 120 S. W. 228. See Trumbull *v.* Trumbull, 71 Neb. 186, 98 N. W. 683; P. *v.* Dolan, 186 N. Y. 4, 78 N. E. 569, 116 Am. St. 521; Lewis *v.* Crane, 78 Vt. 216, 62 A. 60; S. *v.* Stover, 64 W. Va. 668, 63 S. E. 315. But see South Tex. M. Co. *v.* Dozier (Tex. Civ.), 158 S. W. 1051.

467-26 Alaska Co. *v.* Dinkelspiel, 121 Fed. 318, 57 C. C. A. 14; P. *v.* Chin Non, 146 Cal. 561, 80 P. 681 (jurors reading newspapers relating to trial); Shedden *v.* Stiles, 121 Ga. 637, 49 S. E. 719; Rich *v.* Hayes, 97 Me. 293, 54 A. 724.

467-27 *Contra,* Willson *v.* Faxon, 117 N. Y. S. 361.

467-28 P. *v.* Dolan, 186 N. Y. 4, 78 N. E. 569, 116 Am. St. 521; S. *v.* Stover, 64 W. Va. 668, 63 S. E. 315.

468-31 Hoxie *v.* Walker, 75 N. H. 308, 74 A. 183.

469-33 S. *v.* Wallace, 78 Conn. 677, 63 A. 448; Crawford *v.* S., 117 Ga. 247, 43 S. E. 762 (plot not introduced may be used; but *comp.* Nobles *v.* S., 127 Ga. 212, 56 S. E. 125, map not in evidence not allowed to be used); Carroll *v.* C., 26 Ky. L. R. 1083, 83 S. W. 552; S. *v.* Ferrell, 233 Mo. 452, 136 S. W. 709 (gun and bullets); S. *v.* Knapp, 70 O. St. 380, 71 N. E. 705 (written confession used).

469-34 Terry *v.* Williams, 148 Ala. 468, 41 S. 804.

469-35 Alaska Co. *v.* Dinkelspiel, 121 Fed. 318, 56 C. C. A. 14; Taylor *v.* Robinson, 94 Ark. 560, 127 S. W. 972; Van Leuven *v.* Van Leuven, 3 Cal. App. 409, 85 P. 860.

Part of exhibit inadmissible.—S. *v.* Strong, 83 N. J. L. 177, 83 A. 506.

Marking exhibit, not essential. Maxwell *v.* McCall, 145 Ia. 687, 124 N. W. 760.

Formal introduction, not essential if paper treated as in evidence. S. *v.* Bowman, 80 Kan. 473, 103 P. 84.

Exhibits attached to a pleading, not evidence unless offered as such. Missouri, etc. R. Co. *v.* Lawson, 55 Tex. Civ. 388, 119 S. W. 921.

470-36 Nobles *v.* S., 127 Ga. 212, 56 S. E. 125; Carman *v.* R. Co., 32 Mont. 137, 79 P. 690.

470-37 Use without putting in evidence.—Hardy *v.* Randall, 173 Ala. 516, 55 S. 997.

470-39 Carr *v.* Co., 29 R. I. 276, 70 A. 196. See S. *v.* Allen, 23 Ida. 772, 131 P. 1112; Berbarry *v.* Tombacher, 162 N. C. 497, 77 S. E. 412.

Exhibits in foreign language and not translated, admissible. Squadrilli *v.* Cielvo, 101 N. Y. S. 661; Brummer *v.* Co., 55 Misc. 227, 105 N. Y. S. 3.

Should not be offered en masse.—Dowie *v.* Priddle, 116 Ill. App. 184.

Preserving, in bill of exceptions.—See Porter *v.* Terrell, 2 Ga. App. 269, 58 S. E. 493; Pledge *v.* Griffith, 33 Mont. 191, 83 P. 392; Huron D. Co. *v.* Swart, 2 O. C. C. (N. S.) 457; Young *v.* Young, 7 O. C. C. (N. S.) 419.

Exhibits referred to by person whose deposition is being taken must be inclosed, sealed up and directed to clerk of court. Crane Co. *v.* Neel, 104 Mo. App. 177, 77 S. W. 766.

In patent cases court is especially entitled to have exhibits placed before it to which testimony of experts may be referred. Gray *v.* Grinbery, 159 Fed. 138.

470-40 Thompson *v.* S. (Tex. Cr.), 160 S. W. 685.

470-41 Verified exhibits referred to in deposition, competent. Title G. & S. Co. *v.* Nichols, 12 Ariz. 405, 100 P. 825.

EXPERIMENTS.

Impossibility of derailment, 488-49; *Possibility of seeing,* 489-50.

473-1 Hughes *v.* S., 126 Tenn. 40, 148 S. W. 543.

473-2 Fuentes *v.* S., 64 Fla. 64, 59 S. 395 (struggle with defendant by state's attorney to illustrate struggle in which homicide occurred); Johnson *v.* S., 55 Fla. 46, 46 S. 154; Spires *v.* S., 50 Fla. 121, 39 S. 181; Carolina Portland Cement Co. *v.* Marshall, 9 Ga. App. 555, 71 S. E. 942; Augusta R. & E. Co. *v.* Arthur, 3 Ga. App. 513, 60 S. E. 213; De Loach, etc. Co. *v.* Co., 2 Ga. App. 493, 58 S. E. 790; Atlanta, etc. R. Co. *v.* Hudson, 2 Ga. App. 352, 58 S. E. 500; Boerner F. Co. *v.* Mucci (Ia.), 138 N. W. 866; Kimball Co. *v.* Co., 141 Ia. 632, 118 N. W. 891; Chicago T. Co. *v.* Co., 134 Ia. 252, 111 N. W. 935; Huggard *v.* Co., 132 Ia. 724, 109 N. W. 475; Dow *v.* Bulfinch, 192 Mass. 281, 78 N. E. 416; P. *v.* Auerbach, 176 Mich. 23, 141 N. W. 869; Young *v.* Kinney, 85 Neb. 131, 122 N. W. 679; Lillie *v.* S., 72 Neb. 228, 100 N. W. 316; Beckley *v.* Alexander (N. H.), 90 A. 878; Peterson *v.* Co., 55 Or. 511, 106 P. 337; Carr *v.* Co., 26 R. I. 180, 58 A. 678; S. *v.* Avant, 85 S. C. 570, 67 S. E. 908; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401; Ansbary *v.* L. Co., 78 Wash. 379, 139 P. 46; Halverson *v.* Co., 35 Wash. 600, 77 P. 1058. See Thiel *v.* Kennedy, 82 Minn. 142, 84 N. W. 657; Wilson *v.* R. Co., 135 Wis. 18, 114 N. W. 462.

Weight for jury in consideration of similarity of which jury may believe to exist (to actual occurrence). McClendon *v.* S., 7 Ga. App. 784, 68 S. E. 331.

Experimental evidence may be best. Tackman *v.* B. of Am., 132 Ia. 64, 106 N. W. 350. See also Hooker *v.* S., 98 Md. 145, 56 A. 390. But see Spires *v.* S., 50 Fla. 121, 39 S. 181.

Use of magnifying glass.—See S. *v.* Wallace, 78 Conn. 677, 63 A. 448; Flora *v.* Powrie, 23 App. Cas. (D. C.) 195; Cotton *v.* R., 191 Mass. 103, 77 N. E. 698.

474-3 Johnson *v.* S., 55 Fla. 46, 46 S. 154; C. *v.* Buxton, 205 Mass. 49, 91 N. E. 128; Clemons *v.* R. Co., 137 Wis. 387, 119 N. W. 102. See Spires *v.* S., 50 Fla. 121, 39 S. 181; De Loach, etc. Co. *v.* Co., 2 Ga. App. 493, 58 S. E. 790; Chicago T. Co. *v.* Co., 134 Ia. 252, 111 N. W. 935; Dow *v.* Bulfinch, 192 Mass. 281, 78 N. E. 416; Healey *v.* Bartlett, 73 N. H. 110, 59 A. 617. But see Amsbary *v.* L. Co., 78 Wash. 379, 139 P. 46.

474-6 If proper conditions do not exist it is error to receive such evidence. Hisler *v.* S., 52 Fla. 30, 42 S. 692.

475-7 Martin *v.* S. (Fla.), 66 S. 139; Johnson *v.* S., 55 Fla. 46, 46 S. 154; S. *v.* Bass, 251 Mo. 107, 157 S. W. 782; Beckley *v.* Alexander (N. H.), 90 A. 878. See Spires *v.* S., 50 Fla. 121, 39 S. 181; Hisler *v.* S., 52 Fla. 30, 42 S. 692.

Although relevant, admissibility of an experiment depends upon whether it will tend to aid rather than to confuse jury. Healey *v.* Bartlett, 73 N. H. 110, 59 A. 617.

475-8 Harris *v.* S., 62 Tex. Cr. 235, 137 S. W. 373.

476-11 See Carr *v.* Co., 26 R. I. 180, 58 A. 678.

476-12 Spurlock *v.* Co., 118 La. 1, 42 S. 575. *Comp.* Richardson *v.* S., 49 Tex. Cr. 391, 94 S. W. 1016.

477-13 Larrabee *v.* McGuinness, 165 Fed. 169, 91 C. C. A. 203; P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804; P. *v.* Morrigan, 29 Mich. 4; Fisher *v.* Ins. Co., 124 Tenn. 450, 138 S. W. 316; Speers *v.* S., 55 Tex. Cr. 368, 116 S. W. 568. See Coffman *v.* S. (Tex. Cr.), 165 S. W. 939; Rasmussen *v.* Co., 133 Wis. 205, 113 N. W. 453.

478-14 Benson *v.* Mfg. Co., 147 Wis. 20, 132 N. W. 633. See Saucier *v.* Mills, 72 N. H. 292, 56 A. 545; Carr *v.* Co., 26 R. I. 180, 58 A. 678. But see Moon *v.* Roberts, 170 Ill. App. 367.

Operation of telephone.—Chicago T. Co. *v.* Co., 134 Ia. 252, 111 N. W. 935.

478-16 Chicago T. Co. *v.* Co., supra; Thiel *v.* Kennedy, 82 Minn. 142, 84 N. W. 657; Saucier *v.* Mills, 72 N. H. 292, 56 A. 545; Green *v.* R. Co., 131 App. Div. 277, 115 N. Y. S. 590.

479-18 Southern R. Co. *v.* Brock, 132 Ga. 858, 64 S. E. 1083. See Birmingham, etc. Co. *v.* Rutledge, 142 Ala. 195, 39 S. 338; Minden *v.* Vedene, 72 Neb. 657, 101 N. W. 330.

Erroneous demonstration.—Willis *v.*

City, 161 Mo. App. 461, 143 S. W. 516.

Dramatic exhibition, not permitted. Felsch *v.* Babb, 72 Neb. 736, 101 N. W. 1011.

479-19 Medical expert may demonstrate condition of plaintiff's legs by sticking pins in them, and take away his crutches to show inability to stand. Missouri R. Co. *v.* Lynch, 40 Tex. Civ. 543, 90 S. W. 511.

"To show their extent or to enable a surgeon to demonstrate their nature and character." Landro *v.* Great Northern R. Co., 117 Minn. 306, 135 N. W. 991, *cit.* Clay *v.* R. Co., 104 Minn. 1, 115 N. W. 949.

480-22 But see Felsch *v.* Babb, 72 Neb. 736, 101 N. W. 1011.

481-23 See P. *v.* Stilwell, 81 Misc. 456, 142 N. Y. S. 628, *aff.* in 162 App. Div. 811, 148 N. Y. S. 59.

Where a father indicted for killing his baby contended his three year old son accidentally discharged the pistol, evidence son was given pistol and could neither cock nor discharge it when cocked, admissible. S. *v.* Woodrow, 58 W. Va. 527, 52 S. E. 545.

482-28 Birmingham R. L. & P. Co. *v.* Saxon (Ala.), 59 S. 584; P. *v.* Curtright, 258 Ill. 430, 101 N. E. 551; Walker *v.* S. (Tex. Cr.), 151 S. W. 822; S. *v.* Baker, 69 Wash. 589, 125 P. 1016.

Demonstration of physician by use of manikin of proper method of delivering child. See Lee *v.* Moore (Tex. Civ.), 162 S. W. 437.

Permitting a motorman to illustrate, with his hands, the time it would take him to go through the various motions necessary to reverse the lever, etc., in order to stop or check up the car. Birmingham Co. L. & P. Co. *v.* Saxon (Ala.), 59 S. 584.

483-31 P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804. See Taekman *v.* B. of Am., 132 Ia. 64, 106 N. W. 350, *cit.* the text; Roberts *v.* Dover, 72 N. H. 147, 55 A. 895.

483-32 La Porte C. Co. *v.* Sullender (Ind. App.), 71 N. E. 922; Cheetham *v.* R., 26 R. I. 279, 58 A. 881; Krueger *v.* Co., 38 Tex. Civ. 398, 85 S. W. 1156 (rip-saw threw timber in opposite direction from that claimed). See De Loach, etc. Co. *v.* Co., 2 Ga. App. 493, 58 S. E. 790; S. *v.* Nowells, 135 Ia. 53, 109 N. W. 1016; Davis *v.* Co., 121 App. Div. 242, 105 N. Y. S. 693; Zimmer *v.* R. Co., 123 Wis. 643, 101 N. W. 1099 (where plaintiff fell from crowded car as it went around curve, experiment with car not crowded, inadmissible).

483-33 Taekman *v.* B. of Am., 132 Ia. 64, 106 N. W. 350, "To render the experiment of any probative value, however, the conditions must be such that they may be found to have been not only possible, but reasonably probable."

484-34 P. *v.* Solani, 6 Cal. App. 103, 91 P. 654; Daniels *v.* Stock, 23 Colo. App. 529, 130 P. 1031; Spires *v.* S., 50 Fla. 121, 39 S. 181; Hisler *v.* S., 52 Fla. 30, 42 S. 692; De Loach, etc. Co. *v.* Co., 2 Ga. App. 493, 58 S. E. 790; Upthegrove *v.* R. Co., 154 Ill. App. 460; Burt *v.* Co., 141 Ill. App. 603; Chicago, etc. Co. *v.* Schallawitz, 118 Ill. App. 9; Merchants L. & T. Co. *v.* Boucher, 115 Ill. App. 101; Chicago, etc. R. Co. *v.* Crose, 113 Ill. App. 547; Chicago C. R. Co. *v.* Brecher, 112 Ill. App. 106; Elgin, etc. Co. *v.* Wilson, 120 Ill. App. 371; La Porte C. Co. *v.* Sullender (Ind. App.), 71 N. E. 922; Kimball Co. *v.* Co., 141 Ia. 632, 118 N. W. 891; Huggard *v.* Co., 132 Ia. 724, 109 N. W. 475; Byrd *v.* Co., 136 Ky. 766, 125 S. W. 174; Louisville R. Co. *v.* Hoskins, 28 Ky. L. R. 124, 88 S. W. 1087; Jenkins *v.* R. Co., 105 Minn. 504, 117 N. W. 928; S. *v.* Bass, 251 Mo. 107, 157 S. W. 782; S. *v.* Nordall, 38 Mont. 327, 99 P. 960; Clarence *v.* S., 86 Neb. 210, 125 N. W. 540; Mitchell *v.* Sayles, 28 R. I. 240, 66 A. 574 (pressure required to burst steam pipe); Krueger *v.* Co., 38 Tex. Civ. 398, 85 S. W. 1156; Houston, etc. R. Co. *v.* Ramsey, 43 Tex. Civ. 603, 97 S. W. 1067; Richardson *v.* S., 49 Tex. Cr. 391, 94 S. W. 1016; Richards *v.* Co., 107 Va. 881, 59 S. E. 1104 (making tracks for purpose of comparison); Trego *v.* Co., 136 Wis. 315, 117 N. W. 855; Wilson *v.* R. Co., 135 Wis. 18, 114 N. W. 462, 115 N. W. 330; Zimmer *v.* R. Co., 123 Wis. 643, 101 N. W. 1099.

See Wingfield *v.* McClintock, 85 Kan. 452, 113 P. 394.

That dissimilarity of conditions favored objecting party does not require court to admit experiment. Halverson *v.* Co., 35 Wash. 600, 77 P. 1058.

485-35 Larrabee *v.* McGuinness, 165 Fed. 169, 91 C. C. A. 203; Atlanta, etc. R. Co. *v.* Hudson, 2 Ga. App. 352,

58 S. E. 500; Elgin, etc. Co. *v.* Wilson, 120 Ill. App. 37; La Porte C. Co. *v.* Sullender (Ind. App.), 71 N. E. 922; S. *v.* Bass, 251 Mo. 107, 157 S. W. 782; Burton *v.* R. Co., 176 Mo. App. 14, 162 S. W. 1064; S. *v.* Ryan, 56 Or. 524, 108 P. 1009; Speers *v.* S., 55 Tex. Cr. 368, 116 S. W. 568; Kansas City, etc. Co. *v.* Hall (Tex. Civ.), 152 S. W. 445, *cit.* ENCYCLOPÆDIA OF EVIDENCE; Amsbary *v.* L. Co., 78 Wash. 379, 139 P. 46; Lasityr *v.* Olympia, 61 Wash. 651, 112 P. 752; Zimmer *v.* R. Co., 123 Wis. 643, 101 N. W. 1099.

485-37 Atlanta, etc. R. Co. *v.* Hudson, 2 Ga. App. 352, 58 S. E. 500, *cit.* the text; Hauser *v.* P., 210 Ill. 253, 71 N. E. 416; S. *v.* Nowells, 135 Ia. 53, 109 N. W. 1016; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401.

Where defense was that defendant mistook deceased for a deer, experiment was held admissible if conditions were so far similar as to render result of substantial use on the question of care. Harper *v.* Holcomb, 146 Wis. 183, 130 N. W. 1128.

485-38 Johnson *v.* R. Co., 80 Kan. 456, 103 P. 90; Vosler *v.* R. Co., 77 N. J. L. 727, 73 A. 483.

487-42 See Kansas City, etc. R. Co. *v.* Hall (Tex. Civ.), 152 S. W. 445, *cit.* ENCYCLOPÆDIA OF EVIDENCE.

488-44 Evidence excluded because conditions not shown to be same. Wilson *v.* R. Co., 135 Wis. 18, 114 N. W. 462. See Omaha R. Co. *v.* Larson, 70 Neb. 591, 97 N. W. 824.

488-46 But see Louisville R. Co. *v.* Hoskins, 28 Ky. L. R. 124, 88 S. W. 1087.

488-47 See Elgin, etc. Co. *v.* Wilson, 120 Ill. App. 371; Amsbary *v.* L. Co., 78 Wash. 379, 139 P. 46.

488-48 Atlanta, etc. R. Co. *v.* Hudson, 2 Ga. App. 352, 58 S. E. 500; Galveston, etc. R. Co. *v.* Olds (Tex. Civ.), 112 S. W. 787; Houston, etc. R. Co. *v.* Ramsey, 43 Tex. Civ. 603, 97 S. W. 1067. See Elgin, etc. T. Co. *v.* Wilson, 217 Ill. 47, 75 N. E. 436.

488-49 Gray *v.* R. Co., 143 Ia. 268, 121 N. W. 1097; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651 (ability to see wire). See Chicago, etc. R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. 135.

Impossibility of derailment of car when turning corner may be shown by experiments with similar cars going at highest rate of speed. Cheetham *v.* R. Co., 26 R. I. 279, 58 A. 881. *Comp.* Halverson *v.* Co., 35 Wash. 600, 77 P. 1058.

Weight of such testimony not great. Palmer *v.* R. Co., 34 Utah 466, 98 P. 689.

489-50 Young *v.* Kinney, 85 Neb. 131, 122 N. W. 679 (identification of brand on horse in question by examination of other horses similarly branded); S. *v.* Bean, 77 Vt. 384, 60 A. 807.

Identification by flash of gun.—Refusal to permit experiment before jury in dark room, not error. Spires *v.* S., 50 Fla. 121, 39 S. 181.

Possibility of seeing persons and things under given conditions may be shown by experiments under like conditions. Healey *v.* Bartlett, 73 N. H. 110, 59 A. 617 (testator seeing and hearing attesting witnesses from bed where he lay); Hauser *v.* P., 210 Ill. 253, 71 N. E. 416. Conditions must be same. Chicago, etc. R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. 135 (possibility of injured person seeing train because of intervening car). And see Taylor *v.* S., 135 Ga. 622, 70 S. E. 237.

489-51 Gibbons *v.* Ty., 5 Okla. Cr. 212, 115 P. 129.

490-52 Johnson *v.* R. Co., 80 Kan. 456, 103 P. 90. See Hutchinson *v.* Gate Co., 247 Mo. 71, 152 S. W. 52.

Conductor not allowed to reproduce signal before jury. Baltimore & O. R. Co. *v.* Fouts (Ohio), 104 N. E. 544.

Possibility of testator seeing and hearing attesting witnesses. Healey *v.* Bartlett, 73 N. H. 110, 59 A. 617.

Hearing sounds through walls and floor of adjoining rooms. Dow *v.* Bulfinch, 192 Mass. 281, 78 N. E. 416, refusal to allow evidence of experiment, not error.

491-56 Jury may smell of bottle of alcohol. Thompson *v.* S. (Tex. Cr.), 160 S. W. 685.

Discretionary with court to allow jury to taste of article. Boerner Fry Co. *v.* Mucci (Ia.), 138 N. W. 866.

Improper to let jury feel of overcoat. P. *v.* Enright, 256 Ill. 221, 99 N. E. 936.

491-57 Krens *v.* S., 75 Neb. 294, 106 N. W. 27. See generally vol. 3, p. 134; vol. 6, p. 704, vol. 7, p. 929 and supplement thereto.

491-59 See S. *v.* Graham, 116 La.

779, 41 S. 90; S. *v.* Williams, 120 La. 175, 45 S. 94.

492-60 P. *v.* Weber, 149 Cal. 325, 86 P. 671, evidence admitted as to firing bullets from pistol used by defendant. See Thomas *v.* S. (Ala. App.), 65 S. 863.

Experiments with knife and clothing to identify knife. Durfee *v.* S. (Tex. Cr.), 165 S. W. 180.

Scattering of shot.—See S. *v.* Ronk, 91 Minn. 419, 98 N. W. 334.

492-61 S. *v.* Nowells, 135 Ia. 53, 109 N. W. 1016 (with piece of decedent's shirt); Hughes *v.* S., 126 Tenn. 40, 148 S. W. 543. See Hisler *v.* S., 52 Fla. 30, 42 S. 692; Lillie *v.* S., 72 Neb. 228, 100 N. W. 316.

492-63 See Hisler *v.* S., 52 Fla. 30, 42 S. 692; P. *v.* Solani, 6 Cal. App. 103, 91 P. 654.

Where caliber and make unknown, but weapon was shown to be an ordinary revolver, experiments with different calibers and makes and different kinds of powder were properly shown. Lillie *v.* S., 72 Neb. 228, 100 N. W. 316.

492-64 See P. *v.* Solani, 6 Cal. App. 103, 91 P. 654; Hisler *v.* S., 52 Fla. 30, 42 S. 692.

Cartridges of same kind need not be used where same pistol and cloth used. S. *v.* Nowells, 135 Ia. 53, 109 N. W. 1016; Lillie *v.* S., 72 Neb. 228, 100 N. W. 316.

493-65 See Lillie *v.* S., supra.

493-67 See P. *v.* Solani, supra.

494-72 But see Louisville R. Co. *v.* Hoskins, 28 Ky. L. R. 124, 88 S. W. 1087 (experiment with horse, other than one used in collision, to show time required to reach and cross track, excluded); O'Dea *v.* R. Co., 142 Mich. 265, 105 N. W. 746 (time used by engineer to oil engine—experiment excluded).

495-73 But see Richardson *v.* R. Co., 170 Ill. App. 336.

Child's ability to discharge pistol. See supra, 481-23.

495-74 Van Wyk *v.* P., 45 Colo. 1, 99 P. 1009; Armstrong P. Co. *v.* Clem (Tex. Civ.), 151 S. W. 576. See Mann's Admr. *v.* Reynolds, 150 Ky. 313, 150 S. W. 329; Boyd *v.* S., 84 Miss. 414, 36 S. 525; Davis *v.* Co., 121 App. Div. 242, 105 N. Y. S. 693.

Impregnation of water with a certain chemical may be shown by testing before jury a sample of such water with litmus paper. Crabtree C. M. *v.* Hamby, 28 Ky. L. R. 687, 90 S. W. 226.

Speed at which automobile was run may be shown by proof of experiments though experimenter not an expert. C. *v.* Buxton, 205 Mass. 49, 91 N. E. 128.

495-75 Frank *v.* S., 141 Ga. 243, 80 S. E. 1016; Cheetham *v.* R. Co., 26 R. I. 279, 58 A. 881. But see C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127.

496-79 Upthegrove *v.* R. Co., 154 Ill. App. 460; S. *v.* Schneck, 85 Kan. 334, 116 P. 823; Hooker *v.* S., 98 Md. 145, 56 A. 390; Boyd *v.* S., 84 Miss. 414, 36 S. 525.

497-81 Van Wyk *v.* P., 45 Colo. 1, 99 P. 1009; Mark *v.* Greenawalt, 32 App. Cas. (D. C.) 253; Gray *v.* R. Co., 143 Ia. 268, 121 N. W. 1097; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651. See Larrabee *v.* McGuinness, 165 Fed. 169, 91 C. C. A. 203; S. *v.* Sorenson (Ia.), 138 N. W. 411; Cheetham *v.* R. Co., 26 R. I. 279, 58 A. 881.

497-82 Byrd *v.* Co., 136 Ky. 766, 125 S. W. 174 (doubted).

498-83 United States, etc. Co. *v.* Granger, 172 Ala. 546, 55 S. 244.

500-89 Van Wyk *v.* P., 45 Colo. 1, 99 P. 1009.

500-90 Mark *v.* Greenawalt, 32 App. Cas. (D. C.) 253. See infra, "Patents," 615-6.

501-96 Ex parte Turman, 50 Tex. Cr. 7, 95 S. W. 533, accused cannot on cross-examination be compelled to place a cap on his head for purpose of identification by prosecuting witness.

501-1 *Contra.* Experiments out of court, not admissible. S. *v.* Ronk, 91 Minn. 419, 98 N. W. 334. See Thiel *v.* Kennedy, 82 Minn. 142, 84 N. W. 657.

502-2 Wheeling, etc. R. Co. *v.* Parker, 29 O. C. C. 1, 9 O. C. C. (N. S.) 28; S. *v.* Ballew, 83 S. C. 82, 63 S. E. 688.

502-4 S. *v.* Ballew, 83 S. C. 82, 63 S. E. 688. See Wheeling, etc. R. Co. *v.* Parker, 29 O. C. C. 1, 9 O. C. C. (N. S.) 28.

504-11 S. *v.* Bass, 251 Mo. 107, 157 S. W. 782. See Omaha St. R. Co. *v.* Larson, 70 Neb. 591, 97 N. W. 824.

Non-expert may state result of experiment seen by him where expert who performed it shows similarity of conditions. Krueger *v.* Co., 38 Tex. Civ. 398, 85 S. W. 1156.

EXPERT AND OPINION EVIDENCE

Professional ability, 520-12; *Theory of spiritualism*, 526-36; *Nurses*, 545-85; *Calculating interest*, 553-13; *Infringement of copyright*, 602-90; *Experiments and tests*, 607-15; *Compelling witness to qualify*, 611-24; *Redirect examination*, 621-53; *Knowledge*, 701-11.

517-1 Longfellow *v.* Vernon (Ind. App.), 105 N. E. 178, *citing* 5 ENCYCLOPÆDIA OF EVIDENCE 517.

517-6 See Louft *v.* Pyle (Del.), 75 A. 619.

An expert is one possessing, in regard to a particular subject or department of human activity, knowledge not acquired by ordinary persons. Yates *v.* Garrett, 19 Okla. 499, 92 P. 142.

519-11 Suthon *v.* Laws, 132 La. 207, 61 S. 204.

520-12 See Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295.

A father is prima facie competent to express an opinion as to elocutionary ability of daughter. Cleveland, etc. R. Co. *v.* Hadley, 40 Ind. App. 731, 82 N. E. 1025.

521-14 Am. A. C. Co. *v.* Hogan, 213 Fed. 416 (C. C. A.); United States *v.* J. B. Thomas & Co., 178 Fed. 602; Chicago, etc. R. Co. *v.* Hale, 99 C. C. A. 379, 176 Fed. 71; Allen *v.* Field, 130 Fed. 641, 65 C. C. A. 19; Archer *v.* Ostemeier (Ind. App.), 105 N. E. 522; Clark *v.* Co., 146 Ia. 428, 123 N. W. 327; Ammer *v.* Postal, 168 Mich. 405, 134 N. W. 453; Stocker *v.* Schneider, 228 Pa. 149, 77 A. 437; Cochran *v.* Casey (Tex. Civ.), 128 S. W. 1145; Swan *v.* R. Co. (Utah), 127 P. 267.

Testimony of doctors based on actual test by them to determine possibility of self-infliction of fatal wound excluded as not being a matter of skill or science. P. *v.* Curtright, 258 Ill. 430, 101 N. E. 551. See also vol. 5, p. 590, n. 37, and see vol. 6, p. 682, n. 14.

Any matter as to which an opinion requires technical or scientific knowledge. McClendon *v.* S., 7 Ga. App. 784, 68 S. E. 331.

Peculiar knowledge or experience not common to the world. P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077.

The usual and ordinary way of constructing and operating machinery, structures and appliances. Ridenour *v.* Wilcox Mines Co., 164 Mo. App. 576, 147 S. W. 852.

Operation of dust collectors.—Quaker Oats Co. *v.* Grice, 195 Fed. 441, 115 C. C. A. 343.

Finger-print identification.—P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077.

521-15 Johnson *v.* Caughren, 55 Wash. 125, 104 P. 170.

A witness may give his opinion on facts within his knowledge where the subject-matter is entirely within common observation and experience, and it would not be practicable for him to have placed them all before the jury. S. *v.* Jackson, 130 La. 201, 57 S. 888.

522-17 Rogers *v.* Kee, 171 Mich. 551, 137 N. W. 260. See Willet *v.* Johnson, 13 Okla. 563, 76 P. 174, to connect physical condition with injuries alleged to be its cause.

In action for failing to properly treat a fracture there can be no recovery without testimony of medical experts tending to show lack of requisite skill and care. Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807.

523-21 Testimony as to facts cannot rest on information derived from others. Mason *v.* Mills, 81 S. C. 554, 62 S. E. 399.

523-23 Standard Acc. & Life Ins. Co. *v.* Wood, 116 Md. 575, 82 A. 702; S. *v.* Rasco, 239 Mo. 535, 144 S. W. 449.

But the opinion need not be positive. Costello *v.* S., 176 Ala. 1, 58 S. 202.

523-24 St. Louis, etc. R. Co. *v.* Williams, 108 Ark. 387, 158 S. W. 494; Dardenelle, etc. Co. *v.* Croom, 95 Ark. 284, 129 S. W. 280; Chicago, etc. R. Co. *v.* Hale, 176 Fed. 71, 99 C. C. A. 379; Ausmus *v.* P., 47 Colo. 167, 107 P. 204; Allison *v.* Wall, 121 Ga. 822, 49 S. E. 831; Casey *v.* Biscuit Co., 163 Ill. App. 145; Archer *v.* Ostemeier (Ind. App.), 105 N. E. 522; Withey *v.* Fowler Co. (Ia.), 145 N. W. 923; Greenway *v.* County, 144 Ia. 332, 122 N. W. 943; White Auto Co. *v.* Dorsey, 119 Md. 251, 86 A. 617; Harris *v.* Co., 111 Md. 209, 73 A. 805; Meily *v.* R. Co., 215 Mo. 567, 114 S. W. 1013; Ferdon *v.* R. Co., 131 App. Div. 380, 115 N. Y. S. 352; Ake *v.* Pittsburgh, 238 Pa. 371, 86 A. 268; Thompson *v.* Reed, 29 S. D. 85, 135 N. W. 679; Hot Springs Mfg. Co. *v.* Revercomb, 110 Va. 240, 65 S. E. 557; Johnson *v.* Caughren, 55 Wash. 125, 104 P. 970; Johnson *v.* C., 111 Va.

877, 69 S. E. 1104; Christiansen *v.* McLellan, 74 Wash. 318, 133 P. 434.

524-25 Gossett *v.* Mfg. Co., 153 Ky. 101, 154 S. W. 897; Rural Home T. Co. *v.* Arnold (Ky.), 119 S. W. 811; Southern Exp. Co. *v.* Jacobs, 109 Va. 27, 63 S. E. 17; O'Brien *v.* McKelvey, 59 Wash. 115, 109 P. 337.

524-26 Hardinge Conical Mill Co. *v.* Engineering Co., 195 Fed. 936, 115 C. C. A. 624; U. S. Co. *v.* Parry, 166 Fed. 407, 92 C. C. A. 159; Strever *v.* Woodward (Ia.), 141 N. W. 931.

524-27 Boston, etc. R. Co. *v.* Boyton Co., 211 Fed. 812 (C. C. A.); Royal Ex. Assur. *v.* Co., 166 Fed. 32, 92 C. C. A. 66 (cumulative testimony); Woods *v.* S. (Ala.), 65 S. 342; Barlew *v.* S., 5 Ala. App. 290, 57 S. 601; Ausmus *v.* P., 47 Colo. 167, 107 P. 204; Landrum *v.* Swann, 8 Ga. App. 209, 68 S. E. 862; Lafrentz *v.* Cavanagh, 166 Ill. App. 366; City of Geneseo *v.* Schultz, 257 Ill. 273, 100 N. E. 926; Barrie *v.* Quimby, 206 Mass. 259, 92 N. E. 451; Internat. Boone Co. *v.* Rainy Lake, etc. Co., 112 Minn. 104, 127 N. W. 382; Porter *v.* Hetherington, 172 Mo. App. 502, 158 S. W. 473; Ward *v.* Ins. Co. (Or.), 138 P. 1067; Houston P. Co. *v.* Griffith (Tex. Civ.), 164 S. W. 431; Clinchfield C. Co. *v.* Wheeler, 108 Va. 448, 62 S. E. 269. See also vol. 13, p. 552, n. 4.

Testimony proffered by the defendant from several witnesses as to the number of cars which in their opinion the plaintiff would have sold in 1903. "Under some circumstances perhaps evidence of this sort might be admissible. But here there was evidence as to the number of cars of several makes actually sold during 1903 and divers other facts from which an inference could be fairly drawn by the jury. It was a case where expert evidence might well be excluded in the discretion of the trial court." Randall *v.* Car Co., 212 Mass. 352, 99 N. E. 221.

Correct method of delivering a child having been demonstrated by two of appellee's experts by use of a manikin, court refused to permit appellant's experts to show by means of the manikin what in their opinion was the correct method. Held not an abuse of discretion. Lee *v.* Moore (Tex. Civ.), 162 S. W. 437.

524-28 Pace *v.* Louisville & N. R. Co., 166 Ala. 519, 52 S. 52.

525-31 Atlantic C. L. R. Co. *v.* Caple, 110 Va. 514, 66 S. E. 855. See S. *v.* Flanigan, 111 Md. 481, 74 A. 818.

525-32 Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651; Ferdon *v.* R. Co., 131 App. Div. 380, 115 N. Y. S. 352; Meehan *v.* R. Co., 13 N. D. 432, 101 N. W. 183.

525-33 Montana.—Copenhaver *v.* N. P. R. Co., 42 Mont. 453, 113 P. 467.

526-35 Lake *v.* Co., 160 Fed. 887, 88 C. C. A. 69 (number of men required to do work); National B. Co. *v.* Nolan, 138 Fed. 6, 70 C. C. A. 436; Am. B. Co. *v.* Fennell, 158 Ala. 484, 48 S. 97; Mallory *v.* Brademyer, 76 Ark. 538, 89 S. W. 551; P. *v.* Overacker, 15 Cal. App. 620, 115 P. 756; Denver, etc. R. Co. *v.* Vitello, 34 Colo. 50, 81 P. 766; Smith *v.* Stevens, 33 Colo. 427, 81 P. 35; P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077; Star B. Co. *v.* Hauck, 222 Ill. 348, 78 N. E. 827, 126 Ill. App. 608; Riley *v.* Co., 129 Ill. App. 123; S. *v.* Co., 124 Ia. 323, 100 N. W. 59 (whether butter substitute bore color of butter); Boisvert *v.* Ward, 199 Mass. 594, 85 N. E. 849; Whalen *v.* Rosnosky, 195 Mass. 545, 81 N. E. 282; Wolfe *v.* Co., 189 Mass. 591, 76 N. E. 222; Meehan *v.* R. Co., 186 Mass. 511, 72 N. E. 61; Wilkerson *v.* R. Co., 126 Mo. App. 613, 105 S. W. 24; Dakan *v.* Co., 197 Mo. 238, 94 S. W. 944; Kuttner *v.* R. Co., 80 N. J. L. 11, 77 A. 470, *aff.* 80 A. 1135; Watson *v.* Co., 127 App. Div. 134, 111 N. Y. S. 277; P. *v.* Brown, 110 App. Div. 490, 96 N. Y. S. 957; Winters *v.* Naughton, 91 App. Div. 80, 86 N. Y. S. 439; Trickey *v.* Clark, 50 Or. 516, 93 P. 457; De Hoyes *v.* R. Co., 52 Tex. Civ. 543, 115 S. W. 75; Lee *v.* Salt Lake, 30 Utah 35, 83 P. 562; Randall *v.* Moody (Vt.), 88 A. 321; Va. Iron C. & C. Co. *v.* Tomlinson, 104 Va. 249, 51 S. E. 362; Benson *v.* Mfg. Co., 147 Wis. 20, 132 N. W. 633; Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777 (danger of chipping cast iron from building with cold chisel).

But see Miera *v.* Ty., 13 N. M. 192, 81 P. 586, *quot.* from Taylor *v.* Monroe, 43 Conn. 36, as follows: "The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, . . . but whether the witnesses offered as experts have any peculiar knowledge or experience not common to the world, which renders their opinions . . . any

aid to the court or jury." And see Wise *v.* Lillie, 84 Kan. 86, 113 P. 403.

Manner of taking oysters from receptacle not matter for experts. Travis *v.* R. Co. (Ala.), 62 S. 851.

No error in sustaining the objection to the question to a medical witness: "Was he, at that time, able to walk without a stick?" as it called for a fact, and not for the opinion of the expert witness. Louisville & N. R. Co. *v.* Elliott, 166 Ala. 419, 52 S. 28.

Witness "was permitted to state that he had observed the plaintiff for five hours while the latter was on the witness stand, and that from such observation he had discovered nothing to indicate any loss of memory or lack of concentration of ideas on the part of plaintiff, and that plaintiff's capacity in this regard, as indicated by his appearance and demeanor on the witness stand, was free of defects and about the same as that of any other average man. So it is seen that defendant was allowed to prove everything by this witness that he attempted to prove except the description of the plaintiff's demeanor and appearance while on the witness stand. This, of course, was not competent, for the jurors observed this as clearly as the doctor did The latter as an expert could, at most, be permitted to give his opinion as to what the conduct indicated." St. Louis I. M. & S. R. Co. *v.* Tucka, 95 Ark. 190, 129 S. W. 541.

526-36 Parkin *v.* Co., 157 Cal. 41, 106 P. 210; Sullivan *v.* Co., 13 Cal. App. 35, 108 P. 895; P. *v.* Klehm, 238 Ill. 89, 87 N. E. 119; Steele *v.* Andrews, 144 Ia. 360, 121 N. W. 17; S. *v.* Schneck, 85 Kan. 334, 116 P. 823; Comrs. *v.* S., 107 Md. 210, 68 A. 602, 14 L. R. A. (N. S.) 452; Balt. R. Co. *v.* Sattler, 100 Md. 306, 59 A. 654; Doherty *v.* Booth, 200 Mass. 522, 86 N. E. 945; Cummings *v.* Co., 40 Mont. 599, 107 P. 904; Duke *v.* Museum, 157 App. Div. 637, 142 N. Y. S. 804; Disiker *v.* Society, 87 S. C. 187, 69 S. E. 153; Rice *v.* S., 54 Tex. Cr. 149. 112 S. W. 299; Doyle *v.* Melendy, 83 Vt. 339, 71 A. 881; Benson *v.* Mfg. Co., 147 Wis. 20, 132 N. W. 633; Ladwig *v.* Co., 141 Wis. 191, 124 N. W. 407. *Contra.* Scope of expert evidence not restricted to matters of science, art or skill, but extends to any subject in respect to which one may derive by experience special and peculiar knowledge. Zarnik *v.* Co., 133 Wis. 290, 113 N. W. 752; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237. See Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501; Kirby *v.* Co., 77 S. C. 404, 58 S. E. 10; Northern S. Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066.

Handwriting.—Stitzel *v.* Miller, 250 Ill. 72, 95 N. E. 53.

Expert testimony not admissible to bring into a case a theory of spiritualism which might have discredited testimony to the effect a belief therein was entertained by testator. O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59.

527-37 Am. A. C. Co. *v.* Hogan, 213 Fed. 416 (C. C. A.); Chicago U. T. Co. *v.* Roberts, 229 Ill. 481, 82 N. E. 401; Goddard *v.* Enzler, 222 Ill. 462, 78 N. E. 805; P. *v.* Clemente, 130 N. Y. S. 612. See Stark G. Co. *v.* Co., 57 Tex. Civ. 529, 122 S. W. 947.

Value.—Greene, etc. Co. *v.* John C. Quinlen Co., 148 Ill. App. 1.

"Questions asked by the defendant's counsel of real estate men, who were testifying as experts in their behalf, as to the degree of certainty with which real estate agents could estimate the probable rate of increase in value of property like that involved in this case for ten years in the future. These questions were objected to on the ground that they called for opinions from the witnesses as to the value of the testimony of other experts who had testified in the case, and were rightly excluded on that ground." Eastman *v.* Dunn, 34 R. I. 416, 83 A. 1057.

Rules of railroad.—Expert opinion inadmissible to construe. Niles *v.* R. Co. (Vt.), 89 A. 629; White *v.* R. Co. (Vt.), 89 A. 618.

527-38 Sellers *v.* Dickert (Ala.), 64 S. 40; Stevens *v.* S., 6 Ala. App. 6, 60 S. 459; Central of Georgia R. Co. *v.* Bagley, 173 Ala. 611, 55 S. 894; Councill *v.* Mayhew, 172 Ala. 295, 55 S. 314; Alabama G. S. R. Co. *v.* Yount, 165 Ala. 537, 51 S. 737; St. Louis, etc. R. Co. *v.* Osborne, 95 Ark. 310, 129 S. W. 537; Parkin *v.* Co., 157 Cal. 41, 106 P. 210; Denver, etc. R. Co. *v.* Reiter, 47 Colo. 417, 107 P. 1100; Same *v.* Vitello, 34 Colo. 50, 81 P. 766; Johnson *v.* Wilmington, etc. R. Co., 7 Penne. (Del.) 5, 76 A. 961; Hearn *v.* Wilmington, etc. R. Co., 1 Boyce (Del.), 271, 76 A. 629; Cache R. Dist. *v.* R. Co., 255 Ill. 398,

99 N. E. 635; Crooks *v.* Coal Co., 263 Ill. 343, 105 N. E. 132; Keefe *v.* Armour & Co., 258 Ill. 28, 101 N. E. 252; Turner *v.* Coal Co., 61 Ill. App. 534; Courtney *v.* R. Co., 161 Ill. App. 577; Schlander *v.* Co., 253 Ill. 154, 97 N. E. 233; Barnes *v.* Chicago, etc. R. Co., 147 Ill. App. 601; Wullner *v.* Co., 145 Ill. App. 486; Kolp *v.* Co., 145 Ill. App. 645; Chicago *v.* France, 124 Ill App. 648; Goddard *v.* Enzler, 123 Ill. App. 108; S. *v.* Bennett, 143 Ia. 214, 121 N. W. 1021; Martin *v.* Co., 131 Ia. 724, 106 N. W. 359; Root *v.* Pack. Co., 88 Kan. 413, 129 P. 147; Coblentz *v.* Putifer, 87 Kan. 719, 125 P. 30; Augusta O. Co. *v.* Co., 80 Kan. 261, 101 P. 1072; Foster-M. Co. *v.* Chinn, 134 Ky. 424, 120 S. W. 364; Harris *v.* Hipsley (Md.), 89 A. 852; Hanrahan *v.* City, 114 Md. 517, 80 A. 312; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651; Walker *v.* Williamson, 205 Mass. 514, 91 N. E. 885; Braasch *v.* Co., 153 Mich. 652, 118 N. W. 366; So. etc. Co. *v.* Smith (Mo.), 165 S. W. 804; Kane *v.* R. Co., 251 Mo. 13, 157 S. W. 644; Wesner *v.* R. Co., 177 Mo. App. 117, 163 S. W. 298; Knost *v.* Van Hoose (Mo. App.), 167 S. W. 596; Green *v.* R. Co., 142 Mo. App. 67, 125 S. W. 865 (in court's discretion); Tighe *v.* R. Co. (Mo. App.), 107 S. W. 1034; Roscoe *v.* R. Co., 202 Mo. 576, 101 S. W. 32; Piper *v.* Murray, 43 Mont. 230, 115 P. 669; Central City *v.* Marquis, 75 Neb. 233, 106 N. W. 221; Keefe *v.* R., 75 N. H. 116, 71 A. 379; Havholm *v.* Iron Wks., 159 App. Div. 578, 144 N. Y. S. 833; Dittman *v.* Co., 144 App. Div. 632, 129 N. Y. S. 221; Ferdon *v.* R. Co., 131 App. Div. 380, 115 N. Y. S. 352; Winters *v.* Naughton, 91 App. Div. 80, 86 N. Y. S. 439 (trench not a safe place to work and sheathing or bracing not properly constructed); Burns *v.* Crow, 107 N. Y. S. 944 (safety of scaffold); Carron *v.* Co., 106 N. Y. S. 723 (danger of running more than one board through saw); O'Doherty *v.* Co., 113 App. Div. 636, 99 N. Y. S. 351 (boiler explosion due to failure to repair); Dolan *v.* Co., 105 App. Div. 366, 94 N. Y. S. 241; Lane *v.* R. Co., 93 App. Div. 40, 86 N. Y. S. 947; Byers *v.* S., 1 Okla. Cr. 677, 100 P. 261; Laidlaw-Dunn Gordon Co. *v.* Miller, 31 O. C. C. 559; Dorn *v.* Drug Co., 65 Or. 516, 133 P. 351; Pointer *v.* Co., 59 Or. 438, 117 P. 605; Stoner *v.* Co., 40 Pa. Super. 599; Miller *v.* R. Co., 94 S. C. 388, 77 S. E. 1111; McCown *v.* Muldrow, 91 S. C. 523, 74 S. E. 386; Cumberland T. Co. *v.* Mill Co. (Tenn.), 164 S. W. 1145; Texas & P. R. Co. *v.* Tomlinson (Tex. Civ.), 157 S. W. 278; Missouri, etc. R. Co. *v.* Graves, 57 Tex. Civ. 395, 122 S. W. 458; St. Louis, etc. R. Co. *v.* Gunter, 44 Tex. Civ. 480, 99 S. W. 152; Metropolitan Ins. Co. *v.* Wagner, 50 Tex. Civ. 233, 109 S. W. 1120; Houston, etc. R. Co. *v.* McHale, 47 Tex. Civ. 360, 105 S. W. 1149; Powdrill *v.* S., 62 Tex. Cr. 442, 138 S. W. 114; Jesse *v.* S., 46 Tex. Cr. 444, 80 S. W. 999 (person's capacity to do certain work); Smith *v.* R. Co., 33 Utah 129, 93 P. 185; Atlantic C. R. Co. *v.* Caple, 110 Va. 514, 66 S. E. 855; Sanpere *v.* Sanpair, 57 Wash. 524, 107 P. 369; Findley *v.* R. Co. (W. Va.), 78 S. E. 396; Mylius *v.* Lumb. Co., 69 W. Va. 346, 71 S. E. 404; Hamann *v.* Co., 127 Wis. 550, 106 N. W. 1081; Johnson *v.* Highland, 124 Wis. 597, 102 N. W. 1085; Lounsbury *v.* Davis, 124 Wis. 432, 102 N. W. 941.

See Richardson *v.* S., 145 Ala. 46, 41 S. 82; Carty *v.* Boeseke, 2 Cal. App. 646, 84 P. 267; Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23; Illinois C. R. Co. *v.* Smith, 208 Ill. 608, 70 N. E. 628.

Impossibility of happening of the accident cannot be shown by expert testimony. McKay *v.* Elec. Co., 76 Wash. 257, 136 P. 134. See also vol. 8, p. 954, n. 44.

Bridge not reasonably safe.—Escher *v.* Carroll County (Ia.), 141 N. W. 38.

Expert testimony covering the ultimate facts not proper. Hite *v.* Kenne, 149 Wis. 207, 134 N. W. 383.

Amount of damage is for the jury. Carter *v.* R. Co., 112 Md. 599, 77 A. 301.

Illustrations of improper questions. "(1) Have you ever observed the conduct of mules when approaching some object that is calculated to frighten them? (2) In your 20 years' experience with mules, did you ever observe a mule or mules frighten at an object; if yea, did the mules shy, or what was their conduct under the circumstances?" Cecil Paper Co. *v.* Nesbitt, 117 Md. 59, 83 A. 254.

"Is it possible for any one working at a fleshing machine for some days to fail to know that there is some sort of cutting instrument in the machine?"

Seininski *v.* Leather Co. (Del.), 83 A. 20.

Referring to a lubricator and the water valve which was a part of it: "Could an expert engineer see through there and see those threads unless he took it out?" Pace *v.* Louisville & N. R. Co., 166 Ala. 519, 52 S. 52.

Safety of a platform which fell may be asked of an expert, but not the cause of the accident. Luper *v.* Henry, 59 Wash. 33, 109 P. 208.

Whether or not a drunken man could use the same care for his safety as a sober man. Illinois Cent. R. Co. *v.* Holland's Admr., 147 Ky. 699, 145 S. W. 389.

That two holes in the defendant's shirt were not made by the same instrument, though no injury resulted to the defendant by allowing the witness to testify to what the jury could see for themselves. Olden *v.* S., 176 Ala. 6, 58 S. 307.

That the fracture of plaintiff's arm might have been caused by her falling from a street car. Otto *v.* R. Co., 148 Wis. 54, 134 N. W. 157.

"There have been cases decided here in which it was held that a witness may state his judgment as to the existence vel non of facts where the facts stated were collective facts and the judgment of them was based upon knowledge of all the constituent elements. Sometimes it is impracticable to lay before the jury all the details upon which the collective fact is based. E. T. V. & G. R. R. Co. *v.* Watson, 90 Ala. 41, 7 South. 813; McVay *v.* State, 100 Ala. 110, 14 South. 862. It has been said that the soundness of the conclusion in such a case is to be tested on cross-examination. But it has never been held that a witness may usurp the function of the jury—or the court, when it passes on the facts—by stating his conclusion as to the very fact in issue between the parties." Brandon *v.* Co., 167 Ala. 365, 52 S. 640.

Which of two causes produced a given result—opinions not admissible where conditions necessary for operation of causes can be so described jury can understand them and intelligently form opinion. Meehan *v.* R. Co., 13 N. D. 432, 101 N. W. 183. See Castner, etc. Co. *v.* Davies, 154 Fed. 938, 83 C. C. A. 510.

Whether physical condition result of given cause, where this is the issue, cannot be asked—question must be whether it could or might be the result. Elgin, etc. Co. *v.* Wilcox, 132 Ill. App. 446; Centralia *v.* Ayres, 133 Ill. App. 290; Lutz *v.* R. Co., 123 Mo. App. 499, 100 S. W. 46; Smart *v.* Kansas City, 208 Mo. 162, 105 S. W. 709; Thomas *v.* R. Co., 125 Mo. App. 131, 100 S. W. 1121; Spaulding *v.* Edina, 122 Mo. App. 65, 97 S. W. 545; Mayes *v.* R. Co., 121 Mo. App. 614, 97 S. W. 612; Glasgow *v.* R. Co., 191 Mo. 347, 89 S. W. 915. But see Redmon *v.* R. Co., 185 Mo. 1, 84 S. W. 26; Wood *v.* R. Co., 181 Mo. 433, 81 S. W. 152. *Comp.* Kehoe *v.* R. Co., 56 Misc. 138, 106 N. Y. S. 196; Chicago C. R. Co. *v.* Foster, 128 Ill. App. 571. *Contra,* Chicago *v.* Didier, 227 Ill. 571, 81 N. E. 698, unnecessary to ask whether condition "might" have been caused by injuries. See Sullivan *v.* R. Co., 185 Mass. 602, 71 N. E. 90; Ahern *v.* R. Co., 102 Minn. 435, 113 N. W. 1019. But see Smart *v.* Kan. City, 208 Mo. 162, 105 S. W. 709.

Whether machinery should have been guarded.—Opinion incompetent. Marks *v.* Mills, 135 N. C. 287, 47 S. E. 432. *Comp.* Nat. B. Co. *v.* Nolan, 138 Fed. 6, 70 C. C. A. 436; Carlin *v.* Kennedy, 97 Minn. 141, 106 N. W. 340; Bennett *v.* Co., 147 N. C. 620, 61 S. E. 463. See Morgan *v.* Co., 120 Mo. App. 590, 97 S. W. 638, sufficiency of guard.

Competency of employe, in an action for injuries due to his negligence—opinion inadmissible. Purkey *v.* Co., 57 W. Va. 595, 50 S. E. 755. See Cherokee, etc. Co. *v.* Dickson, 55 Kan. 62, 39 P. 691; Stoll *v.* Co., 19 Utah 271, 57 P. 295. But see First Nat. Bk. *v.* Chandler, 144 Ala. 286, 39 S. 822 (whether elevator-boy wide awake and attentive, competent); Lake, etc. R. Co. *v.* Fitzgerald, 112 Ill. App. 312 (opinions of experts who had previously examined men to determine fitness for promotion, competent); El Paso, etc. R. Co. *v.* Smith (Tex. Civ.), 108 S. W. 988; Kansas City, etc. R. Co. *v.* Taylor (Tex Civ.), 107 S. W. 889 (he was a careless, ignorant fellow, slow, unsatisfactory and unreliable, competent); United O. & R. Co. *v.* Grey, 47 Tex. Civ. 10, 102 S. W. 934 (competency of servant in action for discharge); Consumer's C. Oil Co. *v.* Jonte, 36 Tex. Civ. 18, 80 S. W. 847

(opinion of foreman that servant who caused injury was "reliable," admissible).

What is reasonable time for performance of an act. See Allison *v.* Wall, 121 Ga. 822, 49 S. E. 831. See infra, 711-43. But see Texas, etc. R. Co. *v.* Walker, 43 Tex. Civ. 278, 95 S. W. 743.

Mental capacity to contract.—When this is the issue witness cannot give opinion person had capacity, though he may state opinion of person's sanity after detailing facts on which opinion based. Nashville, etc. R. Co. *v.* Brundige, 114 Tenn. 31, 84 S. W. 805. See Denver, etc. R. Co. *v.* Scott, 34 Colo. 99, 81 P. 763.

Error in receiving expert testimony not fatal if jury must have reached same conclusion as expert or where his testimony is on a point which jury could decide in accordance with general experience. Puget Sound R. *v.* Van Pelt, 168 Fed. 206, 93 C. C. A. 492.

529-39 City of Woburn *v.* Adams, 187 Fed. 781, 109 C. C. A. 629; U. S. Co. *v.* Parry, 166 Fed. 407, 92 C. C. A. 159; Central C. & C. Co. *v.* Williams, 173 Fed. 337, 97 C. C. A. 597; Harbison-W. R. Co. *v.* Scott (Ala.), 64 S. 547; Alabama Consol. Coal & Iron Co. *v.* Heald, 168 Ala. 626, 53 S. 162; T. & C. Ins. Co. *v.* Fouke, 94 Ark. 358, 127 S. W. 461 (stated under infra, "Negligence," 955-52); Greer *v.* R. Co., 115 Minn. 213, 132 N. W. 6; McAuley *v.* Co., 39 Mont. 185, 102 P. 586; Davis *v.* R. Co., 81 S. C. 466, 62 S. E. 856 (impaired value of animals); S. *v.* Kammel, 23 S. D. 465, 122 N. W. 420 (cause of death); International, etc. R. Co. *v.* McCullough (Tex. Civ.), 118 S. W. 558 (witness may answer hypothetical question though it is decisive of matter in issue if it is not a mixed one of law and fact); Galveston, etc. R. Co. *v.* Jones (Tex. Civ.), 123 S. W. 737.

See Ruth *v.* Johnson, 172 Fed. 191, 96 C. C. A. 643; Central, etc. R. Co. *v.* McClifford, 120 Ga. 90, 47 S. E. 590; Wood *v.* R. Co., 181 Mo. 433, 81 S. W. 152; Christiansen *v.* McLellan, 74 Wash. 318, 133 P. 434.

Insolvency is a proper subject for opinion testimony. Cabaniss *v.* S., 8 Ga. App. 129, 68 S. E. 849.

Mere fact answer may decide very question at issue no ground of objection. Galveston, etc. R. Co. *v.* Henefy (Tex. Civ.), 99 S. W. 884; Zarnik *v.* Co., 133 Wis. 290, 113 N. W. 752 (if question based upon undisputed or assumed facts warranted by record).

A question upon which jury may pass judgment in reaching an ultimate conclusion may be testified to if it does not cover such conclusion. Clark *v.* Co., 146 Ia. 428, 123 N. W. 327.

A criterion of duty may be established by opinion evidence notwithstanding jury may infer duty of person whose conduct involved. Yeager *v.* R. Co., 148 Ia. 231, 123 N. W. 974.

529-40 U. S. *v.* Greene, 146 Fed. 801 (construction of contract); Wright *v.* R. Co., 130 Fed. 843, 65 C. C. A. 327; Sellers *v.* Dickert (Ala.), 64 S. 40; S. *v.* Gibson, 83 S. C. 34, 64 S. E. 607; Houston, etc. R. Co. *v.* Hawkins (Tex. Civ.), 167 S. W. 190; Williams *v.* Livingston, 52 Tex. Civ. 275, 113 S. W. 786.

529-41 Merriman *v.* Blalack, 57 Tex. Civ. 270, 122 S. W. 403.

In equity suit tried by court admission of such testimony, not cause for reversal. Prime *v.* Yonkers, 131 App. Div. 110, 115 N. Y. S. 305.

Error in receiving conclusions based on testimony, not always fatal. Andrews *v.* Wheeler, 10 Cal. App. 614, 103 P. 144.

529-42 Marshall *v.* R. Co., 171 Mich. 180, 137 N. W. 89.

530-44 Jones *v.* Co., 137 Mo. App. 408, 118 S. W. 675, if answer to hypothetical question not based on knowledge of case.

530-45 White Auto Co. *v.* Dorsey, 119 Md. 251, 86 A. 617; Wertheimer *v.* Rosenbaum, 146 N. Y. S. 177; S. *v.* Burno, 158 N. C. 632, 74 S. E. 462; S. *v.* Stockman, 82 S. C. 388, 64 S. E. 595 (witness who has seen bruises on the person made by a fist may testify bruises were so made); Kleine Bros. *v.* Gidcomb (Tex. Civ.), 152 S. W. 462. See Pennsylvania, etc. R. Co. *v.* Schwarz, 75 N. J. L. 801, 70 A. 134.

Expert capacity is wholly relative to subject of particular question. Conley *v.* Co., 99 Me. 57, 58 A. 61.

530-46 Conley *v.* Co., supra; Balt. R. & H. Co. *v.* Kreiner, 109 Md. 361, 71 A. 1066.

530-47 Odom *v.* S. (Ala.), 55 S. 820; Alabama Consol. Coal & Iron Co. *v.* Heald, 168 Ala. 626, 53 S. 162; Dilburn *v.* R. Co., 156 Ala. 228, 47 S. 210; Mc-

Allister-C. Co. *v.* Matthews, 150 Ala. 167, 43 S. 747; Matthews *v.* Farrell, 140 Ala. 298, 38 S. 325; O'Rourke *v.* Sproul, 147 Ill. App. 609; McCabe *v.* Swift, 143 Ill. App. 404; Schlesinger *v.* Scheunemann, 114 Ill. App. 459; Louisville, etc. Co. *v.* Burch, 155 Ky. 731, 160 S. W. 252; S. *v.* Flanigan, 111 Md. 481, 74 A. 818; First Nat. Bk. *v.* Hedgecock, 87 Neb. 220, 127 N. W. 171; Elec. Park, etc. Co. *v.* Psichos, 83 N. J. L. 262, 83 A. 76; S. *v.* Maioni, 78 N. J. L. 339, 74 A. 526; Riley *v.* R. Co., 70 N. J. L. 289, 57 A. 445 (qualifications must appear from the evidence when objection on this ground); Epstein *v.* Co., 101 N. Y. S. 793; Dolan *v.* Co., 105 App. Div. 366, 94 N. Y. S. 241; Heraneourt Brewing Co. *v.* Frank, 31 O. C. C. 277; Wichita, etc. Co. *v.* Munsell (Okla.), 132 P. 906; Bernard *v.* Smith (R. I.), 90 A. 657; Gulf, etc. R. Co. *v.* Ford (Tex. Civ.), 143 S. W. 943; International, etc. R. Co. *v.* Welbourne (Tex. Civ.), 113 S. W. 780; Gulf, etc. R. Co. *v.* Harrison (Tex. Civ.), 104 S. W. 399; Fowlie *v.* Co., 82 Vt. 230, 72 A. 989; Pierson *v.* R. Co., 52 Wash. 595, 100 P. 999.

Time in which the blood would coagulate and cease to flow in dead bodies is the subject of expert evidence and not within the common knowledge of the court or the jury. But the mere fact that a witness had seen blood flow from two dead bodies, on prior occasions does not render him competent as an expert on this subject. Clemmons *v.* S., 167 Ala. 20, 52 S. 467.

Witness was shown to be qualified by actual experience and long observation to form an opinion of some probative value, based upon the appearance of a wound on a horse and of the blood found about it, as to the length of time such wound had been inflicted before it was observed by the witness. Ala. Great So. R. Co. *v.* C. C. Gewin, 5 Ala. App. 584, 59 S. 553.

532-48 A non-expert may testify to facts known to or observed by him where no special knowledge or skill is required for their intelligent statements or observation. Davis *v.* S., 141 Ala. 62, 37 S. 676; Fletcher *v.* Prestwood, 143 Ala. 174, 38 S. 847 (capacity of saw mill); Thomas *v.* S., 139 Ala. 80, 36 S. 734; P. *v.* Weber, 149 Cal. 325, 86 P. 671; Gunkel *v.* Seiberth, 27 Ky. L. R. 455, 85 S. W. 733; Chess & W. Co. *v.* Gohagan, 32 Ky. L. R. 372, 105 S. W. 890; S. *v.* Lyons, 113 La. 959, 37 S. 890; Beier *v.* Co., 197 Mo. 215, 94 S. W. 876; Wells *v.* Ty., 14 Okla. 436, 78 P. 124 (description of wounds); Barber *v.* S. (Tex. Cr.), 142 S. W. 577; Barber *v.* S., 64 Tex. Cr. 89, 142 S. W. 582; M. K. & T. R. Co. *v.* Hollan (Tex. Civ.), 107 S. W. 642; Park *v.* Co., 47 Wash. 597, 92 P. 442 (effect of fumes and smoke on plant life). *Comp.* Wenchell *v.* Stevens, 30 Pa. Super. 527. Rule applies even though facts testified to relate to or form part of other matters or occurrences which require expert knowledge to qualify a witness to testify concerning them. Krueger *v.* Co., 38 Tex. Civ. 398, 85 S. W. 1156.

532-49 Mere casual observation, superficial reading or slight oral instruction, not sufficient. Conley *v.* Co., 99 Me. 57, 58 A. 61.

533-50 Gilmore *v.* Co., 79 Conn. 498, 66 A. 4, expert on presses, incompetent on belt lacings.

533-51 Lucas *v.* S., 173 Ind. 302, 90 N. E. 305; Consol. G. Co. *v.* Baltimore, 105 Md. 43, 65 A. 628; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300, *cit.* the text.

Knowledge of existence of public prejudice against buying property burdened with an easement does not qualify witness to testify to value of such property. Penn., etc. R. Co. *v.* Schwarz, 75 N. J. L. 801, 70 A. 134.

533-53 O'Shaugness *v.* R. Co., 144 Ill. App. 144; Johnston *v.* R. Co., 141 Ia. 114, 119 N. W. 286; Crosby *v.* City, 84 N. J. L. 708, 87 A. 341; Van Ness *v.* Co., 78 N. J. L. 511, 74 A. 456; Larsen *v.* Co., 53 Wash. 146, 101 P. 717; Hupfer *v.* Co., 127 Wis. 306, 106 N. W. 831.

The qualifications of a witness called to testify as an expert upon a question pertaining to railroading are determined by considering the particular branch of the business in which he has been engaged, the length of time that he has served in a particular capacity, his opportunities for obtaining the requisite knowledge, skill and experience, and the relationship between the branch of the service in which he has been engaged and the question upon which he is called to give testimony. Fla. East Coast R. Co. *v.* Lassiter, 59 Fla. 246, 52 S. 975.

Knowledge of local conditions, essential

where cause to be shown. Power *v.* Turner, 37 Mont. 521, 97 P. 950.

534-55 Dean *v.* Wabash R. Co., 229 Mo. 425, 129 S. W. 953.

534-56 Miller *v.* S., 94 Ark. 538, 128 S. W. 353, *cit.* the text.

535-59 Staples *v.* Steed, 6 Ala. App. 594, 60 S. 499; Arkansas S. R. Co. *v.* Wingfield, 94 Ark. 75, 126 S. W. 76; Copeland *v.* S., 58 Fla. 26, 50 S. 621; Piper *v.* R., 75 N. H. 228, 72 A. 1024; Wortman *v.* S., 9 Okla. Cr. 440, 132 P. 358; Rice *v.* S., 49 Tex. Cr. 569, 94 S. W. 1024 (medical expert—opinion death caused by strychnine poison), *cit.* the text. See Hoffman *v.* Brew. Co., 167 Ill. App. 291; Consol. G. Co. *v.* Baltimore, 105 Md. 43, 65 A. 628 (experts on taxation). But see Kath *v.* R. Co., 121 Wis. 503, 99 N. W. 217 (expert cannot state what he learns entirely from medical works unsupported by practical experience); Richmond, etc. R. Co. *v.* Rubin, 102 Va. 809, 47 S. E. 834.

A witness was permitted to testify as to the best and quickest way to stop a car—to lessen its speed, etc. He testified that he had been a motorman for between seven and eight years, had had experience in stopping cars, etc. If there was any difference between the cars that the witness had managed and the one in question, that could have been brought out in cross-examination. Birmingham R., L. & P. Co. *v.* Saxon (Ala.), 59 S. 584.

That knowledge acquired from laboratory experiments only goes merely to credibility of expert. Koshinski *v.* Co., 231 Ill. 198, 83 N. E. 149.

Hypnotism as an anaesthetic.—Surgeon may testify hypnotism could be used as an anaesthetic, though he had no experience or practice. S. *v.* Donovan, 128 Ia. 44, 102 N. W. 791.

535-60 Stone & Webster Eng. Corp. *v.* Melovich, 202 Fed. 438, 120 C. C. A. 544; McClaren *v.* Co., 166 Fed. 714, 92 C. C. A. 386; Wall *v.* S., 2 Ala. App. 157, 56 S. 57; Alabama Consol. Coal & Iron Co. *v.* Heald, 168 Ala. 626, 53 S. 162; Venable *v.* Venable, 165 Ala. 621, 51 S. 833; Williamson I. Co. *v.* McQueen, 144 Ala. 265, 40 S. 306; Black *v.* S., 1 Ala. App. 168, 55 S. 948; Dardanelle Pontoon Bridge, etc. Co. *v.* Croon, 95 Ark. 284, 129 S. W. 280; T. & C. Ins. Co. *v.* Fouke, 94 Ark. 358, 127 S. W. 461; Stitzel *v.* Miller, 250 Ill. 72, 95 N. E. 53; Upton *v.* Hospital, 157 Ill. App. 126; Lee *v.* Republic, etc. Co., 148 Ill. App. 585; Lake Erie, etc. R. Co. *v.* Moore (Ind.), 97 N. E. 203; Federal Union Surety Co. *v.* Mfg. Co. (Ind.), 95 N. E. 1104; Hanson *v.* Tel. Co. (Ia.), 146 N. W. 460; Delfs *v.* Dunshee, 143 Ia. 381, 122 N. W. 236; Stewart *v.* Co., 88 Kan. 521, 129 P. 181; Lovell, etc. Co. *v.* Justice, 147 Ky. 642, 144 S. W. 1079; E. M. F. Co. *v.* Davis, 146 Ky. 231, 142 S. W. 391; L'Hote *v.* Co., 203 Mass. 294, 89 N. E. 532; Potter *v.* R. Co., 157 Mich. 216, 121 N. W. 808; City of Aurora *v.* Ins. Co. (Mo. App.), 165 S. W. 357; Model Clothing Co. *v.* Co., 158 Mo. App. 481, 139 S. W. 242; Lay *v.* R. Co., 157 Mo. App. 467, 138 S. W. 884; Meily *v.* R. Co., 215 Mo. 567, 114 S. W. 1013; Soucier *v.* Mfg. Co. (N. H.), 88 A. 708; Harrison *v.* R. Co., 195 N. Y. 86, 87 N. E. 802; Wolfe *v.* Mosler Safe Co., 124 N. Y. S. 541; Younce *v.* Lumb. Co., 155 N. C. 239, 71 S. E. 329; Morrisett *v.* Mills, 151 N. C. 31, 65 S. E. 514; Great Western C. Co. *v.* Malone (Okla.), 136 P. 403, *quoting* 5 ENCY. OF EV. 535; Brown *v.* Truax, 58 Or. 572, 115 P. 597; Rice *v.* County, 46 Or. 574, 81 P. 358; Bardsley *v.* Gill, 218 Pa. 56, 66 A. 1112; McDonald *v.* Sundstrom, 31 Pa. Super. 241; Pecos, etc. R. Co. *v.* Maxwell (Tex. Civ.), 156 S. W. 548; Missouri, etc. R. Co. *v.* Coker (Tex. Civ.), 143 S. W. 218; Postal T. C. Co. *v.* Co. (Tex. Civ.), 126 S. W. 1172; Cochran *v.* Casey (Tex. Civ.), 128 S. W. 1145; Texas & N. O. R. Co. *v.* McCoy, 54 Tex. Civ. 278, 117 S. W. 446 (if matter pertains to witness' trade or calling, immaterial how knowledge obtained; weight of testimony, not competency, affected by extent of observations); Griffin *v.* R. Co. (Vt.), 89 A. 220; Krawiecki *v.* Box Co., 151 Wis. 176, 138 N. W. 710; Palmer *v.* Schultz, 138 Wis. 455, 120 N. W. 348.

Experience held insufficient.—Sanders *v.* S., 2 Ala. App. 13, 56 S. 69; Lawrence *v.* Lumb. Co., 171 Ala. 300, 55 S. 111.

A witness who testified he had been engaged all his life in cutting and hauling wood was allowed to state his opinion as to how much wood there remained uncut. Sauer *v.* Veltmann (Tex. Civ.), 149 S. W. 706.

Testimony of an experienced brakeman and switchman as to the manner in which switch engines were usually constructed and as to the appliances

ordinarily adopted on such engines. Cannon *v.* R. Co., 29 S. D. 433, 137 N. W. 347.

Tobacco grower.—Carle *v.* Nelson, 145 Wis. 593, 130 N. W. 467.

Hobbling and throwing horses without injuring them—a witness who knows how from observation and experience need not qualify as a veterinarian. Staples *v.* Steed, 167 Ala. 241, 52 S. 646. See also Staples *v.* Steed, 6 Ala. App. 594, 60 S. 499.

A witness who testifies to experience in trailing men may testify to trailing the tracks of men from a point near where the homicide was committed to a given point, and that he could tell the difference between tracks made by a person walking and one running, in that the tracks of the one running would be farther apart, and when running the toe of the shoe cuts deeper, etc. Grant *v.* S. (Tex. Cr.), 148 S. W. 760.

That a witness was in the cattle business and had been buying, selling and shipping for about 35 years, and that he had had quite a large experience in shipping such cattle as these in controversy by rail from Southwest Texas to North Texas and Oklahoma points, that he saw the shipments in controversy before they were loaded at Norias, was sufficient to qualify him as an expert and to make admissible his opinion as to the probable loss if the cattle were shipped in the usual way. True Bros. *v.* R. Co. (Tex. Civ.), 143 S. W. 298. See also Estes *v.* D. & R. G. R. Co., 49 Colo. 378, 113 P. 1005; M. K. & T. R. Co. *v.* Moss (Tex. Civ.), 135 S. W. 626.

An engineer of more than 21 years' experience may testify what obstructions were calculated to endanger the lives of persons traveling on trains traversing the tracks of a road. Clay *v.* S. (Tex. Cr.), 146 S. W. 166.

A practical blacksmith with 15 years' experience in shoeing horses may testify relative to special knowledge condition of a horse's foot for the liability of a loose nail to drop[illegible] observation[illegible]ope *v.* S., 174 Ala. 63, 57 S. 245 S. 6[illegible]

536-61 Yates *v.* Co. (Ala.), 39 S. 647; In re Hoyle's Will, 162 Mich. 275, 127 N. W. 284; Ray *v.* R. Co., 147 Mo. App. 332, 126 S. W. 543. *Contra*, Fuller *v.* R. Co., 61 Misc. 599, 113 N. Y. S. 1001. But see Port H. Mach. Co. *v.* Bragg, 77 Neb. 357, 109 N. W. 398.

One instance or experience, not basis for opinion as to general rule or result. Gulf, etc. R. Co. *v.* Kimble, 49 Tex. Civ. 622, 109 S. W. 234; Currelli *v.* Jackson, 77 Conn. 115, 58 A. 762 (frozen dynamite).

Regard may be had by expert testifying to proper manner of doing work to capabilities of men engaged in doing it as observed while they were witnesses. Barrett *v.* Co., 201 Mass. 117, 87 N. E. 565.

537-65 Tracy *v.* Mt. Pleasant (Ia.), 146 N. W. 78; Weibert *v.* Hanan, 136 App. Div. 388, 121 N. Y. S. 35 (knowledge of facts involved); Richmond *v.* Wood, 109 Va. 75, 63 S. E. 449; Loomis *v.* Besse, 148 Wis. 647, 135 N. W. 123.

Appointment of experts to ascertain grade of goods, after testimony given of their quality, largely in discretion of court. McMillian *v.* Co., 125 La. 854, 51 S. 1013.

538-66 Dust collecting systems.—Barney *v.* Oats Co., 85 Vt. 372, 82 A. 113.

Witness familiar with blasting in street only, incompetent as to possibility of protecting persons while blasting in quarries. McMahon *v.* Bangs, 5 Penne. (Del.) 178, 62 A. 1098.

Foreman's opinion as to whether men were working admissible. Lepan *v.* Mach. Co. (Mich.), 144 N. W. 693.

Lineman.—Opinion as to method of erecting poles, competent. Kansas City So. R. Co. *v.* Rogers, 203 Fed. 462, 121 C. C. A. 586.

Timber man.—Value of timber. Itasca, etc. Co. *v.* McKinley, 124 Minn. 183, 144 N. W. 768, 1135. See also vol. 13, p. 18, n. 18.

Weather bureau officials.—Opinion competent as to time of daybreak on a particular day. Sullivan *v.* R. Co., 167 Ill. App. 152.

Milliner.—Value of millinery stock. St. Louis, etc. R. Co. *v.* Crowell (Okla.), 127 P. 1063.

Tying knots.—Expert may testify as to proper method of tying knots, so as to assure safety of elevator. McLain *v.* D. Co., 19 Cal. App. 475, 126 P. 391. See also vol. 8, p. 955, n. 48.

Stock buyer.—Opinion as to value of stock. Hanson *v.* West. Union Tel. Co. (Ia.), 146 N. W. 460. See also vol. 13, p. 551, n. 96.

Automobile expert.—With reference to distance within which particular auto running a specified speed could be stopped. Goldblatt *v.* Brocklebank, 166 Ill. App. 315; Crandall *v.* Krause, 165 Ill. App. 15.

Cold storage plant manager.—Opinion as to temperature at which solidly frozen meats will thaw. Stewart *v.* Produce Co., 88 Kan. 521, 129 P. 181.

Undertaker.—Relative to embalming. S. *v.* Wilson (Ia.), 141 N. W. 337.

Qualification as electrical engineer. Witness was the chief engineer of defendant when the plan was constructed and thereafter until after the injury in question, and, as such, was in practical charge of the electrical machinery and appliances. He had had eight years' practical experience as an electrical engineer, and had taken a course of study in that science. The fact that he had worked in no other powder mill did not disqualify him as an expert in the subject of the proper construction of electrical switches in places surrounded by high explosives. Jewell *v.* Mfg. Co., 166 Mo. App. 555, 149 S. W. 1045.

539-67 Condition of tool made from steel may be shown by chemist experienced in metallurgical analysis. Potvin *v.* Co., 156 Mich. 201, 120 N. W. 613.

539-70 Smith *v.* S., 165 Ala. 50, 51 S. 610; Towaliga F. P. Co. *v.* Sims, 6 Ga. App. 749, 65 S. E. 844; United R. & E. Co. *v.* Corbin, 109 Md. 442, 72 A. 606; Streight *v.* S., 62 Tex. Cr. 453, 138 S. W. 742. See Ireland *v.* White, 102 Me. 233, 66 A. 477; Ducharme *v.* R. Co., 203 Mass. 384, 89 N. E. 561; Spaulding *v.* Edina, 122 Mo. App. 65, 97 S. W. 545; McConnell *v.* S., 77 Neb. 773, 110 N. W. 666; Walters *v.* Rock, 18 N. D. 45, 115 N. W. 511; Hildebrand *v.* Artisans, 50 Or. 159, 91 P. 542; S. *v.* Megorden, 49 Or. 259, 88 P. 306; Taylor *v.* Woodmen, 42 Wash. 304, 84 P. 867; Bowers *v.* S., 122 Wis. 163, 99 N. W. 447. But see Kath *v.* R. Co., 121 Wis. 503, 99 N. W. 217.

X-ray expert.—Result of observations. Dooley *v.* R. Co., 166 Ill. App. 312; Judejko *v.* R. Co., 166 Ill. App. 140; McCauley *v.* R. Co., 163 Ill. App. 176. See also Sheldon *v.* Wright, 80 Vt. 298, 67 Atl. 807.

General practitioner not qualified as insanity expert. Ashby *v.* S., 124 Tenn. 684, 139 S. W. 872.

Experience with the particular kind of case in question is not necessary. Flaherty *v.* Co., 30 Pa. Super. 446. Want of experience as to particular disease goes to weight of testimony only. Pecos, etc. R. Co. *v.* Coffman, 56 Tex. Civ. 472, 121 S. W. 218.

As affected by school of medicine. See Grainger *v.* Still, 187 Mo. 197, 85 S. W. 1114 (osteopath); Longan *v.* Weltmer, 180 Mo. 322, 79 S. W. 655 (regular physician or surgeon competent as to propriety and effect of treatment given by magnetic healer consisting of manipulations of the patient's body). Licensed osteopath may be qualified, if it is not shown they had no experience in similar cases, where knowledge of materia medica not essential. Bucher *v.* R. Co., 139 Wis. 597, 120 N. W. 518. See 541-74, infra.

540-71 Undertaker of twenty years' experience who had seen and examined wounds on dead men, may testify from his examination of certain wounds they were fatal. Cecil *v.* S. (Tex. Cr.), 100 S. W. 390.

541-74 Macon R. & L. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569; Missouri, etc. R. Co. *v.* Farris (Tex. Civ.), 124 S. W. 497.

A medical student who has merely attended lectures on mental diseases is not competent as an expert on insanity. Hamilton *v.* U. S., 26 App. Cas. (D. C.) 382.

541-75 *Contra* by statute. S. *v.* Howard, 120 La. 311, 45 S. 260. But statute does not disqualify physician from testifying as a non-expert. Hocking *v* Co., 131 Wis. 532, 111 N. W. 685.

Wisconsin statute held to leave court free to receive testimony of physician who qualifies under common law rule. Smits *v.* S., 145 Wis. 601, 130 N. W. 525, where it was held that statement of license to practice means prima facie compliance with license act in absence of cross-examination.

An osteopath, graduated from a school whose curriculum embraces courses on physiology and anatomy and who has since gained a practical knowledge of nervous diseases, may testify to the nature and probable duration of a nervous disease due to personal injuries, although he is not licensed to administer drugs. Macon R. & L. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569. See 539-70, supra.

Expert electrician may testify to effects of electrical shock. Crosby *v.* R. Co., 53 Or. 496, 100 P. 300.

542-76 A license is insufficient to qualify witness to testify whether a gunshot wound caused death, where he is not a graduate of any school of medicine, has read no books on surgery, and is not familiar with gunshot wounds. Smith *v.* S. (Tex. Cr.), 99 S. W. 100.

542-77 Schley *v.* S., 48 Fla. 53, 37 S. 518; S. *v.* Kammel, 23 S. D. 465, 122 N. W. 420; Rice *v.* S., 54 Tex. Cr. 149, 112 S. W. 299, 49 Tex. Cr. 569, 94 S. W. 1024 (*dist.* Burt *v.* S., 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305); Soquet *v.* S., 72 Wis. 659, 40 N. W. 391.

543-81 Pennsylvania Co. *v.* Whitney, 169 Fed. 572, 95 C. C. A. 70; Hitchner W. P. Co. *v.* R. Co., 168 Fed. 602, 93 C. C. A. 598 (unusual conditions in question); Maryland, etc. R. Co. *v.* Brown, 109 Md. 304, 71 A. 1005 (knowledge as to cause of particular accident); Snow L. Co. *v.* R. Co., 151 N. C. 217, 65 S. E. 920; Gulf, etc. R. Co. *v.* Belton, 57 Tex. Civ. 460, 122 S. W. 413. See Woodstock I. Wks. *v.* Kline, 149 Ala. 391, 43 S. 362; St. Louis, etc. R. Co. *v.* Plumlee, 78 Ark. 147, 95 S. W. 442 (improper construction of handcar —section hand of one and a half years' experience, competent); Atlantic, etc. R. Co. *v.* Crosby, 53 Fla. 400, 43 S. 318; Gulf, etc. R. Co. *v.* Wynne (Tex. Civ.), 91 S. W. 823 (civil engineer); Gulf, etc. R. Co. *v.* Hullis, 41 Tex. Civ. 219, 91 S. W. 317 (stationary engineer, competent as to certain matters relating to locomotive engine).

Freight engineer may testify within what distance passenger train may be stopped. Southern R. Co. *v.* Gullatt, 158 Ala. 502, 48 S. 472.

544-82 Kinlen *v.* R. Co., 216 Mo 145, 115 S. W. 523. See Yergy *v.* R Co., 39 Mont. 213, 102 P. 310.

545-85 Experienced graduate nurse may testify of physical condition of a patient and reason certain remedies administered. Kimie *v.* R. Co., 156 Cal. 379, 104 P. 986.

546-86 Harris *v.* Co., 111 Md. 209, 73 A. 805; Powell *v.* R. Co. (Mo.), 164 S. W. 628; Keefe *v.* R., 75 N. H. 116, 71 A. 379; Guitar *v.* Randel (Tex. Civ.), 147 S. W. 642.

Party offering expert must show his qualifications. Evans D. Co. *v.* Co., 13 Cal. App. 119, 108 P. 1027.

Witness' competency need not cover ultimate question involved, if he is qualified as to an element entering into it. Building Co. *v.* Seattle, 52 Wash. 226, 100 P. 330.

Employer who has hired a person to care for machines may not question his competency to give expert testimony as to them. Clemens *v.* Co., 153 Mich. 495, 117 N. W. 187.

546-88 Physician held qualified to express opinion as to effect of "Murphy operation," although he had no actual experience in that operation. Niles *v.* R. Co. (Vt.), 89 A. 629.

547-90 Pensacola Elec. Co. *v.* Bissett, 59 Fla. 360, 52 S. 367; True Bros. *v.* R. Co. (Tex. Civ.), 143 S. W. 298; Barney *v.* Co., 85 Vt. 372, 82 A. 113. See Wordan *v.* S., 143 Ala. 13, 39 S. 406 (witness may state extent of experience); Salmon *v.* Rathjens, 152 Cal. 290, 92 P. 733 (party producing expert may question him not only to show his competency, but also the value of his testimony—as by showing peculiar or unusual experience in matters in issue).

547-91 Witness may be asked as to his familiarity with a designated treatise and its authority and his agreement therewith. Gulf, etc. R. Co. *v.* Farmer, 102 Tex. 235, 115 S. W. 260.

Extracts from a work of recognized authority may be embodied in a question and its author named. Ibid.

Sustaining character evidence, inadmissible if witness' personal or professional character not attacked. International, etc. R. Co. *v.* Lane (Tex. Civ.), 127 S. W. 1066.

548-93 Horton *v.* R. Co., 161 Ala. 107, 49 S. 423; Watson *v.* Lumb. Co., 132 La. 796, 61 S. 795; Fitch *v.* Martin, 84 Neb. 745, 122 N. W. 50 (if facts which will give weight to opinion are admittedly unknown to witness, his opinion is not competent). See Groff *v.* Groff, 209 Pa. 603, 59 A. 65.

548-94 Glover *v.* S., 129 Ga. 717, 59 S. E. 816; Yates *v.* Garrett, 19 Okla. 449, 92 P. 142; Cochran *v.* Casey (Tex. Civ.), 128 S. W. 1145; Southern T. & T. Co. *v.* Evans, 54 Tex. Civ. 63, 116 S. W. 418.

Although a physician denies he is an expert his opinion is competent if he shows himself very familiar with the matter in controversy. S. *v.* Daly, 210 Mo. 664, 109 S. W. 53. See Spaulding

v. Edina, 122 Mo. App. 65, 97 S. W. 545.

548-95 But the witness may testify to facts which show he is not qualified. Louisville & N. R. Co. *v.* Zeigler, 167 Ala. 237, 52 S. 599.

548-96 Harris *v.* Co., 111 Md. 209, 73 A. 805.

Collateral issues must be avoided in inquiring of others concerning competency of witness. Missouri, etc. R. Co. *v.* Bailey, 53 Tex. Civ. 295, 115 S. W. 601.

549-98 Beattie *v.* Hudson Co. (Mich.), 146 N. W. 650; Raapke *v.* Co., 82 Neb. 716, 118 N. W. 652; Rice *v.* County, 46 Or. 574, 81 P. 358. But see Dolan *v.* Co., 105 App. Div. 366, 94 N. Y. S. 241.

Witness not offered as expert may be used as such on cross-examination if qualifications shown. Martin *v.* R. Co., 205 Mass. 16, 91 N. E. 159.

549-1 Gila Val., etc. R. Co. *v.* Lyon, 9 Ariz. 218, 80 P. 337; Birmingham, etc. Co. *v.* Saxon (Ala.), 59 S. 584; Barlew *v.* S., 5 Ala. App. 290, 57 S. 601; Alabama Consol., etc. Co. *v.* Heald, 168 Ala. 626, 53 S. 162; Louisville & N. R. Co. *v.* Elliott, 166 Ala. 419, 52 S. 28 (*cit.* the text); Mabry *v.* Randolph, 7 Cal. App. 421, 94 P. 403; Ft. Collins D. R. Co. *v.* France, 41 Colo. 512, 92 P. 953; Atlantic, etc. R. Co. *v.* Crosby, 53 Fla. 400, 43 S. 318; Schley *v.* S., 48 Fla. 53, 37 S. 518; Glover *v.* S., 129 Ga. 717, 59 S. E. 816; La Porte C. Co. *v.* Sullender (Ind. App.), 71 N. E. 922; S. *v.* Daly, 210 Mo. 664, 109 S. W. 53; Spaulding *v.* Edina, 122 Mo. App. 65, 97 S. W. 545; Schrodt *v.* St. Joseph, 109 Mo. App. 627, 83 S. W. 543; Modlin *v.* Jones, 84 Neb. 551, 121 N. W. 984; Keefe *v.* R., 75 N. H. 116, 71 A. 379; Hope *v.* R. Co., 211 Pa. 401, 60 A. 996; Commerce M. & G. Co. *v.* Gowan (Tex. Civ.), 104 S. W. 916; El Paso, etc. R. Co. *v.* Smith, 50 Tex. Civ. 10, 108 S. W. 988; Place *v.* R. Co., 80 Vt. 196, 67 A. 545; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237 (both qualifications of witness and question whether subject is one for expert testimony).

Form of hypothetical question is a matter for the court. S. *v.* Pierce (Vt.), 88 A. 740.

Counsel cannot waive such proof so as to deprive the court of its prerogative. Elec. Park Amusement Co. *v.* Psichos, 83 **N. J. L.** 262, 83 A. 766.

For the master when hearing is before one. Kelly *v.* Allin, 212 Mass. 327, 99 N. E. 273.

Competency of witness need not be determined until question asked. Conley *v.* Co., 99 Me. 57, 58 A. 61.

550-2 Question of fact. Keefe *v.* R., 75 N. H. 116, 71 A. 805.

550-3 Chicago, etc. R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517; Barlew *v.* S., 5 Ala. App. 290, 57 S. 601; P. *v.* Overacker, 15 Cal. App. 620, 115 P. 756; Evans D. Co. *v.* Co., 13 Cal. App. 119, 108 P. 1027; Carsecallen *v.* Co., 15 Ida. 444, 98 P. 622; S. *v.* Flanigan, 111 Md. 481, 74 A. 818; Poole *v.* R. Co., 216 Mass. 12, 102 N. E. 918; Greene *v.* Corey, 210 Mass. 536, 97 N. E. 70; Carroll *v.* R. Co., 200 Mass. 527, 86 N. E. 793; McDonough *v.* Cameron, 116 Minn. 480, 134 N. W. 118; Corse Co. *v.* Co., 94 Minn. 331, 102 N. W. 728; Yergy *v.* R. Co., 39 Mont. 213, 102 P. 310; Theobold *v.* Shepard, 75 N. H. 52, 71 A. 26; Multnomah County *v.* Co., 49 Or. 204, 89 P. 389; Southern T. & T. Co. *v.* Evans, 54 Tex. Civ. 63, 116 S. W. 418; Hot Springs Mfg. Co. *v.* Revercomb, 110 Va. 240, 65 S. E. 557. See Texas & P. R. Co. *v.* Warner, 42 Tex. Civ. 280, 93 S. W. 489.

551-4 Hitchner W. P. Co. *v.* R. Co., 168 Fed. 602, 93 C. C. A. 598; U. S. Co. *v.* Parry, 166 Fed. 407, 92 C. C. A. 159; Ft. Collins D. R. Co. *v.* France, 41 Colo. 512, 92 P. 953; Atlantic C. L. R. Co. *v.* Dees, 56 Fla. 127, 48 S. 28; Atlantic, etc. Co. *v.* Crosby, 53 Fla. 400, 43 S. 318; Schley *v.* S., 48 Fla. 53, 37 S. 518; Balt. R. & H. Co. *v.* Kreiner, 109 Md. 361, 71 A. 1066; Martin *v.* R. Co., 205 Mass. 16, 91 N. E. 159; Kinney *v.* Co., 76 N. J. L. 735, 71 A. 269; Burns *v.* Co., 70 N. J. L. 745, 59 A. 220, 592; Horne *v.* Co., 144 N. C. 375, 57 S. E. 19; Multnomah County *v.* Co., 49 Or. 204, 89 P. 389; Dallas, etc. R. Co. *v.* English, 42 Tex. Civ. 393, 93 S. W. 1096 (although evidence would sustain contrary ruling); Fowlie *v.* Co., 82 Vt. 230, 72 A. 989; Place *v.* R. Co., 80 Vt. 196, 67 A. 545; Virginia I. C. & C. Co. *v.* Tomlinson, 104 Va. 249, 51 S. E. 362; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237.

Testimony was objected to upon the ground that it did not appear that witness had had any experience in mining iron pyrites or sulphur ore. The court said: "It appeared that he was a scientific and practical engineer of long

experience, and though he did not claim to be a mining engineer, he had been for many years a member of the American Society of Mining Engineers; that while he had no experience in filtering or purifying water from mines, he had been a city engineer and had experience in filtering and cleansing water for drinking purposes. He may not have been very highly qualified to speak as an expert upon the question as to which he was permitted to testify, yet we cannot say that it clearly appears that he was not a competent witness, and unless we can so declare, under the well-settled rule of this court permitting him to testify as an expert would furnish no sufficient ground for reversal." Arminius Chemical Co. *v.* Landrum, 113 Va. 7, 73 S. E. 459.

551-5 Chicago, etc. R. Co. *v.* Heidenreich, 254 Ill. 231, 98 N. E. 567; Pennsylvania, etc. R. Co. *v.* Schwarz, 75 N. J. L. 801, 70 A. 134.

Not reversed unless palpably and grossly wrong.—Eastman *v.* Dunn, 34 R. I. 416, 83 A. 1057.

552-6 Van Ness *v.* Co., 78 N. J. L. 511, 74 A. 456; Pecos, etc. R. Co. *v.* Coffman, 56 Tex. Civ. 472, 121 S. W. 218.

552-10 Number of witnesses may be limited in sound discretion of court. West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377.

553-11 Tex., etc. R. Co. *v.* Norman (Tex. Civ.), 153 S. W. 1184.

553-12 Bonato *v.* Coal Co., 156 Ill. App. 196, *aff.* 248 Ill. 422, 94 N. E. 69; Cohen & Co. *v.* Rittiman (Tex. Civ.), 139 S. W. 59.

Fingerprints, see infra, "Identity," p. 929, n. 83.

Footprints, see vol. 6, p. 706, notes 64-66 and supplement; also vol. 6, p. 929, n. 83, and supplement.

553-13 Runke *v.* Sanitary Dist., 260 Ill. 380, 103 N. E. 236; Title G. & S. Co. *v.* C., 146 Ky. 702, 143 S. W. 401. See Brown *v.* First Natl. Bk., 49 Colo. 393, 113 P. 483; Bode *v.* S., 80 Neb. 74, 113 N. W. 996; Kannow *v.* Assn., 76 Neb. 330, 107 N. W. 563.

While an expert accountant may show results of complicated calculations or footings of columns of figures (Iowa, etc. B. & L. Assn. *v.* Fitch, 142 Ia. 329, 120 N. W. 694; Ruth *v.* S., 140 Wis. 373, 122 N. W. 733), he cannot state his conclusion from an examination of books that profits were a certain amount. Smythe *v.* Evans, 209 Ill. 376, 70 N. E. 906. See Crawford *v.* Roney, 126 Ga. 763, 55 S. E. 499; Brown *v.* U. S., 142 Fed. 1, 73 C. C. A. 187 (competent as to general results shown by books of account).

What inspection would show is an inadmissible conclusion. McKone *v.* Ins. Co., 131 Wis. 243, 110 N. W. 472. See Morgan *v.* Barber (Tex. Civ.), 99 S. W. 730.

Jury as capable of computing interest as expert accountant. Clements *v.* Mutersbaugh, 27 App. Cas. (D. C.) 165.

553-14 Vaughan's S. Store *v.* Stringfellow, 56 Fla. 708, 48 S. 410; Tilden *v.* Hubbard, 25 Ida. 677, 138 P. 1133; Cochran *v.* Casey (Tex. Civ.), 128 S. W. 1145.

Marketable quality of hay.—Eaton *v.* Blackburn, 49 Or. 22, 88 P. 303.

A fruit expert may testify that apples, if merchantable when sold, could not have reached condition they were shown to have been in five days later. Jones *v.* Emerson, 41 Wash. 33, 82 P. 1017.

553-15 Profits of a business may not be shown in absence of books. Cox *v.* Co., 38 Pa. Super. 545.

554-20 *Contra,* Trammell *v.* Turner (Tex. Civ.), 82 S. W. 325 (sufficiency of fence to turn cattle of ordinary breaching disposition—expert opinion admissible).

555-21 International Agr. Corp. *v.* Abercombie (Ala.), 63 S. 549. See Myers *v.* City, 146 N. C. 246, 59 S. E. 674 (farmers who have examined land but have had no previous acquaintance therewith may testify to what it will yield after construction of sewer which causes water to stand on it); Chicago, etc. R. Co. *v.* Longbottom (Tex. Civ.), 80 S. W. 542 (what yield would have been but for overflow). *Comp.* Dennis *v.* Co., 6 Cal. App. 58, 91 P. 425.

555-22 Baker *v.* Cotney, 142 Ala. 566, 38 S. 131, experienced cotton farmer competent to estimate yield of cotton on land seen by him.

Whether there was a good stand of melons in a crop which he saw growing —opinion of experienced farmer competent although he had never grown melons. Colo. F., etc. Co. *v.* York, 38 Colo. 239, 88 P. 181.

555-23 Damage to agricultural lands by pasturing animals thereon. Tandy *v.* Fowler (Tex. Civ.), 150 S. W. 481.

556-24 Adamson *v.* Harper (Ia.),

143 N. W. 844; St. Louis & S. F. R. Co. *v.* Knox (Tex. Civ.), 151 S. W. 902; Texas & P. R. Co *v.* Good (Tex. Civ.), 151 S. W. 617.

Estimate of loss in weight of cattle caused by change in feed, competent. Enlow *v.* Hawkins, 71 Kan. 633, 81 P. 189. *Comp.* Atchison, etc. R. Co. *v.* Watson, 71 Kan. 696, 81 P. 499, and infra, 559-36.

Pedigree of foal.—Opinions competent as to whether foal offspring of certain mare and stallion, or of others of different breeds. Brady *v.* Shirley, 18 S. D. 608, 101 N. W. 886. *Comp.* Miller *v.* Ty., 9 Ariz. 123, 80 P. 321, experienced stockmen who have observed a mare and a colt following her may testify colt belonged to mare.

Rancher, as to method of throwing stock.—Staples *v.* Steed, 6 Ala. App. 594, 60 S. 499. See also Staples *v.* Steed, 167 Ala. 741, 52 S. 646.

556-27 Walters *v.* Stacey, 122 Ill. App. 658 (of boars in same enclosure to fight); Delfs *v.* Dunshee (Ia.), 122 N. W 237 (when frightened). *Contra*, Johnston *v.* Co., 65 W. Va. 544, 64 S. E. 841.

556-28 Plaintiff on cross-examination could not answer the general question whether a mare could slink her foal without the knowledge of anyone, because he was not an expert. Gemricher *v.* Houge Bros. (Ia.), 134 N. W. 1094.

557-30 Power *v.* Turner, 37 Mont. 521, 97 P. 950; International, etc. R. Co. *v.* McCullough (Tex. Civ.), 118 S. W. 558 (cause of infection); Ft. Worth, etc. R. Co. *v.* Hagler, 38 Tex. Civ. 52, 84 S. W. 692 (witness qualified to testify cattle when shipped were afflicted with "dry murrain").

Experienced cattlemen are qualified to express opinion as to diseases of cattle. Gulf, etc. R. Co. *v.* Brock (Tex. Civ.), 150 S. W. 488.

Proper treatment for sick horse—veterinarian competent. Welch *v.* Fransioli, 46 Wash. 530, 90 P. 644.

Texas fever.—A farmer and cattle raiser who has had experience with cattle infected with Texas fever may give opinion cattle died therefrom. Yates *v.* Garrett, 19 Okla. 449, 92 P. 142.

557-31 Ill. Cent. R. Co. *v.* Howard, 152 Ky. 308, 153 S. W. 427; Tutt *v.* Rensselaer, 126 App. Div. 502, 110 N. Y. S. 705 (permanency of injuries); Galveston, etc. R. Co. *v.* Jones (Tex. Civ.), 123 S. W. 737 (extent of injuries); Kortendick *v.* Waterford, 142 Wis. 413, 125 N. W. 945 (effect of injury). See Walters *v.* Stacey, 122 Ill. App. 658 (whether wounds on a boar might or could have been inflicted by another boar); Keyes M., etc. Co. *v.* R. Co., 105 Mo. App. 556, 80 S. W. 53.

Cause of death and whether animals properly fed, matters for expert testimony. S. *v.* Keeland, 39 Mont. 506, 104 P. 513.

558-33 Gatlin *v.* S. (Tex. Cr.), 163 S. W. 428.

558-34 Estimate of weight and shrinkage of cattle shipped on railroad. St. Louis, etc. R. Co. *v.* Dodson (Tex. Civ.), 97 S. W. 523.

Weight of cattle, opinion of experienced cattle man as to. Midland Val. R. Co. *v.* Adkins, 36 Okla. 15, 127 P. 867.

559-35 Kennon *v.* S., 46 Tex. Cr. 359, 82 S. W. 518, fast driving makes cattle scour frequently.

559-36 Nashville C. & St. L. Ry. *v.* Hinds (Ala. App.), 60 S. 409; Louisville & N. R. Co. *v.* McClintock, 151 Ky. 455, 152 S. W. 253; International, etc. R. Co. *v.* Sharpe (Tex. Civ.), 167 S. W. 814; Higby *v.* Kirksey (Tex. Civ.), 163 S. W. 315; Trout *v.* R. Co. (Tex. Civ.), 111 S. W. 220 (shrinkage); International, etc. R. Co. *v.* Nowaski, 48 Tex. Civ. 144, 106 S. W. 437; St. Louis, etc. R. Co. *v.* Rogers, 49 Tex. Civ. 304, 108 S. W. 1027; St. Louis, etc. R. Co. *v.* Boshear (Tex. Civ.), 108 S. W. 1032; St. Louis, etc. R. Co. *v.* Dodson (Tex. Civ.), 97 S. W. 523; Texas, etc. R. Co. *v.* Walker, 43 Tex. Civ. 278, 95 S. W. 743; Southern Exp. Co. *v.* Jacobs, 109 Va. 27, 63 S. E. 17.

See Farmers' Bk. *v.* R. Co., 119 Mo. App. 1, 95 S. W. 986; Texas & P. R. Co. *v.* Stewart, 43 Tex. Civ. 399, 96 S. W. 106. But see Texas & P. R. Co. *v.* Slator (Tex. Civ.), 102 S. W. 156; St. Louis, etc. R. Co. *v.* Gunter, 44 Tex. Civ. 480, 99 S. W. 152 (whether shipment as rapid as possible, inadmissible).

Shrinkage of livestock during transportation.—St. Louis, etc. Co. *v.* Shepard, 40 Okla. 589, 139 P. 833; St. Louis & S. F. Co. *v.* Rich (Tex. Civ.), 162 S. W. 1194; Gulf, etc. R. Co. *v.* Ideus (Tex. Civ.), 157 S. W. 173; Pecos & N. T. R. Co. *v.* Cox (Tex. Civ.), 150 S. W. 265.

That cause of condition of cattle improper transportation and handling, too great delay, and being jerked and

switched about improperly—opinion inadmissible. Texas & P. R. Co. *v.* Felker, 40 Tex. Civ. 604, 90 S. W. 530.

Ordinary loss of weight caused by shipment of cattle. Atchison, etc. R. Co. *v.* Watson, 71 Kan. 696, 81 P. 499. *Comp.* 556-25, supra.

Reasonable time for shipment.—See infra, 711-43.

Reasonable delay.—Expert testimony that two hours' delay at a junction point for making up trains, getting orders and clearing tracks reasonable, competent. Chicago, etc. Co. *v.* Kapp, 37 Tex. Civ. 203, 83 S. W. 233. See Chicago, etc. R. Co. *v.* Carroll, 36 Tex. Civ. 359, 81 S. W. 1020.

559-37 See Tuttle *v.* Moody (Tex. Civ.), 94 S. W. 134.

559-38 Herrin *v.* Sieben, 46 Mont. 226, 127 P. 323; Houston, etc. R. Co. *v.* Ellis (Tex. Civ.), 160 S. W. 606; Tandy *v.* Fowler (Tex. Civ.), 150 S. W. 481; Karlen *v.* Hadinger, 147 Wis. 78, 132 N. W. 591.

559-40 Bissell *v.* Ford, 176 Mich. 64, 141 N. W. 860; Farrell *v.* Co., 194 Mass. 431, 80 N. E. 469 (method of moving derrick); Piper *v.* Murray, 43 Mont. 230, 115 P. 669; Lowe *v.* Keens, 90 Neb. 565, 133 N. W. 1127; Levy *v.* Tiger, 90 N. Y. S. 366 (necessity for shoring up in reconstruction of building); Nelson *v.* Young, 91 App. Div. 457, 87 N. Y. S. 69 (unusual length of span); Kettler B. Mfg. Co. *v.* O'Neil, 57 Tex. Civ. 568, 122 S. W. 900 (compliance of work with contract); Stark G. Co. *v.* Co., 57 Tex. Civ. 529, 122 S. W. 947 (same); Luper *v.* Henry, 59 Wash. 33, 109 P. 208.

See Fraternal Const. Co. *v.* Co., 28 Ky. L. R. 383, 89 S. W. 265.

Cause of breaking of plate glass window.—Carpenter of experience in setting broken plate glass may give opinion. Drouin *v.* Wilson, 80 Vt. 335, 67 A. 825.

Number of men needed to raise timber proper subject for expert testimony. Sloss-Sheffield, etc. Co. *v.* Smith (Ala.), 64 S. 337.

Cost of erecting structure.—Petterson *v.* Thomas, 136 N. Y. S. 74.

Proper method of fastening cables to drums of derricks. Kelly-Atkinson Const. Co. *v.* Munson (Ind. App.), 101 N. E. 510.

Arrangement of lights.—Architect permitted to testify as to the most effective manner of locating lights in theatre. Valentine Co. *v.* Sloan (Ind. App.), 101 N. E. 102. See vol. 8, p. 955, n. 46.

Cost of building.—Opinion or estimate inadmissible if cost can be determined. Israels *v.* McDonald, 107 N. Y. S. 826.

That constant use of a floor makes it smooth and slippery may be testified to by witnesses familiar with such floors. Acme H. Co. *v.* Chittick, 230 Ill. 558, 82 N. E. 647.

Safety of block and hook used by painter. Anderson *v.* Fielding, 92 Minn. 42, 99 N. W. 357.

Safety of scaffold, where it is the issue, cannot be directly testified to by expert, though he may state strength and character of materials used and proper method of construction. Burns *v.* Crow, 107 N. Y. S. 944.

Quality of stone.—Witness experienced in building and selling stone may testify as to its quality. Keim *v.* City, 32 Pa. Super. 613.

560-41 Whiting-M. C. Co. *v.* Preston, 121 Md. 210, 88 A. 110; Citizens S. Bk. *v.* Ins. Co. (Vt.), 86 A. 1056.

Proportion of work done when building abandoned. Scheerer *v.* Deming, 154 Cal. 138, 97 P. 155.

560-42 See Bowen *v.* Co., 3 Cal. App. 312, 84 P. 1010; Rice *v.* County, 46 Or. 574, 81 P. 358.

561-43 Sullivan *v.* Owens (Tex. Civ.), 90 S. W. 690, customary rate of exchange.

Whether prudent business man would loan given amount on a certain security—opinion of money lender, competent. In re Roach's Est., 50 Or. 179, 92 P. 118.

561-46 Miller *v.* S., 94 Ark. 538, 128 S. W. 353; E. M. F. Co. *v.* Davis, 146 Ky. 231, 142 S. W. 391; Belcher *v.* S. (Tex. Cr.), 161 S. W. 459.

562-49 Griffin W. Co. *v.* Smith, 173 Fed. 245, 97 C. C. A. 411; Dardanelle, etc. Co. *v.* Croom, 95 Ark. 284, 129 S. W. 280; Lucas *v.* S., 173 Ind. 302, 90 N. E. 305; Escher *v.* County (Ia.), 141 N. W. 38; Long *v.* Sweeten (Md.), 90 A. 782; Maynard *v.* Westfield (Vt.), 90 A. 504 (not permissible to ask witness why he did not erect a railing at a culvert, because this would amount to getting his opinion as to the sufficiency of the highway). See Central *v.* Marquis, 75 Neb. 233, 106 N. W. 221 (bridge); infra, 595-56.

Proper manner of constructing trestle for logging railroad. Bundy *v.* Co., 149 Cal. 772, 87 P. 622. See Bowen *v.* Co., 3 Cal. App. 312, 84 P. 1010.

Improper construction of support for bridge—engineering, expert competent. Dutton *v.* R. Co., 32 Pa. Super. 630.

Whether pavement of material not in common use was laid at such a pitch as to be dangerous is a proper matter for opinion of witness of experience in laying such pavement. Garberg *v.* Samuels, 27 R. I. 359, 62 A. 211.

562-50 Life of bridge timber. See supra, 560-42, and Rice *v.* County, 46 Or. 574, 81 P. 358 (witness of experience, competent).

562-51 Effect of unsound timber in a trestle, not subject of expert testimony. Bowen *v.* Co., 3 Cal. App. 312, 84 P. 1010.

563-52 Floore *v.* Burgher Co. (Tex. Civ.), 128 S. W. 1152.

563-53 Am. A. C. Co. *v.* Hogan, 213 Fed. 416 (C. C. A.); Nussbaumer *v.* S., 54 Fla. 87, 44 S. 712; Stowell *v.* Co., 139 Mich. 18, 102 N. W. 227; S. *v.* Fiore (N. J.), 88 A. 1039; Kleine Bros. *v.* Gidcomb (Tex. Civ.), 152 S. W. 462.

Effect of bichloride of mercury on human face. Cooks *v.* Co., 13 Haw. 681.

Identity of compounds may be shown by chemists who have made analysis. Badische A. & S. F. *v.* Klipstein, 125 Fed. 543.

Cause of death.—Davis *v.* S., 54 Tex. Cr. 236, 114 S. W. 366.

563-55 As, "This $900 ticket [referring to the certificate of deposit of $900 introduced by plaintiff] was evidently traced from a paper already written. It was not made at the first writing." E. B. Martin & Sons *v.* Bank, 137 Ga. 285, 73 S. E. 387.

564-57 Converse *v.* Ferguson, 166 Cal. 1, 134 P. 977.

564-58 Alexander *v.* Smith, 3 Ala. App. 501, 57 S. 104; Hanrahan *v.* City, 114 Md. 517, 80 A. 312. *Comp.* St. Louis, etc. R. Co. *v.* Morris, 76 Ark. 542, 89 S. W. 846; Elliott *v.* Ferguson, 37 Tex. Civ. 40, 83 S. W. 56.

564-60 Colusa Parrot M. & S. Co. *v.* Monahan, 162 Fed. 276, 89 C. C. A. 256; Denver C. E. Co. *v.* Walters, 39 Colo. 301, 89 P. 815 (sufficiency of insulation); Jacksonville E. Co. *v.* Sloan, 52 Fla. 257, 42 S. 516 (whether precautions necessary in repairing broken electric wire); Goddard *v.* Enzler, 222 Ill. 462, 78 N. E. 805; Beyer *v.* Tr. Co., 156 Ill. App. 47; Kimball Co. *v.* Co., 141 Ia. 632, 118 N. W. 891; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651 (purpose of removing insulation on wires); Warren *v.* R. Co., 141 Mich. 298, 104 N. W. 613 (effectiveness of particular kind of insulator and tendency to cease using where formerly used); Bernier *v.* Co., 92 Minn. 214, 99 N. W. 778 (how long defect in insulation existed); Riley *v.* City (Mo.), 167 S. W. 1022; Jewell *v.* Mfg. Co., 166 Mo. App. 555, 149 S. W. 1045; North Amherst, etc. T. Co. *v.* Jackson, 4 O. C. C. (N. S.) 386 (safety of insulator); St. Clair *v.* Co., 38 Pa. Super. 228; Anderson *v.* S. (Tex. Civ.), 159 S. W. 847; S. W. Tel. & T. Co. *v.* Luckie (Tex. Civ.), 153 S. W. 1158; Citizens' T. Co. *v.* Thomas, 45 Tex. Civ. 20, 99 S. W. 879.

See Quincy Co. *v.* Schmitt, 123 Ill. App. 647; Martin *v.* Co., 131 Ia. 724, 106 N. W. 359; Meehan *v.* R. Co., 186 Mass. 511, 72 N. E. 61; Anthony *v.* Co., 165 Mich. 388, 130 N. W. 659.

Hypothetical question as to whether construction of electrical wires, proper. German-Am. Ins. Co. *v.* Co., 103 App. Div. 310, 93 N. Y. S. 46.

564-61 Reinke *v.* Sanitary Dist., 260 Ill. 380, 103 N. E. 236; N. J., etc. R. Co. *v.* Tutt, 168 Ind. 205, 80 N. E. 420 (sufficiency of tile to carry water under railroad embankment); Garrett *v.* Winterich (Ind. App.), 87 N. E. 161 (capacity of sewer); Golden *v.* Mannex, 214 Mass. 502, 101 N. E. 1081; Union Ice Co. *v.* R. Co. (Mich.), 144 N. W. 1033; City of Aurora *v.* Ins. Co. (Mo. App.), 165 S. W. 357; Risley *v.* Co., 75 N. J. L. 840, 69 A. 192 (whether bulkhead would better resist storms with or without filling of sand); Prime *v.* Yonkers, 131 App. Div. 110, 115 N. Y. S. 305 (skill and propriety of wall construction); Dutton *v.* R. Co., 32 Pa. Super. 630; Early & Clement G. Co. *v.* City (Tex. Civ.), 137 S. W. 431; Gurley *v.* R. Co. (Tex. Civ.), 124 S. W. 502.

Engineer may testify whether a portion of construction work was within specifications, but not whether it was authorized by contract as a whole. U. S. *v.* Greene, 146 Fed. 801.

Propriety of action of engineer in operation of engine, may be testified to. Ball *v.* Co., 32 App. Cas. (D. C.) 177.

565-62 But see U. S. *v.* Hung Chang, 126 Fed. 400.

White man or Indian? Expert testimony competent upon such question. Stewart *v.* U. S.,, 211 Fed. 41, 127 C. C. A. 477.

565-63 Currelli *v.* Jackson, 77 Conn. 115, 58 A. 762 (frozen dynamite); Stephen *v.* Duffy, 237 Ill. 549, 86 N. E. 1082, 142 Ill. App. 219 (existence of unexploded dynamite); Remsberg *v.* Co., 73 Kan. 66, 84 P. 548 (effect of explosion of dynamite on persons and buildings within certain radius); Spino *v.* Butler Bros., 113 Minn. 326, 129 N. W. 590.

Method of thawing explosives.—Westlake *v.* Min. Co., 48 Mont. 120, 136 P. 38.

Explosive quality of dust.—Barney *v.* Co., 85 Vt. 372, 82 A. 113.

Explosive oils.—Stowell *v.* Co., 139 Mich. 18, 102 N. W. 227 (kerosene); Bardsley *v.* Gill, 218 Pa. 56, 66 A. 1112; Waters-P. O. Co. *v.* Snell, 47 Tex. Civ. 413, 106 S. W. 170.

Cause of explosion of gasoline—opinion competent. Bloch *v.* Ins. Co., 132 Wis. 150, 112 N. W. 45.

566-65 P. *v.* Grutz (N. Y.), 105 N. E. 843; Thomason *v.* S. (Tex. Cr.), 160 S. W. 359. See Sun Ins. Off. *v.* Co., 72 Kan. 41, 82 P. 513; Dakan *v.* Co., 197 Mo. 238, 94 S. W. 944.

566-66 Effect of fire on trees and hedges—opinion of expert competent. Chicago, etc. R. Co. *v.* Mosher, 76 Kan. 599, 92 P. 554.

Fruit dealer.—Opinion as to condition of fruit when received by carrier. Ala., etc. R. Co. *v.* McKenzie, 139 Ga. 410, 77 S. E. 647.

567-68 Substitute for butter. But see S. *v.* Co., 124 Ia. 323, 100 N. W. 59.

567-70 Keefe *v.* Armour & Co., 258 Ill. 28, 101 N. E. 252. But see White *v.* Ins. Co., 120 App. Div. 260, 105 N. Y. S. 87.

567-71 See S. *v.* Remington, 50 Or. 99, 91 P. 473, whether certain caliber bullet would make hole size of one in picket shown witness, although picket and bullet before jury.

Experience with firearms is necessary before witness can testify to size and caliber of ball used in a homicide. Ripley *v.* S., 51 Tex. Cr. 126, 100 S. W. 943.

Character of weapon.—Opinion based on report heard by witness. S. *v.* Graham, 116 La. 779, 41 S. 90.

567-73 Moline J. Co. *v.* Dinnan, 81 Conn. 111, 70 A. 634; Porteous *v.* Exp. Co., 112 Minn. 31, 127 N. W. 429.

567-74 Brunelle *v.* Co., 194 Mass. 407, 80 N. E. 466 (construction of ordinance); Consumers' L. Co. *v.* Hubner (Tex. Civ.), 154 S. W. 249; First, etc. Tr. Co. *v.* Const. Co. (Tex. Civ.), 153 S. W. 680. See infra, 699-7.

Opinion on mixed question of law and fact, inadmissible. Gulf, etc. R. Co. *v.* Kimble, 49 Tex. Civ. 622, 109 S. W. 234; Houston, etc. R. Co. *v.* Davis, 50 Tex. Civ. 74, 109 S. W. 422.

Possession of property.—Opinion evidence as to, excluded. Fadden *v.* McKinney (Vt.), 89 A. 351.

568-75 Walters *v.* Mitchell, 6 Cal. App. 410, 92 P. 315 (marketable title); Hirsch *v.* Beverly, 125 Ga. 657, 54 S. E. 678; Scott *v.* Hughes, 66 W. Va. 573, 66 S. E. 737, *cit.* the text.

569-76 Amount of lumber that could be sawed from certain trees. Newton's Admx. *v.* S. Co. (Vt.), 90 A. 583.

569-77 Crane *v.* Fry, 126 Fed. 278, 61 C. C. A. 260 (proper conduct and management of log boom and what is practicable to be done in its operation); Dell *v.* McGrath, 92 Minn. 187, 99 N. W. 629 (number of men necessary to do certain work with safety); Westerman *v.* F. Co., 162 N. C. 294, 78 S. E. 221; Whitfield *v.* Co., 152 N. C. 211, 67 S. E. 512 (diameter of trees necessary to square to prescribed dimensions, and rate of growth of trees on like land); Ives *v.* Co., 147 N. C. 306, 61 S. E. 70 (sufficiency of rafting gear); Wall *v.* Melton (Tex. Civ.), 94 S. W. 358 (method described by another witness not a correct one for estimating amount of timber cut). See Louisville & N. R. Co. *v.* Morton, 28 Ky. L. R. 355, 89 S. W. 243, and supra, 562-49.

Usual size of trees of given species may be shown. Cochran *v.* Casey (Tex. Civ.), 128 S. W. 1145.

Measurement of timber on piece of land qualifies witness to give estimate of quantity. Park *v.* Co., 47 Wash. 597, 92 P. 442.

Sealer who qualifies as expert may estimate amount of timber taken away. Callen *v.* Collins (Tex. Civ.), 154 S. W. 673.

570-78 City of Manchester *v.* Landry, 199 Fed. 882, 118 C. C. A. 330;

Alaska-T. G. M. Co. *v.* Cheney, 162 Fed. 593, 89 C. C. A. 351; Shaughnessy *v.* Holt, 236 Ill. 485, 86 N. E. 256; Fuller *v.* R. Co., 61 Misc. 599, 113 N. Y. S. 1001 (packing for transportation). See Yates *v.* Co. (Ala.), 39 S. 647; Espenlaub *v.* Ellis, 34 Ind. App. 163, 72 N. E. 527; German Ins. Co. *v.* R. Co., 128 Ia. 386, 104 N. W. 361 (fire arresting appliances on engines); Kernan *v.* Crook, 100 Md. 210, 59 A. 753; Carr *v.* Co., 26 R. I. 180, 58 A. 678; Delmar O. Co. *v.* Bartlett, 62 W. Va. 700, 59 S. E. 634. But see Gomes *v.* Co., 187 Mass. 124, 72 N. E. 840; Hamann *v.* Co., 127 Wis. 550, 106 N. W. 1081.

Safe way to equip a scrubber.—Mulholland *v.* Gas Co., 21 Cal. App. 44, 131 P. 110, 131 P. 113.

Hoisting machines.—Opinion of machinist as to proper operation of, admissible. Louisville & N. R. Co. *v.* Goodwin, 151 Ky. 149, 151 S. W. 376.

Customary methods.—Redhead *v.* Co., 116 App. Div. 34, 101 N. Y. S. 301. Use of oil pans and drains to prevent floor from becoming oily. Knickerbocker I. Co. *v.* Gray, 171 Ind. 395, 84 N. E. 341. Not customary to put inexperienced men at work on machines like those in question, and why. Gammel-S. Pub. Co. *v.* Monfort (Tex. Civ.), 81 S. W. 1029.

Dangerousness of machine to boy operating same is for jury and not for experts. Anderson *v.* Co., 127 Wis. 273, 106 N. W. 1077. See Coe *v.* Van Why, 33 Colo. 315, 80 P. 894; Vollman, etc. Co. *v.* Spry, 126 Ky. L. R. 228, 80 S. W. 1092 (boy of sixteen would not appreciate danger of operating joiner with safety board removed); Va. Iron, etc. Co. *v.* Tomlinson, 104 Va. 249, 51 S. E. 362. *Contra*, Punkowski *v.* Co., 4 Penne. (Del.) 544, 57 A. 559; Gammel-S. Pub. Co. *v.* Monfort (Tex. Civ.), 81 S. W. 1029; Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777, and infra, 570-79; 572-84; 683-53.

Possibility of equipping machinery with guards.—Carlin *v.* Kennedy, 97 Minn. 141, 106 N. W. 340; McGinnis *v.* Co., 122 Mo. App. 227, 99 S. W. 4 (practicability). See Ford *v.* Co., 30 Ky. L. R. 698, 99 S. W. 609; Morgan *v.* Co., 120 Mo. App. 590, 97 S. W. 638. *Comp.* Bennett *v.* Co., 147 N. C. 620, 61 S. E. 463, holding injured person might testify shield, which had been on machine, but which had been taken away, would have prevented injury.

Typewriting machine.—As bearing on question whether certain documents were made on a certain machine an expert may testify as to correspondence between peculiarities of such machine and writings, and improbability any two machines would have same peculiarities. S. *v.* Freshwater, 30 Utah 442, 85 P. 447.

Tools and appliances necessary for doing work and proper method of their use may be shown. Morris *v.* Williams, 143 Ill. App. 140.

570-79 Stone, etc. Corp. *v.* Melovich, 202 Fed. 438, 120 C. C. A. 544; Cochrell *v.* Co., 5 Ga. App. 317, 63 S. E. 244 (cause of sudden automatic starting of machinery); House Cold T. S. Co. *v.* Whitehurst, 148 N. C. 446, 62 S. E. 523 (machines of like kind and make). See Hammer *v.* Janowitz, 131 Ia. 20, 108 N. W. 109 (proper method of constructing crane); Chicago, etc. R. Co. *v.* Denton (Tex. Civ.), 101 S. W. 452.

Safety of valve.—Wells *v.* Swift & Co., 90 Kan. 168, 133 P. 732.

Steam-pipe.—Whether use of cast-iron pipe dangerous under circumstances and whether bursting resulted from use of such pipe. Erickson *v.* Co., 193 Mass. 119, 78 N. E. 761.

Necessity of spark arrester on traction engine. Underwood *v.* Stevens, 149 Mich. 39, 112 N. W. 487.

Safety appliances used on pile driver. Wabash S. D. Co. *v.* Black, 126 Fed. 721, 61 C. C. A. 639; Koon *v.* R. Co., 69 S. C. 101, 48 S. E. 86 (whether pulley like one in question safe or unsafe for purpose for which used. But see Trickey *v.* Clark, 50 Or. 516, 93 P. 457.

570-80 Stone, etc. Corp. *v.* Melovich, 202 Fed. 438, 120 C. C. A. 544; U. S. Heater Co. *v.* Jenss, 128 Wis. 162, 107 N. W. 293 (rated capacity of heater boiler); Odegard *v.* Co., 130 Wis. 659, 110 N. W. 809 (sawmill machinery).

571-81 Minica *v.* Cooperage Co., 175 Mo. App. 91, 157 S. W. 1006.

571-82 Siegel Cooper *v.* Treka, 218 Ill. 559, 75 N. E. 1053; Shaughnessy *v.* Holt, 140 Ill. App. 572 (effect of automatic stop); Obermeyer *v.* Co., 120 Mo. App. 59, 96 S. W. 673. See Starer *v.* Stern, 100 App. Div. 393, 91 N. Y. S. 821.

571-83 Williamson I. Co. *v.* McQueen, 144 Ala. 265, 40 S. 306 (furnace); McLain *v.* D. Co., 19 Cal. App. 475, 126 P. 391; Hopperman *v.* Bldg. Co., 214 Mass. 33, 100 N. E. 1023; Comeau *v.* Co., 84 Vt. 501, 80 A. 51. See Starer *v.* Stern, 100 App. Div. 393, 91 N. Y. S. 821; Billmeyer *v.* Co., 150 Ia. 318, 130 N. W. 115. *Contra* in absence of proof as to uniformity in wear of gearing. Kinkler *v.* Co. (Wis.), 124 N. W. 273. But see Lounsbury *v.* Davis, 124 Wis. 432, 102 N. W. 941.

572-84 Adams M. Co. *v.* Turner, 162 Ala. 351, 50 S. 308; Punkoyski *v.* Co., 4 Penne. (Del.) 544, 57 A. 559 (proper method of operation); L'Hote *v.* Co., 203 Mass. 294, 89 N. E. 532 (use of gauges on saws); Scarlotta *v.* Ash, 95 Minn. 240, 103 N. W. 1025 (machinery working properly); Wofford *v.* Mills, 72 S. C. 346, 51 S. E. 918 (what one would do to get his hands caught in a machine in a certain manner); Morrisett *v.* Mills, 151 N. C. 31, 65 S. E. 514 (change of gearing with belt loose on pulley); Hocking *v.* Co., 131 Wis. 532, 111 N. W. 685 (die improperly set). See Vollman, etc. Co. *v.* Spry, 26 Ky. L. R. 228, 80 S. W. 1092 (construction of joiner and effect of attempting to operate it without safety boards); Gammel-S. P. Co. *v.* Monfort (Tex. Civ.), 81 S. W. 1029; Thomson *v.* Co., 43 Wash. 253, 86 P. 588 (sawyer may testify to customary manner of guarding saw, as may also millwright and contractor); Johnson *v.* Highland, 124 Wis. 597, 102 N. W. 1085.

Dangerousness of method of operating a machine. Swarts *v.* Co., 115 App. Div. 739, 100 N. Y. S. 1054, it would have been less dangerous for spindles, on which plaintiff was injured, to revolve outwardly instead of inwardly. *Contra,* Carron *v.* Co., 106 N. Y. S. 723, dangerousness of method of operating, when question not for expert testimony.

572-85 St. Louis, etc. R. Co. *v.* Reed, 92 Ark. 350, 122 S. W. 645.

572-86 But see Sloss-S., etc. Co. *v.* Hutchinson, 144 Ala. 221, 40 S. 114.

572-87 Chicago, etc. R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517; Sticht *v.* Co., 195 N. Y. 70, 87 N. E. 801. But see Castner, etc. Co. *v.* Davies, 154 Fed. 938, 83 C. C. A. 510, holding that while experts could state various things which might cause explosion and bearing which given facts might have on question, they could not testify directly which cause produced it, this being for jury. See Chicago *v.* O'Donnell, 124 Ill. App. 78; O'Doherty *v.* Co., 113 App. Div. 636, 99 N. Y. S. 351.

573-88 City of Aurora *v.* Ins. Co. (Mo. App.), 165 S. W. 357.

573-89 U. S. Co. *v.* Parry, 166 Fed. 407, 92 C. C. A. 159 (safety of scaffold); Fredrick Mfg. Co. *v.* Devlin, 127 Fed. 71, 62 C. C. A. 53 (breaking of castings); Luitweiler P. Eng. Co. *v.* Water Co., 16 Cal. App. 198, 116 P. 707, rehear. *denied,* 116 P. 712; Crankshaw *v.* Co., 1 Ga. App. 363, 58 S. E. 222 (working of doors to show cases); Vohs *v.* Snorthill, 124 Ia. 471, 100 N. W. 495; Fraternal C. Co. *v.* Co., 28 Ky. L. R. 383, 89 S. W. 265; McDonald *v.* Sundstrom, 31 Pa. 241; Boop *v.* Co., 212 Pa. 523, 61 A. 1021 (broken fly wheel should not be repaired and used); Lewis *v.* Crane, 78 Vt. 216, 62 A. 60 (painter accustomed to swinging stages may state weight which hook would support); Smith *v.* Dow, 43 Wash. 407, 86 P. 555 (method of hoisting lumber); Twentieth Century Co. *v.* Quilling, 136 Wis. 481, 117 N. W. 1007 (purpose for which device designed); Estey Organ Co. *v.* Lehman, 132 Wis. 144, 111 N. W. 1097, 11 L. R. A. (N. S.) 254 (what regulation of a certain organ indicated—as to care taken of it); Hocking *v.* Co., 131 Wis. 532, 111 N. W. 685 (steel splinter came from crevice in a die—based on examination and comparative tests as to hardness, grain, etc.). But see Epstein *v.* Co., 52 Misc. 184, 101 N. Y. S. 793 (plumber not competent to give opinion whether sinking of elevator railway pillar caused break in drain pipe below it); Dolan *v.* Co., 105 App. Div. 366, 94 N. Y. S. 241 (iron worker of eighteen years' experience, not competent, after five or six weeks, experience in building steel vaults, to testify to necessity for using set screws to hold plates in place during construction).

Wood workers.—Opinion as to machine guards admissible. Murray *v.* Daley (Ia.), 146 N. W. 451.

Machine or plant, condition of. Bowser & Co. *v.* Savidusky, 154 Wis. 76, 142 N. W. 182.

Scaffold.—Opinion by builder of same as to its strength. Raney *v.* Houston

L. & P. Co. (Tex. Civ.), 153 S. W. 178.

Proper construction of column.—Carpenter qualified to give opinion as to. Corrigan, Lee & Halpin *v.* Heubler (Tex. Civ.), 167 S. W. 159.

Water-pipe.—Opinion of plumber as to effect of water pressure upon. Beck *v.* Hanline (Ind.), 89 A. 377.

Necessity of spiking bottom of car ladder.—Car repairer competent to testify in regard to. Missouri, etc. R. Co. *v.* Hedric (Tex. Civ.), 154 S. W. 633.

Character of weld.—Pfeifer *v.* Wks., 258 Ill. 427, 101 N. E. 548.

Cost of repairing automobile.—Holcomb Co. *v.* Clark, 86 Conn. 319, 85 A. 376.

574-90 Nordan *v.* S., 143 Ala. 13, 39 S. 406; Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; Spain *v.* Burch, 169 Mo. App. 94, 154 S. W. 172; St. Louis, etc. Co. *v.* Overturf (Tex. Civ.), 163 S. W. 639; Hickey *v.* R. Co. (Tex. Civ.), 95 S. W. 763; Kaczmarek *v.* Co., 148 Wis. 46, 134 N. W. 348; Charron *v.* Fuel Co., 143 Wis. 437, 128 N. W. 75; Nelson *v.* R. Co., 130 Wis. 214, 109 N. W. 933; Faber *v.* Co., 124 Wis. 554, 102 N. W. 1049. See Elliott *v.* Ferguson, 37 Tex. Civ. 40, 83 S. W. 56; supra, "Cause," 953-32.

Cause of pain at point of fracture. Bird *v.* Hart-Parr Co. (Ia.), 146 N. W. 74.

A physician was asked: "What percentage of eyes are saved, affected like this eye was, provided you get to them, say within 10 or 12 hours after you feel the sharp pain that occurs?" The court said: "If based upon the experience of the witness as an expert, it would be admissible for that reason. If it was based upon the concensus of opinion of specialists, we think it would be admissible for that reason. The evidence is similar in character to that presented by statistics gathered by learned and experienced men, such as the average of life contained in mortality tables, and other kindred subjects." Western Union Tel. Co. *v.* Ford, 10 Ga. App. 606, 74 S. E. 70.

Cause of physical condition of person examined. S. *v.* White, 48 Or. 416, 87 P. 137. But see Raynor *v.* R. Co., 106 App. Div. 449, 94 N. Y. S. 632; Newton *v.* R. Co., 106 App. Div. 415, 94 N. Y. S. 825.

Nature and extent of injuries which would have been inflicted had engine been going at certain rate—opinion inadmissible. Southern R. Co. *v.* Weatherlow, 153 Ala. 171, 44 S. 1019.

Effect of injuries on ability to use members affected. Lewis *v.* Crane, 78 Vt. 216, 62 A. 60. See Chicago C. R. Co. *v.* Lowitz, 218 Ill. 24, 75 N. E. 755.

Pain.—That certain given conditions would produce pain. W. U. T. Co. *v.* Stubbs, 43 Tex. Civ. 132, 94 S. W. 1083.

In explanation of X-ray photograph of fractured bone. Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807. See supra, 539-70.

Duties of midwife.—C. *v.* Porn, 195 Mass. 443, 81 N. E. 305.

Seriousness of injury.—Monize *v.* Begaso, 190 Mass. 87, 76 N. E. 460.

Probable result of an injury. Ill. Cent. R. Co. *v.* Beeler, 142 Ky. 772, 135 S. W. 305; Jerome *v.* R. Co., 155 Mo. App. 202, 134 S. W. 107.

Parts of body may be shown to be parts of a human body and hairs to be those of a human being. Miller *v.* S., 94 Ark. 538, 128 S. W. 353.

A physician "who had attended the testatrix for a period of 15 years before her death and had made frequent examinations of her at various times may give his opinion that during all that period it would have been very painful for her, and almost impossible, to have committed any act such as she was charged with." Norton *v.* Clark, 253 Ill. 557, 97 N. E. 1079.

574-91 Triangle L. Co. *v.* Acreo (Ark.), 166 S. W. 958; Chicago City R. Co. *v.* Casey, 139 Ill. App. 655; Campbell *v.* Hayden, 164 Mo. App. 252, 145 S. W. 103; Missouri, etc. R. Co. *v.* Farris (Tex. Civ.), 124 S. W. 497. See Chicago *v.* McNally, 128 Ill. App. 375.

Strength tests.—Medical experts' testimony as to. Richardson *v.* R. Co., 170 Ill. App. 336. See supra, "Experiments," 495-73.

A query of a physician as to examination made by him "soon after the injury" is not too indefinite as to time, as a matter of law. Dean *v.* Wabash R. Co., 229 Mo. 425, 129 S. W. 953.

Physician's prognosis made as result of examination immediately after injury, admissible as tending to corroborate or disprove result of subsequent examinations, dependent partly upon

statements of patient. Fletcher *v.* Dixon, 107 Md. 420, 68 A. 875.

574-92 Opinions concerning physical fitness of person to marry, inadmissible if based on his nervous condition. United R. & E. Co. *v.* Corbin, 109 Md. 442, 72 A. 606.

575-93 **Physician may testify** whether or not the condition of injured party could result from the facts stated. Galveston, etc. R. Co. *v.* Grenig (Tex. Civ.), 142 S. W. 135.

575-94 **Impeachment** by use of books. See infra, 650-55.

"**Of course, medical books,** however celebrated their authors, are not admissible in evidence, because the author is not under oath, and not subject to cross-examination. But, for the purpose of testing the qualifications, as well as the credibility, of an expert, it is generally held, as in Wittenberg *v.* Onsgard, 78 Minn. 342, 87 N. W. 14, 47 L. R. A. 141, that when the witness has testified that the authorities support his view, he may be asked on cross-examination whether a medical work, admitted by him to be a standard authority, does not express a contrary view. And it is no objection to such cross-examination that incidentally the opinions of the author are thus brought before the jury." Landro *v.* R. Co., 117 Minn. 306, 135 N. W. 991.

Opinion may be based on published statistics.—Piper *v.* R., 75 N. H. 228, 72 A. 1024.

575-95 P. *v.* Hagemon, 236 Ill. 514, 86 N. E. 370; S. *v.* Stapp, 246 Mo. 338, 151 S. W. 971; Veiss *v.* United R. Co. (Mo. App.), 167 S. W. 615. See also vol. 1, p. 63, n. 61.

Opinion as to kind of instrument and manner of using which would produce condition found. C. *v.* Sinclair, 195 Mass. 100, 80 N. E. 799.

576-96 Escambia, etc. Power Co. *v.* Sutherland, 61 Fla. 167, 55 S. 83; Laner *v.* S., 141 Ga. 17, 80 S. E. 5; Levering *v.* C., 132 Ky. 666, 117 S. W. 253; Hildebrand *v.* Artisans, 50 Or. 159, 91 P. 542 (when rigor mortis sets in); Stegner *v.* Brotherhood, 24 S. D. 371, 123 N. W. 842.

576-97 Pacific M. R. I. Co. *v.* Shields (Ala.), 62 S. 71; Burkett *v.* S., 154 Ala. 19, 45 S. 682; Sims *v.* S., 139 Ala. '74, 36 S. 138, 101 Am. St. 17; Foley *v.* Co., 144 Ala. 178, 40 S. 273; Birmingham, etc. Co. *v.* Enslen, 144 Ala. 343, 39 S. 74; Turck *v.* Chicago, 146 Ill. App. 472; S. *v.* Hessenius (Ia.), 146 N. W. 58; Travelers' Ins. Co. *v.* Davies, 152 Ky. 600, 153 S. W. 956; Mageau *v.* R. Co., 106 Minn. 375, 119 N. W. 200; Goodes *v.* Com. Travelers, 174 Mo. App. 330, 156 S. W. 995; Horst *v.* Lewis, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460; Fay *v.* S., 52 Tex. Cr. 185, 107 S. W. 55; Metropolitan L. Ins. Co. *v.* Wagner, 50 Tex. Civ. 233, 109 S. W. 1120 (surgeon may testify decedent's wounds were or could have been caused with knife found beside his bed). See Dunn *v.* R. Co., 130 Ia. 580, 107 N. W. 616. See also vol. 6, p. 684, n. 24. *Comp.* Martin *v.* Co., 131 Ia. 724, 106 N. W. 359.

Cause of death.—Houston, etc. R. Co. *v.* Rutland, 45 Tex. Civ. 621, 101 S. W. 529. *Comp.* Kelly *v.* Wills, 116 App. Div. 758, 102 N. Y. S. 223. See infra, 590-36.

Presence at time of death, unnecessary to enable attending physician who saw decedent daily up to that, to state cause thereof. Chadwick *v.* Assn., 143 Mich. 481, 106 N. W. 1122.

Facts upon which opinion as to cause of death is based must be in evidence. Kinney *v.* Brotherhood, 15 N. D. 21, 106 N. W. 44. *Comp.* Hunter *v.* Ithaca, 141 Mich. 539, 105 N. W. 9. But not in case of physician basing opinion on examination alone. Morrow *v.* Assn., 125 Ia. 633, 101 N. W. 468; Boehm *v.* Detroit, 141 Mich. 277, 104 N. W. 626.

Conscious suffering of deceased may be testified to by physician who saw body soon after death. Hines *v.* Co., 203 Mass. 288, 89 N. E. 628.

577-99 Macon *v.* S. (Ala.), 60 S. 312; S. *v.* Buck, 88 Kan. 114, 127 P. 631. See vol. 6, p. 684, n. 24. *Comp.* Chicago *v.* Didier, 227 Ill. 571, 81 N. E. 698, and see supra, 527-38.

Rule applicable in civil actions.—Baehr *v.* Co., 133 Mo. App. 541, 113 S. W. 689.

Sufficiency of cause to produce a condition may be testified to. Shaughnessy *v.* Holt, 140 Ill. App. 572.

578-4 S. *v.* Hessenius (Ia.), 146 N. W. 58; S. *v.* Potoniec, 117 Minn. 80, 134 N. W. 305.

578-5 Lovelady *v.* Co., 161 Ala. 494, 50 S. 96; VanWyk *v.* P., 45 Colo. 1, 99 P. 1009; Palmer *v.* Schultz, 138 Wis.

455, 120 N. W. 348 (assistant coroner's testimony received).

578-7 Foley *v.* Power Co., 165 Cal. 103, 130 P. 1183; McCleary *v.* S. (Md.), 89 A. 1100; P. *v.* MacGregor (Mich.), 144 N. W. 869; S. *v.* Vance, 38 Utah 1, 110 P. 434. See also vol. 6, p. 685, n. 33.

Facts disclosed by dissection may be stated by physician who saw results thereof, although he did not take part in or see dissecting. Steinacker *v.* Hills, 91 App. Div. 521, 87 N. Y. S. 33.

580-13 Marbury *v.* R. Co., 176 Fed. 9, 99 C. C. A. 483; W. U. T. Co. *v.* Rowell, 166 Ala. 651, 51 S. 880; Perkins *v.* Co., 155 Cal. 712, 103 P. 190; Anderson *v.* Mayor, 6 Penne. (Del.) 485, 70 A. 204 (cause); Washington, etc. R. Co. *v.* Lukens, 32 App. Cas. (D. C.) 442; Towaliga F. P. Co. *v.* Sims, 6 Ga. App. 749, 65 S. E. 844; Shaughnessy *v.* Holt, 236 Ill. 485, 86 N. E. 256; Amann *v.* R. Co., 148 Ill. App. 151; Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402 (symptoms of disease given by authorities); Ducharme *v.* R. Co., 203 Mass. 384, 89 N. E. 561 (effect of subsequent inquiry upon vision of person with one eye); Hull *v.* R., 158 Mich. 682, 123 N. W. 571; S. *v.* James (Minn.), 144 N. W. 216; Torreyson *v.* R. Co. (Mo.), 129 S. W. 409; Neuer *v.* R. Co., 143 Mo. App. 402, 127 S. W. 669; Hufford *v.* R. Co., 130 Mo. App. 638, 109 S. W. 1062 (only a portion of certain bodily infirmities caused by injury complained of); McCaffery *v.* R. Co., 192 Mo. 144, 90 S. W. 816; St. Louis S. R. Co. *v.* Taylor (Tex. Civ.), 123 S. W. 714.

See Dixon *v.* S., 139 Ala. 104, 36 S. 784 (whether person suffering certain ailment could have performed certain act in view of his subsequent condition); Indianapolis & E. R. Co. *v.* Bennett, 39 Ind. App. 141, 79 N. E. 389; Struth *v.* Decker, 100 Md. 368, 59 A. 727; Wood *v.* R. Co., 181 Mo. 433, 81 S. W. 152; Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311. But see Mackey *v.* R. Co., 115 App. Div. 467, 101 N. Y. S. 439; Higgins *v.* Co., 96 App. Div. 69, 89 N. Y. S. 76.

Exceptional effects of diseases may be stated by expert. Thompson *v.* Peterson, 152 App. Div. 667, 137 N. Y. S. 635.

In Roark *v.* R. Co., 163 Mo. App. 705, 147 S. W. 499, the questions asked were whether or not, in your opinion, the low temperature in the car "would account for the relapse and recurrence of her former ailment." The court said: "It is well known that in investigations it is frequently the case that many different things will account for a certain condition. In this case, plaintiff's condition was being accounted for. It could, of course, have been brought about by one of many different things as a cause, or by several things combining to the one result. So the question was not, did the trip in the cold car cause plaintiff's condition, but, would it account for such condition? That is to say, could the condition have been caused by the trip? The question was, not whether the cold car caused the condition, but, was the cold car a way in which it could be accounted for? In other words, could it have resulted from the trip in the cold car?"

Attending physician may state what, in his judgment, was plaintiff's affliction, and whether it might be caused by an injury such as plaintiff alleged she received. Torreyson *v.* R. Co. (Mo.), 129 S. W. 409.

Statements as to the nature and character of plaintiff's ailment, without suggesting the particular cause, are competent. Torreyson *v.* U. R. Co., 164 Mo. App. 366, 145 S. W. 106.

582-18 Mental effect upon patient of fear of hydrophobia may be shown. Burns *v.* Brier, 204 Mass. 195, 90 N. E. 399.

582-19 Malpractice. Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807.

583-20 Perkins *v.* Co., 155 Cal. 712, 103 P. 190; Anderson *v.* Mayor, 6 Penne. (Del.) 485, 70 A. 204; United R. & E. Co. *v.* Corbin, 109 Md. 442, 72 A. 606; Gillman *v.* R. Co., 224 Pa. 267, 73 A. 342; Goldstein *v.* East, etc. Tp., 43 Pa. Super. 158.

Probable duration or recurrence of malady resulting from personal injuries. Ellis *v.* R. Co. (R. I.), 67 A. 428. See Kansas City R. Co. *v.* Butler, 143 Ala. 262, 38 S. 1024 (permanence of injuries); Cumberland T. & T. Co. *v.* Overfield, 32 Ky. L. R. 421, 106 S. W. 242; Garard *v.* Co., 207 Mo. 242, 105 S. W. 767; Rosenblatt *v.* Co., 91 App. Div. 413, 86 N. Y. S. 801; Graham *v.* Bauland, 97 App. Div. 141, 89 N. Y. S. 595; Citizens, etc. Co. *v.* Bell, 5 O. C. C. (N. S.) 321; Simone *v.* Co.,

28 R. I. 186, 66 A. 202, 9 L. R. A. (N. S.) 740; Klingaman *v.* Fish, 19 S. D. 139, 102 N. W. 601; Missouri, etc. R. Co. *v.* Lynch, 40 Tex. Civ. 543, 90 S. W. 511; Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051; Faber *v.* Co., 124 Wis. 554, 102 N. W. 1049; infra, "Injuries to the Person," 402-85. But see Leahy *v.* Co., 117 App. Div. 316, 102 N. Y. S. 78; Kavanagh *v.* Co., 95 N. Y. S. 567.

583-21 St. Louis, I. M. & S. R. Co. *v.* Osborne, 95 Ark. 310, 129 S. W. 537; Miller *v.* R. Co., 167 Mich. 21, 132 N. W. 483; P. *v.* Koerner, 117 App. Div. 40, 102 N. Y. S. 93 (whether accused after homicide, was shamming unconsciousness, but not what symptoms of shamming are); Ft. Worth B. R. Co. *v.* Cabell (Tex. Civ.), 161 S. W. 1083. See Kimic *v.* R. Co., 156 Cal. 379, 104 P. 986.

584-22 Supreme Lodge *v.* Baker, 163 Ala. 518, 50 S. 958 (indication of habitual use of stimulants); Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; S. *v.* Bridgham, 51 Wash. 18, 97 P. 1096.

585-23 Stevens *v.* S., 6 Ala. App. 6, 60 S. 459; Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501 (whether pregnancy likely to follow first act of intercourse); S. *v.* Shaft (N. C.), 81 S. E 932.

585-24 Premature birth of child. Mother who states she knows difference between a full grown and premature child, competent (Bessemer, etc. Co. *v.* Doak, 152 Ala. 166, 44 S. 627, 12 L. R. A. (N. S.) 389); also professional nurse. Souchek *v.* Karr, 78 Neb. 488, 111 N. W. 150.

Period of gestation—whether it could have extended over period claimed. S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531. See Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501.

585-25 S. *v.* Donnington, 246 Mo. 343, 151 S. W. 975; Burge *v.* S. (Tex. Cr.), 167 S. W. 63; S. *v.* Winslow, 30 Utah 403, 85 P. 433 (forcible penetration). See also vol. 10, p. 594, n. 32; vol. 10, p. 593, n. 30.

Possibility of committing rape in given position—physician may give opinion. Miera *v.* Ty., 13 N. M. 192, 81 P. 586. *Comp.* Richardson *v.* S., 49 Tex. Cr. 391, 94 S. W. 1016; infra, 671-17.

Inflammation of parts.—Physician who examined prosecutrix several days after offense, not permitted to testify that rape caused her condition. P. *v.* Schultz, 260 Ill. 35, 102 N. E. 1045. See also vol. 10, p. 594, n. 31.

586-26 Clayton *v.* S. (Ala.), 64 S. 76; Roberson *v.* S. (Ala.), 62 S. 837; Smith *v.* S., 165 Ala. 50, 51 S. 610; Sims *v.* S., 139 Ala. 74, 36 S. 138 (wound fatal); Hampton *v.* S., 50 Fla. 55, 39 S. 421 (date of infliction); Harper *v.* S., 129 Ga. 770, 59 S. E. 792; Hunner *v.* Stevenson (Md.), 89 A. 418; Stevens *v.* S., 84 Neb. 759, 122 N. W. 58; Kelly *v.* S. (Tex. Cr.), 151 S. W. 304; Stovall *v.* S., 53 Tex. Cr. 30, 108 S. W. 699; Fay *v.* S., 52 Tex. Cr. 185, 107 S. W. 55. *Comp.* P. *v.* Weber, 149 Cal. 325, 86 P. 671.

Expert who examined wound may be questioned as to its effect without hypothetical question. S. *v.* Megorden, 49 Or. 259, 88 P. 306.

Extent of flow of blood as result of wound and signs thereof on ground may be shown. Simmons *v.* S., 55 Tex. Cr. 441, 117 S. W. 141.

Length of time wound had been inflicted. Pullen *v.* S. (Tex. Cr.), 156 S. W. 935.

586-27 Clemons *v.* S., 48 Fla. 9, 37 S. 647 (whether fracture could have been caused by blow from fist); Wilson *v.* U. S., 5 Ind. Ty. 610, 82 S. W. 924; S. *v.* Voorhies, 115 La. 200, 38 S. 964; S. *v.* Nieuhaus, 217 Mo. 332, 117 S. W. 73; C. *v.* Campbell, 31 Pa. Super. 9; Girtman *v.* S. (Tex. Cr.), 164 S. W. 1008; Roberts *v.* S. (Tex. Cr.), 156 S. W. 651; Williams *v.* S. (Tex. Cr.), 144 S. W. 622; Metropolitan L. Ins. Co. *v.* Wagner, 50 Tex. Civ. 233, 109 S. W. 1120; Ozark *v.* S., 51 Tex. Cr. 106, 100 S. W. 927; Tune *v.* S., 49 Tex. Cr. 445, 94 S. W. 231; S. *v.* Drummond, 70 Wash. 260, 126 P. 541; Bowers *v.* S., 122 Wis. 163, 99 N. W. 447. See also vol. 6, p. 684, n. 22. But see McFeat *v.* R. Co., 5 Penne. (Del.) 52, 62 A. 898.

Having found a bruise on skin, and rupture of bladder, may give opinion that same blow caused both. Johnson *v.* C., 111 Va. 877, 69 S. E. 1104.

588-28 *Contra,* S. *v.* Stockman, 82 S. C. 388, 64 S. E. 595.

588-29 Rohn *v.* S. (Ala.), 65 S. 42. See Patton *v.* S. (Tex. Cr.), 80 S. W. 86, person who testifies he is familiar with gunshot wounds may state wound was from a gunshot.

588-30 Smith *v.* S. (Ala.), 62 S. 184.

588-31 Dumas *v.* S., 159 Ala. 42, 49 S. 221; Rigell *v.* S., 8 Ala. App. 46, 62 S. 977, *quoting* 5 ENCY. OF EV. 588; Price *v.* U. S., 1 Okla. Cr. 291, 97 P. 1056; Pearson *v.* S., 56 Tex. Cr. 607, 120 S. W. 1004. *Contra* in civil action when there is doubt about how deceased struck and his position when struck. Kern *v.* R. Co., 141 Ia. 620, 118 N. W. 451; C. *v.* Dorr, 216 Mass. 314, 103 N. E. 902; Miera *v.* Ty., 13 N. M. 192, 81 P. 586 (deceased was sitting down). See Wells *v.* Ty., 14 Okla. 436, 78 P. 124. See also vol. 6, p. 623, n. 87.

Position of arm when bullet entered it—surgeon's opinion inadmissible, being for jury. Wilson *v.* U. S., 5 Ind. Ty. 610, 82 S. W. 924.

589-32 Cabrera *v.* S., 56 Tex. 141, 118 S. W. 1054; Roe *v.* S., 55 Tex. Cr. 128, 115 S. W. 593 (non-medical witness of large practical observation). See S. *v.* Voorhies, 115 La. 200, 38 S. 964.

589-34 S. *v.* Voorhies, 115 La. 200, 38 S. 964. *Contra*, where question is immaterial. S. *v.* Jacobs, 26 S. D. 183, 128 N. W. 162.

Value of such testimony, not great. Van Norman *v.* Brotherhood, 143 Ia. 536, 121 N. W. 1080.

589-35 P. *v.* Knapp, 16 Cal. App. 682, 117 P. 792.

The state proved by a medical witness that deceased's skull was crushed, and in answer to the question, "What sort of blow would be necessary to produce that?" was permitted to state, "Take a tremendous blow." Harris *v.* S. (Tex. Civ.), 148 S. W. 1074.

590-36 P. *v.* Heacock, 10 Cal. App. 450, 102 P. 543; Knights, etc. Co. *v.* Crayton, 110 Ill. App. 648; Metropolitan L. Ins. Co. *v.* Wagner, 50 Tex. Civ. 233, 109 S. W. 1120. *Contra*, Miera *v.* Ty., 13 N. M. 192, 81 P. 586.

590-37 Miller *v.* S., 9 Okla. Cr. 255, 131 P. 717. See C. *v.* Leach, 156 Mass. 99, 30 N. E. 163; Miera *v.* Ty., supra.

In C. *v.* Spiropoulos, 208 Mass. 71, 94 N. E. 451, it was established that deceased was left-handed, and physicians were properly admitted to testify that the wounds could not have been self-inflicted.

590-38 Davis *v.* S. (Tex. Cr.), 154 S. W. 550.

590-39 Sun Ins. Off. *v.* Co., 72 Kan. 41, 82 P. 513, wool-merchants and manufacturers of experience may testify to possibility of spontaneous combustion in wool. See Allen *v.* Field, 130 Fed. 641, 65 C. C. A. 19; Keim *v.* City, 32 Pa. Super. 613.

Fruit merchant's opinion as to cause of fruit's decay. Western & A. R. Co. *v.* Summerour, 139 Ga. 545, 77 S. E. 802.

Condition of potatoes after having been frozen.—Emerson *v.* R. Co., 120 Minn. 84, 138 N. W. 1026.

As to market value.—Chicago, R. I. & G. R. Co. *v.* Clark (Tex. Civ.), 129 S. W. 186.

Market value of fruit at specified times may be shown by a witness who is first proved to be "posted." Erk *v.* Simpson, 137 Ga. 608, 73 S. E. 1065.

As to the value of the different grades of tobacco shown to be in the warehouses burned. "The various grades were established by the testimony of those who graded, handled, and put up this tobacco, and when the witnesses who were called upon to testify as to the value of the various grades of tobacco destroyed had qualified themselves by showing that they were familiar with the market value of these grades of tobacco at that time, the court did not err in permitting them to testify upon this point." Louisville & N. R. Co. *v.* Tobacco Society, 147 Ky. 22, 143 S. W. 1040.

Damage to goods on steamships—whether caused by fresh or salt water. Houston, etc. R. Co. *v.* Bath, 40 Tex. Civ. 270, 90 S. W. 55.

That dampness will injure dry goods and it was not safe or practical to put a stock of goods in certain premises for that reason. Meyer *v.* Madden, 45 Tex. Civ. 74, 99 S. W. 723.

591-40 Soucier *v.* Mfg. Co. (N. H.), 88 A. 708; Kinston C. Mills *v.* Corp., 161 N. C. 562, 77 S. E. 682. See Trickey *v.* Clark, 50 Or. 516, 93 P. 457.

Proper method of stacking sacks of flour. Commerce M. & G. Co. *v.* Gowan (Tex. Civ.), 104 S. W. 916.

591-41 Central C. & C. Co. *v.* Williams, 173 Fed. 337, 97 C. C. A. 597; Warrior P. C. Co. *v.* Shereda (Ala.), 62 S. 721; Tutwiler *v.* Farrington, 144 Ala. 157, 39 S. 898 (as to timbering); King, etc. Co. *v.* Min. Co., 22 Colo. App. 528, 127 P. 129; Kellyville C. Co. *v.* Strine, 217 Ill. 516, 75 N. E. 375 (same); Hamilton *v.* Coal Co., 149 Ill. App. 10; Bolen-D. C. Co. *v.* Williams,

7 Ind. Ty. 648, 104 S. W. 867 (capabilities of machine used in mine); Spencer *v.* Bruner, 126 Mo. App. 94, 103 S. W. 578; Rogers *v.* Rundell, 128 Mo. App. 10, 106 S. W. 1096; Great Western C. Co. *v.* Malone (Okla.), 136 P. 403; Consolidated, etc. Co. *v.* Gonzales, 50 Tex. Civ. 79, 109 S. W. 946 (percentage of copper in ore); Redd *v.* Carnahan, 65 W. Va. 330, 64 S. E. 138 (character and sufficiency of work done in drilling well). See Kellyville C. Co. *v.* Moreland, 121 Ill. App. 410; Delmar O. Co. *v.* Bartlett, 62 W. Va. 700, 59 S. E. 634. See infra, "Negligence," 955-45.

Timber.—As to proper placing of in mine. Jacobs *v.* Coal Co., 165 Ill. App. 444.

Conditions making timbering necessary. Bird *v.* Co., 2 Cal. App. 674, 84 P. 256.

Whether vein of sufficient value or promise to justify working or development (Wilson *v.* Co., 142 Ia. 521, 119 N. W. 604; Noyes *v.* Clifford, 37 Mont. 138, 94 P. 842); whether ground worth locating as claim. Anderson *v.* U. S., 152 Fed. 87, 81 C. C. A. 311. But see Lynch *v.* U. S., 138 Fed. 535, 71 C. C. A. 59.

Relative safety of methods used in hoisting cars in a mine shaft, in a personal injury action based on negligence, is for jury. Johnson *v.* Co., 28 Utah 46, 76 P. 1089.

Manner of exploding. — Stevenson *v.* Avery, etc. Co., 152 Ill. App. 565.

That shale is a "mineral."—McCombs *v.* Stephenson, 154 Ala. 109, 44 S. 867.

Cost of drilling gas-well.—Witnesses experienced in drilling in same neighborhood, where conditions same, may give opinions. Fredonia G. Co. *v.* Bailey, 77 Kan. 296, 94 P. 258.

592-42 Sloss-S. S. & I. Co. *v.* Green, 159 Ala. 178, 49 S. 301, sufficiency of inspection. *Contra,* when competency of such person is in issue, as in an action for injuries due to his negligence. Purkey *v.* Co., 57 W. Va. 595, 50 S. E. 755. And see supra, 527-38.

592-43 Safety of roof of mine may be shown by testimony of experienced miner who tested it. Cotton *v.* Co., 147 Ia. 427, 123 N. W. 381.

Avoidance of gas explosion.—Sloss-S. S. & I. Co. *v.* Sharp, 156 Ala. 284, 47 S. 279.

592-44 American T. & L. Co. *v.* Co., 111 Md. 504, 75 A. 341.

Method of preventing water entering the ash ejector pipe. Reid *v.* Co. (Me.), 90 A. 609.

That miscalculation of distance on sea is more likely than on land. Laupahoehoe S. Co. *v.* Co., 11 Haw. 261.

593-46 Possibility of averting collision—opinion competent. Lambert *v.* Co., 37 Wash. 113, 79 P. 608.

Cause of collision.—Where a vessel collided with a drawbridge while passing through, testimony of expert observer she was proceeding safely until order for full speed given and would have avoided collision but for it, admissible. Multnomah Co. *v.* Co., 49 Or. 204, 89 P. 389.

593-47 Carscallen *v.* Co., 15 Ida. 444, 98 P. 622. See Ty. *v.* Cotton, 17 Haw. 618.

594-51 Loading stevedores.—Tweedie T. Co. *v.* Craig, 159 App. Div. 192, 144 N. Y. S. 64.

594-54 Expert in photography may testify as to what the plate showed regarding overlapping signature and scroll while he was taking enlarged photograph, although not a handwriting expert. Wenchell *v.* Stevens, 30 Pa. Super. 527. See vol. 9, p. 780, n. 26.

Where camera placed when picture taken—not subject for opinion. McFeat *v.* R. Co., 5 Penne. (Del.) 52, 62 A. 898.

594-55 Landers *v.* R. Co., 156 Mo. App. 580, 137 S. W. 605; Harrison *v.* R. Co., 195 N. Y. 86, 87 N. E. 802; St. Louis, etc. Co. *v.* Neef (Tex. Civ.), 138 S. W. 1168; South & W. R. Co. *v.* Mann, 108 Va. 557, 62 S. E. 354 (to establish center line of double track and determine width of land necessary to construct and maintain such track).

Damage caused by improper storing or packing of goods in car. Tex. & P. R. Co. *v.* Warner, 42 Tex. Civ. 280, 93 S. W. 489.

Method of loading logs on car.—Louisville & N. R. Co. *v.* Morton, 28 Ky. L. R. 355, 89 S. W. 243.

Ratio of difference in cost of handling local shipments as compared with interstate shipments, may be shown by experts. Southern P. Co. *v.* Bartine, 170 Fed. 725.

595-56 Dolge *v.* R. Co., 107 Minn. 242, 119 N. W. 1066; Gulf, etc. R. Co. *v.* Belton, 57 Tex. Civ. 460, 122 S. W. 413 (feasibility of grade crossing). See

Guinn *v.* R. Co., 125 Ia. 301, 101 N. W. 94 (whether cutting ditches necessary for construction of roadbed); Smith *v.* Fordyee, 190 Mo. 1, 88 S. W. 679 (purpose of derailing-switch and where it should be placed); Wilson *v.* R. Co., 29 R. I. 146, 69 A. 364 (safety of customary method of placing posts); Gulf, etc. R. Co. *v.* Harbison (Tex. Civ.), 88 S. W. 452; Mo., K. & T. R. Co. *v.* Huddleston (Tex. Civ.), 81 S. W. 64 (capacity of culvert—witness must know its dimensions).

That track defective and unsafe.—Northern Ala. R. Co. *v.* Shea, 142 Ala. 119, 37 S. 796.

Method of constructing switch.—Witness of experience in track department, competent. Buckalew *v.* R. Co., 107 Mo. App. 575, 81 S. W. 1176.

Switch frogs.—Whether dangerous when unblocked and whether blocked frogs are common safety devices. Schroeder *v.* R. Co., 128 Ia. 365, 103 N. W. 985.

Comparative life and strength of timbers in a trestle. Bowen *v.* Co., 3 Cal. App. 312, 84 P. 1010. *Comp.* supra, 560-42 and 562-50.

Effect of vibrations caused by running trains over a trestle is matter for expert testimony. Bowen *v.* Co., 3 Cal. App. 312, 84 P. 1010.

Feasibility of proposed change in location and curvature of tracks as affected by safety and convenience of public and cost and safety of operating railroad, subject for opinions of experts. Atlantic & B. R. Co. *v.* Mayor, 128 Ga. 293, 57 S. E. 493.

595-57 Stewart *v.* R. Co., 136 Ky. 717, 125 S. W. 154.

595-58 Missouri etc. R. Co. *v.* Hagler (Tex. Civ.), 112 S. W. 783.

595-61 See supra, 564-61.

595-62 That condition of a crossing reasonably necessary for improvement of road and usefulness of highway not necessarily impaired, are conclusions which cannot be testified to by roadmaster. Illinois S. R. Co. *v.* Hayer, 225 Ill. 613, 80 N. E. 316.

Whether railway street crossing is dangerous, opinion inadmissible. Tiffin *v.* R. Co., 78 Ark. 55, 93 S. W. 564.

596-65 Yeager *v.* R. Co., 148 Ia. 231, 123 N. W. 974 (duty of engineers). See Bonn *v.* R. Co. (Tex. Civ.), 82 S. W. 808 (employe could not gain knowledge of rails like one in question by working around shops, inadmissible conclusion).

Physical qualifications of fireman—whether certain injuries rendered person not acceptable according to standard of the company—physician employed by it and familiar with requirements, competent. Chicago, etc. R. Co. *v.* Hiltibrand, 44 Tex. Civ. 614, 99 S. W. 707.

Duties of employe.—See infra, 699-7.

Necessity for rules to prevent accidents to men engaged in particular duties—opinions of experts, incompetent where issue for jury. Lane *v.* R. Co., 93 App. Div. 40, 86 N. Y. S. 947; McLaughlin *v.* R. Co., 111 App. Div. 254, 97 N. Y. S. 719. But a person experienced in switch yards may testify as to reasonableness of rule relating to switching used in some yards. Freemont *v.* R. Co., 111 App. Div. 831, 98 N. Y. S. 179.

597-66 Alabama G. S. R. Co. *v.* Vail, 155 Ala. 382, 46 S. 587, number of men required to handle timbers covered with ice.

597-67 Reeves *v.* R. Co., 24 S. D. 84, 123 N. W. 498; St. Louis S. R. Co. *v.* Boyd, 56 Tex. Civ. 282, 119 S. W. 1154.

Proper method of loading car wheels on flat car may be shown by experts. Meily *v.* R. Co., 215 Mo. 567, 114 S. W. 1013.

598-68 Wabash R. Co. *v.* U. S., 168 Fed. 1, 93 C. C. A. 393 (condition of car coupler and its operation); Jackson L. Co. *v.* Cunningham, 141 Ala. 206, 37 S. 445 (weight of locomotive); St. Louis, etc. R. Co. *v.* Noland, 75 Kan. 691, 90 P. 273 (whether properly equipped locomotive would set fires); Maryland, etc. R. Co. *v.* Brown, 109 Md. 304, 71 A. 1005; Atchison, etc. R. Co. *v.* Bryant (Tex. Civ.), 162 S. W. 400; Lind *v.* Reeves (Tex. Civ.), 154 S. W. 262; Morgan *v.* R. Co., 50 Tex. Civ. 420, 110 S. W. 978 (emission of sparks, best method of preventing).

Sparks and spark arrester.—St. Louis, etc. R. Co. *v.* Parks, 40 Tex. Civ. 480, 90 S. W. 343, sufficiency of arrester. See vol. 10, p. 546. Experts may testify as to condition of sparks thrown a specified distance, and whether live sparks would have been carried such distance if engine in proper order. Babbitt *v.* R. Co., 108 App. Div. 74, 95 N. Y. S. 429. Distance live sparks may be carried. Potter *v.* R. Co., 157 Mich. 216, 121 N. W. 808.

598-69 Grand Trunk W. R. Co. *v.* Lindsay, 201 Fed. 836, 120 C. C. A. 166; Texas & N. O. R. Co. *v.* McCoy, 54 Tex. Civ. 278, 117 S. W. 446 (danger of making coupling). See Hitchner W. P. Co. *v.* R. Co., 158 Fed. 1011.

Relative merits of tell-tales cannot be directly testified to, although witness may state kinds in general use. Whitehead *v.* R. Co., 103 Minn. 13, 114 N. W. 254, 467. But expert may state what good railroading required as to placing of tell-tales before overhead bridges. Pittsburg, etc. R. Co. *v.* Lamphere, 137 Fed. 20, 69 C. C. A. 542.

Method of inspection of handholds and what would be disclosed thereby may be shown by expert car inspector. San Antonio, etc. R. Co. *v.* Beauchamp, 54 Tex. Civ. 123, 116 S. W. 1163.

599-70 Chicago, etc. R. Co. *v.* Hale, 176 Fed. 71, 99 C. C. A. 379; Sloss-S. etc. Co. *v.* Reid (Ala.), 64 S. 334; Brown *v.* R. Co., 171 Ala. 310, 55 S. 107; Kansas City S. R. Co. *v.* Leslie (Ark.), 167 S. W. 83; Temple *v.* Gilbert, 86 Conn. 335, 85 A. 380; Baker *v.* R. Co., 161 Ill. App. 521; McGrew *v.* R. Co., 142 Ill. App. 210; Pittsburg R. Co. *v.* Nicholas, 165 Ind. 679, 76 N. E. 522; Mitchell *v.* R. Co., 138 Ia. 283, 114 N. W. 622; Matthews *v.* R. Co., 130 Ky. 551, 113 S. W. 459 (best means of extricating person under car wheels); Farmer *v.* R. Co. (Mo. App.), 161 S. W. 327; Stewart *v.* R. Co., 141 N. C. 253, 53 S. E. 877 (what constitutes a train crew generally, and what is proper crew for light engine); Texas & N. O. R. Co. *v.* Cook (Tex. Civ.), 167 S. W. 158; International, etc. R. Co. *v.* Brice (Tex. Civ.), 126 S. W. 613 (engineer's control of engine); Galveston, etc. R. Co. *v.* Mitchell, 48 Tex. Civ. 381, 107 S. W. 374 (whether necessary and customary to use steam in starting locomotive under certain circumstances); St. Louis, etc. R. Co. *v.* Rogers, 49 Tex. Civ. 304, 108 S. W. 1027 (whether lumber properly loaded would shift during certain trip); Gulf, etc. R. Co. *v.* Winter, 38 Tex. Civ. 8, 85 S. W. 477 (curve not such as to require that approaching trains be flagged); New York, etc. R. Co. *v.* Wilson, 109 Va. 754, 64 S. E. 1060 (usual danger signals and meaning).

See Meehan *v.* R. Co., 13 N. D. 432, 101 N. W. 183; Chicago, etc. R. Co. *v.* Cain, 37 Tex. Civ. 531, 84 S. W. 682. But see Denver, etc. R. Co. *v.* Vitello, 34 Colo. 50, 81 P. 766; Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29. See also vol. 10, p. 546, n. 61.

Whether injury could have occurred had certain appliances been on the car. Atlantic, etc. R. Co. *v.* Crosby, 53 Fla. 400, 43 S. 318.

Whether engine handled properly—engineer's opinion inadmissible. Birmingham, etc. Co. *v.* Martin, 148 Ala. 8, 42 S. 618. See Bryan P. Co. *v.* R. Co. (Tex. Civ.), 110 S. W. 99.

But experienced engineer may testify to proper method of handling engine when passing combustible material. St. Louis, etc. R. Co. *v.* Dawson, 77 Ark. 434, 92 S. W. 27.

How far headlight could be seen. Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 S. 702. *Comp.* St. Louis, etc. R. Co. *v.* Shannon, 76 Ark. 166, 88 S. W. 851.

Propriety of train dispatcher's order cannot be testified to by expert unless it is shown he knew of conditions which existed. Welch *v.* Co., 96 Mich. 211, 104 N. W. 894.

599-73 Broom *v.* R. Co., 95 S. C. 368, 80 S. E. 616. Expert may state condition of wreck but not cause thereof. Nickles *v.* R., 74 S. C. 102, 54 S. E. 255. He may testify he examined wreck and could find no cause. So. Kan. R. Co. *v.* Sage, 43 Tex. Civ. 38, 94 S. W. 1074.

599-74 McGrew *v.* R. Co., 142 Ill. App. 210. See Woodstock I. Wks. *v.* Kline, 149 Ala. 391, 43 S. 362.

600-75 Kansas City S. R. Co. *v.* Henrie, 87 Ark. 443, 112 S. W. 967 (passing each other by properly constructed drawheads); Huggins *v.* R. Co., 148 Ala. 153, 41 S. 856 (coupling). Switchmen of experience competent to state force used in coupling, not unusual. Mullen *v.* R. Co. (Tex. Civ.), 92 S. W. 1000.

600-76 See Southern, etc. R. Co. *v.* Swinney, 149 Ala. 405, 42 S. 808; Goodwyn *v.* R. Co., 2 Ga. App. 470, 58 S. E. 688; St. Louis, etc. R. Co. *v.* Smith (Tex. Civ.), 90 S. W. 926.

Effect of split switch on car passing over—opinion admissible Place *v.* R. Co., 80 Vt. 196, 67 A. 545.

600-77 Fuhry *v.* R. Co., 239 Ill. 548, 88 N. E. 221. *Comp.* infra, 708-31.

Witness who did not see the train cannot give opinions based on appearance of wreck. Cook *v.* Co., 41 Wash. 314, 83 P. 419.

600-78 Balt. & O. R. Co. *v.* Connell, 137 Fed. 8, 69 C. C. A. 570; Northern A. R. Co. *v.* Shea, 142 Ala. 119, 37 S. 796 (certain speed dangerous at certain place); St. Louis, etc. R. Co. *v.* Fithian, 106 Ark. 491, 155 S. W. 88; Canham *v.* R. I. Co., 35 R. I. 177, 85 A. 1050; Halverson *v.* Co., 35 Wash. 600, 77 P. 1058 (experienced motorman familiar with route may state what is safe speed at particular curve). See also vol. 12, p. 137. *Contra,* Ford *v.* R., 30 Ky. L. R. 644, 99 S. W. 355, what would be reasonably safe rate of speed for car under given conditions.

Usual time for transportation of freight between given points may be shown by experienced shipper. Missouri, etc. R. Co. *v.* Scoggin, 57 Tex. Civ. 349, 123 S. W. 229.

Speed of automobile may be testified to by experienced motorman. Hough *v.* Co., 146 Mo. App. 58, 123 S. W. 83.

600-79 Southern R. Co. *v.* Gullatt, 158 Ala. 502, 48 S. 472; Birmingham, etc. R. Co. *v.* Randle, 149 Ala. 539, 43 S. 355; Wallace *v.* Co., 145 Ala. 682, 40 S. 89 (street car); Central, etc. R. Co. *v.* McClifford, 120 Ga. 90, 47 S. E. 590; Indianapolis St. R. Co. *v.* Seerley, 35 Ind. App. 467, 72 N. E. 169, 1034 (street car); Bruggeman *v.* R. Co., 147 Ia. 187, 123 N. W. 1007; Louisville & N. R. Co. *v.* Burch's Admr., 155 Ky. 731, 160 S. W. 252; So. Covington, etc. R. Co. *v.* Weber, 26 Ky. L. R. 922, 82 S. W. 986; Bladecka *v.* Co., 155 Mich. 253, 118 N. W. 963; Young *v.* R. Co., 227 Mo. 307, 127 S. W. 19; Lynch *v.* R. Co., 208 Mo. 1, 106 S. W. 68; Impkamp *v.* Co., 108 Mo. App. 655, 84 S. W. 119; Meng *v.* R. Co., 108 Mo. App. 553, 84 S. W. 213; Zelenka *v.* Co., 82 Neb. 511, 118 N. W. 103; Draper *v.* R. Co., 161 N. C. 307, 77 S. E. 231; Atchison, etc. R. Co. *v.* Baker, 37 Okla. 48, 130 P. 577; Galveston, etc. R. Co *v.* Murray (Tex. Civ.), 99 S. W 144, Northern Tex. Tr. Co. *v.* Caldwell, 44 Tex. Civ. 374, 99 S. W. 869 (whether street car can stop in much shorter distance than locomotive or train); Wise T. Co. *v.* McCormick, 107 Va. 376, 58 S. E. 584; So. R. Co. *v.* Baptist, 114 Va. 723, 77 S. E. 477.

See Western R. *v.* Stone, 145 Ala. 663, 39 S. 723 (whether engineer had time to make effort to stop—mere conclusion); Dallas, etc. R. Co. *v.* English, 42 Tex. Civ. 393, 93 S. W. 1096. See vol 11, p. 839, 840 and supplement.

Whether car was stopped as soon as possible may not be asked of motorman. He should be asked what he did to stop it and whether what he did was all that could have been done. Birmingham, etc. R. Co. *v.* Randle, 149 Ala. 539, 43 S. 355. See vol. 12, p. 139, n. 9. But see Macon, etc. R. Co. *v.* Stewart, 125 Ga. 88, 54 S. E. 197, holding inadmissible as a conclusion statement of engineer he could have done no more than he did. And to same effect, Central, etc. R. Co. *v.* Bagley, 121 Ga. 781, 49 S. E. 780; Johnson *v.* Center, 4 Cal. App. 616, 88 P. 727 (conductor cannot state whether engineer took every possible precaution to stop train and prevent accident). *Comp.* 670-15 and 16. Engineer may not testify he nor any human agency could have stopped train sooner than it was stopped. Bruggeman *v.* R. Co., 147 Ia. 187, 123 N. W. 1007.

Use of most effective means—motorman competent. Birmingham, etc. Co. *v.* Hayes, 153 Ala. 178, 44 S. 1032. See infra, 640-34.

Non-expert is incompetent to express opinion on question. Boring *v.* R. Co., 194 Mo. 541, 92 S. W. 655.

Rule applied to automobile. Scholl *v.* Grayson, 147 Mo. App. 652, 127 S. W. 415.

Form of hypothetical question.—Should embrace all important facts. Heinzle *v.* R. Co., 182 Mo. 528, 81 S. W. 848.

601-80 Houston, etc. R. Co. *v.* Schuttee (Tex. Civ.), 91 S. W. 806. *Comp.* San Antonio, etc. R. Co. *v.* Jackson, 38 Tex. Civ. 201, 85 S. W. 445 (non-expert incompetent. *Contra,* Dilburn *v.* R. Co., 156 Ala. 228, 47 S. 210; Seaboard, etc. R. Co. *v.* Bradley, 125 Ga. 193, 54 S. E. 69.

Cause of delay in movement of train may be shown. Missouri, etc. R. Co. *v.* Howell (Tex. Civ.), 126 S. W. 899.

601-81 Currie *v.* R. Co., 81 Conn. 383, 71 A. 356; Kinlen *v.* R. Co., 216 Mo. 145, 115 S. W. 523; Batsch *v.* R. Co., 143 Mo. App. 58, 122 S. W. 371 (stopping car); Ellis *v.* R. Co., 234 Mo. 657, 138 S. W. 23; Yergy *v.* R. Co., 39 Mont. 213, 102 P. 310; Fisher *v.* Co., 141 Wis. 515, 124 N. W. 1005.

Stopping of street cars.—Opinion evidence admissible to show distance within which street car can be stopped. Lyons *v.* R. Co., 253 Mo. 143, 161 S. W. 726.

Distance within which particular car could be stopped—expert must have had experience with similar cars. Columbus R. Co. *v.* Connor, 6 O. C. C. (N. S.) 361. But see supra, 600-79; also vol. 11, pp. 839, 840 and supplement.

Car-brakes.—See Regan *v.* R. Co., 115 App. Div. 705, 101 N. Y. S. 213.

601-82 Regan *v.* R. Co., 115 App. Div. 705, 101 N. Y. S. 213.

Necessity of assisting passenger to alight—opinion of conductor inadmissible. San Antonio Tr. Co. *v.* Flory, 45 Tex. Civ. 233, 100 S. W. 200.

Riding on inner car-step—whether safe position is question for jury, where facts all before jury. Allen *v.* Co., 183 Mo. 411, 81 S. W. 1142.

Expert may testify concerning allotments of land as shown by ancient records. Shinnecock Hills, etc. R. Co. *v.* Aldrich, 132 App. Div. 118, 116 N. Y. S. 532.

601-84 Mayor, etc. *v.* Co. (N. J.), 87 A. 639. See Goodson *v.* Fitzgerald, 40 Tex. Civ. 619, 90 S. W. 898; Camp *v.* League (Tex. Civ.), 92 S. W. 1062 (whether property described by field notes is embraced within mètes and bounds given in a deed examined by witness—opinion admissible).

"While surveyors may be asked, as expert witnesses, questions upon matters with which they are peculiarly acquainted, and which cannot be made known to the jury without such testimony, yet they cannot testify as to conclusions of fact or conclusions of law, since such matters are for the determination of the jury or the court, as the case may be." Virginia Coal & Iron Co. *v.* Ison, 114 Va. 144, 75 S. E. 782.

True location of lands and boundaries, testimony of surveyors admissible. Chappelle *v.* Roberts, 150 Ala. 457, 43 S. 489. Where engineer made necessary measurements, his testimony as to location of boundary line is a statement of fact and not opinion. Brundred *v.* McLaughlin, 213 Pa. 115, 62 A. 565.

602-87 But see Clarke *v.* Case, 144 Mich. 148, 107 N. W. 893.

Comparative age of marks on trees may be shown by expert surveyor. Cochran *v.* Casey (Tex. Civ.), 128 S. W. 1145.

602-89 Usual method of proceeding in repairing telephone wires under conditions imposing unusual strain on poles may be shown by expert testimony on issue of negligence. Clark *v.* Co., 146 Ia. 428, 123 N. W. 327.

602-90 Waterbury Co. *v.* Reed, 41 App. Cas. (D. C.) 256. Comparisons by expert witnesses are admissible to show infringement of copyright, but only as aids to court. Encyc. Brit. Co. *v.* Assn., 130 Fed. 460.

603-92 Los Angeles *v.* Hunter, 156 Cal. 603, 105 P. 755, manner of creation of river. See Gulf, etc. Co. *v.* Harbison (Tex. Civ.), 88 S. W. 452.

603-93 But see Mallory *v.* Brademyer, 76 Ark. 538, 89 S. W. 551.

603-95 Hot Springs L. & M. Co. *v.* Revercomb, 110 Va. 240, 65 S. E. 557, whether stream floatable.

Quantity of water flowing in creek. Gallatin *v.* Irr. Co., 163 Cal. 405, 126 P. 864.

Character of soil—as permitting percolation of water,—civil engineer, competent. Flint *v.* Co., 73 N. H. 483, 62 A. 788.

Cause of overflow.—Gurley *v.* R. Co. (Tex. Civ.), 124 S. W. 502.

603-97 Van Wyk *v.* P., 45 Colo. 1, 99 P. 1009.

Temperature.—Expert allowed to express opinion as to standard temperature of offices. Whitney *v.* Aronson, 21 Cal. App. 9, 130 P. 700.

603-98 Pratt *v.* Dunlap, 85 Conn. 180, 82 A. 195. *Comp.* Laupahoehoe S. Co. *v.* Co., 11 Haw. 261.

Translating.—In John II Estate *v.* Judd, 13 Haw. 319, expert in Hawaiian language permitted to translate words used in will in that language.

Railroad rules in ordinary language—explanation by expert, improper. Stewart *v.* R. Co., 141 N. C. 253, 53 S. E. 877.

604-99 Baer *v.* Co., 159 Ala. 491, 49 S. 92; McCombs *v.* Stephenson, 154 Ala. 109, 44 S. 867 (term "minerals" in conveyance); Henderson-B. L. Co. *v.* Cook, 149 Ala. 226, 42 S. 838 ("surfacing" in railroad construction); Law *v.* Co., 165 Cal. 394, 132 P. 590; Garrity *v.* Catholic Order, 148 Ill. App. 189; Turlock, etc. Co. *v.* Pac. etc. Co., 71 Wash. 128, 127 P. 842.

"Shoring, bracing and trenching."—Alta P. Mill Co. *v.* Garland, 167 Cal. 179, 138 P. 738.

Telegraphic code.—Meaning of cipher code, explained. Allen M. & C. Co. *v.* Bk., 129 Ga. 748, 59 S. E. 813.

Indictment.—Testimony of expert ad-

missible to explain meaning of terms of art in indictment. S. *v.* Meyers, 120 La. 127, 44 S. 1008.

604-3 See National F. Ins. Co. *v.* Hauberg, 215 Ill. 378, 74 N. E. 377.

605-4 Birmingham, etc. Co. *v.* O'Brien (Ala.), 64 S. 343; Goggin *v.* Chicago, 162 Ill. App. 368; Ditton *v.* Hart, 175 Ind. 181, 93 N. E. 961; Porter *v.* Hetherington, 172 Mo. App. 502, 158 S. W. 469; Trogdon *v.* Sheep Co. (Mont.), 139 P. 792; McCawn *v.* Muldrow, 91 S. C. 525, 74 S. E. 386.

Opinion may be based upon personal knowledge or hypothetical case. Hanley *v.* R. Co., 59 W. Va. 419, 53 S. E. 625.

No error in sustaining objection to a question calling for an opinion based on a casual acquaintance or observation. McGhee *v.* S., 178 Ala. 4, 59 S. 573.

605-5 Marx *v.* Amusement Co., 211 N. Y. 33, 105 N. E. 97.

Where facts not embraced in hypothetical questions are considered by witness, answer stricken out. Cobb *v.* Co., 191 N. Y. 475, 84 N. E. 395.

606-7 Fidelity & C. Co. *v.* Meyer, 106 Ark. 91, 152 S. W. 995; Missouri, etc. R. Co. *v.* Graves, 57 Tex. Civ. 395, 122 S. W. 458.

606-8 Feuchtwanger *v.* Malting Co., 187 Fed. 713, 109 C. C. A. 461, *rev.* 169 Fed. 983. See Colo. F., etc. Co. *v.* York, 38 Colo. 239, 88 P. 181; Chicago U. T. Co. *v.* Giese, 229 Ill. 260, 83 N. E. 232; Federal B. Co. *v.* Reeves, 73 Kan. 107, 84 P. 560; Cobb *v.* Co., 191 N. Y. 475, 84 N. E. 395; Houston, etc. R. Co. *v.* Tisdale (Tex. Civ.), 109 S. W. 413; S. *v.* Rutledge, 37 Wash. 523, 79 P. 1123.

Hypothetical question based on hearsay. See infra, 621-53.

Exception made where scientific experiments made by different persons acting together and each has testified to result of examination he made. Buck *v.* Brady, 110 Md. 568, 73 A. 277.

606-9 So. Bell Tel. Co. *v.* Covington, 139 Ga. 566, 77 S. E. 382; S. *v.* Reilly, 25 N. D. 339, 141 N. W. 720.

Testimony of other experts as to symptoms, a proper basis for opinion as to cause. Louisville R. Co. *v.* Oppenheimer, 31 Ky. L. R. 1141, 104 S. W. 720.

607-10 Pecos, etc. Co. *v.* Coffman (Tex. Civ.), 160 S. W. 145.

607-14 Parrish *v.* S., 139 Ala. 16, 36 S. 1012; Dick *v.* Trust Co. (Conn.), 89 A. 907; Cunniff *v.* Cunniff, 255 Ill. 407, 99 N. E. 654; Crozier *v.* R. Co., 106 Minn. 77, 118 N. W. 256. *Contra*, Davis *v.* S., 54 Tex. Cr. 236, 114 S. W. 366. See Lancaster *v.* Exr., 27 Ky. L. R. 1127, 87 S. W. 1137. But see Kelly *v.* Wills, 116 App. Div. 758, 102 N. Y. S. 223.

607-15 S. *v.* Burno, 158 N. C. 632, 74 S. E. 462; S. *v.* Stewart, 156 N. C. 636, 72 S. E. 193; Streight *v.* S., 62 Tex. Cr. 453, 138 S. W. 742; Britton *v.* Oil Co. (W. Va.), 81 S. E. 525. See Yates *v.* S., 127 Ga. 813, 56 S. E. 1017; Chicago L. R. Co. *v.* Shreve, 226 Ill. 530, 80 N. E. 1049.

Opinion of intelligence of party excluded because of insufficient opportunity to make observations. P. *v.* Luis, 158 Cal. 185, 110 P. 580.

A physician was allowed to state what the person's general health was, the ground of the objection being that, while he saw him socially very frequently, he rarely attended him professionally. "We think there was sufficient opportunity for observation upon which to found the opinion expressed. An analogous case is found in Jones *v.* Collins, 94 Md. 413, 51 Atl. 398, where a physician who knew a testator well, but had never attended him, was allowed to give his opinion upon his mental capacity, without stating the facts on which his opinion was formed." Standard Acc. & Life Ins. Co. *v.* Wood, 116 Md. 575, 82 A. 702.

Experiments and tests, proper bases for expert testimony. See C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127; Hocking *v.* Co., 131 Wis. 532, 111 N. W. 685.

Inspection of wreck does not qualify expert to testify to speed at which train was run when wrecked. Neesley *v.* Co., 35 Utah 259, 99 P. 1067.

608-17 Woods *v.* S. (Ala.), 65 S. 342; P. *v.* Delhantie, 163 Cal. 461, 125 P. 1066; Colesar *v.* Coal Co., 255 Ill. 532, 99 N. E. 709; Elward *v.* R. Co., 161 Ill. App. 630; Czerniak *v.* Chicago, 161 Ill. App. 360; Chicago *v.* Didier, 131 Ill. App. 406; Chicago *v.* Saldman, 129 Ill. App. 282 (hypothetical statement of facts alone); Boehm *v.* Detroit, 141 Mich. 277, 104 N. W. 626 (examination alone); Lyons *v.* R. Co., 253 Mo. 143, 161 S. W. 726; International, etc. Co. *v.* Williams (Tex. Civ.), 160 S. W. 639. See Elgin, etc. Co. *v.* Wilson, 217 Ill. 47, 75 N. E. 436; Chicago U. T. *v.*

Hampe, 130 Ill. App. 596; Chicago & A. R. Co. *v.* Johnson, 128 Ill. App. 20; Travelers' Ins. Co. *v.* Bingham, 32 Ky. L. R. 233, 105 S. W. 894; Louisville R. Co. *v.* Oppenheimer, 31 Ky. L. R. 1141, 104 S. W. 720; Gasink *v.* New Ulm, 92 Minn. 52, 99 N. W. 624; Pope *v.* S. (Miss.), 62 S. 10; Patterson *v.* Tr. Co. (Mo.), 163 S. W. 955; Porter *v.* Hetherington, 172 Mo. App. 502, 158 S. W. 469; Holden *v.* R. Co., 108 Mo. App. 665, 84 S. W. 133; Goken *v.* Dallugge, 72 Neb. 16, 99 N. W. 818; McLoughlin *v.* Brick Co., 160 App. Div. 115, 145 N. Y. S. 199; Bach *v.* R. Co., 109 App. Div. 654, 96 N. Y. S. 321; Hildebrand *v.* Artisans, 50 Or. 159, 91 P. 542; Modern Brotherhood, etc. *v.* Jordan (Tex. Civ.), 167 S. W. 794; Houston, etc. R. Co. *v.* Rutland, 45 Tex. Civ. 621, 101 S. W. 529. But see Ottawa *v.* Green, 72 Kan. 214, 83 P. 616; Leahy *v.* Co., 117 App. Div. 316, 102 N. Y. S. 78.

Physician may give his opinion as to mental capacity from his personal observation though he has not attended the person professionally. Standard Acc. & Life Ins. Co. *v.* Wood, 116 Md. 575, 82 A. 702.

608-18 Arcade Co. *v.* Boxwell, 41 App. Cas. (D. C.) 213; Elgin, etc. Co. *v.* Wilson, 217 Ill. 47, 75 N. E. 436; Indianapolis, etc. Co. *v.* Reeder, 37 Ind. App. 262, 76 N. E. 816; C. *v.* Sinclair, 195 Mass. 100, 80 N. E. 799; Walters *v.* Rock, 18 N. D. 45, 115 N. W. 511; Stegner *v.* Brotherhood, 24 S. D. 371, 123 N. W. 842; Paris, etc. R. Co. *v.* Flanders (Tex. Civ.), 165 S. W. 99. See Detrich *v.* R. Co., 125 Mo. App. 608, 102 S. W. 1044; Cooper *v.* R. Co., 163 N. C. 150, 79 S. E. 418.

History of case given expert by another physician will not base an opinion by him. Horney *v.* R. Co., 165 Ill. App. 547.

Physicians may testify to facts found by his own observations, but not from statements of patient. Galveston, H. & S. A. R. Co. *v.* Grenig (Tex. Civ.), 142 S. W. 135.

Opinion based on hearsay statements of injured person, incompetent. Chicago U. T. Co. *v.* Giese, 229 Ill. 260, 83 N. E. 232; Ill. C. R. Co. *v.* McCollum, 130 Ill. App. 267; Bates M. Co. *v.* Crowley, 115 Ill. App. 540; Federal B. Co. *v.* Reeves, 73 Kan. 107, 84 P. 560, (opinion cannot be based partly on examination and partly on statements of patient which do not come within rule admitting declarations of existing pain and physical condition); Gibler *v.* R. Co., 129 Mo. App. 93, 107 S. W. 1021. But see Eckels *v.* Muttschall, 230 Ill. 462, 82 N. E. 872; Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23; Chicago C. R. Co. *v.* Shreve, 226 Ill. 530, 80 N. E. 1049; Stevens *v.* P., 215 Ill. 593, 74 N. E. 786; Travelers' Ins. Co. *v.* Bingham, 32 Ky. L. R. 233, 105 S. W. 894. Opinion based on statements of patient as to past symptoms, inadmissible. Holloway *v.* Kansas City, 184 Mo. 19, 82 S. W. 89: Schissler *v.* S., 122 Wis. 365, 99 N. W. 593.

609-20 Nau *v.* Oil Co., 154 Ill. App. 421; Frick *v.* R. Co., 154 Ill. App. 277; McCullough *v.* R. Co., 154 Ill. App. 208. See Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23; Chicago C. R. Co. *v.* Mauger, 128 Ill. App. 512 (opinion must be based on objective and not subjective symptoms); Chicago C. R. Co. *v.* Shreve, 128 Ill. App. 462; Kath *v.* R. Co., 121 Wis. 503, 99 N. W. 217.

Opinion based on self-serving statements is inadmissible. Coburn *v.* R. Co., 149 Ill. App. 132, *aff.* 243 Ill. 448, 90 N. E. 741.

Statements of accused long after commission of offense, not basis for expert testimony as to his sanity. P. *v.* Hill, 195 N. Y. 16, 87 N. E. 813.

Flinching.—Where examination merely for purpose of getting testimony, physician cannot state injured person flinched when touched. Comstock *v.* Twp., 137 Mich. 541, 100 N. W. 788.

609-21 C. *v.* Sinclair, 195 Mass. 100, 80 N. E. 799.

610-23 Weibert *v.* Hanan, 202 N. Y. 328, 95 N. E. 688, *rev.* 136 App. Div. 388, 121 N. Y. S. 35; P. *v.* Faber, 199 N. Y. 256, 92 N. E. 674; P. *v.* Woodbury, 67 Misc. 481, 123 N. Y. S. 592; Marshall *v.* Thomas, 31 O. C. C. 363; Manila *v.* Rodriguez, 7 Phil. Isl. 292; Bryan P. Co. *v.* R. Co. (Tex. Civ.), 110 S. W. 99; Hanson *v.* R. Co. (Wis.), 146 N. W. 524.

Contra.—Physician who has examined person may testify as to his sanity without detailing facts on which conclusion is based. These may be elicited on cross-examination. In re Martin's Will, 82 Misc. 574, 144 N. Y. S. 174.

When not required.—John *v.* Schaefer Jr. & Co. *v.* Ely, 84 Conn. 501, 80 A. 775.

Expert must state facts on which opinion rests if he does not testify wholly

with reference to others' testimony. Fowlie *v.* Co., 82 Vt. 230, 72 A. 989.

611-24 Turner *v.* Mining Co., 156 Ill. App. 60; Hanrahan *v.* City, 114 Md. 517, 80 A. 312; Cunningham *v.* R. Co., 156 Mo. App. 617, 137 S. W. 600.

Explanation of opinion may be made in discretion of court. C. *v.* Parsons, 195 Mass. 560, 81 N. E. 291.

A question objected to in redirect examination was a part of a question which the defendant's counsel had asked in cross-examination in endeavoring to establish their claim with reference to the assumption of risk. "Having itself opened up the matter, and, in substance, asked the very question under consideration, the defendant cannot complain because, it not having got the answer it wanted, the court permitted the plaintiff in redirect examination to inquire on the same point." Barney *v.* Oats Co., 85 Vt. 372, 82 A. 113.

Witness cannot be compelled to qualify himself to give opinion, but if after so doing he reduces his opinion to writing, he can be compelled to refresh his recollection by referring to the same. Stevens *v.* Worcester, 196 Mass. 45, 81 N. E. 907. See Scofield *v.* Little, 2 Ga. App. 286, 58 S. E. 666; Barrus *v.* Phaneuf, 166 Mass. 123, 44 N. E. 141, 32 L. R. A. 619; C. *v.* Cochran, 31 Pa. C. C. 344. See also vol. 14, p. 574, n. 4.

612-27 See Chicago C. R. Co. *v.* Sugar, 117 Ill. App. 578.

612-28 Louisville, etc. R. Co. *v.* Lee, 154 Ky. 226, 157 S. W. 60.

Allowed: "You may state how this dust must be handled, or what must be its state when it explodes, basing your answer upon your experience and investigation of this very subject. The witness said, 'You mean the state or the condition?' and the examiner added, 'Yes, the entire condition that causes the explosion.'" Barney *v.* Oats Co., 85 Vt. 372, 82 A. 113.

The question should call for the opinion of the witness at the time he is testifying. Costello *v.* S., 176 Ala. 1, 58 S. 202.

A lengthy hypothesis concluded with this question: "Q. Doctor, state whether or not, in your opinion, there might, could or would have been any connection between the blows that she received upon her body, as I have described them to you, and the pain that she suffered at the base of the brain and along the spinal column and at the tail of the spinal column, the sleeplessness of nights, the nervousness; the question is whether or not there would be any connection, might, could or would be any connection, between those things? A. Yes, sir." "The objection made in this court is to the word 'would' in the question; it being claimed that that word called for a conclusion of fact from the witness, the determination of which should have been left to the jury. . . . The form of question, including the word 'would,' was stated with approval in Taylor *v.* Railway Co., 185 Mo. 239, 84 S. W. 873, and that part of the case thus stating a form of question was afterwards quoted with approval by the Supreme Court in State *v.* Hyde, 234 Mo. 200, 136 S. W. 316. We have had occasion to say, in Holtzen *v.* Railroad, 159 Mo. App. 370, 140 S. W. 767, that the approval of the Taylor case should be regarded as closing the matter of propriety of the question in this court." Moore *v.* R. Co., 164 Mo. App. 34, 147 S. W. 488.

612-30 See Cobb *v.* Co., 191 N. Y. 475, 84 N. E. 395.

613-31 Carnes *v.* C., 146 Ky. 425, 142 S. W. 723.

613-32 See Hampton *v.* S., 50 Fla. 55, 39 S. 421; Chicago C. R. Co. *v.* Sugar, 117 Ill. App. 578; St. Louis, etc. R. Co. *v.* Lowe (Tex. Civ.), 97 S. W. 1087; Gulf, etc. R. Co. *v.* Tullis, 41 Tex. Civ. 219, 91 S. W. 317. But see San Antonio, etc. R. Co. *v.* Trigo (Tex. Civ.), 101 S. W. 254.

613-33 Georgetown *v.* Groff (Ky.), 124 S. W. 888. See Edwards *v.* Burke, 36 Wash. 107, 78 P. 610.

613-35 Griffin W. Co. *v.* Smith, 173 Fed. 245, 97 C. C. A. 411; Salmon *v.* Rathjens, 152 Cal. 290, 92 P. 733; Quincy, etc. Co. *v.* Schmitt, 123 Ill. App. 647; N. J., etc. R. Co. *v.* Tutt, 168 Ind. 205, 80 N. E. 420; Balt., etc. R. Co. *v.* Sattler, 102 Md. 595, 62 A. 1125; Logan *v.* R. Co., 188 Mass. 414, 74 N. E. 663; Gulf, etc. R. Co. *v.* Abbott (Tex. Civ.), 146 S. W. 1078.

Matters incompetent as substantive evidence cannot be introduced to fortify opinion though offered under guise of reasons therefor, even though on cross-examination they would be competent to test and diminish weight of opinion. Pierson *v.* R. Co., 191 Mass. 223, 77 N. E. 769.

Details of experiments on which opinion based may be excluded in court's discretion. C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127. But see vol. 5, p. 495 and supplement.

614-36 See Salmon *v.* Rathjens, 152 Cal. 290, 92 P. 733.

615-38 Ferguson, etc. Co. *v.* Good (Ark.), 165 S. W. 628; St. Louis, etc. R. *v.* Magness, 93 Ark. 46, 123 S. W. 786; Lauth *v.* Co., 146 Ill. App. 584; Withey *v.* Fowler Co. (Ia.), 145 N. W. 923; Hopperman *v.* Ship Bldg. Co. (Mass.), 104 N. E. 463; Reid *v.* Co. (Me.), 90 A. 609; Lyons *v.* R. Co., 253 Mo. 143, 161 S. W. 726; Meily *v.* R. Co., 215 Mo. 567, 114 S. W. 1013; Corkran *v.* Taylor, 77 N. J. L. 195, 71 A. 124; Wortman *v.* S., 9 Okla. Cr. 440, 132 P. 358; C. *v.* Fencez, 226 Pa. 114, 75 A. 19; Wauhop *v.* Souvage's Heirs (Tex. Civ.), 159 S. W. 185; Order of U. C. T. *v.* Roth (Tex. Civ.), 159 S. W. 176; Texas & N. O. R. Co. *v.* Walker (Tex. Civ.), 125 S. W. 99; Dunkin *v.* Hoquiam, 56 Wash. 47, 105 P. 149.

When unnecessary.—Schreiner *v.* Tel. Co., 82 N. J. L. 743, 82 A. 887; S. *v.* Stewart, 156 N. C. 636, 72 S. E. 193; McCown *v.* Muldrow, 91 S. C. 523, 74 S. E. 386; Lawrence *v.* S. (Tex. Cr.), 143 S. W. 636; Hite *v.* Keene, 149 Wis. 207, 134 N. W. 383.

615-39 Alabama G. S. R. Co. *v.* McWhorter, 156 Ala. 269, 47 S. 84; P. *v.* Le Doux, 155 Cal. 535, 102 P. 517; Shaughnessy *v.* Holt, 236 Ill. 485, 86 N. E. 256; Watson *v.* Elec. Co. (Ia.), 144 N. W. 350; Healey *v.* Mach. Co., 216 Mass. 75, 102 N. E. 944; Mann's Admr. *v.* Reynolds, 150 Ky. 313, 150 S. W. 329; Webb *v.* R. Co., 107 Minn. 282, 119 N. W. 955; Mississippi Central R. Co. *v.* Walden, 101 Miss. 781, 58 S. 538; Hutton *v.* R. Co., 165 Mo. App. 645, 150 S. W. 722; Latourette *v.* Miller, 67 Or. 141, 135 P. 327; Carr *v.* L. Co., 29 R. I. 276, 70 A. 196; Galveston, etc. R. Co. *v.* Jones (Tex. Civ.), 123 S. W. 737; Richmond *v.* Wood, 109 Va. 75, 63 S. E. 449.

See Mitchell Sq., etc. Co. *v.* Grant, 143 Ala. 194, 38 S. 855; Tighe *v.* R. Co. (Mo. App.), 107 S. W. 1034; Crawford *v.* Me. Cent. R. Co., 76 N. H. 29, 78 A. 1078; Burns *v.* Crow, 123 App. Div. 251, 107 N. Y. S. 944; McGinness *v.* R. Co., 104 App. Div. 342, 93 N. Y. S. 787.

May be based on facts same as those of case on trial. Central, etc. R. Co. *v.* McClifford, 120 Ga. 90, 47 S. E. 590.

Improper question.—Action for killing a mule. "An expert veterinarian, who found, after the mule's skin had been removed, that his body was badly bruised, and his internal organs were in a state of congestion and decomposition. He was asked, substantially, the following question by plaintiff's counsel: 'State your opinion as to the cause of the mule's death, if you have one, based upon your knowledge and experience and your post mortem examination of him?' He answered: 'My opinion is that the mule was jammed up in the car.' This evidence was improperly admitted. The question required him to testify, not only as to the condition of the mule when he examined him, which was proper, but to go further and give his opinion as to the existence of a fact, which was almost, if not quite, the equivalent of the one directly involved in the issue." J. M. Pace Mule Co. *v.* R. Co., 160 N. C. 252, 75 S. E. 994.

Truth or falsity of facts hypothesized is never a matter to be considered by the expert. International, etc. R. Co. *v.* Goswick, 98 Tex. 477, 85 S. W. 785, *aff.* (Tex. Civ.), 83 S. W. 423.

617-40 Galveston, etc. R. Co. *v.* Henefy (Tex. Civ.), 115 S. W. 57.

617-41 Quaker Oats Co. *v.* Grice, 195 Fed. 441, 115 C. C. A. 343; Chicago, etc. R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517.

Incompetent testimony received without objection may be embodied in hypothetical question if it has probative value. Crozier *v.* R. Co., 106 Minn. 77, 118 N. W. 256.

617-42 Hunter *v.* Ithaca, 141 Mich. 539, 105 N. W. 9 (that question calls for possibility rather than probability, goes to weight and not to competency, of answer); Gehl *v.* Brew. Co., 156 App. Div. 51, 141 N. Y. S. 133; Houston, etc. R. Co. *v.* Fox (Tex. Civ.), 156 S. W. 922. See Mayes *v.* R. Co., 121 Mo. App. 614, 97 S. W. 612; Kehoe *v.* R. Co., 56 Misc. 138, 106 N. Y. S. 196; Newton *v.* R. Co., 106 App. Div. 415, 94 N. Y. S. 825; Rosenblatt *v.* Co., 91 App. Div. 413, 86 N. Y. S. 801.

Later miscarriages "likely to occur" not enough. Osterhout *v.* R. Co., 122 N. Y. S. 692.

Opinion as to probable permanence of injury or disease is proper. Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051; Faber *v.* Co., 124 Wis. 554, 102 N. W.

1049 (whether injuries were "likely" or "apt" to result in recurrent troubles). See vol. 7, pp. 402, 403; Graham *v.* Co., 97 App. Div. 141, 89 N. Y. S. 595 (use of "likely" instead of "probable," not improper); Klingaman *v.* Fish, 19 S. D. 139, 102 N. W. 601. But see Leahy *v.* Co., 117 App. Div. 316, 102 N. Y. S. 78; Kavanagh *v.* Co., 95 N. Y. S. 567.

617-43 P. *v.* Bowen, 165 Mich. 231, 130 N. W. 706; Ward *v.* Ins. Co., 82 Neb. 499, 118 N. W. 70.

618-44 Currey *v.* Robinson (Kan.), 139 P. 1023; Masteller *v.* R. Co., 103 Minn. 244, 114 N. W. 757; Millirons *v.* R. Co., 176 Mo. App. 39, 162 S. W. 1069; Kidney *v.* Gray, 154 App. Div. 193, 138 N. Y. S. 834.

Hypothetical question put to other witnesses may be repeated and witness asked to add thereto facts obtained by examination he made. Washington, etc. R. Co. *v.* Lukens, 32 App. Cas. (D. C.) 442. Such question unnecessary when expert has made personal observations. Crozier *v.* R. Co., 106 Minn. 77, 118 N. W. 256.

618-46 See Smart *v.* City, 208 Mo. 162, 105 S. W. 709.

618-47 Tighe *v.* R. Co. (Mo. App.), 107 S. W. 104; Walters *v.* Rock, 18 N. D. 45, 115 N. W. 511. See Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82; Darcy *v.* Lead Co., 155 Mo. App. 266, 133 S. W. 1191; Burns *v.* Crow, 123 App. Div. 251, 107 N. Y. S. 944.

Where plaintiff sues for services it is improper to state the services claimed and ask an opinion as to value. Gardner *v.* Eldridge, 149 Mo. App. 210, 130 S. W. 403.

Asking expert to assume truth of a certain witness' testimony is not requiring him to weigh evidence. Duthey *v.* S., 131 Wis. 178, 111 N. W. 222.

Failure to include facts on which question based justifies its exclusion though witness has heard evidence. Barker *v.* Co., 79 Conn. 342, 65 A. 143; Shoemaker *v.* Elmer, 70 N. J. L. 710, 58 A. 940.

Credibility of witness who has testified to supposed facts should not be submitted to expert. Sloss-S. S. & I. Co. *v.* Sharp, 156 Ala. 284, 47 S. 279.

619-48 Birmingham R., etc. Co. *v.* Fisher, 173 Ala. 623, 55 S. 995; Louisville & N. R. Co. *v.* Young, 168 Ala. 551, 53 S. 213; P. *v.* LeDoux, 155 Cal. 535, 102 P. 517 (of facts simple, salient and few); Chicago U. T. Co. *v.* Roberts, 229 Ill. 481, 82 N. E. 401; Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82; Porteous *v* Exp. Co., 112 Minn. 31, 127 N. W. 429; Masteller *v.* R. Co., 103 Minn. 244, 114 N. W. 757; Tighe *v.* R. Co. (Mo. App.), 107 S. W. 1035; Walters *v.* Rock, 18 N. D. 45, 115 N. W. 511; Latourette *v.* Miller, 67 Or. 141, 135 P. 327; Gillman *v.* R. Co., 224 Pa. 267, 73 A. 342; S. *v.* Kammel, 23 S. D. 465, 122 N. W. 420; Barney *v.* Oats Co., 85 Vt. 372, 82 A. 113. See Ahern *v.* St. R. Co., 102 Minn. 435, 113 N. W. 1019. *Contra*, Shoemaker *v.* Elmer, 70 N. J. L. 710, 58 A. 940, *disap.* Twombly *v.* Leach, 11 Cush. (Mass.) 397.

620-49 An expert witness, after being first acquainted with the whole of the particular part upon which he is to pronounce, may be asked to express an opinion upon any defined portion which is not contradictory in itself, and the truth of which is expressly assumed, but he cannot determine conflicting elements. McDyer *v.* Eastern Pa. R. Co., 227 Pa. 641, 76 A. 841, *cit.* Yardley *v.* Cuthbertson, 108 Pa. 395, 1 A. 765.

620-50 P. *v.* LeDoux, 155 Cal. 535, 102 P. 517; Illinois C. R. Co. *v.* McCollum, 130 Ill. App. 267.

620-51 Chicago *v.* Didier, 227 Ill. 571, 81 N. E. 698; Crozier *v.* R. Co., 106 Minn. 77, 118 N. W. 256 (practice not favored); St. Louis, etc. R. Co. *v.* Hall (Tex. Civ.), 81 S. W. 571. See Smart *v.* Kansas City, 208 Mo. 162, 105 S. W. 709. *Comp.* Leahy *v.* Co., 117 App. Div. 316, 102 N. Y. S. 78.

Testimony of one witness, basis for hypothetical question. Hanchett *v.* Haas, 125 Ill. App. 111.

621-52 Canham *v.* R. I. Co., 35 R. I. 177, 85 A. 1050. *Contra*, P. *v.* LeDoux, 155 Cal. 535, 102 P. 517; Los Angeles *v.* Hunter, 156 Cal. 603, 105 P. 755 (error not per se fatal); Shoemaker *v.* Elmer, 70 N. J. L. 710, 58 A. 940.

A doctor's conclusion as to sanity of person based on all the testimony, part of which the doctor heard, and part of which he read, and which testimony included the opinions and conclusions of other witnesses is inadmissible. Harris *v.* Hipsley (Md.), 89 A. 852.

621-53 Harten *v.* Loffler, 212 U. S. 397; Elba *v.* Bullard, 152 Ala. 237, 44 S. 412; In re Purcell's Est., 164 Cal. 300, 128 P. 932; In re Higgins' Est., 156 Cal. 257, 104 P. 6; Roche *v.* Bald-

win, 143 Cal. 186, 76 P. 956; Denver, etc. R. Co. *v.* Reiter, 47 Colo. 417, 107 P. 1100; Butler *v.* Phillips, 38 Colo. 378, 88 P. 480; Borrett *v.* Petry, 148 Ill. App. 622; O'Shaugnessy *v.* R. Co., 144 Ill. App. 174; Sanford *v.* Hoge, 118 Ill. App. 609; Botwinis *v.* Allgood, 113 Ill. App. 188; Ludwig *v.* S., 170 Ind. 648, 85 N. E. 345; Philpott *v.* Jones (Ia.), 146 N. W. 859; S. *v.* Usher, 136 Ia. 606, 111 N. W. 811; S. *v.* Hunter, 124 Ia. 569, 100 N. W. 510; Bennett *v.* Mt. Vernon, 124 Ia. 537, 100 N. W. 349; Baker *v.* Mathew, 137 Ia. 410, 115 N. W. 15; Beck *v.* Hanline (Md.), 89 A. 377; Balt. & O. R. Co. *v.* Denver, 112 Md. 296, 75 A. 352; Robinson *v.* Jones, 105 Md. 62, 65 A. 814; United E. & P. Co. *v.* S., 100 Md. 634, 60 A. 248; Ryan *v.* Co., 200 Mass. 188, 86 N. E. 310; Arnold *v.* Co., 189 Mass. 547, 76 N. E. 194; Farrell *v.* Haze, 157 Mich. 374, 122 N. W. 197; Collins *v.* Dowlan, 118 Minn. 214, 136 N. W. 854; Root *v.* R. Co., 195 Mo. 348, 92 S. W. 621; S. *v.* Brown, 181 Mo. 192, 79 S. W. 1111; In re Murphy's Est., 43 Mont. 353, 116 P. 1004; Carman *v.* R. Co., 32 Mont. 137, 79 P. 690; Goken *v.* Dallugge, 72 Neb. 16, 99 N. W. 818; P. *v.* Patrick, 182 N. Y. 131, 74 N. E. 843; Causa *v.* Kenney, 156 App. Div. 134, 141 N. Y. S. 98; Fitzpatrick *v.* R. Co., 92 N. Y. S. 248; Davis *v.* Maxwell, 108 App. Div. 128, 96 N. Y. S. 45; Finsilver *v.* Warehouse Co., 129 N. Y. S. 401; Monds *v.* Dunn, 163 N. C. 108, 79 S. E. 303; Dameron *v.* Lumb. Co., 161 N. C. 495, 77 S. E. 694; S. *v.* Holly, 155 N. C. 485, 71 S. E. 450; S. *v.* Goetz, 21 N. D. 569, 131 N. W. 514; Zeigler *v.* Simplex Foundation Co., 228 Pa. 64, 77 A. 239; Eastman *v.* Dunn, 34 R. I. 416, 83 A. 1057; J. W. Bishop Co. *v.* Curran, 28 R. I. 504, 76 A. 275; St. Louis, etc. Co. *v.* Dean (Tex. Civ.), 152 S. W. 527; Sargent *v.* Barnes (Tex. Civ.), 159 S. W. 366; Kirby *v.* S. (Tex. Cr.), 150 S. W. 455; Kemendo *v.* Dispatch Co. (Tex. Civ.), 131 S. W. 73; Galveston, etc. R. Co. *v.* Noelke (Tex. Civ.), 125 S. W. 969; Gulf, etc. R. Co. *v.* Craft (Tex. Civ.), 102 S. W. 170; Texas M. R. *v.* Ritchey, 49 Tex. Civ. 409, 108 S. W. 732; Lyman *v.* James (Vt.), 89 A. 932; Lawson *v.* Crane, 83 Vt. 115, 74 A. 641.

See Parham *v.* S., 147 Ala. 57, 42 S. 1; Lanigan *v.* Neely, 4 Cal. App. 760, 89 P. 441; LaLonde *v.* Co., 145 Mich. 77, 108 N. W. 365; Herbeck *v.* Germain, 144 Mich. 157, 107 N. W. 901.

"**In every case the facts** which the hypothetical question must cover should be governed largely by the subject-matter of each particular investigation, and to a large extent subject to the sound discretion of the trial judge, but the rule in this state is an unbending one that the facts embraced in the hypothetical question put to the witness in every case must be within the confines of the evidence. Benjamin *v.* Metropolitan St. Ry. Co., 50 Mo. App. 602; Russ *v.* Railway Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823." Ridenour *v.* Wilcox Mines Co., 164 Mo. App. 576, 147 S. W. 852.

There must be credible evidence of fact assumed. Smith *v.* R. Co., 48 Misc. 393, 95 N. Y. S. 529. But if there is some evidence to establish it, answer cannot be excluded. Becker *v.* Ins. Co., 99 App. Div. 5, 90 N. Y. S. 1007.

Based upon hearsay and facts of which there is no evidence, incompetent. Kelly *v.* Kelly, 103 Md. 548, 63 A. 1082.

On redirect examination hypothetical questions cannot be based upon assumed facts of which there is no evidence. Thomas *v.* Co., 106 Md. 299, 67 A. 259. Nor can expert be re-examined on matters not touched upon in cross-examination. In re B. I. Bridge, 118 App. Div. 272, 103 N. Y. S. 441. See Finley *v.* R. Co., 91 N. Y. S. 759.

622-58 Kinlen *v.* R. Co., 216 Mo. 145, 115 S. W. 523, presumption of freedom from negligence.

623-59 Miehlke *v.* R. Co., 129 App. Div. 438, 114 N. Y. S. 90. See Bower *v.* Self, 68 Kan. 825, 75 P. 1021; Herrick *v.* Holland, 83 Vt. 502, 77 A. 6; Overacker *v.* R. Co., 64 Wash. 491, 117 P. 403.

623-60 Pittsburg, etc. R. Co. *v.* Moore, 110 Ill. App. 304; Delaney *v.* Co., 202 Mass. 359, 88 N. E. 773; Conway *v.* R. Co., 161 Mo. App. 81, 142 S. W. 1101; McDonald *v.* Co., 26 R. I. 467, 59 A. 391; Gulf, etc. R. Co. *v.* Abbott (Tex. Civ.), 146 S. W. 1078; Walker *v.* Strosnider, 67 W. Va. 39, 67 S. E. 1087. See Pittsburg, etc. R. Co. *v.* Nicholas, 165 Ind. 679, 76 N. E. 522, 73 N. E. 195, 74 N. E. 626. Testimony not offered, though on file, ignored in framing questions. Ward *v.* Ins. Co., 82 Neb. 499, 118 N. W. 70.

623-61 McDonald *v.* Co., 26 R. I. 467, 59 A. 391.

Even if necessary to suspend examination of the expert and prove the missing fact on leave of the court which would be granted as matter of course. But if the testimony of the expert is followed up by proof of the fact, this is not reversible error. Any other holding would defeat legitimate recoveries by a strict and harsh construction of the rules of evidence. Standard Acc. & Life Ins. Co. *v.* Wood, 116 Md. 575, 82 A. 702.

624-64 Woodward *v.* R. Co., 122 Fed. 66, 58 C. C. A. 402; Grasselli Chem. Co. *v.* Davis, 166 Ala. 471, 52 S. 35; Parrish *v.* S., 139 Ala. 16, 36 S. 1012; Ince *v.* S., 77 Ark. 426, 93 S. W. 65; St. Louis, etc. R. Co. *v.* Hook, 83 Ark. 584, 104 S. W. 217; Perkins *v.* Co., 155 Cal. 712, 103 P. 190; P. *v.* James, 5 Cal. App. 427, 90 P. 561; Jones *v.* City, 20 Ida. 5, 116 P. 110; Botwinis *v.* Allgood, 113 Ill. App. 188; Netcher *v.* Bernstein, 110 Ill. App. 484; Chicago C. R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28; Indianapolis, etc. Co. *v.* Formes, 40 Ind. App. 202, 80 N. E. 872; Wingfield *v.* McClintock, 85 Kan. 452, 116 P. 488, *aff.* 85 Kan. 207, 113 P. 394; Order of U. C. T. *v.* Barnes, 75 Kan. 720, 90 P. 293; Larson *v.* R. Co., 212 Mass. 262, 98 N. E. 1048; C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127; Holton *v.* Cochran, 208 Mo. 314, 106 S. W. 1035; Millirons *v.* R. Co., 176 Mo. App. 39, 162 S. W. 1069; Rossier *v.* R. Co., 125 Mo. App. 159, 101 S. W. 1111; S. *v.* Crowe, 39 Mont. 174, 102 P. 579; Ward *v.* Ins. Co., 82 Neb. 499, 118 N. W. 70; Hamblin *v.* S., 81 Neb. 148, 115 N. W. 850; Daggett *v.* R. Co., 75 N. J. L. 630, 68 A. 179; Coles *v.* R. Co., 49 Misc. 246, 97 N. Y. S. 289; Swanson *v.* Co., 22 N. D. 563, 135 N. W. 207; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300; Gillman *v.* R. Co., 224 Pa. 267, 73 A. 342; El Paso E. R. Co. *v.* Bolgiano (Tex. Civ.), 109 S. W. 388; Betts *v.* S., 48 Tex. Cr. 522, 89 S. W. 413; Lindsay, etc. Co. *v.* Land Co. (Utah), 137 P. 837; Norfolk & W. R. Co. *v.* Spears, 110 Va. 110, 65 S. E. 482 (details of testimony need not be given); Hanstad *v.* R. Co., 44 Wash. 505, 87 P. 832; S. *v.* Underwood, 35 Wash. 558, 77 P. 863; Dralle *v.* Reedsburg, 140 Wis. 319, 122 N. W. 771.

See P. *v.* Weick, 123 App. Div. 328, 107 N. Y. S. 968; Nelson *v.* R. Co., 130 Wis. 211, 109 N. W. 933; Schissler *v.* S., 122 Wis. 365, 99 N. W. 593; Oborn *v.* S., 143 Wis. 249, 126 N. W. 737.

Of course the answer of the expert goes for nothing if the jury finds no proof of facts assumed. Pensacola, etc. Co. *v.* Bissett, 59 Fla. 360, 52 S. 367.

626-65 Long Distance T. & T. Co. *v.* Schmidt, 157 Ala. 391, 47 S. 731; Landis *v.* Watts, 82 Neb. 359, 117 N. W. 705. See Order of U. C. T. *v.* Barnes, 75 Kan. 720, 90 P. 293.

In Taylor *v.* **R. Co.,** 166 Mo. App. 131, 148 S. W. 470, the court said: "Objection, we think too critical, is made to the hypothetical question as to the distance in which a car could have been stopped, going at the rate of ten miles an hour, as the one in controversy was. We do not think there was any valid objection pointed out, when the matter is viewed from a practical standpoint. The witness was familiar with the grade, and he was asked in what distance the cars which were run on that line, running at the rate of ten miles an hour, could be stopped. We judge from the objection that the question should have been made to apply only to the particular car which struck the wagon. If so, it would be rare that evidence of this nature could be produced for a plaintiff in cases of collision with cars. If there was any peculiarity about this car from those in general use on that line, defendant could have made it the basis for cross-examination, or evidence in its own behalf."

626-66 Collins *v.* Chipman, 41 Tex. Civ. 563, 93 S. W. 666.

626-67 *Contra*, Davis *v.* S., 54 Tex. Cr. 236, 114 S. W. 366.

626-68 Van Wyk *v.* P., 45 Colo. 1, 99 P. 1009; Keatley *v.* Fraternity, 2 Boyce (Del.), 511, 82 A. 294; S. *v.* Stewart, 156 N. C. 636, 72 S. E. 193; Galveston, etc. R. Co. *v.* Henefy (Tex. Civ.), 115 S. W. 57; Curtley *v.* Soc., 51 Wash. 242, 98 P. 667.

627-69 Hoagland *v.* Canfield, 160 Fed. 146.

Even though it necessitate the incorporation of apparently trivial facts into the question. In re Benjamin's Will, 136 N. Y. S. 1070.

All facts necessary for expression of opinion based upon evidence in the case. Am. Towing & Lightering Co. *v.* Co., 117 Md. 660, 84 A. 182.

All material facts on which there is evidence may be included. Fowler *v.* Co., 18 S. D. 131, 99 N. W. 1095.

627-70 Question need not include all the evidence. Townsend *v.* Butte, 41 Mont. 410, 109 P. 969; Comeau *v.* Manuel & Sons Co., 84 Vt. 501, 80 A. 51.

627-72 In re Munier's Est., 147 Ia. 312, 126 N. W. 149.

Fact to be ultimately determined, may be stated. Helland *v.* Bridenstine, 55 Wash. 470, 104 P. 626.

627-73 Levy *v.* Iron Works, 143 App. Div. 7, 127 N. Y. S. 506.

627-74 P. *v.* Cord, 157 Cal. 562, 108 P. 511; P. *v.* Guaragna, 23 Cal. App. 120, 137 P. 279; Whiting-M. C. Co. *v.* Preston, 121 Md. 210, 88 A. 110; Avery *v.* S., 120 Md. 229, 88 A. 148; Miller *v.* Leib, 109 Md. 414, 72 A. 466; Quinley *v.* Tr. Co. (Mo. App.), 165 S. W. 346; Palmer *v.* R. Co., 142 Mo. App. 440, 127 S. W. 96; Landis *v.* Watts, 84 Neb. 671, 121 N. W. 980; S. *v.* Maioni, 78 N. J. L. 339, 74 A. 526; Knutson *v.* Moe Bros., 72 Wash. 290, 130 P. 347; Ferguson *v.* Truax, 136 Wis. 637, 118 N. W. 251. See Impkamp *v.* Co., 108 Mo. App. 655, 84 S. W. 119; Heinzle *v.* R. Co., 182 Mo. 528, 81 S. W. 848; Chicago, etc. R. Co. *v.* Cain, 37 Tex. Civ. 531, 84 S. W. 682. But see St. Louis, etc. R. Co. *v.* Hook, 83 Ark. 584, 104 S. W. 217; Ince *v.* S., 77 Ark. 426, 93 S. W. 65.

Question must not omit facts whose inclusion is necessary to render answer of value to jury. Fuchs *v.* Tone, 218 Ill. 445, 75 N. E. 1014; Balt., etc. R. Co. *v.* Trader, 106 Md. 635, 68 A. 12; El Paso E. R. Co. *v.* Bolgiano (Tex. Civ.), 109 S. W. 388. See Chicago *v.* O'Donnell, 124 Ill. App. 78; Earp *v.* S. (Miss.), 38 S. 288.

Hypothetical question one of a series.— In such case an omission of a fact in one question will be remedied if the other questions contain it. Riley *v.* City of Independence (Mo.), 167 S. W. 1022.

628-75 Bouvier *v.* Brass, 12 Ariz. 310, 100 P. 799; Williams *v.* Fulkes, 103 Ark. 196, 146 S. W. 480; Balt. & O. R. Co. *v.* Dever, 112 Md. 296, 75 A. 352; P. *v.* Parker, 166 Mich. 587, 131 N. W. 1120; S. *v.* Thompson, 153 N. C. 618, 69 S. E. 254; S. *v.* Holly, 155 N. C. 485, 71 S. E. 450; S. *v.* Garrison, 59 Or. 440, 117 P. 657; De Hoyes *v.* R. Co., 52 Tex. Civ. 543, 115 S. W. 75.

628-76 Carter-Rice *v.* Aubin, 172 Fed. 916, 97 C. C. A. 274; Ince *v.* S., 77 Ark. 426, 93 S. W. 65; Scurlock *v.* Boone, 142 Ia. 580, 120 N. W. 313; Order of U. C. T. *v.* Barnes, 75 Kan. 720, 90 P. 293; Carroll *v.* R. Co., 200 Mass. 527, 86 N. E. 793; Oborn *v.* S., 143 Wis. 249, 126 N. W. 737.

628-77 Wingfield *v.* McClintock, 85 Kan. 452, 116 P. 488, *aff.* 85 Kan. 207, 113 P. 394; Beave *v.* Co., 212 Mo. 331, 111 S. W. 52; Kearner *v.* C. S. Tanner Co., 31 R. I. 203, 76 A. 833; Gulf, etc. R. Co. *v.* Abbott (Tex. Civ.), 146 S. W. 1078.

Truth of matters assumed is for the jury. Ryan *v.* P., 50 Colo. 99, 114 P. 306.

628-78 Reardon *v.* L. Co., 21 Cal. App. 357, 131 P. 894.

628-79 Carter-Rice *v.* Aubin, 172 Fed. 916, 97 C. C. A. 274; P. *v.* Clemente, 130 N. Y. S. 612.

628-81 P. *v.* Guaragna, 23 Cal. App. 120, 137 P. 279. See also vol. 9, p. 93, n. 12.

629-83 See S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531. But see P. *v.* Bowers, 1 Cal. App. 501, 82 P. 553; Allen *v.* Co., 212 Mass. 191, 98 N. E. 618; Dean *v.* Wabash R. Co., 229 Mo. 425, 129 S. W. 953. *Contra,* Medical books admissible as substantive evidence. Birmingham, etc. Co. *v.* Moore, 148 Ala. 115, 42 S. 1024.

629-84 Draper *v.* R. Co., 161 N. C. 307, 77 S. E. 231.

629-85 Curtice *v.* Dixon, 74 N. H. 386, 68 A. 587.

629-86 Results observed by witness in particular instances may not be given on direct examination. Holden *v.* Co., 109 Minn. 59, 122 N. W. 1018.

629-88 Councill *v.* Mayhew, 172 Ala. 295, 55 S. 314; P. *v.* Zito, 141 Ill. App. 534; Brown *v.* Dist. (Ia.), 143 N. W. 1077; Rathjen *v.* Acc. Assn., 93 Neb. 629, 141 N. W. 815; Houston, etc. R. Co. *v.* Fox (Tex. Civ.), 156 S. W. 922. See Kasjeta *v.* Co., 73 N. H. 22, 58 A. 874; Chicago, etc. R. Co. *v.* Harton, 40 Tex. Civ. 235, 88 S. W. 857.

629-89 Burk *v.* Reese, 143 Ia. 496, 121 N. W. 1016; Underwood *v.* Quantic, 85 Kan. 111, 116 P. 361; Paul *v.* Clements, 176 Mich. 251, 142 N. W. 384; Winn *v.* Woodmen, 138 Mo. App. 701, 119 S. W. 536; Allen *v.* Coal Co., 43 Mont. 269, 115 P. 673; Parker *v.* R., 84 Vt. 329, 79 A. 865; Fraser *v.* Blanchard, 83 Vt. 136, 73 A. 995.

630-91 Pate *v.* Coal Co., 158 Ill. App. 578; Leinen *v.* Joslin (Ia.), 142 N. W.

988; Lack Malleable Iron Co. *v.* Graham, 147 Ky. 161, 143 S. W. 1016; Fahr *v.* R. Co. (N. J. L.), 72 A. 69; Missouri, etc. R. Co. *v.* Dalton, 56 Tex. Civ. 82, 120 S. W. 240; Citizens S. Bk. *v.* Ins. Co. (Vt.), 86 A. 1056; Morgan *v.* Hendrick, 80 Vt. 284, 67 A. 702. See Trull *v.* Woodmen, 12 Ida. 318, 85 P. 1081.

631-94 If application of mechanical appliances is involved and their character and witness' familiarity with them is shown, general questions may be put as to proper and safe way to operate them. Meily *v.* R. Co., 215 Mo. 567, 114 S. W. 1013.

631-95 Gallatin *v.* Irr. Co., 163 Cal. 405, 126 P. 864; In re Higgins' Est., 156 Cal. 257, 104 P. 6; Brown *v.* Dist. (Ia.), 143 N. W. 1077. See Hyde *v.* Fall River, 197 Mass. 4, 83 N. E. 323.

631-96 Hussong D. M. Co. *v.* Co., 173 Fed. 236; Aeolian Co. *v.* Co., 157 Fed. 320; Piper *v.* Murray, 43 Mont. 230, 115 P. 669; Maurer *v.* Gould (N. J.), 59 A. 28. But see Chicago *v.* Rosenbaum, 126 Ill. App. 93.

632-98 P. *v.* Dietmeyer, 164 Ill. App. 405; Dean *v.* Wabash R. Co., 229 Mo. 425, 129 S. W. 953; Sherman G. & E. Co. *v.* Belden (Tex. Civ.), 115 S. W. 897; Chicago, etc. R. Co. *v.* Harton, 40 Tex. Civ. 235, 88 S. W. 857.

632-1 Sherman G. & E. Co. *v.* Belden (Tex. Civ.), 115 S. W. 897; Collins *v.* Chipman, 41 Tex. Civ. 563, 95 S. W. 666.

632-2 Parrish *v.* S., 139 Ala. 16, 36 S. 1012; Thomas *v.* Co., 106 Md. 299, 67 A. 259. *Contra* if question one of value. Mayhew *v.* Brislin, 13 Ariz. 102, 108 P. 253.

632-3 S. *v.* Buck, 88 Kan. 114, 127 P. 631; Thomas *v.* Co., 106 Md. 299, 67 A. 259.

633-4 See West, etc. Comrs. *v.* Boal, 232 Ill. 248, 83 N. E. 824.

633-5 Drexler *v.* Borough, 238 Pa. 376, 86 A. 272. But see Chicago, etc. R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050.

634-8 Shaughnessy *v.* Holt, 236 Ill. 485, 86 N. E. 256; Jacoby *v.* R. Co., 153 App. Div. 352, 138 N. Y. S. 486; Citizens S. Bk. *v.* Ins. Co. (Vt.), 86 A. 1056.

While it is not competent to ask witness how many times he has testified for defense in similar actions, he may be asked as to number of times he has testified for defendant. McMahon *v.* R. Co., 239 Ill. 334, 88 N. E. 223.

634-9 Vaughan's S. Store *v.* Stringfellow, 56 Fla. 708, 48 S. 410, cit. the text. But see Rowe *v.* Co., 44 Wash. 658, 87 P. 921.

634-11 Reid *v.* S. (Ala.), 61 S. 324; Thomas *v.* S., 156 Ala. 166, 47 S. 257; Burkhard *v.* Water Co., 243 Pa. 369, 90 A. 157; Drexler *v.* Borough, 238 Pa. 376, 86 A. 272; Carr *v.* Co., 26 R. I. 180, 58 A. 678; Missouri, etc. R. Co. *v.* Farris (Tex. Civ.), 126 S. W. 1174; Brey *v.* Forrestal, 151 Wis. 245, 138 N. W. 645.

To test in every reasonable way not only the credibility of the witness, but also the soundness and reasonableness of his opinions elicited in the direct examination as to an issue offered by adverse party. Conway *v.* R. Co., 161 Mo. App. 81, 142 S. W. 1101.

An expert cannot be asked on cross-examination as to whether results in other cases were not adverse to opinions given by him. Watts *v.* S., 99 Md. 30, 57 A. 542. But see C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (discretionary with court). *Comp.* Chicago, etc. R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050.

634-13 McDade *v.* S. (Ala. App.), 64 S. 519; Moennich *v.* Chicago, 147 Ill. App. 553.

635-14 Smith *v.* S. (Ala.), 62 S. 184; St. Louis, etc. R. Co. *v.* Fithian, 106 Ark. 491, 155 S. W. 88; Chicago U. T. Co. *v.* Ertrachter, 228 Ill. 114, 81 N. E. 816; Howard *v.* Creech, 31 Ky. L. R. 201, 101 S. W. 974. See West, etc. Comrs. *v.* Boal, 232 Ill. 248, 83 N. E. 824.

635-15 Donnelly *v.* R. Co., 163 Ill. App. 7; Mayor, etc. *v.* Yost, 121 Md. 366, 35 A. 342; Minihan *v.* R. Co., 205 Mass. 402, 91 N. E. 414 (all that took place and was said when witness examined plaintiff in presence of her physician may be shown); In re Bremerton, 73 Wash. 565, 132 P. 240. See Martin W. Co. *v.* R. Co. (Ia.), 143 N. W. 497; Butcher *v.* Geissenhainer, 109 N. Y. S. 159; Panhandle & G. R. Co. *v.* Kirby, 42 Tex. Civ. 340, 94 S. W. 173.

Whether test applied by witness was fair, may be asked on cross-examination. Rowe *v.* Co., 44 Wash. 658, 87 P. 921.

635-16 See S. *v.* Blackburn (Ia.), 110 N. W. 275. But see Mitchell *v.* Leech, 69 S. C. 413, 48 S. E. 290.

Whether authorities do not lay down a different doctrine may be asked on

cross-examination. Chicago U. T. Co. *v.* Ertrachter, 228 Ill. 114, 81 N. E. 816.

636-17 Griffith *v.* Co., 14 Cal. App. 145, 111 P. 107; S. *v.* Blackburn (Ia.), 110 N. W. 275. See Lilley *v.* Parkinson, 91 Cal. 655, 27 P. 1091; P. *v.* Bowers, 1 Cal. App. 501, 82 P. 553; S. *v.* Thompson, 127 Ia. 440, 103 N. W. 377; S. *v.* Moeller, 20 N. D. 114, 126 N. W. 568.

Nor can such books be gotten in evidence by assuming their supposed teachings. S. *v.* Blackburn (Ia.), 110 N. W. 275.

Account books, not otherwise admissible, competent to test accuracy of accountant's report. King County *v.* Whittlesey, 52 Wash. 206, 100 P. 320.

636-18 Travelers' Ins. Co. *v.* Davies, 152 Ky. 600, 153 S. W. 956; Eckels, etc. Co. *v.* Co., 119 Md. 107, 86 A. 38; MacDonald *v.* R. Co., 219 Mo. 468, 118 S. W. 78; Beadle *v.* Paine, 46 Or. 424, 80 P. 903. But see P. *v.* Bowers, 1 Cal. App. 501, 82 P. 553.

637-20 S. *v.* Moeller, 20 N. D. 114, 126 N. W. 568.

637-21 Linforth *v.* Co., 156 Cal. 58, 103 P. 320; Gage *v.* Billing, 12 Cal. App. 688, 108 P. 664; S. *v.* Saxon, 87 Conn. 5, 86 A. 590; In re Anderson, 79 Conn. 535, 66 A. 7; Souft *v.* Pyle, 1 Boyce (Del.) 192, 75 A. 619; Shaffer *v.* U. S., 24 App. Cas. (D. C.) 417; Graham *v.* Graham, 137 Ga. 668, 74 S. E. 426; Mitchell *v.* S., 6 Ga. App. 554, 65 S. E. 326, cit. the text; Carscallen *v.* Co., 15 Ida. 444, 98 P. 622; P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077; Stanley *v.* Taylor (Ia.), 142 N. W. 81; Murphy *v.* Murphy, 146 Ia. 255, 125 N. W. 191; S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531; Gately *v.* Taylor, 211 Mass. 60, 97 N. E. 619; C. *v.* Howard, 205 Mass. 128, 91 N. E. 397; Hull *v.* R., 158 Mich. 682, 123 N. W. 571; Musolf *v.* Co., 108 Minn. 369, 122 N. W. 499; Young *v.* R. Co., 227 Mo. 307, 127 S. W. 19; S. *v.* Daly, 210 Mo. 664, 109 S. W. 53; Inman *v.* R. Co., 157 Mo. App. 171, 137 S. W. 3; F. W. Brockman, etc. Co. *v.* Aaron, 145 Mo. App. 307, 130 S. W. 116; Davis *v.* Dist., 84 Neb. 858, 122 N. W. 38; Lubbee *v.* Hilgert, 135 App. Div. 227, 120 N. Y. S. 387; Byrne *v.* Byrne, 109 App. Div. 476, 96 N. Y. S. 375; C. *v.* Shults, 221 Pa. 466, 70 A. 823, 17 Pa. Dist. 47; Helland *v.* Bridenstine, 55 Wash. 470, 104 P. 626. See Dean *v.* Wks., 106 Mo. App. 167, 80 S. W. 292; Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807.

Though questions arising in trial are "so far apart from the field of general knowledge, and so peculiarly within the scope of professional learning and experience, that the testimony of the expert witnesses is entitled to great consideration by the jury, still the jury can not be required, as matter of law, to accept the conclusions of such witnesses." Robinson *v.* Crotwell (Ala.), 57 S. 23. And see Central of Georgia R. Co. *v.* Clements, 2 Ala. App. 520, 57 S. 52.

638-22 Costello *v.* S., 176 Ala. 1, 58 S. 202; Landrum *v.* Swann, 8 Ga. App. 209, 68 S. E. 862; St. Louis, etc. Co. *v.* Weldon, 39 Okla. 369, 135 P. 8.

638-23 Stanley *v.* Taylor (Ia.), 142 N. W. 81.

639-27 Hunt *v.* R. Co., 199 Mass. 220, 85 N. E. 446; Cunningham *v.* Friendly (Or.), 139 P. 928; U. S. *v.* Trono, 3 Phil. Isl. 213; King County *v.* Whittlesey, 52 Wash. 206, 100 P. 320. See Frank *v.* Co., 18 O. Dec. 32.

640-29 Sundh Elec. Co. *v.* Elec. Co., 204 Fed. 277, 122 C. C. A. 475; Marbury *v.* R. Co., 176 Fed. 9, 99 C. C. A. 483, cit. the text; Gilbert *v.* Lloyd, 170 Ill. App. 436; Longfellow *v.* Vernon (Ind. App.), 105 N. E. 178; Zook *v.* Welty, 156 Mo. App. 703, 137 S. W. 989; McFadden *r.* R. Co., 161 Mo. App. 652, 143 S. W. 884.

The opinion of experts based on their personal observation as well as their scientific knowledge, cannot be disregarded by the jury. S. *v.* Vance, 38 Utah 1, 110 P. 434.

Test of consistency and reasonableness, having reference to all the evidence, should be applied. In re Am. Board of Comrs., 102 Me. 72, 66 A. 215; Bucher *v.* R. Co., 139 Wis. 597, 120 N. W. 518 (reasonableness of conclusion, important).

640-30 Mageau *v.* R. Co., 106 Minn. 375, 119 N. W. 200; Burke *v.* Cleveland, 6 O. N. P. (N. S.) 225; King County *v.* Whittlesey, 52 Wash. 206, 100 P. 320.

Opinions inconsistent with common knowledge or ordinary observation, not accepted. Ladwig *v.* Co., 141 Wis. 191, 124 N. W. 407.

640-32 P. *v.* Hales, 23 Cal. App. 731, 139 P. 667; S. *v.* Kelly, 77 Conn. 266, 58 A. 705 (must be weighed and tested by rules applicable to other testimony); S. *v.* Briscoe, 6 Penne. (Del.), 401, 67

A. 154; King *v.* Gilson, 191 Mo. 307, 90 S. W. 367; S. *v.* Wertz, 191 Mo. 569, 90 S. W. 838; In re Gedney's Will, 142 N. Y. S. 157; In re Mara, 137 N. Y. S. 151; Turner *v.* S., 48 Tex. Cr. 585, 89 S. W. 975. See Atkins *v.* S., 119 Tenn. 458, 105 S. W. 353.

Extra-legal action of witness in accordance with his testimony does not add to its value. Burke *v.* Cleveland, 6 O. N. P. (N. S.) 225.

640-33 Wendl *v.* Fuerst (Ore.), 136 P. 1.

640-34 Royal Ex. Assur. *v.* Co., 166 Fed. 32, 92 C. C. A. 66; Zimmer *v.* Kilborn, 165 Cal. 523, 132 P. 1026; Scufferle *v.* McFarland, 28 App. Cas. (D. C.) 94; So. R. Co. *v.* Lowe, 139 Ga. 362, 77 S. E. 44; Jennings *v.* Stripling, 127 Ga. 778, 56 S. E. 1026 (value of services); Atlantic & B. R. Co. *v.* Co., 125 Ga. 478, 54 S. E. 530 (value); Korab *v.* R. Co. (Ia.), 146 N. W. 765; Fitter *v.* Co., 143 Ia. 689, 121 N. W. 48; Moore *v.* R. Co., 151 Ia. 353, 131 N. W. 30; Helm *v.* Ins. Co., 132 Ia. 177, 109 N. W. 605 (value); Patterson *v.* Tr. Co. (Mo.), 163 S. W. 955; Fields *v.* R. Co., 169 Mo. App. 624, 155 S. W. 845; Sackman *v.* Freeman, 130 Mo. App. 384, 109 S. W. 818 (must consider, but are not bound by expert testimony as to reasonable value of brokerage services); Widman Inv. Co. *v.* City, 191 Mo. 459, 90 S. W. 763; Roberts *v.* Jones, 156 Mo. App. 552, 137 S. W. 639; Pritchard *v.* Hooker, 114 Mo. App. 605, 90 S. W. 415 (value); Ward *v.* Ins. Co., 91 Neb. 52, 135 N. W. 220; In re Schmidt's Will, 139 N. Y. S. 464; In re Titus Street, 123 N. Y. S. 1018; Draper *v.* R. Co., 161 N. C. 307, 77 S. E. 231; Baber *v.* Caples (Ore.), 138 P. 472; Galveston, etc. R. Co. *v.* Gillespie, 48 Tex. Civ. 56, 106 S. W. 707; Southern K. R. Co. *v.* West (Tex. Civ.), 102 S. W. 1174; Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807; Depow *v.* R. Co., 151 Wis. 109, 138 N. W. 42 (as to amount of damages). See U. S. *v.* Chisholm, 153 Fed. 808.

Opinions of experts are merely advisory and not binding; jury should accord them such weight as they believe, from all the evidence, they are entitled to. Markey *v.* R. Co., 185 Mo. 348, 84 S. W. 61. See Guyon *v.* R. Co., 49 Misc. 514, 97 N. Y. S. 1038 (value of medical services).

Market value.—While testimony as to market value does not involve the opinion of the witness as to what a particular commodity is worth, at the same time it is not such an opinion of a witness testifying as an expert as that the jury would have a right to absolutely disregard it, where it was uncontradicted. McNamara *v.* Cotton, Co., 10 Ga. App. 669, 73 S. E. 1092.

When unreasonable, opinions of experts not binding. Restetsky *v.* R. Co., 106 Mo. App. 382, 85 S. W. 665.

Expert testimony as to value of attorney's services, not conclusive on court, since it is capable of forming and exercising an independent judgment. Lee *v.* Lomax, 219 Ill. 218, 76 N. E. 377; Dinkelspiel *v.* Pons, 119 La. 236, 43 S. 1018; Brooklyn Heights R. Co. *v.* R. Co., 109 N. Y. S. 31. See Am. S. Co. *v.* Co., 158 Fed. 978, 86 C. C. A. 182; Cochran *v.* Lee, 28 Ky. L. R. 344, 89 S. W. 145.

Court no judicial knowledge sufficient to rebut opinions of experts that air brake is more efficacious alone than in conjunction with reversal of engine. Harris *v.* R., 153 Ala. 139, 44 S. 962, 14 L. R. A. (N. S.) 261, *over.* Central, etc. R. Co. *v.* Foshee, 125 Ala. 199, 27 S. 1006. But see dissent.

641-35 Denison *v.* Co., 135 Fed. 864; Cleveland *v.* Wheeler, 8 Ala. App. 645, 62 S. 309; Mitchell *v.* S., 6 Ga. App. 554, 65 S. E. 326; *cit.* the text; Towle *v.* Parsons (Ia.), 141 N. W. 1049; S. *v.* Stapp, 246 Mo. 338, 151 S. W. 971; Poumeroule *v.* Cable Co., 167 Mo. App. 533, 152 S. W. 114, 165 S. W. 1174; S. *v.* Herron, 77 N. J. L. 523, 71 A. 274; Rushing *v.* R. Co., 149 N. C. 158, 62 S. E. 890; Houston, etc. R. Co. *v.* Hirsch (Tex. Civ.), 160 S. W. 426; James *v.* Robertson, 39 Utah 414, 117 P. 1068. But see Ball *v.* Skinner, 134 Ia. 298, 111 N. W. 1022.

Expert opinions not to be disregarded if nature of case such that juror's experience, knowledge and common sense not an aid, and opinions not discredited. Kerwin *v.* Friedman, 127 Mo. App. 519, 105 S. W. 1102. See Restetsky *v.* R. Co., 106 Mo. App. 382, 85 S. W. 665.

Where a view by jury has been had they are not bound to base their verdict entirely upon opinions of experts as to value, although there is no other evidence. West, etc. Comrs. *v.* Boal, 232 Ill. 248, 83 N. E. 824. But such opinions cannot be wholly disregarded. Du Pont *v.* Dist., 203 Ill. 170, 67 N. E. 815.

642-36 Louft *v.* Pyle, 1 Boyce (Del.)

192, 75 A. 619; S. *v.* Collins, 5 Penne. (Del.) 263, 62 A. 224; Sayre *v.* Trustees, 192 Mo. 95, 90 S. W. 787.

642-37 Ducharme *v.* R. Co., 203 Mass. 384, 89 N. E. 561; Johnson *v.* R. Co., 107 Minn. 285, 119 N. W. 1061.

642-38 Arkansas S. R. Co. *v.* Wingfield, 94 Ark. 75, 126 S. W. 76; S. *v.* Collins, 5 Penne. (Del.) 263, 62 A. 224; Holliday *v.* O'Donnell (Ind. App.), 101 N. E. 642; Bird *v.* Hart-Parr Co. (Ia.), 146 N. W. 74; Ewing *v.* Co., 65 W. Va. 726, 65 S. E. 200; Bucher *v.* R. Co., 139 Wis. 597, 120 N. W. 518.

643-43 In re Anderson, 79 Conn. 535, 66 A. 7; Terre Haute T. & L. Co. *v.* Payne, 45 Ind. App. 132, 89 N. E. 413; Peterson *v.* Brackey, 143 Ia. 75, 119 N. W. 967; Lubbee *v.* Hilgert, 135 App. Div. 227, 120 N. Y. S. 387; Norfolk & W. R. Co. *v.* Sollenberger, 110 Va. 606, 66 S. E. 857; Hedger *v.* S., 144 Wis. 279, 128 N. W. 80. See Robinson *v.* Jones, 105 Md. 62, 65 A. 814 (testamentary capacity); Shoemaker *v.* Elmer, 70 N. J. L. 710, 58 A. 940.

643-44 The Medea, 173 Fed. 498; Moon *v.* Wright (Ga. App.), 78 S. E. 141; Austin *v.* Austin, 260 Ill. 299, 103 N. E. 268; Louisville, etc. R. Co. *v.* Admx., 28 Ky. L. R. 989, 90 S. W. 977; Succession of White, 132 La. 890, 61 S. 860; Illinois C. R. Co. *v.* Emmerson, 91 Miss. 230, 44 S. 928 (testimony of eyewitness to facts); In re Fuller's Est., 222 Pa. 182, 70 A. 1005; Howard *v.* Howard, 112 Va. 566, 72 S. E. 133; Wampler *v.* Harrell, 112 Va. 635, 72 S. E. 135; Comstock *v.* Lumb. Co., 69 W. Va. 100, 71 S. E. 255. See Johnston *v.* Turnbull, 130 Fed. 769, 65 C. C. A. 157.

Testimony of injured person as to extent of injury and suffering may be accepted in preference to contrary testimony of "a whole college of physicians." Southern R. Co. *v.* Tankersley, 3 Ga. App. 548, 60 S. E. 297. See also Payne *v.* Co., 47 Wash. 342, 91 P. 1084.

Nature of issue largely determines weight which should be given to expert testimony which conflicts with direct testimony, since it may be such that only experts can speak upon it with certainty. Ball *v.* Skinner, 134 Ia. 298, 111 N. W. 1022.

Relative weight of conflicting expert and non-expert opinions. See In re Peterson, 136 N. C. 13, 48 S. E. 561; Moore *v.* Caldwell, 6 O. C. C. (N. S.) 484. *Comp.* McMullen *v.* City, 104 App. Div. 337, 93 N. Y. S. 772; Harvey *v.* Fargo, 99 App. Div. 599, 91 N. Y. S. 84.

644-46 Holcomb *v.* P. Co., 175 Mich. 500, 141 N. W. 534.

645-47 Where corroborated by circumstances expert testimony that signature on note not genuine was sufficient to warrant jury in disregarding positive direct testimony to the contrary. Simpson *v.* Schultz, 31 Ind. App. 151, 67 N. E. 457. See Modern S. Co. *v.* County, 126 Ia. 606, 102 N. W. 536.

645-48 Carter *v.* Aubin, 172 Fed. 916, 97 C. C. A. 274; Osborn *v.* Carey, 24 Ida. 158, 132 P. 967. See S. *v.* Wertz, 191 Mo. 569, 90 S. W. 838.

But satisfactory or unsatisfactory character of proof of facts hypothesized is not material. Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501.

646-50 Guarantee, etc. Co. *v.* Waller, 240 Pa. 575, 88 A. 13.

646-51 Lubbee *v.* Hilgert, 135 App. Div. 227, 120 N. Y. S. 387; C. *v.* Shults, 221 Pa. 466, 70 A. 823.

It is not for jury to find what facts in hypothetical question are material or otherwise and determine weight to be given answer accordingly. Burk *v.* Reese, 143 Ia. 496, 121 N. W. 1016.

646-52 Pinnell *v.* Kelly (Ind. App.), 99 N. E. 772.

But not that the opinion of experts is entitled to greater weight than that of non-experts. Lang *v.* Lang (Ia.), 135 N. W. 604.

647-55 *Contra,* C. *v.* Shults, 221 Pa. 466, 70 A. 823.

648-56 Huntsville *v.* Pulley (Ala.), 65 S. 405; Citizens, etc. Co. *v.* Lee (Ala.), 62 S. 199; Vischer *v.* R. Co., 256 Ill. 572, 100 N. E. 270; Peebles *v.* Co., 143 Ill. App. 370; Rivers *v.* Richards, 213 Mass. 515, 100 N. E. 745. See infra, "Objections," 96-28. See also vol. 8, p. 109, n. 81; vol. 8, p. 47, n. 42.

648-58 Chicago U. T. Co. *v.* Roberts, 229 Ill. 481, 82 N. E. 401; Kaufman *v.* Abrams, 90 N. Y. S. 1068 (qualifications).

Form of objection to hypothetical questions. See P. *v.* James, 5 Cal. App. 427, 90 P. 561; Illinois C. R. Co. *v.* Becker, 119 Ill. App. 221; Botwinis *v.* Allgood, 113 Ill. App. 188; Riverton C. Co. *v.* Shepard, 111 Ill. App. 294; Frigstad *v.* R. Co., 101 Minn. 40, 111 N. W.

838; Bragg *v.* R. Co., 192 Mo. 331, 91 S. W. 527; Longan *v.* Weltmer, 180 Mo. 322, 79 S. W. 655 (must point out defect); S. *v.* Megorden, 49 Or. 259, 88 P. 306.

648-59 Empire C. Co. *v.* Gravlee, 9 Ala. App. 657, 64 S. 207; Ryan *v.* Co., 10 Cal. App. 484, 102 P. 558 (matters of common knowledge); Smith *v.* S., 65 Fla. 56, 61 S. 120; Oliver *v.* Co. (R. I.), 90 A. 764; Byers *v.* Ty., 1 Okla. Cr. 677, 100 P. 261; C. *v.* Calhoun, 238 Pa. 474, 86 A. 472.

In a close case the erroneous admission of expert testimony, cause for reversal. Welle *v.* Co., 186 N. Y. S. 319, 79 N. E. 6; Ferdon *v.* R. Co., 131 App. Div. 380, 115 N. Y. S. 352.

649-60 Archer *v.* Ostemeier (Ind. App.), 105 N. E. 522; Corrigan, Lee & Halpin *v.* Heubler (Tex. Civ.), 167 S. W. 159.

649-61 See Gray *v.* Phillips, 54 Tex. Civ. 148, 117 S. W. 870.

649-62 Capital Tract. Co. *v.* Contner, 120 Md. 78, 87 A. 904.

649-63 Bolen-D. C. Co. *v.* Williams, 7 Ind. Ty. 648, 104 S. W. 867; Gulf, etc. R. Co. *v.* Boyce, 39 Tex. Civ. 195, 87 S. W. 395.

"**The mere fact** that a witness, after testifying to all the facts leading to the inevitable conclusion that an instrument is a forgery, declares it to be such is not a harmful or reversible error." Barber *v.* S. (Tex. Civ.), 142 S. W. 577.

650-64 Jones *v.* S., 174 Ala. 53, 57 S. 31; Princeton, etc. Co. *v.* Howell, 46 Ind. App. 572, 92 N. E. 122; In re Clinton St. Police Station Site, 123 N. Y. S 198; S. *v.* Newcomb, 58 Wash. 414, 109 P. 355.

Memory and his veracity are proper subjects for investigation upon cross-examination, and the accuracy of a test upon which his testimony is based. P. *v.* Lustig, 206 N. Y. 162, 99 N. E. 183

650-65 Landro *v.* R. Co., 117 Minn. 306, 135 N. W. 991.

651-67 Kernan *v.* Crook, 100 Md. 210, 59 A. 753.

652-68 Grand Tr., etc. R. Co. *v.* Lindsay, 201 Fed. 836, 120 C. C. A. 166; Sanders *v.* S., 2 Ala. App. 13, 56 S. 69; Weaver *v.* S., 1 Ala. App. 48, 55 S. 956; Pace *v.* R. Co., 166 Ala. 519, 52 S. 52; Napier *v.* Elliott, 177 Ala. 113, 58 S. 435; Cosmopolitan Fire Ins. Co. *v.* Gingold, 3 Ala. App. 537, 57 S. 266; Pope *v.* S., 174 Ala. 63, 57 S. 245; Neyman *v.* R. Co., 174 Ala. 613, 57 S. 435; Carwile *v.* S., 148 Ala. 576, 39 S. 220; Osborne *v.* S., 140 Ala. 84, 37 S. 105; Henderson *v.* Brunson, 141 Ala. 674, 37 S. 549; Hunt *v.* Curtis, 151 Ala. 507, 44 S. 54 (sufficiency of estate personalty to pay debts); Alabama, etc. R. Co. *v.* Sampley, 169 Ala. 372, 53 S. 142; Abingdon Mills *v.* Grogan, 167 Ala. 146, 52 S. 596; Bercher *v.* Gunter, 95 Ark. 155, 128 S. W. 1036; Lehman *v.* Lindenmeyer, 48 Colo. 305, 109 P. 956; Johnson *v.* S., 136 Ga. 804, 72 S. E. 233; McCray *v.* S., 134 Ga. 416, 68 S. E. 62; Tillman *v.* Bomar, 134 Ga. 660, 68 S. E. 504; Georgia R. & Electric Co. *v.* Cocke, 137 Ga. 720, 74 S. E. 244; Holland *v.* McRae, etc. Co., 134 Ga. 678, 68 S. E. 555; Shuler *v.* S., 126 Ga. 630, 56 S. E. 496; Upper Alton *v.* Green, 112 Ill. App. 439; Grand Trunk, etc. R. Co. *v.* S., 40 Ind. App. 695, 82 N. E. 1017; Indianapolis, etc. Co. *v.* Kidd, 167 Ind. 402, 79 N. E. 347; Beery *v.* Driver, 167 Ind. 127, 76 N. E. 967; Craswell *v.* Pure Bred Cattle, etc. Co., 148 Ia. 9, 126 N. W. 908; Marnan *v.* R. Co., 156 Ia. 457, 136 N. W. 884; Stokes *v.* Sac City, 155 Ia. 334, 136 N. W. 207; Frederickson *v.* R. Co., 156 Ia. 26, 135 N. W. 12; D. A. Enslow & Son *v.* Ennis, 155 Ia. 266, 135 N. W. 1105; Allen *v.* Urdangen, 141 Ia. 280, 119 N. W. 724. See *v.* R. Co., 123 Ia. 443, 99 N. W. 106; Jenkins *v.* Beachy, 71 Kan. 857, 80 P. 947; South Covington, etc. R. Co. *v.* Core, 29 Ky. L. R. 836, 96 S. W. 562; Balt. & O. R. Co. *v.* S., 107 Md. 642, 69 A. 439, 72 A. 340; Robinson *v.* R. Co., 211 Mass. 483, 98 N. E. 576; Greene *v.* Corey, 210 Mass. 536, 97 N. E. 70; Carnrick *v.* Liquozone Co., 210 Mass. 594, 97 N. E. 76; Johnson *v.* Carbide Co., 169 Mich. 651, 135 N. W. 1069; Barfoot *v.* White Star Line, 170 Mich. 349, 136 N. W. 437; Ex parte Adler, 171 Mich. 263, 136 N. W. 1120; Haney *v.* Pinckney, 155 Mich. 659, 119 N. W. 1099; Masterson *v.* Co., 204 Mo. 507, 98 S. W. 504, 103 S. W. 48; Schermer *v.* McMahon, 108 Mo. App. 36, 82 S. W. 535; Hendley *v.* Co., 106 Mo. App. 20, 79 S. W. 1163; McKenna *v.* Snare & Triest Co., 147 App. Div. 855, 133 N. Y. S. 107; Marina *v.* Collis, 54 Misc. 581, 104 N. Y. S. 747; Leonard *v.* R. Co., 98 App. Div. 204, 90 N. Y. S. 574; Lunansky *v.* Co., 94 N. Y. S. 557; Slater *v.* R. Co., 94 N. Y. S. 395; S. *v.* Thomson, 153 N. C. 618, 69 S. E. 254; Bristol & S. Co. *v.* Skapple, 17 N. D.

271, 115 N. W. 841; Chicago, etc. R. Co. *v.* Stibbs, 17 Okla. 97, 87 P. 293; Taylor *v.* Brown, 49 Or. 423, 90 P. 673; Curtin *v.* Gas Co., 233 Pa. 397, 82 A. 503; S. *v.* Boyles, 80 S. C. 352, 60 S. E. 233; Norris *v.* Assn., 19 S. D. 114, 102 N. W. 306 (that loss covered by insurance had been "settled"); Linger *v.* Balfour (Tex. Civ.), 149 S. W. 795; Trinity, etc. R. Co. *v.* Crawford (Tex. Civ.), 146 S. W. 329; Arnold *v.* Johnson (Tex. Civ.), 128 S. W. 1186; Oakes *v.* Prather (Tex. Civ.), 81 S. W. 557; Franklin *v.* Boone, 39 Tex. Civ. 597, 88 S. W. 262; Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804; Gulf, etc. R. Co. *v.* Wittnebert (Tex. Civ.), 104 S. W. 424; Dupree *v.* R. Co. (Tex. Civ.), 96 S. W. 647; Willis *v.* S., 49 Tex. Cr. 139, 90 S. W. 1100; Deskin *v.* S., 49 Tex. Cr. 439, 93 S. W. 742; Fowlie *v.* McDonald, Cutler & Co., 85 Vt. 438, 82 A. 677; Metropolitan L. Ins. Co. *v.* Hall, 104 Va. 572, 52 S. E. 345.

See Missouri, etc. R. Co. *v.* Brown (Tex. Civ.), 155 S. W. 979.

As, for example, "(1) She started to get off while it was not running slow enough for a woman to get off in safety, is that right? (2) Isn't it a fact that when the car stopped she was going down to the next corner, and changed her mind after the car stopped again?" North Ala. Tr. Co. *v.* Taylor, 3 Ala. App. 456, 57 S. 146.

"Taking all of your information, up to the present time, including your investigation into these books, have you been able to reach a conclusion that Mr. Thornton made a true statement as to the condition of this bank?" Thornton *v.* C., 113 Va. 736, 73 S. E. 481.

"I will ask you if the purchase of that farm was through the procurement of the plaintiff company, the Cox Real Estate Company?" S. J. Cox Real Estate Co. *v.* French, 160 Mo. App. 478, 142 S. W. 449.

Admission by witness that his testimony was a conclusion does not make it so. Parshall *v.* S., 62 Tex. Cr. 177, 138 S. W. 759.

Evidence of market value is opinion evidence. F. W. Brockman Com. Co. *v.* Aaron, 145 Mo. App. 307, 130 S. W. 116.

While one was testifying as a witness, the district attorney asked him, "State whether or not that some of the tracks that you discovered there were made by the boot heel of the boot that you made for the defendant?" to which the witness answered, "Yes, sir." "Defendant objected to this testimony on the ground that it called for the opinion and conclusion of the witness. The testimony of this witness goes into minute particulars as to the way he knew the tracks he saw at the place from which the cotton was taken were made by boots he had made for this defendant, in that he had repaired them, and he could tell by the tracks the repair work he had done. This is not a conclusion or opinion, but a statement of a fact that he knew the track was made by boots made by him for defendant. Counsel for appellant may not see how the witness could so testify; but the fact is he did so testify. The argument of counsel might go to its weight, but not to its admissibility." Newton *v.* S. (Tex. Cr.), 143 S. W. 638.

Discretion of court properly exercised. The following question was put by defendant to certain witnesses: "In traveling over that walk as you have stated, did you ever notice any defects in the walk?" Also: "In passing over, did you ever notice any holes or defects in the walk?" Objection was made to each of these questions, on the ground, among others, that it called for the opinion of the witnesses as to "what constitutes a defect in the walk." The objection in each case was sustained. Robertson *v.* City of Waukon, 155 Ia. 260, 135 N. W. 1093.

Whether another person owned or borrowed a pistol may or may not be a mere conclusion, depending upon whether witness had knowledge. Waggoner *v.* S. (Tex. Cr.), 98 S. W. 255.

Claims by third person. — A witness may testify how long a third person was in possession of land claiming under another (Henry *v.* Frohlichstein, 149 Ala. 330, 43 S. 126); or "who, if anyone, claimed" land after a certain time. Field *v.* Field, 39 Tex. Civ. 1, 87 S. W. 726.

What witness would have done under given circumstances is, when relevant, a fact he may state, and not a conclusion. International, etc. R. Co. *v.* Davis (Tex. Civ.), 84 S. W. 669.

Ready, Willing and Able.—Testimony of a broker he had purchasers "ready, willing and able to buy" an inadmis-

sible conclusion. Northwestern P. Co. *v.* Whitney, 5 Cal. App. 105, 89 P. 981.

653-70 Cleveland, etc. R. Co. *v.* True (Ind. App.), 100 N. E. 22. See S. *v.* Nowells, 135 Ia. 53, 109 N. W. 1016.

653-71 See Nolan *v.* Nolan, 155 Cal. 476, 101 P. 520.

654-73 See S. *v.* Nowells, 135 Ia. 53, 109 N. W. 1016; Barker *v.* City, 146 Mich. 257, 109 N. W. 427; Canham *v.* R. I. Co., 35 R. I. 177, 85 A. 1050; Lane *v.* S., 59 Tex. Cr. 595, 129 S. W. 353.

654-74 Werten *v.* K. B. Koosa, etc. Co., 169 Ala. 258, 53 S. 98; Welch *v.* S., 156 Ala. 112, 46 S. 856; Kroell *v.* S., 139 Ala. 1, 36 S. 1025; P. *v.* Barnnovich, 16 Cal. App. 427, 117 P. 572; S. *v.* McGuire, 84 Conn. 470, 80 A. 761; Nichols *v.* Wentz, 78 Conn. 429, 62 A. 610; Mosley *v.* Fears, 135 Ga. 71, 68 S. E. 804; Thompson *v.* Kelsey, 8 Ga. App. 23, 68 S. E. 518; Brunswick, etc. R. Co. *v.* Hoodenpyle, 129 Ga. 174, 58 S. E. 705; Robinson *v.* S., 128 Ga. 254, 57 S. E. 315; Delaware, etc. T. Co. *v.* Fiske, 40 Ind. App. 348, 81 N. E. 1100; Estes *v.* R. Co. (Ia.), 141 N. W. 49; Beans *v.* Denny, 141 Ia. 52, 117 N. W. 1091; Rothrock *v.* Cedar Rapids, 128 Ia. 252, 103 N. W. 475; Baker *v.* Oughton, 130 Ia. 35, 106 N. W. 272 (that certain clothing was needed by persons to whom furnished); Barrie *v.* Quimby, 206 Mass. 259, 92 N. E. 451; Beverley *v.* E. R. Co., 194 Mass. 450, 80 N. E. 507 (whether unloading of three cars would make fair-sized crowd on platform); Partelow *v.* R. Co., 196 Mass. 24, 81 N. E. 894; Curtright *v.* Ruehmann (Mo. App.), 166 S. W. 701; Standley *v.* R. Co., 121 Mo. App. 537, 97 S. W. 244; McCloskey *v.* Co., 107 Mo. App. 260, 80 S. W. 723 (whether certain bills for clothing constituted a liberal provision by father for sons); Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295; S. *v.* Laster, 71 N. J. L. 586, 60 A. 361; Harper *v.* Lenoir, 152 N. C. 723, 68 S. E. 228; Taylor *v.* Co., 145 N. C. 383, 59 S. E. 139; C. *v.* Karamarkovic, 218 Pa. 405, 67 A. 650; McKim *v.* City, 217 Pa. 243, 66 A. 340; C. *v.* Eyler, 217 Pa. 512, 66 A. 746; Anderson *v.* Co., 29 S. D. 450, 136 N. W. 1123; Machen *v.* Co., 72 S. C. 256, 51 S. E. 697; Scott *v.* Co., 123 Tenn. 258, 130 S. W. 757; Oliver *v.* S. (Tex. Cr.), 144 S. W. 604; Moore *v.* S. (Tex. Cr.), 144 S. W. 598; Diaz *v.* S., 62 Tex. Cr. 317, 137 S. W. 377; Commerce, etc. Co. *v.* Camp (Tex. Civ.), 129 S. W. 852; Missouri, etc. R. Co. *v.* Pettit, 54 Tex. Civ. 358, 117 S. W. 894; Smith *v.* R. Co., 45 Tex. Civ. 81, 99 S. W. 564; Metropolitan L. Ins. Co. *v.* Wagner, 50 Tex. Civ. 233, 109 S. W. 1120; McCabe *v.* Co., 39 Tex. Civ. 614, 88 S. W. 387 (cause of fall—that person slipped on a board and fell); Potomac, etc. R. Co. *v.* Chichester, 111 Va. 152, 68 S. E. 404; Richards *v.* C., 107 Va. 881, 59 S. E. 1104; O'Brien *v.* McKelvey, 59 Wash. 115, 109 P. 337; Findley *v.* R. Co. (W. Va.), 78 S. E. 396; Kunst *v.* Grafton, 67 W. Va. 20, 67 S. E. 74; Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777, *cit.* the text.

See Smith *v.* Co., 147 Ala. 702, 41 S. 307.

Opinions improperly received if all the facts on which they are founded can be ascertained and made intelligible to court or jury. Springfield, etc. Co. *v.* Warrick, 249 Ill. 470, 94 N. E. 933.

Identity.—Stephens *v.* S., 1 Ala. App. 159, 55 S. 940; Harris *v.* S., 62 Tex. Cr. 235, 137 S. W. 373. See vol. 6, p. 912.

Witness may answer, "Was that ditch dug any deeper than was necessary in order to make it take off the water?" Alexander *v.* Smith, 3 Ala. App. 501, 57 S. 104.

Not objectionable to testify "as the wheels approached the blocks, they came very fast and the wheel on the inside struck a low place and increased the speed so much more and run over the end of the block," and, further, that he knew there was a low place "from the wheels going down and running is the way I detected something wrong." Freeman *v.* Grashel (Tex. Civ.), 145 S. W. 695.

"It has long been the holding of this court that emotions, such as anger, joy, etc., are incapable of description in words, as are also indications of pain, suffering, sickness, etc., and that a witness may testify as to whether a person looked 'sick,' or 'bad,' or seemed angry, etc., being a mere shorthand rendering of a fact which could not be otherwise more accurately described. This applies, also, to the question as to the tone of his voice." Long *v.* Seigel, 177 Ala. 338, 58 S. 380, *cit.* cases.

Witness may testify, "I have made inquiry, and have found out how books are kept generally by grain dealers. My books are kept in the usual and ordinary method in which men engaged in a similar business to mine keep their books; that is the system." German Fire Ins. Co. *v.* Walker (Tex. Civ.), 146 S. W. 606.

Witness who has inspected a body may testify that "the bullet entered the left side of deceased, passed through his body, and came out on the other side." P. *v.* Bond, 13 Cal. App. 175, 109 P. 150.

That an ax found by witness after the killing on the premises where it occurred had blood and hair on it when found and examined by him, was the statement of a simple fact. Watts *v.* S., 177 Ala. 24, 59 S. 270.

What hour of the day the crossing was most used. Birmingham R., L. & P. Co. *v.* Saxon (Ala.), 59 S. 590.

"**To allow the witness** to state whether the train was running fast, or too fast, is fully authorized by the rule laid down in Jones *v.* Fuller, 19 S. C. 70, 45 Am. Rep. 761, where the court says: 'While it is necessary that the witness should first state the facts upon which he bases his opinion, where the facts are such as are capable of being reproduced in language, it is not necessary to do so, where the facts are *not* capable of reproduction in such a way as to bring before the minds of the jury the condition of things upon which the witness bases his opinion.'" Nelson *v.* R. Co., 92 S. C. 151, 75 S. E. 408.

657-76 Birmingham R., L. & P. Co. *v.* Long, 1 Ala. App. 510, 59 S. 382; Pope *v.* S., 174 Ala. 63, 57 S. 245; Crain *v.* S., 166 Ala. 1, 52 S. 31. See First Nat. Bk. *v.* Chandler, 144 Ala. 286, 39 S. 822; Bain *v.* S., 46 Tex. Cr. 96, 79 S. W. 814.

657-78 So. R. Co. *v.* Stollenwerck, 166 Ala. 556, 52 S. 204; Penn. C. Co. *v.* Perdue, 164 Ala. 508, 51 S. 352; Southern R. Co. *v.* Weatherlow, 153 Ala. 171, 44 S. 1019 (whether "many" or few people used a crossing); P. *v.* Wirsching, 145 Ill. App. 121 (that place in question a "bucket shop"); Martin *v.* Co., 81 S. C. 432, 62 S. E. 833 (that person well known in community); Kincheloe Irr. Co. *v.* Co., 105 Tex. 231, 146 S. W. 1187. See Reiter-C. Mfg. Co. *v.* Hamlin, 144 Ala. 192, 40 S. 280; Lander *v.* Sheehan, 32 Mont. 25, 79 P. 406; Kunst *v.* Grafton, 67 W. Va. 20, 67 S. E. 74.

"**Control,**" **like "possession," is a statement of collective fact** and permissible, but when qualified by terms such as "exclusive," and "open and notorious," the realm of mere opinion is entered. Ashford *v.* McKee (Ala.), 62 S. 879. See infra, p. 699, n. 7.

"**Leaving it to the cross-examination** to develop the foundation for the impression or conclusion." Atwood *v.* Atwood, 84 Conn. 169, 79 A. 59, full statement of rule.

That tracks looked as if made by someone running. Ragland *v.* S., 178 Ala. 59, 59 S. 637.

Whether a certain station was a regular stopping place. Birmingham R., L & P. Co. *v.* Saxon (Ala.), 59 S. 584.

What relation the assessed valuation bore to the actual value of the property assessed. "The witness was asked upon cross-examination upon what he formed his opinion, and he said on actual sales of property made by him and the relation between the selling price and the assessed valuation; and, although he held in his hand a list of those sales, containing the prices at which they were made and the assessed value, neither side asked him to produce it. I am inclined to let the evidence stand as a resume of these specific instances upon which it was based, chiefly because neither side called for the evidence of the instances, a tabulation of which the witness held in his hand, and to give the defendant an exception, if it so desires." P. *v.* Woodbury, 67 Misc. 481, 123 N. Y. S. 592.

Possession.—See infra, 699-7.

Ownership of chattels may be testified to by another than reputed owner. Curtis *v.* Hunt, 158 Ala. 78, 48 S. 598. See Hawley *v.* Bond, 20 S. D. 215, 105 N. W. 464.

Purchase.—See Driver *v.* King, 145 Ala. 585, 40 S. 315.

Ability to work since receiving injury. Southern R. Co. *v.* Dean, 128 Ga. 366, 57 S. E. 702. See infra, 696-93.

Denial of indebtedness not a conclusion, but testimony to a collective fact. Owen *v.* McDermott, 148 Ala. 669, 41 S. 730. See LeClair Co. *v.* Co., 124 Wis. 44, 102 N. W. 346. So is direct statement of fact of indebtedness. Richards *v.* Co., 145 Ala. 657, 39 S. 615.

Correctness of photograph.—Hebbe *v.*

Maple Creek, 121 Wis. 668, 99 N. W. 442.

657-79 Parker *v.* R. Co., 164 Mo. App. 31, 147 S. W. 489; Weiss *v.* Kohlhagen, 58 Or. 144, 113 P. 46.

657-80 Landrum *v.* Swann, 8 Ga. App. 209, 68 S. E. 862; Georgia S. & F. R. Co. *v.* Walker, 5 Ga. App. 155, 62 S. E. 720.

658-81 Lafrentz *v.* Cavanagh, 166 Ill. App. 306; Espinoza *v.* S. (Tex. Cr.), 165 S. W. 208, *cit.* Excv. or Ev.

658-82 Danner *v.* Walker-S. Co. (Tex. Civ.), 154 S. W. 295; Pecos, etc. R. Co. *v.* Bishop (Tex. Civ.), 154 S. W. 305; Missouri, etc. R. Co. *v.* Reno (Tex. Civ.), 146 S. W. 207.

Whether person had control over assistant.—Testimony of witness knowing fact competent. Forbes *v.* Davidson, 147 Ala. 702, 41 S. 312.

Opinion of witness as to who had superintendence of him not a mere conclusion. Choctaw, etc. Min. Co. *v.* Moore (Ala.), 63 So. 558.

Whether witness' income necessary for support of family. Torry *v.* Krauss, 149 Ala. 200, 43 S. 184.

The question of who was in custody of a car is not a conclusion, but a question of fact. "Neither was it hearsay, nor would the rules of the company be the best evidence. The rules of the company could not determine the fact of who was in the custody of the car, as indicated by the testimony of the witness. Kelly *v.* S. (Tex. Cr.), 149 S. W. 110.

Witness may state whether or not, in placing a rail with tongs, the rail would bounce. Murdock *v.* Carolina, etc. R. Co., 159 N. C. 131, 74 S. E. 887.

That plaintiff a hard-working woman is statement of fact and not conclusion. St. Louis, etc. R. Co. *v.* Smith, 34 Tex. Civ. 612, 79 S. W. 340.

Testimony based on knowledge, not opinion. San Antonio S. Co. *v.* Higdon (Tex. Civ.), 123 S. W. 732.

659-83 Martin *v.* Beatty, 254 Ill. 615, 98 N. E. 996; In re Winslow's Will (Ia.), 122 N. W. 971; Davis *v.* Davis, 29 S. D. 420, 137 N. W. 283 (sanity); Allen *v.* Burr's, etc. R. Co. (Tex. Civ.), 143 S. W. 1185; Ft. Worth, etc. R. Co. *v.* Morrison (Tex. Civ.), 129 S. W. 1159.

Statement held not a conclusion.—Pope *v.* S., 174 Ala. 63, 57 S. 245.

A non-expert may testify that a certain liquor is whisky. Treadwell *v.* S., 168 Ala. 96, 53 S. 290.

Testimony as to witness' physical condition.—Dean *v.* Wabash R. Co., 229 Mo. 425, 129 S. W. 953.

The opinions of non-experts in such cases are limited to facts and reasons derived from actual observation, and are admissible because the courts recognize the difficulty experienced by witnesses in describing to the jury all the conditions and appearances which enter into opinions they express. Lang *v.* Lang (Ia.), 135 N. W. 604.

659-85 See Hurley *v.* Ty., 13 Ariz. 2, 108 P. 222.

Court determines qualifications.—Melvin *v.* Murphy (Ala.), 63 S. 546; Tandy *v.* Fowler (Tex. Civ.), 150 S. W. 481.

659-86 Gould *v.* U. S., 209 Fed. 730, 126 C. C. A. 454; N. Y., etc. R. Co. *v.* U. S., 203 Fed. 953, 122 C. C. A. 255; Stephens *v.* S., 1 Ala. App. 159, 55 S. 940; Williams *v.* Fulkes, 103 Ark. 196, 146 S. W. 480; Smith *v.* S. (Ga. App.), 80 S. E. 22; Ala., etc. R. Co. *v.* Brown, 140 Ga. 792, 79 S. E. 1113; Logan *v.* Hope, 139 Ga. 589, 77 S. E. 809; Reinschmidt *v.* Dorough (Ga. App.), 81 S. E. 252; Archer *v.* Ostemeier (Ind. App.), 105 N. E. 522; Jacobs *v.* Disharoon, 113 Md. 92, 77 A. 258; Stone *v.* R. Co. (Mo. App.), 129 S. W. 1074; Deal *v.* R. Co. (Mo. App.), 129 S. W. 50; Tandy *v.* Fowler (Tex. Civ.), 150 S. W. 481; Gulf, etc. R. Co. *v.* Abbott (Tex. Civ.), 146 S. W. 1078; St. Louis, etc. R. Co. *v.* Demsey, 40 Tex. Civ. 398, 89 S. W. 786; Fowlie *v.* Co., 82 Vt. 230, 72 A. 989. See Richards *v.* Co., 107 Va. 881, 59 S. E. 1104.

Non-expert witness can give an opinion only after he has detailed facts to base it upon. Henry *v.* So. R. Co., 93 S. C. 125, 75 S. E. 1018.

660-87 Worden *v.* U. S., 204 Fed. 1, 122 C. C. A. 315; Louisville & N. R. Co. *v.* Willis, 58 Fla. 307, 51 S. 134; S. *v.* Hogan, 145 Ia. 352, 124 N. W. 178; Patten *v.* Lynett, 133 App. Div. 746, 118 N. Y. S. 185; McCarthy *v.* Fell, 24 S. D. 74, 123 N. W. 497; Witty *v.* S. (Tex. Cr.), 153 S. W. 1146; Texas, etc. R. Co. *v.* Owen (Tex. Civ.), 128 S. W. 1139; Castle *v.* Guilford, 86 Vt. 540, 86 A. 804. See also vol. 6, p. 469, n. 75.

Facts need not be stated in formal way if they appear incidentally from testimony of witness. Bond *v.* R. Co., 55 Tex. Civ. 119, 118 S. W. 867.

660-89 Pride *v.* S., 133 Ga. 438, 66 S. E. 259; Union P. R. Co. *v.* Thisler, 80 Kan. 583, 103 P. 999.

661-90 Dollar *v.* I. Banking Corp., 13 Cal. App. 331, 109 P. 499; St. Louis, etc. R. Co. *v.* Sizemore, 53 Tex. Civ. 491, 116 S. W. 403.

661-91 Duggan *v.* N. J., etc. Co., 7 Penne. (Del.) 318, 76 A. 636; Rehfuss *v.* Hill, 243 Ill. 140, 90 N. E. 187; Lang *v.* Lang (Ia.), 135 N. W. 604; Kingston Coal Co. *v.* Aaron, 147 Ky. 480, 144 S. W. 371; In re Miller's Est., 36 Utah 228, 102 P. 996.

662-92 Cincinnati, etc. R. Co. *v.* Cook, 45 Ind. App. 401, 90 N. E. 1052.

662-94 P. *v.* Klempke, 19 Cal. App. 672, 127 P. 653; Neidy *v.* Littlejohn, 146 Ia. 355, 125 N. W. 198; Guerra *v.* Co. (Tex. Civ.), 163 S. W. 669.

662-95 Turner *v.* Co., 213 U. S. 257; Slezak *v.* Co., 142 Mo. App. 693, 121 S. W. 1095; White *v.* R. Co., 222 Pa. 534, 71 A. 1081; San Antonio, etc. R. Co. *v.* Laws (Tex. Civ.), 125 S. W. 973.

662-96 Middlebrooks *v.* Sanders (Ala.), 61 S. 898; Fowlkes *v.* Lewis (Ala. App.), 65 S. 724; Bruce *v.* Nat. Bk. (Ala.), 64 S. 82; Newberry *v.* Atkinson (Ala.), 64 S. 46; Union Painless Dentists *v.* Dement, 6 Ala. App. 505, 60 S. 421; Eaton *v.* S., 8 Ala. App. 136, 63 So. 41; Grantland *v.* S., 8 Ala. App. 319, 62 S. 470; Ala., G., So. R. Co. *v.* Neal, 8 Ala. App. 591, 62 S. 554; West. U. Tel. Co. *v.* Sledge, 7 Ala. App. 650, 62 S. 390; Borden & Co. *v.* Co., 7 Ala. App. 335, 62 S. 245; Ala. City G. & A. R. Co. *v.* Heald, 178 Ala. 636, 59 S. 461; Pope *v.* S., 174 Ala. 63, 57 S. 245; Weller & Co. *v.* Camp, 169 Ala. 275, 52 S. 929; Brandon *v.* Progress, etc. Co., 167 Ala. 365, 52 S. 640; Southern R. Co. *v.* Lewis, 165 Ala. 555, 51 S. 746; Birmingham W. Co. *v.* Ferguson, 164 Ala. 494, 51 S. 150 (unless facts on which conclusion based given); Dupree *v.* S., 148 Ala. 620, 42 S. 1004; Huachuca W. Co. *v.* Swain, 4 Ariz. 113, 77 P. 619 (whether prudent person could fail to see excavation at night); Plumlee *v.* R. Co., 85 Ark. 488, 109 S. W. 515; Continental C. Co. *v.* Todd, 82 Ark. 214, 101 S. W. 168; St. Louis, etc. R. Co. *v.* Morris, 76 Ark. 542, 89 S. W. 846; Fanning *v.* Green, 156 Cal. 279, 104 P. 308 (not material); Shafter E. Co. *v.* Alvord, 2 Cal. App. 602, 84 P. 279; Kent *v.* Cobb, 24 Colo. App. 264, 133 P. 424; King Solomon, etc. Co. *v.* Min. Co., 22 Colo. App. 528, 127 P. 129; Geiger *v.* Kiser, 47 Colo. 297, 107 P. 267; S. *v.* Campbell, 82 Conn. 671, 74 A. 927 (possibility of averting injury); Mitchum *v.* S., 56 Fla. 71, 47 S. 815; Nickles *v.* S., 48 Fla. 46, 37 S. 312; McCray *v.* S., 134 Ga. 416, 68 S. E. 62; Shaw *v.* Jones, 133 Ga. 446, 66 S. E. 240; Thomas *v.* S., 122 Ga. 151, 50 S. E. 64; Mayor *v.* Humphries, 122 Ga. 800, 50 S. E. 986; Central, etc. R. Co. *v.* Goodwin, 120 Ga. 83, 47 S. E. 641; Hoffman *v.* Brew. Co., 257 Ill. 185, 100 N. E. 531; West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377; Chicago, etc. R. Co. *v.* O'Donnell, 213 Ill. 545, 72 N. E. 1133 (whether car overcrowded); Baltimore, etc. R. Co. *v.* Morris (Ind. App.), 103 N. E. 35; Cincinnati, etc. R. Co. *v.* Cook, 44 Ind. App. 303, 88 N. E. 76; Cleveland, etc. R. Co. *v.* Osgood, 36 Ind. App. 34, 73 N. E. 285; Aetna P. Co. *v.* Earlandson, 33 Ind. App. 251, 71 N. E. 185; Miller *v.* Miller, 154 Ia. 344, 134 N. W. 1058 (opposition to marriage); Arnd *v.* Aylesworth, 145 Ia. 185, 123 N. W. 1000; Bruggeman *v.* R. Co., 147 Ia. 187, 123 N. W. 1007; Newport Rolling M. Co. *v.* Mason, 152 Ky. 224, 153 S. W. 220; Ohio & K. R. Co. *v.* Beuris, 146 Ky. 612, 143 S. W. 16; Russell *v.* R. Co. (Ky.), 124 S. W. 841; Ball *v.* Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; S. *v.* Hamilton, 124 La. 132, 49 S. 1004; Giering *v.* Sauer, 120 Md. 295, 87 A. 774; Whiting-M. C. Co. *v.* Preston, 121 Md. 210, 88 A. 110; Capital Tr. Co. *v.* Contner, 120 Md. 78, 87 A. 904; Weadock *v.* Swart (Mich.), 144 N. W. 557; Gerhard *v.* Co., 155 Mich. 618, 119 N. W. 904; Comstock *v.* Twp., 137 Mich. 541, 100 N. W. 788; McDonald *v.* Duluth, 93 Minn. 206, 100 N. W. 1102; Disbrow *v.* Ice Co., 170 Mo. App. 585, 157 S. W. 116; Teepen *v.* Taylor, 141 Mo. App. 282, 124 S. W. 1062; Benson *v.* Peters, 87 Neb. 263, 126 N. W. 1003; Hankins *v.* Reimers, 86 Neb. 307, 125 N. W. 516; Ames *v.* Ames, 75 Neb. 473, 106 N. W. 584 (ability to converse intelligently, a conclusion to be drawn by jury where conversations shown); Burns *v.* Loftus, 32 Nev. 55, 104 P. 246; Powell *v.* R. Co., 28 Nev. 40, 78 P. 978 (necessity of sounding steam whistle at hours of beginning and quitting work); Austrian *v.* Laubheim, 78 N. J. L. 178, 73 A. 226; Moran *v.* Oil Co., 211 N. Y. 187, 105 N. E. 217; Neponset N. Bk. *v.* Dunbar, 158 App. Div. 5, 143 N. Y. S. 174; McKenna *v.* Snare & Triest Co., 147 App. Div. 855, 133 N. Y. S. 107 (as to employment); Zide *v.* Scheinberg, 114 N. Y. S. 41;

Anderson *v.* R. Co., 18 N. D. 462, 123 N. W. 281; S. *v.* Hunskor, 16 N. D. 420, 114 N. W. 996; Fowler *v.* Delaplain, 79 O. St. 279, 87 N. E. 260; Columbia Valley T. Co. *v.* Smith, 56 Or. 6, 107 P. 465; Eastman *v.* Dunn, 34 R. I. 416, 83 A. 1057; Perry *v.* Sheldon, 30 R. I. 426, 75 A. 690; McCoy *v.* R. Co., 84 S. C. 62, 65 S. E. 939; Wyckoff *v.* Kerr, 24 S. D. 241, 123 N. W. 733; Johnson *v.* S. (Tex. Cr.), 167 S. W. 733; McClung *v.* Watson (Tex. Civ.), 165 S. W. 532; Chism *v.* S. (Tex. Cr.), 159 S. W. 1185; Putnam L. & D. Co. *v.* Elser (Tex. Civ.), 159 S. W. 190; Foster *v.* S. (Tex. Cr.), 150 S. W. 936; Long *v.* Smith (Tex. Civ.), 162 S. W. 25; Consumers' L. Co. *v.* Hubner (Tex. Civ.), 154 S. W. 249; Williams *v.* S. (Tex. Cr.), 144 S. W. 622; Sackville *v.* Storey (Tex. Civ.), 149 S. W. 239 (as to who was witness' principal); Arnold *v.* Johnson (Tex. Civ.), 128 S. W. 1186; Citizens' R. Co. *v.* Robertson, 41 Tex. Civ. 324, 91 S. W. 609; Kansas City Southern R. Co. *v.* Carter (Tex. Civ.), 166 S. W. 115; Bennett *v.* Foster (Tex. Civ.), 161 S. W. 1078; San Antonio Brew. Assn. *v.* Wolfshohl (Tex. Civ.), 155 S. W. 644 (negligence; not subject for opinion evidence); Texas S. R. Co. *v.* Long, 35 Tex. Civ. 339, 80 S. W. 114; Hart *v.* Hart (Tex. Civ.), 110 S. W. 91; Meyers *v.* Co., 28 Utah 96, 77 P. 347 (whether place plaintiff working sufficiently lighted); Fadden *v.* McKinney (Vt.), 89 A. 351; Pantages *v.* Co., 55 Wash. 453, 104 P. 629; Trego *v.* M. Co., 136 Wis. 315, 117 N. W. 855; Zitske *v.* Grohn, 128 Wis. 159, 107 N. W. 20; Paseo *v.* S. (Wyo.), 117 P. 862.

See Dow W. & I. Wks. *v.* Smith (Ky.), 124 S. W. 819.

Error not capital if reasons for conclusion given. Colono *v.* Co., 147 Ill App. 327.

Conclusion not harmful if in accordance with facts proved. Casey *v.* Co., 240 Ill. 416, 88 N. E. 982.

Form of question, not always determinative of competency of answer. Webster *v.* Moore, 108 Md. 572, 71 A. 466.

Opinion of witness upon very matter in issue, not proper. Detroit S. R. Co. *v.* Lambert, 150 Fed. 555, 80 C. C. A. 357; Kendrick *v.* Furman, 80 Neb. 797, 115 N. W. 541; Leatherman *v.* S., 49 Tex. Cr. 485, 95 S. W. 504; Curtis *v.* Co., 44 Wash. 334, 87 P. 345 (contributory negligence). *Comp.* 527-38.

Unnecessary force.—Opinion inadmissible. Hubbard *v.* R. Co., 32 Ky. L. R. 1337, 108 S. W. 331.

Whether one contract is merged in another is for the jury. Auditorium T. Co. *v.* Nav. Co., 77 Wash. 277, 137 P. 489.

Whether death self-inflicted, where this is in issue. Metropolitan L. Ins. Co. *v.* Wagner, 50 Tex. Civ. 233, 109 S. W. 1120.

What is public place.—O'Neill Mfg. Co. *v.* Harris, 127 Ga. 640, 56 S. E. 739.

Necessity of taking land by eminent domain, opinion incompetent. Grand Rapids *v.* Coit, 149 Mich. 668, 113 N. W. 362.

That footprints made by a particular person—Witness should describe points of similarity and leave conclusion to the jury. Heidelbaugh *v.* S., 79 Neb. 499, 113 N. W. 145; DuBose *v.* S., 148 Ala. 560, 42 S. 862. But see S. *v.* Hopper, 114 La. 557, 38 S. 452, and *contra,* Alford *v.* S., 47 Fla. 1, 36 S. 436; Tankersley *v.* S., 51 Tex. Cr. 170, 101 S. W. 234 (but witness must have made some comparative measurement or there must be some common peculiarity.) *Comp.* Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102; Turner *v.* S., 48 Tex. Cr. 585, 89 S. W. 975. And see vol. 6, pp. 706, 929.

Unfitness of mother for custody of child. Moore *v.* Dozier, 128 Ga. 90, 57 S. E. 110.

Mental condition.—We are not ready to say that the continual search for and accumulation of strings and other similar objects by a person advanced in years to more than 80 and of impaired memory is not an indication of mental unsoundness, and that a witness, after reciting such facts in connection with a somewhat intimate acquaintance, may not express an opinion thereon. There was no error. Erwin *v.* Fillenwarth (Ia.), 137 N. W. 502.

"The circumstances that some of the witnesses were incompetent to testify to personal transactions or communications with decedent furnished no ground for excluding their opinion, as non-experts, as to his mental condition. In re Estate of Goldthorp, 94 Ia. 336, 62 N. W. 845, 58 Am. St. Rep. 400." Irwin *v.* Fillenwarth (Ia.), 137 N. W. 502.

Witness after detailing facts was asked whether "Peter Fillenwarth was capable of looking after financial affairs," and, over objection as incompetent, answered in the negative. Proper. Irwin *v.* Fillenwarth (Ia.), 137 N. W. 502.

664-97 Gracy *v.* R. Co., 53 Fla. 350, 42 S. 903; S. *v.* Hart, 94 S. C. 214, 77 S. E. 862.

665-98 Railey *v.* S. (Tex. Cr.), 121 S. W. 1120.

665-99 Lacey *v.* Hendricks, 164 Ala. 280, 51 S. 157; Rearden *v.* L. Co., 21 Cal. App. 357, 131 P. 894; Milner *v.* Gatlin, 139 Ga. 109, 76 S. E. 860; Lambert *v.* Giffin, 257 Ill. 152, 100 N. E. 496; Indianapolis & M. R. T. Co. *v.* Walsh, 45 Ind. App. 42, 90 N. E. 138; Jacobs *v.* Disharoon, 113 Md. 92, 77 A. 258; Sackett P. B. Co. *v.* Co., 66 Misc. 158, 121 N. Y. S. 238; Granite B. C. *v.* Greene, 25 R. I. 586, 57 A. 649; Chancey *v.* S., 58 Tex. Cr. 54, 124 S. W. 426; Life Ins. Co. *v.* Hairston, 108 Va. 832, 62 S. E. 1057. See Kasower *v.* Sandler, 96 N. Y. S. 734 (construction of contract).

665-2 Brandon *v.* Progress, etc. Co., 167 Ala. 365, 52 S. 640; Alabama G. S. R. Co. *v.* Yount, 165 Ala. 537, 51 S. 737; Watson *v.* S., 8 Ala. App. 414, 62 S. 997; St. Louis, etc. R. Co. *v.* Wirbel, 108 Ark. 437, 158 S. W. 118; Clemons *v.* S., 48 Fla. 9, 37 S. 647; City of Dalton *v.* Humphries, 139 Ga. 556, 77 S. E. 790; Farmer's Co-op. D. Co. *v.* Dist., 16 Ida. 525, 102 P. 481; McCreary *v.* C., 158 Ky. 612, 165 S. W. 981; Whisner *v.* Whisner (Md.), 89 A. 393; Morrow *v.* R. Co., 140 Mo. App. 200, 123 S. W. 1034; P. *v.* Jones, 115 N. Y. S. 800; Benson *v.* Murton, 66 Ore. 199, 133 P. 340, 1189; Wood *v.* Praul, 217 Pa. 293, 66 A. 528; Freeman *v.* Taylor (Tex. Civ.), 125 S. W. 613; Thomason *v.* S. (Tex. Cr.), 160 S. W. 359; Koger *v.* S. (Tex. Cr.), 165 S. W. 577; Houston, etc. R. Co. *v.* Patrick, 50 Tex. Civ. 491, 109 S. W. 1097; Chenault *v.* S., 46 Tex. Cr. 351, 81 S. W. 971; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401; Olympia L. & P. Co. *v.* Harris, 58 Wash. 410, 108 P. 940; Nichols *v.* Hufford (Wyo.), 133 P. 1084.

Witness' "understanding" is inadmissible. Wall *v.* S., 2 Ala. App. 157, 56 S. 57.

665-3 Bachelder *v.* Morgan (Ala.), 60 S. 815; Jackson *v.* S., 177 Ala. 12, 59 S. 171 (that deceased made a motion toward his hip pocket "like he was going to get a pistol"); Atlanta, etc. R. Co. *v.* Wood, 160 Ala. 657, 49 S. 426; Stricklin *v.* Moore, 106 Ark. 14, 151 S. W. 1009; Leifer Mfg. Co. *v.* Gross, 93 Ark. 277, 124 S. W. 1039; Jacobs *v.* Disharoon, 113 Md. 92, 77 A. 258; Haney *v.* Pinckney, 155 Mich. 659, 119 N. W. 1099; McCreery *v.* R. Co., 221 Mo. 18, 120 S. W. 24; Gibbens *v.* Hart (Tex. Civ.), 117 S. W. 168. See Haines *v.* Goodlander, 73 Kan. 183, 84 P. 986; Dean Co. *v.* Standifer, 37 Tex. Civ. 181, 83 S. W. 230.

That team took fright from caboose is a mere guess of witness. St. Louis, etc. R. Co. *v.* Smith (Tex. Civ.), 153 S. W. 391.

665-4 Reagan R. B. Co. *v.* Co., 55 Tex. Civ. 509, 121 S. W. 526; Pecos, etc. R. Co. *v.* Co., 42 Tex. Civ. 60, 93 S. W. 1024. See Long *v.* S., 76 Ark. 493, 89 S. W. 93, 91 S. W. 26, whether person, from his reputation, would be likely to carry out threat.

666-5 S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035; Harkrider *v.* Gaut (Tex. Civ.), 167 S. W. 164; Salmon *v.* S. (Tex. Cr.), 154 S. W. 1023; Green *v.* S., 49 Tex. Cr. 238, 90 S. W. 1115. But see Gilliland *v.* Board, 141 N. C. 482, 54 S. E. 413.

Understanding. — Love *v.* Scatcherd, 146 Fed. 1, 77 C. C. A. 1; Gentry *v.* Singleton, 128 Fed. 679, 63 C. C. A. 231. But affiant's "understanding" of contract is not objectionable as a mere conclusion where it appears to be his recollection of its substance in lieu of a statement of its exact language. Leath *v.* Hinson, 117 Ga. 589, 43 S. E. 985. See Whitfield *v.* Diffie (Tex. Civ.), 105 S. W. 324.

666-6 Dodson *v.* S. (Ala. App.), 65 S. 206; Clarke *v.* Dunn, 161 Ala. 633, 50 S. 93; Birmingham R., L. & P. Co. *v.* Morris, 163 Ala. 190, 50 S. 198; Williams *v.* S., 149 Ala. 4, 43 S. 720 (best judgment); Stephens *v.* S., 1 Ala. App. 159, 55 S. 940; Kimic *v.* R. Co., 156 Cal. 273, 104 P. 312; Minor *v.* S., 55 Fla. 77, 46 S. 297; Jones *v.* Co., 137 Ga. 638, 74 S. E. 59 (I am satisfied); Harris *v.* S., 62 Tex. Cr. 235, 137 S. W. 373; Gilliland *v.* Board, 141 N. C. 482, 54 S. E. 413; St. Louis, etc. R. Co. *v.* Smith (Tex. Civ.), 153 S. W. 391; Texas & P. R. Co. *v.* Henson, 56 Tex. Civ. 468, 121 S. W. 1127 (loss of value $2 or $2.50); Reagan R. B. Co. *v.* Co., 55 Tex. Civ. 509, 121 S. W. 526 ("not less" than a specified quantity, not ob-

jectionable). *Contra*, Erie R. Co. *v.* Schomer, 171 Fed. 798, 96 C. C. A. 458 (''I judge'').

See Southern R. Co. *v.* Howell, 79 S. C. 281, 60 S. E. 677; Berge *v.* Kittleson, 133 Wis. 664, 114 N. W. 125. But see Hammond *v.* S., 154 Ala. 81, 45 S. 654; Pool *v.* S., 48 Tex. Cr. 478, 88 S. W. 350.

Certainty as to parties to whom testimony related, not essential as against objection it is a supposition. Merriweather *v.* Co., 161 Ala. 441, 49 S. 916.

667-7 Williams *v.* S., 5 Ala. App. 112, 59 S. 528; Louisville & N. R. Co. *v.* Dilborn, 178 Ala. 600, 59 S. 438; Birmingham, etc. Co. *v.* Ryan, 148 Ala. 69, 41 S. 616; Mimbs *v.* S., 2 Ga. App. 387, 58 S. E. 499; S. *v.* Richards, 126 Ia. 497, 102 N. W. 439; Leland *v.* Chamberlin, 56 Tex. Civ. 256, 120 S. W. 1040; Herrick *v.* Holland, 83 Vt. 502, 77 A. 6.

667-8 Bragan *v.* Co., 163 Ala. 93, 51 S. 30. *Contra*, Lamb *v.* Brunswick, 121 Ga 345, 49 S. E. 275.

''I guess.''—Use of phrase does not indicate a mere conjecture where context shows that witness is exercising his best judgment. Midland Val. R. Co. *v.* Adkins, 36 Okla. 15, 127 P. 867.

668-9 Louisville & N. R. Co. *v.* Dilburn, 178 Ala. 600, 59 S. 438 (witness ''reckoned'' as to length of time train stopped); Hammond *v.* S., 154 Ala. 81, 45 S. 654; Smith *v.* S., 8 Ala. App. 187, 62 S. 575; Griffin *v.* S., 2 Ga. App. 534, 58 S. E. 781 (person ''seemed'' to be engaged in a game of cards); Howell *v.* Co., 121 Ga. 461, 49 S. E. 299; Pavan *v.* Co. (N. J.), 83 A. 960; Elliston *v.* S., 50 Tex. Cr. 575, 99 S. W. 999; Wade *v.* S., 48 Tex. Cr. 512, 90 S. W. 503.

668-10 Chenoweth *v.* Sutherland, 141 Mo. App. 272, 124 S. W. 1055; Sexton, etc. Co. *v.* Sexton, 48 Tex. Civ. 190, 106 S. W. 728; Green *v.* S., 49 Tex. Cr. 238, 90 S. W. 1115.

668-11 Staples *v.* Steed, 167 Ala. 241, 52 S. 646; Wolfe *v.* Ives, 83 Conn. 174, 76 A. 526; Jackson *v.* United States, 34 App. Cas. (D. C.) 1; Atlantic, etc. R. Co. *v.* Crosby, 53 Fla. 400, 43 S. 318 (railway conductor); Hilliard *v.* King, 134 Ga. 817, 68 S. E. 619; Rump *v.* Woods, 50 Ind. App. 347, 98 N. E. 369; McLaughlin *v.* Griffin, 155 Ia. 302, 135 N. W. 1107; Colsh *v.* R. Co., 149 Ia. 176, 127 N. W. 198; Himmelwright *v.* Baker, 82 Kan. 569, 109 P. 178; Iron Clad, etc. Co. *v.* Stanfield, 112 Md. 360, 76 A. 854; Texas, etc. Co. *v.* Bird (Tex. Civ.), 165 S. W. 8; Galveston, etc. R. Co. *v.* Sample (Tex. Civ.), 145 S. W. 1057; Freeman *v.* Moreman (Tex. Civ.), 146 S. W. 1045; Riley *v.* Fisher (Tex. Civ.), 146 S. W. 581; Internat., etc. R. Co. *v.* Bell (Tex. Civ.), 130 S. W. 634; Tecklenburg *v.* Co., 59 Wash. 384, 109 P. 1036; Portland, etc. R. Co. *v.* Co., 59 Wash. 191, 109 P. 814.

Competency. — Skilled observer may give his opinion that a person whom he has seen at work is competent or incompetent. Owen *v.* R. Co. (Ala.), 61 S. 924. See also vol. 2, p. 847, n. 39.

An experienced wool buyer who has never inspected wool damaged by fire may nevertheless, after inspecting wool so damaged, give a valuable opinion concerning the amount, damage and the market value of the wool burned and wet. Close *v.* R. Co., 169 Mich. 392, 135 N. W. 346.

Number of witnesses limited during trial.—In re Winslow's Will (Ia.), 122 N. W. 971.

669-12 Jones *v.* Burgess, 124 Minn. 265, 144 N. W. 954. See C. *v.* Eyler, 217 Pa. 512, 66 A. 746.

670-14 See Nichols *v.* Wentz, 78 Conn. 429, 62 A. 610; Scott *v.* S., 49 Tex. Cr. 386, 93 S. W. 112. But see San Antonio T. Co. *v.* Kumpf (Tex. Civ.), 99 S. W. 863 (that motorman tried to stop car, inadmissible).

670-15 Birmingham, etc. R. Co. *v.* Randle, 149 Ala. 539, 43 S. 355 (motorman seemed to try to stop car as quick as he could); W. U. T. Co. *v.* Merrill, 144 Ala. 618, 39 S. 121 (sending telegram); Alley *v.* Foundry Co., 159 N. C. 327, 74 S. E. 885. *Comp.* 600-79.

670-16 Louisville & N. R. Co. *v.* Scalf, 155 Ky. 273, 159 S. W. 804; Drown *v.* Co., 81 Vt. 378, 70 A. 599 (where question is only of physical conditions and physical practicability).

Possibility of avoiding injury.—Atlantic I. & C. Co. *v.* Mixon, 126 Ga. 457, 55 S. E. 237. See Southern R. Co. *v.* McGowan, 149 Ala. 449, 43 S. 378. *Comp.* Atlantic, etc. R. Co. *v.* Crosby, 53 Fla. 400, 43 S. 328.

Possibility of saving hand caught in machinery.—Opinion of plaintiff as to, inadmissible. Iverson *v.* Look (S. D.), 143 N. W. 332. See also vol. 8, p. 955, n. 52.

671-17 Welch *v.* S., 156 Ala. 112, 46 S. 876; Reiter C. Mfg. Co. *v.* Hamlin, 144 Ala. 192, 40 S. 280; Dix *v.* Co.,

76 N. J. L. 178, 68 A. 1101 (whether hot water vat in ice plant could be covered without interference with operation of plant); Crowell *v.* S., 56 Tex. Cr. 480, 120 S. W. 897; Richardson *v.* S., 49 Tex. Cr. 391, 94 S. W. 1016 (prosecution for sodomy with a jennet —opinion of witness familiar with size and height of both accused and animal, that copulation impossible with accused standing on ground, erroneously excluded). See Beaumont T. Co. *v.* Dilworth (Tex. Civ.), 94 S. W. 352.

Possibility of injured person's communicating orders to conductor admissible. Pecos & N. T. R. Co. *v.* Finklea (Tex. Civ.), 155 S. W. 612.

Not a conclusion for witness to testify to sufficiency of time for doing act. Casey *v.* Co., 240 Ill. 416, 88 N. E. 982.

Conclusion may be competent, when facts on which it rests are stated for purpose of showing witness' good faith. Brower *v.* W. U. T. Co., 81 Kan. 109, 105 P. 497.

671-18 Missouri, etc. R. Co. *v.* Williams, 56 Tex. Civ. 246, 120 S. W. 553 (stoppage of train).

672-20 *Comp.* Allen *v.* Urdangen, 141 Ia. 280, 119 N. W. 724.

672-21 Pennsylvania C. Co. *v.* Bowen, 159 Ala. 165, 49 S. 305, proper way to drive heading in coal mine.

673-23 Davidson *v.* Ryle, 103 Tex. 209, 124 S. W. 616, honesty in general.

673-25 S. *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634. See also Decker *v.* S., 85 Ark. 64, 107 S. W. 182. *Comp.* S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461.

Excessive force.—Hubbard *v.* R. Co., 32 Ky. L. R. 1337, 108 S. W. 331.

673-26 St. Louis, etc. R. Co. *v.* Osborne, 95 Ark. 310, 129 S. W. 537. See Kansas, etc. R. Co. *v.* Taylor (Tex. Civ.), 107 S. W. 889.

Whether habits grown or become more pronounced—opinion of acquaintance of many years, competent. Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755.

673-27 Taylor *v.* Co., 145 N. C. 383, 59 S. E. 139.

674-28 Rawles *v.* Cork, 23 Cal. App. 455, 138 P. 369; Bowman *v.* Min. Co., 168 Mo. App. 703, 154 S. W. 891. See Conway *v.* Murphy, 135 Ia. 171, 112 N. W. 764, caution spending money.

674-29 Barlow *v.* Hamilton, 151 Ala. 634, 44 S. 657 (whether person looked as though his feelings hurt); Nichols *v.* Wentz, 78 Conn. 429, 62 A. 610 (whether there was any act or statement by one person indicating coercion or attempt to influence another); Appeal of Spencer, 77 Conn. 638, 60 A. 289 ("person spoke affectionately"); Perdue *v.* S., 135 Ga. 277, 69 S. E. 184; Hawaii *v.* Awai, 12 Haw. 174; Duncan *v.* S., 171 Ind. 444, 86 N. E. 641 (heard quarreling); Vannest *v.* Murphy, 135 Ia. 123, 112 N. W. 236 (acted childish); Kuhlman *v.* Weiben, 129 Ia. 188, 105 N. W. 445 (acted drunk); White *v.* White, 76 Kan. 82, 90 P. 1087 (gesticulating "like he was mad," or was standing with his head down "as if he was crying"); C. *v.* Snell, 189 Mass. 12, 75 N. E. 75 (what a person at a distance appeared to be doing); S. *v.* Thompson, 161 N. C. 238, 76 S. E. 249; Heflin *v.* R. Co. (Tex. Civ.), 159 S. W. 499; Houston, etc. R. Co. *v.* Lee (Tex. Civ.), 123 S. W. 154 (ungentlemanly conduct); Arnwine *v.* S., 54 Tex. Cr. 213, 114 S. W. 796 (party not doing anything), but *comp.* Williams *v.* S., 54 Tex. Cr. 642, 114 S. W. 802; Earles *v.* S., 52 Tex. Cr. 140, 106 S. W. 138 (peaceable); Stanley *v.* S. (Tex. Cr.), 95 S. W. 1076 (demeanor while testifying); Jones *v.* S., 47 Tex. Cr. 515, 85 S. W. 5 (cool and collected); Bain *v.* S., 46 Tex. Cr. 96, 79 S. W. 814 (accused when arrested trembled badly and seemed about to fall; was pale and scarcely able to stand); Till *v.* S., 132 Wis. 242, 111 N. W. 1109 (was "worried," "acted stupid" and as if "something was wrong"). But see Ball *v.* U. S., 147 Fed. 32, 77 C. C. A. 126 (certain persons all rushed onto property of another as if by arrangement, inadmissible conclusion); Bell *v.* S., 140 Ala. 57, 37 S. 281; Stevens *v.* Larwill, 110 Mo. App. 140, 84 S. W. 113 (person "did not speak very friendly," inadmissible conclusion).

Manner of speaking.—P. *v.* Stilwell, 81 Misc. 456, 142 N. Y. S. 628.

Previous acquaintance is not necessary. Watson *v.* S., 52 Tex. Cr. 85, 105 S. W. 509.

"Acted like lovers." — Inadmissible conclusion — acts and conversations should be shown. Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501.

Rationality of conduct.—A witness may state whether conduct seen by him impressed him as rational or irrational, although his opinion as to rationality of actor is incompetent. P. *v.* Pekarz,

185 N. Y. 470, 78 N. E. 294. See Hodge *v.* Rambo, 155 Ala. 175, 45 S. 678; De Arellanes *v.* Arellanes, 151 Cal. 443, 90 P. 1059 (appeared to be rational); In re Small, 118 App. Div. 502, 103 N. Y. S. 705; Schoenberg & Co. *v.* Co., 52 Misc. 104, 101 N. Y. S. 798.

Cause of conduct.—See S. *v.* Bennett, 137 Ia. 427, 110 N. W. 150.

Feigning. — Opinion admissible. McCormick *v.* R. Co., 141 Mich. 17, 104 N. W. 390. *Comp.* P. *v.* Koerner, 117 App. Div. 40, 102 N. Y. S. 93.

Tone of voice.—Whether angry or otherwise. Campos *v.* S., 50 Tex. Cr. 289, 97 S. W. 100.

Conversation may be characterized as secret. Clinton *v.* S., 56 Fla. 57, 47 S. 389.

675-30 Neyman *v.* R. Co., 174 Ala. 613, 57 S. 435; Brown *v.* Ratliff, 21 Cal. App. 282, 131 P. 769; Alsup *v.* S. (Tex. Cr.), 153 S. W. 624; Rhodes *v.* S. (Tex. Cr.), 153 S. W. 128; Niles *v.* R. Co. (Vt.), 89 A. 629. But see Henry *v.* Frohlichstein, 149 Ala. 330, 43 S. 126; Nichols *v.* Wentz, 78 Conn. 429, 62 A. 610; Lord *v.* St. R., 74 N. H. 295, 67 A. 639 (person looked frightened and was about to jump from car, admissible); Scott *v.* S., 49 Tex. Cr. 386, 93 S. W. 112.

675-31 *Comp.* Dittfurth *v.* S., 46 Tex. Cr. 424, 80 S. W. 628.

Age.—Opinion as to age of person based on facts stated. Poulter *v.* S. (Tex. Cr.), 157 S. W. 166. But see vol. 1, p. 738, n. 24.

675-32 S. *v.* Denny, 17 N. D. 519, 117 N. W. 869, *cit.* the text.

675-33 See Ward *v.* Meredith, 220 Ill. 66, 77 N. E. 118 (horse was or appeared to be frightened); Schmidt *v.* Co., 136 Ia. 401, 113 N. W. 820 (other horses frightened at same object); Mikesell *v.* R. Co., 134 Ia. 736, 112 N. W. 201; Foster *v.* Co., 141 Mich. 316, 104 N. W. 617; St. Louis, etc. R. Co. *v.* Hall (Tex. Civ.), 106 S. W. 194.

What caused mule to turn from the track in mine—inadmissible conclusion. Madden *v.* Co., 133 Ia. 699, 111 N. W. 57. But what frightened horses may be a fact within knowledge of witness. Dublin G. & E. Co. *v.* Frazier, 46 Tex. Civ. 288, 103 S. W. 197. *Comp.* Clinton *v.* Howard, 42 Conn. 294; vol. 5, p. 680n.

676-35 Putnam *v.* Ins. Co., 155 Mich. 134, 118 N. W. 922; Blackwood C. & C. Co. *v.* James, 107 Va. 656, 60 S. E. 90.

Whether horse fit for lady to drive—inadmissible conclusion. Fletcher *v.* Dixon, 107 Md. 420, 68 A. 875.

Experienced horsemen may state steam shovel is calculated to frighten horses of ordinary gentleness. Heinmiller *v.* Winston, 131 Ia. 32, 107 N. W. 1102.

676-36 Southern R. Co. *v.* Proctor, 3 Ala. App. 413, 57 S. 513; Hale *v.* C., 151 Ky. 639, 152 S. W. 773; Louisville & N. R. Co. *v.* Brown, 28 Ky. L. R. 772, 90 S. W. 567 (liveryman of ten years' experience competent to testify mare had fever and was sick, but not that she had lung fever); Power *v.* Turner, 37 Mont. 521, 97 P. 950 (infection of premises); O'Brien *v.* Von Lienen (Tex. Civ.), 149 S. W. 723. *Comp.* supra, 557-30.

That certain injuries could have caused death of horse, inadmissible. Southern R. Co. *v.* Taylor, 148 Ala. 52, 42 S. 625.

Physical condition.—Statements cattle were "in bad condition," were "hard lookers," "in very bad shape," and "in very hard condition," not conclusions or opinions, but statements of descriptive fact. Gulf, etc. R. Co. *v.* Kimble, 49 Tex. Civ. 622, 109 S. W. 234. So is testimony cattle were in "good condition." Texas & P. R. Co. *v.* White, 35 Tex. Civ. 521, 80 S. W. 641.

677-37 Long *v.* Seigel, 177 Ala. 338, 58 S. 380; Jones *v.* S., 156 Ala. 175, 47 S. 100 (looked like a white person); First Nat. Bk. *v.* Chandler, 144 Ala. 286, 39 S. 822 (wide-awake and attentive); Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 814 (seemed to suffer); Sims *v.* S., 59 Fla. 38, 52 S. 198; U. S. Health & Ins. Co. *v.* Clark, 41 Ind. App. 345, 83 N. E. 760; Vannest *v.* Murphy, 135 Ia. 123, 112 N. W. 236; S. *v.* Nowells, 135 Ia. 53, 109 N. W. 1016; Federal Bet. Co. *v.* Reeves, 77 Kan. 111, 93 P. 627; S. *v.* Matthews, 119 La. 665, 44 S. 336 (excited appearance of accused); S. *v.* Hopper, 114 La. 557, 38 S. 452 (appearance of accused in presence of victim); Osborn *v.* R. Co., 144 Mo. App. 119, 129 S. W. 226; Fulton *v.* R. Co., 125 Mo. App. 239, 102 S. W. 47; Lord *v.* R. Co., 74 N. H. 295, 67 A. 639 (frightened); Shaffer *v.* S. (Tex. Cr.), 151 S. W. 1061; Owen *v.* S., 52 Tex. Cr. 65, 105 S. W. 513 (*cit.* the text); St. Louis, etc. R. Co. *v.* Boyer, 44 Tex. Civ. 311, 97 S. W. 1070 (person's appearance and actions did not indicate he was hurt or injured); Powdrill *v.* S., 62 Tex. Cr. 442, 138 S. W.

114; Ferguson *v.* S., 50 Tex. Cr. 155, 95 S. W. 111 (apparent age); Mullen *v.* R. Co. (Tex. Civ.), 92 S. W. 1000; Gulf, etc. R. Co. *v.* Miller, 35 Tex. Civ. 116, 79 S. W. 1109 (person seemed to be looking at another person); Blue Ridge L. & P. Co. *v.* Price, 108 Va. 652, 62 S. E. 938.

See Cole *v.* S., 51 Tex. Cr. 89, 101 S. W. 218. But see S. *v.* Baudoin, 115 La. 837, 40 S. 239.

Looked drunk.—Swain *v.* S., 8 Ala. App. 26, 62 S. 446. See also vol. 6, p. 651, n. 30.

677-39 **"He had no use of his head and neck** and the right arm," competent. Scott *v.* O'Leary (Ia.), 138 N. W. 512.

Negative statement of appearance, proper—as that person did not show anger or surprise. Tagert *v.* S., 143 Ala. 88, 39 S. 293. See infra, "Injuries to Person," 424-47.

That a person was unconscious at a certain time and conscious at another time. Missouri, etc. R. Co. *v.* Coker (Tex. Civ.), 143 S. W. 218.

677-41 Bufford *v.* Little, 159 Ala. 300, 48 S. 697 (appearance of stumps as to time of severance); Walker *v.* S., 153 Ala. 31, 45 S. 640 (clothes—washed-out blood-stains); Dillard *v.* S. (Ala.), 39 S. 584 (what a person had looked like a bottle of wine); Miller *v.* S., 94 Ark. 538, 128 S. W. 353, *cit.* the text; Illinois C. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 (whether cracks in bolts new or old); Damren *v.* Trask, 103 Me. 204, 68 A. 818 (clapboards); International, etc. R. Co. *v.* Drought (Tex. Civ.), 100 S. W. 1011; International, etc. R. Co. *v.* Gready, 36 Tex. Civ. 536, 82 S. W. 1061 (handhold on car had pulled out); Williams *v.* Norton, 81 Vt. 1, 69 A. 146 (wire rope seemed to have been broken by use). But see Gress L. Co. *v.* Co., 120 Ga. 751, 48 S. E. 115, lost writing bore indications of being genuine, inadmissible.

Whether or not a given article had the appearance of being washed. Harris *v.* S. (Tex. Cr.), 148 S. W. 1074.

That a beverage looked like whisky. Strange *v.* S., 5 Ala. App. 164, 59 S. 691.

Evidence of a comparison between things which cannot be exhibited to jury is proper. S. *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982; S. *v.* Miller, 71 N. J. L. 527, 60 A. 202. *Contra,* Texas & P. R. Co. *v.* Stewart, 52 Tex. Civ. 514, 114 S. W. 413.

Whether anything unusual about a mail crane, inadmissible. Western R. *v.* Cleghorn, 143 Ala. 392, 39 S. 133.

Effect of appearance on value may be shown. Missouri, etc. R. Co. *v.* Pettit, 54 Tex. Civ. 358, 117 S. W. 894.

677-42 Rothrock *v.* Cedar Rapids, 128 Ia. 252, 103 N. W. 475, snow looked as though some one had fallen and left print of body. See Louisville & N. R. Co. *v.* Pearce, 142 Ala. 680, 39 S. 72 (how far something had been dragged—from appearance of ground); Hickey *v.* S., 51 Tex. Cr. 230, 102 S. W. 417; Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102. But see Cleveland, etc. R. Co. *v.* Alfred, 113 Ill. App. 236, impression in dust "looked just like some man had hit in the dust," inadmissible.

678-43 Duncan *v.* S., 171 Ind. 444, 86 N. E. 641 (something felt like a revolver); Electric P. Co. *v.* Tp., 77 Kan. 580, 96 P. 68; S. *v.* Hill, 46 Mont. 24, 126 P. 41; Beers *v.* R. Co., 101 App. Div. 308, 91 N. Y. S. 957 (witness familiar with noise and motion of cars running on particular track may state noise and motion at a certain point on a particular occasion not of usual kind); Richards *v.* C., 107 Va. 881, 59 S. E. 1104 (certain substance was oil and mustache was false).

Quality of soil.—Kitchin *v.* Nursery Co., 65 Or. 20, 130 P. 408, 1133, 132 P. 956.

That smoke was powder smoke.—Johnson *v.* S. (Ala.), 63 S. 163.

That red splotches seen on defendant's clothing "looked like blood." McClain *v.* S. (Ala.), 62 S. 241.

That ground was too hard to permit tracks to be followed. S. *v.* Sanders, 75 S. C. 409, 56 S. E. 35.

That light from neighboring store would illumine place where defendant was killed. Key *v.* S., 8 Ala. App. 2, 62 S. 35.

Genuineness.—Witnesses familiar with taste, smell and color of a patent medicine may testify a medicine sold under same name was an imitation. Hostetter Co. *v.* Gallagher, 142 Fed. 208.

679-44 Plumlee *v.* R. Co., 85 Ark. 488, 109 S. W. 515 (condition of a car); Interstate Coal Co. *v.* Shelton, 152 Ky. 92, 153 S. W. 1. See Chicago, etc. R. Co. *v.* O'Donnell, 114 Ill. App. 345, whether there was room in a car for more people—calls for inadmissible con-

clusion. Question should be whether there was any vacant space.

Damaged.—Witness cannot say property is damaged. Sloss-S., etc. Co. *v.* Mitchell (Ala.), 61 S. 934.

679-45 Williams *v.* Lansing, 152 Mich. 169, 115 N. W. 961, opinion of experienced witness stringers of sidewalk when taken up six months after accident had not been suitable to hold a nail for a year or more, admissible.

679-46 Miller *v.* Chicago, etc. R. Co. (Mo. App.), 167 S. W. 1160. See Virginia-C. C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725. But see Standley *v.* R. Co., 121 Mo. App. 537, 97 S. W. 244.

Whether waiting room suitable and convenient—opinion inadmissible. Illinois C. R. Co. *v.* C., 28 Ky. L. R. 802, 90 S. W. 602.

681-48 Anniston *v.* Iney, 151 Ala. 392, 44 S 48 (dangerous and impassable condition of street); Seidel *v.* Woodbury, 81 Conn. 65, 70 A. 58 (in answer to hypothetical question); Comstock *v.* Tp., 137 Mich. 541, 100 N. W. 788; McDonald *v.* Duluth, 93 Minn. 206, 100 N. W. 1102; Thompson *v.* City, 124 Mo. App. 439, 101 S. W. 709; Maynard *v.* Westfield (Vt.), 90 A. 504.

Policeman familiar with sidewalk may state whether it was in reasonably safe condition. Campbell *v.* New Haven, 78 Conn. 394, 62 A. 665. *Comp.* Harrison *v.* Ayrshire, 123 Ia. 528, 99 N. W. 132. *Contra*, Spaulding *v.* Edina, 122 Mo. App. 65, 97 S. W. 545; Miller *v.* Canton, 112 Mo. App. 322, 87 S. W. 96.

682-50 See Virginia-C. C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725.

Capacity of machine may be testified to. Romona O. S. Co. *v.* Shields, 173 Ind. 68, 88 N. E. 595.

683-51 Louisville & N. R. Co. *v.* Admx., 28 Ky. L. R. 1113, 91 S. W. 685.

683-52 See Cain *v.* R. Co., 74 S. C. 89, 54 S. E. 244; Thompson *v.* R. Co., 48 Tex. Civ. 284, 106 S. W. 910. But see Standley *v.* R. Co., 121 Mo. App. 537, 9 S. W. 244.

But where witness knows condition of a semaphore his testimony thereto is not opinion evidence. Chicago, etc. R. Co. *v.* Vipond, 112 Ill. App. 558.

Dangerous condition of platform.—McFeat *v.* R. Co., 5 Penne. (Del.) 52, 62 A. 898.

Unevenness of rails may be shown by non-expert. Lincoln *v.* R. Co., 82 Vt. 187, 72 A. 821.

683-53 Evans *v.* Mills, 124 Ga. 318, 52 S. E. 538 (machine dangerous); Civetti *v.* Am., etc. Corp., 124 App. Div. 345, 108 N. Y. S. 663; McKim *v.* City, 217 Pa. 243, 66 A. 340; Cain *v.* R. Co., 74 S. C. 89, 54 S. E. 244 (safety of embankment); Thompson *v.* R. Co., 48 Tex. Civ. 284, 106 S. W. 910. See Taylor *v.* S., 49 Fla. 69, 38 S. 380; Charlton *v.* R. Co., 200 Mo. 413, 98 S. W. 529; Konig *v.* R., 36 Nev. 181, 135 P. 141; Tweed *v.* Tel. Co. (Tex.), 166 S. W. 696; Virginia-C. C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725, and infra, 570-78. *Comp.* Detroit S. R. Co. *v.* Lambert, 150 Fed. 555, 80 C. C. A. 357; Morgan *v.* Co., 120 Mo. App. 590, 97 S. W. 638; Houston, etc. R. Co. *v.* McHale, 47 Tex. Civ. 360, 105 S. W. 1149.

"One of the plaintiff's witnesses, who had worked ten years on a threshing machine, was asked, concerning the machine on which plaintiff was injured, 'Was or not that machine, on the day of the accident, a dangerous machine?' This was objected to by defendant as a matter of opinion. Objection sustained. The same witness was then asked, 'You say that there was a wooden cover over the knife cylinder of this machine; was that the regular covering furnished with these machines?' Objected to by counsel for defendant as irrelevant, there being no allegation in plaintiff's narr. covering defective design. Objection sustained." Seininski *v.* Leather Co. (Del.), 83 A. 20.

Comparative danger of crossing railroad at different places. Savannah, etc. R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. 308.

Deadliness of weapon.—McDuffie *v.* S., 121 Ga. 580, 49 S. E. 708; Moran *v.* S., 120 Ga. 846, 48 S. E. 324.

Expert opinion.—See supra, 562-49.

684-54 Savage *v.* Hayes, 142 Ill. App. 316; Mimea *v.* Cooperage Co., 175 Mo. App. 91, 157 S. W. 1006; Levin *v.* Clad & Sons (Pa.), 90 A. 570; Ft. Worth B. R. Co. *v.* Cabell (Tex. Civ.), 161 S. W. 1083; Stone *v.* Sylliaasen, 70 Wash. 89, 126 P. 84. See also vol. 8, p. 955, n. 45.

685-56 Lemons *v.* S., 59 Tex. Cr. 299, 128 S. W. 416 (belief); Richardson *v.* S., 49 Tex. Cr. 391, 94 S. W. 1016.

685-58 S. *v.* Drummond, 70 Wash. 260, 126 P. 541.

Opinion accused was seen at place where offense committed and it was committed at place he was seen, competent. Buzan *v.* S., 59 Tex. Cr. 213, 128 S. W. 388.

686-60 A statement of fact respecting direction of bullet which entered body of deceased, competent though witness unable to precisely locate wound. Carson *v.* S., 57 Tex. Cr. 394, 123 S. W. 590.

686-64 Troy, etc. Co. *v.* Co. (Ala.), 65 S. 141; Black *v.* Hankins, 6 Ala. App. 512, 60 S. 441; Cross *v.* Co., 123 Ga. 817, 51 S. E. 704; McCrary *v.* Pritchard, 119 Ga. 876, 47 S. E. 341; McGuire *v.* Mfg. Co., 23 Ida. 608, 131 P. 654; Huntington *v.* Stemen, 37 Ind. App. 553, 77 N. E. 407; Harriman *v.* Co., 132 Ia. 616, 110 N. W. 33; W. U. T. Co. *v.* Ring, 102 Md. 677, 62 A. 801; Crystal I. Co. *v.* Holliday (Miss.), 64 S. 658; Wiggins *v.* R. Co., 119 Mo. App. 492, 95 S. W. 311; Raymond *v.* Edelbrock, 15 N. D. 231, 107 N. W. 194; Elliott *v.* Wallowa County, 57 Or. 236, 109 P. 130; Montgomery *v.* Somers, 50 Or. 259, 90 P. 674; Byrne *v.* R. Co., 219 Pa. 217, 68 A. 672; Mauldin *v.* R. Co., 73 S. C. 9, 52 S. E. 677; Patterson *v.* McMinn (Tex. Civ.), 152 S. W. 223; Pegues Merc. Co. *v.* Brown (Tex. Civ.), 145 S. W. 280; Bell County *v.* Flint (Tex. Civ.), 91 S. W. 329. *Comp.* Nash *v.* Co., 123 App. Div. 148, 108 N. Y. S. 336. *Contra,* Jackson *v.* R. Co., 73 S. C. 557, 54 S. E. 231 (from personal injuries); Roundtree *v.* R. Co., 72 S. C. 474, 52 S. E. 231.

See also vol. 4, p. 12, n. 25.

Fact of damage.—Witness cannot testify land was damaged, this being a conclusion for jury to draw (Gosdin *v.* Williams, 151 Ala. 592, 44 S. 611; Balt., R. Co. *v.* Sattler, 102 Md. 595, 62 A. 1125; Central, etc. R. Co. *v.* Keyton, 148 Ala. 675, 41 S. 918); nor that he sustained damages by reason of a certain act. Richmond *v.* Brandt, 118 Ill. App. 624.

Cause of damage to goods.—Statement that from general appearance damage was due to improper storing or packing in the car, of fact and not opinion. Texas & P. R. Co. *v.* Warner, 42 Tex. Civ. 280, 93 S. W. 489.

688-66 Opinions as to damages, competent when based on difference in cost of performance and contract price. Wilkinson *v.* Dunbar, 149 N. C. 20, 62 S. E. 748.

688-70 La Compagnie, etc. *v.* Persaglio, 165 Fed. 638, 91 C. C. A. 610; The Umbria, 148 Fed. 283 (damage to vessel); Huntsville *v.* Pulley (Ala.), 65 S. 405; Werten *v.* Co., 169 Ala. 258, 53 S. 98; St. Louis, etc. R. Co. *v.* Brooksher, 86 Ark. 91, 109 S. W. 1169; Peoria, etc. Co. *v.* Vance, 234 Ill. 36, 84 N. E. 607; Withey *v.* R. Co., 141 Mich. 412, 104 N. W. 773 (damage to wearing apparel); Close *v.* R. Co., 169 Mich. 392, 135 N. W. 346; Watson *v.* Co., 31 Mont. 513, 79 P. 14; Union Fibre Co. *v.* Co., 176 Mo. App. 26, 162 S. W. 1046; Deal *v.* St. Louis, etc. R. Co., 144 Mo. App. 684, 129 S. W. 50; Casciato *v.* Mason (Or.), 138 P. 841; St. Louis, etc. R. Co. *v.* Wood Bros. (Tex. Civ.), 147 S. W. 283; Chicago, R. I. & G. R. Co. *v.* Clark (Tex. Civ.), 129 S. W. 186; International, etc. R. Co. *v.* Aten (Tex. Civ.), 81 S. W. 346; Loomis *v.* Besse, 148 Wis. 647, 135 N. W. 123.

See also Auckland *v.* Lawrence, 20 Colo. App. 364, 78 P. 1035; Parrott *v.* R. Co., 127 Ia. 419, 103 N. W. 352. *Contra.* Central, etc. R. Co. *v.* Barnett, 151 Ala. 407, 44 S. 392; Balt., etc. R. Co. *v.* Sattler, 102 Md. 595, 62 A. 1125, 64 A. 507; McCook *v.* McAdams, 76 Neb. 1, 106 N. W. 988, 110 N. W. 1005, 114 N. W. 596. See Ft. Collins D. R. Co. *v.* France, 41 Colo. 512, 92 P. 953; supra, "Damages," 14-30.

Damage to cattle.—Ft. Worth, etc. R. Co. *v.* Bk., 36 Tex. Civ. 293, 81 S. W. 1050, *dist.* Gulf, etc. R. Co. *v.* Wright, 1 Tex. Civ. 402, 21 S. W. 80, where evidence did not show witness considered only legitimate elements of damage.

Earning capacity of deceased may be shown by opinion. Yergy *v.* R. Co., 39 Mont. 213, 102 P. 310.

Value of use may be shown by opinions. Combs *v.* Lake, 91 Ark. 128, 120 S. W. 977.

Where defendant's wealth affects measure of damages, opinions as to the reputed amount of it competent. Beans *v.* Denny, 141 Ia. 52, 117 N. W. 1091.

Value of destroyed crop may be testified to by owner. Davenport *v.* R. Co., 148 N. C. 287, 62 S. E. 431.

689-71 Fowler *v.* S., 155 Ala. 21, 45 S. 913 (bruised).

That wounds appeared to have been made with a penknife found beside the body and from appearances effort had been made to tie up wounds with cloth cut from decedent's skirt. Metropolitan L. Ins. Co. *v.* Wagner, 50 Tex. Civ. 233, 109 S. W. 1120, *cit.* the text.

Cause of death.—Non-expert competent where cause evident to ordinary person. S. *v.* Caron, 118 La. 349, 42 S. 960. See S. *v.* Lyons, 113 La. 959, 37 S. 890. But otherwise incompetent. Ala. Consol. C. & I. Co. *v.* Heald, 154 Ala. 580, 45 S. 686, deceased looked as if he had been smothered.

690-73 S. *v.* Barwick, 89 S. C. 153, 71 S. E. 838; Paseo *v.* S., 19 Wyo. 344, 117 P. 862. See Buzan *v.* S., 59 Tex. Cr. 213, 128 S. W. 388; Welch *v.* S., 57 Tex. Cr. 111, 122 S. W. 880.

Witness who has hunted and killed large animals and shown familiarity with character of wounds made by bullets may testify where bullets entered body of deceased. Spence *v.* Ty., 13 Ariz. 20, 108 P. 227.

690-74 Osborn *v.* R. Co. (Mo. App.), 166 S. W. 1118; S. *v.* Laster, 71 N. J. L. 586, 60 A. 361; Miller *v.* City, 104 App. Div. 33, 93 N. Y. S. 227 (depth of hole); New York, etc. R. Co. *v.* Wilson, 109 Va. 754, 64 S. E. 1060.

690-75 Relative position of one rail of a road as compared with the other may be shown by witness who observed and measured it though measurement not made with spirit level. Gardner *v.* R. Co., 223 Mo. 389, 122 S. W. 1068.

690-76 See Stephenson *v.* Meeks, 141 Ga. 561, 81 S. E. 831. See also vol. 13, p. 227, n. 61.

691-77 Hetland *v.* Bilstad, 140 Ia. 411, 118 N. W. 422; Com. *v.* Rodziewicz, 213 Mass. 68, 99 N. E. 574. See City E. R. Co. *v.* Smith, 121 Ga. 663, 49 S. E. 724; Beers *v.* R. Co., 101 App. Div. 308, 91 N. Y. S. 957; Buzan *v.* S., 59 Tex. Cr. 213, 128 S. W. 388.

Conclusion from flashes and reports shots could not have been fired by one person, competent. Kroell *v.* S., 139 Ala. 1, 36 S. 1025.

Tasting and smelling as basis of opinion as to whether cider is fermented. P. *v.* Emmons (Mich.), 144 N. W. 479.

691-78 Bruchman *v.* U. S., 11 Ariz. 178, 89 P. 413.

691-79 Central, etc. R. Co. *v.* Hyatt, 151 Ala. 355, 43 S. 867 (witnesses may state whether or not a person could have seen a thing); Arkansas & L. R. Co. *v.* Sanders, 81 Ark. 604, 99 S. W. 1109 (distance at which engineer could have seen animal on track); St. Louis, etc. R. Co. *v.* Shannon, 76 Ark. 166, 88 S. W. 851 (how far a common headlight would light up track); Mygreen *v.* Smith, 162 Ill. App. 276; Chicago C. R. Co. *v.* Hagenback, 228 Ill. 290, 81 N. E. 1014; Chicago C. R. Co. *v.* Rohe, 118 Ill. App. 322; Rietveld *v.* R. Co., 129 Ia. 249, 105 N. W. 515; De Haven *v.* D. G. L. Co., 150 Ky. 241, 150 S. W. 322; Osborn *v.* R. Co. (Mo. App.), 166 S. W. 1118; Missouri, etc. R. Co. *v.* Steele, 50 Tex. Civ. 634, 110 S. W. 171; Stone *v.* R. Co., 32 Utah 185, 89 P. 715 (engineer may testify whether escaping steam obscured his view). But see Hammond *v.* S., 147 Ala. 79, 41 S. 761; Morrow *v.* Co., 70 S. C. 242, 49 S. E. 573. *Comp.* Doyle *v.* Eschen, 5 Cal. App. 55, 89 P. 836.

Brightness of electric light.—Witness cannot characterize brightness of electric light where accident occurred as, "so bright he could have read a newspaper there" and "he thought it (the light) was pretty near as bright as day." Chicago *v.* Loebel, 130 Ill. App. 487.

Sufficiency of light at night to permit person on sidewalk to see excavation in street. Huachuca W. Co. *v.* Swain, 4 Ariz. 113, 77 P. 619.

692-80 See Southern I. R. Co. *v.* Osborn, 39 Ind. App. 333, 78 N. E. 248, 79 N. E. 1067; Mitchell *v.* R. Co., 138 Ia. 283, 114 N. W. 622 (how far and under what circumstances engineer could have seen standing cars). But see Chicago, etc. R. Co. *v.* Steckman, 224 Ill. 500, 79 N. E. 602; Chicago, etc. R. Co. *v.* Lowitz, 218 Ill. 24, 75 N. E. 755 (incompetent as mere conclusion).

Unless based on experiment or experience testimony that under given conditions a person standing a certain distance from a given point could have seen a small object on the track at such point, is inadmissible. Ayers *v.* R. Co., 190 Mo. 228, 88 S. W. 608.

693-81 Statement that a conductor saw certain specified objects admissible. Louisville, etc. Co. *v.* Williams (Ala.), 62 S. 679.

693-82 Hill *v.* S., 146 Ala. 691, 40 S. 387.

693-83 Wiar *v.* R. Co. (Ia.), 144 N.

W. 703; St. Louis, etc. Co. *v.* Brown (Tex. Civ.), 163 S. W. 383; St. Louis, etc. R. Co. *v.* Knowles, 44 Tex. Civ. 172, 99 S. W. 867.

694-84 Northern Tex. T. Co. *v.* Caldwell, 44 Tex. Civ. 374, 99 S. W. 869. *Contra*, Dodd *v.* Elec. Co., 95 S. C. 9, 78 S. E. 525; El Paso E. R. Co. *v.* Boer (Tex. Civ.), 108 S. W. 199.

694-86 Holcombe *v.* S., 5 Ga. App. 47, 62 S. E. 647, *cit.* the text.

694-87 Testimony a third person had no financial responsibility, not a conclusion. Harrison G. Co. *v.* R. Co., 145 Mich. 712, 108 N. W. 1081.

Possession of property.—See Arnold *v.* Harris, 142 Mich. 275, 105 N. W. 744.

695-90 Connecticut F. Ins. Co. *v.* R. Co., 171 Mo. App. 70, 153 S. W. 544; Fleming *v.* Pullen (Tex. Civ.), 97 S. W. 109.

Other possible cause than locomotive—opinion incompetent. Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521.

A witness was allowed to express the opinion that lightwood stumps, under conditions indicated, were not dangerous about sparks, and not likely to throw them any distance. "The witness had personal knowledge of the facts and attendant circumstances involved in the statement, and were shown to be qualified by observation and experience to give an opinion that would aid the jury to a correct conclusion; and we think the ruling of his honor admitting the testimony is sustained by several decisions of the court." Caton *v.* Toler, 160 N. C. 104, 75 S. E. 929.

696-91 *Comp.* Dunn *v.* Newberry (Tex. Civ.), 86 S. W. 626.

696-93 Mobile L. & R. Co. *v.* Walsh, 146 Ala. 295, 40 S. 560 (person unable to do anything); St. Louis, etc. Co. *v.* Tucka, 95 Ark. 190, 129 S. W. 541; St. Louis, etc. R. Co. *v.* Osborne, 95 Ark. 310, 129 S. W. 537; Kline *v.* R. Co., 150 Cal. 741, 90 P. 125; Pioneer R. Assn. *v.* Jones, 111 Ill. App. 156; Supreme Lodge *v.* Jones, 113 Ill. App. 241; Chicago C. R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (nervous condition of injured person); Federal Bet. Co. *v.* Reeves, 77 Kan. 111, 93 P. 627; Fulton *v.* R. Co., 125 Mo. App. 239, 102 S. W. 47; Cole *v.* S., 51 Tex. Cr. 89, 101 S. W. 218; Ft. Worth & D. C. R. Co. *v.* Morrison (Tex. Civ.), 129 S. W. 1159; Houston, etc. R. Co. *v.* O'Donnell (Tex. Civ.), 90 S. W. 886 (impairment of witness' own hearing); Cunningham *v.* Neal, 49 Tex. Civ. 613, 109 S. W. 455; Davis *v.* R. Co., 31 Utah 307, 88 P. 2. But see Young *v.* Beveridge, 81 Neb. 180, 115 N. W. 766; Kirby *v.* Co., 77 S. C. 404, 58 S. E. 10.

Ability to attend meals.—Opinion evidence admissible to show one's inability to go to his meals. St. Louis, etc. R. Co. *v.* Pruitt (Tex. Civ.), 157 S. W. 236. See also vol. 7, p. 397, n. 71.

A description of the outward manifestations of a person's physical or mental condition and health does not involve an opinion. Cunningham *v.* Neal, 49 Tex. Civ. 613, 109 S. W. 455. See Jacobs *v.* S., 146 Ala. 103, 42 S. 70.

Nature and effect of physical injuries. See Hill *v.* S., 146 Ala. 691, 40 S. 387; Mo. K. & T. R. Co. *v.* Hibbitts, 49 Tex. Civ. 419, 109 S. W. 228. That, after examination, witness thought person seriously hurt and knocked senseless. Hyland *v.* Co., 70 S. C. 315, 49 S. E. 879. Physical appearance of injury may be described by non-expert. McIlwain *v.* Gaebe, 128 Ill. App. 209. Party may testify he has been a nervous wreck ever since an injury. Chicago, etc. R. Co. *v.* Patton, 122 Ill. App. 174. But see Kozlowski *v.* City, 113 Ill. App. 513.

Physical capacity to labor or to do a full day's work—opinion of non-expert competent. Young *v.* Beveridge, 81 Neb. 180, 115 N. W. 766. See also Semet-S. Co. *v.* Wilcox, 143 Fed. 839, 74 C. C. A. 635 (person competent to testify he was able to do work called for in contract); Federal Bet. Co. *v.* Reeves, 77 Kan. 111, 93 P. 627; Lindsay *v.* Kansas City, 195 Mo. 166, 93 S. W. 273, and supra, 657-78; Southern Kan. R. Co. *v.* Sage (Tex. Civ.), 80 S. W. 1038 (testimony by engineer he was disabled by injuries from following his calling, not opinion or conclusion). But see St. Louis, etc. R. Co. *v.* Demsey, 40 Tex. Civ. 398, 89 S. W. 786; Jesse *v.* S., 46 Tex. Cr. 444, 80 S. W. 999. Witness may state effect attempts to work had on injured person. Chicago, etc. R. Co. *v.* Jones, 39 Tex. Civ. 480, 88 S. W. 445. That after injury a person could not lift anything, was crippled up, always suffering, and could not walk far without resting—competent. San Antonio Tr. Co. *v.* Flory, 45 Tex. Civ. 233, 100 S. W. 200. But see Wells, F. & Co. *v.* Boyle, 39 Tex. Civ. 365, 87

S. W. 164. That he did not appear to be half as good a man as before injury. St. Louis, etc. R. Co. *v.* Smith (Tex. Civ.), 90 S. W. 926.

Whether injury appeared recent and may describe it. Robinson *v.* Halley, 124 Ia. 443, 100 N. W. 328.

Effect of medical treatment may be stated by one who has observed treatment and its effects. Cleveland, etc. R. Co. *v.* Hadley, 40 Ind. App. 731, 82 N. E. 1025.

Delirium.—Non-expert incompetent. S. *v.* Nowells, 135 Ia. 53, 109 N. W. 1016.

697-96 Ewing *v.* Light Co., 91 Kan. 388, 137 P. 940; Rearden *v.* R. Co., 215 Mo. 105, 114 S. W. 961; Fearon *v.* Mullins, 38 Mont. 45, 98 P. 650; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300; Duerler Mfg. Co. *v.* Eichhorn, 44 Tex. Civ. 638, 99 S. W. 715; St. Louis, etc. R. Co. *v.* Boyer, 44 Tex. Civ. 311, 97 S. W. 1070 (person "ill"); Johnson *v.* R. Co., 35 Utah 285, 100 P. 390. But see Chicago, etc. R. Co. *v.* Rowell, 151 Ky. 313, 151 S. W. 950; Illinois L. Ins. Co. *v.* DeLang, 30 Ky. L. R. 753, 99 S. W. 616.

See also vol. 8, p. 586, n. 9.

697-97 Cleveland, etc. R. Co. *v.* Hadley, 40 Ind. App. 731, 82 N. E. 1025; Duerler Mfg. Co. *v.* Eichhorn, 44 Tex. 638, 99 S. W. 715; Fletcher *v.* Dixon, 113 Md. 101, 77 A. 326. See vol. 8, p. 588, n. 22.

Or for the better.—Modern Brotherhood, etc. *v.* Jordan (Tex. Civ.), 167 S. W. 794.

698-98 *Contra*, Valentine *v.* Ins. Co., 106 App. Div. 487, 94 N. Y. S. 758.

698-99 Roth *v.* Assn., 102 Tex. 241, 115 S. W. 31.

698-1 Macon R. & L. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569; Bardstown *v.* County, 28 Ky. L. R. 710, 90 S. W. 246 (small-pox—incompetent). See infra, "Mental and Physical States," 588-23.

That a person died of consumption may be testified by a non-expert. Krapp *v.* Ins. Co., 143 Mich. 369, 106 N. W. 1107, *disap.* Grattan *v.* Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617.

Cough, lung or female trouble—question whether witness' wife had any of these before injury, calls for fact and not opinion. St. Louis, etc. R. Co. *v.* Lowe (Tex. Civ.), 97 S. W. 1087.

The symptoms which he has observed may be stated by a non-expert, but not nature of disease. Illinois L. Ins. Co. *v.* DeLang, 30 Ky. L. R. 753, 99 S. W. 616. Thus, a question whether witness saw any conduct or action by another indicating he had piles, is inadmissible. Taylor *v.* Woodmen, 42 Wash. 304, 84 P. 867.

698-2 But see Hubbard *v.* Perlie, 25 App. Cas. (D. C.) 477.

A person who has had experience with burns may give opinion as to means used to inflict burns on another. S. *v.* Nienhaus, 217 Mo. 332, 117 S. W. 73.

698-4 Indianapolis, etc. R. Co. *v.* Reeder, 37 Ind. App. 262, 76 N. E. 816; Kentucky Midland C. Co. *v.* Vincent (Ky.), 166 S. W. 800; Morris *v.* R. Co., 105 Minn. 276, 117 N. W. 500; Texas & N. O. R. Co. *v.* Clippenger, 47 Tex. Civ. 510, 106 S. W. 155; St. Louis, etc. R. Co. *v.* Schuler (Tex. Civ.), 102 S. W. 783; Gulf, etc. Co. *v.* Wafer (Tex. Civ.), 130 S. W. 712. See Chicago & A. R. Co. *v.* Johnson, 128 Ill. App. 20; Board *v.* Kirby, 156 Ky. 741, 161 S. W. 1115; Fulton *v.* R. Co., 125 Mo. App. 239, 102 S. W. 47; San Antonio T. Co. *v.* Flory, 45 Tex. Civ. 233, 100 S. W. 200.

Manifestations of pain.—Gardner *v.* Paulson, 117 Ill. App. 17.

699-6 Dean *v.* R. Co., 229 Mo. 425, 129 S. W. 953.

Identity.—See infra, "Identity," 934-6.

699-7 Foster *v.* Murphy, 135 Fed. 47, 67 C. C. A. 521; Wilson *v.* Hotchkiss, 21 Cal. App. 392, 132 P. 88; Home Bk. & Realty Co. *v.* Baum, 85 Conn. 383, 82 A. 970; Hoffman *v.* Brew. Co., 167 Ill. App. 291; Kelly *v.* Williams, 162 Ill. App. 571; Billick *v.* Davenport (Ia.), 145 N. W. 470; Wilson *v.* Co., 134 Ia. 594, 112 N. W. 89 (abandonment); Monger *v.* Effland, 87 Kan. 710, 125 P. 46; Jacobs *v.* Disharoon, 113 Md. 92, 77 A. 258; Wells & M. *v.* Littleton, 100 Md. 416, 60 A. 22; Whitcomb *v.* Whitcomb (Mass.), 105 N. E. 613; Luce *v.* Parsons, 192 Mass. 8, 77 N. E. 1032; Rice *v.* James, 193 Mass. 458, 79 N. E. 807; Calvert *v.* Schultz, 143 Mich. 441, 106 N. W. 1123; Brown *v.* Carson, 132 Mo. App. 371, 111 S. W. 1181; De Sandro *v.* Light & W. Co., 48 Mont. 226, 136 P. 711; Rosenberg *v.* Wilkens, 127 App. Div. 906, 111 N. Y. S. 539; S. *v.* Denny, 17 N. D. 519, 117 N. W. 869; Swing *v.* Rose, 75 O. St. 355, 79 N. E. 757; Buchanan *v.* Randall, 21 S. D. 44, 109 N. W. 513 (purchase);

Berger *v.* Kirby, 105 Tex. 611, 153 S. W. 1130; Nat. State Bk. *v.* Ricketts (Tex. Civ.), 152 S. W. 646; Kirby L. Co. *v.* Williams (Tex. Civ.), 159 S. W. 309; Baldwin *v.* Co. (Tex. Civ.), 143 S. W. 716; W. U. T. Co. *v.* Smith, 52 Tex. Civ. 107, 113 S. W. 766 (though facts on which conclusion rests stated); Donner *v.* Graap, 134 Wis. 523, 115 N. W. 125 (duty).

See Hendrickson *v.* Dwyer, 70 N. J. L. 223, 57 A. 420. But see Owen *v.* McDermott, 148 Ala. 669, 41 S. 730 (indebtedness—denial of, competent); Gatt *v.* Shive (Tex. Civ.), 82 S. W. 303 (papers in bank under control of depositor, competent as a fact); Le Clair Co. *v.* Co., 124 Wis. 44, 102 N. W. 346 (indebtedness—denial of, competent).

Citizenship.—"Well, I consider I was a citizen of the state of West Virginia," excluded as a mere expression of opinion. Gartin *v.* Coal Co. (W. Va.), 78 S. E. 673.

Opinion that a certain pasteboard was a knuck pattern inadmissible. Maxwell *v.* S. (Ala. App.), 65 S. 732.

That work was under direction of bridge foreman is not a conclusion. Marshall & E. T. A. Co. *v.* Blackburn (Tex. Civ.), 155 S. W. 625.

Opinion that person had lost entire sight of eye, inadmissible. Inst., etc. Assn. *v.* Rogers (Tex. Civ. App.), 163 S. W. 421.

That tracks were those of a particular horse, not an opinion where witness bases his statement on knowledge. Elmore *v.* S. (Tex. Cr.), 162 S. W. 517.

"That he had paid" a bill not opinion, but statement of fact. Cocke & Co. *v.* Muddy C. & I. Co. (Tex. Civ.), 155 S. W. 1019.

Duty.—Opinion of witness as to what he believed his duty to be as car checker, excluded. Houston B. & T. R. Co. *v.* Stephens (Tex. Civ.), 155 S. W. 703.

Kind of deed given not subject for opinion evidence. Hume *v.* Darsey (Tex. Civ.), 154 S. W. 255.

Reasonableness of time, see infra, 711-43.

"Took an affidavit."—Opinion that another "took an affidavit" inadmissible. Johnson *v.* S. (Ga. App.), 79 S. E. 524.

Duty of servant or employe.—Russell *v.* R. Co. (Ia.), 141 N. W. 1077.

"Rotten."—That rope was rotten is but a conclusion of witness, where he has stated no facts. Dugan *v.* Trans. Co., 160 App. Div. 11, 145 N. Y. S. 31.

Employment.—Witness's opinion that he was employed by another is a conclusion, and inadmissible. Winslow *v.* L. & P. Co. (Cal.), 130 P. 427. But see vol. 8, p. 496, n. 24.

Violation of city ordinance.—Opinion as to not admissible. Torgeson *v.* Hanford (Wash.), 139 P. 648.

Agreed price.—Statement of, not a conclusion. Detroit R. T. Co. *v.* Aldrich, 176 Mich. 357, 142 N. W. 373. *Comp.* Kitchin *v.* Nursery Co., 65 Or. 20, 130 P. 408, 1133, 132 P. 956.

Fault of injured.—Opinion as to inadmissible. Gray *v.* Ry. Co., 215 Mass. 143, 102 N. E. 71. See also vol. 8, p. 955, n. 49.

That C. recognized a mortgage, mere conclusion. Barber *v.* Toomey, 67 Or. 452, 136 P. 343.

"Did you ever part with your interest in the Humboldt farm?" calls for a conclusion which court must draw. Work *v.* Work, 90 Kan. 683, 136 P. 236.

Paternity.—That R. is father of assured, is a mere conclusion. Mutual L. Ins. Co. *v.* Good, 25 Colo. App. 204, 136 P. 821. See also vol. 8, p. 172, n. 28.

Book makers.—Opinion that defendants are book makers unsupported by evidence is a mere conclusion. P. *v.* Laude, 81 Misc. 256, 143 S. 156.

Contract.—Existence of contract of employment. International H. Co. *v.* Campbell, 43 Tex. Civ. 421, 96 S. W. 93. Construction by or understanding of witness, improper. Montgomery County *v.* Bean, 26 Ky. L. R. 568, 82 S. W. 240; Hillock *v.* Grape, 111 App. Div. 720, 97 N. Y. S. 823; Bowen *v.* Ins. Co., 20 S. D. 103, 104 N. W. 1040); but witness' "understanding" of contract proper when it means "recollection." Leath *v.* Hinson, 117 Ga. 589, 43 S. E. 985. See supra, 666-5. Witness cannot state everything required by contract had been done (Taylor *v.* McFatter [Tex. Civ.], 109 S. W. 395. *Comp.* Providence M. Co. *v.* Browning, 72 S. C. 424, 52 S. E. 117); or that contract had been sold or transferred to him. Mardowitz *v.* Goldberg, 87 N. Y. S. 234.

Duties of servant or employe.—Testimony by one who knows facts is not a conclusion. Kirby L. Co. *v.* Chambers, 41 Tex. Civ. 632, 93 S. W. 607; Pullman Co. *v.* Norton (Tex. Civ.), 91 S. W. 841; Long *v.* R. Co. (Tex. Civ.), 85 S. W. 1048 (conductor may testify as to duties of brakeman); St. Louis, etc. R. Co. *v.* Rea (Tex. Civ.), 84 S. W. 428. *Contra,* Tarnowski *v.* R. Co. (Ind.), 104 N. E. 16, question to brakeman "What were your duties, Mr. H., as brakeman on that day," held objectionable as calling for conclusion.

Partnership.—Existence of (Hubbard *v.* Mulligan, 34 Colo. 236, 82 P. 783); authority of partner to sign firm checks (Michigan S. Co. *v.* Paul, 149 Mich. 695, 113 N. W. 310). But see Clark *v.* Hoffman, 128 Ill. App. 422, on question whether concern a corporation or partnership, old employes competent to state it was a partnership.

Agency.—W. U. T. Co. *v.* Heathcoat, 149 Ala. 623, 43 S. 117; Am. T. & T. Co. *v.* Green, 164 Ind. 349, 73 N. E. 707 (authority of agent). See Aughey *v.* Windrem, 137 Ia. 315, 114 N. W. 1047; McCormack *v.* Herboth, 115 Mo. App. 193, 91 S. W. 164; Carr *v.* Ins. Co., 115 App. Div. 755, 101 N. Y. S. 158. *Contra,* Fritz *v.* Co., 136 Ia. 699, 114 N. W. 193, "agency is a condition of which anyone having knowledge of it may testify, subject, however, to the test of cross-examination." See also Gould *v.* Co., 147 Ala. 629, 41 S. 675, limitations on salesman's authority.

Possession is a fact, which may be testified to directly when term used in its proper sense as distinguished from "seisin." Wright *v.* S., 136 Ala. 139, 34 S. 233; Nathan *v.* Dierssen, 146 Cal. 63, 79 P. 739; Iler *v.* Miller, 78 Neb. 675, 111 N. W. 589, 14 L. R. A. (N. S.) 289; Child *v.* Kingsbury, 46 Vt. 47. But it is not proper for witness to characterize possession as "open and notorious." Driver *v.* King, 145 Ala. 585, 40 S. 315.

Delivery and acceptance of deed.—Direct denial of receipt or acceptance not a conclusion, though affirmative testimony deed delivered and accepted would be inadmissible. Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209. See Brooks *v.* Sioux City, 114 Ia. 641, 87 N. W. 682. But see Chew *v.* Jackson, 45 Tex. Civ. 656, 102 S. W. 427.

Lack of consideration.—Testimony by wife that deed to her by husband was without consideration is admissible and not equivalent to allowing witness to testify she did not hold land under an implied trust. Yordi *v.* Yordi, 6 Cal. App. 20, 91 P. 348, *foll.* Hardison *v.* Davis, 131 Cal. 635, 63 P. 1005.

Abandonment of easement—conclusion inadmissible. Gaston *v.* R. Co., 120 Ga. 516, 48 S. E. 188.

Sale.—Testimony of witness she "sold" a particular chattel, incompetent. Rea *v.* Schow, 42 Tex. Civ. 600, 93 S. W. 706, this fact being principal issue. See Mardowitz *v.* Goldberg, 87 N. Y. S. 234.

701-11 Melvin *v.* Murphy (Ala.), 63 S. 546; Johnston *v.* Johnston, 174 Ala. 220, 57 S. 450; Georgia R. & E. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944; Keys *v.* McDowell (Ind. App.), 100 N. E. 385; In re Martin's Will (Ia.), 142 N. W. 74; In re Law's Est. (Ia.), 138 N. W. 53; Jones *v.* C., 154 Ky. 752, 159 S. W. 568; McEleney *v.* Donovan, 119 Minn. 294, 138 N. W. 306; Hunter *v.* Briggs, 254 Mo. 28, 162 S. W. 204; Conwill *v.* Eldridge (Okla.), 130 P. 912; Shelton *v.* R. Co., 86 S. C. 98, 67 S. E. 899; In re Hackett's Est. (S. D.), 145 N. W. 437; Key *v.* S. (Tex. Cr.), 161 S. W. 130; Montgomery *v.* S. (Tex. Cr.), 151 S. W. 813; Koppe *v.* Koppe, 57 Tex. Civ. 204, 122 S. W. 68; Ex parte McCoy, 47 Tex. Cr. 237, 82 S. W. 1044 (temper); S. *v.* George, 58 Wash. 681, 109 P. 114 (mental state). See Atlantic Coast L. R. Co. *v.* Whitney, 64 Fla. 72, 61 S. 179. See also vol. 7, p. 468, n. 73. But see Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678, holding testimony testatrix was easily influenced and susceptible to flattery, a conclusion.

Sanity.—Non-expert opinion as to admissible. Woods *v.* S. (Ala.), 65 S. 342. See also vol. 7, p. 470, n. 78.

Generally one person cannot testify whether another knows or knew a certain fact. West Pratt C. Co. *v.* Andrews, 150 Ala. 368, 43 S. 348.

701-13 See In re Helpbringer's Est. (Mo. App.), 162 S. W. 288.

That alleged purchaser was ready, willing and able cannot be testified to by broker. Northwestern P. Co. *v.* Whitney, 5 Cal. App. 105, 89 P. 981.

701-14 Tagert *v.* S., 143 Ala. 88, 39 S. 293 (person did not show anger); S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461 (whether witness heard de-

fendant use a single cross word or any word that sounded in a quarrelsome tone); S. *v.* Tate, 161 N. C. 280, 76 S. E. 713; Owen *v.* S., 52 Tex. Cr. 65, 105 S. W. 513, quot. the text; Campos *v.* S., 50 Tex. Cr. 289, 97 S. W. 100; In re Miller's Est., 36 Utah 228, 102 P. 996, *cit.* the text.

Cause of apparent displeasure cannot be stated by witness. Fleckinger *v.* Taffee, 149 Mich. 678, 113 N. W. 311.

Testimony injury done maliciously is a conclusion. Vandiver *v.* Waller, 143 Ala. 411, 39 S. 136; Doty *v.* R. Co., 137 Ia. 689, 114 N. W. 522.

703-16 S. *v.* Byrd, 41 Mont. 585, 111 P. 407. *Comp.* supra, 675-33.

703-17 S. *v.* Turner, 143 N. C. 641, 57 S. E. 158; Gill *v.* Ruggles, 95 S. C. 90, 78 S. E. 536; Gabler *v.* S., 49 Tex. Cr. 623, 95 S. W. 521. But see Parham *v.* S., 147 Ala. 57, 42 S. 1, deceased afraid to go about at night, inadmissible.

703-18 Caswell *v.* Co. (Ia.), 126 N. W. 908; Hamilton *v.* Co., 129 Ia. 172, 105 N. W. 438; Williams *v.* Williams, 109 Me. 537, 85 A. 43; Canham *v.* R. I. Co., 35 R. I. 177, 85 A. 1050; Johnson *v.* S. (Tex. Cr.), 167 S. W. 733. See infra, "Intent," 601-47. But see Waggoner *v.* S. (Tex. Cr.), 98 S. W. 255.

One party to a contract may testify as to what was the understanding between himself and the other regarding a certain matter, although he cannot recall the conversations. Whitfield *v.* Diffie (Tex. Civ.), 105 S. W. 324. See supra, 666-5.

Whether husband "abandoned" her (witness) not proper question as it involves question of intent. Grantland *v.* S., 8 Ala. App. 319, 62 S. 470.

704-19 *Contra,* Pearce *v.* Stace, 207 N. Y. 506, 101 N. E. 434, *over.* McKee *v.* Nelson, 4 Cow. (N. Y.) 355.

705-21 Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844, whether person seemed to suffer after injury.

705-22 Tagert *v.* S., 143 Ala. 88, 39 S. 293, person did not show surprise.

Opinion as to consciousness of person, not a conclusion. In re Murray's Est., 145 Ia. 368, 124 N. W. 193.

706-26 Boan *v.* Lumb. Co. (Ala.), 63 S. 564; Hurley *v.* Ty., 13 Ariz. 2, 108 P. 222; Baltimore & O. R. Co. *v.* Harris, 121 Md. 254, 88 A. 282; Jones *v.* Co., 99 Md. 64, 57 A. 620 (noise loud enough to be heard by any one on car); Kohr *v.* R. Co., 117 Mo. App. 302, 92 S. W. 1145 (bell heard by witness was starting bell and gripman's gong).

That noise heard sounded like collision of street cars, not inadmissible. Binsbacher *v.* Co., 108 Mo. App. 1, 82 S. W. 546. Cause of noise, whether shotgun or rifle may be testified to. Hunter *v.* S., 54 Tex. Cr. 224, 114 S. W. 124.

That train making less noise than usual is a statement of fact. International, etc. R. Co. *v.* Villareal, 36 Tex. Civ. 532, 82 S. W. 1063.

Difference in sound between reports of pistols heard by witness is statement of fact. West *v.* S., 53 Fla. 77, 43 S. 445.

706-27 Bufford *v.* Little, 159 Ala. 300, 48 S. 697 (number of trees cut, though stumps not counted); Fowler *v.* S., 8 Ala. App. 168, 63 S. 40; P. *v.* Helm, 152 Cal. 532, 93 P. 99 (width of bicycle tracks); Garner *v.* S., 6 Ga. App. 788, 65 S. E. 842 (size of bullet).

708-31 Erie R. Co. *v.* Weber, 207 Fed. 293, 125 C. C. A. 37; St. Louis, etc. R. Co. *v.* Fithian, 106 Ark. 491, 155 S. W. 88; Nichols *v.* R. Co., 44 Colo. 501, 98 P. 808; Colorado & S. R. Co. *v.* Webb, 36 Colo. 224, 85 P. 683; Seaboard, etc. R. Co. *v.* Smith, 53 Fla. 375, 43 S. 235; Louisville & N. R. Co. *v.* Jones, 50 Fla. 225, 39 S. 485; Reidel *v.* R. Co., 144 Ill. App. 424; Powers *v.* Iowa Cent. R. Co. (Ia.), 136 N. W. 1049; Gregory *v.* R. Co., 126 Ia. 230, 101 N. W. 761; Atchison, etc. R. Co. *v.* Holloway, 71 Kan. 1, 80 P. 31; Louisville & N. R. Co. *v.* Stewart, 131 Ky. 665, 115 S. W. 775; Garran *v.* R. Co., 144 Mich. 26, 107 N. W. 284; Line *v.* R. Co., 143 Mich. 163, 106 N. W. 719; Tinkle *v.* R. Co., 212 Mo. 445, 110 S. W. 1086; Potter *v.* R. Co., 136 Mo. App. 125, 117 S. W. 593; Donaldson *v.* R. Co., 128 Mo. App. 245, 107 S. W. 36; Lynch *v.* R. Co., 208 Mo. 1, 106 S. W. 68; Stotler *v.* R. Co., 200 Mo. 107, 98 S. W. 509; Sluder *v.* Co., 189 Mo. 107, 88 S. W. 648; Aston *v.* Co., 105 Mo. App. 226, 79 S. W. 999; Sherman *v.* Co., 33 Nev. 385, 111 P. 416; Bracken *v.* R. Co., 222 Pa. 410, 71 A. 926; St. Louis, etc. R. Co. *v.* Gilliam (Tex. Civ.), 166 S. W. 706; Missouri, etc. R. Co. *v.* Pettit, 54 Tex. Civ. 358, 117 S. W. 894; Johnson *v.* R. Co., 35 Utah 285, 100 P. 390.

See Little Rock, etc. Co. *v.* Hicks, 79 Ark. 248, 96 S. W. 385. See also vol. 10, p. 493, n. 5.

Question for court.—Qualifications of witness. Borneman *v.* R. Co., 19 S. D. 459, 104 N. W. 208.

Speed of automobile.—An ordinary witness who has observed moving objects is competent. Porter *v.* Buckley, 147 Fed. 140, 78 C. C. A. 138; Neidy *v.* Littlejohn, 146 Ia. 355, 125 N. W. 198; Matla *v.* Co., 160 Mich. 639, 125 N. W. 708; S. *v.* Watson, 216 Mo. 420, 115 S. W. 1011. See Wright *v.* Crane, 142 Mich. 508, 106 N. W. 71.

Speed of automobile.—Cedar C. S. Co. *v.* Steadman (Ala.), 65 S. 984; Am. M. Car Co. *v.* Robbins (Ind.), 103 N. E. 641.

709-32 City & S. R. Co. *v.* Cooper, 32 App. Cas. (D. C.) 550; Augusta R. & E. Co. *v.* Arthur, 3 Ga. App. 513, 60 S. E. 213; Chicago C. R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (speed with which car started); Fuhry *v.* R. Co., 144 Ill. App. 521; Chicago C. R. Co. *v.* Rohe, 118 Ill. App. 322; Chicago C. R. Co. *v.* Hyndshaw, 116 Ill. App. 367; Watson *v.* Elec. Co. (Ia.), 144 N. W. 350; Lorenzen *v.* R. Co., 249 Mo. 182, 155 S. W. 30; Lyons *v.* R. Co., 253 Mo. 143, 161 S. W. 726; Slezak *v.* Co., 142 Mo. App. 693, 121 S. W. 1095 (in court's discretion); Niehaus *v.* R. Co., 165 Mo. App. 606, 148 S. W. 389 ("faster than the ordinary"); Hall *v.* R. Co., 124 Mo. App. 661, 101 S. W. 1137; Coffey *v.* R. Co., 79 Neb. 286, 112 N. W. 589. See infra, "Street Railroads, 138-7.

Also automobiles.—Spearman *v.* McCrary, 4 Ala. App. 473, 58 S. 927; Himmelwright *v.* Baker, 82 Kan. 569, 109 P. 178.

Extraordinary speed.—Witness unfamiliar with ordinary speed of a certain line of cars cannot testify that one of them was running at an extraordinary rate of speed. Verrone *v.* R. Co., 27 R. I. 370, 62 A. 512.

A passenger on the car is not disqualified from giving opinion. Goodes *v.* Co., 150 Mich. 494, 114 N. W. 338; Tinkle *v.* R. Co., 212 Mo. 445, 110 S. W. 1086.

709-33 Grudzinski *v.* R. Co., 165 Ill. App. 152. *Comp.* supra, 600-77. See Wright *v.* Crane, 142 Mich. 508, 106 N. W. 71 (speed of automobile). But see Eckels *v.* Muttschall, 230 Ill. 462, 82 N. E. 872.

709-36 Johnson *v.* R. Co., 80 Kan. 456, 103 P. 90. See infra, "Railroads," 493-5.

710-39 Montgomery St. R. Co. *v.* Shanks, 139 Ala. 480, 37 S. 166, looked very fast. See Harvey *v.* R. Co., 114 La. 1065, 38 S. 859. But see Birmingham, etc. Co. *v.* Rutledge, 142 Ala. 195, 39 S. 338.

Full speed.—Testimony horse car was going at full speed, admissible. Beaumont T. Co. *v.* Dilworth (Tex. Civ.), 94 S. W. 352.

Usual rate.—Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 S. 702; Little Rock, etc. Co. *v.* Green, 78 Ark. 129, 93 S. W. 752.

710-40 S. *v.* Williams, 31 Nev. 360, 102 P. 974; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237.

Question whether there is any way witness from his knowledge and from ticket can tell or estimate time it was sold, does not call for opinion. P. *v.* Lowrie, 4 Cal. App. 137, 87 P. 253.

711-42 Patton *v.* S., 156 Ala. 23, 46 S. 862 (cartridge seemed to have been recently fired); Allison *v.* Wall, 121 Ga. 822, 49 S. E. 831. See Sexton, etc. Co. *v.* Sexton, 48 Tex. Civ. 190, 106 S. W. 728.

711-43 Southern R. Co. *v.* Haynes (Ala.), 65 S. 339 (inadmissible); San Antonio, etc. R. Co. *v.* Jackson, 38 Tex. Civ. 201, 85 S. W. 445, whether train stopped long enough for passenger to alight, incompetent.

Length of stop.—Whether sufficient to permit passenger to alight. Birmingham, etc. Co. *v.* Glenn (Ala.), 60 S. 111.

Possibility of going certain distance in specified time.—Opinion evidence as to inadmissible. Weaver *v.* S. (Tex. Cr.), 150 S. W. 785.

Usual time needed to transport stock. Opinion evidence as to, competent. Gulf, etc. Co. *v.* Drahn (Tex. Civ.), 163 S. W. 330.

Stopping of automobile.—Bystander not acquainted with operation of automobiles incompetent to say whether machine stopped as quickly as possible. Hamilton H. & Co. *v.* Larrimer (Ind.), 105 N. E. 43.

What is a reasonable time for performance of a special work is proper subject of opinion where elements and data for making calculation could not be detailed to jury or presented in such way that they could make the calcu-

lation, unless it is the very matter in issue, and therefore for the jury. Allison *v.* Wall, supra. Thus, opinion of messenger boy as to what is reasonable time for delivery of telegram in a particular case, is admissible in discretion of court. Kirby *v.* T. Co., 77 S. C. 404, 58 S. E. 10. So a cattle shipper familiar with route and distance between two places may state what is a reasonable time for shipment between them. St. Louis, etc. R. Co. *v.* Rogers, 49 Tex. Civ. 304, 108 S. W. 1027; Texas, etc. R. Co. *v.* Walker, 43 Tex. Civ. 278, 95 S. W. 743; Texas & P. R. Co. *v.* Ellerd, 38 Tex. Civ. 596, 87 S. W. 362; International, etc. R. Co. *v.* McGehee (Tex. Civ.), 81 S. W. 804. See also St. Louis, etc. R. Co. *v.* Boshear (Tex. Civ.), 108 S. W. 1032. *Contra*, Houston & T. C. R. Co. *v.* Roberts, 101 Tex. 418, 108 S. W. 808; Texas & P. R. Co. *v.* Tomlinson (Tex. Civ.), 157 S. W. 278; Kansas City, etc. R. Co. *v.* Beckham (Tex. Civ.), 152 S. W. 228.

712-44 *Contra*, Brinsfield *v.* Howeth, 110 Md. 520, 73 A. 289, meaning of "girl of loose character." See Julian *v.* Star Co., 209 Mo. 35, 107 S. W. 496.

Witness may give understanding of meaning of word he used though it is defined in dictionaries. Robinson *v.* Yetter, 238 Ill. 320, 87 N. E. 363.

712-45 Effect of words on others, a conclusion. Shuler *v.* S., 126 Ga. 630, 55 S. E. 496.

713-49 Landrum *v.* Swann, 8 Ga. App. 209, 68 S. E. 862; Miller *v.* Hart-Parr Co. (Ia.), 144 N. W. 589; Bacot *v.* S., 96 Miss. 125, 50 S. 500; Hamilton *v.* R., 150 N. C. 193, 63 S. E. 730; Texas & P. R. Co. *v.* Taylor, 54 Tex. Civ. 419, 118 S. W. 1097.

714-51 Scott *v.* S., 64 Fla. 490, 60 S. 335; Snell *v.* Weldon, 239 Ill. 279, 87 N. E. 1022; Fredericks *v.* R. Co., 225 Pa. 23, 73 A. 965; Parshall *v.* S., 62 Tex. Cr. 177, 138 S. W. 759.

Inadequate opportunities of observation. "Brief casual conversations at chance meetings, particularly with strangers, small purchases of tobacco, and transactions of a similar character, do not form a satisfactory basis for determining a person's mental powers. While such occurrences, and opinions based on them, are competent evidence, they do not carry much weight." Smith *v.* Kopitzki, 254 Ill. 498, 98 N. E. 953.

714-52 Moore *v.* Gilbert, 175 Fed. 1, 99 C. C. A. 141; Hicks *v.* Burgess (Ala.), 64 S. 290; Hope *v.* Burton (Del.), 90 A. 466; Patrum *v.* R. Co. (Mo.), 129 S. W. 1041; Ray *v.* R. Co., 147 Mo. App. 332, 126 S. W. 543; Norfolk & W. R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445. See In re Wharton, 132 Ia. 714, 109 N. W. 492; Hawk *v.* R. Co., 130 Mo. App. 658, 108 S. W. 1119.

714-53 Brantley *v.* S. (Ala. App.), 65 S. 678. See Kane *v.* R. Co., 251 Mo. 13, 157 S. W. 644.

714-54 Alsup *v.* S. (Tex. Cr.), 153 S. W. 624.

714-55 Steinfeld & Co. *v.* Wing Wong, 14 Ariz. 336, 128 P. 354; Weill *v.* Danziger, 22 Cal. App. 688, 136 P. 308; Vaughan's S. Store *v.* Stringfellow, 56 Fla. 708, 48 S. 410, *cit.* the text; Gales *v.* S. (Ga. App.), 81 S. E. 364. See Barekdall *v.* Brick Co., 21 Cal. App. 685, 132 P. 846.

Uncontradicted circumstantial evidence renders conclusion harmless. Suchomel *v.* Maxwell, 240 Ill. 231, 88 N. E. 558.

715-57 Wiar *v.* R. Co. (Ia.), 144 N. W. 703; Glenn *v.* R. Co., 167 Mo. App. 109, 150 S. W. 1092.

715-59 S. *v.* Hogan, 117 La. 863, 42 S. 352.

715-60 Snell *v.* Weldon, 239 Ill. 279, 87 N. E. 1022.

EXTORTION.

See 8 STANDARD PROC., title "**Extortion.**"

716-1 Lancaster *v.* Will, 136 Ga. 405, 71 S. E. 731; Hanley *v.* S., 125 Wis. 396, 104 N. W. 57.

717-2 Keener *v.* Kidd, 71 Misc. 321, 130 N. Y. S. 207; Drake *v.* S., 2 Okla. Cr. 643, 103 P. 878.

718-7 Scope of cross-examination of co-defendant. See P. *v.* Schmitz, 7 Cal. App. 330, 94 P. 407.

718-8 Money paid must be shown to have been for purpose of averting threatened unlawful injury, regardless of purpose of which threat was made.

719-9 Rex *v.* Gilham, 1 Esp. (Eng.) 285.

719-10 Dean *v.* S., 9 Ga. App. 303, 71 S. E. 597.

719-11 Vogel *v.* Brown, 201 Mass. 261, 87 N. E. 686. *Contra*, Hanley *v.* S., 125 Wis. 396, 104 N. W. 57.

719-12 S. *v.* Wainwright, 50 Wash. 225, 97 P. 51, quot. the text.

720-16 See S. *v.* Blackington (Me.), 88 A. 726.

722-21 Vogel *v.* Brown, 201 Mass. 261, 87 N. E. 686, plaintiff must show that defendant acted wilfully and corruptly.

EXTRADITION.

Presumption from warrant as to flight, 724-9; *Presumption that indictment was duly authenticated,* 731-44; *Sufficiency of record of conviction,* 731-50.

See 8 STANDARD PROC., title "Extradition."

724-5 Officer's return not evidence of identity of prisoner if it is traversed (Barnes *v.* Nelson, 23 S. D. 181, 121 N. W. 89); otherwise if it is not traversed in that particular or by the petition. S. *v.* Bates, 102 Minn. 104, 112 N. W. 1026.

724-6 Barnes *v.* Nelson, 23 S. D. 181, 121 N. W. 89, *cit.* the text.

Evidence insufficient.—Charlton *v.* Kelly, 229 U. S. 447, 33 Sup. Ct. 945, 57 L. ed. 1274, 46 L. R. A. (N. S.) 397.

Presumption of identity of fugitive arises from identity of name. S. *v.* Bates, 101 Minn. 303, 112 N. W. 260.

724-7 Depoilly *v.* Palmer, 28 App. Cas. (D. C.) 324.

724-8 S. *v.* Curtis, 111 Minn. 240, 126 N. W. 719 (warrant but presumptive evidence); In re Mutchler, 8 O. N. P. (N. S.) 345.

724-9 Presumption from warrant as to flight.—Presumption arises from governor's issuance of warrant that accused was fugitive. Pettibone *v.* Nichols, 203 U. S. 192; Ex parte Edwards, 91 Miss. 621, 44 S. 827; Dennison *v.* Christian, 72 Neb. 703, 101 N. W. 1045.

Under Iowa statute (Code, §5171), an affidavit of the county attorney, accompanying the requisition and made upon knowledge, is sufficient. Harris *v.* Magee, 150 Ia. 144, 129 N. W. 742.

725-12 P. *v.* Baker, 142 App. Div. 598, 127 N. Y. S. 382.

725-13 In re McCready, 10 West. L. Rep. (Can.) 132; Ex parte Fudera, 162 Fed. 591. See In re Harsha, 11 Ont. L. R. (Can.) 494.

725-14 In re Harsha, supra; Ex parte Glaser, 176 Fed. 702, 100 C. C. A. 254.

726-17 In re Mutchler, 8 O. N. P. (N. S.) 345. See Farrell *v.* Hawley, 78 Conn. 150, 61 A. 502; In re Fairman, 3 O. N. P. (N. S.) 485.

727-21 In re McCarthy, 5 Haw. 573, production of indictment sufficient presumption of guilt.

728-31 Ex parte La Mantia, 206 Fed. 330; In re Muller, 5 Phila. (Pa.) 289.

728-32 Depositions taken in demanding government are admissible upon hearing before commissioner for purpose of vesting jurisdiction in him to issue warrant. Yordi *v.* Nolte, 215 U. S. 227.

729-36 Unsworn depositions competent if properly certified. Ex parte Glaser, 176 Fed. 702, 100 C. C. A. 254.

Copies of depositions certified by American consul are admissible and need not be attested by oath as formerly required by Rev. St., §5271. Ex parte La Mantia, 206 Fed. 330; Ex parte Schorer, 197 Fed. 67.

730-39 Insanity irrelevant. Ex parte Charlton, 185 Fed. 880.

Insanity irrelevant.—Charlton *v.* Kelly, 229 U. S. 447, 33 Sup. Ct. 945, 57 L. ed. 1274, 46 L. R. A. (N. S.) 397, *aff.* Ex parte Charlton, 185 Fed. 880.

730-41 Governor's warrant presumptive evidence that all essential prerequisites have been observed; and if the proceedings, when produced, appear to be regular, such presumption becomes conclusive evidence of right to extradite (In re Davis, 122 Mass. 324; P. *v.* Comr., 100 App. Div. 483, 91 N. Y. S. 760); and that governor was in possession of all the facts giving the legal basis of his action, and if he was not, burden is on person arrested to show it (Exparte Edwards, 91 Miss. 621, 44 S. 827; Dennison *v.* Christian, 72 Neb. 703, 101 N. W. 1045, *aff.* 196 U. S. 637); In re Gillis, 38 Wash. 156, 80 P. 300); and is sufficient evidence to justify a removal. Munsey *v.* Clough, 196 U. S. 364. See also Pettibone *v.* Nichols, 203 U. S. 192.

731-44 Benson *v.* Palmer, 31 App. Cas. (D. C.) 561.

Presumption that indictment was duly authenticated.—When an indictment, made a part of requisition papers, is authenticated, the presumption is that it was done by one who was at least

acting governor. Kemper *v.* Metzger, 169 Ind. 112, 81 N. E. 663.

731-48 A notary public not a magistrate within law and an affidavit before him, charging commission of crime, is worthless in extradition proceedings. Ex parte Owen (Okla. Cr.), 136 P. 197. *Comp.* Ex parte Faihtinger (Tex. Civ.), 163 S. W. 441.

731-50 Ex parte Walters (Miss.), 64 S. 2. See Ex parte Thaw, 214 Fed. 423.

The record of conviction is sufficient evidence to sustain proceedings for interstate extradition. Hughes *v.* Pflanz, 138 Fed. 980, 71 C. C. A. 234. The governor may demand additional evidence. Marbles *v.* Creecy, 215 U. S. 63. See Greene *v.* Henkel, 183 U. S. 249; Benson *v.* Palmer, 31 App. Cas. (D. C.) 561. Under Indiana statute citizen or resident may show impossibility of his having committed offense. O'Malley *v.* Quigg, 172 Ind. 350, 88 N. E. 611.

FALSE IMPRISONMENT.

Not necessary to prove damage, 733-4; *The complaint,* 733-4; *Other offenses,* 736-9.

733-1 Curry *v.* Co., 167 Mich. 17, 132 N. W. 463. See Bennett *v.* S. S. Co., 161 App. Div. 753, 147 N. Y. S. 193.

733-2 Crossett *v.* Campbell, 122 La. 659, 48 S. 141.

733-3 Cleveland *v.* Emerson (Ind. App.), 99 N. E. 796; Black *v.* Marsh, 31 Ind. App. 53, 67 N. E. 201; Vara *v.* Co., 114 La. 261, 38 S. 162; Barfield *v.* Coker, 73 S. C. 181, 53 S. E. 170.

Record of case in justice's court is admissible to prove illegality of arrest and imprisonment. Williamson *v.* Coal Co. (W. Va.), 78 S. E. 94.

Plaintiff may show when and how he obtained his liberty. Whittaker *v.* Sanford, 110 Me. 77, 85 A. 399.

That defendant was leader of a religious sect and exercised supreme control over members, may be shown. Whittaker *v.* Sanford, 110 Me. 77, 85 A. 399.

733-4 Westberry *v.* Clanton, 136 Ga. 795, 72 S. E. 238; Blocker *v.* Clark, 126 Ga. 484, 54 S. E. 1022, 7 L. R. A. (N. S.) 268; Gold *v.* Campbell, 54 Tex. Civ. 269, 117 S. W. 463; Williams *v.* Coal Co. (W. Va.), 78 S. E. 94. *Contra.* Oates *v.* McGlaun, 145 Ala. 656, 39 S. 607; Steinberger *v.* Miller, 29 Ky. L. R. 1132, 96 S. W. 1101; Parke *v.* Fellman, 145 App. Div. 836, 130 N. Y. S. 361. *Comp.* Sundmaker *v.* Gaudet, 113 La. 887, 37 S. 865. And see W. U. T. Co. *v.* Thompson, 144 Fed. 578, 75 C. C. A. 334; Sanders *v.* Davis, 153 Ala. 375, 44 S. 979; Baker *v.* Tedford, 11 West. L. Rep. (Can.) 614.

Contra since the law will always prima facie impute good faith to judicial action, the burden is upon the plaintiff to allege and prove the want of it. Parris *v.* S., 175 Ala. 1, 57 S. 867. See Taylor Bros. *v.* Hearn (Tex. Civ.), 133 S. W. 301.

Plaintiff may offer complaint which was basis of arrest as bearing upon the credibility of evidence or for defense and cause of arrest. Schoette *v.* Drake, 139 Wis. 18, 120 N. W. 393.

Not necessary to prove damage.—Roberts *v.* Brown, 43 Tex. Civ. 206, 94 S. W. 388.

Testimony that defendant, an attorney, prepared the sheriff's return to a writ of habeas corpus whereby plaintiff secured his release is inadmissible. Shull *v.* Boyd, 251 Mo. 452, 158 S. W. 313.

734-5 Baker *v.* Tedford, 11 West. L. Rep. (Can.) 614; Weigel *v.* Brown, 194 Fed. 652, 115 C. C. A. 442; St. Louis, etc., R. Co. *v.* Waters, 105 Ark. 619, 152 S. W. 137; Black *v.* Marsh, 31 Ind. App. 53, 67 N. E. 201; Tubbs *v.* Haessig, 149 Mich. 185, 112 N. W. 750; Adams *v.* Schwartz, 137 App. Div. 230, 122 N. Y. S. 41; Sigmon *v.* Shell, 165 N. C. 582, 81 S. E. 739; Tracy *v.* Coffey, 8 O. C. C. (N. S.) 88; McAleer *v.* Good, 216 Pa. 473, 65 A. 934; Mann *v.* Cowan, 8 Pa. Super. 30; Gold *v.* Campbell, 54 Tex. Civ. 269, 117 S. W. 463; Smith *v.* Clark, 37 Utah 116, 106 P. 653 (rule does not apply to complainant who takes no subsequent part).

Atmospheric conditions of place of imprisonment may be testified to. Arcade *v.* Boxwell, 41 App. Cas. (D. C.) 213.

734-6 Donati *v.* Righetti, 9 Cal. App. 45, 97 P. 1128; Piedmont Hotel Co. *v.* Henderson, 9 Ga. App. 672, 72 S. E. 51; Hermanson *v.* Goodyear, 139 Ill. App. 374; Whittaker *v.* Sanford, 110 Me. 77, 85 A. 399; Smith *v.* Clark, 37 Utah 116, 106 P. 653; Buseman *v.* Schultz, 154 Ia. 493, 132 N. W. 378.

That person who made arrest was armed may be shown. Gray *v.* Strickland, 163 Ala. 344, 50 S. 152.

734-7 Pell City M. Co. *v.* Swearingen, 156 Ala. 397, 47 S. 272; Campbell *v.*

Hyde, 92 Ark. 128, 122 S. W. 90; Michael *v.* Bacon, 5 Ga. App. 331, 63 S. E. 228; Feld *v.* Loftis, 240 Ill. 105, 88 N. E. 281 (record in habeas corpus proceedings by which plaintiff was discharged under the body execution offered in evidence is not admissible); McGrew *v.* Holmes, 145 Ia. 540, 124 N. W. 195; Schnider *v.* Montross, 158 Mich. 263, 122 N. W. 534; Smith *v.* Co., 127 App. Div. 278, 111 N. Y. S. 202. *Contra* if papers issued after imprisonment. Gold *v.* Campbell, 54 Tex. Civ. 269, 117 S. W. 463.

Evidence as to the truth of matter alleged in void warrant is inadmissible. Howell *v.* Wyser (W. Va.), 82 S. E. 503.

Judgment of discharge in habeas corpus proceedings is immaterial. Feld *v.* Loftis, 140 Ill. App. 530, *disap.* Castor *v.* Bates, 127 Mich. 285, 86 N. W. 810.

Transcript of proceedings before justice of peace and execution issued by him are admissible on merits, though transcript unsealed. Feld *v.* Loftis, supra.

Docket kept by defendant as justice of peace admissible. Hermanson *v.* Goodyear, 139 Ill. App. 374.

735-8 Termination of criminal proceeding is immaterial. Knickerbocker S. Co. *v.* Cusack, 172 Fed. 358, 97 C. C. A. 56.

Admissible on issue of exemplary damages.—Cullen *v.* Dickenson (S. D.), 144 N. W. 656.

Capias bond admissible only in mitigation of damages in favor of bail. Gray *v.* Strickland, 163 Ala. 344, 50 S. 152.

A previous arrest and conviction for same offense does not affect legality of process; nor does withholding of information to that effect tend to show that subsequent imprisonment was false. Donati *v.* Righetti, 9 Cal. App. 45, 97 P. 1128.

736-9 Sebring *v.* Harris, 20 Cal. App. 56, 128 P. 137 (probable cause); Rogers *v.* Toliver, 139 Ga. 281, 77 S. E. 28; Schnider *v.* Montross, 158 Mich. 263, 122 N. W. 534 (or breach of peace); Nelson *v.* Halverson, 117 Minn. 255, 135 N. W. 818; Schultz *v.* Cemetery, 190 N. Y. 276, 83 N. E. 41; Sippell *v.* Salmowitz, 58 Misc. 48, 110 N. Y. S. 17; Sigmon *v.* Shell, 165 N. C. 582, 81 S. E. 739 (reasonable grounds).

Evidence held insufficient.—United Cigar Stores Co. *v.* Young, 36 App. Cas. (D. C.), 390.

Plaintiff's conduct shortly before arrest may be shown in justification thereof if he was arrested for like acts Schoette *v.* Drake, 139 Wis. 18, 120 N. W. 393.

As evidence of officer's good faith on question of damages evidence of surrounding circumstances is admissible. Holmes *v.* Le Fors, 36 Okla. 729, 129 P. 718.

736-11 In Alabama, contrary to rule elsewhere, defendant may not testify to his purpose in having arrest made. Gray *v.* Strickland, 163 Ala. 344, 50 S. 152.

737-12 See Birmingham Ledger Co. *v.* Buchanan (Ala. App.), 65 S. 667.

737-13 Kroeger *v.* Passmore, 36 Mont. 504, 93 P. 805, 14 L. R. A. (N. S.) 988; Schultz *v.* Cemetery, 190 N. Y. 276, 83 N. E. 41; Sippell *v.* Salmowitz, 58 Misc. 48, 110 N. Y. S. 17.

In an action by employe of railway against it and one of its agents, based ment for former's arrest and imprisonment for taking coal from the company's yard, defendants' knowledge and acquiescence in the practice of its employes of taking coal therefrom may be proved. Southern R. Co. *v.* Peek, 6 Ga. App. 43, 64 S. E. 308.

Condition of plaintiff immediately following release from the alleged unlawful confinement admissible. Birmingham L. Co. *v.* Buchanan (Ala. App.), 65 S. 667.

Refusal of defendant's servant to release plaintiff admissible. Birmingham L. Co. *v.* Buchanan (Ala. App.), 65 S. 667.

Warning and fact of beating, inadmissible. Alabama, etc., Co. *v.* Rice (Ala.), 65 S. 402.

Lack of exit from place of detention may be shown. Birmingham L. Co. *v.* Buchanan (Ala. App.), 65 S. 667.

FALSE PERSONATION.

739-3 Butts *v.* S., 47 Tex. Cr. 494, 84 S. W. 586, even though allegation is unnecessary.

739-4 An "executive officer" as used in Texas code includes any police officer or policeman in any city or town of this state. Ex parte Preston (Tex. Cr.), 161 S. W. 115.

FALSE PRETENSES.

Variance, 753-30.

744-1 S. *v.* Luff, 1 Boyce (Del.) 152, 74 A. 1079; S. *v.* Briscoe, 6 Penne. (Del.) 401, 67 A. 154; Formby *v.* S. (Ga. App.), 81 S. E. 799; Ganey *v.* S., 10 Ga. App. 777, 74 S. E. 286 (corpus delicti not established beyond reasonable doubt); Laster *v.* S., 4 Ga. App. 804, 62 S. E. 508; Goddard *v.* S., 2 Ga. App. 154, 58 S. E. 304; Carlisle *v.* S., 2 Ga. App. 651, 58 S. E. 1068; P. *v.* Depew, 237 Ill. 574, 86 N. E. 1090; C. *v.* Vaughn, 140 Ky. 559, 131 S. W. 396; C. *v.* Lile, 140 Ky. 558, 131 S. W. 397; S. *v.* Dines, 206 Mo. 649, 105 S. W. 722; S. *v.* Davis, 159 N. C. 851, 64 S. E. 498; Trimble *v.* S. (Tex. Cr.), 145 S. W. 929; Thurman *v.* S., 59 Tex. Cr. 285, 128 S. W. 404. See Ager *v.* S., 2 Ga. App. 158, 58 S. E. 374.

Evidence held sufficient.—Morse *v.* S., 9 Ga. App. 424, 71 S. E. 699.

744-2 See P. *v.* Green, 22 Cal. App. 45, 133 P. 334. *Contra.* P. *v.* Leavens, 12 Cal. App. 178, 106 P. 1103. *Comp.* S. *v.* Sparks, 79 Neb. 504, 113 N. W. 154.

Ownership of property obtained must be proved as alleged. Martins *v.* S., 17 Wyo. 319, 98 P. 709.

Corroboration is required where pretenses are verbal. Taylor *v.* Ty., 2 Okla. Cr. 1, 99 P. 628.

745-4 Littell *v.* U. S., 169 Fed. 620, 95 C. C. A. 148; Erickson *v.* S., 14 Ariz. 253, 127 P. 754; S. *v.* Luff, 1 Boyce (Del.) 152, 74 A. 1079; S. *v.* Briscoe, 6 Penne. (Del.) 401, 67 A. 154; S. *v.* Holden, 2 Boyce (Del.) 429, 79 A. 215; Partridge *v.* U. S., 39 App. Cas. (D. C.) 571.

"No more cogent proof of this intent could be offered than a showing that at the time of the conveyance the grantor of the prosecuting witness had no title to either the lot conveyed or the lot pointed out, and that this fact was well known to the appellant." S. *v.* Dana, 59 Wash. 30, 109 P. 191.

745-5 P. *v.* Segal (Mich.), 146 N. W. 644.

745-6 P. *v.* Brecker, 20 Cal. App. 205, 127 P. 666; P. *v.* Weil, 243 Ill. 208, 90 N. E. 731; P. *v.* Depew, 237 Ill. 574, 86 N. E. 1090; C. *v.* King, 202 Mass. 379, 88 N. E. 454; S. *v.* Lovan, 245 Mo. 516, 151 S. W. 141; S. *v.* Miller, 212 Mo. 73, 111 S. W. 18; Yoakum *v.* S., (Tex. Cr.), 150 S. W. 910; Glover *v.* S., 57 Tex. Cr. 208, 122 S. W. 396.

Statements of defendant disclosing his appreciation of his individual responsibility for act, competent. Gambrill *v.* S., 120 Md. 203, 87 A. 900.

745-7 Mere promise is not false pretense. Oliver *v.* S., 6 Ga. App. 791, 65 S. E. 843.

746-8 Lawrence *v.* S., 103 Md. 17, 63 A. 96; S. *v.* Roberts, 201 Md. 702, 100 S. W. 484.

746-9 Lawrence *v.* S., supra; S. *v.* Roberts, supra.

746-10 P. *v.* Segal (Mich.), 146 N. W. 644; P. *v.* Andre, 157 Mich. 362, 122 N. W. 98, 153 Mich. 531, 117 N. W. 55; S. *v.*Whiteaker, 64 Or. 297, 129 P. 534.

747-12 C. *v.* King, 202 Mass. 379, 88 N. E. 454.

747-13 P. *v.* Andre, 153 Mich. 531, 117 N. W. 55. See Gambrill *v.* S., 120 Md. 203, 87 A. 900.

747-14 Rex *v.* Wyatt, L. R. (1904), 1 K. B. 188; Reg. *v.* Roebuck, 7 Cox C. C. 126, Dears. & B. 24, 2 Jur. (N. S.) 597, 25 L. J. M. C. 101, 4 W. R. 514; Rex *v.* Whitehead, 1 Car. & P. 67, 12 E. C. L. 49; Reg. *v.* Francis, L. R. 2 C. C. 128, 12 Cox C. C. 612, 43 L. J. M. C. 97, 30 L. T. (N. S.) 503, 22 W. R. 633; Reg. *v.* Cooper, 1 Q. B. D. 19, 13 Cox C. C. 123, 45 L. J. M. C. 15, 33 L. T. (N. S.) 754, 24 W. R. 279; Rex *v.* Roberts, 1 Campb. 399, 2 Leach C. C. 987 note; Reg. *v.* Stenson, 12 Cox C. C. 111, 25 L. T. (N. S.) 666; Reg. *v.* Hope, 17 Ont. (Can.) 463 (foll. Reg. *v.* Francis, L. R., 2 C. C. 128, 12 Cox C. C. 612, 43 L. J. M. C. 97, 30 L. T. (N. S.) 503, 22 W. R. 663); Wood *v.* U. S., 16 Pet. (U. S.) 342; Wright *v.* U. S., 1 Hayw. & H. 201, 30 Fed. Cas. No. 18,097; P. *v.* Bercovitz, 163 Cal. 636, 126 P. 479, 43 L. R. A. (N. S.) 667n; P. *v.* Brecker, 20 Cal. App. 205, 127 P. 666; P. *v.* Whalen, 154 Cal. 472, 98 P. 194; Clarke *v.* P., 53 Colo. 214, 125 P. 113; Wyatt *v.* S., (Ga. App.), 81 S. E. 802; Farmer *v.* S., 100 Ga. 41, 28 S. E. 26; P. *v.* Weil, 244 Ill. 176, 91 N. E. 112, 243 Ill. 208, 90 N. E. 731; DuBois *v.* P., 200 Ill. 157, 65 N. E. 658, 93 Am. St. 183; P. *v.* Pouchot, 117 Ill. App. 1; Crum *v.* S., 148 Ind. 401, 47 N. E. 833 (*over.* Strong *v.* S., 86 Ind. 208, 44 Am. Rep. 292); S. *v.* Long, 103 Ind. 481, 3 N. E. 169; S. *v.* Faxton (Ia.), 147 N. W. 347; S. *v.* Carter, 112 Ia. 15, 83

N. W. 715; S. *v.* Brady, 100 Ia. 191, 69 N. W. 290, 62 Am. St. 560, 36 L. R. A. 693; S. *v.* Gibson, 132 Ia. 53, 106 N. W. 270; S. *v.* Briggs, 74 Kan. 377, 86 P. 447; Carnell *v.* S., 85 Md. 1, 36 A. 117; C. *v.* Tuckerman, 10 Gray (Mass.) 173; C. *v.* Coe, 115 Mass. 481; P. *v.* Hoffman, 142 Mich. 531, 105 N. W. 838; P. *v.* Shelters, 99 Mich. 333, 99 N. W. 362; P. *v.* Wakely, 62 Mich. 297, 28 N. W. 871; P. *v.* Schweitzer, 23 Mich. 301; S. *v.* Southall, 77 Minn. 296, 79 N. W. 1007; S. *v.* Wilson, 223 Mo. 156, 122 S. W. 701; S. *v.* Turley, 142 Mo. 403, 44 S. W. 267; S. *v.* Jackson, 112 Mo. 585, 20 S. W. 674; S. *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666; S. *v.* Cooper, 85 Mo. 256; S. *v.* Roberts, 201 Mo. 702, 100 S. W. 484; S. *v.* Sparks, 79 Neb. 504, 113 N. W. 154; Morgan *v.* S., 56 Neb. 696, 77 N. W. 64 (admissible to show knowledge but not intent); S. *v.* Call, 48 N. H. 126; Cunningham *v.* S., 61 N. J. L. 67, 38 A. 817, 61 N. J. L. 666, 40 A. 696; P. *v.* Peckens, 153 N. Y. 576, 47 N. E. 883; P. *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62; Shipply *v.* P., 86 N. Y. 375, 40 Am. Rep. 551; P. *v.* Levin, 119 App. Div. 233, 104 N. Y. S. 647; Mayer *v.* P., 80 N. Y. 364; P. *v.* Putnam, 90 App. Div. 125, 85 N. Y. S. 1056; P. *v.* Jeffcrey, 82 Hun 409, 31 N. Y. S. 267; P. *v.* Reavey, 38 Hun (N. Y.) 418, 39 Hun 361; Copperman *v.* P., 3 Thomp. & C. (N. Y.) 199; P. *v.* Spielman, 20 Alb. L. J. (N. Y.), 96 (admissible to show intent but not knowledge, since knowledge must be shown before intent, is material); Tarbox *v.* S., 38 O. St. 581; Rafferty *v.* S., 91 Tenn. 655, 16 S. W. 728; Britt *v.* S., 9 Humph. (Tenn.) 31; Davison *v.* S., 12 Tex. App. 214; Baker *v.* S., 120 Wis. 135, 97 N. W. 566.

See P. *v.* Bercovitz, 163 Cal. 636, 126 P. 479, 43 L. R. A. (N. S.) 667n.

"Proof of other similar offenses by the appellant committed at or about the same time are admissible to establish identity in developing res gestae, or in making out the guilt of the defendant by a chain of circumstances connected with the crime for which he is on trial." Trimble *v.* S. (Tex. Cr.), 145 S. W. 929, *citing* many cases.

7-18-15 Reg. *v.* Holt, Bell. C. C. 280, 8 Cox C. C. 411, 6 Jur. (N. S.) 1121, 30 L. J. M. C. 11, 3 L. T. (N. S.) 310, 9 W. R. 74; Reg. *v.* Fuidge, 9 Cox C. C. 430, 10 Jur. (N. S.) 160, L. & C. 390, 33 L. J. M. C. 74, 9 L. T. R. (N. S.) 777, 12 W. R. 351; Cowan *v.* S., 22 Neb. 519, 35 N. W. 405; S. *v.* Letourneau, 24 R. I. 3, 51 A. 1048, 96 Am. St. 696; S. *v.* Oppenheimer, 41 Wash. 630, 84 P. 588. Remote transactions may not be proved. P. *v.* Depew, 237 Ill. 574, 86 N. E. 1090.

7-19-16 S. *v.* Sparks, 79 Neb. 504, 113 N. W. 154; S. *v.* Whiteaker, 64 Or. 297, 129 P. 534; S. *v.* Marshall, 77 Vt. 262, 59 A. 916. See S. *v.* Bercovitz, 163 Cal. 636, 126 P. 479, 43 L. R. A. (N. S.) 667, 670n.

7-19-18 Officer's knowledge of falsity of items in his bill may be shown by acts and declarations of his agents within scope of their authority. S. *v.* Hartnett, 7 Penne. (Del.) 204, 74 A. 82.

7-19-19 Swift *v.* S., 126 Ga. 590, 55 S. E. 478; C. *v.* Vaughn, 140 Ky. 559, 131 S. W. 396; S. *v.* Davis, 150 N. C. 851, 64 S. E. 898. See also Fairy *v.* S., 50 Tex. Cr. 396, 97 S. W. 700.

State must prove value of jewelry in order to prove falsity of representations. P. *v.* Streicher, 162 App. Div. 181, 147 N. Y. S. 277.

7-20-20 P. *v.* Ward, 5 Cal. App. 36, 89 P. 874; P. *v.* Smith, 3 Cal. App. 62, 84 P. 449; S. *v.* Hartnett, 7 Penne. (Del.) 204, 74 A. 82 (falsity of any item of bill presented by officer); S. *v.* Miller, 212 Mo. 73, 111 S. W. 18; S. *v.* Keyes, 196 Mo. 136, 93 S. W. 801, 6 L. R. A. (N. S.) 369. See P. *v.* Segal (Mich.), 146 N. W. 644; C. *v.* Lundberg, 18 Phila. (Pa.) 482.

7-20-21 Bonner *v.* S., 8 Ala. App. 236, 62 S. 337; Stumpff *v.* P., 51 Colo. 202, 117 P. 134; P. *v.* Ward, 5 Cal. App. 36, 89 P. 874; Whitaker *v.* S., 138 Ga. 139, 75 S. E. 254; S. *v.* Adams, 10 Ida. 591, 79 P. 398; S. *v.* Wilson, 73 Kan. 334, 80 P. 639, 84 P. 737; Gambrill *v.* S., 120 Md. 203, 87 A. 900; Lawrence *v.* S., 103 Md. 17, 63 A. 96; C. *v.* Clancy, 187 Mass. 191, 72 N. E. 842; P. *v.* Hoffman, 142 Mich. 531, 105 N. W. 838; S. *v.* Keyes, 196 Mo. 136, 93 S. W. 801, 6 L. R. A. (N. S.) 369; Moline *v.* S., 72 Neb. 361, 100 N. W. 810; P. *v.* Reiss, 114 App. Div. 431, 99 N. Y. S. 1002; S. *v.* Whiteaker, 64 Or. 297, 129 P. 534.

Existence of record of unsatisfied mortgage not proof that debt unpaid. S. *v.* Clark, 141 Ia. 297, 119 N. W. 719.

Parol evidence of conversation between

parties is admissible to corroborate the written evidence required by statute. S. *v.* Germain, 54 Or. 395, 103 P. 521.

Generally any evidence is admissible to show falsity of pretenses. P. *v.* Langley, 114 App. Div. 427, 100 N. Y. S. 123; P. *v.* Reiss, 114 App. Div. 431, 99 N. Y. S. 1002.

751-22 See Glover *v.* S., 57 Tex. Cr. 208, 122 S. W. 396 (accused's check and evidence of non-payment).

751-23 Owens *v.* S., 98 Ark. 609, 137 S. W. 256; Parker *v.* S., 98 Ark. 575, 137 S. W. 253; Clark *v.* Lumb. Co., 158 N. C. 139, 73 S. E. 793.

Burden on prosecuting witness to show reliance on representation. S. *v.* Davis, 150 N. C. 851, 64 S. E. 498. He may testify thereto (P. *v.* Weil, 244 Ill. 176, 91 N. E. 112, 243 Ill. 208, 90 N. E. 731, but to results of investigation made by correspondence concerning the matter. S. *v.* Steele, 226 Mo. 583, 126 S. W. 406.

Prosecutor may testify. S. *v.* Hetrick, 84 Kan. 157, 113 P. 383.

Failure to take precautions immaterial. Littell *v.* U. S., 169 Fed. 620, 95 C. C. A. 148.

751-24 S. *v.* Toale, 94 S. C. 156, 77 S. E. 754. See P. *v.* Osborn, 12 Cal. App. 148, 106 P. 891.

752-25 Bonner *v.* S., 8 Ala. App, 236, 62 S. 337. *Contra* under statutes. Ganey *v.* S., 10 Ga. App. 777, 74 S. E. 286 (penal code, 1910, §719); Hay *v.* S., 7 Ga. App. 407, 66 S. E. 984; Allen *v.* S., 58 Tex. Cr. 494, 126 S. W. 571.

Loss of title, as well as of possession, of property must be shown. S. *v.* Germain, 54 Or. 395, 103 P. 521.

752-27 S. *v.* Lovan, 245 Mo. 516, 151 S. W. 141.

753-28 Gambrill *v.* S., 120 Md. 203, 87 A. 900; Glover *v.* S., 57 Tex. Cr. 208, 122 S. W. 396 (self-serving declarations).

753-29 C. *v.* Balph, 18 Pa. C. C. 242.

753-30 Webb *v.* Theater Co., 87 Conn. 129, 87 A. 274; New Castle Theater Co. *v.* Ward (Ind. App.), 104 N. E. 526; Mattison *v.* Connerby, 46 Mont. 103, 126 P. 851; S. *v.* Marsh, 162 N. C. 603, 77 S. E. 839; Hurst *v.* Fur Co., 95 S. C. 221, 78 S. E. 960. But see Gambrill *v.* S., 120 Md. 203, 87 A. 900, wherein evidence of corporation defendant's solvent state was admitted in aid of its disavowal of criminal intent in obtaining money. See supra, 751-22.

Variance.—An allegation that defendant received money is sustained by showing that he received a check which was cashed before arrest. S. *v.* Germain, 54 Or. 395, 103 P. 521.

FIXTURES.

756-1 Banner I. Wks. *v.* Wks., 143 Mo. App. 1, 122 S. W. 762; Trustees *v.* Grubb, 5 Phila (Pa.) 41; Anderson *v.* Englehart, 18 Wyo. 409, 108 P. 977.

757-2 It will be assumed that destroyed buildings permanently rested on the soil. Las Animas, etc. L. Co. *v.* Fatjo, 9 Cal. App. 318, 99 P. 393.

757-3 Grubbs *v.* Hawes, 173 Ala. 383, 56 S. 227.

757-4 Grubbs *v.* Hawes, 173 Ala. 383, 56 S. 227; First C. & S. Bk. *v.* Co., 144 Mich. 188, 107 N. W. 1107; Security T. Co. *v.* Co., 67 N. J. Eq. 514, 58 A. 865; Gasaway *v.* Thomas, 56 Wash. 77, 105 P. 168; Lynn *v.* Waldron, 38 Wash. 82, 80 P. 292; Fish *v.* Young, 127 Wis. 149, 106 N. W. 795.

Kansas City S. R. Co. *v.* **Anderson,** 88 Ark. 129, 113 S. W. 1030; Mollie Gibson Consol. M. & M. Co. *v.* McNichols, 51 Colo. 54, 116 P. 1041; Equitable G. & T. Co. *v.* Knowles, 8 Del. Ch. 106, 67 A. 961; Portland *v.* Co., 103 Me. 240, 68 A. 1040; Smith *v.* Bk., 202 Mass. 482, 88 N. E. 1086; Banner I. Wks. *v.* Wks., 143 Mo. App. 1, 122 S. W. 762; P. *v.* O'Donnel, 202 N. Y. 313, 95 N. E. 762, *mod.* 127 N. Y. S. 1137; Niagara Falls H. P. & Mfg. Co. *v.* Schermerhorn, 60 Misc. 209, 111 N. Y. S. 576; Commercial, etc., Co. *v.* Co., 31 O. C. C. 361, *aff.* 81 O. St. 521, 91 N. E. 1127; McFeron *v.* Doynes (Or.), 116 P. 1063; Bullock Elec. Mfg. Co. *v.* Co., 231 Pa. 129, 80 A. 568; Kinnear *v.* R. Co., 223 Pa. 390, 72 A. 808; Taylor *v.* Lee (Tex. Civ.), 139 S. W. 908; Shelton *v.* Piner (Tex. Civ.), 126 S. W. 65; Welsh *v.* McDonald, 64 Wash. 108, 116 P. 589; Filley *v.* Christopher, 39 Wash. 22, 80 P. 834.

See Searle *v.* Bishop, 203 Mass. 493, 89 N. E. 809; Mechanics' & T. Bk. Co., 137 App. Div. 45, 122 N. Y. S. 33.

Intention of landlord and tenant at time latter made the improvement controls. Kinnear *v.* R. Co., 223 Pa. 390, 72 A. 808. Unexecuted intention immaterial. Big Beaver C. Co. *v.* County, 37 Pa. Super. 250.

759-5 Ochs *v.* Tilton (Ind.), 103 N. E. 837; Nat. A. V. Co. *v.* Winslow, 215 Mass. 462, 102 N. E. 705; Hook *v.* Bolton, 199 Mass. 244, 85 N. E. 175; Rawls *v.* Ins. Co., 97 S. C. 189, 81 S. E. 505; Hurst *v.* Fur Co., 95 S. C. 221, 78 S. E. 960. See Smith *v.* Bk., 202 Mass. 482, 88 N. E. 1086.

Statutory provisions.—Conde *v.* Sweeney, 16 Cal. App. 157, 116 P. 319; Western Nat. Bk. *v.* Gerson, 27 Okla. 280, 117 P. 205.

760-6 Hook *v.* Bolton, 199 Mass. 244, 85 N. E. 175; Jacob *v.* Kellogg, 56 Misc 661, 107 N. Y. S. 713.

762-8 As between lessee and mortgagee such facts may also be shown. Gordon *v.* Miller, 28 Ind. App. 612, 63 N. E. 774.

Purchase of property on conditional sale is relevant. Smith *v.* Bk., 202 Mass. 482, 88 N. E. 1086.

766-22 *Contra*, Monarch L. *v.* Westbrook, 109 Va. 382, 63 S. E. 1070. *Comp.* Niagara Falls H. P. & Mfg. Co. *v.* Schermerhorn, 60 Misc. 209, 111 N. Y. S. 576.

766-23 See Parker *v.* Co., 148 Ala. 275; 41 S. 923.

767-24 State S. Bk. *v.* Hoskins, 130 Ia. 339, 106 N. W. 764.

769-28 Welsh *v.* McDonald, 64 Wash. 108, 116 P. 589.

Acceptance of new lease silent as to right to remove trade fixtures does not raise presumption of intent to abandon them. Thomas *v.* Gayle, 134 Ky. 330, 120 S. W. 290.

770-31 Barnes *v.* Hosmer (Mass.), 82 N. E. 27, original agreement of reservation may be shown by inference from a subsequent recognition of rights.

771-33 See Searle *v.* Bishop, 203 Mass. 493, 89 N. E. 809.

Erection of another building on same lot with knowledge of owner immaterial. Searle *v.* Bishop, supra.

FORCIBLE ENTRY AND DETAINER.

Declarations against interest, 781-10; *Entry under parol contract to rent*, 802-72; *Pendency of suit for injunction*, 805-85.

See corresponding title in 8 STANDARD PROC.

775-1 Bush *v.* Thomas, 162 Ala. 168, 50 S. 133; Bailey *v.* Blacksher, 142 Ala. 254, 37 S. 827; Barnewell *v.* Stephens, 142 Ala. 609, 38 S. 662; Brown *v.* French, 148 Ala. 272, 42 S. 409; Amos *v.* Cohn, 7 Cal. App. 432, 94 P. 590; Perry N. S. Co. *v.* Griffin, 57 Fla. 133, 49 S. 554, *cit.* the text (possession must have been recent); Rockhold *v.* Doering, 122 Ill. App. 194; Roberts *v.* Menifee, 149 Ky. 354, 149 S. W. 839; Taylor *v.* Orlansky, 92 Miss. 761, 46 S. 50, 136; Milem *v.* Freeman, 136 Mo. App. 106, 117 S. W. 644; Redman *v.* Perkins, 122 Mo. App. 164, 98 S. W. 1097; Metz *v.* Schneider, 120 Mo. App 453, 97 S. W. 187; Anderson *v.* R. Co., 128 Mo. App. 175, 107 S. W. 456; Rivera *v.* de Guzman, 1 Phil. Isl. 289.

Testimony of painters that landlord ordered painting incompetent. McClusky *v.* Nelson, 179 Ill. App. 182.

One who was in peacable possession may recover same. McDaniel *v.* Directors, 125 Ill. App. 332.

Property described in complaint must be shown to be that upon which entry was made. Montijo *v.* Sherer, 6 Cal. App 558, 92 P. 512.

Possession by defendant at beginning of action must be shown. Wolfe *v.* Hall, 61 Fla. 492, 54 S. 777; McClusky *v.* Nelson, 179 Ill. App. 182; Maples *v.* Smythe, 35 Okla. 469, 130 P. 145.

777-2 Easement.—Right to a way cannot be recovered in an action of forcible entry and detainer. Maye *v.* Thurber, 146 Ala. 180, 40 S. 822.

License of city to maintain a stand, location of which is not specifically designated, cannot recover. Becher *v.* New York, 102 App. Div. 269, 92 N. Y. S. 460.

777-3 Grammer *v.* Blansett, 93 Ark. 421, 124 S. W. 1037; Richie *v.* Owsley, 137 Ky. 63, 121 S. W. 1015; Oyster Bay *v.* Jacob, 109 App. Div. 613, 96 N. Y. S. 620; Harman *v.* Alt, 69 W. Va. 287, 71 S. E. 709.

Evidence insufficient.—Victor Realty Co. *v.* Argumanian, 172 Ala. 108, 55 S. 621.

778-4 McCormick *v.* McDowell, 28 Ky. L. R. 854, 90 S. W. 541; Brumfield *v.* Reynolds, 4 Bibb (Ky.) 388; C. *v.* Johnson, 3 Pa. C. C. 641; Zuercher *v.* Startz, 53 Tex. Civ. 442, 115 S. W. 1175.

779-5 Lorah *v.* Emerson, 154 Ala. 145, 45 S. 228; Zuercher *v.* Startz, 53 Tex. Civ. 442, 115 S. W. 1175.

Cutting timber and grazing stock on land is not sufficient evidence of pos-

session. Stockley *v.* Cissna, 119 Tenn. 135, 104 S. W. 792.

779-6 Knowles *v.* Crocker, 149 Cal. 278, 86 P. 715.

Inclosure of land not necessary. Geoghegan *v.* Turner, 26 Ky. L. R. 537, 82 S. W. 244.

780-7 Bailey *v.* Blacksher, 142 Ala. 168, 50 S. 133; Richie *v.* Owsley, 137 Ky. 63, 121 S. W. 1015; Oyster Bay *v.* Jacob, 109 App. Div. 613, 96 N. Y. S. 620; Stockley *v.* Cissna, 119 Tenn. 135, 104 S. W. 792; Mansfield *v.* Northcut, 112 Tenn. 536, 80 S. W. 437. See Hendrickson *v.* Linville, 31 Ky. L. R. 967, 104 S. W. 688. *Comp.* Perry N. S. Co. *v.* Griffin, 57 Fla. 133, 49 S. 554.

780-8 Watson *v.* Scarborough, 147 Ala. 689, 40 S. 672 (possession must be "actual, exclusive, and peaceable"); Childers *v.* Hieronymus, 32 Ky. L. R. 394, 105 S. W. 979.

But possession for any definite length of time need not be shown. Highland Park O. Co. *v.* Co., 1 Cal. App. 340, 82 P. 228.

781-10 Declaration against interest by agent of claimant admissible to show possession not under adverse claim. Bailey *v.* Blacksher, 142 Ala. 254, 37 S. 827.

781-11 McCormick *v.* McDowell, 28 Ky. L. R. 854, 90 S. W. 541.

781-12 Reputation as to possession of ownership inadmissible. Milen *v.* Freeman, 136 Mo. App. 106, 117 S. W. 644.

781-13 White *v.* Pfieffer, 165 Cal. 740, 134 P. 321; Ladd *v.* Ladd, 168 Ill. App. 302, *aff.* in 256 Ill. 183, 99 N. E. 916. *Contra,* Taylor *v.* Orlansky, 92 Miss. 761, 46 S. 50, 136; Simon *v* Hermann, 129 N. Y. S. 1014.

Parol evidence competent to show right to possession. Powers *v.* Myers, 25 Okla. 165, 105 P. 674.

782-14 See Moye *v.* Thurber, 146 Ala. 180, 40 S. 822; Fisk *v.* Arnold, 7 Ind. Ty. 526, 104 S. W. 824.

Fact of possession, rather than right thereto, is the issue. Denecke *v.* Miller, 142 Ia. 486, 119 N. W. 380.

Prima facie case made out by lessee showing he has right to possession. Floersheim *v.* Baude, 110 Ill. App. 536.

Burden to show right to recover is on plaintiff. Fisk *v.* Arnold, 7 Ind. Ty. 526, 104 S. W. 824.

Right of plaintiff must affirmatively appear and judgment cannot be taken by default. Smith *v.* Finger, 15 Okla. 120, 79 P. 759.

782-15 Clark *v.* Langenbach, 130 Fed. 755, 65 C. C. A. 181. See Floersheim *v.* Baude, 110 Ill. App. 536.

Tenant cannot bring action against landlord. Washington *v.* Moore, 84 Ark. 220, 105 S. W. 253.

782-16 Redman *v.* Perkins, 122 Mo. App. 164, 98 S. W. 1097; Olson Land Co. *v.* Park Co., 63 Wash. 521, 115 P. 1083.

782-18 Brown *v.* French, 159 Ala. 645, 49 S. 255 (if entry was acquiesced in); Montijo *v.* Shearer, 6 Cal. App. 558, 92 P. 512; Thomas *v.* Olenick, 237 Ill. 167, 86 N. E. 592; Rockhold *v.* Doering, 122 Ill. App. 194; Merki *v.* Merki, 212 Ill. 121, 72 N. E. 9; Haas *v.* Juul, 178 Ill. App. 397; Geiger *v.* Brown, 167 Ill. App. 534; Denecke *v.* Miller, 142 Ia. 486, 119 N. W. 380; Purcell *v.* Merrick, 172 Mo. App. 412, 158 S. W. 478; Spellman *v.* Rhode, 33 Mont. 21, 81 P. 395; Fitchett *v.* Henley, 31 Nev. 326, 104 P. 1060; Oyster Bay *v.* Jacob, 109 App. Div. 613, 96 N. Y. S. 620; Vansellous *v.* Huene, 26 Okla. 243, 108 P. 1102; Evangelista *v.* Tabayuyong, 7 Phil. Isl. 607; Francis *v.* Holmes, 54 Tex. Civ. 608, 118 S. W. 881 (so provided by statute).

Comp. Phillips *v.* Phillips (Ala.), 65 S. 49.

"**As has been decided in cases** without number, the matter of title is of no moment whatever in actions of unlawful detainer—the disturbance is to the possession, and the case must be determined on the relative rights of possession between the parties." Prendergast *v.* Graverman, 166 Mo. App. 33, 147 S. W. 1094. And see Goldring *v.* Reid, 61 Fla. 250, 54 S. 718.

783 Plaintiff must show superior title.—Phillips *v.* S. (Ala.), 65 S. 49.

783-19 Rockhold *v.* Doering, 122 Ill. App. 194; Dineen *v.* Olson, 73 Kan. 379, 85 P. 538 (justice of peace may receive evidence of title when necessary to determine question of possession); Moore *v.* Shoup, 123 Mo. App. 409, 100 S. W. 53 (declarations of defendant as to title, admissible). Written or oral evidence, admissible. Stone *v.* Blanchard, 87 Neb. 1, 126 N. W. 766; Cowen *v.* McGoron, 31 O. C. C. 590.

784-20 Barnewell *v.* Stephens, 142 Ala. 609, 38 S. 662; Bailey *v.* Black-

sher, 142 Ala. 254, 37 S. 827; McMillan *v.* Reese, 61 Fla. 360, 55 S. 388; Johnson *v.* Assn., 126 Ill. App. 592.

Surveys and proof of occupation admissible only to show location of land and that land occupied was not that possession of which is claimed. Paden *v.* Gibbs, 88 Miss. 274, 40 S. 871.

784-21 Clark *v.* Langenbach, 130 Fed. 755, 65 C. C. A. 181; Richie *v.* Owsley, 137 Ky. 63, 121 S. W. 1015.

785-23 See Thomas *v.* Olenick, 140 Ill. App. 385.

786-27 Dutcher *v.* Sanders, 20 Cal. App. 549, 129 P. 809.

787-29 Stevens *v.* Weyer, 169 Ill. App. 469; Feder *v.* Hager, 64 W. Va. 452, 63 S. E. 285. See Highland Park O. Co. *v.* Co., 1 Cal. App. 340, 82 P. 228, (admission harmless); Folsom *v.* Hunter, 6 Ind. Ty. 453, 98 S. W. 156; Moore *v.* Girten, 5 Ind. Ty. 384, 82 S. W. 848; Childers *v.* Hieronymus, 32 Ky. L. R. 394, 105 S. W. 979; Howard *v.* Davis, 40 Okla. 86, 136 P. 401.

Extent of possession. — See Bush *v.* Thomas, 162 Ala. 168, 50 S. 133.

Decision of secretary of interior is determinative of right of possession as to government land. Brennan *v.* Shanks, 24 Okla. 563, 103 P. 705.

Tax receipts not evidence of right of possession. Evangelista *v.* Tabayuyong, 7 Phil. Isl. 607.

Sheriff's deed.—Antognoli *v.* O'Have Zedek, 19 Ill. App. 142.

787-30 Phillips *v.* Phillips (Ala.), 65 S. 49; Amos *v.* Cohn, 7 Cal. App. 432, 94 P. 590; Goad *v.* Heckler, 19 Colo. App. 479, 76 P. 542; Hallock *v.* R. Co., 202 N. Y. 201, 95 N. E. 644, *rev.* 120 N. Y. S. 1127.

Evidence insufficient.—Cate *v.* Knight, 10 Ga. App. 664, 73 S. E. 1079.

Wrongful intent not necessary element. School Dist. *v.* Holt, 126 Mo. App. 571, 105 S. W. 32.

788-31 Wilson *v.* Campbell, 75 Kan. 159, 88 P. 548; Spellman *v.* Rhode, 33 Mont. 21, 81 P. 395.

Tearing down fence, sufficient. Brown *v.* French, 148 Ala. 272, 42 S. 409; Fowler *v.* Ohnick, 45 Wash. 41, 87 P. 1050.

Chiseling away portion of wall is forcible entry. Holzhausen *v.* Hoskins, 115 Mo. App. 261, 91 S. W. 410.

Opening of gate insufficient. Fowler *v.* Prichard, 148 Ala. 261, 41 S. 667.

789-32 Knowles *v.* Crocker, 149 Cal. 278, 86 P. 715; Highland Park O. Co. *v.* Co., 1 Cal. App. 340, 82 P. 228; Goad *v.* Heckler, 19 Colo. App. 479, 76 P. 542; Oyster Bay *v.* Jacob, 109 App. Div. 613, 96 N. Y. S. 620; Pakas *v.* Hurley, 61 Misc. 228, 114 N. Y. S. 142.

789-33 Clark *v.* Langenbach, 130 Fed. 755, 65 C. C. A. 181.

790-34 Harman *v.* Alt, 69 W. Va. 287, 71 S. E. 709.

791-35 "The plaintiff, if in possession of the building, was not dispossessed. She could not therefore pursue a complaint for forcible entry and detainer or for forcible detainer under the statute, to restore her to possession. The forcing of the door was not to dispossess her, but, as found by the court, to obtain certain goods, not belonging to her, which were stored in the building. It does not appear that the defendant or his mother knew of the plaintiff's presence in the building, or that she claimed to be in possession of it until the door was forced. An owner whose house has been entered during his temporary absence by a thief or other trespasser, and the door barred against him, is not bound to leave the trespasser in possession and to proceed against him in ejectment to regain possession. Such possession is not the actual possession which the statute against forcible entry and detainer protects." Carrier *v.* Carrier, 85 Conn. 203, 82 A. 187.

792-38 Winchester *v.* Becker, 4 Cal. App. 382, 88 P. 296, false key.

792-39 Ehrlick *v.* C., 31 Ky. L. R. 401, 102 S. W. 289; Paden *v.* Gibbs, 88 Miss. 274, 40 S. 871; Redman *v.* Perkins, 122 Mo. App. 164, 98 S. W. 1097 (action of unlawful detainer); Zuercher *v.* Startz, 53 Tex. Civ. 442, 115 S. W. 1175.

In Alabama it does not matter how defendant went into possession. Lorah *v.* Emerson, 154 Ala. 145, 45 S. 228; Sprouse *v.* Story, 144 Ala. 542, 42 S. 23. See Brown *v.* French, 159 Ala. 645, 49 S. 255.

793-41 Preston *v.* Davis, 112 Ill. App. 636; Thull *v.* Allen, 72 Neb. 760, 101 N. W. 1024.

That entry was by consent must be shown to sustain a count for unlawful detainer. Bailey *v.* Blacksher, 142 Ala. 254, 37 S. 827.

794-43 See Shepperson *v.* Burnette, 116 Tenn. 117, 92 S. W. 762. *Comp.*

Stahl B. Co. *v.* Van Buren, 45 Wash. 451, 88 P. 837.

In Missouri the grantee of the landlord may maintain unlawful detainer. Doner *v.* Ingram, 119 Mo. App. 156, 95 S. W. 983.

795-44 Victor Realty Co. *v.* Argumanian, 172 Ala. 108, 55 S. 621. See Savold *v.* Baldwin (N. D.), 146 N. W. 544; Smith *v.* Finger, 15 Okla. 120, 79 P. 759; Columbia, etc. R. Co. *r.* Moss, 44 Wash. 589, 87 P. 951.

795-46 Demand unnecessary where right of possession has terminated by limitation. Henion *v.* Vavrik, 126 Ill. App. 292.

795-47 See Fowler *v.* Prichard, 148 Ala. 261, 41 S. 667.

795-48 Dulmaine *v.* Co., 46 Colo. 469, 104 P. 1038.

796-52 Barnewell *v.* Stephens, 142 Ala. 609, 38 S. 662.

797-54 McKinney *v.* Mfg. Co., 157 Ill. App. 339.

797-56 **Authority of agent** to make demand must be shown by affirmative proof, and subsequent ratification by landlord insufficient. Barnewell *v.* Stephens, 142 Ala. 609, 38 S. 662.

797-57 Iler *v.* Miller, 78 Neb. 677, 111 N. W. 590; Heller *r.* Beal, 23 O. C. C. 540; Gardner *v.* Kime, 20 Okla. 784, 95 P. 242; Smith *r.* Finger, 15 Okla. 120, 79 P. 759; Martin *v.* Hartshorne, 17 Okla. 586, 87 P. 854.

798-59 Peddicord *v.* Berk, 74 Kan. 236, 86 P. 465.

798-60 Smith *v.* Travel, 20 Okla. 512, 94 P. 529, affidavit of service by officer insufficient.

799-63 **Whether damages can be recovered** for detention is undecided. Montgomery *v.* Co., 61 W. Va. 620, 57 S. E. 137. But see Fisk *r.* Arnold, 7 Ind. Ty. 526, 104 S. W. 824; Osteen *v.* Stovall, 5 Ind. Ty. 170, 82 S. W. 710.

799-64 Winchester *r.* Becker, 4 Cal. App. 382, 88 P. 296; Sparrevohn *v.* Fisher, 2 Phil. Isl. 676.

801-70 Cowen *r.* McGoron, 31 O. C. C. 590. See West *v.* Comeaux, 73 Kan. 271, 85 P. 138.

Under contract to execute lease.—Adock *v.* Lieber, 51 Colo. 373, 117 P. 993.

Defendant must establish an affirmative defense. Bettens *v.* Hoover, 12 Cal. App. 313, 107 P. 329. Must show, if contract is within statute of frauds, that he took possession under contract to buy. Marks *v.* McGookin, 127 Ia. 716, 104 N. W. 373.

801-71 Defendant is concluded by statements in his affidavit to remove case to higher court as to manner of his entry. Brown *v.* French, 159 Ala. 645, 49 S. 255.

802-72 **Entry under parol contract** to rent evidence good faith. Newell *r.* Taylor, 74 S. C. 8, 54 S. E. 212. See Dominick *v.* Kane, 4 O. N. P. (N. S.) 583.

802-74 Refusal of defendant's wife to sign lease immaterial if she was in occupation of premises. Monroe *v.* Stayt, 57 Wash. 592, 107 P. 517.

803-75 **Abandonment** subsequent to the entry, no defense. Spellman *v.* Rhode, 33 Mont. 21, 81 P. 395.

803-81 Hord *r.* Sartain, 27 Ky. L. R. 796, 86 S. W. 692.

Burden is on plaintiff to show entry within two years. Karnes *v.* Johnston, 58 W. Va. 595, 52 S. E. 658.

804-83 Character of house kept by plaintiff irrelevant. Brown *v.* French, 159 Ala. 645, 49 S. 255.

804-84 McCormick *r.* McDowell, 28 Ky. L. R. 854, 90 S. W. 541; Robinson *v.* Marshall, 25 Ky. L. R. 1785, 78 S. W. 904; Oyster Bay *r.* Jacob, 109 App. Div. 613, 96 N. Y. S. 620.

805-85 **Pendency of suit for injunction** by plaintiff is defense to action of forcible entry and detainer. Lowry *v.* Mitchell, 14 Okla. 241, 78 P. 379. But see Howe *v.* Parker, 18 Okla. 282, 90 P. 15.

Contest before land department.—Appeal to Secretary of Interior no defense to an action of forcible detainer brought by successful contestant. Smith *v.* Finger, 15 Okla. 120, 79 P. 759.

Counter-claim for damages not allowable. Spellman *v.* Rhode, 33 Mont. 21, 81 P. 395.

FOREIGN LAWS.

808-3 Barrielle *r.* Bettman, 199 Fed. 838 (*cit.* 5 ENCY. OF EV. 808, note); Goodyear T. & R. Co. *v.* Wheel Co., 164 Fed. 869; The Matterhorn, 128 Fed. 863, 63 C. C. A. 331; McFadden *v.* Mitchell, 61 Cal. 148; Wickersham *v.* Johnston, 104 Cal. 407, 38 P. 89, 43 Am. St. 118; Board *v.* Estrella, 5 Haw. 211; Clark *r.* R. Co., 115 Ill. App. 150; Coe *v.* Hill, 201 Mass. 15,

86 N. E. 949; Gordon *v.* Knott, 199 Mass. 173, 85 N. E. 184 (statements in the reasoning in opinions of foreign courts cannot be regarded unless proved); Carnell *v.* Halpin, 159 Mich. 42, 123 N. W. 578; Marshall *v.* Ower & Co., 171 Mich. 232, 137 N. W. 204; Lando *v.* Lando, 112 Minn. 257, 127 N. W. 1125; Oehler *v.* Hamburg, etc., 145 N. Y. S. 1090; In re Peterson's Est., 22 N. D. 480, 134 N. W. 751; Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 130 P. 55. **Judicial notice will be taken** that civil law is basis of French law. Barrielle *v.* Bettman, 199 Fed. 838.

"We are confined to the case as the record presents it. The laws of other states are facts which must be alleged and proved and of which we cannot take judicial notice either in their language or their interpretation." Southworth *v.* Morgan, 205 N. Y. 293, 98 N. E. 490.

808-4 Teat *v.* Chapman & Co., 1 Ala. App. 491, 56 S. 267; Southern Ex. Co. *v.* Owens, 146 Ala. 412, 41 S. 752; Ellis *v.* Terrell (Ark.), 158 S. W. 957 (contrary by statute); Fox *v.* Mick, 20 Cal. App. 599, 129 P. 972; Lilly-B. Co. *v.* Sonnemann, 157 Cal. 192, 106 P. 715; Ancient Order *v.* Dixon, 45 Colo. 95, 100 P. 427; Southern Exp. Co. *v.* Hanaw, 134 Ga. 445, 67 S. E. 944; Royal League *v.* Kavanagh, 233 Ill. 175, 84 N. E. 178; Hayward *v.* Sencenbaugh, 141 Ill. App. 391; Clark *v.* R. Co., 115 Ill. App. 150; Balt., etc. R Co. *v.* Mc Donald, 112 Ill. App. 391; Crane *v* Blackman, 126 Ill. App. 631; Leathe *v.* Thomas, 218 Ill. 246, 75 N. E. 810; Krouse *v.* Krouse, 48 Ind. App. 3, 95 N. E. 262; Balt., etc. R. Co. *v.* Ryan, 31 Ind. App. 597, 68 N. E. 923; Varner *v.* Exch., 138 Ia. 201, 115 N. W. 1111; Bolinger *v.* Beacham, 81 Kan. 746, 106 P. 1094; Missouri, etc. R. Co. *v.* Sealy (Kan.), 99 P. 230 (except as an aid to interpretation and application of local law); Loyal Legion *v.* Brewer, 75 Kan. 729, 90 P. 247; Ferd Heim B. Co. *v.* Gimber, 67 Kan. 834, 72 P. 359 (neither statutes nor decisions of sister state noticed except for purpose of construing laws of form and determining what they are); Lemon *v.* R. Co., 137 Ky. 276, 125 S. W. 701; Wettlaufer *v.* Baxter, 137 Ky. 362, 125 S. W. 741; Cumberland T. & T. Co. *v.* R. Co., 117 La. 199, 41 S. 492; Mandru *v.* Ashby, 108 Md. 693, 71 A. 312; Merrick *v.* Betts, 214 Mass. 223, 101 N. E. 131; Marshall *v.* Owen & Co., 171 Mich. 232, 137 N. W. 204; Twin City B. Factory *v.* Ins. Co., 114 Minn. 475, 131 N. W. 497; Fehrenbach *v.* L. Co. (Mo. App.), 167 S. W. 631; Davis *v.* McCall (Mo. App.), 166 S. W. 1113; Rashall *v.* R. Co., 249 Mo. 509, 155 S. W. 426; Gibson *v.* R. Co., 225 Mo. 473, 125 S. W. 453; Snuffer *v.* Karr, 197 Mo. 182, 94 S. W. 983; Smith *v.* Aultman, 120 Mo. App. 462, 96 S. W. 1034; McKnight *v.* R. Co., 33 Mont. 40, 82 P. 661; Kimball *v.* Kimball, 75 N. H. 291, 73 A. 408; Fish *v.* R. Co., 158 App. Div. 92, 143 N. Y. S. 365; Electro Tint E. Co. *v.* Co., 130 App. Div. 561, 115 N. Y. S. 34; Van Tassell *v.* S. Co., 83 Misc. 126, 144 N. Y. S. 793; Goodwin *v.* Goodwin, 80 Misc. 303, 141 N. Y. S. 175; In re Kutter's Est., 79 Misc. 74, 139 N. Y. S. 693; (*comp.* Mallory *v.* Hot Springs Co., 157 App. Div. 253, 141 N. Y. S. 961); Strodl *v.* Co., 130 N. Y. S. 35, *rev.* 122 N. Y. S. 609; Brown C. Co. *v.* Dowd, 155 N. C. 307, 71 S. E. 721; Lassiter *v.* R. Co., 136 N. C. 89, 48 S. E. 642; Hall *v.* R. Co., 146 N. C. 345, 59 S. E. 879; Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 130 P. 55; Scott *v.* Ford, 52 Or. 288, 97 P. 99; Cape May, etc. Co. *v.* Henderson, 231 Pa. 82, 79 A. 982; Whiting Mfg. Co. *v.* Bk., 15 Pa. Super. 419; O'Donnell *v.* Johnson (R. I.), 90 A. 165; Bethea *v.* Allen, 95 S. C. 479, 79 S. E. 639; Ogg *v.* Ogg (Tex. Civ.), 165 S. W. 912; Western U. Tel. Co. *v.* White (Tex. Civ.), 162 S. W. 905; Stamp *v.* R. Co. (Tex. Civ.), 161 S. W. 450; (*comp.* Zarate *v.* Villareal (Tex. Civ.), 155 S. W. 328); Texas, etc. R. Co. *v.* Miller (Tex. Civ.), 128 S. W. 1165; El Paso, etc. R. Co. *v.* Smith, 50 Tex. Civ. 10, 108 S. W. 988; White *v.* Richeson (Tex. Civ.), 94 S. W. 202; Grow *v.* R. Co. (Utah), 138 P. 398; Hunt *v.* Monroe, 32 Utah 428, 91 P. 269; Dowell *v.* Cox, 108 Va. 460, 62 S. E. 272; App *v.* App, 106 Va. 253, 55 S. E. 672. See Gleason *v.* Thayer, 87 Conn. 248, 87 A. 790; Tourtelot *v.* Booker (Tex. Civ.), 160 S. W. 293.

810-6 Hale *v.* Co., 15 Conn. 539, 39 Am. Dec. 398; Anderson *v.* May, 10 Heisk. (Tenn.) 84; Hobbs *v.* R. Co., 9 Heisk. (Tenn.) 873. See Missouri, etc. Ins. Co. *v.* Lovelace, 1 Ga. App. 446, 58 S. E. 93; Orient Ins. Co. *v.* Rudolph, 69 N. J. Eq. 570, 61 A. 26.

810-7 Creelman Co. *v.* Lesh, 73 Ark. 16, 83 S. W. 320.

§10-8 Woodard *v.* Woodard, 216 Mass. 1, 102 N. E. 921; Cherry *v.* Cherry (Mo.), 167 S. W. 539.

§11-10 Perry *v.* Morris, 7 Ind. Ty. 146, 104 S. W. 571; San Antonio L. Pub. Co. *v.* Lewy, 52 Tex. Civ. 22, 113 S. W. 574; El Paso, etc. R. Co. *v.* Smith, 50 Tex. Civ. 10, 108 S. W. 988 (notice taken of act organizing a territory).

§11-15 Irvine *v.* Elliott, 203 Fed. 82; Bond *v.* Farwell, 172 Fed. 58, 96 C. C. A. 546 (all the statute to be applied, noticed though only part is pleaded); Moore *v.* Pywell, 29 App. Cas. (D. C.) 312; Evans *v.* R. Co., 5 Phila. (Pa.) 512.

§12-18 Elliott *v.* Garvin, 7 Ind. Ty. 679, 104 S. W. 878.

§13-19 Hill *v.* Spraid, 11 West. L. Rep. (Can.) 680; Crosby *v.* R. Co., 158 Fed. 144; Keep *v.* Co., 154 Fed. 121; Wood *v.* Circle, 212 Ill. 532, 72 N. E. 783; Wooden *v.* R. Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. 803, 13 L. R. A. 458.

Evidence insufficient.—Louisville & N. R. Co. *v.* Cook, 168 Ala. 592, 53 S. 190.

§13-20 Murphy *v.* Murphy, 145 Cal. 482, 78 P. 1053; Galard *v.* Winans (Md.), 74 A. 626; Gordon *v.* Knott, 199 Mass. 173, 85 N. E. 184; Vazakas *v.* Vazakas, 109 N. Y. S. 568; Fletcher *v.* Co., 72 Wash. 525, 130 P. 1140. But see Sokel *v.* P., 212 Ill. 238, 72 N. E 382.

§14-21 Wills *v.* Wills 166 Cal. 529, 137 P. 249; Cellulose P. Co. *v.* Calhoun, 166 Cal. 513, 137 P. 238; Hobbs *v.* Min. Co., 164 Cal. 497, 129 P. 781, 43 L. R. A. (N. S.) 1112; Van Buskirk *v.* Kuhns, 164 Cal. 472, 129 P. 587; Wilson *v.* Durkee, 20 Cal. App. 492, 129 P. 617; In re Hancock's Est., 156 Cal. 804, 106 P. 58; Cavallaro *v.* R. Co., 110 Cal. 348, 42 P. 918, 52 Am. St. 94; In re Harrington, 140 Cal. 244, 73 P. 1000, 140 Cal. 294, 74 P. 136; Flood *v.* Dunphy, 147 Cal. 95, 81 P. 315; Bonfils *v.* Gillespie, 25 Colo. App. 496, 139 P. 1054; Howard *v.* R. Co., 11 App. Cas. (D. C.) 300; Lay *v.* R. Co., 131 Ga. 345, 62 S. E. 189; Douglas *v.* Douglas, 22 Ida. 336, 125 P. 796; Board, etc. *v.* Pro. Bureau, 175 Ill. App. 464; Nehring *v.* Nehring, 164 Ill. App. 527; Reid *v.* Co., 146 Ill. App. 371; News Pub. Co. *v.* Press, 114 Ill. App. 241; Clark *v.* Jackson, 222 Ill. 13, 78 N. E. 6 (similar statutes presumed to have received same construction); Hogue *v.* Steel, 207 Ill. 340, 69 N. E. 931; Irose *v.* Balla (Ind.), 104 N. E. 851; Balt., etc. R. Co. *v.* Freeze, 169 Ind. 370, 82 N. E. 761; Wilhite *v.* Skelton, 5 Ind. Ty. 621, 82 S. W. 932; Secor *v.* Siver (Ia.), 146 N. W. 845; Rudolph H. Co. *v.* Price (Ia.) 145 N. W. 910; Putbrees *v.* James (Ia.), 144 N. W. 607; Scott *v.* Scott (Ia.), 143 N. W. 1103; Smith & Son *v.* Bloom (Ia.), 141 N. W. 32; Lefebure *v.* Ex. Co. (Ia.), 139 N. W. 1117; Condit *v.* Johnson (Ia.), 139 N. W. 477; Anderson *v.* Thero, 139 Ia. 632, 118 N. W. 47; Campbell *v.* Campbell, 129 Ia. 317, 105 N. W. 583; Bershears *v.* Co., 80 Kan. 194, 101 P. 1011; Bk. *v.* Nordstrom, 70 Kan. 485, 78 P. 804; St. Louis, etc. R. Co. *v.* Johnson, 74 Kan. 83, 86 P. 156 (common law); Elswick *v.* Ramey, 157 Ky. 639, 163 S. W. 751; Louisville & N. R. Co. *v.* Smith, 135 Ky. 462, 122 S. W. 806; Arnett *v.* Pinson, 33 Ky. L. R. 36, 108 S. W. 852; Miller *v.* Aldrich, 202 Mass. 109, 88 N. E. 441; C. *v.* Stevens, 196 Mass. 280, 82 N. E. 33; Attorney-Gen. *v.* Council, 196 Mass. 151, 81 N. E. 966; Farmers, etc. Bk. *v.* Venner, 192 Mass. 531, 78 N. E. 540; Callender, etc. Co. *v.* Flint, 187 Mass. 104, 72 N. E. 345; Cherry *v.* Sprague, 187 Mass. 113, 72 N. E. 456; Hodgkins *v.* Bowser, 195 Mass. 141, 80 N. E. 796; Twin City B. Factory *v.* Ins. Co., 114 Minn. 475, 131 N. W. 497; Wentz *v.* Ry. Co. (Mo.), 168 S. W. 1166; Fehrenbach W. & L. Co. *v.* R. Co. (Mo. App.), 167 S. W. 631; Madden *v.* R. Co., 167 Mo. App. 143, 151 S. W. 489; Brown *v.* Worthington, 162 Mo. App. 508, 142 S. W. 1082; Bank *v.* Co., 139 Mo. App. 110, 120 S. W. 648; McManus *v.* R. Co., 118 Mo. App. 152, 94 S. W. 743; Bethel *v.* Pawnee (Neb.), 145 N. W. 363; In re Kutter's Est., 79 Misc. 74, 139 N. Y. S. 693; Fish *v.* R. Co., 158 App. Div. 92, 143 N. Y. S. 365; Fallon *v.* Mertz, 110 App. Div. 755, 97 N. Y. S. 417; Spencer *v.* Busch, 50 Misc. 284, 98 N. Y. S. 690 (law of sister state presumed to be same as common law of forum); Hall *v.* R. Co., 146 N. C. 345, 59 S. E. 879; Wagner *v.* Co., 25 Okla. 558, 106 P. 969; Harn *v.* Cole, 20 Okla. 553, 95 P. 415; Betz *v.* Wilson, 17 Okla. 383, 87 P. 844; Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 130 P. 55; Cape May R. E. Co. *v.* Henderson, 231 Pa. 82, 79 A. 982; Linton

v. Moorhead, 209 Pa. 646, 59 A. 264; Stoddart *v.* Myers, 52 Pa. Super. 179; Braintrim *v.* Overseers, 10 Pa. C. C. 250; Taber *v.* R. Co., 81 S. C. 317, 62 S. E. 311; Iowa L. & T. Co. *v.* Schnose, 19 S. D. 248, 103 N. W. 22; Ogg *v.* Ogg (Tex. Civ.), 165 S. W. 912; Western U. Tel. Co. *v.* White (Tex. Civ.), 162 S. W. 905; Southwestern Sur. Ins. Co. *v.* Anderson (Tex. Civ.), 152 S. W. 816; Wingo *v.* Rudder (Tex. Civ.), 120 S. W. 1073; El Paso, etc. R. Co. *v.* Smith, 50 Tex. Civ. 10, 108 S. W. 988; Nat. Bk. *v.* Kenney, 98 Tex. 293, 83 S. W. 368, *rev.* 80 S. W. 555; Southern, etc. R. Co. *v.* Curtis, 44 Tex. Civ. 477, 99 S. W. 566; Southern, etc. R. Co. *v.* Burgess Co. (Tex. Civ.), 90 S. W. 189; Missouri, etc. R. Co. *v.* Wise (Tex. Civ.), 106 S. W. 465 (construction placed on law by sister state presumed to be same as that given by courts of forum); Grow *v.* R. Co. (Utah), 138 P. 398; Stanford *v.* Gray (Utah), 129 P. 423; Moreland *v.* Moreland, 108 Va. 93, 60 S. E. 730; Norfolk, etc. R. Co. *v.* Denny, 106 Va. 383, 56 S. E. 321; Colpe *v.* Lindblom, 57 Wash. 106, 106 P. 634; Clark *v.* Eltinge, 38 Wash. 376, 80 P. 556; Mantle *v.* Dabney, 44 Wash. 193, 87 P. 122; State Bk. *v.* Pease, 153 Wis. 9, 139 N. W. 767; Wenzel *v.* R. Co., 152 Wis. 418, 140 N. W. 81; Edleman *v.* Edleman, 125 Wis. 270, 104 N. W. 56; Howe *v.* Ballard, 113 Wis. 375, 89 N. W. 136 (construction of laws of sister state presumed to be same as of forum).

See Moton *v.* Dewell, 32 O. C. C. 35, *Comp.* Am. Woolen Co. *v.* Maaget, 86 Conn. 234, 85 A. 583.

Presumption of comity.—Cumberland Gaslight Co. *v.* Gas Co., 188 Fed. 585, 110 C. C. A. 383, *aff.* 182 Fed. 667.

Common law of another state.—Wilson *v.* Durkee, 20 Cal. App. 492, 129 P. 617; Woodard *v.* Woodard, 216 Mass. 1, 102 N. E. 921; Merrick *v.* Betts, 214 Mass. 223, 101 N. E. 131 (not presumed the same on question of slave marriages); Levy *v.* Downig, 213 Mass. 334, 100 N. E. 638; Jones *v.* R. Co., 211 Mass. 521, 98 N. E. 607; De Vall *v.* De Vall, 57 Or. 128, 109 P. 755.

Not pleaded.—Thompson *v.* R. Co., 243 Mo. 336, 148 S. W. 484.

In Houston, etc. R. Co. *v.* **Fife** (Tex. Civ.), 147 S. W. 1181, "The averment by the defendant that the right of action asserted by plaintiff was afforded by a civil statute of Louisiana cured the want of such pleading by plaintiff and its effect was tantamount to an allegation by plaintiff and admission by defendant that such a law of Louisiana existed. The existence of such a law being so pleaded, the presumption obtained that the law of that state was the same as our own, and therefore it was not necessary for plaintiff to prove the law."

816-22 Merrick *v.* Betts, 214 Mass. 223, 101 N. E. 131.

816-23 Ham *v.* R. Co., 149 Mo. App. 200, 130 S. W. 407. See Gross *v.* Haisley, 2 Ind. App. 23, 28 N. E. 123.

816-25 Tunnicliff *v.* Fox, 68 Neb. 811, 94 N. W. 1032.

816-26 Westheimer *v.* Habinek, 131 Ia. 643, 109 N. W. 189. *Comp.* Betz *v.* Wilson, 17 Okla. 383, 87 P. 844; Edleman *v.* Edleman, 125 Wis. 270, 104 N. W. 56.

817-27 Kraus *v.* Torry, 146 Ala. 548, 40 S. 956.

817-31 Cuba R. Co. *v.* Crosby, 170 Fed. 369, 95 C. C. A. 539; Corinth Bk. *v.* King (Ala.), 62 S. 704; Teat *v.* Chapman & Co., 1 Ala. App. 491, 56 S. 267; Hoxie *v.* R. Co., 82 Conn. 352, 73 A. 754; Seaboard, etc. R. Co. *v.* Andrews, 140 Ga. 254, 78 S. E. 925; Westberry *v.* Clanton, 136 Ga. 795, 72 S. E. 238; Thomas *v.* Clarkson, 125 Ga. 72, 54 S. E. 77; Bailey *v.* Devine, 123 Ga. 653, 51 S. E. 603; Ellington *v.* Harris, 127 Ga. 85, 56 S. E. 134; Whitfield *v.* R. Co., 7 Ga. App. 268, 66 S. E. 973; Robinson *v.* Yetter, 143 Ill. App. 172 (presumption not overcome by uncertain expert testimony unsupported by decisions); Forsyth *v.* Barnes, 131 Ill. App. 467; Scholten *v.* Barber, 217 Ill. 148, 75 N. E. 460; Edwards *v.* Schillinger, 148 Ill. App. 227; Crane *v.* Blackman, 126 Ill. App. 631; Krouse *v.* Krouse, 48 Ind. App. 3, 95 N. E. 262; Penn., etc. Ins. Co. *v.* Noreross, 163 Ind. 379, 72 N. E. 132; Southern R. Co. *v.* Elliott, 170 Ind. 273, 82 N. E. 1051; Cobe *v.* Malloy, 44 Ind. App. 8, 88 N. E. 620; Midland S. Co. *v.* Bk., 34 Ind. App. 107, 72 N. E. 290; Sykes *v.* Bk., 78 Kan. 688, 98 P. 206; Elswick *v.* Ramey, 157 Ky. 639, 163 S. W. 751; Louisville & N. R. Co. *v.* Massie, 138 Ky. 449, 128 S. W. 330; Arnett *v.* Pinson, 33 Ky. L. R. 36, 108 S. W. 852; Nat. Bk. *v.* R. Co., 99 Md. 661, 59 A. 134; Cormo *v.* Wks., 205 Mass. 366, 91 N. E. 313; Demel-

man *v.* Brazier, 193 Mass. 588, 79 N. E. 812; Cherry *v.* Cherry (Mo.), 167 S. W. 539; Davis *v.* McCall (Mo. App.), 166 S. W. 1113; Armor *v.* Frey, 253 Mo. 447, 161 S. W. 829; Shelton *v.* R. Co., 167 Mo. App. 404, 151 S. W. 493; Stevenson *v.* Smith, 189 Mo. 447, 88 S. W. 86; Atwater *v.* B. Co., 147 Mo. App. 436, 126 S. W. 823; Hubbard *v.* R. Co., 112 Mo. App. 459, 87 S. W. 52; Jordan *v.* Pence, 123 Mo. App. 321, 100 S. W. 529; Cook *v.* R. Co., 78 Neb. 64, 110 N. W. 718; Kimball *v.* Kimball, 75 N. H. 291, 73 A. 408; Bodine *v.* Berg, 82 N. J. L. 662, 82 A. 901; Int. Text Bk. Co. *v.* Connelly, 206 N. Y. 188, 99 N. E. 722; In re Kutter's Est., 79 Misc. 74, 139 N. Y. S. 693; Robb *v.* College, 185 N. Y. 485, 78 N. E. 359; Southworth *v.* Morgan, 205 N. Y. 293, 98 N. E. 490; Roberts *v.* Pratt, 152 N. C. 731, 68 S. E. 240; Hanson *v.* R. Co., 18 N. D. 324, 121 N. W. 78; Ellis *v.* Abbott (Or.), 138 P. 488; Scott *v.* Ford, 52 Or. 288, 97 P. 99; O'Donnell *v.* Johnson (R. I.), 90 A. 165; Gilliland *v.* R. Co., 85 S. C. 26, 67 S. E. 20; Jonesville Mfg. Co. *v.* R. Co., 77 S. C. 480, 58 S. E. 422; Pee Dee. Naval Stores Co. *v.* Hamer, 92 S. C. 423, 75 S. E. 695; W. U. T. Co. *v.* Parsley, 57 Tex. Civ. 8, 121 S. W. 226; Mountain Lake L. Co. *v.* Blair, 109 Va. 147, 63 S. E. 751; Frank *v.* Gump, 104 Va. 306, 51 S. E. 358; Pitt *v.* Little, 58 Wash. 355, 108 P. 941.

See Wade *v.* Boone (Mo. App.), 168 S. W. 360. *Comp.* Southern R. Co. *v.* Diseker (Ga. App.), 81 S. E. 269.

No presumption arises that common law prevails in another state where court knows or has means of ascertaining that such is not the case. So-R. Co. *v.* Diseker (Ga. App.), 81 S. E. 269.

Presumption that construction placed on common law by the court of a territory is the same as by the United States Supreme Court. El Paso, etc. R. Co. *v.* Smith, 50 Tex. Civ. 10, 108 S. W. 988. See Fallon *v.* Mertz, 110 App. Div. 755, 97 N. Y. S. 417.

818-32 Fehrenbach W. & L. Co. *v.* R. Co. (Mo. App.), 167 S. W. 631; Madden *v.* R. Co., 167 Mo. App. 143, 151 S. W. 489; Shelton *v.* R. Co., 167 Mo. App. 404, 151 S. W. 493; Atchison, etc. R. Co. *r.* Pickens (Tex. Civ.), 118 S. W. 1133 (law of Texas applied in a case arising in New Mexico). *Contra,* Cuba R. Co. *v.* Crosby, 170 Fed. 369, 95 C. C. A. 539.

819-34 *Contra,* Atty.-Gen. *v.* Council, 196 Mass. 151, 81 N. E. 966.

819-35 *Contra,* St. Louis, etc. R. Co. *v.* Johnson, 74 Kan. 83, 86 P. 156.

819-36 Presumption extends only to states formed out of English territory. Mathieson *v.* R. Co., 219 Mo. 542, 118 S. W. 9; McManus *v.* R. Co., 118 Mo. App. 152, 94 S. W. 743. Florida never recognized the common law as the source of its jurisprudence. Watford *v.* Co., 152 Ala. 178, 44 S. 567.

819-38 Gasaway *v.* Thomas, 56 Wash. 77, 105 P. 168.

819-39 But see Barrielle *v.* Bettman, 199 Fed. 838.

820-43 Davis *v.* McColl (Mo. App.), 166 S. W. 1113.

Though there is a change by statute in the state of the forum. Schaun *v.* Brandt, 116 Md. 560, 82 A. 551; Dickey *v.* Bk., 89 Md. 280, 43 A. 33; Bk. *v.* Couse, 68 Misc. 153, 124 N. Y. S. 79.

820-44 Bierhaus *v.* Co., 8 Ind. App. 246, 34 N. E. 581; Bowlin Co. *v.* Brandenburg, 130 Ia. 220, 106 N. W. 497; Bannard *v.* Duncan, 79 Neb. 189, 112 N. W. 353; Windhorst *v.* Bergendahl, 21 S. D. 218, 111 N. W. 544; Star, etc. Mfg. Co. *v.* Nordeman, 118 Tenn. 384, 100 S. W. 93; Ex parte Latham, 47 Tex. Cr. 208, 82 S. W. 1046; Mantle *r.* Dabney, 44 Wash. 193, 87 P. 122; Murrilla *v.* Guis, 51 Wash. 93, 98 P. 100; Moehlenpah *v.* Mayhew, 138 Wis. 561, 119 N. W. 826; Elmergreen *r.* Weimer, 138 Wis. 112, 119 N. W. 836. *Contra,* Bonfils *v.* Gillespie, 25 Colo. App. 496, 139 P. 1054; Arnett *v.* Pinson, 33 Ky. L. Rep. 36, 108 S. W. 852; Cormo *v.* Wks., 205 Mass. 366, 91 N. E. 313; Demelman *r.* Brazier, 193 Mass. 588, 79 N. E. 812; Cherry *v.* Sprague, 187 Mass. 113, 72 N. E. 456; C. *v.* Stevens, 196 Mass. 280, 82 N. E. 33; Olds *r.* Co., 185 Mass. 500, 70 N. E. 1022 (no presumption that statutes of New York give power to dissolve a corporation); Wilcox *v.* Bergman, 96 Minn. 219, 104 N. W. 955; Ham *v.* R. Co., 136 Mo. App. 17, 117 S. W. 108; Eckles *r.* R. Co., 112 Mo. App. 240, 87 S. W. 99; Venner *v.* R. Co., 160 App. Div. 127, 145 N. Y. S. 725; Waters *r.* Spencer, 44 Misc. 15, 89 N. Y. S. 693; Robb *r.* College, 185 N. Y. 485, 78 N. E. 359. **No such presumption.**—Patton *v.* Patton, 67 Misc. 404, 123 N. Y. S. 329.

821-45 Thomas *v.* Clarkson, 125 Ga. 72, 54 S. E. 77.

821-46 Trimble *v.* Stamper (Mo. App.), 166 S. W. 820; In re Weekes, 146 N. Y. S. 1006.

821-47 Ala. Code 1896, §1821; Cochran *v.* Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581; Mandru *v.* Ashby, 108 Md. 693, 71 A. 312; Traders Nat. Bk. *v.* Jones, 104 App. Div. 433, 93 N. Y. S. 768; Howe *v.* Ballard, 113 Wis. 375, 89 N. W. 136.

822-48 Compton *v.* S., 152 Ala. 68, 44 S. 685; Moore *v.* Pooley, 17 Ida. 57, 104 P. 898; McCraney *v.* Glos, 222 Ill. 628, 78 N. E. 921; Christiansen *v.* Wks., 223 Ill. 142, 79 N. E. 97; New York, C. & St. L. R. Co. *v.* Lind (Ind.), 102 N. E. 449; Summit *v.* Ins. Co., 123 Ia. 681, 99 N. W. 563 (copy admissible as presumptive evidence); Dimpfel *v.* Wilson, 107 Md. 329, 68 A. 561; State Nat. Bk. *v.* Levy, 141 Mo. App. 288, 125 S. W. 542; Ridpath *v.* Heller, 46 Mont. 586, 129 P. 1054; P. *v.* Portman, 159 App. Div. 702, 145 N. Y. S. 189; Braintrim *v.* Overseers, 10 Pa. C. C. 250.

See Trimble *v.* Stamper (Mo. App.), 166 S. W. 820.

Must purport to be published by authority.—Laub *v.* De Vault, 139 Ill. App. 398.

Single section of a code may be introduced and other party may offer cognate sections. Southern R. Co. *v.* Robertson, 7 Ga. App. 154, 66 S. E. 535.

822-49 Ridpath *v.* Heller, 46 Mont. 586, 129 P. 1054; Cook *v.* R. Co., 78 Neb. 64, 110 N. W. 718; Traders Nat. Bk. *v.* Jones, supra.

Wisconsin statute (St. 1898, §4139) "provides that the existence and the tenor or effect of all foreign laws may be proved as facts by parol, but if it shall appear that the law in question is contained in a written statute or code, the courts may in their discretion reject any evidence of such law that is not accompanied by a copy thereof." Hite *v.* Keene, 149 Wis. 207, 134 N. W. 383.

822-50 Bonner *v.* S., 8 Ala. App. 236, 62 S. 337; S. *v.* McDonald, 55 Or. 419, 104 P. 967 (printed by government printer and procured by mail from him, though but a pamphlet relating to a single subject).

822-51 Forbidden by statute in North Dakota. In re Peterson's Est., 22 N. D. 480, 134 N. W. 751. Denied in Trimble *v.* Stamper (Mo. App.), 166 S. W. 820.

827-60 See In re Lyles Est., 93 Neb. 768, 141 N. W. 1127; O'Donnell *v.* Johnson (R. I.), 90 A. 165. But see Massucco *v.* Tomassi, 78 Vt. 188, 62 A. 57.

Attorney's opinion as to the validity of an agreement under the laws of his state is not controlling upon court. Eberhart *v.* Rath, 89 Kan. 329, 131 P. 604.

828-64 Dimpfel *v.* Wilson, 107 Md. 329, 68 A. 561; General Conference Assn., etc. *v.* Assn., 166 Mich. 504, 132 N. W. 94; Reilly *v.* Steinhart, 161 App. Div. 242, 146 N. Y. S. 534; Rainey *v.* R. Co., 84 Vt. 521, 80 A. 723.

Construction a question of fact.—Shelton *v.* R. Co., 189 Fed. 153.

828-65 Nashua S. Bk. *v.* Co., 108 Fed. 764, 48 C. C. A. 15.

830-67 Beckley *v.* Co., 147 Ala. 195, 40 S. 655; Christiansen *v.* Wks., 223 Ill. 142, 79 N. E. 97; Hayward *v.* Sencenbaugh, 141 Ill. App. 395, *cit.* the text; Electric W. Co. *v.* Prince, 200 Mass. 386, 86 N. E. 947; Rialto Co. *v.* Miner (Mo. App.), 166 S. W. 629.

830-68 Guaranty Trust Co. *v.* Hannay, 210 Fed. 810, 127 C. C. A. 360; Robinson *v.* Yetter, 143 Ill. App. 172; Billick *v.* Davenport (Ia.), 145 N. W. 470; Union Cent. L. Ins. Co. *v.* Dukes, 132 Ky. 370, 113 S. W. 454; Electric W. Co. *v.* Prince, 200 Mass. 386, 86 N. E. 947; Ridpath *v.* Heller, 46 Mont. 586, 129 P. 1054; St. Bk. *v.* Pease, 153 Wis. 9, 139 N. W. 767. See Dimpfel *v.* Wilson, 107 Md. 329, 68 A. 561.

831-69 Banco De Sonora *v.* Co., 124 Ia. 576, 100 N. W. 532.

831-70 Reid *v.* Co., 146 Ill. App. 371; Dimpfel *v.* Wilson, 107 Md. 329, 68 A. 561, *crit.* Gardner *v.* Lewis, 7 Gill (Md.) 377; Merrick *v.* Betts, 214 Mass. 223, 101 N. E. 131; Old Dominion C. M. & S. Co. *v.* Bigelow, 203 Mass. 159, 89 N. E. 193; Ridpath *v.* Heller, 46 Mont. 586, 129 P. 1054; Steinke *v.* Dobson, 90 Neb. 616, 134 N. W. 169 (code §420).

Previous opinion of court which is to decide what the foreign law is is not evidence of such law. Electric W. Co. *v.* Prince, 200 Mass. 386, 86 N. E. 947.

Federal cases not evidence of law of state in matters of general law. Old

Dominion C. M. & S. Co. *v.* Bigelow, 203 Mass. 159, 89 N. E. 193.

832-71 Banco De Sonora *v.* Co., 124 Ia. 576, 100 N. E. 532.

832-74 See Electric W. Co. *v.* Prince, 200 Mass. 386, 86 N. E. 947.

833-76 Electric W. Co. *v.* Prince, 200 Mass. 386, 86 N. E. 947.

FORFEITURES.

836-3 Grain D. Co. *v.* U. S., 204 Fed. 429, 122 C. C. A. 615. *Comp.* U. S. *v.* Co., 156 Fed. 219.

836-5 U. S. *v.* Chain, 139 Fed. 513, 71 C. C. A. 500.

839-10 **Intent** need not be proved under act Cong. June 10, 1890, ch. 407, §29, 26 St. 141. Six Parcels, etc. *v.* U. S., 8 Ariz. 389, 76 P. 473. So also under §3082 Rev. St. U. S. *v.* Fifty Waltham Watch Movements, 139 Fed. 291. So also under §2802, Rev. St. Dodge *v.* U. S., 131 Fed. 849, 65 C. C. A. 603. So also under §3449 Rev. St. U. S. *v.* Co., 156 Fed. 219. *Contra* under §9, act June 10, 1890, ch. 407, 26 St. 135. U. S. *v.* Ninety-Nine Diamonds, 132 Fed. 579; U. S. *v.* One Silk Rug, 158 Fed. 974, 86 C. C. A. 178.

839-11 **Fraudulent intent** of shipper insufficient where there is absence of such intent on part of enterer. U. S. *v.* One Silk Rug, 158 Fed. 974, 86 C. C. A. 178.

840-12 U. S. *v.* Tobacco, 147 Fed. 127, 77 C. C. A. 353.

843-19 That entire conduct of parties has been free from deception may be shown. U. S. *v.* Tobacco, 147 Fed. 127, 77 C. C. A. 353.

843-22 See U. S. *v.* Tobacco, supra.

846-34 See White *v.* S., 80 Ark. 598, 98 S. W. 377.

Burden is on respondent to show he is within protection of an exception in statute. In re Cullinan, 45 Misc. 497, 92 N. Y. S. 802.

Some evidence must be presented to a municipal council to justify the forfeiture of liquor license for cause. Carr *v.* Counsel, 124 Ga. 116, 52 S. E. 300.

Forfeiture of lease for selling liquor on Sunday occurs eo instante upon sale, and may be established in court of civil jurisdiction by amount of proof requisite in such a tribunal. Moser *v.* Stebel, 9 O. C. C. (N. S.) 217.

846-35 *Comp.* Osborne *v.* S., 77 Ark. 439, 92 S. W. 406.

847-37 Presumption of defendant's ownership where found in his possession. Steward *v.* S. (Ind.), 103 N. E. 316.

848-42 Purdy *v.* Assn., 101 Mo. App. 91, 74 S. W. 486.

848-43 By laws must be introduced in evidence. Wood *v.* Machine Co., 166 Ill. App. 346.

848-44 Purdy *v.* Assn., 101 Mo. App. 91, 74 S. W. 486.

848-45 See Central R. Co. *v.* Johnson, 30 N. H. 390.

Forfeiture of mining rights must be shown by clear and convincing evidence. Copper Mt. M. & S. Co. *v.* Co., 39 Mont. 487, 104 P. 540.

FORGERY.

Forgery of other paper, 859-30; *Acts of third party,* 865-56; *Subsequent possession of money,* 866-62.

852-1 S. *v.* Pilling, 53 Wash. 464, 102 P. 230. *Contra,* U. S. *v.* Paraiso, 1 Phil. Isl. 127, false receipt.

Intent to defraud must be proved.—Harrison *v.* S., 13 Ga. App. 31, 78 S. E. 686; S. *v.* Stickler, 90 Kan. 783, 136 P. 329. Evidence of false entries in the books and other acts of defendant may be shown. Dowling *v.* U. S., 41 App. Cas. (D. C.) 11.

Intent must be proved. P. *v.* Corrigan, 129 App. Div. 75, 113 N. Y. S. 513.

852-2 S. *v.* Murray, 72 S. C. 508, 52 S. E. 189.

Opinion of prosecuting witness inadmissible. Howard *v.* S. (Tex. Cr.), 143 S. W. 178.

852-3 Hurst *v.* S., 1 Ala. App. 235, 56 S. 18; P. *v.* Hoyt, 145 App. Div. 695, 130 N. Y. S. 505. See Crayton *v.* S., 47 Tex. Cr. 88, 80 S. W. 839.

852-4 Whether witness would have paid the check if presented by a bank or person, legitimately holding it is immaterial. S. *v.* McBride, 72 Wash. 390, 130 P. 486.

853-5 Bartlett *v.* S., 8 Ala. App. 248, 62 S. 320; S. *v.* Anderson, 1 Boyce (Del.) 135, 74 A. 1097; Wooldridge *v.* S., 49 Fla. 137, 38 S. 3 (failure to carry out official duty of posting warrants in a registry book; and see P. *v.* Curtiss, 118 App. Div. 259, 103 N. Y. S. 395); Spears *v.* P., 220 Ill. 72,

77 N. E. 112; P. *v.* Campbell, 160 Mich. 108, 125 N. W. 42 (non-payment of money alleged to have been loaned); Fischl *v.* S., 54 Tex. Cr. 55, 111 S. W. 410; Frye *v.* S. (Tex. Cr.), 146 S. W. 199.

That document forged would establish a link in defendant's title tends to establish intent. Snow *v.* S., 85 Ark. 203, 107 S. W. 980.

All the circumstances, including the financial relations existing between defendant and complaining witness may be shown on question of intent. Markowski *v.* S., 56 Tex. Cr. 555, 120 S. W. 195. See also S. *v.* Kelley, 143 Mo. App. 697, 127 S. W. 950.

Another crime may be shown if it is connected with the forgery. S. *v.* Bell, 212 Mo. 111, 111 S. W. 24.

853-6 See Russell *v.* S., 51 Fla. 124, 40 S. 625.

853-7 Wesley *v.* S. (Tex. Cr.), 150 S. W. 197.

853-8 See C. *v.* Hall, 24 Pa. Super. 558.

853-9 Evidence that bank refused to cash check is admissible. Wesley *v.* S. (Tex. Cr.), 150 S. W. 197.

Evidence held sufficient.—Farr *v.* S., 99 Ark. 134, 137 S. W. 563; P. *v.* Cotton, 250 Ill. 338, 95 N. E. 283.

The fact that an instrument was not acknowledged until thirteen years after its execution does not justify any deduction of forgery. Crosby *v.* Ardoin (Tex. Civ.), 145 S. W. 709.

No such person.—P. *v.* Gordon, 13 Cal. App. 678, 110 P. 469.

Undisputed evidence may establish forgery as a matter of law. Greenwald *v.* Ford, 21 S. D. 28, 109 N. W. 516.

Burden on party alleging to show fact of forgery. Blackburn *v.* Cherry, 87 Ark. 641, 113 S. W. 25.

853-10 Russell *v.* S., 51 Fla. 124, 40 S. 625; McLean *v.* S., 3 Ga. App. 660, 60 S. E. 332.

854-11 S. *v.* Bowman, 80 Kan. 473, 103 P. 84 (writing to be regarded though not formally introduced if treated as in evidence); Deal *v.* S., 96 Miss. 82, 50 S. 495; Dreeben *v.* S. (Tex. Cr.), 162 S. W. 501; Davis *v.* S. (Tex. Cr.), 156 S. W. 1171; Bobbitt *v.* S., 59 Tex. Cr. 314, 128 S. W. 1104, quot. the text; Muniz *v.* S., 59 Tex. Cr. 365, 128 S. W. 1104. See Spears *v.* S., 59 Fla. 44, 51 S. 815; Richard *v.* S., 127 Ga. 42, 55 S. E. 1044; S. *v.* Ottley, 147 Ia. 329, 126 N. W. 334 (admissible though not filed as required by statute).

Authority of corporation whose obligation is forged to do business in state need not be shown. S. *v.* Bell, 212 Mo. 111, 111 S. W. 24.

Instrument must be identified.—S. *v.* Carlson, 145 Ia. 154, 123 N. W. 765.

855-12 See Baird *v.* S., 51 Tex. Cr. 322, 101 S. W. 991.

855-16 Loring *v.* Jackson, 43 Tex. Cr. 306, 95 S. W. 19.

855-17 See P. *v.* Tollefson, 145 Mich. 444, 108 N. W. 751; Spicer *v.* S., 52 Tex. Cr. 177, 105 S. W. 813; Johnson *v.* S. (Tex. Cr.), 102 S. W. 1133.

Comparison with other writing.—Horn *v.* S. (Tex. Cr.), 150 S. W. 948.

Genuine checks admissible in civil case to compare signatures. Richards *v.* Osborne (Tex. Civ.), 164 S. W. 392.

Comparison of handwriting may be made if compared writing is independently in evidence, but not if it is extraneous though genuine. Genuine check not admissible. King *v.* S., 8 Ala. App. 239, 62 S. 374.

By comparison.—Frye *v.* S. (Tex. Cr.), 146 S. W. 199.

856-19 See Abel *v.* S. (Tex. Cr.), 97 S. W. 1055.

856-21 S. *v.* Spiker, 131 Ia. 194, 108 N. W. 233; Taylor *v.* C., 28 Ky. L. R. 1348, 92 S. W. 292 (letter containing admission of guilt not inadmissible because it also contains an admission of another forgery); S. *v.* Bell, 212 Mo. 111, 111 S. W. 24; S. *v.* Skillman, 76 N. J. L. 464, 70 A. 83. See P. *v.* Tollefson, 145 Mich. 444, 108 N. W. 751.

Subsequent conduct admissible to show intent. Dowling *v.* U. S., 41 App. Cas. (D. C.) 11.

In a prosecution for forgery for falsely lettering a receipt to a note, the testimony given by accused in the action brought on the note is admissible. Barber *v.* S., 64 Tex. Cr. 89, 142 S. W. 582.

857-23 S. *v.* Farr, 29 R. I. 72, 69 A. 5. See Pittman *v.* S., 51 Fla. 94, 41 S. 385; P. *v.* Tollefson, 145 Mich. 444, 108 N. W. 751.

Flight.—Bolton *v.* S., 146 Ala. 691, 40 S. 409; Wooldridge *v.* S., 49 Fla. 137, 38 S. 3; P. *v.* Curtiss, 118 App. Div. 259, 103 N. Y. S. 395.

Motive may be shown by purpose for which money used. P. *v.* Gaffey, 182

N. Y. 257, 74 N. E. 836, *rev.* 98 App. Div. 461, 90 N. Y. S. 706.

857-24 Buell *v.* Bk., 58 Wash. 407, 108 P. 951.

Figures tending to show defendant had been practicing are admissible. C. *v.* Cowan, 4 Pa. Super. 579. And see Lauer *v.* Posey, 15 Pa. Super. 543.

857-25 Separation of forged paper from an instrument of which it had been part may be shown. S. *v.* Mitton, 37 Mont. 366, 96 P. 926.

857-26 P. *v.* Parker, 67 Mich. 222, 34 N. W. 720; S. *v.* Skillman, 76 N. J. L. 464, 70 A. 83.

858-27 See Spicer *v.* S., 52 Tex. Cr. 177, 105 S. W. 813.

858-28 Telfair *v.* S., 56 Fla. 104, 47 S. 863; S. *v.* Waterbury, 133 Ia. 135, 110 N. W. 328.

859-29 U. S. *v.* Castillo, 6 Phil. Isl. 453.

859-30 In civil cases the forgery must be proved by a preponderance of proof. In re Mara, 137 N. Y. S. 151.

No presumption that grantor in deed authorized another to sign his name. Hansen *v.* Owens, 132 Ga. 648, 64 S. E. 800.

Inability of person whose name is alleged to have been forged to write is relevant. Hansen *v.* Owens, 132 Ga. 648, 64 S. E. 800.

Papers taken from accused after his arrest are admissible. S. *v.* Sharpless, 212 Mo. 176, 111 S. W. 69.

Forgery of other paper.—Reference in a forged grant to deed simultaneously delivered with it, both containing a description known to grantor to be wrong, tends to show deed was forged. West *v.* Co., 56 Tex. Civ. 341, 120 S. W. 228.

859-31 P. *v.* Di Ryana, 8 Cal. App. 333, 96 P. 919; Flint R. Lumb. Co. *v.* Smith, 134 Ga. 627, 68 S. E. 436; Goodman *v.* P., 228 Ill. 154, 81 N. E. 830; U. S. *v.* Castro, 6 Phil. Isl. 10.

859-32 Terry *v.* S., 60 Tex. Cr. 60, 130 S. W. 1004.

Testimony of accomplice must be corroborated. S. *v.* Kelliher, 49 Or. 77, 88 P. 867; Hinson *v.* S., 53 Tex. Cr. 143, 109 S. W. 174.

859-33 Edwards *v.* S., 53 Tex. Cr. 50, 108 S. W. 673.

860-34 Crossland *v.* S., 77 Ark. 537, 544, 92 S. W. 776; S. *v.* Pine, 56 W. Va. 1, 48 S. E. 206.

Lack of authority established prima facie by proof that defendant personated the titleholder. P. *v.* Browne, 118 App. Div. 793, 103 N. Y. S. 903, *aff.* 189 N. Y. 528, 82 N. E. 1130.

860-35 See Abel *v.* S. (Tex. Cr.), 97 S. W. 1055.

860-36 See Spicer *v.* S., 52 Tex. Cr. 177, 105 S. W. 813.

860-37 S. *v.* Jackson, 221 Mo. 478, 120 S. W. 66; S. *v.* Mitten, 37 Mont. 366, 96 P. 926, 36 Mont. 376, 92 P. 969 (alteration must be material); C. *v.* Pioso, 17 Pa. Super. 45; S. *v.* Lotono, 62 W. Va. 310, 58 S. E. 621.

Question of alteration is for the jury. Jones *v.* Bk.., 102 Ark. 302, 143 S. W. 1060.

861-39 Hall *v.* S., 55 Tex. Cr. 267, 116 S. W. 808 (error in initial); Gaut *v.* S., 49 Tex. Cr. 493, 94 S. W. 1034; Spicer *v.* S., 52 Tex. Cr. 177, 105 S. W. 813.

861-40 P. *v.* Gordon, 13 Cal. App. 678, 110 P. 469; S. *v.* Chance, 82 Kan. 388, 108 P. 789; P. *v.* Browne, 118 App. Div. 793, 103 N. Y. S. 903, *aff.* 189 N. Y. 528, 82 N. E. 1130; Feeny *v.* S., 62 Tex. Cr. 585, 138 S. W. 135.

861-41 Return of subpoenas showing that the persons could not be found is not evidence that such persons are fictitious. Taylor *v.* S., 50 Tex. Cr. 381, 97 S. W. 474.

862-45 Authenticity of document must be shown by accused after denial thereof by complaining witness. U. S. *v.* Viloria, 1 Phil. Isl. 682.

862-46 Spears *v.* P., 220 Ill. 72, 77 N. E. 112; Ex parte Warford, 3 Okla. Cr. 381, 106 P. 559; St. Louis, etc. R. Co. *v.* May, 53 Tex. Civ. 257, 115 S. W. 900.

The fact that witness was indebted to the defendant is immaterial. A debt does not excuse forgery even to raise money to pay the debt. S. *v.* McBride, 72 Wash. 390, 130 P. 486.

862-47 Wooldridge *v.* S., 49 Fla. 137, 38 S. 3; Jordan *v.* S. (Tex. Cr.), 143 S. W. 623.

863-48 Murphy *v.* S., 49 Tex. Cr. 488, 93 S. W. 543; Edwards *v.* S., 53 Tex. Cr. 50, 108 S. W. 673. See C. *v.* Grauman, 52 Pa. Super. 204.

863-49 Abel *v.* S. (Tex. Cr.), 97 S. W. 1055.

Declarations of grantor in alleged forged deed held admissible. S. *v.* Draughon, 151 N. C. 667, 65 S. E. 913.

Declarations of decedent admissible to show his purpose to execute will of the tenor of that alleged to have been

forged. S. *v.* Ready, 78 N. J. L. 599, 75 A. 564.

Good faith of accused may be shown in answer to charge of falsification of public document. U. S. *v.* San Jose, 7 Phil. Isl. 604.

864-52 S. *v.* Willard, 228 Mo. 328, 128 S. W. 749; S. *v.* Forbes, 75 N. H. 306, 73 A. 929.

864-53 Chappell *v.* S., 58 Tex. Cr. 401, 126 S. W. 274, denial of issuance of paper—books need not be produced.

864-54 P. *v.* Browne, 118 App. Div. 793, 103 N. Y. S. 903, *aff.* 189 N. Y. 528, 82 N. E. 1130.

865-56 Pye *v.* S. (Tex. Cr.), 154 S. W. 222.

Similarity of names.—P. *v.* Bernard, 21 Cal. App. 56, 130 P. 1063.

Acts of third party.—A mortgage given by wife of accused on the land to which he forged a deed may be shown to have been released without consideration in favor of prosecuting witness. Kurowski *v.* S., 143 Wis. 210, 126 N. W. 546.

865-57 Telfair *v.* S., 58 Fla. 110, 50 S. 573; S. *v.* Fisk, 170 Ind. 166, 83 N. E. 995; C. *v.* Bond, 188 Mass. 91, 74 N. E. 293; S. *v.* Stark, 202 Mo. 210, 100 S. W. 642 (having forged deed in possession with intent to utter); S. *v.* Mitton, 37 Mont. 366, 96 P. 926.

Evidence sufficient.—S. *v.* Chissell, 245 Mo. 549, 150 S. W. 1066.

865-58 Ex parte Driggs, 10 Cal. App. 445, 102 P. 542.

865-59 C. *v.* Bond, 188 Mass. 91, 74 N. E. 293.

Uncorroborated confession insufficient. C. *v.* Burgess, 28 Ky. L. R. 1128, 91 S. W. 266; Blacker *v.* S., 74 Neb. 671, 105 N. W. 302.

866-61 Walker *v.* S., 127 Ga. 48, 56 S. E. 113; C. *v.* Bond, 188 Mass. 91, 74 N. E. 293.

866-62 Maloney *v.* S., 91 Ark. 485, 121 S. W. 728; S. *v.* Ready, 77 N. J. L. 329, 72 A. 445.

Subsequent possession of money is evidence of forging and uttering. Walker *v.* S., 127 Ga. 48, 56 S. E. 113. And see Hinson *v.* S., 53 Tex. Cr. 143, 109 S. W. 174.

866-63 Snow *v.* S., 85 Ark. 203, 107 S. W. 980; P. *v.* Gorham, 9 Cal. App. 341, 99 P. 391.

867-64 See P. *v.* McPherson, 6 Cal. App. 266, 91 P. 1098.

867-66 P. *v.* Hunt, 23 Cal. App. 770, 139 P. 903; S. *v.* Chissell, 245 Mo. 549, 150 S. W. 1066; P. *v.* Colmey, 116 App. Div. 516, 101 N. Y. S. 1016; P. *v.* Ghiggeri, 122 N. Y. S. 1141; C. *v.* Hall, 24 Pa. Super. 558; S. *v.* Murray, 72 S. C. 508, 52 S. E. 189; Feeney *v.* S., 58 Tex. Cr. 152, 124 S. W. 944.

See Rownd *v.* S., 93 Neb. 427, 140 N. W. 790.

867-67 Snow *v.* S., 85 Ark. 203, 107 S. W. 980; S. *v.* Anderson, 1 Boyce (Del.) 135, 74 A. 1097; S. *v.* O'Connell, 144 Ia. 559, 123 N. W. 201; P. *v.* Dolan, 111 App. Div. 600, 97 N. Y. S. 929; P. *v.* Browne, 118 App. Div. 793, 103 N. Y. S. 903, *aff.* 189 N. Y. 528, 82 N. E. 1130; S. *v.* Peeples, 71 Wash. 451, 129 P. 108. See Fluewellian *v.* S., 59 Tex. Cr. 334, 128 S. W. 621.

A check given to defendant and cashed by him is admissible to show knowledge as to where the person giving the check banked and opportunity to see his signature Whorton *v.* S. (Tex. Cr.), 152 S. W. 1082.

Illiteracy does not prove want of knowledge. S. *v.* Stark, 202 Mo. 210, 100 S. W. 642.

Uncorroborated testimony of accomplice insufficient. P. *v.* Colmey, 116 App. Div. 516, 101 N. Y. S. 1016.

867-68 Maloney *v.* S., 91 Ark. 485, 121 S. W. 728 (if signature is fictitious); S. *v.* Waterbury, 133 Ia. 135, 110 N. W. 328; S. *v.* Mitton, 36 Mont. 376, 92 P. 969.

Knowingly passing as genuine a forged instrument is conclusive of intent. Jordan *v.* S., 127 Ga. 278, 56 S. E. 422.

Officers of bank may show that the signature to check fictitious by testifying that no person of that name dealt with it. Maloney *v.* S., 91 Ark. 485, 121 S. W. 728.

867-69 S. *v.* Mitten, 37 Mont. 366, 96 P. 926.

868-71 Ex parte Glaser, 176 Fed. 702, 100 C. C. A. 254; Pirscher *v.* U. S., 133 Fed. 526, 67 C. C. A. 660; Dillard *v.* U. S., 141 Fed. 303, 72 C. C. A. 451; Wright *v.* S., 138 Ala. 69, 34 S. 1009; Wooldridge *v.* S., 49 Fla. 137, 38 S. 3; Pittman *v.* S., 51 Fla. 94, 41 S. 385 (fact that defendant is under indictment for other forgeries is immaterial); S. *v.* Chance, 82 Kan. 392, 108 P. 791; S. *v.* Stark, 202 Mo. 210, 100 S. W. 642 (having possession of forged paper with intent to utter); S. *v.* Mitten, 37 Mont. 366, 96 P. 926; P. *v.* Dolan, 186

N. Y. 4, 78 N. E. 569, *rev.* 111 App. Div. 600, 97 N. Y. S. 929; S. *v.* Murphy, 17 N. D. 48, 115 N. W. 84 (solely on question of intent); S. *v.* Ray, 91 S. C. 551, 75 S. E. 174; Dreeben *v.* S. (Tex. Cr.), 162 S. W. 501; Dugat *v.* S. (Tex. Cr.), 160 S. W. 376; Warren *v.* S. (Tex. Cr.), 149 S. W. 130.

See Lesley *v.* Ewing (Pa.), 90 A. 797 (civil case); Horn *v.* S. (Tex. Cr.), 150 S. W. 948. *Contra,* Buell *v.* Bk., 58 Wash. 407, 108 P. 951, in a civil action.

Common plan and identity of method may be shown by evidence of other and similar forgeries. P. *v.* Harben, 5 Cal. App. 29, 91 P. 398; S. *v.* Newman, 34 Mont. 434, 87 P. 462; P. *v.* Dolan, supra; Taylor *v.* S., 47 Tex. Cr. 101, 81 S. W. 933. Commission of another crime related to uttering may be proved. S. *v.* O'Connell, 144 Ia. 559, 123 N. W. 201.

Defendant's connection with similar forgeries must be shown before they are admissible. S. *v.* Kelliher, 49 Or. 77, 88 P. 867.

Other forgery of same party's name but by another person, inadmissible. Laudermilk *v.* S., 47 Tex. Cr. 427, 83 S. W. 1107.

To rebut a claim of authority to sign a note evidence of other forgeries of same person's name is admissible. Usher *v.* S., 47 Tex. Cr. 93, 81 S. W. 309.

869-72 Taylor *v.* S., 50 Tex. Cr. 381, 97 S. W. 474. See Lauer *v.* Posey, 15 Pa. Super. 543.

870-74 Condition of instrument at a time previous to its introduction may be shown. Telfair *v.* S., 58 Fla. 110, 50 S. 573. Another paper showing the obligation for which the forged one was given is admissible. Telfair *v.* S., supra.

FORMER CONVICTION.

871-1 P. *v.* Oppenheimer, 156 Cal. 733, 106 P. 74 (admissible on trial of a prisoner for assault); S. *v.* Payne, 223 Mo. 112, 122 S. W. 1062 (records of penitentiary competent to show service of sentence); Muckenfuss *v.* S., 55 Tex. Cr. 216, 117 S. W. 853. See S. *v.* Smith, 129 Ia. 709, 106 N. W. 187; S. *v.* Boyd, 178 Mo. 2, 76 S. W. 979; C. *v.* McDermott, 224 Pa. 362, 73 A. 427.

Should introduce information.—Koger *v.* S. (Tex. Cr.), 165 S. W. 577.

Former conviction as affecting defendant's credibility can only be proved by record. Miller *v.* C. (Ky.), 113 S. W. 518; C. *v.* Walsh, 196 Mass. 369, 82 N. E. 19; P. *v.* Burke, 157 Mich. 108, 121 N. W. 282. Affidavits not competent though judgment not entered. De Leon *v.* S., 55 Tex. Cr. 39, 114 S. W. 828.

Judicial notice taken by trial court of conviction therein, and pending appeal. Dupree *v.* S., 56 Tex. Cr. 562, 120 S. W. 871.

Admission of previous conviction renders proof thereof inadmissible. Howard *v.* S., 139 Wis. 529, 121 N. W. 133 (statute), *dist.* P. *v.* Sickles, 156 N. Y. 541, 51 N. E. 288.

871-2 Evidence of a former conviction is inadmissible in the absence of allegation in complaint. Paetz *v.* S., 129 Wis. 174, 107 N. W. 1090.

872-4 S. *v.* Smith, 129 Ia. 709, 106 N. W. 187. *Contra,* S. *v.* Court, 225 Mo. 609, 125 S. W. 451.

Admissions of accused competent to identify him as person to whom former judgment applied. S. *v.* Boyd, 178 Mo. 2, 76 S. W. 979.

872-5 See Lindley *v.* S., 57 Tex. Cr. 305, 122 S. W. 873.

FORMER JEOPARDY.

874-3 Steinkuhler *v.* S., 77 Neb. 331, 109 N. W. 395; Peterson *v.* S., 79 Neb. 132, 112 N. W. 306.

Entry of judgment in first cause must be proved. S. *v.* Hankins, 136 N. C. 621, 48 S. E. 593. See Feagin *v.* S., 139 Ala. 107, 36 S. 18.

Some evidence must have been introduced as a predicate. Hall *v.* S. (Tex. Cr.), 86 S. W. 765.

874-4 Decker *v.* S., 58 Tex. Cr. 159, 124 S. W. 912.

874-5 Price *v.* U. S., 156 Fed. 950, 85 C. C. A. 247; S. *v.* Day, 5 Penne. (Del.) 101, 58 A. 946 (crime necessarily included); Fews *v.* S., 1 Ga. App. 122, 58 S. E. 64; S. *v.* Gapen, 17 Ind. App. 524, 45 N. E. 678, 47 N. E. 25; S. *v.* Reed, 168 Ind. 588, 81 N. E. 571; Tudor *v.* C., 134 Ky. 186, 119 S. W. 816; S. *v.* Hill, 122 La. 711, 48 S. 160; Watson *v.* S., 105 Md. 650, 66 A. 635; Warren *v.* S., 79 Neb. 526, 113 N. W. 143; S. *v.* Rosa, 72 N. J. L. 462, 62 A.

695 (same act); S. *v.* Hankins, 136 N. C. 621, 48 S. E. 593; S. *v.* Virgo, 14 N. D. 293, 103 N. W. 610; Wallace *v.* S., 57 Tex. Cr. 354, 123 S. W. 135; Kellett *v.* S., 51 Tex. Cr. 641, 103 S. W. 882; Clement *v.* S. (Tex. Cr.), 86 S. W. 1016.

875-7 Barber *v.* S., 151 Ala. 56, 43 S. 808; Storm *v.* Ty., 12 Ariz. 109, 99 P. 275; Richards *v.* S., 108 Ark. 87, 157 S. W. 141; Grayson *v.* S., 92 Ark. 413, 123 S. W. 388; Manee *v.* S., 5 Ga. App. 229, 62 S. E. 1053; Price *v.* S. (Miss.), 61 S. 314; S. *v.* Polk, 144 Mo. App. 326, 127 S. W. 933; Ty. *v.* West, 14 N. M. 546, 99 P. 343; S. *v.* Freeman, 162 N. C. 594, 77 S. E. 780; S. *v.* White, 146 N. C. 608, 60 S. E. 505; Loyd *v.* S., 6 Okla. Cr. 76, 116 P. 959; Creech *v.* S. (Tex. Cr.), 158 S. W. 277; Kilcoyne *v.* S. (Tex. Cr.), 92 S. W. 36; Benton *v.* S., 52 Tex. Cr. 422, 107 S. W. 837; Clement *v.* S. (Tex. Cr.), 86 S. W. 1016; S. *v.* Williams, 43 Wash. 505, 86 P. 847.

Issue must go to jury, regardless of court's knowledge. Dockstader *v.* P., 43 Colo. 437, 97 P. 254.

875-8 S. *v.* Friedley (W. Va.), 80 S. E. 1112.

875-9 S. *v.* Day, 5 Penne. (Del.) 101, 58 A. 946, defendant not entitled to benefit of a reasonable doubt. But *comp.* Walker *v.* S. (Tex. Cr.), 97 S. W. 1043; Benton *v.* S., 52 Tex. Cr. 422, 107 S. W. 837.

Judgment of acquittal not admissible for defendant if obtained by false testimony as to collateral matters. S. *v.* Bevill, 79 Kan. 524, 100 P. 476.

Unauthorized minute entry inadmissible. Dockstader *v.* P., 43 Colo. 437, 97 P. 254.

876-14 S. *v.* Wells, 69 Kan. 792, 77 P. 547; S. *v.* Ireland, 89 Miss. 763, 42 S. 797; Benson *v.* S., 53 Tex. Cr. 254, 109 S. W. 166; Zinn *v.* S. (Tex. Cr.), 117 S. W. 136.

876-16 See C. *v.* Schoener, 216 Pa. 71, 64 A. 890.

876-19 McNish *v.* S., 47 Fla. 69, 36 S. 176. See Ex parte Vickery, 51 Fla. 141, 40 S. 77; S. *v.* White, 71 Kan. 356, 80 P. 589; Horner *v.* S., 8 O. C. C. (N. S.) 441; Riggs *v.* S. (Tex. Cr.), 96 S. W. 25.

877-24 Price *v.* S. (Miss.), 61 S. 314.

878-27 S. *v.* White, 146 N. C. 608, 60 S. E. 505; C. *v.* Dotterer, 30 Pa. C. C. 364.

878-30 See Decker *v.* S., 58 Tex. Cr. 159, 124 S. W. 912.

Dismissal over objection is equivalent to acquittal. Allen *v.* S., 52 Fla. 1, 41 S. 593; S. *v.* Reed, 168 Ind. 588, 81 N. E. 571; Vela *v.* S., 49 Tex. Cr. 588, 95 S. W. 529.

879-32 S. *v.* White, 146 N. C. 608, 60 S. E. 505, defendant may testify and cannot be compelled to testify on the criminal issue.

880-35 S. *v.* Pianfetti, 79 Vt. 236, 65 A. 84.

880-37 S. *v.* Dewees, 76 S. C. 72, 56 S. E. 674.

881-40 S. *v.* Blodgett, 143 Ia. 578, 121 N. W. 685; S. *v.* Foley, 114 La. 412, 38 S. 402; Watson *v.* S., 105 Md. 650, 66 A. 635; S. *v.* Potter, 125 Mo. App. 465, 102 S. W. 668; S. *v.* Rosa, 72 N. J. L. 462, 62 A. 695 (court decides issue of former jeopardy where it is raised by demurrer); Ty. *v.* West, 14 N. M. 546, 99 P. 343 (if no evidence offered to support plea); Horner *v.* S., 8 O. C. C. (N. S.) 441; Loyd *v.* S., 6 Okla. Cr. 76, 116 P. 959; Morris *v.* S., 1 Okla. Cr. 617, 99 P. 760; S. *v.* Dewees, 76 S. C. 72, 56 S. E. 674.

881-41 Reynolds *v.* S., 1 Ala. App. 24, 55 S. 1016; S. *v.* Day, 5 Penne. (Del.) 101, 58 A. 946; S. *v.* Irwin, 17 S. D. 380, 97 N. W. 7. *Contra.* Storm *v.* Ty., 12 Ariz. 109, 99 P. 275.

FORMER TESTIMONY.

Part of, that is available, 961-11.

887-2 Dover *v.* Greenwood, 177 Fed. 946; In re Durant, 80 Conn. 140, 67 A. 497.

888-6 Missouri, etc. R. Co. *v.* Nesbit, 43 Tex. Civ. 630, 97 S. W. 825.

888-7 Salt Lake *v.* Smith, 104 Fed. 457, 43 C. C. A. 637; Louisville & N. R. Co. *v.* Dilburn, 178 Ala. 600, 59 S. 438; Hooper *v.* Dorsey, 5 Ala. App. 463, 58 S. 951. *Comp.* Diamond C. Co. *v.* Allen, 137 Fed. 705, 71 C. C. A. 107; Citizen's Bk. *v.* Boswell, 31 Ky. L. R. 1259, 104 S. W. 1014; Dambmann *v.* R. Co., 55 Misc. 60, 106 N. Y. S. 221; S. *v.* Callahan, 18 S. D. 115, 99 N. W. 1099. *Contra.* where accused testified on a former trial and refuses to again testify. S. *v.* Simmons, 78 Kan. 852, 98 P. 277.

888-8 Chambers *v.* Morris, 159 Ala. 606, 48 S. 687; Maloney *v.* S., 91 Ark. 485, 121 S. W. 728; Williams *v.* Wolff, 3 Ga. App. 737, 60 S. E. 357; Watkins *v.* Clough, 119 App. Div. 527, 103 N. Y. S. 270; McCall *v.* Alexander, 84 S. C. 187, 65 S. E. 1021; Evans *v.* S., 12 Tex. App. 370. See Ex parte Bottomley, (1909) 2 K. B. 14, cause partially heard before another magistrate—reading of former testimony.

889-10 Lanza *v.* Co., 124 Ia. 659, 100 N. W. 488; Beavers *v.* Bowen, 26 Ky. L. R. 291, 80 S. W. 1165; S. *v.* Coleman, 199 Mo. 112, 97 S. W. 574.

889-12 Admissible if witness has since died. Lake Erie, etc. R. Co. *v.* Huffman, 177 Ind. 126, 97 N. E. 434.

890-14 See Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295.

892-27 Former testimony admitted by stipulation waives objection that accused is entitled to confront the witnesses. S. *v.* Williford, 111 Mo. App. 668, 86 S. W. 570.

893-34 See Bunkers *v.* Peters, 122 Minn. 130, 141 N. W. 1118.

893-36 Opinion testimony is admissible under the usual conditions. Carr *v.* Co., 29 R. I. 276, 70 A. 196.

894-39 See Willsen *v.* R. Co., 95 App. Div. 388, 88 N. Y. S. 597.

894-40 See Keim *v.* Reading, 32 Pa. Super. 613.

895-43 See Robertson *v.* S., 63 Tex. Cr. 216, 142 S. W. 533, containing an exhaustive review of authorities.

895-44 Finnes *v.* Co., 114 Minn. 339, 131 N. W. 371.

895-45 S. *v.* Simmons, 78 Kan. 852, 98 P. 277; Jones *v.* S., 64 Tex. Cr. 510, 143 S. W. 621. See Fuqua *v.* C., 118 Ky. 578, 81 S. W. 923; S. *v.* Milam, 65 S. C. 321, 43 S. E. 677.

896-48 Cornelius *v.* S., 54 Tex. Cr. 173, 112 S. W. 1050; Porch *v.* S., 51 Tex. Cr. 7, 99 S. W. 1122 (*over.* cases cited in the original). See Wyatt *v.* S., 58 Tex. Cr. 115, 124 S. W. 929.

Testimony of accused on a former trial is admissible if he does not testify on second trial. Hill *v.* S., 54 Tex. Cr. 646, 114 S. W. 117.

Admissible if witness was not under arrest, though not warned or sworn. McMeans *v.* S., 55 Tex. Cr. 69, 114 S. W. 837.

896-49 U. S. *v.* Greene, 146 Fed. 793; Nome Beach L. & T. Co. *v.* Ins. Co., 156 Fed. 484; Tutwiler *v.* Burns, 160 Ala. 386, 49 S. 455; Coulson *v.* Scott, 167 Ala. 606, 52 S. 436; Phillips *v.* Pippin, 4 Ala. App. 426, 58 S. 111; Eyer *v.* S. (Ark.), 164 S. W. 756; Meyer *v.* Foster, 147 Cal. 166, 81 P. 402; Young *v.* P., 54 Colo. 293, 130 P. 1011; Daniels *v.* Stock, 23 Colo. App. 529, 130 P. 1031; Atwood *v.* Atwood, 86 Conn. 579, 86 A. 29; Banks *v.* Bradwell, 140 Ga. 640, 79 S. E. 572; Jones *v.* S., 128 Ga. 23, 57 S. E. 313; Heatley *v.* Long, 135 Ga. 153, 68 S. E. 783; Doggett *v.* Greene, 163 Ill. App. 369; Levi *v.* S. (Ind.), 104 N. E. 765; Sievers-C. Co. *v.* Curd, 24 Ky. L. R. 1317, 71 S. W. 506; Fuqua *v.* C., 118 Ky. 578, 81 S. W. 923; Austin *v.* C., 124 Ky. 55, 98 S. W. 295; S. *v.* Britton, 131 La. 877, 60 S. 379; S. *v.* Herlihy, 102 Me. 310, 66 A. 643; McGivern *v.* Steele, 197 Mass. 164, 83 N. E. 405; Jones *v.* Pendleton, 160 Mich. 338, 125 N. W. 349; Finnes *v.* Co., 114 Minn. 339, 131 N. W. 371; O'Rourke *v.* Opera House Co., 47 Mont. 459, 133 P. 965; P. *v.* Vitusky, 155 App. Div. 139, 140 N. Y. S. 19; Cohen *v.* R. Co., 154 App. Div. 603, 139 N. Y. S. 887; Shook *v.* Fox, 126 App. Div. 565, 110 N. Y. S. 951; Willsen *v.* R. Co., 95 App. Div. 388, 88 N. Y. S. 597; Washmood *v.* U. S. (Okla. Cr.), 136 P. 184; Wadsworth *v.* S., 9 Okla. Cr. 84, 130 P. 808; S. *v.* Walton, 53 Or. 557, 99 P. 431; Keim *v.* Reading, 32 Pa. Super. 613; Williams *v.* Smith, 29 R. I. 562, 72 A. 1093; Sirvilley *v.* S. (Tex. Cr.), 166 S. W. 733; Gamboa *v.* S. (Tex. Cr.), 155 S. W. 249; Witty *v.* S. (Tex. Cr.), 153 S. W. 1146; Irving *v.* S. (Tex. Cr.), 150 S. W. 611; Waggoner *v.* Sneed (Tex. Civ.), 138 S. W. 219; Pratt *v.* S., 53 Tex. Cr. 281, 109 S. W. 138; Parks *v.* C., 109 Va. 807, 63 S. E. 462.

A stenographic transcript of the testimony given at an earlier trial, admissible under the common law practice permitting an accurate reproduction of testimony given at a former trial between the same parties or their privies. Randall *v.* Motor Car Co., 212 Mass. 352, 99 N. E. 221, *cit.* McGivern *v.* Steele, 197 Mass. 164, 83 N. E. 405; Jaquith *v.* Morrill, 204 Mass. 181, 189, 90 N. E. 556.

898-50 Harmless error in excluding former testimony. Standard M. Ins. Co. *v.* Co., 167 Fed. 119, 92 C. C. A. 571.

898-51 Daniels *v.* Stock, 23 Colo. App. 529, 130 P. 1031; Atwood *v.* Atwood, 86 Conn. 579, 86 A. 29; Levi *v.* S. (Ind.), 104 N. E. 765; Temple *v.* Phelps, 193 Mass. 297, 79 N. E. 482.

899-54 Harris *v.* S. (Tex. Cr.), 160 S. W. 447. *Contra.* McCrorey *v.* Garrett, 109 Va. 645, 64 S. E. 978.

900-57 Daniels *v.* Stock, 23 Colo. App. 529, 130 P. 1031.

Became sick after being subpoenaed. S. *v.* Britton, 131 La. 877, 60 S. 379.

901-59 Rio Grande So. R. Co. *v.* Campbell, 55 Colo. 493, 136 P. 68; Donaldson *v.* Coal Co., 175 Ill. App. 224.

901-63 See Greenlee *v.* Mosnat, 136 Ia. 639, 111 N. W. 996.

903-66 *Comp.* Hill *v.* S., 54 Tex. Cr. 646, 114 S. W. 117.

904-67 Wingrove *v.* Tr. Co., 237 Pa. 549, 85 A. 850; Cooper *v.* S. (Tex. Cr.), 160 S. W. 382; Wyatt *v.* S., 58 Tex. Cr. 115, 124 S. W. 929. *Contra* under statute. Fitch *v.* T. Co., 124 Ia. 665, 100 N. W. 618; Van Norman *v.* Brotherhood, 143 Ia. 536, 121 N. W. 1080. But not if witness is in courtroom. Lanza *v.* County, 124 Ia. 659, 100 N. W. 488. "Defendant, under our laws, is entitled to have a witness produced in court, and 'be confronted with the witnesses against him,' except in the instances where the witness is dead, is beyond the jurisdiction of the court, is insane, or is kept away from court by the connivance of a defendant. In either of these events, if at a former judicial hearing the defendant had an opportunity to cross-examine the witness, it would be admissible; but, before the evidence taken at a former trial or hearing is admissible, proof must be made that the defendant had the opportunity to cross-examine the witness, and that he is dead, or one of the other exceptions in fact exist." Betts *v.* S. (Tex. Cr.), 144 S. W. 677.

Former testimony of attorney or physician engaged in discharge of professional duty at time of trial, admissible by statute. Doyle *v.* Co., 124 Mo. App. 504, 101 S. W. 598.

904-69 Cuff *v.* Co., 14 Ont. L. R. 263; Toledo T. Co. *v.* Cameron, 137 Fed. 48, 69 C. C. A. 28 (witness resident more than 100 miles from court—discussion of authorities); Francis *v.* S. (Ala.), 65 S. 969; Phillips *v.* S. (Ala. App.), 65 S. 444; Eyer *v.* S. (Ark.), 164 S. W. 756; Wimberly *v.* S., 90 Ark. 514, 119 S. W. 668; Young *v.* P., 54 Colo. 293, 130 P. 1011; Ross-Lewin *v.* Ins. Co., 20 Colo. App. 262, 78 P. 305; Atwood *v.* Atwood, 86 Conn. 579, 86 A. 29; Levi *v.* S. (Ind.), 105 N. E. 898; Levi *v.* S. (Ind.), 104 N. E. 765; Reichers *v.* Dammeier, 45 Ind. App. 208, 90 N. E. 644; S. *v.* Simmons, 78 Kan. 852, 98 P. 277; Harbison *v.* White (Ky.), 114 S. W. 250 (if deposition cannot be procured); Dolph *v.* R. Co., 149 Mich. 278, 112 N. W. 981; Madden *v.* Duluth, etc. R. Co., 112 Minn. 303, 127 N. W. 1052; S. *v.* Butler, 247 Mo. 685, 153 S. W. 1042; O'Meara *v.* McDermott, 40 Mont. 38, 104 P. 1049; Kolodrianski *v.* Co., 29 R. I. 127, 69 A. 505; Millner *v.* S. (Tex. Cr.), 162 S. W. 348; Gamboa *v.* S. (Tex. Cr.), 155 S. W. 249; Pace *v.* S. (Tex. Cr.), 153 S. W. 132; Whorton *v.* S. (Tex. Cr.), 152 S. W. 1082; Long *v.* S., 55 Tex. Cr. 55, 114 S. W. 632; Ozark *v.* S., 51 Tex. Cr. 106, 100 S. W. 927; S. *v.* Vance, 38 Utah 1, 110 P. 434. See Atchison, etc. R. Co. *v.* Baker, 37 Okla. 48, 130 P. 577. *Contra.* Brown *v.* P., 145 Ill. App. 263; Holifield *v.* Laurel, 96 Miss. 59, 50 S. 488 (in a criminal case though offered by defendant). *Comp.* Diamond C. Co. *v.* Allen, 137 Fed. 705, 71 C. C. A. 107.

Right lost by taking deposition.—Tillman *v.* Bormar, 134 Ga. 660, 68 S. E. 504.

Testimony given by defendant's witness may be used at a subsequent trial by plaintiff. Hudson *v.* Roos, 76 Mich. 173, 42 N. W. 1099.

905-73 But see Funk *v.* Ins. Co., 87 Kan. 568, 125 P. 35; Henry *v.* S. (Okla. Cr.), 136 P. 982. *Comp.* Fitch *v.* Co., 124 Ia. 665, 100 N. W. 618.

Not "inaccessible."—Brinson R. Co. *v.* Beard, 11 Ga. App. 737, 76 S. E. 76; Crumm *v.* Allen & Co. (Ga.), 75 S. E. 108 (construing Ga. Code, §5773).

Absence from county and party's financial inability to secure depositions or attendance sufficient. Souchek *v.* Karr, 83 Neb. 645, 120 N. W. 210. If reachable by deposition insufficient. Levi *v.* S. (Ind.), 104 N. E. 765.

906-75 Absence must be permanent. S. *v.* Britton, 131 La. 877, 60 S. 379.

906-76 Pate *v.* S., 158 Ala. 1, 48 S. 388; Kirkland *v.* S., 141 Ala. 45, 37 S. 352; Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 S. 702.

906-77 Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 S. 702; P. *v.* Ballard, 1 Cal. App. 222, 81 P. 1040; Taylor *v.* S., 126 Ga. 557, 55 S. E. 474; Cohen *v.* Brunson (Ga. App.), 80 S. E. 679; Iowa L. Ins. Co. *v.* Haughton (Ind. App.), 87 N. E. 702; Boyd *v.* R. Co., 101 Tex. 411, 108 S. W. 813; Wise T. Co. *v.* McCormick, 107 Va. 376, 58 S. E. 584.

906-78 Fitch *v.* Co., 124 Ia. 665, 100 N. W. 618; Somers *v.* S., 54 Tex. Cr. 475, 113 S. W. 533. *Comp.* Delahunt *v.* Co., 215 Pa. 241, 64 A. 515.

906-79 See El Paso R. Co. *v.* Kitt (Tex. Civ.), 99 S. W. 587; Wise T. Co. *v.* McCormick, 107 Va. 376, 58 S. E. 584.

907-80 Ross-Lewin *v.* Ins. Co., 20 Colo. App. 262, 78 P. 305; Kolodrianski *v.* Co., 29 R. I. 127, 69 A. 505.

907-81 Wimberly *v.* S., 90 Ark. 514, 119 S. W. 668.

908-85 Daniels *v.* Stock, 23 Colo. App. 529, 130 P. 1031; Levi *v.* S. (Ind.), 104 N. E. 765; Swilley *v.* S. (Tex. Cr.), 166 S. W. 733; Green *v.* S. (Tex. Cr.), 154 S. W. 1003; Ozark *v.* S., 51 Tex. Cr. 106, 100 S. W. 927.

Smith *v.* S. (Tex. Cr.), 148 S. W. 722, *quot.* from Reynolds *v.* U. S., 98 U. S. 145, 158. "The question becomes practically one of fact to be settled as a preliminary to the admission of secondary evidence. In this respect it is like the preliminary question of the proof of loss of a written instrument before secondary evidence of the contents of the instrument can be admitted."

908-87 Cuff *v.* Co., 14 Ont. L. R. 263; Pope *v.* S. (Ala.), 63 S. 71; P. *v.* Louie Dene, 20 Cal. App. 137, 128 P. 339; Daniels *v.* Stock, 23 Colo. App. 529, 130 P. 1031; Putnal *v.* S., 56 Fla. 86, 47 S. 864; Robinson *v.* S., 128 Ga. 254, 57 S. E. 315; Henry *v.* S. (Okla. Cr.), 136 P. 982; Edwards *v.* S., 9 Okla. Cr. 306, 131 P. 956; Greenan *v.* Eggeling, 30 Pa. Super. 253 (inability to subpoena); Boyd *v.* R. Co., 101 Tex. 411, 108 S. W. 813; St. Louis S. R. Co. *v.* Boyd, 56 Tex. Civ. 282, 119 S. W. 1154 (sufficiency of predicate is largely for discretion of court); Knutson *v.* Moe Bros., 72 Wash. 290, 130 P. 347.

Whether the proof offered suffices is for the court to say, but it must be abundant. Krouse *v.* R. Co., 170 Mich. 438, 136 N. W. 434.

909-88 Failure of witness to keep engagement to be present not cause for reading his testimony. Chicago, etc. R. Co. *v.* Newsome, 174 Fed. 394, 98 C. C. A. 1.

909-89 In re Durant, 80 Conn. 140, 67 A. 497 (death); Rogers *v.* Rogers, 6 Penne. (Del.) 267, 66 A. 374 (death). See Atwood *v.* Atwood, 86 Conn. 579, 86 A. 29.

909-90 P. *v.* Leavens, 12 Cal. App. 178, 106 P. 1103. *Contra* as to depositions used before a coroner, in absence of statute. Queatham *v.* Woodmen, 148 Mo. App. 33, 127 S. W. 651.

910-93 In re Hersey, 171 Fed. 1004 (in bankruptcy); Pope *v.* S. (Ala.), 63 S. 71; Eyer *v.* S. (Ark.), 164 S. W. 756; Fox *v.* S., 102 Ark. 393, 144 S. W. 516; Atwood *v.* Atwood, 86 Conn. 579, 86 A. 29; In re Durant, 80 Conn. 140, 67 A. 497; London, etc. Co. *v.* Cereal Co., 251 Ill. 123, 95 N. E. 1064; Levi *v.* S. (Ind.), 104 N. E. 765; Lake Erie, etc. Co. *v.* Huffman, 177 Ind. 126, 97 N. E. 434; S. *v.* Herlihy, 102 Me. 310, 66 A. 643; S. *v.* Butler, 247 Mo. 685, 153 S. W. 1042; Cohen *v.* R. Co., 154 App. Div. 603, 139 N. Y. S. 887; Wilson *v.* R. Co., 95 App. Div. 388, 88 N. Y. S. 597; S. *v.* Walton, 53 Or. 557, 99 P. 431; Kolodrianski *v.* Co., 29 R. I. 127, 69 A. 505; Pratt *v.* S., 53 Tex. Cr. 281, 10 S. W. 138.

912-96 Putnal *v.* S., 56 Fla. 86, 47 S. 864.

Master's findings sent back to be supplemented upon further hearing. Crowley *v.* Crowley, 76 N. H. 342, 82 A. 839.

913-98 See Hinson *v.* S. (Ark.), 159 S. W. 1126; Edgerley *v.* Appleyard, 110 Me. 337, 86 A. 244.

913-99 U. S. *v.* Greene, 146 Fed. 793 (proceedings before commissioner for removal of prisoner to another district); Kirkland *v.* S., 141 Ala. 45, 37 S. 352 (habeas corpus hearing); Rogers *v.* Rogers, 6 Penne. (Del.) 267, 66 A. 374 (testimony before examiner in chancery); Putnal *v.* S., 56 Fla. 86, 47 S. 864, *quot.* the text; Packham *v.* Glendmeyer, 103 Md. 416, 63 A. 1048 (before sheriff's jury in lunacy proceeding); Keim *v.* Reading, 32 Pa. Super. 613 (road jury).

914-3 Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211.

916-11 Daniels *v.* Stock, 23 Colo. App. 529, 130 P. 1031; Atwood *v.* Atwood, 86 Conn. 579, 86 A. 29; Banks

v. Bradwell, 140 Ga. 640, 79 S. E. 572; Jones *v.* Bk. Co., 137 Ga. 561, 73 S. E. 835; Stephens *v.* Hoffman, 263 Ill. 197, 104 N. E. 1090; London Guarantee & Accident Co. *v.* Cereal Co., 251 Ill. 123, 95 N. E. 1064; Levine *v.* Carroll, 121 Ill. App. 105; Lake Erie, etc. R. Co. *v.* Huffman, 177 Ind. 126, 97 N. E. 434; Leggat *v.* Carroll, 30 Mont. 384, 76 P. 805; Harris *v.* Curtis, 139 App. Div. 393; 124 N. Y. S. 263; Cohen *v.* R. Co., 154 App. Div. 603, 139 N. Y. S. 887; Witty *v.* S. (Tex. Cr.), 153 S. W. 1146; Knutson *v.* Moe Bros., 72 Wash. 290, 130 P. 347. See Beamer *v.* Morrison, 210 Ill. 443, 71 N. E. 402; Becker *v.* Philadelphia, 217 Pa. 344, 66 A. 564 (unnecessary where used for impeachment); In re Park, 29 Utah 257, 81 P. 83.

918-13 Nordan *v.* S., 143 Ala. 13, 39 S. 406. See Spokane *v.* Costello, 42 Wash. 182, 84 P. 652.

918-16 Nordan *v.* S., 143 Ala. 13, 39 S. 406; In re Durant, 80 Conn. 140, 67 A. 497.

Criminal offense for which accused is being tried must be identical with that for which he was arraigned in order that testimony given on examination may be received. Somers *v.* S., 54 Tex. Cr. 475, 113 S. W. 533.

919-18 In re Durant, 80 Conn. 140, 67 A. 497.

920-19 Daniels *v.* Stock, 23 Colo. App. 529, 130 P. 1031; Atwood *v.* Atwood, 86 Conn. 579, 86 A. 29; Banks *v.* Bradwell, 140 Ga. 640, 79 S. E. 572; Stephens *v.* Hoffman, 263 Ill. 197, 104 N. E. 1090; Madden *v.* Stegman, 88 Kan. 29, 127 P. 524; Cohen *v.* R. Co., 154 App. Div. 603, 139 N. Y. S. 887; Shook *v.* Fox, 126 App. Div. 565, 110 N. Y. S. 951; Robertson *v.* S., 63 Tex. Cr. 216, 142 S. W. 533; Knutson *v.* Moe Bros., 72 Wash. 290, 130 P. 347.

If person is same although in different capacities, testimony admissible. Cohen *v.* R. Co., 154 App. Div. 603, 139 N. Y. S. 887.

Indiana statute merely restates common law rule. Lake Erie, etc. R. Co. *v.* Huffman, 177 Ind. 126, 97 N. E. 434.

921-20 Chappell *v.* John, 45 Colo. 45, 99 P. 44; Sebree *v.* Board, etc., 166 Ill. App. 276; Farwell *v.* Board, etc., 166 Ill. App. 298; Hunter *v.* Court, 126 Ia. 357, 102 N. W. 156; Esley L. & P. Co. *v.* Power Co., 172 Mich. 78, 137 N. W. 663; S. *v.* Eastham, 240 Mo. 241, 144 S. W. 492 (where testimony taken at trial of defendant's brother was refused); Byrne *v.* Co., 143 Mo. App. 85, 122 S. W. 349; Leggat *v.* Carroll, 30 Mont. 384, 76 P. 805; Patty *v.* Co., 53 Or. 350, 96 P. 1106 (notwithstanding identity of issues); Gulf, etc. R. Co. *v.* Peacock (Tex. Civ.), 128 S. W. 463; Bolt *v.* Sav. Bk. (Tex. Civ.), 145 S. W. 707. But see In re Durant, 80 Conn. 140, 67 A. 497; Brownlee *v.* Bunnell, 31 Ky. L. R. 669, 103 S. W. 284.

923-23 Rumford C. Wks. *v.* Co., 148 Fed. 862, 154 Fed. 65, 83 C. C. A. 177, 159 Fed. 436, 86 C. C. A. 416; Woods *v.* Sargent, 43 Colo. 268, 95 P. 932; Shaw *v.* R. Co., 187 N. Y. 186, 79 N. E. 984, *aff.* 110 App. Div. 892, 96 N. Y. S. 1145.

924-24 Woods *v.* Sargent, 43 Colo. 268, 95 P. 932.

924-25 Ala. Consol. Coal & I. Co. *v.* Heald, 171 Ala. 263, 55 S. 181; McInturff *v.* Ins. Co., 155 Ill. App. 225, *aff.* P. *v.* R. Co., 247 Ill. 445, 93 N. E. 369; Succession of Derigny, 128 La. 853, 55 S. 552.

See Kentucky, etc. Co. *v.* Downing (Ky.), 167 S. W. 683.

926-35 Martin *v.* Ragsdale, 71 S. C. 67, 50 S. E. 671.

928-44 O'Meara *v.* McDermott, 40 Mont. 38, 104 P. 1049; Pratt *v.* Tailer, 135 App. Div. 1, 119 N. Y. S. 803.

930-51 Putnal *v.* S., 56 Fla. 86, 47 S. 864; S. *v.* Simmons, 78 Kan. 852, 98 P. 277; Fuqua *v.* C., 118 Ky. 578, 81 P. 923; S. *v.* Herlihy, 102 Me. 310, 66 A. 643; Arnwine *v.* S., 54 Tex. Cr. 213, 114 S. W. 796 (though testimony not read to or signed by witness). *Comp.* S. *v.* Woods, 71 Kan. 658, 81 P. 184; Smith *v.* S., 48 Tex. Cr. 65, 85 S. W. 1153 (*over.* by Porch *v.* S., 51 Tex. Cr. 7, 99 S. W. 1122).

Contra under statute giving accused right to be confronted by witnesses "in the presence of the court." S. *v.* Hefferman, 22 S. D. 513, 118 N. W. 1027.

932-53 Rogers *v.* Rogers, 6 Penne. (Del.) 267, 66 A. 374.

932-54 Stealer *v.* S. (Okla. Cr.), 138 P. 395.

932-57 Millner *v.* S. (Tex. Cr.), 163 S. W. 348.

933-62 McGivern *v.* Steele, 197 Mass. 164, 83 N. E. 405.

933-65 Objection that party could waive questions asked upon former trial in cross-examination does not pre-

vent all of testimony given by witness being produced at second trial. Pratt *v.* S., 53 Tex. Cr. 281, 109 S. W. 138.

934-71 **Affidavit provided for** in §4643 Ky. St. unnecessary where death is conceded. Kentucky Tr. & Ter. Co. *v.* Downing (Ky.), 167 S. W. 683.

934-72 Ripley *v.* S., 58 Tex. Cr. 489, 126 S. W. 586.

Cannot be read to jury unless offered as evidence. Sullivan *v.* Co., 51 Wash. 71, 97 P. 1109.

935-73 Dover *v.* Greenwood, 177 Fed. 946; Hardin *v.* S., 57 Tex. Cr. 401, 123 S. W. 613.

935-74 See Smith *v.* S., 48 Tex. Cr. 65, 85 S. W. 1153.

935-79 See Harris *v.* R. Co., 124 Mo. App. 45, 101 S. W. 601.

936-84 By affidavit. Yocum's Admx. *v.* R. Co., 143 Ky. 700, 137 S. W. 217.

May be shown before jury.—Hughes *v.* S. (Tex. Cr.), 152 S. W. 912.

937-87 Iowa L. Ins. Co. *v.* Haughton (Ind. App.), 85 N. E. 127. See Ripley *v.* S., 58 Tex. Cr. 489, 126 S. W. 586.

938-94 All facts concerning illness of a witness must be presented; physician's certificate insufficient. Smith *v.* Moore, 149 N. C. 185, 62 S. E. 892.

938-98 Woodstock I. Wks. *v.* Kline, 149 Ala. 391, 43 S. 362. *Comp.* Smith *v.* S., 48 Tex. Cr. 65, 85 S. W. 1153.

939-3 Kirkland *v.* S., 141 Ala. 45, 37 S. 352; Taylor *v.* S., 126 Ga. 557, 55 S. E. 474.

939-4 Reasonable diligence must be shown. Vandewege *v.* Peter, 83 Neb. 140, 119 N. W. 226.

939-5 Letters written by absent witness and postmarked and dated without the state are evidence to prove a removal from the state. Kirkland *v.* S., 141 Ala. 45, 37 S. 352.

Statement by a witness that absent witness told him he was living in another state is insufficient. Southern R. Co *v.* Bonner, 141 Ala. 517, 37 S. 702.

Oath of some person as to absence necessary. Smith *v.* S., 48 Tex. Cr. 65, 85 S. W. 1153.

Inability to find may be proved by answers to inquiries made. Cuff *v.* Co., 14 Ont. L. R. 263.

Return of non est is not sufficient. S. *v.* McClellan, 79 Kan. 11, 98 P. 209.

939-6 Woodstock I. Wks. *v.* Kline, 149 Ala. 391, 43 S. 362; Wise T. Co. *v.* McCormick, 107 Va. 376, 58 S. E. 584. *Comp.* Smith *v.* S., 48 Tex. Cr. 65, 85 S. W. 1153.

939-7 Pike *v.* Hauptman, 83 Neb. 172, 119 N. W. 231, and with testimony of officer as to inquiries for witness may be sufficient.

940-10 Postea of former trial not necessary prerequisite to admission of record. Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211.

940-11 Tritch *v.* Perry, 48 Colo. 339, 108 P. 981.

941-17 See McGivern *v.* Steele, 197 Mass. 164, 83 N. E. 405.

941-19 Meekins *v.* R. Co., 136 N. C. 1, 48 S. E. 501. *Comp.* Wallach *v.* R. Co., 105 App. Div. 422, 94 N. Y. S. 574, party failing to object to expert witness because he was not qualified cannot object at a second trial after his decease.

942-25 S. *v.* Herlihy, 102 Me. 310, 66 A. 643; Jaquith *v.* Morrill, 204 Mass. 181, 90 N. E. 556; Keim *v.* Reading, 32 Pa. Super. 613; Best *v.* S. (Tex. Cr.), 164 S. W. 996.

May be in narrative form.—Best *v.* S. (Tex. Cr.), 164 S. W. 996.

943-26 Vandewege *v.* Peter, 83 Neb. 140, 119 N. W. 226.

944-28 Vandewege *v.* Peter, supra.

945-32 Colby *v.* Reams, 109 Va. 308, 63 S. E. 1009.

946-36 Ary *v.* S., 104 Ark. 212, 148 S. W. 1032; Meyer *v.* Foster, 147 Cal. 166, 81 P. 402; Studabaker *v.* Faylor, 170 Ind. 498, 83 N. E. 747, *rev.* (Ind. App.), 80 N. E. 861; Packham *v.* Glendmeyer, 103 Md. 416, 63 A. 1048.

"**When a witness who was present** in court and testified orally in a case has died, the rule permits that testimony to be proved, in substance, in a subsequent trial of the same case, or in another case in which the issue and parties are substantially the same, by the uncertain and inexact memory of one who heard the witness testify and assumes to be able to remember it. Horne *v.* Williams, 23 Ind. 37; Rooker *v.* Parsley, 72 Ind. 497; Chamberlayne's Modern Law of Ev., §§1682-1687." Lake Erie, etc. R. Co. *v.* Huffman, 177 Ind. 126, 97 N. E. 434.

Witness cannot prove testimony of a deceased witness by testifying that record of former case is correct, and then placing in record of case at bar as much of such testimony as is desired. Rumford C. Wks. *v.* Co., 148 Fed. 862.

946-38 Ex parte affidavit of a deceased witness not competent. Fender *v.* Ramsey, 131 Ga. 440, 62 S. E. 527.

947-40 Meyer *v.* Foster, 147 Cal. 166, 81 P. 402; Studabaker *v.* Faylor, 170 Ind. 498, 83 N. E. 747, *rev.* (Ind. App.), 80 N. E. 861; Mollison *v.* Rittgers, 140 Ia. 365, 118 N. W. 512; Austin *v.* C., 30 Ky. L. R. 295, 98 S. W. 295; Weinhandler *v.* Co., 46 Misc. 584, 92 N. Y. S. 792; Harris *v.* S. (Tex. Cr.), 160 S. W. 447.

947-44 S. *v.* Overton (N. J.), 88 A. 689. *Contra* if statute requires evidence to be in writing. Rex *v.* Farrell, 15 Ont. L. R. 100.

948-47 Hardin *v.* S., 57 Tex. Cr. 401, 123 S. W. 613, it cannot be proved by an agreed statement of facts made at former trial. *Contra* if testimony was taken in writing by magistrate (S. *v.* Branham, 13 S. C. 389), unless accused admits correctness of oral testimony. S. *v.* Winter, 83 S. C. 153, 65 S. E. 209. See Austin *v.* C., 30 Ky. L. R. 295, 98 S. W. 295.

948-49 See supra this title, 930-51.

948-50 **Transcript admissible** when verified by such person. P. *v.* Ong Git, 23 Cal. App. 148, 137 P. 283.

948-51 Ching Lum *v.* Lam Man Beu, 19 Haw. 363.

949-54 El Paso R. Co. *v.* Kitt (Tex. Civ.), 99 S. W. 587.

949-55 **Transcript "practically correct,"** inadmissible. Harper *v.* S. (Ga.), 81 S. E. 817.

949-58 Cornelius *v.* S., 54 Tex. Cr. 173, 112 S. W. 1050. See Eyer *v.* S. (Ark.), 164 S. W. 756.

Need not be signed by witness. Best *v.* S. (Tex. Cr.), 164 S. W. 996.

Must be certified by trial judge.—Knutson *v.* Moe Bros., 72 Wash. 290, 130 P. 347.

951-61 Harris *v.* S. (Tex. Cr.), 160 S. W. 447.

951-62 Fuqua *v.* C., 118 Ky. 578, 81 S. W. 923; Austin *v.* C., 30 Ky. L. R. 295, 98 S. W. 295; Temple *v.* Phelps, 193 Mass. 297, 79 N. E. 482; Turner *v.* R. Co., 138 Mo. App. 143, 120 S. W. 128. See Hutchinson *v.* S., 8 O. C. C. (N. S.) 313.

Testimony signed by witness or transcript filed with clerk admissible without further verification. Wadsworth *v.* S., 9 Okla. Cr. 84, 130 P. 808.

Requirements of certification not satisfied by oral testimony of stenographer, Wells *v.* Chase, 126 Wis. 202, 105 N. W. 799.

Authentication in some manner is essential. Williams *v.* Co., 37 Colo. 62, 86 P. 337. Where stenographer had died and no one could be found to read his notes or speak as to their correctness transcript was inadmissible. Pew *v.* Johnson, 35 Mont. 173, 88 P. 770.

Reporter may use notes to refresh memory, in which case their exclusion is not error. Roanoke R. & E. Co. *v.* Young, 108 Va. 783, 62 S. E. 961.

951-63 See Lanza *v.* Co., 124 Ia. 659, 100 N. W. 488; Fitch *v.* Co., 124 Ia. 665, 100 N. W. 618; Wiltsey *v.* Wiltsey, 135 Ia. 430, 109 N. W. 776; S. *v.* Dean, 148 Ia. 566, 126 N. W. 692.

Stenographer may translate and read his notes to jury. Wilmoth *v.* Wheaton, 81 Kan. 29, 105 P. 39.

951-67 Miller *v.* U. S., 41 App. Cas. (D. C.) 52 (former testimony); Quinlan *v.* C., 149 Ky. 476, 149 S. W. 892; P. *v.* Vitusky, 155 App. Div. 139, 140 N. Y. S. 19; P. *v.* Hoke, 151 App. Div. 744, 136 N. Y. S. 235; Stealer *v.* S. (Okla. Cr.), 138 P. 395; Wadsworth *v.* S., 9 Okla. Cr. 84, 130 P. 808; Pace *v.* S. (Tex. Cr.), 153 S. W. 132; Wiener *v.* Zweib (Tex Civ.), 128 S. W. 699. See U. S. *v.* Greene, 146 Fed. 793; Barksdale *v.* Ins. Co., 120 Ga. 388, 47 S. E. 943; Jones *v.* S., 128 Ga. 23, 57 S. E. 313; Levine *v.* Carroll, 121 Ill. App. 105; El Paso R. Co. *v.* Kitt (Tex. Civ.), 99 S. W. 587.

Identification by stenographer who took down testimony. Jones *v.* S., 174 Ala. 85, 57 S. 36.

952-68 Coley *v.* S. (Fla.), 64 S. 751. *Comp.* Meyer *v.* Foster, 147 Cal. 166, 81 P. 402.

952-73 Ross-Lewin *v.* Ins. Co., 20 Colo. App. 262, 78 P. 305; Bare *v.* Coke Co. (W. Va.), 80 S. E. 941; Howard *v.* Co., 129 Wis. 98, 108 N. W. 48 (bill of exception best evidence, as compared with certified stenographic transcript; omitted points may be supplied).

Transcript of the testimony before a justice inadmissible unless he is required to make it. Scott *v.* S., 92 Miss. 833, 46 S. 251.

953-74 Young *v.* P., 54 Colo. 293, 130 P. 1011. See Harbison *v.* White (Ky.), 114 S. W. 250.

953-76 Central R. Co. *v.* Carleton, 163 Ala. 62, 51 S. 27.

954-77 Souchek *v.* Karr, 83 Neb. 645, 120 N. W. 210, verified by stenographer.

954-79 Lueders *v.* U. S., 210 Fed. 419, 127 C. C. A. 151; S. *v.* Longstreth, 19 N. D. 268, 121 N. W. 1114; Packham *v.* Glendmeyer, 103 Md. 416, 63 A. 1048; Jaquith *v.* Morrill, 204 Mass. 181, 90 N. E. 556; O'Rourke *v.* H. Co., 47 Mont. 459, 133 P. 965.

955-80 Studebaker *v.* Faylor (Ind. App.), 80 N. E. 861; Harris *v.* S. (Tex. Cr.), 160 S. W. 447; Arnwine *v.* S., 54 Tex. Cr. 213, 114 S. W. 796.

956-82 Packham *v.* Glendmeyer, 103 Md. 416, 63 A. 1048.

956-83 Merrill *v.* Leisenring, 166 Mich. 219, 131 N. W. 538.

956-85 Tutwiler *v.* Burns, 160 Ala. 386, 49 S. 455; Banks *v.* Bradwell, 140 Ga. 640, 79 S. E. 572; Brunhild *v.* Co., 144 Ill. App. 198; S. *v.* Herlihy, 102 Me. 310, 66 A. 643; Merrill *v.* Leisenring, 166 Mich. 219, 131 N. W. 538; Greensboro L. Ins. Co. *v.* Knight, 160 N. C. 592, 76 S. E. 623; Keim *v.* Reading, 32 Pa. Super. 613 (a party); Williams *v.* Smith, 29 R. I. 562, 72 A. 1093; Mooney *v.* S. (Tex. Cr.), 164 S. W. 828. See Harris *v.* S. (Tex. Cr.), 160 S. W. 447.

957-87 West *v.* S., 7 Ala. App. 145, 62 S. 290.

957-88 Descrippo *v.* S., 8 Ala. App. 85, 62 S. 1004; Whitmire *v.* Heath, 155 N. C. 304, 71 S. E. 313; Harris *v.* S. (Tex. Cr.), 160 S. W. 447.

957-91 Inability to remember substance of certain parts of testimony disqualifies witness. Central R. Co. *v.* Carleton, 163 Ala. 62, 51 S. 27.

958-92 O'Rourke *v.* H. Co., 47 Mont. 459, 133 P. 965.

960-7 Objection because of irresponsiveness cannot be first made when former testimony is offered. Sherman G. & E. Co. *v.* Belden, 103 Tex. 59, 123 S. W. 119.

960-8 P. *v.* Edwards, 14 Cal. App. 128, 111 P. 263; Robinson *v.* S., 128 Ga. 254, 57 S. E. 315; Delahunt *v.* Co., 215 Pa. 241, 64 A. 515.

Conflict or doubt as to accuracy of predicate should be submitted to the jury. Ozark *v.* S., 51 Tex. Cr. 106, 100 S. W. 927.

960-9 P. *v.* Ballard, 1 Cal. App. 222, 81 P. 1040.

960-10 Clear proof of necessity for admission of former testimony is necessary. Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 S. 702.

961 The fact of the engagement of prosecutrix and defendant is relevant. Brantley *v.* S. (Ala. App.), 65 S. 678.

961-11 The fact that a party could at the second trial have waived cross-examination of a witness does not prevent all the testimony of such deceased witness, given at former trial, being introduced. Whether it was given on direct or cross-examination is immaterial. Pratt *v.* S., 53 Tex. Cr. 281, 109 S. W. 138.

961-13 Rittenhouse *v.* Bell, 106 Ark. 315, 153 S. W. 1111.

962-20 Lerum *v.* Geving, 97 Minn. 269, 105 N. W. 967; Omaha R. Co. *v.* Boesen, 74 Neb. 764, 105 N. W. 303.

962-21 See Perry *v.* S. (Tex. Cr.), 153 S. W. 138.

963-22 See Randle *v.* R. Co., 158 Ala. 532, 48 S. 114.

Absence of objections on former trial or error in ruling thereon, not material on second trial. Pratt *v.* Tailer, 135 App. Div. 1, 119 N. Y. S. 803.

963-24 Bagnell Timber Co. *v.* R. Co., 242 Mo. 11, 145 S. W. 469. See Garvik *v.* R. Co., 131 Ia. 415, 108 N. W. 327.

Admissions in former testimony are not conclusive on party. Wiley *v.* R. Co., 86 Vt. 504, 86 A. 808.

963-28 If there is a conflict in the testimony given on different trials that first given will be preferred because occurrence was then fresher in witness' memory. Adams Exp. Co. *v.* Ten Winkel, 44 Colo. 59, 96 P. 818.

964-30 Temple *v.* Phelps, 193 Mass. 297, 79 N. E. 482.

964-31 P. *v.* Ballard, 1 Cal. App. 222, 81 P. 1040.

FORNICATION

See this title in 10 STANDARD PROC.

967-1 Seats *v.* S., 122 Ga. 173, 50 S. E. 65; Lightner *v.* S., 126 Ga. 563, 55 S. E. 471; S. *v.* Naylor (Or.), 136 P. 889; Hofer *v.* S., 130 Wis. 576, 110 N. W. 391.

Mere proof of opportunity for intercourse is insufficient. Sadler *v.* S., 52 Tex. Cr. 439, 107 S. W. 352; Quinn *v.* S., 51 Tex. Cr. 155, 101 S. W. 248.

967-2 Turney *v.* S., 60 Ark. 259, 29 S. W. 893; S. *v.* McDavitt, 140 Ia. 342, 118 N. W. 370 ("leading the life of lewdness"); S. *v.* Williams, 94 Minn. 319, 102 N. W. 722; S. *v.* Chandler, 132 Mo. 155, 33 S. W. 797; S. *v.* Poyner, 57 Wash. 489, 107 P. 181 (lewdness). See S. *v.* Sauls, 70 S. C. 393, 50 S. E. 17.

Habitual intercourse is not shown by

proof of four or five instances. Collins *v.* S., 46 Tex. Cr. 550, 80 S. W. 372; Hilton *v.* S., 41 Tex. Cr. 190, 53 S. W. 113.

Living together is not established by showing the persons occupied same house. Boswell *v.* S., 48 Tex. Cr. 47, 85 S. W. 1076 (man and servant). But see Lenert *v.* S. (Tex. Cr.), 63 S. W. 563 (priest and housekeeper).

968-3 See S. *v.* Cannon, 72 N. J. L. 46, 60 A. 177.

968-6 Watson *v.* S., 62 Tex. Cr. 620, 138 S. W. 611. But see S. *v.* Naylor (Or.), 136 P. 889.

969-7 In a prosecution for unlawful cohabitation it may be shown defendant was married though it is not so pleaded. Tynes *v.* S., 93 Miss. 119, 46 S. 535.

969-8 Townser *v.* S., 58 Tex. Cr. 453, 126 S. W. 572.

Corroboration of woman's testimony necessary where it bears upon its face evidence of unreliability. Hofer *v.* S., 130 Wis. 576, 110 N. W. 391.

969-10 Illness at time may be shown. C. *v.* Pearl, 29 Pa. Super. 307.

970-13 Bailey *v.* S. (Tex. Cr.), 150 S. W. 915.

970-14 Reputation of defendant's paramour for chastity, relevant in prosecution for lewdness. S. *v.* Poyner, 57 Wash. 489, 107 P. 181.

FRAUD

Burden of proof as between vendor and purchaser, 8-8; *Excessive consideration for services,* 48-73; *Making of representation,* 57-11; *Value as evidence of damage,* 76-98.

6-1 Tonopah & G. R. Co. *v.* Fellanbaum, 32 Nev. 278, 107 P. 882; Ragley-McW. L. Co. *v.* Davidson (Tex. Civ.), 152 S. W. 856.

6-2 Kerfoot *v.* Yeo (Can.), 11 West L. Rep. 355; Brandorn *v.* McCausland, 171 Fed. 402, 96 C. C. A. 358; Schagun *v.* Co., 162 Fed. 209, 89 C. C. A. 189; Drew *v.* Co. (Ala.), 65 S. 71; Crooker *v.* White, 162 Ala. 476, 50 S. 227; Mut. L. Ins. Co. *v.* Owen (Ark.), 161 S. W. 720; Kansas, etc. Co. *v.* R. Co. (Ark.), 163 S. W. 171; Simon *v.* Groc. Co., 108 Ark. 164, 156 S. W. 1015; Collin Co. Grain Co. *v.* Andrew (Ark.), 162 S. W. 1098; Ferguson *v.* Co., 99 Ark. 45, 137 S. W. 555; Wendling L. Co. *v.* Co., 153 Cal. 411, 95 P. 1029; Davis *v.* Society, 21 Cal. App. 444, 132 P. 462; Bacon *v.* Soule, 19 Cal. App. 428, 126 P. 384; Del Vecchio *v.* Savelli, 10 Cal. App. 79, 101 P. 32; McLaughlin *v.* Thomas, 86 Conn. 252, 85 A. 370; Board *v.* Robbins, 82 Conn. 623, 74 A. 938; Benanti *v.* Ins. Co., 86 Conn. 15, 84 A. 109; Madre *v.* Gaskins, 39 App. Cas. (D. C.) 19; Jaselli *v.* Bk., 36 App. Cas. (D. C.) 159; Third Nat. Bk. *v.* Poe, 5 Ga. App. 113, 62 S. E. 826; McKennan *v.* Mickelberry, 242 Ill. 117, 89 N. E. 717; Koebel *v.* Doyle, 256 Ill. 610, 100 N. E. 154; P. *v.* Templeman, 169 Ill. App. 287; Smith *v.* Berz, 125 Ill. App. 122; Adams *v.* Pease, 113 Ill. App. 356; Larch *v.* Holz (Ind. App.), 101 N. E. 127; Anderson *v.* Brew. Assn., 49 Ind. App. 403, 97 N. E. 445; Wills *v.* Drug Co., 50 Ind. App. 193, 97 N. E. 449; First Nat. Bk. *v.* Osborn (Ia.), 142 N. W. 209; Detrick *v.* Patterson (Ia.), 141 N. W. 325; Scanlon *v.* Scanlon, 154 Ia. 748, 135 N. W. 634; Beaver *v.* Ross, 140 Ia. 154, 118 N. W. 287; Nesmith *v.* Platt, 137 Ia. 292, 114 N. W. 1053; McDowell *v.* Edward's Admr., 156 Ky. 475, 161 S. W. 534; Blackwell *v.* O'Neal, 152 Ky. 563, 153 S. W. 721; Shacklette *v.* Goodall, 151 Ky. 20, 151 S. W. 23; Winfrey's Trustee *v.* Winfrey, 150 Ky. 138, 150 S. W. 42; Chowning *v.* Howser, 24 Ky. L. R. 1951, 72 S. W. 748; Horn *v.* Carroll, 25 Ky. L. R. 2305, 80 S. W. 518; Breaux *v.* Broussard, 116 La. 215, 40 S. 639; Hamilton *v.* Hamilton, 130 La. 302, 57 S. 935; Aetna Ind. Co. *v.* Fuller, 111 Md. 321, 73 A. 738; Gormley *v.* Dangel, 214 Mass. 5, 100 N. E. 1084; Turner *v.* Williams, 202 Mass. 500, 89 N. E. 110; Barron *v.* Co., 184 Mass. 440, 68 N. E. 831; Jobert *v.* Wagner, 147 Mich. 409, 110 N. W. 942; Bunkers *v.* Peters, 122 Minn. 130, 141 N. W. 1118; Smith *v.* Brigham, 106 Minn. 91, 118 N. W. 150; Carter *v.* Gardner, 95 Miss. 651, 48 S. 615; Coleman *v.* Hagey, 252 Mo. 102, 158 S. W. 829; Avery Co. *v.* Powell, 174 Mo. App. 628, 161 S. W. 335; Graham Paper Co. *v.* Pub. Co., 172 Mo. App. 495, 158 S. W. 92; Gilbert *v.* Seitz, 170 Mo. App. 569, 157 S. W. 118; Early *v.* R. Co., 167 Mo. App. 252, 149 S. W. 1170; Flood *v.* Busch, 165 Mo. App. 142, 146 S. W. 73; Lindsay *v.* Min. Co., 244 Mo. 438, 148 S. W. 849; Ray County S. Bk. *v.* Hutton, 224 Mo. 42, 123 S. W. 47; New England L. & T. Co. *v.* Browne, 177 Mo. 412, 76 S. W. 954; Heffernan *v.* Rags-

dale, 199 Mo. 375, 97 S. W. 890; So. Missouri L. Co. *v.* Crommer, 202 Mo. 504, 101 S. W. 22; Bingaman *v.* Bingaman, 85 Neb. 248, 122 N. W. 981; First Nat. Bk. *v.* Lesser, 10 N. M. 700, 65 P. 179; Cassidy *v.* Uhlmann, 170 N. Y. 505, 63 N. E. 554; Eppley *v.* Kennedy, 131 App. Div. 1, 115 N. Y. S. 360; Tannebaum *v.* Shaffer, 122 N. Y. S. 180; King *v.* Howett & Co. (Okla.), 140 P. 1182; Gross *v.* McBrayer, 159 N. C. 372, 74 S. E. 915; Dare County *v.* Co., 152 N. C. 23, 67 S. E. 37; In re Robinson's Est., 222 Pa. 113, 70 A. 966 (ante-nuptial contract); In re Simon, 20 Pa. Super. 450; Comelin *v.* Schultze, 1 P. R. Fed. 289; Foix *v.* Moeller (Tex. Civ.), 159 S. W. 1048; Morrison *v.* Cotton (Tex. Civ.), 152 S. W. 866; Reed *v.* Holloway (Tex. Civ.), 127 S. W. 1189; Collins *v.* Kelsey (Tex. Civ.), 97 S. W. 122; Dickerson *v.* Groc. Co. (Tex. Civ.), 147 S. W. 695; Sav. Bk. *v.* Todd, 114 Va. 708, 77 S. E. 446; Fitzgerald *v.* Frankel, 109 Va. 603, 64 S. E. 941; Mullen *v.* Searls Co., 69 W. Va. 790, 72 S. E. 1089; Coates *v.* Marsden, 142 Wis. 106, 124 N. W. 1057.

See McBride *v.* Farrington, 131 Fed. 797; Gipe *v.* R. Co., 41 Ind. App. 156, 82 N. E. 471; Baker *v.* Mathew, 137 Ia. 410, 115 N. W. 15; Western Mfg. Co. *v.* Cotton, 31 Ky. L. R. 1130, 104 S. W. 758; McNaughton *v.* Smith, 136 Mich. 368, 99 N. W. 382; Raymond *v.* McKenna, 147 Mich. 35, 110 N. W. 121; Bellettiere *v.* Lawlor, 47 Misc. 161, 93 N. Y. S. 471; Tuttle *v.* Tuttle, 146 N. C. 484, 59 S. E. 1008; Collins *v.* Chipman, 41 Tex. Civ. 563, 95 S. W. 666; Western C. Co. *v.* Anderson, 45 Tex. Civ. 513, 101 S. W. 1061; Colston *v.* Bean, 78 Vt. 283, 62 A. 1015; Redwood *v.* Rogers, 105 Va. 155, 53 S. E. 6; Virginia Ins. Co. *v.* Hogue, 105 Va. 355, 54 S. E. 8; Pierce *v.* Elec. Co., 78 Wash. 167, 138 P. 666; Johnson *v.* Mann, 72 Wash. 651, 131 P. 213; Pickle *v.* Lincoln Bk., 61 Wash. 545, 112 P. 654; Miles *v.* Co., 124 Wis. 278, 102 N. W. 555; Devereux *v.* Peterson, 126 Wis. 558, 106 N. W. 249.

So well settled that citation of authorities unnecessary. Dorrington *v.* Carpenter, 171 Mich. 652, 137 N. W. 538.

Never shifts.—City of Richmond *v.* Jones, 111 Va. 214, 68 S. E. 181.

Burden sustained.—Adams *v.* Burton, 107 Me. 223, 77 A. 835; Winter *v.* R. Co., 118 Minn. 487, 136 N. W. 1089; Depue *v.* Washer Co., 144 Mo. App. 656, 129 S. W. 230; Davis *v.* Forman, 229 Mo. 27, 129 S. W. 213; Morrison *v.* Gardner, 57 Or. 438, 111 P. 243; Rushing *v.* Spreen (Tex. Civ.), 142 S. W. 49.

Evidence insufficient.—See Bawden *v.* Taylor, 254 Ill. 464, 98 N. E. 941; Atty. Gen. *v.* Council, 206 Mass. 158, 92 N. E. 136.

No presumption of fraud in claim where in action on fire policy recovery is less than claim and face of policy. Goldstein *v.* Ins. Co., 124 Ia. 143, 99 N. W 696.

8-3 Snow *v.* Wathen, 127 App. Div. 948, 112 N. Y. S. 41, evidence must be irresistible.

Where a fact was proved from which two inferences could be drawn—one of innocence, the other of fraud—it was not error to call jury's attention to probability of innocence. Mead *v.* Darling, 159 Fed. 684, 86 C. C. A. 552.

8-4 Presumption has no probative force. It performs an office in the absence of evidence, so that one who has cast upon him the burden of proof may be enabled to sustain it without presenting proof. Board *v.* Robbins, 82 Conn. 623, 74 A. 938.

8-5 Varley D. M. Co. *v.* Ostheimer, 159 Fed. 655, 86 C. C. A. 523; Hutchason *v.* Spinks, 3 Cal. App. 291, 85 P. 122. See Standard Mfg. Co. *v.* Brons, 118 Ill. App. 632.

Agency of person who perpetrated fraud must be proved by plaintiff in order to hold the principal. O'Day *v.* Bennett, 26 Ky. L. R. 702, 82 S. W. 442. But plaintiff need not prove both principal and agent made false representations. First Nat. Bk. *v.* Baldwin, 46 Tex. Civ. 244, 102 S. W. 786.

8-6 S. Rose Co. *v.* Hasenzahl, 141 Ky. 676, 133 S. W. 547.

8-8 Weil *v.* Fineran, 78 Ark. 87, 93 S. W. 568; Chowning *v.* Howser, 24 Ky. L. R. 1951, 72 S. W. 748; Waymire *v.* Shipley, 52 Or. 464, 97 P. 807, cit. the text; In re Whitmer's Est., 224 Pa. 413, 73 A. 551 (ante-nuptial contract); Merrill *v.* Bradley (Tex. Civ.), 121 S. W. 561. *Contra,* Austrian *v.* Laubheim, 78 N. J. L. 178, 73 A. 226, statute.

If grantee in deed fails to testify or present evidence within his power he must show he is a bona fide purchaser. Brooks *v.* Garner, 20 Okla. 236, 97 P. 995.

10-11 See Spangler *v.* Yarborough, 23 Okla. 806, 101 P. 1107.

10-12 Del Vecchio *v.* Savelli, supra, cit. the text.

10-13 "Such cases rest on the view that the circumstances themselves prove the fraud, unless its existence be negatived by other evidence." Miles *v.* Co., 124 Wis. 278, 102 N. W. 555.

Party alleging existence of such relations must establish the fact. Nelson *v.* Brown, 164 Ala. 397, 51 S. 360; Shevlin *v.* Shevlin, 96 Minn. 398, 105 N. W. 257.

10-14 Nelson *v.* Brown, 164 Ala. 397, 51 S. 360; Beach *v.* Wilton, 244 Ill. 413, 91 N. E. 492; Detriek *v.* Patterson (Ia.), 141 N. W. 325; Schneider *v.* Schneider, 125 Ia. 1, 98 N. W. 159; McDowell *v.* Edward's Admr., 156 Ky. 475, 161 S W. 534; Ford *v.* Gale, 155 App. Div. 675, 140 N. Y. S. 541; Dolan *v.* Cummings, 116 App. Div. 787, 102 N. Y. S. 91 (brother and sister); Belden *r.* Belden, 139 App. Div. 137, 124 N. Y. S. 225; Light *v.* Light, 221 Pa. 136, 70 A. 553; Tindal *r.* Sublett, 82 S. C. 199, 63 S. E. 960.

10-15 U. S. O. & L. Co. *r.* Bell, 153 Cal. 781, 96 P. 901; Bolles *r.* O'Brien, 63 Fla. 342, 59 S. 133; Mansfield *v.* Wallace, 217 Ill. 610, 75 N. E. 682; Hamilton *v.* Allen, 86 Neb. 401, 125 N. W. 610; Croeheron *r.* Savage, 75 N. J. Eq. 589, 73 A. 33; Bingham *r.* Sheldon, 101 App. Div. 48, 91 N. Y. S. 917; Phipps *r.* Willis, 53 Or. 190, 96 P. 866, cit. the text; Landis *v.* Wintermute, 40 Wash. 673, 82 P. 1000.

10-17 Copeland *r.* Bruning, 44 Ind. App. 405, 87 N. E. 1000; Gassert *v.* Strong, 38 Mont. 18, 98 P. 497; Branch *v.* Buckley, 109 Va. 784, 65 S. E. 652.

10-18 Hemenway *v.* Abbott, 8 Cal. App. 450, 97 P. 190; Smith *r.* Moore, 149 N. C. 185, 62 S. E. 892, 142 N. C. 277, 55 S. E. 275; Hanna *v.* Haynes, 42 Wash. 284, 84 P. 861.

10-22 Edwards *r.* Edwards, 104 Ark. 641, 149 S. W. 89; Mathy *r.* Mathy, 88 Ark. 56, 113 S. W. 1012; Tilton *r.* Tilton, 130 Ky. 281, 113 S. W. 134; Massey *v.* Rae, 18 N. D. 409, 121 N. W. 75.

10-23 Hays *v.* Feather, 244 Ill. 172, 91 N. E. 97; McCord *v.* Bright, 44 Ind. App. 275, 87 N. E. 654; Eighmy *v.* Brock, 126 Ia. 535, 102 N. W. 444 (stepfather and stepdaughter); McAdams *r.* McAdams, 80 O. St. 232, 88 N. E. 542. *Contra,* Hudson *v.* Hudson, 237 Ill. 9, 86 N. E. 661, conveyance to child *Comp.* Dick *v.* Albers, 243 Ill. 231, 90 N. E. 683.

11-24 Jordan *r.* Catheart, 126 Ia. 600, 102 N. W. 510, minor child and husband of her cousin.

11-25 Ford *r.* Gale, 155 App. Div. 675, 140 N. Y. S. 541.

11-26 Gassert *r.* Strong, 37 Mont. 18, 98 P. 497.

11-29 Hughes *r.* Co., 13 Ariz. 52, 108 P. 231 (promoters and stockholders); Stewart *r.* Harris, 69 Kan. 498, 77 P. 277; Davids *r.* Davids, 135 App. Div. 206, 120 N. Y. S. 350. See Strong *r.* Repide, 213 U. S. 419.

11-31 Gugel *r.* Hiscox, 138 App. Div. 61, 122 N. Y. S. 557.

11-32 Bingham *r.* Sheldon, 101 App. Div. 48, 91 N. Y. S. 917.

12-33 Nelson *r.* Brown, 164 Ala. 397, 51 S. 360; Barry *r.* Murphy, 24 Ky. L. R. 953, 70 S. W. 276; Bingham *r.* Sheldon, supra; Gugel *r.* Hiscox, 138 App. Div. 61, 122 N. Y. S. 557.

Presumption of fraud where transaction is with a non compos mentis. Sprinkle *r.* Wellborn, 140 N. C. 163, 52 S. E. 666.

12-36 A broader rule recognized. Liland *v.* Tweto, 19 N. D. 551, 125 N. W. 1032.

12-37 Family relationship not of itself sufficient to justify presumption of fraud; it is a persuasive circumstance. Schneider *r.* Schneider, 125 Ia. 1, 98 N. W. 159; Shevlin *v.* Shevlin, 96 Minn. 398, 105 N. W. 257 (brothers). See Jenkins *v.* Rhodes, 106 Va. 564, 56 S. E. 332.

Relations of confidence presumed to exist between husband and wife. Massey *v.* Rae, 18 N. D. 409, 121 N. W. 75.

13-38 Crawford *v.* Crawford, 134 Ga. 114, 67 S. E. 673 (brothers); Dick *r.* Albers, 243 Ill. 231, 90 N. E. 683; Smith *r.* Brigham, 106 Minn. 91, 118 N. W. 150.

15-40 See State Bk. *r.* Cook, 125 Ia. 111, 100 N. W. 72; Rockford *r.* Barrett, 22 S. D. 83, 115 N. W. 522.

16-42 Vertrees *r.* Head, 138 Ky. 82, 127 S. W. 523; Int. Text-B. Co. *r.* Marvin, 166 Mich. 660, 132 N. W. 437; Sacks *v.* Schimmel, 3 Pa. Super. 426.

16-43 Joseph *r.* Baker, 95 Ark. 150, 128 S. W. 864; Providence J. Co. *r.* Nagel, 157 Cal. 497, 108 P. 312; Brown *r.* Rape, 136 Ga. 584, 71 S. E. 802; Providence J. Co. *r.* Fessler, 145 Ia.

74, 123 N. W. 957; Judd *v.* Walker, 215 Mo. 312, 114 S. W. 979; Batura *v.* McBride, 77 N. J. L. 779, 73 A. 600; Scarsdale P. Co. *v.* Carter, 63 Misc. 271, 116 N. Y. S. 731; Klein *v.* Williams, 123 N. Y. S. 53; Barclay *v.* Deverle, 53 Tex. Civ. 236, 116 S. W. 123. See infra, "Parol Evidence," 335-37. **Rule of estoppel by deed** does not apply where deed obtained by fraud. Goodwin *v.* Fall, 102 Me. 353, 66 A. 727.

16-44 Thomason & Son *v.* Co., 9 Ga. App. 349, 71 S. E. 596; Ah Hoy *v.* Raymond, 19 Haw. 568; Supreme Council *v.* Beggs, 110 Ill. App. 139; Kelty *v.* McPeake, 143 Ia. 567, 121 N. W. 529; Hinkley *v.* Co., 132 Ia. 396, 107 N. W. 629; Folkes *v.* Pratt, 86 Miss. 254, 38 S. 224; Sawyer *v.* Walker, 204 Mo. 133, 102 S. W. 544; Sathre *v.* Rolfe, 31 Mont. 85, 77 P. 431; Rectenbaugh *v.* Co., 22 S. D. 410, 118 N. W. 697; Rochford *v.* Barrett, 22 S. D. 83, 115 N. W. 522; Butler *v.* Anderson (Tex. Civ.), 107 S. W. 656; Lilienthal *v.* Herren, 42 Wash. 209, 84 P. 829.

17-45 Deming *v.* Wallace, 73 Kan. 291, 85 P. 139; Western Mfg. Co. *v.* Cotton, 31 Ky. L. R. 1130, 104 S. W. 758.

17-47 Barrow *v.* Grant, 116 La. 952, 41 S. 220, parol evidence not admissible to show vendee named in a conveyance of realty was not real vendee, since that is not the kind of fraud that causes error.

18-52 See Ranch *v.* Lynch (Del.), 89 A. 134.

18-54 Timmerman *v.* Whiting, 118 Minn. 398, 137 N. W. 9.

18-55 Lumpkin *v.* Foley, 204 Fed. 372, 122 C. C. A. 542; Henderson *v.* Gilliland (Ala.), 65 S. 793; Bruce *v.* Citizens' Bk. (Ala.), 64 S. 82; Morris *v.* Barton (Ala.), 60 S. 172; Dudley *v.* Stansberry, 5 Ala. App. 491, 59 S. 379; Corney *v.* Corney, 108 Ark. 415, 159 S. W. 20; Ferguson *v.* Trust Co., 99 Ark. 45, 137 S. W. 555; In re Yoell's Est., 164 Cal. 540, 129 P. 999; Ranch *v.* Lynch (Del.), 89 A. 134; Stewart & Donohoe *v.* Eng. Co. (Del.), 84 A. 209; Rogers *v.* Rogers, 6 Penne. (Del.), 267, 66 A. 374; Nelson *v.* Hudgel, 23 Ida. 327, 130 P. 85; Koebel *v.* Doyle, 256 Ill. 610, 100 N. E. 154; Mathias *v.* Miller, 164 Ill. App. 113; Board *v.* Wolff, 166 Ind. 325, 76 N. E. 247; Ashwell *v.* Miller (Ind. App.), 103 N. E. 37; Larch *v.* Holz (Ind. App.), 101 N. E. 127; Aubaugh *v.* Alexander (Ia.), 146 N. W. 747; Hessig-Ellis, etc. Co. *v.* Drug Co. (Ia.), 143 N. W. 569; First Nat. Bk. *v.* Osborn (Ia.), 142 N. W. 209; Winfrey's Trustee *v.* Winfrey, 150 Ky. 138, 150 S. W. 42; Spiller *v.* Bechard, 110 Me. 221, 85 A. 752; Ayers *v.* Farwell, 196 Mass. 349, 82 N. E. 35; Donnelly *v.* Lyons, 173 Mich. 515, 139 N. W. 246; Raymond *v.* McKenna, 147 Mich. 35, 110 N. W. 121; Troll *v.* City (Mo.), 168 S. W. 167; Kansas City *v.* Woerishoeffer, 249 Mo. 1, 155 S. W. 779; Avery Co. *v.* Powell, 174 Mo. App. 628, 161 S. W. 335; Donlon *v.* Donlon, 154 App. Div. 212, 138 N .Y. S. 1039; Klein *v.* Gallin, 141 N. Y. S. 831; Buchall *v.* Higgins, 109 App. Div. 607, 96 N. Y. S. 241; Bellettiere *v.* Lawlor, 47 Misc. 161, 93 N. Y. S. 471; Shebley *v.* Quatman, 66 Or. 441, 134 P. 68; Ball *v.* Danton, 64 Or. 184, 129 P. 1032; Addleman *v.* L. & H. Co., 242 Pa. 587, 89 A. 674; Pocono, etc. I. Co. *v.* Co., 214 Pa. 640, 64 A. 398; Barber *v.* Benner, 17 Pa. C. C. 376; First Nat. Bk. *v.* Harvey, 29 S. D. 284, 137 N. W. 365 (cit. the text); Allen *v.* Kane (Wash.), 140 P. 534.

See In re Walden, etc. Co., 199 Fed. 315; Mut. L. Ins. Co. *v.* Owen (Ark.), 164 S. W. 720; McLaughlin *v.* Thomas, 86 Conn. 252, 85 A. 370; Coffey *v.* Scott, 66 Or. 465, 135 P. 88.

20-58 Lumpkin *v.* Foley, 204 Fed. 372, 122 C. C. A. 542; In re Hawks, 204 Fed. 309; U. S. *v.* Carter, 172 Fed. 1, 96 C. C. A. 587; Hardesty *v.* U. S., 168 Fed. 25, 93 C. C. A. 417; Gonzales *v.* Tucker, 101 Ark. 558, 142 S. W. 824; Russell *v.* Brooks, 92 Ark. 509, 122 S. W. 649; Providence J. Co. *v.* Nagel, 157 Cal. 497, 108 P. 312; Hopkins *v.* White, 20 Cal. App. 234, 128 P. 780; Elliott *v.* P., 56 Colo. 236, 138 P. 39; Kronfeld *v.* Missal, 87 Conn. 491, 89 A. 95; McLaughlin *v.* Thomas, 86 Conn. 252, 85 A. 370; Ranch *v.* Lynch (Del.), 89 A. 134; Rogers *v.* Rogers, 6 Penne. (Del.), 267, 66 A. 374; Cohen *v.* Friedman, 259 Ill. 416, 102 N. E. 815; Burnham *v.* Roth, 244 Ill. 344, 91 N. E. 472; Fabian *v.* Traeger, 215 Ill. 220, 74 N. E. 131; Gandy *v.* Co. (Ind. App.), 90 N. E. 915; Tyler *v.* Davis, 37 Ind. App. 557, 75 N. E. 3; Hessig-Ellis, etc. Co. *v.* Drug Co. (Ia.), 143 N. W. 569; Johnson *v.* Carter, 143 Ia. 95, 120 N. W. 320; First Cong. Church *v.* Terry, 130 Ia. 513, 107 N. W. 305; Leach *v.* R. Co., 137 Ky.

292, 125 S. W. 708; Price *v.* Rosenberg, 200 Mass. 36, 85 N. E. 887; Hale *v.* Harris, 169 Mich. 172, 134 N. W. 1111; McNaughton *v.* Smith, 136 Mich. 368, 99 N. W. 382; Zehnder *v.* Stark, 248 Mo. 39, 154 S. W. 92; Birch Tree State Bk. *v.* Dowler, 167 Mo. App. 373, 151 S. W. 784; Banta *v.* Hubbell, 167 Mo. App. 38, 150 S. W. 1089; Mosby *v.* Co., 91 Mo. App. 500; Kilpatrick *v.* Wiley, 197 Mo. 123, 159, 95 S. W. 213; Buchanan *v.* Buchanan, 73 N. J. Eq. 544, 68 A. 780; Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295; Ash *v.* Meeks, 134 App. Div. 154, 118 N. Y. S. 821; Tuttle *v.* Tuttle, 146 N. C. 484, 59 S. E. 1008; Clough *v.* Dawson (Or.), 138 P. 233; Porter *v.* O'Donovan, 65 Or. 1, 130 P. 393; Phipps *v.* Willis, 53 Or. 190, 96 P. 866; Williamson *v.* Co., 42 Or. 153, 70 P. 387, 532; Quirk *v.* Ins. Co., 12 Pa. Super. 250; Addleman *v.* L. & H. Co., 242 Pa. 587, 89 A. 674; Rochford *v.* Barrett, 22 S. D. 83, 115 N. W. 522; McIndoo *v.* Wood (Tex. Civ.), 162 S. W. 488; Foix *v.* Moeller (Tex. Civ.), 159 S. W. 1048; Morrison *v.* Cotton (Tex. Civ.), 152 S. W. 866; Anderson *v.* Crow (Tex. Civ.), 151 S. W. 1080; Reed *v.* Holloway (Tex. Civ.), 127 S. W. 1189; Smythe *v.* R. Co. (Vt.), 90 A. 901; Redwood *v.* Rogers, 105 Va. 155, 53 S. E. 6; Harvey *v.* Nutter, 66 W. Va. 208, 66 S. E. 363; Deepwater Council *v.* Renick, 59 W. Va. 343, 53 S. E. 552.

See In re Walden, etc. Co., 199 Fed. 315; Hall *v.* Santangelo, 178 Ala. 447, 60 S. 168; Powers *v.* Phillips, 166 Ill. App. 407; Combs *v.* Miller, 149 Ky. 546, 149 S. W. 906.

21-59 Declarations of plaintiff's testator concerning his land may be proved in favor of his devisee. Foote *v.* Brown, 81 Conn. 218, 70 A. 699, statute.

21-60 Southern States Fire, etc. Ins. Co. *v.* De Long, 178 Ala. 110, 59 S. 61.

22-62 Hall *v.* Santangelo, 178 Ala. 447, 60 S. 168; Mann *v.* Darden, 6 Ala. App. 555, 60 S. 454; Dudley *v.* Stansberry, 5 Ala App. 491, 59 S. 379; Fabian *v.* Traeger, 215 Ill. 220, 74 N. E. 131; Weigand *v.* Cannon, 118 Ill. App. 635; Woods *v.* Shearer (Ind. App.), 105 N. E. 917; Brakefield *v.* Shelton, 76 Kan. 451, 92 P. 709; Gantt *v.* Brown, 238 Mo. 560, 142 S. W. 422; McKibbin *v.* Day, 74 Neb. 424, 104 N. W. 752; Schock *v.* Co., 222 Pa. 271, 71 A. 94; Troxell *v.* Malin, 9 Pa. Super. 483; Schoeneman *v.* Weill, 3 Pa. Super. 119; Dantzler *v.* Cox, 75 S. C. 334, 55 S. E. 774; Sullivan & Co. *v.* Ramsey (Tex. Civ.), 155 S. W. 580; Johns *v.* Ins. Co., 76 Wash. 349, 136 P. 120.

"It is indispensable to truth and to a proper administration of justice that it should be so." Jackson *v.* S., 2 Ala. App. 226, 57 S. 110.

"Every incident of a fraudulent transaction is admissible, whenever any part of that transaction is called in question in judicial proceedings." Finberg *v.* Robert, 85 Conn. 565, 84 A. 369.

23-64 Lenoch *v.* Yoss (Ia.), 136 N. W. 542; Kurinsky *v.* Lynch, 201 Mass. 28, 87 N. E. 70; Ward *v.* Cook, 158 Mich. 283, 122 N. W. 785; Gasser *v.* Wall, 115 Minn. 59, 131 N. W. 850; Schock *v.* Co., 222 Pa. 271, 71 A. 94. See Stuke *v.* Glaser, 223 Ill. 316, 79 N. E. 105 (any competent evidence admissible to show fraud in a will); C. *v.* Dow (Mass.), 105 N. E. 995; Hankins *v.* F. & M. Bk. (Okla.), 141 P. 272.

Written order for goods alleged to have been fraudulently sold, admissible. Louisiana Co. *v.* Co., 73 Ark. 542, 84 S. W. 1047.

Correspondence between defendant and a third person relating to subject-matter, admissible. Sawyer *v.* Walker, 204 Mo. 133, 102 S. W. 544.

Contract for purchase of land may, in court's discretion, be excluded where its execution is admitted and only issue is as to actionable deceit. Luncheon *v.* Woeknitz, 21 S. D. 285, 111 N. W. 632.

Failure of a party to testify is to be considered. Dantzler *v.* Cox, 75 S. C. 334, 55 S. E. 774.

Existence of disease in animals, concerning which no representations made, cannot be proved. Power *v.* Turner, 37 Mont. 521, 97 P. 950.

23-65 Strong *v.* Repide, 213 U. S. 419; Barnsdall *v.* O'Day, 134 Fed. 828, 67 C. C. A. 278; Walker *v.* U. S., 152 Fed. 111, 81 C. C. A. 329; Kilpatrick *v.* Wiley, 197 Mo. 123, 159, 95 S. W. 213; Farmers Bk. *v.* Yenney, 73 Neb. 338, 102 N. W. 617; Collins *v.* Chipman, 41 Tex. Civ. 563, 95 S. W. 666.

24-66 Schagun *v.* Co., 162 Fed. 209, 89 C. C. A. 189, clause in contract giving purchaser right to reject machine negatives intent to defraud.

24-67 Fabian *v.* Traeger, 215 Ill. 220,

74 N. E. 131; Kelty *v.* McPeake, 113 Ia. 567, 121 N. W. 529. See McCaskey Reg. Co. *v.* Bennett, 6 Ala. App. 185, 60 S. 541; Chicago & A. R. Co. *v.* Jennings, 217 Ill. 494, 75 N. E. 560; Kempe *v.* Bennett, 134 Ia. 247, 111 N. W. 926; Leach *v.* R. Co., 137 Ky. 292, 125 S. W. 708; Price *v.* Rosenberg, 200 Mass. 36, 85 N. E. 887; Walsh *v.* Taitt, 142 Mich. 127, 105 N. W. 544; Carter *v.* Gardner, 95 Miss. 651, 48 S. 615.

Mental weakness of person alleged to have been defrauded may be shown. Bloomer *v.* Gray, 10 Ind. App. 326, 37 N. E. 819.

Promise to employ plaintiff as officer in new corporation may be shown. McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668.

25-68 Eastern T. & B. Co. *v.* Cunningham, 103 Me. 455, 70 A. 17; Fitzgerald *v.* Frankel, 109 Va. 603, 64 S. E. 941.

25-69 Leach *v.* R. Co., 137 Ky. 292, 125 S. W. 708.

25-70 Del Vecchio *v.* Savelli, 10 Cal. App. 79, 101 P. 32, subsequent profits of business.

25-71 Long-L. H. Co. *v.* Ewing, 8 Ala App. 657, 62 S. 341; Springhetti *v.* Hahnewald, 54 Colo. 383, 131 P. 266; American B. & L. Assn. *v.* Fowler, 46 Ind. App. 285, 88 N. E. 118 (agent's statement of opinions); City Nat. Bk. *v.* Jordan, 139 Ia. 499, 117 N. W. 758.

Declaration as res gestae.—Bolds *v.* Woods, 9 Ind. App. 657, 36 N. E. 933.

26-72 Ward *v.* Cook, 158 Mich. 283, 122 N. W. 785.

26-73 Larson *v.* Thoma, 143 Ia. 338, 121 N. W. 1059; Johnson County S. Bk. *v.* Redfearn, 141 Mo. App. 386, 125 S. W. 224; McAdams *v.* McAdams, 80 O. St. 232, 88 N. E. 542 (grantor's declarations admissible to rebut presumption of fraud on grantee's part; not competent to show fraud if made in latter's absence). See Western C. etc. Co. *v.* Anderson, 45 Tex. Civ. 513, 101 S. W. 1061. But see Walsh *v.* Paine, 123 Minn. 185, 143 N. W. 718.

Statements made to other creditors at about the same time, admissible. Storms *v.* Horton, 77 Conn. 334, 59 A. 421. Statements made by agent of one party to agent of other, admissible. Johnston County S. Bk. *v.* Chase, 151 N. C. 108, 65 S. E. 745.

26-74 Tooker *v.* Alston, 159 Fed. 599, 86 C. C. A. 425, (similar statements to others); McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668 (declarations of coconspirator); Weil *v.* Cohn, 4 Pa. Super. 443. But see Pierce *v.* Cole, 110 Me. 134, 85 A. 567.

26-75 See Parker *v.* U. S., 203 Fed. 950, 122 C. C. A. 252.

27-76 Colonial S. Co. *v.* Larson, 47 Colo. 25, 105 P. 861; Mutual R. L. Ins. Co. *v.* Seidel, 52 Tex. Civ. 278, 113 S. W. 945; Belka *v.* Allen, 82 Vt. 456, 74 A. 91.

Declarations by decedent in absence of parties, inadmissible. Lusse *v.* Lusse, 140 Mo. App. 497, 120 S. W. 114.

27-77 Bennett *v.* McLeod, 10 West. L. Rep. (Can.) 56; Czarnecki *v.* Dereckter, 81 Conn. 338, 71 A. 354; Gillespie *v.* Co., 236 Ill. 188, 86 N. E. 219; Mutual Mfg. Co. *v.* Moore, 137 Ky. 130, 125 S. W. 267.

27-78 In re Cramer, 175 Fed. 879.

28-82 Ireland *v.* Scharpenberg, 54 Wash. 558, 103 P. 801. See Donnelly *v.* Co., 102 Md. 1, 61 A. 301; Hines *v.* Royce, 127 Mo. App. 718, 106 S. W. 1091; Keeler *v.* Seaman, 47 Misc. 292, 95 N. Y. S. 920.

29-84 Edward Malley Co. *v.* Button, 77 Conn. 571, 60 A. 125; Hartford L. Ins. Co. *v.* Hope, 40 Ind. App. 354, 81 N. E. 595, 1088; Power *v.* Turner, 37 Mont. 521, 97 P. 950; Crompton *v.* Beedle, 83 Vt. 287, 75 A. 331. Failure of vendor to invite tests of quality of goods which could not otherwise be determined, relevant. Ward *v.* Cook, 158 Mich. 283, 122 N. W. 785.

29-85 Strong *v.* Repide, 213 U. S. 419; Stewart *v.* Joyce, 201 Mass. 301, 87 N. E. 613; Phelps *v.* Jones, 141 Mo. App. 223, 124 S. W. 1067; Moehlenpah *v.* Mayhew, 138 Wis. 561, 119 N. W. 826. See Tevis *v.* Ryan, 233 U. S. 273, 34 Sup. Ct. 481.

29-86 Concealment of fact by agent that at time of becoming such, he had a probable customer for principal's property, not evidence of fraud. Larson *v.* Thoma, 143 Ia. 338, 121 N. W. 1059.

30-87 Kelty *v.* McPeake, 143 Ia. 567, 121 N. W. 529.

30-89 See In re Cramer, 175 Fed. 879.

31-90 Carter *v.* Gardner, 95 Miss. 651, 48 S. 615; Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268.

32-98 Berenson *v.* Conant, 214 Mass. 127, 101 N. E. 60.

33-11 Tooker *v.* Alston, 159 Fed. 599, 86 C. C. A. 425; Exchange Bk. *v.* Moss, 149 Fed. 340, 79 C. C. A. 278; Charles *v.* S., 58 Fla. 17, 50 S. 419; Saffold *v.* S., 11 Ga. App. 329, 75 S. E. 338; Fabian *v.* Traeger, 215 Ill. 220, 74 N. E. 131; Standard Mfg. Co. *v.* Brons, 118 Ill. App. 632; Hartford L. Ins. Co. *v.* Hope, 40 Ind. App. 354, 81 N. E. 595, 1088; McCombs *v.* Ins. Co. (Ia.), 141 N. W. 327; Cahill *v.* Applegarth, 98 Md. 493, 56 A. 794; Ward *v.* Cook, 158 Mich. 283, 122 N. W. 785; Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295; Neumeyer *v.* Hooker, 131 App. Div. 592, 116 N. Y. S. 204; Ettlinger *v.* Weil, 94 App. Div. 291, 87 N. Y. S. 1049, *rev.* on other points, 184 N. Y. 179, 77 N. E. 31; S. *v.* Talley, 77 S. C. 99, 57 S. E. 618; Loftus *v.* Sturgis (Tex. Civ.), 167 S. W. 14; Ogden Val. etc. Co. *v.* Lewis (Utah), 125 P. 687.

See C. *v.* Dow (Mass.), 105 N. E. 995; Carnahan *v.* Moore, 70 Wash. 623, 127 P. 195. *Comp.* Mahler *v.* Beishline, 46 Colo. 603, 105 P. 874.

35-12 P. *v.* Donaldson, 255 Ill. 19, 99 N. E. 62; Loftus *v.* Sturgis (Tex. Cr.), 167 S. W. 14.

35-13 Ogden Val. etc. Co. *v.* Lewis (Utah), 125 P. 687.

35-14 McCombs *v.* Ins. Co. (Ia.), 141 N. W. 327; Murray *v.* Moore, 104 Va. 707, 52 S. E. 381. See Saveland *v.* Connors, 121 Wis. 28, 98 N. W. 933.

Fraud of others practiced upon same plaintiff, incompetent. Obst *v.* Unnerstall, 184 Mo. 383, 83 S. W. 450.

Incompetent for the purpose of corroborating plaintiff or to prove guilty knowledge in defendant of frauds of its agents. Buckley *v.* Co., 113 Ill. App. 210.

Not material as to damages. Pitchel *v.* Webber, 104 Me. 401, 71 A. 1031.

35-15 See Hobbs *v.* Boatright, 195 Mo. 693, 93 S. W. 934.

35-17 Stewart *v.* Wright, 147 Fed. 321, 77 C. C. A. 499.

36-19 Edward Malley Co. *v.* Button, 77 Conn. 571, 60 A. 125.

37-24 McCombs *v.* Ins. Co. (Ia.), 141 N. W. 327; Benson *v.* Murton, 66 Or. 199, 133 P. 340, 1189; Houston, etc. R. Co. *v.* Johnson, 103 Tex. 320, 127 S. W. 539; Zavala, etc. Co. *v.* Tolbert (Tex. Civ.), 165 S. W. 29. See Potterton *v.* Condit (Mass.), 105 N. E. 443.

38-27 Barrell *v.* Dickinson, 82 Vt. 551, 74 A. 234. *Comp.* Fabian *v.* Traeger, 215 Ill. 220, 74 N. E. 131.

39-33 In re Kyte, 174 Fed. 867.

Report made to state officer is on same footing as if made to mercantile agency. Dime S. Bk. *v.* Fletcher, 158 Mich. 162, 122 N. W. 540.

Statement by bankrupt.—In re Foster, 186 Fed. 254.

40-34 Mills *v.* Brill, 105 App. Div. 389, 94 N. Y. S. 163; Katzenstein *v.* Co., 41 Tex. Civ. 106, 91 S. W. 360.

40-35 See supra, "Bankruptcy," 232-78.

40-40 Mills *v.* Brill, supra.

41-42 Hot Springs R. Co. *v.* McMillan, 76 Ark. 88, 88 S. W. 846.

41-45 McDonough *v.* Williams, 86 Ark. 600, 112 S. W. 164; Solis *v.* Williams, 205 Mass. 350, 91 N. E. 148.

42-46 See Hibbets *v.* Threlkeld, 137 Ia. 164, 114 N. W. 1045; Thompson *v.* Randall, 28 Ky. L. R. 716, 90 S. W. 251.

42-47 Richards *v.* Sutter, 94 Ark. 621, 125 S. W. 1018. See Lindley *v.* Kemp, 38 Ind. App. 355, 76 N. E. 798; New England L. & T. Co. *v.* Browne, 177 Mo. 412, 76 S. W. 954.

42-48 See Mattauch *v.* Walsh, 136 Ia. 225, 113 N. W. 818, members of same church.

42-50 Semper *v.* Englehart, 140 Ia. 286, 118 N. W. 318 (age and physical condition of grantor); Lukert *v.* Eldridge (Mont.), 139 P. 999 (*cit.* 6 Encyclopedia of Evidence 42). See Capital F. Ins. Co. *v.* Montgomery, 81 Ark. 508, 99 S. W. 687; Prater *v.* Peters, 31 Ky. L. R. 1311, 105 S. W. 102; Bilafsky *v* Ins. Co., 192 Mass. 504, 78 N. E. 534 (relevant solely on issue of reliance); Obst *v.* Unnerstall, 184 Mo. 383, 83 S. W. 450.

42-51 Semper *v.* Englehart, 140 Ia. 286, 118 N. W. 318.

43-56 Fabian *v.* Traeger, 215 Ill. 220, 74 N. E. 131; C. *v.* Dow (Mass.), 105 N. E. 995; Solis *v.* Williams, 205 Mass. 350, 91 N. E. 148; Hines *v.* Royce, 127 Mo. App. 718, 106 S. W. 1091. See C. *v.* Dow (Mass.), 105 N. E. 995.

44-59 Insolvency at time of receipt of goods ordered several months previously, not evidence of fraud. Ayers *v.* Farwell, 196 Mass. 349, 82 N. E. 35.

45-60 Mills *v.* Brill, 105 App. Div. 389, 94 N. Y. S. 163, testimony of witnesses they would have lent defendant money, incompetent.

45-61 Betts *v.* Howard (Ia.), 118 N. W. 281.

45-62 Turner *v.* Washburn, 25 Ky. L. R. 2198, 80 S. W. 460; Johnson *v.* Woodworth, 134 App. Div. 715, 119 N. Y. S. 146; Bruner *v.* Cobb, 36 Okla. 228, 131 P. 165; Moore *v.* Miller (Tex. Civ.), 155 S. W. 573. See Covington *v.* Shinkle, 25 Ky. L. R. 73, 74 S. W. 652; Odd Fellows Assn. *v.* Dayton, 25 Ky. L. R. 665, 76 S. W. 181.

45-63 Stevens *v.* Ozburn, 1 Tenn. Ch. App. 213.

45-64 Steinfeld *v.* Nielsen, 12 Ariz. 381, 100 P. 1094; Worth *v.* Watts, 74 N. J. Eq. 609, 70 A. 357.

Proof as to inadequacy must be limited to time contract made. Steinfeld *v.* Nielsen, 12 Ariz. 381, 100 P. 1094.

45-65 Richards *v.* Sutter, 94 Ark. 621, 125 S. W. 1018; Beach *v.* Wilton, 244 Ill. 413, 91 N. E. 492; Worth *v.* Watts, 74 N. J. Eq. 609, 70 A. 357; Beacon, etc. Co. *v.* Bowen (R. I.), 82 A. 81; Klaveness *v.* Freese (S. D.), 145 N. W. 561; Belka *v.* Allen, 82 Vt. 456, 74 A. 91 (offer to resell property at one-half stipulated price, competent though made two years after sale); Deepwater C. *v.* Renick, 59 W. Va. 343, 53 S. E. 552; Moehlenpah *v.* Mayhew, 138 Wis. 561, 119 N. W. 826.

46-66 Johnson *v.* Woodworth, 134 App. Div. 715, 119 N. Y. S. 146.

46-67 Steinfeld *v.* Nielsen, 12 Ariz. 381, 100 P. 1094, applying rule of text where parties had equal knowledge of value.

47-70 Skeels *v.* Porter (Ia.), 145 N. W. 332; Vaupel *v.* Mulhall, 141 Ia. 365, 118 N. W. 272, *appr.* Likes *v.* Baer, 10 Ia. 89) stated in corresponding note in original); Ganow *v.* Ashton, 32 S. D. 458, 143 N. W. 383.

Market value of incumbered property is basis upon which adequacy of consideration tested. Koppe *v.* Koppe, 57 Tex. Civ. 204, 122 S. W. 68.

47-71 Schwitters *v.* Springer, 236 Ill. 271, 86 N. E. 102 (income producing capacity); Wotesbek *v.* Newman, 151 Wis. 365, 138 N. W. 1000.

Evidence that mortgage was for full value, competent. Nagel *v.* Davis (Ia.), 143 N. W. 1087.

47-72 Financial condition of corporation respecting which representations made may be shown. Thayer *v.* Schley, 137 App. Div. 166, 121 N. Y. S. 1064.

48-73 Drake *v.* Holbrook, 25 Ky. L. R. 1489, 78 S. W. 158.

All facts and circumstances connected with the letting and performance of contract for public work are to be considered in ascertaining whether price excessive. Expert testimony is not convincing if it does not regard them. Burke *v.* Cleveland, 6 O. N. P. (N. S.) 225.

49-75 Pierce *v.* Cole, 110 Me. 134, 85 A. 567; Wilson, etc. Co. *v.* Atkinson, 162 N. C. 298, 78 S. E. 212; Luckenbach *v.* Thomas (Tex. Civ.), 166 S. W. 99. See vol. 3, pp. 6, 12, notes 9, 22, and supplement thereto.

49-76 Luckenbach *v.* Thomas (Tex. Civ.), 166 S. W. 99. See vol. 3, p. 6, n. 9, and supplement thereto.

50-80 Luckenbach *v.* Smith, 14 Cal. App. 139, 111 P. 266; Chandler-Blackstad Merc. Co. *v.* Price & Co., 10 Ga. App. 383, 73 S. E. 413; Gasser *v.* Wall, 115 Minn. 59, 131 N. W. 850; Tuttle *v.* Tuttle, 146 N. C. 484, 59 S. E. 1008.

Evidence held sufficient. — Miller *v.* Bricker, 117 Minn. 394, 136 N. W. 14.

Evidence insufficient.—Adams *v.* S., 10 Ga. App. 801, 74 S. E. 95; Burke *v.* Berry, 152 Ia. 110, 131 N. W. 753; Diamond *v.* Shriver, 114 Md. 643, 80 A. 217; Wann *v.* Scullin, 235 Mo. 629, 139 S. W. 425; Allen Kingston Motor Car Co. *v.* Bank, 145 App. Div. 294, 129 N. Y. S. 1070; Lunschen *v.* Barnhart, 27 S. D. 449, 131 N. W. 501; Cooper *v.* Fisher, 63 Wash. 489, 115 P. 1041.

50-81 Morrison *v.* Martin, 84 Conn. 628, 80 A. 716; Chicago C. R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195; Tyler *v.* Davis, 37 Ind. App. 557, 75 N. E. 3; Gipe *v.* R. Co., 41 Ind. App. 156, 82 N. E. 471; New *v.* Jackson, 50 Ind. App. 120, 95 N. E. 328; Chesapeake, etc. Co. *v.* Magowan, 147 Ky. 422, 144 S. W. 80; Hawley *v.* Wicker, 117 App. Div. 638, 102 N. Y. S. 711; Robinson *v.* Roberts, 20 Okla. 787, 95 P. 246; Clough *v.* Dawson (Or.), 138 P. 233; Porter *v.* O'Donovan, 65 Or. 393, 130 P. 393; Kabat *v.* Moore, 48 Or. 191, 85 P. 506; Fry *v.* Co., 219 Pa. 514, 69 A. 56; McDoel *v.* Jordan (Tex. Civ.), 151 S. W. 1178.

See Drobney *v.* Steel Co., 204 Fed. 11, 122 C. C. A. 325.

Whether representation is opinion or fact is for jury. Williamson *v.* Harris, 167 Mo. App. 347, 151 S. W. 500.

What are or are not material inducements is for jury. Kehl *v.* Abram, 210 Ill. 218, 71 N. E. 347.

50-82 Scott *v.* Burnight, 131 Ia. 507, 107 N. W. 422; Mattauch *v.* Walsh, 136 Ia. 225, 113 N. W. 818; Patten *v.* Field, 108 Me. 299, 81 A. 77; Mosby *v.* Co., 91 Mo. App. 500 (slight circumstances warrant submission).

51-83 In re Mfg. Co., 173 Fed. 480, 97 C. C. A. 486; McNaughton *v.* Smith, 136 Mich. 368, 99 N. W. 382; Hubbard *v.* McLean, 122 Wis. 75, 99 N. W. 465.

51-84 In re Hawks, 204 Fed. 309; King *v.* Lamborn, 186 Fed. 21, 108 C. C. A. 123; Wendling L. Co. *v.* Co., 153 Cal. 411, 95 P. 1029; Magaw *v.* Huntley, 36 App. Cas. (D. C.) 26; Nevans *v.* Dickinson Bros., 138 Ky. 760, 129 S. W. 100; Willoughby *v.* Pope, 101 Miss. 808, 58 S. 705; Barr *v.* Sofranski, 130 App. Div. 783, 115 N. Y. S. 533; Addleman *v.* L. & H. Co., 242 Pa. 587, 89 A. 674; Sebring *v.* Brickley, 7 Pa. Super. 198; Dickenson *v.* Ramsey, 115 Va. 521, 79 S. E. 1025; Deepwater C. *v.* Renick, 59 W. Va. 343, 53 S. E. 552; Mullen *v.* Searls Co., 69 W. Va. 790, 72 S. E. 1089; Sansom *v.* Wolford, 60 W. Va. 380, 55 S. E. 1020; Hubbard *v.* McLean, 122 Wis. 75, 99 N. W. 465; Dohmen Co. *v.* Ins. Co., 96 Wis. 38, 71 N. W. 69; Miles *v.* Co., 124 Wis. 278, 102 N. W. 555. See Board *v.* Robbins, 82 Conn. 623, 74 A. 938.

Proof held insufficient.—Giers *v.* Hudson, 102 Ark. 232, 143 S. W. 916; Grayson-McLeod Lumber Co. *v.* Slack, 102 Ark. 79, 143 S. W. 581.

52-85 Am. H. & D. Co. *v.* Hall, 110 Ill. App. 463; Latta *v.* Coffeen, 140 Ia. 515, 118 N. W. 881; Baker *v.* Mathew, 137 Ia. 410, 115 N. W. 15; Long *v.* Davis, 136 Ia. 734, 114 N. W. 197; Elwood *v.* Tiemair, 91 Kan. 842, 139 P. 362; Gehlert *v.* Quinn, 35 Mont. 451, 90 P. 168; Tuttle *v.* Tuttle, 146 N. C. 464, 59 S. E. 1008; Virginia Ins. Co. *v.* Hogue, 105 Va. 355, 54 S. E. 8. And see Maginnis *v.* Storrs, 152 Ill. App. 454.

And sufficient to satisfy court. Dorrington *v.* Carpenter, 171 Mich. 652, 137 N. W. 538.

As against purchaser from plaintiff's vendee latter's conclusion he had not sold the land is not proof of fraud. Salmen B. & L. Co. *v.* Peterson, 121 La. 528, 46 S. 616.

52-86 In re Hawks, 204 Fed. 309; State Bk. *v.* Emge (Ia.), 108 N. W. 530; Adkins *v.* Stewart (Ky.), 166 S. W. 984; Hurst *v.* Duff, 156 Ky. 218, 160 S. W. 953; Winfrey's Trustee *v.* Winfrey, 150 Ky. 138, 150 S. W. 42; Gormley *v.* Dangel, 214 Mass. 5, 100 N. E. 1084; Avery Co. *v.* Powell, 174 Mo. App. 628, 161 S. W. 335.

See Duryea *v.* Zimmerman, 121 App. Div. 560, 106 N. Y. S. 237.

53-87 Colwell *v.* Neufeld (Can.), 11 West. L. Rep. 583 ("clearest and most convincing"); Drew *v.* Co. (Ala.), 65 S. 71; Nelson *v.* Hudgel, 23 Ida. 327, 130 P. 85; Gillespie *v.* Co., 236 Ill. 188, 86 N. E. 291; Detrick *v.* Patterson (Ia.), 141 N. W. 325; Betts *v.* Howard (Ia.), 118 N. W. 281; Liberty *v.* Haines, 103 Me. 182, 68 A. 738; Strout *v.* Lewis, 104 Me. 65, 71 A. 137; Henderson *v.* Ressor, 141 Mo. App. 540, 126 S. W. 203; Griffin *v.* Co., 140 N. C. 514, 53 S. E. 307; Moore *v.* Adams, 26 Okla. 48, 108 P. 392; Shebley *v.* Quatman, 66 Or. 441, 134 P. 68; Redwood *v.* Rogers, 105 Va. 155, 53 S. E. 6; Doyle *v.* Langdon (Wash.), 141 P. 352; Allen *v.* Kane (Wash.), 140 P. 534; Bahrs *v.* Runkle (Wash.), 139 P. 637; Uhlbright *v.* Mulcahy, 78 Wash. 9, 138 P. 314; Pierce *v.* Elec. Co., 78 Wash. 167, 138 P. 666; In re Ball's Will, 153 Wis. 27, 141 N. W. 8; Schiefelbein *v.* Co., 139 Wis. 612, 120 N. W. 398.

See Barnes *v.* Willis, 65 Fla. 363, 61 S. 828.

"**Clear and convincing proof**" means proof sufficient to overcome presumption of innocence. Virginia Ins. Co. *v.* Hogue, 105 Va. 355, 54 S. E. 8.

53-88 Lepley *v.* Anderson (Wis.), 125 N. W. 433 (degree of certainty produced by clear and satisfactory evidence); Bowe *v.* Gage, 127 Wis. 245, 106 N. W. 1074.

53-89 Zehnder *v.* Stark, 248 Mo. 39, 154 S. W. 92.

53-90 Direct testimony of plaintiff sufficient. Bilafsky *v.* Ins. Co., 192 Mass. 504, 78 N. E. 534; Ellis *v.* Ellis, 1 Tenn. Ch. 198 (though uncorroborated).

54-91 Tanton *v.* Martin, 80 Kan. 22, 101 P. 461; Int. Harv. Co. *v.* Fleming, 109 Me. 104, 82 A. 843; Hodges *v.* Wilson, 165 N. C. 233, 81 S. E. 340. See Maginnis *v.* Storrs, 152 Ill. App. 454; Norton *v.* Bruce, 77 Kan. 597, 95 P. 389; Owen *v.* U. S. Sur. Co., 38 Okla. 123, 131 P. 1091. But see In re Hawks, 204 Fed. 309.

54-92 Brooks *v.* Culver, 168 Mich. 436, 134 N. W. 470.

54-94 Montgomery M. Mfg. Co. *v.* Leith, 162 Ala. 246, 50 S. 210; Gehlert

v. Quinn, 35 Mont. 451, 90 P. 168 (clear and distinct).

55-97 Am. H. & D. Co. *v.* Hall, 110 Ill. App. 463; McNaughton *v.* Smith, 136 Mich. 368, 99 N. W. 382; Walsh *v.* Taitt, 142 Mich. 127, 105 N. W. 544. *Comp.* Bowe *v.* Gage, 127 Wis. 245, 106 N. W. 1074.

55-1 Wann *v.* Scullin, 210 Mo. 429, 109 S. W. 688.

To set aside a judgment fraud must be established by clear, strong, and cogent evidence, leaving no room for reasonable doubt of its existence. Lieber *v.* Lieber, 239 Mo. 1, 143 S. W. 458.

Presumptive evidence may establish fraud. Buchanan *v.* Buchanan, 73 N. J. Eq. 544, 68 A. 780.

Strong evidence of a convincing nature, necessary. Western Mfg. Co. *v.* Cotton, 31 Ky. L. R. 1130, 104 S. W. 758.

56-2 Crane *v.* Schaefer, 140 Ill. App. 647, 657; *dist.* P. *v.* Sullivan, 218 Ill. 419, 75 N. E. 1005; Tuttle *v.* Tuttle, 146 N. C. 484, 59 S. E. 1008; Virginia Ins. Co. *v.* Hogue, 105 Va. 355, 54 S. E. 8.

Execution of judgment not restrained unless cause therefor is shown "beyond all reasonable controversy by evidence clear, convincing and satisfactory." Boring *v.* Ott, 138 Wis. 260, 119 N. W. 865.

56-5 U. S. *v.* Collett, 159 Fed. 932, 87 C. C. A. 460.

56-9 U. S. *v.* Collett, supra; Mastin *v.* Noble, 157 Fed. 506, 85 C. C. A. 98 (must be clear, unequivocal and convincing); Langley *v.* Fitzgerald, 43 Colo. 301, 95 P. 923 ("most clear and convincing proof").

Negative allegation may be supported by less proof than an affirmative one. Del Vecchio *v.* Savelli, 10 Cal. App. 79, 101 P. 32.

57-11 Making of representation evidence of the slight value of the property competent to prove alleged representation not made. Aldrich *v.* Scribner, 146 Mich. 609, 109 N. W. 1121. But under statute of frauds oral evidence is inadmissible to prove making of false representation as to character, conduct or credit of third person. Knight *v.* Rawlings, 205 Mo. 412, 104 S. W. 38. See Getchell *v.* Dusenbury, 145 Mich. 197, 108 N. W. 723. But where corporation whose credit misrepresented was only an instrument in the scheme to defraud parol evidence was received. McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668.

Admissions.—Making the representation may be proved by admissions in pleadings. Crandall *v.* Parks, 152 Cal. 772, 93 P. 1018.

57-12 Stewart *v.* Fleming, 105 Ark. 37, 150 S. W. 128; Barclay *v.* Deyerle, 53 Tex. Civ. 236, 116 S. W. 123 (negative); Kathan *v.* Comstock, 140 Wis. 427, 122 N. W. 1044. See In re Mfg. Co., 173 Fed. 480, 97 C. C. A. 486; Zagarino *v.* Kurzrok, 135 App. Div. 763, 119 N. Y. S. 907; Howe *v.* Martin, 23 Okla. 561, 102 P. 128; Buchanan *v.* Burnett, 102 Tex. 492, 119 S. W. 1141.

Intent must be proved except in equity actions for rescission, etc. Hartford L. Ins. Co. *v.* Hope, 40 Ind. App. 354, 81 N. E. 595, 1088.

58-13 Kerfoot *v.* Yeo (Can.), 11 West. L. Rep. 355; Vincent *v.* Corbett, 94 Miss. 46, 47 S. 641; Peters *v.* Lohman, 171 Mo. App. 465, 156 S. W. 783; Spead *v.* Tomlinson, 73 N. H. 46, 59 A. 376; Mayor *v.* Co., 77 N. J. L. 732, 73 A. 484 (intent to deliver less quantity of coal than ordered); Buchall *v.* Higgins, 109 App. Div. 607, 96 N. Y. S. 241; Duryea *v.* Zimmerman, 121 App. Div. 560, 106 N. Y. S. 237; Moran *v.* Brown, 113 N. Y. S. 1038; King *v.* Howeth & Co. (Okla.), 140 P. 1182.

58-14 Kimber *v.* Young, 137 Fed. 744, 70 C. C. A. 178; Am. Bldg. & L. Assn. *v.* Hughes, 46 Ind. App. 248, 92 N. E. 180; Gahren *v.* Nat. Bk., 157 Ky. 266, 162 S. W. 1135; Peters *v.* Lohman, 171 Mo. App. 465, 156 S. W. 783; Ray County S. Bk. *v.* Hutton, 224 Mo. 42, 123 S. W. 47; Serrano *v.* Co., 117 Mo. App. 185, 93 S. W. 810; Lambert *v.* Elmendorf, 124 App. Div. 758, 109 N. Y. S. 574; Dutton *v.* Pyle, 7 Pa. Super. 126; Curtley *v.* Soc., 46 Wash. 50, 89 P. 180.

Evidence insufficient.—Foster *v.* U. S., 188 Fed. 305; Bumpas *v.* Stein, 18 Ida. 578, 111 P. 127.

59-15 *Contra* where representation is made as of maker's knowledge concerning a matter susceptible thereof. Spead *v.* Tomlinson, 73 N. H. 46, 59 A. 376. Falsity of statement justifies inference of knowledge. Farmer *v.* Lynch (R. I.), 67 A. 449.

59-21 Owner of land presumed to know boundaries and area. Eichelberger *v.* Co., 9 Cal. App. 628, 100 P. 117.

60-22 Moran *v.* Brown, 113 N. Y. S. 1038; Biard & Scales *v.* Tyler Bldg. L.

Assn. (Tex. Civ.), 147 S. W. 1168.

61-25 Adams *v.* Collins, 196 Mass. 422, 82 N. E. 498, if no actual bad faith claimed.

63-30 Walker *v.* U. S., 152 Fed. 111, 81 C. C. A. 329; Kronfeld *v.* Missol, 87 Conn. 491, 89 A. 95; Upchurch *v.* Mizell, 50 Fla. 456, 40 S. 29; Rochford *v.* Barrett, 22 S. D. 83, 115 N. W. 522; Cornell *v.* Steele, 109 Va. 589, 64 S. E. 1038 (estimate by engineer may be so grossly erroneous as to imply fraud). See C. *v.* Dow (Mass.), 105 N. E. 995.

Degree of certainty.—Denoyer *v.* First Nat. Acc. Co., 145 Wis. 450, 130 N. W. 475.

63-31 Brandt *v.* Krogh, 14 Cal. App. 39, 111 P. 275; Boddy *v.* Henry, 126 Ia. 31, 101 N. W. 447; Roy *v.* Bordas, 161 Mich. 567, 126 N. W. 717; Stratton *v.* Dudding, 164 Mo. App. 22, 147 S. W. 516; Downey *v.* Finucane, 205 N. Y. 251, 98 N. E. 391; Mills *v.* Brill, 105 App. Div. 389, 94 N. Y. S. 163.

Dishonest mental state must be shown and is proved by showing "that a false representation has been made (1) by knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false." Derry *v.* Peek, L. R. 14 App. Cas. (Eng.) 337; Kimber *v.* Young, 137 Fed. 744, 70 C. C. A. 178; Hanson *v.* Kline, 136 Ia. 101, 113 N. W. 504; Serrano *v.* Co., 117 Mo. App. 185, 93 S. W. 810; People's Bk. *v.* Co., 179 Mo. 648, 78 S. W. 618; Shackett *v.* Bickford, 74 N. H. 57, 65 A. 252; Lambert *v.* Elmendorf, 124 App. Div. 758, 109 N. Y. S. 574. A representation as to a fact not susceptible of personal knowledge can be regarded only as an opinion, and fraud cannot be inferred. Connell *v.* Co., 33 Colo. 30, 78 P. 677; Atlas S. Co. *v.* Bechard, 102 Me. 197, 66 A. 390; Goodwin *v.* Fall, 102 Me. 353, 66 A. 727; Adams *v.* Collins, 196 Mass. 422, 82 N. E. 498; Leach *v.* Bond, 129 Mo. App. 315, 108 S. W. 596; Spead *v.* Tomlinson, 73 N. H. 46, 59 A. 376.

63-33 International Banking Corp. *v.* Payne, 188 Fed. 40, 110 C. C. A. 418; Given *v.* Powell, 145 App. Div. 559, 129 N. Y. S. 869; Biard & Seales *v.* L. Assn. (Tex. Civ.), 147 S. W. 1168.

64-34 Boddy *v.* Henry, 126 Ia. 31, 101 N. W. 447; Vincent *v.* Corbett, 94 Miss. 46, 47 S. 641.

64-35 Crane *v.* Schaefer, 140 Ill. App. 647.

64-36 Farmer *v.* Lynch (R. I.), 67 A. 449.

64-37 Corey *v.* Boynton, 82 Vt. 257, 72 A. 987; Simons *v.* Cissna, 52 Wash. 115, 100 P. 200. See Board *v.* Robbins, 82 Conn. 623, 74 A. 938.

65-40 Hall *v.* Duplex-Power Co., 168 Mich. 634, 135 N. W. 118; Vincent *v.* Corbett, 94 Miss. 46, 47 S. 641.

65-41 Ligon *v.* Minton (Ky.), 125 S. W. 304; James Clark Co. *v.* Colton, 91 Md. 195, 46 A. 386; Stewart *v.* Joyce, 201 Mass. 301, 87 N. E. 613; Collins *v.* Chipman, 41 Tex. Civ. 563, 93 S. W. 666. See Cahill *v.* Applegarth, 98 Md. 493, 56 A. 794; Cassidy *v.* Uhlmann, 170 N. Y. 505, 63 N. E. 554. *Comp.* Baker *v.* Mathew, 137 Ia. 410, 115 N. W. 15, opportunity of director to know an element.

66-43 Boddy *v.* Henry, 126 Ia. 31, 101 N. W. 447 (tax receipts admissible to show knowledge of amount of land in tract); Adams *v.* Barber, 157 Mo. App. 379, 139 S. W. 489. See Webb *v.* Harding (Tex. Civ.), 159 S. W. 1029.

Equal latitude is permitted in establishing good faith and absence of fraud. Connelly *v.* Brown, 73 N. H. 193, 60 A. 750.

66-44 See Kerr *v.* Shurtleff (Mass.), 105 N. E. 871.

67-48 Gate City Nat. Bank *v.* Boyer, 161 Mo. App. 143, 142 S. W. 487; Peters *v.* Lohman, 171 Mo. App. 465, 156 S. W. 783; King *v.* Howeth & Co. (Okla.), 140 P. 1182.

67-50 Rollins *v.* Quimby, 206 Mass. 391, 92 N. E. 493; Krause *v.* Cook, 144 Mich. 365, 108 N. W. 81 (testimony of defendant sufficient). See Ogden Val. etc. Co. *v.* Lewis (Utah), 125 P. 687.

Silence may be convincing as to intent. Metropolitan Ins. Co. *v.* Freedman, 159 Mich. 114, 123 N. W. 547.

68-52 Kelly P. Co. *v.* London (Tex. Civ.), 125 S. W. 974.

68-53 Skeels *v.* Porter (Ia.), 145 N. W. 332; Hall *v.* Duplex-Power Co., 168 Mich. 634, 135 N. W. 118.

68-55 See Noyes *v.* Meharry, 213 Mass. 598, 100 N. E. 1090.

69-59 Rushing *v.* Spreen (Tex. Civ.), 142 S. W. 49.

69-62 Collins *v.* Chipman, 41 Tex. Civ. 563, 93 S. W. 666. False representations made intermediate the contract and time for performance, relevant. Batura *v.* McBride, 77 N. J. L. 779, 73 A. 600.

70-63 Kerfoot *v.* Yeo (Can.), 11 West. L. Rep. 355; The Hurstdale, 179 Fed. 371, 102 C. C. A. 649; Crooker *v.* White, 162 Ala. 476, 50 S. 227; Joseph *v.* Baker, 95 Ark. 150, 128 S. W. 864; Gillespie *v.* Co., 236 Ill. 188, 86 N. E. 219; Long *v.* Davis, 136 Ia. 734, 114 N. W. 197; Bilafsky *v.* Ins. Co., 192 Mass. 504, 78 N. E. 534; Meland *v.* Youngberg, 124 Minn. 446, 145 N. W. 167; Peters *v.* Lohman, 171 Mo. App. 465, 156 S. W. 783; Depue *v.* Swift, etc. Co., 144 Mo. App. 656, 129 S. W. 230; Dale *v.* Com. Co., 160 Mo. App. 314, 142 S. W. 745; Alvin F. & T. Assn. *v.* Hartman, 146 Mo. App. 155, 123 S. W. 957; Sinclair *v.* Higgins, 46 Misc. 136, 93 N. Y. S. 195; King *v.* Howeth & Co. (Okla.), 140 P. 1182; Smith *v.* Reed, 141 Wis. 483, 124 N. W. 489.

See Hutchason *v.* Spinks, 3 Cal. App. 291, 85 P. 132; Youle *v.* Fosha, 76 Kan. 20, 90 P. 1090; Wann *v.* Scullin, 210 Mo. 429, 109 S. W. 688; George *v.* Hesse (Tex. Civ.), 94 S. W. 1122.

70-64 Cherry *v.* Co. (Tex. Civ.), 115 S. W. 81.

Scope of presumption as to builder's familiarity with character of work incident to construction of a dam and reservoir. See Board *v.* Robbins, 82 Conn. 623, 74 A. 938.

70-66 Holmes *v.* Rivers, 145 Ia. 702, 124 N. W. 801. See Epes *v.* Saunders, 109 Va. 99, 63 S. E. 428; Kathan *v.* Comstock, 140 Wis. 427, 122 N. W. 1044.

71-68 Allen *v.* Spensley, 202 Fed. 62, 120 C. C. A. 378; In re Petition, 18 O. Dec. 591.

71-69 Robinson *v.* Roberts, 20 Okla. 787, 95 P. 246.

71-70 See Parker *v.* Bk., 152 N. C. 253, 67 S. E. 492.

71-72 Kincaid *v.* Price, 82 Ark. 20, 100 S. W. 76; Hirschman *v.* Hodges, 59 Fla. 517, 51 S. 550; Morrow *v.* Laverty, 77 Neb. 245, 109 N. W. 150. See Grinrod *v.* Co., 34 Mont. 169, 85 P. 891; Adams *v.* Barber, 157 Mo. App. 370, 139 S. W. 489. *Contra,* Tooker *v.* Alston, 159 Fed. 599, 86 C. C. A. 425.

Confirmation of defendant's representations by others, immaterial if such representations relied upon. Buchanan *v.* Burnett, 52 Tex. Civ. 68, 114 S. W. 406.

71-73 King *v.* Lamborn, 186 Fed. 21, 108 C. C. A. 123; Delaney *v.* Jackson, 95 Ark. 131, 128 S. W. 859; Bradford *v.* Wright, 145 Mo. App. 623, 123 S. W. 108. See Ripy *v.* Cronan, 131 Ky. 631, 115 S. W. 791.

Presumption does not arise if defendant's conduct a material, though not sole, inducement to transaction. Sioux Nat. Bk. *v.* Bk., 56 Fed. 139, 5 C. C. A. 448; Tooker *v.* Alston, 159 Fed. 599, 86 C. C. A. 425.

71-74 Mabardy *v.* McHugh, 202 Mass. 148, 88 N. E. 894 (collecting cases pro and con); Lindsay *v.* Davidson, 57 Wash. 517, 107 P. 514.

72-75 Providence J. Co. *v.* Nagel, 157 Cal. 497, 108 P. 312; Kelty *v.* McPeake, 143 Ia. 567, 121 N. W. 529; Pott *v.* Hanson, 109 Minn. 416, 124 N. W. 17; Judd *v.* Walker, 215 Mo. 312, 114 S. W. 979 (representation as to average); Buchanan *v.* Burnett, 102 Tex. 492, 119 S. W. 1141; Crompton *v.* Beedle, 83 Vt. 287, 75 A. 331 (active misrepresentations); Jameson *v.* Kempton, 52 Wash. 106, 100 P. 186.

72-76 Tooker *v.* Alston, 159 Fed. 599, 86 C. C. A. 425; Providence J. Co. *v.* Fessler, 145 Ia. 74, 123 N. W. 957; Rollins *v.* Quimby, 200 Mass. 162, 86 N. E. 350 (or assurance).

72-79 Haldeman *v.* Schuh, 109 Ill. App. 259; Kearney *v.* Darin, 162 Ill. App. 37; Holmes *v.* Rivers, 145 Ia. 702, 124 N. W. 801; Boulden *v.* Stilwell, 100 Md. 543, 60 A. 609; Hulbert *v.* Co., 201 Mass. 239, 87 N. E. 577; Ward *v.* Cook, 158 Mich. 283, 122 N. W. 785; Pinch *v.* Hotaling, 142 Mich. 521, 106 N. W. 69 (plaintiff cannot state why he acted as he did); Timmerman *v.* Whiting, 118 Minn. 398, 137 N. W. 9; Goldman *v.* Hadley (Tex. Civ.), 122 S. W. 282. See Leicher *v.* Keeney, 110 Mo. App. 292, 85 S. W. 920; Collins *v.* Chipman, 41 Tex. Civ. 563, 93 S. W. 666.

73-83 Del Vecchio *v.* Savelli, 10 Cal. App. 79, 101 P. 32; Knapp *v.* Schemmel (Ia.), 124 N. W. 309; Rollins *v.* Quimby, 200 Mass. 162, 86 N. E. 350; Bilafsky *v.* Ins. Co., 192 Mass. 504, 78 N. E. 534 (illiteracy of plaintiff relative to issue); Phelps *v.* Jones, 141 Mo. App. 223, 124 S. W. 1067; Berge *v.* Eager, 85 Neb. 425, 123 N. W. 454; Jacobsen *v.* Whitely, 138 Wis. 434, 120 N. W. 285. See McDonough *v.* Williams, 77 Ark. 261, 92 S. W. 783. And see S. Rose Co. *v.* Hasenzahl, 141 Ky. 676, 133 S. W. 547.

Effect of representations upon third party, not decisive. Britton *v.* Poore, 57 Fla. 45, 49 S. 507.

Statements by plaintiff to defendant at time of transaction and as a part thereof, admissible. Magruder *v.* Montgomery, 33 App. Cas. (D. C.) 133.

74-87 That actual value was very slight is competent upon issue of plaintiff's reliance. Aldrich *v.* Scribner, 146 Mich. 609, 109 N. W. 1121; Hibbets *v.* Threlkeld, 137 Ia. 164, 114 N. W. 1045.

74-89 Kerfoot *v.* Yeo (Can.), 11 West. L. Rep. 355; Eppley *v.* Kennedy, 131 App. Div. 1, 115 N. Y. S. 360 (advice of attorney as to validity of franchise).

Nature of information so acquired must be shown. Neher *v.* Hansen, 12 Cal. App. 370, 107 P. 565.

Reliance solely upon defendant's representations need not be shown. Baker *v.* Mathew, 137 Ia. 410, 115 N. W. 15.

74-91 Ligon *v.* Minton (Ky.), 125 S. W. 304; Greene *v.* Co., 111 N. Y. S. 802 (exception to rule stated). See Wells *v.* Co., 144 Ia. 605, 123 N. W. 371; Keeler *v.* Seaman, 47 Misc. 292, 95 N. Y. S. 920.

Representations in articles of incorporation duly filed may not be relied upon. Webb *v.* Rockefeller, 195 Mo. 57, 93 S. W. 772, 6 L. R. A. (N. S.) 872, *disap.* Hyatt *v.* Van Riper, 105 Mo. App. 664, 78 S. W. 1043; McKee *v.* Rudd, 222 Mo. 344, 121 S. W. 312.

75-93 Presumed representations prior to transaction and directly related to it made designedly to effectuate it. Eichelberger *v.* Co., 9 Cal. App. 628, 100 P. 117.

75-94 Written representation only may be relied upon under some statutes. McKee *v.* Rudd, 222 Mo. 344, 121 S. W. 312.

75-95 See Phelps *v.* Jones, 141 Mo. App. 223, 124 S. W. 1067. Test of misrepresentations is whether they in fact deceived, and not whether they were sufficient to influence conduct of a person of ordinary intelligence. Bowe *v.* Gage, 127 Wis. 245, 106 N. W. 1074.

Evidence insufficient when inconsistent with the view that the defendant intended to, or did, actually deceive or mislead the plaintiff by false or fraudulent representations of fact. Gordon *v.* Manhattan Desk Co., 123 N. Y. S. 57.

75-97 Ettlinger *v.* Weil, 184 N. Y. 179, 77 N. E. 31, *rev.* 94 App. Div. 291, 87 N. Y. S. 1049. See Hartford L. Ins. Co. *v.* Hope, 40 Ind. App. 354, 81 N. E. 595, 1088 (all damages will be remitted except those expressly proved); Bellettiere *v.* Lawlor, 47 Misc. 161, 93 N. Y. S. 471; Sonnesyn *v.* Akin, 14 N. D. 248, 104 N. W. 1026.

Declaration by defendant as to the amount of timber on certain land not admissible on question of damages in action of deceit for misrepresentations as to ownership of part of land. Jewett *v.* Buck, 78 Vt. 353, 63 A. 136.

"**In actions of fraud** it is not necessary to allege or prove actual damages." Blumenfeld *v.* Stine, 42 Misc. 411, 87 N. Y. S. 81.

76-98 Brandom *v.* McCausland, 171 Fed. 402, 96 C. C. A. 358 (also amount of damages); Stacey *v.* Robinson (Mo. App.), 168 S. W. 261; Marshall-McC. Co. *v.* Halloran, 15 N. D. 71, 106 N. W. 293; King *v.* Howeth & Co. (Okla.), 140 P. 1182.

Evidence of value of property at time of sale is admissible. McDonough *v.* Williams, supra.

Worthlessness of foreign patents in which defendant interested and which were subject of the contract, not assumed. O'Shea *v.* Vaughn, 201 Mass. 412, 87 N. E. 616.

76-99 Walter *v.* Parry, 51 Fla. 344, 40 S. 69; Providence I. Co *v.* Fessler, 145 Ia. 74, 123 N. W. 957; Luik *v.* Jackson, 164 Mo. App. 195, 147 S. W. 1114.

Cannot be shown unless specially pleaded. Pickett *v.* Gleed, 39 Tex. Civ. 71, 86 S. W. 946.

Evidence of fraud inadmissible under plea of privilege. Neuman *v.* Buffalo P. Co. (Tex. Civ.), 160 S. W. 657

76-3 Freeman *v.* Harbaugh Co., 114 Minn. 283, 130 N. W. 1110; White *v.* White (Tex. Civ.), 95 S. W. 733.

Relevant acts can be proved though not alleged. McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668.

Action for constructive fraud cannot be sustained by proof of actual fraud. Sinclair *v.* Higgins, 46 Misc. 136, 93 N. Y. S. 195.

77-5 Cahill *v.* Applegarth, 98 Md. 493, 56 A. 794.

Although conspiracy alleged, recovery may be had against one defendant. Gurney *v.* Tenney, 197 Mass. 457, 84 N. E. 428. And see Miller *v.* John, 111 Ill. App. 56.

78-6 Edward Malley Co. *v.* Button, 77 Conn. 571, 60 A. 125; Long *v.* Davis, 136 Ia. 734, 114 N. W. 197; Pinch *v.*

Hotaling, 142 Mich. 521, 106 N. W. 69; Niebels *v.* Howland, 97 Minn. 209, 106 N. W. 337; Collins *v.* Chipman, 41 Tex. Civ. 563, 95 S. W 666.

78-7 Murray *v.* Davies, 77 Kan. 767, 94 P. 283; Pott *v.* Hanson, 109 Minn. 416, 124 N. W. 17; Old Dominion C. M. & S. Co. *v.* Bigelow, 203 Mass. 159, 89 N. E. 193; Blumenfeld *v.* Stine, 42 Misc. 411, 87 N. Y. S. 81; Koppe *v.* Koppe, 57 Tex. Civ. 204, 122 S. W. 68.

78-9 Fitzgerald *v.* Frankel, 109 Va. 603, 64 S. E. 941.

Burden of proving waiver upon alleger. White *v.* Ins. Co., 115 Va. 305, 78 S. E. 582.

79-14 McDonough *v.* Williams, 77 Ark. 261, 92 S. W. 783; Tuttle *v.* Stovall, 134 Ga. 325, 67 S. E. 806; Worth *v.* Watts, 74 N. J. Eq. 609, 70 A. 357; Koppe *v.* Koppe, 57 Tex. Civ. 204, 122 S. W. 68. See Grinrod *v.* Co., 34 Mont. 169, 85 P. 891 (estoppel); Emerson-N. Co. *v.* Cupps, 15 N. D. 606, 108 N. W. 796.

79-19 Del Vecchio *v.* Savelli, 10 Cal. App. 79, 101 P. 32.

FRAUDULENT CONVEYANCES

Right of grantee to attack a judgment debt; burden of proof, 86-4; *Non-compliance with statute,* 119-6; *Spendthrift trust,* 129-42; *Judgment in attachment,* 129-42; *Inferred from position of party,* 129-42; *Grantor incompetent as witness,* 133-55; *Unsatisfactory showing as to where grantee obtained his money,* 143-81; *Secrecy,* 143-81.

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Must also show amount of claim prior to conveyance. Tenold *v.* Klimesh (Ia.), 141 N. W. 1046.

86-3 Irish *v.* Daniels, 100 Minn. 189, 110 N. W. 968.

86-4 Right of grantee to attack judgment debt; burden of proof.—Burden upon grantee to establish such an equity as will give him a right to attack the validity of a claim upon which the creditor has obtained a judgment. LeHerisse *v.* Hess (N. J.), 57 A. 808.

86-5 Omaha Cattle Loan Co. *v.* Shelly, 89 Neb. 502, 131 N. W. 926. See Metz *v.* Patton, 63 W. Va. 439, 60 S. E. 399.

Creditor of deceased insolvent claiming over $100.00 need not first obtain judgment under New York statute. Mertens *v.* Mertens, 48 Misc. 235, 96 N. Y. S. 785. See Aigeltinger *v.* Einstein, 143 Cal. 609, 77 P. 669; Crary *v.* Kurtz, 132 Ia. 105, 105 N. W. 590, 109 N. W. 452; Grunsfeld *v.* Brownell, 12 N. M. 192, 76 P. 310.

87-9 White's Admx. *v.* White, 148 Ky. 492, 146 S. W. 1101; Tyner *v.* Johnson, 119 Md. 627, 87 A. 266; C. Bk. *v.* Kearns, 100 Md. 202, 59 A. 1010; Walkeen L. M. Co. *v.* Johnston, 131 Mo. App. 693, 111 S. W. 639; Borden *v.* Lynch, 34 Mont. 503, 87 P. 609; Everitt *v.* Bk., 82 Neb. 191, 117 N. W. 401 (through consideration paid grantor's near relative upon assignment of instrument).

88-11 Montgomery M. Mfg. Co. *v.* Leith, 162 Ala. 246, 50 S. 210; Snellgrove *v.* Evans, 145 Ala. 600, 40 S. 567; Ledbetter *v.* Davenport, 154 Ala. 336, 45 S. 467; Dumas *v.* Clayton, 32 App. Cas. (D. C.) 566; Morimura *v.* Samaha, 32 App. Cas. (D. C.) 189; Crockett *v.* Bray, 151 N. C. 615, 66 S. E. 666; Broussard *v.* Lawson (Tex. Civ.), 124 S. W. 712; Harvey *v.* Nutter, 66 W. Va. 208, 66 S. E. 363; Dudley *v.* Buckley, 68 W. Va. 630, 70 S. E. 376. *Comp.* Ball *v.* Danton, 64 Or. 184, 129 P. 1032.

90-15 Broussard *v.* Lawson, supra.

90-17 Creditor need not show that consideration paid was not exempt. Childers *v.* Bales (Ky.), 124 S. W. 295.

90-18 Assignment of chose in action without consideration not presumptively fraudulent as against subsequent creditor. Weckerly *v.* Taylor, 74 Neb. 84, 103 N. W. 1065.

92-23 Klein *v.* Gallin, 136 App. Div. 382, 120 N. Y. S. 1036.

92-24 Blume *v.* Co., 144 Ill. App. 96; Dose *v.* Beatie, 62 Or. 308, 123 P. 383, 125 P. 277.

92-25 First Nat. Bk. *v.* Danser, 70 W. Va. 529, 74 S. E. 623.

92-26 Hickok *v.* Cowperthwait, 134 App. Div. 617, 119 N. Y. S. 390; Stubling *v.* Wilson, 50 Or. 282, 90 P. 1011.

93-27 See Officer *v.* Swindlehurst, 41 Mont. 126, 108 P. 583.

Fraudulent intent not disproved by showing existence of antecedent debt and good faith in transfer. Hickok *v.* Cowperthwait, 134 App. Div. 617, 119 N. Y. S. 390.

93-28 Broussard *v.* Lawson (Tex. Civ.), 124 S. W. 712.

"Transactions between husband and wife are closely scrutinized, and, as to existing creditors, a deed made by a vendor to the wife under instructions by the husband is presumed to have been paid for by the husband, thus placing upon the wife the burden of proving an adequate consideration; yet, as to subsequent creditors, the burden is on the creditor to show either that there was no consideration, or that the deed was made for the purpose of hindering, delaying, or defrauding creditors." Elam *v.* Lumb. Co., 176 Ala. 48, 57 S. 483.

93-30 Southern Co. *v.* Verdier, 51 Fla. 570, 40 S. 676; Bennett *v.* Boshold, 123 Ill. App. 311; Wigginton *v.* Minter, 28 Ky. L. R. 79, 88 S. W. 1082; Cramer *v.* Cale, 72 N. J. Eq. 210, 73 A. 813; Parker *v.* Fenwick, 147 N. C. 525, 61 S. E. 378; Walker *v.* Harold, 44 Or. 205, 74 P. 705; Heiges *v.* Pifer, 224 Pa. 628, 73 A. 950; Miller *v.* Ferguson, 110 Va. 222, 65 S. E. 564; Sledge *v.* Reed, 112 Va. 202, 70 S. E. 523; Adams *v.* Wingard, 53 Wash. 560, 102 P. 426 (statutory rule); Kingwood, etc. Co. *v.* Halbritter, 68 W. Va. 654, 70 S. E. 557.

Burden of proving derivation of consideration from source other than husband on wife. Lewis *v.* Palmer, 106 Va. 522, 56 S. E. 341; Rankin *v.* Goodwin, 103 Va. 81, 48 S. E. 521; Richardson *v.* Pierce, 105 Va. 628, 54 S. E. 480.

95-34 Hickok *v.* Cowperthwait, 134 App. Div. 617, 119 N. Y. S. 390.

95-35 Vashon *v.* Barrett, 105 Va. 790, 54 S. E. 705.

96-36 Rice *v.* Allen, 69 Neb. 349, 95 N. W. 704.

96-37 Silvey *v.* Vernon, 153 Ala. 570, 45 S. 68.

97-40 Presumption conclusive. Citizens' Bk. *v.* Wilfong, 66 W. Va. 470, 66 S. E. 636.

98-44 Burden on vendee to show legal consideration. Chisolm *v.* Moore, 49 Pa. Super. 132.

99-46 Proof of consideration additional to full-value consideration immaterial. Burnell *v.* Olmsted, 46 Colo. 67, 102 P. 515.

101-50 Moral consideration shown by parol as between mother and son where latter has reconveyed to her. Paris G. Co. *v.* Burks, 56 Tex. Civ. 223, 120 S. W. 552.

101-51 Grantee showing conveyance in performance of resulting trust. Blake *v.* Meadows, 225 Mo. 1, 123 S. W. 868.

102-53 Shoemaker *v.* Drug Co., 112 Va. 612, 72 S. E. 121. See Parks *v.* Worthington, 101 Tex. 505, 109 S. W. 909.

Judicial notice taken that recited consideration nominal if justified by facts. York *v.* Leverett, 159 Ala. 529, 48 S. 684.

102-54 Thompson *v.* Williams, 100 Md. 195, 60 A. 26; Coombs *v.* Aborn, 29 R. I. 40, 68 A. 817. See Tyner *v.* Johnson, 119 Md. 627, 87 A. 266; Broussard *v.* Lawson (Tex. Civ.), 124 S. W. 712.

Recital of $1 and "other valuable considerations" does not show want of consideration. Wadleigh *v.* Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063, 109 N. Y. S. 633.

103-58 Kilgore *v.* English, 143 Ky. 524, 136 S. W. 1013; Miller *v.* Ferguson, 110 Va. 222, 65 S. E. 564.

103-59 Heiges *v.* Pifer, 224 Pa. 628, 73 A. 950.

Indefinite testimony not valuable, especially if relating to remote period. Roco *v.* Rivera, 5 Phil. Isl. 547.

104-60 Morgan *v.* Kendrick, 91 Ark. 394, 121 S. W. 278.

Evidence of mere badges of fraud not convincing against explicit testimony. De Moss *v.* McGee, 66 W. Va. 441, 66 S. E. 525; Citizens' Bk. *v.* Wilfong, 66 W. Va. 470, 66 S. E. 636.

104-61 Lightman *v.* Epstein, 164 Ala. 660, 51 S. 164; Klein *v.* Gallin, 136 App. Div. 382, 120 N. Y. S. 1036.

Payment of full consideration by creditor for excessive quantity of property does not purge transactions if done with knowledge of debtor's bad intention toward other creditors. McKnight-K. G. Co. *v.* Hudson, 147 Mo. App. 31, 126 S. W. 511.

105 Person attacking must show vendor retains control of property.—Leona Di Maggio, 133 La. 199, 62 S. 631.

105-64 Opinion as to reasonableness of price paid not competent. Lightman *v.* Epstein, 164 Ala. 660, 51 S. 164.

Testimony of debtor's exemption right must relate to time of conveyance. Childers *v.* Bales (Ky.), 124 S. W. 295.

But a circumstance that consideration was not barred by statute. Hoover *v.* Wasson, 11 Cal. App. 589, 105 P. 945.

105-65 Hopkins *v.* White, 20 Cal. App. 234, 128 P. 780; Fabian *v.* Trac-

ger, 215 Ill. 220, 74 N. E. 131; Wigginton *v.* Minter, 28 Ky. L. R. 79, 88 S. W. 1082; Voorhees *v.* Unger, 142 App. Div. 543, 127 N. Y. S. 11; Shoemaker *v.* Drug Co., 112 Va. 612, 72 S. E. 121.

No presumption mortgage made when mortgagor is indebted to another is fraudulent. Hudson *v.* Childree (Tex. Civ.), 156 S. W. 1154.

Presumption as to intent of wife joining husband in grant. Davis *v.* Stovall (Ala.), 64 S. 586.

Legislature may declare doing certain acts presumptively fraudulent if stated conditions not met. Sprintz *v.* Saxton, 126 App. Div. 421, 110 N. Y. S. 585.

106-66 Manitoba B. & M. Co. *v.* McDonald (Can.), 11 West. L. Rep. 313; In re Kayser, 177 Fed. 383, 100 C. C. A. 616; In re Elletson, 174 Fed. 859 (if evidence aliunde relied on); Harrison *v.* Richards, 196 Fed. 770, 116 C. C. A. 394; Allen *v.* Riddle, 141 Ala. 621, 37 S. 680; Scholle *v.* Finnell, 167 Cal. 90, 138 P. 746; Schell *v.* Gamble, 153 Cal. 448, 95 P. 870; Nixon *v.* Goodwin, 3 Cal. App. 358, 85 P. 169; S. *v.* Martin, 77 Conn. 142, 58 A. 745; Jackson *v.* Co., 53 Fla. 265, 44 S. 516; German-Am. Bk. *v.* Hoffman, 120 Ill. App. 363; Am. H. & D. Co. *v.* Hall, 208 Ill. 597, 70 N. E. 581; Fippinger *v.* Ullrich, 178 Ill. App. 611; Stark *v.* Lamb, 167 Ind. 642, 78 N. E. 668, 79 N. E. 895; Hamrick *v.* Hoover, 41 Ind. App. 411, 84 N. E. 28; Bell *v.* Dufur, 142 Ia. 701, 121 N. W. 500; Klay *v.* McKellar, 122 Ia. 163, 97 N. W. 1091; Clark *v.* Ford, 126 Ia. 460, 102 N. W. 421; Atkinson *v.* McNider, 130 Ia. 281, 105 N. W. 504; Campbell *v.* Campbell, 129 Ia. 317, 105 N. W. 583; Perry *v.* Krish, 157 Ky. 109, 162 S. W. 555; Aultman M. Co. *v.* Walker, 138 Ky. 835, 124 S. W. 329; Willett *v.* Froelich, 28 Ky. L. R. 798, 90 S. W. 572; Tyner *v.* Johnson, 119 Md. 627, 87 A. 266; Thompson *v.* Williams, 100 Md. 195, 60 A. 26; Holmes *v.* Co., 86 Miss. 782, 39 S. 70; Coleman *v.* Hagey, 252 Mo. 102, 158 S. W. 829; Black *v.* Epstein, 221 Mo. 286, 120 S. W. 754; Southern Bk. *v.* Nichols, 202 Mo. 309, 100 S. W. 613; Vreeland *v.* Rogers (N. J.), 61 A. 486; Riker *v.* Gwynne, 109 N. Y. S. 570; Pfisterer *v.* Toledo (Ohio), 106 N. E. 18; Courtney S. Co. *v.* Polley (Tex. Civ.), 95 S. W. 7; Wheby *v.* Moir, 102 Va. 875, 47 S. E. 1005.

See Larch *v.* Holz (Ind. App.), 101 N. E. 127; St. Louis Clay P. Co. *v.* Christopher, 152 Wis. 603, 140 N. W. 351.

Sufficient evidence.—Clifton *v.* Herrick, 16 Cal. App. 484, 117 P. 622; Darner *v.* Brown (Ia.), 137 N. W. 461; Abramson *v.* Horner, 115 Md. 232, 82 A. 907; Carrel *v.* Meek, 155 Mo. App. 337, 137 S. W. 19.

Representatives of grantor must show fraud. Robertson *v.* Hefley, 55 Tex. Civ. 368, 118 S. W. 1159.

107-67 Brunson *v.* Rosenheim, 149 Ala. 112, 43 S. 31; Merillat *v.* Hensey, 32 App. Cas. (D. C.) 64; Kennard *v.* Curran, 239 Ill. 122, 87 N. E. 913; Wick *v.* Hickey (Ia.), 103 N. W. 469; Crary *v.* Kurtz, 132 Ia. 105, 105 N. W. 590, 109 N. W. 452; C. Bk. *v.* Kearns, 100 Md. 202, 59 A. 1010; Barnhart *v.* Anderson, 22 S. D. 395, 118 N. W. 31; Shoemaker *v.* Drug Co., 112 Va. 612, 72 S. E. 121. See Metz *v.* Patton, 63 W. Va. 439, 60 S. E. 399 (ejectment).

Evidence held sufficient to set aside a conveyance as fraudulent. McIlRoy *v.* Stone (Tex. Civ.), 143 S. W. 944.

Debtor presumed to intend natural and obvious consequences of act. Blyth & F. Co. *v.* Kastor, 17 Wyo. 180, 97 P. 921.

Existing creditors of bankrupt who has made gift of property need not prove fraudulent intent. Cartwright *v.* West, 155 Ala. 619, 47 S. 93.

107-69 Scott *v.* Lumaghi, 236 Ill. 564, 86 N. E. 384. See Ketner *v.* Donten, 15 Pa. Super. 604.

107-70 Yeiser *v.* Broadwell, 83 Neb. 302, 119 N. W. 473.

109-72 Parkinson Bros. *v.* Figel (Cal. App.), 142 P. 135; Charles R. Parkinson Co. *v.* Figel (Cal. App.), 142 P. 140; Clayton *v.* Clayton, 250 Ill. 433, 95 N. E. 480; State Bk. of Clinton *v.* Barnett, 250 Ill. 312, 95 N. E. 178, *rev.* 151 Ill. App. 79; Piper *v.* Taylor, 165 Ill. App. 31; Cannon *v.* Castleman, 164 Ind. 343, 73 N. E. 689; Holmes *v.* Co., 86 Miss. 782, 39 S. 70; Banta *v.* Hubbell, 167 Mo. App. 38, 150 S. W. 1089; McCartney *v.* Titsworth, 142 App. Div. 292, 126 N. Y. S. 905.

Grantor's insolvency at time of conveyance need not be proved. Kennard *v.* Curran, 239 Ill. 122, 87 N. E. 913 (if then largely indebted and becomes insolvent soon afterward); Crary *v.* Kurtz, 132 Ia. 105, 105 N. W. 590.

109-73 Bluthenthal *v.* Stone, 59 Fla. 161, 51 S. 851.

109-74 Smyth *v.* Hall, 126 Ia. 627, 102 N. W. 520; Atkinson *v.* McNider, 130 Ia. 281, 105 N. W. 504; Gage *v.* Burns, 78 Neb. 737, 111 N. W. 791; Coombs *v.* Aborn, 29 R. I. 40, 68 A. 817.

109-75 Wigginton *v.* Minter, 28 Ky. L. R. 79, 88 S. W. 1082.

110-77 Am. H. & D. Co. *v.* Hall, 208 Ill. 597, 70 N. E. 581.

110-78 **Presumption of honesty** not used to determine issues the subject of conflicting evidence nor to overweigh most reasonable and probable conclusion from all the evidence. White *v.* Million, 114 Mo. App. 70, 89 S. W. 599.

110-79 Allen *v.* Riddle, 141 Ala. 621, 37 S. 680; Lemp B. Co. *v.* Guion, 17 Okla. 131, 87 P. 584; Harrisonburg H. Co. *v.* Co., 106 Va. 302, 55 S. E. 679.

111-80 Burden on trustee in bankruptcy to show conveyance sought to be set aside within statutory period. Allen *v.* Gray, 63 Misc. 219, 115 N. Y. S. 928.

111-81 Manitoba B. & M. Co. *v.* McDonald (Can.), 11 West. L. Rep. 313; Van Iderstine *v.* D. Co., 174 Fed. 518, 98 C. C. A. 300; Shelton *v.* Price, 174 Fed. 891; Brewster *v.* Co., 164 Fed. 124; Brewster *v.* Goff, 164 Fed. 127; Montgomery M. Mfg. Co. *v.* Leith, 162 Ala. 246, 50 S. 210; Ledbetter *v.* Davenport, 154 Ala. 336, 45 S. 467; Allen *v.* Riddle, 141 Ala. 621, 37 S. 680; Scholle *v.* Finnell, 167 Cal. 90, 138 P. 746; First Nat. Bk. *v.* Follett, 20 Colo. App. 372, 80 P. 147; Morimura *v.* Sanaha, 25 App. Cas. (D. C.) 189; New Orleans Co. *v.* Guillory, 117 La. 821, 42 S. 329; Rownd *v.* Davidson, 113 La. 1047, 37 S. 965; Tyner *v.* Johnson, 119 Md. 627, 87 A. 266; McCauley *v.* Shockey, 105 Md. 641, 66 A. 625; Southern Bk. *v.* Nichols, 202 Mo. 309, 100 S. W. 613; Zimmerman *v.* Com. Co., 156 Mo. App. 588, 137 S. W. 642; Atlantic R. Co. *v.* Stokes, 77 N. J. Eq. 119, 75 A. 445; Hall *v.* Frith, 51 Misc. 600, 101 N. Y. S. 31; Calvert *v.* Alvey, 152 N. C. 610, 68 S. E. 153; Mannemacher *v.* Merrill, 22 N. D. 46, 132 N. W. 412; Ellet-Kendall S. Co. *v.* Ross, 28 Okla. 697, 115 P. 892; Copperthite *v.* Nat. Bk., 111 Va. 70, 68 S. E. 392; Wheby *v.* Moir, 102 Va. 875, 47 S. E. 1005; Speidel G. Co. *v.* Stark, 62 W. Va. 512, 59 S. E. 498.

See Goldener *v.* Spencer, 163 Cal. 317, 125 P. 347; Breneman *v.* Herdman, 35 App. Cas. (D. C.) 27; Banta *v.* Hubbell, 167 Mo. App. 38, 150 S. W. 1089. But see Tromer *v.* Bader, 80 Misc. 335, 142 N. Y. S. 206.

Burden to show transferee's insolvency. Banta *v.* Hubbell, 167 Mo. App. 38, 150 S. W. 1089.

Grantee promising support of grantor presumed to know conveyance to be fraudulent as to creditors. Baxter *v.* Baxter, 19 Cal. App. 238, 125 P. 359.

Presumption of grantee's knowledge of actual financial condition of grantor where former managing officer of latter. Atherton *v.* Emerson, 199 Mass. 199, 85 N. E. 530.

Burden on grantee buying entire stock of retail merchant. Thomas *v.* Adelman, 136 Fed. 973; English *v.* Ross, 140 Fed. 630; In re Hines, 144 Fed. 544; Allen *v.* McMannes, 156 Fed. 615; In re Pease, 129 Fed. 446; Roberts *v.* Johnson, 151 Fed. 567, 81 C. C. A. 47; Jackman *v.* Bk., 125 Wis. 465, 104 N. W. 98.

Some courts hold grantee's participation in fraudulent intent of grantor must be proved. Rike *v.* Ryan, 147 Ala. 497, 41 S. 959 (subsequent creditor); German-A. Bk. *v.* Hoffman, 120 Ill. App 363; Atkinson *v.* McNider, 130 Ia. 281, 105 N. W. 504; Smyth *v.* Hall, 126 Ia. 627, 102 N. W. 520; Livesley *v.* Heise, 48 Or. 147, 85 P. 509.

In New York when fraudulent intent of grantor proved burden on grantee to prove lack of knowledge. Bailey *v.* Fransioli, 101 App. Div. 140, 91 N. Y. S. 852. So also where grantor's insolvency appears. Wadleigh *v.* Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063, 109 N. Y. S. 633; Lawrence *v.* Heylman, 111 App. Div. 848, 98 N. Y. S. 121, *aff.* 189 N. Y. 573, 82 N. E. 1128. But proof of grantor's fraudulent intent casting burden on grantee must be supplied by evidence competent as against grantee. Wadleigh *v.* Wadleigh, supra.

113-82 See In re Kullberg, 176 Fed. 585.

113-83 In re Friedman, 164 Fed. 131 (payment to preferred creditor); Brewster *v.* Co., 164 Fed. 124; Brewster *v.* Goff, 164 Fed. 127; Carr *v.* Way, 141 Ia. 245, 119 N. W. 700; Atherton *v.* Emerson, 199 Mass. 199, 85 N. E. 530.

State of facts may exist negativing presumption of innocence and casting upon grantee burden of proving good faith and non-participation. McCauley *v.* Shockey, 105 Md. 641, 66 A. 625.

113-85 In re Friedman, 164 Fed. 131; Brewster *v.* Co., 164 Fed. 124;

Burnham *v.* G. Co., 144 Ia. 577, 123 N. W. 220.

Under bankruptcy act sufficient to show preferred creditor's reasonable cause to believe debtor's intention to give preference. Blyth & F. Co. *v.* Kastor, 17 Wyo. 180, 97 P. 921.

114-86 Elam *v.* Lumb. Co., 176 Ala. 48, 57 S. 483.

114-87 Burnham *v.* G. Co., 144 Ia. 577, 123 N. W. 220, accepting payment of much less than due raises inference in favor of creditor.

114-88 See Sprintz *v.* Saxton, 126 App. Div. 421, 110 N. Y. S. 585, ruled under statute and noted supra, 105-65.

114-89 Kopperl *v.* Co. (Tex. Civ.), 119 S. W. 1169.

114-90 Southern Cotton Oil Co. *v.* Harris, 175 Ala. 323, 57 S. 854; Sellers *v.* Hayes, 163 Ind. 422, 72 N. E. 119. See Jackson *v.* Co., 53 Fla. 265, 44 S. 516.

Vendee must show giving notice of sale to creditors of vendor in accordance with statute regulating bulk sales. Seeman *v.* Levine, 121 N. Y. S. 645.

Burden on vendee knowing grantor's insolvency. Riker *v.* Gwynne, 129 App. Div. 112, 113 N. Y. S. 404.

115-91 Elam *v.* Lumb. Co., 176 Ala. 48, 57 S. 483; Smith *v.* Pitts, 167 Ala. 461, 52 S. 402; Rike *v.* Ryan, 147 Ala. 497, 41 S. 959; Allen *v.* Caldwell, 149 Ala. 293, 42 S. 855; Cartwright *v.* West, 155 Ala. 619, 47 S. 93; Allen *v.* Lyness, 81 Conn. 626, 71 A. 936; State Bk. *v.* Chatten, 69 Kan. 435, 77 P. 96; Washington Nat. Bk. *v.* Beatty, 75 N. J. Eq. 433, 72 A. 428; Richardson *v.* Pierce, 105 Va. 628, 54 S. E. 480 (rule applies to conveyance by husband to wife when not insolvent); Edwards Mfg. Co. *v.* Carr, 65 W. Va. 673, 64 S. E. 1030.

Evidence held insufficient.—Gately *v.* Kappler, 209 Mass. 426, 95 N. E. 859.

Fraud not presumed as to subsequent creditor from mere incurring of debt. Searcy *v.* Gwaltney, 36 Tex. Civ. 158, 81 S. W. 576.

115-92 Collings *v.* Collings, 29 Ky. L. R. 51, 92 S. W. 577; Washington Nat. Bk. *v.* Beatty, 75 N. J. Eq. 433, 72 A. 428. *Contra,* Hemenway *v.* Thaxter, 150 Cal. 737, 90 P. 116.

115-93 Atlanta, etc. Assn. *v.* Smith, 141 Wis. 377, 123 N. W. 106, as between stockholder and corporation where result renders latter insolvent, though continuing in business without apparent change in assets. *Contra,* Case *v.* Phelps, 39 N. Y. 164; Sommermeyer *v.* Schwartz, 89 Wis. 66, 61 N. W. 311. See Kennard *v.* Curren, 239 Ill. 122, 87 N. E. 913. *Comp.* Allen *v.* Lyness, 81 Conn. 626, 71 A. 936.

Actual fraudulent intent necessary under bankrupt act. In re M'Loon, 162 Fed. 575.

116-94 Intent, independent of damage, immaterial. Veeder *v.* Veeder, 141 Ia. 492, 120 N. W. 61.

116-95 Knowledge of conveyance imputed to creditor becoming such long after making if not claiming to have become such on faith of debtor's repeated ownership of property. Washington Nat. Bk. *v.* Beatty, 75 N. J. Eq. 433, 72 A. 428.

116-96 Seilert *v.* McAnally, 223 Mo. 505, 122 S. W. 1064.

116-97 Wilson *v.* Parke, 119 Mo. App. 25, 96 S. W. 244. *Comp.* Lyon *v.* Moore, 259 Ill. 23, 102 N. E. 179.

116-98 Winfrey's Trustee *v.* Winfrey, 150 Ky. 138, 150 S. W. 42. See Ball *v.* Danton, 64 Or. 184, 129 P. 1032. And see Hopkins *v.* White, 20 Cal. App. 234, 128 P. 780.

116-99 Intent to give preference sometimes conclusively presumed. Brewster *v.* Co., 164 Fed. 124.

117-1 In re Sanger, 169 Fed. 722; Cowan *v.* Staggs, 178 Ala. 144, 59 S. 153; Davis *v.* Vandiver, 160 Ala. 454, 49 S. 318.

118-2 Kelley *v.* Pollock, 57 Fla. 459, 49 S. 934.

118-4 Merillat *v.* Hensey, 32 App. Cas. (D. C.) 64.

119-6 In re Sanger, 169 Fed. 722; In re Knopf, 144 Fed. 245; Allen *v.* McMannes, 156 Fed. 615; Dokken *v.* Page, 147 Fed. 438, 77 C. C. A. 674; Morimura *v.* Samoha, 25 App. Cas. (D. C.) 189; Walker *v.* Montgomery, 236 Ill. 244, 86 N. E. 240.

Non-compliance with statute.—Regulating transfer of goods raises presumption of fraud. Calkins *v* Howard, 2 Cal. App. 233, 83 P. 280 (conclusive); Parham *v.* Co., 127 Ga. 303, 56 S. E. 460; Thorpe *v.* Co., 99 Minn. 22, 108 N. W. 940; Gilbert *v.* Gonyea, 103 Minn. 459, 115 N. W. 640 (failure to secure inventory, burden on vendee to rebut such presumption); Williams *v.* Bk., 15 Okla. 477, 82 P. 496; Kohn *v.* Fishbach, 36 Wash. 69, 78 P. 199; Plass *v.* Morgan, 36 Wash. 160, 78 P. 784; Fisher *v.* Herrmann, 118 Wis. 424, 95 N. W. 392.

Vendee's knowledge not conclusive of

bad faith "if he does not directly or indirectly make himself an instrument for the purpose of subsequently benefitting the transferor." Mulcahy *v.* Archibald, 28 Can. Sup. Ct. 523; Manitoba B. & M. Co. *v.* McDonald (Can.), 11 West. L. Rep. 313.

119-7 Mowen *v.* Nitsch, 103 Md. 685, 62 A. 582.

119-8 White *v.* Million, 114 Mo. App. 70, 89 S. W. 599.

119-9 First Nat. Bk. *v.* Fry, 216 Mo. 24, 115 S. W. 439; Griswold *v.* Szwanek, 82 Neb. 761, 118 N. W. 1073. See In re M'Loon, 162 Fed. 575, mortgage securing advances no act of bankruptcy.

120-10 Walkeen *v.* Brown, 88 Kan. 571, 128 P. 1122; Kline *v.* Cowan, 84 Kan. 772, 115 P. 587; Perry *v.* Krish, 157 Ky. 109, 162 S. W. 555; Atkins *v.* B. & T. Co. (Ky.), 124 S. W. 879; Standifer *v.* Baker, 31 Ky. L. R. 42, 101 S. W. 365; Underleak *v.* Scott, 117 Minn. 136, 134 N. W. 731; Wilson *v.* Salsbury, 167 Mo. App. 191, 151 S. W. 194; Kennedy's Admr. *v.* Duncan, 157 Mo. App. 212, 137 S. W. 299; Kerker *v.* Levy, 206 N. Y. 109, 99 N. E. 181; Lehrenkrauss *v.* Bonnell, 138 App. Div. 493, 122 N. Y. S. 866; Lawrence *v.* Heylman, 111 App. Div. 848, 98 N. Y. S. 121, *aff.* 189 N. Y. 573, 82 N. E. 1128; Seed *v.* Jennings, 47 Or. 464, 83 P. 872; Roberts *v.* Co., 86 Vt. 76, 83 A. 807. See Simons *v.* Groc. Co., 108 Ark. 164, 156 S. W. 1015; Lane *v.* Newton, 140 Ga. 415, 78 S. E. 1082; Shacklette *v.* Goodall, 151 Ky. 20, 151 S. W. 23.

Contra, Link *v.* Hathway, 143 Mo. App. 502, 127 S. W. 913, foll. Gage *v.* Mears, 107 Mo. App. 140, 70 S. W. 712.

Fraud upon prospective spouse.—"The law in Illinois is well settled that a voluntary conveyance by either party to a marriage contract of his or her real property, made without the knowledge of the other and on the eve of marriage, is a fraud upon the marital rights of such other, and may be set aside as fraudulent and void as against the party whose rights are injuriously affected by such conveyance. Daniher *v.* Daniher, 201 Ill. 489, 66 N. E. 239, and cases there cited. Under the law of this state a conveyance made after a contract of marriage has been entered into, even though it is voluntary, is not conclusively presumed to be fraudulent, although in other jurisdictions the rule seems to be otherwise. Ward *v.* Ward, 63 Ohio St. 125, 57 N. E. 1095, 51 L. R. A. 858, 81 Am. St. Rep. 621; Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258. Following the rule laid down in Champlin *v.* Champlin, 16 R. I. 314, 15 Atl. 85; Hamilton *v.* Smith, 57 Iowa 15, 10 N. W. 276, 42 Am. Rep. 39, and Fennessey *v.* Fennessey, 84 Ky. 519, 2 S. W. 158, 4 Am. St. Rep. 210, this court, in Daniher *v.* Daniher, supra, 201 Ill. on page 494, 66 N. E. on page 240, laid down the rule as follows: 'But we think the better rule is that, where any such voluntary conveyance is made without the knowledge of the other of such contracting parties, it presents a prima facie case of fraud, subject to be explained by the parties interested, and the burden is on the grantee to establish the validity of the deed.'" Dunbar *v.* Dunbar, 254 Ill. 281, 98 N. E. 563.

New York.—"It has long been the rule of law in this state that where an insolvent debtor transfers his property to one of his creditors as security for an antecedent debt, and the creditor taking the property advances nothing at the time, does not relinquish the security then held, or suspend any remedy upon it, such grantee is not a purchaser for a valuable consideration. Cary *v.* White, 52 N. Y. 138; Ten Eyck *v.* Witbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809. Every element required to establish consideration is lacking in the case at bar, with the exception of an alleged agreement to extend the time of payment of Bonnell's existing indebtedness at the time of the giving of the mortgage, followed by actual forbearance. Upon this issue the oral evidence is conflicting, and confined to Bonnell upon the one side and the vice president of the bank upon the other. Bonnell testified that there was no agreement to extend, either verbal or otherwise. The vice president admits that the mortgage consummated the prior oral agreement. By the terms of the mortgage, the amount secured thereby is payable upon demand, and from the very moment of its delivery the money it secured was presently due. The voluntary transfer by an insolvent debtor of his property is more than mere evidence of fraud. It is a fact from which a fraudulent intent may be inferred." Lehrenkrauss *v.* Bonnell, 122 N. Y. S. 866.

"We hold that the rule stated in Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082, that a voluntary conveyance by one indebted at the time is presumptively fraudulent as against existing creditors, is the law of this state, rather than the rule laid down in Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 105." Kerker *v.* Levy, 206 N. Y. 109, 99 N. E. 181.

Rule under bankruptcy act.—See Sargent *v.* Blake, 160 Fed. 57, 87 C. C. A. 213.

120-11 Patton *v.* Walker (Ky.), 118 S. W. 312; Com. Bk. *v.* Vollrath, 135 Mo. App. 63, 115 S. W. 510. *Contra,* Bull *v.* Bray, 89 Cal. 286, 26 P. 873 (fraudulent intent must be proved); Emmons *v.* Barton, 109 Cal. 662, 42 P. 303; Roberts *v.* Co., 86 Vt. 76, 83 A. 807.

121-12 Shiels *v.* Nathan, 12 Cal. App. 604, 108 P. 34; Atkins *v.* B. & T. Co. (Ky.), 124 S. W. 879; Star *v.* Penfield, 166 Mo. App. 302, 148 S. W. 382.

Presumption of fraud from inadequacy of consideration not indulged in absence of proof that grantor had no other property sufficient to pay debts. Pearsall *v.* Stewart, 112 App. Div. 366, 98 N. Y. S. 467.

121-13 Nat. Bk. *v.* Behan (1913), Ir. R. 512; Flood *v.* Bollmeier (Ia.), 138 N. W. 1102; Long *v.* Co., 135 Ia. 398, 112 N. W. 550; Am. Nat. Bk. *v.* Thornburrow, 109 Mo. App. 639, 83 S. W. 771; Vandeventer *v.* Goss, 116 Mo. App. 316, 91 S. W. 958; Scharff *v.* McGaugh, 205 Mo. 344, 103 S. W. 550; State Bk. *v.* Fish, 120 N. Y. S. 365 (substitution of collaterals); Douthat *v.* Roberts (W. Va.), 80 S. E. 819. See Waddle *v.* Phosphate Co. (Ala.), 63 S. 462; Flood *v.* Bollmeier (Ia.), 144 N. W. 579.

Grantee must show debtor's property sufficient to meet demands against him. Adams *v.* Wingard, 53 Wash. 560, 102 P. 426.

121-14 Elam *v.* Lumb. Co., 176 Ala. 48, 57 S. 483; Edwards Mfg. Co. *v.* Carr, 65 W. Va. 673, 64 S. E. 1030. See Simon *v.* Groc. Co., 108 Ark. 164, 156 S. W. 1015.

121-16 Folkes *v.* Wyatt (Tex. Civ.), 126 S. W. 958.

122-18 Fouche *v.* Shearer, 172 Fed. 592. *Comp.* In re Kayser, 177 Fed. 383, 100 C. C. A. 615. *Contra* under statute. Cracy *v.* Kurtz, 132 Ia. 105, 105 N. W. 590, 109 N. W. 452; Seilert *v.* McAnally, 223 Mo. 505, 122 S. W. 1064; Scharff *v.* McGaugh, 205 Mo. 344, 103 S. W. 550.

In a case where a husband, engaged in business and involved in debt, resulting in insolvency, made a voluntary transfer of property to his wife, it was said that, as against existing creditors, such transfer was fraudulent, no matter how pure the motive which induced it, because from the testimony the result of such transfer was to reduce the assets of the husband to such an extent as to delay and hinder his creditors in the collection of their debt. Brady *v.* Irby, 101 Ark. 573, 142 S. W. 1124.

122-19 Allen *v.* Pierce, 163 Ala. 612, 50 S. 924; Borror *v.* Carrier, 34 Ind. App. 353, 73 N. E. 123; Richardson *v.* Richardson, 134 Ia. 242, 111 N. W. 934; Lehrenkrauss *v.* Bonnell, 138 App. Div. 493, 122 N. Y. S. 866.

123-21 Joy *v.* Helbing, 7 Cal. App. 519, 94 P. 863 (husband to wife); Hunt *v.* Nance, 122 Ky. 274, 92 S. W. 6; Standifer *v.* Baker, 31 Ky. L. R. 42, 101 S. W. 365; Seed *v.* Jennings, 47 Or. 464, 83 P. 872. See Quilidimi *v.* Agostini, 2 P. R. Fed. 258.

123-22 Burden on creditor to show arising of debt three years after debtor obtained possession of bailed property under statute vesting title in bailee after such period. Matthis *v.* Thurman, 143 Ala. 558, 39 S. 360.

123-23 Bartell *v.* Griffin, 47 Colo. 569, 108 P. 171; Hoffman *v.* Owens, 31 Nev. 481, 104 P. 241; Allen *v.* Gray, 63 Misc. 219, 115 N. Y. S. 928. See Helgert *v.* Stewart, 20 Colo. App. 202, 77 P. 1091; Farmer *v.* Hughes, 38 Colo. 318, 88 P. 191; Rapple *v.* Hughes, 10 Ida. 338, 77 P. 722; Anderson *v.* Berry, 158 Mo. App. 133, 138 S. W. 78; Ellet-Kendall Shoe Co. *v.* Ross, 28 Okla. 697, 115 P. 892; Johnson *v.* Emery, 31 Utah 126, 86 P. 869.

Transfer may be constructive.—Taney *v.* Bk., 187 Fed. 689, 109 C. C. A. 437; Dysart Savings Bk. *v.* Weinstein, 152 Ia. 260, 132 N. W. 18.

123-24 In re Elletson Co., 174 Fed. 859 (under amended statute of West Virginia, changing rule declared by state court); Hiser *v.* Walbaum, 129 Ill. App. 82; Foley *v.* Boyer, 153 Ill. App. 613; Radovich *v.* Jenkins, 123 La. 355, 48 S. 988; Grand Rapids B. Co. *v.* Pettis, 159 Mich. 679, 124 N. W. 577; Williams *v.* Brown, 137 Mich. 569, 100 N. W. 786 (presumption applies in favor of both prior and subsequent cred-

itors); Wilson *v.* Walrath, 103 Minn. 413, 115 N. W. 203; Stam *v.* Smith, 183 Mo. 464, 81 S. W. 1217; Neeley *v.* Trautwein, 79 Neb. 751, 113 N. W. 141; Hickok *v.* Cowperthwaite, 134 App. Div. 617, 119 N. Y. S. 390; Hill *v.* Page, 108 App. Div. 71, 95 N. Y. S. 465; Tuttle *v.* Hayes, 107 N. Y. S. 22; Cochran Grocery Co. *v.* Harris, 28 Okla. 715, 116 P. 185; Hunter Const. Co. *r.* Lyons, 233 Pa. 561, 82 A. 761; Kendig *r.* Binkley, 10 Pa. Super. 463; Speidel G. Co. *v.* Stark, 62 W. Va. 512, 59 S. E. 498; Seivert *v.* Galvin, 133 Wis. 391, 113 N. W. 680.

See In re Friedman, 164 Fed. 131.

Burden resting on grantee.—Dose *v.* Beatie, 62 Or. 308, 123 P. 383, 125 P. 277.

Under Texas statute possession of wife's property by husband after transfer to her by him not significant. Broussard *v.* Lawson (Tex. Civ.), 124 S. W. 712.

124-25 Brown-Camp Hardware Co. *v.* Hawthorne, 154 Ia. 456, 135 N. W. 75; Kimelewski *v.* C., 39 Pa. Super. 308.

125-27 Hoffman *v.* Owens (Nev.), 104 P. 241; Seivert *v.* Galvin, 133 Wis. 391, 113 N. W. 680 (question for jury). See Rosenberg *v.* Ross, 6 Cal. App. 755, 93 P. 284; Israel *v.* Day, 41 Colo. 52, 92 P. 698; Rapple *v.* Hughes, 10 Ida. 338, 77 P. 722; Reynolds *v.* Beck, 108 Mo. App. 188, 83 S. W. 292; Webster *v.* Sherman, 33 Mont. 448, 84 P. 878; Kendig *v.* Binkley, 10 Pa. Super. 463.

Actual delivery, open public change of possession, continued and manifested by outward and visible signs, rendering it evident that possession and apparent, as well as real ownership of vendor has ended necessary under statute. Allen *v.* Gray, 63 Misc. 219, 115 N. Y. S. 928.

125-28 *Comp.* Speidel G. Co. *v.* Stark, 62 W. Va. 512, 59 S. E. 498.

125-29 Retention by husband of land conveyed to wife not significant if living together. Robertson *v.* Hefley, 55 Tex. Civ. 368, 118 S. W. 1159.

125-30 Wilson *v.* Walrath, 103 Minn. 413, 115 N. W. 203; Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268.

126-33 Griswold *v.* Nichols, 126 Wis. 401, 105 N. W. 815.

126-34 Lowe *v.* Matson, 140 Ill. 108, 29 N. E. 1036.

126-35 Horner-G. Co. *v.* Miller, 147 Fed. 295; Wilks *v.* Vaughan, 73 Ark. 174, 83 S. W. 913; Gage *v.* Burns, 78 Neb. 737, 111 N. W. 791; Coffey *v.* Scott, 66 Or. 465, 135 P. 88; U. S. Nat. Bk. *v.* Thebaud, 65 Or. 317, 132 P. 1168; Stubling *v.* Wilson, 50 Or. 282, 90 P. 1011 (brothers); Livesley *v.* Heise, 48 Or. 147, 85 P. 509.

Presumption rebuttable by positive evidence of unfriendly relations. White *v.* Glover, 23 App. Cas. (D. C.) 389.

127-36 Davis *v.* Vandiver, 160 Ala. 454, 49 S. 318; Am. H. & D. Co. *v.* Hall, 208 Ill. 597, 70 N. E. 581; First N. Bk. *v.* Fry, 216 Mo. 24, 115 S. W. 439. See Shiels *v.* Nathan, 12 Cal. App. 604, 108 P. 34; Mueller *v.* Renkes, 31 Mont. 100, 77 P. 512; Johnson *v.* Lucas, 103 Va. 36, 48 S. E. 497; Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268.

127-37 Long *v.* Co., 135 Ia. 398, 112 N. W. 550 (creditors not shown to be prior); Russell *v.* Phillips, 145 Mich. 268, 108 N. W. 718. See Lehman *v.* Gunn, 154 Ala. 369, 45 S. 620; Campbell *v.* Campbell, 129 Ia. 317, 105 N. W. 583; Smyth *v.* Hall, 126 Ia. 627, 102 N. W. 520. *Contra,* Hatfield *v.* Cline, 143 Ky. 565, 137 S. W. 212; Dorwin *v.* Patton, 101 Minn. 344, 112 N. W. 266 (not conclusive); Seeley *r.* Ritchey, 76 Neb. 427, 107 N. W. 769, *rev.* on rehearing, 110 N. W. 1105; Flint *v.* Chaloupka, 78 Neb. 594, 111 N. W. 465, 13 L. R. A. (N. S.) 309; Hulen *v.* Chilcoat, 79 Neb. 595, 113 N. W. 122; Shoemaker *v.* Drug Co., 112 Va. 612, 72 S. E. 121.

Comp. Simon *v.* Groc. Co., 108 Ark. 164, 156 S. W. 1015.

Such a relation calls for a closer scrutiny than where strangers are engaged. Cowan *v.* Staggs, 178 Ala. 144, 59 S. 153.

Many courts, say transaction between members of family to be closely scrutinized. Penn *v.* Trompen, 72 Neb. 273, 100 N. W. 312; Lawrence *v.* Heylman, 111 App. Div. 848, 98 N. Y. S. 121, *aff.* 189 N. Y. 573, 82 N. E. 1128; Bailey *v.* Fransioli, 101 App. Div. 140, 91 N. Y. S. 852.

Voluntary donee must show as against claimant through creditor of his donor existence of facts sustaining title. Hobbs *v.* Cashwell, 152 N. C. 183, 67 S. E. 495.

Carefully scrutinized if conveyance covers all of debtor's property. Riker *v.* Gwynne, 129 App. Div. 112, 113 N. Y. S. 404.

127-38 Nowsky *v.* Siedlecki, 83 Conn. 109, 75 A. 135; Guthrie *v.* Hill,

138 Ky. 181, 127 S. W. 767 (statute). See Clark *v.* Ford, 126 Ia. 460, 102 N. W. 421; Berry *v.* Ewen, 27 Ky. L. R. 467, 85 S. W. 227 (fraud not presumed where wife had property equal to consideration paid for conveyance); Wadleigh *v.* Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063; Van Ingen *v.* Peterson, 31 O. C. C. 506; Everson *v.* Wood, 59 Or. 285, 117 P. 299; Sav. Bk. *v.* Todd, 114 Va. 708, 77 S. E. 446.

128-39 Papan *v.* Nahay, 106 Ark. 230, 152 S. W. 107; Martin *v.* Banks, 89 Ark. 77, 115 S. W. 928; Waters *v.* Co., 76 Ark. 252, 88 S. W. 879 (uncorroborated testimony of wife insufficient); Tibbetts *v.* Terrill, 44 Colo. 94, 96 P. 978; Helm *v.* Brewster, 42 Colo. 25, 93 P. 1101; Gray *v.* Collins, 139 Ga. 776, 78 S. E. 127; Strickland *v.* Jones, 131 Ga. 409, 62 S. E. 322; Kennard *v.* Curran, 239 Ill. 122, 87 N. E. 913; Torrey *v.* Dickinson, 213 Ill. 36, 72 N. E. 703; Carr *v.* Way, 141 Ia. 245, 119 N. W. 700; Harvey *v.* Godding, 77 Neb. 289, 109 N. W. 220; Graeber *v.* Sides, 151 N. C. 596, 66 S. E. 600; Meighen *v.* Chandler, 20 N. D. 238, 126 N. W. 992; Walker *v.* Harold, 44 Or. 205, 74 P. 705; Eason *v.* Lyons, 114 Va. 390, 76 S. E. 957; Rankin *v.* Goodwin, 103 Va. 81, 48 S. E. 521; Hughson *v.* Dameron, 113 Va. 607, 75 S. E. 92; Kline *v.* Kline, 103 Va. 263, 48 S. E. 882; Dill *v.* Carver, 70 Wash. 103, 126 P. 86; Adams *v.* Wingard, 53 Wash. 560, 102 P. 426; Edwards Mfg. Co. *v.* Carr, 65 W. Va. 673, 64 S. E. 1030.

See Stix *v.* Calender, 155 Ky. 806, 160 S. W. 514; Knickerbocker T. Co. *v.* Carhart, 71 N. J. Eq. 495, 64 A. 756; Mauch Chunk Nat. Bk. *v.* Shrader (W. Va.), 81 S. E. 1121. But see Perry *v.* Krish, 157 Ky. 109, 162 S. W. 555; Blackwell *v.* O'Neal, 152 Ky. 563, 153 S. W. 721.

But where husband not indebted at time of conveyance no presumption of fraud and burden on subsequent creditor. Richardson *v.* Pierce, 105 Va. 628, 54 S. E. 480.

Rule not applicable in favor of subsequent creditors. Eckhart *v.* Co., 236 Ill. 134, 86 N. E. 199.

128-40 Van Ingen *v.* Peterson, 31 O. C. C. 506.

129-42 Dumas *v.* Clayton, 32 App. Cas. (D. C.) 566; Coldren L. Co. *v.* Royal, 140 Ia. 381, 118 N. W. 426. See Cawood *v.* Howard (Ky.), 113 S. W. 109; Standifer *v.* Baker, 31 Ky. L. R. 42, 101 S. W. 365.

Judgment in attachment important evidence of debtor's intent. Smith *v.* Birge, 126 Ill. App. 596.

Knowledge of grantee inferred from position of parties.—Nelson *v.* Spence, 129 Ga. 35, 58 S. E. 697, grantee president of grantor corporation.

Spendthrift putting entire estate in hands of trustee presumed to intend fraud as to subsequent creditors. Ward *v.* Marie, 73 N. J. Eq. 510, 68 A. 1084. *Comp.* Newton *v.* Jay, 107 App. Div. 457, 95 N. Y. S. 413, deed of trust by woman contemplating foreign marriage, not fraudulent.

Bulk sale of goods not so far prima facie fraudulent as to meet burden assumed by complainant of showing bad faith. Shelton *v.* Price, 174 Fed. 891.

129-43 Chandler *v.* Higgins, 156 Ala. 511, 47 S. 284.

Grantor's intent immaterial if debt paid bona fide, payment absolute and not materially in excess of debt, and no advantage retained. Lightman *v.* Epstein, 164 Ala. 660, 51 S. 164.

130-47 Kennard *v.* Curran, 239 Ill. 122, 87 N. E. 913; Cohen *v.* Goldberg, 65 Minn. 473, 67 N. W. 1149; Hill *v.* Page, 108 App. Div. 71, 95 N. Y. S. 465; Robertson *v.* Hafley, 55 Tex. Civ. 368, 118 S. W. 1159.

131-48 Allen *v.* Knutson, 96 Minn. 340, 104 N. W. 963.

132-54 Dumas *v.* Clayton, 32 App. Cas. (D. C.) 566.

133-55 Kennard *v.* Curran, 239 Ill. 122, 87 N. E. 913.

Incompetent to testify as to transactions with deceased grantee (statute). Roberts *v.* Mack, 98 App. Div. 485, 90 N. Y. S. 526. But where grantor deceased grantee not incompetent. Stam *v.* Smith, 183 Mo. 464, 81 S. W. 1217.

Grantor's testimony of fraudulent intent not necessarily showing fraud. Robertson *v.* Hefley, 55 Tex. Civ. 368, 118 S. W. 1159.

133-57 Savage *v.* Milum, 170 Ala. 115, 54 S. 180; Hill *v.* Page, 108 App. Div. 71, 95 N. Y. S. 465.

"As to the first assignment of error, we are unable to see why it was not competent and relevant for the witness Fannie D Eubanks to testify as to what her intention was at the time the mortgage was executed to her. It cannot be denied that the mortgage would be valid in her hands as against

the creditors of her husband, even if he had a fraudulent intent, provided she did not have notice of it or did not participate in the fraudulent execution of the mortgage, and, this being one of the questions involved in the case, how can the fact better be proved than by her own testimony as to what her intention was at the time?" Sanford Chamberlain & Albers Co. *v.* Eubanks, 152 N. C. 697, 68 S. E. 219.

133-58 Grantor's testimony competent to show grantor's knowledge. Townes *v.* Stultz, 78 S. C. 366, 59 S. E. 983.

Question of good faith open to investigation only when attack is on ground of fraud in fact as well as fraud in law. Taylor *v.* Co., 47 Mont. 342, 132 P. 549.

134-59 Chandler *v.* Higgins, 156 Ala. 511, 47 S. 284.

135-60 Helm *v.* Brewster, 42 Colo. 25, 93 P. 1101; De Ruiter *v.* De Ruiter 28 Ind. App. 9, 62 N. E. 100; Riker *v.* Gwynne, 109 N. Y. S. 570; Virginia-C. C. Co. *v.* Hunter, 84 S. C. 214, 66 S. E. 177.

135-61 In re Elletson, 174 Fed. 859; Allen *v.* Caldwell, 149 Ala. 293, 42 S. 855; Morgan *v.* Kendrick, 91 Ark. 394, 121 S. W. 278; Smith *v.* Goodrich, 75 Ark. 603, 87 S. W. 125; Ferguson *v.* Tr. Co., 99 Ark. 45, 137 S. W. 555; Raney Bros. *v.* Cotton Co., 11 Ga. App. 450, 75 S. E. 672; Kennard *v.* Curran, 239 Ill. 122, 87 N. E. 913; Coldren L. Co. *v.* Rayol, 140 Ia. 381, 118 N. W. 426 (failure to put ante-nuptial contract in writing); Bowman *v.* Baker, 147 Ky. 437, 144 S. W. 383; Dallas B. *v.* Holzner, 116 La. 719, 41 S. 48 (failure of grantor and grantee to deny fraud or affirm good faith); Thompson *v.* Williams, 100 Md. 195, 60 A. 26; Klauber *v.* Schloss, 198 Mo. 502, 95 S. W. 930; Southern Bk. *v.* Nichols, 202 Mo. 309, 100 S. W. 613; St. Francis Mill Co. *v.* Sugg, 206 Mo. 148, 104 S. W. 5; Phillips *v.* Rule, 124 Mo. App. 525, 102 S. W. 32 (sale of large stock of goods in bulk, without inventory or appraisement and in haste); New York S. M. Co. *v.* West, 107 Mo. App. 254, 80 S. W. 923 (sending checks to creditors though no funds on deposit); Omaha C. L. Co. *v.* Shelly, 89 Neb. 502, 131 N. W. 926; Lawrence *v.* Heylman, 111 App. Div. 848, 98 N. Y. S. 121, *aff.* 189 N. Y. 573, 82 N. E. 1128; Blyth & F. Co. *v.* Kastor, 17 Wyo. 180, 97 P. 921.

Circumstances insufficient to show fraud. Pierce *v.* Pierce, 16 Cal. App. 375, 117 P. 580.

False recital of consideration, no per se evidence of fraud. Pierce *v.* Pierce, supra.

Statement in conveyance that it was not given to defraud no evidence of fraud. Strop *v.* Hughes, 123 Mo. App. 547, 101 S. W. 146.

136-62 In re Larkin, 168 Fed. 100 (may overcome grantor's testimony); California M. Co. *v.* Manley, 10 Ida. 786, 81 P. 50; Wigginton *v.* Minter, 28 Ky. L. R. 79, 88 S. W. 1082; Childers *v.* Pickenpaugh, 219 Mo. 376, 118 S. W. 453; Adams *v.* Hamilton, 53 Tex. Civ. 405, 116 S. W. 1169; Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268; Moore *v.* Tearney, 62 W. Va. 72, 57 S. E. 263.

137-63 Nixon *v.* Goodwin, 3 Cal. App. 358, 85 P. 169.

138-64 Pelham *v.* Co., 156 Ala. 500, 47 S. 172.

Payment of creditors with proceeds of sale, relevant. Van Slyck *v.* Woodruff, 118 App. Div. 47, 103 N. Y. S. 139.

138-65 Shelton *v.* Price, 174 Fed. 891; Chandler *v.* Higgins, 156 Ala. 511, 47 S. 284; Tibbetts *v.* Terrill, 44 Colo. 94, 96 P. 978; Scott *v.* Lumaghi, 236 Ill. 564, 86 N. E. 384; First Nat. Bk. *v.* Hoard, 142 Ia. 726, 121 N. W. 508; Atherton *v.* Emerson, 199 Mass. 199, 85 N. E. 530; Matthews *v.* Joannes, 156 Mich. 663, 121 N. W. 272; Childers *v.* Pickenpaugh, 219 Mo. 376, 118 S. W. 453; Rusho *v.* Richardson, 77 Neb. 360, 109 N. W. 394; Whitwell *v.* Wright, 136 App. Div. 246, 120 N. Y. S. 1065; Bailey *v.* Fransioli, 101 App. Div. 140, 91 N. Y. S. 852; C. *v.* Hyde, 39 Pa. Super. 261; Townes *v.* Stultz, 78 S. C. 366, 59 S. E. 983; Comeau *v.* Hurley, 22 S. D. 310, 117 N. W. 371; Berge *v.* Kittleson, 133 Wis. 664, 114 N. W. 125 (payment of other creditors by vendee).

Giving other security for same debt, to same party, at same time shown. Blyth & F. Co. *v.* Kastor, 17 Wyo. 180, 97 P. 921.

139-66 Fabian *v.* Traeger, 215 Ill. 220, 74 N. E. 131; King *v.* Grannis, 29 Pa. Super. 367; C. *v.* Hyde, 39 Pa. Super. 261.

140-68 Lightman *v.* Epstein, 164 Ala. 660, 51 S. 164; Ferguson *v.* Tr. Co., 99 Ark. 45, 137 S. W. 555; Montgomery

v. Gardner (R. I.), 71 A. 67; McCaskey *v.* Potts, 65 W. Va. 641, 64 S. E. 908.

141-70 Repayment by wife to husband of money used by him improving property he conveyed to her cannot be established by their uncorroborated testimony. Edwards Mfg. Co. *v.* Carr, 65 W. Va. 673, 64 S. E. 1030.

142-71 In re McLoon, 162 Fed. 575; Lynch *v.* Sweetland, 8 Cal. App. 582, 97 P. 413; Joy *v.* Helbing, 7 Cal. App. 519, 94 P. 863; Rankin *v.* Schultz, 141 Ia. 681, 118 N. W. 383; Tabor *v.* Armstrong, 30 Ky. L. R. 938, 99 S. W. 957; Clark *v.* Lewis, 215 Mo. 173, 114 S. W. 604 (conditions under which withholding from record fraudulent); Moore *v.* Tearney, 62 W. Va. 72, 57 S. E. 263. See Big Four I. Co. *v.* Wright, 207 Fed. 535, 125 C. C. A. 577. *Comp.* Allen *v.* Caldwell, 149 Ala. 293, 42 S. 855; Atkinson *v.* McNider, 130 Ia. 281, 105 N. W. 504; Thompson *v.* Williams, 100 Md. 195, 60 A. 26; Johnston *v.* Bk., 85 Miss. 234, 38 S. 100; Jones *v.* Levering, 116 Mo. App. 377, 91 S. W. 980.

142-72 Bucher *v.* Allen, 11 Cal. App. 650, 105 P. 942 (vendee's employment by vendor tends to prove no change of possession); Bishop *v.* Co., 30 Ky. L. R. 725, 99 S. W. 644; Thompson *v.* Williams, 100 Md. 195, 60 A. 26 (child need not expel father from home); Citizens' S. Bk. *v.* Brown, 110 Minn. 176, 124 N. W. 990; Atlantic R. Co. *v.* Stokes, 77 N. J. Eq. 119, 75 A. 445 (not convincing); Edwards *v.* Co., 150 N. C. 171, 63 S. E. 742; Witt *v.* Teat (Tex. Civ.), 167 S. W. 302; Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268; Seivert *v.* Galvin, 133 Wis. 391, 113 N. W. 680. See Leader *v.* Co., 144 Ia. 180, 122 N. W. 833; Studebaker Bros. Mfg. Co. *v.* Elsey, etc. Co., 152 Mo. App. 401, 133 S. W. 412.

Reconveyance to wife of grantor's debtor and his management of property to be considered. Bodkin *v.* Kerr, 97 Minn. 301, 107 N. W. 137.

Assessment of property to vendor subsequent to sale irrelevant. Comeau *v.* Hurley, 24 S. D. 275, 123 N. W. 715.

142-74 Gage *v.* Mears, 107 Mo. App. 140, 80 S. W. 712, fraud not inferred from insolvency.

142-75 Chandler *v.* Higgins, 156 Ala. 511, 47 S. 284.

Vendor may testify that certain creditors were omitted from schedule filed by him, that debts enumerated were owing when he paid defendant. Grant *v.* Co., 23 S. D. 195, 121 N. W. 95.

143-76 Rankin *v.* Schultz, 141 Ia. 681, 118 N. W. 383; Washington Nat. Bk. *v.* Beatty, 75 N. J. Eq. 433, 72 A. 428; Riker *v.* Gwynne, 129 App. Div. 112, 113 N. Y. S. 404.

Proximity in time of conveyance and judgment, of slight importance. Thompson *v.* Williams, 100 Md. 195, 60 A. 26.

Debtor's liability to action for damages must be shown, if relevant, by proof of facts existing when conveyance made. Hinkle *v.* Smith, 133 Ga. 255, 65 S. E. 427.

143-77 Strickland *v.* Jones, 131 Ga. 409, 62 S. E. 322.

143-78 Mercantile Exch. Bk. *v.* Taylor, 51 Fla. 473, 41 S. 22, not conclusive.

Judicial notice taken of fact of want of custom for merchant to mortgage entire stock to secure prior indebtedness. Grant *v.* Co., 23 S. D. 195, 121 N. W. 95.

143-79 Davis *v.* Vandiver, 160 Ala. 454, 49 S. 318; McCuin *v.* Groc. Co., 78 Ark. 63, 93 S. W. 563; Walker *v.* Montgomery, 236 Ill. 244, 86 N. E. 240; Urdangen *v.* Doner, 122 Ia. 533, 98 N. W. 317; Morgan *v.* Boulton, 27 Ky. L. R. 572, 85 S. W. 747; Willett *v.* Froelich, 28 Ky. L. R. 798, 90 S. W. 572; Bishop *v.* Co., 30 Ky. L. R. 725, 99 S. W. 644; Mueller *v.* Renkes, 31 Mont. 100, 77 P. 512; Bunker *v.* Co., 75 N. H. 131, 71 A. 866; Lawrence *v.* Heylman, 111 App. Div. 848, 98 N. Y. S. 121, *aff.* 189 N. Y. 573, 82 N. E. 1128; Wahlheimer *v.* Truslow, 106 App. Div. 73, 94 N. Y. S. 137; Ketner *v.* Donten, 15 Pa. Super. 604.

See Beebe S. Co. *v.* Austin, 92 Ark. 248, 122 S. W. 482.

Want of consideration evidentiary fact, not conclusive of fraudulent intent. Stevens *v.* Meyers, 14 N. D. 398, 104 N. W. 529.

143-80 Montgomery M. Mfg. Co. *v.* Leith, 162 Ala. 246, 50 S. 210; Bekins *v.* Dieterle, 5 Cal. App. 690, 91 P. 173; Southern Bk. *v.* Nichols, 202 Mo. 309, 100 S. W. 613; Parks *v.* Worthington, 101 Tex. 505, 109 S. W. 909.

143-81 Martin *v.* Gwynn, 90 Ark. 44 117 S. W. 754; Nelson *v.* Spence, 129 Ga. 35, 58 S. E. 697; Clark *v.* Harper, 215 Ill. 24, 74 N. E. 61; Morgan *v.* Boulton, 25 Ky. L. R. 572, 85 S. W.

747; Brite *v.* Guy, 28 Ky. L. R. 57, 88 S. W. 1069; Willett *v.* Froelich, 28 Ky. L. R. 798, 90 S. W. 572; New Orleans Co. *v.* Guillory, 117 La. 821, 42 S. 329; McCauley *v.* Shockey, 105 Md. 641, 66 A. 625 (relevant to issue of grantee's guilty knowledge); Black *v.* Epstein, 221 Mo. 286, 120 S. W. 754; Martin *v.* Shears, 78 Neb. 404, 110 N. W. 1010; Riker *v.* Gwynne, 109 N. Y. S. 570; Edwards *v.* Co., 150 N. C. 171, 63 S. E. 742; Coombs *v.* Aborn, 29 R. I. 40, 68 A. 817; Ford *v.* Chelf, 112 Va. 98, 70 S. E. 500; Adams *v.* Dempsey, 35 Wash. 80, 76 P. 538; Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268; Moore *v.* Tearney, 62 W. Va. 72, 57 S. E. 263.

Unsatisfactory showing as to where grantee obtained money suspicious circumstance. McCuin *v.* Groc. Co., 78 Ark. 63, 93 S. W. 563; Morimura *v.* Samaha, 25 App. Cas. (D. C.) 189.

Existence of secret trust badge of fraud. Thompson *v.* Williams, 100 Md. 195, 60 A. 26.

144-82 Grantee first-class business man irrelevant. Arnold *v.* Harris, 142 Mich. 275, 105 N. W. 744. Character of parties irrelevant. Black *v.* Epstein, 221 Mo. 286, 120 S. W. 754.

144-83 See Oldham's Admx. *v.* Oldham's Admx., 141 Ky. 526, 133 S. W. 232; McCaskey *v.* Potts, 65 W. Va. 641, 64 S. E. 908.

144-84 Pelham *v.* Co., 156 Ala. 500, 47 S. 172; Martin *v.* Gwynn, 90 Ark. 44, 117 S. W. 754; Clark *v.* Harper, 215 Ill. 24, 74 N. E. 61; Crary *v.* Kurtz, 132 Ia. 105, 105 N. W. 590, 109 N. W. 452; Black *v.* Epstein, 221 Mo. 286, 120 S. W. 754; Stevens *v.* Meyers, 14 N. D. 398, 104 N. W. 529; Blyth & F. Co. *v.* Kastor, 17 Wyo. 180, 97 P. 921. See Smeeth-Harwood Co. *v.* Hutchison, 175 Ill. App. 602; Smith *v.* Birge, 126 Ill. App. 596.

Grantor's solvency is important, but not conclusive. Quinn *v.* Co., 102 Minn. 256, 113 N. W. 689.

Irregular judgment admissible to show donor's indebtedness when making gift to wife. Cone *v.* Belcher, 57 Tex. Civ. 493, 124 S. W. 149.

144-85 Transactions whereby debtors strip themselves of all their property raise presumption of fraudulent intent. McCauley *v.* Shockey, 105 Md. 641, 66 A. 625; Bailey *v.* Fransioli, 101 App. Div. 140, 91 N. Y. S. 852; Blahnik *v.* Barta, 130 Wis. 121, 109 N. W. 980. See Hemenway *v.* Thaxter, 150 Cal. 737, 90 P. 116; Bekins *v.* Dieterle, 5 Cal. App. 690, 91 P. 173; Morgan *v.* Boulton, 27 Ky. L. R. 572, 85 S. W. 747; Jones *v.* Lossiter, 29 Ky. L. R. 514, 93 S. W. 657; Dallas Brewery *v.* Holzner, 116 La. 719, 41 S. 48. Where debtor strips himself but uses property to pay certain creditors, fraudulent intent disproved. Scott *v.* Thomas, 104 Va. 330, 51 S. E. 829.

Insolvency as result of conveyance not shown by proof of insolvency nine months after conveyance. Clark *v.* Lewis, 215 Mo. 173, 114 S. W. 604. Presumption that grantor had no property left after voluntary conveyance when execution returned unsatisfied. Campbell *v.* Campbell, 129 La. 317, 105 N. W. 583.

145-87 Tibbetts *v.* Terrill, 44 Colo. 94, 96 P. 978.

Habits of grantor shown by trustee in bankruptcy seeking to recover a preference for purpose of showing what grantee would have discovered if he had made an honest inquiry. Grant *v.* Co., 23 S. D. 195, 121 N. W. 95.

145-89 If grantee knew insolvency of grantor and had reasonable cause to believe effect of transfer would be to give him a preference, no other evidence of intent to prefer necessary. Hess *v.* Co., 108 Minn. 22, 121 N. W. 232, *dist.* Hardy *v.* Gray, 144 Fed. 922, 75 C. C. A. 562.

Grantee's knowledge not shown by contract made with grantor. Van Iderstine *v.* Co., 98 C. C. A. 300, 174 Fed. 518.

146-91 Montgomery M. Mfg. Co. *v.* Leith, 162 Ala. 246, 50 S. 210. See Dallas Brewery *v.* Holzner, 116 La. 719, 41 S. 48

146-95 Doxsee *v.* Waddick, 122 Ia. 599, 98 N. W. 483; Homewood P. Bk. *v.* Marshall, 223 Pa. 289, 72 A. 627; Horstman *v.* Little (Tex. Civ.), 88 S. W. 286.

Deeds and mortgages. — Pritchard *v.* Smith, 160 N. C. 79, 75 S. E. 803.

148-97 Fabian *v.* Traeger, 215 Ill. 220, 74 N. E. 131, purchases by grantee from defendant and from corporation president of which was defendant's wife, made on same day, shown, though but one sale attacked for fraud.

148-2 Thompson *v.* Newland, 144 Mich. 595, 108 N. W. 93.

149-4 Doxsee *v.* Waddick, 122 Ia. 599, 98 N. W. 483.

149-5 Perry *v.* Pore, 28 Ky. L. R. 897, 90 S. W. 952.
Offers to sell by grantor inadmissible in favor of grantee unless part of res gestae. McCuin *v.* Co., 78 Ark. 63, 93 S. W. 563.

149-8 Grant *v.* Co., 23 S. D. 195, 121 N. W. 95. See vol. 1, p. 520, et seq.
Excessive effort to give transaction fair aspect considered. Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268.

150-10 Citizens' S. Bk. *v.* Brown, 110 Minn. 176, 124 N. W. 990.
Remote acts cannot be proved. Barr *v.* Sofranski, 130 App. Div. 783, 115 N. Y. S. 533.
Disposition of vendor's goods shown to ascertain value. Grant *v.* Co., 23 S. D. 195, 121 N. W. 95.

150-12 Parker *v.* Fenwick, 147 N. C. 525, 61 S. E. 378.

151-13 Goldstein *v.* Morgan, 122 Ia. 27, 96 N. W. 897; Walker *v.* Bk., 33 Ky. L. R. 753, 111 S. W. 328; Borden *v.* Lynch, 34 Mont. 503, 87 P. 609; Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268.

152-15 Homewood P. Bk. *v.* Marshall, 223 Pa. 289, 72 A. 627 (if some evidence received showing common design by parties).
Statements grantor on supplementary proceedings admissible. Lawrence *v.* Heylman, 111 App. Div. 848, 98 N. Y. S. 121, *aff.* 189 N. Y. 573, 82 N. E. 1128.
Subsequent use of money obtained for property immaterial. First Nat. Bk. *v.* Fry, 216 Mo. 24, 115 S. W. 439.
Mortgaging land conveyed by debtor to children significant fact. Martin *v.* Gwynn, 90 Ark. 44, 117 S. W. 754.

153-19 Grantors' declarations to notary who drew deed, in plaintiff's absence incompetent to show good faith. Johnston *v.* Spoonheim, 19 N. D. 191, 123 N. W. 830.

153-20 See Smith *v.* Birge, 126 Ill. App. 596.
Subsequent declarations competent. Chandler *v.* Higgins, 156 Ala. 511, 47 S. 284.

153-21 Collin Co. Grain. Co. *v.* Andrew (Ark.), 162 S. W. 1098 (*quot.* 6 ENCY. OF EV. 153); Skelley *v.* Vail, 27 Ind. App. 87, 60 N. E. 961; Stam *v.* Smith, 183 Mo. 464, 81 S. W. 1217; Beeler *v.* Perry, 128 Mo. App. 234, 107 S. W. 1008; Wadleigh *v.* Wadleigh, 111 App. Div. 367, 97 N. Y S. 1063, *s. c.*, 109 N. Y. S. 633; Parker *v.* Fenwick, 147 N. C. 525, 61 S. E. 378; Henry *v.* Phillips, 105 Tex. 459, 151 S. W. 533; Maffi *v.* Stephens (Tex. Civ.), 93 S. W. 158; Colston *v.* Miller, 55 W. Va. 490, 47 S. E. 268. See Martin *v.* Shumway, 89 Kan. 892, 132 P. 993, and 6-153.

154-22 Perry *v.* Pore, 28 Ky. L. R. 897, 90 S. W. 952. *Comp.* Martin *v.* Shumway, 89 Kan. 892, 132 P. 993.

154-23 Hargus *v.* Hayes, 83 Ark. 186, 103 S. W. 163; Borden *v.* Lynch, 34 Mont. 503, 87 P. 609; Maffi *v.* Stephens (Tex. Civ.), 93 S. W. 158.

155-26 See Thompson *v.* Shaw, 104 Me. 85, 71 A. 370.

155-28 Skelley *v.* Vail, 27 Ind. App. 87, 60 N. E. 961; Walker *v.* Harold, 44 Or. 205, 74 P. 705.

156-30 Boyer *v.* Weimer, 204 Pa. 295, 54 A. 21.

156-33 Banks *v.* McCandless, 119 Ga. 793, 47 S. E. 332; Moore *v.* Tearney, 62 W. Va. 72, 57 S. E. 263.

157-35 Emmons *v.* Barton, 109 Cal. 662, 42 P. 303.

159-46 Merillat *v.* Hensey, 32 App. Cas. (D. C.) 64; White *v.* Million, 114 Mo. App. 70, 89 S. W. 599; Tuttle *v.* Hayes, 107 N. Y. S. 22; Stevens *v.* Meyers, 14 N. D. 398, 104 N. W. 529.
Where on face legal effect of instrument is to hinder creditors question of fraudulent intent is one of law. Wood *v.* Eldredge, 147 Mich. 554, 111 N. W. 168.
Facts ascertained and determined by trial court, existence of constructive fraud and of valuable consideration, question of law on appeal. Clark *v.* Block, 78 Conn. 467, 62 A. 757.
While what constitutes fraudulent intention is by statute question of fact findings of referee not controlling on appeal (Tanner *v.* Eckhardt, 107 App. Div. 79, 94 N. Y. S. 1013), though finding of jury conclusive. Hill *v.* Page, 108 App. Div. 71, 95 N. Y. S. 465.

GAMING.

Character of house, how shown, 198-43; *Keeping bucket shop,* 200-56; *Aiding and abetting wagers on horse race,* 200-56; *Visiting gambling house,* 200-56.

163-1 Hooper *v.* Nuckles (Ala.), 39 S. 711; Pelouze *v.* Slaughter, 241 Ill. 215, 89 N. E. 259; Ennis *v.* Edgar, 154 Ill. App. 543; Cadwell & Co. *v.* Lean's Est., 169 Mich. 117, 134 N. W. 1110;

Beidler L. Co. *v.* Co., 13 N. D. 639, 102 N. W. 880.

Intent a question for the jury.—Chandler *v.* Prince (Mass.), 105 N. E. 1076.

Mutuality of intent.—In re Baxter, 152 Fed. 137, 81 C. C. A. 355; Hooper *v.* Nuckles (Ala.), 39 S. 711; Farnum *v.* Whitman, 187 Mass. 381, 73 N. E. 473. See Zeller *v.* Leiter, 114 App. Div. 148, 99 N. Y. S. 624, *rev.* 189 N. Y. 361, 82 N. E. 158.

166-2 Wilhite *v.* Houston, 200 Fed. 390, 118 C. C. A. 542; Baker *r.* Lehman, Weil & Co. (Ala.), 65 S. 321; Hooper *v.* Nuckles (Ala.), 39 S. 711; King *v.* Zell, 105 Md. 435, 66 A. 279; Miller *v.* Klovstad, 14 N. D. 435, 105 N. W. 164; Burney *v.* Blanks (Tex. Civ.), 136 S. W. 806; Wagner *r.* Engel-Miller Co., 144 Wis. 486, 129 N. W. 392.

166-3 Wilhite *v.* Houston, 200 Fed. 390, 118 C. C. A. 542; Bailey *r.* Phillips, 159 Fed. 535; Hooper *v.* Nuckles, supra; Pelouze *v.* Slaughter, 241 Ill. 215, 89 N. E. 259; Cromwell *v.* Davies, 163 Ill. App. 152; Nash-Wright Co. *v.* Wright, 156 Ill. App. 243; Richter *v.* Poe, 109 Md. 20, 71 A. 420; Taylor *v.* Sebastian, 156 Mo. App. 147, 138 S. W. 549; Thompson *v.* Williamson, 67 N. J. Eq. 212, 58 A. 602; King *v.* Zell, 105 Md. 435, 66 A. 279; Miller *v.* Klovstad, 14 N. D. 435, 105 N. W. 164; Smith *v.* Bowen, 45 Tex. Civ. 222, 100 S. W. 796.

See Holt *v.* Wellons, 163 N. C. 124, 79 S. E. 450; Cobb Bros. & Co. *v.* Guthrie, 160 N. C. 313, 76 S. E. 81.

Must prove mutual intention of no delivery. Russell *v.* Turner (Ga. App.), 80 S. E. 731.

Evidence held sufficient. — Livingston Nat. Bk. *v.* Miller, 154 Ill. App. 104.

Evidence held insufficient.—Bank of Montreal *v.* Griffin, 154 Ill. App. 616; Cameron *v.* Preu, 81 N. J. L. 335, 79 A. 1034; Faux *v.* Fitler, 232 Pa. 33, 81 A. 91.

168-8 In re Aetna C. Mills, 171 Fed. 994.

169-10 Bartlett *v.* Slusher, 215 Ill. 348, 74 N. E. 370.

169-12 Luke *v.* Livingston, 9 Ga. App. 116, 70 S. E. 596; Richter *v.* Poe, 109 Md. 20, 71 A. 420.

Evidence that seller when agent of another had made previous contracts with buyers' agent whereby actual delivery had been made are admissible on question of intention. Maybank & Co. *v.* Rogers (S. C.), 82 S. E. 422.

170-13 Smith *v.* Bowen, 45 Tex. Civ. 222, 100 S. W. 796.

171-18 Nash-Wright Co. *v.* Wright, 156 Ill. App. 243; Long *v.* Eaves & Co., 99 Miss. 888, 56 S. 178. See Kassuba Com. Co. *v.* Blodgett, 155 Wis. 529, 143 N. W. 1060, *aff.* 145 N. W. 177.

If no expectation of delivery, cannot recover. Holt *v.* Wellons, 163 N. C. 124, 79 S. E. 450.

173-22 Taylor *v.* Sebastian, 158 Mo. App. 147, 138 S. W. 549.

174-24 Allen's Exr. *v.* Trust Co. (Va.), 82 S. E. 104; Wagner *v.* Engel-Miller Co., supra. See S. M. Weld. & Co. *v.* Austin (Miss.), 65 S. 247.

Advance of money.—Henry Hentz & Co. *v.* Booz, 8 Ga. App. 577, 70 S. E. 108.

176-30 James *v.* Haven, 185 Fed. 692, 107 C. C. A. 640.

176-31 In re Aetna C. Mills, 171 Fed. 994; Livingston Nat. Bk. *v.* Miller, 154 Ill. App. 104.

Evidence of buyer that seller had asked to be notified if buyer ever wanted any cotton admissible to show delivery was intended. Holt *v.* Wellons, 163 N. C. 124, 79 S. E. 450.

177-34 Richter *v.* Poe, 109 Md. 20, 71 A. 420; Chandler *v.* Prince, 214 Mass. 180, 100 N. E. 1029. See infra, "Similar Transactions," 798-54.

178-35 Gray *v.* Robinson, 95 Miss. 1, 48 S. 226. See Wilhite *v.* Houston, 200 Fed. 390, 118 C. C. A. 542. But see Baker *r.* Co. (Ala.), 65 S. 321.

But cannot show buyer had settled other contracts by payment of margins without delivery. Baker *r.* Lehman Weil & Co. (Ala.), 65 S. 321.

178-36 Kassuba Co. *r.* Blodgett, 155 Wis. 529, 143 N. W. 1060, *aff.* 145 N. W. 177.

184-55 Allwright *v.* Skillings, 188 Mass. 538, 74 N. E. 944.

A tabulation of defendant's claims solely as a memorandum of what the defendant claimed and not as evidence is admissible. Chandler *v.* Prince, 214 Mass. 180, 100 N. E. 1029.

185 Recovery of money before contingent event occurs.—In an action to recover stake in hands of other party to wager the burden of proof is on plaintiff to show his demand for return was made before contingent event had occurred. Davis *v.* Fleshman (Pa.), 91 A. 489.

185-58 *Contra,* First Nat. Bk. *v.* Mil-

ler, 139 Ill. App. 608, in discretion of court as corroborative testimony.

Evidence showing legal nature of transactions with other customers, inadmissible on defendant's behalf. Anderson *v.* Exch., 191 Mass. 117, 77 N. E. 706.

185-59 Sparrevohn *v.* Bachrach, 7 Phil. Isl. 194.

186-67 Welch *v.* Corey, 201 Mass. 165, 87 N. E. 477, to show money deposited as security for, or applied in, payment, was payment.

186-68 See Clark *v.* Slaughter, 129 Wis. 642, 109 N. W. 556.

In action to recover securities, evidence as to amount of losses in transaction held inadmissible. Chandler *v.* Prince (Mass.), 105 N. E. 1076.

186-69 Source from which plaintiff obtained money sued for, immaterial. Welch *v.* Corey, 201 Mass. 165, 87 N. E. 477.

186-70 Plaintiff's testimony as to nature of transactions in which he engaged is conclusive as to him; his broker is not so bound. Atwater *v.* Co., 147 Mo. App. 436, 126 S. W. 823 See Boroughs *v.* Peterson, 39 Utah 11, 114 P. 758.

187-74 Unfairness of game, immaterial. Roberts *v.* Respass, 131 Ky. 10, 114 S. W. 341.

187-75 Griffin *v.* S., 5 Ga. App. 43, 62 S. E. 685; Moore *v.* S., 49 Tex. Cr. 378, 92 S. W. 1083.

188-76 *Contra,* Fields *v.* S., 4 O. N. P. (N. S.) 401.

189-83 S. *v.* Behan, 113 La. 754, 37 S. 714.

Evidence showing conviction for same offense, admissible. Taylor *v.* S., 50 Tex. Cr. 288, 98 S. W. 839.

190-84 City *v.* Harris, 115 Mo. App. 707, 92 S. W. 505; S. *v.* Lane, 82 S. C. 144, 63 S. E. 612. See S. *v.* Behan, 113 La. 754, 37 S. 714.

190-85 It must be shown neither party to contract for future delivery contemplated actual delivery. Salmon *v.* S., 56 Tex. Cr. 408, 120 S. W. 427.

190-87 *Contra,* if allegation is a particular game was played. S. *v.* Radmilovich, 40 Mont. 93, 105 P. 91.

190-88 Strange *v.* S., 11 Ga. App. 265, 74 S. E. 1100. See Davis *v.* S., 123 Ga. 502, 51 S. E. 501; S. *v.* Hayes, 154 Mo. App. 588, 136 S. W. 8.

Evidence sufficient.—Gordon *v.* De Witt, 106 Ark. 283, 153 S. W. 807.

190-90 Barker *v.* S., 127 Ga. 276, 56 S. E. 419; S. *v.* Clein, 154 Mo. App. 686, 136 S. W. 14.

In Texas in a prosecution for playing cards in a public place it is unnecessary to show money or property was wagered Penal Code, 1906, art. 380. See Inman *v.* S., 47 Tex. Cr. 609, 85 S. W. 796; Mapes *v.* S. (Tex. Cr.), 85 S. W. 797; Scales *v.* S., 46 Tex. Cr. 296, 81 S. W. 947.

190-91 Griffin *v.* S., 2 Ga. App. 534, 58 S. E. 781; Christison *v.* S., 177 Ind. 363, 98 N. E. 113; S. *v.* Johnson, 163 Mo. App. 41, 145 S. W. 1183. See Goslin *v.* C., 121 Ky. 698, 90 S. W. 223.

191-94 Proof of payment for use of pool table, in accordance with custom, not sufficient to sustain conviction unless accused's knowledge of custom shown. Ellis *v.* S., 58 Tex. Cr. 319, 125 S. W. 892.

191-95 See Jacobs *v.* P., 117 Ill. App. 195.

If cards are not adduced, there must be proof that poker is played with cards, otherwise the court will not take judicial knowledge that poker is a game of chance. S. *v.* Solon, 247 Mo. 672, 153 S. W. 1023.

Gaming table found in room admissible in evidence. Adams *v.* S. (Ala. App.), 64 S. 371.

Value of chips used, immaterial unless inquiry is limited to their value as used. Melton *v.* S., 58 Tex. Cr. 86, 124 S. W. 910.

191-97 Commission of distinct crime in premises prior to gambling may not be proved. S. *v.* Radmilovich, supra.

191-98 Evidence of conviction of accomplice is inadmissible. Sparks *v.* S. (Tex. Cr.), 142 S. W. 1183.

191-99 Testimony to show conspiracy is admissible. S. *v.* Potts, 239 Mo. 403, 144 S. W. 495.

192-1 Under Texas penal code. See supra, 190-90.

192-2 Bradford *v.* S., 147 Ala. 118, 41 S. 1024 (burden on state to prove beyond reasonable doubt place was public); Winston *v.* S., 145 Ala. 91, 41 S. 174 (where building not per se a public place proof of games played in it admissible to show it was such a place); Thrasher *v.* S., 168 Ala. 130, 53 S. 256.

Private house, sufficiency of evidence. See Simons *v.* S., 56 Tex. Cr. 339, 120 S. W. 208.

Proof as to place must conform to allegation. P. *v.* Lewis, 140 Ill. App. 493; McAllister *v.* S., 55 Tex. Cr. 264, 116 S. W. 582 (though allegation unnecessary).

Time need not be proved as alleged. McAllister *v.* S., supra.

193-6 Thrasher *v.* S., 168 Ala. 130, 53 S. 256.

194-13 Mitchell *v.* S., 9 Okla. Cr. 172, 130 P. 1175, professional gambler.

194-14 Courtney *v.* S., 5 Ind. App. 356, 32 N. E. 335.

194-15 Sufficient evidence.—Twilley *v.* S., 9 Ga. App. 435, 71 S. E. 587; S. *v.* Souva, 231 Mo. 566, 137 S. W. 873; S. *v.* Gaines, 32 R. I. 462, 79 A. 1107; Knox *v.* S., 62 Tex. Cr. 512, 138 S. W. 787.

Insufficient evidence.—S. *v.* Miller, 234 Mo. 588, 137 S. W. 887; Purvis *v.* S., 62 Tex. Cr. 302, 137 S. W. 701.

195-17 Proof of existence of corporation which issued stocks sold must be made if statute prohibits their sale. P. *v.* Wirsching, 239 Ill. 522, 88 N. E. 169.

195-18 C. *v.* Charlie Joe, 193 Mass. 383, 79 N. E. 737 (not necessary to show all premises controlled by defendant used for unlawful gaming); S. *v.* Hogle, 156 Mo. App. 367, 137 S. W. 21.

Evidence that the place was arranged for gambling and resorted to for that purpose is admissible. Minto *v.* S., 8 Ala. App. 306, 62 S. 376.

Evidence sufficient.—Boswell *v.* S. (Tex. Cr.), 150 S. W. 432.

Evidence held to support a conviction for keeping a gambling resort. Goodwin *v.* S. (Tex. Cr.), 143 S. W. 939.

"**The kind of dice used in the game,** that a tag containing the defendant's name was found on one of the tables, that the poker table covers had the defendant's name stamped thereon—these facts and circumstances tended to prove the corpus delicti of the offense charged and the defendant's connection therewith, and were properly admitted in evidence for the consideration of the jury." S. *v.* Potts, 239 Mo. 405, 144 S. W. 495.

195-19 U. S. *v.* Palma, 4 Phil. Isl. 547; Handy *v.* S., 49 Tex. Cr. 381, 92 S. W. 848; Spencer *v.* S., 49 Tex. Cr. 382, 92 S. W. 847.

195-21 C. *v.* Charlie Joe, supra; S. *v.* Baker, 69 W. Va. 263, 71 S. E. 186.

195-22 Martin *v.* S., 2 Ala. App. 175, 56 S. 64; C. *v.* Charlie Joe, 193 Mass. 383, 79 N. E. 737; Parshall *v.* S., 62 Tex. Cr. 177, 138 S. W. 750.

Using or keeping devices for gambling purposes need not be shown. P. *v.* Leach, 143 Ill. App. 442.

195-23 S. *v.* Hall, 228 Mo. 456, 128 S. W. 745.

195-24 Lewis *v.* Co., 115 Va. 962, 80 S. E. 575. No necessity of showing wager. Carroll *v.* S. (Tex. Cr.), 81 S. W. 294. See Miller *v.* C., 117 Ky. 80, 77 S. W. 682, 79 S. W. 250 (evidence admissible to show nature of game of faro); S. *v.* Behan, 113 La. 701, 37 S. 607.

Testimony showed a table especially prepared for craps exhibited to attract bettors, and a percentage was retained by the game keeper and is sufficient to show a gaming table was exhibited. Gershner *v.* S., 106 Ark. 488, 153 S. W. 600.

196-25 Bashinski *v.* S., 123 Ga. 508, 51 S. 499 (testimony defendant lessee of premises during period within which gambling was carried on, admissible to show his control); Brown *v.* S., 49 Tex. Cr. 419, 93 S. W. 723; Berry *v.* S., 49 Tex. Cr. 376, 92 S. W. 1081; Moore *v.* S., 62 Tex. Cr. 326, 137 S. W. 690.

It was not shown "the manager of the hotel, or any officer, director, or employe of the hotel, was ever present when the gaming was going on; and the mere fact that a number of persons, in going to and from the room where the gaming was conducted, passed through the lobby of the hotel was claimed not sufficient to justify the inference of knowledge on the part of those in charge of the hotel, because the evidence shows that many persons also passed through the lobby of the hotel for the purpose of visiting the toilet room, and patronizing the soft drink establishment and the pool room. The rule is that the word 'suffer' or 'permit' means that the defendants must have suffered or permitted the game with the knowledge that money was being bet, won, or lost thereby; or the evidence must show some facts or circumstances by which the jury might infer such knowledge. And the court so instructed the jury. While it is true that no actual knowledge on the part of appellants was shown, it is true that the crap games continued in the storage room for a period of several months. It is also true that at times it was frequented by as many as

25 or 30 persons. Taking into consideration the length of time the game continued, and the frequency with which it took place, together with the number of people who attended the games, these facts were sufficient to justify the inference of knowledge on the part of those in charge of the hotel." Lancaster Hotel Co. *v.* C., 149 Ky. 443, 149 S. W. 942.

196-26 See S. *v.* Cronin, 189 Mo. 663, 88 S. W. 604.

Previous offenses may be proved to show knowledge. S. *v.* Lee, 228 Mo. 480, 128 S. W. 987.

196-28 S. *v.* Hall, 228 Mo. 456, 128 S. W. 745. See P. *v.* Brewer, 142 Ill. App. 610; Moore *v.* S, 49 Tex. Cr. 378, 92 S. W. 1083.

196-29 Ty. *v.* Church, 14 N. M. 226, 91 P. 720. See Robertson *v.* S. (Tex. Cr.), 159 S. W. 713; Davis *v.* S. (Tex. Cr.), 151 S. W. 313.

Prima facie proof of permission is sometimes made by showing exhibition of gambling table. Jarboe *v.* C., 32 Ky. L. R. 755, 107 S. W. 227, statute.

Consent shown by proving previous acts of like kind, though accused not then present. S. *v.* Lee, 228 Mo. 480, 128 S. W. 987.

197-30 Minto *v.* S., 8 Ala. App. 306, 62 S. 376; Tully *v.* S., 88 Ark. 411, 114 S. W. 920 (evidence one gambled and furnished chips does not show he was doing so as banker or exhibitor); Nelson *v.* U. S., 28 App. Cas. (D. C.) 32; Howard *v.* S., 49 Tex. Cr. 327, 91 S. W. 785.

Evidence sufficient.—Gershner *v.* S., 106 Ark. 488, 153 S. W. 600.

197-33 Evidence of "take out."—Minto *v.* S., 8 Ala. App. 306, 62 So. 376.

197-34 Strong *v.* S. (Tex. Cr.), 156 S. W. 656.

198-41 Floeckinger *v.* S., 45 Tex. Cr. 199, 75 S. W. 303.

198-42 Miller *v.* C., 117 Ky. 80, 77 S. W. 682, 79 S. W. 250; S. *v.* Behan, 113 La. 701, 37 S. 607 (evidence admissible showing defendant participated in dealing faro in same place within two weeks immediately preceding date charged); Stetter *v.* S., 77 Neb. 777, 110 N. W. 761; P. *v.* Albert, 136 App. Div. 224, 120 N. Y. S. 875; Rasor *v.* S., 57 Tex. Cr. 10, 121 S. W. 512; Herrin *v.* S., 50 Tex. Cr. 351, 97 S. W. 88.

Declarations by players to arresting officer, competent, though not heard by defendant. S. *v.* Chase, 17 N. D. 429, 117 N. W. 537.

Evidence that place was upstairs, door was kept closed, and there was a lookout and the general furnishing of the room is admissible. Brandes *v.* S. (Ala. App.), 65 S. 307.

198-43 Character of house may be shown by gambling paraphernalia. S. *v.* Hoyle, 98 Minn. 254, 107 N. W. 1130.

199-44 S. *v.* Behan, 113 La. 701, 37 S. 607 (evidence showing defendant dealt faro in same place within two weeks immediately preceding date charged admissible to show knowledge); S. *v.* Lee, 228 Mo. 480, 128 S. W. 987; S. *v.* Chase, 17 N. D. 429, 117 N. W. 537; Rasor *v.* S., 57 Tex. Cr. 10, 121 S. W. 512 (subsequent acts also).

199-46 See Ford *v.* S., 86 Miss. 123, 38 S. 229; Crippen *v.* S., 46 Tex. Cr. 455, 80 S. W. 372 (evidence defendant's name appeared on a building over which gambling house conducted admissible to show building in his control).

199-48 Giving security for appearance of persons arrested while gambling in defendant's premises, relevant. Camp *v.* S., 58 Fla. 12, 50 S. 537.

Change of possession of money among players tend to show it was lost and won. Schmidt *v.* Ty., 13 Ariz. 77, 108 P. 246.

Orders given player for money which he won, admissible against person who signed them. Camp *v.* S., 58 Fla. 12, 50 S. 537.

Employment and payment of person for conducting place may be shown, and such person may testify to proprietor's profits. Camp *v.* S., supra.

Defendant may show receipt of a purported request from parent of minor that latter be permitted to play pool. Simpson *v.* S., 58 Tex. Cr. 253, 125 S. W. 398.

199-50 Chism *v.* S. (Tex. Cr.), 159 S. W. 1185.

200-51 Flynn *v.* P., 123 Ill. App. 591, necessary to show beyond reasonable doubt actual knowledge by defendant.

200-52 Ruh *v.* C., 141 Ky. 585, 133 S. W. 219.

200-54 Bashinski *v.* S., 122 Ga. 164, 50 S. E. 54.

200-55 Bashinski *v.* S., supra.

200-56 P. *v.* Viskniskki, 155 Ill. App. 292.

Keeping bucket shop.—In a prosecution for keeping a "bucket shop" a witness may testify place was such. It need not be shown that the shares which it was pretended to buy and sell were those of an existing corporation. P. *v.* Wirsching, 145 Ill. App. 121.

Aiding and abetting wagers on horse race.—In a prosecution for aiding, abetting and reporting bets on horse races testimony as to physical conditions about telegraph office and concerning acts of telegraph company and accused in conducting their business is competent. S. *v.* Rose, 40 Mont. 66, 105 P. 82. It is also competent to show all surrounding circumstances at and about time bet made, though disclosure of other and distinct offenses result. S. *v.* Sylvester, 40 Mont. 79, 105 P. 86.

One who visits a gambling house must show a valid excuse. S. *v.* Bridgewater, 171 Ind. 1, 85 N. E. 715.

GIFTS

204-1 Collins *v.* Maude, 144 Cal. 289, 77 P. 945; Merchants' L. & T. Co. *v.* Egan, 143 Ill. App. 572; Farlow *v.* id., 154 Ia. 647, 135 N. W. 1; Bevington *v.* Bevington, 133 Ia. 351, 110 N. W. 840 (clear and unequivocal evidence necessary to establish a parol gift of land); Endicott *v.* Stump (Ky.), 128 S. W. 76; Wedding *v.* Wedding, 27 Ky. L. R. 943, 87 S. W. 313; Gledhill *v.* McCoombs, 110 Me. 341, 86 A. 247; Poppleton *v.* Poppleton, 143 Mich. 208, 106 N. W. 703; Merriman *v.* Merriman, 75 Neb. 222, 106 N. W. 174; Taylor *v.* Coriell, 66 N. J. Eq. 262, 57 A. 810; Schippers *v.* Kempkes (N. J. Eq.), 67 A. 1042; Baur *v.* Cron (N. J. L.), 66 A. 585; In re Bayley, 67 N. J. Eq. 566, 59 A. 215; Tompkins *v.* Leary, 134 App. Div. 114, 118 N. Y. S. 810; Liebert *v.* Hoffman, 55 Misc. 108, 105 N. Y. S. 337; In re Schroeder, 113 App. Div. 204, 99 N. Y. S. 176; Bowron *v.* DeSelding, 105 App. Div. 500, 94 N. Y. S. 292; Andrews *v.* Nichols, 116 App. Div. 645, 101 N. Y. S. 977 (gift inter vivos may be established by unsupported testimony of donee's wife in absence of suspicious circumstances; see In re Van Derzee, 73 Hun 532, 26 N. Y. S. 121); Berg *v.* Keber, 78 Misc. 468, 138 N. Y. S. 358; Miller *v.* McLean, 31 O. C. C. 64; In re Smith's Est., 237 Pa. 115, 85 A. 76; Dill *v.* Westbrook, 226 Pa. 217, 75 A. 252; Combest *v.* Wall (Tex. Civ.), 102 S. W. 147; Walker *v.* Hargear, 36 Wash. 672, 79 P. 472. See Osgood *v.* Carter, 110 Me. 550, 87 A. 477; Gick *v.* Stumff, 53 Misc. 83, 103 N. Y. S. 1109.

204-2 McCord *v.* McCord, 136 Ia. 53, 113 N. W. 552.

204-3 Succ. of Zacharie, 119 La. 150, 43 S. 988; Leask *v.* Hoagland, 128 N. Y. S. 1017.

Conduct of parties may raise presumption of gift. Marshall *v.* Stratton, 96 Miss. 465, 51 S. 132.

205-4 Garrison *v.* U. T. Co., 164 Mich. 345, 129 N. W. 691; In re Van Derzee, 73 Hun 532, 26 N. Y. S. 121.

205-5 Manning *v.* Berry, 142 Ia. 47, 120 N. W. 483; Oliver *v.* Perry, 131 Ia. 654, 109 N. W. 183; In re Bremer's Est., 151 Ia. 449, 131 N. W. 667; Coutant *v.* Mason, 145 N. Y. S. 785; Gegan *v.* Co., 129 App. Div. 184, 113 N. Y. S. 595. See Citizens' Nat. Bk. *v.* McKenna, 168 Mo. App. 254, 153 S. W. 521.

205-6 Lohnes *v.* Baker, 156 Mo. App. 397, 137 S. W. 282; O'Neil *v.* O'Neil, 43 Mont. 505, 117 P. 889; In re Van Alstyne, 207 N. Y. 298, 100 N. E. 802.

206-7 Wilson *v.* Edwards, 79 Ark. 69, 94 S. W. 927 (possession insufficient); Manning *v.* Berry, 142 Ia. 47, 120 N. W. 483.

206-8 Thomas *v.* Tilley, 147 Ala. 189, 41 S. 854. See Supple *v.* Bk., 198 Mass. 393, 84 N. E. 432; McMahon *v.* Lawler, 190 Mass. 343, 77 N. E. 489.

Donor's declarations and admissions, insufficient. Campbell *v.* Sech, 155 Mich. 634, 119 N. W. 922.

206-9 Thomas *v.* Tilley, 147 Ala. 189, 41 S. 854; Gledhill *v.* McCoombs, 110 Me. 341, 86 A. 247; Chamberlain *v.* Eddy, 154 Mich. 593, 118 N. W. 499; In re Van Alstyne, 207 N. Y. 298, 100 N. E. 802; In re Wright, 121 App. Div. 581, 106 N. Y. S. 369. *Comp.* Jones *v.* Nicholas, 151 Ia. 362, 130 N. W. 125.

207-10 Norsworthy *v.* Willoughby, 176 Ala. 145, 57 S. 717; Thomas *v.* Tilley, supra; Nogga *v.* Bk., 79 Conn. 425, 65 A. 129; Merchants' L. & T. Co. *v.* Egan, 222 Ill. 494, 78 N. E. 800; Merritt *v.* Bush, 122 Ill. App. 189; Crawfordsville Tr. Co. *v.* Ramsey (Ind. App.), 100 N. E. 1049; Dorrell *v.* Sparks, 142 Mo. App. 460, 127 S. W. 103; Kelly *v.* Beers, 194 N. Y. 49, 86

N. E. 980; Berg *v.* Keber, 78 Misc. 468, 138 N. Y. S. 358; In re Bergner's Est. (Pa.), 90 A. 1068; Sullivan *v.* Hess, 241 Pa. 407, 88 A. 544; In re Smith's Est., 237 Pa. 115, 85 A. 76; Maxler *v.* Hawk, 233 Pa. 316, 82 A. 251; McFerrin *v.* Templeman, 102 Tex. 530, 120 S. W. 167; Ewan *v.* Louthan, 110 Va. 575, 66 S. E. 869.

Testimony against record title "must be clear, satisfactory, and as sometimes said, conclusive." Farlow *v.* Farlow, 154 Ia. 647, 135 N. W. 1, cit. earlier cases.

Evidence held insufficient.—Congregational Church Bldg. Soc. *v.* Trustees, 77 N. J. Eq. 505, 79 A. 893.

Evidence to show parol gift of land. Combest *v.* Wall (Tex. Civ.), 115 S. W. 354.

In absence of confidential relation (Liebert *v.* Hoffman, 105 N. Y. S. 337), donor who seeks to recover property given another must show bad faith on part of donee and that delivery made on condition. Wertheimer *v.* Baum, 59 Misc. 527, 111 N. Y. S. 18.

207-11 Davis *v.* Parsons, 165 Cal. 70, 130 P. 1055; Crawfordsville Tr. Co. *v.* Ramsey (Ind. App.), 100 N. E. 1049; Tucker *v.* Tucker, 138 Ia. 344, 116 N. W. 119 (evidence as to extent of donor's estate admissible as showing intention); Succ. of Zacharie, 119 La. 150, 43 S. 988; Herrick *v.* Dennett, 203 Mass. 17, 89 N. E. 141; Pease *v.* Jennings (Mich.), 146 N. W. 260; Chamberlain *v.* Eddy, 154 Mich. 593, 118 N. W. 499; Nelson *v.* Olson, 108 Minn. 109, 121 N. W. 609; Talbot *v.* Talbot, 32 R. I. 72, 78 A. 535.

207-12 Broad field of inquiry open respecting past of aged and ignorant person who makes gift of almost his entire estate. Simpson *v.* League, 110 Md. 286, 72 A. 1109. See Smith *v.* Smith, 84 Kan. 242, 114 P. 245.

Source of grantor's legal advice may be shown. Fagan *v.* Lentz, 156 Cal. 681, 105 P. 951.

Retention of property by donor.—Garrison *v.* W. T. Co., 164 Mich. 345, 129 N. W. 691.

Reliance of grantor upon promise made by grantee may be testified to by former. Garrison *v.* W. T. Co., supra.

207-13 In re Hall's Est., 154 Cal. 527, 98 P. 269; Holloway *v.* Hoard, 140 Ga. 380, 78 S. E. 928; McCoy *v.* McCoy, 31 Ky. L. R. 1189, 104 S. W. 1031; Simpson *v.* League, 110 Md. 286, 72 A. 1109; Peters *v.* Schultz, 107 Minn. 29, 119 N. W. 385; Kelly *v.* Beers, 194 N. Y. 49, 86 N. E. 980.

208-14 In re Hall's Est., 154 Cal. 527, 98 P. 269; Armstrong *v.* Armstrong, 142 Ill. App. 507.

208-15 Donor may testify to his intent, but may not state he had not made gift. Fanning *v.* Green, 156 Cal. 279, 104 P. 308.

208-16 Not decisive.—Abegg *v.* Hirst, 144 Ia. 196, 122 N. W. 838.

Donee's knowledge need not be shown where delivery made to another for him. Barlow *v.* Halley, 121 N. Y. S. 708.

208-17 Fisher *v.* Ludwig, 6 Cal. App. 144, 91 P. 658; Herrick *v.* Dennett, 203 Mass. 17, 89 N. E. 141; Day *v.* Richards, 197 Mass. 86, 83 N. E. 324 (delivery not shown); Schauer *v.* Von Schauer (Tex. Civ.), 138 S. W. 145. See Jones *v.* Nicholas, 151 Ia. 362, 130 N. W. 125.

Possession of safety deposit box containing deed. Hahn *v.* Dean, 108 Me. 355, 82 A. 204.

Reason for making symbolic delivery must be shown. Tompkins *v.* Leary, 134 App. Div. 114, 118 N. Y. S. 810.

Assignment of chose in action to husband and wife jointly constitutes a gift of a one-half interest to her though he retained possession and collected interest. Abegg *v.* Hirst, 144 Ia. 196, 122 N. W. 838.

Actual delivery by donor's agent must be shown. Trubey *v.* Pease, 146 Ill. App. 507.

209-18 Bowen *v.* Kutzner, 167 Fed. 281, 296, 93 C. C. A. 33.

209-19 "It is not necessary that any eyewitness should be produced as to the fact of delivery. Words of the donor indicating that he had renounced ownership are sufficient. Judge Penrose puts this clearly in Malone's Estate, 8 Wkly. Notes Cas. 179, 182, where he says: 'With regard to the proof of actual delivery, it is not necessary that the witnesses shall have seen it take place. The bonds, or the notes, or the policy may have been at the time already in the custody of the donee, and in such case words indicating that the donor renounces all ownership would undoubtedly be sufficient.' He further says that: 'The delivery may be proved by the declarations of

the donor, just as the gift itself may be; and when the donor declares that he had given at a previous time, and that the donee had then become the owner, it is implied that delivery, and indeed every other formality necessary to create a gift, had taken place. The law always presumes knowledge of its requirements.'" Leitch *v.* Nat. Bk., 234 Pa. 557, 83 A. 416.

209-20 Taylor *v.* Purdy, 151 Ky. 82, 151 S. W. 45. See Barlow *v.* Halley, 121 N. Y. S. 708.

Delivery not essential.—In re Hall's Est., 154 Cal. 527, 98 P. 269.

209-21 Taylor *v.* Purdy, 151 Ky. 82, 151 S. W. 45; Simmonds *v.* Simmonds, 133 Ky. 493, 118 S. W. 304; Mulfinger *v.* Mulfinger, 114 Md. 463, 79 A. 1089; Nelson *v.* Olson, 108 Minn. 109, 121 N. W. 609; Fair *v.* Wynne, 155 Mo. App. 341, 137 S. W. 78. *Comp.* Foxworthy *v.* Adams, 136 Ky. 403, 124 S. W. 381.

Indorsement of notes, not delivery. Burchett *v.* Fink, 139 Mo. App. 381, 123 S. W. 74.

210-22 Goelz *v.* Bk., 31 Ind. App. 67, 67 N. E. 232; Hulet *v.* R. Co., 14 N. D. 209, 103 N. W. 628; Thompson *v.* Griggs, 31 Pa. Super. 608; Larisey *v.* Larisey, 93 S. C. 450, 77 S. E. 129; Taylor *v.* Sanford (Tex. Civ.), 150 S. W. 262.

210-23 Mahoney *v.* Martin, 72 Kan. 406, 83 P. 982; Larisey *v.* Larisey, supra.

Acceptance as trustee of intended donees presumed when delivery made to one of them, rather than as agent of donor. Mollison *v.* Rittgers, 140 Ia. 365, 118 N. W. 512.

211-24 Harris *v.* Harris, 82 Vt. 199, 72 A. 912.

211-27 Lowe *v.* Hart, 93 Ark. 548, 125 S. W. 1030; McIntosh *v.* Fisher, 125 Ill. App. 511; Caldwell *v.* Caldwell, 24 Pa. Super. 230; Shannon *v.* Marchblanks, 35 Tex. Civ. 615, 80 S. W. 860; Hammond *v.* Hammond, 43 Tex. Civ. 284, 94 S. W. 1067. See McMahon *v.* Cronin, 128 N. Y. S. 423.

212-28 Sockwell *v.* Sockwell (Tex. Civ.), 166 S. W. 1188.

212-29 McComb *v.* McComb, 241 Ill. 453, 89 N. E. 714; Keller *v.* McConville, 175 Mich. 479, 141 N. W. 652; Fowler *v.* Fowler, 141 Mo. App. 610, 125 S. W. 1171; Gate City Nat. Bk. *v.* Boyer, 161 Mo. App. 143, 142 S. W. 487; Gould *v.* Hurley, 75 N. J. Eq. 512, 73 A. 129 (not convincing).

213-30 Fanning *v.* Green, 156 Cal. 279, 104 P. 308; Fischer Art Co. *v.* Hutchins, 41 App. Cas. (D. C.) 156; Moore *v.* Fingar, 131 App. Div. 399, 115 N. Y. S. 1035 (declarations by donor in donee's presence competent); Park *v.* Park, 39 Pa. Super. 212. See Schmidt *v.* Schweitzer, 137 N. Y. S. 807.

214-31 Merchants' L. & T. Co. *v.* Egan, 143 Ill. App. 572. *Comp.* Campbell *v.* Sech, 155 Mich. 634, 119 N. W. 922.

214-32 Campbell *v.* Sech, supra; Moore *v.* Fingar, 131 App. Div. 399, 115 N. Y. S. 1035; Krider *v.* Hartzell, 40 Pa. Super. 186.

Acts of donee, inconsistent with claim of gift, outweigh donor's declarations. In re Miller, 64 Misc. 232, 119 N. Y. S. 52.

215-34 Brown *v.* Columbus (N. J. Eq.), 75 A. 917.

Subsequent financial loss, irrelevant. Fowler *v.* Fowler, 141 Mo. App. 610, 125 S. W. 1171.

215-35 In re Hall's Est., 154 Cal. 527, 98 P. 269; Stark *v.* Kelley, 132 Ky. 376, 113 S. W. 498; Jones *v.* Crisp, 100 Md. 30, 71 A. 515 (power to control subject of gift, vital). But *comp.* Candee *v.* Bk., 81 Conn. 372, 71 A. 551 (gift of deposit "subject to" donor's "use of same" for life); Brown *v.* Columbus (N. J. Eq.), 75 A. 917; Providence Inst. for Sav. *v.* Wallace (R. I.), 85 A. 923; McFerrin *v.* Templeman, 102 Tex. 530, 120 S. W. 167 (reservation of vendor's lien).

216-36 Pease *v.* Jennings (Mich.), 146 N. W. 260.

217-38 Kelly *v.* Beers, 194 N. Y. 49, 86 N. E. 980, 194 N. Y. 60, 86 N. E. 985.

218-39 Campbell *v.* Sech, 155 Mich. 634, 119 N. W. 922, parent and child.

218-40 Delivery of book decisive though donor retains use of deposit (Candee *v.* Bk., 81 Conn. 372, 71 A. 551); but retention of bank book after deposit of funds to joint account of donor and another negatives gift. Robinson *v.* Bk., 7 Cal. App. 642, 95 P. 533, *dist.* Booth *v.* Bk., 122 Cal. 19, 54 P. 370; Sprague *v.* Walton, 145 Cal. 228, 78 P. 645.

219-41 Staples *v.* Berry, 110 Me. 32, 85 A. 303.

Letter from husband to wife bespeaking either intention bank account in his

name shall belong to her or assurance it is hers, not evidence of delivery. In re Miller, 64 Misc. 232, 119 N. Y. S. 52.

Purchase of property in joint names of husband and wife, by former out of proceeds of sale of his property, refutes contention proceeds given her. Monaghan *v.* Collins (N. J. Eq.), 71 A. 617.

219-42 Hutcheson *v.* Bibb, 142 Ala. 586, 38 S. 754; Rickman *v.* Meier, 213 Ill. 507, 72 N. E. 1121; Groff *v.* Stitzer, 75 N. J. Eq. 452, 72 A. 970; Monaghan *v.* Collins, supra; Watson *v.* Holmes, 80 Misc. 48, 140 N. Y. S. 727; Jenkins *v.* Jenkins, 66 Or. 12, 132 P. 542. See Wight *v.* Worden, 162 Ill. App. 182.

220-43 Independent advice given to, and relied on, by donor, may be shown. In re Cooper's Will, 75 N. J. Eq. 177, 71 A. 676.

220-44 Hutcheson *v.* Bibb, 142 Ala. 586, 38 S. 754; Rickman *v.* Meier, 213 Ill. 507, 72 N. E. 1121; Kittle *v.* Brown, 161 Ill. App. 98; Simpson *v.* League, 110 Md. 286, 72 A. 1109; Groff *v.* Stitzer, 75 N. J. Eq. 452, 72 A. 970; Gick *v.* Stumpf, 126 App. Div. 548, 110 N. Y. S. 712; Watson *v.* Holmes, 80 Misc. 48, 140 N. Y. S. 727; Liebert *v.* Hoffman, 55 Misc. 108, 105 N. Y. S. 337; Cole *v.* Sweet, 112 App. Div. 777, 98 N. Y. S. 625; Bowron *v.* De Selding, 105 App. Div. 500, 94 N. Y. S. 292; Baber *v.* Caples (Or.), 138 P. 472; Jenkins *v.* Jenkins, 66 Or. 12, 132 P. 542.

Evidence held sufficient.—Stouffer *v.* Wolfskill, 114 Md. 603, 80 A. 300.

Rule not applicable where conveyance by way of gift by father to foster child. Sears *v.* Vaughan, 230 Ill. 572, 82 N. E. 881.

Clear and satisfactory evidence required where death of donor precedes assertion of donee's claim. Robinson *v.* Bk., 7 Cal. App. 642, 95 P. 533.

221-45 Huston *v.* Smith, 248 Ill. 396, 94 N. E. 63.

221-46 Hagin *v.* Shoaf, 9 Ala. App. 300, 63 S. 764; Beck *v.* Beck, 77 N. J. Eq. 51, 75 A. 228. See Wheeler *v.* Armstrong, 164 Ala. 442, 51 S. 268; Gray *v.* Gray (Me.), 87 A. 661.

Husband and wife.—McGee *v.* McGee, 78 N. J. Eq. 430, 79 A. 268.

222-48 Mayers *v.* Lark (Ark.), 168 S. W. 1093; Harbour *v.* Harbour, 103 Ark. 273, 146 S. W. 867; Poole *v.* Oliver, 89 Ark. 578, 117 S. W. 747; Fanning *v.* Green, 156 Cal. 279, 104 P. 308; Vickers *v.* Vickers, 133 Ga. 383, 65 S. E. 885; Maciejewska *v.* Jarzombek, 243 Ill. 136, 90 N. E. 231 (applying rule to improvements); Brennaman *v.* Schell, 212 Ill. 356, 72 N. E. 412; Yetman *v.* Hedgeman (N. J.), 88 A. 206; Sprinkle *v.* Spainhour, 149 N. C. 223, 62 S. E. 910; Denny *v.* Schwabacher, 54 Wash. 689, 104 P. 137. See Adams *v.* Button, 156 Ky. 693, 161 S. W. 1100.

Conveyance to financee.—Where a man purchases real estate and has it conveyed to woman he has ageed to marry, no presumption of gift arises. Lufkin *v.* Jakeman, 188 Mass. 528, 74 N. E. 933.

Legal presumption of gift to wife does not arise from erection by husband of building on land held by them as tenants in common. Brady *v.* Brady, 82 Conn. 424, 74 A. 684.

223-49 See § 164 Civil Code, as amended in 1889, and Fanning *v.* Green, 156 Cal. 279, 104 P. 308.

223-51 Subsequent use made of property and position of parties thereto, relevant. Fanning *v.* Green, supra.

224-53 Wright *v.* Wright, 242 Ill. 71, 89 N. E. 789; Schultze *v.* Schultze, 73 N. J. Eq. 597, 75 A. 824; McElveen *v.* King, 88 S. C. 346, 70 S. E. 801.

Burden of proof on husband.—Buckel *v.* Smith, 26 Ky. L. R. 494, 82 S. W. 235.

224-54 Wyatt *v.* Scott, 84 Ark. 355, 105 S. W. 871.

225-55 In re Teter, 173 Fed. 798; Wyatt *v.* Scott, supra (use of wife's property by husband rebuts statutory presumption of trusteeship or agency arising by reason of his possession); Miller *v.* McLean, 31 O. C. C. 64. See Thompson *v.* Jones, 167 Cal. 748, 141 P. 366. *Comp.* Krider *v.* Hartzell, 40 Pa. Super. 186.

225-57 Use, occupation and claim of ownership by husband, not inconsistent with gift to wife. Poole *v.* Oliver, 89 Ark. 578, 117 S. W. 747.

226-59 Owsley *v.* Owsley, 25 Ky. L. R. 1194, 77 S. W. 394 (presumption not indulged in face of wife's positive testimony and trustee's admission to contrary); Elmer *v.* Co., 76 N. J. Eq. 452, 74 A. 668.

226-60 Absence of power of revocation is evidence of a mistake that sometimes overcomes evidence of gift. See White *v.* White, 60 N. J. Eq. 104, 45 A. 767.

226-61 See Rust *v.* S. (Tex. Cr.), 158 S. W. 519.

Parol testimony of husband and wife respecting understanding of transaction will not overcome presumption as against his creditors. In re Teter, 173 Fed. 798.

Contemporaneous agreement wife should hold land as trustee may be shown. Poole *v.* Oliver, 89 Ark. 578, 117 S. W. 747.

226-62 Union T. & S. Bk. *v.* Tyler, 161 Mich. 561, 126 N. W. 713 (very slight evidence enough if fraud not alleged); Jenning *v.* Rohde, 99 Minn. 335, 109 N. W. 597; Hill *v.* Escort, 38 Tex. Civ. 487, 86 S. W. 367 (of bank deposit proved by parol).

227-64 Neal *v.* Neal, 155 Ala. 604, 47 S. 66; McLaughlin *v.* McLaughlin, 241 Ill. 366, 89 N. E. 645; Naeseth *v.* Hommedal, 109 Minn. 153, 123 N. W. 287; Jenning *v.* Rohde, 99 Minn. 335, 109 N. W. 597. See Davis *v.* Kuck, 93 Minn. 262, 101 N. W. 165.

Burden not on donee to show fairness of transaction unless there is evidence of undue influence. Vaughn *v.* Vaughn, 217 Pa. 496, 66 A. 745.

Age and feeblesness of parent may raise presumption against gift. Reed *v.* Reed, 101 Md. 138, 60 A. 621; Slack *v.* Rees, 66 N. J. Eq. 447, 59 A. 466.

Exception made where child had access to and control over parent's property. Campbell *v.* Seeh, 155 Mich. 634, 119 N. W. 922.

228-66 Possession not sufficient evidence of gift. Holsberry *v.* Harris, 56 W. Va. 320, 49 S. E. 404.

228-67 Peters *v.* Schultz, 107 Minn. 29, 119 N. W. 385.

228-68 McCabe *v.* Brosenne, 107 Md. 490, 69 A. 259; Adley *v.* Fletcher, 53 Wash. 82, 104 P. 167.

228-70 See Mitchener *v.* Frazer, 168 Mo. 265, 153 S. W. 488.

229-74 Brennaman *v.* Schell, 212 Ill. 356, 72 N. E. 412. And see Carr *v.* Carr, 15 Cal. App. 480, 115 P. 261.

230-75 See Hulet *v.* R. Co., 14 N. D. 209, 103 N. W. 628.

230-76 Brennaman *v.* Schell, 212 Ill. 356, 72 N. E. 412. See White *v.* White, 64 W. Va. 30, 60 S. E. 885.

Presumption of gift to wife or child of entire estate is rebuttable by slight evidence. Bachseits *v.* Leichtweis, 256 Ill. 357, 100 N. E. 197.

230-78 Relevant facts include age **of parent, relations to donee,** his conduct concerning property conveyed after transfer—withholding deed from record, concealing its existence from others, and recognizing donor's continued ownership. Neal *v.* Neal, 155 Ala. 604, 47 S. 66.

230-80 Brennaman *v.* Schell, 212 Ill. 356, 72 N. E. 412.

No presumption of gift where child holds realty under contract to convey. Graham *v.* Peacock, 131 Ga. 785, 63 S. E. 348.

230-81 Frye *v.* Gullion, 143 Ia. 719, 121 N. W. 563; Caldwell *v.* Caldwell, 24 Pa. Super. 230; Hall *v.* Hall (N. J. Eq.), 74 A. 651 (reservation of possession and control by oral agreement, fatal); Cook *v.* Cook, 24 S. D. 223, 123 N. W. 693; Meurin *v.* Kopplin (Tex. Civ.), 100 S. W. 984. See Young *v.* Crawford, 82 Ark. 33, 100 S. W. 87; Manning *v.* Berry, 142 Ia. 47, 120 N. W. 483; Schmitt *v.* Schmitt, 94 Minn. 414, 103 N. W. 214 (evidence sufficient); Field *v.* Field, 39 Tex. Civ. 1, 87 S. W. 726 (preponderance sufficient coupled with acts of possession and improvements).

Evidence held insufficient to establish a parol gift. Norsworthy *v.* Willoughby, 176 Ala. 145, 57 S. 717.

Will in conformity with terms of oral contract, convincing evidence of reliability of parol testimony concerning contract. Park *v.* Park, 39 Pa. Super. 212.

231-82 Dill *v.* Westbrook, 226 Pa. 217, 75 A. 252; Holsberry *v.* Harris, 56 W. Va. 320, 49 S. E. 404; White *v.* White, 64 W. Va. 30, 60 S. E. 885.

232-84 Cooley *v.* Stringfellow, 164 Ala. 460, 51 S. 321.

234-93 Platt *v.* Elias, 186 N. Y. 374, 79 N. E. 1, presumption of fact.

234-94 Lowe *v.* Hart, 93 Ark. 548, 125 S. W. 1030; Kimball *v.* Green, 148 Mich. 298, 111 N. W. 761; In re Bayley, 67 N. J. Eq. 566, 59 A. 215; In re Bailey, 111 App. Div. 909, 98 N. Y. S. 725; Davis *v.* Davis, 104 N. Y. S. 824; Baber *v.* Caples (Or.), 138 P. 472; Schuyler *v.* Stephens, 28 R. I. 506, 68 A. 311. See Parker *v.* Copland, 70 N. J. Eq. 685, 64 A. 129; Conaghan *v.* Bk., 54 Misc. 582, 104 N. Y. S. 829; Le Brun *v.* Le Brun, 49 Or. 368, 90 P. 584 (evidence sufficient); Davie *v.* Davie, 47 Wash. 231, 91 P. 950 (evidence sufficient).

Proof beyond a reasonable doubt necessary. Stewart *v.* Stokes, 177 Mo. App. 390, 164 S. W. 156.

235-95 **No presumption of law** against a gift causa mortis. Baber *v.* Caples (Or.), 138 P. 472.

236-99 Lowe *v.* Hart, 93 Ark. 548, 125 S. W. 1030; In re Perry, 129 App. Div. 587, 114 N. Y. S. 246.

Less positive evidence required to prove delivery of gift causa mortis to a relative. First Nat. Bk. *v.* O'Byrne, 177 Ill. App. 473.

Testimony that gift was made is not a conclusion. Scott *v.* Trust Co., 123 Tenn. 258, 130 S. W. 757.

Burden of showing fraud, undue influence or mental infirmity is on party seeking to set gift aside. Philpot *v.* Co., 3 Ga. App. 742, 60 S. E. 480.

237-1 O'Neil *v.* O'Neil, 43 Mont. 505, 117 P. 889; O'Brien *v.* Bk., 99 App. Div. 76, 91 N. Y. S. 364. See First Nat. Bk. *v.* O'Byrne, 177 Ill. App. 473; Cronin *v.* Bk., 201 Mass. 146, 87 N. E. 484.

237-2 Stark *v.* Kelley, 132 Ky. 376, 113 S. W. 498; Foley *v.* Harrison, 233 Mo. 460, 136 S. W. 354; Callahan *v.* Forest, 118 N. Y. S. 541.

237-3 **Presumption.**—"As Mrs. Mallory was in her last illness at the time of making the gift and evidently made the donation under the apprehension of death from her existing disease we are constrained to hold that the transaction was causa mortis. This is the presumption from such a state of facts. Knight *v.* Tripp, 121 Cal. 674, 54 Pac. 267; Henschel *v.* Maurer, 69 Wis. 576 34 N. W. 926, 2 Am. St. Rep. 757." Vosburg *v.* Mallory, 155 Ia. 165, 135 N. W. 577.

238-4 Callahan *v.* Forest, 118 N. Y. S. 541.

239-9 Hecht *v.* Shaffer, 15 Wyo. 34, 85 P. 1056, evidence must show delivery and act or declaration indicating intention to make a gift causa mortis.

239-10 Stout *v.* McNab, 157 Cal. 356, 107 P. 1005; Bryan *v.* Jones, 134 Ga. 48, 67 S. E. 399; Nelson *v.* Peterson, 202 Mass. 369, 88 N. E. 916.

Delivery of keys to safe deposit box is sufficient delivery of contents. Harrison *v.* Foley, 206 Fed. 57, 124 C. C. A. 191.

239-12 Indorsement not required. Callahan *v.* Forest, 118 N. Y. S. 541.

240-13 In re Perry, 129 App. Div. 587, 114 N. Y. S. 246; Hecht *v.* Shaffer, supra.

240-15 In re Duffy, 127 App. Div. 74, 111 N. Y. S. 77.

Delivery of indorsed receipt for a draft, sufficient. Cronin *v.* Bk., 201 Mass. 146, 87 N. E. 484.

240-18 Nelson *v.* Peterson, 202 Mass. 369, 88 N. E. 916. See First Nat. Bank *v.* Obyrne, 177 Ill. App. 473.

241-19 In re Podhajsky's Est., 137 Ia. 742, 115 N. W. 590 (acceptance presumed through action of trustee); Varley *v.* Sims, 100 Minn. 331, 111 N. W. 269; Barnard *v.* Thurston, 86 Minn. 343, 90 N. W. 574.

241-20 Dawson *v.* Waggaman, 23 App. Cas. (D. C.) 428.

Declarations of donor causa mortis of personality, made after gift, incompetent to defeat donee. Scheps *v.* Bk., 97 App. Div. 434, 90 N. Y. S. 26.

242-24 See Lowe *v.* Hart, 93 Ark. 548, 125 S. W. 1030.

242-25 Gilmore *v.* Lee, 237 Ill. 402, 86 N. E. 568; McPherson *v.* Byrne, 155 Mich. 338, 118 N. W. 985.

242-26 Acts and declarations of donor in absence of donee, competent to show revocation of gift. Stout *v.* McNab, 157 Cal. 356, 107 P. 1005.

GRAND JURY

Presence of interpreter, 249-22.

245-1 Presumed subpoena issued for proper purpose. In re Osborne, 62 Misc. 575, 117 N. Y. S. 169.

Duces tecum.—In re Bornn Hat Co., 184 Fed. 506.

245-5 Only witnesses whose names are indorsed on indictment may testify. C. *v.* Bayley, 18 Pa. Dist. 909, statute.

245-6 Switzer *v.* S., 7 Ga. App. 7, 65 S. E. 1079 (solicitor general, not privileged from testifying as to oath he administered, nor as to whether witness sworn); S. *v.* Ottley, 147 Ia. 329, 126 N. W. 334 (record need not show fact). But see P. *v.* Sexton, 187 N. Y. 495, 80 N. E. 396, *aff.* 42 Misc. 312, 86 N. Y. S. 517, holding, under statute, unsworn testimony of children may be received.

Refusing to be sworn.—Ex parte Barnes (Tex. Cr.), 166 S. W. 728.

247-13 P. *v.* Sexton, supra.

Second bill may be found without hearing testimony, the first being insuffi-

cient. Choice *v.* S., 54 Tex. Cr. 517, 114 S. W. 132. Notwithstanding general change in membership of jury. McCarthy *v.* S., 90 Ark. 384, 119 S. W. 647.

248-17 Sadler *v.* S., 124 Tenn. 50, 136 S. W. 430.

248-18 Le Barron *v.* S. (Miss.), 65 S. 648; S. *v.* Sullivan, 110 Mo. App. 75, 84 S. W. 105; P. *v.* Acritelli, 57 Misc. 574, 110 N. Y. S. 430 (depending on nature of proceeding); Moody *v.* S., 57 Tex. Cr. 76, 121 S. W. 1117. See P. *v.* Grout, 147 N. Y. S. 591; P. *v.* Contracting Co., 82 Misc. 174, 143 N. Y. S. 337.

Where special assistant county attorney not legally appointed has appeared for county attorney indictment will be set aside. Viers *v.* S. (Okla. Cr.), 134 P. 80.

May advise, but cannot be present when vote taken. Choice *v.* S., 54 Tex. Cr. 517, 114 S. W. 132.

Special appointee.—Hartgraves *v.* S., 5 Okla. Cr. 266, 114 P. 343.

248-19 Jones *v.* S., 149 Ala. 63, 43 S. 28; Coon *v.* S. (Ark.), 160 S. W. 226. See Tiner *v.* S. (Ark.), 158 S. W. 1087. *Comp.* U. S. *v.* Co., 163 Fed. 66.

Attorney addressing grand jury while deliberating rendered indictment invalid. Collier *v.* S. (Miss.), 61 S. 689.

249-20 U. S. *v.* Heinze, 177 Fed. 770.

249-21 Richards *v.* S., 108 Ark. 87, 157 S. W. 141; P. *v.* Delhantie, 163 Cal. 461, 125 P. 1066; S. *v.* Sullivan, 110 Mo. App. 75, 84 S. W. 105; Porter *v.* S. (Tex. Cr.), 160 S. W. 1194. *Contra,* C. *v.* Berry, 29 Ky. L. R. 234, 92 S. W. 936; S. *v.* Salmon, 216 Mo. 466, 115 S. W. 1106 (stenographer a witness and read notes of all testimony to jury). See U. S. *v.* Co., 177 Fed. 774; P. *v.* Coco, 70 Misc. 195, 128 N. Y. S. 409; C. *v.* Hegedus, 44 Pa. Super. 157.

249-22 Harper *v.* S., 131 Ga. 771, 63 S. E. 339.

Sworn interpreter may be present and express what witness testified. Fletcher *v.* C., 123 Ky. 571, 96 S. W. 855; Lyon *v.* C., 29 Ky. L. R. 1020, 96 S. W. 857.

Presence of unauthorized person must be shown by accused on motion to quash indictment. Moody *v.* S., 58 Tex. Cr. 76, 121 S. W. 1117.

249-23 **Racial discrimination** in drawing jury, not presumed. Thomas *v.* Texas, 212 U. S. 278. It is not shown by proof no one of defendant's race was on jury which indicted him. Martin *v.* Texas, 200 U. S. 316.

249-25 In Georgia statute gives such right in certain cases. Dyer *v.* S., 6 Ga. App. 390, 65 S. E. 42.

252-28 Offenses of same general nature may be considered at same time. P. *v.* Acritelli, 57 Misc. 574, 110 N. Y. S. 430.

252-29 U. S. *v.* Bolles, 209 Fed. 682.

253-30 Failure to hear competent evidence, an irregularity not available after plea of guilty. Latourette *v.* S., 91 Ark. 65, 120 S. W. 411.

253-31 S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402. See P. *v.* Grout, 147 N. Y. S. 591. *Contra* in absence of evidence justifying bill (P. *v.* White, 111 N. Y. S. 1070), and if it clearly appears such evidence influenced it. P. *v.* Acritelli, 57 Misc. 574, 110 N. Y. S. 430.

254-32 S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402, dying declarations competent.

254-33 See Tong Kai *v.* Ty., 15 Haw. 612.

254-37 S. *v.* Bramlett (Miss.), 47 S. 433; S. *v.* Naughton, 221 Mo. 398, 120 S. W. 53; P. *v.* Gillette, 126 App. Div. 665, 111 N. Y. S. 133. See La Fell *v.* S. (Tex. Cr.), 153 S. W. 884. *Comp.* C. *v.* Bolger, 229 Pa. 597, 79 A. 113.

Where accused's testimony disclosed nothing not already known indictment will not be dismissed. P. *v.* Cummins, 153 App. Div. 93, 138 N. Y. S. 517.

255-38 See S. *v.* Naughton, supra.

256-41 P. *v.* Bermel, 71 Misc. 356, 128 N. Y. S. 524; P. *v.* Acritelli, 57 Misc. 574, 110 N. Y. S. 430.

256-42 Ex parte Gauss, 223 Mo. 277, 122 S. W. 741; Ex parte Eichel, 223 Mo. 258, 122 S. W. 743; Edmonston *v.* C., 110 Va. 897, 66 S. E. 224. See Ex parte Higgins (Tex. Cr.), 160 S. W. 696.

As to stockholder in defunct corporation in refusing to produce books and papers. Grant *v.* U. S., 227 U. S. 74, 33 Sup. Ct. 190, 57 L. ed. 423, *aff.* In re Grant, 198 Fed. 708.

As to corporate officers in resisting compulsory production of books and papers. Wheeler *v.* U. S., 226 U. S. 478, 57 L. ed. 309, 33 Sup. Ct. 158.

Bankrupt's books—Johnson *v.* U. S., 228 U. S. 457, 33 Sup. Ct. 572, 57 L. ed. 919.

257-45 P. *v.* Wyatt, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159.

Comp. S. *v.* Randolph, 139 Mo. App. 314, 123 S. W. 61.

257-47 Where his own acts are under investigation he cannot testify. U. S. *v.* Bolles, 209 Fed. 682.

257-48 Mackey *v.* S. (Ala.), 65 S. 330; Taylor *v.* S., 49 Fla. 69, 38 S. 380; P. *v.* Duncan, 261 Ill. 339, 103 N. E. 1043; S. *v.* Britton, 131 La. 877, 60 S. 379; S. *v.* Randolph, supra; P. *v.* Grout, 147 N. Y. S. 591; Edwards *v.* S. (Tex. Cr.), 166 S. W. 517. See McLeod *v.* S., 8 Ala. App. 329, 62 S. 991.

Unless all witnesses were incompetent. P. *v.* Bladek, 259 Ill. 69, 102 N. E. 243.

258-50 P. *v.* Acritelli, 57 Misc. 574, 110 N. Y. S. 430; C. *v.* Kulp, 17 Pa. C. C. 561. *Comp.* Noll *v.* Dailey (W. Va.), 79 S. E. 668.

259-52 P. *v.* Evans, 81 Misc. 606, 143 N. Y. S. 49. See Eureka County Bk. Habeas Corpus Cases, 35 Nev. 80, 126 P. 655, rehearing *denied*, 129 P. 308; P. *v.* Grout, 147 N. Y. S. 591; P. *v.* Ansteth, 84 Misc. 356, 146 N. Y. S. 73.

259-55 P. *v.* McCauley, 256 Ill. 504, 100 N. E. 182; P. *v.* Glasser, 60 Misc. 410, 112 N. Y. S. 323; P. *v.* Gassett, 112 N. Y. S. 555.

Presumption that requisite number of jurors concurred in finding. Cook *v.* S. (Ark.), 160 S. W. 223; Reed *v.* S., 20 Okla. Cr. 589, 103 P. 1042.

260-56 Presumption not operative when minutes of jury before court. P. *v.* Acritelli, 57 Misc. 574, 110 N. Y. S. 430.

260-59 Havenor *v.* S., 125 Wis. 444, 104 N. W. 116. See supra, "Forgery," 854-11.

260-60 U. S. *v.* Violon, 173 Fed. 501, *disap.* U. S. *v.* Kilpatrick, 16 Fed. 765 (to ascertain sufficiency of evidence); Gaines *v.* S., 146 Ala. 16, 41 S. 865 (no inspection on ground of admission of inadmissible evidence, there being no claim as to its insufficiency); S. *v.* Rhoads, 81 O. St. 397, 91 N. E. 186; Havenor *v.* S., supra.

Not entitled as a matter of right. Padgett *v.* S., 64 Fla. 389, 59 S. 946.

260-61 In re Montgomery, 126 App Div. 72, 110 N. Y. S. 793; P. *v.* Posnansky, 147 N. Y. S. 548; P. *v.* Snyder, 117 N. Y. S. 476 (not to ascertain whether evidence sustains indictment); P. *v.* Klaw, 53 Misc. 158, 104 N. Y. S. 482; P. *v.* Steinhardt, 47 Misc. 252, 93 N. Y. S. 1026 (inspection allowed only to enable accused to move to set aside indictment—not entitled to it to prepare for trial); P. *v.* Distributing Co., 76 Misc. 577, 137 N. Y. S. 235, 27 N. Y. Cr. 345 (denied).

May inspect minutes only to enable defendant to move to set aside indictment on statutory grounds. P. *v.* Dunbar Cont. Co., 82 Misc. 174, 143 N. Y. S. 337.

Accused not entitled to copy of his testimony.—Porter *v.* S., 173 Ind. 694, 91 N. E. 340.

261-62 Bexley *v.* S., 141 Ga. 1, 80 S. E. 314; S. *v.* Campbell, 73 Kan. 688, 85 P. 784; Cramer *v.* Harmon, 126 Mo. App. 54, 103 S. W. 1086; Goodwin *v.* S. (Tex. Cr.), 158 S. W. 274; Murphy *v.* S., 124 Wis. 635, 102 N. W. 1087. *Contra*, S. *v.* Faulkner, 185 Mo. 673, 84 S. W. 967.

In Alabama a grand juror's evidence is limited to show whether testimony before grand jury and on trial is consistent (except in perjury). Farlow *v.* S., 7 Ala. App. 137, 61 S. 474.

261-63 S. *v.* Johnson, 73 N. J. L. 199, 63 A. 12. But see St. L., etc. R. Co. *v.* S., 99 Ark. 1, 136 S. W. 938.

Testimony cannot be read in evidence without consent. Hinson *v.* S. (Ark.), 159 S. W. 1126.

262-64 Murphy *v.* S., 124 Wis. 635, 102 N. W. 1087; P. *v.* Woodward, 71 Misc. 607, 130 N. Y. S. 854. *Contra*, if to be used to impeach return of indictment. P. *v.* Nall, 242 Ill. 284, 89 N. E. 1012.

262-67 Havenor *v.* S., 124 Wis. 444, 104 N. W. 116, counsel for accused may inspect, but such inspection is limited to such portions of the record as are used in evidence and in such manner and at such times during progress of trial as court directs.

262-68 S. *v.* Taylor, 202 Mo. 1, 100 S. W. 41.

"The judge fully guarded the defendant's legal rights, and instructed the jury not to consider this evidence unless they were satisfied that the statements were made by the defendant voluntarily and after he had been informed that he was not obliged to furnish any evidence tending to incriminate himself. This unrestricted constitutional guaranty against incriminating testimony by one accused of crime was established when a defendant was not allowed to be a witness in his own behalf, and need not be extended under present day conditions." Com. *v.*

MacKenzie, 211 Mass. 578, 98 N. E. 598.

262-69 Pilgrim *v.* S., 3 Okla. Cr. 49, 104 P. 383, statute. See Farlow *v.* S., 7 Ala. App. 137, 61 S. 474; Cramer *v.* Harmon, 126 Mo. App. 54, 103 S. W. 1086.

Juror may not repeat incompetent testimony given before jury. Woodall *v.* S., 58 Tex. Cr. 513, 126 S. W. 591.

Disclosure of proceedings proper if public justice requires. S. *v.* Putnam, 53 Or. 266, 100 P. 2.

263-70 Signed minutes of testimony given by witness may be used to impeach him as witness in civil action. Hunt *v.* R. Co. (Ia.), 141 N. W. 334.

263-72 Smith *v.* S. (Ala.), 62 S. 864; P. *v.* Nall, 242 Ill. 284, 89 N. E. 1012; S. *v.* Hoffman, 134 Ia. 587, 112 N. W. 103; S. *v.* Hoen, 88 Kan. 573, 129 P. 153; Cramer *v.* Harmon, 126 Mo. App. 54, 103 S. W. 1086; Cloud *v.* S. (Tex. Cr.), 153 S. W. 892. See S. *v.* Hector (Ia.), 138 N. W. 930.

264-73 Havenor *v.* S., 125 Wis. 444, 104 N. W. 116.

But not introduced in evidence. S. *v.* Patton (Mo.), 164 S. W. 223.

GUARANTY.

Execution provable by parol, 271-12; *Burden,* 286-50.

267-2 McDowell, Stocker & Co. *v.* Sharp, 157 Ill. App. 165; Blasdel *v.* Erickson, 157 Ill. App. 615; Frohardt Bros. *v.* Duff (Ia.), 132 N. W. 31; McDonald *v.* Constr. Co., 152 Ia. 273, 132 N. W. 369; Huff *v.* Simmers, 114 Md. 548, 79 A. 1003; Barnett *v.* Rosenberg, 209 Mass. 421, 95 N. E. 849; Pile *v.* Bright, 156 Mo. App. 301, 137 S. W. 1017; Ubert *v.* Schonger, 144 App. Div. 696, 129 N. Y. S. 545; May *v.* Roberts, 28 Okla. 619, 115 P. 771; Fisher *v.* Lutz, 146 Wis. 664, 132 N. W. 592.

Promise by corporation.—Swisher *v.* Grocery Co., 158 Ill. App. 186.

267-5 See Carter *v.* Schmaele, 2 Phila. (Pa.) 351.

269-7 Maxfield *v.* Jones, 106 Ark. 346, 153 S. W. 584; Morris *v.* Lucker, 158 Mich. 518, 123 N. W. 21; Duffy Co. *v.* Todebush, 157 App. Div. 688, 142 N. Y. S. 790. See Wood *v.* Boese, 135 App. Div. 810, 120 N. Y. S. 137.

269-8 Highsmith *v.* Hammonds, 99 Ark. 400, 138 S. W. 635.

269-9 See Young *v.* Bank of Miami (Tex. Civ.), 161 S. W. 436.

271-12 Klosterman *v.* Co., 101 Md. 29, 60 A. 251.

Fact of execution may be shown by parol. Leftkovitz *v.* Bk., 152 Ala. 521, 44 S. 613.

271-13 Maril *v.* Boswell, 12 Ga. App. 41, 76 S. E. 773; Burt *v.* Flynn, 24 Pa. C. C. 451.

272-14 Newcomb *v.* Kloeblen, 77 N. J. L. 791, 74 A. 511.

275-19 People's Bank *v.* Stewart, 160 Mo. App. 643, 142 S. W. 789; Gansevoort Bank *v.* Keahon, 145 App. Div. 214, 129 N. Y. S. 1074; Williams & Flash Co. *v.* Carpenter, 32 R. I. 349, 79 A. 821.

278-30 Burt *v.* Flynn, 24 Pa. C. C. 451.

279-32 Klosterman *v.* Co., 101 Md. 29, 60 A. 251.

284-40 Bond *v.* Farwell, 172 Fed. 58, 96 C. C. A. 546.

286-50 Burden of proving execution on plaintiff where defendant files general issue verified. Blue I. B. Co. *v.* Fraatz, 123 Ill. App. 27.

287-52 National Bk. *v.* Garn, 3 O. C. C. (N. S.) 428.

Plaintiff must show defendant's liability.—Foster County S. Bk. *v.* Hester, 18 N. D. 135, 119 N. W. 1044.

287-54 Statutory presumption arising from production and possession of indorsed note is not applicable against guarantor. As against his representatives the common-law presumption arising from proof of his signature is writing was signed in form in which it was produced. Ripon H. Co. *v.* Haas, 141 Wis. 65, 123 N. W. 659.

287-55 Jacobs *v.* Goodman, 130 N. Y. S. 135; Spande *v.* Indemnity Co., 61 Or. 220, 117 P. 973.

288-56 Standard Supply Co. *v.* Person, 154 N. C. 456, 70 S. E. 745.

288-57 White *v.* Bk., 119 Ill. App. 354.

Denial of consideration not permissible after guarantee parted with goods. Bond *v.* Farwell, 172 Fed. 58, 95 C. C. A. 546.

289-59 Armour & Co. *v.* Bluthenthal & Bickart, 9 Ga. App. 707, 72 S. E. 168; Merchants' Nat. Bk. *v.* Cressey (Ia.), 146 N. W. 761; Atlas Shoe Co. *v.* Bloom, 209 Mass. 563, 95 N. E. 952; Am., etc. Co. *v.* Ward, 113 App. Div. 319, 99 N. Y. S. 717.

290-63 Ft. Dearborn Nat. Bk. *v.* Miller, 178 Ill. App. 450.

294-71 Gold Medal Furniture Co. *v.* Stephenson, 23 W. L. R. (Can.) 664, 4 W. W. R. 7, 10 D. L. R. 1; Shores, Mueller Co. *v.* Lonning (Ia.), 140 N. W. 197; Drovers' D. Nat. Bk. *v.* Newgass, 161 App. Div. 769, 147 N. Y. S. 4; Providence M. Co. *v.* Browning, 72 S. C. 424, 52 S. E. 117; Tilt-K. S. Co. *v.* Haggarty (Tex. Civ.), 114 S. W. 386; U. S. H. Co. *v.* Jenss, 128 Wis. 162, 107 N. W. 293.

294-72 A letter of defendant, even though written to avoid suit, is admissible to show that he did execute the contract. Shows *v.* Steiner, Lobman & Frank, 175 Ala. 363, 57 S. 700.

The guarantor's consent to a modification of the original contract may be shown by circumstantial evidence. Shepard L. Co. *v.* Banigan (R. I.), 87 A. 531.

295-75 See Burns *v.* Poole, 106 Minn. 69, 118 N. W. 156.

Notice unnecessary, when.—Cumberland, etc. Mfg. Co. *v.* Wheaton, 208 Mass. 425, 94 N. E. 803.

Non acceptance shown by circumstantial evidence.—American, etc. Co. *v.* Moskowitz, 140 N. Y. S. 522.

295-76 Robinson *v.* Trust Co., 188 Fed. 37, 111 C. C. A. 526; Pressed Radiator Co. *v.* Hughes, 155 Ill. App. 80; J. R. Watkins, etc. Co. *v.* Brand, 143 Ky. 468, 136 S. W. 867.

Notice need not be proved.—Bond *v.* Farwell, 172 Fed. 58, 95 C. C. A. 546; Sheffield *v.* Whitfield, 6 Ga. App. 762, 65 S. E. 807; Tilt-K. S. Co. *v.* Haggarty (Tex. Civ.), 114 S. W. 386.

295-77 Finnucan *v.* Feigenspan, 81 Conn. 378, 71 A. 497 (to aid interpretation); Perlman *v.* Ehrlich, 119 N. Y. S. 663 (to show intent).

296-80 People's Bk. *v.* Stewart, 152 Mo. App. 314, 133 S. W. 70.

296-81 Evidence of principal's indebtedness, unknown to guarantor, irrelevant in absence of fraud. J. A. Tolman Co. *v.* Butt, 116 Wis. 597, 93 N. W. 548.

296-83 *Contra*, if not of res gestae and self-serving. Moore L. Co. *v.* Walker, 110 Va. 775, 67 S. E. 374.

298-89 But see Cohen *v.* Hurwitz, 142 N. Y. S. 305.

301-99 Notice need not be given. Tilt-K. S. Co. *v.* Haggarty (Tex. Civ.), 114 S. W. 386.

301-2 Guaranty Trust Co. *v.* Koehler, 187 Fed. 192; Fleck *v.* Feldman, 54 Misc. 228, 104 N. Y. S. 366; First Nat. Bk. *v.* Wunderlich, 145 Wis. 193, 130 N. W. 98.

Evidence held insufficient.—Latham *v.* Savage, 166 Mich. 300, 131 N. W. 571.

Modification of contract.—Baumann *v.* Michel, 114 Minn. 481, 131 N. W. 495.

302-3 American R. Co. *v.* Hoffman, 26 Pa. Super. 177, evidence showing delay in guarantee's performance, not sufficient.

GUARDIAN AND WARD.

Choice of new guardian, 305-2; *Incapacity of ward*, 316-53; *Care, prudence and fidelity of guardian*, 332-9; *Fairness of settlements*, 336-39; *Actions on bonds—defenses*, 339-55.

305-2 Where a ward makes a prima facie showing he has attained age at which he is entitled to choose a new guardian, burden shifts to those opposing the change. In re Crawford, 4 Pa. C. C. 507.

306-7 Hindorff *v.* Sovereign Camp, 150 Ia. 185, 129 N. W. 831.

308-17 Roush *v.* Griffith, 65 W. Va. 752, 65 S. E. 168.

309-22 Norton *v.* Bk., 17 Okla. 295, 87 P. 848, presumption of authority to lease ward's land and as to legality of proceedings connected therewith—burden on party attacking.

309-26 Alcon *v.* Koons, 42 Ind. App. 537, 82 N. E. 92; Stevens *v.* Meserve, 73 N. H. 293, 61 A. 420.

310-31 In re Kitchen (Ind. App.), 89 N. E. 375.

311-34 Order of court must be proved. Nicholson *v.* Nicholson (Tex. Civ.), 125 S. W. 965.

312-39 Presumption services were voluntary, arising from relationship between guardian and ward, has never been carried beyond case of uncle and nephew. In re Quinn, 16 Phila. (Pa.) 223.

313-42 See also Love *v.* Love, 72 Kan. 658, 83 P. 201.

314-47 In re Propst, 144 N. C. 562, 57 S. E. 342.

314-49 But see Beachy *v.* Shomber, 73 Kan. 62, 84 P. 547 (no presumption of notice of sale from fact of con-

firmation); Wood *v.* Frickie, 120 La. 180, 45 S. 96 (presumption as to recordation of lost bond given by tutrix).

Party seeking appointment of guardian ad litem must show reason. Ancell *v.* Co., 223 Mo. 209, 122 S. W. 709.

316-53 Where guardian seeks to set aside conveyance made by ward on ground of latter's incapacity, he shows such fact. Reese *v.* Shutti, 133 Ia. 681, 108 N. W. 525.

317-54 Baum *v.* Hartmann, 226 Ill. 160, 80 N. E. 711.

318 Guardian's services rendered presumed ordinary. C. *v.* Bk. & Tr. Co. (Ky.), 167 S. W. 411.

319-62 Willis *v.* Rice, 157 Ala. 252, 48 S. 397; In re Robb, 134 Ia. 195, 111 N. W. 803.

No presumption as to settlement of guardianship affairs from fact conveyance made to a ward after attaining majority. Rouse *v.* Whitney, 102 N. Y. S. 899.

321-67 Payment to ward, not presumed during continuance of guardianship. Roush *v.* Griffith, 65 W. Va. 752, 65 S. E. 168.

321-69 Borcher *v.* McGuire, 85 Neb. 646, 124 N. W. 111.

321-70 Brandau *v.* Greer, 95 Miss. 100, 48 S. 519.

323-75 Am. B. Co. *v.* P., 46 Colo. 394, 104 P. 81.

Conclusive as to matters embraced in settlement only. Nelson *v.* Cowling, 89 Ark. 334, 116 S. W. 890.

324-76 U. S. Co. *v.* Davis, 2 Ga. App. 525, 58 S. E. 777.

325-78 France *v.* Shockey, 92 Ark. 41, 121 S. W. 1056; Ackerman *v.* Haumueller, 148 Mo. App. 400, 128 S. W. 51, 56; Whitfield *v.* Burrell, 54 Tex. Civ. 567, 118 S. W. 153.

327-84 Fidelity Co. *v.* Schelper, 37 Tex. Civ. 393, 83 S. W. 871, plaintiff must show guardian's failure to account to extent and in manner pointed out in his obligation.

327-88 Burden of proving breach of condition not met by showing funds were not paid to ward where such payments forbidden by statute. Fidelity Co. *v.* Schelper, supra.

328-89 U. S. Co. *v.* Davis, 2 Ga. App. 525, 58 S. E. 777.

328-90 See Hanrahan *v.* Sears, 72 N. H. 71, 54 A. 702.

Evidence as to disposition of prospective ward's estate, admissible. P. *v.* Payne, 161 Ill. App. 640.

329-92 Brack *v.* Morris, 90 Kan. 64, 132 P. 1185. See Skinner *v.* Knickrehm, 10 Cal. App. 596, 102 P. 947.

330-96 Talbott *v.* Curtis, 65 W. Va. 132, 63 S. E. 877.

330-99 In re Bedford's Est., 158 Cal. 145, 110 P. 302; Russner *v.* McMillan, 37 Wash. 416, 79 P. 988 (evidence inadmissible to show arrest of one of applicant's daughters for vagrancy, it appearing he had never had her custody).

330-1 In re Williams, 77 N. J. Eq. 478, 77 A. 350.

331-6 Recitals in settlement of accounts of administrator of estate in which ward a beneficiary are evidence to show existence of a valid claim in favor of ward, subject to guardian's right to surcharge and falsify same. They are not sufficient to show payment to guardian. Roush *v.* Griffith, 65 W. Va. 752, 65 S. E. 168.

332-9 Care, prudence and fidelity of guardian in investments sufficiently appears where securities taken were similar to those invested in by banks. Stevens *v.* Meserve, 73 N. H. 293, 61 A. 420.

334-26 Brookhouse *v.* Co., 73 N. H. 368, 62 A. 219, evidence showing use for private purposes competent upon question of intention to appropriate.

335 Purchaser must testify as to facts if within prohibition of §§5078, 5088 Shannon's Code. Arbuckle *v.* Arbuckle (Tenn.), 167 S. W. 111.

335-31 Account presented to guardian may be read in evidence on appeal from order allowing it in part, as may a detailed statement filed with county judge at his request. Bradshaw *v.* Lyles, 55 Tex. Civ. 384, 119 S. W. 918.

336-38 Contract with heirs of ward inadmissible, ward not having been a party. Euler *v.* Euler (Ind. App.), 102 N. E. 856.

Testimony of commissioner as to proceedings of guardian admissible in action to set aside settlement. Euler *v.* Euler, supra.

336-39 Proof of ward's knowledge she was giving her estate to her guardian is not sufficient to show fairness of transaction without further proof of lack of undue influence. Baum *v.* Hartmann, 226 Ill. 160, 80 N. E. 711.

337-44 Guardian is incompetent to impeach his final settlement. Title G. & S. Co. *v.* Slinker, 35 Okla. 128, 128 P. 696.

338-45 Merritt *v.* Wallace, 76 Ark. 217, 88 S. W. 876 (guardian must introduce evidence to sustain his account where challenged, otherwise it will be rejected).

338-47 Condition of ward's property may be shown and cause thereof. Ballou *v.* Ballou, 30 R. I. 286, 74 A. 1089.

338-48 Gilliam *v.* Guffy, 142 Ky. 631, 134 S. W. 1162.

339-55 Actions on bonds—defenses. Whatever credits a guardian is entitled to can be shown as a defense to an action on his bond. Rouse *v.* Whitney, 102 N. Y. S. 899 (unsatisfied return of execution admissible as showing ward exhausted remedies against guardian); Fidelity Co. *v.* Schelper, 37 Tex. Civ. 393, 83 S. W. 871.

Breach of trust may not be excused by showing it was made at solicitation of ward's mother. S. *v.* Smith, 139 Mo. App. 101, 120 S. W. 614.

Record in another suit between guardian and ward not competent to show expenses incurred by latter to recover land, title to which stood in guardian's name, if other expenses than those so incurred included in it. S. *v.* Smith, 139 Mo. App. 101, 120 S. W. 614.

HABEAS CORPUS.

Burden of proving violation of conditional pardon, 350-29.

342-3 Stretton *v.* Rudy, 176 Fed. 727, 101 C. C. A. 223; Villa *v.* Allen, 2 Phil. Isl. 436.

342-4 Ex parte McCoy, 10 Cal. App. 116, 101 P. 419.

343-5 Montgomery *v.* Hughes, 4 Ala. App. 245, 58 S. 113.

343-6 Right to impeach and cross-examine witnesses, open to both parties. Ex parte Nathan (Fla.), 50 S. 38.

343-7 Ex parte Yabucanin, 199 Fed. 365; In re Phillips, 5 Penne. (Del.) 133, 59 A. 47 (municipal judge conclusively presumed to have found sufficient facts to warrant him in committing and to have followed the law); Ex parte Koen, 58 Tex. Cr. 279, 125 S. W. 401. And see Ex parte Adams, 170 Ala. 105, 54 S. 501.

345-9 Indictment presumptive evidence of probable cause if sufficient on face. Pereles *v.* Weil, 157 Fed. 419.

345-10 Hyde *v.* Shine, 199 U. S. 62; Eureka County Bk. Habeas Corpus Cases, 35 Nev. 80, 126 P. 655, 129 P. 308.

346-12 Eureka County Bk. H. C. Cases, 35 Nev. 80, 126 P. 655, 129 P. 308.

Burden on state to refute testimony showing no crime had been committed. Eureka County Bk. H. C. Cases, 35 Nev. 80, 126 P. 655, 129 P. 308.

346-14 In re Haigler (Ariz.), 137 P. 423; Ex parte Nathan (Fla.), 50 S. 38.

347-15 *Contra,* S. *v.* Stracener, 160 Ala. 123, 49 S. 301; Ex parte Nathan, supra.

Conflicting evidence not reviewed; if it is insufficient, magistrate's ruling disregarded. Pereles *v.* Weil, 157 Fed. 419.

347-17 S. *v.* Stracener, 160 Ala. 123, 49 S. 301; Ex parte Lewis, 11 Cal. App. 530, 105 P. 774 (commitment of insane person); Ex parte Nathan (Fla.), 50 S. 38; In re Wright, 74 Kan. 406, 89 P. 678, 86 P. 460; Ex parte Page, 89 Neb. 299, 131 N. W. 820; McCartney *v.* Hay, 85 Neb. 655, 124 N. W. 104 (commitment by board of insanity); McGorray *v.* Sutter, 80 O. St. 400, 89 N. E. 10; Ex parte Smith, 2 Okla. Cr. 24, 99 P. 893. But see In re Lowe, 3 O. N. P. (N. S.) 641, where one having been committed as a contumacious witness brings habeas corpus sheriff must show legality of commitment.

Want of probable cause cannot be shown by proof affidavit upon which commitment issued not based on personal knowledge of affiant. Lee *v.* Van Pelt, 57 Fla. 94, 48 S. 632.

Absence of jurisdiction may be shown by non-record evidence. In re Wyant, 8 O. N. P. (N. S.) 207.

348-18 In re Gip Ah Chan, 6 Haw. 25; In re McNaught, 1 Okla. Cr. 528, 99 P. 241; Ex parte Rupert, 6 Okla. Cr. 90, 116 P. 350; Ex parte Martinez (Tex. Cr.), 145 S. W. 959.

As to military judgment burden is upon respondent to show it was based on some provision of positive law. Hamilton *v.* McClaughry, 136 Fed. 445.

348-19 Judgment of discharge is not res judicata in extradition proceedings unless question of guilt was fully investigated. Benson *v.* Palmer, 31 App. Cas. (D. C.) 485.

348-20 Denial of writ on ground of petitioner's insanity, not conclusive on hearing of subsequent writ for discharge. P. *v.* Lamb, 118 N. Y. S. 389.

349-21 Charlton *v.* Kelly, 229 U. S. 447, 33 Sup. Ct. 945, 57 L. ed. 1274; Ex parte Law, 2 Ala. App. 257, 56 S. 79; Depoilly *v.* Palmer, 28 App. Cas. (D. C.) 324. See Munsey *v.* Clough, 196 U. S. 364; Compton *v.* S., 152 Ala. 68, 44 S. 685.

Prisoner may show indictment or affidavit which is basis of the extradition charges no crime under laws of demanding state. Barriere *v.* S., 142 Ala. 72, 39 S. 55. See Singleton *v.* S., 144 Ala. 104, 42 S. 23; Compton *v.* S., 152 Ala. 68, 44 S. 685.

349-23 Barriere *v.* S., 142 Ala. 72, 39 S. 55; Singleton *v.* S., 144 Ala. 104, 42 S. 23; S. *v.* Langum (Minn.), 147 N. W. 708; Dennison *v.* Christian, 72 Neb. 703, 101 N. W. 1045 (fact of issuing warrant is sufficient to justify presumption governor found accused a fugitive from justice); Poor *v.* Cudihee, 37 Wash. 609, 79 P. 1105. See Shreve *v.* S., 4 Ala. App. 216, 59 S. 223; P. *v.* Police Comr., 83 Misc. 643, 146 N. Y. S. 781.

Issuance of warrant makes prima facie case in favor of right of extradition. Ex parte Walters (Miss.), 64 S. 2.

349-24 Harris *v.* S., 148 Ala. 659, 41 S. 416; Ex parte Spencer, 34 Nev. 240, 117 P. 1.

Burden on demanding state to identify the accused by proper evidence. Ryan *v.* Rogers (Wyo.), 132 P. 95.

A presumption as to identity arises from identity of name of accused with name in warrant and requisition papers. S. *v.* Bates, 101 Minn. 303, 112 N. W. 260. See vol. 6, p. 913, et seq.

350-26 Farrell *v.* Hawley, 78 Conn. 150, 61 A. 502 (presumption governor had grounds for believing prisoner was present in demanding state when crime committed); Blackwell *v.* Jennings, 128 Ga. 264, 57 S. E. 484; Kemper *v.* Metzger, 169 Ind. 112, 81 N. E. 663 (for note see infra, "Extradition," 731-44); S. *v.* Schlachter, 21 S. D. 276, 111 N. W. 566.

350-28 Burden on accused, if proceedings regular in form, to show he is not a fugitive from justice. McNichols *v.* Pease, 207 U. S. 100; Pierce *v.* Creecy, 210 U. S. 387; Morrison *v.* Dwyer, 143 Ia. 502, 121 N. W. 1064.

350-29 Burden of proving violation of conditional pardon on state. Spencer *v.* Kees, 47 Wash. 276, 91 P. 963.

Petitioner must show he is within terms of proclamation of amnesty. Villa *v.* Allen, 2 Phil. Isl. 436.

350-30 Intent and good faith of defendant may be inquired into in proceeding for custody of child. Ex parte Fields, 56 Wash. 259, 105 P. 466.

352-40 Ex parte Walton, 2 Okla. Cr. 437, 101 P. 1034.

353-43 Sneed *v.* S., 157 Ala. 8, 47 S. 1028.

353-44 Robertson *v.* Heath, 132 Ga. 310, 64 S. E. 73.

354-46 Robertson *v.* Heath, supra (better practice is to hear evidence or have testimony in form of depositions).

354-47 S. *v.* Langum (Minn.), 147 N. W. 708.

354-48 Ex parte Zentner, 188 Fed. 344; Singleton *v.* S., 144 Ala. 104, 42 S. 23; S. *v.* Langum (Minn.), 147 N. W. 708.

Telegram of governor of sister state insufficient to revoke his requisition but admissible as justifying a continuation of a hearing on habeas corpus. Ex parte Massee, 95 S. C. 315, 79 S. E. 97.

Affidavits of outside persons are inadmissible to impeach the requisition of a governor of a sister state. Ex parte Massee, supra.

354-49 Ex parte Law, 2 Ala. App. 257, 56 S. 79.

HANDWRITING.

Use of chemical test, 365-19; *Qualifications*, 486-93; *Comparison of seals*, 440-33; *Typewritten documents*, 440-33.

360-2 . Groff *v.* Groff, 209 Pa. 603, 59 A. 65.

Where two signed, there being no witnesses, one may testify to his own signature and that he saw the other sign. Malchow *v.* S. (Ala.), 59 S. 342.

360-3 Tarnofker *v.* Grissler, 108 N. Y. S. 696. See S. *v.* Branton, 49 Or. 86, 87 P. 535.

360-5 Williams *v.* Smith, 29 R. I. 562, 72 A. 1093. See Jacobs *v.* R. Co., 188 Mass. 245, 74 N. E. 349; S. *v.* Goldstein, 72 N. J. L. 336, 62 A. 1006, 65 A. 1119; Mississippi L. & C. Co. *v.* Kelly, 19 S. D. 577, 104 N. W. 265.

Testimony of writer not of higher grade than that of one who knows his

signature. Washington *v.* S., 143 Ala. 62, 39 S. 388.

Under California Code proof of handwriting by comparison is of equal force as proof by subscribing witness. Castor *v.* Bernstein, 2 Cal. App. 703, 84 P. 244.

361-7 Campbell *v.* Collins, 133 Ia. 152, 110 N. W. 435.

362-10 *Comp.* Brown *v.* Woodward, 75 Conn. 254, 53 A. 112.

Entire instrument may, in court's discretion, be submitted to purported author before requiring his answer as to genuineness of signature. Fee *v.* Bk., 37 Utah 28, 106 P. 517.

362-12 Shaffer *v.* U. S., 24 App. Cas. (D. C.) 417.

No presumption from fact body of a will is in decedent's handwriting, he signed it. In re Burtis, 43 Misc. 437, 89 N. Y. S. 441.

363-15 In re Burtis, supra.

364-18 Le Master *v.* P., 54 Colo. 416, 131 P. 269; McCray *v.* S., 134 Ga. 416, 68 S. E. 62; Williams *v.* Williams, 109 Me. 537, 85 A. 43; In re Hopper's Will, 90 Neb. 622, 134 N. W. 237; S. *v.* Goldstein, 72 N. J. L. 336, 62 A. 1006, 65 A. 1119; Barber *v.* S. (Tex. Cr.), 142 S. W. 577; O'Brien *v.* McKelvey, 59 Wash. 115, 109 P. 337; S. *v.* Miller (Wash.), 141 P. 293, 1139. "**Of course**, the extent of his familiarity with the handwriting will enter into the weight of the testimony." Southern R. Co. *v.* Cortner, 3 Ala. App. 400, 58 S. 84, *cit.* Moon's Admx. *v.* Crowder, 72 Ala. 79.

365-19 **Use of a chemical test** in open court to determine questions concerning the ink used in writing a probated will not permitted unless precautions taken to preserve instrument in condition in which it was offered. In re Gartland's Will, 60 Misc. 33, 112 N. Y. S. 719.

366-25 S. *v.* Barrett, 5 Penne. (Del.) 147, 59 A. 45.

367-26 Southern R. Co. *v.* Cortner, 3 Ala. App. 400, 58 S. 84; Jewett *v.* Bryant, 159 Mich. 345, 123 N. W. 1097; Chappell *v.* S., 58 Tex. Cr. 401, 126 S. W. 274.

367-27 Hoag *v.* Wright, 174 N. Y. 36, 66 N. E. 579.

368-28 Ware *v.* Burch, 148 Ala. 529, 42 S. 562; Wilber *v.* Gillespie, 127 App. Div. 604, 112 N. Y. S. 20. See Neely *v.* Carter, 96 Ga. 197, 23 S. E. 313.

369-32 See Hopkins *v.* S., 52 Fla. 39, 42 S. 52.

Witness unwilling to swear positively cannot be pressed for opinion where he says he has no opinion. In re Smart's Will, 145 N. Y. S. 838.

370-35 Differences in signatures may be indicated without argument. Nagle *v.* Schnadt, 239 Ill. 595, 88 N. E. 178.

370-36 Rinker *v.* U. S., 151 Fed. 755, 81 C. C. A. 379; Pittman *v.* S., 51 Fla. 94, 41 S. 385; Hopkins *v.* S., 52 Fla. 39, 42 S. 52; Shaw *v.* Chiles, 9 Ga. App. 460, 71 S. E. 745; Stitzel *v.* Miller, 250 Ill. 72, 95 N. E. 53; Campbell *v.* Conner, 15 Ind. App. 23, 42 N. E. 688; Frank *v.* Berry, 128 Ia. 223, 103 N. W. 358; Yelton *v.* Black, 26 Ky. L. R. 885, 82 S. W. 634; Wilson *v.* Clear (N. J.), 89 A. 1031; Tarnofker *v.* Grissler, 108 N. Y. S. 696; Nicholson *v.* Lumb. Co., 156 N. C. 59, 72 S. E. 86, 36 L. R. A. (N. S.) 162; Greenwald *v.* Ford, 21 S. D. 28, 109 N. W. 516; S. *v.* Simmons, 52 Wash. 132, 100 P. 269. See S. *v.* Barrett, 5 Penne. (Del.) 147, 59 A. 45.

371-37 Shaffer *v.* U. S., 24 App. Cas. (D. C.) 417.

371-38 Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37; Washington *v.* S., 143 Ala. 62, 39 S. 388 (partner may testify); Ware *v.* Burch, 148 Ala. 529, 42 S. 562; Fearnley *v.* Fearnley, 44 Colo. 417, 98 P. 819; Wooldridge *v.* S., 49 Fla. 137, 38 S. 3; Kelly *v.* Fallon, 108 Ill. App. 108; Gentner *v.* Ulmer, 15 Phila. (Pa.) 233.

373-41 Gress L. Co. *v.* Co., 120 Ga. 751, 48 S. E. 115; In re Burbank, 104 App. Div. 312, 93 N. Y. S. 866.

373-42 King *v.* S., 8 Ala. App. 239, 62 S. 374; S. *v.* Barrett, 5 Penne. (Del.) 147, 59 A. 45; Shaw *v.* Chiles, 9 Ga. App. 460, 71 S. E. 745; Hoisting M. Co. *v.* Wks., 84 N. J. L. 504, 87 A. 331; S. *v.* Goldstein, 72 N. J. L. 336, 62 A. 1006, 65 A. 1119; Comerer *v.* Ins. Co., 53 Pa. Super. 516. See Griffin *v.* Assn., 151 Ala. 597, 44 S. 605.

374-43 S. *v.* McBride, 30 Utah 422, 85 P. 440.

374-44 Morris *v.* Co., 44 Tex. Civ. 488, 99 S. W. 178. See Carr *v.* Carr, 138 Mich. 396, 101 N. W. 550.

375-47 Gillespie *v.* Co., 236 Ill. 188, 86 N. E. 219.

376-49 Nicholson *v.* Lumb. Co., 156 N. C. 59, 72 S. E. 86, 36 L. R. A. (N. S.) 162.

377-53 In re Lord's Will, 106 Me.

51, 75 A. 286; C. *v.* Hutchison, 4 Pa. C. C. 18.

377-55 Smith *v.* C., 151 Ky. 517, 152 S. W. 574, brothers.

378-56 S. *v.* McBride, 30 Utah 422, 85 P. 440.

378-57 See S. *v.* Howard, 30 Mont. 518, 77 P. 50.

378-58 S. *v.* Barrett, 5 Penne. (Del.) 147, 59 A. 45.

378-59 Rinker *v.* U. S., 151 Fed. 755, 81 C. C. A. 379; Brown *v.* McBride, 129 Ga. 92, 58 S. E. 702. See Smith *v.* C., 151 Ky. 517, 152 S. W. 574.

378-60 Testimony to mere resemblances in the writing and author's usual writing does not show witness competent. Grandechampt *v.* Billis, 124 La. 117, 49 S. 998.

379-61 Defendant may testify letters are in handwriting of prosecutrix. S. *v.* Barrett, 5 Penne. (Del.) 147, 59 A. 45.

379-64 Wooldridge *v.* S., 49 Fla. 137, 38 S. 3.

380-66 S. *v.* Bond, 12 Ida. 424, 86 P. 43; Murphy *v.* Murphy, 146 Ia. 255, 125 N. W. 191; Frank *v.* Berry, 128 Ia. 223, 103 N. W. 358; Bess *v.* C., 118 Ky. 858, 82 S. W. 576; Broadrick *v.* Broadrick, 25 Pa. Super. 225; S. *v.* Freshwater, 30 Utah 442, 85 P. 447.

381-70 S. *v.* Draughn, 140 Mo. App. 263, 124 S. W. 20; S. *v.* Faught, 140 Mo. App. 369, 124 S. W. 62.

382-73 *Contra*, Carmical *v.* Carmical, 32 Ky. L. R. 171, 104 S. W. 1037, witness incompetent who was familiar with handwriting of author at time of trial, but not at time of execution of will ten years before.

383-75 Ray *v.* Hunter, 122 Ill. App. 466.

385-83 McGarry *v.* Healey, 78 Conn. 365, 62 A. 671, expert may state peculiarities mark handwriting even in presence of attempts at disguise.

385-85 Marshall *v.* Thomas, 31 O. C. C. 363; Dolan *v.* Meehan (Tex. Civ.), 80 S. W. 99 (whether alleged signature is a traced signature); Colbert *v.* S., 125 Wis. 423, 104 N. W. 61 (whether writing is normal, but not cause of its being abnormal).

Experts cannot testify as to whether marks over a signature were made by person who wrote it. In re Hopkins, 172 N. Y. 360, 65 N. E. 173.

385-86 Venable *v.* Venable, 165 Ala. 621, 51 S. 833 (subsequent examination, to refresh memory of witness, of other papers signed by decedent does not render such testimony incompetent); Ausmus *v.* P., 47 Colo. 167, 107 P. 204; Flint Riv., etc. Co. *v.* Smith, 134 Ga. 627, 68 S. E. 436; Cochran *v.* Stein, 118 Minn. 323, 136 N. W. 1037; In re Fuller's Est., 222 Pa. 182, 70 A. 1005; Warren *v.* S., 54 Tex. Cr. 443, 114 S. W. 380.

385-89 Experts may state whether body of will, its signature, and signature of one subscribing witness, written in same ink as signature of another witness, and which was the older writing. Savage *v.* Bowen, 103 Va. 540, 49 S. E. 668.

386-91 Rinker *v.* U. S., 151 Fed. 755, 81 C. C. A. 379 (expert may state there has been an apparent attempt to disguise); McGarry *v.* Healey, 78 Conn. 365, 62 A. 671.

386-93 Underwood *v.* Quantic, 85 Kan. 111, 116 P. 361.

Time to compare and study may be given expert in discretion of court. Colbert *v.* S., 125 Wis. 423, 104 N. W. 61.

Acquaintance with handwriting of purported author, unnecessary to qualify expert. Dolan *v.* Meehan, supra.

386-95 See In re Burbank, 104 App. Div. 312, 93 N. Y. S. 866.

387-98 Withaup *v.* U. S., 127 Fed. 530, 62 C. C. A. 328; Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348; Shannon *v.* Castner, 21 Pa. Super. 294; Gentner *v.* Ulmer, 15 Phila. (Pa.) 233; Mahon *v.* S., 46 Tex. Cr. 234, 79 S. W. 28; Wade *v.* R. Co. (Tex. Civ.), 110 S. W. 84. See Griffin *v.* Assn., 151 Ala. 597, 44 S. 605; Groff *v.* Groff, 209 Pa. 603, 59 A. 65.

Not in North Carolina.—Boyd *v.* Leatherwood, 165 N. C. 614, 81 S. E. 1025.

Such comparison is limited; thus where plaintiff wrote his name and address at request of counsel, only the name and address on the disputed writing could be submitted to jury for comparison. Jacobs *v.* R. Co., 188 Mass. 245, 74 N. E. 349.

Counsel in argument may call attention to peculiarities existing in both genuine writings and exemplars. P. *v.* Hutchings, 137 Mich. 527, 100 N. W. 753. But in a will contest it was error for propounder to show jury revocatory words on the margin of a will and comment on differences in the letters of

the signature there and to the will proper. In re Shelton, 143 N. C. 218, 55 S. E. 705.

Comparison by jury is proper whether or not an expert has testified. Castor *v.* Bernstein, 2 Cal. App. 703, 84 P. 244. *Comp.* Leslie *v.* Heald, 15 Leg. Int. 53, 3 Phila. (Pa.) 55.

388-99 Castor *v.* Bernstein, 2 Cal. App. 703, 84 P. 244; Howard *v.* Creech, 31 Ky. L. R. 201, 101 S. W. 974; S. *v.* Branton, 49 Or. 86, 87 P. 535.

388-2 Burr *v.* Finch, 91 Neb. 417, 136 N. W. 72.

388-4 See Castor *v.* Bernstein, 2 Cal. App. 703, 84 P. 244; P. *v.* Peters, 241 Ill. 273, 89 N. E. 704.

Not additional evidence.—Alexander *v.* Blackburn, 178 Ind. 66, 98 N. E. 711, *cit.* Short *v.* S., 63 Ind. 376; White Sewing Mach. Co. *v.* Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109; Morse *v.* Blanchard, 117 Mich. 37, 75 N. W. 93; Hatch *v.* S., 6 Tex. App. 384.

389-9 Gentner *v.* Ulmer, 15 Phila. (Pa.) 233.

Comparison not allowed in Alabama. Campbell *v.* Bates, 143 Ala. 338, 39 S. 144. But see Washington *v.* S., 143 Ala. 62, 39 S. 388. In Ware *v.* Burch, 148 Ala. 529, 42 S. 562, and Griffin *v.* Assn., 151 Ala. 597, 44 S. 605, a distinction is made between experts and non-experts, former only being allowed to make comparisons.

389-10 Comparison proper although writing in issue appears to be disguised. McGarry *v.* Healey, 78 Conn. 365, 62 A. 671.

390-11 Williams *v.* Williams, 109 Me. 537, 85 A. 43.

390-13 See Ashwell *v.* Miller (Ind. App.), 103 N. E. 37.

391-14 P. *v.* Gordon, 13 Cal. App. 678, 110 P. 469; Howard *v.* Creech, 31 Ky. L. R. 201, 101 S. W. 974; Shannon *v.* Castner, 21 Pa. Super. 294; Whitaker *v.* Thayer, 38 Tex. Civ. 537, 86 S. W. 364.

Texas statute requires in a criminal case corroboration of evidence by comparison. Spicer *v.* S., 52 Tex. Cr. 177, 105 S. W. 813.

Florida statute applies to criminal as well as civil cases. Wooldridge *v.* S., 49 Fla. 137, 38 S. 3.

392-17 Paulk *v.* Creech, 8 Ga. App. 738, 70 S. E. 145; Brin *v.* Gale (Tex. Civ.), 135 S. W. 1133.

394-22 Ware *v.* Burch, 148 Ala. 529, 42 S. 562; Griffin *v.* Assn., 151 Ala. 597, 44 S. 605; Murphy *v.* Murphy, 146 Ia. 255, 125 N. W. 191; Groff *v.* Groff, 209 Pa. 603, 59 A. 65; Jordt *v.* S., 50 Tex. Cr. 2, 95 S. W. 514. See Withaup *v.* U. S., 127 Fed. 530, 62 C. C. A. 328.

Only an expert can qualify himself by preparation and study to give evidence in a particular case. In re Burbank, 104 App. Div. 312, 93 N. Y. S. 866.

395-23 See Ferguson *v.* S., 61 Tex. Cr. 152, 136 S. W. 465.

Sheriff had accused make copy of letter.—Such copy may be used to compare handwriting and sheriff could testify as to facts. Jones *v.* S. (Tex. Cr.), 165 S. W. 144.

395-24 Stitzel *v.* Miller, 250 Ill. 72, 95 N. E. 53; Rangeley *v.* Harris, 165 N. C. 358, 81 S. E. 346; Municipal Court *v.* Kirby, 28 R. I. 287, 67 A. 8; O'Brien *v.* McKelvey, 59 Wash. 115, 109 P. 337.

396-25 S. *v.* Witherspoon, 231 Mo. 706, 133 S. W. 323.

397-30 *Comp.* Withaup *v.* U. S., 127 Fed. 530, 62 C. C. A. 328.

398-31 Expert may be required to state reasons for opinion. Howard *v.* Creech, 31 Ky. L. R. 201, 101 S. W. 974. His opinion is valuable only as accompanied by reasons. In re Burtis, 43 Misc. 437, 89 N. Y. S. 441.

398-32 S. *v.* Ryno, 68 Kan. 348, 74 P. 1114.

399-34 A comparison of a simulated genuine signature with a simulation of the disputed signature, written upon a blackboard by an expert, unwarranted. Groff *v.* Groff, 209 Pa. 603, 59 A. 65.

399-35 Griffin *v.* Assn., 151 Ala. 597, 44 S. 605; Bivings *v.* Gosnell, 141 N. C. 341, 53 S. E. 861.

399-36 Wall *v.* S., 2 Ala. App. 157, 56 S. 57.

400-37 Councilman *v.* Bk., 103 Md. 469, 64 A. 358, technical study not necessary.

401-39 Abernethy *v.* Yount, 138 N. C. 337, 50 S. E. 696; Whitaker *v.* Thayer, 38 Tex. Civ. 537, 86 S. W. 364 (deputy county clerk).

402-40 See Charles *v.* S., 58 Fla. 17, 50 S. 419.

402-41 Ausmus *v.* P., 47 Colo. 167, 107 P. 204; Councilman *v.* Bk., 103 Md. 469, 64 A. 358; S. *v.* Burns, 27 Nev. 289, 74 P. 983; Savage *v.* Bowen, 103 Va. 540, 49 S. E. 668.

404-47 Griffin *v.* Assn., 151 Ala. 597, 44 S. 605; Municipal Court *v.* Kirby, 28 R. I. 287, 67 A. 8; Savage *v.* Bowen, 103 Va. 540, 49 S. E. 668.

Clear proof of expert's competency necessary. Groff *v.* Groff, 209 Pa. 603, 59 A. 65.

404-51 Murphy *v.* Murphy, 146 Ia. 255, 125 N. W. 191; Succession of White, 132 La. 890, 61 S. 860; Municipal Court *v.* Kirby, 28 R. I. 287, 67 A. 8 (not of controlling weight).

Expert evidence of much importance. In re Burtis, 43 Misc. 437, 89 N. Y. S. 441 Is insufficient if handwriting denied under oath of accused. Brooks *v.* S., 57 Tex. Cr. 251, 122 S. W. 386, statute.

406-52 Cochran *v.* Stein, 118 Minn. 323, 136 N. W. 1037; O'Brien *v.* McKelvey, 59 Wash. 115, 109 P. 337.

406-53 Barnes *v.* U. S., 166 Fed. 113, 92 C. C. A. 97; Withaup *v.* U. S., 127 Fed. 530, 62 C. C. A. 328; Griffin *v.* Assn., 151 Ala. 597, 44 S. 605; Castor *v.* Bernstein, 2 Cal. App. 703, 84 P. 244; Charles *v.* S., 58 Fla. 17, 50 S. 419; Stitzel *v.* Miller, 250 Ill. 72, 95 N. E. 53; Kahn *v.* S. (Ind.), 105 N. E. 385; Ashwell *v.* Miller (Ind. App.), 103 N. E. 37; P. *v.* Hutchings, 137 Mich. 527, 100 N. W. 753. See S. *v.* Coleman, 17 S. D. 594, 98 N. W. 175.

407-54 Warren *v.* S., 54 Tex. Cr. 443, 114 S. W. 380.

Writing improperly admitted cannot be used as standard. Ashwell *v.* Miller (Ind. App.), 103 N. E. 37.

408-55 On denial of alleged author of genuineness of signature and his pointing out differences between it and his signature, he may be cross-examined as to genuineness of another signature. Hobart *v.* Van Aernam, 146 Ill. App. 1.

408-57 Withaup *v.* U. S., 127 Fed. 530, 62 C. C. A. 328.

Signature to application for process to secure witnesses admissible over objection defendant was entitled to process, he having been warned it could be used against him. Mahon *v.* S., 46 Tex. Cr. 234, 79 S. W. 28.

Judicial notice not taken of genuineness of signature of defendant to papers in another action. Mahon *v.* S., supra.

409-58 Frank *v.* Berry, 128 Ia. 223, 103 N. W. 358; Mississippi, etc. Co. *v.* Kelly, 19 S. D. 577, 104 N. W. 265.

409-59 Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348; Brown *v.* Evans, 149 Mich. 429, 112 N. W. 1079. *Comp.* Daniel *v.* Lance, 29 Pa. Super. 454.

410-61 Ashwell *v.* Miller (Ind. App.), 103 N. E. 37.

410-63 Barnes *v.* U. S., 166 Fed. 113, 92 C. C. A. 97; Withaup *v.* U. S., 127 Fed. 530, 62 C. C. A. 328; Cox *v.* S., 162 Ala. 66, 50 S. 398; Washington *v.* S., 143 Ala. 62, 39 S. 388; Bolton *v.* S., 146 Ala. 691, 40 S. 409; King *v.* S., 8 Ala. App. 239, 62 S. 374; Griffin *v.* Assn., 151 Ala. 597, 44 S. 605; S. *v.* Seymour, 10 Ida. 699, 79 P. 825 (exceptions recognized); Whitaker *v.* Mastin, 143 Ill. App. 195; Stitzel *v.* Miller, 250 Ill. 72, 95 N. E. 53; Ashwell *v.* Miller (Ind. App.), 103 N. E. 37; P. *v.* Tollefson, 145 Mich. 444, 108 N. W. 751 (objection must be made when writing offered); Wade *v.* R. Co. (Tex. Civ.), 110 S. W. 84.

411-64 S. *v.* Brown, 146 Ia. 113, 124 N. W. 899 (it seems); Williams *v.* Williams, 109 Me. 537, 85 A. 43; In re Smart's Will, 145 N. Y. S. 838; Smith *v.* Hanson, 34 Utah 171, 96 P. 1087, quot. the text; S. *v.* Kent, 83 Vt. 28, 74 A. 389; O'Brien *v.* McKelvey, 59 Wash. 115, 109 P. 337. And see Blakesburg Sav. Bk. *v.* Burton, 156 Ia. 671, 137 N. W. 916.

Letters admitted as standard of comparison.—Whorton *v.* S. (Tex. Cr.), 152 S. W. 1082.

If genuineness not admitted, documents may be excluded. Smith *v.* Hanson, 34 Utah 171, 96 P. 1087.

413-66 Griffin *v.* Assn., 151 Ala. 597, 44 S. 605; Wilmington S. Bk. *v.* Waste, 76 Vt. 331, 57 A. 241.

414-67 North Am. Ins. Co. *v.* Throop, 22 Mich. 146, 7 Am. Rep. 638; Taylor *v.* Taylor, 138 Mich. 658, 101 N. W. 832 (witness entitled to see document); Groff *v.* Groff, 209 Pa. 603, 59 A. 65.

A qualified non-expert who has testified to the genuineness of a signature seen through a slit in an envelope, cannot be impeached by an expert, who was inferentially the author of it, his testimony being based upon an examination of the signature and paper to which it was attached after removal from the envelope. P. *v.* Patrick, 182 N. Y. 131, 74 N. E. 843.

414-68 Wilmington S. Bk. *v.* Waste, 76 Vt. 331, 57 A. 241.

415-70 S. *v.* Ryno, 68 Kan. 347, 74 P. 1114.

417-75 Municipal Court *v.* Kirby, 28 R. I. 287, 67 A. 8. See Pulliam *v.* Sells, 124 Ky. 310, 99 S. W. 289; Councilman *v.* Bk., 103 Md. 469, 64 A. 358; S. *v.* Stark, 202 Mo. 210, 100 S. W. 642; Farrell *v.* R. Co., 83 App. Div. 393, 82 N. Y. S. 334, 178 N. Y. 596, 70 N. E. 1098; S. *v.* Scott, 63 Or. 444, 128 P. 441; S. *v.* Branton, 49 Or. 86, 87 P. 535.

419-76 McCreary *v.* Coggeshall, 74 S. C. 42, 53 S. E. 978; Woodward *v.* Keck (Tex. Civ.), 97 S. W. 852.

419-78 McCreary *v.* Coggeshall, supra. See Bivings *v.* Gosnell, 141 N. C. 341, 53 S. E. 861.

420-80 Campbell *v.* Bates, 143 Ala. 338, 39 S. 144. *Comp.* Cresswell *v.* Jackson, 2 F. & F. (Eng.) 24; Wooldridge *v.* S., 49 Fla. 137, 38 S. 3; St. Louis Bk. *v.* Hoffman, 74 Mo. App. 203; Johnson *v.* S. (Tex. Cr.), 102 S. W. 1133 (genuine writings of alleged forger, admissible).

421-81 See Bolton *v.* S., 146 Ala. 691, 40 S. 409; Daniel *v.* Lance, 29 Pa. Super. 454.

Writing executed by defendant accused of forgery, after arrest and warning, admissible as a standard on behalf of state. Johnson *v.* S. (Tex. Cr.), 102 S. W. 1133.

422-83 S. *v.* Barris, 78 N. J. L. 14, 73 A. 248; Greenwald *v.* Ford, 21 S. D. 28, 109 N. W. 516, *cit.* the text.

422-84 King *v.* S., 8 Ala. App. 239, 62 S. 374; Sullivan *v.* Starkey, 32 O. C. C. 485; Wade *v.* R. Co. (Tex. Civ.), 110 S. W. 84.

424-86 Smith *v.* S. (Ala. App.), 65 S. 693; United States, etc. Co. *v.* Hill, 9 Ala. App. 222, 62 S. 954; King *v.* S., 8 Ala. App. 239, 62 S. 374; Jacobs *v.* R. Co., 188 Mass. 245, 74 N. E. 349; Lowe *v.* R. Co., 85 S. C. 363, 67 S. E. 460.

426-87 Chicago, etc. Co. *v.* Butler, 139 Ga. 816, 78 S. E. 244; Morse *v.* C., 129 Ky. 294, 111 S. W. 714; First Nat. Bk. *v.* Hedgecock, 87 Neb. 220, 127 N. W. 171; Boyd *v.* Leatherwood, 165 N. C. 614, 81 S. E. 1025; Mississippi L. & C. Co. *v.* Kelly, 19 S. D. 577, 104 N. W. 265; Horn *v.* S. (Tex. Cr.), 150 S. W. 948; Taylor *v.* S., 62 Tex. Cr. 611, 138 S. W. 615.

Lead pencil signature may be a proper exemplar. Groff *v.* Groff, 209 Pa. 603, 59 A. 65.

Burden of proof is on party presenting writing. S. *v.* Ryder, 80 Vt. 422, 68 A. 652.

427-90 P. *v.* Botkin, 9 Cal. App. 244, 98 P. 861; Kahn *v.* S. (Ind.), 105 N. E. 385; C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056; Schmuck *v.* Hill, 2 Neb. (Unof.) 79, 96 N. W. 158 (duress or fraud may then be shown to affect their weight); C. *v.* Coleman, 17 S. D. 594, 98 N. W. 175 (admission of counsel); S. *v.* Cottrell, 56 Wash. 543, 106 P. 179. See Griffin *v.* Assn., 151 Ala. 597, 44 S. 605; Castor *v.* Bernstein, 2 Cal. App. 703, 84 P. 244; Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348; Pulliam *v.* Sells, 124 Ky. 310, 99 S. W. 289; Newton Centre T. Co. *v.* Stuart, 201 Mass. 288, 87 N. E. 630; S. *v.* Branton, 49 Or. 86, 87 P. 535.

Documents valid as against a party because written at his request can not be treated as standard for comparison. S. *v.* Branton, 49 Or. 86, 87 P. 535.

Where writer is not a party his admission of the genuineness of certain signatures offered as standards is not conclusive and plaintiff is entitled to have jury pass upon question, although the testimony came from his own witness. Stark *v.* Burke, 131 Ia. 684, 109 N. W. 206.

427-91 Ashwell *v.* Miller (Ind. App.) 103 N. E. 37; Wade *v.* R. Co. (Tex. Civ.), 110 S. W. 84. *Comp.* S. *v.* Ryno, 68 Kan. 348, 74 P. 1114.

428-92 *Comp.* P. *v.* Botkin, 9 Cal. App. 244, 98 P. 861.

428-93 Kahn *v.* S. (Ind.), 105 N. E. 385. See S. *v.* Seymour, 10 Ida. 699, 79 P. 825.

Where he has introduced it in evidence. Ashwell *v.* Miller (Ind. App.), 103 N. E. 37.

Signature to paper sued upon may be denied though it is like admitted signatures to other papers. Newton Centre T. Co. *v.* Stuart, 201 Mass. 288, 87 N. E. 630.

428-95 Signature cannot be used as a comparison unless there is an opportunity to cross-examine party alleged to have written it. Flaum *v.* Sturtz, 110 N. Y. S. 377.

428-96 S. *v.* Fillpot, 51 Wash. 223, 98 P. 659. *Contra,* Newton Centre T Co. *v.* Stuart, 201 Mass. 288, 87 N. E. 630.

429-98 Newton C. T. Co. *v.* Stuart, supra; C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056.

Comp. S. *v.* Coleman, 17 S. D. 594, 98 N. W. 175.

430-99 S. *v.* Olds, 217 Mo. 305, 116 S. W. 1080; S. *v.* Ryder, 80 Vt. 422, 68 A. 652.

Circumstantial evidence may establish genuineness of writing under rule requiring "direct proof of the signature or other equivalent evidence." C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056.

Test.—Writings admitted or proved to be genuine may be used as standards of comparison. S. *v.* Ryno, 68 Kan. 348, 74 P. 1114.

431-4 S. *v.* McBride, 30 Utah 422, 85 P. 440. See P. *v.* Tollefson, 145 Mich. 444, 108 N. W. 751 (hotel register admitted); S. *v.* Ryder, 80 Vt. 422, 68 A. 652.

432-5 Ashwell *v.* Miller (Ind. App.), 103 N. E. 37.

Writer's belief paper genuine, sufficient. S. *v.* Cottrell, 56 Wash. 543, 106 P. 179.

432-6 *Contra,* S. *v.* Branton, 49 Or. 86, 87 P. 535.

Warning should be given accused his signature could be used against him as a standard of comparison. Johnson *v.* S. (Tex. Cr.), 102 S. W. 1133; Mahon *v.* S., 46 Tex. Cr. 234, 79 S. W. 28.

433-8 Farrell *v.* R. Co., 83 App. Div. 393, 82 N. Y. S. 334, 178 N. Y. 596, 70 N. E. 1098; Shannon *v.* Castner, 21 Pa. Super. 294.

434-13 S. *v.* Ryno, 68 Kan. 348, 74 P. 1114; C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056. See S. *v.* Ryder, 80 Vt. 422, 68 A. 652.

435-15 Walters *v.* Josey, 137 Ga. 475, 73 S. E. 653.

435-17 In re Burtis, 43 Misc. 437, 89 N. Y. S. 441, chart made by expert from comparison of 1400 genuine signatures, admitted.

435-19 Reilly *v.* Frias, 85 Misc. 162, 147 N. Y. S. 84.

436-21 *Contra.*—Carbon copy admissible as a standard. Wade *v.* R. Co. (Tex. Civ.), 110 S. W. 84.

436-23 *Comp.* In re McClellan, 20 S. D. 498, 107 N. W. 681.

438-26 See McCullough *v.* Munn, 2 Irish (1908) 194.

439-27 Illustration of witness' testimony in comparing handwriting by use of blackboard and chalk, irregular. S. *v.* Cottrell, 56 Wash. 543, 106 P. 179.

Corroboration may be by circumstantial evidence. Batte *v.* S., 57 Tex. Cr. 125, 122 S. W. 561.

439-28 Ballow *v.* Collins, 139 Ala. 543, 36 S. 712.

440-32 Expert may testify different typewritten documents were written on same machine. S. *v.* Freshwater, 30 Utah 442, 85 P. 447. And to the genuineness of marks having many peculiarities. Ausmus *v.* P., 47 Colo. 167, 107 P. 204.

440-33 In affirmative. Ausmus *v.* P., supra.

As to mark.—In re Corcoran's Will, 129 N. Y. S. 165.

Comparison of seals is proper upon the issue of genuineness of seal in question. Loring *v.* Jackson, 43 Tex. Civ. 306, 95 S. W. 19.

Typewritten documents.—Peculiarities in manner of writing or in character of letters of typewriter may exist so as to authorize a witness who has received several of them to testify they came from same source. Huber Mfg. Co. *v.* Clandel, 71 Kan. 441, 80 P. 960.

HEARSAY

Admissible to show motive, 447-28.

443-2 Dowell *v.* S. (Ind.), 101 N. E. 815; S. *v.* Gulliver (Ia.), 142 N. W. 948; S. *v.* Crean, 43 Mont. 47, 114 P. 603; S. *v.* D'Adame, 84 N. J. L. 386, 86 A. 414, 82 N. J. L. 315, 82 A. 520; King *v.* Bynum, 137 N. C. 491, 49 S. E. 955; Camden F. Ins. Assn. *v.* Puett (Tex. Civ.), 164 S. W. 418; Blair *v.* Boyd (Tex. Civ.), 129 S. W. 870. See Cornett *v.* C., 156 Ky. 795, 162 S. W. 112; Davis *v.* S. (Tex. Cr.), 152 S. W. 1094.

"It affords a cover to fraud and gives to an unsworn statement of one person of matters which are repeated by another, whose bias or failure to understand or whose imperfection of memory may vitally affect its real meaning and import, the same dignity and quality which we give to testimony taken under oath in a solemn judicial proceeding." S. *v.* Beesan, 155 Ia. 355, 136 N. W. 317. And see Hately *v.* Kiser, 253 Ill. 288, 97 N. E. 651.

443-3 Phillips *v.* S. (Ala. App.), 65 S. 444; Gibson *v.* S., 6 Ala. App. 9, 60 S. 532; Weaver *v.* S., 1 Ala. App. 48, 55 S. 956; Phillips *v.* S., 3 Ala. App.

218, 57 S. 1033; Humphries *v.* S., 2 Ala. App. 1, 56 S. 72; Merrill *v.* Sheffield, 169 Ala. 242, 53 S. 219; May *v.* S., 167 Ala. 36, 52 S. 602; St. Louis, etc. Co. *v.* Pipe Co., 167 Ala. 442, 52 S. 904; Dickens *v.* Murray, 163 Ala. 556, 50 S. 1019; Spencer Lumb. Co. *v.* Dover, 99 Ark. 488, 138 S. W. 985; In re Donnellan's Est., 164 Cal. 14, 127 P. 166; Spear *v.* United Railroads, 16 Cal. App. 637, 117 P. 956; Northwestern Redwood Co. *v.* Dickens, 13 Cal. App. 689, 110 P. 591; P. *v.* Schmitz, 7 Cal. App. 330, 94 P. 407; Ausmus *v.* P., 47 Colo. 167, 107 P. 204; Owens *v.* S., 65 Fla. 483, 62 S. 651; Hughes *v.* S., 61 Fla. 32, 55 S. 463; Johnson *v.* S., 136 Ga. 804, 72 S. E. 233; Hilbert *v.* R. Co., 20 Ida. 54, 116 P. 1116; Stephens *v.* Collison, 256 Ill. 238, 99 N. E. 914; Eggmann *v.* Nutter, 169 Ill. App. 116; State Bk. *v.* Barnett, 250 Ill. 312, 95 N. E. 178, *rev.* 151 Ill. App. 79; Keeley Co. *v.* Hargreaves, 236 Ill. 316, 86 N. E. 132; S. *v.* Gilmore, 151 Ia. 618, 132 N. W. 53, 35 L. R. A. (N. S.) 1084; Canton Lumb. Co. *v.* Liller, 112 Md. 258, 76 A. 415; Sumwalt Ice Co. *v.* Ice Co., 114 Md. 403, 80 A. 48; Kovacs *v.* Mayoras, 175 Mich. 582, 141 N. W. 662; Grimme *v.* Aid Assn., 167 Mich. 240, 132 N. W. 497; Brown *v.* S., 99 Miss. 719, 55 S. 961; Burford *v.* S., 99 Miss. 770, 56 S. 162; Swearingin *v.* Swearingin, 217 Mo. 565, 117 S. W. 704; Gibony *v.* Foster, 230 Mo. 106, 130 S. W. 314; Donner *v.* S., 69 Neb. 56, 95 N. W. 40; S. *v.* Sweet, 81 N. J. L. 250, 79 A. 1054; P. *v.* Kinney, 202 N. Y. 389, 95 N. E. 756; Postman *v.* Rowan, 123 N. Y. S. 913; Daniel *v.* Dixon, 161 N. C. 377, 77 S. E. 305; Shawnee, etc. Co. *v.* Motesenbocker (Okla.), 138 P. 790; Cimini *v.* Zambarano (R. I.), 89 A. 295; Ashby *v.* S., 124 Tenn. 684, 139 S. W. 872; Williams *v.* S. (Tex. Cr.), 166 S. W. 1170; Robbins *v.* S. (Tex. Cr.), 166 S. W. 528; Henry *v.* Phillips, 105 Tex. 459, 151 S. W. 533; Williams *v.* S. (Tex. Cr.), 144 S. W. 620; Oltmans Bros. *v.* Poland (Tex. Civ.), 142 S. W. 653; Gulf, etc. Co. *v.* Coulter (Tex. Civ.), 139 S. W. 16; S. W. Tel. & T. Co. *v.* Doolittle (Tex. Civ.), 138 S. W. 415; Campbell *v.* S., 62 Tex. Cr. 561, 138 S. W. 607; Taylor *v.* S., 62 Tex. Cr. 611, 138 S. W. 615; Rice *v.* Ragan (Tex. Civ.), 129 S. W. 1148; Vagts *v.* Utman, 125 Wis. 265, 104 N. W. 88.

See Alexander, etc. Co. *v.* Bk., 140 Ga. 266, 78 S. E. 1071; Carswell *v.* S., 7 Ga. App. 198, 66 S. E. 488 (code); McRae *v.* S., 8 Okla. Cr. 483, 129 P. 71. And see P *v.* Bartnett, 15 Cal. App. 89, 113 P. 879; Turgeon *v.* Woodward, 83 Conn. 537, 78 A. 577; Hyslop *v.* R. Co., 208 Mass. 362, 94 N. E. 310; Wells *v.* S., 5 Okla. Cr. 22, 113 P. 210; Baxter *v.* Patenaude, 32 R. I. 197, 78 A. 625; Broadnax *v.* S. (Tex. Cr.), 150 S. W. 1168. *Comp.* Brooks *v.* Ingram (Ala.), 65 S. 138.

That the clerk of council had said to an inquirer that he never saw such an ordinance. Sterling *v.* St. Marys, 137 Ga. 177, 73 S. E. 374.

On the question whether certain goods were guarded an answer: "I don't believe they were; and it was the talk there of a great many people." S. *v.* Gebhart, 70 W. Va. 232, 73 S. E. 964.

On the evening of a homicide F. had borrowed a pistol from O., and defendant offered to prove by O. that F. had told him the day subsequent to the killing that he (F.) had delivered the pistol to deceased just a short time before the homicide. He also desired to prove by the witness other statements of F., and that he (witness), in obedience to the statement of F., had gone to look for the pistol. The witness testified he had never seen the pistol since he loaned it to F., and did not know what had become of it. The statements of F. would be hearsay, pure and simple." Kinney *v.* S. (Tex. Cr.), 144 S. W. 257.

That plaintiff's attending physician told her she had ribs broken by the accident. Johnson *v.* Town of Iron River, 149 Wis. 139, 135 N. W. 522.

That a third party had admitted that he committed the offense with which the defendant was charged. Stinson *v.* S., 3 Ala. App. 74, 57 S. 509.

Admission of hearsay presumed prejudicial. Topolewski *v.* S., 130 Wis. 244, 109 N. W. 1037.

444-4 See Hauger *v.* U. S., 173 Fed. 54, 97 C. C. A. 372.

444-5 Donner *v.* S., 69 Neb. 56, 95 N. W. 40.

444-6 San Francisco T. Co. *v.* Gray, 11 Cal. App. 314, 104 P. 999; Minea *v.* C. Co. (Mo. App.), 162 S. W. 741; Morris *v.* Parry, 110 Mo. App. 675, 85 S. W. 620; S. *v.* Grills, 35 R. I. 70, 85 A. 281; Tripp *v.* S. (Tex. Cr.), 160 S. W. 1191.

445-8 See Sheppard *v.* Austin, 159 Ala. 361, 48 S. 696.

446-10 Firemen's Ins. Co. *v.* R., 138 N. C. 42, 50 S. E. 452.

Preface to book admissible, author being dead and other evidence of facts therein stated unavailable. Merriam Co. *v.* Pub. Co., 207 Fed. 515, 125 C. C. A. 177.

446-11 Bradshaw *v.* S. (Tex. Cr.), 155 S. W. 218. See, however, Merriam *v.* Syndicate Pub. Co., 207 Fed. 515, 125 C. C. A. 177.

Surprise at testimony of adverse party does not affect the rule. Watkins *v.* Watkins, 39 Mont. 367, 102 P. 860.

Market quotations may be shown in absence of witnesses who have knowledge. Tully *v.* Co., 141 Ill. App. 312.

446-12 P. *v.* Dong Pok Yip, 164 Cal. 143, 127 P. 1031; Benedict *v.* Dakin, 243 Ill. 384, 90 N. E. 712; S. *v.* Monfre, 122 La. 251, 47 S. 543; Earockson *v.* Rogers, 112 Md. 160, 75 A. 513; P. *v.* Andre, 157 Mich. 362, 122 N. W. 98; S. *v.* Theisen (Mo.), 142 S. W. 1088; McCrimmon *v.* Murray, 43 Mont. 457, 117 P. 73; Hardaway *v.* R. Co., 90 S. C. 475, 73 S. E. 1020; Marthinson *v.* McCutchen, 84 S. C. 256, 66 S. E. 120; Saunders *v.* Thut (Tex. Civ.), 165 S. W. 553; Roth *v.* Assn., 102 Tex. 241, 115 S. W. 31; Wilkins *v.* Brock, 81 Vt. 332, 70 A. 572; Palmer *v.* Smith, 147 Wis. 70, 132 N. W. 614.

See Parke & L. Co. *v.* Co., 145 Cal. 534, 78 P. 1065, 79 P. 71; S. *v.* Co., 79 Kan. 371, 99 P. 603; S. *v.* Perry, 124 La. 931, 50 S. 799; Wyandotte Co. *v.* Bruner, 147 Mich. 400, 110 N. W. 949; W. U. T. Co. *v.* Hirsch (Tex. Civ.), 84 S. W. 394; St. Louis, etc. R. Co. *v.* Co., 42 Tex. Civ. 125, 95 S. W. 656; Richmond *v.* Wood, 109 Va. 75, 63 S. E. 449.

As preliminary to proof of fact, see Whorton *v.* S. (Tex. Cr.), 151 S. W. 300.

"**When a witness is asked** to state what was said to him by the other party to the conversation under inquiry, it could not be held that his testimony was irresponsive, merely because it included a question, asked by the witness himself, which elicited the declaration sought to be proved." Dudderar *v.* Dudderar, 116 Md. 605, 82 A. 453.

446-13 Ferguson *v.* Boyd, 169 Ind. 537, 81 N. E. 71; Edwards *v.* Kevil, 133 Ky. 392, 118 S. W. 273; Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1; Landers *v.* R. Co., 134 Mo. App. 80, 114 S. W. 543; S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035; Connelly *v.* Brown, 73 N. H. 193, 60 A. 750; Brady *v.* R. Co., 76 N. J. L. 744, 71 A. 238 (to show notice); Henderson *v.* S., 55 Tex. Cr. 15, 115 S. W. 45.

See McNitt *v.* Henderson, 155 Mich. 214, 118 N. W. 974; Iverson *v.* Co., 22 S. D. 638, 119 N. W. 1006; Snell *v.* S., 56 Tex. Cr. 302, 119 S. W. 859 (message delivered by one person to another from a third may be proved, person to whom it was delivered being apprised of messenger's mission); Mills *v.* Riggle, 83 Kan. 703, 112 P. 617; Hampton *v.* S., 99 Miss. 176, 54 S. 722.

446-14 Georgia R. & E. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944; Mississippi C. R. Co. *v.* Turnage, 95 Miss. 854, 49 S. 840; St. Louis, etc. R. Co. *v.* Sizemore, 53 Tex. Civ. 491, 116 S. W. 403; Wilkins *v.* Brock, 81 Vt. 332, 70 A. 572. See infra, "Injuries to Person," 388-41 et seq; St. Louis, etc. R. Co. *v.* Demsey, 40 Tex. Civ. 398, 89 S. W. 786.

Inadmissible if self-serving.—Peacock *v.* S., 10 Ga. App. 402, 73 S. E. 404.

446-15 S. *v.* Brand, 77 N. J. L. 486, 72 A. 131; S. *v.* Draughon, 151 N. C. 667, 65 S. E. 913.

447-17 Carpenter *v.* Gibson, 82 Vt. 336, 73 A. 1030.

447-19 Scott *v.* Co. (Ky.), 122 S. W. 202; Keefe *v.* R., 75 N. H. 116, 71 A. 379; Morse *v.* Whitcomb, 54 Or. 412, 102 P. 788.

447-21 S. *v.* McDonald, 55 Or. 419, 106 P. 444; U. S. *v.* Bergantino, 3 Phil. Isl. 118.

447-23 See Hubbard *v.* Slavens, 218 Mo. 598, 117 S. W. 1104; S. *v.* McGinnis, 56 Or. 163, 108 P. 132, stating hearsay is admissible to show right to possession of land if evidence cannot be otherwise obtained.

447-25 St. Louis, etc. R. Co. *v.* Lane (Tex. Civ.), 118 S. W. 847.

447-28 Keeley Co. *v.* Hargreaves, 236 Ill. 316, 86 N. E. 132; Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1; Elliff *v.* Co., 53 Or. 66, 99 P. 76. See Weil *v.* Lester, 94 Ark. 195, 126 S. W. 712.

"**While hearsay testimony** is generally inadmissible, nevertheless, when information, conversation and similar evidence are pertinent to explain conduct or ascertain motive, such evidence so far as these motives are concerned, changes in character from hearsay to original evidence, throwing light on

conduct or motive. Where evidence tends to ascribe a motive for the testimony of a particular witness it is competent to disprove the existence of such motive, and hearsay may be admitted for this purpose.'' Smith *v.* S., 7 Ga. App. 252, 66 S. E. 556.

447-29 Castner *v.* R. Co., 126 Ia. 581, 102 N. W. 499. See P. *v.* Randazzio, 194 N. Y. 147, 87 N. E. 112.

447-30 See Hauger *v.* U. S., 173 Fed. 54, 97 C. C. A. 372; Gardner *v.* S., 55 Tex. Cr. 394, 117 S. W. 140.

448-31 See Stewart *v.* Doak, 58 W. Va. 172, 52 S. E. 95.

Declarations of guilt by third persons are hearsay. Tillman *v.* S. (Ark.), 166 S. W. 582.

448-32 Boatmen's Bk. *v.* Trower, 171 Fed. 964; Slaughter *v.* Slaughter (Ala.), 65 S. 348; Reaves *v.* S., 158 Ala. 5, 48 S. 373; Schuman *v.* S., 106 Ark. 362, 153 S. W. 611; P. *v.* Driggs, 12 Cal. App. 240, 108 P. 62; In re Jones, 130 Ia. 177, 106 N. W. 610; Hill *v.* Ins. Co., 150 N. C. 1, 63 S. E. 124; Adams *v.* C. Co. (Tex. Civ.), 161 S. W. 417; Diseren *v.* S., 59 Tex. Cr. 149, 127 S. W. 1038.

Comp. Merriam *v.* Pub. Co., 207 Fed. 515, 125 C. C. A. 177.

A Massachusetts statute provides that a declaration of a deceased person shall not be inadmissible as hearsay if made in good faith before commencement of action, and on personal knowledge. Putnam *v.* Harris, 193 Mass. 58, 78 N. E. 747; Hall *v.* Reinherz, 192 Mass. 52, 77 N. E. 880; Randall *v.* Claflin, 194 Mass. 560, 80 N. E. 597 (declarations of decedent for whose death action brought).

The statute has always been liberally construed. White *v.* Co., 208 Mass. 193, 94 N. E. 278; Randall *v.* Car Co., 212 Mass. 352, 99 N. E. 221.

448-33 Duncan *v.* S., 171 Ind. 444, 86 N. E. 641. See Dixon *v.* R. Co., 37 Wash. 310, 79 P. 943.

Although out of jurisdiction hearsay still inadmissible. Bradshaw *v.* S. (Tex. Cr.), 155 S. W. 218.

448-34 Consolidated G. Co. *v.* Hammond, 175 Fed. 641, 99 C. C. A. 195; Lemon *v.* U. S., 164 Fed. 953, 90 C. C. A. 617; Central Union D. & R. Co. *v.* Mansfield, 169 Fed. 614, 95 C. C. A. 142; In re F. Co., 166 Fed. 516; Atlanta, etc. R. Co. *v.* Brown, 158 Ala. 607, 48 S. 73; Title G. & S. Co. *v.* Bk., 89 Ark. 471, 117 S. W. 537; San Francisco T. Co. *v.* Gray, 11 Cal. App. 314, 104 P. 999; Denver City T. Co. *v.* Hills, 50 Colo. 328, 116 P. 125, 36 L. R. A. (N. S.) 213; Bauer *v.* Goldman, 45 Colo. 163, 100 P. 435; Vaughan's S. Store *v.* Stringfellow, 56 Fla. 708, 48 S. 410; Johnson Co. S. Bk. *v.* Richardson & Son, 9 Ga. App. 466, 71 S. E. 757; Hannah *v.* Vensel, 19 Ida. 796, 116 P. 115; P. *v.* Trenner, 144 Ill. App. 275; Fidelity & D. Co. *v.* Co., 133 Ky. 74, 117 S. W. 393; Mattingly *v.* Shortell, 120 Ky. 52, 85 S. W. 215; Delaney *v.* Co., 202 Mass. 359, 88 N. E. 773; Gardiner *v.* Donovan, 155 Mich. 414, 119 N. W. 432; Merritt *v.* Westerman, 165 Mich. 535, 131 N. W. 66; Probert *v.* Inv. Co., 155 Mo. App. 344, 137 S. W. 41; Gardner *v.* R. Co., 223 Mo. 389, 122 S. W. 1068; State Nat. Bk. *v.* Levy, 141 Mo. App. 288, 125 S. W. 542 (report of congressional investigating committee); Kenyon-N. L. Co. *v.* Dist., 40 Mont. 123, 105 P. 551; Hutchins *v.* Berry, 75 N. H. 416, 75 A. 650; Kaufhold *v.* Roth, 74 N. J. L. 61, 64 A. 1057 (postal card inadmissible); Brown *v.* Newell, 132 App. Div. 548, 116 N. Y. S. 965 (scientific book); Allen Kingston, etc. Co. *v.* Bk., 145 App. Div. 294, 129 N. Y. S. 1070; Chenoweth *v.* Co., 53 Or. 111, 99 P. 86; U. S. *v.* Dayutal, 4 Phil. Isl. 93; Nock *v.* Lloyd, 32 R. I. 313, 79 A. 832; King *v.* Co., 84 S. C. 73, 65 S. E. 944; S. *v.* Kruse, 24 S. D. 174, 123 N. W. 71; Cathey *v.* R. Co. (Tex. Civ.), 124 S. W. 217; Mut. Life Ins. Co. *v.* Hodnette (Tex. Civ.), 147 S. W. 615; Baird & Scales *v.* Bldg. & L. Assn. (Tex. Civ.), 147 S. W. 1168; S. *v.* Blake, 36 Utah 605, 105 P. 910; Coolidge *v.* Taylor, 85 Vt. 39, 80 A. 1038; Dunkin *v.* Hoquiam, 56 Wash. 47, 105 P. 149; Koloff *v.* R. Co., 71 Wash. 543, 129 P. 398 (letters sometimes hearsay); Jeffery *v.* R. Co., 138 Wis. 1, 119 N. W. 879.

Field notes of a surveyor calling for the lines and corners of prior surveys are hearsay. S. *v.* Lumb. Co. (Tex. Civ.), 159 S. W. 391.

448-35 Knights Templar *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 (depositions taken at coroner's inquest, inadmissible); United S. Co. *v.* Summers, 110 Md. 95, 72 A. 775; Lindsay *v.* Bates, 223 Mo. 294, 122 S. W. 682; Bean *v.* Co., 40 Mont. 31, 104 P. 869; Hufty *v* Wilson, 78 N. J. L. 241, 74 A. 137; Holliday *v.* Co., 130 App. Div. 654, 115 N. Y. S. 383; Ismael *v.* Guanzon, 2

Phil. Isl. 347; S. *v.* Weil, 83 S. C. 478, 65 S. E. 634; Jones *v.* S. (Tex. Cr.), 167 S. W. 1110; Rule *v.* Richards (Tex. Civ.), 159 S. W. 386; Magee *v.* Paul (Tex. Civ.), 159 S. W. 325; Fletcher *r.* Bk. (Tex. Civ.), 126 S. W. 936. See also Kullman, etc. Co. *v.* Super. Ct., 15 Cal. App. 276, 114 P. 589.

449-38 Shaffer *v.* S. (Tex. Cr.), 151 S. W. 1061. See Tate *v.* P. College (Or.), 140 P. 743. *Comp.* St. Louis, etc. R. Co. *v.* Gunter, 39 Tex. Civ. 129, 86 S. W. 938 (witness can testify of market value of cattle as given in newspaper market report).

449-39 Owen *v.* Moxon, 167 Ala. 615, 52 S. 527; Goodwin *v.* S., 1 Ala. App. 136, 56 S. 29; Heatley *v.* Long, 135 Ga. 153, 68 S. E. 783; Nat. C. C. Co. *v.* Duvall, 150 Ky. 192, 150 S. W. 46; S. *v.* Lee, 130 La. 477, 58 S. 155; Jackson *v.* S. (Miss.), 63 S. 235; S. *v.* Patton (Mo.), 164 S. W. 223; Bradley *v.* Woodmen, 146 Mo. App. 428, 124 S. W. 69; Hinckley *v.* Jewett, 86 Neb. 464, 125 N. W. 1086; McRae *r.* Cassan, 15 N. M. 496, 110 P. 574; Barnes *v.* R. Co., 161 N. C. 581, 77 S. E. 855; Wood *v.* Praul, 217 Pa. 293, 66 A. 528 (neighborhood gossip). And see Shingler *v.* Bailey, 135 Ga. 666, 70 S. E. 563; Scott *v.* Woodman, 149 Ia. 562, 129 N. W. 302; Perkins *v.* City, 16 N. M. 185, 113 P. 609; Brice *r.* S. (Tex. Cr.), 162 S. W. 874; Standard Paint Co. *v.* Hdw. Co. (Tex. Civ.), 136 S. W. 1150.

449-41 Jordan *v.* S., 59 Tex. Cr. 208, 128 S. W. 139.

Admission of crime by third persons.— Minniard *v.* C., 158 Ky. 210, 164 S. W. 804. See vol. 6, p. 752.

449-42 Naftzger *r.* U. S., 200 Fed. 494, 118 C. C. A. 598; Plott *r.* Foster (Ala. App.), 62 S. 299; Brigman *v.* S., 8 Ala. App. 400, 62 S. 980; Woodmen of World *v.* Wright, 7 Ala. App. 255, 60 S. 1006; St. Louis, etc. R. Co. *r.* Savage, 163 Ala. 55, 50 S. 113; W. U. T. Co. *r.* Sockwell, 91 Ark. 475, 121 S. W. 1046; P. *r.* Powers, 23 Cal. App. 447, 138 P. 373; P. *r.* Whalen, 154 Cal. 472, 98 P. 194; P. *r.* Driggs, 12 Cal. App. 240, 108 P. 62; Coast C. M. Co. *r.* Lumb. Co. (Conn.), 89 A. 898; Florida, etc. Co. *v.* Carter (Fla.), 65 S. 254; Perdue *v.* S., 135 Ga. 277, 69 S. E. 184; Blakely *r.* Proctor, 134 Ga. 139, 67 S. E. 389; P. *r.* Lukoszus, 242 Ill. 101, 89 N. E. 749; S. *r.* Finley, 147 Ia. 563, 126 N. W. 699; Hopper *r.* Sellers (Kan.), 139 P. 365; Scully *v.* McDonald, 158 Ky. 471, 165 S. W. 674; General, etc. Co. *r.* Richardson, 157 Ky. 503, 163 S. W. 482; Beaty *r.* C., 140 Ky. 230, 130 S. W. 1107; Wilson *r.* C. (Ky.), 121 S. W. 431; Cleaver *r.* R. Co., 30 Ky. L. R. 1059, 100 S. W. 223; Anderson *r.* Shaw, 131 La. 662, 60 S. 50; Polvere *r.* Const. Co., 215 Mass. 199, 102 N. E. 334; Pratt *r.* Hamilton, 161 Mich. 258, 126 N. W. 196; Swift Co. *r.* Scott (Mo. App.), 163 S. W. 538; Hitt *r.* Hitt, 150 Mo. App. 631, 131 S. W. 369; Northrup *r.* Colter, 150 Mo. App. 639, 131 S. W. 364; Barr *r.* R. Co., 138 Mo. App. 471, 120 S. W. 111; S. *r.* Fiore (N. J.), 88 A. 1039; Stetson *r.* Stetson, 146 N. Y. S. 245; Barnes *r.* R. Co., 161 N. C. 581, 77 S. E. 855; Knight *r.* Willard, 26 N. D. 140, 143 N. W. 346; Moore *r.* O'Dell, 27 Okla. 194, 111 P. 308; Chicago, etc. R. Co. *r.* S., 24 Okla. 370, 103 P. 617; S. *r.* Dunn, 53 Or. 304, 99 P. 278; Harkness *r.* Borough, 238 Pa. 544, 86 A. 478; O'Brien *r.* Von Lienen (Tex.), 149 S. W. 723; Redman *r.* S. (Tex. Cr.), 149 S. W. 670; Carrollton Press B. Co. *r.* Davis (Tex. Civ.), 155 S. W. 1046; St. Louis, etc. R. Co. *r.* Dean (Tex. Civ.), 152 S. W. 527; Gamble *r.* Martin (Tex. Civ.), 151 S. W. 327; Campbell *r.* S., 59 Tex. Cr. 496, 129 S. W. 139; Pierce *r.* Waller (Tex. Civ.), 127 S. W. 1077; Kirby L. Co. *r.* Cummings, 39 Tex. Civ. 220, 87 S. W. 231; W. U. Tel. Co. *r.* Bradford, 41 Tex. Civ. 281, 91 S. W. 818; Alkire *r.* Co., 57 Wash. 300, 106 P. 915. *Contra* as to proof of custom. S. *r.* Hughes, 31 Nev. 270, 102 P. 562.

See Rosenthal *r.* M'Graw, 138 Fed. 721, 71 C. C. A. 277; Little Rock, etc. R. Co. *r.* Cross, 78 Ark. 220, 93 S. W. 981; S. *r.* Smith, 3 Cal. App. 62, 84 P. 449; Brusseau *r.* Co., 133 Ia. 245, 110 N. W. 577; Provident, etc. Soc. *r.* Whayne, 29 Ky. L. R. 160, 93 S. W. 1049; Houston, etc. Co. *r.* Fox (Tex.), 166 S. W. 693; Wells *r.* Margraves (Tex. Civ.), 164 S. W. 881; Texas, etc. R. Co. *r.* Leggett, 44 Tex. Civ. 296, 99 S. W. 176.

Hearsay evidence incompetent to establish any specific fact which is susceptible of being proved by witnesses who speak of their own knowledge. Chicago, etc. R. Co. *r.* Jennings, 217 Ill. 494, 75 N. E. 560; Hirshberg *r.* Robinson, 75 N. J. L. 256, 66 A. 925. But where a witness testifies he has truly stated to a third person, and of his own knowledge facts which he has since forgotten, such person is competent to testify as to what statement was. Hart

v. R. Co., 144 N. C. 91, 56 S. E. 559. Testimony based upon knowledge derived from official time card of railroad is not hearsay. W. U. T. Co. *v.* O'Fiel, 47 Tex. Civ. 40, 104 S. W. 406.

Telephone conversations.—Witness may testify to a conversation over a telephone, although he has no personal knowledge as to identity of other party, that there was another party or that such party heard what was said to him. McCarthy *v.* Peach, 186 Mass. 67, 70 N. E. 1029. See Edge *v.* R. Co., 206 Mo. 471, 104 S. W. 90; St. Louis, etc. R. Co. *v.* Kennedy (Tex. Civ.), 96 S. W. 653. But statement of a person to witness as to what person at the other end of the line said, is hearsay. Texas, etc. R. Co. *v.* Felker, 44 Tex. Civ. 420, 99 S. W. 439.

450-43 Hauger *v.* U. S., 173 Fed. 54, 97 C. C. A. 372; Davis *v.* Arnold, 143 Ala. 228, 39 S. 141; Colorado Co. *v.* York, 38 Colo. 239, 88 P. 181; S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035; Roth *v.* Assn., 102 Tex. 241, 115 S. W. 31. See Hurd *v.* R. Co., 160 Mich. 535, 125 N. W. 414; St. Louis S. R. Co. *v.* Eccles, 53 Tex. Civ. 125, 115 S. W. 648, surveyor's testimony competent when based on his survey and data obtained from records.

450-44 Parsons *v.* Co., 82 Conn. 333, 73 A. 785; Puryear *v.* Ould, 81 S. C. 456, 62 S. E. 863; Jaquith *v.* Worden, 73 Wash. 349, 132 P. 33.

451-46 Brandly *v.* Co., 130 App. Div. 410, 114 N. Y. S. 896.

451-47 S. *v.* Newcomb, 220 Mo. 54, 119 S. W. 405; S. *v.* Osborne, 54 Or. 289, 103 P. 62; Ross *v.* S., 56 Tex. Cr. 275, 118 S. W. 1034. See Florida, etc. Co. *v.* Carter (Fla.), 65 S. 254.

451-48 Sayre *v.* Woodyard, 66 W. Va. 288, 66 S. E. 320. See Sheppard *v.* Austin, 159 Ala. 361, 48 S. 696.

451-49 Dryden *v.* Barnes, 101 Md. 346, 61 A. 342; Donner *v.* S., 69 Neb. 56, 95 N. W. 40. See Remington M. Co. *v.* Co., 6 Penne. (Del.), 288, 66 A. 465; Levy *v.* Iron Wks., 127 N. Y. S. 506; Texas, etc. R. Co. *v.* Leggett (Tex. Civ.), 86 S. W. 1066.

Non-expert opinions cannot be based on hearsay. Caswell *v.* S., 5 Ga. App. 483, 63 S. E. 566.

451-50 Lawlor *v.* Loewe, 187 Fed. 522, 109 C. C. A. 288; Polytinsky *v.* Patterson, 3 Ala. App. 302, 57 S. 130; Hardy *v.* Randall, 173 Ala. 516, 55 S. 997; Crumpton *v.* S., 167 Ala. 4, 52 S. 605; In re Louck's Est., 160 Cal. 551, 117 P. 673; Equitable Mfg. Co. *v.* Watson, 119 Ga. 280, 46 S. E. 440; S. *v.* Finley, 147 Ia. 563, 126 N. W. 699; Magers *v.* Magers, 143 Ia. 750, 123 N. W. 330; Campbell *v.* Brown, 85 Kan. 527, 117 P. 1010; Willner *v.* Silverman, 109 Md. 341, 71 A. 962; Carr *v.* Co., 29 R. I. 276, 70 A. 196; Newman *v.* S., 55 Tex. Cr. 376, 116 S. W. 1156; Ft. Worth, etc. R. Co. *v.* Chisholm (Tex. Civ.), 146 S. W. 988; Marrett *v.* Herrington (Tex. Civ. App.), 145 S. W. 254; Ikland *v.* Ikland (Tex. Civ.), 139 S. W. 925.

451-51 McNaron *v.* S., 7 Ala. App. 170, 62 S. 302; Hooper *v.* Dorsey, 5 Ala. App. 463, 58 S. 951; Howard *v.* S., 165 Ala. 18, 50 S. 954; P. *v.* Everett, 10 Cal. App. 12, 101 P. 528; Brice *v.* S. (Tex. Cr.), 162 S. W. 874; Zachary *v.* S., 57 Tex. Cr. 179, 122 S. W. 263. See Sasser *v.* S. (Tex. Cr.), 166 S. W. 1160. *Comp.* Senter *v.* Teague (Tex. Civ.), 164 S. W. 1045.

451-52 *Contra,* Ayers *v.* S., 62 Fla. 14, 57 S. 349.

451-53 Hauger *v.* U. S., 173 Fed. 54, 99 C. C. A. 372; Owen *v.* R. Co. (Ala.), 61 S. 924; St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 113; In re Donnellan's Est., 164 Cal. 14, 127 P. 166; S. *v.* Gulliver (Ia.), 142 N. W. 948; Liverpool, etc. Co. *v.* Wright, 158 Ky. 290, 164 S. W. 952; Conners *v.* C., 152 Ky. 57, 153 S. W. 16; Mentz's Assignee *v.* Mahoney, 150 Ky. 409, 150 S. W. 503; Chandler *v.* Prince (Mass.), 105 N. E. 1076; Heffernan *v.* Whittlsey (Minn.), 148 N. W. 63; S. *v.* Robinson (Mo.), 161 S. W. 1169; S. *v.* Rees, 40 Mont. 571, 107 P. 893; Graham *v.* Graham, 157 App. Div. 52, 141 N. Y. S. 766; King *v.* Bynum, 137 N. C. 491, 49 S. E. 955; Houston & T. C. Ry. Co. *v.* Fox (Tex.), 166 S. W. 693; Texas Power & L. Co. *v.* Burger (Tex. Civ.), 166 S. W. 680; Maddox *v.* Clark (Tex. Civ.), 163 S. W. 309; Bennett *v.* Foster (Tex. Civ.), 161 S. W. 1078; Harris *v.* S. (Tex. Cr.), 161 S. W. 125; Ward *v.* S. (Tex. Cr.), 159 S. W. 272; Davis *v.* S. (Tex. Cr.), 156 S. W. 1171; Decker *v.* S. (Tex. Cr.), 154 S. W. 566; Shaffer *v.* S. (Tex. Cr.), 151 S. W. 1061; Elder *v.* S. (Tex. Cr.), 151 S. W. 1052; Walker *v.* S. (Tex. Cr.), 151 S. W. 822; Kelly *v.* S. (Tex. Cr.), 151 S. W. 304; Kirksey *v.* S., 58 Tex. Cr. 188, 125 S. W. 15; O'Neal *v.* S., 51 Tex. Cr. 100, 100 S. W. 919; McKay *v.* Elec.

Co., 76 Wash. 257, 136 P. 134; McDonald *v.* Ins. Co., 76 Wash. 488, 136 P. 702. See Slaughter *v.* Slaughter (Ala.), 65 S. 348; S. *v.* Robinson, 253 Mo. 271, 161 S. W. 1169; P. *v.* Stilwell, 162 App. Div. 811, 148 N. Y. S. 59; Williams *v.* S. (Tex. Cr.), 166 S. W. 1170; Parrish *v.* Adwell (Tex. Cr.), 124 S. W. 441.

452-54 Combs *v.* Combs, 130 Ky. 827, 114 S. W. 334; Spande *v.* Indemnity Co., 61 Or. 220, 117 P. 973; Dowling *v.* De Witt, 96 S. C. 435, 81 S. E. 173.

452-58 Bennett *v.* S., 95 Ark. 100, 128 S. W. 851; H. Scherer & Co. *v.* Independent, etc. Co., 162 Mich. 173, 127 N. W. 268; Marthinson *v.* McCutcheon, 84 S. C. 256, 66 S. E. 120 (grantor never saw deed after signing it); Parshall *v.* S., 62 Tex. Cr. 177, 138 S. W. 759; Kleine Bros. *v.* Gicomb (Tex. Civ.), 152 S. W. 462; Pecos, etc. R. Co *v.* Brooks (Tex. Civ.), 145 S. W. 619; Trout *v.* R. Co. (Tex. Civ.), 111 S. W. 220.

See Owens *v.* Nat. Bk. (Tex. Civ.), 167 S. W. 798; St. Louis, etc. R. Co. *v.* Gould (Tex. Civ.), 165 S. W. 13; Dunn *v.* S. (Tex. Cr.), 161 S. W. 467; Adams *v.* Cameron (Tex. Civ.), 161 S. W. 417.

Objector must show testimony given by witness in answer to question as to knowledge, is hearsay. Rouss *v.* King, 74 S. C. 251, 54 S. E. 615; Sloan *v.* Hunter, 56 S. C. 385, 34 S. E. 658, 76 Am. St. 551.

452-59 Norman S. Co. *v.* Ford, 77 Conn. 461, 59 A. 499.

452-60 Patterson *v.* S., 156 Ala. 62, 47 S. 52; Davis *v.* Arnold, 143 Ala. 228, 39 S. 141; Atlantic, etc. Co. *v.* Collins, 13 Ga. App. 759, 79 S. E. 916; Lambert *v.* Hamlin, 73 N. H. 138, 59 A. 941; Kirby L. Co. *v.* Cummings, 39 Tex. Civ. 220, 87 S. W. 231. See Norman S. Co. *v.* Ford, 77 Conn. 461, 59 A. 499.

453-61 Sylvester *v.* Ammons, 126 Ia. 140, 101 N. W. 782.

453-63 In re Bell's Est., 157 Cal. 528, 108 P. 497; Ettien *v.* Drum, 39 Mont. 34, 101 P. 151; Ellis *v.* Lewis (Tex. Civ.), 81 S. W. 1031; Anderson *v.* Sparks, 142 Wis. 398, 124 N. W. 925. See W. U. Tel. Co. *v.* Westmoreland, 150 Ala. 654, 43 S. 790; P. *v.* Jailles, 146 Cal. 301, 79 P. 965; Norman S. Co. *v.* Ford, 77 Conn. 461, 59 A. 499; O'Brien *v.* Co., 40 Mont. 212, 105 P. 724; Marthinson *v.* McCutcheon, 84 S. C. 256, 66 S. E. 120.

Statement of one having apparent knowledge is admissible. Downey *v.* R. Co., 219 Pa. 32, 67 A. 916; Quinn *v.* Co. (R. I.), 67 A. 364.

Witness may know a fact both from personal knowledge and hearsay, in which case it is admissible. Atlanta, etc. R. Co. *v.* McManus, 1 Ga. App. 302, 58 S. E. 258.

455-66 St. Louis S. R. Co. *v.* Mitchell (Tex. Civ.), 127 S. W. 876.

455-68 Equitable Mtg. Co. *v.* Watson, 119 Ga. 280, 46 S. E. 440; Moultrie L. Co. *v.* Co., 122 Ga. 26, 49 S. E. 729; Childers *v.* Pickenpaugh, 219 Mo. 376, 118 S. W. 453; Rosenberg *v.* Wilkens, 127 App. Div. 906, 111 N. Y. S. 539. See Eggmann *v.* Nutter, 169 Ill. App. 116; Reeve *v.* Leibrandt, 165 Ill. App. 541.

It may be disregarded in equity though received without objection. Jones *v.* Plummer, 137 Mo. App. 337, 118 S. W. 109.

455-69 Hays *v.* Lemoine, 156 Ala. 465, 47 S. 97; Metropolitan Life Ins. Co. *v.* Lyons, 50 Ind. App. 534, 98 N. E. 824; Struth *v.* Decker, 100 Md. 368, 59 A. 727; Covell *v.* Co., 164 Mo. App. 630, 147 S. W. 555; Wilkinson *v.* R. Co., 146 Mo. App. 711, 125 S. W. 544; Sheibley *v.* Nelson, 84 Neb. 393, 121 N. W. 458; S. *v.* Dunn, 53 Or. 304, 99 P. 278; W. U. T. Co. *v.* Hirsch (Tex. Civ.), 84 S. W. 394; Leary *v.* S., 55 Tex. Cr. 547, 117 S. W. 822; In re Bean's Will, 85 Vt. 452, 82 A. 734. See S. *v.* Jones, 86 S. C. 17, 67 S. E. 160.

Hearsay admitted without objection, see vol. 9, p. 114, and supplement.

Error in admitting hearsay over objection, cured by receiving such testimony from another witness without objection. Houston, etc. R. Co. *v.* Maxwell (Tex. Civ.), 128 S. W. 160.

Striking out of hearsay admitted without objection and brought out in detail on cross-examination is within discretion of court. McWilliams *v.* R. Co., 146 Mich. 216, 109 N. W. 272.

HIGHWAYS

Presumption of legality of proceedings subsequent to acquiring jurisdiction, 461-8; *Obstructing; special injury,* 472-07; *Prescription and acts of others,* 474-78; *Notice of injury,* 487-21; *Indemnification of city,* 504-92; *Ownership of* [illegible] 507-99.

460-1 Heath *v.* Sheetz, 164 Ind. 665, 74 N. E. 505; Soaper *v.* Kimsey, 144 Ky. 32, 137 S. W. 797.

460-3 Relevant and irrelevant facts. Location of established ways, proximity to the one proposed and accessibility to inhabitants shown; but not number of miles of way in town, taxable property, rate of taxation, amount of the road fund and number of road hands. Sterling *v.* Frick, 171 Ind. 710, 86 N. E. 65.

460-7 Barber *v.* Griffin, 158 N. C. 348, 74 S. E. 110.

461-8 Bliss *v.* Junkins, 106 Me. 128, 75 A. 386; S. *v.* R. Co., 114 Minn. 293, 131 N. W. 330.

Over public lands.—Middleton *v.* Presidio County (Tex. Civ.), 138 S. W. 812.

Special statutory authority not necessary.—Horgan *v.* Town, 32 R. I. 528, 80 A. 271.

Presumption of jurisdiction arising from selectmen's return, original petition lost and use of way acquiesced in many years. Cushing *v.* Webb, 102 Me. 157, 66 A. 719.

Presumption of legality of proceedings subsequent to acquiring jurisdiction arises after jurisdiction appears. Fowler *v.* Newsom, 174 Ind. 104, 90 N. E. 9; Biglow *v.* Ritter, 131 Ia. 213, 108 N. W. 218.

Return of proceedings presumed true. Gorham *v.* Johnson, 157 Mich. 433, 122 N. W. 181.

461-10 Tucson Con. C. Co. *v.* Reese, 12 Ariz. 226, 100 P. 777; Louisville & N. R. Co. *v.* Gerard, 130 Ky. 18, 112 S. W. 915; Jensen *v.* County, 55 Or. 54, 105 P. 96.

Proceeding presumed regular after long lapse of time. District of Columbia *v.* Jones, 38 App. Cas. (D. C.) 560.

Authorities may notice identity of route described in petition with that in former petition adversely acted on McKaig *v.* Jordan, 172 Ind. 84, 87 N. E. 974.

461-11 See In re Riddell, 116 N. Y. S. 261.

Court order presumptively shown as against collateral attack that petitioners were freeholders. Brumley *v.* S., 83 Ark. 236, 103 S. W. 615.

Possession of land presumptive evidence of ownership in fee. Stevens *v.* Sandnes, 108 Minn. 271, 121 N. W. 902.

461-12 Proceedings not subject to collateral attack. Comrs. *v.* Comrs., 142 Ill. App. 489.

Presumption of regularity of proceedings declared by statute. Sharpe *v.* Hasey, 141 Wis. 76, 123 N. W. 647.

461-13 Young *v.* Milan, 73 N. H. 552, 64 A. 16 (evidence sufficient showing waiver of notice); Barber *v.* Vinton, 82 Vt. 327, 73 A. 881 (recital in record that action was taken "after due hearing" does not show notice).

Proceedings in court sufficient notice. Waller *v.* Syck, 146 Ky. 181, 142 S. W. 229.

Selectmen's return presumptive evidence of notice given on petition Cushing *v.* Webb, 102 Me. 157, 66 A. 719.

Court order establishing highway, reciting giving of notice sufficiently shows service as against collateral attack. Brumley *v.* S., 83 Ark. 236, 103 S. W. 615.

Presumption that notice given not overcome by non-essential entry showing contrary. Molyneux *v.* Grimes, 78 Kan. 830, 98 P. 278.

461-14 Affidavit of service aided by being made part of record and return. Gorham *v.* Johnson, 157 Mich. 433, 122 N. W. 181.

461-15 Extrinsic evidence inadmissible to show notice. Barber *v.* Vinton, 82 Vt. 327, 73 A. 881.

462-17 Mathis *v.* S., 11 Ga. App. 95, 74 S. E. 713; Crans *v.* Durdall, 154 Ia. 468, 134 N. W. 1086; Rose *v.* Stephens (Ky.), 112 S. W. 676 (prescriptive use); Van Wanning *v.* Deeter, 78 Neb. 284, 112 N. W. 902, 78 Neb. 282, 110 N. W. 703, *foll.* Henry *v.* Ward, 49 Neb. 392, 68 N. W. 518 (action to restrain road overseer from removing fences from land claimed by overseer to be highway, plaintiff alleging no highway existed); Parsons *v.* Rye, 140 N. Y. S. 961; Wright *v.* Fanning (Tex. Civ.), 86 S. W. 786; Evans *v.* Scott, 37 Tex. Civ. 373, 83 S. W. 874. But see S. *v.* R. Co. (W. Va.), 81 S. E. 1039. *Comp.* Smith *v.* Zimmer, 45 Mont. 282, 125 P. 420.

Whether road is public or private is question of law. Dees *v.* Thompson (Tex. Civ.), 166 S. W. 56.

Burden to show width of street upon petitioner. Kruse *v.* Kemp, 179 Ind. 650, 102 N. E. 133.

Insufficient evidence.—Palmer *v.* City, 248 Ill. 201, 93 N. E. 765; Tiffany *v.* Town, 126 N. Y. S. 910.

Presumption that city holds fee.—City of Springfield *v.* Postal Tel. Cable Co., 253 Ill. 346, 97 N. E. 672.

Grant of land presumed when proved that public has had exclusive possession and use for period barring action for recovery of realty. Meade *v.* Topeka, 75 Kan. 61, 88 P. 574. *Comp.* Heacock *v.* Sullivan, 70 Kan. 750, 79 P. 659, where it was sought to enjoin authorities from opening highway, defendants claiming highway previously laid out, burden on plaintiff to show non-existence of road. See Smith *v.* Jarvis, 47 Tex. Civ. 185, 105 S. W. 1168. General use for twenty years raises presumption of all elements to create highway by prescription. Carter *v.* Walker (Ala.), 65 S. 170.

462-18 Dickerman *v.* Marion, 122 Ill. App. 154; C. *v.* Slagel, 33 Pa. Super 514.

463-19 S. *v.* Hood, 143 Mo. App. 313, 126 S. W. 992.

463-22 Village *v.* Coyer, 223 Ill. 96, 79 N. E. 54; Council Grove *v.* Bowman, 76 Kan. 563, 92 P. 550 (evidence showed presumptive existence of highway).

463-23 Leases admissible under general denial to show use of highway permissive. Dennis *v.* Gary, 56 Wash. 112, 105 P. 172.

463-24 *Comp.* Paulsen *v.* Wilton, 78 Conn. 58, 61 A. 61, holding when defendant suffers default and denies place to be highway burden on defendant on hearing in damages to prove denial.

Platform of railway station used by the public. Rudd *v.* Indemnify Co., 114 Minn. 512, 131 N. W. 633.

464-25 Penick *v.* County, 131 Ga. 385, 62 S. E. 300; Atchison, etc. R. Co. *v.* Hayes, 79 Kan. 542, 99 P. 1131. See Northrup *v.* Pike Tp., 242 Pa. 1, 88 A. 781.

"Road register" when inadmissible. Penick *v.* County, 131 Ga. 385, 62 S. E. 300.

Parts of ordinance admissible showing existence of street; otherwise as to parts requiring railroad companies to keep streets in repair. Horton *v.* Seattle, 53 Wash. 316, 101 P. 1091.

464-27 Map inadmissible unless recorded. Tucson Con. Co. *v.* Reese, 12 Ariz. 226, 100 P. 777.

465-29 Lovington *v.* Adkins, 232 Ill. 510, 83 N. E. 1043; Board *v.* Patrick, 18 Wyo. 130, 107 P. 748. See Beaumont, etc. Co. *v.* Yarborough (Tex. Civ.), 156 S. W. 252.

465-31 Penick *v.* County, 131 Ga. 385, 62 S. E. 300 (when opening date involved); Quinn *v.* Baage, 138 Ia. 426, 114 N. W. 205. See Biglow *v.* Ritter, 131 Ia. 213, 108 N. W. 218.

Presumed, after lapse of time, that petitioners for highway qualified and survey sufficient order. Olwell *v.* Travis, 140 Wis. 547, 123 N. W. 111.

466-38 Action of grand jury looking to repair of road and expenditure of money thereon by authorities not a finality as to existence as public road. King *v.* Council, (1908), 2 Irish 101.

466-39 Penick *v.* County, 131 Ga. 385, 62 S. E. 300; Brack *v.* Ochs, 80 Kan. 433, 102 P. 479.

City maps and records not best evidence of street locations on ground. International, etc. R. Co. *v.* Morin, 53 Tex. Civ. 531, 116 S. W. 656.

467-40 Graham *v.* Bailard, 157 Cal. 96, 106 P. 215; Todd *v.* Crail, 167 Ind. 48, 77 N. E. 402.

468-41 Todd *v.* Crail, supra.

468-46 Village *v.* R. Co., 224 Ill. 101, 79 N. E. 678; Crigler *v.* Newman, 29 Ky. L. R. 27, 91 S. W. 706; Asbury *v.* City, 161 Mo. App. 496, 144 S. W. 127; Dow *v.* R. Co., 116 Mo. App. 555, 92 S. W. 744; Harriman *v.* Moore, 74 N. H. 277, 67 A. 225; Diehl *v.* R. Co., 17 Pa. Dist. 961 (grant presumed after continuous use more than forty years); Ballard *v* County (Tex. Civ.), 126 S. W. 56. *Comp.* Haan *v.* Meester, 132 Ia. 709, 109 N. W. 211, holding evidence of use alone not sufficient to establish highway See also Gosdin *v.* Williams, 151 Ala. 592, 44 S. 611.

Proof of user is inadmissible to support a petition averring the establishment of a highway by due proceeding. Crans *v.* Durdall, 154 Ia. 468, 134 N. W. 1086.

"The mere fact that the owner of the servient estate never gave, and the persons using the passway never asked, permission is not in itself sufficient to overcome the presumption in their favor arising from the long continued use of the way. Smith *v.* Pennington, 122 Ky. 355, 91 S. W. 730, 28 Ky. Law Rep. 1282, 8 L. R. A. (N. S.) 149; Anderson *v.* Southworth, 76 S. W. 391, 25 Ky. Law Rep. 776; Rogers *v.* Flick, 144 Ky. 844, 139 S. W. 1098." Lyles *v.* Graves, 147 Ky. 807, 145 S. W. 762.

469-47 Dow *v.* R. Co., 116 Mo. 555, 92 S. W. 744.

Parol evidence admissible to show particular place was used as street. Johnston *v.* Palmetto, 139 Ga. 556, 77 S. E. 807.

Width of highway shown by record, by parol, by evidence of extent of travel. Illinois C. R. Co. *v.* Smith, 133 Ky. 732, 118 S. W. 933.

Errata.—Case last cited in original reported in 25 Ia. 208.

470-48 Harriman *v.* Moore, 74 N. H. 277, 67 A. 225.

Location of commonly used streets testified to by any informed witness. Stringfield *v.* S., 4 Ga. App. 842, 62 S. E. 569; International, etc. R. Co. *v.* Morin, 53 Tex. Civ. 531, 116 S. W. 656. *Comp.* Johnson *v.* S., 1 Ga. App. 195, 58 S. E. 265.

470-49 Officer's testimony caring for highway sufficient. Anne Arundel County *v.* Carr, 111 Md. 141, 73 A. 668.

470-50 Extent of user of street as to width immaterial. Brunner F. Co. *v.* Payne, 54 Tex. Civ. 501, 118 S. W. 602.

470-52 Paulsen *v.* Wilton, 78 Conn. 58, 61 A. 61; Parkey *v.* Galloway, 147 Mich. 693, 111 N. W. 348.

470-54 Penick *v.* County, 131 Ga. 385, 62 S. E. 300; Benton *v.* St. Louis, 217 Mo. 687, 118 S. W. 418. *Contra,* Norfolk & W. R. Co. *v.* Board, 110 Va. 95, 65 S. E. 531 (refusal of county court to accept not affected by repairs by officers nor by user). See Paulsen *v.* Wilton, 78 Conn. 58, 61 A. 61.

Measurements of ground in relation to figures on plat shown by surveyor. Perry *v.* Sheldon, 30 R. I. 426, 75 A. 690.

470-55 Chicago *v.* Wildman, 240 Ill. 215, 88 N. E. 559.

471-56 Intention and acceptance must be shown. Penick *v.* County, 131 Ga. 385, 62 S. E. 300.

471-58 Haan *v.* Meester, 132 Ia. 709, 109 N. W. 211. See St. Louis, etc. R. Co. *v.* R. Co., 190 Mo. 246, 88 S. W. 634.

471-59 Merchant *v.* Markham, 170 Ala. 278, 54 S. 236; De la Guerra *v.* Striedel, 159 Cal. 85, 112 P. 856. Inconsistent acts of landowner do not show intention to dedicate. S. *v.* Hood, 143 Mo. App. 313, 126 S. W. 992.

Conclusive presumption of dedication and acceptance arises from uninterrupted public use. Louisville *v.* Tompkins (Ky.), 122 S. W. 174.

471-61 Davis *v.* S., 9 Ga. App. 430, 71 S. E. 603; Ricketson *v.* Village, 130 N. Y. S. 794.

Evidence held insufficient to establish highway by user. Town of Great Scott *v.* Robinson, 115 Minn. 247, 132 N. W. 204.

472-64 Plaintiff's admission in action to enjoin obstruction that land was defendant's admissible as showing plaintiff's use was with recognition of defendant's dominion. Evans *v.* Scott, 37 Tex Civ. 373, 83 S. W. 874. Implied admission may not be proved to show existence of highway. P. *v.* Johnson, 237 Ill. 237, 86 N. E. 676.

472-65 See Isham *v.* S., 49 Tex. Cr. 324, 92 S. W. 808.

472-66 Opinions incompetent to show whether place of injury part of highway. Perry *v.* Sheldon, 30 R. I. 426, 75 A. 690.

Boundaries of old highway established by town officers on basis of non-judicial evidence. Appeal of St. John's Church, 83 Conn. 101, 75 A. 88.

Common or general reputation proved of matter of public interest or directly affecting people of locality, regardless of whether the alleged right is ancient or not. La Barre *v.* Bent, 154 Mich. 520, 118 N. W. 6; Morse *v.* Whitcomb, 54 Or. 412, 102 P. 788.

472-67 Town of Pleasant View *v.* Day, 155 Ill. App. 120; S. *v.* Transue, 131 Mo. App. 323, 111 S. W. 523. *Contra,* Jacobs *v.* S., 55 Tex. Cr. 149, 115 S. W. 581.

When enjoining highway obstruction, special injury must be shown. Evans *v.* Scott (Tex. Civ.), 97 S. W. 116.

Burden of proving license or lawfulness of obstruction on defendant. Kenyon *v.* R. Co., 235 Ill. 406, 85 N. E. 660.

Burden not shifted by acts or belief of public officers. Bellevue *v.* Hunter, 105 Minn. 343, 117 N. W. 445.

473-69 See Town *v.* Pruett, 215 Ill. 162, 74 N. E. 111.

473-70 S. *v.* Cipra, 71 Kan. 714, 81 P. 488.

473-71 *Contra,* Town of East Nelson *v.* Leeds, 158 Ill. App. 227.

474-73 Craighead *v.* S., 55 Tex. Cr. 339, 116 S. W. 579 (verbal authority to locate road shown); Isham *v.* S., 49 Tex. Cr. 324, 92 S. W. 808.

Permission of mayor admissible on question of wilfulness. Martin *v.* S. (Tex. Cr.), 162 S. W. 1145.

Railroad company may show offense

charged first and commission in violation of rules and positive instructions. S. *v.* R. Co., 65 W. Va. 603, 64 S. E. 735.

474-77 S. *v.* Rodman, 86 S. C. 154, 68 S. E. 343. *Contra* in case of long permissive use of passway. Here defendant must show that gates he erected were at points where the way enters and leaves his land. Evans *v.* Cook, 33 Ky. L. R. 788, 111 S. W. 326.

Where defendant claims superior title, he has burden of proving it. Johnston *v.* Palmetto, 139 Ga. 794, 77 S. E. 807.

Evidence of custom competent where obstruction results from building operations, and consideration is due judgment of city officers. Button *v.* Louisville (Ky.), 118 S. W. 977.

Obstruction by public agent presumed lawful. Lefkovitz *v.* Chicago, 238 Ill. 23, 87 N. E. 58.

Duty of third party to remove obstruction or put up signals immaterial to rights of traveler. Kenyon *v.* R. Co., 235 Ill. 406, 85 N. E. 660.

Burden on owner to show want of conflict on boundaries with streets. Perry *v.* Ball, 52 Tex. Civ. 134, 113 S. W. 588.

474-78 **Prescription and acts of others.**—Existence of right by prescription shown, and fact that others maintained similar partial obstructions. Pickrell *v.* Carlisle, 135 Ky. 126, 121 S. W. 1029

Official permission immaterial. Caldwell *v.* George, 96 Miss. 484, 50 S. 631.

475-79 Parker *v.* Bedford, 139 Ia. 545, 117 N. W. 955; Cunningham *v.* Frankfort, 104 Me. 208, 70 A. 441; Gillis *v.* Co., 202 Mass. 222, 88 N. E. 779 (not required to exclude every possible theory of cause of accident if attributable directly to defendant's fault); Beck *v.* Club, 37 Pa. Super. 521 (happening of accident no proof of negligence); Humphries *v.* R. Co., 84 S. C. 202, 65 S. E. 1051; Wanta *v.* Elec., etc. Co., 148 Wis. 295, 134 N. W. 133.

Knowledge as to cause of defect admissible.—Long *v.* Sweeten (Md.), 90 A. 782.

Sufficient evidence.—Pierce *v.* City, 59 Wash. 615, 110 P. 537.

Judicial notice of universal unevenness and irregularity in walks, curbs and pavements. Gastel *v.* New York, 194 N. Y. 15, 86 N. E. 833.

Statutory notice of injury must be shown Cunningham *v.* Frankfort, 104 Me. 208, 70 A. 441.

Presumed defendant knows of filing of statutory notice of intention to sue. Bogart *v.* New York, 128 App. Div. 139, 112 N. Y. S. 549.

Res ipsa loquitur applies where no explanation of fall of electric lamp, with live wires attached. Potera *v.* Brookhaven, 95 Miss. 774, 49 S. 617.

475-81 Service of notice of injury shown by proof of delivery to clerk in city clerk's office, the clerk and assistant being absent, and by a request to deliver it to the officer. Janse *v.* Boston, 201 Mass. 348, 87 N. E. 633.

475-82 Rule does not apply where city attempts to authorize use of street for a fair. Van Cleef *v.* Chicago, 144 Ill. App. 488.

476-83 Greene County *v.* Walker, 10 Ga. App. 347, 73 S. E. 424; Ft. Wayne *v.* Merriman (Ind. App.), 90 N. E. 781; Cunningham *v.* Frankfort, 104 Me. 208, 70 A. 441.

Plaintiff has the affirmative.—Tripp *v.* Wells, 104 Me. 29, 70 A. 533.

Failure to register and number automobile does not affect owner's rights to recover for injury thereto. Hemming *v.* New Haven, 82 Conn. 661, 74 A. 892. Otherwise if statutory prohibition of use of highways by unlicensed automobiles. See Dudley *v.* R. Co., 202 Mass. 443, 89 N. E. 25.

476-85 *Comp.* Carson *v.* Dresden, 129 App. Div. 728, 113 N. Y. S. 959, strict rule applies.

Location of street on which injury sustained shown by general testimony. Scheffer *v.* Hardin, 140 Mo. App. 13, 124 S. W. 569.

Statutory notice describing place of accident and insufficiency of highway aided by evidence that place was subsequently pointed out to proper officer Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805.

477-86 Stanton *v.* Webster, 170 Mich. 428, 136 N. W. 421; Briggs *v.* Tp., 150 Mich. 381, 114 N. W. 221.

477-87 Orr *v.* Oldtown, 99 Me. 190, 58 A. 914; Whitman *v.* Fisher, 98 Me. 573, 57 A. 895; Roth *v.* Comrs., 115 Md. 469, 80 A. 1031; Briggs *v.* Tp., 150 Mich. 381, 114 N. W. 221; Speck *v.* Bruce, 166 Mich. 550, 132 N. W. 114, 35 L. R. A. (N. S.) 203; Humphries *v.* R. Co., 84 S. C. 202, 65 S. E. 1051; Vollmer *v.* Town, 146 Wis. 630, 132 N. W. 542.

477-88 Chicago *v.* Carlin, 141 Ill. App. 118.

477-89 Holbert *v.* Philadelphia, 221 Pa. 266, 70 A. 746; Smith *v.* Gilreath, 69 S. C. 353, 48 S. E. 262.

478-90 Quarles *v.* City, 138 Mo. App. 45, 119 S. W. 1019. See Winckler *v.* New York, 129 App. Div. 45, 113 N. Y. S. 412.

479-94 See also Lynch *v.* Kineth, 36 Wash. 368, 78 P. 923.

479-95 Mayor, etc. of City *v.* Gordon, 167 Ala. 334, 52 S. 430; Anderson *v.* Mayor, 6 Penne. (Del.) 485, 70 A. 204; Belleview *v.* England (Ky.), 118 S. W. 994; Cutting *v.* Shelburne, 193 Mass. 1, 78 N. E. 752; Knight *v.* City, 138 Mo. App. 153, 119 S. W. 990; Kovarik *v.* County, 86 Neb. 440, 125 N. W. 1082; March *v.* Phoenixville, 221 Pa. 64, 70 A. 274; Snee *v.* Co., 24 S. D. 361, 123 N. W. 729; Bedford *v.* Sitwell, 110 Va. 296, 65 S. E. 471 (knowledge of general defective condition); Dralle *v.* Reedsburg, 130 Wis. 347, 110 N. W. 210.

Contributory negligence must be shown. Winona *v* Botzet, 169 Fed. 321, 94 C. C. A. 563. See infra, "Negligence," 854-7, 859-16.

Knowledge of defect not determinative of person's negligence using street. Cochran *v.* Shirley, 43 Ind. App. 453, 87 N. E. 993; Cutting *v.* Shelburne, 193 Mass. 1, 78 N. E. 752; Winship *v.* Boston, 201 Mass. 273, 87 N. E. 600.

Precautions to guard dangerous place in day time shown by plaintiff, knowing thereof, on issue of care by him at night. Chicago *v.* Thomas, 141 Ill. App. 122.

480-96 Lerner *v.* Philadelphia, 221 Pa. 294, 70 A. 755; Pederson *v.* County, 54 Wash. 637, 103 P. 1125; Shriver *v.* Court, 66 W. Va. 685, 66 S. E. 1062. See Galveston, etc. R. Co. *v.* Schuessler, 56 Tex. Civ. 410, 120 S. W. 1147.

Rule limited to where unusual condition exists. Stock *v.* Tacoma, 53 Wash. 226, 101 P. 830.

Knowledge of defect shown. Winship *v.* Boston, 201 Mass. 273, 87 N. E. 600.

Unbarricaded streets presumably open, and may be used though traveler knows of general unsafe condition if knowledge not extending to danger incident to use. Scurlock *v.* Boone, 142 Ia. 684, 121 N. W. 369.

Character of defect and extent of inconvenience of avoiding it relevant on question of negligence. March *v.* Phoenixville, 221 Pa. 64, 70 A. 274.

Assumption defect remedied.—See Rome *v.* Brooks (Ga. App.), 66 S. E. 627.

480-97 Mineral City *v.* Gilbow, 81 O. St. 263, 90 N. E. 800. *Comp.* Dobbins *v.* Co., 163 Ala. 222, 50 S. 919.

Absence of light where defect long existed relevant. Wallace *v.* New Haven, 82 Conn. 527, 74 A. 886.

480-98 City of Mobile *v.* Webster, 4 Ala. App. 470, 59 S. 185; Anderson *v.* Mayor, 6 Penne. (Del.) 485, 70 A. 204; Valley Tp. *v.* Stiles, 77 Kan. 557, 95 P. 572; Mayfield *v.* Hughley (Ky.), 122 S. W. 838; Abbott *v.* Rockland, 105 Me. 147, 73 A. 865; Wolverton *v.* Village, 171 Mich. 419, 137 N. W. 211; Orser *v.* New York, 193 N. Y. 537, 86 N. E. 523; Portsmouth *v.* Houseman, 109 Va. 554, 65 S. E. 11. *Contra* if defect caused by city's agents. Schelich *v.* Mayor, 1 Boyce (Del.) 57, 74 A. 367; Tabor *v.* Buffalo, 136 App Div. 258, 120 N. Y. S. 1089 (defect caused by authorized opening). See 483-7, infra.

Duty to give notice of injury not excused by city's knowledge of defect causing injury. Forsyth *v.* Saginaw, 158 Mich. 201, 122 N. W. 523.

481-99 Belleview *v.* England (Ky.), 118 S. W. 994.

481-1 Vonkey *v.* St. Louis, 219 Mo. 37, 117 S. W. 733.

482-2 Brennan *v.* New York, 130 App. Div. 267, 114 N. Y. S. 578; Holbert *v.* Philadelphia, 221 Pa. 266, 70 A. 746.

482-3 See ibid.

483-5 Rome *v.* Brooks (Ga. App.), 66 S. E. 627; Burnside *v.* Smith (Ky.), 119 S. W. 744; Franklin *v.* Worcester, 204 Mass. 22, 90 N. E. 404; Moriarty *v.* New York, 132 App. Div. 10, 116 N. Y. S. 323 (portable stone); Beck *v.* Club, 228 Pa. 173, 77 A. 448; Smith *v.* Tacoma, 51 Wash. 101, 98 P. 91.

483-6 Miller *v.* Mullan, 17 Ida. 28, 104 P. 660; Ferguson *v.* Waverly, 128 App. Div. 697, 112 N. Y. S. 891.

483-7 Wallace *v.* New Haven, 82 Conn. 527, 74 A. 886; Miller *v.* Mullan, 17 Ida. 28, 104 P. 660; Connelly *v.* Boston, 206 Mass. 4, 91 N. E. 998; Merritt *v.* Co., 215 Mo. 299, 115 S. W. 19; Orser *v.* New York, 193 N. Y. 537, 86 N. E. 523 (loose stone); Herndon *v.* County, 83 S. C. 551, 65 S. E. 820; Portsmouth *v.* Houseman, 109 Va. 554, 65 S. E. 11. See Sutter *v.* Kansas City, 138 Mo. App. 105, 119 S. W. 1084, ap-

plying strict rule to continuing act.
Number and duties of various employes competent. Spalding *v.* Ziegler, 173 Mo. App. 698, 160 S. W. 14.
Notice implied where defendant caused defect. Burditt *v.* Winchester, 205 Mass. 493, 91 N. E. 880. See 480-98, supra.
Rule where danger intermittent.—See Romo *v.* Brooks (Ga. App.), 66 S. E. 627.
Actual notice shown by direct or circumstantial evidence. Not proved by showing notice to police officer, as customary, and that such officers ordinarily reported to proper officer. Abbott *v.* Rockland, 105 Me. 147, 73 A. 865.
484-8 Weinhardt *v.* New Orleans, 125 La. 351, 51 S. 286; Merritt *v.* Co., 215 Mo. 299, 115 S. W. 19; Perry *v.* Sheldon, 30 R. I. 426, 75 A. 690; Herndon *v.* County, 83 S. C. 551, 65 S. E. 820.
Communication to day laborer incompetent. Monds *v.* Town of Dunn, 163 N. C. 108, 79 S. E. 303.
Expressions of opinion to proper officer as to sufficiency of work shown. Heberling *v.* Warrensburg, 133 Mo. App. 714, 113 S. W. 673.
Knowledge of rumors of other accidents at place shown. Redepenning *v.* Rock, 136 Wis. 372, 171 N. W. 805.
484-10 Central Union Tel. Co. *v.* Conneaut, 167 Fed. 274, 93 C. C. A. 196; Servoss *v.* Amsterdam, 64 Misc. 667, 120 N. Y. S. 280. See St. Paul *v.* Hyslop, 174 Fed. 391, 98 C. C. A. 609. Inspection shortly before accident shown. Herndon *v.* County, 83 S. C. 551, 65 S. E. 820.
485-11 Billings *v.* Snohomish, 51 Wash. 135, 98 P. 107. See Servoss *v.* Amsterdam, 64 Misc. 667, 120 N. Y. S. 280.
485-13 See Louisville *v.* Lambert (Ky.), 116 S. W. 261.
Existence and repair of defect in vicinity of that specified in notice may be proved if nature of materials affected such that lapse of time would result in decay. Bleistine *v.* Chelsea, 204 Mass. 105, 90 N. E. 526.
485-14 Bleistine *v.* Chelsea, supra.
Length of time defect resulting from rotting of wood existed shown by proof of condition when accident occurred. Tilton *v.* Haverhill, 203 Mass. 580, 89 N. E. 1040.
486-15 Graham *v.* Rockford, 142 Ill. App. 306; Mayfield *v.* Hughley (Ky.), 122 S. W. 838; Merritt *v.* Co., 215 Mo. 299, 115 S. W. 19 (one month); Tucker *v.* O'Brien, 117 N. Y. S. 1010; Apker *v.* Hoquiam, 51 Wash. 567, 99 P. 746 (thirty days).
486-16 Weinhardt *v.* New Orleans, 125 La. 351, 51 S. 286.
Defendant must show insufficiency of time to make repairs. Weinhardt *v.* New Orleans, supra.
486-17 Holliday *v.* Mayor, 10 Ga. App. 709, 74 S. E. 67.
In rebuttal of permit to temporarily obstruct street, competent to show dangerous character of temporary walk constructed. Fuhrman *v.* Eng. Co., 156 Wis. 650, 146 N. W. 796.
Safety and convenience of highway determined with reference to special facts and conditions existing, such as location, nature and extent of travel. Cunningham *v.* Frankfort, 104 Me. 208, 70 A. 441.
Opinions as to necessity for drain or ditch, inadmissible. Gallagher *v.* Tipton, 133 Mo. App. 557, 113 S. W. 674.
487-19 Hayner *v.* Schaghticoke, 126 App. Div. 498, 110 N. Y. S. 714; Batdorff *v.* Oregon City, 53 Or. 402, 100 P. 937. *Contra* where officer sued for malfeasance. Ibid, *cit.* Bennett *v.* Whitney, 94 N. Y. 302.
487-20 Taylor *v.* Manson, 9 Cal. App. 382, 99 P. 410.
487-21 See Mayfield *v.* Hughley (Ky.), 122 S. W. 838.
Streets in annexed territory.—Where injury occurs on street in territory recently annexed city may show extent and condition of streets in such territory, lack of lighting facilities and difficulty in way of repairing. Richmond *v.* Mason, 109 Va. 546, 65 S. E. 8.
Notice of injury.—Proof of compliance with statute requiring notice of the injury to certain official necessary. No presumption that notice given clerk was communicated. Huntington *v.* Calais, 105 Me. 144, 73 A. 829.
Excessive speed of automobile and absence of lights shown. Lauson *v.* Fond du Lac, 141 Wis. 57, 123 N. W. 629.
487-22 Herndon *v.* City, 34 Utah 65, 95 P. 646.
488-24 Expert may testify as to method of examining bridge to learn condition. Greenway *v.* County, 144 Ia. 332, 122 N. W. 943.
488-25 Opinions as to existence of danger inadmissible. Wicker *v.* Alton, 140 Ill. App. 135.

Non-expert testimony based on hypothetical question, improper, but not reversible error. Seidel *v.* Woodbury, 81 Conn. 65, 70 A. 58.

Use of temporary walk by plaintiff on day of injury and prior thereto shown to establish use by public. Hughes *v.* Detroit, 161 Mich. 283, 126 N. W. 214.

Age of reconstructed bridge material. Greenway *v.* County, 144 Ia. 332, 122 N. W. 943.

489-30 Campbell *v.* City, 239 Mo. 455, 144 S. W. 408.

490-33 Wallace *v.* New Haven, 82 Conn. 527, 74 A. 886.

490-34 Cunningham *v.* Frankfort, 104 Me. 208, 70 A. 441.

491-37 Witt *v.* Latimer, 139 Ia. 273, 117 N. W. 680 (testimony related to day of injury); Falldin *v.* Seattle, 57 Wash. 307, 106 P. 914 (if confined to locality).

491-38 Witt *v.* Latimer, 139 Ia. 273, 117 N. W. 680. See Cupp *v.* Elmira, 126 App. Div. 539, 110 N. Y. S. 742.

491-39 See vol. 8, p. 922, n. 91; vol. 11, p. 820, n. 6, and supplements thereto.

492-40 Miller *v.* Mullan, 17 Ida. 28, 104 P. 660 (if no question as to place of injury and defect alleged not a special one); City of Covington *v.* Westbay, 156 Ky. 839, 162 S. W. 91. See Strand *v.* Co., 136 Ia. 68, 113 N. W. 488. And see vol. 8, p. 923, n. 92, and supplement thereto.

Rumors of condition of way cannot be proved. Miller *v.* Mullan, 17 Ida. 28, 104 P. 660.

492-41 Similar acts of other commissioners admissible. Kent *v.* Town, 80 Misc. 560, 141 N. Y. S. 932.

492-42 Brodie *v.* Lewistown, 164 Ill. App. 335; Servoss *v.* Amsterdam, 64 Misc. 667, 120 N. Y. S. 280; Kortendick *v.* Waterford, 142 Wis. 413, 125 N. W. 945. See vol. 8, p. 922, n. 90, and supplement thereto.

493-47 Hartford *v.* Hause, 106 Md 439, 67 A. 273. See vol. 8, p. 908, n. 40, and supplement thereto.

494-48 Falldin *v.* Seattle, 57 Wash. 307, 106 P. 914.

494-51 Jones *v.* Seattle, 51 Wash. 245, 98 P. 743. See vol. 8, p. 905, n. 35, and supplement thereto.

495-53 Madisonville *v.* Stewart (Ky.), 121 S. W. 421 (not harmful if existence of defect not controverted); Perry *v.* Sedalia, 168 Mo. App. 235, 153 S. W. 536; Woods *v.* Poplar Bluff, 136 Mo. App. 155, 116 S. W. 1109; Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805. See vol. 8, p. 914, n. 67 et seq., and supplement thereto. *Contra,* Tise *v.* Thomasville, 151 N. C. 281, 65 S. E. 1007.

"As tending to establish the defendant's negligence the court below admitted evidence of the condition of the coal hole 30 days after the accident, and that the defendant then caused it to be repaired. This evidence was received over the objection and exception of the defendant, and constituted prejudicial error. Whether the defendant was negligent was a question which should have been decided upon the facts as they existed at the time of the accident. Clapper *v.* Town of Waterford, 131 N. Y. 382, 30 N. E. 240." Lewis *v.* Gleason, 123 N. Y. S. 36.

If such evidence received without objection testimony as to dates of repairs harmless. Witt *v.* Latimer, 139 Ia. 273, 117 N. W. 680.

496-56 City of Hammond *v.* Jahnke, 178 Ind. 177, 99 N. E. 39; Tise *v.* Thomasville, 151 N. C. 281, 65 S. E. 1007.

Subsequent repairs shown to meet contentions that condition of highway prevented repairs, and that officers were misled by statutory notice of defect. Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805. And to identify place of injury. Kelley *v.* Boston, 201 Mass. 86, 87 N. E. 494.

496-57 Time of repairs shown in rebuttal. Tise *v.* Thomasville, 151 N. C. 281, 65 S. E. 1007.

496-59 Williams *v.* Inhab. of Winthrop, 213 Mass. 581, 100 N. E. 1101.

497-60 Apker *v.* Hoquiam, 51 Wash. 567, 99 P. 746, injuries to others in same accident.

497-62 Terry *v.* Village of Perry, 199 N. Y. 79, 92 N. E. 91; Friedman *v.* New York, 63 Misc. 310, 116 N. Y. S. 750; Smith *v.* Tacoma, 51 Wash. 101, 98 P. 91. But see Williams *v.* Inhab. of Winthrop, 213 Mass. 581, 100 N. E. 1101.

498-64 Flansburg *v.* Town, 205 N. Y. 423, 98 N. E. 750; Gastel *v.* New York, 194 N. Y. 15, 86 N. E. 833.

498-66 Winona *v.* Botzet, 169 Fed. 321, 94 C. C. A. 563, fright by steam whistle.

Proof other horses not frightened inadmissible. Kent *v.* Town, 80 Misc. 560, 141 N. Y. S. 932.

499-68 City of Covington *v.* Westbay, 156 Ky. 839, 162 S. W. 91; Lamb *v.* Lake Tp., 175 Mich. 77, 140 N. W. 1069; Falldin *v.* Seattle, 57 Wash. 307, 106 P. 914. See vol. 8, p. 929, n. 18, and supplement thereto. But see Williams *v.* Inhab. of Winthrop, 213 Mass. 581, 100 N. E. 1101.

499-69 Denver *v.* Maurer, 47 Colo. 209, 106 P. 875. See vol. 8, p. 932, n. 30, and supplement thereto.

499-70 Denver *v.* Maurer, supra.

Nor upon question whether city could not discover defect. Indianapolis *v.* Slider (Ind.), 105 N. E. 56.

499-71 Garske *v.* Ridgeville, 123 Wis. 503, 102 N. W. 22. See vol. 8, p. 931, n. 29, and supplement thereto.

500-72 *Contra*, Gould *v.* Hutchins, 73 N. H. 69, 58 A. 1046, admissible if not too remote. See vol. 11, p. 815, n. 81, and supplement thereto.

Burden on plaintiff to show ordinary care to avoid injury through collision. Nadeau *v.* Sawyer, 73 N. H. 70, 59 A. 369. See Kiernan *v.* Cashin, 92 N. Y. S. 255. Where pedestrian seeks recovery for injury sustained by being struck by automobile burden on him to show negligence on part of defendant constituting proximate cause of injury. Simeone *v.* Lindsay, 6 Penne. (Del.) 224, 65 A. 778.

Burden does not shift when plaintiff is a child.—Where a bicycle rider collided with a pedestrian, and latter brought action, the fact that plaintiff was a child and defendant a man does not shift the burden from plaintiff to defendant to show which, if either, was to blame. Lee *v.* Jones, 181 Mo. 291, 79 S. W. 927.

Burden of proving contributory negligence.—In an action by a traveler on a highway for injury from collision with vehicle burden on defendant to show plaintiff's contributory negligence. Standard O. Co. *v.* Hartman, 102 Md. 563, 62 A. 805.

Condition of highway remote from place of accident.—Where a plaintiff was injured by reason of the fact that his horse was frightened by a passing automobile, evidence inadmissible as to condition of the highway three hundred feet from where defendant's witness saw the automobile and some distance from where accident occurred. Strand *v.* Co., 136 Ia. 68, 113 N. W. 188.

Testimony as to noise of automobile. Where an action was brought for injuries resulting from fright of plaintiff's horse by automobile, testimony admissible showing machine made more noise than any other witness had heard. Fletcher *v.* Dixon, 107 Md. 420, 68 A. 875.

500-73 See vol. 8, p. 949, n. 23, and supplement thereto.

500-76 *Comp.* Howard *v.* Osage, 89 Kan. 205, 132 P. 187.

500-77 Heberling *v.* Warrensburg, 133 Mo. App. 544, 113 S. W. 673.

501-78 Sobriety of persons accompanying plaintiff when injured on a sidewalk immaterial. Jones *v.* Seattle, 51 Wash. 245, 98 P. 743.

Defendant's understanding of character of horse material. Ferryall *v.* Youlden, 76 N. H. 548, 85 A. 786.

Intoxication of plaintiff shown. Anderson *v.* Mayor, 6 Penne. (Del.) 485, 70 A. 204.

501-80 See vol. 8, p. 948, n. 14, and supplement thereto.

502-84 See vol. 9, p. 777, n. 18, and supplement thereto.

502-85 But see vol. 9, p. 778, n. 21, and supplement thereto.

503-87 See vol. 9, p. 772, n. 5, and supplement thereto.

503-91 Cole *v.* Barber (R. I.), 82 A. 129.

504-92 *Contra* if not made in discharge of duty. Escher *v.* County, 146 Ia. 738, 125 N. W. 810.

Indemnification of city by contractor cannot be shown. Hughes *v.* Detroit, 161 Mich. 283, 126 N. W. 214.

504-93 Appeal of St. John's Church, 83 Conn. 101, 75 A. 88; Highway Comrs. *v.* Kinahan, 240 Ill. 593, 88 N. E. 1044 (evidence must be clear and satisfactory); Phillips *v.* R. Co., 89 Kan. 835, 133 P. 129; Lowe *v.* Co., 25 S. D. 393, 126 N. W. 609.

Evidence held sufficient.—Hart *v.* Village, 89 Neb. 418, 131 N. W. 816.

Effect of adverse possession.—Town of Red Bluff *v.* Walbridge, 15 Cal. App. 770, 116 P. 77; S. *v.* De Vall, 157 Mo. App. 587, 138 S. W. 667; Morgan *v.* Town, 32 R. I. 528, 80 A. 271.

506-95 Actual nonuser must be proved under circumstances clearly indicating intention to surrender and abandon public right. Highway Comrs. *v.* Kinahan, 240 Ill. 593, 88 N. E. 1044

Nonuser of part.—Town of Red Bluff *v.* Walbridge, 15 Cal. App. 770, 116 P 77.

506-96 Town of Red Bluff *v.* Wal-

bridge, supra; Walker *v.* Syck, 146 Ky. 181, 142 S. W. 229.

Substituted highway must be legally adopted. Lowe *v.* Co., 25 S. D. 393, 126 N. W. 609.

507-97 Nature of acts more significant than time of nonuser. Mason *v.* Ross, 75 N. J. Eq. 136, 71 A. 141.

507-98 Lyons *v.* Mullen, 78 Neb. 151, 110 N. W. 743; Lowe *v.* Co., 25 S. D. 393, 126 N. W. 609.

507-99 Ownership of fee in village streets presumed in abutting owners. Ward *v.* Kropf, 120 N. Y. S. 476.

HOMESTEADS AND EXEMPTIONS

Removal presumptively permanent, 542-40; *Presumption of ownership of personalty stored on homestead,* 558-16.

See Homesteads and Exemptions, 11 STANDARD PROC.

512-1 Finding against existence of homestead. Snipes *v.* Morton (Tex. Civ.), 144 S. W. 286.

512-2 Cowan *v.* Staggs, 144 Ala. 178, 59 S. 153; Allen *v.* Shires, 47 Colo. 433, 107 P. 1070; Smith *v.* Spafford, 16 N. D. 208, 112 N. W. 965.

Dwelling may be on adjoining land. Gibbs *v.* Adams, 76 Ark. 575, 89 S. W. 1008 (separation of land from dwelling by street not conclusive as to right to claim it as part of homestead); Mann *v.* Jenkins, 33 Ky. L. R. 589, 110 S. W. 387.

513-3 U. S. *v.* Richards, 149 Fed. 443; Flowers *v.* Co., 89 Ark. 506, 117 S. W. 547.

514-6 Houston I. & B. Co. *v.* Sharp (Tex. Civ.), 114 S. W. 180.

514-8 U. S. *v.* Richards, 149 Fed. 443; Zollinger *v.* Dunnaway, 105 Mo. App. 36, 78 S. W. 666; Parker *v.* Cook, 57 Tex. Civ. 234, 122 S. W. 419.

515-11 *Contra* where she left former homestead on remarriage. Stobaugh *v.* Irons, 243 Ill. 55, 90 N. E. 272.

515-12 Steele *v.* Robertson, 75 Ark. 228, 87 S. W. 117; Gibbs *v.* Adams, 76 Ark. 575, 89 S. W. 1008; Matthews *v.* Jeacle, 61 Fla. 686, 55 S. 865; Somers *v.* Somers (S. D.), 146 N. W. 716; Roe *v.* Davis (Tex. Civ.), 142 S. W. 950; Cobb *v.* Collins, 51 Tex. Civ. 63, 111 S. W. 760. See Cunningham *v.* Marshall, 94 Neb. 302, 143 N. W. 197.

Presumption in favor of homestead where party lived on premises at time material furnished for which lien claimed. Lamb L. Co. *v.* Roberts, 23 S. D. 191, 121 N. W. 93.

516-14 Gillespie *v.* Co., 236 Ill. 188, 86 N. E. 219.

517-18 Dawson Co. *v.* Hudson, 137 Ga. 846, 74 S. E. 796.

518-21 Non-use of party for homestead purposes, not decisive. Green *v.* Richardson, 122 La. 361, 47 S. 682.

522-34 Phillips *v.* Williams, 130 Ky. 773, 113 S. W. 908.

522-36 Sloss-S. S. & I. Co. *v.* House, 157 Ala. 663, 47 S. 572. See infra, "Intent," 597-39.

523-46 Parol testimony competent to show application made for homestead. McLamb *v.* Lambertson, 4 Ga. App. 553, 62 S. E. 107.

524-50 Morris *v.* Simmons (Tex. Civ.), 138 S. W. 800; Thigpen *v.* Russell, 55 Tex. Civ. 211, 118 S. W. 1080.

525-52 Watson *v.* Bk., 56 Tex. Civ. 138, 119 S. W. 915.

526-56 Rogers *v.* Brotherhood, 131 Mo. App. 353, 111 S. W. 518.

526-57 Sheehy *v.* Scott, 128 Ia. 551, 104 N. W. 1139; Fox *v.* Bk., 126 Ia. 481, 102 N. W. 424.

526-58 Eastern Kentucky Asylum *v.* Cottle, 143 Ky. 719, 137 S. W. 235.

527-64 See Davis *v.* Low, 66 Or. 599, 135 P. 314.

528-69 Adjudication of bankrupt court, conclusive upon bankrupt's creditor. Morton *v.* Jones, 136 Ky. 797, 125 S. W. 247.

529-74 See Balance *v.* Gordon, 247 Mo. 119, 152 S. W. 358.

533-99 Victor *v.* Grimmer, 118 Mo. App. 592, 95 S. W. 274; Drought *v.* Stallworth, 45 Tex. Civ. 159, 100 S. W. 188.

533-1 Gebhart *v.* Merchant, 84 Ark. 359, 105 S. W. 1034; St. Mary Bk. & Tr. Co. *v.* Daigle, 128 La. 758, 55 S. 345; Wiener *v.* Zweib (Tex. Civ.), 128 S. W. 699.

534-2 Drought *v.* Stallworth, 45 Tex. Civ. 159, 100 S. W. 188.

534-3 Evidence showing abandonment. Burns *v.* Parker (Tex. Civ.), 137 S. W. 705.

534-4 Tyrrell *v.* Shannon, 147 Ia. 184, 123 N. W. 325; Am. Nat. Bk. *v.* Mathews (Ky.), 124 S. W. 811; National Bk. *v.* Chamberlain, 72 Neb. 469, 100 N. W. 943; Thigpen *v.* Russell, 55 Tex. Civ. 211, 118 S. W. 1080; Armstrong *v.* Neville (Tex. Civ.), 117 S. W. 1010 (conditional intent not material).

535-7 Hohn *v.* Pauly, 11 Cal. App. 724, 106 P. 266.

535-8 Elliott *v.* Parlin, 71 Kan. 665, 81 P. 500; Seilert *v.* McAnally, 223 Mo. 505, 122 S. W. 1064; Doman *v.* Fenton (Neb.), 147 N. W. 209; Whitford *v.* Kinzel, 92 Neb. 373, 138 N. W. 597, 90 Neb. 573, 133 N. W. 1124; Gaar *v.* Burge, 49 Tex. Civ. 599, 110 S. W. 181; Drought *v.* Stallworth, 45 Tex. Civ. 159, 100 S. W. 188 (presumption as to continuance); Baker *v.* Magee (Tex. Civ.), 136 S. W. 1161; Jones *v.* Kepford, 17 Wyo. 468, 100 P. 923.

Effect of abandonment of family by husband.—Somers *v.* Somers, 27 S. D 500, 131 N. W. 1091.

536-9 Vittengl *v.* Vittengl, 156 Ia. 41, 135 N. W. 63; Snodgrass *v.* Copple, 131 Mo. App. 346, 111 S. W. 845 (prima facie evidence only); Hoefling *v.* Thulemeyer (Tex Civ.), 142 S. W. 102; Rockwell *v.* Hudgens, 57 Tex. Civ. 504, 123 S. W. 185.

536-10 Embry *v.* Bk., 125 La. 116, 51 S. 87; Bennett *v.* Dempsey, 94 Miss. 406, 48 S. 901 (removal from state not essential; statute).

536-12 Stephen Putney Shoe Co. *v.* White, 172 Ala. 89, 55 S. 503.

Widow's failure to file declaration on removal, not conclusive. Sewell *v.* Sewell, 156 Ala. 616, 47 S. 204.

537-14 Armstrong *v.* Neville (Tex. Civ.), 117 S. W. 1010.

537-15 Matthews *v.* Jeacle, 61 Fla. 686, 55 S. 865; Am. Nat. Bk. *v.* Mathews (Ky.), 124 S. W. 811; Collins *v.* Bounds, 82 Miss. 447, 34 S. 355; Snodgrass *v.* Copple, 131 Mo. App. 346, 111 S. W. 845; Victor *v.* Grimmer, 118 Mo. App. 592, 95 S. W. 274; Meyer D. Co. *v.* Bybee, 179 Mo. 354, 78 S. W. 579; Ayres *v.* Patton, 51 Tex. Civ. 186, 111 S. W. 1079; Jones *v.* Kepford, 17 Wyo. 468, 100 P. 923.

537-18 Alvord Nat. Bk. *v.* Ferguson (Tex. Civ.), 126 S. W. 622.

538-21 Wiener *v.* Zweib (Tex. Civ.), 128 S. W. 699; Jones *v.* Kepford, 17 Wyo. 468, 100 P. 923.

538-22 Somers *v.* Somers, 27 S. D. 500, 131 N. W. 1091.

538-23 Making entry on government land in another state, indicative of intention to abandon homestead, but is not abandonment if no removal. Kimberlin *v.* Gordon, 139 Mo. App. 464, 122 S. W. 1144.

539-28 Death of wife does not give occasion for setting apart homestead to husband, presumption being he will continue to occupy it. Wiener *v.* Zweib (Tex. Civ.), 128 S. W. 699.

540-31 Smith *v.* Spafford, 16 N. D. 208, 112 N. W. 965.

542-37 Swift *v.* Kleckner, 146 Mich. 91, 109 N. W. 34; Ungers *v.* Chapman, 146 Mich. 643, 109 N. W. 1124; Smith *v.* Spafford, 16 N. D. 208, 112 N. W. 965; Rockwell *v.* Hudgens, 57 Tex. Civ. 504, 123 S. W. 185 (pendency of criminal proceedings, circumstances under which claimant returned and subsequent payment for homestead); Gaar *v.* Burge, 49 Tex. Civ. 599, 110 S. W. 181.

542-38 McGregor *v.* Kellum, 50 Fla. 581, 39 S. 697; Lutz *v.* Ristine, 136 Ia. 684, 112 N. W. 818; Withers *v.* Love, 72 Kan. 140, 83 S. W. 204 (claimant confined in insane asylum); Swift *v.* Kleckner, 146 Mich. 91, 109 N. W. 34; Allen *v.* County, 81 Neb. 198, 115 N. W. 775; Weatherington *v.* Smith, 77 Neb. 363, 109 N. W. 381, 13 L. R. A. (N. S.) 430; Curry *v.* Wilson, 45 Wash. 19, 87 P. 1065.

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542-39 McGregor *v.* Kellum, 50 Fla. 581, 39 S. 697.

542-40 Unexplained removal, presumptively permanent. Allen *v.* County, 81 Neb. 198, 115 N. W. 775; Smith *v.* Spafford, 16 N. D. 208, 112 N. W. 965.

543-42 Am. Nat. Bk. *v.* Mathews (Ky.), 124 S. W. 811.

543-44 Gaar *v.* Burge, 49 Tex. Civ. 599, 110 S. W. 181.

544-48 Keller *v.* Lindow (Tex. Civ.), 133 S. W. 304.

545-50 McGregor *v.* Kellum, 50 Fla. 581, 39 S. 697.

545-51 Snodgrass *v.* Copple, 131 Mo. App. 346, 111 S. W. 845. See McGregor *v.* Kellum, 50 Fla. 581, 39 S. 697.

545-53 Snodgrass *v.* Copple, supra. See McGregor *v.* Kellum, supra.

546-55 Osage M. Co. *v.* Blanc, 79 Kan. 356, 99 P. 601; McGill *v.* Sutton, 67 Kan. 234, 72 P. 853 (claimant may show he voted under misapprehension of law).

547-59 Lawson *v.* Hammond, 119 Mo. App. 480, 94 S. W. 313.

547-61 Victor *v.* Grimmer, 118 Mo. App. 592, 95 S. W. 274; Lawson *v.* Hammond, 119 Mo. App. 480, 94 S. W. 313.

548-63 *Contra,* Zukoski *v.* McIntyre, 93 Miss. 806, 47 S. 435; Snodgrass *v.* Copple, 131 Mo. App. 346, 111 S. W. 845 (if intent to buy another homestead with proceeds).

Failure to invest proceeds of homestead in another homestead within reasonable time after sale, conclusive evidence of abandonment as against debts existing prior to later purchase. Baker *v.* Kash (Ky.), 113 S. W. 820.

548-65 Wiener *v.* Zweib (Tex. Civ.), 128 S. W. 699.

548-66 Burel *v.* Baker, 89 Ark. 168, 116 S. W. 181.

548-68 Ungers *v.* Chapman, 146 Mich. 643, 109 N. W. 1124.

Offer to sell by widow, abandonment. Phillips *v.* Williams, 130 Ky. 733, 113 S. W. 908.

548-70 Thigpen *v.* Russell, 55 Tex. Civ. 211, 118 S. W. 1080; Gaar *v.* Burge, 49 Tex. Civ. 599, 110 S. W. 181.

549-74 Clark *v.* Bird, 158 Ala. 278, 48 S. 359; Shatuck *v.* Weaver, 80 Kan. 82, 101 P. 649; Snodgrass *v.* Copple, 131 Mo. App. 346, 111 S. W. 845; Drought *v.* Stallworth, 45 Tex. Civ. 159, 100 S. W. 188 (temporary renting of part, no segregation made, does not divest). *Contra,* Autry *v.* Reasor, 102 Tex. 123, 113 S. W. 748.

549-75 Allen *v.* Campbell, 53 Tex. Civ. 76, 115 S. W. 360.

Lease to wife, evidence in favor of homestead right. Jones *v.* Klepford, 17 Wyo. 468, 110 P. 923.

550-82 "We are bound to presume that, when she went with him to assume the legal status of wife in the foreign jurisdiction where he resided, she ceased to have home, domicile, or right of homestead in this state. Such being the case, her return and reoccupation of the property could not clothe her anew with the rights which she had thus abandoned." Anderson *v.* Blakesly, 155 Ia. 430, 136 N. W. 210.

552-88 Husband's desertion of wife. Winkles *v.* Powell (Ala.), 55 S. 536.

552-92 Armstrong *v.* Neville (Tex. Civ.), 117 S. W. 1010.

552-93 Elliott *v.* Parlin, 71 Kan. 665, 81 P. 500; Carter *v.* Pickett, 39 Okla. 144, 134 P. 440; Armstrong *v.* Neville (Tex. Civ.), 117 S. W. 1010 ("It must be undeniably clear and beyond almost the shadow, at least, of all reasonable grounds of dispute"); Gaar *v.* Burge, 49 Tex. Civ. 599, 110 S. W. 181.

553-96 Bovine *v.* Selden, 155 Mich. 556, 119 N. W. 1090.

554-2 Dolan *v.* Sammons, 147 Ia. 466, 124 N. W. 880.

556-5 McLeod *v.* Noble, 122 La. 714, 48 S. 161.

557-10 Forbes *v.* Groves, 134 Mo. App. 729, 115 S. W. 451.

558-15 Freeman *v.* Matthews, 6 Ga. App. 164, 64 S. E. 716.

Abandonment of avocation by pursuit of another, question for jury. It is relevant to show time elapsed since given avocation actively engaged in. Van Lue *v.* Co., 12 Cal. App. 749, 108 P. 717.

558-16 A wife owning and occupying a homestead is presumptively in possession of crops stored thereon, and one seeking to subject same to husband's debt must show his ownership. Foreman *v.* Bk., 128 Ia. 661, 105 N. W. 163.

559-22 Contract of employment and rules of employer defining duties of employe, admissible to determine whether latter is a laborer or not. Robinson *v.* Co., 6 Ga. App. 203, 64 S. E. 717.

561-31 Subsequent acts of debtor and assignee may be shown on question of former's waiver of right to select exempt property. In re Kraus, 79 O. St. 314, 87 N. E. 176.

HOMICIDE

Premeditation—use of deadly weapon, 593-65; *Burden of proof of alibi,* 600-94; *Physical condition of accused,* 671-53; *Method of proof of other crimes,* 682-11; *Handprints,* 707-68; *Trailing by bloodhounds,* 707-68; *Killing during execution of process—previous threats by defendant,* 731-33; *Preliminary showing necessary to proof of physical condition,* 738-84; *Position of body as evidence of suicide,* 748-60; *Physical condition and contributory negligence of deceased,* 755-98; *Prior assaults by third person as evidence of apprehension,* 761-36; *Explanatory evidence as to threats,* 797-11.

580-1 Reversible error to refuse to so charge. Fowler *v.* S., 155 Ala. 21, 45 S. 913.

580-2 Strickland *v.* S., 151 Ala. 31, 44 S. 90; S. *v.* Blackburn, 7 Penne. (Del.) 479, 75 A. 536; S. *v.* Johns, 6 Penne. (Del.) 174, 65 A. 763; Sprouse *v.* C., 132 Ky. 269, 116 S. W. 344; Watkins *v.* C., 29 Ky. L. R. 1273, 97 S. W. 740; P. *v.* Dinser, 49 Misc. 82, 98 N. Y. S. 314; Adams *v.* S., 47 Tex. Cr. 347, 84 S. W. 231. *Contra*, Elliott *v.* S., 132 Ga. 758, 64 S. E. 1090.

580-6 Pettis *v.* S. (Tex. Cr.), 150 S. W. 790.

581-8 Pressley *v.* S., 132 Ga. 64, 63 S. E. 784.

581-9 Chesley *v.* S., 121 Ga. 340, 49 S. E. 258 (intent to kill implied where poison intended for one person eaten by another); Weisenbach *v.* S., 138 Wis. 152, 119 N. W. 843. See Munday *v.* S., 5 O. C. C. (N. S.) 656.

Presumption "can only be applied where the assault which resulted in death has been committed with a murderous weapon, or has otherwise been of such a nature that its probable and natural result would be to produce death." P. *v.* Dinser, 106 N. Y. S. 495, death of child from striking with hand.

Violent assault upon deceased, whom accused knew to have heart disease, if followed by death, presumed to have been done with intent to kill. S. *v.* Baldes, 133 Ia. 158, 110 N. W. 440.

581-12 Wilson *v.* S., 140 Ala. 43, 37 S. 93; P. *v.* Besold, 154 Cal. 303, 97 P. 871; S. *v.* Naylor (Del.), 90 A. 880; S. *v.* Stockley (Del.), 82 A. 1078; S. *v.* Jackson (Del.), 82 A. 824; S. *v.* Di Guglielmo, 4 Penne. (Del.) 336, 55 A. 350; S. *v.* Mills, 6 Penne. (Del.) 497, 69 A. 841; S. *v.* Underhill, 6 Penne. (Del.) 491, 69 A. 880; McLeod *v.* S., 128 Ga. 17, 57 S. E. 83; Fallon *v.* S., 5 Ga. App. 659, 63 S. E. 806; Nelson *v.* S., 4 Ga. App. 223, 60 S. E. 1072; S. *v.* Dillingham, 143 Ia. 282, 121 N. W. 1071; S. *v.* Maioni, 78 N. J. L. 339, 74 A. 526; S. *v.* McKay, 150 N. C. 813, 63 S. E. 1059; C. *v.* Palmer, 222 Pa. 299, 71 A. 100; U. S. *v.* Fitzgerald, 2 Phil. Isl. 419; Ford *v.* S. (Tex. Cr.), 142 S. W. 6; Deneaner *v.* S., 58 Tex. Cr. 624, 127 S. W. 201; S. *v.* Medley, 66 W. Va. 216, 66 S. E. 358.

581-13 Lewis *v.* S. (Ga. App.), 81 S. E. 378. See Coolman *v.* S., 163 Ind. 503, 72 N. E. 568.

581-14 S. *v.* Lee, 1 Boyce (Del.) 18, 74 A. 4; Ewing *v.* C., 129 Ky. 237, 111 S. W. 352; Pettis *v.* S. (Tex. Cr.), 150 S. W. 790; Hardin *v.* S., 51 Tex. Cr. 559, 103 S. W. 401 (may be considered by jury). See Stanton *v.* S. (Tex. Cr.), 151 S. W. 808.

581-15 Rigsby *v.* S., 174 Ind. 284, 91 N. E. 925. See S. *v.* Keener, 225 Mo. 488, 125 S. W. 747; Dawson *v.* S. (Tex. Cr.), 161 S. W. 469.

Some action indicating purpose to use deadly weapon must be taken to give rise to presumption; threats to use it, not enough. Spencer *v.* S., 59 Tex. Cr. 217, 128 S. W. 118.

582-16 Hunter *v.* S., 10 Ga. App. 831, 74 S. E. 553; Ripley *v.* S., 7 Ga. App. 679, 67 S. E. 834; S. *v.* Stubblefield, 239 Mo. 526, 144 S. W. 404.

582-17 Wright *v.* S., 148 Ala. 596, 42 S. 745; Horton *v.* P., 47 Colo. 252, 107 P. 257; Adams *v.* S., 125 Ga. 11, 53 S. E. 804; Fallon *v.* S., 5 Ga. App. 659, 63 S. E. 806. See Brown *v.* S., 142 Ala. 287, 38 S. 268.

582-18 Weisenbach *v.* S., 138 Wis. 152, 119 N. W. 843; Ullman *v.* S., 124 Wis. 602, 103 N. W. 6. See Smith *v.* S., 57 Tex. Cr. 455, 123 S. W. 698, applying presumption in favor of self-defense.

Use of deadly weapon in connection with other circumstances, may establish specific intent. Jackson *v.* S., 48 Tex. Cr. 648, 90 S. W. 34. And see S. *v.* Ruck, 194 Mo. 416, 92 S. W. 706; Wright *v.* S., 48 Tex. Cr. 613, 90 S. W. 36.

583-22 *Contra*, U. S. *v.* Taguibao, 1 Phil. Isl. 16.

583-25 Brown *v.* S., 142 Ala. 287, 38 S. 268; Ray *v.* S., 147 Ala. 5, 41 S. 519; S. *v.* Stockley (Del.), 82 A. 1078; Howard *v.* S., 2 Ga. App. 830, 59 S. E. 89; Starr *v.* S., 160 Ind. 661, 67 N. E. 527; S. *v.* Baker, 143 Ia. 224, 121 N. W. 1028; S. *v.* Bennett, 128 Ia. 713, 105 N. W. 324; P. *v.* Sandueci, 195 N. Y. 361, 88 N. E. 385 (repeated shots, blows or acts of violence point toward deliberate action); Munos *v.* S., 58 Tex. Cr. 147, 124 S. W. 941.

584-27 Taylor *v.* S., 82 Ark. 540, 102 S. W. 367; S. *v.* Bailey, 79 Conn. 589, 65 A. 951; S. *v.* Di Guglielmo, 4 Penne. (Del.) 336, 55 A. 350; S. *v.* Brinte, 4 Penne. (Del.) 551, 58 A. 258; S. *v.* Emory, 5 Penne. (Del.) 126, 58 A. 1036; S. *v.* Harmon, 4 Penne. (Del.) 580, 60 A. 866; S. *v.* Collins, 5 Penne.

(Del.) 263, 62 A. 224; Bradley *v.* S., 128 Ga. 20, 57 S. E. 237; Robinson *v.* S., 130 Ga. 361, 60 S. E. 1005; Burley *v.* S., 130 Ga. 343, 60 S. E. 1006; Williford *v.* S., 121 Ga. 173, 48 S. E. 962; Campbell *v.* S., 124 Ga. 432, 52 S. E. 914 (presumption applies, although evidence entirely circumstantial); Smith *v.* S., 124 Ga. 213, 52 S. E. 329; Tolbirt *v.* S., 124 Ga. 767, 53 S. E. 327; Mann *v.* S., 124 Ga. 760, 53 S. E. 324; P. *v.* Collins, 166 Mich. 4, 131 S. W. 78; Simms *v.* S. (Tex. Cr.), 148 S. W. 786; Potts *v.* S., 56 Tex. Cr. 39, 118 S. W. 535. See S. *v.* Creste (Del.) 86 A. 214; Nathan *v.* S., 131 Ga. 48, 61 S. E. 994; S. *v.* Henderson, 74 S. C. 477, 55 S. E. 117.

Homicide committed deliberately or without adequate cause presumed malicious. S. *v.* Brown, 5 Penne. (Del.) 339, 61 A. 1077; S. *v.* Bell, 5 Penne. (Del.) 192, 62 A. 147; S. *v.* Tilghman, 6 Penne. (Del.) 54, 63 A. 772; S. *v.* Johns, 6 Penne. (Del.) 174, 65 A. 763; S. *v.* Honey, 6 Penne. (Del.) 148, 65 A. 764; S. *v.* Underhill, 6 Penne. (Del.) 491, 69 A. 880.

584-28 Young *v.* S., 99 Ark. 407, 138 S. W. 475; Turner *v.* S., 139 Ga. 593, 77 S. E. 828; Boyd *v.* S., 136 Ga. 340, 71 S. E. 416; Leonard *v.* S., 133 Ga. 435, 66 S. E. 251. *Contra,* S. *v.* Dewey (Utah), 127 P. 275.

584-29 S. *v.* Watson (Del.), 82 A. 1086; S. *v.* Jackson (Del.), 82 A. 824; S. *v.* Blackburn, 7 Penne. (Del.) 479, 75 A. 536; Welty *v.* S. (Ind.), 100 N. E. 73; S. *v.* Prolow, 98 Minn. 459, 108 N. W. 873; S. *v.* Anderson, 53 Or. 479, 101 P. 198; Puryear *v.* S., 56 Tex. Cr. 231, 118 S. W. 1042. See Rhodes *v.* S., 133 Ga. 723, 66 S. E. 887.

585-30 S. *v.* Watson (Del.), 82 A. 1086; Fields *v.* C., 152 Ky. 80, 153 S. W. 29; S. *v.* Cameron (N. C.), 81 S. E. 748; S. *v.* Stockley (Del.), 82 A. 1078; Dougherty *v.* S., 59 Tex. Cr. 464, 128 S. W. 398.

An act done deliberately, or without adequate cause, is presumed to have been done with malice. S. *v.* Short, 2 Boyce (Del.) 491, 82 A. 239.

585-32 S. *v.* Smith, 78 Kan. 179, 96 P. 39; Kennison *v.* S., 80 Neb. 688, 115 N. W. 289; Lucas *v.* S., 78 Neb. 454, 111 N. W. 145; S. *v.* Rochester, 72 S. C. 194, 51 S. E. 685.

Admission of killing, coupled with statements showing justification, negatives presumption. Perkins *v.* S., 124 Ga. 6, 52 S. E. 17; Wall *v.* S., 5 Ga. App. 305, 63 S. E. 27. See Green *v.* S., 124 Ga. 343, 52 S. E. 431.

586-33 Roberson *v.* S. (Ala.), 62 S. 837; Garcia *v.* S. (Tex. Cr.), 156 S. W. 939.

587-35 Pumphrey *v.* S., 84 Neb. 636, 122 N. W. 19; S. *v.* McDowell, 145 N. C. 563, 59 S. E. 690. And see S. *v.* Kritchman, 84 Conn. 152, 79 A. 75.

Act naturally calculated to produce death, raises presumption. Cupps *v.* S., 120 Wis. 504, 97 N. W. 210, 98 N. W. 546.

External acts or circumstances transpiring before, at time of, or immediately after killing, relevant. Snowberger *v.* S., 58 Tex. Cr. 530, 126 S. W. 878.

587-36 Grubbs *v.* S., 5 Ala. App. 49, 59 S. 350; Monteith *v.* S., 161 Ala. 18, 49 S. 777; Brown *v.* S., 142 Ala. 287, 38 S. 268; Kennedy *v.* S., 147 Ala. 687, 40 S. 658; Allen *v.* S., 148 Ala. 588, 42 S. 1006; Burkett *v.* S., 154 Ala. 19, 45 S. 682; Clardy *v.* S., 96 Ark. 52, 131 S. W. 46; Taylor *v.* S., 82 Ark. 540, 102 S. W. 367; S. *v.* Naylor (Del.), 90 A. 880; S. *v.* Moore, 1 Boyce (Del.) 142, 74 A. 1112; S. *v.* Powell, 5 Penne. (Del.) 24, 61 A. 966; S. *v.* Brown, 5 Penne. (Del.) 339, 61 A. 1077; S. *v.* Tilghman, 6 Penne. (Del.) 54, 63 A. 772; S. *v.* Johns, 6 Penne. (Del.) 174, 65 A. 763; S. *v.* Honey, 6 Penne. (Del.) 148, 65 A. 764; S. *v.* Uzzo, 6 Penne. (Del.) 212, 65 A. 775; S. *v.* Cephus, 6 Penne. (Del.) 160, 67 A. 150; Flannigan *v.* S., 135 Ga. 21, 69 S. E. 171; S. *v.* Hayden, 131 Ia 1, 107 N. W. 929; S. *v.* Prolow, 98 Minn. 459, 108 N. W. 873; S. *v.* Robertson (N. C.), 81 S. E. 689; S. *v.* Fowler, 151 N. C. 731, 66 S. E. 567; S. *v.* Cole, 132 N. C. 1069, 44 S. E. 391; S. *v.* Walker, 145 N. C. 567, 59 S. E. 878; C. *v.* Gibson, 211 Pa. 546, 60 A. 1086; S. *v.* Byrd, 72 S. C. 104, 51 S. E. 542; Carson *v.* S., 57 Tex. Cr. 394, 123 S. W. 590; S. *v.* Medley, 66 W. Va. 216, 66 S. E. 358; Anderson *v.* S., 133 Wis. 601, 114 N. W. 112.

The deliberate selection and use of a deadly weapon is evidence of malice; and where malice exists, together with the killing, the crime of murder is complete. S. *v.* Jackson (Del.), 82 A. 824.

The burden of disproving malice is then on the accused. S. *v.* Short, 2 Boyce (Del.) 491, 82 A. 239.

"By the terms of article 51 of the Penal Code the intention is presumed whenever the means used are such as would ordinarily result in the commission of the forbidden act, but under the terms of article 717, supra, if the instrument be one not likely to produce death, then the presumption is reversed, and no such presumption can be indulged that death was designed unless from the manner in which the instrument was used such intention is made evidently to appear. It follows, therefore, from these statutes that the weapon or means used must possess the character of a deadly weapon without regard to the manner in which it is used; and, second, though not deadly, the manner of its use must show an evident intention to kill. The character of the weapon, therefore, cannot be fixed or determined by the manner of its use." Grant *v.* S. (Tex. Cr.), 143 S. W. 929.

588-37 Ty. *v.* Gutierrez, 13 N. M. 138, 79 P. 716.

589-39 Coolman *v.* S., 163 Ind. 503, 72 N. E. 568; S. *v.* Dunn, 221 Mo. 530, 120 S. W. 1179; S. *v.* Quick, 150 N. C. 820, 64 S. E. 168.

589-40 Paschal *v.* S., 125 Ga. 279, 54 S. E. 172; Hightower *v.* S., 56 Tex. Cr. 248, 119 S. W. 691.

589-41 S. *v.* Miele, 1 Boyce (Del.) 33, 74 A. 8.

589-42 McLin *v.* S., 48 Tex. Cr. 549, 90 S. W. 1107, it may be charged pistol is a deadly weapon.

589-43 Allen *v.* S., 148 Ala. 588, 42 S. 1006, piece of timber.

Judicial notice will not be taken that ax a deadly weapon. Bush *v.* S., 52 Tex. Cr. 398, 107 S. W. 348. It has been taken that club with which deceased killed, a deadly weapon. S. *v.* Dunn, 221 Mo. 530, 120 S. W. 1179.

Weapon not ordinarily deadly may be so when used upon a child or old person. Little *v.* S., 3 Ga. App. 441, 60 S. E. 113.

589-44 Clemons *v.* S., 48 Fla. 9, 37 S. 647 (metallic knucks); Nelson *v.* S., 4 Ga. App. 223, 60 S. E. 1072 (knife); S. *v.* Ruck, 194 Mo. 416, 92 S. W. 706 (heavy beer bottle).

590-49 See Paschal *v.* S., 125 Ga. 279, 54 S. E. 172.

591-52 Taylor *v.* S., 49 Fla. 69, 38 S. 380; Nelson *v.* S., 4 Ga. App. 223, 60 S. E. 1072; McDuffie *v.* S., 121 Ga. 580, 49 S. E. 708 (where weapon is before jury, opinion evidence as to its character, unnecessary); S. *v.* Spaugh, 199 Mo. 147, 97 S. W. 901; Hardin *v.* S., 51 Tex. Cr. 559, 103 S. W. 401 (doctor); Earles *v.* S., 52 Tex. Cr. 140, 106 S. W. 138.

591-53 Styles *v.* S., 5 Ala. App. 36, 59 S. 698.

591-56 S. *v.* Miele, 1 Boyce (Del.) 33, 74 A. 8; Coolman *v.* S., 163 Ind. 503, 72 N. E. 568.

591-58 Grant *v.* S. (Tex. Cr.), 143 S. W. 929.

Manner of use of means which produced death may give rise to presumption of intent. Grant *v.* S., 56 Tex. Cr. 411, 120 S. W. 481.

592-64 S. *v.* Roberson, 150 N. C. 837, 64 S. E. 182; U. S. *v.* Idica, 3 Phil. Isl. 313; S. *v.* Gravely, 66 W. Va. 375, 66 S. E. 503.

As to homicides committed by "lying in wait, poisoning, starvation, imprisonment, or torture" in which premeditation is shown or admitted—the presumption of murder in first degree applies. S. *v.* Matthews, 142 N. C. 621, 55 S. E. 342.

593-65 S. *v.* Prolow, 98 Minn. 459, 108 N. W. 873. See S. *v.* Medley, 66 W. Va. 216, 66 S. E. 358.

Use of deadly weapon will not raise presumption of premeditation and deliberation. S. *v.* Cole, 132 N. C. 1069, 44 S. E. 391.

Killing which occurs in commission of premeditated offense, in pursuance of specific intent, does not involve intent. C. *v.* Aston, 227 Pa. 106, 75 A. 1017.

593-66 Roberson *v.* S. (Ala.), 62 S. 837; S. *v.* Brinte, 4 Penne. (Del.) 551, 58 A. 258; S. *v.* Adams, 6 Penne. (Del.) 178, 65 A. 510; S. *v.* Samuels, 6 Penne. (Del.) 36, 67 A. 161; Blanton *v.* S., 72 Fla. 12, 41 S. 789; Middleton *v.* S., 63 Fla. 24, 58 S. 225; Rickerson *v.* S., 10 Ga. App. 464, 73 S. E. 681; Peace *v.* C., 146 Ky. 754, 143 S. W. 399; Levering *v.* C., 132 Ky. 666, 117 S. W. 253; S. *v.* Pressler, 16 Wyo. 214, 92 P. 806. See infra, "Reasonable Doubt," 628-18, et seq., also vol. 2, p. 790, n. 48; vol. 9, p. 921, n. 72; vol. 10, p. 626, n. 12 and supplement thereto.

Sufficient evidence.—Flake *v.* S., 2 Ala. App. 134, 56 S. 47; Hunter *v.* S., 104 Ark. 245, 149 S. W. 99; Dixon *v.* S., 103 Ark. 629, 145 S. W. 901; Jones *v.*

S., 102 Ark. 195, 143 S. W. 907; Spinks *v.* S., 104 Ark. 641, 149 S. W. 54; Trice *v.* S., 137 Ga. 784, 74 S. E. 243; Elliott *v.* S., 138 Ga. 23, 74 S. E. 691; Norton *v.* S., 137 Ga. 842, 74 S. E. 759; Josey *v.* S., 137 Ga. 769, 74 S. E. 282; Alford *v.* S., 137 Ga. 458, 73 S. E. 375; Scott *v.* S., 135 Ga. 29, 68 S. E. 792; Mixon *v.* S., 7 Ga. App. 805, 68 S. E. 315; Lewis *v.* S., 134 Ga. 531, 68 S. E. 101; Slaughter *v.* C., 149 Ky. 5, 147 S. W. 751; Bowling *v.* C., 148 Ky. 9, 145 S. W. 1126; S. *v.* Potoniec, 117 Minn. 80, 134 N. W. 305; S. *v.* Gow, 235 Mo. 307, 138 S. W. 648; P. *v.* Giusto, 206 N. Y. 67, 99 N. E. 190; P. *v.* Loose, 199 N. Y. 505, 92 N. E. 100; P. *v.* Gilbert, 199 N. Y. 10, 92 N. E. 85; P. *v.* Gambaro, 199 N. Y. 511, 92 N. E. 212; Hughes *v.* S. (Tenn.), 148 S. W. 543; Parker *v.* S. (Tex. Cr.), 149 S. W. 108; Wells *v.* S. (Tex. Cr.), 145 S. W. 950; York *v.* S. (Tex. Cr.), 142 S. W. 8; Vela *v.* S., 62 Tex. Cr. 361, 137 S. W. 120.

Evidence held to sustain a conviction for murder in second degree. Smith *v.* S. (Tex. Cr.), 146 S. W. 896; Burns *v.* S. (Tex. Cr.), 145 S. W. 356.

594-69 S. *v.* Herring, 131 La. 972, 60 S. 634; C. *v.* Deitrick, 221 Pa. 7, 70 A. 275; Mason *v.* S. (Tex. Cr.), 163 S. W. 66; Potts *v.* C., 113 Va. 732, 73 S. E. 470.

Evidence held to sustain a conviction of murder in first degree. C. *v.* Brent, 233 Pa. 381, 82 A. 469; Miller *v.* S. (Tex. Cr.), 144 S. W. 239.

595-71 Bryant *v.* Ty., 12 Ariz. 165, 100 P. 455; Scoggin *v.* S. (Ark.), 159 S. W. 211; S. *v.* Blackburn, 7 Penne. (Del.) 479, 75 A. 536; S. *v.* Byrd, 41 Mont. 585, 111 P. 407; Prince *v.* U. S., 3 Okla. Cr. 700, 109 P. 241; Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561; C. *v.* Reed, 234 Pa. 573, 82 A. 601; S. *v.* Drummond, 70 Wash. 260, 126 P. 541; S. *v.* Clark, 58 Wash. 128, 107 P. 1047; S. *v.* Trail, 59 W. Va. 175, 53 S. E. 17. See S. *v.* Naylor (Del.), 90 A. 880; S. *v.* Creste (Del.), 86 A. 214.

Where presumption of murder does not exist the burden of proving malice is on the state. S. *v.* Dewey (Utah), 127 P. 275.

595-73 S. *v.* Teachy, 138 N. C. 587, 50 S. E. 232; C. *v.* Greene, 227 Pa. 86, 75 A. 1024; S. *v.* Trail, 59 W. Va. 175, 53 S. E. 17; S. *v.* Clark, 58 Wash. 128, 107 P. 1047. See C. *v.* Lee, 226 Pa. 283, 75 A. 411; C. *v.* Pacito, 229 Pa. 328, 78 A. 828.

595-74 Daniel *v.* S., 126 Ga. 541, 55 S. E. 472; Pash *v.* C., 146 Ky. 390, 142 S. W. 700; P. *v.* Nelson, 145 App. Div. 680, 130 N. Y. S. 488; Noble *v.* S., 54 Tex. Cr. 436, 113 S. W. 281.

595-75 Bellamy *v.* S., 56 Fla. 43, 47 S. 868; U. S. *v.* Regis, 2 Phil. Isl. 113; McMillan *v.* S. (Tex. Cr.), 165 S. W. 576. See Sartin *v.* S., 51 Tex. Cr. 571, 103 S. W. 875. And see the title "Corpus Delicti," vol. 3, p. 664, and supplement thereto.

595-76 Bryant *v.* Ty., 12 Ariz. 165, 100 P. 455; P. *v.* Jones, 160 Cal. 358, 117 P. 176; S. *v.* Brown, 2 Boyce (Del.) 405, 80 A. 146; Parsons *v.* P., 218 Ill. 386, 75 N. E. 993; S. *v.* Gaddy (N. C.), 81 S. E. 608; S. *v.* McClure (N. C.), 81 S. E. 458; S. *v.* Walker, 145 N. C. 567, 59 S. E. 878; Williams *v.* S., 9 Okla. Cr. 206, 131 P. 179; Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561; U. S. *v.* Capisonda, 1 Phil. Isl. 575; Litton *v.* C., 101 Va. 833, 44 S. E. 923.

596-77 Petty *v.* S., 76 Ark. 515, 89 S. W. 465; P. *v.* Grill, 151 Cal. 592, 91 P. 515; Burley *v.* S., 130 Ga. 343, 60 S. E. 1006; S. *v.* Robertson (N. C.), 81 S. E. 689; S. *v.* Hazlet, 16 N. D. 426, 113 N. W. 374; C. *v.* Calhoun, 238 Pa. 474, 86 A. 472; S. *v.* Drummond, 70 Wash. 260, 126 P. 541. See Henderson *v.* S. (Ala. App.), 65 S. 721.

597-79 S. *v.* Lee, 1 Boyce (Del.) 18, 74 A. 4.

598-80 McBryde *v.* S., 156 Ala. 44, 47 S. 302; Robinson *v.* S., 155 Ala. 67, 45 S. 916; S. *v.* Bailey, 79 Conn. 589, 65 A. 951; S. *v.* Creste (Del.), 86 A. 214; S. *v.* Stockley (Del.), 82 A. 1078; S. *v.* Short, 2 Boyce (Del.) 491, 82 A. 239; S. *v.* Moore, 1 Boyce (Del.) 142, 74 A. 1112; S. *v.* Honey, 6 Penne. (Del.) 148, 65 A. 764; S. *v.* Cephus, 6 Penne. (Del.) 160, 67 A. 150; S. *v.* Skinner, 32 Nev. 70, 104 P. 223 (statute); S. *v.* Yates, 155 N. C. 450, 71 S. E. 317; S. *v.* Fowler, 151 N. C. 731, 66 S. E. 567; S. *v.* Walker, 145 N. C. 567, 59 S. E. 878; C. *v.* Palmer, 222 Pa. 299, 71 A. 100 (if intentional killing with deadly weapon shown); C. *v.* Colandro, 231 Pa. 343, 80 A. 571; S. *v.* Chastain, 85 S. C. 64, 67 S. E. 6; S. *v.* Byrd, 72 S. C. 104, 51 S. E. 542; S. *v.* Reeder, 72 S. C. 223, 51 S. E. 702; S. *v.* Moss, 77 S. C. 391, 57 S. E. 1098 (evidence of state may establish defense); S. *v.* Kibler, 79

S. C. 170, 60 S. E. 438; S. *v.* Dillard, 59 W. Va. 197, 53 S. E. 117.

598-81 Andrews *v.* S., 159 Ala. 14, 48 S. 858; Lawson *v.* S., 171 Ind. 131, 84 N. E. 974, cit. the text; S. *v.* Clayton, 145 Ia. 596, 124 N. W. 605; S. *v.* Usher, 126 Ia. 287, 102 N. W. 101; S. *v.* Yates, 132 Ia. 475, 109 N. W. 1005; S. *v.* Varnado, 128 La. 883, 55 S. 562; Turley *v.* S., 74 Neb. 471, 104 N. W. 934; De Leon *v.* S. (Tex. Cr.), 155 S. W. 247; Bordeaux *v.* S., 58 Tex. Cr. 61, 124 S. W. 640; Stuart *v.* S., 57 Tex. Cr. 592, 124 S. W. 656.

598-82 McDonald *v.* S., 12 Ga. App. 526, 77 S. E. 655; S. *v.* Ardoin, 128 La. 14, 54 S. 407; S. *v.* McPherson, 114 Minn. 498, 131 N. W. 645; De Leon *v.* S. (Tex. Cr.), 155 S. W. 247.

Where state relies almost entirely upon admissions of defendant, it must prove falsity of further statement he acted in self defense. Pratt *v.* S., 50 Tex. Cr. 227, 96 S. W. 8.

598-83 Tillis *v.* S. (Ala. App.), 64 S. 527; Monteith *v.* S., 161 Ala. 18, 49 S. 777; McCurley *v.* S. (Ala.), 39 S. 1022; Kennedy *v.* S., 147 Ala. 687, 40 S. 658; Allen *v.* S., 148 Ala. 588, 42 S. 1006.

598-84 Tillis *v.* S. (Ala. App.), 64 S. 527; Bluett *v.* S., 151 Ala. 41, 44 S. 84; S. *v.* Chastain, 85 S. C. 64, 67 S. E. 6; S. *v.* Andrews, 73 S. C. 257, 53 S. E. 423; S. *v.* Thrailkill, 71 S. C. 136, 50 S. E. 551 (by preponderance). See Brake *v.* S., 8 Ala. App. 98, 63 S. 11.

599-85 McGhee *v.* S., 178 Ala. 4, 59 S. 573. See Wright *v.* S., 148 Ala. 596, 42 S. 745.

599-86 Green *v.* S., 143 Ala. 2, 39 S. 362. See McBryde *v.* S., 156 Ala. 44, 47 S. 302.

599-87 McGhee *v.* S., 178 Ala. 4, 59 S. 573; P. *v.* Ashland, 20 Cal. App. 168, 128 P. 798; P. *v.* Oppenheimer, 156 Cal. 733, 106 P. 74; P. *v.* Snesser, 142 Cal. 354, 75 P. 1093; Allams *v.* S., 123 Ga. 509, 51 S. E. 506; S. *v.* Lyons, 113 La. 959, 37 S. 890; S. *v.* Maioni, 78 N. J. L. 339, 74 A. 526; S. *v.* Cloninger, 149 N. C. 567, 63 S. E. 154; C. *v.* Hallowell, 223 Pa. 494, 72 A. 845; S. *v.* Quigley, 26 R. I. 263, 58 A. 905; Roberts *v.* S. (Tex. Cr.), 150 S. W. 627; Thomas *v.* S., 55 Tex. Cr. 293, 116 S. W. 600; S. *v.* Harris, 74 Wash. 60, 132 P. 735. *Comp.* Mathley *v.* C., 27 Ky. L. R. 785, 86 S. W. 988.

Burden on state where accused is shown to have been previously and chronically insane. Allams *v.* S., 122 Ga. 500, 51 S. E. 506.

599-88 S. *v.* Barker, 216 Mo. 532, 115 S. W. 1102; S. *v.* Pressler, 16 Wyo. 214, 92 P. 806.

600-90 P. *v.* Grill, 151 Cal. 592, 91 P. 515, Penal Code, § 1105.

600-91 S. *v.* Hazlet, 16 N. D. 426, 113 N. W. 374; C. *v.* Dietrick, 221 Pa. 7, 70 A. 275; S. *v.* Ferguson, 91 S. C. 235, 74 S. E. 502.

600-92 Gater *v.* S., 141 Ala. 10, 37 S. 692; S. *v.* Yates, 132 Ia. 475, 109 N. W. 1005; S. *v.* Shelton, 164 N. C. 513, 79 S. E. 883.

Defendant not required to "convince" jury intoxication rendered him incompetent. S. *v.* Maugano, 77 N. J. L. 544, 72 A. 366.

600-94 Burden of proving an alibi, on defendant. Parkham *v.* S., 147 Ala. 57, 42 S. 1.

601-95 Moore *v.* S., 4 Ala. App. 65, 59 S. 189; Talley *v.* S., 174 Ala. 101, 57 S. 445; P. *v.* Bond, 13 Cal. App. 175, 109 P. 150; S. *v.* Stockley (Del.), 82 A. 1078; Rickerson *v.* S., 10 Ga. App. 464, 73 S. E. 681; Glasco *v.* S., 137 Ga. 336, 73 S. E. 578; S. *v.* Vanella, 40 Mont. 326, 106 P. 364; P. *v.* Sandueci, 195 N. Y. 361, 88 N. E. 385; S. *v.* McKay, 150 N. C. 813, 63 S. E. 1059; Ford *v.* S. (Tex Cr.), 142 S. W. 6.

Sufficient evidence.—P. *v.* Poole, 111 N. Y. S. 258.

Where charge is murder in first degree burden is on commonwealth to show all the elements of murder of first degree beyond a reasonable doubt. Com. *v.* Brent, 233 Pa. 381, 82 A. 469.

Venue must be proved by a preponderance of evidence. Nichols *v.* S., 102 Ark. 266, 143 S. W. 1071.

601-97 S. *v.* Ferguson, 91 S. C. 235, 74 S. E. 502.

602-99 Mann *v.* S., 124 Ga. 700, 53 S. E. 324; Bradley *v.* S., 128 Ga. 20, 57 S. E. 237; S. *v.* Fowler, 151 N. C. 731, 66 S. E. 567; S. *v.* Kendall, 143 N. C. 659, 57 S. E. 340.

604-5 Com. *v.* Colandro, 231 Pa. 343, 80 A. 571; C. *v.* Palmer, 222 Pa. 200, 71 A. 100; S. *v.* Ferguson, 91 S. C. 235, 74 S. E. 502; S. *v.* Strother, 81 S. C. 503, 66 S. E. 877; S. *v.* Beeler, 72 S. C. 223, 51 S. E. 702. See also Childs *v.* S., 98 Ark. 430, 136 S. W. 285.

Beyond a reasonable doubt.—S. *v.* McPherson, 114 Minn. 498, 131 N. W. 645.

Insufficient evidence.—Parker *v.* C., 141 Ky. 509, 133 S. W. 209; Florence *v.*

S., 61 Tex. Cr. 238, 134 S. W. 689.

604-6 S. *v.* Skinner, 32 Nev. 70, 104 P. 223; S. *v.* Chastain, 85 S. C. 64, 67 S. E. 6; S. *v.* Kibler, 79 S. C. 170, 60 S. E. 438.

604-8 P. *v.* Ashland, 20 Cal. App. 168, 128 P. 798; P. *v.* Suesser, 142 Cal. 354, 75 P. 1093; Allams *v.* S., 123 Ga. 500, 51 S. E. 506; S. *v.* Lyons, 113 La. 959, 37 S. 890; C. *v.* Lee, 226 Pa. 283, 75 A. 411; S. *v.* Quigley, 26 R. I. 263, 58 A. 905; Sartin *v.* S., 51 Tex. Cr. 571, 103 S. W. 875.

605-9 Johnson *v.* S., 57 Fla. 18, 49 S. 40; Bishop *v.* S., 97 Miss. 498, 52 S. 690; P. *v.* Carlin, 194 N. Y. 448, 87 N. E. 805; S. *v.* Pressler, 16 Wyo. 214, 92 P. 806.

605-12 S. *v.* Thomas, 135 Ia. 717, 109 N. W. 900.

606-14 C. *v.* Brent, 233 Pa. 381, 82 A. 469; S. *v.* Yates, 132 Ia. 475, 109 N. W. 1005.

606-17 Gambrell *v.* S., 92 Miss. 728, 46 S. 138.

Evidence held irrelevant.—Walker *v.* S., 137 Ga. 398, 73 S. E. 368.

606-19 Unusual form of questions not cause for excluding evidence in favor of accused. Brock *v.* S., 92 Miss. 712, 46 S. 67.

606-20 Wright *v.* S., 3 Ala. App. 24, 58 S. 68.

Evidence of "no bill" returned by grand jury is inadmissible. Crawley *v.* S., 137 Ga. 777, 74 S. E. 537.

Testimony of Deceased.—Accused was first tried on an assault charge prior to death of deceased. This evidence was reduced to writing and signed by deceased, was delivered to the clerk of the superior court properly identified. Held admissible in murder trial, as a compliance with Rev. § 3205. S. *v.* Wilson, 158 N. C. 599, 73 S. E. 812.

606-24 Cornelius *v.* S., 54 Tex. Cr. 173, 112 S. W. 1050, parts of testimony.

607-26 P. *v.* Huntington, 8 Cal. App. 612, 97 P. 760; Cornelius *v.* S., 54 Tex. Cr. 173, 112 S. W. 1050.

607-29 Kirkwood *v.* S., 3 Ala. App. 15, 57 S. 504; Haywood *v.* S., 90 Miss. 461, 43 S. 614; Swanney *v.* S. (Tex. Cr.), 146 S. W. 548.

Sounds heard by witness over the telephone. S. *v.* Rasco, 239 Mo. 535, 144 S. W. 449.

Unconnected acts are irrelevant.—Howard *r.* Com., 144 Ky. 644, 139 S. W. 844.

That carnival was in progress may be shown to help to fix dates and circumstances. Nelson *v.* S., 51 Tex. Cr. 349, 101 S. W. 1012.

Manner and appearance of deceased during conversation between several parties may be testified to by witness who had never seen him before. Watson *v.* S., 52 Tex. Cr. 85, 105 S. W. 509.

Request of defendant for private talk with deceased may be shown. Vaughn *v.* S., 51 Tex. Cr. 180, 101 S. W. 445.

Instantaneousness of death may be shown. Bluett *v.* S., 151 Ala. 41, 44 S. 84.

In a poisoning case nature and character of the suffering of deceased and manner of death, material. Nordan *v.* S., 143 Ala. 13, 39 S. 406.

607-30 Jones *v.* United States, 179 Fed. 584, 103 C. C. A. 142; S. *v.* Rasco, 239 Mo. 535, 144 S. W. 449; Dietz *v.* S., 149 Wis. 462, 136 N. W. 166.

Testimony as to sound of shots and appearance of shell taken from pistol found near body of deceased, admissible. Noel *v.* S., 161 Ala. 25, 49 S. 824.

608-31 Hill *v.* S., 146 Ala. 51, 41 S. 621; Jacobs *v.* S., 146 Ala. 103, 42 S. 70 (condition of prosecutor in action for assault with intent to kill); Fowler *v.* S., 155 Ala. 21, 45 S. 913; Bennett *v.* S., 95 Ark. 100, 128 S. W. 851; P. *v.* Rogers, 163 Cal. 476, 126 P. 143; Simms *v.* S. (Tex. Cr.), 148 S. W. 786; Ward *v.* S. (Tex. Cr.), 146 S. W. 931; Welch *v.* S., 57 Tex. Cr. 111, 122 S. W. 880 (without first showing body not disturbed); Cole *v.* S., 48 Tex. Cr. 439, 88 S. W. 341.

Where a father and son were killed at the same time, evidence of the son's wounds are admissible in a prosecution for murder of the father. P. *v.* Sartori, 168 Mich. 308, 134 N. W. 200.

Bruises on body may be shown on issue whether poison taken voluntarily or administered by force. Green *v.* S., 125 Ga. 742, 54 S. E. 724.

Photograph of body admissible, although defendant admits location and character of wounds. S. *v.* Powell, 5 Penne. (Del.) 24, 61 A. 966. And see S. *r.* Roberts, 28 Nev. 350, 82 P. 100 (photographs of wounds); Young *v.* S., 49 Tex. Cr. 207, 92 S. W. 841.

608-32 P. *v.* Bond, 13 Cal. App. 175, 109 P. 150; Lundy *v.* S., 59 Tex. Cr. 131, 127 S. W. 1032.

View of scene may be taken and evidence taken during such view. Underwood *v.* C., 27 Ky. L. R. 8, 84 S. W. 310.

Hearsay inadmissible.—Patterson *v.* S., 156 Ala. 62, 47 S. 52.

608-33 Bennett *v.* S., 93 Ark. 100, 128 S. W. 851; S. *v.* Nordall, 38 Mont. 327, 99 P. 960 (everything found in ruins of burned home, in which lives of family lost, may be shown); Cabrera *v.* S., 56 Tex. Cr. 141, 118 S. W. 1054.

Other evidence of shooting than wound may be given—as bullet marks on a house and bushes, and freshly emptied cartridge shells. S. *v.* Peterson, 149 N. C. 533, 63 S. E. 87.

608-35 Ott *v.* S., 160 Ala. 29, 49 S. 810; Starr *v.* S., 160 Ind. 661, 67 N. E. 527; Frazier *v.* C. (Ky.), 114 S. W. 268; Hill *v.* S., 54 Tex. Cr. 646, 114 S. W. 117; Cole *v.* S., 48 Tex. Cr. 439, 88 S. W. 341 (blood on ground); Butler *v.* S., 61 Tex. Cr. 133, 134 S. W. 230.

Hats found at place of homicide as res gestae. C. *v.* Karamarkovic, 218 Pa. 405, 67 A. 650.

Empty shells found next day.—Nickles *v.* S., 48 Fla. 46, 37 S. 312. But see Tinsley *v.* S., 52 Tex. Cr. 91, 106 S. W. 347.

608-36 Tillman *v.* S. (Ark.), 166 S. W. 582; Sellers *v.* S., 91 Ark. 175, 120 S. W. 840; P. *v.* Grill, 151 Cal. 592, 91 P. 515; S. *v.* Roger, 129 Ia. 229, 105 N. W. 455; Newcomb *v.* S., 49 Tex. Cr. 550, 95 S. W. 1048; Gibson *v.* S., 53 Tex. Cr. 349, 110 S. W. 41. And see vol. 9, p. 781, and supplement thereto.

Photographs of body admissible.—P. *v.* Rogers, 163 Cal. 476, 126 P. 143.

608-37 Noel *v.* S., 161 Ala. 25, 49 S. 824; P. *v.* Antony, 146 Cal. 124, 79 P. 858; S. *v.* Cummings, 189 Mo. 626, 88 S. W. 706; Ty. *v.* Price, 14 N. M. 262, 91 P. 733 (minor inaccuracies no objection); P. *v.* Sexton, 187 N. Y. 495, 80 N. E. 396 (map with red line designating path followed by defendant in going from his house to scene of homicide); S. *v.* Finch, 54 Or. 482, 103 P. 505; S. *v.* Remington, 50 Or. 99, 91 P. 473 (map by competent surveyor admissible though made at direction of district attorney to illustrate his theory).

609-40 P. *v.* Mahatch, 148 Cal. 200, 82 P. 779, objects correctly placed by witnesses to represent conditions at time of homicide. *Contra*, Brett *v.* S., 94 Miss. 660, 47 S. 781, *foll.* Fere *v.* S., stated in corresponding note in original work.

610-42 Martin *v.* C., 30 Ky. L. R. 1196, 100 S. W. 872 (deceased sold liquor, irrelevant); S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235 (evidence as to business of deceased and that it made him many enemies, irrelevant). See S. *v.* Cummings, 189 Mo. 626, 88 S. W. 706 (business of deceased when witness first knew him, immaterial).

610-45 Habit of deceased to carry bill-book in pocket may be testified to. Carwile *v.* S., 148 Ala. 576, 39 S. 220.

610-46 Richardson *v.* S., 145 Ala. 46, 41 S. 82 (presence about a mile from scene of homicide); Rose *v.* S., 144 Ala. 114, 42 S. 21 (admissible though evidence showing killing by defendant, direct); Reed *v.* S., 130 Ga. 52, 60 S. E. 191 (fact accused last person seen with deceased, important); S. *v.* Miller, 71 N. J. L. 527, 60 A. 202 (absence of defendant from accustomed place); Williams *v.* S. (Tex. Cr.), 144 S. W. 622.

Also those of an accomplice.—Jones *v.* S., 174 Ala. 53, 57 S. 31.

610-47 Thomas *v.* S. (Ala. App.), 65 S. 863 (nervousness of accused); Givins *v.* S., 8 Ala. App. 122, 62 S. 1020; Sanford *v.* S., 2 Ala. App. 81, 57 S. 134; Mangum *v.* S., 156 Ala. 95, 47 S. 104 (number of people present); P. *v.* Hayes, 9 Cal. App. 301, 99 P. 386; Carnes *v.* C., 146 Ky. 425, 142 S. W. 723; Cross *v.* S., 118 Md. 660, 86 A. 223; S. *v.* Lance, 149 N. C. 551, 63 S. E. 198; Rogers *v.* S., 9 Okla. Cr. 277, 131 P. 941; S. *v.* Tribett, 74 Wash. 125, 132 P. 875.

Evidence of intoxication of deceased two hours before the assault is irrelevant. Jones *v.* S., 174 Ala. 53, 57 S. 31.

610-48 Medley *v.* S., 156 Ala. 78, 47 S. 218; Glass *v.* S., 147 Ala. 50, 41 S. 727; Morris *v.* S., 146 Ala. 66, 41 S. 274 (acts occurring same day and leading up to homicide); Stallworth *v.* S., 146 Ala. 8, 41 S. 184; Williams *v.* S., 147 Ala. 10, 41 S. 992; Way *v.* S., 155 Ala. 52, 46 S. 273; Jackson *v.* S., 177 Ala. 12, 59 S. 171; Humphries *v.* S., 2 Ala. App. 1, 56 S. 72; P. *v.* Cipolla, 155 Cal. 224, 100 P. 252; S. *v.* Perry, 124 La. 931, 50 S. 799; S. *v.* Rasco, 239 Mo. 535, 144 S. W. 449; S. *v.* Stewart, 156 N. C. 636, 72 S. E. 193; Coulter *v.* S.

(Tex. Cr.), 162 S. W. 885; Simpson *v.* S. (Tex. Cr.), 154 S. W. 999; Ryan *v.* S. (Tex. Cr.), 142 S. W. 878; Davis *v.* S. (Tex. Cr.), 143 S. W. 1161; Kinney *v.* S. (Tex. Cr.), 144 S. W. 257; Thompson *v.* S., 55 Tex. Cr. 120, 113 S. W. 536; Fonseca *v.* S., 48 Tex. Cr. 28, 85 S. W. 1069; Waggoner *v.* S., 49 Tex. Cr. 260, 92 S. W. 38; Moore *v.* S., 52 Tex. Cr. 336, 107 S. W. 540; S. *v.* Vance, 38 Utah 1, 110 P. 434.

Admissibility of communication over which difficulty arose. Addington *v.* S., 8 Okla. Cr. 703, 130 P. 311.

Testimony as to the deceased's shooting craps in the house of witness 30 minutes before the shooting occurred is not admissible as part of res gestae. Parris *v.* S., 175 Ala. 1, 57 S. 857.

"**The remark of Fisher** was made as the shot was fired, as was the remark of deceased, and is a part of the event; was addressed to the defendant. He must have heard it and made no reply. Witness Pete shows he was the first person to deceased, and only a few minutes had transpired from the shooting until the statement was made." Kinney *v.* S. (Tex. Cr.), 144 S. W. 257.

Evidence held inadmissible.—Weaver *v.* S., 1 Ala. App. 48, 55 S. 956.

611-49 Bailey *v.* S. (Ala. App.), 65 S. 422; Lawson *v.* S., 155 Ala. 44, 46 S. 259; P. *v.* White, 251 Ill. 67, 95 N. E. 1036; McGowan *v.* C. (Ky.), 117 S. W. 387 (about an hour before homicide); Ty. *v.* Price, 14 N. M. 262, 91 P. 733; S. *v.* Benjamin (R. I.), 71 A. 65; Robertson *v.* S. (Tex. Cr.), 150 S. W. 627; Brown *v.* S., 56 Tex. Cr. 389, 120 S. W. 444; Hardison *v.* S. (Tex. Cr.), 85 S. W. 1071; Renn *v.* S. (Tex. Cr.), 143 S. W. 167.

Two hours previous.—Bone *v.* S., 8 Ala. App. 59, 62 S. 455.

As against accomplice evidence of acts of principals prior to his connection with crime, inadmissible. Beard *v.* S., 57 Tex. Cr. 323, 123 S. W. 147.

612-50 Bishop *v.* S. (Ala.), 61 S. 820; Newman *v.* S., 160 Ala. 102, 49 S. 786; P. *v.* Woods, 147 Cal. 265, 81 P. 652 (robbery of third person which was occasion of deceased officer's interference); Smith *v.* C., 29 Ky. L. R. 231, 92 S. W. 610 (difficulty with children of deceased); P. *v.* Del Vermo, 192 N. Y. 470, 85 N. E. 690; S. *v.* Thrailkill, 71 S. C. 136, 50 S. E. 551, 73 S. C. 314, 53 S. E. 482; Muldrew *v.* S. (Tex. Cr.), 166 S. W. 156; McKinney *v.* S., 49 Tex. Cr. 591, 96 S. W. 48; Moore *v.* S., 52 Tex. Cr. 336, 107 S. W. 540; Weisenbach *v.* S., 138 Wis. 152, 119 N. W. 843.

612-51 Holland *v.* S., 55 Tex. Cr. 27, 115 S. W. 48.

612-52 Wells *v.* S. (Ala.), 65 S. 950; Pate *v.* S., 150 Ala. 10, 43 S. 343; Sims *v.* S., 59 Fla. 38, 52 S. 198; S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461 (surrender to constable); Powers *v.* C., 26 Ky. L. R. 277, 92 S. W. 975; S. *v.* McKenzie (N. C.), 81 S. E. 301; McKelvey *v.* S. (Tex. Cr.), 155 S. W. 932; Derden *v.* S., 56 Tex. Cr. 396, 120 S. W. 485 (attempted assault at place other than that where fatal injury inflicted).

Evidence held too remote.—Defendant walked several hundred yards to his home, put up his gun, told his father of the killing, and then walked a mile to the home of the justice of the peace, and gave himself up. He then offered to prove as res gestae by himself and by the justice of the peace what he then told the justice of the peace of the killing. Blue *v.* S. (Tex. Cr.), 148 S. W. 730.

But not acts not connected with the killing. Gibbons *v.* S., 137 Ga. 786, 74 S. E. 549.

An act not connected with the killing is inadmissible. Gibbons *v.* S., 137 Ga. 786, 74 S. E. 549.

Surrender of accused and admission of killing, inadmissible as original evidence. Jones *v.* S., 132 Ga. 340, 63 S. E. 1114.

Acts of third parties in ordering spectators away from body of deceased and in moving articles near it, may be shown. Eggleston *v.* S., 59 Tex. Cr. 542, 128 S. W. 1105.

613-53 Wells *v.* S. (Ala.), 65 S. 950; Conwill *v.* S., 8 Ala. App. 82, 62 S. 1006; Hammond *v.* S., 147 Ala. 79, 41 S. 761; Pate *v.* S., 150 Ala. 10, 43 S. 343; Arnold *v.* S., 131 Ga. 494, 62 S. E. 806; Helton *v.* C., 27 Ky. L. R. 137, 84 S. W. 574; Miracle *v.* C., 148 Ky. 453, 146 S. W. 1136; S. *v.* Simon, 131 La. 520, 59 S. 975; S. *v.* Blount, 124 La. 202, 50 S. 12; P. *v.* Owen, 154 Mich. 571, 118 N. W. 590; S. *v.* Sassaman, 214 Mo. 695, 114 S. W. 599; P. *v.* Morse, 196 N. Y. 306, 89 N. E. 816; S. *v.* Anderson, 53 Or. 479, 101 P. 198; Roma *v.* S., 55 Tex. Cr. 344, 116 S. W. 598; Menefee *v.* S., 50 Tex. Cr. 249, 97 S. W. 486; Nelson *v.* S., 51 Tex.

Cr. 349, 101 S. W. 1012; Fay *v.* S., 52 Tex. Cr. 185, 107 S. W. 55. See S. *v.* Shockley, 29 Utah 25, 80 P. 865; vol. II, p. 805, n. 65, and supplement thereto.

Later disconnected crime may not be shown. Holland *v.* S., 162 Ala. 5, 50 S. 215 (assault on third person unless made in attempt to escape); P. *v.* Governale, 193 N. Y. 581, 86 N. E. 554.

613-54 Way *v.* S., 155 Ala. 52, 46 S. 273; Untreinor *v.* S., 146 Ala. 26, 41 S. 285; P. *v.* Hayes, 9 Cal. App. 301, 99 P. 386; McCoy *v.* S., 91 Miss. 257, 44 S. 814; S. *v.* Baker, 209 Mo. 444, 108 S. W. 6 (nature of wound, declarations and acts of third person, admissible); S. *v.* Woodward, 191 Mo. 617, 90 S. W. 90; Bruner *v.* U. S., 1 Okla. 205, 96 P. 597 (to explain deceased's presence at place of crime).

See Frank *v.* S., 141 Ga. 243, 80 S. E. 1016.

Scar on third person received in same fight, part of res gestae. Alarcon *v.* S., 47 Tex. Cr. 415, 83 S. W. 1115.

613-55 Kirklin *v.* S., 168 Ala. 83, 53 S. 253. See Frank *v.* S., 141 Ga. 243, 80 S. E. 1016.

614-58 Ausmus *v.* P., 47 Colo. 167, 107 P. 204; McKelvey *v.* S. (Tex. Cr.), 155 S. W. 932; Orner *v.* S. (Tex. Cr.), 143 S. W. 935.

Presumption on appeal is declarations admitted in evidence were part of res gestae, if they might have been such. Manning *v.* S., 51 Tex. Cr. 211, 98 S. W. 251.

614-59 Jones *v.* S., 88 Ark. 579, 115 S. W. 166.

614-60 Douglass *v.* S., 54 Tex. Cr. 639, 114 S. W. 808, provable if made within few moments.

614-62 Levering *v.* C., 132 Ky. 666, 117 S. W. 253; S. *v.* Lindsay, 122 La. 375, 47 S. 687; Price *v.* S., 1 Okla. Cr. 358, 98 P. 447.

615-64 Mitchell *v.* S., 82 Ark. 324, 101 S. W. 763; S. *v.* Uzzo, 6 Penne. (Del.) 212, 65 A. 775; Smith *v.* S., 11 Ga. App. 385, 74 S. E. 447.

615-65 Barnett *v.* S., 165 Ala. 59, 51 S. 299; P. *v.* Smith, 151 Cal. 619, 91 P. 511; Warrick *v.* S., 125 Ga. 133, 53 S. E. 1027; Gambrell *v.* C., 130 Ky. 513, 113 S. W. 476; Oliver *v.* S. (Tex. Cr.), 159 S. W. 235; Puryear *v.* S., 56 Tex. Cr. 231, 118 S. W. 1042. See S. *v.* Banner, 149 N. C. 519, 63 S. E. 81; McMillan *v.* S. (Tex. Cr.), 143 S. W. 1174.

616-66 Havard *v.* S., 55 Tex. Cr. 213, 115 S. W. 1185.

616-67 See Garcia *v.* S. (Tex. Cr.), 156 S. W. 939.

616-68 Simmons *v.* S., 145 Ala. 61, 40 S. 660; Amos *v.* S. (Ga. App.), 81 S. E. 903; Martinez *v.* S. (Tex. Cr.), 153 S. W. 886.

616-69 Johnson *v.* S. (Tex. Cr.), 167 S. W. 733.

617-70 Norwood *v.* S. (Ala. App.), 65 S. 851; Fowler *v.* S., 8 Ala. App. 168, 63 S. 40; Crowley *v.* S., 103 Ark. 315, 147 S. W. 47; Grant *v.* U. S., 28 App. Cas. (D. C.) 169; Goodman *v.* S., 122 Ga. 111, 49 S. E. 922; S. *v.* Lewis, 139 Ia. 405, 116 N. W. 606; C. *v.* Hargis, 124 Ky. 356, 30 Ky. L. R. 510, 99 S. W. 343; P. *v.* Del Vermo, 192 N. Y. 470, 85 N. E. 690; Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561; Fleming *v.* S., 54 Tex. Cr. 339, 114 S. W. 383; Rice *v.* S., 49 Tex. Cr. 569, 94 S. W. 1024 (accusatory statement addressed to defendant); Moore *v.* S., 49 Tex. Cr. 499, 96 S. W. 321; Johnson *v.* S. (Tex. Cr.), 149 S. W. 165; Bowles *v.* C., 103 Va. 816, 48 S. E. 527.

617-71 *Contra*, Williams *v.* S., 58 Fla. 138, 50 S. 749.

617-72 McGowan *v.* C. (Ky.), 117 S. W. 387 (two or three hours after, inadmissible); S. *v.* Birks, 199 Mo. 263, 97 S. W. 578 (one-half hour after shooting, inadmissible); Johnson *v.* S., 1 Okla. Cr. 321, 97 P. 1059 (few minutes after).

Written statement made soon after discovery of parties, admissible. S. *v.* Morrison, 64 Kan. 669, 68 P. 48.

617-73 Ludlow *v.* S., 156 Ala. 58, 47 S. 321 (half hour after and quarter of a mile or more away, not admissible); Nordan *v.* S., 143 Ala. 13, 39 S. 406 (twenty minutes after taking poison and while suffering, admissible); Walker *v.* S., 137 Ga. 398, 73 S. E. 368; Hobbs *v.* S., 55 Tex. Cr. 299, 117 S. W. 811; Tinsley *v.* S., 52 Tex. Cr. 91, 106 S. W. 347 (statement as to who shot him, made ten minutes after shooting, admissible); Stovall *v.* S., 53 Tex. Cr. 30, 108 S. W. 699 (fifteen minutes after).

619-74 Reaves *v.* S., 158 Ala. 5, 48 S. 373; Fisher *v.* S. (Ark.), 160 S. W. 210; Jones *v.* S., 88 Ark. 579, 115 S. W. 166; S. *v.* Kelleher, 201 Mo. 614, 100 S. W. 470.

619-75 Williams *v.* S., 58 Fla. 138, 50 S. 749; Washington *v.* S., 137 Ga.

218, 73 S. E. 512; Puryear *v.* S., 56 Tex. Cr. 231, 118 S. W. 1042; Wilson *v.* S., 49 Tex. Cr. 50, 90 S. W. 312. See McMahon *v.* S., 46 Tex. Cr. 540, 81 S. W. 296, conversation between defendant and co-actor as to cause, admissible.

619-76 Exculpating statement must be part of res gestae. Cole *v.* S., 125 Ga. 276, 53 S. E. 958.

620-77 Glenn *v.* S., 157 Ala. 12, 47 S. 1034 (profane language); S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461; P. *v.* Quimby, 134 Mich. 625, 96 N. W. 1061; Price *v.* S., 1 Okla. Cr. 358, 98 P. 447.

620-78 Simon *v.* S. (Ala.), 61 S. 801; Maddox *v.* S., 159 Ala. 53, 48 S. 689; Garner *v.* S., 6 Ga. App. 788, 65 S. E. 842; S. *v.* Beeson, 155 Ia. 355, 136 N. W. 317; S. *v.* Blount, 124 La. 202, 50 S. 12; S. *v.* Peterson, 149 N. C. 533, 63 S. E. 87; S. *v.* Hunter, 82 S. C. 153, 63 S. E. 685; Lee *v.* S., 121 Tenn. 521, 116 S. W. 881.

620-80 Ex parte S. (Ala.), 61 S. 53; Fleming *v.* S., 150 Ala. 19, 43 S. 219; P. *v.* Hayes, 9 Cal. App. 301, 99 P. 386.

620-81 Kennedy *v.* S. (Ala.), 62 S. 49 (just after killing); Macon *v.* S. (Ala.), 60 S. 312; Holland *v.* S., 162 Ala. 5, 50 S. 215 (statements when leaving place just after shooting); Pitts *v.* S., 140 Ala. 70, 37 S. 101 (declarations after walking a quarter of a mile, inadmissible); Ferguson *v.* S., 141 Ala. 20, 37 S. 448; Williams *v.* S., 147 Ala. 10, 41 S. 992; P. *v.* Sidelinger, 9 Cal. App. 298, 99 P. 390; Warrick *v.* S., 125 Ga. 133, 53 S. E. 1027 (narrative statement, inadmissible); Cole *v.* S., 125 Ga. 276, 53 S. E. 958; Park *v.* S., 126 Ga. 575, 55 S. E. 489; Garcia *v.* S. (Tex. Cr.), 156 S. W. 939 (ten or fifteen minutes after); Knight *v.* S., 55 Tex. Cr. 243, 116 S. W. 56 (immediately after); Long *v.* S., 48 Tex. Cr. 175, 88 S. W. 203; Craven *v.* S., 49 Tex. Cr. 78, 90 S. W. 311; Pratt *v.* S., 50 Tex. Cr. 227, 96 S. W. 8.

Statement of a witness which called forth an exclamation of "What have I done," from the defendant, held admissible. S. *v.* Butler (Mo.), 167 S. W. 509.

622-82 Morgan *v.* S., 8 Ala. App. 172, 63 S. 21; Pope *v.* S., 174 Ala. 63, 57 S. 245; Shirley *v.* S., 144 Ala. 35, 40 S. 269; Amos *v.* S. (Ga. App.), 81 S. E. 903; Kennedy *v.* C., 30 Ky. L. R. 1063, 100 S. W. 242; Baysinger *v.* Ty., 15 Okla. 386, 82 P. 728; Pettis *v.* S. (Tex. Cr.), 150 S. W. 790; Havard *v.* S., 55 Tex. Cr. 213, 115 S. W. 1185; Hull *v.* S., 50 Tex. Cr. 607, 100 S. W. 403. See S. *v.* Howard, 120 La. 311, 45 S. 260; Smith *v.* S. (Tex. Cr.), 156 S. W. 214.

622-83 Martinez *v.* S., 55 Colo. 51, 132 P. 64. *Comp.* Rains *v.* C., 29 Ky. L. R. 66, 92 S. W. 276, admissible when made to defendant.

Declarations of one participant, competent against co-defendant whether heard by latter or not. Elliott *v.* S., 58 Tex. Cr. 200, 125 S. W. 568.

Cries of "police, murder" inadmissible. Benjamin *v.* S., 148 Ala. 671, 41 S. 739.

623-84 Harbour *v.* S., 140 Ala. 103, 37 S. 330; Jones *v.* S., 66 Fla. 79, 62 S. 899; S. *v.* Benjamin (R. I.), 71 A. 65; Keeton *v.* S., 59 Tex. Cr. 316, 128 S. W. 404.

623-85 Humphries *v.* S., 2 Ala. App. 1, 56 S. 72; Rivers *v.* S., 10 Ga. App. 487, 73 S. E. 610; Stacy *v.* S., 53 Tex. Cr. 461, 110 S. W. 901.

623-86 Temple *v.* S. (Miss.), 62 S. 429.

623-87 Wells *v.* Ty., 14 Okla. 436, 78 P. 124 (expert).

Statement by third person in presence of accused, while being arrested, killing not accidental, may be proved. S. *v.* Benjamin (R. I.), 71 A. 65.

624-88 Opinion as to which party was in greater danger, inadmissible. S. *v.* Hamilton, 124 La. 132, 49 S. 1004.

624-91 Williams *v.* S., 147 Ala. 10, 41 S. 992; Poe *v.* S., 155 Ala. 31, 46 S. 521; Le Barron *v.* S. (Miss.), 65 S. 648; Wells *v.* Ty., 14 Okla. 436, 78 P. 124 (non-expert); Carson *v.* S., 57 Tex. Cr. 394, 123 S. W. 590. See Ball *v.* C., 31 Ky. L. R. 188, 101 S. W. 956.

624-92 Hays *v.* S., 155 Ala. 40, 46 S. 471 (may be asked what he took pistol with him for); Reagan *v.* S., 57 Tex. Cr. 642, 124 S. W. 685. *Contra* Pate *v.* S., 162 Ala. 32, 50 S. 357. See infra, "Intent," 597-39.

624-93 Ewing *v.* C., 129 Ky. 237, 111 S. W. 352.

625-97 Brown *v.* S., 7 Ala. App. 26, 61 S. 12; Patterson *v.* S., 156 Ala. 62, 47 S. 52; Gibbs *v.* S., 156 Ala. 70, 47 S. 65.

625-98 S. *v.* Flanagan, 83 N. J. L. 379, 84 A. 1046; P. *v.* Morse, 196 N. Y. 306, 89 N. E. 816; S. *v.* Robertson (N. C.), 81 S. E. 689; U. S. *v.* Sabio,

2 Phil. Isl. 485; S. *v.* Rowell, 75 S. C. 494, 56 S. E. 23 (intoxication may be shown); Williams *v.* S., 57 Tex. Cr. 492, 123 S. W. 1110.

Incompetent in face of undisputed evidence of premeditation. Handy *v.* S., 101 Md. 39, 60 A. 452.

625-99 Talley *v.* S., 174 Ala. 101, 57 S. 445; Crain *v.* S., 166 Ala. 1, 52 S. 31; P. *v.* Kafoury, 16 Cal. App. 718, 117 P. 938; S. *v.* Blackburn, 7 Penne. (Del.) 479, 75 A. 536; S. *v.* Brinte, 4 Penne. (Del.) 551, 58 A. 258; S. *v.* Adams, 6 Penne. (Del.) 178, 65 A. 510; Thomas *v.* S., 58 Fla. 122, 51 S. 410; S. *v.* Fleming, 17 Ida. 471, 106 P. 305; S *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982; Burns *v.* C., 136 Ky. 468, 124 S. W. 409; S. *v.* Towers, 106 Minn. 105, 118 N. W. 361; P. *v.* Jackson, 196 N. Y. 357, 89 N. E. 924; P. *v.* Morse, 196 N. Y. 306, 89 N. E. 816; P. *v.* Ferone, 120 App. Div. 323, 105 N. Y. S. 448; S. *v.* Robertson (N. C.), 81 S. E. 689; U. S. *v.* Gasal, 3 Phil. Isl. 354; Williams *v.* S., 57 Tex. Cr. 492, 123 S. W. 1110; Wysong *v.* S. (Tex. Cr.), 146 S. W. 941.

See Fowler *v.* S., 161 Ala. 1, 49 S. 788.

Evidence negativing malice.—S. *v.* Baldwin, 152 N. C. 822, 68 S. E. 148.

Bunching of tracks tend to show a lying in wait. Harrison *v.* S. (Ala.), 40 S. 57.

625-1 S. *v.* Robertson (N. C.), 81 S. E. 689. See Betts *v.* S., 57 Tex. Cr. 389, 124 S. W. 424.

625-2 Hall *v.* S. (Ala. App.), 65 S. 427; Phillips *v.* S., 161 Ala. 60, 49 S. 794 (appearance of vicinity in which crime committed, as affected thereby, may also be shown; but testimony as to where injured person taken for treatment is irrelevant); Wright *v.* S., 148 Ala. 596, 42 S. 745; S. *v.* Blount, 121 La. 202, 50 S. 12; S. *v.* Spaugh, 199 Mo. 147, 97 S. W. 901; S. *v.* Robertson (N. C.), 81 S. E. 689; S. *v.* Remington, 50 Or. 99, 91 P. 473; Williams *v.* S., 57 Tex. Cr. 492, 123 S. W. 1110. And see Phillips *v.* S., 170 Ala. 5, 54 S. 111.

626-4 Hall *v.* S. (Ala. App.), 65 S. 427 (length of time in hospital); Newman *v* S., 160 Ala. 102, 49 S. 786 (time of disability shown); Brown *v.* S., 142 Ala. 287, 38 S. 268; S. *v.* Churchill, 52 Wash. 210, 100 P. 309; S. *v.* Weisenberger, 42 Wash. 426, 85 P. 20.

626-10 P. *v.* Hill, 1 Cal. App. 414, 82 P. 398 (evidence defendant, armed with deadly weapon, knew he did not give deceased street car conductor $5, as he claimed, admissible); Corbitt *v.* S. (Tex. Cr.), 163 S. W. 436.

627-11 Whidden *v.* S., 64 Fla. 165, 59 S. 561; Wheat *v.* C. (Ky.), 118 S. W. 264. See S. *v.* Roberson, 150 N. C. 837, 64 S. E. 182.

Warning given by defendant to only person having right of access to a trunk, in which he had set a spring gun, admissible. S. *v.* Marfaudille, 48 Wash. 117, 92 P. 939, 14 L. R. A. (N. S.) 346.

627-12 Warford *v.* P., 41 Colo. 203, 92 P. 24.

627-14 Jones *v.* S. (Ala.), 61 S. 434; S. *v.* Banusik (N. J. L.), 64 A. 994 (orders given barkeeper to serve him water when he drank with deceased); Cooper *v.* S., 123 Tenn. 37, 128 S. W. 826.

627-15 Drake *v.* S. (Tex. Cr.), 143 S. W. 1157.

628-16 Phillips *v.* S., 161 Ala. 60, 49 S. 794; Flanagan *v.* S., 135 Ga. 221, 69 S. E. 171; S. *v.* Towers, 106 Minn. 105, 118 N. W. 361; S. *v.* Jones, 86 S. C. 17, 67 S. E. 160; Stanton *v.* S. (Tex. Cr.), 158 S. W. 994; Betts *v.* S., 57 Tex. Cr. 389, 124 S. W. 424 (cruelty of father to infant); Burnam *v.* S. (Tex. Cr.), 148 S. W. 757. See also C. *v.* Ballon, 229 Pa. 323, 78 A. 831.

628-18 P. *v.* Bowser, 196 N. Y. 296, 89 N. E. 818; Davis *v.* S. (Tex. Cr.), 143 S. W. 1161.

Opinion of witness as to what either party was endeavoring to do is inadmissible. Barlew *v.* S., 5 Ala. App. 290, 57 S. 601.

628-19 Nine months too remote.—Nichols *v.* S., 102 Ark. 266, 143 S. W. 1071.

Two years previous not too remote when connected with other testimony of continuous ill treatment down to time of homicide. Cooper *v.* S. (Tex. Cr.), 161 S. W. 1094.

"It requires no argument to show that, if the state could show ill feeling existing nearly three years before the tragedy, to show probable premeditation, thus raising the presumed crime from murder in the second degree to murder in the first degree, appellant should have the right to give evidence of good will for a period of a year or more, to hold the crime to the legal presumption of second degree murder, or to reduce it to a lower de-

gree." S. v. George, 58 Wash. 681, 109 P. 114.

628-20 Subsequent friendship of parties may be shown. Early v. S., 51 Tex. Cr. 382, 103 S. W. 868.

629-22 S. v. Clark, 119 La. 733, 44 S. 449; Holder v. S., 119 Tenn. 178, 104 S. W. 225.

629-23 Jahnke v. S., 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; Miera v. Ty., 13 N. M. 192, 91 P. 586; S. v. Bean, 77 Vt. 384, 60 A. 807. See vol. 11, p. 801, n. 58, and supplement thereto.

Erratum.—"Previous attempts" should appear on page 628 as catch line under IV, 7, D, b, (I.).

629-24 Watts v. S., 177 Ala. 24, 59 S. 270; Grubbs v. S., 5 Ala. App. 49, 59 S. 350; Holland v. S., 162 Ala. 5, 50 S. 215; Pitts v. S., 140 Ala. 70, 37 S. 101; Shirley v. S., 144 Ala. 35, 40 S. 269 (length of time of existence may be shown); Nort v. S. (Ariz.), 138 P. 543; P. v. Wilson, 23 Cal. App. 513, 138 P. 971; P. v. Piercy, 16 Cal. App. 13, 116 P. 322; Spencer v. C., 32 Ky. L. R. 880, 107 S. W. 342; S. v. Lovell, 235 Mo. 343, 138 S. W. 523; S. v. Tweed, 152 N. C. 843, 68 S. E. 139; Wells v. Ty., 14 Okla. 436, 78 P. 124; S. v. Brooks, 79 S. C. 144, 60 S. E. 518, 17 L. R. A. (N. S.) 483 (quarrel over custody of child); Robbins v. S. (Tex. Cr.), 166 S. W. 528; Coffman v. S. (Tex. Cr.), 165 S. W. 939; Powdrell v. S. (Tex. Cr.), 155 S. W. 231; Brewer v. S. (Tex. Cr.), 153 S. W. 622; Penton v. S. (Tex. Cr.), 149 S. W. 190; Hunter v. S., 59 Tex. Cr. 439, 129 S. W. 125.

See the title "**Similar Transactions.**"

Evidence by a witness as to what persons had told her of a difficulty between accused and deceased on the day before the killing, is not admissible. S. v. Lee, 130 La. 477, 58 S. 155.

A justice of the peace testified that he had a case in his court against defendant for fighting his wife, and also a constable that the defendant had paid fines for fighting his wife and assaulting her with a pistol and a gun. "The objection to this was that it was an attempt to put the defendant's general character and reputation in evidence; that the evidence was hearsay and immaterial. When appellant was on the stand, he was asked if he had not paid fines for fighting his wife. This he denied, and said he and his wife had always gotten along well. The court said he allowed this testimony to impeach appellant. We hold the testimony was admissible for the purpose of proving motive, animus, and intent at the time of the homicide." Wilson v. S., 60 Tex. Cr. 1, 129 S. W. 613.

629-25 Hurley v. Ty., 13 Ariz. 2, 108 P. 222; P. v. Del Vermo, 192 N. Y. 470, 85 N. E. 690; P. v. Dinser, 49 Misc. 82, 98 N. Y. S. 314; Davis v. S. (Tex. Cr.), 163 S. W. 442; Martin v. S. (Tex. Cr.), 160 S. W. 968.

Testimony that defendant, while under arrest for carrying a pistol, had said that the one whom he afterwards killed was responsible for all the trouble, was admissible to show motive for the homicide. Lane v. S., 59 Tex. Cr. 595, 129 S. W. 353.

629-26 S. v. Greaves, 243 Mo. 540, 147 S. W. 973.

Indictment against accused and record showing continuance of case in which deceased a witness, admissible; but inquiry into merits of prosecution, improper. Monteith v. S., 161 Ala. 18, 49 S. 777.

630-27 Wells v. S. (Ala.), 65 S. 950; Bone v. S., 8 Ala. App. 59, 62 S. 455; Quinn v. S., 1 Ala. App. 116, 55 S. 450; Jones v. S., 174 Ala. 53, 57 S. 31; Sanford v. S., 2 Ala. App. 81, 57 S. 134; Pressley v. S., 166 Ala. 17, 52 S. 337; May v. S., 167 Ala. 36, 52 S. 602; Holland v. S., 162 Ala. 5, 50 S. 215; Pitts v. S., 140 Ala. 70, 37 S. 101; Sanford v. S., 143 Ala. 78, 39 S. 370; Stallworth v. S., 146 Ala. 8, 41 S. 184; Patterson v. S., 146 Ala. 39, 41 S. 157; Logan v. S., 149 Ala. 11, 43 S. 10; Fleming v. S., 150 Ala. 19, 43 S. 219; Bluett v. S., 155 Ala. 67, 45 S. 916; Patterson v. S., 156 Ala. 62, 47 S. 52; Poe v. S., 155 Ala. 31, 46 S. 521; Cox v. S., 58 Fla. 33, 50 S. 875; S. v. Gabriella (Ia.), 144 N. W. 9; Blanton v. C., 147 Ky. 812, 146 S. W. 10; Carnes v. C., 146 Ky. 425, 142 S. W. 723; S. v. Birks, 199 Mo. 263, 97 S. W. 578; Flores v. S. (Tex. Cr.), 162 S. W. 883; Williams v. S. (Tex. Cr.), 150 S. W. 185; Brown v. S., 54 Tex. Cr. 121, 112 S. W. 80 (applying rule to difficulty between defendant and person with whom he believed deceased to have been in sympathy); Jay v. S., 52 Tex. Cr. 567, 109 S. W. 131.

See McCoy v. S., 91 Miss. 257, 44 S. 814 (details of previous difficulty between defendant's brother and deceased, inadmissible).

"The details of the encounter cannot be shown, where it is so separated in point of time or circumstances from the act charged as to constitute no part of the res gestae of that act." Jackson *v.* S., 177 Ala. 12, 59 S. 171.

"When the question as to whether the deceased or the defendant, in a trial for unlawful homicide, was free from fault in bringing on the fatal difficulty, is in doubt, the fact and character of previous difficulties—but not their particulars—between the defendant and the deceased may be shown. Under such circumstances, previous threats and their character—but not the particulars of the causes of the threats—may also be shown. In such a case the general character of the deceased and the defendant for peace and quiet or for turbulence and for bloodthirstiness—but not for the particular acts by which such character was established—may also be shown." Cook *v.* S., 5 Ala. App. 11, 59 S. 519.

Main attending circumstances should be admitted. White *v.* C., 31 Ky. L. R. 271, 102 S. W. 298.

630-28 *Comp.* S. *v.* Baudoin, 115 La. 837, 40 S. 239.

630-29 Noel *v.* S., 161 Ala. 25, 49 S. 824; Coulter *v.* S. (Tex. Cr.), 162 S. W. 885; Looney *v.* C., 115 Va. 921, 78 S. E. 625.

630-30 S. *v.* Finch, 54 Or. 482, 103 P. 505; Looney *v.* C., 115 Va. 921, 78 S. E. 625.

631-31 Wilson *v.* S., 60 Tex. Cr. 1, 129 S. W. 613.

Subsequent good relations shown in rebuttal. S. *v.* George, 58 Wash. 681, 109 P. 114.

631-32 S. *v.* Fielding, 135 Ia. 255, 112 N. W. 539; P. *v.* Conklin, 175 N. Y. 333, 67 N. E. 624.

631-34 Roberts *v.* S., 123 Ga. 146, 51 S. E. 374; Campbell *v.* S., 123 Ga. 533, 51 S. E. 644; Green *v.* S., 125 Ga. 742, 54 S. E. 724; Owen *v.* S., 52 Tex. Cr. 65, 105 S. W. 513.

631-35 Ziniman *v.* S. (Ala.), 65 S. 56.

631-36 S. *v.* Schuyler, 75 N. J. L. 487, 68 A. 56 (ten years); Hedger *v.* S., 144 Wis. 279, 128 N. W. 80.

633-42 Lowman *v.* S., 161 Ala. 47, 50 S. 43; P. *v.* Woods, 147 Cal. 265, 81 P. 652 (preparations to kill if necessary in connection with proposed burglary); S. *v.* Marren, 17 Ida. 766, 107 P. 993; S. *v.* West, 120 La. 747, 45 S. 594; C. *v.* Snell, 189 Mass. 12, 75 N. E. 75; Clemmons *v.* S., 8 Okla. Cr. 159, 126 P. 704; Williams *v.* S., 57 Tex. Cr. 492, 123 S. W. 1110.

Presence of defendant and brother near place of homicide day before, as well as upon day of homicide, may be shown. S. *v.* Howard, 120 La. 311, 45 S. 260.

633-43 Williams *v.* S., 161 Ala. 52, 50 S. 59; McDaniels *v.* S. (Ark.), 167 S. W. 96; S. *v.* Moore, 1 Boyce (Del.) 142, 74 A. 1112; Garner *v.* S., 6 Ga. App. 788, 65 S. E. 842; S. *v.* Ryan, 56 Or. 524, 108 P. 1009; Barbee *v.* S., 58 Tex. Cr. 129, 124 S. W. 961 (exhibition of weapon in connection with discussion of matters which led to shooting); Wysong *v.* S. (Tex. Cr.), 146 S. W. 941; Wilson *v.* S., 63 Tex. Cr. 81, 138 S. W. 409.

A witness "having testified, among other things, to the fact that he was the person nearest to defendant and deceased at the time the latter was shot, and the first to get to them afterwards, also that the defendant had no pistol at that time, and that he had never seen him with a pistol during the month that he lived with him, also that he never saw him with a pistol at any time, was asked: 'Did you ever see the defendant with a pistol?' To this question the solicitor objected, and the court sustained the objection, and defendant excepted. In this ruling there was no error. In addition to the fact that the witness had just testified as above, it was immaterial as to whether the witness had ever seen defendant with a pistol." Olden *v.* S., 176 Ala. 6, 58 S. 307.

Remoteness of time not material if testimony warrants presumption of continued possession. P. *v.* Del Vermo, 192 N. Y. 470, 85 N. E. 690.

633-44 P. *v.* Martin, 13 Cal. App. 96, 108 P. 1034. *Contra*, Graham *v.* S., 57 Tex. Cr. 104, 123 S. W. 691.

Possession of weapon anterior to difficulty may not be proved unless it was recent or its possession is shown to be connected therewith. S. *v.* McGreevey, 17 Ida. 453, 105 P. 1047. Subsequent possession shown. P. *v.* Del Vermo, 192 N. Y. 470, 85 N. E. 690.

633-45 Phillips *v.* S. (Ala. App.), 65 S. 444; Kennedy *v.* S. (Ala.), 62 S. 49 (box of ammunition); Rollings *v.* S., 160 Ala. 82, 49 S. 329; Glass *v.* S., 147 Ala. 50, 41 S. 727; Poe *v.* S., 155 Ala.

31, 46 S. 521; Ewing *v.* C., 129 Ky. 237, 111 S. W. 352; P. *v.* Haxer, 144 Mich. 575, 108 N. W. 90; Jones *v.* S. (Tex. Cr.), 163 S. W. 81; Dobbs *v.* S., 54 Tex. Cr. 579, 113 S. W. 921; McKinney *v.* S., 49 Tex. Cr. 591, 96 S. W. 48. See vol. 3, p. 130, n. 38 and supplement thereto.

That accused did not have such a weapon until the time of the crime may be shown. S. *v.* Mack (N. J.), 90 A. 1120.

Effort to procure weapon may be shown. Brewer *v.* S. (Tex. Cr.), 153 S. W. 622.

633-46 Ferguson *v.* S., 141 Ala. 20, 37 S. 448; Crumbly *v.* S., 141 Ga. 17, 80 S. E. 281; Litton *v.* C., 101 Va. 833, 44 S. E. 923 (possession of shells prepared and loaded).

Purchase of cartridges shown though killing not done with pistol and it was not shown accused had one on or about his person at time. Hocker *v.* C., 33 Ky. L. R. 944, 111 S. W. 676.

634-51 S. *v.* Hough, 138 N. C. 663, 50 S. E. 709.

Remoteness of evidence.—Ringo *v.* S., 54 Tex. Cr. 561, 114 S. W. 119.

Construction of a "blind" to enable him to get possession of his little boy and not to allow him to lie in wait for deceased. Mathison *v.* S., 87 Miss. 739, 40 S. 801.

Threats by deceased may be shown to rebut evidence of malice in borrowing a gun; no foundation need be laid. S. *v.* Stockett, 115 La. 743, 39 S. 1000. See S. *v.* Clifford, 59 W. Va. 1, 52 S. E. 981.

How defendant became possessed of weapon is immaterial where the evidence shows previously formed design to take decedent's life. Johnson *v.* C., 29 Ky. L. R. 442, 93 S. W. 581.

635-52 S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660; Brundige *v.* S., 49 Tex. Cr. 596, 95 S. W. 527.

635-56 A handbook containing instructions and diagrams respecting compression of carotid artery, being property of accused and bearing indications of having been used by him, is admissible, as is evidence he had received oral instruction on compression of such artery, where no marks of violence found on body of deceased, and accused was illiterate. C. *v.* Howard, 205 Mass. 128, 91 N. E. 397.

635-57 P. *v.* Garnett, 9 Cal. App. 194, 98 P. 247; S. *v.* Marren, 17 Ida. 766, 107 P. 993; Carnes *v.* C., 146 Ky. 425, 142 S. W. 723; McCleary *v.* S. (Md.), 89 A. 1100; P. *v.* Haxer, 144 Mich. 575, 108 N. W. 90 (resistance to arrest); Cook *v.* S., 85 Miss. 738, 38 S. 110 (subsequent boasting). See Barden *v.* S., 145 Ala. 1, 40 S. 948.

That defendant was seen praying some time after and at some distance from the scene of the homicide. Turner *v.* S. (Ala. App.), 65 S. 719.

Jeers at weeping relatives and friends of deceased. S. *v.* Robertson (N. C.), 81 S. E. 689.

635-58 S. *v.* Robertson (N. C.), 81 S. E. 689; Hancock *v.* S., 47 Tex. Cr. 3, 83 S. W. 696 (pursuit and second attack on deceased).

Going for a physician for deceased. Maxwell *v.* S. (Ala. App.), 65 S. 732.

636-60 Relations apparently existing between husband and wife soon after alleged accidental shooting of her, relevant to show degree of blame she attached to him in explanation of her dying declarations. Such evidence did not open door for hearsay testimony as to their previous relations. P. *v.* Alexander, 161 Mich. 645, 126 N. W. 837.

636-61 Maddox *v.* S., 159 Ala. 53, 48 S. 689; Ferguson *v.* S., 141 Ala. 20, 37 S. 448; Glass *v.* S., 147 Ala. 50, 41 S. 727; S. *v.* Willis, 24 Ida. 252, 132 P. 962; Watkins *v.* C., 149 Ky. 26, 147 S. W. 947; Cross *v.* S., 118 Md. 660, 86 A. 223; P. *v.* Owen, 154 Mich. 571, 118 N. W. 590; Singleton *v.* S., 57 Tex. Cr. 560, 124 S. W. 92; Morris *v.* S., 50 Tex. Cr. 515, 98 S. W. 873; Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804; Drake *v.* S. (Tex. Cr.), 143 S. W. 1157.

That defendant had asked witness that day, "If I get into trouble will you go my bond?" was admissible in the light of defendant's testimony that he carried his pistol that day, and at the time he got the pistol he had in mind the threat of deceased, and carried it for protection. Drake *v.* S. (Tex. Cr.), 143 S. W. 1157.

Admissible although witness heard only part of conversation in which they were made. Woodward *v.* S., 50 Tex. Cr. 294, 97 S. W. 499.

Declarations by one party, admissible to show inferential malice on part of one who subsequently co-operated with declarant in wanton homicide. Hunter *v.* S., 54 Tex. Cr. 224, 114 S. W. 124.

636-62 Miller *v.* S., 146 Ala. 686, 40

S. 342; Morris *v.* S., 146 Ala. 66, 41 S. 274; Graham *v.* S., 125 Ga. 48, 53 S. E. 816; Wayne *v.* C., 154 Ky. 698, 159 S. W. 548; S. *v.* Bailey, 190 Mo. 257, 88 S. W. 733; S. *v.* Whitsett, 232 Mo. 511, 134 S. W. 555; S. *v.* Robertson (N. C.), 81 S. E. 689.

Heartless replies by defendant when questioned as to arrangements for burying his wife whom he was accused of killing, were admissible though the conversation took place 24 hours after the killing. S. *v.* Albanes, 109 Me. 199, 83 A. 548, *cit.* Duncan *v.* C. (Ky.), 12 S. W. 673; Wilkinson *v.* Drew, 75 Me. 360; Lewis *v.* S., 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720; Spear *v.* Sweeney, 88 Wis. 545, 60 N. W. 1060.

637-65 Rex *v.* Sunfield, 15 Ont. L. R. 252; Underwood *v.* S. (Ala.), 60 S. 842; Ragland *v.* S., 178 Ala. 59, 59 S. 637; Humphries *v.* S., 2 Ala. App. 1, 56 S. 72; Holland *v.* S., 162 Ala. 5, 50 S. 215; Pitts *v.* S., 140 Ala. 70, 37 S. 101; Tipton *v.* S., 140 Ala. 39, 37 S. 231; Franklin *v.* S., 145 Ala. 669, 39 S. 979; Parham *v.* S., 147 Ala. 57, 42 S. 1; Thomas *v.* S., 150 Ala. 31, 43 S. 371; Heninburg *v.* S., 151 Ala. 26, 43 S. 959; Bluett *v.* S., 151 Ala. 41, 44 S. 84; Poe *v.* S., 155 Ala. 31, 46 S. 521; P. *v.* Palasson, 14 Cal. App. 123, 111 P. 109; Jones *v.* S., 66 Fla. 79, 62 S. 899; Carlton *v.* S., 63 Fla. 1, 58 S. 486; Rouse *v.* S., 135 Ga. 227, 69 S. E. 180; S. *v.* Thompson, 127 Ia. 440, 103 N. W. 377; S. *v.* Demming, 79 Kan. 526, 100 P. 285; Gabbard *v.* C. (Ky.), 156 S. W. 1037; Gambrell *v.* C., 130 Ky. 513, 113 S. W. 476; Esterline *v.* S., 105 Md. 629, 66 A. 269; P. *v.* Owen, 154 Mich. 571, 118 N. W. 590; S. *v.* Bobbitt, 215 Mo. 10, 114 S. W. 511; S. *v.* Cummings, 189 Mo. 627, 88 S. W. 106; S. *v.* King, 203 Mo. 560, 102 S. W. 515; S. *v.* Wilson, 158 N. C. 599, 73 S. E. 812 (three days before); S. *v.* Exum, 138 N. C. 599, 50 S. E. 283; S. *v.* Brooks, 79 S. C. 144, 60 S. E. 518, 17 L. R. A. (N. S.) 483; Coulter *v.* S. (Tex. Cr.), 162 S. W. 885; Brewer *v.* S. (Tex. Cr.), 153 S. W. 622; Rhodes *v.* S. (Tex. Cr.), 153 S. W. 128; Brock *v.* S. (Tex. Cr.), 151 S. W. 801; Pettis *v.* S. (Tex. Cr.), 150 S. W. 790; Johnson *v.* S. (Tex. Cr.), 149 S. W. 165; Blocker *v.* S., 55 Tex. Cr. 30, 114 S. W. 814 (if evidence circumstantial).

And see vol. 3, p. 128, and supplement thereto.

Uncommunicated threat, admissible. Graham *v.* S., 125 Ga. 48, 53 S. E. 816.

Hearsay evidence, inadmissible to prove threat. Cole *v.* S., 45 Tex. Cr. 439, 88 S. W. 341.

Corpus delicti should first be established or evidence adduced from which jury can infer it. Parham *v.* S., 147 Ala. 57, 42 S. 1.

638-66 S. *v.* Robertson (N. C.), 81 S. E. 689; Coffman *v.* S. (Tex. Cr.), 165 S. W. 939; Kemper *v.* S., 63 Tex. Cr. 1, 138 S. W. 1025; Carson *v.* S., 57 Tex. Cr. 394, 123 S. W. 590.

Letter containing expressions of ill-will, admissible. S. *v.* Exum, 138 N. C. 599, 50 S. E. 283.

638-67 P. *v.* Riggins, 159 Cal. 113, 112 P. 862.

638-68 Statement, "If you had let me alone I would have killed all of them," admitted as threat. McKinney *v.* S., 49 Tex. Cr. 591, 96 S. W. 48. *Contra.* Early *v.* S., 51 Tex. Cr. 382, 102 S. W. 868.

639-69 Poellnitz *v.* S., 1 Ala. App. 121, 55 S. 1028; Singleton *v.* S., 57 Tex. Cr. 560, 124 S. W. 92; Owen *v.* S., 52 Tex. Cr. 65, 105 S. W. 513.

639-70 Monteith *v.* S., 161 Ala. 18, 49 S. 777. *Comp.* Wright *v.* S., 148 Ala. 596, 42 S. 745, statement there was going to be trouble some day, not threat.

Warning to deceased not to testify in a case against defendant. Tennison *v.* S. (Ala.), 62 S. 780.

Statement insufficient.—"It requires conjecture on conjecture to inject hostile meaning into the mere act of summoning or requesting the presence of defendant as witness." May *v.* S., 167 Ala. 36, 52 S. 602.

639-71 McClain *v.* S. (Ala.), 62 S. 241.

639-72 Smith *v.* S. (Ala.), 62 S. 861; Early *v.* S. (Ga. App.), 81 S. E. 385; Golatt *v.* S., 130 Ga. 18, 60 S. E. 107; S. *v.* Cerciello (N. J.), 90 A. 1112; Barnes *v.* S., 53 Tex. Cr. 628, 111 S. W. 943.

639-73 S. *v.* Kretschmar, 232 Mo. 29, 133 S. W. 16.

640-74 Knight *v.* S., 160 Ala. 58, 49 S. 764; George *v.* S., 145 Ala. 41, 40 S. 961; S. *v.* Shouse (N. C.), 81 S. E. 333; S. *v.* Meyers, 57 Or. 50, 110 P. 407, 23 L. R. A. (N. S.) 143; Hiles *v.* S. (Tex. Cr.), 163 S. W. 717; McKelvey *v.* S. (Tex. Cr.), 155 S. W. 932; Pace *v.* S. (Tex. Cr.), 153 S. W. 132; Rogers *v.* S. (Tex. Cr.), 149 S. W. 127;

McMahon *v.* S., 46 Tex. Cr. 540, 81 S. W. 296; Holland *v.* S., 55 Tex. Cr. 27, 115 S. W. 48; Melton *v.* S., 47 Tex. Cr. 451, 83 S. W. 822; Barbee *v.* S., 50 Tex. Cr. 426, 97 S. W. 1058; Garrett *v.* S., 52 Tex. Cr. 255, 106 S. W. 389.

640-76 Singleton *v.* S., 57 Tex. Cr. 560, 124 S. W. 92; Long *v.* S., 48 Tex. Cr. 175, 88 S. W. 203; Hall *v.* S. (Tex. Cr.), 88 S. W. 244; McKinney *v.* S., 49 Tex. Cr. 591, 96 S. W. 48; Manning *v.* S., 51 Tex. Cr. 211, 98 S. W. 251; Armstrong *v.* S., 50 Tex. Cr. 26, 96 S. W. 15, 50 Tex. Cr. 467, 98 S. W. 844.

641-78 Finney *v.* S. (Ala. App.), 65 S. 93; Hixon *v.* S., 130 Ga. 479, 61 S. E. 14; Starr *v.* S., 160 Ind. 661, 67 N. E. 527; S. *v.* Rosa, 72 N. J. L. 462, 62 A. 695; Ty. *v.* Alarid, 15 N. M. 165, 106 P. 371; McKelvey *v.* S. (Tex. Cr.), 155 S. W. 932; Pace *v.* S. (Tex. Cr.), 153 S. W. 132.

641-79 Crumbly *v.* S., 141 Ga. 17, 80 S. E. 281.

642-80 Hendrickson *v.* C., 146 Ky. 742, 143 S. W. 433; Hiles *v.* S. (Tex. Cr.), 163 S. W. 717.

"As we understand the rule, evidence of a threat, or a general threat to do violence to some person or persons, although the declarant may not mention the name of any person, and the witness may not know what person or persons the threats are directed against or have reference to, is competent as showing malice and ill-will either general or personal, when, shortly after the threat is made, the declarant carries the threat out by an attack or assault on the person he is being prosecuted for assaulting. The subsequent assault shows that the declarant in threatening to do violence had malice and ill-will towards everybody or towards some particular person, and evidence of the threat is competent to show general malice and ill-will and a general desire to commit violence, or malice and ill-will towards the person who is the subject of the assault." Ellis *v.* C., 146 Ky. 715, 143 S. W. 425.

643-83 S. *v.* Teachey, 138 N. C. 587, 50 S. E. 232. See Williams *v.* S., 147 Ala. 10, 41 S. 992; Earles *v.* S., infra, 734-54.

Evidence of threats not inadmissible because jury may believe act upon which they were conditioned not done by deceased. P. *v.* Simmons, 7 Cal. App. 559, 95 P. 48.

643-84 Threats against someone who had been shooting cows. Finney *v.* S. (Ala. App.), 65 S. 93.

643-85 S. *v.* Sharp, 233 Mo. 269, 135 S. W. 488; McDaniel *v.* S., 8 Okla. Cr. 209, 127 P. 358.

643-86 Bowling *v.* C., 148 Ky. 9, 145 S. W. 1126.

644-87 Hurley *v.* Ty., 13 Ariz. 2, 108 P. 222, children of decedent.

645-90 Rex *v.* Sunfield, 15 Ont. L. R. 252 (not material error); Owen *v.* S., 58 Tex. Cr. 261, 125 S. W. 405; Jay *v.* S., 52 Tex. Cr. 567, 109 S. W. 131. See also S. *v.* McHamilton, 128 La. 498, 54 S. 971.

645-91 Roma *v.* S., 55 Tex. Cr. 344, 116 S. W. 598, subsequent threat against one who witnessed homicide.

645-93 S. *v.* Exum, 138 N. C. 599, 50 S. E. 283.

646-98 Young *v.* S., 49 Tex. Cr. 207, 92 S. W. 841.

646-99 Roma *v.* S., 55 Tex. Cr. 344, 116 S. W. 598, statement of brother in presence of accused he was going to kill decedent, admissible. See Morgan *v.* S., 8 Ala. App. 172, 63 S. 21; Ripley *v.* S., 51 Tex. Cr. 126, 100 S. W. 943.

646-1 *Contra* as to threat made by wife of accused in his presence. Hoffman *v.* C., 134 Ky. 726, 121 S. W. 690.

646-3 Monteith *v.* S., 161 Ala. 18, 49 S. 777; Hixon *v.* S., 130 Ga. 479, 61 S. E. 14; S. *v.* Demming, 79 Kan. 526, 100 P. 285; S. *v.* Hyder (Mo.), 167 S. W. 524; S. *v.* Coleman, 186 Mo. 151, 84 S. W. 978; S. *v.* Rosa, 72 N. J. L. 462, 62 A. 695; P. *v.* Johnson, 185 N. Y. 219, 77 N. E. 1164; Powdrill *v.* S. (Tex. Cr.), 155 S. W. 231; S. *v.* Quinn, 56 Wash. 295, 105 P. 818.

647-4 Hurley *v.* Ty., 13 Ariz. 2, 108 P. 222; S. *v.* Stratford, 149 N. C. 483, 62 S. E. 882.

647-6 P. *v.* Johnson, 185 N. Y. 219, 77 N. E. 1164; Powdrill *v.* S. (Tex. Cr.), 153 S. W. 231.

647-7 Descrippo *v.* S., 8 Ala. App. 85, 62 S. 1004.

648-8 Whole conversation in course of which threat communicated to defendant by witness, inadmissible. Simpson *v.* S., 48 Tex. Cr. 328, 87 S. W. 826.

649-16 Pratt *v.* S., 50 Tex. Cr. 227, 96 S. W. 8, defendant may testify threat not made seriously.

649-17 Probative force not great,

Sprouse *v.* C., 132 Ky. 269, 116 S. W. 344.

649-19 Montgomery *v.* S., 160 Ala. 7, 49 S. 902; Chowning *v.* S., 91 Ark. 503, 121 S. W. 735; S. *v.* Pell, 140 Ia. 655, 119 N. W. 154 (to be considered, if at all, only as bearing on intent or ability to do act charged); Seaborn *v.* C., 25 Ky. L. R. 2203, 80 S. W. 223.

649-20 S. *v.* Lance, 149 N. C. 551, 63 S. E. 198, admissible to show condition in connection with testimony tending to show recklessness. See S. *v.* Rumble, 81 Kan. 16, 105 P. 1.

Evidence that defendant was intoxicated on the night prior to the alleged homicide, is not admissible. Orner *v.* S. (Tex. Cr.), 143 S. W. 935.

650-21 Rex *v.* Blythe, 19 Ont. L. R. 386; Heningburg *v.* S., 151 Ala. 26, 43 S. 959; S. *v.* Rumble, 81 Kan. 16, 105 P. 1; Pash *v.* C., 146 Ky. 390, 142 S. W. 700; S. *v.* Hogan, 117 La. 863, 42 S. 352.

651-26 Evidence of intoxication which does not amount to or produce temporary insanity is not admissible, even for purpose of determining degree of murder. Young *v.* S., 53 Tex. Cr. 416, 110 S. W. 445, statute.

651-31 S. *v.* Bailey, 190 Mo. 257, 88 S. W. 733, hostility to non-union men. See S. *v.* Jones, 249 Mo. 80, 155 S. W. 33.

Hostility to "Spotters" admissible only where deceased was, or was believed to be, member of such class. Harrison *v.* S., 47 Tex. Cr. 393, 83 S. W. 699.

652-33 Brown *v.* S., 54 Tex. Cr. 121, 112 S. W. 80.

652-38 P. *v.* Suesser, 142 Cal. 354, 75 P. 1093, where deceased killed in endeavor to prevent accomplishment by defendant of intent to kill another.

653-40 Jenkins *v.* S., 59 Tex. Cr. 475, 128 S. W. 1113.

653-42 S. *v.* Brown, 188 Mo. 451, 87 S. W. 519; S. *v.* Feeley, 194 Mo. 300, 92 S. W. 663.

653-43 S. *v.* Jones, 249 Mo. 80, 155 S. W. 33; S. *v.* Miller, 73 S. C. 277, 53 S. E. 426; S. *v.* Smalls, 73 S. C. 516, 53 S. E. 976; S. *v.* Thrailkill, 73 S. C. 314, 53 S. E. 482; 71 S. C. 136, 50 S. E. 551; McLin *v.* S., 48 Tex. Cr. 549, 90 S. W. 1107.

Setting spring gun in a trunk is such evidence of intent to kill anyone interfering with trunk, that defendant cannot show he did not intend to kill deceedent. S. *v.* Marfaudille, 48 Wash. 117, 92 P. 939, 14 L. R. A. (N. S.) 346.

653-44 Roberts *v.* S., 171 Ala. 12, 54 S. 993; Poellnitz *v.* S., 1 Ala. App. 121, 55 S. 1028; P. *v.* Piercy, 16 Cal. App. 13, 116 P. 322; S. *v.* Hinkley, 81 Kan. 838, 106 P. 1088; Ellis *v.* C., 146 Ky. 715, 143 S. W. 425; Barbee *v.* S., 58 Tex. Cr. 129, 124 S. W. 961; Weisenbach *v.* S., 138 Wis. 152, 119 N. W. 843. But see P. *v.* Wright, 144 Cal. 161, 77 P. 877, apparently contra.

Proof of motive is not requisite.—P. *v.* Knapp, 16 Cal. App. 682, 117 P. 792; Ashby *v.* S., 124 Tenn. 684, 139 S. W. 872.

654-46 See Hardy *v.* C., 110 Va. 910, 67 S. E. 522.

Accused's indictment for adultery after homicide cannot be shown in absence of evidence deceased knew paramour. Newman *v.* S., 58 Tex. Cr. 443, 126 S. W. 578.

654-47 Brown *v.* S., 7 Ala. App. 26, 61 S. 12; S. *v.* McGuire, 84 Conn. 470, 80 A. 761.

654-48 Smithson *v.* S., 124 Tenn. 218, 137 S. W. 487.

654-50 Deliberation may be negatived by such evidence. S. *v.* Speyer, 207 Mo. 540, 106 S. W. 505.

654-51 Singleton *v.* S., 57 Tex. Cr. 560, 124 S. W. 92.

Circumstances may outweigh defendant's positive testimony as to intent Rosemond *v.* S., 86 Ark. 160, 110 S. W. 229.

654-52 See Satterwhite *v.* S., 82 Ark. 64, 100 S. W. 70; S. *v.* Ruck, 194 Mo. 416, 92 S. W. 706.

655-57 S. *v.* Hembree, 54 Or. 463, 103 P. 1008, important if evidence circumstantial.

655-58 P. *v.* Mahatch, 148 Cal. 200, 82 P. 779.

656-60 S. *v.* Thrailkill, 73 S. C. 314, 53 S. E. 482.

656-62 Kennedy *v.* S., 140 Ala. 1, 37 S. 90, 147 Ala. 687, 40 S. 678.

Peaceful mission of deceedent and previous permission given by accused, may be shown. Bondman *v.* S., 145 Ala. 680, 40 S. 85. Competent to show he was not seeking a difficulty and to account for his presence at place where it occurred. S. *v.* Labry, 124 La. 748, 50 S. 700.

656-64 Brownlee *v.* S., 48 Tex. Cr. 408, 87 S. W. 1153, conduct of deceased.

656-65 Ricketson *v.* S., 134 Ga. 306, 67 S. E. 881; Rumsey *v.* S., 126 Ga. 419, 55 S. E. 167 (deceased went to house of accused to visit lewd woman, known to accused to be such).

657-67 Mathis *v.* S., 63 Fla. 21, 58 S. 541; S. *v.* Allen, 23 Ida. 772, 131 P. 1112; S. *v.* Cather, 121 Ia. 106, 96 N. W. 722; S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461 (self-defense); Allen *v.* C., 134 Ky. 110, 119 S. W. 795; P. *v.* Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718; S. *v.* Holly, 155 N. C. 485, 71 S. E. 450; S. *v.* Green, 152 N. C. 835, 68 S. E. 16. And see generally the title "Character," vol. 3, p. 1.

"The court properly refused, however, to allow that witness to testify that his character was better than the 'average negro.' The law draws no distinction between the negro and the members of the white race as to what is or what is not a good character. There is but one standard, and all men must measure up to it." Cook *v.* S., 5 Ala. App. 11, 59 S. 519.

Remoteness. — Character of accused many years before, in community from which he came, admissible, remoteness going only to its weight. P. *v.* Van Gaasbeck, 118 App. Div. 511, 913, 103 N. Y. S. 249.

Negative evidence of character is competent. Way *v.* S., 155 Ala. 52, 46 S. 273; Sinclair *v.* S., 87 Miss. 330, 39 S. 522; Johnson *v.* S. (Miss.), 40 S. 324; Mitchell *v.* S., 51 Tex. Cr. 71, 100 S. W. 930 (of deceased); S. *v.* Cremeans, 62 W. Va. 134, 57 S. E. 405.

657-69 S. *v.* Simmons, 74 Kan. 799, 88 P. 57.

657-71 Arnold *v.* S., 131 Ga. 494, 62 S. E. 806.

Defendant "not limited to proving what people may have said of him as to his being or not being a quiet and peaceable man, but is entitled to inquire as to his character from those acquainted with him, and they are authorized to speak from his general peaceable and quiet conduct and from not having known or heard anything to the contrary." S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969. See S. *v.* Cather, 121 Ia. 106, 96 N. W. 722.

Honesty and industry cannot be shown. S. *v.* Griggsby, 117 La. 1046, 42 S 497.

Never arrested before inadmissible. S. *v.* Marfaudille, 48 Wash. 117, 92 P. 939, 14 L. R. A. (N. S.) 346.

657-72 Accused cannot show he sent his wages to sister when he killed her husband for wrongs done her by decedent. Smith *v.* S. (Ala.), 62 S. 184.

657-73 Sanford *v.* S., 2 Ala. App. 81, 57 S. 134; Weaver *v.* S., 83 Ark. 119, 102 S. W. 713; Crawley *v.* S., 137 Ga. 777, 74 S. E. 537; Goolsby *v.* S., 59 Tex. Cr. 528, 129 S. W. 624 (as to acts committed five years before).

It may be shown defendant went under an assumed name. Way *v.* S., 155 Ala. 52, 46 S. 273.

657-75 Hightower *v.* S. (Ga. App.), 80 S. E. 684; P. *v.* Cleminson, 250 Ill. 135, 95 N. E. 157; S. *v.* Thompson, 127 Ia. 440, 103 N. W. 377; Newman *v.* C., 28 Ky. L. R. 81, 88 S. W. 1089; S. *v.* Shaw, 75 Wash. 326, 135 P. 20, See supra, "Character," 13-24, 25; and vol. 3, p. 12, n. 24, and supplement thereto.

657-77 Subsequent character, based upon what was said after crime committed, cannot be proved. Allen *v.* C., 134 Ky. 110, 119 S. W. 795.

657-78 Harrison *v.* S. (Ala.), 40 S. 57; S. *v.* Le Blanc, 116 La. 822, 41 S. 105. See P. *v.* Wright, 144 Cal. 161, 77 P. 877 (extent of witness' knowledge may be inquired into); S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969.

Defendant was allowed to show "such exculpation as he saw proper to offer in his answers to the inquiries of the attorney for the state. The state was not allowed to introduce any evidence in respect of these matters outside or beyond the testimony of the plaintiff in error. It was proper to ask the defendant these questions on cross-examination, as they had a bearing upon his moral character, and his credit as a witness, as without doubt murder is an immoral act." Hughes *v.* S. (Tenn.), 148 S. W. 543, 553.

658-84 McGuire *v.* S., 2 Ala. App. 218, 57 S. 57; Williams *v.* S. (Tex. Cr.), 148 S. W. 763.

658-85 P. *v.* Conrow, 200 N. Y. 356, 93 N. E. 943; Wells *v.* Ty., 14 Okla. 436, 78 P. 124; P. *v.* Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718. *Contra,* Simmons *v.* S., 158 Ala. 8, 48 S. 606. See generally the title "Character," and supplement thereto, also vol. 3, p. 7, et seq.

659-87 S. *v.* Brooks (Del.), 84 A. 225; S. *v.* Short, 2 Boyce (Del.) 491, 82 A. 239; S. *v.* Wilson, 5 Penne. (Del.)

77, 62 A. 227; S. *v.* Johns, 6 Penne. (Del.) 174, 65 A. 763; Allen *v.* C., 134 Ky. 110, 119 S. W. 795; S. *v.* Maupin, 93 Mo. 164, 93 S. W. 379; P. *v.* Gilbert, 199 N. Y. 10, 92 N. E. 85.

659-88 Montgomery *v.* S., 2 Ala. App. 25, 56 S. 92; Worley *v.* S., 138 Ga. 336, 75 S. E. 240.

Such evidence competent to rebut testimony concerning threats by deceased. Cornelius *v.* S., 54 Tex. Cr. 173, 112 S. W. 1050, statute.

659-89 Kirby *v.* S., 151 Ala. 66, 44 S. 38; Weaver *v.* S., 83 Ark. 119, 102 S. W. 713; P. *v.* Meert, 157 Mich. 93, 121 N. W. 318; Woods *v.* S., 90 Miss. 245, 43 S. W. 433; S. *v.* Woodward, 191 Mo. 617, 90 S. W. 90; S. *v.* Dipley, 242 Mo. 461, 147 S. W. 111; P. *v.* Barnes, 202 N. Y. 77, 95 N. E. 15; Berry *v.* S. (Tex. Cr.), 163 S. W. 964; Streight *v.* S., 62 Tex. Cr. 453, 138 S. W. 742; Melton *v.* S., 47 Tex. Cr. 451, 83 S. W. 822; Keith *v.* S., 50 Tex. Cr. 63, 94 S. W. 1044; Puryear *v.* S., 50 Tex. Cr. 454, 98 S. W. 258; Bays *v.* S., 50 Tex. Cr. 548, 99 S. W. 561.

Evidence of reputation of defendant's deceased wife for chastity inadmissible for any purpose. Hall *v.* S. (Tex. Cr.), 138 S. W. 272.

Deceased's character not material unless self-defense involved or evidence indirect and nature of transaction doubtful. S. *v.* Banner, 149 N. C. 519, 63 S. E. 84; S. *v.* Peterson, 149 N. C. 533, 63 S. E. 87; S. *v.* Fisher, 149 N. C. 557, 63 S. E. 153; S. *v.* Dunlap, 149 N. C. 550, 63 S. E. 164. Character for chastity not material. Hall *v.* S., 89 Ark. 569, 117 S. W. 753.

Character of wife of accused, not a witness, may not be inquired into. Rollings *v.* S., 160 Ala. 82, 49 S. 329.

Acts of violence committed by deceased on third person, of which accused knew, immaterial in absence of plea of self-defense. S. *v.* Raice, 24 S. D. 111, 123 N. W. 708.

659-90 Maxwell *v.* S. (Ala. App.), 65 S. 732; Clayton *v.* S. (Ala.), 64 S. 76; German *v.* S. (Ala.), 61 S. 326; Olden *v.* S., 176 Ala. 6, 58 S. 307; Jones *v.* S., 174 Ala. 53, 57 S. 31; Long *v.* S., 2 Ala. App. 96, 57 S. 62; Sanford, *v.* S., 2 Ala. App. 81, 57 S. 134; Barnett *v.* S., 165 Ala. 59, 51 S. 299; Littlejohn *v.* S., 76 Ark. 481, 89 S. W. 463; Ware *v.* S. (Ga.), 76 S. E. 857; Tucker *v.* S., 133 Ga. 470, 66 S. E. 250; Taylor *v.* S., 121 Ga. 348, 49 S. E. 303; Williams *v.* S., 123 Ga. 138, 51 S. E. 322; Gibbons *v.* S., 137 Ga. 786, 74 S. E. 549; S. *v.* Mitchell, 130 Ia. 697, 107 N. W. 804; Cornett *v.* C., 156 Ky. 795, 162 S. W. 112; S. *v.* Kinchen, 126 La. 39, 52 S. 185; S. *v.* High, 122 La. 521, 47 S. 878; S. *v.* McKenzie, 228 Mo. 385, 128 S. W. 948; Hopkins *v.* S., 9 Okla. Cr. 104, 130 P. 1101; Chant *v.* S. (Tex. Cr.), 166 S. W. 513; Carter *v.* S. (Tex. Cr.), 165 S. W. 200; Salmon *v.* S. (Tex. Cr.), 154 S. W. 1023; Strickland *v.* S. (Tex. Cr.), 161 S. W. 110; Byrd *v.* S. (Tex. Cr.), 151 S. W. 1068; Cole *v.* S., 51 Tex. Cr. 89, 101 S. W. 218; Redman *v.* S., 52 Tex. Cr. 591, 108 S. W. 365; Jay *v.* S., 52 Tex. Cr. 567, 109 S. W. 131. *Comp.* Wakefield *v.* S., 50 Tex. Cr. 124, 94 S. W. 1046.

Admissibility of declarations relative to deceased's threats. Maxwell *v.* S. (Ala. App.), 65 S. 732.

But if the state puts in exculpatory declarations of the accused it is bound by them. Giesecke *v.* S. (Tex. Cr.), 142 S. W. 1179.

The question asked the witness Butler on cross-examination, "What did he [defendant] tell you, what did he say to anyone?" was properly refused, as calling for a self-serving declaration on the part of the defendant that was a part of the res gestae. The declaration is not shown to be part of a conversation previously brought out by the state, and was not offered as such, but as independent statements constituting part of the res gestae. Sanford *v.* S., 2 Ala. App. 81, 57 S. 134.

"It is competent for the accused, in a homicide case, to prove why he was carrying a weapon at the time of the encounter, in order to negative a criminal purpose. State *v.* Kretschmar, 232 Mo. 29, 133 S. W. 16. But it would not be competent to prove such fact by statements made by the defendant when he was not under oath, and we have been unable to find any exception to the rule against hearsay which would make Ketchel's statements competent as to why he carried a weapon." S. *v.* Dipley, 242 Mo. 461, 147 S. W. 111.

The defendant's good will or ill will towards the deceased's wife was not an issue in the case, and cannot be shown. Sanford *v.* S., 2 Ala. App. 81, 57 S. 134.

Proof of declaration of defendant as to purpose, on being informed of dece-

dent's threats, not harmful. Dumas *v.* S., 159 Ala. 42, 49 S. 224.

659-92 S. *v.* Spivey, 151 N. C. 676, 65 S. E. 995; Clark *v.* S., 56 Tex. Cr. 293, 120 S. W. 179, *over.* Bateson *v.* S., 46 Tex. Cr. 34, 80 S. W. 88, and other cases (not objection statement in form of conclusion—as that declarant acted in self-defense).

660-95 Dudley *v.* S. (Ala.), 64 S. 309; Clayton *v.* S. (Ala.), 64 S. 76; Johnson *v.* S. (Ala.), 63 S. 163; Underwood *v.* S., 176 Ala. 17, 58 S. 389; Olden *v.* S., 176 Ala. 6, 58 S. 307; Jones *v.* S., 174 Ala. 85, 57 S. 36; Holland *v.* S., 162 Ala. 5, 50 S. 215; P. *v.* Ong Git, 23 Cal. App. 148, 137 P. 283; McCleary *v.* S. (Md.), 89 A. 1100; Helvenston *v.* S., 53 Tex. Cr. 636, 111 S. W. 959 (showing malignant disposition against class of persons embracing deceased); Johnson *v.* S., 47 Tex. Cr. 523, 84 S. W. 824; Gregory *v.* S., 50 Tex Cr. 73, 94 S. W. 1041 (must be made before arrest or voluntary character established); Manning *v.* S., 51 Tex. Cr 211, 98 S. W. 251 (admissible though deceased not present).

Declarations at time of surrender, admissible as res gestae of surrender. Gregory *v.* S., 50 Tex. Cr. 73, 94 S. W. 1041.

660-96 Smith *v.* S. (Ala.), 62 S. 864; Carwile *v.* S., 148 Ala. 576, 39 S. 220; Morris *v.* S., 146 Ala. 66, 41 S. 274.

660-97 P. *v.* Weber, 149 Cal. 325, 86 P. 671. See Shelton *v.* S., 144 Ala. 106, 42 S. 30.

661-99 Vinson *v.* S. (Ala. App.), 64 S. 639; Smith *v.* S. (Ala.), 62 S. 864; Holland *v.* S., 162 Ala. 5, 50 S. 215; Frazier *v.* C. (Ky.), 114 S. W. 268; Johnson *v.* S. (Tex. Cr.), 149 S. W. 165; S. *v.* Bean, 77 Vt. 384, 60 A. 807.

662-5 Fisher *v.* S. (Ark.), 160 S. W. 210; Ayers *v.* S., 62 Fla. 14, 57 S. 349; Gray *v.* S., 12 Ga. App. 634, 77 S. E. 916; Jones *v.* S., 139 Ga. 104, 76 S. E. 748; S. *v.* Barber, 13 Ida. 65, 88 P. 418; Garcia *v.* S. (Tex. Cr.), 156 S. W. 939; Orner *v.* S. (Tex. Cr.), 143 S. W. 935; Mullins *v.* C., 113 Va. 787, 75 S. E. 193; S. *v.* Trail, 59 W. Va. 175, 53 S. E. 17. See Dawson *v.* S. (Tex. Cr.), 161 S. W. 469.

"What the court below held, and what the state asks us to approve, is that such abuse and ill treatment need not necessarily be shown by the testimony of witnesses having any knowledge thereof, but by mere hearsay—the statements of witnesses who claim to have heard the deceased in her lifetime and not in the presence of her husband make such charges against him. We are cited to no authority whatever that goes to this extent." S. *v.* Beeson, 155 Ia. 355, 136 N. W. 317.

Implied admissions. — Ante mortem statements by deceased, in presence of defendant, to be admissible as implied admissions of defendant must be such as would naturally call for denial. S. *v.* Baruth, 47 Wash. 283, 91 P. 977.

When defendant is under arrest declarations of deceased inadmissible though made in presence of defendant. S. *v.* Kelleher, 201 Mo. 614, 100 S. W. 470.

Woman dying as result of defendant's effort to produce a miscarriage may have been so far a conspirator as to render her declarations, subsequent to but closely connected with the act, admissible. Johnson *v.* P., 33 Colo. 224, 80 P. 133.

Declarations of deceased concerning a fact, though made in the absence of accused, relevant as part of res gestae. Rice *v.* S., 54 Tex. Cr. 149, 112 S. W. 299, 307.

662-7 Gregory *v.* S., 148 Ala. 566, 42 S. 829; George *v.* S., 145 Ala. 41, 40 S. 961 (statement "I am cut" admissible); S. *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634; S. *v.* Hinson, 150 N. C. 827, 64 S. E. 124.

663-9 S. *v.* Tribett, 74 Wash. 125, 132 P. 875.

663-10 Clark *v.* S., 56 Tex. Cr. 293, 120 S. W. 179, if not heard by defendant.

664-15 Deceased's declarations of intention to prosecute accused may be shown by witness to whom they were made where accused made threats against deceased, though only part of such declarations communicated to accused. Hardy *v.* C., 110 Va. 910, 67 S. E. 522.

664-16 Declaration deceased was shot in back may be proved. Graves *v.* S., 58 Tex. Cr. 42, 124 S. W. 676.

665-17 See S. *v.* Roberts, 28 Nev. 350, 82 P. 100.

665-18 Holland *v.* S., 162 Ala. 5, 50 S. 215; Easley *v.* S. (Ark.), 159 S. W. 36; Owens *v.* S., 65 Fla. 483, 62 S. 651; P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804; Bowling *v.* C. (Ky.), 126 S. W. 360; P. *v.* Friedman, 205 N. Y. 161, 98

N. E. 471; S. *v.* Hinson, 150 N. C. 827, 64 S. E. 124; S. *v.* Lindsay, 82 S. C. 486, 63 S. E. 1064; Oliver *v.* S. (Tex. Cr.), 159 S. W. 235; Deneaner *v.* S., 58 Tex. Cr. 624, 127 S. W. 201. See Pace *v.* S., 58 Tex. Cr. 99, 124 S. W. 949. See vol. 6, p. 752.

665-20 Vinson *v.* S. (Ala. App.) 64 S. 639; Robbins *v.* S. (Tex. Cr.), 166 S. W. 528; McMahon *v.* S., 46 Tex. Cr. 540, 81 S. W. 296; Johnson *v.* S., 47 Tex. Cr. 523, 84 S. W. 824.

Statements of defendant's spouse not incompetent. Robbins *v.* S. (Tex. Cr.), 166 S. W. 528.

666-22 Williams *v.* S. (Tex. Cr.), 166 S. W. 1170; Robbins *v.* S. (Tex. Cr.), 166 S. W. 528; Wallace *v.* S. (Tex. Cr.), 145 S. W. 925.

666-23 Statement must have been made directly to defendant. S. *v.* Ethridge, 188 Mo. 352, 87 S. W. 495.

666-24 S. *v.* Romeo (Utah), 128 P. 530.

667-25 McNaron *v.* S. (Ala. App.), 62 S. 302.

667-29 Vinson *v.* S. (Ala. App.), 64 S. 639.

668-31 S. *v.* Ethridge, 188 Mo. 352, 87 S. W. 495.

668-36 Opinion of prosecuting officer as to accused's guilt as disclosed in another case against other implicated parties, inadmissible. Figaroa *v.* S., 58 Tex. Cr. 611, 127 S. W. 193.

669-37 P. *v.* Morales, 143 Cal. 550, 77 P. 470; S. *v.* Nordall, 38 Mont. 327, 99 P. 960; Young *v.* S., 49 Tex. Cr. 207, 92 S. W. 841 (chain by which deceased tied to tree).

Board containing a bullet hole, found under head of deceased admissible. P. *v.* Barrett, 22 Cal. App. 780, 136 P. 520.

Not admissible if too remote. Erdman *v.* S., 90 Neb. 642, 134 N. W. 258.

Scar on a third person—having been received in same fight. Alarcon *v.* S., 47 Tex. Cr. 415, 83 S. W. 115. And in prosecution for assault with intent to murder, scar left by wound inflicted on prosecutor may be exhibited. Mayes *v.* S. (Tex. Cr.), 100 S. W. 386.

Section of wall bearing imprint of bloody hand. S. *v.* Miller, 71 N. J. L. 527, 60 A. 202.

669-38 P. *v.* Weber, 149 Cal. 325, 86 P. 671, bullets may be arranged in particular order when submitted to jury.

669-39 S. *v.* McAnarney, 70 Kan. 679, 79 P. 137.

A club seen by moonlight at time of assault and found at a spot where defendant was known to have been thereafter. S. *v.* Teale, 154 Ia. 677, 135 N. W. 408.

669-42 Vick *v.* S. (Ark.), 165 S. W. 287; P. *v.* Wilson, 23 Cal. App. 513, 138 P. 971; P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804; Pemberton *v.* S., 55 Tex. Cr. 464, 117 S. W. 837.

670-43 Hickey *v.* S., 62 Tex. Cr. 568, 138 S. W. 1051.

670-44 Roberts *v.* S., 123 Ga. 146, 51 S. E. 374 (curtain pole); S. *v.* Seery, 129 Ia. 259, 105 N. W. 511 (iron rod); S. *v.* Aspara, 113 La. 940, 37 S. 883; P. *v.* Bonier, 189 N. Y. 108, 81 N. E. 949 (blood-stained hammer); C. *v.* Karamakovic, 218 Pa. 105, 67 A. 659 (knife).

670-45 S. *v.* Walker, 133 Ia. 489, 110 N. W. 925; P. *v.* Morse, 196 N. Y. 306, 89 N. E. 816; Canón *v.* S., 59 Tex. Cr. 398, 128 S. W. 141. *Comp.* P. *v.* Hill, 198 N. Y. 64, 91 N. E. 272.

Empty shells bearing same marks as other shells found on accused. Fuller *v.* S., 147 Ala. 35, 41 S. 774.

671-48 Harris *v.* S. (Tex. Cr.), 148 S. W. 1074; Tolliver *v.* S., 53 Tex. Cr. 329, 111 S. W. 655; Turner *v.* S., 48 Tex. Cr. 585, 89 S. W. 975; S. *v.* Romano, 41 Wash. 241, 83 P. 1 (shells and gun admitted where prosecutor shot as well as cut, although indictment was for cutting only).

Box in which deceased kept his pistol, alleged to have been used by accused, admissible to identify pistol. Shelton *v.* S., 141 Ala. 106, 42 S. 30.

671-49 P. *v.* Kinney, 202 N. Y. 389, 95 N. E. 756.

671-50 Barnett *v.* S., 165 Ala. 59, 51 S. 299; S. *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982; S. *v.* Miller, 71 N. J. L. 527, 60 A. 302; S. *v.* McIntosh, 94 S. C. 439, 78 S. E. 327 (shoes).

See P. *v.* Ah Lee, 164 Cal. 350, 128 P. 1035.

671-51 P. *v.* Antony, 146 Cal. 124, 79 P. 878 (bloody clothes found in trunk belonging jointly to defendant and wife). Durfee *v.* S. (Tex. Cr.), 165 S. W. 180.

671-53 S. *v.* Aspara, 113 La. 940, 37 S. 883; S. *v.* Jeffries, 210 Mo. 302, 109 S. W. 614 (shoes of accused).

If woman accused of infanticide submits to physical examination, though

under arrest at time, result thereof may be shown. Cordes *v.* S., 54 Tex. Cr. 204, 112 S. W. 943.

672-54 Olden *v.* S., 176 Ala. 6, 58 S. 307; Rollings *v.* S., 160 Ala. 82, 49 S. 329 (immaterial facts disclosed by such evidence might be otherwise shown); Pate *v.* S., 150 Ala. 10, 43 S. 343; P. *v.* Besold, 154 Cal. 363, 97 P. 871; S. *v.* Moore, 80 Kan. 232, 102 P. 475; Dobbs *v.* S., 54 Tex. Cr. 550, 113 S. W. 923; Long *v.* S., 48 Tex. Cr. 175, 88 S. W. 203; Adams *v.* S., 48 Tex. Cr. 452, 93 S. W. 116 (to show size of knife used); Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804 (to show clothing set on fire); Tinsley *v.* S., 52 Tex. Cr. 91, 106 S. W. 347 (admission harmless, where although there was no dispute as to location of wound, clothing had been washed and no attempt to inflame the minds of jury made); S. *v.* Drummond, 70 Wash. 260, 126 P. 541; S. *v.* Churchill, 52 Wash. 210, 100 P. 309, *cit.* the text. See supra, "Demonstrative Evidence," 278-42, and vol. 4, p. 278, n. 42, and supplement thereto.

Bloody clothing worn by the assaulted party at the time of the difficulty, material and necessary to corroborate the state's testimony as to the number of times defendant cut and cut at the assaulted party. York *v.* S. (Tex. Cr.), 142 S. W. 8.

Best evidence rule does not apply and witnesses may testify to holes without producing garments. Underwood *v.* C., 27 Ky. L. R. 8, 84 S. W. 310.

May be taken to jury room, but can only be used for purpose for which introduced. Puryear *v.* S., 50 Tex. Cr. 454, 98 S. W. 258.

672-55 Huguley *v.* S., 4 Ala. App 29, 58 S. 814; Sanford *v.* S., 2 Ala. App. 81, 57 S. 134; Hankins *v.* S., 103 Ark. 28, 145 S. W. 524; Venters *v.* S., 47 Tex. Cr. 280, 83 S. W. 832.

672-56 P. *v.* Besold, 154 Cal. 363, 97 P. 871 (changes may be explained); S. *v.* Gallman, 79 S. C. 229, 60 S. E. 682.

673-57 Rollings *v.* S., 160 Ala. 82, 49 S. 329; York *v.* S. (Tex. Cr.), 142 S. W. 8.

673-58 Rollings *v.* S., 160 Ala. 82, 49 S. 329 (other articles than clothing found on deceased not admissible if free from blood stains or bullet marks); Melton *v.* S., 47 Tex. Cr. 451, 83 S. W. 822.

Exposure of scar of a wound not permitted where there is no dispute as to location of wound. Simpson *v.* S., 48 Tex. Cr. 328, 87 S. W. 826.

673-59 See supra, "Demonstrative Evidence," 295-42.

673-60 Milo *v.* S., 59 Tex. Cr. 196, 127 S. W. 1025.

673-61 S. *v.* Bailey, 79 Conn. 589, 65 A. 951 (skull and photograph of it, to show condition and injury); S. *v.* Lewis, 139 Ia. 405, 116 N. W. 606.

Portion of skull where there was a claim that death resulted from a blow other than the one on the head. S. *v.* Teale, 154 Ia. 677, 135 N. W. 408.

Exhuming of decedent's skull, discretionary with court. Moss *v.* S., 152 Ala. 30, 44 S. 598.

673-62 P. *v.* Besold, 154 Cal. 363, 97 P. 871.

674-67 Moss *v.* S., 152 Ala. 30, 44 S. 598; P. *v.* Morales, 143 Cal. 550, 77 P. 470; S. *v.* Aspara, 113 La. 940, 37 S. 883; Long *v.* S., 48 Tex. Cr. 175, 88 S. W. 203.

Bullet found in ground near homicide though one hundred days later. Hickey *v.* S., 51 Tex. Cr. 230, 102 S. W. 417.

Jury may be recalled and permitted to inspect bullets. Potts *v.* S., 56 Tex. Cr. 39, 118 S. W. 535.

674-68 Granberry *v.* S. (Ala.), 62 S. 52; S. *v.* Crea, 10 Ida. 88, 76 P. 1013; Clefford *v.* P., 229 Ill. 633, 82 N. E. 343; S. *v.* Lewis, 139 Ia. 405, 116 N. W. 606; S. *v.* Wilson, 223 Mo. 173, 122 S. W. 671; P. *v.* Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116; Long *v.* S., 48 Tex. Cr. 175, 88 S. W. 203; Alarcon *v.* S., 47 Tex. Cr. 415, 83 S. W. 1115; Jackson *v.* S., 48 Tex. Cr. 648, 90 S. W. 34; Hickey *v.* S., 51 Tex. Cr. 230, 102 S. W. 417. See P. *v.* Mar Gin Suie, 11 Cal. App. 42, 103 P. 951.

A knife loaned by witness.—Ryan *v.* S. (Tex. Cr.), 142 S. W. 878.

674-69 Watson *v.* S., 50 Tex. Cr. 171, 95 S. W. 115.

675-70 S. *v.* Gallman, 79 S. C. 229, 60 S. E. 682.

Stick may be shown to be similar to lost one alleged to have been used by deceased. Wilson *v.* S., 49 Tex. Cr. 50, 90 S. W. 312.

Model of knife owned by accused, admissible. P. *v.* Del Vermo, 192 N. Y. 470, 85 N. E. 690.

675-71 Watts *v.* S., 8 Ala. App. 115, 63 S. 15; Wiggins *v.* S. (Ga. App.), 80 S. E. 724; P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077; S. *v.* Barrett, 240

Mo. 161, 144 S. W. 485; S. *v.* Hazlet, 16 N. D. 426, 113 N. W. 374; Roberts *v.* S. (Tex. Cr.), 156 S. W. 651. See infra, "Similar Transactions," 799-55 et seq.

675-72 Pace *v.* S., 58 Tex. Cr. 90, 124 S. W. 949, res gestae, intent, system or identity of parties.

675-74 P. *v.* Crowley, 13 Cal. App. 322, 109 P. 493; P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077; Lee *v.* S. (Tex. Cr.), 162 S. W. 843.

676-75 P. *v.* Argentos, 156 Cal. 720, 106 P. 65; P. *v.* Cook, 148 Cal. 334, 83 P. 43; Sanderson *v.* S., 169 Ind. 301, 82 N. E. 525; Welch *v.* C., 33 Ky. L. R. 51, 108 S. W. 863; S. *v.* Simon, 131 La. 520, 59 S. 975; C. *v.* Howard, 205 Mass. 128, 91 N. E. 397; S. *v.* Spaugh, 199 Mo. 147, 97 S. W. 901, 200 Mo. 571, 98 S. W. 55; S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969; S. *v.* Martin, 47 Or. 282, 83 P. 849; C. *v.* Chiemilewski, 243 Pa. 171, 89 A. 964; Cook *v.* S. (Tex. Cr.), 160 S. W. 465; S. *v.* Ness, 71 Wash. 334, 128 P. 664.

Appearance bonds to answer charge of shooting at deceased, admissible. S. *v.* Goodson, 116 La. 388, 40 S. 771.

676-76 P. *v.* Barobuto, 196 N. Y. 293, 89 N. E. 837.

676-77 Prettyman *v.* U. S., 180 Fed. 30, 103 C. C. A. 384; Jones *v.* U. S., 179 Fed. 584, 103 C. C. A. 142; P. *v.* Manasse, 153 Cal. 10, 94 P. 92; Clark *v.* P., 224 Ill. 554, 79 N. E. 941; S. *v.* High, 116 La. 79, 40 S. 538; P. *v.* Hodge, 141 Mich. 312, 104 N. W. 599; Clark *v.* S., 79 Neb. 473, 113 N. W. 211.

677-79 Attempts to commit other crimes and statements of intention to commit them, within principle. C. *v.* Snell, 189 Mass. 12, 75 N. E. 75.

677-81 P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077; S. *v.* Bailey, 190 Mo. 257, 88 S. W. 733; S. *v.* Roberts, 28 Nev. 350, 82 P. 100; P. *v.* Hill, 198 N. Y. 64, 91 N. E. 272.

677-82 C. *v.* Snell, 189 Mass. 12, 75 N. E. 75.

677-83 S. *v.* Bailey, 190 Mo. 257, 88 S. W. 733.

678-85 P. *v.* Morse, 196 N. Y. 306, 89 N. E. 816; S. *v.* Adams, 138 N. C. 688, 50 S. E. 765; Knight *v.* S., 55 Tex. Cr. 243, 116 S. W. 56.

679-87 S. *v.* Miller, 73 S. C. 277, 53 S. E. 426; S. *v.* Smalls, 73 S. C. 516, 53 S. E. 976; Knight *v.* S., 55 Tex. Cr. 243, 116 S. W. 56.

680-96 P. *v.* O'Bryan, 165 Cal. 55, 130 P. 1042; P. *v.* Woods, 147 Cal. 265, 81 P. 652.

681-5 P. *v.* Hodge, 141 Mich. 312, 104 N. W. 599.

681-7 P. *v.* Cook, 148 Cal. 334, 83 P. 43; Burge *v.* U. S., 26 App. Cas. (D. C.) 524.

682-9 Burge *v.* U. S., 26 App. Cas. (D. C.) 524.

682-11 Record of trial for another crime should be produced. S. *v.* Andrews, 73 S. C. 257, 53 S. E. 423.

682-12 Barlew *v.* S., 5 Ala. App. 290, 57 S. 601; Barnett *v.* S., 165 Ala. 59, 51 S. 299; Green *v.* S., 125 Ga. 742, 54 S. E. 724; Smith *v.* C., 148 Ky. 60, 146 S. W. 4; S. *v.* Rasco, 239 Mo. 535, 144 S. W. 449.

682-13 Harrison *v.* S., 144 Ala. 20, 40 S. 568; Williams *v.* S., 147 Ala. 10, 41 S. 992 (non-expert may testify wound was penetrating); Singleton *v.* S. (Tex. Cr.), 167 S. W. 46; Ward *v.* S. (Tex. Cr.), 159 S. W. 272; Mitchell *v.* S., 55 Tex. Cr. 62, 114 S. W. 830 (discharge of blood); Stovall *v.* S., 53 Tex. Cr. 30, 108 S. W. 699 (doctor may testify wound ranged backward and upward).

Attending physician, after describing wound and its results, may testify that it was "severe." S. *v.* Baker (Ia.), 135 N. W. 1097.

Cause and time of death should be shown. Irving *v.* S. (Tex. Cr.), 150 S. W. 611.

Place of entrance and exit of bullet may be shown by direct testimony. P. *v.* Weber, 149 Cal. 325, 86 P. 671.

Wounds not described in information may be testified of. S. *v.* Kaufmann, 22 S. D. 433, 118 N. W. 337.

682-14 Robin *v.* S. (Ala.), 65 S. 42; Clayton *v.* S. (Ala.), 64 S. 76; Hill *v.* S., 146 Ala. 51, 41 S. 621; S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461; Roberts *v.* S. (Tex. Cr.), 156 S. W. 651; Welch *v.* S., 57 Tex. Cr. 111, 122 S. W. 880. See supra, "Expert and Opinion Evidence," 589-32.

683-15 Dumas *v.* S., 159 Ala. 42, 49 S. 224; Burkett *v.* S., 154 Ala. 19, 45 S. 682; Spates *v.* S., 62 Tex. Cr. 532, 138 S. W. 393; Fay *v.* S., 52 Tex. Cr. 185, 107 S. W. 55 (wounds produced death).

683-16 Clemons *v.* S., 48 Fla. 9, 37 S. 647, whether wounds could have been produced by naked fists.

Finding cartridge near deceased's house

may be proved. Barnett *v.* S., 165 Ala. 59, 51 S. 299.

683-19 P. *v.* Olsen, 1 Cal. App. 17, 81 P. 676.

A doctor was asked: "What would you say as to the character of the weapon or club that was used to produce this fracture you found in the skull?" And over the objection of the appellant he answered: "I believe a blunt or rounded, fairly heavy object—possibly like a whiffletree. That is the most common shape." "If the witness were to be interpreted as saying that the blow was administered with a whiffletree, the answer would probably have been incompetent; but such is not his statement." S. *v.* Baker (Ia.), 135 N. W. 1097.

683-21 Bailey *v.* S. (Ala. App.), 65 S. 422.

684-22 Humphrey *v.* S., 74 Ark. 554, 86 S. W. 431; Girtman *v.* S. (Tex. Cr.), 164 S. W. 1008. See also vol. 5, p. 586, n. 27.

684-23 Barlew *v.* S., 5 Ala. App. 290, 57 S. 601.

Experienced graduates of medical schools may give opinions though they never had case similar. Rice *v.* S., 49 Tex. Cr. 569, 94 S. W. 1024.

684-24 S. *v.* Hessenius (Ia.), 146 N. W. 58; S. *v.* Robinson, 126 Ia. 69, 101 N. W. 634; Levering *v.* C., 132 Ky. 666, 117 S. W. 253; Espinoza *v.* S. (Tex. Cr.), 165 S. W. 208; Davis *v.* S., 54 Tex. Cr. 236, 114 S. W. 366. See supra, "Cause," 953-32.

The question should call for the opinion of the witness at the time he is testifying, not at the time he examined the body. Costello *v.* S., 176 Ala. 1, 58 S. 202.

684-26 Morris *v.* C., 27 Ky. L. R. 145, 84 S. W. 560, specified wound hastened death.

Place of entrance of bullet that caused death. Williams *v.* S., 147 Ala. 10, 41 S. 992.

684-27 *Contra,* Jones *v.* S., 155 Ala. 1, 46 S. 579.

685-28 Chemical examination of third person's body admissible when such person killed in same way and as part of same transaction, to prove cause of death of party whose death is in issue. P. *v.* Quimby, 134 Mich. 625, 96 N. W. 1061. But result of such examination of third person's body is inadmissible where its purpose is merely to show poison was kept by accused and accessible to her some months before death of person with whose murder she is charged. P. *v.* Collins, 144 Mich. 121, 107 N. W. 1114.

685-30 P. *v.* Cleminson, 250 Ill. 135, 95 N. E. 157.

685-31 Sufficient quantity of poison to cause death need not be proved to have been found in body, before jury can find it was cause of death; and amount found some time after death is not evidence of amount in body at time of death. C. *v.* Danz, 211 Pa. 507, 60 A. 1070.

685-33 P. *v.* Quimby, 134 Mich. 625, 96 N. W. 1061.

686-35 Presumption body and viscera remained in care of keeper of morgue where autopsy held, until delivered to undertaker. S. *v.* Daly, 210 Mo. 664, 109 S. W. 53.

686-36 See Nordan *v.* S., 143 Ala. 13, 39 S. 406.

687-42 Ward *v.* S. (Tex. Cr.), 159 S. W. 272.

Evidence clothing and bed linen were soiled by vomiting and purging admissible, it appearing these were symptoms of arsenical poisoning. P. *v.* Bowers, 1 Cal. App. 501, 82 P. 553.

687-43 But fact that with proper and immediate medical treatment deceased's life might have been saved is immaterial if no physician could be procured. Bonner *v.* S., 125 Ga. 237, 54 S. E. 143.

Evidence similar discolorations were on body of another deceased person is inadmissible to show whether discolorations on decedent's body were result of violence or natural causes. Fowler *v.* S., 161 Ala. 1, 49 S. 788.

687-44 S. *v.* Pell, 140 Ia. 655, 119 N. W. 154; S. *v.* Baruth, 47 Wash. 283, 91 P. 977.

687-45 Daniel *v.* S., 126 Ga. 541, 55 S. E. 472; S. *v.* Hyde, 234 Mo. 200, 136 S. W. 316; S. *v.* Cunningham, 87 S. C. 453, 69 S. E. 1093.

Precise means causing death need not be shown. Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237. It must appear defendant's act caused death. Armsworthy *v.* S., 48 Tex. Cr. 413, 88 S. W. 215, statute.

689-52 S. *v.* O'Neall, 79 S. C. 571, 60 S. E. 1121.

689-53 Heubner *v.* S., 131 Wis. 162, 111 N. W. 63. See McCowan *v.* S., 51 Tex. Cr. 205, 100 S. W. 1157; Berryman *v.* S., 51 Tex. Cr. 192, 101 S. W.

225; Hardin *v.* S., 52 Tex. Cr. 238, 106 S. W. 352.

690-54 Orner *v.* S. (Tex. Cr.), 143 S. W. 935.

690-55 P. *v.* Botkin, 9 Cal. App. 244, 98 P. 861; P. *v.* Patrick, 182 N. Y. 131, 74 N. E. 843. See P. *v.* Staples, 149 Cal. 405, 86 P. 886; S. *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634.

Witnesses who ate of poisoned article may state symptoms experienced. P. *v.* Botkin, 9 Cal. App. 244, 98 P. 861.

690-61 Decedent's habits and character may not be proved to show cause of death. C. *v.* Rivet, 205 Mass. 464, 91 N. E. 877.

691-62 Copeland *v.* S., 58 Fla. 26, 50 S. 621 (opportunity); S. *v.* Buck, 88 Kan. 114, 127 P. 631; Spates *v.* S., 62 Tex. Cr. 532, 138 S. W. 393. See S. *v.* Nordmark, 84 Kan. 628, 114 P. 1068. **And see** the title "Circumstantial Evidence," vol. 3, p. 60.

Condition of clothing of deceased. Welch *v.* S. (Tex. Cr.), 147 S. W. 572; Smith *v.* C., 148 Ky. 60, 146 S. W. 4; Williams *v.* S. (Tex. Cr.), 148 S. W. 763.

Where an officer was killed while making an arrest, setting of traps on way to defendant's house may be shown. Dietz *v.* S., 149 Wis. 462, 136 N. W. 166.

False statement admissible. S. *v.* Aspara, 113 La. 940, 37 S. 883.

Denial of identity.—Franklin *v.* S., 145 Ala. 669, 39 S. 979.

691-63 Thomas *v.* S. (Ala. App.), 65 S. 863; Van Wyk *v.* P., 45 Colo. 1, 99 P. 1009; Wright *v.* S., 56 Tex. Cr. 353, 120 S. W. 458. See Holder *v.* S., 119 Tenn. 178, 104 S. W. 225.

692-65 P. *v.* Soeder, 150 Cal. 12, 87 P. 1016, evidence to show motive.

692-67 Ty. *v.* Price, 14 N. M. 262, 91 P. 733 (explanatory evidence admissible); P. *v.* Wolter, 203 N. Y. 484, 97 N. E. 30; Ward *v.* S. (Tex. Cr.), 146 S. W. 931.

692-71 Testimony as to wounds disclosed on examination of accused after arrest is not compelling him to be witness against will. S. *v.* Miller, 71 N. J. L. 527, 60 A. 202.

Comparison of spots on clothing of accused with spots cut off and chemically examined, proper. S. *v.* Miller, supra.

693-74 Pope *v.* S., 168 Ala. 33, 53 S. 292; Davidson *v.* S., 108 Ark. 191, 158 S. W. 1103; P. *v.* Wood, 145 Cal. 659, 79 P. 367; S. *v.* Jeffries, 210 Mo. 302, 109 S. W. 614; C. *v.* Kovovic, 209 Pa. 465, 58 A. 857 (ownership of weapon); Shaffer *v.* S. (Tex. Cr.), 151 S. W. 1061; Wright *v.* S., 56 Tex. Cr. 353, 120 S. W. 458 (immaterial accused under arrest when articles taken from his person); Knight *v.* S., 55 Tex. Cr. 243, 116 S. W. 56 (uncertainty as to identification only affects weight of evidence); Hardy *v.* C., 110 Va. 910, 67 S. E. 522.

Bullet and empty pistol shells.—Forester *v.* S. (Tex. Cr.), 163 S. W. 87.

693-75 Davidson *v.* S., 108 Ark. 191, 158 S. W. 1103. Testimony as to bloody clothing must connect it with accused. C. *v.* Johnson, 213 Pa. 607, 63 A. 134.

693-76 Thomas *v.* S. (Ala. App.), 65 S. 863; S. *v.* Nordall, 83 Mont. 327, 99 P. 960.

Possession of property of accomplice.—Millner *v.* S. (Tex. Cr.), 162 S. W. 348.

That search of his premises was made without a warrant is immaterial. Popo *v.* S., 168 Ala. 33, 53 S. 292.

Possession of poison may be shown where death caused by poison. S. *v.* Woodard, 132 Ia. 675, 108 N. W. 753.

694-77 Strickland *v.* S., 151 Ala. 31 44 S. 90 (handcuffs which deceased was trying to put on defendant at time of homicide); S. *v.* Sassaman, 214 Mo. 695, 114 S. W. 590 (paper purporting to be signed by deceased); P. *v.* Jackson, 182 N. Y. 66, 74 N. E. 565; C. *v.* Kovovic, 209 Pa. 465, 58 A. 857; Harris *v.* S., 62 Tex. Cr. 235, 137 S. W. 373; Elsworth *v.* S., 54 Tex. Cr. 38, 111 S. W. 963. And see S. *v.* Gruber, 19 Ida. 692, 115 P. 1.

Defendant's possession of money above what he could account for. Saulsberry *v.* S., 178 Ala. 16, 59 S. 476.

In P. *v.* Wolter, 203 N. Y. 484, 97 N. E. 30, "no witness was produced who ever saw Ruth Wheeler and the defendant together; nor was it made to appear that they had ever met one another prior to the day of her death. The proof, however, points unerringly to the defendant as the perpetrator of the crime. He admits that he wrote the postal card in response to which she set out to visit his apartment; and in a book kept by him was found, in his handwriting, an entry of her name and address, which it is impossible he could have ascertained, except from her on the occasion of her visit. In his fireplace were found a hatpin and ring which Ruth Wheeler had worn on the morning of her disappearance; and

in a house to which the defendant had moved on the following day was discovered an umbrella which the girl was known to have had with her when she left home. The defendant gave no explanation to account for the presence of these articles or the traces of homicidal death upon his premises."

694-78 Braham *v.* S., 143 Ala. 28, 38 S. 919; P. *v.* Argentos, 156 Cal. 720, 106 P. 65; S. *v.* Schreiber, 111 Minn. 138, 126 N. W. 536.

694-79 Possession by defendant's wife, he having made claim of ownership, may be shown. P. *v.* Antony, 146 Cal. 124, 79 P. 858.

While on way to police station "the party stopped at a grocery store, where the prisoners were allowed to visit a privy together; and in this outhouse, two days later, were discovered the watch and chain and bracelets which have been mentioned. There was testimony that these articles were not there before the place was thus visited by Zanza and Giusto; and plainly the fact of their discovery was competent and convincing evidence against them both, for both had confessedly just come from the room whence the objects had been feloniously taken." P. *v.* Giusto, 206 N. Y. 67, 99 N. E. 190.

694-82 S. *v.* Barnes, 47 Or. 592, 85 P. 998 (ring in defendant's possession when arrested six weeks after homicide); Morris *v.* S., 30 Tex. App. 95, 16 S. W. 757 (several months later).

695-85 C. *v.* Borasky, 214 Mass. 313, 101 N. E. 377; Combs *v.* S., 55 Tex. Cr. 334, 116 S. W. 584; Hardy *v.* C., 110 Va. 910, 67 S. E. 522. See C. *v.* Rivet, 205 Mass. 464, 91 N. E. 877.

695-86 S. *v.* Myers, 198 Mo. 225, 94 S. W. 242, failure to attend funeral.

695-87 Pope *v.* S., 168 Ala. 33, 53 S. 292; P. *v.* Galbo, 156 App. Div. 414, 141 N. Y. S. 1078; Lillystrom *v.* S., 146 Wis. 525, 132 N. W. 132.

Requesting druggist not to file a prescription for poison. S. *v.* Buck, 88 Kan. 114, 127 P. 631.

But an attempt to deceive the arresting officer may be explained upon the theory that the accused was agitated by the circumstances. P. *v.* Elmore, 167 Cal. 205, 138 P. 989.

Attempt to manufacture evidence, suspicious. White *v.* S., 74 Ark. 491, 86 S. W. 296; S. *v.* Marren, 17 Ida. 766, 107 P. 993; Mass. *v.* S., 59 Tex. Cr. 390, 128 S. W. 394.

696-88 Hixon *v.* S., 130 Ga. 479, 61 S. E. 14 (expression of desire to flee); S. *v.* High, 116 La. 79, 40 S. 538 (desperateness of resistance to arrest with surrounding circumstances); P. *v.* Haxer, 144 Mich. 575, 108 N. W. 90 (resisting arrest); S. *v.* Finley, 193 Mo. 202, 91 S. W. 942; S. *v.* Spaugh, 199 Mo. 147, 97 S. W. 901, 200 Mo. 571, 98 S. W. 55 (shooting at pursuer); Hardy *v.* C., 110 Va. 910, 67 S. E. 522.

696-89 Asbeck *v.* S. (Tex. Cr.), 156 S. W. 925.

696-94 See S. *v.* Bailey, 190 Mo. 257, 88 S. W. 733; Weisenbach *v.* S., 138 Wis. 152, 119 N. W. 843.

696-95 C. *v.* Hargis, 124 Ky. 356, 30 Ky. L. R. 510, 99 S. W. 348; Rhodes *v.* S. (Tex. Cr.), 153 S. W. 128. See Brown *v.* S., 142 Ala. 287, 38 S. 268; Ward *v.* C., 26 Ky. L. R. 1256, 83 S. W. 649; Orner *v.* S. (Tex. Cr.), 143 S. W. 935.

Destruction of bed clothes upon which deceased died. Coffman *v.* S. (Tex. Cr.) 165 S. W. 939.

697-98 Bishop *v.* S. (Ala.), 61 S. 820; Nordan *v.* S., 143 Ala. 13, 39 S. 406; Canon *v.* S., 59 Tex. Cr. 398, 128 S. W. 141; Weisenbach *v.* S., 138 Wis. 152, 119 N. W. 843.

Evidence to show feigned grief admissible on behalf of prosecution. Beaupre *v.* S. (Tex. Cr.), 156 S. W. 625.

697-99 Bishop *v.* S. (Ala.), 61 S. 820; C. *v.* Borasky, 214 Mass. 313, 101 N. E. 377; Reed *v.* S., 5 Okla. Cr. 365, 114 P. 1114. Defendant cannot testify to her motive in doing the acts. Bush *v.* S., 168 Ala. 77, 53 S. 266.

698-1 Ducett *v.* S. (Ala.), 65 S. 351; Bishop *v.* S. (Ala.), 61 S. 820; Streety *v.* S., 165 Ala. 71, 51 S. 415; P. *v.* Weber, 149 Cal. 325, 86 P. 671; Roberts *v.* S., 123 Ga. 146, 51 S. E. 374; Levering *v.* C., 132 Ky. 666, 117 S. W. 253; S. *v.* Hogan, 117 La. 863, 42 S. 352; C. *v.* Borasky, 214 Mass. 313, 101 N. E. 377; S. *v.* Daly, 210 Mo. 664, 109 S. W. 53; P. *v.* Galbo, 156 App. Div. 414, 141 N. Y. S. 1078; P. *v.* Koerner, 117 App. Div. 40, 102 N. Y. S. 93 (whether defendant was shamming unconsciousness); S. *v.* McKenzie (N. C.), 81 S. E. 301; Williams *v.* S. (Tex. Cr.), 144 S. W. 620; Gray *v.* S., 47 Tex. Cr. 375, 83 S. W. 705; Oborn *v.* S., 143 Wis. 249, 126 N. W. 737.

At trial.—Lane *v.* S., 59 Tex. Cr. 595, 129 S. W. 353.

698-5 Glass *v.* S., 147 Ala. 50, 41 S. 727; P. *v.* Haxer, 144 Mich. 575, 108 N. W. 90 (resistance to arrest).

Possession of or attempt to use drug to prevent bloodhounds from following trail. Asbeck *v.* S. (Tex. Cr.), 156 S. W. 925.

698-7 Chancellor *v.* S., 76 Ark. 215, 88 S. W. 880 (when confronted with weapon used); Boles *v.* P., 37 Colo. 41, 86 P. 1030; Bradley *v.* S., 54 Tex. Cr. 53, 111 S. W. 733.

698-8 Crowell *v.* S., 56 Tex. Cr. 480, 120 S. W. 897.

699-15 Cooper *v.* S., 13 Ga. App. 686, 79 S. E. 764; Hall *v.* S., 141 Ga. 7, 80 S. E. 307; Flanagan *v.* S., 135 Ga. 221, 69 S. E. 171.

699-16 Pate *v.* S., 150 Ala. 10, 43 S. 343 (voluntary surrender inadmissible); S. *v.* McCaskill (Ia.), 142 N. W. 445; Sneed *v.* Ty., 16 Okla. 641, 86 P. 70; Upton *v.* S., 48 Tex. Cr. 289, 88 S. W. 212 (same).

700-19 S. *v.* Aspara, 113 La. 940, 37 S. 883 (pistol of same caliber); Morgan *v.* Ty., 16 Okla. 530, 85 P. 718; Tinsley *v.* S., 52 Tex. Cr. 91, 106 S. W. 347.

Possession by defendant of rifle by which deceased shot, a few minutes before, may be shown. Medley *v.* S., 156 Ala. 78, 47 S. 218.

700-20 S. *v.* Green, 115 La. 1041, 40 S. 451 (pistol found on accused when arrested six months later); P. *v.* Weick, 123 App. Div. 328, 107 N. Y. S. 968 (abortion instruments).

700-23 S. *v.* Jeffries, 210 Mo. 302, 109 S. W. 614 (weapon found near scene of homicide which formerly belonged to defendant and traced to possession of alleged accomplice); Hardy *v.* C., 110 Va. 910, 67 S. E. 522.

That weapon owned by deceased is missing and was similar to one found in possession of accused may be shown. Shelton *v.* S., 144 Ala. 106, 42 S. 30.

701-26 Recent discharge of gun owned by accused may be shown by testimony of witness who examined it day after homicide. Pemberton *v.* S., 55 Tex. Cr. 464, 117 S. W. 837.

Delivery of weapon to officer by third person cannot be shown unless accused connected with it. Hardin *v.* S., 55 Tex. Cr. 631, 117 S. W. 974.

701-27 Goforth *v.* S. (Ala.), 63 S. 8; Kirkwood *v.* S., 3 Ala. App. 15, 57 S. 504; Jones *v.* S., 174 Ala. 85, 57 S. 36; Rollings *v.* S., 160 Ala. 82, 49 S. 329; Benjamin *v.* S., 148 Ala. 671, 41 S. 739; P. *v.* Crowley, 13 Cal. App. 322, 109 P. 493; P. *v.* Easton, 148 Cal. 50, 82 P. 840 (admissible where defense is insanity); S. *v.* McCaskill (Ia.), 142 N. W. 445; Shumway *v.* S., 82 Neb. 152, 117 N. W. 407; P. *v.* Galbo, 156 App. Div. 414, 141 N. Y. S. 1078; S. *v.* Tate, 161 N. C. 280, 76 S. E. 713; C. *v.* Kovovic, 209 Pa. 465, 58 A. 857; Cabrera *v.* S., 56 Tex. Cr. 141, 118 S. W. 1054; Hunter *v.* S., 59 Tex. Cr. 439, 129 S. W. 125.

See Franklin *v.* S., 145 Ala. 669, 39 S. 979. And see vol. 3, p. 140, and supplement thereto.

Forfeiture of bond.—Where defendant is permitted to introduce in evidence his bail bond, in order to disprove flight, proof that the bond has been forfeited is competent. Davis *v.* S., 11 Ga. App. 804, 76 S. E. 391.

701-28 Barr *v.* S., 56 Tex. Cr. 372, 120 S. W. 422; Charba *v.* S., 48 Tex. Cr. 316, 87 S. W. 829; Williams *v.* S. (Tex. Cr.), 144 S. W. 622.

701-29 Preparations for flight prior to crime, provable. Hocker *v.* C., 33 Ky. L. R. 944, 111 S. W. 676.

702-33 Sweatt *v.* S., 156 Ala. 85, 47 S. 194; S. *v.* White, 189 Mo. 339, 87 S. W. 1188.

702-34 Goforth *v.* S. (Ala.), 63 S. 8; Jones *v.* S., 174 Ala. 85, 57 S. 36; Rollings *v.* S., 160 Ala. 82, 49 S. 329 (irrelevant to show relationship of accused and party in charge of conveyance in which accused traveled); Shumway *v.* S., 82 Neb. 152, 117 N. W. 407 (place to which defendant went); Wendling *v.* C., 143 Ky. 587, 137 S. W. 205.

702-35 Goforth *v.* S. (Ala.), 63 S. 8.

702-36 Kirkwood *v.* S., 3 Ala. App. 15, 57 S. 504; Jones *v.* S., 174 Ala. 85, 57 S. 36; S. *v.* Spaugh, 199 Mo. 147, 97 S. W. 901, 200 Mo. 571, 98 S. W. 55.

Submission to arrest may be shown in rebuttal of evidence of flight. Dixon *v.* S., 12 Ga. App. 17, 76 N. E. 794.

703-38 Goforth *v.* S. (Ala.), 63 S. 8; Harrell *v.* S., 166 Ala. 14, 52 S. 345; P. *v.* Mar Gin Suie, 11 Cal. App. 42, 103 P. 951. See Rose *v.* S., 144 Ala. 114, 42 S. 21, cannot testify why he left state.

Postal cards written by accused to his mother stating his whereabouts and

plans for the future are, on account of their open character, admissible to rebut a charge of flight. Goforth *v.* S. (Ala.), 63 S. 8.

703-39 Brown *v.* S., 88 Miss. 166, 40 S. 737. See P. *v.* Easton, 148 Cal. 50, 82 P. 840.

703-40 **Presence of armed men** must be shown to have been connected with accused's flight. Owens *v.* S., 65 Fla. 483, 62 S. 651.

703-42 See Carlton *v.* S., 63 Fla. 1, 58 S. 486.

704-46 *Comp.* S. *v.* Baker, 110 Mo. 7, 19 S. W. 222, 33 Am. St. 414.

704-47 P. *v.* Easton, 148 Cal. 50, 82 P. 840.

704-48 Goforth *v.* S. (Ala.), 63 S. 8; P. *v.* Mar Gin Suie, 11 Cal. App. 42, 103 P. 951; Barr *v.* S., 56 Tex. Cr. 372, 120 S. W. 422.

704-50 Harris *v.* S. (Ala. App.), 62 S. 477; Thompson *v.* S. (Tex. Cr.), 163 S. W. 973. And see generally vol. 3, p. 134; vol. 7, p. 929; vol. 5, p. 491, and supplement thereto.

704-51 Moss *v.* S., 152 Ala. 30, 44 S. 598.

704-52 Phillips *v.* S., 162 Ala. 14, 50 S. 194; Johnson *v.* S., 55 Fla. 46, 46 S. 154; S. *v.* Adams, 85 Kan. 435, 116 P. 608, 35 L. R. A. (N. S.) 870; S. *v.* Jeffries, 210 Mo. 302, 109 S. W. 614 (there should be other evidence tending to connect defendant with crime). **Witness may testify** that the tracks were made by a shoe of a certain size or number. Finney *v.* S. (Ala. App.), 65 S. 93.

Evidence identifying shoe used to compare tracks, admissible. Du Bose *v.* S., 148 Ala. 560, 42 S. 862.

705-54 Cordes *v.* S., 54 Tex. Cr. 204, 112 S. W. 943, approximate correspondence with shoes found at residence of defendant accused of infanticide; failure to produce stick used to measure immaterial except as it affected weight of testimony.

705-56 S. *v.* Thompson, 161 N. C. 238, 76 S. E. 249.

705-57 S. *v.* Sanders, 75 S. C. 409, 56 S. E. 35.

705-60 See S. *v.* Jeffries, 210 Mo. 302, 109 S. W. 614.

705-63 Phillips *v.* S., 162 Ala. 14, 50 S. 194; Pope *v.* S., 168 Ala. 33, 53 S. 292.

706-64 Du Bose *v.* S., 148 Ala. 560, 42 S. 862; Johnson *v.* S., 55 Fla. 46, 46 S. 154.

Opinion tracks coming and going made by same person, admissible. Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102. Witness may state direction in which tracks appeared to be going. Hickey *v.* S., 51 Tex. Cr. 230, 102 S. W. 417.

Finger prints.—Expert's opinion as to identity of person making, competent. S. *v.* Cerciello (N. J.), 90 A. 1112. See vol. 6, p. 929, n. 83.

706-65 Witness may testify certain shoes would make same kind of track as tracks shown to exist at place where defendant had been seen. Turner *v.* S., 48 Tex. Cr. 585, 89 S. W. 975.

707-68 Peculiar marks need not be shown. S. *v.* Adams, 138 N. C. 688, 50 S. E. 765.

Handprints.—Where accused voluntarily placed his hand over a bloody handprint on the wall, testimony as to the comparison is competent. S. *v.* Miller, 71 N. J. L. 527, 60 A. 202.

And where impression and photograph of defendant's hand had been taken with his consent and after warning, there may be a comparison made with handprints of scene of homicide. Powell *v.* S., 50 Tex. Cr. 592, 99 S. W. 1005.

Trailing by bloodhounds.—Evidence of the result of trailing by bloodhounds is admissible where training and reliability of dogs is shown and they are started from point at which guilty party appears to have been. Richardson *v.* S., 145 Ala. 46, 41 S. 82 (full cross-examination allowed as to breeding and training of dogs and details of hunt); S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969. See infra, "Identity," 931-97, et seq.

Actions of hounds in smelling around defendant and making demonstrations, irrelevant. Wallace *v.* S., 48 Tex. Cr. 318, 87 S. W. 1041.

A non-expert may testify to the result of a comparison made with hair taken from a hand of deceased and that of accused. S. *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982.

707-69 Anderson *v.* S., 53 Tex. Cr. 341, 110 S. W. 54, purchase of shells similar to those found at scene. And see Wilson *v.* S., 171 Ala. 25, 54 S. 572.

Attempt to procure another to commit the murder is admissible evidence. Roberson *v.* S. (Ala.), 62 S. 837.

But testimony of a witness that another who borrowed a pistol from him said he gave it to the accused shortly

before the killing is incompetent as hearsay. Kinney *v.* S. (Tex. Cr.), 144 S. W. 257.

707-70 Levering *v.* C., 132 Ky. 666, 117 S. W. 253, possession and preparation for use.

707-71 S. *v.* Manigan (Ia.), 145 N. W. 869. *Comp.* Gregory *v.* S., 140 Ala. 16, 37 S. 259, defendant may not testify to reasons for having weapon.

709-87 P. *v.* Gillette, 191 N. Y. 107, 83 N. E. 680.

Written by defendant.—Lynn *v.* S., 140 Ga. 387, 79 S. E. 29.

Written by deceased.—Lee *v.* S. (Tex. Cr.), 162 S. W. 813.

709-88 McCorquodale *v.* S. (Tex. Cr.), 98 S. W. 879.

709-90 S. *v.* Fiore (N. J.), 88 A. 1039; P. *v.* Wolters, 203 N. Y. 484, 97 N. E. 30; Rhodes *v.* S. (Tex. Cr.), 153 S. W. 128.

Defendant should be permitted to explain letters. Spicer *v.* S. (Ala.), 65 S. 972.

710-91 S. *v.* Daly, 210 Mo. 664, 109 S. W. 53.

710-92 Poe *v.* S., 155 Ala. 31, 46 S. 521; Ewing *v.* C., 129 Ky. 237, 111 S. W. 352; Word *v.* C., 151 Ky. 527, 152 S. W. 556; Huggins *v.* S. (Miss.), 60 S. 209; S. *v.* Guthrie, 145 N. C. 492, 59 S. E. 652. See also Taylor *v.* S., 135 Ga. 622, 70 S. E. 237.

Error to charge threats may be proved solely to show who was aggressor. Price *v.* U. S., 1 Okla. Cr. 291, 97 P. 1056.

710-93 Cause and reason of threats allowed to be shown. Treadway *v.* S. (Tex. Cr.), 144 S. W. 655.

711-94 Inability to recall exact language used not cause for excluding testimony. S. *v.* Benjamin (R. I.), 71 A. 65.

711-95 Threats by one defendant, not evidence against another, ignorant of them, where killing not in cold blood. S. *v.* Walsworth, 54 Or. 371, 103 P. 516.

711-96 Brown *v.* S., 56 Tex. Cr. 389, 120 S. W. 444.

Jury may infer against whom threats directed. Hardy *v.* C., 110 Va. 910, 67 S. E. 522.

711-97 If a difficulty is shown to exist between deceased and accused threats may be proved though no person named. Holland *v.* S., 56 Tex. Cr. 440, 120 S. W. 470.

711-98 Montgomery *v.* S., 160 Ala. 7, 49 S. 902.

711-99 Williams *v.* S., 161 Ala. 52, 50 S. 59; Hobbs *v.* S., 86 Ark. 360, 111 S. W. 264 (one or other of brothers); C. *v.* West (Ky.), 113 S. W. 76. See Rawlins *v.* S., 124 Ga. 81, 52 S. E. 1.

711-1 Hardy *v.* C., 110 Va. 910, 67 S. E. 522; Weisenbach *v.* S., 138 Wis. 152, 119 N. W. 813.

711-2 *Contra* unless threats renewed. Brown *v.* S., 56 Tex. Cr. 389, 120 S. W. 444.

Greatly lessens probative value of threat. Crumley *v.* S., 5 Ga. App. 231, 62 S. E. 1005.

711-3 **Specific threats against third person** not admissible as proving defendant's hostility toward deceased. Word *v.* C., 151 Ky. 527, 152 S. W. 556.

712-5 S. *v.* Porter, 213 Mo. 43, 111 S. W. 529, 127 A. S. R. 589; S. *v.* Benjamin (R. I.), 71 A. 65 (eighteen months).

712-8 Hardy *v.* C., 110 Va. 910, 67 S. E. 522.

712-9 Declarations by defendant of affection for deceased, inadmissible to rebut testimony of threats. S. *v.* Baudoin, 115 La. 837, 40 S. 239.

712-10 Crumley *v.* S., 5 Ga. App. 231, 62 S. E. 1005.

Attempt of deceased to execute threat may not be shown by accused because testimony would be a conclusion. Bettis *v.* S., 160 Ala. 3, 49 S. 781.

Threats by third person a member of a faction composed of deceased, accused and others may be proved if accused's assent thereto is shown beyond reasonable doubt. Magan *v.* C. (Ky.), 119 S. W. 734.

713-11 Hays *v.* S. (Ala.), 63 S. 7; Johnson *v.* S., 142 Ala. 1, 37 S. 937; Scott *v.* S. (Ark.), 139 S. W. 1026; Bonner *v.* S. (Fla.), 65 S. 663; Wall *v.* S., 126 Ga. 86, 54 S. E. 815; P. *v.* McMahon, 244 Ill. 45, 91 N. E. 104 (pregnancy of deceased); T. *v.* Clark, 15 N. M. 35, 99 P. 697; Hays *v.* S. (Tex. Cr.), 164 S. W. 841; Kelly *v.* S. (Tex. Cr.), 151 S. W. 304; S. *v.* Turley (Vt.), 88 A. 562.

Relation of accused and deceased to a labor strike. P. *v.* O'Bryan, 165 Cal. 55, 130 P. 1042.

While proof of motive is not indispensable the presence of motive tends

toward guilt. P. *v.* MacGregor (Mich.), 144 N. W. 869.

To complete proof.—McMurphy *v.* S. (Ala.), 58 S. 748.

Wife murder.—Letters found in defendant's possession from another woman referring to her marriage to him after he should obtain a divorce, admissible to repel presumption arising from matrimonial relation. S. *v.* McFarland, 83 N. J. L. 474, 83 A. 993.

"**Letters of guardianship** and the order of the court appointing deceased guardian of his brothers and sisters, including the two girls staying at appellant's house. The judgment of the probate court, being regular on its face, could not be collaterally attacked, and the letters admitted are shown by the evidence to be the identical letters of guardianship presented by deceased to appellant on the morning of the tragedy. There was no error in overruling the objections made and in admitting this testimony, for it shows that appellant knew the mission of deceased, and under the evidence in this case this testimony would tend strongly to show the motive of appellant in killing deceased if he unlawfully killed him. Rev. Stats., arts. 2306, 2312; Harvey *v.* Edens, 69 Tex. 420, 6 S. W. 306; Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877. If the state's theory was correct, appellant had threatened to penitentiary deceased if he qualified as guardian; when shown the letters of guardianship he said he would not give up the girls; and when deceased intimated he would get them if the law authorized, the difficulty followed in a short time thereafter, this being evidence tending to show the motive of appellant in his actions." Welch *v.* S. (Tex. Cr.), 147 S. W. 572.

Even when motive is not of the essence of the crime it is relevant as a circumstance to identify the prisoner as the perpetrator of the crime, and to establish malice, deliberation and premeditation. S. *v.* Wilkins, 158 N. C. 603, 73 S. E. 992.

Motive need not be proved.—P. *v.* Besold, 154 Cal. 363, 97 P. 871; P. *v.* Barnes, 202 N. Y. 77, 95 N. E. 15; Wynne *v.* S., 59 Tex. Cr. 117, 127 S. W. 197. But fact state has made a prima facie case does not prevent its adding proof of motive in its case in chief. P. *v.* Cook, 148 Cal. 334, 83 P. 43.

713-12 P. *v.* Muhly, 11 Cal. App. 129, 104 P. 466; S. *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982; C. *v.* Latampa, 226 Pa. 23, 74 A. 736 (prejudice against nationality); S. *v.* Turley (Vt.), 88 A. 562.

713-13 Kirklin *v.* S. (Tex. Cr.), 164 S. W. 1016.

713-14 Cannon *v.* Ty., 1 Okla. Cr. 600, 99 P. 622.

Physical characteristics of parties, germane to show animus, purpose and motive. Lundy *v.* S., 59 Tex. Cr. 131, 127 S. W. 1032.

713-15 Opinions inadmissible. Knight *v.* S., 55 Tex. Cr. 243, 116 S. W. 56.

714-16 Streety *v.* S., 165 Ala. 71, 51 S. 415; Tipton *v.* S., 140 Ala. 39, 37 S. 231; Ward *v.* C., 29 Ky. L. R. 62, 91 S. W. 700; Powers *v.* C., 29 Ky. L. R. 227, 92 S. W. 975 (statement of dislike); P. *v.* Droste, 160 Mich. 66, 125 N. W. 87; S. *v.* Bradley, 161 N. C. 290, 76 S. E. 720; S. *v.* Teachey, 138 N. C. 587, 50 S. E. 232; Asbeck *v.* S. (Tex. Cr.), 156 S. W. 925; Bogue *v.* S. (Tex. Cr.), 155 S. W. 943; Barnes *v.* S., 53 Tex. Cr. 628, 111 S. W. 943; S. *v.* Turley (Vt.), 88 A. 562. See S. *v.* Ferrell, 233 Mo. 452, 136 S. W. 709.

Remarks of defendant when he heard of the outcome of a divorce suit between deceased and his wife are admissible, but not the judgment entry in that suit or other details. Drake *v.* S. (Tex. Cr.), 143 S. W. 1157.

Communication to deceased unnecessary.—McCray *v.* S., 134 Ga. 416, 68 S. E. 62.

714-17 Copeland *v.* S., 58 Fla. 26, 50 S. 621; S. *v.* Overton (N. J.), 88 A. 689.

714-18 Jones *v.* S. (Ala.), 61 S. 434; S. *v.* Durant, 87 S. C. 532, 70 S. E. 306; Johnson *v.* S. (Tex. Cr.), 149 S. W. 165; S. *v.* Turley (Vt.), 88 A. 562.

714-19 S. *v.* Turley (Vt.), 88 A. 562.

Visits made by deceased to home of accused, in his absence, cannot be proved. Sanders *v.* S., 54 Tex. Cr. 101, 112 S. W. 68.

714-20 Woolman *v.* S. (Ark.), 167 S. W. 851; S. *v.* Buonoma (Conn.), 90 A. 225; Copeland *v.* S., 58 Fla. 26, 50 S. 621; P. *v.* Burkhart, 165 Mich. 240, 130 N. W. 597; Miller *v.* S., 9 Okla. Cr. 255, 131 P. 717; Brock *v.* S. (Tex. Cr.),

151 S. W. 801. See Gilmer *v.* S. (Ala.), 61 S. 377.

Evidence of illicit relations years before inadmissible. Ballard *v.* S. (Tex. Cr.), 160 S. W. 716.

Evidence of relations two years prior to homicide held too remote. Tillman *v.* S. (Ark.), 166 S. W. 582.

Evidence as to relations a year before excluded, as too remote though later relations shown. Wright *v.* S., 3 Ala. App. 24, 58 S. 68.

715-21 Underwood *v.* S. (Ala.), 60 S. 842; Barnett *v.* S., 165 Ala. 59, 51 S. 299; Shirley *v.* S., 144 Ala. 35, 40 S. 269; Bonner *v.* S. (Fla.), 65 S. 663; Sylvester *v.* S., 46 Fla. 166, 35 S. 142 (merits of controversy, inadmissible); Early *v.* S. (Ga. App.), 81 S. E. 385; S. *v.* McKenzie (N. C.), 81 S. E. 301; Gant *v.* S. (Tex. Cr.), 165 S. W. 142; Coulter *v.* S. (Tex. Cr.), 162 S. W. 885. See Kelly *v.* S. (Tex. Cr.), 151 S. W. 304; Burnam *v.* S., 61 Tex. Cr. 51, 133 S. W. 1045.

715-22 Kennedy *v.* S., 140 Ala. 1, 37 S. 90; Copeland *v.* S., 58 Fla. 26, 50 S. 621; Clemmons *v.* S., 92 Miss. 244, 45 S. 834 (fact accused attributed killing of friend by third person to influence of deceased); Moore *v.* S., 49 Tex. Cr. 499, 96 S. W. 321 (indictment against deceased for assault on defendant, admissible).

Improper relations between deceased and accused's sister. Coon *v.* S. (Ala. App.), 65 S. 911.

Deceased's contemplated marriage with the sister of accused against the latter's wishes. De Leon *v.* S. (Tex. Cr.), 155 S. W. 247.

Objections of deceased to defendant's intimacy with her sister may be shown. Gallegos *v.* S., 48 Tex. Cr. 58, 85 S. W. 1150.

Confession of wife to defendant of illicit relations with deceased. Shipp *v.* C., 124 Ky. 643, 30 Ky. L. R. 904, 99 S. W. 945.

Note from defendant warning deceased to keep cattle off his land, admissible. Long *v.* S., 48 Tex. Cr. 175, 88 S. W. 203.

Religious views—difference in may be shown. Long *v.* S., 48 Tex. Cr. 175, 88 S. W. 203.

715-23 S. *v.* Marren, 17 Ida. 766, 107 P. 993; Sergent *v.* C., 133 Ky. 284, 117 S. W. 362; Spencer *v.* C., 32 Ky. L. R. 880, 107 S. W. 342; S. *v.* Clark, 119 La. 733, 44 S. 449; S. *v.* McKenzie (N. C.), 81 S. E. 301; Penton *v.* S. (Tex. Cr.), 149 S. W. 190.

Evidence held admissible to show dispute over money matters. Ward *v.* S. (Tex. Cr.), 159 S. W. 272.

715-26 Van Wyk *v.* P., 45 Colo. 1, 99 P. 1009; Sanderson *v.* S., 169 Ind. 301, 82 N. E. 525.

Previous quarrel with employe of deceased may be shown. P. *v.* Smith, 9 Cal. App. 644, 99 P. 1111.

715-28 Carter *v.* S., 108 Ark. 124, 156 S. W. 443; Powdrill *v.* S., 62 Tex. Cr. 442, 138 S. W. 114; S. *v.* Tribett, 74 Wash. 125, 132 P. 875. See Turnbull *v.* S., 8 Okla. Cr. 479, 128 P. 743.

716-29 Separation of accused and wife, the pendency of divorce proceedings, and relation of deceased thereto may be shown only in a general way and without going into their merits. Rollings *v.* S., 160 Ala. 82, 49 S. 329.

716-31 Sergent *v.* C., 133 Ky. 284, 117 S. W. 362; S. *v.* Finch, 54 Or. 482, 103 P. 505; Canon *v.* S. (Tex. Cr.), 128 S. W. 141; Spick *v.* S., 140 Wis. 104, 121 N. W. 664 (though accused not informed of fact deceased was his accuser, his knowledge of the accusation coming to him in such a way as to lead to the inference deceased might have made the accusation). See P. *v.* Chin Hane, 108 Cal. 597, 41 P. 697.

717-35 Roberts *v.* S., 171 Ala. 12, 54 S. 993; Early *v.* S. (Ga. App.), 81 S. E. 385; Brown *v.* S., 141 Ga. 5, 80 S. E. 320; Burley *v.* S., 130 Ga. 343, 60 S. E. 1006; Cornett *v.* C., 136 Ky. 795, 162 S. W. 112; S. *v.* Andrews, 73 S. C. 257, 53 S. E. 423.

717-36 S. *v.* Saxon, 87 Conn. 5, 86 A. 590; S. *v.* Stratford, 149 N. C. 483, 62 S. E. 882; Reyes *v.* S., 55 Tex. Cr. 422, 117 S. W. 152.

717-37 Washington *v.* S., 155 Ala. 2, 46 S. 778; P. *v.* Easton, 148 Cal. 50, 82 P. 840; Mathley *v.* C., 120 Ky. 389, 27 Ky. L. R. 785, 86 S. W. 988; McCorquodale *v.* S. (Tex. Cr.), 98 S. W. 879; S. *v.* Bean, 77 Vt. 384, 60 A. 807.

Testimony must be limited to particular person or persons connected with the case. S. *v.* High, 122 La. 521, 47 S. 878.

717-38 Spicer *v.* S. (Ala.), 65 S. 972; Waldrop *v.* S. (Ala.), 64 S. 80; P. *v.* Curtright, 238 Ill. 430, 101 N. E. 551; S. *v.* Simon, 121 La. 520, 50 S. 975; P. *v.* Brasch, 193 N. Y. 46, 85 N. E. 809; Coffman *v.* S. (Tex. Cr.), 165

S. W. 939; Rice *v.* S., 54 Tex. Cr. 149, 112 S. W. 299.

That they had quarreled, the husband appearing to be the aggressor and that he had even gone so far as to threaten her life, and had attempted to use his knife and draw his pistol. S. *v.* Wilkins, 158 N. C. 603, 73 S. E. 992.

Jealousy may be shown.—S. *v.* Guthrie, 145 N. C. 492, 59 S. E. 652; Reeves *v.* S., 47 Tex. Cr. 340, 83 S. W. 803.

717-39 Spicer *v.* S. (Ala.), 65 S. 972 (statements held inadmissible); P. *v.* Le Doux, 155 Cal. 535, 102 P. 517; Porter *v.* S., 173 Ind. 694, 91 N. E. 340; Levering *v.* C., 132 Ky. 666, 117 S. W. 253; C. *v.* Howard, 204 Mass. 128, 91 N. E. 397; Hill *v.* S. (Tex. Cr.), 161 S. W. 118; Combs *v.* S., 55 Tex. Cr. 334, 116 S. W. 584.

Defendant's belief in her marriage to deceased may be shown by certified copy of certificate recorded in another jurisdiction. P. *v.* Le Doux, 155 Cal. 535, 102 P. 517.

718-40 But evidence of a previous suit for divorce is inadmissible. Daniels *v.* S. (Tex. Cr.), 160 S. W. 707.

718-41 S. *v.* Simon, 131 La. 520, 59 S. 975.

Fact bastardy proceedings instituted before marriage of parties and seduction proceedings pending relevant. Nordan *v.* S., 143 Ala. 13, 39 S. 406.

718-46 Fowler *v.* S., 155 Ala. 21, 45 S. 913; Josey *v.* S., 137 Ga. 769, 74 S. E. 282, cit. this text.

719-47 Boyce *v.* Brinkley, 107 Ark. 280, 154 S. W. 951.

719-48 C. *v.* Howard, 204 Mass. 128, 91 N. E. 397. See Ballard *v.* S. (Tex. Cr.), 160 S. W. 716.

719-49 Green *v.* S., 125 Ga. 742, 54 S. E. 724.

719-50 Fact of criminal intimacy of deceased with another man must have been communicated to defendant. Groce *v.* Ty., 12 Ariz. 1, 94 P. 1108.

Fact deceased lived on earnings of accused as prostitute may be shown. P. *v.* Le Doux, 155 Cal. 535, 102 P. 517.

Reputation of deceased spouse for chastity held inadmissible. Hall *v.* S. (Tex. Cr.), 158 S. W. 272.

But witnesses' opinion as to deceased's adultery is inadmissible when no knowledge thereof by defendant is shown. Ragland *v.* S. (Ala.), 65 S. 776.

719-51 Spicer *v.* S. (Ala.), 65 S. 972.

719-52 Spicer *v.* S. (Ala.), 65 S. 972; P. *v.* Le Doux, 155 Cal. 535, 102 P. 517; Porter *v.* S., 173 Ind. 694, 91 N. E. 340, cit. the text; Lawson *v.* S., 171 Ind. 431, 84 N. E. 974; C. *v.* Howard, 204 Mass. 128, 91 N. E. 397; S. *v.* Fiore (N. J.), 88 A. 1039; P. *v.* Brasch, 193 N. Y. 46, 85 N. E. 809; Wortman *v.* S., 9 Okla. Cr. 440, 132 P. 358; Davis *v.* S., 54 Tex. Cr. 236, 114 S. W. 366; Rice *v.* S., 49 Tex. Cr. 569, 94 S. W. 1024.

Evidence admissible to explain apparent illicit relations.—Spicer *v.* S. (Ala.), 65 S. 972.

720-53 P. *v.* Bowers, 1 Cal. App. 501, 82 P. 553; Rice *v.* S., 54 Tex. Cr. 149, 112 S. W. 299; S. *v.* Legg, 59 W. Va. 315, 53 S. E. 545.

720-54 But see P. *v.* Harris, 209 N. Y. 70, 102 N. E. 546.

720-55 See Sasser *v.* S., 129 Ga. 541, 59 S. E. 255, cit. the text.

721-60 Bush *v.* S., 168 Ala. 77, 53 S. 266; Littlejohn *v.* S., 76 Ark. 481, 89 S. W. 463; P. *v.* Feld, 149 Cal. 464, 86 P. 1100; P. *v.* Dinser, 49 Misc. 82, 98 N. Y. S. 314; Goode *v.* S., 57 Tex. Cr. 220, 123 S. W. 597; Fay *v.* S., 52 Tex. Cr. 185, 107 S. W. 55.

Illicit relations with sister of deceased (Gallegos *v.* S., 48 Tex. Cr. 58, 85 S. W. 1150), or daughter. S. *v.* Martin, 47 Or. 282, 83 P. 849.

721-61 P. *v.* Botkin, 9 Cal. App. 244, 98 P. 861; S. *v.* Page, 212 Mo. 224, 110 S. W. 1057; S. *v.* Fiore (N. J.), 88 A. 1039; Lane *v.* S. (Tex. Cr.), 164 S. W. 378; Menefee *v.* S., 50 Tex. Cr. 249, 97 S. W. 486; Pannell *v.* S., 59 Tex. Cr. 383, 128 S. W. 133; Anderson *v.* S., 53 Tex. Cr. 341, 110 S. W. 54; Drake *v.* S. (Tex. Cr.), 143 S. W. 1157.

Evidence that defendant did not know that his paramour was deceased's wife is admissible. P. *v.* Watson, 165 Cal. 645, 133 P. 298.

721-62 P. *v.* Botkin, 9 Cal. App. 244, 98 P. 861; S. *v.* Page, 212 Mo. 224, 110 S. W. 1057, (telegram sent deceased's wife informing her of the homicide); Anderson *v.* S., 8 Okla. Cr. 90, 126 P. 840; Pannell *v.* S., 59 Tex. Cr. 383, 128 S. W. 133.

721-67 Walker *v.* S., 141 Ga. 525, 81 S. E. 442. Family feud may be shown (Rawlins *v.* S., 124 Ga. 31, 52 S. E. 1), after connection of defendant therewith. Jones *v.* C., 32 Ky. L. R. 598, 106 S. W. 802.

722-69 Pope *v.* S., 168 Ala. 33, 53 S. 292; Johnson *v.* S., 128 Ga. 71, 57 S.

E. 84; Jenkins *v.* S. (Wyo.), 134 P. 260.

722-70 Macon *v.* S. (Ala.), 60 S. 312; Bowen *v.* S., 140 Ala. 65, 37 S. 233 (that watch deceased had won from accused by gambling disappeared); S. *v.* Ness, 71 Wash. 334, 128 P. 664.

722-71 P. *v.* Antony, 146 Cal. 124, 79 P. 858; S. *v.* Bailey, 79 Conn. 589, 65 A. 951, Cook *v.* S., 134 Ga. 347, 67 S. E. 812; S. *v.* Oteri, 128 La. 939, 55 S. 582; S. *v.* Shelton, 223 Mo. 118, 122 S. W. 732; Shumway *v.* S., 82 Neb. 152, 117 N. W. 407; S. *v.* Humphrey, 63 Or. 540, 128 P. 824; Spates *v.* S., 62 Tex. Cr. 532, 138 S. W. 393; Elsworth *v.* S., 54 Tex. Cr. 38, 111 S. W. 963; Thurman *v.* C., 107 Va. 912, 60 S. E. 99 (receipt given by deceased tending to show possession of money, admissible). But see Ward *v.* S. (Ala.), 62 S. 703. **And that none was found** on his body or on his premises after the crime. S. *v.* Rasco, 239 Mo. 535, 144 S. W. 449.

723-73 P. *v.* Soeder, 150 Cal. 12, 87 P. 1016 (desire to get married); Turner *v.* S., 48 Tex. Cr. 585, 89 S. W. 975 (payment of mortgage); Spates *v.* S., 62 Tex. Cr. 532, 138 S. W. 393.

It may be shown defendant sold property upon which deceased had a mortgage. Carwile *v.* S., 148 Ala. 576, 39 S. 220.

723-77 Macon *v.* S. (Ala.), 60 S. 312; Cook *v.* S., 134 Ga. 347, 67 S. E. 812.

Knowledge thirty days before, not too remote. Saulsberry *v.* S., 178 Ala. 16, 59 S. 476.

723-79 Macon *v.* S. (Ala.), 60 S. 312.

724 Rebuttal.—Evidence admissible to show that defendant had been invited to share in proceeds of a robbery but did not do so. S. *v.* Powell (Mo.), 167 S. W. 559.

Defendant may show that he was in no need of money. S. *v.* Allen, 23 Ida. 772, 131 P. 1112.

724-85 Forgery of will disposing of decedent's estate in favor of accused may be shown. Levering *v.* C., 132 Ky. 666, 117 S. W. 253.

725-86 Jenkins *v.* S. (Wyo.), 134 P. 260.

725-87 P. *v.* Weber, 149 Cal. 325, 86 P. 671.

725-88 Spicer *v.* S. (Ala.), 65 S. 972; P. *v.* Soeder, 150 Cal. 12, 87 P. 1016; Johnson *v.* S., 128 Ga. 71, 57 S. E. 84; S. *v.* Woodard, 132 Ia. 675, 108 N. W. 753; Streight *v.* S., 62 Tex. Cr. 453, 138 S. W. 742.

A statement by accused subsequent to homicide relative to anticipated expenditures held inadmissible. Spicer *v.* S. (Ala.), 65 S. 972.

Evidence of details in obtaining insurance inadmissible. Spicer *v.* S. (Ala.), 65 S. 972.

725-89 Spicer *v.* S. (Ala.), 65 S. 972; Van Wyk *v.* P., 45 Colo. 1, 99 P. 1009 (inability of accused to pay premium may be shown).

725-90 C. *v.* Rivet, 205 Mass. 464, 91 N. E. 877 (application for benefits may be proved to show accused knew his rights as assignee).

725-92 Accused's knowledge of insurance must be shown. P. *v.* Auerbach, 176 Mich. 23, 141 N. W. 869.

725-94 Roberson *v.* S. (Ala.), 62 S. 837; S. *v.* Buonomo, 87 Conn. 285, 87 A. 977; Robbins *v.* S. (Tex. Cr.), 166 S. W. 528; Foster *v.* S. (Tex. Cr.), 150 S. W. 936.

726-95 P. *v.* Cook, 148 Cal. 324, 83 P. 43

726-96 P. *v.* Prantikos, 164 Cal. 113, 127 P. 1029.

726-99 Maloy *v.* S., 52 Fla. 101, 41 S. 791 (personal bad feeling in connection with litigation need not be shown); Ball *v.* C., 31 Ky. L. R. 188, 101 S. W. 956; McElwain *v.* C., 146 Ky. 104, 142 S. W. 234; S. *v.* Finch, 54 Or. 482, 103 P. 505 (disbarment proceedings).

726-1 Zipperian *v.* P., 33 Colo. 134, 79 P. 1018; Daniels *v.* S., 57 Fla. 1, 48 S. 747; Smith *v.* S., 48 Fla. 307, 37 S. 573; McElwain *v.* C., 146 Ky. 104, 142 S. W. 234; Ball *v.* C., 31 Ky. L. R. 188, 101 S. W. 956; S. *v.* Brady, 124 La. 951, 50 S. 806.

727-3 Daniels *v.* S., 57 Fla. 1, 48 S. 747.

Knowledge of accused is essential. Mullins *v.* C., 113 Va. 787, 75 S. E. 192.

727-4 Hayes *v.* S., 126 Ga. 95, 54 S. E. 809; Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102.

728-9 Hayes *v.* S., 126 Ga. 95, 54 S. E. 809; Ball *v.* C., 31 Ky. L. R. 188, 101 S. W. 956; S. *v.* Finch, 54 Or. 482, 103 P. 505 (record admissible though some of facts in it provable by parol).

728-10 S. *v.* Finch, supra, if deceased's appointment as prosecutor for bar association not shown to have been in writing parol proof competent.

728-12 S. *v.* Vanella, 40 Mont. 326, 106 P. 364, (*disap.* Vaughan *v.* C., 85 Va. 671, 8 S. E. 584, which held absence of motive, if there is reasonable doubt as to who committed crime, strong presumption of innocence); S. *v.* Finch, 54 Or. 482, 103 P. 505.

Motive immaterial.—No motive need be shown, and it is immaterial what was existing motive, except as bearing upon intent, malice, etc. Ward *v.* S., 153 Ala. 9, 45 S. 221; Campbell *v.* S., 124 Ga. 432, 52 S. E. 914 (proof of motive unnecessary to support presumption of malice from unlawful killing); Clefford *v.* P., 229 Ill. 633, 82 N. E. 343; Rains *v.* C., 29 Ky. L. R. 66, 92 S. W. 276; S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235; S. *v.* Feeley, 194 Mo. 300, 92 S. W. 663; S. *v.* Adams, 138 N. C. 688, 50 S. E. 765; S. *v.* Thrailkill, 73 S. C. 314, 53 S. E. 482; Holder *v.* S., 119 Tenn. 178, 104 S. W. 225; S. *v.* Barker, 56 Wash. 510, 106 P. 133; Cupps *v.* S., 120 Wis. 504, 97 N. W. 210, 98 N. W. 546.

Absence of evidence of it, not circumstance in favor of accused except as it may be regarded in connection with other facts and circumstances. Hogue *v.* S., 93 Ark. 316, 124 S. W. 783. It may be material if evidence wholly circumstantial. P. *v.* Argentos, 156 Cal. 720, 106 P. 65. Absence of evidence of motive may favor accused if there is doubt of guilt. S. *v.* Blackburn, 7 Penne. (Del.) 479, 75 A. 536. It has been said failure to prove motive tends to prove innocence. S. *v.* Francis, 199 Mo. 671, 98 S. W. 11. Testimony should be reasonably substantial before jury justified in concluding motive induced commission of act. S. *v.* Gordon, 199 Mo. 561, 98 S. W. 39.

Erratum.—"Weight and sufficiency" should appear on page 729 as main subhead, j, under IV, 14, Y.

728-13 S. *v.* Levy, 9 Ida. 483, 75 P. 227; Allen *v.* S., 88 Miss. 159, 40 S. 744 (absence of motive important where evidence circumstantial). See 728-12. Motive by itself, insufficient to sustain conviction. P. *v.* Staples, 149 Cal. 405, 86 P 886.

729-15 Swilley *v.* S. (Tex. Cr.), 166 S. W. 733. See Drane *v.* S., 92 Miss. 180, 45 S. 149; S. *v.* Kelleher, 201 Mo. 614, 100 S. W. 470; S. *v.* Williams, 28 Nev. 395, 82 P. 353.

Comment improper.—S. *v.* Ruck, 194 Mo. 416, 92 S. W. 706; Wallace *v.* S., 46 Tex. Cr. 341, 81 S. W. 966.

729-17 Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102.

729-20 Rains *v.* C., 29 Ky. L. R. 66, 92 S. W. 276; S. *v.* Gillis, 73 S. C. 318, 53 S. E. 487.

Premeditated design may be established by circumstantial evidence. Pugh *v.* S., 55 Fla. 150, 45 S. 1023.

730-22 Bowen *v.* S., 140 Ala. 65, 37 S. 233; Young *v.* S., 121 Ga. 334, 49 S. E. 256; Campbell *v.* S., 123 Ga. 533, 51 S. E. 644; S. *v.* Levy, 9 Ida. 483, 75 P. 227; S. *v.* Francis, 199 Mo. 671, 98 S. W. 11.

"**Where, upon consideration of all the facts,** the mind is left in such doubt as we entertain in this case, we naturally feel considerable hesitation in affirming a verdict of conviction, where, even under the admitted facts, it is not at all improbable that the crime may have been committed by some one else."
Hall *v.* C., 149 Ky. 42, 147 S. W. 764.

730-25 P. *v.* Rischo, 262 Ill. 596, 105 N. E. 8.

730-27 See Johnson *v.* S., 128 Ga. 71, 57 S. E. 84.

731-28 S. *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237.

731-32 Writ of possession, under which deceased assisted officer in evicting defendant, admissible without direct evidence lands described were those from which defendant was sought to be evicted. Williams *v.* S., 147 Ala. 10, 41 S. 992.

731-33 Smith *v.* S., 52 Tex. Cr. 27, 105 S. W. 182.

Previous threats by defendant he would resist ejection by killing, admissible. Williams *v.* S., 147 Ala. 10, 41 S. 992.

731-34 *Contra,* Looney *v.* C., 115 Va. 921, 78 S. E. 625.

731-35 Knowledge by deceased of offense committed by accused need not be shown. All that occurred just prior to killing may be proved, including acts of persons present, order issued by officer, and resulting conduct of deceased. S. *v.* Bertchey, 77 N. J. L. 640, 73 A. 524.

732-37 Officer may testify he summoned deceased to aid in arresting defendant, but may not give details of conversation between former and himself as to defendant's character. Owen *v.* S., 58 Tex. Cr. 261, 125 S. W. 405.

732-38 Owen *v.* S., supra.

732-12 Condron *v.* S., 62 Tex. Cr. 485, 138 S. W. 594.
Not cause for excluding warrant it tends to show accused's guilt of another offense. Hunter *v.* S., 3 Okla. Cr. 533, 107 P. 444.
732-13 Coile *v.* S., 8 O. C. C. (N. S.) 596, illegality of warrant immaterial if premeditation shown.
732-15 Yates *v.* S., 127 Ga. 813, 56 S. E. 1017; P. *v.* Blake, 157 Mich. 533, 122 N. W. 113; Cortez *v.* S., 47 Tex. Cr. 10, 83 S. W. 812.
733-17 C. *v.* Phelps, 209 Mass. 396, 95 N. E. 868.
Card containing offer of regard for arrest of defendant, admissible. Harper *v.* S., 129 Ga. 770, 59 S. E. 792.
733-19 Accused's knowledge of official character of deceased may be shown by his conversation with a third party. S. *v.* Messervy, 86 S. C. 503, 68 S. E. 766.
733-50 *Comp.* Ty. *v.* Kimmick, 15 N. M. 178, 106 P. 381.
733-51 S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402. See Hull *v.* S., 50 Tex. Cr. 607, 100 S. W. 403.
734-54 Threat to kill any officer attempting to arrest defendant, inadmissible where defendant referred to an entirely distinct matter. Earles *v.* S., 47 Tex. Cr. 559, 85 S. W. 1.
734-55 Owen *v.* S., 58 Tex. Cr. 261, 125 S. W. 405.
734-57 P. *v.* Woods, 147 Cal. 265, 81 P. 652, defendant and companions armed with burglar tools and were returning from unsuccessful attempt at burglary.
Indictment for different crime may not be shown. Owen *v.* S., 58 Tex. Cr. 261, 125 S. W. 405.
735-58 P. *v.* Governale, 193 N. Y. 581, 86 N. E. 554.
Facts tending to show defendant a fugitive from justice, admissible. Harper *v.* S., 129 Ga. 770, 59 S. E. 792.
735-59 S. *v.* Honore, 121 La. 573, 46 S. 655 (commission of felony); C. *v.* Phelps, 209 Mass. 396, 95 N. E. 868; S. *v.* Spaugh, 200 Mo. 571, 98 S. W. 55; Earles *v.* S., 52 Tex. Cr. 140, 106 S. W. 138 (instructions to arrest).
Ordinances giving officer power to arrest without warrant, admissible. Earles *v.* S., 52 Tex. Cr. 140, 106 S. W. 138.
735-61 A justice of the peace cannot appoint a special bailiff to execute a warrant of arrest and such warrant is not admissible. Neeley *v.* C., 123 Ky. 1, 93 S. W. 596.
735-63 Holland *v.* S., 162 Ala. 5, 50 S. 215.
Threats by deceased may be shown. Hammond *v.* S., 147 Ala. 79, 41 S. 761.
Ordinances of city for violation of which arrest being made. See S. *v.* Coleman, 186 Mo. 151, 84 S. W. 978. Admissible if decedent met death while attempting to arrest accused for their violation. S. *v.* Campisi, 123 La. 815, 49 S. 535. Inadmissible if there are no common law crimes. S. *v.* Collinsworth, 8 O. N. P. (N. S.) 383.
Peace warrant and what was done under it may be considered only to throw light on situation of parties and motives prompting conduct. Neeley *v.* C., 123 Ky. 1, 93 S. W. 596.
736-65 Dangerous character of deceased may be shown (Hammond *v.* S., 147 Ala. 79, 41 S. 761), but not reputation among peace officers especially. Stevens *v.* C., 124 Ky. 32, 30 Ky. L. R. 290, 98 S. W. 284.
736-66 See Warford *v.* P., 41 Colo. 203, 92 P. 21, decedent shot in fracas after refusing to obey officer.
736-67 Defendant limited to proof of charges against deceased for violation of ordinances; details of acts and conduct, inadmissible. Hammond *v.* S., 147 Ala. 79, 41 S. 761.
736-68 *Contra* if it is claimed deceased was at scene of homicide for unlawful purpose connected with accused. Patterson *v.* S., 134 Ga. 264, 67 S. E. 816.
736-72 See Turley *v.* S., 74 Neb. 471, 104 N. W. 954, decedent's peaceable and rightful possession may be shown by lease.
737-76 Where difficulty precipitated by threat of deceased to take possession of a hog on premises of defendant, claimed by deceased, evidence he had the general reputation of not being able to distinguish his own hogs from others, irrelevant. Maloy *v.* S., 52 Fla. 101, 41 S. 791.
737-77 Van Schaick *v.* U. S., 159 Fed. 847, 87 C. C. A. 27; S. *v.* McGinnis, 12 Ida. 336, 85 P. 1089 (negligent shooting on highway); Westrup *v.* C., 123 Ky. 95, 29 Ky. L. R. 519, 93 S. W. 646 (evidence did not show negligence in providing medical attendance). Compare infra, 754-87.
Conclusion of defendant that he did his best to avoid the result, inadmissi-

ble. S. *v.* Campbell, 82 Conn. 671, 74 A. 927.

Statement by defendant of surprise and grief on being told deceased was shot, inadmissible. Saye *v.* S., 50 Tex. Cr. 569, 99 S. W. 551.

Greater speed in driving than ordinance authorized is evidence of negligence. S. *v.* Moore, 129 Ia. 514, 106 N. W. 16.

Character of defendant as a cautious and prudent officer may be shown. Saye *v.* S., 50 Tex. Cr. 569, 99 S. W. 551.

737-78 Green *v.* S., 168 Ala. 90, 53 S. 286; C. *v.* West (Ky.), 113 S. W. 76 (irregular warrant, indorsement and acts done under it, admissible in favor of accused); Creech *v.* C., 32 Ky. L. R. 808, 107 S. W. 212; P. *v.* Clemente, 130 N. Y. S. 612; Wilson *v.* S. (Tex. Cr.), 156 S. W. 1185. See supra, 625-38; infra, 754-87 et seq.

737-79 Combs *v.* S., 55 Tex. Cr. 334, 116 S. W. 584.

Threats against intended victim admissible. Owens *v.* S., 65 Fla. 483, 62 S. 651.

738-81 See Johnson *v.* S., 12 Ga. App. 493, 77 S. E. 587.

738-82 P. *v.* Gee Gong, 15 Cal. App. 28, 114 P. 78. See Brundige *v.* S., 49 Tex. Cr. 596, 95 S. W. 527.

Instructions of superior officers, not admissible in killing by a militiaman Manley *v.* S., 62 Tex. Cr. 392, 137 S. W. 1137.

738-84 Hill *v.* S., 156 Ala. 3, 46 S. 864 (may testify why he was armed); P. *v.* Smith, 151 Cal. 619, 91 P. 511; P. *v.* Carlin, 194 N. Y. 448, 87 N. E. 805 (insanity may be shown under plea of not guilty); Millner *v.* S. (Tex. Cr.), 162 S. W. 348; Pratt *v.* S., 50 Tex. Cr. 227, 96 S. W. 8 (physical and mental degeneration as bearing upon mental status).

Previous statement of witness to a third person that accused acted like a crazy man is inadmissible. Milford *v.* S., 2 Ala. App. 104, 57 S. 96.

Statement by accused that he was going to feign insanity is admissible. Reed *v.* S., 102 Ark. 525, 145 S. W. 206.

Subsequent insanity irrelevant upon issue of adequate cause. Sartin *v.* S., 51 Tex. Cr. 571, 103 S. W. 875.

Preliminary showing of self-defense must be made. Dunn *v.* S., 143 Ala. 67, 39 S. 147; Robinson *v.* S., 155 Ala. 67, 45 S. 916.

738-85 Bailey *v.* S., 4 Ala. App. 7, 58 S. 675; Chaplin *v.* C., 142 Ky. 782, 135 S. W. 298.

739-86 *Contra*, it seems. Gordon *v.* C., 136 Ky. 508, 124 S. W. 806, stated under infra, "Mental and Physical States," 583-80.

Decree as to custody of child may be shown in a prosecution for homicide committed in attempt to comply with decree. Foster *v.* S., 8 Okla. Cr. 139, 126 P. 835.

739-87 S. *v.* Johnson (Ia.), 144 N. W. 303; Hillis *v.* S. (Tex. Cr.), 166 S. W. 1154.

Advice to defendant by a justice of the peace to go upon the land over which the fatal difficulty arose may be shown by defendant. Hillis *v.* S. (Tex. Cr.), 166 S. W. 1154.

739-88 P. *v.* Overacker, 15 Cal. App. 620, 115 P. 756; Hill *v.* S., 156 Ala. 3, 46 S. 864.

739-89 McCray *v.* S., 134 Ga. 416, 68 S. E. 62; S. *v.* Hinkley, 81 Kan. 838, 106 P. 1088; Hart *v.* S., 57 Tex. Cr. 21, 121 S. W. 508.

740-93 All was said and done while parties together may be shown. Holland *v.* S., 162 Ala. 5, 50 S. 215.

740-95 Collins *v.* S., 102 Ark. 180, 143 S. W. 1075.

741-98 Brewer *v.* S., 160 Ala. 66, 49 S. 336, *disap.* Hooks *v.* S., 99 Ala. 168, 13 S. 767.

741-3 S. *v.* Hazlet, 16 N. D. 426, 113 N. W. 374; Hancock *v.* S., 47 Tex. Cr. 3, 83 S. W. 696.

Previous meeting.—Redman *v.* S. (Tex. Cr.), 149 S. W. 670.

742-5 Potter *v.* C. (Ky.), 124 S. W. 317; Mitchell *v.* S., 51 Tex. Cr. 71, 100 S. W. 930; Roch *v.* S., 52 Tex. Cr. 48, 105 S. W. 202 (prosecutor was violating agreement); S. *v.* Churchill, 52 Wash 210, 100 P. 309.

Attack by prosecutor on defendant five days before cannot be proved. Roper *v.* U. S., 7 Ind. Ty. 185, 104 S. W. 584.

742-6 Sanders *v.* S., 50 Tex. Cr. 430, 97 S. W. 1046. See Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156.

Threats made a week before by defendant, inadmissible. S. *v.* Edwards, 203 Mo. 528, 102 S. W. 520.

742-8 S. *v.* Spivey, 191 Mo. 87, 90 S. W. 81 (threats to whip defendant); S. *v.* Haulon, 38 Mont. 557, 100 P. 1035.

Remote difficulties cannot be proved. Poe *v.* S., 155 Ala. 31, 46 S. 521, four years.

742-10 Fox *v.* S. (Tex. Cr.), 158 S. W. 1141; Davis *v.* S. (Tex. Cr.), 155 S. W. 546; Gray *v.* S., 55 Tex. Cr. 90, 114 S. W. 635; Bays *v.* S., 50 Tex. Cr. 548, 99 S. W. 571; Redman *v.* S., 52 Tex. Cr. 591, 108 S. W. 365 (sudden transport of passion necessary). See Walker *v.* S. (Tex. Cr.), 156 S. W. 206; Stewart *v.* S., 52 Tex. Cr. 273, 106 S. W. 685.

743-13 Lowman *v.* S., 171 Ala. 47, 50 S. 43; Young *v.* S., 59 Tex. Cr. 137, 127 S. W. 1058. See McWilliams *v.* S., 178 Ala. 68, 60 S. 101; S. *v.* Harmon, 79 S. C. 80, 60 S. E. 230.

Knowledge of wife's adultery not recent, hence inadmissible. Martinez *v.* S. (Tex. Cr.), 153 S. W. 886.

Homicide immediately after discovery of parties in adultery reduces crime to manslaughter. Logan *v.* S., 155 Ala. 85, 46 S. 480.

743-14 Rigell *v.* S., 8 Ala. App. 46, 62 S. 977; Young *v.* S., 54 Tex. Cr. 417, 113 S. W. 276.

743-15 Killing must have been on first meeting after acquiring knowledge to be justification. Orange *v.* S., 47 Tex. Cr. 337, 83 S. W. 385.

743-16 S. *v.* Jones, 86 S. C. 17, 67 S. E. 160.

743-17 See Thomas *v.* S., 150 Ala. 31, 43 S. 371.

743-18 Lawson *v.* S., 155 Ala. 44, 46 S. 259, if accused aggressor and self-defense not involved.

743-20 Orange *v.* S., 47 Tex. Cr. 337, 83 S. W. 385.

Admissible where defense is insulting conduct to defendant's wife. Venters *v.* S., 47 Tex. Cr. 280, 83 S. W. 832, fact other men had obtained divorces for deceased's intimate relations with their wives is incompetent.

Rebuttal evidence of good character for chastity can only be given after direct evidence of bad character; insufficient some characteristic of deceased had been incidentally brought out. Gregory *v.* S., 50 Tex. Cr. 73, 94 S. W. 1041.

743-21 *Contra* if it is not shown deceased was doing anything when killed. Spencer *v.* S., 59 Tex. Cr. 217, 128 S. W. 118.

744-27 Cameron *v.* S. (Tex. Cr.), 153 S. W. 867.

That deceased was not pregnant is inadmissible in rebuttal of defendant's contention that she had admitted to him, her husband, that she was pregnant by another man. P. *v.* Harris, 209 N. Y. 70, 102 N. E. 546.

744-30 Gossett *v.* S., 123 Ga. 431, 51 S. E. 394. But see Jones *v.* S., 51 Tex. Cr. 472, 101 S. W. 993, prior acts inadmissible to prove "general character" of female relative, but *contra*, apparently, if such acts known to defendant.

745-31 *Contra*, Young *v.* S., 59 Tex. Cr. 137, 127 S. W. 1058.

745-34 Facts showing premeditation by accused, relevant. Lowman *v.* S., 161 Ala. 47, 50 S. 43.

745-35 Shipp *v.* C., 30 Ky. L. R. 904, 99 S. W. 945; Sturgeon *v.* C., 31 Ky. L. R. 536, 102 S. W. 812; S. *v.* Albanes, 109 Me. 199, 83 A. 548.

745-37 Hill *v.* S., 52 Tex. Cr. 241, 106 S. W. 145.

Statements made to defendant by his wife.—Whidden *v.* S., 64 Fla. 165, 59 S. 561.

745-38 Truth or falsity immaterial. Melton *v.* S., 47 Tex. Cr. 451, 83 S. W. 822; Bays *v.* S., 50 Tex. Cr. 548, 99 S. W. 561; Stewart *v.* S., 52 Tex. Cr. 273, 106 S. W. 685; Hill *v.* S., 52 Tex. Cr. 241, 106 S. W. 145.

In S. *v.* Green, 152 N. C. 835, 68 S. E. 16, the trial judge permitted the prisoner's wife to rehearse to the jury, in minute detail, everything she told the prisoner about the conduct of the deceased the night before. The prisoner offered to prove as a substantive and independent fact the truth of the narrative by the wife, but this was excluded by his honor. No error.

745-40 *Contra*, Gaines *v.* S., 58 Tex. Cr. 631, 127 S. W. 181, if defendant introduced statement.

745-41 Redman *v.* S., 52 Tex. Cr. 591, 108 S. W. 365.

746-43 Declarations of accused as to purpose in going to deceased may be shown. Stapleton *v.* S., 56 Tex. Cr. 422, 120 S. W. 866.

746-45 S. *v.* Beeson, 155 Ia. 355, 136 N. W. 317.

746-46 S. *v.* Beeson (Ia.), 136 N. W. 317.

746-47 C. *v.* Howard, 205 Mass. 128, 91 N. E. 397.

747-49 Ott *v.* S., 160 Ala. 29, 49 S. 810.

747-54 S. *v.* Nowells, 135 Ia. 53, 109

N. W. 1016, to show whether powder stains would necessarily exist.

748-56 Nordan *v.* S., 143 Ala. 13, 39 S. 406, defendant may testify to threat of deceased to take her life.

Erratum.—For "and" substitute "an act."

748-59 Kelly *v.* S. (Tex. Cr.), 151 S. W. 304.

748-60 Miera *v.* Ty., 13 N. M. 192, 81 P. 586, full discussion.

Position of body is sometimes of importance upon question of suicide. S. *v.* Lucas, 122 Ia. 141, 97 N. W. 1003.

748-61 S. *v.* Allen, 23 Ida. 772, 131 P. 1112. Invitation to another to spend night with him is inadmissible. Sasser *v.* S., 129 Ga. 541, 59 S. E. 255.

Another offense may be shown.—P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077.

Finding against a defense of alibi sustained. P. *v.* Connors, 253 Ill. 266, 97 N. E. 643.

749-64 Spicer *v.* S. (Ala.), 65 S. 972 (threats of third); Storey *v.* S., 160 Ala. 100, 49 S. 753; P. *v.* Pezutt, 255 Ill. 583, 99 N. E. 677; Stout *v.* S., 174 Ind. 395, 92 N. E. 161; Etly *v.* C., 130 Ky. 723, 113 S. W. 896; Wheeler *v.* S., 56 Tex. Cr. 547, 121 S. W. 166. See S. *v.* Washelesky, 81 Conn. 22, 70 A. 62.

Any evidence competent if the third person were being tried is competent in behalf of defendant. Harrison *v.* S., 47 Tex. Cr. 393, 83 S. W. 699.

750-70 Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102.

Conviction of third person for assault on deceased cannot be shown. Hardin *v.* S., 57 Tex. Cr. 401, 123 S. W. 613.

751-74 S. *v.* Cremeans, 62 W. Va. 134, 57 S. E. 405.

Threats by third person against prosecuting witness, inadmissible in prosecution for assault with intent to kill. Storey *v.* S., 160 Ala. 100, 49 S. 753.

Where killing in an affray and defense is self-defense, evidence of threats of third person, a party to the affray, is admissible. S. *v.* Gaylord, 70 S. C. 415, 50 S. E. 20.

752-75 S. *v.* Baudoin 115 La. 837, 40 S. 239; Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102.

Threats by deceased to kill a third person inadmissible unless such person is otherwise connected with the homicide. McCorquodale *v.* S. (Tex. Cr.), 98 S. W. 879.

Fact deceased had enemies and was apprehensive of harm from them is too remote. Wallace *v.* S., 46 Tex. Cr. 341, 81 S. W. 966.

752-76 Johnson *v.* S., 48 Tex. Cr. 423, 88 S. W. 223, if motive robbery, possession of money by third person who would not naturally have had it may be shown by defendant.

752-77 Tillman *v.* S. (Ark.), 166 S. W. 582; Beach *v.* S., 138 Ga. 265, 75 S. E. 139; Wyres *v.* S. (Tex. Cr.), 166 S. W. 1150. See vol. 6, p. 449, n. 41, and supplement.

753-80 Blocker *v.* S., 55 Tex. Cr. 30, 114 S. W. 814; Pace *v.* S., 61 Tex. Cr. 436, 135 S. W. 379.

753-82 Ott *v.* S., 160 Ala. 29, 49 S. 810.

753-85 Goolsby *v.* S., 133 Ga. 427, 66 S. E. 159; Graham *v.* S., 57 Tex. Cr. 104, 123 S. W. 691; Hedger *v.* S., 144 Wis. 279, 128 N. W. 80.

754-87 P. *v.* Williamson, 6 Cal. App. 336, 92 P. 313; Davis *v.* S. (Tex. Cr.), 143 S. W. 1161. *Comp.* supra, 737-78 et seq.

Conclusion.—Defendant charged with negligent homicide may not testify he did his best to avoid the result. He may state what he did. S. *v.* Campbell, 82 Conn. 671, 74 A. 927.

754-88 Casteel *v.* S., 73 Ark. 152, 83 S. W 953.

754-89 Prior disagreements may be shown. Parsons *v.* P., 218 Ill. 386, 75 N. E. 993.

754-91 See S. *v.* Botha, 27 Utah 289, 75 P. 731.

754-93 Opinions as to cause of homicide, inadmissible. Marsh *v.* S., 54 Tex. Cr. 144, 112 S. W. 320.

755-98 **If casual connection between wound and deceased's death is clearly** shown defendant may not show prior diseased condition of deceased. Dumas *v.* S., 159 Ala. 42, 49 S. 224.

Contributory negligence of deceased need not be negatived by state in jurisdictions where that is required in civil actions, prosecution being for negligent homicide. S. *v.* Campbell, 82 Conn. 671, 74 A. 927.

755-99 Derrick *v.* S., 92 Ark. 237, 122 S. W. 506; S. *v.* Jones, 249 Mo. 80, 155 S. W. 33; P. *v.* Governale, 193 N. Y. 581, 86 N. E. 554; S. *v.* Stockman, 82 S. C. 388, 64 S. E. 595; Gardner *v.* S., 121 Tenn. 684, 120 S. W. 816.

The accused may employ such means of protection and defense as at the time and under all the present conditions appeared to him to be reasonably neces-

sary and he may relate what the conditions were, and what his belief was as to the necessity for the action he took; but it is then for the jury, with all the facts before them, to say whether or not he did more than was necessary, or than appeared to him to be necessary." Salisbury *v.* C., 146 Ky. 730, 143 S. W. 371.

755-1 S. *v.* Bright, 89 S. C. 228, 71 S. E. 821.

Accused is only bound by his animus and intent and circumstances surrounding him at time. Hence, if he believed deceased had committed a crime against him his innocence thereof cannot be shown by proof of circumstances unknown to accused. Winn *v.* S., 54 Tex. Cr. 538, 113 S. W. 918.

756-1 Derrick *v.* S., 92 Ark. 237, 122 S. W. 506.

756-5 Degree of intoxication of deceased may be shown, after proof of overt act by him. Neilson *v.* S., 146 Ala. 683, 40 S. 221.

In McMurphy *v.* S., 4 Ala. App. 20, 58 S. 748, "the evidence tended to show that the deceased was drinking at the time, and there was some evidence tending to show that his drunken condition must have been so apparent that the defendant must have known that the behavior of the deceased was due entirely to his drunken condition, and that he was in a state of mental imbecility on account of such drunken condition. We are, therefore, of the opinion that the court committed no error in permitting testimony tending to show that 30 minutes before the homicide the deceased was 'drunk sleep' on a railroad near defendant's house."

756-9 Eggleston *v.* S., 59 Tex. Cr. 542, 128 S. W. 1105.

757-10 Ellzey *v.* S. (Miss.), 37 S. 837, defendant's shirt cut.

757-11 Cause of accused's wound may be shown and time inflicted. Roma *v.* S., 55 Tex. Cr. 344, 116 S. W. 598.

757-12 Derrick *v.* S., 92 Ark. 237, 122 S. W. 506; P. *v.* Wright, 144 Cal. 161, 77 P. 877 (defendant may explain how it happened deceased was shot in back of neck).

Body may be disinterred for examination. Gray *v.* S., 55 Tex. Cr. 90, 114 S. W. 635.

758-14 Jones *v.* S. (Ala.), 57 S. 245; S. *v.* Lee, 1 Boyce (Del.) 18, 74 A. 4; S. *v.* Cather, 121 Ia. 106, 96 N. W. 722 (club); Rogers *v.* S., 8 Okla. Cr. 226, 127 P. 365; Jay *v.* S., 56 Tex. Cr. 111, 120 S. W. 449.

Impression of witness, derived from movement by deceased after fatal shot, immaterial. Barbee *v.* S., 58 Tex. Cr. 129, 124 S. W. 961.

Opinion deceased was armed may be given by witness who felt a hard object on his person. Way *v.* S., 155 Ala. 52, 46 S. 273.

758-15 Andrus *v.* S. (Tex. Cr.), 165 S. W. 189; Cole *v.* S., 51 Tex. Cr. 89, 101 S. W. 218.

Defendant may testify he saw a pistol on decedent day prior to homicide. Kennedy *v.* C., 31 Ky. L. R. 546, 102 S. W. 863.

758-17 Crumpton *v.* S., 167 Ala. 4, 52 S. 605.

Irrelevant in absence of testimony showing justification. Gibbs *v.* S., 156 Ala. 70, 47 S. 65.

758-19 Rollings *v.* S., 160 Ala. 82, 49 S. 329 (also deceased not armed several hours prior to killing and not in habit of going armed); Dougherty *v.* S., 59 Tex. Cr. 464, 128 S. W. 398. See Lee *v.* S., 78 Ark. 77, 93 S. W. 754.

State may show deceased, when searched immediately after shooting, had no weapon. Jackson *v.* S., 147 Ala. 699, 41 S. 178, or only a pocket knife, closed, and in his pocket. Baysinger *v.* Ty., 15 Okla. 386, 82 P. 728.

Weapon of deceased not loaded cannot be shown. Roberts *v.* S., 48 Tex. Cr. 378, 88 S. W. 221.

Declarations of accused as to what he would do to make it appear he was assaulted if he killed a man, competent. Barnes *v.* S., 53 Tex. Cr. 628, 111 S. W. 943.

Interference by third persons with articles near body of deceased may be shown. Eggleston *v.* S., 59 Tex. Cr. 542, 128 S. W. 1105.

759-20 Arnwine *v.* S., 54 Tex. Cr. 213, 114 S. W. 796.

759-22 S. *v.* Churchill, 52 Wash. 210, 100 P. 309 (*cit.* the text), wife of deceased may testify he did not own a revolver.

Competent to prove that several hours after the killing witness searched defendant's house for weapons and found none; the reference being especially to the butcher knife with which defendant claimed deceased was attacking him. Watts *v.* S. (Ala.), 59 S. 270.

759-23 P. *v.* Wright, 144 Cal. 161, 77 P. 877.

759-24 Grant *v.* S., 56 Tex. Cr. 411, 120 S. W. 481.

759-26 The defendant, a minor, "undertook to prove that he was instructed by his father on that morning to go to the point where the obstructions had been placed and aid in removing such obstructions, and that after that time he might go hunting. There was some evidence tending to show the the defendant's younger brother was also present at the time of the homicide and that his gun was there, and it seems to us that this evidence was also relevant as tending to explain why the defendant was present and why he had his shotgun with him on that occasion, and as also explaining the presence of the younger brother and the presence of the gun of the younger brother. It certainly had some tendency, if believed, to rebut the idea that the defendant had engaged in a conspiracy, and that he was there armed for the purpose of aiding and abetting the other defendants in carrying out a common design to violate the law." Pearce *v.* S., 4 Ala. App. 32, 58 S. 996.

760-28 S. *v.* Skinner (Nev.), 139 P. 773; P. *v.* Taylor, 177 N. Y. 237, 69 N. E. 534; Holcomb *v.* S., 54 Tex. Cr. 486, 113 S. W. 754.

But not the state of feeling of deceased toward an accomplice not on trial. Jones *v.* S., 174 Ala. 53, 57 S. 31.

Belief of defendant deceased was jealous of him on account of his supposed friendship for wife of decedent, admissible. P. *v.* Ryan, 152 Cal. 364, 92 P. 853.

Criminal intimacy of accused with decedent's wife, immaterial on issue of self-defense. Pannell *v.* S., 54 Tex. Cr. 498, 113 S. W. 536.

760-29 See S. *v.* Emerson, 78 S. C. 83, 58 S. E. 974.

760-33 Ewing *v.* C., 129 Ky. 237, 111 S. W. 352; Price *v.* S., 1 Okla. Cr. 358, 98 P. 447.

Overt act on deceased's part must be shown. S. *v.* Bouvy, 124 La. 1054, 50 S. 849.

Reason accused in fear of deceased may not be shown by his own testimony. S. *v.* Raice, 24 S. D. 111, 123 N. W. 708.

761-34 Bogue *v.* S. (Tex. Cr.), 155 S. W. 943. See S. *v.* Kennedy, 207 Mo. 528, 106 S. W. 57.

Inadmissible where unknown to defendant. Pratt *v.* S., 53 Tex. Cr. 281, 109 S. W. 138.

761-35 Undisclosed and unknown condition of mind of assaulted party may not be shown. Darnell *v.* S., 58 Tex. Cr. 585, 126 S. W. 1122. But see Singleton *v.* S. (Tex. Cr.). 167 S. W. 46.

761-36 Kincaid *v.* S. (Tex. Cr.), 145 S. W. 597; Dowell *v.* S., 58 Tex. Cr. 482, 126 S. W. 871.

Converse is the rule. Gray *v.* S., 55 Tex. Cr. 90, 114 S. W. 635.

761-40 C. *v.* Thomas, 31 Ky. L. R. 899, 104 S. W. 326.

762-41 Humber *v.* C., 31 Ky. L. R. 606, 102 S. W. 1179; S. *v.* Rochester, 72 S. C. 194, 51 S. E. 685.

763-47 Dowell *v.* S., 58 Tex. Cr. 482, 126 S. W. 871.

763-48 Opinion as to what would have happened if deceased had not been killed when he was, inadmissible. S. *v.* Stockman, 82 S. C. 388, 64 S. E. 595.

763-49 Jones *v.* S. (Ala.), 61 S. 434.

764-51 Application of defendant to have deceased put under bond to keep the peace is inadmissible. S. *v.* Atchley, 186 Mo. 174, 84 S. W. 984.

764-55 Fact defendant left deceased to avoid trouble, but was followed by him, competent. Moseley *v.* S., 89 Miss. 802, 41 S. 384.

In Burks *v.* **S.** (Miss.), 57 S. 367, "appellant offered to prove that earlier in the day deceased, with a shotgun, had forced appellant to give him a dime, which appellant had and which deceased claimed, and that when the gun was taken away from him deceased obtained another gun and came back, threatening to kill appellant, who fled upon learning of his approach; that when he failed to find appellant he threatened to kill other parties if they did not tell him where appellant was, and said, if he saw appellant and Albert Porter 'between this and sundown, one or the other of them had to die.'" Exclusion was fatal error, *cit.* Brown *v.* State, 88 Miss. 166, 40 S. 737.

765-58 Welsh *v.* S., 9 Ala. App. 4, 63 S. 685; Underwood *v.* S. (Ala.), 60 S. 842; Turner *v.* S., 160 Ala. 40, 49 S. 828; S. *v.* Blee, 133 Ia. 725, 111 N. W. 19 (evidence as to who was aggressor in former affray); Gambrell *v.* C., 130

Ky. 513, 113 S. W. 476; U. S. *v.* McCray, 2 Phil. Isl. 545; S. *v.* McKellar, 85 S. C. 236, 67 S. E. 314 (subsequent conduct); Garcia *v.* S. (Tex. Cr.), 156 S. W. 939; Gray *v.* S., 55 Tex. Cr. 90, 114 S. W. 625; Williams *v.* S. (Tex. Cr.), 144 S. W. 620; S. *v.* Waldron, 71 W. Va. 1, 75 S. E. 558.

Details of previous difficulty, admissible to determine who was aggressor in instant case, proof of overt act by deceased having been made. Brown *v.* S., 88 Miss. 166, 40 S. 737, 87 Miss. 800, 40 S. 1009. See infra, 780-34.

Defendant's refusal to assent to immediate marriage of deceased with his daughter, admissible. Kennedy *v.* S., 140 Ala. 1, 37 S. 90.

765-59 Morris *v.* S., 146 Ala. 66, 41 S. 274; S. *v.* Butler, 146 Ia. 285, 125 N. W. 196; Burks *v.* S., 101 Miss. 87, 57 S. 367.

766-61 Welsh *v.* S., 9 Ala. App. 4, 63 S. 685; Gambrell *v.* C., 130 Ky. 513, 113 S. W. 476; S. *v.* Lee, 85 S. C. 101, 67 S. E. 141.

Accused may not testify to his conduct in trying to avoid decedent. Turner *v.* S., 160 Ala. 40, 49 S. 828.

Aggravated trespasses by defendant tend to show he was aggressor. S. *v.* Crump, 116 La. 978, 41 S. 229.

766-62 Potter *v.* C. (Ky.), 124 S. W. 317; S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035 (specific acts of violence towards accused and others in his presence).

Details of previous quarrels, admissible. Pratt *v.* S., 53 Tex. Cr. 281, 109 S. W. 138. But see infra, 780-34.

766-63 Accused's testimony as to his physical condition, shown as reason for deceased's attack, may be corroborated by physician who examined him. Cox *v.* S., 58 Fla. 33, 50 S. 875.

766-64 Montgomery *v.* S., 2 Ala. App. 25, 56 S. 92; Allen *v.* C., 134 Ky. 110, 119 S. W. 795 (quarrel between deceased and husband about latter's relations with accused); Shields *v.* S., 87 Miss. 429, 39 S. 1010; Moseley *v.* S., 89 Miss. 802, 41 S. 381; Keeton *v.* S., 59 Tex. Cr. 316, 128 S. W. 404. See McHenry *v.* S., 54 Tex. Cr. 477, 114 S. W. 115.

Deceased's rightful occupancy of premises claimed by accused may be shown by parol. Gay *v.* S., 58 Tex. Cr. 472, 125 S. W. 896.

767-67 Howard *v.* S., 172 Ala. 402, 55 S. 255; Brooks *v.* S., 85 Ark. 376, 108 S. W. 205; Rouse *v.* S., 157 Ga. 227, 69 S. E. 180; Burroughs *v.* U. S., 6 Ind. Ty. 164, 90 S. W. 8; S. *v.* Rideau, 116 La. 245, 40 S. 694; Burks *v.* S., 101 Miss. 87, 57 S. 367; S. *v.* Atchley, 180 Mo. 174, 84 S. W. 985; Summers *v.* S. (Tex.), 148 S. W. 774; Bethune *v.* S., 49 Tex. Cr. 166, 90 S. W. 1014.

Uncommunicated threats.—S. *v.* Powell, 5 Penne. (Del.) 24, 61 A. 966; S. *v.* Blee, 133 Ia. 725, 111 N. W. 19; Newton *v.* C., 31 Ky. L. R. 327, 102 S. W. 264; Wheeler *v.* C., 120 Ky. 697, 27 Ky. L. R. 1090, 87 S. W. 1106; Sinclair *v.* S., 87 Miss. 330, 39 S. 522; S. *v.* Birks, 199 Mo. 263, 97 S. W. 578; S. *v.* Kelleher, 201 Mo. 614, 100 S. W. 470; S. *v.* Edwards, 203 Mo. 528, 102 S. W. 520; S. *v.* Jackman, 29 Nev. 403, 91 P. 143; S. *v.* Scaduto, 74 N. J. L. 289, 65 A. 908; S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660, *cit.* the text. See infra, 788-73.

Inadmissible where there is no claim defendant was not the aggressor (Martin *v.* S., 141 Ala. 8, 40 S. 275; Fleming *v.* S., 150 Ala. 19, 43 S. 219; Oates *v.* S., 156 Ala. 99, 47 S. 74; S. *v.* Peace, 121 La. 1071, 47 S. 28); or, where it is admitted deceased was the aggressor. Brooks *v.* S., 85 Ark. 376, 108 S. W. 205.

Direct evidence.—Existence of it renders uncommunicated threats inadmissible upon issue of who was aggressor. S. *v.* Barber, 13 Ida. 65, 88 P. 418.

Such threats need not be directed against defendant. C. *v.* Thomas, 31 Ky. L. R. 899, 104 S. W. 326.

Threats made merely introductory to the shooting, inadmissible. Scott *v.* S., 75 Ark. 142, 86 S. W. 1004.

Threats against third person may be shown where defense is a killing in defence of such person. S. *v.* Hennessy, 29 Nev. 320, 90 P. 221.

Physical examination of accused may be ordered on his motion to show whether wound on his person would corroborate his testimony as to attack made on him by deceased. Browder *v.* C., 136 Ky. 45, 123 S. W. 328.

767-68 P. *v.* Smith, 151 Cal. 619, 91 P. 511; S. *v.* Lee, 1 Boyce (Del.) 18, 74 A. 4; S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461 (that defendant was a large, robust man who would use weapons when angry); Humber *v.* C., 31 Ky. L. R. 606, 102 S. W. 1179; Stevens *v.* S., 84 Neb. 759, 122 N. W. 58; Sanchez *v.* S. (Tex. Cr.), 153 S. W. 1133;

Bryant *v.* S., 51 Tex. Cr. 66, 100 S. W. 371; Newcomb *v.* S., 49 Tex. Cr. 550, 95 S. W. 1048. See S. *v.* Hough, 138 N. C. 663, 50 S. E. 709; S. *v.* Doris, 51 Or. 136, 94 P. 44, 16 L. R. A. (N. S.) 660, *cit.* the text.

Pregnancy of deceased.—Watts *v.* S., 177 Ala. 24, 59 S. 270.

Disparity in size and weight having been shown by defendant, state may show health and physical condition of deceased. S. *v.* Beckner, 194 Mo. 281, 91 S. W. 892.

Fact both feet of deceased amputated, and he could stand erect only by holding on to something. Hill *v.* S., 146 Ala. 51, 41 S. 621.

768-69 Bearden *v.* S., 47 Tex. Cr. 271, 83 S. W. 808.

768-71 Stubs worn by deceased whose feet had been amputated, admissible. Hill *v.* S., 146 Ala. 51, 41 S. 621.

768-74 S. *v.* Barber, 13 Ida. 65, 88 P. 418, conclusion of witness inadmissible.

768-75 Non-expert may state deceased was not robust and stout-looking. Cole *v.* S., 51 Tex. Cr. 89, 101 S. W. 218.

768-77 See S. *v.* Usher, 136 Ia. 606, 111 N. W. 811.

769-78 Robinson *v.* S., 155 Ala. 67, 45 S. 916.

769-79 **Addiction** to use of cocaine and its effect. Moseley *v.* S., 89 Miss. 802, 41 S. 384.

769-80 S. *v.* Churchill, 52 Wash. 210, 100 P. 309, *cit.* the text.

769-81 Witherspoon *v.* S., 168 Ala. 87, 53 S. 271.

769-82 Admissible only (a) where there is evidence tending to show self-defense, and (b) where evidence is wholly circumstantial and character of transaction in doubt. S. *v.* Exum, 138 N. C. 599, 50 S. E. 283.

769-83 Hysaw *v.* S. (Tex. Cr.), 155 S. W. 941. See Kennedy *v.* C., 31 Ky. L. R. 546, 102 S. W. 863 (proved by reputation); Mulkey *v.* S., 5 Okla. Cr. 75, 113 P. 532.

Single instance of deceased carrying a gun at one time not admissible. Hysaw *v.* S. (Tex. Cr.), 155 S. W. 941.

770-85 Rogers *v.* S., 144 Ala. 32, 40 S. 572; Jackson *v.* S., 147 Ala. 699, 41 S. 178; Bluett *v.* S., 151 Ala. 41, 44 S. 84; Warrick *v.* S., 125 Ga. 133, 53 S. E. 1027; Cook *v.* S. (Tex. Cr.), 160 S. W. 465. And see the title "Character," vol. 3, p. 1 et seq.

771-90 Wells *v.* S. (Ala.), 65 S. 950; Watson *v.* S. (Ala.), 61 S. 334; Patterson *v.* S., 156 Ala. 62, 47 S. 52; Green *v.* S., 143 Ala. 2, 39 S. 362; Carter *v.* S., 108 Ark. 124, 156 S. W. 443; S. *v.* Coleman, 119 La. 669, 44 S. 338; S. *v.* Price, 158 N. C. 641, 74 S. E. 587. See S. *v.* Stukes, 73 S. C. 386, 53 S. E. 643; Blocker *v.* S., 61 Tex. Cr. 413, 135 S. W. 130.

771-91 Pate *v.* S., 162 Ala. 32, 50 S. 357; P. *v.* Barrett, 22 Cal. App. 780, 136 P. 520; S. *v.* Short, 2 Boyce (Del.) 491, 82 A. 239; S. *v.* Lee, 1 Boyce (Del.) 18, 74 A. 4; Kipley *v.* P., 215 Ill. 358, 74 N. E. 379; Ware *v.* C., 140 Ky. 534, 131 S. W. 269; C. *v.* West (Ky.), 113 S. W. 76; C. *v.* Tircinski, 189 Mass. 257, 75 N. E. 261; S. *v.* Zorn, 202 Mo. 12, 100 S. W. 591; S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035; S. *v.* Roderick, 77 O. St. 301, 82 N. E. 1082; S. *v.* Thompson, 49 Or. 46, 88 P. 583 (to characterize nature of assault); Spencer *v.* S., 59 Tex. Cr. 217, 128 S. W. 118; Jones *v.* S. (Tex. Cr.), 153 S. W. 310.

771-92 S. *v.* Rideau, 116 La. 245, 40 S. 691; S. *v.* Jones, 48 Mont. 505, 139 P. 441; S. *v.* Thompson, 49 Or. 46, 88 P. 583. *Contra*, in the absence of such doubt. S. *v.* Weathers, 127 La. 930, 54 S. 290.

772-94 Alexander *v.* S., 8 Ga. App. 531, 69 S. E. 917; Pollard *v.* S., 58 Tex. Cr. 299, 125 S. W. 390.

Lewdness of defendant's wife, and that he was informed of her misconduct, in no way palliates his crime, if he murders her. If her lewdness rendered him insane, and he killed her while insane, he must offer evidence of his insanity at the time of the act, before the evidence of her lewdness becomes admissible. Milford *v.* S., 2 Ala. App. 104, 57 S. 96.

772-95 Sanford *v.* S., 2 Ala. App. 81, 57 S. 134; P. *v.* Barrett, 22 Cal. App. 780, 136 P. 520; Hargis *v.* C., 135 Ky. 578, 123 S. W. 239 (son cannot show deceased's character as father); Serna *v.* S. (Tex. Cr.), 105 S. W. 795 (deceased committed rape, inadmissible). And see Birdwell *v.* U. S., 4 Okla. Cr. 472, 113 P. 205; S. *v.* Crosby, 88 S. C. 98, 70 S. E. 440.

It was competent to show deceased was a "fussy, quarrelsome man, and would fight." But the evidence offered to show that deceased was addicted to drunkenness and crap shooting, and

that he was once cut in a crap game, was properly rejected. Jacobson v. S. (Ala.), 59 S. 171.

Question limited to character of deceased for "peace and quiet," improper; it should embrace his reputation as a "violent, dangerous, turbulent, and bloodthirsty man." Tribble v. S., 145 Ala. 23, 40 S. 938.

On cross-examination of witness who testified to quarrelsome character of deceased, details of personal difficulty with him, inadmissible. St. Clair v. S., 49 Tex. Cr. 479, 92 S. W. 1095.

Hypothetical questions, improper. Hunter v. S., 54 Tex. Cr. 224, 114 S. W. 124.

772-96 Pate v. S., 162 Ala. 32, 50 S. 357.

Reputation of deceased for violence when drinking is admissible. Roberson v. S., 175 Ala. 15, 57 S. 829.

Desperate character when drinking. P. v. Lamar, 148 Cal. 564, 83 P. 993; U. S. v. Densmore, 12 N. M. 99, 75 P. 31; Crow v. S., 48 Tex. Cr. 419, 88 S. W. 814.

Isolated facts or particular acts, not provable. Hardgraves v. S., 88 Ark. 261, 114 S. W. 216.

773-97 S. v. Hanlon, 38 Mont. 557, 100 P. 1035.

773-98 Jaime v. Ty., 12 Ariz. 5, 94 P. 1092; S. v. Barber, 13 Ida. 65, 88 P. 418; Jones v. S. (Tex. Cr.), 153 S. W. 310; Spencer v. S. (Tex. Civ.), 128 S. W. 118. *Comp.* S. v. Feeley, 194 Mo. 300, 92 S. W. 663. See Smith v. S. (Tex. Cr.), 156 S. W. 214.

An overt act on the part of the deceased must also be made to appear. S. v. Pullen, 130 La. 249, 57 S. 906.

Isolated acts of violence are not admissible in evidence unless the defendant knew of such acts. Lubbock v. S. (Tex. Cr.), 147 S. W. 258.

773-99 S. v. Thompson, 49 Or. 46, 88 P. 583. See U. S. v. Madlangbayan, 2 Phil. Isl. 426.

773-2 Defendant may be asked whether he had knowledge of deceased's violent character. S. v. Clark (Ia.), 144 N. W. 596.

774-3 Pate v. S., 162 Ala. 32, 50 S. 357. See P. v. Lamar, 148 Cal. 564, 83 P. 993.

774-4 Styles v. S., 3 Ala. App. 36, 59 S. 698; Barlow v. S., 3 Ala. App. 290, 57 S. 601; Cook v. S., 3 Ala. App. 11, 59 S. 519; Green v. S., 143 Ala. 2, 39 S. 362; Crawley v. S., 137 Ga. 777, 74 S. E. 537; P. v. Terrell, 262 Ill. 138, 104 N. E. 264; S. v. Zorn, 202 Mo. 12, 100 S. W. 591.

Rule applies in case of assault with intent to kill. Roch v. S., 52 Tex. Cr. 48, 105 S. W. 202.

774-7 Osburn v. S., 164 Ind. 262, 73 N. E. 601.

777-15 Montgomery v. S., 2 Ala. App. 25, 56 S. 92; Jackson v. S., 147 Ala. 699, 41 S. 178; Warrick v. S., 125 Ga. 133, 53 S. E. 1027; McCoy v. S., 91 Miss. 267, 44 S. 814; S. v. Colvin, 226 Mo. 446, 126 S. W. 448; Ty. v. Lobato, 17 N. M. 666, 134 P. 222; S. v. Roderick, 77 O. St. 301, 82 N. E. 1082; S. v. Thrailkill, 71 S. C. 136, 50 S. E. 551. See Chaplin v. C., 142 Ky. 782, 135 S. W. 298. But see Bullock v. S. (Tex. Cr.), 165 S. W. 196.

Specific acts may be considered if admitted by agreement of counsel. Long v. S., 127 Ga. 350, 56 S. E. 444.

"Did you hear people generally say S. D. had the reputation of shooting people?" improper. Bluett v. S., 151 Ala. 41, 44 S. 84.

Reputation as a dangerous person cannot be established by proof of reputation of going armed with a razor. Vaughn v. S., 51 Tex. Cr. 180, 101 S. W. 445.

Character evidence must be confined to community in which deceased lived and to some reasonable time previous to homicide. Lynch v. P., 33 Colo. 128, 79 P. 1015. *Comp.* P. v. Van Gaasbeck, 118 App. Div. 511, 913, 103 N. Y. S. 249.

That deceased was in a reckless state of mind cannot be shown by evidence of family troubles. Morgan v. S., 8 Ala. App. 172, 63 S. 21.

Admission by deceased as to purpose concerning another than accused is incompetent if state has not shown character of such other. Montgomery v. S., 160 Ala. 7, 49 S. 902.

778-16 See Hughes v. S., 132 Ala. 5, 44 S. 694.

Opinions as to whether deceased had not been the "most dangerous man" in the county could not have aided the jury or benefited the defendant in this case. S. v. Barrett, 240 Mo. 161, 144 S. W. 485.

Comparison of deceased with other men, improper. Patterson v. S., 156 Ala. 62, 47 S. 52.

778-17 Kemper *v.* S., 63 Tex. Cr. 1, 138 S. W. 1025.

778-18 P. *v.* Overacker, 15 Cal. App. 620, 115 P. 756; Powers *v.* S., 117 Tenn. 363, 97 S. W. 815.

778-20 Sneed *v.* Ty., 16 Okla. 641, 86 P. 70; Crow *v.* S., 48 Tex. Cr. 419, 88 S. W. 814; Cole *v.* S., 48 Tex. Cr. 439, 88 S. W. 341.

778-21 Crawley *v.* S., 137 Ga. 777, 74 S. E. 537; Kelly *v.* P., 229 Ill. 81, 82 N. E. 198 (that accused offers evidence of his own good reputation, immaterial. Dawson *v.* S. (Tex. Cr.), 155 S. W. 266.

778-23 Bullock *v.* S. (Tex. Cr.), 165 S. W. 196; Hysaw *v.* S. (Tex. Cr.), 155 S. W. 941; Darnell *v.* S., 58 Tex. Cr. 585, 126 S. W. 1122. See vol. 3, p. 14, n. 28, 29, and supplement thereto.

After evidence by defendant that deceased was quarrelsome and dangerous when drinking state may prove deceased's general reputation when not drinking. S. *v.* Feeley, 194 Mo. 300, 92 S. W. 663.

778-24 Canon *v.* S., 59 Tex. Cr. 398, 128 S. W. 141.

Texas statute allows proof of character by state after proof of communicated threat. Arnwine *v.* S., 50 Tex. Cr. 254, 477, 96 S. W. 4, 99 S. W. 97; Menefee *v.* S., 50 Tex. Cr. 249, 97 S. W. 486. See Moore *v.* S., 49 Tex. Cr. 499, 96 S. W. 321. No distinction where threat made directly to defendant. Jirou *v.* S., 53 Tex. Cr. 18, 108 S. W. 655; and rule applies to uncommunicated threat. Ibid (semble).

778-25 *Comp.* Wakefield *v.* S., 50 Tex. Cr. 124, 94 S. W. 1046; Gregory *v.* S., 50 Tex. Cr. 73, 94 S. W. 1041.

Answer to question, "was he not a shootist?" opens door for rebuttal. S. *v.* Lejeune, 116 La. 193, 40 S. 632.

779-27 Magan *v.* C. (Ky.), 119 S. W. 734.

See vol. 3, p. 14, n. 31, and supplement thereto.

Evidence of good reputation of wife of defendant is not admissible where she is not a witness and her reputation not in issue. Defendant had offered evidence that he was mentally unbalanced in consequence of information of the existence of illicit relations between his wife and the deceased. Brown *v.* S. (Ala. App.), 64 S. 170.

Reputation of deceased family, immaterial. S. *v.* Hamilton, 124 La. 132, 49 S. 1004.

Character of third party whom accused took to be his assailant need not be proved where danger to which accused exposed was real. Williams *v.* S., 54 Tex. Cr. 642, 114 S. W. 802.

779-28 Overt act by deceased must be shown to satisfaction of court. S. *v.* Golden, 113 La. 791, 37 S. 757.

779-29 Beasley *v.* S. (Ala.), 61 S. 259; Hargis *v.* C., 135 Ky. 578, 123 S. W. 239; Brown *v.* S., 88 Miss. 166, 40 S. 737; McHugh *v.* Ty., 17 Okla. 1, 86 P. 433; Rogers *v.* S., 8 Okla. Cr. 226, 127 P. 365; Clay *v.* S. (Tex. Cr.), 157 S. W. 164; Pannell *v.* S., 54 Tex. Cr. 498, 113 S. W. 536.

Rebuttal.—Subsequent friendship may be shown by state. Watson *v.* S., 52 Tex. Cr. 85, 105 S. W. 509.

Abuse of defendant by deceased who arrested him earlier in day. Humber *v.* C., 31 Ky. L. R. 606, 102 S. W. 1179.

Beating of wife by decedent on previous occasions cannot be proved. Hutcherson *v.* S., 165 Ala. 16, 50 S. 1027.

780-31 See Bordeaux *v.* S., 58 Tex. Cr. 61, 124 S. W. 640.

780-34 Patterson *v.* S., 156 Ala. 62, 47 S. 52; Dunn *v.* S., 143 Ala. 67, 39 S. 147; Ludwig *v.* S., 170 Ind. 648, 85 N. E. 345; S. *v.* Blee, 133 Ia. 725, 111 N. W. 19; Hargis *v.* C., 135 Ky. 578, 123 S. W. 239; Hughes *v.* S. (Miss.), 38 S. 33; Bordeaux *v.* S., 58 Tex. Cr. 61, 124 S. W. 640.

780-35 Brown *v.* S., 88 Miss. 166, 40 S. 737; Pratt *v.* S., 53 Tex. Cr. 281, 109 S. W. 138 (where evidence circumstantial).

781-36 Smith *v.* S., 142 Ala. 14, 39 S. 329; S. *v.* Short, 2 Boyce (Del.) 491, 82 A. 239. *Comp.* Crow *v.* S., 48 Tex. Cr. 419, 88 S. W. 814.

Declaration of bystanders at altercation of deceased and third person, defendant not being present, inadmissible. Gray *v.* S., 47 Tex. Cr. 375, 83 S. W. 705.

781-38 C. *v.* West (Ky.), 113 S. W. 76; P. *v.* Jeina, 125 App. Div. 697, 110 N. Y. S. 83; Sneed *v.* Ty., 16 Okla. 641, 86 P. 70 (to show knowledge of deceased's violent temper).

Particular acts admissible when so connected in point of time or occasion with fatal meeting as to produce reasonable apprehension of grievous bodily harm. S. *v.* Andrews, 73 S. C. 257, 53 S. E. 423.

782-39 Johnson *v.* S. (Tex. Cr.), 167 S. W. 733. Accused's purpose in going where deceased was may be explained. Stapleton *v.* S., 56 Tex. Cr. 422, 120 S. W. 866.

782-40 Johnson *v.* S. (Tex. Cr.), 167 S. W. 733.

783-41 Bradley *v.* S., 142 Wis. 137, 124 N. W. 1024.

783-42 Details of difficulties with other persons inadmissible. Redden *v.* S., 7 Ala. App. 33, 60 S. 992.

783-44 **Where record of indictment is introduced** defendant may show his acquittal but not details of prosecution. Johnson *v.* S. (Tex. Cr.), 167 S. W. 733.

783-48 Sandford *v.* S., 2 Ala. App. 81, 57 S. 134; Gilmore *v.* S., 141 Ala. 51, 37 S. 359; S. *v.* Heath, 221 Mo. 565, 121 S. W. 149; Darnell *v.* S., 58 Tex. Cr. 585, 126 S. W. 1122; S. *v.* Tribett, 74 Wash. 125, 132 P. 875. See Barber *v.* S. (Ala. App.), 65 S. 812; Beasley *v.* S. (Ala.), 61 S. 259.

Threats are not a justification unless it is shown that at time of homicide deceased by some act then done manifested intent to execute them. Lockhart *v.* S., 53 Tex. Cr. 589, 111 S. W. 1024, statute.

784-49 S. *v.* Clifford, 59 W. Va. 1, 52 S. E. 981. See Burton *v.* S., 82 Ark. 595, 102 S. W. 362, "circumstantial facts which are part of the res gestae."

784-50 S. *v.* Tribett, 74 Wash. 125, 132 P. 875.

784-51 Newton *v.* C., 31 Ky. L. R. 327, 102 S. W. 264.

Language need not amount to an express threat. Bethune *v.* S., 49 Tex. Cr. 166, 90 S. W. 1014.

784-52 Expression of prejudice, not a threat. S. *v.* Stockman, 82 S. C. 388, 64 S. E. 395.

784-53 Olive *v.* S., 2 Ala. App. 77, 57 S. 66; Pitts *v.* S., 140 Ala. 70, 37 S. 101; Harbour *v.* S., 140 Ala. 103, 37 S. 330; Bell *v.* S., 84 Ark. 128, 104 S. W. 1108; P. *v.* Quimby, 6 Cal. App. 482, 92 P. 493.

Mere general threats, made under such circumstances, or at such a time, that they cannot be reasonably construed as being made against the defendant are not admissible. Olive *v.* S., supra.

785-54 S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035.

785-56 S. *v.* Beckner, 194 Mo. 281, 91 S. W. 892; S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035; Dowell *v.* S. (Tex. Cr.), 126 S. W. 871. *Contra* if against an individual other than accused. Spencer *v.* S., 59 Tex. Cr. 217, 128 S. W. 118.

Incompetent otherwise.—Harbour *v.* S., 140 Ala. 103, 37 S. 330.

785-58 Threats against those associated with defendant, admissible. Wheeler *v.* C., 120 Ky. 697, 27 Ky. L. R. 1090, 87 S. W. 1106.

785-59 Turner *v.* S., 160 Ala. 40, 49 S. 828; Gibson *v.* S., 6 Ala. App. 9, 60 S. 532; Ridgell *v.* S., 1 Ala. App. 94, 55 S. 327; Ware *v.* C., 140 Ky. 534, 131 S. W. 269; Hellard *v.* C., 119 Ky. 445, 27 Ky. L. R. 115, 84 S. W. 329; S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035; S. *v.* Greaves, 243 Mo. 540, 147 S. W. 973; Rogers *v.* S., 8 Okla. Cr. 226, 127 P. 365; Foster *v.* S., 8 Okla. Cr. 129, 126 P. 835; Green *v.* U. S., 2 Okla. Cr. 55, 101 P. 112; Kemper *v.* S., 63 Tex. Cr. 1, 138 S. W. 1025; Shelton *v.* S., 56 Tex. Cr. 265, 119 S. W. 862.

And see vol. 3, p. 128, and supplement thereto.

786-61 Jackson *v.* S., 103 Ark. 21, 145 S. W. 559; Brooks *v.* S., 85 Ark. 376, 108 S. W. 205; Burton *v.* S., 82 Ark. 595, 102 S. W. 362; Warford *v.* P., 41 Colo. 203, 92 P. 24; S. *v.* King, 203 Mo. 560, 102 S. W. 515; S. *v.* Burns, 199 Mo. 263, 97 S. W. 578; S. *v.* Whitworth, 47 Mont. 424, 133 P. 364; Rogers *v.* S., 8 Okla. Cr. 226, 127 P. 365; Morris *v.* Ty., 1 Okla. Cr. 617, 99 P. 760; Carver *v.* S. (Tex. Cr.), 148 S. W. 746; McMillan *v.* S. (Tex. Cr.), 143 S. W. 1174; Fielding *v.* S., 48 Tex. Cr. 334, 87 S. W. 1044.

786-63 Martin *v.* S., 144 Ala. 8, 40 S. 275; Oates *v.* S., 156 Ala. 99, 47 S. 74; S. *v.* Harris, 131 La. 616, 59 S. 1009; S. *v.* Bouvy, 124 La. 1054, 44 S. 849; S. *v.* Coleman, 119 La. 609, 44 S. 338; S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035; Reed *v.* S., 2 Okla. Cr. 589, 103 P. 1042; Glover *v.* S. (Tex. Cr.), 107 S. W. 854.

Instruction requiring proof deceased was dangerous in addition to proof of acts indicating intention to execute threats, erroneous. St. Clair *v.* S., 49 Tex. Cr. 479, 92 S. W. 1095.

Possession of weapon by defendant cannot be explained as being due to threats of deceased in absence overt act. S. *v.* Kennedy, 207 Mo. 528, 106 S. W. 57.

786-64 Jones *v.* S. (Ala.), 61 S. 434; Oates *v.* S., 156 Ala. 99, 47 S. 74; Dunn *v.* S., 143 Ala. 67, 39 S. 147; Fleming *v.*

S., 150 Ala. 19, 43 S. 219; Foster *v.* S., 8 Okla. Cr. 139, 126 P. 835; Reed *v.* S., 2 Okla. Cr. 589, 103 P. 1042.

Inadmissible where defendant not entitled to invoke self-defense. Skipper *v.* S., 144 Ala. 100, 42 S. 43. Or where undisputed evidence shows him the aggressor. Black *v.* S., 84 Ark. 121, 104 S. W. 1104.

Predicate must be laid. S. *v.* Miller, 125 La. 254, 51 S. 189.

787-66 Stokes *v.* Ty., 14 Ariz. 242, 127 P. 742; Burton *v.* S., 82 Ark. 595, 102 S. W. 362; S. *v.* Stockman, 82 S. C. 388, 64 S. E. 595; Jay *v.* S., 52 Tex. Cr. 567, 109 S. W. 131.

787-67 S. *v.* Creste (Del.), 86 A. 214; Morris *v.* Ty., 1 Okla. Cr. 617, 99 P. 760; Lundy *v.* S., 59 Tex. Cr. 131, 127 S. W. 1032.

Details of conversation in which threats communicated to defendant, inadmissible. Bluett *v.* S., 151 Ala. 41, 44 S. 84.

787-69 S. *v.* Harris, 131 La. 616, 59 S. 1009; Dobbs *v.* S., 54 Tex. Cr. 550, 113 S. W. 923.

788-71 It would not be competent to prove what the witness told the defendant's wife about the threats, in the absence of any evidence going to show that the threats were communicated. Barlew *v.* S., 5 Ala. App. 290, 57 S. 601.

788-72 S. *v.* Price, 158 N. C. 641, 74 S. E. 587.

788-73 Turner *v.* S., 160 Ala. 40, 49 S. 828; Carter *v.* S., 108 Ark. 124, 156 S. W. 443; Jackson *v.* S., 103 Ark. 21, 145 S. W. 559; Duncan *v.* S., 171 Ind. 444, 86 N. E. 641; S. *v.* Johnson (Ia.), 144 N. W. 303; S. *v.* Jackson, 156 Ia. 588, 137 N. W. 1034; Hargis *v.* C., 135 Ky. 578, 123 S. W. 239; S. *v.* Barksdale, 122 La. 788, 48 S. 264, cit. the text; Echols *v.* S., 99 Miss. 683, 55 S. 485; S. *v.* Jones, 48 Mont. 505, 139 P. 441; S. *v.* Whitworth, 47 Mont. 424, 133 P. 364; S. *v.* Blackwell, 162 N. C. 672, 78 S. E. 316; Kirklin *v.* S. (Tex. Cr.), 164 S. W. 1016; Pate *v.* S., 54 Tex. Cr. 491, 113 S. W. 757. See supra, 767-67, "Uncommunicated Threats;" Wilson *v.* S., 140 Ala. 43, 37 S. 93; Warrick *v.* S., 125 Ga. 133, 53 S. E. 1027; Neathery *v.* P., 227 Ill. 110, 81 N. E. 16; Wheeler *v.* C., 120 Ky. 697, 27 Ky. L. R. 1090, 87 S. W. 1106 (against defendant's associates in killing).

788-74 S. *v.* Blee, 133 Ia. 725, 111 N. W. 19; S. *v.* Baldwin, 155 N. C. 494, 71 S. E. 212.

789-75 Wilson *v.* S., 140 Ala. 43, 37 S. 93; Warford *v.* P., 41 Colo. 203, 92 P. 24; S. *v.* Whitworth, 47 Mont. 424, 133 P. 364; Summers *v.* S. (Tex. Cr.), 148 S. W. 774; Buckner *v.* S., 55 Tex. Cr. 511, 117 S. W. 802.

789-76 Howard *v.* S., 172 Ala. 402, 55 S. 255; Crumpton *v.* S., 167 Ala. 4, 52 S. 605; Quinn *v.* S., 1 Ala. App. 116, 55 S. 450; S. *v.* Baldwin, 155 N. C. 494, 71 S. E. 212; Buckner *v.* S., 55 Tex. Cr. 511, 117 S. W. 802; Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804. See also P. *v.* Brown, 15 Cal. App. 393, 114 P. 1004.

790-78 Black *v.* S., 84 Ark. 121, 104 S. W. 1104. And see Martin *v.* S., 144 Ala. 8, 40 S. 275; Fleming *v.* S., 150 Ala. 19, 43 S. 219; Oates *v.* S., 156 Ala. 99, 47 S. 74; Brooks *v.* S., 85 Ark 376, 108 S. W. 205; S. *v.* Peace, 121 La. 1071, 47 S. 28.

790-79 Boyett *v.* S., 8 Ala. App. 93, 62 S. 984; Pressley *v.* S., 132 Ga. 64, 63 S. E. 784; P. *v.* Terrell, 262 Ill. 138, 104 N. E. 264; Guy *v.* S., 37 Ind. App. 691, 77 N. E. 855; S. *v.* Harris, 131 La. 616, 59 S. 1009; S. *v.* Davis, 123 La. 133, 48 S. 771; S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035; S. *v.* Scaduto, 74 N. J. L. 289, 65 A. 908.

792-82 S. *v.* Robichaux, 121 La. 860, 46 S. 888.

792-83 Fallon *v.* S., 5 Ga. App. 659, 63 S. E. 806.

792-84 Rouse *v.* S., 135 Ga. 227, 69 S. E. 180; Sinclair *v.* S., 87 Miss. 330, 39 S. 522; Pate *v.* S., 54 Tex. Cr. 491, 113 S. W. 757; McMillan *v.* S. (Tex. Cr.), 143 S. W. 1174. See supra, 767-67.

795-90 Dixon *v.* S., 12 Ga. App. 17, 76 S. E. 794; Lindsay *v.* S., 138 Ga. 818, 76 S. E. 369; Pride *v.* S., 133 Ga. 438, 66 S. E. 259.

Unsworn statement of defendant not technically evidence. Roberson *v.* S., 12 Ga. App. 102, 76 S. E. 752.

795-91 Self-serving declarations of accused as to threats made by deceased, inadmissible. Noel *v.* S., 161 Ala. 25, 49 S. 824.

795-92 S. *v.* High, 116 La. 79, 40 S. 538.

795-93 S. *v.* Davis, 123 La. 133, 48 S. 771.

795-94 S. *v.* Davis, supra.

Any witness who heard them may testify to threats; fact witness a prosti-

tute goes merely to weight of testimony. S. v. Jackman, 29 Nev. 403, 91 P. 143.

796-96 Price v. S., 1 Okla. Cr. 378, 98 P. 447; Williams v. S. (Tex.), 148 S. W. 763; Hart v. S., 57 Tex. Cr. 21, 121 S. W. 508. See Lynch v. P., 33 Colo. 128, 79 P. 1015.

796-98 Price v. S., 1 Okla. Cr. 378, 98 P. 447; Hart v. S., 57 Tex. Cr. 21, 121 S. W. 508 (immaterial, if motive for making threats shown, deceased arrested for doing act out of which difficulty between him and accused originated).

796-99 Griffin v. S., 165 Ala. 29, 50 S. 962.

796-1 Threats by prosecutor may be rebutted by showing defendant had been entertained at his home and well treated, and this in turn may be shown to be untrue. Cunningham v. S., 89 Miss. 356, 42 S. 172. *Comp.* Watson v. S., 52 Tex. Cr. 85, 105 S. W. 509.

796-3 Taylor v. S., 121 Ga. 348, 49 S. E. 303.

797-9 Stafford v. S., 50 Fla. 134, 39 S. 106, other and more recent threats having been admitted.

797-11 S. v. McKellar, 85 S. C. 236, 67 S. E. 314, competent if made immediately after difficulty, though not at place thereof.

Nature of threat and its inducing cause may be shown; whole conversation in which it was made, admissible. Adams v. S., 47 Tex. Cr. 347, 84 S. W. 231.

798-12 Carter v. S., 108 Ark. 124, 156 S. W. 443; Morris v. Ty., 1 Okla. Cr. 617, 99 P. 760; Pollard v. S., 58 Tex. Cr. 299, 125 S. W. 390.

Threats by third person admissible where they constitute part of series of events leading up to the killing. S. v. Clifford, 59 W. Va. 1, 52 S. E. 981. May be shown if there was least degree of concerted action by him and another against accused. Magan v. C. (Ky.), 119 S. W. 734 (if made known to accused); Price v. S., 1 Okla. Cr. 378, 98 P. 447. Communicated threats of third person previous to time he and deceased threatened defendant may be proved though conspiracy did not exist between deceased and person who made threats. S. v. Horseman, 52 Or. 572, 98 P. 135.

798-13 Admissible when third person is killed in same transaction. See Newton v. C., 31 Ky. L. R. 327, 102 S. W. 264.

798-15 Tetterton v. C., 28 Ky. L. R. 116, 89 S. W. 8.

798-16 S. v. Hennessy, 29 Nev. 320, 90 P. 221.

798-17 Gillis v. S., 8 Ga. App. 696, 70 S. E. 53; Wheat v. C. (Ky.), 108 S. W. 264; S. v. Eastham, 240 Mo. 241, 144 S. W. 492. See S. v. Turner, 246 Mo. 598, 152 S. W. 313.

Where third person was aggressor defendant cannot justify killing, and evidence of defense of such third person is incompetent. See Adams v. S., 48 Tex. Cr. 452, 93 S. W. 116.

Particulars of original difficulty with the third person, immediately preceding the killing, admissible. Sanford v. S., 143 Ala. 78, 39 S. 370.

798-18 Threats against third person are competent. Wheeler v. C., 27 Ky. L. R. 1091, 87 S. W. 1106; S. v. Hennessy, 29 Nev. 320, 90 P. 221.

799-19 U. S. v. Fitzgerald, 2 Phil. Isl. 419. See infra, 800-28.

Evidence must tend to throw some light upon guilt or innocence of accused. Campbell v. Ty., 14 Ariz. 109, 125 P. 717.

Illicit relation of deceased with wife of accused may be shown. U. S. v. Ancheta, 1 Phil. Isl. 30.

800-21 Body of deceased may be disinterred for examination where self-defense pleaded and evidence conflicts as to who was aggressor. Gray v. S., 55 Tex. Cr. 90, 114 S. W. 635.

800-24 *Contra*, S. v. Crawford, 66 W. Va. 114, 66 S. E. 110, unless accompanied by acts showing purpose to do violence to accused.

Insults to defendant's wife may be shown. Hobbs v. S., 57 Tex. Cr. 299, 117 S. W. 811. If accused shows insult by deceased to his wife state may show former exposed wife to insult. Caples v. S., 3 Okla. Cr. 72, 104 P. 493. The influence of insults offered by deceased to wife of accused is removed by latter's admission of them, so as to render it immaterial whether accused believed wife's statements or not and to excuse delay in acting upon them. Akin v. S., 56 Tex. Cr. 324, 119 S. W. 863.

Nothing less than assault by deceased will reduce murder to manslaughter. Brantley v. S., 5 Ga. App. 428, 63 S. E. 519.

Threats by deceased cannot be proved where murder committed with deliberation and premeditation. Thompson *v.* S., 88 Ark. 447, 114 S. W. 1184.

800-28 U. S. *v.* Abelinde, 1 Phil. Isl. 568.

Aggravating circumstances must be as fully proved as the crime. U. S. *v.* Alvarez, 3 Phil. Isl. 24; U. S. *v.* Perdon, 4 Phil. Isl. 141; U. S. *v.* Rana, 4 Phil. Isl. 231; U. S. *v.* Ulat, 7 Phil. Isl. 559.

801-29 S. *v.* Washelesky, 81 Conn. 22, 70 A. 62; S. *v.* Blount, 124 La. 202, 50 S. 12; U. S. *v.* Cabe, 1 Phil. Isl. 265.

801-31 C. *v.* Deitrick, 221 Pa. 7, 70 A. 275 (if he gives notice to defendant he will not call a particular witness); Davis *v.* S., 57 Tex. Cr. 545, 124 S. W. 104. See vol. 14, p. 570.

801-32 P. *v.* Deitz, 86 Mich. 419, 49 N. W. 296; C. *v.* Nosti, 18 Pa. Dist. 356.

802-36 *Contra,* in discretion of court, if relations existing between witness and defendant suspicious and former has made conflicting statements. Dillon *v.* S., 137 Wis. 655, 119 N. W. 352.

"The state cannot be forced to introduce any particular witnesses in the proof of its case," though those called had not seen the affray. Lard *v.* S., 54 Tex. Cr. 570, 113 S. W. 762.

The only eye witness need not be offered by state. Harper *v.* S., 131 Ga. 771, 63 S. E. 339.

802-37 A subpoenaed witness need not be sworn if state has reason to believe he will not testify to the truth. S. *v.* Brady, 124 La. 951, 50 S. 806.

HUSBAND AND WIFE

Extent of agency, 808-6; *Fraudulent conveyance by husband,* 813-19; *Defense,* 815-27; *Estoppel to claim ownership,* 825-55; *Improvements,* 827-60; *Exceptions to rule,* 899-3.

807-1 Rauers, etc. Co. *v.* Berthiaume, 21 Cal. App. 670, 132 P. 596, 833; Rheam *v.* Martin, 26 App. Cas. (D. C.) 181; Larson *v.* Carter, 14 Ida. 511, 94 P. 825; McNemar *v.* Cohn, 115 Ill. App. 31; Lindsley *v.* Smith, 150 Mich. 543, 114 N. W. 340; Cox *v.* R. Co., 111 Mo. App. 394, 85 S. W. 989; Black *v.* McQuaid, 75 N. J. L. 639, 68 A. 102; Vucci *v.* Pellettieri, 111 N. Y. S. 784; Francis *v.* Reeves, 137 N. C. 269, 49 S. E. 213; Smith *v.* Olivarri (Tex. Cr.), 127 S. W. 235. See also Porter *v.* Terrell, 2 Ga. App. 269, 58 S. E. 493; Gulliford *v.* McQuillen, 75 Kan. 454, 89 P. 927.

No presumption of authorization of husband of stockholder to represent her at meeting. Steele *v.* Co., 42 Colo. 529, 95 P. 349.

807-2 Gero *v.* Abbott, 157 Mich. 573, 122 N. W. 307; S. *v.* Dickmann, 146 Mo. App. 396, 124 S. W. 29; Nugent *v.* New York, 58 Misc. 453, 111 N. Y. S. 438; Henderson *v.* S., 55 Tex. Cr. 640, 117 S. W. 825.

807-4 Copeland *v.* Lumb. Co., 4 Ala. App. 230, 57 S. 124; Sanders *v.* Brown, 145 Ala. 665, 39 S. 732; Dussoulas *v.* Thomas, 6 Penne. (Del.) 1, 65 A. 590; Davidson *v.* Slack, 143 Ia. 104, 120 N. W. 109; Ellerslie Planting Co. *v.* Blackman, 129 La. 948, 57 S. 279; O'Connell *v.* Casey, 206 Mass. 520, 92 N. E. 804; Walder *v.* English, 137 App. Div. 43, 122 N. Y. S. 1; Roberts *v.* Little, 18 N. D. 608, 120 N. W. 563. And see Thompson *v.* Brown, 121 Ga. 522, 59 S. E. 223.

Where all consideration of debt reaches wife as accession to separate estate and she retains and enjoys it, only slight evidence of husband's agency in contracting debt necessary. Pinkston *v.* Co., 123 Ga. 302, 51 S. E. 387. *Comp.* Cornelia, etc. Co. *v.* Wilcox, 129 Ga. 522, 59 S. E. 223.

808-5 Larson *v.* Carter, 14 Ida. 511, 94 P. 825; Nugent *v.* New York, 58 Misc. 453, 111 N. Y. S. 438. *Contra* under statute, but presumption of agency overcome by proof of gift. Wyatt *v.* Scott, 84 Ark. 355, 105 S. W. 871.

Though agency of husband presumed from taking charge of wife's property, no presumption of agency in buying other property. Du Bose *v.* Gladden, 75 S. C. 78, 55 S. E. 152.

808-6 See Harding *v.* Harding (Ky.), 116 S. W. 305.

Implied authority of wife in husband's extended absence extends to those things customarily delegated; but not to conveying real estate. Evans *v.* Co., 130 Wis. 189, 109 N. W. 952.

809-7 Meyer *v.* Frenkil, 116 Md. 411, 82 A. 208; Feiner *v.* Boynton, 73 N. J. L. 136, 62 A. 420; De Brauwere *v.* De Brauwere, 144 App. Div. 521, 129 N. Y. S. 587; Valois *v.* Gardner, 122 App. Div. 245, 106 N. Y. S. 808; Ruhl *v.* Heintze, 97 App. Div. 442, 89 N. Y.

S. 1031. See Ponder *v.* Morris, 152 Ala. 531, 44 S. 651.

Contrary may be shown.—Goodson *v.* Powell, 9 Ga. App. 497, 71 S. E. 765.

S09-9 Mattar Bros. *v.* Wather, 99 Ark. 329, 138 S. W. 455; Cooper *v.* Haseltine, 50 Ind. App. 400, 98 N. E. 437; Schwartz *v.* Cohn, 129 N. Y. S. 464; Proctor *v.* Woodruff, 119 N. Y. S. 232.

S10-11 Sutherin *v.* Chesney, 85 Kan. 122, 116 P. 254; Peacock *v.* Newton, 144 Ky. 552, 139 S. W. 791; Mack *v.* Engel, 165 Mich. 540, 131 N. W. 92; Cox *v.* R. Co., 111 Mo. App. 394, 85 S. W. 989.

Ratification of acts of husband.—Cage & Crow *v.* Perry (Tex. Civ.), 142 S. W. 75.

Wife's declared intention of building house, payment by her on account of materials and fact of sale on her credit significant. Lindsley *v.* Smith, 150 Mich. 543, 114 N. W. 340.

S10-12 See Talboys *v.* Byrne, 109 Minn. 412, 124 N. W. 15. *Comp.* Kissinger *v.* Jacobs, 113 N. Y. S. 819, and see Gero *v.* Abbott, 157 Mich. 573, 122 N. W. 307.

Acts and words of wife showing authorization or ratification, sufficient. Black *v.* McQuaid, 75 N. J. L. 639, 68 A. 102.

Admission that wife was given money to pay for articles previously purchased by her significant. Proctor *v.* Woodruff, 119 N. Y. S. 232.

S10-13 Chamberlain *v.* Brown, 141 Ia. 540, 120 N. W. 334; Hawkins *v.* Windhorst, 77 Kan. 674, 96 P. 48. *Comp.* Ham *v.* Brown, 2 Ga. App. 71, 58 S. E. 316.

Performance of like acts by husband cannot be shown unless wife knew of them. Newton Centre T. Co. *v.* Stuart, 201 Mass. 288, 87 N. E. 630.

S11-14 McNemar *v.* Cohn, 115 Ill. App. 31; Lindsley *v.* Smith, 150 Mich. 543, 114 N. W. 340. See Ham *v.* Brown, 2 Ga. App. 71, 58 S. E. 316.

S11-15 Spradling *v.* Spradling, 101 Ark. 451, 142 S. W. 848; Mathy *v.* Mathy, 88 Ark. 56, 113 S. W. 1012; Leimgruber *v.* Leimgruber, 172 Ind. 370, 86 N. E. 73; Wilson *v.* Mullins (Ky.), 119 S. W. 1180; Massey *v.* Rae, 18 N. D. 409, 121 N. W. 75 (wife to husband); Montgomery *v.* Montgomery (Okla.), 139 P. 288; Eason *v.* Lyons, 114 Va. 390, 76 S. E. 957.

Wife must establish husband's indebtedness to her and execution of evidence thereof relied on. Broussard *v.* Lawson (Tex. Civ.), 124 S. W. 712.

Wife's title to property levied on as husband's must be shown by evidence not admitting of reasonable doubt. Jenkins *v.* Courtright, 39 Pa. Super. 232.

Direct contracts cannot be made.—Crosby *v.* Clem, 209 Mass. 193, 95 N. E. 297.

S12-16 Donlon *v.* Donlon, 154 App. Div. 212, 138 N. Y. S. 1039.

S12-17 Yordi *v.* Yordi, 6 Cal. App. 20, 91 P. 348; Donlon *v.* Donlon, 154 App. Div. 212, 138 N. Y. S. 1039; Massey *v.* Rae, 18 N. D. 409, 121 N. W. 75. See Mahan *v.* Schroeder, 236 Ill. 392, 86 N. E. 97.

S13-18 Murdock *v.* Murdock, 121 Ill. App. 429; Colbert *v.* Rings, 231 Ill. 404, 83 N. E. 274 (recognizing doctrine, but holding agreement not so unreasonable and unfair as to warrant presumption against validity); Tilton *v.* Tilton, 130 Ky. 281, 113 S. W. 134; Donaldson *v.* Donaldson, 249 Mo. 228, 155 S. W. 791; Rieger *v.* Schaible, 81 Neb. 33, 115 N. W. 560, 17 L. R. A. (N. S.) 866 (holding interest reserved not so disproportionate as to raise presumption of disguised concealment by husband). *Comp.* Nesmith *v.* Platt, 137 Ia. 292, 114 N. W. 1053. See Egger *v.* Egger, 225 Mo. 116, 123 S. W. 928.

Antenuptial agreement. — Mines *v.* Phee, 254 Ill. 60, 98 N. E. 260.

S13-19 Tilton *v.* Tilton, 130 Ky. 281, 113 S. W. 134.

Wife must show ignorance at time of marriage, of pre-nuptial conveyance by her husband and reliance on prospective rights in property as inducement to marriage. Bell *v.* Dufur, 142 Ia. 701, 121 N. W. 500.

S13-20 Note and bill of sale executed by husband sufficient evidence of indebtedness to wife and of sale of property to her in satisfaction thereof. Broussard *v.* Lawson (Tex. Civ.), 124 S. W. 712.

S13-21 Perkins *v.* Morgan, 36 Colo. 360, 85 P. 640; Oatman *v.* Watrous, 120 App. Div. 66, 105 N. Y. S. 174; Ellenbogen *v.* Slocum, 121 N. Y. S. 1110.

Question of agency is of fact. Wanamaker *v.* Weaver, 176 N. Y. 75, 68 N. E. 135, 65 L. R. A. 529, 98 Am. St. 621.

Liability of husband married since 1877, for goods purchased by wife, may rest upon express promise to pay there-

for, breach of duty to provide necessaries, as at common law, or obligation imposed by statute. Fitzmaurice *v.* Buck, 77 Conn. 390, 59 A. 415.

Wife requesting medical treatment for infant, presumed she did so as agent. Howell *v.* Blesh, 19 Okla. 260, 91 P. 893.

§13-22 Feiner *v.* Boynton, 73 N. J. L. 136, 62 A. 420; Pickhardt *v.* Pratt, 55 Misc. 231, 105 N. Y. S. 236; McClelland *v.* Lynch, 98 N. Y. S. 640. *Comp.* Edminston *v.* Smith, 13 Ida. 645, 92 P. 842.

§14-23 McKee *v.* Cunningham, 2 Cal. App. 684, 84 P. 260; Steinfield *v.* Girrard, 103 Me. 151, 68 A. 630; Pickhardt *v.* Pratt, 55 Misc. 231, 105 N. Y. S. 236; Levison *v.* Davis, 212 Pa. 148, 61 A. 819. *Comp.* Moore *v.* Rose, 130 Mo. App. 668, 108 S. W. 1105, holding refusal to charge jury to effect stated in text correct.

Where there is no overt separation and wife continues to reside in home provided, presumption of agency to pledge husband's credit for necessaries exists. Ball *v.* Lovett, 98 N. Y. S. 815.

Expenses incurred by wife in prosecuting divorce suit, no implied authority to pledge husband's credit therefor. Zent *v.* Sullivan, 47 Wash. 315, 91 P. 1088.

§14-24 Morgenroth *v.* Spencer, 124 Wis. 564, 102 N. W. 1086.

Wife insane, no implied liability of husband for care while in asylum. Richardson *v.* Stuesser, 125 Wis. 66, 103 N. W. 261.

§14-25 See Baker *v.* Oughton, 130 Ia. 35, 106 N. W. 272.

Wife living separate from husband as result of his desertion, agency implied in her to purchase necessaries on his credit; burden on plaintiff to prove desertion. Clothier *v.* Sigle, 73 N. J. L. 419, 63 A. 865.

§14-26 Demand for payment upon husband is circumstance to be considered in determining to whom credit was given. Blendermann *v.* Mann-Wray, 108 N. Y. S. 700, action against wife.

A pass book in possession of wife admissible to show to whom credit given. Blendermann *v.* Mann-Wray, 115 N. Y. S. 1081.

Money furnished wife on husband's credit after giving notice of no liability for her debts cannot be recovered unless proof of his financial condition be made, his failure to provide for her and that money was advanced for necessaries. Klopfer *v.* Mittenthal, 117 N. Y. S. 93.

§15-27 Mellanson *v.* Mellanson, 113 Ill. App. 81; Bartlow *v.* Bartlow, 114 Ill. App. 604; Kurz *v.* Kurz, 119 Mo. App. 53, 96 S. W. 242; Chapman *v.* Chapman, 74 Neb. 388, 104 N. W. 880; Bond *v.* Bond, 45 Wash. 511, 88 P. 943 (evidence sufficient). See Faller *v.* Faller, 146 Mich. 84, 109 N. W. 47.

Neglect to provide support must be shown to maintain action. Lathrop *v.* Lathrop, 78 Conn. 650, 63 A. 514.

To defeat wife's claim for support on ground of voluntary abandonment of husband's domicile, abandonment must be shown by cogent proof. Price *v.* Price, 75 Neb. 552, 106 N. W. 657.

Defense.—Upon prosecution for wife abandonment defendant may show they had entered into voluntary agreement to live separate and apart. Virtue *v.* P., 122 Ill. App. 223. See Clark *v.* Clement, 71 N. H. 5, 51 A. 256.

§15-28 Taylor *v.* Taylor, 108 Md. 129, 69 A. 632. See Cuthbertson *v.* S., 72 Neb. 727, 101 N. W. 1031.

What constitutes good cause is question of law. Existence need not be known to husband at time he abandons wife, but may be shown if information thereof came to him thereafter. S. *v.* Stout, 139 Ia. 557, 117 N. W. 958.

§16-29 *Comp.* Eckerson *v.* Mitchell, 74 N. J. L. 347, 68 A. 81; Goetting *v.* Normoyle, 191 N. Y. 368, 84 N. E. 287.

Likelihood wife will become public charge must be shown. P. *v.* De Wolf, 133 App. Div. 879, 118 N. Y. S. 75.

§16-31 Circumstantial evidence sufficient. S. *v.* Williams, 136 Mo. App. 304, 116 S. W. 1128.

Declarations of accused, showing attachment for another woman, competent. S. *v.* Morgan, 146 Ia. 298, 125 N. W. 166.

Absence of good cause for failure to support may be shown by proof of defendant's earnings and other facts from which it may be inferred. S. *v.* Dvoracek, 140 Ia. 266, 118 N. W. 399.

§16-32 Wife's adultery cannot be proved by hearsay or rumors. Carnley *v.* S., 162 Ala. 94, 50 S. 362.

Refusal of wife to live with husband may be shown, and willingness and ability to support her. P. *v.* Flewellyn, 111 N. Y. S. 621.

816-33 S. *v.* McPherson, 72 Wash. 371, 130 P. 481.

If abandonment of wife and child is alleged proof must conform, and evidence of marriage and paternity of child necessary. Wife may testify to paternity though it was born prior to marriage. Husband may show access of another party to wife during period of gestation. Carnley *v.* S., 162 Ala. 94, 50 S. 362.

Destitution shown by proof of inability to support without public aid. S. *v.* Dvoracek, 140 N. W. 266, 118 N. W. 399.

817-34 Emmons *v.* Stevane, 73 N. J. L. 349, 64 A. 1014. *Comp.* Schuler *v.* Henry, 42 Colo. 367, 94 P. 360, 14 L. R. A. (N. S.) 1009.

817-35 S. *v.* Harvey, 130 Ia. 394, 106 N. W. 938; C. *v.* Adams, 186 Mass. 101, 71 N. E. 78.

819-39 Control of house.—In a prosecution for keeping a bawdy house the court said: "We regard this presumption as being in the same category as is the presumption that that which the wife does in her husband's presence, she does because of his coercion, and like it to be held to be only prima facie and rebuttable. See State *v.* Ma Foo (State *v.* Baker) 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414. Such a presumption is said to be regarded in most of the later cases as something to be easily rebutted, 'especially in that numerous class of cases which relate to the illegal sale of liquors, a business in which married women frequently engage understandingly.' Schouler's Domestic Relations (5th ed.) §50. This theory of easy rebuttal should also be held especially applicable to cases like the present one, 'for,' says another learned writer, 'this is an offense as to the government of the house in which the wife has a principal share; and also such an offense as may generally be presumed to be managed by the intrigues of the sex.' 1 Russell on Crimes, p. 151." S. *v.* Hoelcher, 163 Mo. App. 352, 143 S. W. 850.

820-40 S. *v.* Gill, 150 Ia. 210, 129 N. W. 821.

820-41 Lumpkin *v.* City, 9 Ga. App. 470, 71 S. E. 755.

821-47 In re Grogan's Est., 82 Misc. 555, 145 N. Y. S. 285.

822-49 Meyrovitz *v.* Levy (Ala.), 63 S. 963; Sample *v.* Guyer, 143 Ala 613, 42 S. 106; Gibson *v.* Wallace, 147 Ala. 322, 41 S. 960; Mohr *v.* Griffin, 137 Ala. 456, 34 S. 378; Gilmore *v.* Hunt, 137 Ga. 272, 73 S. E. 364. See Creighton *v.* Crane, 73 Neb. 650, 103 N. W. 284. *Comp.* Ludlow *v.* Colt, 41 Ind. App. 138, 83 N. E. 643. See Indianapolis B. Co. *v.* Behnke, 41 Ind. App. 288, 81 N. E. 119; Field *v.* Campbell, 164 Ind. 389, 72 N. E. 260.

Mortgage.—Lamkin *v.* Lovell, 176 Ala. 334, 58 S. 258.

823-50 Opelousas Nat. Bk. *v.* Fahey, 129 La. 225, 55 S. 772; Sibley *v.* Robertson, 212 Pa. 24, 61 A. 426.

Colorable scheme to evade statute against suretyship by married woman. Summers *v.* Lee, 10 Ga. App. 441, 73 S. E. 602.

Burden of proving benefit of consideration inured to wife on party seeking to enforce contract. Field *v.* Campbell, 164 Ind. 389, 72 N. E. 260.

823-52 Gibson *v.* Wallace, 147 Ala. 322, 41 S. 960; Black *v.* McCarley, 31 Ky. L. R. 1198, 104 S. W. 987. See Third Nat. Bk. *v.* Tierney, 33 Ky. L. R. 418, 110 S. W. 293.

No presumption of undue influence indulged where married woman has all the capacity of a femme sole respecting her separate estate because she becomes surety for stranger. Sawyer-M. Co. *v.* Hodgson, 18 Ont. L. R. 333.

823-53 Crump *v.* Walkup, 246 Mo. 266, 151 S. W. 709. *Contra*, Beck *v.* Beck, 78 N. J. Eq. 544, 80 A. 550, *rev.* 77 N. J. Eq. 51, 75 A. 228. *Comp.* Small *v.* Pryor, 69 N. J. Eq. 606, 61 A. 564.

824-54 First Nat. Bk. *v.* Thomas (Tex. Civ.), 118 S. W. 221.

Sufficient.—Larson *v.* Larson, 15 Cal. App. 531, 115 P. 340.

825-55 Oldershaw *v.* Mfg. Co., 19 Cal. App. 179, 125 P. 263.

Ownership of land by wife carries presumption of ownership of crops. Webster *v.* Sherman, 33 Mont. 448, 84 P. 878. See also Foreman *v.* Bk., 128 Ia. 661, 105 N. W. 163.

Under Kentucky Act, wife claiming interest in husband's property because of payment by her on his behalf has not burden of showing payment made from separate estate. Eberhardt *v.* Wahl, 124 Ky. 225, 98 S. W. 994.

Estoppel to claim ownership.—See Magerstadt *v.* Schaefer, 213 Ill. 351, 72 N. E. 1063; McCormick M. Co. *v.* Perkins, 135 Ia. 64, 110 N. W. 15;

Moore *v.* Rawlings, 137 Ia. 284, 114 N. W. 1040; Kershaw *v.* Merritt, 194 Mass. 113, 80 N. E. 213.

826-59 Davidson *v.* Woodward, 156 Fed. 915, 84 C. C. A. 495; Booker *v.* Castillo, 154 Cal. 672, 98 P. 1067 (rule affected by ch. 219, St. 1889); Humbird L. Co. *v.* Doran, 24 Ida. 507, 135 P. 66; Douglas *v.* Douglas, 22 Ida. 336, 125 P. 796; Succession of Andrus, 131 La. 940, 60 S. 623; Latour *v.* Guillory, 130 La. 570, 58 S. 341; Pitts *v.* Kerley, 126 La. 221, 52 S. 281; Rocques *v.* Freeman, 125 La. 60, 51 S. 68; S. *v.* Langan, 32 Nev. 176, 105 P. 568; Reade *v.* Lea, 14 N. M. 442, 95 P. 131; Lerbs *v.* Lerbs, 71 Misc. 51, 129 N. Y. S. 903; Gameson *v.* Gameson (Tex. Civ.), 162 S. W. 1169; Ragley, etc. Co. *v.* Davidson (Tex. Civ.), 152 S. W. 856; Aycock *v.* Thompson (Tex. Civ.), 146 S. W. 641; Du Perier *v.* Du Perier (Tex. Civ.), 126 S. W. 10; Wade *v.* Wade (Tex. Civ.), 106 S. W. 188; Parks *v.* Worthington (Tex. Civ.), 104 S. W. 921; Stein *v.* Mentz, 42 Tex. Civ. 38, 94 S. W. 447; Henry *v.* Vaughan, 46 Tex. Civ. 531, 103 S. W. 192; Smith *v.* Smith (Tex. Civ.), 91 S. W. 815; Letot *v.* Peacock (Tex. Civ.), 94 S. W. 1121; Hoopes *v.* Mathis, 40 Tex. Civ. 121, 89 S. W. 36; York *v.* Hilger (Tex. Civ.), 84 S. W. 1117; Colpe *v.* Lindblom, 57 Wash. 106, 106 P. 634; Ballard *v.* Slyfield, 47 Wash. 174, 91 P. 642. *Contra,* Farnum *v* Bk., 12 Cal. App. 426, 107 P. 568; §164 Civ. Code. See In re Shirey's Est., 167 Cal. 193, 138 P. 994; Nilson *v.* Sarment, 153 Cal. 524, 96 P. 315, for effect of ch. 219, stats. 1889; vol. 6, p. 221, and supplement thereto, and see Bekins *v.* Dieterle, 5 Cal. App. 690, 91 P. 173.

In California §164 of the Civil Code.— Lenninger *v.* Lenninger, 167 Cal. 297, 139 P. 679.

Burden on party pleading that property is community property. Emery *v.* Barfield (Tex. Civ.), 156 S. W. 311.

Burden on wife to show that property owned by husband before marriage was partly paid for out of community funds after marriage. Gameson *v.* Gameson (Tex. Civ.), 162 S. W. 1169.

Presumption that property conveyed to wife is separate. Mitchell *v.* Moss, 16 Cal. App. 594, 117 P. 685.

Contra, if transaction complete before marriage except giving of deed. Guye *v.* Guye, 63 Wash. 340, 115 P. 731.

Property held by husband and wife at his death presumed community property. Cope *v.* Blount, 38 Tex. Civ. 516, 91 S. W. 615.

In the absence of evidence as to manner in which property acquired, no presumption it was community property, or separate property of either spouse, rather than that it was held as joint tenants or as tenants in common. Harlow *v.* Co., 145 Cal. 477, 78 P. 1045.

Even where married woman engages in trade it is presumed with community funds and burden on person asserting property her separate property. Bashore *v.* Parker, 146 Cal. 525, 80 P. 707.

827-60 McMurray *v.* Bodwell, 16 Cal. App. 574, 117 P. 627; In re Hill's Est., 167 Cal. 59, 138 P. 690; Nilson *v.* Sarment, 153 Cal. 524, 96 P. 315; Humbird L. Co. *v.* Doran, 24 Ida. 507, 135 P. 66; Watkins *v.* Watkins (Tex. Civ.), 119 S. W. 145; Denny *v.* Schwabacher, 54 Wash. 689, 104 P. 137; Ballard *v.* Slyfield, 47 Wash. 174, 91 P. 642.

Improvements on separate property of one spouse not within presumption. Separate ownership of land improved makes prima facie case as to improvements, and burden on party seeking reimbursement for latter to rebut it. Darden *v.* Taylor (Tex. Civ.), 126 S. W. 944.

828-62 Booker *v.* Castillo, 154 Cal. 672, 98 P. 1067; Reade *v.* Lea, 14 N. M. 442, 95 P. 131 (presumption overcome by clear and conclusive proof); Neher *v.* Armijo, 9 N. M. 325, 54 P. 236; Leonardo *v.* Santiago, 7 Phil. Isl. 401; Letot *v.* Peacock (Tex. Civ.), 94 S. W. 1121; McClintic *v.* Dry Goods Co. (Tex.), 154 S. W. 1157.

Judgment creditor not a purchaser or incumbrancer in good faith and for valuable consideration within conclusive presumption of code. Fulkerson *v.* Stiles, 156 Cal. 703, 105 P. 966.

828-63 Nilson *v.* Sarment, 153 Cal. 524, 96 P. 315; Baldwin *v.* McFarland (Ida.), 141 P. 76; Douglas *v.* Douglas, 22 Ida. 336, 125 P. 796; Succession of Andrus, 131 La. 940, 60 S. 623; Du Perier *v.* Du Perier (Tex. Civ.), 126 S. W. 10 (intention of parties may also be shown); O'Farrell *v.* O'Farrell, 56 Tex. Civ. 51, 119 S. W. 899 (because of superior knowledge burden is heavier on husband than on wife); York *v.* Hilger (Tex. Civ.), 84 S. W. 1117; U.

S. F. & G. Co. *v.* Lee, 58 Wash. 16, 107 P. 870 (funds and credit of wife); Worthington *v.* Crapser, 63 Wash. 389, 115 P. 849; Ballard *v.* Slyfield, 47 Wash. 174, 91 P. 612.

See Eaton *v.* Locey, 22 Cal. App. 762, 136 P. 534.

Action by husband to recover community property defeated by proof that title is in wife by virtue of agreement between them, though that is not pleaded. Michael *v.* Rabe, 56 Tex. Civ. 441, 120 S. W. 565.

828-64 Nilson *v.* Sarment, 153 Cal. 524, 96 P. 315.

828-66 See Nilson *v.* Sarment, supra.

828-67 Clarke *v.* Lassus, 128 La. 919, 55 S. 576. But see Succession of Andrus, 131 La. 940, 60 S. 623.

829-68 Gameson *v.* Gameson (Tex. Civ.), 162 S. W. 1169.

829-69 Gameson *v.* Gameson (Tex. Civ.), 162 S. W. 1169; Carpenter *v.* Brackett, 57 Wash. 460, 107 P. 359 (acts of parties in creating liens on land and their expressed intentions at time of transfer relevant). See Eaton *v.* Locey, 22 Cal. App. 762, 136 P. 534.

Double declaration that spouse bought property with individual funds and for purpose of replacing that individual property from which funds came is necessary. Succession of Andrus, 131 La. 940, 60 S. 623.

Subsequent declaration of husband against interest, competent. Leonardo *v.* Santiago, 7 Phil. Isl. 401.

Insurance of property by husband for wife, no evidence of recognition as hers. Nilson *v.* Sarment, 153 Cal. 524, 96 P. 315.

Deeds of trust executed by husband and wife to secure loans and providing for reconveyance to her no evidence against him. Wilson *v.* Sarment, supra.

829-70 Recitals not binding on husband's heirs. Succession of Graf, 125 La. 197, 51 S. 115.

830-71 Succession of Turgeau, 130 La. 650, 58 S. 497.

830-72 Succession of Turgeau, supra; Farrow *v.* Farrow, 72 N. J. Eq. 421, 65 A. 1009, 11 L. R. A. (N. S.) 389. See also Smith *v.* Sheppard, 2 Ga. App. 144, 58 S. E. 303. *Comp.* Naler *v.* Ballew, 81 Ark. 328, 99 S. W. 72.

Purchase notes for sale of wife's separate estate payable to husband and wife, no presumption of gift to husband. Tison *v.* Gass, 46 Tex. Civ. 163, 102 S. W. 751.

Bank deposit in name of husband and wife, husband presumed to have intended to benefit wife to extent of conferring on her right of survivorship. West *v.* McCullough, 123 App. Div. 846, 108 N. Y. S. 453. But see dissenting opinion.

830-74 Small *v.* Pryor, 69 N. J. Eq. 606, 61 A. 564, statute.

831-75 Huston *v.* Smith, 248 Ill. 396, 94 N. E. 63.

831-76 In re Foss, 147 Fed. 790; Spradling *v.* Spradling, 101 Ark. 451, 142 S. W. 848; Stonecipher *v.* Kear, 131 Ga. 688, 63 S. E. 217; Jackson *v.* Williams, 129 Ga. 716, 59 S. E. 776; Denter *v.* Denter, 214 Ill. 308, 73 N. E. 453; Oliver *v.* Sample, 72 Kan. 582, 84 P. 138; Siling *v.* Hendrickson, 193 Mo. 365, 92 S. W. 105; Van Etten *v.* Bk., 79 Neb. 632, 113 N. W. 163; Lahey *v.* Broderick, 72 N. H. 180, 55 A. 324; McGee *v.* McGee, 81 N. J. Eq. 190, 86 A. 406; Herbert *v.* Alvord, 75 N. J. Eq. 488, 72 A. 946; Kjolseth *v.* Kjolseth, 27 S. D. 80, 129 N. W. 752; Du Perier *v.* Du Perier (Tex. Civ.), 126 S. W. 10; Tison *v.* Gass, 46 Tex. Civ. 163, 102 S. W. 751; Effler *v.* Burns, 70 W. Va. 415, 74 S. E. 233.

Same presumption from purchase with funds of wife in the name of the husband. Whitten *v.* Whitten, 70 W. Va. 422, 74 S. E. 237.

Property paid for with joint earnings, presumption of gift as to husband's share. Jentsch *v.* Jentsch, 84 Ark. 322, 105 S. W. 572.

"**And the law** does not imply a promise or obligation on her part to refund the money, or to divide the property purchased, or to hold the same in trust for him. His conduct is referable to his affection for her and his duty to protect her against want; and it will be presumed to be a gift, so far as he is concerned, becomes absolutely her property. Wood *v.* Wood, 100 Ark. 370, 140 S. W. 275; Womack *v.* Womack, 73 Ark. 281, 83 S. W. 937, 1130; O'Hair *v.* O'Hair, 76 Ark. 389, 88 S. W. 945. It is true this presumption is not conclusive, and may be rebutted by evidence of facts antecedent to and contemporaneous with the conveyance, showing that the intention of the husband was to have his wife hold the land in trust for him; and that he did not intend to make her a gift thereof. Chambers *v.* Michael, 71 Ark. 373, 74 S. W. 516;

Milner *v.* Freeman, 40 Ark. 62.'' Harbour *v.* Harbour, 103 Ark. 273, 146 S. W. 867.

831-77 Killian *v.* Killian, 10 Cal. App. 312, 101 P. 806; McMahon *v.* Cronin, 128 N. Y. S. 423.

Burden on husband or those claiming through him to show that wife assented in writing to his purchasing property with her money and taking title in his own name. Fogle *v.* Pendell, 248 Mo. 65, 154 S. W. 81.

Burden on plaintiff to show that property in wife's name was paid for by her husband, plaintiff's debtor. Cogar *v.* Nat. Bk., 151 Ky. 470, 152 S. W. 278.

House built on lot belonging to wife. Braxton *v.* Johnston, 34 App. Cas. (D. C.) 386.

Presumed, in absence of evidence of fraud, that conveyance, consideration for which is not attacked, from husband to wife made in good faith. Shorett *v.* Signor, 58 Wash. 89, 107 P. 1033.

832-78 Lahey *v.* Broderick, 72 N. H. 180, 55 A. 354.

832-80 Killian *v.* Killian, 10 Cal. App. 312, 101 P. 806.

833-83 Bank deposit in husband's name not conclusive of ownership, he and wife having checked against it. Leonard *v.* Piggott, 152 Mich. 436, 116 N. W. 366.

834-86 Williams *v.* Keef, 241 Mo. 366, 145 S. W. 425, considering a transaction that took place in 1867.

835-87 Title, etc. Co. *v.* Ingersoll, 153 Cal. 1, 94 P. 94; Southern Bk. of Fulton *v.* Nichols, 235 Mo. 401, 138 S. W. 881.

Evidence rebutting such presumption. Miller *v.* McLean, 31 O. C. C. 64.

Husband taking title to property on exchange for wife's property, without her consent, implied trustee for her. Siling *v.* Hendrickson, 193 Mo. 365, 92 S. W. 105.

837-92 Goodrich *v.* T. Co., 105 Ark. 90, 150 S. W. 406. See Ahlering *v.* Speckman, 30 Ky. L. R. 940, 99 S. W. 973.

838-97 See Atlantic, etc. Co. *v.* Williams, 5 Ga. App. 647, 63 S. E. 671.

May be shown that wife permitted husband to hold property as his own, and he had offered it for sale. Mitchell *v.* Smith, 86 Ark. 486, 111 S. W. 806.

839-1 Intention of parties in having conveyance made to wife testified to by them. Fulkerson *v.* Stiles, 156 Cal. 703, 105 P. 966.

841-9 Eaton *v.* Loccy, 22 Cal. App 762, 136 P. 534.

841-10 Martin *v.* Munroe, 121 Md 679, 89 A. 319.

841-11 Madden *v.* Stegman, 88 Kan. 29, 127 P. 524.

842-12 Cogar *v.* Nat. Bk., 151 Ky. 470, 152 S. W. 278.

842-13 Admission of making contract in wife's favor some evidence of continued existence. Unger *v.* Mellinger, 43 Ind. App. 524, 88 N. E. 74.

843-15 Bank *v.* Baldwin, 14 Ida. 75, 93 P. 504, 17 L. R. A. (N. S.) 676. Nebraska doctrine reaffirmed. Northwall Co. *v.* Osgood, 80 Neb. 764, 115 N. W. 308.

Contra.—By the Arkansas statute a married woman is not authorized to contract generally, and when the complaint alleges a contract made by a married woman it must also allege facts sufficient to constitute a cause of action against her under the statute, in which event, of course, the burden of proof would be upon the plaintiff. ''When appellant, after setting up in her answer the defense or coverture, had shown that she was a married woman at the time of the making of the note, she established a prima facie good defense to the action, which could only be overcome by testimony that the obligation was one she was authorized to make under the statute; and, notwithstanding it may be true that production of the note, with the proof of her signature thereto, entitled the plaintiff prima facie to recover, upon the ground that it was apparently upon its face the note of an unmarried woman, when it was shown in defense that she was a married woman at the time of the execution thereof, the presumption changed, and plaintiff's cause of action at common law was destroyed, and if he had one under the statute he was entitled to prove it, but the burden rested upon him to do so. Downing *v.* O'Brien, 67 Barb. (N. Y.) 582.'' Hardin *v.* Jessie, 103 Ark. 246, 146 S. W. 499.

844-16 Farmers & T. Bk. *v.* Eubanks, 2 Ga. App. 839, 59 S. E. 193. See Wilson *v.* Fitzgerald, 25 Pa. Super. 633; Children's Aid Soc. *v.* Benford, 26 Pa. Super. 555. *Comp.* Gilbert *v.* Brown, 123 Ky. 703, 97 S. W. 40; Bentley *v.* Bentley, 72 Neb. 803, 101 N. W. 976

(where alleged debt consisted of items of various accounts.

Payment by husband, of living expenses of wife, is presumed to be from community funds, not from her separate property. Title Ins. & Tr. Co. *v.* Ingersoll, 158 Cal. 474, 111 P. 360.

Burden on wife to show she executed mortgage as surety for husband's debts in an action to set it aside. Corinth Bk., etc. Co. *v.* King (Ala.), 62 S. 704.

845-19 U. S. *v.* Gwynne, 209 Fed. 993; P. *v.* Bladek, 259 Ill. 69, 102 N. E. 243; Roxburgh *v.* Roxburgh, 162 Ill. App. 364; Strauss *v.* Hutson (Miss.), 61 S. 594; Grant *v.* Mitchell, 156 N. C. 15, 71 S. E. 1087.

Confidence not to be broken even after marriage dissolved. Lanham *v.* Lanham (Tex.), 145 S. W. 336, *cit.* Scott *v.* C., 94 Ky. 515, 23 S. W. 219, 42 A. S. R. 373.

847-26 Sayler *v.* Walter, 30 Pa. Super. 370.

Wife of brother of accused competent to testify that her husband committed crime. Hardin *v.* S., 51 Tex. Cr. 559, 103 S. W. 401.

847-29 Sands *v.* Bradley, 36 Okla. 649, 129 P. 732 *cit.* ENCYCLOPAEDIA OF EVIDENCE.

848-32 U. S. *v.* Gwynne, 209 Fed. 993; McRae *v.* S. (Miss.), 61 S. 977; Whitehead *v.* Kirk (Miss.), 61 S. 737; Strauss *v.* Hutson (Miss.), 61 S. 594.

848-34 Fearn *v.* Postlethwaite, 240 Ill. 626, 88 N. E. 1057.

848-35 Northcutt *v.* Co. (Mo. App.), 162 S. W. 747; Fish *v.* Bloodworth, 36 Okla. 586, 129 P. 32; S. *v.* Muzzy (Vt.), 88 A. 895.

Husband and wife compelled to testify for or against each other in all cases. Ex parte Beville, 58 Fla. 170, 50 S. 685.

849-36 Pace *v.* R. Co., 174 Mo. App. 227, 156 S. W. 746. See Hanford *v.* Dowdle, 75 Ark. 127, 86 S. W. 818.

Michigan statute prohibiting husband or wife to testify for or against the other without consent does not disqualify widow suing for money loaned in husband's life time from testifying to ownership; that management of property was turned over to her by husband; that she managed it, and proceeds were hers. Leonard *v.* Piggott, 152 Mich. 436, 116 N. W. 366.

849-37 Grantland *v.* S., 8 Ala. App. 319, 62 S. 470; Fidelity & C. Co. *v.* Cooper, 137 Ky. 544, 126 S. W. 111; Freeland *v.* Williamson, 220 Mo. 217, 119 S. W. 560 (in suit to establish resulting trust in land bought with wife's money, title in deceased husband's name); Pace *v.* R. Co., 174 Mo. App. 227, 156 S. W. 746.

849-38 Larson *v.* Carter, 14 Ida. 511, 94 P. 825; Pace *v.* R. Co., 174 Mo. App. 227, 156 S. W. 746.

850-40 McCord *v.* McCord, 140 Ga. 170, 78 S. E. 833. See Ex parte Beville, 58 Fla. 170, 50 S. 685.

850-41 McCord *v.* McCord, 140 Ga. 170, 78 S. E. 833.

851-43 Kofsky *v.* Kofsky, 254 Ill. 88, 98 N. E. 287; Kaufman *v.* Murray (Ind.), 105 N. E. 466; Hyde *v.* Honiter, 175 Mo. App. 583, 158 S. W. 83; Berst *v.* Moxom, 157 Mo. App. 342, 138 S. W. 74; Miller *v.* Stebbins, 77 Vt. 183, 59 A. 844. See Gemkow *v.* Link, 225 Ill. 21, 80 N. E. 47.

852-45 White *v.* Bower (Colo.), 136 P. 1053; Bailey *v.* Kennedy, 148 Ia. 715, 126 N. W. 181 (suit by husband for alienation of wife's affections); Walker *v.* Walker (Ky.), 114 S. W. 338 (husband competent in action which wife might have brought if sole if she did not testify); Tockstein *v.* Bimmerle, 150 Mo. App. 491, 131 S. W. 126. See Guillaume *v.* Flannery, 21 S. D. 1, 108 N. W. 255 (statute); Mead *v.* Owen, 80 Vt. 273, 67 A. 722 (statute).

Husband subscribing witness to will in which his wife is named as legatee, may testify on proceeding to probate will. Lanning *v.* Gay, 70 Kan. 353, 78 P. 810.

Action by husband as administrator to recover for death of son, wife competent for plaintiff. Mitchell *v.* Brady, 124 Ky. 411, 99 S. W. 266. And so in suit by him as next friend for son. Illinois C. R. Co. *v.* Becker, 119 Ill. App. 221.

852-46 Dean *v.* Dean, 13 Ga. App. 798, 80 S. E. 25; Jackson *v.* Smith, 139 Mo. App. 691, 123 S. W. 1026.

853-48 Ex parte Beville, 58 Fla. 170, 50 S. 685; Clark *v.* Co., 140 Ill. App. 207; Allen *v.* C., 134 Ky. 110, 119 S. W. 795; Fishback *v.* Harrison, 137 Mo. App. 664, 119 S. W. 465 (wife not agent of husband in signing name to a note because of inability).

Testimony admissible.—Husband does not testify "for or against" his wife if she is not a party to the record and

has no legal interest in suit. Powell *v.* Strickland, 163 N. C. 393, 79 S. E. 872.

854-49 Wicker *v.* S. (Ga. App.), 82 S. E. 58; Gastaner *v.* Gastaner, 131 La. 1, 58 S. 1012; Kanne *v.* Kanne, 119 Minn. 265, 138 N. W. 25; Herron *v.* R. Co., 29 Okla. 317, 116 P. 952; Canole *v.* Allen, 222 Pa. 156, 70 A. 1053 (on cross-examination).

Husband may testify against wife in action brought by him against her for accounting. Dorsett *v.* Dorsett, 226 Pa. 334, 75 A. 593, statute.

854-50 White *v.* Bower (Colo.), 136 P. 1053; Stoutenborough *v.* Rammel, 123 Ill. App. 487; Bauer *v.* Bauer, 177 Mich. 169, 142 N. W. 1074; Kanne *v.* Kanne, 119 Minn. 265, 138 N. W. 25; Strauss *v.* Hutson (Miss.), 61 S. 594; Weekerly *v.* Taylor, 74 Neb. 772, 105 N. W. 254. See Payne *v.* Payne, 129 Wis. 450, 109 N. W. 105.

Action by husband for divorce for desertion, wife asking for temporary alimony; husband may not testify to her adultery. Bishop *v.* Bishop, 124 Ga. 293, 52 S. E. 743.

No unfavorable inference drawn against accused because objecting to wife's testimony. U. S. *v.* Melehor, 2 Phil. Isl. 588.

857-51 Clark *v.* Co., 140 Ill. App. 207. See Hyde *v.* Honiter, 175 Mo. App. 583, 158 S. W. 83.

858-53 Wesoky *v.* U. S., 175 Fed. 333, 99 C. C. A. 121.

858-56 Porter *v.* U. S., 7 Ind. Ty. 616, 104 S. W. 855 (common law wife); Young *v.* S., 49 Tex. Cr. 207, 92 S. W. 841; Oborn *v.* S., 143 Wis. 249, 126 N. W. 737.

858-57 *Comp.* Lara *v.* S., 48 Tex. Cr. 568, 89 S. W. 840.

858-58 S. *v.* Hancock, 28 Nev. 300, 82 P. 95.

859-62 **Bigamous marriage** void, woman may testify against supposed husband on trial. Murphy *v.* S., 122 Ga. 149, 50 S. E. 48; Hock *v.* P., 219 Ill. 265, 76 N. E. 356; S. *v.* Rocker, 130 Ia. 239, 106 N. W. 645; Young *v.* S., 49 Tex. Cr. 207, 92 S. W. 841; Lara *v.* S., 48 Tex. Cr. 568, 89 S. W. 840.

Bigamist is competent witness against unlawful husband. Jeems *v.* S. (Ga.), 81 S. E. 202.

860-63 Donnan *v.* Donnan, 256 Ill. 244, 99 N. E. 931; Clark *v.* Co., 140 Ill. App. 207; In re Robinson's Est., 222 Pa. 113, 70 A. 966. See Williams *v.* S., 149 Ala. 4, 43 S. 720. *Comp.* S. *v.* Luper (Or.), 95 P. 811.

By statute.—The competency of one spouse as a witness depends upon the relationship at time of trial and not at time cause of action accrued. Sands *v.* Bradley, 36 Okla. 649, 129 P. 732.

860-65 Howard *v.* Strode, 242 Mo. 210, 146 S. W. 792; S. *v.* Leasia, 45 Or. 410, 78 P. 328.

860-67 Mahoney *v.* Roberts, 86 Ark. 130, 110 S. W. 225 (wife, a party, compelled to testify, but not against husband); Strode *v.* Frommeyer, 115 Mo. App. 220, 91 S. W. 167.

861-70 Rendahl *v.* Walsh, 145 Ill. App. 601.

861-71 Miles *v.* R. Co., 90 Ark. 485, 119 S. W. 837 (applying rule affirmatively); McCamey *v.* Wright, 90 Ark. 608, 119 S. W. 841.

862-72 **Statute in District of Columbia.**—Dawson *v.* Waggaman, 23 App. Cas. (D. C.) 428. See Heintz *v.* Dennis, 216 Ill. 487, 75 N. E. 192.

Alabama.—Spouse of plaintiff in action against administrator competent on behalf of other spouse. Meyers *v.* Meyers, 141 Ala. 343, 37 S. 451; Henderson *v.* Brunson, 141 Ala. 674, 37 S. 549.

California statute.—Kaltschmidt *v.* Weber, 145 Cal. 596, 79 P. 272.

Michigan.—Ayres *v.* Short, 142 Mich. 501, 105 N. W. 1115, same effect.

Iowa statute.—Lucas *v.* McDonald, 126 Ia. 678, 102 N. W. 532.

Kentucky.—Same rule. Black *v.* McCarley, 31 Ky. L. R. 1198, 104 S. W. 987; Bright *v.* Bright, 30 Ky. L. R. 834, 99 S. W. 901; Doty *v.* Dickey, 29 Ky. L. R. 900, 96 S. W. 544; Bartee *v.* Edmunds, 29 Ky. L. R. 872, 96 S. W. 535; Hollinsworth *v.* Barrett, 28 Ky. L. R. 280, 89 S. W. 107.

Texas.—Whitfield *v.* Diffie (Tex. Civ.), 105 S. W. 324; Edelstein *v.* Brown (Tex. Civ.), 95 S. W. 1126.

Wife of claimant against estate of decedent, competent. Butler *v.* Phillips, 38 Colo. 378, 88 P. 480.

Husband's interest in wife's property does not disqualify him as witness in her favor, as against administrator, though a party; but incompetent on own behalf. White *v.* Poole, 74 N. H. 71, 65 A. 255, *cit.* cases.

862-73 Rathbone *v.* Maltz, 155 Mich. 306, 118 N. W. 991.

862-74 St. Louis, etc. R. Co. *v.* Raines, 90 Ark. 482, 119 S. W. 266;

St. Louis, etc. Co. *v.* McCullough, 101 Ark. 254, 142 S. W. 192.

862-75 West *v.* Rawdon (Okla.), 130 P. 1160; St. Louis, etc. Co. *v.* Bloom, 39 Okla. 78, 134 P. 432; Guthrie *v.* Mitchell, 38 Okla. 55, 132 P. 138; Western, etc. Co. *v.* Williamson, etc. Co., 37 Okla. 213, 131 P. 691; Sands *v.* Bradley, 36 Okla. 649, 129 P. 732.

By statute in Texas "the husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein, except as to confidential communications between such husband and wife." Lanham *v.* Lanham (Tex.), 145 S. W. 336.

862-76 West *v.* Rawdon (Okla.), 130 P. 1160; St. Louis, etc. Co. *v.* Bloom, 39 Okla. 78, 134 P. 432; Guthrie *v.* Mitchell, 38 Okla. 55, 132 P. 138; Western N. Ins. Co. *v.* Williamson, etc. Co., 37 Okla. 213, 131 P. 691; Sands *v.* Bradley, 36 Okla. 649, 129 P. 732.

862-77 Guthrie *v.* Mitchell, 38 Okla. 55, 132 P. 138.

863-78 Cook *v.* Neely, 143 Mo. App. 632, 128 S. W. 233.

863-79 Strauss *v.* Hutson (Miss.), 61 S. 594.

863-80 Arnold *v.* Arnold, 141 Ga. 158, 80 S. E. 652; Anderson *v.* Anderson, 140 Ga. 802, 79 S. E. 1124; Bauer *v.* Bauer, 177 Mich. 169, 142 N. W. 1074; Wood *v.* Wood (N. J. Eq.), 62 A. 429; E. W. M. *v.* J. C. M., 2 Tenn. Ch. App. 463. See supra, "Divorce," 792-28.

Wife is competent witness in contempt proceedings against husband growing out of divorce proceedings. Mitchell *v.* Court, 163 Cal. 423, 125 P. 1061.

Under New York code (§831) husband competent to prove marriage in action for divorce for adultery of wife. Suffin *v.* Suffin, 119 App. Div. 852, 104 N. Y. S. 839.

Under Pennsylvania statute either spouse suing for divorce, incompetent where personal service not had. Penny *v.* Penny, 34 Pa. Super. 88; Davenport *v.* Davenport, 35 Pa. C. C. 62 (or non-performance).

864-81 Action by divorced wife against husband concerning property claimed by him as gift from her, neither competent. Johnson *v.* Johnson, 28 Ky. L. R. 937, 90 S. W. 964. Husband not compellable to testify to financial ability. Nissen *v.* Farquhar, 121 La. 642, 46 S. 679.

864-82 Rose *v.* Monarch, 150 Ky. 129, 150 S. W. 56; Lyle *v.* Andalaft (Mo. App.), 165 S. W. 1146; Taylor *v.* George, 176 Mo. App. 215, 161 S. W. 1187; Muskogee, etc. Co. *v.* McIntire (Okla.), 133 P. 213; West *v.* Rawdon (Okla.), 130 P. 1160.

Illinois statute makes wife competent to testify for or against husband "in all matters of business transactions where the transaction was had and conducted by" her as agent for husband. Donk, etc. Co. *v.* Stroetter, 229 Ill. 134, 82 N. E. 250; Thornton *v.* Muus, 120 Ill. App. 422; Lumbard *v.* Holdiman, 115 Ill. App. 458.

864-83 Treiber *v.* McCormack, 90 Kan. 675, 136 P. 268; Rose *v.* Monarch, 150 Ky. 129, 150 S. W. 56; Monahan *v.* Schwartz, 32 Ky. L. R. 1285, 108 S. W. 285; Leigh *v.* Bk., 31 Ky. L. R. 251, 102 S. W. 233; Conn., etc. Co. *v.* R. Co., 171 Mo. App. 70, 153 S. W. 544; Collier *v.* Co., 147 Mo. App. 700, 127 S. W. 435; Joplin *v.* Freeman, 125 Mo. App. 717, 103 S. W. 130; Lowman *v.* Bk., 40 Okla. 519, 139 P. 952; St. Louis, etc. Co. *v.* Bloom, 39 Okla. 78, 134 P. 432; Guthrie *v.* Mitchell, 38 Okla. 55, 132 P. 138; Western N. Ins. Co. *v.* Williamson, etc. Co., 37 Okla. 213, 131 P. 691; Sands *v.* Bradley, 36 Okla. 649, 129 P. 732; Fish *v.* Bloodworth, 36 Okla. 586, 129 P. 32; Armstrong *v.* Crump, 25 Okla. 452, 106 P. 875; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237; Bloch *v.* Ins. Co., 132 Wis. 150, 112 N. W. 45; Karlen *v.* Hadinger, 147 Wis. 78, 132 N. W. 591.

See Shepherd *v.* Schomaker, 115 La. 542, 39 S. 554. *Comp.* Boyce *v.* Bolster, 79 Vt. 40, 64 A. 79.

Action against husband for necessaries furnished wife, wife competent. Morgenroth *v.* Spencer, 124 Wis. 564, 102 N. W. 1086.

Missouri statute.—Gardner *v.* R. Co., 124 Mo. App. 461, 101 S. W. 684. See also Moore *v.* Rose, 130 Mo. App. 668, 108 S. W. 1105.

Husband may testify for wife as to business transacted by him for her as agent. Smith *v.* Travel, 20 Okla. 512, 94 P. 529.

Husband, as wife's agent may testify to facts occurring when she was not present, though she also testifies. Miller *v.* Jones, 32 Ky. L. R. 1078, 107 S. W. 783.

Transactions between husband and wife not within statutes. Taylor *v.* Mc-

Clintock, 87 Ark. 243, 112 S. W. 405.
866-87 Donk, etc. Co. *v.* Stroetter, 229 Ill. 134, 82 N. E. 250.
868-90 Treiber *v.* McCormack, 90 Kan. 675, 136 P. 268; Connecticut F. Ins. Co *v.* Chester, etc. R. Co., 171 Mo. App. 70, 153 S. W. 544.
See Trawick *v.* Trussell, 122 Ga. 320, 50 S. E. 86; Shepherd *v.* Schomaker, 115 La. 542, 39 S. 554.
Husband may testify acting as wife's agent. Smith *v.* Travel, 20 Okla. 512, 94 P. 529, *foll.* Am. Exp. Co. *v.* Lankford, 2 Ind. Ty. 18, 46 S. W. 183, *aff.* 93 Fed. 380, 35 C. C. A. 353.
868-91 St. Louis, etc. R. Co. *v.* Courtney, 77 Ark. 431, 92 S. W. 251; Joplin *v.* Freeman, 125 Mo. App. 717, 103 S. W. 130; Muskogee, etc. Co. *v.* McIntire (Okla.), 133 P. 213.
869-94 Illinois statute.—Marks *v.* Madsen, 261 Ill. 51, 103 N. E. 625; Linkemann *v.* Knepper, 226 Ill. 473, 80 N. E. 1009; Cotter *v.* Sullivan, 162 Ill. App. 396; Levine *v.* Carroll, 121 Ill. App. 105; Ames *v.* Thren, 125 Ill. App. 312; Rago *v.* Veneziano, 155 Ill. App. 557; Stix *v.* Calendar, 155 Ky. 806, 160 S. W. 514; Cartright *v.* Cartright, 70 W. Va. 507, 74 S. E. 655. See Stevens *v.* Stevens (Mich.), 148 N. W. 229.
In an action by a son to set aside a deed executed by his deceased mother on the ground of non-delivery, the husband was held competent to testify as to the delivery of the deed, but not as to statements made by his wife. Weigard *v.* Rutschke, 253 Ill. 260, 97 N. E. 641.
Pennsylvania statute.—Heckman *v.* Heckman, 215 Pa. 203, 64 A. 425.
Action by wife to establish ownership of property held in trust by husband's mother's administrator, husband competent, having no direct interest adverse to administrator. Bentley *v.* Jun (Neb.), 107 N. W. 865.
870-95 Wobbe *v.* Schaub, 143 Ill. App. 361.
Rhode Island.—Hartley *v.* Hartley, 27 R. I. 176, 61 A. 144.
871-98 *Contra,* Bianchi *v.* Del Valle, 117 La. 587, 42 S. 148; Martin *v.* Derenbecker, 116 La. 495, 40 S. 849.
Husband suing for injuries to wife and children, wife competent to prove employment of nurse for children. Louisville & N. R. Co. *v.* Quinn, 145 Ala. 657, 39 S. 616.
872-99 S. *v.* Blackwell, 162 N. C. 672, 78 S. E. 316. See also Roberts *v.* Bartlett, 190 Mo. 680, 89 S. W. 858. *Comp.* Bentley *v.* Jun (Neb.), 107 N. W. 865; Hiskett *v.* Bozarth, 75 Neb. 70, 105 N. W. 990.
872-1 Ditto *v.* Slaughter, 28 Ky. L. R. 1164, 92 S. W. 2; Floore *v.* Green, 26 Ky. L. R. 1073, 83 S. W. 133; Taylor *v.* Johnson, 30 Ky. L. R. 656, 99 S. W. 320.
874-9 Burden on husband and wife to show transaction was fair. Gray *v.* Collins, 139 Ga. 776, 78 S. E. 127.
874-12 Under the Kentucky Civil Code, §606, either, but not both, may testify. Pike County *v.* Sowards, 147 Ky. 37, 143 S. W. 745.
875-14 Chesapeake & O. R. Co. *v.* Banks' Admr., 144 Ky. 137, 137 S. W. 1066.
875-16 Hooper *v.* Hooper (N. C.), 81 S. E. 933; McCall *v.* Galloway, 162 N. C. 353, 78 S. E. 429.
876-17 Rust *v.* Oltmer, 74 N. J. L. 802, 67 A. 337; Hooper *v.* Hooper (N. C.), 81 S. E. 933; McCall *v.* Galloway, 162 N. C. 353, 78 S. E. 429; Grant *v.* Mitchell, 156 N. C. 15, 71 S. E. 1087.
876-18 Hooper *v.* Hooper (N. C.), 81 S. E. 933.
Crim. con.—Husband competent to prove marriage only. Hill *v.* Pomelear, 72 N. J. L. 528, 63 A. 269.
876-22 Bailey *v.* Kennedy, 148 Ia. 715, 126 N. W. 181; Rust *v.* Oltmer, 74 N. J. L. 802, 67 A. 337 (where declaration contained a count for crim. con., and one for alienating affections, as to first neither spouse competent except to prove marriage; as to second, competent for all purposes).
Competent for husband. — Harris *v.* Brown, 187 Fed. 6, 109 C. C. A. 60.
Michigan.—Knickerbocker *v.* Worthing, 138 Mich. 224, 101 N. W. 540.
877-23 Wife competent for husband on grounds of public policy. Coy *v.* Humphreys, 142 Mo. App. 92, 125 S. W. 877. Competent under act of 1907 to rebut attack upon her character or conduct. Keath *v.* Shiffer, 37 Pa. Super. 573.
877-24 Timmann *v.* Timmann, 142 N. Y. S. 298; Flint *v.* Pierce, 136 N. Y. S. 1056. *Comp.* Evans *v.* S., 165 Ind. 369, 75 N. E. 651, married woman prosecuting a bastardy proceeding competent to testify non-access.
877-25 Hooper *v.* Hooper (N. C.), 81 S. E. 933. Evidence of conduct not excluded. Williams *v.* S. (Tex. Cr.), 148 S. W. 763.

Incompetency of wife does not render mother and doctor incompetent to testify to her potency after examination of her body. Edwards *v.* S. (Tex. Cr.), 160 S. W. 709.

878-27 Barron *v.* Anniston, 157 Ala. 399, 48 S. 58; Elmore *v.* S., 140 Ala. 184, 37 S. 156; Riedel *v.* Crocker, 161 Ill. App. 608; Joseph *v.* C., 30 Ky. L. R. 638, 99 S. W. 311 (deposition of defendant's wife, properly excluded); S. *v.* Kephart, 56 Wash. 561, 106 P. 165 (burning of wife's property). See Grabowski *v.* S., 126 Wis. 447, 105 N. W. 805.

As to sanity of husband charged with crime, wife incompetent on his behalf. C. *v.* Wolfel, 28 Ky. L. R. 16, 88 S. W. 1061. *Contra* in a civil action. Piper *v.* R., 75 N. H. 228, 72 A. 1024.

878-28 Norman *v.* S., 127 Tenn. 340, 155 S. W. 135.

878-29 Rule of competency extends to actions criminal in nature—selling liquors to husband contrary to law; he may testify. Pettis County *v.* De Bold, 136 Mo. App. 265, 117 S. W. 88.

879-30 S. *v.* Cox, 150 N. C. 816, 64 S. E. 199; Tucker *v.* S., 7 Okla. Cr. 634, 124 P. 1134, 125 P. 1089; Rhea *v.* Ty., 3 Okla. Cr. 230, 105 P. 314 (court may not instruct as to inference to be drawn from failure of accused to call wife).

879-31 Wife of deceased competent for state in prosecution of his murderer except as to confidential communications. Carter *v.* C., 131 Ky. 240, 114 S. W. 1186.

879-32 Talbott *v.* U. S., 208 Fed. 144, 125 C. C. A. 360; Newman *v.* S., 160 Ala. 102, 49 S. 786.

880-38 Talbott *v.* U. S., 208 Fed. 144, 125 C. C. A. 360; Woodward *v.* S., 84 Ark. 119, 104 S. W. 1109, *cit.* the text.

Rule applies where two indicted separately for distinct offenses. Bowmer *v.* S., 55 Tex. Cr. 416, 116 S. W. 798.

880-39 Wife of one defendant pleading guilty may testify in corroboration of her husband. Graff *v.* P., 208 Ill. 312, 70 N. E. 299, 108 Ill. App. 168.

Adultery. — Husband of woman with whom defendant is charged with having committed crime competent for state. Pruett *v.* S., 141 Ala. 69, 37 S. 343.

881-40 Watson *v.* S. (Ala.), 61 S. 334, *cit.* Ency. of Ev.

881-41 Watson *v.* S. (Ala.), 61 S. 334, *cit.* Ency. of Ev. Spencer *v.* S., 52 Tex. Cr. 289, 106 S. W. 386.

881-43 Ector *v.* S., 10 Ga. App. 777, 74 S. E. 295; Finklea *v.* S., 94 Miss. 777, 48 S. 1; S. *v.* Wooley, 215 Mo. 620, 115 S. W. 417; Woodall *v.* S., 58 Tex. Cr. 513, 126 S. W. 591 (regardless of objection or exception); Lara *v.* S., 48 Tex. Cr. 568, 89 S. W. 840. See Grabowski *v.* S., 126 Wis. 447, 105 N. W. 805; P. *v.* Bowen, 165 Mich. 231, 130 N. W. 706.

Wife of prosecuting witness is not incompetent. P. *v.* Upton, 169 Mich. 31, 135 N. W. 108.

Statements by wife to third person in husband's presence cannot be testified to by such third person against husband, wife being incompetent. S. *v.* Richardson, 194 Mo. 326, 92 S. W. 649.

882-44 In Alabama wife may testify against husband in prosecution for vagrancy. Thomas *v.* S., 155 Ala. 125, 46 S. 771.

Massachusetts.—C. *v.* Barker, 185 Mass. 324, 70 N. E. 203.

882-45 Cohen *v.* U. S., 214 Fed. 23; S. *v.* Anderson, 252 Mo. 83, 158 S. W. 817.

883-46 U. S. *v.* Rispoli, 189 Fed. 271; Halley *v.* S., 108 Ark. 224, 158 S. W. 121; Molyneux *v.* Willcockson (Ia.), 137 N. W. 1016.

884-47 Cohen *v.* U. S., 214 Fed. 22 (C. C. A.); U. S. *v.* Gwynne, 209 Fed. 993; Williams *v.* S., 149 Ala. 4, 43 S. 720; Ex parte Kantrowitz (Cal.), 140 P. 1078; Molyneux *v.* Willcockson (Ia.), 137 N. W. 1016; Miller *v.* S., 78 Neb. 645, 111 N. W. 637; Murray *v.* S., 48 Tex. Cr. 141, 86 S. W. 1024; S. *v.* Woodrow, 58 W. Va. 527, 52 S. E. 545.

Wife competent to testify to crime committed by husband, and to all facts, though tending to convict him of different crime committed at same time in same transaction. Miller *v.* S., 78 Neb. 645, 111 N. W. 637.

Decedent's incriminating declarations against husband admissible on his trial for homicide. Rice *v.* S., 54 Tex. Cr. 149, 112 S. W. 299.

884-49 S. *v.* Orth, 79 O. St. 130, 86 N. E. 476, failure to support minor children.

884-51 Wife not competent on prosecution of husband for murder of infant child, though same ball killed child and wounded wife while child in arms. S. *v.* Woodrow, 58 W. Va. 527, 52 S. E. 545.

885-53 Stevens *v.* S. (Tex. Cr.), 150 S. W. 944.

885-54 Halley *v.* S., 108 Ark. 224, 158 S. W. 121; Miller *v.* C., 154 Ky. 201, 157 S. W. 373.

Prosecution for wife abandonment, wife competent against husband. Carnley *v.* S., 162 Ala. 94, 50 S. 362. Wester *v.* S., 142 Ala. 56, 38 S. 1010.

Wife competent to testify to abandonment and fact of marriage. Cunningham *v.* S., 13 Ga. App. 80, 78 S. E. 780.

Contempt proceedings against husband for non-payment of alimony latter competent to purge himself. Stoddard *v.* Stoddard, 122 La. 151, 47 S. 446.

886-56 U. S. *v.* Gwynne, 209 Fed. 993. But see Miller *v.* Com., 154 Ky. 201, 157 S. W. 373.

886-59 Kitchens *v.* S. (Okla. Cr.), 140 P. 619; Mitchell *v.* S. (Okla. Cr.), 140 P. 622. See S. *v.* Perkins, 143 Ia. 55, 120 N. W. 62.

Husband may testify as to adultery of wife who is not a party to the record. Powell *v.* Strickland, 163 N. C. 393, 79 S. E. 872.

Wife divorced as result of adultery for which husband on trial, competent, against him. S. *v.* Nelson, 39 Wash. 221, 81 P. 721.

887-60 Smith *v.* S. (Ga. App.), 81 S. E. 912; Arnold *v.* Arnold, 141 Ga. 158, 80 S. E. 652; Anderson *v.* Anderson, 140 Ga. 802, 79 S. E. 1124; U. S. *v.* Meyers, 14 N. M. 522, 99 P. 336; Lewis *v.* Lewis, 77 Misc. 412, 136 N. Y. S. 686; Hooper *v.* Hooper (N. C.), 81 S. E. 933.

887-61 Smith *v.* S. (Ga. App.), 81 S. E. 912; Biers *v.* Biers, 156 App. Div. 409, 142 N. Y. S. 128.

887-62 Biers *v.* Biers, 156 App. Div. 409, 142 N. Y. S. 128; Hooper *v.* Hooper (N. C.), 81 S. E. 933.

888-63 McRae *v.* S. (Miss.), 61 S. W. 977; S. *v.* Vaughan, 136 Mo. App. 645, 118 S. W. 1186.

888-65 Williams *v.* S., 149 Ala. 4, 53 S. 720; P. *v.* Rader (Cal. App.), 141 P. 958; Purdy *v.* S., 50 Tex. Cr. 318, 97 S. W. 480. See S. *v.* Woodrow, 58 W. Va. 527, 52 S. E. 545.

Prosecution of husband for threatening to kill wife, wife competent against him. Murray *v.* S., 48 Tex. Cr. 141, 86 S. W. 1024.

Relation must have existed when assault made. P. *v.* Johnson, 9 Cal. App. 233, 98 P. 682.

889-67 Bryan *v.* S., 55 Tex. Cr. 136, 114 S. W. 811; Knapp *v.* S., 54 Tex. Cr. 633, 114 S. W. 836; S. *v.* Kniffen, 44 Wash. 485, 87 P. 837.

889-69 Richardson *v.* S., 103 Md. 112, 63 A. 317; Hooper *v.* Hooper (N. C.), 81 S. E. 933.

890-72 Harville *v.* S., 54 Tex. Cr 426, 113 S. W. 283.

891-75 S. *v.* Luper (Or.), 95 P. 811, former wife competent against husband on prosecution for perjury committed in divorce suit.

891-76 Norman *v.* S., 127 Tenn. 340, 155 S. W. 135. Prosecution of husband for attempted rape upon wife, while living separate, wife not competent against him. Frazier *v.* S., 48 Tex. Cr. 142, 86 S. W. 754.

892-83 *Comp.* Bishop *v.* Bishop, 124 Ga. 293, 52 S. E. 743.

892-84 Pettis *v.* S. (Tex. Cr.), 150 S. W. 790.

893-85 Roberts *v.* S. (Tex. Cr.), 168 S. W. 100; Taylor *v.* S. (Tex. Cr.), 167 S. W. 56; Pettis *v.* S. (Tex. Cr.) 150 S. W. 790; Hobbs *v.* S., 53 Tex. Cr. 71, 112 S. W. 308; Swanney *v.* S. (Tex. Cr.), 146 S. W. 548.

893-86 S. *v.* Burgess (Mo.), 168 S. W. 740; S. *v.* Nibarger (Mo.), 164 S. W. 453; Roberts *v.* S. (Tex. Cr.), 168 S. W. 100; Taylor *v.* S. (Tex. Cr.), 167 S. W. 56; Johnson *v.* S. (Tex. Cr.), 162 S. W. 512; Pettis *v.* S. (Tex. Cr.), 150 S. W. 790.

893-88 S. *v.* Shouse, 188 Mo. 473, 87 S. W. 480.

894-90 Tucker *v.* S., 7 Okla. Cr. 634, 124 P. 1134, 125 P. 1089.

Massachusetts.—"It is well to note the difference as to the various kinds of testimony with which the statute deals. As to private conversations with each other, neither husband nor wife is allowed to testify, no matter how much the testimony is desired by either of them or by any third party. As to their testimony against each other either may testify, but shall not be compelled so to do in a criminal proceeding against the other. The privilege is that of the spouse called and not of the defendant. In the case of the defendant in a criminal suit the question whether he will testify is decided by him alone. In only this last case is his failure to produce the evidence not to be taken against him. In all other proceedings and as to all witnesses except himself in a criminal proceeding against him, the defendant

is left to the general principles of law as to what inference may be drawn against him for his failure to produce evidence in his favor. In this respect our statute differs from those of some states which expressly provide that the failure of one spouse to produce the other shall not in a criminal case be taken against the defendant." C. *v.* Spencer, 212 Mass. 438, 99 N. E. 266.

894-91 Marks *v.* Madsen, 261 Ill. 51, 103 N. E. 625; Neice *v.* R. Co., 165 Ill. App. 627; Mueller *v.* Knollenberg 161 Ill. App. 107; Patterson *v.* Bank (Ind. App.), 102 N. E. 880; Vernon *v.* Assn. (Ia.), 138 N. W. 696; Goff *v.* Murphy, 153 Ky. 634, 156 S. W. 95; Mentz's Assignee *v.* Mahoney, 150 Ky. 409, 150 S. W. 503; Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40; McRae *v.* S. (Miss.), 61 S. 977; Whitehead *v.* Kirk (Miss.), 61 S. 737; S. *v.* Wallace, 162 N. C. 622, 78 S. E. 1; Adkins *v.* Wright, 37 Okla. 771, 131 P. 686; Freeman *v.* Freeman, 71 W. Va. 303, 76 S. E. 657.

Alienation of husband's affections and for crim. con., wife incompetent to testify to husband's declarations to her relating to defendant or her conduct. Dodge *v.* Rush, 28 App. Cas. (D. C.) 149.

893-93 Humphrey *v.* Pope, 1 Cal. App. 374, 82 P. 223; Trometer *v.* D. C., 24 App. Cas. (D. C.) 242; Wobbe *v.* Schaub, 143 Ill. App. 361; Hostetter *v* Green (Ky.), 167 S. W. 919; Leucht *v* Leucht, 129 Ky. 700, 112 S. W. 845; Adkins *v.* Wright, 37 Okla. 771, 131 P. 686; S. *v.* Luper (Or.), 95 P. 811; Gant *v.* S., 55 Tex. Cr. 284, 116 S. W. 801; S. *v.* Muzzy (Vt.), 88 A. 895; Lurty *v.* Lurty, 107 Va. 466, 59 S. E. 405. See Klein *v.* Klein, 31 Ky. L. R 28, 101 S W. 382.

Alienating husband's effections, wife may testify to acts, statements and declarations by him showing affection and subsequent loss. Sexton *v.* Sexton, 129 Ia. 487, 105 N. W. 314.

Fact of being joint parties and jointly interested immaterial. Marshall *v.* Marshall, 71 Kan. 313, 80 P. 629.

896-94 Nicoll *v.* Nicoll, 22 Cal. App. 268, 133 P. 1144; Clover *v.* Woodmen, 142 Ill. App. 276.

897-97 Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40; S. *v.* Wallace 162 N. C. 622, 78 S. E. 1; S. *v.* Luper (Or.), 95 P. 911; Freeman *v.* Freeman, 70 W. Va. 303, 76 S. E. 657.

897-98 S. *v.* Muzzy (Vt.), 88 A. 895.

897-99 McCord *v.* McCord, 140 Ga. 170, 78 S. E. 833; Clover *v.* Woodmen, supra; Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40. See Grieb *v.* Stahl, 101 Tex. 306, 107 S. W. 41; Pace *v.* S., 61 Tex. Cr. 436, 135 S. W. 379.

Communication between husband and wife living under articles of separation are not privileged. Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40.

898-2 McCord *v.* McCord, 140 Ga. 170, 78 S. E. 833; Wickes *v.* Walden, 228 Ill. 56, 81 N. E. 798; German-A Ins. Co. *v.* Paul, 5 Ind. Ty. 703, 83 S. W. 60; Miller *v.* S. (Tex. Cr.), 144 S. W. 239.

899-3 Rule rendering incompetent communications between spouses subject to exceptions as where it is necessary to disclose them in order to protect personal rights or liberty of party to whom made. S. *v.* Luper, 49 Or 605, 91 P. 444. See also Shepherd *v.* C., 27 Ky. L. R. 376, 85 S. W. 191.

899-4 Neice *v.* R. Co., 165 Ill. App. 627; Mueller *v.* Knollenberg, 161 Ill App. 107; Clover *v.* Woodmen, 142 Ill. App. 276.

900-6 Whitehead *v.* Kirk (Miss.), 61 S. 737.

900-7 Kiolbassa *v.* Union, 141 Ill. App. 297; White *v.* White, 101 Minn. 451, 112 N. W. 627 (reception of evidence not prejudicial).

901-8 Illinois statute covers conversations between a spouse and a third party in presence of other spouse. Donnan *v.* Donnan, 236 Ill. 341, 86 N. E. 279.

901-9 Jacobs *v.* U. S., 161 Fed. 694 88 C. C. A. 554; Hostetter *v.* Green (Ky.), 167 S. W. 919; Brown *v.* Patterson, 224 Mo. 639, 124 S. W. 1; First Bk., etc. *v.* Hill (Tex. Civ.), 151 S. W. 652.

Confidential communication defined. Lanham *v.* Lanham (Tex.), 145 S. W. 336.

Confessions of wife committing crime jointly with husband, not within rule of exclusion. S. *v.* Mann, 39 Wash 144, 81 P. 561.

901-10 Thomas *v.* S., 155 Ala. 125, 46 S. 771; Leyner *v.* Leyner, 123 Ia. 185, 98 N. W. 628; Hostetter *v.* Green (Ky.), 167 S. W. 919; Whitford *v.* Ins. Co., 163 N. C. 223, 79 S. E. 501; S. *v.* Luper, 49 Or. 605, 91 P. 444; First Bk., etc. *v.* Hill (Tex. Civ.), 151 S. W. 652.

See Shepherd *v.* C., 27 Ky. L. R. 376, 85 S. W. 191.

902-11 Hostetter *v.* Green (Ky.), 167 S. W. 919; Bankers' F. Union *v.* Donahue, 33 Ky. L. R. 196, 109 S. W. 878 (action on life insurance policy); Brown *v.* Patterson, 224 Mo. 639, 124 S. W. 1.

903-12 *Contra,* Donnan *v.* Donnan, 236 Ill. 341, 86 N. E. 279. See C. *v.* Cronin, 185 Mass. 96, 69 N. E. 1065.

As to sanity at time of suicide, wife competent to testify to circumstances surrounding husband's death. Metropolitan L. Ins. Co. *v.* Thomas, 32 Ky. L. R. 770, 106 S. W. 1175.

903-13 Macon, etc. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569; Chicago C. R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28; Clover *v.* Woodmen, 142 Ill. App. 276; Supreme Lodge *v.* Jones, 113 Ill. App. 241; Illinois L. Ins. Co. *v.* De Lang, 30 Ky. L. R. 753, 99 S. W. 616; Missouri, etc. R. Co. *v.* Hibbitts, 49 Tex. Civ. 419, 109 S. W. 228.

To show property homestead.—Steves *v.* Smith, 49 Tex. Civ. 126, 107 S. W. 141.

903-15 Hostetter *v.* Green (Ky.), 167 S. W. 919; Goff *v.* Murphy, 153 Ky. 634, 156 S. W. 95; Whitehead *v.* Kirk (Miss.), 61 S. 737.

904-16 Lurty *v.* Lurty, 107 Va. 466, 59 S. E. 405.

905-19 *Comp.* Marshall *v.* Marshall, 71 Kan. 313, 80 P. 629.

905-21 *Comp.* Johnson *v.* Johnson, 28 Ky. L. R. 937, 90 S. W. 964.

905-22 And so of delivery by one spouse in presence of other to third party. Baker *v.* Baker, 239 Ill. 82, 87 N. E. 868.

805-24 **Action by trustee** in bankruptcy to set aside gifts to bankrupt's wife she may be compelled to testify. Wiley *v.* McBride, 74 Ark. 34, 85 S. W. 84.

Wife may not testify to threats made to her against another. Gant *v.* S., 55 Tex. Cr. 284, 116 S. W. 801.

906-26 P. *v.* Chadwick, 4 Cal. App. 63, 87 P. 384; Mueller *v.* Batcheler, 131 Ia. 650, 109 N. W. 186; C. *v.* Everson, 29 Ky. L. R. 760, 96 S. W. 460; Kanne *v.* Kanne, 119 Minn. 265, 138 N. W. 25; S. *v.* Laudisi (N. J.), 90 A. 1098; S. *v.* Wallace, 162 N. C. 622, 78 S. E. 1; Ickes *v.* id., 237 Pa. 582, 85 A. 885; Harris *v.* S. (Tex. Cr.), 161 S. W. 125; Cowser *v.* S. (Tex. Cr.), 157 S. W. 758; First Bk. of Springtown *v.* Hill (Tex. Civ.), 151 S. W. 652; Richards *v.* S., 55 Tex. Cr. 278, 116 S. W. 587. See Connella *v.* Ty., 16 Okla. 365, 86 P. 72; Cole *v.* S., 48 Tex. Cr. 439, 88 S. W. 341; S. *v.* Muzzy (Vt.), 88 A. 895. But see Whitehead *v.* Kirk (Miss.), 61 S. 737.

Spouse may testify.—Whitehead *v.* Kirk (Miss.), 61 S. 737.

Conversation between husband, wife and father not privileged, and may be testified to by wife on prosecution of husband for murder of father. Cole *v.* S., 51 Tex. Cr. 89, 101 S. W. 218.

906-27 Phillips *v.* S. (Ala. App.), 65 S. 673; Gant *v.* S., 55 Tex. Cr. 284, 116 S. W. 801, *cit.* the text.

907-28 But see Kerr *v.* Yager (Ia.), 138 N. W. 905.

Wife competent to testify to conversation between husband and third party in suit in which husband is neither a party nor interested in outcome. Short *v.* Thomas (Mo. App.), 163 S. W. 252.

907-30 Apkins *v.* C., 148 Ky. 662, 147 S. W. 376 (where, however, the error was harmless); Hearne *v.* S. C., 50 Tex. Cr. 431, 97 S. W. 1050; S. *v.* Muzzy (Vt.), 88 A. 895. See Lurty *v.* Lurty, 107 Va. 466, 59 S. E. 405. *Comp.* E. W. M. *v.* J. C. M., 2 Tenn. Ch. App. 463.

907-31 Caldwell *v.* S., 146 Ala. 141, 41 S. 473; Connella *v.* Ty., 16 Okla. 365, 86 P. 72.

908-32 S. *v.* Wallace, 162 N. C. 622, 78 S. E. 1; Harris *v.* S. (Tex. Cr.), 161 S. W. 126; S. *v.* Simmons, 52 Wash. 132, 100 P. 269; S. *v.* Nelson, 39 Wash. 221, 81 P. 721 (letter produced by prosecution).

Letter by accused to wife while in jail, intercepted and never delivered, not privileged. Hammons *v.* S., 73 Ark. 495, 84 S. W. 718.

908-33 Harris *v.* S. (Tex. Cr.), 161 S. W. 125. Letter by accused to wife written while in jail under known rule requiring opening and examination by jailer not privileged. De Leon *v.* Ty., 9 Ariz. 161, 80 P. 348. *Comp.* Ward *v.* S., 70 Ark. 204, 66 S. W. 926, letter taken from wife forcibly privileged.

909-35 McCord *v.* McCord, 140 Ga. 170, 78 S. E. 833.

IDENTITY

Opinion, 912-3; *Of names of places*, 912-6; *Of house*, 927-74.

912-3 Williams *v.* S., 149 Ala. 4, 43 S. 720; Jordan *v.* S., 50 Fla. 94, 39 S. 155; Gray *v.* S., 6 Ga. App. 428, 65 S. E. 191; P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077; Craig *v.* S., 171 Ind. 317, 86 N. E. 397; S. *v.* Richards, 126 Ia. 497, 102 N. W. 439; Morse *v.* C., 129 Ky. 294, 111 S. W. 714; P. *v.* Hammond, 177 Mich. 416, 143 N. W. 244; S. *v.* Lane (N. C.), 81 S. E. 620; S. *v.* Carmon, 145 N. C. 481, 59 S. E. 657; Coffman *v.* S., 51 Tex. Cr. 478, 103 S. W. 1128; Roszczynala *v.* S., 125 Wis. 414, 104 N. W. 113.

"Witness was not willing to testify positively that the defendant was the man who sold him the liquor, nevertheless he did testify that to the best of his recollection the defendant was the man. The evidence of the above witness rises above mere conjecture or suspicion. It assumes the dignity of the positive testimony of a witness who from the fact that he had no acquaintance with the defendant and had only seen him when he bought whisky from him on one occasion in the dark was unwilling to positively say that he was the man, but was willing to testify that, to the best of his recollection, he was the man. This witness having testified that, to the best of his recollection, the defendant was the man who had sold him the liquor, it was the duty of the court to submit, under the evidence in this case, the question of the defendant's guilt vel non to the jury." Hollingsworth *v.* S., 3 Ala. App. 153, 57 S. 501.

Opinion incompetent after witness testified it was too dark to distinguish person seen. Pool *v.* S., 48 Tex. Cr. 478, 88 S. W. 350.

Opinion as to possibility of identifying assailant at a certain time and place inadmissible where not shown assault took place under circumstances set forth, or witness ascertained by experiment possibility of such identification under like conditions. Keyser *v.* S., 95 Md. 96, 51 A. 1057.

912-4 P. *v.* Gorman, 14 Cal. App. 253, 111 P. 285.

913-5 **Identification by finger-prints.** P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077.

913-6 Rex *v.* Leach, 17 Ont. L. R. 643; Reid *v.* S., 168 Ala. 118, 53 S. 254; Des Moines S. Bk. *v.* Kennedy, 142 Ia. 272, 120 N. W. 742 (in civil actions it is prima facie evidence); Snyder *v.* Fidler, 125 Ia. 378, 101 N. W. 130; Cumberland G. Mfg. Co. *v.* Arteaux, 199 Mass. 426, 85 N. E. 536; Nicholson *v.* Lumb. Co., 160 N. C. 33, 75 S. E. 730.

Identity of names of places alone is some evidence of their identity. W. U. T. Co. *v.* Hankins, 50 Tex. Civ. 513, 110 S. W. 539.

Identification by assumed name.—A person may acquire an assumed name by which he may be identified as certainly as by his true name. Stallworth *v.* S., 146 Ala. 8, 41 S. 184.

913-7 Pearce *v.* Haas, 122 Ia. 376, 47 S. 687; Atwood *v.* Co., 148 Mich. 224, 111 N. W. 747, *cit.* the text; S. *v.* Bates, 102 Minn. 104, 112 N. W. 1026; S. *v.* Court, 225 Mo. 609, 125 S. W. 451; Hoffman *v.* Ins. Co., 135 App. Div. 739, 119 N. Y. S. 978; C. *v.* Doe, 18 Pa. Dist. 611; Cardenas *v.* S., 58 Tex. Cr. 109, 124 S. W. 953; Blunt *v.* Oil Co. (Tex. Civ.), 146 S. W. 248.

This presumption is strong in proportion as the differences between the two names are slight. Johnston *v.* S., 65 Fla. 492, 62 S. 655.

Presumption is slight.—Jones *v.* S., 48 Mont. 505, 139 P. 441.

In extradition proceedings presumption of identity of fugitive arises from identity of name. S. *v.* Bates, 101 Minn. 303, 112 N. W. 260.

Statutory presumption of identity of person from identity of name is disputable. P. *v.* Mullen, 7 Cal. App. 547, 94 P. 867.

Is sufficient evidence prima facie. Ryle *v.* Davidson (Tex. Civ.), 116 S. W. 823.

914-8 **Where circumstances show** nothing to the contrary identity of names on indictment and record is presumptive evidence of identity of person. Nelson *v.* S., 151 Ala. 2, 43 S. 966.

Where same name appears twice in a list of witnesses there is no presumption of identity, but rather that there were two persons of same name. Shaffer *v.* U. S., 24 App. Cas. (D. C.) 417.

914-9 See Ex parte Long Lock, 173 Fed. 208.

No presumption because of identity of name that notary who attested affidavit was same person who subsequently, as solicitor of city court, joined

with prosecutor in signing the accusation. Shuler *v.* S., 125 Ga. 778, 54 S. E. 689.

915-10 Mobile L. & R. Co. *v.* Mackay, 158 Ala. 51, 48 S. 509, applying rule to corporation.

915-11 Ferguson *v.* Trustees, 168 Ill. App. 225. See Lucas *v.* Co., 186 Mo. 448, 85 S. W. 359.

916-12 **Time person became resident of a state** may be relevant on question of identity, and is provable by testimony of family history. Keck *v.* Woodward, 53 Tex. Civ. 267, 116 S. W. 75.

Circumstances strengthening presumption stated. Hoffman *v.* Ins. Co., 135 App. Div. 739, 119 N. Y. S. 978.

916-13 Presumption can be invoked only where such name is to be applied to a particular person involved. P. *v.* Wong Sang Lung, 3 Cal. App. 221, 84 P. 843.

916-14 P. *v.* Wong Sang Lung, 3 Cal. App. 221, 84 P. 843.

917-23 S. *v.* Loser, 132 Ia. 419, 104 N. W. 337; S. *v.* Payne, 223 Mo. 112, 122 S. W. 1062; S. *v.* Le Pitre, 54 Wash. 166, 103 P. 27; Colbert *v.* S., 125 Wis. 423, 104 N. W. 61.

Identity of name not sufficient on prosecution for second offense. Thompson *v.* S., 66 Fla. 206, 63 S. 423.

Identity of names not sufficient to identify defendant with record of previous convictions so as to apply statute increasing penalty because of such conviction. S. *v.* Smith, 129 Ia. 709, 106 N. W. 187.

917-24 When witness is sought to be impeached by the use of record of prior conviction identity of names makes a prima facie showing of identity of person and question is for jury. S. *v.* Loser, supra; Boyd *v.* S., 150 Ala. 101, 43 S. 204; Clifford *v.* Co., 232 Ill. 150, 83 N. E. 448. But see Byrd *v.* S., 51 Tex. Cr. 539, 103 S. W. 863.

917-25 Brum *v.* Ivins, 154 Cal. 17, 96 P. 876.

918-27 Einstein *v.* Co., 132 Mo. App. 82, 111 S. W. 859; Hill & Jahns *v.* Lofton (Tex. Civ.), 165 S. W. 67.

919-34 Telfair *v.* S., 56 Fla. 104, 47 S. 863; P. *v.* Seaman, 239 Ill. 611, 88 N. E. 212; Harrel *v.* Neef, 80 Kan. 348, 102 P. 838; McAuliff *v.* Hughes, 128 App. Div. 355, 112 N. Y. S. 486; Bailie *v.* Co., 55 Tex. Civ. 473, 119 S. W. 325. See Brum *v.* Ivins, 154 Cal. 17, 96 P. 876.

919-35 Brooke *v.* S., 155 Ala. 78, 46 S. 491.

920-36 Illinois C. R. Co. *v.* Hasenwinkle, 232 Ill. 224, 83 N. E. 815; S. *v.* Priest, 215 Mo. 1, 114 S. W. 949.

920-38 *Comp.* Hope *v.* Seaman, 119 N. Y. S. 713. See Illinois C. R. Co. *v.* Hasenwinkle, 232 Ill. 224, 83 N. E. 815 (variance immaterial in condemnation notice); S. *v.* Loser, 132 Ia. 419, 104 N. W. 337 (middle initial no part of name); Lucas *v.* Co., 186 Mo. 448, 85 S. W. 359; Morrison *v.* Turnbaugh, 192 Mo. 427, 91 S. W. 152 (not important in identifying person sued for taxes); State Finance Co. *v.* Halstenson, 17 N. D. 145, 114 N. W. 724 (*dist.* from Ambs *v.* R. Co., 44 Minn. 266, 46 N. W. 321, where initials changed). But see Taulbee *v.* Buckner, 28 Ky. L. R. 1246, 91 S. W. 734, holding omission of middle initial will not raise presumption of difference of identity in tracing chain of title to land.

921-40 S. *v.* Loser, 132 Ia. 419, 104 N. W. 337; State Finance Co. *v.* Halstenson, 17 N. D. 145, 114 N. W. 724. But see Cleveland, etc. R. Co. *v.* Peirce, 34 Ind. App. 188, 72 N. E. 604, though unnecessary to give middle name or initial, a mistake is fatal.

921-42 Maxwell *v.* S. (Ala.), 65 S. 732; Dehn *v.* Dehn, 170 Mich. 407, 136 N. W. 453; Hess *v.* Stockard, 99 Minn. 504, 109 N. W. 1113.

921-43 Morse *v.* Co., 129 Ky. 294, 111 S. W. 714 (indictment under assumed name); Cain *v.* S. (Tex. Cr.), 153 S. W. 147.

921-44 Roach *v.* Wolff (Neb.), 146 N. W. 1019.

921-45 **Similarity of article** found with defendant's clothing. See S. *v.* Alton, 105 Minn. 410, 117 N. W. 617.

Blood stains and semen stains on clothing must be shown to have been deposited recently in order to be material in rape case. S. *v.* Alton, 105 Minn. 410, 117 N. W. 617.

922-46 Cox *v.* Cline, 147 Ia. 353, 126 N. W. 330; Olson *v.* Bk., 78 Kan. 592, 96 P. 853.

Admission of identity.—Rio Grande W. R. Co. *v.* Boyd, 44 Colo. 119, 96 P. 781.

922-47 Previous illegal sale of liquor to stranger may be proved to identify defendant. Abrams *v.* S., 155 Ala. 105, 46 S. 464.

Competent to show every step taken by defendant prior to commission of

crime to establish his identity. P. *v.* Duffy, 160 App. Div. 385, 145 N. Y. S. 705.

922-48 Carson *v.* Slattery, 123 La 825, 49 S. 586.

922-49 Williams *v.* S., 56 Tex. Cr. 496, 120 S. W. 882.

922-50 Harris *v.* Martin, 150 N. C. 367, 64 S. E. 126.

923-53 See S. *v.* Findling, 123 Minn. 413, 144 N. W. 142.

923-54 Writings of accused similar to letters carved on door and containing peculiarities of punctuation, competent to show habit. S. *v.* Kent, 83 Vt. 28, 74 A. 389.

Commission of other offenses in similar manner may be shown if manner novel. Morse *v.* Co., 129 Ky. 294, 111 S. W. 714.

924-57 Finney *v.* S. (Ala. App.), 65 S. 93; Way *v.* S., 155 Ala. 52, 46 S. 273 (best judgment); Kent *v.* Cobb, 24 Colo. App. 264, 133 P. 424 (telephone conversation); Tonkin-C. R. Co. *v.* Hedges, 24 Ida. 304, 133 P. 699; S. *v.* Vanella, 40 Mont. 326, 106 P. 364; U. S. *v.* Cagaoaan, 7 Phil. Isl. 207; Belcher *v.* S. (Tex. Cr.), 161 S. W. 459; Del. Ins. Co. *v.* Wallace (Tex. Civ.), 160 S. W. 1130 (telephone conversation); S. *v.* Karas (Utah), 136 P. 788. See Gallagher *v.* Mach. Co., 177 Ill. App. 198; Harris *v.* Raskin, 142 N. Y. S. 342; Hancock *v.* Ins. Co., 81 Misc 159, 142 N. Y. S. 352; Forester *v.* S. (Tex. Cr.), 163 S. W. 87. And see generally vol. 14, p. 154.

Witness testified that just before the shooting he heard one of the crowd or mob cry out, "Turn the damned negro loose." At that time West was about 250 or 300 yards away and was not able to recognize any member of the crowd or to determine or to say from seeing them whether any of them was a white man. In describing the tone of the voice, he said, "It was a cultured voice"; that he could distinguish the voice of a plantation negro from that of a cultured white man; and that in this instance it was the voice of a white man. The court said: "We think that this testimony was admissible. The recognition of the voice is a conclusion reached through the sense of hearing, like the recognition of the appearance of a person is a conclusion reached through the sense of sight. It is not a mere matter of opinion. It is admissible as direct and positive evidence, the weight of which is for the jury's determination. One may by the sense of hearing recognize the voice of a person with which he is familiar, and may likewise recognize and know the difference between the voices of persons of different nationalities, and between that of a white man and a negro." Rhea *v.* S., 104 Ark. 162, 147 S. W. 463, *cit.* this text.

Recognition of voice over telephone, competent. S. *v.* Usher, 136 Ia. 606, 111 N. W. 811; Holzhauer *v.* Sheeny, 31 Ky. L. R. 1238, 104 S. W. 1034.

Knowledge of voice required. Dunham *v.* McMichael, 214 Pa. 485, 63 A. 1007. See Mack *v.* S., 54 Fla. 55, 44 S. 706, 13 L. R. A. (N. S.) 373; Waggoner *v.* S., 49 Tex. Cr. 260, 92 S. W. 38 (statement "it went mighty like J. W.'s voice," admissible).

924-58 Holland *v.* S., 56 Tex. Cr. 440, 120 S. W. 470.

924-59 Where only a few hours' previous acquaintance is shown and no peculiarities, identification by voice and size of person seen in dark is insufficient. Walker *v.* S., 50 Tex. Cr. 221, 96 S. W. 35, *cit.* the text.

924-60 P. *v.* Castile, 3 Cal. App. 487, 86 P. 746.

925-61 S. *v.* Findling, 123 Minn. 413, 144 N. W. 142.

925-62 P. *v.* Way, 119 App. Div. 344, 104 N. Y. S. 277 (jawbone fractured by bullet admissible to identify deceased as person assaulted); Foster *v.* S. (Tex. Cr.), 150 S. W. 936.

Witness who collected bones of grandchildren after a fire may testify as to what they were and identify those of the older and younger, though she was not an expert. Sprouse *v.* C., 132 Ky. 269, 116 S. W. 344.

925-63 Denver, etc. R. Co. *v.* Gunning, 33 Colo. 280, 80 P. 727; S. *v.* Vann, 162 N. C. 534, 77 S. E. 295.

926-66 Gulf, etc. R. Co. *v.* Matthews, 99 Tex. 160, 88 S. W. 192.

927-70 Accused may be required to put his foot in track near place of crime. Magee *v.* S., 92 Miss. 865, 46 S. 529, valuable opinion, collecting cases.

927-71 Webb *v.* S. (Tex. Cr.), 154 S. W. 1013.

Circumstantial evidence, sufficient. S. *v.* Clark, 145 Ia. 731, 122 N. W. 957.

Habit of dog may be proved. Rumbaugh *v.* McCormick, 80 O. St. 211, 88 N. E. 410.

Familiarity with gallop of horses, sufficient upon which to base opinion as to their identity. Holder *v.* S., 119 Tenn. 178, 104 S. W. 225.

927-72 Lawton *v.* Shepard, 36 Okla. 772, 130 P. 135; Brady *v.* Shirley, 18 S. D. 608, 101 N. W. 886.

Identity of animal may be proved by witness after another has testified concerning it, though unable to identify it. McCullough *v.* Dunn, 83 Neb. 591, 119 N. W. 1127.

927-73 P. *v.* Romero, 12 Cal. App. 466, 107 P. 709; Independent B. Assn. *v.* Brew. Co., 169 Ill. App. 347; Elmore *v.* S. (Tex. Cr.), 162 S. W. 517; Reynolds *v.* S. (Tex. Cr.), 160 S. W. 362; Turner *v.* S. (Tex. Cr.), 160 S. W. 357; Williams *v.* S. (Tex. Cr.), 147 S. W. 571. See supra, "Animals," 889-3.

Unrecorded brand, no presumption of ownership, but may be used as means of identification. S. *v.* Dunn, 13 Ida. 9, 88 P. 235; Hurst *v.* Ty., 16 Okla. 600, 86 P. 280.

927-74 Wright *v.* S., 156 Ala. 108, 47 S. 201; Black *v.* S., 1 Ala. App. 255, 55 S. 948; Minor *v.* S., 55 Fla. 77, 46 S. 297; Lingerfelt *v.* S., 125 Ga. 4, 53 S. E. 803; City Nat. Bk. *v.* Jordan, 139 Ia. 499, 117 N. W. 758; S. *v.* Hopper, 114 La. 557, 38 S. 452; S. *v.* James, 194 Mo. 268, 92 S. W. 679; S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235; Delaware Ins. Co. *v.* Hill (Tex. Civ.), 127 S. W. 283; Richards *v.* C., 107 Va. 881, 59 S. E. 1104 (as to whether substance found on grass was oil).

"**In examination of the witness, the** prosecution would hand the vest to a certain witness and ask them if they had ever seen the vest, and the witnesses were permitted to answer that it was Mr. Rudolph's vest. The objection urged was, instead of handing the vest to the witness, the witness should have been required to describe the vest owned by Mr. Rudolph before handing it to the witness. The witnesses had testified they were present when the vest was taken out of the trunk, and identified it as the vest belonging to one of the deceased parties, and the bills present no error." Harris *v.* S. (Tex. Cr.), 148 S. W. 1074.

Witness who has felt object in pocket of accused may give opinion it was a pistol. Way *v.* S., 155 Ala. 52, 46 S. 273.

Identity of house presumed from identity of number, name of street and city. P. *v.* Price, 143 Cal. 351, 77 P. 73.

Conclusions of non-experts, inadmissible S. *v.* Denny, 17 N. D. 519, 117 N. W. 869.

928-75 Wiley *v.* S., 92 Ark. 586, 124 S. W. 249; McDonald *v.* S., 56 Fla. 74, 47 S. 485; Collins *v.* Co., 140 Ia. 304, 118 N. W. 401; Gilchrist *v.* Corliss, 155 Mich. 126, 118 N. W. 938 (corporate devices); Alpena *v.* Mainville, 153 Mich. 732, 117 N. W. 338 (similarity of paper used in certain place with that used as exhibit); Lynne *v.* S., 53 Tex. Cr. 375, 111 S. W. 729 (of money); S. *v.* Tidwell (Utah), 139 P. 863; S. *v.* King, 64 W. Va. 546, 63 S. E. 468.

"**While the burden is upon the plaintiff** in such cases to prove whose machine was responsible for the accident resulting in his injury, and he must identify it to the satisfaction of the jury, he is not required to do an impossible thing, but only to produce such evidence as will satisfy the minds of 12 intelligent jurors of the identity of the machine. This might be done by showing the similarity between the peculiar and unusual decorations on the Roberts machine and those on the machine which frightened the plaintiffs' horse, and the plaintiffs might thus make a prima facie case which the defendants would be called upon to answer. . . . The rapidity with which an automobile travels, and especially the speed at which this one was going, would prevent a more specific identification than that given by the plaintiffs." Bowling *v.* Roberts, 235 Pa. 89, 83 A. 600.

On trial for burglary where articles hard to identify (as, green hog hides), are found in possession of defendant, it may be shown that the one robbed is the only person in the community who skins hogs for their hides. Key *v.* S., 4 Ala. App. 76, 58 S. 946.

Description of real estate controls designation of building on it. Dermedy *v.* Jackson, 147 Ia. 620, 125 N. W. 228.

Correspondence of invoice with goods may be shown. Kerrch *v.* U. S., 171 Fed. 366, 96 C. C. A. 258; Johnson *v.* Co., 143 Mo. App. 441, 127 S. W. 692.

Plats, admissible to identify land. Black *v.* R. Co., 237 Ill. 500, 86 N. E. 1065.

Identity of size of lands in assessment lists will not sustain finding of their identity. Floyd *v.* Co., 222 Pa. 257, 71 A. 13.

Of money, shown by circumstantial evidence. Thompson *v.* S., 38 Fla. 106, 50 S. 507.

Indictment and record of conviction of defendant in replevin for larceny of property, not admissible to show its identity. Sapo *v.* Simpson, 117 N. Y. S. 105.

928-76 Lawson *v.* Co., 113 N. Y. S. 647; Fox *v.* Tift, 57 Or. 268, 111 P. 51.

928-78 Contents of documents may raise presumption of identity. Kolterman *v.* Chilvers, 82 Neb. 216, 117 N. W. 405.

928-79 Identity of document before admission. Plott *v.* Foster, 7 Ala. App. 402, 62 S. 299.

928-80 Producing paper in obedience to judicial order, admission of its identity. Des Moines S. Bk. *v.* Kennedy, 142 Ia. 272, 120 N. W. 742.

929-83 Krens *v.* S., 75 Neb. 294, 106 N. W. 27; S. *v.* Cerciella (N. J.), 90 A. 1112 (finger prints); S. *v.* Thompson, 161 N. C. 238, 76 S. E. 249. See also vol. 6, p. 706, n. 64.

929-84 Moore *v.* S., 51 Tex. Cr. 468, 103 S. W. 188.

930-87 Webb *v.* S. (Ala. App.), 65 S. 845; S. *v.* Jeffries, 210 Mo. 302, 109 S. W. 614. See generally vol. 3, p. 134; vol. 5, p. 491; vol. 6, p. 704.

Opinion as to correspondence of two sets of tracks, admissible. Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102.

930-88 Heidelbaugh *v.* S., 79 Neb. 499, 113 N. W. 145.

Evidence that tracks were found admissible. Thompson *v.* S. (Tex. Cr.), 163 S. W. 973. See generally vol. 3, p. 134.

930-89 Alford *v.* S., 47 Fla. 1, 36 S. 436 (where witness had opportunity to become acquainted with footprints of such person).

Tracks of buggy, horse, and men traced to accused's home. Pinkerton *v.* S. (Tex. Cr.), 160 S. W. 87. See generally vol. 3, p. 124; vol. 5, p. 491; vol. 7, p. 704.

931-93 See Boyd *v.* S., 50 Tex. Cr. 138, 94 S. W. 1053, defendant negro is not entitled to be escorted into court by four other negroes to test ability of prosecutrix to identify him.

931-95 P. *v.* Ong Git, 23 Cal. App. 148, 137 P. 283; Shaffer *v.* U. S., 24 App. Cas. (D. C.) 417; Powell *v.* S., 50 Tex. Cr. 592, 99 S. W. 1005. See S. *v.* Jones, 48 Mont. 505, 139 P. 441.

931-96 P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804. Recognizing the conflict, the court in Stout *v.* S., 174 Ind. 395, 92 N. E. 161, said: "The question of the admissibility of such evidence in our jurisdiction has never been decided, but is still open to be determined in the future when properly presented. The court did not err in rejecting the evidence which appellant offered to introduce."

931-97 Allen *v.* S., 8 Ala. App. 228, 62 S. 971; McDonald *v.* S., 165 Ala. 85, 51 S. 629; Spears *v.* S., 92 Miss. 613, 46 S. 166; S. *v.* Spivey, 151 N. C. 676, 65 S. E. 995; S. *v.* Hunter, 143 N. C. 607, 56 S. 547; S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969.

931-98 Gallant *v.* S., 167 Ala. 60, 52 S. 739; Davis *v.* S., 46 Fla. 137, 35 S. 76, 47 Fla. 26, 36 S. 170; Spreese *v.* C., 132 Ky. 269, 116 S. W. 344; Denham *v.* C., 27 Ky. L. R. 171, 84 S. W. 538; S. *v.* Rasco, 239 Mo. 735, 144 S. W. 449; Spears *v.* S., 92 Miss. 613, 46 S. 166; S. *v.* Freeman, 146 N. C. 615, 60 S. E. 986; S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969 (cases discussed).

When such evidence has been admitted defendant should have "the fullest opportunity by cross-examination to inquire into the breeding and testing of the dogs, and into any facts or circumstances tending to show that, by reason of their unreliability, or of their lack of proper training, the incriminating value of the evidence was impaired. Richardson *v.* State, 145 Ala. 46, 41 South. 82. But the facts or circumstances so sought to be brought out must be such as would have a proximate tendency to shed light upon the question of the value as evidence of the conduct of the dogs on the occasion which is the subject of investigation." Hadnot *v.* S., 3 Ala. App. 102, 57 S. 383.

Must be shown they were trained to track human beings and could do so with accuracy. Little *v.* S., 147 Ala. 662, 39 S. 674.

Defendant should have fullest oppor-

tunity to inquire into breeding and testing of dogs and circumstances of the hunt. Richardson *v.* S., 145 Ala. 46, 41 S. 82.

Opinion by trainer of dogs as to why they left the trail, incompetent. Richardson *v.* S., 145 Ala. 46, 41 S. 82.

932-1 Minor *v.* S., 55 Fla. 77, 46 S. 297; S. *v.* Allen, 23 Ida. 772, 131 P. 1112; Williams *v.* S., 56 Tex. Cr. 496, 120 S. W. 882; Perry *v.* S. (Tex. Cr.), 155 S. W. 263; S. *v.* Miller, 78 Wash. 268, 138 P. 896. See generally vol. 14, p. 154.

933-2 Alabama G. S. R. Co. *v.* Vail, 155 Ala. 382, 46 S. 587.

934-4 P. *v.* Gray, 148 Cal. 507, 83 P. 707; S. *v.* Kysilka, 84 N. J. L. 6, 87 A. 79; S. *v.* Rutledge, 37 Wash. 523, 79 P. 1123.

Must be based on acquaintance with or knowledge of person to be identified. Alford *v.* S., 47 Fla. 1, 36 S. 436.

Statement by party answering phone call it was defendant company is incompetent to establish defendant's receipt of message. Planter's O. Co. *v.* Co., 126 Ga. 621, 55 S. E. 495.

Common reputation in family may be sufficient identification where no superior proof is obtainable. Arnold *v.* Ins. Co., 20 Pa. Super. 61.

Testimony based on act of another in showing place in question, not hearsay. Long *v.* S., 58 Tex. Cr. 28, 124 S. W. 640.

934-5 Perry *v.* S. (Tex. Cr.), 155 S. W. 263.

934-6 Full description of traits on which opinion based, not essential to give it weight. Gray *v.* S., 6 Ga. App 428, 65 S. E. 191.

935-7 Hays *v.* S., 10 Ga. App. 823, 74 S. E. 314.

935-8 Way *v.* S., 155 Ala. 52, 46 S. 273; Craig *v.* S., 171 Ind. 317, 86 N. E. 397.

935-9 Birones *v.* S., 105 Ark. 82, 150 S. W. 416; Weaver *v.* S. (Tex. Cr.), 150 S. W. 785 (admissible). *Contra*, Reno *v.* S., 56 Tex. Cr. 229, 120 S. W. 429.

"Prof. Wigmore says that such testimony is admissible for the purpose of restoring the credit of an impeached identifying witness; that is to say, where the witness is impeached by proof of prior contradictory statements showing that the identification is a recent contrivance. 2 Wigmore, 119, 1130. His views on this subject are not in accord with the weight of authority, as we attempted to show in Burks *v.* State, 78 Ark. 271, 93 S. W. 983, 8 Ann. Cas. 476, and we there declined to follow them. But nowhere, so far as we can ascertain, has it ever been held that a so-called 'extra judicial identification' is admissible as original testimony; and it was therefore, in any view of the case, inadmissible, for there was no attempt to impeach the witness by contradictory statements, or otherwise. The testimony was introduced as original evidence, and it was clearly inadmissible, for it was not competent to corroborate the identifying witness by proof of former identification." Warren *v.* S., 103 Ark. 165, 146 S. W. 477.

936-11 Angle *v.* S. (Ala. App.), 64 S. 646.

Time act done may be shown to establish that another act was done in due time. Wynne *v.* S., 155 Ala. 99, 46 S. 459.

IMPEACHMENT OF WITNESSES

Involuntary confession, 62-94; *Declarations of joint defendants*, 77-59.

13-4 See Lueders *v.* U. S., 210 Fed. 419, 127 C. C. A. 151; De Noyelles *v.* Ins. Co., 78 Misc. 649, 138 N. Y. S. 855.

14-8 Fountain *v.* Ins. Co. (Cal.), 117 P. 630; Rangeley *v.* Harris, 165 N. C. 358, 81 S. E. 346; Burge *v.* S. (Tex. Cr.), 167 S. W. 63; Curry *v.* S. (Tex. Cr.), 162 S. W. 851.

Impeaching evidence need not absolutely disprove and falsify testimony. Schwartz *v.* S., 55 Tex. Cr. 36, 114 S. W. 809.

15-13 P. *v.* Wright, 4 Cal. App. 704, 89 P. 364.

15-14 Bringgold *v.* Bringgold, 40 Wash. 121, 82 P. 179.

15-15 Competent to impeach witness at earliest opportunity. See Eversole *v.* C. (Ky.), 163 S. W. 496.

Impeachment attempted first time in surrebuttal to attack adversaries' witnesses on his examination in chief comes too late. Gabbard *v.* C. (Ky.), 167 S. W. 942.

16-16 Pereira *v.* Co., 51 Or. 477, 94 P. 835.

17-22 Evidence insufficient. Stewart *v.* Hall, 154 Ia. 415, 134 N. W. 1092.

"The witness could only be impeached by evidence that her general reputation for truth or morality rendered her unworthy of belief, or that she had made statements different from her testimony given in chief in this case, or relative to some matter which was not collateral to the issue involved therein. Kirby's Digest, §3137." Peters *v.* S., 103 Ark. 119, 146 S. W. 491.

17-23 P. *v.* Tubbs, 147 Mich. 1, 110 N. W. 132.

Witness should not be required to pass upon his own veracity as to facts not yet arisen. S. *v.* Sydnor, 253 Mo. 375, 161 S. W. 692.

Showing deponent to be a negro inadmissible to impeach. Texas & P. R. Co. *v.* Good (Tex. Civ.), 151 S. W. 617.

Manner of impeachment is regulated by statutes. Welch *v.* C., 33 Ky. L. R. 51, 108 S. W. 863.

17-24 Alabama G. S. R. Co. *v.* Cardwell (Ala.), 60 S. 107; Stahlman *v.* R. Co. (Mo. App.), 166 S. W. 312; Carl *v.* Wolcott (Tex. Civ.), 156 S. W. 334. See Phillips *v.* S. (Ala. App.), 65 S. 444; Thompson Co. *v.* Warren, 38 App. Cas. (D. C.) 310; Ft. Worth B. R. Co. *v.* Cabell (Tex. Civ.), 161 S. W. 1083; St. Louis, etc. R. Co. *v.* Benjamin (Tex. Civ.), 161 S. W. 379; Gamboa *v.* S. (Tex. Cr.), 155 S. W. 249; Holmes *v.* S. (Tex. Cr.), 150 S. W. 926.

19-27 S. *v.* Anderson, 120 La. 331, 45 S. 267; S. *v.* Spencer, 45 La. Ann. 1, 12 S. 135; S. *v.* Jones, 48 Mont. 505, 139 P. 441.

Witness called by court.—P. *v.* Cleminson, 250 Ill. 135, 95 N. E. 157.

Where defendant sought by proper questions on cross-examination to impeach plaintiff's witness by showing that, subsequent to the storage of the goods with defendant, the witness had sworn to a value of 70 cents per gallon for the cognac, as compared with a valuation of $8 per gallon as testified to on trial, the exclusion of the evidence was erroneous. Palestine Hebrew Wine Co. *v.* Terminal Co., 67 Misc. 456, 123 N. Y. S. 348.

19-28 In re Johnson's Est., 152 Cal. 778, 93 P. 1015; Newell *v.* White, 29 R. I. 343, 73 A. 798.

20-30 In re Johnson's Est., 152 Cal. 778, 93 P. 1015.

21-31 U. S. *v.* Budd, 144 U. S. 154; Ashley *v.* Board, 83 Fed. 534, 27 C. C. A. 585; Choctaw, etc. R. Co. *v.* Newton, 140 Fed. 225, 250, 71 C. C. A. 655; In re San Miguel Gold Min. Co., 197 Fed. 127; Kauffmann *v.* Johns-Manville Co., 156 Ill. App. 426; P. *v.* Paul, 143 Ill. App. 566; Cochburn *v.* Men's Assn. (Ia.), 143 N. W. 1006; Left Fork C. Co. *v.* Owens' Admx., 155 Ky. 212, 159 S. W. 703; Watts *v.* Bryant, 144 Ky. 14, 137 S. W. 780; S. *v.* Dardenne, 131 La. 59, 58 S. 1032; S. *v.* Gallo, 115 La. 746, 39 S. 1001; S. *v.* Shapiro, 216 Mo. 359, 115 S. W. 1022; Becker *v.* Hart, 129 App. Div. 511, 113 N. Y. S. 1053; Sturgis *v.* S., 2 Okla. Cr. 362, 102 P. 57; S. *v.* McKay, 89 S. C. 234, 71 S. E. 858; Cunningham *v.* S. (Tex. Cr.), 166 S. W. 519; Reyes *v.* S., 48 Tex. Cr. 346, 88 S. W. 245. See also vol. 3, p. 290, n. 88, and p. 533, n. 7.

Party may call, in a civil action, officers or managing agent of a corporation which is a party without being barred the privilege of impeaching their testimony. Corbett *v.* Assn., 135 Wis. 505, 115 N. W. 365, 16 L. R. A. (N. S.) 177, statute.

23-33 Dilburn *v.* R. Co., 156 Ala. 228, 47 S. 210; S. *v.* Gallo, 115 La. 746, 39 S. 1001.

23-35 Black *v.* Epstein, 221 Mo. 286, 120 S. W. 754; Lambert *v.* Armentrout, 65 W. Va. 375, 64 S. E. 260.

23-36 W. U. T. Co. *v.* Northcutt, 158 Ala. 539, 48 S. 553; Womble *v.* Wilbur, 3 Cal. App. 535, 86 P. 916; Chicago City R. Co. *v.* Gregory, 221 Ill. 591, 77 N. E. 1112; Maloney *v.* Union, 143 Ill. App. 615; Balt. & O. R. Co. *v.* S., 107 Md. 642, 69 A. 139; S. *v.* Draughn, 140 Mo. App. 263, 124 S. W. 20; Berkowsky *v.* R. Co., 127 App. Div. 544, 111 N. Y. S. 989; P. *v.* Dixon, 118 App. Div. 593, 103 N. Y. S. 186; O'Doherty *v.* Co., 113 App. Div. 636, 99 N. Y. S. 351; S. *v.* McKay, 89 S. C. 234, 71 S. E. 858; Goss *v.* S., 57 Tex. Cr. 557, 124 S. W. 107; Compagnie Co. *v.* Co. (Tex. Civ.), 107 S. W. 651; Scott *v.* S., 52 Tex. Cr. 164, 105 S. W. 796; Ozark *v.* S., 51 Tex. Cr. 106, 100 S. W. 927; Benson *v.* S., 51 Tex. Cr. 367, 103 S. W. 911; Franklin *v.* S. (Tex. Cr.), 88 S. W. 357.

25-37 Chicago, etc. R. Co. *v.* Roberts, 35 Colo. 498, 84 P. 68; Barber *v.* S., 3 Ga. App. 598, 60 S. E. 285; Alexander *v.* S., 1 Ga. App. 289, 57 S. E. 996 (unless entrapped); Power *v.* R. Co., 157 App. Div. 400, 142 N. Y. S.

592; Benjamin *v.* Green, 144 N. Y. S. 311; City of Woodburn *v.* Aplin, 64 Or. 610, 131 P. 516; Quinn *v.* S., 51 Tex. Cr. 155, 101 S. W. 248 (failure to testify as expected). See O'Rear *v.* Lumb. Co., 6 Ala. App. 461, 60 S. 462, unless entrapped.

May call witness' attention to variant statements to explain inconsistency. Power *v.* R. Co., 157 App. Div. 400, 142 N. Y. S. 592.

25-38 See Reyes *v.* S., 48 Tex. Cr. 346, 88 S. W. 245.

25-39 Willis *v.* S., 49 Tex. Cr. 139, 90 S. W. 1100. But see Southern R. Co. *v.* Parks (Ala. App.), 65 S. 202; Barber *v.* S., 3 Ga. App. 598, 60 S. E. 285; Alexander *v.* S., 1 Ga. App. 289, 57 S. E. 996; Benson *v.* S., 51 Tex. Cr. 367, 103 S. W. 911 (may be impeached where affirmative fact testified to and party surprised thereby); Franklin *v.* S. (Tex. Cr.), 88 S. W. 357.

Prosecutor not allowed to question his own witness as to alleged contradictory statements made elsewhere. Beach *v.* S., 138 Ga. 265, 75 S. E. 139.

25-40 *Contra*, Thomas *v.* Fos, 51 Wash. 250, 98 P. 663, statute. But see Power *v.* R. Co., 157 App. Div. 400, 142 N. Y. S. 592.

Rule applies though witness subsequently called by adverse party and foundation laid for impeachment upon cross-examination. Baltimore & O. R. Co. *v.* S., 107 Md. 642, 69 A. 439.

25-42 Variant statements not admissible to contradict witness called by party though he was afterward called by the other party and made his witness and gave variant testimony in that capacity. O'Doherty *v.* Co., 113 App. Div. 636, 99 N. Y. S. 351, *dist.* Hubner *v.* R. Co., 77 App. Div. 290, 79 N. Y. S. 153, cited in corresponding note of Encyclopaedia, *aff.* without opinion, 177 N. Y. 523, 69 N. E. 1124.

Opinion in principal case treats question as settled by Coulter *v.* Co., 56 N. Y. 585, holding a party cannot impeach his own witness, although subsequently called as a witness for adverse party, either by general evidence or by proof of contradictory statements out of court. To same effect is Nichols *v.* White, 85 N. Y. 531. But see P. *v.* Smith, 113 App. Div. 396, 99 N. Y. S. 118. In Kansas rule is as stated in latest New York case, supra, at least in absence of special circumstances. S. *v.* Keefe, 54 Kan. 197, 38 P. 302; Johnston *v.* Marriage, 74 Kan. 208, 86 P. 461, 87 P. 74.

26-43 Washington *v.* S., 155 Ala. 2, 46 S. 778; Chicago C. R. Co. *v.* Gregory, 221 Ill. 591, 77 N. E. 1112; Lindquist *v.* Dickson, 98 Minn. 369, 107 N. W. 958; Masourides *v.* S., 86 Neb. 105, 125 N. W. 132; S. *v.* Johnson, 73 N. J. L. 199, 63 A. 12; P. *v.* Smith, 113 App. Div. 396, 99 N. Y. S. 118; S. *v.* Waldrop, 73 S. C. 60, 52 S. E. 793; Dallas, etc. R. Co. *v.* McAllister, 41 Tex. Civ. 131, 90 S. W. 933.

26-44 Hyde *v.* U. S., 225 U. S. 347, 32 Sup. Ct. 793, 56 L. ed. 1114; Thomasson *v.* S., 80 Ark. 364, 97 S. W. 297; P. *v.* Lukoszus, 242 Ill. 101, 89 N. E. 749; S. *v.* Draughn, 140 Mo. App. 263, 124 S. W. 20; Masourides *v.* S., 86 Neb. 105, 125 N. W. 132; Iveson *v.* Tract. Co., 159 App. Div. 27, 143 N. Y. S. 1077.

27-45 Chicago C. R. Co. *v.* Gregory, 221 Ill. 591, 77 N. E. 1112.

27-47 Lindquist *v.* Dickson, 98 Minn. 369, 107 N. W. 958; Beier *v.* Co., 197 Mo. 215, 94 S. W. 876; S. *v.* Johnson, 73 N. J. L. 199, 63 A. 12; Dallas, etc. R. Co. *v.* McAllister, 41 Tex. Civ. 131, 90 S. W. 933.

Use of diligence to prevent surprise. See Beier *v.* Co., 197 Mo. 215, 94 S. W. 876.

27-48 Chicago C. R. Co. *v.* Gregory, 221 Ill. 591, 77 N. E. 1112.

27-49 Thomasson *v.* S., 80 Ark. 364, 97 S. W. 297; Lindquist *v.* Dickson, 98 Minn. 369, 107 N. W. 958; Selover *v.* Bryant, 54 Minn. 434, 56 N. W. 58, 40 Am. St. 349, 21 L. R. A. 418; S. *v.* Johnson, 73 N. J. L. 199, 63 A. 12; Brayman *v.* Grant, 130 App. Div. 272, 114 N. Y. S. 336; S. *v.* Waldrop, 73 S. C. 60, 52 S. E. 793.

28-50 Chicago C. R. Co. *v.* Gregory, 221 Ill. 591, 77 N. E. 1112.

In Texas such statements may be proved. Southwestern Coal & I. Co. *v.* Rohr, 15 Tex. Civ. 404, 39 S. W. 1017; Hord *v.* R. Co., 33 Tex. Civ. 163, 79 S. W. 227; Dallas, etc. R. Co. *v.* McAllister, 41 Tex. Civ. 131, 90 S. W. 933.

28-51 Griffin W. Co. *v.* Smith, 173 Fed. 245, 97 C. C. A. 411; Derrick *v.* S., 92 Ark. 237, 122 S. W. 506; Ray *v.* S., 102 Ark. 594, 145 S. W. 881; Lynch *v.* Bronson, 80 Conn. 566, 69 A. 538; Sessions *v.* S., 6 Ga. App. 336, 64 S. E. 1101; S. *v.* Corcoran, 7 Ida. 220, 61 P. 1034; S. *v.* Fowler, 13 Ida. 317,

89 P. 757; S. v. Alexander, 89 Kan. 422, 131 P. 139; Left Fork C. Co. v. Owens' Admx., 155 Ky. 212, 159 S. W. 703; Dukes v. Davis, 30 Ky. L. R. 1348, 101 S. W. 390 (statute); Garrison v. C., 29 Ky. L. R. 411, 93 S. W. 594; S. v. Sederstrom, 99 Minn. 234, 109 N. W. 113; Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958; Bloom v. S. (Neb.), 146 N. W. 965; Sturgis v. S., 2 Okla. Cr. 362, 102 P. 57; S. v. Jennings, 48 Or. 483, 87 P. 524, 89 P. 421; Pratt v. S., 59 Tex. Cr. 635, 129 S. W. 364; Brown v. S., 55 Tex. Cr. 9, 114 S. W. 820; Southworth v. S., 52 Tex. Cr. 532, 109 S. W. 133; McMahan v. S., 50 Tex. Cr. 244, 96 S. W. 17; Hardy v. C., 110 Va. 910, 67 S. E. 522 (statute); State Bk. v. Co., 53 Wash. 528, 102 P. 414. Halwas v. Co., 141 Wis. 127, 123 N. W. 789; Corbette v. Assn., 135 Wis. 505, 115 N. W. 365, 16 L. R. A. (N. S.) 177.

See Glenn v. R. Co., 167 Mo. App. 109, 150 S. W. 1092.

Variant statements made to party or counsel alone admissible. Murphy v. S., 120 Md. 229, 87 A. 811.

Questions concerning matters, the truth of which counsel is not prepared to prove, must not be put. S. v. Fowler, 13 Ida. 317, 89 P. 757.

31-52 Roy v. S., 102 Ark. 588, 145 S. W. 190; Western U. Tel. Co. v. Vickery (Tex. Civ.), 158 S. W. 792. See also vol. 3, p. 532, n. 6.

In Texas proof of bad character is the only exception to this rule. St. Louis, etc. R. Co. v. Cotton Pickery (Tex. Civ.), 146 S. W. 201.

31-53 And in several other states. Blackburn v. C., 75 Ky. 181; Garrison v. C., 29 Ky. L. R. 411, 93 S. W. 594; P. v. Eleo, 131 Mich. 519, 91 N. W. 755, 94 N. W. 1069; S. v. Sederstrom, 99 Minn. 234, 109 N. W. 113; Hurley v. S., 46 O. St. 320, 21 N. E. 645, 4 L. R. A. 161; Ozark v. S., 51 Tex. Cr. 106, 100 S. W. 927; St. Louis, etc. R. Co. v. Cotton Pickrey, supra.

31-54 S. v. Sederstrom, 99 Minn. 234, 109 N. W. 113.

31-57 Bollinger v. Bollinger, 154 Cal. 695, 99 P. 196; Marugg v. Kells, 146 Ill. App. 394; Garrison v. C., 29 Ky. L. R. 411, 93 S. W. 594; Clancy v. Co., 192 Mo. 615, 91 S. W. 509; Reding v. Reding, 143 Mo. App. 659, 127 S. W. 936; Sturgis v. S., 2 Okla. Cr. 362, 102 P. 57; El Paso, etc. R. Co. v. Landon (Tex. Civ.), 124 S. W. 744; State Bk. v. Co., 53 Wash. 528, 102 P. 414; Halwas v. Co., 141 Wis. 127, 123 N. W. 789.

32-58 Testimony need not be particularly hurtful. Southworth v. S., 52 Tex. Cr. 532, 109 S. W. 133.

33-60 P. v. Goldfarb, 152 App. Div. 473, 137 N. Y. S. 284.

Hostility a question of fact determined at trial. Dow v. Dow (N. H.), 89 A. 450.

34-61 Griffin W. Co. v. Smith, 173 Fed. 245, 97 C. C. A. 411; Derrick v. S., 92 Ark. 237, 122 S. W. 506; P. v. Lukoszus, 242 Ill. 101, 89 N. E. 749; Murphy v. S., 120 Md. 229, 87 A. 811; Corsick v. R. Co. (Mass.), 105 N. E. 600; Baker v. R. Co. (Mo. App.), 168 S. W. 842; Beier v. Co., 197 Mo. 215, 94 S. W. 876; Clancy v. Co., 192 Mo. 615, 91 S. W. 509; Detjen v. Brew. Co., 157 Mo. App. 614, 138 S. W. 646; S. v. Adams, 55 N. J. L. 386; Sturgis v. S., 2 Okla. Cr. 362, 102 P. 57; Parry v. S. (Tex. Cr.), 155 S. W. 263; State Bk. v. Co., 53 Wash. 528, 102 P. 414. See Loicano v. S. (Tex. Cr.), 163 S. W. 64. And see Hyde v. U. S., 35 App. Cas. (D. C.) 451; also vol. 3, p. 535, n. 10, and supplement thereto.

"In no case can a party calling a witness be permitted to impeach his general reputation for truth and veracity; but there are special circumstances under which he may be permitted to impeach or discredit him by showing that he had previously stated the facts in a different manner. The conditions under which this is allowable are thus stated in Smith v. Briscoe, 65 Md. 561, 5 Atl. 334: 'If the witness has made to the party who calls him, or to the attorney of such party, a statement totally variant from his sworn testimony, and on the faith of such testimony he has been called, he may be asked if he made such a statement, and if he denies, we see no objection to the proof of such statement, not for the purpose of impeaching the general character of the witness, but for the protection of the party calling him.'" S. v. R. Co., 117 Md. 280, 83 A. 166.

34-62 Luke v. Cannon, 4 Ga. App. 538, 62 N. E. 110 (it must also appear party who called witness ascertained from him what it was expected would

be testified to); Clancy *v.* Co., 192 Mo. 615, 91 S. W. 509.

If notice is given party testimony before grand jury was given under a mistake and witness will correct it, it is error to prove that testimony. Ware *v.* S., 49 Tex. Cr. 413, 92 S. W. 1093.

35-63 Threlkeld *v.* Bond, 29 Ky. L. R. 177, 92 S. W. 606; Goss *v.* S., 57 Tex. Cr. 557, 124 S. W. 107; Ware *v.* S., 49 Tex. Cr. 413, 92 S. W. 1093; Willis *v.* S., 49 Tex. Cr. 139, 90 S. W. 1100; St. Louis, etc. R. Co. *v.* Cotton Pickery (Tex. Civ.), 146 S. W. 201.

35-64 Southworth *v.* S., 52 Tex. Cr. 532, 109 S. W. 133.

36-65 Lambert *v.* Armentrout, 65 W. Va. 375, 64 S. E. 260.

36-68 Lambert *v.* Armentrout, supra.

36-71 Murphy *v.* S., 120 Md. 229, 87 A. 811; Maguire *v.* Amusement Co., 211 Mass. 22, 97 N. E. 142; Detjen *v.* Brew. Co., 157 Mo. App. 614, 138 S. W. 696; S. *v.* Kysilka (N. J.), 90 A. 309; Sturgis *v.* S., 2 Okla. Cr. 362, 102 P. 57; Southworth *v.* S., 52 Tex. Cr. 532, 109 S. W. 133.

Extent of cross-examination of witness called by party is for discretion of court. Gierczak *v.* Co., 142 Wis. 207, 125 N. W. 436.

37-76 Beier *v.* Co., 197 Mo. 215, 94 S. W. 876.

37-78 Indorsement of witness' name on indictment does not make him state's witness. Booton *v.* S., 86 Neb. 114, 125 N. W. 144.

38-81 Hammond *v.* S., 147 Ala. 79, 41 S. 761; Schultz *v.* Reed, 122 Ill. App. 420; Guffey P. Co. *v.* Hamill, 42 Tex. Civ. 196, 94 S. W. 458.

39-85 McGuire *v.* R. Co., 70 W. Va. 538, 74 S. E. 859.

39-86 See Reding *v.* Reding, 143 Mo. App. 659, 127 S. W. 936.

39-87 Watts *v.* Bryant, 144 Ky. 14, 137 S. W. 780.

40-92 King *v.* Ins. Co., 195 Mo. 290, 92 S. W. 892.

40-93 People's Nat. Bk. *v.* Hazard, 231 Pa. 552, 80 A. 1094; Campagnie, etc. Co. *v.* Co. (Tex. Civ.), 107 S. W. 651.

41-1 S. *v.* Caron, 118 La. 349, 42 S. 960.

41-3 P. *v.* Creeks, 141 Cal. 529, 75 P. 101; In re Kennedy, 104 Cal. 429, 38 P. 93; In re Johnson's Est., 152 Cal. 778, 93 P. 1015 (negative testimony); P. *v.* Scott, 22 Cal. App. 54, 133 P. 496; S. *v.* Cox, 151 N. C. 698, 66 S. E. 128; Stark G. Co. *v.* Co., 57 Tex. Civ. 529, 122 S. W. 947.

Not prejudicial error to impeach witness whose deposition stricken out after reading. Lindsay *v.* Bates, 223 Mo. 294, 122 S. W. 682.

42-4 Testimony must relate to occasion of which witness testified. Ausmus *v.* P., 47 Colo. 167, 107 P. 204.

42-5 Beier *v.* Co., 197 Mo. 215, 94 S. W. 876; Pollard *v.* S., 58 Tex. Cr. 299, 125 S. W. 390.

42-9 Benton *v.* S., 78 Ark. 284, 94 S. W. 688; S. *v.* Burno, 158 N. C. 632, 74 S. E. 462.

Cannot impeach witness not cross-examined. In re Smart's Will, 145 N. Y. S. 838.

Witnesses in rebuttal.—S. *v.* Kinchen, 126 La. 39, 52 S. 185.

Testimony must be material to disputed question. Beecham *v.* Wetherbee, 160 Mich. 585, 125 N. W. 702.

42-11 Uhlman *v.* F. S. & H. Co. (Minn.), 148 N. W. 102.

42-12 Wendling *v.* Bowden, 252 Mo. 647, 161 S. W. 774; Miller *v.* Journal Co., 246 Mo. 722, 152 S. W. 40.

43-16 Cook *v.* S. (Ark.), 160 S. W. 223; P. *v.* Oliver, 7 Cal. App. 601, 95 P. 172; P. *v.* Soeder, 150 Cal. 12, 87 P. 1016; Clinton *v.* S., 53 Fla. 98, 43 S. 312, 58 Fla. 23, 50 S. 580; Maloy *v.* S., 52 Fla. 101, 41 S. 791; McCoy *v.* U. S., 6 Ind. Ty. 415, 98 S. W. 144; Ochsner *v.* C., 128 Ky. 761, 109 S. W. 326; S. *v.* Anderson, 135 La. —, 65 S. 478; S. *v.* Oden, 130 La. 598, 58 S. 351; S. *v.* Callahan, 100 Minn. 63, 110 N. W. 342; S. *v.* Baker, 209 Mo. 444, 108 S. W. 6; S. *v.* Beckner, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535; S. *v.* Barnett, 203 Mo. 640, 102 S. W. 506; S. *v.* Barrett, 240 Mo. 161, 144 S. W. 485; S. *v.* Mills, 79 S. C. 187, 60 S. E. 664 (credibility only); Hays *v.* S., 51 Tex. Cr. 111, 100 S. W. 926; Dungan *v.* S., 135 Wis. 151, 115 N. W. 350; Eads *v.* S., 17 Wyo. 490, 101 P. 946.

See P. *v.* O'Bryan, 165 Cal. 55, 130 P. 1042.

May be cross-examined as to specific acts of immorality. Rhea *v.* S., 104 Ark. 162, 147 S. W. 463.

Statements made by a person accused with crime, prior to an arrest, in regard to an issue in the case, are always admissible in evidence, if the state de-

sires to elicit same. Ex parte Martinez (Tex. Cr.), 145 S. W. 959.

By showing that he has been convicted of crime involving moral turpitude, that he has made contradictory statements, or that he is a person of general bad character. McGuire *v.* S., 3 Ala. App. 40, 57 S. 60.

Except that no statements made while under arrest can be introduced to impeach him. Burton *v.* S. (Tex. Cr.), 148 S. W. 805.

43-17 Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126; Carr *v.* S., 81 Ark. 589, 99 S. W. 831; P. *v.* Weber, 149 Cal. 325, 86 P. 671; P. *v.* Romero, 12 Cal. App. 466, 107 P. 709; Henderson *v.* C., 28 Ky. L. R. 1212, 91 S. W. 1141; S. *v.* Griggsby, 117 La. 1046, 42 S. 497; P. *v.* Poole, 159 Mich. 350, 123 N. W. 1093; S. *v.* Oliphant, 128 Mo. App. 252, 107 S. W. 32; Powers *v.* S., 117 Tenn. 363, 97 S. W. 815; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237. See also McLain *v.* S., 62 Tex. Cr. 118, 136 S. W. 1057.

44-21 General character of accused cannot be assailed unless he has put it in issue. Clinton *v.* S., 53 Fla. 98, 43 S. 312, 50 S. 580; S. *v.* Grove, 61 W. Va. 697, 57 S. E. 296. Nor can his reputation as a dangerous and turbulent person be proved. S. *v.* Richardson, 194 Mo. 326, 92 S. W. 649.

44-23 P. *v.* Poole, 159 Mich. 350, 123 N. W. 1093; Haddix *v.* S., 76 Neb. 369, 107 N. W. 781.

State may recall the defendant to the stand after his having testified as a witness, for the purpose of laying a predicate for his impeachment. Costello *v.* S., 176 Ala. 1, 58 S. 202.

44-24 P. *v.* Soeder, 150 Cal. 12, 87 P. 1016; McCann *v.* P., 226 Ill. 562, 80 N. E. 1061; S. *v.* Wertz, 191 Mo. 569, 90 S. W. 838; S. *v.* Jennings, 48 Or. 483, 87 P. 524, 89 P. 421; Trezevant *v.* S. (Tex. Cr.), 145 S. W. 1191.

45-26 Carr *v.* S., 81 Ark. 589, 99 S. W. 831; Ruark *v.* C., 150 Ky. 47, 150 S. W. 5; Henderson *v.* C., 28 Ky. L. R. 1212, 91 S. W. 1141; P. *v.* Ryder, 151 Mich. 187, 114 N. W. 1021; S. *v.* Smith, 125 Mo. 2, 28 S. W. 181; S. *v.* Weeden, 133 Mo. 70, 34 S. W. 473; S. *v.* Dyer, 139 Mo. 199, 40 S. W. 768; S. *v.* Baker, 209 Mo. 444, 108 S. W. 6; S. *v.* Oliphant, 128 Mo. App. 252, 107 S. W. 32; S. *v.* Barnett, 203 Mo. 640, 102 S. W. 506 (general reputation for morality); S. *v.* Richardson, 194 Mo. 326, 92 S. W. 649; S. *v.* Woodward, 191 Mo. 617, 90 S. W. 90; Powers *v.* S., 117 Tenn. 363, 97 S. W. 815; Dungan *v.* S., 135 Wis. 151, 115 N. W. 350.

46-30 Mitchell *v.* S., 148 Ala. 618, 42 S. 1014; Byers *v.* S., 105 Ala. 31, 16 S. 716; Crawford *v.* S., 112 Ala. 1, 21 S. 214; Newman *v.* C., 28 Ky. L. R. 81, 88 S. W. 1089; S. *v.* Griggsby, 117 La. 1046, 42 S. 497; S. *v.* Mills, 79 S. C. 187, 60 S. E. 664.

47-33 S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235; Cecil *v.* S. (Tex. Cr.), 100 S. W. 390; Turman *v.* S., 50 Tex. Cr. 7, 95 S. W. 533; Lucas *v.* S., 49 Tex. Cr. 135, 90 S. W. 880; Sexton *v.* S., 48 Tex. Cr. 497, 88 S. W. 348 (number of times witness indicted shown). *Contra*, S. *v.* Barrett, 117 La. 1086, 42 S. 513, *disap.* local cases.

47-34 Cecil *v.* S. (Tex. Cr.), 100 S. W. 390.

48-37 *Contra*, S. *v.* Barrett, 117 La. 1086, 42 S. 513, *disap.* S. *v.* Murphy, 45 La. Ann. 958, 13 S. 229.

Number of larceny cases brought against witness may be inquired of, and nature of property involved in them. McCoy *v.* U. S., 6 Ind. Ty. 415, 98 S. W. 144.

48-38 Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126; Fuller *v.* S., 147 Ala. 35, 41 S. 774; P. *v.* Soeder, 150 Cal. 12, 87 P. 1016; P. *v.* Oliver, 7 Cal. App. 601, 95 P. 172; S. *v.* Hayden, 131 Ia. 1, 107 N. W. 929; Oehsner *v.* C., 128 Ky. 761, 109 S. W. 326; Henderson *v.* C., 28 Ky. L. R. 1212, 91 S. W. 1141; Farmer *v.* C., 28 Ky. L. R. 1168, 91 S. W. 682; S. *v.* Barrett, 117 La. 1086, 42 S. 513; S. *v.* Clark, 117 La. 920, 42 S. 425; S. *v.* Griggsby, 117 La. 1046, 42 S. 497; P. *v.* DeCamp, 146 Mich. 533, 109 N. W. 1047; Starling *v.* S., 89 Miss. 328, 42 S. 798 (statute provides for proof of "conviction"); Williams *v.* S., 87 Miss. 373, 39 S. 1006; S. *v.* Oliphant, 128 Mo. App. 252, 107 S. W. 32 (conviction in another state for like offense); S. *v.* Brooks, 202 Mo. 106, 100 S. W. 416; S. *v.* Woodward, 191 Mo. 617, 90 S. W. 90; S. *v.* Spivey, 191 Mo. 87, 90 S. W. 81; S. *v.* Heusack, 189 Mo. 295, 88 S. W. 21 (conviction in another state); S. *v.* Lawrence, 28 Nev. 440, 82 P. 614; S. *v.* Mount, 73 N. J. L. 582, 64 A. 124; P. *v.* Cascone, 185 N. Y. 317, 78 N. E. 287; Hull *v.* S., 50 Tex. Cr. 607, 100 S. W. 403.

Guilt without conviction may be shown, but not a trial resulting in acquittal. P. *v.* Cascone, 185 N. Y. 317, 78 N. E. 287.

Particulars of transaction on which conviction based may be inquired into. Ochsner *v.* C., 128 Ky. 761, 109 S. W. 326. Defendant may be asked if he was not convicted under another name and why he assumed such name. Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126; S. *v.* Clark, 117 La. 920, 42 S. 425. Circumstances affecting punishment inflicted may be shown. P. *v.* DeCamp, 146 Mich. 533, 109 N. W. 1047.

49-40 Accused's statement to another he had been imprisoned, not competent. Fannin *v.* S., 51 Tex. Cr. 41, 100 S. W. 916, 10 L. R. A. (N. S.) 744.

49-41 A plea of nolo contendere is equivalent to a plea of guilty, and record of conviction is admissible though it does not recite party's guilt. S. *v.* Herlihy, 102 Me. 310, 68 A. 643.

50-47 Welch *v.* C., 33 Ky. L. R. 51, 108 S. W. 863; Powers *v.* S., 117 Tenn. 363, 97 S. W. 815.

51-49 S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531; S. *v.* Hodgeson, 130 La. 382, 58 S. 14; S. *v.* Hazlett, 14 N. D. 490, 105 N. W. 617.

52-52 S. *v.* Sanders, 75 S. C. 409, 56 S. E. 35; Link *v.* S. (Tex. Cr.), 164 S. W. 987; Johnson *v.* S. (Tex. Cr.), 162 S. W. 512; Grimes *v.* S. (Tex. Cr.), 160 S. W. 689.

52-53 Gabbard *v.* C. (Ky.), 167 S. W. 942; Beeson *v.* S., 60 Tex. Cr. 39, 130 S. W. 1006.

So held as to matters brought out by defendant's counsel on the cross-examination of impeaching witnesses, purposely elicited to break the force of the general answers given by such witnesses by showing that the bad reputation to which they had testified was the outgrowth of matters of no great consequence, so far as concerned the trait with respect to which the state was endeavoring to impeach defendant and his witness. S. *v.* Barrett, 240 Mo. 161, 144 S. W. 485.

52-54 See Sacks *v.* U. S., 41 App. Cas. (D. C.) 34.

53-55 Mobley *v.* Lyon, 134 Ga. 125, 67 S. E. 668.

53-56 Kennedy *v.* Woodmen, 243 Ill. 560, 90 N. E. 1084.

53-57 Robinson *v.* S., 10 Ga. App. 462, 73 S. E. 622.

53-58 Admission an absent witness would, if present, testify to matters stated in affidavit waives right to impeach him by a method which requires a foundation. Helbig *v.* Ins. Co., 120 Ill. App. 58; Chicago & A. R. Co. *v.* Lammert, 19 Ill. App. 135.

54-60 Lueders *v.* U. S., 210 Fed. 419, 127 C. C. A. 151; Livingston *v.* S., 7 Ala. App. 43, 61 S. 54; Barfield *v.* Evans (Ala.), 65 S. 928; Phillips *v.* S. (Ala. App.), 65 S. 673; Tennison *v.* S. (Ala.), 62 S. 780; Wells *v.* R. Co., 5 Ala. App. 579, 59 S. 343; Hughes *v.* S., 152 Ala. 5, 44 S. 694; Speakman *v.* Vest, 152 Ala. 623, 44 S. 1021; Giddens *v.* Rutledge, 146 Ala. 232, 40 S. 759; Jones *v.* S., 145 Ala. 51, 40 S. 947; Morris *v.* S., 146 Ala. 66, 41 S. 274; Gardner *v.* S. (Ariz.), 139 P. 474; Tiner *v.* S. (Ark.), 158 S. W. 1087; Tate *v.* S., 91 Ark. 513, 121 S. W. 737; Rector *v.* Robins, 82 Ark. 424, 102 S. W. 209; Duckworth *v.* S., 83 Ark. 192, 103 S. W. 601; P. *v.* O'Bryan, 165 Cal. 55, 130 P. 1042; P. *v.* Rader (Cal. App.), 141 P. 958; Keyes *v.* R. Co., 152 Cal. 437, 93 P. 88; P. *v.* Romero, 12 Cal. App. 466, 107 P. 709; Bowen *v.* Co., 3 Cal. App. 312, 84 P. 1010; Denver City Co. *v.* Lomovt, 53 Colo. 292, 126 P. 276; Gankyo-Mitsunaga *v.* P. (Colo.), 129 P. 240; Denver, etc. R. Co. *v.* Mitchell, 42 Colo. 43, 94 P. 289; S. *v.* Rivers, 82 Conn. 454, 74 A. 757; Grant *v.* U. S., 28 App. Cas. (D. C.) 169; Clinton *v.* S., 53 Fla. 98, 43 S. 312; Adams *v.* S., 54 Fla. 1, 45 S. 494; Ham *v.* Brown, 2 Ga. App. 71, 58 S. E. 316; Jones *v.* Harrell, 110 Ga. 373, 35 S. E. 690; Georgia, etc. Co. *v.* Andrews, 125 Ga. 85, 54 S. E. 76; Cox *v.* S., 124 Ga. 95, 52 S. E. 150; P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804; Hirsch, etc. R. Co. *v.* Coleman, 227 Ill. 149, 81 N. E. 21; McCann *v.* P., 226 Ill. 562, 80 N. E. 1061; Sanger *v.* Bacon (Ind.), 101 N. E. 1001; Hicks *v.* S., 165 Ind. 440, 75 N. E. 641; Atoka C. & M. Co. *v.* Miller, 7 Ind. Ty. 104, 104 S. W. 555; DuBois *v.* Luthmers, 147 Ia. 315, 126 N. W. 147; Stark *v.* Burke, 131 Ia. 684, 109 N. W. 206; Hunt *v.* R. Co. (Ia.), 141 N. W. 334; S. *v.* Swartz, 87 Kan. 852, 126 P. 1091; Sullivan *v.* C., 158 Ky. 536, 165 S. W. 696; Louisville & N. R. Co. *v.* Scalf, 155 Ky. 273, 159 S. W. 804; Interstate C. Co. *v.* Love, 153 Ky. 323, 155 S. W. 746; Mann's Admr. *v.* Reynolds, 150 Ky. 313, 150

S. W. 329; Hoke's Admr. *v.* Steel Co., 149 Ky. L. R. 627, 149 S. W. 968; Mathis *v.* Bk., 136 Ky. 634, 124 S. W. 876; Owensboro City R. Co. *v.* Allen, 32 Ky. L. R. 1353, 108 S. W. 357; Cincinnati, etc. R. Co. *v.* Rodes, 31 Ky. L. R. 430, 102 S. W. 321; S. *v.* Mitchell, 119 La. 374, 44 S. 132; Capital Tract. Co. *v.* Contner (Md.), 87 A. 904; Murphy *v.* S., 120 Md. 229, 87 A. 811; Coolidge *v.* R. Co., 214 Mass. 568, 102 N. E. 74; O'Connell *v.* Casey, 206 Mass. 520, 92 N. E. 804; Snow *v.* Adams, 200 Mass. 251, 85 N. E. 1052; Robinson *v.* R. Co., 189 Mass. 594, 76 N. E. 190; P. *v.* Tubbs, 147 Mich. 1, 110 N. W. 132; Carey *v.* Nissle, 145 Mich. 383, 108 N. W. 733; Johnson *v.* C. Co. (Mich.), 148 N. W. 432; Uggen *v.* Bazille, 123 Minn. 97, 143 N. W. 112; Stahlman *v.* United R. Co. (Mo. App.), 166 S. W. 312; S. *v.* Bowen, 247 Mo. 584, 153 S. W. 1033; S. *v.* Kennedy, 207 Mo. 528, 106 S. W. 57; Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78; S. *v.* Peters (Mo.), 167 S. W. 520; S. *v.* Mulhall, 199 Mo. 202, 97 S. W. 583; Bragg *v.* R. Co., 192 Mo. 331, 91 S. W. 527; S. *v.* Forsha, 190 Mo. 296, 88 S. W. 746; Rathjen *v.* R. Co., 85 Neb. 808, 124 N. W. 473; Sperbeck *v.* R. Co. (N. J.), 64 A. 1012; P. *v.* Willard, 159 App. Div. 19, 143 N. Y. S. 1032; Wade *v.* Worcester, 134 App. Div. 51, 118 N. Y. S. 657; P. *v.* Mallon, 116 App. Div. 425, 101 N. Y. S. 814; Ruemer *v.* Clark, 121 App. Div. 231, 105 N. Y. S. 659; Hanlon *v.* Ehrich, 178 N. Y. 474, 71 N. E. 12; P. *v.* Murphy, 113 App. Div. 363, 99 N. Y. S. 110; Rossenbach *v.* Foresters, 184 N. Y. 92, 76 N. E. 1085; Johnson *v.* R. Co., 140 N. C. 574, 53 S. E. 362; S. *v.* Price, 158 N. C. 641, 74 S. E. 587; S. *v.* Burno, 158 N. C. 632, 74 S. E. 462; S. *v.* Hazlett, 14 N. D. 490, 105 N. W. 617; Shawnee, etc. Co. *v.* Matesenbocker (Okla.), 148 P. 790; Dillard *v.* Co., 52 Or. 126, 94 P. 966; Pereira *v.* Co., 51 Or. 477, 94 P. 835; C. *v.* Racco, 225 Pa. 113, 73 A. 1067; Baker *v.* Moore, 29 Pa. Super. 301; Link *v.* S. (Tex. Cr.), 164 S. W. 987; Creale *v.* S. (Tex. Cr.), 158 S. W. 268; Jordan *v.* Johnson (Tex. Civ.), 155 S. W. 1194; Tucker *v.* S. (Tex. Cr.), 150 S. W. 190; O'Brien *v.* Von Lienen (Tex. Civ.), 149 S. W. 723; Dickson *v.* S. (Tex. Cr.), 146 S. W. 914; Treadway *v.* S. (Tex. Cr.), 144 S. W. 655; Roe *v.* Davis (Tex. Civ.), 142 S. W. 950; Hunter *v.* S., 59 Tex. Cr. 439, 129 S. W. 125; Long *v.* S., 59 Tex. Cr. 103, 127 S. W. 351; Norris *v.* S., 52 Tex. Cr. 105, 106 S. W. 136; Adams *v.* S., 52 Tex. Cr. 13, 105 S. W. 197; Hood *v.* S. (Tex. Cr.), 101 S. W. 229; International, etc. R. Co. *v.* Munn, 46 Tex. Civ. 270, 102 S. W. 442; Maxey *v.* Fairbanks Co., 42 Tex. Civ. 274, 95 S. W. 632; McIntyre *v.* S., 50 Tex. Cr. 83, 94 S. W. 1048; Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29; Lewter *v.* Lindley (Tex. Civ.), 89 S. W. 784; S. *v.* Chynoweth (Utah), 126 P. 302; Larkin *v.* Co., 30 Utah 86, 83 P. 686; McQuiggan *v.* Ladd, 79 Vt. 90, 64 A. 503; Baltimore R. Co. *v.* Hudgins (Va.), 81 S. E. 48; Richards *v.* C., 107 Va. 881, 59 S. E. 1104; Fink *v.* Thomas, 66 W. Va. 487, 66 S. E. 650.

See Davidson *v.* S., 108 Ark. 191, 153 S. W. 1103; Monckton *v.* R. Co. (Kan.), 139 P. 1164; Louisville & N. R. Co. *v.* Moore, 150 Ky. 692, 150 S. W. 849; Magness *v.* S. (Miss.), 63 S. 572; Nichols & Shepard Co. *v.* Horstad (S. D.), 146 N. W. 566; Taylor *v.* S. (Tex. Cr.), 167 S. W. 56.

Joining in verdict of coroner's jury certifying lack of knowledge as to who did killing not inconsistent with testimony. P. *v.* Wilson, 23 Cal. App. 513, 138 P. 971.

Witness had testified that the defendant did not give the pistol to her, which was a material fact in the case, and it was proper to show that she had contradicted that statement by stating that he did give it to her. Harmon *v.* S., 166 Ala. 28, 52 S. 348.

"Among other things these witnesses were permitted to testify, after a proper predicate had been laid, that she (Mrs. Willie Pratt) stated to them soon after the homicide that she had never heard Mr. Lide say anything against Mr. Pratt, and again that she had stated that appellant's wife asked him immediately after the killing: 'Have you gone and killed old man Lide?' and appellant replied, 'Yes, by God, I have.' There can, we think, in the light of the record, be no sort of question that it was entirely proper to permit the impeachment of Mrs. Pratt as to the statement that she had never heard Mr. Lide say anything against Mr. Pratt.'' Pratt *v.* S., 59 Tex. Cr.

635, 129 S. W. 364. And see Lane *v.* S., 59 Tex. Cr. 595, 129 S. W. 353.

"There was no error in the allowance of this question, propounded by the solicitor on cross-examination of defendant's witness: 'Were you and his mother ever married?' On this examination in chief, this witness had testified 'that he was the father of the defendant.' The question complained of related, as is obvious, to the very matter, viz., paternity, which the defendant himself had introduced before the jury. While it does not appear that the state could be benefited by a refutation of the paternity which the witness had confessed on his examination in chief, yet it cannot be said that such want of benefit deprived the state of the right to reflect upon the truth of the former statement of fatherhood by showing that the witness and defendant's mother were never married." Savage *v.* S., 174 Ala. 94, 57 S. 469.

Court no discretion as to admission of proof of variant statements relating to main issue. Robinson *v.* R. Co., 189 Mass. 594, 76 N. E. 190.

Right limited to witnesses in pending case. P. *v.* Hayes, 9 Cal. App. 301, 99 P. 386.

56-61 Pelham *v.* Co., 156 Ala. 500, 47 S. 172; Boswell *v.* S., 9 Ala. App. 23, 64 S. 188; P. *v.* Corey, 8 Cal. App. 720, 97 P. 907; Atlanta, etc. R. Co. *v.* McManus, 1 Ga. App. 302, 58 S. E. 258; Kennedy *v.* Woodmen, 243 Ill. 560, 90 N. E. 1084; Reisch *v.* P., 229 Ill. 574, 82 N. E. 321; Bang *v.* R. Co., 128 App. Div. 134, 112 N. Y. S. 530; Luttrell *v.* S. (Tex. Cr.), 157 S. W. 157; Anderson *v.* Motor Car Co. (Tex. Civ.), 131 S. W. 419. And see Bennett *v.* Wallace, 165 Mich. 66, 130 N. W. 188.

As to the source of certain property. Moray *v.* S. (Tex. Cr.), 145 S. W. 592.

57-62 In re Barry, 219 Ill. 391, 76 N. E. 577; Illinois C. R. Co. *v.* Johnson (Ky.), 115 S. W. 798; Cullen *v.* Co., 128 App. Div. 369, 112 N. Y. S. 934; Vanhooser *v.* S., 55 Tex. Cr. 144, 113 S. W. 285. See S. *v.* Dietz (Ia.), 143 N. W. 1080.

57-63 Avery *v.* White, 83 Conn. 311, 76 A. 360; Fuhry *v.* R. Co., 239 Ill. 548, 88 N. E. 221; Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689; Hicks *v.* S. (Miss.), 47 S. 524; Hardin *v.* S., 55 Tex. Cr. 631, 117 S. W. 974; Renn *v.* S., 64 Tex. Cr. 639, 143 S. W. 167.

57-64 Bennett *v.* S., 84 Ark. 97, 104 S. W. 928; Fountain *v.* S., 7 Ga. App. 559, 67 S. E. 218; P. *v.* Poole, 159 Mich. 350, 123 N. W. 1093; S. *v.* Newcomb, 220 Mo. 54, 119 S. W. 405; S. *v.* Hooper, 151 N. C. 646, 65 S. E. 613; Marshall *v.* Ty., 2 Okla. Cr. 136, 101 P. 139; U. S. *v.* Caligagan, 2 Phil. Isl. 433; Perry *v.* S. (Tex. Cr.), 153 S. W. 138; Young *v.* S., 54 Tex. Cr. 417, 113 S. W. 276.

Minutes of testimony may not be used if not signed by witness. S. *v.* Goodager, 56 Or. 198, 106 P. 638.

57-65 P. *v.* Bond, 13 Cal. App. 175, 109 P. 150; Brunhild *v.* Co., 144 Ill. App. 198; Louisville & N. R. Co. *v.* Bell (Ky.), 114 S. W. 328; Upchurch *v.* S., 96 Miss. 586, 51 S. 810; Queatham *v.* Woodmen, 148 Mo. App. 33, 127 S. W. 651; Garrett *v.* Co., 219 Mo. 65, 118 S. W. 68; S. *v.* McKenzie (N. C.), 81 S. E. 301; S. *v.* Jennings, 48 Or. 483, 87 P. 524, 89 P. 421; Deneaner *v.* S., 58 Tex. Cr. 624, 127 S. W. 201; Corpus *v.* S., 51 Tex. Cr. 315, 102 S. W. 1152; Texas Cent. R. Co. *v.* Dumas (Tex.), 149 S. W. 543.

See Clark *v.* Goldie, 177 Mich. 653, 144 N. W. 504.

57-66 Carlton *v.* S. (Ark.), 161 S. W. 145; P. *v.* Crawford (Cal. App.), 141 P. 824; Hunt *v.* R. Co. (Ia.), 141 N. W. 334; S. *v.* Johnson, 73 N. J. L. 199, 63 A. 12; Link *v.* S. (Tex. Cr.), 164 S. W. 987; Cole *v.* S. (Tex. Cr.), 162 S. W. 880.

58-67 Wright *v.* Nostrand, 94 N. Y. 31.

Rule not applicable where accused compulsorily testified in bankruptcy proceeding. Alkon *v.* U. S., 163 Fed. 810, 90 C. C. A. 116.

Only testimony of witness sought to be impeached, admissible. Scott *v.* S., 92 Miss. 833, 46 S. 251.

58-68 Clark *v.* Gurley, 48 Tex. Civ. 274, 106 S. W. 394 (deposition not admissible, but proof of contents proper); Nash *v.* Co., 109 Va. 14, 63 S. E. 14; Hudkins *v.* Crim, 64 W. Va. 225, 61 S. E. 166.

58-69 Joyce *v.* Joyce, 80 Conn. 88, 67 A. 374; Hobbs *v.* C., 156 Ky. 847, 162 S. W. 104; S. *v.* Campisi, 123 La. 815, 49 S. 535 (whether voluntary or not); Clancy *v.* Co., 192 Mo. 615, 91 S. W. 509; Novogrucky *v.* R. Co., 125

App. Div. 715, 110 N. Y. S. 28; Kennedy *v.* Winfrey (Tex. Civ.), 163 S. W. 1018; Hudkins *v.* Crim, 64 W. Va. 225, 61 S. E. 166.

58-70 Novogrucky *v.* R. Co., 125 App. Div. 715, 110 N. Y. S. 28; Smith *v.* S., 3 Okla. Cr. 629, 108 P. 418.

58-71 Warth *v.* Loewenstein, 219 Ill. 222, 76 N. E. 379; Clancy *v.* Co., 192 Mo. 615, 91 S. W. 509. See Gibbons *v.* R. I. Co. (R. I.), 91 A. 9.

Admissible although taken through an interpreter. P. *v.* Lopez, 21 Cal. App. 188, 131 P. 104.

59-72 Lanigan *v.* Neely, 4 Cal. App. 760, 89 P. 441; Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78, 94.

Unsigned deposition.—See 58-68, supra.

59-74 W. U. T. Co. *v.* Gillis, 89 Ark. 483, 117 S. W. 749; White River M. & N. Co. *v.* Langston, 76 Ark. 420, 88 S. W. 971; Frank *v.* S., 141 Ga. 243, 80 S. E. 1016; Owens *v.* S. (Ga.), 76 S. E. 860; Chicago C. R. Co. *v.* Mauger, 128 Ill. App. 512; Davis *v.* Bk., 6 Ind. Ty. 124, 89 S. W. 1015 (taken through unsworn interpreter, agent for both parties); Ada Coal Co. *v.* Linville, 152 Ky. 2, 153 S. W. 21; Beier *v.* Co., 197 Mo. 215, 94 S. W. 876 (affidavit for continuance); Dow *v.* Dow (N. H.), 89 A. 450; Lederer *v.* Lederer, 108 App. Div. 228, 95 N. Y. S. 623; S. *v.* McKenzie (N. C.), 81 S. E. 301; Randell *v.* S., 49 Tex. Cr. 261, 90 S. W. 1012. See Randall *v.* Co. (Me.), 87 A. 376.

60-78 Wilcox *v.* Downing (Conn.), 91 A. 262; Fox *v.* Erbe, 100 App. Div. 343, 91 N. Y. S. 832, *aff.*, no opinion, 184 N. Y. 542, 76 N. E. 1095; Lindsay *v.* Dutton, 227 Pa. 208, 75 A. 1096; Michel *v.* Michel (Tex. Civ.), 115 S. W. 358; Hoskins *v.* Bk., 48 Tex. Civ. 246, 107 S. W. 598; Texas, etc. R. Co. *v.* Moers (Tex. Civ.), 97 S. W. 1064; Hudkins *v.* Crim, 64 W. Va. 225, 61 S. E. 166.

General objection to admissibility of judgment roll in action against several will not be ground for excluding it if admissible to impeach testimony of one. Fox *v.* Erbe, 100 App. Div. 343, 91 N. Y. S. 832.

Answer in chancery by one defendant not competent against another unless interests joint. Hudkins *v.* Crim, 64 W. Va. 225, 61 S. E. 166.

Record in chancery suit not admissible to impeach witness who was a party in favor of a stranger thereto. Murray *v.* Moore, 104 Va. 707, 52 S. E. 381.

60-80 Browder *v.* R. Co., 107 Va. 10, 57 S. E. 572, pleading filed by witness' authority and upon information he supplied.

Where allegations made on information and belief in an original petition as to the members composing a partnership and an amended petition, containing like allegations, names different persons as members, court may decline to submit either pleading to the jury. Daniel *v.* Lance, 29 Pa. Super. 454.

60-81 Weaver *v.* S., 83 Ark. 119, 102 S. W. 713 (affidavit for continuance in conflict with accused's testimony); Hobbs *v.* Blanchard, 75 N. H. 73, 70 A. 1082; Bader *v.* S., 57 Tex. Cr. 293, 122 S. W. 555 (notwithstanding admissions they were made and were false); Galveston, etc. R. Co. *v.* Harris, 48 Tex. Civ. 434, 107 S. W. 108; Hudkins *v.* Crim, 64 W. Va. 225, 61 S. E. 166.

It was held error to refuse "to permit appellant to introduce in evidence the original sworn rendition of the property in question for taxes made by the appellee in January preceding the killing, and in refusing to require the appellee while a witness on the stand to answer whether or not he had rendered the jack for that year at the sum of $200. This evidence was admissible as an admission by appellee and by way of impeachment or contradiction of his testimony; he having sworn that the animal was worth $1,200 and that its value was the same in January preceding." Ft. Worth, etc. R. Co. *v.* Chisholm (Tex. Civ.), 146 S. W. 988.

60-82 Hoagland *v.* Canfield, 160 Fed. 146; The Ocracoke, 159 Fed. 552; Stodenmeyer *v.* Hart, 155 Ala. 243, 46 S. 488; Giddens *v.* Rutledge, 146 Ala. 232, 40 S. 759; Dennis *v.* S., 88 Ark. 418, 114 S. W. 926; Rector *v.* Robins, 82 Ark. 424, 102 S. W. 209; Keyes *v.* R. Co., 152 Cal. 437, 93 P. 88; Leonard *v.* Gillette, 79 Conn. 664, 66 A. 502; Grant *v.* U. S., 28 App. Cas. (D. C.) 169; Perdue *v.* S., 126 Ga. 112, 54 S. E. 820; Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; Rhomberg *v.* Avenarius, 135 Ia. 176, 112 N. W. 548; Louisville & N. R. Co. *v.* Bell (Ky.), 114 S. W. 328; Lanasa *v.* S., 109 Md. 602, 71 A. 1058; Carey *v.* Nissle, 145 Mich. 383, 108 N. W. 733; McManus *v.* Co., 105 Minn. 144, 117 N. W. 223; Bowles *v.* S. (Miss.), 40 S. 165; Schloemer *v.* Co., 204 Mo. 99, 102 S. W. 565; S. *v.* Mul-

hall, 199 Mo. 202, 97 S. W. 583; Mullin *v.* Co., 196 Mo. 572, 94 S. W. 288; Lydston *v.* Co., 75 N. H. 23, 70 A. 385; U. S. *v.* Adamson, 15 N. M. 280, 106 P. 653; Pate *v.* Co., 148 N. C. 571, 62 S. E. 614; Dillard *v.* Co., 52 Or. 126, 94 P. 966; S. *v.* Suber, 82 S. C. 159, 63 S. E. 684; First Nat. Bk. *v.* Pearce (Tex. Civ.), 126 S. W. 285; Hood *v.* S. (Tex. Cr.), 101 S. W. 229; Maxey *v.* Fairbanks Co., 42 Tex Civ. 254, 95 S. W. 632; Bridgman *v.* Winsness, 33 Utah 383, 98 P. 186; Am. L. Co. *v.* Whitlock, 109 Va. 238, 63 S. E. 991.

60-83 Alabama, etc. R. Co. *v.* Clarke, 145 Ala. 459, 39 S. 816; Rector *v.* Robins, 82 Ark. 424, 102 S. W. 209 (mortgage and note); Marengo *v.* Eichler, 245 Ill. 47, 91 N. E. 758; S. *v.* Hodgeson, 130 La. 382, 58 S. 14; Miller *v.* R. Co., 144 Mich. 1, 107 N. W. 714; Norris *v.* S., 52 Tex. Cr. 166, 106 S. W. 136; San Antonio T. Co. *v.* Parks (Tex. Civ.), 93 S. W. 130 (application for insurance competent to meet testimony of examining physician).

60-84 Rittenberry *v.* Smyer, 164 Ala. 514, 51 S. 233; In re Laveaga's Est., 165 Cal. 607, 133 P. 307; Kingsbury *v.* P., 44 Colo. 403, 99 P. 61; Magruder *v.* Montgomery, 33 App. Cas. (D. C.) 133; Reeves *v.* Callaway, 140 Ga. 101, 78 S. E. 717; Corona C. & I. Co. *v.* Copeland, 7 Ga. App. 481, 67 S. E. 203; Davis *v.* Bk., 6 Ind. Ty. 124, 89 S. W. 1015; Bowman *v.* Callahan, 137 Ky. 773, 127 S. W. 142; S. *v.* Johnson, 125 La. 347, 51 S. 289; Dickson *v.* Fowler, 114 Md. 344, 79 A. 519; In re Bishop, 208 Mass 405, 94 N. E. 479; Farrar *v.* R. Co, 249 Mo. 210, 155 S. W. 439; Aldridge *v.* Ins. Co., 204 N. Y. 83, 97 N. E. 399; S *v.* Robertson (N. C.), 81 S. E. 689; S. *v.* Fisher, 149 N. C. 557, 63 S. E. 153.

"On cross-examination prisoner was questioned in relation to a letter he had sent to his uncle in which there were statements inconsistent with the reason he had assigned for leaving the city. The letter had been written at his dictation and, while his directions had not been strictly followed, he knew what the letter contained and had adopted it as written and made it his own." C. *v.* De Masi, 234 Pa. 570, 83 A. 430.

61-85 Rainey *v.* Kemp, 54 Tex. Civ. 486, 118 S. W. 630 (report of commercial agency); Chesapeake & O. R. Co. *v.* Swartz, 115 Va. 723, 80 S. E. 568.

61-86 Davis *v.* Bk., 6 Ind. Ty. 124, 89 S. W. 1015.

61-87 Davis *v.* Anderson, 163 Ala. 385, 50 S. 1002; Hirsch, etc. R. Co. *v.* Coleman, 227 Ill. 149, 81 N. E. 21; McCann *v.* P., 226 Ill. 562, 80 N. E. 1061; Edmunds Mfg. Co. *v.* McFarland, 118 Ill. App. 256; Illinois C. R. Co. *v.* Wade, 206 Ill. 523, 69 N. E. 565; Lynch *v.* Ins. Co., 132 App. Div. 571, 116 Supp. 998; Hanlon *v.* Ehrich, 80 App. Div. 359, 80 N. Y. S. 692; Lowe *v.* R. Co., 85 S. C. 363, 67 S. E. 460; Wingate *v.* S. (Tex. Cr.), 152 S. W. 1078.

61-89 Conover *v.* Coal Co., 161 Ill. App. 74. Statement in newspaper received. Hoskins *v.* Bk., 48 Tex. Civ. 246, 107 S. W. 598.

61-91 Penn. C. Co. *v.* Perdue, 164 Ala. 508, 51 S. 352; Farrar *v.* R. Co., 249 Mo. 210, 155 S. W. 439; Paris *v.* Waddell, 139 Mo. App. 288, 123 S. W. 79; Renn *v.* S., 64 Tex. Cr. 639, 143 S. W. 167; Foreman *v.* S., 61 Tex. Cr. 56, 134 S. W. 229; Mears *v.* Daniels, 84 Vt. 91, 78 A. 737.

Confession inadmissible unless made to a court or in writing signed by witness. Brown *v.* S., 55 Tex. Cr. 572, 118 S. W. 139, statute.

61-92 Hoagland *v.* Canfield, 160 Fed. 146; Tillman *v.* S. (Ark.), 166 S. W. 582; St. Louis, etc. R. Co. *v.* Clark, 90 Ark. 504, 119 S. W. 825; Linforth *v.* Co., 156 Cal. 58, 103 P. 320; Louisville, etc. Co. *v.* Stewart, 131 Ky. 665, 115 S. W. 775; Gordan *v.* R. Co., 222 Mo. 516, 121 S. W. 80; Earl *v.* Earl, 81 N. J. Eq. 444, 86 A. 940; Sperbeck *v.* R. Co. (N. J.), 64 A. 1012; Richard Cocke & Co. *v.* D. Co. (Tex. Civ.), 168 S. W. 988; Rogers *v.* S. (Tex. Cr.), 143 S. W. 631; Lane *v.* S., 59 Tex. Cr. 595, 129 S. W. 353; Galveston, etc. R. Co. *v.* Norton, 55 Tex. Civ. 478, 119 S. W. 702; Norfolk, etc. Co. *v.* O'Neill, 109 Va. 670, 64 S. E. 948; Hilton *v.* Hayes, 154 Wis. 27, 141 N. W. 1015. See Phillips *v.* S. (Tex. Cr.), 164 S. W. 1004.

61-93 Noel *v.* S., 161 Ala. 25, 49 S. 824; Renn *v.* S., 64 Tex. Cr. 639, 143 S. W. 167; Bussey *v.* S., 59 Tex. Cr. 260, 127 S. W. 1035; Juul *v.* Co., 55 Wash. 156, 104 P. 191. See also Higgins *v.* C., 142 Ky. 647, 134 S. W. 1135.

62-94 Statements in involuntary con-

fession, concerning which accused did not testify on direct examination, may not be proved to contradict statements on cross-examination. Harrold *v.* S., 169 Fed. 47, 94 C. C. A. 415, *disap.* C. *v.* Tolliver, 119 Mass. 312; Hicks *v.* S., 99 Ala. 169, 13 S. 375; S. *v.* Broadbent, 27 Mont. 342, 71 P. 1.

62-95 Letter-heads containing names partners, competent against person who ordered them on the issue of his membership. Rector *v.* Robins, 82 Ark. 424, 102 S. W. 209.

62-97 Denver, etc. R. Co. *v.* Mitchell, 42 Colo. 43, 94 P. 289; Berry *v.* C., 28 Ky. L. R. 1025, 90 S. W. 1072 (statement after arrest); S. *v.* Callahan, 100 Minn. 63, 110 N. W. 342 (purpose as to future action); Gordon *v.* R. Co., 222 Mo. 516, 121 S. W. 80; Lederer *v.* Lederer, 108 App. Div. 228, 95 N. Y. S. 623.

62-3 But see Hoyt *v.* R. Co., 166 Ill. App. 361.

63-5 S. *v.* Mulhall, 199 Mo. 202, 97 S. W. 583; Paris *v.* Waddell, 139 Mo. App. 288, 123 S. W. 79.

Nor in the presence of the party in whose behalf the witness is examined. Turner *v.* S., 4 Ala. App. 100, 58 S. 116.

63-8 Marengo *v.* Eichler, 245 Ill. 47, 91 N. E. 758; Bowman *v.* Callahan, 137 Ky. 773, 127 S. W. 142; S. *v.* Hogan, 117 La. 863, 42 S. 352.

64-10 See Larkin *v.* Co., 30 Utah 86, 83 P. 686.

65-13 Baker *v.* S., 85 Ark. 300, 107 S. W. 983 (affidavit for continuance stating what it was believed absent witness would testify to); Vanhouser *v.* S., 52 Tex. Cr. 572, 108 S. W. 386; Watson *v.* S., 50 Tex. Cr. 171, 95 S. W. 115; Scott *v.* S., 49 Tex. Cr. 386, 93 S. W. 112; Kirk *v.* S., 48 Tex. Cr. 624, 89 S. W. 1067.

66-14 First Nat. Bk. *v.* Miller, 235 Ill. 135, 85 N. E. 312; Watson *v.* Co., 137 Ky. 619, 126 S. W. 146; Keeton *v.* S., 59 Tex. Cr. 316, 128 S. W. 404; Lewter *v.* Lindley (Tex. Civ.), 89 S. W. 784.

66-15 P. *v.* Yee Yum (Cal. App.), 141 P. 958; P. *v.* Ho Kim You (Cal. App.), 141 P. 958; P. *v.* Camoroto, 133 App. Div. 260, 117 N. Y. S. 655. See Lowe *v.* R. Co., 85 S. C. 363, 67 S. E. 460.

67-16 See Ridgell *v.* S., 156 Ala. 10, 47 S. 71.

67-17 Noel *v.* S., 161 Ala. 25, 49 S. 824; Hughes *v.* S., 152 Ala. 5, 44 S. 694; Jones *v.* S., 145 Ala. 51, 40 S. 947; Atlanta, etc. R. Co. *v.* McManus, 1 Ga. App. 302, 58 S. E. 278; Robinson *v.* R. Co., 189 Mass. 594, 76 N. E. 190; P. *v.* Tubbs, 147 Mich. 1, 110 N. W. 132; Schloemer *v.* Co., 204 Mo. 99, 102 S. W. 565; Paris *v.* Waddell, 139 Mo. App. 288, 123 S. W. 79; Sperbeck *v.* R. Co. (N. J.), 64 A. 1012; Hood *v.* S. (Tex. Cr.), 101 S. W. 229; Larkin *v.* Co., 30 Utah 86, 83 P. 686.

Under bankruptcy act bankrupt may not be cross-examined concerning testimony before referee. Jacobs *v.* U. S., 161 Fed. 694, 88 C. C. A. 554.

68-18 Strong *v.* P., 119 Ill. App. 79. See Bragg *v.* R. Co., 192 Mo. 331, 91 S. W. 527.

69-26 Atlanta, etc. R. Co. *v.* McManus, 1 Ga. App. 302, 58 S. E. 278.

70-29 S. *v.* Hodgeson, 130 La. 382, 58 S. 14.

70-32 Hanlon *v.* Ehrich, 178 N. Y. 474, 71 N. E. 12.

71-33 Turner *v.* S., 4 Ala. App. 100, 58 S. 116; Thompson *v.* School Dist. (Ark.), 158 S. W. 963; Duckworth *v.* S., 83 Ark. 192, 103 S. W. 601; P. *v.* Singh, 20 Cal. App. 146, 128 P. 420; Robinson *v.* R. Co., 189 Mass. 594, 76 N. E. 190; Schloemer *v.* Co., 204 Mo. 99, 102 S. W. 565; Mullin *v.* Co., 196 Mo. 572, 94 S. W. 288; Sperbeck *v.* R. Co. (N. J.), 64 A. 1012; Hanlon *v.* Ehrich, supra.

Failure to recollect immaterial facts, impeachment inadmissible. P. *v.* Hammond, 177 Mich. 416, 143 N. W. 244.

72-34 Hughes *v.* S., 152 Ala. 5, 44 S. 694; Jones *v.* S., 145 Ala. 51, 40 S. 947; Phillips *v.* S. (Ala. App.), 65 S. 673; Strong *v.* P., 119 Ill. App. 79; Hicks *v.* S., 165 Ind. 440, 75 N. E. 641; Chicago, etc. R. Co. *v.* Benedict's Admr., 154 Ky. 675, 159 S. W. 526; Carey *v.* Nissle, 145 Mich. 383, 108 N. W. 723; Paris *v.* Waddell, 139 Mo. App. 288, 123 S. W. 79; Myers *v.* S. (Tex. Cr.), 101 S. W. 1000; Larkin *v.* Co., 30 Utah 86, 83 P. 686.

What was said or done by witness cannot be proved if question is whether he was present when offense committed. Hicks *v.* S., supra.

72-35 P. *v.* Mar Gin Suie, 11 Cal. App. 42, 103 P. 971; Rice *v.* S., 51 Tex. Cr. 133, 100 S. W. 949; Campos *v.* S., 50 Tex. Cr. 289, 97 S. W. 100.

73-36 If denial made and confirmed by witness to whom variant statement is said to have been made it is not competent to show by another second witness made it to him. S. *v.* Walton, 53 Or. 557, 99 P. 431.

74-40 Raines *v.* S., 147 Ala. 691, 40 S. 932; P. *v.* Singh, 20 Cal. App. 146, 128 P. 420; S. *v.* Hummer, 72 N. J. L. 328, 62 A. 388; Hanlon *v.* Ehrich, 178 N. Y. 474, 71 N. E. 12; S. *v.* Jennings, 48 Or. 483, 87 P. 524, 89 P. 421; Texarkana G. & E. Co. *v.* Lanier (Tex. Civ.), 126 S. W. 67; Bice *v.* S., 51 Tex. Cr. 133, 100 S. W. 949; Woodward *v.* S., 50 Tex. Cr. 294, 97 S. W. 499.

74-42 S. *v.* Hodgeson, 130 La. 382, 58 S. 14. See S. *v.* Barnett, 203 Mo. 640, 654, 102 S. W. 506.

75-45 Reisch *v.* P., 229 Ill. 574, 82 N. E. 321.

75-47 S. *v.* Swartz, 87 Kan. 852, 126 P. 1091.

76-50 S. *v.* Mitchell, 119 La. 374, 44 S. 132; S. *v.* High, 116 La. 79, 40 S. 538.

77-58 See Anderson *v.* S. (Tex. Cr.) 159 S. W. 847.

77-59 Skeen *v.* S., 51 Tex. Cr. 39, 100 S. W. 770.

Variant statements of accused who has testified in his own behalf, and therefore in behalf of his co-defendant, are competent to discredit him as witness for himself and as witness in behalf of co-defendant so far as he testified in latter's behalf. S. *v.* Rubaka, 82 Conn. 59, 72 A. 566.

78-60 Lueders *v.* U. S., 210 Fed. 419, 127 C. C. A. 151; Dillard *v.* U. S., 141 Fed. 303, 72 C. C. A. 451; Southern R. Co. *v.* Dickens, 161 Ala. 144, 49 S. 766; Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844; Sellers *v.* S., 93 Ark. 313, 124 S. W. 770; Hinson *v.* S., 76 Ark. 366, 88 S. W. 947; In re De Laveaga's Est., 165 Cal. 607, 133 P. 307; P. *v.* O'Bryan, 165 Cal. 55, 130 P. 1042; P. *v.* Gray, 148 Cal. 507, 83 P. 707; P. *v.* Cyty, 11 Cal. App. 702, 106 P. 257; Gankyo Mitsunaga (Colo.), 129 P. 240; Brackett *v.* Co., 127 Ga. 672, 56 S. E. 762; Jenkins *v.* S., 13 Ga. App. 82, 78 S. E. 828; Luke *v.* Cannon, 4 Ga. App. 538, 62 S. E. 110; P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804 (*cit.* 7 Ency. of Ev. 78); Cook *v.* Lynch, 128 Ill. App. 117; Sanger *v.* Bacon (Ind.), 101 N. E. 1001; S. *v.* Swartz, 87 Kan. 852, 126 P. 1091; Illinois C. R. Co. *v.* Smith, 133 Ky. 732, 118 S. W. 933; Owensboro City R. Co. *v.* Allen, 32 Ky. L. R. 1353, 108 S. W. 357; French *v.* C., 30 Ky. L. R. 98, 97 S. W. 427; Schmidt *v.* Schmidt, 216 Mass. 572, 104 N. E. 474; Gorham *v.* Moor, 197 Mass. 522, 84 N. E. 436; Loranger *v.* Carpenter, 148 Mich. 549, 112 N. W. 125; Bialy *v.* Krause, 142 Mich. 158, 105 N. W. 149; Scott *v.* S. (Miss.), 39 S. 1012; Hermann *v.* C., 144 Mo. App. 147, 129 S. W. 414; S. *v.* Murphy, 201 Mo. 691, 100 S. W. 414; S. *v.* Dunn, 53 Or. 304, 99 P. 278; Behrens *v.* Mountz, 37 Pa. Super. 326; Walker *v.* Walker (R. I.), 67 A. 519; S. *v.* Watson, 94 S. C. 458, 78 S. E. 324; Craig M. Co. *v.* Cromer, 85 S. C. 350, 67 S. E. 289; Cole *v.* S. (Tex. Cr.), 162 S. W. 880; Dooley *v.* Boiders (Tex. Civ.), 128 S. W. 690; Western C., etc. Co. *v.* Anderson, 45 Tex. Civ. 513, 101 S. W. 1061; Prewitt *v.* Co., 46 Tex. Civ. 123, 101 S. W. 812; Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804; Moody *v.* Rowland, 46 Tex. Civ. 412, 102 S. W. 911; Barbee *v.* S., 50 Tex. Cr. 426, 97 S. W. 1058; Honeycutt *v.* S., 49 Tex. Cr. 300, 92 S. W. 421; Kirk *v.* Co., 58 Wash. 283, 108 P. 604; Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633; Barton *v.* Bruley, 119 Wis. 326, 96 N. W. 815.

Must be material.—Farrar *v.* R. Co. (Mo.), 155 S. W. 439; Texas Tr. Co. *v.* Fearis (Tex. Civ.), 163 S. W. 1060; Hall *v.* S. (Tex. Cr.), 158 S. W. 272; Winston *v.* Terrace (Wash.), 138 P. 673. "**The plaintiff's wife on cross-examination,** having testified that her husband purchased his goods from first-class houses in New York, the defendant, for the purpose of contradicting her, called a witness, Tolstoy, and proposed to prove by him that he had seen the plaintiff's wife in New York in 1910, on the East Side, so-called, in a place kept by a dealer in 'jobs,' making a purchase there. In the absence of testimony showing that she was acting as agent for her husband, this evidence was properly excluded as not contradicting the wife as to the character of the places where her husband purchased his goods." Rumberg *v.* Cutler, 86 Conn. 8, 84 A. 107.

Rule applies to accused who has testified on his own behalf. Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237.

80-61 Southern R. Co. *v.* Dickens, 161 Ala. 144, 49 S. 766; Southern R.

Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844; Funderburk *v.* S., 145 Ala. 661, 39 S. 672; P. *v.* Smith, 9 Cal. App. 224, 98 P. 546; Adams *v.* S., 51 Fla. 1, 45 S. 494; Atlantic, etc. Co. *v.* Crosby, 53 Fla. 460, 43 S. 348; Hubbard *v.* County, 140 Ia. 520, 118 N. W. 912; Peterson *v.* O'Connor, 106 Minn. 470, 119 N. W. 243; Nickolizack *v.* S., 75 Neb. 27, 105 N. W. 895; Payne *v.* S. (Okla. Cr.), 136 P. 201; Cole *v.* S. (Tex. Cr.), 162 S. W. 880; Ballard *v.* S. (Tex. Cr.), 160 S. W. 716; Dooley *v.* Boiders (Tex. Civ.), 128 S. W. 690; Keener *v.* S., 51 Tex. Cr. 590, 103 S. W. 904; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237.

81-62 Kelly *v.* R. Co., 148 Ala. 143, 41 S. 870; Hot Springs R. Co. *v.* Bodeman, 76 Ark. 302, 88 S. W. 960; In re Gird's Est., 157 Cal. 534, 108 P. 499; French *v.* C., 30 Ky. L. R. 98, 97 S. W. 427; S. *v.* Bellard, 132 La. 491, 61 S. 537; Cooper *v.* S., 94 Miss. 480, 49 S. 178; Nickolizack *v.* S., 75 Neb. 27, 105 N. W. 895; Alcolm Co. *v.* Brenack, 96 N. Y. S. 1055; Payne *v.* S. (Okla. Cr.), 136 P. 201; Launikitas *v.* Tract. Co., 241 Pa. 458, 88 A. 703; Buck *v.* McKeesport, 227 Pa. 10, 75 A. 840; Mares *v.* S. (Tex. Cr.), 158 S. W. 1130; Baltimore, etc. R. Co. *v.* Hudgins (Va.), 81 S. E. 48; Keener *v.* S., 51 Tex. Cr. 590, 103 S. W. 904; Brundige *v.* S., 49 Tex. Cr. 596, 95 S. W. 527. See Louisville R. Co. *v.* Frick, 158 Ky. 450, 165 S. W. 649; vol. 3, p. 877, n. 19, and supplement thereto.

In some jurisdictions court may permit contradiction on irrelevant matters brought out on cross-examination. Salem News Co. *v.* Caliga, 144 Fed. 965, 75 C. C. A. 673; Bennett *v.* Susser, 191 Mass. 329, 77 N. E. 884.

81-66 Anderson *v.* Co., 57 Wash. 502, 107 P. 376.

82-67 Alexander *v.* Vaughan, 106 Ark. 438, 153 S. W. 594; Furlow *v.* United Oil Mills, 104 Ark. 489, 149 S. W. 69; Ward *v.* C., 151 Ky. 527, 152 S. W. 556; Murphy *v.* S., 120 Md. 229, 87 A. 811; S. *v.* Dunn, 53 Or. 304, 99 P. 278, 100 P. 258, *cit.* the text; San Antonio, etc. R. Co. *v.* Wagner (Tex. Civ.), 166 S. W. 24; Paris, etc. R. Co. *v.* Flanders (Tex. Civ.), 165 S. W. 99; So. Texas Mtg. Co. *v.* Dozier (Tex. Civ.), 158 S. W. 1051. See Texas Co *v.* Strange (Tex. Civ.), 154 S. W. 327.

83-68 Southern R. Co. *v.* Dickens, supra.

85-72 Launikitas *v.* Tract. Co., 241 Pa. 458, 88 A. 703.

85-78 Gulf, etc. R. Co. *v.* Matthews, 100 Tex. 63, 93 S. W. 1068, sustains most propositions in text.

85-80 Birmingham R. & E. Co. *v.* Mason, 144 Ala. 387, 39 S. 590.

86-82 Pelham *v.* Co., 156 Ala. 500, 47 S. 172; Tate *v.* S., 91 Ark. 513, 121 S. W. 737; Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; Robinson *v.* R. Co., 189 Mass. 594, 75 N. E. 190; Mullin *v.* Co., 196 Mo. 572, 94 S. W. 288; Rossenbach *v.* Foresters, 184 N. Y. 92, 76 N. E. 1085; S. *v.* Kenny, 77 S. C. 236, 57 S. E. 859; Gulf, etc. R. Co. *v.* Matthews, 100 Tex. 63, 93 S. W. 1068; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237. See Long *v.* S., 59 Tex. Cr. 103, 127 S. W. 551.

86-83 Nickolizack *v.* S., 75 Neb. 27, 105 N. W. 985.

86-84 Willis *v.* S., 49 Tex. Cr. 139, 90 S. W. 1100.

The company "introduced two witnesses, one of them an employe in its service, who testified that a day or two after the accident appellee admitted to them that the wire first caught on the lines and stopped the mules, but that he forced them forward, and by that means caused the wire to come in contact with the bed and throw it from the wagon. Appellee denied the making of these statements. In any event, the testimony of the two witnesses referred to was not substantive evidence, but was competent for the purpose of contradicting appellee, and thereby discrediting him." Cynthiana Telephone Co. *v.* Asbury, 147 Ky. 307, 143 S. W. 1050.

86-85 S. *v.* Malmberg, 14 N. D. 523, 105 N. W. 614.

87-88 P. *v.* Brown, 110 App. Div. 490, 96 N. Y. S. 957, 188 N. Y. 554, 80 N. E. 1115 (no opinion); S. *v.* Manley, 82 Vt. 556, 74 A. 231.

87-89 S. *v.* Hunter, 82 S. C. 153, 63 S. E. 685.

Rule as to relevancy not always strictly applied. S. *v.* Callahan, 100 Minn. 63, 110 N. W. 342.

87-90 Miller *v.* S., 174 Ind. 235, 91 N. E. 930; Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; Holmes *v.* S. (Tex. Cr.), 150 S. W. 926.

88-91 Louisville, etc. R. Co. *v.* Quinn, 146 Ala. 330, 39 S. 756; Houston, etc.

R. Co. *v.* Adams, 44 Tex. Civ. 288, 98 S. W. 222; Cooper *v.* S., 48 Tex. Cr. 608, 89 S. W. 816.

88-93 S. *v.* Matheson, 142 Ia. 414, 120 N. W. 1036; Masterson *v.* Co., 204 Mo. 507, 103 S. W. 48.

89-94 C. *v.* Smith, 163 Mass. 411, 40 N. E. 189.

90-5 See Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694, *appr.* and *dist.* S. *v.* McGaffin, cited in corresponding note of the Encyclopaedia.

Unauthorized statements by third parties in presence of witness, not admissible. Tucker *v.* Ty., 17 Okla. 56, 87 P. 307.

92-10 Stout *v.* S., 174 Ind. 395, 92 N. E. 161; Hunt *v.* R. Co. (Ja.), 141 N. W. 334; Louisville & N. R. Co. *v.* Setser's Admr., 149 Ky. 162, 147 S. W. 956; Pash *v.* C., 146 Ky. 390, 142 S. W. 700; S. *v.* Bowen, 247 Mo. 584, 153 S. W. 1033.

Must be immaterial.—Gankyo Mitsunaga *v.* P. (Colo.), 129 P. 240.

92-11 Myers *v.* Manlove, 164 Ind. App. 128, 71 N. E. 893; Seibert *v.* Ins. Co., 132 Ia. 58, 106 N. W. 507; Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694; International, etc. R. Co. *v.* Boykin, 99 Tex. 259, 89 S. W. 639; Franklin *v.* S. (Tex. Cr.), 88 S. W. 357.

93-12 P. *v.* Guaragna, 23 Cal. App. 120, 137 P. 279.

93-16 Sanger *v.* Bacon (Ind.), 101 N. E. 1001.

96-23 Sills *v.* S., 2 Ala. App. 73, 57 S. 89; Andrews *v.* S., 159 Ala. 14, 48 S. 858; Strickland *v.* S., 151 Ala. 31, 44 S. 90; Coker *v.* S., 144 Ala. 28, 40 S. 516; Barfield *v.* Evans (Ala.), 65 S. 928; Jones *v.* S., 101 Ark. 439, 142 S. W. 838; Murphy *v.* R. Co., 92 Ark. 159, 122 S. W. 636; In re Gird's Est., 157 Cal. 534, 108 P. 499; Keyes *v.* R. Co., 152 Cal. 437, 93 P. 88; Clark *v.* Dalziel, 3 Cal. App. 121, 84 P. 429; P. *v.* Gray, 148 Cal. 507, 83 P. 707; S. *v.* Brelawski (Del.), 84 A. 950; Partridge *v.* U. S., 39 App. Cas. (D. C.) 571; Bennett *v.* S., 66 Fla. 369, 63 S. 842; Clinton *v.* S., 53 Fla. 98, 43 S. 312; Whitney *v.* Cleveland, 13 Ida. 558, 91 P. 176; Benedict *v.* Dakin, 243 Ill. 384, 90 N. E. 712; Hirsch, etc. R. Co. *v.* Coleman, 227 Ill. 149, 81 N. E. 21; Hoyt *v.* R. Co., 166 Ill. App. 361; New York, etc. R. Co. *v.* Flynn, 41 Ind. App. 501, 81 N. E. 741, 82 N. E. 1009; Louisville *v.* Laufer, 140 Ky. 457, 131 S. W. 192; Wilson *v.* C. (Ky.), 121 S. W. 430; Clay *v.* Goldstein, 31 Ky. L. R. 390, 102 S. W. 319; S. *v.* Simon, 131 La. 520, 59 S. 975; S. *v.* Meyers, 120 La. 127, 44 S. 1008; Lerum *v.* Geving, 97 Minn. 269, 105 N. W. 967; Ebert *v.* R. Co., 174 Mo. App. 45, 160 S. W. 34; S. *v.* Heath, 221 Mo. 565, 121 S. W. 149; Tonopah L. Co. *v.* Riley, 30 Nev. 312, 95 P. 1001; P. *v.* Seidenshner, 210 N. Y. 341, 104 N. E. 420; Novogrucky *v.* R. Co., 125 App. Div. 715, 110 N. Y. S. 28; P. *v.* Mallon, 116 App. Div. 425, 101 N. Y. S. 814; Hanlon *v.* Ehrich, 178 N. Y. 474, 71 N. E. 12; Robinson *v.* S., 8 Okla. Cr. 667, 130 P. 121; S. *v.* Casasanta, 29 R. I. 587, 73 A. 342; S. *v.* Hampton, 79 S. C. 179, 60 S. E. 669; Texarkana G. & E. Co. *v.* Lanier (Tex. Civ.), 126 S. W. 67; Opet *v.* Denzer (Tex. Civ.), 93 S. W. 527; International, etc. R. Co. *v.* Boykin, 99 Tex. 259, 89 S. W. 639; S. *v.* Bardelli, 78 Vt. 102, 62 A. 44; Larsen *v.* Sedro-W., 49 Wash. 134, 94 P. 938; Hilton *v.* Hayes, 154 Wis. 27, 141 N. W. 1015; Ferguson *v.* Truax, 136 Wis. 637, 118 N. W. 251; Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633.

See Mygreen *v.* Smith, 162 Ill. App. 276; Strauss *v.* R. Co., 94 S. C. 324, 77 S. E. 117.

In Massachusetts, attention of witness need not be called to previous statement unless it is party's own witness. Am. A. C. Co. *v.* Hogan, 213 Fed. 416 (C. C. A.).

Defendant offered to read in evidence, for the purpose of impeachment, all of the testimony given by the witness on the trial of another. "There is no authority, under the laws of this state," said the court, "for the impeachment of a witness in that manner." S. *v.* Potts, 239 Mo. 403, 144 S. W. 495.

S. who testified on behalf of defendant was asked by the prosecutor if she did not at the preliminary examination of E. testify to a state of facts at variance with her evidence in this case. Said witness denied making the statement attributed to her, whereupon the prosecutor, over the objection of defendant, called one L., the magistrate who held the preliminary examination of E., and proved by him that the evidence of said S. upon the said preliminary was in conflict with her evidence as then given in this case. The

court committed no error in permitting said witness to be impeached and discredited in this manner. "It matters not whether such prior statement was made in court as a witness in the same or a different case or made outside of a court at a time when the witness was not under oath." S. *v.* Eastham, 240 Mo. 241, 144 S. W. 492.

99-26 S. *v.* Tarlton, 22 S. D. 495, 118 N. W. 706.

Foundation need not be laid when proof of variant statement is bought out on cross-examination of another witness; party whose witness has been contradicted may recall him and secure explanation of contradiction. Usual practice is preferable. Newell *v.* Taylor, 74 S. C. 8, 54 S. E. 212.

100-30 But see S. *v.* Robertson, 133 La. 806, 63 S. 362.

100-31 Webb *v.* S., 14 Ariz. 506, 131 P. 970, *cit.* 7 ENCY. OF EV. 100.

100-32 Pruitt *v.* S., 92 Ala. 41, 9 S. 406; P. *v.* Garnett, 9 Cal. App. 194, 98 P. 247; New York, etc. R. Co. *v.* Flynn, 41 Ind. App. 501, 81 N. E. 741, 82 N. E. 1009; Jenkins *v.* Lutz, 26 Ind. App. 150, 59 N. E. 288.

103-40 Other facts inconsistent with witness' statement may be shown without predicate. Louisville & N. R. Co. *v.* Perkins, 165 Ala. 471, 51 S. 870.

104-42 S. *v.* Hampton, 79 S. C. 179, 60 S. E. 669.

104-43 Lemon *v.* U. S., 164 Fed. 953, 90 C. C. A. 617.

105-45 Stinson *v.* C., 29 Ky. L. R. 733, 96 S. W. 463.

105-48 Blakely O. & F. Co. *v.* Proctor, 134 Ga. 139, 67 S. E. 389.

105-50 Clay *v.* Goldstein, 31 Ky. L. R. 390, 102 S. W. 319.

106-51 Omaha R. Co. *v.* Boesen, 74 Neb. 764, 105 N. W. 303; Texarkana G. & E. Co. *v.* Lanier (Tex. Civ.), 126 S. W. 67.

106-52 Lerum *v.* Geving, 97 Minn. 269, 105 N. W. 967; Omaha R. Co. *v.* Boesen, 74 Neb. 764, 105 N. W. 303.

106-56 **Declarations of party as to the subject-matter of the controversy which are contradictory of statements made by him upon the witness stand are competent to be proven as a substantive matter without first calling the party's attention to them while he is on the witness stand.** S. *v.* Pulley, 82 N. J. L. 579, 82 A. 857, *cit.* McBlain *v.* Edgar, 65 N. J. L. 634, 48 A. 600.

107-59 Lerum *v.* Geving, 97 Minn. 269, 105 N. W. 967.

108-61 Lerum *v.* Geving, supra

108-62 But see Curry *v.* S. (Tex. Cr.), 162 S. W. 851.

108-64 Blakely O. & F. Co. *v.* Proctor, 134 Ga. 138, 67 S. E. 389.

109-67 Am. A. C. Co. *v.* Hogan, 213 Fed. 416 (C. C. A.); Daniels *v.* Stock, 23 Colo. App. 529, 130 P. 1031; Hirsch, etc. R. Co. *v.* Coleman, 227 Ill. 149, 81 N. E. 21; S. *v.* Simon, 131 La. 520, 59 S. 975; S. *v.* Hampton, 79 S. C. 179, 60 S. E. 669; S. *v.* Coss, 53 Or. 462, 101 P. 193; S. *v.* Ballew, 83 S. C. 82, 65 S. E. 688; Curry *v.* S. (Tex. Cr.), 162 S. W. 851; Gutzman *v.* Ft. Worth (Tex. Civ.), 155 S. W. 1182; Scandinavian Am. Bk. *v.* Long, 75 Wash. 270, 134 P. 913. See S. *v.* Johns, 135 La. ——, 65 S. 738; S. *v.* D'Adame, 55 N. J. L. 386, 86 A. 414.

Discretionary with courts as to time question be asked, when witness absent. Miller *v.* Pearce, 86 Vt. 322, 85 A. 620.

"**The court,** without requiring the record to be shown the witness, permitted the cross-examination of the co-defendant Carpenter as to his failure to testify at the coroner's inquest and the preliminary examination concerning certain matters related at the trial. The questions were: 'I will ask you, Mr. Carpenter, if at the coroner's inquest, when you were detailing this affair before the inquest, if you testified to anything before the jury about hearing voices upon the bank'' and ''Now, I will ask you if both at the coroner's inquest you testified to anything about the peddler fishing there?'' and 'Now, I will ask you if both at the preliminary examination of this case, and at the former trial of this case, if you didn't place my hand upon this gun and testify that that was the manner in which the Indian grabbed it?' As to the first two, they were merely preliminary for the purpose of impeachment and were properly allowed, although the transcript of the testimony of the witness was not first shown him. People *v.* Hart, 153 Cal. 261, 94 Pac. 1042." P. *v.* Bond, 13 Cal. App. 175, 109 P. 150.

109-69 Jaynes *v.* P., 44 Colo. 537,

99 P. 325; S. *v.* Devorss, 221 Mo. 469, 120 S. W. 75.

109-70 Conrades *v.* Heller (Md.), 87 A. 28.

110-73 P. *v.* Hogan, 11 Cal. App. 599, 105 P. 938.

110-74 Math *v.* R. Co., 243 Ill. 114, 90 N. E. 235 (question put to witness on former trial and answer thereto need not be given); McKiernan *v.* Hall, 65 Misc. 138, 121 N. Y. S. 87; S. *v.* Hampton, 79 S. C. 179, 60 S. E. 669.

111-75 Exact words used by witness should be incorporated in question. Haddix *v.* S., 76 Neb. 369, 107 N. W. 781.

111-76 *Comp.* Quigg *v.* Post, 131 App. Div. 155, 115 N. Y. S. 147.

111-77 Ex parte Phillips (Ala.), 66 S. 3 (time and place); Livingston *v.* S., 7 Ala. App. 43, 61 S. 54; Big Tree M. & M. Co. *v.* Hamilton, 157 Cal. 130, 107 P. 301; Denver City Co. *v.* Lomovt, 53 Colo. 292, 126 P. 276; Luke *v.* Cannon, 4 Ga. App. 538, 62 S. E. 110; Conrades *v.* Heller (Md.), 87 A. 28; Loughlin *v.* Brassil, 187 N. Y. 128, 79 N. E. 854; Harding *v.* Conlon, 159 App. Div. 441, 144 N. Y. S. 663; McKiernan *v.* Hall, 65 Misc. 138, 121 N. Y. S. 87; S. *v.* Stockman, 82 S. C. 388, 64 S. E. 595. See Phillips *v.* S. (Ala. App.), 65 S. 673.

If attention is directed to conversation so there is no misunderstanding, it is sufficient although not all the elements of foundation are shown. Denver City Co. *v.* Lomovt, 53 Colo. 292, 126 P. 276.

113-79 Allen *v.* Mayor (Ga. App.), 81 S. E. 252.

"What she testified to at the previous trial could not be proved by relating what she said about it, as that would be mere hearsay. If the object was to impeach the witness, a predicate should have been laid, by asking Emma Williams whether she made such statements, giving time and place, person to whom the statements, were made, persons present, etc., and the question to this witness should be as definite in describing the time, place, etc., so as to identify the statements as to those included in the predicate. 4 Mayfield's Dig., p. 1198, § 168; Price *v.* State, 117 Ala. 113, 23 South. 691." McDaniel *v.* S., 166 Ala. 7, 52 S. 400.

114-85 Predicate for proof of conviction of murder will not sustain proof of conviction of shooting a man. Murph *v.* S., 153 Ala. 67, 45 S. 208.

114-86 Jaynes *v.* P., 44 Colo. 535, 99 P. 325, on one of two days sufficient.

115-87 See Evans *v.* Barnett, 6 Penne. (Del.) 44, 63 A. 770.

116-93 Unnecessary to designate person where it is some one in a crowd, rest of foundation being sufficient. Hall *v.* S. (Ala. App.), 65 S. 427.

116-95 Coffey *v.* R. Co., 79 Neb. 286, 112 N. W. 589.

Foundation unnecessary if witness denies he made statements. Maxey *v.* Fairbanks, 42 Tex. Civ. 254, 95 S. W. 632.

117-96 Ex parte Phillips (Ala.), 66 S. 3; P. *v.* Yee Foo, 4 Cal. App. 730, 89 P. 450; Clinton *v.* S., 53 Fla. 98, 43 S. 312; Coffey *v.* R. Co., 79 Neb. 286, 112 N. W. 589; P. *v.* Murphy, 113 App. Div. 363, 99 N. Y. S. 110.

117-99 Stinson *v.* C., 29 Ky. L. R. 733, 96 S. W. 463; Batsch *v.* R. Co., 143 Mo. App. 58, 122 S. W. 371 (admission of signature good foundation); Tonseth *v.* P. Co. (Or.), 141 P. 868.

Must be connected with witness assailed. S. *v.* Rogers, 96 S. C. 350, 80 S. E. 620.

Writing must be shown and witness admit he wrote it before impeachment. Whisner *v.* Whisner (Md.), 89 A. 393.

Transcript of testimony need not be shown witness while preliminary questions being put. P. *v.* Hart, 153 Cal. 261, 94 P. 1042.

Question may be framed from writing. Hoagland *v.* Canfield, 160 Fed. 146, 164.

117-1 P. *v.* Bartley, 12 Cal. App. 773, 108 P. 868; Washington *v.* S., 124 Ga. 423, 52 S. E. 910 (not applicable to statement made under judicial oath); Haulon *v.* Ehrich, 178 N. Y. 474, 71 N. E. 12.

Form of question may affect application of rule, as where it assumed witness did not make variant statement. P. *v.* Bartley, 12 Cal. App. 773, 108 P. 868.

118-3 Stewart *v.* S., 58 Fla. 97, 50 S. 642; Osborn *v.* Carey, 24 Ida. 158, 132 P. 967; Keane *v.* Co., 17 Ida. 179, 105 P. 60; S. *v.* Woodward, 132 Ia. 675, 108 N. W. 753; Stinson *v.* C., supra; S. *v.* Goodager, 56 Or. 198, 106 P. 638.

118-7 Witness may be asked if he

made statement alleged. Lloyd *v.* Kerley (Tex. Civ.), 106 S. W. 696.

118-8 Richards *v.* U. S., 99 C. C. A. 401, 175 Fed. 911.

119-15 Haddix *v.* S., 76 Neb. 369, 107 N. W. 781.

120-18 Rabinowitz *v.* Silverman, 223 Pa. 139, 72 A. 378.

Foundation unnecessary if evidence offered as substantive evidence. Adams *v.* R. Co., 156 Ia. 31, 135 N. W. 21.

120-20 Testimony must not go beyond predicate. Red *v.* S., 39 Tex. Cr. 414, 46 S. W. 408; Messer *v.* S., 43 Tex. Cr. 97, 63 S. W. 643; St. Clair *v.* S., 49 Tex. Cr. 479, 92 S. W. 1095.

120-22 Costello *v.* S., 176 Ala. 1, 58 S. 202; Johnson *v.* S., 55 Fla. 46, 46 S. 154; S. *v.* Blassengame, 132 La. 250, 61 S. 219; Hicks *v.* S. (Miss.), 47 S. 524.

121-23 Hays *v.* S., 51 Tex. Cr. 111, 100 S. W. 926.

121-24 Pitman *v.* S., 148 Ala. 612, 42 S. 993; Vann *v.* S., 140 Ala. 122, 37 S. 158 (discretion not subject to review); Hammond *v.* S., 147 Ala. 79, 41 S. 761 (same); Hirsch, etc. R. Co. *v.* Coleman, 227 Ill. 149, 81 N. E. 21; S. *v.* Owens, 130 La. 746, 58 S. 557; Guffey P. Co. *v.* Hamill, 42 Tex. Civ. 196, 94 S. W. 458.

122-33 Williams *v.* S., 147 Ala. 10, 41 S. 992.

124-35 Question should be in precise words put to principal witness. Hanselman *v.* Broad, 113 App. Div. 447, 99 N. Y. S. 404; Sloan *v.* R. Co., 45 N. Y. 125.

124-38 "In the question asked appellant, the time fixed was before the show started, while the impeaching witness was permitted to say that the remark alleged to have been made by appellant was made while the show was in progress or about the time it commenced." Hendrickson *v.* C., 147 Ky. 298, 143 S. W. 993.

125-43 Adams *v.* Co., 82 Conn. 448, 74 A. 755 (in discretion of court); S. *v.* Coss, 53 Or. 462, 101 P. 193 (on cross-examination only); Rabinowitz *v.* Silverman, 223 Pa. 139, 72 A. 378.

128-58 McDaniel *v.* S., 166 Ala. 7, 52 S. 400; P. *v.* Boud, 13 Cal. App. 175, 109 P. 150; Barton *v.* Barton's Admr., 142 Ky. 487, 134 S. W. 902; Gross *v.* S., 61 Tex. Cr. 176, 135 S. W. 373.

128-59 Higgins *v.* C., 142 Ky. 617, 134 S. W. 1135.

128-60 Only testimony of witness sought to be impeached should be introduced. Scott *v.* S., 92 Miss. 833, 46 S. 251.

Entire testimony at preliminary hearing admissible to show whether it contained statement witness said he made. Ty. *v.* Clark, 15 N. M. 35, 99 P. 697.

129-62 Reiter C. Mfg. Co. *v.* Hamlin, 144 Ala. 192, 40 S. 280; Tonopah L. Co. *v.* Riley, 30 Nev. 312, 95 P. 1091.

Witness cannot be asked what he said until proof he made statement received. Cathcart *v.* Webb (Ala.), 42 S. 25.

129-65 Alabama, etc. R. Co. *v.* Clarke, 145 Ala. 459, 39 S. 816.

130-67 Chicago C. R. Co. *v.* Mauger, 128 Ill. App. 512; P. *v.* Canoroto, 133 App. Div. 260, 117 N. Y. S. 655.

130-68 See McCann *v.* P., 226 Ill. 562, 80 N. E. 1061.

131-69 See Pinnacle M. Co. *v.* Popst, 54 Colo. 451, 131 P. 413.

It is matter of right to prove variant statements after witness' attention called to them. Rhomberg *v.* Avenarius, 135 Ia. 176, 112 N. W. 548.

131-71 S. *v.* Morris, 58 Or. 397, 114 P. 476.

132-74 Joyce *v.* Joyce, 80 Conn. 88, 67 A. 374; S. *v.* Jennings, 48 Or. 483, 87 P. 524, 89 P. 421.

Writing in behalf of accused may be used to impeach him; not essential it be produced. Its contents may be embodied in questions put to him in laying foundation for impeachment; affirmative answer may be accepted as proof of its contents. Eads *v.* S., 17 Wyo. 490, 101 P. 946.

132-76 Signed statement, admitted to contain only what witness said not inadmissible because it does not contain all he said. S. *v.* Jennings, 48 Or. 483, 87 P. 524, 89 P. 421.

132-77 John J. Badel Co. *v.* Borches, 147 Ky. 506, 145 S. W. 1[illegible]; Mississippi Cent. R. Co. *v.* Daens, 97 Miss. 765, 53 S. 398, overruling suggestion of error, 53 S. 351; S. *v.* Eastham, 240 Mo. 241, 144 S. W. 492; P. *v.* Willard, 139 App. Div. 19, 143 N. Y. S. 1002; Kenney *v.* Co., 134 App. Div. 859, 119 N. Y. S. 363; S. *v.* Jennings, 48 Or. 483, 87 P. 524, 89 P. 421; S. *v.* Sanders, 75 S. C. 109, 76 S. E. 35; Anderson *v.* S. (Tex. Cr.), 159 S. W. 847; Pratt *v.* S., 59 Tex. Cr. 635, 129 S. W. 264. See Monckton *v.* R. Co. (Kan.), 139 P. 1164.

133-79 Brunhild *v.* Co., 144 Ill. App. 198 (witness may refresh recollection from notes he took); Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689.

133-80 S. *v.* Hooper, 151 N. C. 646, 65 S. E. 613 (though notes of testimony taken by judge); Perry *v.* S. (Tex. Cr.), 153 S. W. 138.

134-81 S. *v.* Pirkey, 22 S. D. 550, 118 N. W. 1042; Perry *v.* S. (Tex. Cr.), 153 S. W. 138.

134-83 Tyrrell *v.* S., 177 Ind. 14, 97 N. E. 14; Illinois C. R. Co. *v.* Johnson (Ky.), 115 S. W. 798; Baum *v.* S., 6 O. C. C. (N. S.) 515 (stenographer, after testifying he knew, when he took notes, they were accurate, may read them, although not able, by using them to refresh his memory, to testify without them). See Davis *v.* Bk., 6 Ind. Ty. 124, 89 S. W. 1015; C. *v.* Vose, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813.

134-91 Presumption on appeal is, record being silent, proof of contradictory statements was made. S. *v.* Jennings, 48 Or. 483, 87 P. 524, 89 P. 421.

135-93 S. *v.* Squirrel Coat, 32 S. D. 569, 143 N. W. 958.

136-98 That which witness has said ordinarily can be much better proved by examination of person by whom it was said. S. *v.* Caron, 118 La. 349, 42 S. 960.

137-99 See vol. 11, p. 126, n. 56 and supplement thereto.

137-1 Porter *v.* R. Co., 177 Ala. 406, 59 S. 255; Marengo *v.* Eichler, 245 Ill. 47, 91 N. E. 758; Indianapolis & C. T. Co. *v.* Wiles, 174 Ind. 236, 91 N. E. 161; Grebenstein *v.* Co., 205 Mass. 431, 91 N. E. 411; Lowe *v.* R. Co., 85 S. C. 363, 67 S. E. 460 (notwithstanding testimony contradicted orally). *Contra* if witness called by party offering statement. S. *v.* Phillips, 118 Ia. 660, 92 N. W. 876; S. *v.* Hoffman, 134 Ia. 587, 112 N. W. 103; Stinson *v.* C., 29 Ky. L. R. 733, 96 S. W. 463; Hendricks *v.* C., 23 Ky. L. R. 1191, 64 S. W. 954; S. *v.* Wells, 33 Mont. 291, 83 P. 476 (notwithstanding witness' denial he made statement); Masourides *v.* S., 86 Neb. 105, 125 N. W. 132.

Statement made to detectives improperly admitted when witness said on the stand she had, upon reflection, concluded that such statement was erroneous. Erdman *v.* S., 90 Neb. 642, 134 N. W. 258.

Letter admissible only when witness denies making statements in it. Dooley *v.* Miller, 2 Tex. Civ. 132, 21 S. W. 157; Lloyd *v.* Kerley (Tex. Civ.), 106 S. W. 696.

Only so much of a deposition as directly relates to variant testimony need be read. Charlton *v.* Kelly, 156 Fed. 433, 84 C. C. A. 295.

Part of statement may be admitted, in discretion of court, if attention of witness called to contradictory parts. Griffin W. Co. *v.* Smith, 173 Fed. 245, 97 C. C. A. 411.

138-3 See vol. 11, p. 107, n. 18, and supplement thereto.

139-4 See vol. 11, p. 108, n. 19, and supplement thereto.

139-6 Qualified assent of witness, sufficient. Lowe *v.* R. Co., 85 S. C. 363, 67 S. E. 460.

139-8 Rule changed by statute. S. *v.* Hoffman, 134 Ia. 587, 112 N. W. 103.

140-10 Richards *v.* C., 107 Va. 881, 59 S. E. 1104.

140-11 Transcript of justice is incompetent unless he is required to reduce testimony to writing. Scott *v.* S., 92 Miss. 833, 46 S. 251.

141-15 Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689; Casey *v.* S., 50 Tex. Cr. 392, 97 S. W. 496 (accuracy of notes testified to).

141-16 **Not admissible** though verified by official stenographer (Prewitt *v.* Co., 46 Tex. Civ. 123, 101 S. W. 812), or if stenographer declines to say all testimony is given. S. *v.* Martin, 47 Or. 282, 83 P. 849. Unverified minutes of stenographer inadmissible. Jaffe *v.* R. Co., 49 Misc. 520, 97 N. Y. S. 1037.

Stenographer may use notes taken on former trial to refresh memory as to witness' testimony. Illinois C. R. Co. *v.* Johnson (Ky.), 115 S. W. 798.

142-18 Snyder *v.* S., 145 Ala. 33, 40 S. 978; In re De Laveaga's Est., 165 Cal. 607, 133 P. 307; Brown *v.* McBride, 129 Ga. 92, 58 S. E. 702; Georgia R. & E. Co. *v.* Dougherty, 4 Ga. App. 614, 62 S. E. 158; Hirsch, etc. R. Co. *v.* Coleman, 227 Ill. 149, 81 N. E. 21; Indianapolis & C. T. Co. *v.* Wiles, 174 Ind. 236, 91 N. E. 161; P. *v.* Dumas, 161 Mich. 45, 125 N. W. 766; Tonopah L. Co. *v.* Riley, 30 Nev. 312, 95 P. 1001; Baum *v.* S., 6 O. C. C. (N. S.) 515; Mason *v.* R. Co. (Tex. Civ.), 151 S. W. 350;

Dooley *v.* Boiders (Tex. Civ.), 128 S. W. 690; Scandinavian Am. Bk. *v.* Long, 75 Wash. 270, 134 P. 913.

See Findley *v.* R. Co. (W. Va.), 78 S. E. 396.

143-19 Allen *v.* Shook (Tex. Civ.), 160 S. W. 1091; Cain *v.* S. (Tex. Cr.), 153 S. W. 147.

143-21 Stewart *v.* S., 58 Fla. 97, 50 S. 642; P. *v.* Droste, 160 Mich. 66, 125 N. W. 87; Murray *v.* Moore, 104 Va. 707, 52 S. E. 381.

143-22 Monckton *v.* R. Co. (Kan.), 139 P. 1164.

143-24 Allen *v.* Ellis, 125 Wis. 565, 104 N. W. 739.

144-26 Texarkana G. & E. Co. *v.* Lanier (Tex. Civ.), 126 S. W. 67.

145-32 Joyce *v.* Joyce, 80 Conn. 88, 67 A. 374; Ellis *v.* Ellis (Ky.), 128 S. W. 1057; Shreve *v.* Crosby, 72 N. J. L. 491, 63 A. 333 (immaterial variant statements in writing).

145-33 Chandler *v.* S., 124 Ga. 821, 53 S. E. 91; Spencer *v.* S., 59 Tex. Cr. 217, 128 S. W. 118; Hoggan *v.* Cahoon, 31 Utah 172, 87 P. 164.

145-34 Atchison, etc. R. Co. *v.* Hastings, 79 Kan. 499, 100 P. 68; Faulkner *v.* S., 53 Tex. Cr. 258, 109 S. W. 199.

145-36 Ignorance of technical words in paper may be shown. Brown *v.* McBride, 129 Ga. 92, 58 S. E. 702.

146-37 Georgia R. & E. Co. *v.* Dougherty, 4 Ga. App. 614, 62 S. E. 158; Maxey *v.* S., 58 Tex. Cr. 118, 124 S. W. 927.

146-38 P. *v.* Hutchings, 8 Cal. App. 550, 97 P. 325; Turner *v.* S., 131 Ga. 761, 63 S. E. 294; Hood *v.* S., 52 Tex. Cr. 524, 107 S. W. 848 (statute provides for admission of whole conversation if part proved); Corpus *v.* S., 51 Tex. Cr. 315, 102 S. W. 1152 (portions of testimony on inquest).

146-39 Falkner *v.* S., 151 Ala. 77, 44 S. 409; Casey *v.* S., 50 Tex. Cr. 392, 97 S. W. 496.

Variance in testimony as compared with that previously given may be explained by showing only substance of latter was written. S. *v.* Hampton, 79 S. C. 179, 60 S. E. 669.

147-42 May be explained prior to putting on of witness to prove statements as on redirect. Bosley *v.* S. (Tex. Cr.), 153 S. W. 878.

147-43 Chandler *v.* S., 124 Ga. 821, 53 S. E. 91.

147-44 *Compare* Allen *v.* Shook (Tex. Civ.), 160 S. W. 1091.

148-45 South Covington, etc. R. Co. *v.* Core, 29 Ky. L. R. 836, 96 S. W. 562. See Murray *v.* Moore, 104 Va. 707, 52 S. E. 381.

148-47 Recalling impeached witness, for discretion of court. Bills *v.* S., 55 Tex. Cr. 541, 117 S. W. 835.

149-50 Lilly *v.* Bank, 178 Fed. 53, 102 C. C. A. 1; Wefel *v.* Stillman, 151 Ala. 249, 44 S. 203; Adams *v.* S., 93 Ark. 260, 124 S. W. 766; S. *v.* Trego, 25 Ida. 625, 138 P. 1124; Hunt *v.* R. Co. (Ia.), 141 N. W. 334; S. *v.* Goodson, 116 La. 388, 40 S. 771 (contradiction of witness' statement he could not speak English); Booze *v.* Yazoo, 94 Miss. 428, 48 S. 820; Boling *v.* S., 91 Neb. 599, 136 N. W. 1078; Salonga *v.* Concepcion, 3 Phil. Isl. 563; Merck *v.* Merck, 83 S. C. 329, 65 S. E. 347; Link *v.* S. (Tex. Cr.), 164 S. W. 987; Luttrell *v.* S. (Tex. Cr.), 157 S. W. 157; Parish *v.* S. (Tex. Cr.), 153 S. W. 327; Long *v.* S., 59 Tex. Cr. 103, 127 S. W. 551; Griffin *v.* R. Co. (Vt.), 89 A. 220; S. *v.* McCormick, 56 Wash. 469, 105 P. 1037.

Precautionary acts taken to preserve legal rights and not based on personal knowledge of facts, not provable to affect credibility. Blickley *v.* Luce, 148 Mich. 233, 111 N. W. 752.

149-51 Ruemer *v.* Clark, 121 App. Div. 231, 105 N. Y. S. 659; Beeson *v.* S., 60 Tex. Cr. 39, 130 S. W. 1006; Barbee *v.* S., 58 Tex. Cr. 129, 124 S. W. 961. See Donohue *v.* S. (Tex. Cr.), 155 S. W. 250.

Witness who has testified he is not living in a state of adultery cannot be impeached by testimony tending to show contrary. Gonzales *v.* S., 54 Tex. Cr. 230, 112 S. W. 941.

150-52 One may avail himself of the right to remain silent without incurring hostile criticism by impeachment. Masterson *v.* Co., 204 Mo. 507, 103 S. W. 48, *dist.* and *disap.* C. *v.* Smith, 163 Mass. 411, 40 N. E. 189.

150-53 Shelton *v.* Haeelip, 167 Ala. 217, 51 S. 937; Corona C. & I. Co. *v.* Copeland, 7 Ga. App. 481, 67 S. E. 203; Bordner *v.* Depler, 142 Ill. App. 526; Schloemer *v.* Co., 204 Mo. 99, 102 S. W. 565. But *comp.* Loughlin *v.* Brassil, 187 N. Y. 128, 79 N. E. 854.

150-54 Van Wyk *v.* P., 45 Colo. 1, 99 P. 1009; Czarnecki *v.* Derecktor, 81 Conn. 338, 71 A. 354; Crosby *v.* Wells,

73 N. J. L. 790, 67 A. 295; Schuh *v.* S., 58 Tex. Cr. 165, 124 S. W. 908; Bluestein *v.* Collins (Tex. Civ.), 103 S. W. 687. See Birmingham, etc. Co. *v.* Friedman (Ala.), 65 S. 939; Frazer *v.* S., 159 Ala. 1, 49 S. 245.

Credibility of excuse for dereliction of duty may be tested by proof of previous trials for like neglect. P. *v.* Lewis, 111 App. Div. 375, 97 N. Y. S. 1057, 186 N. Y. 583, 79 N. E. 1113 (no opinion).

Previous omission of witness to perform like duty to that, performance of which he has testified of, may be shown on cross-examination. Southern R. Co. *v.* Blanford, 105 Va. 373, 54 S. E. 1.

Testimony as to sobriety of a deceased person may be tested by asking witness if he had ever seen such person in the penitentiary and if he had ever talked with another person about having a complaint made against deceased for intoxication. Rossenbach *v* Foresters, 184 N. Y. 92, 76 N. E. 1085.

Witness' silence where a person not a party to the record makes a statement in his presence cannot be shown under statute expressing that a declaration or act of another, in presence and within observation of a party, and his conduct in relation thereto, may be shown. S. *v.* Ryan, 56 Or. 524, 108 P 1009.

151-55 Stodenmeyer *v.* Hart, 155 Ala. 243, 46 S. 488; Czarnecki *v.* Dereckter, 81 Conn. 338, 71 A. 354; Bonaparte *v.* S., 65 Fla. 287, 61 S. 633; Fitzgerald *v.* Allen, 240 Ill. 80, 88 N. E. 240; Lindstrom *v.* Fitzpatrick, 105 Minn. 331, 117 N. W. 441; Green *v.* S., 56 Tex. Cr. 191, 120 S. W. 425; Southern R. Co. *v.* Blanford, supra; S. *v.* McCormick, 56 Wash. 469, 105 P. 1037.

151-56 Booze *v.* Yazoo, 94 Miss. 428, 48 S. 820; Sotebier *v.* Co., 203 Mo. 702, 102 S. W. 651; Ruemer *v.* Clark, 121 App. Div. 231, 105 N. Y. S. 659.

152-58 Verbal proof of a judicial complaint is admissible. Ruemer *v.* Clark, supra.

152-59 Mortimore *v.* Affleck (Tex. Civ.), 125 S. W. 51; Ross *v.* S., 53 Tex. Cr. 295, 109 S. W. 152. See Marsh *v.* S., 54 Tex. Cr. 144, 112 S. W. 320, contradictory statement after the event cannot be proved.

152-61 Kansas City S. R. Co. *v.* Frost, 93 Ark. 183, 124 S. W. 748, applying rule to witness whose testimony was by deposition. *Contra,* S. *v.* Stockman, 82 S. C. 388, 64 S. E. 595.

Predicate not required if witness a party. Ruemer *v.* Clark, 121 App. Div. 231, 105 N. Y. S. 659.

152-62 Lindstrom *v.* Fitzpatrick, 104 Minn. 331, 117 N. W. 441; S. *v.* Hanlon, 38 Mont. 557, 100 P. 1035.

153-64 Marsh *v.* S., 54 Tex. Cr. 144, 112 S. W. 320.

Admissions by silence, see vol. 1, p. 367, et seq; vol. 3, p. 148; and infra, this volume, for matter supplementary thereto.

153-66 Larrance *v.* P., 222 Ill. 155, 78 N. E. 50; Ranken *v.* Donovan, 115 App. Div. 651, 100 N. Y. S. 1049; Huebner *v.* Roosevelt, 7 Daly (N. Y.) 111.

Witness not subpoenaed on previous hearing may not be questioned. Spring *v.* Perkins, 156 Mich. 327, 120 N. W. 807.

154-67 Lanigan *v.* Neely, 4 Cal. App. 760, 89 P. 441; S. *v.* Armstrong, 118 La. 480, 43 S. 57; Kelley *v.* Boston, 201 Mass. 86, 87 N. E. 494; Henderson *v.* S., 50 Tex. Cr. 604, 101 S. W. 208; Gulf, etc. R. Co. *v.* Matthews, 100 Tex. 63, 93 S. W. 1068 (important case). See Patterson *v.* S. (Ala. App.), 62 S. 1023.

Other circumstances than the silence of witness may be shown to give emphasis to the significance of his silence. Gulf, etc. R. Co. *v.* Matthews, supra.

155-68 Barbee *v.* S., 50 Tex. Cr. 426, 97 S. W. 1058.

155-69 Parham *v.* S., 147 Ala. 57, 42 S. 1 (silence of witness as grand juror); Cramer *v.* Harmon, 126 Mo. App. 54, 103 S. W. 1086.

Silence of accused on former trials may be shown on a third trial. Sanders *v.* S., 52 Tex. Cr. 156, 105 S. W 803.

156-70 Noel *v.* S., 161 Ala. 25, 49 S. 824 (failure to offer to testify at inquest, unimportant); Larrance *v.* P., 222 Ill. 155, 78 N. E. 50; Chicago C. R. Co. *v.* Rohe, 118 Ill. App. 322 (immaterial plaintiff not called upon to testify in suit by another party arising out of same act of negligence); Newman *v.* C., 28 Ky. L. R. 81, 88 S. W. 1089 (silence on application for bail); Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694; Ripley *v.* S., 58 Tex. Cr. 489, 126 S. W. 586.

Refusal to testify on advice of attorney because testimony might incriminate, cannot be shown. Garrett *v.* Co., 219 Mo. 65, 118 S. W. 68.

156-71 Gulf, etc. R. Co. *v.* Matthews, 100 Tex. 63, 93 S. W. 1068. See Patterson *v.* S. (Ala. App.), 62 S. 1024.

156-72 Crossland *v.* S., 77 Ark. 514, 92 S. W. 776; Cramer *v.* Harmon, supra.

156-73 Henderson *v.* S., 50 Tex. Cr. 604, 101 S. W. 208; Gulf, etc. R. Co. *v.* Matthews, 100 Tex. 63, 93 S. W. 1068.

157-78 See Noel *v.* S., 161 Ala. 25, 49 S. 824.

157-82 Wyman *v.* R. Co., 158 Fed. 957, 86 C. C. A. 161; Patterson *v.* S., 156 Ala. 62, 47 S. 52; Carwile *v.* S., 148 Ala. 576, 39 S. 220; Williams *v.* S., 123 Ala. 39, 26 S. 521; S. *v.* Suber, 82 S. C. 159, 63 S. E. 684; Ferguson *v.* S., 57 Tex. Cr. 205, 122 S. W. 551.

Rule witness may not testify of his intent, reason or motive is set aside when impeachment is attempted by proof of his contradictory acts, statements and conduct. Carwile *v.* S., 148 Ala. 576, 39 S. 220; Williams *v.* S., 123 Ala. 39, 26 S. 521.

158-83 Corroboration may be by proof of previous consistent claims and statements made before their effect could be anticipated. National C. Co. *v.* Alexander, 75 Kan. 537, 89 P. 923; Stirn *v.* Nelson, 65 Kan. 419, 70 P. 355.

158-87 San Antonio *v.* Wildenstein (Tex. Civ.), 109 S. W. 231.

158-89 Notice of purpose to impeach non-resident witness need not be given St. Louis S. R. Co. *v.* Garber, 51 Tex. Civ. 70, 111 S. W. 227.

158-90 S. *v.* Hayden, 131 Ia. 1, 107 N. W. 929; Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639; Craft *v.* Barron, 121 Ky. 129, 88 S. W. 1099.

159-91 Alexander *v.* Hill, 32 Ky. L. R. 1117, 108 S. W. 225.

159-94 Reputation of accused cannot be proved by what was said of him subsequent to commission of offense. Powers *v.* S., 117 Tenn. 363, 97 S. W. 815.

For the purpose of impeachment, and for no other purpose. McGuire *v.* S., 3 Ala. App. 40, 57 S. 60.

159-95 Craft *v.* Barron, 121 Ky. 129, 88 S. W. 1099; S. *v.* Bryant, 97 Minn. 8, 105 N. W. 974. No presumption as to change of character. Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639.

160-97 Cline *v.* Waters, 28 Ky. L. R. 679, 90 S. W. 231 (inquiry as to immoral conduct fifteen or twenty years before properly excluded); Warren *v.* C., 99 Ky. 370, 35 S. W. 1028; S. *v.* Meehan, 86 Vt. 246, 84 A. 862.

160-99 But see vol. 3, p. 27.

161-1 Reaves *v.* S., 158 Ala. 5, 48 S. 373; Gabbard *v.* C. (Ky.), 167 S. W. 942.

161-2 S. *v.* Fitch (Mo. App.), 166 S. W. 639. See St. Louis S. R. Co. *v.* Garber, 51 Tex. Civ. 70, 111 S. W. 227; vol. 3, p. 27, n. 71 and supplement thereto.

163-4 Craft *v.* Barron, 121 Ky. 129, 88 S. W. 1099; P. *v.* Mix, 149 Mich. 260, 112 N. W. 907; Norwood *v.* Andrews, 71 Miss. 641, 16 S. 262.

The reputation formed 4 or 5 years before trial in another place is not incompetent. Clark *v.* Hendricks (Tex. Civ.), 164 S. W. 57. See vol. 3, p. 28, n. 83 and supplement thereto.

164-7 S. *v.* Bryant, 97 Minn. 8, 105 N. W. 974; Justiss *v.* S., 57 Tex. Cr. 218, 123 S. W. 413.

164-8 Winn *v.* S., 54 Tex. Cr. 538, 113 S. W. 918; Hull *v.* S., 50 Tex. Cr. 607, 100 S. W. 403 (four years not too remote); Ware *v.* S., 49 Tex. Cr. 413; 92 S. W. 1093 (twenty years too remote).

164-9 Busby *v.* S. (Okla. Cr.), 136 P. 598.

165-11 S. *v.* Pugh, 75 Kan. 792, 90 P. 242; S. *v.* Abbott, 65 Kan. 139, 69 P. 160.

165-12 Louisville & N. R. Co. *v.* Stanley (Ala.), 65 S. 39. See Magness *v.* S. (Miss.), 63 S. 352; Burnaman *v.* S. (Tex. Cr.), 159 S. W. 244, 46 L. R. A. (N. S.) 1001, 1002 n.

165-13 Smith *v.* S. (Ala.), 62 S. 864; P. *v.* Yee Foo, 4 Cal. App. 730, 89 P. 450; Parker *v.* S., 11 Ga. App. 251, 75 S. E. 437; S. *v.* Koller, 129 Ia. 111, 105 N. W. 391; S. *v.* Darling, 202 Mo. 150, 100 S. W. 631; Richards *v.* Osborne (Tex. Civ.), 164 S. W. 392; Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156 (effort to conceal materiality of testimony). See Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156, question of bribery is collateral, defendant not being connected with it.

166-14 Routledge *v.* Co. (Tex. Civ.), 95 S. W. 749.

166-15 Livingston *v.* S., 7 Ala. App. 43, 61 S. 54. See Daniels *v.* Stock, 23 Colo. App. 529, 130 P. 1031.

167-18 Clancy *v.* Co., 192 Mo. 615, 91 S. W. 509.

167-20 Witness who has explained variant testimony may be shown to have been arrested on a charge of being the guilty party. Snyder *v.* S., 145 Ala. 33, 40 S. 978.

Proof that witness predicted commission of offense not competent. Woodward *v.* S., 50 Tex. Cr. 294, 97 S. W. 499.

Experiments at scene of crime may be proved. Van Wyk *v.* P., 45 Colo. 1, 99 P. 1009.

167-21 S. *v.* Darling, 202 Mo. 150, 100 S. W. 631; Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156. See Burnaman *v.* S. (Tex. Cr.), 159 S. W. 244, 46 L. R. A. (N. S.) 1001 n.

Impeaching testimony going back eleven years not admissible in cross-examination especially where the state makes no effort to prove the facts. C. *v.* Croson (Pa.), 89 A. 821. See vol. 3, p. 30, n. 91, and supplement thereto.

168-22 P. *v.* Yee Foo, 4 Cal. App. 730, 89 P. 450; S. *v.* Darling, 202 Mo. 150, 100 S. W. 631; Schuster *v.* S., 80 Wis. 107, 49 N. W. 30.

See Burnaman *v.* S. (Tex. Cr.), 159 S. W. 244, 46 L. R. A. (N. S.) 1001, 1002 n.

168-25 Kokoshkey *v.* R. Co., 162 Ill. App. 613.

168-26 St. Louis S. R. Co. *v.* Bryson, 41 Tex. Civ. 245, 91 S. W. 829.

169-27 Miller *v.* Ty., 149 Fed. 330, 79 C. C. A. 268; Shotts *v.* McKinney, 39 Ind. App. 101, 79 N. E. 219; S. *v.* Howard, 120 La. 311, 45 S. 260; S. *v.* Nibarger, 255 Mo. 289, 164 S. W. 453; S. *v.* Grubb, 201 Mo. 585, 99 S. W. 1083 (may not be shown by express testimony witness is a dead beat); S. *v.* Richardson, 194 Mo. 326, 92 S. W. 649; Clardy *v.* S. (Tex. Cr.), 147 S. W. 568; Earles *v.* S., 64 Tex. Cr. 537, 142 S. W. 1181; Hazard *v.* Assn., 54 Tex. Civ. 110, 116 S. W. 625.

See Taber *v.* Eyler (Tex. Civ.), 162 S. W. 490.

170-28 S. *v.* Gregory, 148 Ia. 152, 126 N. W. 1109; Miller *v.* Ty., supra; S. *v.* Barnett, 203 Mo. 640, 102 S. W. 506; Justiss *v.* S., 57 Tex. Cr. 218, 123 S. W. 413 (previous fights, irrelevant).

Witness should be asked if he did the acts but not if he had been charged with them. Miller *v.* Journal Co., 246 Mo. 722, 152 S. W. 40.

170-29 In re Durant, 80 Conn. 140, 67 A. 497; Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804; S. *v.* Grove, 61 W. Va. 697, 57 S. E. 296.

170-30 Keith *v.* S., 127 Tenn. 40, 152 S. W. 1029; Capshaw *v.* S. (Tex. Cr.), 166 S. W. 737; Wilson *v.* S. (Tex. Cr.), 160 S. W. 967. See vol. 3, p. 759, n. 33; vol. 7, p. 177, n. 41, and supplement thereto.

Even though the offenses did not involve moral turpitude. Williamson *v.* S. (Tex. Cr.), 167 S. W. 360.

In Texas witnesses in civil cases cannot be asked concerning discreditable acts having no material bearing upon the issues. Moody *v.* Rowland, 46 Tex. Civ. 412, 102 S. W. 911. It may be shown witness who has assumed responsibility for a crime fabricated his testimony as a defense for accused. Carnes *v.* S., 51 Tex. Cr. 437, 103 S. W. 403.

There have been conflicting decisions on the point stated in the text. Recently the supreme court has declared the rule originally favored—inquiry should be confined to witness' general reputation for truth and should not extend to general moral character. Missouri, etc. R. Co. *v.* Creason, 101 Tex. 335, 107 S. W. 527. Witness cannot be asked if he is a deserter. Gulf, etc. R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151.

171-31 S. *v.* Pugh, 75 Kan. 792, 90 P. 242; Newton *v.* C., 31 Ky. L. R. 327, 102 S. W. 264; P. *v.* Williams, 159 Mich. 518, 124 N. W. 555; S. *v.* Oliphant, 128 Mo. App. 252, 107 S. W. 32. See S. *v.* Jones (Wash.), 142 P. 35. *Contra,* Cincinnati, etc. R. Co. *v.* Ashurst (Ky.), 124 S. W. 303; Missouri, etc. R. Co. *v.* Adams (Tex. Civ.), 114 S. W. 453.

"It appears from the record that the witness Carter had not been indicted in regard to any of the matters inquired about, and no complaint filed against him. In the case of Ware *v.* State, 36 Tex. Cr. R. 599, 38 S. W. 198, and Barkman *v.* State, 41 Tex. Cr. R. 105, 52 S. W. 73, it was held: 'The witness never having been indicted or under legal accusation for said offenses, it was not competent evidence to impeach him.' For a full discussion of this question and a citation of authorities,

see Wright *v.* State, 140 S. W. 1105. The testimony was not admissible, and the court did not err in excluding it." Grant *v.* S. (Tex. Cr.), 148 S. W. 760.

172-32 Cook *v.* S. (Ark.), 160 S. W. 223; Winn *v.* Woodmen, 138 Mo. App. 701, 119 S. W. 536. But see Alabama etc. Co. *v.* Thornhill (Miss.), 63 S. 674. *Contra,* Justiss *v.* S. (Tex. Cr.), 123 S. W. 413.

172-33 Filasto *v.* U. S., 211 Fed. 329, 127 C. C. A. 578; Ellis *v.* S., 56 Tex. Cr. 14, 117 S. W. 978.

Twenty years ago too remote.—Boyette *v.* S. (Tex. Cr.), 162 S. W. 872.

Keeping bawdy house cannot be singled out. Huckabaa *v.* S., 4 Ala. App. 68, 58 S. 684.

173-34 Cook *v.* S. (Ark.), 160 S. W. 223; Ware *v.* S., 91 Ark. 555, 121 S. W. 927; Sitton *v.* Grand Lodge, 84 Mo. App. 208; S. *v.* Sibley, 132 Mo. 102, 33 S. W. 167, 53 Am. St. 477; York *v.* Everton, 121 Mo. App. 640, 97 S. W. 604; P. *v.* Fiori, 123 App. Div. 174, 108 N. Y. S. 416. But see Ballard *v.* S. (Tex. Cr.), 160 S. W. 716. *Contra,* Foote *v.* S. (Tex. Cr.), 144 S. W. 275.

173-35 Swint *v.* S., 154 Ala. 46, 45 S. 901; Ware *v.* S., 91 Ark. 555, 121 S. W. 927; Casavan *v.* Sage, 201 Mass. 547, 87 N. E. 893; Wendling *v.* Bowden, 252 Mo. 647, 161 S. W. 774; Miller *v.* Journal Co., 246 Mo. 722, 152 S. W. 40; S. *v.* Sassaman, 214 Mo. 695, 114 S. W. 599; Opper *v.* Davega, 126 App. Div. 941, 111 N. Y. S. 521; Edwards *v.* Price, 162 N. C. 243, 78 S. E. 145; Missouri, etc. R. Co. *v.* Bailey, 53 Tex. Civ. 295, 115 S. W. 601. See vol. 3, p. 760, n. 34, and supplement thereto.

"In the examination of H., it appeared that after D went away, and before the bankruptcy officials took possession, H. was in charge of the store, practically as agent for D., and on H's cross-examination there were intimations or efforts to show that he had not faithfully accounted to any one for the proceeds received, and, in effect, that he had embezzled such proceeds. This had no direct bearing on the issue, but was in the nature of an attack on his credibility. Later, D put on a witness and sought to prove the amount of money which had thus come into H's possession. The court excluded the evidence. This ruling was right. H's credibility as a witness could not be tried by raising and trying an independent issue as to his honesty, his interest or his motives." Daniels *v.* U. S., 196 Fed. 459, 116 C. C. A. 233.

175-36 Miller *v.* Journal Co., 246 Mo. 722, 152 S. W. 40.

176-37 Mo. etc. R. Co. *v.* Hailey (Tex. Civ.), 156 S. W. 1119. See Miller *v.* Journal Co., 246 Mo. 722, 152 S. W. 40; S. *v.* Knox (S. C.), 82 S. E. 278; vol. 3, p. 4, n. 4, and supplement thereto.

177-38 Nashville I. R. Co. *v.* Barnum, 212 Fed. 634, (C. C. A.); Miller *v.* Ty., 149 Fed. 330, 79 C. C. A. 268 (possession of stolen property); Nelson *v.* S. (Ala. App.), 65 S. 844; Perry *v.* S., 149 Ala. 40, 43 S. 18; P. *v.* Cramley (Cal. App.), 138 P. 123; In re Gird's Est., 157 Cal. 534, 108 P. 499; Baker *v.* S., 51 Fla. 1, 40 S. 673; Mercer *v.* S., 40 Fla. 216, 24 S. 174, 74 Am. St. 135, Adkinson *v.* S., 48 Fla. 1, 37 S. 522; Sullivan *v.* C., 158 Ky. 536, 165 S. W. 696; Louisville & N. R. Co. *v.* Sealf, 155 Ky. 273, 159 S. W. 811; S. *v.* Baudoin, 115 La. 837, 40 S. 239; S. *v.* Romero, 117 La. 1103, 42 S. 482; Richardson *v.* S., 103 Md. 112, 63 A. 317; Davis *v.* S., 87 Miss. 337, 39 S. 522; S. *v.* Burgess (Mo.), 168 S. W. 740; S. *v.* Hyder (Mo.), 167 S. W. 521; S. *v.* Jones, 48 Mont. 505, 139 P. 441; S. *v.* Crowe, 39 Mont. 174, 102 P. 379; Trustees, etc. *v.* Mebane, 165 N. C. 644, 81 S. E. 1020; S. *v.* Arnold, 146 N. C. 602, 60 S. E. 504; S. *v.* Hairston, 121 N. C. 579, 28 S. E. 492; S. *v.* Bullard, 100 N. C. 486, 6 S. E. 191; Nixon *v.* McKinney, 105 N. C. 23, 11 S. E. 154; Litchfield *v.* S., 8 Okla. Cr. 164, 126 P. 707; Redsecker *v.* Wade (Or.), 138 P. 485; S. *v.* White, 48 Or. 416, 87 P. 137; Launikitas *v.* Tract. Co., 241 Pa. 458, 88 A. 703; Willis *v.* S. (Tex. Cr.), 167 S. W. 352; Qualls *v.* S. (Tex. Cr.), 165 S. W. 202; Phillips *v.* S. (Tex. Cr.), 164 S. W. 1004; Ballard *v.* S. (Tex. Cr.), 160 S. W. 716; Mares *v.* S. (Tex. Cr.), 158 S. W. 1130; Hall *v.* S. (Tex. Cr.), 158 S. W. 272; San Antonio *v.* Wildenstein (Tex. Civ.), 109 S. W. 231; S. *v.* Stimpson, 78 Vt. 124, 62 A. 14, 1 L. R. A. (N. S.) 1153; Bowman *v.* Bank, 115 Va. 463, 80 S. E. 95; Bringgold *v.* Bringgold, 40 Wash. 121, 82 P. 179.

See Sacks *v.* U. S., 41 App. Cas. (D. C.) 34; Gullatt *v.* S. (Ga. App.), 80 S. E. 340; Capshaw *v.* S. (Tex. Cr.), 166 S. W. 737.

177-39 Hensley *v.* C., 31 Ky. L. R. 386, 102 S. W. 268 (code provides wit-

ness cannot be impeached by particular wrongful acts, except it may be shown he has been convicted of a felony); Britton *v.* C., 123 Ky. 411, 96 S. W. 556 (killing in another state from which witness fled to avoid arrest).

And so in Texas.—Missouri, etc. R. Co. *v.* Adams (Tex. Civ.), 114 S. W. 453.

177-40 Not proper to ask witness concerning his associates. Miller *v.* Ty., supra.

So in Oklahoma.—Crawford *v.* Ferguson, 5 Okla. Cr. 377, 115 P. 278.

177-41 Rhea *v.* S., 104 Ark. 162, 147 S. W. 463; Shotts *v.* McKinney, 39 Ind. App. 101, 79 N. E. 219; S. *v.* Caron, 118 La. 349, 42 S. 960 (course of conduct); P. *v.* Cascone, 185 N. Y. 317, 78 N. E. 287; Williamson *v.* S. (Tex. Cr.), 167 S. W. 360; Wilson *v.* S. (Tex. Cr.), 160 S. W. 967. See vol. 3, p. 759, n. 33; vol. 7, p. 170, n. 30 and supplement thereto.

178-42 Benton *v.* S., 78 Ark. 284, 94 S. W. 688 (defendant may be asked if he had not married a negress); Shotts *v.* McKinney, 39 Ind. App. 101, 79 N. E. 219; Greer *v.* R. Co., 193 Mass. 246, 79 N. E. 267; Robinson *v.* R. Co., 189 Mass. 594, 76 N. E. 190; Wendling *v.* Bowden, 252 Mo. 647, 161 S. W. 774; Miller *v.* Journal Co., 246 Mo. 722, 152 S. W. 40; Robinson *v.* S., 143 Wis. 205, 126 N. W. 750. And see Tollifson *v.* P., 49 Colo. 219, 112 P. 794; Stewart *v.* Stewart, 175 Ind. 412, 94 N. E. 564; Ward *v.* Meeds, 114 Minn. 18, 130 N. W. 2.

Discretion reviewable.—P. *v.* Fiori, 123 App. Div. 174, 108 N. Y. S. 416; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237.

180-47 Powers *v.* S., 117 Tenn. 363, 97 S. W. 815; Jones *v.* S., 51 Tex. Cr. 472, 101 S. W. 993.

180-48 Ballard *v.* S. (Tex. Civ.), 160 S. W. 716. *Contra*, S. *v.* Fleetwood, 111 Minn. 70, 126 N. W. 485.

180-49 See Valigura *v.* S. (Tex. Cr.), 153 S. W. 856.

181-51 Link *v.* S. (Tex. Cr.), 164 S. W. 987.

181-52 S. *v.* Hasty, 76 S. C. 105, 56 S. E. 669; Greenville *v.* Spencer, 77 S. C. 50, 57 S. E. 638; Wallen *v.* Wallen, 107 Va. 131, 57 S. E. 596.

182-53 S. *v.* Crowe, 39 Mont. 174, 102 P. 579; Link *v.* S. (Tex. Cr.), 164 S. W. 987.

182-54 Clinton *v.* S., 56 Fla. 57, 47 S. 389, inquiry as to violation of statute not involving moral turpitude.

Disposition of criminal charge by court or grand jury, in absence of admission, not competent against officer who made arrest to impeach his testimony in respect to guilt of party arrested. P. *v.* Way, 119 App. Div. 344, 104 N. Y. S. 277.

183-58 P. *v.* Ryder, 151 Mich. 187, 114 N. W. 1021; Douglass *v.* S. (Tex. Cr.), 98 S. W. 840; Griffin *v.* S., 26 Tex. App. 157, 9 S. W. 459, 8 Am. St. 460; Stockholm *v.* S., 24 Tex. App. 598, 7 S. W. 338; Duffy *v.* Radke, 138 Wis. 38, 119 N. W. 811.

But if witness testifying to bad reputation says he would believe him on oath under some conditions, court may exclude testimony. Dent *v.* S. (Ga. App.), 80 S. E. 548.

Question must not be put so as to call for opinion of truth of testimony given at trial by person whom it is sought to impeach. Maloy *v.* S., 52 Fla. 101, 41 S. 791.

185-62 Hughes *v.* S., 152 Ala. 5, 44 S. 694; Holmes *v.* S., 88 Ala. 26, 7 S. 193, 16 Am. St. 17; Mitchell *v.* S., 148 Ala. 618, 42 S. 1014; P. *v.* Van Zile, 159 App. Div. 61, 144 N. Y. S. 287; Irvin *v.* Johnson, 56 Tex. Civ. 492, 120 S. W. 1085; Douglass *v.* S. (Tex. Cr.), 98 S. W. 840; Duffy *v.* Radke, 138 Wis. 38, 119 N. W. 811.

186-63 Hughes *v.* S.; Holmes *v.* S., supra; Carter *v.* S., 145 Ala. 679, 40 S. 82; S. *v.* Rester, 116 La. 985, 41 S. 231; Wolff *v.* Co., 42 Tex. Civ. 30, 94 S. W. 1062; McQuiggan *v.* Ladd, 79 Vt. 90, 64 A. 503.

Knowledge of sustaining witness concerning character of assailed witness may be tested by asking if he had heard of accusations against latter inconsistent with testimony concerning him. Williams *v.* S., 144 Ala. 14, 40 S. 405; P. *v.* Weber, 149 Cal. 325, 86 P. 671.

Form of question must not be such as to prejudice assailed witness. P. *v.* Weber, supra.

186-65 S. *v.* Blackburn (Ia.), 110 N. W. 275; S. *v.* Rester, 116 La. 985, 41 S. 231; Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78, 94; P. *v.* Van Zile, 159 App. Div. 61, 144 N. Y. S. 287.

187-66 Spotswood *v.* Spotswood, 4 Cal. App. 711, 89 P. 362, testimony based on personal knowledge.

187-67 Poe *v.* Poe, 93 Ark. 426, 124 S. W. 1029.

Reports heard of defendant after commission of offense cannot be shown. Powers *v.* S., 117 Tenn. 363, 97 S. W. 815.

188-72 "It is competent to ask a witness if he thinks he knows the general character of a witness who has been previously examined." Collins *v.* S., 3 Ala. App. 64, 58 S. 80.

Example of improper question.—Edgar *v.* S., 59 Tex. Cr. 491, 129 S. W. 141.

189-74 Edgar *v.* S., 59 Tex. Cr. 491, 129 S. W. 141.

190-75 S. *v.* Blackburn (Ia.), 110 N. W. 275; S. *v.* Haupt, 126 Ia. 152, 101 N. W. 739. See Gordon *v.* Gilmer, 141 Ga. 347, 80 S. E. 1007.

191-79 S. *v.* Trego, 25 Ida. 625, 138 P. 1124; Hunt *v.* R. Co. (Ia.), 141 N. W. 334, *citing* 7 ENCYC. OF EV. 191, 195; Sullivan *v.* C., 158 Ky. 536, 165 S. W. 696; Louisville & N. R. Co. *v.* Scalf, 155 Ky. 273, 159 S. W. 804; Litchfield *v.* S., 8 Okla. Cr. 164, 126 P. 707; S. *v.* Knox (S. C.), 82 S. E. 278. See S. *v.* Burgess (Mo.), 168 S. W. 740.

193-81 Hunt *v.* R. Co. (Ia.), 141 N. W. 334, *citing* 7 ENCYC. OF EV. 191, 195; Sullivan *v.* C., 158 Ky. 536, 165 S. W. 696; Louisville & N. R. Co. *v.* Scalf, 155 Ky. 273, 159 S. W. 804; S. *v.* Wellman, 253 Mo. 302, 161 S. W. 795; S. *v.* Beckner, 194 Mo. 281, 91 S. W. 892; Redseeker *v.* Wade (Or.), 138 P. 485; Powers *v.* S., 117 Tenn. 363, 97 S. W. 815; Dungan *v.* S., 135 Wis. 151, 115 N. W. 350.

McGuire *v.* **S.**, 3 Ala. App. 40, 57 S. 60, when the court refused to limit the testimony to the subject of his general bad character for truth and veracity.

195-83 Litchfield *v.* S., 8 Okla. Cr. 164, 126 P. 707; McIntosh *v.* McNair, 53 Or. 87, 99 P. 74; S. *v.* Knox (S. C.), 82 S. E. 278.

In McDonald *v.* **Humphries** (Tex. Civ.), 146 S. W. 712, on cross-examination Brown was asked whether he (the witness) was not under indictment on a charge of swindling for more than $50. The court said: "We think it is authoritatively established by the case of Railway *v.* Creason, 101 Tex. 335, 107 S. W. 528, that the admission of this testimony was error. This seems to be held upon the ground that, for the purposes of impeachment, testimony must be confined to information relevant to the issue of the credibility of the witness. It was held in that case not relevant to the credibility of the witness to inquire whether he had been indicted for arson, and the statement is made in that case that such inquiries should be confined to the general reputation for truth, and should not extend to the general moral character."

196-84 Reputation for breaking particular law inadmissible. S. *v.* Wellman, 253 Mo. 302, 161 S. W. 795.

197-85 S. *v.* Christopher, 134 Mo. App. 6, 114 S. W. 549.

197-86 S. *v.* Trego, 25 Ida. 625, 138 P. 1124.

198-87 Edenfield *v.* S. (Ga. App.), 81 S. E. 253; Cutchin *v.* City, 113 Va. 452, 74 S. E. 403. *Comp.* Edwards *v.* Price, 162 N. C. 243, 78 S. E. 145.

Permitted.—S. *v.* Wellman, 253 Mo. 302, 161 S. W. 795.

Reputation as to guilt of analagous offenses admissible. S. *v.* Chinn, 169 Mo. App. 38, 154 S. W. 805. But see Sasser *v.* S. (Tex. Cr.), 166 S. W. 1160.

199-88 Young *v.* Corrigan, 208 Fed. 431; Hunt *v.* R. Co. (Ia.), 141 N. W. 334. See Edwards *v.* Price, 162 N. C. 243, 78 S. E. 145.

Witness may qualify answer and state he knows reputation only in certain localities. Edwards *v.* Price, 162 N. C. 243, 78 S. E. 145.

200-89 In re Brown's Will, 143 Ia. 649, 120 N. W. 667.

200-90 Baer *v.* Co., 159 Ala. 491, 49 S. 92 (business residence); Banker *v.* Ford, 152 Ill. App. 12.

202-1 Ft. Worth, etc. Co. *v.* Cabell (Tex. Civ.), 161 S. W. 1083.

204-7 Divorce for adultery inadmissible.—Knight *v.* S. (Tex. Cr.), 147 S. W. 268.

Judgment of insanity admissible to impeach. Mason *v.* S. (Tex. Cr.), 168 S. W. 115.

204-10 In re Thorman's Est. (Ia.), 144 N. W. 7.

205 Improper to ask witness regarding indictment, etc., against him, when it is known there was none in fact, merely to arouse prejudice. Capshaw *v.* S. (Tex. Cr.), 166 S. W. 737.

205-17 Charge of court to jury submitting issue of insanity inadmissible. Caton *v.* S. (Tex. Cr.), 147 S. W. 590.

Violations of state law only are admissible. Swope *v.* S., 4 Ala. App. 83, 58 S. 809.

206-18 Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689.

Guilt cannot be inquired into of itself. Goad *v.* S., 52 Tex. Cr. 444, 108 S. W. 680.

206-19 P. *v.* Weiss, 129 App. Div. 671, 114 N. Y. S. 236.

Not competent to show witness partially served sentence of imprisonment. Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493.

206-20 Remoteness of time may make evidence inadmissible. Deckard *v.* S., 57 Tex. Cr. 359, 123 S. W. 417.

206-21 Benson *v.* S., 103 Ark. 87, 145 S. W. 883; Smith *v.* S., 79 Ark. 25, 94 S. W. 918; Pease *v.* S. (Tex. Cr.), 155 S. W. 657; Keeton *v.* S., 59 Tex. Cr. 316, 128 S. W. 404 (if offense involves moral turpitude); Goad *v.* S., 52 Tex. Cr. 444, 108 S. W. 680; Price *v.* S. (Tex. Cr.), 147 S. W. 243; Hunter *v.* S., 59 Tex. Cr. 439, 129 S. W. 125; Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804; Turman *v.* S., 50 Tex. Cr. 7, 95 S. W. 533; Childress *v.* S., 48 Tex. Cr. 617, 90 S. W. 30. *Contra,* S. *v.* Barrett, 117 La. 1086, 42 S. 513, *disap.* local cases.

Not indictment for misdemeanor.— Johnson *v.* S. (Tex. Cr.), 149 S. W. 165.

Indictment against witness by jury which indicted defendant is admissible against former on trial of latter for the identical offense. Hayes *v.* S., 126 Ga. 95, 54 S. E. 809. Indictment must be shown to have been founded on same transaction. It must also be shown witness knew of its existence, if that be the fact. Riggins *v.* R. Co. (Tex.), 118 S. W. 125.

207-22 Musgraves *v.* S., 3 Okla. Cr. 421, 106 P. 544; Goad *v.* S., 52 Tex. Cr. 444, 108 S. W. 680; Willis *v.* S., 49 Tex. Cr. 139, 90 S. W. 1100.

Informal accusation is not provable. Wade *v.* S., 48 Tex. Cr. 512, 90 S. W. 503.

Attorney for witness who has been indicted may not testify charges were groundless. Howard *v.* S., 53 Tex. Cr. 378, 111 S. W. 1038.

207-23 Glover *v.* U. S., 147 Fed. 426, 77 C. C. A. 450; Campbell *v.* S. (Ala.), 62 S. 57; Watson *v.* S., 155 Ala. 9, 46 S. 232; Alexander *v.* Vaughan, 106 Ark. 438, 153 S. W. 594; Kincaid *v.* Price, 82 Ark. 20, 100 S. W. 76; Kansas City S. R. Co. *v.* Belknap, 80 Ark. 587, 98 S. W. 366; Stanley *v.* Ins. Co., 70 Ark. 107, 66 S. W. 432; Benton *v.* S., 78 Ark. 284, 94 S. W. 688; Dotterer *v.* S., supra; Sullivan *v.* C., 158 Ky. 536, 165 S. W. 696; S. *v.* Barrett, 117 La. 1086, 42 S. 513; Starling *v.* S., 89 Miss. 328, 42 S. 798 (statute provides for proof of "conviction"); S. *v.* Wigger, 196 Mo. 90, 93 S. W. 390 (statute provides for proof of conviction only); P. *v.* Morrison, 195 N. Y. 116, 88 N. E. 21; P. *v.* Cascone, 185 N. Y. 317, 78 N. E. 287; Nelson *v.* S., 3 Okla. Cr. 468, 106 P. 647; West. Assur. Co. *v.* Hillyer, etc. Co. (Tex. Civ.), 167 S. W. 816; Diseren *v.* S., 59 Tex. Cr. 149, 127 S. W. 1038; Eads *v.* S., 17 Wyo. 490, 101 P. 946. See Harding *v.* Conlon, 159 App. Div. 441, 144 N. Y. S. 663; vol. 3, p. 762, n. 38, and supplement thereto.

208-24 S. *v.* Oien, 26 N. D. 552, 145 N. W. 424; S. *v.* Nyhus, 19 N. D. 326, 124 N. W. 71 (unless witness afforded opportunity to say whether or not he was guilty of offense for which arrested); Nelson *v.* S., 3 Okla. Cr. 468, 106 P. 647 (any offense); S. *v.* Sanderson, 83 Vt. 351, 75 A. 961.

Conviction and arrest may be included in same question. Koch *v.* S., 126 Wis. 470, 106 N. W. 531. No error by asking as to arrest if inquiry as to conviction immediately follows. Thornton *v.* S., 117 Wis. 338, 93 N. W. 1107.

209-25 Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126 (Alaska); Roden *v.* S., 3 Ala. App. 197, 58 S. 71; Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689; S. *v.* Manuel, 133 La. 571, 63 S. 174; S. *v.* Barrett, 117 La. 1086, 42 S. 513; S. *v.* Herlihy, 102 Me. 310, 66 A. 643; Totten *v.* Totten, 172 Mich. 565, 138 N. W. 257; P. *v.* Hoffman, 154 Mich. 145, 117 N. W. 568; P. *v.* Tubbs, 147 Mich. 1, 100 N. W. 132 (assault and battery); Williams *v.* S., 87 Miss. 373, 39 S. 1006; S. *v.* Banks (Mo.), 167 S. W. 505; S. *v.* Kennedy, 207 Mo. 528, 106 S. W. 57; S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235; S. *v.* Heusack, 189 Mo. 295, 88 S. W. 21; P. *v.* Callahan, 151 App. Div. 666, 136 N. Y. S. 407; S. *v.* Oien, 26 N. D. 552, 145 N. W. 424; Schnase *v.* Goetz, 18 N. D. 594, 120 N. W. 553; Busby *v.* S. (Okla. Cr.), 136 P. 598; Missouri R. Co. *v.* Johnson, 34 Okla. 582, 126 P. 567 (violation of prohibition law); Redsecker *v.* Wade (Or.), 138 P. 485; Triphonoff *v.* Sweeney, 65 Or. 299, 130 P. 979; C. *v.* Racco, 225 Pa. 113, 73 A. 1067; Barrell *v.* Dickinson, 82 Vt. 551, 74 A. 234; Koch *v.* S., 126 Wis. 470, 106 N. W. 531 ("criminal offense" includes misdemeanor, but not violation of ordinance).

See Harwell *v.* S. (Ala. App.), 65 S. 702.

Conviction of offense compelling confinement in house of reform. Williams *v.* C., 152 Ky. 610, 153 S. W. 961.

Particular crime may be shown.—McDaniel *v.* S., 8 Okla. Cr. 209, 127 P. 358.

Contempt of court, not criminal offense. Farrell *v.* Phillips, 140 Wis. 611, 123 N. W. 117.

Question as to conviction for drunkenness, not being limited as to locality, will be regarded as having reference to place in which there was no ordinance on the subject and where general law operative. Koch *v.* S., 126 Wis. 470, 106 N. W. 531.

210-26 Collins *v.* S., 3 Ala. App. 64, 58 S. 80; Gillman *v.* S, 165 Ala. 135, 51 S. 722 (violation of ordinance not within statute); Wheeler *v.* S., 4 Ga. App. 325, 61 S. E. 409; Genest *v.* Co., 75 N. H. 365, 74 A. 593; Perkins *v.* Baker (Okla.), 137 P. 661; Nelson *v.* S., 3 Okla. Cr. 468, 106 P. 647; Hamilton *v.* S. (Tex. Cr.), 168 S. W. 536; Harris *v.* S. (Tex. Cr.), 167 S. W. 43; Hightower *v.* S. (Tex. Cr.), 165 S. W. 184 (selling intoxicating liquor not an offense involving moral turpitude); Bogue *v.* S. (Tex. Cr.), 155 S. W. 943; Goodwin *v.* S., 58 Tex. Cr. 496, 126 S. W. 582; Sue *v.* S., 52 Tex. Cr. 122, 105 S. W. 804; Pollok *v.* S. (Tex. Cr.), 101 S. W. 231; Williams *v.* S., 51 Tex. Cr. 361, 102 S. W. 1134; Turman *v.* S., 50 Tex. Cr. 7, 95 S. W. 533; Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493 (indictment in two counts dismissed as to felony, conviction as to misdemeanor); Eads *v.* S., 17 Wyo. 490, 101 P. 946.

See Edenfield *v.* S. (Ga. App.), 81 S. E. 253; Coker *v.* S. (Tex. Cr.), 160 S. W. 366.

Immaterial to show how many times he paid fines. Willis *v.* S. (Tex. Cr.), 167 S. W. 352.

Vagrancy.—Duty to show under what section of statute, witness pleaded guilty before plea is admissible. Bowman *v.* S. (Tex. Cr.), 164 S. W. 846.

Conviction of felony.—Rollings *v.* S., 160 Ala. 82, 49 S. 329.

211-27 P. *v.* McGee (Cal. App.), 141 P. 1055; P. *v.* Rader (Cal. App.), 141 P. 958; P. *v.* Eldridge, 147 Cal. 782, 82 P. 442; Kennedy *v.* Lee, 147 Cal. 596, 82 P. 257 (foreign judgment inadmissible unless it shows conviction of felony); P. *v.* Gray, 148 Cal. 507, 83 P. 707; P. *v.* Martini, 21 Cal. App. 743, 132 P. 1069; P. *v.* Newman, 261 Ill. 11, 103 N. E. 589; In re Thorman's Est. (Ia.), 144 N. W. 7; Hunt *v.* R. Co. (Ia.), 141 N. W. 334; Sullivan *v.* C., 158 Ky. 536, 165 S. W. 696; Hoskins *v.* Jackson, 155 Ky. 638, 160 S. W. 174; Louisville & N. R. Co. *v.* Scalf, 155 Ky. 273, 159 S. W. 804; Parson *v.* C., 33 Ky. L. R. 1051, 112 S. W. 617; Landy *v.* Moritz, 33 Ky. L. R. 223, 109 S. W. 897; Wells *v.* C., 30 Ky. L. R. 504, 99 S. W. 218; Pennington *v.* C., 21 Ky. L. R. 542, 51 S. W. 818; Hensley *v.* C., 25 Ky. L. R. 48, 74 S. W. 677; Ball *v.* C., 30 Ky. L. R. 600, 99 S. W. 326; S. *v.* Lawrence, 28 Nev. 440, 82 P. 614; Turner *v.* S. (Tex. Cr.), 160 S. W. 357 (if not too remote); O'Neal *v.* S. (Tex. Cr.), 146 S. W. 938. See Watson *v.* Co., 137 Ky. 619, 126 S. W. 146; C. *v.* Doe, 18 Pa. Dist. 611.

Name of felony may be proved by witness. P. *v.* Eldridge, 147 Cal. 782, 82 P. 442.

211-28 Harwell *v.* S. (Ala. App.), 65 S. 702; Mitchell *v.* S., 148 Ala. 618, 42 S. 1014; Smith *v.* S., 129 Ala. 89, 29 S. 669, 87 Am. St. 47; Williams *v.* S., 144 Ala. 14, 40 S. 405 (inquiry as to conviction in certain court too general); Fuller *v.* S., 147 Ala. 35, 41 S. 774 (statutory felony not a common law crime); Schuman *v.* S. (Ark.), 153 S. W. 611; Pioneer F.-P. Co. *v.* Clifford, 125 Ill. App. 352; Daxanbeklar *v.* P., 93 Ill. App. 553.

Have you been on chain gang is too general. Harwell *v.* S. (Ala. App.), 65 S. 702.

Record showing disbarment of witness as attorney is competent, charges of criminal conduct and finding being specific. Whipple *v.* R. Co., 143 Mich. 47, 106 N. W. 692. It is otherwise where charge not specific, though misconduct admitted and license surrendered. Dickinson *v.* Dustin, 21 Mich. 561.

213-29 Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493.

213-30 Simpson *v.* S. (Tex. Cr.), 154 S. W. 999.

214-32 Avery *v.* S., 121 Md. 229, 88 A. 148.

214-33 Totten *v.* Totten, 172 Mich. 565, 138 N. W. 257; Lamb *v.* S. (Tex. Cr.), 168 S. W. 534; Girtman *v.* S. (Tex. Cr.), 164 S. W. 1008; Ross *v.* S. (Tex.

Cr.), 163 S. W. 433; Thompson *v.* S. (Tex. Cr.), 160 S. W. 685; Turner *v.* S. (Tex. Cr.), 160 S. W. 357; Kaufman *v.* S. (Tex. Cr.), 159 S. W. 58; Asbeck *v.* S. (Tex. Cr.), 156 S. W. 925; Casey *v.* S., 51 Tex. Cr. 433, 102 S. W. 725 (indictment dismissed). See Capshaw *v.* S. (Tex. Cr.), 166 S. W. 737.

214-34 Ballard *v.* S. (Tex. Cr.), 160 S. W. 716; Miller *v.* S. (Tex. Cr.), 150 S. W. 635. See Abilene & S. R. Co. *v.* Burleson (Tex. Civ.), 157 S. W. 1177; Robinson *v.* S. (Tex. Cr.), 156 S. W. 212.

214-35 **Commission of crime** cannot be inquired about, but if witness answers in negative no harm results. S. *v.* Long, 201 Mo. 664, 100 S. W. 587.

Accusation of guilt cannot be proved Bain *v.* S., 38 Tex. Cr. 635, 44 S. W. 518; Caldwell *v.* S. (Tex. Cr.), 106 S. W. 343.

215-36 See Hoskins *v.* Jackson, 155 Ky. 638, 160 S. W. 174.

Must be crime involving moral turpitude.—Hightower *v.* S., 60 Tex. Cr. 109, 131 S. W. 324.

Violations of state law only, are admissible, not of municipal ordinances. Huckabaa *v.* S., 4 Ala. App. 68, 58 S. 684.

215-38 S. *v.* Herlihy, 102 Me. 310, 66 A. 643.

215-39 Burnett *v.* S. (Tex. Cr.), 165 S. W. 581; White *v.* S., 57 Tex. Cr. 196, 122 S. W. 391.

Witness who admits he pleaded guilty of one crime may be shown to have so pleaded to another. S. *v.* Forsha, 190 Mo. 296, 88 S. W. 746.

216-40 P. *v.* Van Zile, 159 App. Div. 61, 144 N. Y. S. 287; P. *v.* Van Zile, 80 Misc. 329, 141 N. Y. S. 168; Missouri, etc. R. Co. *v.* Adams (Tex. Civ.), 114 S. W. 453.

216-43 S. *v.* Dipley, 242 Mo. 461, 147 S. W. 111.

Prior convictions of witness who testifies he committed crime for which defendant being tried may be shown though witness subsequently acquitted. Early *v.* S., 56 Tex. Cr. 492, 120 S. W. 431.

216-45 S. *v.* Heusack, 189 Mo. 295, 88 S. W. 21.

Thirty years before too remote. Gardner *v.* S., 55 Tex. Cr. 400, 117 S. W. 148. And twenty-four years. White *v.* S., 57 Tex. Cr. 196, 122 S. W. 391. Twenty years. Richards *v.* S., 55 Tex. Cr. 278, 116 S. W. 587. Eleven years. Waddle *v.* S. (Tex. Cr.), 165 S. W. 591. Nine years not too remote. Lane *v.* S. (Tex. Cr.), 164 S. W. 378. Thirteen years, having been pardoned. Vick *v.* S. (Tex. Cr.), 159 S. W. 50. Eighteen years. Turner *v.* S. (Tex. Cr.), 160 S. W. 357. Twenty-three years. McGill *v.* S. (Tex. Cr.), 160 S. W. 353. See Brown *v.* S., 56 Tex. Cr. 389, 120 S. W. 444.

216-46 Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126 (record of federal court in another state, competent); Rollings *v.* S., 160 Ala. 82, 49 S. 329 (notwithstanding admission of fact); Wheeler *v.* S., 4 Ga. App. 325, 61 S. E. 409; In re Thorman's Est. (Ia.), 144 N. W. 7; Louisville & N. R. Co. *v.* Scalf, 155 Ky. 273, 159 S. W. 804; Watson *v.* Co., 137 Ky. 619, 126 S. W. 146; S. *v.* Herlihy, 102 Me. 310, 66 A. 643 (immaterial there is no formal judgment of conviction where plea is nolo contendere); C. *v.* Borasky, 214 Mass. 313, 101 N. E. 377; P. *v.* De Camp, 146 Mich. 533, 109 N. W. 1047; S. *v.* Hubbard, 223 Mo. 80, 122 S. W. 694; S. *v.* Payne, 223 Mo. 112, 122 S. W. 1062 (records of penitentiary admissible to show service of sentence and discharge); S. *v.* Kennedy, 207 Mo. 528, 106 S. W. 57; S. *v.* Brooks, 202 Mo. 106, 100 S. W. 416; S. *v.* Deal, 52 Or. 568, 98 P. 165; C. *v.* Doe, 18 Pa. Dist. 611; Huff *v.* McMichael (Tex. Civ.), 127 S. W. 574; Gulf, etc. R. Co. *v.* Gibson, 42 Tex. Civ. 306, 93 S. W. 469. See vol. 3, p. 762, n. 37, and supplement thereto.

Only so much of record as discloses conviction admitted. Farrell *v.* Phillips, 140 Wis. 611, 123 N. W. 117.

217-47 C. *v.* Doe, 18 Pa. Dist. 611.

217-48 Boyd *v.* S., 150 Ala. 101, 43 S. 204; S. *v.* Priest, 215 Mo. 1, 114 S. W. 949; C. *v.* Doe, 18 Pa. Dist. 611. *Comp.* Ayers *v.* Ratshesky, 213 Mass. 589, 101 N. E. 78.

Identity of name establishes prima facie identity of person notwithstanding defendant's denial. Colbert *v.* S., 125 Wis. 423, 104 N. W. 61.

217-49 Hunter *v.* S., 133 Ga. 78, 65 S. E. 154; S. *v.* Blitz, 171 Mo. 530, 71 S. W. 1027; S. *v.* Thornhill, 174 Mo. 364, 74 S. W. 832; S. *v.* Spivey, 191 Mo. 87, 90 S. W. 81; S. *v.* Woodward, 191 Mo. 617, 90 S. W. 90; Bowman *v.* S. (Tex. Cr.), 164 S. W. 846 (vagrancy).

218-50 Objection to parol proof of conviction must be specific or failure

to produce record will be waived. O'Donnell *v.* P., 224 Ill. 218, 79 N. E. 639.

218-53 Roden *v.* S., 5 Ala. App. 247, 59 S. 751; Schuman *v.* S., 106 Ark. 362, 153 S. W. 611; P. *v.* Martini, 21 Cal. App. 743, 132 P. 1069; P. *v.* Oliver, 7 Cal. App. 601, 95 P. 172; P. *v.* Eldridge, 147 Cal. 782, 82 P. 442; Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689, *dist.* Farley *v.* S., 57 Ind. 331; In re Thurman's Est. (Ia.), 144 N. W. 7; Louisville & N. R. Co. *v.* Scalf, 155 Ky. 273, 159 S. W. 804; Ge Burk *v.* C., 153 Ky. 264, 155 S. W. 381; Parson *v.* C., 33 Ky. L. R. 1051, 112 S. W. 617; Farmer *v.* C., 28 Ky. L. R. 1168, 91 S. W. 682; Henderson *v.* C., 122 Ky. 296, 28 Ky. L. R. 1212, 91 S. W. 1141; Britton *v.* C., 29 Ky. L. R. 857, 96 S. W. 556; Williams *v.* S., 87 Miss. 373, 39 S. 1006; Hill *v.* Maxwell, 77 N. J. L. 766, 73 A. 501; Derrick *v.* Wallace (App. Div.), 145 N. Y. S. 585; S. *v.* Holder, 153 N. C. 606, 69 S. E. 66; Schnase *v.* Goetz, 18 N. D. 594, 120 N. W. 553; Cowan *v.* S., 5 Okla. Cr. 313, 114 P. 627; Hendrix *v.* S., 4 Okla. Cr. 611, 113 P. 244; S. *v.* Deal, 52 Or. 568, 98 P. 165; C. *v.* Payne, 242 Pa. 394, 89 A. 559; C. *v.* Racco, 225 Pa. 113, 73 A. 1067; Bogue *v.* S. (Tex. Cr.), 155 S. W. 943; Chambers *v.* Wyatt (Tex. Civ.), 151 S. W. 864; White *v.* S., 61 Tex. Cr. 498, 135 S. W. 562. See vol. 3, p. 762, n. 37, and supplement thereto.

"When a defendent in a criminal case becomes a witness in his own behalf, he is subject to impeachment like any other witness. The testimony which he gives may be discredited in the same manner that this may be done in the case of any other witness. Upon his cross-examination, therefore, he may be questioned relative to specific acts for the purpose of discrediting his testimony, and he may be asked as to whether or not he has suffered a former conviction for some crime affecting his credibility. When a defendant is a witness in his own behalf, the purpose of such testimony is only to impair his credibility, and not to exclude him as a witness, and such conviction may be shown therefore by his own cross-examination, and need not be shown by the record of the judgment. Turner *v.* State, 139 S. W. 1124." Benson *v.* S., 103 Ark. 87, 145 S. W. 883.

220-56 Character of offenses must be specified. Ellis *v.* S., 56 Tex. Cr. 14, 117 S. W. 978.

221-57 *Contra*, Pinckhard *v.* S., 62 Tex. Cr. 602, 138 S. W. 601.

222-58 S. *v.* Powell, 5 Penne. (Del.) 24, 61 A. 966 (docket entries inadmissible); Green *v.* S., 125 Ga. 742, 54 S. E. 724; S. *v.* Sovern, 225 Mo. 580, 125 S. W. 769 (statute); P. *v.* Cardillo, 207 N. Y. 70, 100 N. E. 715.

Rumors of criminal conduct, inadmissible. Sheppard *v.* S., 56 Tex. Cr. 604, 120 S. W. 446.

222-59 Conviction proved by extrinsic evidence. S. *v.* Griggsby, 117 La. 1046, 42 S. 497.

222-63 Angle *v.* S. (Ala. App.), 64 S. 646; Watson *v.* Co., 137 Ky. 619, 126 S. W. 146. *Contra*, S. *v.* Madison, 23 S. D. 584, 122 N. W. 647.

222-64 Missouri, etc. R. Co. *v.* Adams (Tex. Civ.), 114 S. W. 453 (error harmless); Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493.

Presumed court took judicial notice that pardons related to particular judgments. Thompson *v.* U. S., 202 Fed. 401, 407, 120 C. C. A. 575.

223-65 Kendrick *v.* Cunningham, 9 Ala. App. 398, 63 S. 797; Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689; Shields *v.* Conway, 133 Ky. 35, 117 S. W. 340; S. *v.* Peters (Mo.), 167 S. W. 520.

"We are of the opinion that this would open up a wide field upon a collateral issue, and place upon the jury the burden of retrying an issue already adjudicated by a court of competent jurisdiction, and would tend to divert the attention of the jury from the real issue they were impaneled to try. The right to ask a witness whether he has been convicted is statutory in this state, and when the witness answers in the affirmative this ends the line of inquiry." Smith *v.* S., 102 Miss. 330, 59 S. 96.

Admission of conviction, conclusive. Fuller *v.* S., 147 Ala. 35, 41 S. 774.

223-66 See Parsons *v.* C., 33 Ky. L. R. 1051, 112 S. W. 657. But see Rittenberg *v.* Smith, 214 Mass. 343, 101 N. E. 989, 47 L. R. A. (N. S.) 215, note; Perry *v.* S. (Tex. Cr.), 155 S. W. 263.

Cannot show sentence was committed. Rittenberg *v.* Smith, 214 Mass. 343, 101 N. E. 989, 47 L. R. A. (N. S.) 215, n.

223-67 Proof must be limited to con-

viction. Dodds *v.* S. (Miss.), 45 S. 863, statute.

Not that he has been in jail.—Bell *v.* S., 170 Ala. 16, 54 S. 116.

223-68 Smith *v.* S., 159 Ala. 68, 48 S. 668, and how long imprisoned.

224-74 Bergman *v.* Solomon, 143 Ky. 581, 136 S. W. 1010.

224-75 Ward *v.* S. (Tex. Cr.), 146 S. W. 931.

224-76 Keeton *v.* S., 59 Tex. Cr. 316, 128 S. W. 404.

In some states witness may not be asked if he has been indicted. Ross *v.* S., 139 Ala. 144, 36 S. 718; Watson *v.* S., 155 Ala. 9, 46 S. 232; Howard *v.* C., 110 Ky. 356, 61 S. W. 756; Pennington *v.* C., 21 Ky. L. R. 542, 51 S. W. 818; Missouri, etc. R. Co. *v.* Creason, 101 Tex. 335, 107 S. W. 527, *over.* Carroll *v.* S., 32 Tex. Cr. 431, 24 S. W. 100, 40 Am. St. 786.

225-82 Johnson *v.* S. (Tex. Cr.), 153 S. W. 875.

225-84 P. *v.* Wright, 133 App. Div. 133, 117 N. Y. S. 441, if witness testified on subject. *Contra,* Smith *v.* S., 159 Ala. 68, 48 S. 668; S. *v.* Bryant, 97 Minn. 8, 105 N. W. 974, §6841 Gen. Stats. 1894; Smith *v.* S., 3 Okla. Cr. 629, 108 P. 418.

226-87 Peters *v.* S., 124 Ga. 80, 52 S. E. 147.

Witness in criminal case cannot testify of his character for truth and veracity. Glass *v.* S., 147 Ala. 50, 41 S. 727.

226-89 Redmond *v.* S., 4 Ala. App. 190, 59 S. 181; Tilley *v.* S., 167 Ala. 107, 52 S. 732; Graham *v.* S., 57 Tex. Cr. 104, 123 S. W. 691; Dunlap *v.* S., 50 Tex. Cr. 504, 98 S. W. 845 (for truth or honesty).

Where grand jurors may be required to disclose testimony of witnesses one juror may, in contradiction of the testimony of another, testify testimony given in court corresponded with that before the jury. Kennedy *v.* C., 33 Ky. L. R. 83, 109 S. W. 313.

226-90 Carter *v.* S., 145 Ala. 679, 40 S. 82 Earle *v.* S., 1 Ala. App. 183, 56 S. 32; Title Ins. & T. Co. *v.* Ingersoll, 153 Cal. 1, 94 P. 94; S. *v.* Cato, 116 La. 195, 40 S. 633; Weitzel *v.* Fowler, 143 Mich. 700, 107 N. W. 451; Milan Bk. *v.* Richmond, 235 Mo. 532, 139 S. W. 352; P. *v.* Kinney, 202 N. Y. 389, 95 N. E. 756; Missouri, etc. R. Co. *v.* Burk (Tex. Civ.), 162 S. W. 457; Pratt *v.* S., 53 Tex. Cr. 281, 109 S. W. 138; Smith *v.* S., 51 Tex. Cr. 137, 100 S. W. 924; Casey *v.* S., 50 Tex. Cr. 392, 97 S. W. 496; McKnight *v.* S., 50 Tex. Cr. 252, 95 S. W. 1056; Green *v.* S., 49 Tex. Cr. 238, 90 S. W. 1115; Western U. Tel. Co. *v.* Tweed (Tex. Civ.), 138 S. W. 1155.

Testimony cannot be "bolstered," when there was no effort made to impeach her, by contradictory statements, reputation for truth and veracity, or otherwise. Oldham *v.* S., 63 Tex. Cr. 527, 142 S. W. 13.

227-91 Competency of assailing evidence is immaterial to the right to offer sustaining evidence. Party assailed is not bound to move such evidence be stricken out or its purpose and effect be limited. S. *v.* Speritus, 191 Mo. 24, 90 S. W. 459.

Attack may be anticipated where predicate laid and sustaining evidence offered before impeaching witnesses have testified. Harris *v.* S., 49 Tex. Cr. 338, 94 S. W. 227.

228-94 Inman *v.* Co., 146 Fed. 449, 76 C. C. A. 659; Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844; Birmingham, etc. R. Co. *v.* Ellard, 135 Ala. 433, 33 S. 276; Title Ins. & T. Co. *v.* Ingersoll, 153 Cal. 1, 94 P. 94.

Deponent who has admitted in a second deposition making of mistake in a prior one may not be sustained by proof of statements corroborative of later deposition. Breeden *v.* Martens, 21 S. D. 357, 112 N. W. 960.

228-95 Brown *v.* S., 52 Tex. Cr. 267, 106 S. W. 368 (variance in testimony of witness); Myers *v.* S. (Tex. Cr.), 101 S. W. 1000; Chesapeake & O. R. Co. *v.* Fortune, 107 Va. 412, 59 S. E. 1095.

228-96 Reavely *v.* Harris, 239 Ill. 526, 88 N. E. 238 (if counsel refuses to state purpose of evidence); Warren *v.* S., 51 Tex. Cr. 598, 103 S. W. 888.

229-97 Harris *v.* S., 49 Tex. Cr. 338, 94 S. W. 227; Warren *v.* S., supra.

Wherever contradictory or apparently contradictory statements of witness are proved, his reputation for truth and veracity may be shown. Dunlap *v.* S., 50 Tex. Cr. 504, 98 S. W. 845.

229-98 Harris *v.* S., 49 Tex. Cr. 338, 94 S. W. 227.

229-99 Corpus *v.* S., 51 Tex. Cr. 315, 102 S. W. 1152.

230-5 Kennedy *v.* C., 33 Ky. L. R. 83, 109 S. W. 313; Harris *v.* S., supra.

231-13 Veracity of impeaching wit-

ness cannot be gone into. Graham *v.* S., 57 Tex. Cr. 104, 123 S. W. 691.

231-14 Hopkins *v.* S. (Ind.), 102 N. E. 851; Hicks *v.* S., 165 Ind. 440, 75 N. E. 641; Hinshaw *v.* S., 147 Ind. 334, 372, 47 N. E. 157; Bowman *v.* Blankenship, 165 N. C. 519, 81 S. E. 746; Armfield *v.* R. Co., 162 N. C. 24, 77 S. E. 963; Allred *v.* Kirkman, 160 N. C. 392, 76 S. E. 244; Northcutt *v.* S. (Tex. Cr.), 158 S. W. 1004; Bosley *v.* S. (Tex. Cr.), 153 S. W. 878; Foster *v.* S. (Tex. Cr.), 150 S. W. 936; Hardin *v.* S., 55 Tex. Cr. 631, 117 S. W. 974, 123 S. W. 613; Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156; Casey *v.* S., 50 Tex. Cr. 392, 97 S. W. 496; Davis *v.* Davis, 44 Tex. Civ. 238, 98 S. W. 198; Aetna Ins. Co. *v.* Eastman, 95 Tex. 34, 64 S. W. 863; St. Louis S. R. Co. *v.* Irvine (Tex. Civ.), 89 S. W. 428; Craven *v.* S., 49 Tex. Cr. 78, 90 S. W. 311; Franklin *v.* S. (Tex. Cr.), 88 S. W. 357. See Richard Cocke & Co. *v.* Develop. Co. (Tex. Civ.), 168 S. W. 988.

"When one seeks to impeach a witness, then his statements made at the time of or shortly after the occurrence are admissible to support his testimony in the trial, if it does do so." Williams *v.* S. (Tex.), 148 S. W. 763; Dickson *v.* S. (Tex. Cr.), 146 S. W. 914; Lewis *v.* S., 64 Tex. Cr. 490, 142 S. W. 875.

"Testimony of this character is known as evidence of a consonant statement; and this may be defined as a prior declaration of a witness whose testimony has been attacked, and whose credibility stands impeached which, considering the impeachment, the court will allow to be proved by the person to whom the declaration was made, in order to support the credibility of the witness, and which, but for the existence of such impeachment, would ordinarily be excluded as hearsay. To sustain the admission of such declarations, the impeachment must plainly appear, and must go to the credibility of the witness." Lyke *v.* R. Co., 236 Pa. 38, 84 A. 595. The court further said: "To a considerable extent the admission of such testimony is a matter to be decided in each case by the trial judge in the exercise of a wise discretion, and depends largely upon the character and degree of impeachment indulged in by the opposite party. Here the jury had the testimony of numerous witnesses for the defendant to declarations by the plaintiff contrary to his evidence given at the trial, and this with the other impeachments, despite the assertion of counsel for the defense, in objecting to the rebuttal testimony, that he did not so intend, could well be taken as conveying the charge that the plaintiff's testimony was not the story told by him from the time of the accident, but one concocted for the purpose of the trial, or what is known in the law as a recent fabrication. Therefore the trial judge was within his right in permitting the plaintiff to show that his testimony at the trial was consistent with his declarations made a few minutes after the accident and years before the suit was brought. Whether or not the declarations then made were for the purpose of putting him in a position subsequently to bring suit against the defendant was for the jury to consider in passing upon the weight of the evidence."

Only so much of prior statements as have been contradicted are admissible, and they only for purpose of affecting credibility. Hicks *v.* S., 165 Ind. 440, 75 N. E. 641.

Qualified rule.—In some jurisdictions admissibility of prior consistent statements depends upon existence of contention evidence is a recent fabrication. Driggers *v.* U. S., 21 Okla. 60, 95 P. 612, discussion of cases.

232-16 Bowman *v.* Blankenship, 165 N. C. 519, 81 S. E. 746; Armfield *v.* R. Co., 162 N. C. 24, 77 S. E. 963; Craven *v.* S., 49 Tex. Cr. 78, 90 S. W. 311; Hudson *v.* S., 49 Tex. Cr. 24, 90 S. W. 177; Burch *v.* S., 49 Tex. Cr. 13, 90 S. W. 168.

232-17 Bowman *v.* Blankenship, supra; Armfield *v.* R. Co., supra.

232-18 Bowman *v.* Blankenship, 165 N. C. 519, 81 S. E. 746; Armfield *v.* R. Co., 162 N. C. 24, 77 S. E. 963. *Contra*, Lanasa *v.* S., 109 Md. 602, 71 A. 1058.

233-20 P. *v.* Wright, 4 Cal. App. 704, 89 P. 364; P. *v.* Turner, 1 Cal. App. 420, 82 P. 397; Turner *v.* S., 131 Ga. 761, 63 S. E. 294; Cook *v.* S., 124 Ga. 653, 53 S. E. 104; Atlanta, etc. R. Co. *v.* Strickland, 116 Ga. 439, 42 S. E. 864; McBride *v.* R. & E. Co., 125 Ga. 515, 54 S. E. 674; Marengo *v.* Eichler, 245 Ill. 47, 91 N. E. 758; C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127; S. *v.* Burgess (Mo.), 168 S. W. 740; Zuckerman *v.* R. Co., 117 App. Div. 378, 102

N. Y. S. 641; Cincinnati T. Co. *v.* Stephens, 75 O. St. 171, 79 N. E. 235; Williams *v.* Lumb. Co. (Tex. Civ.), 136 S. W. 1182; S. *v.* Turley (Vt.), 88 A. 562.

234-23 Zuckerman *v.* R. Co., 117 App. Div. 378, 102 N. Y. S. 641.

235-25 Extension of rule not favored. C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127.

235-26 Hudson *v.* Slate, 53 Tex. Civ. 453, 117 S. W. 469.

Extension of rule opposed.—C. *v.* Tucker, supra.

236-28 White *v.* S., 57 Tex. Cr. 196, 122 S. W. 391.

236-29 P. *v.* Katz, 154 App. Div. 44, 139 N. Y. S. 137; Holmes *v.* S. (Tex. Cr.), 156 S. W. 1172; Gusemano *v.* S. (Tex. Cr.), 155 S. W. 217; Ft. Worth, etc. R. Co. *v.* Matchett (Tex. Civ.), 152 S. W. 1113.

237-32 Corpus *v.* S., 51 Tex. Cr. 315, 102 S. W. 1152.

237-34 S. *v.* Pace, 159 N. C. 462, 74 S. E. 1018.

238-37 Watson *v.* S., 155 Ala. 9, 46 S. 232; Graham *v.* S., 153 Ala. 38, 45 S. 580; Bell *v.* Aiken, 1 Ga. App. 36, 57 S. E. 1001; S. *v.* Puller, 130 La. 249, 57 S. 906; S. *v.* Christopher, 134 Mo. App. 6, 114 S. W. 549; Browning *v.* R. Co., 118 Mo. App. 449, 94 S. W. 315; Warfield *v.* R. Co., 104 Tenn. 74, 55 S. W. 304, 78 Am. St. 911; La Follette Co. *v.* Minton, 117 Tenn. 415, 101 S. W. 178, 11 L. R. A. (N. S.) 478; Whittlesey *v.* S. (Tex. Cr.), 167 S. W. 345; Missouri, etc. R. Co. *v.* Adams (Tex. Civ.), 114 S. W. 453; Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493; Harris *v.* S., 49 Tex. Cr. 338, 94 S. W. 227.

239-42 Inquiry must be as to "general character," and not "character merely." Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844.

240-43 Haywood *v.* S., 12 Ga. App. 240, 76 S. E. 1077; S. *v.* Gibson, 83 S. C. 34, 64 S. E. 607, uncontradicted evidence of good moral character renders it harmless to exclude testimony as to whether witness would believe defendant under oath.

240-44 Mayhew *v.* S. (Tex. Cr.), 155 S. W. 191.

Letter from a third party, shown defendant at time plaintiff made the variant statement, is admissible to show improbability of his making such statement in contradiction of terms of letter. Davis *v.* Farwell, 80 Vt. 166, 67 A. 129.

240-45 S. *v.* Speritus, 191 Mo. 24, 90 S. W. 459; Missouri, etc. R. Co. *v.* Adams (Tex. Civ.), 114 S. W. 453.

242-51 Shields *v.* Conway, 133 Ky. 35, 117 S. W. 340.

243-54 Missouri, etc. R. Co. *v.* Dumas (Tex. Civ.), 93 S. W. 493.

243-57 Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844 (what witness "thought" about another's character, immaterial); S. *v.* Stewart, 6 Penne. (Del.) 435, 67 A. 786; Lee *v.* Andrews, 151 Mich. 5, 114 N. W. 672; P. *v.* Turney, 124 Mich. 542, 83 N. W. 273.

244-59 Negative testimony is competent by witness who has known assailed witness for a long time. Spencer *v.* S., 132 Wis. 509, 112 N. W. 462.

244-61 P. *v.* Wright, 4 Cal. App. 704, 89 P. 364, cross-examination proper though state announced it would not attack defendant's character.

244-62 Sustaining evidence received up to beginning of argument. Neill *v.* S., 49 Tex. Cr. 219, 91 S. W. 791, statute.

245-63 Lay *v.* Fuller, 178 Ala. 375, 59 S. 609; Wynne *v.* S., 155 Ala. 99, 46 S. 459; Strickland *v.* S., 151 Ala. 31, 44 S. 90; Maloy *v.* S., 52 Fla. 101, 41 S. 791; Hudgins *v.* S., 7 Ga. App. 785, 68 S. E. 336; Sebree *v.* Rogers, 31 Ky. L. R. 476, 102 S. W. 841; Malinowski *v.* R. Co., 154 Mich. 104, 117 N. W. 565; Yalovitz *v.* Schutz, 115 N. Y. S. 1080.

246-64 Jones *v.* S., 145 Ala. 51, 40 S. 947; Benjamin *v.* S., 148 Ala. 671, 41 S. 739; St. Louis S. R. Co. *v.* Hutchison, 79 Ark. 247, 96 S. W. 374; Georgia R. & B. Co. *v.* Andrews, 125 Ga. 85, 54 S. E. 76; Godair *v.* Bk., 225 Ill. 572, 80 N. E. 407; Chicago, etc. Co. *v.* Jennings, 217 Ill. 494, 75 N. E. 560; Bennett *v.* Susser, 191 Mass. 329, 77 N. E. 884; Cullen *v.* Co., 128 App. Div. 369, 112 N. Y. S. 934; S. *v.* Trail, 59 W. Va. 175, 53 S. E. 17.

247-69 Chandler *v.* S., 124 Ga. 821, 63 S. E. 91; S. *v.* Wells, 33 Mont. 291, 83 P. 476.

247-70 Olson *v.* Rice, 140 Ia. 630, 119 N. W. 84.

248-71 Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 629, error to instruct evidence of character entitled to weight in proportion to its nearness to time in question.

248-72 The Ocracoke, 159 Fed. 552,

248-73 Godair *v.* Bk., 225 Ill. 572, 80 N. E. 407; Chicago City R. Co. *v.* Ryan, 225 Ill. 287, 80 N. E. 116; Fields *v.* R. Co., 113 Mo. App. 642, 88 S. W. 134.

249-74 McCullough *v.* Sawtell, 134 Ga. 512, 68 S. E. 89; Foster *v.* Crisman (Ia.), 144 N. W. 1021; Malinowski *v.* R. Co., 154 Mich. 104, 117 N. W. 565. Jury need not believe beyond reasonable doubt witness has testified falsely. Colbert *v.* S., 125 Wis. 423, 104 N. W. 61. See P. *v.* Arnold, 248 Ill. 169, 93 N. E. 786; Allen *v.* R. Co., 145 Wis. 263, 129 N. W. 1094.

249-75 J. Hancock Ins. Co. *v.* Powell, 116 Ill. App. 151; Allen *v.* Ellis, 125 Wis. 565, 104 N. W. 739.

249-76 Godair *v.* Bk., 225 Ill. 572, 80 N. E. 407, testimony of witnesses for one party must not be singled out.

Improper instruction.—Jefferson *v.* S., 102 Miss. 174, 59 S. 8.

Impeached witness is not to be believed because testimony corroborated by unimpeached witnesses. Olson *v.* Rice, 140 Ia. 630, 119 N. W. 84.

249-77 Atlantic C. L. R. Co. *v.* Odum, 5 Ga. App. 780, 63 S. E. 1126; Coles *v.* Coles, 130 Ky. 349, 113 S. W. 417; Hutchins *v.* Murphy, 146 Mich. 621, 110 N. W. 52; Hobbs *v.* Blanchard, 75 N. H. 73, 70 A. 1082; Walsh *v.* Co., 126 App. Div. 229, 110 N. Y. 523; Brown *v.* S., 55 Tex. Cr. 9, 114 S. W. 820; Franklin *v.* S. (Tex. Cr.), 88 S. W. 357; Am. L. Co. *v.* Whitlock, 109 Va. 238, 63 S. E. 991.

The office of impeaching testimony is to break the effect only of damaging evidence. Antur *v.* S. (Tex. Cr.), 147 S. W. 234.

250-78 Mass *v.* S., 59 Tex. Cr. 390, 128 S. W. 394.

Conviction not sustained on previous testimony contradictory to that given on trial. Thompson *v.* S., 57 Tex. Cr. 408, 123 S. W. 593.

251-80 Competency of testimony, not affected by proof of variant statements. Fuhry *v.* R. Co., 239 Ill. 548, 88 N. E. 221.

251-81 Watson *v.* R. Co., 137 Ky. 619, 129 S. W. 341; Thornton *v.* S., 117 Wis. 338, 93 N. W. 1107.

251-83 Ada Coal Co. *v.* Linville, 152 Ky. 2, 153 S. W. 21.

251-85 P. *v.* Corey, 8 Cal. App. 720, 97 P. 907; Kingsbury *v.* P., 44 Colo 403, 99 P. 61; Georgia R. & Elec. Co *v.* Cocke, 137 Ga. 720, 74 S. E. 244; Watson *v.* Co., 137 Ky. 619, 126 S. W. 146; Sturgis *v.* S., 2 Okla. Cr. 362, 102 P. 57; Henderson *v.* S., 58 Tex. Cr. 581, 126 S. W. 1123.

252-86 Illinois C. R. Co. *v.* Johnson (Ky.), 115 S. W. 798; S. *v.* D'Adamo (N. J.), 86 A. 414; Rowan *v.* S., 57 Tex. Cr. 625, 124 S. W. 668.

252-87 Stark *v* Burke, 131 Ia. 684, 109 N. W. 206; Puryear *v.* S., 56 Tex. Cr. 231, 118 S. W. 1042; Bluestein *v.* Collins (Tex. Civ.), 108 S. W. 687. Waiver does not result from failure to ask instruction when testimony received. Walsh *v.* Co., 126 App. Div. 229, 110 N. Y. S. 523.

252-88 Harris *v.* S., 19 Tex. Cr. 338, 94 S. W. 227; Franklin *v.* S. (Tex. Cr.), 88 S. W. 357.

252-89 Rollings *v.* S., 160 Ala. 82, 49 S. 329, on request.

252-90 Court must restrict use of evidence. Edmondson *v.* S. (Tex. Cr.), 150 S. W. 917.

252-91 S. *v.* Hayden, 131 Ia. 1, 107 N. W. 929; Oehsner *v.* C., 128 Ky. 761, 109 S. W. 326; Fueston *v.* C., 91 Ky. 230, 15 S. W. 177; Collins *v.* C., 15 Ky. L. R. 691, 25 S. W. 743; Jones *v.* C., 22 Ky. L. R. 388, 57 S. W. 472; Ashcraft *v.* C., 24 Ky. L. R. 488, 68 S. W. 847; Dungan *v.* S., 135 Wis. 151, 115 N. W. 350; Thornton *v.* S., 117 Wis. 338, 93 N. W. 1107 (immaterial what was character of previous offense).

Improper impeaching evidence not ground for reversal of accused not affected. Caples *v.* S., 3 Okla. Cr. 72, 104 P. 493.

If record silent it will be assumed proper caution was given. Farmer *v.* C., 28 Ky. L. R. 1168, 91 S. W. 682.

253-94 Smith *v.* S., 90 Ark. 435, 119 S. W. 655; James *v.* Co., 10 Cal. App. 785, 103 P. 1082; Miller *v.* S., 139 Ga. 716, 78 S. E. 181; Oppenheim *v.* S., 12 Ga. App. 480, 77 S. E. 672; Clark *v.* S., 5 Ga. App. 605, 63 S. E. 606; Bartlett *v.* S. C., 142 Ia. 538, 119 N. W. 729; S. *v.* Hill, 135 La. —, 65 S. 763; Spray *v.* Ayotte, 161 Mich. 593, 126 N. W. 630; Bailey *v.* S., 94 Miss. 863, 48 S. 227; S. *v.* Sebastian, 215 Mo. 58, 114 S. W. 522; Caple *v.* S., 3 Okla. Cr. 621, 105 P. 681; Raleigh *v.* S. (Tex. Cr.), 168 S. W. 1070; Haley *v.* S., 59 Tex. Cr. 338, 128 S. W. 1133; Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29; Norfolk & W. R. Co. *v.* Spencer, 104 Va. 637, 52 S. E. 310. See Bowlegs *v.* S., 9 Okla. Cr.

69, 130 P. 824. *Comp.* Chaet *v.* Goldberg, 110 N. Y. S. 817. Exceptions recognized. Hanson *v.* Bailey, 96 Minn. 274, 104 N. W. 969; Cairns *v.* Keith, 50 Minn. 32, 52 N. W. 267; Bankers' M. O. Assn. *v.* Nachod, 128 App. Div. 307, 112 N. Y. S. 740.

Nor to secure continuance.—Fletcher *v.* S. (Tex. Cr.), 153 S. W. 1134. See Raleigh *v.* S. (Tex. Cr.), 168 S. W. 1050; Cole *v.* S. (Tex. Cr.), 156 S. W. 929.

INCEST

Declarations of prosecutrix, 255-9.

254-1 Skidmore *v.* S., 57 Tex. Cr. 497, 123 S. W. 1129, though accused attacked her chastity.

Relationship of father and daughter excludes presumption of improper conduct between them arising from proof of circumstances. S. *v.* Hembree, 54 Or. 463, 103 P. 1008.

255-2 Vickers *v.* S. (Tex. Cr.), 154 S. W. 578, opinion evidence.

255-3 Skidmore *v.* S., 57 Tex. Cr. 497, 123 S. W. 1129, competent to rebut evidence showing birth of child.

Reason of husband for marrying female whom he knew to be pregnant admissible as bearing on question of his paternity of child. Harris *v.* S., 64 Tex. Cr. 594, 144 S. W. 232.

255-6 S. *v.* Burt, 17 S. D. 7, 94 N. W. 409, under statute forbidding wife to testify against husband without consent, except when crime committed by him against her.

255-8 Pridemore *v.* S., 53 Tex. Cr. 620, 111 S. W. 155.

Not conclusion for prosecutrix to testify that accused had "sexual intercourse" with her. Details may be elicited on cross-examination. Straub *v.* S., 5 O. C. C. (N. S.) 529.

Consent of female or lack of it immaterial. McCaskill *v.* S., 55 Fla. 117, 45 S. 843; S. *v.* Freddy, 117 La. 121, 41 S. 436; Straub *v.* S., 5 O. C. C. (N. S.) 529; S. *v.* Winslow, 30 Utah 403, 85 P. 433; S. *v.* Aker, 54 Wash. 342, 103 P. 420 (and so of means used).

Conspiracy of prosecutrix and others to bring about commission of offense cannot be shown. S. *v.* Rennick, 127 Ia. 294, 103 N. W. 159.

Completion of sexual act obviates proof of emission. Latter inferred from circumstances. S. *v.* Judd, 132 Ia. 296, 109 N. W. 892.

Dying declarations of woman inadmissible.—P. *v.* Stison, 140 Mich. 216, 103 N. W. 542.

Flight and conveyance of property by defendant shown. Skidmore *v.* S., supra.

255-9 Burford *v.* S. (Tex. Cr.), 151 S. W. 538; Jordan *v.* S., 62 Tex. Cr. 388, 137 S. W. 114; Jordan *v.* S., 59 Tex. Cr. 208, 128 S. W. 139; Pate *v.* S. (Tex. Cr.), 93 S. W. 556 (though consent given unwillingly).

Evidence sufficient.—P. *v.* Smith, 23 Cal. App. 382, 138 P. 107; S. *v.* Russell, 64 Or. 247, 129 P. 1051; Vickers *v.* S. (Tex. Cr.), 154 S. W. 578.

Voluntary confession sufficient corroboration. Knowles *v.* S. (Ark.), 168 S. W. 148.

"Certainly so long as the condition of minority existed the immaturity of the prosecutrix could be taken into account as throwing some light on the question of her voluntary consent." S. *v.* Heft, 155 Ia. 21, 134 N. W. 950.

Complaints by prosecutrix, though not part of res gestae, shown; proof should not include name of other party. S. *v.* Winslow, 30 Utah 403, 85 P. 433.

Declarations of prosecutrix, made in defendant's absence, concerning previous intercourse with her, inadmissible. Peterson *v.* S., 84 Neb. 76, 120 N. W. 1110.

Sufficiency of corroborative evidence. S. *v.* Brown, 209 Mo. 413, 107 S. W. 1068; Smothers *v.* S., 81 Neb. 426, 116 N. W. 152.

256-10 Gaston *v.* S., 95 Ark. 233, 128 S. W. 1033 (if against woman's will); Straub *v.* S., 5 O. C. C. (N. S.) 529; S. *v.* Aker, 54 Wash. 342, 103 P. 420.

256-11 P. *v.* Turner, 260 Ill. 84, 102 N. E. 1036; S. *v.* Rennick, 127 Ia. 294, 103 N. W. 159 (absence of consent); Schwartz *v.* S., 65 Neb. 196, 91 N. W. 190; Bridges *v.* S., 80 Neb. 91, 113 N. W. 1048.

256-12 Adams *v.* S., 78 Ark. 16, 92 S. W. 1123 (such evidence shows probability of guilt and sustains evidence showing offense); P. *v.* Turner, 260 Ill. 84, 102 N. E. 1036; S. *v.* Judd, 132 Ia. 296, 109 N. W. 892 (also of undue intimacy); S. *v.* Heft, 155 Ia. 21, 134 N. W. 950; S. *v.* Pruitt, 202 Mo. 49,

100 S. W. 431 (acts of lascivious familiarity not amounting to offense shown); S. *v.* Brown, 209 Mo. 413, 107 S. W. 1068 (testimony need not be specific as to time, unless objection is pointed); Smothers *v.* S., 81 Neb. 426, 116 N. W. 152; Ellsworth *v.* S. (Okla. Cr.), 137 P. 1188; Cowser *v.* S. (Tex. Cr.), 157 S. W. 758; Pridemore *v.* S., 53 Tex. Cr. 620, 111 S. W. 155 (familiarity). *Contra,* Skidmore *v.* S., 57 Tex. Cr. 497, 123 S. W. 1129, noting that Barrett *v.* S., 55 Tex. Cr. 182, 115 S. W. 1187, was ruled on authority of Burnett *v.* S., 32 Tex. Cr. 86, 22 S. W. 117, which was overruled in Clifton *v.* S., 46 Tex. Cr. 18, 79 S. W. 824, 108 Am. St. 983, which latter was followed in cases referred to.

256-13 S. *v.* Heft, 155 Ia. 21, 134 N. W. 950.

257-15 Barrett *v.* S., 55 Tex. Cr. 182, 115 S. W. 1187.

257-16 Quaere S. *v.* Heft, 155 Ia. 21, 134 N. W. 950.

257-17 P. *v.* Stison, 140 Mich. 216, 103 N. W. 542 (pregnancy); S. *v.* Winslow, 30 Utah 403, 85 P. 433 (expert testimony based on examination made soon after offense).

Exhibition to jury of child to show resemblance is proper. S. *v.* Russell, 64 Or. 247, 129 P. 1051.

Birth of child to prosecutrix proved (Barrett *v.* S., 55 Tex. Cr. 182, 115 S. W. 1187), though married at time of birth. Smothers *v.* S., 81 Neb. 426, 116 N. W. 152.

Birth of child admissible.—Jordan *v.* S., 62 Tex. Cr. 388, 137 S. W. 114.

Prosecutrix allowed to testify that she had a child where from the condition of the evidence the jury would infer that her testimony would have been against the state on this point. Harris *v.* S., 64 Tex. Cr. 594, 144 S. W. 232. "It is true that, in view of the testimony of the prosecutrix that she had no intercourse with any other man than her father, a doubt as to the paternity of the child might give rise to a doubt by necessary inference as to the general truthfulness of the testimony of the prosecutrix, but such a doubt would not necessarily result in an acquittal. The jurors might believe that in this one respect the prosecutrix testified falsely, and yet in view of the corroboration as to the transaction complained of have believed beyond a reasonable doubt that it took place." S. *v.* Heft, 155 Ia. 21, 134 N. W. 950.

258-18 P. *v.* Stison, 140 Mich. 216, 103 N. W. 542; Pridemore *v.* S., 53 Tex. Cr. 620, 111 S. W. 155; S. *v.* Manley, 82 Vt. 556, 74 A. 231.

Defendant's confession shown as substantive evidence, though denied by him. P. *v.* Block, 120 App. Div. 364, 105 N. Y. S. 275.

Mother of prosecutrix must be lawful wife of defendant. Hamilton *v.* S. (Tex. Cr.), 153 S. W. 331.

258-19 Knowledge of relationship no element of crime. S. *v.* Judd, 132 Ia. 296, 109 N. W. 892; S. *v.* Rennick, 127 Ia. 294, 103 N. W. 159. Otherwise under statutes. S. *v.* Winslow, 30 Utah 403, 85 P. 433.

258-20 Affirmative proof essential; witness' understanding as to existence of fact essential to validity of marriage relied on to establish relationship inadmissible. Harvill *v.* S., 54 Tex. Cr. 426, 113 S. W. 283.

258-21 S. *v.* Judd, 132 Ia. 296, 109 N. W. 892; Watkins *v.* S., 58 Tex. Cr. 110, 124 S. W. 959.

259-22 Relationship of daughter inferred from long residence with one whom she habitually addressed as mother, and that of uncle from frequent reference to him as such by accused, and of the mother in her presence as brother. S. *v.* Judd, 132 Ia. 296, 109 N. W. 892.

Where it appears that defendant had been married prior to marriage to the mother of prosecutrix it must also be proved that first marriage had been legally dissolved. Vickers *v.* S. (Tex. Cr.), 154 S. W. 578; Burford *v.* S. (Tex. Cr.), 151 S. W. 538.

Defendant's confession in presence of his wife and daughter not a confidential communication within Code Cr. Pro., 1911, art. 794. Cowser *v.* S. (Tex. Cr.), 157 S. W. 758.

Mere proof that female was his niece not sufficient. Blalack *v.* S. (Tex. Cr.), 162 S. W. 865.

259-23 Marriage license and return admissible without other proof than party who performed ceremony was public officer except designation following his signature. Baker *v.* S., 56 Tex. Cr. 16, 118 S. W. 542.

INFANTS

Judicial notice, 262-1; *Capacity to commit sexual crime*, 265-14.

262-1 Tennessee C., I. & R. Co. *v.* Crotwell, 156 Ala. 304, 47 S. 64; Standard F. Co. *v.* Holmstrom (Ind. App.), 104 N. E. 872; Phillips *v.* Williams (Ky.), 114 S. W. 1191; Byrnes *v.* Byrnes, 126 App. Div. 619, 111 N. Y. S. 72; Rice *v.* Ruble, 39 Okla. 51, 134 P. 49.

Proof must be clear and conclusive. McCauly *v.* Grim (Va.), 79 S. E. 1041.

Evidence held to show plaintiff was not of age when he executed deed. Walker *v.* Goodlett, 102 Ark. 383, 144 S. W. 189.

Judicial notice that party to action is infant taken by court appointing guardian ad litem. Reynolds *v.* Alderman, 54 Misc. 73, 103 N. Y. S. 863.

Presumed girl of fourteen a child within intent of statute concerning cruelty to children. Stone *v.* S., 1 Ga. App. 292, 57 S. E. 992.

263-4 Crosby *v.* Ardoin (Tex. Civ.), 145 S. W. 709.

263-5 See Bryant *v.* McKinney, 29 Ky. L. R. 951, 96 S. W. 809; Brook *v.* Kalfon, 58 Misc. 192, 108 N. Y. S. 1102.

Proof of infancy under law of Mexico. See Banco DeSonora *v.* Co., 124 Ia. 576, 100 N. W. 532.

263-6 Presumed that children under twelve non sui juris. Gerber *v.* Boorstein, 113 App. Div. 808, 99 N. Y. S. 1091; Grealish *v.* R. Co., 130 App. Div. 238, 114 N. Y. S. 582. *Contra*, Simkoff *v.* R. Co., 190 N. Y. 256, 83 N. E. 15 (seven years); Batchelor *v.* Co., 131 App. Div. 136, 115 N. Y. S. 93 (five years).

Not presumed in favor of one who has dealt with infant in violation of law, that latter was agent. P. *v.* McGuire, 113 App. Div. 631, 99 N. Y. S. 91.

263-7 S. *v.* Fisk, 15 N. D. 589, 108 N. W. 485.

264-9 Presumption of innocence continues until child is twelve. P. *v.* DoMenico, 45 Misc. 309, 92 N. Y. S. 390.

264-11 Key *v.* S., 4 Ala. App. 76, 58 S. 946; Reynolds *v.* S., 154 Ala. 14, 45 S. 894; Beason *v.* S., 96 Miss. 105, 50 S. 488; S. *v.* Tincher (Mo.), 166 S. W. 1028; S. *v.* Fisk, 15 N. D. 589, 108 N. W. 485.

265-12 Whether boy within three months of fourteen had capacity to commit manslaughter question for jury S. *v.* Mariano (R. I.), 91 A. 21.

265-14 Reynolds *v.* S., supra; Singleton *v.* S., 124 Ga. 136, 52 S. E. 156; Beason *v.* S., supra; P. *v.* Squazza, 40 Misc. 71, 81 N. Y. S. 254; P. *v.* Domenico, 45 Misc. 309, 92 N. Y. S. 390; S. *v.* Fisk, supra.

Physical capacity of boy under fourteen to rape must be shown as independent fact; rule applies to prosecution for assault with intent. S. *v.* Fisk, 15 N. D. 589, 108 N. W. 485.

A plea of guilty by child under twelve does not overcome presumption of innocence. P. *v.* Domenico, 45 Misc. 309, 92 N. Y. S. 390.

267-16 Hampton *v.* S., 1 Ala. App. 156, 55 S. 1018; Brown *v.* S. (Ga. App.), 78 S. E. 352; Scott *v.* S. (Tex. Cr.), 158 S. W. 814; Pyron *v.* S., 62 Tex. Cr. 639, 138 S. W. 705.

Infant under nine cannot be convicted of perjury unless he understands the nature and illegality of the act. Smith *v.* S. (Tex. Cr.), 164 S. W. 838.

Under act relating to juvenile offenders, the issue of age must be settled. Ex parte Winfield (Tex. Cr.), 168 S. W. 92.

State must show defendant under thirteen understood nature and illegality of particular act. Simmons *v.* S., 50 Tex. Cr. 527, 97 S. W. 1052. Mere proof of knowledge of right from wrong insufficient. Price *v.* S., 50 Tex. Cr. 71, 94 S. W. 901.

267-17 Adams *v.* R. Co. (W. Va.), 80 S. E. 1115.

Child over fourteen presumed sui juris. Fortune *v.* Hall, 122 App. Div. 250, 106 N. Y. S. 787.

Mental and physical capacity corresponding to age of infant presumed in action for negligence. Conkey *v.* Larsen, 173 Ind. 585, 91 N. E. 163.

268-18 Singleton *v.* S., 124 Ga. 136, 52 S. E. 156; Scott *v.* S. (Tex. Cr.), 158 S. W. 814.

Capacity of boy to understand and avoid danger a subject for opinion evidence. Sprinkle *v.* Coal Co. (W. Va.), 78 S. E. 971.

Presumed that servant under fourteen does not appreciate risk of employment. Ghaner *v.* Co., 85 S. C. 90, 67 S. E. 242. Person over fourteen presumed competent to perform duties as servant. Burnett *v.* Co., 152 N. C. 35, 67 S. E. 30. To be conscious of danger and able

to avoid voluntary act. Baker *v.* R., 150 N. C. 562, 64 S. E. 506; Hairston *v.* Co., 66 W. Va. 324, 66 S. E. 473.

Not presumed that infant of thirteen not sui juris. Lee *v.* Co., 134 App. Div. 123, 118 N. Y. S. 852.

Freedom from contributory negligence presumed of children under seven. Baker *v.* R. Co., 79 N. J. L. 249, 75 A. 441. Contributory negligence not involved in injury to child of six. Pascagoula R. & P. Co. *v.* Brondum, 96 Miss. 28, 50 S. 97. Prior to fourteen presumed incapacity to be guilty of contributory negligence, which must be overcome by evidence that infant did not exercise care and discretion usual with infants of a like age. Hazelerigg *v.* Dobbins, 145 Ia. 495, 123 N. W. 196. See infra, "Master and Servant," 529-95.

Question of capacity for jury. Singleton *v.* S., 124 Ga. 136, 52 S. E. 156.

269-20 Pearson *v.* White & Cochran, 13 Ga. App. 117, 78 S. E. 864; McAllister *v.* Gatlin, 3 Ga. App. 731, 60 S. E. 355; Mauldin *v.* University, 126 Ga. 681, 55 S. E. 922.

Statutes not affecting proof of declarations of infants under age at which they may testify, their declarations being part of the res gestae. Beal-D. Co. *v.* Carr, 85 Ark. 479, 108 S. W. 1053.

269-22 Falconer *v.* May Stern & Co., 165 Ill. App. 598; International Co. *v.* Connelly, 206 N. Y. 188, 99 N. E. 722; Grissom *v.* Beidleman, 35 Okla. 343, 129 P. 853. See Hickman & Wells *v.* McDonald (Ia.), 145 N. W. 322; Starke *v.* Storm's Exrs., 115 Va. 651, 79 S. E. 1057.

Plaintiff must show state, degree, condition in life of infant, and his parents' failure to furnish alleged necessary. Mauldin *v.* University, 126 Ga. 681, 55 S. E. 922; Nash *v.* Inman, L. R. 2 K. B. (1908) 1.

Torts.—See Covault *v.* Nevitt (Wis.), 146 N. W. 1115.

270-23 International T. B. Co. *v.* Doran, 80 Conn. 307, 68 A. 255; Maloney & Kratky *v.* Perks, 169 Ill. App. 227; Falconer *v.* May Stern & Co., 165 Ill. App. 598.

270-24 Wickham *v.* Torley, 136 Ga. 594, 71 S. E. 881.

Certified copy of court proceedings competent to show removal of disability under statute. Ketchum *v.* Co., 155 Ala. 256, 46 S. 476.

270-25 Grotjan *v.* Rice, 124 Wis. 253, 102 N. W. 551. See Farrar *v.* Wheeler, 145 Fed. 482, 75 C. C. A. 386.

Statements of infant's father to third persons of his and his son's relations, in absence of parties to suit, incompetent on question of emancipation. Grotjan *v.* Rice, 124 Wis. 253, 102 N. W. 551.

That infant is receiving proceeds of labor does not alone show permission to engage in business from which proceed flow. Southern C. O. Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788.

270-27 Any act or declaration disclosing clear intent sufficient. Spencer *v.* Collins, 156 Cal. 298, 104 P. 320.

Institution of suit and plea of infancy is sufficient disaffirmance. Smoot *v.* Ryan (Ala.), 65 S. 828.

Disaffirmance must be shown by unequivocal acts. Hatton *v.* Co., 57 Tex. Civ. 478, 123 S. W. 163.

271-28 Admission of existing liability must be shown; not enough to prove admission of existence of account. Louden Mfg. Co. *v.* Milmine, 14 Ont. L. R. (Can.) 532.

271-30 Ratification of contract by retaining possession of proceeds after majority must be shown by party so alleging. Southern C. O. Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788.

271-31 Freasier *v.* S. (Tex. Cr.), 84 S. W. 360. Rule changed by statute. Moore *v.* S., 49 Tex. Cr. 449, 96 S. W. 327.

271-32 Adult may not testify to matters occurring when he less than two years old. P. *v.* Carlin, 194 N. Y. 448, 87 N. E. 805.

272-33 S. *v.* Findling, 123 Minn. 413, 144 N. W. 142. See Valdez *v.* S. (Tex. Cr.), 160 S. W. 341.

272-34 S. *v.* Meyer, 135 Ia. 507, 113 N. W. 322 (child of six competent); S. *v.* Tolla, 72 N. J. L. 515, 62 A. 675.

272-35 Landthrift *v.* S., 140 Ala. 114, 37 S. 287; Crosby *v.* S., 93 Ark. 156, 124 S. W. 781; Warthen *v.* S., 11 Ga. App. 151, 74 S. E. 894; P. *v.* Scott, 261 Ill. 165, 103 N. E. 617; McLain *v.* Chicago, 127 Ill. App. 489; Sokol *v.* P., 212 Ill. 238, 72 N. E. 382; S. *v.* Meyer, 135 Ia. 507, 113 N. W. 322; S. *v.* King, 117 Ia. 484, 91 N. W. 768; Idle *v.* C., 148 Ky. 618, 147 S. W. 381; Bright *v.* C., 120 Ky. 298, 86 S. W. 527; Peters *v.* S. (Miss.), 63 S. 606; S. *v.* Tolla, 72 N. J. L. 515, 62 A. 675; C. *v.* Fur-

man, 211 Pa. 549, 60 A. 1089; Douglass *v.* S. (Tex. Cr.), 165 S. W. 933; Cole *v.* S. (Tex. Cr.), 165 S. W. 929; Munger *v.* S., 57 Tex. Cr. 384, 122 S. W. 874; Freasier *v.* S. (Tex. Cr.), 84 S. W. 360; Moore *v.* S., 49 Tex. Cr. 449, 96 S. W. 327; North Tex. C. Co. *v.* Bostick (Tex. Civ.), 80 S. W. 109; S. *v.* Morasco (Utah), 128 P. 571. See Matthews *v.* S., 96 Miss. 169, 50 S. 561. And see Birdwell *v.* U. S., 4 Okla. Cr. 472, 113 P. 205.

"Nothing was said about this testimony, or the age of the witness, before verdict; but the point was made in the motion for a new trial. If the defendant had any reason to believe that the witness was not qualified, he should have suggested this to the trial judge, either before he was permitted to testify, or by motion to exclude his evidence. A defendant will not be permitted to play fast and loose with the court. Courts are not forums in which to test the relative adroitness and ingenuity of opposing counsel, but are organized to administer the law with fairness and impartiality." Smith *v.* S., 102 Miss. 330, 59 S. 96.

274-36 Olson *v.* Olson, 130 Ia. 353, 106 N. W. 758; Mays *v.* S., 58 Tex. Cr. 651, 127 S. W. 546.

Presumption that child is incompetent by reason of tender years may be rebutted by showing his knowledge of oath and of legal and moral penalty that follows a known falsehood. Gehl *v.* Brew. Co., 156 App. Div. 51, 141 N. Y. S. 133.

275-37 Gordon *v.* S., 147 Ala. 42, 41 S. 847; Henderson *v.* S. (Ala. App.), 65 S. 721; S. *v.* Meyer, 135 Ia. 507, 113 N. W. 322 (inability to define "oath" and "testimony" not determinative of capacity); Bright *v.* C., 120 Ky. 298, 86 S. W. 527; P. *v.* Washor, 196 N. Y. 104, 89 N. E. 441; Munger *v.* S. (Tex. Cr.). 122 S. W. 875; Gabler *v.* S., 49 Tex. Cr. 623, 95 S. W. 521.

Age at time of event testified of and memory of it matters affecting only weight of child's testimony. Gordon *v.* S., 147 Ala. 42, 41 S. 347.

275-38 *Contra,* Freasier *v.* S. (Tex. Cr.), 84 S. W. 360.

275-39 P. *v.* Washor, 196 N. Y. 104, 89 N. E. 441; North Texas C. Co. *v.* Bostick (Tex. Civ.), 80 S. W. 109.

275-41 S. *v.* King, 117 Ia. 484, 91 N. W. 768.

276-45 Simmons *v.* S., 158 Ala. 8, 48 S. 606; Jones *v.* S., 145 Ala. 51, 40 S. 947; Crosby *v.* S., 93 Ark. 156, 124 S. W. 781. Knowledge of nature of oath more significant than general intelligence. Young *v.* S., 122 Ga. 725, 50 S. E. 996. In Castleberry *v.* S., 135 Ala. 24, 33 S. 431, a witness of eight, who stated that she was made by God, and that if she lied would go to hell, was competent. And see Walker *v.* S., 134 Ala. 86, 32 S. 703; Eatman *v.* S., 139 Ala. 67, 36 S. 16; Landthrift *v.* S., 140 Ala. 114, 37 S. 287; Trim *v.* S. (Miss.), 33 S. 718; North Texas C. Co. *v.* Bostwick (Tex. Civ.), 80 S. W. 109; Freasier *v.* S. (Tex. Cr.), 84 S. W. 360.

277-46 Clinton *v.* S., 53 Fla. 98, 43 S. 312; Bright *v.* C., 120 Ky. 298, 86 S. W. 527; C. *v.* Furman, 211 Pa. 549, 60 A. 1089; Sanoedo *v.* S. (Tex. Cr.), 69 S. W. 142. See Gabler *v.* S., 49 Tex. Cr. 623, 95 S. W. 521.

277-48 See S. *v.* Smith, 203 Mo. 695, 102 S. W. 526.

278-50 Rex *v.* Armstrong, 15 Ont. L. R. 47; City of Victor *v.* Smilavich, 54 Colo. 479, 131 P. 392; S. *v.* Sykes, 248 Mo. 708, 154 S. W. 1130; S. *v.* Connors, 233 Mo. 348, 135 S. W. 444; Madden *v.* R. Co., 76 N. H. 379, 83 A. 129; P. *v.* Washor, 196 N. Y. 104, 89 N. E. 441; Smith *v.* S. (Tex. Cr.), 164 S. W. 838; Freasier *v.* S. (Tex. Cr.), 84 S. W. 360; S. *v.* Morasco (Utah), 128 P. 571; Johnson *v.* Co., 111 Va. 877, 69 S. E. 1104.

279-51 City of Victor *v.* Smilavich, 54 Colo. 479, 131 P. 392; Clinton *v.* S., 53 Fla. 98, 43 S. 312; S. *v.* Gregory, 148 Ia. 152, 126 N. W. 1109; S. *v.* Meyer, 135 Ia. 507, 113 N. W. 322; S. *v.* Headley, 224 Mo. 177, 123 S. W. 577; S. *v.* Tolla, 72 N. J. L. 515, 62 A. 675; C. *v.* Furman, 211 Pa. 549, 60 A. 1089; Douglass *v.* S. (Tex. Cr.), 165 S. W. 933; Cole *v.* S. (Tex. Cr.), 165 S. W. 929; Applebaum *v.* Bass (Tex. Civ.), 113 S. W. 173; Freasier *v.* S. (Tex. Cr.), 84 S. W. 360; Moore *v.* S., 49 Tex. Cr. 449, 96 S. W. 327; Gabler *v.* S., 49 Tex. Cr. 623, 95 S. W. 521; S. *v.* Morasco (Utah), 128 P. 571; S. *v.* Myrberg, 56 Wash. 384, 105 P. 622; Robinson *v.* S., 143 Wis. 205, 126 N. W. 750.

Insufficient examination cause for appellate interference (Crosby *v.* S., 93 Ark. 156, 124 S. W. 781), though child

testified on previous trial. Young *v.* S., 122 Ga. 725, 50 S. E. 996. Question of competency may be considered during examination on main issue, thereby curing failure to examine. Webb *v.* S., 7 Ga. App. 35, 66 S. E. 27.

279-52 Clinton *v.* S., 53 Fla. 98, 43 S. 312.

Test prescribed by law must be applied and if he is excluded without such test of his capacity it is an arbitrary abuse of discretion. Piepke *v.* R. Co., 242 Pa. 321, 89 A. 124.

In absence of request for examination of child of six objection to competency properly overruled. Evers *v.* S., 84 Neb. 708, 121 N. W. 1005.

280-53 P. *v.* Stanley, 130 App. Div. 64, 114 N. Y. S. 395.

Court may allow counsel to examine. Simmons *v.* S., 158 Ala. 8, 48 S. 606.

280-55 Young *v.* S., 122 Ga. 725, 50 S. E. 996.

281-58 Rex *v.* Armstrong, 15 Ont. L. R. 47.

281-60 Clinton *v.* S., 53 Fla. 98, 43 S. 312.

281-63 In civil cases. See Gehl *v.* Brew. Co., 156 App. Div. 51, 141 N. Y. S. 133.

282-66 Lyons *v.* Nat. Bk., 101 Ark. 368, 142 S. W. 856.

Admissions in pleadings by guardians ad litem do not bind infants; neither do admissions of co-defendants though interests joint. Stephenson *v.* Collins, 57 W. Va. 351, 50 S. E. 439.

Admissions negativing infancy.—Taylor *v.* White & Awbrey, 1 Ala. App. 593, 56 S. 2.

INJUNCTION

Presumption in favor of patentee who has judgment, 288-1.

288-1 Sanders *v.* Brown, 145 Ala. 665, 39 S. 732; Everett *v.* Jennings, 137 Ga. 253, 73 S. E. 375; Everett *v.* Tabor, 119 Ga. 128, 46 S. E. 72; Schoemaker *v.* Wallace, 154 Ia. 236, 134 N. W. 740; Dowdell *v.* Soc., 114 La. 19, 38 S. 16; Carswell *v.* Swindell, 102 Md. 636, 62 A. 956; Little *v.* Lenoir, 151 N. C. 415, 66 S. E. 337; Ty. *v.* Whitehall, 13 Okla. 534, 76 P. 148; McMahan *v.* Morgan (Tex. Civ.), 151 S. W. 1123.

Evidence must sustain case made by bill. Sanders *v.* Brown, 145 Ala. 665, 39 S. 732.

Patentee who has established his right to priority of invention has strong presumption in his favor and is, prima facie, entitled to injunction. Defendant must satisfy court beyond reasonable doubt. Laas *v.* Scott, 145 Fed. 195. Presumption in favor of complaint not overcome by ex parte affidavits relating to long past events. American G. Co. *v.* R. Co., 155 Fed. 427; Richards *v.* Meissner, 158 Fed. 109 (evidence must carry thorough conviction).

Ne exeat.—Rule applies to one seeking writ. Jastram *v.* McAuslan, 29 R. I. 471, 72 A. 531.

288-2 Sharp *v.* Bellinger, 155 Fed. 139; Johns-P. Co. *v.* Co., 155 Fed. 129; Weir *v.* Winnett, 155 Fed. 824; Robertson *v.* Lewie, 77 Conn. 345, 59 A. 409; Godwin *v.* Phifer, 51 Fla. 441, 41 S. 597; Warren Mfg. Co. *v.* Baltimore, 110 Md. 188, 86 A. 502; City of Water Val. *v.* S. (Miss.), 60 S. 576; Marvel *v.* Jonah, 81 N. J. Eq. 369, 86 A. 968; Savage *v.* R. Co., 73 N. J. Eq. 308, 67 A. 436; Wolfer *v.* Hurst, 50 Or. 218, 91 P. 366; Columbia College *v.* Tunberg, 64 Wash. 19, 116 P. 280; Pence *v.* Carney, 58 W. Va. 296, 52 S. E. 702.

Should be granted with great caution and only when necessity requires. Western N. Y. Water Co. *v.* Laughlin, 82 Misc. 496, 143 N. Y. S. 737.

Cannot invoke to decide an academic question. Bellarts *v.* Cleeton, 65 Or. 269, 132 P. 961.

289-3 St. Louis S. W. R. Co. *v.* R. Co., 188 Fed. 374; McCarthy *v.* Co., 147 Fed. 981; Hall S. Co. *v.* Co., 153 Fed. 907, 82 C. C. A. 653; Indian L. & T. Co. *v.* Shoenfelt, 135 Fed. 484, 68 C. C. A. 196; Randall *v.* Freed, 154 Cal. 299, 97 P. 669; Gray *v.* Council, 9 Del. Ch. 171, 79 A. 735; Metcalf *v.* Martin, 54 Fla. 531, 45 S. 463; White *v.* Assn., 233 Ill. 526, 84 N. E. 658; Chicago, etc. R. Co. *v.* Comrs., 175 Ind. 630, 95 N. E. 364; Owen County Soc. *v.* Brumback, 32 Ky. L. R. 916, 107 S. W. 710; Devou *v.* Pense, 32 Ky. L. R. 697, 106 S. W. 874; Carswell *v.* Swindell, 102 Md. 636, 62 A. 956; Savage *v.* R. Co., 73 N. J. Eq. 308, 67 A. 436; Schwarzenbach *v.* Co., 129 N. Y. S. 384; Yount *v.* Setzer, 155 N. C. 213, 71 S. E. 209; Bracken *v.* Stone, 20 Okla. 613, 95 P. 226; Marshall *v.* Hunter, 13 Okla. 261, 74 P. 368; South A. W. R. Co. *v.* R. Co., 104 Va. 322, 51 S. E. 843; Grant-

ham *v.* Gibson, 41 Wash. 125, 83 P. 14.

289-4 Williams *v.* Harper, 127 Ill App. 619; Ranney *v.* Stoll, 174 Mich. 440, 140 N. W. 607; Whalen *v.* Co., 129 N. Y. S. 391; Gannett *v.* C., 55 Misc. 555, 106 N. Y. S. 3; Berkey *v.* Co., 220 Pa. 65, 69 A. 329.

289-5 Carpenter *v.* Cemetery, 188 Fed. 856; Weir *v.* Winnett, 155 Fed. 824.

If it appears that more damage is likely to occur by granting a temporary injunction than by refusing it it should not be granted and contrariwise it should be granted if greater injury will occur by refusing. Cubbins *v.* Com., 204 Fed. 299; Marvel *v.* Jonah, 81 N. J. Eq. 369, 86 A. 968; Willock *v.* Arensberg, 51 Pa. Super. 73; Matagorda C. Co. *v.* Irr. Co. (Tex. Civ.), 154 S. W. 1176.

290-8 Bracken *v.* Stone, 19 Okla. 613, 93 P. 236; Barget *v.* Drake, 52 Pa. Super. 647.

290-9 Louisville & N. R. Co. *v.* Com., 157 Fed. 944; Sorenson *v.* Norell, 24 Colo. App. 470, 135 P. 119; S. *v.* Co., 77 Kan. 774, 95 P. 391; Hurd *v.* R. Co., 73 Kan. 83, 84 P. 553; Ver Steeg *v.* R. Co., 250 Mo. 61, 156 S. W. 689; Aldrich *v.* Paper Co., 81 N. J. Eq. 244, 87 A. 65; S. *v.* R. Co., 145 N. C. 495, 59 S. E. 570.

290-10 Delaware, etc. R. Co. *v.* Union, 158 Fed. 541; Randall *v.* Freed, 154 Cal. 299, 97 P. 669; Allott *v.* Co., 237 Ill. 55, 86 N. E. 685; City of Chicago *v.* Gaslight Co., 170 Ill. App. 98; Spurgeon *v.* Rhodes, 167 Ind. 1, 78 N. E. 288; Williams *v.* School Dist., 167 Mo. App. 476, 151 S. W. 506; Hotchkiss *v.* Keck, 84 Neb. 545, 121 N. W. 579; Meyer *v.* Somerville Water Co. (N. J.), 82 A. 915; Russell *v.* Union, 57 Misc. 96, 107 N. Y. S. 303; Hodgins *v.* Hodgins, 23 Okla. 625, 103 P. 711; Le Blond *v.* Peshtigo, 14 Wis. 604, 123 N. W. 157.

291-12 Carlisle *v.* Smith, 200 Fed. 268; Sperry & Hutchinson Co. *v.* Pommer, 199 Fed. 309; Hall S. Co. *v.* Co., 153 Fed. 907, 82 C. C. A. 653 (reasonable certainty); Mathews G. C. Co. *v.* Lister, 154 Fed. 490; Marconi W. T. Co. *v.* Co., 154 Fed. 74; McCarthy *v.* Co., 147 Fed. 981; Star Co. *v.* House, 141 Fed. 129; Paul Steam S. Co. *v.* Paul, 129 Fed. 757 (rule especially strict in circuit court for Massachusetts); Builders' S. Co. *v.* Acton, 56 Fla. 756, 47 S. 822; Godwin *v.* Phifer, 51 Fla. 441, 41 S. 597 (especially if application made without notice); Silvey *v.* R. Co., 137 Ga. 468, 73 S. E. 629; Williams *v.* Harper, 127 Ill. App. 619 (if granted without notice); Spurgeon *v.* Rhodes, 167 Ind. 1, 78 N. E. 288; Perry *v.* Co., 44 Ind. App. 207, 88 N. E. 859; Stinson *v.* Co., 109 Md. 111, 71 A. 527; Pearman *v.* Wiggins (Miss.), 60 S. 1; School Dist. *v.* DeLong, 80 Neb. 667, 114 N. W. 934; Savage *v.* R. Co., 73 N. J. Eq. 308, 67 A. 436; Schalkenbach *v.* Co., 129 App. Div. 389, 113 N. Y. S. 352 (especially if court without jurisdiction to grant permanent injunction); Lanham *v.* Co., 48 Wash. 337, 93 P. 522 (mandatory writ).

See American V. Fibre Co. *v.* Taylor (Del. Ch.), 87 A. 1025.

For preservation of possible rights temporary injunctions granted upon testimony not convincing, but permanent injunction granted only upon clear establishment of necessary facts. McCarthy *v.* Co., 147 Fed. 981. See Goldfield C. M. Co. *v.* Union, 159 Fed 500.

Showing need not be so strong where it is merely sought to maintain status quo and denial of writ would practically be decision against complainant on merits. Jones *v.* Dimes, 130 Fed. 638; Gring *v.* Co., 129 Fed. 996.

Sufficient evidence.—Baldwin *v.* Assn., 165 Mich. 98, 130 N. W. 214.

Insufficient evidence.—Fleming *v.* Rohleder (Tex. Civ.), 135 S. W. 735.

293-14 Jones *v.* Dimes, 130 Fed. 638; Lehman *v.* Graham, 135 Fed. 39, 67 C. C. A. 513; Kerr *v.* New Orleans, 126 Fed. 920, 61 C. C. A. 450; Haisfield *v.* City of Gainesville, 139 Ga. 715, 77 S. E. 1126; Steadman *v.* Co., 119 Ga. 616, 46 S. E. 838; Everett *v.* Tabor, 119 Ga. 128, 46 S. E. 72; McConnell *v.* Co., 125 Ga. 376, 54 S. E. 117.

See Sperry & Hutchinson Co. *v.* Pommer, 199 Fed. 309; Adel Lumber Co. *v.* Sorrell, 139 Ga. 375, 77 S. E. 153; Simmons *v.* Atlanta Tel. & Tel. Co., 139 Ga. 488, 77 S. E. 377; Brantley *v.* Lee, 139 Ga. 600, 77 S. E. 788; Kohlruss *v.* Zachery, 139 Ga. 625, 77 S. E. 812; Hendricks *v.* Jackson, 139 Ga. 604, 77 S. E. 816; Hanes *v.* Davis, 139 Ga. 669, 77 S. E. 1054; City of St. George *v.* Haag, 138 Ga. 768, 76 S. E. 49; Crawford *v.* Sullivan, 238 Pa. 142, 85 A. 1090.

Granting or refusing of an injunction is largely within discretion of the court. American G. S. Co. *v.* S. Co., 202 Fed. 202, 120 C. C. A. 644; Kankakee *v.* S. Co., 199 Fed. 757, 118 C. C. A. 195; Fireball, etc. Co. *v.* A. Co., 198 Fed. 650, 117 C. C. A. 354; Wilmington C. R. Co. *v.* Taylor, 198 Fed. 159; Alford & Mills *v.* Lumb. Co., 139 Ga. 231, 76 S. E. 999; Ga., etc. R. Co. *v.* R. Co., 139 Ga. 119, 76 S. E. 853; Beidenkopf *v.* Ins. Co. (Ia.), 142 N. W. 434; Onen *v.* Herkimer, 172 Mich. 593, 138 N. W. 198; Halfmoon B. Co. *v.* Const. Co., 157 App. Div. 183, 141 N. Y. S. 865; Freseman *v.* Purvis, 51 Pa. Super. 506; Weaver *v.* Richardson (Wyo.), 132 P. 1148. See Fisher *v.* Kutztown Borough, 49 Pa. Super. 483.

293-15 Taylor *v.* R. Co., 54 Fla. 635, 45 S. 574, 16 L. R. A. (N. S.) 307.

Mistake of law on part of court is an abuse of discretion. Bissel *v.* Olson, 26 N. D. 60, 143 N. W. 340.

293-16 Russell *v.* Union, 57 Misc. 96, 107 N. Y. S. 303; Angelo Co. *v.* Co., 55 Misc. 328, 105 N. Y. S. 590; Tise *v.* Whitaker Co., 144 N. C. 507, 57 S. E. 210; Jeff Chaison T.-S. Co. *v.* Co., 56 Tex. Civ. 611, 121 S. W. 716.

294-17 Ford *v.* Taylor, 140 Fed. 356; Goldfield C. M. Co. *v.* Union, 159 Fed. 500; Seaboard A. L. R. Co. *v.* Coin., 155 Fed. 792; Richards *v.* Meissner, 158 Fed. 109; Colorado Eastern R. Co. *v.* R. Co., 141 Fed. 898, 73 C. C. A. 132; Enright *v.* Boyd, 122 App. Div. 885, 106 N. Y. S. 493; S. *v.* Club, 82 S. C. 142, 63 S. E. 545. See N. Y. Motion P. Co. *v.* Mfg. Co, 77 Misc. 581, 137 N. Y. S. 278; American L. Ins. Co. *v.* Ferguson, 66 Or. 417, 134 P. 1029.

295-18 Spokane S. Wks. *v.* Ridpath, 48 Wash. 370, 93 P. 533.

296-20 Daniels *v.* Daniels (Tex. Civ.), 127 S. W. 569.

296-21 Anderson *v.* Englehart, 18 Wyo. 409, 108 P. 977.

297-22 Alderman *v.* Wilson, 69 S. C. 156, 48 S. E. 85.

297-24 S. *v.* Co., 77 Kan. 774, 95 P. 391; School Dist. *v.* DeLong, 80 Neb. 667, 114 N. W. 931.

298-25 Camp No. 6 *v.* Arrington, 107 Md. 319, 68 A. 548, answers by merely formal parties not essential.

Verification essential.—Lee *v.* Broocks, 54 Tex. Civ. 220, 118 S. W. 164, statute.

298-26 White *v.* Ryan, 15 Pa. C. C. 170.

298-28 Baker *v.* McKinney, 54 Fla. 495, 44 S. 944; Godwin *v.* Phifer, 51 Fla. 441, 41 S. 597; Reed *v.* Bk., 230 Ill. 50, 82 N. E. 341; Cadillac A. Co. *v.* Boynton, 142 Ill. App. 381; Shulman *v.* Co., 113 App. Div. 759, 99 N. Y. S. 419; Blackwell's D. T. Co. *v.* Co., 145 N. C. 367, 59 S. E. 123; Harvey *v.* Ryan, 59 W. Va. 134, 53 S. E. 7; Badger B. Mfg. Co. *v.* Daly, 137 Wis. 601, 119 N. W. 328.

299-30 Weeks *v.* Co., 53 Fla. 793, 44 S. 173.

299-32 Greenwood *v.* Trigg, 154 Ala. 487, 46 S. 227; Bishop *v.* Owens, 5 Cal. App. 83, 89 P. 844 (allegations as to multiplicity of suits and legal rights which may result from wrongful acts); Baker *v.* McKinney, 54 Fla. 495, 44 S. 944; Hall *v.* Horne, 52 Fla. 510, 42 S. 383; Godwin *v.* Phifer, 51 Fla. 441, 41 S. 597; Reed *v.* Bk., 230 Ill. 50, 82 N. E. 341; Builders' P. & D. Co. *v.* Trades, 116 Ill. App. 264; Vandalia C. Co. *v.* Lawson, 43 Ind. App. 226, 87 N. E. 47; McKeever *v.* Baker, 80 Kan. 201, 101 P. 991; S. *v.* Co., 77 Kan. 774, 95 P. 391; Gulf, etc. R. Co. *v.* Barnes, 94 Miss. 484, 48 S. 823; Kienle *v.* R. Co., 133 App. Div. 391, 117 N. Y. S. 500; Jordan *v.* Greenville, 79 S. C. 436, 60 S. E. 973; Holbein *v.* De La Garza (Tex. Civ.), 126 S. W. 42; Clark *v.* Peck, 79 Vt. 275, 65 A. 14.

301-34 Richards *v.* Meissner, 158 Fed. 109; Ashburn *v.* Graves, 149 Fed. 968, 79 C. C. A. 478; Indian L. & T. Co. *v.* Shoenfelt, 135 Fed. 484, 68 C. C. A. 196; Montgomery, etc. Co. *v.* Co., 142 Ala. 462, 38 S. 1026; Randall *v.* Freed, 154 Cal. 299, 97 P. 669; Bishop *v.* Owens, 5 Cal. App. 83, 89 P. 844; Merced Falls G. & E. Co. *v.* Turner, 2 Cal. App. 720, 84 P. 239; Metcalf *v.* Martin, 54 Fla. 531, 45 S. 463; Consolidated, etc. R. Co. *v.* R. Co., 107 Md. 671, 69 A. 518; Carswell *v.* Swindell, 102 Md. 636, 62 A. 956; Schoch *v.* Garrison, 74 N. J. Eq. 292, 70 A. 147; Ehrich *v.* Grant, 111 App. Div. 196, 97 N. Y. S. 600; South & W. R. C. *v.* R. Co., 104 Va. 323, 51 S. E. 843; Pence *v.* Carney, 58 W. Va. 296, 52 S. E. 702.

Allegation that damage amounted to sum named or other large sum does not negative injury done and threatened irreparable. Roberts *v.* Heinsohn, 123 Ga. 685, 51 S. E. 589.

If allegations show irreparable injury defendant's insolvency immaterial. Mc-

Connell *v.* Co., 125 Ga. 376, 54 S. E. 117.

302-38 Godwin *v.* Phifer, 51 Fla. 441, 41 S. 597; McLauchlin *v.* McLauchlin, 128 Ga. 653, 58 S. E. 156; Ft. Dearborn S. & D. Co. *v.* Rigdon, 166 Ill. App. 334.

Verification sufficient in form if signed by plaintiff and fact duly certified to. Chancey *v.* Allison, 48 Tex. Civ. 441, 107 S. W. 605.

In federal courts verification must be made before an officer within §1778 R. S. Stationary E. P. Co. *v.* Comerford, 155 Fed. 667.

303-40 My Maryland Lodge *v.* Adt, 100 Md. 238, 59 A. 721; Baltimore B. H. *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660.

Affidavit by attorney must state reasons for making unless made on his knowledge, and, if not so made, must show why not made by person having knowledge. Wiles *v.* Co., 13 Ida. 326, 89 P. 1053; Terry *v.* Green, 53 Misc. 10, 103 N. Y. S. 1014.

303-42 Seaboard A. L. R. Co. *v.* Co., 53 Fla. 832, 44 S. 351 (solicitor); First Baptist Soc. *v.* Dexter, 193 Mass. 187, 79 N. E. 342 (treasurer of religious corporation, plaintiff); Southern R. Co *v.* R. Co., 102 Va. 483, 46 S. E. 784 (president).

303-45 McLauchlin *v.* McLauchlin, 128 Ga. 653, 58 S. E. 156.

A verification "are true in substance and fact as therein alleged" is sufficiently positive. Mohr *v.* Smith, 176 Ill. App. 64.

303-48 Allegations made on understanding and belief, no statement being made as to source or grounds thereof, not helped by affidavits of others stating that allegations true. Gillette *v.* Noyes, 92 App. Div. 313, 86 N. Y. S. 1062.

304-52 Leck *v.* Baldwin Co., 178 Ill. App. 93; Allen *v.* Judge, 159 Mich. 612, 124 N. W. 581.

Where none of allegations are on information and belief a verification that the facts are true and adding "that the allegations in said petition based on knowledge and belief were true to the best of affiant's knowledge and belief" the latter part is mere surplusage and may be disregarded. Houston Oil Co. *v.* Davis (Tex. Civ.), 154 S. W. 337.

306-54 Under a statute providing that a writ shall not be awarded unless judge satisfied of plaintiff's equity, and that an affidavit is sufficient if affiant swears he believes it to be true, it is enough to state affiant president of corporation, has read bill, allegations in it of which he has knowledge are true, and, as to the other matters, he believes them to be true. Southern R. Co. *v.* R. Co., 102 Va. 483, 46 S. E. 784.

306-55 Rule varied though bill verified only upon information and belief after rule to show cause has been issued and no return made to it, and especially after demurrer has been interposed. Niles *v.* Co., 22 App. Cas. (D. C.) 225.

308-60 Familiarity of affiant with facts alleged must be stated. Empire G. Co. *v.* Co., 154 Ala. 409, 45 S. 657.

Affidavits made on information and belief sufficient. Freeman *v.* Talc. Co., 151 App. Div. 732, 136 N. Y. S. 233.

In Illinois it is sufficient if the material allegations are positively sworn to, and it may otherwise be verified upon information and belief. Leck *v.* Baldwin Co., 178 Ill. App. 93.

309-62 Christian Hospital *v.* P., 223 Ill. 244, 79 N. E. 72; Leeds *v.* Institute, 122 Ill. App. 650.

311-66 See Spurgeon *v.* Rhodes, 167 Ind. 1, 78 N. E. 288.

311-67 Godwin *v.* Phifer, 51 Fla. 441, 41 S. 597.

If notice is given of the application and there is no denial of the averments of the bill allegations on information and belief sufficient. Spurgeon *v.* Rhodes, 167 Ind. 1, 78 N. E. 288.

312-73 See Hartingh *v.* Circuit Judge, 176 Mich. 289, 142 N. W. 585.

313-74 Stationary E. P. Co. *v.* Comerford, 155 Fed. 667; McLauchlin *v.* McLauchlin, 128 Ga. 653, 58 S. E. 156 (amendment made after order nisi issued).

313-77 Cragg *v.* Levinson, 238 Ill. 69, 87 N. E. 121; S. *v.* Co., 82 S. C. 181, 63 S. E. 884; Alamo Club *v.* S. (Tex. Civ.), 147 S. W. 639; Citizens St. Bk. *v.* Bk., 56 Tex. Civ. 515, 120 S. W. 1141.

313-78 Dawson *v.* Baldridge, 55 Tex. Civ. 124, 118 S. W. 593.

313-79 Pocahontas C. Co. *v.* Co., 60 W. Va. 508, 56 S. E. 264.

Conclusions not admitted; only facts well pleaded. White *v.* Assn., 233 Ill 526, 84 N. E. 658.

313-80 White *v.* Assn., supra.

Amended bill considered in passing on

motion to dissolve injunction. Belzoni O. Co. *v.* R. Co., 94 Miss. 58, 47 S. 468.

314-81 If contradictory allegations are made bill will be tested by weaker ones. Durham *v.* Edwards, 50 Fla. 495, 38 S. 926; Barco *v.* Doyle, 50 Fla. 488, 39 S. 103; Godwin *v.* Phifer, 51 Fla. 441, 41 S. 597.

315-89 Brookshire O. Co. *v.* Co., 151 Cal. 577, 91 P. 383.

319-2 Answers filed after action by trial court not considered on appeal. Builders' S. Co. *v.* Acton, 56 Fla. 756, 47 S. 822.

319-3 Brookshire O. Co. *v.* Co., 151 Cal. 577, 91 P. 383; Terry *v.* Hageman, 102 Miss. 224, 59 S. 75.

An answer which either expressly admits or neither admits nor denies them is considered as admitting. Rothschild & Co. *v.* Mfg. Co., 174 Ill. App. 381.

319-4 Goodson *v.* Stewart, 149 Ala. 106, 42 S. 1019.

320-5 Deere & W. Co. *v.* Co., 153 Fed. 177, 82 C. C. A. 351; Ford *v.* Taylor, 140 Fed. 356; Ambursen H. Const. Co. *v.* Gun Co. (Del. Ch.), 88 A. 559.

322-8 Ford *v.* Taylor, supra.

322-11 Hall *v.* R. Co., 158 Ala. 271, 48 S. 365.

323-12 Deere & W. Co. *v.* Co., 153 Fed. 177, 82 C. C. A. 351. See Hartingh *v.* Circuit Judge, 176 Mich. 289, 142 N. W. 585.

324-14 Schiefer *v.* Freygang, 125 App. Div. 498, 109 N. Y. S. 848.

Statements in form of justification of acts will not supply lack of proof of intent on plaintiff's part. Cox *v.* Sheen, 82 Neb. 472, 118 N. W. 125.

326-19 Dingley *v.* Buckner, 11 Cal. App. 181, 104 P. 478.

329-30 Sacramento *v.* Co., 155 Fed. 1022; Long *v.* Shepherd, 159 Ala. 595, 48 S. 675; Webster *v.* Debardelaben, 147 Ala. 280, 41 S. 831; Montgomery, etc. Co. *v.* Co., 142 Ala. 462, 38 S. 1026; Western T. & T. Co. *v.* Co., 75 Ark. 286, 87 S. W. 432; Martin *v.* Danziger, 21 Cal. App. 563, 132 P. 284; Godwin *v.* Phifer, 51 Fla. 441, 41 S. 597; Wall *v.* Clayton, 130 Ga. 428, 60 S. E. 1047; McKenzie *v.* Withers (Tex. Civ.), 153 S. W. 413.

330-31 Johnson *v.* Howze, 154 Ala. 494, 45 S. 653; Mobile & W. R. Co. *v.* Co., 152 Ala. 320, 44 S. 471; Shaw *v.* Palmer, 54 Fla. 490, 44 S. 953; Robbins *v.* White, 52 Fla. 613, 42 S. 841; Swan *v.* Indianaola, 142 Ia. 731, 121 N. W. 547 (except where fraud gravamen of action); Wallace *v.* Salisbury, 147 N. C. 58, 60 S. E. 713; Dawson *v.* Balridge, 55 Tex. Civ. 124, 118 S. W. 593; Lewis *v.* Hall, 64 W. Va. 147, 61 S. E. 317; Meyer *v.* Meyer, 60 W. Va. 473, 56 S. E. 209; Carstens *v.* Fond du Lac, 137 Wis. 465, 119 N. W. 117.

Affidavits given same effect as formal answer in some states. Gossard Co. *v.* Crosby, 132 Ia. 155, 109 N. W. 483.

330-32 Ford *v.* Taylor, 140 Fed. 356; Francis *v.* Coal Co. (Ala.), 60 S. 919; Mobile & W. R. Co. *v.* Co., 152 Ala. 320, 44 S. 471; Everett *v.* Tabor, 119 Ga. 128, 46 S. E. 72; Lowery *v.* Cole, 47 Mont. 64, 130 P. 410; Rea Bros. Sheep Co. *v.* Rudi, 46 Mont. 149, 127 P. 85 (abuse of discretion); Corbett *v.* Sweeney (Tex. Civ.), 151 S. W. 858. See Masonic F. T. Assn. *v.* Chicago, 131 Ill. App. 1; Axtell *v.* Lopp (Tex. Civ.), 152 S. W. 192.

Verified answer not conclusive upon merits independently of special circumstances. Spar C. M. Co. *v.* Casserleigh, 34 Colo. 454, 83 P. 1058.

331-33 Pere Marquette R. Co. *v.* Bradford, 149 Fed. 492; Johnson *v.* Howze, 154 Ala. 494, 45 S. 653; Dawson *v.* Baldridge, 55 Tex. Civ. 124, 118 S. W. 593; Meyer *v.* Meyer, 60 W. Va. 473, 56 S. E. 209.

Denials disregarded if right to commit acts sought to be enjoined not asserted. P. *v.* Tool, 35 Colo. 225, 86 P. 224, 229, 239; Herzog *v.* Fitzgerald, 74 App. Div. 110, 77 N. Y. S. 366.

332-34 Swan *v.* Indianola (Ia.), 121 N. W. 547.

333-36 Fuller *v.* Chenault, 157 Ala. 46, 47 S. 197; Gilreath *v.* Co., 157 Ala. 153, 47 S. 298.

334-38 See Mobile & W. R. Co. *v.* Co., 152 Ala. 320, 44 S. 471.

335-39 Arlington Heights F. Co. *v.* Co., 175 Fed. 141; Lehman *v.* Graham, 135 Fed. 39, 67 C. C. A. 513; Seaboard A. L. R. Co. *v.* Comm., 155 Fed. 792; Mountain C. Co. *v.* U. S., 142 Fed. 625, 73 C. C. A. 621; Pere Marquette R. Co. *v.* Bradford, 149 Fed. 492; McCarthy *v.* Co., 147 Fed. 981; Gring *v.* Co., 129 Fed. 996; Sampson & M. Co. *v.* R. Co., 129 Fed. 761; Williams *v.* R. Co., 150 Cal. 592, 89 P. 330; P. *v.* Tool, supra; Eberhardt *v.* Co. (Del. Ch.), 74 A. 33; Everett *v.* Tabor, 119 Ga. 128, 46 S. E. 72; My Maryland Lodge *v.*

Adt, 100 Md. 238, 59 A. 721; Martin *v.* McFall, 65 N. J. Eq. 91, 55 A. 465; P. *v.* Co., 131 App. Div. 174, 115 N. Y. S. 297; Berkey *v.* Co., 220 Pa. 65, 69 A. 329; Ferry L. L. Co. *v.* Holt, 53 Wash. 584, 102 P. 445; Meyer *v.* Meyer, 60 W. Va. 473, 56 S. E. 209; Eau Claire, etc. Co. *v.* Eau Claire, 134 Wis. 548, 115 N. W. 155.

336-40 American S. & R. Co. *v.* Godfrey, 158 Fed. 225, 89 C. C. A. 139; Arizona C. Co. *v.* Gillespie, 12 Ariz. 190, 100 P. 465; Garth L. & S. Co. *v.* Johnson, 151 Mich. 205, 115 N. W. 52; Sullivan *v.* Co., 208 Pa. 540, 57 A. 1065, 66 L. R. A. 712, *over.* Huckenstine's App., 70 Pa. 102, 10 Am. Rep. 669. Doctrine not applicable to decrees after hearing on plenary proofs. U. S. *v.* Luce, 141 Fed. 385, 416.

337-42 Pere Marquette R. Co. *v.* Bradford, 149 Fed. 492.

338-44 McGourin *v.* Springs, 51 Fla. 502, 41 S. 541.

340-51 New Decatur *v.* Scharfenberg, 147 Ala. 367, 41 S. 1025.

342-54 Pere Marquette R. Co. *v.* Bradford, 149 Fed. 492; McGourin *v.* Springs, 51 Fla. 502, 41 S. 541.

342-55 See Hall *v.* R. Co., 158 Ala. 271, 48 S. 365.

342-58 Denials of answer must not be less positive than those of petition in order that writ may be dissolved on pleadings. Collins *v.* Stanley, 15 Wyo. 282, 88 P. 620.

343-59 Empire G. Co. *v.* F. Co., 154 Ala. 409, 45 S. 657.

Verified answer, oath thereto being waived, entitled only to weight of ex parte affidavit. Pere Marquette R. Co. *v.* Bradford, 149 Fed. 492.

Defective verification of bill does not remedy answer defectively verified. Empire G. Co. *v.* F. Co., 154 Ala. 409, 45 S. 657.

345-68 S. *v.* Co., 82 S. C. 181, 63 S. E. 884.

346-70 Right to cross-examine affiant sometimes provided for by rule of court, and when examination has been had testimony used by either party though the other announces he will not use it. Campbell *v.* Hough, 73 N. J Eq. 601, 68 A. 759.

Affidavits inadmissible if not properly entitled unless they otherwise show necessary facts. Hicks *v.* Portwood, 129 Ga. 307, 58 S. E. 837; Horton *v.* Fulton, 130 Ga. 466, 60 S. E. 1059; Johnson *v.* Tanner, 126 Ga. 718, 56 S. E. 80.

346-72 Withers *v.* Linden (Tex. Civ.), 138 S. W. 1117.

Affidavits not admissible after arguments closed and court has announced purpose to grant order. Green *v.* Freeman, 126 Ga. 274, 55 S. E. 45.

346-73 Affidavits competent only to support allegations of bill and petition; cannot serve as amendments of either, or to introduce new grounds for relief. Montgomery W. P. Co. *v.* Chapman, 128 Fed. 197.

Deposition not inadmissible because after taken and before hearing there was substitution of parties, issues not affected. Munger *v.* Yeiser, 80 Neb. 285, 114 N. W. 166, under statute.

347-74 Ford *v.* Taylor, 140 Fed. 356.

348-75 Affidavits required before preliminary writ issues. Juniata W. & P. Co. *v.* Co., 226 Pa. 407, 75 A. 603.

348-76 Roman *v.* Co., 147 Ala. 389, 41 S. 292. *Comp.* Wilson *v.* Wilson, 52 Pa. Super. 639, where the court permitted two other affidavits to be filed nunc pro tunc.

349-77 Notice of purpose to support bill by extrinsic evidence must be given opposing party where such evidence admissible. Roman *v.* Co., supra. witnesses).

349-81 Webster *v.* Debardelaben, 147 Ala. 280, 41 S. 831.

355-95 If petitioner has verified petition affidavit impeaching his veracity admissible. Buschbaum *v.* Heriot, 5 Ga. App. 521, 63 S. E. 645.

355-96 Bracken *v.* Stone, 20 Okla. 613, 95 P. 236.

355-97 False statements as to some facts weakens whole case. Connett *v.* Hatters, 76 N. J. Eq. 202, 74 A. 188.

356-98 Nelson *v.* Hammonds, 173 Ala. 14, 55 S. 301.

356-1 Collins *v.* Weigselbaum, 126 Ill. App. 158.

357-6 Service of notice necessary. Roman *v.* Co., 147 Ala. 389, 41 S. 292. In action against municipality clear proof of urgency to authorize issuance of writ without notice necessary. Chicago *v.* Farson, 118 Ill. App. 291.

Affiant's conclusion as to consequences resulting from giving notice of application for injunction no cause for issuing without notice under exception in statute. Godwin *v.* Phifer, 51 Fla. 441, 41 S. 597; Christian Hospital *v.* P., 223

Ill. 244, 79 N. E. 72; Chicago *v.* Farson, 118 Ill. App. 291; South Park Comrs. *v.* Farson, 119 Ill. App. 337.

Affidavits not served as prescribed by rule of court excluded, and court may refuse to hear testimony of affiants as to matters contained therein. Hester *v.* Exley, 130 Ga. 460, 60 S. E. 1053.

Service of notice dispensed with for sufficient cause. Seaboard A. L. R. *v.* Co., 53 Fla. 832, 44 S. 351.

358-7 All complainant's evidence need not be presented on application for preliminary writ. New York C. I. Wks. *v.* Brennan, 105 N. Y. S. 865.

359-9 Chattanooga, etc. R. Co. *v.* Morrison, 140 Ga. 769, 79 S. E. 903; Cassidy *v.* Howard, 140 Ga. 844, 80 S. E. 1; Clark *v.* Wall, 32 Mont. 219, 79 P. 1052.

Testimony given by defendant's president as witness in suit between other parties inadmissible. Arnold *v.* R. Co., 123 App. Div. 659, 108 N. Y. S. 296.

359-10 Chamberlain *v.* Brown, 144 Ia. 601, 123 N. W. 161; Marshall *v.* Homier, 13 Okla. 264, 74 P. 368; Kittanning B. Co. *v.* Co., 224 Pa. 129, 73 A. 174 (error to refuse to hear defendant's witnesses).

360-13 Walker *v.* Brosius (Tex. Civ.), 90 S. W. 655, negotiations preliminary to written contract incompetent.

360-14 Parol evidence of ownership and possession of realty received. American S. & R. Co. *v.* Godfrey, 158 Fed. 225, 89 C. C. A. 139.

360-15 Wilson *v.* Wilson, 128 Ga. 177, 57 S. E. 310 (deeds admissible in suit to restrain trespass); Mossman *v.* Thorson, 118 Ill. App. 574; Todd *v.* Crail, 167 Ind. 48, 77 N. E. 402.

Deed to common grantor of both parties immaterial. Corker *v.* Stafford, 125 Ga. 428, 54 S. E. 92.

361-16 Stinson *v.* Co., 109 Md. 111, 71 A. 527.

361-17 Laas *v.* Scott, 145 Fed. 195, judgment casts upon party resisting injunction burden of satisfying court beyond reasonable doubt.

Ex parte order granting preliminary restraining order not given much weight on question of continuing injunction. Richards *v.* Meissner, 158 Fed. 109.

362-19 Glasco *v.* Dist., 24 Okla. 236, 103 P. 687, if pleadings silent as to nature of evidence relied on.

Evidence incompetent in support of application for perpetual injunction received upon hearing motion for preliminary writ. My Maryland Lodge *v.* Adt, 100 Md. 238, 59 A. 721.

Defendant's malice shown; complainant allowed to show everything relevant under his pleadings reasonably tending to show him entitled to writ. Whittaker *v.* Stangvick, 100 Minn. 386, 111 N. W. 295, 10 L. R. A. (N. S.) 921.

Parol evidence competent on motion to dissolve injunction if notice recites it will be offered. Fisher *v.* Hussey, 25 Okla. 845, 108 P. 374.

362-20 Remberg *v.* Co., 73 Kan. 66, 84 P. 548.

363-24 Reed *v.* Bk., 230 Ill. 50, 82 N. E. 341. See Hawkins *v.* Hubbell & Houser, 127 Tenn. 312, 154 S. W. 1146.

Plaintiff in action to cancel injunction bond must sustain allegation that defendant had not suffered damage. Lawlor *v.* Merritt, 81 Conn. 715, 72 A. 143.

364-26 Babcock *v.* Reeves, 149 Ala. 665, 43 S. 21.

365-28 Brown *v.* Peterson, 117 Ill. App. 401.

365-29 Mica I. Co. *v.* Co., 157 Fed. 92; Littleton *v.* Burgess, 16 Wyo. 58, 91 P. 832, 16 L. R. A. (N. S.) 49 (jurisdiction of court issuing writ cannot be questioned). See Virginia Beach D. Co. *v.* C., 115 Va. 280, 78 S. E. 617.

366-32 Cimiotti Co. *v.* Co., 158 Fed. 171. See Pyott L. & M. Co. *v.* Tarwater (Tenn.), 150 S. W. 539.

If bond is broader than statute, latter controls. Quinn *v.* Co., 19 Colo. App. 497, 76 P. 552.

366-33 Fidelity & D. Co. *v.* Tinsley, 30 Ky. L. R. 1095, 100 S. W. 272; Albers Com. Co. *v.* Spencer, 236 Mo. 608, 139 S. W. 321; Moore *v.* Lachmund, 59 Or. 565, 117 P. 1123; Crawford *v.* Corp., 89 S. C. 456, 71 S. E. 1049; Quarnberg *v.* City of Chamberlain, 29 S. D. 377, 137 N. W. 405; McLennon *v.* Fenner, 19 S. D. 492, 104 N. W. 218. See Tennes *v.* Bldg. Co., 72 Wash. 644, 131 P. 201, where there is no basis for measuring damages.

Limited to such actual damages as are the proximate consequences of issuing the injunction. American Bonding Co. *v.* S., 120 Md. 305, 87 A. 922; Virginia Beach D. Co. *v.* C., 115 Va. 280, 78 S. E. 617.

Value of property tied up need not be proved. Cameron *v.* Jones, 41 Tex. Civ. 4, 90 S. W. 1129.

Stipulation between parties as to basis on which goods to be charged binding

as to rate of credit given for returns. Collins *v.* Huffman, 48 Wash. 184, 93 P. 220.

Holder of stock restrained from selling may show he had purchaser, notwithstanding it could not be sold without order of court, which was not obtained and could not be because of injunction. Slack *v.* Stephens, 19 Colo. App. 538, 76 P. 741.

Evidence restricted to damages caused by injunction. Collins *v.* Huffman, 48 Wash. 184, 93 P. 220.

367-34 Lewis *v.* Collier, 157 Ala. 533, 47 S. 790; Chicago Title & T. Co. *v.* Chicago, 209 Ill. 172, 70 N. E. 572; Clay Center *v.* Williamson, 79 Kan. 485, 100 P. 59; Hawkins *v.* Hubbell & Houser, 127 Tenn. 312, 154 S. W. 1146.

367-36 Fidelity & D. Co. *v.* Walker, 158 Ala. 129, 48 S. 600; Fidelity & D. Co. *v.* Tinsley, 30 Ky. L. R. 1095, 100 S. W. 272; Nielsen *v.* Albert Lea, 87 Minn. 285, 91 N. W. 1113; Curphy *v.* Terrell, 89 Miss. 624, 42 S. 235; Albers Com. Co. *v.* Spencer, 236 Mo. 608, 139 S. W. 321; McLennon *v.* Fenner, 19 S. D. 492, 104 N. W. 218; Littleton *v.* Burgess, 16 Wyo. 58, 91 P. 832, 16 L. R. A. (N. S.) 49. *Contra* in federal courts. Tullock *v.* Mulvane, 184 U. S. 497; Missouri, etc. R. Co. *v.* Elliott, 184 U. S. 530; Sullivan *v.* Cartier, 147 Fed. 222, 77 C. C. A. 448; Lindeberg *v.* Howard, 146 Fed. 467, 77 C. C. A. 23; National Society *v.* Co., 56 Misc. 627, 107 N. Y. S. 820 (applying rule to action in state court on bond given in federal court).

368-37 Marks *v.* Club, 219 Ill. 417, 76 N. E. 582; Fordham *v.* Thompson, 144 Ill. App. 342 (if there was a contract it should be proved); Littleton *v.* Burgess, 16 Wyo. 58, 91 P. 832, 16 L. R. A. (N. S.) 49.

Counsel fees not recoverable because auxillary to the main suit. S. *v.* Nash (W. Va.), 79 S. E. 829.

Right to recover attorney's fees where injunction sole relief sought not dependent upon proof of substantial damage if legal rights invaded. Weierhauser *v.* Cole, 132 Ia. 14, 109 N. W. 301.

Sum agreed to be paid best evidence of value of attorney's services. Mossman *v.* Thorson, 118 Ill. App. 574.

368-38 Miller *v.* Donovan, 13 Ida. 735, 92 P. 991 (stating rule more broadly than text); Lanum *v.* Patterson, 143 Ill. App. 255; Chicago A. & N. R. Co. *v.* Whitney, 143 Ia. 506, 121 N. W. 1043; Chicago, etc. R. Co. *v.* Sullivan, 26 Ky. L. R. 46, 80 S. W. 791; Gulfport L. & I. Co. *v.* Augur (Miss.), 48 S. 722.

Estimate of value of several services be sufficient. Akin *v.* Rice, 137 Mo. App. 147, 117 S. W. 655.

369-39 Dempster *v.* Lansingh, 128 Ill. App. 388 (immaterial that services performed in securing dissolution necessary on hearing on merits); Collins *v.* Huffman, 48 Wash. 184, 93 P. 220. See Littleton *v.* Burgess, 16 Wyo. 58, 91 P. 832, 16 L. R. A. (N. S.) 49.

INJURIES TO PERSON

Testimony of plaintiff, 375-4; *Declarations of injured person,* 375-4; *Declaration amounting to conclusion,* 377-9; *Judicial notice pain suffered,* 385-31; *Actions for wrongful death,* 406-99; *Persons abnormal or suffering from incurable disease,* 427-62; *Duration of ancestor's life,* 428-68; *Responsibility of beneficiary for death,* 441-6.

374 That defendant is protected by accident insurance is inadmissible. Shay *v.* Horr (Wash.), 139 P. 604. So also the admission of testimony that counsel for defendant represented an indemnity insurance company is error because it neither affected his liability or his credibility. Watson *v.* Adams (Ala.), 65 S. 528.

374-1 See "Expert and Opinion Evidence."

374-2 *Contra* if medical expert called examine plaintiff with a view to qualifying as a witness. Comstock *v.* Georgetown, 137 Mich. 541, 100 N. W. 788.

If plaintiff's condition has been fully testified to physician should not give opinion as to whether he was simulating. McCormick *v.* R. Co., 141 Mich. 17, 104 N. W. 390. *Comp.* Judd *v.* Caledonia, 150 Mich. 480, 114 N. W. 346.

375-4 Testimony of plaintiff he was injured and suffered is not only competent, but jury can accept and credit testimony based on his knowledge in preference to the evidence of "a whole college of physicians" he was not injured. Southern R. Co. *v.* Tankersley, 3 Ga. App. 548, 60 S. E. 297.

Declarations of injured person he was

injured are admissible when part of res gestae. Runnels *v.* R. Co., 49 Tex. Civ. 150, 107 S. W. 647; St. Louis, etc. R. Co. *v.* Coats (Tex. Civ.), 103 S. W. 662. See Nielson *v.* Co., 5 Neb. (Unof.) 430, 98 N. W. 1090, exclusion of evidence of declarations not fatal, the fact of injury being otherwise established.

Conversation between plaintiff and conductor of car from which plaintiff thrown, occurring immediately on reboarding car, in which conductor asked plaintiff if she was hurt, to which she replied she was, is part of res gestae and admissible. Nixon *v.* R. Co., 79 Neb. 550, 113 N. W. 117.

Statement of plaintiff to companion he was hurt, made immediately after arising from a fall and in response to inquiry, is admissible. Lexington *v.* Flcharty, 74 Neb. 626, 104 N. W. 1056.

Conversation between plaintiff and daughter when latter reached her mother immediately after the fall, not admissible Potter *v.* Cave, 123 Ia. 98, 98 N. W. 569.

Non-injury of other persons, similarly situated with person claiming to have been injured, may be shown. Kelly P. Co. *v.* London (Tex. Civ.), 125 S. W. 974.

Giving notice.—If statute requires notice be given defendant before suit brought plaintiff must show compliance therewith. Gutierrez *v.* R. Co., 102 Tex. 378, 117 S. W. 426.

Burden on plaintiff to show nature and extent of injury. Murphy *v.* Co., 31 Nev. 120, 101 P. 322.

375-5 Alabama Chemical Co. *v.* Phelps, 175 Ala. 121, 57 S. 694; Robinson *v.* Crotwell, 175 Ala. 194, 57 S. 23; Spear *v.* United Railroads, 16 Cal. App. 637, 117 P. 956; Joiner *v.* R. Co., 128 La. 1050, 55 S. 670; Mullin *v.* R. Co., 185 Mass. 522, 70 N. E. 1021; Markoff *v.* R. Co., 169 Mich. 37, 134 N. W. 1101; Blomquist *v.* Co., 112 Minn. 143, 127 N. W. 481; Davis *v.* R. Co., 145 N. C. 95, 58 S. E. 798; Waters-Pierce O. Co. *v.* Deselms, 18 Okla. 107, 89 P. 212; Cole *v.* Barber (R. I.), 82 A. 129; Allison *v.* City, 112 Va. 243, 71 S. E. 525.

If the actual physical cause of the injury is admitted by defendant upon the record, there is "left for inquiry only the question whether such actual physical cause was the legal or proximate cause. That may be a question of fact or a question of law, according to whether the evidence bearing on the subject is controverted or uncontroverted. The fact of reasonable anticipation of injury as an element of proximate cause may be established by the evidence, and, if so, any error in submitting it to the jury becomes innocuous if the jury answers the question correctly. Nelson *v.* Railway Co., 130 Wis. 214, 109 N. W. 933; Davis *v.* Railway Co., 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935; Wheeler *v.* Milner, 137 Wis. 26, 118 N. W. 187." Brossard *v.* Morgan Co., 150 Wis. 1, 136 N. W. 181.

The Indiana statute requires that an employer operating emery wheels shall provide exhaust fans of sufficient power for the purpose of carrying off dust from such wheels. If the plaintiff claims injury from failure to comply with this, to enable him to recover, he must show, in addition to the other material facts alleged in his complaint, that he was injured by the dust coming from the emery wheel in controversy and in considering that question the term "dust" should be considered and construed in accord with the ordinary and generally accepted meaning of the term. Indianapolis Fdry. Co. *v.* Lackey, 51 Ind. App. 175, 97 N. E. 349.

In an action for injuries sustained by being struck by an automobile, evidence as to whether the driver would or would not have driven at a dangerous rate of speed is irrelevant. McCown *v.* Muldrow, 91 S. C. 523, 74 S. E. 386.

Evidence held to sustain a verdict for injury by explosion of gas. Southern Ind. Gas Co. *v.* Tyner, 49 Ind. App. 475, 97 N. E. 580.

The condition of the machinery is a question for the jury upon a sufficient prima facie showing of imperfect operation. Cubbage *v.* Est. of Conrad Youngerman, 155 Ia. 39, 134 N. W. 1071.

Evidence as to mangled condition of decedent, for whose wrongful death damages sought, is admissible, action being for punitive as well as compensatory damages. Brickman *v.* R. Co., 74 S. C. 306, 54 S. E. 553.

Injury sustained in collision, force of collision and effect upon the cars are proper to aid in determining manner in which injuries sustained and their

nature and extent. Johnstone *v.* R. Co., 45 Wash. 154, 87 P. 1125.

In action to recover damages for unlawful killing grade of offense is not material. Defendant must show he acted in self-defense. On that issue evidence of antecedent facts and those attending the homicide is admissible. Gray *v.* Phillips, 54 Tex. Civ. 148, 117 S. W. 870.

376-6 See Heinmiller *v.* Winston, 131 Ia. 32, 107 N. W. 1102.

In action to recover for injury caused by a runaway car evidence of other cars running away at same place is admissible. Mayer *v.* R. Co., 142 Mich. 459, 105 N. W. 888.

376-7 Kansas, etc. R. Co. *v.* Morris, 80 Ark. 528, 98 S. W. 363; Western & A. R. Co. *v.* Watkins (Ga. App.), 80 S. E. 916; Smith *v.* R. Co., 165 Ill. App. 190; Vaughan *v.* R. Co., 177 Mo. App. 155, 164 S. W. 144; Jewell *v.* Mfg. Co., 166 Mo. App. 555, 149 S. W. 1045; Scott *v.* Townsend (Tex. Civ.), 159 S. W. 342; International, etc. R. Co. *v.* Hugen, 45 Tex. Civ. 326, 100 S. W. 1000; Dixon *v.* Russell, 156 Wis. 161, 145 N. W. 761. See "Res Gestae."

376-8 Gorza *v.* R. Co., 175 Ill. App. 117; Hutcheis *v.* R. Co., 128 Ia. 279, 103 N. W. 779; Robinson *v.* Stahl, 74 N. H. 310, 67 A. 577; St. Louis B. & M. R. Co. *v.* Fielder (Tex. Civ.), 163 S. W. 606. See Chicago & E. I. R. Co. *v.* Mitchell (Ind. App.), 105 N. E. 396.

377-9 Charleston & W. C. R. Co. *v.* Burckhalter, 141 Ga. 127, 80 S. E. 278; Southern R. Co. *v.* Brown, 126 Ga. 1, 54 S. E. 911; Louisville & N. R. Co. *v.* Scalf, 155 Ky. 273, 159 S. W. 804; Smith *v.* Stoner, 243 Pa. 57, 89 A. 795; Magill *v.* R. Co., 95 S. C. 306, 78 S. E. 1033; Zoesch *v.* Co., 134 Wis. 270, 114 N. W. 485.

Although the declaration may be part of the res gestae if it is nothing more than the conclusion of declarant as to the negligence of a co-employe, it should not be received. Dunn *v.* R. Co., 130 Ia. 580, 107 N. W. 616.

377-11 Kansas City R. Co. *v.* Matthews, 142 Ala. 298, 39 S. 207; Empire C. Co. *v.* Gravlee, 9 Ala. App. 657, 64 S. 207; Gordon *v.* R. Co., 154 Ia. 449, 134 N. W. 1057; Rothrock *v.* Cedar Rapids, 128 Ia. 252, 103 N. W. 475; Christopherson *v.* R. Co., 135 Ia. 409, 109 N. W. 1077 (declaration immediately after regaining consciousness, in response to inquiry by physician); Grant *v.* R. Co., 172 Mo. App. 334, 157 S. W 1016; Giles *v.* R. Co., 169 Mo. App. 24, 154 S. W. 852; Andrzejewski *v.* Fuel Co. (Wis.), 148 N. W. 37. See Koke's Admr. *v.* Steel Co., 149 Ky. 627, 149 S. W. 968. *Comp.* Klass *v.* R. Co., 169 Mo. Mo. App. 617, 155 S. W. 57.

377-12 Christopherson *v.* R. Co., supra. See White *v.* Marquette, 140 Mich. 310, 103 N. W. 698.

378-13 Alabama, etc. R. Co. *v.* Heald, 178 Ala. 636, 59 S. 461; Prescott & N. W. R. Co. *v.* Thomas (Ark.), 167 S. W. 486; McBride *v.* R. Co., 125 Ga. 515, 54 S. E. 674; White *v.* R. Co., 123 Ga. 353, 51 S. E. 411; Louisville & N. R. Co. *v.* Scalf, 155 Ky. 273, 159 S. W. 804; Chesapeake & O. R. Co. *v.* Walker's Admrs. (Ky.), 167 S. W. 128; White *v.* Marquette, 140 Mich. 310, 103 N. W. 698; Vaughan *v.* R. Co., 177 Mo. App. 155, 164 S. W. 144; Grant *v.* R. Co., 172 Mo. App. 334, 157 S. W. 1016; Poumeroule *v.* Cable Co., 167 Mo. App. 533, 152 S. W. 114; Hitchman *v.* Kerbaugh, 242 Pa. 582, 89 A. 669; Ferance *v.* Mfg. Co. (R. I.), 89 A. 339.

See Mathes *v.* R. Co., 178 Ill. App. 34; Gray *v.* R. Co., 215 Mass. 143, 102 N. E. 71; Torgeson *v.* Hanford (Wash.), 139 P. 648.

Given in response to an inquiry. Greener *v.* Elec. Co., 209 N. Y. 135, 102 N. E. 527, 46 L. R. A. (N. S.) 975, *rev.* 153 App. Div. 439, 138 N. Y. S. 273.

379-14 Jewell *v.* Mfg. Co., 166 Mo. App. 555, 149 S. W. 1045. *Comp.* Christopherson *v.* R. Co., 135 Ia. 409, 109 N. W. 1077.

379-15 Bessierre *v.* R. Co. (Ala.), 60 S. 82; Zipperlen *v.* R. Co., 7 Cal. App. 206, 93 P. 1049; Illinois Cent. R. Co. *v.* Holland's Admr., 147 Ky. 699, 145 S. W. 389; Cincinnati, etc. R. Co. *v.* Evans, 33 Ky. L. R. 596, 110 S. W. 844; Illinois C. R. Co. *v.* Houchins, 31 Ky. L. R. 93, 101 S. W. 924; United R. & E. Co. *v.* Cloman, 107 Md. 681, 69 A. 379; Johnson *v.* Motor Co., 173 Mich. 277, 139 N. W. 30; Hedlund *v.* R. Co., 120 Minn. 319, 139 N. W. 603; Union P. R. Co. *v.* Edmondson, 77 Neb. 682, 110 N. W. 650; Canham *v.* R. I. Co., 35 R. I. 177, 85 A. 1050; Missouri, etc. R. Co. *v.* Boring (Tex. Civ.), 166 S. W. 76. See Cowen *v.* R. Co., 169 Ill. App. 236; Nelson *v.* Const. Co., 148 N. Y. S. 971; Cincinnati Tract. Co. *v.* Jamison, 32 O. C. C. 336; Gulf, etc. R. Co. *v.* Culver

(Tex. Civ.), 168 S. W. 514. But see Callahan *v.* R. Co., 47 Mont. 401, 133 P. 687.

Such declarations must be a part of the res gestae; otherwise they cannot be received. Rouston *v.* R. Co., 151 Mich. 237, 115 N. W. 62.

380-16 Kemp *v.* R. Co., 122 Ga. 559, 50 S. E. 465; Dudley *v.* R. Co., 170 Mo. App. 652, 154 S. W. 462; Fredenthal *v.* Brown, 52 Or. 33, 95 P. 1114; Zentner *v.* Co., 126 Wis. 196, 105 N. W. 911. See "Res Gestae."

380-17 Illinois C. R. Co. *v.* Lowery (Ala.), 63 S. 952; Kramm *v.* R. Co., 22 Cal. App. 737, 136 P. 523; Atlantic C. L. R. Co. *v.* Crosby, 53 Fla. 400, 43 S. 318; Interstate Coal Co. *v.* Love, 153 Ky. 323, 155 S. W. 746; Louisville & N. R. Co. *v.* Moore, 150 Ky. 692, 150 S. W. 849; Hedlund *v.* R. Co., 120 Minn. 319, 139 N. W. 603; Bowman *v.* Min. Co., 168 Mo. App. 703, 154 S. W. 891; Greener *v.* Electric Co., 153 App. Div. 439, 138 N. Y. S. 273; Harrill *v.* R. Co., 132 N. C. 655, 44 S. E. 109; Kumke *v.* Kid Co. (Pa.), 90 A. 538; Gosa *v.* R. Co., 67 S. C. 347, 45 S. E. 810. See Clark *v.* Van Vleck, 135 Ia. 194, 112 N. W. 648.

380-18 Declarations of agent of another company as to incompetency of motorman operating car on which plaintiff injured, not admissible. Heinze *v.* R. Co. (Ia.), 114 N. W. 534.

Declarations of third persons, in presence of defendant, admissible if he had opportunity to contradict or explain them. Stowell *v.* Hall, 56 Or. 256, 108 P. 182, statute.

381-19 See also vol. 5, p. 610, n. 22. Travis *v.* R. Co. (Ala.), 62 S. 851; Forbes *v.* Davidson, 147 Ala. 702, 41 S. 312.

Objection was made to the exclusion of the evidence of a witness as to his opinion as to the number of chains that would have to break before anything would happen to cause the wrench to slip. "While he had worked as car repairer and was familiar with the winding devices on said cars, we think, in view of his testimony, he did not qualify as an expert on this issue." Texas Traction Co. *v.* Morrow (Tex. Civ.), 145 S. W. 1069.

381-21 Konig *v.* R. Co., 36 Nev. 181, 135 P. 141.

Jolting and jarring—opinion admissible as to whether stop of train caused jar sufficient to throw passenger about Chicago, etc. R. Co. *v.* Rowell, 151 Ky. 313, 151 S. W. 950.

382-22 Kane *v.* R. Co., 251 Mo. 13, 157 S. W. 644; Castine *v.* R. Co., 249 Mo. 192, 155 S. W. 38.

382-23 Travis *v.* R. Co. (Ala.), 62 S. 851; Dow *v.* Oroville, 22 Cal. App. 215, 134 P. 197; Kelleher *v.* R. Co., 256 Ill. 454, 100 N. E. 145; Strever *v.* Woodard (Ia.), 141 N. W. 931; Owensboro City R. Co. *v.* Tucker, 148 Ky. 844, 147 S. W. 916; Baltimore & O. R. Co. *v.* Harris, 121 Md. 254, 88 A. 282; Ahren *v.* R. Co., 102 Minn. 435, 113 N. W. 1019; Millirons *v.* R. Co., 176 Mo. App. 39, 162 S. W. 1069; Veiss *v.* R. Co. (Mo. App.), 167 S. W. 615; Patterson *v.* Co. (Mo. App.), 163 S. W. 955; Lewkowitz *v.* R. Co. (Mo. App.), 161 S. W. 588; Porter *v.* Hetherington, 172 Mo. App. 502, 158 S. W. 469; Gray *v.* R. Co., 153 Wis. 637, 142 N. W. 505. See Elward *v.* R. Co., 161 Ill. App. 630. *Comp.* MacFeat *v.* R. Co., 5 Penne. (Del.) 52, 62 A. 898; Dunn *v.* R. Co., 130 Ia. 580, 107 N. W. 616 (where plaintiff was injured by a crowbar lying near the track, struck by a passing train, and hurled against him, it was improper to ask a physician whether the injury might have been caused by a crowbar "thrown by coming in contact with a swiftly moving object like a train"; the material question for witness was whether the injury might have been caused by the impact, and not whether the bar might had been thrown by the train or some other force).

It was objected, in substance, that the opinion of an expert in answer to an hypothetical question, "in a suit for damage for personal injury, is inadmissible in the development of plaintiff's prima facie case for the purpose of establishing the existence of such injuries, where the issue was not whether such character of accident could cause such injuries, but whether it did in fact cause the same." The court said: "There is nothing in this proposition. Plaintiff was clearly entitled to adduce any testimony of a competent character to connect the cause and the proximate results of the injury. This the plaintiff was entitled to do in making out her case as well as at some other stage of the proceeding." Gulf, etc. R. Co. *v.* Abbott (Tex. Civ.), 146 S. W. 1078.

A physician was asked if the injury

set forth in the question might have produced plaintiff's nervous condition, and he answered in the affirmative. This was held proper. Richardson *v.* R. Co., 166 Mo. App. 162, 147 S. W. 1126.

But testimony of experts that they had never known of an injury of the nature complained of resulting from an electric shock is inadmissible. Black *v.* R. Co., 162 Mo. App. 90, 144 S. W. 131.

Physician who has never examined plaintiff's injuries but is present at trial and hears part of plaintiff's testimony cannot give opinion concerning probability of person injured in manner testified to. Ottawa *v.* Green, 72 Kan. 214, 83 P. 616.

383-24 Empire L. Ins. Co. *v.* Gee, 178 Ala. 492, 60 S. 90; Chicago U. T. Co. *v.* Roberts, 229 Ill. 481, 82 N. E. 401; Boehm *v.* Detroit, 141 Mich. 277, 104 N. W. 626; Noller *v.* Wright, 138 Mich. 416, 101 N. W. 553; Murphy *v.* Co., 31 Nev. 120, 101 P. 322; Beard *v.* R. Co., 143 N. C. 136, 55 S. E. 505; Parrish *v.* R. Co., 146 N. C. 125, 59 S. E. 348. See Jones *v.* Co., 137 N. C. 337, 49 S. E. 355; St. Louis, etc. Co. *v.* Brown (Tex. Civ.), 163 S. W. 383. *Comp.* Summerlin *v.* R. Co., 133 N. C. 550, 45 S. E. 898; Riser *v.* R. Co., 67 S. C. 419, 46 S. E. 47.

383-25 Fleddermann *v.* Co., 134 Mo. App. 199, 113 S. W. 1143.

Burden of proving the nature of the injury is on the plaintiff, as at common law. Warfield *v.* Hepburn, 62 Fla. 409, 57 S. 618.

A physician may testify as to his examination of deceased made immediately after injury and as to statements of deceased then made as to pain and location of injuries. Albrecht *v.* Morris, 91 Neb. 442, 136 N. W. 48.

383-26 St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 113; Atwood *v.* Co., 82 Conn. 539, 74 A. 899; Nielson *v.* Co., 5 Neb. (*Unof.*) 430, 98 N. W. 1090; Murphy *v.* Co., 31 Nev. 120, 101 P. 322; Brown *v.* Blaine, 41 Wash. 287, 83 P. 310. *Comp.* Jacksonville E. Co. *v.* Batchis, 54 Fla. 192, 44 S. 933.

Evidence of weight of injured person before injury, competent. O'Dea *v.* R. Co., 142 Mich. 265, 105 N. W. 746.

Burden is on plaintiff to show how far previous ailment caused his existing condition as compared with effect of injury complained of. Rawlings *v.* Co., 158 Mich. 143, 122 N. W. 504.

384-27 St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 113; St. Louis, etc. R. Co. *v.* Hook, 83 Ark. 584, 104 S. W. 217; Denver City Tramway Co. *v.* Cowan, 51 Colo. 64, 116 P. 136; Atlantic C. L. R. Co. *v.* Whitney, 65 Fla. 72, 61 S. 179; Southern I. R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550; Federal B. Co. *v.* Reeves, 73 Kan. 107, 84 P. 560, 77 Kan. 111, 93 P. 627; Hines *v.* Kansas City, 120 Mo. App. 190, 96 S. W. 672; Dreyfus *v.* R. Co., 124 Mo. App. 585, 102 S. W. 53; Partello *v.* R. Co. (Mo. App.), 107 S. W. 473; Murphy *v.* Co., 31 Nev. 120, 101 P. 322; Shoemaker *v.* Sonju, 15 N. D. 518, 108 N. W. 42; Brown *v.* Traction Co., 230 Pa. 498, 79 A. 713; Rapid Trans. R. Co. *v.* Williams (Tex. Civ.), 136 S. W. 267.

A showing of plaintiff's condition and the effect produced upon her in an attempt to walk on the street in the heat. Richardson *v.* R. Co., 166 Mo. App. 162, 147 S. W. 1126.

"**Loss of appetite** and inability to sleep were not set up in the petition as a specific injury for which the plaintiff sought recompense, but plaintiff testified that as a result of the accident he could not sleep well, and that he had no appetite, conditions which were admissible in evidence under the pleadings as made, because they reasonably and properly might be expected to follow the shock of the collision and the injuries described." Owensboro City R. Co. *v.* Tucker, 148 Ky. 844, 147 S. W. 916.

Taking medicine to cure or relieve suffering, admissible. Southern R. Co. *v.* Cunningham, 152 Ala. 147, 44 S. 658.

In action by married woman for personal injuries it is proper to show she has been incapacitated by her injuries from performing labor for the purpose of showing nature and extent of injuries. Bliss *v.* Beck, 80 Neb. 290, 114 N. W. 162, *dist.* Central City *v.* Engle, 65 Neb. 885, 91 N. W. 849.

Evidence plaintiff gave birth to still born child one year after injury and had miscarriage three years after, admissible. Chicago U. T. Co. *v.* Ertrachter, 228 Ill. 114, 81 N. E. 816.

Impaired vision.—Shaw *v.* Co., 146 N. C. 235, 59 S. E. 676.

Injury to sexual organs, and inability to have intercourse with wife, and that prior to injury he had begotten children, may be shown. Deering H. Co. *v.* Barzak, 227 Ill. 71, 81 N. E. 1. See Postal T. Co. *v.* Likes, 225 Ill. 249, 80 N. E. 136.

On second trial it is competent for plaintiff to show condition of health between first and second trial, as to improvement. Kircher *v.* Larchwood, 129 Ia. 554, 105 N. W. 834. See W. Chicago R. Co. *v.* Dougherty, 209 Ill. 241, 70 N. E. 586, third trial.

Effect of injury in creating a predisposition to like injuries, relevant. Donnelly *v.* R. Co., 235 Ill. 35, 85 N. E. 233.

385-28 Schmidt *v.* R. Co., 239 Ill. 494, 88 N. E. 275.

Loss of childbearing power, proper to be considered. Normile *v.* Co., 57 W. Va. 132, 49 S. E. 1030.

Plaintiff's capacity to conceive, notwithstanding injury, may be shown, as may fact she would continually suffer pain of miscarriages. Such evidence is not admissible to show damages for loss of future offspring, but relevant as basis for damages for future pain. Devine *v.* R. Co., 131 App. Div. 142, 115 N. Y. S. 263.

Amputation of leg may be shown. Smart *v.* Kansas City, 208 Mo. 162, 105 S. W. 709.

385-29 St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 113 (loss in weight and inability to sleep may also be shown); Colorado Spr. & R. Co. *v.* Petit, 37 Colo. 326, 86 P. 121; Smith *v.* Whittlesey, 79 Conn. 189, 63 A. 1085; Bowring *v.* Co., 5 Penne. (Del.), 594, 66 A. 369; Heidelbaugh *v.* R. Co., 6 Penne. (Del.) 209, 65 A. 587; Schmidt *v.* R. Co., 240 Ill. 494, 88 N. E. 275 (such testimony may come from physicians, though based on observation open to laymen); Keokuk & H. B. Co. *v.* Wetzel, 228 Ill. 253, 81 N. E. 864; Donk *v.* Thil, 228 Ill. 233, 81 N. E. 857; Cincinnati, etc. R. Co. *v.* Cook, 45 Ind. App. 401, 90 N. E. 1052 (husband's action for injury to wife); Davis *v.* Co., 20 S. D. 399, 109 N. W. 374; Pecos, etc. R. Co. *v.* Coffman, 56 Tex. Civ. 472, 121 S. W. 218 (such testimony not a conclusion); Sorenson *v.* Co., 129 Wis. 366, 109 N. W. 84. And see Partridge *v.* R. Co., 184 Fed. 211, 107 C. C. A. 49.

Evidence of fainting spells after injury is admissible. Renders *v.* R. Co., 144 Mich. 387, 108 N. W. 368. But there must be evidence of some casual connection with injury. Sloss-S., etc. Co. *v.* Vinzant, 153 Ala. 212, 44 S. 1015.

Evidence menstrual period became irregular after injury admissible. Cedartown *v.* Brooks, 2 Ga. App. 583, 59 S. E. 836.

Mental and physical pain may be inferred without affirmative testimony in case of serious injury. Nolan *v.* Co., 33 Ky. L. R. 745, 111 S. W. 290; Gulf, etc. R. Co. *v.* Coleman, 51 Tex. Civ. 415, 112 S. W. 690. See supra, "Assault and Battery," 1004-4.

Time suffering continued, relevant. Texas C. T. Co. *v.* Owens (Tex. Civ.), 128 S. W. 926.

385-30 Breen *v.* R. Co. (Ia.), 141 N. W. 410; Hertzberg *v.* T. Co., 243 Pa. 540, 90 A. 344; Niles *v.* R. Co. (Vt.), 89 A. 629. See Spencer *v.* Johnson, 176 Mich. 278, 142 N. W. 582.

385-31 Birmingham R. Co. *v.* Ellard, 135 Ala. 433, 33 S. 276; Hanrahan *v.* Chicago, 145 Ill. App. 38 (confinement in prison at hard labor may be shown); Etzkorn *v.* Oelwein, 142 Ia. 107, 120 N. W. 636; Chlanda *v.* Co., 213 Mo. 244, 112 S. W. 249. See Kinix *v.* R. Co., 156 Cal. 379, 104 P. 986; Mullin *v.* R. Co., 185 Mass. 522, 70 N. E. 1021. *Comp.* Larsen *v.* Sedro-W., 49 Wash. 134, 94 P. 938.

Evidence of simulated lameness is not admissible where plaintiff does not claim injury occasioned lameness. Williams *v.* Lansing, 152 Mich. 169, 115 N. W. 961.

Judicial notice taken that injury to hand, resulting in loss of two fingers, causes pain. Bolton *v.* Ovitt, 80 Vt. 362, 67 A. 881. See Kirkham *v.* Co., 39 Wash. 415, 81 P. 869.

Error of physician of good repute in treating plaintiff may not be shown in mitigation of damages. Scholl *v.* Grayson, 147 Mo. App. 652, 127 S. W. 415, *foll.* Elliott *v.* Kansas City, 174 Mo. 554, 74 S. W. 617.

Exaggerated claims as to effect of previous injury received by defendant may not be shown to meet issue of fraud as to extent of injury for which suit brought. Houston, etc. R. Co. *v.* Johnson, 103 Tex. 320, 127 S. W. 539.

Willingness to submit to physical ex-

amination may be inquired into. Sertant *v.* Crane, 142 Ill. App. 49.

Evidence of injuries not specified and not admissible for that reason may be received in rebuttal of such testimony. Southern T. & T. Co. *v.* Evans, 54 Tex. Civ. 63, 116 S. W. 418.

Seriousness of plaintiff's injuries may not be proved by showing amount received by him from another employer in settlement of his claim, though proof of former injury and bringing suit therefor shown. Houston, etc. R. Co. *v.* Johnson (Tex. Civ.), 118 S. W. 1150.

Previous injury, resulting in similar symptoms to those complained of, may be shown. Wheeler *v.* Milner, 137 Wis. 26, 118 N. W. 187.

386-33 Rearden *v.* R. Co., 215 Mo. 105, 114 S. W. 961, under general allegation.

Plaintiff may show heart trouble under a declaration that he was greatly hurt, bruised, injured, wounded, cut, and lacerated in and about his head, neck, shoulder, sides and arms, and then and there received severe and permanent injuries by reason of the premises to his head and base of his brain from which he has suffered through faintness, dizzy spells, nausea, and hypochondria, etc. Markoff *v.* R. Co., 169 Mich. 37, 134 N. W. 1101, *cit.* Montgomery *v.* R. Co., 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287; Leslie *v.* Jackson, etc. Tr. Co., 134 Mich. 518, 96 N. W. 580; Comstock *v.* Tp. of Georgetown, 137 Mich. 541, 100 N. W. 788; Renders *v.* Grand T. R. Co., 144 Mich. 387-391, 108 N. W. 368; Groat *v.* Detroit U. R., 153 Mich. 165-167, 116 N. W. 1081.

Injuries naturally resulting from wounds described in complaint may be proved though not pleaded. Katahdin Co. *v.* Peltomaa, 156 Fed. 342, 84 C. C. A. 238; New York T. Co. *v.* Garside, 157 Fed. 521, 85 C. C. A. 285.

386-34 Previous disability is no bar to recovery for damage resulting from the injury complained of. North German Lloyd S. S. Co. *v.* Rochl (Tex. Civ.), 144 S. W. 322.

386-35 See Donnelly *v.* R. Co., 131 Ill. App. 302. *Comp.* Birmingham R. & C. Co. *v.* Enslen, 144 Ala. 343, 39 S. 74. *Contra,* Evarts *v.* R. Co., 3 Cal. App. 712, 86 P. 830.

387-36 Empire C. Co. *v.* Gravlee, 9 Ala. App. 657, 64 S. 207; Lewy Art Co. *v.* Agricola, 169 Ala. 60, 53 S. 145; Grasselli Chemical Co. *v.* Davis, 166 Ala. 471, 52 S. 35; Louisville & N. R Co. *v.* Davener, 162 Ala. 660, 50 S. 276; Birmingham R. Co. *v.* Moore, 151 Ala. 327, 43 S. 841; Birmingham R. Co. *v.* Rutledge, 142 Ala. 195, 39 S. 338; Birmingham R. Co. *v.* Enslen, 144 Ala. 343, 39 S. 74; St. Louis S. R. Co. *v.* Jackson, 93 Ark. 119, 124 S. W. 241; Dow *v.* City of Oroville, 22 Cal. App. 215, 134 P. 197; Colorado Springs & I. R. Co. *v.* Allen, 48 Colo. 4, 108 P. 990; Georgia R. & E. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944; Shaughnessy *v.* Holt, 236 Ill. 485, 86 N. E. 256; Indianapolis & M. R. T. Co. *v.* Walsh, 45 Ind. App. 42, 90 N. E. 138; Nicoll *v.* Sweet (Ia.), 144 N. W. 615; Etzkorn *v.* Oelwein, 142 Ia. 107, 120 N. W. 636; Robinson *v.* Halley, 124 Ia. 443, 100 N. W. 328; Battis *v.* R. Co., 124 Ia. 623, 100 N. W. 543; Federal B. Co. *v.* Reeves, 73 Kan. 107, 84 P. 560, 77 Kan. 111, 93 P. 627; Louisville & N. R. Co. *v.* Scalf, 155 Ky. 273, 159 S. W. 804; Louisville & N. R. Co. *v.* Miller, 154 Ky. 236, 157 S. W. 8; Geiselman *v.* Schmidt, 106 Md. 580, 68 A. 202; Pruner *v.* R. Co., 173 Mich. 146, 139 N. W. 48; Leedy *v.* Hoover, 160 Mich. 449, 125 N. W. 394; O'Dea *v.* R. Co., 142 Mich. 265, 105 N. W. 746; De Courcy *v.* Co., 140 Mo. App. 169, 120 S. W. 632; Murphy *v.* Co., 31 Nev. 120, 101 P. 322 (though defendant admitted injury); Vuilleumier *v.* Co., 55 Or. 129, 105 P. 706; Gosa *v.* R. Co., 67 S. C. 347, 45 S. E. 810; Gulf T. & W. R. Co. *v.* Culver (Tex. Civ.), 168 S. W. 514; Missouri, K. & T. R. Co. *v.* Graham (Tex. Civ.), 168 S. W. 55; Pecos & N. T. R. Co. *v.* Coffman (Tex. Civ.), 160 S. W. 145; Texas Tr. Co. *v.* Morrow (Tex. Civ.), 145 S. W. 1069; International, etc. R. Co. *v.* Lane (Tex. Civ.), 127 S. W. 1066; St. Louis, etc. R. Co. *v.* Garber (Tex. Civ.), 108 S. W. 742; St. Louis, etc. R. Co. *v.* Boyer, 44 Tex. Civ. 311, 97 S. W. 1070; Graves *v.* Waitsfield, 81 Vt. 84, 69 A. 137; Stevens *v.* Friedman, 58 W. Va. 78, 51 S. E. 132. *Comp.* Goodwyn *v.* R. Co., 2 Ga. App. 470, 58 S. E. 688; Western & A. R. Co. *v.* Burnham, 123 Ga. 28, 50 S. E. 984. See "Mental and Physical States."

Not when made to physicians while they were examining her under order of court. De Haven *v.* Gaslight Co., 150 Ky. 241, 150 S. W. 322.

Even though declarant was then insane.

Knox *v.* Robbins (Tex. Civ.), 151 S. W. 1134.

Testimony of physician as to complaints uttered during his examination. Richardson *v.* R. Co., 166 Mo. App. 162, 147 S. W. 1126, *cit.* Brady *v.* T. Co., 140 Mo. App. 421, 124 S. W. 1070.

Testimony that plaintiff "always complains of being sore in her lungs" is admissible as importing complaints related to present suffering. Howe *v.* R. Co., 139 Mich. 638, 103 N. W. 185.

Complaints of plaintiff to physician of wound throbbing at night and loss of sleep, made during "actual treatment," admissible. Gilmore *v.* Co., 79 Conn. 498, 66 A. 4.

388-37 Heilberger *v.* Co., 133 Mo. App. 452, 113 S. W. 730.

That plaintiff would cry out and weep as if in pain; otherwise manifest physical suffering and complain from time to time his broken limb hurt him, is competent. Fishburn *v.* R. Co., 127 Ia. 483, 103 N. W. 481.

388-38 Ft. Worth & D. C. R. Co. *v.* Hays (Tex. Civ.), 131 S. W. 416. *Contra*, Sertant *v.* Crane, 142 Ill. App. 49.

388-39 Fishburn *v.* R. Co., 127 Ia. 483, 103 N. W. 481.

388-40 Madden *v.* Wilcox, 174 Ind. 657, 91 N. E. 933; Missouri, etc. R. Co. *v.* Dalton, 56 Tex. Civ. 82, 120 S. W. 240.

388-41 Pecos, etc. R. Co. *v.* Coffman, 56 Tex. Civ. 472, 121 S. W. 218. See St. Louis, etc. R. Co. *v.* Williams, 108 Ark. 387, 158 S. W. 494.

388-42 Prescott, etc. R. Co. *v.* Thomas (Ark.), 167 S. W. 486; Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402; Brady *v.* Co., 140 Mo. App. 421, 124 S. W. 1070 (*noting* Gartside *v.* Ins. Co., 76 Mo. 446, 43 Am. Rep. 765, *over.* by Grall *v.* Tower, 88 Mo. 249, 55 Am. Rep. 358, *foll.* in Squires *v.* Chillicothe, 89 Mo. 226, 1 S. W. 23).

389-43 Western, etc. Co. *v.* Bean, 163 Ala. 255, 50 S. 1012; Atlanta, etc. R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818; Etzkorn *v.* Oelwein, 142 Ia. 107, 120 N. W. 636; Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402; Houston, etc. R. Co. *v.* Maxwell (Tex. Civ.), 128 S. W. 160. *Comp.* International, etc. R. Co. *v.* Lane (Tex. Civ.), 127 S. W. 1066. *Contra*, Albrecht *v.* Morris, 91 Neb. 442, 136 N. W. 48.

Sufficient evidence of appearance of conduct of plaintiff, or of the particular circumstances under which the statements were made should be produced to make it, at least, probable they were the natural and spontaneous expressions of present feeling, and not the result of deliberate purpose. Sufficiency of such evidence is for discretion of the court. St. Louis, etc. R. Co. *v.* Chaney, 77 Kan. 276, 94 P. 126.

Complaint of inability to use any member of the body may be shown by plaintiff's physician. Brown *v.* Co., 141 Mo. App. 382, 125 S. W. 236.

Statement in answer to question by physician, competent. Vuilleumier *v.* Co., 55 Or. 129, 105 P. 706.

389-45 Feigning disease or pain, not presumed. Greinke *v.* R. Co., 234 Ill. 564, 85 N. E. 327.

389-46 Richardson *v.* R. Co., 166 Mo. App. 162, 147 S. W. 1126. *Comp.* Roche *v.* Brooklyn, 105 N. Y. 294, 11 N. E. 630; 59 Am. Rep. 506; Klingaman *v.* Fish, 19 S. D. 139, 102 N. W. 601; Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800.

To an osteopath.—Smith *v.* R. Co., 165 Ill. App. 190.

389-47 Western, etc. Co. *v.* Bean, 163 Ala. 255, 50 S. 1012; Leely *v.* Hoover, 160 Mich. 449, 125 N. W. 394; Mississippi C. R. Co. *v.* Turnage, 97 Miss. 854, 49 S. 840; International, etc. R. Co. *v.* Lane (Tex. Civ.), 127 S. W. 1066. *Contra* as to wife of injured person. Fidelity Co. *v.* Cooper, 137 Ky. 544, 126 S. W. 111. Reason for distinction. See Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402.

391-54 **Descriptive or narrative** statements of physical condition or feeling in answer to a question, and not part of res gestae not admissible. Klingaman *v.* Co., 19 S. D. 139, 102 N. W. 601.

Must be the apparently spontaneous result of the occurrence operating on the perceptive senses of the speaker. Illinois Cent. R. Co. *v.* Lowery (Ala.), 63 S. 952.

Statements to physician as to past suffering, not admissible. Gibler *v.* R. Co., 129 Mo. App. 92, 107 S. W. 1021.

Statements of injured party to another as to pain and injury after occurrence alleged to have caused injury, not admissible. Price *v.* Grayll, 133 Wis. 603, 114 N. W. 100.

391-55 David *v.* Ass. Co., 166 Ill. App. 490; Duffey *v.* Co., 147 Ia. 225,

124 N. W. 609 (long after injury); Mississippi C. R. Co. *v.* Turnage, 95 Miss. 854, 49 S. 840; Vuilleumier *v.* Co., 55 Or. 129, 105 P. 706; Texas C. R. Co. *v.* Wheeler, 52 Tex. Civ. 603, 116 S. W. 83. See Guilford Cont. Co. *v.* Clark (Ind. App.), 99 N. E. 777.

Inadmissible if made several months after injury. Kienninger *v.* R. Co., 113 N. Y. S. 96.

392-58 Western, etc. Co. *v.* Bean, 163 Ala. 255, 50 S. 1012; Mobile & O. R. Co. *v.* Carpenter (Miss.), 61 S. 693; St. Louis, etc. R. Co. *v.* Norvell (Tex. Civ.), 115 S. W. 861. See Indianapolis T. & T. Co. *v.* Gillaspy (Ind. App.), 105 N. E. 242; Johnston *v.* R. Co., 141 Ia. 114, 119 N. W. 286.

A physician was asked if he heard appellee "make any complaint of pain about his hand, expressions of pain, and if so to state what he said." "The only objection to this question was that the statement was not competent unless prior to the commencement of this action. This was not a good objection. The question, fairly construed, asked him to state what he heard, if anything, in the way of expressions of present existing pain relating to the time he saw appellee. This class of testimony is competent, and its admissibility does not depend upon the statements being made before suit is begun. The ground of this objection might be considered in weighing such testimony, but not in determining its admissibility." Indianapolis So. R. Co. *v.* Tucker, 51 Ind. App. 480, 98 N. E. 431.

392-59 Fuhry *v.* R. Co., 239 Ill. 548, 88 N. E. 221.

Testimony of physician as to flinching on part of plaintiff during examination is not admissible if physician called to make examination for purpose of qualifying as a witness. Comstock *v.* Georgetown, 137 Mich. 541, 100 N. W. 788. Other indications may make such testimony competent, as increase in movement of pulse. Schmidt *v.* R. Co., 239 Ill. 494, 88 N. E. 275.

Exclamations long after injury and after deciding to bring action, admissible. McCormick *v.* R. Co., 141 Mich. 17, 104 N. W. 390.

392-60 Greinke *v.* R. Co., 234 Ill. 564, 85 N. E. 327; Comstock *v.* Georgetown, 137 Mich. 541, 100 N. W. 788; O'Dea *v.* R. Co., 142 Mich. 265, 105 N. W. 746.

Testimony of a physician that two months after the accident plaintiff "exhibited to him a scar about two inches long across the top of her head, which she had received from being thrown out of a carriage on the pike; that she was complaining that since the accident she had suffered from various nervous manifestations, dizziness, headache and the like. The witness further said that a physician could not prove whether a woman was sleepless or dizzy, and that he had to rely upon her statements for that." Error. Radel Co. *v.* Boreches, 147 Ky. 506, 145 S. W. 755, *cit.* C. & O. R. *v.* Wiley, 134 Ky. 461, 121 S. W. 402.

393-61 Coburn *v.* R. Co., 243 Ill. 448, 90 N. E. 741; Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402.

Physician called not only to give treatment, but also to prepare for testifying, cannot testify to statements made to him by plaintiff as to injuries and feeling at time of first examination. Kath *v.* R. Co., 121 Wis. 503, 99 N. W. 217.

393-62 See Schoek *v.* Cooling, 175 Mich. 313, 141 N. W. 675.

394-63 See De Haven *v.* Gaslight Co., 150 Ky. 241, 150 S. W. 322.

394-65 Texas P. & L. Co. *v.* Burger (Tex. Civ.), 166 S. W. 680.

394-66 St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 113; Central of Ga. R. Co. *v.* Campbell (Ala. App.), 64 S. 540; McClain *v.* Assn., 17 Ida. 63, 104 P. 1015; Dow W. & I. Wks. *v.* Smith (Ky.), 124 S. W. 819 (medical testimony not essential if plaintiff testifies fully and exhibits injured member); Shaw *v.* Co., 146 N. C. 235, 59 S. E. 676; Brown *v.* R. Co., 147 N. C. 136, 60 S. E. 898; Reeves *v.* R. Co., 24 S. D. 84, 123 N. W. 498; Chicago, etc. R. Co. *v.* Evans (Tex. Civ.), 143 S. W. 966; Kansas City M. & O. R. Co. *v.* Florence (Tex. Civ.), 138 S. W. 430; Missouri, etc. R. Co. *v.* Johnson (Tex. Civ.), 126 S. W. 672 (may testify to what he did after injury); Galveston, H. & S. R. Co. *v.* Holyfield (Tex. Civ.), 91 S. W. 353. See also Dykstra *v.* R. Co., 165 Mich. 13, 130 N. W. 320; Erdmann *v.* R. Co., 174 Mo. App. 245, 156 S. W. 764.

He may testify what physician examined him. Chesapeake & O. R. Co. *v.* Meyers, 150 Ky. 841, 151 S. W. 19.

Exclamation of pain made when physician is examining him. St. Louis S. W. R. Co. *v.* Pruitt (Tex. Civ.), 157 S. W. 236.

"Plaintiff was permitted to state, over objection, that since the accident he had not been able to sleep, and that as a result of his injuries he had been troubled with nervousness. Whilst this latter statement was in the nature of a conclusion, it was nevertheless a fact which we think the witness competent to state." McLaughlin *v.* Griffin, 155 Ia. 302, 135 N. W. 1107.

Testimony of injured person he had no use of his foot not a conclusion. McDonald *v.* R. Co., 144 Mich. 379, 108 N. W. 85.

395-67 Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844.

Pain endured by plaintiff as result of tests made by physician to determine extent or seat of injury may be testified to. Louisville & N. R. Co. *v.* Lynch, 137 Ky. 696, 126 S. W. 362.

Impotency as result of accident may be proved by plaintiff's testimony as to his inability to have intercourse. Epstein *v.* R. Co., 143 Mo. App. 135, 122 S. W. 366.

395-68 *Contra*, Birmingham R. Co. *v.* Pritchett, 161 Ala. 480, 49 S. 782; Weatherford, etc. R. Co. *v.* White, 55 Tex. Civ. 32, 118 S. W. 799 (if limb shortened).

In **Central of Georgia R. Co. *v.* Clements**, 2 Ala. App. 520, 57 S. 52, "it was entirely permissible for appellee to state that the rib of an umbrella stuck into his chest, that his hands were bruised, his fingers and ribs broken, and his hips injured, and it was also permissible for him to say that after that time he had suffered from a cough and a sorethroat; but we think that only an expert could say that his lungs or speaking organs, neither of which organs was actually injured by the fall, had become involved by reason of injuries to the above other parts of his body. This deduction was one only which a medical expert could draw from the facts, or the jury in their exclusive province as triers of the facts."

Inability to work may be testified to by plaintiff. Alabama, etc. Co. *v.* Tallant, 165 Ala. 521, 51 S. 835.

Permanency of injuries may be inferred from plaintiff's testimony showing their nature and continuance (St. Louis S. R. Co. *v.* Marshall (Tex. Civ.), 120 S. W. 512), notwithstanding expert testimony to contrary. Southern R. Co. *v.* Petway, 7 Ga. App. 659, 67 S. E. 886.

Period of plaintiff's inability to work may be shown. Ferrari *v.* Co., 54 Or. 210, 102 P. 1016.

396-70 Lewy Art Co. *v.* Agricola, 169 Ala. 60, 53 S. 145; Mobile, etc. R. Co. *v.* Walsh, 146 Ala. 295, 40 S. E. 560; Georgia R. & E. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944; Macon, etc. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 709; Greinke *v.* R. Co., 234 Ill. 564, 85 N. E. 327; Indianapolis S. R. Co. *v.* Tucker, 51 Ind. App. 480, 98 N. E. 421; Federal B. Co. *v.* Reeves, 73 Kan. 107, 84 P. 560, 77 Kan. 111, 93 P. 627; Ohio, etc. Co. *v.* Beuris, 146 Ky. 612, 143 S. W. 16; Fulton *v.* R. Co., 125 Mo. App. 229, 102 S. W. 47; Partello *v.* R. Co., 217 Mo. 645, 117 S. W. 1138; Hillerbrand *v.* Co., 141 Mo. App. 122, 121 S. W. 326, 102 S. W. 47; Lindsay *v.* Kansas City, 195 Mo. 166, 93 S. W. 273; Brown *v.* R. Co., 147 N. C. 136, 60 S. E. 898; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300; Missouri, etc. R. Co. *v.* Farris (Tex. Civ.), 124 S. W. 497; St. Louis, etc. R. Co. *v.* Boyer, 44 Tex. Civ. 311, 97 S. W. 1070; St. Louis, etc. R. Co. *v.* Lowe (Tex. Civ.), 97 S. W. 1087; San Antonio Tr. Co. *v.* Flory, 45 Tex. Civ. 233, 100 S. W. 200; Missouri, etc. R. Co. *v.* Hibbitts, 49 Tex. Civ. 419, 109 S. W. 528; Cunningham *v.* Neal, 49 Tex. Civ. 613, 109 S. W. 455; Blue Ridge Co. *v.* Price, 108 Va. 652, 62 S. E. 928; Yount *v.* Strickland, 17 Wyo. 526, 101 P. 942.

See Texas M. R. Co. *v.* Ritchey, 49 Tex. Civ. 409, 108 S. W. 732. And see "Expert and Opinion Evidence"; "Mental and Physical States."

Appearance of plaintiff's face as indicating suffering; his complaints and fact he cried a great deal, etc., may be shown. Fishburn *v.* R. Co. (Ia.), 98 N. W. 380.

Whether injury appeared recent or otherwise, and its appearance, may be testified to by non-expert. Robinson *v.* Halley, 124 Ia. 442, 100 N. W. 328.

Testimony of plaintiff's husband she could not walk as well six months after injury as at time of trial relates to a fact within his observation, and is not a conclusion. Schmidt *v.* Co., 126 Ia. 401, 112 N. W. 520.

Testimony of non-expert to what effect medical treatment observed by him had

upon injured member of body is competent. Cleveland, etc. R. Co. *v.* Hadley, 40 Ind. App. 731, 82 N. E. 1025.

397-71 Barker *v.* Kalamazoo, 146 Mich. 257, 109 N. W. 427 (holding proper exclusion of testimony plaintiff did not go out as much as before, but witness could not say it was wholly due to the accident); Johnson *v.* R. Co., 35 Utah 285, 100 P. 390 (condition of voice).

397-73 Kline *v.* R. Co., 150 Cal. 741, 90 P. 125; Heinel *v.* R. Co., 6 Penne. (Del.) 428, 67 A. 173; Fidelity & C. Co. *v.* Cooper, 137 Ky. 544, 126 S. W. 111; Underwood *v.* Co., 128 La. 968, 55 S. 641; International etc. R. Co. *v.* Sandlin, 57 Tex. Civ. 151, 122 S. W. 60 (and limbs were paralyzed); Texas, etc. R. Co. *v.* Clippenger, 47 Tex. Civ. 510, 106 S. W. 155; Yount *v.* Strickland, 17 Wyo. 526, 101 P. 942.

Father of injured son may testify "he was in awful pain and agony." Boehm *v.* Detroit, 141 Mich. 277, 104 N. W. 626.

398-74 Cleveland, etc. R. Co. *v.* Hadley, 39 Ind. App. 731, 82 N. E. 1025.

398-75 Scott *v.* O'Leary (Ia.), 138 N. W. 512.

398-76 Cause of injury may be testified to by plaintiff. Pullman Co. *v.* Hoyle, 52 Tex. Civ. 534, 115 S. W. 315.

399-77 Involuntary character of groaning of injured person may not be testified to by another. Pierson *v.* R. Co., 159 Mich. 110, 123 N. W. 576.

Plaintiff's appearance at the time of trial is for the jury. Ohio & K. R. Co. *v.* Beuris, 146 Ky. 612, 143 S. W. 16.

In Nitschka *v.* **Geiszler,** 23 N. D. 412, 137 N. W. 454, witness was allowed to describe after proper foundation laid the marks of violence that he saw on plaintiff's body when he saw him in bed two weeks after the assault.

399-78 Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844; Kansas City R. Co. *v.* Butler, 143 Ala. 262, 38 S. 1024; Kimic *v.* R. Co., 156 Cal. 379, 104 P. 986; Seaboard, etc. R. *v.* Maddox, 131 Ga. 799, 63 S. E. 344; Hirsch *v.* Co., 146 Ill. App. 501; Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402; Vohs *v.* Shorthill, 130 Ia. 538, 107 N. W. 417; Cumberland, etc. Co. *v.* Overfield, 32 Ky. L. R. 421, 106 S. W. 242; United Rys. & Electric Co. *v.* Dean, 117 Md. 686, 84 A. 75; United R. & E. Co. *v.* Corbin, 109 Md. 442, 72 A. 606; Fletcher *v.* Dixon, 107 Md. 420, 68 A. 875; Ducharme *v.* R. Co., 203 Mass. 384, 89 N. E. 561; Marshall *v.* Co., 157 Mich. 541, 122 N. W. 131; Hutton *v.* R. Co., 166 Mo. App. 645, 150 S. W. 722; Carlile *v.* Bentley, 81 Neb. 715, 116 N. W. 772; Adler *v.* Lesser, 110 N. Y. S. 196; Holder *v.* Lumb. Co., 161 N. C. 177, 76 S. E. 485; Lewis *v.* Power Co., 59 Or. 314, 117 P. 423; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300; Klingaman *v.* Co., 19 S. D. 139, 102 N. W. 601; Missouri, etc. R. Co. *v.* Farris (Tex. Civ.), 124 S. W. 497; St. Louis, etc. Co. *v.* Brown (Tex. Civ.), 163 S. W. 383; Norfolk R. & L. Co. *v.* Spratley, 103 Va. 379, 49 S. E. 502; Dralle *v.* Reedsburg, 140 Wis. 319, 122 N. W. 771.

See Cordiner *v.* Co., 5 Cal. App. 400, 91 P. 436. And see "Expert and Opinion Evidence;" also vol. 5, p. 586, n. 26.

Character of injury disclosed by X-ray skiagraph. Dooley *v.* R. Co., 166 Ill. App. 312. But see Elzig *v.* Boles, 135 Ia. 208, 112 N. W. 540.

Injury resulting in stiff ankle.—Medical expert may testify as to what effect existing stiffness would have on plaintiff's ability to work. Lewis *v.* Crane, 78 Vt. 216, 62 A. 60.

Plaintiff's condition long after injury may be testified to by physician who treated him then if it is shown to have been continuous. Cridland *v.* Crow, 221 Pa. 618, 70 A. 888.

Liable.—"The word 'liable' is defined as 'exposed to a certain contingency more or less probable.' Webster's Dictionary. The word was used by the witness in the sense of probable, and was doubtless so understood by the jury. The identical phrase was used in Montgomery *v.* Scott, 34 Wis. 339, and upheld as a legitimate expression of opinion by a medical expert. In Kansas City *v.* Stoner, 49 Fed. 209, 1 C. C. A. 231, the court held that the plaintiff was entitled to recover for the probable effects of the injury, even though at the time not apparent." Alley *v.* Foundry Co., 159 N. C. 327, 74 S. E. 885.

401-79 Greenway *v.* County, 144 Ia. 332, 122 N. W. 943.

Trained nurses may testify as to what part they took in operation on deceased and that he complained of pain. Horney *v.* R. Co., 165 Ill. App. 547.

Probable result of injuries, may be testified to. Pullman Co. *v.* Hoyle, 52 Tex. Civ. 534, 115 S. W. 315.

401-83 Missouri, etc. R. Co. *v.* Dalton, 56 Tex. Civ. 82, 120 S. W. 240, nature of injury indicated by way plaintiff bandaged.

401-84 Olmstead *v.* Red Cloud, 86 Neb. 528, 125 N. W. 1101; Gillman *v.* R. Co., 224 Pa. 267, 73 A. 342; St Louis, etc. Co. *v.* Brown (Tex. Civ.), 163 S. W. 383.

402-85 Lauth *v.* Co., 244 Ill. 244, 91 N. E. 431; Rupp *v.* Keebler, 175 Ill. App. 619; Brininstool *v.* R. Co., 157 Mich. 172, 131 N. W. 728; Osterhout *v.* R. Co., 138 App. Div. 625, 122 N. Y. S. 692; Houston & T. C. R. Co. *v.* Fox (Tex.), 166 S. W. 693; St. Louis, etc. R. Co. *v.* Moore (Tex. Civ.), 161 S. W. 378; Rapid T. R. Co. *v.* Allen, 54 Tex Civ. 245, 117 S. W. 486 (but if plaintiff is shown to be a mental wreck, testimony as to what her condition "might" be is not objectionable); Bucher *v.* R. Co., 139 Wis. 597, 120 N. W. 518. See Dix *v.* Co., 76 N. J. L. 178, 68 A. 1101.

"Likely" synonymous with "probably," or reasonably to be expected. Taylor *v.* R. Co., 166 Mo. App. 131, 148 S. W. 470; Vohs *v.* Shorthill, 130 Ia. 538, 107 N. W. 417. See Faber *v.* Co. 124 Wis. 554, 102 N. W. 1049; Garard *v.* Co., 207 Mo. 242, 105 S. W. 767. *Comp.* Kerr *v.* Grand Fork, 15 N. D. 294, 107 N. W. 197.

"Liable" synonymous with "probable."—Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051.

Reasonable expectation of recurrence of condition may be shown, and anticipated, consequence thereof. Lauth *v.* Co., 146 Ill. App. 584.

Probability future suffering will be endured, sufficient. Wallace *v.* R. Co., 222 Pa. 556, 71 A. 1086.

Pain resulting from improper treatment by defendant's physician may be shown if plaintiff prudent in committing himself to care of another physician. Wallace *v.* R. Co., supra.

403-86 Denver City T. Co. *v.* Gawley, 23 Colo. App. 332, 129 P. 258; Seaboard, etc. R. *v.* Maddox, 133 Ga. 799, 63 S. E. 344 (report of another physician and a skiagraph made by him may be referred to in testimony given on cross-examination as confirmatory of witness' testimony); Donnelly *v.* R. Co., 235 Ill. 35, 85 N. E. 233 (predisposition of plaintiff to similar injury in consequence of wrong); Hirsch *v.* Co., 146 Ill. App. 501 (testimony based on reflexion of knees and feet, not objectionable as subjective); Lexington R. Co. *v.* Woodward (Ky.), 118 S. W. 967; United R. & E. Co. *v.* Corbin, 109 Md. 442, 72 A. 606; Boehm *v.* Detroit, 141 Mich. 277, 104 N. W. 626; Meily *v.* R. Co., 215 Mo. 567, 114 S. W. 1013; Roscoe *v.* R. Co. (Tex. Civ.), 127 S. W. 872 (examination prior to injury not required where plaintiff testified to previous condition); Monaghan *v.* Co., 140 Wis. 457, 122 N. W. 1066. See Gasink *v.* New Ulm, 92 Minn. 52, 99 N. W. 624. See also vol. 5, p. 605, n. 17.

Ability of person injured to pursue avocation may be testified to by medical witness. Galveston, etc. R. Co. *v.* Worth, 53 Tex. Civ. 351, 116 S. W. 365.

403-87 Opinion may rest on statements made to physician by injured person and they may be given in connection with opinion. See De Courcy *v.* Co., 140 Mo. App. 169, 120 S. W. 632.

Scope of testimony is not limited to particular parts alleged to have been injured, but may cover symptoms in any other part which may be confirmatory of fact alleged. Lexington R. Co. *v.* Woodward (Ky.), 118 S. W. 965.

403-88 Empire C. Co. *v.* Gravlee, 9 Ala. App. 657, 64 S. 207; Barnes *v.* Co. 235 Ill. 566, 85 N. E. 921; Fuhry *v.* R Co., 144 Ill. App. 521 (testimony may be based in part on what patient said); Crosby *v.* R. Co., 53 Or. 496, 100 P. 809. *Comp.* Fed. B. Co. *v.* Reeves, 73 Kan 107, 84 P. 560, physician cannot testify to conclusions of permanency of injury to patient, based partly on history of injury detailed to him and partly on his examination.

But he may not repeat the history of the case given by patient. Pennsylvania *v.* Cable Co., 167 Mo. App 533, 152 S. W. 114.

Testimony of physician who attended plaintiff, based upon observation, as to time of ultimate recovery, is competent. Simone *v.* Co., 28 R. I. 186, 66 A. 202, 9 L. R. A. (N. S.) 740.

Before permitting attending physician to testify to extent of injuries, they should be established. White *v.* R. Co., 6 Penne. (Del.) 105, 63 A. 931.

Anatomy of affected member of body may be shown for purpose of connecting it with injured part. Brown *v.*

Co., 141 Mo. App. 382, 125 S. W. 236.

Medical testimony must be based upon objective, and not subjective, conditions. Barnes *v.* R. Co., 147 Ill. App. 601.

403-89 Louisville & N. R. Co. *v.* Lynch, 137 Ky. 696, 126 S. W. 362 (statement of physician to plaintiff); Dunkin *v.* Hoquiam, 56 Wash. 47, 105 P. 149.

Opinion as to cause of plaintiff's absence from trial, irrelevant in absence of other testimony on the point. Southern R. Co. *v.* Davis, 132 Ga. 812, 65 S. E. 131.

404-90 Opinions of others than witness may not be given. Alkire *v.* Co., 57 Wash. 300, 106 P. 915.

404-91 Fitzgerald *v.* Chicago, 144 Ill. App. 462 (if based on objective symptoms); St. Louis, etc. R. Co. *v.* Horne (Tex.), 145 S. W. 1186. *Contra,* as to subjective condition. Casey *v.* R. Co., 237 Ill. 140, 86 N. E. 606.

404-92 Two year's lapse between accident and examination of expert does not render his testimony incompetent. Czerniak *v.* Chicago, 161 Ill. App. 360.

404-93 Eckels *v.* Muttschall, 230 Ill. 462, 82 N. E. 872; Wilson *v.* R. Co., 144 Ill. App. 604 (rule applies to attending physician only). See St. Louis, etc. R. Co. *v.* Wright, 105 Ark. 269, 150 S. W. 706. *Contra,* Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402, valuable discussion.

Physician cannot testify as to what plaintiff said to him where there is no direct proof of such fact. Adams *v.* Bucyrus Co., 155 Wis. 70, 143 N. W. 1027.

Opinion on statements as to past symptoms as detailed by injured party, not proper (Gibler *v.* R. Co., 129 Mo. App. 93, 107 S. W. 1021) though made during examination. Chicago U. T. Co. *v.* Giese, 229 Ill. 260, 82 N. E. 232.

It is a rigorous rule which causes a physician to exclude everything learned from patient. Chicago C. R. Co. *v.* Casey, 139 Ill. App. 655.

405-94 Monaghan *v.* Co., 140 Wis. 457, 122 N. W. 1066.

Means of mitigating plaintiff's injury may be shown by medical testimony. White *v.* R. Co., 145 Ia. 408, 124 N. W. 309.

405-96 Davis *v.* Adrian, 147 Mich. 300, 110 N. W. 1084; Galveston, etc. R. Co. *v.* Harper, 53 Tex. Civ. 614, 114 S. W. 1168 (photograph taken before injury).

What a skiagraph showed cannot be testified to by a physician; it should be produced. Elzig *v.* Bales, 135 Ia. 208, 112 N. W. 540. But see Dooley *v.* R. Co., 166 Ill. App. 312.

A radiograph is admissible to sustain testimony showing necessity for second operation. Wallace *v.* R. Co., 222 Pa. 556, 71 A. 1086.

405-97 Compagnie, etc. *v.* Rivers 211 Fed. 294, 127 C. C. A. 580; Birmingham R. & C. Co. *v.* Wright, 153 Ala. 99, 44 S. 1037; Chicago Con. T. Co. *v.* Schritter, 222 Ill. 364, 78 N. E. 820, 124 Ill. App. 578; Owensboro C. R. Co. *v.* Robertson, 31 Ky. L. R. 1047, 104 S. W. 707; Bernadsky *v.* R. Co., 76 N. J. L. 580, 70 A. 189 (but not mental suffering resulting from groundless apprehension as to future result of injury); Tweed *v.* Tel. Co. (Tex.), 166 S. W. 696; Gulf, etc. R. Co. *v.* Sauter, 46 Tex. Civ. 309, 103 S. W. 201; Sorensen *v.* Co., 129 Wis. 366, 109 N. W. 84; Pumorlo Co. *v.* Merrill, 125 Wis. 102, 103 N. W. 464. See Melone *v.* R. Co., 151 Cal. 113, 91 P. 522; Hannigan *v.* Wright, 5 Penne. (Del.) 537, 63 A. 234; Nashville, etc. R. Co. *v.* Miller, 120 Ga. 453, 47 S. E. 959; Huggard *v.* Co., 132 Ia. 724, 109 N. W. 475; Rapid T. R. Co. *v.* Allen, 54 Tex. Civ. 245, 117 S. W. 486.

Inability to collect faculties, and mental confusion, may be shown. Graves *v.* Waitsfield, 81 Vt. 84, 69 A. 137.

Mental suffering of pregnant woman due to fear and apprehension before birth of child it would be deformed in consequence of injury, permissible; but not so as to mental anxiety after birth and prospective anxiety and disappointment on account of its deformity and diseased condition. Prescott *v.* Robinson, 74 N. H. 460, 69 A. 522, 17 L. R. A. (N. S.) 594.

Mere mental suffering, unconnected with physical injury, not to be considered. Huston *v.* Freemansburg, 212 Pa. 548, 61 A. 1022. See Harless *v.* R. Co., 123 Mo. App. 22, 99 S. W. 793 Mental anguish statute has reference only to telegraph companies. Taylor *v.* R. Co., 78 S. C. 552, 59 S. E. 641.

Mental suffering connected with and growing out of physical injury is to be considered in determining damages (Rice *v.* Council Bluffs, 124 Ia. 639, 100 N. W. 506); but sorrow and anguish

endured as a result of contemplation of death of plaintiff's baby cannot be considered. McDermott *v.* Severe, 202 U. S. 600; Southern P. Co. *v.* Hetzer, 135 Fed. 272, 68 C. C. A. 26; Sullivan *v.* R. Co., 197 Mass. 512, 83 N. E. 1091; Britt *v.* R. Co., 148 N. C. 37, 61 S. E. 601.

Mental anguish suffered while fastened in train wreck, on fire, admissible. Louisville, etc. R. Co. *v.* Brown, 32 Ky. L. R. 552, 106 S. W. 795. *Contra* as to anguish or wounded feelings of passenger arising solely from fact of having been carried past destination. Sappington *v.* R. Co., 127 Ga. 178, 56 S. E. 311.

Fright followed by a series of physical ills as its natural consequence and giving rise to nervous disturbances, and these in turn to physical troubles, be recovered for. Simone *v.* Co., 28 R. I. 186, 66 A. 202, 9 L. R. A. (N. S.) 740, cit. and dist. numerous cases. *Comp.* Porter *v.* R. Co., 73 N. J. L. 405, 63 A. 860.

Fright and nervousness resulting directly and naturally from the negligent act and causing impairment of health or loss of bodily power, may be considered. Kimberly *v.* Howland, 143 N. C. 398, 55 S. E. 778. See Stewart *v.* R. Co., 112 La. 764, 36 S. 676.

Mental anguish suffered by widow considered in action for death of husband. Dobynus *v.* R. Co., 119 La. 72, 43 S. 934 (deprivation of companionship); Brickman *v.* R. Co., 74 S. C. 306, 54 S. E. 553.

Sorrow, mental distress and bereavement of father occasioned by death of son, may be considered. Kelly *v.* R. Co., 58 W. Va. 216, 52 S. E. 520. *Contra*, Bube *v.* R. Co., 140 Ala. 276, 37 S. 280; Byrd *v.* Co., 139 N. C. 273, 51 S. E. 851.

Under statute providing mental and physical pain suffered by a decedent in consequence of injury may be considered an element of damage in connection with other elements allowed by law, fright or mental suffering preceding injury but caused by the act immediately resulting therein, may be considered. Yeaton *v.* R. Co., 73 N. H. 285, 61 A. 522.

Mental suffering caused by contemplation of condition in which injury left plaintiff or because of attitude of others toward him for that reason cannot be regarded. Gulf, etc. R. Co. *v.* Dickens, 54 Tex. Civ. 637, 118 S. W. 612.

Plaintiff may testify concerning apprehensions as to result of injury. So. Kansas R. Co. *v.* McSwain, 55 Tex. Civ. 317, 118 S. W. 874.

406-98 Compagnie, etc. *v.* Rivers, 211 Fed. 294, 127 C. C. A. 530. See Chicago U. T. Co. *v.* Lawrence, 211 Ill. 373, 71 N. E. 1024, 113 Ill. App. 269.

406-99 Gulf, etc. R. Co. *v.* Dickens, 54 Tex. Civ. 637, 118 S. W. 612. *Contra*, Madden *v.* Wilcox, 174 Ind. 657, 91 N. E. 938. See City of Rome *v.* Ford, 13 Ga. App. 386, 79 S. E. 243; Beaver *v.* R. Co., 101 Minn. 314, 112 N. W. 267, Montgomery *v.* R. Co., 73 S. C. 503, 53 S. E. 987.

Apprehension from inability to make a living admissible as an element of mental suffering. Egan *v.* R. Co., 211 Fed. 562; Rome *v.* Ford, 13 Ga. App. 386, 79 S. E. 243.

In action for wrongful death, bereavement, mental suffering, etc., on part of surviving next of kin for whom law allows damages cannot be considered. Johnson Co. *v.* Carmen, 71 Neb. 682, 99 N. W. 502.

Mental state of plaintiff, resulting from pendency of action, cannot be shown. Lockwood *v.* R. Co., 200 Mass. 537, 86 N. E. 934.

406-1 Madden *v.* Wilcox, 174 Ind. 657, 91 N. E. 923.

Change in disposition of injured person shown by expert testimony. Neece *v.* R. Co., 113 Mo. App. 402, 127 S. W. 669.

Change in mental and nervous condition may be shown by non-experts who have had opportunity to observe. Lauth *v.* Co., 244 Ill. 244, 91 N. E. 431. And by plaintiff's physician. Burns *v.* Brier, 204 Mass. 125, 90 N. E. 399, effect of dog's bite.

Extent of plaintiff's interest in a business and effect of injury thereon not relevant to show mental suffering caused by injury. Stadler *v.* Co., 195 N. Y. 478, 88 N. E. 1063.

407-2 Detroit, etc. R. Co. *v.* Kimball, 211 Fed. 633 (C. C. A.); Southern Pacific Co. *v.* Ward, 208 Fed. 334, 125 C. C. A. 601; St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 413; Tyler *v.* Bullard, 172 Ala. 237, 54 S. 41; Birmingham R. Co. *v.* Wright, 172 Ala. 99, 44 S. 1027; Donovan *v.* R. Co., 150 Cal. 496, 93 P. 109; Bowring *v.* Co., 4

Penne. (Del.) 594, 66 A. 369; Heinel *v.* R. Co., 6 Penne. (Del.) 428, 67 A. 173; Ruff *v.* R. Co. (Fla.), 64 S. 782; Western & A. R. Co. *v.* Davis, 139 Ga. 493, 77 S. E. 576; Louisville & N. R. Co. *v.* Smith, 136 Ga. 455, 71 S. E. 774; Atlanta, etc. R. Co. *v.* Haralson, 133 Ga. 231, 65 S. E. 437; McClain *v.* Assn., 17 Ida. 63, 104 P. 1015; Lake Shore R. Co. *v.* Teeters, 166 Ind. 335, 77 N. E. 599; Greenway *v.* County, 144 Ia. 332, 122 N. W. 943; Federal B. Co. *v.* Reeves, 73 Kan. 107, 84 P. 560, 77 Kan. 111, 93 P. 627; Nolan *v.* Co., 33 Ky. L. R. 745, 111 S. W. 290; Central C. Co. *v.* Booker, 32 Ky. L. R. 794, 107 S. W. 198; Baltimore & O. R. Co. *v.* Comrs., 113 Md. 404, 77 A. 930; Stynes *v.* R. Co., 206 Mass. 75, 91 N. E. 998; Lewless *v.* R. Co., 146 Mich. 531, 109 N. W. 1051; Olivier *v.* R. Co., 138 Mich. 242, 101 N. W. 530; Williams *v.* R. Co., 141 Mo. App. 625, 125 S. W. 522; Yergy *v.* R. Co., 39 Mont. 213, 102 P. 310, Beckley *v.* Alexander (N. H.), 90 A. 878; Dillon *v.* R. Co., 73 N. H. 367, 62 A. 93; Boyce *v.* R. Co., 126 App. Div. 248, 110 N. Y. S. 393; Clark *v.* Co., 138 N. C. 77, 50 S. E. 518; Davis *v.* Co., 20 S. D. 399, 107 N. W. 374; El Paso R. Co. *v.* Murphy, 49 Tex. Civ. 586, 109 S. W. 489; Shaw *v.* Seattle, 39 Wash. 590, 81 P. 1057; Ewing *v.* Co., 65 W. Va. 726, 65 S. E. 200.

See "Capacity."

In case of injury to infant.—Ferrier *v.* Mercantile Co., 158 Mo. App. 533, 138 S. W. 893.

Infant.—"The fact that the child's death has occurred before he has become a wage-earner does not foreclose inquiry as to the probable value of his services for the years ensuing his death. Black *v.* Railroad Co., 146 Mich. 568, 109 N. W. 1052; Brasch *v.* Stove Co., 153 Mich. 652, 118 N. W. 366, 20 L. R. A. (N. S.) 500. To enable the jury to determine the probable earning capacity of the child for the period of his probable life after arriving at the age of 21, a wide latitude must necessarily be allowed in the admission of testimony as to the child's status and future prospects and the vocations and their remuneration which might reasonably be expected to be open to him." Love *v.* R. Co., 170 Mich. 1, 135 N. W. 963, *cit.* Snyder *v.* Railway Co., 131 Mich. 418, 91 N. W 643; Jeffries *v.* Air Line R., 129 N. C 236, 39 S. E. 836; Walters *v.* Co., 41 Ia. 71; Fishburn *v.* R. Co., 127 Ia. 483, 103 N. W. 481.

Inability to follow ordinary avocation, consequent upon injury, may be proved to characterize extent of injury. Smith *v.* Whittlesey, 79 Conn. 189, 63 A. 1085.

Action by unmarried woman for injuries causing postponement of marriage, proper to consider incapacity to do work as housewife. Remey *v.* R. Co., 141 Mich. 116, 104 N. W. 420.

Impaired earning capacity of infant South Omaha *v.* Sutliffe, 72 Neb. 746, 101 N. W. 997.

Earning capacity of husband for whose death damages are asked, considered. Evarts *v.* R. Co., 3 Cal. App. 712, 86 P. 830.

Impairment of earning capacity may be shown by preponderance of evidence. Rowe *v.* Co., 44 Wash. 658, 87 P. 921.

Burden on partially disabled person to show diminution in earning capacity. Manistee M. Co. *v.* Hobdy, 165 Ala. 411, 51 S. 871.

Value of wife's services to husband may be inferred from nature of injuries and jurors' knowledge. Texas T. & T. Co. *v.* Scott (Tex. Civ.), 127 S. W. 587. Her earnings need not be shown. Louisville *v.* Tompkins (Ky.), 122 S. W. 174.

408-3 Reeves *v.* Lutz (Mo. App.), 162 S. W. 280.

408-4 See "Capacity."

408-5 Eaton *v.* R. Co., 1 Boyce (Del.) 435, 75 A. 369; Stynes *v.* R. Co., 206 Mass. 75, 91 N. E. 998 (also importance of business); Ryan *v.* Co., 138 Wis. 466, 120 N. W. 264.

408-6 Gray *v.* R. Co., 215 Mass. 143, 102 N. E. 71.

408-7 Chesapeake & O. R. Co. *v.* Bank's Admr., 153 Ky. 629, 156 S. W. 109; Ryan *v.* Co., 138 Wis. 466, 120 N. W. 264 (education and official position).

Earning capacity depends upon several matters, such as age, health, occupation or business, habits of industry, manner of living, etc., and these should be disclosed. Wallace *v.* Co., 219 Pa. 327, 68 A. 952.

State and condition of plaintiff's family or household, a relative fact in action to recover for injuries sustained by wife. Cincinnati, etc. R. Co. *v.* Cook, 45 Ind. App. 401, 90 N. E. 1052.

Impaired earning power may be determined by jury from their general knowledge and experience where alle-

gation general; and not confined to loss in particular employment. Dallas, etc. St. R. Co. *v.* Motwiller, 51 Tex. Civ. 432, 112 S. W. 794.

409-8 Seaboard A. L. R. Co. *v.* Parker, 65 Fla. 543, 62 S. 589; Central R. Co. *v.* Moore, 5 Ga. App. 562, 63 S. E. 642; Nicoll *v.* Sweet (Ia.), 144 N. W. 615.

Evidence as to character, continuance and extent of plaintiff's business after injury is admissible for defendant. Burns *v.* Co., 148 Cal. 208, 82 P. 959.

Assistance rendered decedent by his father may be shown on behalf of defendant, his earning capacity being small. Abel *v.* Co., 212 Pa. 329, 61 A. 915.

409-10 McClain *v.* Assn., 17 Ida. 63, 104 P. 1015 (injury proper as to unemancipated minor to ascertain damages recoverable after majority); Indianapolis & N. S. Co. *v.* Newby, 45 Ind. App. 540, 90 N. E. 29 (also capacity of deceased); Cox's Admr. *v.* R. Co., 137 Ky. 388, 125 S. W. 1056; Marshall *v.* R. Co., 171 Mich. 180, 137 N. W. 89; Boyce *v.* R. Co., 126 App. Div. 248, 110 N. Y. S. 393; Dallas, etc. St. R. Co. *v.* Motwiller, 51 Tex. Civ. 432, 112 S. W. 794.

Administrator's inventory and account, not competent to show decedent's earning power. Cooper *v.* R. Co., 140 N. C. 209, 52 S. E. 932.

411-11 In action by infant evidence of father's employment and wages earned admissible. Fishburn *v.* R. Co., 127 Ia. 483, 103 N. W. 481; Thomas *v.* Arie, 122 Ia. 538, 98 N. W. 380.

Vocation of father several years prior to son's death by wrongful act, admissible as tending to show vocation decedent might have followed. Meggison *v.* Maine & Son's Co. (Ia.), 141 N. W. 1074.

411-12 Missouri, etc. R. Co. *v.* Reno (Tex. Civ.), 146 S. W. 207.

Remote criminal act cannot be shown. Missouri, etc. R. Co. *v.* Adams (Tex. Civ.), 114 S. W. 453.

Contract of employment is admissible. Parker *v.* R. R., 84 Vt. 329, 79 A. 865.

411-13 Mississippi C. R. Co. *v.* Hardy, 88 Miss. 732, 41 S. 505. See Southern Pac. Co. *v.* Ward, 208 Fed. 385, 125 C. C. A. 601. But see Ft. Worth, etc. R. Co. *v.* Staleup (Tex. Civ.), 167 S. W. 279. *Contra* if plaintiff just entered upon employment of lower grade than he had previously filled in similar line of work Schaufele *v.* R. Co., 6 Ga. App. 660, 65 S. E. 708. See also Clark Lumb. Co. *v.* St. Coner, 97 Ark. 358, 133 S. W. 1132; Burch *v.* Co., 32 Nev. 75, 104 P. 225.

Where promotion governed by rules, a railway mail clerk who has passed his principal examination may show salary which, but for injury, he would be earning. Williams *v.* R. Co., 42 Wash. 597, 84 P. 1129.

Burden on plaintiff to throw light upon probable future earnings of deceased and their present value. St. Louis, etc. R. Co. *v.* Freeman, 89 Ark. 326, 116 S. W. 678.

Prospects of young man may be considered. Hughes *v.* Assn., 131 App. Div. 185, 115 N. Y. S. 320.

Plaintiff may testify to his competency to fill a higher position and compensation connected with it. Missouri, etc. R. Co. *v.* Lasater, 53 Tex. Civ. 51, 115 S. W. 103. But such evidence is not competent in absence of proof of a vacancy, actual or reasonably prospective, or of a rule of defendant to promote employes. Marshal *v.* Mills, 82 Vt. 489, 74 A. 108.

Capabilities of decedent may be shown. Conrad *v.* R. Co., 137 App. Div. 372, 121 N. Y. S. 774.

412-14 Roth *v.* Buettell, 142 Ia. 212, 119 N. W. 166, failure of employer to renew contract after injury. See Gray *v.* R. Co., 215 Mass. 143, 102 N. E. 71.

412-15 Skow *v.* R. Co., 141 Wis. 21, 123 N. W. 138.

413-20 McClain *v.* Assn., 17 Ida. 63, 104 P. 1015 (experience and ability as rider in races); Rhinesmith *v.* R. Co., 76 N. J. L. 783, 72 A. 15.

Extent of studies may be shown. Gray *v.* R. Co., 215 Mass. 143, 102 N. E. 71.

Immaterial.—"Do you want it to go out to the people of this county that your earning capacity is lessened by reason of the accident?" Wilkins *v.* United Ry., 169 Mich. 437, 135 N. W. 350.

414-21 Alabama G. S. R. Co. *v.* McWhorter, 156 Ala. 269, 47 S. 84 (if it is not shown former employment abandoned); Scally *v.* Garratt, 11 Cal. App. 138, 104 P. 325; Knox *v.* Mill, 236 Ill. 437, 86 N. E. 90; Osterholm *v.* Co., 40 Mont. 508, 107 P. 499; Wells, Fargo & Co. *v.* Benjamin (Tex. Civ.), 165 S. W. 120; Pecos, etc. R. Co. *v.* Blasengame, 42 Tex. Civ. 66, 93 S. W. 187; St.

Louis, etc. R. Co. *v.* Knowles, 44 Tex. Civ. 172, 99 S. W. 867; Consolidated C. R. Co. *v.* Taylor, 48 Tex. Civ. 605, 107 S. W. 889; Cook *v.* L. Co., 48 Wash. 619, 94 P. 189. See Evansville F. Co. *v.* Freeman (Ind. App.), 105 N. E. 258.

Wages earned in another capacity thirteen years prior to the injury, not competent. Helmstetter *v.* Ry. Co., 243 Pa. 422, 90 A. 203.

Compensation received when injury sustained is basis of recovery unless employment temporary. Smith *v.* Co., 55 Wash. 357, 104 P. 651.

Definite evidence of plaintiff's capacity to follow some other pursuit to enable jury to bring their general knowledge to bear thereon. Greenway *v.* County, 144 Ia. 332, 122 N. W. 943; O'Conner *v.* R. Co., 144 Ia. 289, 122 N. W. 947.

Illinois rule.—*Comp.* Barnett, etc. R Co. *v.* Schlapka, 208 Ill. 426, 70 N. E. 343; West Chicago S. R. Co. *v.* Dougherty, 209 Ill. 241, 70 N. E. 586; Chicago & J. R. Co. *v.* Spence, 213 Ill. 220, 72 N. E. 796.

415-23 See Bettis *v.* R. Co., 131 Ia. 46, 108 N. W. 103.

Compensation received in another employment, presumed to be commensurate with value of services, and may be shown though plaintiff voluntarily quit defendant's service. Roth *v.* Buettel, 142 Ia. 212, 119 N. W. 166.

415-24 Duke *v.* R. Co., 172 Fed. 684; Citizens' L., H. & P. Co. *v.* Lee (Ala.), 62 S. 199; Central R. Co. *v.* Alexander, 144 Ala. 257, 40 S. 424; Chicago, etc. R. Co. *v.* Gunn (Ark.), 166 S. W. 568; MacFeat *v.* R. Co., 5 Penne. (Del.) 52, 62 A. 898 (holding question as to decedent's "habits, with respect to industry, at the time of his death" too general); Seaboard A. L. R. *v.* Parker, 65 Fla. 543, 62 S. 589; Devine *v.* Boston Store, 167 Ill. App. 443; Conover *v.* Coal Co., 161 Ill. App. 74; Louisville & A. R. Co. *v.* Cox (Ky.), 125 S. W 1056; Louisville, etc. R. Co. *v.* Daniel, 28 Ky. L. R. 1146, 91 S. W. 691; Buffalo, etc. M. Co. *v.* Hodges, 30 Ky. L. R. 346, 98 S. W. 274; Buxton *v.* Ainsworth, 153 Mich. 315, 116 N. W. 1094; Arata *v.* R. Co., 167 Mo. App. 90, 150 S. W. 1122; Osterholm *v.* Co., 40 Mont. 508, 107 P. 499; Boyce *v.* R. Co., 126 App. Div. 248, 110 N. Y. S. 393; Ft. Worth, etc. R. Co. *v.* Stalcup (Tex Civ. App.), 167 S. W. 279; Ft. Worth etc. Co. *v.* Keith (Tex: Civ.), 163 S. W. 142.

See Hammer *v.* Janowitz, 131 Ia. 20, 108 N. W. 109; Felske *v.* R. Co., 166 Mich. 367, 130 N. W. 676. See also vol. 3, p. 3, n. 3.

Evidence as to the habits of thrift, industry and ability to work, of the deceased, and whether or not he furnished proper maintenance for the plaintiff out of his earnings, was proper on the question of damages. Houston *v.* Quinn, 168 Ill. App. 593.

417-27 Chicago, etc. R. Co. *v.* Hale, 176 Fed. 71, 99 C. C. A. 379; Duke *v.* R. Co., 172 Fed. 684; Elba *v.* Bullard, 152 Ala. 237, 44 S. 412; Central R. Co. *v.* Alexander, 144 Ala. 257, 40 S. 424; Reiter-C. Mfg. Co. *v.* Hamlin, 144 Ala. 192, 40 S. 280; Shaw *v.* R. Co., 157 Cal. 240, 107 P. 108 (either as wages or in business); Bonneau *v.* R. Co., 152 Cal. 406, 93 P. 106; Mason *v.* Macon, etc. Co., 123 Ga. 773, 51 S. E. 569; Wrightsville, etc. R. Co. *v.* Gornto, 129 Ga. 204, 58 S. E. 769; Barnes *v.* Co., 235 Ill. 566, 85 N. E. 921 (value of plaintiff to employer, improper); Chicago C. R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087; Wilson *v.* R. Co., 154 Ill. App. 632; New Castle *v.* Grubbs, 171 Ind. 482, 86 N. E. 757; Gregory *v.* Slaughter, 30 Ky. L. R. 500, 99 S. W. 247; Stynes *v.* R. Co., 206 Mass. 75, 91 N. E. 998 (though disability not permanent); Campbell *v.* Chillicothe (Mo. App.), 162 S. W. 309; Bourke *v.* R. Co., 33 Mont. 267, 83 P 470; Carlisle *v.* Bentley, 81 Neb. 715, 116 N. W. 772; Boyce *v.* R. Co., 126 App. Div. 248, 110 N. Y. S. 393; Buckner *v.* R. Co., 164 N. C. 201, 80 S. E. 225; Rushing *v.* R. Co., 149 N. C. 161, 62 S. E. 890; Chicago, etc. R. Co. *v.* Stibbs, 17 Okla. 97, 87 P. 293; Brown *v.* Nav. Co., 63 Or. 396, 128 P. 38; McCarthy *v.* R. Co., 211 Pa. 193, 60 A. 778.

See Southern R. Co. *v.* Howell, 135 Ala. 639, 34 S. 6; City E. R. Co. *v.* Smith, 121 Ga. 663, 49 S. E. 724; Wells, Fargo & Co. *v.* Benjamin (Tex. Civ.), 165 S. W. 120; Loofbourow *v.* R. Co., 33 Utah 480, 94 P. 981; Lewis *v.* Crane, 78 Vt. 216, 62 A. 60; Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713.

Allowance to wife.—"Where a husband, engaged in a small business with only a nominal capital invested and having no other means of support, gives his wife a monthly allowance with which to maintain his family, for

a long period of years, it is a fair inference that the sums of money so given come with his earnings, and in a proper case such proof is admissible to show earning power at least to the extent of the amount so furnished." Boggers *v.* R. Co., 234 Pa. 379, 83 A. 356.

Offer of wages at time of injury, admissible to show earning capacity. Montgomery *v.* R. Co., 73 S. C. 503, 53 S. E. 987.

Probable earnings based on successful efforts of party, not admissible. Haas *v.* R. Co., 128 Mo. App. 79, 106 S. W 599.

Pendency of parents' action to recover wages of injured son is no reason for excluding evidence of son's earnings in action by him for same injury. McMahon *v.* Bangs, 5 Penne. (Del.) 178, 62 A. 1098.

Capacity of deceased to do housework, shown. Hartzler *v.* R. Co., 140 Mo. App. 665, 126 S. W. 760.

Returns received by farmer may be shown by witnesses informed thereof. Gray *v.* Phillips, 54 Tex. Civ. 148, 117 S. W. 870.

Schedule of wages paid by defendant and its time-table, admissible to show what deceased could have earned, subject to proof as to his ability to have continued to make trips according to such table. Atlantic C. L. R. Co. *v.* Jones, 132 Ga. 189, 63 S. E. 834.

Necessity for and definiteness of evidence.—See St. Louis R. Co. *v.* Niblack, 53 Tex. Civ. 619, 117 S. W. 188.

Plaintiff's financial condition may be shown on cross-examination. Pecos, etc. R. Co. *v.* Coffman, 56 Tex. Civ. 472, 121 S. W. 218.

418-28 Pronskevitch *v.* R. Co., 232 Ill. 136, 83 N. E. 545; Stanley *v.* Taylor (Ia.), 142 N. W. 81.

Earnings subsequent to injury, not conclusive, no impairment of ability sustained. Nolan *v.* Co., 33 Ky. L. R. 745, 111 S. W. 290.

418-30 See Nevers L. Co. *v.* Fields, 151 Ala. 367, 44 S. 81.

419-33 Proof of plaintiff's qualifications to earn money received prior to injury or that his services corresponded in value thereto need not be made in absence of anything to raise presumption, gift made by his employer. Amann *v.* Co., 243 Ill. 263, 90 N. E. 673.

419-34 Helmstetter *v.* Co., 243 Pa. 422, 90 A. 203; Buck *v.* McKeesport, 223 Pa. 211, 72 A. 514 (earnings of married woman twenty-three years before injury, too remote).

Inquiry may extend to three or four months prior to injury. West Pratt C. Co. *v.* Andrews, 150 Ala. 368, 43 S. 348. Year prior not too remote. Bourke *v.* R. Co., 33 Mont. 267, 83 P. 470. Nor twenty years if capacity existed at time of injury. El Paso R. Co. *v.* Murphy, 49 Tex. Civ. 586, 109 S. W. 489. Time should not be limited to period between injury and institution of action. Shoemaker *v.* Sonju, 15 N. D. 518, 108 N. W. 42.

420-35 Employment of others to perform work usually done by plaintiff may be shown in proof of incapacity, but not as element of recovery. Stynes *v.* R. Co., 206 Mass. 75, 91 N. E. 998, *disap.* Macon C. R. Co. *v.* Barnes, 113 Ga. 212, 38 S. E. 756, which held sum paid for services of others might be proved.

420-36 *Comp.* Ohio, etc. T. Co. *v.* Wernke, 42 Ind. App. 326, 84 N. E. 999.

421-37 Zibbell *v.* Pac. Co., 160 Cal. 237, 116 P. 513; Morrow *v.* Co., 70 S. C. 242, 49 S. E. 573. *Comp.* Central R. Co. *v.* McNab, 150 Ala. 332, 43 S. 222. See vol. 11, p. 780, n. 16, and supplement thereto.

421-38 Chicago, etc. R. Co. *v.* Hale, 186 Fed. 626, 108 C. C. A. 490, *rev.* 176 Fed. 21, 99 C. C. A. 379; Chicago, etc. R. Co. *v.* Hale, 99 C. C. A. 379, 176 Fed. 71 (if capital substantial); Eaton *v.* R. Co., 1 Boyce (Del.) 435, 75 A. 369; Mitchell *v.* R. Co., 138 Ia. 283, 114 N. W. 622; York *v.* Everton, 121 Mo. App. 640, 97 S. W. 604; Boyce *v.* R. Co., 126 App. Div. 248, 110 N. Y. S. 393. *Comp.* El Paso R. Co. *v.* Murphy, 49 Tex. Civ. 586, 109 S. W. 489. See Shaw *v.* R. Co., 157 Cal. 240, 107 P. 108; Wells *v.* R. Co., 82 Vt. 108, 71 A. 1103. Intention to go into business and arrangements therefor cannot be shown. United R. & E. Co. *v.* Riley, 109 Md. 327, 71 A. 970.

421-39 Fuller *v.* R. Co., 158 Ill. App. 198; Mitchell *v.* R. Co., 138 Ia. 283, 114 N. W. 622; Gray *v.* R. Co., 215 Mass. 143, 102 N. E. 71; Spiking *v.* Co., 33 Utah 313, 93 P. 838; Ryan *v.* Co., 138 Wis. 466, 120 N. W. 264. See Chicago U. T. Co. *v.* Brethauer, 223 Ill. 521, 79 N. E. 287, 127 Ill. App. 204; Bartow *v.* R. Co., 73 N. J. L. 12, 62

A. 489 (error to refuse to charge that "as there is no definite proof of the amount of loss of profits sustained by the plaintiff in his business, no damage can be allowed for his loss of profits"); Mason *v.* R. Co., 75 N. J. L. 521, 68 A. 105.

Profits from buying and selling cattle may be shown. Jordan *v.* R. Co., 124 Ia. 177, 99 N. W. 693.

422-40 Belleview *v.* England (Ky.), 118 S. W. 994; Kirk *v.* Co., 58 Wash. 283, 108 P. 604.

Tips.—Torgeson *v.* Hanford (Wash.), 139 P. 648.

Evidence of past profits not admissible to show probable future profits. Mitchell *v.* R. Co., 138 Ia. 283, 114 N. W. 622.

Loss of profits in lunch business, not admissible. Weir *v.* R. Co., 188 N. Y. 416, 81 N. E. 168.

423-42 St. Louis, etc. R. Co. *v.* Osborne, 95 Ark. 310, 129 S. W. 537; St. Louis S. R. Co. *v.* Jackson, 93 Ark. 119, 124 S. W. 241; City, etc. R. Co. *v.* Smith, 121 Ga. 663, 49 S. E. 724; Lake Shore, etc. R. Co. *v.* Teeters, 166 Ind. 335, 77 N. E. 599; Escher *v.* County, 146 Ia. 738, 125 N. W. 810 (value of services in superintending business; International, etc. R. Co. *v.* Lane (Tex. Civ.), 127 S. W. 1066.

May testify as to his experience in various kinds of work which he had followed. Birmingham, etc. Co. *v.* Simpson (Ala.), 59 S. 213.

424-44 Inability to follow certain occupations may be testified to by plaintiff. St. Louis S. R. Co. *v.* Norvell (Tex. Civ.), 115 S. W. 861.

424-45 Houston, etc. R. Co. *v.* Fanning, 40 Tex. Civ. App. 422, 91 S. W. 344. Chesapeake & O. R. Co. *v.* Hoffman, 109 Va. 44, 63 S. E. 432. See also vol. 7, p. 846, n. 38.

Amount of damages may be testified to by injured party. Roundtree *v.* R. Co., 72 S. C. 474, 52 S. E. 231. *Contra*, Kirk *v.* Co., 58 Wash. 283, 108 P. 604.

424-47 See "Expert and Opinion Evidence."

Reduction of ability to perform manual labor.—Physician familiar with injury, and who describes its nature, may testify in relation thereto. McDonald *v.* R. Co., 144 Mich. 379, 108 N. W. 85.

Ability to perform physical labor may be testified to by non-expert who knew plaintiff prior to injury and observed him since. Houston, etc. R. Co. *v.* Parnell, 56 Tex. Civ. 265, 120 S. W. 951, *disap.* Wells, Fargo Exp. Co. *v.* Boyle, 39 Tex. Civ. 365, 87 S. W. 164.

Extent of diminution of earning capacity may be shown by plaintiff. Atlantic, etc. R. Co. *v.* Haralson, 133 Ga. 231, 65 S. E. 437.

425-48 Non-expert testimony is competent to show earning capacity. Rajnowski *v.* R. Co., 74 Mich. 20, 41 N. W. 847 (services of little child); Yergy *v.* R. Co., 39 Mont. 213, 102 P. 310.

425-49 Proof of value of services of young child not essential in action by parent to recover for its death. Black *v.* R. Co., 146 Mich. 568, 109 N. W. 1052.

425-50 Colusa Parrot M. & S. Co. *v.* Monahan, 162 Fed. 276, 89 C. C. A. 256; Duke *v.* R. Co., 172 Fed. 684; MacFeat *v.* R. Co., 5 Penne. (Del.) 52, 62 A. 898; Swift *v.* Gaylord, 229 Ill. 330, 82 N. E. 299; Houston *v.* Quinn, 168 Ill. App. 593; Hammer *v.* Janowitz, 131 Ia. 20, 108 N. W. 109; Haynes *v.* R. Co., 101 Me. 335, 64 A. 614; Williams *v.* R. Co., 141 Mo. App. 625, 125 S. W. 522; City of Shawnee *v.* Slankard, 29 Okla. 133, 116 P. 803; Missouri, etc. R. Co. *v.* Graham (Tex. Civ.), 168 S. W. 55; St. Louis S. R. Co. *v.* Garber, 51 Tex. Civ. 70, 111 S. W. 227 (though age not alleged); Serdan *v.* Falk Co., 153 Wis. 169, 140 N. W. 1035.

Age, health, habits and physical condition of injured competent to prove his expectancy of life. St. Louis, etc. R. Co. *v.* Brogan, 105 Ark. 533, 151 S. W. 699.

Plaintiff may show that his injuries will result fatally. Atlantic, etc. R. Co. *v.* Thompson, 211 Fed. 889 (C. C. A.).

Judicial notice will not be taken of what deceased would have earned during the period of his life expectancy. White *v.* R. Co. (Tex. Civ.), 146 S. W. 692.

Shortening of life may be considered in determining extent of injury. Muncie P. Co. *v.* Hacker, 37 Ind. App. 194, 76 N. E. 770.

Decedent's life expectancy must be shown by plaintiff. Buckman *v.* R. Co., 227 Pa. 277, 75 A. 1069.

All injury sustained not presumed to have been experienced at time of trial. Rushing *v.* R. Co., 149 N. C. 161, 62 S. E. 890.

425-51 Expectancy of life of bene-

ficiary who may be expected to die before other beneficiaries must be proved before there can be recovery on his behalf of any earnings deceased might have made before attaining majority. Mississippi Oil Co. *v.* Smith, 95 Miss. 528, 48 S. 735.

426-52 Showing condition of health. Nicoll *v.* Sweet (Ia.), 144 N. W. 615.

426-53 Howard *v.* McCabe, 79 Neb. 42, 112 N. W. 305; Virginia, etc. R. Co. *v.* Bailey, 103 Va. 205, 49 S. E. 33; Hodd *v.* Tacoma, 45 Wash. 436, 88 P. 842. See O'Clair *v.* Co., 27 R. I. 448, 63 A. 238; MacGregor *v.* Co., 27 R. I. 85, 60 A. 761.

Error in admission is harmless if serious injury is shown and an instruction is given that such evidence is to be considered only injury is found permanent. Louisville, etc. R. Co. *v.* Croxton, 63 Fla. 223, 58 S. 369.

Preponderance of evidence enough to establish disfigurement. Witt *v.* Latimer, 139 Ia. 273, 117 N. W. 680.

426-55 Southern R. Co. *v.* Cunningham, 152 Ala. 147, 44 S. 658.

426-56 Allegation of permanency, sufficient. St. Louis S. R. Co. *v.* Garber, 51 Tex. Civ. 70, 111 S. W. 227

426-57 Merchants' & M. T. Co. *v.* Corcoran, 4 Ga. App. 654, 62 S. E. 130 (not essential); New York C. & St. L. R. Co. *v.* Lind (Ind.), 102 N. E. 449; Scott *v.* R. Co. (Ia.), 141 N. W. 1065; Cubbage *v.* Est., etc., 155 Ia. 39, 134 N. W. 1074; Proctor C. Co. *v.* Beaver's Admr., 151 Ky. 839, 152 S. W. 965; Louisville & N. R. Co. *v.* Campbell (Ky.), 122 S. W. 848 (if injury permanent); Ranta *v.* Min. Co. (Mich.), 147 N. W. 609; O'Dell *v.* Stewart & Co. (Neb.), 147 N. W. 121; Oliver *v.* Const. Co. (R. I.), 90 A. 764; Gulf, etc. R. Co. *v.* Stewart (Tex. Civ.), 164 S. W. 1059; Snell *v.* Jones, 49 Wash. 582, 96 P. 4 (indefinite knowledge of plaintiff's age). See Macrill *v.* City of Hartington, 93 Neb. 670, 141 N. W. 825. See also vol. 13, p. 604, n. 82.

Jury may determine expectancy or duration of life of person injured without such tables from age, health, habits and the facts which affect probable continuance. St. Louis, etc. R. Co. *v.* Trotter, 101 Ark. 183, 142 S. W. 189; St. Louis, etc. R. Co. *v.* Glossup, 88 Ark. 225, 114 S. W. 247; Kansas, etc. R. Co. *v.* Morris, 80 Ark. 528, 98 S. W. 363.

Plaintiff's testimony respecting himself and injuries may afford data for ascertaining life expectancy. Southern R. Co. *v.* Petway, 7 Ga. App. 659, 67 S. E. 886.

Loss of earnings. — Pierce *v.* R. Co., 173 U. S. 1; Am. C. D. Co. *v.* Boyd, 148 Fed. 258; Birmingham R. Co. *v.* Wright, 153 Ala. 99, 44 S. 1037; Valente *v.* R. Co., 151 Cal. 534, 91 P. 481; Messing *v.* R. Co., 5 Penne. (Del.) 526, 64 A. 247; Calvert *v.* Co., 231 Ill. 290, 83 N. E. 184 (tables of Dr. Wigglesworth); Pittsburg R. Co. *v.* Ross, 169 Ind. 3, 80 N. E. 845; Patton *v.* Sanborn, 133 Ia. 650, 110 N. W. 1032; Banks *v.* Braman, 195 Mass. 97, 80 N. E. 799; Howell *v.* R. Co., 136 Mich. 432, 99 N. W. 406; Horst *v.* Lewis (Neb.), 103 N. W. 460; Howard *v.* McCabe, 79 Neb. 42, 112 N. W. 305; Notto *v.* R. Co., 75 N. J. L. 826, 69 A. 968, 17 L. R. A. (N. S.) 1128; O'Clair *v.* Co., 27 R. I. 448, 63 A. 238; MacGregor *v.* Co., 27 R. I. 85, 60 A. 761; Virginia, etc. R. Co. *v.* Bailey, 103 Va. 205, 49 S. E. 33; Snell *v.* Jones, 49 Wash. 582, 96 P. 4; Brown *v.* Blaine, 41 Wash. 287, 83 P. 310; Hodd *v.* Tacoma, 45 Wash. 436, 88 P. 842; Rhoades *v.* R. Co., 49 W. Va. 494, 39 S. E. 209, 87 Am. St. 826, 55 L. R. A. 179

See Northern Ala. R. Co. *v.* Key, 150 Ala. 641, 43 S. 794; Southern R. Co. *v.* O'Bryan, 119 Ga. 147, 45 S. E. 1000. *Comp.* Atlantic, etc. R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818.

Tables in code supplement, admissible. Clark *v.* Van Vleck, 135 Ia. 194, 112 N. W 684.

Admissible to show expectancy of female.—Croft *v.* R. Co., 134 Ia. 411, 109 N. W. 723.

427-58 See infra, "Mortality Tables," 636-10.

427-59 Mississippi Oil Co. *v.* Smith, 95 Miss. 528, 48 S. 735.

Prospective damages of person seriously injured cannot be computed on basis of such tables. Canfield *v.* R. Co., 142 Ia. 658, 121 N. W. 186.

427-60 See Knott *v.* Peterson, 125 Ia. 404, 101 N. W. 173. But see Northern P. R. Co. *v.* Chervenak, 203 Fed. 884, 122 C. C. A. 178. See also "Best and Secondary Evidence."

427-62 In case of persons abnormal or suffering from incurable disease tables not admissible. Colbert *v.* Co. (R. I.), 67 A. 446.

427-63 Western & A. R. Co. *v.*

Clark, 117 Ga. 548, 44 S. E. 1; Scott *v.* R. Co. (Ia.), 141 N. W. 1065; Moyse *v.* R. Co., 41 Mont. 272, 108 P. 1062; Moses *v.* Mathews (Neb.), 146 N. W. 920; South Omaha *v.* Sutliffe, 72 Neb. 746, 101 N. W. 997; Bussey *v.* R. Co., 78 S. C. 352, 58 S. E. 1015. See Central R. Co. *v.* Minor, 2 Ga. App. 804, 59 S. E. 81; Croft *v.* R. Co., 134 Ia. 411, 109 N. W. 723. *Comp.* Bettis *v.* R. Co., 131 Ia. 46, 108 N. W. 103.

428-64 See Davis *v.* R. Co., 147 Mich. 479, 111 N. W. 76; Beattie *v.* Detroit, 137 Mich. 319, 100 N. W. 574. *Comp.* Sterling *v.* Co., 142 Mich. 284, 105 N. W. 755.

Tables not essential; jury may determine probable duration of life from age and injuries. Missouri V. B. & I. Co. *v.* Ballard, 53 Tex. Civ. 110, 116 S. W. 93.

428-66 Ft. Worth, etc. R. Co. *v.* Spear (Tex. Civ.), 107 S. W. 613.

428-67 Northern P. R. Co. *v.* Chervenak, 203 Fed. 884, 122 C. C. A. 178; Love *v.* R. Co., 170 Mich. 1, 135 N. W. 963. See Messing *v.* R. Co., 5 Penne. (Del.) 526, 64 A. 247.

428-68 See Knott *v.* Peterson, 125 Ia. 404, 101 N. W. 173. *Comp.* St. Louis, etc. R. Co. *v.* Hall (Tex. Civ.), 106 S. W. 194.

Evidence plaintiff's ancestors were long-lived is admissible. Haynes *v.* R. Co., 101 Me. 335, 64 A. 614; Sterling *v.* Co., 142 Mich. 284, 105 N. W. 755. See Rincicotti *v.* Co., 77 Conn. 617, 60 A. 115, age of decedent's parents at death.

429-69 Amann *v.* Co., 243 Ill. 263, 90 N. E. 673; McClintic, Marshall C. Co. *v.* Eckman, 153 Ky. 704, 156 S. W. 382; Bruce *v.* R. Co., 175 Mo. App. 568, 158 S. W. 102; Meade *v.* Goldman 129 N. Y. S. 899, rehear. *denied*, 130 N. Y. S. 1121; Tucker *v.* Mills, 76 S. C. 539, 57 S. E. 626; Parker *v.* R. R., 84 Vt. 329, 79 A. 865; Berg *v.* Co., 125 Wis. 262, 104 N. W. 60. See Coffey *v.* Sutton, 175 Ill. App. 331; Maroney *v.* R. Co., 123 Minn. 180, 144 N. W. 149; Dallas Consol. E. R. Co. *v.* Carroll (Tex. Civ.), 152 S. W. 1165.

Liability to pay is sufficient.—Wilson *v.* R. Co., 144 Ill. App. 604.

Medical expenses cannot be recovered when not alleged. San Antonio Tract. Co. *v.* Cassanova (Tex. Civ.), 154 S. W. 1190.

429-70 Montgomery *v.* Shirley, 159 Ala. 239, 48 S. 679; Central R. Co. *v.* McNab, 150 Ala. 332, 43 S. 222; Elba *v.* Bullard, 152 Ala. 237, 44 S. 412; Woodward I. Co. *v.* Curl, 153 Ala. 205, 44 S. 974; Iaeger *v.* Metcalf, 11 Ariz. 283, 94 P. 1094; Kimie *v.* R. Co., 156 Cal. 273, 104 P. 312 (question as to expenses plaintiff put to, proper); Heidelbaugh *v.* R. Co., 6 Penne. (Del.) 209, 65 A. 587; Ruff *v.* R. Co. (Fla.), 64 S. 782; Nashville, etc. R. Co. *v.* Hubble (Ga.), 76 S. E. 1009; Chicago C. R. Co. *v.* Henry, 218 Ill. 92, 75 N. E. 758; Donk *v.* Thil, 228 Ill. 233, 81 N. E. 857; Cross *v.* R. Co., 33 Ky. L. R 432, 110 S. W. 290; Stotler *v.* R. Co., 200 Mo. 107, 98 S. W. 509; Sotebier *v.* R. Co., 203 Mo. 702, 102 S. W. 651; Flaherty *v.* Co., 207 Mo. 318, 106 S. W. 15; Cowgill *v.* City of St. Joseph (Mo. App.), 167 S. W. 1157; Gibbs *v.* Co., 142 Mo. App. 19, 125 S. W. 840 (liability); Clark *v.* Co., 138 N. C. 77, 50 S. E. 518; Allen *v.* Co., 144 N. C. 288, 56 S. E. 942; Missouri, etc. R. Co. *v.* Dalton, 56 Tex. Civ. 82, 120 S. W. 240; Mullen *v.* R. Co. (Tex. Civ.), 92 S. W. 1000; Texas R. Co. *v.* Chippenger, 47 Tex. Civ. 510, 106 S. W. 155; Norfolk R. & L. Co. *v.* Spratley, 103 Va. 379, 49 S. E. 502; Shaw *v.* Seattle, 39 Wash. 590, 81 P. 1057. *Contra* as to expense of trip for benefit of plaintiff's health. Statler *v.* Co., 195 N. Y. 478, 88 N. E. 1063. See Sloss-S. & C. Co. *v.* Vinzant, 153 Ala. 212, 44 S. 1015; Shoemaker *v.* Jackson, 128 Ia. 488, 104 N. W. 503; Storm *v.* Butte, 35 Mont. 385, 89 P. 726; Franey *v.* Taxicab Co. (Wash.), 141 P. 890.

Hospital fees may be shown. Montgomery S. R. Co. *v.* Mason, 133 Ala. 508, 32 S. 261.

Expenses incurred by parent in nursing injured child. Simone *v.* Co., 28 R. I. 186, 66 A. 202, 9 L. R. A. (N. S.) 740; Johnson *v.* Co., 131 Wis. 627, 111 N. W. 722.

Physician's bill admissible where evidence shows contract with plaintiff to pay. Burnham *v.* Co. (R. I.), 68 A. 421.

In action by married woman value of medical services cannot be considered unless it is shown she has paid therefor, or has a separate estate liable therefor. Pomerine Co. *v.* White, 70 Neb. 177, 98 N. W. 1040.

Expenses for board and keep while disabled cannot be shown. Vedder *v.* Delaney, 122 Ia. 583, 98 N. W. 373.

Evidence by plaintiff of agreement to reimburse county for expenses incurred in caring for plaintiff under charge of officers of the poor, admissible. Vedder *v.* Delaney, supra.

Evidence plaintiff's daughter, who had a family of her own and lived apart from her parents, came to plaintiff's home and nursed plaintiff, is sufficient to show as between plaintiff and her daughter, it was expected and intended compensation should be made. Wissler *v.* Atlantic, 123 Ia. 11, 98 N. W. 131.

Value of nurse hire may be shown, though plaintiff's wife nursed him. Indianapolis & E. R. Co. *v.* Bennett, 39 Ind. App. 141, 79 N. E. 389.

That bills for expenditures included in bankruptcy schedules filed by plaintiff, proved against his estate and his legal liability therefor discharged, not ground for their exclusion. Sibley *v.* Nason, 196 Mass. 125, 81 N. E. 887.

Must be evidence of payment or liability for expenditures, if any, before they may be considered. Rio Grande S. R. Co. *v.* Campbell, 44 Colo. 1, 96 P. 986; Jones *v.* George, 227 Ill. 64, 81 N. E. 4.

Itemized bill, not admissible if it includes items for which defendant not responsible. Kirk *v.* Co., 58 Wash. 283, 108 P. 604.

429-73 Chicago C. R. Co. *v.* Henry, 218 Ill. 92, 75 N. E. 758; Sotebier *v.* Co., 203 Mo. 702, 102 S. W. 651; Zilko *v.* Johnson, 22 N. D. 75, 132 N. W. 640; Busch *v.* Robinson, 46 Or. 539, 81 P. 237; Northern Tex. T. Co. *v.* Mullins, 44 Tex. Civ. 566, 99 S. W. 433; Normile *v.* Co., 57 W. Va. 132, 49 S. E. 1030.

430-75 Coffey *v.* Sutton, 175 Ill. App. 331; Elzig *v.* Bales, 135 Ia. 208, 112 N. W. 540; Graefe *v.* Co., 224 Mo. 232, 123 S. W. 835; Klingaman *v.* Co., 19 S. D. 139, 102 N. W. 601. *Contra,* Birmingham R. L. & P. Co. *v.* Humphries, 172 Ala. 495, 55 S. 307.

In an action against saloonkeeper for loss of support due to personal injuries while her husband was drunk. She could recover her services as nurse and evidence of their value is admissible Spencer *v.* Johnson, 176 Mich. 278, 142 N. W. 582. See vol. 7, p. 708.

Sum paid may be shown as first step in proving value of services. Schmitt *v.* Kurrus, 140 Ill. App. 132, 234 Ill. 578, 85 N. E. 261.

430-76 Thompson *v.* Coal Co., 158 Ill. App. 289; Amann *v.* Co., 243 Ill. 263, 90 N. E. 673; Schmitt *v.* Kurrus, 140 Ill. App. 132, 234 Ill. 578, 85 N. E. 261; Hobbs *v.* Marion, 123 Ia. 726, 99 N. W. 577; Veler *v.* Delaney, 122 Ia. 583, 98 N. W. 373; Pratt *v.* Hamilton, 161 Mich. 258, 126 N. W. 196; Nelson *v.* R. Co., 113 Mo. App. 659, 88 S. W. 781; Storm *v.* Butte, 35 Mont. 385, 89 P. 726; Armstrong *v.* Auburn, 84 Neb. 842, 122 N. W. 43; Moran *v.* R. Co., 74 N. H. 500, 69 A. 884; Brown *v.* White, 202 Pa. 297, 51 A. 992; Galveston H. & H. R. Co. *v.* Hodnett (Tex. Civ.), 155 S. W. 678; International, etc. R. Co. *v.* Lane (Tex. Civ.), 127 S. W. 1066; Houston, etc. R. Co. *v.* Garcia (Tex. Civ.), 90 S. W. 713; Missouri, etc. R. Co. *v.* Morgan, 49 Tex. Civ. 212, 108 S. W. 724. See also Ft. Worth, etc. R. Co. *v.* Morris, 45 Tex. Civ. 596, 101 S. W. 1038; Nelson *v.* Co., 52 Wash. 177, 100 P. 325; Brown *v.* Blaine, 41 Wash. 287, 83 P. 310.

Sums charged may justify inference as to reasonableness. Missouri, etc. R. Co. *v.* Dalton, 56 Tex. Civ. 82, 120 S. W. 240.

Evidence of usual and customary charge, though named in two sums, sufficient without statement of amount charged against plaintiff or evidence of his promise to pay either sum. McCarthy *v.* Co., 243 Ill. 185, 90 N. E. 372.

430-77 Physician who rendered services may testify to their value. Montgomery *v.* Shirley, 179 Ala. 239, 48 S. 679. See also vol. 13, p. 582, n. 9.

Expense of future medical services may be ascertained from evidence showing value of those rendered. Scurlock *v.* Boone, 142 Ia. 684, 121 N. W. 369.

430-80 Dean *v.* Co., 44 Wash. 564, 87 P. 824; Philby *v.* R. Co., 46 Wash. 173, 89 P. 468; Herning *v.* Lumb. Co., 153 Wis. 101, 140 N. W. 1102.

Connection between expenses of and injury must be shown. Georgia R. & E. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944; Amann *v.* Co., 243 Ill. 263, 90 N. E. 673.

431-81 Birmingham, etc. Co. *v.* Friedman (Ala.), 65 S. 939; Davis *v.* Kornman, 141 Ala. 479, 37 S. 789; Johnston *v.* Beadle, 6 Cal. App. 251, 91 P. 1011; Southern R. Co. *v.* Phillips, 136 Ga. 282, 71 S. E. 414; Griser *v.* Schoenborn, 109 Minn. 297, 123 N. W. 822; Texas Co. *v.* Strange (Tex. Civ.), 154

S. W. 327. See Kelly *v.* R. Co., 152 Wis. 328, 140 N. W. 60. *Comp.* Mississippi C. R. Co. *v.* Hardy, 88 Miss. 732, 41 S. 505; Dallas, etc. R. Co. *v.* Summers, 48 Tex. Civ. 474, 106 S. W. 891. *Contra* if punitive damages are recoverable. Calder *v.* R. Co., 89 S. C. 287, 71 S. E. 841.

432-82 Marien *v.* Walsh, 64 Or. 583, 131 P. 505.

433-84 Plaintiff's pecuniary condition may be shown if punitive damages recoverable. Bolles *v.* R. Co., 134 Mo. App. 696, 115 S. W. 459.

433-86 *Comp.* Morrow *v.* Co., 70 S. C. 242, 49 S. E. 573.

433-87 De Luna *v.* R. Co., 130 App. Div. 386, 114 N. Y. S. 893. *Comp.* Proper *v.* R. Co., 136 Mich. 352, 99 N. W. 283, reception of evidence at instance of defendant, decedent was wealthy, was, if error, harmless. See Yergy *v.* R. Co., 39 Mont. 213, 102 P. 310.

Age, sex, general health and intelligence of deceased, situation and condition of survivors and their relation to deceased, limits scope of evidence. De Luna *v.* R. Co., 130 App. Div. 386, 114 N. Y. S. 893.

434-88 Ft. Worth, etc. R. Co. *v.* Stalcup (Tex. Civ.), 167 S. W. 279. See Duke *v.* R. Co., 172 Fed. 684.

434-89 Nilson *v.* R. Co., 84 Neb. 595, 121 N. W. 1128; Chesapeake & O. R. Co. *v.* Ghee, 110 Va. 527, 66 S. E. 826.

434-90 Preble *v.* R. Co., 243 Ill. 340, 90 N. E. 716; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651 (may not be prejudicial). See infra, "Parent and Child," 293-85.

Plaintiff may show husband was her sole support.—Preble *v.* R. Co., 243 Ill. 340, 90 N. E. 716.

Decedent's applications for money orders in behalf of mother, admissible after showing she had received money from him. Nordhaus *v.* R. Co., 242 Ill. 166, 89 N. E. 974.

435-92 St. Louis, etc. R. Co. *v.* Jacks, 105 Ark. 347, 151 S. W. 706; Brennen *v.* Co., 147 Ill. App. 263 (wife may show amount of pecuniary aid received from husband); Nordhaus *v.* R. Co., 147 Ill. App. 274 (mother may show receipt of money from son); Powell *v.* R. Co. (Mo.), 164 S. W. 628; Crabtree *v.* R. Co., 86 Neb. 33, 124 N. W. 932 (in action by parent for death of child, dist. local cases); Harrison *v.* R. Co., 195 N. Y. 86, 87 N. E. 802 (dependence of children may be shown, but not that they were inmates of orphanage). See Kettelhake *v.* Car & F. Co., 171 Mo. App. 528, 153 S. W. 552; Williams *v.* R. Co., 169 Mo. App. 468, 155 S. W. 64.

Salary and financial ability of father and prospects of. financial ability to educate his child. Love *v.* R. Co., 170 Mich. 1, 135 N. W. 963.

436-93 Farley *v.* R. Co., 87 Conn. 328, 87 A. 990; McCoullough *v.* R. Co. (Ia.), 142 N. W. 67.

436-95 Use made by decedent of earnings, shown. Brennen *v.* Co., 241 Ill. 610, 89 N. E. 756.

Insurance on decedent's life in favor of plaintiff, immaterial. Houston, etc. R. Co. *v.* Lemair, 55 Tex. Civ. 237, 119 S. W. 1162.

437-96 Lacorazza *v.* Cantalupo, 210 Fed. 875, 127 C. C. A. 459; Rio Grande S. R. Co. *v.* Campbell, 44 Colo. 1, 96 P. 986; Louisville, etc. R. Co. *v.* Collingsworth, 45 Fla. 403, 33 S. 513; Jones *v.* George, 227 Ill. 64, 81 N. E. 4; Frick *v.* R. Co., 154 Ill. App. 277; Monongahela, etc. Co. *v.* Hardsaw, 169 Ind. 147, 81 N. E. 492; United R. & E. Co. *v.* Riley, 109 Md. 327, 71 A. 970; Torreyson *v.* R. Co., 144 Mo. App. 626, 129 S. W. 409; Southern R. Co. *v.* Simmons, 105 Va. 651, 55 S. E. 459; Longmore *v.* Co., 78 Wash. 468, 139 P. 191. But see Eoff *v.* R. Co., 70 Wash. 270, 126 P. 533. *Comp.* Hardin *v.* City of Moline, 179 Ill. App. 101. Widowhood of plaintiff suing to recover for injury to child, relevant. Cherryvale *v.* Hawman, 80 Kan. 170, 101 P. 994.

That plaintiff, a minor fourteen years, was living with his mother who had six children and two sisters working for defendant, cannot be shown. Sanitary Can Co. *v.* McKinney, 52 Ind. App. 379, 100 N. E. 785.

May be shown to show incentive to thrift and accumulation. But see Nicoll *v.* Sweet (Ia.), 144 N. W. 615.

But damages will be presumed in law where deceased left a mother surviving. Smiley *v.* R. Co., 169 Ill. App. 29.

Exception to rule in case of loss of sexual power. Simpson *v.* Foundation Co., 201 N. Y. 479, 95 N. E. 10, *rev.* 118 N. Y. S. 1142.

Plaintiff was permitted to prove that the family of the deceased consisted of his wife and three children, and this was claimed to be in "violation of the rule established in Beems *v.* Railway

Co., 58 Iowa 158, 12 N. W. 222. In the case before us the evidence was received on redirect examination of a witness and was explanatory of matters developed upon the cross-examination of the same witness. It was made to appear by the direct examination of such witness that the decedent was earning $3 to $4 per day. He was only 23 years old. On cross-examination it was shown that he had saved none of his earnings and had no property. This later circumstance was proper for the consideration of the jury as bearing upon the injury to the estate of the decedent by reason of his death. It follows, we think, that it was a proper explanation of the absence of property saved to show that he was supporting a dependent family on such earnings." Dufree v. R. Co., 155 Ia. 544, 136 N. W. 695.

438-97 Bahr v. R. Co., 101 Minn. 314, 112 N. W. 267.

Contra in Missouri by statute.—Hartnett v. R. Co., 162 Mo. App. 554, 142 S. W. 750.

438-2 United R. & E. Co. v. Riley, 109 Md. 327, 71 A. 970; Bahr v. R. Co., 101 Minn. 314, 112 N. W. 267.

439-3 Duke v. R. Co., 172 Fed. 684; Valente v. R. Co., 158 Cal. 412, 111 P. 95; Kramm v. R. Co., 22 Cal. App. 737, 136 P. 523; Kettelhake v. Car & F. Co., 171 Mo. App. 528, 153 S. W. 552; Powell v. R. Co. (Mo.), 164 S. W. 628; Ogan v. R. Co., 142 Mo. App. 248, 126 S. W. 191; Hollingsworth v. Co., 38 Mont. 143, 99 P. 142. See Lord v. R. Co., 74 N. H. 295, 67 A. 639; Portsmouth S. R. Co. v. Peed, 102 Va. 662, 47 S. E. 850. *Comp.* Olivier v. R. Co., 138 Mich. 242, 101 N. W. 530, holding evidence decedent left a family immaterial.

Conduct of deceased toward his minor children a proper subject of inquiry. Kramm v. R. Co., 22 Cal. App. 737, 136 P. 523.

Membership of deceased in a church admissible as indicating influence he might have had on the children. White v. R. Co. (Vt.), 89 A. 618.

Evidence of birth of still-born child is inadmissible. Preble v. R. Co., 149 Ill. App. 584, *aff.* 243 Ill. 340, 90 N. E. 716.

Where a widow sues for wrongful death of her husband, she may testify that he was her sole means of support. Kulvic v. Coal Co., 253 Ill. 386, 97 N. E. 688.

Under the Massachusetts statute it is a condition precedent to recovery for death of a servant that decedent left either a widow or dependent next of kin. Bartley v. R. Co., 198 Mass. 163, 83 N. E. 1093.

Evidence of ill-health of wife suing for death of husband, competent. Evarts v. R. Co., 3 Cal. App. 712, 86 P. 820.

Care given children by father, shown. Cleveland, etc. R. Co. v. Starks (Ind. App.), 89 N. E. 602.

Birth of child after father's death, shown under proper pleadings. Preble v. R. Co., 243 Ill. 340, 90 N. E. 716.

441-4 McCoullough v. R. Co. (Ia.), 142 N. W. 67; McKenzie v. R. Co., 216 Mo. 1, 115 S. W. 13 (not prejudicial if damages not affected); McCabe v. Co., 27 R. I. 272, 61 A. 667.

441-5 Physical condition of decedent's widow shown under statute permitting recovery of such damages as may be just. Evans v. R. Co., 37 Utah 431, 108 P. 638. Otherwise under statute limiting recovery to money value of loss of support and maintenance. Chicago, etc. R. Co. v. Woolridge, 174 Ill. 330, 51 N. E. 701.

Remarriage of widow not admissible. Wabash R. Co. v. Gretzinger (Ind.), 104 N. E. 69.

Marital relations of plaintiff and deceased may be proved. Mize v. Co., 38 Mont. 521, 100 P. 971. Witness who had opportunity to observe conduct of parties to each other may testify thereof. Evans v. R. Co., 37 Utah 431, 108 P. 638.

Number, ages and sex of children of one of the plaintiffs cannot be shown. Cook v. R. Co., 143 Ill. App. 109.

Death of minor children of decedent, immaterial; but proof thereof harmless. Zetsche v. R. Co., 238 Ill. 240, 87 N. E. 412.

Contingency of decedent's marriage, death or use of his money for other purposes may be regarded in action by his brother and sole heir. Conklin v. Co., 130 App. Div. 308, 114 N. Y. S. 190.

441-6 Converse true as to adults. Hollingsworth v. Co., 38 Mont. 143, 99 P. 142.

Affection existing between deceased and his children may be shown as

predicate for recovery of damages in their behalf after attaining majority, statute not limiting period. Kansas City S. R. Co. *v.* Frost, 93 Ark. 183, 124 S. W. 748.

Responsibility of beneficiary for death may be shown in mitigation. Cleveland, etc. R. Co. *v.* Bossert, 44 Ind. App. 245, 87 N. E. 158.

442-8 Bakka *v.* Coal Co. (Utah), 134 P. 888. *Comp.* Louisville, etc. Co. *v.* Daniel, 122 Ky. 256, 91 S. W. 691; Carlton *v.* R. Co., 128 Mo. App. 451, 106 S. W. 1100.

Where defendant claimed plaintiff was malingering evidence of general reputation is admissible. Quanah A. & P. R. Co. *v.* Johnson (Tex. Civ.), 159 S. W. 406.

442-10 Chicago, etc. R. Co. *v.* Gunn (Ark.), 166 S. W. 568. See Hunter *v.* Durand, 137 Mich. 53, 100 N. W. 191; Bedenbaugh *v.* R. Co., 69 S. C. 1, 48 S. E. 53.

Habits, care, and sobriety of deceased may be shown where there are no eyewitnesses, but may be rejected if there were witnesses. O'Donnell *v.* Mfg. Co., 172 Ill. App. 601; Anderson *v.* R. Co., 170 Ill. App. 210.

Habits and customs.—See Alabama & V. R. Co. *v.* Thornhill (Miss.), 63 S. 674.

INSANITY

Previous insanity. 464-64; *Examination by expert,* 473-85; *Weight of opinions,* 476-94; *Discharge from asylum,* 479-3; *Relation to pleadings,* 479-4; *Burden of proof,* 480-6.

446-1 Kelly *v.* Nusbaum, 244 Ill. 158, 91 N. E. 72; Ross *v.* Ross, 140 Ia. 51, 117 N. W. 1105; Foster *v.* Long, 8 O. N. P. (N. S.) 75; Castle *v.* Dole, 54 Wash. 585, 103 P. 828. See In re Schmidt's Will, 139 N. Y. S. 464.

446-2 Hodge *v.* Rambo, 155 Ala. 175, 45 S. 678. See Wood *v.* Wood, 129 Ia. 255, 105 N. W. 517, favor shown son insufficient to warrant appointment of guardian.

446-3 Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405 (source from which testator derived property shown); Donnan *v.* Donnan, 236 Ill. 341, 86 N. E. 279; Hitt *v.* Terry, 92 Miss. 671, 46 S. 829; P. *v.* Meringola, 113 App. Div. 488, 99 N. Y. S. 357. See Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755.

446-5 P. *v.* Carlin, 194 N. Y. 448, 87 N. E. 805; S. *v.* Coyle, 86 S. C. 81, 67 S. E. 24.

Intelligence shown in the commission of crime, knowledge and recollection of it, evidence to rebut claim of epilepsy. P. *v.* Furlong, 187 N. Y. 198, 79 N. E. 978.

446-6 S. *v.* Jack, 4 Penne. (Del.) 470, 58 A. 833.

446-7 Attempts at suicide are evidence of derangement. In re Killen's Est., 223 Pa. 201, 72 A. 521.

446-8 Masonic Assn. *v.* Pollard, 121 Ky. 349, 89 S. W. 219. See South Atl. L. Ins. Co. *v.* Hurt, 115 Va. 398, 79 S. E. 401.

447-9 In re Dolbeer, 149 Cal. 227, 86 P. 695.

447-10 Reed *v.* S., 102 Ark. 525, 145 S. W. 206; P. *v.* Oppenheimer, 156 Cal. 733, 106 P. 74; P. *v.* Fallon, 149 Cal. 287, 86 P. 689; C. *v.* Spencer, 212 Mass. 438, 99 N. E. 266; S. *v.* Porter, 213 Mo. 43, 111 S. W. 529 (quot. paragraph of text containing this note number); P. *v.* Nino, 149 N. Y. 317, 43 N. E. 853; S. *v.* Driggers, 84 S. C. 526, 66 S. E. 1042; S. *v.* Constantine, 48 Wash. 218, 93 P. 317 (whole of conversation admissible). *Contra,* S. *v.* Vann, 82 N. C. 631, which seems inconsistent with Norwood *v.* Marrow, 20 N. C. 442, and McLeary *v.* Norment, 84 N. C. 235.

447-11 S. *v.* Speyer, 194 Mo. 459, 91 S. W. 1075 (letters).

A contract stating that defendant is subject to fits is inadmissible. Maxey *v.* S. (Tex. Cr.), 145 S. W. 952.

447-12 P. *v.* Brent, 11 Cal. App. 674, 106 P. 110; S. *v.* Porter, 213 Mo. 43, 111 S. W. 529. *Contra,* S. *v.* Neubauer, 145 Ia. 337, 124 N. W. 312. See P. *v.* Willard, 150 Cal. 543, 89 P. 124.

Subsequent conduct.—See Oborn *v.* S., 143 Wis. 249, 126 N. W. 737.

447-14 In re Thomas' Est., 155 Cal. 488, 101 P. 798; Conway *v.* Murphy, 135 Ia. 171, 112 N. W. 764 (admissions as substantive evidence); O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59; Jones *v.* Thomas, 218 Mo. 508, 117 S. W. 1177.

448-16 Jenkins *v.* Weston, 200 Mass. 488, 86 N. E. 955. *Comp.* Ames *v.* Ames, 75 Neb. 473, 106 N. W. 584, declaration in verified answer inadmissible.

448-17 Westfall *v.* Wait, 165 Ind. 353, 73 N. E. 1089.

449-18 Declarations showing only moral delinquency, inadmissible. Snell *v.* Weldon, 239 Ill. 279, 87 N. E. 1022. "Admission of insanity can never fix the status of unsound mind in the person making the admission." In re Phillips, 158 Mich. 155, 122 N. W. 554.

449-19 See S. *v.* Constantine, 48 Wash. 218, 93 P. 317.

Belief in spiritualism, evidence of insanity. See Owen *v.* Crumbaugh, 228 Ill. 380, 81 N. E. 1044, and Scott *v.* Scott, 212 Ill. 597, 72 N. E. 708.

449-20 Groce *v.* Ty., 12 Ariz. 1, 94 P. 1108 (consulting a palmist); Curtis *v.* Kirkpatrick, 9 Ida. 629, 75 P. 760; McReynolds *v.* Smith, 172 Ind. 336, 86 N. E. 1009; Lang *v.* Lang (Ia.), 135 N. W. 604; In re Knox, 123 Ia. 24, 98 N. W. 468; Eades *v.* Owens, 24 Ky. L. R. 2328, 74 S. W. 186; In re Killen's Est., 223 Pa. 201, 72 A. 521; Rogers *v.* S., 77 Vt. 454, 61 A. 489; Steward *v.* State, 124 Wis. 623, 102 N. W. 1079. See P. *v.* Oppenheimer, 156 Cal. 733, 106 P. 74 (treatment accorded accused by others after commission of crime, immaterial); Tubb *v.* S., 55 Tex. Cr. 606, 117 S. W. 858.

Where proponents showed competency by evidence that she successfully managed her own business contestants may show that management was unsuccessful. Byrne *v.* Fulkerson, 254 Mo. 97, 162 S. W. 171.

Manner of treatment of testatrix by her family given in connection with her conduct under such treatment and evidence of acts in which no person of sound mind would acquiesce are competent to show a person is mentally incompetent. In re De Laveaga's Est., 165 Cal. 607, 133 P. 307.

Great latitude allowed in reception of evidence. S. *v.* Porter, 213 Mo. 43, 111 S. W. 529.

Acts and threats of third person, communicated to defendant, admissible. S. *v.* Bradley, 120 La. 248, 45 S. 120.

Prescription by physician, of drugs used in treating insanity, not admissible. Ames *v.* Ames, 75 Neb. 473, 106 N. W. 584.

Conveyance made and business conversations with attorney, competent. In re Miller, 27 Pa. C. C. 49.

Wrongful belief as to thefts by brother from him, competent. Dowie *v.* Sutton, 126 Ill. App. 47.

If testamentary capacity in issue, wide range of inquiry permissible into facts and circumstances prior and subsequent to will, including nature and extent of the state, testator's family and connections and his relations to them. Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405.

Conduct of incompetent's family toward him shown. Hopkins *v.* Wampler, 108 Va. 705, 62 S. E. 926.

449-21 U. S. *v.* Chisolm, 149 Fed. 284, 153 Fed. 808; Denver R. Co. *v.* Scott, 34 Colo. 99, 81 P. 763 (expression of face and eyes); Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; S. *v.* McGruder, 125 Ia. 741, 101 N. W. 646; Kempf *v.* Koppa, 74 Kan. 153, 85 P. 806 (wide latitude allowed); Cogan *v.* Cogan, 202 Mass. 58, 88 N. E. 662; Lane *v.* S., 59 Tex. Cr. 595, 129 S. W. 353. See Black *v.* Post, 67 W. Va. 253, 67 S. E. 1072.

Conduct and planning of defendant may so establish sanity as to dispense with necessity of instructing. Bast *v.* C., 124 Ky. 747, 99 S. W. 978.

449-22 Barnett *v.* S. (Ala.), 39 S. 778 (defendant worked well as carpenter); P. *v.* Willard, 150 Cal. 543, 89 P. 124; S. *v.* Lyons, 113 La. 959, 37 S. 890; Smith *v.* S., 95 Miss. 756, 49 S. 945; S. *v.* Hancock, 151 N. C. 699, 66 S. E. 137; Tubb *v.* S., 55 Tex. Cr. 606, 117 S. W. 858; Oborn *v.* S., 143 Wis. 249, 126 N. W. 737.

A conversation heard as to playing crazy is admissible to show insanity was merely pretended. Granberry *v.* S. (Ala.), 63 S. 975.

Demeanor at trial.—Lane *v.* S., 59 Tex. Cr. 595, 129 S. W. 373.

450-23 Perkins *v.* Co., 155 Cal. 712, 103 P. 190; Lascelles *v.* Clark, 204 Mass. 362, 90 N. E. 875; Beadle *v.* Anderson, 158 Mich. 483, 123 N. W. 8; West *v.* R. Co., 151 N. C. 231, 65 S. E. 979.

451-24 Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405 ("a belief in something that no sane man could believe is evidence of insanity"; baselessness of personal hostility shown); Castle *v.* Dole, 54 Wash. 585, 103 P. 828.

451-25 Steward *v.* S., 124 Wis. 623, 102 N. W. 1079.

451-26 McReynolds *v.* Smith, 172 Ind. 336, 86 N. E. 1009; In re Knox, 123 Ia. 24, 98 N. W. 468; Smith *v.* Ryan, 136 Ia. 335, 112 N. W. 8; Moss *v.* S., 57 Tex. Cr. 620, 124 S. W. 647.

What person has done and said for

many years is pertinent. "On this ground, evidence that he had habitually cursed his wife and children during many years, and applied to them vile epithets, and questioned the chastity of his daughters when but 11 or 12 years of age, was admissible. As argued, a person may employ the language he indulged in, or consume the intoxicants he was shown to have disposed of, without being of unsound mind; but this does not obviate the probative value of such evidence, when considered in connection with other circumstances indicative of a weakened or diseased intellect." Lang *v.* Lang (Ia.), 135 N. W. 604.

452-28 *Comp.* Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755 (increase in drinking); S. *v.* Brown, 181 Mo. 192, 79 S. W. 1111 (insufficient to warrant instruction).

452-29 Ross *v.* Ross, 140 Ia. 51, 117 N. W. 1105 (neither age nor wealth of testator material); S. *v.* Petty, 32 Nev. 384, 108 P. 934; Pratt *v.* S., 50 Tex. Cr. 227, 96 S. W. 8 (general deterioration). See Leaptrct *v.* S., 51 Fla. 57, 40 S. 616.

453-32 C. *v.* Johnson, 188 Mass. 382, 74 N. E. 939; Prewitt *v.* S. (Miss.), 63 S. 330. See P. *v.* Buck, 151 Cal. 667, 91 P. 529; In re Dolbeer, 149 Cal. 227, 86 P. 695.

Admissible only in support of proof of acts of an insane character on part of testatrix. Rintelen *v.* Schaefer, 158 App. Div. 477, 143 N. Y. S. 631.

Insanity of collateral kindred irrelevant. S. *v.* Baker, 246 Mo. 357, 152 S. W. 46.

Proof must first be made that disease is hereditary. In re Myers, 184 N. Y. 54, 76 N. E. 920. *Comp.* Dillman *v.* McDanel, 222 Ill. 276, 78 N. E. 591, 113 Am. St. 400.

Such proof cannot be made by declarations of defendant. Braham *v.* S., 143 Ala. 28, 38 S. 919.

453-33 Physicians may be asked whether or not insanity is hereditary. Prewitt *v.* S. (Miss.), 63 S. 330.

454-34 Dillman *v.* McDanel, 222 Ill. 276, 78 N. E. 591, 113 Am. St. 400 (cannot go further back than to uncles and aunts); S. *v.* Van Tassel, 103 Ia. 6, 72 N. W. 497; Berry *v.* Co., 96 Md. 45, 53 A. 720; P. *v.* Gambacorta, 197 N. Y. 181, 90 N. E. 809; Laros *v.* C., 84 Pa. 200; Rogers *v.* S., 77 Vt. 454, 61 A. 489. *Comp.* C *v.* Johnson, 188 Mass. 382, 74 N. E. 939.

The supreme court of Illinois held in Dillman *v.* McDanel, 222 Ill. 276, 78 N. E. 591, 113 Am. St. 400, that if there is evidence tending to show mental unsoundness, it is competent to show the sanity of a testator's collateral blood relations no further removed than uncles and aunts without making proof that it was hereditary in character, citing many authorities in support of this conclusion. Martin *v.* Beatty, 254 Ill. 615, 98 N. E. 996.

Insanity not inferred from mere hereditary taint. Pringle *v.* Burroughs, 185 N. Y. 375, 78 N. E. 150.

Secondary evidence inadmissible unless some evidence of insanity. C. *v.* Snyder, 224 Pa. 526, 73 A. 910.

454-35 Buford *v.* Gruber, 223 Mo. 231, 122 S. W. 717.

Remoteness of testimony for discretion of court. Jenkins *v.* Weston, 200 Mass. 488, 86 N. E. 955.

454-36 S. *v.* Grendahl, 131 Ia. 602, 109 N. W. 121; Bond *v.* S. (Tenn.), 165 S. W. 229.

Finding of jury of mental incapacity not admissible as to capacity of person at previous time. Packham *v.* Ludwig, 63 A. 1048, s. c. sub nom, Peckham *v.* Glendmeyer, 103 Md. 416, 63 A. 1048.

455-37 Nobles *v.* Hutton, 7 Cal. App. 14, 93 P. 289; P. *v.* Zeigler, 142 Cal. 337, 75 P. 1090; S. *v.* Austin, 71 O. St. 317, 73 N. E. 218.

455-38 U. S. *v.* Chisolm, 149 Fed. 284; S. *v.* Jack, 4 Penne. (Del.) 470, 58 A. 833; Rogers *v.* Rogers, 6 Penne. (Del.) 267, 66 A. 374; In re Bullard's Est. (Minn.), 144 N. W. 412.

456-40 Moore *v.* Gilbert, 175 Fed. 1, 99 C. C. A. 141.

456-41 Scope of inquiry for discretion of court. S. *v.* Crowe, 39 Mont. 174, 102 P. 579. As congenital insanity of testator limited to six years before will made. Hardy *v.* Martin, 200 Mass. 548, 86 N. E. 939.

456-42 Moore *v.* Gilbert, 175 Fed. 1, 99 C. C. A. 141; Farr *v.* Chambless, 175 Ala. 659, 57 S. 458; Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405; Rogers *v.* Rogers, 6 Penne. (Del.) 267, 66 A. 374; Fitzgerald *v.* Tvedt, 142 Ia. 40, 120 N. W. 465; Ireland *v.* White, 102 Me. 233, 66 A. 477; Grand Lodge *v.* Brown, 160 Mich. 437, 125 N. W. 400; West *v.* West, 84 Neb. 169, 120 N.

W. 925; In re Gedney's Will, 142 N. Y. S. 157; In re Thorp's Will, 150 N. C. 487, 64 S. E. 379; Mitchell *v.* Inman (Tex. Civ.), 156 S. W. 290; Morse *v.* S. (Tex. Cr.), 152 S. W. 927; McHay *v.* Peterson, 52 Tex. Civ. 195, 113 S. W. 981; South Atl. L. Ins. Co. *v.* Hurt, 115 Va. 398, 79 S. E. 401; Hopkins *v.* Wampler, 108 Va. 705, 62 S. E. 926; S. *v.* Harris, 74 Wash. 60, 132 P. 735.

Insufficient.—McGuire *v.* Moorhead, 151 Ia. 25, 130 N. W. 140.

457-43 King *v.* Gilson, 191 Mo. 307, 90 S. W. 367; Morse *v.* S. (Tex. Cr.), 152 S. W. 927; Wooten *v.* S., 51 Tex. Cr. 428, 102 S. W. 416.

457-44 In re Kohler, 159 Fed. 55, 86 C. C. A. 245; Towner *v.* Towner, 65 W. Va. 476, 64 S. E. 732 (proof must be clear and "must go to the state and habit, not to the accidental interview or the degree of self-possession in any particular act").

On contestant in will case.—In re Dolbeer, 149 Cal. 227, 86 P. 695.

458-45 Altig *v.* Altig, 137 Ia. 420, 114 N. W. 1056; Grand Lodge *v.* Brown, 160 Mich. 437, 125 N. W. 400; Jones *v.* Thomas, 218 Mo. 508, 117 S. W. 1177; Chadwell *v.* Reed, 198 Mo. 359, 95 S. W. 227; Teter *v.* Teter, 59 W. Va. 449, 53 S. E. 779.

459-47 McHay *v.* Peterson, 52 Tex. Civ. 195, 113 S. W. 981.

459-48 Burden of proof in an action to restore one under guardianship to the control of his property is on the petitioner. Shafer *v.* Shafer (Ind.), 104 N. E. 507.

459-52 In re Cashman, 168 Fed. 1008; U. S. *v.* Chisolm, 149 Fed. 284; Porter *v.* S., 140 Ala. 87, 37 S. 81; P. *v.* Oppenheimer, 156 Cal. 733, 106 P. 74; P. *v.* Willard, 150 Cal. 543, 89 P. 124; P. *v.* Suesser, 142 Cal. 354, 75 P. 1093; S. *v.* Jack, 4 Penne. (Del.) 470, 58 A. 833; Carter *v.* S., 2 Ga. App. 254, 58 S. E. 532; Hall *v.* C., 155 Ky. 541, 159 S. W. 1155; S. *v.* Porter, 213 Mo. 43, 111 S. W. 529; S. *v.* Maioni, 78 N. J. L. 339, 74 A. 526; S. *v.* Hancock, 151 N. C. 699, 66 S. E. 137 (must be proved to satisfaction of jury); S. *v.* Austin, 71 O. St. 317, 73 N. E. 218; C. *v.* Calhoun, 238 Pa. 474, 86 A. 472; C. *v.* Beckwith, 27 Pa. C. C. 481; Douglass *v.* S. (Tex. Cr.), 165 S. W. 933; Graham *v.* S. (Tex. Cr.), 163 S. W. 726; Wilson *v.* S., 78 Tex. Cr. 596, 127 S. W. 548 (clear preponderance); Pollok *v.* S. (Tex. Cr.), 101 S. W. 231 (prosecution for slander); Sartin *v.* S., 51 Tex. Cr. 571, 103 S. W. 875; Nugent *v.* S., 46 Tex. Cr. 67, 80 S. W. 84; Rusk *v.* S., 53 Tex. Cr. 338, 110 S. W. 58; Fults *v.* S., 50 Tex. Cr. 502, 98 S. W. 1057; S. *v.* Craig, 52 Wash. 66, 100 P. 167.

Evidence insufficient.—No specialist or person who had any experience in treating diseases of the mind was called as a witness. With the exception of two physicians, the witnesses were all neighbors, who did not claim and would not say that Miracle was mentally unsound. The substance of their testimony was to the effect that he looked queer, and sometimes acted in an unusual manner, after he had received his injuries. Miracle *v.* C., 148 Ky. 456, 146 S. W. 1136.

460-54 Matheson *v.* U. S., 227 U. S. 540, 33 Sup. Ct. 355, 57 L. ed. 631; C. *v.* Johnson, 188 Mass. 382, 74 N. E. 939; S. *v.* Barker, 216 Mo. 532, 115 S. W. 1102; S. *v.* Crowe, 39 Mont. 174, 102 P. 579; Hamblin *v.* S., 81 Neb. 148, 115 N. W. 850; Dathey *v.* S., 131 Wis. 178, 111 N. W. 222; S. *v.* Pressler, 16 Wyo. 214, 92 P. 806.

460-55 Johnston *v.* Johnson, 174 Ala. 220, 57 S. 450; In re Dolbeer, 149 Cal. 227, 86 P. 695; Rogers *v.* Rogers, 6 Penne. (Del.) 267, 66 A. 371; S. *v.* Kilduff (Ia.), 141 N. W. 962; Fish *v.* Poorman, 85 Kan. 237, 116 P. 898; Hall *v.* C., 155 Ky. 541, 159 S. W. 1155; Covington *v.* O'Meara, 133 Ky. 762, 119 S. W. 187; Andrews *v.* Committee, 120 Ky. 718, 87 S. W. 1080, 90 S. W. 581; Ireland *v.* White, 102 Me. 233, 66 A. 477; In re Bristor's Estate, 115 Md. 614, 81 A. 25; Hanson *v.* Kalstaad, 114 Minn. 489, 131 N. W. 477; Chadwell *v.* Reed, 198 Mo. 359, 95 S. W. 227; Donlon *v.* Donlon, 128 N. Y. S. 1039; In re Gedney's Will, 142 N. Y. S. 157; In re Thomas, 4 Pa. C. C. 270; Cole *v.* Barber (R. I.) 82 A. 129; Morse *v.* S. (Tex. Cr.), 152 S. W. 927; Woods *v.* S. (Tex. Cr.), 150 S. W. 633; Batterton *v.* S., 52 Tex. Cr. 381, 107 S. W. 826 (competency of witness); Hopkins *v.* Wampler, 108 Va. 705, 62 S. E. 926; S. *v.* Harris, 74 Wash. 60, 132 P. 735.

See S. *v.* Mewhinney (Utah), 134 P. 632. And see infra, "Insurance," 554-44.

The law favors the prosecution with the presumption of sanity, and it is thus proof or evidence. De Rinzie *v.* P., 56 Colo. 249, 138 P. 1009.

461-56 Stanfill *v.* Johnson, 159 Ala. 546, 49 S. 223; Hill-D. Bk. Co. *v.* Loomis, 140 Mo. App. 62, 119 S. W. 967; Schindler *v.* Parzoo, 52 Or. 452, 97 P. 755; Lamb *v.* Adams, 18 Pa. Dist. 110.

462-57 Kelly *v.* Nusbaum, 244 Ill. 158, 91 N. E. 72; In re Brigham's Est., 144 Ia. 71, 120 N. W. 1054; Black *v.* Post, 67 W. Va. 253, 67 S. E. 1072.

462-58 In re Kehler, 159 Fed. 55, 86 C. C. A. 245.

If will is challenged before probate by those entitled to property disposed of as against persons seeking to acquire rights in derrogation of statute proponents have burden of showing testamentary capacity. McReynolds *v.* Smith, 172 Ind. 336, 86 N. E. 1009.

462-59 S. *v.* Jack, 4 Penne. (Del.) 470, 58 A. 833; Johnson *v.* S., 57 Fla. 18, 49 S. 40; S. *v.* Wetter, 11 Ida. 433, 73 P. 341; S. *v.* Mitchell, 130 Ia. 697, 107 N. W. 804; Hall *v.* C., 155 Ky. 541, 159 S. W. 1155; S. *v.* Barker, 216 Mo. 332, 115 S. W. 1102; S. *v.* Austin, C. *v.* Beckwith, supra; Thomas *v.* S., 55 Tex. Cr. 293, 116 S. W. 600; S. *v.* Brown, 36 Utah 46, 102 P. 641.

Presumption of sanity "goes little if any further than to constitute a rule of practice to the effect that in absence of any evidence bearing upon the subject there is no issue to be submitted to the jury." Duthey *v.* S., 131 Wis. 178, 111 N. W. 222.

Existence of epileptic condition not basis upon which presumption of insanity can rest. C. *v.* Snyder, 224 Pa. 526, 73 A. 910.

462-60 Presumption of sanity continues after indictment until questioned by reputable evidence and specific declaration to contrary is made to the court. If matters called to its attention raise a doubt sanity must be inquired into. Marshall *v.* Ty., 2 Okla. Cr. 136, 101 P. 139.

462-61 In re Kehler, 159 Fed. 55, 86 C. C. A. 245; Melvin *v.* Murphy (Ala.), 63 S. 546; Rogers *v.* Rogers, 6 Penne. (Del.) 267, 66 A. 374; Cochran *v.* S., 65 Fla. 91, 61 S. 187; In re Weedman's Est., 254 Ill. 504, 98 N. E. 956; In re Knox, 123 Ia. 24, 98 N. W. 468; Johnson *v.* Co., 104 Md. 460, 65 A. 333; Byrne *v.* Fulkerson, 254 Mo. 97, 162 S. W. 171; Buford *v.* Gruber, 223 Mo. 231, 122 S. W. 717; King *v.* Gilson, 191 Mo. 307, 90 S. W. 367; Beard *v.* R. Co., 143 N. C. 136, 55 S. E. 505; In re Thomas, 4 Pa. C. C. 270; Mitchell *v.* Inman (Tex. Civ.), 156 S. W. 290; Witty *v.* S. (Tex. Cr.), 153 S. W. 1146; Morse *v.* S. (Tex. Cr.), 152 S. W. 927; Wooten *v.* S., 51 Tex. Cr. 428, 102 S 416; S. *v.* Snell, 46 Wash. 327, 89 P. 931 (presumption applies after finding of insanity by jury); Towner *v.* Towner, 65 W. Va. 476, 64 S. E. 732. See Ex parte McWilliams, 254 Mo. 512, 164 S. W. 221. *Comp.* C. *v.* Calhoun, 238 Pa. 474, 86 A. 472.

Rule not applicable to one offered as witness unless judgment is recent or he is confined in asylum. Covington *v.* O'Meara, 133 Ky. 762, 119 S. W. 187.

463-62 Cogbill *v.* S., 8 Ala. App. 223, 62 S. 406; S. *v.* Jack, 4 Penne. (Del.) 470, 58 A. 833; P. *v.* Lamb, 118 N. Y. S. 389; S. *v.* Austin, 71 O. St. 317, 73 N. E. 218; Mason *v.* Rodriguez, 53 Tex. Civ. 445, 115 S. W. 868; Sims *v.* S., 50 Tex. Cr. 563, 91 S. W. 555.

464-63 Mullen *v.* Johnson, 157 Ala. 262, 47 S. 584; S. *v.* Kavanaugh, 4 Penne. (Del.) 131, 52 A. 335 (delirium tremens); Hallohan *v.* Rempe, 120 N. Y. S. 901.

464-64 Presumption not conclusive. Davis *v.* Davis, 24 S. D. 474, 124 N. W. 715. Presumed one discharged from asylum where confined because of delusions cured. In re Thorp's Will, 150 N. C. 487, 64 S. E. 379. And that sanity continued after finding thereof, though previous inquisition found insanity existed. West *v.* McDonald (Ky.), 113 S. W. 872. No presumption of previous insanity from finding of existing insanity. In re Dolbeer, 149 Cal. 227, 86 P. 695.

464-65 Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405; In re Colburn, 11 Cal. App. 604, 105 P. 924 (must be clearly shown to justify appointment of guardian); Ireland *v.* White, 102 Me. 233, 66 A. 477; West *v.* West, 84 Neb. 169, 120 N. W. 925 (clear and satisfactory evidence required); Mitchell *v.* Inman (Tex. Civ.), 156 S. W. 290; Hazard *v.* Assn., 54 Tex. Civ. 110, 116

S. W. 625; Hopkins *v.* Wampler, 108 Va. 705, 62 S. E. 926, dist. local cases in which stronger language is used.

"Reasonable satisfaction is the degree the law requires." Johnston *v.* Johnston, 174 Ala. 220, 57 S. 450.

465-66 *Comp.* S. *v.* Johnston, 118 La. 276, 42 S. 935.

465-67 P. *v.* Willard, 150 Cal. 543, 89 P. 124; P. *v.* Suesser, 142 Cal. 354, 75 P. 1093; P. *v.* Carantan, 11 Cal. App. 561, 105 P. 768; S. *v.* Austin, 71 O. St. 317, 73 N. E. 218; C. *v.* Lee, 226 Pa. 283, 75 A. 411; Welch *v.* S. (Tex. Cr.), 157 S. W. 946; Witty *v.* S. (Tex. Cr.), 153 S. W. 1146; McCullough *v.* S., 50 Tex. Cr. 132, 94 S. W. 1056; Stanfield *v.* S., 50 Tex. Cr. 69, 94 S. W. 1057; Fults *v.* S., 50 Tex. Cr. 502, 98 S. W. 1057; S. *v.* Brown, 36 Utah 46, 102 P. 641; S. *v.* Harris, 74 Wash. 60, 132 P. 735 (*cit.* ENCYC. OF EV., p. 84).

To the reasonable satisfaction of the jury. Jones *v.* S. (Ala.), 61 S. 434.

466-68 De Rinzie *v.* P., 56 Colo. 249, 138 P. 1009.

Neither the word "satisfied" nor the words "preponderance of the evidence" should be used in an insanity instruction. Wilcoxin *v.* C., 138 Ky. 846, 129 S. W. 309.

467-69 Lang *v.* Lang (Ia.), 135 N. W. 604; Smith *v.* Guerre (Tex. Civ.), 159 S. W. 417.

What is "reasonable opportunity" to produce witnesses on behalf of alleged insane person for discretion of court; abuse of which must be proved. Ex parte Lewis, 11 Cal. App. 530, 105 P. 774.

Necessarily all testimony on a question of this sort is opinion. Hall *v.* C., 155 Ky. 541, 159 S. W. 1155.

467-70 Heningburg *v.* S., 153 Ala. 13, 45 S. 246; Denver, etc. R. Co. *v.* Scott, 34 Colo. 99, 81 P. 763; Whisner *v.* Whisner (Md.), 89 A. 393; Gorham *v.* Moor, 197 Mass. 522, 84 N. E. 436; In re Cheney's Est., 78 Neb. 274, 110 N. W. 731; In re Campbell's Will, 136 N. Y. S. 1086; C. *v.* Henderson, 242 Pa. 372, 89 A. 567; Witty *v.* S. (Tex. Cr.), 153 S. W. 1146. See Daniel *v.* Dixon, 161 N. C. 377, 77 S. E. 305. *Comp.* Weber *v.* Co., 14 Ida. 404, 94 P. 441; Hodges *v.* Wilson, 165 N. C. 323, 81 S. E. 340 *Contra*, S. *v.* Banner, 149 N. C. 519, 63 S. E. 84.

"Bill of exceptions shows that appellant offered to prove by the witness McIlvany that he had known the defendant 15 or 16 years, and had had more or less intimate knowledge of him for the last 3 or 4 years, and that from such knowledge he did not believe defendant could think consecutively, and that he did not think defendant had mental strength enough to form and plan a design to take life and carry same out, and that said witness McIlvany, if permitted by the court, would have so testified, to which counsel for the state objected for the following reason, to-wit: Because the test of lunacy was the knowledge of right and wrong, and that if such knowledge was possessed by defendant he would be guilty of murder in the first degree if the facts of premeditation and design and malice could be proven notwithstanding defendant's weak mental condition incapacitating him to make and carry out a plan. The court signs the bill with the statement that witness was not a doctor, nor expert in diseases of the mind, and question was leading, and also called for expert opinion. We think the ruling of the court was correct." Lane *v.* S., 59 Tex. Cr. 595, 129 S. W. 353.

In California opinions of intimate acquaintances of person whose sanity is in issue are admissible under code. In re Budan's Est., 156 Cal. 230, 104 P. 442, holding nurse attending such person three days competent.

New York rule.—Lay witnesses can only state contemporary impressions of rationality or irrationality of acts and declarations testified to by them. In re Myers, 184 N. Y. 54, 76 N. E. 920; P. *v.* Pekarz, 185 N. Y. 470, 78 N. E. 294; Schoenberg *v.* Ulman, 51 Misc. 83, 99 N. Y. S. 650; Schoenberg *v.* Co., 52 Misc. 104, 101 N. Y. S. 798; In re Small, 118 App. Div. 502, 103 N. Y. S. 705; In re Brower, 112 App. Div. 370, 98 N. Y. S. 138; Warner *v.* Packer, 123 N. Y. S. 725; P. *v.* Silverman, 181 N. Y. 235, 73 N. E. 980.

Hypothetical questions improper.—In re Dolbeer, 149 Cal. 227, 86 P. 695.

468-71 Hodge *v.* Rambo, 155 Ala. 178, 45 S. 678; Braham *v.* S., 143 Ala. 28, 38 S. 919; Rodney *v.* Burton (Del.), 86 A. 826; Goss *v.* S. (Ga. App.), 81 S. E. 217; Vannest *v.* Murphy, 135 Ia. 123, 112 N. W. 236; Ireland *v.* White, 102 Me. 233, 66 A. 477 (physicians' testimony received); Nelson *v.* Thompson, 16 N. D. 295, 112 N. W. 1058; C. *v.* Fencez, 226 Pa. 114, 75 A. 19; S. *v.*

Constantine, 48 Wash. 218, 93 P. 317; Duthey *v.* S., 131 Wis. 178, 111 N. W. 222. See Gorham *v.* Moor, 197 Mass. 522, 84 N. E. 436; Beard *v.* R. Co., 143 N. C. 136, 55 S. E. 505.

468-72 Jenkins *v.* Weston, 200 Mass. 488, 86 N. E. 955; Kaack *v.* Stanton, 51 Tex. Civ. 495, 112 S. W. 702.

468-73 U. S. *v.* Chisholm, 153 Fed. 808; Melvin *v.* Murphy (Ala.), 63 S. 546; Birmingham, etc. R. & P. Co. *v.* Randle, 149 Ala. 539, 43 S. 355; Loveman *v.* Co., 149 Ala. 515, 43 S. 411; Byrd *v.* S., 76 Ark. 286, 88 S. W. 974; In re Dolbeer, 149 Cal. 227, 86 P. 695; Lamb *v.* Wilke, 19 Cal. App. 286, 125 P. 757; In re Colburn, 11 Cal. App. 604, 105 P. 924; Scott *v.* S., 64 Fla. 490, 60 S. 355; Goss *v.* S. (Ga. App.), 81 S. E. 247; Slaughter *v.* Heath, 127 Ga. 747, 57 S. E. 69; Snell *v.* Weldon, 239 Ill. 279, 87 N. E. 1022; McReynolds *v.* Smith, 172 Ind. 336, 86 N. E. 1009; Lawson *v.* S., 171 Ind. 431, 84 N. E. 974; In re Law's Est. (Ia.), 138 N. W. 531; Smith *v.* Ryan, 136 Ia. 335, 112 N. W. 8; S. *v.* Nowells, 135 Ia. 53, 109 N. W. 1016 (opinion as to delirium of person making dying declaration); Stutsman *v.* Sharpless, 125 Ia. 335, 101 N. W. 105; In re Selleck, 125 Ia. 678, 101 N. W. 453; Howard *v.* Carter, 71 Kan. 85, 80 P. 61; Jones *v.* C., 154 Ky. 752, 159 S. W. 568; Stafford *v.* Tarter, 29 Ky. L. R. 1184, 96 S. W. 1127; Swick *v.* Sheridan, 107 Minn. 130, 119 N. W. 791; Bacot *v.* S., 96 Miss. 125, 50 S. 500; Hunter *v.* Briggs, 254 Mo. 28, 162 S. W. 204; Wightman *v.* Lodge, 121 Mo. App. 252, 98 S. W. 829; Spencer *v.* Spencer, 31 Mont. 631, 79 P. 320; In re Isaac, 76 Neb. 823, 107 N. W. 1016; P. *v.* Silverman, 181 N. Y. 235, 73 N. E. 980; S. *v.* Khoury, 149 N. C. 454, 62 S. E. 638; Bowman *v.* Wade, 54 Or. 347, 103 P. 72; Lassas *v.* McCarty, 47 Or. 474, 84 P. 76; Atkins *v.* S., 119 Tenn. 458, 105 S. W. 353 (basis of opinion need not be shown prior to giving of opinion); Brice *v.* S. (Tex. Cr.), 162 S. W. 874; Rogers *v.* S. (Tex. Cr.), 159 S. W. 40; Rice *v.* S., 54 Tex. Cr. 149, 100 S. W. 299; Betts *v.* S., 48 Tex. Cr. 522, 89 S. W. 413; Taylor *v.* S., 49 Tex. Cr. 7, 90 S. W. 647; Wells *v.* S., 50 Tex. Cr. 499, 98 S. W. 851; Fults *v.* S., 50 Tex. Cr. 502, 98 S. W. 1057; Henderson *v.* S., 49 Tex. Cr. 511, 93 S. W. 550; Rogers *v.* S., 77 Vt. 454, 61 A. 489; Hopkins *v.* Wampler, 108 Va. 705, 62 S. E. 926.

Not necessary where opinion is that person is mentally sound. Thornton *v.* McReynolds (Tex. Civ.), 156 S. W. 1144.

If expert does not state the facts he should not be allowed to state that he has not observed anything that led him to the conclusion that the defendant was insane. Larson *v.* S., 92 Neb. 24, 137 N. W. 894.

In testifying to sanity rather than insanity witness not limited to basing his opinion on facts detailed. Braham *v.* S., 143 Ala. 28, 38 S. 919; Porter *v.* S., 140 Ala. 87, 37 S. 81; Proctor *v.* Pointer, 127 Ga. 134, 56 S. E. 111; Glover *v.* S., 129 Ga. 717, 59 S. E. 816; Heaston *v.* Krieg, 167 Ind. 101, 77 N. E. 805; S. *v.* Hayden, 131 Ia. 1, 107 N. W. 929; Lucas *v.* McDonald, 126 Ia. 678, 102 N. W. 532.

Cross-examination as to reason for opinion proper. S. *v.* Penna, 35 Mont. 535, 90 P. 787.

469-74 S. *v.* Rumble, 81 Kan. 16, 105 P. 1 (sane or insane); S. *v.* Crowe, 39 Mont. 174, 102 P. 579; S. *v.* Banner, 149 N. C. 519, 63 S. E. 84; S. *v.* Craig, 52 Wash. 66, 100 P. 167. But see Reed *v.* S., 75 Neb. 509, 106 N. W. 649.

Rule more broadly stated than in text in some cases. S. *v.* Lyons, 113 La. 959, 37 S. 890; S. *v.* Montgomery, 121 La. 1005, 46 S. 997.

469-75 Schuman *v.* S., 106 Ark. 362, 153 S. W. 611; In re Coburn, 11 Cal. App. 604, 105 P. 924; Chicago T. Co. *v.* Lawrence, 211 Ill. 373, 71 N. E. 1024; Turner *v.* Mfg. Co., 161 Ill. App. 535; Whisner *v.* Whisner (Md.), 89 A. 393; Struth *v.* Decker, 100 Md. 368, 59 A. 727; Robinson *v.* R. Co., 211 Mass. 483, 98 N. E. 576; Hibbard *v.* Baker, 141 Mich. 124, 104 N. W. 399. See S. *v.* Kilduff (Ia.), 141 N. W. 962. See also vol. 8, p. 584, n. 89; vol. 14, p. 372, n. 27.

Extent of facts goes to weight of opinion rather than competency. Tubb *v.* S., 55 Tex. Cr. 606, 117 S. W. 858.

Inference of insanity need not be deducible from facts disclosed by witness. S. *v.* Rumble, 81 Kan. 16, 105 P. 1.

470-76 Bacot *v.* S., 96 Miss. 125, 50 S. 500.

470-77 "One who shows intimate association or a course of dealing with a person will be permitted to testify

whether or not, in his opinion, a person was of unsound mind; but it is only a physician, or an expert witness who shows himself qualified, who can testify as to what effect epilepsy or other disease of the human mind is likely to produce. A nonprofessional witness who brings himself in such contact with an individual, and by his dealings or otherwise shows a knowledge of the acts and conduct of such individual, can testify as to his opinion of the sanity of an individual; but he cannot give an opinion on a theoretical question, based on facts with which he is not familiar, or give an opinion as to what would be the result of a given course of conduct or disease, as producing insanity." Maxey *v.* S. (Tex. Cr.), 145 S. W. 952.

470-78 Woods *v.* S. (Ala.), 65 S. 342; Melvin *v.* Murphy (Ala.), 63 S. 546; Harris *v.* S., 8 Ala. App. 33, 62 S. 477; Jones *v.* S. (Ala.), 61 S. 434; Pritchard *v.* Fowler, 171 Ala. 662, 55 S. 147; Mullen *v.* Johnson, 157 Ala. 262, 47 S. 584; Braham *v.* S., 143 Ala. 28, 38 S. 919; Schuman *v.* S., 106 Ark. 362, 153 S. W. 611; Williams *v.* Fulkes, 103 Ark. 196, 146 S. W. 480; In re Mc Kenna, 143 Cal. 580, 77 P. 461; Nobles *v.* Hutton, 7 Cal. App. 14, 93 P. 289 (husband separated from wife for one year, competent); Huyck *v.* Rennie, 151 Cal. 411, 90 P. 929; P. *v.* Suesser, 142 Cal. 354, 75 P. 1093; Martin *v.* Beatty, 254 Ill. 615, 98 N. E. 996; Wetzel *v.* Firebaugh, 251 Ill. 190, 95 N. E. 1085; Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; S. *v.* Von Kutzleben, 136 Ia. 89, 113 N. W. 484 (observation during trial insufficient); Kempf *v.* Koppa, 71 Kan. 153, 85 P. 806; S. *v.* Lyons, 113 La. 959, 37 S. 890; Packham *v.* Glendmeyer, 103 Md. 416, 63 A. 1048; S. *v.* Berberick, 38 Mont. 423, 100 P. 209 (question for court's discretion); Stewart *v.* Stewart, 155 N. C. 341, 71 S. E. 308; Conwill *v.* Eldridge, 35 Okla. 537, 130 P. 912; Atkins *v.* S., 119 Tenn. 458, 105 S. W. 353; Brice *v.* S. (Tex. Cr.), 162 S. W. 871; Key *v.* S. (Tex. Cr.), 161 S. W. 130; Kirby *v.* S. (Tex. Cr.), 150 S. W. 455; Hood *v.* S. (Tex. Cr.), 101 S. W. 229 (bare acquaintance insufficient); Sims *v.* S., 50 Tex. Cr. 563, 99 S. W. 555; Wells *v.* S., 50 Tex. Cr. 499, 98 S. W. 851; Londonderry *v.* Fryor, 84 Vt. 294, 79 A. 46.

See P *v.* Delhantie, 163 Cal. 461, 125 P. 1066; Kirby *v.* S. (Tex. Cr.), 150 S. W. 455. And see vol. 8, p. 584, n. 89.

Where witness was wife.—Melvin *v.* Murphy (Ala.), 63 S. 546.

California Code Civ. Proc., §1870, subs. 10, provides witness must be "intimate acquaintance." In re Coburn, 165 Cal. 202, 131 P. 352.

A witness who states that he had known the subject of inquiry while he was young, and had seen him while he was young every day or so, and had known him intimately for 27 or 28 years, is qualified to testify, from his observations he must necessarily have made of the conduct and declarations of the defendant, whether from such acts and declarations the defendant was, in his opinion, sane or insane. Bishop *v.* S., 96 Miss. 846, 52 S. 21.

The jailer was permitted to testify that during appellant's custody in the jail he had frequently talked with him, and from such he believed defendant was sane. He did not repeat any statement of defendant. This testimony was admissible. Lane *v.* S., 59 Tex. Cr. 595, 129 S. W. 353.

Discretion of court in passing on competency of witness subject to review. S. *v.* Rumble, 81 Kan. 16, 105 P. 1.

Extent of witness' observation affects only weight of testimony. Hopkins *v.* Wampler, 108 Va. 705, 62 S. E. 926.

471-79 Woods *v.* S. (Ala.), 65 S. 342; Altig *v.* Altig, 137 Ia. 420, 115 N. W. 1056; S. *v.* Rumble, 81 Kan. 16, 105 P. 1; Jenkins *v.* Weston, 200 Mass. 488, 86 N. E. 955; Murphy *v.* Nett, 47 Mont. 38, 130 P. 451; C. *v.* Calhoun, 238 Pa. 474, 86 A. 472. See Lyles *v.* S., 48 Tex. Cr. 119, 86 S. W. 763 (non experts may testify deceased rational at time of making dying declaration).

471-80 Question for court. Braham *v.* S., 143 Ala. 28, 38 S. 919 (weight of evidence for jury); Hamilton *v.* U. S., 26 App. Cas. (D. C.) 382.

471-81 Glover *v.* S., 129 Ga. 717, 59 S. E. 816; S. *v.* Bell, 212 Mo. 111, 111 S. W. 21; P. *v.* Pekarz, 185 N. Y. 470, 78 N. E. 294. See Braham *v.* S., 143 Ala. 28, 38 S. 919.

472-83 Porter *v.* S., 140 Ala. 87, 37 S. 81; Schuman *v.* S., 106 Ark. 362, 153 S. W. 611; Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405 (comparative value of physician's opinion and that of specialist excluded); In re Dolliver, 149 Cal. 227, 86 P. 695; Hamilton *v.* U. S., 26 App. Cas. (D. C.) 382 (medical

student incompetent); In re Whiting, 110 Me. 232, 85 A. 791; C. *v.* Spencer, 212 Mass. 438, 99 N. E. 266; In re Miller, 27 Pa. C. C. 49.

472-84 Kirby *v.* S. (Tex. Cr.), 150 S. W. 455.

Expert need not state ground of opinion; cross-examination may show this. C. *v.* Johnson, 188 Mass. 382, 74 N. E. 939.

Experts' opinions not received unless based on facts testified to by themselves or others. Rogers *v.* S., 77 Vt. 454, 61 A. 489.

Testimony must not be in argumentative form, based on ethical considerations of decedent's conduct. Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405.

473-85 P. *v.* Delhantie, 163 Cal. 461, 125 P. 1066; C. *v.* Johnson, 188 Mass. 382, 74 N. E. 939; P. *v.* Hill, 195 N. Y. 16, 87 N. E. 813 (preliminary question not necessary asking whether witness formed impression at time of interview with accused); S. *v.* Banner, 149 N. C. 519, 63 S. E. 84; Tubb *v.* S., 55 Tex. Cr. 606, 117 S. W. 858 (conduct of person in court). See McGhee *v.* S., 178 Ala. 4, 59 S. 573.

Expert's opinion not inadmissible because he promised accused right treatment. P. *v.* Hill, 195 N. Y. 16, 87 N. E. 813.

Physical and mental examination by expert made, statements of defendant, after warning, admissions, and not inadmissible upon ground of compelling self-incrimination. P. *v.* Furlong, 187 N. Y. 198, 79 N. E. 978. See P. *v.* Meringola, 113 App. Div. 488, 99 N. Y. S. 357.

Remoteness of time no objection if disease permanent. Carlisle *v.* Atchley, 165 Ala. 265, 51 S. 798.

474-86 Yates *v.* S., 127 Ga. 813, 56 S. E. 1017 (hypothetical question unnecessary); In re Schmidt's Will, 139 N. Y. S. 464.

As to privilege, see Larson *v.* S., 92 Neb. 24, 137 N. W. 894, and "Privileged Communications."

Accused's declarations after commission insufficient basis for expert testimony. P. *v.* Hill, 195 N. Y. 16, 87 N. E. 813.

474-87 Woods *v.* S. (Ala.), 65 S. 342; P. *v.* Griffith, 146 Cal. 339, 80 P. 68; C. *v.* Johnson, 188 Mass. 382, 74 N. E. 939; C. *v.* Fencez, 226 Pa. 114, 75 A. 19; Duthey *v.* S., 131 Wis. 178, 111 N. W. 222.

475-88 Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405.

475-89 Ince *v.* S., 77 Ark. 426, 93 S. W. 65; Bell *v.* S., 212 Mo. 111, 111 S. W. 24; S. *v.* Crowe, 39 Mont. 174, 102 P. 579; Hamblin *v.* S., 81 Neb. 148, 115 N. W. 850; Betts *v.* S., 48 Tex. Cr. 522, 89 S. W. 413.

476-91 See Struth *v.* Decker, 100 Md. 368, 59 A. 727.

476-93 Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405; Earp *v.* S. (Miss.), 38 S. 288 (expert may not state insanes do not kill for money). Whether insanity can be simulated stated by expert. Braham *v.* S., 143 Ala. 28, 38 S. 919.

476-94 Garrus *v.* Davis, 234 Ill. 326, 84 N. E. 924.

Value of opinions of non-experts measured by basic facts. Conway *v.* Murphy, 135 Ia. 171, 112 N. W. 764; Howard *v.* Carter, 71 Kan. 85, 80 P. 61; Kempf *v.* Koppa, 74 Kan. 153, 85 P. 806; Smith *v.* C., 33 Ky. L. R. 998, 112 S. W. 615; Reed *v.* S., 75 Neb. 509, 106 N. W. 649; Lassas *v.* McCarty, 47 Or. 474, 84 P. 76; Atkins *v.* S., 119 Tenn. 458, 105 S. W. 353; Pollok *v.* S. (Tex. Cr.), 101 S. W. 231; Teter *v.* Teter, 59 W. Va. 449, 53 S. E. 779. See Ames *v.* Ames, 75 Neb. 473, 106 N. W. 584.

Received with caution.—Atkins *v.* S., 119 Tenn. 458, 105 S. W. 353. See P. *v.* Nihell, 144 Cal. 200, 77 P. 916; P. *v.* Buck, 151 Cal. 667, 91 P. 529.

Not conclusive.—U. S. *v.* Chisolm, 149 Fed. 284, *s. c.*, 153 Fed. 808; S. *v.* Humbles, 126 Ia. 462, 102 N. W. 409.

477-95 Barnett *v.* S. (Ala.), 39 S. 778; Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405; Vannest *v.* Murphy, 135 Ia. 123, 112 N. W. 236; S. *v.* Charles, 124 La. 744, 50 S. 699; S. *v.* Penna, 35 Mont. 535, 90 P. 787; Reed *v.* S., 75 Neb. 509, 106 N. W. 649; Knox *v.* Robbins (Tex. Civ.), 151 S. W. 1134; Wilson *v.* S., 58 Tex. Cr. 596, 127 S. W. 548; Hopkins *v.* Wampler, 108 Va. 705, 62 S. E. 926.

477-96 Ex parte Lewis, 11 Cal. App. 530, 105 P. 774; In re Johnson (Kan.), 139 P. 1161; Smedley *v.* C., 139 Ky. 767, 127 S. W. 485 (is admissible); Sbarbero *v.* Miller, 72 N. J. Eq. 248, 65 A. 472; Schoenberg *v.* Ulman, 51 Misc. 83, 99 N. Y. S. 650 (shifts burden); Davis *v.* Davis, 24 S. D. 474, 124

N. W. 715 (foreign judgment); Bond v. S. (Tenn.), 165 S. W. 229. See Chase v. Chase, 216 Mass. 391, 103 N. E. 857.

In California commitment to asylum by lunacy commission does not fix status. P. v. Willard, 150 Cal. 543, 89 P. 124.

Certified copy of evidence upon which accused was adjudged insane not admissible in absence of showing the witnesses were dead or their attendance secured. Cooper v. S. (Tex. Cr.), 166 S. W. 382.

In West Virginia justice's jurisdiction limited to purpose of committing such person to hospital, and where he is not so committed finding of justice inadmissible in proceeding for appointment of committee. Karnes v. Johnston, 58 W. Va. 595, 52 S. E. 658.

Acquital of defendant on trial for homicide, the defense being insanity, raises conclusive presumption that he is "manifestly dangerous," within meaning of statute. S. v. Snell, 46 Wash. 327, 89 P. 931.

478-97 See Richie v. Shepard, 158 App. Div. 192, 143 N. Y. S. 19; P. v. Lamb, 118 N. Y. S. 389.

"Whether the person's mental condition at the time covered by the finding is evidence of his mental condition at a prior time would seem logically to be a question of the probative force or weight of the evidence or its tendency to prove the fact in issue." In re Bullard's Est. (Minn.), 144 N. W. 412.

Finding of insanity in collateral proceeding not conclusive. S. v. Grendahl, 131 Ia. 602, 109 N. W. 121. See P. v. Willard, 150 Cal. 543, 89 P. 124.

478-98 Donnelly v. R. Co., 163 Ill. App. 7; In re Wright, 74 Kan. 406, 86 P. 460, 89 P. 678; Covington v. O'Meara, 133 Ky. 762, 119 S. W. 187; P. v. Lamb, 118 N. Y. S. 389; Ex parte Allen, 82 Vt. 365, 73 A. 1078. But see Foran v. Healy, 73 Kan. 633, 85 P. 751, 86 P. 470.

Inquisition of lunacy, as well as inquisition of post mortem, and others, are admissible but not conclusive. Donnelly v. R. Co., 163 Ill. App. 7.

Cannot be attacked collaterally.—Packard v. Ulrich, 106 Md. 246, 67 A. 246, 12 L. R. A. (N. S.) 895.

478-99 Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69; Logan v. Vanarsdall, 27 Ky. L. R. 822, 86 S. W. 981 (rebuttal by parol); Seaborn v. S. (Tex. Cr.), 90 S. W. 649.

Fact that man of twenty-two inmate of institution when two years old too remote. But, generally, whole previous career may be gone into. P. v. Carlin, 194 N. Y. 448, 87 N. E. 805.

In New York conclusive as to contracts and wills, not as to crimes or as between strangers. Schoenberg v. Ulman, 51 Misc. 83, 99 N. Y. S. 650; O'Reilley v. Sweeney, 54 Misc. 448, 105 N. Y. S. 1033 (conclusive as to competency to make contract).

479-1 Smith v. Ruehl, 135 Ky. 264, 122 S. W. 145.

Judgment conclusive that person "was a lunatic at the time, prima facie evidence of lunacy at a subsequent time, but raises no presumption that she was a lunatic at any previous time." Andrews v. Committee, 120 Ky. 718, 87 S. W. 1080, 90 S. W. 581. Conclusive upon incompetent's wife in subsequent proceeding to secure sale of land from husband's interest. Smith v. Ruehl, 135 Ky. 264, 122 S. W. 145.

Adjudication made after offense committed not admissible. S. v. Neubauer, 145 Ia. 337, 124 N. W. 312.

479-2 Schindler v. Parzoo, 52 Or. 452, 97 P. 755, retroactive effect. See 479-4; In re Bullard's Est. (Minn.), 141 N. W. 412.

479-3 Discharge from asylum.—Proceedings in California judicial in nature; judgment rendered conclusive upon status; but proceedings under other sections only prima facie evidence. Aldrich v. Barton, 153 Cal. 488, 95 P. 900.

479-4 Rogers v. S., 77 Vt. 474, 61 A. 489.

Evidence on a preliminary inquiry as to competency not limited to papers presented by petitioner; court should regard all the papers. In re Burke, 125 App. Div. 889, 110 N. Y. S. 1064; In re Fox, 138 App. Div. 43, 122 N. Y. S. 889.

Subsequent judgment.—Judgment finding grantor insane cannot be given retroactive effect to show incompetency a year previous to rendition. Rhoades v. Fuller, 139 Mo. 179, 40 S. W. 760; Hecker v. Zumbuhr, 34 Tex. Civ. 289, 118 S. W. 149. See Schindler v. Parzoo, 52 Or. 452, 97 P. 755.

No special plea necessary, insanity shown on plea of not guilty. S. v. Spey-

er, 207 Mo. 540, 106 S. W. 505; S. *v.* Howard, 30 Mont. 518, 77 P. 50.

479-5 If insane his testimony would be entitled to little credit. Mason *v.* S. (Tex. Cr.), 168 S. W. 115.

Fact that indictment charges assault upon an imbecile female does not necessarily render her incompetent as witness. S. *v.* Simes, 12 Ida. 310, 85 P. 914; S. *v.* Crouch, 130 Ia. 478, 107 N. W. 173.

In proceeding for appointment of guardian alleged incompetent may be compelled to testify. Cogan *v.* Cogan, 202 Mass. 58, 88 N. E. 662.

480-6 Cuesta *v.* Goldsmith, 1 Ga. App. 48, 57 S. E. 983. See supra, "Competency," 177-40.

Existing judgment establishing insanity of witness not conclusive as to capacity to testify. Singleton *v.* S., 57 Tex. Cr. 560, 124 S. W. 92.

The guardian of an insane person cannot offer him as witness. Hart *v.* Miller, 29 Ind. App. 222, 64 N. E. 239.

Burden upon person objecting to competency of witness, to establish insanity. Batterton *v.* S., 52 Tex. Cr. 381, 107 S. W. 826.

Presumption of regularity, that lunatic was present at hearing, since officer presumed to do duty. Porter *v.* Asylum, 28 Ky. L. R. 796, 90 S. W. 263.

480-7 Vannest *v.* Murphy, 135 Ia. 123, 112 N. W. 236, weight of opinion evidence.

Degree of mental capacity necessary to enable party to contract for court; whether party has required quantum for jury; opinions incompetent upon both points. Nashville, etc. R. Co. *v.* Brundige, 114 Tenn. 31, 84 S. W. 805.

480-8 S. *v.* Howard, 30 Mont. 518, 77 P. 50. See Baker *v.* S., 9 Okla. Cr. 47, 130 P. 524.

INSOLVENCY

Concealment of, 491-24.

482 Insolvency in criminal action. See Brown *v.* S. (Tex. Cr.), 162 S. W. 339.

482-1 McDonald *v.* R. Co., 164 Fed. 1007; Phelan *v.* Co., 147 Ia. 626, 125 N. W. 208; German S. Bk. *v.* T. Co., 27 Ky. L. R. 581, 85 S. W. 761; Floyd-J. *v.* Anderson, 30 Mont. 351, 76 P. 751; Moseley *v.* Johnson, 144 N. C. 257, 56 S. E. 922; Comelin *v.* Schultze, 1 P. R. Fed. 289 (otherwise under bankruptcy act if fraud shown on part of bankrupt); Gainesville W. Co. *v.* Gainesville, 103 Tex. 394, 128 S. W. 370 (as cause for forfeiture of franchise); Jensen *v.* Montgomery, 29 Utah 89, 80 P. 504; Jackson *v.* Co., 108 Vt. 714, 62 S. E. 964. See In re Perlhefter, 177 Fed. 299.

Evidence sufficient.—Goshorn *v.* Murray, 197 Fed. 407.

Insolvency, question for jury. Schloss *v.* Strellow, 156 Fed. 662, 84 C. C. A. 374.

Failure of bank, prima facie of its previous knowledge of insolvency. S. *v.* Salmon, 216 Mo. 466, 115 S. W. 1106, statute.

482-2 Cleage *v.* Laidley, 149 Fed. 346, 79 C. C. A. 284 (insolvency presumed to continue as long as usual under similar state of affairs); Wachsmuth *v.* Ins. Co., 147 Ill. App. 510; Lewis *v.* Co. (Ind. App.), 102 N. E. 391; Dehoust *v.* Lewis, 128 App. Div. 131, 112 N. Y. S. 559.

Insolvency of firm not presumed from prior insolvency of member. Jaquith *v.* Davenport, 197 Mass. 397, 84 N. E. 125.

482-3 Martin *v.* Hertz, 224 Ill. 84, 79 N. E. 558.

483-4 Hawes *v.* Bk., 124 Ga. 567, 52 S. E. 922; Worthy *v.* Battle, 125 Ga. 415, 54 S. E. 667; Blyth & F. Co. *v.* Kastor, 17 Wyo. 180, 97 P. 921.

485-8 Martin *v.* Gwynn, 90 Ark. 44, 117 S. W. 754; Campbell *v.* Park, 128 Ia. 181, 101 N. W. 861; Nelson Mfg. Co. *v.* Shreve, 104 Mo. App. 474, 79 S. W. 488 (estimate of value of alleged insolvent's property, admissible).

The state bank commissioner and the trustee in bankruptcy are competent to testify as to values of assets and liabilities of defendant's band where there is a question of insolvency. Brown *v.* S. (Tex. Cr.), 162 S. W. 339.

486-9 Cabaniss *v.* S., 8 Ga. App. 129, 68 S. E. 849.

486-10 Campbell *v.* Park, 128 Ia. 181, 101 N. W. 861.

486-11 See Campbell *v.* Park, supra.

486-12 *Comp.* First Nat. Bk. *v.* Robinson (Tex. Civ.), 124 S. W. 177.

Final account of administrator, evidence of decedent's insolvency. Rich *v.* Morisey, 149 N. C. 47, 62 S. E. 762.

486-13 Brown *v.* S. (Tex. Cr.), 162 S. W. 339.

487-14 Rising *v.* Dickinson, 18 N. D. 478, 121 N. W. 616.

487-15 Blyth & F. Co. *v.* Kastor, 17 Wyo. 180, 97 P. 921.

487-16 Michaels *v.* McRoy, 158 Mich. 605, 123 N. W. 37. See Moseley *v.* Johnson, 144 N. C. 257, 56 S. E. 922.

488-18 Ellis *v.* S., 138 Wis. 513, 119 N. W. 1110.

491-24 Davis *v.* Yonge, 74 Ark. 161, 85 S. W. 90; Tibbetts *v.* Terrill, 44 Colo. 94, 96 P. 978; Parrish *v.* C., 136 Ky. 77, 123 S. W. 339; Seigfried *v.* R. Co., 147 Mo. App. 543, 126 S. W. 798 (previous transactions may not be shown to prove solvency; *contra* as to insolvency). But see Bolster *v.* Graves, 189 Mass. 301, 75 N. E. 714.

In determining the insolvency of the maker of a note sued on, it was held not admissible to attack his good faith in other transactions for the purpose of establishing his insolvency. Texas Baptist University *v.* Patton (Tex. Civ.), 145 S. W. 1063.

Closing doors of bank, evidence of insolvency. Dehoust *v.* Lewis, 128 App. Div. 131, 112 N. Y. S. 559.

Concealment of insolvency.—Falsifying inventory and using it as a basis of statements as to financial standing, destroying books, establishing fictitious credit, and making excessive purchases on credit, establish concealment of insolvency. In re Friedman, 164 Fed. 131.

Value of assets may be shown by proof of price at which they sold. Atherton *v.* Emerson, 199 Mass. 199, 85 N. E. 530.

492-25 Michaels *v.* McRoy, 158 Mich. 605, 123 N. W. 37; S. *v.* Salmon, 216 Mo. 466, 115 S. W. 1106; First Nat. Bk. *v.* Robinson (Tex. Civ.), 124 S. W. 177; Nixon *v.* Wks., 51 Wash. 419, 99 P. 11.

A letter written by a third party requesting the party in question to have up certain notes, was not admissible, as being mere hearsay. Texas Baptist University *v.* Patton (Tex. Civ.), 145 S. W. 1063.

Refusal to honor drafts, not evidence of insolvency. Smith *v.* R. Co., 145 Mo. App. 394, 122 S. W. 342.

Trustee in bankruptcy may testify he has not received or been able to find any property of bankrupt. Cree *v.* Bk., 141 Ia. 232, 119 N. W. 614.

Affidavit in attachment, not evidence of insolvency of defendant named therein in another action between different parties. Lemon *v.* U. S., 164 Fed. 953, 90 C. C. A. 617.

492-26 Martin *v.* Gwynn, 90 Ark. 44, 117 S. W. 754.

492-27 Haspel *v.* McLaughlin, 38 Pa. Super. 334.

493-29 Fales *v.* Browning, 68 S. C. 13, 46 S. E. 545. *Comp.* Halbert *v.* Pranke, 91 Minn. 204, 97 N. W. 976. *Contra* in action by trustee to recover fraudulent preference given one not a party to the proceedings in which schedules and evidence filed. Taylor *v.* Nichols, 134 App. Div. 787, 119 N. Y. S. 1042. *Contra* in prosecution for receiving deposits as banker when insolvent, objection being defendant would be involuntary witness against himself. S. *v.* Drew, 110 Minn. 247, 124 N. W. 1091. *Contra*, C. *v.* Ensign, 40 Pa. Super. 157.

Claims allowed by referee in bankruptcy may be proved, though defendant not a party to proceeding. Cree *v.* Bk., 141 Ia. 232, 119 N. W. 614.

493-30 Crabtree *v.* R. Co., 86 Neb. 33, 124 N. W. 932, parents' action for child's death.

Bank examiners' reports, admissible to show financial condition of examined bank. S. *v.* Salmon, 216 Mo. 466, 115 S. W. 1106.

494-31 McMillan *v.* Co., 133 Ga. 760, 66 S. E. 943; National Valley Bk. *v.* Houston, 66 W. Va. 336, 66 S. E. 465.

Value of bonds of corporation, as compared with its assets, not such evidence of insolvency as justifies forfeiture of franchise so long as it meets accruing liabilities. Gainesville W. Co. *v.* Gainesville, 103 Tex. 391, 128 S. W. 370.

495-33 Fowler *v.* Crouse, 177 Fed. 646, 99 C. C. A. 230; In re Brigham's Est., 144 Ia. 71, 120 N. W. 1054 (if conditions remain substantially unchanged); German S. Bk. *v.* Co., 27 Ky. L. R. 581, 85 S. W. 761 (subsequent insolvency not evidence of prior insolvency); Ellis *v.* S., 138 Wis. 513, 119 N. W. 1110. *Comp.* Kurtz *v.* Co., Utah 313, 108 P. 14, and see Campbell *v.* Park, 128 Ia. 181, 101 N. W. 861.

Remoteness.—Solvency four years after alleged insolvency existed, too remote. Martin *v.* Gwynn, 90 Ark. 44, 117 S. W. 754. Insolvency a year after material time does not show insolvency then. Com. Nat. Bk. *v.* Gilinsky, 142 Ia. 178, 120 N. W. 476.

Borrowing money to meet expenditures in fulfillment of contract, not evidence of insolvency. McDonald *v.* R. Co., 164 Fed. 1007.

Evidence of subsequent insolvency is immaterial if insolvency at time in question shown. Simons *v.* Cissna, 52 Wash 115, 100 P. 200.

INSURANCE

Judicial notice of form of applications and of manner of preparing policies, 502-9; *Presumption as to change of beneficiary,* 505-22; *Apprehension of incendiarism,* 527-76; *Presumption of death,* 549-33.

499-1 Aetna Ins. Co. *v.* Kennedy, 161 Ala. 600, 50 S. 73; Troy *v.* London, 145 Ala. 280, 39 S. 713; Volunteer S. L. Ins. Co. *v.* Buchanan, 10 Ga. App. 255, 73 S. E. 602; Lyford *v.* Ins. Co., 99 Me. 273, 58 A. 916; Moloney *v.* Ins. Co., 168 Mich. 269, 134 N. W. 6; Ryan *v.* Ins. Co., 117 Mo. App. 688, 93 S. W. 347; Bassett *v.* Ins. Co., 85 Neb. 85, 122 N. W. 703; Samaha *v.* Ins. Co., 84 N. J. L. 731, 87 A. 442; Sammons *v.* Ins. Co., 94 S. C. 366, 77 S. E. 1108.

499-2 Presumption in favor of legality of marriage in fact applies to aid woman who married in reliance on validity of a divorce obtained by her sponse and for whose benefit he obtained insurance. Scott *v.* Scott, 25 Ky. L. R. 1356, 77 S. W. 1122.

499-3 See Troy *v.* London, 145 Ala. 280, 39 S. 713.

500-4 Not presumed policy covered property because of fraud; if it is not shown how it was included, mistake will be presumed. Herzog *v.* Ins. Co., 36 Wash. 611, 79 P. 287.

Extent of interest.—If insurer is estopped to rely upon clause in policy forbidding change of title, it must show insured's interest is of less value than sum for which property insured. Continental Ins. Co. *v.* Thomason, 27 Ky. L. R. 158, 84 S. W. 546.

500-5 Troy *v.* London, 145 Ala. 280, 39 S. 713; McFarlane *v.* Robertson, 137 Ga. 132, 73 S. E. 490; Volunteer S. L. Ins. Co. *v.* Buchanan, 10 Ga. App. 255, 73 S. E. 602.

It is presumed assignment duly made continues in full force, notwithstanding assignor is in possession of policy claiming it under a reassignment. Cuyler *v.* Wallace, 183 N. Y. 291, 76 N. E. 1.

Authority to assign policy presumed in favor of action by the directors. Cass County *v.* Ins. Co., 188 Mo. 1, 86 S. W. 237.

Evidence insufficient.—Volunteer S. L. Ins. Co. *v.* Buchanan, 10 Ga. App. 255, 73 S. E. 602.

500-6 Ownership shown by parol. Ozark Ins. Co. *v.* Hopson, 82 Ark. 603, 101 S. W. 171.

501-7 German F. Ins. Co. *v.* Gibbs, 42 Tex. Civ. 407, 92 S. W. 1068, 96 S. W. 760, declarations of insured after loss.

Declarations of insured competent to show assignment of policy as against his executor. Ormond *v.* Ins. Co., 145 N. C. 140, 58 S. E. 997.

501-8 Insurer's by-laws competent to show claimant of proceeds of policy not qualified to be a beneficiary. Foss *v.* Petterson, 20 S. D. 93, 104 N. W. 915.

Evidence to show dependence of plaintiff on insured need not be strong, certificate designating plaintiff as such and all requirements having been met. Erickson *v.* Woodmen, 43 Wash. 242, 86 P. 584.

Ownership of burned building may be shown by insured's testimony. Phoenix Ins. Co. *v.* McAtee, 33 Ind. App. 106, 70 N. E. 947.

Nature of assignment of property may be proved—as that deed was intended as security and debt secured and was paid and property reconveyed before loss. Burkhart *v.* Ins. Co., 11 Pa. Super. 280.

Issuing policy is prima facie evidence of insured's insurance interest in property described. *Contra* as to proofs of loss. Cash *v.* Ins. Co., 111 Minn. 162, 126 N. W. 524.

502-9 Law *v.* Assur. Co., 165 Cal. 394, 132 P. 590; Am. C. Co. *v.* Ins. Co., 12 Cal. App. 133, 106 P. 720; Western A. Co. *v.* McAlpin, 23 Ind. App. 220, 55 N. E. 119; Brown *v.* Ins. Co., 82 Kan. 442, 108 P. 824; German Ins. Co. *v.* Goodfriend, 30 Ky. L. R. 218, 97 S. W. 1098; Cunningham *v.* Ins. Co., 200 Mass. 333, 86 N. E. 787; McIntyre *v.* Ins. Co., 142 Mo. App. 256, 126 S. W. 227 (re-insurance); Boos *v.* Ins. Co., 22 N. D. 11, 132 N. W. 222; State Mut. F. Ins. Co. *v.* Taylor (Tex. Civ.), 157 S. W. 950; Thompson *v.* Ins. Co., 45 Wash. 482, 88 P. 941.

Parol contract shown.—Pelican Ins. Co. *v.* Schildknecht, 32 Ky. L. R. 1257, 108 S. W. 312. Proof must be full and

clear. Hartford F. Ins. Co. *v.* Whitman, 75 O. St. 312, 79 N. E. 459.

Judicial notice taken of custom to require a formal application and authenticated medical examination of applicant. Taylor *v.* A. O. U. W., 101 Minn. 72, 111 N. W. 919. And of manner in which policies prepared, including use of slips and pasters. Waters *v.* Co., 144 N. C. 663, 57 S. E. 437.

503-10 Athens Mut. Ins. Co. *v.* Evans, 132 Ga. 703, 64 S. E. 993; Delaware Ins. Co. *v.* Ins. Co., 126 Ga. 380, 55 S. E. 330.

503-11 See, as to life insurance, Francis *v.* Ins. Co., 55 Or. 280, 106 P. 323.

503-12 Because oral contracts unusual more than ordinarily convincing evidence required to show they were made. Whitman *v.* Ins. Co., 128 Wis. 124, 107 N. W. 291.

Contract not shown.—Harriman *v.* Ins. Co., 43 Wash. 398, 86 P. 656; Whitman *v.* Ins. Co., 128 Wis. 124, 107 N. W. 291.

503-13 Western A. Co. *v.* McAlpin, 23 Ind. App. 220, 55 N. E. 119.

504-14 Judicial notice taken of custom of life insurers to forward policies to local agents for delivery. Francis *v.* Ins. Co., 55 Or. 280, 106 P. 323.

504-15 Metropolitan Ins. Co. *v.* Williamson, 171 Fed. 116, 98 C. C. A. 90. See New York L. Ins. Co. *v.* Johnson, 24 Ky. L. R. 1867, 72 S. W. 762.

Where beneficiary named was dead when policy was issued. Queen Ins. Co. *v.* Peters, 10 Ga. App. 289, 73 S. E. 536.

Proof of possession of policy.—New York L. Ins. Co. *v.* Johnson, 24 Ky. L. R. 1867, 72 S. W. 762.

Presumption is policy accepted as such, and in absence of verified plea denying its execution or verification of the general issue its execution and delivery is deemed admitted. Helbig *v.* Ins. Co., 120 Ill. App. 58.

504-16 Gray *v.* Blackwood (Ark.), 165 S. W. 958. Delivery and acceptance not proved. Wood *v.* Yeoman (Ia.), 113 N. W. 825.

Non-execution cannot be proved by defendant under the general issue when it is admitted by the pleadings. Citizens' Nat. Fire Ins. Co. *v.* Bridge Co., 116 Md. 422, 82 A. 372.

504-17 Wheaton *v.* Ins. Co., 20 S. D. 62, 104 N. W. 850.

504-18 Mutual L. A. Co. *v.* Giguere, 32 Can. Sup. 348; Amos-Richia *v.* Ins. Co., 152 Fed. 192; Richardson *v.* Ins. Co., 143 Ill. App. 279; Gardner *v.* Ins. Co., 163 N. C. 307, 79 S. E. 806; Waters *v.* Co., 144 N. C. 663, 57 S. E. 437.

Evidence insured requested new policy on different terms, not competent on question of acceptance of policy issued. Cauthen *v.* Ins. Co., 80 S. C. 264, 61 S. E. 428.

Due delivery of policy presumed where insured is shown to have had possession of it and its loss is proved. National M. F. Ins. Co. *v.* Sprague, 40 Colo. 344, 92 P. 227. And where policy produced by representative of insured. Mutual L. A. Co. *v.* Giguere, 32 Can. Sup. 348. Recital in policy premium paid imports delivery. National M. F. Ins. Co. *v.* Sprague, 40 Colo. 344, 92 P. 227.

Effect of proving delivery.—Amos-Richia *v.* Ins. Co., 152 Fed. 192; Rayburn *v.* Co., 141 N. C. 425, 54 S. E. 283, 138 N. C. 379, 50 S. E. 762; Waters *v.* Co., 144 N. C. 663, 57 S. E. 437; Hartford F. Ins. Co. *v.* Whitman, 75 O. St. 312, 79 N. E. 459.

No presumption, in absence of special circumstances, of variation between policy and application because slips pasted on former; their effect is for jury. Waters *v.* Co., 144 N. C. 663, 57 S. E. 437.

Date of delivery may be shown.—Haughton *v.* Ins. Co., 165 Ind. 32, 74 N. E. 613.

Custom of insurer as to delivering policies may be shown to establish delivery to insured. Payne *v.* Ins. Co., 141 Fed. 339, 72 C. C. A. 487.

On issue of acceptance and approval of application contradictory endorsements, admissible. Robinson *v.* Ins. Co., 144 Fed. 1005.

Understanding of agents of insurer and insured as to meaning of contract to renew policies executed by principals, not sufficient evidence of mistake to justify reformation thereof. Barker *v.* Co., 134 Fed. 70, 67 C. C. A. 196.

Possession of incomplete policy.—Amos-Richia *v.* Ins. Co., 152 Fed. 192.

Presumption in terms of policy conform to application. German Am. Ins. Co. *v.* Darrin, 80 Kan. 578, 103 P. 87.

No presumption arises from possession of policy requirement it be countersigned by person named, waived. Caywood *v.* Knights, 171 Ind. 410, 86 N. E. 482.

505-19 Witherow *v.* Mystic Toilers (Utah), 130 P. 58.

Declarations regarded in connection with letters from insurer to insured. Todd *v.* Ins. Co., 9 Pa. Super. 371.

Fact of agency.—The fact of agency may be established by oral testimony of the agent where his appointment is not in fact in writing, or required to be. Smith *v.* S., 149 Wis. 63, 134 N. W. 1123.

505-20 Cosmopolitan Fire Ins. Co. *v.* Gingold, 3 Ala. App. 537, 57 S. 266.

Previous delivery of policy to another by agent who delivered that in question may be shown. Sovereign Camp *v.* Carrington, 41 Tex. Civ. 29, 90 S. W. 921.

Renewal receipt executed by agent, admissible.—McCullough *v.* Ins. Co., 2 Pa. Super. 233.

505-21 Receipt for premium inadmissible unless signed in representative capacity, agent representing both parties. Foreman *v.* Assn., 104 Va. 694, 52 S. E. 337.

505-22 Alexander *v.* Woodmen, 161 Ala. 561, 49 S. 883; Capital F. Ins. Co. *v.* Davis, 93 Ark. 179, 124 S. W. 520 (liability alleged to have resulted from defendant's consolidation with company which issued policy); Little *v.* Trav. Men's Assn., 154 Ia. 440, 134 N. W. 1087; Cummins *v.* Ins. Co., 153 Ia. 579, 134 N. W. 79; Lyford *v.* Ins. Co., 99 Me. 273, 58 A. 916; Lee *v.* Ins. Co., 203 Mass. 299, 89 N. E. 529 (also existence of conditions precedent); More *v.* Ins. Co., 130 N. Y. 537, 29 N. E. 757 (no presumption of acceptance from silence after receipt of application); Hartford Ins. Co. *v.* Whitman, 75 O. St. 312, 79 N. E. 459 (proof must be full and clear).

Evidence held insufficient to show that the certificate was issued before death of insured. Supreme Lodge K. P. *v.* Graham, 49 Ind. App. 535, 97 N. E. 806.

Agency presumed if insurer accepts application, issues policy and retains premium. Smith *v.* Ins. Co., 21 S. D. 433, 113 N. W. 94.

Agent's possession of official premium receipt, evidence of authority to receive payment. Lauze *v.* Ins. Co., 74 N. H. 334, 68 A. 31.

Presumption as to change of beneficiary.—Baker *r.* Baker, 110 App. Div. 660, 97 N. Y. S. 455.

Burden of proving intent to change beneficiary, on person who asserts rights of former. Barner *v.* Lyter, 31 Pa. Super. 435.

Authority of local agents may be shown by evidence of course of business between them and general agents. St. Paul F. & M. Ins. Co. *v.* Stogner, 44 Tex. Civ. 60, 98 S. W. 218.

Under statutes a person who does any of the acts enumerated therein is presumed to be insurer's agent. Madden *v.* Ins. Co., 70 S. C. 295, 49 S. E. 855; Costello *v.* Ins. Co., 133 Wis. 361, 113 N. W. 639.

Agency shown.—Capital F. Ins. Co. *v.* Montgomery, 81 Ark. 508, 99 S. W. 687.

Evidence sufficient to carry question of contract to jury. Payne *v.* Ins. Co., 141 Fed. 339, 72 C. C. A. 487.

Agent's declaration he had written insurance, inadmissible to show contract. Torpey *v.* National L. I. Co., 29 Ky. L. R. 371, 92 S. W. 982.

Burden of showing non-observance of conditions in policy negativing effect of delivery, on insurer. Rayburn *v.* Co., 141 N. C. 425, 54 S. E. 283.

506-23 Helbig *v.* Ins. Co., 234 Ill. 251, 84 N. E. 897.

A certificate of secretary of state that a certain person is agent of insurer is admissible to establish agency. Sun Ins. Office *v.* Mitchell (Ala.), 65 S. 143.

Completion of contract presumed if policy found with other papers of insured after death. Gardner *v.* Co., 110 Minn. 291, 125 N. W. 264.

Denial of authority to change beneficiary must be shown by party alleging it. Grand Lodge *v.* Brown, 160 Mich. 437, 125 N. W. 400.

Clear and convincing proof necessary Am. C. Co. *v.* Ins. Co., 12 Cal. App. 133, 106 P. 720.

No presumption against power of insurer to issue policy in question. Mutual R. I. Ins. Co. *v.* Ross, 42 Ind. App. 621, 86 N. E. 506.

506-24 Kentucky V. M. & C. Co. *v.* Soc., 146 Fed. 695, 77 C. C. A. 121; Mulrooney *v.* Ins. Co., 157 Fed. 598 (applying rule to indorsement); Northern A. Co. *v.* Assn., 183 U. S. 308; Connecticut F. Ins. Co. *v.* Buchanan, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758; Meigs *v.* Co., 134 Fed. 1021, 68 C. C. A. 249; Miles *v.* Sledge, 157 Ala. 528, 47 S. 595; Fidelity & C. Co. *v.* Co., 82 Conn. 475, 74 A. 780; Athens Mut. Ins. Co. *v.* Evans, 132 Ga.

703, 64 S. E. 993; Wheeler *v.* Co., 129 Ga. 237, 58 S. E. 709; Puryear *v.* Ins. Assn., 137 Ga. 579, 73 S. E. 851; Blalock *v.* Ins. Co., 13 Ga. App. 486, 79 S. E. 374; Hays *v.* Tr. Co. (Ind. App.), 105 N. E. 919; Mason's U. L. I. Assn. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493; Phillipy *v.* Homesteaders, 140 Ia. 562. 118 N. W. 880; Kelsey *v.* Co., 131 Ia. 207, 108 N. W. 221; Phenix Ins. Co. *v.* Stahl, 72 Kan. 578, 83 P. 614; State L. Ins. Co. *v.* Johnson, 73 Kan. 567, 85 P. 597; Provident Soc. *v.* Withers, 132 Ky. 541, 116 S. W. 350; Gooding *v.* Ins. Co., 110 Me. 69, 85 A. 391; Williams *v.* Ins. Co. (Md.), 89 A. 97; Crook *v.* Ins. Co., 112 Md. 268, 75 A. 388; Grisham *v.* Ins. Co., 130 Mo. App. 57, 109 S. W. 96; Dakan *v.* Ins. Co., 125 Mo. App. 451, 102 S. W. 634; Collins *v.* Ins. Co., 32 Mont. 329, 80 P. 609; Lauze *v.* Ins. Co., 74 N. H. 334, 68 A. 31; Gleason *v.* Ins. Co., 73 N. H. 583, 64 A. 187; Johnston & Collins Co. *v.* Davis, 142 N. Y. S. 475; Langdon *v.* Ins. Co., 116 App. Div. 558, 101 N. Y. S. 914; Gardner *v.* Ins. Co., 163 N. C. 367, 79 S. E. 806; Hammel *v.* Ins. Co., 4 O. C. C. (N. S.) 380; Gish *v.* Ins. Co., 16 Okla. 59, 87 P. 869; Deming I. Co. *v.* Ins. Co., 16 Okla. 1, 83 P. 918; Peters *v.* Ins. Co., 63 Or. 382, 126 P. 1005; Johnson *v.* Stewart, 243 Pa. 485, 90 A. 349; Burt *v.* Burt, 218 Pa. 198, 67 A. 210; Kentucky W. Mfg. Co. *v.* Co., 77 S. C. 92, 57 S. E. 676 (meaning of "fully insured"); Prince *v.* Ins. Co., 77 S. C. 187, 57 S. E. 766; McGrath *v.* Ins. Co., 74 S. C. 69, 54 S. E. 218; Bowen *v.* Ins. Co., 20 S. D. 103, 104 N. W. 1040 (binding receipt); Mut. F. Ins. Co. *v.* Turner, 115 Va. 631, 79 S. E. 1067; Metropolitan L. Ins. Co. *v.* Hall, 101 Va. 572, 52 S. E. 345; Ferguson *v.* Ins. Co., 45 Wash. 209, 88 P. 128; Oliker *v.* Ins. Co. (W. Va.), 78 S. E. 746; Rief *v.* Co., 131 Wis. 368, 111 N. W. 502. See vol. 9, p. 322, n. 24.

Description of property.—Parol evidence is not admissible to show that the policy was not intended to cover the property plainly described therein. Citizens' Mut. Fire Ins. Co. *v.* Bridge Co., 116 Md. 422, 82 A. 372.

As between original insurer and its reinsurer books of former not conclusive of good standing of its members, and under Illinois statute reinsurer is liable to all members in such standing whether records on books clear or not. Bolles *v.* Assn., 220 Ill. 400, 77 N. E. 198.

509-25 Burt *v.* Burt, 221 Pa. 171, 70 A. 710; Mutual L. Ins. Co. *v.* Hargus (Tex. Civ.), 99 S. W. 580.

Proof similar mistake made in writing another policy by agent who wrote policy in suit, incompetent to show mistake in latter. Arnold *v.* Ins. Co., 116 App. Div. 60, 101 N. Y. S. 132.

Mistake not shown.—Arkansas, etc. Ins. Co. *v.* Witham, 82 Ark. 226, 101 S. W. 721.

509-26 **Declarations of insured** provable after death to show alterations in application, and as to whether delivery of policy absolute or conditional. Rayburn *v.* Co., 141 N. C. 425, 54 S. E. 283.

Mistake in giving date in application may be shown. Madden *v.* Ins. Co., 70 S. C. 295, 49 S. E. 855.

509-27 **Receipt for premium.**—Huffaker's Exr. *v.* Ins. Co. (Ky.), 156 S. W. 1038.

"**Even though plaintiff** can resort to secondary evidence to prove the lightning clause was attached to the policy, this must be the best attainable. Though the rule seems to be laid down broadly in England that there are no degrees in secondary evidence, the current of authority is otherwise in this country. Harvey *v.* Thorpe, 28 Ala. 250, 260, 65 Am. Dec. 344; Cornett *v.* Williams, 20 Wall. 226, 246, 22 L. ed. 254; Wilson *v.* South Park Commissioners, 70 Ill. 46. And this court seems to be committed to the American doctrine. Conger *v.* Converse, 9 Iowa 554; Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305; Zalesky *v.* Ins. Co., 102 Iowa 512, 70 N. W. 187, 71 N. W. 433." Cummins *v.* Ins. Co., 153 Ia. 579, 134 N. W. 79.

510-28 Miller *v.* Ins. Co., 202 Fed. 442, 120 C. C. A. 548; Osterhoudt *v.* Ins. Co., 136 App. Div. 123, 120 N. Y. S. 641; State Mut. L. Co. *v.* Ballard (Tex. Civ.), 122 S. W. 267; Norris *v.* Ins. Co., 52 Wash. 554, 100 P. 1025. See Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873; Frost *v.* Ins. Co., 77 Vt. 407, 60 A. 803.

Evidence of the "rider" not attached to policy admissible. Palatine Ins. Co. *v.* Kehoe, 210 Mass. 426, 96 N. E. 1099.

510-29 See Worthy *v.* Farmers' Life Con., 139 Ga. 81, 76 S. E. 856.

511-30 Am. C. Co. *v.* A. Co., 148 Fed. 77.

512-31 New Amsterdam C. Co. *v.* Co., 95 Ark. 140, 128 S. W. 861; Georgia I. & C. Co. *v.* Co., 133 Ga. 326, 65 S.

E. 775; Am. Ins. Co. *v* Meyers, 118 Ill. App. 484; Aetna Ins. Co. *v.* Strout, 16 Ind. App. 160, 44 N. E. 934; Wolverine L. Co. *v.* Ins. Co., 145 Mich. 558, 108 N. W. 1088. See Cal. R. Co. *v.* Ins. Co., 23 Cal. App. 611, 138 P. 960; Hazelton *v.* Ins. Co., 141 Wis. 639, 124 N. W. 1014.

Condition of property shown.—Harris *v.* Ins. Co., 190 Mass. 361, 77 N. E. 493.

512-32 Bowditch *v.* Soc., 193 Mass. 565, 79 N. E. 788; Aetna Ins. Co. *v.* Brannon, 99 Tex. 391, 89 S. W. 1057.

513-34 A life policy is not varied by parol evidence showing it was not procured for insured's benefit and he did not pay premiums. Hinton *v.* Ins. Co., 135 N. C. 314, 47 S. E. 474.

513-35 Messenger *v.* Ins. Co., 47 Colo. 448, 107 P. 643 ("in yard"); Am. Ins. Co. *v.* Meyers, 118 Ill. App. 484; Ward *v.* Ins. Co., 80 Vt. 321, 67 A. 821; Prudential Ins. Co. *v.* Alley, 104 Va. 356, 51 S. E. 812.

Insured may be required to produce books for examination pursuant to terms of indemnity policy, premium being based on compensation paid employes. U. S. C. Co. *v.* Robins, 108 App. Div. 361, 95 N. Y. S. 726.

Evidence of the basis on which insured made previous claim under a like policy issued by insurer is immaterial as affecting construction of policy sued upon. Continental C. Co. *v.* Johnson, 74 Kan. 129, 85 P. 545.

513-36 Hartford, etc. Ins. Co. *v.* Brew. Co., 201 Fed. 617, 120 C. C. A. 45; Barker *v.* Ins. Co., 136 Mich. 626, 99 N. W. 866 (meaning of "winter-season" as applied to saw mills); Slavik *v.* Soc., 59 Misc. 183, 110 N. Y. S. 347; Carson *v.* Ins. Co., 1 Pa. Super. 572 (meaning of "pulmonary" diseases).

Custom must be pleaded and proof of it clear and harmonious. Girard L. Ins. Co. *v.* Ins. Co., 13 Phila. (Pa.) 90.

513-37 United States, etc. Co. *v.* Hill (Ala. App.), 62 S. 954.

Presumed knowledge of insurer's special agents concerning local use of terms was that of their non-resident principal, and policy written with reference to such use thereof. Barker *v.* Ins. Co., 136 Mich. 626, 99 N. W. 866.

Well known custom of place where contract made to regard "noon" as twelve o'clock standard time, shown. Rochester G. Ins. Co. *v.* Co., 27 Ky. L. R. 1155, 87 S. W. 1115.

Ambiguity in "rider" explained by showing form of policy usually issued in such cases. St. Paul, etc. Ins. Co. *v.* Balfour, 168 Fed. 212, 93 C. C. A. 498.

Disregard of insurer's rule as to written application for reinstatement may be shown if insured knew of it. Inability to obtain blanks on which to make application, significant. Lounsbury *v.* Knights, 128 App. Div. 394, 112 N. Y. S. 921.

514-38 Kentucky V. M. & C. Co. *v.* Soc., 146 Fed. 695, 77 C. C. A. 121.

Custom of insured and knowledge of his purpose not to keep safe as required may be shown to have been brought home to agent at time policy delivered and before premium paid. Riley *v.* Ins. Co., 117 Mo. App. 229, 92 S. W. 1147.

Admissible only on question of prepayment of premiums. Gresham *v.* Ins. Soc., 157 Ky. 402, 163 S. W. 214.

514-40 Pac. M. L. I. Co. *v.* Shields (Ala.), 62 S. 71; Ward *v.* Ins. Co., 80 Vt. 321, 67 A. 821 (part of application inadmissible if balance unaccounted for).

Where the policy is not offered in evidence and there is no proof of its contents there can be no recovery. Fidelity, etc. Ins. Co. *v.* Sadau (Tex. Civ.), 159 S. W. 137.

By-laws of insurer, not mentioned in policy, are inadmissible. Masonic Life Assn. *v.* Robinson, 149 Ky. 80, 147 S. W. 882.

Former policy admissible if renewal lost, only difference being as to dates. Edgefield Mfg. Co. *v.* Co., 78 S. C. 73, 58 S. E. 969.

Copy of policy admissible if insurer fails to produce original or one which could be shown to be such. Carr *v.* Ins. Co., 115 App. Div. 755, 101 N. Y. S. 158.

Notice to produce policy must be given by insurer if it desires to use it to prove violations of conditions subsequent. Thompson *v.* Ins. Co., 77 S. C. 294, 57 S. E. 848.

Conflict between application and policy resolved in accordance with latter. Tate *v.* Ins. Co., 133 Mo. App. 584, 113 S. W. 659; Harr *v.* Nobles, 78 Neb. 175, 110 N. W. 713, *appr.* Goodwin *v.* Soc., 97 Ia. 226, 66 N. W. 157, 59 Am. St. 411, 32 L. R. A. 473.

Policy admissible.—Wheaton v. Ins. Co., 20 S. D. 62, 104 N. W. 870.

By-laws of benefit society, if part of contract, may be offered by either party. Hayden v. Ins. Co., 136 Fed. 285, 69 C. C. A. 423.

Policy and proofs constitute a prima facie case of existence of contract. Helbig v. Ins. Co., 120 Ill. App. 58. They do not make such a case as to amount of loss. Lancashire Ins. Co. v. Lyon, 124 Ill. App. 491. In connection with admission in answer concerning date of death they make a prima facie case. Thaxton v. Ins. Co., 143 N. C. 33, 55 S. E. 419.

Certificate showing rights of insured in reserve fund, admissible. Petite v. Ins. Co., 142 Ia. 265, 120 N. W. 642.

514-41 Fraternal L. Assn. v. Evans, 140 Ga. 284, 78 S. E. 915; Independent L. I. Co. v. Rider, 150 Ky. 505, 150 S. W. 649. See Continental C. Co. v. Owen, 38 Okla. 107, 131 P. 1084.

515-42 Tackman v. Brotherhood, 132 Ia. 64, 106 N. W. 350; Keeton v. Nat. Union (Mo. App.), 165 S. W. 1107.

515-43 Ellis v. Ins. Co., 228 Pa. 230, 77 A. 460; Fidelity T. & T. Co. v. Ins. Co., 213 Pa. 415, 63 A. 51.

515-44 Fraternal L. Assn. v. Evans, 140 Ga. 284, 78 S. E. 915; Bush v. Ins. Co. (W. Va.), 81 S. E. 984; Bowyer v. C. Co. (W. Va.), 78 S. E. 1000. See Eminent Household v. Prater, 37 Okla. 568, 133 P. 48.

515-45 Wheelock v. Ins. Co., 115 Minn. 177, 131 N. W. 1081. See Deming v. Ins. Co., 169 Ill. App. 96.

By-laws, if not made part of contract, inadmissible as against provisions in latter. Young v. Assn., 126 Mo. App. 325, 103 S. W. 557 (reinsurer's by-laws); Gleason v. Ins. Co., 73 N. H. 583, 64 A. 187; Bruger v. Ins. Co., 129 Wis. 281, 109 N. W. 95.

Constitution of benefit society is best evidence of its provisions. Masons' etc. Assn. v. Brockman, 20 Ind. App. 206, 50 N. E. 493.

Records of mutual company.—Sup. Council v. Haas, 116 Ill. App. 587; Bagley v. Grand Lodge, 131 Ill. 498, 22 N. E. 487.

Application is best evidence of disclosures made to physician. Taylor v. Woodmen, 42 Wash. 304, 84 P. 867.

Copy of application.—Bruger v. Ins. Co., 129 Wis. 281, 109 N. W. 95. **Must be authenticated.** Aetna L. Ins. Co. v. Duparquet, 53 Misc. 581, 103 N. Y. S. 800.

Recital in policy property insured is part of realty, prima facie evidence. Co-operative Ins. Assn. v. Hubbs, 53 Tex. Civ. 68, 115 S. W. 670.

515-46 An indorsement on application of the examining physician, he being agent of insurance company, is inadmissible and not binding on insured. Eminent Household v. Prater, 37 Okla. 568, 133 P. 48.

515-47 Manhattan L. Ins. Co. v. Verneuille, 156 Ala. 592, 47 S. 72; Metropolitan L. Ins. Co. v. Burch, 39 App. Cas. (D. C.) 397; Southern S. Ins. Co. v. Herlihy, 138 Ky. 359, 128 S. W. 91 (medical examination included if part of application); Griffin v. Soc., 119 Ky. 856, 84 S. W. 1164; Paquette v. Ins. Co., 193 Mass. 217, 79 N. E. 250; Custer v. Assn., 211 Pa. 257, 60 A. 776.

Under Pennsylvania statute by laws or regulations bearing on contract, inadmissible if unattached to policy. Mowry v. Soc., 27 Pa. Super. 390.

Kentucky statute.—Am. Guild v. Wyatt, 30 Ky. L. R. 632, 100 S. W. 264; Bankers F. Union v. Donahue, 33 Ky. L. R. 196, 109 S. W. 878.

516-48 Metropolitan Ins. Co. v. Hawkins, 31 App. Cas. (D. C.) 493; Biermann v. Ins. Co., 142 Ia. 341, 120 N. W. 963; Sovereign Camp v. Salmon (Ky.), 120 S. W. 358 (immaterial insured waived statute); Greiner v. Ins. Co., 40 Pa. Super. 387.

Oral evidence of statements in application, inadmissible. Fidelity T. & T. Co. v. Ins. Co., 213 Pa. 415, 63 A. 51; Southern S. Ins. Co. v. Herlihy, 138 Ky. 359, 128 S. W. 91.

No presumption policy and application were attached if detached when offered. Mahon v. Ins. Co., 141 Pa. 409, 22 A. 876.

Compliance with statute cannot be shown by proof of insurer's custom in attaching papers and that policy bore evidence of having had application attached; opinion evidence on last point, incompetent. Custer v. Assn., 211 Pa. 257, 60 A. 776.

Breach of conditions or warranties in policy may be proved though application not attached. Kirkpatrick v. Co., 139 Ia. 370, 115 N. W. 1107, 19 L. R. A. (N. S.) 102; Barker v. Ins.

Co., 188 Mass. 542, 74 N. E. 945, 74 N. E. 495.

Iowa statute, if not complied with, makes policy sole evidence. Rauen *v.* Ins. Co., 129 Ia. 725, 106 N. W. 198.

"**Application**" includes all statements in the paper so denominated, except report of medical examiner, considered necessary to form basis of contract. Paquette *v.* Ins. Co., 193 Mass. 215, 79 N. E. 250. If all material portions of paper designated as "proposal" are embodied in application, except designation of beneficiary, application is admissible. Langdeau *v.* Ins. Co., 194 Mass. 56, 80 N. E. 452. Supplemental application must be attached to or endorsed on policy, otherwise original not admissible. Fisher *v.* Assn., 188 Pa. 1, 41 A. 467. Writings to secure fidelity bonds are within statutes. U. S. & G. Co. *v.* Co., 148 Fed. 353, 78 C. C. A. 345.

Scope of statute.—Hews *v.* Soc., 143 Fed. 850, 74 C. C. A. 676; Holden *v.* Ins. Co., 191 Mass. 153, 77 N. E. 309; Prudential Ins. Co. *v.* Alley, 104 Va. 356, 51 S. E. 812. Does not exclude premium receipt and application if no policy issued. C. Ins. Co. *v.* Davis, 136 Ky. 339, 124 S. W. 345.

Slight discrepancies between copy and original will not affect admissibility of former. Knapp *v.* Brotherhood, 139 Ia. 136, 117 N. W. 298.

Unattached application admissible as between insured and stranger to policy. Knowles *v.* Knowles, 205 Mass. 290, 91 N. E. 213.

Defense of fraudulent conspiracy.—Paquette *v.* Ins. Co., 193 Mass. 215, 79 N. E. 250.

516-49 Mass., etc. Co. *v.* Crenshaw (Ala.), 65 S. 65; Mutual, etc. Ins. Co. *v.* Owen (Ark.), 164 S. W. 720; Atlas F. & I. Co. *v.* Malone, 99 Ark. 428, 138 S. W. 962; Schwartz *v.* Neighbors, 12 Cal. App. 595, 108 P. 51; Connecticut Fire Ins. Co. *v.* Co., 50 Colo. 424, 116 P. 154; Diehl *v.* Ins. Co., 176 Ill. App. 462; Johnson *v.* Foresters, 175 Ill. App. 554; Milhim *v.* Ins. Co., 171 Ill. App. 262; Court of Honor *v.* Clark, 125 Ill. App. 490; Collins *v.* Foresters, 43 Ind. App. 549, 88 N. E. 87; Biermann *v.* Ins. Co., 142 Ia. 341, 120 N. W. 963; Reserve, etc. Ins. Co. *v.* Boreing (Ky.), 163 S. W. 1085; National Council etc. of Security *v.* Wilson, 147 Ky. 293, 143 S. W. 1000; Gardner *v.* Ins. Co., 31 Ky. L. R. 89, 101 S. W. 908; Metropolitan Ins. Co. Co. *v.* Ford, 31 Ky. L. R. 513, 102 S. W. 876 (rejection of application for other insurance); Harris *v.* Ins. Co., 190 Mass. 361, 77 N. E. 493; Murphy *v.* Ins. Co., 106 Minn. 112, 118 N. W. 355; Roedel *v.* Ins. Co., 176 Mo. App. 584, 160 S. W. 44; Bailey *v.* Ins. Co., 166 Mo. App. 583, 149 S. W. 1169; Winn *v.* Woodmen, 138 Mo. App. 701, 119 S. W. 536 (proof must be strict); Higgens *v.* Nobles, 83 Neb. 504, 120 N. W. 137; Samaha *v.* Ins. Co., 84 N. J. L. 731, 87 A. 442; Peck *v.* Ins. Co., 91 App. Div. 597, 87 N. Y. S. 210, 181 N. Y. 585, 74 N. E. 1122 (no opinion); Nat. Union *v.* Kelley (Okla.), 140 P. 1157; Owen *v.* S. Co., 38 Okla. 123, 131 P. 1091; Francis *v.* Ins. Co., 55 Or. 280, 106 P. 323; Am. Nat. Ins. Co. *v.* Fawcett (Tex. Civ.), 162 S. W. 10; Delaware Ins. Co. *v.* Hill (Tex. Civ.), 127 S. W. 283; Schofield *v.* Ins. Co., 79 Vt. 161, 64 A. 1107; Metropolitan Ins. Co. *v.* De Vault, 109 Va. 392, 63 S. E. 982; Goldman *v.* Co., 125 Wis. 390, 104 N. W. 80 (employer's indemnity risk).

Warranties deemed representations.—Continental C. Co. *v.* Owen, 38 Okla. 107, 131 P. 1084.

But when the falsity of the representation is shown the burden should rest on plaintiff to show the insurance company knew otherwise. Little *v.* Ins. Co., 150 Ky. 35, 149 S. W. 1112.

Burden not shifted by admissions of fact made in course of trial under statute giving right to open and close to party against whom judgment would go if no evidence offered. Palatine Ins. Co. *v.* Co., 13 N. M. 241, 82 P. 363.

Insurer must establish facts showing policy void because in contravention of statute forbidding rebates. McNaughton *v.* Ins. Co., 140 Wis. 214, 122 N. W. 764.

"**When appellee had alleged** and proven the issuance and delivery of the policy to him by appellant for a valuable consideration paid by appellee, the destruction by fire of the property, his ownership thereof at the time of the issuance of the policy and at the time of the fire, and its value at the time of its destruction, that he had made the proofs of loss and demanded payment and the refusal to pay by appellant, appellee had made a case entitling him to recover; and, if any of the terms of the policy had been breached by appellee which would de-

prive him of his right to recover, the burden of so alleging and proving was on appellant. Alamo Fire Insurance Company *v.* Hill, 36 S. W. 102; Allemania Fire Insurance Company *v.* Fred et al., 11 Tex. Civ. App. 311, 32 S. W. 243; Sullivan *v.* Hartford Fire Insurance Company, 34 S. W. 999." Northern Assur. Co. *v.* Applegate (Tex. Civ.), 145 S. W. 295.

519-50 Independent T. Co. *v.* Ins. Office, 173 Fed. 564; Nabors *v.* Ins. Co., 84 Ark. 184, 105 S. W. 92; Haughton *v.* Ins. Co., 165 Ind. 32, 73 N. E. 592; Scott *v.* Ins. Co., 56 Misc. 545, 107 N. Y. S. 124; Huestess *v.* Ins. Co., 88 S. C. 31, 70 S. E. 403; Schofield *v.* Ins. Co., 79 Vt. 161, 64 A. 1107; Rochester G. Ins. Co. *v.* Assn., 107 Va. 701, 60 S. E. 93; Ferrandini *v.* Assn., 151 Wash. 442, 99 P. 6.

While proof of habits of insured might be admissible if confined to period immediately, succeeding date of application they are not admissible if remote where defendant relied on misrepresentations as to use of intoxicants. Brotherhood, etc. *v.* Cole, 108 Ark. 527, 158 S W. 153.

Under statutes.—Mutual L. Ins. Co. *v.* Mullan, 107 Md. 457, 69 A. 385; North Am. A. I. Co. *v.* Sickles, 2 O. C. C. (N. S.) 222.

520-51 Kentucky V. M. & C. Co. *v.* Soc., 146 Fed. 695, 77 C. C. A. 121; Vincent *v.* Assn., 77 Conn. 281, 58 A. 963; Metropolitan Life Ins. Co. *v.* Wolford, 49 Ind. App. 392, 97 N. E. 444; Johnson *v.* Ins. Co., 120 Mo. App. 80, 96 S. W. 697; Mohr *v.* Ins. Co., 32 R. I. 177, 78 A. 554.

Effect of statute.—Barker *v.* Ins. Co., 198 Mass. 375, 84 N. E. 490.

Order of proof.—Vincent *v.* Assn., 77 Conn. 281, 58 A. 963, *dist.* Hennessy *v.* Ins. Co., 74 Conn. 699, 52 A. 490.

Presumption statements in application are prima facie true has no other effect than to make it insurer's duty to proceed with evidence of their untruthfulness; it is not to be regarded with the evidence in final determination of issues. Vincent *v.* Assn., 77 Conn. 281, 58 A. 963. *Contra*, Tuckman *v.* Brotherhood, 132 Ia. 64, 106 N. W. 350.

520-52 Roedel *v.* Ins. Co., 176 Mo. App. 584, 160 S. W. 44.

521-55 Ajum Goolam, Hossen & Co. *v.* Ins. Co., (1901) App. Cas. (Eng.) 362.

521-57 Arkansas M. L. Ins. Co. *v.* Stuckney, 85 Ark. 33, 106 S. W. 203; Denver L. Ins. Co. *v.* Crane, 19 Colo. App. 191, 73 P. 875 (representations in application being set up and relied upon in answer); Gate City F. Ins. Co. *v.* Thornton, 5 Ga. App. 585, 63 S. E. 638; Sinclair *v.* Co., 132 Ia. 549, 107 N. W. 184 (fidelity bond); Brotherhood of Printers D. & P. *v.* Barton, 46 Ind. App. 160, 92 N. E. 64; Barker *v.* Ins. Co., 136 Mich. 626, 99 N. W. 866; Keeton *v.* Nat. Union (Mo. App.), 165 S. W. 1107; Huguenin *v.* C. Co., 94 S. C. 138, 77 S. E. 751; Madden *v.* Ins. Co., 70 S. C. 295, 49 S. E. 855; First Nat. Bk. *v.* Cleland, 36 Tex. Civ. 478, 82 S. W. 337 (must show fire occurred when iron safe clause required books to be kept in safe); Norwich Soc. *v.* Cheaney (Tex. Civ.), 128 S. W. 1163; Port Blakely Co. *v.* Ins. Co., 50 Wash. 657, 97 P. 781; Denoyer *v.* Acc. Co., 145 Wis. 450, 130 N. W. 475.

"It is no part of an insured's duty to negative a condition subsequent. The authorities are practically agreed in holding that the burden of proving the fraud is on the insurer." Benanti *v.* Ins. Co., 86 Conn. 15, 84 A. 109.

522-58 Mahoney *v.* Ins. Co., 3 O. N. P. (N. S.) 246.

"**Because of the practical inconvenience** of compelling proof of all of the conditions precedent in a policy of insurance the plaintiff under our rule may, upon proof of his interest, the issuance of the policy to him, the loss and compliance with the proofs of loss, rest upon the legal presumption that these conditions are prima facie established and the case made out. Thereupon the defendant may offer its proof of the several breaches which it may have pleaded, and these the plaintiff may in turn rebut. This burden of proof never shifts. Upon the whole evidence it is where it was at the beginning, upon the plaintiff, to prove his compliance with the terms and conditions precedent of the policy." Benanti *v.* Ins. Co., 86 Conn. 15, 84 A. 109.

522-61 Fidelity & D. Co. *v.* Co., 45 Colo. 443, 103 P. 383; Kinney *v.* Ins. Soc. (Ia.), 141 N. W. 706; Adams *v.* Ins. Co., 135 Ia. 299, 112 N. W. 671; Roseberry *v.* Assn., 142 Mo. App. 552, 121 S. W. 785; Silver *v.* Assur. Corp., 61 Wash. 593, 112 P. 666.

523-63 *Contra*, Cone *v.* Ins. Co., 139 Ia. 205, 117 N. W. 207, statute.

523-64 Cone *v.* Ins. Co., supra.

523-66 Insured must show the violation of terms of policy did not contribute to the loss. Krell *v.* Ins. Co., 127 Ia. 748, 104 N. W. 364, statute.

523-67 Franklin L. Ins. Co. *v.* McAfee, 28 Ky. L. R. 676, 90 S. W. 216; Shoemaker *v.* Co., 75 Neb. 587, 106 N. W. 316; Bowen *v.* Ins. Co., 20 S. D. 103, 104 N. W. 1040.

524-68 Fidelity Mut. Ins. Co. *v.* Click, 93 Ark. 162, 124 S. W. 764; Mutual I. Ins. Co. *v.* Perkins, 81 Ark. 87, 98 S. W. 709; Globe Mut. L. Ins. Co. *v.* Meyer, 118 Ill. App. 155; Gibson *v.* Ins. Co. (Mo. App.), 168 S. W. 818; Cauthen *v.* Ins. Co., 80 S. C. 264, 61 S. E. 428. See Helbig *v.* Ins. Co., 120 Ill. App. 58; Lakka *v.* Brotherhood (Ia.), 143 N. W. 513; Boulware *v.* Ins. Co., 176 Mo. App. 593, 159 S. W. 761.

Conclusive evidence under code so as to make policy binding, and evidence that payment was by note and the lapse of policy by non-payment under another provision cannot be shown. Noble *v.* Ins. Co. (S. D.), 146 N. W. 606.

Receipt may be contradicted by parol evidence. Gruen *v.* Ins. Co., 169 Mo. App. 161, 152 S. W. 407.

Receipt for any premium subsequent to first is prima facie evidence of payment of previous premiums. Hanson *v.* Ins. Co., 78 Neb. 421, 113 N. W. 114.

Sworn denial of execution of receipt because of lack of authority of officer to sign it when it was executed does not render receipt inadmissible. United Moderns *v.* Pistole, 38 Tex. Civ. 422, 86 S. W. 377.

Presumption credit was extended arises from delivery of policy acknowledging receipt of premium if payment not demanded. Cauthen *v.* Ins. Co., 80 S. C. 264, 61 S. E. 428; Raulet *v.* Ins. Co., 157 Cal. 213, 107 P. 292. Is conclusive under statute so far as to preclude insurer from denying effectiveness of policy. Peever M. Co. *v.* Assn., 23 S. D. 1, 119 N. W. 1008.

524-69 Note or due bill attached to policy and bearing its date is admissible as part of contract to show credit given. Globe Mut. L. I. Co. *v.* Meyer, 118 Ill. App. 155.

524-70 Security Ins. Co. *v.* Kleutsch, 169 Fed. 104, 95 C. C. A. 432; Grand Lodge *v.* Whithead, 87 Ark. 115, 112 S. W. 199; Supreme Council *v.* Haas, 116 Ill. App. 587; Sovereign Camp *v.* Cox (Ind. App.), 76 N. E. 888; Wait *v.* Workers, 140 Ia. 648, 119 N. W. 72; Kidder *v.* Commandery, 192 Mass. 326, 78 N. E. 469; Strand *v.* Loyal Am., 122 Minn. 118, 142 N. W. 10; Keeton *v.* Nat. Union (Mo. App.), 165 S. W. 1107; Bange *v.* Supreme Council (Mo. App.), 161 S. W. 652; Burchard *v.* Assn., 139 Mo. App. 606, 123 S. W. 973; Gruwell *v.* Council, 126 Mo. App. 496, 104 S. W. 884 (identical clause of contract pleaded as ground of forfeiture must be shown); Kinney *v.* Yeoman, 15 N. D. 21, 106 N. W. 44; Patton *v.* Women, etc., 65 Or. 33, 131 P. 521; Olympia B. Co. *v.* Assn., 53 Wash. 16, 101 P. 371 (and it was past due).

See Berryhill *v.* Supreme **Tribe, 167 Mo.** App. 530, 152 S. W. 93.

Evidence of note given in partial payment of premium and never paid is admissible on part of defendant. Stephenson *v.* Ins. Co., 139 Ga. 82, 76 S. E. 592; Sexton *v.* Ins. Co., 160 N. C. 597, 76 S. E. 535.

Weight of evidence.—Stand *v.* Greissman, 91 N. Y. S. 278.

Uncancelled receipt in insurer's possession for premium which matured prior to death of insured does not justify setting aside verdict. Hanson *v.* Ins. Co., supra.

Payment of waiver may be inferred by failure to repudiate contract or recognize it. Mauck *v.* Ins. Co., 4 Penne. (Del.) 325, 54 A. 952.

525-71 Locomotive Eng., etc. Assn. *v.* Bobo, 8 Ga. App. 149, 68 S. E. 842; Supreme Council *v.* Haas, 116 Ill. App. 587; Johnson *v.* Ins. Co., 166 Mo. App. 261, 148 S. W. 631; Burchard *v.* Assn., 139 Mo. App. 606, 123 S. W. 973 (technical compliance with rules required); Kinney *v.* Yeomen, 15 N. D. 21, 106 N. W. 44; Moore *v.* Everitt, 20 Pa. Super. 13.

Insurer's assessment book.—Moore *v.* Rohrbacker, 30 Pa. Super. 568.

Evidence of making and payment of previous assessments, competent to show course of dealing and meaning of contract. Moore *v.* Rohrbacker, supra.

Insurer must show existence of emergency authorizing it to increase assessments. Hicks *v.* Assn., 117 Tenn. 203, 96 S. W. 962.

526-72 Supreme Council *v.* Haas, 116 Ill. App. 587; Auspitz *v.* Soc., 62 Misc. 469, 115 N. Y. S. 109; Duffy *v.* Ins. Co., 142 N. C. 103, 55 S. E. 79; Van Etten *v.* Grand Lodge, 72 N. J. L. 61, 60 A 210. See Seely *v.* Ins. Co., 73

N. H. 339, 61 A. 585, 72 N. H. 49, 55 A. 425; Reynolds *v.* Co., 30 Pa. Super. 456.

Application of guaranty fund to premiums.—On insurer's failure to produce its books plaintiff may introduce such evidence as is available to show condition of its guaranty fund and its availability to meet the demands of his policy. Sworn reports of insurer to state insurance departments, admissions of its officers, expert testimony and mortality tables are competent. Provident, etc. Soc. *v.* King, 216 Ill. 416, 75 N. E. 166.

By-law making certificate of officer conclusive notice mailed is void, if not requiring he certify of his knowledge. Duffy *v.* Ins. Co., 142 N. C. 103, 55 S. E. 79.

Mutual insurer's indebtedness to insured in excess of sum due from him on account of dues and arising out of a loss insured against may be shown to defeat claim of forfeiture. Frieman *v.* Ins. Co., 120 Mo. App. 430, 97 S. W. 186.

Notice must be shown to have been given in accordance with insurer's charter. Non-receipt of it is some evidence it was not mailed. Miner *v.* Ins. Co., 153 Mich. 594, 117 N. W. 211.

526-73 Sleight *v.* Council, 133 Ia. 379, 107 N. W. 183; Kinney *v.* Yeomen, 15 N. D. 21, 106 N. W. 44 (good standing alleged).

Reinsurer must show member of reinsured company was not in good standing therein. Brown *v.* Assn., 224 Ill. 576, 79 N. E. 949; Bolles *v.* Assn., 220 Ill. 400, 77 N. E. 198 (statute).

Clear intention to enforce a forfeiture must be proved. Lane *v.* Yeomen, 125 Ill. App. 406.

Burden of proving reinstatement of member is on his beneficiary. Woodmen *v.* Jackson, 80 Ark. 419, 97 S. W. 673; Kennedy *v.* Fraternity, 36 Mont. 325, 92 P. 971. If forfeiture is followed by death beneficiary must show facts occurring during membership which avoid the forfeiture. Brotherhood *v.* Dee, 101 Tex. 597, 111 S. W. 396.

Entries in books.—United Moderns *v.* Pistole, 38 Tex. Civ. 422, 86 S. W. 377.

Right of foreign insurer.—Gruwell *v.* Council, 126 Mo. App. 496, 104 S. W. 884; Loyal Americans *v.* McClanahan, 50 Tex. Civ. 256, 109 S. W. 973.

Burden on plaintiff to show material changes in defendant's by-laws since his certificate issued. United Moderns *v.* Rathbun, 104 Va. 736, 52 S. E. 352. Insured must overcome prima facie evidence resulting from act of insurer in accordance with contract. Underwood *v.* Woodmen, 141 Ia. 240, 119 N. W. 610.

527-74 National F. Ins. Co. *v.* Co., 119 Ill. App. 67; German M. F. Ins. Co. *v.* Weikel, 153 Ky. 288, 155 S. W. 373; Richardson *v.* Ins. Co., 109 Me. 117, 82 A. 1005; Lanier *v.* Ins. Co., 142 N. C. 14, 54 S. E. 786 (consent of beneficiary to cancellation of policy must be shown); Waters *v.* Co., 144 N. C. 663, 57 S. E. 437.

Evidence insufficient to show cancellation where it was not proved that the company accepted the return of the policy. Michigan Mut. Life Ins. Co. *v.* Parker, 10 Ga. App. 697, 73 S. E. 1096.

527-75 Beneficiary must show financial condition of insured justified payment of premiums in excess of sum fixed by statute limiting amount which may be annually expended for insurance and proceeds of which shall not be subject to creditors' claim. Red River N. Bk. *v.* DeBerry, 47 Tex. Civ. 96, 105 S. W. 998.

527-76 Supreme Lodge *v.* Baker, 163 Ala. 518, 50 S. 958 (one vice or moral delinquency cannot be shown to prove existence of another not necessarily connected with it as cause or effect); Schwartz *v.* Neighbors, 12 Cal. App. 595, 108 P. 51; Phoenix Ins. Co. *v.* McAtee, 33 Ind. App. 106, 70 N. E. 947; Knapp *v.* Yeomen, 149 Ia. 137, 126 N. W. 336; Fidelity Mut. L. Ins. Co. *v.* Miazza, 93 Miss. 18, 46 S. 817; Brock *v.* Ins. Co., 156 N. C. 112, 72 S. E. 213.

Intemperance.—Evans *v.* Modern Woodmen, 147 Mo. App. 155, 129 S. W. 487.

Foreign census reports inadmissible to show age if apparently unreliable. Maher *v.* Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496.

Incumbrance on property.—Smith *v.* Ins. Co., 21 S. D. 433, 113 N. W. 94.

Insured's health.—Perry *v.* Ins. Co., 143 Mich. 290, 106 N. W. 860. Insured's knowledge of his health may be shown by proof of physician's statements to him. Bryant *v.* Woodmen, 86 Neb. 372, 125 N. W. 621.

Apprehension of incendiarism.—Contrary to declarations prior to applica-

tion, admissible. Donley *v.* Ins. Co., 184 N. Y. 107, 76 N. E. 914. See Wells *v.* Ins. Co., 117 App. Div. 346, 101 N. Y. S. 1059.

Insurer bound by testimony of its witness to effect another policy obtained by plaintiff is void. Nabors *v.* Ins. Co., 84 Ark. 184, 105 S. W. 92.

Evidence of over-valuation of property covered by open policy, immaterial unless risk increased. Ins. Co. *v.* Osborn, 26 Ind. App. 88, 59 N. E. 181.

Non-medical witnesses may testify as to healthy appearance of insured notwithstanding physicians testified he might have disease alleged and be apparently healthful. Rondinella *v.* Ins. Co., 24 Pa. Super. 293; Baldi *v.* Ins. Co., 18 Pa. Super. 599.

Good faith of insured immaterial as to warranties.—Glidden *v.* Co., 198 Mass. 109, 84 N. E. 143; Perry *v.* Ins. Co., 143 Mich. 290, 106 N. W. 860; Collins *v.* Ins. Co., 32 Mont. 329, 80 P. 609, 1092; Schofield *v.* Ins. Co., 79 Vt. 161, 64 A. 1107. But see Keiper *v.* Soc., 159 Fed. 206.

Occupation of insured.—Collins *v.* Ins. Co., 32 Mont. 329, 80 P. 609.

Materiality of warranty cannot be affected by evidence. Collins *v.* Ins. Co., supra.

Insurer not precluded from showing transactions with deceased by usual statute. Erickson *v.* Woodmen, 43 Wash. 242, 86 P. 584.

Intemperance.—Masons' Union L. Assn. *v.* Brockman, 26 Ind. App. 182, 59 N. E. 401.

Report of examining physician competent on question of insured's health at time policy issued. Perry *v.* Ins. Co., 143 Mich. 290, 106 N. W. 860.

Prior application to another insurer admissible to prove falsity of warranty as to age. Taylor *v.* A. O. U. W., 101 Minn. 72, 111 N. W. 919.

Sale of land not shown by copy of tax list and notice of sale. Am. Ins. Co. *v.* Dannehower, 89 Ark. 111, 115 S. W. 950.

530-77 Walden *v.* Assn., 89 Neb. 546, 131 N. W. 962; Schofield *v.* Ins. Co., 79 Vt. 161, 64 A. 1107; Phila. U. Agency *v.* Brown (Tex. Civ.), 151 S. W. 899 (other insurance).

Expert opinion of physician as to health of assured. Keatley *v.* Grand Fraternity, 2 Boyce (Del.) 511, 82 A. 294.

Certificate of death.—Krapp *v.* Ins. Co., 143 Mich. 369, 106 N. W. 1107; Keefe *v.* Assn., 37 App. Div. 276, 55 N. Y. S. 827. Are evidence only of things required to be stated. McKinley *v.* Ins. Co., 6 Misc. 9, 26 N. Y. S. 63.

Evidence insured's negligence caused loss is immaterial in action on fire policy. German Ins. Co. *v.* Goodfriend, 30 Ky. L. R. 218, 97 S. W. 1098.

Credit for premium. — Cauthen *v.* Ins. Co., 80 S. C. 264, 61 S. E. 428.

Non-expert opinions as to disease of which person died, competent. Krapp *v.* Ins. Co., 143 Mich. 369, 106 N. W. 1107. But *comp.* Grattan *v.* Ins. Co., 80 N. Y. 281.

531-78 See Netherlands F. Ins. Co. *v.* Barry, 103 App. Div. 581, 93 N. Y. S. 164.

Evidence insufficient to show vested right in life policy.—Baker *v.* Baker, 110 App. Div. 660, 97 N. Y. S. 455.

Failure to return unearned premium may be testified to by wife of insured. Hartford Ins. Co. *v.* Becton (Tex. Civ.), 124 S. W. 474.

532-79 Provident, etc. Society *v.* Whayne, 29 Ky. L. R. 160, 93 S. W. 1049; Carson *v.* Ins. Co., 1 Pa. Super. 572.

Under statutes a substantial compliance may be shown. Security Mut. Ins. Co. *v.* Berry, 81 Ark. 92, 98 S. W. 693.

532-81 National F. Ins. Co. *v.* Duncan, 44 Colo. 472, 98 P. 634.

Intent to deceive.—Rochester G. Ins. Co. *v.* Schmidt, 151 Fed. 681; Helm *v.* Ins. Co., 132 Ia. 177, 109 N. W. 605.

532-82 Application of insured to other insurer. Speiser *v.* Ins. Co., 119 Wis. 530, 97 N. W. 207.

False statements by insured, about time policy applied for tend to prove general plan to defraud. Provident, etc. Society *v.* Whayne, 29 Ky. L. R. 160, 93 S. W. 1049.

534-85 Scott *v.* Ins. Co., 56 Misc 545, 107 N. Y. S. 124. See Schwartz *v.* Neighbors, 12 Cal. App. 595, 108 P. 51. Illness intermediate medical examination and delivery of policy may be shown, latter providing it should not take effect unless insured in "sound health" on its date. Packard *v.* Ins. Co., 72 N. H. 1, 54 A. 287.

534-86 As a chronic disease.—Met. Life Ins. Co. *v.* Hayslett, 111 Va. 107, 68 S. E. 256.

Addiction to use of intoxicants for long

time prior to the application may be shown, as may plea of guilty to drunkenness. Langdeau *v.* Ins. Co., 194 Mass. 56, 80 N. E. 452.

Evidence of ill health at the time of giving the warranty. Brashear *v.* American Patriots, 161 Mo. App. 566, 144 S. W. 163.

Remoteness.—Declarations concerning health six or seven years before application, not too remote. Hews *v.* Soc., 143 Fed. 850, 74 C. C. A. 676.

In Iowa a statute estops insurer by its examiner's report from setting up insured not in condition of health required by policy at time of its delivery. See Roe *v.* Ins. Assn., 137 Ia. 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144.

Evidence as to appearance of a person in the early stage of Bright's disease is immaterial. Metropolitan L. I. Co. *v.* Betz, 44 Tex. Civ. 557, 99 S. W. 1140.

Ability to attend to business and proof insured did attend thereto is competent on question of his being diseased or in need of medical help. Valentini *v.* Ins. Co., 106 App. Div. 487, 94 N. Y. S. 758.

534-87 Life Ins. Co. *v.* Hairston, 108 Va. 832, 62 S. E. 1057.

"The verdict of the jury was to the effect that her representations were true, and that her health was good. The verdict on the last proposition was sustained by substantial evidence, although the preponderance was in favor of the appellant. Notwithstanding evidence that she had consumption in 1904, there was much evidence to show she was in good health in 1908, when she became a member of the appellant order." Cundiff *v.* Royal Neighbors, etc., 162 Mo. App. 117, 144 S. W. 128.

535-88 Nophsker *v.* Council, 215 Pa. 631, 64 A. 788. See Murphy *v.* Ins. Co., 205 Pa. 444, 55 A. 19.

Report of insurer's physician competent on question of insured's health at time of examination. Perry *v.* Ins. Co., 143 Mich. 290, 106 N. W. 860.

Rejection by fraternal association, not competent to show misrepresentation was made in stating no application for insurance had been rejected by any "company." Lyon *v.* United Moderns, 148 Cal. 470, 83 P. 804.

Cause for rejection of insured's application by another insurer may be shown to prove his good faith in giving negative answer to question. Provident, etc. Society *v.* Whayne, 29 Ky. L. R. 160, 93 S. W. 1049.

Proof of rejection of application by another insurer of a person of same name as insured must be accompanied by proof of identity. Fidelity T. & T. Co. *v.* Ins. Co., 213 Pa. 415, 63 A. 51. Identity of names is presumptive evidence of identity of persons. Spiegel *v.* Ins. Co., 96 N. Y. S. 201.

Insurer's reputation for accepting members regardless of health and insured's knowledge thereof may be proved on issue as to materiality of a representation. Home Soc. *v.* Shelton (Tex. Civ.), 85 S. W. 320.

Proof of liability for assessment where policy lost.—See Moore *v.* Everitt, 20 Pa. Super. 13.

Local custom respecting time of closing stores may be proved to show compliance with iron-safe clause. Capital F. Ins. Co. *v.* Kaufman, 91 Ark. 310, 121 S. W. 289.

535-89 Denver L. Ins. Co. *v.* Crane, 19 Colo. App. 191, 73 P. 875 (demand for premium); Ranta *v.* Tent, 97 Minn. 454, 107 N. W. 156 (of physician who investigated cause of death); Eames *v.* Ins. Co., 134 Mo. App. 331, 114 S. W. 85; Bange *v.* Legion, 128 Mo. App. 461, 105 S. W. 1092 (officer's knowledge of address of members); Wightman *v.* Lodge, 121 Mo. App. 252, 98 S. W. 829; Exchange Bk. *v.* Ins. Co., 109 Mo. App. 654, 83 S. W. 534 (answer to former action on policy); Paddock-H. I. Co. *v.* Ins Co., 118 Mo. App. 85, 93 S. W. 358 (seaworthiness); Jacoby *v.* Ins. Co., 10 Pa. Super. 366; Ulysses Elgin B. Co. *v.* Ins. Co., 20 Pa. Super. 384; Fidelity T. & T. Co. *v.* Ins. Co., 213 Pa. 415, 63 A. 51; Wheaton *v.* Ins. Co., 20 S. D. 62, 104 N. W. 850; Aetna Ins. Co. *v.* Brannon (Tex. Civ.), 91 S. W. 614 (statement policy "was all right" not a conclusion).

Admissions.—Providence, etc. Society *v.* King, 216 Ill. 416, 75 N. E. 166; National Council *v.* Dillen, 212 Ill. 320, 72 N. E. 367. By co-defendants, not binding. Herzog *v.* Ins. Co., 36 Wash. 611, 79 P. 287.

Delivery of policy by agent charged with ascertaining whether insured in good health, and after inquiry, affirmative evidence. Lee *v.* Ins. Co., 203 Mass. 299, 89 N. E. 429.

Report filed by insurer, competent to show its financial condition. King *v.*

Ins. Co., 133 Mo. App. 612, 114 S. W. 63.

535-90 Woodmen *v.* Jackson, 80 Ark. 419, 97 S. W. 673; Smith *v.* Ins. Co., 200 Mass. 50, 85 N. E. 841; Bruger *v.* Ins. Co., 129 Wis. 281, 109 N. W. 95 (not conclusive though unqualified).

Fraternal and "Old Line Policies" distinguished as to admission of declarations by the insured. Libre *v.* Brotherhood, 168 Ill. App. 328.

Declarations of insured as evidence against beneficiary. Knights of Maccabees *v.* Shields, 156 Ky. 270, 160 S. W. 1043.

Declarations of deceased father of insured concerning his age, competent though made at time application made. Mutual R. L. Ins. Co. *v.* Jay, 50 Tex. Civ. 165, 109 S. W. 1116.

Declarations of one claiming to be insured's beneficiary, as his affianced wife, competent, as that engagement broken. Grand Lodge *v.* Mackey (Tex. Civ.), 104 S. W. 907.

Answer to original complaint not admission of facts set up in amended pleading. Moore *v.* Everitt, 20 Pa. Super. 13.

535-91 Ross-Lewin *v.* Ins. Co., 20 Colo. App. 262, 78 P. 305, declarations as to intended action must be specific.

535-93 Logia Suprema, etc. *v.* Aguire, 14 Ariz. 390, 129 P. 503; Daley *v.* Trainmen, 7 O. N. P. (N. S.) 238 (applying rule to benefit society); Met. L. Ins. Co. *v.* O'Grady, 115 Va. 830, 80 S. E. 743; Life Ins. Co. *v.* Hairston, 108 Va. 832, 62 S. E. 1057; Johnston *v.* Assn., 136 Wis. 528, 117 N. W. 1019. See McEwen *v.* Ins. Co., 23 Cal. App. 694, 39 P. 242.

Testimony of physician as to condition of insured four years prior to application is inadmissible. Johnson *v.* Ins. Co., 123 Minn. 453, 144 N. W. 218.

Does not apply to mutual benefit or fraternal associations in which beneficiary has no vested interest in the certificate. Knights of Maccabees *v.* Shield, 156 Ky. 270, 160 S. W. 1043, rehear. *denied,* 157 Ky. 35, 162 S. W. 778.

Admission of answers made to medical examiner by insured after application is proper to show wilful mis-statement Kennedy *v.* Ins. Co., 177 Ill. App. 50

Rule as to declarations and res gestae is not strictly observed when former made in explanation of declarant's physical condition; if not remote in point of time from date of policy they may be proved. Haughton *v.* Ins. Co., 165 Ind. 32, 73 N. E. 592. Declarations of insured, not made in extremis or as part of res gestae to a party in interest, inadmissible to show who was his beneficiary. Grand Lodge *v.* Mackey (Tex. Civ.), 104 S. W. 907. Hospital records not competent to prove declarations of insured as to time health had been bad. Metropolitan L. I. Co. *v.* Vojtech, 116 Ill. App. 271.

536-94 Mason's **U. L. I. Assn.** *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493; Lindahl *v.* Court, 100 Minn. 87, 110 N. W. 358.

536-95 Hews *v.* Soc., 143 Fed. 850, 74 C. C. A. 676; McEwen *v.* Ins. Co., 23 Cal. App. 694, 139 P. 242; Denver L. I. Co. *v.* Crane, 19 Colo. App. 191, 73 P. 875; Taylor *v.* A. O. U. W., 101 Minn. 72, 111 N. W. 919; Ogden *v.* W. O. W., 78 Neb. 806, 113 N. W. 524.

Admissions competent against executor.—Finn *v.* Ins. Co., 98 App. Div. 588, 90 N. Y. S. 697.

Agent's admissions.—Continental Ins Co. *v.* Cummings, 98 Tex. 115, 81 S. W. 705.

536-96 Masons' Union L. I. Assn. *v* Brockman, 20 Ind. App. 206, 50 N. E. 493; Met. L. Ins. Co. *v.* O'Grady, 115 Va. 830, 80 S. E. 743.

Insured's knowledge of habits, presumed.—Langdeau *v.* Ins. Co., 194 Mass. 56, 80 N. E. 452.

Conclusive presumption of knowledge of by-laws of society arises if they are made part of member's certificate. Loyd *v.* Woodmen, 113 Mo. App. 19, 87 S. W. 530; Sterling *v.* Jurisdiction, 28 Utah 505, 80 P. 375.

Agent's declarations of knowledge of plaintiff's uninsurability, not competent unless part of res gestae. Standard L. & A. Ins. Co. *v.* Holloway, 24 Ky. L. R. 1856, 72 S. W. 796.

537-97 Union L. Ins. Co. *v.* Jameson, 31 Ind. App. 28, 67 N. E. 199; Western T. Assn. *v.* Munson, 73 Neb. 858, 103 N. W. 688; Puls *v.* Lodge, 13 N. D. 559, 102 N. W. 165; Nophsker *v.* Council, 215 Pa. 631, 64 A. 788.

537-98 Patterson *v.* Co., 25 App. Cas. (D. C.) 46, if part of res gestae.

Narration to layman inadmissible if not of res gestae. Travelers' P. Assn. *v.* Roth (Tex. Civ.), 108 S. W. 1039.

537-1 Mutual R. Ins. Co. *v.* Jay (Tex. Civ.), 101 S. W. 545.

537-2 Adams *v.* Ins. Co., 135 Ia. 299,

112 N. W. 651; Continental C. Co. *v.* Owen, 38 Okla. 107, 131 P. 1084.

538-3 Krell *v.* Ins. Co., 127 Ia. 748, 104 N. W. 364; Stauch *v.* Assn., 127 App. Div. 350, 111 N. Y. S. 540; Prudential Ins. Co. *v.* Alley, 104 Va. 356, 51 S. E. 812.

538-4 Traders' Ins. Co. *v.* Dobbins, 114 Tenn. 227, 86 S. W. 383, usage of dealers to keep dynamite.

539-5 Boruszweski *v.* Co., 186 Mass. 589, 72 N. E. 250.

Custom of insurer to send notice of time for payment of premium may be shown. Bango *v.* Legion, 128 Mo. App. 461, 105 S. W. 1092; Knoebel *v.* Ins Co., 135 Wis. 424, 115 N. W. 1094. But see Baldwin *v.* Ins. Co., 107 Ky. 356, 54 S. W. 13, 92 Am. St. 362; Pelican A. Co. *v.* Schildknecht, 32 Ky. L. R. 1257, 108 S. W. 312.

Authority of agent's clerk may be shown by proof of customary mode in which he transacted business. German F. I. Co. *v.* Co., 15 Ind. App. 623, 43 N. E. 41; Provident A. Soc. *v.* Bailey, 118 Ky. 36, 80 S. W. 452.

539-10 United Order *v.* Hooser, 160 Ala. 334, 49 S. 354; Aronson *v.* Ins. Co., 9 Cal. App. 473, 99 P. 537; Wallace *v.* Ins. Co., 10 Ga. App. 517, 73 S. E. 698; Knapp *v.* Brotherhood, 139 Ia. 136, 117 N. W. 298 (if there is specific denial); Shawnee F. Ins. Co. *v.* Knerr, 72 Kan. 385, 83 P. 611; Crook *v.* Ins. Co., 112 Md. 268, 75 A. 388; Conner *v.* Life Assn., 171 Mo. App. 364, 157 S. W. 814; Western N. Ins. Co. *v.* Marsh, 34 Okla. 414, 125 P. 1094; Spann *v.* Ins. Co., 83 S. C. 262, 65 S. E. 232; Security L. & A. Co. *v.* Underwood (Tex. Civ.), 150 S. W. 293.

Evidence showing knowledge by officers of a lodge that a member was engaged in saloon business is admissible to show waiver and also evidence as to actions of officers in regard to others engaged in that business. Zeman *v.* N. A. Union, 263 Ill. 304, 105 N. E. 22.

Evidence of insurer's custom to present premium receipt as demand for payment, which had been done in case of other policies held by plaintiff and others is admissible. Mutual, etc. Ins. Co. *v.* Davis (Tex. Civ.), 154 S. W. 1184.

Conduct of company in not promptly, openly, and emphatically declaring a forfeiture is admissible. Keys *v.* Nat. Council, 174 Mo. App. 671, 161 S. W. 345.

Burden on insured extends to all facts essential to constitute proof of waiver —as that the agent, who was also agent for insured, had in mind, when he acquired knowledge in latter capacity and did act alleged to be a waiver, fact he was acting for insurer. That may be shown by circumstantial evidence. Foreman *v.* Assn., 104 Va. 694, 52 S. E. 337.

Notice of other insurance is not to be presumed from fact of mailing duly stamped letter to insurer, receipt of which denied. Home Ins. Co. *v.* Marple, 1 Ind. App. 411, 27 N. E. 633.

In Kansas it is presumed agent authorized to contract may make any waiver within usual scope of business if insured does not know it is beyond scope of authority conferred; insurer is presumed to know all facts communicated to agent. Despain *v.* Ins. Co., 81 Kan. 722, 106 P. 1027.

541-12 Supreme Tribe of Ben Hur *v.* Lennert, 178 Ind. 122, 98 N. E. 115.

541-15 Commercial Ins. Co. *v.* Belk, 88 Ark. 506, 115 S. W. 172; Merchants' F. Ins. Co. *v.* McAdams, 88 Ark. 550, 115 S. W. 175; Arkansas Ins. Co. *v.* Witham, 82 Ark. 226, 101 S. W. 721 (notwithstanding non-waiver agreement); Capital F. Ins. Co. *v.* Montgomery, 81 Ark. 508, 99 S. W. 687; National F. Ins. Co. *v.* Duncan, 44 Colo. 472, 98 P. 634; Prudential Ins. Co. *v.* Hummer, 36 Colo. 208, 84 P. 61; Eagle F. Co. *v.* Lewallen, 56 Fla. 246, 48 S. 947; Veal *v.* Ins. Co., 6 Ga. App. 721, 65 S. E. 714; Allen *v.* Assur. Co., 14 Ida. 728, 95 P. 829; Jones *v.* Knights, 236 Ill. 113, 86 N. E. 191; Western U. Assn. *v.* Hankins, 221 Ill. 304, 77 N. E. 447 (offer to pay loss as fixed by adjuster, waives right to appraisement); Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873; Arispe M. Co. *v.* Ins. Co., 141 Ia. 607, 127 N. W. 122; Farmers' A. Ins. Co. *v.* Ferguson, 78 Kan. 791, 98 P. 231; Conn. F. Ins. Co. *v.* Moore, 154 Ky. 18, 156 S. W. 867; St. Landry, etc. Co. *v.* Ins. Co., 113 La. 1053, 37 S. 967 (notwithstanding policy provides waivers must be written); Perry *v.* Ins. Co., 143 Mich. 290, 106 N. W. 860; Exchange Bk. *v.* Ins. Co., 109 Mo. App. 654, 83 S. W. 534 (agent's offer to "knock off," not a proposition to compromise); Dolan *v.* Royal Neighbors, 123 Mo. App. 147, 100 S. W. 498;

Downs *v.* Knights of Columbus, 76 N. H. 165, 80 A. 227; Modlin *v.* Ins. Co., 151 N. C. 35, 65 S. E. 605; Berry *v.* Ins Co., 83 S. C. 13, 64 S. E. 859; Equitable L. Assn. Society *v.* Ellis (Tex. Civ.), 137 S. W. 184; British Am. A. Co. *v.* Francisco (Tex. Civ.), 123 S. W. 1144 (though policy stipulates otherwise); Fire Assn. *v.* Masterson (Tex. Civ.), 83 S. W. 49; Frost *v.* Ins. Co., 77 Vt. 407, 60 A. 803 (it may be shown restrictions in policy upon agent's authority to waive conditions removed); Staats *v.* Assn., 55 Wash. 51, 104 P. 185. It is otherwise under North Carolina standard policy; waiver must be shown by writing on or attached to policy. Black *v.* Ins. Co., 148 N. C. 169, 61 S. E. 672. And under a policy which provides all waivers shall be indorsed. Western A. Co. *v.* Doull, 12 Can. Sup. 446; Shannon *v.* Ins. Co., 2 Ont. App. (Can.) 396; St. Paul F. & M. Ins. Co. *v.* Penman, 151 Fed. 961, 81 C. C. A. 151; Northern A. Co. *v.* Assn., 183 U. S. 308; Meigs *v.* A. Co., 134 Fed. 1021, 68 C. C. A. 249.

Evidence that defendant's agents had maps in their offices showing the occupancy of the building was competent to show waiver. Van Slochem *v.* Villard, 154 App. Div. 166, 138 N. Y. S. 855.

Evidence tending to show waiver by defendant's local agent is inadmissible if there be no offer to show satisfaction by the company where there is no writing attached to policy as required. Rife *v.* Underwriters, 204 Fed. 32, 122 C. C. A. 346.

Knowledge or notice of condition existing under prior policy on same property cannot be proved, though it and policy sued upon are substantially alike. Kentucky V. M. & C. Co. *v.* Soc., 146 Fed. 695, 77 C. C. A. 121.

Expenditure of money in preparing additional proofs demanded may be proved to show waiver of warranty. Prudential Ins. Co. *v.* Hummer, 36 Colo. 208, 84 P. 61.

Agent's knowledge of insured's condition.—Rearden *v.* Ins. Co., 79 S. C. 526, 60 S. E. 1106.

Waiver of conditions.—Collins *v.* Ins. Co., 32 Mont. 329, 80 P. 609.

Limitation of agent's authority to waive cannot be shown unless knowledge of it brought to insured. Fire Assn. *v.* Masterson (Tex. Civ.), 83 S. W. 49.

Order of proof.—Rearden *v.* Ins. Co., 79 S. C. 526, 60 S. E. 1106.

542-16 Metropolitan Ins. Co. *v.* Williamson, 174 Fed. 116, 98 C. C. A. 90; Raulet *v.* Ins. Co., 157 Cal. 213, 107 P. 292 (conduct of parties shown); Jones *v.* Knights, 236 Ill. 113, 86 N. E. 191; Triple T. B. Assn. *v.* Wood, 78 Kan. 812, 98 P. 219; Leland *v.* Samaritans, 111 Minn. 207, 126 N. W. 728; Keys *v.* Nat. Council, 174 Mo. App. 671, 161 S. W. 345; Lally *v.* Ins. Co., 75 N. H. 188, 72 A. 208; Markgraf *v.* Fellowship, 134 App. Div. 984, 119 N. Y. S. 665; Seidel *v.* Soc., 138 Wis. 66, 119 N. W. 818. *Contra* if insured contends policy had not lapsed at time of fire, but had been reinstated by payment after due, but prior to fire. Continental Ins. Co. *v.* Hargrove, 131 Ky. 837, 116 S. W. 256.

See Day *v.* Supreme Forest, 174 Mo. App. 260, 156 S. W. 721.

Oral evidence cannot be received to establish waiver contrary to terms of policy. St. Paul Ins. Co. *v.* Penman, 151 Fed. 961, 81 C. C. A. 151; Gish *v.* Ins. Co., 16 Okla. 59, 87 P. 869. *Contra*, People's F. Ins. Assn. *v.* Goyne, 79 Ark. 315, 96 S. W. 365.

Waiver of limitation for suing may be shown by correspondence concerning claim between plaintiff and defendant's agents, and between said agents themselves. Lynchburg C. M. Co. *v.* Ins. Co., 149 Fed. 954, 79 C. C. A. 464. Papers found among those of deceased, purporting to come from insurer's general agent, and bearing his signature attached with rubber stamp, according to proved custom, admissible to prove waiver. Union Cent. L. Ins. Co. *v.* Washburn, 158 Ala. 169, 48 S. 475.

Customary time for remitting premiums by agent may be proved to show prompt payment not insisted upon. Crowder *v.* Co., 115 Mo. App. 535, 91 S. W. 1016.

Proof of one transaction is immaterial. Suess *v.* Ins. Co., 193 Mo. 564, 91 S. W. 1041.

Previous policies issued by insurer on same risk, but for higher rate, inadmissible to show waiver in existing policy. Columbian Exp. S. Co. *v.* Co., 220 Ill. 172, 77 N. E. 128.

Agreement for credit inferred from dealings of parties. Kelly *v.* Ins. Co., 106 App. Div. 352, 94 N. Y. S. 601; Cornell *v.* Ins. Co., 120 App. Div. 459, 104 N. Y. S. 999.

Knowledge of truth of misrepresentations by insured as to his rejection by other insurers cannot be shown by proof of the existence of a bureau among companies through which members supplied with notice of rejections unless it is shown rejecting companies were served by such bureau. Providence, etc. Soc. *v.* Whayne, 29 Ky. L. R. 160, 93 S. W. 1049.

Evidence of custom generally, inadmissible against distinct notice in particular case. Brown *v.* Co., 207 Pa. 609, 56 A. 1125.

Waiver of iron safe clause.—Riley *v.* Ins. Co., 117 Mo. App. 229, 92 S. W. 1147.

543-17 Capital F. Ins. Co. *v.* Montgomery, 81 Ark. 508, 99 S. W. 687; Lyon *v.* United Moderns, 148 Cal. 470, 83 P. 804 (applying rule to mutual fraternal societies where application precedes membership); Schwartz *v.* Neighbors, 12 Cal. App. 595, 108 P. 51; Fair *v.* Ins. Co., 5 Ga. App. 708, 63 S. E. 812; Allen *v.* Co., 14 Ida. 728, 95 P. 829; Farrenkoph *v.* Holm, 237 Ill. 94, 86 N. E. 702; Iowa L. Ins. Co. *v.* Haughton (Ind. App.), 87 N. E. 702; U. S. Health, etc. Co. *v.* Clark, 41 Ind. App. 345, 83 N. E. 760; Roe *v.* Ins. Assn., 137 Ia. 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144 (statute); Gardner *v.* Ins. Co., 31 Ky. L. R. 89, 101 S. W. 908; Perry *v.* Ins. Co., 143 Mich. 290, 106 N. W. 860; Nute *v.* Ins. Co., 109 Mo. App. 585, 83 S. W. 83; Higgens *v.* Nobles, 83 Neb. 504, 120 N. W. 137; Pearlstine *v.* Ins. Co., 74 S. C. 246, 54 S. E. 372 (parol waivers prohibited); Smith *v.* Ins. Co., 21 S. D. 433, 113 N. W. 94 (over-valuation); Continental Ins. Co. *v.* Cummings, 98 Tex. 115, 81 S. W. 705; Aetna Ins. Co. *v.* Brannon (Tex. Civ.), 91 S. W. 614; Home C. Soc. *v.* Shelton (Tex. Civ.), 85 S. W. 320 (plaintiff illiterate); Modern Woodmen *v.* Lawson, 110 Va. 81, 65 S. E. 509.

Evidence that insured made full statement to medical examiner is admissible to show he made no misrepresentation when he denied ever having had certain kinds of rheumatism. Nat. Council *v.* Sealey (Tex. Civ.), 162 S. W. 455.

Agent's knowledge of a fact may be shown by evidence, inter alia, fact generally known in locality in which he lived. Continental Ins. Co. *v.* Cummings, 98 Tex. 115, 81 S. W. 705 Knowledge acquired by agent years before policy issued, immaterial unless it is shown to have been acquired as insurer's agent. Continental Ins. Co. *v.* Cummings, supra.

544-18 Wilder *v.* Co., 150 Fed. 92, 80 C. C. A. 46; Capital F. Ins. Co. *v.* Montgomery, 81 Ark. 508, 99 S. W. 687.

544-19 Home Ins. Co. *v.* Sylvester, 25 Ind. App. 207, 57 N. E. 991; Fire Assn. *v.* Yeagley, 31 Ind. App. 387, 72 N. E. 1035; Modern Woodmen *v.* Angle, 127 Mo. App. 91, 104 S. W. 297.

Partial explanation of terms of policy by agent may be shown, he having assumed to fully explain it. Hartford L. Ins. Co. *v.* Hope, 40 Ind. App. 354, 81 N. E. 595, 1088.

544-20 Bowditch *v.* Soc., 193 Mass. 565, 79 N. E. 788; Rinker *v.* Ins. Co., 214 Pa. 608, 64 A. 82 (notice of limitation on agent's power given).

545-21 Rinker *v.* Ins. Co., 214 Pa. 608, 64 A. 82, inability of applicant to read not being shown. *Contra*, Maloney *v.* Union, 143 Ill. App. 615.

545-22 McKinley *v.* Ins. Co., 211 Fed. 951 (C. C. A.); Banes *v.* Co., 142 Fed. 957, 74 C. C. A. 127; Fidelity & D. Co. *v.* Co., 45 Colo. 443, 103 P. 383; German Am. Ins. Co. *v.* Hyman, 42 Colo. 156, 94 P. 27, 16 L. R. A. (N. S.) 77; Tonsor *v.* Fidelity Co., 158 Ill. App. 515; Roch *v.* Men's Assn. (Ia.), 145 N. W. 479; O'Connor *v.* Ins. Co., 169 Mo. App. 150, 152 S. W. 396; Clark *v.* Ins. Co. (Neb.), 147 N. W. 1118; Hammond Pack. Co. *v.* Howey, 129 N. Y. S. 1062; Knerll *v.* Co., 119 N. Y. S. 744; Schindler *v.* Co., 109 N. Y. S. 723; Tolmie *v.* Co., 95 App. Div. 352, 88 N. Y. S. 717, 183 N. Y. 581, 76 N. E. 1110 (no opinion); Warmcastle *v.* Ins. Co., 201 Pa. 302, 50 A. 941.

Production of policy with proof and notice of death is prima facie case and the burden is on defendant to show any unpaid premiums. Harris *v.* Ins. Co., 248 Mo. 304, 154 S. W. 68.

Evidence as to whether other companies having policies covering the same property had paid claims under those policies is inadmissible. Cosmopolitan Fire Ins. Co. *v.* Gingold, 3 Ala. App. 537, 57 S. 263.

The circumstantial evidence necessary to establish cause of death need not be such a nature nor the circumstances so related to each other as not fairly

and reasonably to permit any other conclusion than that death was so caused to be drawn from them; a mere preponderance of evidence is enough. Travelers' P. Assn. *v.* Roth (Tex. Civ.), 108 S. W. 1039, *appr.* Rippey *v.* Miller, 46 N. C. 479, 62 Am. Dec. 178, and *disap.* Asbach *v.* R. Co., 74 Ia. 248, 37 N. W. 182; Neal *v.* R. Co., 129 Ia. 5, 105 N. W. 197, 2 L. R. A. (N. S.) 905; R. Co. *v* Rhoades, 64 Kan. 553, 68 P. 58.

Evidence as to disease which caused incapacity to labor need not be specific if incapacity shown. Jennings *v.* Co., 44 Colo. 68, 96 P. 982.

545-23 Royal Ex. A. *v.* Co., 166 Fed. 32, 92 C. C. A. 66, to show right to abandon. See Spalding *v.* Ins. Co., 10 Haw. 190.

546-24 Heagany *v.* Union, 143 Mich. 186, 106 N. W. 700; Bradley *v.* Woodmen, 146 Mo. App. 428, 124 S. W. 69.

547-25 Illinois Com. Men's Assn. *v.* Parks, 179 Fed. 794, 103 C. C. A. 286; Preferred Acc. Ins. Co. *v.* Fielding, 35 Colo. 19, 83 P. 1013; Wilkinson *v.* Ins. Co., 240 Ill. 205, 88 N. E. 550; Moore *v.* Assn., 166 Ill. App. 38; Central Acc. Ins. Co. *v.* Spence, 126 Ill. App. 32; Clark *v.* Travel, etc. Assn., 156 Ia. 201, 135 N. W. 1114; Aetna L. I. Co. *v.* Milward, 118 Ky. 716, 82 S. W. 364; Noyes *v.* Assn., 190 Mass. 171, 76 N. E. 665; McAuley *v.* Co., 37 Mont. 256, 96 P. 131; Goodes *v.* Order, etc., 174 Mo. App. 330, 156 S. W. 995; Hardenbergh *v.* Assr. Corp., 80 Misc. 522, 141 N. Y. S. 502; Hill *v.* Ins. Co., 209 Pa. 632, 59 A. 262; Keefer *v.* Ins. Co., 201 Pa. 448, 51 A. 366.

Burden discharged if death by unexplained violent external means is shown. Preferred Acc. Ins. Co. *v.* Fielding, 35 Colo. 19, 83 P. 1013.

"**The burden** was at all times upon the plaintiff to show, not only the death of the assured, but that it was caused by violent, accidental, and external means. Taylor *v.* Pacific Mutual Life, 110 Ia. 621, 82 N. W. 326. The appearance of the wound would clearly support the finding that the cause of the wound was violent and external. Jenkins *v.* Hawkeye Commercial Assn., 147 Ia. 113, 124 N. W. 199, 30 L. R. A. (N. S.) 1181." Caldwell *v.* Traveling Men's Assn., 156 Ia. 327, 136 N. W. 678.

Burden sustained.—"On the Sunday of his death, C. with his son who was then about 15 years of age, had breakfast after 9 o'clock in the morning, and dinner at a little after 1 o'clock. Soon after dinner, the two went to the Elks' lodge-room, and in a few minutes after reaching there they both went to the pool for a bath. C. had been in the water a few minutes, and was walking towards his son, when he made a slight jump forward, made a few faint motions with his hands, and sank. He was taken from the pool five or ten minutes later, dead. An autopsy showed him to have been in perfect health in life, and the opinion of several medical experts was that the cold water had produced a shock from which C.'s system did not react; that his vitality was thereby reduced and a fainting spell brought on which caused him to sink; and that he was drowned. While the appellant earnestly insists that the evidence is insufficient to sustain a finding that C. was drowned, we think otherwise. The testimony of the physicians, based largely on the autopsy, it is true, together with the testimony of the eyewitnesses, was ample to take the case to the jury on that question." Clark *v.* Traveling Men's Assn., 156 Ia. 201, 135 N. W. 1114.

547-26 Evidence as to title to the property inadmissible where plea does not raise question. Union M. I. Co. *v.* Tr. Co. (Ala.), 65 S. 78.

548-27 German Am. Ins. Co. *v.* Brown, 75 Ark. 251, 87 S. W. 135.

548-28 Schornak *v.* Ins. Co., 96 Minn. 299, 104 N. W. 1087.

548-29 Richmond C. Co. *v.* Co., 159 Fed. 985; German-Am. Ins. Co. *v.* Hyman, 42 Colo. 156, 94 P. 27, 16 L. R. A. (N. S.) 77; Stephens *v.* Assn., 139 Mo. App. 369, 123 S. W. 63; Fidelity & C. Co. *v.* Bank (Okla.), 142 P. 312; General Acc. Ins. Co. *v.* Hayes, 52 Tex. Civ. 272, 113 S. W. 990. And see Jordan *v.* Ins. Co., 151 Ia. 73, 130 N. W. 177.

Reinsurer must show a particular case not within its contract, admission to that effect being qualified by a reference to its by-laws and constitution. Young *v.* Assn., 126 Mo. App. 325, 103 S. W. 557.

Exceptions and provisos.—See Cassidy *v.* Co., 99 Me. 399, 59 A. 549; Sohier *v.* Ins. Co., 11 Allen (Mass.) 336; Kingsley *v.* Ins. Co., 8 Cush. (Mass.) 393 ("on condition applicant take all risk from cotton wastes," a proviso).

549-30 Admitted seaworthiness presumed to continue. Paddock H. I. Co. *v.* Ins. Co., 118 Mo. App. 85, 93 S. W. 358.

549-32 Travelers' P. Assn. *v.* Fawcett (Ind. App.), 104 N. E. 991.

549-33 Mongeau *v.* Ins. Co., 128 La. 654, 55 S. 6; Lockway *v.* Woodmen, 121 Minn. 170, 141 N. W. 1; Martin *v.* Modern Woodmen, 158 Mo. App. 468, 139 S. W. 231; Queatham *v.* Woodmen, 148 Mo. App. 33, 127 S. W. 651; Hart *v.* Maccabees, 83 Neb. 423, 119 N. W. 679; Haywood *v.* Grand Lodge (Tex. Civ.), 138 S. W. 1194; Sovereign Camp of Woodmen *v.* Jackson (Tex. Civ.), 138 S. W. 1137; Brahmsteadt *v.* Mystic Workers, etc., 152 Wis. 580, 140 N. W. 354.

Presumption of death arises after seven years without information concerning the absent person. Heagany *v.* Union, 143 Mich. 186, 106 N. W. 700. Such presumption, based upon statute, conclusive upon absentee and those claiming under him. New York Ins. Co. *v.* Chittenden, 134 Ia. 613, 112 N. W. 96. Presumption not sustained because proper inquiries not made of relative of insured. Modern Woodmen *v.* Graber, 128 Ill. App. 585. In determining whether death is to be presumed it is proper to receive evidence of inquiries made for missing man, widely extended publication of offer of reward for information of him and other like facts and circumstances. Modern Woodmen *v.* Gerdom, 77 Kan. 401, 94 P. 788.

549-34 Fenton *v.* Assn., 139 Ia. 166, 117 N. W. 251; Junior Order United American Mechanics *v.* Ringo, 146 Ky. 602, 143 S. W. 22.

550-35 Bakalars *v.* Co., 141 Wis. 43, 122 N. W. 721.

Where in a policy it is stipulated there can be no recovery for an injury intentionally inflicted by any other person the burden is on the insurer to prove that the injury is within the exception. Gaynor *v.* Ins. Co., 12 Ga. App. 601, 77 S. E. 1072.

550-36 Continental C. Co. *v.* Todd, 82 Ark. 214, 101 S. W. 168; Jenkins *v.* Assn., 147 Ia. 113, 124 N. W. 199; Noyes *v.* Assn., 190 Mass. 171, 76 N. E. 665; Garcelon *v.* Assn., 195 Mass. 531, 81 N. E. 201; Kephart *v.* Co., 17 N. D. 380, 116 N. W. 349; North Am. Acc. Ins. Co. *v.* Gulick, 1 O. C. C. (N. S.) 477.

550-37 McClure *v.* Assn., 141 Ia. 370, 118 N. W. 269; Meadows *v.* Ins. Co., 120 Mo. 76, 31 S. W. 578, 50 Am. St. 427; Starr *v.* Ins. Co., 41 Wash. 199, 83 P. 113 (rule declared "by almost universal authority").

550-38 McDermott *v.* Hawkeye, etc. Assn. (Ia.), 139 N. W. 472; Campbell *v.* Co., 23 Ky. L. R. 1999, 66 S. W. 1033; Reddick *v.* Acc. Co. (Mo. App.), 165 S. W. 351.

551-39 Supreme Lodge *v.* Lipscomb, 50 Fla. 406, 39 S. 637; Vernon *v.* Assn. (Ia.), 138 N. W. 696; Kirkpatrick *v.* Ins. Co., 141 Ia. 74, 117 N. W. 1111; Thompson *v.* Assn., 167 Mich. 31, 132 N. W. 554; Price *v.* Soc., 37 Pa. Super. 299.

551-40 Preferred Acc. Ins. Co. *v.* Fielding, 35 Colo. 19, 83 P. 1013; Allen *v.* Travelers' Assn. (Ia.), 143 N. W. 574.

No presumption as between disease and accidental cause. Keefer *v.* Ins. Co., 201 Pa. 448, 51 A. 366; Taylor *v.* Co., 208 Pa. 439, 57 A. 830.

If the only question is whether death was accidental the burden of proof is on plaintiff to show the injury was not self-inflicted. Bemick *v.* Men's Assn., 175 Ill. App. 511.

"**It has been repeatedly held that**, in the absence of direct evidence on the subject, a presumption arises that the wound was not intentionally inflicted either by the assured or by another. This presumption is almost the equivalent of a presumption that the wound was inflicted through accidental means. The authorities, however, stop short of announcing the presumption in this later form. They do hold, however, that the presumption first stated is available to the plaintiff as affirmative evidence; and that an inference may be drawn therefrom by the triers of fact that the wound was caused by accidental means as the only other alternative." Caldwell *v.* Assn., 156 Ia. 327, 136 N. W. 678, et many cases.

552-41 National Union *v.* Fitzpatrick, 133 Fed. 694, 66 C. C. A. 524; Woodmen of World *v.* Wright (Ala. App.), 60 S. 1006; Grand Lodge *v.* Banister, 80 Ark. 190, 96 S. W. 742; Ross-Lewin *v.* Ins. Co., 20 Colo. App. 262, 78 P. 305; Georgia, etc. Co. *v.* McCrame, 12 Ga. App. 855, 78 S. E. 1115; Wilkinson *v.* Ins. Co., 240 Ill. 205, 88 N. E. 550, 144 Ill. App. 38 (if death by external and violent

means proved presumption against suicide and murder involves prima facie showing of death by accidental means); Modern Woodmen *v.* Kincheloe (Ind. App.), 91 N. E. 976; Sovereign Camp *v.* Bridges, 7 Ind. Ty. 433, 104 S. W. 672; Equitable L. I. Co. *v.* Hebert, 37 Ind. App. 373, 76 N. E. 1023; Wood *v.* Woodmen (Ia.), 147 N. W. 888; Van Norman *v.* Brotherhood, 143 Ia. 536, 121 N. W. 1080; Tackman *v.* Brotherhood, 132 Ia. 64, 106 N. W. 350 (presumption considered in deciding question; but see 520-51, supra); Vicars *v.* Ins. Co., 158 Ky. 1, 164 S. W. 106; Am. B. Assn. *v.* Stough, 26 Ky. L. R. 1093, 83 S. W. 126; Bohaker *v.* Ins. Co., 215 Mass. 32, 102 N. E. 342, 46 L. R. A. (N. S.) 543; Ferris *v.* Loyal Americans, 152 Mich. 314, 116 N. W. 445; O'Connor *v.* Woodmen, 110 Minn. 18, 124 N. W. 454; Kornig *v.* Ind. Co., 102 Minn. 31, 112 N. W. 1039; Lindahl *v.* Court, 100 Minn. 87, 110 N. W. 358; Cummings *v.* Woodmen, 170 Mo. App. 194, 155 S. W. 488; Newland *v.* Woodmen, 168 Mo. App. 311, 153 S. W. 1097; Almond *v.* Woodmen, 133 Mo. App. 382, 113 S. W. 695; Norman *v.* Com. Travelers, 163 Mo. App. 175, 145 S. W. 853; Walden *v.* Assn., 89 Neb. 546, 131 N. W. 962; Benard *v.* Home Circle, 161 App. Div. 59, 146 N. Y. S. 232; Cornell *v.* Ins. Co., 120 App. Div. 459, 104 N. Y. S. 999; Thaxton *v.* Ins. Co., 143 N. C. 33, 55 S. E. 419; Soules *v.* Brotherhood, 19 N. D. 23, 120 N. W. 769; Hildebrand *v.* Artisans, 50 Or. 159, 91 P. 542; Bircher *v.* Brotherhood, 25 S. D. 325, 126 N. W. 583; First, etc. Ins. Co. *v.* Jiminez (Tex. Civ.), 163 S. W. 656; Grand Fraternity *v.* Green (Tex. Civ.), 131 S. W. 442; Grand Fraternity *v.* Melton, 102 Tex. 399, 117 S. W. 788; Sovereign Camp *v.* Boehme, 44 Tex. Civ. 159, 97 S. W. 847; Metropolitan L. Ins. Co. *v.* De Vault, 109 Va. 392, 63 S. E. 982; Beard *v.* Ins. Co., 65 W. Va. 283, 64 S. E. 119; Andrews *v.* C. Co., 154 Wis. 82, 142 N. W. 487; Krogh *v.* Brotherhood, 153 Wis. 397, 141 N. W. 276; Cady *v.* Co., 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260; Rohloff *v.* Assn., 130 Wis. 61, 109 N. W. 989.

See Miles *v.* Court of Honor, 173 Ill. App. 187; Tomlinson *v.* Camp (Ia.), 141 N. W. 950; Farnsley's Admrs. *v.* Ins. Co., 156 Ky. 699, 161 S. W. 1111; Aetna Life Ins. Co. *v.* Rustin, 151 Ky. 132, 151 S. W. 366; Newland *v.* Modern Woodmen, 168 Mo. App. 311, 153 S. W. 1097; Benard *v.* Home Circle, 161 App. Div. 59, 146 N. Y. S. 232.

The presumption becomes operative only after the introduction of evidence compatible either with the theory of accidental death or with the theory of suicide. Farnsley's Admr. *v.* Ins. Co., 156 Ky. 699, 161 S. W. 1111.

Evidence held to show death by accident.—Peterson *v.* Ins. Co., 115 Minn. 232, 132 N. W. 277.

Presumption of suicide arising from admission in proofs is not stronger than general presumption against suicide, and does not change burden of proof. Rohloff *v.* Assn., 130 Wis. 61, 109 N. W. 989.

Presumption of law is reinforced by a coincident presumption of fact. Aetna L. Ins. Co. *v.* Milward, 118 Ky. 716, 82 S. W. 364.

Application and weight of presumption. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Carnes *v.* Assn., 106 Ia. 281, 76 N. W. 683, 68 Am. St. 306; Travelers' Ins. Co. *v.* Nicklas, 88 Md. 470, 41 A. 906; Burnham *v.* Co., 117 Mich. 142, 75 N. W. 445; Brown *v.* Ins. Co. (Tenn. Ch. App.), 57 S. W. 415, 51 L. R. A. 252. And whatever presumption exists may, in any case, be overcome, not only by oral testimony, but by reasonable deductions or inferences from facts established. Travelers' Ins. Co. *v.* McConkey, 127 U. S. 661; Supreme Tent *v.* King, 142 Fed. 678, 73 C. C. A. 668; Somerville *v.* Assn., 11 App. Cas. (D. C.) 417; Clement *v.* Clement, 113 Tenn. 40, 81 S. W. 1249; John *v.* Assn., 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587; Agen *v.* Ins. Co., 105 Wis. 217, 80 N. W. 1020, 76 Am. St. 905.

554-42 Supreme Tent *v.* King, 142 Fed. 678, 73 C. C. A. 668; Mutual Life Ins. Co. *v.* Durden, 9 Ga. App. 797, 72 S. E. 295; Prudential Ins. Co. *v.* Dolan, 46 Ind. App. 40, 91 N. E. 970; Lindahl *v.* Court, 100 Minn. 87, 110 N. W. 358; Schrader *v.* Modern Brotherhood, 90 Neb. 683, 134 N. W. 267; Walden *v.* Assn., 89 Neb. 546, 131 N. W. 962; Hardinger *v.* Brotherhood, 72 Neb. 860, 101 N. W. 983, 103 N. W. 74; Rohloff *v.* Assn., 130 Wis. 61, 109 N. W. 989.

Must be shown by clear and satisfactory evidence and a mere preponderance is not enough. South Atl. L. Ins. Co. *v.* Hurt, 115 Va. 398, 79 S. E. 401.

Not with a degree of certainty required

to justify a conviction upon circumstantial evidence in a criminal case, to wit, that "the evidence must be of such character as to exclude with reasonable certainty every other hypothesis than that of death by suicide." Modern Woodmen *v.* Craiger, 175 Ind. 30, 92 N. E. 113.

Great preponderance required. Almond *v.* Woodmen, 133 Mo. App. 382, 113 S. W. 695.

If circumstantial evidence is relied on facts must show there was no reasonable hypothesis of natural or accidental death. Kornig *v.* Co., 102 Minn. 31, 112 N. W. 1039; Lindahl *v.* Court, 100 Minn. 87, 110 N. W. 358; Metropolitan Ins. Co. *v.* De Vault, 109 Va. 392, 63 S. E. 982.

Lack of motive may be shown. National Union *v.* Fitzpatrick, 133 Fed. 694, 66 C. C. A. 524.

Suicide shown.—Supreme Tent *v.* King, 142 Fed. 678, 73 C. C. A. 668; Zearfoss *v.* Union, 102 Minn. 56, 112 N. W. 1044; Hardinger *v.* Brotherhood, 72 Neb. 860, 101 N. W. 983, 103 N. W. 74; White *v.* Ins. Co., 120 App. Div. 260, 105 N. Y. S. 87; Felix *v.* Ins. Co., 216 Pa. 95, 64 A. 903; Grand F. Co. *v.* Melton, 102 Tex. 399, 117 S. W. 788.

Suicide not shown.—Grand Lodge *v.* Banister, 80 Ark. 190, 96 S. W. 742; Ross-Lowin *v.* Ins. Co., 20 Colo. App. 262, 78 P. 305; Sovereign Camp *v.* Bridges, 7 Ind. Ty. 433, 104 S. W. 672; Sovereign Camp *v.* Salmon (Ky.), 120 S. W. 358; Ferris *v.* Loyal Americans, 152 Mich. 314, 116 N. W. 445; Kornig *v.* Ind. Co., 102 Minn. 31, 112 N. W. 1039; Rohloff *v.* Assn., 130 Wis. 61, 109 N. W. 989.

For court or jury?—"It is true that in cases such as this suicide is an affirmative defense, and generally it is a defense that should be submitted to the jury as an issue of fact; but it is not true that an affirmative defense cannot be so clearly and indisputably established that its existence should not be accepted by the court as proved in law. Where all the evidence in a case is of such character that it affords no room for reasonable controversy about an ultimate fact, there can be no issue, and therefore nothing concerning such fact for the triers of fact to determine. In each of the cases cited by plaintiff, there was room in the evidence for a reasonable inference against the fact of suicide, and the issue properly was submitted to the jury." Richey *v.* Woodmen, etc., 163 Mo. App. 235, 146 S. W. 461, *cit.* Almond *v.* Modern Woodmen, 133 Mo. App. 382, 113 S. W. 695; Claver *v.* Woodmen, 152 Mo. App. 155, 133 S. W. 153, and, also, Norman *v.* Order of U. C. T. of America, 163 Mo. App. 175, 145 S. W. 853.

554-43 See Woodmen *v.* Landrum (Ky.), 166 S. W. 598.

554-44 Van Norman *v.* Brotherhood, 143 Ia. 536, 121 N. W. 1080, notwithstanding insured had mental ailment.

554-45 Jenkner *v.* Supreme Tent, 243 Pa. 281, 90 A. 73.

554-47 Kiesewetter *v.* Maccabees, 227 Ill. 48, 81 N. E. 19, body found hanging with rope around neck and statement in proof.

555-48 Hilburn *v.* Ins. Co., 140 Mo. App. 355, 124 S. W. 63; Bode *v.* Ins. Co., 103 Mo. App. 289, 77 S. W. 116.

555-49 Berner *v.* Brotherhood, 154 Ill. App. 27; National Ben. Soc. *v.* Oldham, 70 Kan. 79, 78 P. 163; Reed *v.* Ins. Co., 81 N. J. L. 523, 80 A. 462.

A void award of appraisers is inadmissible. Riddell *v.* Ins. Co. (R. I.), 89 A. 833.

556-52 Fidelity & D. Co. *v.* Co., 45 Colo. 443, 103 P. 383 (embezzlement by employe); Mott *v.* Ins. Co. (Tex. Civ.), 154 S. W. 658.

Loss under credit policy.—See Philadelphia C. Co. *v.* Co., 133 Ky. 745, 118 S. W. 1004.

Intemperance prior to insurance does not prove subsequent intemperance. Sovereign Camp *v.* Salmon (Ky.), 120 S. W. 358.

557-53 "Affirmative proof" is such evidence of truth of matters asserted as tends to establish them, regardless of its character. The condition is complied with by making prima facie showing of facts required to impose liability. Jenkins *v.* Assn., 147 Ia. 113, 124 N. W. 199.

Custom of mutual insurer to pay losses not covered by policies cannot be shown. Sleet *v.* Ins. Co. (Ky.), 113 S. W. 515.

558-54 Fountain *v.* Ins. Co. (Cal.), 117 P. 630; Loomis *v.* Ins. Co., 16 Cal. App. 532, 117 P. 642; Queen Ins. Co. *v.* Van Giesen, 136 Ga. 741, 72 S. E. 41; Young *v.* Assn., 126 Mo. App. 325, 103 S. W. 557.

Stipulations as to form on which proofs

shall be made do not exclude other written evidence. Metropolitan Ins. Co. *v.* McAuley, 134 Ga. 165, 67 S. E. 393

Events occurring after abandonment of vessel may be shown so far as they relate to her pre-existing state, as customary charge for wrecking services performed in attempt to rescue her. Royal Ex. A. *v.* Co., 166 Fed. 32, 92 C. C. A. 66.

Presumption of death arising from continued absence of insured is available to plaintiff though payment of assessments suspended on assumption of death long prior to time presumption arose. Behlmer *v.* A. O. U. W., 109 Minn. 305, 123 N. W. 1071.

559-55 Wilkinson *v.* Ins. Co., 144 Ill. App. 38; Simpkins *v.* Assn., 148 Ia. 543, 126 N. W. 192; Metropolitan Ins. Co. *v.* Maddox (Ky.), 127 S. W. 503 (placing poison on different shelf than that on which usually kept, relevant to show it was mistaken for harmless remedy); McAuley *v.* Co., 37 Mont. 256, 96 P. 131.

Plaintiff's unwillingness to an investigation of cause of fire admissible. Mott *v.* Ins. Co. (Tex. Civ.), 154 S. W. 658.

Intoxication.—Little *v.* Assn., 154 Ia. 440, 134 N. W. 1087.

Drinking habits, standing alone, irrelevant and immaterial. James *v.* Casualty Co., 118 Minn. 146, 136 N. W. 582.

Belief of witness.—In an action on a fire insurance policy, evidence as to witness' belief as to cause of fire was immaterial. Citizens' Mut. Fire Ins. Co. *v.* Bridge Co., 116 Md. 422, 82 A. 372.

Action on fidelity bond.—U. S. F. & G. Co. *v.* Co., 148 Fed. 353, 78 C. C. A. 345.

Demonstrative evidence.—Tackman *v.* Brotherhood, 132 Ia. 64, 106 N. W. 350.

Absence of motive to commit suicide, weighty circumstance. Kornig *v.* Co., 102 Minn. 31, 112 N. W. 1039.

Animals killed by lightning.—Freeman *v.* Ins. Co., 121 Mo. App. 532, 97 S. W. 225.

Insured's habits may be shown on issue as to cause of death. Grand Lodge *v.* Banister, 80 Ark. 190, 96 S. W. 742; Wilkinson *v.* Ins. Co., 240 Ill. 205, 88 N. E. 550 (also temperament); Furbush *v.* Co., 133 Mich. 479, 95 N. W. 551, 131 Mich. 234, 91 N. W. 135, 100 Am. St. 582.

Pecuniary condition of insured may be proved on issue of suicide. Fidelity & C. Co. *v.* Freeman, 109 Fed. 847, 48 C. C. A. 692, 54 L. R. A. 680; Furbush *v.* Co., 133 Mich. 479, 95 N. W. 551, 131 Mich. 234, 91 N. W. 135, 100 Am. St. 582; Kornig *v.* Co., 102 Minn. 31, 112 N. W. 1039; Goldschmidt *v.* Ins. Co., 134 App. Div. 475, 119 N. Y. S. 233; Cox *v.* Tribe, 42 Or. 365, 71 P. 73, 95 Am. St. 752, 60 L. R. A. 620; Rohloff *v.* Assn., 130 Wis. 61, 109 N. W. 989.

Voluntary exposure to unnecessary danger.—Dillon *v.* Co., 130 Mo. App. 502, 109 S. W. 89.

Death by accident shown.—Taylor *v.* Co., 208 Pa. 439, 57 A. 830. See National Assn. *v.* Scott, 155 Fed. 92, 83 C. C. A. 652; Thomas *v.* Co., 106 Md. 299, 67 A. 259.

Admissions of insurer's physician competent to show cause of death. Ranta *v.* Supreme Tent, 97 Minn. 454, 107 N. W. 156.

Proofs of loss do not limit details of fact or evidence to circumstances set out. Noyes *v.* Assn., 190 Mass. 171, 76 N. E. 665.

Insured's bodily condition and all that was said or done by him during two weeks intervening between injury and death in relation to his condition may be shown on issue as to whether death resulted from accidental injury. Ward *v.* Ins. Co., 82 Neb. 499, 118 N. W. 70.

Incidental character of physical injury, presumed. Simpkins *v.* Assn., 148 Ia. 543, 126 N. W. 192.

Deficient documentary evidence may be supplemented by other evidence. Metropolitan Ins. Co. *v.* McAuley, 134 Ga. 165, 67 S. E. 393.

Physician's certificate inadmissible if not referred to in proofs. Salts *v.* Ins. Co., 140 Mo. App. 142, 120 S. W. 714.

Preliminary reports of physician to insurer, not competent to show insured's disease. General Acc. Ins. Co. *v.* Hayes, 52 Tex. Civ. 272, 113 S. W. 990.

Relevant facts.—Meily Co. *v.* Ins. Co., 148 Fed. 683, 79 C. C. A. 454 (expressions of hopefulness); Provident, etc. Soc. *v.* Whayne, 29 Ky. L. R. 160, 93 S. W. 1049 (prior to state of health); Goldschmidt *v.* Ins. Co., 134 App. Div.

475, 119 N. Y. S. 233 (mental and physical state just prior to death); Cady *v.* Co., 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260 (res gestae declarations). See Patterson *v.* Co., 25 App. Cas. (D. C.) 46.

559-56 Philadelphia Underwriters Agency *v.* Brown (Tex. Civ.), 151 S. W. 899.

560-57 **Wilfulness in committing suicide** need not be shown. Union C. L. I. Co. *v.* Hollowell, 14 Ind. App. 611, 43 N. E. 277.

Mere evidence that a policy holder was in pecuniary straits at the times he obtained the policy and suffered the injury of itself would be no evidence of an intentional injury, but such evidence, coupled with other facts and circumstances, may form an important and powerful link in an evidentiary chain that will support a reasonable inference that the injury was self inflicted. Ex parte Alexander, 163 Mo. App. 615, 147 S. W. 521.

Previous fires on premises in question cannot be proved, it not being contended insured caused them. Colonial M. F. I. Co. *v.* Ellinger, 112 Ill. App. 302.

Previous statements by plaintiff.—Palatine Ins. Co. *v.* Co., 13 N. M. 241, 82 P. 363.

Defendant may furnish missing part of stipulated proof if plaintiff fails to do so. Hoffman *v.* Ins. Co., 134 App. Div. 978, 119 N. Y. S. 1128.

560-60 Evidence of plaintiff's financial condition when loss occurred, competent to rebut charge of fraud. Palatine Ins. Co. *v.* Co., 13 N. M. 241, 82 P. 363.

561-61 Meily Co. *v.* Ins. Co., 148 Fed. 683, 79 C. C. A. 454.

561-65 U. S. L. Ins. Co. *v.* Vocke, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65; Genna *v.* Casualty Co., 167 Ill. App. 413; Lundholm *v.* Mystic Workers, 164 Ill. App. 472; Boeck *v.* Woodmen (Ia.), 143 N. W. 999; Tomlinson *v.* Camp (Ia.), 141 N. W. 950; Mittelstadt *v.* Woodmen, 143 Ia. 186, 121 N. W. 803.

561-66 Pac. M. L. Ins. Co. *v.* McCabe, 157 Ky. 270, 162 S. W. 1136; Aetna L. I. Co. *v.* Milward, 118 Ky. 716, 82 S. W. 364 (reviewing cases on both sides); Queatham *v.* Woodmen, 148 Mo. App. 33, 127 S. W. 651 (testimony incompetent; verdict not competent to show cause of death; otherwise as to fact of death); Boehme *v.* Woodmen, 36 Tex. Civ. 501, 85 S. W. 444.

See Krogh *v.* Brotherhood, 153 Wis. 397, 141 N. W. 276.

Record of the board of health not admissible. Brotherhood of Painters, etc. *v.* Barton, 46 Ind. App. 160, 92 N. E. 64, *foll.* Craiger *v.* Modern Woodmen, etc., 40 Ind. App. 279, 80 N. E. 429, holding that a coroner's verdict, although attached to proofs of death made by the beneficiary in conformity to blanks furnished by the company, was not admissible in evidence.

Verdict of coroner's jury does not per se make prima facie case for insurer. Grand Lodge *v.* Banister, 80 Ark. 190, 96 S. W. 742.

Findings of coroner, without jury, inadmissible. Kinney *v.* Yeomen, 15 N. D. 21, 106 N. W. 44.

561-67 Whitney Est. Co. *v.* Co., 155 Cal. 521, 101 P. 911; Knapp *v.* Brotherhood, 139 Ia. 136, 117 N. W. 298; Erie B. Co. *v.* Ins. Co., 81 O. St. 1, 89 N. E. 1065 (binding as to mortgagee though he was not a party to, and had no notice of, appraisement); Graham *v.* Ins. Co., 75 O. St. 374, 79 N. E. 959. See Western U. Assn. *v.* Hankins, 221 Ill. 304, 77 N. E. 447; Townsend *v.* Ins. Co., 86 App. Div. 323, 83 N. Y. S. 909, 178 N. Y. 634, 71 N. E. 1140 (no opinion).

Award pursuant to verbal submission may be discredited by either verbal or documentary evidence by one who denies he was a party to it. Levy *v.* Ins. Co., 58 W. Va. 546, 52 S. E. 449. Award, conclusive until set aside Mayer *v.* Co., 124 App. Div. 241, 108 N. Y. S. 711. Insured may present evidence to appraisers. Harth *v.* Ins. Co., 31 Ky. L. R. 180, 102 S. W. 242.

562-68 Bolte *v.* Assn., 23 S. D. 240, 121 N. W. 773; North British, etc. Ins. Co. *v.* Edmundson, 104 Va. 486, 52 S. E. 350. See Lindahl *v.* I. O. F., 100 Minn. 87, 110 N. W. 378, 377 Am. St. 666, 8 L. R. A. (N. S.) 910; Markham *v.* I. O. O. F., 78 Neb. 295, 110 N. W. 638.

562-69 Rochester German Ins. Co. *v.* Schmidt, 151 Fed. 681, Phoenix Ins. Co. *v.* McAtee, 33 Ind. App. 198, 70 N. E. 947; Helm *v.* Ins. Co., 132 Ia. 177, 109 N. W. 695; Lundwick *v.* Ins. Co., 128 Ia. 376, 104 N. W. 429; Amusement Synd. Co. *v.* Ins. Co., 87 Kan. 367, 116 P. 620, rehear. *denied*, 88 Kan. 616, 118 P. 76; Farley *v.* Ins. Co., 148 Wis. 622,

134 N. W. 1054. See Citizens' S. Bk. *v.* Ins. Co. (Vt.), 86 A. 1056.

Assessor's schedule inadmissible where no return had been made that year. Kelley *v.* Ins. Co., 262 Ill. 158, 104 N. E. 188.

Cost of construction.—Teter *v.* Ins. Co. (W. Va.), 82 S. E. 201.

Market value.—State Mut. Ins. Co. *v.* Cathey (Tex. Civ.), 153 S. W. 935.

Preliminary "proofs of loss"—ex parte statements of plaintiff—should be admitted at the trial only when necessary, and then with proper caution to the jury against considering them as evidence of the fact. Mut. Fire Ins. Co. *v.* Ritter, 113 Md. 163, 77 A. 388, *cit.* earlier cases.

Cost evidence of value.—Glaser *v.* Ins. Co., 47 Misc. 89, 93 N. Y. S. 524.

563-70 Liverpool, etc. R. Co. *v.* McFadden, 170 Fed. 179, 95 C. C. A. 429 (as contradistinguished from time fire started); Lundvick *v.* Ins. Co., 128 Ia. 376, 104 N. W. 429; Central Glass Co. *v.* Ins. Co., 130 La. 18, 57 S. 538; Howerton *v.* Ins. Co., 105 Mo. App. 575, 80 S. W. 27; Orr, etc. Co. *v.* Co., 77 N. J. L. 749, 73 A. 541 (bill for property sold insured, not admissible); Delaware Ins. Co. *v.* Hill (Tex. Civ.), 127 S. W. 283 (value when insured in connection with proof of no change). See Hartford Ins. Co. *v.* Becton (Tex. Civ.), 124 S. W. 474.

Expert may give cost of replacing machinery. Sharp *v.* Ins. Co., 164 Mo. App. 475, 147 S. W. 154.

A memorandum made by the adjuster at time of his investigation, held admissible to show the point at which the investigation ceased, but not to show that the items were correct. Chamberlain *v.* Ins. Co., 177 Ala. 516, 58 S. 267.

564-71 *Contra*, Oklahoma, etc. Assn. *v.* McCorkle, 21 Okla. 606, 97 P. 270, statute.

Amount paid by insurer for loss of property, not conclusive evidence of value as between insured and third party in suit for insurer's benefit in part. Verdon *v.* Co., 69 N. J. L. 598, 55 A. 99.

564-72 Delaware Ins. Co. *v.* Hills (Tex. Civ.), 127 S. W. 283.

564-74 Furlong *v.* Ins. Co., 136 Ia. 468, 113 N. W. 1084 (inventories by both parties); Cohen *v.* Ins. Office, 198 N. Y. 140, 91 N. E. 265; Wells W. Co. *v.* Ins. Co., 209 Pa. 488, 58 A. 894; Smith *v.* Ins. Co., 21 S. D. 433, 113 N. W. 94.

Verified proofs of loss may be used as basis for testimony as to value of property. Bruger *v.* Ins. Co., 129 Wis. 281, 109 N. W. 95.

565-75 Testimony as to value of goods destroyed is competent, at least where false swearing and fraud set up, though based upon what witness saw in storehouse. Prudential F. Ins. Co. *v.* Alley, 104 Va. 356, 51 S. E. 812.

Manner in which loss arrived at may be shown by plaintiff to meet charge of fraud in making proofs. Cohen *v.* Ins. Office, 198 N. Y. 140, 91 N. E. 265.

Amount insured paid in settlement of claims of consignors whose property had been stolen, immaterial in action on policy covering loss by larceny or burglary. Monahan *v.* Co., 114 N. Y. S. 862.

Loss under indemnity policy.—An employe whose fidelity has been guaranteed may testify of amount collected for his employer. Supreme Ruling *v.* Co., 114 App. Div. 689, 99 N. Y. S. 1033. Entries made by him in course of duties, admissible. Lancashire Ins. Co. *v.* Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. 475; Bk. *v.* Bk., 128 N. C. 366, 38 S. E. 908, 83 Am. St. 682; Goldman *v.* Co., 125 Wis. 390, 104 N. W. 80.

565-76 Fidelity & C. Co. *v.* Cooper, 137 Ky. 544, 126 S. W. 111; Starr *v.* Ins. Co., 41 Wash. 199, 83 P. 113.

Verified tax list by insured, inadmissible to contradict his testimony. German M. Ins. Co. *v.* Niewedde, 11 Ind. App. 624, 39 S. E. 534.

566-77 Modern Woodmen *v.* Cecil, 108 Md. 357, 70 A. 331.

Adjustment is prima facie proof of amount due. German F. Ins. Co. *v.* Gibbs, 42 Tex. Civ. 407, 92 S. W. 1068, 96 S. W. 760.

566-78 Coscarella *v.* Ins. Co., 175 Mo. App. 130, 157 S. W. 873.

Statements in proofs over plaintiff's signature, if there without his knowledge, may be contradicted. Prudential Ins. Co. *v.* Hummer, 36 Colo. 208, 84 P. 61.

566-79 In an action upon a benefit certificate, statements made by an assured are competent evidence against the beneficiary. Lundholm *v.* Mystic Workers, 164 Ill. App. 472.

Where the defense is suicide and proof shows he intended to commit suicide because his wife had been unfaithful,

the evidence of the good character of the wife for chastity is admissible on the theory that a husband with a sound mind would not charge his wife with infidelity when there was no evidence. Ga. L. Ins. Co. *v.* McCrame, 12 Ga. App. 853, 78 S. E. 1115.

Declarations of insured looking to investigations of cause of loss, admissible to meet subsequent charge of complicity in causing it, previous declarations being shown in support of that issue. O'Toole *v.* Ins. Co., 159 Mich. 187, 123 N. W. 795.

567-81 Insurance Office *v.* Co., 72 Kan. 41, 82 P. 513 (combustion of wool); Travelers' Ins. Co. *v.* Bingham, 32 Ky. L. R. 233, 105 S. W. 894; Rathjen *v.* Woodmen, 93 Neb. 629, 141 N. W. 815; Hildebrand *v.* Artisans, 50 Or. 159, 91 P. 542; Madden *v.* Ins. Co., 70 S. C. 295, 49 S. E. 855; Taylor *v.* Woodmen, 42 Wash. 304, 84 P. 867; Bloch *v.* Ins. Co., 132 Wis. 150, 112 N. W. 45 (cause of explosion).

Opinions of experts and non-experts. Metropolitan L. Ins. Co. *v.* Wagner, 50 Tex. Civ. 233, 109 S. W. 1120.

Conclusion is not called for by request to witness to state condition and facial expression of insured. U. S. Health, etc. Co. *v.* Clark, 41 Ind. App. 345, 83 N. E. 760. Inquiry as to habit of insured concerning use of intoxicants does not call for conclusions from witnesses who have knowledge thereof. Taylor *v.* Co., 145 N. C. 383, 59 S. E. 139.

Non-experts may testify whether they had seen or observed certain symptoms of disease in a person. Illinois L. Ins. Co. *v.* De Lang, 30 Ky. L. R. 753, 99 S. W. 616.

Opinion must be based on knowledge or on facts and circumstances testified to by others. Kinney *v.* Yeomen, 15 N. D. 21, 106 N. W. 44.

Opinions as to feasibility of removing goods from building on fire, inadmissible. Ins. Co. *v.* Osborn, 26 Ind. App. 88, 59 N. E. 181.

Non-experts acquainted with value of like property as that burned may testify of its value. Home Ins. Co. *v.* Sylvester, 25 Ind. App. 207, 57 N. E. 991; Helm *v.* Ins. Co., 132 Ia. 177, 109 N. W. 605; Glaser *v.* Ins. Co., 47 Misc. 89, 93 N. Y. S. 524; Tucker *v.* Ins. Co., 58 W. Va. 30, 51 S. E. 86. Owner may give opinion as to value of stock. Smith *v.* Ins. Co., 21 S. D. 433, 113 N. W. 94.

A non-expert may not testify whether insured's conduct indicated he had a certain disease. Taylor *v.* Woodmen, 42 Wash. 304, 84 P. 867. Nor as to cause if facts may be given jury in usual manner. Continental C. Co. *v.* Todd, 82 Ark. 214, 101 S. W. 168. But he may testify as to condition of insured's health at time in question and performance by him of his duties. Fidelity T. & T. Co. *v.* Ins. Co., 213 Pa. 415, 63 A. 51.

Indicia of fire may be testified of. Ins. Office *v.* Co., 72 Kan. 41, 82 P. 513.

568-82 Expert testimony, admissible on question of probabilities of danger and loss to be apprehended from situation of vessel. Royal Ex. A. *v.* Co., 166 Fed. 32, 92 C. C. A. 66.

569-83 Wightman *v.* Lodge, 121 Mo. App. 252, 98 S. W. 829.

569-84 Orient Ins. Co. *v.* Kaptur, 176 Ind. 308, 95 N. E. 230; United States Fire Ins. Co. *v.* Bynum & Co., 143 Ky. 804, 137 S. W. 771; Globe & R. Ins. Co. *v.* Johnson (Ky.), 127 S. W. 765; Aetna L. I. Co. *v.* Milward, 118 Ky. 716, 82 S. W. 364, 68 L. R. A. 285; Mut. F. Ins. Co. *v.* Pickett, 117 Md. 638, 83 A. 1097; Smith *v.* Ins. Co., 200 Mass. 50, 85 N. E. 841; Noyes *v.* Assn., 190 Mass. 171, 76 N. E. 665; Orr, etc. Co. *v.* Co., 77 N. J. L. 749, 73 A. 541; St. Paul Ins. Co. *v.* Mittendorf, 24 Okla. 651, 104 P. 354.

Slight evidence will establish waiver if insured's rights not prejudiced. Breeden *v.* Ins. Co., 23 S. D. 417, 122 N. W. 348.

Action on claim by mutual company, presumed. Winn *v.* Woodmen, 138 Mo. App. 701, 119 S. W. 536.

It is for jury to say whether burden on plaintiff met under policy requiring proof satisfactory to insurer. Traiser *v.* Assn., 202 Mass. 292, 88 N. E. 971.

570-85 North Am. Ins. Co. *v.* Watson, 6 Ga. App. 193, 64 S. E. 693.

570-86 See Ray *v.* Ins. Co. (Ala.), 65 S. 536.

570-88 Coy *v.* Ins. Co., 110 Me. 551, 88 A. 355; Palatine Ins. Co. *v.* Kehoe, 210 Mass. 426, 96 N. E. 1099; Newton *v.* Ins. Co., 125 Wis. 289, 104 N. W. 107.

Evidence of any degree may be sufficient under statute expressing insured need not give such proof as is required in court, but may give best evidence in his power. Da Rin *v.* Co., 41 Mont. 175, 108 P. 649.

570-89 See Supreme F. W. *v.* Knight, 9 Ala. App. 428, 64 S. 196; Preferred Acc. Ins. Co. *v.* Fielding, 35 Colo. 19, 83 P. 1013; Helm *v.* Ins. Co., 132 Ia. 177, 109 N. W. 605; Aetna L. I. Co. *v.* Milward, 118 Ky. 716, 82 S. W. 364; Walker *v.* Assn., 142 Mich. 162, 105 N. W. 597; Jacoby *v.* Ins. So., 10 Pa. Super. 366; Newton *v.* Ins. Co., 125 Wis. 289, 104 N. W. 107.

Physical and mental condition of insured may excuse compliance with terms of accident policy. Reed *v.* Assn., 154 Mich. 161, 117 N. W. 600 (notice); Roseberry *v.* Assn., 142 Mo. App. 552, 121 S. W. 785.

571-90 **An attorney**, representing another insurer whose policy covered the same loss, examining insured and preparing proofs of loss with knowledge of defendant's agent, which proofs were accepted by defendant, may testify to the facts where the defense set up that no proofs of loss had been furnished. Aachen & M. F. Ins. Co. *v.* T. G. Co. (Ala. App.), 64 S. 635.

571-91 Copies of proofs competent if original in possession of insurer and without jurisdiction. Davis *v.* Ins. Co., 5 Pa. Super. 506.

571-92 Supreme Lodge *v.* Baker, 163 Ala. 518, 50 S. 958.

571-95 Queen, etc. Co. *v.* Laster, 108 Ark. 261, 156 S. W. 848.

571-96 Western Assn. *v.* Hankins, 221 Ill. 304, 77 N. E. 447; Melancon *v.* Ins. Co., 116 La. 324, 40 S. 718.

Evidence excusing immediate notice. Edgefield Mfg. Co. *v.* Co., 78 S. C. 73, 58 S. E. 969.

572-99 Good faith of insured in valuing property may be proved by showing source of his information. German Am. Ins. Co. *v.* Brown, 75 Ark. 251, 87 S. W. 135.

572-1 United Commercial Travelers *v.* Sain, 186 Fed. 271, 108 C. C. A. 317; Continental Casualty Co. *v.* Ogburn, 175 Ala. 357, 57 S. 852; Queen, etc. Co. *v.* Laster, 108 Ark. 261, 156 S. W. 848; Am. Ins. Co. *v.* Dannenhower, 89 Ark. 111, 115 S. W. 950; Preferred A. Ins. Co. *v.* Fielding, 35 Colo. 19, 83 P. 1013 (demanding proofs insurer not entitled to); McInturff *v.* Ins. Co., 155 Ill. App. 225, *aff.* P. *v.* R. Co., 247 Ill. 445, 93 N. E. 369; Novak *v.* Ins. Co., 156 Ill. App. 352; Gash *v.* Ins. Co., 153 Ill. App. 31; Penn Mut. L. I. Co. *v* Norcross, 163 Ind. 379, 72 N. E. 132; Griffith *v.* Ins. Co., 143 Ia. 88, 120 N. W. 90; Nichols *v.* Ins. Co., 125 Ia. 262, 101 N. W. 115; Citizens', etc. Co. *v.* Bridge Co., 116 Md. 422, 82 A. 372; Keeton *v.* Nat. Union (Mo. App.), 165 S. W. 1107; Johnson *v.* Ins. Co., 137 Mo. App. 380, 118 S. W. 112; Hays *v.* Assn., 127 Mo. App. 195, 104 S. W. 1141 (letter admissible though signature not proved); Exchange Bk. *v.* Ins. Co., 109 Mo. App. 654, 83 S. W. 534; Da Rin *v.* Co., 41 Mont. 175, 108 P 649 (silence); Morgenstern *v.* Ins. Co., 89 Neb. 459, 131 N. W. 969; Farrell *v.* Ins. Co., 84 Neb. 72, 120 N. W. 929; Orr, etc. Co. *v.* Co., 77 N. J. L. 749, 73 A. 541; Bohles *v.* Ins. Co., 83 N. J. L. 246, 83 A. 904; O'Rourke *v.* Ins. Co., 30 N. Y. S. 215; Dobson *v.* Ins. Co., 86 App. Div. 115, 83 N. Y. S. 456, 179 N. Y. 557, 71 N. E. 1130 (no opinion); Monahan *v.* Co., 114 N. Y. S. 862; St. Paul Ins. Co. *v.* Co., 23 Okla. 79, 99 P. 647; Bush *v.* Ins. Co., 222 Pa. 419, 71 A. 916; Hughes *v.* Ins. Co., 222 Pa. 462, 71 A. 923; Breeden *v.* Ins. Co., 23 S. D. 417, 122 N. W. 348; Fisher *v.* Ins. Co., 124 Tenn. 450, 138 S. W. 316; Scott *v.* Ins. Co. (W. Va.), 74 S. E. 659; Miller *v.* Woodmen, 140 Wis. 505, 122 N. W. 1126. See Conn. F. Ins. Co. *v.* Moore, 154 Ky. 18, 156 S. W. 867.

Answer in previous action.—Exchange Bk. *v.* Ins. Co., 109 Mo. App. 654, 83 S. W. 534.

Promise to pay loss made after suit brought cannot be proved. Hess *v.* Ins. Co., 38 Pa. Super. 151.

Acts after proofs due, immaterial. Com. F. Ins. Co. *v.* Waldron, 88 Ark 120, 114 S. W. 210.

573-2 Schilansky *v.* Ins. Co., 4 Penne. (Del.) 293, 55 A. 1014; Libre *v.* Brotherhood, 168 Ill. App. 328 (insurance); Lancashire Ins. Co. *v.* Lyon, 124 Ill. App. 491; Com. Travelers *v.* Barnes, 72 Kan. 306, 82 P. 1099; Am. B. Assn. *v.* Stough, 26 Ky. L. R. 1093, 83 S. W. 126; Mutual L. Ins. Co. *v.* Rain, 108 Md. 353, 70 A. 87; Traiser *v.* Assn., 202 Mass. 292, 88 N. E. 901; Kennedy *v.* Ins. Co., 157 Mich. 411, 122 N. W. 134 (not always error to receive proofs as evidence of extent of loss); Harmon *v.* Ins. Co., 170 Mo. App. 309, 156 S. W. 87; Rosenberg *v.* Ins. Co., 209 Pa. 336, 58 A. 671; Teter *v.* Ins. Co. (W. Va.), 82 S. E. 40; Tucker *v.* Ins. Co., 58 W. Va. 30, 51 S. E. 86.

See Thaxton *v.* Ins. Co., 143 N. C. 33, 55 S. E. 419.

Error in admitting proofs for general purposes cured by testimony of witnesses who made them. Continental C. Co. *v.* Colvin, 77 Kan. 561, 95 P. 565.

Rule varied by stipulations in policy to effect written statement made as prescribed shall be prima facie evidence of its truth. See Am. S. Co. *v.* Pauly, 170 U. S. 160; Security, etc. Co. *v.* Co., 108 N. Y. S. 171.

Proofs may be part of adjustment of loss, and if so are prima facie proof of amount of it. German F. Ins. Co. *v.* Gibbs, 42 Tex. Civ. 407, 92 S. W. 1068, 96 S. W. 760.

Under general denial.—See Paquette *v.* Ins. Co., 193 Mass. 215, 79 N. E. 250.

574-4 Inventory and ex parte appraisement, not admissible. Melancon *v.* Ins. Co., 116 La. 324, 40 S. 718.

Waiver of proofs, not admission of truthfulness of statements in them. General Acc. Ins. Co. *v.* Hayes, 52 Tex. Civ. 272, 113 S. W. 990.

575-6 Kiesewetter *v.* Maccabees, 227 Ill. 48, 81 N. E. 19; Wasey *v.* Ins. Co., 126 Mich. 119, 85 N. W. 459; Ferris *v.* Americans, 152 Mich. 314, 116 N. W. 445; Queatham *v.* Woodmen, 148 Mo. App. 33, 127 S. W. 651. *Contra*, if made by guardian on behalf of ward. Hill *v.* Ins. Co., 150 N. C. 1, 63 S. E. 124; Felix *v.* Ins. Co., 216 Pa. 95, 64 A. 903.

575-7 Rodier *v.* Ins. Co., 32 App. Cas. (D. C.) 159; Rasicot *v.* Neighbors, 18 Ida. 85, 108 P. 1048; Haughton *v.* Ins. Co., 165 Ind. 32, 73 N. E. 592; Krapp *v.* Ins. Co., 143 Mich. 369, 106 N. W. 1107 (under clause in policy); Beard *v.* Neighbors, 53 Or. 102, 99 P. 83; Siebelist *v.* Ins. Co., 19 Pa. Super. 221; Knights *v.* Gillis (Tex. Civ.), 125 S. W. 338.

The proofs, when offered solely to show compliance with policy, cannot be used by insurer, who has not offered any evidence, as a basis for nonsuit because they show breach of insurer's statements in application. Baldi *v.* Ins. Co., 30 Pa. Super. 213; Rondinella *v.* Ins. Co., 30 Pa. Super. 223. The first case *disap.* Walther *v.* Ins. Co., 65 Cal. 417, 4 P. 413. Not admissible at insurer's request after admission of receipt. Modern Woodmen *v.* Cecil, 108 Md. 357, 70 A. 331.

Admission which states it is based on hearsay, not competent. Maher *v.* Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496.

575-8 Fair *v.* Ins. Co., 5 Ga. App. 708, 63 S. E. 812; Coulter *v.* Assn., 144 Ill. App. 255; Traiser *v.* Assn., 202 Mass. 292, 88 N. E. 901; Barker *v.* Ins. Co., 198 Mass. 375, 84 N. E. 490; Lindemann *v.* Ins. Co., 120 N. Y. S. 96 (letter of physician); Knights *v.* Gillis (Tex. Civ.), 125 S. W. 338, *cit.* the text; Schon *v.* Woodmen, 51 Wash. 482, 99 P. 25 (not error to exclude if physician has testified fully). But see Triple T. B. Assn. *v.* Wheatley, 76 Kan. 251, 91 P. 59.

Statements by a physician in proofs of death submitted to a society are competent against a beneficiary if such beneficiary has, in such proofs of death, adopted such statements. Lindholm *v.* Mystic Workers, 164 Ill. App. 472.

Physician's statement not admissible if based on hearsay. Scott *v.* Ins. Co., 56 Misc. 545, 107 N. Y. S. 124.

Waiver of statute concerning confidential communications between physician and patient results from stipulation in policy that affidavit of former shall be a part of proofs of death and state cause of death and such other information as insurer shall require. The attending physician may testify to confidential disclosures made by insured during his last illness. Metropolitan Ins. Co. *v.* Brubaker, 78 Kan. 146, 96 P. 62; Western T. Assn. *v.* Munson, 73 Neb. 858, 103 N. W. 688. Insured's waiver operates in favor of those who claim under him. Metropolitan, etc. Co. *v.* Willis, 37 Ind. App. 48, 76 N. E. 560. And against them. Modern Woodmen *v.* Angle, 127 Mo. App. 94, 104 S. W. 297.

576-9 Metropolitan, etc. Co. *v.* Wagner, 50 Tex. Civ. 233, 109 S. W. 1120 (stipulation in policy).

The general rule that the record of a coroner's inquest attached to proofs of death by beneficiary of insured is competent to prove admissions as to the cause of death has no application when such record is made part of the proofs pursuant to by-laws of insurer. Bibby *v.* Thomas, 131 Ala. 350, 31 S. 432; Matzenbaugh *v.* P., 194 Ill. 108, 62 N. E. 546; Rhode *v.* Ins. Co., 129 Mich. 112, 88 N. W. 400; Cox *v.* Tribe, 42 Or. 365, 71 P. 73.

Statement in physician's affidavit as to result of coroner's inquest, inadmis-

sible. Wasey *v.* Ins. Co., 126 Mich. 119, 85 N. W. 459.

576-11 Craiger *v.* Woodmen, 40 Ind. App. 279, 80 N. E. 429, plaintiff denied insured came to his death as found by inquest. See Rohloff *v.* Assn., 130 Wis. 61, 109 N. W. 989.

Undertaker's report of death, inadmissible, and if attached to certified copy of physician's report both may be excluded. Globe, etc. Assn. *v.* Meyer, 118 Ill. App. 155.

576-12 See Queathem *v.* Woodmen, 148 Mo. App. 33, 127 S. W. 651.

576-13 Continental Ins. Co. *v.* Rosenberg, 7 Penne. (Del.) 174, 74 A. 1073; Coulter *v.* Assn., 144 Ill. App. 255, *cit.* the text; U. S. Health, etc. Co. *v.* Harvey, 129 Ill. App. 104 (value of time lost); Traiser *v.* Assn., 202 Mass. 292, 88 N. E. 901; Barker *v.* Ins. Co., 198 Mass. 375, 84 N. E. 490; Krapp *v.* Ins. Co., 143 Mich. 369, 106 N. W. 1107; Coscarella *v.* Ins. Co., 175 Mo. App. 130, 157 S. W. 873; Queathem *v.* Woodmen, 148 Mo. App. 33, 127 S. W. 651; Hart *v.* Maccabees, 83 Neb. 423, 119 N. W. 679; Aetna L. Ins. Co. *v.* Pelham, 52 Misc. 658, 102 N. Y. S. 461; Hill *v.* Ins. Co., 150 N. C. 1, 63 S. E. 124; Baldi *v.* Ins. Co., 18 Pa. Super. 599; Rondinella *v.* Ins. Co., 18 Pa. Super. 613, 28 Pa. C. C. 517; Holleran *v.* Co., 18 Pa. Super. 573 (not conclusive on guardian); Knights *v.* Gillis (Tex. Civ.), 125 S. W. 338; Mellen *v.* Ins. Co., 83 Vt. 242, 75 A. 273; Rohloff *v.* Assn., 130 Wis. 61, 109 N. W. 989.

Expert testimony, not incompetent because it tends to contradict opinions of witnesses as given in affidavits. Traiser *v.* Assn., 202 Mass. 292, 88 N. E. 901, *disap.* Campbell *v.* Ins. Co., 92 Mass. 213.

Plaintiff must show statement in proofs erroneous in point of fact; not enough to show it was based on hearsay. Hill *v.* Ins. Co., 150 N. C. 1, 63 S. E. 124.

Preponderance of evidence, not required to show proofs made under mistake of fact. Ferris *v.* Americans, 152 Mich. 314, 116 N. W. 445.

Circumstances under which proofs made may be shown. Metropolitan, etc. Co. *v.* Thomas, 32 Ky. L. R. 770, 106 S. W. 1175.

577-15 Soules *v.* Brotherhood, 19 N. D. 23, 120 N. W. 760, though plaintiff acquiesced in action taken.

Proof made by insurer's agent, as required by it is evidence in favor of insured (Patterson *v.* Artisans, 43 Or. 333, 72 P. 1095; Hildebrand *v.* Artisans, 50 Or. 159, 91 P. 542; Whigham *v.* Foresters, 44 Or. 543, 75 P. 1067), who cannot be deprived of the right to offer it by admission of its sufficiency. United Moderns *v.* Pistole, 38 Tex. Civ. 422, 86 S. W. 377. See Puls *v.* Lodge, 13 N. D. 559, 102 N. W. 165.

577-16 See Commercial U. A. Co. *v.* Wolfe (Okla.), 137 P. 704.

577-17 Unconditional receipt, prima facie evidence of payment; disregarded only for weighty reasons. Benseman *v.* Ins. Co., 13 Pa. Super. 363.

Payment to assignee.—Burden on assignor to show insurer's knowledge of fraudulent character of assignment. Vanderslice *v.* Ins. Co., 13 Pa. Super. 455.

578-18 Moloney *v.* Co., 168 Mich. 269, 134 N. W. 6.

Dependence of designated beneficiary. If insurer paid amount due to regularly designated beneficiary, person who alleges beneficiary not dependent on insured must show fact. Kittredge *v.* Assn., 191 Mass. 23, 77 N. E. 648.

Payment to wrong person.—Morey *v.* Monk, 142 Ala. 175, 38 S. 265.

Insurer must show expenditure of reserve fund in surplus of which insured had right to share. Petite *v.* Ins. Co., 142 Ia. 265, 120 N. W. 642.

578-19 Krogh *v.* Brotherhood, 153 Wis. 397, 141 N. W. 276. See Maloney *v.* N. A. Union, 177 Ill. App. 658.

579-20 Frees *v.* Ins. Co., 163 App. Div. 57, 148 N. Y. S. 790.

INTENT

Membership in society, 587-14; *Understanding,* 597-39; *Financial condition,* 610-70.

583-1 U. S. *v.* Co., 158 Fed. 20, 85 C. C. A. 302; P. *v.* Leavens, 12 Cal. App. 178, 106 P. 1103.

583-2 Gaynor *v.* Ins. Co., 12 Ga. App. 601, 77 S. E. 1072.

583-3 Walker *v.* U. S., 152 Fed. 111, 81 C. C. A. 329.

Statute presumes and it was presumed in Soby *v.* P., 134 Ill. 66, 25 N. E. 109, that man keeping place where gambling in grain permitted, necessarily intends permitting it. Weare C. Co. *v.* P., 209 Ill. 528, 70 N. E. 1076.

583-4 Ward *v.* Cook, 158 Mich. 283, 122 N. W. 785.

584-5 U. S. *v.* Chisholm, 153 Fed. 808; Luttermann *v.* Romey, 143 Ia. 233, 121 N. W. 1040; Rector *v.* Outzen, 93 Miss. 254, 46 S. 408; S. *v.* Hovis, 135 Mo. App. 544, 116 S. W. 6.

584-6 Atchison, etc. R. Co. *v.* Sullivan, 173 Fed. 456, 97 C. C. A. 1; In re Smith, 176 Fed. 426; P. *v.* Meadows, 136 App. Div. 226, 121 N. Y. S. 17; Rochford *v.* Barrett, 22 S. D. 83, 115 N. W. 522.

Preference.—"The bankrupt not only knew that he was insolvent, but he knew that he was so irretrievably so that he could not hope to continue his business, and he knew that he could not make the payment in which he did make without disparity in his payments to his other creditors. If the effect of the act was to create a preference, and such was its natural consequence, he must be presumed to have intended to do that which was the necessary result of his act." In re Dorr, 186 Fed. 276, 108 C. C. A. 322.

584-7 Walsh *v.* U. S., 174 Fed. 615, 98 C. C. A. 461; U. S. *v.* Wilson, 176 Fed. 806; Hankins *v.* S., 103 Ark. 28, 145 S. W. 524; P. *v.* Claudius, 8 Cal. App. 597, 97 P. 687; S. *v.* Blackburn, 7 Penne. (Del.) 479, 75 A. 536; Gaynor *v.* Ins. Co., 12 Ga. App. 601, 77 S. E. 1072; McLeod *v.* S., 128 Ga. 17, 57 S. E. 83; Weare C. Co. *v.* P., 209 Ill. 528, 70 N. E. 1076; Lane *v.* P., 142 Ill. App. 571; Knight *v.* Miller, 172 Ind. 27, 87 N. E. 823; S. *v.* Colvin, 226 Mo. 446, 126 S. W. 448; S. *v.* Greer, 243 Mo. 599, 147 S. W. 968; Hackney *v.* Raymond, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675 ("the obvious consequence"); P. *v.* Breen, 181 N. Y. 493, 74 N. E. 483; Ampersand H. Co. *v.* Ins. Co., 131 App. Div. 361, 115 N. Y. S. 480; Wadsworth *v.* S., 9 Okla. Cr. 84, 130 P. 808; S. *v.* Clark, 58 Wash. 128, 107 P. 1047.

See Smith *v.* S., 57 Tex. Cr. 455, 123 S. W. 698; S. *v.* Ware, 58 Wash. 526, 109 P. 359.

585-9 Hibbard *v.* U. S., 172 Fed. 66, 96 C. C. A. 554; S. *v.* Taylor, 57 W. Va. 228, 50 S. E. 247; S. *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

585-11 U. S. *v.* Breese, 173 Fed. 402.

587-14 **Membership in society.**—Acceptance and use of membership tickets in society not determinative of membership therein in favor of third party. Parties could show they regarded tickets as admission tickets and did not read them. Tarbell *v.* Gifford, 82 Vt. 222, 72 A. 921.

587-15 Luther *v.* S., 117 Ind. 619, 98 N. E. 640; Tyner *v.* U. S., 2 Okla. Cr. 689, 103 P. 1057.

588-17 Coleman *v.* Coleman, 216 Ill. 261, 74 N. E. 791; Cantwell *v.* S., 47 Tex. Cr. 521, 85 S. W. 18.

588-18 Brewster *v.* L. Co., 164 Fed. 124; Johnson *v.* Wald, 93 Fed. 640, 35 C. C. A. 522; Blyth & F. Co. *v.* Kastor, 17 Wyo. 180, 97 P. 921. See Cincinnati T. W. Co. *v.* Matthews, 24 Ky. L. R. 2445, 74 S. W. 242.

589-19 P. *v.* Botkin, 9 Cal. App. 244, 98 P. 861 (presumption conclusive); S. *v.* Mills, 6 Penne. (Del.) 497, 69 A. 841; Orr *v.* S., 6 Ga. App. 628, 65 S. E. 582; S. *v.* Bennett, 128 Ia. 713, 105 N. W. 324; P. *v.* Kathan, 136 App. Div. 303, 120 N. Y. S. 1096; S. *v.* Smith, 55 Or. 408, 106 P. 797.

590-20 Louisville R. Co. *v.* Co., 130 Ky. 738, 114 S. W. 343; S. *v.* Clark, 32 Nev. 145, 104 P. 593; P. *v.* Corrigan, 195 N. Y. 1, 87 N. E. 792; S. *v.* Ross, 55 Or. 450, 104 P. 596.

591-21 P. *v.* Minney, 155 Mich. 534, 119 N. W. 918. *Contra*, Louisville R. Co. *v.* C., 130 Ky. 738, 114 S. W. 343.

591-22 Kellogg *v.* Ins. Co., 133 Mo. App. 391, 113 S. W. 663; Selland *v.* Nelson, 22 N. D. 14, 132 N. W. 220.

591-23 Cleage *v.* Laidley, 140 Fed. 346, 79 C. C. A. 284; Silver *v.* Graves, 210 Mass. 26, 95 N. E. 948; Hubbard *v.* Lewis, 128 App. Div. 416, 112 N. Y. S. 1050.

591-24 S. *v.* Johns, 140 Ia. 125, 118 N. W. 295; S. *v.* Costa, 78 Vt. 198, 62 A. 38.

592-28 Scott *v.* Dunkle, etc. Co., 106 Ark. 83, 152 S. W. 1027; No. British, etc. Ins. Co. *v.* Tye, 1 Ga. App. 380, 58 S. E. 110. See vol. 9, pp. 285, 436, 431; vol. 13, p. 845.

592-30 Coon *v.* S. (Ala. App.), 65 S. 911. Must be proved beyond reasonable doubt. S. *v.* Sparks, 79 Neb. 511, 114 N. W. 598.

593-31 Horton *v.* P., 47 Colo. 252, 107 P. 257; Hankinson *v.* S., 6 Ga. App. 793, 65 S. E. 837; P. *v.* Kathan, 136 App. Div. 303, 120 N. Y. S. 1096.

594-32 Jenkins *v.* S., 58 Fla. 62, 50 S. 582. See Hibbard *v.* U. S., 172 Fed. 66, 96 C. C. A. 554.

Evidence must go beyond showing mere possibility of criminal intent.

Cotton *v.* S., 52 Tex. Cr. 55, 105 S. W. 185.

594-33 S. *v.* Truitt, 5 Penne. (Del.) 466, 62 A. 790; S. *v.* Di Guglielmo, 4 Penne. (Del.) 336, 55 A. 350; Wiggins *v.* S., 172 Ind. 78, 87 N. E. 718; Combs *v.* S., 55 Tex. Cr. 332, 116 S. W. 595.

595-35 Horton *v.* P., 47 Colo. 252, 107 P. 257; Jenkins *v.* S., 58 Fla. 62, 50 S. 582; Washington *v.* S., 51 Tex. Cr. 542, 103 S. W. 879; Castle *v.* S., 49 Tex. Cr. 1, 90 S. W. 32.

596-37 In re Kyte, 174 Fed. 867 (interest under bankruptcy act); Hibbard *v.* U. S., 172 Fed. 66, 96 C. C. A. 554; Gaynor *v.* Ins. Co., 12 Ga. App. 601, 77 S. E. 1072; S. *v.* Luff, 1 Boyce (Del.) 152, 74 A. 1079; Fallon *v.* S., 5 Ga. App. 659, 63 S. E. 806; Wiggins *v.* S., 172 Ind. 78, 87 N. E. 718; Garrett *v.* Co., 219 Mo. 65, 118 S. W. 68; S. *v.* Pilling, 53 Wash. 464, 102 P. 230.

Burden of proving intent in civil action on party alleging existence. Willett *v.* Froelich, 28 Ky. L. R. 798, 90 S. W. 572; Spead *v.* Tomlinson, 73 N. H. 46, 59 A. 376; In re Newcomb's Est., 192 N. Y. 238, 84 N. E. 950; P. *v.* Hayes, 135 App. Div. 19, 119 N. Y. S. 808. But if intent manifested by act done, as by attorney in disrespect of court, he must sustain allegations of good faith. Cobb *v.* U. S., 172 Fed. 641, 96 C. C. A. 477.

And generally in a civil action if prima facie case made, burden on defendant to show good faith. Remmers *v.* Bk., 173 Fed. 484, 97 C. C. A. 490.

Presumption that parties making contracts for future delivery of grain intend performance and burden on one averring illegal intention of one or more has made contracts void to establish allegations by plenary proof. Cleage *v.* Laidley, 149 Fed. 346, 79 C. C. A. 284.

596-38 Southern R. Co. *v.* Haynes (Ala.), 65 S. 339; Gilley *v.* Denman (Ala.), 64 S. 97; Boan *v.* Lumb. Co (Ala.), 63 S. 564; Harris *v.* S., 8 Ala. App. 33, 62 S. 477; Brown *v.* S., 7 Ala. App. 26, 61 S. 12; Bradley *v.* S., 3 Ala. App. 212, 58 S. 95; Wray *v.* S., 2 Ala. App. 139, 57 S. 144; Pate *v.* S., 162 Ala. 32, 50 S. 357; Patterson *v.* S., 156 Ala. 62, 47 S. 52 (on cross-examination inquiry made as to accused's motives for acts); Smith *v.* S., 145 Ala. 17, 40 S. 957; Vest *v.* Speakman, 153 Ala. 393, 44 S. 1017.

See Grantland *v.* S., 8 Ala. App. 319, 62 S. 470.

Grantor may testify to intent in delivering deeds. Napier *v.* Elliott, 162 Ala. 129, 50 S. 148.

597-39 Crawford *v.* U. S., 212 U. S. 183; Weddel *v.* U. S., 213 Fed. 208 (C. C. A.); Richards *v.* U. S., 175 Fed. 911, 99 C. C. A. 401; Cleage *v.* Laidley, 149 Fed. 346, 79 C. C. A. 284; Ryan *v.* Ty., 12 Ariz. 208, 100 P. 770; Fulkerson *v.* Stiles, 156 Cal. 703, 105 P. 966; P. *v.* Martel, 21 Cal. App. 573, 132 P. 600; Bertelsen *v.* Bertelsen, 7 Cal. App. 258, 94 P. 80; Lupton *v.* Underwood (Del.), 85 A. 965; Eatman *v.* S., 48 Fla. 21, 37 S. 576; Penick *v.* County, 131 Ga. 385, 62 S. E. 300; S. *v.* Jones, 25 Ida. 587, 138 P. 1116; P. *v.* Rudorf, 149 Ill. App. 215; Lane *v.* P., 142 Ill. App. 571; Dunbar *v.* Armstrong, 115 Ill. App. 549; Davis *v.* Cox, 178 Ind. 486, 99 N. E. 803; Beach *v.* Beach (Ia.), 141 N. W. 921; S. *v.* Loos, 145 Ia. 170, 123 N. W. 962; Helm *v.* Ins. Co., 132 Ia. 177, 109 N. W. 605; S. *v.* Adams, 91 Kan. 642, 138 P. 580; Lewis *v.* R. Co., 82 Kan. 351, 108 P. 95; Hamilton *v.* C., 33 Ky. L. R. 1014, 112 S. W. 603; S. *v.* Morin, 102 Me. 290, 66 A. 650; Mut. F. Ins. Co. *v.* Ritter, 113 Md. 163, 77 A. 388; Carriere *v.* Co., 203 Mass. 322, 89 N. E. 544; Sherman *v.* Sherman, 193 Mass. 400, 79 N. E. 774; Preger *v.* Barnett, 175 Mich. 494, 141 N. W. 587; Grout *v.* Stewart, 96 Minn. 230, 104 N. W. 966; Chambers *v.* Chambers, 227 Mo. 262, 127 S. W. 86; Sherman *v.* Shaughnessy, 148 Mo. App. 679, 129 S. W. 245; Hackney *v.* Raymond, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Wheeler *v.* Exch., 72 N. H. 315, 56 A. 754; Hill *v.* Page, 108 App. Div. 71, 95 N. Y. S. 465; Watson *v.* R. Co., 152 N. C. 215, 67 S. E. 502; Sanford, etc. Co. *v.* Eubanks, 152 N. C. 697, 68 S. E. 219; S. *v.* Johnson, 17 N. D. 554, 118 N. W. 230; Cobb *v.* Pub. Co. (Okla.), 140 P. 1079; Snow *v.* S., 3 Okla. Cr. 291, 105 P. 575; Mahon *v.* Rankin, 54 Or. 328, 102 P. 608, cit. the text; Anthony *v.* Ball (Tex. Civ.), 146 S. W. 612; Jones *v.* S., 58 Tex. Cr. 313, 125 S. W. 914; Thoresen *v.* Lumb. Co., 73 Wash. 99, 131 P. 645, 132 P. 860; Brown *v.* S., 127 Wis. 193, 106 N. W. 536; Sharpe *v.* Hasey, 141 Wis. 76, 123 N. W. 647. *Contra* if testimony mere conclusion. Saxton *v.* Perry, 47 Colo. 263, 107 P. 281.

In Noonan *v.* **Luther**, 206 N. Y. 105, 99 N. E. 178, "when the defendant was

testifying, he was asked this question. 'Did you have any intention, in placing your hands upon her as you did and pushing her as you did, did you have any other intention than to remove her from the premises as quietly as you could, using only such force as necessary?' On the objection of the plaintiff, the evidence was excluded as immaterial, to which the defendant excepted. In some respects, the form of this question was improper; but the objection taken was not to the form of the question, but to the materiality of the evidence. If objection had been made to the form, that could have been changed. We think the ruling of the trial court was erroneous, and that the evidence was not only material, but that the question of the defendant's intent was of vital importance, not on the amount of damages alone, but on the plaintiff's right of action."

Failure to expressly testify to intent not convincing if conduct explicit. Wasmund *v.* Harm, 36 Wash. 170, 78 P. 777.

Intent of a party in executing a bill of sale cannot be testified to by him. Russell *v.* Haltom, 76 Ark. 506, 89 S. W. 471.

Understanding.—Defendant may testify concerning understanding of legal requirements respecting matter in question and offer documentary proof. He may also testify to his understanding of the effect of a contract entered into by him. Nurnberger *v.* U. S., 156 Fed. 721, 84 C. C. A. 377.

599-10 Cleage *v.* Laidley, 149 Fed. 346, 79 C. C. A. 281; Green *v.* S., 91 Ark. 510, 121 S. W. 727; Fanning *v.* Green, 156 Cal. 279, 104 P. 308; Larson *v.* Thoma, 143 Ia. 338, 121 N. W. 1059; C. *v.* Ewing, 135 Ky. 557, 122 S. W. 851; Chambers *v.* Chambers, 227 Mo. 262, 127 S. W. 86; Huskie *v.* Griffin, 75 N. H. 345, 74 A. 595.

599-11 Vermont *v.* U. S., 174 Fed. 792, 98 C. C. A. 500; U. S. *v.* Breese, 173 Fed. 402; Lewis *v.* McDonald, 83 Neb. 694, 120 N. W. 207; Brown *v.* S., 127 Wis. 193, 106 N. W. 536.

599-12 Los Angeles *v.* McCollum, 156 Cal. 148, 103 P. 914.

600-13 Connor *v.* Hodges, 7 Ga. App. 153, 66 S. E. 546; Duckett *v.* R. Co., 99 Mo. App. 444, 73 S. W. 926.

601-15 In re William Hill & Sons, 186 Fed. 569; Read *v.* Gould, 139 Ga. 499, 77 S. E. 642; Dunbar *v.* Armstrong, 115 Ill. App. 549; Semler M. Co. *v.* Fyffe, 127 Ill. App. 511; Rimes *v.* Carpenter, 59 Misc. 145, 110 N. Y. S. 965 (on direct examination party cannot testify to operations of mind rendering more probable doing of acts testified to). See Hume *v.* Darsey (Tex. Civ.), 154 S. W. 255.

An effort to show the motive of the maker of a deed of trust, "uncommunicated to the other party, was objectionable, both because it was not competent to show the undisclosed motive of a grantor in order to destroy the grant, and also because one person can not testify broadly what motive is in the mind of another." Huger *v.* Protestant Episcopal Church, 137 Ga. 205, 73 S. E. 385.

601-16 Rochford *v.* Barrett, 22 S. D. 83, 115 N. W. 522; Winton *v.* McGraw, 60 W. Va. 98, 54 S. E. 506. See S. *v.* Newman, 74 N. H. 10, 64 A. 761.

So it was improper to ask plaintiff, testifying for herself, if she had "money to pay your fare if it had been demanded." Witness had been allowed to testify that she had with her a certain amount of money, and she could not testify to her secret intentions or purposes. Broyles *v.* R. Co., 166 Ala. 616, 52 S. 81.

Usurious intentions of parties to contract shown, though free from ambiguity. Clemens *v.* Crane, 234 Ill. 215, 84 N. E. 884.

Oral testimony of intent of parties to written contract admissible to show they intended it a wagering contract; immaterial that such testimony contradicts writing. Wheeler *v.* Stock Exch., 72 N. H. 315, 56 A. 754.

Intention of parties to release of one joint wrong doer shown by parol, terms not varied. El Paso, etc. R. Co. *v.* Darr (Tex. Civ.), 93 S. W. 166.

601-17 Ex parte Chow Chok, 161 Fed. 627; Tarver *v.* S., 9 Ala. App. 17, 64 S. 161; Hill *v.* S., 161 Ala. 67, 50 S. 41; Brown *v.* Ratliff, 21 Cal. App. 282, 131 P. 769; Greve *v.* Co., 8 Cal. App. 275, 96 P. 904; Bradford *v.* Assn., 26 App. Cas. (D. C.) 268; Aetna Ins. Co. *v.* Fuller, 111 Md. 321, 73 A. 738; P. *v.* Aeritelli, 57 Misc. 574, 110 N. Y. S. 430; Comeau *v.* Hurley, 24 S. D. 275, 123 N. W. 715; Leland *v.* Chamberlin, 56 Tex. Civ. 276, 120 S. W. 1040; Holloway *v.* S., 54 Tex. Cr. 467, 113 S. W. 928 (witness may state knowledge of

meaning of another from language used).

A witness' intention may be shown by himself. In re Van Ness' Will, 78 Misc. 592, 139 N. Y. S. 485.

603-48 Exceptions. Jandt *v.* Potthast, 102 Ia. 223, 71 N. W. 216; Brakefield *v.* Shelton, 76 Kan. 451, 92 P. 709.

603-50 *Contra,* Majecia T. Co. *v.* Rogers, 43 Ind. App. 306, 87 N. E. 165. See Hamilton *v.* Co., 129 Ia. 172, 105 N. W. 438.

Corporation's intent as to future action testified to by president without producing records. New York, etc. R. Co. *v.* Offield, 78 Conn. 1, 60 A. 740.

Declarations of members of corporation. Starr, etc. Assn. *v.* Assn., 77 Conn. 83, 58 A. 467.

604-51 Thomas *v.* Livingston, 155 Ala. 546, 46 S. 851.

604-52 Hill *v.* S., 161 Ala. 67, 50 S. 41.

605-55 *Contra* as to uncommunicated intent. Brent *v.* Lilly, 174 Fed. 877. *Comp.* Valley P. Co. *v.* Wise, 93 Ark. 1, 123 S. W. 768.

605-57 Lowrey *v.* Hawaii, 206 U. S. 206; Burke *v.* Bishop, 175 Fed. 167; Darden *v.* Mann, 163 Ala. 297, 50 S. 1033; P. *v.* Carson, 155 Cal. 164, 99 P. 970; P. *v.* Black, 147 Cal. 426, 81 P. 1099; Helm *v.* Brewster, 42 Colo. 25, 93 P. 1101; S. *v.* Brown (Del.), 85 A. 797; S. *r.* Hartnett, 7 Penne. (Del.) 204, 74 A. 82; S. *v.* Mills, 6 Penne. (Del.) 497, 69 A. 841; McCommons *v.* Williams, 131 Ga. 313, 62 S. E. 230 (extent of interest in corporation to which stockholder sold goods); First Nat. Bk. *v.* Miller, 235 Ill. 135, 85 N. E. 312 (unusual precaution to give deals in grain semblance of legality); Clemens *v.* Crane, 234 Ill. 215, 84 N. E. 884; Lucas *v.* S., 173 Ind. 302, 90 N. E. 305; McClenny *v.* Inverarity, 80 Kan. 569, 103 P. 82; Willett *v.* Froelich, 28 Ky. L. R. 798, 90 S. W. 572; Atherton *v.* Emerson, 199 Mass. 199, 85 N. E. 530; S. *v.* Co., 110 Minn. 415, 126 N. W. 126; Leggett *v.* Exposition Co., 157 Mo. App. 108, 137 S. W. 893; Duckett *r.* R. Co., 99 Mo. App. 444, 73 S. W. 926; S. *v.* Beverly, 201 Mo. 550, 100 S. W. 463; P. *r.* Hayes, 135 App. Div. 19, 119 N. Y. S. 808; De Graff *r.* S., 2 Okla. Cr. 519, 103 P. 538; Elliott *v.* Bozorth, 52 Or. 391, 97 P. 632; S. *v.* Humphreys, 43 Or. 44, 70 P. 824; C. *v.* Sanderson, 40 Pa. Super. 416; Whitsett *r.* Carney (Tex. Civ.), 124 S. W. 443; S. *r.* Roby, 83 Vt. 121, 74 A. 638.

Violation of sanitary code.—"If proof of criminal intent—that is, intent to use these rotten eggs in the making of breadstuffs—was requisite to sustain the conviction, then the circumstances surrounding the discovery of the eggs were sufficient for a legitimate finding of such criminal intent." P. *v.* Friedman, 122 N. Y. S. 500.

Extent of injury inflicted upon party assaulted material as to defendant's intent. Brown *v.* S., 142 Ala. 287, 38 S. 268.

606-58 New York Cent., etc. R. Co. *r.* U. S., 212 U. S. 481; Hamilton Nat. Bk. *v.* Balcomb, 177 Fed. 155, 100 C. C. A. 575; S. *v.* Anderson, 1 Boyce (Del.) 135, 74 A. 1097; Samaha *v.* Mason, 27 App. Cas. (D. C.) 470; Thomas *v.* S., 58 Fla. 122, 51 S. 410; Gaynor *v.* Ins. Co., 12 Ga. App. 601, 77 S. E. 1072; Ham *v.* S., 122 Ga. 574, 50 S. E. 342; Bartlett *v.* Slusher, 215 Ill. 348, 74 N. E. 370; Weare Com. Co. *v.* P., 209 Ill. 528, 70 N. E. 1076; Portland *v.* Co., 103 Me. 240, 68 A. 1040; S. *v.* Kelley, 143 Mo. App. 697, 127 S. W. 950; S. *v.* Thompson, 31 Nev. 209, 101 P. 557; Ty. *v.* Sais, 15 N. M. 171, 103 P. 980; P. *v.* Meadows, 136 App. Div. 226, 121 N. Y. S. 17; Rochford *v.* Barrett, 22 S. D. 83, 115 N. W. 522; Lewis *v.* S., 48 Tex. Cr. 149, 86 S. W. 1027; S. *v.* Costa, 78 Vt. 198, 62 A. 38; Rohrer *v.* Lockery, 136 Wis. 532, 117 N. W. 1060.

The criminal act "is ordinarily susceptible of direct proof by facts which are discernible by the natural senses. The intent or purpose exists only in the mind of the accused, and, like malice, or any feeling, emotion or mental status, is manifested by external circumstances capable of proof." P. *v.* Connors, 253 Ill. 266, 97 N. E. 643.

Evidence of any facts having probative force upon issue competent. Jamieson *v.* Wallace, 167 Ill. 388, 47 N. E. 762, 59 Am. St. 302; Sprague *v.* Warren, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679; Wheeler *v.* Stock Exch., 72 N. H. 315, 56 A. 754.

Judgment in attachment admissible to show vendor-debtor's intent. Smith *v.* Birge, 126 Ill. App. 596.

Prohibited contract.—Bashinski *v.* S., 122 Ga. 164, 50 S. E. 54; Kessler *v.* Pearson, 126 Ga. 725, 55 S. E. 963.

Statute declaring failure to perform contract prima facie evidence of intent to injure other party thereto valid. Bailey *v.* S., 158 Ala. 18, 48 S. 498.

606-59 Evidence that one is reputed overbearing and associates afraid of him admissible to show no entering into of conspiracy through fear. Choice *v.* S., 54 Tex. Cr. 517, 114 S. W. 132.

607-60 Schuh *v.* S., 58 Tex. Cr. 165, 124 S. W. 908.

Hearsay admissible.—See supra, "Hearsay," 447-28.

607-61 P. *v.* Carson, 155 Cal. 164, 99 P. 970; Elliott *v.* Bozorth, 52 Or. 391, 97 P. 632; C. *v.* Snyder, 40 Pa. Super. 485; Walker *v.* Hargear, 36 Wash. 672, 79 P. 472. See U. S. *v.* Hillegass, 176 Fed. 444.

Good faith of grantee accepting deed from one subsequently alleged incompetent shown by evidence that party asserting incompetency of grantor also took deed from him at about that time. Parker *v.* Betts, 47 Colo. 428, 107 P. 816.

Relations of grantor to others of his children than grantee material on question of intent with which possession of deed was parted with. Baker *v.* Baker, 9 Cal. App. 737, 100 P. 892.

Knowledge of party whose funds were misapplied in relation to account of accused relevant fact. U. S. *v.* Hillegass, 176 Fed. 444.

607-62 In re Cashman, 168 Fed. 1008; Green *v.* S., 91 Ark. 510, 121 S. W. 727; S. *v.* Lockwood, 1 Boyce (Del.) 28, 74 A. 2; Livingston *v.* S., 6 Ga. App. 805, 65 S. E. 812; Weare C. Co. *v.* P., 209 Ill. 528, 70 N. E. 1076; Bartlett *v.* Slusher, 215 Ill. 348, 74 N. E. 370; Hamilton *v.* C., 33 Ky. L. R. 1014, 112 S. W. 603 (abstaining from doing what might easily have been done); Fletcher *v.* C., 118 Ky. 351, 80 S. W. 1089; Voss *v.* Sylvester, 203 Mass. 233, 89 N. E. 241; S. *v.* Thompson, 31 Nev. 209, 101 P. 557; C. *v.* Sanderson, 40 Pa. Super. 416; Houston I. & B. Co. *v.* Sharp (Tex. Civ.), 114 S. W. 180; Hardin *v.* S., 51 Tex. Cr. 559, 103 S. W. 401; S. *v.* Howard, 83 Vt. 6, 74 A. 392.

Contract alleged entered into with fraudulent intent admissible to show intent. Frazer *v.* S., 159 Ala. 1, 49 S. 245.

Effectiveness of act matter for consideration. P. *v.* Strombeck, 145 Cal. 110, 78 P. 472.

608-63 In re Kyte, 174 Fed. 867; S. *v.* Loos, 145 Ia. 170, 123 N. W. 962; Jones *v.* Taylor, 136 Ky. 39, 123 S. W. 326; Cohoe *v.* S., 82 Neb. 744, 118 N. W. 1088; Faison *v.* Kelly 149 N. C. 282, 62 S. E. 1086; Woodmen *v.* Welch, 16 Okla. 188, 83 P. 547. See infra, "Trade Marks," etc., 656-76. Advice of counsel shown in issue of knowingly and fraudulently doing a prohibited act. Klein *v.* Powell, 174 Fed. 640, 98 C. C. A. 394; In re Kyte, supra; Jones *v.* Taylor, supra.

608-64 See In re Kyte, 174 Fed. 867.

Evidence of customary manner of discharging duty not always relevant to rebut evidence of intent, especially if performance of duty in the customary way would have disclosed the fraud defendant was a party to. Grunberg *v.* U. S., 145 Fed. 81, 76 C. C. A. 51.

609-67 Southern R. Co. *v.* Peek, 6 Ga. App. 43, 64 S. E. 308; Harrison *v.* McLaughlin, 108 Md. 427, 70 A. 424; C. *v.* Sanderson, 40 Pa. Super. 416.

609-69 Rex *v.* Blythe, 19 Ont. L. R. 386; Chowning *v.* S., 91 Ark. 503, 121 S. W. 735; S. *v.* Truitt, 5 Penne. (Del.) 466, 62 A. 790; S. *v.* Bennett, 128 Ia. 713, 105 N. W. 324; S. *v.* Rumble, 81 Kan. 16, 105 P. 1 (intoxication, irrespective of extent, not conclusive as to intent). *Contra* under statute, Stoudenmire *v.* S., 58 Tex. Cr. 258, 125 S. W. 399. See infra, "Intoxication," 789-12.

Partial intoxication immaterial.—Brown *v.* S., 142 Ala. 287, 38 S. 268.

610-70 Brown *v.* S., supra, unless intent involved specific.

Financial condition.—Insolvency of party seeking restraining enforcement of judgment because defendant indebted to him and alleging willingness to pay difference due latter shown on question of good faith. Kaufman *v.* Cooper, 39 Mont. 146, 101 P. 969.

611-72 Thompson *v.* U. S., 144 Fed. 14, 75 C. C. A. 172; Beckwith *v.* Sheldon, 154 Cal. 393, 97 P. 887; Coghlin *v.* Coghlin, 79 O. St. 71, 85 N. E. 1078; Elliott *v.* Bozorth, 52 Or. 391, 97 P. 632; S. *v.* Allison, 24 S. D. 622, 124 N. W. 747; Little *v.* Herzinger, 34 Utah 337, 97 P. 639. See C. *v.* Sanderson, 40 Pa. Super. 416.

611-73 U. S. *v.* Kettenbach, 175 Fed. 463. See Raffield *v.* S., 7 Ga. App. 422, 67 S. E. 109.

Possession of means for committing crime at remote date cannot be shown to convict of crime thereafter committed. Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181.

612-74 Chitwood *v.* U. S., 173 Fed. 551, 82 C. C. A. 507; Woodson *v.* Wright, 7 Ala. App. 255, 60 S. 1006; In

re Hall's Est., 154 Cal. 527, 98 P. 269; P. *v.* Barker 144 Cal. 705, 78 P. 266; Starr, etc. Assn. *v.* Assn., 77 Conn. 83, 58 A. 467; S. *v.* Brown (Del.), 85 A. 797; S. *v.* Luff, 1 Boyce (Del.) 152, 74 A. 1079; S. *v.* Mills, 6 Penne. (Del.) 497, 69 A. 841; P. *v.* Depew, 237 Ill. 574, 86 N. E. 1090; P. *v.* Moir, 207 Ill. 180, 69 N. E. 905; Bartlett *v.* Slusher, 215 Ill. 348, 74 N. E. 370; Smith *v.* Birge, 126 Ill. App. 596; Nolte *v.* R. Co. (Ia.), 147 N. W. 192; Harris *v.* C., 25 Ky. L. R. 297, 74 S. W. 1044; Webster *v.* Moore, 108 Md. 572, 71 A. 466; Hunneman *v.* Phelps, 199 Mass. 15, 85 N. E. 169; King *v.* McCarthy, 54 Minn. 190, 55 N. W. 960; Brightwell *v.* McAfee, 249 Mo. 562, 155 S. W. 820; King *v.* Co., 226 Mo. 351, 126 S. W. 415; S. *v.* Newman, 74 N. H. 10, 64 A. 761; S *v.* Kane, 77 N. J. L. 244, 72 A. 39; In re Newcomb's Est., 192 N. Y. 238, 84 N. E. 950; Anson *v.* Sav. Bk., 155 App. Div. 939, 140 N. Y. S. 1017; S. *v.* Johnson, 84 S. C. 45, 65 S. E. 1023; S. *v.* Costa, 78 Vt. 198, 62 A. 38; Walker *v.* Hargear, 36 Wash. 672, 79 P. 472.

Best evidence on the subject but proofs must be restricted to the time of the utterance. Ickes *v.* Ickes, 237 Pa. 582, 85 A. 885.

Stipulations in contract, if of unusual nature, looked upon with suspicion as cover for intentions of parties. Weare C. Co. *v.* P., 209 Ill. 528, 70 N. E. 1076.

Declarations inconsistent with conduct, given little weight. P. *v.* Moir, 207 Ill. 180, 69 N. E. 905.

613-75 Managle *v.* Parker, 75 N. H. 139, 71 A. 637; P. *v.* Cahill, 193 N. Y. 232, 86 N. E. 39.

614-76 U. S. *v.* Kline, 201 Fed. 954; In re Brown's Will, 143 Ia. 649, 120 N. W. 667; McElveen *v.* King, 88 S. C. 346, 70 S. E. 801; Terrell *v.* S., 55 Tex. Cr. 282, 116 S. W. 569. See note, 106 C. C. A. 479, knowledge and intent.

Declarations as to future action, after execution entered upon, no part of res gestae, but competent as fact relevant to fact in issue—doing of intended act. Dunham *v.* Cox, 81 Conn. 268, 70 A. 1033.

Admissions and declarations explained. S. *v.* Morin, 102 Me. 290, 66 A. 650.

614-77 Dunham *v.* Cox, 81 Conn. 268, 70 A. 1033; P. *v.* Nall, 242 Ill. 284, 89 N. E. 1012; S. *v.* Morgan, 146 Ia. 298, 125 N. W. 166; S. *v.* Bailey, 190 Mo. 257, 284, 88 S. W. 733; Houston O. Co. *v.* Kimball, 103 Tex. 94, 122 S. W. 533 (declarations of decedent competent as to his abandonment of property).

615-81 See Kaliamotes *v.* Wardwell (Me.), 89 A. 313; Comeau *v.* Hurley, 22 S. D. 310, 117 N. W. 371. See also "Res Gestae."

Servant's declarations inadmissible against master if no part of res gestae, whether made prior or subsequent to event. Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23.

616-82 Thompson *v.* U. S., 144 Fed. 14, 75 C. C. A. 172; Dunham *v.* Cox, 81 Conn. 268, 70 A. 1033; First Nat. Bk. *v.* Miller, 235 Ill. 135, 85 N. E. 312; In re Murray's Est., 145 Ia. 368, 124 N. W. 193; Webster *v.* Moore, 108 Md. 572, 71 A. 466; Terrell *v.* S., 55 Tex. Cr. 282, 116 S. W. 569.

In a prosecution for white slavery, acts done and declarations made afterward and elsewhere are admissible as bearing on intent. Kulp *v.* U. S., 210 Fed. 249, 127 C. C. A. 67.

Where series of similar transactions, statements prior to first proved though statute bars action. Bartlett *v.* Slusher, 215 Ill. 348, 74 N. E. 370.

617-87 Union Oil Co. *v.* Stewart, 158 Cal. 149, 110 P. 313; Magruder *v.* Montgomery, 33 App. Cas. (D. C.) 133.

618-88 S. *v.* Atkins, 77 Vt. 215, 59 A. 826.

619-89 Julian *v.* Co., 209 Mo. 35, 107 S. W. 496, twelve years before suit.

619-92 In re Newcomb's Est., 192 N. Y. 238, 84 N. E. 950, purposed change of domicile.

621-95 May *v.* U. S., 157 Fed. 1, 86 C. C. A. 575; St. Louis S. R. Co. *v.* Ray (Tex. Civ.), 127 S. W. 281 (to third party).

622-98 Collison *v.* R. Co., 146 Ill. App. 64; Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23; Thigpen *v.* Russell, 55 Tex. Civ. 211, 118 S. W. 1080 (intent to abandon homestead).

Declarations of testator of intention to provide for person in will, inadmissible. Hoffner *v.* Custer, 237 Ill. 64, 86 N. E. 737.

624-2 Johnson *v.* S., 12 Ga. App. 493, 77 S. E. 587; McClenny *v.* Inverarity, 80 Kan. 569, 103 P. 82; United P. Co. *v.* Matheny, 81 O. St. 204, 90 N. E. 154. See Hammers *v.* Knight, 168 Ill. App. 203.

Declarations of agent in absence of principal, inadmissible. Little *v.* Rich, 55 Tex. Civ. 326, 118 S. W. 1077.

Uncommunicated motive not admissible (Hardin *v.* S., 8 Ala. App. 215, 63 S. 18), except on cross-examination. Davis *v.* Clausen, 7 Ala. App. 381, 62 S. 267.

625-3 Chesbrough *v.* Woodworth, 195 Fed. 875, 116 C. C. A. 465 (sale of bank stock belonging to defendants and their relatives); Blake *v.* Scott, 92 Ark. 46, 121 S. W. 1054; S. *v.* Marren, 17 Ida. 766, 107 P. 993 (preparation and plan); Ty. *v.* Gallegos, 17 N. M. 409, 130 P. 245; P. *v.* Schlessel, 127 App. Div. 510, 112 N. Y. S. 45; Rauh *v.* Morris, 40 Okla. 288, 137 P. 1174; W. U. T. Co. *v.* Simmons (Tex. Civ.), 93 S. W. 686 (prior refusal to send message); S. *v.* Weisenberger, 42 Wash. 426, 85 P. 20.

625-4 Kessler *v.* Goldstrom, 177 Fed. 392, 101 C. C. A. 476; Pumphrey *v.* S., 156 Ala. 103, 47 S. 156; P. *v.* Grow, 16 Cal. App. 147, 116 P. 369; S. *v.* Brown (Del.), 85 A. 797; Lewis *v.* McDonald, 83 Neb. 694, 120 N. W. 207; Cope *v.* Co., 39 Pa. Super. 134; U. S. *v.* Sabio, 2 Phil. Isl. 485; Hutchinson *v.* S., 58 Tex. Cr. 228, 125 S. W. 19.

See McKnight *v.* S. (Tex. Cr.), 156 S. W. 1188.

626-5 Kettenbach *v.* U. S., 202 Fed. 377, 120 C. C. A. 505; Johnson *v.* S., 75 Ark. 427, 88 S. W. 905; Savage *v.* S., 63 Fla. 40, 57 S. 605; S. *v.* McGann, 8 Ida. 40, 66 P. 823; Harlow *v.* Co., 53 Or. 272, 100 P. 7; S. *v.* Johnson, 84 S. C. 45, 65 S. E. 1023; Parks *v.* Knox (Tex. Civ.), 130 S. W. 203; Schlossmacher *v.* Co., 52 Wash. 588, 100 P. 1013.

Agreement to restore stolen money cannot be proved. P. *v.* Britton, 134 App. Div. 275, 118 N. Y. S. 989.

Sale of article for legitimate use cannot be shown to rebut evidence of intent shown by sales for prohibited purpose. S. *v.* Costa, 78 Vt. 198, 62 A. 38.

627-6 Williamson *v.* U. S., 207 U. S. 425; Coggey *v.* Bird, 209 Fed. 803, 126 C. C. A. 527; Worden *v.* U. S., 204 Fed. 1, 122 C. C. A. 315; Kettenbach *v.* U. S., 202 Fed. 377, 120 C. C. A. 505; Walsh *v.* U. S., 174 Fed. 615, 98 C. C. A. 461; Barnard *v.* U. S., 162 Fed. 618, 89 C. C. A. 376; Jones *v.* U. S., 162 Fed. 417, 89 C. C. A. 303; Bryan *v.* U. S., 133 Fed. 495, 66 C. C. A. 369; Dillard *v.* U. S., 141 Fed. 303, 72 C. C. A. 451; Brown *v.* U. S., 142 Fed. 1, 73 C. C. A. 187; Chitwood *v.* U. S., 153 Fed. 551, 82 C. C. A. 505; Wall *v.* S., 2 Ala. App. 157, 56 S. 57; Morris *v.* S., 144 Ala. 81, 39 S. 973; Qualey *v.* Ty., 8 Ariz. 45, 68 P. 546; Ross *v.* S., 92 Ark. 481, 123 S. W. 756; Howard *v.* S., 72 Ark. 586, 82 S. W. 196; Johnson *v.* S., 75 Ark. 427, 88 S. W. 905; Storms *v.* S., 81 Ark. 25, 98 S. W. 678; P. *v.* Grubb (Cal. App.), 141 P. 1051; P. *v.* Kizer, 22 Cal. App. 10, 133 P. 516, 134 P. 346; P. *v.* Whalen, 154 Cal. 472, 98 P. 194, cit. the text; Warford *v.* P., 43 Colo. 107, 96 P. 556; McLaughlin *v.* Thomas, 86 Conn. 252, 85 A. 370; Presley *v.* S., 63 Fla. 37, 57 S. 605; Eatman *v.* S., 48 Fla. 21, 37 S. 576; Wyatt *v.* S. (Ga. App.), 81 S. E. 802; Frank *v.* S. (Ga.), 80 S. E. 1016; S. *v.* O'Neil, 24 Ida. 582, 135 P. 60; Miller *v.* Smith, 7 Ida. 204, 61 P. 824; S. *v.* McGann, 8 Ida. 40, 66 P. 823; P. *v.* Zito, 237 Ill. 434, 86 N. E. 1041, 140 Ill. App. 611; P. *v.* Pouchot, 174 Ill. App. 1; Hartford L. Ins. Co. *v.* Hope, 40 Ind. App. 354, 81 N. E. 595, 1088; Sanderson *v.* S., 169 Ind. 301, 82 N. E. 525; Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039; Jeffries *v.* U. S., 7 Ind. Ty. 47, 103 S. W. 761; S. *v.* Sheets, 127 Ia. 73, 102 N. W. 415; Wellington *v.* C., 158 Ky. 161, 164 S. W. 333; May *v.* C., 153 S. W. 141, 154 S. W. 1074; Mulligan *v.* C., 144 Ky. 246, 137 S. W. 1062; Helton *v.* C., 27 Ky. L. R. 137, 84 S. W. 574; Carpenter *v.* C., 29 Ky. L. R. 100, 92 S. W. 553; S. *v.* Morgan, 129 La. 154, 55 S. 747; S. *v.* Johnson, 111 La. 935, 36 S. 30; S. *v.* High, 116 La. 79, 40 S. 538; C. *v.* Dow (Mass.), 105 N. E. 995; P. *v.* Bullock, 173 Mich. 397, 139 N. W. 43; P. *v.* Hancock, 166 Mich. 654, 132 N. W. 443; P. *v.* Loomis, 161 Mich. 651, 126 N. W. 985; S. *v.* Foley, 247 Mo. 607, 153 S. W. 1010; S. *v.* Robinson, 236 Mo. 712, 139 S. W. 140; Powell *v.* St. Louis, etc. R. Co., 229 Mo. 246, 129 S. W. 963; S. *v.* Bailey, 190 Mo. 257, 280, 88 S. W. 733; S. *v.* Hill, 46 Mont. 24, 126 P. 41; Clark *v.* S., 79 Neb. 473, 113 N. W. 211; S. *v.* Sparks, 79 Neb. 504, 113 N. W. 151; S. *v.* Sparks, 79 Neb. 511, 114 N. W. 598; S. *v.* Jankowski, 83 N. J. L. 796, 85 A. 1135, *aff.* 82 N. J. L. 229, 82 A. 309; Ty. *v.* Caldwell, 14 N. M. 535, 98 P. 167; Greensboro, etc. Co. *v.* Knight, 160 N. C. 592, 76 S. E. 623; S. *v.* Jackson, 21 S. D. 494, 113 N. W. 880; Standard O. Co. *v.* S., 117 Tenn. 618, 658, 100 S. W. 705; Loftus *v.* Sturgis (Tex. Civ.), 167 S. W. 14; Grading-ton *v.* S. (Tex. Cr.), 155 S. W. 210; Bailey *v.* S. (Tex. Cr.), 155 S. W. 536; Overstreet *v.* S. (Tex. Cr.), 150 S. W. 899; Carden *v.* S., 62 Tex. Cr. 545, 138

S. W. 598; Adams *v.* S., 62 Tex. Cr. 426, 138 S. W. 117; Petty *v.* S., 59 Tex. Cr. 586, 129 S. W. 615; Tuller *v.* S., 58 Tex. Cr. 571, 126 S. W. 1158; Leach *v.* S., 46 Tex. Cr. 507, 81 S. W. 733; Weatherford *v.* S., 51 Tex. Cr. 430, 103 S. W. 633; S. *v.* Roby, 83 Vt. 121, 74 A. 638; Carnahan *v.* Moore, 70 Wash. 623, 127 P. 195.

See Schultz *v.* U. S., 200 Fed. 234, 118 C. C. A. 420; P. *v.* King, 23 Cal. App. 259, 137 P. 1076; S. *v.* Bowen (Utah), 134 P. 623; vol. 11, pp. 791, 801, nn. 44, 58, and supplement thereto. *Comp.* Ogden, etc. Co. *v.* Lewis (Utah), 125 P. 687.

Where proof of intent is unnecessary, evidence of similar offenses is inadmissible. Proctor *v.* S., 8 Okla. Cr. 537, 129 P. 77.

Or lack thereof.—Prettyman *v.* U. S., 180 Fed. 30, 103 C. C. A. 384.

Contra, Rex *v.* Pollard, 19 Ont. L. R. (Can.) 96, unless evidence of system.

629-7 P. *v.* Hoffman, 142 Mich. 531, 105 N. W. 838; S. *v.* Sparks, 79 Neb. 504, 511, 113 N. W. 154, 114 N. W. 598.

629-8 Partridge *v.* U. S., 39 App. Cas. (D. C.) 571; Miller *v.* Smith, 7 Ida. 204, 61 P. 824; Hartford L. Ins. Co. *v.* Hope, 40 Ind. App. 354, 81 N. E. 595; Julian *v.* Co., 209 Mo. 35, 107 S. W. 496.

629-9 S. *v.* Brown (Del.), 85 A. 797; P. *v.* Hagenow, 236 Ill. 514, 86 N. E. 370. See supra, "Abortion," 54-3.

630-11 Bryan *v.* U. S., 133 Fed. 495, 66 C. C. A. 369. See vol. 3, p. 746, n. 4 et seq; vol. 11, p. 804, n. 62, and supplement thereto.

630-12 Ross *v.* S., 92 Ark. 481, 123 S. W. 756; Storms *v.* S., 81 Ark. 25, 98 S. W. 678; P. *v.* Hatch, 163 Cal. 368, 125 P. 907; Eatman *v.* S., 48 Fla. 21, 37 S. 576; S. *v.* Boggs (Ia.), 147 N. W. 934; Morse *v.* C., 129 Ky. 294, 111 S. W. 714; S. *v.* Hight, 150 N. C. 817, 63 S. E. 1043; Leach *v.* S., 46 Tex. Cr. 507, 81 S. W. 733; S. *v.* Nilson, 56 Wash. 289, 105 P. 829. See supra, "Embezzlement," 145-33. See also vol. 5, p. 145, n. 33; vol. 11, p. 802, n. 59, and supplement thereto.

630-14 P. *v.* Brecker, 20 Cal. App. 205, 127 P. 666; Clarke *v.* P., 53 Colo. 214, 125 P. 113; P. *v.* Wiel, 244 Ill. 176, 91 N. E. 112; S. *v.* Foxton (Ia.), 147 N. W. 347; S. *v.* Sparks, 79 Neb. 504, 113 N. W. 154. See vol. 5, p. 747, n. 14; vol. 11, p. 803, n. 60, and supplement thereto.

630-15 Dillard *v.* U. S., 141 Fed. 303, 72 C. C. A. 451; P. *v.* Bercovitz, 163 Cal. 636, 126 P. 479; S. *v.* Hetrick, 84 Kan. 157, 113 P. 383; S. *v.* Mitten, 36 Mont. 376, 96 P. 969. See vol. 5, p. 868, n. 71; vol. 11, p. 868, n. 61, and supplement thereto.

630-16 P. *v.* Manasse, 153 Cal. 10, 94 P. 92; May *v.* C., 153 Ky. 141, 154 S. W. 1074; S. *v.* High, 116 La. 79, 40 S. 538; P. *v.* Macgregor (Mich.), 144 N. W. 869; Hunter *v.* S., 3 Okla. Cr. 533, 107 P. 444; Jenkins *v.* S., 59 Tex. Cr. 475, 128 S. W. 1113. See vol. 6, p. 676, n. 77; vol. 11, p. 804, n. 64, and supplement thereto.

630-17 Autrey *v.* S. (Ark.), 168 S. W. 556; Johnson *v.* S., 75 Ark. 427, 88 S. W. 905; P. *v.* Rial, 23 Cal. App. 713, 139 P. 661; Presley *v.* S., 63 Fla. 37, 57 S. 605; Ty. *v.* Caldwell, 14 N. M. 535, 98 P. 167; P. *v.* Weber, 130 App. Div. 593, 115 N. Y. S. 453; Long *v.* S., 55 Tex. Cr. 55, 114 S. W. 632. See vol. 8, p. 132, n. 23, and supplement thereto.

630-18 S. *v.* Sheets, 127 Ia. 73, 102 N. W. 415. See vol. 10, p. 595, n. 35, and supplement thereto.

630-19 Brown *v.* U. S., 142 Fed. 1, 73 C. C. A. 187 (loans of national bank funds to insolvents); Chitwood *v.* U. S., 153 Fed. 551, 82 C. C. A. 505 (conversion of mail matter); Morris *v.* S., 144 Ala. 81, 39 S. 973 (changing name of debtor to defraud creditors); Qualey *v.* Ty., 8 Ariz. 45, 68 P. 546 (falsifying corporate records); S. *v.* Dulaney, 87 Ark. 17, 112 S. W. 158 (bribery); Jeffries *v.* U. S., 7 Ind. Ty. 47, 103 S. W. 761 (receiving stolen goods); P. *v.* Giddings, 159 Mich. 523, 124 N. W. 546 (sale of liquor); S. *v.* Sparks, 79 Neb. 511, 115 N. W. 598 (filing second claim for work for which payment made); P. *v.* Schlessel, 127 App. Div. 510, 112 N. Y. S. 45; S. *v.* Jackson, 21 S. D. 494, 113 N. W. 880 (previous false reports); Wyatt *v.* S., 55 Tex. Cr. 73, 114 S. W. 812 (robbery); Weatherford *v.* S., 51 Tex. Cr. 430, 103 S. W. 633 (illegal prescriptions). And see P. *v.* Harrison, 14 Cal. App. 545, 112 P. 733; Williams *v.* S., 4 Okla. Cr. 523, 114 P. 1114.

White slavery.—S. *v.* Jankowski, 83 N. J. L. 796, 85 A. 1135, *aff.* 82 N. J. L. 229, 82 A. 309.

Conspiracy to misapply funds.—Breese *v.* U. S., 203 Fed. 824, 122 C. C. A. 142, *aff.* 172 Fed. 761.

Pandering.—P. *v.* Grubb (Cal. App.), 141 P. 1051.

Unlawful liquor selling.—Hill *v.* S., 3 Okla. Cr. 686, 109 P. 291.

Assaults.—Warford *v.* P., 43 Colo. 107, 96 P. 556.

Convictions for maintaining liquor nuisance in one place cannot be proved to show accused's intent in keeping liquor at another. S. *v.* Bartley, 105 Me. 505, 74 A. 1129.

631-20 S. *v.* Sheets, 127 Ia. 73, 102 N. W. 415.

Assault.—P. *v.* O'Bryan, 165 Cal. 55, 130 P. 1042.

In action against husband for failing to provide for wife and child his arrest may be shown for seducing wife and that prosecution dismissed because of marriage. S. *v.* Stout, 139 Ia. 557, 117 N. W. 958.

632-22 Hartford L. Ins. Co. *v.* Hope, 40 Ind. App. 354, 81 N. E. 595, 1088; Stotts *v.* Fairfield (Ia.), 145 N. W. 61; J. B. Millet Co. *v.* Andrews, 175 Mich. 350, 141 N. W. 578; Harris *v.* R. Co., 77 N. J. L. 278, 72 A. 50. See vol. 11, p. 791, n. 41; vol. 6, p. 67, n. 46, and supplement thereto. But see Smolowitz *v.* Orbach, 141 N. Y. S. 527.

632-23 Walker *v.* Montgomery, 249 Ill. 378, 94 N. E. 527.

632-24 First Nat. Bk. *v.* Miller, 235 Ill. 135, 85 N. E. 312; Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1; Julian *v.* Co., 209 Mo. 35, 107 S. W. 496; W. U. T. Co. *v.* Simmons (Tex. Civ.), 93 S. W. 686 (refusal to transmit message).

632-26 P. *v.* Minney, 155 Mich. 534, 119 N. W. 918.

633-27 Roden *v.* S., 5 Ala. App. 247, 59 S. 751; S. *v.* Dulaney, 87 Ark. 17, 112 S. W. 158; Autrey *v.* S. (Ark.), 168 S. W. 556; S. *v.* Weiss, 63 Or. 462, 128 P. 448; C. *v.* Shields, 50 Pa. Super. 1; S. *v.* Dana, 59 Wash. 30, 109 P. 191.

633-30 Clarke *v.* S., 5 Ga. App. 93, 62 S. E. 663; P. *v.* Molineux, 168 N. Y. 264, 298, 61 N. E. 286, 62 L. R. A. 193; Parrish *v.* S. (Tenn.), 164 S. W. 1174; Currington *v.* S. (Tex. Cr.), 161 S. W. 478. See also P. *v.* Ruef, 14 Cal. App. 576, 114 P. 48, 54.

Evidence of other wrongful acts not competent against defendants not connected with, or who have no knowledge of them. Miller *v.* U. S., 133 Fed. 337, 66 C. C. A. 399.

634-31 C. *v.* Dow (Mass.), 105 N. E. 995; Herndon *v.* S., 50 Tex. Cr. 552, 99 S. W. 558; Ogden, etc. Co. *v.* Lewis (Utah), 125 P. 687.

635-32 See S. *v.* O'Neil, 24 Ida. 582, 135 P. 60.

635-34 P. *v.* Minney, 155 Mich. 534, 119 N. W. 918; P. *v.* Molineux, 168 N. Y. 264, 298, 61 N. E. 286, 62 L. R. A. 193; S. *v.* Fulwider, 28 S. D. 622, 134 N. W. 807.

Accused may show intent was against another and different party. Smith *v.* S., 46 Tex. Cr. 267, 284, 81 S. W. 936.

Period of time to be covered is discretionary with court. First Nat. Bk. *v.* Miller, 235 Ill. 135, 85 N. E. 312.

No similarity.—"Transactions by which defendant misappropriated money given to him to buy stock in the open market, differ in character from those where moneys were obtained by false representation that he personally owned stock for which he obtained payment. It is, of course, true that the acts sought to be established as bearing on the question of intent need not be part of a general scheme or plan; but it is necessary that they must be similar in character." P. *v.* Cohen, 148 App. Div. 205, 133 N. Y. S. 103.

637-37 Long *v.* S., 55 Tex. Cr. 55, 114 S. W. 632. See infra, "Offenses Against Postal Laws," 147-6.

In case of assault and battery it may be proved defendant had tried to hire witness to assault the same person. Rice *v.* P., 55 Colo. 506, 136 P. 74.

Intent of corporation.—See infra, "Trade Marks," etc., 655-73.

Accused's connection with prior transaction must be shown. P. *v.* Giddings, 159 Mich. 523, 124 N. W. 546.

639-41 P. *v.* Spriggs, 119 App. Div. 236, 104 N. Y. S. 539.

639-43 See infra, "Trade Marks," etc., 655-73.

640-44 Clarke *v.* S., 5 Ga. App. 93, 62 S. E. 663.

641-46 Schultz *v.* U. S., 200 Fed. 234, 118 C. C. A. 420; S. *v.* Jackson, 21 S. D. 494, 113 N. W. 880 (limitation of one year no abuse of discretion).

641-47 Presley *v.* S., 63 Fla. 37, 57 S. 605.

642-51 Storms *v.* S., 81 Ark. 25, 98 S. W. 678; Eatman *v.* S., 48 Fla. 21, 37 S. 576; Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039; S. *v.* Jackson, 21 S. D. 494, 113 N. W. 880.

642-52 Wyatt *v.* S., 55 Tex. Cr. 73, 114 S. W. 812.

INTEREST

Presumption it was included in verdict, 644-4; *Unreasonable and vexatious delay,* 644-6; *Expert testimony,* 649-24.

643-2 Schlotterbeck *v.* Schwinn, 23 Okla. 681, 103 P. 854. See infra, 645-8.

644-4 Myers *v.* Ruddy, 154 Ill. App. 438; Whitman *v.* McIntyre, 199 Mass. 436, 85 N. E. 426 (as against trustees); Boyles *v.* Byers (Tex. Civ.), 138 S. W. 1112.

Advancement of money to purchase property is presumed to be made on interest. Semi-Tropic S. Assn. *v.* Johnson, 163 Cal. 639, 126 P. 488.

Loan presumed to be on interest. Hall *v.* Graham, 112 Va. 560, 72 S. E. 105.

Presumption that interest included in verdict, where party in whose favor verdict was rendered was entitled to such. Clements *v.* Muttersbaugh, 27 App. Cas. (D. C.) 165; Blackwell, etc. R. Co. *v.* Bebout, 19 Okla. 63, 91 P. 877.

No presumption indulged that a garnishee retaining money pending litigation for his benefit did not make use of it. Cox *v.* Cronan, 82 Conn. 175, 72 A. 927.

644-5 Mack *v.* Engel, 165 Mich. 540, 131 N. W. 92.

644-6 O'Meara *v.* Coal Co., 154 Ill. App. 321. See Lafrentz Co. *v.* Cavanagh, 166 Ill. App. 306; Chicago Brick Co. *v.* Ryan, 165 Ill. App. 120; Chicago Brick Co. *v.* McLester, 165 Ill. App. 114; Osgood *v.* Poole, 165 Ill. App. 63; Chivers *v.* Sigmund, 164 Ill. App. 555; Gwynn *v.* Daugherty (Ind. App.), 102 N. E. 147.

Unreasonable and vexatious delay established by evidence showing refusal to pay until creditor shall do something not required. American, etc. Co. *v.* Co., 129 Ill. App. 548.

645-8 Interest laws of different jurisdictions presumed similar. Schlotterbeck *v.* Schwinn, 23 Okla. 681, 103 P. 854.

647-12 Party who has agreed to pay interest must show performance of obligation. Cole *v.* Co., 200 Mass. 594, 86 N. E. 902.

647-13 Vance R. L. Co. *v.* Durphy, 8 Cal. App. 664, 97 P. 702, implied admission in pleading.

647-14 Fishel *v.* Irwin, 132 La. 344, 61 S. 397.

648-19 Thomas *v.* Turner, 157 Ill. App. 16.

649-20 Common law did not imply promise to pay interest and it cannot be recovered unless expressly contracted for. Lynchburg *v.* Amherst Co., 115 Va. 600, 80 S. E. 117.

649-24 Expert testimony inadmissible to show interest due if jury competent to assess. Clements *v.* Muttersbaugh, 27 App. Cas. (D. C.) 165.

INTERPRETER

651-1 P. *v.* Salas, 2 Cal. App. 537, 84 P. 295.

651-2 Grand juries have like power. S. *v.* Firmatura, 121 La. 676, 46 S. 691.

652-3 If testimony required in English, if possible, testimony of witness' inability to use English should be received before calling of interpreter Hackart *v.* Co., 243 Ill. 49, 90 N. E. 257.

652-4 Dobbins *v.* R. Co., 79 Ark. 85, 95 S. W. 794 (though witness can write, testimony taken by signs if better); Ralph *v.* S., 124 Ga. 81, 52 S. E. 298 (party under physical disability).

653-9 P. *v.* Lopez, 21 Cal. App. 188, 131 P. 104. See John *v.* Judd, 13 Haw. 319; Kozlowski *v.* City, 113 Ill. App. 513.

An interpreter need not demonstrate his qualifications in the presence of the jury. P. *v.* Ong Git, 23 Cal. App. 148, 137 P. 283.

655-16 Interpreter not disqualified in interpreting for prosecutrix in rape case where it was shown his and her great-great-grandfather was the same person. P. *v.* Rardin, 255 Ill. 9, 99 N. E. 59.

655-18 S. *v.* Firmatura, 121 La. 676, 46 S. 691, nor because in official capacity he was active in trying to discover party guilty of offense investigated.

656-20 S. *v.* Smith, 203 Mo. 695, 102 S. W. 526.

657-22 P. *v.* Ong Git, 23 Cal. App. 148, 137 P. 283. See S. *v.* Firmatura, 121 La. 676, 46 S. 691.

657-23 Specific instances of inaccuracy must be shown. P. *v.* Phillips, 12 Cal. App. 760, 108 P. 731.

657-24 Avaro *v.* Avaro, 235 Mo. 424, 138 S. W. 500.

Oath not administered either to interpreter or witness in preliminary proceedings to ascertain whether witness'

language interpretable. P. v. Weston, 236 Ill. 104, 86 N. E. 188.

658-28 Tavares v. Dewing, 33 R. I. 424, 82 A. 133.

659-29 Felts v. Murphy, 201 U. S. 123.

659-31 Extrajudicial confession through interpreter admissible where interpretation reduced to writing, signed by accused, and interpreter testifies to its correctness. S. v. Banusik (N. J. L.), 64 A. 994.

660-33 Kelly v. Assn., 2 Cal. App. 460, 84 P. 321.

660-34 Davis v. Bk., 6 Ind. Ty. 124, 89 S. W. 1015 (affidavit, though interpreter affiant's agent, admissible to contradict or impeach affiant's testimony, although interpreter not sworn); P. v. Randazzio, 194 N. Y. 147, 87 N. E. 112 (though accused took no part in selecting interpreter).

661-37 When the interpreter testified he had forgotten what defendant had testified to but he had truly interpreted what was said at the time, the testimony of a juror as to what had been interpreted to the jury is not hearsay and is admissible. Mares v. S. (Tex. Cr.), 158 S. W. 1130.

663-43 Yick Wo v. Underhill, 5 Cal. App. 519, 90 P. 967.

666-68 In Alabama Code §7175 requires proof to the reasonable satisfaction of the jury. Smith v. S. (Ala.), 62 S. 184.

INTOXICATING LIQUORS

Chemical composition of other liquors, 679-38; *Liquor sold at other places and by other persons*, 682-53; *Rebate of license money*, 694-20; *Transfer of license*, 697-42; *Intoxication prior to sales complained of*, 703-77; *Druggist's affidavit*, 731-13.

675-5 Rutherford v. S., 48 Tex. Cr. 431, 88 S. W. 810, hop ale.

675-8 Wilson v. S., 3 Ala. App. 158, 57 S. 503; Lambie v. S., 151 Ala. 86, 44 S. 51; Purcell v. S., 61 Fla. 43, 55 S. 847; Dent v. S. (Ga. App.), 80 S. E. 548; O'Connell v. S., 5 Ga. App. 234, 62 S. E. 1007; S. v. Mitchell, 134 Mo. App. 540, 114 S. W. 1113; P. v. O'Reilly, 129 App. Div. 522, 114 N. Y. S. 258 (dist. cases because of difference in statutes); S. v. Ball, 19 N. D. 782, 123 N. W. 826; Rochester Brew. Co. v. S., 26 Okla. 309, 109 P. 298; Antonelli v. S., 3 Okla. Cr. 580, 107 P. 951; Petitti v. S., 3 Okla. Cr. 587, 107 P. 954; S. v. Carmody, 50 Or. 1, 91 P. 446, 1081, 12 L. R. A. (N. S.) 828; S. v. Club, 83 S. C. 509, 65 S. E. 730; Moreno v. S., 64 Tex. Cr. 660, 143 S. W. 156; Vines v. S., 19 Wyo. 255, 116 P. 1013.

675-9 Dallas B. v. Holmes, 51 Tex. Civ. 514, 112 S. W. 122. See Potts v. S., 50 Tex. Cr. 368, 97 S. W. 477.

676-10 Hoagland v. Canfield, 160 Fed. 146; Feddern v. S., 79 Neb. 651, 113 N. W. 127.

676-11 Lambie v. S., 151 Ala. 86, 44 S. 51 (whether "hop jack" or "hop ale" is beer and intoxicating for court) Potts v. S., 50 Tex. Cr. 368, 97 S. W. 477; Casens v. S., 48 Tex. Cr. 186, 88 S. W. 229; Sullivan v. S., 48 Tex. Cr. 201, 87 S. W. 150; Schwulst v. S., 52 Tex. Cr. 426, 108 S. W. 698 (that witness received what he supposed was beer and said, "I guess it was intoxicating." insufficient); Bird v. S., 49 Tex. Cr. 205, 91 S. W. 791 (evidence insufficient).

"Near beer."—See Abbott v. S., 11 Ga. App. 43, 74 S. E. 621.

677-17 Hoagland v. Canfield, 160 Fed. 146.

677-21 Purcell v. S., 61 Fla. 43, 55 S. 847; Benton v. S., 9 Ga. App. 422, 71 S. E. 498; Carswell v. S., 7 Ga. App. 198, 66 S. E. 488; S. v. York, 74 N. H. 125, 65 A. 685; Smith v. S., 56 Tex. Cr. 501, 120 S. W. 881; Wilcoxson v. S. (Tex. Cr.), 91 S. W. 581; Beaty v. S., 53 Tex. Cr. 432, 110 S. W. 449. See Donaldson v. S., 3 Ga. App. 451, 60 S. E. 115.

678-23 Nussbaumer v. S., 54 Fla. 87, 44 S. 712.

678-31 Marks v. S., 159 Ala. 71, 48 S. 864 (mead or metheglin); S. v. Pigg, 78 Kan. 618, 97 P. 859 (Manhattan cocktail known to be intoxicating).

679-32 The general reputation that bitters were used for intoxicating purposes, not admissible. S. v. Benson, 154 Ia. 313, 134 N. W. 851.

679-33 Snead v. S., 7 Ala. App. 118, 61 S. 473; Kinnane v. S., 106 Ark. 337, 153 S. W. 264; De Freese v. Atlanta, 12 Ga. App. 201, 76 S. E. 1077. See also Nussbaumer v. S., 54 Fla. 87, 44 S. 712; S. v. Gibbs, 109 Minn. 247, 123 N. W. 810; Roberts v. S., 59 Tex. Cr. 47, 126 S. W. 1129.

That beverage had color of whiskey, bottles labeled whiskey and odor of

whiskey in place, may be shown. Woodward *v.* S., 5 Ala. App. 202, 59 S. 688; Strange *v.* S., 5 Ala. App. 164, 59 S. 691.

679-34 Looks and tastes like whiskey is sufficient evidence. Nixon *v.* S., 92 Neb. 115, 138 N. W. 136.

679-35 S. *v.* Mostella (N. C.), 74 S. E. 578.

Witness for state may not testify that liquid he bought at a sale other than that for which defendant on trial did not taste like that shown to jury as liquid sold to prosecutor. Swalm *v.* S., 49 Tex. Cr. 241, 91 S. W. 575.

679-38 Nussbaumer *v.* S., 54 Fla. 87, 44 S. 712; Gourley *v.* C., 140 Ky. 221, 131 S. W. 34; Poston *v.* S., 83 Neb. 240, 119 N. W. 520; S. *v.* Costa, 78 Vt. 198, 62 A. 38.

Chemical composition of other liquors unidentified with liquor sold inadmissible. Magill *v.* S., 51 Tex. Cr. 357, 103 S. W. 397; S. *v.* Costa, 78 Vt. 198, 62 A. 38.

Hearsay.—Testimony as to analysis made by another hearsay. Uloth *v.* S., 48 Tex. Cr. 295, 87 S. W. 823.

680-39 Competency of expert. P. *v.* Marx, 128 App. Div. 828, 112 N. Y. S. 1011.

680-40 Treadwell *v.* S., 168 Ala. 96, 53 S. 290; Brighton *v.* Miles, 151 Ala. 479, 44 S. 394; Nussbaumer *v.* S., 54 Fla. 87, 44 S. 712; S. *v.* Olson, 95 Minn. 104, 103 N. W. 727; Feddern *v.* S., 79 Neb. 651, 113 N. W. 127 (that liquor tasted like beer); Markinson *v.* S., 2 Okla. Cr. 323, 101 P. 353; Trinkle *v.* S., 59 Tex. Cr. 567, 123 S. W. 1114; Beaty *v.* S., 53 Tex. Cr. 432, 110 S. W. 449; Wiginton *v.* S., 51 Tex. Cr. 492, 102 S. W. 1124 (or was similar to beer in color and taste is admissible); Porter *v.* S. (Tex. Cr.), 86 S. W. 1014 (that Ino and Frosty did not taste like beer and were not beer); Curtis *v.* S., 52 Tex. Cr. 606, 108 S. W. 380; Peeples *v.* S. (Tex. Cr.), 99 S. W. 1002; S. *v.* Good, 56 W. Va. 215, 49 S. E. 121.

Comparison of the effect of the liquor sold cannot be made with another liquor unless qualities of two are shown. Petitti *v.* S., 3 Okla. Cr. 587, 107 P. 954.

Though witness neither smelled nor tasted liquor, may state it was whiskey. Rice *v.* S., 52 Tex. Cr. 359, 107 S. W. 832.

680-42 Lewis *v.* S., 6 Ga. App. 779, 65 S. E. 842; S. *v.* Gibbs, 109 Minn. 247, 123 N. W. 810. See Lambie *v.* S., 151 Ala. 86, 44 S. 51.

Freight bills as evidence of intoxicating properties. Thompson *v.* S. (Tex. Cr.), 87 S. W. 353.

681-43 But see Thompson *v.* S., supra.

681-44 Johnson *v.* S., 3 Ala. App. 155, 57 S. 499; Martin *v.* S., 57 Tex. Cr. 149, 122 S. W. 24; McRoberts *v.* S., 49 Tex. Cr. 288, 92 S. W. 804.

Amount drunk by prosecutor cannot be shown by defendant in absence of evidence as to effect. Henderson *v.* S., 49 Tex. Cr. 269, 91 S. W. 569.

Probable effect.—Statement of witness as to probable effect of a drink of liquor consumed by a patron inadmissible. Young *v.* Beveridge, 81 Neb. 180, 115 N. W. 766.

681-45 Martin *v.* S., 57 Tex. Cr. 149, 122 S. W. 24; McRoberts *v.* S., 49 Tex. Cr. 288, 92 S. W. 804.

681-46 See infra, 682-49.

681-47 Gourley *v.* C., 140 Ky. 221, 131 S. W. 34.

682-49 Murph *v.* S., 153 Ala. 67, 45 S. 208; Gourley *v.* C., 140 Ky. 221, 131 S. W. 34; Markinson *v.* S., 2 Okla. Cr. 323, 101 P. 353; Newman *v.* S., 55 Tex. Cr. 376, 116 S. W. 1156; McRoberts *v.* S., 49 Tex. Cr. 288, 92 S. W. 804. See S. *v.* Gillispie, 63 W. Va. 152, 59 S. E. 957.

682-50 Kennedy *v.* S. (Ala.), 62 S. 49; Woodward *v.* S., 5 Ala. App. 202, 59 S. 688. See infra, 682-53.

682-53 S. *v.* Cool, 66 W. Va. 86, 66 S. E. 740, if sold in labeled bottles as put up by maker and has commercial name. But see Rutherford *v.* S., 48 Tex. Cr. 431, 88 S. W. 810.

Liquor sold at other places.—After proof that beverage was product of same concern and bore same label as beverages sold elsewhere to the trade by the manufacturer evidence of its intoxicating effects at such places admissible, it being shown it was in the same condition as when received from manufacturer. S. *v.* Clark, 124 La. 965, 50 S. 811.

Liquor sold by others.—Testimony of third person that he had sold a certain liquor to accused and another may be followed by testimony of witnesses that they had drank liquor bought from the other. If it is shown that another dealer was not prosecuted for selling same kind of liquor it may be shown he was officially warned not

to continue its sale. Snead *v.* S., 55 Tex. Cr. 583, 117 S. W. 983.

Sale of "soft drinks" at other times immaterial. Hall *v.* S., 7 Ga. App. 186, 66 S. E. 486.

682-54 Poston *v.* S., 83 Neb. 240, 119 N. W. 520. See infra, 741-71. But see Isom *v.* S., 52 Tex. Cr. 438, 107 S. W. 350.

Such testimony not important.—Snead *v.* S., 55 Tex. Cr. 583, 117 S. W. 983.

683-56 Tompkins *v.* S., 2 Ga. App. 639, 58 S. E. 1111 (whiskey); Howard *v.* S., 7 Ga. App. 61, 65 S. E. 1076.

684-58 P. *v.* Seeley, 105 App. Div. 149, 93 N. Y. S. 982, 183 N. Y. 544, 76 N. E. 1102.

684-60 Evidence of open sale of malt extract, inadmissible to show non-intoxicating qualities. S. *v.* Costa, 78 Vt. 198, 62 A. 38.

Comparison with other liquors.—Evidence excluded showing extract in question used for same purpose as other medicines, that such medicines contained large per cent. of alcohol, that a person could not become intoxicated on them or the extract. S. *v.* Costa, supra.

Requests not to sell particular liquor irrelevant as to its properties. Murray *v.* S., 56 Tex. Cr. 420, 120 S. W. 438.

Percentage of alcohol in other preparations recognized as standard medicines irrelevant if quantity of alcohol in article sold shown. Clement *v.* Dwight, 137 App. Div. 389, 121 N. Y. S. 788.

684-61 Smith *v.* S., 11 Ga. App. 89, 74 S. E. 711; Ex parte Lockman, 18 Ida. 465, 110 P. 253; Crawford *v.* S., 5 Okla. Cr. 33, 113 P. 200; Rutherford *v.* S., 48 Tex. Cr. 431, 88 S. W. 810; Cannan *v.* S. (Tex. Cr.), 159 S. W. 1186; Jones *v.* S. (Tex. Cr.), 156 S. W. 1191.

Preparation which could not be used as a beverage. Kincaid *v.* S., 49 Tex. Cr. 303, 92 S. W. 415.

Burden when on defendant.—S. *v.* Durr, 69 W. Va. 251, 71 S. E. 767.

684-62 Gaskins *v.* S., 127 Ga. 51, 55 S. E. 1045; Lumpkin *v.* City, 9 Ga. App. 470, 71 S. E. 755; Gourley *v.* C., 140 Ky. 221, 131 S. W. 34; Cannan *v.* S. (Tex. Cr.), 159 S. W. 1186; Sullivan *v.* S., 48 Tex. Cr. 201, 87 S. W. 150. *Contra* if sale of beer proved. P. *v.* Anderson, 159 Mich. 185, 123 N. W. 605. See Mason *v.* S., 1 Ga. App. 534, 58 S. E. 139, and infra, 769-24.

Intoxicating quality must be shown beyond reasonable doubt in criminal cases. Roberts *v.* S., 59 Tex. Cr. 47, 126 S. W. 1129; Beaty *v.* S., 53 Tex. Cr. 432, 110 S. W. 449. Where judicial notice taken of properties of liquor defendant must raise such doubt as to the nature of that he sold. Antonelli *v.* S., 3 Okla. Cr. 580, 107 P. 951; Petitti *v.* S., 3 Okla. Cr. 587, 107 P. 954.

684-64 *Contra,* Reed *v.* Ty., 1 Okla. Cr. 481, 98 P. 583. See S. *v.* Files, 71 Kan. 862, 80 P. 948; S. *v.* Olson, 95 Minn. 104, 103 N. W. 727 (where court permitted liquor to go into jury-room with instruction it should not be tasted).

Presumed beverage sold to trade generally under trade name, the product of a single firm, possesses uniform qualities. S. *v.* Clark, 124 La. 965, 50 S. 811.

685-65 P. *v.* Stone, 154 Ill. App. 7; P. *v.* Adler, 169 Mich. 322, 135 N. W. 289; S. *v.* Burk, 234 Mo. 574, 137 S. W. 969, *aff.* 151 Mo. App. 188, 131 S. W. 883; Luther *v.* S., 83 Neb. 455, 120 N. W. 125; S. *v.* York, 74 N. H. 125, 65 A. 685. See S. *v.* Good, 56 W. Va. 215, 49 S. E. 121.

A recent Alabama statute (Acts Special Session, 1909, pp. 63, 93, §32½) permits the state to give in evidence the fact that the beverage which the defendant sold or otherwise disposed of possessed "the same color, odor and general appearance, or the same taste, color and general appearance of a prohibited liquor or beverage." "Evidence that a beverage has the color, odor and general appearance of whisky, for instance, or that it has the taste, color and general appearance of beer, has some tendency to prove that it is a prohibited liquor within the meaning of the statute. But it cannot be said that proof of the mere color of a beverage has a logical or legitimate tendency to identify it as a prohibited liquor." Wright *v.* S., 4 Ala. App. 150, 58 S. 803.

685-67 But in Neal *v.* S., 51 Tex. Cr. 513, 102 S. W. 1139, held not error to admit order for election where petition consisted of several papers attached.

685-68 Madill *v.* Midland, 156 Mich. 56, 120 N. W. 355; P. *v.* Hamilton, 143 Mich. 1, 106 N. W. 275.

Petitioner must show signature obtained by fraud. In re Petition, 18 O. Dec. 591.

686-69 Long *v.* S., 165 Ala. 101, 51 S. 636; Nicols *v.* C., 27 Ky. L. R. 1176, 87 S. W. 1072 (*rev.* 27 Ky. L. R. 690, 86 S. W. 513); Crigler *v.* C. (Ky.), 83 S. W. 587; S. *v.* Hitchcock, 124 Mo. App. 101, 101 S. W. 117; Jackson *v.* S. (Tex. Cr.), 157 S. W. 1196; Robinson *v.* S. (Tex. Cr.), 154 S. W. 997; Pierce *v.* S. (Tex. Cr.), 154 S. W. 559; Lester *v.* S. (Tex. Cr.), 153 S. W. 861; Galloway *v.* S. (Tex. Cr.), 153 S. W. 857; Kinnebrew *v.* S. (Tex. Cr.), 150 S. W. 775; Hogan *v.* S. (Tex. Cr.), 147 S. W. 601; Ferguson *v.* S. (Tex. Cr.), 147 S. W. 239; Ellis *v.* S., 59 Tex. Cr. 419, 128 S. W. 1125; Woodward *v.* S., 58 Tex. Cr. 411, 126 S. W. 270; Davis *v.* S., 52 Tex. Cr. 546, 107 S. W. 828, 829; Cantwell *v.* S., 47 Tex. Cr. 521, 85 S. W. 18; Byrd *v.* S., 51 Tex. Cr. 539, 103 S. W. 863; Craddick *v.* S., 48 Tex. Cr. 385, 88 S. W. 347.

See Nobles *v.* S. (Tex. Cr.), 158 S. W. 1133.

Issuance of licenses by judge who canvassed votes raises presumption majority in favor of licenses. S. *v.* Songer, 76 Ark. 169, 88 S. W. 903.

Presumption where state has shown election adopting prohibition. Holland *v.* S., 51 Tex. Cr. 147, 101 S. W. 1002.

Parol testimony competent to show place where sale made within prohibition territory. Coleman *v.* S., 53 Tex. Cr. 578, 111 S. W. 1011.

686-70 Jay *v.* O'Donnell, 178 Ind. 282, 98 N. E. 349. See infra, "Judicial Notice," 963-66.

Sufficiency of orders of commissioners' court putting law into effect cannot be questioned. Wesley *v.* S., 57 Tex. Cr. 277, 122 S. W. 550.

686-71 S. *v.* Robertson, 142 Mo. App. 38, 125 S. W. 215; S. *v.* Foreman, 121 Mo. App. 502, 97 S. W. 269; Fitze *v.* S. (Tex. Cr.), 85 S. W. 1156.

686-72 See Fitze *v.* S. (Tex. Cr.), 85 S. W. 1156.

687-73 Koerber *v.* Board, 155 Mich. 677, 120 N. W. 8. See S. *v.* Songer, 76 Ark. 169, 88 S. W. 903.

687-74 Long *v.* S., 165 Ala. 101, 51 S. 636; Doyle *v.* S., 59 Tex. Cr. 60, 127 S. W. 815 (conclusively).

Unless proper certificate of publication made state must prove each and every step necessary to be had before adoption of local option law; failure to show posting of notices fatal. McGovern *v.* S., 49 Tex. Cr. 35, 90 S. W. 502.

687-76 Holland *v.* S., 51 Tex. Cr. 147, 101 S. W. 1002, proper publication presumed.

687-77 See Hood *v.* S., 52 Tex. Cr. 524, 107 S. W. 848.

That election held proved by testimony of officer ordering it. Long *v.* S., 165 Ala. 101, 51 S. 636.

688-80 P. *v.* Willi, 147 Ill. App. 207; S. *v.* Kimmel, 156 Mo. App. 461, 137 S. W. 329.

Election record competent to show that election held in town in question notwithstanding the certification showed election held in township. P. *v.* Arms, 165 Ill. App. 394.

Record of town meeting competent and sufficient. S. *v.* Bollenbach, 98 Minn. 480, 108 N. W. 3.

Action in counting ballots not impeachable by testimony of bystander. Savage *v.* Umphries (Tex. Civ.), 118 S. W. 893.

Recital in order as to population of towns or cities, conclusive. S. *v.* Rinke, 140 Mo. App. 645, 121 S. W. 159.

688-81 Lynch *v.* S., 31 O. C. C. 352, *aff.* 81 O. St. 489, 91 N. E. 1133; Coleman *v.* S., 53 Tex. Cr. 578, 111 S. W. 1011.

688-82 Beaty *v.* S., 53 Tex. Cr. 432, 110 S. W. 449. *Comp.* Gorman *v.* S., 52 Tex. Cr. 327, 106 S. W. 384.

689-84 P. *v.* Walker, 154 Ill. App. 3; S. *v.* O'Kelley, 156 Mo. App. 493, 137 S. W. 332; S. *v.* O'Brien, 35 Mont. 482, 90 P. 514; S. *v.* Berry, 32 O. C. C. 250; S. *v.* Carmody, 50 Or. 1, 91 P. 446, 1081, 12 L. R. A. (N. S.) 828; Romero *v.* S., 56 Tex. Cr. 435, 120 S. W. 589; Fields *v.* S., 52 Tex. Cr. 451, 107 S. W. 857 (orders and decrees ordering election and publication of result, admissible). See S. *v.* Kline, 50 Or. 426, 93 P. 237.

Proof by parol.—Paul *v.* Judge, 169 Mich. 452, 135 N. W. 283.

Proof of publication.—See S. *v.* Oliphant, 128 Mo. App. 252, 107 S. W. 32; S. *v.* Haines (Mo. App.), 107 S. W. 36.

Testimony of commissioners, inadmissible in absence of showing of loss of records. S. *v.* Songer, 76 Ark. 169, 88 S. W. 903.

Formal orders necessary. Bills *v.* S., 55 Tex. Cr. 541, 117 S. W. 835.

County court record admissible though not showing return of publication of result of election, order of publication being disclosed. S. *v.* Bush, 136 Mo. App. 608, 118 S. W. 670.

690-85 Where provision for contesting election made, defendant in prosecution for violating law cannot deny its validity. S. *v.* O'Brien, 35 Mont. 482, 90 P. 514.

But that notice of election not published for time required, cannot be proved. S. *v.* O'Brien, supra.

Burden on defendant.—S. *v.* Kline, 50 Or. 426, 93 P. 237.

690-88 Prima facie proof that those signing a petition of protest in regard to liquor dealers' bonds were electors may be made by the poll book. Covell *v.* Village Council (Mich.), 146 N. W. 309.

690-90 Application on which election was ordered and order admissible when supplemented by testimony showing signing by specified number of voters. Long *v.* S., 165 Ala. 101, 51 S. 636.

690-91 Parol evidence admissible to identify particular building referred to in petition. Thomas *v.* Burke, 91 Ark. 595, 121 S. W. 1060.

691-92 Mitchell *v.* S., 115 Md. 360, 80 A. 1020; S. *v.* Brown, 130 Mo. App. 214, 109 S. W. 99. See S. *v.* O'Brien, supra.

691-93 Wiginton *v.* S., 51 Tex. Cr. 492, 102 S. W. 1124.

691-95 Affidavits not admissible to show petitioners freeholders. In re Klamm (Neb.), 117 N. W. 991.

691-96 Allegations of fact in remonstrance, not convincing. In re Indian B. Co.'s License, 226 Pa. 56, 75 A. 29.

Petitioner must show sufficiency of petition.—Neither certificate of register of deeds nor testimony of deputy assessor who made last assessment competent to show petitioners are freeholders. Deeds to them, executed during a period of eight years, are admissible, but do not establish ownership of real estate at time petition signed. Rosenberg *v.* Rohrer, 83 Neb. 469, 120 N. W. 159

Remonstrants must show their qualifications and authority of those who have acted for them. Miller *v.* Resler, 172 Ind. 320, 88 N. E. 516.

Action of signers of abandoned remonstrance concerning it immaterial. Lee *v.* Shull, 172 Ind. 309, 88 N. E. 521.

Agreement by applicant not to sell liquors to factory employes in neighborhood is some evidence of unsuitability of place for business. Bormann's App., 81 Conn. 458, 71 A. 502.

Issue of license to another to sell liquor near church or school immaterial to rights of applicant, no abuse of official discretion being shown. Appeal of Schusler, 81 Conn. 276, 70 A. 1029.

692-98 In re Powell, 83 Neb. 119, 119 N. W. 9, violation of law or acts repugnant to moral sense of community.

Non-prosecution of applicant during ten years and general approval of application by people of neighborhood considerations of weight. Louisville *v.* Gagen (Ky.), 116 S. W. 745.

Identity of intoxicated persons to whom applicant charged to have sold liquors must be shown. Lycoming Licenses, 35 Pa. C. C. 24.

Testimony of sales to minor should be stricken out if witness refuses to name him. In re Klamm (Neb.), 117 N. W. 991.

That applicant's house disorderly one day no evidence he kept such a house. Louisville *v.* Hendricks (Ky.), 116 S. W. 747.

692-1 Bolton *v.* Hegner, 82 Neb. 772, 118 N. W. 1096 (single exhibition of lascivious pictures shown); Woods *v.* Garvey, 82 Neb. 776, 118 N. W. 1114 (applicant frequently intoxicated).

Acts of corporate officers and agents proved in opposition to corporation's application for brewer's license. In re Indian B. Co.'s License, 226 Pa. 56, 75 A. 29.

692-3 Petitions and remonstrances of uninformed persons not entitled to weight. In re Indian B. Co.'s License, supra.

Applicant must show abuse of discretion by licensing officers. Berger *v.* De Loach, 56 Tex. Civ. 532, 121 S. W. 591.

Relevant facts to show merchant's good faith.—See C. *v.* Ewing, 135 Ky. 557, 122 S. W. 851, statute.

692-4 Statements in application conclusive upon licensing officer. P. *v.* Walker, 60 Misc. 130, 112 N. Y. S. 1021, statute.

No presumption of applicant's fitness indulged against remonstrance. In re Klamm (Neb.), 117 N. W. 991.

692-7 In re Indian B. Co.'s License, 226 Pa. 56, 75 A. 29, not binding.

692-8 In re Moore, 140 Ia. 560, 118

N. W. 879, if facts on which rested stated.

693-12 *Comp.* Whissen *v.* Furth, 73 Ark. 366, 84 S. W. 500.

693-13 Whissen *v.* Furth, supra; Hodges *v.* Court, 117 Ky. 619, 78 S. W. 177; In re Berger, 84 Neb. 128, 120 N. W. 960.

693-14 **Petitioner's qualifications** must be shown by applicant if issue made. Swihart *v.* Hansen, 76 Neb. 727, 107 N. W. 862; In re Marica, 85 Neb. 842, 124 N. W. 460.

Remonstrators must show they constitute majority of ward electors. Adams *v.* Smith, 173 Ind. 398, 90 N. E. 625.

693-15 See Carr *v.* Augusta, 124 Ga. 116, 52 S. E. 300.

694-20 Davis *v.* Repp, 79 N. J. L. 394, 75 A. 169.

Intent of license immaterial where employment prohibited of persons under prescribed age to serve liquors. In re Clement, 64 Misc. 439, 119 N. Y. S. 347.

Rebate of license money.—In a proceeding to recover proportion of license money paid on surrendering license, burden on licensee to show compliance with statute. Two convictions for violation by employes conclusive against him. P. *v.* Clement, 117 App. Div. 539, 102 N. Y. S. 779, 134 App. Div. 462, 119 N. Y. S. 374.

694-21 Violations of law on other premises may not be shown. Clement *v.* Smith, 128 App. Div. 859, 113 N. Y. S. 55.

694-22 See City *v.* Jones, 31 Ky. L. R. 1203, 104 S. W. 971.

695-27 County *v.* Lewis, 123 Mo. App. 673, 100 S. W. 1107.

695-29 S. *v.* Madeira, 125 Mo. App. 508, 102 S. W. 1046 (sufficiency of notice to produce); S. *v.* Barnett, 110 Mo. App. 592, 85 S. W. 613; S. *v.* Walker, 129 Mo. App. 371, 108 S. W. 615. See S. *v.* Barnett, 110 Mo. App. 584, 85 S. W. 615.

Parol evidence of license, admissible. Oldham *v.* S., 52 Tex. Cr. 516, 108 S. W. 667. See Joliff *v.* S., 53 Tex. Cr. 61, 109 S. W. 176.

696-31 S. *v.* Barnett, 110 Mo. App. 592, 85 S. W. 613. See White *v.* C., 107 Va. 901, 59 S. E. 1101. But see S. *v.* Madeira, 125 Mo. App. 508, 102 S. W. 1046, not admissible to show delivery.

But not testimony of person, not a revenue collector, who examined records. Biddy *v.* S., 52 Tex. Cr. 412, 107 S. W. 814. Apparently *contra,* Suggs *v.* S. (Tex. Cr.), 101 S. W. 999.

Examined copy admissible, but not certificate of revenue officer showing issuance of license. Reed *v.* S., 53 Tex. Cr. 4, 108 S. W. 368; Bayless *v.* S., 121 Tenn. 75, 113 S. W. 1039.

696-32 A book containing stubs of licenses not admissible if stub of license in question does not show where defendant authorized to sell. S. *v.* Madison, 23 S. D. 584, 122 N. W. 647.

696-33 S. *v.* Madison, supra.

697-42 Burden of proving right to transfer license on party claiming it. Hill *v.* Sheridan, 128 Mo. App. 415, 107 S. W. 426. Best evidence of transfer license itself with transfer endorsed, best secondary evidence record of license. Plaintiff's testimony inadmissible. Hill *v.* Sheridan, supra.

697-43 Weischelbaum *v.* Hayslip, 127 Ga. 417, 56 S. E. 413.

Where prohibition rule, burden on plaintiff to show legality of sale. Westheimer *v.* Habinck, 131 Ia. 643, 109 N. W. 189.

698-45 Federal license shown held by plaintiff as quasi admission that liquors sold were intoxicating. Shelby V. Co. *v.* Hawn, 149 N. C. 355, 63 S. E. 78.

699-49 Frankel *v.* Hillier, 16 N. D. 387, 113 N. W. 1067.

700-56 Minot *v.* Doherty, 203 Mass. 37, 89 N. E. 188. See Garrigan *v.* Kennedy, 19 S. D. 11, 101 N. W. 1081.

Prima facie case is made by evidence that a license was granted for saloon at place where liquor was sold, that a saloon was opened and conducted there, and a sale made by a person in charge within time covered by license —and justifies an inference that person in charge was agent of defendant. Lawlor *v.* S. (Ind. App.), 99 N. E. 487.

700-57 Botwinis *v.* Allgood, 113 Ill. App. 188; Sullivan *v.* Conrad, 79 Neb. 303, 112 N. W. 660; Garrigan *v.* Kennedy, 19 S. D. 11, 101 N. W. 1081 (suicide of plaintiff's husband). See Currier *v.* McKee, 99 Me. 364, 59 A. 442.

Question for jury.—Triggs *v.* McIntyre, 215 Ill. 369, 74 N. E. 400, 115 Ill. App. 257; Temme *v.* Schmidt, 210 Pa. 507, 60 A. 158.

700-58 **No presumption** particular drunkard will reform. Acken *v.* Tinglehoff, 83 Neb. 296, 119 N. W. 456.

Burden on plaintiff to prove incapacitating intoxication. Sellers *v.* Knight (Ala.), 64 S. 329.

Defendant must show facts bringing him within exceptions in statute. Birkman *v.* Fahrenthold, 52 Tex. Civ. 335, 114 S. W. 428.

700-59 McElroy *v.* Sparkman (Tex. Civ.), 139 S. W. 529.

701-61 Woods *v.* Dailey, 211 Ill. 495, 71 N. E. 1068; Bistline *v.* Ney, 134 Ia. 172, 111 N. W. 422; Birkman *v.* Fahrenthold, 52 Tex. Civ. 335, 114 S. W 428.

702-64 Howard *v.* McCabe, 79 Neb. 42, 112 N. W. 305.

702-66 See Montross *v.* Alexander, 152 Mich. 513, 116 N. W. 190.

702-67 Clowry *v.* Holmes, 170 Ill. App. 125.

702-68 Nor it would seem is it admissible as part of plaintiff's case, though harmless error in Mathre *v.* Devendorf, 130 Ia. 107, 106 N. W. 366.

Sale to minor.—Previous habits of intoxication shown as bearing on alleged shock to plaintiff's feelings. Bailey *v.* Briggs, 143 Mich. 303, 106 N. W. 863.

Acts and declarations of husband shown to prove habits and to rebut evidence that liquor was sold for medicine. Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1.

Damages for mental suffering affected by testimony. Liebler *v.* Carrel, 155 Mich. 196, 118 N. W. 975.

Deceased's habits in using liquor prior to execution of bond in suit shown as bearing on illegality of subsequent sales and exemplary damages. Sisson *v.* Lampert, 159 Mich. 509, 124 N. W. 513.

Frequency of abusive conduct of husband when drunk relevant as to his being an habitual drunkard. Birkman *v.* Fahrenthold, 52 Tex. Civ. 335, 114 S. W. 428.

702-69 Kelley *v.* Malhoit, 115 Ill. App. 23; Lee *v.* Hederman (Ia.), 138 N. W. 893.

Frequent previous drunkenness of minor for whose death action brought admissible to show extent of shock of plaintiff's feelings. Bailey *v.* Briggs, 143 Mich. 303, 106 N. W. 863.

703-70 Defendant's knowledge deceased's habit need not be shown. Bennett's Claim, 160 Mich. 309, 125 N. W. 2.

703-71 See Hilliker *v.* Farr, 140 Mich. 444, 112 N. W. 1116; Pennington *v.* Gillaspie, 63 W. Va. 541, 61 S. E. 416 (evidence of sales by agent admitted).

703-73 Sales on alleged dates need not be shown. Birkman *v.* Fahrenthold, 52 Tex. Civ. 335, 114 S. W. 428.

That defendant allowed prostitutes to associate with plaintiff's son in his place of business, is admissible as part of res gestae. Mahoney *v.* Goldblatt, 163 Ill. App. 563.

703-75 Undelivered notice cannot be shown. Montross *v.* Alexander, 152 Mich. 513, 116 N. W. 190.

703-76 Testimony that notice had been withdrawn and plaintiff had not complained of sales met by proof that request was sent defendant not to sell plaintiff's husband liquor. Birkman *v.* Fahrenthold, 52 Tex. Civ. 335, 114 S. W. 428.

"**The presence of her 12 year old boy** when the notice was served was a part of the res gestae of the service, and it was as competent for her to show that her boy witnessed that service as it would have been to show that anybody else was present." Johnson *v.* Grondin, 170 Mich. 447, 136 N. W. 423.

703-77 Prior intoxication.—Evidence of habitual drunkenness on part of person to whom illegal sales were made prior to time stated in declaration and continuance to time of sales complained of and knowledge on part of seller, admissible. Pennington *v.* Gillespie, 63 W. Va. 541, 61 S. E. 416.

Details of prior intoxications of deceased shown if habit material. Merrill *v.* Tinkler, 160 Mich. 575, 125 N. W. 717.

Intoxication of deceased on death day shown. Sisson *v.* Lampert, 159 Mich. 509, 124 N. W. 513.

Deceased's use of intoxicants on death day shown in proof of intoxication that day. Pilkins *v.* Hans, 87 Neb. 7, 126 N. W. 864.

704-78 Spencer *v.* Johnson, 176 Mich. 278, 142 N. W. 582; Bennett's Claim, 160 Mich. 309, 125 N. W. 2 (contract to support; sum contributed during year preceding death of intoxicated person shown).

See Bulger *v.* Prenica, 93 Neb. 697, 142 N. W. 117.

Sources of support for plaintiff's family shown, also physical suffering of members. Acken *v.* Tinglehoff, 83 Neb. 296, 119 N. W. 456.

Failure to support testified to by plaintiff, also details. Such testimony no conclusion. Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1.

704-79 Bond admissible without showing approval. Barry County *v.* Sherman, 146 Mo. App. 691, 125 S. W. 781.

Village records prima facie evidence of execution and delivery of bond. Pilkins *v.* Hans, 87 Neb. 7, 126 N. W. 864.

704-80 Expenses of medical attendance and burial shown. Keeling *v.* Pommer, 83 Neb. 510, 120 N. W. 155.

704-81 Montross *v.* Alexander, 152 Mich. 513, 116 N. W. 190; Manzer *v.* Phillips, 139 Mich. 61, 102 N. W. 292 (testimony that plaintiff had children, error).

Child dependent on plaintiff for support. Garrigan *v.* Kennedy, 19 S. D. 11, 101 N. W. 1081.

705-84 Sale to third party, inadmissible. Hilliker *v.* Farr, 149 Mich. 444, 112 N. W. 1116.

705-85 Merrinane *v.* Miller, 148 Mich. 412, 111 N. W. 1050.

706-86 Sales to others than plaintiff's husband shown where sale as beverage per se unlawful, contention being that sales to him were for medicinal purposes. Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1.

Inebriate's attempts to secure liquor from defendant through others and his statements to them in defendant's absence cannot be proved. McNetton *v.* Herb, 158 Mich. 525, 123 N. W. 17.

706-87 Eggers *v.* Hardwick, 155 Ill. App. 254.

707-91 Nagle *v.* Keller, 141 Ill. App. 444, financial condition of plaintiff and deceased brother.

That children contribute support cannot be shown by plaintiff because she was cross-examined as to husband's earnings and business. Manzer *v.* Phillips, 139 Mich. 61, 102 N. W. 292.

Wife may show compulsion to perform menial labor and accept aid from county. Eastwood *v.* Klamm, 83 Neb. 546, 120 N. W. 149.

707-92 That husband paid doctor's bills and funeral expenses occasioned by plaintiff's son's death inadmissible. Hilliker *v.* Farr, 149 Mich. 444, 112 N. W. 1116.

Evidence of money borrowed and squandered is competent.—Hendrix *v.* Goldman 163 Ill. App. 592.

708-93 Garrigan *v.* Kennedy, 19 S. D. 11, 101 N. W. 1081.

Decedent's statements as to cause of drinking, incompetent. Greener *v.* Nielhaus, 44 Ind. App. 674, 89 N. E. 377.

708-94 Lee *v.* Hederman (Ia.), 138 N. W. 893; Spencer *v.* Johnson, 176 Mich. 278, 142 N. W. 582.

Sufficiency of evidence to show actual damages. Garrigan *v.* Kennedy, supra.

Habits as to sobriety.—See Keyser *v.* Damron (Ky.), 167 S. W. 381.

708-95 Mathre *v.* Co., 130 Ia. 111, 106 N. W. 368; Eastwood *v.* Klamm, 83 Neb. 546, 120 N. W. 149.

708-96 McNetton *v.* Herb, 158 Mich. 525, 123 N. W. 17 (reason for not accepting office in a fraternal society, immaterial).

709-98 See Mathre *v.* Co., 130 Ia. 111, 106 N. W. 368.

Children's inability to attend school and since father's death compulsion to work shown. Horst *v.* Lewis, 71 Neb. 365, 103 N. W. 460.

709-99 *Comp.* Eastwood *v.* Klamm, 83 Neb. 546, 120 N. W. 149.

Plaintiff's ill health resulting from husband's drunkenness shown. Montross *v.* Alexander, 152 Mich. 513, 116 N. W. 190.

709-1 Pennington *v.* Gillaspie, 63 W. Va. 541, 61 S. E. 416.

In Johnson *v.* Grondin, 170 Mich. 447, 136 N. W. 423, there was testimony tending to show the use of vile language addressed to the plaintiff by her husband when he was in an intoxicated condition, of repeated assaults upon her, and of other misconduct on his part. "We think," said the court, "as was said by this court in Rice *v.* Rice, 104 Mich. 381, 62 N. W. 833, that when damages of this nature are recoverable, the amount of damages lies in the sound discretion of the jury; that they are not capable of actual measurement, and that it is not necessary to introduce any evidence of value. When the jury have before them the circumstances surrounding the wrong done, they have the basis on which they may find a verdict."

709-2 Presence of children when plaintiff informed of husband's drunkenness, inadmissible in aggravation of damages. Manzer *v.* Phillips, 139 Mich. 61, 102 N. W. 292.

Admission of death of intoxicated person does not preclude evidence of manner of death and of condition of body,

these facts tending to show intoxication at time of death. Bennett's Claim, 160 Mich. 309, 125 N. W. 2.

710-5 Young *v.* Beveridge, 81 Neb. 180, 115 N. W. 766.

711-9 Seahill *v.* Ind. Co., 157 Mich. 310, 122 N. W. 78; Fahrenthold *v.* Tell, 52 Tex. Civ. 110, 113 S. W. 635 (notice revoking prohibitory notice given other dealers immaterial).

711-10 Price *v.* Wakeham, 48 Tex. Civ. 339, 107 S. W. 132.

Good faith must be shown by defendant. Fahrenthold *v.* Tell, 52 Tex. Civ. 110, 113 S. W. 635; Farr *v.* Waterman (Tex. Civ.), 95 S. W. 65.

711-11 Greener *v.* Nielhaus, 44 Ind. App. 674, 89 N. E. 377.

Defendant's opinion as to sufficiency of notice revoking notice not to sell liquor immaterial, as is evidence of motive of person giving such notice. Fahrenthold *v.* Tell, 52 Tex. Civ. 110, 113 S. W. 635.

711-13 Emancipation of minor no defense.—Price *v.* Wakeham, 48 Tex. Civ. 339, 107 S. W. 132.

Acquiescence of parent in sale to minor defense. Price *v.* Wakeham, supra.

712-15 Wakeham *v.* Price (Tex. Civ.), 89 S. W. 1093.

712-17 Montross *v.* Alexander, 152 Mich. 513, 116 N. W. 190.

Husband's conduct toward wife when drunk proved to refute charge of connivance by her. Birkman *v.* Fahrenthold, 52 Tex. Civ. 335, 114 S. W. 428.

712-18 Husband's attitude toward liquor business immaterial in action by wife to recover for sale of liquor to minor son. Liebler *v.* Carrel, 155 Mich. 196, 118 N. W. 975.

714-21 See Mathre *v.* Devendorf, 130 Ia. 107, 106 N. W. 366, evidence of former suit inadmissible.

714-23 Kelley *v.* Malhoit, 115 Ill. App. 23. *Comp.* Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1.

Unless specific acts of intoxication shown and defendant denies making sales. Liebler *v.* Carrel, 155 Mich. 196, 118 N. W. 975.

715-25 Deel *v.* Heiligenstein, 244 Ill. 239, 91 N. E. 429, and so of insurance on husband's life.

715-26 See supra, 705-85; Price *v.* Wakeham, 48 Tex. Civ. 339, 107 S. W. 132 (bad character of plaintiff no defense).

716-34 Williams *v.* S., 12 Ga. App. 84, 76 S. E. 785. See vol. 2, p. 804, n. 92-93, and supplement thereto.

716-35 Butler *v.* Mayor, 11 Ga. App. 133, 74 S. E. 858.

General evidence admissible for defendant after lapse of long time. Clement *v.* Beers, 126 App. Div. 1, 110 N. Y. S. 99.

719-48 Inability to procure license no defense to action to recover penalty for selling without it though defendant has complied with all conditions precedent. Clement *v.* Smith, 60 Misc. 595, 112 N. Y. S. 955.

720-50 Pumphrey *v.* Anderson, 141 Ia. 140, 119 N. W. 528.

Burden on defendant to rebut prima facie case made by plaintiff. Shideler *v.* Naughton (Ia.), 145 N. W. 280.

Defendant must show lawfulness of sales proved. Sharp *v.* Davis, 142 Ia. 19, 120 N. W. 323. Compliance with conditions precedent to right to sell. Jones *v.* Byington, 128 Ia. 397, 104 N. W. 473.

720-51 See Stromert *v.* Johnson, 144 Ia. 682, 123 N. W. 336.

720-52 S. *v.* Cipra (Kan.), 141 P. 1133. Sufficiency of affidavits. S. *v.* Jepson, 76 Kan. 644, 92 P. 600, 603.

720-53 S. *v.* Johns, 140 Ia. 125, 118 N. W. 295.

721-54 Miller *v.* C. (Ky.), 113 S. W. 518, one year before indictment not too remote; otherwise as to sales prior to such time.

721-57 *Contra* as to convictions in another place. Miller *v.* C. (Ky.), 113 S. W. 518; S. *v.* Bartley, 105 Me. 505, 74 A. 1129.

722-58 Sufficiency of evidence. See S. *v.* Johns, 140 Ia. 125, 118 N. W. 295.

722-60 Presumption of ownership where liquors consigned to person and knowingly received. S. *v.* Johns, supra

722-62 Stromert *v.* Johnson, 144 Ia. 682, 123 N. W. 336.

723-65 Indiana.—Campbell *v.* S., 171 Ind. 702, 87 N. E. 212; S. *v.* Liquor, 82 Vt. 287, 73 A. 586.

723-66 See Farley *v.* Certain, etc., 84 Misc. 104, 146 N. Y. S. 1003.

In absence of return of search warrant presumption none made, and owner unlawfully deprived of property. An unsigned inventory insufficient. S. *v.* Liquors, 75 N. H. 273, 73 A. 169.

724-70 See S. *v.* Liquor, 82 Vt. 287, 73 A. 586.

725-76 Gillespie *v.* S., 96 Miss. 856, 51 S. 811 (possession of appliances adapted to retailing liquors); Yeoman *v.* S., 81 Neb. 252, 117 N. W. 997; Steinkuhler *v.* S., 77 Neb. 331, 109 N. W. 395; S. *v.* Barrett, 138 N. C. 630, 50 S. E. 506; S. *v.* Kelly, 22 N. D. 5, 132 N. W. 223.

725-77 Coy *v.* S., 59 Tex. Cr. 379, 128 S. W. 414, possession of revenue license.

Prima facie, as used in such statutes, has no peculiar meaning. Walker *v.* S. (Tex. Cr.), 145 S. W. 904.

725-78 Appling *v.* S., 88 Ark. 393, 114 S. W. 927; S. *v.* Adams, 22 Ida. 485, 126 P. 401; S. *v.* Galleton, 176 Mo. App. 115, 161 S. W. 848; S. *v.* Russell, 164 N. C. 482, 80 S. E. 66. See S. *v.* Kline, 50 Or. 426, 93 P. 237.

Documentary evidence of a license secured by defendant for a club placed burden on defendant to prove no participation in any sales made in the club. Taylor *v.* S. (Ga. App.), 80 S. E. 292.

Presumption of innocence attends accused in absence of statute declaring what presumptive evidence of guilt. Yeoman *v.* S., 81 Neb. 252, 117 N. W. 997. Follows the case on appeal if not rebutted. Riggs *v.* S., 84 Neb. 335, 121 N. W. 588.

Question for jury.—S. *v.* O'Brien, 35 Mont. 482, 90 P. 514. See C. *v.* Price, 123 Ky. 163, 29 Ky. L. R. 593, 94 S. W. 32.

726-79 But see Johnston *v.* S., 65 Fla. 492, 62 S. 655.

726-80 Lambie *v.* S., 151 Ala. 86, 44 S. 51; Josey *v.* S., 88 Ark. 269, 114 S. W. 216; Montpelier *v.* Mills, 171 Ind. 175, 85 N. E. 6; Combast *v.* C., 137 Ky. 495, 125 S. W. 1092. See S. *v.* Storm, 74 Kan. 859, 86 P. 145; Cheney *v.* Coughlin, 201 Mass. 204, 87 N. E. 744; Milam *v.* S. (Tex. Cr.), 146 S. W. 185; Bell *v.* S., 62 Tex. Cr. 242, 137 S. W. 670; Dozier *v.* S., 62 Tex. Cr. 258, 137 S. W. 679; Salt Lake City *v.* Robinson (Utah), 125 P. 657; S. *v.* Brew. Co., 71 W. Va. 38, 75 S. E. 149.

License to sell "near beer" is irrelevant. Abbott *v.* S., 11 Ga. App. 43, 74 S. E. 621, under Penal Code, 1910, §426.

727-81 S. *v.* Flagstad, 25 S. D. 337, 126 N. W. 585, presumption of performance of official duty must be overcome.

When there was sufficient evidence to warrant the jury in finding that the defendant was at the time of the alleged offense a tavern keeper, it must be presumed, said the court, that he was a licensed tavern keeper, in the absence of any evidence to the contrary, rather than engaged in an unlawful business. Reismier *v.* S., 148 Wis. 593, 135 N. W. 153.

Existence of license authorizing physician to practice must be proved by state if alleged in prosecution for issuing prescription for liquors. McAllister *v.* S., 156 Ala. 122, 47 S. 161.

727-84 Roden *v.* S., 3 Ala. App. 197, 58 S. 71; S. *v.* Nethken, 60 W. Va. 673, 55 S. E. 742.

727-85 Henley *v.* S., 3 Ala. App. 215, 58 S. 96; Stoner *v.* S., 5 Ga. App. 716, 63 S. E. 602 (liquor sold within implied exception); Skelton *v.* S., 173 Ind. 462, 89 N. E. 860; S. *v.* Mulhern, 130 Ia. 46, 106 N. W. 267; Miller *v.* S. (Miss.), 63 S. 269; S. *v.* Zehnder (Mo. App.), 168 S. W. 666; S. *v.* Terry, 73 N. J. L. 554, 64 A. 113; De Graff *v.* S., 2 Okla. Cr. 519, 103 P. 538; S. *v.* Collins, 28 R. I. 439, 67 A. 796; Devine *v.* C., 107 Va. 860, 60 S. E. 37. See Gambil *v.* C., 142 Ky. 312, 134 S. W. 160; S. *v.* Wills, 154 Mo. App. 605, 136 S. W. 25.

Druggist license presumptive evidence that licensee druggist. C. *v.* Byers, 33 Ky. L. R. 252, 109 S. W. 895.

Possession of druggist's permit immaterial when liquor sold as beverage or kept under circumstances making place public nuisance. S. *v.* Giroux, 75 Kan. 695, 90 P. 249.

Contra in civil action. Davis *v.* Kuehn (Tex. Civ.), 119 S. W. 118, and if information does not negative exception. Rex *v.* Boomer, 15 Ont. L. R. 321. See Highsmith *v.* Waycross, 7 Ga. App. 611, 67 S. E. 677.

Selling within four miles of a school house. Brinkley *v.* S. (Tenn.), 143 S. W. 1120.

728-86 S. *v.* Gary, 124 Mo. App. 175, 101 S. W. 614; S. *v.* McCormick, 56 Wash. 469, 105 P. 1037.

On prosecution for maintaining nuisance, error to exclude evidence that defendant had license. Sopher *v.* S., 169 Ind. 177, 81 N. E. 913, 14 L. R. A. (N. S.) 172.

728-87 Gaskins *v.* S., 127 Ga. 51, 55 S. E. 1045; Jackson *v.* S., 13 Ga. App. 147, 78 S. E. 867; Cooper *v.* City, 13

Ga. App. 169, 78 S. E. 1097; McGovern *v.* S., 11 Ga. App. 612, 74 S. E. 1101; Langston *v.* City, 9 Ga. App. 449, 71 S. E. 592; Benton *v.* S., 9 Ga. App. 422, 71 S. E. 498; Cheatwood *v.* City, 9 Ga. App. 828, 72 S. E. 284.

Burden not on defendant to show he had no connection with illegal sale though made in his own home. Whitley *v.* S. (Ga. App.), 81 S. E. 797.

Presumption of ownership from delivery.—S. *v.* Russell, 6 Penne. (Del.) 573, 69 A. 839. See Fisher *v.* S., 55 Fla. 17, 46 S. 422.

Burden on defendant to show that he acted as agent for purchaser (Morgan *v.* City of Cedartown, 13 Ga. App. 139, 78 S. E. 863; Starr *v.* S., 12 Ga. App. 360, 77 S. E. 205); and how, when and from whom he obtained the liquor (Fletcher *v.* S., 12 Ga. App. 809, 78 S. E. 478).

Burden on accused to show he was not interested in sale. Jones *v.* S., 12 Ga. App. 564, 77 S. E. 892.

Sale by agent of licensee, contrary to license, prima facie authorized. S. *v.* Fagan, 1 Boyce (Del.) 45, 74 A. 692.

729-89 Smedley *v.* S., 11 Ga. App. 108, 74 S. E. 848.

729-92 And no accommodation, loan or exchange of commodity is defense. Sparks *v.* S. (Tex. Cr.), 99 S. W. 546.

But where served with lunch for jury to say whether sale or gift. Savage *v.* S., 50 Tex. Cr. 199, 88 S. W. 351. See Barnes *v.* S. (Tex. Cr.), 88 S. W. 804.

729-94 Receiving money from one who ordered liquor and supplying it casts upon accused burden of showing how, where and from whom obtained; burden is met by showing liquor was bought, after ordered, from another person. Bray *v.* Commerce, 5 Ga. App. 605, 53 S. E. 596.

729-96 S. *v.* Gibbs, 109 Minn. 247, 123 N. W. 810.

729-97 Marx *v.* Lodge, 157 Ala. 107, 47 S. 207.

730-2 Marx *v.* Lodge, supra (applying rule to police officer); Raum *v.* Board, etc., 155 Ky. 690, 160 S. W. 255; Looper *v.* S. (Tex. Cr.), 167 S. W. 342.

Evidence competent though sale obtained simply as means to a conviction. S. *v.* Spiker, 88 Kan. 644, 129 P. 195.

730-3 Evidence obtained in an illegal search by officers of accused's premises is inadmissible. Underwood *v.* S., 13 Ga. App. 206, 78 S. E. 1103.

730-4 Davis *v.* S., 145 Ala. 69, 40 S. 663 (*contra* by statute); S. *v.* Sherman, 137 Mo. App. 70, 119 S. W. 479; S. *v.* Madeira, 125 Mo. App. 508, 102 S. W. 1046; Biddy *v.* S. (Tex. Cr.), 108 S. W. 689; Joliff *v.* S. (Tex. Cr.), 109 S. W. 176; Campbell *v.* S., 59 Tex. Cr. 496, 129 S. W. 139. But see Oldham *v.* S., 52 Tex. Cr. 516, 108 S. W. 667.

730-5 Schoennerstedt *v.* S., 55 Tex. Cr. 638, 117 S. W. 829, if time involved in transaction covered.

Certificates from internal revenue department showing that defendant had paid the special liquor tax which license had expired before offense charged are inadmissible. Tucker *v.* S., 9 Okla. Cr. 555, 132 P. 689.

730-6 Tarpey *v.* S., 8 Ala. App. 432, 63 S. 17; Collins *v.* S., 94 Ark. 94, 125 S. W. 647 (does not make prima facie case unless found on premises); Haar *v.* S. (Ga. App.), 81 S. E. 611; S. *v.* Sexton, 141 Mo. App. 694, 125 S. W. 519; Martoni *v.* S. (Tex. Cr.), 167 S. W. 349; Brown *v.* S. (Tex. Cr.), 160 S. W. 374.

Federal liquor license though obtained from defendant by stealth is admissible in evidence. Nixon *v.* S., 92 Neb. 115, 138 N. W. 136.

730-7 Gustin *v.* S. (Ala. App.), 65 S. 302; Huckabee *v.* S., 7 Ga. App. 677, 67 S. E. 837 (certified copy); P. *v.* Barton, 147 Ill. App. 185; City of Topeka *v.* Briggs, 90 Kan. 843, 135 P. 1184; S. *v.* Dollar, 88 Kan. 346, 128 P. 365; Moulder *v.* S. (Okla. Cr.), 138 P. 815; Ward *v.* S., 8 Okla. Cr. 525, 128 P. 1105; Brown *v.* S. (Tex. Cr.), 160 S. W. 374; Broadnox *v.* S. (Tex. Cr.), 150 S. W. 1168.

Statutory presumption.—Payment of federal liquor tax is prima facie evidence of defendant's guilt. Hargrove *v.* S., 8 Okla. Cr. 487, 129 P. 74.

Internal revenue tax stamps admissible. P. *v.* Foreman, 165 Ill. App. 13.

Stub of internal revenue license and tax stamp is competent evidence. Warrick *v.* S., 8 Ala. App. 391, 62 S. 342; Woodward *v.* S., 5 Ala. App. 202, 59 S. 688; Strange *v.* S., 5 Ala. App. 164, 59 S. 691.

Though not made or verified by custodian.—S. *v.* Nippert, 74 Kan. 371, 86 P. 478; King *v.* S., 53 Tex. Cr. 101,

109 S. W. 182; Biddy *v.* S. (Tex. Cr.), 108 S. W. 689.

Constitutionality.—Admission of copy constitutional. S. *v.* Dowdy, 145 N. C. 432, 58 S. E. 1002; S. *v.* Toler, 145 N. C. 440, 58 S. E. 1005.

Sufficiency of copy.—S. *v.* Dowdy, 145 N. C. 432, 58 S. E. 1002; S. *v.* Toler, 145 N. C. 440, 58 S. E. 1005.

730-8 See Joliff *v.* S. (Tex. Cr.), 109 S. W. 176; Biddy *v.* S. (Tex. Cr.), 108 S. W. 689.

Ambiguity in date of license explainable by parol. S. *v.* Fagan, 1 Boyce (Del.) 45, 74 A. 692.

License admissible though licensee not in premises before trial. Lockhart *v.* S., 58 Tex. Cr. 438, 126 S. W. 575.

Secondary evidence of express money orders admissible if originals are in another state. Gary *v.* S., 7 Ga. App. 501, 67 S. E. 207.

Secondary evidence of defendant's license competent on failure to produce original on notice. S. *v.* Poundstone, 140 Mo. App. 399, 124 S. W. 79.

Possession of license explained. O'Brien *v.* S., 55 Tex. Cr. 319, 116 S. W. 813.

731-10 Reed *v.* Ty., 1 Okla. Cr. 481, 98 P. 583, testimony that records do not show issue of license to accused sufficient.

Evidence admissible that defendant paid license tax for place and period of time involved in charge. Warrick *v.* S., 8 Ala. App. 391, 62 S. 342.

Records not required by law to be kept inadmissible. S. *v.* Flagstad, 25 S. D. 337, 126 N. W. 585.

731-12 McGovern *v.* S., 11 Ga. App. 612, 74 S. E. 1101; P. *v.* Boos, 155 Mich. 407, 120 N. W. 11.

Labels are some evidence of contents. Jackson *v.* S. (Ala. App.), 65 S. 708; Herring *v.* S. (Ala. App.), 65 S. 707; Hodge *v.* S. (Ala. App.), 65 S. 676.

731-13 Druggists's affidavit, required to be made and filed, that no sales made other than those shown, prima facie evidence of such sales. Edgar *v.* S., 46 Tex. Civ. 171, 102 S. W. 439.

732-15 See S. *v.* Costa, 78 Vt. 198, 62 A. 38.

Search warrant, affidavit and return are admissible. Patterson *v.* S., 8 Ala. App. 420, 62 S. 1023.

732-18 Strickland *v.* S., 171 Ind. 642, 87 N. E. 12.

732-19 License dated later than time offense committed, inadmissible. S. *v.* Fagan, 1 Boyce (Del.) 45, 74 A. 692.

733-20 S. *v.* Kimmel, 156 Mo. App. 461, 137 S. W. 329.

733-22 P. *v.* Van Alstyne, 157 Mich. 366, 122 N. W. 193, regardless of legality of sales.

733-24 See infra, 752-28.

Certified copies of records of internal revenue collector, admissible. S. *v.* Pigg, 78 Kan. 618, 97 P. 859.

734-26 Expired lease admissible if defendant in occupation of premises alleged to be used for illegal sale. Smith *v.* S., 55 Tex. Cr. 320, 116 S. W. 593.

734-27 Harris *v.* S., 9 Ala. App. 87, 64 S. 352; Holmes *v.* S., 12 Ga. App. 359, 77 S. E. 187; Gordon *v.* S., 7 Ga. App. 691, 67 S. E. 893; S. *v.* Lindquist, 110 Minn. 12, 124 N. W. 215; Lightle *v.* S., 2 Okla. Cr. 334, 101 P. 608; Thompson *v.* S. (Tex. Cr.), 160 S. W. 685; McAdams *v.* S., 59 Tex. Cr. 86, 126 S. W. 1156 (liquor in possession of prosecuting witness).

734-29 Taylor *v.* S., 5 Ga. App. 237, 62 S. E. 1048 (though unlawfully seized); Russell *v.* Anderson, 141 Ia. 533, 120 N. W. 89; Sturgis *v.* S., 2 Okla. Cr. 362, 102 P. 57.

Bottles lying around, which were not identified in any way, are not admissible. S. *v.* Benson, 154 Ia. 313, 134 N. W. 851.

734-30 Vessels officially stamped as correct, admissible to show correctness of measurements. P. *v.* Nylin, 236 Ill. 19, 86 N. E. 156.

734-31 Peters *v.* C., 154 Ky. 689, 159 S. W. 531; Wathen *v.* C., 133 Ky. 94, 116 S. W. 336; Overton *v.* S. (Okla. Cr.), 140 P. 1135; Cowley *v.* S. (Tex. Cr.), 161 S. W. 471; Lockhart *v.* S., 57 Tex. Cr. 438, 126 S. W. 575 (sales after date alleged to connect defendant with business); Hays *v.* S., 49 Tex. Cr. 369, 91 S. W. 585. See Oldham *v.* S., 52 Tex. Cr. 516, 108 S. W. 667; S. *v.* Costa, 78 Vt. 198, 62 A. 38.

Evidence of defendant's resistance to arrest is admissible. Moreno *v.* S. (Tex. Cr.), 160 S. W. 361.

Bulging pockets of accused is circumstantial evidence. Cooper *v.* City (Ala. App.), 65 S. 715.

Defendant's refusal to allow sheriff to search an adjoining room where liquor was found. Patterson *v.* S., 8 Ala. App. 420, 62 S. 1023.

Defendant was the only agency that steered the witness to the place where

the whisky was procured. He stood at the door when the whisky was taken, and saw the proper amount of money therefore deposited, and then accompanied the witness to the door of the house, when, the transaction being thus fully completed, the witness departed, without word or comment. "From these facts and circumstances," said the court, "we think the jury were warranted in finding that the defendant either sold the whisky himself, or was connected with the owner thereof, and interested in its sale." McWilliams *v.* S., 101 Ark. 569, 142 S. W. 1147.

Reason for defendant's refusal to take money found on table, inadmissible. King *v.* S., 50 Tex. Cr. 321, 97 S. W. 488.

Gifts of whisky to solicit business in violation of statute. Meadows *v.* S., 121 Ga. 362, 49 S. E. 268.

Declarations of an alleged partner, his presence at and familiarity with place of business relevant on issue of partnership. Holt *v.* S., 57 Tex. Cr. 432, 125 S. W. 43.

Independent sales cannot be proved. Campbell *v.* S., 55 Tex. Cr. 277, 116 S. W. 581.

Acquittal on charge of keeping liquors no relevancy on trial of accusation for selling them. Taylor *v.* S., 5 Ga. App. 237, 62 S. E. 1048.

Defendant's suretyship for other violators of law immaterial. Taylor *v.* S., 54 Tex. Cr. 90, 111 S. W. 932.

735-32 Loudermilk *v.* S., 4 Ala. App. 167, 58 S. 180; Donaldson *v.* S., 3 Ga. App. 451, 60 S. E. 115; S. *v.* Zagone, 135 La. —, 65 S. 737; S. *v.* Linder, 76 O. St. 463, 81 N. E. 753; Scott *v.* S., 56 Tex. Cr. 140, 120 S. W. 196; Cross *v.* S., 49 Tex. Cr. 437, 94 S. W. 1015.

735-34 S. *v.* Sexton, 141 Mo. App. 694, 125 S. W. 519. See Bonner *v.* S., 2 Ga. App. 711, 58 S. E. 1123; S. *v.* Ford, 76 Kan. 424, 91 P. 1066 (bills for liquors); S. *v.* Martel, 103 Me. 63, 68 A. 454; Baughman *v.* S., 49 Tex. Cr. 33, 90 S. W. 166; S. *v.* Gillespie, 63 W. Va. 152, 59 S. E. 957; also Reynolds *v.* S., 52 Fla. 409, 42 S. 373. But see Harris *v.* S., 50 Tex. Cr. 411, 97 S. W. 704. *Comp.* Myers *v.* S., 52 Tex. Cr. 558, 108 S. W. 392.

Carrier's books, or receipts signed by accused are admissible evidence. Hodge *v.* S. (Ala. App.), 65 S. 676; Daniel *v.* S., 11 Ga. App. 799, 76 S. E. 162; Powell *v.* C., 149 Ky. 415, 149 S. W. 889; Tweedy *v.* S. (Okla. Cr.), 140 P. 787; S. *v.* Emmons, 63 Or. 535, 127 P. 791; Brown *v.* S. (Tex. Cr.), 160 S. W. 374; Wilson *v.* S. (Tex. Cr.), 154 S. W. 571.

Exhibits showing shipments of liquors by consignors to themselves are admissible. S. *v.* Sexton, 91 Kan. 171, 136 P. 901.

Letters ordering liquors and enclosing checks in payment, admissible. Goad *v.* S., 73 Ark. 625, 83 S. W. 935.

Evidence of receipt of packages, even where nothing to indicate contents, admissible. Goad *v.* S., supra.

That defendant had received eight barrels of whisky, was admissible as a circumstance in the case tending to show the character of business in which defendant was engaged. Patton *v.* S. (Tex. Cr.), 145 S. W. 1189.

Bills and accounts.—S. *v.* Corn, 76 Kan. 416, 91 P. 1067.

Previous application for license to carry on business where unlawful sale made shown as evidence of identity of place and defendant's control. Hookman *v.* S., 59 Tex. Cr. 183, 127 S. W. 825.

Ordering as agent for another. S. *v.* Finley, 162 Mo. App. 134, 144 S. W. 120.

735-35 Clement *v.* Beers, 126 App. Div. 1, 110 N. Y. S. 99.

736-36 Patterson *v.* S., 8 Ala. App. 420, 62 S. 1023; McGovern *v.* S., 11 Ga. App. 267, 74 S. E. 1101; S. *v.* Clinkenbeard, 142 Mo. App. 146, 125 S. W. 827; S. *v.* Kennard, 74 N. H. 76, 65 A. 376; Williams *v.* S., 56 Tex. Cr. 496, 120 S. W. 882 (declarations as to former sales if evidence circumstantial as to accused's identity); Roberts *v.* S., 52 Tex. Cr. 355, 107 S. W. 59; Novy *v.* S., 62 Tex. Cr. 492, 138 S. W. 139.

Admission by partner.—See supra, "Admissions," 578-60.

736-41 Furnishing liquid to one ordering whisky evidence of furnishing whisky. P. *v.* Marx, 128 App. Div. 828, 112 N. Y. S. 1011.

737-45 C. *v.* Bottom, 140 Ky. 212, 130 S. W. 1091; Wathen *v.* C., 133 Ky. 94, 116 S. W. 336 (may raise presumption defendant's agent acted within scope of employment).

737-46 S. *v.* Fagan, 1 Boyce (Del.) 45, 74 A. 692; C. *v.* Riley, 196 Mass. 60, 81 N. E. 881; Ollre *v.* S., 57 Tex. Cr. 520, 123 S. W. 1116. See Cantwell

v. S., 47 Tex. Cr. 521, 85 S. W. 18, revocation of instruction.

If accused kept dramshop, it is presumed that those attending to that business had authority to sell. P. *v.* Kryl, 168 Ill. App. 298.

738-47 See S. *v.* Barnett, 110 Mo. App. 584, 85 S. W. 615.

738-50 Guarreno *v.* S., 148 Ala. 637, 42 S. 833.

Authority of wife presumed.—Trometer *v.* D. C., 24 App. Cas. (D. C.) 242.

738-52 See P. *v.* Kryl, 168 Ill. App. 298; Tucker *v.* S., 7 Okla. Cr. 634, 124 P. 1134, 125 P. 1089.

739-57 Ellington *v.* S. (Tex. Cr.), 86 S. W. 330; Webb *v.* S. (Tex. Cr.), 86 S. W. 331.

739-64 Powell *v.* C., 149 Ky. 415, 149 S. W. 889; Walker *v.* S., 49 Tex. Cr. 345, 94 S. W. 230; Jackson *v.* S., 49 Tex. Cr. 248, 91 S. W. 574. See S. *v.* Dahlquist, 17 N. D. 40, 115 N. W. 81 (receipt for goods signed by consignee's agent). *Com.* Cox *v.* S., 3 Ga. App. 609, 60 S. E. 283. But see Stanley *v.* S., 89 Miss. 63, 42 S. 284; Gorman *v.* S., 52 Tex. Cr. 24, 105 S. W. 200; Novy *v.* S., 62 Tex. Cr. 492, 138 S. W. 139.

Defendant's signature in express book must be proved. Stevens *v.* S. (Tex. Cr.), 150 S. W. 942.

Carrier's records evidence against consignee. Herring *v.* S. (Ala. App.), 65 S. 707. But are inadmissible to show receipt of liquors. Sadler *v.* S., 165 Ala. 109, 51 S. 564.

739-65 P. *v.* Boos, 155 Mich. 407, 120 N. W. 11; Todd *v.* S., 57 Tex. Cr. 15, 121 S. W. 506 (buildings, fixtures and surroundings described). See Patterson *v.* S., 8 Ala. App. 420, 62 S. 1023; Biddy *v.* S. (Tex. Cr.), 108 S. W. 689 (testimony as to bar fixtures, admitted); S. *v.* Suiter, 78 Vt. 391, 63 A. 182 (paraphernalia on premises); Reismier *v.* S., 148 Wis. 593, 135 N. W. 153.

Evidence admissible that defendant's place of business had odor of barroom; that beverages sold had color of whisky or of beer. Warrick *v.* S., 8 Ala. App. 391, 62 S. 342.

Evidence of blind tiger shown.—Kinnane *v.* S., 106 Ark. 337, 153 S. W. 264.

Paraphernalia found on premises of another person, but in same building in adjoining and connected room, admitted where close intimacy appears. S. *v.* Suiter, 78 Vt. 391, 63 A. 182.

That place was public resort and unusual quantity of liquor found raises presumption that it was kept for illegal sale. Bohstedt *v.* Teufel (Ia.), 106 N. W. 513.

Finding of empty flask-shaped bottles purporting to contain ginger, and statement of chemist that he had never seen medicinal ginger put up in such bottles, admissible. S. *v.* Krinski, 78 Vt. 162, 62 A. 37.

740-66 Evidence of subsequent conduct of place after complaint filed is inadmissible. Johnson *v.* S. (Tex. Cr.), 153 S. W. 875.

740-67 Bloodworth *v.* Mayor, 12 Ga. App. 650, 77 S. E. 1131; S. *v.* Thompson, 76 Kan. 365, 91 P. 79; McAdams *v.* S., 59 Tex. Cr. 86, 126 S. W. 1156; Craddick *v.* S., 48 Tex. Cr. 385, 88 S. W. 347; Smith *v.* S., 52 Tex. Cr. 507, 107 S. W. 819; McNeely *v.* S., 49 Tex. Cr. 286, 92 S. W. 419; Frazier *v.* S., 52 Tex. Cr. 131, 105 S. W. 508; Harris *v.* S., 50 Tex. Cr. 411, 97 S. W. 704. See Henderson *v.* S., 52 Tex. Cr. 514, 107 S. W. 820. *Comp.* Carswell *v.* S., 7 Ga. App. 198, 66 S. E. 488; Riggs *v.* S. (Tex. Cr.), 96 S. W. 25; Owens *v.* S. (Tex. Cr.), 96 S. W. 31; Thompson *v.* S. (Tex. Cr.), 97 S. W. 316.

Conversations of others in presence of defendants with detective are admissible and not hearsay. S. *v.* Seahorn (N. C.), 81 S. E. 687.

Complaints to town marshal prior to suit, inadmissible. Brighton *v.* Miles, 151 Ala. 479, 44 S. 394.

Conversation explanatory of receipt of letters ordering liquor, admissible. Goad *v.* S., 73 Ark. 625, 83 S. W. 935.

Statements out of defendant's presence.—Brighton *v.* Miles, 151 Ala. 479, 44 S. 394; S. *v.* Kennard, 74 N. H. 76, 65 A. 376; Marks *v.* S., 49 Tex. Cr. 274, 92 S. W. 414; Holmes *v.* S., 52 Tex. Cr. 352, 353, 106 S. W. 1160; Pride *v.* S., 52 Tex. Cr. 441, 107 S. W. 819. *Comp.* Lambie *v.* S., 151 Ala. 86, 44 S. 51; Henderson *v.* S., 50 Tex. Cr. 604, 101 S. W. 208.

741-68 Cowley *v.* S. (Tex. Cr.), 161 S. W. 471; Coleman *v.* S., 53 Tex. Cr. 578, 111 S. W. 1011.

Evidence of liquors in defendant's house admitted though owned by another in Benson *v.* S., 51 Tex. Cr. 367, 101 S. W. 911.

741-70 Lindley *v.* S., 57 Tex. Cr. 480, 123 S. W. 1107, acts and declarations of go-betweens shown though accused not present.

741-71 Kirk *v.* S. (Ala. App.), 65 S. 195; Brown *v.* S. (Tex. Cr.), 160 S. W. 374; S. *v.* Krinski, 78 Vt. 162, 62 A. 37 (wrangling of intoxicated persons). But see Holmes *v.* S., 12 Ga. App. 359, 77 S. E. 187.

741-72 Houtz *v.* P., 123 Ill. App. 445, loud and profane language. *Comp.* Biddy *v.* S. (Tex. Cr.), 108 S. W. 689.

741-74 Familiarity of parties with alleged disguised sale proved. Coleman *v.* S., 53 Tex. Cr. 578, 111 S. W. 1011.

742-75 See Cooper *v.* City (Ala. App.), 65 S. 715.

742-77 S. *v.* Benson, 154 Ia. 313, 134 N. W. 851; Thompson *v.* S., 9 Okla. Cr. 525, 132 P. 695; Hookman *v.* S., 59 Tex. Cr. 183, 127 S. W. 825; Gorman *v.* S., 52 Tex. Cr. 327, 106 S. W. 384, 52 Tex. Cr. 24, 105 S. W. 200 (reputation as "blind tiger" inadmissible). But see S. *v.* Brooks, 74 Kan. 175, 85 P. 1013.

On prosecution for illegal sale the state may prove the general reputation of defendant's place of business. Ostendorf *v.* S., 8 Okla. Cr. 360, 128 P. 143.

General reputation admissible. O'Brien *v.* S., 55 Tex. Cr. 431, 117 S. W. 133; Joliff *v.* S., 53 Tex. Cr. 61, 109 S. W. 176 (to show character of house). May be shown that place has reputation of being one where liquors are sold; but incompetent to show generally reputed they were sold without license. Lockhart *v.* S., 58 Tex. Cr. 438, 126 S. W. 575.

Druggist's reputation as violator of law shown to impeach testimony. S. *v.* Christopher, 134 Mo. App. 6, 114 S. W. 549.

743-80 Evidence that purchaser was intoxicated is admissible. P. *v.* Salladay, 22 Cal. App. 552, 135 P. 508.

745-90 Cohen *v.* S., 7 Ga. App. 5, 65 S. E. 1096; Smith *v.* S., 3 Ga. App. 326, 59 S. E. 934; S. *v.* Madison, 23 S. D. 584, 122 N. W. 647; Cohn *v.* S., 120 Tenn. 61, 109 S. W. 1149; S. *v.* Suiter, 78 Vt. 391, 63 A. 182; S. *v.* Krinski, 78 Vt. 162, 62 A. 37.

745-91 Ware *v.* S., 6 Ga. App. 578, 65 S. E. 333; Toles *v.* S., 10 Ga. App. 444, 73 S. E. 597; Herman *v.* S., 8 Okla. Cr. 422, 128 P. 179; S. *v.* Barr, 84 Vt. 38, 77 A. 914. See Campbell *v.* S., 171 Ind. 702, 87 N. E. 212; McKinzie *v.* S., 8 Okla. Cr. 404, 127 P. 1090; S. *v.* Costa, 78 Vt. 198, 62 A. 38.

Certified copy of record of collector of internal revenue is prima facie proof of intent to sell. Moulder *v.* S. (Okla. Cr.), 138 P. 815.

Large quantities of liquor received. Billingsley *v.* S., 4 Okla. Cr. 597, 113 P. 241.

"**If the sales shown are unlawful,** the unlawful intent with which they were kept is no less to be presumed because it is proved or admitted that the person making the sale holds a pharmacy permit or has theretofore complied with all conditions of the mulct statute. S. *v.* Sartori, 55 Iowa 340, 7 N. W. 604." Bowers *v.* Maas, 154 Ia. 640, 135 N. W. 25.

Intent is immaterial under some statutes. S. *v.* Ross, 70 W. Va. 549, 74 S. E. 670.

"**There is no law** which prohibits a person from keeping whisky, no matter what the quantity, unless it is kept for some unlawful purpose, and when the above charge is made the proof must not only show that the person charged had intoxicating liquors, but that the liquor was kept for an unlawful purpose. The testimony in this case does no more than create a suspicion that the beer found was kept for an unlawful purpose, if it can be said to do that. That a person ordered a cask of beer raises no presumption that he ordered it for an unlawful purpose. When a house is searched, and it is discovered that the beer has been put to the use which it might be supposed the party ordering it intended it should be, and for which it is made, and when it additionally appears that the beer had been opened with a cork-screw and drunk from a glass, this is not sufficient to warrant the presumption that it was kept for an unlawful purpose. When section 1747 of the Code of 1906, as amended by Acts 1908, p. 117, provides that the fact that any person had in possession appliances adapted to the retailing of liquor shall be presumptive evidence that the person having the appliances is engaged in keeping intoxicating liquors for sale, or for the purpose of giving same away in violation of law, it does not and cannot mean that when a home is invaded and searched, and glasses, and a waiter, and a corkscrew, and intoxicating liquors are found, that these things alone shall

warrant the conviction of any person under this statute. . . . If these things be found in a storehouse, or in and about a person's place of business, this fact may be a stronger circumstance of guilt than when found in a home; but in all cases these things alone cannot be said to be such appliances, within the meaning of the statute, as to warrant a conviction in themselves. It may be difficult to prove the crime charged in this affidavit, and it should be.'' Minter *v.* City of Jackson, 101 Miss. 139, 57 S. 549.

745-94 Collins *v.* S., 152 Ala. 90, 44 S. 571; Hall *v.* S., 7 Ga. App. 186, 66 S. E. 486.

Payment of United States liquor tax constitutes prima facie evidence of intent during term of license to violate prohibitory law. Greenwood *v.* S., 9 Okla. Cr. 342, 131 P. 940.

A single unauthorized sale by a druggist is sufficient to establish unlawful intent. S. *v.* Benson, 154 Ia. 313, 134 N. W. 851.

746-95 Intent immaterial where sale of less than five gallons outside city alleged. P. *v.* Nylin, 139 Ill. App. 500.

746-96 Proof of payment of United States retail liquor dealers' tax and possession of liquors is proof of keeping with intent to sell. Cohn *v.* S. (Okla. Cr.), 135 P. 1155.

747-1 See Louisville & N. R. Co. *v.* C., 31 Ky. L. R. 683, 103 S. W. 349; ante, 742-77.

747-2 Bacot *v.* S., 94 Miss. 225, 48 S. 228; Clement *v.* Dwight, 137 App. Div. 389, 121 N. Y. S. 788. *Contra,* Newman *v.* S., 55 Tex. Cr. 376, 116 S. W. 1156; Reed *v.* S., 53 Tex. Cr. 4, 108 S. W. 368. See Henderson *v.* S., 49 Tex. Cr. 269, 91 S. W. 569. Sale of Peruna. Stelle *v.* S., 77 Ark. 441, 92 S. W. 530.

748-5 Druggist prosecuted for selling morphine must show that he acted in good faith. Chicago *v.* Brendecke, 170 Ill. App. 25.

748-6 *Comp.* Kittrell *v.* S., 89 Miss. 666, 42 S. 609.

748-7 P. *v.* Nylin, 236 Ill. 19, 86 N. E. 156 (sale of less than five gallons); Holly *v.* Simmons, 38 Tex. Civ. 124, 85 S. W. 325.

Intent immaterial in civil action to recover penalty though in form action criminal. Pulver *v.* S., 83 Neb. 446, 119 N. W. 780.

749-8 Admissibility in mitigation of punishment. Scott *v.* S., 47 Tex. Cr. 176, 82 S. W. 656.

749-9 Smith *v.* S., 5 Ga. App. 834, 63 S. E. 928; Louisville & N. R. Co. *v.* C., 31 Ky. L. R. 683, 103 S. W. 349; Goode *v.* S., 87 Miss. 495, 40 S. 12 (sale for medicinal use); Snell *v.* S., 56 Tex. Cr. 246, 119 S. W. 852; Ferguson *v.* S., 50 Tex. Cr. 155, 95 S. W. 111; S. *v.* Smith, 61 W. Va. 329, 56 S. E. 528. Information or notice that liquor was intoxicating admitted. Henderson *v.* S., 49 Tex. Cr. 269, 91 S. W. 569. See supra, 747-1; Cantwell *v.* S., 47 Tex. Cr. 521, 85 S. W. 18.

749-10 Louisville & N. R. Co. *v.* C., 31 Ky. L. R. 683, 103 S. W. 349.

Evidence of other sales admitted as shedding light on bona fides of accused. Sweatt *v.* S., 153 Ala. 70, 45 S. 588.

849-11 Ferguson *v.* S., 50 Tex. Cr. 155, 95 S. W. 111.

Good faith of seller immaterial. Harper *v.* S., 91 Ark. 422, 121 S. W. 737.

750-12 *Contra,* Goodspeed *v.* R. Co., 184 N. Y. 351, 77 N. E. 392; McCarthy *v.* R. Co., 126 App. Div. 182, 110 N. Y. S. 936.

751-15 S. *v.* Field, 139 Mo. App. 20, 119 S. W. 499.

751-18 P oof of father's non-consent presumptive evidence that consent not given, regardless of absence of evidence of mother's non-consent. S. *v.* McCormick, 56 Wash. 469, 105 P. 1037

751-19 See supra, 711-13.

751-20 Gelber *v.* S., 56 Tex. Cr. 460, 120 S. W. 863, conduct of minor in business matters shown.

Jury may consider appearance at trial. Quinn *v.* P., 51 Colo. 350, 117 P. 996.

Immaterial in action for breach of bond. Krick *v.* Dow (Tex. Civ.), 84 S. W. 245.

751-22 Intent of defendant immaterial. Seele *v.* S., 83 Neb. 109, 122 N. W. 686.

752-25 Smothers *v.* Jackson, 92 Miss. 327, 45 S. 982 (reputation as keeper of ''blind tiger'' inadmissible); Gorman *v.* S., 52 Tex. Cr. 24, 105 S. W. 200. See supra, 742-77.

752-26 Goad *v.* S., 73 Ark. 625, 83 S. W. 935.

Bills of firm receipted are admissible. S. *v.* Dollar, 88 Kan. 346, 128 P. 365.

Bill and accounts to show kind of business, admissible in prosecution for

keeping nuisance. S. *v.* Corn, 76 Kan. 416, 91 P. 1067.

752-27 Joyce *v.* S., 56 Tex. Cr. 333, 120 S. W. 453, competent on question of good faith as to belief concerning properties of liquor sold.

752-28 Roden *v.* S., 5 Ala. App. 247, 59 S. 751; Baker *v.* S., 5 Ala. App. 156, 59 S. 690; Sapp *v.* S., 2 Ala. App. 190, 56 S. 45; Appling *v.* S., 88 Ark. 393, 114 S. W. 927; P. *v.* Plopper, 158 Ill. App. 250; P. *v.* Joyce, 154 Ill. App. 13; S. *v.* Boynton, 155 N. C. 456, 71 S. E. 341; Tweedy *v.* S. (Okla. Cr.), 140 P. 787; Columbo *v.* S. (Tex. Cr.), 145 S. W. 910; Park *v.* S. (Tex. Cr.), 98 S. W. 243; Walker *v.* S., 49 Tex. Cr. 345, 94 S. W. 230.

Certified copy of the stub of a certain internal revenue license and internal revenue tax stamp, issued by the collector of internal revenue for the state of Alabama to the defendant and another person, authorizing them to engage in the business of retail liquor dealers. Strange *v.* S., 5 Ala. App. 164, 59 S. 691.

Under §22½ of the Alabama statute, approved August 25, 1909, the fact of the payment of such wholesale or retail dealer's or wholesale or retail malt liquor dealer's special United States internal revenue tax for the place and covering the period involved shall be deemed to be and constitute prima facie evidence that the party paying the same or to whom it was issued had sold or offered for sale the liquors for which or for the privilege of selling which said special tax had been paid. Rose *v.* S., 4 Ala. App. 163, 58 S. 680.

License posted in the saloon. P. *v.* Davis, 171 Mich. 241, 137 N. W. 61.

Possession of license by another, with whom defendant was doing business, shown. Suggs *v.* S. (Tex. Cr.), 101 S. W. 999. But see Biddy *v.* S., 52 Tex. Cr. 412, 107 S. W. 814.

Subsequent payment of such tax, inadmissible. Lane *v.* S., 49 Tex. Cr. 335, 92 S. W. 839.

Prima facie evidence.—Hestand *v.* C., 28 Ky. L. R. 1315, 92 S. W. 12; Magee *v.* S., 50 Tex. Cr. 444, 98 S. W. 245. See S. *v.* Martel, 103 Me. 63, 68 A. 454; S. *v.* Nethken, 60 W. Va. 673, 55 S. E. 742. But see Uloth *v.* S., 48 Tex. Cr. 295, 87 S. W. 823.

752-29 Allen *v.* S., 11 Ga. App. 245, 75 S. E. 11; Denton *v.* S., 52 Tex. Cr. 58, 105 S. W. 199.

752-30 Fox *v.* S., 53 Tex. Cr. 150, 109 S. W. 370. See Peyton *v.* S., 83 Ark. 102, 102 S. W. 1110, certificate of revenue collector inadmissible to show license.

Such a statute constitutional.—S. *v.* Toler, 145 N. C. 440, 58 S. E. 1005; S. *v.* Dowdy, 145 N. C. 432, 58 S. E. 1002; King *v.* S., 53 Tex. Cr. 101, 109 S. W. 182.

Meaning of prima facie evidence under these statutes. S. *v.* Momberg, 14 N. D. 291, 103 N. W. 566.

753-32 Herring *v.* S. (Ala. App.), 65 S. 707; Appling *v.* S., 88 Ark. 393, 114 S. W. 927; Lancaster *v.* S., 2 Okla. Cr. 681, 103 P. 1065.

Frequency and amounts of receipts of liquor are evidence of getting it for sale. Watson *v.* S. (Ala. App.), 65 S. 689; Brigman *v.* S., 8 Ala. App. 400, 62 S. 980; Miller *v.* S. (Tex. Cr.), 161 S. W. 128.

753-33 Angle *v.* S. (Ala. App.), 64 S. 646; Howell *v.* S. (Ala. App.), 64 S. 522; Hammock *v.* S., 8 Ala. App. 367, 62 S. 322; Cheek *v.* Metcalf, 3 Ala. App. 646, 57 S. 108; Dillard *v.* S., 152 Ala. 86, 44 S. 537; McClure *v.* S., 148 Ala. 625, 42 S. 813; Hughes *v.* S., 61 Fla. 32, 55 S. 463; S. *v.* Benson, 154 Ia. 313, 134 N. W. 851; S. *v.* Oden, 130 La. 598, 58 S. 351; P. *v.* Bullock, 173 Mich. 397, 139 N. W. 43; P. *v.* Giddings, 159 Mich. 523, 124 N. W. 546; Kittrell *v.* S., 89 Miss. 666, 42 S. 609; S. *v.* Pierce, 111 Mo. App. 216, 85 S. W. 663; Proctor *v.* S., 8 Okla. Cr. 537, 129 P. 77; Nobles *v.* S. (Tex. Cr.), 158 S. W. 1133; Todd *v.* S. (Tex. Cr.), 155 S. W. 220; Haney *v.* S., 57 Tex. Cr. 158, 122 S. W. 34; Swalm *v.* S., 49 Tex. Cr. 241, 91 S. W. 575. *Comp.* Rice *v.* P., 40 Colo. 377, 90 P. 1031; Carswell *v.* S., 7 Ga. App. 198, 66 S. E. 488; Driver *v.* S., 48 Tex. Cr. 20, 85 S. W. 1056; S. *v.* Gillispie, 63 W. Va. 152, 59 S. E. 957. See P. *v.* Seeley, 105 App. Div. 149, 93 N. Y. S. 982; *aff.* in 183 N. Y. 544, 76 N. E. 1102; Rutherford *v.* S., 48 Tex. Cr. 431, 88 S. W. 810; Devine *v.* C., 107 Va. 860, 60 S. E. 37. But see Kehoe *v.* C., 28 Ky. L. R. 35, 88 S. W. 1107; Smith *v.* S. (Tex. Cr.), 100 S. W. 953.

Keeping bawdy house.—Taliaferro *v.* U. S., 213 Fed. 25 (C. C. A.).

Other offenses may be shown under Alabama Acts, Sp. Session, 1909, p. 63, §29½. Moss *v.* S., 3 Ala. App. 189, 58 S. 62.

Other legitimate sales cannot be shown. Blasingame *v.* S., 47 Tex. Cr. 582, 85 S. W. 275. *Contra* under statute, if within period of limitation; must be shown with same clearness as sale alleged. Harvey *v.* S., 95 Miss. 601, 49 S. 268.

Evidence of sales to other persons inadmissible. Devine *v.* C., 107 Va. 860, 60 S. E. 37. Such evidence admissible to show seller's identity. Abrams *v.* S., 155 Ala. 105, 46 S. 464.

Two sales constituting one transaction may be shown. S. *v.* O'Brien, 35 Mont. 482, 90 P. 514.

Where there were counts for selling and counts for keeping and exposing for sale without a license, evidence of other sales admissible. S. *v.* Barr, 78 Vt. 97, 62 A. 43.

753-34 Ross *v.* S. (Tex. Cr.), 163 S. W. 433.

Where indictment charges several offenses evidence of other offenses is clearly admissible. Angle *v.* S. (Ala. App.), 64 S. 646.

754-35 Barron *v.* Anniston, 157 Ala. 399, 48 S. 58; Miller *v.* S. (Tex. Cr.), 161 S. W. 128; Nobles *v.* S. (Tex. Cr.), 158 S. W. 1133; Andrada *v.* S. (Tex. Cr.), 152 S. W. 910. See Mitchell *v.* S. (Tex. Cr.), 159 S. W. 1073; Creech *v.* S. (Tex. Cr.), 158 S. W. 277.

754-36 Rosenberg *v.* S., 5 Ala. App. 196, 59 S. 366; Louisville, etc. Co. *v.* C., 31 Ky. L. R. 683, 103 S. W. 349; P. *v.* Giddings, 159 Mich. 523, 124 N. W. 546; Curry *v.* S., 117 Md. 587, 83 A. 1030; S. *v.* Peterson, 98 Minn. 210, 108 N. W. 6; Hill *v.* S., 3 Okla. Cr. 686, 109 P. 291; Nobles *v.* S. (Tex. Cr.), 158 S. W. 1133; Wilson *v.* S. (Tex. Cr.), 154 S. W. 571; Milam *v.* S. (Tex. Cr.), 146 S. W. 185; Morris *v.* S., 48 Tex. Cr. 562, 89 S. W. 832; Walker *v.* S., 49 Tex. Cr. 345, 94 S. W. 230; Carnes *v.* S., 51 Tex. Cr. 437, 103 S. W. 403; Childress *v.* S., 48 Tex. Cr. 617, 90 S. W. 30; Roach *v.* S., 47 Tex. Cr. 500, 84 S. W. 586; Brown *v.* S. (Tex. Cr.), 160 S. W. 374; Russell *v.* S., 19 Wyo. 272, 116 P. 451.

See Goode *v.* S., 50 Fla. 461, 39 S. 461; Gorman *v.* S., 52 Tex. Cr. 327, 106 S. W. 384, and supra, 749-10; vol. 11, p. 801, n. 58, and supplement thereto. But see Holland *v.* S., 51 Tex. Cr. 142, 101 S. W. 1005. *Comp.* McKinley *v.* S., 52 Tex. Cr. 182, 106 S. W. 342.

In prosecutions for pursuing the occupation all evidence which would tend to show that he was doing so would be admissible. Clay *v.* S. (Tex. Cr.), 144 S. W. 280.

"**The ultimate fact charged by the** plaintiff is the keeping of liquors with intent to sell in violation of law. The fact, if it be a fact, that defendants did, in the building or place mentioned, sell and deliver intoxicating liquors to others in violation of law, is certainly very cogent evidence both of the keeping and of the intent to sell, and because of their probative value the proof of these facts is clearly admissible, though not specifically pleaded. State *v.* Thompson, 74 Iowa 119, 37 N. W. 104." Bowers *v.* Maas, 154 Ia. 640, 135 N. W. 25.

Previous acquittal of making another sale does not render evidence inadmissible. Stovall *v.* S. (Tex. Cr.), 97 S. W. 92.

Subsequent conviction of selling liquor and continuing to do so cannot be shown. Henderson *v.* S., 49 Tex. Cr. 478, 93 S. W. 551.

On prosecution for nuisance other sales proved. S. *v.* O'Malley, 132 Ia. 696, 109 N. W. 491.

Unlawfully keeping liquor continuing offense, evidence admissible that same condition existed, both before and after day named (within reasonable limits), to show intent with which it was kept on day designated. S. *v.* Collins, 28 R. I. 439, 67 A. 796.

Defendant required to testify of receipt of commissions on orders and to his having license. Coleman *v.* S., 53 Tex. Cr. 578, 111 S. W. 1011.

755-37 Alberson *v.* S., 54 Tex. Cr. 8, 111 S. W. 412, searches by sheriff.

755-38 S. *v.* Costa, 78 Vt. 198, 62 A. 38, prior sales admissible.

Offense must be proved before evidence of other alleged offenses receivable. Vannort *v.* S., 57 Tex. Cr. 615, 124 S. W. 654.

755-39 Allison *v.* S., 1 Ala. App. 206, 55 S. 453.

756-40 S. *v.* Baker, 50 Or. 381, 92 P. 1076, 13 L. R. A. (N. S.) 1040 (allowing female to remain in saloon); Misher *v.* S. (Tex. Cr.), 152 S. W. 1049.

756-42 Dillard *v.* S., 152 Ala. 86, 44 S. 537; Untreinor *v.* S., 146 Ala. 133, 41 S. 170; Scott *v.* S., 150 Ala. 59, 43 S. 181; Abrams *v.* S., 155 Ala. 105, 46 S. 464.

756-43 Verified answer of accused in **prior civil suit** is admissible as to

whether he was engaged in selling whiskey. Stitch *v.* S. (Okla. Cr.), 137 P. 887.

758-50 *Contra,* Jennings *v.* S., 55 Tex. Cr. 147, 115 S. W. 587.

When admitted for this purpose, it should be limited to the purpose for which it was introduced in the charge of the court. Clay *v.* S. (Tex. Cr.), 144 S. W. 280.

758-53 S. *v.* Stanley, 134 La. 131, 63 S. 850.

Defendant's presence in place where law violated four days after prosecution irrelevant. S. *v.* Thompson, 76 Kan. 365, 91 P. 79.

Ownership of place cannot be proved by general reputation. Minter *v.* S. (Tex. Cr.), 150 S. W. 783.

Circumstantial evidence proper to show accused controls premises. Gales *v.* S. (Ga. App.), 81 S. E. 364.

Knowledge of accused's place of business testified to by qualified witness. P. *v.* Boos, 155 Mich. 407, 120 N. W. 11.

759-57 P. *v.* Boos, supra.

759-61 Williams *v.* S., 56 Tex. Cr. 496, 120 S. W. 882, declarations tending to show ownership.

759-62 P. *v.* Moore, 155 Mich. 107, 118 N. W. 742.

Bills for liquor.—S. *v.* Corn, 76 Kan. 416, 91 P. 1067.

760-65 Patterson *v.* S., 8 Ala. App. 420, 62 S. 1023.

760-66 In prosecution for maintaining nuisance proper to show who lessee of premises. S. *v.* Kruse, 19 N. D. 203, 124 N. W. 385.

760-70 Watson *v.* S., 8 Ala. App. 414, 62 S. 997; Stokes *v.* S., 5 Ala. App. 159, 59 S. 310; Smith *v.* S., 2 Ala. App. 216, 56 S. 39; Kelly *v.* Anniston, 164 Ala. 631, 51 S. 415 (found on person of accused after arrest and also on person of buyer); Collins *v.* S., 94 Ark. 94, 125 S. W. 647 (shows prima facie case); S. *v.* Fulman, 7 Penne. (Del.) 123, 74 A. 1; Williams *v.* S., 13 Ga. App. 179, 78 S. E. 1012; Cooper *v.* S., 12 Ga. App. 561, 77 S. E. 878; Lewis *v.* S., 6 Ga. App. 205, 64 S. E. 701; P. *v* Bullock, 173 Mich. 397, 139 N. W. 43; S. *v.* Helton, 143 Mo. App. 499, 127 S. W. 595 (also quantity sold in given time); Field *v.* S., 55 Tex. Cr. 524, 117 S. W. 806; Myers *v.* S., 52 Tex. Cr. 558, 108 S. W. 392 (*over.* Parish *v.* S., 48 Tex. Cr. 578, 89 S. W. 830; Harris *v.* S., 50 Tex. Cr. 411, 97 S. W. 704; (Tex. Cr.), 100 S. W. 920); King *v.* S., 50 Tex. Cr. 321, 97 S. W. 488; S. *v.* Suiter, 78 Vt. 391, 63 A. 182.

See Wynn *v.* S. (Ala. App.), 65 S. 687; Ward *v.* S., 51 Fla. 133, 40 S. 177; supra, 745-90.

Defendant's access to liquors at time of sales is admissible. Black *v.* S. (Tex. Cr.), 151 S. W. 1053.

Carrier's agent may testify to delivery of liquors to defendant. Dawson *v.* S. (Tex. Cr.), 164 S. W. 5; Cowley *v.* S. (Tex. Cr.), 161 S. W. 471.

Shipments of liquors to defendant is relevant evidence. Watson *v.* S., 8 Ala. App. 414, 62 S. 997; Coates *v.* S., 5 Ala. App. 182, 59 S. 323.

Large shipments of liquor raise presumption of accumulation for unlawful sale. S. *v.* Dollar, 88 Kan. 346, 128 P. 365.

Delivery of liquors to defendant is relevant evidence. Webb *v.* S., 13 Ga. App. 733, 80 S. E. 14.

Possession of liquors at any place except dwelling is prima facie evidence of guilt. Dunn *v.* S., 8 Ala. App. 382, 62 S. 379; Hauser *v.* S., 6 Ala. App. 31, 60 S. 549.

Though not a violation of law to purchase whisky outside of the state and ship it into the state, yet, where the defendant is charged with having in his possession intoxicating liquors with the intention or for the purpose of selling the same in violation of law, evidence that he was receiving whisky was a relevant fact in connection with the charge. Price *v.* City, 97 Miss. 477, 52 S. 486.

Evidence held sufficient.—Holland *v.* S., 9 Ga. App. 831, 72 S. E. 290.

Possession shown by sales.—Holland *v.* S., 9 Ga. App. 831, 72 S. E. 290.

Ownership immaterial.—"From the testimony of the two witnesses it would appear that the two transactions were entirely separate and distinct, and that the incidents related by Dotson had no reference to the time testified to by the state's witness when he received the whisky from the defendant in person and paid him for it. Under such circumstances as testified to by the state's witness, it was immaterial who the whisky belonged to." Roden *v.* S., 3 Ala. App. 204; 58 S. 73.

Evidence of ownership admissible, though unnecessary. Whitfield *v.* S., 2 Ga. App. 124, 58 S. E. 385.

Possession of unusual quantity raises

presumption of keeping for illegal sale. Bohstedt *v.* Teufel (Ia.), 106 N. W. 513.

Possession of other kinds shown as bearing on question whether kind alleged kept for sale. S. *v.* Krinski, 78 Vt. 162, 62 A. 37, Jamaica ginger.

Presumption of ownership from delivery (Goode *v.* S., 50 Fla. 461, 39 S. 461), and of guilt from possession. S. *v.* McIntyre, 139 N. C. 599, 52 S. E. 63.

Bottles and other articles from place charged to be nuisance, admissible though contents of part not shown to contain liquor. S. *v.* Giroux, 75 Kan. 695, 90 P. 249. See S. *v.* Collins, 28 R. I. 439, 67 A. 796 (empty bottles on driveway); S. *v.* Files, 71 Kan. 862, 80 P. 948 (bottles of whisky seized under warrant); Reynolds *v.* S., 52 Fla. 409, 42 S. 373 (jugs smelling of whisky found at defendant's place).

Possession presumptive evidence of transportation, on prosecution for illegal transportation. S. *v.* Pope, 79 S. C. 87, 60 S. E. 234. But may be rebutted. Vann *v.* S., 140 Ala. 122, 37 S. 158.

Liquor belonging to others.—Defendant cannot show storing liquor for others. Donald *v.* S. (Miss.), 41 S. 4.

761-71 Creed *v.* S. (Tex. Cr.), 155 S. W. 240.

Accused may rebut evidence of ownership of liquors found in his place of business by proof that they belonged to an employee. Bloodworth *v.* Mayor, 12 Ga. App. 650, 77 S. E. 1131.

761-72 Cheek *v.* S., 3 Ala. App. 646, 57 S. 108; Smith *v.* S., 11 Ga. App. 89, 74 S. E. 711; S. *v.* Lindquist, 110 Minn. 12, 124 N. W. 215; S. *v.* Boynton, 155 N. C. 456, 71 S. E. 341; Lancaster *v.* S., 2 Okla. Cr. 681, 103 P. 1065; Weil *v.* S., 48 Tex. Cr. 603, 90 S. W. 644; King *v.* S., 50 Tex. Cr. 321, 97 S. W. 488; McKinley *v.* S., 47 Tex. Cr. 222, 82 S W. 1042 (at express office).

See Willingham *v.* S. (Ala. App.), 65 S. 847.

Evidence of finding beer in building with which defendant was not shown to have any connection is inadmissible. Grider *v.* S. (Ala. App.), 64 S. 756; Cravey *v.* S. (Ala. App.), 64 S. 756.

On premises of another.—S. *v.* Suiter, 78 Vt. 391, 63 A. 182.

Shipment of liquors to accused about time witness testified he bought from him shown in corroboration. Sadler *v.* S., 165 Ala. 109, 51 S. 564.

761-73 S. *v.* Ackerman, 214 Mo. 325, 113 S. W. 1087; S. *v.* Collins, 28 R. I. 439, 67 A. 796.

Receipts of several shipments proved by carrier's records. S. *v.* Schumacher, 21 N. D. 591, 132 N. W. 143.

761-74 S. *v.* Kennard, 74 N. H. 76, 65 A. 376; Lancaster *v.* S., 2 Okla. Cr. 681, 103 P. 1065; S. *v.* Collins, 28 R. I. 439, 67 A. 796; King *v.* S., 50 Tex. Cr. 321, 97 S. W. 488.

Possession of empty bottles, inadmissible. O'Shennessey *v.* S., 49 Tex. Cr. 600, 96 S. W. 790.

762-75 Goss *v.* S., 57 Tex. Cr. 557, 124 S. W. 107 (seven weeks prior too remote); King *v.* S., 50 Tex. Cr. 321, 97 S. W. 488.

762-76 Alexander *v.* S., 7 Ga. App. 88, 66 S. E. 274; Baughman *v.* S., 49 Tex. Cr. 33, 90 S. W. 166 (shipments to defendant during year). *Contra,* S. *v.* Ryan, 1 Boyce (Del.) 223, 75 A. 869; Myers *v.* S., 56 Tex. Cr. 222, 118 S. W. 1032 (if whisky same brand as sold). *Comp.* Carnes *v.* S., 51 Tex. Cr. 437, 103 S. W. 403.

Subsequent to offense.—Finding liquor three days after sale, admissible. Starbeck *v.* S., 53 Tex. Cr. 192, 109 S. W. 162; Parish *v.* S., 48 Tex. Cr. 578, 89 S. W. 830; Harris *v.* S., 51 Tex. Cr. 564, 98 S. W. 390, and O'Shennessey *v.* S., 49 Tex. Cr. 600, 96 S. W. 790, are overruled. See Riggs *v.* S. (Tex. Cr.), 96 S. W. 25.

Purchase of liquors by third party shown where prosecutor testified defendant told him he would get liquor from such person and that accused, in company with another, returned from the third person's house with liquor. Wesley *v.* S., 57 Tex. Cr. 277, 122 S. W. 550.

762-77 Herring *v.* S. (Ala. App.), 65 S. 707; Holmes *v.* S., 12 Ga. App. 359, 77 S. E. 187; Price *v.* City of Gulfport, 97 Miss. 477, 52 S. 486; Overton *v.* S. (Okla. Cr.), 140 P. 1135; Walker *v.* S. (Okla. Cr.), 127 P. 895; Martoni *v.* S. (Tex. Cr.), 167 S. W. 349; Brown *v.* S. (Tex. Cr.), 160 S. W. 374; Creed *v.* S. (Tex. Cr.), 155 S. W. 240; Byrd *v.* S. (Tex. Cr.), 151 S. W. 1068. See S. *v.* Dahlquist, 17 N. D. 40, 115 N. W. 81; Childs *v.* S., 4 Okla. Cr. 474, 113 P. 545; Dawson *v.* S. (Tex. Cr.), 164 S. W. 5; Leonard *v.* S. (Tex. Cr.), 152 S. W. 632;

S. *v.* Kiger, 63 W. Va. 450, 61 S. E. 362.

763-78 S. *v.* Collins, 28 R. I. 439, 67 A. 796; S. *v.* Costa, 78 Vt. 198, 62 A. 38.

763-79 See Russell *v.* Anderson, 141 Ia. 533, 120 N. W. 89.

763-80 McAdams *v.* S., 59 Tex. Cr. 86, 126 S. W. 1156.

Possession is prima facie evidence of ownership. Pappenburg *v.* S. (Ala. App.), 65 S. 418.

Purchaser's possession of liquor on leaving defendant's place, which he entered without liquor, significant. S. *v.* Clinkenbeard, 142 Mo. App. 146, 125 S. W. 827.

Purpose for which liquors kept at place immaterial under act of 1907. Cohen *v.* S., 7 Ga. App. 5, 65 S. E. 1096.

763-81 Cheek *v.* S., etc., 3 Ala. App. 646, 57 S. 108; Gary *v.* S., 7 Ga. App. 501, 67 S. E. 207; S. *v.* O'Malley, 132 Ia. 696, 109 N. W. 491; S. *v.* Gross, 76 N. H. 304, 82 A. 533; Tucker *v.* S., 7 Okla. Cr. 634, 124 P. 1134, 125 P. 1089; Walker *v.* S. (Tex. Cr.), 145 S. W. 904; Walker *v.* S., 49 Tex. Cr. 345, 94 S. W. 230; Holland *v.* S., 51 Tex. Cr. 142, 101 S. W. 1005. See Creed *v.* S. (Tex. Cr.), 155 S. W. 240; Teague *v.* S., 51 Tex. Cr. 526, 102 S. W. 1141, taking orders for whisky within local option district admissible.

Evidence that empty whisky bottles and other jugs and bottles containing whisky were found on premises was admissible. Smith *v.* S., 12 Ga. App. 482, 77 S. E. 651.

"It appears that prior to the adoption of the local option law appellant was engaged in the saloon business, and when prohibition was adopted he entered into the cold drink business, and took out internal revenue license to sell intoxicating liquor; that when prosecuting witness desired a bottle of whisky he went into appellant's place of business and called for 'cheese,' and placed 75 cents on the counter, when appellant would go into the back room, and upon his return the prosecuting witness would go into the room and get the whisky wrapped in tissue paper. This would tend to show a method and system by which appellant was engaged in the sale of intoxicating liquors, and was admissible for the purpose of showing the system by which appellant made sales, if he did do so. James *v.* State, 138 S. W. 612." Columbo *v.* S. (Tex. Cr.), 145 S. W. 910.

In Texas "the legislature, in making it an offense to pursue the business or occupation of selling intoxicating liquors, has provided that no person shall be convicted of that offense unless it be shown that he has made at least two sales in three years, and this court has held, in the case of Fitch *v.* State, 58 Tex. Cr. R. 366, 127 S. W. 1040, that as the legislature has provided that two sales must be proven, that the person to whom the two sales were made must be alleged in the indictment, and it being necessary to prove two sales, they must be proven as alleged, but the rules of evidence are not otherwise changed, and all evidence which would tend to show that the person under indictment was guilty of the offense of pursuing that business or occupation named would be admissible." Whitehead *v.* S. (Tex. Cr.), 147 S. W. 583.

Prior sales, under indictment for nuisance, admissible. S. *v.* Moore (Ia.), 106 N. W. 268; S. *v.* Wick, 130 Ia. 31, 106 N. W. 268.

763-82 Goode *v.* S., 50 Fla. 45, 39 S. 461, crime proved by showing systematic course of trade as well as single act. And state proved in Joliff *v.* S., 53 Tex. Cr. 61, 109 S. W. 176, that persons other than accused sold liquor at house kept by him, to show house was kept for purpose of selling liquor.

Time witness testified before grand jury proved to show prosecution not barred. Wynne *v.* S., 155 Ala. 99, 46 S. 459.

764-84 Statement as to who controlled place where sale made competent. Green *v.* S., 56 Tex. Cr. 191, 120 S. W. 425.

764-85 Henderson *v.* S., 49 Tex. Cr. 269, 91 S. W. 569; S. *v.* Nethken, 60 W. Va. 673, 55 S. E. 742.

765-96 May show bona fide prescription issued by himself. S. *v.* Robertson, 142 Mo. App. 38, 125 S. W. 215.

765-97 Allison *v.* S., 1 Ala. App. 206, 55 S. 453; Harris *v.* S., 51 Tex. Cr. 564, 98 S. W. 390; Starnes *v.* S., 52 Tex. Cr. 403, 107 S. W. 550 (sale to witness). See Deisher *v.* S. (Tex. Cr.), 96 S. W. 28, testimony of minor of payment.

Evidence confined to sale.—Guarreno *v.* S., 148 Ala. 637, 42 S. 833.

Maintenance of room adjoining drug store, where defendant's customers drank liquor sold by him, proved. P.

v. Van Alstyne, 157 Mich. 366, 122 N. W. 193.

Consent to drinking proved by defendant's failure to object to others drinking in his place. S. *v.* Morgan, 134 Mo. App. 726, 115 S. W. 491.

766-6 Mitchell *v.* S., 141 Ala. 90, 37 S. 407; Ledbetter *v.* S., 143 Ala. 52, 38 S. 836; Miller *v.* S., 168 Ala. 100, 53 S. 278; Carson *v.* S., 3 Ala. App. 206, 58 S. 88; Reynolds *v.* S., 52 Fla. 409, 42 S. 373; Flood *v.* S., 12 Ga. App. 702, 78 S. E. 268; Walker *v.* S., 122 Ga. 747, 50 S. E. 994; Sowell *v.* S., 126 Ga. 105, 54 S. E. 916; Graves *v.* S., 127 Ga. 46, 56 S. E. 72; Southern E. Co. *v.* S., 1 Ga. App. 700, 58 S. E. 67; Donaldson *v.* S., 3 Ga. App. 451, 60 S. E. 115; Teasley *v.* S., 124 Ga. 794, 53 S. E. 102; Robinson *v.* S., 125 Ga. 31, 53 S. E. 766; Dowdy *v.* C., 31 Ky. L. R. 33, 101 S. W. 338; Adams E. Co. *v.* C., 29 Ky. L. R. 224, 92 S. W. 932; Cable *v.* S. (Miss.), 38 S. 98; Price *v.* S. (Miss.), 38 S. 41; Harper *v.* S., 85 Miss. 338, 37 S. 956; S. *v.* Watkins, 164 N. C. 425, 79 S. E. 619; Smith *v.* S. (Tex. Cr.), 145 S. W. 918; Hamilton *v.* S. (Tex. Cr.), 145 S. W. 922; Gee *v.* S., 57 Tex. Cr. 151, 122 S. W. 23; Young *v.* S. (Tex. Cr.), 90 S. W. 1017; Givens *v.* S., 49 Tex. Cr. 267, 91 S. W. 1090; Smith *v.* S. (Tex. Cr.), 97 S. W. 499; Dupree *v.* S. (Tex. Cr.), 91 S. W. 578; Roberson *v.* S. (Tex. Cr.), 91 S. W. 578; Brunson *v.* S. (Tex. Cr.), 91 S. W. 582; Oldham *v.* S., 52 Tex. Cr. 516, 108 S. W. 667; Gaddis *v.* S. (Tex. Cr.), 106 S. W. 1155; Cantwell *v.* S., 47 Tex. Cr. 521, 85 S. W. 18; Blasingame *v.* S., 47 Tex. Cr. 582, 85 S. W. 275; Williams *v.* S., 48 Tex. Cr. 75, 85 S. W. 1144; Cook *v.* S. (Tex. Cr.), 89 S. W. 641; Hoyt *v.* S. (Tex. Cr.), 89 S. W. 1082; Sawyer *v.* S., 52 Tex. Cr. 597, 108 S. W. 394; Owens *v.* S. (Tex. Cr.), 96 S. W. 31; Potts *v.* S., 52 Tex. Cr. 440, 108 S. W. 660; Bittix *v.* S., 48 Tex. Cr. 232, 87 S. W. 348; Curtis *v.* S., 52 Tex. Cr. 606, 108 S. W. 380; Hays *v.* S., 49 Tex. Cr. 369, 91 S. W. 585; O'Neal *v.* S., 49 Tex. Cr. 297, 92 S. W. 417; Choran *v.* S., 49 Tex. Cr. 301, 92 S. W. 422; Lane *v.* S., 49 Tex. Cr. 335, 92 S. W. 839; Cooper *v.* S., 52 Tex. Cr. 228, 105 S. W. 1126; Human *v.* S., 52 Tex. Cr. 474, 107 S. W. 817.

See Goode *v.* S., 50 Fla. 45, 39 S. 461; Weil *v.* S., 48 Tex. Cr. 603, 90 S. W. 644; S. *v.* Collins, 67 W. Va. 530, 68 S. E. 268. *Comp.* Kelly *v.* C., 26 Ky. L. R. 1038, 83 S. W. 99.

Evidence must show the time when as well as the place where the illegal sale was made. Hammock *v.* S., 7 Ala. App. 112, 61 S. 471.

Burden on state to prove possession of liquors and criminal intent to violate prohibition laws. Ren *v.* S., 9 Okla. Cr. 671, 132 P. 1131.

Evidence of specific facts showing violation of prohibitory law must be produced. Tracy *v.* S., 9 Okla. Cr. 532, 132 P. 692.

Evidence sufficient.—Fisher *v.* S., 55 Fla. 17, 46 S. 422; Gibbs *v.* U. S., 7 Ind. Ty. 182, 104 S. W. 583; Day *v.* C., 29 Ky. L. R. 807, 814, 816, 96 S. W. 508; S. *v.* Budworth, 104 Minn. 257, 116 N. W. 486; S. *v.* Brown, 130 Mo. App. 214, 109 S. W. 99; S. *v.* Scanlon, 130 Mo. App. 395, 110 S. W. 16; S. *v.* Herring, 145 N. C. 418, 58 S. E. 1007; C. *v.* Pollak, 33 Pa. Super. 600; Goad *v.* S., 52 Tex. Cr. 444, 108 S. W. 680; Owens *v.* S., 47 Tex. Cr. 634, 96 S. W. 794; Loving *v.* S. (Tex. Cr.), 100 S. W. 154; Feagin *v.* S. (Tex. Cr.), 100 S. W. 776; Hall *v.* S., 53 Tex. Cr. 304, 109 S. W. 933; Dunn *v.* S., 48 Tex. Cr. 107, 86 S. W. 326; Brunson *v.* S. (Tex. Cr.), 91 S. W. 582; Nicholson *v.* S., 48 Tex. Cr. 223, 87 S. W. 343; Oldham *v.* S., 52 Tex. Cr. 516, 108 S. W. 667 (conspiracy to make sales).

Evidence insufficient.—Bonner *v.* S., 2 Ga. App. 711, 58 S. E. 1123; Harris *v.* S., 47 Tex. Cr. 588, 85 S. W. 1198; Bittix *v* S., 48 Tex. Cr. 232, 87 S. W. 348; Tippit *v.* S., 53 Tex. Cr. 180, 109 S. W. 190; Gaston *v.* S. (Tex. Cr.), 102 S. W. 116; Loving *v.* S. (Tex. Cr.), 100 S. W. 154; Feagin *v.* S. (Tex. Cr.), 100 S. W. 776; King *v.* S., 53 Tex. Cr. 101, 109 S. W. 182; Lane *v.* S., 49 Tex. Cr. 335, 92 S. W. 839; Ferguson *v.* S., 50 Tex. Cr. 155, 95 S. W. 111; Sims *v.* S. (Tex. Cr.), 86 S. W. 1019; Chenowith *v.* S., 50 Tex. Cr. 238, 96 S. W. 19; Harris *v.* S., 47 Tex. Cr. 588, 85 S. W. 284.

Whether device or subterfuge.—Turner *v.* S., 121 Ga. 154, 48 S. E. 906; Noble *v.* C., 32 Ky. L. R. 73, 105 S. W. 413; Lemore *v.* C., 32 Ky. L. R. 387, 105 S. W. 930 (subsequent borrowing money from party to whom defendant had given whisky no sale); S. *v.* Melton, 130 Mo. App. 262, 109 S. W. 858; Jones *v.* S., 52 Tex. Cr. 519, 107 S. W. 849; Scott *v.* S., 52 Tex. Cr. 164, 105 S. W. 796; Walker *v.* S., 49 Tex. Cr. 345, 94

S. W. 230; Renfro *v.* S. (Tex. Cr.), 91 S. W. 576; Hays *v.* S., 47 Tex. Cr. 150, 83 S. W. 201.

Circumstantial evidence to establish sale, admissible. Starnes *v.* S., 52 Tex. Cr. 403, 107 S. W. 550; Johnson *v.* S., 52 Tex. Cr. 554, 107 S. W. 816. See S. *v.* O'Malley, 132 Ia. 696, 109 N. W. 491.

Soliciting orders.—Bruce *v.* S. (Tex. Cr.), 92 S. W. 1092.

Delivery.—Until sale proved evidence cannot be admitted of delivery of liquor to defendant. Brighton *v.* Miles, 151 Ala. 479, 44 S. 394.

Payment in metal checks sufficient. Duke *v.* S., 146 Ala. 138, 41 S. 170.

Exchange of brandy for peaches, a sale. Barnes *v.* S. (Tex. Cr.), 88 S. W. 804.

Evidence held sufficient.—Ridley *v.* S., 5 Okla. Cr. 522, 115 P. 628.

Evidence held insufficient.—Vines *v.* S., 19 Wyo. 255, 116 P. 1013.

Taking out federal license to sell raises no presumption that a sale was made to the prosecuting witness. Columbo *v.* S. (Tex. Cr.), 145 S. W. 910.

Circumstantial evidence alone is sufficient to support a conviction. Reismier *v.* S., 148 Wis. 593, 135 N. W. 153.

Evidence held sufficient to sustain a conviction. S. *v.* Brown, 82 N. J. L. 164, 82 A. 302.

767-7 S. *v.* Nelson, 14 N. D. 297, 103 N. W. 609; Jackson *v.* S., 49 Tex. Cr. 248, 91 S. W. 574; Roach *v.* S., 47 Tex. Cr. 500, 84 S. W. 586.

767-8 See Ledbetter *v.* S., 143 Ala. 52, 38 S. 386.

767-9 Delivery not essential to sale. S. *v.* Small, 82 S. C. 93, 63 S. E. 4.

Connection of accused with sale may be shown by circumstantial evidence. Gales *v.* S. (Ga. App.), 81 S. E. 364.

767-12 Cage *v.* S., 11 Ga. App. 318, 75 S. E. 160; Brown *v.* S., 121 Tenn. 186, 114 S. W. 198 (loan, repayment to be made in kind).

767-13 Lewis *v.* S., 6 Ga. App. 205, 64 S. E. 701. See S. *v.* Russell, 164 N. C. 482, 80 S. E. 66.

767-15 Mills *v.* S., 148 Ala. 633, 42 S. 816; Kinnane *v.* S., 106 Ark. 286, 153 S. W. 262; Lambert *v.* S., 11 Ga. App. 764, 76 S. E. 73; S. *v.* Benson, 154 Ia. 313, 134 N. W. 851. See Wolfe *v.* S., 107 Ark. 33, 153 S. W. 1102; Misher *v.* S. (Tex. Cr.), 152 S. W. 1049.

Proof of one sale insufficient. Lester *v.* S. (Tex. Cr.), 153 S. W. 861.

Quantity sold immaterial under Sunday statute. S. *v.* Wahl, 137 Mo. App. 651, 119 S. W. 453.

Engaging in business of selling without license proved by showing single sale coupled with other sales on same and other days. P. *v.* Moore, 155 Mich. 107, 118 N. W. 742.

Continuous keeping or frequent sales need not be shown to sustain conviction for keeping liquors for illegal sale, barter, etc. Coggins *v.* Griffin, 5 Ga. App. 1, 62 S. E. 659.

767-16 P. *v.* Rudorf, 149 Ill. App. 215; P. *v.* Dieterich, 142 Mich. 527, 105 N. W. 1112; Peebles *v.* S. (Miss.), 63 S. 271; Oliver *v.* S., 101 Miss. 382, 58 S. 6; S. *v.* Hunter, 89 S. C. 136, 71 S. E. 823. See S. *v.* Collins, 28 R. I. 439, 67 A. 796. *Contra*, Harding *v.* C., 105 Va. 858, 52 S. E. 832.

Evidence of sales made anterior to date alleged is admissible. Lawson *v.* Gulfport (Miss.), 62 S. 357.

Should be proven as about the time alleged. Lester *v.* S. (Tex. Cr.), 153 S. W. 861.

Record must show that the action was not barred. Yancey *v.* S., 1 Ala. App. 226, 55 S. 267.

Must be prior to indictment.—Vaughan *v.* S. (Tex. Cr.), 93 S. W. 741. See Bragg *v.* S., 126 Ga. 442, 55 S. E. 232, evidence insufficient.

Proof of sale prior to indictment and not within bar of statute, sufficient. Stelle *v.* S., 77 Ark. 441, 92 S. W. 530. See DeArmon *v.* S. (Tex. Cr.), 97 S. W. 479; Pitts *v.* S., 124 Ga. 79, 52 S. E. 147.

But it must appear that the sale took place before the indictment was found. Abbott *v.* S., 11 Ga. App. 43, 74 S. E. 621.

768-17 Henson *v.* S., 12 Ga. App. 632, 77 S. E. 916; Sims *v.* S. (Tex. Cr.), 86 S. W. 1019. See Lambie *v.* S., 151 Ala. 86, 44 S. 51; Wolfe *v.* S., 107 Ark. 29, 153 S. W. 1100; Collins *v.* C., 149 Ky. 397, 149 S. W. 817; Stanley *v.* S., 89 Miss. 63, 42 S. 284; S. *v.* Gilson, 114 Mo. App. 652, 90 S. W. 400 (evidence sufficient); Parker *v.* S., 48 Tex. Cr. 69, 85 S. W. 1155; Green *v.* S., 49 Tex. Cr. 204, 91 S. W. 585 (evidence insufficient); Wolf *v.* S., 48 Tex. Cr. 54, 85 S. W. 1145.

Order of commissioner's court creating the election precinct is admissible and evidence showing that offense committed in such precinct. Walker *v.* S. (Tex. Cr.), 151 S. W. 318.

State must prove possession or control of premises and possession of liquor. Mater *v.* S., 9 Okla. Cr. 380, 132 P. 383.

Must be proved to be within territory where sale is forbidden. S. *v.* Jaeger, 240 Mo. 1, 144 S. W. 103.

Where sale is prohibited within one-half mile of a fair, the distance must be determined by a straight line and not along the streets and sidewalks. Woodring *v.* Nolan (Ia.), 135 N. W. 567.

768-18 See S. *v.* Williams, 20 S. D. 492, 107 N. W. 830; O'Shennessey *v.* S., 49 Tex. Cr. 600, 96 S. W. 790.

768-20 Wilburn *v.* S., 8 Ga. App. 28, 68 S. E. 460.

768-21 Evidence of sale to agent of disclosed principal will not support indictment for selling to agent as individual. Barlow *v.* S., 127 Ga. 58, 56 S. E. 131.

768-22 Southern Exp. Co. *v.* S., 1 Ga. App. 700, 58 S. E. 67. *Contra*, S. *v.* Williams, 20 S. D. 492, 107 N. W. 830.

769-24 Shaw *v.* City, 11 Ga. App. 391, 75 S. E. 486; Porter *v.* S. (Tex. Cr.), 86 S. W. 1014. See Rice *v.* P., 40 Colo. 377, 90 P. 1031.

769-25 See James *v.* S., 49 Tex. Cr. 334, 91 S. W. 227. But evidence must show liquor sold was judicially known as intoxicating or that it was so in fact. Beaty *v.* S., 53 Tex. Cr. 432, 110 S. W. 449. See Bird *v.* S., 49 Tex. Cr. 205, 91 S. W. 791.

769-26 Southern Exp. Co. *v.* S., 1 Ga. App. 700, 58 S. E. 67. See Graham *v.* S., 121 Ga. 590, 49 S. E. 678.

769-27 **Non existence of license** may be shown by admissions in stipulations of the record of the case. Gill *v.* S. (Tex. Cr.), 150 S. W. 616.

Village clerk's record is competent evidence of the issuance of a license. S. *v.* Jones (Minn.), 147 N. W. 822.

769-28 Possession of federal license made by statute prima facie evidence of sale. Clopton *v.* C., 109 Va. 813, 63 S. E. 1022.

769-29 Buyers need not be called if others testify they saw sales. P. *v.* Moore, 155 Mich. 107, 118 N. W. 742.

The federal license itself is held to be the best evidence of its issuance. S. *v.* Oden, 130 La. 598, 58 S. 351.

769-31 Evidence of single illegal sale may sustain a conviction of illegally keeping intoxicating liquors for sale. Everett *v.* City of Vidalia (Ga.), 82 S. E. 50.

Operating a restaurant in local option territory in which liquors are sold is sufficient evidence of maintaining a common nuisance. Young *v.* C., 149 Ky. 390, 149 S. W. 822.

770-35 S. *v.* Demoss, 74 Kan. 173, 85 P. 937 (proof of sales unnecessary). See Sopher *v.* S., 169 Ind. 177, 81 N. E. 913, 14 L. R. A. (N. S.) 172, evidence insufficient.

Large shipments of liquor establish inference of maintaining a nuisance. S. *v.* Dollar, 88 Kan. 346, 128 P. 365.

770-36 But see S. *v.* Poull, 14 N. D. 557, 105 N. W. 717.

770-39 Judgment in civil action inadmissible in criminal proceeding. S. *v.* Weil, 83 S. C. 478, 65 S. E. 634.

"**Evidence that he had made a sale** is admissible as a circumstance tending to prove the offense charged; but proof that one had made two or even three isolated sales would not sustain a conviction wherein he was charged with pursuing the business and occupation." Whitehead *v.* S. (Tex. Cr.), 147 S. W. 583.

770-40 Byrd *v.* S. (Tex. Cr.), 151 S. W. 1068.

State in proving that accused followed the business of selling intoxicants need not prove each specific sale alleged but must prove at least two sales. Hightower *v.* S. (Tex. Cr.), 165 S. W. 184.

771-41 Strange *v.* S., 5 Ala. App. 164, 59 S. 691.

771-43 General reputation of accused as a boot legger may not be shown. Wilkerson *v.* S., 9 Okla. Cr. 662, 132 P. 1120. *Contra*, Sasser *v.* S. (Tex. Cr.), 166 S. W. 1160.

771-44 Smith *v.* S., 11 Ga. App. 89, 74 S. E. 711.

Insufficient evidence to show possession for illegal sale. Lorena *v.* S. (Ala. App.), 65 S. 313.

Mere possession is insufficient.—Proof of mere possession of a bottle of liquor on the occasion in question would not support a conclusion that he kept such liquor for sale or offered to sell it. Oldacre *v.* S., 5 Ala. App. 187, 59 S. 715.

771-45 Flahive *v.* S., 10 Ga. App. 401, 73 S. E. 536; Patterson *v.* Batesville (Miss.), 37 S. 560; S. *v.* Otrey, 22 N. D. 128, 132 N. W. 367; S. *v.* Collins, 28 R. I. 439, 67 A. 796; S. *v.* Suiter, 78 Vt. 391, 63 A. 182.

Consuming capacity of defendant may be shown, but general evidence of ca-

pacity is inadmissible. Loudermilk *v.* S., 4 Ala. App. 167, 58 S. 180.

Evidence held to support a conviction for unlawfully keeping intoxicating liquors. S. *v.* Ravan, 91 S. C. 265, 74 S. E. 500.

771-46 Wynne *v.* City, 10 Ga. App. 818, 74 S. E. 286; Sawyer *v.* Blakely, 2 Ga. App. 159, 58 S. E. 399; Lynch *v.* S., 31 O. C. C. 352, *aff.* 81 O. St. 489, 91 N. E. 1133.

Mode of proof.—Cheek *v.* S., 3 Ala. App. 646, 57 S. 108.

But non-ownership in connection with other circumstances may shown innocence. Heard *v.* S., 10 Ga. App. 546, 73 S. E. 694.

772-51 Possession of federal license is, if unexplained, strong evidence of keeping liquors for sale. P. *v.* Moore, 155 Mich. 107, 118 N. W. 742.

Defendant's declarations of such license and act in exhibiting proved. P. *v.* Moore, supra.

772-52 Birmingham *v.* P., 40 Colo. 362, 90 P. 1121; City *v.* Moran, 121 Mo. App. 682, 97 S. W. 948; Lutkehaus *v.* Village, 31 O. C. C. 281; S. *v.* Grant, 20 S. D. 164, 105 N. W. 97 (such evidence unexplained justifies conviction). See S. *v.* Madeira, 125 Mo. App. 508, 102 S. W. 1046; Smith *v.* S., 52 Tex. Cr. 357, 107 S. W. 353. But see Beane *v.* S., 72 Ark. 368, 80 S. W. 573; Kolman *v.* S., 2 Ga. App. 648, 58 S. E. 1070.

772-53 Duluth *v.* Abrahamson, 96 Minn. 39, 104 N. W. 682; Griffith *v.* S., 48 Tex. Cr. 575, 89 S. W. 832. See S. *v.* Meagher, 114 Mo. App. 266, 89 S. W. 595.

772-55 See Woods *v.* S. (Tex. Cr.), 151 S. W. 296; Cranfill *v.* S., 49 Tex. Cr. 397, 92 S. W. 846.

Intent immaterial.—Advice or permission from policeman cannot be shown. P *v.* Gordon, 156 Mich. 237, 120 N. W. 578.

773-57 See Young *v.* C., 149 Ky. 390, 149 S. W. 822.

Reputation of house proved.—Bumbaugh *v.* S., 56 Tex. Cr. 331, 120 S. W. 423.

773-60 See S. *v.* Barnett, 111 Mo. App. 688, 86 S. W. 572.

773-61 See C. *v.* Price, 123 Ky. 163, 94 S. W. 32; S. *v.* Gary, 124 Mo. App. 175, 101 S. W. 614.

773-63 Krick *v.* Dow (Tex. Cr.), 84 S. W. 245. See S. *v.* Hawkins, 96 Minn. 140, 104 N. W. 898; Ferguson *v.* S., 50 Tex. Cr. 155, 95 S. W. 111.

774-65 Rowe *v.* C., 24 Ky. L. R. 974, 70 S. W. 407.

774-68 Diligence immaterial in action on licensee's bond. S. *v.* Dubruiel, 75 N. H. 369, 74 A. 1048.

774-71 Proof of what witness did with liquor was material since if drunk on premises it was circumstance in support of charge. Norton *v.* S. (Ind.), 100 N. E. 449.

775-75 Partridge *v.* S., 88 Ark. 267, 114 S. W. 215 (mistaken sale by clerk of beer kept for own use); Ayers *v.* C., 147 Ky. 801, 145 S. W. 1106; Morgan *v.* C., 30 Ky. L. R. 139, 97 S. W. 411; P. *v.* Giddings, 159 Mich. 523, 124 N. W. 546; S. *v.* Midkiff, 125 Mo. App. 397, 102 S. W. 590; Holland *v.* S., 51 Tex. Cr. 147, 101 S. W. 1002. See Rosenberg *v.* S., 5 Ala. App. 196, 59 S. 366; City *v.* Jones, 31 Ky. L. R. 1203, 104 S. W. 971.

Sale by agent sufficient.—S. *v.* O'Malley, 132 Ia. 696, 109 N. W. 491; Schwulst *v.* S., 52 Tex. Cr. 426, 108 S. W. 698.

775-76 McNulty *v.* S., 40 Ind. App 113, 81 N. E. 109; Pecaria *v.* S., 48 Tex. Cr. 139, 90 S. W. 42; Sweeney *v.* S., 49 Tex. Cr. 226, 91 S. W. 575. See Kittrell *v.* S., 89 Miss. 666, 42 S. 609; S. *v.* Barnett, 111 Mo. App. 688, 86 S. W. 572.

775-77 S. *v.* Pierce, 111 Mo. App. 216, 85 S. W. 663.

Evidence insufficient to show consent to sale. S. *v.* Walls (Mo. App.), 167 S. W. 1160.

775-78 McGovern *v.* S., 49 Tex. Cr. 35, 90 S. W. 502; Roberts *v.* S., 52 Tex. Cr. 355, 107 S. W. 59. See City *v.* Jones, 31 Ky. L. R. 1203, 104 S. W. 971, liquor dealer's bond.

776-79 S. *v.* Fuller, 32 O. C. C. 465.

776-80 See Lambie *v.* S., 151 Ala. 86, 44 S. 51.

Liquors at place of worship.—Bradford *v.* S., 5 Ga. App. 494, 63 S. E. 530.

INTOXICATION

Habit of, and breach of contract, 780-12.

777-1 May *v.* S., 167 Ala. 36, 52 S. 602; Parker *v.* S., 153 Ala. 25, 45 S. 248; Suggs *v.* S., 9 Ga. App. 830, 72 S. E. 287; S. *v.* Sparegrove, 134 Ia. 599, 112 N. W. 83; S. *v.* Bennett, 128 Ia. 713, 105 N. W. 324; Gordon *v.* C., 136 Ky. 508, 124 S. W. 806; Henderson *v.* S., 49 Tex. Cr. 269, 91 S. W. 569; Pace *v.* S.

(Tex. Cr.), 79 S. W. 531; S. *v.* Nethken, 60 W. Va. 673, 55 S. E. 742.

Sufficiency of observation rests in discretion of court. Clarke *v.* R. Co., 92 Minn. 418, 100 N. W. 231.

777-2 S. *v.* Ryan, 122 La. 1095, 48 S. 537; C. *v.* Eyler, 217 Pa. 512, 66 A. 746.

Testimony of party.—Moore *v.* S. (Tex. Cr.), 144 S. W. 598.

777-3 Maryland & P. R. Co. *v.* Tucker, 115 Md. 43, 80 A. 688; S. *v.* Stockman, 82 S. C. 388, 64 S. E. 595; Palmer *v.* Schurz, 22 S. D. 283, 117 N. W. 150; Daniel *v.* Woodmen, 53 Tex. Civ. 570, 118 S. W. 211; Henderson *v.* S., 49 Tex. Cr. 269, 91 S. W. 569.

Quantity of liquor which will produce intoxication cannot be shown by witness whose only qualification is he had drunk a great deal. Clark *v.* S., 53 Tex. Cr. 529, 111 S. W. 659.

778-4 Billingsley *v.* R. Co., 177 Ala. 342, 58 S. 433; Parker *v.* S., 153 Ala. 25, 45 S. 248; Hawkins *v.* Studdard, 132 Ga. 265, 63 S. E. 852; Miller *v.* P., 216 Ill. 309, 74 N. E. 743; S. *v.* Trueman, 34 Mont. 249, 85 P. 1024; C. *v.* Eyler, 217 Pa. 512, 66 A. 746; Crowell *v.* S., 56 Tex. Cr. 480, 120 S. W. 897; Henderson *v.* S., 49 Tex. Cr. 269, 91 S. W. 569.

Amount of liquor drunk by person whose intoxication is alleged may be shown by him. C. *v.* Snyder, 224 Pa. 526, 73 A. 910.

Condition of alleged drunken person may be testified to by him (Ward *v.* R. Co., 237 Ill. 633, 86 N. E. 1111; Gordon *v.* C., 136 Ky. 508, 124 S. W. 806); but he may not show what he said to others two hours before occurrence in question. Gordon *v.* C., 136 Ky. 508, 124 S. W. 806.

Residence in inebriates' home, not admissible to prove drunkenness. Marren *v.* Union, 145 Ill. App. 375.

Evidence sufficient to establish.—"A party of men who begin the morning with visits to the saloons, and keep it up at intervals until afternoon, are not apt to carry in mind a very accurately itemized account of their drinks, and, if within one, two, or three hours after a circuit of that kind they go out and sit down or lie down or fall asleep on a railway track where trains are liable to be passing at any moment, the conclusion that they are intoxicated is so nearly irresistible that a finding to the contrary would border on the ludicrous." Little *v.* Assn., 154 Ia. 440, 134 N. W. 1087.

778-5 Snead *v.* Scott (Ala.), 62 S. 36; Rutledge *v.* Rowland, 161 Ala. 114, 49 S. 461; Danley *v.* Hibbard, 222 Ill. 88, 78 N. E. 39; Seaborn *v.* C., 25 Ky. L. R. 2203, 80 S. W. 223; S. *v.* Pemberton, 39 Mont. 530, 104 P. 556; Bedenbaugh *v.* R. Co., 69 S. C. 1, 48 S. E. 53; St. Louis, etc. Co. *v.* Jenkins (Tex. Civ.), 163 S. W. 621. *Contra,* Lewis *v.* Co. (Tex. Civ.), 112 S. W. 593 (if issue raised by other competent evidence). See McQuiggan *v.* Ladd, 79 Vt. 90, 64 A. 503; supra, "Insurance," 556-52.

Evidence tending to show defendant's use of intoxicants and their effect on him is admissible as to whether or not defendant was intoxicated. Howell *v.* S. (Ga. App.), 81 S. E. 247.

Evidence of reputation, inadmissible if issue confined to limited time. Knapp *v.* Yeomen, 149 Ia. 137, 126 N. W. 336.

General effect of intoxication upon mind of person in question cannot be shown on issue of intoxication at particular time. Hawkins *v.* Studdard, 132 Ga. 265, 63 S. E. 852.

778-6 Kozlowski *v.* Chicago, 113 Ill. App. 513; Madisonville *v.* Stewart (Ky.), 121 S. W. 421; Ryan *v.* R. Co., 127 App. Div. 11, 111 N. Y. S. 21; Fielder *v.* R. Co., 51 Tex. Civ. 244, 112 S. W. 699 (one instance three months before); Lind *v.* Co., 140 Wis. 183, 120 N. W. 839.

778-7 Campbell *v.* Co., 109 Ky. 661, 60 S. W. 492; Lambert *v.* Hamlin, 73 N. H. 138, 59 A. 941; Beard *v.* Ins. Co., 65 W. Va. 283, 64 S. E. 119.

Habitual intemperance may be shown to prove neglect of duty. Texas, etc. R. Co. *v.* Coutourie, 135 Fed. 465, 68 C. C. A. 177.

Finding of whisky flask in wagon is circumstance too remote to prove intoxication. Texas M. R. Co. *v.* Wiggins (Tex. Civ.), 161 S. W. 445.

779-8 Little Rock R. & E. Co. *v.* Billings, 173 Fed. 903, 98 C. C. A. 467; Sharpton *v.* R. Co., 72 S. C. 162, 51 S. E. 553; Fielder *v.* R. Co., 51 Tex. Civ. 244, 112 S. W. 699; Norfolk & W. R. Co. *v.* Brame, 109 Va. 422, 63 S. E. 1018. See infra, "Negligence," 947-3.

779-11 Ruby *v.* Ewing, 49 Ind. App. 520, 97 N. E. 798; U. S. *v.* Fitzgerald, 2 Phil. Isl. 419.

Incapacity must be shown to have resulted from intoxication before contract may be set aside because of it.

Power *v.* King, 18 N. D. 600, 120 N. W. 543.

780-12 Laws *v.* S., 144 Ala. 118, 42 S. 40; Byrd *v.* S., 76 Ark. 286, 88 S. W. 974; P. *v.* Stein, 23 Cal. App. 108, 137 P. 271; S. *v.* Truitt, 5 Penne. (Del.) 466, 62 A. 790 (assault to rape); S. *v.* Adams, 6 Penne. (Del.) 178, 65 A. 510; Jenkins *v.* S., 58 Fla. 62, 50 S. 582; P. *v.* Jones, 263 Ill. 564, 105 N. E. 744; Bleich *v.* P., 227 Ill. 80, 81 N. E. 36; S. *v.* Pell, 140 Ia. 655, 119 N. W. 154; S. *v.* Yates, 132 Ia. 475, 109 N. W. 1005; Terhune *v.* C., 144 Ky. 370, 138 S. W. 274; Norman *v.* C., 31 Ky. L. R. 1283, 104 S. W. 1024; Seaborn *v.* C., 25 Ky. L. R. 2203, 80 S. W. 223; C. *v.* McDonald, 187 Mass. 581, 73 N. E. 852 (embezzlement); Butler *v.* S. (Miss.), 39 S. 1005; S. *v.* Woodward, 191 Mo. 617, 90 S. W. 90; McCormick *v.* S., 66 Neb. 337, 92 N. W. 606; S. *v.* Bridgham, 51 Wash. 18, 97 P. 1096.

See P. *v.* Griffith, 146 Cal. 339, 80 P. 68; Miller *v.* P., 216 Ill. 309, 74 N. E. 743; Carney *v.* U. S., 7 Ind. Ty. 247, 104 S. W. 606; S. *v.* Rumble, 81 Kan. 16, 105 P. 1; C. *v.* Eyler, 217 Pa. 512, 66 A. 746.

Insanity resulting from intoxication may be shown.—C. *v.* Parsons, 195 Mass. 560, 81 N. E. 291.

Mistake may be shown by evidence defendant intoxicated. Garrett *v.* S., 49 Tex. Cr. 235, 91 S. W. 577.

Voluntary intoxication may be shown only in mitigation of penalty. Stoudenmire *v.* S., 58 Tex. Cr. 258, 125 S. W. 399, statute.

Statute declaring rule substantially in accord with the text does not apply where accused long addicted to morphine habit. Moss *v.* S., 57 Tex. Cr. 620, 124 S. W. 647.

Degree to which accused intoxicated must be shown to make evidence of intoxication admissible. Ryan *v.* U. S., 26 App. Cas. (D. C.) 74 (specific intent); C. *v.* Snyder, 224 Pa. 526, 73 A. 910.

Intoxication, mitigating circumstance. U. S. *v.* Fitzgerald, 2 Phil. Isl. 419.

Habits of party to contract for support may be shown as illustrating any charge of misconduct by party alleged to have broken it; but not general habits as to use of liquors if such party aware of them before he contracted. Cox *v.* Combs, 51 Tex. Civ. 346, 111 S. W. 1069.

JUDGMENTS

In condemnation proceedings, 839-36; *May be evidence though not conclusive,* 839-36; *In equity conclusive at law,* 852-90; *Exceptions to rules,* 852-90.

781 Burden on party asserting former adjudication to prove it. Guyer *v.* Tr. Co. (Ind. App.), 104 N. E. 82; Cuneo *v.* Freeman, 137 N. Y. S. 885.

785-1 Page *v.* Garver, 5 Cal. App. 383, 90 P. 481; Dix *v.* Dix, 132 Ga. 630, 64 S. E. 790; Crovatt *v.* Baker, 130 Ga. 507, 61 S. E. 127; Connelly *v.* Omaha, 79 Neb. 146, 112 N. W. 360.

785-2 Missouri Ins. Co. *v.* Lovelace, 1 Ga. App. 446, 58 S. E. 93; McCullough *v.* Connelly, 137 Ia. 682, 114 N. W. 301, 15 L. R. A. (N. S.) 823; School Twp. *v.* Dist., 134 Ia. 349, 112 N. W. 5; Cotter *v.* R. Co., 190 Mass. 302, 76 N. E. 910; Corbett *v.* Craven, 193 Mass. 30, 78 N. E. 748, 196 Mass. 319, 82 N. E. 37; Couch *v.* Harp, 201 Mo. 457, 100 S. W. 9; Harris *v.* Co., 114 Tenn. 328, 85 S. W. 897.

785-3 Brown *v.* Clark, 80 Conn. 419, 68 A. 1001.

786-4 McFall *v.* Kirkpatrick, 236 Ill. 281, 86 N. E. 139; Lamberton *v.* Dinsmore, 75 N. H. 574, 78 A. 620.

786-5 Gering *v.* Dist., 76 Neb. 219, 107 N. W. 250; McLennon *v.* Fenner, 19 S. D. 492, 104 N. W. 218; Krug *v.* Hendricks, 54 Wash. 209, 102 P. 1049; Pereles *v.* Gross, 126 Wis. 122, 105 N. W. 217; Davis *v.* Schmidt, 126 Wis. 461, 106 N. W. 119.

786-7 Hays *v.* Bostick, 96 Miss. 794, 51 S. 462; Hembree *v.* McFarland, 55 Wash. 605, 104 P. 837.

786-9 Bigelow *v.* Min. Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009; Michigan T. Co. *v.* Ferry, 175 Fed. 667, 99 C. C. A. 221; Burt, etc. Co. *v.* Bailey, 175 Fed. 131; Dix *v.* Dix, 132 Ga. 630, 64 S. E. 790; Field *v.* Field, 215 Ill. 496, 74 N. E. 443; In re Phillips, 158 Mich. 155, 122 N. W. 554; Sammons *v.* Pike, 108 Minn. 291, 120 N. W. 340; Lake *v.* Perry, 95 Miss. 550, 49 S. 569; Gibson *v.* Sexson, 82 Neb. 475, 118 N. W. 77; Logan *v.* Flattau, 73 N. J. Eq. 222, 67 A. 1007; Hope *v.* Seaman, 119 N. Y. S. 713; Ballew *v.* Young, 24 Okla. 182, 103 P. 623; Ross *v.* Martin (Tex. Civ.), 128 S. W. 718; White *v.* White, 66 W. Va. 79, 66 S. E. 2.

787-10 Bk. *v.* Reed, 232 Ill. 238, 83 N. E. 820; Dittmer *v.* Mierandorf, 129

Ia. 643, 106 N. W. 158; Gibson *v.* Sexson, 82 Neb. 475, 118 N. W. 77; Hope *v.* Seaman, 119 N. Y. S. 713; Clarke *v* Doyle, 17 N. D. 340, 116 N. W. 348; Scales *v.* Wren, 103 Tex. 304, 127 S. W. 164.

Presumption in favor of. Chicago, etc. R. Co. *v.* Grantham, 165 Ind. 279, 75 N. E. 265.

787-12 Murray *v.* Strong, 2 Alaska 517; Converse *v.* Bk., 79 Conn. 163, 64 A. 341; Whitcomb *v.* Quinlan, 75 N. H. 429, 75 A. 525; Guffey *v.* R. Co., 122 N. Y. S. 947.

787-13 Ely *v.* Ins. Co., 33 Ky. L. R. 272, 110 S. W. 265; Duval *v.* Johnson, 90 Neb. 503, 133 N. W. 1125; Fitch *v.* Huntington, 125 Wis. 204, 102 N. W. 1066.

788-16 Strauss *v.* Strauss, 122 App. Div. 729, 107 N. Y. S. 842.

788-17 See In re Clark, 135 Wis. 437, 115 N. W. 387.

789-24 Hall & Farley *v.* Imp. Co., 173 Ala. 398, 56 S. 235; Moody *v.* Atkinson, 165 Ala. 299, 51 S. 621; Taylor *v.* Darling, 22 Cal. App. 101, 133 P. 503; McCullough *v.* Connelly, 137 Ia. 682, 114 N. W. 301, 15 L. R. A. (N. S.) 823; Succession of Herber, 119 La. 1064, 44 S. 888; Coyle *v.* Tr. Co., 216 Mass. 156, 103 N. E. 288; Jones *v.* Gould, 129 N. Y. S. 1038; Fulton, etc. Co. *v.* Co., 130 App. Div. 343, 114 N. Y. S. 642; Rich *v.* Morisey, 149 N. C. 37, 62 S. E. 762; Pittsburg C. Co. *v.* R. Co., 227 Pa. 90, 75 A. 1029; McPherson *v.* Swift, 22 S. D. 165, 116 N. W. 76; Kerr *v.* Blair, 55 Tex. Civ. 349, 118 S. W. 791; Horner *v.* Gas Co., 71 W. Va. 345, 76 S. E. 662.

Collateral motion.—Decision not on merits. Brown *v.* Beckwith, 58 W. Va. 140, 51 S. E. 977.

Burden is upon party denying binding effect of a former judgment to show it was not upon the merits. Sweeney *v.* Waterhouse, 43 Wash. 613, 86 P. 946.

790-26 Avery *v.* Bk., 221 Mo. 71, 119 S. W. 1106; Kerr *v.* Blair, 55 Tex. Civ. 349, 118 S. W. 791; Hermann *v.* Allen (Tex. Civ.), 118 S. W. 794.

791-28 See supra, "Conclusive Evidence," 274-20.

791-32 First Nat. Bk. *v.* Goldsmith, 40 Ind. App. 592, 82 N. E. 799; Wettlaufer *v.* Baxter, 137 Ky. 362, 125 S. W. 741; Pollak *v.* Mfg. Co., 81 Misc. 216, 142 N. Y. S. 495; St. Aubin *v.* City, 31 O. C. C. 106.

791-33 Murray *v.* Pocatello, 226 U. S. 318, 33 Sup. Ct. 107, 57 L. ed. 239; Missouri, etc. Ind. Co. *v.* Lovelace, 1 Ga. App. 446, 58 S. E. 93; Farmers' Assn. *v.* Caine, 224 Ill. 599, 79 N. E. 956.

791-34 Motes *v.* R. Co., 11 Ariz. 39, 89 P. 410.

792-35 Weisenborn *v.* Evans, 30 Ky. L. R. 781, 99 S. W. 629.

792-36 Prall *v.* Prall, 58 Fla. 496, 50 S. 867; Richmond Mills *v.* Co., 123 Ga. 216, 51 S. E. 290; Watt *v.* Barnes, 41 Ind. App. 466, 84 N. E. 158; Randolphs *v.* Snyder, 139 Ky. 159, 129 S. W. 562; Pollak *v.* Mfg. Co., 81 Misc. 216, 142 N. Y. S. 495; Ex parte Corliss, 16 N. D. 470, 114 N. W. 962; Hodge *v.* Corp., 90 S. C. 229, 71 S. E. 1009; Carpenter *v.* Landry, 45 Tex. Civ. 506, 101 S. W. 277; Jefferson *v.* Scott (Tex. Civ.), 135 S. W. 705; S. *v.* Super. Ct., 62 Wash. 556, 114 P. 427.

793-37 Coram *v.* Ingersoll, 148 Fed. 169, 78 C. C. A. 303; Gould *v.* Soto, 14 Ariz. 558, 133 P. 410; Smith *v.* Cowell, 41 Colo. 178, 92 P. 20; Moore *v.* R. Co., 119 Tenn. 710, 109 S. W. 497.

793-39 Wapello S. S. Bk. *v.* Colton, 143 Ia. 359, 122 N. W. 149.

Judgment on pleadings is on merits. Bailey *v.* Co., 5 Cal. App. 740, 91 P. 416.

793-40 Prall *v.* Prall, 58 Fla. 496, 50 S. 867; Succession of Herber, 119 La. 1064, 44 S. 888.

793-41 Jenkins *v.* Purcell, 29 App. Cas. (D. C.) 209; Howard *v.* Howard, 133 Ky. 568, 118 S. W. 367; Jones *v.* Hubbard, 193 Mo. 147, 90 S. W. 1137; Hazel *v.* Jacobs, 78 N. J. L. 459, 75 A. 903; Pioneer, etc. Co. *v.* S., 40 Okla. 417, 138 P. 1033; Farmers' S. Bk. *v.* Stephenson, 23 Okla. 695, 102 P. 992; Randal *v.* Gould, 18 Pa. Dist. 6; Connor *v.* McCoy, 83 S. C. 165, 65 S. E. 257 (recital judgment by consent, conclusive); Robbins *v.* Hubbard (Tex. Civ.), 108 S. W. 773.

A compromise judgment in suit brought by one citizen in interests of all, not binding upon them. Board *v.* Buckley, 85 Miss. 713, 38 S. 104.

795-44 Hoff *v.* Hackett, 148 Wis. 32, 134 N. W. 132.

Where an agreed judgment is collaterally attacked, it will be conclusively presumed that all of the parties affected agreed to, else the court would not have entered it. Duff *v.* Hagins, 146 Ky. 792, 143 S. W. 378.

795-46 Phillips *v.* Milling Co., 27 S. D. 350, 131 N. W. 308.

795-47 In re Stone, 172 Fed. 947; Kellogg *v.* Maloney, 152 Fed. 405, 81 C. C. A. 531; San Gabriel Bk. *v.* Co., 4 Cal. App. 630, 89 P. 360; Tootle *v.* McClellan, 7 Ind. Ty. 64, 103 S. W. 766, 12 L. R. A. (N. S.) 941; Garrett B. Ins. Co. *v.* Minard, 82 Kan. 338, 108 P. 80; Watson *v.* McHenry, 107 Md. 245, 68 A. 606; Standard S. Co. *v.* Merritt, 48 Misc. 498, 96 N. Y. S. 181; Meyerhoffer *v.* Baker, 121 App. Div. 797, 106 N. Y. S. 718; Weisinger *v.* Rosenberg, 108 N. Y. S. 1065; Turnage *v.* Joyner, 145 N. C. 81, 58 S. E. 757; U. S. F. & G. Co. *v.* Jasper, 56 Tex. Civ. 236, 120 S. W. 1145 (no inference beyond material facts pleaded). See supra, "Conclusive Evidence," 274-21.

796-48 Pence *v.* Long, 38 Ind. App. 63, 77 N. E. 961.

797-49 Counter claim pleaded by defaulting party, not res adjudicata. North Baltimore Co. *v.* Altpeter, 133 Wis. 112, 113 N. W. 435.

797-50 Wyman *v.* Embree, 78 Neb. 84, 110 N. W. 537.

Matters actually litigated, concluded if parties had opportunity to be heard. In re Rahm's Est., 226 Pa. 594, 75 A. 830.

797-52 Watson *v.* McHenry, 107 Md. 245, 68 A. 606.

797-53 Calaf Y Fugurul *v.* Calaf Y Rivera, 232 U. S. 371, 34 Sup. Ct. 411; Bemis Car B. Co. *v.* Brill Co., 200 Fed. 749, 119 C. C. A. 229; In re Searry's Est. (Ariz.), 137 P. 868; Lewis *v.* R. Co., 107 Ark. 41, 154 S. W. 198; Bartlett *v.* O'Mahoney, 47 Colo. 237, 107 P. 219; Hughes *v.* Morrison, 141 Ga. 476, 81 S. E. 202; Hubbard *v.* Power Co., 89 Kan. 446, 131 P. 1182; Kentucky C. L. Co. *v.* Baker, 155 Ky. 344, 159 S. W. 943; Landers *v.* Landers, 151 Ky. 206, 151 S. W. 386; Warner *v.* Michel, 167 Mo. App. 713, 151 S. W. 159; Howell *v.* Bent, 48 Mont. 268, 137 P. 49; Dunseth *v.* R. Co., 41 Mont. 14, 108 P. 567; Schultze *v.* Schultze (N. J. Eq.), 75 A. 824; Ward *v.* Ward, 130 App. Div. 27, 114 N. Y. S. 326; McCargo *v.* Jergens, 206 N. Y. 363, 99 N. E. 838; Rhyne *v.* Rhyne, 160 N. C. 559, 76 S. E. 469; Pioneer, etc. Co. *v.* S., 40 Okla. 417, 138 P. 1033; Rice *v.* Woolery, 38 Okla. 199, 132 P. 817; Claypool *v.* O'Neill, 65 Or. 511, 133 P. 349; People's W. Co. *v.* City, 241 Pa. 208, 88 A. 503; In re Rahm's Est., 226 Pa. 594, 75 A. 830; Morrow *v.* R. Co., 84 S. C. 224, 66 S. E. 186 (judgment of involuntary nonsuit on failure to show cause of action); City of San Antonio *v.* Nat. Bk. (Tex. Civ.), 155 S. W. 620; Keller *v.* Co. (Tex. Civ.), 127 S. W. 888; Sweetser *v.* Fox (Utah), 134 P. 599; Sav. Bk. *v.* Todd, 114 Va. 708, 77 S. E. 446.

Judgment of dismissal after trial on issue joined by general denial. Fluker *v.* De Grange, 117 La. 331, 41 S. 591.

Burden on party relying upon plea of res judicata to prove matter in issue was litigated. Luguna Dist. *v.* Co., 5 Cal. App. 166, 89 P. 993 (also to show no change in facts); Grand Val. Irr. Co. *v.* Co., 37 Colo. 483, 86 P. 324 (preponderance); Harris *v.* Co., 129 Ga. 241, 58 S. E. 831; Draper *v.* Medlock, 122 Ga. 234, 50 S. E. 113; Gering *v.* Dist., 76 Neb. 219, 107 N. W. 250; Clark *v.* Scovill, 198 N. Y. 279, 91 N. E. 800 (evidence must be consistent with record if that is indefinite); Griffen *v.* Keese, 187 N. Y. 454, 80 N. E. 367; Ex parte Stevenson, 20 Okla. 549, 94 P. 1071; Moore *v.* R. Co., 119 Tenn. 710, 109 S. W. 497.

798-54 Ederheimer *v.* Dry Goods Co., 105 Ark. 488, 152 S. W. 142; Fowler *v.* Davis, 1 Ga. App. 549, 57 S. E. 939; Wilcoxon *v.* Wilcoxon, 230 Ill. 93, 82 N. E. 584; Harrington *v.* Harrington, 189 Mass. 281, 75 N. E. 632; Scientific A. Club *v.* Horchitz, 168 Mo. App. 35, 151 S. W. 475; Douglas *v.* Smith, 75 Neb. 169, 106 N. W. 173; Claypool *v.* O'Neill, 65 Or. 511, 133 P. 349.

798-55 St. Louis, etc. R. Co. *v.* R. Co., 152 Fed. 849, 81 C. C. A. 643; Gunter *v.* R. Co., 200 U. S. 273; Drinkard *v.* Oden, 150 Ala. 475, 43 S. 578; Ederheimer *v.* Dry Goods Co., 105 Ark. 488, 152 S. W. 142; Briggs *v.* Manning, 80 Ark. 304, 97 S. W. 289; Nemo *v.* Farrington, 7 Cal. App. 443, 94 P. 874, 877; In re Bell's Est., 153 Cal. 331, 95 P. 372; Smith *v.* Cowell, 41 Colo. 178, 92 P. 20; Booth *v.* Mohr, 125 Ga. 472, 54 S. E. 147; McLendon *v.* Shumate, 128 Ga. 526, 57 S. E. 886; Thompson *v.* Hemenway, 218 Ill. 46, 75 N. E. 791; Kidder *v.* Walker, 121 Ill. App. 546; Peacock *v.* Co., 114 Ill. App. 463; United O. & G. Co. *v.* Alberson, 43 Ind. App. 626, 88 N. E. 359; Same *v.* Ellsworth, 43 Ind. App. 670, 88 N. E. 362; Chicago, etc. R. Co. *v.* Grantham, 165 Ind. 279, 75 N. E. 265; Van Camp *v.* Huntington, 39 Ind. App. 28, 78 N. E. 1057; Jackson *v.* Morgan, 167 Ind. 528, 78 N. E. 633; Crockett *v.* Crockett,

132 Ia. 388, 106 N. W. 944; Naugle *v.* Naugle, 89 Kan. 622, 132 P. 164; Wren *v.* Cooksey, 155 Ky. 620, 159 S. W. 1167; Brashears *v.* Frazier, 30 Ky. L. R. 647, 99 S. W. 342; Harvin *v.* Blackman, 121 La. 431, 46 S. 525; Aetna L. Ins. Co. *v.* Tremblay, 101 Me. 585, 65 A. 22; Slingluff *v.* Hubner, 101 Md. 652, 61 A. 326; Hill *v.* McConnell, 106 Md. 574, 68 A. 199; Cotter *v.* R. Co., 190 Mass. 302, 76 N. E. 910; Corbett *v.* Craven, 193 Mass. 30, 78 N. E. 748, 196 Mass. 319, 82 N. E. 37; Kaufer *v.* Ford, 100 Minn. 49, 110 N. W. 364; Alexander *v.* Thompson, 101 Minn. 5, 111 N. W. 385; Thornton *v.* Natchez, 88 Miss. 1, 41 S. 498; Scientific A. Club *v.* Horchitz, 168 Mo. App. 35, 151 S. W. 475; Barber Co. *v.* Field (Mo. App.), 97 S. W. 179; Pond *v.* Huling, 125 Mo. App. 474, 101 S. W. 115; Summet *v.* Co., 208 Mo. 501, 106 S. W. 614; First Nat. Bk. *v.* Gibson, 74 Neb. 232, 104 N. W. 174, 105 N. W. 1081; In re Walsh's Est. (N. J. L.), 74 A. 563; Rauh *v.* Wolf, 62 Misc. 621, 116 N. Y. S. 13; Pierson *v.* Hughes, 102 N. Y. S. 528; Maasch *v.* Grauer, 123 App. Div. 669, 108 N. Y. S. 54; Yuen Suey *v.* Fleshman, 65 Or. 606, 133 P. 803; Claypool *v.* O'Neill, 65 Or. 511, 133 P. 349; Miller *v.* Smith, 109 Va. 651, 64 S. E. 956; Spring Hill I. Co. *v.* Co., 42 Wash. 379, 85 P. 6 (suggested modification); Spokane V. L. & W. Co. *v.* Madson, 46 Wash. 640, 91 P. 1; Tio *v.* Brown, 131 Wis. 573, 111 N. W. 679. *Comp.* Shively *v.* Co., 5 Cal. App. 236, 89 P. 1073. See supra, "Conclusive Evidence," 270-9. Affirmance on other grounds leaves question expressly determined by lower court, res adjudicata. Russell *v.* Russell, 134 Fed. 840, 67 C. C. A. 436.

801-56 Van Camp *v.* Huntington, 39 Ind. App. 28, 78 N. E. 1057.

801-57 Standard M. Ins. Co. *v.* Co., 167 Fed. 119, 92 C. C. A. 571; Bryan *v.* Jones, 138 Ga. 719, 75 S. E. 1117; Triska *v.* Miller, 86 Neb. 503, 125 N. W. 1070; Clarke *v.* Aldridge, 162 N. C. 326, 78 S. E. 216; Carver Bros. *v.* Merrett (Tex. Civ.), 155 S. W. 633; Crain *v.* Ins. Co., 56 Tex. Civ. 406, 120 S. W. 1098.

802-58 Roberts *v.* Leutzke, 39 Ind. App. 577, 78 N. E. 635; O'Brien *v.* Allen, 42 Wash. 393, 85 P. 8.

802-59 In re Clark, 176 Fed. 955; Arcadia Mfg. Co. *v.* Fisher, 120 La. 1076, 46 S. 28; Jennings *v.* Wall (Mass.) 104 N. E. 738; S. *v.* Muench, 217 Mo. 124, 117 S. W. 25; Sloan *v.* Byers, 37 Mont. 503, 97 P. 855; Winnipiseogee Mfg. Co. *v.* Laconia, 74 N. H. 82, 65 A. 378; Lane *v.* Kuehn (Tex.), 167 S. W. 804; Moehlenpah *v.* Mayhew, 138 Wis. 561, 119 N. W. 826.

802-60 Wilkinson *v.* Co., 150 Ala. 464, 43 S. 857; Bk. *v.* Smith, 146 Cal. 398, 81 P. 542; Neill *v.* Harris, 133 Ga. 493, 66 S. E. 246 (though a question involved eliminated by consent); Georgia R. & B. Co. *v.* Wright, 124 Ga. 596, 53 S. E. 251; Kelly *v.* Moore, 128 Ga. 683, 58 S. E. 181; School Twp. *v.* Dist., 134 Ia. 349, 112 N. W. 5; Bleakley *v.* Barclay, 75 Kan. 462, 89 P. 906; Siler *v.* Carpenter, 155 Ky. 640, 160 S. W. 186; McManus *v.* Scheele, 118 La. 744, 43 S. 394; Sloan *v.* Byers, 37 Mont. 503, 97 P. 855; P. *v.* Bk., 104 App. Div. 219, 93 N. Y. S. 521; Potash *v.* Co., 48 Misc. 402, 95 N. Y. S. 571; Martin *v.* Co., 103 N. Y. S. 947; Meyerhoffer *v.* Baker, 121 App. Div. 797, 106 N. Y. S. 718; Weisinger *v.* Rosenberg, 108 N. Y. S. 1065; Clarke *v.* Aldridge, 162 N. C. 326, 78 S. E. 216. See supra, "Conclusive Evidence," 279-9.

804-61 Connolly *v.* Dammann, 232 Ill. 175, 83 N. E. 531; Sbarbero *v.* Miller, 72 N. J. Eq. 248, 65 A. 472; In re Locust Ave., 185 N. Y. 115, 77 N. E. 1012; Eisenberg *v.* Thorne, 49 Misc. 617, 96 N. Y. S. 1020; Rothstein *v.* Steinbugler, 52 Misc. 552, 102 N. Y. S. 470; Carter *v.* Carter, 14 N. D. 66, 103 N. W. 425; Heilner *v.* Smith, 49 Or. 14, 88 P. 299; Mosteller *v.* Holborn, 21 S. D. 547, 114 N. W. 693; Seifen *v.* Racine, 129 Wis. 343, 109 N. W. 72.

Judgment in bar urged as defense to prosecution of second action upon same claim, concludes parties as to all matters offered in relation to the claim or which might have been offered; but where second action is upon a different claim, prior judgment is an estoppel only as to those points upon determination of which verdict rendered. Werckmeister *v.* Co., 138 Fed. 162; Delaware, etc. R. Co. *v.* Kutter, 147 Fed. 51, 77 C. C. A. 315; Linton *v.* Co., 147 Fed. 824; Grand Val. Irr. Co. *v.* Co., 37 Colo. 483, 86 P. 324; Blackford *v.* Wilder, 28 App. Cas. (D. C.) 535; Lincoln T. Co. *v.* Nathan, 122 Mo. App. 319, 99 S. W. 484; Am. R. Co. *v.* New York, 123 App. Div. 483, 107 N. Y. S. 1098; Kirven *v.* Co., 77 S. C. 493, 58 S. E. 424.

804-62 Cartwright *v.* West, 155 Ala. 619, 47 S. 93.

804-64 Excelsior C. Co. *v.* Gildersleeve, 160 Fed. 47, 87 C. C. A. 202; Lowe *v.* Ozmun, 3 Cal. App. 387, 86 P. 729; Horner *v.* Bell, 105 Md. 113, 66 A. 39; Hering *v.* Mosher, 144 Mich. 152, 107 N. W. 917; Brown *v.* McKie, 185 N. Y. 303, 78 N. E. 64; Moser *v.* R. Co., 233 Pa. 259, 82 A. 362; Peacock *v.* Coltrane (Tex. Civ.), 116 S. W. 389; Hilton *v.* Snyder, 37 Utah 384, 108 P. 698. Non-essential recital in judgment is prima facie evidence of fact recited after lapse of forty years. S. *v.* Ortiz, 99 Tex. 475, 90 S. W. 1084, 86 S. W. 45.

805 Dismissal without prejudice of a claim in bankruptcy is not res adjudicata. Graves *v.* Bank, 89 Kan. 179, 131 P. 146.

Judgment directing a verdict held not conclusive. St. Louis, etc. R. Co. *v.* Duncan (Tex. Civ.), 164 S. W. 1087.

805-67 Sessinghaus *v.* Knoche, 137 Mo. App. 323, 118 S. W. 104. See Wiltrout *v.* Showers, 82 Neb. 777, 118 N. W. 1080.

805-68 Ahlers *v.* Smiley, 11 Cal. App. 343, 104 P. 997; Keane *v.* Co., 17 Ida. 179, 105 P. 60; Peninsular Stove Co. *v.* Bagby, 158 Ill. App. 302; Conant *v.* Chamber, 201 Mass. 479, 87 N. E. 906; Haskell *v.* Friend, 196 Mass. 198, 81 N. E. 962; Deneen *v.* R. Co., 150 Mich. 235, 113 N. W. 1126; Wing *v.* Ins. Co., 167 Mo. App. 14, 150 S. W. 1121; Dean *v.* R. Co., 148 Mo. App. 428, 128 S. W. 10; Frank & J. G. Jenkins, Jr. *v.* Conklin, 130 N. Y. S. 778; Forehand *v.* Taylor, 155 N. C. 353, 71 S. E. 433; Joyner *v.* Ins. Co., 155 N. C. 255, 71 S. E. 434; Smith *v.* Co., 151 N. C. 260, 65 S. E. 1009; Gratz *v.* Parker, 137 Wis. 104, 118 N. W. 637. See Mossler Co. *v.* Cesare, 65 Misc. 40, 119 N. Y. S. 274.

806-69 Burns *v.* Vereen, 132 Ga. 349, 64 S. E. 113; Mason *v.* R. Co., 226 Mo. 212, 125 S. W. 1128 (statute).

807-70 Harrison *v.* Foley, 206 Fed. 57, 124 C. C. A. 191; Crausby *v.* Crausby, 164 Ala. 471, 51 S. 529 (*contra* under rule of court unless otherwise ordered); Carr *v.* Howell, 154 Cal. 372, 97 P. 885; In re Bump's Est., 152 Cal. 274, 92 P. 643; Hinsdale E. L. & P. Co. *v.* Ogle, 45 Colo. 454, 101 P. 786; Smith *v.* Cowell, 41 Colo. 178, 92 P. 20; Sumner *v.* Griffin, 130 Ky. 323, 113 S. W. 422; Sevier *v.* Bowling, 30 Ky. L. R. 217, 97 S. W. 806; Virtue *v.* Mfg. Co., 123 Minn. 17, 142 N. W. 930; Pennington C. Bk. *v.* Bauman, 85 Neb. 226, 122 N. W. 848; Clark *v.* Scovill, 198 N. Y. 279, 91 N. E. 800; McPherson *v.* Swift, 22 S. D. 165, 116 N. W. 76; Averill M. Co. *v.* Allbritton, 51 Wash. 30, 97 P. 1082 (without prejudice).

Dismissal "without prejudice," not judgment on merits (Budlong *v.* Budlong, 48 Wash. 645, 94 P. 478), nor is dismissal by agreement. Couch *v.* Harp, 201 Mo. 457, 100 S. W. 9.

Dismissal as to certain defendants. judgment rendered thereafter, not binding on them (Dittmer *v.* Mierandorf, 129 Ia. 643, 106 N. W. 158), and dismissal of one of two counts, not conclusive as to the other. Lemon *v.* Bk., 131 Ia. 79, 108 N. W. 104.

Dismissal on ground summons defective, not on merits. Macon & B. R. Co. *v.* Walton, 127 Ga. 294, 56 S. E. 419.

Dismissal on hearing, determination on merits. Mayer *v.* Kornegay, 152 Ala. 650, 44 S. 839; Pond *v.* Huling, 125 Mo. App. 474, 101 S. W. 115. See Cohen *v.* Bachrach, 56 Misc. 524, 107 N. Y. S. 61.

808-71 Robinson *v.* F. Co., 159 Fed. 131, 86 C. C. A. 321; Kelly *v.* Griffin, 165 Ala. 309, 51 S. 789 (for want of prosecution); Walter Brew. Co. *v.* Henseleit, 146 Wis. 666, 132 N. W. 631.

Presumed dismissed on merits, but parol evidence is admissible to rebut presumption. Stratton *v.* Com., 145 Fed. 436.

Dismissal caused by complainant. Boon *v.* Riley, 171 Ala. 657, 54 S. 997.

808-72 In Hazen *v.* Lyndonville Bank, 70 Vt. 543, 41 A. 1046, 67 Am. St. 680, it is said: "A decree in equity, dismissing a bill without prejudice, only puts an end to the suit then pending and is not a bar to a subsequent suit for the same cause of action." In Massachusetts it is held that a declaration in a decree for divorce, dismissing the libel without prejudice, imports that it is not intended to be a bar to a new libel for the same cause. Thurston *v.* Thurston, 99 Mass. 39. See Noonan *v.* Luther, 206 N. Y. 105, 99 N. E. 178.

809-73 Swift *v.* McPherson, 232 U. S. 51, 34 Sup. Ct. 239; Kenealy *v.* Glos, 241 Ill. 15, 89 N. E. 289. See Stratton *v.* Com., 164 Fed. 901.

809-74 Presumption voluntary dismissal on merits. In re Ward's Est., 152

Mich. 218, 116 N. W. 23; Michel *v.* White, 64 Wash. 341, 116 P. 860. See American H. B. Assn. *v.* Assn., 114 Ill. App. 136.

809-75 Informal dismissal by plaintiff, not adjudication. Farmers' O. & M. Co. *v.* Melton, 159 Ala. 469, 49 S. 225.

811-76 Dismissal of some counts without objection by defendant, no bar. Crossman *v.* Griggs, 188 Mass. 156, 74 N. E. 358.

Dismissal pursuant to motion by each party, no findings being made on the issues, is not a bar, regardless of recitals in judgment. Northern P. R. Co. *v.* Spencer, 56 Or. 250, 108 P. 180.

811-78 See Smith *v.* Pinnell, 107 Ark. 185, 154 S. W. 497.

811-79 S. *v.* Bellflower, 129 Mo. App. 138, 108 S. W. 117.

812-83 Melvin *v.* Melvin, 8 Cal. App. 684, 97 P. 696.

812-84 Wells *v.* Co., 144 Ia. 605, 123 N. W. 371; Hopedale E. Co. *v.* Co., 132 App. Div. 348, 116 N. Y. S. 859 (final judgment dismissing complaint under code).

Vacation of judgment by consent, pending appeal, renders it inadmissible. Fidelity & D. Co. *v.* R. Co., 50 Wash. 391, 97 P. 453.

Dismissal after reversal.—After judgment of reversal, remand of cause and setting aside original judgment dismissal prevents judgment of reversal from being res adjudicata, though dismissal erroneous. Collins *v.* Ins. Co., 232 Ill. 37, 83 N. E. 542, 14 L. R. A. (N. S.) 356; Jones *v.* Knights, 236 Ill. 113, 86 N. E. 191.

813-86 Order modifying temporary injunction, though affirmed, not res judicata. Kuchler *v.* Weaver, 23 Okla. 420, 100 P. 915.

814-87 In re Rick's Estate, 160 Cal. 467, 117 P. 539; McKinnon *v.* Johnson, 57 Fla. 120, 48 S. 910; Crovatt *v.* Baker, 130 Ga. 507, 61 S. E. 127; Old Wayne Assn. *v.* McDonough, 164 Ind. 321, 73 N. E. 703; Brown *v.* Powers, 146 Ia. 729, 125 N. W. 833; Pierce *v.* Marrs, 153 Ky. 748, 156 S. W. 404; Herwig's Succession, 122 La. 64, 47 S. 398; Baird *v.* R. Co., 129 N. Y. S. 329; Clark *v.* Scovill, 198 N. Y. 279, 91 N. E. 800; Floyd *v.* Co., 222 Pa. 257, 71 A. 13; Atlantic, etc. R. Co. *v.* R. Co., 88 S. C. 464, 71 S. E. 34; Harris *v.* Mason, 120 Tenn. 668, 115 S. W. 1146; Dickensheets *v.* Hudson (Tex. Civ.), 167 S. W. 1097; Peacock *v.* Coltrane (Tex. Civ.), 156 S. W. 1087; Iguano L. & M. Co. *v.* Jones, 65 W. Va. 59, 64 S. E. 640. Appeal from judgment and issue of supersedeas bond will not prevent judgment being final. Boynton *v.* Co., 84 Ark. 203, 105 S. W. 77.

Notwithstanding adjudication is erroneous. Hill Co. *v.* Fidelity Co., 157 Ill. App. 261.

814-88 Marsh *v.* Lott, 156 Cal. 643, 105 P. 968; In re Harrington, 147 Cal. 124, 81 P. 546; Larkins *v.* Assn., 221 Ill. 428, 77 N. E. 678; S. *v.* Tillotson, 85 Kan. 577, 117 P. 1030; Corbett *v.* Craven, 193 Mass. 30, 78 N. E. 748, 196 Mass. 319, 82 N. E. 37; Logan *v.* R. Co., 82 S. C. 518, 64 S. E. 515. See Zerulla *v.* Lodge, 223 Ill. 518, 79 N. E. 160.

815-89 Hope *v.* Shevill, 137 App. Div. 86, 122 N. Y. S. 127 (denial of motion to set aside judgment for lack of jurisdiction of party); Bunker *v.* Bunker, 140 N. C. 18, 52 S. E. 237; Texas Co. *v.* Beddingfield, 53 Tex. Civ. 10, 114 S. W. 894; McGuire *v.* Co., 53 Wash. 425, 102 P. 237.

Interlocutory judgment conclusive; except as to matters reserved. Gates *v.* Paul, 127 Wis. 628, 107 N. W. 492.

816-90 S. *v.* Riley, 219 Mo. 667, 118 S. W. 647; O'Shea *v.* Moritz, 126 App. Div. 412, 110 N. Y. S. 885 (order may have effect of final judgment if accepted as such by parties). See Stringer *v.* Gamble, 155 Mich. 295, 118 N. W. 979.

Decree for alimony subject to modification, not final. Freund *v.* Freund, 71 N. J. Eq. 524, 63 A. 756. See Israel *v.* Israel, 148 Fed. 576, 79 C. C. A. 32.

817-91 Old Colony Tr. Co. *v.* Omaha, 230 U. S. 100, 33 Sup. Ct. 967, 57 L. ed. 1410; Presidio County *v.* Co., 212 U. S. 58; Ingersoll *v.* Coram, 211 U. S. 335; Schwab *v.* Co., 98 C. C. A. 160, 174 Fed. 305; M'Caslin *v.* Co., 139 Fed. 393; Holland *v.* Fairbanks, 166 Ala. 198, 51 S. 931; Milam *v.* Coley, 144 Ala. 535, 39 S. 511; Posey *v.* Gamble, 148 Ala. 660, 41 S. 416; Daniel *v.* Jordan, 146 Ala. 229, 40 S. 940; Sims *v.* R. Co., 155 Ala. 233, 46 S. 494; Biederman *v.* Parker, 105 Ark. 86, 150 S. W. 397; Cazort *v.* Dunbar, 91 Ark. 400, 121 S. W. 270; Holt Mfg. Co. *v.* Collins, 154 Cal. 265, 97 P. 516; Norris *v.* Hay, 149 Cal. 695, 87 P. 380; Rollins *v.* Fearnley, 45 Colo. 319, 101 P. 345; Hodges *v.* Co., 140 Ga. 569, 79 S. E.

462; Tipton *v.* Pendergrass, 139 Ga. 34, 76 S. E. 385; Hinkler *v.* Smith, 133 Ga. 255, 65 S. E. 427; Harpold *v.* Doyle, 16 Ida. 671, 101 P. 158; Hilton *v.* Searight, 163 Ill. App. 605; Mullally *v.* Lott, 162 Ill. App. 533; P. *v.* Lower, 162 Ill. App. 305; Waschow *v.* Waschow, 155 Ill. App. 167; Sanitary Dist. *v.* R. Co., 241 Ill. 622, 89 N. E. 800; Sill *v.* Pate, 230 Ill. 39, 82 N. E. 356; Stecher *v.* P., 217 Ill. 348, 75 N. E. 501; Hoover *v.* Lewis (Ind. App.), 105 N. E. 400; Louisville, etc. R. Co. *v.* Linton, 43 Ind. App. 709, 88 N. E. 532; Am. Exp. Co. *v.* Bk., 146 Ia. 448, 123 N. W. 342; School Twp. *v.* Dist., 134 Ia. 349, 112 N. W. 5; Miller *v.* Ditlinger, 81 Kan. 9, 105 P. 20; Brandon *v.* Ard, 74 Kan. 424, 87 P. 366; Hostetter *v.* Green (Ky.), 167 S. W. 919; Akers *v.* Fulkerson, 153 Ky. 228, 154 S. W. 1101; Martin *v.* Hall, 152 Ky. 677, 153 S. W. 997; Mentz's Assignee *v.* Mahoney, 150 Ky. 409, 150 S. W. 503; Wagner *v.* Hatcher, 137 Ky. 406, 125 S. W. 1063; Jones *v.* Jones, 31 Ky. L. R. 183, 101 S. W. 980; Combs *v.* Co., 32 Ky. L. R. 601, 106 S. W. 815; Monroe *v.* Mattox, 27 Ky. L. R. 575, 85 S. W. 748; Gajan *v.* Patout, 135 La. —, 65 S. 17; Lee *v.* Powell Bros., 126 La. 51, 52 S. 214; American T. & L. Co. *v.* Co. (Md.), 84 A. 182; Baltimore & O. R. Co. *v.* Comrs., 111 Md. 176, 73 A. 656; Jennings *v.* Wall (Mass.), 104 N. E. 738; Coyle *v.* Tr. Co., 216 Mass. 156, 103 N. E. 288; Old Dom. Co. M. & S. Co. *v.* Bigelow, 203 Mass. 159, 89 N. E. 193; Duffee *v.* R. Co., 191 Mass. 563, 77 N. E. 1036; Flint *v.* Stockdale, 157 Mich. 593, 122 N. W. 279; Keeton *v.* Union (Mo. App.), 165 S. W. 1107; Richards *v.* Co., 221 Mo. 149, 119 S. W. 953; Oliver *v.* Smith, 94 Miss. 879, 49 S. 1; Wood *v.* Smith, 193 Mo. 130, 91 S. W. 85; Sawyer *v.* Walker, 204 Mo. 133, 102 S. W. 544; McLaren *v.* Co., 126 Mo. App. 254, 102 S. W. 1105; Coleman *v.* Reynolds, 207 Mo. 463, 105 S. W. 1070; Bristow *v.* Thackston, 187 Mo. 332, 86 S. W. 94; Butte L. & I. Co. *v.* Merriman, 32 Mont. 402, 80 P. 675; Whitcomb *v.* Quinlan, 75 N. H. 429, 75 A. 525; Hutchins *v.* Berry, 74 N. H. 225, 66 A. 1046; Nellis *v.* Countryman, 153 App. Div. 500, 138 N. Y. S. 246; Shalet *v.* Stoloff, 135 App. Div. 376, 120 N. Y. S. 345; Clark *v.* Durland, 104 App. Div. 615, 93 N. Y. S. 249; Hobbs *v.* Cashwell, 152 N. C. 183, 67 S. E. 495; Fisher *v.* Co., 138 N. C. 90, 50 S. E. 592; Millhiser *v.* Leatherwood, 140 N. C. 231, 52 S. E. 782; In re Board of Education (Okla.), 130 P. 951; Harding *v.* Gillett, 25 Okla. 199, 107 P. 665; Webb *v.* Wolfard, 56 Or. 394, 108 P. 1005; Siegfried *v.* Boyd, 237 Pa. 55, 85 A. 72; Woods *v.* Klein, 223 Pa. 256, 72 A. 523; In re Hess, 27 Pa. Super. 498; Richmond *v.* James, 27 R. I. 154, 61 A. 54; Williams *v.* Co., 85 S. C. 1, 66 S. E. 117; Mitchell *v.* Cleveland, 76 S. C. 432, 57 S. E. 33; Kammann *v.* Barton, 23 S. D. 442, 122 N. W. 416; S. *v.* Coughran, 19 S. D. 271, 103 N. W. 31; Jones *v.* Burkitt (Tex. Civ.), 150 S. W. 275; Miller *v.* Freeman (Tex. Civ.), 127 S. W. 302; McKinley *v.* Wilson (Tex. Civ.), 96 S. W. 112; Cocke *v.* R. Co., 46 Tex. Civ. 363, 103 S. W. 407; Parlin & O. Co. *v.* Vawter, 39 Tex. Civ. 520, 88 S. W. 407; Storms *v.* Mundy, 46 Tex. Civ. 88, 101 S. W. 258; Slaughter *v.* Cooper (Tex. Civ.), 107 S. W. 897; Kirk *v.* Oakley, 110 Va. 67, 65 S. E. 528; Wick *v.* Rea, 54 Wash. 424, 103 P. 462; Johnson *v.* Shuey, 40 Wash. 22, 82 P. 123; Thompson *v.* Mann, 65 W. Va. 648, 64 S. E. 920; Smith *v.* White, 63 W. Va. 472, 60 S. E. 404, 14 L. R. A. (N. S.) 530.

See Miller *v.* Franklin (Ga. App.), 80 S. E. 549; Schnitzer *v.* Mfg. Co. (Mo. App.), 160 S. W. 282; Smith *v.* Banks (Tex. Civ.), 152 S. W. 449.

Admissible against a stranger as prima facie proof of a fact which may be shown by evidence of general reputation, as custom, pedigree, race, death, alienage and the like. Grant Bros. *v.* U. S., 232 U. S. 647, 34 Sup. Ct. 452.

In Hall *v.* **Hall**, 122 N. Y. S. 401, the attack was sought to be made not by a party, but by a stranger to the record, and the court held such course permissible, *cit.* Brownell *v.* Snyder, 122 App. Div. 246, 106 N. Y. S. 771. "It may be that in the present case the defendant in the Colorado action could only attack the judgment which was rendered against him by application to the court in which that judgment was rendered, and in the action in which it was rendered. But the plaintiff in this action was not a party to the action in Colorado, and would have no standing to make such an application. He must have the right, either in Colorado or elsewhere, to question the validity of the judgment collaterally in so far as it affects his

interests. He has satisfactorily established that that judgment was procured by fraud, which would require the court by which it was rendered to vacate it upon a proper application, and I think it may be pronounced void in the present action."

"It has come to be accepted law that where the right to letters of administration of an estate depends upon relationship to the intestate (Code, §2520), and that question is investigated and determined by a court generally jurisdictioned in the premises, and the letters are granted accordingly, that adjudication is conclusive, as to relationship to the decedent and as to the right to distribution, upon parties to that proceeding, and the judgment therein cannot be collaterally assailed in another form. Caujolle *v.* Ferrie, 13 Wall. 465, 20 L. ed. 507; Bouchier *v.* Taylor, 7 Brown's Parliamentary Cases, 414-432; Barrs *v.* Jackson, 1 Phillips (Eng. Ch. Rep.) 581." White *v.* Hill, 176 Ala. 480, 58 S. 444.

Where two or more defendants make issues with plaintiff a judgment in their favor settles between them no fact that might have been, but was not, put in issue by a proper pleading. Whitesell *v.* Strickler, 167 Ind. 602, 78 N. E. 845; Giblin *v.* Co., 131 Wis. 261, 111 N. W. 499. See Gulling *v.* Bk., 28 Nev. 450, 82 P. 800, 29 Nev. 257, 89 P. 25.

Intervenor.—Hutto *v.* Black, 88 S. C. 1, 70 S. E. 420.

When co-plaintiff or co-defendants of a party do in fact, though not in form, occupy attitude of adversaries, judgment is conclusive. Comstock *v.* Keating, 115 Mo. App. 372, 91 S. W. 416.

Offer of former judgment in evidence must be expressly limited to defendants parties to prior action. Ryan *v.* Young, 147 Ala. 660, 41 S. 954.

Exceptions.—Hamilton *v.* McNeill, 150 Ia. 470, 129 N. W. 480.

819-94 Davis *v.* Schmidt, 126 Wis. 461, 106 N. W. 119.

819-95 Old Dom., etc. Co. *v.* Bigelow, 283 Mass. 159, 89 N. E. 193.

820-96 Kamm *v.* Rees, 177 Fed. 14, 100 C. C. A. 432; Millie I. M. Co. *v.* McKinney, 172 Fed. 42, 96 C. C. A. 156; In re Bell's Est., 153 Cal. 331, 95 P. 372; Virginia-C. C. Co. *v.* Fisher, 58 Fla. 377, 50 S. 504; Copeland *v.* Bruning, 44 Ind. App. 405, 87 N. E. 1000; Myers *v.* Priest, 145 Ia. 81, 123 N. W. 943; Dibert *v.* D'Arcy, 248 Mo. 617, 154 S. W. 1116; Perkins *v.* Goddin, 111 Mo. App. 429, 85 S. W. 936; Hoffmeier *v.* Trost, 83 N. J. L. 358, 85 A. 221; Richards *v.* Gill, 138 App. Div. 75, 122 N. Y. S. 620; Harris *v.* Co., 114 Tenn. 328, 85 S. W. 897.

Presumption is judgment is conclusive against party only in capacity in which he sued. Sbarbero *v.* Miller, 72 N. J. Eq. 248, 65 A. 472. But judgment against plaintiff suing under trade name is conclusive against him as an individual. Clark *v.* Wyche, 126 Ga. 24, 54 S. E. 909.

821-97 Oliver *v.* Smith, 94 Miss. 879, 49 S. 1. And see Troxell *v.* R. Co., 185 Fed. 540, where, however, the character was same in both suits.

"**The judgment establishing the liability** of her testator, having been rendered against the defendant as his executrix, did not bind her individually. Original proof of all the facts established in the action against her as executrix, and upon which the judgment therein was based, was required." Richards *v.* Gill, 122 N. Y. S. 620.

Judgment against administrator in one state, not admissible against administrator in another state, regardless of whether same person or different persons occupy the positions. Richards *v.* Blaisdell, 12 Cal. App. 101, 106 P. 732.

821-98 Jefferson H. & P. Co. *v.* Co., 139 Fed. 385, 71 C. C. A. 481 (must have acted openly); Rumford C. Wks. *v.* Co., 148 Fed. 862; Champlin *v.* Butler, 124 Ill. App. 41; Montgomery *v.* Alden, 133 Ia. 675, 108 N. W. 234; Parsons *v.* Urie, 104 Md. 238, 64 A. 927; Pew *v.* Johnson, 35 Mont. 173, 88 P. 770; S. *v.* Homer, 249 Mo. 58, 155 S. W. 405; In re Alexander, 214 Pa. 369, 63 A. 799; Castleberry *v.* Bussey (Tex. Civ.), 166 S. W. 14; Elliott *v.* Morris (Tex. Civ.), 121 S. W. 209; Ramsey *v.* Wilson, 52 Wash. 111, 100 P. 177; Kolpack *v.* Kolpack, 128 Wis. 169, 107 N. W. 457.

"**There is no presumption** that one who does not appear to have been a party had his day in court, but the recital or silence of a judgment is not fatal. The true facts may always be shown. In the one instance that jurisdiction was never acquired over an alleged party; in other instance that a person not named as a party of record, did, in fact, appear in the action as a party. Re-

citals in a judgment of a court of record are not necessary, and the facts of jurisdiction may always be shown. 2 Rumsey's Practice, p. 688; Freeman on Judgments, §48; Hampton *v.* Dean, 4 Tex. 456. Numerous are the instances where a party not in privity with any party to the action and not named as a party of record has yet been bound by the judgment." Hendrick *v.* Biggar, 66 Misc. 576, 122 N. Y. S. 162.

822-99 Lingle *v.* Chicago, 221 Ill. 519, 77 N. E. 924; Thompson *v.* Hemenway, 218 Ill. 46, 75 N. E. 791, 227 Ill. 146, 81 N. E. 52; Murphy *v.* Coale, 107 Md. 198, 68 A. 615; Southern E. Co. *v.* S., 91 Miss. 195, 44 S. 785. See Dempster *v.* Lansingh, 244 Ill. 402, 91 N. E. 488.

Person merely called as a witness not concluded. Sigfried *v.* Boyd, 237 Pa. 55, 85 A. 72.

Payment of attorney employed does not per se make third person a participant. Mankato *v.* Co., 142 Fed. 329, 73 C. C. A. 439; Cockins *v.* Bk., 84 Neb. 624, 122 N. W. 16.

Witness interested in result, is bound. Am. B. Co. *v.* Loeb, 47 Wash. 447, 92 P. 282.

Deposition does not render deponent a party. Cornett *v.* Moore, 30 Ky. L. R. 280, 97 S. W. 380.

824-1 In re Krall, 196 Fed. 402; Warren F. Co. *v.* DeCamp, 154 Fed. 198 (principal and agent; but see Northwestern Bk. *v.* Silberman, 154 Fed. 809, 83 C. C. A. 525); Gould *v.* Soto, 14 Ariz. 558, 133 P. 410; Walden *v.* Walden, 128 Ga. 126, 57 S. E. 323; McFall *v.* Fitzpatrick, 236 Ill. 281, 86 N. E. 139; Rullman *v.* Rullman, 81 Kan. 521, 106 P. 52; Cecil *v.* Robertson, 32 Ky. L. R. 357, 105 S. W. 926 (lunatic's committee); Roach *v.* Craig, 124 La. 684, 50 S. 652; McDevitt *v.* Bryant, 104 Md. 187, 64 A. 931; Francis *v.* Hazlett, 192 Mass. 137, 78 N. E. 405 (stockholders in bank concluded by action against it); Van Etten *v.* Bk., 79 Neb. 632, 113 N. W. 163; McCreary *v.* Creighton, 76 Neb. 179, 107 N. W. 240; Roarke *v.* Roarke, 77 N. J. Eq. 181, 75 A. 761; Tonnele *v.* Wetmore, 195 N. Y. 436, 88 N. E. 1068 (unborn remaindermen); Downey *v.* Seib, 185 N. Y. 427, 78 N. E. 66, 113 Am. St. 926, 8 L. R. A. (N. S.) 49; O'Donaghue *v.* Smith, 184 N. Y. 365, 77 N. E. 621; Jacob *v.* Oyster Bay, 109 App. Div. 630, 96 N. Y. S. 626 (principal and agent); Lighton *v.* Syracuse, 112 App. Div. 589, 98 N. Y. S. 792; S. *v.* Willis, 19 N. D. 209, 124 N. W. 706; Ex parte Corliss, 16 N. D. 470, 114 N. W. 962 (receiver represents creditor); El Reno *v.* Co. (Okla.), 107 P. 163; C. *v.* Co., 224 Pa. 95, 73 A. 327; Galveston, etc. R. Co. *v.* Gillespie, 48 Tex. Civ. 56, 106 S. W. 707 (statutory representative); Shaw *v.* Waldron, 55 Wash. 271, 104 P. 272. See Still *v.* Wood, 85 S. C. 562, 67 S. E. 910, supra, "Conclusive Evidence," 277-34.

Relator in mandamus represents people at large. City Council *v.* Walker, 154 Ala. 242, 45 S. 586; Kaufer *v.* Ford, 100 Minn. 49, 110 N. W. 364.

Judgment against corporation does not show liability against stockholders if later action not against them as corporate debtors. Schenck C. Co. *v.* Co., 121 N. Y. S. 838.

825-4 Busse *v.* Schaeffer, 128 Ia. 319, 103 N. W. 947, property right involved.

A proper, though unnecessary, party is bound. In re Comrs., 138 App. Div. 349, 122 N. Y. S. 922.

825-5 Tilt *v.* Kelsey, 207 U. S. 43; Manson *v.* Williams, 213 U. S. 453; Hudson *v.* Wright, 164 Ala. 298, 51 S. 389 (regularity of participant, immaterial); P. *v.* Wilson, 6 Cal. App. 122, 91 P. 661 (contestant in election case and people); Ward *v.* Clendenning, 245 Ill. 206, 91 N. E. 1028; Greenfield G. Co. *v.* Trees, 165 Ind. 209, 75 N. E. 2 (relator in mandamus); McLellan *v.* Rosser, 116 La. 801, 41 S. 97; Perkins *v.* Goddin, 111 Mo. App. 429, 85 S. W. 936; Womach *v.* St. Joseph, 201 Mo. 467, 100 S. W. 443; Hendrick *v.* Biggar, 66 Misc. 576, 122 N. Y. S. 162.

825-6 Roth T. Co. *v.* Co., 161 Fed. 709, 88 C. C. A. 569; Byne *v.* Mayor, 6 Ga. App. 48, 64 S. E. 285; Henry *v.* Heldmaier, 226 Ill. 152, 80 N. E. 705; Landes *v.* Matthews, 136 Mo. App. 637, 118 S. W. 1185; Olmstead *v.* Rawson, 188 N. Y. 517, 81 N. E. 456; Corning *v.* Spelman, 130 App. Div. 767, 115 N. Y. S. 366; Stuart *v.* County, 40 Wash. 267, 82 P. 270. *Contra.* Lamar County *v.* Talley (Tex. Civ.), 127 S. W. 272. See Northern P. R. Co. *v.* Boyd, 177 Fed. 804, 101 C. C. A. 18; Feland *v.* Berry, 130 Ky. 328, 113 S. W. 425; Shaw *v.* Waldron, 55 Wash. 271, 104 P. 272; S. *v.* King, 64 W. Va. 546, 63 S. E. 468.

Actions involving partners.—Heavrin *v.* Lack Malleable, Iron Co., 153 Ky. 329, 155 S. W. 729.

Lis Pendens.—See Boynton *v.* Co., 84 Ark. 203, 105 S. W. 77; Calkins *v.* Bk., 20 S. D. 466, 107 N. W. 675; Latta *v.* Wiley (Tex. Civ.), 92 S. W. 433; Bk. *v.* Doherty, 42 Wash. 317, 84 P. 872; Dent *v.* Pickens, 59 W. Va. 274, 53 S. E. 154.

Wife bound by judgment in trespass to try title where husband party, if claim of homestead not a defense. Breath *v.* Flowers, 43 Tex. Civ. 516, 95 S. W. 26. See Gustin *v.* Crockett, 44 Wash. 536, 87 P. 839.

Adverse interests must have existed between parties unless issues between them tried. Peters *v.* St. Louis, 226 Mo. 62, 125 S. W. 1134. Non-adversary position of parties in prior suit, immaterial. El Reno *v.* Co. (Okla.), 107 P. 163.

Membership in association which induced bringing suit does not make one a party to latter. Brandon *v.* Ard, 211 U. S. 11.

Former partner of party not bound, though he interested himself in securing reversal of judgment. Elliott *v.* Morris (Tex. Civ.), 121 S. W. 209.

827-7 Moore *v.* Gilbert, 175 Fed. 1, 99 C. C. A. 141; Page *v.* Garver, 5 Cal. App. 383, 90 P. 481; Davidson *v.* Baldwin, 2 Cal. App. 733, 84 P. 238; Bartlett *v.* O'Mahoney, 47 Colo. 237, 107 P. 219; Harding *v.* Harker, 17 Ida. 341, 105 P. 788; Schuler *v.* Ford, 10 Ida. 739, 80 P. 219; Ward *v.* Clendenning, 245 Ill. 206, 91 N. E. 1028; Shields *v.* Sorg, 129 Ill. App. 266; Keith *v.* Ray, 231 Ill. 213, 83 N. E. 152 (administrator of deceased party); Mundell *v.* Greeley, 76 Kan. 797, 92 P. 1117; Power *v.* Snow, 75 Kan. 182, 88 P. 1083; O'Sullivan *v.* Douglass, 124 Ky. 243, 98 S. W. 990; Succession of Theriot, 120 La. 383, 45 S. 285; Minnesota D. Co. *v.* Johnson, 96 Minn. 91, 107 N. W. 740, 104 N. W. 1149; Pierce *v.* Pierce, 139 Mo. App. 416, 122 S. W. 1147; Jones *v.* Hubbard, 193 Mo. 147, 90 S. W. 1137; Carthage *v.* Weesner, 116 Mo. App. 118, 92 S. W. 178 (assignee bound); Am. S. Co. *v.* Co., 120 Mo. App. 410, 97 S. W. 184 (bailor and bailee); Womach *v.* St. Joseph, 201 Mo. 467, 100 S. W. 443 (husband not in privity with wife in action to recover for injury to her); Summet *v.* Co., 208 Mo. 501, 106 S. W. 614; Canterbury *v.* Kansas City, 130 Mo. App. 1, 108 S. W. 574; Newton *v.* Hunt, 134 App. Div. 325, 119 N. Y. S. 3; Butterly *v.* Deering, 102 App. Div. 395, 92 N. Y. S. 675; Kosower *v.* Sandler, 49 Misc. 443, 98 N. Y. S. 65; Randal *v.* Gould, 225 Pa. 42, 73 A. 986; Gilman *v.* Carpenter, 22 S. D. 123, 115 N. W. 659; Davenport *v.* Bearden, 49 Tex. Civ. 196, 108 S. W. 474; S. *v.* Ortiz, 99 Tex. 475, 90 S. W. 1084, 86 S. W. 45; Bartlett Est. Co. *v.* Co., 56 Wash. 434, 105 P. 846, 56 Wash. 437, 105 P. 848; Tio *v.* Brown, 131 Wis. 573, 111 N. W. 679; Ryan *v.* Malone, 134 Wis. 293, 114 N. W. 517.

Co-heirs not privies.—White *v.* Hill (Ala.), 58 S. 444.

829-8 U. S. *v.* Sommers, 171 Fed. 57, 96 C. C. A. 299; Shiels *v.* Nathan, 12 Cal. App. 604, 108 P. 34; Heinroth *v.* Griffin, 242 Ill. 610, 90 N. E. 199; Pilliod *v.* Co., 46 Ind. App. 719, 91 N. E. 829; Ward *v.* Schlosser, 111 Md. 528, 75 A. 116; Auditor Gen. *v.* Bishop, 161 Mich. 117, 125 N. W. 715; Zielda F. I. Co. *v.* Co., 143 Mo. App. 357, 126 S. W. 788; Pierce *v.* Pierce, 139 Mo. App. 416, 122 S. W. 1147; Stone *v.* R., 197 N. Y. 279, 90 N. E. 843; Yarborough *v.* Moore, 151 N. C. 116, 65 S. E. 763 (unborn heirs); Patton *v.* Minor, 103 Tex. 176, 125 S. W. 6; Barrette *v.* Whitney, 36 Utah 574, 106 P. 522; Roller *v.* Murray, 71 W. Va. 161, 76 S. E. 172. *Comp.* Holland *v.* Fairbanks, 166 Ala. 198, 51 S. 931; Blanton *v.* Nunley, 55 Tex. Civ. 427, 119 S. W. 881. See Baker *v.* Cartersville, 127 Ga. 221, 56 S. E. 249 (validity of city bonds); Board *v.* S., 19 Okla. 375, 91 P. 699 (same).

Decrees in probate proceedings.—In re McVay, 14 Ida. 56, 93 P. 28; Baker *v.* L. Co., 32 Ky. L. R. 982, 107 S. W. 704; In re Mudgett, 103 Me. 367, 69 A. 575; In re Goldsticker, 192 N. Y. 35, 84 N. E. 581; Pearce *v.* Leitch, 43 Tex. Civ. 398, 96 S. W. 1094; Meeker *v.* Winyee, 48 Wash. 27, 92 P. 883.

829-9 Stockman *v.* Whitmore, 140 Ia. 378, 118 N. W. 403; Ford *v.* Ford, 25 Okla. 785, 108 P. 366; Taylor *v.* Taylor, 54 Or. 560, 103 P. 524; Roemer *v.* Traylor (Tex. Civ.), 128 S. W. 685. *Contra* if question but incidentally involved. Hilton *v.* Snyder, 37 Utah 384, 108 P. 698. See Mathews *v.* Hanson, 19 N. D. 692, 124 N. W. 1116.

829-10 Lewis *v.* Frick, 233 U. S. 291, 34 Sup. Ct. 488; Crausby *v.* Crausby, 164 Ala. 471, 51 S. 529; In re

Blake's Est., 157 Cal. 448, 108 P. 287; Fehringer *v.* Drug Co., 56 Colo. 445, 138 P. 1007; Goerke *v.* Manitou, 25 Colo. App. 482, 139 P. 1049; Windsor R. & C. Co. *v.* Co., 44 Colo. 214, 98 P. 729; Prall *v.* Prall, 58 Fla. 496, 50 S. 867; Lane *v.* Hyams, 134 Ga. 621, 68 S. E. 469; Feld *v.* Loftis, 240 Ill. 105, 88 N. E. 281; Leigh *v.* Co., 234 Ill. 76, 79 N. E. 318; Hilton *v.* Searight, 163 Ill. App. 605; Waschow *v.* Waschow, 155 Ill. App. 167; Bradford *v.* Abbott, 127 Ill. App. 6; Fullerton *v.* Des Moines, 147 Ia. 254, 126 N. W. 159; Hostetter *v.* Green (Ky.), 167 S. W. 919; Fuson *v.* Stewart, 137 Ky. 748, 126 S. W. 1097; Schlater *v.* Le Blanc, 121 La. 919, 46 S. 921; Scovel *v.* Levy, 118 La. 982, 43 S. 642; Morton *v.* Harrison, 111 Md. 536, 75 A. 337; Coyle *v.* Tr. Co., 216 Mass. 156, 103 N. E. 288; Newhall *v.* Co., 205 Mass. 585, 91 N. E. 905; Farlin *v.* Sanborn, 161 Mich. 615, 126 N. W. 634; Virtue *v.* Mfg. Co., 123 Minn. 17, 142 N. W. 930; Witte *v.* Storm, 236 Mo. 470, 139 S. W. 384; Taylor *v.* Welch, 168 Mo. App. 223, 153 S. W. 490; Kazebeer *v.* Nunemaker, 82 Neb. 732, 118 N. W. 646; Gering *v.* Dist., 76 Neb. 219, 107 N. W. 250; Schilstra *v.* Vanden Heuvel (N. J.), 90 A. 1056; Hoffmeier *v.* Trost, 83 N. J. L. 358, 85 A. 221; Ferry-H. Co. *v.* Co., 76 N. J. Eq. 1, 73 A. 230; McArthur *v.* Griffith, 147 N. C. 545, 61 S. E. 519; Sommers *v.* Wagner, 21 N. D. 531, 131 N. W. 797; Mahoning V. R. Co. *v.* Van Alstine, 77 O. St. 395, 83 N. E. 601; Chicago R. I. & P. R. Co. *v.* Davis, 26 Okla. 434, 109 P. 214; Siegfried *v.* Boyd, 237 Pa. 55, 85 A. 72; Maguyon *v.* Agra, 7 Phil. Isl. 4; Sanford *v.* King, 19 S. D. 334, 103 N. W. 28; Galveston Chamber of Commerce *v.* R. Comrs. (Tex. Civ.), 137 S. W. 737; Kirby *v.* Hayden (Tex. Civ.), 125 S. W. 993; Pierce *v.* Mitchell (Vt.), 90 A. 577; Holbrook *v.* Co., 84 Vt. 411, 80 A. 339; Egbers *v.* Fischer, 73 Wash. 308, 131 P. 1128; Vulcan I. Wks. *v.* Co., 39 Wash. 435, 81 P. 913; Bird *v.* Winyer, 44 Wash. 264, 87 P. 259; Feder *v.* Hager, 64 W. Va. 452, 63 S. E. 285. See U. S. *v.* R. Co., 229 U. S. 244, 33 Sup. Ct. 850, 57 L. ed. 1169; Dempster *v.* Lansingh, 244 Ill. 402, 91 N. E. 488; Modlin *v.* S., 175 Ind. 511, 94 N. E. 826; Hoffmeier *v.* Trost, 83 N. J. L. 358, 85 A. 221.

Must cause of action be same? In affirmative. Peachy *v.* Gold Mines Co., 204 Fed. 659; Teel *v.* Dunnihoo, 230 Ill. 476, 82 N. E. 844; Chicago T. etc. Co. *v.* Moody, 233 Ill. 634, 84 N. E. 656. *Contra*, Missouri Ins. Co. *v.* Lovelace, 1 Ga. App. 446, 58 S. E. 93; Stitt *v.* Co., 101 Minn. 93, 111 N. W. 948.

The test is not the nature of relief prayed, but whether facts found and adjudged are same as those to be litigated in case at bar. Tew *v.* Webster, 118 Minn. 375, 136 N. W. 1098. And see Mason *v.* Mason, 5 Ala. App. 377, 59 S. 699.

"The claim asserted by the complaint in the former suit was broad enough to have comprehended the one sought to be maintained in the present action, and that damages because of the failure of the principal in the bond, after the date of the judgment in that suit, to provide the stipulated maintenance and support were recoverable in that suit, and that judgment, the result of a trial of the case had upon the merits, might well be pleaded as a bar to the plaintiff's right to maintain the claim asserted by her in the present suit." Mason *v.* Mason, 5 Ala. App. 377, 59 S. 701.

"The verdict of the jury renders res adjudicata as to the complainant and the defendants or their successors (it happens that they are the same parties in this action) the precise question only which was submitted to the jury, namely, whether or not, upon any of the grounds upon which a verdict could depend, the complainant had sustained the burden of proof." Cheatham Elec. S. D. Co. *v.* Transit Devel. Co., 197 Fed. 563, *cit.* Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214.

A bar to all matters of law and fact which were, or which might have been, properly put in issue and decided by the previous judgment. Hoster-Columbus Assoc. Breweries Co. *v.* Corp., 111 Va. 223, 68 S. E. 50.

Plaintiff, in a suit for an injunction to prevent the seizure and sale of his property, cannot withhold grounds which he should have stated, and then, when he is cast in the action, file another suit, setting forth the facts originally alleged and those withheld. Brooks *v.* Magee, 126 La. 388, 52 S. 551.

In Roanoke Rapids Power Co. *v.* **Power Co.,** 152 N. C. 472, 68 S. E. 190, the court pointed out that the language of the court in the former case excludes the idea that the present facts were considered or decided.

The burden is on the party who relies on the judgment as a bar to show such happenings at the former trial as would make the judgment an adjudication of issues now presented. Sparrow T. A. Co. *v.* Mack, 195 Fed. 474, 115 C. C. A. 384.

"**Where a cause of action,** matter in defense, or counterclaim is once litigated on the merits in a court of competent jurisdiction, whether decided properly or otherwise, the judgment is a bar, and whether the judgment be res adjudicata is to be decided on the "record," which, in the limited sense in which that term is here used, means the judgment roll only showing the pleadings and judgment, provided the judgment be such, in the light of the pleadings, that it necessarily shows whether or not the cause of action, defense, or counterclaim over which the question arises was litigated; but, if not, then it is incumbent on the party interposing the judgment as a bar to show the essential facts by the record of the proceedings on the trial or other parol evidence." Barber *v.* Ellingwood, 122 N. Y. S. 369.

831-11 Elk Garden Co. *v.* Co., 206 Fed. 212; Werckmeister *v.* Co., 138 Fed. 162; Bagley *v.* Co., 150 Fed. 284, 80 C. C. A. 172; Emerson *v.* Co., 149 Cal. 50, 85 P. 122; Laws *v.* Newkirk, 39 Colo. 78, 88 P. 861; Nichols *v.* Wentz 78 Conn. 429, 62 A. 610; Bonds *v* Brown, 133 Ga. 451, 66 S. E. 156; Chicago *v.* Mecartney, 216 Ill. 377, 75 N. E. 117; Wachsmuth *v.* Ins. Co., 147 Ill. App. 510; Hoover *v.* Lewin (Ind. App.), 105 N. E. 400; Johnson *v.* Gordon (Ky.), 118 S. W. 372; Scottish-A. Mtg. Co. *v.* Buncklev, 88 Miss. 641, 41 S. 502; Tootle *v.* Buckingham, 190 Mo. 183, 88 S. W. 619; Bennett *v.* Quinlan, 47 Mont. 247, 131 P. 1067; Mercer Co. *v.* Omaha, 76 Neb. 289, 107 N. W. 565; S. *v.* R. Co., 80 Neb. 333, 114 N. W. 422, 14 L. R. A. (N. S.) 336; Schilstra *v.* Vanden Heuvel (N. J.), 90 A. 1056; Vogt *v.* Vogt, 119 App. Div. 518, 104 N. Y. S. 164; Crow *v.* Crow (Or.), 139 P. 854; Siegfried *v.* Boyd, 237 Pa. 55, 85 A. 72; In re Lappe, 215 Pa. 424, 64 A. 607; Wylie *v.* Langhorne, 45 Tex. Civ. 618, 101 S. W. 527; Hudson *v.* Min. Co., 71 W. Va. 402, 76 S. E. 797; Petrie *v.* Co., 134 Wis. 394, 114 N. W. 808; Pereles *v.* Gross, 126 Wis. 122, 105 N. W. 217. See Saylor *v.* Saylor, 151 Ky. 694, 152 S. W. 763.

Issue not raised by pleadings may be conclusively settled by judgment, where parties so agree. Engel *v.* Sontag, 110 N. Y. S. 933.

832-12 Sharp *v.* Zeller, 114 La. 549, 38 S. 449; Eisenberg *v.* Thorne, 49 Misc. 617, 96 N. Y. S. 1020; Stockley *v.* Cissna, 119 Tenn. 135, 104 S. W. 792; Arlington, etc. Co. *v.* L. Co. (Tex. Civ.), 160 S. W. 1109; Hermann *v.* Allen, 103 Tex. 382, 128 S. W. 115 (immaterial no evidence offered).

The findings, verdict, bill of exceptions, or extrinsic evidence may also be looked to to determine what questions were decided. Gerbig *v.* Bell, 143 Wis. 157, 126 N. W. 871.

832-13 In re Hancock's Est., 156 Cal. 804, 106 P. 58; Krause *v.* Nolte, 217 Ill. 298, 75 N. E. 362; Elkhart P. Co. *v.* Fulkerson, 36 Ind. App. 219, 75 N. E. 283; Thurman *v.* Leach (Ky.), 116 S. W. 300; Athol S. Bk. *v.* Bennett, 203 Mass. 480, 89 N. E. 632; Cope *v.* Shoemate, 139 Mo. App. 4, 119 S. W. 503; Jordan *v.* Chambers, 226 Pa. 573, 75 A. 956; Jackson *v.* Thomson, 215 Pa. 209, 64 A. 421; Delaune *v.* Co. (Tex. Civ.), 128 S. W. 174; Wells *v.* R., 82 Vt. 108, 71 A. 1103; Garrett *v.* Co., 66 W. Va. 587, 66 S. E. 741; Itzel *v.* Winn, 141 Wis. 645, 124 N. W. 1033. And see Pulaski County *v.* Hill, 97 Ark. 450, 134 S. W. 973.

"**The plea of res judicata applies** to every objection urged in a second suit, when the objection was open to the party within the legitimate scope of the pleadings of the former one, and might have been presented in it." Jones *v.* Morgan, 59 Fla. 542, 52 S. 140.

Matters in issue, though not actually presented, concluded. Bluthenthal *v.* Bigbie, 33 App. Cas. (D. C.) 209.

833-14 Thompson *v.* McPherson (Ky.), 124 S. W. 272; Gilcreast *v.* Bartlett, 74 N. H. 29, 64 A. 767; Hoffman *v.* Shoemaker, 69 W. Va. 233, 71 S. E. 198. See Swamp L. Dist. *v.* Blumenberg, 156 Cal. 539, 106 P. 392; Howcott *v.* Smart, 128 La. 130, 54 S. 586.

"**Where a suit, action, or proceeding is** sought to be maintained upon the same claim, a previous judgment concerning it, as an estoppel, is very broad in its effect. It concludes every fact necessary to uphold it, and extends not only to matters actually determined, but to every other matter which the parties might have litigated and have had decided as incident to and essen-

tially connected with the subject-matter of the litigation. But the rule is otherwise where the second action or proceeding is sought to be maintained upon a different claim. There the prior judgment will only operate as an estoppel against matters actually litigated, or as to facts distinctly in issue and upon which such judgment is predicated. These principles are well established. Cromwell *v.* County of Sac, 94 U. S. 351, 24 L. ed. 195; White *v.* Ladd, 41 Or. 324, 332, 68 Pac. 739, 93 Am. St. Rep. 732. It is also settled law that a judgment upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties; but to have this operation it must appear from the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. Any uncertainty on this head must be dispelled by extrinsic proof; otherwise, the entire subject-matter of the action will be set at large upon the new contention. Russell *v.* Place, 94 U. S. 606, 24 L. ed. 214.'' Lim Jew *v.* U. S., 196 Fed. 736, 116 C. C. A. 364.

Parol testimony admissible, under the informal pleadings permitted in the municipal court, to show the actual scope of the issues litigated in the earlier action. Devine *v.* Kilcommons, 122 N. Y. S. 261.

Counterclaim not presumed litigated because pleaded. Barber *v.* Ellingwood, 137 App. Div. 704, 122 N. Y. S. 369.

833-15 Woman's Assn. *v.* Fordyce, 74 Ark. 621, 86 S. W. 417; Wardlow *v.* Middleton, 156 Cal. 585, 105 P. 738; Halliday *v.* Bk., 128 Ga. 639, 58 S. E. 169; Gouwens *v.* Gouwens, 222 Ill. 223, 78 N. E. 597; Peterson *v.* Kissell, 148 Ia. 516, 125 N. W. 808; Broadway C. M. Co. *v.* Robinson, 150 Ky. 707, 150 S. W. 1000. Kaufman *v.* Cooper, 39 Mont. 146, 101 P. 969; Stone *v.* R., 197 N. Y. 279, 90 N. E. 843; Frank *v.* Miller, 116 App. Div. 855, 102 N. Y. S. 277; Strangward *v.* Co., 82 O. St. 121, 91 N. E. 988.

See Grand Forks *v.* Paulsness, 19 N. D. 293, 123 N. W. 878.

834-16 House C. T. S. Co. *v.* Ingraham, 83 Conn. 31, 75 A. 80; Kaiser *v.* S., 80 Kan. 364, 102 P. 454; S. *v.* Leavenworth, 75 Kan. 787, 90 P. 237; Livingston *v.* Klaw, 137 App. Div. 639, 122 N. Y. S. 264; Roach *v.* Curtis, 115 App. Div. 765, 101 N. Y. S. 333; Bradburn *v.* Roberts, 148 N. C. 214, 61 S. E. 617.

834-17 Wadly *v.* Leggitt, 82 Ark. 262, 101 S. W. 720 (outstanding title acquired after trial in ejectment); Brenner *v.* Heiler, 46 Ind. App. 335, 91 N. E. 744; Shepherd *v.* Kansas City, 81 Kan. 369, 105 P. 531; Lighton *v.* Syracuse, 188 N. Y. 499, 81 N. E. 464; Johnson *v.* Seattle, 53 Wash. 564, 102 P. 448 (original assessment and re-assessment).

834-18 Nemo *v.* Farrington, 7 Cal. App. 443, 94 P. 874; Meeker *v.* Shuster, 4 Cal. App. 294, 87 P. 1102; Brown *v.* Banks, 54 Fla. 255, 44 S. 1011; Chicago, etc. R. Co. *v.* Grantham, 165 Ind. 279, 75 N. E. 265; Roach *v.* Craig, 124 La. 684, 50 S. 652; Mann *v.* Doerr, 222 Mo. 1, 121 S. W. 86; Houseman *v.* Co., 214 Pa. 552, 64 A. 379; Stockley *v.* Cissna, 119 Tenn. 135, 104 S. W. 792.

834-19 Kennedy *v.* Ins. Co., 157 Mich. 411, 122 N. W. 134. See supra, ''Conclusive Evidence,'' 269-7.

834-20 Jochem *v.* Cooley, 176 Fed. 719, 100 C. C. A. 155; Messinger *v.* Anderson, 171 Fed. 785, 96 C. C. A. 445; Kelly *v.* Griffin, 165 Ala. 309, 51 S. 789; Pattison *v.* Smith, 94 Ark. 588, 127 S. W. 983; Lyon *v.* Bursey, 36 App. Cas. (D. C.) 235; Dils *v.* Justice, 137 Ky. 822, 127 S. W. 472; Miller *v.* Natwick, 110 Minn. 448, 125 N. W. 1022; Hutchinson *v.* Patterson, 226 Mo. 174, 126 S. W. 403; Buchanan *v.* Harrington, 152 N. C. 333, 67 S. E. 747; Ottow *v.* Friese, 20 N. D. 86, 126 N. W. 503; Weatherford *v.* McKay, 59 Or. 558, 117 P. 969; Remilliard *v.* Authier, 20 S. D. 290, 105 N. W. 626; Provident Nat. Bk. *v.* Webb (Tex. Civ.), 128 S. W. 426; Struntz *v.* Hood, 57 Wash. 578, 107 P. 352.

Ejectment.—Two concurring judgments necessary. Pritchard *v.* Fowler, 171 Ala. 662, 55 S. 147.

Not conclusive in ejectment.—Witte *v.* Storm, 236 Mo. 470, 139 S. W. 384.

836 Judgment in eminent domain proceedings is conclusive. Dose *v.* Seattle, 78 Wash. 571, 139 P. 594.

836-21 Hamrick *v.* Gilbreath, 164 Ala. 292, 51 S. 336; Jacob *v.* Warehouses, 125 App. Div. 556, 109 N. Y. S. 1015.

836-22 Roarke *v.* Roarke, 77 N. J. Eq. 181, 75 A. 761 (proceeding by overseer of poor resulting in order requiring defendant to support his family bars application by wife for mainte-

ance under divorce statute); Nernst L. Co. *v.* Hill, 243 Pa. 448, 90 A. 137; Smith *v.* Clark, 37 Utah 116, 106 P. 653, cit. the text. See Roberts *v.* Neal, 137 Mo. App. 109, 119 S. W. 461; supra, "Conclusive Evidence," 270-9.

Judgment on claim in bill in equity, based on defendant's fraudulent representations leading to contract of purchase, does not bar to action at law based on breach of such contract. Newhall *v.* Co., 205 Mass. 585, 91 N. E. 905.

836-23 Prall *v.* Prall, 58 Fla. 496, 50 S. 867; Dils *v.* Justice, 137 Ky. 822, 127 S. W. 472; International P. Co. *v.* Purdy, 136 App. Div. 189, 120 N. Y. S. 342; Stay *v.* Stay, 53 Wash. 534, 102 P. 420. See Brennan *v.* Co., 45 Colo. 248, 100 P. 412; Clement *v.* Moore, 135 App. Div. 723, 119 N. Y. S. 883.

837-24 Moser *v.* Philadelphia, etc. R. Co., 233 Pa. 259, 82 A. 362.

837-25 Judgment is evidence of result of action. Balt. & O. R. Co. *v.* Comrs., 111 Md. 176, 73 A. 656.

837-26 Adams *v.* Koehler, 65 Misc. 192, 119 N. Y. S. 761. See Snowhill *v.* Co., 39 Ind. App. 240, 77 N. E. 412; Case Mfg. Co. *v.* Moore, 144 N. C. 527, 57 S. E. 213.

837-27 See Van Camp *v.* Huntington, 39 Ind. App. 28, 78 N. E. 1057.

838-33 Clapp *v.* Vatcher, 9 Cal. App. 462, 99 P. 549; Stuke *v.* Glaser, 223 Ill. 316, 79 N. E. 105 (proponents bound, but not contestants); In re Goldsticker, 192 N. Y. 35, 84 N. E. 581; Smith *v.* Ryan, 116 App. Div. 397, 101 N. Y. S. 1011 (only presumptive evidence of due execution so far as real property is concerned).

838-34 Keating *v.* Smith, 154 Cal. 186, 97 P. 300, judgment of distribution conclusive as to validity of trust.

839-36 Judgment in condemnation proceedings, conclusive as to public use to which property appropriated to be put. Lowe *v.* Co., 157 Cal. 503, 108 P. 297.

Judgment may be evidence though not conclusive, as where it cancels note and mortgage. In such case it is admissible to sustain decree directing disposition to be made of surplus. Aetna Ins. Co. *v.* Syndicate, 11 Cal. App. 165, 104 P. 470.

839-37 Albright *v.* Mickey, 99 Ark. 147, 137 S. W. 568; Beauchamp *v.* Bertig, 90 Ark. 351, 119 S. W. 75; Steele *v.* Bryant, 132 Ky. 569, 116 S. W. 755; Hooper *v.* R. Co. (Mass.), 105 N. E. 892; Davis *v.* Davis, 24 S. D. 474, 124 N. W. 715.

839-38 St. Louis, etc. R. Co. *v.* Vanderberg, 91 Ark. 252, 120 S. W. 993; Propper *v.* Owens, 136 Ga. 787, 72 S. E. 242; McCormick *v.* McCormick, 82 Kan. 31, 107 P. 546; Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40; Page *v.* Page, 189 Mass. 85, 75 N. E. 92; Converse *v.* Ayer, 197 Mass. 443, 84 N. E. 98; Armstrong *v.* Minkus, 93 Miss. 621, 47 S. 467; Ross *v.* Saylor, 39 Mont. 559, 104 P. 864; Freund *v.* Freund, 71 N. J. Eq. 524, 63 A. 756; Strickland *v.* Co., 72 N. J. Eq. 170, 64 A. 982; Stone *v.* R., 197 N. Y. 279, 90 N. E. 843; Strauss *v.* Strauss, 122 App. Div. 729, 107 N. Y. S. 842; Stilwell *v.* Smith, 219 Pa. 36, 67 A. 910; Morrow *v.* R. Co., 84 S. C. 224, 66 S. E. 186; Tourtelot *v.* Booker (Tex. Civ.), 160 S. W. 293; Varn *v.* Co. (Tex. Civ.), 124 S. W. 693; Roller *v.* Murray, 71 W. Va. 161, 76 S. E. 172. See supra, "Conclusive Evidence," 272-14.

Presumed valid.—Gottlieb *v.* Co., 87 App. Div. 380, 84 N. Y. S. 413, 181 N. Y. 563, 74 N. E. 1117.

840-39 Everett *v.* Everett, 215 U. S. 203; Harris *v.* Balk, 198 U. S. 215; Vennum *v.* Holmberg, 51 Colo. 306, 117 P. 169; Hilton *v.* Stewart, 15 Ida. 150, 96 P. 579; Forrest *v.* Fey, 218 Ill. 165 75 N. E. 789; Wright *v.* Ins. Co., 154 Ill. App. 201; Balt., etc. R. Co. *v.* Freeze, 169 Ind. 370, 82 N. E. 761; Tootle *v.* Buckingham, 190 Mo. 183, 88 S. W. 619; Dixon *v.* Dixon, 76 N. J. Eq. 364, 74 A. 995; Guggenheim *v.* Wahl, 122 N. Y. S. 941.

Its nullity in the state where rendered may be proved by the decisions of that state. Gundry *v.* Hancock, 147 Ill. App. 49.

"**The respect due to the decrees of the courts** of a sister state, as well as to our own previous decision, requires this court to refuse to inquire whether the Connecticut court was right or wrong in its original determination that Mrs. Curtiss was an incompetent, and to require her to try out the question as to whether her condition has so changed as to entitle her to be restored to the possession of her property and the control of her person by direct proceedings in the courts of Connecticut. The laws of that state provide sufficient methods of review." In re Curtiss, 122 N. Y. S. 468.

840-40 Bigelow *v.* Min. Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009; Jos. Joseph & Bro. Co. *v.* Hoffman, 173 Ala. 568, 56 S. 216; O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59; Hope *v.* Shevill, 137 App. Div. 86, 122 N. Y. S. 127; Holcomb *v.* Kelly, 114 N. Y. S. 1048.

841-41 Attestation by deputy clerk, improper. S. *v.* Foreman, 121 Mo. App. 502, 97 S. W. 269. See Tourtelot *v.* Booker (Tex. Civ.), 160 S. W. 293; and the title "Records."

841-42 Forbes *v.* Davis (Ala.), 65 S. 516; Britton *v.* Chamberlain, 234 Ill. 246, 84 N. E. 895; Hagan *v.* Snider, 44 Tex. Civ. 139, 98 S. W. 213; Wolf *v.* King, 49 Tex. Civ. 41, 107 S. W. 617 (necessity of judge's certificate).

Full Christian name of clerk need not appear. Old Wayne, etc. Assn. *v.* McDonough, 164 Ind. 321, 73 N. E. 703.

842-47 No presumption justice of peace had jurisdiction. Bick *v.* Lanham, 123 Mo. App. 268, 100 S. W. 530. See Geduld *v.* R. Co., 55 Misc. 239, 105 N. Y. S. 110.

842-48 See Bick *v.* Lanham, 123 Mo. App. 268, 100 S. W. 530.

842-49 Burden on plaintiff. Kwilecki *v.* Holman (Mo.), 167 S. W. 989.

842-50 Hazel *v.* Jacobs, 78 N. J. L. 459, 75 A. 903.

842-51 Ross *v.* Saylor, 39 Mont. 559, 104 P. 864; Orient Ins. Co. *v.* Rudolph, 69 N. J. Eq. 570, 61 A. 26.

843-52 *Comp.* In re Culp, 2 Cal. App. 70, 83 P. 89; Forrest *v.* Fey, 218 Ill. 165, 75 N. E. 789.

843-54 Bigelow *v.* Min. Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009; Davis *v.* Davis, 174 Fed. 786, 98 C. C. A. 494; Cooper *v.* Brazelton, 135 Fed. 476, 68 C. C. A. 188; Old Wayne Ins. Co. *v.* McDonough, 204 U. S. 8; In re Hancock's Est., 156 Cal. 804, 106 P. 58; In re Culp, 2 Cal. App. 70, 83 P. 89; Field *v.* Field, 215 Ill. 496, 74 N. E. 443 (and subject-matter); Forrest *v.* Fey, 218 Ill. 165, 75 N. E. 789; Citizens' State Bk. *v.* Read, 45 Ind. App. 158, 90 N. E. 492; Tootle *v.* McClellan, 7 Ind. Ty. 64, 103 S. W. 766, 12 L. R. A. (N. S.) 941; Cuykendall *v.* Doe, 129 Ia. 453, 105 N. W. 698; Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40; Fall *v.* Fall (Neb.), 113 N. W. 175; Olmsted *v.* Olmsted, 190 N. Y. 458, 86 N. E. 569; In re Curtiss, 134 App. Div. 547, 119 N. Y. S. 556.

See Bigelow *v.* Min. Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. ed. 1009.

If judgment in rem it must appear res was within jurisdiction of foreign court. Ely *v.* Ins. Co., 33 Ky. L. R. 272, 110 S. W. 265.

"No argument is required and no citation of authorities is necessary to support the proposition that the judgment of a foreign court when sued upon in the courts of this state is open to impeachment for want of jurisdiction of the foreign court. The recital or assertion of jurisdiction, in the record of the judgment, is in this respect immaterial." Marshall *v.* Owen & Co., 171 Mich. 232, 137 N. W. 204.

"Even though it have jurisdiction of the plaintiff and of the subject-matter of the action, in so far that it can render a judgment perfectly valid within its own territorial jurisdiction, the recognition of that judgment in other jurisdictions is a matter of comity only, and such recognition cannot be required as a matter of right." Hall *v.* Hall, 122 N. Y. S. 401.

844-57 Roberts *v.* Leutzke, 39 Ind. App. 577, 78 N. E. 635; Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40; S. *v.* Webber, 96 Minn. 422, 105 N. W. 490; Anthony *v.* Wilson, 74 N. J. L. 630, 65 A. 988; Coakley *v.* Rickard, 136 App. Div. 489, 121 N. Y. S. 280; Johnston *v.* Ins. Co., 104 App. Div. 550, 93 N. Y. S. 1052; Varn *v.* Co. (Tex. Civ.), 124 S. W. 693; Wick *v.* Rea, 54 Wash. 424, 103 P. 462. *Contra* if record shows defendant non-resident. Smith *v.* Oliver, 65 Misc. 487, 120 N. Y. S. 73. *Contra*, justice of the peace. Huie *v.* De Vore, 123 N. Y. S. 12.

Presumption not indulged when it appears jurisdiction lacking. Old Wayne Ins. *v.* McDonough, 204 U. S. 8.

Failure of officer who served process to state all facts necessary to show jurisdiction does not overcome presumption. Hodge *v.* Co., 54 Misc. 442, 105 N. Y. S. 1067.

Presumption from fact court had a judge, clerk, and seal, it was a court of general jurisdiction and had jurisdiction. Old Wayne Assn. *v.* McDonough, 164 Ind. 321, 73 N. E. 703; Christiansen *v.* Kriesel, 133 Wis. 508, 113 N. W. 980.

844-58 Patterson *v.* Taylor, 78 N. J. L. 10, 73 A. 225.

844-59 In re Hancock's Est., 156 Cal. 804, 106 P. 58; Forsyth *v.* Barnes, 228 Ill. 326, 81 N. E. 1028; Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40;

Orient Ins. Co. *v.* Rudolph, 69 N. J. Eq. 570, 61 A. 26; Hall *v.* Hall, 122 N. Y. S. 401; Mottu *v.* Davis, 151 N. C. 237, 65 S. E. 969; Bomar *v.* Morris (Tex. Civ.), 126 S. W. 663. See vol. 10, p. 936, et seq., and supplement thereto.

845-60 Wick *v.* Rea, 54 Wash. 424, 103 P. 462. See Spiker *v.* Soc., 140 Mich. 225, 103 N. W. 611, 104 N. W. 670.

Burden is on defendant.—Forbes *v.* Davis (Ala.), 65 S. 516.

846-61 Forbes *v.* Davis (Ala.), 65 S. 516.

846-62 El Capitan, etc. Co. *v.* Lees, 13 N. M. 407, 86 P. 924, misnomer of defendant corporation no defense.

846-63 Hazel *v.* Jacobs, 78 N. J. L. 459, 75 A. 903. See Harrison *v.* Co., 140 Fed. 385, 72 C. C. A. 405, and as to judgment for alimony. Cureton *v.* Cureton, 132 Ga. 745, 65 S. E. 65.

Decree made in capacity of board of directors of insurance company conslusive as to necessity for and amount of assessment, but is not so in another state as to any other question. Swing *v.* Wellington, 44 Ind. App. 455, 89 N. E. 514.

847-64 Covington *v.* Bk., 198 U. S. 100; Manhattan Trust Co. *v.* Co., 188 Fed. 1006; Willcox *v.* Jones, 177 Fed. 870. 101 C. C. A. 84; Davis *v.* Davis, 174 Fed. 786, 98 C. C. A. 494; Gunning S. *v.* Buffalo, 157 Fed. 249.

Jurisdiction of state court open to attack. Cooper *v.* Brazelton, 135 Fed. 476, 68 C. C. A. 188.

847-65 Higgins *v.* Eaton, 188 Fed. 938.

848-67 Cornue *v.* Ingersoll, 176 Fed. 194, 99 C. C. A. 548; Harmon *v.* Best, 174 Ind. 323, 91 N. E. 19; McCabe *v.* R. Co., 136 Ky. 674, 124 S. W. 892; Palatine Ins. Co. *v.* O'Brien, 107 Md. 341, 68 A. 484, 16 L. R. A. (N. S.) 1055; Miller *v.* Natwick, 110 Minn 448, 125 N. W. 1022; Thornton *v.* Natchez, 88 Miss. 1, 41 S. 498; Dunseth *v.* R. Co. (Mont.), 108 P. 567; Whitwell *v.* Wright, 136 App. Div. 246, 120 N. Y S. 1065; Hamon *v.* Foust, 127 Tenn. 32, 150 S. W. 418; Edwards *v.* Smith (Tex. Civ.), 137 S. W. 1161.

848-69 Karrick *v.* Wetmore, 25 App. Cas. (D. C.) 415; Tootle *v.* McClellan, 7 Ind. Ty. 64, 103 S. W. 766, 12 L. R. A. (N. S.) 941; Weyburn *v.* Watkins, 90 Miss. 728, 44 S. 145; Vennum *v.* Mertens, 119 Mo. App. 461, 95 S. W. 292; Fall *v.* Fall, 75 Neb. 104, 106 N. W. 412; Orient Ins. Co. *v.* Rudolph, 69 N. J. Eq. 570, 61 A. 26; Gleason *v.* Ins. Co., 189 N. Y. 100, 81 N. E. 777.

849-70 Alaska Co. *v.* Debney, 2 Alaska 303; Banco Minero *v.* Ross & Masterson (Tex. Civ.), 138 S. W. 224.

849-72 In re Neidnig, 123 App. Div. 894, 108 N. Y. S. 478, judgment in nature of police regulation of foreign country, no extraterritorial effect.

849-76 Mexican C. R. Co. *v.* Chantry, 136 Fed. 316, 69 C. C. A. 454; Kessler *v.* Co., 158 Fed. 744, 85 C. C. A. 642; Alaska Co. *v.* Debney, 2 Alaska 303; In re Neidnig, 56 Misc. 216, 107 N. Y. S. 590, *rev.* 123 App. Div. 894, 108 N. Y. S. 478; De Kohly *v.* Fernandez, 58 Misc. 24, 110 N. Y. S. 398.

Ineffectual as to matters not adjudicated. Com. Nat. Bk. *v.* Sloman, 194 N. Y. 506, 87 N. E. 811.

850-79 The Kaiser Wilhelm Der Grosse, 175 Fed. 215.

851-80 Seaboard R. Co. *v.* O'Quin, 124 Ga. 357, 52 S. E. 427; Beckworth *v.* Phillips, 6 Ga. App. 859, 65 S. E. 1075, *foll.* Powell *v.* Wiley, 125 Ga. 823, 54 S. E. 732; Natwell *v.* Comrs., 110 Md. 667, 73 A. 710. See supra, "Identity," 928-75; Micks *v.* Mason, 145 Mich. 212, 108 N. W. 707; Adams *v.* Sigman, 89 Miss. 844, 43 S. 877; Myers *v.* Co., 123 Mo. App. 682, 101 S. W. 124; Frierson *v.* Jenkins, 72 S. C. 341, 51 S. E. 862.

In a civil action by the widow to recover of appellant on a policy of insurance issued on life, the judgment of an examining court acquitting the man who killed him cannot be regarded as evidence tending to sustain the defense that P. was himself the agressor, and therefore, when killed, was violating the law of the state. Sovereign Camp of Woodmen, etc. *v.* Purdon, 147 Ky. 177, 143 S. W. 1021.

Foreign judgment of conviction, not conclusive in civil action. In re Ebbs, 150 N. C. 44, 63 S. E. 190.

851-82 Powell *v.* Wiley, 125 Ga. 823, 54 S. E. 732 (judgment of acquittal inadmissible); Watson *v.* R. Co., 137 Ky. 619, 129 S. W. 341; Karlen *v.* Hadinger, 147 Wis. 78, 132 N. W. 591.

851-85 Adams *v.* Sigman, 89 Miss. 844, 43 S. 877.

Judgment on plea of nolo contendere, at least prima facie evidence in collateral civil action. Consolidated I. Mfg. Co. *v.* Medford, 18 Pa. Dist. 293.

851-86 U. S. *v.* Co., 142 Fed. 300; S. *v.* Corron, 73 N. H. 434, 62 A. 1044.

852-88 Seattle *v.* Saulez, 47 Wash. 365, 92 P. 140. See Cooke *v.* Loper, 151 Ala. 546, 44 S. 78.

852-89 See vol. 8, p. 418, n. 20, and supplement thereto.

852-90 Lewis *v.* Frick, 233 U. S. 291, 34 Sup. Ct. 488; Patterson *v.* S., 156 Ala. 62, 47 S. 52; Wilcox *v.* S., 8 Ga. App. 536, 69 S. E. 1086; S. *v.* Cary, 135 La. ——, 65 S. 748; McConnico *v.* S. (Miss.), 65 S. 243; S. *v.* Weil, 83 S. C. 478, 65 S. E. 634.

Judgment in equity conclusive at law if other requirements met. Bruner *v.* Finley, 217 Pa. 127, 66 A. 159; Van Camp *v.* Huntington, 39 Ind. App. 28, 78 N. E. 1057; Everett *v.* Jordan, 146 Ala. 690, 40 S. 386.

Converse true.—Smith *v.* Cowell, 41 Colo. 178, 92 P. 20.

Exceptions.—Rules of res judicata do not apply to statutory new trials in ejectment. Weigel *v.* Green, 221 Ill. 187, 77 N. E. 574. Exceptions to rules in criminal cases exist in prosecutions for perjury, since conviction cannot be had upon uncorroborated testimony of one witness. S. *v.* Sargood, 80 Vt. 415, 68 A. 49.

852-91 Schwarz *v.* Kennedy, 142 Fed. 1027; St. Louis, etc. R. Co. *v.* R. Co., 152 Fed. 849, 81 C. C. A. 643; Mogenson *v.* Zubler, 36 Colo. 235, 84 P. 981; C. *v.* Churchill, 131 Ky. 251, 115 S. W. 189. *Comp.* Haggart *v.* Kansas City, 77 Kan. 798, 94 P. 789; Bandy *v.* Cates, 44 Tex. Civ. 38, 97 S. W. 710.

Presumption status continues as of time decree rendered. Mayer *v.* Kornegay, 152 Ala. 650, 44 S. 839. Evidence of change in conditions is admissible. Froelicher *v.* Wks., 121 La. 451, 46 S. 570.

Prima facie case of identity of person and subject-matter where record relied upon is produced and alleged facts appear with reasonable certainty. Moore *v.* R. Co., 119 Tenn. 710, 109 S. W. 497.

852-92 Gulling *v.* Bk., 28 Nev. 450, 82 P. 800.

Where the pleadings are definite and unambiguous, the case falls within the general rule of former adjudication. The judgment is not only prima facie proof of what was adjudicated. Mitten *v.* Caswell Runyan Co., 52 Ind. App. 521, 99 N. E. 47.

853-93 Millie I. M. Co. *v.* McKinney, 172 Fed. 42, 96 C. C. A. 156 (opinion of court included in record); Delaware, etc. R. Co. *v.* Kutter, 147 Fed. 51, 77 C. C. A. 315; Hall & Farley *v.* Co., 173 Ala. 398, 56 S. 235; Nalle *v.* Oyster, 36 App. Cas. (D. C.) 36; Bennett *v.* Quinlan, 47 Mont. 247, 131 P. 1067; Gering *v.* Dist., 76 Neb. 219, 107 N. W. 250; Gulling *v.* Bk., 28 Nev. 450, 82 P. 800; Hubbard *v.* Gould, 74 N. H. 25, 64 A. 668; Wiertz S. M. Co. *v.* Co., 139 N. Y. S. 926; Reitman *v.* Shapiro, 114 N. Y. S. 887; Holbrook *v.* Co., 84 Vt. 411, 80 A. 239; Manchester Assn. *v.* Porter, 106 Va. 528, 56 S. E. 337.

Agreement of dismissal may be shown by extrinsic evidence. Turner *v.* Fleming, 37 Okla. 75, 130 P. 551.

Opinion of court in former case may be looked at. Carson *v.* Co., 142 Fed. 893; Horine *v.* Wende, 29 App. Cas. (D. C.) 415; Moore *v.* R. Co., 119 Tenn. 710, 109 S. W. 497.

854-94 Holford *v.* James, 136 Fed. 553, 69 C. C. A. 263 (issues did not appear in entry of judgment and pleadings destroyed); Gorham *v.* New Haven, 79 Conn. 670, 66 A. 505; Walker *v.* Glos, 245 Ill. 253, 91 N. E. 1074; Burns *v.* Marsh, 144 Mo. App. 412, 128 S. W. 834; O'Connor *v.* Byrne, 86 App. Div. 627, 83 N. Y. S. 665, 180 N. Y. 556, 73 N. E. 1127; Pennebaker *v.* Parker, 33 Pa. Super. 458; Iguano L. & M. Co. *v.* Jones, 65 W. Va. 59, 64 S. E. 640.

854-95 Stone *v.* R. Co., 75 Kan. 600, 90 P. 251.

855-96 Irvin *v.* Spratlin, 127 Ga. 240, 55 S. E. 1037; Harris *v.* Co., 129 Ga. 241, 58 S. E. 831. See Cambridge *v.* Foster, 195 Mass. 411, 81 N. E. 278.

855-97 Reeves *v.* Lamm, 135 Ia. 201, 112 N. W. 642.

855-98 Hooper *v.* Pierce, 151 Ala. 517, 44 S. 108.

Amendment disallowed by court is admissible in rebuttal to show plaintiffs unsuccessfully endeavored to raise question in issue by their pleadings. Draper *v.* Medlock, 122 Ga. 234, 50 S. E. 113.

856 Burden on defendant to show payment. Dowling *v.* Hastings, 211 N. Y. 199, 105 N. E. 194.

856-99 Schwarz *v.* Kennedy, 142 Fed. 1027; Ahlers *v.* Smiley, 11 Cal. App. 343, 104 P. 997 (records usually compared); Bonds *v.* Brown, 133 Ga. 451, 66 S. E. 156; Draper *v.* Medlock, 122 Ga. 234, 50 S. E. 113; Institution

v. Puffer, 201 Mass. 41, 87 N. E. 562; Barber *v.* Ellingwood, 137 App. Div. 704, 122 N. Y. S. 369; Martin *v.* Stranger, 29 R. I. 464, 72 A. 534; La Brie *v.* McKim, 56 Tex. Civ. 322, 120 S. W. 1083 (agreement as to terms of judgment); Gerbig *v.* Bell, 143 Wis. 157, 126 N. W. 871.

Burden on party claiming benefit of former judgment to remove doubt as to its scope. Prall *v.* Prall, 58 Fla. 496, 50 S. 867.

Opinion of appellate court may be resorted to where decree ambiguous to determine points ruled. Taylor *v.* Taylor, 54 Or. 560, 103 P. 524.

Pleading, instructions and verdict, admissible. Roth T. Co. *v.* Co., 161 Fed. 709, 88 C. C. A. 569.

856-1 Fowler *v.* Stebbins, 136 Fed. 365, 69 C. C. A. 209; Hofferberth *v.* Nash, 50 Misc. 328, 98 N. Y. S. 684.

856-2 Fowler *v.* Stebbins, 136 Fed. 365, 69 C. C. A. 209 (evidence admissible by party to apply description in pleadings to himself); Ward *v.* Clendenning, 245 Ill. 206, 91 N. E. 1028; McCarthy *v.* Benedict, 89 Neb. 293, 131 N. W. 598; Hendrick *v.* Biggar, 66 Misc. 576, 122 N. Y. S. 165; Wren *v.* Scales, 55 Tex. Civ. 62, 119 S. W. 879; Haines *v.* West, 101 Tex. 226, 105 S. W. 1118, 102 S. W. 436.

856-5 Murphy *v.* Bk., 82 Ark. 131, 100 S. W. 894.

857-7 Ex parte Von Vetsera, 7 Cal. App. 136, 93 P. 1036; Miller *v.* Bulkley, 85 Miss. 706, 38 S. 99; Ex parte Stevenson, 20 Okla. 549, 94 P. 1071.

857-8 Russell *v.* Houston, 115 Tenn. 536, 91 S. W. 192.

857-9 Standard S. Co. *v.* Merritt, 48 Misc. 498, 96 N. Y. S. 181.

857-11 Smith *v.* Co., 140 N. C. 375, 53 S. E. 233.

Plea in bar necessary.—P. *v.* R. Co., 149 Mich. 122, 112 N. W. 716.

857-12 Shannon *v.* Mastin (Mo. App.), 108 S. W. 1116; Standard S. Co. *v.* Merritt, 48 Misc. 498, 96 N. Y. S. 181 (need not be pleaded except when used in bar); Bonanza M. Co. *v.* Co., 29 Utah 159, 80 P. 736; Davis *v.* Schmidt, 126 Wis. 461, 106 N. W. 119.

In equity evidence of former adjudication is admissible only after it has been pleaded. Evans *v.* Woodsworth, 213 Ill. 404, 7 N. E. 1082.

858-13 See Schott *v.* Henkin, 32 S. D. 633, 144 N. W. 115.

858-15 Richstein *v.* Welch, 197 Mass. 224, 83 N. E. 417.

858-16 *Comp.* Weatherwax L. Co. *v.* Ray, 38 Wash. 545, 80 P. 775.

Burden on party pleading prior adjudication to prove it. Hawk *v.* Co., 149 N. C. 16, 62 S. E. 754.

859-19 Swing *v.* Co., 78 Ark. 246, 93 S. W. 978; Hembree *v.* McFarland, 55 Wash. 605, 104 P. 837.

This rule is applicable alike to foreign and domestic judgments. Lieber *v.* Lieber, 239 Mo. 1, 143 S. W. 458.

859-20 Marshall *v.* Owen & Co., 171 Mich. 232, 137 N. W. 204. But see Swing *v.* Co., 78 Ark. 246, 93 S. W. 978.

Extrinsic evidence admissible to show lack of jurisdiction. In re Farkash, 8 O. N. P. (N. S.) 137.

859-22 Old Wayne Ins. Co. *v.* McDonough, 204 U. S. 8.

859-23 See infra, "Service," 717-6, et seq.

859-24 Merz *v.* Mehner, 57 Wash. 324, 106 P. 1118.

859-25 *Comp.* Splane *v.* Splane, 29 Pa. Super. 185, California law.

860-27 Brown *v.* Caldwell, 13 Cal. App. 29, 108 P. 874; Page *v.* Garver, 5 Cal. App. 383, 90 P. 481; Waterbury Bk. *v.* Reed, 231 Ill. 246, 83 N. E. 188 (conclusive if nothing to contrary appears in record); Francis *v.* Lilly, 124 Ky. 230, 98 S. W. 996; Howard *v.* Strode, 242 Mo. 210, 146 S. W. 792; Sieves *v.* Smith, 49 Tex. Civ. 126, 107 S. W. 141. See Eminence L. Co. *v.* Co., 187 Mo. 420, 86 S. W. 145.

Recital of appearance of adult defendants generally, no names used, does not include non-resident not served. White *v.* White, 66 W. Va. 79, 66 S. E. 2.

860-30 Thomas *v.* Virden, 160 Fed. 418, 87 C. C. A. 370; Prichard *v.* Sigafus, 103 App. Div. 535, 93 N. Y. S. 152; Rice *v.* Bennett, 29 S. D. 341, 137 N. W. 359. See International, etc. R. Co. *v.* Brisenio (Tex. Civ.), 92 S. W. 998.

861-32 Weller *v.* Co., 93 Ark. 490, 125 S. W. 129; Board *v.* Fleming, 93 Ark. 462, 125 S. W. 132; Bryant *v.* Shute's Exr., 147 Ky. 268, 144 S. W. 28; Levy *v.* Gilligan (Pa.), 90 A. 647; Keystone B. Co. *v.* Schermer, 241 Pa. 361, 88 A. 657; Blake T. Co. *v.* Posluszsy, 31 Pa. Super. 602; Hopkins *r.* Cain (Tex.), 143 S. W. 1145; Bargna *v.* Bargna (Tex. Civ.), 127 S. W. 1156.

861-34 Varney *v.* Co., 64 W. Va. 417, 63 S. E. 203.

861-36 Bk. *v.* Stroud, 223 Pa. 33, 72 A. 341; Light *v.* Scholl, 32 Pa. Super. 133 (within court's discretion); Groninger *v.* Acker, 32 Pa. Super. 124; Ueeker *v.* Thiedt, 137 Wis. 634, 119 N. W. 878. See Donnelly *v.* Donnelly (Pa.), 90 A. 922.

Meritorious defense need not be shown where judgment shows it was void because of lack of jurisdiction. Ayers *v.* Co., 89 Ark. 160, 116 S. W. 199. Or is alleged to be so. Flowers *v.* King, 145 N. C. 234, 58 S. E. 1074.

Recital in record of presence of defendant's attorney, not conclusive. Wallace *v.* Wallace, 141 Ia. 306, 119 N. W. 752.

Evidence need not be uncontradicted. Levy *v.* Gilligan (Pa.), 90 A. 647.

862-38 Case need not be sent to jury although evidence is conflicting. Augustine *v.* Wolf, 215 Pa. 558, 64 A. 777.

862-39 Arizona, etc. Co. *v.* Benton, 12 Ariz. 373, 100 P. 952 (or oral testimony); International Assn. *v.* Stark, 44 Ind. App. 535, 89 N. E. 611 (allegations taken to be true if not denied); Chubbuck *v.* Beaty, 80 Kan. 789, 104 P. 558 (registry receipt attached to affidavit as exhibit and verified deposition are affidavits).

862-42 Arizona, etc. Co. *v.* Benton, 12 Ariz. 373, 100 P. 952.

Other competent evidence, admissible. Chubbuck *v.* Beaty, 80 Kan. 789, 104 P. 558.

863-44 Briggs *v.* R. Co., 175 Ala. 130, 57 S. 882.

863-45 Edmunds *v.* Inman, 24 S. D. 457, 124 N. W. 430 (records, minutes or memoranda); Trotti *v.* Kinnear (Tex. Civ.), 144 S. W. 326.

863-46 Bench notes of judge.—The mere fact that the bench notes made by the judge do not mention the pleadings in question does not furnish record evidence that no such action was taken as set out in the minutes, for the reason that there is no law requiring the judge to make bench notes, and the minutes of the court, and not the bench notes, constitute the record of the case. Nor does the fact that the previous judgment appears on the loose leaves of the minutes furnish any such record evidence, for, without the aid of parol testimony, it shows that it was erased, which is presumed to be the act of the court. Briggs *v.* R. Co., 175 Ala. 130, 57 S. 882.

864-48 Cadillac A. Co. *v.* Boynton, 240 Ill. 171, 88 N. E. 564; Steves *v.* Smith (Tex. Civ.), 107 S. W. 141.

865 The burden of proof is on a judgment plaintiff suing for his assignee to prove the assignment as well as to establish his case. Flynn *v.* Howard (Mass.), 105 N. E. 880.

865-52 Evans *v.* Woodsworth, 213 Ill. 404, 72 N. E. 1082. See Davis *v.* Rhea, 90 Ark. 261, 119 S. W. 271; Mahoney *v.* Ins. Co., 133 Ia. 570, 110 N. W. 1041.

Must be shown beyond reasonable doubt.—Boring *v.* Ott, 138 Wis. 260, 119 N. W. 865.

Only extrinsic and collateral fraud can be proved. Mengel *v.* Mengel, 145 Ia. 737, 120 N. W. 72; French *v.* Raymond, 82 Vt. 156, 72 A. 324.

Affirmative proof by plaintiff of due diligence at former trial, necessary. Citizens Ins. Co. *v.* Herpolsheimer, 78 Neb. 707, 111 N. W. 606; Engler *v.* Knoblaugh, 131 Mo. App. 481, 110 S. W. 16.

865-53 McCarthy *v.* Troll, 90 Ark. 199, 118 S. W. 416.

867-65 Whitman *v.* Hitt, 75 Ark. 461, 87 S. W. 1032.

867-66 See Gottlieb *v.* Co., 87 App. Div. 380, 84 N. Y. S. 413, 181 N. Y. 563, 74 N. E. 1117.

867-67 Easterwood *v.* Burnitt (Tex. Civ.), 126 S. W. 934.

867-68 Putnam *v.* Kiffen, (Can.) 11 West. L. Rep. 559 (proceedings in garnishment or sale under execution, but prima facie evidence of payment); Hagins *v.* Blitch, 6 Ga. App. 839, 65 S. E. 1082.

Note by stranger, not payment unless so agreed. Sullivan *v.* Saunders, 66 W. Va. 350, 66 S. E. 497.

Entry in attorney's register does not show payment within fixed time if no year given. McLain *v.* Bird, 120 N. Y. S. 1032.

868-69 Janvier *v.* Culbreth, 5 Penne. (Del.) 505, 63 A. 309.

JUDICIAL NOTICE

Geological formation, 890-47; *Uses of common tools,* 890-47; *City in sister state incorporated and county seat,* 891-51; *Deadly character of weapon,* 893-57; *Financial status of persons or counties,* 893-57; *Value of commodities,* 906-25; *Existence of telegraph companies,* 945-

82; *Location of town with reference to railroads,* 1017-39; *City Park,* 1020-57.

879-1 Timson *v.* Co., 220 Mo. 580, 119 S. W. 565, rule of evidence; rebuttable if facts disputable.

Is of equal force with proof, and as a means of establishing facts makes evidence unnecessary. Beardsley *v.* Irving, 81 Conn. 489, 71 A. 580.

880-5 Ball *v.* Flora, 26 App. Cas. (D. C.) 394.

881-10 City of St. Louis *v.* Niehaus, 236 Mo. 8, 139 S. W. 450.

882-11 Appeal of Woodward, 81 Conn. 152, 70 A. 453. *Contra,* Lownsdale *v.* Co., 54 Wash. 542, 103 P. 833.

Federal supreme court, on appeal from state court, will not notice laws of other states except to extent court below would. See vol. 5, p. 812, n. 16.

Matters which cannot be noticed by trial court may not be noticed by appellate court in reviewing judgment. Lownsdale *v.* Co., 54 Wash. 542, 103 P. 833; Pacific I. & S. Wks. *v.* Gaerig, 55 Wash. 149, 104 P. 151.

882-14 Miller *v.* Miller (Ind. App.), 104 N. E. 588.

883-15 Facts outside record may be noticed if they disclose moot character of question presented. Keely *v.* Co., 169 Fed. 601, 95 C. C. A. 99.

883-16 *Contra,* P. *v.* Blair (Mich.), 108 N. W. 772.

883-17 Rome R. & L. Co. *v.* Keel, 3 Ga. App. 769, 60 S. E. 468 (where alleged fact contrary to laws of physics. See infra, 893-61. See S. *v.* Co., 52 Or. 502, 95 P. 722. *Contra,* P. *v.* R. Co. 145 Mich. 140, 108 N. W. 772, *foll.* Griffing *v.* Gibb, 2 Black (U. S.) 519. See Tutwiler, etc. Co. *v.* Farrington, 144 Ala. 157, 39 S. 898; Smith *v.* Lodge, 124 Mo. App. 181, 101 S. W. 662 (court cannot notice A. O. U. W. is fraternal insurance society; where allegation to this effect denied by allegation it is an old line company). *Comp.* S. *v.* Norcross, 132 Wis. 534, 112 N. W. 40.

883-19 Line *v.* Line, 119 Md. 403, 86 A. 1032.

884-22 Utah N. Co. *v.* Marsh, 46 Colo. 211, 103 P. 302; Jackson *v.* S. (Tex. Cr.), 157 S. W. 1196. See Rome R. & L. Co. *v.* Keel, 3 Ga. App. 769, 60 S. E. 468.

"It may be **helpful to the court,** in enabling it to determine the weight of the evidence, to take such matters into consideration; but in no case, as we believe, and certaintly not where the testimony is uncontroverted, is the court authorized to render judgment against the evidence, based solely upon its knowledge of the persons and conditions of litigants or witnesses or situations." Hall *v.* Whipple (Tex. Civ.), 145 S. W. 308.

885-27 Paterson *v.* Co., 74 N. J. Eq. 49, 70 A. 472. See Harris *v.* R. Co., 153 Ala. 139, 44 S. 962, 14 L. R. A. (N. S.) 261.

886-31 Warnock *v.* Itawis, 38 Wash. 144, 80 P. 297.

887-36 Long *v.* S., 94 Ark. 570, 127 S. W. 961; Greenway *v.* County, 144 Ia. 332, 122 N. W. 943; Hillerbrand *v.* Co., 141 Mo. App. 122, 121 S. W. 326; Waters-P. Co. *v.* Deselms, 18 Okla. 107, 89 P. 212; McClintock *v.* R. Co., 83 S. C. 58, 64 S. E. 1009. See Hoagland *v.* Canfield, 160 Fed. 146; Moran *v.* R. Co., 74 N. H. 500, 69 A. 884.

Value of attorney's services in one state cannot be noticed by jury in distant state. S. *v.* Flarsheim, 137 Mo. App. 1, 119 S. W. 17.

Distance sparks and cinders may be blown must be proved. Manning *v.* R. Co., 137 Mo. App. 631, 119 S. W. 464.

887-38 Houston, etc. R. Co. *v.* Maxwell (Tex. Civ.), 128 S. W. 160.

888-41 Green *v.* S., 91 Ark. 510, 121 S. W. 727; Levy *v.* Lupton (Tex. Civ.), 156 S. W. 362.

889-42 Loveman *v.* R. Co., 149 Ala. 515, 43 S. 411. *Contra,* Davis *v.* R. Co., 136 N. C. 115, 48 S. E. 591; Deans *v.* R. Co., 107 N. C. 686, 12 S. E. 77, 22 Am. St. 902; Lloyd *v.* R. Co., 118 N. C. 1010, 24 S. E. 805, 54 Am. St. 764.

Value of physician's services may be determined from juror's knowledge. Moran *v.* R. Co., 74 N. H. 500, 69 A. 884.

Distance in which train can be stopped. See infra, 942-63.

889-43 But see Harris *v.* R. Co., 153 Ala. 139, 44 S. 962, 14 L. R. A. (N. S.) 261.

889-44 P. *v.* Price, 9 Cal. App. 218, 98 P. 547 (weight of witness). But see Vannest *v.* Murphy, 135 Ia. 123, 112 N. W. 236; Morehead *v.* Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Galveston, etc. R. Co. *v.* Pigott, 54 Tex. Civ. 367, 116 S. W. 841.

890-45 Long *v.* S., 94 Ark. 570, 127 S. W. 961; Louisville *v.* Tompkins (Ky.), 122 S. W. 174 (extent of impairment of earning capacity of woman as housekeeper); Hillerbrand *v.* Co.,

141 Mo. App. 122, 121 S. W. 326. See Waters-P. O. Co. *v.* Deselms, 18 Okla. 107, 89 P. 212.

890-46 Value of services may be found on judgment of jury if their character is shown. Hall *v.* Assn., 53 Tex. Civ. 592, 116 S. W. 831, *disap.* Sayers *v.* Craven, 107 Mo. App. 407, 81 S. W. 473; Bradner *v.* Co., 115 Mo. App. 102, 91 S. W. 997, because conflicting with Hull *v.* St. Louis, 138 Mo. 618, 40 S. W. 89, 42 L. R. A. 753.

890-47 Murphy *v.* P., 225 U. S. 623, 32 Sup. Ct. 697, 56 L. ed. 1229 (keeping billiard hall has harmful tendency); Card *v.* C. Co., 202 Fed. 351; Eagle White Lead Co. *v.* Commission, 188 Fed. 256; Hooker *v.* Commission, 188 Fed. 242; Shawnee Milling Co. *v.* Temple, 179 Fed. 517; Hoagland *v.* Canfield, 160 Fed. 146; Central, etc. Co. *v.* Conneaut, 167 Fed. 274, 93 C. C. A. 196; Cent. of G. R. Co. *v.* Crane (Ala. App.), 65 S. 866; Metropolitan L. I. Co. *v.* Goodman (Ala. App.), 65 S. 449; Vinegar, etc. Co. *v.* Howard (Ala.), 65 S. 172; Empire Imp. Co. *v.* Lynch (Ala.), 62 S. 16; Sanders *v.* S., 2 Ala. App. 13, 56 S. 69; Heno *v.* Fayetteville, 90 Ark. 292, 119 S. W. 287; Grogan *v.* Chaffee, 156 Cal. 611, 105 P. 745; Ex parte Berry, 147 Cal. 523, 82 P. 44; Re Excelsior S. Co., 40 App. Cas. (D. C.) 480 (organization known as boy scouts); Dennehy *v.* Robertson, 32 App. Cas. (D. C.) 355; Capital Co. *v.* Brown, 29 App. Cas. (D. C.) 473; Peninsular Tel. Co. *v.* Measkill, 64 Fla. 420, 60 S. 338 (telephone as protection from lightning); S. *v.* R. Co., 48 Fla. 114, 37 S. 652; Wolfe *v.* R. Co., 2 Ga. App. 499, 58 S. E. 899; Dunbar *v.* Dunbar, 168 Ill. App. 142; Lehigh Portland Cement Co. *v.* McLean, 245 Ill. App. 360, 92 N. E. 248; *aff.* Hill Lumb. Co. *v.* Same, 149 Ill. App. 368; City of Williams, 254 Ill. 360, 98 N. E. 666; Chicago *v.* Duffy, 117 Ill. App. 261, 277; Wabash R. Co. *v.* Thomas, 117 Ill. App. 110; Madden *v.* Wilcox, 174 Ind. 657, 91 N. E. 933; U. S. B. & P. Co. *v.* S., 174 Ind. 460, 91 N. E. 953; Princeton, etc. Co. *v.* Howell, 46 Ind. App. 572, 92 N. E. 122; Chapman *v.* Newell, 146 Ia. 415, 125 N. W. 324; Cardwell *v.* R. Co., 90 Kan. 707, 136 P. 244; Cheek *v.* R. Co., 89 Kan. 247, 131 P. 617 (inflammable gases accumulate in mines); Sun Ins. Off. *v.* Woolen Mill, 72 Kan. 41, 82 P. 513; Mays *v.* Pelly (Ky.), 125 S. W. 713 (increase in value of land); S. *v.* Lundy, 131 La. 910, 60 S. 613 (parish under water from Mississippi); Blaisdell *v.* Town, 110 Me. 500, 87 A. 361; Dawson *v.* Elec. Co., 119 Md. 373, 86 A. 1041; Aetna I. Co. *v.* Fuller, 111 Md. 321, 74 A. 369; P. *v.* Barnes (Mich.), 148 N. W. 400 (ability to change speed of automobile); Sassaman *v.* Wells (Mich.), 144 N. W. 478; Colborne *v.* R. Co., 177 Mich. 139, 143 N. W. 32 (automobile); Oblaser *v.* Judge, 159 Mich. 665, 124 N. W. 590; Prewitt *v.* S. (Miss.), 63 S. 330 (insanity is hereditary); Couch *v.* R. Co., 252 Mo. 34, 158 S. W. 347; Walsh *v.* Pub. Co., 250 Mo. 142, 157 S. W. 326; Ver Steeg *v.* R. Co., 250 Mo. 61, 156 S. W. 689; Sessinghaus Mill Co. *v.* Hanelbrink, 247 Mo. 212, 152 S. W. 354 (special skill required to manage manufacturing plant); S. *v.* Holtcamp, 245 Mo. 655, 151 S. W. 153; Moler *v.* Whisman, 243 Mo. 571, 147 S. W. 985; S. *v.* Gordon, 236 Mo. 142, 139 S. W. 403; Home Tel. Co. *v.* Tel. Co., 236 Mo. 114, 139 S. W. 108; S. *v.* Breuer, 235 Mo. 240, 138 S. W. 515; Bowman *v.* Co., 226 Mo. 53, 125 S. W. 1120; Patenaude *v.* R. Co. (N. H.), 87 A. 249; Connett *v.* Hatters, 76 N. J. Eq. 202, 74 A. 188; P. *v.* Becker, 210 N. Y. 274, 104 N. E. 396; Pollitz *v.* R. Co., 207 N. Y. 113, 100 N. E. 721; P. *v.* Ringe, 197 N. Y. 143, 90 N. E. 451; Town of Ridgeway *v.* Treman, 129 N. Y. S. 1081; P. *v.* Stevens, 67 Misc. 529, 124 N. Y. S. 769; P. *v.* State Bd., 123 N. Y. S. 609; In re Petition, etc., 31 O. C. C. 54; First Nat. Bk. *v.* Rogers, 24 Okla. 357, 103 P. 582; Henry *v.* S. (Okla. Cr.), 136 P. 982 (governor's opposition to legal executions); S. *v.* Laurence, 9 Okla. Cr. 16, 130 P. 508; Buchanan *v.* Hicks Co., 66 Or. 503, 133 P. 780, 134 P. 1191 (necessity of a guard on a hand saw); Bagley E. Co. *v.* Butler, 24 S. D. 429, 123 N. W. 866 (disregard of law concerning full value assessments); Texas Co. *v.* Earles (Tex. Civ.), 164 S. W. 28; Ex parte Bradshaw (Tex. Cr.), 159 S. W. 259; Ex parte Botts (Tex. Cr.), 154 S. W. 22; Vance *v.* R. Co. (Tex. Civ.), 152 S. W. 743 (that thistle is a nuisance); Brownwood O. M. *v.* Stubblefield, 53 Tex. Civ. 165, 115 S. W. 626 (extent of use of cogwheels); San Antonio, etc. R. Co. *v.* Mertuik (Tex. Civ.), 102 S. W. 153; Charvoz *v.* Salt Lake City (Utah), 131 P. 901 (thousands of miles of irrigation ditches); Rugg *v.* Tolman, 39 Utah 295, 117 P. 54; Daly *v.* Old,

35 Utah 74, 99 P. 460; Ex parte Settle, 114 Va. 715, 77 S. E. 496; Southern R. Co. *v.* Blanford, 105 Va. 373, 54 S. E. 1; Dougan *v.* Seattle, 76 Wash. 621, 136 P. 1165; Rood *v.* Co., 55 Wash. 217, 104 P. 249.

See Null *v.* Williamson, 166 Ind. 537, 78 N. E. 76; Meehan *v.* R. Co., 43 Mont. 72, 114 P. 781; Wood *v.* Sherwood, 161 App. Div. 335, 146 N. Y. S. 465; Jones *v.* Fowler, 161 N. C. 354, 77 S. E. 415. See Romano *v.* P. Co. (Ala.), 62 S. 677.

That use of tobacco is uncleanly.—S. *v.* Olson, 26 N. D. 304, 144 N. W. 661.

That school boy can use snuff without being detected. S. *v.* Olson, 26 N. D. 304, 144 N. W. 661.

Such matters of common knowledge and science as are known to all men of ordinary understanding and intelligence. Angola R. & Power Co. *v.* Butz (Ind.), 98 N. E. 818.

The every-day experience of mankind. S. *v.* R. Co., 242 Mo. 339, 147 S. W. 118.

"In the bill the land in controversy is described as S. W. ¼ of the S. W. ¼ of section 28, township 17 S., range 4 W., and N. W. ¼ of N. W. ¼ of section 29, township 17 S., range 6 W., situated in Jefferson county, Ala. The court judicially knows that here are two separate tracts." Rucker *v.* R. Co. (Ala.), 58 S. 465.

"**Judicial notice** is taken of the different geological strata of coal in each county and of many other facts connected with coal mines and their operation. State *v.* Barrett, 87 N. E. 7. This court knows without being told a detached stone 7½ feet long, 3 feet wide, and 18 inches thick, situated in the roof of an entry to a coal mine, can be 'carefully secured or taken down.'" Princeton Coal Min. Co. *v.* Howell, 46 Ind. App. 572, 92 N. E. 122.

Courts will take judicial notice of the fact that certain structures maintained in the public streets of a city will attract children. Buttron *v.* Bridell, 228 Mo. 622, 129 S. W. 12.

Well-known geological formation underlying Chicago, noticed in Chicago *v.* Duffy, 117 Ill. App. 261.

What cigarettes are, noticed in Kappes *v.* Chicago, 119 Ill. App. 436.

Uses of common universal tools noticed, and that scythe is a proper tool to mow weeds. Post *v.* R. Co., 121 Mo. App. 562, 97 S. W. 233.

Danger connected with freight elevator in control of boy of fourteen, noticed. Braasch *v.* Co., 153 Mich. 652, 118 N. W. 366.

891-48 See Harper F. Co. *v.* Co., 144 N. C. 639, 57 S. E. 458.

Anything that the court may take judicial notice of must be something which, from its nature, is or should be known to all men of ordinary understanding and intelligence, and such men the jury must be deemed to be. Ruehl *v.* Tel. Co., 23 N. D. 6, 135 N. W. 793.

Knowledge of a class of men in a particular business must be proved. Bowman *v.* Co., 226 Mo. 53, 125 S. W. 1120.

891-49 Heno *v.* Fayetteville, 90 Ark. 292, 119 S. W. 287.

891-51 City in sister state incorporated and county seat, noticed. Phillips *v.* Lindley, 112 App. Div. 283, 98 N. Y. S. 423, 188 N. Y. 606, 81 N. E. 1173.

Courts will extend the scope of judicial knowledge so as to keep proper pace with the rapid advance of art, science, and general knowledge, when the facts are of such an age and duration as to have become a part of the common knowledge of well-informed persons. Moreno *v.* S., 64 Tex. Cr. 660, 143 S. W. 156, cit. many cases.

892-52 See Auten *v.* Board, 83 Ark. 431, 104 S. W. 130.

892-54 Am. S. P. Co. *v.* Co., 157 Fed. 660, 87 C. C. A. 260; P. *v.* Board, 122 Ill. App. 40; Timson *v.* Co., 220 Mo. 580, 119 S. W. 565, *quot.* the text. See Dunphy *v.* Co., 118 Mo. App. 506, 523, 95 S. W. 301.

892-55 Carr *v.* Fair, 92 Ark. 359, 122 S. W. 659; Washington Terminal Co. *v.* Dist., 36 App. Cas. (D. C.) 186. See Smith *v.* Lodge, 124 Mo. App. 181, 101 S. W. 662; St. Louis S. R. Co. *v.* McIntosh (Tex. Civ.), 126 S. W. 692; S. *v.* Norcross, 132 Wis. 534, 112 N. W. 40.

The court cannot take judicial notice that there is a "distillery, or brewery, in this state, that confines itself, in respect of the raw material it uses, to the produce of this state, or even that it uses any such raw material of the produce of the state." Motlow *v.* S., 125 Tenn. 547, 145 S. W. 177.

Individual's place of residence, not noticed. Slocum *v.* McLaren, 106 Minn. 386, 119 N. W. 406.

892-56 Fountain *v.* Ins. Co. (Cal.), 117 P. 630; St. Paul's Parish *v.* East St. Louis, 245 Ill. 470, 92 N. E. 322; Windfall *v.* S., 172 Ind. 302, 88 N. E. 505 (that publication a newspaper, has

any circulation, or place of publication); Ruthstrom *v.* Peterson, 72 Kan. 679, 83 P. 825; Ehrsam *v.* Jackman, 73 Kan. 435, 446, 85 P. 559, 91 P. 486 (how much flour may be extracted from different grades of wheat); In re Harrington's Will, 142 Wis. 447, 125 N. W. 986. See Guinn *v.* Court, 28 Ky. L. R. 759, 90 S. W. 274; S. *v.* Club (Mo.), 92 S. W. 185. Turpentine industry and effect of cutting and boxing trees. Board *v.* Co., 93 Miss. 822, 47 S. 177.

Meaning of anything in a foreign language not noticed. Hossbach *v.* Behr, 124 N. Y. S. 379.

893-57 Thomas *v.* Hotel Co., 16 Cal. App. 403, 117 P. 1041; Burns *v.* Casey, 13 Cal. App. 154, 109 P. 94; Hohn *v.* Pauly, 11 Cal. App. 724, 106 P. 266 (manner in which houses built and used in county); Burton *v.* Chicago, 236 Ill. 383, 86 N. E. 93 (alleys not provided with sidewalks); Jefferson Davis County *v.* Long, 94 Miss. 538, 49 S. 613 (extent of damage to trees by extracting turpentine); Newlin *v.* R. Co., 222 Mo. 375, 121 S. W. 125; St. Louis *v.* Co., 202 Mo. 690, 100 S. W. 627; Gordon *v.* R. Co., 39 Mont. 571, 104 P. 679; Robinson *v.* Ins. Co., 198 N. Y. 523, 91 N. E. 373; Villa *v.* Allen, 2 Phil. Isl. 436; St. Louis S. R. Co. *v.* McIntosh (Tex. Civ.), 126 S. W. 692; Capito *v.* Topping, 65 W. Va. 587, 64 S. E. 845.

See Ward *v.* S. (Ala.), 39 S. 923 (condition of county roads); Texas, etc. R. Co. *v.* Langham (Tex. Civ.), 95 S. W. 686.

Condition of real estate market.—Blixt *v.* Realty Co., 122 N. Y. S. 861.

Cannot take judicial notice of the fact that pneumonia develops within 24 or 48 hours after exposure. Gillespie *v.* R. Co., 144 Mo. App. 508, 129 S. W. 277.

Not how much time would be required to teach the average student to satisfactorily perform all the work required of a public barber in such a manner as to prevent the spread of disease. Moler *v.* Whisman, 243 Mo. 571, 147 S. W. 985.

"Caunot say, as a matter of law or as a matter of fact, in the absence of an affirmative showing that there was any material difference between the cost of crushing rock and that of 'selected earth material,' that any such difference existed or would exist." Burns *v.* Casey, 13 Cal. App. 154, 109 P. 94.

Court does not know an ax is a deadly weapon.—Bush *v.* S., 52 Tex. Cr. 398, 107 S. W. 348.

Financial status of persons or countries. Financial condition of litigants, as to their solvency or insolvency, is not a matter for notice even though they may be large corporations engaged in supplying public necessities. S. *v.* Clements, 37 Mont. 96, 95 P. 845; and same is true as to foreign countries; court does not know market value of their bonds. Hebblethwaite *v.* Flint, 115 App. Div. 597, 101 N. Y. S. 43.

893-58 Chicago, etc. R. Co. *v.* Salem, 166 Ind. 71, 76 N. E. 631; Reineman *v.* Larkin, 222 Mo. 156, 121 S. W. 307; Jackson *v.* S. (Tex. Cr.), 157 S. W. 1196; Pierce *v.* S. (Tex. Cr.), 154 S. W. 559; Vance *v.* R. Co. (Tex. Civ.), 152 S. W. 743.

893-59 Allen *v.* Co., 178 Fed. 287; Timson *v.* Co., 220 Mo. 580, 119 S. W. 565; S. *v.* Brooks, 58 Wash. 648, 109 P. 211.

893-60 See Kohr *v.* R. Co., 117 Mo. App. 302, 92 S. W. 1145; Norwich Ins. Soc. *v.* R. Co., 46 Or. 123, 78 P. 1025.

893-61 Princeton, etc. Co. *v.* Howell, 46 Ind. App. 572, 92 N. E. 122; Sun Ins. Off. *v.* Mill, 72 Kan. 41, 82 P. 513 (recognized scientific facts and principles); Miller *v.* Detroit, 156 Mich. 630, 121 N. W. 490 (shedding limbs of trees); Whitman *v.* Co., 152 Mich. 645, 116 N. W. 614 (when specific gravity of log becomes greater than water it sinks); Dunphy *v.* Yards, 118 Mo. App. 506, 523, 95 S. W. 301 (court should be careful not to assume knowledge of natural facts and laws beyond scope of common positive knowledge); P. *v.* Farina, 134 App. Div. 110, 118 N. Y. S. 817 (period of human gestation); Morton *v.* R. Co., 48 Or. 444, 87 P. 151, 1046; Doty *v.* Village, 84 Vt. 15, 77 A. 866.

See Scufferle *v.* Macfarland, 28 App. Cas. (D. C.) 94.

Course of the heavenly bodies.—Fuller *v.* R. Co., 164 Ill. App. 385.

Gravity and friction—operation of railway.—*Contra.* Rome R. & L. Co. *v.* Keel, 3 Ga. App. 769, 60 S. E. 468.

What tides noticed.—Eichelberger *v.* Co., 9 Cal. App. 628, 100 P. 117.

894-62 Barber, etc. Co. *v.* Wabash, 43 Ind. App. 167, 86 N. E. 1034; Day's Com. *v.* Bk. (Ky.), 116 S. W. 259; Putnam *v.* R. Co., 43 Tex. Civ. 448, 94 S.

W. 1102 (no fruit growing on Jan. 10th).

894-63 Middlesex T. Co. *v.* R. Co. (N. J.), 89 A. 45; First Nat. Bk. *v.* Rogers, 24 Okla. 357, 103 P. 582; McCullough *v.* Rucker, 53 Tex. Civ. 89, 115 S. W. 323.

895-65 Matagorda C. Co. *v.* Irr. Co. (Tex. Civ.), 154 S. W. 1176.

896-67 See Scarborough *v.* Woodill, 7 Cal. App. 39, 93 P. 383 (infra, 906-27).

Will take judicial notice of the great drought during a certain summer and fall, and the great danger to life and property from extensive forest fires. Inglis *v.* Assn., 169 Mich. 311, 136 N. W. 443.

896-68 But see South Pasadena *v.* Co., 152 Cal. 579, 93 P. 490 (noticing that cities are located in a comparatively arid region where there is little if any water not applied to some valuable use and that water sources in their vicinity command a high price); Elser *v.* Gross Point, 223 Ill. 230, 79 N. E. 27.

Cannot take judicial notice of the presence of clouds in the sky at a given time. S. *v.* Howard, 242 Mo. 432, 147 S. W. 95.

896-69 S. *v.* Williams, 31 Nev. 360, 102 P. 974.

896-70 See Orvik *v.* Casselman, 15 N. D. 34, 105 N. W. 1105 (infra, 927-28); Salt Lake City *v.* Robinson, 39 Utah 260, 116 P. 442.

896-71 Beardsley *v.* Irving, 81 Conn. 489, 71 A. 580; Williams *v.* Allison, 10 Ga. App. 840, 74 S. E. 442; Line *v.* Line, 119 Md. 403, 86 A. 1032; Meriwether *v.* Overly, 228 Mo. 218, 129 S. W. 1; McAllister *v.* S., 55 Tex. Cr. 264, 116 S. W. 582.

897-72 Line *v.* Line, 119 Md. 403, 86 A. 1032.

See Garth *v.* Motter, 248 Mo. 477, 154 S. W. 733.

897-75 Beardsley *v.* Irving, 81 Conn. 489, 71 A. 580; Falkeneau C. Co. *v.* Ginley, 131 Ill. App. 399 (that considerable light would shine through a large opening from the street two hours before sunset); Dayton, etc. Co. *v.* Marshall, 36 Ind. App. 491, 75 N. E. 824; Moore *v.* R. Co., 151 Ia. 353, 131 N. W. 30; Warner *v.* R. Co., 156 Mo. App. 523, 137 S. W. 275.

897-77 Lakin *v.* El. R. Co., 148 Ill. App. 268; Miller *v.* R. Co., 106 Minn. 499, 119 N. W. 218; S. *v.* Gunderson, 56 Wash. 672, 106 P. 194 (converse of rule of text).

898-78 Kyser *v.* Hertzler (Ala.), 65 S. 967; Whittemore *v.* Baxter (Mich.), 148 N. W. 437; Sweezo *v.* Power Co., 166 Mich. 25, 131 N. W. 125; Laine *v.* E. Co., 123 Minn. 254, 143 N. W. 783; Whitaker *v.* R. Co., 115 Minn. 140, 131 N. W. 1061; Meehan *v.* P. Co., 252 Mo. 609, 161 S. W. 825; S. *v.* Nerzinger, 220 Mo. 36, 119 S. W. 379 (sulphuric acid); Buckley *v.* Co., 127 App. Div. 52, 111 N. Y. S. 23 (explosion of bottles); Peterson *v.* Co., 55 Or. 511, 106 P. 337; Solleim *v.* Norbeck (S. D.), 147 N. W. 266; Hamburg-Bremen, etc. Co. *v.* Swift (Tex. Civ.), 130 S. W. 670 (inflammability of hay); Texas, etc. R. Co *v.* Bellar, 51 Tex. Civ. 154, 112 S. W. 323 (inflammability of crude petroleum).

Three per cent. butter fat test for milk, not unreasonably high. St. Louis *v.* Co., 190 Mo. 507, 89 S. W. 627. *Comp.* St. Louis *v.* Liessing, 190 Mo. 464, 89 S. W. 611.

That formaldehyde placed in milk as a preservative is not injurious, cannot be noticed. St. Louis *v.* Schuler, 190 Mo. 524, 89 S. W. 621.

Electricity; dangerous qualities noticed. Warren *v.* R. Co., 141 Mich. 298, 104 N. W. 613; DeKallands *v.* Co., 153 Mich. 25, 116 N. W. 564.

That kerosene is a product of crude petroleum.—Moeckel *v.* Co., 190 Mass. 280, 76 N. E. 447.

Explosives.—Chicago *v.* Murdock, 212 Ill. 9, 72 N. E. 46 (dynamite as explosive, dangerous); American Fork City *v.* Briggs (Utah), 134 P. 747 (same).

Rough on rats is not known to contain arsenic, nor does court know name is everywhere applied to same substance. S. *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634.

Dangerous character of shotgun when fired at close range. S. *v.* Sutterfield, 22 S. D. 584, 119 N. W. 548.

898-79 Chicago *v.* Gage, 237 Ill. 328, 86 N. E. 633; S. *v.* Intoxicating Liquors, 106 Me. 142, 76 A. 267. See S. *v.* Bowen, 247 Mo. 584, 153 S. W. 1033.

899-80 Et seq. See "Intoxicating Liquors," supra, 675-2 to 678-31.

899-81 But "hop-ale" or "hop-jack," not known to be malt liquor. Daniel *v.* S., 149 Ala. 44, 43 S. 22.

899-84 Gourley *v.* C., 140 Ky. 221, 131 S. W. 34.

899-85 See S. *v.* Barr, 84 Vt. 38, 77 A. 914, 48 L. R. A. (N. S.) 302 n.

899-86 Purcell *v.* S., 61 Fla. 43, 55 S. 847; Fears *v.* S., 125 Ga. 740, 54 S. E. 661; Benton *v.* S., 9 Ga. App. 422, 71 S. E. 498; Tompkins *v.* S., 2 Ga. App. 639, 58 S. E. 1111; S. *v.* York, 74 N. H. 125, 65 A. 685; Wilcoxson *v.* S. (Tex. Cr.), 91 S. W. 581. See S. *v.* Barr, 84 Vt. 38, 77 A. 914, 48 L. R. A. (N. S.) 302, 303 n.

900-87 Hoagland *v.* Canfield, 160 Fed. 146. See S. *v.* Barr, 84 Vt. 38, 77 A. 914, 48 L. R. A. (N. S.) 302, 305 n.

900-88 See S. *v.* Barr, 84 Vt. 38, 77 A. 914, 48 L. R. A. (N. S.) 302, 304 n.

900-91 Lambie *v.* S., 151 Ala. 86, 44 S. 51; Purcell *v.* S., 61 Fla. 43, 55 S. 847.

901-92 S. *v.* Carmody, 50 Or. 1, 91 P. 446, 1081, 12 L. R. A. (N. S.) 828. See Hoagland *v.* Canfield, 160 Fed. 146; Moreno *v.* S., 64 Tex. Cr. 660, 143 S. W. 156; White *v.* Manning (Tex. Civ.), 102 S. W. 1160.

901-93 Vines *v.* S., 19 Wyo. 255, 116 P. 1013.

901-94 Dallas B. *v.* Holmes, 51 Tex. Civ. 514, 112 S. W. 122.

901-2 See S. *v.* Barr, 84 Vt. 38, 77 A. 914, 48 L. R. A. (N. S.) 302, 306 n.

902-4 Nussbaum *v.* S., 54 Fla. 87, 44 S. 712; S. *v.* Piner, 141 N. C. 760, 53 S. E. 305. See Hall *v.* S., 122 Ga. 142, 50 S. E. 59; S. *v.* Barr, 84 Vt. 38, 77 A. 914, 48 L. R. A. (N. S.) 302, 305 n.

902-9 Union C. Co. *v.* Tel. Co., 163 Cal. 298, 125 P. 242; City of St. Louis *v.* Niehaus, 236 Mo. 8, 139 S. W. 450; Timson *v.* Co., 220 Mo. 580, 119 S. W. 565; San Antonio, etc. R. Co. *v.* Mertink (Tex. Civ.), 102 S. W. 153. See Laturen *v.* Co., 93 N. Y. S. 1035; Ex parte Hawley, 22 S. D. 23, 115 N. W. 93; infra, 908-34.

How far science has rendered safe that which was hitherto dangerous, not noticed. Jackson *v.* Butler, 249 Mo. 342, 155 S. W. 1071.

That scarlet fever is contagious or infectious. S. *v.* Rackowski, 86 Conn. 677, 86 A. 606.

Cause of disease in question not noticed. Poumeroule *v.* Cable Co., 167 Mo. App. 533, 152 S. W. 114.

Methods commonly employed by medical profession.—The autopsy was about ten days after the death of Myrtie Newton. We must assume that the organs had been in a preservative liquid since, for it is common knowledge of which we may take notice that such is the means employed by the medical profession. S. *v.* Pierce (Vt.), 88 A. 740.

Nature, operation and ordinary uses of telephones are facts of which courts will take notice. W. U. T. Co. *v.* Rowell, 153 Ala. 295, 45 S. 73; Wolfe *v.* R. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. 331, 3 L. R. A. 539.

903-10 Poumeroulie *v.* Tel. Co. (Mo. App), 165 S. W. 1174.

Milk test.—That a prescribed test is not a proper one, not noticed. St. Louis *v.* Co., 190 Mo. 507, 89 S. W. 627.

Electrical therapeutics.—The court has no knowledge as to the merits or efficacy of a device advertised to cure by thermal electricity, nor whether it is capable of producing an electric current. Macomber *v.* Board, 28 R. I. 3, 65 A. 263, 8 L. R. A. (N. S.) 585.

904-12 Baker *v.* Co., 146 Fed. 744, 77 C. C. A. 234; Am. Sulph. P. Co. *v.* Co., 157 Fed. 660, 87 C. C. A. 260 (only so far as it is a matter of common knowledge). See infra, "Patents," 625-43.

905-20 McDonald *v.* S., 2 Ga. App. 633, 58 S. E. 1067.

Court knows what a nickel is and its value. Barddell *v.* S., 144 Ala. 54, 39 S. 975; Sims *v.* S., 1 Ga. App. 776, 57 S. E. 1029 (also that a quarter is a twenty-five cent piece).

906-22 McDonald *v.* S., 2 Ga. App. 633, 58 S. E. 1067; Sims *v.* S., 64 Tex. Cr. 435, 142 S. W. 572. See infra, "Value," 425-2.

906-23 McDonald *v.* S., 2 Ga. App. 633, 58 S. E. 1067 (face value, presumptively commercial value). See Barddell *v.* S., 144 Ala. 54, 39 S. 975.

National bank notes part of currency of United States and their value, noticed. Joiner *v.* S., 124 Ga. 102, 52 S. E. 151. But see Goodman *v.* P., 228 Ill. 154, 160, 81 N. E. 830.

906-24 Czerney *v.* Haas, 129 N. Y. S. 537.

906-25 See Joiner *v.* S., 124 Ga. 102, 52 S. E. 151; Ector *v.* S., 120 Ga. 543, 48 S. E. 315.

In a prosecution for receiving stolen cotton, no allegation of its value being made, court could not notice cotton was a thing of value. Wright *v.* S., 1 Ga. App. 158, 57 S. E. 1050.

906-27 Ackerman *v.* Ellis, 81 N. J. L. 1, 79 A. 883; Higgins *v.* Torvick, 55 Or. 274, 106 P. 22. See Scarborough *v.* Woodill, 7 Cal. App. 39, 93 P. 383

(noticing flora and climatic conditions for purpose of determining whether certain trees on a boundary line were natural); International, etc. R. Co. *v.* Voss, 49 Tex. Civ. 566, 109 S. W. 984 (number of times Johnson grass goes to seed in a season, not noticed).

That trees and plants subject to destructive communicable diseases. Ex parte Hawley, 22 S. D. 23, 115 N. W. 93.

907-28 Gibson *v.* S., 7 Ga. App. 692, 67 S. E. 838; Ex parte Botts (Tex. Cr.), 154 S. W. 221. See McLean *v.* R. Co., 203 U. S. 38.

Not that certain disease affects certain organs. Stiles *v.* Hasler (Ind. App.), 104 N. E. 878.

Not the time within which disease develops. Gillespie *v.* R. Co., 144 Mo. App. 508, 129 S. W. 277.

907-29 See Sun Ins. Office *v.* Mill, 72 Kan. 41, 82 P. 513.

Texas fever.—See S. *v.* Asbell, 74 Kan. 397, 86 P. 457.

That horses frighten sometimes at unusual objects, known. Balt., etc. R. Co. *v.* Slaughter, 167 Ind. 330, 79 N. E. 186.

908-31 Williams *v.* R. Co. (Mo.), 165 S. W. 788; George *v.* R. Co., 225 Mo. 364, 125 S. W. 196 (varying capacities to judge of distances).

Difference between races.—Wolfe *v.* R. Co., 2 Ga. App. 499, 58 S. E. 899, negro and Caucasian.

908-32 Whether a mother can tell the difference between prematurely born and full-grown child, court has no knowledge. Bessemer, etc. Co. *v.* Doak, 152 Ala. 166, 44 S. 627, 12 L. R. A. (N. S.) 389.

908-34 Ritchi *v.* Wayman, 244 Ill. 509, 91 N. E. 695; Whitehead *v.* Whitehead, 84 Vt. 321, 79 A. 516. *Comp.* Macomber *v.* Board, 28 R. I. 3, 65 A. 263, 8 L. R. A. (N. S.) 585.

See, however, Cisco O. Mill *v.* Van Geem (Tex. Civ.), 166 S. W. 439.

"The courts take judicial notice that some diseases are spread by diseased persons coming in contact with those who are healthy, and that barbers on account of their very close contact with their customers may contract diseases or allow their tools or soaps to become contaminated by the virus or germs of diseases, and thereby communicate such diseases to their patrons, therefore a prima facie presumption arises that barbers should be able to determine whether or not those who apply to them for shaves are afflicted with contagious or infectious diseases, particularly diseases of the skin." Moler *v.* Whisman, 243 Mo. 571, 147 S. W. 985.

"We do not think that we would be at all justified in affirming that physical injury may not follow a shock caused alone by fright, though the incident occasioning the fright involved no contact with or touching of the person of the victim of the injury." Spearman *v.* McCrary, 4 Ala. App. 473, 58 S. 927.

Effect of morphine.—That 1-10 of a grain taken every four hours could not have a poisonous effect. Laturen *v.* Co., 93 N. Y. S. 1035.

That milk is necessary food for the young and the infirm and disease germs are disseminated through impure milk, and adulterated or diluted milk is not wholesome and nutritious. St. Louis *v.* Schuler, 190 Mo. 524, 535, 89 S. W. 621. *Comp.* St. Louis *v.* Co., 190 Mo. 507, 89 S. W. 621 (supra, 898-78); St. Louis *v.* Liessing, 190 Mo. 464, 89 S. W. 611.

Vaccination.—Auten *v.* Board, 83 Ark. 431, 104 S. W. 130. See also 892-52.

Sanitation.—Court's knowledge of sanitation is too limited to be opposed to that of law makers on matters as to which even the learned differ. Logan *v.* Childs, 51 Fla. 238, 41 S. 197.

909-36 S. *v.* Olson, 26 N. D. 304, 144 N. W. 661.

Effects of venereal disease not noticed. Empire Imp. Co. *v.* Lynch (Ala.), 62 S. 16.

909-37 Hoagland *v.* Canfield, 160 Fed. 146. See supra, "Credibility," 757-22.

909-39 But see Dunphy *v.* Stock Yards, 118 Mo. App. 506, 523, 95 S. W. 301.

That pain is suffered from severe injury.—Bolton *v.* Oviatt, 80 Vt. 362, 67 A. 881.

Cause of nervous condition, beyond judicial knowledge. St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 113.

909-41 See Wolfe *v.* R. Co., 2 Ga. App. 499, 58 S. E. 899.

909-42 Buttron *v.* Bridell, 228 Mo. 622, 129 S. W. 12; Waters-P. O. Co. *v.* Deselms, 18 Okla. 107, 89 P. 212 (common practice of lighting fires with coal oil); Prince *v.* Prince, 64 Wash. 552, 117 P. 255.

Mistakes in names, especially initials, frequently noticed. Shepherd *v.* Sartain (Ala.), 64 S. 57.

Not that strikers desire to murder.—S. *v.* Jones, 249 Mo. 80, 155 S. W. 33.

910-44 San Joaquin, etc. Co. *v.* Stevinson, 164 Cal. 221, 128 P. 924; De Paige *v.* Douglas, 234 Mo. 78, 136 S. W. 345; Bachia *v.* Havemeyer Pt., 77 Misc. 362, 136 N. Y. S. 435.

911-47 But see Somerville *v.* New York, 78 Misc. 203, 137 N. Y. S. 919, changing of coast line.

911-48 Ex parte Lair, 177 Fed. 789 (ports of entry for seagoing vessels); Sublette Ex. Bk. *v.* Fitzgerald, 168 Ill. App. 240; Worden *v.* Cole, 74 Kan. 226, 86 P. 464 (railways); Bower *v.* R. Co. (Neb.), 148 N. W. 148; Robinson *v.* Ins. Co., 198 N. Y. 523, 91 N. E. 373 (harbors within jurisdiction, it seems). Salient facts of geography of incorporated cities of state, noticed. Agnew *v.* City, 79 Neb. 603, 113 N. W. 236.

911-49 Fletcher *v.* Hickman, 165 Fed. 403, 91 C. C. A. 353; Harper F. Co. *v.* Co., 144 N. C. 639, 57 S. E. 458 (infra, 933-40).

911-50 Gaffney *v.* Sederberg, 114 Minn. 319, 131 N. W. 333; S. *v.* Nolegs, 40 Okla. 479, 139 P. 943; Vail *v.* McGuire, 50 Wash. 187, 96 P. 1042.

Rivers referred to in laws.—S. *v.* R. Co., 141 N. C. 846, 54 S. E. 294.

911-51 That a river is a tidal stream. McCarter *v.* Co., 70 N. J. Eq. 525, 61 A. 710.

That flow of small streams grows less year by year, noticed. Andrews *v.* Weckerman, 144 Mich. 199, 107 N. W. 870.

912-53 Weeks-T. P. Co. *v.* Mills, 64 Misc. 205, 118 N. Y. S. 1027.

912-55 Seufferle *v.* Macfarland, 28 App. Cas. (D. C.) 94.

913-56 See Chicago *v.* Kubler, 133 Ill. App. 520.

913-58 Harrison *v.* Fite, 148 Fed. 781, 78 C. C. A. 447; Pappenburg *v* S. (Ala.), 65 S. 418; P. *v.* Board, 122 Ill. App. 40; Terrell *v.* Paducah, 28 Ky. L. R. 1237, 92 S. W. 310 (Tennessee river); Heiberger *v.* Co., 133 Mo. App. 452, 113 S. W. 730; McKinney *v.* Northcutt, 114 Mo. App. 146, 89 S. W. 351 (all tidal waters and large rivers); S *v.* Nolegs, 40 Okla. 479, 139 P. 943; S. *v.* Norcross, 132 Wis. 534, 112 N. W. 40. *Comp.* Donnelly *v.* U. S., 228 U. S. 708, 33 Sup. Ct. 1024, 57 L. ed. 1035.

914-59 Harrison *v.* Fite, 148 Fed. 781, 78 C. C. A. 447. See P. *v.* Board, 122 Ill. App. 40, navigability of streams is a question of fact, proper for notice only in case of streams whose navigability is well known.

914-60 Pinney *v.* Powers (Ind.), 104 N. E. 857. But see S. *v.* Norcross, 132 Wis. 534, 112 N. W. 40; *dist.* S. *v.* Carpenter, 68 Wis. 165, 31 N. W. 730, 60 Am. Rep. 848.

914-62 See McKinney *v.* Northcutt, 114 Mo. App. 146, 89 S. W. 351.

915-63 McConnell *v.* Schultz, 23 Colo. App. 194, 128 P. 876. *Comp.* Gibson *v.* Austin, 23 Colo. App. 220, 128 P. 829. *Contra* as to important cities in country. Philadelphia, etc. R. Co. *v.* Diffendal, 109 Md. 494, 72 A. 193.

915-64 Naylor *v.* Adams, 15 Cal. App. 353, 114 P. 997.

915-65 See P. *v.* Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718 (that cities are only ten miles apart); Johnson *v* R. Co., 140 N. C. 574, 53 S. E. 362.

915-68 Blood *v.* Morrin, 140 Fed. 918 (that cities are more than one hundred miles apart); Harper F. Co. *v* Co., 144 N. C. 639, 57 S. E. 458 (infra, 933-40).

915-69 See Gibson *v.* Austin, 23 Colo. App. 220, 128 P. 859; Harper F. Co. *v.* Co., 144 N. C. 639, 57 S. E. 458 and infra, 933-40.

916-72 Rossmann *v.* Garnier (C. C. A.), 211 Fed. 401; Perkins *v.* Baker (Okla.), 137 P. 661; Alexander *v.* Garcia (Tex. Civ.), 168 S. W. 376; Flores *v.* Hovel (Tex. Civ.), 125 S. W. 606; Frank *v.* Gump, 104 Va. 306, 51 S. 358. See W. U. T. Co. *v.* Rowell, 153 Ala. 295, 45 S. 73; Frederick *v.* Goodbee, 120 La. 783, 45 S. 606; Cumberland T. Co. *v.* R. Co., 117 La. 199, 41 S. 492; Paterson *v.* Water Co., 74 N. J. Eq. 49, 70 A. 472.

917-73 Boer war—time it was in progress, noticed. Dowie *v.* Sutton, 227 Ill. 183, 81 N. E. 395.

917-75 Separation of church into branches, articles of separation and territory assigned to each branch. Malone *v.* Lacroix, 143 Ala. 657, 41 S. 734. See Goode *v.* McPherson, 51 Mo. 126.

917-76 Rossman *v.* Garnier, 211 Fed. 401 (C. C. A.); S. *v.* Wright, 251 Mo. 325, 158 S. W. 823; S. *v.* Kortjohn, 246 Mo. 34, 150 S. W. 1060. See S. *v.* Toole, 32 Mont. 4, 79 P. 403.

Political affiliation of governor and relative strength of political parties at

general election noticed. S. *v.* Wright, 251 Mo. 325, 158 S. W. 823.

917-77 Rossman *v.* Garnier, 211 Fed. 401 (C. C. A.); Kentucky, etc. Mfg. Co. *v.* Adams, 32 Ky. L. R. 823, 106 S. W. 1198.

917-79 Mayor *v.* Co. (N. J. Eq.), 70 A. 472 (when stated by counsel without objection and question determined in collateral actions); Sims *v.* Sealy, 53 Tex. Civ. 518, 116 S. W. 630.

918-81 Krouse *v.* Krouse, 48 Ind. App. 3, 95 N. E. 262; Childress *v.* R. Co., 141 Mo. App. 667, 126 S. W. 169.

918-83 Golden *v.* Murphy, 31 Nev. 395, 103 P. 394; Bailliere *v.* Co., 150 N. C. 627, 64 S. E. 754.

Salient facts of history of cities of state, noticed. Agnew *v.* City, 79 Neb. 603, 113 N. W. 236.

919-87 Foreign wars. See supra, 917-73.

919-88 Day *v.* Smith, 87 Miss. 395, 39 S. 526.

That the Civil War raged with fury in a certain section during lapse in the courts. Howell *v.* Sherwood, 242 Mo. 513, 147 S. W. 810.

919-89 Fielder *v.* Oil Co. (Tex. Civ.), 165 S. W. 48. Of dates on which principal battles fought. Ham *v.* S., 156 Ala. 645, 47 S. 126.

920-98 Day *v.* Smith, 87 Miss. 395, 39 S. 526, de facto government.

921-5 S. *v.* Drabelle (Mo.), 167 S. W. 1016; S. *v.* Roach (Mo.), 167 S. W. 1008; Wentworth *v.* McDonald, 78 Wash. 546, 139 P. 503.

922-11 Hay *v.* Tr. Co. (Ind.), 101 N. E. 651; Pittsburg, etc. R. Co. *v.* Sudhoff, 173 Ind. 314, 90 N. E. 467; Ruehl *v.* Tel. Co., 23 N. D. 6, 135 N. W. 793; Suell *v.* Jones, 49 Wash. 582, 96 P. 4. See infra, "Mortality Tables," 641-28. Admissible without preliminary proof since court notices their authenticity and reliability. Valente *v.* R. Co., 151 Cal. 534, 91 P. 481; Stephens *v.* Elliott, 36 Mont. 92, 92 P. 45.

922-13 P. *v.* Earl, 42 Colo. 238, 94 P. 294; Land *v.* S., 11 Ga. App. 761, 76 S. E. 78; S. *v.* Gross, 175 Ind. 597, 95 N. E. 117; S. *v.* Roach (Mo.), 167 S. W. 1008; S. *v.* Marshall (Mo. App.), 167 S. W. 1050; Short *v.* Morrison, 149 Mo. App. 372, 130 S. W. 78; Davidson *v.* Schmidt, 146 Mo. App. 358, 124 S. W. 552; Patterson *v.* Close, 55 N. J. L. 319, 86 A. 430; P. *v.* Bradley, 207 N. Y. 592, 101 N. E. 766; P. *v.* State Bd., 67 Misc. 474, 123 N. Y. S. 609; In re Board, 128 App. Div. 103, 112 N. Y. S. 619; S. *v.* Brooks, 58 Wash. 648, 109 P. 211; Times P. Co. *v.* Co., 51 Wash. 667, 99 P. 1040.

If constitution assigns cities of prescribed population to certain class, fact their population does not exceed designated number, noticed. Schwierman *v.* Highland Park, 130 Ky. 537, 113 S. W. 507.

922-14 Rossmann *v.* Garnier, 211 Fed. 401 (C. C. A.); U. S. *v.* Heinze, 161 Fed. 425 ("certify" as applied to bank checks); Ex parte Berry, 147 Cal. 523, 82 P. 44 (automobile); Brown *v.* Spreckels, 14 Haw. 399; Sun Ins. Office *v.* Mill, 72 Kan. 41, 82 P. 513; City of St. Louis *v.* Co., 235 Mo. 29, 138 S. W. 648; City of St. Louis *v.* Co., 235 Mo. 1, 138 S. W. 641; In re Gedney's Will, 142 N. Y. S. 157; Barron *v.* Bk. (Tex. Civ.), 138 S. W. 142. See McDonald *v.* S., 2 Ga. App. 633, 58 S. E. 1067 (greenback), and supra, 905-20.

Popular meaning of common words, noticed. Knight *v.* Co., 55 Fla. 301, 45 S. 1025 (that "dip" is popular name for crude pine gum as dipped up from places cut into trees to collect it for manufacture of turpentine and resin); S. *v.* Maloney, 115 La. 498, 39 S. 539 (pool room).

Hawaiian words.—Hawaiian courts notice "ordinary usual and well known meaning of Hawaiian words," and can consult authorities. John II *v.* Judd, 13 Haw. 319, 325.

923-15 Rossman *v.* Garnier, 211 Fed. 401 (C. C. A.); United States *v.* One Car Load, etc., 188 Fed. 453; S. *v.* Wilhite, 132 Ia. 226, 109 N. W. 730 (may receive in evidence standard works defining medical terms).

924-16 See Bond *v.* Kidd, 122 Ga. 812, 50 S. E. 934.

925-19 Bond *v.* Kidd, 122 Ga. 812, 50 S. E. 934.

Meaning of "rake off," noticed. C. *v.* Root, 15 Pa. Dist. 441.

925-21 Westerlund *v.* Min. Co., 203 Fed. 599, 121 C. C. A. 627. See S. *v.* Maloney, 115 La. 498, 39 S. 539.

925-22 Birmingham & A. R. Co. *v.* Maddox, 155 Ala. 292, 46 S. 780, *cit.* the text; Topeka *v.* Stevenson, 79 Kan. 394, 99 P. 589. *Contra*, of "10-10-04." Southwestern T. & T. Co. *v.* Owens (Tex. Civ.), 116 S. W. 89. See supra, "Abbreviations," 24-8.

"F. O. B."—Kilmer *v.* Co., 36 Ind. App. 568, 76 A. 271; Hurst *v.* Co., 73 Kan. 422, 85 P. 551; Vogt *v.* Schienebeck, 122 Wis. 491, 100 N. W. 820, 106 Am. St. 989, 67 L. R. A. 756.

"R. L. D." as used in records of U. S. revenue collector, known to mean "retail liquor dealer." S. *v.* Nippert, 74 Kan. 371, 86 P. 478.

O. N. in freight bill means "order notify." Alabama, etc. R. Co. *v.* Co., 92 Miss. 781, 46 S. 254.

"Pres." means president.—Griffin *v.* Erskine, 131 Ia. 444, 109 N. W. 13.

926-23 McDonald *v.* S., 55 Fla. 134, 46 S. 176 (Jno. means John). See supra, "Abbreviations," 26-19.

927-25 Hull *v.* Croft, 132 Ill. App. 509.

927-27 Van Heusen *v.* Argenteau, 194 N. Y. 309, 87 N. E. 437.

927-28 Rohrbach *v.* Hammill (Ia.), 143 N. W. 872; Atkinson *v.* Kirkpatrick, 90 Kan. 515, 135 P. 579; Prudochl *v.* Randall, 108 Minn. 185, 121 N. W. 913 (of farmers to provide wood for ensuing year during winter and early spring); Pallotta *v.* Tr. Co. (Miss.), 64 S. 938; Watkins *v.* Thomas, 141 Mo. App. 263, 124 S. W. 1063 (to furnish purchaser with abstract of title); O'Brien L. Co. *v.* Wilkinson, 123 Wis. 272, 101 N. W. 1050. See Wamser *v.* Co., 109 App. Div. 53, 95 N. Y. S. 1051 (of business men to wear watch in vest pocket); Waters-P. O. Co. *v.* Deselms, 18 Okla. 107, 89 P. 212; Clement *v.* Graham, 78 Vt. 290, 63 A. 146.

Custom to leave hay chutes open, not noticed. Moellman *v.* Co., 134 Mo. App. 485, 114 S. W. 1023.

System of designating time. — That "Standard" or "railroad" time has been system for designating time since territorial days. Orvik *v.* Casselman, 15 N. D. 34, 105 N. W. 1105.

Customs of business.—See infra, 933-39; 935-46, et seq.

929-29 But not those contrary to law. Mendetz *v.* Wood & Co., 86 Misc 52, 148 N. Y. S. 92.

929-31 See Schultz *v.* Ford, 133 Ia. 142, 109 N. W. 614.

929-32 *Contra,* Butler *v.* Co., 1 Alaska 246.

923-33 Parkersville *v.* Wattier, 48 Or. 332, 86 P. 775, *over.* Lewis *v.* McClure, 8 Or. 274. See Crawford Co. *v.* Hathaway, 67 Neb. 325, 358, 93 N. W. 781.

929-34 Hitchcock *v.* Bd., 259 Ill. 288, 102 N. E. 741, that most religious denominations maintain missions or missionary societies. See Malone *v.* Lacroix, 143 Ala. 657, 41 S. 734.

What "Martinism" is not noticed where its adoption is alleged to be departure from tenets of a church. Jarrell *v.* Sproles, 20 Tex. Civ. 387, 49 S. W. 904.

931-38 Eastern O. Co. *v.* Coulehan, 65 W. Va. 531, 64 S. E. 836, method of marketing natural gas. See South Pasadena *v.* Co., 152 Cal. 579, 93 P. 490 (supra, 896-68).

Existence of prejudice against Jews will not be judicially noticed. Hoxio *v.* Pfaelzer, 167 Ill. App. 79.

The events which led to the enactment of laws will be judicially noticed. In re Union Bk., 204 N. Y. 313, 97 N. E. 737.

Sunday labor.—McCain *v.* S., 2 Ga. App. 389, 58 S. E. 550.

Political parties.—But one republican party. S. *v.* Board, 167 Ind. 276, 78 N. E. 1016.

Where under statute regulating primary elections a party to be entitled to hold such election must have cast 10,000 votes for governor at the last election, court knows democratic party cast more than that number of votes. S. *v.* Flynn, 119 Mo. App. 712, 94 S. W. 543.

Matters naturally pertaining to labor unions, noticed (Lawlor *v.* Merritt, 78 Conn. 630, 63 A. 639); but not compact or principles by which members bound. Birmingham R. Co. *v.* Crampton (Ala.), 39 S. 1020.

Inferiority of negro race.—In determining whether calling a man a negro is an actionable wrong the court may recognize negro race is in mind and morals inferior to the Caucasian. Wolfe *v.* R. Co., 2 Ga. App. 499, 58 S. E. 899.

Common use of telephone.—W. U. T. Co. *v.* Rowell, 153 Ala. 295, 45 S. 73; Wolfe *v.* R. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. 331, 3 L. R. A. 539. See also S. *v.* R. Co., 51 Fla. 578, 40 S. 875.

Automobiles.—Ex parte Berry, 147 Cal. 523, 82 P. 44.

Evil of gambling on horse races.—See S. *v.* Maloney, 115 La. 498, 39 S. 539.

Football season.—Opening and closing of, known. Sieberts *v.* Spangler, 140 Ia. 236, 118 N. W. 292.

Value of chattels, not noticed.—Pierce *v.* Coryn, 139 Ill. App. 445.

933-39 New York Cent., etc. R. Co. *v.* U. S., 212 U. S. 481 (greater part of interstate commerce conducted by corporations); s. c. (C. C. A.), 165 Fed. 833 (use of waybills where transportation over long distance); Mayhew *v.* P. Co., 72 Wash. 431, 130 P. 485. *Comp.* Ex parte Berry, 147 Cal. 523, 82 P. 44.

General custom of transporting sample trunks as personal baggage. Fleischman M. Co. *v.* R. Co., 76 S. C. 237, 56 S. E. 974.

933-40 Harper F. Co. *v.* Co., 144 N. C. 639, 57 S. E. 458, noticing railway connections between Lenoir, N. C., and Erie, Pa., geographical situation of latter, and that fourteen days is unnecessary for carrying goods by express between such points.

934-43 McLean *v.* R. Co., 203 U. S. 38; Baker *v.* Co. (Ala.), 65 S. 321; Louisville & N. R. Co. *v.* Holland, 174 Ala. 675, 55 S. 1001; S. *v.* R. Co., 48 Fla. 114, 37 S. 652; King *v.* Helelilii, 5 Haw. 16; Denegre *v.* Walker, 114 Ill. App. 234 (character of improvements in business center of Chicago and many buildings are erected under long term leases); Dibert *v.* D'Arcy, 248 Mo. 617, 154 S. W. 1116 (stock exchange); P. *v.* Comrs., 196 N. Y. 39, 89 N. E. 581 (continual lessened value of industrial plants notwithstanding ordinary repairs, and that return of not less than six per cent. is expected from investors); Garrett *v.* Co., 66 W. Va. 587, 66 S. E. 741 (concerning mining for oil and gas and usual royalty). See Crawford Co. *v.* Hathaway, 67 Neb. 325, 358, 93 N. W. 781.

934-44 Kentucky, etc. Mfg. Co. *v.* Adams, 32 Ky. L. R. 823, 106 S. W. 1198 (that in 1898 country not recovered from panic of 1893, and values of realty were low, but that in 1902 country was recovering and prices had risen); Hawley *v.* Von Lanken, 75 Neb. 597, 106 N. W. 456. Financial depression and disturbance of October, 1907, noticed. Germania Ins. Co. *v.* Potter, 124 App. Div. 814, 109 N. Y. S. 435.

934-45 Baker *v.* Co. (Ala.), 65 S. 321. Fact articles of commerce do not have fixed values, noticed. Lindsey *v.* Hewitt, 42 Ind. App. 573, 86 N. E. 446.

935-46 Knight *v.* Co., 55 Fla. 301, 45 S. 1025; P. *v.* R. Co., 233 Ill. 378, 84 N. E. 368 (that grain coming to Chicago by any railroad may be transferred by means of the belt roads to any warehouse in city); Wendnagel *v.* Houston, 155 Ill. App. 664; Wallace *v.* Coons, 48 Ind. App. 511, 95 N. E. 132; Ayer & L. Tie Co. *v.* Keown, 29 Ky. L. R. 110, 93 S. W. 588 (business of loading ties on barges for exportation); S. *v.* P. Co., 119 Minn. 225, 137 N. W. 1104; Penn. S. Co. *v.* Co., 193 N. Y. 37, 85 N. E. 820 (payment of incumbrances and expenses out of loan); Harper F. Co. *v.* Co., 144 N. C. 639, 57 S. E. 458 (express business); Grant *v.* D. G. Co., 23 S. D. 195, 121 N. W. 95 (mortgaging entire stock of goods, out of usual course); Southwestern Tel. & Tel. Co. *v.* City (Tex. Civ.), 131 S. W. 80. *Contra* as to methods of transmitting and paying money by express companies. Downs *v.* Co., 135 Mo. App. 330, 116 S. W. 9. See supra, 927-28; 928-29; 933-39.

Of insurance companies to require signed application and medical examination before issuing policy, noticed. Taylor *v.* Lodge, 101 Minn. 72, 111 N. W. 919; Francis *v.* Ins. Co., 55 Or. 280, 106 P. 323. See Waters *v.* Co., 144 N. C. 663, 57 S. E. 437.

Of association to keep records of proceedings. Norwich Ins. Soc. *v.* R. Co., 46 Or. 123, 78 P. 1025.

936-48 Lippitt *v.* Tr. Co. (Conn.), 90 A. 369; Mason *v.* Nelson, 148 N. C. 492, 62 S. E. 625. See Lewis H. Co. *v.* Co., 59 W. Va. 75, 52 S. E. 1017.

In foreign state.—Customary business hours in foreign jurisdiction, not noticed. Columbian Bkg. Co. *v.* Bowen, 134 Wis. 218, 114 N. W. 451.

937-49 Johnson *v.* S., 159 Ala. 113, 48 S. 792 (particular clearing-house or its certificates); Walker *v.* Skliris, 34 Utah 353, 98 P. 114 (different methods of bookkeeping). See supra, "Assignments," 16-1.

937-50 See Schultz *v.* Ford, 133 Ia. 402, 109 N. W. 614.

938-51 U. S. *v.* Catsup, 166 Fed. 773 (process of making tomato catsup); Abbey, etc. Co. *v.* San Mateo, 167 Cal. 434, 139 P. 1068; Detroit L. Co. *v.* The Petrel, 153 Mich. 528, 117 N. W. 80 (accrued seamen's wages rarely equal $100); Wendt *v.* Industrial Ins. Com. (Wash.), 141 P. 311. See Knight *v.* Co., 55 Fla. 301, 45 S. 1025; S. *v.* Woodland, 89 Kan. 641, 132 P. 204.

General duties and character of professions, noticed. O'Reilly *v.* Erlanger, 108 App. Div. 318, 95 N. Y. S. 760.

Not known that covers, carpets, napkins, etc., may not be useful or ornamental in hotel. Hoffmaster *v.* Hodges, 154 Mich. 641, 118 N. W. 484.

939-53 Elkhart H. Co. *v.* Turner, 170 Ind. 455, 84 N. E. 812.

940-54 Conductor's duty and authority in management of train, noticed. Chicago, etc. R. Co. *v.* Anderson, 168 Fed. 901, 94 C. C. A. 241.

Authority and functions of porter on Pullman cars in relation to passengers, noticed. Gannon *v.* R. Co., 141 Ia. 37, 117 N. W. 966.

941-55 *Comp.* 945-83, authority of street car conductor.

941-57 Central G. R. Co. *v.* Crane (Ala. App.), 65 S. 866; Vinegar, etc. Co. *v.* Howard (Ala.), 65 S. 172; Deason *v.* R. Co. (Ala.), 65 S. 172; Bergan *v.* R. Co., 82 Conn. 574, 74 A. 937 (use of caboose cars); Louisville, etc. Co. *v.* C., 158 Ky. 773, 166 S. W. 237; Thacker *v.* R. Co. (Miss.), 55 S. 595; White *v.* R. Co., 99 Miss. 651, 55 S. 593; Shohoney *v.* R. Co., 223 Mo. 649, 122 S. W. 1025 (trunk lines engaged in interstate and intrastate commerce); S. *v.* R. Co., 212 Mo. 658, 111 S. W. 500 (certain road interstate carrier); Delavan *v.* R. Co., 137 N. Y. S. 207 (grades may be changed); P. *v.* R. Co., 198 N. Y. 369, 91 N. E. 849 (operation of by corporations); Texas Cent. R. Co. *v.* Co. (Tex. Civ.), 130 S. W. 250; Houston, etc. R. Co. *v.* Lee (Tex. Civ.), 123 S. W. 154 (custom of passengers not to read tickets); Houston, etc. R. Co. *v.* Pollock (Tex. Civ.), 115 S. W. 843 (means of protecting eyes of bystander from cinders); San Antonio, etc. R. Co. *v.* Mertink (Tex. Civ.), 102 S. W. 153; Thorgrimson *v.* R. Co., 64 Wash. 500, 117 P. 406; Gray *v.* R. Co., 153 Wis. 637, 142 N. W. 505. See vol. 10, p. 564, n. 44, and supplement thereto. But see Chicago, etc. R. Co. *v.* Diver, 213 Ill. 26, 72 N. E. 758.

But not of time necessary for construction. Morley & M. R. Co. *v.* Himmelberger, 247 Mo. 179, 152 S. W. 86.

That one electric road is sufficient in certain district. See Day *v.* Tacoma R. & P. Co. (Wash.), 141 P. 347.

But not of schedule of rates filed with commission. Hartwell R. Co. *v.* Kidd, 10 Ga. App. 771, 74 S. E. 310.

Fare between points, not noticed. Missouri, etc. R. Co. *v.* Lightfoot, 48 Tex. Civ. 120, 106 S. W. 395.

941-58 Philadelphia, etc. R. Co. *v.* Diffendal, 109 Md. 494, 72 A. 193; Harper F. Co. *v.* Co., 144 N. C. 639, 57 S. E. 458.

Court does not know fifty or fifty-five miles per hour is a dangerous rate of speed. Tex., etc. R. Co. *v.* Langham (Tex. Civ.), 95 S. W. 686.

941-61 Broyles *v.* R. Co., 166 Ala. 616, 52 S. 81; Cleveland, etc. R. Co. *v.* Heineman, 46 Ind. App. 388, 90 N. E. 899; Foley *v.* R. Co., 193 Mass. 332, 79 N. E. 765; Mason *v.* Nelson, 148 N. C. 492, 62 S. E. 625. See U. S. *v.* Adair, 152 Fed. 737; Wabash R. Co. *v.* Thomas, 117 Ill. App. 110; Grand Trunk R. Co. *v.* S., 40 Ind. App. 695, 82 N. E. 1017 (switching); Harper F. Co. *v.* Co., 144 N. C. 639, 57 S. E. 458, and 933-39.

Usual means of transporting grain, noticed. Atchison, etc. R. Co. *v.* P., 128 Ill. App. 38.

941-62 P. *v.* R. Co., 233 Ill. 378, 84 N. E. 368 (see supra, 935-46); Tyler *v.* Coker (Tex. Civ.), 124 S. W. 729 (use of rolling stock and portion of it which could be in a city on a given day or be kept there).

942-63 International, etc. R. Co. *v.* Walters (Tex. Civ.), 165 S. W. 525.

Concussions and jerks. — Foley *v.* R. Co., 193 Mass. 332, 79 N. E. 765; Partelow *v.* R. Co., 196 Mass. 42, 81 N. E. 894; Hawk *v.* R. Co., 130 Mo. App. 658, 108 S. W. 1119. See Cleveland, etc. Co. *v.* Nichols, 52 Ind. App. 349, 99 N. E. 497. *Comp.* R. & L. Co. *v.* Keel, 3 Ga. App. 769, 60 S. E. 468.

Spark arresters.—Babbitt *v.* R. Co., 108 App. Div. 74, 95 N. Y. S. 429.

That maintenance of switch lanterns or targets at railroad sidings tends to promote safety of employes and public. Southern R. Co. *v.* Blanford, 105 Va. 373, 54 S. E. 1.

Relative efficiency of airbrakes used alone and in connection with reverse lever. See Harris *v.* R. Co., 153 Ala. 139, 44 S. 962, 14 L. R. A. (N. S.) 261.

Distance in which train could have been stopped—court does not know train going at rate of twenty to twenty-five miles an hour can be stopped within eighty or ninety yards. Southern R. Co. *v.* Gullatt, 150 Ala. 318, 43 S. 577. See Thornton *v.* R. Co., 24 Ky. L. R. 854, 70 S. W. 53; Tully *v.* R. Co., 134 Mass. 499. *Contra,* Davis *v.* R. Co., 136 N. C. 115, 48 S. E. 591.

943-65 See Harper F. Co. *v.* Co., 144 N. C. 639, 57 S. E. 458.
Cost of maintaining agency must be proved. Missouri, etc. R. Co. *v.* S., 24 Okla. 331, 103 P. 613.
943-66 *Contra*, Goodman *v.* P., 228 Ill. 154, 81 N. E. 830, refusing to notice that Chicago Great Western R. Co. owned or operated a railroad although corporate character alleged.
943-67 Vickery *v.* R. Co., 87 Conn. 634, 89 A. 277; Worden *v.* Cole, 74 Kan. 226, 86 P. 464; Patterson *v.* R. Co., 77 Kan. 236, 94 P. 138, 15 L. R. A. (N. S.) 733; Bower *v.* R. Co. (Neb.), 148 N. W. 145; McCullen *v.* R. Co., 146 N. C. 568, 60 S. E. 506; Tyler *v.* Coker (Tex. Civ.), 124 S. W. 729; Missouri, etc. R. Co. *v.* Lightfoot, 48 Tex. Civ. 120, 106 S. W. 395; Texas C. R. Co. *v.* Marrs, 100 Tex. 530, 101 S. W. 1177; Texas, etc. R. Co. *v.* Walker, 43 Tex. Civ. 278, 95 S. W. 743. But see Pierce *v.* R. Co. (Tex. Civ.), 108 S. W. 979.
944-68 Tyler *v.* Coker (Tex. Civ.), 124 S. W. 729.
Termini of interurban electric roads known to be in some city in state. Halladay *v.* R., 155 Mich. 436, 119 N. W. 445.
Stations not noticed. St. Louis, etc. R. Co. *v.* Williams, 25 Okla. 662, 107 P. 428.
944-71 But see Worden *v.* Cole, 74 Kan. 226, 86 P. 464.
944-72 That no railroads existed at passage of organic act. Coffman *v.* S. (Tex. Cr.), 165 S. W. 939.
944-74 Local or principal office of domestic company, noticed. White *v.* R. Co., 5 Ga. App. 308, 63 S. E. 234.
945-77 Where tracks of several companies lie in close proximity along a street, ownership of particular track cannot be noticed. Pierce *v.* R. Co. (Tex. Civ.), 108 S. W. 979.
945-78 City of St. Louis *v.* R. Co. 248 Mo. 10, 154 S. W. 55. But see Atlanta, etc. R. Co. *v.* R. Co., 125 Ga. 529, 54 S. E. 736 (noticing one company succeeded another by legislation).
945-82 Existence of only two telegraph companies in state, not known. S. *v.* R. Co., 51 Fla. 578, 40 S. 875.
Minimum telephone charge for messages to be carried a given distance, noticed. W. U. T. Co. *v.* Saunders, 164 Ala. 234, 51 S. 176.
945-83 Indianapolis St. R. Co. *v.* Ray, 167 Ind. 236, 78 N. E. 978 (street railway is carrier of passengers); Love *v.* R. Co., 170 Mich. 1, 135 N. W. 963; Orth *v.* Saginaw, etc. Co., 162 Mich. 353, 127 N. W. 330; Kirkpatrick *v.* R. Co., 161 Mo. App. 515, 143 S. W. 865; Kleffmann *v.* R. Co., 104 App. Div. 416, 93 N. Y. S. 741 (construction of ordinary horse car). See Spiking *v.* R. Co., 33 Utah 313, 93 P. 838, purpose of fenders.
That conductor has charge of movements of street car, noticed. Kohr *v.* R. Co., 117 Mo. App. 302, 92 S. W. 1145.
The stopping at street crossings to let off and take on passengers and that such stopping is an invitation to ride to all persons desiring to do so, even though car crowded. Baskett *v.* R. Co., 123 Mo. App. 725, 101 S. W. 138.
Failure to provide adequate accommodations and over-crowding of street cars, noticed. Capital T. Co. *v.* Brown, 29 App. Cas. (D. C.) 473.
946-85 Craps is known to be a game played with dice. Sims *v.* S., 1 Ga. App. 776, 57 S. E. 1029, also meaning of "shooting" used in connection.
That poker is a game of chance noticed only when shown to be played with cards. S. *v.* Solon, 247 Mo. 672, 153 S. W. 1023.
Draw poker is known to be a gambling game. Shreveport *v.* Bowen, 116 La. 522, 40 S. 859.
947-89 See St. Louis *v.* Co., 190 Mo. 507, 89 S. W. 621 (supra, 897-78); Empire R. Co. *v.* Sayre, 107 App. Div. 415, 95 N. Y. S. 371.
947-90 Bruce *v.* United States, 202 Fed. 98, 120 C. C. A. 370; Reid *v.* U. S., 211 U. S. 529; Brandon *v.* Ard, 211 U. S. 11; Cox *v.* Board, 161 Ala. 639, 49 S. 814; Campbell *v.* County, 147 Ala. 703, 41 S. 407 (repeal of statute by constitution); Kansas City S. R. Co. *v.* S., 90 Ark. 343, 119 S. W. 288; Jaques *v.* Board (Cal. App.), 141 P. 404; Hogan *v.* Sup. Ct., 16 Cal. App. 783, 117 P. 947; S. *v.* Grier (Del.), 88 A. 579; S. *v.* Briscoe, 6 Penne. (Del.) 401, 67 A. 154; S. *v.* Gutke, 25 Ida. 737, 139 P. 346; Stone *v.* Elliott (Ind.), 101 N. E. 309; S. *v.* Paris, 179 Ind. 446, 101 N. E. 497; Henderson *v.* McGruder, 49 Ind. App. 682, 98 N. E. 137; S. *v.* Wheeler, 172 Ind. 578, 89 N. E. 1; Saum *v.* Dewey, 84 Kan. 811, 115 P. 570; Louisville, etc. R. Co. *v.* C., 154 Ky. 293, 157 S. W. 369; Anderson *v.* C. (Ky.), 117 S. W. 364; Burke *v.* L. Co., 133 La. 369, 63 S. 51; Doss *v.*

Board, 117 La. 450, 41 S. 720; Moynihan *v.* Holyoke, 193 Mass. 26, 78 N. E. 742; Montgomery *v.* S. (Miss.), 65 S. 572; S. *v.* Roach (Mo.), 167 S. W. 1008; S. *v.* Drabelle (Mo.), 167 S. W. 1016; Swing *v.* Co., 150 Mo. App. 574, 131 S. W. 153; Lohmeyer *v.* Co., 214 Mo. 685, 113 S. W. 1108; In re Mohawk R. Bridge, 128 App. Div. 54, 112 N. Y. S. 128; Empire R. Co. *v.* Sayre, 107 App. Div. 415, 95 N. Y. S. 371; Anheuser-B. Assn. *v.* Doss, 36 Okla. 318, 129 P. 49; Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 130 P. 55; Mayhew *v.* Eugene, 56 Or. 102, 104 P. 727; Robinson *v.* Morris, 30 R. I. 132, 73 A. 611; Ganow *v.* Ashton, 32 S. D. 458, 143 N. W. 383; Sears *v.* Ainsworth (Tex. Civ.), 166 S. W. 60; S. *v.* Savage (Tex.), 151 S. W. 530; Clement *v.* Graham, 78 Vt. 290, 63 A. 146; Squilache *v.* Co., 64 W. Va. 337, 62 S. E. 446. See City of Shreveport *v.* Maroun, 134 La. 490, 64 S. 388; Consumers C. Co. *v.* Connolly, 31 Can. Sup. 244; infra, "Statutes," 31-1.

That duty of waterworks company to lay pipes to property is mooted question, noticed. S. *v.* Waterworks Co. (Ala.), 64 S. 23.

"We judicially know that all of each section is incumbered by a first lien in favor of the state for the total amount due the state upon that particular tract of land." Texas Moline Plow Co. *v.* Clark (Tex. Civ.), 145 S. W. 266.

In Walker *v.* Board, 82 N. J. L. 348, 82 A. 422, it was pointed out that a certain enactment "represented the result, which we must judicially notice, of a pressing public demand in nation and state for the abolition of a system of public employment, based upon stratagem and spoils, and the substitution thereof, pro bono publico, of a system of employment, based upon businesslike methods of merits and fitness."

948-91 Marrash *v.* U. S., 168 Fed. 225, 93 C. C. A. 511; Jordan *v.* McDonnell, 151 Ala. 279, 44 S. 101; Perry *v.* Morris, 7 Ind. Ty. 146, 104 S. W. 571; Worden *v.* Cole, 74 Kan. 226, 86 P. 464; Davis *v.* McColl (Mo. App.), 166 S. W. 1113; Milliken *v.* Dotson, 117 App. Div. 527, 102 N. Y. S. 564; Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 130 P. 55; Ganow *v.* Ashton, 32 S. D. 458, 143 N. W. 383; El Paso, etc. R. Co. *v.* Smith, 50 Tex. Civ. 10, 108 S. W. 988.

949-92 Kingman *v.* Comrs., 105 Me. 184, 73 A. 1038 (resolves of legislature); Galveston, etc. Co. *v.* Stautz (Tex. Civ.), 166 S. W. 11. But see International, etc. R. Co. *v.* Hall, 35 Tex. Civ. 545, 81 S. W. 82. *Comp.* Reid *v.* R. Co., 162 N. C. 355, 78 S. E. 306.

A law operative because of a special election in a county, not noticed. Gay *v.* Eugene, 53 Or. 282, 289, 100 P. 254, 306.

950-93 Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 130 P. 55.

950-98 See Chesapeake, etc. Canal *v.* R. Co., 99 Md. 570, 58 A. 34.

951-4 Duy *v.* R. Co., 175 Ala. 162, 57 S. 724; Badgett *v.* S., 157 Ala. 20, 48 S. 54.

951-5 Combs *v.* C., 31 Ky. L. R. 822, 104 S. W. 270 (prohibiting sale of liquor); Ball *v.* C., 30 Ky. L. R. 600, 99 S. W. 326 (same); Crigler *v.* C., 27 Ky. L. R. 918, 87 S. W. 276; Mitchell *v.* S., 115 Md. 360, 80 A. 1020.

953-11 Denver, etc. R. Co. *v.* Wagner, 167 Fed. 75, 92 C. C. A. 527.

953-14 N. Y., etc. R. Co. *v.* Offield, 78 Conn. 1, 60 A. 740.

953-17 Limitation of time for suing out writ of error, not noticed. Peterson *v.* Ins. Co., 244 Ill. 329, 91 N. E. 466.

954-19 In such a case, in passing upon the legal sufficiency of the pleadings, they must be considered with reference to all the relevant provisions of the charter, whether these are specifically set out or not. McCuistion *v.* Fenet (Tex. Civ.), 144 S. W. 1155.

954-20 Sandoval *v.* Priest, 210 Fed. 814, 127 C. C. A. 364; Davis *v.* McColl (Mo. App.), 166 S. W. 1113; Townsend *v.* Trustees, 97 App. Div. 316, 89 N. Y. S. 982 (noticing old laws affecting realty); Guthrie *v.* Mitchell, 38 Okla. 55, 132 P. 138.

955-24 Teat *v.* Chapman & Co., 1 Ala. App. 491, 56 S. 267; Ryan *v.* Co., 153 Cal. 438, 95 P. 862; Equitable, etc. Assn. *v.* King, 48 Fla. 252, 37 S. 181; Krouse *v.* Krouse, 48 Ind. App. 3, 95 N. E. 262; M. K. & T. R. Co. *v.* Hindman (Kan.), 110 P. 102; Loyal M. L. *v.* Brewer, 75 Kan. 729, 90 P. 247; Twin City Box Factory *v.* Co., 114 Minn. 475, 131 N. W. 497; Fehrenbach W. & L. Co. *v.* R. Co. (Mo. App.), 167 S. W. 631; Davis *v.* McColl (Mo. App.), 166 S. W. 1113; Milwaukee G. E. Co. *v.* Gordon, 37 Mont. 209, 95 P. 995; Strodl

v. Co., 130 N. Y. S. 35, *rev.* 122 N. Y. S. 609; Brown Carriage Co. *v.* Dowd, 155 N. C. 307, 71 S. E. 721; Goss *v.* Herman, 20 N. D. 295, 127 N. W. 78; Cape May R. E. Co. *v.* Henderson, 231 Pa. 82, 79 A. 982; Tourtelot *v.* Booker (Tex. Civ.), 160 S. W. 293; Texas, etc. R. Co. *v.* Miller (Tex. Civ.), 128 S. W. 1165. See infra, 958-36; supra, "Foreign Laws," 808-4.

Where laws of sister state involved, decisions of highest court noticed. Baxter *v.* Beckwith, 25 Colo. App. 322, 137 P. 901.

"**Where the law of another state is** relied on to maintain an action or defense, it must be proved as any other fact. Where there is no proof on the subject, it is presumed that the common law of a sister state is the same as the common law of" the forum. Horton *v.* Lumb. Co., 147 Ky. 226, 143 S. W. 1053.

Decisions of other states, not noticed. Southern Exp. Co. *v.* Owens, 146 Ala. 412, 41 S. 752. *Comp.* Missouri, etc. R. Co. *v.* Wise (Tex.), 109 S. W. 112, *aff.* 106 S. W. 465.

"**We cannot take judicial notice** of the statutes of Illinois, and therefore can not, upon this record, determine whether a foreign corporation may do business in that state with or without complying with prescribed conditions, or determine whether defendant, whether it be a domestic or foreign corporation, was served with process in that state in accordance with the laws thereof. Certain presumptions may be indulged in support of the jurisdiction of the courts of a state in certain cases." Marshall *v.* Owen & Co., 171 Mich. 232, 137 N. W. 204.

956-27 Ellis *v.* Terrell (Ark.), 158 S. W. 957; Gleason *v.* Thayer, 87 Conn. 248, 87 A. 790; Appeal of Woodward, 81 Conn. 152, 70 A. 453 (noticed on appeal notwithstanding finding).

956-28 Leathe *v.* Thomas, 218 Ill. 246, 75 N. E. 810; McKnight *v.* R. Co., 33 Mont. 40, 82 P. 661; De Vall *v.* De Vall, 57 Or. 128, 109 P. 755, 110 P. 705; Hunt *v.* Monroe, 32 Utah 428, 91 P. 269.

957-31 Laws of Arkansas adopted by act of congress as laws in Indian Territory, noticed. Missouri, etc. R. Co. *v.* Wise (Tex.), 109 S. W. 112, *aff.* 106 S. W. 465, construction previously placed on such laws by the Arkansas court, not noticed. See Red River Nat. Bk. *v.* De Berry, 47 Tex. Civ. 96, 105 S. W. 998; Bink *v.* S., 48 Tex. Cr. 598, 89 S. W. 1075.

957-32 Beck *v.* Johnson, 169 Fed. 154; In re Marconi, 38 App. Cas. (D. C.) 286; Sullivan *v.* Algrem, 157 Ill. App. 123; Wabash R. Co. *v.* Priddy, 179 Ind. 483, 101 N. E. 724; Louisville R. Co. *v.* Woodford, 153 Ky. 185, 154 S. W. 1083; Lemon *v.* R. Co., 137 Ky. 276, 125 S. W. 701; Wentz *v.* R. Co. (Mo.), 168 S. W. 1166; Davis *v.* McColl (Mo. App.), 166 S. W. 1113; Little River Drainage Dist. *v.* R. Co., 236 Mo. 94, 139 S. W. 330; O'Connell *v.* Pub. Co., 77 Misc. 3, 137 N. Y. S. 332; Carlin *v.* R. Co., 71 Misc. 521, 130 N. Y. S. 828; Erie R. Co. *v.* Welsh (Ohio), 105 N. E. 189; Yankton Nat. Bk. *v.* Benson (S. D.), 146 N. W. 582; House *v.* R. Co., 30 S. D. 321, 138 N. W. 809; Edwards *v.* Smith (Tex. Civ.), 137 S. W. 1161; Sowards *v.* Meagher, 37 Utah 212, 108 P. 1112; Bouchard *v.* R. Co. (Vt.), 89 A. 475; Northern P. R. Co. *v.* Wadekamper, 70 Wash. 392, 126 P. 909; Rowlands *v.* R. Co., 149 Wis. 51, 135 N. W. 156.

See Missouri, etc. R. Co. *v.* Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355; S. *v.* Pub. Service Com. (Mo.), 168 S. W. 1156; McIntosh *v.* R. Co. (Mo. App.), 168 S. W. 821; Stamp *v.* R. Co. (Tex. Civ.), 161 S. W. 450; infra, "Statutes," 31-2.

General orders with general forms in bankruptcy promulgated by United States Supreme Court—judicially noticed. Powell *v.* Pangborn, 145 N. Y. S. 1073.

958-33 Elliott *v.* Garvin, 7 Ind. Ty. 679, 104 S. W. 878; Coombs *v.* Cook, 35 Okla. 326, 129 P. 698. But see Porter *v.* U. S., 7 Ind. Ty. 616, 104 S. W. 855.

958-34 Scott *v.* Jacobs, 31 Okla. 109, 126 P. 780 (laws continued by statute). See Perkins *v.* Baker (Okla.), 137 P. 661.

958-35 Holly *v.* Coke Co., 203 Fed. 668, 122 C. C. A. 64; Irvine *v.* Elliott, 203 Fed. 82; Bohlander *v.* Heikes, 168 Fed. 886, 94 C. C. A. 298; Denver, etc. R. Co. *v.* Wagner, 167 Fed. 75, 92 C. C. A. 527; The Alligator, 161 Fed. 37, 88 C. C. A. 201 (admiralty court); Powell *v.* Pangborn, 145 N. Y. S. 1073; Edwards *v.* Smith (Tex. Civ.), 137 S. W. 1161.

Courts of District of Columbia are courts of United States within this

rule. Moore *v.* Pywell, 29 App. Cas. (D. C.) 312, recognizing distinction in Hanley *v.* Donoghue, 116 U. S. 1, between cases coming from state courts and those beginning in federal court.

In local law of Porto Rico, distinction between law and equity does not obtain. Garzot *v.* de Rubio, 209 U. S. 283, 304.

Canadian supreme court notices existing laws in any of the provinces or territories. Logan *v.* Lee, 39 Can. Sup. 311.

958-36 Southern Exp. Co. *v.* Owens, 146 Ala. 412, 41 S. 752; Ryan *v.* Co., 153 Cal. 438, 95 P. 862; Clark *v.* Co., 115 Ill. App. 150; Crane *v.* Blackman, 126 Ill. App. 631; Royal League *v.* Kavanagh, 233 Ill. 175, 84 N. E. 178; New York, etc. R. Co. *v.* Lind (Ind.), 102 N. E. 449; Varner *v.* Int. Exch., 138 Ia. 201, 115 N. W. 1111 (failure to prove such laws not cured on appeal by citing reports of decisions of such foreign courts); Cumberland T. Co. *v.* R. Co., 117 La. 199, 41 S. 492; In re Lando's Est., 112 Minn. 257, 127 N. W. 1125; Smith *v.* Aultman, 120 Mo. App. 462, 96 S. W. 1034; Snuffer *v.* Karr, 197 Mo. 182, 94 S. W. 983; McKnight *v.* R. Co., 33 Mont. 40, 82 P. 661; White *v.* Richeson (Tex. Civ.), 94 S. W. 202; App *v.* App, 106 Va. 253, 55 S. E. 672. See supra, "Foreign Laws," 808-3.

Laws of Cuba not noticed.—Crosby *v.* R. Co., 158 Fed. 144.

958-37 Southern Exp. Co. *v.* Owens, 146 Ala. 412, 41 S. 752.

958-38 *Contra,* Cumberland T. Co. *v.* R. Co., 117 La. 199, 41 S. 492, *over.* Graham *v.* Williams, 21 La. Ann. 594.

959-42 Frank *v.* Gump, 104 Va. 306, 51 S. E. 358.

959-43 Basis of foreign laws. Banco de Sonora *v.* Co., 124 Ia. 576, 100 N. W. 532, 104 Am. St. 367.

960-50 The Brig Freemason, 45 Ct. Cl. 555.

Reservation created by treaty with Indian tribe is noticed, and that title to land therein is in the Indians as a tribe. Peano *v.* Brennan, 20 S. D. 342, 106 N. W. 409.

960-54 The Matterhorn, 128 Fed. 863, 63 C. C. A. 331.

960-56 Walklin *v.* Horswill, 24 S. D. 191, 123 S. W. 668; S. *v.* R. Co., 81 Vt. 508, 71 A. 197.

Attempts to secure repeal of particular statute, noticed. Youmans *v.* S., 7 Ga. App. 101, 66 S. E. 383.

961-57 S. *v.* Joseph, 175 Ala. 579, 57 S. 942; Ty. *v.* Co., 13 Ariz. 198, 108 P. 960 (practical construction); Lowman *v.* Billington, 65 Misc. 111, 119 N. Y. S. 825 (construction by inferior courts).

Report of commission which drafted law before court, noticed. Tenement H. Dept. *v.* Moeschen, 179 N. Y. 325, 72 N. E. 231, 103 Am. St. 910, 70 L. R. A. 704; Grimmer *v.* Dept., 134 App. Div. 896, 119 N. Y. S. 812.

Long continued practical construction given law by officers, noticed. Copper Q. M. Co. *v.* Board, 9 Ariz. 383, 84 P. 511. *Comp.* Griner *v.* Baggs, 4 Ga. App. 232, 61 S. E. 147.

962-59 McCabe *v.* R. Co., 136 Ky. 674, 124 S. W. 892; Lunsford *v.* Wren, 64 W. Va. 458, 63 S. E. 308. See In re Appointment of Revisor, 141 Wis. 592, 124 N. W. 670.

962-61 See In re Appointment of Revisor, supra, and cases cited under 908-34 and 931-38.

963-62 Lester *v.* Riley (Tex. Civ.), 157 S. W. 459 (date of publication of statutes).

963-66 Jay *v.* O'Donnell, 178 Ind. 282, 98 N. E. 349, *cit.* Prince *v.* Crocker, 166 Mass. 347, 358, 44 N. E. 446, 32 L. R. A. 610. See also Brown *v.* Piper, 91 U. S. 37, 42; Gardner *v.* Collector, 6 Wall. (U. S.) 499; Sherman *v.* Story, 30 Cal. 253, 89 Am. Dec. 93; S. *v.* Wheeler, 172 Ind. 578, 582, 583, 89 N. E. 1, 19 Anno. Cas. 834, and cases cited; Evans *v.* Browne, 30 Ind. 514, 519-521, 95 Am. Dec. 710; Prohibition Amendment Cases, 24 Kan. 700, 715; S. *v.* Stearns, 72 Minn. 200, 219, 75 N. W. 210, and authorities cited.

Adoption of local option law noticed. Bass *v.* S., 1 Ga. App. 728, 790, 57 S. E. 1054. See Moore *v.* S., 126 Ga. 414, 55 S. E. 327; Irby *v.* S., 91 Miss. 542, 44 S. 801.

964-67 Johnson *v.* Scott, 133 Mo. App. 689, 114 S. W. 45; Woodward *v.* S., 58 Tex. Cr. 411, 126 S. W. 270.

Local option.—S. *v.* O'Brien, 35 Mont. 482, 90 P. 514; Allen *v.* S. (Tex. Cr.), 98 S. W. 869 (appellate court); Craddick *v.* S., 48 Tex. Cr. 385, 88 S. W. 347. *Comp.* Combs *v.* C., 31 Ky. L. R. 822, 104 S. W. 270; Ball *v.* C., 30 Ky. L. R. 600, 99 S. W. 326.

Continuance of law, after adoption, for four years as provided by general law,

noticed. S. *v.* Hall, 130 Mo. App. 170, 108 S. W. 1077.

964-68 Munger *v.* S., 57 Tex. Cr. 384, 122 S. W. 874, marriageable age and incapacity of white and colored persons to intermarry.

Acts of local authorities ratified by law, noticed. Cohen *v.* New York, 61 Misc. 124, 113 N. Y. S. 88.

965-70 S. *v.* Comrs. (Ala.), 63 S. 76; Mauldin *v.* R. Co. (Ala.), 61 S. 947; House *v.* R. Co., 30 S. D. 321, 138 N. W. 809; Connor *v.* Zackry, 54 Tex. Civ. 188, 117 S. W. 177 (amount of official bond fixed by judge).

965-71 Bruce *v.* U. S., 202 Fed. 98, 120 C. C. A. 370; In re Mohawk R Bridge, 128 App. Div. 54, 112 N. Y. S. 428.

Succession, by legislative action, of one railroad corporation to properties of another, noticed. Atlanta, etc. R. Co. *v.* R. Co., 125 Ga. 529, 798, 54 S. E. 736.

Authority of state officer provided for by constitution, noticed. Dailey *v.* S., 171 Ind. 646, 87 N. E. 4.

Non-action by railroad commissioner under statute, noticed. Wight *v.* R. Co., 161 Mich. 216, 126 N. W. 414.

Universal belief among lawyers concerning prejudicial effect of evidence showing defendant in action by his servant to recover for personal injuries carried insurance, noticed. Trent *v.* Co., 141 Mo. App. 437, 126 S. W. 238.

Custom of public officers under a law, noticed. Bernard *v.* Benson, 58 Wash. 191, 108 P. 439.

966-74 Reed *v.* Ty., 1 Okla. Cr. 481, 98 P. 588; Cator *v.* Hays (Tex. Civ.), 122 S. W. 953.

966-75 Coffman *v.* S. (Tex. Cr.), 165 S. W. 939.

The territories organized into a state and fact differences existed in their laws, noticed. W. U. T. Co. *v.* Parsley, 57 Tex. Civ. 8, 121 S. W. 226.

Date of statehood, noticed. Rea *v.* S., 3 Okla. Cr. 281, 105 P. 386.

966-76 See Perkins *v.* Baker (Okla.), 137 P. 661.

967-80 S. *v.* Barr, 7 Penne. (Del.) 340, 79 A. 730; Bell *v.* S. (Okla. Cr.), 141 P. 804; S. *v.* Custer, 28 R. I. 222, 66 A. 306; Leonard *v.* S. (Tex. Cr.), 152 S. W. 632; American Fork City *v.* Charlier (Utah), 134 P. 739.

Impossibility of holding referendum election within thirty days after passage of ordinance. Stetson *v.* Seattle, 74 Wash. 606, 134 P. 494.

967-81 Wyatt *v.* Arnot, 7 Cal. App. 221, 94 P. 86 (election to fill judicial vacancy); In re Boswell, 179 Ind. 292, 100 N. E. 833; Mayes *v.* Palmer, 206 Mo. 293, 103 S. W. 1140; S. *v.* Swink, 151 N. C. 726, 66 S. E. 448.

967-83 In re Boswell, 179 Ind. 292, 100 N. E. 833.

Not in Missouri.—S. *v.* Wilson, 161 Mo. App. 301, 143 S. W. 534.

967-86 Perovich *v.* Perry, 167 Fed. 789, 93 C. C. A. 209.

968-89 See In re Mech. Bk., 156 App. Div. 343, 141 N. Y. S. 473.

968-90 See Georgia Bkg. Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52.

968-91 School Dist. *v.* Squares, 82 Kan. 806, 109 P. 168; S. *v.* Mutty, 39 Wash. 624, 82 P. 118. See Copper Q. M. Co. *v.* Board, 9 Ariz. 383, 84 P. 511.

Validity or form of tax deeds not noticed. Fitschen *v.* Olson, 155 Mich. 320, 119 N. W. 3.

969-94 Naftzger *v.* U. S., 200 Fed. 494, 118 C. C. A. 598, as to exchange and possession of stamps.

969-95 Aetna Ind. Co. *v.* Fuller, 111 Md. 321, 73 A. 738.

970-5 Reese *v.* Cobb (Tex. Civ.), 135 S. W. 220.

970-6 *Comp.* Phillips *v.* Lindley, 112 App. Div. 283, 98 N. Y. S. 423, 188 N. Y. 606, 81 N. E. 1173.

970-7 Trotta *v.* Johnson, 28 Ky. L. R. 851, 90 S. W. 540, United States and Italy at peace.

970-10 Myher *v.* Myher, 224 Mo. 631, 123 S. W. 806.

971-11 Election precinct established by county court, which may change boundaries, not noticed. S. *v.* Carmody, 50 Or. 1, 91 P. 446, 12 L. R. A. (N. S.) 828. See 974-29, infra.

971-12 Erickson *v.* S., 14 Ariz. 253, 127 P. 754; Scott *v.* L. Co., 106 Ark. 83, 152 S. W. 1025; P. *v.* Ayers (Mich.), 148 N. W. 383; In re Commissioner, 64 Misc. 620, 120 N. Y. S. 580.

Otherwise if not fixed by public act. S. *v.* Carmody, 50 Or. 1, 91 P. 446, 12 L. R. A. (N. S.) 828.

971-13 Crow *v.* Roane, 86 Ark. 172, 110 S. W. 801; Merritt *v.* County, 3 Cal. App. 168, 84 P. 675; Huxford *v.* Co., 124 Ga. 181, 52 S. E. 439; Seaboard A. L. R. *v.* Peeples, 12 Ga. App. 206, 77 S. E. 12; Cooper *v.* S., 2 Ga. App. 730, 59 S. E. 20; Atchison, etc. R. Co. *v.* Paxton, 75 Kan. 197, 88 P.

1082; P. *v.* Ayers (Mich.), 148 N. W. 383; Noble *v.* Cates, 230 Mo. 189, 130 S. W. 302; S. *v.* R. Co., 141 N. C. 846, 54 S. E. 294; Reed *v.* Ty., 1 Okla. Cr. 481, 98 P. 583; Hughes *v.* Adams, 55 Tex. Civ. 197, 119 S. W. 134 (and geographical shape).

971-14 Topeka *v.* Cook, 72 Kan. 595, 84 P. 376.

972-15 Barney *v.* S., 5 Ala. App. 302, 57 S. 598; Gibson *v.* Austin, 23 Colo. App. 220, 128 P. 859; Curtis *v.* Sexton, 253 Mo. 221, 159 S. W. 512; Bussey *v.* S., 59 Tex. Cr. 260, 127 S. W. 1035.

972-17 U. S. *v.* Stannard, 207 Fed. 198 (counties in federal district); Lyman *v.* S., 90 Ark. 596, 119 S. W. 1116; Huxford *v.* Co., 124 Ga. 181, 52 S. E. 439; Moore *v.* S., 126 Ga. 414, 55 S. E. 327.

That a certain county was carved out of the territory of another. McCammant *v.* Webb (Tex. Civ.), 147 S. W. 693.

Class of county.—Alameda County *v.* Dalton, 148 Cal. 246, 82 P. 1050.

972-19 Court of subsequently organized state will notice existence of county in another state created by law in force within its jurisdiction. Hudson *v.* Webber, 104 Me. 429, 72 A. 184.

973-20 Crosson *v.* Summer, 125 Ga. 291, 54 S. E. 181; Brownsville *v.* Arbuckle, 30 Ky. L. R. 414, 99 S. W. 239; Ladd *v.* Craig, 94 Miss. 659, 47 S. 777; St. Louis, etc. R. Co. *v.* Williams, 25 Okla. 662, 107 P. 428; Missouri, etc. R. Co. *v.* Lightfoot, 48 Tex. Civ. 120, 106 S. W. 395.

De facto county seat, noticed.—Board *v.* S., 19 Okla. 375, 91 P. 699.

Of foreign county.—See supra, 891-51, 972-19.

973-21 Muntzing *v.* Newsom, 22 Colo. App. 446, 125 P. 130.

973-23 *Contra*, Brownsville *v.* Arbuckle, 30 Ky. L. R. 414, 99 S. W. 239.

973-24 Huxford *v.* Co., 124 Ga. 181, 52 S. E. 439.

That new county formerly embraced within limits of another, noticed. Parker *v.* S., 126 Ga. 443, 55 S. E. 329.

973-25 Rea *v.* S., 3 Okla. Cr. 281, 105 P. 386; Board *v.* Patrick, 18 Wyo. 131, 104 P. 531; S. *v.* Schnitger, 16 Wyo. 479, 95 P. 698.

974-29 Miller *v.* Miller (Ind. App.), 164 N. E. 588; P. *v.* Ayers (Mich.), 148 N. W. 383; Shivers *v.* Ins. Co., 99 Miss. 744, 55 S. 965.

Notice not taken places are in particular counties unless they are county seats. Dallas B. *v.* Holmes, 51 Tex. Civ. 514, 112 S. W. 122.

Townships constituting a county and election precincts therein, noticed though latter created or changed by local authorities. Chicago, etc. R. Co. *v.* County, 87 Ark. 406, 112 S. W. 977. But see 971-11, supra.

974-31 Board *v.* Berry, 62 W. Va. 433, 59 S. E. 169.

975-33 State Board *v.* Bellinger, 138 App. Div. 12, 122 N. Y. S. 651.

This is entirely distinct from the question of the titles to office of its individual members, which may be inquired into under other and appropriate circumstances. State Brd. of Pharmacy *v.* Bellinger, 122 N. Y. S. 654.

975-36 Reach *v.* Quinn, 159 Ala. 340, 48 S. 540.

976-38 Perovich *v.* Perry, 167 Fed. 789, 93 C. C. A. 209 (member of cabinet); Frederick *v.* Goodbee, 120 La. 783, 45 S. 606 (member of cabinet); S. *v.* Yeomen, 111 Minn. 39, 126 N. W. 404; Viertel *v.* Viertel, 212 Mo. 562, 111 S. W. 579 (judge of circuit court); S. *v.* Schnitger, 16 Wyo. 479, 95 P. 698 (members of legislature).

976-39 Mayors, past and present, of a city should be noticed by court of county in which city is. Lucas *v.* Boyd, 156 Ala. 427, 47 S. 209.

976-40 S. *v.* Burtenshaw, 25 Ida. 607, 138 P. 1105; S. *v.* G. Co. (W. Va.), 77 S. E. 902.

977-42 In re Clement, 132 App. Div. 598, 117 N. Y. S. 30, appointee of governor.

977-43 See Mayes *v.* Palmer, 206 Mo. 293, 103 S. W. 1140.

977-44 Commissioners to take depositions in other states. Palmer *v.* Fogg, 35 Me. 368, 58 Am. Dec. 708.

978-45 Kellogg *v.* Finn, 22 S. D. 578, 119 N. W. 545, *cit.* the text.

978-49 Courts not compelled to notice who are de facto officers. Williams *v.* Finch, 148 Ala. 674, 41 S. 834.

979-50 Mayes *v.* Palmer, 206 Mo. 293, 103 S. W. 1140, judge to fill unexpired term.

979-51 See Shirran *v.* Dallas, 21 Cal. App. 405, 132 P. 454. But see Globe, etc. Co. *v.* Sayle (Miss.), 65 S. 125.

979-52 Ryan *v.* Young, 147 Ala. 660, 41 S. 954 (though displaced by successor); Williams *v.* Finch, 148 Ala. 674, 41 S. 834. See Butts *v.* Purdy, 63 Or. 150, 125 P. 313, 127 P. 25.

979-53 Casey *v.* Bryce, 173 Ala. 129, 55 S. 810.

979-55 Mayor of city, noticed. P. *v.* Hall, 45 Colo. 303, 100 P. 1129.

980-61 Oberhaus *v.* S., 173 Ala. 483, 55 S. 898; Aultman M. Co. *v.* Burchett, 15 Okla. 490, 83 P. 719. See S. *v.* Schnitger, 16 Wyo. 479, 95 P. 698.

981-63 Greene *v.* Boaz, 157 Ala. 68, 47 S. 255; Touart *v.* S., 173 Ala. 453, 56 S. 211.

981-64 Ex parte Bargagliotti, 6 Cal. App. 333, 92 P. 96 (sheriff); Rogers *v.* McCoach, 120 N. Y. S. 686 (police officer of another state).

That a county treasurer is bound to collect the taxes extended on the duplicate as the same comes to him from the auditor, and to this end he is not only authorized, but required, to levy and sell the property of the delinquent. Warrick *v.* Spry, 49 Ind. App. 327, 97 N. E. 361.

981-66 Touart *v.* S., 173 Ala. 453, 56 S. 211; Ryan *v.* Young, 147 Ala. 660, 41 S. 954; P. *v.* Paulsen, 146 Ill. App. 534; S. *v.* Yeomen, 111 Minn. 39, 126 N. W. 404; In re Peterson's Est., 22 N. D. 480, 134 N. W. 751.

Signature of officer authorized to make certificate, noticed. S. *v.* Hopkins, 118 La. 99, 42 S. 660, assistant coroner.

982-71 In re Peterson's Est., 22 N. D. 480, 134 N. W. 751.

982-72 Pardee *v.* Schanzlin, 3 Cal. App. 597, 86 P. 812; McDonald *v.* P., 123 Ill. App. 346 (seal and signature); S. *v.* Zehnder (Mo. App.), 168 S. W. 661; Brown Mfg. Co. *v.* Gilpin, 120 Mo. App. 130, 96 S. W. 669; Butts *v.* Purdy, 63 Or. 150, 125 P. 313, 127 P. 25.

983-80 Grant *v.* Hardage, 106 Ark. 506, 153 S. W. 826; Foss *v.* Johnstone, 158 Cal. 119, 110 P. 294; Central of Georgia R. Co. *v.* Granite Co., 8 Ga. App. 1, 68 S. E. 775; Warren *v.* R. Co., 156 Ill. App. 111; City of St. Louis *v.* Niehaus, 236 Mo. 8, 139 S. W. 450; City of St. Louis *v.* Kruempeler, 235 Mo. 710, 139 S. W. 446; Pecos & N. T. R. Co. *v.* Jarman & Arnett (Tex. Civ.), 138 S. W. 1131; M. K. & T. R. Co. *v.* McIlhaney (Tex. Civ.), 129 S. W. 153. See also Bennett Trust Co. *v.* Sengstacken, 58 Or. 333, 113 P. 863; Hohn *v.* Bidwell, 27 S. D. 249, 130 N. W. 837.

Practices of departments of state government, noticed. Griner *v.* Baggs, 4 Ga. App. 232, 61 S. E. 147, commissioner of agriculture. *Comp.* Copper Q. M. Co. *v.* Board, 9 Ariz. 383, 84 P. 511.

984-81 Poheim *v.* Meyers, 9 Cal. App. 31, 98 P. 65 (holidays declared by governor); S. *v.* Toole, 32 Mont. 4, 79 P. 403. See Merritt *v.* County, 3 Cal. App. 168, 84 P. 675.

984-82 Casey *v.* Bryce, 173 Ala. 129, 55 S. 810; S. *v.* Norwalk, 77 Conn. 257, 58 A. 759 (volume in which secretary of state binds up bills which have become laws); S. *v.* Barrett, 172 Ind. 169, 87 N. E. 7; In re Decatur St., 133 App. Div. 321, 117 N. Y. S. 855 (city records); S. *v.* Candland, 36 Utah 406, 104 P. 285. See Atlanta, etc. R. Co. *v.* R. Co., 124 Ga. 125, 52 S. E. 320 (of secretary of state); P. *v.* R. Co., 145 Mich. 140, 108 N. W. 772, and supra, 961-57.

Letter of commissioner of general land office in course of official business, noticed. So. P. R. Co. *v.* Lipman, 148 Cal. 480, 83 P. 445.

985-83 Records of tax proceedings not noticed. Auditor-Gen. *v.* Clifford, 143 Mich. 626, 107 N. W. 287.

Report of state tax commissioners, noticed. Jeffersonville *v.* Co., 169 Ind. 645, 83 N. E. 337.

Reports to corporation commissioners by railroad companies, noticed. Staton *v.* R. Co., 144 N. C. 135, 56 S. E. 794.

986-84 Ferrell *v.* Ellis, 129 Ia. 614, 105 N. W. 993; Gannett *v.* Co., 55 Misc. 555, 106 N. Y. S. 3; Page *v.* McClure, 79 Vt. 83, 64 A. 451.

986-85 Jones *v.* Hines, 157 Ala. 624, 47 S. 739; Henderson *v.* McGruder, 49 Ind. App. 682, 98 N. E. 137; Ferrell *v.* Ellis, 129 Ia. 614, 105 N. W. 993; Parker Co. *v.* Kan. City, 73 Kan. 722, 726, 85 P. 781 (only one city in state with population of 50,000). See P. *v.* Earl, 42 Colo. 238, 94 P. 294.

986-86 Ruckert *v.* Richter, 127 Mo. App. 664, 106 S. W. 1081.

986-87 St. Louis, etc. R. Co. *v.* Williams, 25 Okla. 662, 107 P. 428, special census.

And the date of the last federal census. S. *v.* Brooks, 58 Wash. 648, 109 P. 212.

986-88 S. *v.* Schnitger, 16 Wyo. 479, 95 P. 698.

987-89 S. *v.* Wooten, 139 Mo. App. 221, 122 S. W. 1101, result of colorable official proceeding, not noticed.

987-92 Bank *v.* Fulgham, 151 Cal. 234, 90 P. 936; Merritt *v.* County, 3 Cal. App. 168, 84 P. 675; Stanford *v.* Bailey, 122 Ga. 404, 50 S. E. 161; Pay-

ton *v.* McPhaul, 128 Ga. 510, 58 S. E. 50; Williams *v.* S., 2 Ga. App. 629, 58 S. E. 1071; North *v.* Jones (Ind. App.), 100 N. E. 84; Myher *v.* Myher, 224 Mo. 631, 123 S. W. 806; Wishard *v.* S., 5 Okla. Cr. 610, 115 P. 796.

987-93 Little *v.* Williams, 88 Ark. 37, 113 S. W. 340, *cit.* the text; Stanton *v.* Hotchkiss, 157 Cal. 652, 108 P. 864.

988-96 P. *v.* Metz, 126 N. Y. S. 986.

988-97 Little *v.* Williams, 88 Ark. 37, 113 S. W. 340, *cit.* the text; Payton *v.* McPhaul, 128 Ga. 510, 58 S. E. 50; Brannan *v.* Henry, 175 Ala. 454, 57 S. 967. See Bank *v.* Fulgham, 151 Cal. 234, 90 P. 936; Kimball *v.* McKee, 149 Cal. 435, 86 P. 1089.

988-98 S. ex rel. Allen *v.* Town, etc., 177 Ala. 204, 58 S. 905.

989-4 Brannan *v.* Henry, 142 Ala. 698, 39 S. 92; Worden *v.* Cole, 74 Kan. 226, 86 P. 464.

989-6 Stanton *v.* Hotchkiss, 157 Cal. 652, 108 P. 864.

989-7 Stanton *v.* Hotchkiss, supra; Merritt *v.* County, 3 Cal. App. 168, 84 P. 675.

990-10 Merritt *v.* Barta, 158 Cal. 377, 111 P. 259; Davis *v.* S., 134 Wis. 632, 115 N. W. 150. See Kimball *v.* McKee, 149 Cal. 435, 86 P. 1089.

990-14 Leonard *v.* Lennox, 181 Fed. 760, 104 C. C. A. 296; U. S. *v.* Moody, 164 Fed. 269; Nurnberger *v.* U. S., 156 Fed. 721, 84 C. C. A. 377 (land office); Kansas City S. R. Co. *v.* S., 90 Ark. 343, 119 S. W. 288, quot. the text; Kimball *v.* McKee, 149 Cal. 435, 86 P. 1089 (land office); Wabash R. Co. *v.* Campbell, 219 Ill. 312, 76 N. E. 346 (federal quarantine regulations for cattle); S. *v.* R. Co., 141 N. C. 846, 54 S. E. 294 (department of agriculture regulating transportation of cattle). See Beck *v.* Johnson, 169 Fed. 154; Griner *v.* Baggs, 4 Ga. App. 232, 61 S. E. 147.

991-15 See Nagle *v.* U. S., 145 Fed. 302, 76 C. C. A. 181.

991-18 Grant *v.* Hardage, 106 Ark. 506, 153 S. W. 826; Rash *v.* Allen, 1 Boyce (Del.) 444, 76 A. 370; S. *v.* Goff, 135 La. —, 65 S. 481; S. *v.* Swiggart, 118 Tenn. 556, 102 S. W. 75. See S. *v.* Schnitger, 16 Wyo. 479, 95 P. 698.

Of the recitals and records of the journals of both branches of the general assembly to aid the court in determining the validity of any act. Jobe *v.* Urquhart, 102 Ark. 470, 143 S. W. 121.

992-19 S. *v.* Joseph, 175 Ala. 579, 57 S. 942; Woessner *v.* Bullock, 176 Ind. 166, 93 N. E. 1057.

992-21 Worthy *v.* Bush, 262 Ill. 560, 104 N. E. 904; Erford *v.* Peoria, 229 Ill. 546, 82 N. E. 374.

993-22 But see Erford *v.* Peoria, supra.

993-24 Journals of constitutional convention, noticed. Schwartz *v.* P., 46 Colo. 239, 104 P. 92.

993-26 S. *v.* Ricksecker, 73 Kan. 495, 85 P. 547; S. *v.* Toole, 32 Mont. 4, 79 P. 403; S. *v.* Swink, 151 N. C. 726, 66 S. E. 448; Bosworth *v.* R. Co., 26 R. I. 309, 58 A. 982; M. K. & T. R. Co. *v.* McIlhaney (Tex. Civ.), 129 S. W. 153.

993-27 Villa *v.* Allen, 2 Phil. Isl. 436; Sowards *v.* Meagher, 37 Utah 212, 108 P. 1112.

994-29 Bosworth *v.* R. Co., 26 R. I. 309, 58 A. 982, ordering out militia.

994-30 S., etc. *v.* Philips, 64 Fla. 105, 59 S. 241; Kiser *v.* Oglesby, 11 Ga. App. 190, 74 S. E. 1036; Thomas *v.* S., 59 Tex. Cr. 159, 127 S. W. 1030. See P. *v.* Pugliese, 80 Misc. 75, 140 N. Y. S. 849.

995-32 Sapp *v.* S., 2 Ala. App. 190, 56 S. 45.

995-34 S. *v.* Roach (Mo.), 167 S. W. 1008; Law Rep. Co. *v.* Co., 135 Mo. App. 10, 115 S. W. 475 (interstate commerce commission).

The court knows judicially that the city court of Quitman has jurisdiction over the whole county of Brooks, and has authority to enforce a cause of action, such as that set forth in the petition. It likewise knows judicially that the superior court of Brooks county has the same power and authority; and that these are the only two courts in the county which have the jurisdiction to enforce the cause of action. Kiser *v.* Oglesby, 11 Ga. App. 190, 74 S. E. 1036.

Extent of judicial district.—S. *v.* Pope, 110 Mo. App. 520, 85 S. W. 633; S. *v.* Lu Sing, 34 Mont. 31, 85 P. 521.

997-38 Lindsey *v.* Bloodworth, 97 Ark. 541, 134 S. W. 959; Ex parte Looper, 61 Tex. Cr. 129, 134 S. W. 345; Hardman *v.* Brannon, 70 W. Va. 726, 75 S. E. 74.

997-39 S. *v.* Taylor (Mo. App.), 166 S. W. 1071, from entries in record. See P. *v.* Pugliese, 80 Misc. 75, 140 N. Y. S. 849.

997-40 McMullan *v.* Long (Ala.), 39 S. 777 (beginning and length of session); Edwards *v.* S., 123 Ga. 542, 51

S. E. 630; Fry *v.* Radzinski, 219 Ill. 526, 76 N. E. 694; Sinclair *v.* Gunzenhauser, 179 Ind. 78, 98 N. E. 37, 100 N. E. 376; Federal Cement T. Co. *v.* Korff, 50 Ind. App. 608, 97 N. E. 185; Mitchell *v.* Sparlin (Mo.), 164 S. W. 205; S. *v.* Broaddus, 239 Mo. 359, 143 S. W. 455; Kuczma *v.* Droszkowski, 243 Mo. 57, 147 S. W. 1000; Nickey *v.* Leader, 235 Mo. 30, 138 S. W. 18; Ray Co. S. Bk. *v.* Hutton, 224 Mo. 42, 123 S. W. 47; S. *v.* Pope, 110 Mo. App. 520, 85 S. W. 633; S. *v.* Lu Sing, 34 Mont. 31, 85 P. 521; Meadows *v.* Osterkamp, 23 S. D. 462, 122 N. W. 419.

See S. *v.* McQuillan (Mo.), 165 S. W. 713.

When supreme court fixes terms, order is equivalent to statute and is noticed. Board *v.* S., 19 Okla. 375, 91 P. 699.

When commencement only is fixed by law date of adjournment not noticed. Felt *v.* Cook, 31 Utah 299, 87 P. 1092.

Notice taken courts not closed in 1861 and 1862. Breckenridge C. Co. *v.* Scott, 121 Tenn. 88, 114 S. W. 930.

998-42 Rules of district courts of state, not noticed. Powell *v.* Co., 12 Ida. 723, 88 P. 97.

998-43 Mann *v.* Brown, 263 Ill. 394, 105 N. E. 328; Stivers *v.* Byrkett, 56 Or. 565, 109 P. 386. *Contra,* Johnson-W. Co. *v.* Wright, 28 App. Cas. (D. C.) 375.

A custom of the lower court will be noticed. Farber *v.* Conti, 84 Conn. 458, 80 A. 581.

998-44 S. *v.* Homer, 249 Mo. 58, 155 S. W. 405. See Wyatt *v.* Arnot, 7 Cal. App. 221, 94 P. 86.

Not that suit with lower number was commenced before present. Dowdy *v.* Calvi, 14 Ariz. 148, 125 P. 873.

999-46 Usual method of preparing judgments. Bulkley *v.* Co., 136 App. Div. 479, 121 N. Y. S. 159.

999-48 A written report by grand jury, not noticed. Chicago, etc. C. Co. *v.* P., 114 Ill. App. 75, 99.

999-50 Withaup *v.* U. S., 127 Fed. 530, 62 C. C. A. 328; Alabama, etc. R. Co. *v.* Bates, 155 Ala. 347, 46 S. 776; Sewell *v.* Price, 164 Cal. 265, 128 P. 407; U. S., etc. Co. *v.* Newton, 50 Colo. 379, 115 P. 897; Capital City Bk. *v.* Hilson, 64 Fla. 206, 60 S. 189; P. *v.* Ackermann, 146 Ill. App. 301; Pavlicek *v.* Roessler, 121 Ill. App. 219 (appraisement of widow's award); Macy *v.* Lindley (Ind. App.), 99 N. E. 790; S. *v.* Simpson, 166 Ind. 211, 76 N. E. 544, 1005; Bond *v.* R. Co., 124 Minn. 195, 144 N. W. 942; Mahopoulos *v.* R. Co. (Mo.), 165 S. W. 310; Shaw *v.* Shaw, 155 App. Div. 252, 140 N. Y. S. 109 (but not that medical testimony is in this record); Yarbrough *v.* Etheredge (Tex. Civ.), 163 S. W. 998; Cent. Bk. & Trust Co. *v.* Davis (Tex. Civ.), 149 S. W. 290.

1000-51 Bowes *v.* Cannon, 50 Colo. 262, 116 P. 336; McNish *v.* S., 47 Fla. 69, 36 S. 176; Slater *v.* Roche, 148 Ia. 413, 126 N. W. 925; S. *v.* Kesner, 72 Kan. 87, 82 P. 720 (journal entry in same case at previous term).

1000-52 Withaup *v.* U. S., 127 Fed. 530, 62 C. C. A. 328; McNish *v.* S., 47 Fla. 69, 36 S. 176; Slater *v.* Roche, 148 Ia. 413, 126 N. W. 925; Shaw *v.* Shaw, 155 App. Div. 252, 140 N. Y. S. 109; Silverstein *v.* Brown, 153 App. Div. 677, 138 N. Y. S. 848; Brown *v.* De Long, 18 O. Dec. 474; S. *v.* Hunter, 82 S. C. 153, 63 S. E. 685; Johnson *v.* Co. (Tex. Civ.), 121 S. W. 883; Hale *v.* Co., 56 Wash. 236, 105 P. 480. See Howe *v.* Kern, 63 Or. 487, 125 P. 834, 128 P. 818.

1001-55 P. *v.* Cohen, 136 N. Y. S. 163, a charge of assault made pending this case in this court. See S. *v.* Sassaman, 214 Mo. 695, 114 S. W. 590.

Former decision in the case.—McGee *v.* Anderson (Tex. Civ.), 146 S. W. 1198.

Claims made by parties in previous case, noticed. In re Ordway, 196 N. Y. 95, 89 N. E. 474.

1001-58 Bunting *v.* Powers, 144 Ia. 65, 120 N. W. 679; S. *v.* Walker, 78 Kan. 680, 97 P. 862; Danforth *v.* Egan, 23 S. D. 43, 119 N. W. 1021; Dupree *v.* S., 56 Tex. Cr. 562, 120 S. W. 871. See In re Holt, 15 Haw. 580; Reed *v.* Bk., 135 Ill. App. 165 (on scire facias to revive judgment), *aff.* in 232 Ill. 238, 83 N. E. 820; Edgar *v.* McDonald (Tex. Civ.), 106 S. W. 1135.

In contempt proceedings court notices its orders and actions in matter out of which contempt arises, and facts constituting contempt where committed in its presence. Ferriman *v.* P., 128 Ill. App. 230; S. *v.* Thomas, 74 Kan. 360, 86 P. 499 (violation of injunction). See Wilson *v.* Co., 153 Fed. 961, 83 C. C. A. 77.

Appointment of receiver.—Where application therefor is mere incident of action court will notice facts and circumstances brought out in main action.

Waters-P. O. Co. *v.* S., 47 Tex. Civ. 299, 105 S. W. 851.

1002-60 See infra, "Venue," 931-21.

Garnishment proceedings after judgment. Baze *v.* Co. (Tex. Civ.), 94 S. W. 460; Sawyer *v.* Bk., 41 Tex. Civ. 486, 93 S. W. 151.

1003-61 But see Young Hin *v.* Hackfeld, 16 Haw. 427, 430.

1003-62 Buhman *v.* Nickels, 7 Cal. App. 592, 95 P. 177; S. *v.* Hunter, 82 S. C. 153, 63 S. E. 685 (trial court should notice remittitur). *Contra* on demurrer to bill. National C. Co. *v.* Stolts, 174 Fed. 413, 98 C. C. A. 617.

Former jeopardy.—McNish *v.* S., 47 Fla. 69, 36 S. 176.

1003-63 Withaup *v.* U. S., 127 Fed. 530, 62 C. C. A. 328; Murphy *v.* Bk., 82 Ark. 131, 100 S. W. 894 (on plea res judicata); Sewell *v.* Price, 164 Cal. 265, 128 P. 407; Estudillo *v.* Co., 149 Cal. 556, 87 P. 19 (though between same parties); In re Kearney's Est., 13 Cal. App. 92, 109 P. 37; Ryan *v.* Knights, 82 Conn. 91, 72 A. 574; Capital City Bk. *v.* Hilson, 64 Fla. 206, 60 S. 189; McNish *v.* S., 47 Fla. 69, 36 S. 176; O'Connor *v.* U. S., 11 Ga. App. 246, 75 S. E. 110; Hines *v.* Stahl, 79 Kan. 88, 99 P. 273; Lilly *v.* Francis, 137 Ky. 385, 125 S. W. 1050; Matthews *v.* Matthews, 112 Md. 582, 77 A. 249; Oliver *v.* Enriquez, 16 N. M. 322, 117 P. 844; In re Ollschlager's Est., 50 Or. 55, 89 P. 1049; Byrd *v.* S., 51 Tex. Cr. 539, 103 S. W. 863; Pacific I. & S. Wks. *v.* Goerig, 55 Wash. 149, 104 P. 151; Wellman *v.* Hoge, 66 W. Va. 234, 66 S. E. 357; Nicholson *v.* S., 18 Wyo. 298, 106 P. 929; Demars *v.* Hickey, 13 Wyo. 371, 80 P. 521, 81 P. 705.

See Cumberland T. Co. *v.* R. Co., 117 La. 199, 41 S. 492; Taylor *v.* Shelton (Tex. Civ.), 134 S. W. 302.

1004-65 *Comp.* Board *v.* S., 19 Okla. 375, 91 P. 699.

1004-66 Files *v.* Jackson, 84 Ark. 587, 106 S. W. 950 (tax sales in 1873 for taxes of 1872, illegal); McKinnon *v.* Johnson, 57 Fla. 120, 48 S. 910. But in Cumberland T. Co. *v.* R. Co., 117 La. 199, 41 S. 492, court overrules Graham *v.* Williams, and other cases which hold record of other cases in which foreign law determined can be noticed.

1004-68 Buhman *v.* Nickels, 1 Cal. App. 266, 82 P. 85; Brashears *v.* Frazier, 33 Ky. L. R. 662, 110 S. W. 826 (in action for wrongfully prosecuting another action in same court disposition of first, noticed by trial court on demurrer, though not pleaded, and by court on appeal). See Edgar *v.* McDonald (Tex. Civ.), 106 S. W. 1135; Sawyer *v.* Bk., 41 Tex. Civ. 486, 93 S. W. 151; In re Evans (Utah), 130 P. 217. But see Estudillo *v.* Co., 149 Cal. 556, 87 P. 19.

As guide to exercise of its discretion in the disposition of an erroneous judgment appellate court may notice its records of other cases, but not to reverse a judgment unimpeachable on the face of its own record. In re Trans. Pen. Cases, 46 Misc. 579, 92 N. Y. S. 322.

1005-69 Lownsdale *v.* Co., 54 Wash. 542, 103 P. 833.

1005-71 Wilson *v.* Co., 153 Fed. 961, 83 C. C. A. 77; Gallagher *v.* U. S., 144 Fed. 87, 75 C. C. A. 245 (that witness testified differently in another case before the court); Hancock *v.* Co., 37 Ind. App. 351, 75 N. E. 659; Edgar *v.* McDonald (Tex. Civ.), 106 S. W. 1135. See Comstock *v.* Ramsay, 55 Colo. 244, 133 P. 1107; Seymour *v.* Berg, 127 Ill. App. 370; Waterbury Bk. *v.* Reed, 231 Ill. 246, 83 N. E. 188; Culver *v.* Co., 149 Mich. 630, 113 N. W. 9; Sawyer *v.* Bk., 41 Tex. Civ. 486, 93 S. W. 151.

1006-73 Savage *v.* S. (Tex. Civ.), 138 S. W. 211.

1006-74 In re Ollschlager's Est., 50 Or. 55, 89 P. 1049.

1007-76 See Bk. of Eau Claire *v.* Reed, 232 Ill. 238, 83 N. E. 820; Waterbury Bk. *v.* Reed, 231 Ill. 246, 83 N. E. 188.

1007-77 McDonald *v.* R. Co., 164 Fed. 1007.

Mandate of supreme court, filed in another court and incorporated in decree rendered in another case by intermediate court, noticed. Coram *v.* Davis, 174 Fed. 664.

1007-78 Hunter *v.* Lissner, 1 Ga. App. 1, 58 S. E. 54 (bankruptcy proceedings); Robinson *v.* R. Co., 64 W. Va. 406, 63 S. E. 323 (interstate commerce commission).

1007-79 See Southern P. R. Co. *v.* Lipman, 148 Cal. 480, 83 P. 445.

1008-84 Peycke *v.* Shinn, 68 Neb. 343, 347, 94 N. W. 135; P. *v.* Pugliese, 80 Misc. 75, 140 N. Y. S. 849; Guenther *v.* S., 137 Wis. 183, 118 N. W. 640.

Method of entering judgments, noticed. Wynn *v.* McCrancy, 156 Ala. 630, 46 S. 854.

1008-86 Bohanon *v.* Darden, 7 Ala. App. 220, 60 S. 955; McNish *v.* S., 47 Fla. 69, 36 S. 176; Keaton *v.* Jorndt (Mo.), 168 S. W. 784; S. *v.* Richardson, 48 Or. 309, 85 P. 225; Good *v.* R. Co. (Tex. Civ.), 166 S. W. 670. See Munn *v.* Gorden, 87 Kan. 519, 125 P. 7; Richardson *v.* S., 47 Tex. Cr. 592, 85 S. W. 282. *Comp.* Canal L. Co. *v.* Inv. Co., 72 Wash. 437, 130 P. 492.

But not that a certain decision is basis for the publication. Taylor *v.* Pub. Co. (Fla.), 65 S. 3.

1009-87 Glos *v.* Greiner, 226 Ill. 546, 80 N. E. 1055; S. *v.* Campbell, 210 Mo. 203, 109 S. W. 706 (prosecuting attorney); S. *v.* Guglielmo, 46 Or. 250, 79 P. 577, 80 P. 103.

1010-95 *Contra,* Perry *v.* Bush, 46 Fla. 242, 35 S. 225.

1010-99 Glover *v.* Morris, 122 Ga. 768, 50 S. E. 956; In re Barlow, 141 App. Div. 640, 127 N. Y. S. 542.

1010-1 Brunson *v.* S. (Ala.), 39 S. 569; Wyatt *v.* Arnot, 7 Cal. App. 221, 94 P. 86 (election as judge pursuant to governor's proclamation to fill unexpired term); Perry *v.* Bush, 46 Fla. 242, 35 S. 225; S. *v.* Pope, 110 Mo. App. 520, 85 S. W. 633; Mayes *v.* Palmer, 206 Mo. 293, 103 S. W. 1140.

Death of judge.—Gross *v.* Wood, 117 Md. 362, 83 A. 337.

1011-2 P. *v.* Knoblock, 11 Cal. App. 333, 104 P. 1012; Glover *v.* Morris, 122 Ga. 768, 50 S. E. 956; S. *v.* Shea, 28 Okla. 821, 115 P. 862; N. W. Port Huron Co. *v.* Zickrick, 22 S. D. 89, 115 N. W. 525.

1011-7 Weber *v.* Powers, 114 Ill. App. 411; Baker *v.* S., 9 Okla. Cr. 62, 130 P. 820; Nolan *v.* R. Co., 19 Okla. 51, 91 P. 1128 (supreme court licenses all attorneys and therefore knows who are licensed).

1012-10 S. *v.* Kinney, 21 S. D. 390, 113 N. W. 77.

1012-13 Bloch *v.* Crumpacker, 44 Ind. App. 171, 88 N. E. 875.

1012-15 S. *v.* Guglielmo (deputy district attorney), S. *v.* Kinney, 21 S. D. 390, 113 N. W. 77 (clerk).

1012-16 Missouri, K. & T. R. Co. *v.* Hurdle (Tex. Civ.), 142 S. W. 992.

Signature of officer unkown to law, not noticed. Eames *v.* Woodson, 120 La. 1031, 46 S. 13.

1013-17 See S. *v.* Campbell, 210 Mo. 203, 109 S. W. 706; S. *v.* Kinney, 21 S. D. 390, 113 N. W. 77.

1013-20 See Harper F. Co. *v.* Co., 144 N. C. 639, 57 S. E. 458.

1013-22 Lyman *v.* S., 90 Ark. 596, 119 S. W. 1116.

1013-23 See S. *v.* Arthur, 129 Ia. 235, 105 N. W. 422.

1013-25 Rowe *v.* Spencer, 132 Ga. 426, 64 S. E. 468; Brown *v.* R. Co., 76 N. J. L. 795, 71 A. 271 (town boundaries and relative location of town); White *v.* Sohn, 65 W. Va. 409, 64 S. E. 442.

1013-26 Beaty *v.* Sears, 132 Ga. 516, 64 S. E. 321; S. *v.* Fishel, 140 Ia. 460, 118 N. W. 763; Atchison, etc. R. Co. *v.* Paxton, 75 Kan. 197, 88 P. 1082.

Notice taken that city in certain county. Gaddy *v.* Smith (Tex. Civ.), 116 S. W. 164.

1014-28 Holtan *v.* Beck, 20 N. D. 5, 125 N. W. 1048; Gossett *v.* S., 57 Tex. Cr. 43, 123 S. W. 428. See Davis *v.* S., 134 Wis. 632, 115 N. W. 150.

1015-31 S. *v.* Bush, 136 Mo. App. 608, 118 S. W. 670; Missouri, etc. R. Co. *v.* Lightfoot, 48 Tex. Civ. 120, 106 S. W. 395.

1015-32 But see Curtis *v.* Sexton, 252 Mo. 221, 159 S. W. 512; Bartling *v.* Wait (Neb.), 148 N. W. 507.

1015-34 Barney *v.* S., 5 Ala. App. 302, 57 S. 598; Howard *v.* S., 172 Ala. 402, 55 S. 255; Anniston E. G. Co. *v.* Elwell, 144 Ala. 317, 42 S. 45; Dupree *v.* S., 148 Ala. 620, 42 S. 1004; Bell *v.* S., 93 Ark. 600, 125 S. W. 1020; Gould *v.* Mathes, 55 Colo. 384, 135 P. 780; Shaw *v.* Martin, 20 Ida. 168, 117 P. 853; Volker *v.* S., 177 Ind. 159, 97 N. E. 422; S. *v.* Meyer, 135 Ia. 507, 113 N. W. 322; P. *v.* Loris, 131 App. Div. 127, 115 N. Y. S. 236; C. *v.* Salawich, 28 Pa. Super. 330. See S. *v.* R. Co., 141 N. C. 846, 54 S. E. 294.

1016-36 Lemuels *v.* S. (Ark.), 166 S. W. 741; Miller *v.* Miller (Ind. App.), 104 N. E. 588; Reed *v.* Ty., 1 Okla. Cr. 481, 98 P. 583. See Lowville, etc. R. Co. *v.* Elliott, 115 App. Div. 884, 101 N. Y. S. 328.

1017-37 Boundaries of city in which court sits, noticed. Heno *v.* Fayetteville, 90 Ark. 292, 119 S. W. 287.

1017-39 Scott *v.* S., 75 Ark. 142, 86 S. W. 1004 (offense committed five miles east of county seat, committed within county); Cleveland, etc. R. Co. *v.* Miller, 40 Ind. App. 165, 81 N. E. 517; Atchison, etc. R. Co. *v.* Paxton, 75 Kan. 197, 88 P. 1082 (incorporated towns); Scheffler *v.* Hardin, 140 Mo.

App. 13, 124 S. W. 569; St. Louis, etc. R. Co. *v.* Williams, 25 Okla. 662, 107 P 428. See S. *v.* Arthur, 129 Ia. 235, 105 N. W. 422; S. *v.* R. Co., 141 N. C. 846, 54 S. E. 294.

That town not on a railroad, noticed (Green *v.* Co., 150 Ala. 112, 43 S. 216); also that towns are points on a railroad between other towns. Lowville R. Co. *v.* Elliott, 115 App. Div. 884, 101 N. Y. S. 328.

1018-40 That a certain township contains a city of more than 50,000 population has been judicially noticed. Henderson *v.* McGruder, 49 Ind. App. 682, 98 N. E. 137.

1018-42 Dupree *v.* S., 148 Ala. 620, 42 S. 1004; Heno *v.* Fayetteville, 90 Ark. 292, 119 S. W. 287; S. *v.* Arthur, 129 Ia. 235, 105 N. W. 422.

1018-43 Fletcher *v.* Hickman, 165 Fed. 403, 91 C. C. A. 353; Barney *v.* S., 5 Ala. App. 302, 57 S. 598; McKenzie *v.* Newton, 89 Ark. 564, 117 S. W. 553 (natural boundaries); Gibson *v.* Austin, 23 Colo. App. 220, 128 P. 859; Miller *v.* Miller (Ind. App.), 104 N. E. 588; S. *v.* Dollar, 88 Kan. 346, 128 P. 365; Skillman *v.* Clardy (Mo.), 165 S. W. 1050; Curtis *v.* Sexton, 252 Mo. 221, 159 S. W. 512; S. *v.* Cummings, 248 Mo. 509, 154 S. W. 725; Johnson *v.* R. Co., 104 Mo. App. 588, 78 S. W. 275 (towns are suburbs and part of a city although one of them is across state line); S. *v.* Booth, 46 Mont. 334, 127 P. 1017; S. *v.* Wildwood (N. J.), 84 A. 274; P. *v.* Bradley, 207 N. Y. 592, 101 N. E. 766; Harper F. Co. *v.* Co., 144 N. C. 639, 57 S. E. 458 (see supra, 933-40). See Lowville R. Co. *v.* Elliott, 115 App. Div. 884, 101 N. Y. S. 328.

Means of communication, public improvements and existence of daily press of general local circulation, noticed. Fletcher *v.* Hickman, 165 Fed. 403, 91 C. C. A. 353.

1018-44 Boundaries of municipalities, noticed. Guarreno *v.* S., 157 Ala. 17, 48 S. 65.

1018-46 Anderson *v.* Ocala (Fla.), 64 S. 775; Kolman *v.* S., 124 Ga. 63, 52 S. E. 82; P. *v.* Wilkerson, 162 Ill. App. 76; Topeka *v.* Cook, 72 Kan. 595, 84 P. 376 (whether streets in or out of city boundaries); S. *v.* Schneiders (Mo.), 168 S. W. 604; Woodson *v.* R. Co., 224 Mo. 685, 123 S. W. 820. *Contra,* Pacific P. Co. *v.* Verso, 12 Cal. App. 362, 107 P. 590 (streets, their boundaries and relation to each other). See Ingersoll *v.* Davis, 14 Wyo. 120, 82 P. 867. But see In re New York, 48 Misc. 602, 96 N. Y. S. 554.

1019-49 S. *v.* Rogers, 31 Mont. 1, 77 P. 293. See In re Comr., 64 Misc. 620, 120 N. Y. S. 580.

Existence and use of streets in city, noticed. Bailliere *v.* Co., 150 N. C. 627, 64 S. E. 754.

1019-50 Foster *v.* R. Co., 158 Ill. App. 478.

1019-51 S. *v.* P. Co., 119 Minn. 225, 137 N. W. 1104; Gruber *v.* R. Co., 53 Misc. 322, 103 N. Y. S. 216 (appellate court in New York City may notice location and direction of its streets and avenues). See Chicago *v.* Kubler, 133 Ill. App. 520.

1020-56 Nichols *v.* Ansonia, 81 Conn. 229, 70 A. 636; S. *v.* P. Co., 119 Minn. 225, 137 N. W. 1104.

1020-57 That a park is within limits of a city, not noticed. Edwards *v.* City, 124 Ga. 78, 52 S. E. 297.

"**The complaint** describes the land by metes and bounds, as containing 63 7-20 acres, more or less, and avers that it is within the corporate limits of the town of Windfall City, but it is not alleged that it forms any boundary line of the town, and we cannot judicially know, and do not know as a fact, that it does." Town of Windfall City *v.* S., 174 Ind. 311, 92 N. E. 57.

1020-58 S. *v.* Rogers, 31 Mont. 1 77 P. 293.

Location of schoolhouse, noticed. Jeffries *v.* Board, 135 Ky. 488, 122 S. W. 813.

1020-59 Badgett *v.* S., 157 Ala. 20, 48 S. 54; Stoner *v.* Los Angeles, 8 Cal. App. 607, 97 P. 692; C. *v.* Co., 30 Ky L. R. 1235, 100 S. W. 871; Bode *v.* S., 80 Neb. 74, 113 N. W. 996; Board *v.* Buckly, 82 S. C. 352, 64 S. E. 163 (and of repeal of charter); Atherton *v.* Junction, 83 Vt. 218, 74 A. 1118. *Contra,* Paris *v.* Tucker (Tex.), 104 S. W. 1046.

Where made a public act charter, noticed. Austin *v.* Forbis, 99 Tex. 234, 89 S. W. 405.

1021-60 City of Columbiana *v.* Kelley & Co., 172 Ala. 336, 55 S. 526; Darby *v.* City, 173 Ala. 709, 55 S. 889; Bessemer *v.* Carroll, 154 Ala. 506, 45 S. 419; S. *v.* Matthews, 153 Ala. 646, 45 S. 307; Frost *v.* Clements, 153 Ala. 654, 45 S. 203; Denver City T. Co. *v.* Carson, 21 Colo. App. 604, 123 P. 680; Miami *v.* Co., 57 Fla. 366, 49 S. 55; Seaboard A. L. Ry. *v.* Peeples, 12 Ga. App. 154, 77 S. E.

12; Mound City *v.* Mason, 262 Ill. 392, 104 N. E. 685 (corporate existence); White *v.* Moorhead, 120 Minn. 1, 138 N. W. 939; Jennings Hts., etc. Co. *v.* St. Louis (Mo.), 165 S. W. 741; Chase-Hibbard M. Co. *v.* City, 207 N. Y. 460, 101 N. E. 158; Mosher *v.* Elmira, 83 Misc. 328, 145 N. Y. S. 964; Stone *v.* Auerbach, 133 App. Div. 75, 117 N. Y. S. 734; S. *v.* Thompson, 21 N. D. 426, 131 N. W. 231; Naylor *v.* McColloch, 54 Or. 305, 103 P. 68; Bluitt *v.* S., 56 Tex. Cr. 525, 121 S. W. 168; City of Paris *v.* Bray (Tex. Civ.), 142 S. W. 927; Satterfield *v.* C., 105 Va. 867, 52 S. E. 979 (especially where jurisdiction of mayor's court exceeds city limits); S. *v.* Tausick, 64 Wash. 69, 116 P. 651.

1022-61 But see S. *v.* Ricksecker, 73 Kan. 495, 85 P. 547; Brownsville *v.* Arbuckle, 30 Ky. L. R. 414, 99 S. W. 239; Agnew *v.* City, 79 Neb. 603, 113 N. W. 236.

1022-62 Welsh *v.* Shumway, 232 Ill. 54, 83 N. E. 549.

Illinois statute does not require notice to be taken of territory in village. P. *v.* Pederson, 220 Ill. 554, 77 N. E. 251.

1023-65 Clark *v.* City, 160 Cal. 30, 116 P. 722.

1023-67 Class to which city belongs, if dependent upon population, need not be proved. Olmstead *v.* Red Cloud, 86 Neb. 528, 125 N. W. 1101.

1023-68 Clayton *v.* Martin, 7 Ala. App. 190, 60 S. 963; Badgett *v.* S., 157 Ala. 20, 46 S. 54; City of Malvern *v.* Cooper, 108 Ark. 24, 156 S. W. 845; Drifoos *v.* Jonesboro, 107 Ark. 99, 154 S. W. 196; Gardner *v.* S., 80 Ark. 264, 97 S. W. 48; Metteer *v.* Smith, 156 Cal. 572, 105 P. 735; May *v.* Craig, 13 Cal. App. 368, 109 P. 842; Gault *v.* City (Colo.), 142 P. 171; Wolfe *v.* Abbott, 54 Colo. 531, 131 P. 386; Coors *v.* Brock, 22 Colo. App. 470, 125 P. 599; Hill *v.* City, 125 Ga. 697, 54 S. E. 354 (neither supreme court nor any other than a municipal court can notice ordinances); Chicago *v.* Miller, 146 Ill. App. 530; Cordatos *v.* Chicago, 129 Ill. App. 471; P. *v.* Co., 233 Ill. 290, 84 N. E. 230; Sullivan *v.* Darratt, 83 Kan. 799, 109 P. 777; Rudison *v.* Glover, 131 La. 381, 59 S. 817; S. *v.* Mayor, etc., 130 La. 195, 57 S. 798; Burke *v.* Tricalli, 124 La. 774, 50 S. 710; Thomas *v.* S., 101 Miss. 74, 57 S. 364; Peterson *v.* United Rys. (Mo. App.), 168 S. W. 254; City of St. Louis *v.* Young, 235 Mo. 44, 138 S. W. 5; City of St. Louis *v.* Ringold, 235 Mo. 472, 139 S. W. 186; City of St. Louis *v.* Johnson, 235 Mo. 478, 139 S. W. 188; City of St. Louis *v.* Ameln, 235 Mo. 669, 139 S. W. 429; City of St. Louis *v.* Meyer, 235 Mo. 699, 139 S. W. 438; Canton *v.* Madden, 120 Mo. App. 404, 96 S. W. 699; St. Louis *v.* Leissing, 190 Mo. 464, 89 S. W. 611; P. *v.* Bell, 148 N. Y. S. 753; Berry *v.* Sup. Co., 163 App. Div. 21, 148 N. Y. S. 67; New York *v.* Co., 104 App. Div. 223, 93 N. Y. S. 937; Grimmer *v.* Tenement House Dept., 205 N. Y. 549, 98 N. E. 332; Collender *v.* Reardon, 121 N. Y. S. 531; P. *v.* Ahearn, 109 N. Y. S. 249; Cunningham *v.* City, 27 Okla. 858, 113 P. 919; Edwards *v.* Perrette, 35 Pa. C. C. 269; Norfolk & P. T. Co. *v.* Forrest, 109 Va. 658, 64 S. E. 1034; S. *v.* Koch, 138 Wis. 27, 119 N. W. 839.

And so of federal courts.—Robinson *v.* T. Co., 164 Fed. 174, 90 C. C. A. 160.

1024-69 Weiss *v.* Comrs., 152 Ky. 552, 153 S. W. 967; Minnesota *v.* Martin (Minn.), 145 N. W. 383.

1025-70 P. *v.* Tillman, 139 App. Div. 572, 124 N. Y. S. 44, *rev.* 118 N. Y. S. 442, *aff.* 201 N. Y. 585, 95 N. E. 1136.

1025-72 Hill *v.* City, 125 Ga. 697, 54 S. E. 354; City of Chicago *v.* Baker, 157 Ill. App. 130; Houren *v.* R. Co., 236 Ill. 620, 86 N. E. 611; S. *v.* Fulco (La.), 65 S. 239; S. *v.* Gulla (La.), 65 S. 240; Steiner *v.* S., 78 Neb. 147, 110 N. W. 723; Byer *v.* Harris, 77 N. J. L. 304, 72 A. 136; Galen Hall Co. *v.* City, 76 N. J. L. 20, 68 A. 1092. See also Buffalo *v.* Stevenson, 129 N. Y. S. 125.

And so "in an action brought in such courts to enforce an ordinance, such ordinance need neither be pleaded nor proven." City of Milbank *v.* Cronlokken, 29 S. D. 46, 135 N. W. 711.

1025-73 Hill *v.* City, 125 Ga. 697, 54 S. E. 354 (on certiorari); Canton *v.* Madden, 120 Mo. App. 404, 96 S. W. 699; Sachs *v.* Lyons, 53 Misc. 640, 103 N. Y. S. 149.

Contra, Galen Hall Co. *v.* City, 76 N. J. L. 20, 68 A. 1092.

On trial de novo appellate court must notice all matters which trial court compelled to notice, but on appeal to a still higher court where no trial de novo is had a different rule prevails and ordinances must be embodied in the record. Steiner *v.* S., 78 Neb. 147, 110 N. W. 723; *dist.* Foley *v.* S., 42 Neb. 233, 60 N. W. 574.

1026-76 Kempton Lodge *v.* Mozingo

(Ind.), 103 N. E. 411; Elkhart *v.* Turner, 170 Ind. 455, 84 N. E. 812.

1026-79 Seals of private corporations, not noticed. Griffing *v.* Winfield, 53 Fla. 589, 43 S. W. 687.

Location of principal office of domestic corporation, noticed. Wallace *v.* Co., 7 Ga. App. 565, 67 S. E. 694.

Authority by which corporation can acquire rights in bed, banks or water of river, noticed. S. *v.* Co., 52 Or. 502, 95 P. 722.

Wealth of corporation, not noticed. S. *v.* Clements, 37 Mont. 314, 96 P. 498, 37 Mont 96, 95 P. 845.

1026-80 Wycoff *v.* Co., 146 Mo. App. 554, 125 S. W. 550.

1027-81 King Land, etc. Co. *v.* Bowen, 7 Ala. App. 462, 61 S. 22; P. *v.* Wirsching, 239 Ill. 522, 88 N. E. 169 (prosecution for keeping gaming place).

Method by which title to land acquired, noticed. S. *v.* Co., 52 Or. 502, 95 P. 722.

Existence of class of corporations under local laws, noticed. Ingle *v.* Co., 89 Ark. 378, 117 S. W. 241.

1027-83 Atlanta, etc. R. Co. *v.* R. Co., 124 Ga. 125, 52 S. E. 320 (charter of railroad of record in office of secretary of state); McArdle *v.* R. Co., 141 Ill. App. 59; Louisville, etc. R. Co. *v.* C., 154 Ky. 293, 157 S. W. 369; C. *v.* R. Co., 31 Ky. L. R. 859, 104 S. W. 290 (incorporating railway companies); Chicago, etc. R. Co. *v.* Liebel, 27 Ky. L. R. 716, 86 S. W. 549 (same); Madisonville, etc. Co. *v.* C., 140 Ky. 255, 130 S. W. 1084; American S. & W. Co. *v.* Bearse, 194 Mass. 596, 80 N. E. 623.

When created by public act, existence of corporations, noticed. S. *v.* Briscoe, 6 Penne. (Del.) 401, 67 A. 154.

1027-84 See Fuller *v.* Co., 16 Haw. 1, railroad.

1028-85 Notice taken of legal effect of consolidation of domestic corporations, but not of foreign. Jackson C. T. Co *v.* Judge, 155 Mich. 522, 119 N. W. 915.

1029-86 Matter of Dunn, 212 U. S. 374; Heffelfinger *v.* R. Co., 140 Fed. 75.

1029-87 See Northern P. R. Co. *v.* Wadekemper, 70 Wash. 392, 126 P. 909.

1029-90 Mobile L. & R. Co. *v.* Mackay, 158 Ala. 51, 48 S. 509, existence of another corporation with similar name, not noticed.

1029-91 Quantity of land in a league, known. Lony *v.* Shelton (Tex. Civ.), 126 S. W. 40.

Location of boundary lines of land included within portion sold at sheriff's sale, not noticed. Hill *v.* Barner, 8 Cal. App. 58, 96 P. 111.

1030-95 See S. *v.* Co., 52 Or. 502, 95 P. 722.

1030-96 Black *v.* R. Co., 237 Ill. 500, 86 N. E. 1065.

1030-1 Greene *v.* Boaz, 157 Ala. 68, 47 S. 255.

1031-5 United States Wood. P. Co. *v.* Sundmaker, 186 Fed. 678, 110 C. C. A. 224; Merritt *v.* County, 3 Cal. App. 168, 84 P. 675; Hall *v.* Co., 56 Fla. 324, 47 S. 609. See S. *v.* Board, 34 Mont. 426, 87 P. 450.

1031-6 Merritt *v.* County, 3 Cal. App. 168, 84 P. 675.

1031-7 Line *v.* Line, 119 Md. 403, 86 A. 1032; Butts *v.* Butts, 63 Or. 150, 125 P. 313, 127 P. 25.

1031-9 Baker *v.* Co., 146 Fed. 744, 77 C. C. A. 234; John II Est. *v.* Judd, 13 Haw. 319, 325; Line *v.* Line, 119 Md. 403, 86 A. 1032.

Standard medical works admissible to aid court's memory and understanding of medical terms. S. *v.* Wilhite, 132 Ia. 226, 109 S. W. 730.

1033-21 But see S. *v.* Board, 34 Mont. 426, 87 P. 450.

1033-22 Clement *v.* Graham, 78 Vt. 290, 63 A. 146; Page *v.* McClure, 79 Vt. 83, 64 A. 451; Satterfield *v.* C., 105 Va. 867, 52 S. E. 979; O'Brien L. Co. *v.* Wilkinson, 123 Wis. 272, 101 N. W. 1050 (usage). See Goodman *v.* P., 228 Ill. 154, 81 N. E. 830.

1034-23 Sun Ins. Off. *v.* Mill, 72 Kan. 41, 82 P. 513; Line *v.* Line, 119 Md. 403, 86 A. 1032; Taylor *v.* Lodge, 101 Minn. 72, 111 N. W. 919 (where universal custom of requiring signed application before issuance of life insurance policy is noticed, evidence application was signed, unnecessary); Bolton *v.* Ovitt, 80 Vt. 362, 67 A. 881. See Goodman *v.* P., 228 Ill. 154, 81 N. E. 830.

1034-25 Spiking *v.* R. Co., 33 Utah 313, 93 P. 838. See Hoagland *v.* Canfield, 160 Fed. 146.

1034-27 Ex parte Lair, 177 Fed. 789; Moynihan *v.* Holyoke, 193 Mass. 26, 78 N. E. 742; C. *v.* Root, 15 Pa. Dist. 441. But see S. *v.* Norcross, 132 Wis. 534, 112 N. W. 40.

1035-29 Cox *v.* Board, 161 Ala. 639, 49 S. 814; Kansas City S. R. Co. *v.*

S., 90 Ark. 343, 119 S. W. 288; C. *v.* Root, 15 Pa. Dist. 441; Robinson *v.* Morris, 30 R. I. 132, 73 A. 611.

1035-30 But see Wabash R. Co. *v.* Campbell, 219 Ill. 312, 76 N. E. 346.

1036-34 Timson *v.* Co., 220 Mo. 580, 119 S. W. 565.

KIDNAPING

Burden of proving consent, 2-6.

1-3 S. *v.* Leuth, 128 Ia. 189, 103 N. W. 345, proof of detaining person for ransom shows intent. But S. *v.* Holland, 120 La. 429, 45 S. 380, holds intent immaterial (statute).

Harboring runaway child no kidnaping. Soper *v.* Crutcher, 29 Ky. L. R. 1080, 96 S. W. 907.

2-4 S. *v.* Leuth, 128 Ia. 189, 103 N. W. 345; S. *v.* Altemus, 76 Kan. 718, 92 P. 594; S. *v.* Harrison, 145 N. C. 408, 59 S. E. 867; Nunez *v.* S. (Tex. Cr.), 156 S. W. 933.

Acts and declarations of accused's co-conspirators admissible. P. *v.* Micelli, 156 App. Div. 756, 142 N. Y. S. 102.

Evidence of her general appearance and condition on return is admissible, but any evidence of physician's examination and circumstances tending to prove rape is inadmissible. P. *v.* Harrison, 261 Ill. 517, 104 N. E. 259.

2-6 Burden of proving consent of custodian on defendant. S. *v.* Burnett, 142 N. C. 577, 55 S. E. 72.

3-9 Under Idaho statutes mother has equal right with father to custody of child, and one cannot be convicted of kidnaping who, the father being out of the state, takes the child in company with its mother, going of her own free will, out of the state. S. *v.* Beslin, 19 Ida. 185, 112 P. 1053.

3-10 S. *v.* Sager, 99 Minn. 54, 108 N. W. 812.

4-12 Arrington *v.* S., 3 Ga. App. 30, 59 S. E. 207; S. *v.* Rivers, 84 Vt. 154, 78 A. 786.

KNOWLEDGE

6-1 Fowler *v.* Crouse, 175 Fed. 646, 99 C. C. A. 200; Chicago, etc. R. Co. *v.* Bk., 174 Fed. 923, 98 C. C. A. 535; Tedeschi *v.* Burger, 162 Ala. 534, 50 S. 150; Hughes *v.* Co., 13 Ariz. 52, 108 P. 231; Arkansas & L. R. Co. *v.* Sain, 90 Ark. 278, 119 S. W. 659; Powers *v.* Perry, 12 Cal. App. 77, 106 P. 595; S. *v.* Anderson, 1 Boyce (Del.) 135, 74 A. 1097; S. *v.* Hartnett, 7 Penne. (Del.) 204, 74 A. 82; Warner *v.* Warner, 235 Ill. 448, 85 N. E. 630; Ross *v.* R. Co., 243 Ill. 440, 90 N. E. 701; Sanitary C. Co. *v.* Lindley (Ind. App.), 105 N. E. 585; Day's Com. *v.* Bk. (Ky.), 116 S. W. 259; Parrish *v.* C., 136 Ky. 77, 123 S. W. 339; P. *v.* Jefferson, 161 Mich. 621, 126 N. W. 829; Stewart *v.* S., 95 Miss. 627, 49 S. 615; Ray Co. S. Bk. *v.* Hutton, 224 Mo. 42, 123 S. W. 47; Ramsay *v.* Miller, 135 App. Div. 503, 120 N. Y. S. 523; Liland *v.* Tweto, 19 N. D. 551, 125 N. W. 1032; Posey *v.* Nat. Bk., 243 Pa. 568, 90 A. 363; Lone Star B. Co. *v.* Solcher (Tex. Civ.), 126 S. W. 26; El Paso, etc. R. Co. *v.* Welter (Tex. Civ.), 125 S. W. 45; Lightfoot *v.* Horst (Tex. Civ.), 122 S. W. 606; Lewis *v.* R. Co., 57 Tex. Civ. 585, 122 S. W. 605; Louisiana & T. L. Co. *v.* Dupuy, 52 Tex. Civ. 46, 113 S. W. 973; Carter *v.* Thorp, 114 Va. 348, 76 S. E. 950; Crane's, etc. Co. *v.* Co., 108 Va. 862, 62 S. E. 954.

Time knowledge acquired must be shown by party alleging action brought within limit fixed after knowledge of right obtained. Antrim L. Co. *v.* Bolinger, 121 La. 306, 46 S. 337; Citizens' Bk. *v.* Jeansonne, 120 La. 393, 45 S. 367.

Time knowledge of misconduct of jury obtained must be shown by party claiming advantage. S. *v.* Jefferson, 125 La. 296, 51 S. 203.

Burden on person claiming under unrecorded deed to show notice. Sheldon *v.* Powell, 31 Mont. 249, 78 P. 491. On carrier to show knowledge of shipper of restrictive provision of contract signed. Chicago, etc. R. Co. *v.* Igo, 130 Ill. App. 373; Cleveland, etc. R. Co. *v.* Shoot, 130 Ill. App. 139.

7-2 McElvain *v.* Hardesty, 169 Fed. 31, 94 C. C. A. 399; Miller *v.* Ash, 156 Cal. 544, 105 P. 600; Rubio Canon L. & W. Assn. *v.* Everett, 154 Cal. 29, 96 P. 811; Tibbetts *v.* Terrill, 44 Colo. 94, 96 P. 978; Conger *v.* R. Co., 31 App. Cas. (D. C.) 139; Monahan *v.* Co., 4 Ga. App. 680, 62 S. E. 127; Coe *v.* Sloan, 16 Ida. 49, 100 P. 354; McCormick *v.* Co., 142 Ill. App. 159; Colbert *v.* Rings, 231 Ill. 401, 83 N. E. 274; Parrish *v.* C., 136 Ky. 77, 123 S. W. 339; Manuel *v.* Mayor, 111 Md. 196, 73 A. 705; S. *v.* Salmon, 216 Mo. 466, 115 S. W. 1106; Perrin *v.* Co., 78 N. J. L. 515, 74 A. 462 (individual preparing writing in person or by agent deemed to know con-

tents); Osterhoudt *v.* Co., 136 App. Div. 123, 120 N. Y. S. 641; Republic L. Ins. Co. *v.* Co., 130 App. Div. 618, 115 N. Y. S. 503; Kirby *v.* Montgomery, 197 N. Y. 27, 90 N. E. 52; Leggett *v.* R. Co., 152 N. C. 110, 67 S. E. 249 (presumption conclusive against railroad's knowledge of condition of tracks in favor of employe); Rush *v.* Co., 51 Or. 519, 95 P. 193; West Lumb. Co. *v.* Chessher (Tex. Civ.), 146 S. W. 976; Watson *v.* Vansickle (Tex. Civ.), 114 S. W. 1160; Rollo *v.* Nelson, 34 Utah 116, 96 P. 263; Gay *v.* Ins. Co., 37 Utah 280, 107 P. 237 (knowledge of legal acts of directors by minority of board); Manning *v.* Foster, 49 Wash. 541, 96 P. 233.

See New York, etc. Co. *v.* Dist., 33 App. Cas. (D. C.) 377.

An administrator will be presumed to know an act which his official duty required him to know. O'Hanlon *v.* Min. Co., 48 Mont. 65, 135 P. 913.

"**These truisms** are more often invoked in negligence cases against a plaintiff, but where the boot is on the other foot and defendant is charged with a duty to use due care, as here, they fill a very useful office in determining the scope and discerning the elements of defendant's duty." Dutcher *v.* R. Co., 241 Mo. 137, 145 S. W. 63.

A corporation mailing newspaper containing unmailable matter chargeable with knowledge thereof. U. S. *v.* Co., 159 Fed. 296.

Grantor presumed to know contents of deed. Kaaihue *v.* Crabbe, 3 Haw. 768.

Not presumed that, because one owner of option showed contract to another, he also exhibited other papers relating to the subject-matter of the contract to him. Varley D. M. Co. *v.* Ostheimer, 159 Fed. 655, 86 C. C. A. 523.

7-3 P. *v.* Jefferson, 161 Mich. 621, 126 N. W. 829.

The deceased is presumed, in the absence of any showing to the contrary, to have been familiar with the law of gravitation, and to have known that any material which was loose or might become so in the roof of the air course would fall toward the earth. Michaelson *v.* Sergeant Bluffs & Sioux City Brick Co., 94 Iowa 725, 62 N. W. 15." Sidwell *v.* Co., 154 Ia. 475, 135 N. W. 59.

7-4 Walker *v.* Chessman, 75 N. H. 20, 70 A. 248.

Evidence of a bill in equity brought by defendant is admissible. Bean *v.* Atkins (Vt.), 89 A. 643.

7-5 Hogg *v.* Shield, 114 Va. 403, 76 S. E. 934.

Sureties of executor within rule though not parties. Tucker *v.* Stewart, 147 Ia. 294, 126 N. W. 183.

Purchaser at sale under order of court is presumed to have had knowledge of the proceedings. In re Flynn, 171 Mich. 136, 137 N. W. 113, *cit.* In re Axtell, 95 Mich. 244, 54 N. W. 889.

8-7 Joslyn *v.* Co., 177 Fed. 863, 101 C. C. A. 77.

Knowledge of vendee not imputable to co-vendee unless relationship of partners or principal and agent shown. Varley D. M. Co. *v.* Ostheimer, 159 Fed. 655, 86 C. C. A. 523.

8-8 Merchants' G. Co. *v.* Co., 89 Ark. 591, 117 S. W. 767.

Non-resident business man presumed to know local customs. Gould *v.* Co., 147 Ala. 629, 41 S. 675. See Bacon *v.* Blessing, 122 Ga. 369, 50 S. E. 139.

8-9 Exchange Nat. Bk. *v.* Littlo (Ark.), 164 S. W. 731; Bacon *v.* Blessing, supra; Ellis *v.* S., 58 Tex. Cr. 319, 125 S. W. 892; Consolidated S. & R. Co. *v.* Gonzales, 50 Tex. Civ. 79, 109 S. W. 946; Bowles *v.* Rice, 107 Va. 51, 57 S. E. 575.

8-10 Steidtmann *v.* Lay, 234 Ill. 84, 84 N. E. 640. See Ross *v.* Northrup, 156 Wis. 327, 144 N. W. 1124.

9-12 Custom of local banks binding on parties dealing with such bank, whether aware of existence or not. San Francisco Nat. Bk. *v.* Bk., 5 Cal. App. 408, 90 P. 558. See Plover S. Bk. *v.* Moodie, 135 Ia. 685, 110 N. W. 29, presentment of checks.

9-13 See Central Kentucky T. Co. *v.* Chapman (Ky.), 124 S. W. 830 (knowledge of custom of passengers to alight from street car at a place); Farris *v.* R. Co., 151 N. C. 483, 66 S. E. 457.

9-14 Crawford *v.* Co., 215 Mo. 394, 114 S. W. 1057. But see Citizens' Bk. *v.* Chambers, 129 Ia. 414, 105 N. W. 692.

Profession.—S. *v.* Reilly, 25 N. D. 339, 141 N. W. 720.

10-16 Smith *v.* Bloom (Ia.), 141 N. W. 32.

10-17 Customs of parties shown. Smith *v.* Bk., 147 Mo. App. 461, 126 S. W. 810.

Testimony of fact presumed based on knowledge. Shaw *v.* Jones, 133 Ga. 446, 66 S. E. 240.

Presumption of knowledge of terms of insurance policies not strong as applied to insured. Raulet *v.* Ins. Co., 157 Cal. 213, 107 P. 292.

Knowledge of contents of papers signed not conclusively presumed. McKittrick *v.* Co., 84 S. C. 275, 66 S. E. 289.

14-18 Southern R. Co. *v.* Cleveland, 163 Ala. 470, 50 S. 122; Newman *v.* L. Assn., 14 Ariz. 354, 128 P. 53; Paragould *v.* Lawson, 88 Ark. 478, 115 S. W. 379; First Nat. Bk. *v.* Whisenhunt, 94 Ark. 583, 127 S. W. 968 (powers of school officers); Loud *v.* Collins, 12 Cal. App. 786, 108 P. 880; Wyatt *v.* Burdette, 43 Colo. 208, 95 P. 336; Saxton *v.* Perry, 47 Colo. 263, 107 P. 281; In re Elbert (Del.), 88 A. 608; Robinson *v.* Yetter, 143 Ill. App. 172; Am. & S. G. Co. *v.* Spencer (Ind. App.), 103 N. E. 426; Brunaugh *v.* S., 173 Ind. 483, 90 N. E. 1019; Holts-claw *v.* S., 46 Ind. App. 238, 92 N. E. 121; Newman *v.* Flowers, 134 Ky. 557, 121 S. W. 652; Moulton *v.* Scully (Me.), 89 A. 944 (sheriffs); Garrett *v.* Wiltse, 252 Mo. 699, 161 S. W. 694; Peters *v.* St. Louis, 226 Mo. 62, 125 S. W. 1134 (powers of city); State Bk. *v.* Forsyth, 41 Mont. 249, 108 P. 914; Lawrence *v.* Toothaker, 75 N. H. 148, 71 A. 534; P. *v.* Cook, 158 App. Div. 74, 142 N. Y. S. 692, *aff'd.* 103 N. E. 1130; Mackmull *v.* Brandlein, 152 App. Div. 733, 137 N. Y. S. 607; Hebron *v.* New York, 78 Misc. 653, 138 N. Y. S. 1010 (applies to enactment and repeal); Wakefield *v.* Brophy, 122 N. Y. S. 632; Wadsworth *v.* Board, 115 N. Y. S. 8; Breece *v.* Breece, 8 O. N. P. (N. S.) 421; Klein *v.* Miller (Okla.), 141 P. 1117; Chapman *v.* Pendleton, 34 R. I. 160, 82 A. 1063; Iuszkewicz *v.* Luther, 30 R. I. 570, 76 A. 829; Lee *v.* R. Co., 84 S. C. 125, 65 S. E. 1031; Taff *v.* S. (Tex. Cr.), 155 S. W. 214; Crain *v.* S. (Tex. Cr.), 153 S. W. 155; Foard Co. *v.* Sandifer, 105 Tex. 420, 151 S. W. 523, *aff.* (Tex. Civ.), 134 S. W. 823; Cartwright *v.* La Brie (Tex. Civ.), 144 S. W. 725; Day *v.* Co. (Tex. Civ.), 130 S. W. 716; Westchester F. Ins. Co. *v.* Co., 106 Va. 633, 56 S. E. 584; Pinoza *v.* Chair Co., 152 Wis. 173, 140 N. W. 84.

See S. *v.* Palacios (Tex. Civ.), 150 S. W. 229.

No proof is required of a statute. S. *v.* Angel, 93 S. C. 149, 76 S. E. 190.

This presumption applies both to their enactment and repeal. Herron *v.* New York, 78 Misc. 653, 138 N. Y. S. 1010.

Knowledge of instructions given by proper authorities to carry a law into effect, not presumed. State *v.* Palacios (Tex. Civ.), 150 S. W. 229.

11-20 Presumption that judicial officer knows plainly written law not conclusive where he is charged with corruption. Vogel *v.* Brown, 201 Mass. 261, 87 N. E. 686.

12-22 Conclusively presumed to know that no fee or commission could be charged against the town for the collection of the taxes in question. Holts-claw *v.* S., 46 Ind. App. 238, 92 N. E. 121.

12-23 Ware *v.* Fitchburg, 200 Mass. 61, 85 N. E. 951.

Courts will not take judicial notice of municipal ordinances. Coors *v.* Brock, 22 Colo. App. 470, 125 P. 599; Rudison *v.* Glover, 131 La. 381, 59 S. 817.

Persons dealing with municipality bound to notice ordinances. Hope *v.* Alton, 214 Ill. 102, 73 N. E. 406.

12-24 Goldberg *v.* Parker, 87 Conn. 99, 87 A. 555, 46 L. R. A. (N. S.) 1097; State Bk. *v.* Forsyth, 41 Mont. 249, 108 P. 914; Boswell *v.* Ins. Co., 193 N. Y. 465, 86 N. E. 532.

12-25 Long *v.* Newman, 10 Cal. App. 430, 102 P. 534; Iowa, etc. B. & L. Assn. *v.* Fitch, 142 Ia. 329, 120 N. W. 694.

12-26 Minshew *v.* L. Corp. (S. C.), 81 S. E. 1027.

12-27 Hayes *v.* S., 13 Ga. App. 647, 79 S. E. 761. *Comp.* Ft. Worth, etc. Co. *v.* R. Co. (Tex. Civ.), 151 S. W. 850.

13-29 *Contra* as to members. United Order *v.* Hooser, 160 Ala. 334, 49 S. 354; Iowa, etc. Assn. *v.* Fitch, 142 Ia. 329, 120 N. W. 694; Shartle *v.* Brotherhood, 139 Mo. App. 433, 122 S. W. 1139.

Conclusively presumed that members of mutual insurance or benefit society informed of by-laws. Smoot *v.* Assn., 138 Mo. App. 438, 120 S. W. 719; Burchard *v.* Assn., 139 Mo. App. 606, 123 S. W. 973.

13-30 Pouch *v.* Ins. Co., 204 N. Y. 281, 97 N. E. 731.

14-31 Owen *v.* Ins. Co., 84 S. C. 253, 66 S. E. 290, as against foreign corporation.

14-33 Topolewski *v.* P. Co., 143 Wis. 52, 126 N. W. 554.

14-34 P. *v.* Duncan, 22 Cal. App. 430, 134 P. 797; P. *v.* Reitzke, 21 Cal. App. 740, 132 P. 1063; Lury *v.* R., 205 Mass. 540, 91 N. E. 1018; P. *v.* Boos, 155 Mich. 407, 120 N. W. 11; Interna-

tional, etc. R. Co. *v.* Morin, 53 Tex. Civ. 531, 116 S. W. 656.

Knowledge of an assignment of claim for personal injuries. St. Louis, etc. R. Co. *v.* Thomas (Tex. Civ.), 167 S. W. 784.

15-35 Tedeseki *v.* Burger, 162 Ala. 534, 50 S. 150; Powers *v.* Perry, 12 Cal. App. 77, 106 P. 595; Rubio Canon Assn. *v.* Everett, 154 Cal. 29, 96 P. 811 (not conclusive); Pinnell *v.* R. Co., 146 Ill. App. 150; Blossi *v.* R. Co., 144 Ia. 697, 123 N. W. 360; Smith *v.* R. Co., 82 Kan. 136, 107 P. 635; Willner *v.* Silverman, 109 Md. 341, 71 A. 962; Welch *v.* Waterbury, 136 App. Div. 315, 120 N. Y. S. 1059; Roberts *v.* Co., 84 S. C. 283, 66 S. E. 298; Texas, etc. R. Co. *v.* Plummer, 57 Tex. Civ. 563, 122 S. W. 942; Western U. T. Co. *v.* Burton, 53 Tex. Civ. 378, 115 S. W. 364.

15-36 Louisville & N. R. Co. *v.* Williams (Ala.), 62 S. 679; Birmingham R., L. & P. Co. *v.* Selhorst, 165 Ala. 475, 51 S. 568; Louisville & N. R. Co. *v.* Perkins, 165 Ala. 471, 51 S. 870; U. S. P. & F. Co. *v.* Granger, 162 Ala. 637, 50 S. 159; Layton *v.* Campbell, 155 Ala. 220, 46 S. 775 (may state the circumstances relied upon to show knowledge); *disap.* Abbett *v.* Page, 92 Ala. 571, 9 S. 332; West Pratt C. Co. *v.* Andrews, 150 Ala. 368, 43 S. 348; Sneed *v.* Co., 149 Cal. 704, 87 P. 376 (deceased's knowledge of dangers of electricity); Southern C. O. Co. *v.* Skipper, 125 Ga. 368, 54 S. E. 110; Bush *v.* McCarty, 127 Ga. 308, 56 S. E. 430; Slaughter *v.* Heath, 127 Ga. 747, 57 S. E. 69; Mims *v.* Brook, 3 Ga. App. 247, 59 S. E. 711; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651; Flora *v.* Mathing, 19 N. D. 4, 121 N. W. 63; Winkler *v.* S., 58 Tex. Cr. 564, 126 S. W. 1134; Sovereign Camp *v.* Carrington, 41 Tex. Civ. 29, 90 S. W. 921.

Inquiry of opinion improper if witness has testified to facts. Willner *v.* Silverman, 109 Md. 341, 71 A. 962.

16-37 Scheerer *v.* Deming, 154 Cal. 138, 97 P. 155; Stokes *v.* Stokes, 198 N. Y. 301, 91 N. E. 793; Sarro *v.* Bell (Tex. Civ.), 126 S. W. 24 (understanding of deposition).

16-38 Adams *v.* Crim, 176 Ala. 279, 58 S. 442; Southern R. Co. *v.* Lewis, 165 Ala. 555, 51 S. 746; Craney *v.* Co., 240 Ill. 602, 88 N. E. 1046; Franke *v.* Hanly, 215 Ill. 216, 74 N. E. 130; Western Ins. Co. *v.* Ashby (Ind. App.), 102 N. E. 45; So. Pac. Co. *v.* Vaughn (Tex. Civ.), 165 S. W. 885; Folkes *v.* Wyatt (Tex. Civ.), 126 S. W. 958.

16-39 Davis *v.* Clausen, 2 Ala. App 378, 57 S. 79; Alabama S. Co. *v.* Dewy, 156 Ala. 530, 47 S. 55; Midland V. R. Co. *v.* Co., 91 Ark. 180, 120 S. W. 380; P. *v.* Duncan, 22 Cal. App. 430, 134 P. 797; Pacific Mut. Ins. Co. *v.* Van Fleet, 47 Colo. 401, 107 P. 1087; St. Paul's E. Church *v.* Fields, 81 Conn. 670, 72 A. 145; P. *v.* Holtz, 261 Ill. 239, 103 N. E. 1007; P. *v.* Nall, 242 Ill. 284, 89 N. E. 1012; Swanson *v.* R. Co., 242 Ill. 388, 90 N. E. 210; Kentucky S. Co. *v.* Page (Ky.), 125 S. W. 170 (admissions of agent); Anderson *v.* C. (Ky.), 117 S. W. 364; Day's Com. *v.* Bk. (Ky.), 116 S. W. 259; S. *v.* Day, 108 Minn. 121, 121 N. W. 611; Beinert *v.* Tivoli, 62 Misc. 616, 116 N. Y. S. 4; C. *v.* Sanderson, 40 Pa. Super. 416; W. U. T. Co. *v.* Burton, 53 Tex. Civ. 378, 115 S. W. 364; S. *v.* Pettit, 77 Wash. 67, 137 P. 335.

"**It was also proper** for the witness to state that appellant had told him he did not give receipts, that it was not necessary as he could not collect by law, for it would show that appellant was aware of the provisions of the medical practice act and the business he was pursuing was prohibited by law." Singh *v.* S. (Tex. Cr.), 146 S. W. 891.

Lack of knowledge, in favor of declarant. Barney *v.* Quaker Oats Co., 85 Vt. 372, 82 A. 113.

Admissions against interest, on stand, weightier than denials of knowledge on direct examination. Cohen *v.* Barry, 111 N. Y. S. 668.

Obligation of junior grantee to return purchase money if title not clear not admission of knowledge of prior conveyance by grantor to another. Houston O. Co. *v.* Kimball (Tex. Civ.), 114 S. W. 662.

18-40 **Testator's declarations** competent to show knowledge of facts of which will represented his ignorance. In re Thomas Est., 155 Cal. 488, 101 P. 798.

Agent's acts and declarations proved. S. *v.* Hartnett, 7 Penne. (Del.) 204, 74 A. 82.

18-42 Marrash *v.* U. S., 168 Fed. 225, 93 C. C. A. 511; Birmingham R. Co. *v.* Jung, 161 Ala. 461, 49 S. 434; Louisville & N. R. Co. *v.* Fitzgerald, 161 Ala. 397, 49 S. 860; Atlanta, etc. R. Co. *v.* Wood, 160 Ala. 657, 49 S. 426; Birming-

ham, etc. Co. *v.* Curry, 160 Ala. 370, 49 S. 319; Daffin *v.* Co., 158 Ala. 637, 48 S. 109; Hughes *v.* Co., 13 Ariz. 52, 108 P. 231; Rubio Canon Assn. *v.* Everett, 154 Cal. 29, 96 P. 811; S. *v.* Anderson, 1 Boyce (Del.) 135, 74 A. 1097; New York, etc. Co. *v.* Dist., 33 App. Cas. (D. C.) 377; Hall *v.* Hilley, 134 Ga. 77, 67 S. E. 428; Cabaniss *v.* S., 8 Ga. App. 129, 68 S. E. 849; Robinson *v.* S., 6 Ga. App. 696, 65 S. E. 792; Ross *v.* R. Co., 243 Ill. 440, 90 N. E. 701; Hampton *v.* R. Co., 236 Ill. 249, 86 N. E. 243; Earp *v.* Lilly, 217 Ill. 582, 75 N. E. 552; Bimel Co. *v.* Harter, 51 Ind. App. 267, 98 N. E. 360; Ashcraft *v.* Wks., 148 Ia. 420, 126 N. W. 1111; Citizens' Nat. Bk. *v.* Gardner, 147 Ia. 695, 125 N. W. 161; Walsh *v.* Doran, 145 Ia. 110, 123 N. W. 999; Rager *v.* R. Co., 137 Ky. 811, 127 S. W. 155; Hendrickson *v.* R. Co., 137 Ky. 562, 126 S. W. 117; Parrish *v.* Co., 136 Ky. 77, 123 S. W. 339; Day's Com. *v.* Bk. (Ky.), 116 S. W. 259; Adams Exp. Co. *v.* C., 29 Ky. L. R. 231, 92 S. W. 935; C. *v.* Rivet, 205 Mass. 464, 91 N. E. 877; Rintamaki *v.* S. S. Co., 205 Mass. 115, 91 N. E. 220; P. *v.* Jefferson, 161 Mich. 621, 126 N. W. 829; Karp *v.* Barton, 164 Mo. App. 389, 144 S. W. 1111; Groshong *v.* R. Co., 142 Mo. App. 718, 121 S. W. 1084; Morrow *v.* R. Co., 140 Mo. App. 200, 123 S. W. 1034; Bryant *v.* Woodmen, 86 Neb. 372, 125 N. W. 621 (information derived from physician); Willis *v.* Co., 75 N. H. 453, 75 A. 877; Welch *v.* Waterbury, 136 App. Div. 315, 120 N. Y. S. 1059; Heilig *v.* R. Co., 152 N. C. 469, 67 S. E. 1009; S. *v.* Welford, 29 R. I. 450, 72 A. 396 (subsequent conduct); Simpson *v.* S., 58 Tex. Cr. 253, 125 S. W. 398; Ligon *v.* S., 59 Tex. Cr. 274, 128 S. W. 620; Western U. T. Co. *v.* Burton, 53 Tex. Civ. 378, 115 S. W. 364; Marshal *v.* Mills, 82 Vt. 489, 74 A. 108; Crane's etc. Co. *v.* Co., 108 Va. 862, 62 S. E. 954; Foreman *v.* Assn., 104 Va. 694, 52 S. E. 337.

Knowledge of contents of will.—Bailey *v.* Bee (W. Va.), 80 S. E. 454.

Prior accidents.—Falling of plunger on other occasions having been brought to attention of defendant's superintendent may be shown as bearing on defendant's knowledge of its defective condition. Herrera *v.* Sup. Co. (N. J.), 88 A. 1082. See also vol. 8, p. 926, n. 12.

Where plaintiff had worked with machinery for two years it was said that he must have known of a set screw. "His denial of knowledge of its presence is incredible, and may almost be said to be false as matter of law." Larsen *v.* Co., 122 N. Y. S. 1077.

Use of proper address of a party not determinative of knowledge thereof or sufficient to compel an inference. Fleming *v.* McLeod, 39 Can. Sup. 290.

Knowledge of wrong-doer's right and title of another to property converted inferred from reckless disregard of same and intent to appropriate. U. S. *v.* Co., 158 Fed. 20, 85 C. C. A. 302.

20-44 Atkinson, etc. R. Co. *v.* Burks, 78 Kan. 515, 96 P. 950; Voss *v.* Ins. Co., 138 Wis. 492, 118 N. W. 212.

20-45 Farmer *v.* Behmer, 9 Cal. App. 773, 100 P. 901; Pennington *v.* Co. (Tex. Civ.), 122 S. W. 923; Continental Ins. Co. *v.* Cummings (Tex. Civ.), 95 S. W. 48.

Reputed wealth of party not convincing that person contracting with him knew nature and value. Warner *v.* Warner, 235 Ill. 448, 85 N. E. 630.

Knowledge of dissolution of partnership proved by showing general reputation. Bush *v.* McCarty, 127 Ga. 308, 56 S. E. 430; Mims *v.* Brook, 3 Ga. App. 247, 59 S. E. 711.

Common repute admissible.—Smith *v.* Merc. Co., 6 Ala. App. 171, 60 S. 484.

21-46 See Southern R. Co. *v.* Stewart, 164 Ala. 171, 51 S. 324.

21-47 Knowledge of injunction through publications not imputed in contempt proceeding, defendant's attention not directed., Garrigan *v.* U. S., 163 Fed. 16, 89 C. C. A. 494.

21-48 See Krah *v.* Wassmer, 75 N. J. Eq. 109, 71 A. 404, knowledge of building restrictions.

Usage and custom shown to prove knowledge by third party of contract's terms. Southern R. Co. *v.* Lewis, 165 Ala. 451, 51 S. 863.

21-49 Knowledge by bank officer of bank's insolvency when deposit received shown by large variety of circumstances. See Parrish *v.* C., 136 Ky. 77, 123 S. W. 339.

Acts of creditor dealing with alleged insolvent material. Coder *v.* Arts, 152 Fed. 943, 82 C. C. A. 91; Getts *v.* Co., 163 Fed. 417.

22-51 Griffin *v.* R. Co. (Vt.), 89 A. 220. See also vol. 8, p. 535, n. 61.

22-52 Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805, reports of prior

accidents on highway. See D. C. *v.* Duryee, 29 App. Cas. (D. C.) 327.

Existence of defect in highway for reasonable time proved to show knowledge. Burnside *v.* Smith (Ky.), 119 S. W. 744.

22-53 Lone Star B. Co. *v.* Solcher (Tex. Civ.), 126 S. W. 26.

Similar prior operations of appliance shown. Oregon Co. *v.* Roe, 176 Fed. 715, 100 C. C. A. 269.

Servant's reports to master competent. Brady *v.* R. Co., 76 N. J. L. 744, 71 A. 238.

23-55 See Krah *v.* Wassmer, 75 N. J. Eq. 109, 71 A. 404.

23-56 Sapir *v.* U. S., 174 Fed. 219, 98 C. C. A. 227; Ryan *v.* U. S., 26 App. Cas. (D. C.) 74; Piano *v.* S., 161 Ala. 88, 49 S. 803; S. *v.* O'Neil, 24 Ida. 582, 135 P. 60; Juretich *v.* P., 223 Ill. 484, 79 N. E. 181 (use of confidence game); S. *v.* Calhoun, 75 Kan. 259, 88 P. 1079 (other forgeries to show guilty knowledge); S. *v.* Lee, 228 Mo. 480, 128 S. W. 987; P. *v.* Dolan, 186 N. Y. 4, 78 N. E. 569; Posey *v.* Nat. Bk., 243 Pa. 568, 90 A. 363; Armstrong *v.* Co., 75 Wash. 477, 135 P. 233; S. *v.* Nilson, 56 Wash. 289, 105 P. 829. See King *v.* Mahukaliilii, 5 Haw. 96 (possession of other forged papers); vol. 11, p. 801, n. 58, and supplement thereto.

Subsequent accidents cannot be proved. Holliday & W. Co. *v.* O'Donnell (Ind. App.), 101 N. E. 642.

Prosecution for blackmail, former conspiracies shown. Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039.

In trail for receiving embezzled railroad tickets, receipt of other embezzled property shown. Gassenheimer *v.* U. S., 26 App. Cas. (D. C.) 432.

Receiving stolen goods.—Lipsey *v.* P., 227 Ill. 364, 81 N. E. 348; Beuchert *v.* S., 165 Ind. 523, 76 N. E. 111; Jeffries *v.* U. S., 7 Ind. Ty. 47, 103 S. W. 761.

Similar acts of accomplice must be connected with accused by other than accomplice's testimony. S. *v.* Kelliher, 49 Or. 77, 88 P. 867.

23-57 Marrash *v.* U. S., 168 Fed. 225, 93 C. C. A. 511; Birmingham T. & S. Co. *v.* Curry, 160 Ala. 370, 49 S. 319. See Eastern T. & B. Co. *v.* Cunningham, 103 Me. 455, 70 A. 17; Smith *v.* Bk., 147 Mo. App. 461, 127 S. W. 810; vol. 11, p. 791, n. 41; vol. 6, p. 61, n. 46 and supplement thereto.

23-58 Corporate books inadmissible to show knowledge of directors concerning financial condition unless connected with entries, action being between third parties. Thayer *v.* Schley, 137 App. Div. 166, 121 N. Y. S. 1064.

Similar occurrences competent to show master's knowledge of defective operation of appliance if occurring reasonable time before accident. Rondeau *v.* Sayles, 30 R. I. 228, 74 A. 785.

LANDLORD AND TENANT

29-1 Gabel *v.* Page, 6 Cal. App. 618, 92 P. 749; Kilroy *v.* City, 242 Mo. 79, 145 S. W. 769; Holliday *v.* Pegram, 89 S. C. 73, 71 S. E. 367. See also Skarkowska *v.* Malting Co., 152 Ill. App. 48.

Evidence held sufficient.—Silvers *v.* Floyd, 151 Ia. 415, 131 N. W. 652; Brooklyn Dock & T. Co. *v.* Bahrenburg, 120 N. Y. S. 205.

Evidence held insufficient.—Israelson *v.* Valenstein, 130 N. Y. S. 265.

In an action to recover rent due under a lease, the burden of proving the lease inoperative is on defendant. McInturf *v.* Co., 160 Mo. App. 672, 142 S. W. 451.

Presumption as to extent of lease from failure to explain ambiguity. Isabella G. M. Co. *v.* Glenn, 37 Colo. 165, 86 P. 349.

30-3 Swift *v.* Boyd, 202 Mass. 26, 88 N. E. 439; Cavett *v.* Graham, 85 Neb. 152, 122 N. W. 846; Fink *v.* Co., 110 N. Y. S. 248. See United M., etc. I. Co. *v.* Roth, 122 App. Div. 628, 107 N. Y. S. 511.

31-4 S. *v.* Dickmann, 146 Mo. App. 396, 124 S. W. 29; Donovan *v.* Brenning, 79 N. J. L. 202, 74 A. 253. *Contra,* Mason *v.* Haurand, 79 N. J. L. 375, 75 A. 452, inference rebutted by landlord's demand of possession.

Ownership by plaintiff and occupancy by defendant show liability unless agreement to contrary proved. Walsh *v.* Taylor, 142 Ill. App. 46.

31-7 If lease exists and defendant put in possession when made, though doubtful whether land in question covered, admissible to rebut presumption an agreement was made to pay more than lease specifies. Gerhardt *v.* Boettger (N. J. L.), 70 A. 173.

34-20 Donaldson *v.* Strong, 195 Mass. 429, 81 N. E. 267.

34-21 See Wilson *v.* Wilson, 30 Ky. L. R. 695, 99 S. W. 319.

Acts done under lease assigned as collateral may not be proved if it is alleged assignment absolute. Early *v.* Koehler, 110 N. Y. S. 357.

35-28 Brown *v.* Thompson, 45 Ind. App. 188, 90 N. E. 631; Ventura H. Co. *v.* Co., 33 Ky. L. R. 149, 109 S. W. 354.

Landlord must show continuance of possession under lease. Myers *v.* Co., 132 App. Div. 710, 117 N. Y. S. 569.

36-30 In rebuttal of presumption that tenant held over on new terms proposed in notice, may be shown he refused to assent thereto or made a counter proposition, notwithstanding he remained in possession. Galloway *v.* Kerby, 9 Ill. App. 501; Lasher *v.* Heist, 126 Ill. App. 82; Appleton W. Co. *v.* Appleton, 132 Wis. 563, 113 N. W. 44.

37-33 Milligan *v.* Co., 145 Ill. App. 518.

37-37 Johnson *v.* Tucker, 136 Wis. 505, 117 N. W. 1002, tenant may show in action for rent lease from another than plaintiff.

39-45 Draughtsman may testify of contents of lease if loss shown. Hedstrom *v.* Co., 7 Cal. App. 278, 94 P. 386.

39-46 Cohn *v.* Jeffries, 89 Ark. 144, 115 S. W. 926; Cherry Lake Turpentine Co. *v.* Co., 10 Ga. App. 339, 73 S. E. 610.

Lease admissible against assignee if furnished copy and paid rent under it. Landt *v.* McCullough, 218 Ill. 607, 75 N. E. 1069, 121 Ill. App. 328.

Recorded lease under seal may estop lessor from showing tenant's possession not under it and lease had not been delivered. Jetter B. Co. *v.* Kurzel, 59 Misc. 271, 112 N. Y. S. 239.

39-48 Boardman R. Co. *v.* Carlin, 82 Conn. 413, 74 A. 682; Hayes *v.* Atlanta, 1 Ga. App. 25, 57 S. E. 1087; Walder *v.* English, 137 App. Div. 43, 122 N. Y. S. 1 (lease executed by husband of wife's property, also receipts for money paid him in her presence and with her approval); Eagle Tube Co. *v.* Holsten, 110 N. Y. S. 242.

Even though not properly attested.—Cherry Lake Turpentine Co. *v.* Co., 10 Ga. App. 339, 73 S. E. 610.

Unsigned draft of cropping contract with which defendant expressed satisfaction, admissible, with other evidence, to prove contract. Morgan *v.* Tims, 44 Tex. Civ. 308, 97 S. W. 832.

Undelivered lease.—Charlton *v.* Co., 67 N. J. Eq. 629, 60 A. 192.

Whole lease must be offered. Wallace *v.* Dorris, 218 Pa. 534, 67 A. 858.

Void lease and strangers.—The rule that where tenant enters upon occupancy of premises under a void lease, provisions will regulate "the terms on which the tenancy subsists in all respects, except as to the duration of the term" (Laughran *v.* Smith, 75 N. Y. 205; Coudert *v.* Cohn, 118 N. Y. 309, 23 N. E. 298, 16 Am. St. 761, 7 L. R. A. 69), has no application except to parties. Fink *v.* Co., 110 N. Y. S. 248.

Expired lease competent to show relation of lessee in occupation of premises. Smith *v.* S., 55 Tex. Cr. 320, 116 S. W. 593.

40-49 Stanley *v.* Stembridge, 140 Ga. 750, 79 S. E. 842.

Receipt for rent, though providing for execution of lease, enforced as lease. Feust *v.* Craig, 107 N. Y. S. 637.

40-53 Walker I. Co. *v.* Co., 185 Mass. 463, 473, 70 N. E. 937 (may be shown by parol that plaintiff was tenant at will); Drake *v.* Cunningham, 127 App. Div. 79, 111 N. Y. S. 199; Tobey *v.* Mattimore, 54 Misc. 231, 104 N. Y. S. 393.

40-54 Pankau *v.* Morrissey, 224 Ill. 177, 79 N. E. 643.

41-57 Gabel *v.* Page, 6 Cal. App. 618, 92 P. 749; Price *v.* Thompson, 4 Ga. App. 46, 60 S. E. 800. See Newell *v.* Taylor, 74 S. C. 8, 54 S. E. 212; infra, "Parol Evidence," 460-27.

42-59 Cherry Lake Turpentine Co. *v.* Lanier Armstrong Co., 10 Ga. App. 339, 73 S. E. 610.

42-61 Contemporaneous parol contract may be shown by which lease was not to be operative between parties. Metzger *v.* Roberts, 5 O. C. C. (N. S.) 344. But it cannot be shown that a grant was made upon condition defeating effect. Morris *v.* Healy, 46 Wash. 686, 91 P. 186.

Acceptance of others as tenants.—Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979.

43-62 Taber *v.* Eyler (Tex. Civ.), 162 S. W. 490.

43-63 Knoepker *v.* Redel, 116 Mo. App. 62, 92 S. W. 171; Metzger *v.* Roberts, 5 O. C. C. (N. S.) 344. See infra, "Parol Evidence," 461-33.

44-64 Prestwood *v.* Carlton, 162 Ala. 327, 50 S. 254. See supra, "Disorderly House," 730-9.

44-68 **Circumstances rebutting written agreement.** United Merchants' R. & I. Co. *v.* Hippodrome, 133 App. Div. 582, 118 N. Y. S. 128, *rev.* 61 Misc. 308, 113 N. Y. S. 740, *aff.* 201 N. Y. 601, 95 N. E. 1140.

45-70 German-Am. S. Bk. *v.* Gollmer, 155 Cal. 683, 102 P. 932; Sommer *v.* Breweries, 117 N. Y. S. 972.

45-72 Moore *v.* Meat. Co., 16 N. M. 107, 113 P. 827; Eagle T. Co. *v.* Holsten, 110 N. Y. S. 242.

Presumption that party is a tenant rather than a lodger arises when it is shown that he has exclusive possession of the rooms occupied by him. Mathews *v.* Livingston, 86 Conn. 263, 85 A. 529.

Evidence held insufficient.—Patterson *v.* Patterson, 251 Ill. 153, 95 N. E. 1051.

46-73 People's Bank *v.* Bennett, 159 Mo. App. 1, 139 S. W. 219; Brooklyn Dock & T. Co. *v.* Bahrenburg, 120 N. Y. S. 205, *aff.* 202 N. Y. 521, 95 N. E. 1123.

46-75 See Pullis *v.* Somerville, 218 Mo. 624, 117 S. W. 736.

46-77 Sommer *v.* Breweries, 117 N. Y. S. 972 (justifies implication of tenancy); Moskowitz *v.* Co., 117 N. Y. S. 1017 (presumptive evidence of holding under assignment); Eagle T. Co. *v.* Holsten, 110 N. Y. S. 242.

Receipt of part of crops raised by occupier not presumptive evidence that it was leased if right of occupancy denied and owner was asserting right to all crops. Myer *v.* Roberts, 50 Or. 81, 89 P. 1051, 12 L. R. A. (N. S.) 194.

Payment of rent proved though not pleaded in action for use and occupation. Butler *v.* Deegan, 130 App. Div. 544, 115 N. Y. S. 60.

Acceptance of rent from assignee of lease must be shown to have been with knowledge of assignment to establish waiver of covenant against its assignment. German-Am. S. Bk. *v.* Gollmer, 155 Cal. 683, 102 P. 932.

47-79 Presumption that oral lease in absence of local usage, is for one year unless otherwise expressed, has no application where tenant under a written lease stipulated orally for permission to remain a definite time, less than one year, after expiration of formal lease. Gabel *v.* Page, 6 Cal. App. 618, 92 P. 749.

47-80 Boyles *v.* Bradley, 79 Kan. 844, 101 P. 477.

Where a new agreement is claimed to have been made the tenant must prove it. Graham *v.* Crisman (Ia.), 146 N. W. 756.

47-81 Cowell *v.* Snyder, 15 Cal. App. 634, 115 P. 961; Callahan *v.* Michael, 45 Ind. App. 215, 90 N. E. 642 (rule applied to exercise of option for extension; but where option is for renewal there must be affirmative action); Searle *v.* Bishop, 203 Mass. 493, 89 N. E. 809; P. Bank *v.* Bennett, 159 Mo. App. 1, 139 S. W. 219; Leggett *v.* Exposition Co., 157 Mo. App. 108, 137 S. W. 893; Haynes *v.* Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. 636; Ernst *v.* Holzner, 130 N. Y. S. 442; Brooklyn Dock & T. Co. *v.* Bahrenburg, 120 N. Y. S. 205; Dagett *v.* Champney, 122 App. Div. 254, 106 N. Y. S. 892; Holton *v.* Andrews, 151 N. C. 340, 66 S. E. 212; Rohbock *v.* McCargo, 6 Pa. Super. 134; Lipper *v.* Bouve, 6 Pa. Super. 452; Harding *v.* Seeley, 148 Pa. 20, 23 A. 1118; Carhart *v.* Co., 122 Tenn. 455, 123 S. W. 747; Waterman *v.* LeSage, 142 Wis. 97, 124 N. W. 1041 (for one year or less).

Mixed question of law and fact under the evidence in Magner *v.* Barrett, 123 N. Y. S. 690.

49-83 **Possession of written lease** by tenant raises no presumption that agreement for new lease conformed to terms of old lease, no reference being made to it. Sherry *v.* Proal, 131 App. Div. 774, 116 N. Y. S. 234.

Period fixed for payment of rent governs presumption where tenant for term of years holds over. White *v.* Sohn, 65 W. Va. 409, 64 S. E. 442.

49-85 Long *v.* Grant, 163 Ala. 507, 50 S. 914; Ambrose *v.* Hyde, 145 Cal. 555, 79 P. 64; Carhart *v.* Co., 122 Tenn. 455, 123 S. W. 747.

49-86 Waterman *v.* LeSage, 142 Wis. 97, 124 N. W. 1041.

49-87 **Acceptance of option to extend lease** at increased rent inferred from holding over and paying additional rent, though no evidence of giving the stipulated notice. Briggs *v.* Chase, 105 Me. 317, 74 A. 796; Stone *v.* Co., 155 Mass. 267, 29 N. E. 623; Carhart *v.* Co., 122 Tenn. 455, 123 S. W. 747. Otherwise if increased rent not paid. Murtland *v.* English, 214 Pa. 325, 63 A. 882, 112 Am. St. 747; Carhart *v.* Co., supra.

Under statute imposing liability for double rent upon tenant holding over

he may show good faith by testifying to advice of competent attorney. Jones *v.* Taylor, 136 Ky. 39, 123 S. W. 326.

50-88 Walsh *v.* Schmidt, 206 Mass. 405, 92 N. E. 496.

Local usage.—Shute *v.* Bills, 191 Mass. 433, 78 N. E. 96.

Burden on landlord seeking to recover for repairs to show what was done and reasonableness of charge. Woods *v.* Co., 37 Pa. Super. 39.

50-91 Walker I. Co. *v.* Co., 185 Mass. 463, 70 N. E. 937; Dominick *v.* Kane, 4 O. N. P. (N. S.) 583.

50-92 **Lease** is full evidence in married woman's favor. Ewing *v.* Cottman, 9 Pa. Super. 444.

Alterations on face of lease need not be sustained by testimony of two witnesses that it may be received. Yeager *v.* Cassidy, 12 Pa. Super. 232.

50-93 Peaks *v.* Cobb, 192 Mass. 196, 77 N. E. 881.

Secondary evidence of contents of lease admissible if adverse party not expected to have possession and fails to show ability to produce on notice. Cooley *v.* Collins, 186 Mass. 507, 71 N. E. 979.

50-94 **Correspondence concerning renewal** of lease, before expiration of term, admissible. Wallace *v.* Dorris, 218 Pa. 534, 67 A. 858.

Lease given lessor by third person admissible if referred to in former's lease. Davis *v.* Co., 162 Ala. 424, 50 S. 368.

Written options executed prior to leases received to identify premises if leases ambiguous. Chicago A. Assn. *v.* Bldg., 244 Ill. 532, 91 N. E. 665.

Unexecuted draft of lease admissible to remove ambiguity concerning repairs. Rosen *v.* Bamberger, 122 N. Y. S. 240.

Void or insufficient lease, admissible. Eagle T. Co. *v.* Holsten, 110 N. Y. S. 242.

51-95 Morningstar *v.* Querens, 142 Ala. 186, 37 S. 825; Thompson F. & M. Co. *v.* Glass, 136 Ala. 648, 33 S. 811; Bloch *v.* Tucker, 107 Ark. 349, 154 S. W. 1140; Johnston *v.* Mulcahy, 4 Cal. App. 547, 88 P. 491; Dodd *v.* Pasch, 5 Cal. App. 686, 91 P. 166 (term of tenancy); Wilson *v.* Agnew, 25 Colo. App. 109, 136 P. 96; Cherry Lake Turpentine Co. *v.* Co., 10 Ga. App. 339, 73 S. E. 610; Kenyon *v.* Manley, 125 Ill. App. 615; Willis *v.* Weeks, 129 Ia. 525, 105 N. W. 1012; Jackson B. Co. *v.* Wagner, 117 La. 875, 42 S. 356; Brown *v.* Dickey, 106 Me. 97, 75 A. 382, cit. the text; Wentworth *v.* Market Co., 216 Mass. 374, 103 N. E. 1105; Vanderberg *v.* Co., 126 Mo. App. 600, 105 S. W. 17; Soulier *v.* Daab (N. J.), 90 A. 266; P. *v.* Pitt, 142 N. Y. S. 873; Cohen *v.* Strauss, 139 N. Y. S. 929; American B. P. Co. *v.* Geiger, 76 Misc. 571, 137 N. Y. S. 148; Goerlitz *v.* Schwartz, 112 N. Y. S. 1119; Kirby *v.* Hardin (Okla.), 134 P. 854; Creighton *v.* Ladley, 6 Phila. (Pa.), 209; Pressler *v.* Barreda (Tex. Civ.), 157 S. W. 435; Reserve G. Co. *v.* Mfg. Co. (W. Va.), 79 S. E. 1002.

Actual consideration shown by parol. Suderman-D. Co. *v.* Rodgers, 47 Tex. Civ. 67, 104 S. W. 193.

51-96 Slaughter *v.* Johnson, 128 Ill. App. 417; Billiter *v.* Mounts, 147 Ky. 97, 143 S. W. 768; DeFriest *v.* Bradley, 192 Mass. 346, 78 N. E. 467; Walker I. Co. *v.* Co., 185 Mass. 463, 473, 70 N. E. 937.

51-97 See infra, "Parol Evidence," 462-34.

Proof made of parol agreement to perform condition precedent. Cavanagh *v.* Co., 136 Ia. 236, 113 N. W. 856.

Parties' purpose to make formal lease strong evidence of intent that oral agreement should not be binding. Sherry *v.* Proal, 131 App. Div. 774, 116 N. Y. S. 234.

52-98 Davis *v.* Co., 162 Ala. 424, 50 S. 368; Broughton *v.* Mitchell, 147 Ill. App. 281; Aufenkamp *v.* Storch, 138 Ky. 104, 127 S. W. 529; Naughton *v.* Elliott, 68 N. J. Eq. 259, 59 A. 869; Eisert *v.* Adelson, 136 App. Div. 741, 121 N. Y. S. 446; Hardin *v.* Kirby, 25 Okla. 479, 106 P. 837; Bonicamp *v.* Starbuck, 25 Okla. 483, 106 P. 839; Suderman-D. Co. *v.* Rodgers, 47 Tex. Civ. 67, 104 S. W. 193. *Contra,* Tribelhorn *v.* Hanavan, 116 N. Y. S. 632; Harrison *v.* Focht, 18 Pa. Dist. 13 (though parol agreement not omitted through fraud, accident or mistake).

52-1 Carnegie Nat. Gas. Co. *v.* Oil Co. (W. Va.), 81 S. E. 840.

52-2 Witness' conclusion as to property covered by lease, incompetent. Kasower *v.* Sandler, 96 N. Y. S. 734.

53-4 Bristol H. Co. *v.* Pegram, 49 Misc. 535, 98 N. Y. S. 512.

Evidence of custom.—Prigg *v.* Preston, 28 Pa. Super. 272.

54-6 Morningstar *v.* Querens, 142 Ala. 186, 37 S. 825; Gandy *v.* Wiltse, 79 Neb. 280, 112 N. W. 569; Hallenbeck *v.*

Chapman, 71 N. J. L. 477, 58 A. 1096, 72 N. J. L. 201, 63 A. 498; Moore *v.* Coughlin, 127 App. Div. 810, 111 N. Y. S. 856; Tribelhorn *v.* Hanavan, 65 Misc. 22, 119 N. Y. S. 262.

54-7 Erikson *v.* Propp, 106 Minn. 238, 119 N. W. 390.

54-8 Daly *v.* Piza, 105 App. Div. 496, 94 N. Y. S. 154; Greene *v.* Ker, 48 Misc. 609, 95 N. Y. S. 569.

Allowance made in lease for repairs conclusive of lessor's liability. Faron *v.* Jones, 49 Misc. 47, 96 N. Y. S. 316.

55-9 Leeming *v.* Duryea, 49 Misc. 240, 97 N. Y. S. 355. See Morningstar *v.* Querens, 142 Ala. 186, 37 S. 825.

Exception.—See Bailey *v.* Krupp, 59 Misc. 459, 110 N. Y. S. 994.

Admission of liability to make repairs does not result from making them at request. Dalton *v.* Gibson, 192 Mass. 1, 77 N. E. 1035.

Vague and indefinite terms in lease explained by parol showing circumstances connected with execution. Link *v.* Hathway, 143 Mo. App. 502, 127 S. W. 913.

Parties' acts under lease competent to show non-existence of agreement concerning repairs. Tracey *v.* Page, 201 Mass. 62, 87 N. E. 491.

55-10 Richards *v.* Ontai, 19 Haw. 451; Stevenson B. Co. *v.* R. Co., 156 App Div. 271, 141 N. Y. S. 271.

56-11 Oldfield *v.* Brew. Co., 77 Wash. 158, 137 P. 469.

56-12 Course of dealing or understanding variant from terms of lease must be shown by satisfactory evidence; and only as between parties unless subsequent grantee or assignee had knowledge. Thomas *v.* R. Co., 226 Pa. 136, 75 A. 199.

Local custom not provable if parties have orally agreed upon point. Turner *v.* Morris, 142 Mo. App. 60, 125 S. W. 238.

Construction put upon lease by parties, as to matter of which it is silent, proved. Plaut *v.* Co., 174 Fed. 852.

Parties' conduct shown as affecting rent recoverable. Doyle *v.* Dunne, 144 Ill. App. 14.

57-14 Wilson *v.* Agnew, 25 Colo. App. 109, 136 P. 96.

57-15 Granniss *v.* Co., 117 N. Y. S. 881, authority of executor to make lease.

57-16 Parol agreement made when lease executed shown where lessee attempts to use lease in violation thereof. Phillips G. & O. Co. *v.* Co., 213 Pa. 183, 62 A. 830.

57-17 Searle *v.* Bishop, 203 Mass. 493, 89 N. E. 809; Schweig *v.* Co., 54 Misc. 233, 104 N. Y. S. 371; Yinger *v.* Youngman, 30 Pa. Super. 139.

Evidence of fraud relied upon independently of lease must be clear. Sacks *v.* Schimmel, 3 Pa. Super. 426.

As must evidence to show collateral agreement. Yinger *v.* Youngman, 30 Pa. Super. 139; Fidelity T. Co. *v.* Kohn, 27 Pa. Super. 374; Reploge *v.* Singer, 19 Pa. Super. 442 (suit for reformation).

57-18 Davies *v.* Hotchkiss, 112 N. Y. S. 233.

58-19 But see Tobey *v.* Mattimore, 54 Misc. 231, 104 N. Y. S. 393.

58-20 Natelsohn *v.* Reich, 50 Misc. 585, 99 N. Y. S. 327.

59-23 Morse *v.* Tochterman, 21 Cal. App. 726, 132 P. 1055; Nash *v.* Webber, 204 Mass. 419, 90 N. E. 872; Rosen *v.* Bamberger, 122 N. Y. S. 240; Swigert *v.* Hartzell, 20 Pa. Super. 56. In Pine Beach Inv. Co. *v.* Co., 106 Va. 810, 56 S. E. 822, original draft of lease contained words "bars or buffets;" the words "bars or" were erased by lessor, who, before lease consummated, expressed opinion that "buffet" carried with it right to sell liquor. Proof of these facts proper.

59-24 O'Neill *v.* Ogden, 32 Utah 162, 89 P. 464, local usage to explain "lodge use" or "lodge purposes."

Local custom inadmissible to vary unambiguous lease. Eckhardt *v.* Taylor, 90 Kan. 698, 136 P. 218. See also vol. 9, p. 361, n. 49.

59-26 Swigert *v.* Hartzell, 20 Pa. Super. 56.

60-27 Boice *v.* Zimmerman, 3 Pa. Super. 181.

Parties' identity shown by parol. Granniss *v.* Co., 117 N. Y. S. 881.

60-28 Landt *v.* Schneider, 31 Mont. 15, 77 P. 307.

61-29 Chamberlain *v.* Brown, 141 Ia. 540, 120 N. W. 334 (if lease silent intended use of premises shown by parol): Lauderdale *v.* King, 130 Mo. App 236, 109 S. W. 852.

61-34 Hinsdale *v.* McCune, 135 Ia. 682, 113 N. W. 478.

62-35 Dunn *v.* Stegemann, 10 Cal. App. 38, 101 P. 25.

62-39 Hafer *v.* Corbin, 6 O. N. P. (N. S.) 468.

63-40 Waterman *v.* Le Sage, 142 Wis. 97, 124 N. W. 1041.

Proof of oral lease to take effect on expiration of written lease, proper. Gabel *v.* Page, 6 Cal. App. 618, 92 P. 749.

63-41 Wilson *v.* Co., 75 Kan. 499, 89 P. 897 (manner and terms of paying rent); Haight *v.* Cohen, 123 App. Div. 707, 108 N. Y. S. 502; American E. Nat. Bk. *v.* Smith, 61 Misc. 49, 113 N. Y. S. 236.

63-44 Geer *v.* Co., 126 Mo. App. 173, 103 S. W. 151.

63-45 Ventura H. Co. *v.* Co., 33 Ky. L. R. 149, 109 S. W. 354; Hermitage Co. *v.* Roos, 110 N. Y. S. 976.

63-46 Voss *v.* Sylvester, 203 Mass. 233, 89 N. E. 241; Siebold *v.* Heyman, 120 N. Y. S. 105; Wilkes *v.* Levy, 114 N. Y. S. 713.

Tenant must prove warranty.—Clark *v.* Sharpe, 76 N. H. 446, 83 A. 1090; Walsh *v.* Brew. Co., 123 N. Y. S. 814.

64-50 See Wood *v.* Monteleone, 118 La. 1005, 43 S. 657; Drouin *v.* Wilson, 80 Vt. 335, 67 A. 825.

Lessor must prove exercise of due diligence to relet premises for benefit of lessee, his neglect being set up in latter's answer. Woodbury *v.* Sparrell, 198 Mass. 1, 84 N. E. 441.

Breach of covenant by landlord must be established by tenant. Scheffler P. *v.* Perlman, 130 App. Div. 576, 115 N. Y. S. 40.

Notice of defect or existence for such time as to charge landlord with notice must be shown. Brooks *v.* Schlernitzauer, 144 N. Y. S. 484.

Evidence of condition of premises and admissions by landlord before lease executed irrelevant to show notice of condition. Gutman *v.* Folsom, 61 Misc. 304, 113 N. Y. S. 691; Townsend *v.* Rosenblum, 113 N. Y. S. 1029.

64-51 Notice to landlord of condition of premises shown by proof that part of them, similar to part in question, previously found defective. Hanselman *v.* Broad, 113 App. Div. 447, 99 N. Y. S. 404.

Negligence in making repairs.—Blickley *v.* Luce, 148 Mich. 233, 111 N. W. 752.

65-53 Phoenix L. & I. Co. *v.* Seidel, 135 Mo. App. 185, 115 S. W. 1070.

Evidence of repairs after eviction irrelevant, as is evidence of profits on property thereafter. Niles *v.* R. Co., 130 App. Div. 744, 115 N. Y. S. 602.

Non-compliance of lessor with ordinances to secure safety of public shown. Norris *v.* McFadden, 159 Mich. 424, 124 N. W. 54.

Tenant's knowledge that premises included part of street shown if evicted by city and there is no covenant to contrary by lessor. Davis *v.* Co., 162 Ala. 424, 50 S. 368.

65-54 Sanders *v.* Cline, 22 Okla. 154, 101 P. 267.

65-55 Mah Po *v.* McCarthy (Can.), 10 West. L. Rep. 670.

65-56 Parol evidence not admissible in action for breach of covenant, because of lessor's failure of title, to show he leased land by parol from owner. Prestwood *v.* Carlton, 162 Ala. 327, 50 S. 254.

65-57 Phoenix L. & I. Co. *v.* Seidel, 135 Mo. App. 185, 115 S. W. 1070.

Issue of ex parte injunction restraining tenant from using premises shows eviction. Pfund *v.* Herlinger, 10 Phila. (Pa.) 13.

Declarations of tenant inadmissible unless inconsistent with rights. Behrens *v.* Mountz, 37 Pa. Super. 326.

66-59 Prestwood *v.* Carlton, 162 Ala. 327, 50 S. 254; Palmer *v.* Ingram, 2 Ga. App. 200, 58 S. E. 362; Devers *v.* May, 124 Ky. 387, 99 S. W. 255.

Value of tenancy of will.—Hayes *v.* Atlanta, 1 Ga. App. 25, 57 S. E. 1087.

Burden on lessor evicting tenants from mine to show amount and value of ore removed during term of lease. Isabella G. M. Co. *v.* Glenn, 37 Colo. 165, 86 P. 349.

Special damages recoverable if necessarily resulting from lessor's act. Herpolsheimer *v.* Christopher, 76 Neb. 352, 111 N. W. 359, 9 L. R. A. (N. S.) 1127.

66-60 Evidence of damage may cover all natural and probable consequences of act so far as they might have been foreseen by reasonable forecast. Behrens *v.* Mountz, 37 Pa. Super. 326.

67-61 Special value of premises, over stipulated rent, to lessee proved. Devers *v.* May, 124 Ky. 387, 99 S. W. 255.

Evidence of comparative advantages of premises demised and those plaintiff was subsequently forced to accept is inadmissible to show rental value. Wertheimer *v.* Rosenbaum, 146 N. Y. S. 177.

Receipts of business prior and subsequent to landlord's act shown. Ven-

tura H. Co. *v.* Co. (Ky.), 128 S. W. 292.

Damages to other members of plaintiff's family by eviction not provable. Sanders *v.* Cline, 22 Okla. 154, 101 P. 267.

67-62 Value of premises for rent is admissible. Williams W. Wks. *v.* Gunn (Ga. App.), 80 S. E. 668.

67-63 Hayes *v.* Atlanta, 1 Ga. App. 25, 57 S. E. 1087; Roth T. Co. *v.* Co., 146 Mo. App. 1, 123 S. W. 513; Standard A. & Mfg. Co. *v.* Champion, 76 N. J. L. 771, 72 A. 92 (in tort); Hendler *v.* Quigley, 38 Pa. Super. 39; Crews *v.* Cortez, 102 Tex. 111, 113 S. W. 523.

If possession of but part of land leased is given tenant he may show quality of part withheld, crop raised on that cultivated and value and that whole cultivatable by him without extra expense. Pressler *v.* Warren, 57 Tex. Civ. 635, 122 S. W. 909.

Profits by lessee of undeveloped mine during period plaintiff's promised lease was to run proved if shown he would have worked mine as it was worked. Kjelsberg *v.* Chilberg, 177 Fed. 109, 100 C. C. A. 529.

68-65 Prestwood *v.* Carlton, 162 Ala. 327, 50 S. 254.

Receipts of a business shown by lessee's books or testimony, rent based on such receipts. Standard A. & Mfg. Co. *v.* Champion, 76 N. J. L. 771, 72 A. 92.

68-67 **Profits made by tenant** before and after removal in consequence of breach of oral agreement to extend lease shown; but not rental value of premises as agreed upon in lease to another party providing for new building. Rooks *v.* Booth, 160 Mich. 62, 125 N. W. 69.

Value of work and services performed by tenant in part execution of contract proved if he elects to treat landlord's breach as termination of contract. Roberson *v.* Allen, 7 Ga. App. 142, 66 S. E. 542.

Sales by lessee in another place occupied while building was being erected on site of former place and thereafter cannot be shown to prove damages sustained in consequence of lessor's failure to make new building of stipulated dimensions. Bromberg *v.* Co., 162 Ala. 359, 50 S. 314.

69-68 Sloan *v.* Hart, 150 N. C. 269, 63 S. E. 1037.

69-69 See Lauderdale *v.* King, 130 Mo. App. 236, 109 S. W. 852.

69-71 Circumstances of aggravation shown as basis for exemplary damages. Hendler *v.* Quigley, 38 Pa. Super. 39.

70-72 Devers *v.* May, 124 Ky. 387, 99 S. W. 255.

Lessor may prove tender of possession to lessee few days after right thereto accrued and that lessee situated to accept it. Huntington E. P. Co. *v.* Parsons, 62 W. Va. 26, 57 S. E. 253, 9 L. R. A. (N. S.) 1130.

Burden of proving matter in mitigation upon party asserting existence. Evidence must cover all elements. Huntington E. P. Co. *v.* Parsons, supra.

Mitigation for breach of crop lease. Crews *v.* Cortez, 102 Tex. 111, 113 S. W. 523.

70-77 In action by tenant's servant to recover for negligence of landlord lease admissible to show tenant's right to elevator privileges. Sciolaro *v.* Asch, 198 N. Y. 77, 91 N. E. 263.

71-78 Cummings *v.* Elsholtz, 154 Ill. App. 457.

Acts of lessor after rent accrued do not affect right to recover it. And in action between tenant and sub-tenant for rent due when former was dispossessed evidence showing tender by latter to lessor in summary proceedings not relevant. Rainier Co. *v.* Smith, 65 Misc. 560, 120 N. Y. S. 993.

71-79 Swift *v.* Boyd, 202 Mass. 26, 88 N. E. 439.

Where the premises are burned the burden of proving negligence of the tenant is on the landlord to enable him to hold the tenant for rent under an agreement to pay rent on the damaged property only when the fire should be caused by the tenant's negligence. Guernsey *v.* Pub. Co., 85 Misc. 380, 147 N. Y. S. 408.

Burden is on tenant to establish defense to action for rent. Katz *v.* Alvord, 137 N. Y. S. 870.

In an action for rent, evidence of notice of intent to surrender is inadmissible unless it shows such notice as stipulated in the lease. Heyman *v.* Robertson, 146 N. Y. S. 1075.

Admission of relation and of non-payment of rent casts upon tenant burden of proving justification for default. Pearce *v.* Hoyt, 136 Mo. App. 590, 118 S. W. 656.

71-81 See Streit *v.* Fay, 230 Ill. 319, 82 N. E. 648.

72-84 Purtell *v.* Farris, 137 Ga. 318,

73 S. E. 634; Hanson *v.* Co., 23 N. D. 169, 135 N. W. 766.

Lessor must show existence of all statutory conditions giving right to use summary remedy for collection of rent. Palethorp *v.* Schmidt, 12 Pa. Super. 214.

"If one entitled to a forfeiture demands rent accrued after the date of the right of forfeiture, he waives the forfeiture; but there is no waiver in demanding the payment of that, upon the non-payment of which the forfeiture depends." Mansur *v.* Chamberlin, 162 Mo. App. 155, 144 S. W. 510.

72-85 Moran *v.* Lavell, 32 R. I. 338, 79 A. 818.

73 Where rent is portion of crop, landlord in an action for failure to properly cultivate, may show the amount grown on the premises in other years. Henson *v.* Baxter (Tex. Civ.), 166 S. W. 460.

73-86 National Cash Register Co. *v.* Wait, 158 Ill. App. 168.

73-87 Burden of showing tenant's authority to sell crop on which landlord claims lien upon intervener, setting up fact. Antone *v.* Miles, 47 Tex. Civ. 289, 105 S. W. 39.

Lien for advancements.—Advancement of things necessary to cultivation of land presumed to create lien. Brown *v.* Brown, 109 N. C. 124, 13 S. E. 797. In other cases it must be shown that things advanced were in aid of production of crop. Windsor B. House *v.* Watson, 148 N. C. 295, 62 S. E. 305.

73-88 Moore *v.* Rosser, 13 Ga. App. 392, 79 S. E. 246.

Evidence of improvements by the lessee may be introduced in an action by him against his transferee to recover a greater rental than that mentioned in the lease. J. H. Hicks & Son *v.* Mozley & Co., 12 Ga. App. 661, 78 S. E. 133.

Evidence of a custom held admissible to corroborate testimony as to an oral agreement relative to the rent. Jackson *v.* Taylor (Tex. Civ.), 166 S. W. 413.

73-89 See Ingraham *v.* Mitchell, 176 Ill. App. 469.

Agreement as to rent to be paid for subsequent term admission as to rental value for preceding term. Dickinson *v.* Co., 77 Ark. 570, 92 S. W. 21.

Profits owner might have made by using premises not provable. Coles Co. *v.* Co., 150 N. C. 183, 63 S. E. 736.

Use of land or capability for use shown. Coles Co. *v.* Co., supra.

Landlord must show rental value during such time as tenant was not in possession if he claims surrender ineffectual. Gay *v.* Peak, 5 Ga. App. 583, 63 S. E. 650.

Customary rent paid for like land in community shown. Baldwin *v.* Bohl, 23 S. D. 395, 122 N. W. 247.

Unexecuted oral agreement to reduce rent not binding; otherwise as to payments made and accepted thereunder. Zindler *v.* Levitt, 132 App. Div. 397, 116 N. Y. S. 726.

Judicial notice not taken of lessened value of premises because of failure to repair. Davies *v.* Hotchkiss, 112 N. Y. S. 233.

74-91 Dorb *v.* Waybright, 121 N. Y. S. 584, not binding.

74-92 Quinn *v.* Tobiason, 153 Ia. 650, 133 N. W. 1052.

74-93 In re Young, 16 Phila. (Pa.) 215.

When presumption of payment arises from delay in making demand. Phenix *v.* Hallcock, 175 Ill. App. 113.

The production of the lease containing a provision for the payment of the amount claimed makes a prima facie case that such sum is due without intrinsic proof that the same has not been paid. Cohen *v.* Plumtree, 170 Ill. App. 311.

Landlord must show title in action to enjoin removal of building during life of lease, tenant in admittedly rightful possession and claiming ownership. Hoffman *v.* Nelson, 158 Mich. 573, 123 N. W. 41.

74-94 Busch-Everett Co. *v.* Oil Co., 128 La. 886, 55 S. 564; Morgan *v.* Williams, 39 Pa. Super. 580.

Tenant's assent to increased rent during first year relevant as to leasehold period. Busch-Everett Co. *v.* Oil Co., supra; Morgan *v.* Williams, supra.

75-96 Whether premises damaged as to be unfit for occupancy, amount paid lessor by insurers provable. Expert opinions admissible to show effect upon stock of dry goods the premises would have in condition in which they were left by fire. Testimony as to condition of walls and what has been done to secure their safety also competent. It may be shown that precautions taken were called for by reason of fire in an adjoining building. Meyer D. Co. *v.* Madden, 45 Tex. Civ. 74, 99 S. W. 723.

75-97 Gabel *v.* Page, 6 Cal. App. 618, 92 P. 749.

75-98 See Bloom *v.* Wanner, 25 Ky. L. R. 1646, 77 S. W. 930, mailing notice.
Landlord must show sufficiency of notice. Morgan *v.* Williams, 39 Pa. Super. 580.
Writ in dispossession proceedings instituted by landlord's agent not admissible unless authority shown. McDonald *v.* Ruggiero, 136 App. Div. 699, 121 N. Y. S. 417.

75-1 Cancellation of lease by consent must be shown by alleging party. Lynch *v.* H. Co., 112 N. Y. S. 915.

76-2 McLeod *v.* Amero (Me.), 88 A. 652; Levitt *v.* Zindler, 136 App. Div. 695, 121 N. Y. S. 483; Herb *v.* Day, 139 N. Y. S. 931; Edmundson *v.* Mach. Co., 51 Pa. Super. 545; Gardiner *v* Bair, 10 Pa. Super. 74; Rohbock *v.* McCargo, 6 Pa. Super. 134; Lipper *v.* Bouve, 6 Pa. Super. 452; John B. Webster Co. *v.* Grossman (S. D.), 146 N. W. 565; Theo. Hamm Brewing Co. *v.* Wiggam, 27 S. D. 613, 132 N. W. 270.

76-3 Presumption from non-removal of tenant's goods explained by proving acts of lessor. Schneider *v.* Bates, 37 Pa. Super. 432.

76-4 New parol lease no evidence of surrender unless within exception in statute of frauds. Rogge *v.* Levinson, 113 N. Y. S. 525.

76-6 Proof of agreement as to surrender must be clear and explicit; established by preponderance of evidence. Statute of frauds not involved. Rohbock *v.* McCargo, 6 Pa. Super. 134.
Time to vacate.—Evidence of time in which lessee could procure similar premises incompetent where he has stipulated to vacate in reasonable time after notice. Cooper *v.* Gambill, 146 Ala. 184, 40 S. 827.

76-7 Wabash R. & L. Co. *v.* Krabbe, 145 Ill. App. 462; Schwin *v.* Perkins, 77 N. J. L. 402, 72 A. 454; Stott *v.* Chamberlain, 21 S. D. 520, 114 N. W. 683 (under statute); Aaron *v.* Holmes, 35 Utah 49, 99 P. 450.

77-8 Gay *v.* Peak, 5 Ga. App. 583, 63 S. E. 650; Habich *v.* Co., 177 Ind. 193, 97 N. E. 539; Commercial W. Co. *v.* Boston, 194 Mass. 460, 80 N. E. 645; Millis *v.* Ellis, 109 Minn. 81, 122 N. W. 1119; Gerhart R. Co. *v.* Brecht, 109 Mo. App. 25, 84 S. W. 216; Payne *v.* Hall, 82 N. J. L. 362, 82 A. 518; Dagett *v.* Champney, 122 App. Div. 254, 106 N. Y. S. 892; White *v.* Berry, 24 R. I. 74, 52 A. 682; Stott *v.* Chamberlain, 21 S. D. 520, 114 N. W. 683.
Evidence of acceptance.—Friedlander *v.* Citron, 129 N. Y. S. 427.
Lessor may testify of purpose in taking possession of and reletting premises abandoned by lessee. Higgins *v.* Street, 19 Okla. 45, 92 P. 153, 13 L. R. A. (N. S.) 398.
Unauthorized entry upon premises after abandonment, and attempt by lessor to relet them in own name tends strongly to show acceptance of surrender, but not conclusive. It seems, that an actual reletting by lessor in own name to another tenant for a different period than they were leased to defendant for would be conclusive evidence of acceptance of surrender. Feust *v.* Craig, 107 N. Y. S. 637, *cit.* Gray *v.* Co., 9 App. Div. 115, 41 N. Y. S. 73, 162 N. Y. 388, 56 N. E. 903, 76 Am. St. 327, 49 L. R. A. 580; Crane *v.* Edwards, 80 App. Div. 333, 80 N. Y. S. 747. It has been said in another case that acceptance of has never been found, as matter of law, to arise from mere attempt to relet. Dorrance *v.* Bonesteel, 51 App. Div. 129, 64 N. Y. S. 307.
Admissions in another action competent to show acceptance of surrender. Hillman *v.* DeRosa, 46 Misc. 261, 92 N. Y. S. 67.
Lessor's entry for distress of goods for month of term prior to that for which suit brought and receipt of rent therefor shows no surrender of lease by operation of law. Home C. E. Co. *v.* Goldfarb, 78 N. J. L. 146, 74 A. 143.

77-9 Gomprecht *v.* Ludwig, 65 Misc. 557, 120 N. Y. S. 986.
Receipt containing statement that remainder of rent was to be paid by a sub-tenant held insufficient to show an acceptance of the surrender. Edmundson *v.* Mach. Co., 51 Pa. Super. 545.

78-11 Kean *v.* Rogers, 146 Ia. 559, 123 N. W. 754; Millis *v.* Ellis, 109 Minn. 81, 122 N. W. 1119; Feust *v.* Craig, 107 N. Y. S. 637; Pascoe Ap. House *v.* Eno, 35 Pa. Super. 337. See Sandberg *v.* Light, 55 Wash. 189, 104 P. 205.

78-12 Kean *v.* Rogers, 146 Ia. 559, 123 N. W. 754; Payne *v.* Hall, 82 N. J. L. 362, 82 A. 518; Levitt *v.* Zindler, 136 App. Div. 695, 121 N. Y. S. 483 (seeking tenant not enough); Dagett *v.* Champney, 122 App. Div. 254, 106 N. Y. S. 892; Feust *v.* Craig, 107 N. Y. S. 637; Underhill *v.* Collins, 132 N. Y. 269, 30 N. E. 576; Gardiner *v.* Bair, 10 Pa. Super. 74.

Non-occupancy of business property evidence of abandonment. Parnass *v.* Ryerson, 128 Ill. App. 489.

Abandonment of oil and gas lease.—Rawlings *v.* Armel, 70 Kan. 778, 79 P. 683.

Abandonment of mine.—Material to show in justification of abandonment of mine whether operated at profit, and capabilities. Wilson *v.* Co., 142 Ia. 521, 119 N. W. 604.

Dissolution of lessee partnership and tender of key by stranger insufficient to show surrender. Creachen *v.* Achenberg (N. J. L.), 70 A. 160.

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86-1 Jackson *v.* S., 5 Ala. App. 306, 57 S. 594; S. *v.* Stewart, 6 Penne. (Del.) 435, 67 A. 786; S. *v.* Wolf, 6 Penne. (Del.) 323, 66 A. 739; S. *v.* Carr, 4 Penne. (Del.) 523, 57 A. 370; Powell *v.* S., 63 Fla. 34, 57 S. 609; Franklin *v.* S., 3 Ga. App. 342, 59 S. E. 835; Blankenship *v.* C., 147 Ky. 768, 145 S. W. 752; Lucas *v.* C., 147 Ky. 744, 145 S. W. 751: Wallace *v.* S., 91 Neb. 158, 135 N. W. 549; Rockwell *v.* S., 90 Neb. 744, 134 N. W. 528; Motley *v.* S. (Tex. Cr.), 145 S. W. 620; Suggs *v.* S. (Tex. Cr.), 143 S. W. 186; Whitsel *v.* S., 49 Tex. Cr. 42, 90 S. W. 505; Wilson *v.* S. (Tex. Cr.), 100 S. W. 153; S. *v.* Nelson, 39 Utah 238, 117 P. 71; S. *v.* Blay, 77 Vt. 56, 58 A. 794 (uncorroborated extra-judicial confessions insufficient); Topolewski *v.* S., 130 Wis. 244, 109 N. W. 1037.

Evidence held sufficient.—Ledgerwood *v.* S., 6 Okla. Cr. 105, 116 P. 202; S. *v.* Cline, 27 S. D. 573, 132 N. W. 160.

Evidence of breaking in is admissible, although defendant has been acquitted of burglary, since under Texas statute the offenses do not merge. Roman *v.* S. (Tex. Cr.), 142 S. W. 912.

86-2 Control of property by accused must be shown. S. *v.* Johnson, 78 Kan. 866, 98 P. 216.

86-3 Celender *v.* S., 86 Ark. 23, 109 S. W. 1024; S. *v.* Wolf, 6 Penne. (Del.) 323, 66 A. 739; S. *v.* West, 15 Ida. 73, 95 P. 949; S. *v.* Kimes, 145 Ia. 346, 124 N. W. 164; P. *v.* Mindeman, 157 Mich. 120, 121 N. W. 488; Francis *v.* S., 87 Miss. 493, 39 S. 897; S. *v.* Lockhart, 188 Mo. 427, 87 S. W. 457; Rios *v.* S. (Tex. Cr.), 101 S. W. 988; Winchester *v.* S. (Tex. Cr.), 85 S. W. 1073; Bogan *v.* S. (Tex. Cr.), 95 S. W. 131; Johnson *v.* S., 50 Tex. Cr. 68, 94 S. W. 900.

Evidence held insufficient.—Stewart *v.* S., 9 Ga. App. 501, 71 S. E. 755; P. *v.* Manfredi, 129 N. Y. S. 84; S. *v.* Givens, 87 S. C. 525, 70 S. E. 162.

Evidence held sufficient.—Rynes *v.* S., 99 Ark. 121, 137 S. W. 800; Allen *v.* C., 144 Ky. 222, 137 S. W. 1060; Deaton *v.* S., 7 Okla. Cr. 436, 123 P. 701; Chairs *v.* S., 124 Tenn. 630, 139 S. W. 711; Taylor *v.* S., 62 Tex. Cr. 611, 138 S. W. 615.

87-5 P. *v.* Mindeman, 157 Mich. 120, 121 N. W. 488; Wilburn *v.* Ty., 10 N. M. 402, 62 P. 968.

89-8 S. *v.* Johnson, 36 Wash. 294, 78 P. 903, sufficient.

89-9 S. *v.* Smith, 190 Mo. 706, 90 S. W. 440.

89-10 Bailey *v.* S., 50 Tex. Cr. 398, 97 S. W. 694.

89-12 Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141; Jefferson *v.* S., 89 Ark. 129, 115 S. W. 1140; P. *v.* Ward, 10 Cal. App. 524, 102 P. 679; McDonald *v.* S., 56 Fla. 74, 47 S. 485; Ray *v.* S., 4 Ga. App. 67, 60 S. E. 816; Sheffield *v.* S., 1 Ga. App. 135, 57 S. E. 969; Gurley *v.* S., 10 Ga. App. 841, 74 S. E. 441; S. *v.* Clark, 145 Ia. 731, 122 N. W. 957; S. *v.* Collins, 79 Kan. 411, 99 P. 817; S. *v.* Broxton, 118 La. 126, 42 S. 721; Ty. *v.* Leslie, 15 N. M. 240, 106 P. 378; Ty. *v.* Caldwell, 14 N. M. 535, 98 P. 167; C. *v.* Dingman, 26 Pa. Super. 615; S. *v.* Wilkes, 82 S. C. 163, 63 S. E. 688; S. *v.* Langford, 74 S. C. 460, 55 S. E. 120; S. *v.* Glover, 21 S. D. 465, 113 N. W. 625; Daly *v.* S. (Tex. Cr.), 117 S. W. 798 (opportunity); Harrold *v.* S., 46 Tex. Cr. 568, 81 S. W. 728; Rucker *v.* S., 51 Tex. Cr. 222, 101 S. W. 804; Franks *v.* S., 48 Tex. Cr. 211, 87 S. W. 148; Burch *v.* S., 49 Tex. Cr. 13, 90 S. W. 168; Nelson *v.* S., 48 Tex. Cr. 471, 88 S. W. 807; Byrd *v.* S., 49 Tex. Cr. 279, 93 S. W. 114; Hooton *v.* S., 53 Tex. Cr. 6, 108 S. W. 651; Robinson *v.* S., 18 Wyo. 216, 106 P. 24.

90-13 Lipsey *v.* P., 227 Ill. 364, 81 N. E. 348; S. *v.* Johnson, 36 Wash. 294, 78 P. 903.

90-14 S. *v.* Wells, 33 Mont. 291, 83 P. 476 (information from defendant's accomplices as to whereabouts of stolen property, admissible); Winkler *v.* S., 58 Tex. Cr. 564, 126 S. W. 1134.

91-16 C. *v.* Fritch, 9 Pa. C. C. 164; Counts *v.* S., 48 Tex. Cr. 629, 89 S. W. 972 (on prosecution for theft of ap-

pearance bond evidence defendant and principal in bond had been living together in adultery, not admissible).

91-17 S. *v.* Baird, 13 Ida. 29, 88 P. 233; S. *v.* Soper, 207 Mo. 502, 106 S. W. 3; Hawkins *v.* S., 58 Tex. Cr. 407, 126 S. W. 268; Brown *v.* S., 57 Tex. Cr. 570, 124 S. W. 101.

Advertisements for accused are admissible on question of flight. S. *v.* Wallace, 162 N. C. 622, 78 S. E. 1.

92-18 P. *v.* Mindeman, 157 Mich. 120, 121 N. W. 488; Brown *v.* S., 57 Tex. Cr. 570, 124 S. W. 101.

Flight in respect to another like offense, not relevant to offense as to which flight not attempted. Damron *v.* S., 58 Tex. Cr. 255, 125 S. W. 396.

92-19 Lynch *v.* S., 95 Ark. 168, 128 S. W. 1053 (and of other articles than that alleged, all being in same receptacle); P. *v.* King, 8 Cal. App. 329, 96 P. 916; Menefee *v.* S., 59 Fla. 316, 51 S. 555 (offer to sell property in which accused did not deal); Bryant *v.* S., 4 Ga. App. 851, 62 S. E. 540; Quinlan *v.* C., 149 Ky. 476, 149 S. W. 892; Walton *v.* C., 148 Ky. 485, 146 S. W. 1097; S. *v.* Allen, 34 Mont. 403, 87 P. 177; S. *v.* Hamilton, 77 S. C. 383, 57 S. E. 1098 (possession of stolen property and sale for much less than its value, evidence from which guilt inferred); Overstreet *v.* S. (Tex. Cr.), 150 S. W. 899; Daly *v.* S. (Tex. Cr.), 117 S. W. 798; Bink *v.* S., 48 Tex. Cr. 598, 89 S. W. 1075.

See Coleman *v.* S., 150 S. W. 1177.

Circumstantial evidence may show possession. S. *v.* Clark, 145 Ia. 731, 122 N. W. 957.

92-20 Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141.

The corpus delicti not proved by showing possession. Robinson *v.* S., 18 Wyo. 216, 106 P. 24.

92-21 P. *v.* Horton, 7 Cal. App. 34, 93 P. 382; Roquemore *v.* S., 50 Tex. Cr. 542, 99 S. W. 547.

93-23 Douglass *v.* S., 91 Ark. 492, 121 S. W. 923; Wiley *v.* S., 3 Ga. App. 120, 59 S. E. 438; S. *v.* Anderson, 162 N. C. 571, 77 S. E. 238; S. *v.* Record, 151 N. C. 695, 65 S. E. 1010; S. *v.* Winter, 83 S. C. 153, 65 S. E. 209; Pool *v.* S., 51 Tex. Cr. 596, 103 S. W. 892. See S. *v.* Weinberg, 245 Mo. 564, 150 S. W. 1069.

93-24 S. *v.* Carr, 4 Penne. (Del.) 523, 57 A. 370; Hilscher *v.* S., 48 Tex. Cr. 357, 88 S. W. 227.

93-25 P. *v.* King, 8 Cal. App. 329, 96 P. 916; Bryant *v.* S., 4 Ga. App. 851, 62 S. E. 540; S. *v.* Stone, 40 Mont. 88, 105 P. 89; Askew *v.* U. S., 2 Okla. Cr. 155, 101 P. 121; Pickering *v.* U. S., 2 Okla. Cr. 197, 101 P. 123.

There is no burden on defendant to explain his possession of stolen property. S. *v.* Hutchison, 121 Minn. 405, 141 N. W. 483.

93-26 Slater *v.* U. S., 1 Okla. Cr. 275, 98 P. 110.

93-27 S. *v.* Clark, 145 Ia. 731, 122 N. W. 957.

94-28 Black *v.* S., 1 Ala. App. 168, 55 S. 948; Wiley *v.* S., 92 Ark. 586, 124 S. W. 249; Douglass *v.* S., 91 Ark. 492, 121 S. W. 923; P. *v.* Matezuski, 11 Cal. App. 465, 105 P. 425; P. *v.* King, 8 Cal. App. 329, 96 P. 916 (rehear. denied by supreme court); P. *v.* Horton, 7 Cal. App. 34, 93 P. 382; Clark *v.* S., 59 Fla. 9, 15, 52 S. 518; Besheres *v.* S., 12 Ga. App. 805, 78 S. E. 483; Wilkes *v.* S., 11 Ga. App. 384, 75 S. E. 443; S. *v.* Kimes, 145 Ia. 346, 124 N. W. 164; S. *v.* Sparks, 40 Mont. 88, 105 P. 89; S. *v.* Allen, 34 Mont. 403, 87 P. 177; Ty. *v.* Caldwell, 14 N. M. 535, 98 P. 167; Ty. *v.* Livingston, 13 N. M. 318, 84 P. 1021; Slater *v.* U. S., 1 Okla. Cr. 275, 98 P. 110; Askew *v.* U. S., 2 Okla. Cr. 155, 101 P. 121; Cox *v.* Ty., 2 Okla. Cr. 668, 104 P. 378; S. *v.* Hill, 63 Or. 451, 128 P. 444; S. *v.* Brinkley, 55 Or. 134, 104 P. 893; S. *v.* Minnick, 54 Or. 86, 102 P. 605; McDonald *v.* S. (Tex. Cr.), 156 S. W. 209 (sufficient); Newton *v.* S., 62 Tex. Cr. 622, 138 S. W. 708.

95-29 S. *v.* Short, 7 Penne. (Del.) 295, 75 A. 787; S. *v.* Wolf, 6 Penne. (Del.) 323, 66 A. 739; S. *v.* Anderson, 162 N. C. 571, 77 S. E. 238.

96-30 P. *v.* Roderiguez, 16 Cal. App. 358, 116 P. 986; S. *v.* Wolf, 6 Penne. (Del.) 323, 66 A. 739; Miller *v.* P., 229 Ill. 376, 82 N. E. 391; S. *v.* Maggard, 250 Mo. 335, 157 S. W. 354.

96-31 Glass *v.* S. (Ark.), 158 S. W. 1071; McDonald *v.* S., 56 Fla. 74, 47 S. 485; P. *v.* Everett, 242 Ill. 628, 90 N. E. 226; Mason *v.* S., 171 Ind. 78, 85 N. E. 776; S. *v.* Perry (Ia.), 145 N. W. 56; Johnson *v.* C., 154 Ky. 742, 159 S. W. 560; S. *v.* Court, 225 Mo. 609, 125 S. W. 451; S. *v.* Vinton, 220 Mo. 90, 119 S. W. 370; S. *v.* Crooke, 129 Mo. App. 490, 107 S. W. 1104; S. *v.* Stone, 40 Mont. 88, 105 P. 89. *Contra*, S. *v.*

Kimes, 145 Ia. 346, 124 N. W. 164, *over.* cases.

Proof of opportunity and false statements may be made to ascertain origin of possession. Mason *v.* S., 171 Ind. 78, 85 N. E. 776.

Under Spanish law possession is presumed acquired in good faith. U. S. *v.* Rapman, 1 Phil. Isl. 294.

97-32 P. *v.* Gibson, 16 Cal. App. 347, 116 P. 987.

98-35 Mason *v.* S., 171 Ind. 78, 85 N. E. 776.

98-36 S. *v.* Bailey, 63 W. Va. 668, 60 S. E. 785.

99-37 Jones *v.* S., 85 Ark. 360, 108 S. W. 223; P. *v.* King, 8 Cal. App. 329, 96 P. 916; Collier *v.* S., 55 Fla. 7, 45 S. 752; Smith *v.* S., 11 Ga. App. 385, 75 S. E. 447; S. *v.* McKinney, 76 Kan. 419, 91 P. 1068; S. *v.* Christian (Mo.), 161 S. W. 805; S. *v.* Anderson, 162 N. C. 571, 77 S. E. 238; Armstead *v.* S., 48 Tex. Cr. 304, 87 S. W. 824; Selph *v.* S., 49 Tex. Cr. 18, 90 S. W. 174; Pool *v.* S., 51 Tex. Cr. 596, 103 S. W. 892; Robinson *v.* S., 18 Wyo. 216, 106 P. 24.

100-38 Perry *v.* S., 155 Ala. 93, 46 S. 470; Jackson *v.* S., 108 Ark. 425, 158 S. W. 138; Crossland *v.* S., 77 Ark. 537, 92 S. W. 776; Collier *v.* S., 55 Fla. 7, 45 S. 752; S. *v.* Beard (S. D.), 147 N. W. 69; Peters *v.* S., 49 Tex. Cr. 365, 91 S. W. 224.

See Jackson *v.* S. (Okla. Cr.), 139 P. 324.

100-40 S. *v.* Wolf, 6 Penne. (Del.) 323, 66 A. 739; Mance *v.* S., 5 Ga. App. 229, 62 S. E. 1053; Huguley *v.* S., 7 Ga. App. 780, 68 S. E. 333; Miller *v.* P., 229 Ill. 376, 82 N. E. 391; S. *v.* McClain, 130 Ia. 73, 106 N. W. 376; Ty. *v.* Livingston, 13 N. M. 318, 84 P. 1021; Blair *v.* Ty., 15 Okla. 549, 82 P. 653; C. *v.* Berney, 28 Pa. Super. 61 (inference does not arise after lapse of two months); C. *v.* Frew, 3 Pa. C. C. 492; Menchaca *v.* S., 58 Tex. Cr. 198, 125 S. W. 20.

On the question of recovery the nature of the property may be considered. The jury properly could say, that automobile tires ordinarily do not pass from hand to hand in common traffic. C. *v.* Taylor, 210 Mass. 443, 97 N. E. 94.

Check given accused in payment for stolen property, competent to fix date of sale. Dennis *v.* S., 88 Ark. 418, 114 S. W. 926.

101-42 Echols *v.* S., 147 Ala. 700, 41 S. 298; S. *v.* Wells, 33 Mont. 291, 83 P. 476; S. *v.* Minnick, 54 Or. 86, 102 P. 605.

Where accused did not have possession until thirty days after theft, presumption of guilt would not apply. S. *v.* Anderson, 162 N. C. 571, 77 S. E. 238.

102-43 Three and half months, too remote. Menchaca *v.* S., 58 Tex. Cr. 198, 125 S. W. 20.

102-44 S. *v.* Record, 151 N. C. 695, 65 S. E. 1010.

103-45 Wiley *v.* S., 92 Ark. 586, 124 S. W. 249.

103-46 S. *v.* Hammons, 226 Mo. 604, 126 S. W. 422; Morgan *v.* S., 62 Tex. Cr. 120, 136 S. W. 1065.

Sack of shoes, identified, may be admitted in evidence to show recent possession. See S. *v.* Stutches (Ia.), 144 N. W. 597.

105-49 S. *v.* Minnick, 54 Or. 86, 102 P. 605. See Lujan *v.* S. (Ariz.), 141 P. 706.

105-50 Peterson *v.* S., 6 Ga. App. 491, 65 S. E. 311.

105-51 Perry *v.* P., 38 Colo. 23, 87 P. 796 (identification is for jury); S. *v.* James, 194 Mo. 268, 92 S. W. 679 (after identification it is for jury to determine ownership); McDaniel *v.* S., 49 Tex. Cr. 47, 90 S. W. 504. See Perry *v.* S., 155 Ala. 93, 46 S. 470; P. *v.* Petlin, 1 Cal. App. 612, 82 P. 980; Peace *v.* S. (Tex. Cr.), 153 S. W. 320 (insufficient).

Testimony of owner is sufficient to convict even though the preponderance of evidence is contrary. Stewart *v.* S. (Tex. Cr.), 160 S. W. 381.

Evidence to be relevant and admissible need not be sufficient in itself to establish a disputed point in fact. S. *v.* Tidwell (Utah), 139 P. 863.

Identity shown by circumstantial evidence.—S. *v.* Clark, 145 Ia. 731, 122 N. W. 957.

106-52 S. *v.* Clark, supra.

106-53 McDonald *v.* S., 2 Ga. App. 633, 58 S. E. 1067.

106-54 Miller *v.* Ty., 9 Ariz. 123, 80 P. 321, identity of colt's mother. Witness may testify he identified the goods. Platinburg *v.* S., 57 Tex. Cr. 375, 123 S. W. 421.

Men who had repaired article may testify to identity by the way it had been repaired. McGee *v.* S. (Tex. Cr.), 155 S. W. 246.

106-55 McDonald *v.* S., 56 Fla. 74, 47 S. 485 (a gold coin); Thompson *v.*

S., 58 Fla. 106, 50 S. 507; S. *v.* Walker, 194 Mo. 253, 92 S. W. 659.

107-56 See Lynne *v.* S., 53 Tex. Cr. 375, 111 S. W. 729.

107-57 Lynne *v.* S., supra.

108-58 Acts and declarations of prosecuting witness, after accused parted with possession of property stolen, if made in his absence, not competent. Richards *v.* S., 59 Tex. Cr. 203, 127 S. W. 823.

Acts and conduct of third persons cannot be proved if they imply opinion concerning fact of larceny and defendant's guilt. Richards *v.* S., supra.

108-59 Wilson *v.* S., 58 Tex. Cr. 104, 124 S. W. 943.

108-60 Failure of accused to defend action of replevin for property in his possession, immaterial. S. *v.* Kimes, 145 Ia. 346, 124 N. W. 164.

108-61 Crossland *v.* S., 77 Ark. 537, 92 S. W. 776 (method of obtaining property competent to overcome presumption); Peeples *v.* S., 5 Ga. App. 706, 63 S. E. 719.

108-63 McDonald *v.* S., 56 Fla. 74, 47 S. 485; Lanier *v.* S., 126 Ga. 586, 55 S. E. 496 (statements or declarations by accused when first asked for explanation); Morris *v.* S., 5 Ga. App. 300, 63 S. E. 26; S. *v.* Grubb, 201 Mo. 585, 99 S. W. 1083; Britain *v.* S., 52 Tex. Cr. 169, 105 S. W. 817; Pool *v.* S., 48 Tex. Cr. 478, 88 S. W. 350.

109-64 There is no burden on defendant to explain his possession of stolen property. S. *v.* Hutchison, 121 Minn. 405, 141 N. W. 483.

110-66 Williams *v.* S., 5 Ala. App. 112, 59 S. 528.

112-70 If explanation first attempted on trial failure of accused to subpoena person from whom he claims to have obtained property is to be regarded in considering good faith of explanation. Cleveland *v.* S., 57 Tex. Cr. 356, 123 S. W. 142.

112-72 McDonald *v.* S., 56 Fla. 74, 47 S. 485.

113-74 McDonald *v.* S., supra.

115-76 S. *v.* Carter, 144 Ia. 280, 121 N. W. 694; S. *v.* Grubb, 201 Mo. 585, 99 S. W. 1083; S. *v.* Stone, 40 Mont. 88, 105 P. 89.

Inference of guilt, strengthened by false explanation and claim of ownership. Douglass *v.* S., 91 Ark. 492, 121 S. W. 923.

116-81 S. *v.* Carter, 144 Ia. 280, 121 N. W. 694.

117-82 Martin *v.* S., 76 Ark. 615, 88 S. W. 962; McGaha *v.* S., 76 Ark. 615, 88 S. W. 983; P. *v.* Meyers, 5 Cal. App. 674, 91 P. 167; Morris *v.* S., 5 Ga. App. 300, 63 S. E. 26; S. *v.* Carter, 144 Ia. 280, 121 N. W. 694; S. *v.* Bartlett, 128 Ia. 518, 105 N. W. 59; Todd *v.* C., 29 Ky. L. R. 473, 93 S. W. 631; S. *v.* Soper, 207 Mo. 502, 106 S. W. 3; S. *v.* Willette, 46 Mont. 326, 127 P. 1013; Ty. *v.* Livingston, 13 N. M. 318, 84 P. 1021; S. *v.* Winter, 83 S. C. 153, 65 S. E. 209; Slaughter *v.* S. (Tex. Cr.), 105 S. W. 198.

117-83 Sims *v.* S. (Tex. Cr.), 163 S. W. 79.

118-84 S. *v.* Winter, 83 S. C. 153, 65 S. E. 209.

118-85 Sparks *v.* Ty., 146 Fed. 371, 76 C. C. A. 594.

But where defendant claimed never to have had any anvil in his shop, except one different from the stolen one, he cannot show from whom he bought it. Murphy *v.* S. (Ala. App.), 64 S. 520.

119-87 S. *v.* Wright, 199 Mo. 161, 97 S. W. 874; C. *v.* Dingman, 26 Pa. Super. 615; S. *v.* Winter, 83 S. C. 153, 65 S. E. 209.

119-88 S. *v.* Carr, 4 Penne. (Del.) 523, 57 A. 370.

120-90 Martin *v.* S., 10 Ga. App. 795, 74 S. E. 304; Ty. *v.* Caldwell, 14 N. M. 535, 98 P. 167 (to show intent); Howard *v.* S., 9 Okla. Cr. 337, 131 P. 1100.

121-93 Clampitt *v.* U. S., 6 Ind. Ty. 92, 89 S. W. 666; P. *v.* Geyer, 196 N. Y. 364, 90 N. E. 48; P. *v.* Sekeson, 111 App. Div. 490, 97 N. Y. S. 917; P. *v.* Smilie, 118 App. Div. 611, 103 N. Y. S. 348; Clark *v.* S., 59 Tex. Cr. 246, 128 S. W. 131; Wesley *v.* S. (Tex. Cr.), 85 S. W. 802; Topolewski *v.* S., 130 Wis. 244, 109 N. W. 1037.

121-94 Stapleton *v.* S., 80 Ark. 617, 97 S. W. 296; P. *v.* Cahill, 11 Cal. App. 685, 106 P. 115. Suspicious conduct of two apparent strangers on day they co-operated in committing larceny may be proved to show concert of action. Ryan *v.* U. S., 26 App. Cas. (D. C.) 74; Ray *v.* S., 4 Ga. App. 67, 60 S. E. 816; Young *v.* U. S., 7 Ind. Ty. 78, 103 S. W. 771; Ty. *v.* Livingston, 13 N. M. 318, 84 P. 1021; Hurst *v.* Ty., 16 Okla. 600, 86 P. 280; C. *v.* Benedick, 39 Pa. Super. 477.

Admissible where evidence tends to show a conspiracy. Jones *v.* S. (Okla. Cr.), 137 P. 121.

122-95 Douglass *v.* S., 91 Ark. 492,

121 S. W. 923; Bailey *v.* S., 92 Ark. 216, 122 S. W. 497; Thrash *v.* S., 79 Ark. 347, 96 S. W. 360 (changing ear marks on hog and offering to buy same when found sufficient evidence of intent); P. *v.* Grider, 13 Cal. App. 703, 110 P. 586; S. *v.* Wolf, 6 Penne. (Del.) 323, 66 A. 739; Musgrove *v.* S., 5 Ga. App. 467, 63 S. E. 538; Simmons *v.* S., 2 Ga. App. 638, 58 S. E. 1066; S. *v.* Kimes, 145 Ia. 346, 124 N. W. 164; S. *v.* Claybaugh, 138 Mo. App. 360, 122 S. W. 319; P. *v.* Moss, 113 App. Div. 329, 99 N. Y. S. 138; P. *v.* Brunham, 119 App. Div. 302, 104 N. Y. S. 725; Johnson *v.* U. S., 2 Okla. Cr 16, 99 P. 1022. Permanent appropriation of property must be contemplated. P. *v.* Kenney, 135 App. Div. 380, 119 N. Y. S. 854; Canaday *v.* S. (Tex. Cr.), 87 S. W. 346; Flagg *v.* S., 51 Tex. Cr. 602, 103 S. W. 855; Womack *v.* S., 48 Tex. Cr. 148, 86 S. W. 1015; S. *v.* Eddy, 46 Wash. 494, 90 P. 641.

123-96 Canton Nat. Bk. *v.* Co., 111 Md. 41, 73 A. 684; Crockford *v.* S., 73 Neb. 1, 102 N. W. 70; S. *v.* Donaldson, 35 Utah 96, 99 P. 447.

124-97 In Missouri, in order to constitute the crime of larceny, it is necessary that the goods be taken with the intent, not only to deprive the owner of the use thereof, but to convert them to the use or benefit of the defendant. S. *v.* Rhea, 164 Mo. App. 666, 147 S. W. 1096.

124-98 P. *v.* Weber, 130 App. Div. 593, 115 N. Y. S. 453; Worthington *v.* S., 53 Tex. Cr. 178, 109 S. W. 187. But see Aldrich *v.* S., 224 Ill. 622, 79 N. E. 964.

125-1 Kennon *v.* S., 46 Tex. Cr. 359, 82 S. W. 518.

125-2 Brewer *v.* S., 93 Ark. 479, 125 S. W. 127; Cohoe *v.* S., 82 Neb. 744, 118 N. W. 1088; Rochell *v.* S., 55 Tex. Cr. 152, 115 S. W. 583.

126-3 Miller *v.* Ty., 9 Ariz. 123, 80 P. 321; Jackson *v.* S., 101 Ark. 473, 142 S. W. 1153; P. *v.* Mullalley, 16 Cal. App. 44, 116 P. 88; Collier *v.* S., 55 Fla. 7, 45 S. 752; S. *v.* Bailey, 63 W. Va. 668, 60 S. E. 785; Stoddard *v.* S., 132 Wis. 520, 112 N. W. 453.

127-6 S. *v.* Phillips, 105 Minn. 375, 117 N. W. 508; S. *v.* Thompson, 31 Nev. 209, 101 P. 557.

128-7 Towns *v.* S., 167 Ind. 315, 78 N. E. 1012; Malone *v.* S., 169 Ind. 72 81 N. E. 1099; Bradley *v.* S., 165 Ind. 397, 75 N. E. 873; S. *v.* Wortman, 78 Kan. 847, 98 P. 217 (time of taking); C. *v.* Clancy, 187 Mass. 191, 72 N. E. 842; S. *v.* Force, 100 Minn. 396, 111 N. W. 297; S. *v.* McGee, 188 Mo. 401, 87 S. W. 452; S. *v.* Lockhart, 188 Mo. 427, 87 S. W. 457; S. *v.* McCarthy, 36 Mont. 226, 92 P. 521; Ty. *v.* Meredith, 14 N. M. 288, 91 P. 731; P. *v.* Kellogg, 105 App. Div. 505, 94 N. Y. S. 617.

128-8 Blackshare *v.* S., 94 Ark. 548, 128 S. W. 549 (ineffectual attempt to post animals as estrays); Bailey *v.* S. (Ark.), 122 S. W. 497 (one accused of stealing pistol from policeman may show latter threatened to kill him); Kegans *v.* S. (Tex. Cr.), 95 S. W. 122.

129-11 See Taylor *v.* Means, 139 Ga. 578, 77 S. E. 373.

129-12 C. *v.* Taylor, 210 Mass. 443, 97 N. E. 94; P. *v.* Henry, 127 App. Div. 489, 111 N. Y. S. 1005; Long *v.* S., 55 Tex. Cr. 55, 144 S. W. 632; Richardson *v.* S. (Tex. Cr.), 103 S. W. 852.

Publicity of taking, powerful evidence to show bona fides of claim of right. Musgrove *v.* S., 5 Ga. App. 467, 63 S. E. 538.

130-13 Impecunious circumstances of defendant before commission of crime, admissible. Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141; P. *v.* Peltin, 1 Cal. App. 612, 82 P. 980; S. *v.* Wells, 33 Mont. 291, 83 P. 476. If it is shown he had considerable money thereafter. Thompson *v.* S., 58 Fla. 106, 50 S. 507.

130-14 Bass *v.* S., 58 Fla. 1, 50 S. 531; S. *v.* Claybaugh, 138 Mo. App. 360, 122 S. W. 319. See Galloway *v.* S. (Miss.), 63 S. 313; Greene *v.* Fankhauser, 137 App. Div. 124, 121 N. Y. S. 1004.

130-15 Douglass *v.* S., 91 Ark. 492, 121 S. W. 923; Thompson *v.* S., 58 Fla. 106, 50 S. 507.

130-16 Jenkins *v.* S., 58 Fla. 62, 50 S. 582, *cit.* the text; P. *v.* Britton, 134 App. Div. 275, 118 N. Y. S. 989. See Creale *v.* S. (Tex. Cr.), 158 S. W. 268.

Offer to pay prosecutor value of property is admissible, as showing accused believed prosecutor to be owner, as well as accused's guilty participation in crime. Seaborn *v.* S. (Tex. Cr.), 90 S. W. 649; Armstead *v.* S., 48 Tex. Cr. 304, 87 S. W. 824.

Payment to avoid arrest and inconvenience caused thereby, while protesting innocence, competent. Sowles *v.* S., 52 Tex. Cr. 17, 105 S. W. 178.

131-18 Sanford *v.* S. (Tex. Cr.), 143 S. W. 1172. See Stubbs *v.* S. (Tex. Cr.), 160 S. W. 87; Drummond *v.* S. (Tex. Cr.), 158 S. W. 549.

Restitution contemplated but not carried out is inadmissible. P. *v.* Pindar, 210 N. Y. 191, 104 N. E. 133.

Turning animal loose on range after it had been rebranded, though alleged mistake does not constitute a return. Thorne *v.* S., 52 Tex. Cr. 309, 107 S. W. 831.

Return of property by unidentified person, not connected with accused, cannot be shown. P. *v.* Spencer, 137 App. Div. 330, 122 N. Y. S. 190; P. *v.* Spencer, 122 N. Y. S. 195.

131-19 Marley *v.* S. (Ariz.), 140 P. 215; S. *v.* Claybaugh, 138 Mo. App. 360, 122 S. W. 319; Callahan *v.* Kelso, 170 Mo. App. 338, 156 S. W. 716; Fields *v.* S., 57 Tex. Cr. 613, 124 S. W. 652. See Galloway *v.* S. (Miss.), 63 S. 313.

But the state may trace the use of collateral security, where accused asserted his right to use it, as bearing on his motive and intent. P. *v.* Cummins, 153 App. Div. 93, 138 N. Y. S. 517.

Where accused claimed he believed hog belonged to his father, the prosecution could not prove as an incriminative fact that he had never instituted civil proceedings to recover hog. Harris *v.* S. (Tex. Cr.), 160 S. W. 447.

Taking by artifice or concealment may rebut claim of title. Farrell *v.* Phillips, 140 Wis. 611, 123 N. W. 117.

Authority to remove property may be testified to by accused. Guthrie *v.* S. (Miss.), 47 S. 639.

131-21 See P. *v.* Pitt, 142 N. Y. S. 873.

132-23 P. *v.* Rial, 23 Cal. App. 713, 139 P. 661; Brown *v.* S. (Ga. App.), 81 S. E. 590; Martin *v.* S., 10 Ga. App. 795, 74 S. E. 304; Mulligan *v.* C., 144 Ky. 246, 137 S. W. 1062; S. *v.* Morgan, 129 La. 154, 55 S. 747; S. *v.* Allen, 34 Mont. 403, 87 P. 177; P. *v.* Weber, 130 App. Div. 593, 115 N. Y. S. 453; Long *v.* S., 55 Tex. Cr. 55, 114 S. W. 632 (larcenies from various persons at same time by conspirators); Penrice *v.* S. (Tex. Cr.), 105 S. W. 797; Watters *v.* S. (Tex. Cr.), 94 S. W. 1038. See vol. 7, p. 630, n. 17; vol. 11, p. 801, n. 58, and supplement thereto. *Contra*, S. *v.* Fulwider, 28 S. D. 622, 134 N. W. 807.

Contemporaneous theft.—See McKnight *v.* S. (Tex. Cr.), 156 S. W. 1188.

132-24 S. *v.* Hatch, 63 Wash. 617, 116 P. 286. See Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141; S. *v.* Strodemier, 40 Wash. 608, 82 P. 915.

132-25 Lanier *v.* S., 126 Ga. 586, 55 S. E. 496; S. *v.* Allen, 34 Mont. 403, 87 P. 177; C. *v.* Frew, 3 Pa. C. C. 492 (incompetent to prove innocence); S. *v.* White, 77 Vt. 241, 59 A. 829; S. *v.* Blay, 77 Vt. 56, 58 A. 794.

132-26 Dickerson *v.* S., 105 Ark. 72, 150 S. W. 119; P. *v.* Russell, 19 Cal. App. 750, 127 P. 829; S. *v.* Stewart, 6 Penne. (Del.) 435, 67 A. 786; McCrory *v.* S., 11 Ga. App. 787, 76 S. E. 163; S. *v.* Grubb, 201 Mo. 585, 99 S. W. 1083; Cohoe *v.* S., 82 Neb. 744, 118 N. W. 1088; Manley *v.* S. (Tex. Cr.), 153 S. W. 1138; Seaborn *v.* S. (Tex. Cr.), 90 S. W. 649 (self-serving declarations, inadmissible); Eads *v.* S., 17 Wyo. 490, 101 P. 946 (attempt to keep property without jurisdiction and otherwise prevent inspection in aid of proof of identity).

Borrowing money on property left in possession of bailee does not show conversion, possession not being changed. McAlister *v.* S., 59 Tex. Cr. 237, 128 S. W. 123.

Self-serving acts and declarations, not part of res gestae, cannot be proved. Jenkins *v.* S., 58 Fla. 62, 50 S. 582.

133-28 P. *v.* Grider, 13 Cal. App. 703, 110 P. 586; Stewart *v.* S., 10 Ga. App. 442, 73 S. E. 602; Watson *v.* S., 6 Ga. App. 801, 65 S. E. 813; S. *v.* Kimes, 145 Ia. 346, 124 N. W. 164; S. *v.* Hathaway, 150 N. C. 798, 63 S. E. 892; Case *v.* S. (Okla. Cr.), 139 P. 322; Nixon *v.* S. (Tex. Cr.), 93 S. W. 555; Rose *v.* S., 52 Tex. Cr. 154, 106 S. W. 143; Topolewski *v.* S., 130 Wis. 244, 109 N. W. 1037. See P. *v.* Majorana, 155 App. Div. 431, 140 N. Y. S. 8. *Contra*, Hurst *v.* Ty., 16 Okla. 600, 86 P. 280.

Insufficient.—Smith *v.* S. (Ga. App.), 80 S. E. 22.

Non-consent of under-clerk need not be proved when ownership alleged in person having entire charge. King *v.* S. (Tex. Cr.), 100 S. W. 387.

134-32 Lane *v.* S. (Tex Cr.), 152 S. W. 897; Lynch *v.* S. (Tex. Cr.), 156 S. W. 1182.

Non-action, not evidence of consent. Price *v.* S., 55 Tex. Cr. 157, 115 S. W. 586.

135-33 Jones *v.* P., 33 Colo. 161, 79 P. 1013, proved by other witnesses.

135-34 S. *v.* Bjelkstrom, 20 S. D. 1, 104 N. W. 481. See George *v.* U. S.,

6 Ind. Ty. 155, 89 S. W. 1121, exclusion of testimony of third persons they heard owner give accused authority to take property from possession of another, error.

135-35 P. *v.* Hutchings, 8 Cal. App. 550, 97 P. 325.

135-36 Jones *v.* P., 33 Colo. 161, 79 P. 1013 (picking drunken person's pockets); Jackson *v.* S. (Okla. Cr.), 139 P. 324; George *v.* U. S., 1 Okla. Cr. 307, 97 P. 1052 (causing search to be made for stolen property, a cogent circumstance); S. *v.* Faulk, 22 S. D. 183, 116 N. W. 72; Lynch *v.* S. (Tex. Cr.), 156 S. W. 1182; Jordan *v.* S., 51 Tex. Cr. 646, 104 S. W. 900 (death of owner before trial). See Nixon *v.* S., 89 Neb. 109, 130 N. W. 1049.

136-37 S. *v.* James, 133 Mo. App. 300, 113 S. W. 232; Vought *v.* S., 135 Wis. 6, 114 N. W. 518, 646 (unlawful diversion of funds by town officers involves element of non-consent on part of town).

136-38 Lujan *v.* S. (Ariz.), 141 P. 706; Baxter *v.* S. (Fla.), 65 S. 653 (insufficient proof); S. *v.* Baird, 13 Ida. 29, 88 P. 233; S. *v.* James, 133 Mo. App. 300, 113 S. W. 232; Hellums *v.* S., 55 Tex. Cr. 356, 116 S. W. 590; Bryan *v.* S., 49 Tex. Cr. 196, 91 S. W. 580; Byrd *v.* S., 49 Tex. Cr. 279, 93 S. W. 114; Hatfield *v.* S. (Tex. Cr.), 147 S. W. 236; S. *v.* Eddy, 46 Wash. 494, 90 P. 641. See Moore *v.* S., 55 Tex. Cr. 3, 114 S. W. 807.

Evidence held sufficient.—Rynes *v.* S., 99 Ark. 121, 137 S. W. 800; Taylor *v.* S., 62 Tex. Cr. 611, 138 S. W. 615.

It is sufficient to allege ownership of corporate property in superintendent and prove he was in full control of the business and property, and was in possession of latter when stolen. Barnes *v.* S., 46 Tex. Cr. 513, 81 S. W. 735.

136-39 Russell *v.* S., 97 Ark. 92, 133 S. W. 188; Gipson *v.* S., 57 Tex. Cr. 290, 122 S. W. 557.

137-40 Black *v.* S., 1 Ala. App. 168, 55 S. 948; Richards *v.* S., 59 Tex. Cr. 203, 127 S. W. 823; Anglin *v.* S., 52 Tex. Cr. 475, 107 S. W. 835 (money).

137-42 Ogletree *v.* S., 7 Ga. App. 523, 67 S. E. 126.

If stolen money is introduced and exhibited, it need not be identified as that described in information. S. *v.* Pigg, 80 Kan. 481, 103 P. 121.

138-45 Wiley *v.* S., 92 Ark. 586, 124 S. W. 249.

Statement of accused when he made final payment for property in question, proved. White *v.* S., 57 Tex. Cr. 196, 122 S. W. 391.

Identity of property with that owned by prosecuting witness may be shown by opinions. Wright *v.* S., 156 Ala. 108, 47 S. 201.

138-46 General foreman of mechanical department of railroad company had sufficient special ownership. Schneider *v.* S. (Tex. Cr.), 156 S. W. 944.

138-47 S. *v.* Tillett, 173 Ind. 133, 89 N. E. 589; S. *v.* Laird, 79 Kan. 681, 100 P. 637; S. *v.* Mintz, 189 Mo. 268, 88 S. W. 12; McDonald *v.* S. (Tex. Cr.), 156 S. W. 209.

Nature of defendant's possession, shown. Hill *v.* S., 55 Tex. Cr. 407, 117 S. W. 823.

Proof of possession will not overcome presumption of defendant's innocence. S. *v.* James, 133 Mo. App. 300, 113 S. W. 232.

139-48 Ty. *v.* Smith, 12 N. M. 229, 78 P. 42 (certificate of recorded brand must be shown, where title is sought to be established by brand); S. *v.* Brinkley, 55 Or. 134, 104 P. 893; Seaborn *v.* S. (Tex. Cr.), 90 S. W. 649.

In Arizona.—Webb *v.* S., 14 Ariz. 506, 131 P. 970.

139-49 S. *v.* Wolfley, 75 Kan. 406, 89 P. 1046, 93 P. 337.

Ownership of a cow is not proven by showing that owner bought all stock bearing a similar brand, unless the animal is otherwise identified. Baxter *v.* S. (Fla.), 65 S. 653.

139-50 Hurst *v.* Ty., 16 Okla. 600, 86 P. 280 (under statute unrecorded brands, competent to prove ownership); Elmore *v.* S. (Tex. Cr.), 162 S. W. 517; Reynolds *v.* S. (Tex. Cr.), 160 S. W. 362; Turner *v.* S. (Tex. Cr.), 160 S. W. 357.

139-51 S. *v.* Garrett (Or.), 141 P. 1123. See Webb *v.* S., 14 Ariz. 506, 131 P. 970. Rule does not apply if diligence used by owner in getting brand recorded. Ty. *v.* Meredith, 14 N. M. 288, 91 P. 731.

140-52 See Jones *v.* S. (Okla. Cr.), 137 P. 121.

Particular marks relied upon to identify animal need not be proved beyond reasonable doubt if there is testimony as to other marks. Pate *v.* S., 158 Ala. 1, 48 S. 388.

Ownership and possession in third per-

son may be shown. Wilson *v.* S., 58 Tex. Cr. 104, 124 S. W. 943.

140-53 Williams *v.* S., 11 Ga. App. 766, 76 S. E. 72; Peterson *v.* S., 6 Ga. App. 491, 65 S. E. 311; Downer *v.* S., 10 Ga. App. 827, 74 S. E. 301. And see Roberts *v.* S., 61 Tex. Cr. 434, 135 S. W. 144. See Taylor *v.* Means, 139 Ga. 578, 77 S. E. 373.

140-54 Evidence that defendant sold the stolen goods is sufficient to show they were of some value. Greenfield *v.* S. (Ga. App.), 81 S. E. 814.

140-55 Allen *v.* C., 148 Ky. 327, 146 S. W. 762; Schwartz *v.* S., 53 Tex. Cr. 449, 111 S. W. 399; Johnson *v.* S., 57 Tex. Cr. 308, 122 S. W. 877 (if property consists of several articles aggregate value must be shown, and fact they were taken at same time); Hasley *v.* S., 50 Tex. Cr. 45, 94 S. W. 899 (failure to prove alleged value, error).

Evidence held sufficient.—S. *v.* Murphy, 113 Minn. 405, 129 N. W. 850; Frazier *v.* S., 62 Tex. Cr. 640, 138 S. W. 620.

141-56 S. *v.* Lucero, 17 N. M. 484, 131 P. 491.

141-57 S. *v.* Stanley, 123 Mo. App. 294, 100 S. W. 678.

141-58 Joiner *v.* S., 124 Ga. 102, 52 S. E. 151; S. *v.* Faulk, 22 S. D. 183, 116 N. W. 72; Sowles *v.* S., 52 Tex. Cr. 17, 105 S. W. 178; Gibson *v.* S. (Tex. Cr.), 100 S. W. 776.

Value of unindorsed check is amount it represents. S. *v.* McClellan, 82 Vt. 361, 73 A. 993, statute.

142-59 Echols *v.* S., 147 Ala. 700, 41 S. 298; McGee *v.* S. (Tex. Cr.), 155 S. W. 246; Cummings *v.* S. (Tex. Cr.), 106 S. W. 363; Keipp *v.* S., 51 Tex. Cr. 417, 103 S. W. 392.

Opinions as to value of goods of quality superior to those stolen, inadmissible. Close *v.* S., 55 Tex. Cr. 380, 117 S. W. 137.

142-60 Peterson *v.* S., 6 Ga. App. 491, 65 S. E. 311; P. *v.* Zuckerman, 133 App. Div. 615, 118 N. Y. S. 127; McCoy *v.* S., 56 Tex. Cr. 551, 120 S. W. 858 (cost); Collins *v.* S., 56 Tex. Cr. 385, 118 S. W. 1038 (price for which accused sold property).

Circumstances may be proved to show need of complaining witness for money to corroborate defendant's testimony part of sum stolen was returned. S. *v.* Brown, 38 Mont. 309, 99 P. 954.

143-61 Glover *v.* S., 146 Ala. 690, 40 S. 354; Keipp *v.* S., 51 Tex. Cr. 417, 103 S. W. 392; Close *v.* S., 55 Tex. Cr. 380, 117 S. W. 137 (in county at time and where taken).

"**Evidence of the cost price** of an article is not conclusive as to its value; nor, indeed, is evidence as to its selling price. The test by which the degree of guilt of the accused is to be determined is the value of the article at the time it was stolen, and this value is to be arrived at by the jury from a consideration of all the facts and circumstances shown in the evidence. Where the article stolen is in general use, and has what might be called a standard market value, of course, the best evidence of the value of such an article is the price at which it sells in the open market. But where the article does not appear to have a standard value in the open market, or its standard value is not shown, the evidence of its value must be arrived at from facts and circumstances testified to by witnesses who qualify themselves to speak as to its value." Allen *v.* C., 148 Ky. 327, 146 S. W. 762.

143-62 S. *v.* Lewis, 144 Ia. 483, 123 N. W. 168; S. *v.* McDermet, 138 Ia. 86, 115 N. W. 884.

Cost when new, cost of replacing or value of use to owner cannot be proved to show value when taken. Wigginton *v.* C. (Ky.), 114 S. W. 1185.

144-66 S. *v.* Connor, 74 Kan. 898, 87 P. 703 (one witness sufficient to take case to jury); P. *v.* Decker, 127 N. Y. S. 1059; Gotcher *v.* S. (Tex. Cr.), 148 S. W. 574.

Evidence sufficient.—Briscoe *v.* S. (Tex. Cr.), 148 S. W. 565.

And such evidence is competent, though it may incidentally tend to prove that he has committed another and independent crime. S. *v.* Harris, 153 Ia. 592, 133 N. W. 1078.

145-68 S. *v.* Grubb, 201 Mo. 585, 99 S. W. 1083; Trevenio *v.* S., 48 Tex. Cr. 207, 87 S. W. 1162. But see Pool *v.* S., 48 Tex. Cr. 478, 88 S. W. 350.

145-74 Opportunity may be shown though not exclusive. C. *v.* Taylor, 210 Mass. 443, 97 N. E. 94.

146-75 Davis *v.* C., 154 Ky. 774, 159 S. W. 607.

147-79 Howard *v.* S., 3 Ga. App. 659, 60 S. E. 328 (railroad car); Warren *v.* S. (Tex. Cr.), 105 S. W. 817.

147-80 Time of theft must be shown to be anterior indictment. S. *v.* Carr,

4 Penne. (Del.) 523, 57 A. 370; McDaniel *v.* S., 49 Tex. Cr. 47, 90 S. W. 504.

148-81 Thomas *v.* S., 51 Tex. Cr. 329, 101 S. W. 797; S. *v.* Hier, 78 Vt. 488, 63 A. 877 (burden on defendant to establish by preponderance of evidence).

LEADING QUESTIONS

150-2 Davis *v.* Millings, 141 Ala. 378, 37 S. 737; Peebles *v.* Co., 143 Ill. App. 370; First Nat. Bk. *v.* Pearce (Tex. Civ.), 126 S. W. 285; Gibson *v.* S., 47 Tex. Cr. 489, 83 S. W. 1119; Fire Assn. *v.* Masterson (Tex. Civ.), 83 S. W. 49; Missouri, etc. R. Co. *v.* Hendricks, 49 Tex. Civ. 314, 108 S. W. 745. See Southern Cotton Oil Co. *v.* Campbell, 106 Ark. 379, 153 S. W. 256.

151-3 Peebles *v.* Co., 239 Ill. 370, 88 N. E. 166; Chicago City R. Co. *v.* Shaw, 220 Ill. 532, 77 N. E. 129; Granger *v.* Darling, 156 Mich. 31, 120 N. W. 32.

152-4 Nurnberger *v.* U. S., 156 Fed. 721, 84 C. C. A. 377; Hoagland *v.* Canfield, 160 Fed. 146; Anniston Mfg. Co. *v.* R. Co., 145 Ala. 351, 40 S. 965; Peebles *v.* Co., 239 Ill. 370, 88 N. E. 166; Prather *v.* R. Co., 221 Ill. 190, 77 N. E. 430; Devine *v.* Tazewell Co., 161 Ill. App. 547; Roth *v.* Assn., 102 Tex. 241, 115 S. W. 31; Jesse French P. & O. Co. *v.* Garza, 53 Tex. Civ. 346, 116 S. W. 150; Gate City Co. *v.* McGuire (Tex. Civ.), 112 S. W. 436; O'Farrell *v.* O'Farrell, 56 Tex. Civ. 51, 119 S. W. 899; Ft. Worth, etc. R. Co. *v.* Jones, 38 Tex. Civ. 129, 85 S. W. 37; Missouri, etc. R. Co. *v.* Hendricks, 49 Tex. Civ. 314, 108 S. W. 745; Cleveland *v.* Taylor, 49 Tex. Civ. 496, 108 S. W. 1037; Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521.

152-5 Maryland, etc. R. Co. *v.* Brown, 109 Md. 304, 71 A. 1005; Continental Ins. Co. *v.* Cummings (Tex. Civ.), 95 S. W. 48.

152-6 Bryan Press Co. *v.* R. Co. (Tex. Civ.), 110 S. W. 99. See El Paso R. Co. *v.* Ruckman, 49 Tex. Civ. 25, 107 S. W. 1158.

152-7 Southern, etc. Co. *v.* Co., 165 Ala. 582, 51 S. 789; Fulgham *v.* Carter, 142 Ala. 227, 37 S. 932; Fountain *v.* S., 7 Ga. App. 559, 67 S. E. 218; Emanuel *v.* Co., 47 Misc. 378, 94 N. Y. S. 36; Williams *v.* Smith, 29 R. I. 562, 72 A. 1093; Ganow *v.* Ashton, 32 S. D. 458, 143 N. W. 383; St. Louis S. R. Co. *v.* Lowe (Tex. Civ.), 97 S. W. 1087; Moore *v.* S., 49 Tex. Cr. 499, 96 S. W. 321; Coons *v.* S., 49 Tex. Cr. 256, 91 S. W. 1085; Wells *v.* S. (Tex. Cr.), 145 S. W. 950; Brock *v.* Moderns, 36 Tex. Civ. 12, 81 S. W. 340; I. & G. N. R. Co. *v.* Dalwigh, 92 Tex. 655, 51 S. W. 500; Bryan Press Co. *v.* R. Co. (Tex. Civ.), 110 S. W. 99 (last two cases treat text as modification of the common law); Missouri, etc. R. Co. *v.* Steele, 50 Tex. Civ. 634, 110 S. W. 171; I. & G. N. R. Co. *v.* Drought (Tex. Civ.), 100 S. W. 1011. *Contra*, Hill *v.* S., 156 Ala. 3, 46 S. 864. See Southern Cotton O. Co. *v.* Campbell, 106 Ark. 379, 153 S. W. 256; Long *v.* S., 58 Tex. Cr. 209, 127 S. W. 208.

No error.—A state's witness was asked the following questions, to-wit: "You did not give him the money willingly, did you?" and: "He did not have your consent to take the money, did he?" To both of which questions the witness answered, "No." Green *v.* S. (Tex. Cr.), 147 S. W. 593.

152-8 Greene *v.* Hereford, 12 Ariz. 85, 95 P. 105; Lukenbach *v.* Sciple, 72 N. J. L. 476, 63 A. 244; El Paso, etc. R. Co. *v.* Welter (Tex. Civ.), 125 S. W. 45; Gulf, etc. R. Co. *v.* Tullis, 41 Tex. Civ. 219, 91 S. W. 317; Cunningham *v.* Neal, 49 Tex. Civ. 613, 109 S. W. 455; Seago *v.* White, 45 Tex. Civ. 539, 100 S. W. 1015; St. Louis, etc. R. Co. *v.* Conrad (Tex. Civ.), 99 S. W. 209; Goodsoe *v.* S., 52 Tex. Cr. 626, 108 S. W. 388; U. S. G. Co. *v.* Shields (Tex. Civ.), 106 S. W. 724; Houston, etc. R. Co. *v.* Johnson (Tex. Civ.), 118 S. W. 1150; Garrett *v.* S., 52 Tex. Cr. 255, 106 S. W. 389; Ft. Worth, etc. R. Co. *v.* Walker, 48 Tex. Civ. 86, 106 S. W. 400.

See Andrews *v.* S., 159 Ala. 14, 48 S. 858; City of Kankakee *v.* R. Co., 258 Ill. 368, 101 N. E. 592; Mulkey *v.* S., 5 Okla. Cr. 75, 113 P. 532.

152-9 Andrews *v.* S., 159 Ala. 14, 48 S. 858; Williamson Iron Co. *v.* McQueen, 144 Ala. 265, 40 S. 306; S. *v.* Clark (Ia.), 144 N. W. 596; S. *v.* Jones, 48 Mont. 505, 139 P. 441; Gate City Co. *v.* McGuire (Tex. Civ.), 112 S. W. 436; Hein *v.* Mildebrandt, 134 Wis. 582, 115 N. W. 121. See Lupton *v.* Underwood (Del.), 85 A. 965; Williams *v.* Norton, 81 Vt. 1, 69 A. 146.

152-10 See Greene *v* Hereford, 12 Ariz. 85, 95 P. 105.

152-11 O'Farrell *v.* O'Farrell, 56 Tex. Civ. 51, 119 S. W. 899.

153-12 Essary *v.* S., 53 Tex. Cr. 596, 111 S. W. 927.

153-14 Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215, using language of text. See Davis *v.* Mach. Wks., 175 Mich. 61, 140 N. W. 986.

153-15 Bolton *v.* S., 146 Ala. 691, 40 S. 409; Denison & S. R. Co. *v.* Powell, 35 Tex. Civ. 454, 80 S. W. 1054.

153-17 P. *v.* Jones, 160 Cal. 358, 117 P. 176; Moore *v.* S., 49 Tex. Cr. 499, 96 S. W. 321; Hunter *v.* Malone, 49 Tex. Civ. 116, 108 S. W. 709.

153-18 Wickham *v.* P., 41 Colo. 345, 93 P. 478; Nalley *v.* S., 11 Ga. App. 15, 74 S. E. 567; Chicago & A. R. Co. *v.* Walker, 118 Ill. App. 397; S. *v.* Walker, 133 Ia. 489, 110 N. W. 925; S. *v.* Barrett, 117 La. 1086, 42 S. 513; Reed *v.* Co., 198 Mass. 306, 84 N. E. 469 (in court's discretion); S. *v.* Newman, 93 Minn. 393, 101 N. W. 499; Hackney *v.* Raymond, 75 Neb. 793, 106 N. W. 1016; Ainlay *v.* S., 89 Neb. 721, 132 N. W. 120; Blair *v.* S., 72 Neb. 501, 101 N. W. 17 (to reasonable extent); Anderson *v.* Berrum, 36 Nev. 463, 136 P. 973; P. *v.* Sexton, 187 N. Y. 495, 80 N. E. 396; McKeel *v.* Holloman, 163 N. C. 132, 79 S. E. 445; Ostendorf *v.* S., 8 Okla. Cr. 360, 128 P. 143; Gardner *v.* S., 5 Okla. Cr. 531, 115 P. 607; Warren *v.* Warren (R. I.), 80 A. 593; S. *v.* McKay, 89 S. C. 234, 71 S. E. 858; S. *v.* Kennedy, 85 S. C. 116, 67 S. E. 152; S. *v.* Cambron, 20 S. D. 282, 105 N. W. 241; Jones *v.* S. (Tex. Cr.), 163 S. W. 81 (leading question); Wilson *v.* S. (Tex. Cr.), 154 S. W. 571; Moore *v.* S. (Tex. Cr.), 144 S. W. 598; Burch *v.* S., 49 Tex. Cr. 13, 90 S. W. 168; Missouri, etc. R. Co. *v.* McAnaney, 36 Tex. Civ. 76, 80 S. W. 1062 (though witness professes friendship for party calling him, if answers evasive); Littler *v.* Dielmann, 48 Tex. Civ. 392, 106 S. W. 1137; Hanson *v.* R. Co., 75 Wash. 342, 134 P. 1058; S. *v.* Dalton, 43 Wash. 278, 86 P. 590; S. *v.* Carr, 65 W. Va. 81, 63 S. E. 766.

The court may in its discretion permit leading questions where such course of procedure promotes the ends of justice and does not deprive defendant of any legal rights. Thomas *v.* S. (Ala. App.), 65 S. 863; Bachelder *v.* Morgan (Ala.), 60 S. 815; Shaneyfelt *v.* S., 8 Ala. App. 370, 62 S. 331; Prattville Cotton Mills Co. *v.* McKinney, 178 Ala. 554, 59 S. 498; P. *v.* Anthony, 20 Cal. App. 586, 129 P. 968; Padgett *v.* S., 64 Fla. 389, 59 S. 946; Penton *v.* S., 64 Fla. 411, 60 S. 343; Higdon *v.* Williams, 140 Ga. 187, 78 S. E. 767; Wade *v.* S., 13 Ga. App. 142, 78 S. E. 863; Riordan *v.* R. Co., 178 Ill. App. 323; C. *v.* Cline, 213 Mass. 225, 100 N. E. 358; C. *v.* Dorr, 216 Mass. 314, 103 N. E. 902; P. *v.* Frost (Mich.), 146 N. W. 174; Anderson *v.* Berrum, 36 Nev. 463, 136 P. 973; McKeel *v.* Holloman, 163 N. C. 132, 79 S. E. 445; S. *v.* Oden (Or.), 138 P. 1083; Englefield *v.* R. Co. (Tex. Civ.), 159 S. W. 1033; S. *v.* Snyder, 86 Vt. 449, 85 A. 984; Flint *v.* C., 114 Va. 820, 76 S. E. 308; Showalter *v.* S., 148 Wis. 450, 134 N. W. 830.

See Dunshee *v.* Oil Co. (Ia.), 146 N. W. 830.

Witness called under misapprehension and who has misled the party calling him may be asked leading questions. Zilver *v.* Graves, 106 App. Div. 582, 94 N. Y. S. 714.

154-19 Thomasson *v.* S., 80 Ark. 364, 97 S. W. 297; Wickham *v.* P., 41 Colo. 345, 93 P. 478; Deming *v.* Ins. Co., 169 Ill. App. 96; Gray *v.* Kelly, 190 Mass. 184, 76 N. E. 724 (aged witness whose recollection was exhausted); DeKremen *v.* Clothier, 109 App. Div. 481, 96 N. Y. S. 525; Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215; Warren *v.* Warren (R. I.), 80 A. 593; Wilson *v.* S. (Tex. Cr.), 154 S. W. 571; Gulf, etc. R. Co. *v.* Hall, 34 Tex. Civ. 535, 80 S. W. 133; Samson *v.* Ward, 147 Wis. 48, 132 N. W. 629.

When improper.—Montgomery *v.* S., 2 Ala. App. 25, 56 S. 92.

154-20 Shaneyfelt *v.* S., 8 Ala. App. 370, 62 S. 331.

155-21 S. *v.* Dudley, 147 Ia. 645, 126 N. W. 812; S. *v.* Waters, 132 Ia. 481, 109 N. W. 1013; S. *v.* George, 214 Mo. 262, 113 S. W. 1116; Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215; Roberson *v.* S., 53 Tex. Cr. 297, 109 S. W. 160 (prosecutrix talked low, necessitating repetition of questions); Smits *v.* S., 145 Wis. 601, 130 N. W. 525.

As in seduction.—"If you had not been engaged to marry him at that time, would you have given him the privilege of having intercourse with you?" Browning *v.* S., 64 Tex. Cr. 148, 142 S. W. 1.

155-22 S. *v.* Drake, 128 Ia. 539, 105

N. W. 54; Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215.

155-23 S. *v.* Hazlett, 14 N. D. 490, 105 N. W. 617.

155-24 Washington *v.* S., 155 Ala. 2, 46 S. 778; Reeves *v.* R. Co., 164 Ill. App. 611; Liquid C. Co. *v.* Dilley (Tex. Civ.), 150 S. W. 468.

155-25 S. *v.* Simes, 12 Ida. 310, 85 P. 914 (to feeble or simple-minded person); W. U. T. Co. *v.* Teague, 134 Ky. 601, 121 S. W. 484; Anderson *v.* Berrum, 36 Nev. 463, 136 P. 973; S. *v.* Oden (Or.), 138 P. 1083; Graham *v.* S. (Tex. Cr.), 163 S. W. 726; Carter *v.* S., 57 Tex. Cr. 73, 127 S. W. 215; Diaz *v.* S., 62 Tex. Cr. 317, 137 S. W. 377. See Strnad *v.* Messer Co., 142 N. Y. S. 314. See also Cal. Wine Assn. *v.* Ins. Co., 159 Cal. 49, 112 P. 858.

155-26 McCrary *v.* S., 137 Ga. 784, 74 S. E. 536; S. *v.* Drake, 128 Ia. 539, 105 N. W. 54; Carter *v.* S., 57 Tex. Cr. 73, 127 S. W. 215; Bannen *v.* S., 115 Wis. 317, 91 N. W. 107.

An ignorant child who is a reluctant witness. Clardy *v.* S. (Tex. Civ.), 147 S. W. 568.

156-27 P. *v.* Gregory, 8 Cal. App. 738, 97 P. 912; Ehrhardt *v.* P., 51 Colo. 205, 117 P. 164; S. *v.* Megorden, 49 Or. 259, 88 P. 306 (one witness aged 18, other 14, testifying of killing of mother by father); Campbell *v.* S., 62 Tex. Cr. 561, 138 S. W. 607.

156-28 Southwestern B., etc. Co. *v.* Schmidt, 226 U. S. 162, 33 Sup. Ct. 68, 57 L. ed. 170; Asplund *v.* Min. Co., 177 Mich. 529, 143 N. W. 633; Craddick *v.* S., 48 Tex. Cr. 385, 88 S. W. 347; Kozik *v.* Czapiewski, 136 Wis. 70, 116 N. W. 640.

156-30 Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215; Missouri, etc. R. Co. *v.* Neiser, 54 Tex. Civ. 460, 118 S. W. 166.

157-33 Mabry *v.* Randolph, 7 Cal. App. 421, 94 P. 403; Peebles *v.* Co., 239 Ill. 370, 88 N. E. 166; McCann *v.* P., 226 Ill. 562, 80 N. E. 1061; S. *v.* Manigan (Ia.), 145 N. W. 869; P. *v.* Hodge, 141 Mich. 312, 104 N. W. 599; DeKremen *v.* Clothier, 109 App. Div. 481, 96 N. Y. S. 525; Freeman *v.* Grashel (Tex. Civ.), 145 S. W. 695; Jenkins *v.* S. (Wyo.), 134 P. 260.

157-34 "Who was after him?" held leading. Bishop *v.* S. (Ala.), 61 S. 820.

158-36 Hinman *v.* S., 59 Tex. Cr. 29, 127 S. W. 221; Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215. But see Collins *v.* Co., 140 Ia. 114, 115 N. W. 497; St. Louis S. R. Co. *v.* Crabb (Tex. Civ.), 80 S. W. 408.

159-39 Hart *v.* U. S., 183 Fed. 368, 105 C. C. A. 588; S. *v.* Harris (R. I.), 69 A. 506.

159-40 Before court. Pease *v.* S. (Tex. Civ.), 155 S. W. 657.

159-42 Friedland *v.* Nicholsburg 110 N. Y. S. 1055; Busch *v.* Robinson, 46 Or. 539, 81 P. 237.

160-43 Text not applicable where name of party to be identified not proved and no testimony to show he was named as alleged. Brown *v.* S., 53 Tex. Cr. 303, 109 S. W. 188.

Leading questions not reiterable after positive answer. Briggs *v.* P., 219 Ill. 330, 76 N. E. 499.

160-44 Graf Distilling Co. *v.* Wilson, 172 Mo. App. 612, 156 S. W. 23; S. *v.* Angel, 93 S. C. 149, 76 S. E. 190; Zavalla, etc. Co. *v.* Tolbert (Tex. Civ.), 165 S. W. 28; Finch *v.* S. (Tex. Cr.), 158 S. W. 510. See vol. 3, p. 814, n. 48, and supplement thereto.

On redirect as to new matter brought out on cross-examination, permitted. Eaton *v.* Locey, 22 Cal. App. 762, 136 P. 534.

160-45 Fox *v.* S. (Tex. Cr.), 158 S. W. 1141. See vol. 3, p. 815, n. 55, and supplement thereto. But see Zavalla L. & W. Co. *v.* Tolbert (Tex. Civ.), 165 S. W. 28.

160-46 Anderson *v.* Berrum, 36 Nev. 463, 136 P. 973.

160-47 Rockwell *v.* Hudgens, 57 Tex. Civ. 504, 123 S. W. 185.

160-49 Corkery *v.* O'Neill, 9 Pa. Super. 335.

Error in permitting answers to leading questions not cured because witness reiterates matter without objection. Ft. Worth, etc. R. Co. *v.* Jones, 38 Tex. Civ. 129, 85 S. W. 37.

160-50 Hilton *v.* Santelman, 129 Ill. App. 109.

161-51 Rainey *v.* Potter, 120 Fed. 651, 57 C. C. A. 113; Birmingham R. Co. *v.* Pritchett, 161 Ala. 480, 49 S. 782; Barlow *v.* Hamilton, 151 Ala. 634, 44 S. 657; W. U. T. Co. *v.* Westmorland, 150 Ala. 654, 43 S. 790; Scott *v.* S., 75 Ark. 142, 86 S. W. 1004; Plumlee *v.* R. Co., 85 Ark. 488, 109 S. W. 515; Beaudrot *v.* S., 126 Ga. 579, 55 S. E. 592; Colley *v.* Williams, 122 Ga. 841, 50 S. E. 917; Georgia, etc. R. Co. *v.* Sasser, 4 Ga. App. 276, 61 S. E. 505; Lyles *v.* S., 130 Ga. 294, 60 S. E. 578;

McBride *v.* Co., 125 Ga. 515, 54 S. E. 674; Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. 934 (answers to leading interrogatories read in court's discretion); Barker *v.* S., 1 Ga. App. 286, 57 S. E. 989; McClain *v.* Assn., 17 Ida. 63, 104 P. 1015; McLean *v.* Lewiston, 8 Ida. 472, 69 P. 478; Peebles *v.* Co., 239 Ill. 370, 88 N. E. 166; Chicago & A. R. Co. *v.* Walker, 118 Ill. App. 397; Purcell Mills *v.* Bell, 7 Ind. Ty. 717, 104 S. W. 944; S. *v.* Drake, 128 Ia. 539, 105 N. W. 54; Breiner *v.* Nugent, 136 Ia. 322, 111 N. W. 446; S. *v.* Bursaw, 74 Kan. 437, 87 P. 183; Gray *v.* Kelley, 190 Mass. 184, 76 N. E. 724; S. *v.* George, 214 Mo. 262, 113 S. W. 1116; S. *v.* Clinkenbeard, 142 Mo. App. 146, 125 S. W. 827; S. *v.* Bateman, 198 Mo. 212, 94 S. W. 843; S. *v.* Knost, 207 Mo. 18, 105 S. W. 616; S. *v.* Woodward, 191 Mo. 617, 90 S. W. 90; S. *v.* Van Ness, 82 N. J. L. 181, 83 A. 195; Ty. *v.* Meredith, 14 N. M. 288, 91 P. 731; P. *v.* Way, 119 App. Div. 344, 104 N. Y. S. 277; Williams *v.* Smith, 29 R. I. 562, 72 A. 1093; S. *v.* Kennedy, 85 S. C. 146, 67 S. E. 152; S. *v.* Cambron, 20 S. D. 282, 105 N. W. 241; Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215; Missouri, etc. R. Co. *v.* Hendricks, 49 Tex. Civ. 314, 108 S. W. 745; Hunter *v.* S., 59 Tex. Cr. 439, 129 S. W. 125; Johnson *v.* S., 133 Wis. 453, 113 N. W. 674.

Abuse of discretion shown.—S. *v.* Hazlett, 14 N. D. 490, 105 N. W. 617; Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311.

Refusal to permit leading question stands upon at least as high footing as discretion to permit it, being in itself normal rule. Luckenbach *v.* Sciple, 72 N. J. L. 476, 63 A. 244.

161-52. Washington *v.* S., 155 Ala. 2, 46 S. 778 (if generality of answer obviated by cross-examination error immaterial); U. S. O. & L. Co. *v.* Bell, 153 Cal. 781, 96 P. 901; P. *v.* Weber, 149 Cal. 325, 86 P. 671; Shaffer *v.* U. S., 24 App. Cas. (D. C.) 417; Phinazee *v.* Bunn, 123 Ga. 230, 51 S. E. 300; Peterson *v.* S., 6 Ga. App. 491, 65 S. E. 311; Maguire *v.* P., 219 Ill. 16, 76 N. E. 67; Indianapolis & E. R. Co. *v.* Bennett, 39 Ind. App. 141, 79 N. E. 389; Dow *v.* R. Co., 148 Ia. 429, 126 N. W. 918 (unanswered question immaterial); Bess *v.* C., 118 Ky. 858, 82 S. W. 576; S. *v.* Finley, 245 Mo. 465, 150 S. W. 1051; Luckenbach *v.* Sciple, 72 N. J. L. 476, 63 A. 244; Boyle *v.* R. Co., 58 Misc. 50, 110 N. Y. S. 19; Denison & S. R. Co. *v.* Powell, 35 Tex. Civ. 454, 80 S. W. 1054; Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521; Richmond, etc. R. Co. *v.* Rubin, 102 Va. 809, 47 S. E. 834.

See Pease *v.* S. (Tex. Civ.), 155 S. W. 657; Gate City R. Co. *v.* McGuire (Tex. Civ.), 112 S. W. 436.

LEGITIMACY

163-1 In re Hartman's Est., 157 Cal. 206, 107 P. 105; Grant *v.* Stimpson, 79 Conn. 617, 66 A. 166; Buckner *v.* Buckner, 120 Ky. 596, 87 S. W. 776; Bowman *v.* Little, 101 Md. 273, 61 A. 223, 657, 1084; McRae *v.* S. (Miss.), 61 S. 977; Nelson *v.* Jones, 245 Mo. 579, 151 S. W. 80; In re Kennedy, 82 Misc. 214, 143 N. Y. S. 404; Timmann *v.* Timmann, 142 N. Y. S. 298; Flint *v.* Pierce, 136 N. Y. S. 1056; Ewell *v.* Ewell, 163 N. C. 233, 79 S. E. 509; Powell *v.* S., 84 O. St. 165, 95 N. E. 660; Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719; Pooler *v.* Smith, 73 S. C. 102, 52 S. E. 967. *Comp.* Osborne *v.* McDonald, 159 Fed. 791.

If filiation is established.—Lay *v.* Fuller, 178 Ala. 375, 59 S. 609.

By common law marriage.—Skidmore *v.* Harris, 157 Ky. 756, 164 S. W. 98.

In Utah child born as result of plural marriage is illegitimate unless legitimated by statute. Mansfield *v.* Neff (Utah), 134 P. 1160.

Affirmative evidence admissible though question of chastity not raised. O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59.

165-2 In re Hartman's Est., 157 Cal. 206, 107 P. 105; Tyner *v.* Schoonover, 79 Kan. 573, 100 P. 478; Sparks *v.* Ross, 72 N. J. Eq. 762, 65 A. 977; Locust *v.* Caruthers, 23 Okla. 373, 100 P. 520, quot. text; Umbenhower *v.* Labus, 85 O. St. 238, 97 N. E. 832.

"Strict proof" required where establishment of marriage would bastardize issue of subsequent marriage. Bowman *v.* Little, 101 Md. 273, 61 A. 223, 657, 1084.

Presumption rebutted by marriage of one of parties during life of other. In re Campbell's Est., 12 Cal. App. 607, 108 P. 669.

165-3 Osborne *v.* McDonald, 159 Fed. 791; Brisbin *v.* Huntington, 128 Ia. 166, 103 N. W. 144.

165-4 Dunn *v.* Garnett, 129 Ky. 728, 112 S. W. 841; Locust *v.* Caruthers, 23 Okla. 373, 100 P. 520, quot. text; McAllen *v.* Alonzo, 46 Tex. Civ. 449, 102 S. W. 475.

166-6 Birth out of wedlock not conclusive that subsequent husband of mother was not father of child, at least in direct proceeding. Carnley *v.* S., 162 Ala. 94, 50 S. 362.

166-9 Yool *v.* Ewing, (1904) 1 Ir. R. 434; Mayer *v.* Davis, 119 App. Div. 96, 103 N. Y. S. 943, *aff.* in 122 App. Div. 393, 106 N. Y. S. 1041 (husband dead before birth).

Only proof of non-intercourse can bastardize where presumption of intercourse raised by fact of opportunity. Gordon *v.* Gordon, (1905) Pr. Div. 96.

166-10 Jones *v.* S., 11 Ga. App. 760, 76 S. E. 72; Skidmore *v.* Harris, 157 Ky. 756, 164 S. W. 98; Timmann *v.* Timmann, 142 N. Y. S. 298; Flint *v.* Pierce, 136 N. Y. S. 1056; Ewell *v.* Ewell, 163 N. C. 233, 79 S. E. 509. But see Ezidore *v.* Curean, 113 La. 839, 37 S. 773; Bowman *v.* Little, 101 Md. 273, 61 A. 223, 657, 1084.

167-11 See Van Hove *v.* Van Hove, 94 Neb. 575, 143 N. W. 815. *Comp.* Wallace *v.* Wallace, 137 Ia. 37, 114 N. W. 527, 14 L. R. A. (N. S.) 544.

Strongest presumptions in favor of legitimacy. In re Garner's Est., 59 Misc. 116, 112 N. Y. S. 212.

168-12 Wallace *v.* Wallace (N. J. L.), 67 A. 612; In re Garner's Est., supra (divorce).

169-16 Godfrey *v.* Rowland, 16 Haw. 377; Hopkins *v.* Chung Wa, 4 Haw. 650 (though child shows admixture of blood); Canaan *v.* Avery, 72 N. H. 591, 58 A. 509.

So as to admissions of wife.—Grant *v.* Mitchell, 83 Me. 23, 21 A. 178; Scanlon *v.* Walshe, 81 Md. 118, 31 A. 498, 48 Am. St. Rep. 488; Hemmenway *v.* Towner, 1 Allen (Mass.) 209. "And evidence of the adultery of the wife at or about the commencement of the period of gestation is not sufficient to overcome the presumption. Van Aernam *v.* Van Aernam, 1 Barb. Ch. (N. Y.) 375; Cross *v.* Cross, 3 Paige 139, 23 Am. Dec. 778." P. *v.* Case, 171 Mich. 282, 137 N. W. 55.

169-17 Unlawful intercourse not presumed from mere opportunity. S. *v.* Breeden, 41 Ind. App. 370, 83 N. E. 1020.

170-18 Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719.

Chastity of mother in issue on question of testator's delusion as to legitimacy of son in will contest by him. O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59.

170-19 Lay *v.* Fuller, 178 Ala. 375, 59 S. 609; In re Grand's Est., 80 Misc. 450, 141 N. Y. S. 535.

Presumption of continuation of marriage yields to presumption of validity of a second marriage, and the legitimacy of the children thereof after a long desertion by the husband of the first marriage. Lewis *v.* Sizemore, 25 Ky. L. R. 1354, 78 S. W. 122; In re Kelly, 46 Misc. 541, 95 N. Y. S. 57; In re McCausland, 213 Pa. 189, 62 A. 780; In re Wile, 6 Pa. Super. 435.

170-20 Lay *v.* Fuller, 178 Ala. 375, 59 S. 609.

170-21 Godfrey *v.* Rowland, 16 Haw. 377; In re Wile, 6 Pa. Super. 435.

171-23 Godfrey *v.* Rowland, supra; Sergent *v.* Co., 112 Ky. 888, 66 S. W. 1036.

171-25 See Ledet's Succession, 122 La. 200, 47 S. 506.

171-27 Hays *v.* Claypool (Ia.), 145 N. W. 874 (legitimacy); Brisbie *v.* Huntington, 128 Ia. 166, 103 N. W. 144 (insufficient acknowledgment); McLean *v.* McLean (Kan.), 140 P. 847. See In re Gird's Est., 157 Cal. 534, 108 P. 499; In re Jones' Est., 166 Cal. 108, 135 P. 288; Duvigneaud *v.* Loquet, 131 La. 568, 59 S. 992.

Testimony as to recognition of children inadmissible to prove legitimation but admissible as showing relation between mother and putative father. Oklahoma L. Co. *v.* Thomas, 34 Okla. 681, 127 P. 8.

In Porto Rico the recognition of a natural son, disinherited, may be proved in a suit to nullify the institution of a universal heir by will, only by judgment or by an act in solemn and authentic form. Calaf *v.* Calaf, 232 U. S. 371, 34 Sup. Ct. 411, 58 L. ed. 642.

"We know of no authority that holds that the proof upon this question, so far as its impelling and controlling force or influence upon the mind and belief of the jury is concerned, shall be of any different or higher degree than the proof of any other material and essential fact." Haddon *v.* Crawford, 49 Ind. App. 551, 97 N. E. 811.

Denials of paternity by the putative

father are admissible only for the purpose of determining whether or not the acknowledgment was in fact ever made and intended, but not for the purpose of defeating such acknowledgment once actually made and intended. Haddon *v.* Crawford, 49 Ind. App. 551, 97 N. E. 811.

Presumption of paternity from subsequent marriage.—Where statutes declare if a man having a child by a woman afterwards marries her and recognizes the child, it shall be legitimate, the marriage of a man to an unmarried woman who has had a child born out of lawful wedlock creates some presumption that it was his child, though not as strong as in case of child born after marriage. Stein *v.* Stein, 32 Ky. L. R. 664, 106 S. W. 860. Such statutes sometimes make such recognition a legitimation of the child, in which case the contrary cannot be shown. Where they do not, presumption of paternity, and hence of legitimacy, arising from such recognition is at least as strong as in case of child born in lawful wedlock. Davenport *v.* Davenport, 116 La. 1009, 41 S. 240; Breidenstein *v.* Bertram, 198 Mo. 328, 95 S. W. 828; Moore *v.* Flack, 77 Neb. 52, 108 N. W. 143. *Comp.* Miller *v.* Pennington, 218 Ill. 220, 75 N. E. 919 (what is sufficient acknowledgment under statute); Townsend *v.* Menely, 37 Ind. App. 127, 74 N. E. 274; Houghton *v.* Dickinson, 196 Mass. 389, 82 N. E. 481 (sufficiency of acknowledgment).

Will recognizing illegitimate son retainer by testator's brother, until after testator's death, no "public acknowledgment" under statute. In re De Laveaga, 142 Cal. 158, 75 P. 790, *disap.* dicta in In re Jessup, 81 Cal. 408, 21 P. 976, 22 P. 742-1028.

Mother's consent not essential where father acts under statute. Allison *v.* Bryan, 21 Okla. 557, 97 P. 282.

172-28 Mutual L. Ins. Co. *v.* Good, 25 Colo. App. 204, 136 P. 821.

172-31 McCalman *v.* S., 121 Ga. 491, 49 S. E. 609; Esch *v.* Graue, 72 Neb. 719, 101 N. W. 978. But see Land *v.* S., 84 Ark. 199, 105 S. W. 90 (exhibit of child to show paternity in bastardy proceedings). *Contra,* Shailer *v.* Bullock, 78 Conn. 65, 61 A. 65; Higley *v.* Bostick, 79 Conn. 97, 63 A. 786.

Mere presence of child not error. Johnson *v.* S., 133 Wis. 453, 113 N. W. 674.

172-33 Wallace *v.* Wallace, 137 Ia. 37, 114 N. W. 527, 14 L. R. A. (N. S.) 544; Flint *v.* Pierce, 136 N. Y. S. 1056; C. *v.* Reed, 5 Phila. (Pa.) 528. *Contra* by statute in bastardy cases. Evans *v.* S., 165 Ind. 369, 75 N. E. 651, discussion of history of common law rule.

Non-access of husband shown, mother may testify to paternity of children. In re Gird's Est., 157 Cal. 534, 108 P. 499.

174-37 Evans *v.* S., 165 Ind. 369, 75 N. E. 651 (statute); Wallace *v.* Wallace, 137 Ia. 37, 114 N. W. 527, 14 L. R. A. (N. S.) 544. See supra, "Husband and Wife," 816-33.

174-38 In re Jones' Est., 166 Cal. 108, 135 P. 288; In re Gird's Est., 157 Cal. 534, 108 P. 499; Tout *v.* Woodin (Ia.), 137 N. W. 1001; Duvigneaud *v.* Loquet, 131 La. 568, 59 S. 992; S. *v.* McDonald, 55 Or. 419, 104 P. 967; Smith *v.* Smith, 140 Wis. 599, 123 N. W. 146.

174-39 Van Hove *v.* Van Hove, 94 Neb. 575, 143 N. W. 815.

Circumstances surrounding birth of child and conditions existing in household before and after event, coupled with alleged father's treatment of child, may constitute public acknowledgment of paternity. In re Gird's Est., 157 Cal. 534, 108 P. 499.

Reputation, cohabitation declarations of former slaves, competent to show existence of marriage relation under act legitimatizing children. Spaugh *v.* Hartman, 150 N. C. 454, 64 S. E. 198.

174-41 Umbenhour *v.* Umbenhour, 31 O. C. C. 317.

Husband's deposition of non-intercourse before marriage competent to show illegitimacy. The Poulett Peerage, App. Cas. (1903) 395.

Even though conceived before wedlock.—Palmer *v.* Palmer, 79 N. J. Eq. 496, 82 A. 358.

175-43 Walker *v.* Walker, 151 N. C. 164, 65 S. E. 923.

Widow not competent witness to show marriage to intestate, issue being their marriage. Bowman *v.* Little, 101 Md. 273, 61 A. 223.

Declarations and acts of alleged illegitimate admissible against claimants under him. S. *v.* McDonald, 55 Or. 419, 104 P. 967.

175-44 Hardin *v.* Hardin, 27 Ky. L. R. 899, 87 S. W. 284.

Entry in family bible made by a person since deceased showing birth and date is admissible. Ewell *v.* Ewell, 163 N. C. 233, 79 S. E. 509.

"Reputed" defined.—McBride *v.* Sullivan, 155 Ala. 166, 45 S. 902.

175-45 In re Kelley, 46 Misc. 541, 95 N. Y. S. 57.

Proof of a partition of property wherein a person had been recognized as a legitimate heir is competent as an admission or recognition. Ewell *v.* Ewell, 163 N. C. 233, 79 S. E. 509.

176-46 In re Hartman's Est., 157 Cal. 206, 107 P. 105.

176-47 In re Kelley, 46 Misc. 541, 95 N. Y. S. 57. But see Hays *v.* Claypool (Ia.), 145 N. W. 874.

Is admissible.—*Comp.* Lay *v.* Fuller, 178 Ala. 375, 59 S. 609.

177-49 Certificate of baptism given weight. Ledet's Succession, 122 La. 200, 47 S. 506.

177-52 On cross-examination inquiry concerning relations of mother with other than alleged father of child limited to or at about time of begetting. In re Gird's Est., 157 Cal. 534, 108 P. 499.

Acts of alleged parents at time not closely related to time child begotten admissible to show extent of intimacy and to corroborate mother's testimony as to paternity. In re Gird's Est., supra.

LIBEL AND SLANDER

Comparison of pictures, 200-48.

189-1 Davis *v.* Hearst, 160 Cal. 143, 116 P. 530; Whittaker *v.* McQueen, 32 Ky. L. R. 1094, 108 S. W. 236.

Evidence held sufficient.—Simmons *v.* Thompson, 138 Ga. 605, 75 S. E. 671; Cardarelli *v.* Journal Co. (R. I.), 80 A. 583.

Special damage must be strictly proved. De Witt *v.* Scarlett, 113 Md. 47, 77 A. 271.

The proof must be "beyond a reasonable doubt." Dungan *v.* S., 2 Ala. App. 235, 57 S. 117.

More of a preponderance than required to establish civil case necessary to make out case. D'Echaux *v.* D'Echaux, 133 La. 123, 62 S. 597.

189-3 United Cigar Stores Co. *v.* Young, 36 App. Cas. (D. C.) 390; Curtis *v.* Iseman, 137 Ky. 796, 127 S. W. 150.

Burden of proof is on plaintiff.—United Cigar Stores Co. *v.* Young, 36 App. Cas. (D. C.) 390.

189-4 Publication not shown.—Konkle *v.* Haven, 144 Mich. 667, 108 N. W. 98.

Defendant's wife not shown to have published slander. Buckwalter *v.* Gossow, 75 Kan. 147, 88 P. 742; Konkle *v.* Haven, 140 Mich. 472, 103 N. W. 850.

Making letter-press copy of libelous message, not a publication, it not being shown copyist read contents. W. U. T. Co. *v.* Cashman, 149 Fed. 367, 81 C. C. A. 5.

Plaintiff may name person who told him of utterance of alleged slanderous words. Patterson *v.* Frazer (Tex. Civ.), 93 S. W. 146. Such testimony, immaterial. Proctor *v.* Pointer, 127 Ga. 134, 56 S. E. 111.

Publication to husband and wife of slander of latter shown. Schultz *v.* Guldenstein, 144 Mich. 636, 108 N. W. 96.

189-5 And so of postal card. Logan *v.* Hodges, 146 N. C. 38, 59 S. E. 349.

190-6 Copy of newspaper of date subsequent to libel, not evidence of defendant's prior connection therewith. Yusay *v.* Valdez, 1 Phil. Isl. 384.

190-9 Instigation by one defendant of publication in paper published by co-defendants. Maddox *v.* Newton, 4 Ala. App. 454, 58 S. 934.

191-11 Keller *v.* Pub. Co., 140 App. Div. 311, 125 N. Y. S. 212.

191-12 San Antonio L. Pub. Co. *v.* Lewy, 52 Tex. Civ. 22, 113 S. W. 574.

Photograph competent to prove contents of lost libelous letter and to show peculiarities of handwriting. McCullough *v.* Munn, (1908) 2 Irish 194.

191-15 Briggs *v.* Brown, 55 Fla. 417, 46 S. 325; Brinsfield *v.* Howeth, 107 Md. 278, 68 A. 566 (admissions do not show cause of action); Overton *v.* White, 117 Mo. App. 576, 93 S. W. 363 (in pleading may be explained). See Buckwalter *v.* Gossow, 75 Kan. 147, 88 P. 742.

Withdrawal of plea of general issue. Geringer *v.* Novak, 117 Ill. App. 160.

192-18 If publication made in a foreign language plaintiff must show correctness of translation as pleaded. Romano *v.* De Vito, 191 Mass. 457, 78 N. E. 105. If it is challenged. Charleson *v.* Russell, 144 Ia. 38, 121 N. W. 531.

192-19 Cox *v.* S., 162 Ala. 66, 50 S. 398.

192-21 Cox *v.* S., supra.

192-22 See Hedenberg *v.* Nash, 144 Ill. App. 252.

192-23 Briggs *v.* Brown, 55 Fla. 417, 46 S. 325.

Copy must be verified and if purported copy contains opinions and other extraneous matter it is not admissible. Briggs *v.* Brown, supra.

193-24 Patterson *v.* Frazer (Tex. Civ.), 93 S. W. 146.

Evidence that statement was made in the presence of a third party under circumstances such that he must have heard it, is sufficient to raise an issue for the jury. Cameron *v.* Cameron, 162 Mo. App. 110, 144 S. W. 171.

194-30 Kuhlman *v.* Kiefer, 147 Ill. App. 162; Vordenbaumen Lumb. Co. *v.* Parkerson, 129 La. 1080, 57 S. 524. *Contra,* Hamilton *v.* Nance, 159 N. C. 56, 74 S. E. 627; Wiese *v.* Riley, 146 Wis. 640, 132 N. W. 604.

194-31 See Lee *v.* Crump, 146 Ala. 655, 40 S. 609; Miller *v.* Nuckolls, 77 Ark. 64, 91 S. W. 759; Kloths *v.* Hess, 126 Wis. 587, 106 N. W. 251.

All words pleaded need not be proved if part of them constitute cause of action. Dubois *v.* Robbins, 115 Ill. App. 372.

194-32 Actual malice must be established by a preponderance of evidence. Houston C. Pub. Co. *v.* McDavid (Tex. Civ.), 157 S. W. 224.

194-33 See Tingley *v.* Co., 151 Cal. 1, 89 P. 1097. But see Carpenter *v.* Co., 111 App. Div. 266, 97 N. Y. S. 478.

195-34 Tingley *v.* Co., 151 Cal. 1, 89 P. 1097; Bohan *v.* Co., 1 Cal. App. 429, 82 P. 634; Rocky Mt. N. P. Co. *v.* Fridborn, 46 Colo. 440, 104 P. 956; Flanagan *v.* McLane, 87 Conn. 220, 87 A. 727, 88 A. 96; Donahoe *v.* Co., 4 Penne. (Del.) 166, 55 A. 337; Todd *v.* Co., 6 Penne. (Del.) 233, 66 A. 97; Russell *v.* Co., 31 App. Cas. (D. C.) 277; Washington T. Co. *v.* Downey, 26 App. Cas. (D. C.) 258; Briggs *v.* Brown, 55 Fla. 417, 46 S. 325; Abraham *v.* Baldwin, 52 Fla. 151, 42 S. 591; Sparks *v.* Bedford, 4 Ga. App. 13, 60 S. E. 809; Beeson *v.* Gossard Co., 167 Ill. App. 561; Stephens *v.* News Co., 164 Ill. App. 6; Conwisher *v.* Johnson, 127 Ill. App. 602; Lodge *v.* Hampton, 116 Ill. App. 414; Brandt *v.* Story (Ia.), 143 N. W. 545; Andreas *v.* Hinson (Ia.), 137 N. W. 1004; S. *v.* Cooper, 138 Ia. 516, 116 N. W. 691; Vial *v.* Larson, 132 Ia. 208, 109 N. W. 1007; Sheibley *v.* Ashton, 130 Ia. 195, 106 N. W. 618; Berger *v.* Co., 132 Ia. 290, 109 N. W. 784; Reid *v.* Pub. Co., 158 Ky. 727, 166 S. W. 245; Tanner *v.* Stevenson, 138 Ky. 578, 128 S. W. 878; Foster *v.* Chinn, 134 Ky. 424, 120 S. W. 364; Penn. I. Wks *v.* Co., 29 Ky. L. R. 861, 96 S. W. 551; Shockey *v.* McCauley, 101 Md. 461, 61 A. 583; Cairnes *v.* Pelton, 103 Md. 40, 63 A. 105; Ex parte Nelson, 251 Mo. 63, 157 S. W. 794; Miller *v.* Dorsey, 149 Mo. App. 24, 129 S. W. 66; Brown *v.* Publishers, 213 Mo. 655, 112 S. W. 474; Farley *v.* Co., 113 Mo. App. 216, 87 S. W. 565; Paxton *v.* Woodward, 31 Mont. 195, 78 P. 215; Sheibley *v.* Nelson, 84 Neb. 393, 121 N. W. 458; Sheibley *v.* Fales, 75 Neb. 823, 106 N. W. 1032; Crane *v.* Bennett, 177 N. Y. 106, 69 N. E. 274; C. *v.* Swallow, 8 Pa. Super. 539, 580; Moore *v.* Co., 8 Pa. Super 152; Stewart *v.* Co., 1 Pa. C. C. 247; U. S. *v.* Ubinana, 1 Phil. Isl. 471; Lehmann *v.* Medack (Tex. Civ.), 152 S. W. 438; Mayo *v.* Goldman, 57 Tex. Civ. 475, 122 S. W. 449; James *v.* T. Co., 53 Tex. Civ. 603, 117 S. W. 642; Patterson *v.* Frazer (Tex. Civ.), 93 S. W. 146; Chambers *v.* Leiser, 43 Wash. 285, 86 P. 627.

But see W. U. T. Co. *v.* Cashman, 149 Fed. 367, 81 C. C. A. 5.

And the burden would be on the defendant to prove the truth of the charge under the plea of justification. Hamilton *v.* Nance, 159 N. C. 56, 74 S. E. 627, *cit.* Ramsey *v.* Cheek, 109 N. C. 270, 13 S. E. 775.

This, like all other presumptions which take the place of evidence, is a rebuttable presumption, and the presumption may be conclusively destroyed by the facts and circumstances. Tilles *v.* Pub. Co., 241 Mo. 609, 145 S. W. 1143.

Legal malice is shown by establishing publication of libelous article of person named, or if it is so written it may reasonably be taken to refer to a particular person. Binder *v.* Co., 33 Pa. Super. 411, statute.

196-35 Smith *v.* Singles, 6 Penne. (Del.) 544, 72 A. 977; Sparks *v.* Bedford, 4 Ga. App. 13, 60 S. E. 809; Burch *v.* Bernard, 107 Minn. 210, 120 N. W. 33; Humphreys *v.* Pile, 144 Mo. App. 28, 128 S. W. 208.

196-36 Murray *v.* Galbraith, 95 Ark. 199, 128 S. W. 1047; Bohan *v.* Co., 1 Cal. App. 429, 82 P. 634; Todd *v.* Co.,

6 Penne. (Del.) 232, 66 A. 97; Jensen *v.* Damm, 127 Ia. 555, 103 N. W. 798; Butler *v.* Co., 119 App. Div. 767, 104 N. Y. S. 637.

197-37 Cornelius *v.* S., 145 Ala. 65, 40 S. 670; C. *v.* Swallow, 8 Pa. Super. 539, 580; C. *v.* Rovnianek, 12 Pa. Super. 86; C. *v.* Pascoe, 39 Pa. Super. 163; U. S. *v.* Lerma, 2 Phil. Isl. 254.

197-38 Tingley *v.* Co., 151 Cal. 1, 89 P. 1097; Cadle *v.* McIntosh, 51 Ind. App. 365, 99 N. E. 779; Berger *v.* Co., 132 Ia. 290, 109 N. W. 784; Burch *v.* Bernard, 107 Minn. 210, 120 N. W. 33; Paxton *v.* Woodward, 31 Mont. 195, 78 P. 215. *Contra*, Carpenter *v.* Ashley, 16 Cal. App. 302, 116 P. 983.

In Alabama, contrary to the rule elsewhere, a party cannot testify of his intent. Vest *v.* Speakman, 153 Ala. 393, 44 S. 1017. It may be testified of by defendant in criminal action. C. *v.* Scouten, 25 Pa. C. C. 138.

Plaintiff must show actual malice. Liccione *v.* Collier, 133 App. Div. 40, 117 N. Y. S. 639.

197-40 Berger *v.* Co., 132 Ia. 290, 109 N. W. 784.

198-41 Lewis *v.* Hayes, 165 Cal. 527, 132 P. 1022; Smith *v.* Singles, 6 Penne. (Del.) 544, 72 A. 977; Donahoe *v.* Co., 4 Penne. (Del.) 166, 55 A. 337; Graham *v.* S., 6 Ga. App. 436, 65 S. E. 167; Hubbard *v.* Allyn, 200 Mass. 166, 86 N. E. 356; Butterworth *v.* Todd, 76 N. J. L. 317, 70 A. 139; Carpenter *v.* Co., 111 App. Div. 266, 97 N. Y. S. 478.

198-42 Thomas *v.* Bradbury, (1906) 2 K. B. (Eng.) 627, 642; National C. R. Co. *v.* Salling, 173 Fed. 22, 97 C. C. A. 334; Todd *v.* Co., 6 Penne. (Del.) 233, 66 A. 97; Dorn *v.* Cooper, 139 Ia. 742, 118 N. W. 35; S. *v.* Lomack, 130 Ia. 79, 106 N. W. 386; Berger *v.* Co., 132 Ia. 290, 109 N. W. 784; Brinsfield *v.* Howeth, 107 Md. 278, 68 A. 566; Hubbard *v.* Allyn, 200 Mass. 166, 86 N. E. 356 (and attendant circumstances); Moore *v.* Co., 8 Pa. Super. 152; Stewart *v.* Co., 1 Pa. C. C. 247.

Defendant who has pleaded fair comment may be questioned concerning his state of mind (Plymouth M. Soc. *v.* Assn., [1906] 1 K. B. [Eng.] 403; Thomas *v.* Bradbury, [1906] 2 K. B. [Eng.] 627, 642), though privilege pleaded. White *v.* Assn., (1905) 1 K. B. (Eng.) 653.

Deliberation of defendant in publishing substance of clipping from another paper shown. Morning Union Co. *v* Butler, 151 Fed. 188, 80 C. C. A. 464.

Recklessness in giving currency to report may raise presumption of malice. Manitoba F. P. Co. *v.* Nagy, 39 Can. Sup. 340.

198-43 Evidence of express malice, competent though truth of slander pleaded in connection with not guilty. Smith *v.* Singles, 6 Penne. (Del.) 544, 72 A. 977.

Express malice may.—Berson *v.* Gossard Co., 167 Ill. App. 561.

198-44 Thomas *v.* Bradbury, (1906) 2 K. B. (Eng.) 627, 642; Lee *v.* Crump, 146 Ala. 655, 40 S. 609; Julian *v.* Co., 209 Mo. 35, 107 S. W. 496. *Contra*, Dorn *v.* Cooper, 139 Ia. 742, 117 N. W. 1.

Remoteness. — Threat by owner of nearly all the stock of a newspaper twelve years before publication of libel, competent; remoteness affected only weight of the evidence. Julian *v.* Co., 209 Mo. 35, 107 S. W. 496.

Defendant's feelings toward plaintiff may not be shown by latter's testimony. Dorn *v.* Cooper, 139 Ia. 742, 118 N. W. 35.

198-45 Gallagher *v.* Mach. Co., 177 Ill. App. 198.

199-46 Gallagher *v.* Mach. Co., 177 Ill. App. 198.

199-47 Davis *v.* Hearst, 160 Cal. 143, 116 P. 530; Smith *v.* Singles, 6 Penne. (Del.) 544, 72 A. 977; Paxton *v.* Woodward, 31 Mont. 195, 78 P. 215 (threats to revoke teacher's certificate); De Van Rose *v.* Tholborn (Mo.), 134 S. W. 1093.

200-48 In action by a pastor against members of his church testimony of its financial condition and number of members added by him, immaterial. Konkle *v.* Haven, 140 Mich. 472, 103 N. W. 850.

Special manner in which libelous matter published, regarded. Thomas *v.* Bradbury, (1906) 2 K. B. (Eng.) 627.

Expressions and demeanor of defendant as witness and terms of subsequent apology, relevant. Thomas *v.* Bradbury, supra.

Comparison of pictures.—If two pictures published as representative of a disreputable person, one of which was of plaintiff, picture of former is admissible for comparison and to aid in determining whether defendant acted with due care. Burkhardt *v.* Co., 130 App. Div. 22, 114 N. Y. S. 451.

200-49 Cadle *v.* McIntosh, 51 Ind.

App. 365, 29 N. E. 779. *Comp.* Beeson *v.* Gossard Co., 167 Ill. App. 561.

Cannot rebut implied malice.—Ex parte Nelson, 251 Mo. 63, 157 S. W. 794.

200-50 Donohoe *v.* Co., 4 Penne. (Del.) 166, 55 A. 337; McHugh *v.* Ambrose (Ia.), 113 N. W. 1080; Sheibley *v.* Fales, 81 Neb. 795, 116 N. W. 1035; Neafie *v.* Co., 75 N. J. L. 564, 68 A. 146.

200-51 See Snyder *v.* Tribune Co. (Ia.), 143 N. W. 519.

Subsequent publication of full report of trial may be shown for purpose of proving intention to make a fair report of all proceedings. Meriwether *v.* Publishers, 211 Mo. 199, 109 S. W. 750, 16 L. R. A. (N. S.) 953.

Age of adult defendant immaterial if he was before jury. Gillis *v.* Powell, 129 Ga. 403, 58 S. E. 1051.

Disclaimer of malice immaterial in criminal action. Robinson *v.* S., 108 Md. 644, 71 A. 433.

Defendant's declarations, made in a natural manner, and not under circumstances leading to suspicion he was manufacturing evidence, and in reference to matter published, competent, though made prior to publication, in discretion of judge. Barry *v.* McCollom, 81 Conn. 293, 70 A. 1035.

200-52 *Contra,* Dorn *v.* Cooper, 139 Ia. 742, 118 N. W. 35, *over.* Barr *v.* Hack, 46 Ia. 308, on which the text seems to have been based. Rule otherwise in Alabama. See supra, "Intent," 596-38.

200-54 Dorn *v.* Cooper, 139 Ia. 742, 117 N. W. 1.

Disregard of specific instructions by proprietor of newspaper and his absence when publication made may be proved. C. *v.* Rovnianek, 12 Pa. Super. 86.

201-55 Graham *v.* S., 6 Ga. App. 436, 65 S. E. 167; Holmes *v.* Union, 222 Mo. 556, 121 S. W. 100; C. *v.* Swallow, 8 Pa. Super. 539.

For a paper to say that corporate property should be taxed is no evidence of malice toward a mere stockholder. Tilles *v.* Pub. Co., 241 Mo. 609, 145 S. W. 1143.

Publication of what was being done by county officials toward enforcing the law which prohibited bookmaking is not evidence of express malice toward a mere stockholder or even manager of the corporation. Tilles *v.* Pub. Co., 241 Mo. 609, 145 S. W. 1143.

Circumstances under which press association sent out news, immaterial in action against publisher who gave it currency regardless of such circumstances. Post Pub. Co. *v.* Butler, 137 Fed. 723, 71 C. C. A. 309.

Acts, expressions and conduct of plaintiff, circumstances surrounding him and general rumors and representations concerning him may be proved. Donahoe *v.* Co., 4 Penne. (Del.) 166, 55 A. 337.

Provocation cannot be shown in criminal action. Robinson *v.* S., 108 Md. 644, 71 A. 433.

201-56 Butler *v.* Co., 119 App. Div. 767, 104 N. Y. S. 637.

201-57 Justifiable motive, a defense to criminal action. U. S. *v.* Lerma, 2 Phil. Isl. 254, statute.

201-58 Harms *v.* Proehl, 104 Minn. 303, 116 N. W. 587.

202-59 S. *v.* Lomack, 130 Ia. 79, 106 N. W. 386; Yager *v.* Bruce, 116 Mo. App. 473, 93 S. W. 307; C. *v.* Swallow, 8 Pa. Super. 539; Coates *v.* Wallace, 4 Pa. Super. 253.

202-60 Honest belief of defendant may be inquired into although answers may incidentally prove truth of alleged libel. McKergow *v.* Comstock, 11 Ont. L. R. 637.

202-61 Witness may not testify as to effect of information given before he wrote libel; facts upon which to base probable cause for his action are subject to proof. Moore *v.* Co., 8 Pa. Super. 152.

202-63 But see Ott *v.* Co., 40 Wash. 308, 82 P. 403. *Comp.* 300-37, infra. *Contra,* Day *v.* Becker (Tex. Civ.), 145 S. W. 1197.

203-67 See Crafer *v.* Hooper, 194 Mass. 68, 80 N. E. 2.

203-68 Converse. Webb *v.* Gray (Ala.), 62 S. 194.

203-69 Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633.

204-70 Snyder *v.* Tribune Co. (Ia.), 143 N. W. 519; Gripman *v.* Kitchel, 173 Mich. 242, 138 N. W. 1041. See Ingalls *v.* Morrissey, 154 Wis. 632, 143 N. W. 681. *Contra,* S. *v.* Conklin, 47 Or. 509, 84 P. 482.

205-73 But see Overton *v.* White, 117 Mo. App. 576, 93 S. W. 363.

205-74 Cornelius *v.* S., 145 Ala. 65, 40 S. 670.

206-76 Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633, unsworn statements of others or current rumors.

207-79 Collins *v.* Co., 6 Pa. Super. 330.

Failure to investigate excused by showing investigation would have been futile. Butler *v.* Co., 119 App. Div. 767, 104 N. Y. S. 637. It does not show liability. Sheibley *v.* Fales, 81 Neb. 795, 116 N. W. 1035.

207-80 Elimination of matter derogatory to plaintiff before publication of article cannot be proved. Tingley *v.* Co., 151 Cal. 1, 89 P. 1097; Todd *v.* Co., 9 O. C. C. (N. S.) 249, 260; C. *v.* Swallow, 8 Pa. Super. 539, 585; Collins *v.* C., 6 Pa. Super. 330.

208-84 Brown *v.* Co., 213 Mo. 655, 112 S. W. 474.

208-85 Spencer *v.* Minnick (Okla.), 139 P. 130; Mengel *v.* Co., 241 Pa. 367, 88 A. 660.

Conversation with reporter of newspaper which had previously published the information, and what defendant learned from police blotter. Kershaw *v.* Steurer, 138 App. Div. 211, 123 N. Y. S. 77.

209-88 Cook *v.* Co., 227 Mo. 471, 127 S. W. 332.

Wanton disregard of truth or falsity. Sutphin *v.* Times Co., 122 N. Y. S. 835.

209-89 Tingley *v.* Co., 151 Cal. 1, 89 P. 1097. *Comp.* Ferdon *v.* Dickens, 161 Ala. 181, 49 S. 888, plaintiff may show value of his property to meet charge he was to leave state to defraud creditors.

210-93 Andrus *v.* Harris, 126 App. Div. 564, 110 N. Y. S. 819.

211-95 S. *v.* Lomack, 130 Ia. 79, 106 N. W. 386; Andrus *v.* Harris, supra.

211-96 Shockey *v.* McCauley, 101 Md. 461, 61 A. 583.

213-6 Schwing *v.* Dunlap, 130 La. 498, 58 S. 162.

213-8 Tate *v.* Co., 122 La. 472, 47 S. 774; Brown *v.* Co., 213 Mo. 655, 112 S. W. 474 (suppression of parts of testimony).

May show he said he did not believe report and that he gave name of author. Reid *v.* Pub. Co., 158 Ky. 727, 166 S. W. 345.

214-10 See Elder *v.* S. (Tex. Cr.), 151 S. W. 1052.

214-11 Fleet *v.* Tichenor, 156 Cal. 343, 104 P. 458; O'Neil *v.* Adams, 144 Ia. 385, 122 N. W. 976.

215-13 Record of church trial of plaintiff on charges made basis of suit for slander, inadmissible. Harms *v.* Proehl, 104 Minn. 303, 116 N. W. 587.

215-14 Harms *v.* Proehl, supra.

216-16 Pfister *v.* Co., 139 Wis. 627, 121 N. W. 938.

Scope of examination may be limited to opportunity for explicit and direct denial. Pfister *v.* Co., supra.

217-18 Malice of defendant's wife, immaterial if she was not concerned in publication. Konkle *v.* Haven, 144 Mich. 667, 108 N. W. 98.

217-21 Whittaker *v.* McQueen, 32 Ky. L. R. 1094, 108 S. W. 236; Yager *v.* Bruce, 116 Mo. App. 473, 93 S. W. 307.

The answer, if not sustained, may be regarded on question of defendant's good faith. Raynolds *v.* Vinier, 125 App. Div. 18, 109 N. Y. S. 293.

218-24 Proctor *v.* Pointer, 127 Ga. 134, 56 S. E. 111; Pettingill *v.* Gandia, 4 P. R. Fed. 383; Pfister *v.* Co., 139 Wis. 627, 121 N. W. 938.

Plea of justification, unsustained, may be evidence of ratification of act of employe of corporation. Pfister *v.* Co., supra.

Exemplary damages not to be awarded because of failure to support plea of justification. Yager *v.* Bruce, 116 Mo. App. 473, 93 S. W. 307.

220-27 National C. R. Co. *v.* Salling, 173 Fed. 22, 97 C. C. A. 334; Brice *v.* Curtis, 38 App. Cas. (D. C.) 304; Abraham *v.* Baldwin, 52 Fla. 151, 42 S. 591; Barth *v.* Hanna, 158 Ill. App. 20; Everett *v.* De Long, 144 Ill. App. 496; Ott *v.* Murphy (Ia.), 141 N. W. 463; Holmes *v.* Union, 222 Mo. 556, 121 S. W. 100; Cook *v.* Co., 227 Mo. 471, 127 S. W. 332; Fitzgerald *v.* Young, 89 Neb. 693, 132 N. W. 127; Sheibley *v.* Fales, 81 Neb. 795, 116 N. W. 1035; Logan *v.* Hodges, 146 N. C. 38, 59 S. E. 349; Hubbard *v.* Cowling, 36 Okla. 603, 129 P. 714; Collins *v.* Co., 6 Pa. Super. 330; Coates *v.* Wallace, 4 Pa. Super. 253; Mulderig *v.* Times, 215 Pa. 470, 64 A. 636; Joseph *v.* Baars, 142 Wis. 390, 125 N. W. 913.

The burden of establishing facts rendering a privileged communication actionable is on the plaintiff. Melcher *v.* Beeler, 48 Colo. 233, 110 P. 181.

Burden is on plaintiff to prove that a comment is unfair and dishonest. Cook *v.* Pub. Co., 241 Mo. 326, 145 S. W. 480.

220-28 Woods *v.* Plummer, 15 Ont. L. R. 552; Massee *v.* Williams, 207 Fed.

222, 124 C. C. A. 492; Denver P. W. Co. *v.* Holloway, 34 Colo. 432, 83 P. 131; Flanagan *v.* McLane, 87 Conn. 220, 87 A. 727, 88 A. 96; Barry *v.* McCollom, 81 Conn. 293, 70 A. 1035; Abraham *v.* Baldwin, 52 Fla. 151, 42 S. 591; Ott *v.* Murphy (Ia.), 141 N. W. 463; German S. Bk. *v.* Fritz, 135 Ia. 44, 109 N. W. 1008; Vial *v.* Larson, 132 Ia. 208, 109 N. W. 1007; Richardson *v.* Gunby, 88 Kan. 47, 127 P. 533; Tanner *v.* Stevenson, 138 Ky. 578, 128 S. W. 878; Schultz *v.* Guldenstein, 144 Mich. 636, 108 N. W. 96; Cook *v.* Pub. Co., 241 Mo. 326, 145 S. W. 480; Holmes *v.* Union, 222 Mo. 556, 121 S. W. 100; Ashcroft *v.* Hammond, 197 N. Y. 488, 90 N. E. 1117; Mellen *v.* Hotel Co., 153 App. Div. 891, 138 N. Y. S. 451; Morton *v.* Knipe, 128 App. Div. 94, 112 N. Y. S. 451; Howarth *v.* Barlow, 113 App. Div. 510, 99 N. Y. S. 457; Gattis *v.* Kilgo, 140 N. C. 106, 52 S. E. 249; Echard *v.* Morton, 26 Pa. Super. 579; C. *v.* McClure, 1 Pa. C. C. 207; Pettingill *v.* Gandia, 4 P. R. Fed. 383; Spielberg *v.* Kuhn & Bro., 39 Utah 276, 116 P. 1027; Gatewood *v.* Garrett, 106 Va. 552, 56 S. E. 335; Chambers *v.* Leiser, 43 Wash. 285, 86 P. 627; Joseph *v.* Baars, 142 Wis. 390, 125 N. W. 913.

See Yager *v.* Bruce, 116 Mo. App. 473, 93 S. W. 307.

221-30 Tanner *v.* Stevenson, 138 Ky. 578, 128 S. W. 878.

221-31 Barry *v.* McCullom, 81 Conn. 293, 70 A. 1035; Ashcroft *v.* Hammond, 132 App. Div. 3, 116 N. Y. S. 362.

Knowledge of falsity must be shown. Schultz *v.* Guldenstein, 144 Mich. 636, 108 N. W. 96.

221-32 Penry *v.* Dozier, 161 Ala. 292, 49 S. 909; Ashcroft *v.* Hammond, 197 N. Y. 488, 90 N. E. 1117.

222-33 Briggs *v.* Brown, 55 Fla. 417, 46 S. 325; O'Neil *v.* Adams, 144 Ia. 385, 122 N. W. 976 (defendant may state how he came to publish article and purpose in so doing); Trimble *v.* Morrish, 152 Mich. 624, 116 N. W. 451, 16 L. R. A. (N. S.) 1017; Morton *v.* Knipe, 128 App. Div. 94, 112 N. Y. S. 451.

Libel contained excerpts from brief, whole brief admissible on question of fairness. Cobb *v.* Pub. Co. (Okla.), 140 P. 1079.

Opinions as to privileged character of matter, inadmissible. Briggs *v.* Brown, 55 Fla. 417, 46 S. 325.

Existence of like allegations in bill in equity, immaterial. Kimball *v.* Co., 199 Mass. 248, 85 N. E. 103.

Papers not referred to in article, not admissible. San Antonio L. Pub. Co. *v.* Lewy, 52 Tex. Civ. 22, 113 S. W. 574.

Information of threats by plaintiff against defendant's property may be proved if defendant believed it and it was such as a reasonably prudent man would believe; immaterial whether plaintiff made them or not. Edwards *v.* Kevil, 133 Ky. 392, 118 S. W. 273.

222-34 Publication of advertisements by physician, immaterial. Rood *v.* Dutcher, 23 S. D. 70, 120 N. W. 772.

Declarations of plaintiff.—Ott *v.* Murphy (Ia.), 141 N. W. 463.

222-35 Myers *v.* Hodges, 53 Fla. 197, 44 S. 357; Cook *v.* Pub. Co., 241 Mo. 326, 145 S. W. 480; San Antonio L. Pub. Co. *v.* Lewy, 52 Tex. Civ. 22, 113 S. W. 574.

222-36 National C. R. Co. *v.* Salling, 173 Fed. 22, 97 C. C. A. 334; Thompson *v.* Rake, 140 Ia. 232, 118 N. W. 279; Sunley *v.* Ins. Co., 132 Ia. 123, 109 N. W. 463; Meriwether *v.* Publishers, 224 Mo. 617, 123 S. W. 1100; Ashcroft *v.* Hammond, 132 App. Div. 3, 116 N. Y. S. 362.

Abandoned answer setting up justification, admissible, as is evidence to show knowledge of falsity of charge before answer filed. Meriwether *v.* Publishers, 224 Mo. 617, 123 S. W. 1100.

Defendant's contradictory statements concerning occurrence, evidence of malice. Woods *v.* Plummer, 15 Ont. L. R. 552.

222-37 National C. R. Co. *v.* Salling, 173 Fed. 22, 97 C. C. A. 334; Myers *v.* Hodges, 53 Fla. 197, 44 S. 357; Sheftall *v.* R. Co., 123 Ga. 589, 51 S. E. 646; Crafer *v.* Hooper, 194 Mass. 68, 80 N. E. 2; Mulderig *v.* Times, 215 Pa. 470, 64 A. 636.

Malice not shown by publication. Trimble *v.* Morrish, 152 Mich. 624, 116 N. W. 451, 16 L. R. A. (N. S.) 1017.

Defendant should testify as to his motive.—Fleet *v.* Tichenor, 156 Cal. 343, 104 P. 458.

223-39 Melcher *v.* Beeler, 48 Colo. 233, 110 P. 181; Myers *v.* Hodges, 53 Fla. 197, 44 S. 357; Trimble *v.* Morrish, 152 Mich. 624, 116 N. W. 451, 16 L. R. A. (N. S.) 1017; Ashcroft *v.* Hammond, 132 App. Div. 3, 116 N. Y. S. 362; C. *v.* McClure, 1 Pa. C. C. 207.

Declining to name confidential inform-

ant, not cause for inferring malice on part of maker of qualifiedly privileged communication. Trimble *v.* Morrish, supra.

Defendant need not show good reason to believe statements made; only his belief in their truth when made. Barry *v.* McCollom, 81 Conn. 293, 70 A. 1035.

224-41 Thompson *v.* Rake, 140 Ia. 232, 118 N. W. 279; Cook *v.* Pub. Co., 241 Mo. 326, 145 S. W. 480.

Opportunity of persons not concerned in discharge of servant by defendant to read notice thereof may be shown. Ramsdell *v.* R. Co., 79 N. J. L. 379, 75 A. 444.

224-42 Redfearn *v.* Thompson, 10 Ga. App. 550, 73 S. 949; Mills *v.* Flynn (Ia.), 137 N. W. 1082; Ladwig *v.* Heyer, 136 Ia. 196, 113 N. W. 767 (in absence of plea of truth); Cook *v.* R. Co., 227 Mo. 471, 127 S. W. 332; Ashcroft *v.* Hammond, 132 App. Div. 3, 116 N. Y. S. 362; McGeary *v.* Pub. Co., 52 Pa. Super: 35; Sherin *v.* Eastwood, 27 S. D. 312, 131 N. W. 287. *Comp.* Cooper *v.* Romney (Mont.), 141 P. 289.

Failure to plead truth of charges, admission of falsity. Brinsfield *v.* Howeth, 107 Md. 278, 68 A. 566.

225-45 Smith *v.* Singles, 6 Peune. (Del.) 544, 72 A. 977; P. *v.* Fuller, 238 Ill. 116, 87 N. E. 336; O'Neil *v.* Adams, 144 Ia. 385, 122 N. W. 976; Bigley *v.* Casualty Co., 94 Neb. 813, 144 N. W. 810; Beck *v.* Bk., 161 N. C. 201, 76 S. E. 722; Oles *v.* Times, 2 Pa. Super. 130 (in general whole libel must be proved to be true); Sacchetti *v.* Fehr, 217 Pa. 475, 66 A. 742; Reynolds *v.* Holland, 46 Wash. 537, 90 P. 648; Pfister *v.* Co., 139 Wis. 627, 121 N. W. 938 (defendant may not complain if plaintiff assumes burden of proving falsity of allegations).

But see Cooper *v.* Romney (Mont.), 141 P. 289.

Sufficient.—Courier-Journal Co. *v.* Phillips, 142 Ky. 372, 134 S. W. 446.

225-46 Bennett *v.* Crumpton, 1 Ga. App. 476, 58 S. E. 104; Oles *v.* Times, 2 Pa. Super. 130.

Defendant in civil action must also show matter published with good motives and for justifiable ends. Wertz *v.* Sprecher, 82 Neb. 834, 118 N. W. 1071.

225-47 Bennett *v.* Crumpton, 1 Ga. App. 476, 58 S. E. 104; Geringer *v.* Novak, 117 Ill. App. 160; Corning *v.* Dollmeyer, 123 Ill. App. 188; O'Neil *v.* Adams, 144 Ia. 385, 122 N. W. 976; Schultz *v.* Guldenstein, 144 Mich. 636, 108 N. W. 96. See Parsons *v.* Pub. Co. (Ala.), 61 S. 345; Ogle *v.* Sidwell, 167 Mo. App. 292, 149 S. W. 973; Cobb *v.* Pub. Co. (Okla.), 140 P. 1079.

Conversation not in presence of plaintiff inadmissible. Stephens *v.* News Co., 164 Ill. App. 6.

Court in its discretion may exclude remote events. S. *v.* Chiles, 90 Kan. 787, 136 P. 225.

226-48 Certificate issued to insurance company showing compliance with law, admissible. S. *v.* Chiles, 90 Kan. 787, 136 P. 225.

Where a newspaper article complained of stated that plaintiff was served with a summons in an alleged fraudulent cattle transaction and that he had taken advantage of the bankruptcy laws, etc., the defendant alleged the truth of the publication, and plaintiff replied by a general denial. "Under the issues thus framed we think it was competent for plaintiff to show that his bankruptcy was the result of causes beyond his control and was not resorted to for the purpose of defrauding his creditors." Sotham *v.* Telegram Co., 239 Mo. 606, 144 S. W. 428.

227-49 Preponderance of evidence, sufficient. Sacchetti *v.* Fehr, 217 Pa. 475, 66 A. 742.

227-50 S. *v.* Putnam, 53 Or. 266, 100 P. 2.

Evidence must meet identical accusation.—P. *v.* Fuller, 238 Ill. 116, 87 N. E. 336.

227-51 Plaintiff may meet charge of larceny as bailee by proof of a judgment obtained against party he is alleged to have wronged on its obligations. Such proof may not be met by evidence showing the judgment paid on account of another transaction between different parties. Pfister *v.* Co., 139 Wis. 627, 121 N. W. 938.

227-52 C. *v.* McClure, 1 Pa. C. C. 207. See Abraham *v.* Baldwin, 52 Fla. 151, 42 S. 591. *Comp.* 233-77, et seq.

Testimony given before grand jury, inadmissible in action for publication of article concerning indictment of plaintiff. He may cross-examine witness to establish his guilt of a crime. Pfister *v.* Co., 139 Wis. 627, 121 N. W. 938.

228-53 Coates *v.* Wallace, 4 Pa. Super. 253.

228-54 But see Eggert *v.* Newspaper Co., 176 Ill. App. 20.

229-59 Whittaker *v.* McQueen, 32 Ky. L. R. 1094, 108 S. W. 236.

229-60 See Webb *v.* Gray (Ala.), 62 S. 194.

230-61 Krulic *v.* Peteoff, 122 Minn. 517, 142 N. W. 897; Ingalls *v.* Morrissey, 154 Wis. 632, 143 N. W. 681.

Evidence as to acts of wife in absence of husband inadmissible. Flynn *v.* Boglarsky (Mich.), 144 N. W. 516.

230-62 Krulic *v.* Peteoff, supra.

231-66 Bennett *v.* Crumpton, 1 Ga. App. 476, 58 S. E. 104; Krulic *v.* Peteoff, 122 Minn. 517, 142 N. W. 897; Sotham *v.* Telegram Co., 239 Mo. 606, 144 S. W. 428.

231-69 Tingley *v.* Co., 151 Cal. 1, 89 P. 1097; Lodge *v.* Hampton, 116 Ill. App. 414; S. *v.* Lomack, 130 Ia. 79, 106 N. W. 386; Berger *v.* Co., 132 Ia. 290, 109 N. W. 784; Saunders *v.* Co., 107 App. Div. 84, 94 N. Y. S. 993.

If facts of alleged libel are severable evidence in support of a portion of it is admissible. Farbenfabricken *v.* Beringer, 158 Fed. 802, 86 C. C. A. 62; McKergow *v.* Comstock, 11 Ont. L. R. (Can.) 637.

232-70 Sheibley *v.* Nelson, 84 Neb. 393, 121 N. W. 458. See Shipp *v.* Patton, 29 Ky. L. R. 480, 93 S. W. 1033, qualifying earlier cases.

232-71 Flynn *v.* Boglarsky (Mich.), 144 N. W. 516.

Cannot show those parts of publication not made the basis of the action to be true or justifiable. S. *v.* Fosburgh (S. D.), 143 N. W. 279.

Under plea of truth, both words and use in connection with an innuendo is admissible. Spencer *v.* Minnick (Okla.), 139 P. 130.

232-75 S. *v.* Mays, 57 Wash. 540, 107 P. 363, it must also appear matter charged was a crime.

234-78 Abraham *v.* Baldwin, 52 Fla. 151, 42 S. 591, *over.* Schultz *v.* Ins. Co., 14 Fla. 73, and Williams *v.* Dickenson, 28 Fla. 90, 9 S. 847; Bennett *v.* Crumpton, 1 Ga. App. 476, 58 S. E. 104; Madill *v.* Currie, 168 Mich. 546, 134 N. W. 1004; Bigley *v.* Casualty Co., 94 Neb. 813, 144 N. W. 810; Fleming *v.* Wallace, 116 Tenn. 20, 91 S. W. 47.

235-81 Daily *v.* Co., 151 Fed. 114; Rocky Mt. N. P. Co. *v.* Fridborn, 46 Colo. 440, 104 P. 956; Ladwig *v.* Heyer, 136 Ia. 196, 113 N. W. 767; Julian *v.* Co., 209 Mo. 35, 107 S. W. 496; C. *v.* Swallow, 8 Pa. Super. 539, 607.

235-82 Ibid.; Conwisher *v.* Johnson, 127 Ill. App. 602.

Defendant may impute to words used different meaning from that alleged in the innuendo and justify by showing truth of intended meaning. Pfister *v.* Co., 139 Wis. 627, 121 N. W. 938, *appr* Bathrick *v.* Co., 50 Mich. 629, 16 N W. 172, 45 Am. Rep. 673, and *disap.* Bremridge *v.* Latimer, 10 L. T. (Eng.) 816.

235-83 Line *v.* Spies, 139 Mich. 484, 102 N. W. 993.

236-84 Rocky Mt. N. P. Co. *v.* Fridborn, 46 Colo. 440, 104 P. 956; Chaloner *v.* Co., 36 App. Cas. (D. C.) 231; Davis *v.* Mohn, 145 Ia. 417, 124 N. W. 206; Boyce *v.* Wheeler, 161 Mo. App. 504, 144 S. W. 119.

236-85 *Contra,* Shepard *v.* Brewer, 248 Mo. 133, 154 S. W. 116.

236-86 Ladwig *v.* Heyer, 136 Ia. 196, 113 N. W. 767.

237-89 Brinsfield *v.* Howeth, 110 Md. 520, 73 A. 289, local meaning and witness' understanding. See Jones *v.* Banner, 172 Mo. App. 132, 157 S. W. 967.

237-91 Proctor *v.* Pointer, 127 Ga. 134, 56 S. E. 111; Arnold *v.* Lutz, 141 Ia. 596, 126 N. W. 121; Schaefer *v.* Schoenborn, 101 Minn. 67, 111 N. W. 843; Shepard *v.* Brewer, 248 Mo. 133, 154 S. W. 116. See Beeson *v.* Gossard Co., 167 Ill. App. 561.

238-92 Branch *v.* Publishers, 222 Mo. 580, 121 S. W. 93; S. *v.* Fosburgh, 32 S. D. 370, 143 N. W. 279; Kloths *v.* Hess, 126 Wis. 587, 106 N. W. 251.

Witness' understanding of words of obvious meaning cannot have effect. Brown *v.* Wintsch, 110 Mo. App. 264, 84 S. W. 196. It cannot be shown to aid innuendo or enlarge meaning of words used. Line *v.* Spies, 139 Mich. 484, 102 N. W. 993.

238-93 Rocky Mt. N. P. Co. *v.* Fridborn, 46 Colo. 440, 104 P. 956; Julian *v.* Co., 209 Mo. 35, 107 S. W. 496.

239-95 All who heard words must be shown to have had knowledge of circumstances rendering them non-slanderous. Kloths *v.* Hess, 126 Wis. 587, 106 N. W. 251.

240-1 Lemaster *v.* Ellis, 173 Mo. App. 332, 158 S. W. 904.

Though meaning of words of which notice is taken cannot be affected by extraneous evidence, it may not be

material error to receive it. C. *v.* Root, 15 Pa. Dist. 441.

Expert testimony of Swiss lawyers is admissible to say whether certain words contained in a letter were libelous within the meaning of the Swiss penal code. Hite *v.* Keene, 149 Wis. 207, 134 N. W. 383.

241-3 Green *v.* Miller, 33 Can. Sup. 193.

241-4 Rocky Mt. N. P. Co. *v.* Fridborn, 46 Colo. 440, 104 P. 956; Sheftall *v.* R. Co., 123 Ga. 589, 51 S. E. 646.

242-8 Brinsfield *v.* Howeth, 107 Md. 278, 68 A. 566.

244-11 Davis *v.* Hearst, 160 Cal. 143, 116 P. 530; Corr *v.* Assn., 177 N. Y. 131, 69 N. E. 288; Bianchi *v.* Co., 46 Misc. 486, 95 N. Y. S. 28; Fisher *v.* Pub. Co., 239 Pa. 200, 86 A. 776; Express Pub. Co. *v.* Orsborn (Tex. Civ.), 151 S. W. 574.

"**The correct issues** in actions to recover damages for slander, where the words alleged are actionable per se, and in which justification is not pleaded and privilege is not claimed, are: (1) Did the defendant speak of and concerning the plaintiff the words, in substance, alleged in the complaint? (2) If so, what damage is the plaintiff entitled to recover?" Hamilton *v.* Nance, 159 N. C. 56, 74 S. E. 627.

244-12 See Newton *v.* Grubbs, 155 Ky. 479, 159 S. W. 994, 48 L. R. A. (N. S.) 355, 363n.

244-13 Farley *v.* Co., 113 Mo. App. 216, 87 S. W. 565 (pictures of plaintiff published by mistake); James *v.* Co. (Tex. Civ.), 117 S. W. 1028 (publication of plaintiff's picture with knowledge).

245-15 Goldsborough *v.* Orem, 103 Md. 671, 64 A. 36; Dennison *v.* Co., 82 Neb. 675, 118 N. W. 568 (relations between parties); Clark *v.* Co., 203 Pa. 346, 53 A. 237.

245-16 Ellis *v.* Co., 198 Mass. 538, 84 N. E. 1018.

245-17 Newton *v.* Grubbs, 155 Ky. 479, 159 S. W. 994, 48 L. R. A. (N. S.) 355, 364n.

245-18 Mueller *v.* Radebaugh, 79 Kan. 306, 99 P. 612; Dennison *v.* Co., 82 Neb. 675, 118 N. W. 568 (editor's understanding); P. *v.* Parr, 42 Hun (N. Y.) 313.

Defendant may explain whom he meant Ogle *v.* Sidwell, 167 Mo. App. 292, 149 S. W. 973.

246-19 Ball *v.* Co., 237 Ill. 592, 86 N. E. 1097; Peak *v.* Taubman, 251 Mo 390, 158 S. W. 656.

247-24 **Author of article** submitted to paper cannot be asked as to whom it referred, it being res inter alios acta. Parsons *v.* Co. (Ala.), 61 S. 345; Weinman *v.* Wks., 140 N. Y. S. 1085.

247-25 Wisner *v.* Nichols (Ia.), 143 N. W. 1020; Gold *v.* Jewelry Co., 165 Mo. App. 154, 145 S. W. 1174. See Ball *v.* Co., 237 Ill. 592, 86 N. E. 1097.

247-26 Goldsborough *v.* Orem, 103 Md. 671, 64 A. 36.

249-32 Sternberg Mfg. Co. *v.* Miller, 170 Fed. 298, 95 C. C. A. 494; Smith *v.* Singles, 6 Penne. (Del.) 544, 72 A. 977; Donahoe *v.* Co., 4 Penne. (Del.) 166, 55 A. 337; Todd *v.* Co., 6 Penne. (Del.) 233, 66 A. 97; Sparks *v.* Bedford, 4 Ga. App. 13, 60 S. E. 809; Brandt *v.* Story (Ia.), 143 N. W. 545; Dorn *v.* Cooper, 139 Ia. 742, 117 N. W. 1; Clair *v.* Co., 168 Mich. 467, 134 N. W. 443; Slater *v.* Walter, 148 Mich. 650, 112 N. W. 682; Gold *v.* Jewelry Co., 165 Mo. App. 154, 145 S. W. 1174; Paxton *v.* Woodward, 31 Mont. 195, 78 P. 215; Fitzgerald *v.* Young, 89 Neb. 693, 132 N. W. 127; Sheibley *v.* Nelson, 84 Neb. 393, 121 N. W. 458; Butler *v.* Co., 73 N. J. L. 45, 62 A. 272; Gressman *v.* Assn., 197 N. Y. 474, 90 N. E. 1131; Barringer *v.* Deal, 163 N. C. 246, 80 S. E. 161; Sherin *v.* Eastwood, 27 S. D. 312, 131 N. W. 287; Mayo *v.* Goldman, 57 Tex. Civ. 475, 122 S. W. 449; Boyd *v.* Boyd (Va.), 82 S. E. 110.

Substantial damage without proof of pecuniary loss. Williams Printing Co. *v.* Saunders, 113 Va. 156, 73 S. E. 472.

The bad reputation of plaintiff may be shown in mitigation of damages. Redfearn *v.* Thompson, 10 Ga. App. 550, 73 S. E. 949.

Good faith does not reduce actual damages. Comer *v.* Advertiser Co., 172 Ala. 613, 55 S. 195.

250-33 Sunley *v.* Ins. Co., 132 Ia. 123, 109 N. W. 463; Levert *v.* Co., 123 La. 594, 49 S. 206; Saunders *v.* Co., 107 App. Div. 84, 94 N. Y. S. 993; James *v.* Co. (Tex. Civ.), 117 S. W. 1028; Williams Printing Co. *v.* Saunders, 113 Va. 156, 73 S. E. 472. And see Townsley *v.* Yentsch, 98 Ark. 312, 135 S. W. 882.

Actual damage must be shown unless utterances privileged. Phillips *v.* Brad-

shaw, 167 Ala. 199, 52 S. 662; Morasca *v.* Item Co., 126 La. 426, 52 S. 565.

250-34 Sunley *v.* Ins. Co., 132 Ia. 123, 109 N. W. 463. Specific proof of injury to reputation, unnecessary. Jury may pass upon it from all the evidence. Belo *v.* Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. St. 75; Rosenbaum *v.* Roche, 46 Tex. Civ. 237, 101 S. W. 1164.

250-35 Foster-M. Co. *v.* Chinn, 134 Ky. 424, 120 S. W. 364.

Existence of scale of prices for cards commenting patent medicines may be shown to illustrate effect of publishing such a card over plaintiff's name. Foster-M. Co. *v.* Chinn, 134 Ky. 424, 120 S. W. 364.

250-37 Smiddy *v.* Pearlstein, 201 Mass. 246, 87 N. E. 572.

250-38 *Contra,* Linehan *v.* Nelson, 197 N. Y. 482, 90 N. E. 1114. See Sheftall *v.* R. Co., 123 Ga. 589, 51 S. E. 646.

251-39 Geringer *v.* Novak, 117 Ill. App. 160.

It is presumed a statute forbidding telegraph operators to disclose contents of messages, observed. W. U. T. Co. *v.* Cashman, 149 Fed. 367, 81 C. C. A. 5.

251-41 Dalton *v.* Dist. Ct. (Ia.), 145 N. W. 498; Gressman *v.* Assn., 197 N. Y. 474, 90 N. E. 1131.

251-42 Dalton *v.* Dist. Ct. (Ia.), 145 N. W. 498.

252-48 Williams *v.* Fulks (Ark.), 167 S. W. 93; Reid *v.* Pub. Co., 158 Ky. 727, 166 S. W. 245; Bigley *v.* Casualty Co., 94 Neb. 813, 144 N. W. 810.

253-49 Harriman *v.* Co., 132 Ia. 616, 110 N. W. 33.

Plaintiff may testify to fact of damage with a bank; but not as to necessity of filing explanation of libel with it, nor consequence of libel if he acted otherwise. Ferdon *v.* Dickens, 161 Ala. 181, 49 S. 888.

253-50 Corning *v.* Dollmeyer, 123 Ill. App. 188; Foster-M. Co. *v.* Chinn, 134 Ky. 424, 120 S. W. 364.

Reason of plaintiff's liability to obtain local employment as formerly may be shown by opinions. Brinsfield *v.* Howeth, 110 Md. 520, 73 A. 289.

253-52 Williams *v.* Fulks (Ark.), 167 S. W. 93, standing as officer of lodge.

254-53 Post Pub. Co. *v.* Peck, 199 Fed. 6 (C. C. A.); Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547.

254-55 Abandonment of employment because of physical illness resulting from a publication libelous per se cannot be shown. Butler *v.* Co., 73 N. J. L. 45, 73 A. 272.

Minister and author may show size of his congregation, circulation of journal edited by him, books he was author of, their circulation and loss of income from sales. Russell *v.* Co., 31 App. Cas. (D. C.) 277.

255-59 Hubbard *v.* Allyn, 200 Mass. 166, 86 N. E. 356; Crandall *v.* Greeves (Mo. App.), 168 S. W. 264.

255-62 Washington T. Co. *v.* Downey, 26 App. Cas. (D. C.) 258; Smith *v.* Hubbell, 151 Mich. 59, 114 N. W. 865. *Comp.* Woodhouse *v.* Powles, 43 Wash. 617, 86 P. 1063.

255-63 Necessary preliminary showing. Schaffhauser Bros. *v.* Hemmer, 152 Ia. 200, 131 N. W. 6.

255-66 Brinsfield *v.* Howeth, 107 Md. 278, 68 A. 566.

256-68 Hubbard *v.* Allyn, 200 Mass. 166, 86 N. E. 356.

257-70 Binder *v.* Co., 33 Pa. Super. 411.

Illegal character of plaintiff's business, shown. O'Neil *v.* Adams, 144 Ia. 385, 122 N. W. 976.

257-71 Gallagher *v.* Mach. Co., 177 Ill. App. 198; Ott *v.* Murphy (Ia.), 141 N. W. 463; Mills *v.* Flynn (Ia.), 137 N. W. 1082; Davis *v.* Mohn, 145 Ia. 417, 124 N. W. 206, *over.* Prime *v.* Eastwood, 45 Ia. 640; Ellis *v.* Co., 198 Mass. 538, 84 N. E. 1018; Weicherding *v.* Krueger, 109 Minn. 461, 124 N. W. 225; Neafie *v.* Co., 75 N. J. L. 564, 68 A. 146; Bird *v.* Co., 154 App. Div. 491, 139 N. Y. S. 88; Price *v.* Clapp, 119 Tenn. 425, 105 S. W. 864.

257-72 Star Co. *v.* Madden, 188 Fed. 910, 110 C. C. A. 652; McClure *v.* Philipp, 170 Fed. 910, 96 C. C. A. 86 (plaintiff may testify to feelings on reading subsequent article set up as a retraction, jury being told to disregard it as ground of damage); Tingley *v.* Co., 151 Cal. 1, 89 P. 1097.

Defendant's capacity for mental suffering and sources whence same came cannot be shown by evidence offered on cross-examination, as to family ties, history and occupation, public controversies and litigation, those subjects not having been testified of in direct examination. Tingley *v.* Co., 151 Cal. 1, 89 P. 1097. Error to permit plaintiff to state he suffered much. Penry *v.* Dozier, 161 Ala. 292, 49 S. 909.

257-73 Houston C. P. Co. *v.* McDavid (Tex. Civ.), 157 S. W. 224.

Bad character not cause for refusing damages for injured feelings. McArthur *v.* Co., 148 Mich. 556, 112 N. W. 126.

Future mental suffering ceases to be element of damages by lapse of time. Reding *v.* Reding, 143 Mo. App. 659, 127 S. W. 936.

257-74 Post Pub. Co. *v.* Peck, 199 Fed. 6 (C. C. A.).

Orphaned condition and dependence of plaintiff upon her own exertions may be proved to show extent of mental suffering, apprehension of loss of employment being a probable factor. Proof of poverty as independent fact, improper. Washington T. Co. *v.* Downey, 26 App. Cas. (D. C.) 258.

257-75 Smith *v.* Hubbell, 142 Mich. 637. 106 N. W. 547.

258-76 Effect of libel upon plaintiff's family and friends when matter discussed, not a subject for evidence. Sheftall *v.* R. Co., 123 Ga. 589. 51 S. E. 646; Dennison *v.* Co., 82 Neb. 675, 118 N. W. 568 (nor influence of their suffering on plaintiff).

Physical conditions indicating mental suffering may be proved. Finger *v.* Pollack, 188 Mass. 208, 74 N. E. 317; Brown *v.* Wintsch, 110 Mo. App. 264, 84 S. W. 196 (plaintiff's appearance).

258-78 Russell *v.* Co., 31 App. Cas. (D. C.) 277; Brown *v.* Co., 213 Mo. 611, 112 S. W. 462; Brown *v.* Publishers, 213 Mo. 655, 112 S. W. 474; Amory *v.* Vreeland, 125 App. Div. 850, 110 N. Y. S. 859; Saunders *v.* Co., 107 App. Div. 84, 94 N. Y. S. 993; Crane *v.* Bennett, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. 722; Day *v.* Becker (Tex. Civ.), 145 S. W. 1197.

Exemplary damages rest upon proof either of express malice, recklessness or carelessness. Butler *v.* Co., 119 App. Div. 767, 104 N. Y. S. 637; Burkhardt *v.* Co., 130 App. Div. 22, 114 N. Y. S. 451.

259-79 Todd *v.* Co., 6 Penne. (Del.) 233, 66 A. 97; Thompson *v.* Rake, 140 Ia 232, 118 N. W. 279; Garvin *v.* Garvin, 87 Kan. 97, 123 P. 717.

Clear proof of express malice must be made to justify exemplary damages. Donahoe *v.* Co., 4 Penne. (Del.) 166, 55 A. 337.

Plaintiff's conduct concerning alleged libelous matter, relevant. Gressman *v.* Assn., 197 N. Y. 474, 90 N. E. 1131.

259-81 Gressman *v.* Assn., supra; Binder *v.* Co., 33 Pa. Super. 411 (and has a family). See Mills *v.* Flynn (Ia.), 137 N. W. 1082.

259-82 Plaintiff may show what offices he has held in church, state and corporations. Saunders *v.* Co., 107 App. Div. 84, 94 N. Y. S. 993.

Not specific instances.—Sotham *v.* Tel. Co., 239 Mo. 606, 144 S. W. 428.

259-83 But cannot show plaintiff's brother to be a fugitive from justice, he being neither party nor witness. Kimberlin *v.* Ephraim (Okla.), 136 P. 1097.

260-85 Gallagher *v.* Mach. Co., 177 Ill. App. 198; Geringer *v.* Novak, 117 Ill. App. 160; Hahn *v.* Lumpa (Ia.), 138 N. W. 492; Cairnes *v.* Pelton, 103 Md. 40, 63 A. 105; Burch *v.* Bernard, 107 Minn. 210, 120 N. W. 33; Sotham *v.* Tel. Co., 239 Mo. 606, 144 S. W. 428; Downs *v.* Cassidy, 47 Mont. 471, 133 P. 106.

261-89 Harter *v.* Whitebread, 38 Pa. Super. 10.

261-90 *Contra*, Tingley *v.* Co., 151 Cal. 1, 89 P. 1097.

261-91 Downs *v.* Cassidy, 47 Mont. 471, 133 P. 106.

262-93 Geringer *v.* Novak, 117 Ill. App. 160, evidence must be confined to time reasonably near the wrong. See Downs *v.* Cassidy, supra.

Such evidence not competent where there are two defendants, "for it is highly unjust that the recovery against both shall be expanded because of the wealth of one only." Schafer *v.* Ostmann (Mo.), 129 S. W. 63.

262-96 Reliance by defendant on act of agent may be shown in mitigation. Foster-M. Co. *v.* Chinn, 134 Ky. 424, 120 S. W. 364.

264-4 Vest *v.* Speakman, 153 Ala. 393, 44 S. 1017; Foster-M. Co. *v.* Chinn, 134 Ky. 424, 120 S. W. 364; Butler *v.* Co., 73 N. J. L. 45, 73 A. 272.

Evidence of special damage must be confined to the court in which it is alleged. Boyce *v.* Wheeler, 161 Mo. App. 504, 144 S. W. 119.

264-8 See vol. 11, p. 805, n. 65 and supplement thereto.

265-11 Beeson *v.* Gossard Co., 167 Ill. App. 561.

Error to admit entire conversation containing another slander. Alsup *v.* Ray, 175 Ill. App. 621.

Slander by wife, all not alleged to be reiterated by husband, only the reiter-

ated portion is admissible. Lehmann *v.* Medack (Tex. Civ.), 152 S. W. 438.

And first interview leading up to interview in question admissible. Massee *v.* Williams, 207 Fed. 222, 124 C. C. A. 492.

If newspaper article formed part of subject-matter of a conversation material to the cause it is admissible Geringer *v.* Novak, 117 Ill. App. 160.

265-12 McLean *v.* Caverne, 175 Ill. App. 273; Lodge *v.* Hampton, 116 Ill. App. 414; Berger *v.* Co., 132 Ia. 290, 109 N. W. 784.

Anonymous letter referred to in article complained of, not admissible. Lodge *v.* Hampton, 116 Ill. App. 414.

Part of printed matter may be excluded if it bears no relation to libelous part. S. *v.* Williams, 74 Kan. 180, 85 P. 938.

266-13 Berger *v.* Co., 132 Ia. 290, 109 N. W. 784; Craig *v.* Warren, 99 Minn. 246, 109 N. W. 231.

268-25 S. *v.* Shiles, 90 Kan. 787, 136 P. 225 (and subsequent publications consistent therewith); McDonald *v.* S. (Tex. Cr.), 164 S. W. 831.

269-26 But see Am. Pub. Co. *v.* Gamble, 115 Tenn. 663, 686, 90 S. W. 1005. *Comp.* Ashford *v.* Star Co., 41 App. Cas. (D. C.) 395.

269-30 Raymond *v.* Ring, 60 Misc. 235, 112 N. Y. S. 1.

Letter by plaintiff to defendant admissible. Parsons *v.* Pub. Co. (Ala.), 61 S. 345.

270-34 Pier *v.* Speer, 73 N. J. L. 633, 64 A. 161.

270-35 Webb *v.* Gray (Ala.), 62 S. 194; Redfearn *v.* Thompson, 10 Ga. App. 550, 73 S. E. 949; Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243; Corning *v.* Dollmeyer, 123 Ill. App. 188; Kovaes *v.* Mayoras, 175 Mich. 582, 141 N. W. 662; Dodge *v.* Gilman, 122 Minn. 177, 142 N. W. 147; Krulic *v.* Petcoff, 122 Minn. 517, 142 N. W. 897; Burkhiser *v.* Lyons (Tex. Civ.), 167 S. W. 244. See vol. 3, p. 4, n. 4, and supplement thereto.

Whether or not complaint alleges good reputation.—Dodge *v.* Gilman, 122 Minn. 177, 142 N. W. 147.

Evidence must relate to character prior to wrong.—Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633.

271-37 New York, etc. Pub. Co. *v.* Simon, 147 Fed. 224, 77 C. C. A. 366; Schwing *v.* Dunlap, 130 La. 498, 58 S. 162; Krulic *v.* Petcoff, 122 Minn. 517, 142 N. W. 897; Sotham *v.* Tel. Co., 239 Mo. 606, 144 S. W. 428; Pfister *v.* Co., 139 Wis. 627, 121 N. W. 938.

In mitigation of damages other and disconnected immoralities may not be shown. Bergstrom *v.* Ridgway Co., 138 App. Div. 178, 123 N. Y. S. 33.

273-40 Legal acts may not be proved in defense of like acts done after they became unlawful. McClure *v.* Philipp, 170 Fed. 910, 96 C. C. A. 86.

273-41 Lydiard *v.* Co., 110 Minn. 140, 124 N. W. 985; Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633.

273-42 Redfearn *v.* Thompson, 10 Ga. App. 550, 73 S. E. 949; Stearns *v.* Long, 215 Mass. 152, 102 N. E. 362. See vol. 3, p. 4, n. 4, and supplement thereto.

274-43 Yager *v.* Bruce, 116 Mo. App. 473, 497, 93 S. W. 307.

274-44 Good faith of officer in performing official duty, irrelevant as to character. Pickford *v.* Talbot, 211 U. S. 199.

274-47 Phillips *v.* Bradshaw, 167 Ala. 199, 52 S. 665; Burkhart *v.* Co., 214 Pa. 39, 63 A. 410 (professional reputation); Clark *v.* Co., 203 Pa. 346, 53 A. 237.

Even upon attack on plaintiff's reputation he cannot show his general reputation. Kovaes *v.* Mayoras, 175 Mich. 582, 141 N. W. 662.

275-48 Liberal rule governs admission of evidence. See Murray *v.* Galbraith, 95 Ark. 199, 128 S. W. 1047.

277-53 Attack may be by slurs and insinuations in cross-examination and other covert ways. Clark *v.* Co., 203 Pa. 346, 53 A. 237.

278-57 Brinsfield *v.* Howeth, 110 Md. 520, 73 A. 289; Smithley *v.* Pinch, 148 Mich. 670, 112 N. W. 686.

Particular traits of character not provable by plaintiff except as the evidence meets the accusation. Yager *v.* Bruce, 116 Mo. App. 473, 497, 93 S. W. 307.

278-59 Defendant's character in issue only so far as he gives evidence of it; if that is limited to general reputation it cannot be shown he was reputed to be given to writing libelous letters. Cox *v.* S., 162 Ala. 66, 50 S. 398.

279-60 Webb *v.* Gray (Ala.), 62 S. 194; Wells *v.* Toogood, 165 Mich. 677, 131 N. W. 124; Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243; Corning *v.* Dollmeyer, 123 Ill. App. 188; Smithley *v.* Pinch, 148 Mich. 670, 112 N. W. 686;

Krulic *v.* Petcoff, 122 Minn. 517, 142 N. W. 897; Yager *v.* Bruce, 116 Mo. App. 473, 497, 93 S. W. 307; Pier *v.* Speer, 73 N. J. L. 633, 64 A. 161; Stewart *v.* Co., 1 Pa. C. C. 247; Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633.

Indictments for misdemeanors of a different nature than that of which plaintiff accused cannot be shown. Register Co. *v.* Stone, 31 Ky. L. R. 458, 102 S. W. 800.

279-61 See Register Co. *v.* Stone, supra.

280-63 Plaintiff may be asked on cross-examination concerning his reputation, but not whether it is as good as ever. He may be asked whether people believed defendant's statements, and if he stated on direct examination some people believed them, he may be asked to name them. Smith *v.* Singles, 6 Penne. (Del.) 544, 72 A. 977.

280-65 See Tingley *v.* Co., 151 Cal. 1, 89 P. 1097.

280-68 Dodge *v.* Gilman, 122 Minn. 177, 142 N. W. 147.

281-70 Not permissible to show reputation for veracity. Johnson *v.* Featherstone, 141 Ky. 793, 133 S. W. 573.

281-73 Clark *v.* Co., 203 Pa. 346, 53 A. 237; C. *v.* Swallow, 8 Pa. Super. 539, 605. See Meeker *v.* Pub. Co., 55 Colo. 355, 135 P. 457.

282-74 Gripman *v.* Kitchel, 173 Mich. 242, 138 N. W. 1041.

Church trial.—Defendant may show he heard accusations made by him at a church trial. Harms *v.* Proehl 104 Minn. 303, 116 N. W. 587.

Facts provable as provocation may be shown in mitigation in slander action. Andrus *v.* Harris, 126 App. Div. 564, 110 N. Y. S. 819.

282-75 Ott *v.* Murphy (Ia.), 141 N. W. 463; Morgan *v.* Co., 138 Ky. 637, 128 S. W. 1064. *Contra*, Pfister *v.* Co., 139 Wis. 627, 121 N. W. 938.

Truth of some of statements may be regarded in mitigation, as may plaintiff's provocatory conduct if exemplary damages not reducible thereby. Gressman *v.* Assn., 197 N. Y. 474, 90 N. E. 1131.

283-76 Dodge *v.* Gilman, 122 Minn. 177, 142 N. W. 147.

Circumstances connected with publication may be shown to affect exemplary damages. Flowers *v.* Smith, 214 Mo. 98, 112 S. W. 499, 510.

283-77 Tingley *v.* Co., 151 Cal. 1, 89 P. 1097; Ott *v.* Murphy (Ia.), 141 N. W. 463.

283-78 Tingley *v.* Co., supra; Andrus *v.* Harris, 126 App. Div. 564, 110 N. Y. S. 819.

284-80 Davis *v.* Hearst, 160 Cal. 143, 116 P. 530.

285-81 Harms *v.* Proehl, 104 Minn. 303, 116 N. W. 587.

286-84 Pfister *v.* Co., 139 Wis. 627, 121 N. W. 938.

286-88 Dodge *v.* Gilman, 122 Minn. 177, 142 N. W. 147.

287-89 Patterson *v.* Frazer (Tex. Civ.), 93 S. W. 146.

287-92 Cornelius *v.* S., 145 Ala. 65, 40 S. 670.

288-97 Cox *v.* S., 162 Ala. 66, 50 S. 398; Butler *v.* S., 162 Ala. 71, 50 S. 400; Murray *v.* Galbraith, 86 Ark. 50, 109 S. W. 1011; Hayward *v.* Maroney, 86 Conn. 261, 85 A. 379; Alsup *v.* Ray, 175 Ill. App. 621; Burch *v.* Bernard, 107 Minn. 210, 120 N. W. 33; Cook *v.* Conners, 157 App. Div. 832, 143 N. Y. S. 230; Hayden *v.* Hasbrouck, 34 R. I. 556, 84 A. 1087; Gill *v.* Ruggles, 95 S. C. 90, 78 S. E. 536.

Publication of same libel by other papers inadmissible. Hagener *v.* Pub. Co., 172 Mo. App. 436, 158 S. W. 54.

289-98 Ladwig *v.* Heyer, 136 Ia. 196, 113 N. W. 767; S. *v.* Wilcox, 90 Kan. 80, 132 P. 982; Meriwether *v.* Publishers, 211 Mo. 199, 109 S. W. 750, 16 L. R. A. (N. S.) 953; Smith *v.* Brown, 97 S. C. 239, 81 S. E. 633; Curl *v.* S. (Tex. Cr.), 145 S. W. 602; Greeler *v.* Redmond, 154 Wis. 503, 143 N. W. 152; Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633; Kloths *v.* Hess, 126 Wis. 587, 106 N. W. 251. See Ashford *v.* Star Co., 41 App. Cas. (D. C.) 395. But see Giehl *v.* Winkler, 164 Ill. App. 358; Yazoo, etc. R. Co. *v.* Rivers, 93 Miss. 557, 46 S. 705 (proof of what was said in a conversation other than that in question, improper).

Circumstances attending other publications and mode and extent of their repetition may be shown. Register Co. *v.* Worten, 33 Ky. L. R. 840, 111 S. W. 693.

289-99 Vest *v.* Speakman, 153 Ala. 393, 44 S. 1017; Tingley *v.* Co., 151 Cal. 1, 89 P. 1097; Melcher *v.* Beeler, 48 Colo. 233, 110 P. 181; Berger *v.* Co., 132 Ia. 290, 109 N. W. 784; Register Co. *v.* Worten, 33 Ky. L. R. 840, 111 S. W. 693; Gambrill *v.* Schooley, 95 Md. 260,

52 A. 500, 63 L. R. A. 427; Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547; Downs *v.* Cassidy, 47 Mont. 471, 133 P. 106; Crane *v.* Bennett, 177 N. Y. 106, 69 N. E. 274; Flint *v.* Holman, 82 Vt. 297, 73 A. 585.

290-1 Smith *v.* Singles, 6 Penne. (Del.) 544, 72 A. 977; Blodgett *v.* Co. (Ia.), 113 N. W. 821; Weicherding *v.* Krueger, 109 Minn. 461, 124 N. W. 225; Julian *v.* Co., 209 Mo. 35, 107 S. W. 496; Yager *v.* Bruce, 116 Mo. App. 473, 93 S. W. 307 (made while discussing proposition for settlement, negotiations for compromise not pending); Bloomfield *v.* Pinn, 84 Neb. 472, 121 N. W. 716; Cook *v.* Conners, 157 App. Div. 832, 143 N. Y. S. 230.

290-2 Cain *v.* Shutt, 105 Md. 304, 66 A. 24. See Hayward *v.* Maroney, 86 Conn. 261, 85 A. 379.

291-3 Cox *v.* S., 162 Ala. 66, 50 S. 398; Ball *v.* Co., 237 Ill. 592, 86 N. E. 1097; Paxton *v.* Woodward, 31 Mont. 195, 78 P. 215; Bloomfield *v.* Pinn, 84 Neb. 472, 121 N. W. 716; Fitzgerald *v.* Young, 89 Neb. 693, 132 N. W. 127.

292-4 Smith *v.* Singles, 6 Penne. (Del.), 544, 72 A. 977; Roberts *v.* S., 51 Tex. Cr. 27, 100 S. W. 150 (six months after words spoken).

292-5 Cox *v.* S., 162 Ala. 66, 50 S. 398; Butler *v.* S., 162 Ala. 71, 50 S. 400; Ball *v.* Co., 237 Ill. 592, 86 N. E. 1097.

293-6 Register Co. *v.* Worten, 33 Ky. L. R. 840, 111 S. W. 693; Bloomfield *v.* Pinn, 84 Neb. 472, 121 N. W. 716.

293-7 Ladwig *v.* Heyer, 136 Ia. 196, 113 N. W. 767.

Articles published at different times are sufficiently related if they deal with the same general subject. Julian *v.* Co., 209 Mo. 35, 107 S. W. 496.

294-9 Melcher *v.* Beeler, 48 Colo. 233, 110 P. 181.

294-11 Register Co. *v.* Worten, 33 Ky. L. R. 840, 111 S. W. 693; Downs *v.* Cassidy, 47 Mont. 471, 133 P. 106.

294-12 Yazoo, etc. R. Co. *v.* Rivers, 93 Miss. 557, 46 S. 705. See Giehl *v.* Winkler, 164 Ill. App. 358; Quinn *v.* Co., 55 Wash. 69, 104 P. 181.

Not competent in criminal case.—Cox *v.* S., 162 Ala. 66, 50 S. 398.

295-13 Price *v.* Clapp, 119 Tenn. 425, 105 S. W. 864.

295-15 Dubois *v.* Robbins, 115 Ill. App. 372.

296-19 May be too remote. Weicherding *v.* Krueger, 109 Minn. 461, 124 N. W. 225.

296-22 Blodgett *v.* Co. (Ia.), 113 N. W. 821; Register Co. *v.* Worten, 33 Ky. L. R. 840, 111 S. W. 693; Bloomfield *v.* Pinn, 84 Neb. 472, 121 N. W. 716; Curl *v.* S. (Tex. Cr.), 145 S. W. 602.

297-25 Register Co. *v.* Worten, 33 Ky. L. R. 840, 111 S. W. 693.

299-35 Ellis *v.* Co., 198 Mass. 538, 84 N. E. 1018; Neafie *v.* Co., 72 N. J. L. 340, 62 A. 1129; James *v.* Co. (Tex. Civ.), 117 S. W. 1028 (general notice appearing in same paper as libel).

Competent to ask witness effect of retraction on his feelings. Gripman *v.* Kitchel, 173 Mich. 242, 138 N. W. 1041.

300-37 Post Pub. Co. *v.* Butler, 137 Fed. 723, 71 C. C. A. 309; Fessinger *v.* Times Co. (Tex. Civ.), 154 S. W. 1171.

In Massachusetts punitive damages not allowed; but a manifestation of malevolent motives may enhance compensation for injured feelings. Hence, prompt publication of retraction may be shown though effect be to substantially reduce damages. Ellis *v.* Co., 198 Mass. 538, 84 N. E. 1018. *Comp.* Ott *v.* Co., 40 Wash. 308, 82 P. 403.

300-41 Offer to retract, made before trial, may be shown on question of good faith. Dalziel *v.* Co., 52 Misc. 207, 102 N. Y. S. 909, *dist.* Turton *v.* Co., 144 N. Y. 144, 38 N. E. 1009, on ground offer made to attorney not authorized to entertain it. Such offer not within rule which bars evidence of admissions by way of compromise. Dalziel *v.* Co., supra.

301-44 In absence of proof of a demand for a retraction a statute limiting recovery to special damages is not operative. Post Pub. Co. *v.* Butler, 137 Fed. 723, 71 C. C. A. 309.

301-45 Crane *v.* Bennett, 177 N. Y. 106, 69 N. E. 274; Kloths *v.* Hess, 126 Wis. 587, 106 N. W. 251. *Contra*, Denison *v.* Co., 82 Neb. 675, 118 N. W. 568, improper to prove other publishers of libel had published a retraction, article, being libelous per se and punitive damages not being recoverable.

Failure to publish retraction relevant to show publisher's ratification of editor's acts and charge it with his malice. Pfister *v.* Co., 139 Wis. 627, 121 N. W. 938.

303-49 Keller *v.* Am. Bottlers, etc. Co., 140 App. Div. 311, 125 N. Y. S. 212.

305-58 Dalziel *v.* Co., 52 Misc. 207, 102 N. Y. S. 909; Pfister *v.* Co., 139 Wis. 677, 121 N. W. 938.

305-59 Similar publications cannot be shown if matter published as of writer's knowledge; neither can it be proved it was received from a correspondent. Berger *v.* Co., 132 Ia. 290, 109 N. W. 784.

306-60 Dalziel *v.* Co., 52 Misc. 207, 102 N. Y. S. 909.

306-61 Carpenter *v.* Ashley, 148 Cal. 422, 83 P. 444, purporting to be repetitions of defendant's statement.

306-65 Butler *v.* Co., 119 App. Div. 767, 104 N. Y. S. 637.

308-73 Lambright *v.* S., 9 O. C. C. (N. S.) 151, *dist.* Bowers *v.* S., 29 O. 542.

308-74 Dobbs *v.* S., 55 Tex. Cr. 483, 117 S. W. 799.

Evidence as to reputation of prosecutrix for chastity must relate thereto as of or about time of slander. Richmond *v.* S., 58 Tex. Cr. 435, 126 S. W. 596.

308-75 Lay *v.* Linke, 122 Tenn. 433, 123 S. W. 746, by two witnesses or one witness and cogent corroborating circumstances. See Coulter *v.* Stuart, 2 Yerg. (Tenn.) 225, as explained in Fleming *v.* Wallace, 116 Tenn. 20, 91 S. W. 47.

309-76 Lay *v.* Linke, 122 Tenn. 433, 123 S. W. 746, *dist.* cases.

310 Words must be proved strictly as alleged. Burkhiser *v.* Lyons (Tex. Civ.), 167 S. W. 244.

310-82 Hygienic, etc. Co. *v.* Way, 35 Pa. Super. 229; Fant *v.* Sullivan (Tex. Civ.), 152 S. W. 515.

Defendant may be compelled to give names of persons to whom it sent a circular and name of its informant as to matter of which circular stated it had been "advised" because of the bearing such information would have on bona fides and privilege. Massey-H. Co. *v.* Co., 11 Ont. L. R. (Can.) 227. The principle affirmed by divisional court. Massey-H. Co. *v.* Co., 11 Ont. L. R. (Can.) 591. See Plymouth Mut. Soc. *v.* Assn., (1906) 1 K. B. (Eng.) 403.

310-83 McKergow *v.* Comstock, 11 Ont. L. R. (Can.) 637; Pickford *v.* Talbott, 28 App. Cas. (D. C.) 498; Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243; Krulic *v.* Petcoff, 122 Minn. 517, 142 N. W. 897; Logan *v.* Browning (Tex. Civ.), 128 S. W. 1181. *Comp.* Parsons *v.* Pub. Co. (Ala.), 61 S. 345.

311-84 Merrey *v.* Co., 79 N. J. L. 177, 74 A. 464.

311-85 Watt *v.* Watt, (1905) App. Cas. (Eng.) 115; McKergow *v.* Comstock, 11 Ont. L. R. (Can.) 637.

312-86 Ferdon *v.* Dickens, 161 Ala. 181, 49 S. 888.

314-89 Dodge *v.* Gilman, 122 Minn. 177, 142 N. W. 147.

315-93 Proof of general conduct of officer may be made in criminal case though article specifies particular acts. P. *v.* Cornell, 126 App. Div. 151, 110 N. Y. S. 648.

316-96 Allegation as to circulation of libel limits evidence. O'Neil *v.* Adams, 144 Ia. 385, 122 N. W. 976.

Proof of plaintiff's character, limited by allegation as to place in which defendant alleged it to be bad. O'Neil *v.* Adams, supra.

316-97 Massee *v.* Williams, 207 Fed. 222, 124 C. C. A. 492; Donahoe *v.* Co., 4 Penne. (Del.) 166, 55 A. 337.

317-99 Everett *v.* De Long, 144 Ill. App. 496.

317-2 Inconsistent statutory pleas cannot be used as evidence against each other. Ferdon *v.* Dickens, 161 Ala. 181, 49 S. 888.

LIMITATION OF ACTIONS

Burden of showing effect of acknowledgment, 322-7; *Burden of proving bar under foreign statute,* 328-21; *Custom as to presentation of bills,* 328-22; *Burden of showing laches,* 328-22; *Discovery of fraud,* 337-50; *Repudiation of trust,* 338-57.

319-1 Lord *v.* Calhoun, 162 Ala. 444, 50 S. 402; Culberhouse *v.* Hawthorne, 107 Ark. 462, 156 S. W. 421; Swing *v.* Co., 90 Ark. 394, 119 S. W. 265; Swing *v.* Co., 78 Ark. 246, 93 S. W. 978; Catholic University *v.* Waggaman, 32 App. Cas. (D. C.) 307; Williams *v.* S., 13 Ga. App. 338, 79 S. E. 207; Ditmore *v.* Rexford, 165 N. C. 620, 81 S. E. 994; Sprinkle *v.* Sprinkle, 159 N. C. 81, 74 S. E. 739; Conaway *v.* Home Builders, 65 Wash. 39, 117 P. 716.

Statute must be pleaded or evidence cannot be introduced thereunder. Raley *v.* Sullivan (Tex. Civ.), 159 S. W. 99; Holderman *v.* Reynolds (Tex. Civ.), 159 S. W. 67.

Plaintiff must show compliance with

statute imposing conditions upon right of action. McRae *v.* R. Co., 199 Mass. 418, 85 N. E. 425.

320-2 U. S. *v.* Mason, 211 Fed. 233; Van Buskirk *v.* Kuhns, 164 Cal. 472, 129 P. 589; Schell *v.* Weaver, 225 Ill. 159, 80 N. E. 95, cit. the text, *aff.* 128 Ill. App. 106; Ruhl *v.* Gambrill, 175 Ill. App. 641; Hellen *v.* Hellen, 170 Ill. App. 464; Moffett *v.* Farwell, 123 Ill. App. 528; S. *v.* Jackson, 52 Ind. App. 254, 100 N. E. 479; Clark *v.* County, 138 Ky. 676, 128 S. W. 1079; Hunter *v.* Martien, 135 La. ——, 65 S. 486; Slicer *v.* Owens, 241 Mo. 319, 145 S. W. 428; Freeland *v.* Williamson, 220 Mo. 217, 119 S. W. 560; Pemiscot L. & C. Co. *v.* Davis, 147 Mo. App. 194, 126 S. W. 218; Van Burg *v.* Van Engen, 76 Neb. 816, 107 N. W. 1006; Beugger *v.* Ashley, 146 N. Y. S. 910; Watertown Nat. Bk. *v.* Bagley, 134 App. Div. 831, 119 N. Y. S. 592; Porter *v.* Co., 115 App. Div. 333, 100 N. Y. S. 888; Anderson *v.* Crow (Tex. Civ.), 151 S. W. 1080; Texas & G. R. Co. *v.* Whiteside, 55 Tex. Civ. 593, 119 S. W. 126; McAllen *v.* Alonzo (Tex. Civ.), 102 S. W. 475; Houston, etc. R. Co. *v.* Grossman (Tex. Civ.), 89 S. W. 312; Tate *v.* Rose, 35 Utah 229, 99 P. 1003; Green *v.* Dodge, 79 Vt. 73, 64 A. 499; Goodyear Co. *v.* Baker's Est., 81 Vt. 39, 69 A. 160; Virginia R. & P. Co. *v.* Forebee, 115 Va. 289, 78 S. E. 556. *Comp.* Lamberida *v.* Barnum (Tex. Civ.), 90 S. W. 698; Pickens *v.* Stout, 67 W. Va. 422, 68 S. E. 354.

320-3 Atkinson *v.* Co., 16 Ont. L. R. 619 (limitation by contract); Caldwell *v.* Ulsh (Ind. App.), 103 N. E. 879; Gatlin *v.* Vant, 6 Ind. Ty. 254, 91 S. W. 38; Gamet *v.* Haas (Ia.), 146 N. W. 465; Farrow *v.* Farrow (Ia.), 143 N. W. 856; Myers *v.* Lees (Ia.), 117 N. W. 45; Hendrick *v.* Miller, 32 Ky. L. R. 1030, 107 S. W. 731; Green Co. *v.* Howard, 32 Ky. L. R. 243, 105 S. W. 897; Ryan *v.* Bk., 103 Md. 428, 63 A. 1062; Forest Tp. *v.* B. Co. (Mich.), 146 N. W. 416; Berryman *v.* Becker, 173 Mo. App. 346, 158 S. W. 899; Casey *v.* Tel. Co., 155 App. Div. 66, 139 N. Y. S. 579; Beattys *v.* Straiton, 126 N. Y. S. 848; Wright *v.* Hull, 83 O. St. 385, 94 N. E. 813; Ingersoll *v.* Davis, 14 Wyo. 120, 82 P. 867.

Rule applied in equity where sought to excuse laches. S. *v.* Co., 56 Or. 283, 106 P. 780.

321-4 Clark *v.* Lesser, 106 Ark. 207, 153 S. W. 112; Gray *v.* Good, 44 Ind. App. 476, 89 N. E. 498; Rullman *v.* Rullman, 81 Kan. 521, 106 P. 52; Owsley *v* Boles, 30 Ky. L. R. 1016, 99 S. W. 1157; Holden *v.* Cooney, 110 N. Y. S. 1030 (clearly preponderating evidence necessary); Scott *v.* Christenson, 46 Or. 417, 80 P. 731.

321-5 Ryan *v.* Bk., 103 Md. 428, 63 A. 1062; Murphy *v.* Walsh, 113 App. Div. 428, 99 N. Y. S. 346; Cahn *v.* Reilly, 113 N. Y. S. 545.

321-6 Barrett *v.* Sipp, 50 Ind. App. 304, 98 N. E. 310.

Proof of partial payments make a prima facie case for the jury. Ray *v.* McConnell (Mo. App.), 165 S. W. 394.

Payment by wife of interest on note executed by her and husband sufficient evidence of payment by both. Brethauer *v.* Schorer, 81 Conn. 143, 70 A. 592.

Presumed payment by principal on surety's account on latter's request. Blanchard *v.* Blanchard, 61 Misc. 497, 113 N. Y. S. 882.

322-7 Brooklyn Bk. *v.* Barnaby, 197 N. Y. 210, 90 N. E. 834.

Evidence held sufficient.—Mowry *v.* Saunders (R. I.), 80 A. 421.

Acknowledgment shown, presumably relates to entire demand, burden on acknowledgor to show relation to part only. Chicago *v.* Franklin, 119 Ill. App. 384.

322-8 Bk. *v.* Guse, 51 Wash. 365, 98 P. 1127.

Burden not necessarily on one side or other to prove existence or non-existence of other debt. Question solved by construction of acknowledgment or by secondary evidence of contents when received. Read *v.* Price, (1909) 2 K. B. 724, noting that Baillie *v.* Lord Inchiquin, 1 Esp. 435, overruled.

General promise or acknowledgment assumed to relate to demand in question; defendant must show otherwise. Galvin *v.* O'Gorman, 40 Mont. 391, 106 P. 887, *foll.* Blackmore *v.* Neale, 15 Colo. App. 49, 60 P. 952; Doran *v.* Doran, 145 Ia. 122, 123 N. W. 996.

323-9 Hornblower *v.* University, 31 App. Cas. (D. C.) 64; Morgan *v.* Kirkpatrick, 2 Pa. C. C. 262 (evidence sufficient); Bank *v.* Guse, 51 Wash. 365, 98 P. 1127.

323-10 Sartor *v.* Wells, 39 Colo. 84, 89 P. 797, parol sufficient to prove new promise. See Disney *v.* Healey, 73 Kan. 326, 85 P. 287.

323-11 Doran *v.* Doran, 145 Ia. 122,

123 N. W. 996, reasonable certainty, sufficient.

324-13 Cliff *v.* Cliff, 23 Colo. App. 183, 128 P. 860; Caldwell *v.* Ulsh (Ind. App.), 103 N. E. 879; Kidd *v.* Bell (Ky.), 122 S. W. 232; Breaux *v.* Broussard, 116 La. 215, 40 S. 639; Dowse *v.* Gaynor, 155 Mich. 38, 118 N. W. 615; Church *v.* Stevens, 56 Misc. 572, 107 N. Y. S. 310; Paine *v.* Dodds, 14 N. D. 189, 103 N. W. 931; Theis *v.* Board, 22 Okla. 333, 97 P. 973. See Gillmore *v.* Gillmore, 91 Kan. 707, 139 P. 386.

324-14 Armstrong *v.* Wilcox, 57 Fla. 30, 49 S. 41; Pickens *v.* Stout, 67 W. Va. 422, 68 S. E. 354.

324-15 Elean *v.* Childress, 40 Tex. Civ. 193, 89 S. W. 84.

325-16 Gamet *v.* Haas (Ia.), 146 N. W. 465. See Strout *v.* Mach. Co., 208 Fed. 646.

In a suit for conspiracy the period of limitation begins when the existence of the conspiracy and the cause of action is discovered. See Am. Tob. Co. *v.* Tobacco Co., 204 Fed. 58, 122 C. C. A. 372.

326-17 Knowledge not presumed as basis of laches in fraud action. Wills *v.* Co., 52 Or. 70, 96 P. 528.

327-18 Morris *v.* Cisler, 7 O. N. P. (N. S.) 142; Kammann *v.* Barton, 23 S. D. 442, 122 N. W. 416; Dignowity *v.* Sullivan, 49 Tex. Civ. 582, 109 S. W. 428 (not unnecessary to show precise periods when defendant visited state). See Burleigh *v.* Hecht, 22 S. D. 301, 117 N. W. 367.

327-19 Phillips *v.* Lindley, 112 App. Div. 283, 98 N. Y. S. 423.

Burden is on debtor where plaintiff has made prima facie case of absence. Goldberg *v.* Lackshin, 139 N. Y. S. 943.

Accused must show absence.—P. *v.* Whittington, 143 Ill. App. 438.

328-21 Burden of proving bar under foreign statute upon defendant. Wojtylak *v.* Co., 188 Mo. 260, 87 S. W. 506.

328-22 Clifford *v.* Duffy, 56 Misc. 667, 107 N. Y. S. 809.

Record of former action is competent to avoid the bar of limitations where the first proceedings were dismissed for misjoinder and new suits were brought after the running of limitations. Owenby *v.* R. Co., 165 N. C. 641, 81 S. E. 997.

Custom of presentation of bills by plaintiff cannot be proved. Presumed work charged for completed when bills approved. Hornblower *v.* University, 31 App. Cas. (D. C.) 64.

Burden of showing laches on defendant in equity suit brought within period, and on complainant if brought thereafter. Wilson *v.* M. Co., 174 Fed. 317, 98 C. C. A. 189.

329-23 Catholic University *v.* Waggaman, 32 App. Cas. (D. C.) 307; Brown *v.* Osborne, 136 Ky. 456, 124 S. W. 405 (acknowledgment at time of payment).

Contents of lost acknowledgment proved by parol.—Read *v.* Price, (1909) 1 K. B. 577, 2 K. B. 724.

330-26 Berryman *v.* Becker, 173 Mo. App. 346, 158 S. W. 899.

Corroboration of indorsement, required. Ott *v.* Flinspach, 143 Ill. App. 61.

330-27 Brown *v.* Osborn, 136 Ky. 456, 124 S. W. 405.

330-28 Brown *v.* Carson, 132 Mo. App. 371, 111 S. W. 1181. See Keener *v.* Lloyd, 90 Kan. 250, 133 P. 710.

331-29 Ray *v.* McConnell (Mo. App.), 165 S. W. 394; Berryman *v.* Becker, 173 Mo. App. 346, 158 S. W. 899; Crow *v.* Crow, 124 Mo. App. 120, 100 S. W. 1123.

331-30 Ray *v.* McConnell (Mo. App.), 165 S. W. 394; Crow *v.* Crow, 124 Mo. App. 120, 100 S. W. 1123.

332-31 McAbee *v.* Wiley, 92 Ark. 245, 122 S. W. 623; Lovell *v.* Goss, 45 Colo. 304, 101 P. 72; Holmquist *v.* Gilbert, 41 Colo. 113, 92 P. 232, 14 L. R. A. (N. S.) 479; Bulcken *v.* Rohde, 81 S. C. 503, 63 S. E. 786; Crahan *v.* Chittenden, 82 Vt. 410, 72 A. 86.

332-32 Ratification of indorsement not shown by debtor's failure to object. Brooklyn Bk. *v.* Barnaby, 197 N. Y. 210, 90 N. E. 834.

332-35 Bulcken *v.* Rohde, 81 S. C. 503, 63 S. E. 786.

332-37 McAbee *v.* Wiley, 92 Ark. 245, 122 S. W. 623.

333-38 Western C. Co. *v.* Estrada (Tex. Civ.), 116 S. W. 113.

334-42 Doran *v.* Doran, 145 Ia. 122, 123 N. W. 996.

335-43 Davis *v.* Strange, 156 Ky. 420, 161 S. W. 217; Dowell *v.* Dowell, 137 Ky. 167, 125 S. W. 283.

Declarations of intestate that he owed plaintiff and wanted to pay is admissible to show an intention to make part payment to revive debt. Miller *v.* Miller, 169 Mo. App. 432, 155 S. W. 76.

335-45 Atwood *v.* Lammers, 97 Minn. 214, 106 N. W. 310.

336-46 Parker *v.* Carter, 91 Ark. 162, 120 S. W. 836.

Declarations of former owner, made after conveyance of land subject to vendor's lien, irrelevant as against grantee ignorant of lien. Benedict *v.* Griffith, 92 Ark. 195, 122 S. W. 479.

336-47 Ott *v.* Flinspach, 143 Ill. App. 61; Gaffney *v.* Mentele, 23 S. D. 38, 119 N. W. 1030.

Letter written seventeen years before is admissible. Quincy *v.* Blanchard (R. I.), 90 A. 209.

"In Gillingham *v.* **Brown,** 178 Mass. 417, 60 N. E. 122, 55 L. R. A. 320, under a statute in effect the same as section 79, Code Civ. Pr., providing that no acknowledgement or promise shall be evidence of a new contract to take a promise out of the statute of limitations unless in writing, but nothing in it shall alter or take away the effect of a part payment, the court held that such statute does not exclude all parol evidence bearing upon the new promise by way of part payment, that the intent with which the part payment is made may be determined from surrounding circumstances and by statements of the parties made at the time." McCarthy Bros. Co. *v.* Hansknutt, 29 S. D. 535, 137 N. W. 286.

336-48 Assumption of debt by third person making payments thereon, shown by parol. Fitzgerald *v.* Flannagan (Ia.), 125 N. W. 995.

337-49 Where clerk's certificate showed that complaint and summons were issued within the statutory time it was sufficient to prove such fact, even though an indorsement in lead pencil on complaint showed summons was not issued. Barker *v.* Cunningham, 104 Ark. 627, 150 S. W. 153.

The record must determine when notice of beginning of an action was delivered to sheriff. Cooley *v.* Maine (Ia.), 143 N. W. 431.

337-50 Competent to show an heir of deceased grantee first learned from another of perpetration of fraud at given time. Martinson *v.* McCutcheon, 84 S. C. 256, 66 S. E. 120.

337-51 Succession of Driscoll, 125 La. 287, 51 S. 200 (payment on account cannot be shown); O'Quin *v.* Russell, 121 La. 57, 46 S. 100 (debt of decedent).

As, for example, where the only evidence offered by plaintiff was his own testimony to the effect that on June 8, 1909, he presented the note to defendant, who "took it in his hand and examined the face, and turned it over and examined the back, and admitted the justness of the note, that it was all right—made no objection whatever." Fry *v.* Smith, 160 Mo. App. 361, 142 S. W. 739.

338-54 Promise must be made to creditor or agent. President *v.* Stephens, 11 Cal. App. 523, 105 P. 614.

338-55 Letters, sufficient. Galvin *v.* O'Gorman, 40 Mont. 391, 106 P. 887.

338-56 Duncan *v.* Redd (Ga. App.), 80 S. E. 726; Zinn *v.* Stamm, 78 Misc. 567, 139 N. Y. S. 992.

338-57 Trustee setting up statute must show beneficiary's express or implied knowledge of denial of liability or repudiation of trust. Cooley *v.* Gilliam, 80 Kan. 278, 102 P. 1091.

LOST INSTRUMENTS

Recitals as evidence of contents, 358-74.

343-2 McCullough *v.* Munn (1908), 2 Irish 194; P. *v.* Murphy, 20 Cal. App. 398, 129 P. 603; Young *v.* P., 221 Ill. 51, 77 N. E. 536; Choctaw, etc. R. Co. *v.* McAlester, 7 Ind. Ty. 520, 104 S. W. 821; Interstate Co. *v.* Bailey, 29 Ky. L. R. 468, 93 S. W. 578; Young *v.* Engdahl, 18 N. D. 166, 119 N. W. 169; Timbol *v.* Manalo Co., 6 Phil. Isl. 254; Lancaster *v.* Lee, 71 S. C. 280, 51 S. E. 139; Nelson *v.* Co., 20 S. D. 299, 105 N. W. 630; Poitevent *v.* Scarborough (Tex. Civ.), 117 S. W. 443.

343-3 Read *v.* Price, (1909) 1 K. B. 577, 2 K. B. 724; Carpenter *v.* Jones, 76 Ark. 163, 88 S. W. 871; Brasch *v.* Co., 80 Ark. 425, 97 S. W. 445; Nemo *v.* Farrington, 7 Cal. App. 443, 94 P. 874, 877; Houston *v.* S., 124 Ga. 417, 52 S. E. 757; Hiss *v.* Hiss, 228 Ill. 414, 81 N. E. 1056; Mahaffy *v.* Faris, 144 Ia. 220, 122 N. W. 934; C. *v.* Johnson, 199 Mass. 55, 85 N. E. 188; Bailey *v.* Bailey, 139 Mo. App. 176, 122 S. W. 1099; Wells *v.* Harrell, 152 N. C. 218, 67 S. E. 584; Pierce *v.* S., 54 Tex. Cr. 424, 113 S. W. 148.

Rule unchanged by burnt records act. Hibernia S. & L. Soc. *v.* Boyd, 155 Cal. 193, 100 P. 239.

344-9 Felker *v.* Breece, 226 Mo. 320, 126 S. W. 424.

345-10 Martin *v.* Co., 151 Ala. 289,

44 S. 112; Kenady *v.* Gilkey, 81 Ark. 147, 98 S. W. 969; Houghtalling *v.* Houghtalling (Ia.), 112 N. W. 197; Lloyd *v.* Simons, 97 Minn. 315, 105 N. W. 902; Borstelman *v.* Brohan, 80 N. J. Eq. 401, 87 A. 145; In re Hedgepeth's Will, 150 N. C. 245, 63 S. E. 1025. See supra, "Limitation of Actions," 322-8.

Forgery.—Where affidavit of forgery made party relying on lost instrument must show its execution and genuineness. Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645.

Presumption of grant from long possession.—Flanagan *v.* Mathiesen, 70 Neb. 223, 97 N. W. 287.

345-12 Embree *v.* Emerson, 37 Ind. App. 16, 74 N. E. 44, 1110 (no allegation note lost before maturity); Jenkins *v.* Emmons, 117 Mo. App. 1, 94 S. W. 812.

345-13 No presumption lost note payable at bank in state. Embree *v.* Emerson, 37 Ind. App. 16, 74 N. E. 44, 1110.

345-14 Presumed lost deed regularly executed, but not a reservation therein in favor of vendor. Laird *v.* Murray (Tex. Civ.), 111 S. W. 780.

345-15 Choctaw, etc. R. Co. *v.* McAlester, 7 Ind. Ty. 520, 104 S. W. 821.

346-18 Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645; Hutchins *v.* Murphy, 146 Mich. 621, 110 N. W. 52 (evidence, insufficient); Lloyd *v.* Simons, 97 Minn. 315, 105 N. W. 902; Haworth *v.* Haworth, 123 Mo. App. 303, 100 S. W. 531; Bright *v.* Allan, 203 Pa. 386, 53 A. 248; Hutcheson *v.* Massie (Tex. Civ.), 159 S. W. 315 (copy of notary's record); Pratt *v.* Townsend (Tex. Civ.), 125 S. W. 111; Simpson Bk. *v.* Smith, 52 Tex. Civ. 349, 114 S. W. 445 (declaration of scrivener to witness); Garrett *v.* Spradling, 39 Tex. Civ. 60, 88 S. W. 293; Jones *v.* Neal, 44 Tex. Civ. 412, 98 S. W. 417 (record admissible though deed not entitled to record); Texas L. & W. Co. *v.* Walker, 47 Tex. Civ. 543, 105 S. W. 545 (acknowledgment by married woman); Carter *v.* Wood, 103 Va. 68, 48 S. E. 553.

See Wagner *v.* Bk. (Ia.), 118 N. W. 523 (lost certificate of deposit); Sick *v.* Schug (Mich.), 146 N. W. 270; Adkins *v.* Wright, 37 Okla. 771, 131 P. 686; Kirby *v.* Hayden (Tex. Civ.), 125 S. W. 993, and vol. 4, pp. 214, 218.

Sales and resales of land under title represented by lost document and general reputation of ownership considered. Guffey Co. *v.* Hooks, 47 Tex. Civ. 560, 106 S. W. 690.

Recital in ancient deed of antecedent deed, consistent with own provisions after lapse of long period, presumptive proof of former existence of such deed. Havens *v.* Co., 47 N. J. Eq. 365, 20 A. 497.

Contents of letter dictated by illiterate proved to show source. Whalen *v.* Gleeson, 81 Conn. 638, 71 A. 908.

Denial of knowledge by defendant concerning lost paper does not render proof of contents inadmissible. C. *v.* Johnson, 199 Mass. 55, 85 N. E. 188.

346-19 See Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645.

Attesting witnesses' absence accounted for. In re Hedgepeth's Will, 150 N. C. 245, 63 S. E. 1025.

347-20 Lloyd *v.* Simons, 97 Minn. 315, 105 N. W. 902.

347-21 Martin *v.* Co., 151 Ala. 289, 44 S. 112; Hogg *v.* Combs, 29 Ky. L. R. 559, 93 S. W. 670; Haworth *v.* Haworth, 123 Mo. App. 303, 100 S. W. 531; In re Hedgepeth's Will, 150 N. C. 245, 63 S. E. 1025; Buchanan *v.* Rollings (Tex. Civ.), 112 S. W. 785. See Houghtalling *v.* Houghtalling (Ia.), 112 N. W. 197.

348-24 See S. *v.* Ortiz, 99 Tex. 475, 90 S. W. 1084, Indian raid.

350-32 In re Hedgepeth's Will, 150 N. C. 245, 63 S. E. 1025.

350-35 Embree *v.* Emerson, 37 Ind. App. 16, 74 N. E. 44; Olcott *v.* Squires (Tex. Civ.), 144 S. W. 314.

Difficulty of finding not sufficient.—Haven Malleable Casting Co. *v.* Co., 146 Ky. 135, 142 S. W. 227.

352-36 Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918; Turner *v.* Elliott, 127 Ga. 338, 56 S. E. 434.

352-37 Interstate Co. *v.* Bailey, 29 Ky. L. R. 468, 93 S. W. 578.

Evidence as to extent of search to go to jury to rebut adverse inferences. Rice *v.* Taliaferro (Tex. Civ.), 156 S. W. 242.

352-38 Alabama C. Co. *v.* Meador, 143 Ala. 336, 39 S. 216.

353-40 Abernathy *v.* R. Co., 150 N. C. 97, 63 S. E. 180; Kenworthy *v.* Slooman, 62 Or. 604, 125 P. 273, *cit.* 8 ENCYCLOPÆDIA OF EVIDENCE.

353-41 Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918 (predecessor in title should search for lost deed); Liles *v.* Liles, 183 Mo. 326, 81 S. W. 1101 (circumstances

excuse); Kenworthy *v.* Slooman, 62 Or. 604, 125 P. 273 *cit.* 8 ENCYCLOPÆDIA OF EVIDENCE 343, 353.

353-42 Alabama C. Co. *v.* Meador, 143 Ala. 336, 39 S. 216; Kenworthy *v.* Slooman, 62 Or. 604, 125 P. 273, *cit.* 8 ENCYCLOPÆDIA OF EVIDENCE 353. But see Stark *v.* Burke, 131 Ia. 684, 109 N. W. 206.

354-53 Kenworthy *v.* Slooman, 62 Or. 604, 125 P. 273.

355-55 Declarations of testator, competent to show contents of lost or destroyed will. Buchanan *v.* Rollings (Tex. Civ.), 112 S. W. 785.

355-56 See Inlow *v.* Hughes, 38 Ind. App. 375, 76 N. E. 763, lost will.

355-57 Jones *v.* Ballou, 139 N. C. 526, 52 S. E. 254.

356-59 Inlow *v.* Hughes, 38 Ind. App. 375, 76 N. E. 763 (attorney drawing will may testify to provisions); Interstate Co. *v.* Bailey, 29 Ky. L. R. 468, 93 S. W. 578.

357-65 Right to introduce parol evidence depends upon law at time of trial. Aldeguer *v.* Hoskyn, 2 Phil. Isl. 500.

357-67 Authenticated copy of lost writing appearing in brief of evidence, approved by judge on former trial between same parties, competent. Crawford *v.* S., 4 Ga. App. 789, 62 S. E. 501.

357-68 Arbuckle *v.* Matthews, 73 Ark. 27, 83 S. W. 326.

358-71 Monahan *v.* Co., 114 N. Y. S. 862, lost exhibit.

358-73 Whalen *v.* Gleeson, 81 Conn. 638, 71 A. 908; Million *v.* Million (Ky.), 121 S. W. 985; C. *v.* Johnson, 199 Mass. 55, 85 N. E. 188.

358-74 Recitals in ancient deeds, ordinarily of no evidentiary value as against strangers. Davis *v.* Moyles, 76 Vt. 25, 56 A. 174.

358-75 Bailey *v.* Bailey, 139 Mo. App. 176, 122 S. W. 1099.

359-77 Testimony of grantee insufficient. Houghtalling *v.* Houghtalling (Ia.), 112 N. W. 197.

359-80 Hogg *v.* Combs, 29 Ky. L. R. 559, 93 S. W. 670; Jenkins *v.* Emmons, 117 Mo. App. 1, 94 S. W. 812 (party can testify as to fact and circumstances of loss).

359-81 Union Baptist Church *v.* Roper (Ala.), 61 S. 288; Nunn *v.* Lynch, 89 Ark. 41, 115 S. W. 926; Kenady *v.* Gilkey, 81 Ark. 147, 98 S. W. 969; Nemo *v.* Farrington, 7 Cal. App. 443, 94 P. 874, 877; Campbell *v.* Co., 53 Fla. 632, 43 S. 874 (more liberal rule applies where document ancient); Appeal of Flint, 157 Mich. 593, 122 N. W. 279 (evidence need not be clear and unquestionable); Lloyd *v.* Simons, 97 Minn. 315, 105 N. W. 902; Stevens *v.* Fitzpatrick, 218 Mo. 708, 118 S. W. 51; Borstelman *v.* Brohan, 80 N. J. Eq. 401, 87 A. 145; Garland *v.* Bk., 11 N. D. 374, 92 N. W. 452; Leftwich *v.* Early, 115 Va. 323, 79 S. E. 384; McLin *v.* Richmond, 114 Va. 244, 76 S. E. 301; Johnson *v.* McCoy, 112 Va. 580, 72 S. E. 123; Smith *v.* Lurty, 108 Va. 799, 62 S. E. 789.

Importance of document determines degree of proof. Carter *v.* Wood, 103 Va. 68, 48 S. E. 553. Less proof necessary, apparently, where writing is not basis of action. S. *v.* Leasia, 45 Or. 410, 78 P. 328.

Clear and satisfactory proof of contents required. Selph *v.* Purvis, 57 Fla. 188, 49 S. 289. See 359-81, supra. Sufficiency of evidence largely for court's discretion. Felker *v.* Breece, 226 Mo. 320, 126 S. W. 424.

360-82 Garland *v.* Bk., 11 N. D. 374, 92 N. W. 452; Araujo *v.* Celis, 6 Phil. Isl. 223.

360-83 Nemo *v.* Farrington, 7 Cal. App. 443, 94 P. 874; Lloyd *v.* Simons, 97 Minn. 315, 105 N. W. 902; Capell *v.* Fagan, 30 Mont. 507, 77 P. 55; Muller *v.* Keller, 117 N. Y. S. 205 (ownership at time of trial also).

361-85 Scurry *v.* Seattle, 56 Wash. 1, 104 P. 1129.

362-92 In re Hedgepeth's Will, 150 N. C. 245, 63 S. E. 1025. *Comp.* Inlow *v.* Hughes, 38 Ind. App. 375, 76 N. E. 763 (two witnesses necessary to proxe execution of lost will); Michell *v.* Low, 213 Pa. 526, 63 A. 246 (same).

363-95 Embree *v.* Emerson, 37 Ind. App. 16, 74 N. E. 44, as proof of execution.

Judgment establishing lost deed has only such weight as evidence as original deed. McNeely *v.* Laxton, 149 N. C. 327, 63 S. E. 278, statute.

MALICE

365-1 Brennan *v.* Hatters, 73 N. J. L. 729, 65 A. 165.

365-2 Davis *v.* Hearst, 160 Cal. 143, 116 P. 530.

366-9 McCarthy *v.* Barrett, 129 N. Y. S. 705.

Malicious prosecution.—Simmons *v.* Gardner, 46 Wash. 282, 89 P. 887.

Libel and slander.—Vial *v.* Larson, 132 Ia. 208, 109 N. W. 1007; German S. Bk. *v.* Fritz, 135 Ia. 44, 109 N. W. 1008; Chambers *v.* Leiser, 43 Wash. 285, 86 P. 627.

False imprisonment.—Steinbergen *v.* Miller, 29 Ky. L. R. 1132, 96 S. W. 1101.

366-11 P. *v.* Mikulski, 146 N. Y. S. 829.

366-12 Todd *v.* Co., 6 Penne. (Del.) 233, 66 A. 97; Abraham *v.* Baldwin, 52 Fla. 151, 42 S. 591; Berger *v.* Co., 132 Ia. 290, 109 N. W. 784; Gendron *v.* St. Pierre, 73 N. H. 419, 62 A. 966.

366-13 Jones *v.* R. Co., 29 Ky. L. R. 945, 96 S. W. 793; Sundmaker *v.* Gaudet, 113 La. 887, 37 S. 865; Smith *v.* League, 121 App. Div. 600, 106 N. Y. S. 251; Hale *v.* Barnes (Tex. Civ.), 155 S. W. 358; Ton *v.* Stetson, 43 Wash. 471, 86 P. 668 (notice unnecessarily inferred from presumptive case of want of probable cause).

366-16 S. *v.* Naylor (Del.), 90 A. 880; Chicago T. Co. *v.* Mahoney, 230 Ill. 562, 82 N. E. 868; S. *v.* Nerzinger, 220 Mo. 36, 119 S. W. 379. See supra, "Homicide," 583-27 et seq.

Malice presumed from false accusation against passenger, in nature of intentional insult. White *v.* R. Co., 132 Mo. App. 339, 112 S. W. 278.

366-17 Warner *v.* Baker, 36 App. Cas. (D. C.) 493; Williams *v.* R. Co., 90 Kan. 478, 135 P. 671. *Contra*, Vandiver *v.* Waller, 143 Ala. 411, 39 S. 136. See supra, "Intent," 597-39; supra "Libel and Slander," 200-52.

Corporation's servant, defendant in action for malicious prosecution, may testify belief plaintiff's act a misdemeanor. East *v.* R. Co., 115 App. Div. 683, 101 N. Y. S. 364.

366-18 Dorn *v.* Cooper, 139 Ia. 742, 118 N. W. 35.

367-25 Lowe *v.* Co., 157 Cal. 503, 108 P. 297; Wortham *v.* S., 141 Ga. 307, 80 S. E. 1001; Davis *v.* S., 11 Ga. App. 804, 76 S. E. 391; Willner *v.* Silverman, 109 Md. 341, 71 A. 962; Johnson *v.* S., 85 Miss. 572, 37 S. 926; Jennings *v.* Appleman, 159 Mo. App. 12, 139 S. W. 817. See supra, "Homicide," 636-61.

368-28 Pitts *v.* S., 140 Ala. 70, 37 S. 101; S. *v.* Hyder (Mo.), 167 S. W. 524; S. *v.* Brotzer, 245 Mo. 499, 150 S. W. 1078; S. *v.* Atkins, 77 Vt. 215, 59 A. 826.

370-39 Irby *v.* Wilde, 155 Ala. 388, 46 S. 454.

371-42 Dornsife *v.* Ralston, 55 Or. 254, 106 P. 713.

371-47 Willner *v.* Silverman, 109 Md. 341, 71 A. 962.

372-53 Vandiver *v.* Waller, 143 Ala. 411, 39 S. 136.

Prior and subsequent publication of similar articles shows malice. Cox *v.* S., 162 Ala. 66, 50 S. 398; Butler *v.* S., 162 Ala. 71, 50 S. 400; Tingley *v.* Co., 151 Cal. 1, 89 P. 1097.

372-54 Stark *v.* Epler, 59 Or. 262, 117 P. 276.

373-61 Crosland *v.* Graham, 83 S. C. 228, 65 S. E. 233.

373-62 Huskie *v.* Griffin, 75 N. H. 345, 74 A. 595.

374-68 Johnson *v.* Collier, 161 Ala. 204, 49 S. 761 (sale of exempt property knowingly); Scott *v.* Wilson, 82 Conn. 289, 73 A. 781 (erection of spite fence); Bates *v.* Kitchel, 166 Mich. 695, 132 N. W. 459; Gallon *v.* House of G. S., 158 Mich. 361, 122 N. W. 631; Magognos *v.* R. Co., 128 App. Div. 182, 112 N. Y. S. 637; Miller *v.* Wanamaker, 111 N. Y. S. 786.

Absence of good reason for doing act complained of justifies inference of malice if in absence of proof of other motive. Such testimony may overcome defendant's evidence as to motive. Huskie *v.* Griffin, 75 N. H. 345, 74 A. 595.

374-69 International H. Co. *v.* Co., 146 Ia. 172, 122 N. W. 951.

375-74 P. *v.* Flynn, 58 Misc. 621, 111 N. Y. S. 1065, 1067.

375-78 Mills *v.* Larrance, 217 Ill. 446, 75 N. E. 555.

376-79 Todd *v.* Co., 6 Penne. (Del.) 233, 66 A. 97; Thompson *v.* Rake, 140 Ia. 232, 118 N. W. 279; C. *v.* Pascoe, 39 Pa. Super. 163.

376-80 Morning U. Co. *v.* Butler, 151 Fed. 188, 80 C. C. A. 464.

376-81 National C. R. Co. *v.* Salling, 173 Fed. 22, 97 C. C. A. 334.

376-83 P. *v.* Jones, 241 Ill. 482, 89 N. E. 752; P. *v.* Minney, 155 Mich. 543, 119 N. W. 918.

376-86 Brown *v.* S., 142 Ala. 287, 38 S. 268; Clardy *v.* S., 96 Ark. 52, 131 S. W. 46; Flannigan *v.* S., 135 Ga. 221, 69 S. E. 171.

376-90 Pumphrey *v.* S., 84 Neb. 636, 122 N. W. 19.

377-94 Gallon *v.* House of G. S., 158 Mich. 361, 122 N. W. 631.

False imprisonment.—Oates *v.* McGlaun, 145 Ala. 656, 39 S. 607.

377-4 Repetition of slander evidence of malice. Vest *v.* Speakman, 153 Ala. 393, 44 S. 1017; Ladwig *v.* Heyer, 136 Ia. 196, 113 N. W. 767.

378-8 Contradictory statements. See supra, "Libel and Slander," 22-36.

378-11 Evidence of collateral crimes admissible. Sanderson *v.* S., 169 Ind. 301, 82 N. E. 525.

378-13 Dunlap *v.* R. Co., 145 Mo. App. 215, 129 S. W. 262.

379-18 P. *v.* Jones, 241 Ill. 482, 89 N. E. 752.

379-19 Bailee may prove doubt as to plaintiff's title to property. Riddle *v.* Blair, 163 Ala. 314, 51 S. 14.

380-24 Cook *v.* Proskey, 138 Fed. 273, 70 C. C. A. 563; Schon *v.* Whitt, 29 Ky. L. R. 691, 92 S. W. 280; Schroeder *v.* Blum, 74 Neb. 60, 103 N. W. 1073; Pittsburgh, etc. R. Co. *v.* Co., 143 N. C. 54, 55 S. E. 422.

380-25 Rea *v.* Schow, 42 Tex. Civ. 600, 93 S. W. 706, plaintiff may show lien on property sued for to rebut allegation of malice.

MALICIOUS MISCHIEF

382-1 Evidence held sufficient.—S. *v.* Rogne, 115 Minn. 204, 132 N. W. 5.

382-2 Holder *v.* S., 127 Ga. 51, 56 S. E. 71; Woods *v.* S., 10 Ga. App. 476, 73 S. E. 608.

382-3 Deaderick *v.* S., 122 Tenn. 222, 122 S. W. 975; Craighead *v.* S., 55 Tex. Cr. 386, 117 S. W. 128 (witness may testify he and another owned property).

382-4 S. *v.* Leasman, 137 Ia. 191, 114 N. W. 1032.

382-5 S. *v.* Martin, 141 N. C. 832, 53 S. E. 874. See Moody *v.* S., 127 Ga. 821, 56 S. E. 993.

Injury must impair utility or diminish value of property. Davis *v.* R. Co., 61 W. Va. 246, 56 S. E. 400.

383-7 Holder *v.* S., 127 Ga. 51, 56 S. E. 71.

383-8 Rex *v.* Kroesing (Can.), 10 West. L. R. 649; S. *v.* Cubberly (Del.), 80 A. 1003; Crowder *v.* S., 10 Ga. App. 355, 73 S. E. 424; S. *v.* Churchill, 15 Ida. 645, 98 P. 853; P. *v.* Jones, 241 Ill. 482, 89 N. E. 752; S. *v.* Graeme, 130 Mo. App. 138, 108 S. W. 1131; S. *v.* Minor, 17 N. D. 454, 117 N. W. 528; C. *v.* Schaffer, 32 Pa. Super. 375; Knudson *v.* S., 56 Tex. Cr. 513, 120 S. W. 878 (intent to injure property).

Intentional injury or destruction without cause shows malice. S. *v.* Roseum, 128 Ia. 509, 104 N. W. 800.

383-9 C. *v.* Byard, 200 Mass. 175, 86 N. E. 285; Ross *v.* S. (Tex. Cr.), 103 S. W. 697. See C. *v.* Lipshutz, 30 Pa. C. C. 245; S. *v.* Davis, 88 S. C. 229, 70 S. E. 811.

384-11 Minor *v.* S., 56 Tex. Cr. 431, 120 S. W. 860.

Defendant's inconsistent declarations as to ownership of land on which destroyed property situated proved to show wilfulness. Craighead *v.* S., 55 Tex. Cr. 386, 117 S. W. 128.

Declarations of accused as to purpose not admissible in absence of other evidence connecting him with offense. Caldwell *v.* S., 55 Tex. Cr. 164, 115 S. W. 597.

384-15 Miles *v.* Hutchings, (1903) 2 K. B. 714; Rex *v.* Kroesing (Can.), 10 West. L. R. 649; S. *v.* Tarlton, 22 S. D. 495, 118 N. W. 706.

Time, place and circumstances of act shown to disprove malice. McClurg *v.* S., 2 Ga. App. 624, 58 S. 1064.

385-20 S. *v.* Waltz (Ia.), 139 N. W. 458 (abusive language); S. *v.* Tarlton, 22 S. D. 495, 118 N. W. 706.

386-26 Edgar *v.* S., 156 Ala. 147, 47 S. 295; C. *v.* Shaffer, 32 Pa. Super 375; Fitzsimon *v.* S., 59 Tex. Cr. 540, 128 S. W. 903.

387-33 S. *v.* Churchill, 15 Ida. 645, 98 P. 853; P. *v.* Jones, 241 Ill. 482, 89 N. E. 752 (consequence of trespass proved on issue of malice); Caldwell *v.* S., 55 Tex. Cr. 164, 115 S. W. 597.

Expert testimony as to characteristics of dog killed while chasing animals immaterial in criminal case unless defendant knew thereof. S. *v.* Churchill, 15 Ida. 645, 98 P. 853.

MALICIOUS PROSECUTION

Degree of proof, 392-1; *Declaration of complainant to magistrate,* 402-45; *Presumptions—acquittal,* 409-81; *Grand jury docket,* 421-38; *Documentary evidence—Rules of Board of Health,* 422-48.

392-1 Hetu *v.* Assn., 40 Can. Sup. 128; Johnson *v.* Co., 157 Cal. 333, 107 P. 611; Slater *v.* Taylor, 31 App. Cas. (D. C.) 100; McElroy *v.* Co., 254 Ill 290, 98 N. E. 527; Stephens *v.* Gravit, 136 Ky. 479, 124 S. W. 414; Thomas *v.*

Henderson, 125 La. 292, 51 S. 202; Casavan *v.* Sage, 201 Mass. 547, 87 N. E. 893 Orefice *v.* Savarese, 61 Misc. 88, 113 N. Y. S. 175; Deering *v.* Gebhard, 57 Misc. 451, 108 N. Y. S. 715; Coleman *v.* Brown, 126 App. Div. 44, 110 N. Y. S. 701; Robitzek *v.* Daum, 220 Pa. 61, 69 A. 96; Brown *v.* Waite, 38 Pa. Super. 216; Casalduc *v.* Ins. Co., 1 P. R. Fed. 189.

Conviction of co-defendant inadmissible. Schwartz *v.* Boswell, 156 Ky 103, 160 S. W. 748.

Preponderance necessary to establish both malice and want of probable cause. Lisseck *v.* Anderson, 167 Ill. App 393.

Evidence held sufficient.—Lasky *v.* Smith, 115 Md. 370, 80 A. 1010; Danzer *v.* Nathan, 129 N. Y. S. 966; McCarthy *v.* Barrett, 129 N. Y. S. 705.

Actual guilt must be established beyond a reasonable doubt, while probable cause may be shown by proof of such circumstances as would lead a careful and conscientious man to believe plaintiff guilty. Martin *v.* Corscadden, 34 Mont. 308, 86 P. 33.

392-3 Conner *v.* Wetmore, 110 App. Div. 440, 96 N. Y. S. 999; Stanford *v.* Co., 143 N. C. 419, 55 S. E. 815.

Judicial determination of invalidity of statute under which complaint made has no retroactive effect on question of probable cause. Birdsall *v.* Smith, 158 Mich. 390, 122 N. W. 626.

392-4 Banker *v.* Ford, 152 Ill. App. 12; Davis *v.* Calvin, 143 Ky. 270, 136 S. W. 219; Martin *v.* Corscadden, 34 Mont. 308, 86 P. 33.

393-5 Gulsby *v.* Co., 167 Ala. 122, 52 S. 392.

394-8 Graham *v.* Graham, 126 N. Y. S. 941.

395-12 Indictment found after discharge by examining magistrate, prima facie evidence of probable cause. Lindsey *v.* Couch, 22 Okla. 4, 98 P. 973.

395-14 Booraem *v.* Co., 154 Cal. 99, 97 P. 65; Pickford *v.* Hudson, 32 App. Cas. (D. C.) 480; Birdsall *v.* Smith, 158 Mich. 390, 122 N. W. 626; Orefice *v.* Savarese, 61 Misc. 88, 113 N. Y. S. 175; Scheunert *v.* Albers, 140 Wis. 578, 123 N. W. 155.

396-19 Fancourt *v.* Heaven, 18 Ont. L. R. 492, in favor of plaintiff.

Erratum.—For "admissible" in original text, substitute "inadmissible."

Evidence of debtor and creditor account showing plaintiff's claim to embezzled money is inadmissible in absence of evidence of knowledge of account by defendant. Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320.

396-20 Shannon *v.* Simms, 146 Ala. 673, 40 S. 574, though affidavit on which warrant issued void.

Notwithstanding acquittal, plaintiff's guilt may be shown. Mack *v.* Sharp, 138 Mich. 448, 101 N. W. 631.

Reversed judgment of conviction, conclusive of existence of probable cause. Casey *v.* Dorr, 94 Ark. 433, 127 S. W. 708; Smith *v.* Thomas, 149 N. C. 100, 62 S. E. 772 (judgment based on confession); Topolewski *v.* Co., 143 Wis. 52, 126 N. W. 554 (in absence of collateral fraud).

396-21 Indictment, but prima facie evidence. Casey *v.* Dorr, 94 Ark. 433, 127 S. W. 708.

397-22 See Conner *v.* Wetmore, 110 App. Div. 440, 96 N. Y. S. 999; Malich *v.* Josephson, 50 Misc. 315, 98 N. Y. S. 671; Merrell *v.* Dudley, 139 N. C. 57, 51 S. E. 777.

397-24 Johnson *v.* Co., 157 Cal. 333, 107 P. 611; Ching Lum *v.* Lam Man Beu, 19 Haw. 363; Johnston *v.* Linder (Ia.), 143 N. W. 410; Gatz *v.* Harris, 134 Ky. 550, 121 S. W. 462; Stephens *v.* Gravit, 136 Ky. 479, 124 S. W. 414 (*contra* as to advice of magistrate unless he was learned in law); Smith *v.* Tolan, 158 Mich. 89, 122 N. W. 513; Bartlett *v.* Jenkins, 150 Mich. 682, 114 N. W. 679 (defendant may be asked whether he paid counsel and as to time and amount of judgment); Stephens *v.* Conley, 48 Mont. 352, 138 P. 189; Saunders *v.* Baldwin, 112 Va. 431, 71 S. E. 620.

Reason given by state's attorney for arresting plaintiff instead of his servant, inadmissible. Mertens *v.* Mueller, 119 Md. 525, 87 A. 501.

397-25 Pickford *v.* Hudson, 32 App. Cas. (D. C.) 480.

397-26 Goode *v.* Eslow, 151 Mich. 48, 114 N. W. 859.

Attorney not unbiased.—Smith *v.* Fields, 139 Ky. 60, 129 S. W. 325.

397-27 Hardin *v.* Hight, 106 Ark. 190, 153 S. W. 99 (whether full statement made, a question for jury); Van Meter *v.* Bass, 40 Colo. 78, 90 P. 637; Baker *v.* Langley, 3 Ga. App. 751, 60 S. E. 371; Drake *v.* Vickery, 81 Kan. 519, 106 P. 290 (including all facts which could have been known by dili-

gent effort); Gatz *v.* Harris, 135 Ky. 550, 121 S. W. 462; De Boer *v.* Adams, 159 Mich. 560, 124 N. W. 540 (question of fact); Fleckinger *v.* Taffee, 149 Mich. 678, 113 N. W. 311; Gurden *v.* Stevens, 146 Mich. 489, 109 N. W. 856; Mundal *v.* R. Co., 92 Minn. 26, 99 N. W. 273, 100 N. W. 363; Martin *v.* Corscadden, 34 Mont. 308, 86 P. 33; Schroeder *v.* Blum, 74 Neb. 60, 103 N. W. 1073; Putnam *v.* Stalker, 50 Or. 210, 91 P. 363; McDonald *v.* Schroeder, 28 Pa. Super. 128; Topolewski *v.* Co., 143 Wis. 52, 126 N. W. 554; Haas *v.* Powers, 130 Wis. 406, 110 N. W. 205.

Question for jury whether full and fair statement made and whether attorney unequivocally advised prosecution. Abingdon Mills *v.* Grogan, 167 Ala. 146, 52 S. 596.

397-28 Self serving declarations to counsel not relevant to issue of probable cause. Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320.

398-29 Mills *v.* R. Co., 113 N. Y. S. 641. *Comp.* Stewart *v.* Mulligan, 11 Ga. App. 660, 75 S. E. 991.

398-30 Charging money embezzled against accused as a debt does not negative existence of probable cause. Moneyweight S. Co. *v.* McCormick, 109 Md. 170, 72 A. 537.

Want of probable cause cannot be inferred from malice. Callahan *v.* Kelio, 170 Mo. App. 338, 156 S. W. 716.

398-31 Thurkettle *v.* Frost, 137 Mich. 115, 100 N. W. 283; Shea *v.* Co., 97 Minn. 41, 105 N. W. 552; Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78.

399-33 Gulsby *v.* R. Co., 167 Ala. 122, 52 S. 392; Blazek *v.* McCartin, 106 Minn. 461, 119 N. W. 215 (acquittal, prima facie evidence of want of cause); Weisner *v.* Hansen, 81 N. J. L. 601, 80 A. 455.

Finding of magistrate there was no probable cause, admissible. Jacobson *v.* Doll, 82 Neb. 93, 117 N. W. 124, *dist.* Obernalte *v.* Johnson, 36 Neb. 772, 55 N. W. 220 (finding of jury inadmissible).

399-35 Rogers *v.* Van Eps, 143 Wis. 396, 127 N. W. 1006. *Comp.* Nickelson *v.* Co., 39 Wash. 569, 81 P. 1059.

Discharge of plaintiff in criminal prosecution without hearing, not relevant. Smith *v.* Clark, 37 Utah 116, 106 P. 653. Discharge after hearing, prima facie evidence against probable cause. Lindsay *v.* Couch, 22 Okla. 4, 98 P. 973.

Acquittal of plaintiff, not conclusive as to falsity of charge. Moneyweight S. Co. *v.* McCormick, 109 Md. 170, 72 A. 537. Does not tend to show lack of cause. Hanowitz *v.* R. Co., 122 Minn. 241, 142 N. W. 196; Harris *v.* R. Co., 172 Mo. App. 261, 157 S. W. 893; Lindsay *v.* Couch, 22 Okla. 4, 98 P. 973; Furnish *v.* Wallace (Tex. Civ.), 157 S. W. 958 (loss of civil suit).

400-37 Abingdon Mills *v.* Grogan, 167 Ala. 146, 52 S. 596; Cramer *v.* Barmon, 136 Mo. App. 673, 118 S. W. 1179; Linitzky *v.* Gorman, 146 N. Y. S. 313; Orefice *v.* Savarese, 61 Misc. 88, 113 N. Y. S. 175; Thienes *v.* Francis (Or.), 138 P. 490; Baker *v.* Moore, 29 Pa. Super. 301; Casaldue *v.* Ins. Co., 1 P. R. Fed. 189. See Mertens *v.* Mueller, 119 Md. 525, 87 A. 501.

Malice inferred from reckless charge. Smith *v.* League, 121 App. Div. 600, 106 N. Y. S. 251. From failure to make reasonable inquiries. Linitzky *v.* Gorman, 146 N. Y. S. 313. Not required to draw inference. Linitzky *v.* Gorman, supra.

400-38 Greenlee *v.* Ealy, 145 Ia. 394, 124 N. W. 166; International H. Co. *v.* Co., 146 Ia. 172, 122 N. W. 951; Pierce *v.* Doolittle, 130 Ia. 333, 106 N. W. 751; Thomas *v.* Henderson, 125 La. 292, 51 S. 202; Moneyweight S. Co. *v.* McCormick, 109 Md. 170, 72 A. 537; McDonald *v.* Schroeder, 214 Pa. 411, 63 A. 1024; M. K. & T. R. Co. *v.* Groseclose (Tex. Civ.), 134 S. W. 736.

Inferred from want of probable cause. Jones *v.* R. Co., 29 Ky. L. R. 945, 96 S. W. 793.

401-40 Six *v.* Sikking, 158 Ill. App. 230; Stanford *v.* Co., 143 N. C. 419, 55 S. E. 815.

401-41 Wyatt *v.* Burdette, 43 Colo. 208, 95 P. 336; McElroy *v.* Co., 254 Ill. 290, 98 N. E. 527; White *v.* Co., 144 Ia. 92, 121 N. W. 1104; Nelson *v.* Co., 117 Minn. 298, 135 N. W. 808; Callahan *v.* Kelso, 170 Mo. App. 338, 156 S. W. 716; Martin *v.* Corscadden, 34 Mont. 308, 86 P. 33; Linitzky *v.* Gorman, 146 N. Y. S. 313; Smith *v.* League, 121 App. Div. 600, 106 N. Y. S. 251; Merrell *v.* Dudley, 139 N. C. 57, 51 S. E. 777; McCall *v.* Alexander, 84 S. C. 187, 65 S. E. 1021; Evans *v.* R. Co., 105 Va. 72, 53 S. E. 3.

But is not a necessary inference. Birmingham R., etc. Co. *v.* Ellis, 5 Ala. App. 525, 58 S. 796.

Want of probable cause alone does not show malice. Farmers' Assn. *v.* Stew-

art, 167 Ind. 544, 79 N. E. 490; Ton *v.* Stetson, 43 Wash. 471, 86 P. 668. See Van Meter *v.* Bass, 40 Colo. 78, 90 P. 637.

401-42 Casey *v.* Dorr, 94 Ark. 433, 127 S. W. 708; Wyatt *v.* Burdette, 43 Colo. 208, 95 P. 336; Holliday *v.* Coleman, 12 Ga. App. 779, 78 S. E. 482; Pierce *v.* Doolittle, 130 Ia. 333, 106 N. W. 751; Vorhes *v.* Buchwald, 137 Ia. 721, 112 N. W. 1105; Mascot *v.* R. Co., 216 Mass. 193, 103 N. E. 293; Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862; Bosch *v.* Miller, 136 Mo. App. 482, 118 S. W. 506; Humphries *v.* Edwards, 163 N. C. 154, 80 S. E. 165; Heide *v.* R. Co., 40 Pa. Super. 590. See Shattuck *v.* Simonds, 191 Mass. 506, 78 N. E. 122.

402-43 Miller *v.* Lai, 77 N. J. L. 135, 71 A. 63.

402-44 Miller *v.* Runkle, 137 Ia. 155, 114 N. W. 611; Moneyweight S. Co. *v.* McCormick, 109 Md. 170, 72 A. 537.

402-45 Shadden *v.* Butler (Ia.), 144 N. W. 329; Wagner *v.* Hatcher, 137 Ky. 406, 125 S. W. 1063; Lindsay *v.* Bates, 223 Mo. 294, 122 S. W. 682; Martin *v.* Corscadden, 34 Mont. 308, 86 P. 33.

Complainant's declarations to magistrate in taking out warrant and causing arrest, admissible as part of res gestae (Stanford *v.* Co., 143 N. C. 419, 55 S. E. 815. See Fetzer *v.* Burlew, 114 App. Div. 650, 99 N. Y. S. 1100); but not statement to magistrate immediately before case called he desired prosecution dismissed. Rutherford *v.* Dyer, 146 Ala. 665, 40 S. 974.

403-48 Adler *v.* Lesser, 110 N. Y. S. 196.

403-49 Cragin *v.* De Pape, 159 Fed. 691, 86 C. C. A. 559; Wyatt *v.* Burdette, 43 Colo. 208, 95 P. 336; McClain *v.* Adams, 143 Ill. App. 77; Sasse *v.* Rogers, 40 Ind. App. 197, 81 N. E. 590; Farmer *v.* Norton, 129 Ia. 88, 105 N. W. 371; Sehon *v.* Whitt, 29 Ky. L. R. 691, 92 S. W. 280; Gates *v.* Co., 122 La. 437, 47 S. 761; Thurkettle *v.* Frost, 137 Mich. 115, 100 N. W. 283; Putnam *v.* Stalker, 50 Or. 210, 91 P. 363; Baker *v.* Moore, 29 Pa. Super. 301.

Advice of counsel no protection for one who acts maliciously, where acts proved consistent with innocence of accused. Gurden *v.* Stevens, 146 Mich. 489, 109 N. W. 856.

403-51 Abingdon Mills *v.* Grogan, 175 Ala. 247, 57 S. 42; Cascarella *v.* Co., 151 Mich. 15, 114 N. W. 857; Missouri, etc. R. Co. *v.* Groseclose, 50 Tex. Civ. 525, 110 S. W. 477; Evans *v.* R. Co., 105 Va. 72, 53 S. E. 3 (defendant must show he was guided by counsel).

403-52 White *v.* Co., 144 Ia. 92, 121 N. W. 1104; Evans *v.* R. Co., 105 Va. 72, 53 S. E. 3; Hippler *v.* Quandt, 145 Wis. 221, 129 N. W. 1099.

404-53 Wyatt *v.* Burdette, 43 Colo. 208, 95 P. 336; White *v.* Co., 144 Ia. 92, 121 N. W. 1104; Moneyweight S. Co. *v.* McCormick, 109 Md. 170, 72 A. 537.

404-55 Hammar *v.* Atkins, 124 La. 897, 50 S. 787; Baldwin *v.* Co., 109 Minn. 38, 122 N. W. 460.

404-56 Florida, etc. R. Co. *v.* Groves, 55 Fla. 436, 46 S. 294.

404-57 Cook *v.* Proskey, 138 Fed. 273, 70 C. C. A. 563; Cook *v.* Bartlett, 115 App. Div. 829, 100 N. Y. S. 1032. But see Fetzer *v.* Burlew, 114 App. Div. 650, 99 N. Y. S. 1100. *Comp.* Gurden *v.* Stevens, 146 Mich. 489, 109 N. W. 856.

405-58 Casey *v.* Dorr, 94 Ark. 433, 127 S. W. 708; Waring *v.* Hudspeth, 75 Wash. 534, 135 P. 222.

405-61 See Mertens *v.* Mueller (Md.), 89 A. 613.

405-62 White *v.* Co., 144 Ia. 92, 121 N. W. 1104; Moneyweight S. Co. *v.* McCormick, 109 Md. 170, 72 A. 537 (agent may show extent and nature of claim against defendant and how latter regarded use made of the money).

Evidence for the plaintiff tending to prove that the prosecution against her was instituted for the purpose of collecting an alleged debt, and that prosecution could have been ended on the payment of a sum somewhat in excess of the amount that was claimed to be due tended to prove that the prosecution was malicious, since a prosecution with any other motive than that of bringing a guilty party to justice is malicious as a matter of law. McElroy *v.* Catholic Press Co., 254 Ill. 290, 98 N. E. 527, *cit.* Krug *v.* Ward, 77 Ill. 603.

Agent's malice not provable against principal. Little *v.* Rich, 55 Tex. Civ. 326, 118 S. W. 1077.

406-65 Spilker *v.* Abrahams, 133 App. Div. 226, 117 N. Y. S. 376.

Circumstances provoking statement admissible. Mertens *v.* Mueller (Md.), 89 A. 613.

And to show defendant's co-operation

in prosecution. Mertens *v.* Mueller (Md.), 89 A. 613.

Offer by defendant to pay money if building in question burned, irrelevant. Lindsay *v.* Bates, 223 Mo. 294, 122 S. W. 682.

408 Presumed prosecution abandoned, complaint fatally defective. Peake *v.* State Bk., 120 Minn. 455, 139 N. W. 813.

408-78 Dahlberg *v.* Grace, 178 Ill. App. 97; Keithley *v.* Stevens, 142 Ill. App. 406. *Contra,* Cobbey *v.* Co., 77 Neb. 626, 113 N. W. 224, only prima facie evidence.

408-79 McElroy *v.* Press Co., 165 Ill. App. 290; Duerr *v.* Co., 132 Ky. 228, 116 S. W. 325 (unless prosecution and conviction procured by fraud, corruption or perjured testimony; such defense not open when plea of guilty made); Hegan M. Co. *v.* Alford (Ky.), 114 S. W. 290; Schnider *v.* Montross, 158 Mich. 263, 122 N. W. 534. *Contra,* Skeffington *v.* Eylward, 97 Minn. 244, 105 N. W. 638; Francisco *v.* Schmeelk, 156 App. Div. 335, 141 N. Y. S. 402.

408-80 Schnider *v.* Montross, 158 Mich. 263, 122 N. W. 534; Skeffington *v.* Eylward, 97 Minn. 244, 105 N. W. 638; McDonald *v.* Schroeder, 214 Pa. 411, 63 A. 1024.

409-81 Miller *v.* Runkle, 137 Ia. 155, 114 N. W. 611.

Acquittal does not raise presumption of lack of probable cause. Hanowitz *v.* R. Co., 122 Minn. 241, 142 N. W. 196; Morgan *v.* Stewart, 144 N. C. 424, 57 S. E. 149.

Plaintiff's discharge not presumptive evidence of want of probable cause. Prine *v.* Mach. Co., 176 Mich. 300, 142 N. W. 377; Hanowitz *v.* R. Co., 122 Minn. 241, 142 N. W. 196.

409-83 Johnson *v.* Co., 157 Cal. 333, 107 P. 611; Lindsay *v.* West, 6 Ga. App. 284, 64 S. E. 1005; Jones *v.* R. Co., 29 Ky. L. R. 945, 96 S. W. 793; Putnam *v.* Stalker, 50 Or. 210, 91 P. 363; McKenzie *v.* Canning (Utah), 131 P. 1172 (converse); Waring *v.* Hudspeth, 75 Wash. 534, 135 P. 222 (converse). See Stanford *v.* Co., 143 N. C. 419, 55 S. E. 815.

409-84 *Contra,* Perkins *v.* Spaulding, 182 Mass. 218, 65 N. E. 72, but a circumstance. See Stanford *v.* Co., 143 N. C. 419, 55 S. E. 815.

410-86 Equitable L. A. Soc. *v.* Lester (Tex. Civ.), 110 S. W. 499.

411-88 *Contra* if dismissal result of death of prosecuting witness. Gates *v.* Co., 122 La. 437, 47 S. 761. Unexplained possession of recently stolen property justifies inference of criminal connection in acquiring it, notwithstanding acquittal on charge of larceny. Mills *v.* R. Co., 113 N. Y. S. 641.

411-89 White *v.* Co., 156 Ia. 210, 136 N. W. 121; Nelson *v.* Co., 117 Minn. 298, 135 N. W. 808. See Smith *v.* League, 121 App. Div. 600, 106 N. Y. S. 251.

No presumption of malice—it may be inferred. Redgate *v.* So. Pac. Co. (Cal. App.), 141 P. 1191.

411-90 Emerson *v.* Co., 159 Ala. 350, 49 S. 69; Chapman *v.* Nash., 89 Md. 608, 89 A. 117; Orefice *v.* Savarese, 61 Misc. 88, 113 N. Y. S. 175; Casalduc *v.* Ins. Co., 1 P. R. Fed. 189; Farrell *v.* Phillips, 140 Wis. 611, 123 N. W. 117.

411-91 Willinsky *v.* Anderson, 19 Ont. L. R. 437.

412-92 Hetu *v.* Assn., 40 Can. Sup. 128; Hawkins *v.* Collins, 5 Ala. App. 522, 59 S. 694; Booraem *v.* Co., 154 Cal. 99, 97 P. 65; Wyatt *v.* Burdette, 43 Colo. 208, 95 P. 336; Florida, etc. R. Co. *v.* Groves, 55 Fla. 436, 46 S. 294 (want of probable cause and malice must be proved); Kalaukoa *v.* Henry, 11 Haw. 430; Levinson *v.* Thomas, 174 Ill. App. 68; McElroy *v.* Co., 254 Ill. 290, 98 N. E. 527; Sasse *v.* Rogers, 40 Ind. App. 197, 81 N. E. 590; Shadden *v.* Butler (Ia.), 144 N. W. 329; Stephens *v.* Gravit, 136 Ky. 479, 124 S. W. 414; Carnes *v.* Atkins, 123 La. 26, 48 S. 572; Chapman *v.* Nash., 121 Md. 608, 89 A. 117; Mascot *v.* R. Co., 216 Mass. 193, 103 N. E. 293; Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862; March *v.* Vandiver (Mo. App.), 168 S. W. 824; Harris *v.* R. Co., 172 Mo. App. 261, 157 S. W. 893; Stephens *v.* Conley, 48 Mont. 352, 138 P. 189; Condron *v.* Carr, 156 App. Div. 658, 141 N. Y. S. 721; Nelson *v.* Co., 117 Minn. 298, 135 N. W. 808; Cox *v.* Lauritsen (Minn.), 147 N. W. 1093; Hanowitz *v.* R. Co., 122 Minn. 241, 142 N. W. 196; Hayes *v.* Hoyt, 123 N. Y. S. 357; Staton *v.* Mason, 119 App. Div. 437, 104 N. Y. S. 155; Orefice *v.* Savarese, 61 Misc. 88, 113 N. Y. S. 175; Stanford *v.* Co., 143 N. C. 419, 55 S. E. 815; Gaither *v.* Carpenter, 143 N. C. 240, 55 S. E. 625; R. Co. *v.* Co., 143 N. C. 54, 55 S. E. 422, 138 N. C. 174, 50 S. E. 571; Brown *v.* Waite, 38 Pa. Super. 216; Casalduc *v.* Ins. Co., 1 P.

R. Fed. 189; Hale *v.* Barnes (Tex. Civ.), 155 S. W. 358; McKenzie *v.* Canning (Utah), 131 P. 1172; Simmons *v.* Gardner, 46 Wash. 282, 89 P. 887; Farrell *v.* Phillips, 140 Wis. 611, 123 N. W. 117.

See McClarty *v.* Bickel, 155 Ky. 254, 159 S. W. 783; Healey *v.* Aspinwall, 195 Mass. 453, 81 N. E. 256; Crow *v.* Sims (Ohio), 102 N. E. 741; Nickelson *v.* Co., 39 Wash. 569, 81 P. 1059.

"**Where the facts are undisputed,** the court must decide as a matter of law from such facts whether the defendant had or had not probable cause. Lytton *v.* Baird, 95 Ind. 349; Pennsylvania County *v.* Weddle, 100 Ind. 138; Taylor *v.* Baltimore, etc. R. Co., 18 Ind. App. 692, 48 N. E. 1044." Henderson *v.* McGruder, 49 Ind. App. 682, 98 N. E. 137. And see Brown *v.* Selfridge, 34 App. Cas. (D. C.) 242.

412-93 Jones *v.* R. Co., 29 Ky. L. R. 945, 96 S. W. 793; Gaither *v.* Carpenter, 143 N. C. 240, 55 S. E. 625; Moore *v.* Bk., 140 N. C. 293, 52 S. E. 944.

413-96 Heide *v.* R Co, 40 Pa. Super. 590. *Contra,* Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862.

But see Waring *v.* Hudspeth, 75 Wash. 534, 135 P. 222.

Reversed judgment setting aside verdict of acquittal because, as a matter of law, the facts showed guilt, while evidentiary, is not conclusive of existence of probable cause. Platt *v.* Bonsall, 136 App. Div. 397, 120 N. Y. S. 983, declining to follow Crescent City Co. *v.* Union, 120 U. S. 141. See Burt *v.* Smith, 181 N. Y. 1, 73 N. E. 495; Schultz *v.* Cemetery, 190 N. Y. 276, 83 N. E. 41.

414-97 Hawkins *v.* Collins, 5 Ala. App. 522, 59 S. 694; Pickford *v.* Hudson, 32 App. Cas. (D. C.) 480; Levinson *v.* Thomas, 174 Ill. App. 68; Shadden *v.* Butler (Ia.), 144 N. W. 329; Stephens *v.* Gravit, 136 Ky. 479, 124 S. W. 414; Chapman *v.* Nash., 89 Md. 608, 89 A. 117; Moscot *v.* R. Co., 216 Mass. 193, 103 N. E. 293; Cox *v.* Lauritsen (Minn.), 147 N. W. 1093; March *v.* Vandiver (Mo. App.), 168 S. W. 824; Harris *v.* R. Co., 172 Mo. App. 261, 157 S. W. 893; Stephens *v.* Conley, 48 Mont. 352, 138 P. 189; S. *v.* Coats (N. M.), 137 P. 597; Schultz *v.* Cemetery, 190 N. Y. 276, 83 N. E. 41; Linitzky *v.* Gorman, 146 N. Y. S. 313; Galley *v.* Brennan, 156 App. Div. 443, 141 N. Y. S. 991; Orefice *v.* Savarese, 61 Misc. 88, 113 N. Y. S. 175; Hayes *v.* Hoyt, 123 N. Y. S. 359; Maher *v.* Potter, 112 N. Y. S. 102; Berkowich *v.* Kommel, 107 N. Y. S. 119; Casalduc *v.* Ins. Co., 1 P. R. Fed. 189; Hale *v.* Barnes (Tex. Civ.), 155 S. W. 358; So. R. Co. *v.* Mosby, 112 Va. 169, 70 S. E. 517; Anderson *v.* L. Co., 71 Wash. 155, 127 P. 1108.

See McClarty *v.* Bickel, 155 Ky. 254, 159 S. W. 783; Crow *v.* Sims (Ohio), 102 N. E. 741.

414-98 Carnes *v.* Atkins, 123 La. 26, 48 S. 572.

415-2 Donati *v.* Righetti, 9 Cal. App. 45, 97 P. 1128; Chapman *v.* Nash., 121 Md. 608, 89 A. 117; Moscot *v.* R. Co., 216 Mass. 193, 103 N. E. 293; Bartlett *v.* Jenkins, 150 Mich. 682, 114 N. W. 679; Harris *v.* R. Co., 172 Mo. App. 261, 157 S. W. 893; Berkowich *v.* Kommel, 107 N. Y. S. 119; Halberstadt *v.* Ins. Co., 125 App. Div. 830, 110 N. Y. S. 188 (dismissal because accused became fugitive from justice for period rendering prosecution impossible, not sufficient); Orefice *v.* Savarese, 61 Misc. 88, 113 N. Y. S. 175; Hoskins *v.* Co., 219 Pa. 373, 68 A. 843; Evans *v.* Co., 105 Va. 72, 53 S. E. 3; Anderson *v.* L. Co., 71 Wash. 161, 127 P. 1108; Farrell *v* Phillips, 140 Wis. 611, 123 N. W. 117.

See Crews *v.* Mayo, 165 Cal. 493, 132 P. 1032.

Mode of termination may be either by acquittal, dismissal or refusal of prosecutor to proceed; but termination brought about by fraud of accused, or compromise with accuser or any act or procurement on his part is not sufficient. Halberstadt *v.* Ins. Co., 125 App. Div. 830, 110 N. Y. S. 188.

415-4 Emerson *v.* Co., 159 Ala. 350, 49 S. 69 (statements made by defendant's superintendent to attorney prior to arrest); Rutherford *v.* Dyer, 146 Ala. 665, 40 S. 974; Davis *v.* McMillan, 142 Mich. 391, 105 N. W. 862; Stephens *v.* Conley, 48 Mont. 352, 138 P. 189; Moore *v.* Bk., 140 N. C. 293, 52 S. E. 944.

Under general issue, defendant may prove that he did not instigate prosecution or that prosecution has not yet terminated. Stephens *v.* Conley, 48 Mont. 352, 138 P. 189.

415-5 Stephens *v.* Conley, 48 Mont. 352, 138 P. 189; Hackler *v.* Miller, 79 Neb. 209, 114 N. W. 274.

416-7 Shannon *v.* Simms, 146 Ala. 673, 40 S. 574; Penney *v.* Johnston, 142

Ill. App. 634 (such disclosure as would have been made by reasonable and prudent person); Stephens *v.* Conley, 48 Mont. 352, 138 P. 189; Schroeder *v.* Blum, 74 Neb. 60, 103 N. W. 1073.

418-20 Grimes *v.* Greenblatt, 47 Colo. 495, 107 P. 1111; Holtman *v.* Bullock, 154 Ky. 634, 157 S. W. 933 (record different from that in petition excluded). See vol. 7, p. 852, n. 89, and supplement thereto.

418-21 Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78; McCoy *v.* Kalbach, 242 Pa. 123, 88 A. 879.

Bill of exceptions and opinion of supreme court reversing judgment, inadmissible. McElroy *v.* Press Co., 165 Ill. App. 290.

Record in civil suit admissible in favor of defendant. Smith *v.* Clark, 37 Utah 116, 106 P. 653.

Finding in original action nothing was due plaintiff supports inference of want of probable cause and that plaintiff was moved by malice. Peters *v.* Snavely A., 144 Ia. 147, 120 N. W. 1048.

419-25 Thompkins *v.* R. Co., 211 Fed. 391 (C. C. A.); Brown *v.* Alexander, 7 Ala. App. 452, 60 S. 975; Rutherford *v.* Dyer, 146 Ala. 665, 40 S. 974; Smith *v.* Koziolek, 51 Pa. Super. 211.

419-26 Thompkins *v.* R. Co., 211 Fed. 391 (C. C. A.); Brown *v.* Alexander, 7 Ala. App. 452, 60 S. 975; Rutherford *v.* Dyer, supra.

419-27 Brown *v.* Alexander, 7 Ala. App. 452, 60 S. 975.

419-28 **Unsigned by magistrate**, inadmissible. Grissom *v.* Lawler (Ala. App.), 65 S. 705.

420-34 **Motives of judge** in dismissing action inadmissible. Stewart Dry Goods Co. *v.* Arnold, 158 Ky. 241, 164 S. W. 785.

421-37 Brown *v.* Alexander, 7 Ala. App. 452, 60 S. 975; Lamprey *v.* Hood, 73 N. H. 384, 62 A. 380.

Also grand jury docket. — Abingdon Mills *v.* Grogan, 167 Ala. 146, 52 S. 596.

Transcript of justice's proceedings is competent, where it shows prosecution dismissed by state, though it does not show charge judicially investigated and prosecution ended. Rutherford *v.* Dyer, 146 Ala. 665, 40 S. 974.

Actual possession of dwelling injured sufficient; right of possession cannot be questioned. Perry *v.* S., 149 Ala. 40, 43 S. 18.

421-38 Martin *v.* Corseadden, 34 Mont. 308, 86 P. 33 (recital in docket there were no grounds for complaint and judgment entered for costs, inadmissible); Gombert *v.* R. Co., 195 N. Y. 273, 88 N. E. 382.

Grand jury docket showing termination of investigation without indictment of plaintiff, admissible. Shannon *v.* Simms, 146 Ala. 673, 40 S. 574.

421-39 Thompkins *v.* R. Co., 211 Fed. 391 (C. C. A.); So. R. Co. *v.* Barfield, 139 Ga. 460, 77 S. E. 637.

422-42 See Gentzen *v.* H. Co., 173 Ill. App. 127; Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78.

Illegality of complaint or defects in judgment in alleged malicious action cannot be used to defeat action for damages. Hackler *v.* Miller, 79 Neb. 209, 114 N. W. 274.

422-48 Certified copy of publication containing rules of state board of health admissible to show a particular rule, and plaintiff's notice and knowledge of it. Pierce *v.* Doolittle, 130 Ia. 333, 106 N. W. 751.

423-51 Provident Sav. Soc. *v.* Johnson, 30 Ky. L. R. 1031, 99 S. W. 1159.

Recognizance of plaintiff admissible. Smith *v.* Brown, 119 Md. 236, 86 A. 609.

423-52 Material inquiry whether an agent of defendant acted as such or as officer. Abingdon Mills *v.* Grogan, 175 Ala. 247, 57 S. 42.

Erratum. — The word "plaintiff" in text should be read "defendant."

424-59 Where good faith of justice is questioned in issuing warrant he may testify in relation thereto though his opinion of plaintiff's guilt is thereby disclosed. Gurden *v.* Stevens, 146 Mich. 489, 109 N. W. 856. See Aldrich *v.* Tele. Co., 62 Wash. 173, 113 P. 264.

425-67 Part taken by president of defendant in the action may be shown. Tutwiler C. & I. Co. *v.* Tuvin, 158 Ala. 657, 48 S. 79.

426-68 Condition of jail in which plaintiff confined and sufferings there, shown. Grimes *v.* Greenblatt, 47 Colo. 495, 107 P. 1111.

426-70 Shanon *v.* Simms, 146 Ala. 673, 40 S. 574; Stewart *v.* Blair, 171 Ala. 147, 54 S. 206; Cramer *v.* Barmon, 136 Mo. App. 673, 118 S. W. 1179.

Size of plaintiff's family admissible to show character and extent of his mental suffering. Fleckinger *v.* Taffee, 149 Mich. 678, 113 N. W. 311.

Vexation, not element of damage. Beck-

ham *v.* Collins, 54 Tex. Civ. 241, 117 S. W. 431.

427-72 Grimes *v.* Greenblatt, 47 Colo. 495, 107 P. 1111; International H. Co. *v.* Co., 146 Ia. 172, 122 N. W. 951; Mertens *v.* Mueller (Md.), 89 A. 613. *Contra* as to fees for prosecuting action for malicious prosecution. Beckham *v.* Collins, 54 Tex. Civ. 241, 117 S. W. 431.

Contract for fees may not be proved; only such sum as is reasonable can be recovered. Tutwiler C. & I. Co. *v.* Tuvin, 158 Ala. 657, 48 S. 79.

428-78 Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78.

428-79 Inability to work cannot be proved unless special damages alleged. Moneyweight S. Co. *v.* McCormick, 109 Md. 170, 72 A. 537.

429-80 Martin *v.* Corscadden, 34 Mont. 308, 86 P. 33.

429-81 *Contra*, Penney *v.* Johnston, 142 Ill. App. 634, information of other alleged thefts obtained by defendant may also be proved.

429-86 Mertens *v.* Mueller, 119 Md. 525, 87 A. 501; Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78; Singer Mfg. Co. *v.* Bryant, 105 Va. 403, 54 S. E. 320; McIntosh *v.* Wales (Wyo.), 134 P. 274. But see Singer, etc. Co. *v.* Dyer, 156 Ky. 156, 160 S. W. 917.

430-87 Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78; Faroux *v.* Cornwell, 40 Tex. Civ. 529, 90 S. W. 537.

MAPS

432-1 Van Deventer *v.* Lott, 172 Fed. 574; City of Maysville *v.* Truex, 235 Mo. 619, 139 S. W. 390; Lally *v.* R. Co., 61 Misc. 199, 113 N. Y. S. 177.

Presumed correct. Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979.

May be excluded when offered merely to illustrate situation in question Brown *v.* R. Co., 76 N. J. L. 795, 71 A. 271.

432-2 Authenticity presumed when made pursuant to statute and by court's order. Farmers' Co-op. D. Co. *v.* Dist., 16 Ida. 525, 102 P. 481.

432-3 Richards *v.* U. S., 175 Fed. 911, 99 C. C. A. 401; Morcom *v.* Baiersky, 16 Cal. App. 480, 117 P. 560; Fulton L., etc. Co. *v.* S., 62 Misc. 189, 116 N. Y. S. 1000; Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979; Sullivan *v.* Solis, 52 Tex. Civ. 464, 114 S. W. 456.

432-4 Stewart *v.* U. S., 211 Fed. 41, 127 C. C. A. 477.

433-9 Morse *v.* Whitcomb, 54 Or. 412, 102 P. 788.

433-10 Competent to aid defective descriptions in deeds. Houghton *v.* Bk., 157 Cal. 289, 107 P. 113.

433-11 Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979; Dickinson *v.* Smith, 134 Wis. 6, 114 N. W. 133.

434-14 Thrasher *v.* Royster (Ala.), 65 S. 796; Amee *v.* R. Co., 212 Mass. 421, 99 N. E. 168; In re Central R. Co. (N. J.), 65 A. 905; Hagaman *v.* Bernhardt, 162 N. C. 381, 78 S. E. 209; Fulwood *v.* Fulwood, 161 N. C. 601, 77 S. E. 763; Manila *v.* del Rosario, 5 Phil. Isl. 227 (though taken from city archives).

Maker of map may not complain of its introduction by other party; nor is it to be excluded because used in futile effort to effect a compromise of the dispute. If such map erroneously admitted, error cured by view of premises by jury. Illinois C. R. Co. *v.* Nelson (Ky.), 127 S. W. 520.

Burden on party offering map to show its correctness; conclusions of witness not sufficient. Hamilton *v.* Trust, 39 Mont. 269, 102 P. 335.

434-15 Murphy *v.* R. Co., 135 Ga. 194, 69 S. E. 117; P. *v.* R. Co., 239 Ill. 42, 87 N. E. 946.

Sufficiency for court.—Strasser *v.* Stabeck, 112 Minn. 90, 127 N. W. 384.

435-17 Birmingham, etc. Co. *v.* Long, 5 Ala. App. 510, 59 S. 382; Dudley *v.* Stansberry, 5 Ala. App. 491, 59 S. 379; Republic I. & S. Co. *v.* White, 163 Ala. 187, 50 S. 141; Foley *v.* P. Co., 165 Cal. 103, 130 P. 1183; Atlanta, etc. R. Co. *v.* R. Co., 125 Ga. 529, 54 S. E. 736 (plat admissible when accompanied by affidavit by surveyor that it is correct); Reinke *v.* Sanitary Dist., 260 Ill. 380, 103 N. E. 236; Watson *v.* Elec. Co. (Ia.), 144 N. W. 350; Britt *v.* R. Co., 148 N. C. 37, 61 S. E. 601; Reynolds *v.* S. (Tex. Cr.), 160 S. W. 362; Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979. See Peru *v.* Bartels, 214 Ill. 515, 73 N. E. 755 (plat inadmissible where maker testifies it is incorrect); Austin *v.* Whitcher, 135 Ia. 733, 110 N. W. 910; Camden *v.* City, 119 App. Div. 84, 103 N. Y. S. 971; Seabrook *v.* Co., 54 Or. 172, 102 P. 175; Nat. B. Co. *v.* Block (Tex. Civ.), 164 S. W. 393.

Maps shown to be accurate admissible to illustrate testimony though not

made by persons who made surveys upon the ground. Portland & S. R. Co. *v.* Ladd, 47 Wash. 88, 91 P. 573.

Map made from notes of another, which witness did not know to be correct, inadmissible. Hays *v.* Ison, 24 Ky. L. R. 1947, 72 S. W. 733.

Statute giving party in ejectment right to have survey made and to recover costs therefor does not modify rule giving litigant right to introduce maps of the premises with testimony of surveys explanatory thereof. Lenoir *v.* Bk., 87 Miss. 559, 40 S. 5.

435-18 In re Ring, 104 Me. 544, 72 A. 548 (though not shown to have been of stated age); Dickinson *v.* Smith, 134 Wis. 6, 114 N. W. 133.

Map fifty years old and produced from property custody, competent to prove boundary. Cravath *v.* Baylis, 113 App. Div. 666, 99 N. Y. S. 973.

Evidence of age.—Date on map not sufficient evidence of age, without a showing as to who placed it there. Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918.

435-19 Van Deventer *v.* Lott, 172 Fed. 574; Barker *v.* Electric Co., 173 Ala. 28, 55 S. 364.

436-20 Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918; Davis *v.* Clinton, 25 Ky. L. R. 2021, 79 S. W. 259.

Ancient map proves itself when it comes from custody which court deems proper and is free from indication of fraud or invalidity. In re Webster, 106 App. Div. 360, 94 N. Y. S. 1050.

Maps found in volumes in possession of a historical society, purporting to be of a survey made over 100 years ago and referred to in old deeds, admissible as ancient documents. Burns *v.* U. S., 160 Fed. 631, 87 C. C. A. 533.

436-21 See Pullman *v.* Houston (Tex. Civ.), 125 S. W. 69.

436-22 See Brown *v.* Metcalf, 215 Mass. 289, 102 N. E. 413; Bd. of Trustees *v.* R. Co. (N. J.), 89 A. 773.

436-23 Tores *v.* S. (Tex. Cr.), 166 S. W. 523.

Exhibiting map to witnesses in presence of jury to lay foundation for its introduction, not prejudicial. Richards *v.* U. S., 99 C. C. A. 401, 175 Fed. 911.

437-24 Hisler *v.* S., 52 Fla. 30, 42 S. 692; S. *v.* De Hart, 38 Mont. 211, 99 P. 438; S. *v.* Smith, 68 N. J. L. 609, 54 A. 411; Morse *v.* Freeman, 157 N. C. 385, 72 S. E. 1056; Britt *v.* R. Co., 148 N. C. 37, 61 S. E. 601; Spokane *v.* Patterson, 46 Wash. 93, 89 P. 402.

Correctness should be determined by court before admitting it. West *v.* S., 53 Fla. 77, 43 S. 445.

To illustrate testimony and make it intelligible. Person *v.* Roberts, 159 N. C. 168, 74 S. E. 322.

MARRIAGE

License presumed, 467-72; *Time of marriage,* 481-13; *Ratification of slave marriage,* 481-15.

441-1 Darling *v.* Dent, 82 Ark. 76, 100 S. W. 747; Lynch *v.* Knoop, 118 La. 611, 43 S. 252; Duff *v.* Duff, 156 Mo. App. 247, 137 S. W. 909; Pooler *v.* Smith, 73 S. C. 102, 52 S. E. 967; Ruedas *v.* O'Shea (Tex. Civ.), 127 S. W. 891; Hilton *v.* Snyder, 37 Utah 384, 108 P. 698. But see Dudley *v.* R. Co., 167 Mo. App. 647, 150 S. W. 737. *Comp.* vol. 4, p. 579, n. 16; vol. 9, p. 912, and supplement.

Presumed legal as between parties until contrary shown. Ricard *v.* Ricard, 143 Ia. 182, 121 N. W. 525.

Establishment of common law marriage requires stringent proof. Nelson *v.* Jones, 245 Mo. 579, 151 S. W. 80.

441-2 Travers *v.* Reinhardt, 205 U. S. 423. *Comp.* Hearne *v.* S., 50 Tex. Cr. 431, 97 S. W. 1050, though there be no ceremony, if parties agree to live as husband and wife and do so live professedly, proof of these facts beyond reasonable doubt is sufficient in prosecution for bigamy.

441-3 Tison *v.* S., 125 Ga. 7, 53 S. E. 809.

441-4 Snowman *v.* Mason, 99 Me. 490, 59 A. 1019. See vol. 3, p. 782, n. 1, and supplement thereto.

In criminal cases marriage should be proved by person solemnizing, by persons present and who can identify parties, by production and proof of record and identity, or other mode equally direct and clear. Whittit *v.* Miller, 1 Haw. 139.

442-6 In re Thompson, 91 L. T. (Eng.) 680; Travers *v.* Reinhardt, 205 U. S. 423; In re Hartman's Est., 157 Cal. 206, 107 P. 105; Caldwell *v.* Williams (Ky.), 118 S. W. 932; Eames *v.* Woodson, 120 La. 1031, 46 S. 13; Plattner *v.* Plattner, 116 Mo. App. 405, 91 S. W. 457; Forbes *v.* Burgess, 158 N. C. 131, 73 S. E. 792; Fender *v.* Segro (Okla.), 137 P. 103; Locust *v.* Caruthers, 23 Okla. 373, 100 P. 520; Ollschlager's

Est. *v.* Widmer, 55 Or. 145, 105 P. 717; In re Hines, 10 Pa. Super. 124; C. *v.* Haylow, 17 Pa. Super. 541; In re Janney, 12 Pa. C. C. 550; In re Thewlis, 217 Pa. 307, 66 A. 519; Llamos *v.* Nairn, 4 P. R. Fed. 75; Jordan *v.* Johnson (Tex. Civ.), 155 S. W. 1194; Weatherall *v.* Weatherall, 56 Wash. 344, 105 P. 822; Nelson *v.* Carlson, 48 Wash. 651, 94 P. 477.

See Pourier *v.* McKinzie, 147 Fed. 287; Klipfel *v.* Klipfel, 41 Colo. 40, 92 P. 26; Pegg *v.* Pegg, 138 Ia. 572, 115 N. W. 1027 (agreement to be husband and wife, followed by cohabitation, presumptively establishes common-law marriage); Farley *v.* Lumb. Co., 133 La. 497, 63 S. 122; In re Eichler, 146 N. Y. S. 846; Cramsey *v.* Sterling, 111 App. Div. 568, 97 N. Y. S. 1082; Suter *v.* Suter, 68 W. Va. 690, 70 S. E. 705.

Persons deporting themselves as husband and wife presumed married. In re Elliott's Est., 165 Cal. 339, 132 P. 439.

443-7 Sorensen *v.* Sorensen (Neb.), 103 N. W. 455. See Ollschlager's Est. *v.* Widmer, 55 Or. 145, 105 P. 717.

443-8 Murchison *v.* Green, 128 Ga. 339, 57 S. E. 709; Plattner *v.* Plattner, 116 Mo. App. 405, 91 S. W. 457; Locust *v.* Caruthers, 23 Okla. 373, 100 P. 520.

444-9 Sparks *v.* Ross, 74 N. J. Eq. 621, 70 A. 679 (where legitimacy involved, presumption powerful); Umbenbower *v.* Labus, 85 O. St. 238, 97 N. E. 832; In re Sloan's Est., 50 Wash. 86, 96 P. 684.

No presumption in certain cases.—In re Rossignot's Will, 112 N. Y. S. 353.

444-10 Thomas *v.* Thomas, 53 Wash. 297, 101 P. 865.

444-13 S. *v.* Wilson, 5 Penne. (Del.) 77, 62 A. 227.

445-14 Osborne *v.* McDonald, 159 Fed. 791; Smith *v.* Fuller (Ia.), 108 N. W. 765, 138 Ia. 91, 115 N. W. 912, 16 L. R. A. (N. S) 98; Moore *v.* Flack, 77 Neb. 52, 108 N. W. 143; Bey *v.* Bey (N. J.), 90 A. 684; In re Callery's Est., 226 Pa. 469, 75 A. 672; In re Green, 5 Pa. C. C. 605; Muhr's Est., 17 Pa. Dist. 917; Weatherall *v.* Weatherall, 63 Wash. 526, 115 P. 1078.

Cohabitation must be regular and constant to raise presumption of marriage. Fender *v.* Segro (Okla.), 137 P. 103; In re Patterson's Est., 237 Pa. 24, 85 A. 75.

Living together as husband and wife for years creates presumption. Coachman *v.* Sims, 36 Okla. 536, 129 P. 845. See vol. 2, p. 734, n. 2, and supplement thereto.

445-15 Osborne *v.* McDonald, 159 Fed. 791.

446-16 Pegg *v.* Pegg, 138 Ia. 572, 115 N. W. 1027; Forbes *v.* Burgess, 158 N. C. 131, 73 S. E. 792; In re Patterson's Est., 237 Pa. 24, 85 A. 75; Weidenhoft *v.* Primm, 16 Wyo. 340, 94 P. 453.

446-17 Shattuck *v.* Shattuck's Est., 118 Minn. 60, 136 N. W. 409.

447-18 Sparks *v.* Ross, 72 N. J. Eq. 762, 65 A. 977; In re Stanton, 123 N. Y. S. 458.

447-19 Klipfel *v.* Klipfel, 41 Colo. 40, 92 P. 26 (circumstances from which marriage be inferred in absence of contrary evidence); Penney *v.* Co., 212 Mo. 309, 111 S. W. 79; Bey *v.* Bey (N. J.), 90 A. 684; Coachman *v.* Sims, 36 Okla. 536, 129 P. 845; Weatherall *v.* Weatherall, 56 Wash. 344, 105 P. 822. But see Smith *v.* Bk., 115 Tenn. 12, 89 S. W. 392 (where persons lived as husband and wife more than twenty-five years, deceased, if living, would be estopped from denying marriage, and in proceedings by woman to enforce marital rights, marriage presumed as against administrator); Nelson *v.* Carlson, 48 Wash. 651, 94 P. 477.

447-20 Colored Knights *v.* Tucker, 92 Miss. 501, 46 S. 51.

448-22 Wallace's Est., 40 Pa. Super. 595. See In re Rossignot's Will, 112 N. Y. S. 353. *Comp.* Smith *v.* Fuller (Ia.), 108 N. W. 765, where evidence almost conclusively showed common-law marriage, fact both parties married again without divorce, wife after absence of husband over seven years, not conclusive against common-law marriage. See Smith *v.* Fuller, 138 Ia. 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98.

448-24 Klipfel *v.* Klipfel, 41 Colo. 40, 92 P. 26.

448-25 If prior marriage shown it is competent to show both parties to it are alive; place in which they have since resided and that no divorce obtained by either of them. Colored Knights *v.* Tucker, 92 Miss. 501, 46 S. 51.

448-26 Bowman *v.* Little, 101 Md. 273, 61 A. 223, 656. And see supp. opinion, 61 A. 1084.

Inconclusive evidence of former marriage does not overcome presumption

arising from cohabitation and reputation. In re Seibert, 1 Pa. C. C. 229.

450-28 Drawdy *v.* Hesters, 130 Ga. 161, 60 S. E. 451; In re Imboden, 111 Mo. App. 220, 86 S. W. 263; In re Eichler, 146 N. Y. S. 846; Spencer *v.* Spencer, 84 Misc. 264, 147 N. Y. S. 111; Bell *v.* Clarke, 45 Misc. 272, 92 N. Y. S. 163; Weidenhoft *v.* Primm, 16 Wyo. 340, 94 P. 453. See Bey *v.* Bey (N. J.), 90 A. 684; In re Patterson's Est., 237 Pa. 24, 85 A. 75.

Disqualification of one of the parties does not affect presumption. Dietrich *v.* Dietrich, 128 App. Div. 564, 112 N. Y. S. 968.

Slight circumstances will show such change and raise presumption of marriage. Edelstein *v.* Brown, 35 Tex. Civ. 625, 95 S. W. 1027. But see Klipfel *v.* Klipfel, 41 Colo. 40, 92 P. 26. *Contra,* Darling *v.* Dent, 82 Ark. 76, 100 S. W. 747, not presumed relation continued illicit; matter is for proof.

450-31 Presumption of marriage very strong. Bruns *v.* Cope (Ind.), 105 N. E. 471; In re Grande's Est., 80 Misc. 450, 141 N. Y. S. 535; In re Spink's Est., 62 Misc. 158, 116 N. Y. S. 267.

450-32 O'Neill *v.* Davis, 88 Ark. 196, 113 S. W. 1027; Compton *v.* Benham, 44 Ind. App. 51, 85 N. E. 365. *Contra* in case of defacto marriage. Ollschlager's Est. *v.* Widmer, 55 Or. 145, 105 P. 717, statute.

Burden on party who seeks to show change in the relation. Drawdy *v.* Hesters, 130 Ga. 161, 60 S. E. 451; Bey *v.* Bey (N. J.), 90 A. 684.

Circumstantial evidence to prove a change must be very strong, positive and convincing. In re Eichler, 146 N. Y. S. 846.

451-33 Prince *v.* Edwards, 175 Ala. 532, 57 S. 714; Drawdy *v.* Hesters, 130 Ga. 161, 60 S. E. 451; Mick *v.* Mart (N. J. Eq.), 65 A. 851; In re Spink's Est., 62 Misc. 158, 116 N. Y. S. 267; In re Rossignot's Will, 112 N. Y. S. 353.

452-35 Compton *v.* Benham, 44 Ind. App. 51, 85 N. E. 365 (presumption much stronger against parties in such case); Mick *v.* Hart (N. J. Eq.), 65 A. 851; Clark *v.* Barney, 24 Okla. 455, 103 P. 598; Wertzel *v.* Lodge, 11 Pa. C. C. 269; In re Bergdoll, 20 Pa. C. C. 577.

Actual marriage must be shown. Hunt *v.* Cleveland, 6 Pa. C. C. 592.

453-37 Killackey *v.* Killackey, 156 Mich. 127, 120 N. W. 680 (nothing more appearing than previous marriage); Bechtel *v.* Barton, 147 Mich. 318, 110 N. W. 935; In re Terwilliger's Est., 63 Misc. 479, 118 N. Y. S. 424; In re Thewlis, 217 Pa. 307, 66 A. 519; Glens Falls Ins. Co. *v.* Walker (Tex. Civ.), 166 S. W. 122. See Geiger *v.* Ryan, 123 App. Div. 722, 108 N. Y. S. 13.

Statute providing cohabitation subsequent to death of former spouse makes marriage valid, leaves no room for presumption of continuance of meretricious relation. Smith *v.* Fuller (Ia.), 108 N. W. 765, 138 Ia. 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98. See Turner *v.* Turner, 189 Mass. 373, 75 N. E. 612.

454-38 See Compton *v.* Benham, 44 Ind. App. 51, 85 N. E. 365.

455-42 Sy Joe Lieng *v.* Sy Quia, 228 U. S. 335, 33 Sup. Ct. 514, 57 L. ed. 862; Murchison *v.* Green, 128 Ga. 339, 57 S. E. 709; Lando *v.* Lando, 112 Minn. 257, 127 N. W. 1125; Sullivan *v.* Grand Lodge, 97 Miss. 218, 52 S. 360; Sparks *v.* Ross, 79 N. J. Eq. 99, 80 A. 932; Ollschlager's Est. *v.* Widmer, 55 Or. 145, 105 P. 717; Gamble *v.* Rucker, 124 Tenn. 415, 137 S. W. 499; Adams *v.* Cameron Co. (Tex. Civ.), 161 S. W. 417; Clayton *v.* Haywood (Tex. Civ.), 133 S. W. 1082.

See Adams *v.* Scott, 93 Neb. 537, 141 N. W. 148; Hale *v.* Hale, 40 Okla. 101, 135 P. 1143.

"We know of no public policy which will warrant a court in annulling a marriage between competent parties if there be any evidence to sustain it, and especially so where it appears that the parties have consummated the marriage, a child has been born, and the offending party has been openly acknowledge as a spouse." Pierce *v.* Pierce, 58 Wash. 622, 109 P. 45.

After proof of ceremonial marriage and cohabitation, powerful presumption of legality arises. Sparks *v.* Ross, 72 N. J. Eq. 762, 65 A. 977.

456-43 Murchison *v.* Green, 128 Ga. 339, 57 S. E. 709; Winter *v.* Dibble, 251 Ill. 200, 95 N. E. 1093; C. *v.* McKenna, 17 Pa. Dist. 586; Wingo *v.* Rudder (Tex. Civ.), 120 S. W. 1073.

456-44 Weatherall *v.* Weatherall, 56 Wash. 344, 105 P. 822; In re Sloan's Est., 50 Wash. 86, 96 P. 684.

457-45 Reifschneider *v.* Reifschneider, 241 Ill. 92, 89 N. E. 255; In re Sloan's Est., 50 Wash. 86, 96 P. 684.

458-46 Wingo *v.* Rudder (Tex. Civ.), 120 S. W. 1073.

458-47 Non-production of license after lapse of long time does not rebut presumption in favor of legality of marriage. Ollschlager's Est. *v.* Widmer, 55 Or. 145, 105 P. 717.

458-49 Goset *v.* Goset (Ark.), 164 S. W. 759; Murchison *v.* Green, 128 Ga. 339, 57 S. E. 709 (illegality must be shown by clear, distinct, positive and satisfactory proof); Eames *v.* Woodson, 120 La. 1031, 46 S. 13; Turner *v.* Williams, 202 Mass. 500, 89 N. E. 110; Sullivan *v.* Grand Lodge, 97 Miss. 218, 52 S. 360; Adams *v.* Scott, 93 Neb. 537, 141 N. W. 148; Sparks *v.* Ross, 72 N. J. Eq. 762, 65 A. 977; Lau *v.* Lau, 140 N. Y. S. 310; Haile *v.* Hale, 40 Okla. 101, 135 P. 1143; Gamble *v.* Rucker, 124 Tenn. 415, 137 S. W. 499; Adams *v.* Cameron & Co. (Tex. Civ.), 161 S. W. 417; Potter *v.* Potter, 45 Wash. 401, 88 P. 625.

459-50 Winter *v.* Dibble, 251 Ill. 200, 95 N. E. 1093; In re Thewlis, 217 Pa. 307, 66 A. 519.

459-51 Stoutenborough *v.* Rammel, 123 Ill. App. 487; Kentucky S. Co. *v.* Page (Ky.), 125 S. W. 170; In re Wile, 6 Pa. Super. 435; Hilliard *v.* Ins. Co., 137 Wis. 208, 117 N. W. 999. See vol. 1, p. 626, n. 11, et seq.; vol. 9, p. 912, n. 34, and supplement thereto.

459-52 See Sparks *v.* Ross, 75 N. J. Eq. 550, 73 A. 241; In re Sloan's Est., 50 Wash. 86, 96 P. 684. See vol. 2, p. 418, n. 15, and supplement thereto.

Presumption of innocence stronger. In re Stanton, 123 N. Y. S. 458.

Presumption of innocence in favor of remarried spouse does not exist if evidence received; question is of fact. Turner *v.* Williams, 202 Mass. 500, 89 N. E. 110.

Last marriage is presumptively valid and necessitates proof former not dissolved by death or divorce. In re Colton, 129 Ia. 542, 105 N. W. 1008. But proof of second marriage does not raise presumption of illegality of first. Hallums *v.* Hallums, 74 S. C. 407, 54 S. E. 613. But see Resnick *v.* Resnick, 126 Ill. App. 132; Bowman *v.* Little, 101 Md. 273, 61 A. 223, 1084; In re Thewlis, 217 Pa. 307, 66 A. 519.

460-53 Goset *v.* Goset (Ark.), 164 S. W. 759; Murchison *v.* Green, 128 Ga. 339, 57 S. E. 709; Smith *v.* Fuller (Ia.), 108 N. W. 765, 138 Ia. 91, 115 N. W. 912, 16 L. R. A. (N. S) 98; Taylor *v.* Garrett, 101 Miss. 660, 57 S. 658; Gilroy *v.* Brady, 195 Mo. 205, 93 S. W. 279; In re McCausland, 213 Pa. 189, 62 A. 780; C. *v.* McKenna, 17 Pa. Dist. 586. *Contra,* Dietrich *v.* Dietrich, 128 App. Div. 564, 112 N. Y. S. 968.

463-56 Goset *v.* Goset (Ark.), 164 S. W. 759; Town of Roxbury *v.* Town, 85 Conn. 196, 82 A. 193; Alexander *v.* Alexander, 36 App. Cas. (D. C.) 78; Lyon *v.* Lash, 79 Kan. 342, 99 P. 598 (presumption same where former spouse dead); Colored Knights *v.* Tucker, 92 Miss. 501, 46 S. 51; Nelson *v.* Jones, 245 Mo. 579, 151 S. W. 80; Maier *v.* Brock, 222 Mo. 74, 120 S. W. 1167; In re Grande's Est., 80 Misc. 450, 141 N. Y. S. 535; Coachman *v.* Sims, 36 Okla. 536, 129 P. 845; In re Thewlis, 217 Pa. 307, 66 A. 519. But see In re Colton, 129 Ia. 542, 105 N. W. 1008 (it must first be shown there were grounds of divorce), *foll.* Ellis *v.* Ellis, 58 Ia. 720, 13 N. W. 65; Hallums *v.* Hallums, 74 S. C. 407, 54 S. E. 613; Hammond *v.* Hammond, 43 Tex. Civ. 284, 94 S. W. 1067 (no legal presumption of divorce in such case).

The further presumption that either of the parties presumed to be divorced was guilty of wrong will not be indulged. Murray *v.* Scully (Mo.), 167 S. W. 1017.

When such presumption is not indulged. Forbes *v.* Burgess, 158 N. C. 131, 73 S. E. 792.

464-57 In re Wile, 6 Pa. Super. 435; In re Thewlis, 217 Pa. 307, 66 A. 519. See Sparks *v.* Ross, 75 N. J. Eq. 550, 73 A. 241.

464-58 Colored Knights *v.* Tucker, 92 Miss. 501, 46 S. 51. *Contra,* Maier *v.* Brock, 222 Mo. 74, 120 S. W. 1167.

464-59 P. *v.* Portman, 159 App. Div. 702, 145 N. Y. S. 189; Forbes *v.* Burgess, 158 N. C. 131, 73 S. E. 792.

Most cogent and satisfactory evidence required to overcome presumptions in favor of marriage. Ollschlager's Est. *v.* Widmer, 55 Or. 145, 105 P. 717.

464-60 Berger *v.* Kirby, 105 Tex. 611, 153 S. W. 1130. *Comp.* Lindsey *v.* Smith, 131 Ky. 176, 114 S. W. 779.

464-61 Hawaai *v.* Kuhia, 10 Haw. 440; Watson *v.* Lawrence, 134 La. 194, 63 S. 873; S. *v.* Hillman, 142 Mo. App. 510, 127 S. W. 102; S. *v.* Thompson, 31 Utah 228, 87 P. 709.

465-62 Smith *v.* Fuller, 138 Ia. 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98; Lindsey *v.* Smith, 131 Ky. 176, 114 S. W. 779; Watson *v* Lawrence, 134 La.

194, 63 S. 873 (*cit.* 8 ENCY. OF EV. 465); Richardson *v.* S., 103 Md. 112, 63 A. 317 (bigamy); Boling *v.* S., 91 Neb. 579, 136 N. W. 1078; Cooper *v.* S. (Tex. Cr.), 160 S. W. 382; Stevens *v.* S. (Tex. Cr.), 150 S. W. 944; S. *v.* Thompson, 31 Utah 228, 87 P. 709; Koloff *v.* R. Co., 71 Wash. 543, 129 P. 398 (*cit.* 8 ENCY. OF EV. 465); Massucco *v.* Tomassi, 80 Vt. 186, 67 A. 551 (such testimony is better than record); S. *v.* Nieburg, 86 Vt. 392, 85 A. 769.

See vol. 1, p. 625, n. 6; vol. 2, p. 417, n. 6, and supplement thereto.

Anyone who knows facts may prove marriage.—Sellers *v.* Page, 127 Ga. 633, 56 S. E. 1011.

Common-law marriage may be shown by witnesses present when contract made. In re Imboden, 111 Mo. App. 220, 86 S. W. 263.

465-63 Watson *v.* Lawrence, 134 La. 194, 63 S. 873.

466-64 Resnick *v.* Resnick, 126 Ill. App. 132.

466-66 Stodenmeyer *v.* Hart, 155 Ala. 243, 46 S. 488; Stark *v.* Johnson, 43 Colo. 243, 95 P. 930; Southern R. Co. *v.* Brown, 126 Ga. 1, 54 S. E. 911; Watson *v.* Lawrence, 134 La. 194, 63 S. 873; In re Janney, 12 Pa. C. C. 550; S. *v.* Nieburg, 86 Vt. 392, 85 A. 769. See vol. 3, p. 784, n. 4; vol. 4, p. 750, n. 21, and supplement thereto.

In prosecution for bigamy testimony of defendant's alleged wife competent to prove marriage. Richardson *v.* S., 103 Md. 112, 63 A. 317.

467-67 In re Luce, 3 Pa. Super. 289. *Contra,* Crane *v.* Stafford, 217 Ill. 21, 75 N. E. 424; Weidenhoft *v.* Primm, 16 Wyo. 340, 94 P. 453.

467-68 Hewlett *v.* Watson, 134 Ga. 516, 67 S. E. 1128; In re Miller, 34 Pa. Super. 385. See Berger *v.* Kirby, 105 Tex. 611, 153 S. W. 1130.

Woman may not testify to marriage with decedent in action to establish marriage. Weatherall *v.* Weatherall, 56 Wash. 344, 105 P. 822.

Child of alleged marriage may testify to status of parents arising from their respective claims. Lindsey *v.* Smith, 131 Ky. 176, 114 S. W. 779.

467-69 See vol. 1, p. 626, n. 10, and supplement thereto.

467-70 Documentary evidence admissible although clergyman was not "stated." Ross *v.* Sparks, 81 N. J. Eq. 117, 88 A. 384.

467-71 Gardner *v.* S., 9 Ala. App. 60, 64 S. 183; Reifschneider *v.* Reifschneider, 241 Ill. 92, 89 N. E. 255; Harris *v.* S. (Tex. Cr.), 167 S. W. 43. See supra, "Incest." 259-23.

Sworn application for license admissible. P. *v.* Portman, 159 App. Div. 702, 145 N. Y. S. 189.

467-72 License presumed from celebration of ceremony. Godfrey *v.* Rowland, 16 Haw. 377. See Hawaii *v.* Waipa, 10 Haw. 442.

468-73 S. *v.* Rocker, 130 Ia. 239, 106 N. W. 645; Watson *v.* Lawrence, 134 La. 194, 63 S. E. 873; S. *v.* McRae, 83 N. J. L. 796, 85 A. 455; S. *v.* Walsh, 25 S. D. 30, 125 N. W. 295; S. *v.* Thompson, 31 Utah 228, 87 P. 709. See vol. 1, p. 625, n. 4; vol. 2, p. 963, n. 3, and supplements thereto.

Minister's certificate not admissible to prove marriage in prosecution for crim. con. unless it purports to be copy of record law requires him to keep. Whittit *v.* Miller, 1 Haw. 139.

469-76 P. *v.* Le Doux, 155 Cal. 535, 102 P. 517 (certified copy of certificate); Holtman *v.* Holtman (Ky.), 114 S. W. 1198; Eames *v.* Woodson, 120 La. 1031, 46 S. 13; Broadrick *v.* Broadrick, 25 Pa. Super. 225; Harris *v.* S. (Tex. Cr.), 161 S. W. 125.

469-77 Snowman *v.* Mason, 99 Me. 490, 59 A. 1019; Bowman *v.* Little, 101 Md. 273, 61 A. 223, 647, 1084 (such fact cannot be proved by declarations of parties which would bastardize issue); S. *v.* Thompson, 31 Utah 228, 87 P. 709.

469-78 Wigley *v.* Solicitor, (1902) Prob. Div. 233; Hawaii *v.* Waipa, 10 Haw. 442 (without producing license or authority of celebrant); Krekel *v.* Guenzler (Ky.), 124 S. W. 848 (foreign record not conclusive; presumed correct if assented to by all parties). See vol. 2, p. 416, n. 5; vol. 10, p. 733, n. 77, and supplements thereto.

Clergyman's record.—See vol. 5, p. 272, n. 63; vol. 10, p. 738, n. 98; vol. 1, p. 625, n. 5, and supplements thereto.

In criminal case against defendant. Sokel *v.* P., 212 Ill. 238, 72 N. E. 382. *Comp.* P. *v.* Goodrode, 132 Mich. 542, 94 N. W. 14.

471-82 Smith *v.* Fuller (Ia.), 108 N. W. 765, 138 Ia. 91, 115 N. W. 91, 16 L. R. A. (N. S.) 98; S. *v.* Walsh, 25 S. D. 30, 125 N. W. 295.

472-83 See vol. 10, p. 981, n. 88, et seq., and supplement thereto.

472-84 In re Terwilliger's Est., 63 Misc. 479, 118 N. Y. S. 424.

As between parties and privies decree of divorce is sufficient evidence of marriage. Killackey *v.* Killackey, 156 Mich. 127, 120 N. W. 680.

473 See vol. 3, p. 323, n. 76, and supplement thereto.

473-85 Stodenmeyer *v.* Hart, 155 Ala. 243, 46 S. 488 (name under which property listed for taxation); Smith *v.* Fuller (Ia.), 108 N. W. 765, 138 Ia. 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98; Tyner *v.* Schoonover, 79 Kan. 573, 100 P. 478; In re Imboden, 111 Mo. App. 220, 86 S. W. 263; Topper *v.* Perry, 197 Mo. 531, 95 S. W. 203; Forbes *v.* Burgess, 158 N. C. 131, 73 S. E. 792; C. *v.* Haylow, 17 Pa. Super. 541; Perrine *v.* Kohr, 20 Pa. Super. 36; Harlan *v.* Harlan (Tex. Civ.), 125 S. W. 950. **See** vol. 1, p. 626, n. 7; vol. 2, p. 417, n. 7 and supplements thereto.

A certificate of acknowledgment of a woman that she is the wife of a certain person cannot be used in evidence to prove any certain man to be her husband. Dunn *v.* Taylor (Tex. Civ.), 143 S. W. 311.

Declarations of parties sufficient to establish marriage. Smith *v.* Fuller (Ia.), 108 N. W. 765, 138 Ia. 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98.

Proof of suit brought by plaintiff in maiden name against alleged husband, after "ritual" marriage, to recover money loaned him on his promise to legally marry her, competent. Kresh *v.* Kresh, 58 Misc. 461, 111 N. Y. S. 437.

473-86 Murphy *v.* S., 122 Ga. 149, 50 S. E. 48. But see Tison *v.* S., 125 Ga. 7, 53 S. E. 809.

474-88 Murphy *v.* S., 122 Ga. 149, 50 S. E. 48 (bigamy); Dietrich *v.* Dietrich, 128 App. Div. 564, 112 N. Y. S. 968; S. *v.* Moore, 36 Utah 521, 105 P. 293.

474-89 In re Garner's Est., 59 Misc. 116, 112 N. Y. S. 212, notwithstanding prohibition in divorce decree against subsequent marriage of one of the parties.

475-91 C. *v.* Haylow, 17 Pa. Super. 541; In re Seibert, 1 Pa. C. C. 229, 18 Phila. (Pa.) 5.

476-93 In re Terwilliger's Est., 63 Misc. 479, 118 N. Y. S. 424.

In presence of spouse.—Hubatke *v.* Maierhoffer, 81 N. J. L. 410, 79 A. 346.

To characterize cohabitation declarations of parties during period are admissible as part of res gestae, but otherwise they are hearsay, though declarant dead. Drawdy *v.* Hesters, 130 Ga. 161, 60 S. E. 451. But see In re Colton, 129 Ia. 542, 105 N. W. 1008.

476-97 Declarations of those who knew alleged married parties received after lapse of long time (fifty years), especially in case of slaves. Dunn *v.* Garnett, 129 Ky. 728, 112 S. W. 841.

477-1 In re Terwilliger's Est., 63 Misc. 479, 118 N. Y. S. 424; Harlan *v.* Harlan (Tex. Civ.), 125 S. W. 950.

477-2 Davis *v.* Stouffer, 132 Mo. App. 555, 112 S. W. 282; Nelson *v.* Carlson, 48 Wash. 651, 94 P. 477. *Contra,* Ruedeas *v.* O'Shea (Tex. Civ.), 127 S. W. 891, *appr.* Allen *v.* Hall, 2 N. & McC. (S. C.) 114, 10 Am. Dec. 578. See Drawdy *v.* Hesters, 130 Ga. 161, 60 S. E. 451.

478-3 In re Moore, 9 Pa. C. C. 284. *Contra,* Topper *v.* Perry, 197 Mo. 531, 95 S. W. 203 (cases discussed). See In re Imboden, 111 Mo. App. 220, 86 S. W. 263, oral and written declarations of alleged husband, not in presence of wife, competent to rebut evidence of marriage; but his conduct toward other women, inadmissible.

Papers executed to secure appointment as notary, admissible to show woman held herself out as being unmarried. She cannot testify to reasons for so representing herself if alleged husband dead. Collard *v.* Burch, 138 Mo. App. 94, 119 S. W. 1009.

478-7 In re Moore, 9 Pa. C. C. 284.

479-9 Smith *v.* Fuller (Ia.), 108 N. W. 765, 138 Ia. 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98 (fact parties joined in deed as husband and wife, admissible); Mazzei *v.* Gruis, 128 La. 860, 55 S. 555; Imboden *v.* Co., 128 Mo. App. 555, 107 S. W. 400.

Evidence held not sufficient to establish a common law marriage. In re Peterson's Est., 22 N. D. 480, 134 N. W. 751.

479-10 Travers *v.* Reinhardt, 205 U. S. 423; Stodenmeyer *v.* Hart, 155 Ala. 243, 46 S. 488 (letter to woman in which she is recognized as wife); Davis *v.* S., 95 Ark. 555, 129 S. W. 530; Hewlett *v.* Watson, 134 Ga. 516, 67 S. E. 1128, Drawdy *v.* Hesters, 130 Ga. 161, 60 S. E. 451; Cobb *v.* Makee, 1 Haw. 85; Tyner *v.* Schoonover, 79 Kan. 573, 100 P. 478; Bartee *v.* Ed-

munds, 29 Ky. L. R. 872, 96 S. W. 535; In re Imboden, 111 Mo. App. 220, 86 S. W. 263; Plattner *v.* Plattner, 116 Mo. App. 405, 91 S. W. 457; Dietrich *v.* Dietrich, 128 App. Div. 564, 112 N. Y. S. 968.

See vol. 2, p. 417, n. 8, and supplement thereto.

Evidence as to conduct after the date when marriage between first cousins prohibited, admissible to prove common-law marriage prior thereto. In re Wittick's Est. (Ia.), 145 N. W. 913.

In action for dower cohabitation and reputation, sufficient to establish marriage. Smith *v.* Fuller (Ia.), 108 N. W. 765, 138 Ia. 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98; McFadden *v.* McFadden, 32 Pa. Super. 535.

General reputation used to show marriage (Drawdy *v.* Hesters, 130 Ga. 161, 60 S. E. 451); but not when ceremonial marriage is claimed. Bowman *v.* Little, 101 Md. 273, 61 A. 223, 657, 1084. Where records burned, admissible. Farmer *v.* Towers, 106 Ark. 123, 152 S. W. 993.

481-12 Bowman *v.* Little, 101 Md. 273, 61 A. 223, 657, 1084.

Spouse cannot testify to reputation. S. *v.* Adams, 2 Boyce (Del.) 588, 83 A. 936.

481-13 Deed executed by one who subsequently married grantee therein, before alleged date of marriage, admissible to prove marriage as of that date. Phillips *v.* Palmer, 56 Tex. Civ. 91, 120 S. W. 911.

481-15 Stodenmeyer *v.* Hart, 155 Ala. 243, 46 S. 488, transactions in which alleged husband held himself out as unmarried may be shown on cross-examination to disprove marriage.

Indictment for illicit cohabitation. Forbes *v.* Burgess, 158 N. C. 131, 73 S. E. 792.

Unchaste character of woman may be shown to negative assertion of marriage by her. Bell *v.* Clarke, 45 Misc. 272, 92 N. Y. S. 163.

Slave marriages must be validated by legislation or ratification by parties after emancipation. Johnson's Heirs *v.* Raphael, 117 La. 967, 42 S. 470. Their conduct thereafter, competent to show no ratification occurred. In re Walker, 121 La. 865, 46 S. 890.

482-16 Evidence of general reputation in decedent's family he was not married, competent. Jacobs *v.* Fowler, 135 App. Div. 713, 119 N. Y. S. 647.

482-17 Nelson *v.* Carlson, 48 Wash. 651, 94 P. 477.

482-18 Henderson *v.* Ressor, 141 Mo. App. 540, 126 S. W. 203 (in case of death of alleged incapable person evidence should be clear and cogent); Schneider *v.* Rabb (Tex. Civ.), 100 S. W. 163 (preponderance essential).

483-23 Defendant's knowledge her former husband was living and undivorced or her ability to obtain such knowledge may be shown by him. Stokes *v.* Stokes, 198 N. Y. 301, 91 N. E. 793.

484-24 Pray *v.* Pray, 128 La. 1037, 55 S. 666; Thorne *v.* Farrar, 57 Wash. 441, 107 P. 347.

Proof must be clear, satisfactory and convincing. Beeks *v.* Beeks, 66 Fla. 256, 63 S. 444.

484-25 Kutch *v.* Kutch, 85 Neb. 702, 124 N. W. 108; Vazakas *v.* Vazakas, 109 N. Y. S. 568 (where plaintiff only witness).

Evidence held insufficient.—Williams *v.* Williams, 71 Misc. 590, 130 N. Y. S. 875.

485-27 Menzies *v.* Farnon, 18 Ont. L. R. 174.

485-28 Hobbs *v.* Hobbs, 10 Cal. App. 97, 101 P. 22.

Defendant's age may be proved if plaintiff knew of it when marriage occurred. Hatch *v.* Hatch, 58 Misc. 54, 110 N. Y. S. 18.

486-33 W. *v.* S., (1905) Prob. Div. 231.

486-34 Statement by wife, together with refusal to submit to medical inspection, sufficient. W. *v.* S., supra.

486-35 Examination ought not to be required where testimony of plaintiff, standing alone, is persuasive. Christman *v.* Christman, 7 Pa. C. C. 595.

MASTER AND SERVANT

Custom as to time of making contracts, 498-33; *Existence of special dangers,* 520-88; *Injury not result of risk assumed,* 520-88; *Obedience to order as cause of injury,* 525-9; *Negligence of fellow servant,* 533-46; *Custom of giving signals,* 541-99; *Comparative safety of places,* 543-17; *Precautions taken by another employer,* 543-17; *Scope of employment,* 547-36; *Injuries to third persons—burden,* 547-37; *Custom of servant,* 548-48.

493-1 Nelson *v.* Plaster Co., 84 Kan. 797, 115 P. 578; Finkbine Lumb. Co.

v. Cunningham, 101 Miss. 292, 57 S. 916.

495-8 Fraker *v.* Hyde, 127 App. Div. 620, 111 N. Y. S. 757, resolution of directors.

495-10 Parol evidence competent to show the employment even though a written contract exist; providing, of course, that a writing is not required by statute. Stanley *v.* R. Co., 166 Ill. App. 132. See also vol. 8, p. 498, and infra, "Parol Evidence," p. 449, n. 57. **See** Richardson *v.* Lumb. Co. (N. H.), 90 A. 174. (Burden of proving the servant's ignorance of the danger is on the plaintiff).

495-11 Griscom-Spencer Co. *v.* Bernier, 204 Fed. 74, 122 C. C. A. 388; Conger *v.* Hall, 158 Mich. 447, 122 N. W. 1073 (though antedating time for which compensation asked if written after relation established); Helwig *v.* Aulabangh, 83 Neb. 542, 120 N. W. 162; C. *v.* Snyder, 40 Pa. Super. 485. See also vol. 14, p. 713, n. 2.

495-12 Letters from employer to third party, competent as admissions. Harding *v.* Stockyards, 242 Ill. 444, 90 N. E. 205.

Parol evidence, competent to show relation between defendant and stranger that of master and servant, notwithstanding terms of a written contract. Kendall *v.* Johnson, 51 Wash. 477, 99 P. 310. Admissible to show contract of employment by corporation at formal meeting of directors and stockholders, no record kept. Kropp *v.* Co., 138 Mo. App. 49, 119 S. W. 1066. Not inadmissible because letters have been received showing admissions concerning employment. Wintermute *v.* Co., 53 Wash. 539, 102 P. 443.

495-13 Rosenow *v.* Wiener, 11 Cal. App. 294, 104 P. 839; Thornton *v.* Mersereau, 168 Mo. App. 1, 151 S. W. 212; Smith *v.* Williams, 123 Mo. App. 479, 100 S. W. 55; Walker *v.* Co., 131 Wis. 542, 111 N. W. 694. See Montelione *v.* Co., 143 Ill. App. 413.

495-14 Big Hill C. Co. *v.* Clutts, 208 Fed. 524, 125 C. C. A. 526; Rosseau *v.* Deschenes, 203 Mass. 261, 89 N. E. 391; Rand *v.* R. Co., 40 Mont. 398, 107 P. 87; Texas, etc. R. Co. *v.* Parsons, 102 Tex. 157, 113 S. W. 914.

Non-payment by defendant's alleged manager, of expenses of plaintiff's trip, admissible. Buford *v.* Graden (Ala.), 64 S. 552.

496-19 Pryor *v.* Crum, 146 Mo. App. 623, 124 S. W. 597; Muldon *v.* Co., 134 App. Div. 453, 119 N. Y. S. 320; Beaumont, etc. R. Co. *v.* Olmstead, 56 Tex. Civ. 96, 120 S. W. 596; Walker *v.* Co., 131 Wis. 542, 111 N. W. 694.

Presumption services rendered corporation by officer and stockholder gratuitous, in absence of express contract, rebuttable. Ruttle *v.* Co., 153 Mich. 300, 117 N. W. 168; Dodge *v.* Co., 152 Mich. 100, 115 N. W. 1004.

As between master and third person one in charge of automobile at time of collision is prima facie servant of owner. Hironx *v.* Baum, 137 Wis. 197, 118 N. W. 533.

496-20 Taylor *v.* R. Co., 108 Va. 817, 62 S. E. 798.

496-22 Wagner *v.* Co., 141 Mo. App. 51, 121 S. W. 329.

496-23 Witness who has testified to knowledge concerning employment of another may state in whose employment. Brown *v.* R. Co., 108 Minn. 1, 121 N. W. 123.

496-24 But see Winslow *v.* P. Co., 164 Cal. 688, 130 P. 427.

Testimony witness was hired by C, made proper by C's testifying as to authorization to employ. Greenlaw L. & T. Co. *v.* Chambers, 46 Colo. 587, 105 P. 1091. Employe may testify who employer. McCherry *v.* Snare, 130 App. Div. 241, 114 N. Y. S. 674.

497-25 Walleston *v.* Fahnestock, 116 N. Y. S. 743; Arthur C. Co. *v.* Willis (Tex. Civ.), 125 S. W. 584.

497-26 Marshall *v.* Taylor, 168 Mo. App. 240, 153 S. W. 527.

497-27 So. R. Co. *v.* Crone, 51 Ind. App. 300, 99 N. E. 762; Bourne *v.* Whitman, 209 Mass. 155, 95 N. E. 404; In re McCahan's Est., 221 Pa. 188, 70 A. 711 (also declarations to third persons).

Conversations between agent making contract for defendant and latter, immaterial. Puryear *v.* Ould, 81 S. C. 456, 62 S. E. 863.

497-28 Sutton *v.* Lyons, 156 N. C. 3, 72 S. E. 4; Wilson *v.* Alexander, 115 Tenn. 125, 88 S. W. 935. See Heinz *v.* Co., 81 Kan. 261, 105 P. 527; Texas, etc. R. Co. *v.* Parsons, 102 Tex. 157, 113 S. W. 914.

A showing that the automobile belonged to defendant and that the driver was hired by him puts defendant upon proof that the automobile was not used in his business. Ludberg *v.* Barghoorn, 73 Wash. 476, 131 P. 1165. But see Hartnett *v.* Gryzmish (Mass.), 105 N.

E. 988 (proof that the automobile was defendant's and at time of accident was being driven by defendant's chauffeur, does not make out a prima facie case).

Employe may testify for whom he worked on certain day. Winslow *v.* Co., 12 Cal. App. 530, 107 P. 1020.

498-33 Master's admission competent. Kirn *v.* Co., 146 Mo. App. 451, 124 S. W. 45.

Custom as to time of making employment contracts shown to aid in determining whether made and to assist in construction. Carney *v.* Co., 157 Mich. 54, 121 N. W. 806.

498-34 Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37; Indianapolis F. Co. *v.* Bradley, 45 Ind. App. 530, 89 N. E. 505; Linnan *v.* Linnan, 131 La. 535, 59 S. 981; Hartnett *v.* Gryzmish (Mass.), 105 N. E. 988; McDonough *v.* Cameron, 116 Minn. 480, 134 N. W. 118; Winnicott *v.* Orman, 30 Mont. 339, 102 P. 570; Neff *v.* Brandeis, 91 Neb. 11, 135 N. W. 232; Silverman *v.* Garibaldi, 116 N. Y. S. 780; Chaet *v.* Goldberg, 110 N. Y. S. 817; Powell *v.* R. Co., 136 App. Div. 204, 120 N. Y. S. 336; Midgette *v.* Co., 150 N. C. 333, 64 S. E. 5; Marshall, etc. Co. *v.* Sirman (Tex. Civ.), 153 S. W. 401; Layne *v.* R. Co., 66 W. Va. 607, 67 S. E. 1103; Hendrickson *v.* R. Co., 143 Wis. 179, 122 N. W. 758.

Evidence held sufficient.—Yazoo & M. V. R. Co. *v.* Kern, 99 Ark. 584, 138 S. W. 988; Chicago, R. I. & P. R. Co. *v.* Box, 99 Ark. 108, 137 S. W. 566; A. Bentley & Sons Co. *v.* Bryant, 148 Ky. 634, 147 S. W. 402; Sampson *v.* R. Co., 156 Mo. App. 419, 138 S. W. 98; Buckley *v.* Beinhauer, 121 N. Y. S. 180; McLeod *v.* R. Co., 65 Wash. 62, 117 P. 749.

Evidence insufficient.—Casey *v.* Davis & Furber Mach. Co., 122 N. Y. S. 804.

Continuance of relation of master and servant sometimes presumed, as where latter acts as driver for person traveling in his company. See Jones *v.* Scullard, (1898) 2 Q. B. (Eng.) 565; Delory *v.* Blodgett, 185 Mass. 126, 69 N. E. 1078, 102 Am. St. 328, 64 L. R. A. 114; Shepard *v.* Jacobs, 204 Mass. 110, 90 N. E. 392.

Actions for injuries.—Tutwiler, etc. I. Co. *v.* Farrington, 144 Ala. 157, 39 S. 898; Larson *v.* Co., 40 Wash. 224, 82 P. 294.

To third persons.—Burns *v.* Co., 152 Mich. 613, 116 N. W. 182, 16 L. R. A. (N. S.) 816.

Wrongful discharge.—Chaet *v.* Goldberg, 110 N. Y. S. 817.

Proof of nature of employment must be made by party alleging. Howell *v.* Atkinson, 3 Ga. App. 58, 59 S. E. 316.

Burden of proving engagement in master's business.—Yazoo, etc. R. Co. *v.* Slaughter, 92 Miss. 289, 45 S. 873.

Burden of showing modification of original contract.—Glaser *v.* Alumni, 97 N. Y. S. 984.

Presumption as to employment.—Kampmann *v.* Rothwell (Tex. Civ.), 107 S. W. 120.

498-38 Gould *v.* McCrae, 14 Ont. L. R. 194.

498-42 King *v.* R. Co., 140 N. C. 433, 53 S. E. 237; Weidman *v.* Co., 223 Pa. 160, 72 A. 377.

499-43 Woods *v.* Shumard, 114 La. 451, 38 S. 416; Bailey *v.* Sibley Quarry Co., 169 Mich. 227, 134 N. W. 1098.

499-44 Bauer *v.* Goldman, 45 Colo. 163, 100 P. 435. *Contra*, Weidman *v.* Co., 223 Pa. 160, 72 A. 377.

499-46 See cases cited in Maynard *v.* Co., 200 Mass. 1, 85 N. E. 877.

499-49 Ibid.; Weidman *v.* Co., 223 Pa. 160, 72 A. 377.

500-50 Weidman *v.* Co., supra.

500-51 Understanding of one party may not be testified to if nothing said. Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37.

500-53 Declarations made by plaintiff after contract of hiring to successor of person contracting, incompetent to show what it was. Puryear *v.* Ould, 81 S. C. 456, 62 S. E. 863.

500-54 Previous contracts of parties, relevant. Maynard *v.* Co., 200 Mass. 1, 85 N. E. 877.

Customary meaning of "turpentine season" may be shown by parol. Peacock *v.* S., 10 Ga. App. 402, 73 S. E. 404.

500-55 *Contra* if term fixed. Camp *v.* Co., 123 La. 257, 48 S. 927.

Duration of contracts between defendant and other employes, irrelevant. Puryear *v.* Ould, 81 S. C. 456, 62 S. E. 863.

500-56 Merrill *v.* Paper Co., 128 N. Y. S. 959; King *v.* R. Co., 140 N. C. 433, 53 S. E. 237.

500-58 Parol evidence admissible if entire contract not in writing. Kelly P. Co. *v.* London (Tex. Civ.), 125 S. W. 974.

Agreement recognizing existence of parol understanding, without rule of text. Sieberts *v.* Spangler, 140 Ia. 236, 118 N. W. 292.

501-59 Watt *v.* Watt, (Can.) 10 West. L. Rep. 697, silence of employer assent to terms proposed.

Circumstances leading up to transaction shown to show intent and as bearing on plaintiff's testimony. Gate City Co. *v.* McGuire (Tex. Civ.), 112 S. W. 436.

Admissions subsequent to contract, competent. Sicard *v.* Albenberg, 136 Wis. 622, 118 N. W. 179.

501-60 Incomplete writing excluded if terms fully testified to. Gate City Co. *v.* McGuire (Tex. Civ.), 112 S. W. 436.

Paper prepared by employe at employer's request, after performance of services to which it related, if not objected to at time, competent as res gestae. Shepard *v.* Co., 59 Wash. 242, 97 P. 57.

Application for indemnity bond competent.—Ackerman *v.* Berriman, 113 N. Y. S. 1015.

501-61 Evidence is not material that other servants had also sued the master for services. Mance *v.* Hossington, 205 N. Y. 33, 98 N. E. 203.

501-62 Sum paid by one employe, party to contract, to another not a party, not provable. Dixon *v.* Million, 142 Ill. App. 559.

Sum demanded and paid shown. Allen *v.* Urdangen, 141 Ia. 280, 119 N. W. 724.

Notice of reduction of wages must be shown by master; may show notice at meeting of employes though plaintiff not present. Pennington *v.* Co. (Tex. Civ.), 122 S. W. 923.

501-63 See Swafford *v.* Board, 127 Cal. 484, 59 P. 900; Westerman *v.* Cleland, 12 Cal. App. 63, 106 P. 606.

501-66 Goldstein *v.* D'Arcy, 201 Mass. 312, 87 N. E. 584; Ruttle *v.* Foss, 161 Mich. 132, 125 N. W. 790 (defendant may not show what he thinks he could have got others for or price paid another); Fordtran *v.* Stowers, 52 Tex. Civ. 226, 113 S. W. 631.

501-69 Ruttle *v.* Foss, 161 Mich. 132, 125 N. W. 790; Allen *v.* Urdangen, 141 Ia. 280, 119 N. W. 724.

Kind of labor performed may be shown though price agreed on. Arnold *v.* Gilmore (Ia.), 125 N. W. 658.

Payment made proved to show terms of contract. Colloty *v.* Schuman, 76 N J. L. 502, 70 A. 190.

502-80 Colloty *v.* Schuman, supra; McCurdy *v.* Boring, 27 N. D. 1, 146 N. W. 730; McCarthy *v.* Fell, 24 S. D. 74, 123 N. W. 497; Weil *v.* Schwartz (Tex. Civ.), 120 S. W. 1039.

In an action for compensation, evidence that a party rendered services to the corporation with the expectation of receiving pay and with the knowledge and acquiescence of its officers, makes out a prima facie case for compensation. Trogdon *v.* Co. (Mont.), 139 P. 792.

502-82 Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37.

503-83 Trubenbach *v.* Otten, 138 App. Div. 887, 122 N. Y. S. 616, actual or estimated cost of doing work shown.

Previous compensation paid plaintiff by defendant shown. Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37.

503-84 Ruttle *v.* Co., 153 Mich. 300, 117 N. W. 168.

Employer's by-laws, competent to show employe's duties and to aid in determining whether properly discharged. Perry *v.* Co., 8 Cal. App. 35, 95 P. 1128.

503-85 Value of services rendered another employer during time those in question performed shown. Ruttle *v.* Co., 153 Mich. 300, 117 N. W. 168.

503-86 *Contra* if position dissimilar. Alabama S. Co. *v.* Dewey, 156 Ala. 530, 47 S. 55.

In an action for compensation evidence that no salary had been fixed or paid to plaintiff's predecessor by the corporation was properly excluded. Gem K. Mills *v.* Thurman, 140 Ga. 15, 78 S. E. 408.

503-87 Plaintiff may testify to value of service. Rosenow *v.* Wiener, 11 Cal. App. 294, 104 P. 839.

503-91 Alabama S. Co. *v.* Dewey, 156 Ala. 530, 47 S. 55, in other employments.

503-93 If open account pleaded plaintiff may show person contracting with him on behalf of defendant an expert. Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37.

504-94 Cotter *v.* Cotter, 82 Conn. 331, 73 A. 903; Wise *v.* Outtrim, 139 Ia. 192, 117 N. W. 264; In re Martin's Est. (Minn.), 144 N. W. 941; Hartley *v.* Hartley's Est., 173 Mo. App. 18, 155 S. W. 1099.

Rule inapplicable where married daughter leaves home and goes to father. Carrell *v.* McDonnell, 139 Mo.

App. 450, 122 S. W. 1129; Stone *v.* Troll, 134 Mo. App. 308, 114 S. W. 82; Officer *v.* Swindlehurst, 41 Mont. 126, 108 P. 583; Satterly *v.* Dewick, 129 App. Div. 701, 114 N. Y. S. 354 (to aged stepmother).

Presumption where members have ceased to live together—as where adult child having a home returns to parental domicile or receives parent in his. Cole *v.* Fitzgerald, 132 Mo. App. 17, 111 S. W. 628.

504-95 Jones *v.* Tucker (Del.), 84 A. 1012; Pelton *v.* Smith, 50 Wash. 459, 97 P. 460.

504-97 In re Devoe, 58 Misc. 490, 111 N. Y. S. 638 (nephew and aunt).

504-98 Jackson *v.* Buice, 132 Ga. 51, 63 S. E. 823; Bolling *v.* Bolling's Admr., 146 Ky. 313, 142 S. W. 387; Linnan *v.* Linnan, 131 La. 535, 59 S. 981; Cole *v.* Fitzgerald, 132 Mo. App. 17, 111 S. W. 628; Officer *v.* Swindlehurst, 41 Mont. 126, 108 P. 583; Ploger *v.* Bright, 119 N. Y. S. 628; Cowles *v.* Cowles, 81 Vt. 498, 71 A. 191; Pelton *v.* Smith, 50 Wash. 459, 97 P. 460.

505-99 Conway *v.* Conway, 130 Ky. 218, 113 S. W. 94. See supra, "Executors and Administrators," 429-99.

505-1 Converse of rule applied. Ploger *v.* Bright, 119 N. Y. S. 628.

505-2 Pelton *v.* Smith, 50 Wash. 459, 97 P. 460.

505-4 Pelton *v.* Smith, supra.

Character of services.—If services rendered such as claimant accustomed to render in gaining livelihood promise presumed to pay; otherwise if not of that nature. In re Devoe, 58 Misc. 490, 111 N. Y. S. 638.

Non-payment where services have covered long period significant. In re Devoe, supra.

506-6 Cole *v.* Fitzgerald, 132 Mo. App. 17, 111 S. W. 628.

Evidence of expectation of payment, inadmissible. Latta *v.* Lockman, 139 Ia. 626, 117 N. W. 962.

506-13 In re Devoe, 58 Misc. 490, 111 N. Y. S. 638; In re Miller's Est., 222 Pa. 334, 71 A. 185.

Such declarations proved.—Jackson *v.* Buice, 132 Ga. 51, 63 S. E. 823.

506-15 Stone *v.* Troll, 134 Mo. App. 308, 114 S. W. 82, situation and family of claimant regarded. See supra, "Executors and Administrators," 430-6.

Evidence may cover considerable range of circumstances—previous situation of party returning to parental roof; that parent expressed wish to that effect; kind of work done; financial ability of parent and his declarations of purpose to pay. Cole *v.* Fitzgerald, 132 Mo. App. 17, 111 S. W. 628.

507-20 Value of services must be shown by party seeking to recover on quantum meruit. Trubenbach *v.* Otten, 138 App. Div. 887, 122 N. Y. S. 616.

Burden of showing compensation dependent on contingency in nature of affirmative defense and must be established by master. Mansfield *v.* Mallory, 140 Ia. 206, 118 N. W. 290.

508-24 Presumed payments made at regular periods in full. Heywood *v.* Doherty, 121 N. Y. S. 610.

508-25 Payment for domestic service presumed made at stated period, and burden on party seeking to recover, after any great length of time, to rebut presumption. In re Cummiskey's Est., 224 Pa. 509, 73 A. 916.

508-26 Perry *v.* Co., 8 Cal. App. 35, 95 P. 1128.

509-31 Circumstances under which services performed after nominal change of employers proved to show original contract regarded as in force. Perry *v.* Co., supra.

510-33 See Reiter *v.* Co., 237 Ill. 374, 86 N. E. 745; Lopes *v.* Connolly, 210 Mass. 487, 97 N. E. 80.

510-34 Mobile, etc. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37.

Master may testify of acceptance of servant's discharge and authority of another to discharge. Mobile, etc. Co. *v.* Hawkins, supra.

510-36 Kelly P. Co. *v.* London (Tex. Civ.), 125 S. W. 974.

If contract ambiguous as to right to discharge servant may question good faith. Texas L. Ins. Co. *v.* Roberts, 55 Tex. Civ. 217, 119 S. W. 926.

513-50 Likewise he may justify the discharge by showing employe's insolence toward his superiors. And where the insolence consists in offensive letters written to the superior officer these letters are competent. Martindale *v.* Cummins Co., 143 N. Y. S. 1100.

513-54 See Kelly P. Co. *v.* London (Tex. Civ.), 125 S. W. 974.

514-56 Bauer *v.* Goldman, 45 Colo. 163, 100 P. 435 (letter of recommendation from third party, irrelevant where discharge for disobedience); Asinof *v.* Lasker, 121 N. Y. S. 375 (if reason-

able); Smith *v.* S. Co., 115 N. Y. S. 204.

514-59 Williams *v.* Crane, 153 Mich. 89, 116 N. W. 554; Hinchman *v.* C. Co., 151 Mich. 214, 115 N. W. 48; Maxton *v.* Co. (Mo. App.), 114 S. W. 577 (notwithstanding allegation in servant's complaint); Geiger *v.* Rapaport, 79 Misc. 5, 139 N. Y. S. 55; Turner *v.* Wright, 123 N. Y. S. 801; Toube *v.* Co., 116 N. Y. S. 673; Eubanks *v.* Alspaugh, 139 N. C. 520, 52 S. E. 207; Mobile, etc. R. Co. *v.* Hayden, 116 Tenn. 672, 94 S. W. 940. *Contra,* Chaet *v.* Goldberg, 110 N. Y. S. 817.

Allegation of performance of contract by servant must be sustained. Kahn *v.* Guggenheimer, 114 N. Y. S. 767.

515-61 Brown *v.* Co., 127 App. Div 368, 111 N. Y. S. 594; Smith *v.* S. Co., 115 N. Y. S. 204.

515-64 **By-laws of union** enter into contract of employment and their violation may be shown as cause for discharge. Scarano *v.* Lemlein, 66 Misc. 174, 121 N. Y. S. 351.

Servant may testify of ability to perform service demanded, employer being informed of it. Development Co. *v.* King, 170 Fed. 923, 96 C. C. A. 139. And may prove reasons given for discharge. Puryear *v.* Ould, 81 S. C. 456, 62 S. E. 863.

Expense account of servant from time of employment, admissible. Texas L. Ins. Co. *v.* Roberts, 55 Tex. Civ. 217, 119 S. W. 926.

515-65 Batchelder *v.* Co., 227 Pa. 201, 75 A. 1090. See Kelly P. Co. *v.* London (Tex. Civ.), 125 S. W. 974.

516-66 Batchelder *v.* Co., 227 Pa. 201, 75 A. 1090.

517-74 Letters of servant competent to show readiness to perform. Reiter *v.* Co., 237 Ill. 374, 86 N. E. 745.

517-76 Lopes *v.* Connolly, 210 Mass. 487, 97 N. E. 80; Goldberg *v.* Weinberger, 115 N. Y. S. 1098; Texas L. Ins. Co. *v.* Roberts, 55 Tex. Civ. 217, 119 S. W. 926 (notwithstanding plaintiff filed waiver of some of damages claimed). *Contra,* Camp *v.* Co., 123 La. 257, 48 S. 927.

Servant may show net financial result of contract made after discharge. Development Co. *v.* King, 170 Fed. 923, 96 C. C. A. 139.

518-77 Phillips L. Co. *v.* Smith, 7 Ga. App. 222, 66 S. E. 623; Shepherd *v.* Gambill, 29 Ky. L. R. 1163, 96 S. W. 1104; Hunt *v.* Crane, 33 Miss. 669, 69 Am. Dec. 381; Tenzer *v.* Gilmore, 114 Mo. App. 210, 89 S. W. 341; Helwig *v.* Aulabaugh, 83 Neb. 542, 120 N. W. 162; Milage *v.* Woodward, 186 N. Y. 252, 78 N. E. 873; Altes *v.* Blumenthal, 113 N. Y. S. 574; Graff *v.* Blumberg, 53 Misc. 296, 103 N. Y. S. 184; Monroe *v.* Proctor, 51 Misc. 632, 100 N. Y. S. 1021; Quick *v.* Swing, 53 Or. 149, 99 P. 418; San Antonio P. Co. *v.* Moore, 46 Tex. Civ. 259, 101 S. W. 867; Pacific Exp. Co. *v.* Walters, 42 Tex. Civ. 355, 93 S. W. 496. See cases cited in Maynard *v.* Co., 200 Mass. 1, 85 N. E. 877.

In an action for wrongful discharge the defendant has the burden of showing that the servant or employe could have obtained other employment by reasonable diligence. Robinson *v.* Western U. T. Co., 169 Mich. 503, 135 N. W. 292.

Burden met by proof servant made no effort to secure other employment. Pindar *v.* Jenkins, 128 App. Div. 711, 113 N. Y. S. 588.

518-78 Court may determine question from own knowledge. Maynard *v.* Co., 200 Mass. 1, 85 N. E. 877.

518-79 Loos *v.* Brewing Co., 145 Wis. 1, 129 N. W. 645.

519-83 Letter written before contract made admissible to show what parties anticipated would be course of events and what might reasonably be anticipated. Brown *v.* Assn., 173 Fed. 927.

Sums advanced plaintiff to pay his subagents may be shown by defendant. Guttentag *v.* R. Co., 141 N. Y. S. 477.

520-88 Butler *v.* Frazee, 211 U. S. 459; Connelley *v.* R. Co., 201 Fed. 54, 119 C. C. A. 392; Williams *v.* Min. Co., 200 Fed. 211, 118 C. C. A. 397; People's Tel. Co. *v.* Conant, 198 Fed. 624, 117 C. C. A. 328; Campbell *v.* R. Co., 188 Fed. 516; Jackson *v.* R. Co., 178 Fed. 432, 102 C. C. A. 159; Rocky Mt., etc. Co. *v.* Bassett, 178 Fed. 768, 102 C. C. A. 216; Mengel B. Co. *v.* Dubin, 174 Fed. 647, 98 C. C. A. 401; Haines *v.* Spencer, 167 Fed. 266, 92 C. C. A. 658; Nelson *v.* R. Co., 158 Fed. 92, 85 C. C. A. 560; Alabama, etc. Co. *v.* Hammond, 156 Ala. 253, 47 S. 248; St. Louis, etc. R. Co. *v.* Hempfling, 107 Ark. 476, 156 S. W. 171; Chicago, etc. R. Co. *v.* Crawford, 107 Ark. 564, 156 S. W. 175; Missouri & N. A. R. Co. *v.* Murphy, 106 Ark. 436, 153 S. W. 587; Missouri & N. A. R. Co. *v.* Collins, 106 Ark. 353, 153 S. W. 607; Delight L.

Co. *v.* Henderson, 105 Ark. 334, 150 S. W. 868; St. Louis, etc. R. Co. *v.* Wells, 93 Ark. 153, 124 S. W. 524; St. Louis, etc. R. Co. *v.* Goins, 90 Ark. 387, 119 S. W. 277; Arkansas C. O. Co. *v.* Carr, 89 Ark. 50, 115 S. W. 925; St. Louis, etc. R. Co. *v.* Jamison, 87 Ark. 511, 113 S. W. 41; St. Louis, etc. Co. *v.* Holman, 90 Ark. 555, 120 S. W. 146; Wyckoff *v.* R. Co., 11 Cal. App. 106, 103 P. 1100; Ryan *v.* Gas Co., 10 Cal. App. 484, 102 P. 558; Pre *v.* Co., 9 Cal. App. 591, 100 P. 122; Portland G. M. Co. *v.* O'Hara, 45 Colo. 416, 101 P. 773; Bowring *v.* I. Co., 5 Penne. (Del.) 594, 66 A. 369; Am. B. Co. *v.* Valente, 7 Penne. (Del.) 370, 73 A. 400; German-Am. L. Co. *v.* Brock, 55 Fla. 577, 46 S. 740; Stearns C. L. Co. *v.* Fowler, 58 Fla. 362, 50 S. 680; Central R. Co. *v.* Henderson, 6 Ga. App. 459, 65 S. E. 297; Goure *v.* Storey, 17 Ida. 352, 105 P. 794; Christiansen *v.* Wks., 223 Ill. 142, 79 N. E. 97; Obstetar *v.* Steel Co., 154 Ill. App. 172; Lawton *v.* Coal Co., 154 Ill. App. 368; Sivengel *v.* Coal Co., 154 Ill. App. 409; Kresmar *v.* Pack. Co., 153 Ill. App. 338; Gunszpsky *v.* Co., 145 Ill. App. 255; Whitsett *v.* S. Co., 145 Ill. App. 631; Tyma *v.* F. Co., 144 Ill. App. 454; Funk *v.* P. Co., 143 Ill. App. 460; Blood *v.* S. Co., 142 Ill. App. 243; Springer *v.* T. Co., 142 Ill. App. 574; Willson *v.* Logan, 139 Ill. App. 204; Cooney *v.* Co., 143 Ill. App. 155; So. R. Co. *v.* Howerton (Ind.), 105 N. E. 1025 (application of the rule under the Federal Employers' Liability Act); Adams *v.* Antles (Ind. App.), 105 N. E. 931 (assumption of risk doctrine does not apply in case of failure to comply with factory act requiring the guarding of machinery); Emrich F. Co. *v.* Byrnes, 44 Ind. App. 341, 87 N. E. 1042; So. R. Co. *v.* Bufkins, 45 Ind. App. 80, 90 N. E. 98; Cleveland, etc. Co. *v.* Bossert, 44 Ind. App. 245, 87 N. E. 158; Ambre *v.* Co., 43 Ind. App. 47, 86 N. E. 871; Mellette *v.* T. Co., 45 Ind. App. 88, 86 N. E. 432; Atoka M. Co. *v.* Miller, 7 Ind. Ty. 104, 104 S. W. 555; Williams *v.* C. Co., 146 Ia. 489, 125 N. W. 232; Koch *v.* C. Co., 144 Ia. 548, 123 N. W. 172; Jacobson *v.* G. Co., 144 Ia. 1, 120 N. W. 651; Miller *v.* M. Co., 141 Ia. 701, 118 N. W. 518; Contri *v.* C. Co., 143 Ia. 115, 121 N. W. 506; Hardy *v.* R. Co., 139 Ia. 314, 115 N. W. 8, 19 L. R. A. (N. S.) 997; Riverside I. Wks. *v.* Green, 79 Kan. 588, 100 P. 482; Continental C. Corp. *v.* York's Admr. (Ky.), 167 S. W. 131; Chesapeake & O. R. Co. *v.* Walker's Admr. (Ky.), 167 S. W. 128; Louisville & N. R. Co. *v.* Cook, 150 Ky. 689, 150 S. W. 802; Mowrey *v.* Frazier (Ky.), 120 S. W. 289; Blankenship's Admr. *v.* R. Co., 147 Ky. 260, 143 S. W. 995; Louisville & N. R. Co. *v.* Crutcher, 135 Ky. 381, 122 S. W. 191; Chesapeake & O. R. Co. *v.* Lang, 135 Ky. 76, 121 S. W. 993; Wallace *v.* R. Co. (Ky. L. R.), 118 S. W. 962; Ballard *v.* Lee, 131 Ky. 412, 115 S. W. 732; Price *v.* L. Co., 125 La. 888, 51 S. 1025; Ball *v.* R. Co., 123 La. 7, 48 S. 565; Alexander *v.* Co., 124 La. 1, 49 S. 724; Wiley *v.* Batchelder, 105 Me. 536, 75 A. 47; Reid *v.* S. S. Co. (Me.), 90 A. 609; Podvin *v.* Mfg. Co., 104 Me. 561, 72 A. 618; Young *v.* Randall, 104 Me. 135, 71 A. 647; Golden *v.* Ellis, 104 Me. 177, 71 A. 649; Perkins *v.* P. Co., 104 Me. 109, 71 A. 476; Merchants, etc. Co. *v.* S., 108 Md. 564, 70 A. 413; Stewart *v.* Harman, 108 Md. 446, 76 A. 333; S. *v.* Co., 109 Md. 404, 72 A. 602 (rule is specially applicable where employe exposes himself to injury for personal reasons); Dagis *v.* Mfg. Co., 213 Mass. 524, 100 N. E. 620; Archer *v.* Eldredge, 212 Mass. 400, 99 N. E. 161; Goudie *v.* Foster, 202 Mass. 226, 88 N. E. 663; Simoneau *v.* Rice, 202 Mass. 82, 88 N. E. 433; Cavagnaro *v.* Soule, 202 Mass. 62, 88 N. E. 433; Pearson *v.* G. Co., 201 Mass. 176, 87 N. E. 571; Connolly *v.* Furbush, 201 Mass. 271, 87 N. E. 469; Lynch *v.* R., 200 Mass. 403, 86 N. E. 781; Eisner *v.* Horton, 200 Mass. 507, 86 N. E. 892; Harris *v.* Co., 204 Mass. 251, 90 N. E. 542; Teachout *v.* R. Co. (Mich.), 146 N. W. 241; Kaaro *v.* Min. Co. (Mich.), 146 N. W. 149; Moyer *v.* R. Co., 159 Mich. 645, 124 N. W. 542; Englund *v.* R. Co., 108 Minn. 380, 112 N. W. 454; Murphy *v.* Stone Co., 115 Minn. 308, 132 N. W. 294; Manore *v.* P. Co., 107 Minn. 347, 120 N. W. 340; Hutchinson *v.* Gate Co., 247 Mo. 71, 152 S. W. 52; Haas *v.* Foundry Co., 176 Mo. App. 314, 157 S. W. 1036; Nagle *v.* Gaslight Co., 169 Mo. App. 243, 152 S. W. 415; English *v.* Co., 145 Mo. App. 439, 122 S. W. 747; Charlton *v.* R. Co., 200 Mo. 413, 98 S. W. 529; Maynard *v.* R. Co., 155 Mo. App. 352, 137 S. W. 58; Roberts *v.* Jones, 156 Mo. App. 552, 137 S. W. 639; Welch *v.* Dieter, 136 Mo. App. 260, 117 S. W. 97; Fotheringill *v.* Copper Co., 43 Mont. 485, 117 P. 86; Schroder *v.* Wks., 38 Mont. 474, 100 P. 619; For-

quer *v.* B. Co., 37 Mont. 426, 97 P. 843; Thurman *v.* Co., 41 Mont. 141, 108 P. 588; Creighton *v.* Keens, 89 Neb. 637, 131 N. W. 915; Westlake *v.* Murphy, 85 Neb. 45, 122 N. W. 684; Cronin *v.* Co., 75 N. H. 319, 74 A. 180; Loid *v.* Rogers, 77 N. J. L. 784, 73 A. 488; Zebrowski *v.* W. Co., 83 N. J. L. 558, 83 A. 957; Lauter *v.* Const. Co., 83 N. J. L. 617, 83 A. 878; Wallace *v.* Haines, 77 N. J. L. 184, 71 A. 44; Conyes *v.* Amusement Co., 202 N. Y. 408, 95 N. E. 801, *rev.* in part, 116 N. Y. S. 611; Nappa *v.* R. Co., 195 N. Y. 176, 88 N. E. 30; Harrison *v.* R. Co., 195 N. Y. 86, 87 N. E. 802; Sigel *v.* American S. Co., 161 App. Div. 54, 146 N. Y. S. 350 (obligations of master to safeguard servant must have been performed before there can be any assumption of risk); Grady *v.* C. Co., 153 App. Div. 401, 138 N. Y. S. 549 (application under Labor Laws, N. Y. Consol. Laws, 1909, c. 36); Schultis *v.* Waterbury Co., 152 App. Div. 416, 137 N. Y. S. 352; Davenport *v.* O. Co., 132 App. Div. 368, 116 N. Y. S. 609; Utess *v.* R. Co., 131 App. Div. 447, 115 N. Y. S. 389; Feola *v.* Const. Co., 129 App. Div. 435, 114 N. Y. S. 70; Bushtis *v.* C. Co., 128 App. Div. 780, 113 N. Y. S. 294 (notwithstanding penal statute disregarded by master); Pearsall *v.* R. Co., 128 App. Div. 397, 112 N. Y. S. 872 (including risks arising from employer's negligence); Courtney *v.* Mfg. Co., 122 N. Y. S. 721; Larsen *v.* Co., 122 N. Y. S. 1077; Dixon *v.* R. Co., 198 N. Y. 58, 91 N. E. 271; White *v.* Co., 151 N. C. 356, 66 S. E. 210; McGill *v.* Co., 79 O. St. 203, 86 N. E. 989; Dewey P. C. Co. *v.* Blunt, 38 Okla. 182, 132 P. 659; Richardson *v.* S. S. Co., 62 Or. 490, 126 P. 24; Dryden *v.* Co., 53 Or. 418, 101 P. 190; Flaherty *v.* Const. Co., 243 Pa. 580, 90 A. 342; Myers *v.* Co., 225 Pa. 387, 74 A. 223; Bisko *v.* C. Co., 223 Pa. 186, 72 A. 504; Wilson *v.* R. Co., 222 Pa. 341, 71 A. 183; Stimson *v.* Whitmore, 34 R. I. 581, 85 A. 113; Milne *v.* Co., 29 R. I. 504, 72 A. 716; Roberts *v.* Co., 84 S. C. 283, 66 S. E. 298; Goodwin *v.* Co., 80 S. C. 349, 61 S. E. 390; Pollard *v.* Co., 86 S. C. 69, 68 S. E. 132; Mo., etc. R. Co. *v.* Wereberry (Tex. Civ.), 167 S. W. 304 (a repair man, accustomed to cross railroad tracks, does not assume risk of injury occasioned by failure of operators to give the usual warning); Texas & N. O. R. Co. *v.* Murray (Tex. Civ.), 156 S. W. 594; City of Austin *v.* Gress (Tex. Civ.), 156 S. W. 535; Judson & Little *v.* Tucker (Tex. Civ.), 156 S. W. 225; Missouri, etc. R. Co. *v.* Bunkley (Tex. Civ.), 153 S. W. 937; Adams *v.* Lignite Co. (Tex. Civ.), 138 S. W. 1178; Vernon Cotton Oil Co. *v.* Catron (Tex. Civ.), 137 S. W. 404; Alamo D. B. Co. *v.* Yeargan (Tex. Civ.), 123 S. W. 721; Mt. Marion C. M. Co. *v.* Holt, 54 Tex. Civ. 411, 118 S. W. 825; Ft. Worth L. & P. Co. *v.* Moore, 55 Tex. Civ. 157, 118 S. W. 831; Quinn *v.* L. Co. (Tex. Civ.), 118 S. W. 733; Houston, etc. R. Co. *v.* Pollock (Tex. Civ.), 115 S. W. 843; Gilmartin *v.* Kilgore, 52 Tex. Civ. 177, 114 S. W. 398 (notwithstanding protest against orders); Western U. T Co. *v.* Burton, 53 Tex. Civ. 378, 115 S. W. 364; Lone Star B. Co. *v.* Willie (Tex. Civ.), 114 S. W. 186; Continental O. & C. Co. *v.* Scott, 51 Tex. Civ. 117, 112 S. W. 107; Houston, etc. Co. *v.* Alexander, 102 Tex. 497, 119 S. W. 1135 (stating limitation based on act of 1905); Galveston, etc. R. Co. *v.* Fitzpatrick (Tex. Civ.), 91 S. W. 355; Stone *v.* R. Co., 35 Utah 305, 100 P. 362; Fowlie *v.* Co., 82 Vt. 230, 72 A. 989; American L. Co. *v.* Whitlock, 109 Va. 238, 63 S. E. 991; Jacoby *v.* Williams, 110 Va. 55, 65 S. E. 491; Nordstrom *v.* R. Co., 55 Wash. 521, 104 P. 809; O'Dell *v.* Timber Co., 63 Wash. 546, 115 P. 1085; Shore *v.* R. Co., 57 Wash. 212, 106 P. 753; Goddard *v.* T. Co., 56 Wash. 536, 106 P. 188; Meshishnek *v.* S. & G. Co., 51 Wash. 382, 99 P. 9; Stewart *v.* Balfour, 51 Wash. 127, 98 P. 103; Chandler *v.* Foundry Co., 69 W. Va. 391, 71 S. E. 387; Brotzki *v.* G. Co., 142 Wis. 380, 125 N. W. 916; Lillis *v.* W. Mills, 142 Wis. 128, 124 N. W. 1011; Kraczek *v.* Co., 142 Wis. 570, 126 N. W. 30; Rahles *v.* Mfg. Co., 137 Wis. 506, 118 N. W. 350.

Risk from master's negligence not assumed. Pennsylvania R. Co. *v.* Goughnour, 208 Fed. 961, 126 C. C. A. 39; Citizen's, etc. Co. *v.* Lee (Ala.), 62 S. 199; Evans Chem. Wks. *v.* Ball (Ky.), 167 S. W. 390; Brucken *v.* Myers, 153 Ky. 274, 155 S. W. 383; Bliesner *v.* Dist. Co., 174 Mo. App. 139, 157 S. W. 980; Erwin *v.* Tel. Co., 173 Mo. App. 508, 158 S. W. 913; Shimp *v.* Stove Co., 173 Mo. App. 423, 158 S. W. 864; Kettlehake *v.* F. Co., 171 Mo. App. 528, 153 S. W. 552; Dales *v.* R. Co., 169 Mo. App. 183, 152 S. W. 401; Bowman *v.* Min. Co., 168 Mo. App. 703, 154 S. W.

891; Bradley *v.* Northern Cent. Coal Co., 167 Mo. App. 177, 151 S. W. 180; Rosasco *v.* Ideal O. D. Co., 79 Misc. 507, 141 N. Y. S. 23.

But does not assume those arising from the negligence of his employer, unless the defects constituting the negligence are either known to him or plainly observable by him. Republic Elev. Co. *v.* Lund, 196 Fed. 745, 116 C. C. A. 373. And see Wright *v.* R. Co., 197 Fed. 94; A. L. Clark Lumb. Co. *v.* Northcutt, 95 Ark. 291, 129 S. W. 88; International & G. N. R. Co. *v.* Meehan (Tex. Civ.), 129 S. W. 190; Duggan *v.* Heaphy, 85 Vt. 515, 83 A. 726.

The same is true when the servant is working overtime. St. Louis I. M. & S. R. Co. *v.* Martin, 104 Ark. 274, 149 S. W. 69.

Rebutted by custom to warn.—Wickstrom *v.* Whitney, 118 Minn. 416, 136 N. W. 1099.

So it would seem that, where a servant knows of dangers incident to doing a work in a particular way, and voluntarily undertakes to perform it that way, instead of doing it in a safer way which was known to him, he should be denied a recovery for injuries sustained, upon the ground that he assumed the risk of the known danger. Jenney Elec. Mfg. Co. *v.* Flannery (Ind. App.), 98 N. E. 424.

Even though such dangers are not usually incident thereto.—Jenney Elec. Mfg. Co. *v.* Flannery (Ind. App.), 98 N. E. 424.

Presumption rebutted.—Larsen *v.* Mange-Lilica Co., 14 Cal. App. 70, 111 P. 119.

If one has full knowledge of the dangers, momentary forgetfulness would not relieve him from the rule of assumption of risk. Courtney *v.* Mfg. Co., 122 N. Y. S. 721.

Evidence showing lack of knowledge. Alabama Consol. Coal & Iron Co. *v.* Heald, 168 Ala. 626, 53 S. 162; Barney *v.* Quaker Oats Co., 85 Vt. 372, 82 A. 113.

No hidden defects.—Davis *v.* Co., 133 N. Y. S. 247.

It is manifest that the inflexible rule cannot be laid down that in all cases linemen are charged with the entire responsibility for due inspection of poles before going upon them, for the responsibility would depend on the rules and practice of the companies which they serve, the knowledge of the linemen of such rules and practice, the experience of the linemen, and, perhaps, other circumstances.'' Jones *v.* Co., 91 S. C. 273, 74 S. E. 492.

Rule applies to servant of town. Philbrick *v.* Gardiner, 105 Me. 164, 73 A. 1002.

Rule inapplicable where employment contrary to child-labor law. Swift *v.* Miller, 139 Ill. App. 192.

Master must show assumption of risk unusually incident to service. Tarnoski *v.* Co., 85 Neb. 147, 122 N. W. 671. As to risk not disclosed. German-Am. L. Co. *v.* Brock, 55 Fla. 577, 46 S. 740. And risk resulting from own negligence. Brown *v.* Co., 143 Ia. 662, 120 N. W. 732. Also servant's knowledge of act or his increasing danger. Knox *v.* Mill, 236 Ill. 437, 86 N. E. 90. And must show servant's knowledge of conditions on which presumption of assumption of risk rests. Lewis *v.* R. Co., 57 Tex. Civ. 585, 122 S. W. 605.

Disregarded of statute enacted for servant's protection rebuts presumption. Kleinfelt *v.* Co., 156 Mich. 473, 121 N. W. 118; Collins *v.* Co., 143 Mo. App. 333, 127 S. W. 641. Unless servant shown to have knowledge. Doolan *v.* Co., 200 Mass. 200, 85 N. E. 1055; Mika *v.* Wks., 76 N. J. L. 561, 70 A. 327.

In Virginia knowledge by railroad employes of certain risks not conclusive of contributory negligence because of statute, though it may be considered with other evidence. Chesapeake & O. R. Co. *v.* Rowsey, 108 Va. 632, 62 S. E. 363.

Burden of proving existence of special dangers not apparent, or that special skill required to enable safely to do certain work, upon servant. Hicks *v.* Co., 74 N. H. 154, 65 A. 1075.

Burden of showing injury not result of risk assumed on servant. Evansville G., etc. Co. *v.* Raley, 38 Ind. App. 342, 76 N. E. 548, 78 N. E. 254; Clark *v.* Co., 146 Ia. 428, 123 N. W. 327.

Knowledge by master of danger unknown to servant and failure to take precautions shown. Palmijiano *v.* Hyde, 126 App. Div. 221, 110 N. Y. S. 368.

522-89 Sterling P. Co. *v.* Hamel, 207 Fed. 300, 125 C. C. A. 44; Williams *v.* Min. Co., 200 Fed. 211, 118 C. C. A. 397; Pulaski Min. Co. *v.* Hagan, 196 Fed. 724, 116 C. C. A. 352; Louisville & N. R. Co. *v.* Wilson, 188 Fed. 417, 110 C. C. A. 217; St. Louis, I. M. & S.

R. Co. *v.* Conley, 187 Fed. 949, 110 C. C. A. 97; Postal Tel-C. Co. *v.* Grantham, 187 Fed. 52, 109 C. C. A. 370; Great Northern R. Co. *v.* McDermid, 177 Fed. 105, 100 C. C. A. 525; Montana C. & C. Co. *v.* Kovec, 176 Fed. 211, (C. C. A.); Puget Sound E. R. *v.* Harrigan, 176 Fed. 488, 100 C. C. A. 104; McClaren *v.* S. Co., 166 Fed. 714, 92 C. C. A. 386; Standard O. Co. *v.* Brown, 31 App. Cas. (D. C.) 371; Sloss S. S. & I. Co. *v.* Triplett, 4 Ala. App. 323, 58 S. 109; Alabama, etc. Co. *v.* Tallant, 165 Ala. 521, 51 S. 835; So. R. Co. *v.* Bentley, 1 Ala. App. 359, 56 S. 249; Chicago, etc. Co. *v.* Smith, 107 Ark. 512, 156 S. W. 166; River, etc. Co. *v.* Goodwin, 105 Ark. 247, 151 S. W. 267; Southern A. C. Co. *v.* Bowen, 93 Ark. 140, 124 S. W. 1048; St. Louis, etc. R. Co. *v.* Corman, 92 Ark. 102, 122 S. W. 116; St. Louis, etc. R. Co. *v.* Holman, 90 Ark. 555, 120 S. W. 146; Arkansas M. R. Co. *v.* Worden, 90 Ark. 407, 119 S. W. 828; St. Louis S. & L. Co. *v.* Sawyer, 90 Ark. 473, 119 S. W. 830; St. Louis, etc. R. Co. *v.* Hawkins, 88 Ark. 548, 115 S. W. 175; St. Louis, etc. R. Co. *v.* Mangan, 86 Ark. 507, 112 S. W. 168; Boin *v.* Co., 155 Cal. 612, 102 P. 937; Hawley *v.* Co., 16 Cal. App. 50, 116 P. 84; Girard *v.* Co., 83 Conn. 20, 74 A. 1126; Roloff *v.* Luer Bros., 263 Ill. 152, 104 N. E. 1093; Asmossen *v.* Swift, 243 Ill. 93, 90 N. E. 250; Kenny *v.* Mfg. Co., 243 Ill. 396, 90 N. E. 724; McCulloch *v.* S., 243 Ill. 464, 90 N. E. 664; Lee *v.* I. & S. Co., 241 Ill. 372, 89 N. E. 655; Dickson *v.* Swift, 238 Ill. 62, 87 N. E. 59; Stephen *v.* Duffy, 237 Ill. 549, 86 N. E. 1082; Mann *v.* Tr. Co., 236 Ill. 30, 86 N. E. 161; Lawton *v.* Coal Co., 154 Ill. App. 368; McNulty *v.* Biscuit Co., 153 Ill. App. 206; Carr *v.* Silica Co., 153 Ill. App. 511; Malloy *v.* Co., 144 Ill. App. 226; Bonato *v.* C. Co., 143 Ill. App. 163; Illinois C. T. Co. *v.* Mann, 142 Ill. App. 561; Ambre *v.* Co., 43 Ind. App. 47, 86 N. E. 871; Hartshorn *v.* Mardis Co. (Ia.), 146 N. W. 70; Gordon *v.* R. Co., 146 Ia. 588, 123 N. W. 762; Hamilton *v.* R. Co., 145 Ia. 431, 124 N. W. 363; Kirchoff *v.* C. S. Co., 148 Ia. 508, 123 N. W. 210; Kerker *v.* W. Co., 140 Ia. 209, 118 N. W. 306; Meier *v.* Way, 136 Ia. 302, 111 N. W. 420; Cloud *v.* R. Co., 82 Kan. 851, 109 P. 400; Turner *v.* R. Co., 85 Kan. 6, 116 P. 482, *aff.* 83 Kan. 315, 111 P. 433; Thrasher *v.* Emke, 154 Ky. 744, 159 S. W. 565; Louisville & N. R. Co. *v.* Mahoney's Admx., 153 Ky. 761, 156 S. W. 388; Sunrise Coal Co. *v.* McDaniel, 150 Ky. 70, 150 S. W. 35; Frazier *v.* Danner (Ky.), 142 S. W. 216; Louisville, etc. R. Co. *v.* Armstrong, 137 Ky. 146, 125 S. W. 276; Louisville & N. R. Co. *v.* McMillen (Ky.), 119 S. W. 221; Mason *v.* Highland (Ky.), 116 S. W. 320; Reid *v.* S. S. Co. (Me.), 90 A. 609; Bowen *v.* Co., 105 Me. 31, 72 A. 685; Berenson *v.* Butcher, 209 Mass. 208, 95 N. E. 220; Griffin *v.* Co., 204 Mass. 477, 90 N. E. 926; Silvia *v.* R. Co., 203 Mass. 519, 89 N. E. 1061; Howard *v.* W. Co., 203 Mass. 273, 89 N. E. 615; Rosseau *v.* Deschenes, 203 Mass. 261, 89 N. E. 391; Anderson *v.* Marrinan, 202 Mass. 193, 88 N. E. 782; Shannon *v.* Shaw, 201 Mass. 393, 87 N. E. 748; Barrett *v.* T. & T. Co., 201 Mass. 117, 87 N. E. 565; Lynch *v.* Box Co., 200 Mass. 340, 86 N. E. 659; Cousineau *v.* Embury, 171 Mich. 23, 136 N. W. 1111; Kankola *v.* Co., 159 Mich. 689, 124 N. W. 591; Wickstrom *v.* Whitney, 118 Minn. 416, 136 N. W. 1099; Greer *v.* R. Co., 115 Minn. 213, 132 N. W. 6; Olson *v.* Gibson Co., 115 Minn. 25, 131 N. W. 637; Snyder *v.* Board Co., 110 Minn. 40, 124 N. W. 450; Wickham *v.* R. Co., 110 Minn. 74, 124 N. W. 639; Shaver *v.* L. Co., 109 Minn. 376, 123 N. W. 1076; Koreis *v.* R. Co., 108 Minn. 449, 122 N. W. 668; Bigum *v.* Lumb. Co., 107 Minn. 367, 119 N. W. 481; Rase *v.* R. Co., 107 Minn. 260, 120 N. W. 360; Burkard *v.* Co., 217 Mo. 466, 117 S. W. 35; Charlton *v.* R. Co., 200 Mo. 413, 98 S. W. 529; Bradley *v.* C. Co., 167 Mo. App. 177, 151 S. W. 180; Bennett *v.* L. Co., 146 Mo. App. 565, 124 S. W. 608; O'Brien *v.* Mfg. Co., 141 Mo. App. 331, 125 S. W. 804; Allen *v.* Coal Co., 43 Mont. 269, 115 P. 673; Moyse *v.* R. Co., 41 Mont. 272, 108 P. 1062; Osterholm *v.* M. Co., 40 Mont. 508, 107 P. 499; Hill *v.* C. Co., 40 Mont. 1, 104 P. 876; Cutler *v.* Min. Co., 34 Nev. 45, 116 P. 418; Tobler *v.* Co., 85 Neb. 413, 123 N. W. 461; Ramsey *v.* Wks., 78 N. J. L. 474, 74 A. 437; Floersch *v.* Donnell, 77 N. J. L. 772, 73 A. 490; Laragay *v.* Co., 77 N. J. L. 516, 72 A. 57; Pankow *v.* Swift, 78 N. J. L. 532, 74 A. 669; Clark *v.* R. Co., 191 N. Y. 416, 84 N. E. 397; Courtney *v.* Co., 138 App. Div. 383, 112 N. Y. S. 721; Reynolds *v.* Co., 137 App. Div. 446, 122 N. Y. S. 797 (under employers' liability act, question for jury under all states of evidence); Ostermann *v.* Ware, 135 App. Div. 119, 119 N. Y. S. 981;

Bria *v.* Westinghouse, 133 App. Div. 346, 117 N. Y. S. 195; Trentacoste *v.* Cronin, 132 App. Div. 907, 116 N. Y. S. 755; Larsen *v.* Steel Co., 130 N. Y. S. 887; Chernick *v.* Ice Cream Co., 129 N. Y. S. 694; Ovelsen *v.* Transp. & C. Co., 123 N. Y. S. 649; Reid *v.* Rees' Sons Co., 155 N. C. 230, 71 S. E. 315; Umsted *v.* Co., 18 N. D. 309, 122 N. W. 390; Fisher *v.* Prairie, 26 Okla. 337, 109 P. 514; Richardson *v.* S. S. Co., 62 Or. 490, 126 P. 24; Rogers *v.* L. Co., 54 Or. 387, 102 P. 601; Ferrari *v.* Co., 54 Or. 210, 102 P. 1016; Ainsley *v.* R. Co., 243 Pa. 437, 90 A. 129; Perrier *v.* Mills, 29 R. I. 396, 71 A. 796; Berley *v.* Co., 82 S. C. 360, 64 S. E. 157; Iverson *v.* Look (S. D.), 143 N. W. 332; Orange Lumb. Co. *v.* Ellis, 105 Tex. 363, 150 S. W. 582; Hartshorn Bros. *v.* Williamson (Tex. Civ.), 156 S. W. 264; Carter *v.* R. Co. (Tex. Civ.), 155 S. W. 638; Pecos & N. T. R. Co. *v.* Finkler (Tex. Civ.), 155 S. W. 612; Casey *v.* R. Co. (Tex. Civ.), 151 S. W. 856; Freeman *v.* Griewe (Tex. Civ.), 143 S. W. 730; Internat'l, etc. R. Co. *v.* Meehan (Tex. Civ.), 129 S. W. 190; Gentry *v.* Oilmill (Tex. Civ.), 127 S. W. 879; Muse *v.* Abeel (Tex. Civ.), 124 S. W. 430; El Paso, etc. R. Co. *v.* Alexander (Tex. Civ.), 117 S. W. 927; Stone *v.* R. Co., 35 Utah 305, 100 P. 362; Miner *v.* T. Co., 83 Vt. 311, 75 A. 653; Fraser *v.* Blanchard, 83 Vt. 136, 73 A. 995; Vaillancourt *v.* R. Co., 82 Vt. 416, 74 A. 99; Anustasakas *v.* Co., 57 Wash. 453, 107 P. 342; Philbin *v.* R. Co., 56 Wash. 610, 106 P. 169; Johnson *v.* Collier, 54 Wash. 478, 103 P. 818; Gage *v.* L. Co., 53 Wash. 108, 101 P. 501; Morgan *v.* Lumb. Co., 51 Wash. 335, 98 P. 1120; Cook *v.* Co., 48 Wash. 619, 94 P. 189; De Mase *v.* Co., 40 Wash. 108, 82 P. 170; McHolm *v.* Co., 147 Wis. 381, 132 N. W. 585; Szewczyk *v.* Co., 146 Wis. 452, 131 N. W. 977; Schumacher *v.* Co., 142 Wis. 631, 126 N. W. 46; Walker *v.* Co., 131 Wis. 542, 111 N. W. 694.

When testimony not of such a nature that only one inference could be drawn from it. Campbell *v.* R. Co., 90 S. C. 312, 73 S. E. 488.

Unless facts undisputed.—Chase *v.* R. Co., 91 Neb. 81, 135 N. W. 430.

Burden of proof is on defendant.—Baltimore & O. R. Co. *v.* Taylor, 186 Fed. 828, 109 C. C. A. 172; Seipel *v.* Kranich & Bach, 129 N. Y. S. 373; Gt. West., etc. Co. *v.* Malone, 39 Okla. 693, 136 P. 403.

Construing the statute, "the reasonable and obvious interpretation is that an assumption of risk does not follow as a matter of law from a knowledge or understanding of the risk, but is a question of fact to be decided by the jury under all the circumstances peculiar to the case. In this respect, the change wrought by the statute was to make applicable to actions brought under it the prevailing doctrine of recent English cases, where the rule as to the assumption of risks was applied less rigidly as against the employe." Ovelsen *v.* Co., 123 N. Y. S. 649; Gettins *v.* Kelley, 212 Mass. 171, 98 N. E. 684.

522-90 Michigan C. R. Co. *v.* Majkzrak, 200 Fed. 936, 119 C. C. A. 320; Womack *v.* Wks., 172 Fed. 217, 97 C. C. A. 35; Delaware & H. Co. *v.* Beemer, 171 Fed. 821, 96 C. C. A. 493; Western I. Co. *v.* McFarland, 166 Fed. 76, 91 C. C. A. 504; Reed *v.* R. Co., 162 Fed. 750; Alabama S. & W. Co. *v.* Tallant, 165 Ala. 521, 51 S. 835; Warren Co. *v.* Siggs, 91 Ark. 102, 120 S. W. 412; Arkansas Cent. R. Co. *v.* Workman, 87 Ark. 471, 112 S. W. 1082; Boin *v.* Co., 155 Cal. 612, 102 P. 937; German-Am. L. Co. *v.* Brock, 55 Fla. 577, 46 S. 740; Zinkl *v.* A. Co., 169 Ill. App. 191; Kennedy *v.* Swift, 140 Ill. App. 141, Swift *v.* Miller, 139 Ill. App. 192; Miller *v.* Co., 239 Ill. 626, 88 N. E. 196; Green Eng. Co. *v.* Rosinski (Ind. App.), 105 N. E. 938; Madden *v.* Wilcox, 174 Ind. 657, 91 N. E. 933; Brown *v.* Co., 143 Ia. 662, 120 N. W. 732 (risk caused by master's negligence); So. R. Co. *v.* Mauck, 152 Ky. 498, 153 S. W. 729; L'Hote *v.* Co., 203 Mass. 294, 89 N. E. 532; Wickham *v.* R. Co., 110 Minn. 74, 124 N. W. 639; Gettins *v.* Kelley, 213 Mass. 171, 98 N. E. 684; Di Bari *v.* Bishop, 199 Mass. 254, 85 N. E. 89; Peek *v.* Ostrom, 107 Minn. 488, 120 N. W. 1084; Bigum *v.* Co., 107 Minn. 567, 119 N. W. 481; Werner *v.* R. Co., 138 Mo. App. 1, 119 S. W. 1076; Bradford *v.* R. Co., 136 Mo. App. 705, 119 S. W. 32; O'Brien *v.* Co., 40 Mont. 212, 105 P. 724; Driscoll *v.* Rolfe, 75 N. H. 586, 71 A. 379; Pelow *v.* Co., 194 N. Y. 64, 86 N. E. 812; Elliff *v.* Co., 53 Or. 66, 99 P. 76 (not presumed adult laborer knows chemical characteristics of zinc chloride, strength depending upon circumstances); Izydorczyk *v.* Co., 225 Pa. 533, 74 A. 428; Tavares *v.* Dewing (R. I.), 82 A. 133; Manzi *v.*

Co., 29 R. I. 460, 72 A. 394; Sawyer *v.* Co., 83 S. C. 271, 65 S. E. 225; St. Louis S. R. Co. *v.* Marshall (Tex. Civ.), 120 S. W. 521; Texas & N. O. R. Co. *v.* McCoy, 54 Tex. Civ. 278, 117 S. W. 446; Barney *v.* Co., 85 Vt. 372, 82 A. 113; Fowlie *v.* Co., 82 Vt. 230, 72 A. 989 (facts warrant inference of ignorance of defects or danger); Meshishnek *v.* Co., 51 Wash. 382, 99 P. 9; Novak *v.* Co., 141 Wis. 298, 124 N. W. 282; Rankel *v.* Co., 138 Wis. 442, 120 N. W. 269.

See Boyd *v.* Taylor, 195 Mass. 272, 81 N. E. 277; Rahles *v.* Co., 137 Wis. 506, 118 N. W. 350 (inability of adult to understand English immaterial).

Evidence of youth and inexperience should be submitted to jury, not assumed as facts by court in its instructions. National Biscuit Co. *v.* Scott (Tex. Civ.), 142 S. W. 65.

Master's assurance of safety shown. Warren Co. *v.* Siggs, 91 Ark. 102, 120 S. W. 412.

Servant may show usual and customary manner of doing work in which engaged when injured to meet issue of assumed risk. Kennedy *v.* Swift, 234 Ill. 606, 85 N. E. 287.

Need for instruction shown by proof that inexperienced would probably have done work in manner of plaintiff. Johnson *v.* Co., 156 Mich. 669, 121 N. W. 269.

522-92 Custom of similar employers to give instructions, immaterial. Kirckhoff *v.* Co., 148 Ia. 508, 123 N. W. 210.

Neglect of statutory duty to guard machinery shown. Gustafson *v.* Co. (Wash.), 97 P. 1094. Immaterial whether other employers conformed to statute. O'Connell *v.* Smith, 141 Ia. 1, 118 N. W. 266. Whether injury sustained in discharge of servant's ordinary duties or not if sustained in discharge of duty. Miller *v.* Co., 137 Wis. 138, 118 N. W. 536. Non-observance of statute for protection of workmen raises presumption of negligence where injury results. Sterns C. Co. *v.* Evans, 33 Ky. L. R. 755, 111 S. W. 308.

523-93 American, etc. Co. *v.* Urbanski, 162 Fed. 91, 89 C. C. A. 91; Larsen *v.* Co., 14 Cal. App. 70, 111 P. 119; Savage *v.* Hayes, 142 Ill. App. 316; Kerker *r.* Co., 140 Ia. 209, 118 N. E. 306 (if master knew or ought to have known fact); Lunde *v.* Co., 139 Ia. 688, 117 N. W. 1063; Bartley *v.* C. Co. (Ky.), 152 S. W. 955; North East C. Co. *v.* Preston, 132 Ky. 262, 116 S. W. 704; Donovan *v.* Co., 201 Mass. 357, 87 N. E. 580; Lane *v.* Mills, 75 N. H. 102, 71 A. 629; Driscoll *v.* Rolfe, 75 N. H. 586, 71 A. 379; Tittlebaum *v.* Co., 77 N. J. L. 596, 73 A. 500; Wood *v.* McCabe, 151 N. C. 457, 66 S. E. 433; Ferrari *v.* Co., 54 Or. 210, 102 P. 1016; Cumming *v.* Lawrence, 87 S. C. 457, 69 S. E. 1090; Walton *v.* Burchel, 121 Tenn. 715, 121 S. W. 391; Producers' O. Co. *v.* Barnes (Tex. Civ.), 120 S. W. 1023.

Transfer of minor to more dangerous employment, without parents' consent, evidence of negligence. Hillsboro C. Mills *v.* King, 51 Tex. Civ. 518, 112 S. W. 132.

Employment of child under age specified in statute sufficient evidence of negligence. Danaher *v.* Co., 126 App. Div. 385, 110 N. Y. S. 617.

523-94 Louisville & N. R. Co. *v.* Wilson, 162 Ala. 588, 50 S. 188; Mueller *v.* Co., 143 Ill. App. 332; Cent. Ky. Tract Co. *v.* Smedley, 150 Ky. 598, 150 S. W. 658; Cook *v.* Urban (Tex. Civ.), 167 S. W. 251; Continental O. & C. Co. *v.* Gilliam (Tex. Civ.), 151 S. W. 890. See Forquer *v.* Co., 37 Mont. 426, 97 P. 843. *Contra* under statute as to children under prescribed age. Madden *v.* Wilcox, 174 Ind. 657, 91 N. E. 933; Inland S. Co. *v.* Yedinak, 172 Ind. 423, 87 N. E. 229.

Child under child labor statutory age assumes no risk and not chargeable with contributory negligence. Lenahan *v.* Co., 218 Pa. 311, 67 A. 642, 120 Am. St. 885, 12 L. R. A. (N. S.) 461; Stehle *v.* Co., 220 Pa. 617, 69 A. 1116; Sullivan *v.* Co., 222 Pa. 40, 70 A. 909.

523-95 King *v.* Co., 143 Ala. 632, 42 S. 27; Stegmann *v.* Gerber, 146 Mo. App. 104, 123 S. W. 1041; Goodwin *r.* Co., 80 S. C. 349, 61 S. E. 390. *Contra* as to infant under fourteen. Owens *v.* Mills, 83 S. C. 19, 64 S. E. 915. *Comp.* Alexander *v.* Mills, 83 S. C. 17, 64 S. E. 914. See Ball *r.* R. Co., 123 La. 7, 48 S. 565; supra, "Infants," 267-17.

Incapacity under fourteen presumed prima facie, as capacity over that age. Ewing *v.* Co., 65 W. Va. 726, 65 S. E. 200. See Goodwin *v.* Co., 80 S. C. 349, 61 S. 390.

523-96 Doolan *v.* Co., 200 Mass. 200, 85 N. E. 1055, proof of mental deficiency proper though not pleaded.

Appearance of plaintiff as witness regarded by jury on issue of competency to appreciate risk. Ewing *v.* Co., 65 W. Va. 726, 65 S. E. 500.

523-99 King *v.* Co., 143 Ala. 632, 42 S. 27; Hairston *v.* Co., 66 W. Va. 324, 66 S. E. 473 (if infant fourteen); Bare *v.* Co., 61 W. Va. 28, 55 S. E. 907. *Contra* if servant under fourteen. Ghaner *v.* Co., 85 S. C. 90, 67 S. E. 242.

Misrepresentations on behalf of minor, though not denied by him, as to age do not estop him from recovering for injuries sustained in employment from which barred by statute. Braasch *v.* Co., 153 Mich. 652, 118 N. W. 366.

Master's knowledge of servant's minority must be shown unless appearances sufficient to cause inquiry. Louisville & N. R. Co. *v.* Wilson, 162 Ala. 588, 50 S. 188.

Comparison of danger connected with employment, to which father consented, cannot be made with danger connected with different employment to which minor subjected. Ewing *v.* Co., 65 W. Va. 726, 65 S. E. 500.

523-1 Choctaw, etc. R. Co. *v.* McDade, 191 U. S. 64; Yazoo, etc. Co. *v.* Wright, 207 Fed. 281, 125 C. C. A. 25; Williams *v.* Min. Co., 200 Fed. 211, 118 C. C. A. 397; Lake *v.* Co., 160 Fed. 887, 88 C. C. A. 69; Missouri, etc. R. Co. *v.* Wilhoit, 160 Fed. 440, 87 C. C. A. 401; St. Louis, etc. Co. *v.* Rodgers (Ark.), 167 S. W. 106; Nashville Lumb. Co. *v.* Thornton, 101 Ark. 283, 142 S. W. 152; St. Louis, etc. R. Co. *v.* Jamison, 87 Ark. 511, 113 S. W. 41; Barekdall *v.* B. Co., 21 Cal. App. 685, 132 P. 846; Rogers *v.* Ponet, 21 Cal. App. 577, 132 P. 851; Girard *v.* Co., 82 Conn. 271, 73 A. 747; Murphy *v.* Jones, 168 Ill. App. 23; McShane *v.* Hanreddy, 167 Ill. App. 374; Shipley *v.* R. Co., 164 Ill. App. 69; Lake Shore, etc. R. Co. *v.* Johnson, 172 Ind. 548, 88 N. E. 849; Kirchoff *v.* Co., 148 Ia. 508, 123 N. W. 210; Glenn *v.* R. Co., 157 Ky. 453, 163 S. W. 461; Robinson N. & C. Co. *v.* Legrande, 151 Ky. 188, 151 S. W. 383; Dyer *v.* Co., 144 Ky. 592, 139 S. W. 789; Main Jellico M. C. Co. *v.* Parker (Ky.), 124 S. W. 871; Harris *v.* Co., 111 Md. 209, 73 A. 805; Lobenstein *v.* Iron Wks. (Mich.), 146 N. W. 293; Stenvog *v.* Co., 108 Minn. 199, 121 N. W. 903; Coin *v.* Co., 222 Mo. 488, 121 S. W. 1; Pulley *v.* Co., 136 Mo. App. 172, 116 S. W. 430; Evans *v.* Co., 129 App. Div. 768, 113 N. Y. S. 986; Peters *v.* Coal Co., 243 Pa. 241, 90 A. 65; Lamb *v.* R. Co., 217 Pa. 564, 66 A. 762; Hess *v.* Ins. Co., 38 Pa. Super. 158; Cisco O. Mill *v.* Van Geem (Tex. Civ.), 166 S. W. 439; Galveston, etc. Co. *v.* Hodnett (Tex.), 163 S. W. 13; San Antonio B. Assn. *v.* Wolfshohl (Tex. Civ.), 155 S. W. 644; Blalack *v.* Tr. Co. (Tex. Civ.), 149 S. W. 1086; Continental O. & C. Co. *v.* Scott, 51 Tex. Civ. 117, 112 S. W. 107; McPherson *v.* R. Co., 140 Wis. 473, 122 N. W. 1022. *Contra* if result from breach of master's statutory duty. Miami C. Co. *v.* Kane, 45 Ind. App. 391, 90 N. E. 13.

The knowledge must amount to a complete appreciation of the risk and not a mere apprehension of danger. Orange Lumb. Co. *v.* Ellis, 105 Tex. 363, 150 S. W. 582.

Rule inapplicable where doctrine of assumed risk inapplicable. Devine *v.* Co., 240 Ill. 369, 88 N. E. 804.

Presumption extends not to risks resulting from negligence of master increasing danger. St. Louis, etc. R. Co. *v.* Mangan, 86 Ark. 507, 112 S. W. 168.

523-2 Republic I. & S. Co. *v.* Thomasino, 176 Fed. 49, 99 C. C. A. 523; Utah C. M. Co. *v.* Bateman, 176 Fed. 57, 99 C. C. A. 365; Missouri, etc. R. Co. *v.* Wilhoit, 160 Fed. 440, 87 C. C. A. 401; Ross *v.* R. Co., 243 Ill. 440, 90 N. E. 701; Vandeveer *v.* Anderson, 143 Ill. App. 65; Layman *v.* Co., 142 Ill. App. 580; Lammey *v.* Co., 144 Ia. 640, 123 N. W. 356; Green River C. & C. Co. *v.* Phaup, 137 Ky. 34, 121 S. W. 651; Smith *v.* R. Co., 111 Md. 274, 73 A. 818; Cote *v.* Pingree, 205 Mass. 286, 91 N. E. 300; Harris *v.* R. Co., 146 Mo. App. 524, 124 S. W. 576; Welch *v.* Waterbury, 136 App. Div. 315, 120 N. Y. S. 1059; Sabatino *v.* Co., 136 App. Div. 217; 120 N. Y. S. 956; Scott *v.* R. Co., 136 App. Div. 347, 120 N. Y. S. 895; Frank *v.* Co., 18 O. Dec. 32; Stirling *v.* Co., 39 Pa. Super. 42; Lone Star B. Co. *v.* Solcher (Tex. Civ.), 126 S. W. 26; Maxwell G. Co. *v.* Wallan, 57 Tex. Civ. 42, 121 S. W. 182; Ladwig *v.* Co., 141 Wis. 191, 124 N. W. 407.

524-3 American, etc. Co. *v.* Urbanski, 162 Fed. 91, 89 C. C. A. 91; Gagnon *v.* Co., 174 Fed. 477; Savage *v.* Hayes, 142 Ill. App. 316; Kerker *v.* Co., 140 Ia. 209, 118 N. W. 306; Donovan *v.* Co., 205 Mass. 248, 91 N. E. 305; Clemens *v.* Co., 152 Mich. 495, 117 N. W. 187; Borchardt *v.* Co., 106 Minn. 134, 118 N. W. 359; Barney *v.*

Co., 85 Vt. 372, 82 A. 113; Herring *v.* Co., 139 Wis. 412, 121 N. W. 170.

524-4 Am. S. & T. P. Co. *v.* Urbanski, 162 Fed. 91, 89 C. C. A. 91; Wallis *v.* R. Co., 77 Ark. 556, 95 S. W. 446; Choctaw, etc. R. Co. *v.* Jones, 77 Ark. 367, 92 S. W. 244; Williams *v.* Co., 37 Colo. 62, 86 P. 337; Vickery *v.* R. Co., 87 Conn. 634, 89 A. 277; Arnold *v.* Co., 83 Conn. 97, 75 A. 78; Bowring *v.* Co., 5 Penne. (Del.) 594, 66 A. 369; Crawford *v.* Co., 12 Ida. 678, 87 P. 998; Egan *v.* Tr. Co. (Ind. App.), 103 N. E. 1100; Chicago, etc. R. Co. *v.* Bryan, 37 Ind. App. 487, 75 N. E. 678; Hamm *v.* A. Co., 147 Ia. 681, 125 N. W. 186; Duffey *v.* Co., 147 Ia. 225, 124 N. W. 609; Cinkovitch *v.* C. Co., 143 Ia. 595, 121 N. W. 1036; Madden *v.* Co., 133 Ia. 699, 111 N. W. 57; Arenschield *v.* R. Co., 128 Ia. 677, 105 N. W. 200; Martin *v.* Co., 131 Ia. 724, 106 N. W. 359; Calloway *v.* Co., 129 Ia. 1, 104 N. W. 721 (must show knowledge or that conditions were such that ignorance was inexcusable); Bartley *v.* C. Co. (Ky.), 152 S. W. 955; Cumberland T. Co. *v.* Graves, 31 Ky. L. R. 972, 104 S. W. 356; Urquhart *v.* Co., 192 Mass. 257, 78 N. E. 410; Moylon *v.* Co., 188 Mass. 499, 74 N. E. 929; Oiva *v.* Min. Co. (Mich.), 146 N. W. 181; Cristanelli *v.* Co., 154 Mich. 423, 117 N. W. 910; McDonald *v.* Co., 140 Mich. 401, 103 N. W. 829; Nord *v.* Co., 33 Mont. 464, 84 P. 1116; Stephens *v.* Elliott, 36 Mont. 92, 92 P. 45; Grimm *r.* Co., 79 Neb. 395, 114 N. W. 769; Bryant *v.* Fissell, 84 N. J. L. 72, 86 A. 458; Leddy *v.* Carley, 78 Misc. 546, 139 N. Y. S. 227; Freemont *r.* R. Co., 111 App. Div. 831, 98 N. Y. S. 179; Strong *v.* R. Co., 121 App. Div. 391, 106 N. Y. S. 85; Graves *v.* Co., 125 App. Div. 132, 109 N. Y. S. 256; Hunt *r.* Co., 100 App. Div. 119, 91 N. Y. S. 279; Orange Lumb. Co. *r.* Ellis, 105 Tex. 363, 150 S. W. 582; Texas, etc. Co. *r.* Bird (Tex. Civ.), 165 S. W. 8; El Paso, etc. R. Co. *v.* Welter (Tex. Civ.), 125 S. W. 45; Galveston, etc. R. Co. *v.* Hanson (Tex. Civ.), 125 S. W. 63; Industrial Co. *r.* Bivens, 47 Tex. Civ. 396, 105 S. W. 831; Galveston, etc. R. Co. *r.* Parish (Tex. Civ.), 93 S. W. 682; Hoff *v.* Co., 48 Wash. 581, 94 P. 654; Prior *v.* Eggert, 39 Wash. 481, 81 P. 929 (preponderance of evidence necessary); Blankavag *r.* Co., 136 Wis. 380, 117 N. W. 852. *Contra*, Ross *r.* R. Co., 243 Ill. 440, 90 N. E. 701; Swift *r.* Gaylord, 229 Ill. 330, 82 N. E. 299; Dunbar *r.* R. Co., 79 Vt. 474, 65 A. 528; Bolton *r.* Ovitt, 80 Vt. 362, 67 A. 881; McDuffee *v.* R. Co., 81 Vt. 52, 69 A. 124.

Unless the jury believe from the testimony of the plaintiff, or other evidence in the case, including the knowledge and experience of the plaintiff, that he knew, or should have known, of the defect complained of. Scininski *v.* Co. (Del.), 83 A. 20.

Master must show servant's assumption of risks obviated by ordinary care. Manning *v.* Co., 52 Or. 101, 96 P. 545.

Servant must show machinery left unguarded required guarded by statute. Jenkins *v.* Co., 43 Ind. App. 463, 87 N. E. 992.

524-5 Webb *v.* Dinnie Bros., 22 N. D. 377, 134 N. W. 41; Flaherty *v.* Const. Co., 243 Pa. 580, 90 A. 342.

Character of risk shown, but improper to allow testimony that there was nothing connected with it which plaintiff would not likely see. Gulf C. Co. *v.* Abernathy (Tex. Civ.), 116 S. W. 869.

524-6 De Frates *r.* Co., 243 Ill. 356, 90 N. E. 719; Waggoner *v.* Porterfield, 55 Tex. Civ. 169, 118 S. W. 1094.

525-7 Herrera *r.* Sup. Co. (N. J.), 88 A. 1082. Servant's knowledge shown under plea of contributory negligence. Burkard *v.* Co., 217 Mo. 466, 117 S. W. 35.

525-8 Prattville Cotton Mills Co. *v.* McKinney, 178 Ala. 554, 59 S. 498; Odabashian *r.* Rubber Co., 214 Mass. 66, 100 N. E. 1081; Iverson *v.* Look (S. D.), 143 N. W. 332; Texas, etc. R. Co. *v.* Plummer, 57 Tex. Civ. 563, 122 S. W. 942.

That there were not enough men to handle the train. Kington Coal Co. *r.* Aaron, 147 Ky. 480, 144 S. W. 371.

Indirect evidence establishes servant's lack of knowledge. Ross *v.* R. Co., 243 Ill. 440, 90 N. E. 701.

Ignorance of special danger testified to though servant knew of defective condition. Am. S. & T. Co. *v.* Urbanski, 162 Fed. 91, 89 C. C. A. 91.

525-9 Alteriac *v.* C. Co., 161 Ala. 435, 49 S. 867; Briggs *v.* Co., 163 Ala. 237, 50 S. 1025; Kolp *v.* Co., 145 Ill. App. 645 (if work ordered done within general scope of employment); Weber *v.* R. Co., 143 Ill. App. 498; Slavik *v.* I. & R. Co., 143 Ill. App. 509; Chicago, etc. R. Co. *r.* Sanders, 42 Ind. App. 585, 86 N. E. 430 (obvious danger); Mellette *v.* Co., 45 Ind. App. 88, 86 N. E.

432 (like case); Mason *v.* Henry, 137 Ky. 51, 121 S. W. 1001 (if work ordered done in usual course of employment); Stenvog *v.* Co., 108 Minn. 199, 121 N. W. 903; Pulley *v.* Co., 136 Mo. App. 172, 116 S. W. 430; Evans *v.* Co., 129 App. Div. 768, 113 N. Y. S. 986; Kennedy *v.* T. Co., 125 App. Div. 846, 110 N. Y. S. 887; Texas B. Co. *v.* Hutson (Tex. Civ.), 116 S. W. 146.

Held, for the jury.—McBrayer *v.* Chemical Co., 89 S. C. 387, 71 S. E. 980.

Master's intention as to manner of performance of order cannot be shown. Missouri, etc. R. Co. *v.* Gray, 56 Tex. Civ. 61, 120 S. W. 527.

Employe must show obedience caused injury. Tuckett *v.* Laundry, 30 Utah 273, 84 P. 500.

525-10 Alaska, etc. Co. *v.* Egan, 202 Fed. 867, 121 C. C. A. 225; Ohio C. M. Co. *v.* Hutchings, 172 Fed. 201, 96 C. C. A. 653; Alabama, etc. Co. *v.* Tallant, 165 Ala. 521, 51 S. 835; St. Louis, etc. R. Co. *v.* Puckett, 88 Ark. 204, 114 S. W. 224; Chenoweth *v.* Burr, 242 Ill. 312, 89 N. E. 1008; Yarber *v.* R. Co., 235 Ill. 589, 85 N. E. 928; Kennedy *v.* Swift, 234 Ill. 606, 85 N. E. 287; Chenoweth *v.* Burr, 146 Ill. App. 443; Kennedy *v.* Swift, 140 Ill. App. 141 (shown work directed done in unusual way, and that usual way safe); Mellette *v.* Co., 45 Ind. App. 88, 86 N. E. 432 (order must be specific); Young *v.* R. Co., 82 Kan. 332, 108 P. 99; Mo., etc. R. Co. *v.* Walker, 79 Kan. 31, 99 P 269; Evans Chem. Wks. *v.* Ball (Ky.), 167 S. W. 390; Interstate C. Co. *v.* Molner, 150 Ky. 321, 150 S. W. 372; Louisville, etc. Co. *v.* Armstrong, 137 Ky. 146, 125 S. W. 276; Pittsburg, etc. Co. *v.* Schaub, 136 Ky. 652, 124 S. W. 885; Owensboro *v.* Gabbert, 135 Ky. 346, 122 S. W. 178; Keen *v.* L. Co. (Ky.), 118 S. W. 355; Ballard *v.* Lee, 131 Ky. 412, 115 S. W. 732; Louisville, etc. Co. *v.* Mahan (Ky.), 113 S. W. 886; Price, etc. Co. *v.* Haley, 137 Ky. 305, 125 S. W. 720; Mathews *v.* Kerlin, 122 La. 606, 48 S. 123; Buckner *v.* Co., 221 Mo. 700, 120 S. W. 766; Schlavick *v.* Shoe Co., 157 Mo. App. 83, 137 S. W. 79; Bennett *v.* L. Co., 146 Mo. App. 565, 124 S. W. 608; Anderson *v.* C. & M. Co., 138 Mo. App. 76, 119 S. W. 986; Miller *v.* Co., 141 Mo. App. 462, 126 S. W. 187; Benak *v.* Wks., 85 Neb. 836, 124 N. W. 461; Haley *v.* Co., 127 App. Div. 753, 112 N. Y. S. 25 (distinction stated in text not noticed); Lowe *v.* R. Co., 85 S. C. 363, 67 S. E. 460; Galveston, etc. R. Co. *v.* Sanchez, 57 Tex. Civ. 87, 122 S. W. 44; Houston, etc. R. Co. *v.* Johnson (Tex. Civ.), 118 S. W. 1150; Houston, etc. R. Co. *v.* Malloy, 54 Tex. Civ. 490, 118 S. W. 721; Hugo *v.* Paiz (Tex. Civ.), 128 S. W. 912; Washington-S. R. Co. *v.* Cheshire, 109 Va. 741, 65 S. E. 27; Lamoon *v.* Co., 74 Wash. 164, 132 P. 880; Anustasakas *v.* Co., 57 Wash. 453, 107 P. 342; Miller *v.* Co., 137 Wis. 138, 118 N. W. 536.

See Griffin *v.* Co., 204 Mass. 447, 90 N. E. 926; Igo *v.* R. Co., 204 Mass. 197, 90 N. E. 574; Proulx *v.* Bishop, 204 Mass. 130, 90 N. E. 539; Carriere *v.* Co., 203 Mass. 322, 89 N. E. 544; Novak *v.* Co., 141 Wis. 298, 124 N. W. 282.

Presence and acquiescence of servant's superior in performance of act relevant on issue of whether servant discharging duties. St. Louis S. & L. Co. *v.* Sawyer, 90 Ark. 473, 119 S. W. 830.

Assurance of safety must relate to condition after thing reached condition it was in when injury resulted. Yarber *v.* R. Co., 235 Ill. 589, 85 N. E. 928.

Direct order of master to inexperienced servant shown as circumstance excusing servant from degree of caution otherwise due. Hobbs *v.* Small, 4 Ga. App. 627, 62 S. E. 91.

Assurance of safety of place relied on. Brown *v.* Lennane, 155 Mich. 868, 118 N. W. 581, *dist.* other local cases.

Orders and directions regarded on question of contributory negligence. Haidukovich *v.* Co., 106 Minn. 230, 118 N. W. 1017; Cleveland, etc. R. Co. *v.* Bossert, 44 Ind. App. 245, 87 N. E. 158.

Foreman's authority to give directions to workman presumed. Collins *v.* Co., 143 Mo. App. 333, 127 S. W. 641.

In Mississippi peril must be so obviously imminent as to render servant's conduct careless to point of recklessness. Yazoo, etc. R. Co. *v.* Scott, 95 Miss. 43, 48 S. 239.

525-12 Cotton *v.* Co., 147 Ia. 427, 123 N. W. 381; Griffin *v.* Co., 204 Mass. 477, 90 N. E. 926; Jellow *v.* S. Co., 204 Mass. 464, 87 N. E. 906; Carlson *v.* R. Co., 106 Minn. 254, 118 N. W. 832; Pankow *v.* Swift, 78 N. J. L. 532, 74 A. 669; Towler *v.* Mfg. Co., 79 N. J. L. 140, 74 A. 279; Pavan *v.* Worthen & A. Co. (N. J.), 83 A. 960; Sans Bois C. Co. *v.* Janeway, 22 Okla. 425, 99 P. 153; Pfeifer *v.* Steel Co., 243 Pa. 256, 90 A 152;

Hughes B. Co. *v.* Mendoza (Tex. Civ.), 156 S. W. 328; Taylor *v.* White (Tex. Civ.), 113 S. W. 554; Lamoon *v.* Co., 74 Wash. 164, 132 P. 880; Morgan *v.* Co., 51 Wash. 335, 98 P. 1120 (to repair on or after certain event); Cook *v.* Co., 51 Wash. 316, 98 P. 1130.

Entry in master's books competent to show notice of defect, but not to show that defect existed. Brady *v.* R. Co., 76 N. J. L. 744, 71 A. 238.

525-13 Great Northern R. Co. *v.* McDermid, 177 Fed. 105, 100 C. C. A. 525; Haines *v.* Spencer, 167 Fed. 266, 92 C. C. A. 658; St. Louis, etc. R. Co. *v.* Phillips, 165 Ala. 504, 51 S. 638; Pfeiffer Stone Co. *v.* Ford (Ark.), 148 S. W. 516; St. Louis, etc. R. Co. *v.* Holman, 90 Ark. 555, 120 S. W. 146; Hawley *v.* C. Co., 16 Cal. App. 50, 116 P. 84; Suchomel *v.* Maxwell, 240 Ill. 231, 88 N. E. 558; Holacek *v.* Sinclair, 145 Ia. 569, 124 N. W. 331; Cinkovitch *v.* C. Co., 143 Ia. 595, 121 N. W. 1036; Brouseau *v.* Co., 158 Mich. 312, 122 N. W. 620 (rule applies alike to tools and complicated machinery); Buckner *v.* Co., 221 Mo. 700, 120 S. W. 766; Burch *v.* Co., 32 Nev. 75, 104 P. 225; Schmidt *v.* Co., 15 N. M. 232, 107 P. 677; Rice *v.* Co., 174 N. Y. 385, 66 N. E. 979, 95 Am. St. 585, 62 L. R. A. 611; Lobasco *v.* Food Co., 127 App. Div. 677, 111 N. Y. S. 1007; Stokes *v.* P. Co., 134 App. Div. 363, 119 N. Y. S. 37; Hollis *v.* Widener, 221 Pa. 72, 70 A. 287; Meade *v.* Rys., 223 Pa. 145, 72 A. 263; Gulf, etc. R. Co. *v.* Adams (Tex. Civ.), 121 S. W. 876; Myhra *v.* R. Co., 62 Wash. 1, 112 P. 939.

"A promise to remedy a defect complained of does not prove that the defect actually existed, or establish negligence on the part of the master; but, a defective condition having been proved, a promise to repair may be proved for the purpose of shifting the risk from the servant to the master himself. Where a defect which might constitute negligence is shown, the injured employe may prove that he called the attention of his master to the defect, and that the master promised to repair, and during the continuance of the promise, if it was in fact made, the risk of injury through reasonable care in the use of the defective machine rests on the master, and not on the servant." Carron *v.* Standard Refrigerator Co., 123 N. Y. S. 682.

Limitations on rule.—See Am. T. Co. *v.* Adams, 137 Ky. 414, 125 S. W. 1067.

526-14 Southwestern B., etc. Co. *v.* Schmidt, 226 U. S. 162, 33 Sup. Ct. 68, 57 L. ed. 170; McClaren *v.* Co., 166 Fed. 714, 92 C. C. A. 386; Crosby *v.* R. Co., 158 Fed. 144; Marcum *v.* Lumb. Co., 88 Ark. 28, 113 S. W. 357; St. Louis, etc. R. Co. *v.* Mangan, 86 Ark. 507, 112 S. W. 168; St. Louis, etc. R. Co. *v.* Holman, 90 Ark. 555, 120 S. W. 146; Elie *v.* Cowles, 82 Conn. 236, 73 A. 258; Suchomel *v.* Maxwell, 144 Ill. App. 543; Miller *v.* Co., 141 Ia. 701, 118 N. W. 518; Burkard *v.* Co., 217 Mo. 466, 117 S. W. 35; Morgan *v.* R. Co., 136 Mo. App. 337, 117 S. W. 106; Comer *v.* Meyer, 78 N. J. L. 464, 74 A. 497; Andrecsik *v.* Co., 73 N. J. L. 664, 63 A. 719, 4 L. R. A. (N. S.) 913; Dowd *v.* R. Co., 70 N. J. L. 451, 57 A. 248; McGill *v.* Co., 79 O. St. 203, 86 N. E. 989; Hollis *v.* Widener, 221 Pa. 72, 70 A. 287; Taylor *v.* White (Tex. Civ.), 156 S. W. 349; Medlin M. Co. *v.* Schmidt (Tex. Civ.), 126 S. W. 689; Alkire *v.* Co., 57 Wash. 300, 106 P. 915; Morgan *v.* Lumb. Co., 51 Wash. 335, 98 P. 1120.

Where servant was directed by master to drive unbroken horse for one more day, this exonerated him from assuming risk. Nooney *v.* Exp. Co., 208 Fed. 274, 125 C. C. A. 474.

526-16 St. Louis, etc. R. Co. *v.* Holman, 90 Ark. 555, 120 S. W. 146; Shue *v.* R. Co., 6 Ga. App. 714, 65 S. E. 697; Miller *v.* Co., 141 Ia. 701, 118 N. W. 518; Am. T. Co. *v.* Adams, 137 Ky. 414, 125 S. W. 1067; Cook *v.* Co., 51 Wash. 316, 98 P. 1130; Lower *v.* Whitney Bros. Co., 147 Wis. 41, 132 N. W. 588.

526-17 Wortz *v.* Biscuit Co., 105 Ark. 526, 151 S. W. 691; Chicago Mill & L. Co. *v.* Wells, 101 Ark. 537, 142 S. W. 1131; St. Louis, etc. R. Co. *v.* Mealman, 78 Kan. 496, 97 P. 381; Am. T. Co. *v.* Adams, 137 Ky. 414, 125 S. W. 1067; Primley *v.* Co., 53 Wash. 687, 102 P. 763.

Testimony showing that plaintiff knew that the promise of the master to repair had come to an end and had not been fulfilled, and that he was no longer relying upon same. Nashville Lumb. Co. *v.* Thornton, 101 Ark. 283, 142 S. W. 152.

Implied promise sufficient.—Huggard *v.* Co., 132 Ia. 724, 109 N. W. 475.

526-18 See Devine *v.* Co., 126 App. Div. 7, 110 N. Y. S. 119.

Promise made a fellow servant and communicated to plaintiff may be relied upon. St. Louis, etc. R. Co. *v.* Mangan, 86 Ark. 507, 112 S. W. 168; Odil C. Co. *v.* Tadlock, 216 Ill. 624, 75 N. E. 332.

526-19 Alkire *v.* Co., 57 Wash. 300, 106 P. 915.

Nor to the plaintiff individually.—Phoenix Jellico Coal Co. *v.* Robinson, 148 Ky. 26, 145 S. W. 1131.

526-20 Johnson *v.* Co., 88 Ark. 243, 114 S. W. 722, statute. See St. Louis, etc. R. Co. *v.* Hawkins, 88 Ark. 548, 115 S. W. 175, holding servant may assume for reasonable time complaint heeded.

526-21 Colorado & S. R. Co. *v.* Reynolds, 51 Colo. 231, 116 P. 1043; Morden, etc. Wks. *v.* Fries, 228 Ill. 246, 81 N. E. 862 (and that promise was inducement); Fotheringill *v.* Copper Co., 43 Mont. 485, 117 P. 86; Burch *v.* Co., 32 Nev. 75, 104 P. 225.

Master must show performance of duty of repairing. McClaren *v.* Co., 166 Fed. 714, 92 C. C. A. 386.

Proof of existence of defect necessary to make master's promise binding or material. Coin *v.* Co., 222 Mo. 488, 121 S. W. 1.

Express delegation of master's authority to make promise need not be shown. Spencer *v.* Haines, 74 N. J. L. 13, 64 A. 970; Fox *v.* R. Co., 75 N. J. L. 716, 67 A. 1011; Stokes *v.* Co., 134 App. Div. 363, 119 N. Y. S. 37.

Assurance of safety of place, after making inspection and alterations, may be relied upon. Virginia I., etc. Co. *v.* Munsey, 110 Va. 156, 65 S. E. 478.

If servant unable to ascertain. Keller *v.* Berry (Ky.), 121 S. W. 1009.

Master must show scope of servant's duty. Quebec R., L. & P. Co. *v.* Fortin, 40 Can. Sup. 181.

Plaintiff may show defendant consciously neglected statutory duty.—Mertens *v.* Co., 235 Ill. 540, 85 N. E. 743.

On question of duty to remedy defect known to both parties competent to show how many defects remedied by master. Mascott C. Co. *v.* Garrett, 156 Ala. 290, 47 S. 149.

527-22 Wellington *v.* Pelletier, 173 Fed. 908, 97 C. C. A. 458; Stearns Co. *v.* Fowler, 58 Fla. 362, 50 S. 680; Bennett *v.* R. Co., 243 Ill. 420, 90 N. E. 735; Gathman *v.* Chicago, 236 Ill. 9, 86 N. E. 152; McCulloch *v.* S. Co., 243 Ill. 464, 90 N. E. 664; Lyons *v.* Ryerson, 242 Ill. 409, 90 N. E. 288; Aldrich *v.* R. Co., 241 Ill. 402, 89 N. E. 702; Malloy *v.* C. Co., 240 Ill. 102, 88 N. E. 234; Doherty *v.* Co., 146 Ill. App. 219; Malloy *v.* C. Co., 144 Ill. App. 226; Igo *v.* R. Co., 204 Mass. 197, 90 N. E. 574; McIntyre *v.* Tebbetts, 140 Mo. App. 116, 120 S. W. 621; Kipp *v.* Oyster, 133 Mo. App. 711, 114 S. W. 538; Hurley *v.* Olcott, 134 App. Div. 631, 119 N. Y. S. 430; Sullivan-Sanford L. Co. *v.* Cooper (Tex.), 142 S. W. 1168; Freeman *v.* Co., 150 Wis. 93, 135 N. W. 540.

527-23 Am. B. Co. *v.* Valente, 7 Penne. (Del.) 370, 73 A. 400; Bennett *v.* R. Co., 243 Ill. 420, 90 N. E. 735; Doherty *v.* Co., 146 Ill. App. 219; Diebold *v.* Wollborn (Ky.), 122 S. W. 212; Harris *v.* Co., 111 Md. 209, 73 A. 805; McMurray *v.* R. Co., 225 Mo. 272, 125 S. W. 751; McIntyre *v.* Tebbetts, 140 Mo. App. 116, 120 S. W. 621; Sambos *v.* R. Co., 134 Mo. App. 460, 114 S. W. 567; McConnell *v.* Op. Co., 133 N. Y. S. 255.

Presumed railroad employe used pass given him in consideration of contract. Vroom *v.* R. Co., 129 App. Div. 858, 115 N. Y. S. 1063.

527-24 Mollhoff *v.* R. Co., 15 Okla. 540, 82 P. 733, burden on servant to show co-employe vice-principal.

Master must show injury caused by negligence of fellow servant. Millen *v.* Co., 51 Or. 538, 95 P. 196.

527-25 Sloss-S. Co. *v.* Green, 159 Ala. 178, 49 S. 301; Stearns Co. *v.* Fowler, 58 Fla. 362, 50 S. 680; Southern R. Co. *v.* Pope, 133 Ky. 835, 119 S. W. 237; Kipp *v.* Oyster, 133 Mo. App. 711, 114 S. W. 538. *Comp.* Spring V. C. Co. *v.* Buzis, 115 Ill. App. 196, holding master must show existence of relation. See So. R. Co. *v.* Howerton (Ind.), 105 N. E. 1025. And see Woolf *v.* Deahl, 152 Ill. App. 357.

527-26 Middleton *v.* Ross, 202 Fed. 799; Illinois C. R. Co. *v.* Hart, 176 Fed. 245, 100 C. C. A. 49; Maine, etc. G. Co. *v.* Hachey, 173 Fed. 784, 97 C. C. A. 508; American B. Co. *v.* Valente, 7 Penne. (Del.) 370, 73 A. 400; Whitfield *v.* R. Co., 7 Ga. App. 268, 66 S. E. 973; Lunn *v.* Morris, 81 Kan. 94, 105 P. 15; McMurray *v.* R. Co., 225 Mo. 272, 125 S. W. 751; McIntyre *v.* Tebbetts, 140 Mo. App. 116, 120 S. W. 621; Westlake *v.* Murphy, 85 Neb. 45, 122 N. W. 684.

528-27 Standard C. Mills *v.* Collum, 6 Ga. App. 426, 65 S. E. 195.

528-28 Illinois C. R. Co. *v.* Hart, 176 Fed. 245, 100 C. C. A. 49; Roland *v.* Tift, 131 Ga. 683, 63 S. E. 133. *Contra,* Morgan *v.* Robinson, 157 Cal. 348, 107 P. 695, noting code amendment 1907. See Cent., etc. Co. *v.* Smedley, 150 Ky. 598, 150 S. W. 658.

528-30 American B. Co. *v.* Valente, 7 Penne. (Del.) 370, 73 A. 400; Lunn *v.* Morris, 81 Kan. 94, 105 P. 15; Schmeizer *r.* Co., 134 Mo. App. 493, 114 S. W. 1043; Quinn *v.* Co. (Tex. Civ.), 118 S. W. 733.

Captain and crew are fellow servants. Carlin *r.* N. Y. Dock Co., 137 App. Div. 71, 122 N. Y. S. 57.

Superintendent's principal duty under Massachusetts statute not determinable by fact that employe works with hands. New England T. & T. Co. *v.* Butler, 156 Fed. 321, 84 C. C. A. 217.

529-32 Gathman *r.* Chicago, 236 Ill. 9, 86 N. E. 152; Aldrich *r.* R. Co., 241 Ill. 402, 89 N. E. 702; Lyons *r.* Ryerson, 242 Ill. 409, 90 N. E. 288; Bennett *r.* R. Co., 243 Ill. 420, 90 N. E. 735; Kelly *v.* Peters, 126 La. 355, 52 S. 540; Meyers *v.* R. Co., 36 Utah 307, 104 P. 736; Jock *v.* R. Co., 53 Wash. 437, 102 P. 405; Rankel *v.* Co., 138 Wis. 442, 120 N. W. 269.

Engineer and fireman.—Louisville & N. R. Co. *v.* Moran, 148 Ky. 418, 146 S. W. 1131.

529-34 Stearns & C. L. Co. *r.* Fowler, 58 Fla. 362, 50 S. 680. See Chicago *r.* Richardson, 202 Fed. 836, 121 C. C. A. 144.

530-37 Moss *v.* C. Co., 202 Fed. 657, 121 C. C. A. 67; Bayles *r.* Co., 148 Ia. 29, 126 N. W. 808; Barrett *r.* Co., 201 Mass. 117, 87 N. E. 565; Belmer *r.* Co., 158 Mich. 399, 122 N. W. 793; Schmeizer *v.* F. Co., 134 Mo. App. 493, 114 S. W. 1043; Benak *r.* Wks., 85 Neb. 836, 124 N. W. 461; Hurley *r.* Olcott, 134 App. Div. 631, 119 N. Y. S. 430; Jachetta *v.* R. Co., 36 Utah 470, 105 P. 100; Jock *v.* R. Co., 53 Wash. 437, 102 P. 405; Olson *v.* Erickson, 53 Wash. 458, 102 P. 400.

530-38 Stokes *v.* Co., 134 App. Div. 363, 119 N. Y. S. 37; Lantry, etc. C. Co. *v.* McCrackin, 105 Tex. 407, 150 S. W. 1156; Hugo *v.* Paiz (Tex. Civ.), 128 S. W. 912; Ewing *v.* Co., 65 W. Va. 726, 65 S. E. 200.

530-39 Met. R. Lumb. Co. *r.* Davis, 205 Fed. 486, 123 C. C. A. 554; Casey *r* Co., 240 Ill. 416, 88 N. E. 982, 146 Ill. App. 551; Chenoweth *v.* Burr, 146 Ill. App. 443; Doherty *r.* Co., 146 Ill. App. 219; Meier *r.* Co., 136 Ia. 302, 111 N. W. 420; North-East C. Co. *r.* Preston, 132 Ky. 262, 116 S. W. 704; Mooney *r.* Smith, 205 Mass. 270, 91 N. E. 125 (statutory superintendent); Mertz *r.* R. Co., 174 Mo. App. 94, 156 S. W. 807; Madden *r.* R. Co., 167 Mo. App. 143, 151 S. W. 489; English *v.* Co., 145 Mo. App. 439, 122 S. W. 747 (though superior co-operating with subordinate if exercising authority on matter connected with injury); Shives *v.* Mills, 151 N. C. 290, 66 S. E. 141; Noble *v.* L. Co., 151 N. C. 76, 65 S. E. 622; Galvin *v.* Brown, 53 Or. 598, 101 P. 671; Reliable S. L. Co. *v.* Schuster (Tex. Civ.), 159 S. W. 447; Kirby L. Co. *v.* Williams (Tex. Civ.), 159 S. W. 309; City of Greenville *r.* Branch (Tex. Civ.), 152 S. W. 478; Sullivan-S. L. Co. *r.* Cooper (Tex. Civ.), 126 S. W. 35 (power to control merely).

See Missouri, etc. R. Co. *v.* Romans, 103 Tex. 4, 121 S. W. 1104.

531-40 Suchomel *v.* Maxwell, 144 Ill. App. 543; Schumacher *r.* Brew. Co., 247 Mo. 141, 152 S. W. 13; McIntyre *r.* Tebbetts, 140 Mo. App. 116, 120 S. W. 621. Relevant as a circumstance, but not decisive. Bayles *r.* Co., 148 Ia. 29, 126 N. W. 808; Belmer *v.* Co., 158 Mich. 399, 122 N. W. 793.

531-42 Moss *v.* Compress Co., 202 Fed. 657, 121 C. C. A. 67; Boin *v.* Co., 155 Cal. 612, 102 P. 937; Valente *v.* Co., 6 Penne. (Del.) 556, 73 A. 395; Kenny *v.* Co., 243 Ill. 396, 90 N. E. 724; Powers *v.* R. Co., 142 Ill. App. 515; L'Hote *v.* Co., 203 Mass. 294, 89 N. E. 532; Dalm *v.* Co., 157 Mich. 550, 122 N. W. 257; Potvin *v.* S. Co., 156 Mich. 201, 120 N. W. 613; Berglund *r.* R. Co., 109 Minn. 317, 123 N. W. 928; Martin *r.* Cornell, 136 App. Div. 585, 121 N. Y. S. 119; Shives *v.* Mills, 151 N. C. 290, 66 S. E. 141; Hickey *v.* Caldwell, 221 Pa. 545, 70 A. 855; Gilbert *r.* T. Co., 221 Pa. 176, 70 A. 719; Sawyer *r.* Co., 83 S. C. 271, 65 S. E. 225; Davis *r.* Lumb. Co., 126 Tenn. 576, 150 S. W. 545; Virginia I. etc., Co. *v.* Munsey, 110 Va. 156, 65 S. E. 478; Westerlund *r.* Rothschild, 53 Wash. 626, 102 P. 765 (competency of employes immaterial injury sustained as result of negligence of fellow servant in performing non-delegatable duty); Olson *r.* Erickson, 53 Wash. 458, 102 P. 400; Gierczak *v.* Co., 142 Wis. 207, 125 N. W.

436; Halwas *v.* G. Co., 141 Wis. 127, 123 N. W. 789.

Failure to give warning, attributable to master. Anderson *v.* Co., 108 Minn. 455, 122 N. W. 794.

532-43 Erie R. Co. *v.* Schomer, 171 Fed. 798, 96 C. C. A. 458; Girard *v.* Co., 82 Conn. 271, 73 A. 747; Bernheimer *v.* Bager, 108 Md. 551, 70 A. 91; Hoseth *v.* Co., 55 Wash. 416, 104 P. 612.

Custom of foreman to give warning before doing certain act relevant to show duty. Mooney *v.* Smith, 205 Mass. 270, 91 N. E. 125.

Witness may testify whose duty to keep place safe.—Sloss-S. & S. I. Co. *v.* Green, 159 Ala. 178, 49 S. 301.

533-44 Wilkinson G. Co. *v.* Dickinson, 35 Ind. App. 230, 73 N. E. 957; Westlake *v.* Murphy, 85 Neb. 45, 122 N. W. 684; Walters *v.* Lumb. Co., 163 N. C. 536, 80 S. E. 49.

Failure to employ servants possessing qualifications prescribed by statute prevents master from asserting defense of assumption of risk or negligence of fellow servant. Layzell *v.* Co., 156 Mich. 268, 117 N. W. 179.

533-45 Southern P. Co. *v.* Hetzer, 135 Fed. 272, 68 C. C. A. 26; Vogel *v.* Herzfeld-Phillipson Co., 148 Wis. 573, 134 N. W. 141.

533-46 Norfolk & W. R. Co. *v.* Hauser, 211 Fed. 567 (C. C. A.); Pittsburgh R. Co. *v.* Thomas, 174 Fed. 591; 98 C. C. A. 437; Penn. C. Co. *v.* Bowen, 159 Ala. 165, 49 S. 305; First Nat. Bk. *v.* Chandler, 144 Ala. 286, 39 S. 822; Arlington H. Co. *v.* Tanner (Ark.), 164 S. W. 286; Denton *v.* P. Co., 105 Ark. 161, 150 S. W. 572; Still *v.* R. Co., 154 Cal. 559, 98 P. 672; Thompson *v.* Warren, 38 App. Cas. (D. C.) 311; Smith *v.* R. Co., 143 Ill. App. 128; Joohs *v.* C. Co., 143 Ill. App. 20; Wilkinson G. Co. *v.* Dickinson, 35 Ind. App. 230, 73 N. E. 957; Gregory *v.* R. Co., 147 Ia. 715, 124 N. W. 797; Igo *v.* R. Co., 204 Mass. 197, 90 N. E. 574; Pfudl *v.* Romer, 107 Minn. 353, 120 N. W. 302; Britt *v.* Crebo, 172 Mo. App. 426, 158 S. W. 65; Rogers *v.* P. Co., 167 Mo. App. 49, 150 S. W. 556; Tucker *v.* Co., 132 Mo. App. 418, 112 S. W. 6; Chicago, etc. Co. *v.* Duran, 38 Okla. 719, 134 P. 876; McGuire *v.* R. Co., 215 Pa. 618, 64 A. 825; Roberts *v.* Co., 84 S. C. 283, 66 S. E. 298; Girocamo *v.* Tribble, 70 Wash. 25, 126 P. 27; Long *v.* McCabe, 52 Wash. 422, 100 P. 1016; Fuller *v.* Co., 64 W. Va. 437, 63 S. E. 206.

Evidence held sufficient.—Peters *v.* Co., 160 Cal. 48, 116 P. 400.

Burden shifts where acts from which incompetency inferred proven. Seewald *v.* Co., 49 Wash. 655, 96 P. 221.

If statute governing labor hours contains exception plaintiff must show himself not within exception. Chicago, etc. R. Co. *v.* Hamilton, 42 Ind. App. 512, 85 N. E. 1044.

Burden of showing negligence of fellow servant.—Mobile, etc. R. Co. *v.* Hicks, 91 Miss. 273, 46 S. 360. See Creola L. Co. *v.* Mills, 149 Ala. 474, 42 S. 1019; Walker *v.* Co., 76 Ark. 436, 88 S. W. 988; Pearsall *v.* R. Co., 189 N. Y. 474, 82 N. E. 752; Hendrix *v.* Mills, 138 N. C. 169, 50 S. E. 561.

533-47 Willette *v.* Co., 75 N. H. 399, 74 A. 870; Pearson *v.* Co., 51 Wash. 560, 99 P. 753.

Proof of misrepresentations by minor and parent of age of former not conclusive that master free from negligence in employing him in contravention of statute. Koester *v.* Wks., 194 N. Y. 92, 87 N. E. 77. They do not affect master's liability. Inland S. Co. *v.* Yedinak, 172 Ind. 423, 87 N. E. 229.

534-48 Pittsburgh R. Co. *v.* Thomas, 147 Fed. 591, 98 C. C. A. 437; First Nat. Bk. *v.* Chandler, 144 Ala. 286, 39 S. 822; Cubbage *v.* Est., 155 Ia. 39, 134 N. W. 1074; Standard O. Co. *v.* Leach (Ky.), 128 S. W. 885; Place *v.* R. Co., 82 Vt. 42, 71 A. 836.

Notice of incompetency immaterial if employe does not possess statutory qualifications. Kleinfelt *v.* Co., 156 Mich. 473, 121 N. W. 118.

534-49 Hiring an unlicensed person, negligence per se if not excused by master. Cragg *v.* Co., 154 Cal. 663, 98 P. 1063.

Delinquency of servant may be of such flagrant character that jury may infer master could not have failed to discover upon inquiry. See Still *v.* R. Co., 154 Cal. 559, 98 P. 672; Lowe *v.* R. Co., 154 Cal. 573, 98 P. 678.

534-51 Father's request that minor be not required to do certain work proved to show master's knowledge of incompetency. Ewing *v.* Co., 65 W. Va. 726, 65 S. E. 200.

534-52 Lee *v.* Co., 134 App. Div. 123, 118 N. Y. S. 852, shown what representation minor made as to age when employed.

Possession of experience prescribed by statute not sole test of servant's com-

petency. Majestic C. Co. *v.* Bradley, 132 Ky. 533, 116 S. W. 738.

534-53 Louisville & N. R. Co. *v.* Keiffer, 132 Ky. 419, 113 S. W. 433.

535-56 Klofski *v.* Co., 235 Ill. 146, 85 N. E. 274; Layzell *v.* Co., 156 Mich. 268, 117 N. W. 179; Pfudl *v.* Romer, 107 Minn. 353, 120 N. W. 302; Curtis *v.* Co., 73 N. H. 516, 63 A. 400; Veit *v.* Co., 225 Pa. 54, 73 A. 982; Walton *v.* Burchel, 121 Tenn. 715, 121 S. W. 391.

535-58 Walton *v.* Burchel, 121 Tenn. 715, 121 S. W. 391.

535-59 Penn. C. Co. *v.* Bowen, 159 Ala. 165, 49 S. 305; Doll *v.* R. Co., 138 Ky. 486, 128 S. W. 344; Igo *v.* R. Co., 204 Mass. 197, 90 N. E. 574; Tucker *v.* Co., 132 Mo. App. 418, 112 S. W. 6; Hunter *v.* Co., 89 S. C. 502, 71 S. E. 1082.

In Merchants' T. Co. *v.* Corcoran, 4 Ga. App. 654, 62 S. E. 130, evidence of unskilfulness in performance of act outside servant's duty competent to show skill or unskillfulness.

535-61 Pittsburgh R. Co. *v.* Thomas, 174 Fed. 591, 98 C. C. A. 437 (among those of servant's calling); Southern P. Co. *v.* Hetzer, 135 Fed. 272, 68 C. C. A. 26; Walters *v.* Lumb. Co., 163 N. C. 536, 80 S. E. 49; El Paso, etc. R. Co. *v.* Smith, 50 Tex. Civ. 10, 108 S. W. 988; Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29; Griffin *v.* R. Co. (Vt.), 89 A. 220; Moering *v.* Falk Co., 141 Wis. 294, 124 N. W. 402 (reputation among particular class, including only a part of those knowing servant's character or work, inadmissible. Before evidence of reputation received evidence of incompetency should be offered). See also vol. 8, p. 22, n. 51.

536-63 Smith *v.* R. Co., 236 Ill. 369, 86 N. E. 150; Majestic C. Co. *v.* Bradley, 132 Ky. 533, 116 S. W. 738; Young *v.* Co., 133 Wis. 9, 113 N. W. 59.

536-64 Hunt *v.* R. Co. (Ia.), 141 N. W. 334; Pfudl *v.* Romer, 107 Minn. 353, 120 N. W. 302. See Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29. Declarations of a master mechanic, inadmissible to show defendant's notice of servant's incompetency. McClure *v.* R. Co., 146 Mich. 459, 109 N. W. 847.

536-66 Layzell *v.* Co., 156 Mich. 268, 117 N. W. 179.

Defendant's records, competent to show knowledge. Northern P. R. Co. *v.* Lundberg, 176 Fed. 847, 100 C. C. A. 317.

536-67 King *v.* Co., 143 Ala. 632, 42 S. 27.

536-68 See Hodde *v.* Co., 193 Mass. 237, 79 N. E. 252; Vogel *v.* Co., 148 Wis. 573, 134 N. W. 141.

537-69 Southern P. Co. *v.* Hetzer, 135 Fed. 272, 68 C. C. A. 26; Date *v.* Co., 104 App. Div. 207, 93 N. Y. S. 249. See infra, p. 939, n. 60; vol. 11, p. 788, n. 36, and supplement thereto. **Result of investigating** servant's competency proved. Lamb *v.* Co., 140 Ill. App. 195.

Specific acts admissible where employer had knowledge of incompetency or by reasonable diligence might have had. Southern P. Co. *v.* Hetzer, 135 Fed. 272, 68 C. C. A. 26; Pfudl *v.* Romer, 107 Minn. 353, 120 N. W. 302; Dossett *v.* Co., 40 Wash. 276, 82 P. 273.

537-70 Rush *v.* Co., 135 Ia. 376, 112 N. W. 814 (casual neglect not sufficient to show negligence of principal); Cooney *v.* R. Co., 196 Mass. 11, 81 N. E. 905; Iwanowski *v.* Co., 205 Mass. 316, 91 N. E. 296; Pratt *v.* McKee, 135 App. Div. 752, 119 N. Y. S. 967 (if negligence proved all surrounding circumstances competent. *Contra,* Mobile, etc. R. Co. *v.* Hicks, 91 Miss. 273, 46 S. 360, 389.

Single act or omission may be of such character as to carry question of competency to jury. Smith *v.* R. Co., 143 Ill. App. 128.

537-71 First Nat. Bk. *v.* Chandler, 144 Ala. 286, 39 S. 822.

537-72 Pittsburgh R. Co. *v.* Thomas, 174 Fed. 591, 98 C. C. A. 437; Mapes *v.* R. Co., 165 Ill. App. 616; Tucker *v.* Co., 132 Mo. App. 418, 112 S. W. 6; Moering *v.* Falk Co., 141 Wis. 294, 124 N. W. 402; Young *v.* Co., 133 Wis. 9, 113 N. W. 59.

537-73 Alabama R. Co. *v.* Vail, 155 Ala. 382, 46 S. 587 ("was a kind of slow fellow"); Trend *v.* R. Co., 149 Mich. 338, 112 N. W. 977; Willette *v.* Co., 75 N. H. 399, 74 A. 870; Young *v.* Co., 133 Wis. 9, 113 N. W. 59.

538-77 Still *v.* R. Co., 154 Cal. 559, 98 P. 672.

538-79 Peeno *v.* Co., 32 Ky. L. R. 1313, 108 S. W. 349.

538-80 La Chappelle *v.* Co., 157 Ill. App. 112; Chesapeake S. Co. *v.* Hufnagel, 120 Md. 53, 87 A. 4.

538-81 Ft. Worth, etc. R. Co. *v.* Finley, 50 Tex. Civ. 291, 110 S. W. 531.

Opinions of general competency and skill limited to conduct of servant on instant occasion. Lamb *v.* Co., 140 Ill. App. 195.

539-84 Gettings *v.* Kelley, 212 Mass. 171, 98 N. E. 684.

539-85 Physical or mental infirmity shown to establish incompetency. Tucker *v.* Co., 132 Mo. App. 418, 112 S. W. 6. Physical condition evidences incompetency. Rhatigan *v.* Co., 121 N. Y. S. 481.

540-88 Loftus *v.* L. Co. (Mass.), 104 N. E. 575.

540-89 DiBari *v.* Bishop, 199 Mass. 254, 85 N. E. 89; Johnson *v.* Caughren, 55 Wash. 125, 104 P. 170.

Instructions and warning which related to matters occurring before the accident, and had no relation to the proximate cause of plaintiff's injury are not admissible. Mastrostefano *v.* R. I. Processing Co. (R. I.), 82 A. 385.

540-90 Opinion of person representing master inadmissible on question of competency of servant when employed; but statements competent after employe's incompetency shown, to charge master with notice. Smith *v.* R. Co., 143 Ill. App. 128.

Inability to speak language of person with whom servant sent to work shown. Beers *v.* Co., 200 Mass. 19, 85 N. E. 864. But inability to understand English no evidence of incompetency in servant associated with others in performance of mere manual labor. Friberg *v.* Co., 201 Mass. 461, 87 N. E. 897.

540-91 Insufficiency of servants shown. Denver, etc. R. Co. *v.* Reiter, 47 Colo. 417, 107 P. 1100.

Burden on plaintiff to show insufficiency. Ryan *v.* Co., 140 Ia. 619, 119 N. W. 86.

Expert opinions as to number of servants necessary, inadmissible if mechanical operation simple. Bowie *v.* Co., 200 Mass. 571, 86 N. E. 914.

Number of men defendant customarily used in doing work shown. Alabama R. Co. *v.* Vail, 155 Ala. 382, 46 S. 587.

540-92 Stone *v.* R. Co., 35 Utah 305, 100 P. 362.

540-93 Coughlan *v.* R. Co., 6 Penne. (Del.) 242, 67 A. 148.

Failure to adopt rules, immaterial if need not obvious. Knickerbocker *v.* Co., 133 App. Div. 787, 118 N. Y. S. 82.

540-95 Rules adopted and enforced by others shown to test sufficiency of defendant's rules, though former indecisive. Stone *v.* R. Co., 35 Utah 305, 100 P. 362.

Non-adoption of rules by others may not excuse. Van Alstine *v.* Co., 128 App. Div. 58, 112 N. Y. S. 416.

541-97 Sipes *v.* R., 54 Wash. 47, 102 P. 1057. See Stone *v.* R. Co., 35 Utah 305, 100 P. 362.

541-98 Written rules admissible to show plaintiff acting within scope of employment (Wilson *v.* R. Co. (R. I.), 69 A. 364), or to show defendant's negligence. Atchison, etc. R. Co. *v.* Bryant (Tex. Civ.), 162 S. W. 400; Galveston, etc. R. Co. *v.* Garrett, 44 Tex. Civ. 406, 98 S. W. 932. Admissible in behalf of plaintiff, though not pleaded, to support his testimony as to effect of application of emergency brakes. Galveston, etc. R. Co. *v.* Harper, 53 Tex. Civ. 614, 114 S. W. 1168. Rules best evidence of servant's duties. Bennett *v.* R. Co., 243 Ill. 420, 90 N. E. 735.

Violation of rules with knowledge of the master may be shown. Sloss-S., etc. Co. *v.* Capps (Ala.), 62 S. 66. See vol. 8, p. 954, n. 40.

Book of rules carried by deceased and found near place of his injury, admitted. Devine *v.* R. Co., 167 Ill. App. 195. See also vol. 8, p. 954, n. 40.

541-99 Negligence in not adopting rules. See Bell *v.* R. Co., 128 App. Div. 730, 113 N. Y. S. 185.

Custom of giving signals shown by employe injured in performance of duty. Floan *v.* R. Co., 101 Minn. 113, 111 N. W. 957; Joyce *v.* R. Co., 100 Minn. 225, 110 N. W. 975, 8 L. R. A. (N. S.) 756. Otherwise when injury sustained by one not so engaged. Magliani *v.* R. Co., 108 Minn. 148, 121 N. W. 635.

541-4 Virginia, etc. C. Co. *v.* Tomlinson, 104 Va. 249, 51 S. E. 362, employes' testimony never heard warning, inadmissible.

541-5 Ambre *v.* Co., 43 Ind. App. 47, 86 N. E. 871; Carr *v.* Co., 29 R. I. 276, 70 A. 196.

Co-employe may testify plaintiff warned by defendant's foreman. Louisville, etc. R. Co. *v.* Anderson, 150 Ala. 350, 43 S. 566.

Meaning placed on rule by experts shown by them. International, etc. R. Co. *v.* Brice (Tex. Civ.), 126 S. W. 613.

541-6 Looney *v.* R. Co., 200 U. S. 480; Louisville & N. R. Co. *v.* Lowe, 158 Ala. 391, 48 S. 99; Woodson *v.* R.

Co., 91 Ark. 388, 121 S. W. 273; Valerii *v.* Breakwater Co. (Del.), 82 A. 597; Bates M. Co. *v.* Crowley, 115 Ill. App. 540; Balt., etc. R. Co. *v.* Walker, 41 Ind. App. 588, 84 N. E. 730; Eliot *v.* R. Co., 204 Mo. 1, 102 S. W. 532; Davis *v.* Gas, etc. Co., 133 N. Y. S. 247; Helfenbein *v.* Wohlfeld, 235 Pa. 302, 83 A. 827; Stone, etc. Corp. *v.* Goodman (Tex. Civ.), 167 S. W. 10; St. Louis, etc. Co. *v.* Cason (Tex. Civ.), 129 S. W. 394; Galveston, etc. R. Co. *v.* Smith (Tex. Civ.), 93 S. W. 184; Missouri, etc. R. Co. *v.* Lynch, 40 Tex. Civ. 543, 90 S. W. 511. But see N. Albany M. Co. *v.* Senior (Ind. App.), 101 N. E. 1025 (holding there is no such presumption, yet the burden is upon plaintiff to establish master's negligence); El Paso M. Co. *v.* DeGuereque, 46 Tex. Civ. 86, 101 S. W. 814, also Galveston, etc. R. Co. *v.* Roberts (Tex. Civ.), 91 S. W 375; La Bee *v.* Co., 47 Wash. 57, 91 P. 560.

Master presumed to know structural defects in appliances furnished. Stine *v.* Co., 219 Pa. 145, 67 A. 990. See Allen *v.* Co., 212 Pa. 54, 61 A. 572.

Presumption arising from proof that appliance bought from a reputable dealer not conclusive in favor of master. Longpre *v.* Co., 38 Mont. 99, 99 P. 131.

542-7 Canadian N. Co. *v.* Walker, 172 Fed. 346, 97 C. C. A. 44; Western C. & M. Co. *v.* Fountz, 101 Ark. 205, 142 S. W. 160; Jellico *v.* White, 11 Ga. App. 836, 76 S. E. 599; Feeney *v.* Co., 189 Mass. 336, 75 N. E. 733; Webb *v.* Dinnie Bros., 22 N. D. 377, 134 N. W. 41; Millen *v.* Co., 51 Or. 538, 95 P. 196; Price *v.* Co., 41 Tex. Civ. 47, 90 S. W. 717; Merrill *v.* R. Co., 29 Utah 264, 81 P. 85; Jacoby *v.* Williams, 110 Va. 55, 65 S. E. 491 (methods of work); Knudsen *v.* Stone Co., 145 Wis. 394, 130 N. W. 519.

Master need not provide the safest methods of doing the work. Erwin *v.* Tel. Co., 173 Mo. App. 508, 158 S. W. 913.

That safe place not furnished presumptive evidence of negligence. Fowler P. Co. *v.* Enzenperger, 77 Kan. 406, 94 P. 995, 15 L. R. A. (N. S.) 784; Kansas M. Co. *v.* Stark, 77 Kan. 648, 95 P. 1047.

542-8 Norfolk & W. R. Co. *v.* Reed, 167 Fed. 16, 92 C. C. A. 478; Cryder *v.* R. Co., 152 Fed. 417, 81 C. C. A. 559; Jefferys *v.* Co., 157 Fed. 932; Byers *v.* Co., 159 Fed. 347, 86 C. C. A. 347; Carnegie S. Co. *v.* Byers, 149 Fed. 667, 82 C. C. A. 115; Southern R. Co. *v.* Carr, 153 Fed. 106, 82 C. C. A. 240; Looney *v.* R. Co., 200 U. S. 480; Northern P. Co. *v.* Dixon, 139 Fed. 737, 71 C. C. A. 555; Tutwiler, etc. I. Co. *v.* Farrington, 144 Ala. 157, 39 S. 898; Birmingham M. Co. *v.* Rockhold, 143 Ala. 115, 42 S. 96; St. Louis, etc. R. Co. *v.* Wells, 82 Ark. 372, 101 S. W. 738; Chicago, etc. R. Co. *v.* Murray, 85 Ark. 600, 109 S. W. 549; Walls *v.* R. Co. (Del.), 80 A. 355; Bowring *v.* Co, 5 Penne. (Del.) 594, 66 A. 369; Jemnienski *v.* Co., 5 Penne. (Del.) 385, 63 A. 935; Holland *v.* Co., 131 Ga. 715, 63 S. E. 290; Vinson *v.* Mills, 2 Ga. App. 53, 58 S. E. 413; Tyma *v.* Co., 144 Ill. App. 454; Chicago, etc. R. Co. *v.* O'Donnell, 114 Ill. App. 345; Trybula *v.* Mfg. Co., 153 Ill. App. 298; Carlock *v.* R. Co., 155 Ill. App. 199; Geraghty *v.* Fire Proofing Co., 157 Ill. App. 308; Geraghty *v.* Wm. Grace Co., 157 Ill. App. 309; Chicago, etc. R. Co. *v.* Kimmel, 221 Ill. 547, 77 N. E. 936; Sanitary C. Co. *v.* Lindley (Ind. App.), 105 N. E. 585; Adams *v.* R. Co., 38 Ind. App. 607, 78 N. E. 687; Huggard *v.* Co., 132 Ia. 724, 109 N. W. 475; Husk's Admr. *v.* Grocery Co., 153 Ky. 595, 156 S. W. 120; Davis *v.* Co., 116 La. 1070, 41 S. 318; Berdos *v.* Mills, 209 Mass. 489, 95 N. E. 876; Lehman *v.* Co., 104 Minn. 190, 116 N. W. 352; Cederberg *v.* R. Co., 101 Minn. 100, 111 N. W. 953; Kane *v.* R. Co., 251 Mo. 13, 157 S. W. 644; Zachra *v.* Mfg. Co., 159 Mo. App. 96, 139 S. W. 518; Hodges *v.* R. Co., 135 Mo. App. 683, 116 S. W. 1131; Shore *v.* Co., 111 Mo. App. 278, 86 S. W. 905; Beebe *v.* Co., 206 Mo. 419, 103 S. W. 1019; Wojtylak *v.* Co., 188 Mo. 260, 87 S. W. 506; Dunphy *v.* Stockyards, 118 Mo. App. 506, 95 S. W. 301; Kremer *v.* Co., 120 Mo. App. 247, 96 S. W. 726; Purcell *v.* Co., 187 Mo. 276, 86 S. W. 121; Trigg *v.* Co., 187 Mo. 227, 86 S. W. 222; Hamel *v.* Co., 73 N. H. 386, 62 A. 592; Smith *v.* R. Co., 73 N. H. 325, 61 A. 359; Carney *v.* Co., 191 N. Y. 301, 84 N. E. 62; Cotton *v.* R. Co., 149 N. C. 227, 62 S. E. 1093; Ross *v.* Mills, 140 N. C. 115, 52 S. E. 121; Dewey, etc. Co. *v.* Blunt, 38 Okla. 182, 132 P. 659; Manning *v.* Co., 52 Or. 101, 96 P. 545; Fredenthal *v.* Brown, 52 Or. 33, 95 P. 1114; Finn *v.* R. Co., 51 Or. 66, 93 P. 690; Lewis *v.* R. Co., 220 Pa. 317, 69 A. 821; Hughes *v.* Co., 214 Pa.

282, 63 A. 692; Wilson *v.* R. Co., 29 R. I. 146, 69 A. 364; Tavares *v.* Dewing (R. I.), 82 A. 133; Nashville, etc. R. Co. *v.* Hayes, 117 Tenn. 680, 99 S. W. 362; Galveston, etc. Co. *v.* Chojnacky (Tex. Civ.), 163 S. W. 1011; Vernon C. O. Co. *v.* Catron (Tex. Civ.), 137 S. W. 404; Nat. B. Co. *v.* Scott (Tex. Civ.), 142 S. W. 65; Galveston, etc. R. Co. *v.* Parish (Tex. Civ.), 93 S. W. 682; Galveston, etc. R. Co. *v.* Smith, 100 Tex. 267, 98 S. W. 240; Kiley *v.* R. Co., 80 Vt. 536, 68 A. 713; Virginia, etc. C. Co. *v.* Kiser, 105 Va. 695, 54 S. E. 889; Norfolk R. Co. *v.* McDonald, 106 Va. 207, 55 S. E. 554; Law *v.* Bedding Co., 147 Wis. 224, 132 N. W. 593.

See Meyers *v.* Co., 118 La. 805, 43 S. 448; Hendrix *v.* Mills, 138 N. C. 169, 50 S. E. 561. But see St. Jean *v.* Co. (R. I.), 69 A. 604 (holding proof of automatic starting of machine excused servant from proof of latent defect or negligence which caused it). See also Petrarca *v.* Co., 27 R. I. 265, 61 A. 648. *Comp.* O'Connor *v.* Co., 158 Fed. 241, 85 C. C. A. 459 (inspection of material on which servant works).

Preponderance of evidence is sufficient. Gurnea *v.* R. Co., 157 Ill. App. 331.

Evidence sufficient. — Holland *v.* Barnett & Record Co., 143 Wis. 446, 128 N. W. 61.

Under a statute requiring manufacturers to use certain things for the protection of employes, where an injury is proved, the burden of proof rests on defendant to show that certain protecting guards were not practicable, and would not have prevented the accident. Kimmerle *v.* Dubuque Altar Mfg. Co., 154 Ia. 42, 134 N. W. 434.

Presumption operates in favor of servant. Ball *v.* Co., 32 App. Cas. (D. C.) 177.

Burden is on master to show imperfection did not enter into original construction of machine, rather than on servant to show negligence in not repairing it. Miller *v.* Co., 137 Wis. 138, 118 N. W. 536.

Inspection of appliances.—Where appliances constructively in master's custody burden of showing proper inspection upon him. Reed *v.* R. Co., 162 Fed. 750.

Servant may rely on master's assurance that tool is safe and adequate unless risk of using it so obvious that ordinarily prudent person would not have continued to use. Rogers *v.* R. Co., 33 Ky. L. R. 1067, 112 S. W. 630.

Repairs.—Credible evidence appliances known by master out of repair must be overcome by evidence showing contrary or that repairs were made. Firment *v.* Co., 162 Fed. 758.

Neglect of employe to report defect shown. Gardner *v.* R. Co., 128 App. Div. 12, 112 N. Y. S. 369.

Burden of showing ignorance of defects—rule inapplicable when death results.—Moseley *v.* Co., 33 Ky. L. R. 110, 109 S. W. 306. *Contra*, St. Louis, etc. R. Co. *v.* Standifer, 81 Ark. 275, 99 S. W. 81; Klebe *v.* Co., 207 Mo. 480, 105 S. W. 1057; Eliot *v.* R. Co., 204 Mo. 1, 102 S. W. 532.

Cause of injury must be shown. Ashcraft *v.* Wks., 148 Ia. 420, 126 N. W. 1111.

542-9 Looney *v.* R. Co., 200 U. S. 480; Norfolk & W. R. Co. *v.* Hauser, 211 Fed. 567 (C. C. A.); Canadian N. R. Co. *v.* Senske, 201 Fed. 637, 120 C. C. A. 65; Carnegie S. Co. *v.* Byers, 149 Fed. 667, 82 C. C. A. 115; Northern R. Co. *v.* Dixon, 139 Fed. 737, 71 C. C. A. 555; McDonnell *v.* Co., 143 Fed. 480, 74 C. C. A. 500; Jefferys *v.* Co., 157 Fed. 932; Hunter *v.* R. Co., 188 Fed. 645, 110 C. C. A. 459; Lewis *v.* Koller, etc., 186 Fed. 403; Johnson *v.* R. Co., 177 Ala. 284, 58 S. 447; Tennessee C. I. & R. Co. *v.* Crotwell, 156 Ala. 304, 47 S. 64; Woodson *v.* R. Co., 91 Ark. 388, 121 S. W. 273; St. Louis, etc. R. Co. *v.* Reed, 92 Ark. 350, 122 S. W. 645; St. Louis, etc. R. Co. *v.* Hill, 79 Ark. 76, 94 S. W. 914; St. Louis, etc. R. Co. *v.* Wells, 82 Ark. 372, 101 S. W. 738; McDonald *v.* Co., 7 Cal. App. 375, 94 P. 376; Thompson *v.* Co., 148 Cal. 35, 82 P. 367; Creede U. M. Co. *v.* Hawman, 23 Colo. App. 125, 127 P. 924; Elkton, etc. M. Co. *v.* Sullivan, 41 Colo. 241, 92 P. 679; Bowring *v.* Co., 5 Penne. (Del.) 594, 66 A. 369; Butler *v.* Frazee, 25 App. Cas. (D. C.) 392; Scininski *v.* Leather Co. (Del.), 83 A. 20; National B. Co. *v.* Wilson, 169 Ind. 442, 82 N. E. 916; Mitchell L. Co. *v.* Nickless, 44 Ind. App. 197, 85 N. E. 728; Rush *v.* Co., 135 Ia. 376, 112 N. W. 814; Bergman *v.* Altman, 127 Ia. 693, 104 N. W. 280; Dana *v.* Blackburn, 28 Ky. L. R. 695, 90 S. W. 237; Vissman *v.* R. Co., 28 Ky. L. R. 429, 89 S. W. 502; Levins *v.* Bancroft, 114 La. 105, 38 S. 72; Baltimore & O. R. Co. *v.* Wilson, 117 Md. 198, 83 A. 248; Gans S. Co. *v.* Byrnes, 102 Md. 230, 62 A. 155; Bamford *v.* Co., 191

Mass. 479, 78 N. E. 115; Curtin *v.* R. Co., 194 Mass. 260, 80 N. E. 522; Fuller *v.* R. Co., 141 Mich. 66, 104 N. W. 414; Cederberg *v.* R. Co., 101 Minn. 100, 111 N. W. 953; Eliot *v.* R. Co., 204 Mo. 1, 102 S. W. 532; Beebe *v.* Co., 206 Mo. 419, 103 S. W. 1019; Deckerd *v.* R. Co., 111 Mo. App. 117, 85 S. W. 982; Hicks *v.* Co., 74 N. H. 154, 65 A. 1075; Andrews *v.* Reiners, 112 App. Div. 378, 98 N. Y. S. 658; Stackpole *v.* Wray, 99 App. Div. 262, 90 N. Y. S. 1045; Fallon *v.* Mertz, 110 App. Div. 755, 97 N. Y. S. 417; Rende *v.* Co., 187 N. Y. 382, 80 N. E. 206; Jones *v.* R. Co., 144 N. C. 79, 56 S. E. 556; Shaw *v.* Co., 143 N. C. 131, 55 S. E. 433; Horton *v.* R. Co., 145 N. C. 132, 58 S. E. 993; W. Powell Co. *v.* Gaskins, 31 O. C. C. 656; Rush *v.* Co., 51 Or. 519, 95 P. 193; Finn *v.* R. Co., 51 Or. 66, 93 P. 690; Kimke *v.* Co. (Pa.), 90 A. 538; McDonnell *v.* Mills, 241 Pa. 61, 88 A. 81; Allen *v.* Co., 212 Pa. 54, 61 A. 572; Lewis *v.* R. Co., 220 Pa. 317, 69 A. 821; Reeder *v.* Coal Co., 231 Pa. 563, 80 A. 1121; Venbuvr *v.* Mills, 27 R. I. 89, 60 A. 770; Green *v.* Co., 75 S. C. 102, 55 S. E. 125; Galveston, etc. R. Co. *v.* Garven, 50 Tex. Civ. 245, 109 S. W. 426; St. Louis, etc. Co. *v.* Cason (Tex. Civ.), 129 S. W. 394; Norfolk R. Co. *v.* McDonald, 106 Va. 207, 55 S. E. 554; Newhouse *v.* R. Co., 62 W. Va. 562, 59 S. E. 1071.

See Binewicz *v.* Haglin, 103 Minn. 297, 115 N. W. 271; Croce *v.* Buckley, 115 App. Div. 354, 100 N. Y. S. 898. But see Moit *v.* R. Co., 153 Fed. 354, 82 C. C. A. 430; St. Louis, etc. R. Co. *v.* Standifer, 81 Ark. 275, 99 S. W. 81; Louisville, etc. R. Co. *v.* Jones, 50 Fla. 225, 39 S. 485; Atlanta, etc. R. Co. *v.* McManus, 1 Ga. App. 302, 58 S. E. 258; King *v.* R. Co., 1 Ga. App. 88, 58 S. E. 252 (holding where negligent thing complained of existed independently of acts of plaintiff or of a fellow servant presumption arises as to defendant's negligence upon proof of injury); Pittsburg, etc. R. Co. *v.* Campbell, 116 Ill. App. 356; Murray *v.* R. Co., 33 Ky. L. R. 545, 110 S. W. 334; Mobile, etc. R. Co. *v.* Hicks, 91 Miss. 273, 46 S. 360; St. Clair *v.* R. Co., 122 Mo. App. 519, 99 S. W. 775; Lee *v.* R. Co., 112 Mo. App. 372, 87 S. W. 12; McGowan *v.* Nelson, 36 Mont. 67, 92 P. 40; Keenan *v.* Co., 58 Misc. 371, 108 N. Y. S. 952; Ferrick *v.* Eidlitz, 123 App. Div. 587, 108 N. Y. S. 28; Ristau *v.* Co., 120 App. Div. 478, 104 N. Y. S. 1059; Gorman *v.* Milliken, 42 Misc. 336, 86 N. Y. S. 699; Haggblad *v.* R. Co., 117 App. Div. 838, 102 N. Y. S. 1039; Van Inwegan *v.* R. Co., 126 App. Div. 297, 110 N. Y. S. 959 (negligence presumed under doctrine res ipsa loquitur); Hemphill *v.* Co., 141 N. C. 487, 54 S. E. 420; Stewart *v.* R. Co., 141 N. C. 253, 53 S. E. 877; Webb *v.* Dinnie Bros., 22 N. D. 377, 134 N. W. 41; Bussey *v.* R. Co., 78 S. C. 352, 58 S. E. 1015; Commerce, etc. Co. *v.* Camp (Tex. Civ.), 117 S. W. 451; Galveston, etc. R. Co. *v.* Harris, 48 Tex. Civ. 434, 107 S. W. 108 (where shown servant was free from fault upon happening of injury presumption of defendant's negligence arises). See vol. 8, p. 869, n. 44-45, and supplement thereto.

Res ipsa loquitur inapplicable.—Lynch *v.* Packing Co., 63 Wash. 423, 115 P. 838; Lewinn *v.* Murphy, 63 Wash. 356, 115 P. 740.

Presumption that article used in defendant's business placed for use by him. Hoseth *v.* Co., 55 Wash. 416, 104 P. 612. Master's knowledge of condition of place conclusively presumed. Leggett *v.* R. Co., 152 N. C. 110, 67 S. E. 249.

Master must show employe assumed duty of inspecting appliance. Denker *v.* Co., 135 Mo. App. 340, 115 S. W. 1035.

Neglect of statutory duty to guard machinery raises presumption of negligence against master. Kansas B. B. & Mfg. Co. *v.* Stark, 77 Kan. 648, 95 P. 1047. Negligence if practicable to comply with law and neglect to do so caused injury. Callopy *v.* Atwood, 105 Minn. 80, 117 N. W. 238. In New Jersey statute not imposing civil liability for failure to comply with it does not affect master's liability. Mika *v.* Wks., 76 N. J. L. 561, 70 A. 327.

Under Kansas statute happening of collision on a railroad whereby employe carried to place of work, pursuant to contract, is injured raises presumption of negligence on master's part. Missouri P. R. Co. *v.* Larussi, 161 Fed. 66, 88 C. C. A. 230.

543-10 Norfolk & W. R. Co. *v.* Reed, 167 Fed. 16, 92 C. C. A. 478; Firment *v.* Co., 162 Fed. 758; Franke *v.* Hanly, 215 Ill. 216, 74 N. E. 130; McCarthy *v.* Co., 232 Ill. 473, 83 N. E. 957 (evidence of dangerous condition of mine several days prior to accident admis-

sible); Sterns C. Co. *v.* Evans, 33 Ky. L. R. 755, 111 S. W. 308; Dean *v.* R. Co., 199 Mo. 386, 97 S. W. 910; Winkle *v.* Co., 132 Mo. App. 656, 112 S. W. 1026; Reich *v.* Co., 120 App. Div. 445, 104 N. Y. S. 1069; Walker *v.* Co., 111 App. Div. 19, 97 N. Y. S. 521; Davis *v.* Co., 20 S. D. 399, 107 N. W. 374; Paris & Great N. R. Co. *v.* Boston (Tex. Civ.), 142 S. W. 944; Texas Traction Co. *v.* Morrow (Tex. Civ.), 145 S. W. 1069; Barney *v.* Quaker Oats Co., 85 Vt. 372, 82 A. 113; Hansen *v.* Co., 41 Wash. 349, 83 P. 102; Gartin *v.* Coal Co. (W. Va.), 78 S. E. 673.

See Southern C. Co. *v.* Swinney, 149 Ala. 405, 42 S. 808; Bundy *v.* Co., 149 Cal. 772, 87 P. 622; Stratton, etc. Co. *v.* Ellison, 42 Colo. 498, 94 P. 303; Hotchkiss M. R. Co. *v.* Bruner, 42 Colo. 305, 94 P. 331; Finley *v.* R. Co., 31 Ky. L. R. 740, 103 S. W. 343; Black Diamond, etc. Co. *v.* Price, 33 Ky. L. R. 334, 108 S. W. 345; Lamb *v.* R. Co., 217 Pa. 564, 66 A. 762; infra, "Negligence," 908--40, 41.

Expert who testified he informed master of the improper method of construction at time may state reasons for his opinion by indicating defects. Griffin W. Co. *v.* Smith, 173 Fed. 245, 97 C. C. A. 411.

Condition of the whole of a machine proved to show unusual strain on part causing injury. Northern P. R. Co. *v.* Wendel, 156 Fed. 336, 84 C. C. A. 232.

Previous failure of appliance proved to show master's knowledge and duty to give warning. Asheraft *v.* Wks., 148 Ia. 420, 126 N. W. 1111.

543-11 Betts *v.* Hancock, 139 Ga. 198, 77 S. E. 77. See also vol. 8, p. 905, n. 31.

543-13 Norfolk & W. R. Co. *v.* Reed, 167 Fed. 16, 92 C. C. A. 478; Louisville R. Co. *v.* Lowe, 158 Ala. 391, 48 S. 99; Brunger *v.* Co., 6 Cal. App. 691, 92 P. 1043. But see Culver *v.* R. Co., 144 Mich. 254, 107 N. W. 908; Chojnacki *v.* Transit Co., 138 N. Y. S. 1093; Dunbar *v.* R. Co., 79 Vt. 474, 65 A. 528. See vol. 8, p. 905, n. 35, et seq., and supplement thereto.

Condition of belt several days after accident admissible. Chapman *v.* Min. Co., 177 Mo. App. 264, 162 S. W. 648. See also vol. 8, p. 905, n. 35.

Evidence of the condition long after the accident held not admissible. Texas Traction Co. *v.* Morrow (Tex. Civ.), 145 S. W. 1069.

The practicability of guarding machinery in accordance with statute shown. Rase *v.* R. Co., 107 Minn. 260, 120 N. W. 360.

Occurrences after workmen directed to resume work and assured of safety of place shown to prove negligence of superintendent in examination. Tennessee, etc. Co. *v.* George, 161 Ala. 421, 49 S. 681.

543-14 Korab *v.* R. Co. (Ia.), 143 N. W. 876; Silva *v.* Davis, 191 Mass. 47, 77 N. E. 525. See Burns *v.* Crow, 123 App. Div. 251, 107 N. Y. S. 944; Wren *v.* Co., 122 App. Div. 289, 106 N. Y. S. 710; St. Louis, etc. R. Co. *v.* Arnold, 39 Tex. Civ. 161, 87 S. W. 173; Lay *v.* Co., 64 W. Va. 288, 61 S. E. 156.

543-16 Woodson *v.* R. Co., 91 Ark. 388, 121 S. W. 273 (defect discoverable by reason of inspection); Ind. U. T. Co. *v.* Sullivan (Ind. App.), 101 N. E. 401; Campbell *v.* Tr. Co. (Mo. App.), 163 S. W. 287; Erickson *v.* McNeeley, 41 Wash. 509, 84 P. 3.

Existence of guards for some machines evidence of practicability to comply with statute requiring like machines guarded. Kerr *v.* Co., 155 Mich. 191, 118 N. W. 925.

543-17 See Bokamp *v.* R. Co., 123 Mo. App. 270, 100 S. W. 689.

Customary use by employes of one appliance to supplement another, when conditions such as to render latter inadequate, proved, in connection with proof of master's knowledge, to show duty to inspect and repair. Ft. Worth, etc. R. Co. *v.* Day, 55 Tex. Civ. 24, 118 S. W. 739.

Master's ignorance of danger of using defective machine immaterial. King *v.* King, 79 Kan. 584, 100 P. 503.

Comparative safety of places.—Incompetent for servant to show another place reasonably safe one or safer than one to which assigned, if that was reasonably safe place. Virginia P. C. Co. *v.* Seal, 110 Va. 484, 66 S. E. 75.

Competent to show precautions taken by another using same machinery as showing what defendant could have done and as bearing upon question of reasonable care. Chicago, etc. R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517 (shown that platform not such as in ordinary use); Hollis *v.* Widener, 221 Pa. 72, 70 A. 287.

Number of people killed in mine explosion shown to illustrate force and as tending to show negligence. Sterns C. Co. *v.* Evans, 33 Ky. L. R. 755, 111 S. W. 308.

Other defects in appliances cannot be shown. Gardner *v.* R. Co., 128 App. Div. 12, 112 N. Y. S. 369.

543-19 Loughead *v.* Co., 16 Ont. L. R. 64; Pekin Stave & Mfg. Co. *v.* Ramey, 104 Ark. 1, 147 S. W. 83; Steve *v.* Co., 13 Ia. 384, 92 P. 363; McCarthy *v.* Co., 232 Ill. 473, 83 N. E. 957; Wullner *v.* Co., 145 Ill. App. 486; Trent *v.* Co., 141 Mo. App. 437, 126 S. W. 238; Chernick *v.* Co., 66 Misc. 177, 121 N. Y. S. 352; Virginia, etc. C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725. See Perry *v.* Centralia, 50 Wash. 670, 97 P. 802.

Evidence that defendant was insured in a casualty company is incompetent and so dangerous as to require a reversal even when the court strikes it from the record and instructs the jury not to consider it. Rodzborski *v.* Sugar Ref. Co., 210 N. Y. 262, 104 N. E. 616.

Fact of insurance is competent upon question as to which company was doing the work. Boten *v.* Sheffield Ice Co. (Mo. App.), 166 S. W. 883.

544-20 Pace *v.* R. Co., 166 Ala. 519, 52 S. 52; Stratton, etc. Co. *v.* Ellison, 42 Colo. 498, 94 P. 303 (direction of foreman to plaintiff's co-employe to remove cause of injury prior to accident); Reid *v.* S. S. Co. (Me.), 90 A. 609; Dutro *v.* R. Co., 111 Mo. App. 258, 86 S. W. 915 (statement of co-employe to foreman admissible to show notice); Weinert *v.* Co., 127 App. Div. 826, 112 N. Y. S. 123; Allen *v.* Shook (Tex. Civ.), 160 S. W. 1091.

544-21 River, R. & H. Const. Co. *v.* Goodwin, 105 Ark. 247, 151 S. W. 267 (statements of fellow servant, "If I had been doing my duty the accident wouldn't have happened," excluded); Union P. R. Co. *v.* Edmondson, 77 Neb. 682, 110 N. W. 650; Young *v.* R. Co., 75 S. C. 190, 55 S. E. 225.

544-22 Expert testimony as to extra-hazardous nature of employment, inadmissible. Swift *v.* Miller, 139 Ill. App. 192.

544-24 DeWitt *v.* Co., 7 Cal. App. 774, 96 P. 397; Christopherson *v.* R. Co., 135 Ia. 409, 109 N. W. 1077; Reid Auto Co. *v.* Gorsczya (Tex. Civ.), 144 S. W. 688.

544-26 Chicago, etc. R. Co. *v.* Ship, 174 Fed. 353, 98 C. C. A. 257; Missouri, etc. R. Co. *v.* Collier, 157 Fed. 347, 88 C. C. A. 127; Mascott C. Co. *v.* Garrett, 156 Ala. 290, 47 S. 149; Morelli *v.* Co., 81 Conn. 447, 71 A. 353; Wetzel *v.* R. Co., 147 Ill. App. 195; Hampton *v.* R. Co., 143 Ill. App. 91; Cleveland, etc. R. Co. *v.* Gossett, 172 Ind. 525, 87 N. E. 723; Contri *v.* Co., 143 Ia. 115, 121 N. W. 506; Russell *v.* R. Co. (Ky.), 124 S. W. 841; Sinclair *v.* R. Co., 129 Ky. 828, 112 S. W. 910; Moyer *v.* R. Co., 159 Mich. 645, 124 N. W. 542; Matthews *v.* R. Co., 227 Mo. 241, 126 S. W. 1005; Van Camp *v.* R. Co., 141 Mo. App. 344, 125 S. W. 530; Lapsley *v.* Co., 79 N. J. L. 131, 74 A. 283; Burnett *v.* Co., 152 N. C. 35, 67 S. E. 30; Mills *v.* R. Co., 85 S. C. 463, 67 S. E. 565; Athens C. O. Co. *v.* Clark (Tex. Civ.), 126 S. W. 322; Int., etc. R. Co. *v.* Brice (Tex. Civ.), 111 S. W. 1094; Stone *v.* R. Co., 35 Utah 305, 100 P. 362; Boucher *v.* R. & N. Co., 50 Wash. 627, 97 P. 661; Collins *v.* R. Co., 136 Wis. 421, 117 N. W. 1014.

Federal employers' liability act permits a showing of contributory negligence, not to defeat the action, but to mitigate damages. Hall *v.* R. Co., 169 Ill. App. 12. See supra, "Damages," 19-41, and infra, "Negligence," 896-6.

Violation of a rule not contributory negligence unless plaintiff had knowledge of it. Nashville Lumb. Co. *v.* Thornton, 101 Ark. 283, 142 S. W. 152.

Evidence held insufficient.—Adams *v.* Kinston, etc. Co., 156 N. C. 174, 72 S. E. 208.

Circumstances may vary rule. Missouri, etc. R. Co. *v.* Richardson (Tex. Civ.), 125 S. W. 623.

No presumption that orders disobeyed. Powers *v.* R. Co., 142 Ill. App. 515.

Excuse or justification for violating rule shown. Houston, etc. R. Co. *v.* Ravanelli (Tex. Civ.), 123 S. W. 208. As existence of emergency. Hall *v.* R., 81 S. C. 522, 62 S. E. 848; Brown *v.* R., 82 S. C. 528, 64 S. E. 522.

Violation of discretionary rule not fatal. Cahill *v.* R. Co., 143 Ia. 152, 121 N. W. 553.

Violation of rules immaterial unless master has furnished means by which they may be complied with. Huggins *v.* R. Co., 159 Ala. 189, 49 S. 299.

Burden on servant violating rules to show injury not resulting from viola-

tion. International, etc. R. Co. *v.* Brice (Tex. Civ.), 111 S. W. 1094.

Evidence of contributory negligence is supplied by proof of violation of rule. Erickson *v.* Co., 100 Me. 107, 60 A. 708; Inglese *v.* R. Co., 133 App. Div. 198, 117 N. Y. S. 392.

Question for jury.—Except in obvious cases effect of breach of a rule by an injured employe is to be determined by jury as element of contributory negligence. Yongue *v.* R. Co., 133 Mo. App. 141, 112 S. W. 985.

Violation of statute by servant shown to establish no duty owing him as servant. Seaboard A. L. R. *v.* Chapman, 4 Ga. App. 706, 62 S. E. 488.

546-27 Stewart *v.* R. Co., 141 N. C. 253, 53 S. E. 877; Southern K. R. Co. *v.* McSwain, 55 Tex. Civ. 317, 118 S. W. 874.

546-29 *Comp.* St. Louis, etc. R. Co. *v.* Holmes, 88 Ark. 181, 114 S. W. 221; St. Louis, etc. R. Co. *v.* Puckett, 88 Ark. 204, 114 S. W. 224.

Violation of rules by another than injured servant shown on theory that it is an implied form of contract they are to be mutually obeyed. Cleveland, etc. R. Co. *v.* Gossett, 172 Ind. 525, 87 N. E. 723.

Burden on plaintiff to show facts excusing violation of rule. Missouri, etc. R. Co. *v.* Collier, 157 Fed. 347, 88 C. C. A. 127.

Rules admissible to show whether servant exercised due care as to third person. Stevens *v.* R. Co., 184 Mass. 476, 69 N. E. 338; Sullivan *v.* Co., 128 App. Div. 175, 112 N. Y. S. 648. Inadmissible unless covering such situation as plaintiff in when injured, he acting under orders. Olson *v.* Co., 85 Neb. 331, 123 N. W. 422.

Failure to make rules material only where master should anticipate necessity. Palmieri *v.* Pearson, 128 App. Div. 231, 112 N. Y. S. 684.

Rules of other employers, inadmissible. Moyer *v.* R. Co., 159 Mich. 645, 124 N W. 542.

Reasonableness of rules, question of law. Missouri, etc. R. Co. *v.* Collier, 157 Fed. 347, 88 C. C. A. 127.

Custom of foreman may justify finding of existence of rule. Inglese *v.* R. Co., 133 App. Div. 198, 117 N. Y. S. 392.

546-31 Kennedy *v.* Wanamaker, 129 N. Y. S. 1053.

546-32 Incompetent to prove existence of rule by testimony showing general understanding of employes. Schaufele *v.* R. Co., 6 Ga. App. 660, 65 S. E. 708.

546-33 Declarations of servant immediately after injury, admissible to show action in reliance upon obeyance of rule by another. Brady *v.* R. Co., 44 Colo. 283, 98 P. 321.

546-34 Murphy *v.* Gross, 118 Minn. 311, 136 N. W. 868. See Houston, etc. R. Co. *v.* Ravanelli (Tex. Civ.), 123 S. W. 208.

Parol evidence admissible to show practical construction given ambiguous rules. Cleveland, etc. R. Co. *v.* Gossett, 172 Ind. 525, 87 N. E. 723.

546-35 Toledo, etc. R. Co. *v.* Bartley, 172 Fed. 82, 96 C. C. A. 570; El Dorado & B. R. Co. *v.* Wheatley, 88 Ark. 20, 114 S. W. 234 (such evidence not determinative of contributory negligence if danger of violation imminent and obvious); Big Five, etc. Co. *v.* Johnson, 44 Colo. 236, 99 P. 63 (as to scope of employe's duties); Central R. Co. *v.* Mobley, 6 Ga. App. 33, 64 S. E. 300; Seaboard, etc. Co. *v.* Hunt, 10 Ga. App. 273, 73 S. E. 588; Hampton *v.* R. Co., 236 Ill. 249, 86 N. E. 243; Preble *v.* R. Co., 149 Ill. App. 584, *aff.* 243 Ill. 340, 90 N. E. 716; Kenny *v.* Co., 243 Ill. 396, 90 N. E. 724 (habitual violation with master's knowledge); Bennett *v.* R. Co., 243 Ill. 420, 90 N. E. 735 (custom of servants inadmissible unless habitual violation shown and master's knowledge); Chesapeake & O. R. Co. *v.* Barnes, 132 Ky. 728, 117 S. W. 261 (by plaintiff's superiors); Houston, etc. Co. *v.* Schneider, 148 Ky. 651, 147 S. W. 371; Berglund *v.* R. Co., 109 Minn. 317, 123 N. W. 928; Marcum *v.* R. Co., 139 Mo. App. 217, 122 S. W. 1148; O'Brien *v.* Co., 40 Mont. 212, 105 P. 724; Burch *v.* Co., 32 Nev. 75, 104 P. 225; Willis *v.* Co., 75 N. H. 453, 75 A. 877; Reynolds *v.* Co., 137 App. Div. 446, 122 N. Y. S. 797; Haley *v.* P. Co., 127 App. Div. 753, 112 N. Y. S. 25; Bordeaux *v.* R. Co., 150 N. C. 528, 64 S. E. 439; International, etc. R. Co. *v.* Brice (Tex. Civ.), 126 S. W. 613 (competency of such evidence not affected by plaintiff's admissions on previous trials expected to obey rule); Texas, etc. R. Co. *v.* Jackson, 51 Tex. Civ. 646, 113 S. W. 628. *Contra* if express direction given plaintiff, or if act negligent per se. Contri *v.* Co., 143 Ia. 115, 121 N. W. 506.

Burden upon plaintiff to show master

acquiesced in violation of rules. Norfolk & W. R. Co. *v.* Cofer, 114 Va. 434, 76 S. E. 909.

Violation of rules immaterial if plaintiff injured in place of danger assumed for individual purpose. Chesapeake & O. R. Co. *v.* Barnes, 132 Ky. 728, 117 S. W. 261.

Evidence of custom, immaterial as against positive instructions. Green *v.* Co., 162 Ala. 609, 50 S. 289. But custom uniformly observed by employes with employer's sanction has same effect as rule. Lewis *v.* R. Co., 142 Mo. App. 585, 121 S. W. 1090. Custom of employes of another master immaterial. Collins *v.* R. Co., 136 Wis. 421, 117 N. W. 1014.

Evidence of violation of specific instructions overcomes evidence of master's knowledge of customary violation of rules. Crawford *v.* R. Co., 150 N. C. 619, 64 S. E. 589.

Failure of master to inspect premises according to custom and duty shown. Bjorklund *v.* Gray, 106 Minn. 42, 118 N. W. 59.

547-36 St. Louis, etc. R. Co. *v.* York, 92 Ark. 554, 123 S. W. 376; Hampton *v.* R. Co., 143 Ill. App. 91 (deceased's knowledge of abrogation of rule need not be shown); George *v.* R. Co., 225 Mo. 364, 125 S. W. 196. *Comp.* Houston, etc. R. Co. *v.* Ravanelli (Tex. Civ.), 123 S. W. 208. See Clay *v.* R. Co., 221 Pa. 439, 70 A. 807.

Acquiescence of master must be shown. Thomas *v.* Houston, 146 Ky. 156, 142 S. W. 214.

Burden on servant to bring himself within act of congress regulating liability of interstate carriers. Tsmura *v.* R. Co., 58 Wash. 316, 108 P. 774.

Burden on master to show servant causing injury to another servant not acting within scope of employment. Big Five, etc. Co. *v.* Johnson, 44 Colo. 236, 99 P. 63.

Knowledge of master, not presumed from acts of unfaithful servants. Pittsburg, etc. R. Co. *v.* Hall, 46 Ind. App. 219, 90 N. E. 498. His knowledge of a defect and promise to repair waiver of rule requiring defects reported to another. Comer *v.* Meyer, 78 N. J. L. 464, 74 A. 497.

Failure of master to observe rule may make a defense of misrepresentation by employe of his age ineffectual. Yazoo, etc. R. Co. *v.* Cobb, 94 Miss. 561, 48 S. 522.

Time table of later date than rules competent to show observance of former incompatible with latter. Galveston, etc. R. Co. *v.* Worth, 53 Tex. Civ. 351, 116 S. W. 365.

Rules not observed by master, competent in favor of servant as admission in his favor. Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402.

Violation of rules by foreman shown. Norton C. Co. *v.* Hanks, 108 Va. 521, 62 S. E. 335.

Sporadic violation of rules, unauthorized and unknown, immaterial. Missouri, etc. R. Co. *v.* Collier, 157 Fed. 347, 88 C. C. A. 127. Single violation may be shown by employe having right to assume observance regardless of intent in adopting. Galveston, etc. R. Co. *v.* Murphy, 52 Tex. Civ. 420, 114 S. W. 443.

Scope of employment.—Custom of defendant's employes to assist in doing work without usual course of employment shown on issue as to whether plaintiff in line of employment. Jones *v.* Herrick, 141 Ia. 615, 118 N. W. 444. But where the relation of master and servant has been established and the servant shown to be apparently working in the performance of his duties, the defendant has the burden of showing that the servant is not acting within the scope of his employment. Hazzard *v.* Carstairs (Pa.), 90 A. 556. See infra, 498-34.

547-37 In action by third person for injuries burden on plaintiff to show act complained of done by defendant's servants. Halsch *v.* Co., 49 Misc. 525, 97 N. Y. S. 983.

547-38 Evidence that elevator operator smoked cigarettes held inadmissible. Vogel *v.* Herzfeld-Phillipson Co., 148 Wis. 573, 134 N. W. 141.

547-39 Broadstreet *v.* Hall, 168 Ind. 192, 80 N. E. 145; Yazoo, etc. R. Co. *v.* Hare (Miss.), 61 S. 648. See also vol. 8, p. 22, n. 51; p. 547, n. 39.

Evidence as to master's knowledge of servant's incapacity immaterial when latter acting for himself in violation of orders. Danforth *v.* Fisher, 75 N. H. 111, 71 A. 535.

547-41 Minot *v.* Snavely, 172 Fed. 212, 97 C. C. A. 30.

Notice of proclivity of servant to harm shown. Cressy *v.* Co., 108 Minn. 349, 122 N. W. 484.

547-44 See vol. 8, p. 954, n. 40, and supplement thereto.

548-47 *Contra* in action for assault and battery. Miller-B. L. Co. *v.* Stewart, 166 Ala. 657, 51 S. 943. See Palmer T. Co. *v.* Smith, 137 Ky. 319, 125 S. W. 725.

548-48 Circumstances may show defendant's property in charge of servants and their acting within scope of duty in use. Fleishman *v.* Co., 148 Mo. App. 117, 127 S. W. 660. Conduct of servant raises inference acting for and with master's assent. Bryant *v.* Graves, 77 N. J. L. 61, 71 A. 60.

Proof of violation of master's rules does not absolve unless it is also shown servant's act wanton or without scope of employment. Rhinesmith *v.* R. Co., 76 N. J. L. 783, 72 A. 15.

Custom of servant.—Whether particular act of servant, performed to the injury of a third person, was in line of duty determined from relevant facts and circumstances, including evidence of custom of defendant's servants to do like acts. St. Louis, etc. R. Co. *v.* Pell, 89 Ark. 87, 115 S. W. 957.

Authority of foreman inferred from giving orders to men under charge which they obeyed. Waaler *v.* R. Co., 22 S. D. 256, 117 N. W. 140.

Burden is on master to show that one admitted to be his servant and to have been in charge of property was not acting for him when injury inflicted by negligent use. Shamp *v.* Lambert, 142 Mo. App. 567, 121 S. W. 770.

Master's knowledge of, and acquiescence in, custom to initiate new employes by inflicting corporal punishment by those already in service, shown. Medlin M. Co. *v.* Boutwell (Tex. Civ.), 122 S. W. 442.

Shown that servant did act in question in capacity of public officer, in belief he was validly appointed. Philadelphia, etc. R. Co. *v.* Green, 110 Md. 32, 71 A. 986.

Neglect of master to stop malicious acts of servants on premises shown. Hogle *v.* Co., 128 App. Div. 403, 112 N. Y. S. 881, *foll.* Fletcher *v.* R. Co., 168 U. S. 135.

Master may show under general denial acts complained of not done by his servant. Kiers *v.* Rathjen, 60 Misc. 105, 111 N. Y. S. 599.

Servant who has injured third person may testify against master. Bernadsky *v.* R. Co., 76 N. J. L. 580, 70 A. 189.

MATERIALITY

549-1 Perido *v.* R. Co., 144 Ill. App. 446.

"**Evidence** offered in a cause or a question propounded, is material when it is relevant and goes to the substantial matters in dispute or has a legitimate and effective influence or bearing on the decision of the case." Porter *v.* Valentine, 18 Misc. 213, 41 N. Y. S. 507.

550-6 Dickinson *v.* U. S., 159 Fed. 801, 86 C. C. A. 625; First Nat. Bk. *v.* Miller, 235 Ill. 135, 85 N. E. 312; Ruttle *v.* Co., 153 Mich. 300, 117 N. W. 168; Rogers *v.* Colebaugh, 74 N. J. Eq. 367, 70 A. 299; Sterling M. Co. *v.* Nessler, 110 N. Y. S. 246; Lawshe *v.* S., 57 Tex. Cr. 32, 121 S. W. 865.

551-10 Czarnecki *v.* Derecktor, 81 Conn. 338, 71 A. 354; Houston, etc. R. Co. *v.* Cheatham, 52 Tex. Civ. 1, 113 S. W. 777.

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552-1 Key *v.* S. (Tex. Cr.), 161 S. W. 121; Neblett *v.* S., 47 Tex. Cr. 573, 85 S. W. 813. See Green *v.* S., 151 Ala. 14, 44 S. 194.

553-5 O'Brien *v.* S., 31 O. C. C. 33.

554-12 Attempt. See Dahlberg *v.* P., 225 Ill. 485, 80 N. E. 310.

554-13 S. *v.* Bunyard, 273 Mo. 347, 161 S. W. 756. Evidence in rebuttal. Cole *v.* S., 62 Tex. Cr. 270, 138 S. W. 109.

MECHANICS' LIENS

Account no proof of delivery of materials, 562-25.

557-1 Auditing and approving bill rendered makes it an account stated, which will support claim for lien. Naylor *v.* R. Co., 14 Ida. 789, 96 P. 573.

In Michigan a sworn bill in chancery to enforce such lien is evidence of the matters charged under Comp. Laws, §10,719, unless the answer is a sworn denial. Such bill therefore if sufficient will establish a prima facie case unless answer is sworn to. Green Bay Cut Stone Co. *v.* Fabry, 169 Mich. 544, 135 N. W. 312.

558-7 Parol evidence, not admissible to show materials supplied at earlier date than stated in notice. May *v.* Mode, 142 Mo. App. 656, 123 S. W. 523.

559-10 Ætna E. Co. *v.* Deeves, 125 App. Div. 842, 110 N. Y. S. 124; Equitable S. & L. Assn. *v.* Hewitt, 55 Or. 329, 106 P. 447. See Haas E. & Mfg. Co. *v.* Co., 236 Ill. 452, 86 N. E. 248; Empire, etc. Wks. *v.* Margolies, 85 Misc. 238, 148 N. Y. S. 348; Anderson *v.* Falkenmeyer, 148 N. Y. S. 746.

Contract as set out in notice must be substantially proved. Lucas *v.* Rea (Cal. App.), 101 P. 537.

It is presumed in favor of owner of land she supposed building was being erected under contract between her husband and plaintiff; she is not subject to personal judgment because of knowledge of its erection. Frieschel *v.* Grosshauser, 24 S. D. 129, 123 N. W. 698.

Burden on plaintiff to show compliance with conditions precedent to right to maintain action. Fabien *v.* Grabow, 134 Mo. App. 193, 114 S. W. 80.

559-11 Burden on party to prove cancellation who seeks to escape liability on that ground. Wahouma Drug Co. *v.* S. & C. Co. (Ala.), 65 S. 825.

Burden on owner to prove service or posting of notice. Minneapolis, etc. Co. *v.* Co., 124 Minn. 317, 145 N. W. 37.

559-12 Litherland *v.* Co., 54 Or. 71, 100 P. 1.

A prima facie right to a lien is established by proof that the amount charged for material used in building is less than contract price of construction and has not been paid and defendant has burden to prove that plaintiff is not entitled to lien. Marianna Hotel Co. *v.* L. F. & M. Co., 107 Ark. 245, 154 S. W. 952.

Evidence held sufficient.—Wills *v.* Zanello, 59 Or. 291, 117 P. 291.

559-13 Chicago L. & C. Co. *v.* Garmer, 132 Ia. 282, 109 N. W. 780; Laughlin *v.* Connors, 54 Or. 184, 102 P. 793 (proof of value must be definite).

560-15 Nashville, etc. R. Co. *v.* Moore, 148 Ala. 63, 41 S. 984 (husband as wife's agent); Parke Co. *v.* Co., 147 Cal. 490, 82 P. 51; Snyder *v.* Sparks, 73 Neb. 804, 103 N. W. 662; Christianson *v.* Hughes, 18 N. D. 282, 122 N. W. 384; Seattle L. Co. *v.* Sweeney, 43 Wash. 1, 85 P. 677.

Permission by vendor to vendee to make improvements, or knowledge or acquiescence on former's part, not sufficient to show agency or express assent. Belnap *v.* Condon, 34 Utah 213, 97 P. 111.

561-17 Madary *v.* Smartt, 1 Cal. App. 498, 82 P. 561 (counters and partitions as "repairs and alterations") See Tuck *v.* Co., 127 Ga. 729, 56 S. E. 1001; Wera *v.* Bowerman, 191 Mass. 458, 78 N. E. 102; Hathaway *v.* M. Co. (Utah), 132 P. 388.

That structure permanent part of realty. Stevenson *v.* Woodward, 3 Cal. App. 754, 86 P. 990.

Acceptance and approval of account stated renders unnecessary proof of character mentioned in text. Naylor *v.* R. Co., 14 Ida. 789, 96 P. 573.

562-19 Potter Mfg. Co. *v.* Meyer, 171 Ind. 513, 86 N. E. 837.

Lienors entitled to prove that their materials were either in whole or in part used for the specific work for which the owners had given consent under the terms of the lease. McNulty Bros. *v.* Offerman, 152 App. Div. 181, 137 N. Y. S. 27.

Materialmen must prove that there was a mutual understanding that materials were to be used in a particular building. Milwaukee G. M. Co. *v.* Hardware Co. (Colo. App.), 141 P. 527.

562-25 Verified account filed not evidence of delivery of material or state of delivery. Searle & C. L. Co. *v.* Jones, 80 Neb. 567, 114 N. W. 783.

563-26 Actual use of materials furnished need not be shown. Montjoy *v.* Dist. (Can.), 10 West. L. Rep. 282.

Evidence held insufficient.—Burton *v.* Meinert & Miller, 136 Ga. 420, 71 S. E. 870.

Statutory presumption.—Builders' Material Co. *v.* Johnson, 158 Ill. App. 411.

563-27 Madary *v.* Smartt, 1 Cal. App. 498, 82 P. 561.

564-28 Georgia Steel Co. *v.* White, 136 Ga. 492, 71 S. E. 890; Schaller-Hoerr Co. *v.* Gentile, 153 Ill. App. 458; Wolf Co. *v.* R. Co., 29 Pa. Super. 439; Wees *v.* Elbon, 61 W. Va. 380, 56 S. E. 611. See Boland *v.* Webster, 126 Mo. App. 591, 105 S. W. 34; Guarantee B. & L. Assn. *v.* Connor, 216 Pa. 543, 65 A. 1089. **Substantial compliance sufficient.** Salter *v.* Goldberg, 150 Ala. 511, 43 S. 571; Nofziger L. Co. *v.* Shafer, 2 Cal. App. 219, 83 P. 284; Este *v.* R. Co., 27 Pa. Super. 521; Knudson-J. Co. *v.* Brandt, 44 Wash. 68, 87 P. 43; Wees *v.* Elbon, 61 W. Va. 380, 56 S. E. 611; U. S. Blowpipe Co. *v.* Spencer, 61 W. Va. 191, 56 S. E. 345.

564-29 Dunham *v.* Woodworth, 158

Ill. App. 486; Merritt *v.* Poli, 231 Pa. 611, 80 A. 1116.

Where payment pleaded defendant may introduce itemized account of payments made, although he did not file it. Easterling *v.* Shaifer (Miss.), 38 S. 230.

565-30 Grant *v.* Co., 58 W. Va. 162, 52 S. E. 36.

Erroneous statements of sum due, not fatal unless wilful or so exaggerated as to raise presumption to that effect. Hall *v.* Thomas, 111 N. Y. S. 979.

565-31 Fraudulent design to prolong contract for purpose of extending time for filing account must be proved. Shorthill *v.* Co. (Ia.), 124 N. W. 613.

566-33 Winton *v.* Benore, 28 Pa. Super. 27.

566-34 Baker *v.* Smallwood, 161 Mo. App. 257, 143 S. W. 518; Sabin *v.* Cameron, 82 Neb. 106, 117 N. W. 95.

566-35 Parol evidence, admissible to explain trade abbreviations in statement of lien. Wilson, etc. L. Co. *v.* Capron, 145 Mo. App. 497, 122 S. W. 1085.

567-36 Dirksen *v.* Manning, 158 Ill. App. 430; Collins *v.* R. Co., 29 Pa. Super. 547.

567-37 Subcontractor must prove either the expressed satisfaction of the owner as to the correctness of the claim, or prove circumstances from which satisfaction may be inferred in order to recover against owner. Reeve *v.* Kernan (N. J.), 90 A. 285.

567-38 Claimant must show money due contractor. Sioux Falls P. B. Co. *v.* Board, 25 S. D. 36, 125 N. W. 291.

568-41 Contractor's statements as to the use of material purchased not admissible against the owner. Stewart Bros. *v.* Randall Bros., 138 Ga. 796, 76 S. E. 352.

568-42 Knudson-J. Co. *v.* Brandt, 44 Wash. 68, 87 P. 43.

568-45 Evidence admissible to show sufficiency of notice as to description of property. Union L. Co. *v.* Simon, 150 Cal. 751, 89 P. 1077.

Amount of land necessary.—Union L. Co. *v.* Simon, supra.

Property must be identified by notice and extrinsic evidence is not admissible to supply deficiency (Armstrong *v.* Chisolm, 100 App. Div. 440, 91 N. Y. S. 693), except dimensions of premises may be shown so as to embody them in decree. Hurley *v.* Tucker, 128 App. Div. 580, 112 N. Y. S. 980.

569-46 Eccles L. Co. *v.* Martin, 31 Utah 241, 87 P. 713; Johnson *v.* Griffiths & Co. (Tex. Civ.), 135 S. W. 683.

569-47 See Rider-E. E. Co. *v.* Fredericks, 25 Pa. Super. 72.

570-48 Where materials sold on personal credit of owner or contractor it raises question of fact as to waiver of lien. Scott Mfg. Co. *v.* Morgan, 217 Pa. 367, 66 A. 566. See Central L. Co. *v.* Co., 84 Ark. 560, 105 S. W. 583.

MENTAL AND PHYSICAL STATES

Contagious disease; non contagion, 573-15; *Actual state of mind,* 583-80; *Understanding of others,* 586-6.

As to mental capacity as affecting competency of witnesses, see vol. 3, p. 200, et seq.; vol. 7, p. 479, et seq.; and supplement thereto.

As to intoxication as affecting capacity to commit crime, see vol. 7, p. 779, and supplement thereto.

As to mental condition as affecting testamentary capacity, see vol. 14, p. 267, et seq., and supplement thereto.

572-1 Altig *v.* Altig, 137 Ia. 420, 114 N. W. 1056.

572-4 Mountford *v.* Co., 202 Mass. 345, 88 N. E. 782.

572-5 When a present intention of state of mind is once shown it may be presumed to have continued. Ickes *v.* Id., 237 Pa. 582, 85 A. 885.

572-7 In re Miller's Will (Del.), 85 A. 803; Newman *v.* Thompson, 134 Ga. 137, 67 S. E. 662; Mobile, etc. R. Co. *v.* Carpenter (Miss.), 61 S. 693; S. *v.* Fuller, 52 Or. 42, 96 P. 456.

Physical condition of injured person not provable by particulars of difficulty he engaged in a month after injury. Rutledge *v.* Rowland, 161 Ala. 114, 49 S. 461.

573-11 Finger *v.* Pollack, 188 Mass. 208, 74 N. E. 317, plaintiff cried.

573-13 White *v.* White, 76 Kan. 82, 90 P. 1087 (anger); White *v.* R. Co., 132 Mo. App. 339, 112 S. W. 278; Snowberger *v.* S., 58 Tex. Cr. 530, 126 S. W. 878.

573-14 Montgomery R. Co. *v.* Shanks, 139 Ala. 489, 37 S. 166 (plaintiff cried); Barlow *v.* Hamilton, 151 Ala. 634, 44 S. 657; St. Louis, etc. R. Co. *v.* Boyer, 44 Tex. Civ. 311, 97 S. W. 1070 existence of physical injury).

573-15 Contagious disease; non-contagion.—People who have had intimate

relations with a person alleged to have a contagious disease may testify no bad results followed association with him. Mountford *v.* Co., 202 Mass. 345, 88 N. E. 782.

573-17 Madre *v.* Gaskins, 39 App. Cas. (D. C.) 19.

573-18 Martin *v.* Garlock, 82 Kan. 266, 108 P. 92 (spoken after event); Mobile & O. R. Co. *v.* Carpenter (Miss.), 61 S. 693; Snowberger *v.* S., 58 Tex. Cr. 530, 126 S. W. 878.

573-19 Ickes *v.* Ickes, 237 Pa. 582, 85 A. 885.

573-20 Knittel *v.* R. Co., 147 Mo. App. 677, 128 S. W. 5; S. *v.* Brand, 77 N. J. L. 486, 72 A. 131 (surprise).

573-21 Harris *v.* S. (Ala. App.), 62 S. 477.

573-22 Kansas City, etc. R. Co. *v.* Matthews, 142 Ala. 298, 39 S. 207; Patterson *v.* Co., 25 App. Cas. (D. C.) 46; Ward *v.* Ins. Co., 82 Neb. 499, 118 N. W. 70 (from time of illness until death—two weeks).

573-23 Macon R. & L. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569; Smith *v.* R. Co., 165 Ill. App. 190; Scott *v.* Townsend (Tex. Civ.), 159 S. W. 342. See Aurora *v.* Plummer, 122 Ill. App. 143.

574-26 Birmingham L. & P. Co. *v.* Rutledge, 142 Ala. 195, 39 S. 338; Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405; Indianapolis St. R. Co. *v.* Haverstick, 35 Ind. App. 281, 74 N. E. 34; Ind., etc. Co. *v.* Tucker, 51 Ind. App. 480, 98 N. E. 431; Patton *v.* Sanborn, 133 Ia. 650, 110 N. W. 1032; Iola *v.* Farmer, 72 Kan. 620, 84 P. 386; Weeks *v.* R. Co., 190 Mass. 563, 77 N. E. 654; Ward *v.* Ins. Co., 82 Neb. 499, 118 N. W. 70; Stevens *v.* Friedman, 58 W. Va. 78, 51 S. E. 132.

Fact complaints made may be shown. O'Dea *v.* R. Co., 142 Mich. 265, 105 N. W. 746.

575-28 Kansas City, etc. R. Co. *v.* Butler, 143 Ala. 262, 38 S. 1024; Moran *v.* Martinson (Ia.), 146 N. W. 841; Fishburn *v.* R. Co., 127 Ia. 483, 103 N. W. 481; McHugh *v.* Co., 190 Mo. 85, 88 S. W. 853; Western A. Assn. *v.* Munson, 73 Neb. 858, 103 N. W. 688; St. Louis, etc. R. Co. *v.* Boyer, 44 Tex. Civ. 311, 97 S. W. 1070; Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807.

577-39 Kansas City, etc. R. Co. *v.* Butler, 143 Ala. 262, 38 S. 1024; S. *v.* Draughon, 151 N. C. 667, 65 S. E. 913 (declarations of decedent to show attitude toward another); Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807; Stevens *v.* Friedman, 58 W. Va. 78, 51 S. E. 132.

577-41 McHugh *v.* Co., 190 Mo. 85, 88 S. W. 853.

577-42 Grasselli Chem. Co. *v.* Davis, 166 Ala. 471, 52 S. 35; Birmingham, etc. R. Co. *v.* Moore, 151 Ala. 327, 43 S. 841; Smith *v.* R. Co., 165 Ill. App. 190; Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23; Pittsburg, etc. R. Co. *v.* Coll, 37 Ind. App. 232, 76 N. E. 816; Indiana T. Co. *v.* Jacobs, 167 Ind. 85, 78 N. E. 325; Shade *v.* Co., 119 Ky. 592, 84 S. W. 733; O'Dea *v.* R. Co., 142 Mich. 265, 105 N. W. 746; Orlando *v.* R. Co., 109 App. Div. 356, 95 N. Y. S. 898; St. Louis, etc. R. Co. *v.* Pruitt (Tex. Civ.), 157 S. W. 236. See David *v.* Accident Co., 166 Ill. App. 490.

578-47 Krakowski *v.* R. Co., 167 Ill. App. 469; Chicago City R. Co. *v.* Mauger, 128 Ill. App. 512; O'Dea *v.* R. Co., 142 Mich. 265, 105 N. W. 746. Declarations during examination had at instance of adverse party, competent. Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23.

578-48 Manhattan L. Ins. Co. *v.* Verneuille, 156 Ala. 592, 47 S. 72.

578-49 Krakowski *v.* R. Co., 167 Ill. App. 469.

579-51 Mobile & O. R. Co. *v.* Carpenter (Miss.), 61 S. 693.

579-52 McCormick *v.* R. Co., 141 Mich. 17, 104 N. W. 390.

579-54 W. U. T. Co. *v.* Rowell, 153 Ala. 295, 45 S. 73.

579-55 Gilmore *v.* Co., 79 Conn. 498, 66 A. 4; Orlando *v.* R. Co., 109 App. Div. 356, 95 N. Y. S. 898. *Contra,* Gibler *v.* R. Co., 129 Mo. App. 93, 107 S. W. 1021.

580-56 Goodwyn *v.* R. Co., 2 Ga. App. 470, 58 S. E. 688.

580-58 Hardin *v.* R. Co. (Tex. Civ.), 88 S. W. 440.

580-59 Aurora *v.* Plummer, 122 Ill. App. 143; Shade *v.* Co., 119 Ky. 592, 84 S. W. 733; Poumeroule *v.* Cable Co., 167 Mo. App. 533, 152 S. W. 114.

581-62 Competent to show his state of mind and mental suffering. Buckley *v.* R. Co., 215 Mass. 50, 102 N. E. 75.

581-67 Mobile & O. R. Co. *v.* Carpenter (Miss.), 61 S. 693. See Grantland *v.* S., 8 Ala. App. 319, 62 S. 470.

581-68 Wirsing *v.* Smith, 222 Pa. 8, 70 A. 906. See infra, "Telegraphs and Telephones," 463-60.

582-76 Ditto *v.* Slaughter, 28 Ky. L. R. 1164, 92 S. W. 2, duress.

582-77 Penn. C. Co. *v.* Perdue, 164 Ala. 508, 51 S. 352; Goodwyn *v.* R. Co., 2 Ga. App. 470, 58 S. E. 688; O'Dea *v.* R. Co., 142 Mich. 265, 105 N. W. 746; Wise *v.* R. Co., 135 Mo. App. 230, 115 S. W. 452; Ickes *v.* Ickes, 237 Pa. 582, 85 A. 885; Reeves *v.* R. Co., 24 S. D. 84, 123 N. W. 498; Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807 (he could not travel as well as formerly).

Contra as to mental anguish.—Louisville & N. R. Co. *v.* Sharp, 171 Ala. 212, 55 S. 139.

583-78 McClure *v.* Philipp, 170 Fed. 910, 96 C. C. A. 86; St. Louis, etc. Co. *v.* Tucka, 95 Ark. 190, 129 S. W. 541; Fagan *v.* Lentz, 156 Cal. 681, 105 P. 951.

Apprehension as to effects of wounds may be testified to by complainant. Decker *v.* S., 58 Tex. Cr. 159, 124 S. W. 912.

583-79 Witness' opinion as to pregnancy, inadmissible in prosecution for rape. P. *v.* Corey, 8 Cal. App. 720, 97 P. 907.

583-80 **Thoughts of a party,** prior to commission of offense, may not be testified to by him though his acts and declarations may have given some indication of them. Gordon *v.* C., 136 Ky. 508, 124 S. W. 806.

Actual state of mind.—A person may testify to his state of mind as it was at a certain time in consequence of neglect of another; but not to what it would have been under certain conditions. Marriott *v.* Co., 84 Neb. 443, 121 N. W. 241. Effect of duress may be testified to by party upon whom it was exerted. International L. Co. *v.* Parmer (Tex. Civ.), 123 S. W. 196.

583-81 Barlow *v.* Hamilton, 151 Ala. 623, 44 S. 657; Georgia R. & E. Co *v.* Gilleland, 133 Ga. 621, 66 S. E. 944; Fleckinger *v.* Taffee, 149 Mich. 678, 113 N. W. 311; Rearden *v.* R. Co., 215 Mo. 105, 114 S. W. 961; Barbee *v.* S., 58 Tex. Cr. 129, 124 S. W. 961. See supra, "Injuries to Person," 396-70, et seq.

Knowledge of person whose conduct is involved, essential. S. *v.* Vanella, 40 Mont. 326, 106 P. 364.

583-82 Fearon *v.* Mullins, 38 Mont. 45, 98 P. 650.

583-83 Vannest *v.* Murphy, 135 Ia. 123, 112 N. W. 236; Hodges *v.* Wilson, 165 N. C. 323, 81 S. E. 340. *Contra,* Roth *v.* Assn., 102 Tex. 241, 115 S. W. 31.

583-84 Keys *v.* McDowell (Ind. App.), 100 N. E. 385; Bales *v.* Bales (Ia.), 145 N. W. 673; Caltrider *v.* Sharon (Ia.), 145 N. W. 540; S. *v.* Neubauer, 145 Ia. 337, 124 N. W. 312; Hunter *v.* Briggs, 254 Mo. 28, 162 S. W. 204; Roth *v.* Assn., 102 Tex. 241, 115 S. W. 31; Binkley *v.* S., 51 Tex. Cr. 54, 100 S. W. 780 (facts on which opinion of capacity to form criminal intent is based). See In re De Laveaga's Est., 165 Cal. 607, 133 P. 307.

Facts which are based on opinion need not be stated specifically and in detail. Koppe *v.* Koppe, 57 Tex. Civ. 204, 122 S. W. 68. Thus details of conversation with alleged incompetent not essential in connection with opinion. Ballou *v.* Ballou, 30 R. I. 286, 74 A. 1089.

584-85 Illinois Ins. Co. *v.* DeLang, 124 Ky. 569, 99 S. W. 616; Kirby *v.* Co., 77 S. C. 404, 58 S. E. 10.

584-89 Melvin *v.* Murphy (Ala.), 63 S. 546; Perkins *v.* Co., 155 Cal. 712, 103 P. 190; Doherty *v.* Courtney, 150 Cal. 606, 89 P. 434; Goss *v.* S. (Ga. App.), 81 S. E. 247; Graham *v.* Deuterman, 244 Ill. 124, 91 N. E. 61; Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; Wiseman *v.* Goldsberry, 45 Ind. App. 677, 91 N. E. 616; McBride *v.* McBride, 142 Ia. 169, 120 N. W. 709; In re Murray's Est., 145 Ia. 368, 124 N. W. 193; Lucas *v.* McDonald, 126 Ia. 678, 102 N. W. 532 (to continued rationality but not to unsoundness); Howard *v.* Carter, 71 Kan. 85, 80 P. 61; Whisner *v.* Whisner (Md.), 89 A. 393; Jones *v.* Thomas, 218 Mo. 508, 117 S. W. 1177; S. *v.* Banner, 149 N. C. 519, 63 S. E. 84; Myatt *v.* Myatt, 149 N. C. 137, 62 S. E. 887; Conwill *v.* Eldridge (Okla.), 130 P. 912; Guerra *v.* Co. (Tex. Civ.), 163 S. W. 669; Brice *v.* S. (Tex. Cr.), 162 S. W. 874. See also vol. 7, p. 470, n. 78; p. 468, n. 73.

"**Whether a non-expert witness** has sufficient knowledge of another to express an opinion on his mental condition is to be determined by the court. A witness who is not an expert may detail facts and circumstances from which the jury may form an opinion and then give his own conclusion in the form of an opinion. Graham *v.* Deuterman, 244 Ill. 124, 91 N. E. 61. This opinion is to be taken by the jury

for what it is worth. From the nature of things no rule can be laid down declaring the extent of the acquaintance or the opportunities necessary to enable an observer to be a witness.'' Martin *v.* Beatty, 254 Ill. 615, 98 N. E. 996.

Long and intimate acquaintance of witness with person whose mental state is involved is as essential where such person is near death as in other cases. Carlisle *v.* Atchley, 165 Ala. 265, 51 S. 798.

584-90 Piper *v.* R. Co., 75 N. H. 228, 72 A. 1024 (wife of party competent); Missouri, etc. R. Co. *v.* Linton (Tex. Civ.), 126 S. W. 678. See Ames *v.* Ames, 75 Neb. 473, 106 N. W. 584, whether person able to converse intelligently is for jury, witness having given conversation on which issue based.

584-91 Lauth *v.* Co., 244 Ill. 244, 91 N. E. 431; In re Martin's Will (Ia.), 142 N. W. 74; S. *v.* Banner, 149 N. C. 519, 63 S. E. 84. *Comp.* Cragg *v.* Co., 154 Cal. 663, 98 P. 1063.

584-92 First Nat. Bk. *v.* Chandler, 144 Ala. 286, 39 S. 822 (boy a wide-awake and attentive servant); Citizen's R. Co. *v.* Robertson, 41 Tex. Civ. 324, 91 S. W. 609 (whether sufficient intelligence existed to warrant certain action, is for jury).

584-94 Missouri, etc. R. Co. *v.* Linton (Tex. Civ.), 126 S. W. 678; Robinson *v.* S., 143 Wis. 205, 126 N. W. 750 (testimony as to interviews with child and impression as to mental state). Capacity to do right and abstain from doing wrong may be testified to. S. *v.* Crowe, 39 Mont. 174, 102 P. 579.

585-95 Hurley *v.* Caldwell, 244 Ill. 448, 91 N. E. 654; Searles *v.* N. W., etc. Ins. Co., 148 Ia. 65, 126 N. W. 801; McEleney *v.* Donovan, 119 Minn. 294, 138 N. W. 306; Lee *v.* Lee (Mo.), 167 S. W. 1030; Hilmer *v.* Assn., 86 Neb. 285, 125 N. W. 535; Koppe *v.* Koppe, 57 Tex. Civ. 204, 122 S. W. 68.

585-97 Ueeker *v.* Zuercher, 54 Tex. Civ. 289, 118 S. W. 149, though no facts given.

585-98 Koppe *v.* Koppe, 57 Tex. Civ. 204, 122 S. W. 68.

Involuntary nature of act done by one person may not be shown by another's testimony. Pierson *v.* R. Co., 159 Mich. 110, 123 N. W. 576.

585-99 Swain *v.* S., 8 Ala. App. 26, 62 S. 446; Kuhlman *v.* Weiben, 129 Ia. 188, 105 N. W. 445; Gordon *v.* C., 136 Ky. 508, 124 S. W. 806.

585-1 Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755, whether habit of intemperance grown.

585-2 Roberts *v.* S., 123 Ga. 146, 51 S. E. 374; S. *v.* Vanella, 40 Mont. 326, 106 P. 364; Shelton *v.* R. Co., 86 S. C. 98, 67 S. E. 899; Sullivan *v.* R. Co., 85 S. C. 532, 67 S. E. 905; Canon *v.* S., 59 Tex. Cr. 398, 128 S. W. 141; Sanders *v.* S., 54 Tex. Cr. 101, 112 S. W. 68; Jones *v.* S., 47 Tex. Cr. 515, 85 S. W. 5; Till *v.* S., 132 Wis. 242, 111 N. W. 1109 (person ''worried'' and ''acted stupid''). See Erie R. Co. *v.* Schomer, 171 Fed. 798, 96 C. C. A. 458.

585-3 *Contra*, Cohn & G. L. Co. *v.* Robbins, 159 Ala. 289, 48 S. 853.

586-6 Hill *v.* S., 146 Ala. 51, 41 S. 621 (whether another was joking); White *v.* White, 76 Kan. 82, 90 P. 1087; Gordon *v.* C., 136 Ky. 508, 124 S. W. 806; White *v.* R. Co., 132 Mo. App. 339, 112 S. W. 278; Hoxie *v.* Walker, 75 N. H. 308, 74 A. 183; In re Miller's Est., 36 Utah 228, 102 P. 996. But see P. *v.* Meert, 157 Mich. 93, 121 N. W. 318; Stevens *v.* Larwill, 110 Mo. App. 140, 84 S. W. 113 (prejudice against another).

Mental attitude of others. — Witness may not testify another assumed what conduct of third person would be. Milne *v.* Co., 29 R. I. 504, 72 A. 716. Nor say whether remark made through friendliness. Knight *v.* S., 160 Ala. 58, 49 S. 764.

Understanding of others, based upon conduct of third person, may be testified to by person who witnessed such conduct. Houston, etc. R. Co. *v.* Lee (Tex. Civ.), 123 S. W. 154.

586-9 Grantland *v.* S., 8 Ala. App. 319, 62 S. 470; Supreme Lodge *v.* Jones, 113 Ill. App. 241; Ewing *v.* Light Co., 91 Kan. 388, 137 P. 940; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300; Duerler Mfg. Co. *v.* Eichhorn, 44 Tex. Civ. 638, 99 S. W. 715; Davis *v.* R. Co., 31 Utah 307, 88 P. 2. See also vol. 5, p. 697, n. 96.

586-10 Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844; Kline *v.* R. Co., 150 Cal. 741, 90 P. 125; Fidelity & C. Co. *v.* Cooper, 137 Ky. 544, 126 S. W. 111; Illinois Ins. Co. *v.* DeLang, 124 Ky. 569, 99 S. W. 616 (what symptoms existed); Missouri, etc. R. Co. *v.* Farris (Tex. Civ.), 124 S. W. 497; Houston,

etc. R. Co. *v.* Johnson (Tex. Civ.), 118 S. W. 1150; San Antonio Co. *v.* Flory, 45 Tex. Civ. 233, 100 S. W. 200; S. *v.* Carr, 65 W. Va. 81, 63 S. E. 766 (condition after person shot).

586-11 Macon R. & L. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569 (headache); St. Louis, etc. R. Co. *v.* Boyer, 44 Tex. Civ. 311, 97 S. W. 1070.

586-13 Dilburn *v.* R. Co., 156 Ala. 228, 47 S. 210.

587-14 Morris *v.* R. Co., 105 Minn. 276, 117 N. W. 500.

587-15 Partello *v.* R. Co., 217 Mo.. 645, 117 S. W. 1138.

587-16 Walker *v.* S., 147 Ala. 699, 41 S. 176 (conscious); Watson *v.* Newell, 142 N. Y. S. 653.

587-19 San Antonio Co. *v.* Flory, 45 Tex. Civ. 233, 100 S. W. 200, injured person could not lift anything.

587-20 Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23.

587-21 Alabama, etc. R. Co. *v.* Bullard, 157 Ala. 618, 47 S. 578 (may characterize a fall); Jacobs *v.* S., 146 Ala. 103, 42 S. 70 (condition in which prosecutor found after assault); McIlwain *v.* Gaebe, 128 Ill. App. 209; S. *v.* Carr, 65 W. Va. 81, 63 S. E. 766 (whether wound near heart so as to affect it).

Questions which simply asked the witnesses what they saw when examining one's injuries are proper. Ind., etc. R. Co. *v.* Tucker, 51 Ind. App. 480, 98 N. E. 43.

588-22 Modern B., etc. *v.* Jordan (Tex. Civ.), 167 S. W. 794. See also vol. 5, p. 697, n. 97.

588-23 Cordes *v.* S., 54 Tex. Cr. 204, 112 S. W. 943.

Non-expert may testify whether a brother had consumption and as to disease of which parent died. Donovan *v.* Ins. Co., 119 N. Y. S. 1078.

MINES AND MINERALS

Presumption as to rights of respective lessees, 614-93.

592-1 Mineral bearing properties of region in which claim situated, judicially noticed. Golden *v.* Murphy, 31 Nev. 395, 103 P. 394.

592-2 In absence of proof of existence of custom, presumption is federal law governed location. Anderson *v.* Caughey, 3 Cal. App. 22, 84 P. 223.

594-12 Dean *v.* Oil Co. (Wyo.), 128 P. 881.

594-13 The original of an amended or additional certificate duly recorded stating that the locators are citizens is prima facie proof of citizenship. Dean *v.* Oil Co. (Wyo.), 128 P. 881.

595-16 Whether citizenship provable by hearsay, quaere. Stewart *v.* Co., 29 Utah 443, 82 P. 475.

596-17 Cook *v.* Klonos, 164 Fed. 529, 90 C. C. A. 403; Steele *v.* R. Co., 148 Fed. 678, 78 C. C. A. 412; Charlton *v.* Kelly, 2 Alaska 532; New England O. Co. *v.* Congdon, 152 Cal. 211, 92 P. 180; Daggett *v.* Co., 149 Cal. 357, 86 P. 968; Lockhart *v.* Farrell, 31 Utah 155, 86 P. 1077; Dean *v.* Oil Co. (Wyo.), 128 P. 881.

Plaintiff in adverse suit must show besides usual facts, location was not previously made by another or, if it was, it was void, forfeiture or abandonment of claimant's right; latter may not be shown in rebuttal. Moffat *v.* Co., 33 Colo. 142, 80 P. 139; Cleary *v.* Skiffich, 28 Colo. 362, 65 P. 59, 89 Am. St. 207; Lozar *v.* Neill, 37 Mont. 287, 96 P. 343.

596-18 Cook *v.* Klonos, 164 Fed. 529, 90 C. C. A. 403. See Bergquist *v.* Co., 18 Wyo. 234, 106 P. 673.

Where mining claims which have passed out of the hands of the original owners have stood unchallenged for years and have been developed to a considerable extent, the certificate of location, if in due form may be deemed presumptive evidence of discovery and of a valid location; but in the absence of such grounds for indulging a presumption in favor of the integrity of the location, the location notice is, when recorded, prima facie evidence only of what the statute requires it to contain, and which is therein sufficiently set forth. Thomas *v.* Min. Co., 211 Fed. 105.

Recital in location notice.—Fox *v.* Myers, 29 Nev. 169, 86 P. 793.

Posting notice at given point, evidence locator claims discovery there. Fox *v.* Myers, supra.

Opinions of miners, based on facts as to sufficiency of discovery to justify development, competent. Cascaden *v.* Bortolis, 162 Fed. 267, 89 C. C. A. 247.

Proof of discovery of gold may be supplemented by evidence of value of adjacent claims. Cascaden *v.* Bortolis, supra.

597-19 Washoe Copper Co. *v.* Junila, 43 Mont. 178, 115 P. 917. See Knut-

son *v.* Fredlund, 56 Wash. 634, 106 P. 200, notice must comply with law.

Defective notice, coupled with possession, good as color of title against party without right. Protective M. Co. *v.* Co., 51 Wash. 643, 99 P. 1033.

Notice admissible to show color of title and explain testimony. Gibson *v.* Hjul, 32 Nev. 360, 108 P. 759.

Relocation, made after original adjudged void, may be shown under allegation of ownership and possession since a given time. Bergquist *v.* Co., 18 Wyo. 234, 106 P. 673.

Sufficiency of notice, question of fact. Bismarck M. G. M. Co. *v.* Co., 14 Ida. 516, 95 P. 14.

Notices construed liberally.—If by reasonable construction, with or without testimony aliunde, notices give information to subsequent locators, they are sufficient. Londonderry M. Co. *v.* Co., 38 Colo. 480, 88 P. 455; Bismarck M. G. M. Co. *v.* Co., supra.

597-20 Intent of party to adopt old stakes remaining from former location may not be testified to by him. Saxton *v.* Perry, 47 Colo. 263, 107 P. 281.

597-21 Declarations contained in record, by which subsequent patent was obtained are admissible in evidence in absence of proof that record did not state the truth. Round Mt. M. Co. *v.* Min. Co., 36 Nev. 543, 138 P. 71.

597-23 Thomas *v.* M. Co., 211 Fed. 105; Londonderry M. Co. *v.* Co., 38 Colo. 480, 88 P. 455; Bismarck M. G. M. Co. *v.* Co., 14 Ida. 516, 95 P. 14; Ford *v.* Campbell, 29 Nev. 578, 92 P. 206; Bergquist *v.* Co., 18 Wyo. 234, 106 P. 673; Slothower *v.* Hunter, 15 Wyo. 189, 88 P. 36.

The field notes or survey being part of the application for patent a certified copy of them is admissible in evidence. Round Mt. M. Co. *v.* Min. Co., 36 Nev. 543, 138 P. 71.

Defective statement, in connection with amended one, admissible to show attempt on part of locator to comply with law. Butte C. M. Co. *v.* Barker, 35 Mont. 327, 89 P. 302.

Second statement, filed after adverse proceeding begun, admissible except as against intervening claimants. Milwaukee G. E. Co. *v.* Gordon, 37 Mont. 209, 95 P. 995; Bismarck M. G. M. Co. *v.* Co., 14 Ida. 516, 95 P. 14.

Failure to file certificate imposes upon claimant burden to show by other evidence validity of location. Ford *v.* Campbell, 29 Nev. 578, 92 P. 206; Gibson *v.* Hjul, 32 Nev. 360, 108 P. 759.

598-24 Declaratory statement of discovery which describes claim by metes and bounds will, after disappearance of monuments, prevail over oral testimony concerning their location, and calls in such statement will control subsequent location inconsistent therewith. Tiggeman *v.* Mrzlak, 40 Mont. 19, 105 P. 77.

598-26 Affidavit of deceased original locator, prima facie evidence in favor of his grantee. Bismarck M. G. M. Co. *v.* Co., 14 Ida. 516, 95 P. 14.

598-27 Copper Mt. M. & S. Co. *v.* Co., 39 Mont. 487, 104 P. 540.

Where positive evidence is introduced showing that the annual labor has not been performed the burden is upon the party claiming performance to show that it has been performed by other evidence than his affidavit. Dicken's West. M. Co. *v.* M. & M. Co. (Ida.), 141 P. 566.

In Fredericks *v.* Klauser, 52 Or. 110, 96 P. 679, under U. S. Stats. expenditures made on one claim may inure to benefit of another only where contiguous claims held in common. See Upton *v.* Co., 14 N. M. 96, 89 P. 275; Hawgood *v.* Emery, 22 S. D. 573, 119 N. W. 177.

599-28 Copper Mt. M. & S. Co. *v.* Co., 39 Mont. 487, 104 P. 540; Protective M. Co. *v.* Co., 51 Wash. 643, 99 P. 1033. See Fredricks *v.* Klauser, 52 Or. 110, 96 P. 679, as to items which may be allowed for.

599-29 See Wailes *v.* Davies, 158 Fed. 667 (conduct inconsistent with testimony concerning intentions); Fredricks *v.* Klauser, 52 Or. 110, 96 P. 679.

Practical value of mill erected may be shown as bearing on party's good faith, and recorded affidavits of proof of labor under statute, admissible. Big Three M. & M. Co. *v.* Hamilton, 157 Cal. 130, 107 P. 301.

Building road in unorganized mining district for use in general development of property compliance with law. Sexton *v.* Co., 55 Wash. 380, 104 P. 614.

Any competent evidence sufficient. Bismarck M. G. M. Co. *v.* Co., 14 Ida. 516, 95 P. 14.

599-31 Dicken's West M. Co. *v.* M. & M. Co. (Ida.), 141 P. 566; Bismarck M. G. M. Co. *v.* Co., 14 Ida. 516, 95 P. 14.

Mistake in affidavit of labor corrected by extrinsic evidence. Bismarck M. G. M. Co. *v.* Co., supra.

Evidence work done not paid for, immaterial. Big Three M. & M. Co. *v.* Hamilton, 157 Cal. 130, 107 P. 301.

600-32 Wailes *v.* Davies, 158 Fed. 667; Big Three M. & M. Co. *v.* Hamilton, 157 Cal. 130, 107 P. 301; Gear *v.* Ford, 4 Cal. App. 556, 88 P. 600; Snowy Peak M. Co. *v.* Co., 17 Ida. 630, 107 P. 60. *Comp.* Upton *v.* Co., 14 N. M. 96, 89 P. 275; Fredricks *v.* Klauser, 52 Or. 110, 96 P. 679.

600-33 Tiggeman *v.* Mrzlak, 40 Mont. 19, 105 P. 77; Thornton *v.* Kaufman, 40 Mont. 282, 106 P. 361; Copper Mt. M. & S. Co. *v.* M. Co., 39 Mont. 487, 104 P. 540.

600-34 Wailes *v.* Davies, 158 Fed. 667 (proof must be clear and convincing); Fredricks *v.* Klauser, 52 Or. 110, 96 P. 679. See Ford *v.* Campbell, 29 Nev. 578, 92 P. 206.

600-35 Washington G. M. & M. Co. *v.* O'Laughlin, 46 Colo. 503, 105 P. 1092; Strickland *v.* Co., 55 Or. 48, 104 P. 965.

Cessation of work on mining claim is strong evidence of abandonment. Logan, etc. Co. *v.* R. Co., 126 Fed. 623, 61 C. C. A. 359; Foster *v.* Co., 90 Fed. 178, 32 C. C. A. 560; Huggins *v.* Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; Tennessee Oil, etc. Co. *v.* Brown,, 131 Fed. 696, 65 C. C. A. 524; Payne *v.* Neuval, 155 Cal. 46, 99 P. 476; Acme Co. *v.* Williams, 140 Cal. 681, 74 P. 296; Florence O., etc. Co. *v.* Orman, 19 Colo. App. 79, 73 P. 628; Gadbury *v.* Co., 162 Ind. 9, 67 N. E. 259; Ohio Co. *v.* Detamore, 165 Ind. 243, 73 N. E. 906; Rawlings *v.* Armel, 70 Kan. 778, 79 P. 683; Bay State Co. *v.* Co., 27 Ky. L. R. 1133, 87 S. W. 1102; Venture O. Co. *v.* Fretts, 152 Pa. 451, 25 A. 732; Calhoon *v.* Neely, 201 Pa. 97, 50 A. 967; Stage *v.* Boyer, 183 Pa. 560, 38 A. 1035; Urpman *v.* Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. 1027; Steelsmith *v.* Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107. Failure to do required assessment work does not show abandonment. Moffat *v.* Co., 33 Colo. 142, 80 P. 139. Failure of lessee of oil lands to enter within reasonable time may be shown. Garrett *v.* Co., 66 W. Va. 587, 66 S. E. 741.

Abandonment may be proved by acts and words and statements of original owner. Emerson *v.* Akin (Colo. App.), 140 P. 481.

600-36 Ineffectual attempt to relocate claim, not abandonment of original location. Bergquist *v.* Co., 18 Wyo. 234, 106 P. 673.

601-40 Outcroppings of mineral upon land are more or less evidentiary but by no means conclusive of its mineral character, and off the land their value as evidence rapidly lessens. U. S. *v.* Kostelak, 207 Fed. 447.

601-41 U. S. *v.* Kostelak, 207 Fed. 447.

601-43 Brown *v.* Gurney, 201 U. S. 184; Cuenin *v.* P. Co. (Colo.), 141 P. 463; McWilliams *v.* Winslow, 34 Colo. 341, 82 P. 538; Lozar *v.* Neill, 37 Mont. 287, 96 P. 343.

Burden on plaintiff to show that prior patent is invalid. Round Mt. Min. Co. *v.* Min. Co., 35 Nev. 392, 129 P. 308.

601-44 Healey *v.* Rupp, 37 Colo. 25, 86 P. 1015; Lockhart *v.* Farrell, 31 Utah 155, 86 P. 1077. See Porter *v.* Co., 146 Fed. 385, 76 C. C. A. 657; Lozar *v.* Neill, 37 Mont. 287, 96 P. 343.

Location notice or certificate when recorded, prima facie evidence. Bismarck M. Co. *v.* Co., 14 Ida. 516, 95 P. 14.

602-47 The end lines of a claim as fixed by a patent are the same lines prima facie, and the presumption is that the vein runs lengthwise and not crosswise of the claim as located. Work Min. & Mill. Co. *v.* Min. Co., 194 Fed. 620, 114 C. C. A. 392.

The existence of the patent to a claim is presumptive evidence that the location was laid along the course of the vein, and that the vein or lode crosses the end lines of the claim as marked on the ground, and that the side lines are laid in the direction of the strike or onward course of the vein. Stewart Min. Co. *v.* Min. Co., 23 Ida. 724, 132 P. 787.

Whether or not there was mineral bearing rock discovered at time of recording of location certificate may be shown. Specie P. G. M. Co. *v.* Kirk, 56 Colo. 275, 139 P. 21.

603-51 Sharkey *v.* Candiana, 48 Or. 112, 85 P. 219.

603-52 See Round Mt. M. Co. *v.* Min. Co., 36 Nev. 543, 138 P. 71.

604-55 Patent raises conclusive presumption there is an apex of a vein within patented ground, but no presumption it is apex of vein in dispute.

Grand C. M. Co. *v.* Co., 29 Utah 490, 83 P. 648.

604-56 Round Mt. M. Co. *v.* Min. Co., 35 Nev. 392, 129 P. 308.

604-57 See Las Vegas & T. R. Co. *v.* Summerfield, 35 Nev. 229, 129 P. 303.

605-58 See Uinta, etc. T. Co. *v.* Co., 141 Fed. 563, 73 C. C. A. 35.

605-59 Noyes *v.* Clifford, 37 Mont. 138, 94 P. 842.

606-62 Original C. M. Co. *v.* Abbott, 167 Fed. 681. See Ware *v.* White, 81 Ark. 220, 108 S. W. 831.

606-64 See Upton *v.* Co., 14 N. M. 96, 89 P. 275.

607-67 White Co. *v.* Co., 41 Can. Sup. 377, *aff.* 13 B. C. 234; Keely *v.* Co., 169 Fed. 601, 95 C. C. A. 99; Lawson *v.* Co., 207 U. S. 1; Grand C. M. Co. *v.* Co., 29 Utah 490, 83 P. 648; Red. W. G. M. Co. *v.* Clays, 30 Utah 242, 83 P. 841.

Person who asserts ownership must prove it. Keely *v.* Co., 169 Fed. 601, 95 C. C. A. 99.

608-69 Henderson Mfg. Co. *v.* Nicholson (Ky.), 126 S. W. 139.

611-72 Shreve *v.* Harvey, 74 N. J. Eq. 336, 70 A. 671.

612-82 Henderson Mfg. Co. *v.* Nicholson (Ky.), 126 S. W. 139.

614-93 Presumption as to rights of respective lessees.—There is a presumption that right to let down surface of land by lessee of it for mining purposes does not exist unless contrary is apparent from lease. This presumption may be met by evidence of the circumstances, under which lease executed, including facts known to both parties. Butterknowle C. Co. *v.* Co. (1906), App. Cas. 305. Thus, if it is shown the authorized working of lower seam will not make it impossible to work upper seam and it is impossible to work such seam without affecting the upper one, presumption is overcome. Butterley Co. *v.* Co. (1909), 1 Ch. 37.

MONEY COUNTS

618-1 Siebrecht *v.* Siebrecht, 153 App. Div. 227, 137 N. Y. S. 1073.

By a fair preponderance of evidence.—Siebrecht *v.* Siebrecht, 153 App. Div 227, 137 N. Y. S. 1073.

Evidence insufficient.—Stapleton *v.* Curran (Me.), 90 A. 979.

618-3 Miller *v.* Miller, 169 Mo. App. 432, 155 S. W. 76; Levy *v.* Friedman, 83 Misc. 445, 145 N. Y. S. 89; Leask *v.* Hoagland, 64 Misc. 156, 118 N. Y. S. 1035. See Pyle *v.* Starbird, 72 Wash. 386, 130 P. 477.

619-5 Time of payment, presumed to be on demand if nothing said. Duke *v.* Co., 163 Ala. 477, 50 S. 892.

620-11 Morrow *v.* Frankist (Del.), 89 A. 740.

620-13 Morrow *v.* Frankist (Del.), 89 A. 740; White *v.* Bligh, 129 N. Y. S. 405.

620-15 But see Cairbre *v.* McQuillan, 151 Mich. 590, 115 N. W. 737, letters acknowledging receipt of money, evidence.

621-22 Sufficiency of circumstantial evidence. See Leask *v.* Hoagland, 64 Misc. 156, 118 N. Y. S. 1035.

622-23 Aetna I. Co. *v.* Ladd, 135 Fed. 636, 68 C. C. A. 274; Leask *v.* Hoagland, 64 Misc. 156, 118 N. Y. S. 1035; Lincoln *v.* Hemenway, 80 Vt. 530, 69 A. 153.

Witness may testify whether money lent or paid by one party to the other. Birmingham P. & R. Co. *v.* Gillespie, 163 Ala. 408, 50 S. 1032.

622-24 Johnson *v.* Bemis, 3 Cal. App. 82, 84 P. 441; Bolanos *v.* Zumeta, 108 N. Y. S. 1014 (loan to partnership of which defendant a member rather than to him individually).

622-25 *Contra*, where there was no issue of fraud. Agat *v.* Apflebaum, 135 Ill. App. 572.

622-26 See Revel *v.* Vien (Mass.), 105 N. E. 981.

623-28 Young *v.* Anthony, 119 App. Div. 612, 104 N. Y. S. 87, relations such as tended to show gift rather than loan.

Value of property for which money paid by lender, a circumstance as to his good faith. Pullis *v.* Somerville, 218 Mo. 624, 117 S. W. 736.

623-29 Oliver *v.* Camp, 9 Ala. App. 232, 62 S. 469; Illinois Terminal R. Co. *v.* R. Co., 157 Ill. App. 102; Miller *v.* Wagner (Ia.), 141 N. W. 1052; Huff *v.* Simmers, 114 Md. 548, 79 A. 1003; Kiendl *v.* Cochrane, 153 App. Div. 802, 138 N. Y. S. 630; Fallon *v.* Vandesand, 136 Wis. 246, 116 N. W. 176. And see Dobbins *v.* Graer, 50 Colo. 10, 114 P. 303; McIntyre *v.* S. S. Line, 12 Ga. App. 399, 78 S. E. 347.

625-39 Hathaway *v.* County, 103 App. Div. 179, 93 N. Y. S. 436; Mings *v.* Co. (Tex. Civ.), 106 S. W. 192.

625-40 Oliver *v.* Camp, 9 Ala. App. 232, 62 S. 469.

625-43 See Fry *v.* Talbott, 106 Md. 43, 66 A. 664.

626-49 Mings *v.* Co. (Tex. Civ.), 106 S. W. 192.

627-53 Miller *v.* Wagner (Ia.), 141 N. W. 1052, also defendant's claim as defense. See Fallon *v.* Vandesand, 136 Wis. 246, 116 N. W. 176, plaintiff's statements showing payment a gift.

627-54 Pacific Coast C. Co. *v.* Co., 11 Cal. App. 712, 106 P. 262; Harr *v.* Roome, 28 App. Cas. (D. C.) 214; Rudisill *v.* Handley, 9 Ga. App. 789, 72 S. E. 189; Rosenbaum *v.* Co., 146 Ill. App. 229; Devlin *v.* Houghton, 202 Mass. 75, 88 N. E. 580; St. Louis S. Co. *v.* Reed (Mo. App.), 161 S. W. 315; Early *v.* R. Co., 167 Mo. App. 252, 149 S. W. 1170; Seaward *v.* Tasker, 80 Misc. 570, 141 N. Y. S. 618; Gile *v.* Motor Car Co. (N. D.), 145 N. W. 732.

Evidence held insufficient.—White *v.* Robinson, 130 N. Y. S. 388.

Not only that money was received by defendant, but also that it was received to the use of plaintiff. Blake *v.* Corcoran, 211 Mass. 406, 97 N. E. 1002.

Where money paid by mistake.—Morrison *v.* Morrison, 101 Me. 131, 63 A. 392.

628-55 Binser *v.* Co., 1 Boyce (Del.) 220, 75 A. 792; Broaddus *v.* Bruce, 177 Ill. App. 183.

Evidence held insufficient.—Duryea *v.* Lohrke, 121 N. Y. S. 138; Ball *v.* Shephard, 120 N. Y. S. 830.

628-57 Gilson *v.* Co., 82 Conn. 383, 73 A. 765

628-58 Devlin *v.* Houghton, 202 Mass. 75, 88 N. E. 580; Duncan *v.* Holder, 15 N. M. 323, 107 P. 685.

629-59 Bradley Lumb. Co. *v.* Bank, 206 Fed. 41, 124 C. C. A. 175; Copper, etc. Min. Co. *v.* Gleeson, 14 Ariz. 548, 134 P. 285; Smith *v.* Bk., 2 Cal. App. 377, 84 P. 348; Harr *v.* Roome, 28 App. Cas. (D. C.) 214; Grone *v.* Ins. Co. (Del.), 80 A. 809; Cullen *v.* R. Co., 63 Fla. 122, 58 S. 182; Citizens' Bk. *v.* Rudisill, 4 Ga. App. 37, 60 S. E. 818; In re Stepan's Est., 178 Ill. App. 227; Cook *v.* Lewis, 172 Ill. App. 518; Jacobson *v.* Co., 156 Ill. App. 512; First Nat. Bk. *v.* Pickens, 7 Ind. Ty. 725, 104 S. W. 947; Lee *v.* Nat. Bk. (Ia.), 144 N. W. 630; Dow *v.* Bradley, 110 Me. 249, 85 A. 896; Devlin *v.* Houghton, 202 Mass. 75, 88 N. E. 580; Hoyt *v.* Co., 158 Mich. 619, 123 N. W. 529; Hart *v.* Goadby, 129 N. Y. S. 892; Edwards *v.* Const. Co., 64 Or. 308, 130 P. 49; McAvoy *v.* C., 27 Pa. Super. 271. See Simmoneli *v.* White S. L. (R. I.), 66 A. 836; Principe *v.* Same (R. I.), 68 A. 476; Ingram *v.* Posey (Tex. Civ.), 138 S. W. 421.

629-60 March *v.* Union, 79 Conn. 7, 63 A. 291; Mulligan *v.* Harlam, 46 Misc. 571, 92 N. Y. S. 765 (action sustained where money received through fraud of third person); Williams *v.* Smith, 29 R. I. 562, 72 A. 1093. See Gerardi *v.* Gardner (Mo.), 164 S. W. 568.

Making complaint against defendant for embezzlement may be shown. Complaint and warrant, admissible to show institution of proceedings prior to commencement of civil suit. Williams *v.* Smith, 29 R. I. 562, 72 A. 1093.

629-61 McClean' *v.* Stansberry, 151 Ia. 312, 131 N. W. 15.

Parol evidence is admissible to show plaintiff misled by declarations of his vendor though written contract for sale and purchase of land. Gilson *v.* Co., 82 Conn. 383, 73 A. 765.

630-63 Manning *v.* Fallon (N. J.), 66 A. 903.

630-64 Harr *v.* Roome, 28 App. Cas. (D. C.) 214.

630-65 Wilson *v.* Duffy, 158 Mo. App. 509, 138 S. W. 918.

630-68 Titcomb *v.* Powers, 108 Me. 347, 80 A. 851.

631-69 Walder *v.* English, 137 App. Div. 43, 122 N. Y. S. 1, invalid contract.

631-70 Brinser *v.* Co., 1 Boyce (Del.) 220, 75 A. 792 (receipt indicating ownership, not conclusive); Walder *v.* English, 137 App. Div. 43, 122 N. Y. S. 1.

631-73 Jenkins *v.* Clopton, 141 Mo. App. 74, 121 S. W. 759; Seaward *v.* Tasker, 80 Misc. 570, 141 N. Y. S. 618 (evidence sufficient).

631-74 If defendant asserts plaintiff paid third person large sum due him fact such person never had a claim against plaintiff, material. Williams *v.* Smith, 29 R. I. 562, 72 A. 1093.

632-75 Weber *v.* Werner, 138 App. Div. 127, 122 N. Y. S. 943. See St. Louis S. Co. *v.* Reed (Mo. App.), 161 S. W. 315; Gile *v.* Car Co. (N. D.), 145 N. W. 732.

Defendant must show payment.—Williams *v.* Smith, 29 R. I. 562, 72 A. 1093.

MORTALITY TABLES

633-1 Cusick *v.* Boyne, 1 Cal. App. 643, 82 P. 985 (value of life estate); Presley *v.* Tel. Co., 158 Ill. App. 220; Croft *v.* R. Co., 134 Ia. 411, 109 S. W. 723 (expectancy of female); Little *v.* Co., 165 Mich. 654, 131 N. W. 63; Acken *v.* Tinglehoff, 83 Neb. 296, 119 N. W. 456; City of Shawnee *v.* Slankard, 29 Okla. 133, 116 P. 803.

634-3 See Nobrega *v.* Nobrega, 14 Haw. 152.

634-4 Northern P. R. Co. *v.* Chervenak, 203 Fed. 884, 122 C. C. A. 178; Southern P. Co. *v.* Cavin, 144 Fed. 348, 75 C. C. A. 350; Southern R. Co. *v.* Cunningham, 152 Ala. 147, 44 S. 658; Birmingham, etc. Co. *v.* Wright, 153 Ala. 99, 44 S. 1037; McMahon *v.* Bangs, 5 Penne. (Del.) 178, 62 A. 1098; Atlanta, etc. R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818 (inadmissible unless earning capacity established); Pittsburg, etc. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033; Pittsburg, etc. Co. *v.* Ross, 169 Ind. 3, 80 N. E. 845; Scott *v.* R. Co. (Ia.), 141 N. W. 1065 (although possibly of little value); Patton *v.* Sanborn, 133 Ia. 650, 110 N. W. 1032; Proctor C. Co. *v.* Beaver's Admrs., 151 Ky. 839, 152 S. W. 965 (even though he died before judgment); Louisville & N. R. Co. *v.* Campbell (Ky.), 122 S. W. 848; Louisville & N. R. Co. *v.* McMillen (Ky.), 119 S. W. 221; Illinois C. R. Co. *v.* Houchins, 121 Ky. 526, 89 S. W. 530; Ill. C. R. Co. *v.* Morris, 28 Ky. L. R. 956, 90 S. W. 979; Louisville B. & I. Co. *v.* Hart, 122 Ky. 731, 92 S. W. 951; Banks *v.* Braman, 195 Mass. 97, 80 N. E. 799; Merrinane *v.* Miller, 157 Mich. 279, 118 N. W. 11; Robinson *v.* Co., 38 Mont. 222, 99 P. 837; Sledge *v.* Co., 140 N. C. 459, 53 S. E. 259 (prima facie evidence of life expectancy under statute); Oliver *v.* Const. Co. (R. I.), 90 A. 764; Colbert *v.* R. I. Co. (R. I.), 67 A. 446 (inadmissible when injured party abnormal or has incurable disease); Texas N. O. R. Co. *v.* Kelley, 34 Tex. Civ. 21, 80 S. W. 1073; International, etc. Co. *v.* Brandon, 37 Tex. Civ. 371, 84 S. W. 272; Virginia, etc. R. Co. *v.* Bailey, 103 Va. 205, 49 S. E. 33; Suell *v.* Jones, 49 Wash. 582, 96 P. 4.

When not admissible.—*Comp.* Pensacola Sanitarium *v.* Wilkins, 64 Fla. 407, 60 S. 128.

Admissible after permanent character of injury established. Messing *v.* R. Co., 5 Penne. (Del.) 526, 64 A. 247; Knott *v.* Peterson, 125 Ia. 404, 101 N. W. 173; Haney *v.* Pinckney, 155 Mich. 656, 119 N. W. 1099; Acken *v.* Tinglehoff, 83 Neb. 296, 119 N. W. 456; Howard *v.* McCabe, 79 Neb. 42, 112 N. W. 305; MacGregor *v.* Co., 27 R. I. 85, 60 A. 761; O'Clair *v.* Co., 27 R. I. 448, 63 A. 238; Hyland *v.* Co., 70 S. C. 315, 49 S. E. 879 (statutory tables); Duskey *v.* Co., 51 Wash. 145, 98 P. 99; Brown *v.* Blaine, 41 Wash. 287, 83 P. 310; Hodd *v.* Tacoma, 45 Wash. 436, 88 P. 842.

634-5 Ward *v.* Kjoebenhavn, 144 Fed. 524 (when proof brings him within class of lives tabulated); Kansas City R. Co. *v.* Morris, 80 Ark. 528, 98 S. W. 363; St. Louis, etc. R. Co. *v.* Hitt, 76 Ark. 227, 88 S. W. 908, 990; Valente *v.* R. Co., 151 Cal. 534, 91 P. 481; Calvert *v.* Co., 231 Ill. 290, 83 N. E. 184; Winn *v.* R. Co., 143 Ill. App. 71; Pittsburgh, etc. R. Co. *v.* Rogers, 45 Ind. App. 230, 87 N. E. 28; Peterson *v.* Brackley, 143 Ia. 75, 119 N. W. 967; Knott *v.* Peterson, 125 Ia. 404, 101 N. W. 173; Southern R. Co. *v.* Adkins, 133 Ky. 219, 117 S. W. 321; Illinois C. R. Co. *v.* Cane, 28 Ky. L. R. 1018, 90 S. W. 1061; Philip *v.* Heraty, 135 Mich. 446, 100 N. W. 186; Piper *v.* R., 75 N. H. 228, 72 A. 1024; Reynolds *v.* Co., 26 R. I. 457, 59 A. 393; Memphis St. R. Co. *v.* Berry, 118 Tenn. 581, 102 S. W. 85; Huber *v.* R. Co. (Tex. Civ.), 113 S. W. 984; N. & W. R. Co. *v.* Spencer, 104 Va. 657, 52 S. E. 310.

Admissible, but not necessary to produce them. Moses *v.* Mathews (Neb.), 146 N. W. 920.

635-7 Horst *v.* Lewis, 71 Neb. 365, 103 N. W. 460.

635-8 Cusick *v.* Boyne, 1 Cal. App. 643, 82 P. 985; Memphis S. R. Co. *v.* Berry, 118 Tenn. 581, 102 S. W. 85 (deceased in advanced stage of dropsy); So. Kan., etc. R. Co. *v.* Sage (Tex. Civ.), 80 S. W. 1038.

635-9 Canfield *v.* R. Co., 142 Ia. 658, 121 N. W. 186; Miss. C. O. Co. *v.* Smith, 95 Miss. 528, 48 S. 735; Horst *v.* Lewis, 71 Neb. 365, 103 N. W. 460; Colbert *v.* Co. (R. I.), 67 A. 446.

636-10 Louisville & N. R. Co. *v.* McMillen (Ky.), 119 S. W. 221 (jury should consider hazardous nature of employment in fixing weight to be given tables); International, etc. Co. *v.* Brandon, 37 Tex. Civ. 371, 84 S. W.

272; International, etc. Co. *v.* Aten (Tex. Civ.), 81 S. W. 346.

636-12 N. Y. etc. R. Co. *v.* Lind (Ind.), 102 N. E. 449; Macrill *v.* City, 93 Neb. 670, 141 N. W. 825.

637-17 Southern R. Co. *v.* Cunningham, 152 Ala. 147, 44 S. 658; Illinois C. R. Co. *v.* Houchins, 28 Ky. L. R. 499, 89 S. W. 530; Miss. C. R. Co. *v.* Robinson (Miss.), 64 S. 838; Collins *v.* Co., 143 Mo. App. 333, 127 S. W. 641.

Wigglesworth tables.—Winn *v.* R. Co., 239 Ill. 132, 87 N. E. 954; Owens *v.* R. Co., 163 Ill. App. 629.

638-18 Tables in use by reliable insurers, admissible. Huber *v.* R. Co. (Tex. Civ.), 113 S. W. 984.

639-19 Valente *v.* R. Co., 151 Cal. 534, 91 P. 481; Pittsburg, etc. R. Co. *v.* Sudhoff, 173 Ind. 314, 90 N. E. 467; Stephens *v.* Elliott, 36 Mont. 92, 92 P. 45; Rober *v.* R. Co., 25 N. D. 394, 142 N. W. 22.

American Experience Tables of Mortality.—Hay *v.* L. & T. Co. (Ind. App.), 101 N. E. 651.

By North Dakota statute (§7303, R. C 1905) makes the so-called "Carlisle Tables" admissible. "But nowhere do we find authority for the proposition that their introduction is absolutely necessary. In fact, the overwhelming weight of authority is to the effect that the court will take judicial notice of the standard tables, and, if called upon, or even if not called upon, may instruct the jury in relation thereto." Ruehl *v.* Lidgerwood Rural Tel. Co., 23 N. D. 6, 135 N. W. 793.

639-20 Such tables not essential. Merchants' T. Co. *v.* Corcoran, 4 Ga. App. 654, 62 S. E. 130.

639-21 Clark *v.* Van Vleck, 135 Ia. 194, 112 N. W. 648.

641-28 Winn *v.* R. Co., 143 Ill. App. 71; Stephens *v.* Elliott, 36 Mont. 92, 92 P. 45; Whaley *v.* Vidal, 27 S. D. 642, 132 N. W. 248.

641-29 Valente *v.* R. Co., 151 Cal. 534, 91 P. 481, discretionary with court.

642-33 Scott *v.* R. Co. (Ia.), 141 N. W. 1065; Farrell *v.* R. Co., 123 Ia. 690, 99 N. W. 578; Sterling *v.* Co., 142 Mich. 284, 105 N. W. 755; Merrinane *v.* Miller, 148 Mich. 412, 111 N. W. 1050; Moses *v.* Mathews (Neb.), 146 N. W. 920; Omaha *v.* Sutliffe, 72 Neb. 746, 101 N. W. 997; Holt *v.* Hamlin, 120 Tenn. 496, 111 S. W. 241; Texas, etc. R. Co. *v.* Higgins, 44 Tex. Civ. 523, 99 S. W. 200.

643-34 Louisville, etc. R. Co. *v.* Anderson, 150 Ala. 350, 43 S. 566; Peterson *v.* Brackey, 143 Ia. 75, 119 N. W. 967; Robinson *v.* Co., 38 Mont. 222, 99 P. 837; Davis *v.* Borland, 83 Neb. 281, 119 N. W. 454; Iseminger *v.* Co., 209 Pa. 615, 59 A. 64.

Opinion of experts on expectancy of life beyond that given in tables, based upon such tables and longevity of party's father and grandfather are admissible. Hamilton *v.* R. Co., 135 Mich. 95, 97 N. W. 392.

643-35 Bettis *v.* R. Co., 131 Ia. 46, 108 N. W. 103.

MORTGAGES

655-1 Gibbons *v.* Co., 37 Colo. 96, 86 P. 94 (although fraud not alleged); Smith *v.* Hope, 51 Fla. 541, 41 S. 69; Okuu *v.* Kaiaikawaha, 7 Haw. 311; Wasey *v.* Whitcomb, 167 Mich. 58, 132 N. W. 572; Am. C. Bk. *v.* Cabrera, 3 P. R. Fed. 14. See Gore *v.* Glover, 19 Misc. 473, 96 N. Y. S. 969; Smith *v.* Pfluger, 126 Wis. 253, 105 N. W. 476.

657-2 Stalker *v.* Hayes, 81 Conn. 711, 71 A. 1099.

658-6 Holman *v.* Ketchum, 153 Ala. 360, 45 S. 206. See Owen *v.* Mulkey, 84 Ark. 623, 106 S. W. 937; Hereford *v.* Benton, 20 Colo. App. 500, 80 P. 499; Stewart *v.* Hoffman, 31 Mont. 184, 81 P. 3; First Nat. Bk. *v.* Stewart, 13 N. M. 551, 86 P. 622. To show fraudulent character parol evidence admissible to prove statements by mortgagor to mercantile agency. Bruce *v.* Bruce (Tex. Civ.), 89 S. W. 435; Walsh *v.* Taitt, 142 Mich. 127, 105 N. W. 541.

658-10 Hubbard *v.* Ranje, 52 Ind. App. 611, 98 N. E. 311; Wasey *v.* Whitcomb, 167 Mich. 58, 132 N. W. 572.

660-15 See Harris *v.* Staples (Tex. Civ.), 89 S. W. 801.

Presumption as to sum due arising from recitals in mortgage must be overcome by mortgagor. Price *v.* Fertig, 144 Ia. 178, 122 N. W. 811.

664-37 See Van Norman *v.* Young, 228 Ill. 425, 81 N. E. 1060, conditional delivery.

665-40 Proof mortgage executed so as to entitle it, when recorded, to priority over other creditors must be made by one who subscribed as witness after seeing writing executed or hearing it acknowledged. It is not enough one deposes he did so subscribe, statute

providing that when "proved by one or more of the subscribing witnesses to it," it shall be received as evidence and be recorded. Pryor *v.* Gray, 74 N. J. Eq. 438, 70 A. 341.

Secretary of corporation which executes mortgage proper person to make proof of its execution. Pryor *v.* Gray, 74 N. J. Eq. 438, 70 A. 341.

665-43 Pepper *v.* James, 7 Ga. App. 518, 67 S. E. 218.

665-44 Certified copy admissible without proof of loss of original or of its execution, if that be admitted. It may be received if filed before announcement of ready for trial is made. Plea denying existence of partnership between defendants does not require plaintiff to prove execution of mortgage before offering certified copy. Morris *v.* Moon (Tex. Civ.), 120 S. W. 1063.

666-46 In re Signor, 203 Fed. 753. See Craddock *v.* Walden (Ala.), 63 S. 534; Winston *v.* Farrow (Ala.), 40 S. 53. *Contra* by statute. Collerd *v.* Tully 78 N. J. Eq. 557, 80 A. 491, *aff.* 77 N. J. Eq. 439, 77 A. 1079.

666-48 In re Signor, 203 Fed. 753; Reeves *v.* Allgood, 133 Ga. 835, 67 S. E. 82; Hallagan *v.* Johnston (Ind. App.), 104 N. E. 91; Peppers *v.* Harris, 145 Ia. 635, 124 N. W. 625. See Schmidt *v.* Rankin, 193 Mo. 254, 91 S. W. 78.

But parol is not admissible to aid in description of chattels mortgaged. In re Raney, 202 Fed. 1000. See vol. 9, p. 473, n. 83, and supplement thereto.

As to progeny of mortgaged animals. Swint *v.* S., 3 Ala. App. 93, 57 S. 394.

667-50 Patchin *v.* Crossland, 145 Ill. App. 589.

668-52 Dierling *v.* Pettit, 140 Mo. App. 88, 119 S. W. 524.

668-53 In re Signor, 203 Fed. 753; Sigel-C., etc. Co. *v.* Holly, 44 Colo. 580, 101 P. 68; Albien *v.* Smith, 24 S. D. 203, 123 N. W. 675.

Intention of parties may be shown and that by mutual mistake after acquired goods omitted. White Co. *v.* Carroll, 147 N. C. 330, 61 S. E. 196.

Burden on party who asserts mortgagee not entitled to certain property claimed by him to show fact. Mattley *v.* Wolfe, 175 Fed. 619.

668-59 Hubbard *v.* Ranje, 52 Ind. App. 611, 98 N. E. 314; Perkins *v.* Drew (Ky.), 122 S. W. 526.

670-61 Hubbard *v.* Ranje, supra; Perkins *v.* Drew, supra.

671-67 Presumption mortgage remained on file continues until proof made showing it was elsewhere; such proof not given retroactive effect. Murray *v.* Co., 79 Kan. 326, 99 P. 589.

672-76 Wilson *v.* Johnson, 152 Ala. 614, 44 S. 539.

672-78 Certificate must be identified and offered independently of mortgage on which it is endorsed. Ayre *v.* Hixson, 53 Or. 19, 98 P. 515.

674-86 Kitchen *v.* Schuster, 14 N. M. 164, 89 P. 261.

674-87 Ayre *v.* Hixson, 53 Or. 19, 98 P. 515. See Boswell *v.* Bk., 16 Wyo. 161, 92 P. 624, 93 P. 661.

675-92 Dierling *v.* Pettit, 140 Mo. App. 88, 119 S. W. 524; Joslyn *v.* Co., 83 Vt. 49, 74 A. 385.

675-93 Roberts *v.* Little, 18 N. D. 608, 120 N. W. 563, *foll.* Musser *v.* King, 40 Neb. 892, 59 N. W. 744, 42 Am. St. 700.

677-98 Mortgagee must establish lien on property insufficiently identified by mortgage before his right to priority can be admitted. Swayne *v.* Tillotson (Ia.), 123 N. W. 345.

679-8 Ilfeld *v.* Ziegler, 40 Colo. 401, 91 P. 825.

679-9 Baker *v.* Hutchinson, 147 Ala. 636, 41 S. 809.

680-11 Nolen *v.* Farrow, 154 Ala. 269, 45 S. 183; Vermillion *v.* Bk. (Ind. App.), 105 N. E. 530; Peoria S. & M. Wks. *v.* Sinclair, 146 Ia. 56, 124 N. W. 772; Zacharia *v.* Cohen, 140 Ia. 682, 119 N. W. 136. See Pritchard *v.* Hooker, 114 Mo. App. 605, 90 S. W. 415.

In replevin for property mortgaged to plaintiff, burden is on him to show his mortgagor had title. Martin *v.* Lesan, 129 Ia. 573, 105 N. W. 996.

681-13 See Mashburn *v.* Co., 117 Ga. 567, 44 S. E. 97; Bell Wayland Co. *v.* Miller, 39 Okla. 4, 130 P. 593.

681-14 Purchaser who claims to have acted in good faith and without notice must show facts making record ineffectual. Bradford *v.* Lembke (Tex. Civ.), 118 S. W. 159.

683-23 Gilroy *v.* Co., 118 App. Div. 733, 103 N. Y. S. 620.

684-29 Van Gordon *v.* Goldamer, 16 N. D. 323, 113 N. W. 609.

685-31 Mortgagee's knowledge mortgagor indebted to others, immaterial, as is former's purpose in taking an-

other mortgage from latter. Kelly *v.* Ryan, 140 Ia. 580, 118 N. W. 901.

685-36 Luke *v.* Cason, 7 Ga. App. 183, 66 S. E. 493.

686-37 Evidence held sufficient. Fort *v.* S., 1 Ala. App. 195, 55 S. 434.

686-38 See Pinson *v.* Campbell, 124 Mo. App. 260, 101 S. W. 621.

686-42 Mortgage admissible. Martin *v.* S., 3 Ala. App. 90, 58 S. 83.

686-44 Declarations of defendant as to unencumbered condition of property held admissible. Coley *v.* S. (Tex. Cr.), 150 S. W. 789.

687-49 That prior mortgage exceeded value of property may be shown. Osborne *v.* S. (Ark.), 160 S. W. 215.

688-54 Sum realized, immaterial. Hooks *v.* S., 58 Fla. 57, 50 S. 586.

688-56 Com., etc. Co. *v.* White, 172 Mo. App. 537, 158 S. W. 457.

689-59 Brown *v.* Koffler, 133 Mo. App. 494, 113 S. W. 711.

689-61 Release shown by parol. Fincher *v.* Bennett, 94 Ark. 165, 126 S. W. 392.

690 Proof of cost of attempted statutory foreclosure inadmissible in foreclosure suit brought under order of court in the absence of a proper showing that such charges were lawful and reasonable. Townsend *v.* Weisenburger, 32 S. D. 148, 142 N. W. 253.

691-73 Price obtained for property tends to show validity of sale. Speakman *v.* Vest, 166 Ala. 235, 51 S. 980.

691-74 Linkemann *v.* Knepper, 226 Ill. 473, 80 N. E. 1009; Guarantee, etc. Co. *v.* Edwards, 7 Ind. Ty. 297, 104 S. W. 624; Laub *v.* Romans, 131 Ia. 427, 105 N. W. 102; Keeline *v.* Clark, 132 Ia. 360, 166 N. W. 257; Clark *v.* McDowell, 33 Ky. L. R. 177, 109 S. W. 887; In re Schmidt, 114 La. 78, 38 S. 26; Conover *v.* Palmer, 123 App. Div. 817, 108 N. Y. S. 480; Moorhead *v.* Ellison, 56 Tex. Civ. 444, 120 S. W. 1049; Parker *v.* Bushong (Tex. Civ.), 143 S. W. 281; Hesser *v.* Brown, 40 Wash. 688, 82 P. 934; Sahlin *v.* Gregson, 46 Wash. 452, 90 P. 592; Smith *v.* Pfluger, 126 Wis. 253, 105 N. W. 476.

See Hilt *v.* Griffin, 77 Kan. 783, 90 P. 808.

692-76 Thornton *v.* Pinckard, 157 Ala. 206, 47 S. 289; Rodgers *v.* Burt, 157 Ala. 91, 47 S. 226; Harrison *v.* Maury, 157 Ala. 227, 47 S. 724; Thomas *v.* Livingston, 155 Ala. 546, 46 S. 851; Elliott *v.* Conner, 63 Fla. 408, 58 S. 241; McKibben *v.* Diltz, 138 Ky. 664, 123 S. W. 1082; Gibbs *v.* Haughowout, 207 Mo. 384, 105 S. W. 1067; Nagle *v.* Simmank, 54 Tex. Civ. 432, 116 S. W. 862; Shields *v.* Simonton, 65 W. Va. 179, 63 S. E. 972; Froidevaux *v.* Jordon, 64 W. Va. 388, 62 S. E. 686.

So, in a doubtful case, the facts and circumstances surrounding the transaction may be shown. Vaughn *v.* Smith, 148 Ky. 531, 146 S. W. 1094.

Deed and other papers may sufficiently evidence intention of parties. Horn *v.* Bates (Ky.), 114 S. W. 763.

693-77 Cabrera *v.* Bk., 214 U. S. 224 (Porto Rico case); Morton *v.* Allen (Ala.), 60 S. 866; Smith *v.* Smith, 153 Ala. 504, 45 S. 168; Shreve *v.* McGowin, 143 Ala. 665, 42 S. 94; Prickett *v.* Williams (Ark.), 161 S. W. 1023; Meeker *v.* Shuster, 4 Cal. App. 294, 87 P. 1102; Todd *v.* Todd, 164 Cal. 255, 128 P. 413; Anglo Cal. Bk. *v.* Cerf, 147 Cal. 384, 81 P. 1077; Davis *v.* Pursel, 55 Colo. 287, 134 P. 107; Reitze *v.* Humphrey, 53 Colo. 177, 125 P. 510; Heron *v.* Weston, 44 Colo. 379, 100 P. 1130; Lowe *v.* Findley, 141 Ga. 380, 81 S. E. 230; Spencer *v.* Schuman, 132 Ga. 515, 64 S. E. 466 (if grantee has not gone into possession); Bashinski *v.* Swint, 133 Ga. 38, 65 S. E. 152; Thompson *v.* Burns, 15 Ida. 572, 99 P. 111; Bartoletti *v.* Hoerner, 154 Ill. App. 336; Salinger *v.* McAllister (Ia.), 146 N. W. 8; Cold *v.* Beh, 152 Ia. 368, 132 N. W. 73; Veeder *v.* Veeder, 141 Ia. 492, 120 N. W. 61; Jones *v.* Gillett, 142 Ia. 506, 118 N. W. 814; Mahaffy *v.* Faris, 144 Ia. 220, 122 N. W. 934; Keeline *v.* Clark, 132 Ia. 360, 106 N. W. 257; Laub *v.* Romans, 131 Ia. 427, 105 N. W. 102; Kinkead *v.* Peet, 137 Ia. 692, 114 N. W. 616; Krebs *v.* Lauser, 133 Ia. 241, 110 N. W. 443 (title taken as security for money advanced to purchase property); Saylor *v.* Crooker, 89 Kan. 51, 130 P. 689; Farmers' & M. Bk. *v.* Kackley, 88 Kan. 70, 127 P. 539; Brown *v.* Spradlin, 136 Ky. 703, 125 S. W. 150 (regardless of fraud or mistake); Hobbs *v.* Rowland, 136 Ky. 197, 123 S. W. 1185; Funk *v.* Harshman, 110 Md. 127, 72 A. 665; Schmidt *v.* Barclay, 161 Mich. 1, 125 N. W. 729; Leach *v.* Grube, 147 Mich. 348, 110 N. W. 1076; Brightwell *v.* McAfee, 249 Mo. 562, 155 S. W. 820; Harrah *v.* Smith, 79 Neb. 51, 112 N. W. 337; In re Mechanics' Bk., 156 App. Div. 343, 141 N. Y. S. 473; Miller *v.* Smith, 20 N. D. 96, 126

N. W. 499; Kramer *v.* Wilson, 49 Or 333, 90 P. 183; Nagle *v.* Simmank, 54 Tex. Civ. 432, 116 S. W. 862; Batchelder *v.* Randolph, 112 Va. 296, 71 S. E. 533; Clambey *v.* Copland, 52 Wash. 580, 100 P. 1031; Shields *v.* Simonton, 65 W. Va. 179, 63 S. E. 972.

See Tappen *v.* Eshelman, 164 Ind. 338, 73 N. E. 688; Miller *v.* Miller, 101 Md. 600, 61 A. 210; Jennings *v.* Demmon, 194 Mass. 108, 80 N. E. 471; infra, "Parol Evidence," 442-23 et seq.

And see vol. 9, p. 442, n. 24, and supplement thereto.

Extrinsic evidence proper to determine extent, nature and terms of an obligation. Hurd *v.* Chase, 100 Me. 561, 62 A. 660. It may be shown deed to wife through third person intended to be mortgage; but proof must be clear and convincing. Wilson *v.* Terry, 70 N. J. Eq. 231, 62 A. 310.

697-79 Richardson *v.* Beaber, 62 Misc. 542, 115 N. Y. S. 821.

697-85 See McCusker *v.* Geiger, 195 Mass. 46, 80 N. E. 648.

699-87 Rodgers *v.* Burt, 157 Ala. 91, 47 S. 226.

699-88 Rushton *v.* McIllvene, 88 Ark. 299, 114 S. W. 709; Shields *v.* Simonton, 65 W. Va. 179, 63 S. E. 972.

700-89 Shreve *v.* McGowin, 143 Ala. 665, 42 S. 94; De Bartlett *v.* De Wilson, 52 Fla. 497, 42 S. 189. See Jennings *v.* Demmon, 194 Mass. 108, 80 N. E. 471.

700-90 Freeman *v.* Peterson, 45 Colo. 102, 100 P. 600; Salenger *v.* McAllister (Ia.), 146 N. W. 8; Jennings *v.* Demmon, 194 Mass. 108, 80 N. E. 471.

700-91 Belinski *v.* Co., 124 Ill. App. 45; Hubbard *v.* Cheney, 76 Kan. 222, 91 P. 793; Borders *v.* Allen, 33 Ky. L. R. 194, 110 S. W. 240; Graham *v.* Fischer (Ky.), 110 S. W. 386; Stitt *v.* Co., 96 Minn. 27, 104 N. W. 561; Grannis *v.* Hitchcock, 118 Minn. 462, 137 N. W. 186; Wagg *v.* Herbert, 19 Okla. 525, 92 P. 250; Welborn *v.* Dixon, 70 S. C. 108, 49 S. E. 232; Bernardy *v.* Co., 20 S. D. 193, 105 N. W. 737; Duerden *v.* Solomon, 33 Utah 468, 94 P. 978; Lynch *v.* Ryan, 132 Wis. 271, 111 N. W. 707; Smith *v.* Pfluger, 126 Wis. 253, 105 N. W. 476.

See Shreve *v.* McGowin, 143 Ala. 665, 42 S. 94; De Bartlett *v.* De Wilson, 52 Fla. 497, 42 S. 189. *Contra*, Crockett *v.* Waller, 29 Ky. L. R. 1155, 96 S. W. 860 (in absence of allegation of fraud or mistake); Nevius *v.* Nevius, 117 App. Div. 236, 101 N. Y. S. 1091.

701-92 Shields *v.* Simonton, 65 W. Va. 179, 63 S. E. 972. See Campbell *v.* Co., 70 N. J. Eq. 40, 62 A. 319.

701-93 Dabney *v.* Smith, 38 Wash. 40, 80 P. 199.

Mortgagee must conclusively show mortgagor has waived, rescinded or abandoned his equity by subsequent distinct and independent parol agreement partially or completely carried out. Froidevaux *v.* Jordon, 64 W. Va. 388, 62 S. E. 686.

702-96 Calhoun *v.* Anderson, 78 Kan. 746, 98 P. 274.

702-98 Abrams *v.* Abrams, 74 Kan. 888, 88 P. 70.

702-99 See Kidd *v.* Sparks (Tex. Civ.), 167 S. W. 799.

703-1 Nelson *v.* Wadsworth, 171 Ala. 603, 55 S. 120; Thornton *v.* Pinckard, 157 Ala. 206, 47 S. 289; Elliott *v.* Conner, 63 Fla. 408, 58 S. 241; Funk *v.* Harshman, 110 Md. 127, 72 A. 665. See Gardner *v.* Welch, 21 S. D. 151, 110 N. W. 110.

Circumstantial evidence is sufficient. Holien *v.* Slee, 120 Mich. 261, 139 N. W. 493.

704-2 Spencer *v.* Schuman, 132 Ga. 515, 64 S. E. 466; Miller *v.* Smith, 20 N. D. 96, 126 N. W. 499; Mansfield *v.* Hill, 56 Or. 400, 107 P. 471; Moore *v.* Kirby, 52 Tex. Civ. 200, 115 S. W. 632; Froidevaux *v.* Jordon, 64 W. Va. 388, 62 S. E. 686. See Cady *v.* Burgess, 144 Mich. 523, 108 N. W. 414.

705-3 Wilson *v.* Terry, 71 N. J. Eq. 785, 65 A. 983, entries in diary.

705-4 Rodgers *v.* Burt, 157 Ala. 91, 47 S. 226, admissions received with great caution and tested by other evidence.

705-5 Bollinger *v.* Bollinger, 154 Cal. 695, 99 P. 196.

Evidence of conversation between grantor and third person at time agreement was being drawn is inadmissible. Miller *v.* Mandel, 174 Ill. App. 166, *aff.* 259 Ill. 314, 102 N. E. 760.

705-8 Wilbur *v.* Jones, 80 N. J. Eq. 520, 86 A. 769; Miller *v.* Harris, 117 App. Div. 395, 102 N. Y. S. 604; Miller *v.* Smith, 20 N. D. 96, 126 N. W. 499.

706-10 Bascombe *v.* Marshall, 129 App. Div. 516, 113 N. Y. S. 991.

706-11 Rodgers *v.* Burt, 157 Ala. 91, 47 S. 226; Rushton *v.* McIllvene, 88 Ark. 299, 114 S. W. 709; Gray *v.* Hayhurst, 157 Ill. App. 488; Henninger *v.*

McGuire, 146 Ia. 270, 125 N. W. 180, Ridings *v.* Bk., 147 Ia. 608, 125 N. W. 200; Lemke *v.* Lemke, 78 Neb. 525, 111 N. W. 138; Miller *v.* Smith, 20 N. D. 96, 126 N. W. 499; Shields *v.* Simonton, 65 W. Va. 179, 63 S. E. 972; Weltner *v.* Thurmond, 17 Wyo. 268, 98 P. 590.

See Smith *v.* Smith, 153 Ala. 504, 45 S. 168; Samuelson *v.* Mickey, 73 Neb. 852, 103 N. W. 671.

Existence of debt is sometimes said to be essential; it need not be shown by covenant. Jones *v.* Gillett, 142 Ia. 506, 118 N. W. 314; Henninger *v.* McGuire, 146 Ia. 270, 125 N. W. 180; Bascombe *v.* Marshall, 129 App. Div. 516, 113 N. Y. S. 991. Absence of it, a strong circumstance. Rodgers *v.* Burt, 157 Ala. 91, 47 S. 226.

708-12 Rodgers *v.* Burt, 157 Ala. 91, 47 S. 226.

708-13 Guarantee, etc. Co. *v.* Edwards, 164 Fed. 809, 90 C. C. A. 585; Kahn *v.* Metz, 88 Ark. 363, 114 S. W. 911; Griffin *v.* Welch, 88 Ark. 336, 114 S. W. 710; Ridings *v.* Bk., 147 Ia. 608, 125 N. W. 200; Holien *v.* Slee, 120 Minn. 261, 139 N. W. 493; Brightwell *v.* McAfee, 249 Mo. 562, 155 S. W. 820. See Moyer *v.* Dodson, 212 Pa. 344, 61 A. 937; McGaughey *v.* Bk., 41 Tex. Civ. 191, 92 S. W. 1003; Kane *v.* Quillian, 104 Va. 309, 51 S. E. 353.

709-14 Bascombe *v.* Marshall, 129 App. Div. 516, 113 N. Y. S. 991; Weltner *v.* Thurmond, 17 Wyo. 268, 98 P. 590.

710-17 Calhoun *v.* Anderson, 78 Kan. 746, 98 P. 274.

711-23 Thornton *v.* Pinckard, 157 Ala. 206, 47 S. 289; Jones *v.* Gillett, 142 Ia. 506, 118 N. W. 314. See Kidd *v.* Sparks (Tex. Civ.), 167 S. W. 799.

711-24 Rodgers *v.* Burt, 157 Ala. 91, 47 S. 226; Thornton *v.* Pinckard, 157 Ala. 206, 47 S. 289; Brightwell *v.* McAfee, 249 Mo. 562, 155 S. W. 820; Bascombe *v.* Marshall, 129 App. Div. 516, 113 N. Y. S. 991; Yates *v.* Caswell (Tex. Civ.), 126 S. W. 914; Moorhead *v.* Ellison, 56 Tex. Civ. 444, 120 S. W. 1049. See White *v.* Redenbaugh, 41 Ind. App. 580, 82 N. E. 110.

713-25 Hemsted *v.* Hemsted, 150 Ia. 635, 130 N. W. 413; Rathbone *v.* Maltz, 155 Mich. 306, 118 N. W. 991.

713-27 Schmidt *v.* Barclay, 161 Mich. 1, 125 N. W. 729, of great weight.

713-30 See vol. 11, p. 783, n. 21, and supplement thereto.

713-31 Execution of lease by holder of title to one claiming equitable ownership, not conclusive against latter. Jones *v.* Gillett, 142 Ia. 506, 118 N. W. 314.

713-32 Thomas *v.* Livingston, 155 Ala. 546, 46 S. 851; Heron *v.* Weston, 44 Colo. 379, 100 P. 1130; Clambey *v.* Copland, 52 Wash. 580, 100 P. 1031. See Ridings *v.* Bk., 147 Ia. 608, 125 N. W. 200. See Calahan *v.* Dunker, 51 Ind. App. 436, 99 N. E. 1021.

Parol evidence is admissible to connect an absolute deed and a separate defeasance, and to show that together they were intended to be a mortgage. Smith *v.* Hoff, 23 N. D. 37, 135 N. W. 772.

714-39 McIver *v.* Roberts (Ark.), 165 S. W. 273; Strong *v.* Taylor (Ark.), 158 S. W. 123; Edwards *v.* Bond, 105 Ark. 314, 151 S. W. 243; Grummer *v.* Price, 101 Ark. 611, 143 S. W. 95; Hays *v.* Emerson, 75 Ark. 551, 87 S. W. 1027; Black E. O. Co. *v.* Belcher, 22 Cal. App. 258, 133 P. 1153; Mitchell *v.* Mason, 65 Fla. 208, 61 S. 579; Elliott *v.* Conner, 63 Fla. 408, 58 S. 241; Martinet *v.* Duff, 178 Ill. App. 199; Belinski *v.* Co., 124 Ill. App. 45; Grubb *v.* Brendel, 52 Ind App. 531, 100 N. E. 872; Fort *v.* Colby (Ia.), 144 N. W. 393; Miller *v.* Peter, 158 Mich. 336, 122 N. W. 780; Schmidt *v.* Barclay, 161 Mich. 1, 125 N. W. 729; Cady *v.* Burgess, 144 Mich. 523, 108 N. W. 414; Brightwell *v.* McAfee, 249 Mo. 562, 155 S. W. 820; Gibson *v.* Morris (Mont.), 140 P. 76; Beall *v.* Beall, 67 Or. 33, 128 P. 835, 135 P. 185; Bank *v.* Cassem (S. D.), 145 N. W. 551; Elliott *v.* Morris (Tex. Civ.), 121 S. W. 209; Lowry *v.* Carter, 46 Tex. Civ. 488, 102 S. W. 930; Irvin *v.* Johnson, 44 Tex. Civ. 436, 98 S. W. 405; Johnson *v.* Scrimshire, 42 Tex. Civ. 611, 93 S. W. 712; Goodbar *v.* Bloom, 43 Tex. Civ. 434, 96 S. W. 657; Motley's Admr. *v.* Carstairs, 114 Va. 429, 76 S. E. 948; Fridley *v.* Somerville, 60 W. Va. 272, 54 S. E. 502.

715-40 Campbell *v.* I. Co., 229 U. S. 561, 33 Sup. Ct. 796, 57 L. ed. 1330 (*rev.* 36 App. Cas. (D. C.) 149); Guarantee, etc. Co. *v.* Edwards, 164 Fed. 809, 90 C. C. A. 585; Tribble *v.* Singleton, 158 Ala. 308, 48 S. 481; Harper *v.* Co., 149 Ala. 174, 43 S. 360; Harrison *v.* Maury, 157 Ala. 227, 47 S. 724; Rodgers *v.* Burt, 157 Ala. 91, 47 S. 226; Thornton *v.* Pinckard, 157 Ala. 206, 147 S. 289; Ford *v.* Nunnelly (Ark), 165 S. W. 291; La Cotts *v.* La Cotts (Ark.).

159 S. W. 1111; Crismon *v.* P. Co., 106 Ark. 166, 152 S. W. 989; Gates *v.* McPeace, 106 Ark. 583, 153 S. W. 797; Grummer *v.* Price (Ark.), 143 S. W. 95; Rushton *v.* McIllvene, 88 Ark. 299, 114 S. W. 709; Griffin *v.* Welch, 88 Ark. 336, 114 S. W. 710; Kahn *v.* Metz, 88 Ark. 363, 114 S. W. 911; Reynolds *v.* Blanks, 78 Ark. 527, 94 S. W. 694; Bollinger *v.* Bollinger, 154 Cal. 695, 99 P. 196; Renton *v.* Gibson, 148 Cal. 650, 84 P. 186; Freeman *v.* Peterson, 45 Colo. 102, 100 P. 600; Rankin *v.* Rankin, 216 Ill. 132, 74 N. E. 763; Deadman *v.* Yantis, 230 Ill. 243, 82 N. E. 592; Babcock *v.* Babcock, 179 Ill. App. 188; Martinet *v.* Duff, 178 Ill. App. 199; Hill *v.* Viele, 128 Ill. App. 5; Gray *v.* Hayhurst, 157 Ill. App. 488; Jones *v.* Gillett, 142 Ia. 506, 118 N. W. 314; Ridings *v.* Bk., 147 Ia. 608, 125 N. W. 200; Betts *v.* Betts, 132 Ia. 72, 106 N. W. 928; Stokeley *v.* Flanders (Ky.), 128 S. W. 608; Funk *v.* Harshman, 110 Md. 127, 72 A. 655; Smith *v.* Smith, 177 Mich. 268, 143 N. W. 86; Dalton *v.* Mertz, 173 Mich. 153, 138 N. W. 1055; Rathbone *v.* Maltz, 155 Mich. 306, 118 N. W. 991 (clear); Stitt *v.* Co., 96 Minn. 27, 104 N. W. 561; Rinkel *v.* Lubke, 246 Mo. 377, 152 S. W. 81; Brightwell *v.* McAfee, 249 Mo. 562, 155 S. W. 820; Gibson *v.* Morris (Mont.), 140 P. 76; Wilson *v.* Terry, 70 N. J. Eq. 231, 62 A. 310; Miller *v.* Smith, 20 N. D. 96, 126 N. W. 499; Hall *v.* O'Connell, 52 Or. 164, 95 P. 717; Frazer *v.* Seureau (Tex. Civ.), 128 S. W. 649; Irvin *v.* Johnson, 44 Tex. Civ. 436, 98 S. W. 405; Hill *v.* Saunders, 115 Va. 60, 78 S. E. 559; Motley's Admr. *v.* Carstairs, 114 Va. 429, 76 S. E. 948; Batchelder *v.* Randolph, 112 Va. 296, 71 S. E. 533; Beverly *v.* Davis (Wash.), 140 P. 696; Hansen *v.* Abrams, 76 Wash. 457, 136 P. 678; Mittlesteadt *v.* Johnson, 75 Wash. 550, 135 P. 214; Hoover *v.* Bouffleur, 74 Wash. 382, 133 P. 602; Reynolds *v.* Reynolds, 42 Wash. 107, 84 P. 579; Way *v.* Mayhugh, 57 W. Va. 175, 50 S. E. 724.

See Wadleigh *v.* Phelps, 149 Cal. 627, 87 P. 93.

Unequivocal.—Smith *v.* Hoff, 23 N. D. 37, 135 N. W. 772.

Preponderance sufficient.—Schmidt *v.* Barclay, 161 Mich. 1, 125 N. W. 729.

718-41 Butsch *v.* Smith, 40 Colo. 64, 90 P. 61; Derry *v.* Fielder, 216 Mo. 176, 115 S. W. 412; Bascombe *v.* Marshall, 129 App. Div. 516, 113 N. Y. S. 991; Richardson *v.* Beaber, 115 N. Y. S. 821.

718-42 Griffin *v.* Welch, 88 Ark. 336, 114 S. W. 710. See Hudkins *v.* Crim (W. Va.), 78 S. E. 1043.

Question of fact for the trial judge.—Cochrane *v.* Wilson (Tex.), 160 S. W. 593.

721-52 Yates *v.* Caswell (Tex. Civ.), 126 S. W. 914, testimony of notary and inadequacy of consideration.

721-54 Richardson *v.* Beaber, 62 Misc. 542, 115 N. Y. S. 821.

722-62 Nelson *v.* Wadsworth (Ala.), 61 S. 895; Morton *v.* Allen (Ala.), 60 S. 866; Manser *v.* Sims, 157 Ala. 167, 47 S. 270; Strong *v.* Taylor (Ark.), 158 S. W. 123; Crisman *v.* P. Co., 106 Ark. 166, 152 S. W. 989; Kahn *v.* Metz, 88 Ark. 363, 114 S. W. 911; Griffin *v.* Welch, 88 Ark. 336, 114 S. W. 710; Lynch *v.* Lynch, 22 Cal. App. 653, 135 P. 1101; Todd *v.* Todd, 164 Cal. 255, 128 P. 413; Davis *v.* Pursel, 55 Colo. 287, 134 P. 107; Miller *v.* Armstrong, 169 Ill. App. 185; Ward *v.* Tuttle (Ind. App.), 102 N. E. 405, *aff.* 100 N. E. 761; Fort *v.* Colby (Ia.), 144 N. W. 393; Farmers' & M. Bk. *v.* Kackley, 88 Kan. 70, 127 P. 539; Smith *v.* Berry, 155 Ky. 686, 160 S. W. 247; Holien *v.* Slee, 120 Minn. 261, 139 N. W. 493; Baumgartner *v.* Corliss, 115 Minn. 11, 131 N. W. 638; Teal *v.* Bank, 114 Minn. 435, 131 N. W. 486; Bryant *v.* Lazarus, 235 Mo. 606, 139 S. W. 558; Brightwell *v.* McAfee, 249 Mo. 562, 155 S. W. 820; Beall *v.* Beall, 67 Or. 33, 128 P. 835, 135 P. 185; Kidd *v.* Sparks (Tex. Civ.), 167 S. W. 799; Mitchell *v.* Morgan (Tex. Civ.), 165 S. W. 883; Batchelder *v.* Randolph, 112 Va. 296, 71 S. E. 533; Beverly *v.* Davis (Wash.), 140 P. 696; Hoover *v.* Bouffleur, 74 Wash. 382, 133 P. 602; Scandinavian, etc. Bk. *v.* Downs, 72 Wash. 79, 129 P. 894; Polly *v.* Gumney (Wis.), 147 N. W. 356.

See Cuthbertson *v.* Bank (Ia.), 138 N. W. 1090.

723-63 Thornton *v.* Pinckard, 157 Ala. 206, 47 S. 289; Rushton *v.* McIllvene, 88 Ark. 299, 114 S. W. 709; Ford *v.* Nunnelly (Ark.), 165 S. W. 291; McIver *v.* Roberts (Ark.), 165 S. W. 273; La Cotts *v.* La Cotts (Ark.), 159 S. W. 1111; Gates *v.* McPeace, 106 Ark. 583, 153 S. W. 797; Cold *v.* Beh, 152 Ia. 368, 132 N. W. 73; Smith *v.* Smith, 177 Mich. 268, 143 N. W. 86; Hungerford *v.* Snow, 129 App. Div. 816, 114 N. Y. S. 127; Banks *v.* Frith, 97 S. C. 362,

81 S. E. 677; Niles *v.* Lee, 31 S. D. 234, 140 N. W. 259; Motley's Admrs. *v.* Carstairs, 114 Va. 429, 76 S. E. 948.

724 Mortgage and bond presumed to have been issued on date of recordation. Kelly *v.* Val. Co. (W. Va.), 81 S. E. 712.

724-65 See Reynolds *v.* Reynolds, 42 Wash. 107, 84 P. 579.

724-66 Currier *v.* Clark, 145 Ia. 613, 124 N. W. 622.

Burden of proof of forgery is on defendant. Succession of Randazzo *v.* Ferrantelli, 130 La. 552, 58 S. 335, *construing* Code Prac., art. 741.

Verified answer denying authority of corporation officers to execute and sell bonds in question does not place on plaintiff burden of proving execution and delivery otherwise than by producing them. McCormick *v.* Co., 239 Ill. 306, 87 N. E. 924.

724-69 Acknowledgment of recorded mortgage, presumed. In re Pirie, 133 App. Div. 431, 117 N. Y. S. 753; Preston *v.* Albee, 120 App. Div. 89, 105 N. Y. S. 33.

725-71 Proof of execution of mortgage which describes a note sufficiently shows execution of note. Currier *v.* Clark, 145 Ia. 613, 124 N. W. 622.

726-76 See Currier *v.* Clark, supra.

726-77 Ross *v.* Harney, 139 Ill. App. 513, execution shown by any witness who saw grantor sign, or by latter's admission.

726-79 Authority of president of corporation to execute mortgage, not presumed; existence of resolution authorizing its execution not shown by ex parte affidavit. Bk. *v.* Wingate, 123 La. 386, 48 S. 1005.

726-84 Hendricks *v.* Brooks, 80 Kan. 1, 101 P. 622.

726-86 Authority to deliver mortgage may be shown by circumstantial evidence, and cannot be denied after delivery if mortgagee ignorant of infirmity in such person's authority. Ross *v.* Harney, 139 Ill. App. 513.

Authority of foreign corporation to foreclose mortgage.—See Marx *v.* District Grand Lodge, 157 Ala. 107, 47 S. 207.

727-88 Corporation mortgage, duly sealed, is prima facie evidence it was done by proper officer and execution legal. Edwards *v.* Co., 150 N. C. 173, 63 S. E. 740.

727-89 Ross *v.* Harney, 139 Ill. App. 513.

728-93 Preston *v.* Albee, 120 App. Div. 89, 105 N. Y. S. 33. But see Stoddard *v.* Lyon, 18 S. D. 207, 99 N. W. 1116, when execution of note denied possession by mortgagee is not sufficient proof.

729-1 But see Preston *v.* Albee, 120 App. Div. 89, 105 N. Y. S. 33.

730-10 Recitals in mortgage bind parties. Sanchez *v.* Veve, 4 P. R. Fed. 329.

732-17 Waymire *v.* Shipley, 52 Or. 464, 97 P. 807. See Canadian Bk. *v.* Wilson (Can.), 11 West. L. Rep. 539.

732-19 Fairchild *v.* Realty Co., 82 N. J. L. 423, 82 A. 924.

Defendant must show plaintiff's bad faith in purchase of bonds collateral to mortgage. McCormick *v.* Co., 239 Ill. 306, 87 N. E. 924.

732-20 He who claims fruit of an election to treat mortgage as void must show conduct inconsistent with right claimed under it. First Nat. Bk. *v.* Bk., 171 Ind. 323, 86 N. E. 417.

732-21 First Nat. Bk. *v.* Davis, 146 Ill. App. 462.

732-22 First Nat. Bk. *v* Keller, 127 App. Div. 435, 111 N. Y. S. 729; Hall *v.* Thomas, 111 N. Y. S. 979.

733-24 In re Farmers' S. Co., 170 Fed. 502; Campbell *v.* Davis, 94 Miss. 164, 47 S. 546; First Nat. Bk. *v.* Keller, 127 App. Div. 435, 111 N. Y. S. 729.

In foreclosure proceedings parol evidence is proper to show mortgagee agreed as part consideration to pay a prior mortgage. Barton *v.* Assn., 29 Ky. L. R. 336, 93 S. W. 9.

734-27 Clowers *v.* Snowden, 21 Okla. 476, 96 P. 596.

734-29 Brouillard *v.* Stimpson, 201 Mass. 236, 87 N. E. 493.

After mortgage extinguished parol evidence is inadmissible to show it was security for a new and independent debt. Hayhurst *v.* Morin, 104 Me. 169, 71 A. 707.

734-30 Failure of mortgagor's grantee to deny he assumed payment of mortgage as a consideration for his deed, an admission, notwithstanding stipulation deed was silent concerning it; it was inferred fact shown by some other writing. Kenney *v.* Streeter, 88 Ark. 406, 114 S. W. 923.

734-31 See Hall *v.* Thomas, 111 N. Y. S. 979.

735-32 Denial of genuineness of note, not overcome by recital in mortgage of execution of note of like date

and tenor. In re Pirie, 133 App. Div. 431, 117 N. Y. S. 753.

735-33 Sanchez *v.* Veve, 4 P. R. Fed. 329; Anderson *v.* Co. (Tex. Civ.), 120 S. W. 918; Openshaw *v.* Rickmeyer, 45 Tex. Civ. 508, 102 S. W. 467.

735-34 Briggs *v.* Steele, 91 Ark. 458, 121 S. W. 754. See Shreve *v.* Harvey, 74 N. J. Eq. 336, 70 A. 671.

736-35 Dose *v.* Bank, 58 Or. 529, 115 P. 286.

736-40 First Nat. Bk. *v.* Davis, 146 Ill. App. 462. See Huntington *v.* Kneeland, 187 N. Y. 563, 80 N. E. 1111.

739-45 There being no averment of fraud, accident or mistake. Kight *v.* Robinson, 10 Ga. App. 548, 73 S. E. 863.

739-51 Burden is on party who asserts mortgage payable to person designated as "trustee." made for his benefit. Andrews *v.* Kennon, 145 Ia. 474, 122 N. W. 840.

739-52 McCabe *v.* Reed, 88 Neb. 457, 129 N. W. 1019.

740-54 Subsequent assignee must show assignment was in good faith and for value. Froelich *v.* Swafford (S. D.), 144 N. W. 925.

740-57 Harris *v.* Barrett, 75 N. J. Eq. 386, 72 A. 956.

740-58 Subscribing witness need not be called if transfer of mortgage but collaterally involved. Prescott *v.* Fletcher, 133 Ga. 404, 65 S. E. 877.

747-87 Ferguson *v.* Boyd, 169 Ind. 537, 81 N. E. 71.

748-91 Agreement as to interest proved by parol if it explains mortgage. Eareckson *v.* Rogers, 112 Md. 160, 75 A. 513.

749-98 Relinquishment of mortgagor's interest in favor of mortgagee presumed only when latter in possession. Sowles *v.* Minot, 82 Vt. 344, 73 A. 1025.

Mortgagee must show enlargement of rights he claims. Sowles *v.* Minot, supra.

755-17 Welsh *v.* Briggs, 204 Mass. 540, 90 N. E. 1146; Mutual, etc. Ins. Co. *v.* Hotel Co., 82 Misc. 632, 144 N. Y. S. 476; Fulshear *v.* Deadman (Tex. Civ.), 154 S. W. 616.

756-18 Brownell *v.* Oviatt, 215 Pa. 514, 64 A. 670; O'Hara *v.* Corr, 210 Pa. 341, 59 A. 1099.

Conclusive by statute.—Mutual, etc. Co. *v.* Hotel Co., 82 Misc. 632, 144 N. Y. S 476.

757-20 Lapse of fifteen years without payment or other recognition and without enforcement of security, defeats mortgagee's rights. Sowles *v.* Minot, 82 Vt. 344, 73 A. 1025.

757-23 Sowles *v.* Minot, supra, no presumption payment made at maturity of note.

758-29 Chancellor *v.* Seiberlich, 75 N. J. Eq. 501, 72 A. 948.

759-33 Relationship of parties may overcome presumption. See Chancellor *v.* Seiberlich, supra; Ayres *v.* Ayres, 69 N. J. Eq. 343, 60 A. 422, 69 N. J. Eq. 842, 66 A. 1133.

760-34 See Chancellor *v.* Seiberlich, 75 N. J. Eq. 501, 72 A. 948.

761-40 Bower *v.* Bower, 78 N. J. L. 387, 74 A. 522.

762-42 Ward *v.* Ward, 144 Fed. 308; Bower *v.* Bower, 78 N. J. L. 387, 74 A. 522 (gives rise to inference only).

763-44 Morrison *v.* Roehl, 215 Mo. 545, 114 S. W. 981; Gowdy *v.* Gowdy, 83 S. C. 349, 65 S. E. 385.

763-51 Execution of obligation by creditor to debtor, after maturity of previous debt, raises presumption latter was satisfied. But rule does not apply if it appears mortgage sale made at request of mortgagor and he thereafter acknowledged mortgagee's title. Gowdy *v.* Gowdy, 83 S. C. 349, 65 S. E. 385.

764-52 Fitzgerald *v.* Flanagan, 155 Ia. 217, 135 N. W. 738; Gowdy *v.* Gowdy, 83 S. C. 349, 65 S. E. 385; Mead *v.* Mead, 28 S. D. 131, 132 N. W. 701. See Bruce *v.* Wanzer, 18 S. D. 155, 99 N. W. 1102.

Evidence sufficient.—Harris *v.* Hanson, 119 Minn. 20, 137 N. W. 166.

765-55 Davis *v.* Anderson, 163 Ala. 385, 50 S. 1002; Burton *v.* Phillips, 161 Ala. 664, 49 S. 848 (circumstantial evidence).

Presumption of payment arising from lapse of time confirmed by testimony of guardian of mortgagee and of his administrator concerning their ignorance of existence of mortgage. Welsh *v.* Briggs, 204 Mass. 540, 90 N. E. 1146.

765-57 Greist *v.* Gowdy, 81 Conn. 351, 71 A. 555.

765-58 Declarations by decedent, one of the debtors, competent to prove non-payment. Burton *v.* Phillips, 161 Ala. 664, 49 S. 848.

766-62 U. S. *v.* Callotes, 2 Phil. Isl. 16.

766-67 Montague *v.* Priester, 82 S. C. 492, 64 S. E. 393.

767-68 Receipt written by mortgagor and signed by mortgagee taken most strongly against former in ascertaining whether money to be applied on principal or interest. Benson *v.* Reinshagen, 75 N. J. Eq. 358, 72 A. 954.

767-69 Payment of sum bid at sale, presumed from recital in deed. Gowdy *v.* Gowdy, 83 S. C. 349, 65 S. E. 385.

767-71 See vol. 11, p. 161, n. 8, and supplement thereto.

767-72 See vol. 11, p. 160, n. 1, and supplement thereto.

767-73 **Entry of release** on record by mortgagee, mortgagee presumed to act with authority. Newman *v.* Assn., 14 Ariz. 354, 128 P. 53.

768-75 Smith *v.* Fuller, 152 N. C. 7, 67 S. E. 48.

768-76 See Eakle *v.* Hagan, 101 Md. 22, 60 A. 615.

769-77 Latton *v.* McCarty, 142 Wis. 190, 125 N. W. 430.

770-83 Presumed mortgagee's intention is to keep mortgage alive if it is for his interest to do so. Felgner *v.* Slingluff, 109 Md. 474, 71 A. 978.

771-85 Hill-I. L. Co. *v.* Neal, 89 Ark. 385, 117 S. W. 247.

772-88 Thomas *v.* Livingston, 155 Ala. 546, 46 S. 851.

772-89 Parol evidence competent to show service of demand for satisfaction. Burton *v.* Phillips, 161 Ala. 664, 49 S. 848.

773-93 See Dawson *v.* Orange, 78 Conn. 96, 61 A. 101.

Only one witness required to show entry. Largey *v.* Taylor, 75 N. H. 211, 72 A. 375.

Conclusive evidence of mortgagor's entry and possession, not afforded by proof of presence of his personal chattels on premises and existence of locks which remained unforced by mortgagee at time of his entry and for a few days thereafter. Largey *v.* Taylor, 75 N. H. 211, 72 A. 375.

774-98 Recitals in affidavit of sale as to default existing, evidentiary only and do not work estoppel. Brouillard *v.* Stimpson, 201 Mass. 236, 87 N. E. 493.

776-13 Harton *v.* Little, 176 Ala. 267, 57 S. 851.

777-15 But see Windes *v.* Russell, 150 Ala. 625, 43 S. 788.

777-16 See Higbee *v.* Dacley, 15 N. D. 339, 109 N. W. 318.

778-17 McCarty *v.* Hamburger, 112 Md. 40, 75 A. 964.

780-21 Clark *v.* Johnson, 155 Ala. 648, 47 S. 82, of fact of foreclosure and its validity.

780-22 Bryan *v.* Straus, 157 Mich. 49, 121 N. W. 301.

782-31 See Smith *v.* Kirkland, 89 Miss. 647, 42 S. 285.

782-36 Jobert *v.* Wagner, 147 Mich. 409, 110 N. W. 942. See Hewitt *v.* Price, 204 Mo. 31, 102 S. W. 647.

783-37 Seed *v.* Brown (Ala.), 60 S. 98; Talbert *v.* Talbert, 97 S. C. 136, 81 S. E. 64. See Franklin *v.* Jamieson, 15 N. D. 613, 109 N. W. 56.

Burden of proof is on defendant to prove an agreement to extend time of note. Lovelace *v.* Dwyer, 65 Or. 113, 131 P. 1028.

Evidence held insufficient.—Lauterjung *v.* Trustee Co., 156 Ill. App. 621.

783-38 Beebe *v.* Bahr, 84 Neb. 191, 120 N. W. 1021.

783-39 See West., etc. Co. *v.* Halliwell (N. J.), 90 A. 276.

786-50 Plaintiff must show he did not know of deed executed before his mortgage, but recorded thereafter. Bell *v.* Pleasant, 145 Cal. 410, 78 P. 957, 104 Am. St. 601; Hibernia S. & L. Soc. *v.* Farnham, 153 Cal. 578, 96 P. 9.

788-58 See Ronginsky *v.* Freudenthal, 134 App. Div. 422, 119 N. Y. S. 409.

788-59 Hungerford *v.* Snow, 129 App. Div. 816, 114 N. Y. S. 127; McCormick *v.* Levy, 37 Utah 134, 106 P. 660.

789-63 Admissions in answer may dispense with production of mortgage and evidence plaintiff possessed it. Continuance of admitted condition, presumed. Pettus *v.* Gault, 81 Conn. 415, 71 A. 509.

792-77 International Kaolin Co. *v.* Vause, 62 Fla. 505, 57 S. 360.

794-83 Campbell *v.* Hughes, 155 Ala. 591, 47 S. 45, as against one claiming to be surety, fact not being shown by note.

796-93 Sum for which property sold, prima facie shown by report of commissioner. Hibernian S. & L. Soc. *v.* Boyd, 155 Cal. 193, 100 P. 239.

796-96 Existence of right must be established by clear and satisfactory evidence where it rests upon claim deed intended to be mortgage. Elliott *v.* Bozorth, 52 Or. 391, 97 P. 632.

Mortgagee asserting right to redeem by virtue of contract must make it clearly appear contract was fair. Gas-

sert *v.* Strong, 38 Mont. 18, 98 P. 497.

796-97 Coates *v.* Marsden, 142 Wis. 106, 124 N. W. 1057.

796-99 Clear and convincing evidence required to show redemption foregone because of inequitable conduct of mortgagee. Kenmore, etc. Co. *v.* Riley, 20 N. D. 182, 126 N. W. 241.

Mortgagee who relies upon transfer of land as barring right of redemption by payment must clearly show conveyance was voluntary, the consideration adequate and untainted by fraud, and mortgagor not driven into hard bargain. Young *v.* Miner, 141 Wis. 501, 124 N. W. 660.

797-1 Ogden *v.* Stevens, 241 Ill. 556, 89 N. E. 741.

797-3 Existence of unrecorded sheriff's deed, evidence of sale of land and right of grantee to redeem. Kent B. & L. Assn. *v.* Middleton, 112 Md. 10, 75 A. 967

797-4 Lynch *v.* Ryan, 132 Wis. 271, 111 N. W. 707, 137 Wis. 13, 118 N. W. 174, basis on which mortgagee should be reimbursed is reasonable cost of improvements, which is prima facie shown by proof they are such as judicious owner would make on his property.

797-5 Burden on transferee of equity of redemption for inadequate consideration and on understanding it was being taken for mortgagor's benefit, to show facts relied upon in an accounting to absolve him from liability. Johnston *v.* McKenna, 76 N. J. Eq. 217, 74 A. 284.

797-6 West *v.* McDonald (Ky.), 113 S. W. 872; Davis *v.* Blackiston, 108 Md. 640, 71 A. 89; Bartlett Est. Co. *v.* Co., 56 Wash. 437, 105 P. 848.

798-11 Appraisement presumed regularly made. Arnold *v.* Watson, 91 Ark. 328, 121 S. W. 354.

MUNICIPAL CORPORATIONS

Irregularities in adoption of ordinance, 838-98; *Extension of boundaries,* 838-1; *Damages from change of grade—value of other abutting property,* 840-5; *Presumption as to settlement for grade changes,* 844-19; *Damages from change of grade—burden of showing failure to comply with law,* 844-19; *Res gestae in action to recover for mob violence,* 844-19.

802-2 Presumption of incorporation, conclusive on collateral attack. Ex parte Koen, 58 Tex. Cr. 279, 125 S. W. 401.

802-3 McCormick *v.* Jester, 53 Tex. Civ. 306, 115 S. W. 278.

Charter or certificate of incorporation best evidence. Dick *v.* S., 107 Md. 11, 68 A. 286, 576.

803-4 Salem *v.* Young, 142 Mo. App. 160, 125 S. W. 857; Board *v.* Berry, 62 W. Va. 433, 59 S. E. 169.

804-5 Rule applies where territory annexed. Ogle *v.* Belleville, 238 Ill. 389, 87 N. E. 353.

Annexation proceedings cannot be collaterally attacked. Ogle *v.* Belleville, 143 Ill. App. 514; Gardner *v.* Benn, 81 Kan. 442, 105 P. 435; Meffert *v.* Brown, 132 Ky. 201, 116 S. W. 779.

Passing of county judge on petition and ordering election, not conclusive of extent of municipal boundaries. Spurlin *v.* S., 51 Tex. Civ. 266, 115 S. W. 128.

804-7 Lavelle *v.* Town, 49 Colo. 290, 112 P. 774.

804-8 Pickett *v.* Bd. of Comrs., 24 Ida. 200, 133 P. 112. But see Dick *v.* S., 107 Md. 11, 68 A. 286, 576; though charter best evidence general reputation admissible.

806-12 Presumed contract of city for its benefit not for advantage of inhabitants individually. Anerum *v.* Co., 82 S. C. 284, 64 S. E. 151.

806-13 Right to be supplied with water must be established by showing compliance with regulations. Sturgeon *v.* Paris (Tex. Civ.), 122 S. W. 967.

806-14 Manson *v.* College Park, 131 Ga. 429, 62 S. E. 278; Cicero *v.* Grisko, 144 Ill. App. 564; Holly *v.* New York, 128 App. Div. 499, 112 N. Y. S. 797; Pitkin's Admr. *v.* City, 85 Vt. 467, 82 A. 671; Bekkedahl *v.* Westby, 140 Wis. 230, 122 N. W. 727.

Record showing in detail what was done controls officers' report stating conclusions. Northrop *v.* Waterbury, 81 Conn. 305, 70 A. 1024.

807-15 See White *v.* Mitchell, 11 Cal. App. 202, 104 P. 333.

807-16 Quackenbush *v.* City, 186 Fed. 991, 108 C. C. A. 661; Van Arsdale *v.* Dist., 23 Okla. 894, 101 P. 1121.

808-18 City of St. Louis *v.* Ameln, 235 Mo. 669, 139 S. W. 429; City of St. Louis *v.* Ringold, 235 Mo. 472, 139 S. W. 186; City of St. Louis *v.* Johnson, 235 Mo. 478, 139 S. W. 188; City of St. Louis *v.* Young, 235 Mo. 44, 138 S. W. 5, 235 Mo. 63, 138 S. W. 11; Canton *v.*

Madden, 120 Mo. App. 404, 96 S. W. 699; Sachs *v.* Lyons, 53 Misc. 640, 103 N. Y. S. 149; International, etc. R. Co. *v.* Hall, 35 Tex. Civ. 545, 81 S. W. 82. *Contra* as to municipal courts. Byer *v.* Harris, 77 N. J. L. 304, 72 A. 136.

808-19 City of El Dorado *v.* Faulkner, 107 Ark. 455, 155 S. W. 516; Canton *v.* Madden, 120 Mo. App. 404, 96 S. W. 699; Schnaier *v.* Grigsby, 132 App. Div. 854, 117 N. Y. S. 455; Tucker *v.* O'Brien, 117 N. Y. S. 1010.

Introduction of ordinance book and reading of ordinances therefrom without objection was prima facie proof that such ordinances were in force. Plummer *v.* R. Co. (Ind. App.), 104 N. E. 601.

Ordinance of excise board not noticed by municipal court. Byer *v.* Harris, 77 N. J. L. 304, 72 A. 136.

808-20 Briggs *v.* P. Co. (Ala.), 66 S. 95; City of Malvern *v.* Cooper, 108 Ark. 24, 156 S. W. 845; Dreyfus *v.* Boone, 88 Ark. 353, 114 S. W. 718; Ex parte San Chung, 11 Cal. App. 511, 105 P. 609; Hardee *v.* Brown, 56 Fla. 377, 47 S. 834; Haugan *v.* City, 259 Ill. 249, 102 N. E. 185; Chicago *v.* Co., 258 Ill. 409, 101 N. E. 588; P. *v.* R. Co., 232 Ill. 292, 83 N. E. 839; Gage *v.* Wilmette, 230 Ill. 428, 82 N. E. 656; Pittsburgh, etc. R. Co. *v.* Hartford, 170 Ind. 674, 85 N. E. 362 (only such extraneous matters as judicially noticed regarded); Schmidt *v.* Indianapolis, 168 Ind. 631, 80 N. E. 632; S. *v.* City of Atchison (Kan.), 140 P. 873; Cumberland, etc. Co. *v.* Calhoun, 151 Ky. 241, 151 S. W. 659; Bldg., etc. of Detroit *v.* Kunin (Mich.), 148 N. W. 207; Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675; City of St. Louis *v.* Kellman, 235 Mo. 687, 139 S. W. 443; Fifth Ave. C. Co. *v.* New York, 194 N. Y. 19, 86 N. E. 824; City of Brenham *v.* Holle & Seelhorst (Tex. Civ.), 153 S. W. 345; American Fork City *v.* Charlier (Utah), 134 P. 739; Cream City B. P. Co. *v.* Milwaukee (Wis.), 147 N. W. 25.

See City of Benton *v.* Blake, 263 Ill. 358, 104 N. E. 1040; Miners' Bk. *v.* Clark, 252 Mo. 20, 158 S. W. 597.

No presumption of validity where ordinance could be enacted only by city of prescribed class and only evidence is court's knowledge not of that class. Jones *v.* Hines, 157 Ala. 624, 47 S. 739.

809-21 Briggs *v.* P. Co. (Ala.), 66 S. 95; Williams *v.* Talladega, 164 Ala. 633, 51 S. 330; Helena *v.* Miller, 88 Ark. 263, 114 S. W. 237; P. *v.* R. Co., 232 Ill. 292, 83 N. E. 839; Gage *v.* Wilmette, 230 Ill. 428, 82 N. E. 656; City of Springfield *v.* Tel. Co., 164 Ill. App. 276; Conrad *v.* R. Co., 145 Ill. App. 564; Ringelstein *v.* Chicago, 128 Ill. App. 483; Grand Trunk W. R. Co. *v.* South Bend, 174 Ind. 203, 91 N. E. 809; Cumberland T. & T. Co. *v.* City of Calhoun, 151 Ky. 241, 151 S. W. 659; Etchison *v.* Frederick City (Md.), 91 A. 161; Shaw *v.* Stoeltzing (Mo. App.), 167 S. W. 1158; Hislop *v.* Joplin, 250 Mo. 588, 157 S. W. 625; S. *v.* Clifford, 228 Mo. 194, 128 S. W. 755; McCook W. Co. *v.* McCook, 85 Neb. 677, 124 N. W. 100 (water rates); North Jersey R. Co. *v.* City, 75 N. J. L. 349, 67 A. 1072; City of Buffalo *v.* Goodman, 77 Misc. 355, 136 N. Y. S. 568.

See City of Brenham *v.* Holle & Seelhorst (Tex. Civ.), 153 S. W. 345.

809-22 Knoxvill *v.* Co., 212 U. S. 1; Grumbach *v.* Lelande, 154 Cal. 679, 98 P. 1059; Ex parte Junqua, 10 Cal. App. 602, 103 P. 159; Ex parte Thomas, 10 Cal. App. 375, 102 P. 19; Ex parte McCoy, 10 Cal. App. 116, 101 P. 419; Atlantic P. Tel. Co. *v.* City, 136 Ga. 657, 71 S. E. 1115; City of Chicago *v.* Walden, etc. Co., 258 Ill. 409, 101 N. E. 588; Village of Riverton *v.* Horn, 176 Ill. App. 433; City of Springfield *v.* Tel. Co., 164 Ill. App. 276; Chicago *v.* Marsh, 238 Ill. 254, 87 N. E. 319; Chicago *v.* R. Co., 146 Ill. App. 403; Marengo *v.* Eichler, 245 Ill. 47, 91 N. E. 758; Ringelstein *v.* Chicago, 128 Ill. App. 483; Gage *v.* Wilmette, 230 Ill. 428, 82 N. E. 656; Cedar Rapids G. Co. *v.* Cedar Rapids, 144 Ia. 426, 120 N. W. 966; Cumberland, etc. Co. *v.* Calhoun, 151 Ky. 241, 151 S. W. 659; Shaw *v.* Stoeltzing (Mo. App.), 167 S. W. 1158; Hislop *v.* Joslin, 250 Mo. 588, 157 S. W. 625; Salem *v.* Young, 142 Mo. App. 160, 125 S. W. 857; North Jersey R. Co. *v.* City, 75 N. J. L. 349, 67 A. 1072; Neumann *v.* Mayor, etc., 82 N. J. L. 275, 82 A. 511; City of Buffalo *v.* Goodman, 77 Misc. 355, 136 N. Y. S. 568; Borough *v.* Co., 239 Pa. 210, 86 A. 717; **Unreasonable.**—Stamps *v.* Burk, 83 Ark. 351, 104 S. W. 153.

810-24 Hardee *v.* Brown, 56 Fla. 377, 47 S. 834; Corp. of Hammond *v.* Baddeau, 134 La. 871, 64 S. 803.

810-25 Monett Elec., etc. Co. *v.* City, 186 Fed. 360; P. *v.* R. Co., 232 Ill. 292, 83 N. E. 839; Fellows *v.* Dorsey, 171 Mo. App. 289, 157 S. W. 995;

Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675; Dillon *v.* Beacom (Or.), 134 P. 778. See Granite, etc. Co. *v.* Imp. Co., 168 Mo. App. 498, 151 S. W. 487.

Record book is prima facie evidence that ordinance was duly enacted and published. City of Moberly *v.* Deskin (Mo.), 155 S. W. 842.

812-29 Rome *v.* Co., 113 App. Div. 547, 100 N. Y. S. 357.

813-31 Bryant *v.* Pittsfield, 199 Mass. 530, 85 N. E. 739 (*appr.* McCormick *v.* Bay City, 23 Mich. 457, stated on corresponding page and note in original work); Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675; Harrold *v.* City of Huntington (W. Va.), 82 S. E. 476.

814-35 See City of Corinth *v.* Sharp (Miss.), 65 S. 888.

815-37 Published ordinances, presumed duly executed. Hancock *v.* McCarthy, 145 Ia. 51, 123 N. W. 766.

815-39 Book of ordinances presumptive evidence of the validity of ordinance in question, so far as publication concerned. Pittsburgh, etc. R. Co. *v.* Rogers, 45 Ind. App. 230, 87 N. E. 28.

817-42 Burden on party relying on ordinance to be effective on condition to show performance. Sutor *v.* R. Co. (Tex. Civ.), 125 S. W. 943.

817-43 Winn *v.* R. Co., 239 Ill. 132, 87 N. E. 954; Grafton *v.* R. Co., 16 N. D. 313, 113 N. W. 598. See Borough *v.* Co., 239 Pa. 210, 86 A. 717.

The passage of an ordinance may be proved by common law methods. In re Alexander (Neb.), 144 N. W. 907.

818-45 City of Malvern *v.* Cooper, 108 Ark. 24, 156 S. W. 845; Stone *v.* Tallulah Falls, 131 Ga. 452, 62 S. E. 592 (if book produced pursuant to notice and offered party against whom introduced may offer it to prove any other relevant ordinance); Plante *v.* Ill. Cent. R. Co., 148 Ill. App. 609; Plummer *v.* R. Co. (Ind. App.), 104 N. E. 601; Van Valkenberg *v.* Rutherford, 92 Neb. 803, 139 N. W. 652; Grafton *v.* R. Co., 16 N. D. 313, 113 N. W. 598; St. Louis S. R. Co. *v.* Garber, 51 Tex. Civ. 70, 111 S. W. 227 (though enacted clause omitted, if not shown omitted from original); Looney *v.* C., 115 Va. 921, 78 S. E. 625. *Contra* if book does not purport to be published by authority. Winn *v.* R. Co., 239 Ill. 132, 87 N. E. 954.

Proof of publication essential.—Atchison, etc. R. Co. *v.* Baker, 79 Kan. 183, 98 P. 804.

818-46 Van Valkenberg *v.* Rutherford, 92 Neb. 803, 139 N. W. 652.

819-47 Alderman *v.* New Haven, 81 Conn. 137, 70 A. 626; Cleburne *v.* Co. (Tex. Civ.), 127 S. W. 1072.

820-48 Competent between individuals. Norris *v.* McFadden, 159 Mich. 424, 124 N. W. 54.

821-51 Account containing an acknowledgment of indebtedness by chairman of finance committee competent as original proof or in corroboration of other testimony showing indebtedness. Walker *v.* Rome, 6 Ga. App. 59, 64 S. E. 310.

821-53 Donovan *v.* Donovan, 236 Ill. 636, 86 N. E. 575.

823-59 City of Decatur *v.* Barteau, 260 Ill. 612, 103 N. E. 601.

823-60 Illinois, etc. R. Co. *v.* Kief, 111 Ill. App. 354; Town of Slidell *v.* Levy, 128 La. 809, 55 S. 413.

824-65 Southern R. Co. *v.* Weatherlow, 153 Ala. 171, 44 S. 1019; Chicago, etc. R. Co. *v.* Wilson, 225 Ill. 50, 80 N. E. 56, 128 Ill. App. 88; Earlville *v.* Radley, 141 Ill. App. 359; Ft. Worth, etc. R. Co. *v.* Hawes, 48 Tex. Civ. 487, 107 S. W. 556; Spokane *v.* Griffith, 49 Wash. 293, 95 P. 84. But see International, etc. R. Co. *v.* Hall, 35 Tex. Civ. 545, 81 S. W. 82 (such book inadmissible unless proved authorized).

824-66 Southern R. Co. *v.* Weatherlow, 153 Ala. 171, 44 S. 1019; Heno *v.* Fayetteville, 90 Ark. 292, 119 S. W. 287; Illinois, etc. R. Co. *v.* Warriner, 132 Ill. App. 301, 229 Ill. 91, 82 N. E. 246; Winn *v.* R. Co., 143 Ill. App. 71 (to overcome case made by pamphlet must be shown that ordinance not adopted when pamphlet printed); St. Louis, etc. Co. *v.* Garber (Tex. Civ.), 108 S. W. 742. See Brighton *v.* Miles, 151 Ala. 479, 44 S. 394; Illinois, etc. R. Co. *v.* Minnihan, 129 Ill. App. 432 (pamphlet must purport to have been published by authority).

825-67 See, under Texas statute, Texarkana, etc. R. Co. *v.* Frugia, 43 Tex. Civ. 48, 95 S. W. 563; City *v.* Stewart, 40 Tex. Civ. 499, 90 S. W. 49.

826-71 City of Decatur *v.* Barteau, 260 Ill. 612, 103 N. E. 601.

827-72 City of Malvern *v.* Cooper, 108 Ark. 24, 156 S. W. 845.

828-74 Payson *v.* Milan, 144 Ill. App. 204. See Mendel *v.* Dist., 121 Wis. 80, 98 N. W. 932.

829-75 Birmingham *v.* Chestnutt, 161 Ala. 253, 49 S. 813 (letter of clerk no evidence of action on claim); Viernow *v.* Carthage, 139 Mo. App. 276, 123 S. W. 67; Cleburne *v.* Co. (Tex. Civ.), 127 S. W. 1072. See Mendel *v.* Dist., 121 Wis. 80, 98 N. W. 932. *Comp.* Mitchiner *v.* Co., 70 S. C. 522, 50 S. E. 190, where existence of quarantine in question, it may be shown without introducing authorizing ordinance.

830-78 Bell *v.* Town, 3 Ala. App. 652, 57 S. 138.

831-81 Pelham *v.* Co., 131 Ga. 325, 62 S. E. 186; Kidson *v.* Bangor, 99 Me. 139, 58 A. 900; C. *v.* King, 17 Pa. Dist. 785 (quorum present at certain time, presumed to continue); Parrent *v.* Co. (R. I.), 72 A. 865.

832-82 Swan *v.* Indianola, 142 Ia. 731, 121 N. W. 547.

Informal conversation of council members proved to show claim presented; but otherwise as to attitude of members concerning allowance. Haney *v.* Pinckney, 155 Mich. 656, 119 N. W. 1099.

833-85 Riverside Tp. *v.* Stewart, 211 Fed. 873 (C. C. A.).

833-86 Riverside Tp. *v.* Stewart, 211 Fed. 873 (C. C. A.); Walker *v.* Rome, 6 Ga. App. 59, 64 S. E. 310.

835-93 Cook *v.* Manasquan, 80 N. J. L. 206, 76 A. 310, eminent domain proceeding.

837-97 Ex parte Young, 154 Cal. 317, 97 P. 822; Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675.

838-98 Where journal contains irregularities with respect to mode, manner and time of adoption of ordinances, parol evidence admissible to aid same. Chicago, etc. R. Co. *v.* Wilson, 128 Ill. App. 88, 225 Ill. 50, 80 N. E. 56.

838-99 Amboy *v.* R. Co., 236 Ill. 236, 86 N. E. 238; Pottsville *v.* Co., 39 Pa. Super. 1.

838-1 Ex parte Junqua, 10 Cal. App. 602, 103 P. 159; Radley *v.* Knepfly (Tex. Civ.), 124 S. W. 447.

Extension of boundaries.—Controverted allegation as to number of remonstrants against annexation must be established by party alleging sufficiency. In absence of such proof evidence as to consequence of non-annexation inadmissible. Remonstrance admissible only to show names of signers. Louisville *v.* Brown (Ky.), 119 S. W. 1196.

Scope of evidence to show unreasonableness of county license ordinance. See Ex parte McCoy, 10 Cal. App. 116, 101 P. 419.

839-4 McKee *v.* Peters, 142 Mo. App. 286, 126 S. W. 255.

Incomplete ordinance, in form of contract, inadmissible—as one providing for watchman duties to be prescribed thereby, but were not. Wills *v.* R. Co., 133 Mo. App. 625, 113 S. W. 713.

840-5 Eutaw *v.* Botnick, 150 Ala. 429, 43 S. 739, evidence of value immediately after. But see Richardson *v.* Sioux City, 136 Ia. 436, 113 N. W. 928.

Damages from change of grade, value of other abutting property before and since change shown. Americus *v.* Tower, 3 Ga. App. 159, 59 S. E. 434.

841-8 Mayor, etc. *v.* Phillips, 13 Ga. App. 321, 79 S. E. 36.

841-9 Richardson *v.* Sioux City, 136 Ia. 436, 113 N. W. 928; Landry *v.* Lake Charles, 125 La. 210, 51 S. 120 (except as to trees).

Cost of filling.—Mayor, etc. *v.* Daley, 2 Ga. App. 355, 58 S. E. 540.

Cost of wall.—Eutaw *v.* Botnick, 150 Ala. 429, 43 S. 439; Richardson *v.* Sioux City, 136 Ia. 436, 113 N. W. 928.

842-10 *Comp.* Landry *v.* Lake Charles, 125 La. 210, 51 S. 120.

843-13 See Eutaw *v.* Botnick, 150 Ala. 429, 43 S. 439.

843-14 Americus *v.* Tower, 3 Ga. App. 159, 59 S. E. 434.

844-15 Americus *v.* Tower, supra; Richardson *v.* Sioux City, 136 Ia. 436, 113 N. W. 928.

844-17 Spokane *v.* Thompson, 69 Wash. 650, 126 P. 47.

844-18 Spokane *v.* Thompson, supra.

844-19 Gross Coal Co. *v.* Milwaukee, 148 Wis. 72, 134 N. W. 139.

Where city negligently failed to provide a drainage system in raising its grade, any evidence tending to show that the adjacent property was damaged by the overflow of water dammed up by the raise in grade is relevant and material. Mayor, etc. *v.* Phillips, 13 Ga. App. 321, 79 S. E. 36.

Damages from change of grade.—Burden of showing failure to comply with law upon plaintiff. Bernstein *v.* Mt. Vernon, 109 App. Div. 899, 96 N. Y. S. 458.

Res Gestate in action to recover for

mob violence.—Dispatch from mayor to governor requesting troops inadmissible. Pittsburgh, etc. R. Co. *v.* Chicago, 144 Ill. App. 293.

NEGLIGENCE

Weight of plaintiff's testimony, 854-7; *Burden of proving contributory negligence when shown by plaintiff's pleadings*, 858-13; *Violation of ordinance*, 870-47; *Pleading and res ipsa loquitur*, 892-93.

851-1 Thompson *v.* Co., 40 Can. Sup. 396; Weatherly *v.* R. Co., 166 Ala. 575, 51 S. 959; Tobler *v.* Mfg. Co., 166 Ala. 482, 52 S. 86; Wood *v.* R. Co., 5 Penne. (Del.) 369, 64 A. 246; Latham *v.* R. Co., 179 Ill. App. 324; Riordan *v.* R. Co., 178 Ill. App. 323; Hickey *v.* Min. Co., 149 Ill. App. 453; Hamilton *v.* Coal Co., 149 Ill. App. 10; Cleveland, etc. Co. *v.* Henson (Ind. App.), 102 N. E. 399; Nichols *v.* T. Co., 43 Ind. App. 64, 86 N. E. 878; Brown *v.* Co., 43 Ind. App. 560, 88 N. E. 80; Pittsburg, etc. R. Co. *v.* Simons (Ind. App.), 76 N. E. 883; Comes *v.* Dabney (Kan.), 102 P. 488; St. Louis, etc. R. Co. *v.* Justice, 80 Kan. 10, 101 P. 469; Wood *v.* Tel. Co., 151 Ky. 77, 151 S. W. 29; Thomas *v.* Dist. Co., 151 Ky. 29, 151 S. W. 47; Louisville & N. R. Co. *v.* Long (Ky.), 117 S. W. 359; Cincinnati, etc. R. Co. *v.* Zachary, 32 Ky. L. R. 678, 106 S. W. 842; Harris *v.* Co., 111 Md. 209, 73 A. 805; La Pray *v.* Co., 117 Minn. 152, 134 N. W. 313; Haake *v.* Davis, 166 Mo. App. 249, 148 S. W. 450; Battles *v.* R. Co. (Mo. App.), 161 S. W. 614; O'Connell *v.* R. Co., 149 Mo. App. 501, 131 S. W. 117; Smith *v.* Pullman Co., 138 Mo. App. 238, 119 S. W. 1072; McClanahan *v.* R. Co., 147 Mo. App. 386, 126 S. W. 535; Reino *v.* Co., 38 Mont. 291, 99 P. 853; Gage *v.* R. R. (N. H.), 90 A. 855; Caher *v.* R. Co., 75 N. H. 125, 71 A. 225; Cooley *v.* Box Co., 75 N. H. 529, 77 A. 936; Crum *v.* Wright, 82 Misc. 419, 143 N. Y. S. 1080; Moscarello *v.* Haines, 130 App. Div. 135, 114 N. Y. S. 519; McDonnell *v.* Co., 131 App. Div. 301, 115 N. Y. S. 865; Alexander *v.* Statesville, 165 N. C. 527, 81 S. E. 763; Hauser *v.* Co., 150 N. C. 557, 64 S. E. 503; Kearns *v.* R. Co., 139 N. C. 470, 52 S. E. 131; Byrd *v.* Co., 139 N. C. 273, 51 S. E. 851; Brewster *v.* City, 142 N. C. 9, 54 S. E. 784; St. Louis, etc. R. Co. *v.* Criner (Okla.), 137 P. 705; Atchison, etc. R. Co. *v.* R. Co. (Okla.), 135 P. 353; Chicago, etc. Co. *v.* Duran, 38 Okla. 719, 134 P. 876; St. Louis & S. F. R. Co. *v.* Davis, 37 Okla. 340, 132 P. 337; Ahern *v.* Melvin, 21 Pa. Super. 462; Baker *v.* Thompson, 228 Pa. 543, 77 A. 818; International, etc. Co. *v.* Matthews (Tex. Civ.), 158 S. W. 1048; Texas & P. R. Co. *v.* Bailey (Tex. Civ.), 150 S. W. 962; Chicago, etc. R. Co. *v.* Latham, 53 Tex. Civ. 210, 115 S. W. 890; Producers' O. Co. *v.* Barnes (Tex. Civ.), 120 S. W. 1023; Missouri, etc. R. Co. *v.* Greenwood, 40 Tex. Civ. 252, 89 S. W. 810; Ruesch *v.* S. Co., 153 Wis. 664, 140 N. W. 1085.

See Scott *v.* D. C., 27 App. Cas. (D. C.) 413; and vol. 10, p. 468, n. 3, and supplement thereto.

851-2 Larsen *v.* Magna-Silica Co., 14 Cal. App. 70, 111 P. 119; Wistrom *v.* Redlick, 6 Cal. App. 671, 92 P. 1048; Wood *v.* R. Co., 5 Penne. (Del.) 369, 64 A. 246; Scott *v.* D. C., 27 App. Cas. (D. C.) 413; Demereski *v.* Min. Co., 149 Ill. App. 513; Evansville, etc. Co. *v.* Montgomery, 50 Ind. App. 528, 98 N. E. 731; Pittsburg, etc. R. Co. *v.* Simons (Ind. App.), 76 N. E. 883; Isnard *v.* Zinc Co., 83 Kan. 261, 111 P. 185, *aff.* 81 Kan. 765, 106 P. 1003; Reino *v.* Co., 38 Mont. 291, 99 P. 853; Caher *v.* R. Co., 75 N. H. 125, 71 A. 225; Producers' O. Co. *v.* Barnes (Tex. Civ.), 120 S. W. 1023; Missouri, etc. R. Co. *v.* Greenwood, 40 Tex. Civ. 252, 89 S. W. 810; Missouri, etc. R. Co. *v.* Romans, 103 Tex. 4, 121 S. W. 1104; Ft. Worth, etc. R. Co. *v.* Anderson (Tex. Civ.), 118 S. W. 1113.

Evidence insufficient.—Koke's Admr. *v.* Steel Co., 149 Ky. 627, 149 S. W. 968.

851-3 Norfolk & W. R. Co. *v.* Reed, 167 Fed. 16, 92 C. C. A. 478; Chicago, etc. R. Co. *v.* Wilfong, 173 Ind. 308, 90 N. E. 307; Lake Shore, etc. Co. *v.* Johnson, 172 Ind. 548, 88 N. E. 849; Nichols *v.* T. Co., 43 Ind. App. 64, 86 N. E. 878; Pilgrim *v.* Co., 82 Kan. 114, 107 P. 554; Robinson *v.* Co., 204 Mass. 191, 90 N. E. 413; Wickham *v.* R., 160 Mich. 277, 125 N. W. 22; Clark *v.* Sharpe, 76 N. H. 446, 83 A. 1090; Frahm *v.* Co., 131 App. Div. 747, 116 N. Y. S. 90; Gentzkow *v.* R. Co., 54 Or. 114, 102 P. 614; Missouri, etc. R. Co. *v.* Romans, 103 Tex. 4, 121 S. W. 1104; Wickert *v.* Co., 142 Wis. 375, 125 N. W. 943; Ryan *v.* G. Co., 138 Wis. 466, 120 N. W. 264;

Gay *v.* R. & L. Co., 138 Wis. 348, 120 N. W. 283.

Entry in book kept for purpose, notice to defendant of need of repairs. Blair *v.* R. Co., 243 Ill. 224, 90 N. E. 691.

852-4 Swift *v.* O'Brien, 127 Ill. App. 26; Main Jellico M. C. Co. *v.* Parker (Ky.), 124 S. W. 871.

852-5 Waters-P. O. Co. *v.* Deselms, 212 U. S. 159; Norfolk & W. R. Co. *v.* Hauser, 211 Fed. 567 (C. C. A.); Hartford, etc. Ins. Co. *v.* Brew. Co., 201 Fed. 617, 120 C. C. A. 45; Smith *v.* R. Co., 200 Fed. 553, 119 C. C. A. 33; Dubois *v.* Paper Co., 196 Fed. 37, 116 C. C. A. 52; Missouri, etc. R. Co. *v.* Foreman, 174 Fed. 377, 98 C. C. A. 281; Chicago, etc. R. Co. *v.* Davis, 172 Fed. 861, 97 C. C. A. 281; Firment *v.* M. Co., 162 Fed. 758; American S. & T. Plate Co. *v.* Urbanski, 162 Fed. 91, 89 C. C. A. 91; Northern Com. Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230; Beardsley *v.* Co., 176 Fed. 619; Leonard *v.* Co., 148 Fed. 827, 78 C. C. A. 517; Cedar C. S. Co. *v.* Steadham (Ala.), 65 S. 984; Travis *v.* R. Co. (Ala.), 62 S. 851; Weatherly *v.* R. Co., 166 Ala. 575, 51 S. 959; Central F. Co. *v.* Bailey, 162 Ala. 623, 50 S. 346 (if two or more acts of negligence alleged plaintiff must show injury caused by all); Alabama G. S. Co. *v.* Yount, 165 Ala. 537, 51 S. 737; Southern R. Co. *v.* Carter, 164 Ala. 103, 51 S. 147; Suell *v.* Derricott, 161 Ala. 259, 49 S. 895; Louisville & N. R. Co. *v.* Fitzgerald, 161 Ala. 397, 49 S. 860; Alabama, etc. R. Co. *v.* Brock, 161 Ala. 351, 49 S. 453; Chamberlain *v.* R. Co., 159 Ala. 171, 48 S. 703; Robinson *v.* Cowan, 158 Ala. 603, 47 S. 1018 (spread of fire); St. Louis, I. M. & S. R. Co. *v.* De Lambert (Ark.), 166 S. W. 544; Arlington H. Co. *v.* Tanner (Ark.), 164 S. W. 286; St. Louis, etc. R. Co. *v.* Brogan, 105 Ark. 533, 151 S. W. 699; Denton *v.* P. Co., 105 Ark. 161, 150 S. W. 572; Byrd *v.* Pine Bluff Corp., 102 Ark. 631, 145 S. W. 562; Arkansas & L. R. Co. *v.* Sain, 90 Ark. 278, 119 S. W. 659; St. Louis, etc. R. Co. *v.* Goins, 90 Ark. 387, 119 S. W. 277; Arkansas S. C. Co. *v.* Pippins, 92 Ark. 138, 122 S. W. 113; Arkansas C. O. Co. *v.* Carr, 89 Ark. 50, 115 S. W. 925; Chicago M. & L. Co. *v.* Cooper, 90 Ark. 326, 119 S. W. 672; Waters-P. O. Co. *v.* Knisel, 79 Ark. 608, 96 S. W. 342; Thompson *v.* R. Co., 165 Cal. 748, 134 P. 709; Sullivan *v.* Co., 13 Cal. App. 35, 108 P. 895; Atchison, etc. Co. *v.* Gumaer, 22 Colo. App. 495, 125 P. 589; Pryor *v.* Murnane, 82 Conn. 48, 72 A. 571; Katzenstein *v.* Hartford, 80 Conn. 663, 70 A. 23; Fay *v.* R. Co., 81 Conn. 330, 71 A. 364; Conaway *v.* Dukes (Del.), 90 A. 413; Brown *v.* Mayor (Del.), 90 A. 44; Neely *v.* R. Co. (Del.), 89 A. 211; Keith Co. *v.* Co. (Del.), 87 A. 715; Grier *v.* Samuel (Del.), 86 A. 209; Dickerson *v.* Brittingham (Del.), 86 A. 106; Bowen *v.* Steamboat Co. (Del. Super.), 84 A. 1022; Culbert *v.* Tr. Co. (Del.), 82 A. 1081; Girardo *v.* Tr. Co. (Del.), 90 A. 476; Spahn *v.* R. Co. (Del.), 83 A. 27; Riccio *v.* R. Co. (Del.), 82 A. 604; Shockley *v.* McCullough, 2 Boyce (Del.) 504, 82 A. 144; Tobias *v.* R. Co. (Del.), 80 A. 358; Coyle *v.* R. Co., 7 Penne. (Del.) 454, 80 A. 638; Freeman *v.* Wilmington & Philadelphia (Del.), 80 A. 1001; Valento *v.* Co., 6 Penne. (Del.) 556, 73 A. 395; MacFeat *v.* R. Co., 5 Penne. (Del.) 52, 62 A. 898 (death by being struck by train while awaiting transportation at a station); Graboski *v.* Co., 6 Penne. (Del.) 145, 64 A. 74; Garrett *v.* R. Co., 6 Penne. (Del.) 29, 64 A. 254; Robinson *v.* Huber, 6 Penne. (Del.) 21, 63 A. 873; Hannigan *v.* Wright, 5 Penne. (Del.) 537, 63 A. 234; Little *v.* Co., 6 Penne. (Del.) 374, 67 A. 169; Thompson *v.* Warren, 38 App. Cas. (D. C.) 311; Schneider *v.* Co., 31 App. Cas. (D. C.) 420; Girtman Bros. *v.* Eaton, 64 Fla. 69, 59 S. 397; L. & N. R. Co. *v.* Andrews, 10 Ga. App. 349, 73 S. E. 549; Mayor, etc. *v.* Morris, 10 Ga. App. 298, 73 S. E. 539 (as to construction of sewer in newly acquired territory); Talmadge *v.* R. Co., 125 Ga. 400, 54 S. E. 128; Central R. Co. *v.* Henderson, 6 Ga. App. 459, 65 S. E. 297; Riordan *v.* R. Co., 178 Ill. App. 323; McCabe *v.* Swift, 143 Ill. App. 404; Chicago, etc. Co. *v.* Mitchell (Ind.), 105 N. E. 396; City of Evansville *v.* Behme, 49 Ind. App. 448, 97 N. E. 565; Brown *v.* S. & W. Co., 43 Ind. App. 560, 88 N. E. 80; Pittsburgh, etc. R. Co. *v.* Rogers, 45 Ind. App. 230, 87 N. E. 28; Emrich & Co. *v.* Byrnes, 44 Ind. App. 341, 87 N. E. 1042; Evansville, etc. Co. *v.* Loge, 42 Ind. App. 461, 85 N. E. 979; Fletcher *v.* Kelly, 37 Ind. App. 254, 76 N. E. 813; Diamond, etc. C. Co. *v.* Cuthbertson, 166 Ind. 290, 76 N. E. 1060; Indianapolis F. Co. *v.* Bradley, 45 Ind. App. 530, 89 N. E. 505; Dreier *v.* McDermott (Ia.), 141 N. W. 315; Siemonsma *v.* R. Co., 137 Ia. 607, 115 N. W. 230; Pilgrim

v. Co., 82 Kan. 114, 107 P. 554; Stone *v.* News Co., 153 Ky. 240, 154 S. W 1092; Creager *v.* R. Co., 134 Ky. 543, 121 S. W. 458; Rural Home T. Co. *v.* Arnold (Ky. L. R.), 119 S. W. 811; Louisville & N. R. Co. *v.* Long (Ky.), 117 S. W. 359; Steele *v.* L. & I. Co. (Ky.), 114 S. W. 311; Bevis *v.* T. Co., 132 Ky. 385, 113 S. W. 811; Louisville & N. R. Co. *v.* Greenwell (Ky.), 125 S. W. 1054; Brown *v.* S. Co., 134 La. 1046, 64 S. 903; Cofield *v.* Co., 123 La. 944, 49 S. 650; Harris *v.* Co., 115 La. 973, 40 S. 374; Merchants' F. Co. *v.* S., 108 Md. 564, 70 A. 413; Smith *v.* R. Co., 111 Md. 274, 73 A. 818; Rasmussen *v.* Whipple, 211 Mass. 546, 98 N. E. 592; Ahern *v.* R. Co., 210 Mass. 506, 97 N. E. 72; Berdos *v.* Mills, 209 Mass. 489, 95 N. E. 876; McGann *v.* R. Co., 199 Mass. 446, 85 N. E. 570; Carroll *v.* R. Co., 200 Mass. 527, 86 N. E. 793; Shadduck *v.* R. Co. (Mich.), 146 N. W. 238; Tolmie *v.* T. Co. (Mich.), 144 N. W. 855; Allen *v.* Bainbridge, 145 Mich. 366, 108 N. W. 732 (damages from fire set on adjoining premises); Powers *v.* R. Co., 143 Mich. 379, 106 N. W. 1117; Galloway *v.* R., 168 Mich. 343, 134 N. W. 10; Uggen *v.* Bazille, 123 Minn. 97, 143 N. W. 112; Gloekner *v.* Mfg. Co., 109 Minn. 30, 122 N W. 465 (practicability of guarding machinery); Larson *v.* Swift & Co., 116 Minn. 509, 134 N. W. 122; Bruckman *v.* R. Co., 110 Minn. 308, 125 N. W. 263; Bowman *v.* Co., 226 Mo. 53, 125 S. W. 1120; Winter *v.* Van Blarcom (Mo.), 167 S. W. 498; Kane *v.* R. Co., 251 Mo. 13, 157 S. W. 644; Burns *v.* United Rys. Co., 176 Mo. App. 330, 158 S. W. 394; Giles *v.* R. Co., 169 Mo. App. 24, 154 S. W. 852; Perry *v.* Sedalia, 168 Mo. App. 235, 153 S. W. 536; Rogers *v.* Pack. Co., 167 Mo. App. 49, 150 S. W. 556; Collins *v.* Tootle, 166 Mo. App. 551, 149 S. W. 1040; McGrath *v.* Co., 197 Mo. 97, 94 S. W. 872; Lovell *v.* R. Co., 121 Mo. App. 466, 97 S. W. 193; Caudle *v.* Kirkbride, 117 Mo. App. 412, 93 S. W. 868; Luecke *v.* Graham, 123 Mo. App. 212, 100 S. W. 505; Howard *v.* Scarritt Estate Co., 161 Mo. App. 552, 144 S. W. 185; Funsten, etc. Co. *v.* R. Co., 163 Mo. App. 426, 143 S. W. 839; Fink *v.* R. Co., 161 Mo. App. 314, 143 S. W. 568; Michael *v.* R. Co., 161 Mo. App. 53, 143 S. W. 67; Decker *v.* R. Co., 149 Mo. App. 534, 131 S. W. 118; Evans *v.* R. Co., 222 Mo. 435, 121 S. W. 36; Anderson *v.* C. & M. Co., 138 Mo. App. 76, 119 S. W. 986; Titus *v.* Min. Co., 47 Mont. 583, 133 P. 677; Winnicott *v.* Orman, 39 Mont. 339, 102 P. 570; Monson *v.* C. Co., 39 Mont. 50, 101 P. 243; Reino *v.* L. D. Co., 38 Mont. 291, 99 P. 853; O'Brien *v.* Co., 40 Mont. 212, 105 P. 724; Bowers *v.* R. Co., 91 Neb. 229, 135 N. W. 1017; Suiter *v.* R. Co., 84 Neb. 256, 121 N. W. 113; Lincoln T. Co. *v.* Shepherd, 74 Neb. 369, 104 N. W. 882, 107 N. W. 764; Gage *v.* R. R. (N. H.), 90 A. 855; Piper *v.* R., 75 N. H. 435, 75 A. 1041; Wright *v.* R. Co., 74 N. H. 128, 65 A. 687; Hughes *v.* R. Co. (N. J.), 89 A. 769; Kennedy *v.* Co., 76 N. J. L. 618, 72 A. 382; Reagan *v.* R. Co., 15 N. M. 270, 106 P. 376; Sinay *v.* Co., 140 N. Y. S. 1074; Wetsell *v.* Reilly, 159 App. Div. 688, 145 N. Y. S. 167; Rosenstein *v.* McCutcheon, 155 App. Div. 278, 140 N. Y. S. 315; Flieg *v.* Levy, 133 N. Y. S. 249; Lucas *v.* P. Co., 131 App. Div. 368, 115 N. Y. S. 814; Burke *v.* P. Co., 128 App. Div. 680, 112 N. Y. S. 893; Continental Ins. Co. *v.* Co., 193 N. Y. 186, 85 N. E. 1006; Cunningham *v.* Dady, 191 N. Y. 152, 83 N. E. 689; Lane *v.* Co., 125 App. Div. 808, 110 N. Y. S. 91; Morhard *v.* R. Co., 111 App. Div. 353, 98 N. Y. S. 124; Henderson *v.* R. Co., 159 N. C. 581, 75 S. E. 1092; Hauser *v.* Co., 150 N. C 557, 64 S. E. 503; Merrill *v.* R. Co., 151 N. C. 743, 66 S. E. 570; Kumke *v.* Co. (Pa.), 90 A. 538; Kurts *v.* Tr. Co. (Pa.), 90 A. 525; Glancy *v.* Borough, 243 Pa. 216, 89 A. 972; Montgomery *v.* Rowe, 239 Pa. 321, 86 A. 923; Kahn *v.* L. Co., 238 Pa. 70, 85 A. 1117; Johns *v.* R. Co., 226 Pa. 319, 75 A. 408; Harrier *v.* Dale, 224 Pa. 643, 73 A. 945; Phillips *v.* Co., 8 Pa. Super. 210; Jones *v.* R. Co., 9 Pa. Super. 65; Allen *v.* Warwick, 9 Pa. Super. 507; Camancho *v.* Rubert, 4 P. R. Fed. 43; Requena de Molina *v.* Co., 4 P. R. Fed. 356; Campbell *v.* R. Co., 90 S. C. 312, 73 S. E. 488; Walton *v.* Burchel, 121 Tenn. 715, 121 S. W. 391; Lone Star B. Co. *v.* Solcher (Tex. Civ.), 126 S. W. 26; Beaty *v.* R. Co. (Tex. Civ.), 91 S. W. 365; Houston, etc. Co. *v.* Foster (Tex. Civ.), 142 S. W. 846; Trinity, etc. R. Co. *v.* Gregory (Tex. Civ.), 142 S. W. 656; Rosenbaum Grain Co. *v.* Mitchell (Tex. Civ.), 142 S. W. 121; Galveston H. & S. A. R. Co. *v.* Pingenot (Tex. Civ.), 142 S. W. 93; Missouri, etc. R. Co. *v.* Jones, 103 Tex. 187, 125 S. W. 309; Producers' O. Co. *v.* Barnes (Tex. Civ.), 120 S. W. 1023; Houston, etc. R. Co. *v.* Davenport, 102 Tex. 369, 117 S. W. 790; Houston, etc.

R. Co. *v.* Johnson (Tex. Civ.), 118 S. W. 1150; Houston, etc. R. Co. *v.* Pollock (Tex. Civ.), 115 S. W. 843; Pfeiffer *v.* Aue, 53 Tex. Civ. 98, 115 S. W. 300; Lone Star B. Co. *v.* Willie, 52 Tex. Civ. 550, 114 S. W. 186; Cook *v.* Co., 34 Utah 190, 37 P. 28; Smith *v.* R. Co., 33 Utah 129, 93 P. 185; Steele's Admr. *v.* C. & C. Co., 115 Va. 385, 79 S. E. 346; Norfolk & W. R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445; So. R. Co. *v.* Lewis, 113 Va. 117, 73 S. E. 469; Baugher *v.* Harman, 110 Va. 316, 66 S. E. 86; Hale *v.* P. Co., 56 Wash. 236, 105 P. 480; Bush *v.* Mill Co., 54 Wash. 212, 103 P. 45; Wilkie *v.* Co., 55 Wash. 324, 104 P. 616; Findley *v.* R. Co. (W. Va.), 78 S. E. 396; Chandler *v.* Foundry Co., 69 W. Va. 391, 71 S. E. 387; Schumacher *v.* Co., 142 Wis. 631, 126 N. W. 46; McKenzie *v.* Chilliwack Co., 82 L. J. P. C. 22; L. R. (1912) App. Cas. 888; 107 L. T. 570; 29 T. L. R. 40.

See International, etc. Co. *v.* Matthews (Tex. Civ.), 158 S. W. 1048; Ellis *v.* Banyard, 106 L. T. 51; 28 T. L. R. 122, 56 S. J. 139; vol. 2, p. 792, n. 55; vol. 2, p. 908, n. 44; vol. 10, p. 467, n. 2; vol. 12, p. 126, n. 60, and supplement thereto; infra, "Railroads," 467-1 et seq. Plaintiff must show it was practicable for defendant to comply with statute requiring safe-guarding of machinery. Laporte C. Co. *v.* Sullender, 165 Ind. 290, 303, 75 N. E. 277; Henschell *v.* R. Co., 78 Kan. 411, 96 P. 857. (In the latter case statute used words "when practicable," in former, such words not used.)

The fact that accurate evidence of the manner and cause of the accident is not available does not change the burden. Hayden *v.* Joline, 122 N. Y. S. 629, injury from defective pavement.

That damage was caused by plaintiff's negligence set up in answer as matter of defense in reducing the amount of the special damage which the plaintiff claimed to recover for the defendant's breach of his covenant to repair must be established by defendant. "It is not a case, as the defendant claims, of contributory negligence. If the defendant broke his covenant, he was liable for at least nominal damages. If the plaintiff negligently placed his goods where he knew they must be damaged by water from the leaky window and roof, he could not recover for that damage." Rumberg *v.* Cutler, 86 Conn. 8, 84 A. 107.

A servant to make a case against his master "must present to the jury a state of facts that will show that at the time of the injury an ordinarily prudent man in the place of his master would have apprehended that the use of the tools or appliances furnished would, by reason of their condition, probably result in injury to the servants." Lowe *v.* R. Co., 165 Mo. App. 523, 148 S. W. 956.

In an action for injury to a passenger to cast the burden upon the carrier, it must first be shown that the injury complained of resulted from something improper or unsafe in the conduct of the business or in the appliances of transportation. Smith *v.* Ribblett, 233 Pa. 300, 82 A. 245.

Where the pleader has averred several specific acts of negligence in his petition and pointed out the particulars in which the obligation to exercise ordinary care for the safety of plaintiff's husband was breached, the presumption of negligence involved in the phrase "res ipsa loquitur" is not available as prima facie evidence of fault on the part of defendants; and it, therefore, devolved upon plaintiff to show, by the facts and circumstances in evidence, at least one of the breaches of duty specified in the petition. Capehardt *v.* Murta, 165 Mo. App. 55, 145 S. W. 827.

A statute imposing upon a railroad company the duty of maintaining fences does not change the rule. Cross *v.* R. Co., 123 N. Y. S. 908.

Modified by statute in some cases. See Park *v.* Buxton, 10 Ga. App. 356, 73 S. E. 557; New England Box Co. *v.* R. Co., 210 Mass. 465, 97 N. E. 140.

"In personal injury cases the burden is always on the plaintiff to prove that the injury was the direct result of the negligence alleged. The principles and rules of the 'humanitarian doctrine' have not affected this rule." Veatch *v.* R. Co., 145 Mo. App. 232, 129 S. W. 404.

Gross negligence.—"Where a plaintiff charges gross negligence and the injury is one that might, under the circumstances, be the result of mere inadvertence, it is necessary, to sustain the charge, to have some evidence to take the injury out of the field of ordinary negligence. The burden is upon the plaintiff to show gross negligence; and such burden is not met by showing facts and circumstances amounting at most

to only ordinary negligence." Willard *v.* R. Co., 150 Wis. 234, 136 N. W. 646.

Sufficient evidence.—O'Connor *v.* R. Co., 197 Fed. 224; Maguire-Penniman Co. *v.* Lombard, 195 Fed. 477, 115 C. C. A. 387; Dardanelle, etc. Co. *v.* Croom, 95 Ark. 280, 129 S. W. 284; Louisville & N. R. Co. *v.* Tharpe, 11 Ga. App. 465, 75 S. E. 677; Sheppard *v.* Johnson, 11 Ga. App. 280, 75 S. E. 348; U. S. Brd. & Paper Co. *v.* Landers (Ind.), 92 N. E. 203; Ray *v.* R. Co., 82 Kan. 704, 109 P. 172; Cloud *v.* R. Co., 82 Kan. 851, 109 P. 400; Garafalo *v.* R. Co., 206 Mass. 539, 92 N. E. 723; Cornell *v.* R. Co., 112 Minn. 341, 128 N. W. 22; Millman *v.* Co., 119 Minn. 124, 137 N. W. 300; Brown *v.* R. Co., 166 Mo. App. 255, 148 S. W. 457; Thompson *v.* R. Co., 243 Mo. 336, 148 S. W. 484; Steffens *v.* Fisher, 161 Mo. App. 386, 143 S. W. 1101; King *v.* Co., 76 N. H. 442, 83 A. 806; Reynolds *v.* Mfg. Co., 122 N. Y. S. 797; Messersmith *v.* City, 122 N. Y. S. 918; Zwirn *v.* Joline, 122 N. Y. S. 233; Knaisch *v.* Joline, 123 N. Y. S. 412; Hipp *v.* Co., 152 N. C. 745, 68 S. E. 215; Lewis *v.* Building Co., 87 S. C. 210, 69 S. E. 212; Gilliland *v.* R. Co., 86 S. C. 137, 68 S. E. 186; Pullman Co. *v.* Schober (Tex. Civ.), 149 S. W. 236; Cromeenes *v.* R. Co., 37 Utah 475, 109 P. 10.

Evidence insufficient.—Tobler *v.* Mfg. Co., 166 Ala. 482, 52 S. 86; Di Nardi *v.* Co. (Del.), 84 A. 124; Girtman Bros. *v.* Eaton, 64 Fla. 69, 59 S. 397; Patterson *v.* R. Co., 127 La. 44, 53 S. 406; Sexton *v.* R. Co., 245 Mo. 254, 149 S. W. 21; Miller *v.* Walsh, 145 Mo. App. 131, 129 S. W. 458; Wood *v.* R. Co., 137 App. Div. 63, 122 N. Y. S. 159; Warwick *v.* Ginning Co., 153 N. C. 262, 69 S. E. 129; Brookshire *v.* Electric Co., 152 N. C. 669, 68 S. E. 215; Armstrong *v.* Lumb. Co., 86 S. C. 116, 68 S. E. 245; Delancey *v.* R. Co. (Tex. Civ.), 149 S. W. 259.

854-6 Illinois C. R. Co. *v.* Nelson, 173 Fed. 915, 97 C. C. A. 331; St. Louis, etc. R. Co. *v.* Summers, 173 Fed. 358, 97 C. C. A. 328 (burden must be met independently of original act of negligence); Arkansas & L. R. Co. *v.* Sain, 90 Ark. 278, 119 S. W. 659; Chesapeake & O. R. Co. *v.* White's Admr., 147 Ky. 15, 143 S. W. 1046; Louisville & N. R. Co. *v.* Trisler, 140 Ky. 447, 131 S. W. 198; Wagner *v.* R. Co., 160 Mo. App. 334, 142 S. W. 463; Hufft *v.* R. Co., 222 Mo. 286, 121 S. W. 120; Missouri, etc. R. Co. *v.* Sharp (Tex. Civ.), 120 S. W. 263.

Freedom from contributory negligence must be shown by plaintiff to overcome admission by invoking humanitarian doctrine. Krehmeyer *v.* Co., 220 Mo. 639, 120 S. W. 78.

854-7 Schwartzmiller *v.* Co., 197 Fed. 39, 116 C. C. A. 586; Hart *v.* R. Co., 196 Fed. 180, 116 C. C. A. 12; Pulaski Min. Co. *v.* Hagan, 196 Fed. 724, 116 C. C. A. 352; The Sunbeam, 195 Fed. 468, 115 C. C. A. 370; Baltimore & O. R. Co. *v.* Taylor, 186 Fed. 828, 109 C. C. A. 172; Western R. E. Trustees *v.* Hughes, 172 Fed. 206, 96 C. C. A. 658; Winona *v.* Botzet, 169 Fed. 321, 94 C. C. A. 563; Ellsworth *v.* Hunt, 168 Fed. 506, 93 C. C. A. 662; Armour *v.* Carlas, 42 Fed. 721, 74 C. C. A. 53; Missouri, etc. R. Co. *v.* Wilhoit, 160 Fed. 440, 87 C. C. A. 401; Ledbetter *v.* R. Co. (Ala.), 63 S. 987; North Ala. Tr. Co. *v.* Taylor, 3 Ala. App. 456, 57 S. 146; Brigham *v.* R. Co., 104 Ark. 267, 149 S. W. 90; St. Louis, I. M. & S. R. Co. *v.* Wells, 102 Ark. 257, 143 S. W. 1069; St. Louis, etc. R. Co. *v.* Hutchinson, 101 Ark. 424, 142 S. W. 527; Soard *v.* Co., 92 Ark. 502, 123 S. W. 759 (rule not changed by acts 1907, p. 162); Aluminum Co. *v.* Ramsey, 89 Ark. 522, 117 S. W. 568; Choctaw, etc. R. Co. *v.* Doughty, 77 Ark. 1, 91 S. W. 768; Little Rock, etc. Co. *v.* Doyle, 79 Ark. 378, 96 S. W. 353; Zibbell *v.* Co., 160 Cal. 237, 116 P. 513; Cahill *v.* Stone, 153 Cal. 571, 96 P. 84; Jackson *v.* R. Co., 11 Cal. App. 101, 103 P. 1098; Kenny *v.* Kennedy, 9 Cal. App. 350, 99 P. 384; Wistrom *v.* Redlick, 6 Cal. App. 671, 92 P. 1048; Big Five, etc. Co. *v.* Johnson, 44 Colo. 236, 99 P. 63; Coyle *v.* R. Co., 7 Penne. (Del.) 454, 80 A. 638; Valente *v.* Co., 6 Penne. (Del.) 556, 73 A. 395; MacFeat *v.* R. Co., 5 Penne. (Del.) 52, 62 A. 898; Fla., etc. Co. *v.* Geiger, 64 Fla. 282, 60 S. 753; Farnsworth *v.* Elect. Co., 62 Fla. 166, 57 S. 233; German-Am. L. Co. *v.* Brock, 55 Fla. 577, 46 S. 740; Hainlin *v.* Budge, 56 Fla. 342, 47 S. 825; Parkin *v.* R. Co., 149 Ill. App. 421; Am., etc. Co. *v.* Vance, 177 Ind. 78, 97 N. E. 327; Lake Erie, etc. R. Co. *v.* Moore, 51 Ind. App. 110, 97 N. E. 203; Harmon *v.* Foran, 48 Ind. App. 262, 94 N. E. 1050, rehear. *denied* (Ind.), 95 N. E. 597; Inland S. Co. *v.* Yedinak, 172 Ind. 423, 87 N. E. 229; Indianapolis *v.* Mullally, 38 Ind. App. 125, 77 N. E. 1132; Wamsley

v. R. Co., 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640; Stephens v. Co., 38 Ind. App. 414, 78 N. E. 335; Louisville T. Co. v. Short, 41 Ind. App. 570, 83 N. E. 265; Fletcher v. Kelly, 37 Ind. App. 254, 76 N. E. 813; Roberts v. Co., 37 Ind. App. 664, 76 N. E. 323; New Castle B. Co. v. Doty, 37 Ind. App. 84, 76 N. E. 557; Indianapolis v. Keeley, 167 Ind. 516, 79 N. E. 499; Eidson v. R. Co., 85 Kan. 329, 116 P. 485; Lewis v. S. Co., 82 Kan. 163, 107 P. 783; Atchison, etc. R. Co. v. Peck, 79 Kan. 413, 100 P. 54; Kansas B. B. & Mfg. Co. v. Stark, 77 Kan. 648, 95 P. 1047; Storm Bros. v. First Nat. Bank, 148 Ky. 585, 147 S. W. 5; Geary v. McCreary, 147 Ky. 254, 143 S. W. 1004; Cynthiana T. Co. v. Asbury, 147 Ky. 307, 143 S. W. 1050; Warren v. Jeunesse (Ky.), 122 S. W. 862; Bevis v. Co. (Ky.), 113 S. W. 811 (rule not changed because plaintiff unnecessarily alleges due care); Weiss v. Co., 133 La. 14, 62 S. 216; Ferringer v. Co., 122 La. 441, 47 S. 763; Crosby v. Plummer (Me.), 89 A. 145; Anne Arundel County v. Carr, 111 Md. 141, 73 A. 668; Bernheimer v. Bager, 108 Md. 551, 70 A. 91; Obrien v. Co., 119 Minn. 4, 137 N. W. 399; Peterson v. Co., 111 Minn. 105, 126 N. W. 534; Mississippi C. R. Co. v. Hardy, 88 Miss. 732, 41 S. 505; Byerley v. R. Co., 172 Mo. App. 470, 158 S. W. 413; Peperkorn v. R. Co., 171 Mo. App. 709, 154 S. W. 836; Davidson v. Co., 164 Mo. App. 701, 148 S. W. 406; Peppers v. Co., 165 Mo. App. 556, 148 S. W. 401; S. v. Hallen, 165 Mo. App. 422, 146 S. W. 1171; Tetwiler v. R. Co., 242 Mo. 178, 145 S. W. 780; Lessenden v. R. Co., 238 Mo. 247, 142 S. W. 332; George v. R. Co., 225 Mo. 364, 125 S. W. 196; Stotler v. R. Co., 200 Mo. 107, 98 S. W. 509; Meily v. R. Co., 215 Mo. 567, 114 S. W. 1013; Von Trebra v. Co., 209 Mo. 648, 108 S. W. 559; Strickland v. Woolworth, 143 Mo. App. 528, 127 S. W. 628; Lattimore v. Co., 128 Mo. App. 37, 106 S. W. 543; Underwood v. R. Co., 125 Mo. App. 490, 102 S. W. 1045; Schroeder v. Wks., 38 Mont. 474, 100 P. 619; Harrington v. R. Co., 37 Mont. 169, 95 P. 8, 16 L. R. A. (N. S.) 395; Nord v. Co., 33 Mont. 464, 84 P. 1116; Birsch v. E. Co., 36 Mont. 574, 93 P. 940; O'Brien Co. v. Co., 83 Neb. 71, 118 N. W. 1110; Vertrees v. County, 81 Neb. 213, 115 N. W. 863; S. v. Dunklee, 76 N. H. 439, 84 A. 40; Sigel v. American S. Co., 161 App. Div. 54, 146 N. Y. S. 350; Cloke v. Con. Co., 155 App. Div. 461, 140 N. Y. S. 252; Banchetti v. Co., 133 N. Y. S. 170; Ovelsen v. Co., 123 N. Y. S. 649; Cook v. F. Co., 161 N. C. 39, 76 S. E. 473; Coleman v. R. Co., 153 N. C. 322, 69 S. E. 251; Shives v. Mills, 151 N. C. 290, 66 S. E. 141; Stewart v. R. Co., 141 N. C. 253, 53 S. E. 877; Goforth v. R. Co., 144 N. C. 569, 57 S. E. 209; Rober v. R. Co., 25 N. D. 394, 142 N. W. 22; Jackson K. & S. Co. v. Hathaway, 7 O. C. C. (N. S.) 242; Coalgate v. Hurst, 25 Okla. 588, 107 P. 657; Doyle v. Co., 56 Or. 495, 108 P. 201; Palmer v. Co., 56 Or. 262, 108 P. 211; Peterson v. O. Co., 55 Or. 511, 106 P. 337; Gentzkow v. R. Co., 54 Or. 114, 102 P. 614; Jackson v. R. Co., 50 Or. 455, 93 P. 356; Schaefer v. Ice Co., 238 Pa. 367, 86 A. 193; Phillips v. Co., 8 Pa. Super. 210; Galveston, etc. R. Co. v. Pennington (Tex. Civ.), 166 S. W. 465; Texas, etc. Co. v. Bird (Tex. Civ.), 165 S. W. 8; Peden I. & S. Co. v. Jaimes (Tex. Civ.), 162 S. W. 965; Yellow Pine P. Co. v. Wright (Tex. Civ.), 154 S. W. 1168; Galveston Elec. Co. v. Antonini (Tex. Civ.), 152 S. W. 841; Barnes v. Hewitt (Tex. Civ.), 152 S. W. 236; El Paso, etc. R. Co. v. Welter (Tex. Civ.), 125 S. W. 45; Texas Cent. R. Co. v. Perry (Tex. Civ.), 147 S. W. 305; Lam & Rogers v. R. Co. (Tex. Civ.), 142 S. W. 977; St. Louis S. W. R. Co. v. Addis (Tex. Civ.), 142 S. W. 955; Western Union Tel. Co. v. Conder (Tex. Civ.), 138 S. W. 447; El Paso E. R. Co. v. Shaklee (Tex. Civ.), 138 S. W. 188; Texas & N. O. R. Co. v. McLeod (Tex. Civ.), 131 S. W. 311; Producers' O. Co. v. Barnes (Tex. Civ.), 120 S. W. 1023; Houston, etc. R. Co. v. Johnson (Tex. Civ.), 118 S. W. 1150; Galveston, etc. R. Co. v. Worth, 53 Tex. Civ. 351, 116 S. W. 365; Houston, etc. R. Co. v. Pollock (Tex. Civ.), 115 S. W. 843; San Antonio T. Co. v. Levyson, 52 Tex. Civ. 122, 113 S. W. 569; Kansas City, etc. R. Co. v. Young, 50 Tex. Civ. 610, 111 S. W. 764; Houston, etc. R. Co. v. Anglin, 99 Tex. 349, 89 S. W. 897, 966; Texas, etc. R. Co. v. Conway, 44 Tex. Civ. 68, 98 S. W. 1070; Beaty v. R. Co. (Tex. Civ.), 91 S. W. 365; Houston, etc. R. Co. v. Davenport (Tex. Civ.), 110 S. W. 150; Galveston, etc. R. Co. v. Conutesson, 51 Tex. Civ. 1, 111 S. W. 187; Smith v. R. Co., 33 Utah 129, 93 P. 185; Hickey v. R. Co., 29 Utah 392, 82 P. 29; Washington, etc. R. Co. v. Grove's Admr.,

113 Va. 411, 74 S. E. 148; Atlantic, etc. R. Co. *v.* Grubbs, 113 Va. 214, 74 S. E. 144; Chesapeake & O. R. Co. *v.* Rowsey, 108 Va. 632, 62 S. E. 363; Interstate R. Co. *v.* Tyree, 110 Va. 38, 65 S. E. 500; Benson *v.* Lumb. Co., 71 Wash. 616, 129 P. 403; Norman *v.* Bellingham, 46 Wash. 205, 89 P. 559; Sprinkle *v.* C. C. Co. (W. Va.), 78 S. E. 971; Melton *v.* Ry. Co., 71 W. Va. 701, 78 S. E. 369; Erwing *v.* F. Co., 65 W. Va. 726, 65 S. E. 200; Pfeiffer *v.* Radke, 142 Wis. 512, 125 N. W. 934; Hart *v.* Neillsville, 141 Wis. 3, 123 N. W. 125; Lind *v.* Co., 140 Wis. 183, 120 N. W. 839 (immaterial as to source from which evidence comes). See infra, "Railroads," 468-5 et seq; Lewin *v.* Pauli, 19 Pa. Super. 447; vol. 2, p. 935, n. 14; vol. 9, p. 836, n. 47; vol. 10, p. 469, n. 10, and supplements thereto.

Exception, where plaintiff's own case raises presumption of contributory negligence. Smith *v.* Zimmer, 45 Mont. 282, 125 P. 420; Texas Tr. Co. *v.* Wiley (Tex. Civ.), 164 S. W. 1028; Melton *v.* R. Co., 71 W. Va. 701, 78 S. E. 369. See Patterson *v.* Roetzel & Chipman (Ark.), 164 S. W. 301.

Question for jury whether plaintiff was guilty of contributory negligence. Beiser *v.* R. Co., 152 Ky. 522, 153 S. W. 742; Bell-K. C. Co. *v.* Gregory, 152 Ky. 415, 153 S. W. 465; Jackson *v.* Butler, 249 Mo. 342, 155 S. W. 1071; Chicago, etc. Co. *v.* Duran, 38 Okla. 719, 134 P. 876.

Where specific acts of contributory negligence are alleged in an answer the proof must be confined thereto. J. Rosenbaum Grain Co. *v.* Mitchell (Tex.), 145 S. W. 1188.

Rule not affected by comparative negligence act. Zeratsky *v.* R. Co., 141 Wis. 423, 123 N. W. 904.

On issue of contributory negligence plaintiff's testimony accepted as true and most favorable inference to be drawn from it in his favor indulged. Strong *v.* R. Co., 156 Mich. 66, 120 N. W. 683.

857-8 Denver City T. Co. *v.* Carson, 21 Colo. App. 604, 123 P. 680; Pittsburgh, etc. R. Co. *v.* Rogers, 45 Ind. App. 230, 87 N. E. 28; Hawkins *v.* R. Co., 107 Minn. 245, 119 N. W. 1070; Hegberg *v.* R. Co., 164 Mo. App. 514, 147 S. W. 192; Kunkel *v.* R. Co., 18 N. D. 367, 121 N. W. 830; Houston, etc. R. Co. *v.* Davenport, 102 Tex. 369, 117 S. W. 790; Galveston, etc. R. Co. *v.* Conuteson, 51 Tex. Civ. 1, 111 S. W. 187. **But less evidence** may be required to show freedom from fault in such case Peterson *v.* P. Ballantine & Sons, 205 N. Y. 29, 98 N. E. 202.

858-10 Nelson *v.* R. Co. (Ind. App.), 103 N. E. 857; Rhea *v.* Sawyer (Ind. App.), 102 N. E. 52.

858-13 Hainlin *v.* Budge, 56 Fla. 342, 47 S. 825. *Contra,* Lyddy *v.* R. Co., 197 Fed. 524, 117 C. C. A. 20; Louisville & N. R. Co. *v.* Williams, 172 Ala. 560, 55 S. 218; Gleason *v.* Suskin, 110 Md. 137, 72 A. 1034; Meehan *v.* R. Co., 43 Mont. 72, 114 P. 781.

But where plaintiff's pleadings or evidence show prima facie negligence on his part, he has burden of meeting prima facie case. Choctaw, etc. R. Co. *v.* Doughty, 77 Ark. 1, 91 S. W. 768; Cahill *v.* Co., 153 Cal. 571, 96 P. 84; Harrington *v.* R. Co., 37 Mont. 169, 95 P. 8, 16 L. R. A. (N. S.) 395; Nord *v.* Co., 33 Mont. 464, 84 P. 1116; Jackson *v.* R. Co., 50 Or. 455, 93 P. 356; Galveston, etc. R. Co. *v.* Conuteson, 51 Tex. Civ. 1, 111 S. W. 187; Missouri, etc. R. Co. *v.* Plunkett (Tex. Civ.), 103 S. W. 663; Texas, etc. R. Co. *v.* Conway, 44 Tex. Civ. 68, 98 S. W. 1070; Houston, etc. R. Co. *v.* Davenport (Tex. Civ.), 110 S. W. 150. See Pereira *v.* Co., 51 Or. 477, 94 P. 835; Allen *v.* Warrick, 9 Pa. Super. 507; Lewin *v.* Pauli, 19 Pa. Super. 447; Smith *v.* R. Co., 33 Utah 129, 93 P. 185.

Recovery defeated only by proof of acts of contributory negligence pleaded. Alabama G. S. R. Co. *v.* McWhorter, 156 Ala. 269, 47 S. 84.

859-14 Burge *v.* R. Co., 244 Mo. 76, 148 S. W. 925.

859-15 Worthington *v.* Elmer, 207 Fed. 306, 125 C. C. A. 50; German-Am. L. Co. *v.* Brock, 55 Fla. 577, 46 S. W. 740; Nelson *v.* R. Co., 119 Minn. 347, 138 N. W. 419; Porter *v.* Co., 213 Mo. 372, 111 S. W. 1136. See also "Presumptions," p. 895, n. 72.

859-16 Nehring *v.* Co. (Conn.), 84 A. 301; O'Connor *v.* R. & L. Co., 82 Conn. 170, 72 A. 934; Fay *v.* R. Co., 81 Conn. 330, 71 A. 364; Mesite *v.* Co., 82 Conn. 403, 74 A. 684; West., etc. R. Co. *v.* Casteel (Ga.), 75 S. E. 609; So. R. Co. *v.* Freeman, 6 Ga. App. 55, 64 S. E. 129; So. R. Co. *v.* Salmon, 132 Ga. 753, 65 S. E. 70 (statute); Riordan *v.* R. Co., 178 Ill. App. 323; Davis *v.* R. Co., 168 Ill. App. 307; Hartje *v.* Moxley, 235 Ill. 164, 85 N. E. 216; Balt., etc. R. Co. *v.* Ayers, 119 Ill. App. 108;

Ft. Wayne, etc. Co. *v.* Tel. Co., 179 Ind. 334, 100 N. E. 69; Lunde *v.* P. Co., 139 Ia. 688, 117 N. W. 1063; Duffey *v.* Co., 147 Ia. 225, 124 N. W. 609; Calloway *v.* Co., 129 Ia. 1, 104 N. W. 721; Buchholtz *v.* Radcliffe, 129 Ia. 27, 105 N. W. 336; Cahill *v.* R. Co., 137 Ia. 577, 115 N. W. 216; Wilson *v.* R. Co. (Ia.), 142 N. W. 54; Dreier *v.* McDermott (Ia.), 141 N. W. 315; Dirken *v.* P. Co., 110 Me. 374, 86 A. 320; Wyman *v.* Berry, 106 Me. 43, 75 A. 123; French *v.* Sabin, 202 Mass. 240, 88 N. E. 845; Prince *v.* Light Co., 201 Mass. 276, 87 N. E. 558; Teachout *v.* R. Co. (Mich.), 146 N. W. 241; Shadduck *v.* R. Co. (Mich.), 146 N. W. 238; Kaaro *v.* Min. Co. (Mich.), 146 N. W. 149; Tolmie *v.* T. Co. (Mich.), 144 N. W. 855; Rohlfs *v.* Fairgrove, 174 Mich. 555, 140 N. W. 908; Caher *v.* R. Co., 75 N. H. 125, 71 A. 225; Wright *v.* R. Co., 74 N. H. 128, 65 A. 687; Sinay *v.* Co., 140 N. Y. S. 1074; Quick *v.* Can Co., 205 N. Y. 330, 98 N. E. 480; Maercker *v.* R. Co., 137 App. Div. 49, 122 N. Y. S. 87; Boyle *v.* R. Co., 58 Misc. 50, 110 N. Y. S. 19; Cherbuliez *v.* Parsons, 59 Misc. 613, 111 N. Y. S. 516 (freedom from contributory negligence may be established by proof of the facts and circumstances); Lane *v.* Co., 125 App. Div. 808, 110 N. Y. S. 91; Meaney *v.* Horowitz, 115 App. Div. 572, 100 N. Y. S. 975; Axelrod *v.* R. Co., 109 App. Div. 87, 95 N. Y. S. 1072; Baxter *v.* R. Co., 190 N. Y. 439, 83 N. E. 469; Lester *v.* Crabtree, 125 App. Div. 617, 110 N. Y. S. 55; Camancho *v.* Rubert, 4 P. R. Fed. 43; Robinson *v.* Morris, 30 R. I. 132, 73 A. 611; Sherman O. Mill *v.* Neff (Tex. Civ.), 159 S. W. 137; Duggan *v.* Heaphy, 85 Vt. 515, 83 A. 726.

See Humason *v.* R. Co., 259 Ill. 462, 102 N. E. 793; infra, "Railroads," 470-12; infra, "Street Railroads," 130-72; vol. 2, p. 939, n. 12; vol. 9, p. 836, n. 47; vol. 10, p. 470, n. 12, and supplements thereto.

Contra, by N. Y. statute of 1910.—Greif *v.* R. Co., 205 N. Y. 239, 98 N. E. 462.

861-17 Cottle *v.* R. Co., 82 Conn. 142, 72 A. 727; Wallace *v.* R. Co., 6 Ga. App. 526, 65 S. E. 299; Collison *v.* R. Co., 239 Ill. 532, 88 N. E. 251; Chicago *v.* Carlin, 141 Ill. App. 118; Stollery *v.* R. Co., 243 Ill. 290, 90 N. E. 709; Weber *v.* R. Co., 142 Ill. App. 550 (if testimony of eye-witness received, no presumption in favor of self-preservation indulged); Lunde *v.* Co., 139 Ia. 688, 117 N. W. 1063; Fournier *v.* Mfg. Co. (Me.), 81 A. 82; Ralph *v.* L. Co., 200 Mass. 566, 86 N. E. 922; Hamma *v.* Co., 203 Mass. 572, 89 N. E. 1043; Dimauro *v.* R. Co., 200 Mass. 147, 85 N. E. 894 (though defendant's negligence gross, not being wanton); Gates *v.* Beebe, 170 Mich. 107, 135 N. W. 934; Lamb *v.* R. Co., 195 N. Y. 260, 88 N. E. 371 (if plaintiff's negligence does not excuse contributory negligence); Goldberg *v.* Herman, 136 App. Div. 532, 121 N. Y. S. 114; Nichols *v.* Mfg. Co., 134 App. Div. 62, 118 N. Y. S. 651; Boyce *v.* R. Co., 126 App. Div. 248, 110 N. Y. S. 393.

How burden met.—See Lunde *v.* Co., 139 Ia. 688, 117 N. W. 1063.

861-18 Ardolino *v.* Reinhardt, 130 App. Div. 119, 114 N. Y. S. 508, degree of proof may vary.

861-20 Del., etc. Co. *v.* Fleming (Ind. App.), 102 N. E. 163; Rhea *v.* Sawyer (Ind. App.), 102 N. E. 52; Ft. Wayne, etc. Tract. Co. *v.* Tele. Co., 179 Ind. 334, 100 N. E. 69; Evansville, etc. R. Co. *v.* Berndt, 172 Ind. 697, 88 N. E. 612; Pittsburgh, etc. R. Co. *v.* Ins. Co., 44 Ind. App. 268, 87 N. E. 995; Potter *v.* F. Co., 43 Ind. App. 427, 87 N. E. 694.

Rule changed by statute.—Chicago & E. R. Co. *v.* Fretz, 173 Ind. 519, 90 N. E. 76. Unless in case of injury to chattels. Cleveland, etc. R. Co. *v.* Moore, 45 Ind. App. 58, 90 N. E. 93.

861-22 *Contra* in action for death. Cincinnati, etc. R. Co. *v.* Yocum, 137 Ky. 117, 123 S. W. 247.

861-24 Caminez *v.* R. Co., 127 App. Div. 138, 111 N. Y. S. 384. *Comp.* Noakes *v.* R. Co., 121 App. Div. 716, 106 N. Y. S. 522.

862-25 Potter *v.* Co., 43 Ind. App. 427, 87 N. E. 694.

862-27 Hartje *v.* Moxley, 235 Ill. 164, 85 N. E. 216.

862-28 *Contra*, Brown *v.* Co., 143 Ia. 662, 120 N. W. 732.

Rule as to quantum of proof relaxed if death resulted. Vandenbout *v.* R. Co., 129 App. Div. 844, 114 N. Y. S. 760. If no witnesses of accident. Glennon *v.* Co., 130 App. Div. 491, 114 N. Y. S. 1044. In such case comparatively slight evidence will establish freedom from contributory negligence. Paulding *v.* R. Co., 132 App. Div. 68, 116 N. Y. S. 518.

Insufficiency in plaintiff's evidence sup-

plied by defendant's. Boyce *v.* R. Co., 126 App. Div. 248, 110 N. Y. S. 393.

864-33 *Contra,* So. R. Co. *v.* Robertson, 7 Ga. App. 154, 66 S. E. 535.

864-34 Western U. T. Co. *v.* Bennett, 3 Ala. App. 275, 57 S. 87; Carlisle *v.* R. Co., 166 Ala. 591, 52 S. 341; Layton *v.* Hudson, 2 Boyce (Del.) 573, 83 A. 134; Girtman Bros. *v.* Eaton, 64 Fla. 69, 59 S. 397; Herath *v.* R. Co., 149 Ill. App. 268; Campbell *v.* R. Co., 149 Ill. App. 20, 243 Ill. 620, 90 N. E. 1106; Coleman *v.* New Orleans R. & L. Co., 126 La. 239, 52 S. 386; Wilbur *v.* Co., 109 Me. 521, 85 A. 48; Penn. R. Co. *v.* Cecil, 111 Md. 288, 73 A. 820; Renaud *v.* R. Co., 210 Mass. 553, 97 N. E. 98; Larned *v.* Vanderlinde, 165 Mich. 464, 131 N. W. 165; Capehardt *v.* Murta, 165 Mo. App. 55, 145 S. W. 827; Chapman *v.* R. Co., 240 Mo. 592, 144 S. W. 469; Freeman *v.* Griewe (Tex. Civ.), 143 S. W. 730; James *v.* Robertson, 39 Utah 414, 117 P. 1068.

Sufficient evidence.—Baltimore & O. R. Co. *v.* Taylor, 186 Fed. 828, 109 C. C. A. 172; Larsen *v.* Imp. Co., 180 Fed. 268; So. Anthracite C. Co. *v.* Hodge, 99 Ark. 302, 139 S. W. 292; Arkansas Lumb. Co. *v.* Wallace, 99 Ark. 537, 139 S. W. 534; Hawley *v.* Creamery Co., 16 Cal. App. 50, 116 P. 84; Wilkerson *v.* Min. Co., 158 Ill. App. 620; Peru Heating Co. *v.* Lenhart, 48 Ind. App. 319, 95 N. E. 680; Spevack *v.* Fuel Co., 152 Ia. 90, 131 N. W. 653; Ringer *v.* R. Co., 85 Kan. 167, 116 P. 212; Haynes *v.* R. Co., 108 Me. 243, 80 A. 38; Druck *v.* Lime Co., 167 Mich. 154, 132 N. W. 492; Bannigan *v.* Woodbury, 166 Mich. 491, 132 N. W. 77; La Pray *v.* Chemical Co., 117 Minn. 152, 134 N. W. 313; Greer *v.* R. Co., 115 Minn. 213, 132 N. W. 6; Sampson *v.* R. Co., 156 Mo. App. 419, 137 S. W. 98; M'Kenna *v.* Snare & Triest Co., 147 App. Div. 855, 133 N. Y. S. 107; Cromartie *v.* R. Co., 156 N. C. 97, 72 S. E. 98; Olson *v.* Riddle, 22 N. D. 144, 132 N. W. 655; Shields *v.* Transp. Co., 230 Pa. 624, 79 A. 804; McLeod *v.* R. Co., 65 Wash. 62, 117 P. 749; O'Dell *v.* Timber Co., 63 Wash. 546, 115 P. 1085; Lehman *v.* Coffee Co., 146 Wis. 213, 131 N. W. 362; Benson *v.* Mfg. Co., 147 Wis. 20, 132 N. W. 633.

Insufficient evidence.—Wright *v.* R. Co., 47 Ind. App. 673, 95 N. E. 129; Boyd *v.* R. Co., 236 Mo. 54, 139 S. W. 561; Swanson *v.* Stockyards Co., 89 Neb. 361, 131 N. W. 594; Geer *v.* Tele. Co., 129 N. Y. S. 784; McHugh *v.* Gas Co., 32 R. I. 394, 80 A. 12; Houston, E. & M. T. R. Co. *v.* Foster (Tex. Civ.), 142 S. W. 846; Wilson *v.* Werry (Tex. Civ.), 137 S. W. 390; Arminius Chem. Co. *v.* White's Admr., 112 Va. 250, 71 S. E. 637; Young *v.* Lumb. Co., 63 Wash. 600, 116 P. 4.

Before an appellate court can consider the question of negligence, it must determine that the facts are indisputable, and that but one legitimate legal inference may be drawn from them. Fink *v.* Kansas City So. R. Co., 161 Mo. App. 314, 143 S. W. 568.

865-35 Louisville Gas Co. *v.* Fry, 147 Ky. 754, 145 S. W. 748; Vogel *v.* Herzfeld-Phillipson Co., 148 Wis. 573, 134 N. W. 141.

Reasonable degree of certainty required to establish cause of injury Bachelder *v.* Morgan (Ala.), 60 S. 815; Fowler *v.* Co., 143 Mo. App. 422, 127 S. W. 616; Glancy *v.* Borough, 243 Pa. 216, 89 A. 972. See Travis *v.* R. Co. (Ala.), 62 S. 851; Ness *v.* R. Co., 25 N. D. 572, 142 N. W. 165.

866-36 Bolen-D. C. Co. *v.* Williams, 164 Fed. 665, 90 C. C. A. 481 (not absolutely); Suell *v.* Derricott, 161 Ala. 259, 49 S. 895; Ala. T., etc. Co. *v.* Demoville, 167 Ala. 292, 52 S. 406; Chicago M. & L. Co. *v.* Cooper, 90 Ark. 326, 119 S. W. 672; Grier *v.* Samuel (Del.), 86 A. 209; Dickerson *v.* Brittingham (Del.), 86 A. 106; Valente *v.* Co., 6 Penne. (Del.) 556, 73 A. 395; Gatta *v.* R. Co. (Del.), 83 A. 791; Seiniski *v.* L. Co. (Del.), 83 A. 20; Walls *v.* R. Co. (Del.), 80 A. 355; Calkins *v.* Lumb. Co., 23 Ida. 128, 129 P. 435; Gurnea *v.* R. Co., 157 Ill. App. 331; Garry *v.* R. Co., 155 Ill. App. 673; Pierson *v.* Lyon, 243 Ill. 370, 90 N. E. 693; Nelson *v.* R. Co. (Ind. App.), 103 N. E. 857; Dreier *v.* McDermott (Ia.), 141 N. W. 315; Lunde *v.* Co., 139 Ia. 688, 117 N. W. 1063; Rase *v.* R. Co., 107 Minn. 260, 120 N. W. 360; Mississippi C. O. Co. *v.* Smith, 95 Miss. 528, 48 S. 735; Kelly *v.* R. Co., 141 Mo. App. 490, 125 S. W. 818; Fink *v.* R. Co., 161 Mo. App. 314, 143 S. W. 568; Hollingsworth *v.* Co., 38 Mont. 143, 99 P. 142; Hughes *v.* R. Co. (N. J.), 89 A. 769; Oakerson *v.* R. Co., 77 N. J. L. 769, 73 A. 496; Huscher *v.* P. Co., 158 App. Div. 422, 143 N. Y. S. 639; O'Donohue *v.* Co., 67 Misc. 435, 123 N. Y. S. 193; Farmers Merc. Co. *v.* R. Co. (N. D.), 146 N. W. 550; Milton

v. R. Co., 108 Va. 752, 62 S. E. 960 (greater probability sufficient); Steele's Admr. *v.* C. & C. Co., 115 Va. 385, 79 S. E. 346; Clinchfield C. Co. *v.* Wheeler, 108 Va. 448, 62 S. E. 269; Bush *v.* Co., 54 Wash. 212, 103 P. 45.

See Hughes *v.* R. Co. (N. J.), 89 A. 769.

Quantum of proof required to establish contributory negligence is the same as that required to establish negligence. Great W. R. Co. *v.* Drorbaugh, 24 Colo. App. 188, 134 P. 168.

Negligence.—See Kearns *v.* R. Co., 139 N. C. 470, 52 S. E. 131; Woods *v.* R. Co., 104 Va. 650, 52 S. E. 371.

Contributory negligence.—See Wistrom *v.* Redlick, 6 Cal. App. 671, 92 P. 1048; Cartlich *v.* R. Co., 129 Mo. App. 721, 108 S. W. 584; El Paso, etc. R. Co. *v.* Kitt (Tex. Civ.), 90 S. W. 678.

867-37 Wyatt *v.* R. Co., 156 Cal. 170, 103 P. 892; Stone *v.* News Co., 153 Ky. 240, 154 S. W. 1092; Watson *v.* R. Co. (Ky.), 114 S. W. 292; Cincinnati, etc. R. Co. *v.* Johnica (Ky.), 113 S. W. 844; Scanlon *v.* R. Co., 215 Mass. 554, 102 N. E. 915; Quisenberry *v.* R. Co., 142 Mo. App. 275, 126 S. W. 182; Chester *v.* Co., 78 N. J. L. 131, 73 A. 836; Lamb *v.* R. Co., 195 N. Y. 260, 88 N. E. 371; Cross *v.* R. Co., 123 N. Y. S. 908; Merriam *v.* Hamilton, 64 Or. 476, 130 P. 406; Hale *v.* Co., 56 Wash. 236, 105 P. 480.

867-38 Great Northern R. Co. *v.* Johnson, 176 Fed. 328, 99 C. C. A. 618; Minneapolis E. Co. *v.* Cronon, 166 Fed. 651, 92 C. C. A. 345; Denton *v.* Spring, etc. Co., 105 Ark. 161, 150 S. W. 572; O'Connor *v.* Co., 82 Conn. 170, 72 A. 934; Pryor *v.* Murnane, 82 Conn. 48, 72 A. 571; Morse *v.* R. Co., 81 Conn. 395, 71 A. 553; U. S. Cem. Co. *v.* Whitted, 46 Ind. App. 105, 90 N. E. 481; Heinz *v.* Co., 81 Kan. 261, 105 P. 527; Cincinnati, etc. R. Co. *v.* Zachary (Ky.), 124 S. W. 363; Merchants' Co. *v.* S., 108 Md. 564, 70 A. 413; Bigwood *v.* R. Co., 209 Mass. 345, 95 N. E. 751; Ryan *v.* Co., 200 Mass. 188, 86 N. E. 310, and local cases cited; Fontaine *v.* Co., 203 Mass. 265, 89 N. E. 533; Brennan *v.* Butler, 107 Minn. 430, 120 N. W. 540; Olson *v.* Pike, 107 Minn. 411, 120 N. W. 378; Binerviez *v.* Haglin, 103 Minn. 297, 115 N. W. 271, 15 L. R. A. (N. S.) 1096; Fink *v.* R. Co., 161 Mo. App. 314, 143 S. W. 568; Levi *v.* R. Co., 157 Mo. App. 536, 138 S. W. 699; Coin *v.* L. Co., 222 Mo. 488, 121 S. W. 1; Graefe *v.* Co., 224 Mo. 232, 123 S. W. 835; Painter *v.* R. Co., 93 Neb. 419, 140 N. W. 787; Rosenstein *v.* McCutcheon, 155 App. Div. 278, 140 N. Y. S. 315; McDonnell *v.* Co., 131 App. Div. 301, 115 N. Y. S. 865; Keenan *v.* E. Co., 129 App. Div. 117, 113 N. Y. S. 343; Schoonmaker *v.* R. Co., 129 App. Div. 467, 113 N. Y. S. 1048; Lane *v.* Cont. Co., 125 App. Div. 808, 110 N. Y. S. 91; Kearns *v.* R. Co., 139 N. C. 470, 52 S. E. 131; Byrd *v.* Co., 139 N. C. 273, 51 S. E. 851; Scherer *v.* Schlaberg, 18 N. D. 421, 122 N. W. 1000; Mt. Marion, etc. Co. *v.* Holt, 54 Tex. Civ. 411, 118 S. W. 825; Texas & P. C. Co. *v.* Kowiskowsiki, 103 Tex. 173, 125 S. W. 3, *rev.* 118 S. W. 829; Baugher *v.* Harman, 110 Va. 316, 66 S. E. 86; Norfolk, etc. Co. *v.* Witt, 110 Va. 117, 65 S. E. 489; Whitehouse *v.* M. Co., 50 Wash. 563, 97 P. 751; Weckter *v.* R. Co., 54 Wash. 203, 102 P. 1053; Moore *v.* Co., 65 W. Va. 552, 64 S. E. 721, *quot.* the text; Stock *v.* Kern, 142 Wis. 219, 125 N. W. 447; Hart *v.* Neillsville, 141 Wis. 3, 123 N. W. 125; Johanson *v.* Mfg. Co., 139 Wis. 181, 120 N. W. 832.

Evidence which does no more than raise a surmise or suspicion insufficient. Griffin *v.* Lumb. Co. (Tex. Civ.), 144 S. W. 303.

Must show facts from which negligence may be reasonably inferred. Carlisle *v.* Co. (Ala.), 62 S. 759; Rosenstein *v.* McCutcheon, 155 App. Div. 278, 140 N. Y. S. 315.

Cause of injury inferred from circumstances. Lunde *v.* Co., 139 Ia. 688, 117 N. W. 1063.

867-39 Louisville, etc. R. Co. *v.* Bell, 206 Fed. 395, 124 C. C. A. 277; Chesapeake & O. R. Co. *v.* Cowley, 166 Fed. 283, 92 C. C. A. 201; Brown *v.* Co., 143 Ia. 662, 120 N. W. 732; Rowell *v.* Gifford, 200 Mass. 546, 86 N. E. 901; Harrison *v.* R. Co., 195 N. Y. 86, 87 N. E. 802, *dist.* Wieland *v.* Co., 167 N. Y. 19, 60 N. E. 234, 82 Am. St. 707. *Comp.* Bender *v.* S. S., (1909) 2 K. B. 41; Marshall *v.* S. S., (1909) 2 K. B. 46. See So Exp. Co. *v.* Williamson, 66 Fla. 286, 63 S. 433; Bochat *v.* Knisely, 144 Ill. App. 551; Parker *v.* Assn., 155 Mich. 72, 118 N. W. 733; Werner *v.* Co., 138 Mo. App. 1, 119 S. W. 1076; Vosler *v.* R. Co., 77 N. J. L. 727, 73 A. 483; Kennedy *v.* Co., 76 N. J. L. 618, 72 A. 382; Kunkel *v.* R. Co., 18 N. D. 367, 121 N. W. 830.

Due care presumed.—Lincoln *v.* R. Co. (Mich.), 146 N. W. 405; Teachout *v.* R. Co. (Mich.), 146 N. W. 241; Wisniewski *v.* R. Co., 177 Mich. 481, 143 N. W. 613; Stottler *v.* Wabash R. Co. (Mo. App.), 164 S. W. 668; Capp *v.* St. Louis, 251 Mo. 345, 158 S. W. 616; Ebert *v.* R. Co., 174 Mo. App. 45, 160 S. W. 34; Ledbetter *v.* Kirksville, 167 Mo. App. 195, 151 S. W. 228; Melzner *v.* Copper Co., 47 Mont. 351, 132 P. 552; Armstrong *v.* Union Stock Yards Co., 93 Neb. 258, 145 N. W. 158; Grimm *v.* Co., 79 Neb. 395, 114 N. W. 769; Wells Fargo & Co. *v.* Benjamin (Tex. Civ.), 165 S. W. 120. *Comp.* Brady *v.* St. Joseph, 167 Mo. App. 423, 151 S. W. 234. See vol. 10, p. 468, n. 6, and supplement thereto.

Cause of injury must be left to jury if evidence leaves it problematical. Palmer *v.* Co., 56 Or. 262, 108 P. 211.

Reasonable inference, though it is not sole one which might be drawn, sufficient. Lehner *v.* R. Co., 223 Pa. 208, 72 A. 525.

Individual responsibility for negligent act need not be shown if injury resulted from thing in defendant's custody. Crawford *v.* Co., 215 Mo. 394, 114 S. W. 1057.

Question for court.—"Sometimes proof of a particular fact establishes the negligence, in case of there being any, because the act of commission or omission, under the circumstances, is negligence as matter of law. Then the act being conclusively established there is nothing for a jury to do. But where whether there was negligence or not is dependable upon inference of fact from evidentiary circumstances, established by direct evidence, or conceded, in general, the question is for the jury. It is only where there is, obviously, no conflict in the permissible inferences from the evidence, circumstantial and direct, that the question is for the court." Ennis *v.* Dock Co., 148 Wis. 655, 134 N. W. 1051. See also Pennsylvania R. Co. *v.* Goughnour, 208 Fed. 961, 126 C. C. A. 39; Middleton *v.* Ross, 202 Fed. 799; American C. & F. Co. *v.* Ruckle, 200 Fed. 47, 118 C. C. A. 275; Little Rock R. & E. Co. *v.* Sledge, 108 Ark. 95, 158 S. W. 1096; Good *v.* Land & Lumb. Co., 107 Ark. 118, 153 S. W. 1107; Tippecanoe, etc. Co. *v.* R. Co. (Ind. App.), 104 N. E. 866; Ashbach *v.* Tel. Co. (Ia.), 146 N. W. 441; Louisville & N. R. Co. *v.* Allnutt (Ky.), 151 S. W. 14; Beiser *v.* R. Co., 152 Ky. 522, 153 S. W. 742; Lexington *v.* E. R. Co. *v.* Fields, 152 Ky. 19, 153 S. W. 43; Chesapeake & O. R. Co. *v.* Warnock's Admr., 150 Ky. 74, 150 S. W. 29; Teachout *v.* R. Co. (Mich.), 146 N. W. 241; Marshall *v.* Taylor, 168 Mo. App. 240, 153 S. W. 527; Dudley *v.* R. Co., 167 Mo. App. 647, 150 S. W. 737; Strnad *v.* William Messer Co., 146 N. Y. S. 129; Garraghty *v.* Hartstein, 26 N. D. 148, 143 N. W. 390; Kirkland *v.* Corp., 97 S. C. 61, 81 S. E. 306; Nashville, etc. R. Co. *v.* Wade, 127 Tenn. 154, 153 S. W. 1020; Freeman *v.* Kennerly (Tex. Civ.), 151 S. W. 580.

867-41 Payne *v.* Bottling Co., 10 Ga. App. 762, 74 S. E. 1087; Atlantic C. L. Co. *v.* Jones, 132 Ga. 189, 63 S. E. 834; Logue *v.* R. Co., 102 Me. 34, 65 A. 522; S. *v.* Co., 120 Md. 65, 87 A. 492; Brown *v.* R. Co., 166 Mo. App. 255, 148 S. W. 457; Cunningham *v.* Dady, 191 N. Y. 152, 83 N. E. 689; St. Louis, etc. R. Co. *v.* Nichols, 39 Okla. 522, 136 P. 159; Kennedy *v.* Williamsport, 11 Pa. Super. 91. See vol. 2, p. 808, n. 5; vol. 2, p. 811, n. 15 and supplements thereto.

Justification or excuse set up in special pleas must be shown by defendant. Such *v.* Derricott, 161 Ala. 259, 49 S. 395.

868-42 Quebec, etc. R. Co. *v.* Julien, 37 Can. Sup. 632; North Jersey St. R. Co. *v.* Hardy, 142 Fed. 955, 74 C. C. A. 125; West. R. *v.* McGraw (Ala.), 62 S. 772; Wood *v.* R. Co., 5 Penne. (Del.) 369, 64 A. 246; Shockley *v.* McCullough, 2 Boyce (Del.) 504, 82 A. 144; Park *v.* Buxton, 10 Ga. App. 356, 73 S. E. 557; Zoeller *v.* Schmitz, 172 Ill. App. 167; Everett *v.* Foley, 132 Ill. App. 438; Nicoll *v.* Sweet (Ia.), 144 N. W. 615; Nagel *v.* R. Co., 169 Mo. App. 284, 152 S. W. 621; Heiberger *v.* Co., 133 Mo. App. 452, 113 S. W. 730; Brown *v.* Co. (Mo. App.), 109 S. W. 1032; Curtis *v.* R. Co., 159 App. Div. 757, 144 N. Y. S. 1007; Sweeney *v.* Elec.-Ill. Co., 158 App. Div. 449, 143 N. Y. S. 636; Pyne *v.* Marx, 152 App. Div. 471, 137 N. Y. S. 338; Moglia *v.* R. Co., 127 App. Div. 243, 111 N. Y. S. 70; Elliott *v.* R. Co., 127 App. Div. 300, 111 N. Y. S. 358; Pearson *v.* Ehrich, 133 N. Y. S. 273; Martin *v.* McCrary, 115 Tenn. 316, 89 S. W. 324; S. W. Tel., etc. Co. *v.* Shirley (Tex. Civ.), 155 S. W. 663; So. P. Co. *v.* Blake (Tex. Civ.), 128 S. W. 668.

See vol. 2, p. 810, n. 10, and supplement thereto.

"Res ipsa loquitur" does not dispense with rule that he who alleges negligence must prove it. It is simply a mode of proving negligence, and does not change burden of proof. Everett *v.* Foley, 132 Ill. App. 438; Heimberger *v.* S. Co., 165 Ill. App. 316; Cunningham *v.* Dady, 191 N. Y. 152, 83 N. E. 689; Wetsell *v.* Reilly, 159 App. Div. 688, 145 N. Y. S. 167; Lyles *v.* Co., 140 N. C. 25, 52 S. E. 233; Ross *v.* Mills, 140 N. C. 115, 52 S. E. 121. See Brown *v.* Co. (Mo. App.), 109 S. W. 1032. But see Husher *v.* P. Co., 158 App. Div. 422, 143 N. Y. S. 639.

869-44 Cleveland, etc. Co. *v.* Jones, 51 Ind. App. 245, 99 N. E. 503; J. S. Young Co. *v.* S., 117 Md. 247, 83 A. 345; Haigh *v.* Co., 123 App. Div. 376, 107 N. Y. S. 936; Harvell *v.* Lumb. Co., 154 N. C. 254, 70 S. E. 389; Tex. & P. R. Co. *v.* Bailey (Tex. Civ.), 150 S. W. 962; Wells Fargo & Co. *v.* Benjamin (Tex. Civ.), 165 S. W. 120; Coffman *v.* R. (Tex. Civ.), 126 S. W. 619; Wharton *v.* Warner, 75 Wash. 470, 135 P. 235.

869-45 Wing *v.* Co., (1909) 2 K. B. 652; Sweeney *v.* Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. ed. 815; Norfolk, etc. Co. *v.* Hauser, 211 Fed. 567 (C. C. A.); Lewis *v.* Koller, 186 Fed. 403; Patton *v.* R. Co., 179 Fed. 530; Missouri, etc. R. Co. *v.* Foreman, 174 Fed. 377, 98 C. C. A. 281; Minahan *v.* R. Co., 138 Fed. 37, 70 C. C. A. 463; Cincinnati, etc. R. Co. *v.* Co., 139 Fed. 528, 71 C. C. A. 316; Leonard *v.* Co., 148 Fed. 827, 78 C. C. A. 517; So. P. R. Co. *v.* Caraway (Ala.), 62 S. 527; Williams *v.* Co., 164 Ala. 84, 51 S. 385; Louisville & N. R. Co. *v.* Fitzgerald, 161 Ala. 397, 49 S. 860; Robinson *v.* Cowan, 158 Ala. 603, 47 S. 1018; St. Louis, I. M. & S. R. Co. *v.* Ramsay, 96 Ark. 37, 131 S. W. 44; St. Louis, S. R. Co. *v.* Lewis, 91 Ark. 343, 121 S. W. 268; Arkansas C. O. Co. *v.* Carr, 89 Ark. 50, 115 S. W. 925; Western C. & Min. Co. *v.* Garner, 87 Ark. 190, 112 S. W. 392; Chicago M. & L. Co. *v.* Cooper, 90 Ark. 326, 119 S. W. 672; White *v.* Spreckels, 10 Cal. App. 287, 101 P. 920; Creede U. M. Co. *v.* Hawman, 23 Colo. App. 125, 127 P. 924; Girardo *v.* Tr. Co. (Del.), 90 A. 476; Conaway *v.* Dukes (Del.), 90 A. 413; Neely *v.* R. Co. (Del.), 89 A. 211; Keith Co. *v.* Co. (Del.), 87 A. 715; Grier *v.* Samuel (Del.), 86 A. 209; Bowen *v.* Steamboat Co. (Del. Super.), 84 A. 1022; Warren *v.* Corp. (Del.), 84 A. 215; Gatta *v.* R. Co., 2 Boyce (Del.) 551, 83 A. 788; Gismondi *v.* R. Co., 2 Boyce (Del.) 577, 83 A. 136; Seininski *v.* Co. (Del.), 83 A. 20; Culbert *v.* Co. (Del.), 82 A. 1081; Riccio *v.* R. Co. (Del.), 82 A. 604; Evans *v.* R. Co., 7 Penne. (Del.) 458, 80 A. 634; Louft *v.* Pyle, 1 Boyce (Del.) 192, 75 A. 619; Wood *v.* R. Co., 5 Penne. (Del.) 369, 64 A. 246; Garrett *v.* R. Co., 6 Penne. (Del.) 29, 64 A. 254; Robinson *v.* Huber, 6 Penne. (Del.) 21, 63 A. 873; Little *v.* Tel. Co., 6 Penne. (Del.) 374, 67 A. 169; Central, etc. R. Co. *v.* Stiles, 139 Ga. 49, 76 S. E. 570; McCabe *v.* Swift, 143 Ill. App. 404; Cleveland, etc. Co. *v.* Jones, 51 Ind. App. 245, 99 N. E. 503; Rush *v.* Co., 135 Ia. 376, 112 N. W. 814; Louisville & N. R. Co. *v.* Taylor's Admx., 158 Ky. 633, 166 S. W. 199; Lunsford *v.* R. Co., 153 Ky. 283, 155 S. W. 378; So. R. Co. *v.* Pope, 133 Ky. 835, 119 S. W. 237; Frederickson *v.* Co., 101 Me. 406, 64 A. 666; Schier *v.* Wehner, 116 Md. 553, 82 A. 76; Stewart *v.* Harman, 108 Md. 446, 70 A. 333; Carney *v.* R. Co., 212 Mass. 179, 98 N. E. 605; Lincoln *v.* R. Co. (Mich.), 146 N. W. 405; Serviss *v.* R. Co., 169 Mich. 564, 135 N. W. 343; Ammer *v.* Postal, 168 Mich. 405, 134 N. W. 453; Edwards *v.* L. Co., 158 Mich. 428, 122 N. W. 1073; Siegel *v.* R. Co., 160 Mich. 270, 125 N. W. 6; Renders *v.* R. Co., 144 Mich. 387, 108 N. W. 368; Jacobson *v.* R. Co., 108 Minn. 517, 120 N. W. 1089; Twitchell *v.* R. Co., 107 Minn. 383, 120 N. W. 531; Webb *v.* Baldwin, 165 Mo. App. 240, 147 S. W. 849; Glaser *v.* Rothschild, 221 Mo. 180, 120 S. W. 1; Hughes *v.* R. Co. (N. J.), 89 A. 769; Kingsley *v.* R. Co., 81 N. J. L. 536, 80 A. 327; Knickerbocker *v.* R. S. Co., 133 App. Div. 787, 118 N. Y. S. 82; Rosenstein *v.* McCutcheon, 155 App. Div. 278, 140 N. Y. S. 415; Tiedjen *v.* E. Co., 130 App. Div. 504, 114 N. Y. S. 1056; Hahn *v.* Opera Co., 126 App. Div. 815, 111 N. Y. S. 161; Burke *v.* Co., 128 App. Div. 680, 112 N. Y. S. 893; Meaney *v.* Horowitz, 115 App. Div. 572, 100 N. Y. S. 975; O'Donohue *v.* Co., 67 Misc. 435, 123 N. Y. S. 193; Moore *v.* Joline, 123 N. Y. S. 117; Dail *v.* Taylor, 151 N. C. 284, 66 S. E. 135; Isley *v.* Co., 141 N. C. 220, 53 S. E. 841; Rush *v.* Co., 51 Or. 519, 95 P. 193; Beck *v.* Club, 37 Pa. Super. 521; Kis-

sock *v.* Co., 15 Pa. Super. 103; McDonnell *v.* Mills, 241 Pa. 61, 88 A. 81; Reeder *v.* Co., 231 Pa. 563, 80 A. 1121; Connolly *v.* Union League, 221 Pa. 21, 69 A. 1125; Finch *v.* R. Co., 87 S. C. 190, 69 S. E. 208; Wells, Fargo & Co. *v.* Benjamin (Tex. Civ.), 165 S. W. 120; Stone & Webster Eng. Corp. *v.* Brewer (Tex. Civ.), 161 S. W. 38; Texas & P. R. Co. *v.* Bailey (Tex. Civ.), 150 S. W. 962; Hopkins *v.* Lumb. Co. (Tex. Civ.), 144 S. W. 310; Commerce, etc. Co. *v.* Camp (Tex. Civ.), 117 S. W. 451; Lone Star B. Co. *v.* Willie, 52 Tex. Civ. 550, 114 S. W. 186; Yellow P. L. Co. *v.* Goble, 115 Va. 682, 79 S. E. 1036; Steele's Admr. *v.* C. & C. Co., 115 Va. 385, 79 S. E. 346; Norfolk & W. R. Co. *v.* Witt, 110 Va. 117, 65 S. E. 489; McCrorey *v.* Thomas, 109 Va. 373, 63 S. E. 1011; Southern R. Co. *v.* Moore, 108 Va. 388, 61 S. E. 747; Mayhew *v.* P. Co., 72 Wash. 431, 130 P. 485; Hogg *v.* Co., 52 Wash. 8, 100 P. 151. See Dickerson *v.* Brittingham (Del.), 86 A. 106; McCormick, etc. Co. *v.* Gabris, 130 Ill. App. 624; Jones *v.* Levy, 50 Misc. 624, 98 N. Y. S. 206; Wharton *v.* Warner, 75 Wash. 470, 135 P. 235; infra, vol. 8, p. 542, n. 9; vol. 10, p. 511, n. 58; vol. 12, p. 126, n. 61 and supplements thereto. *Contra* as to injuries resulting from running trains. St. Louis, etc. R. Co. *v.* Puckett, 88 Ark. 204, 114 S. W. 224, statute.

Violating law constitutes prima facie negligence.—Erie R. Co. *v.* Weber, 207 Fed. 293, 125 C. C. A. 37; Cabanne *v.* Car Co. (Mo. App.), 161 S. W. 597; Clarke *v.* Woop, 159 App. Div. 437, 144 N. Y. S. 595; Hinton *v.* Bogart, 78 Misc. 46, 137 N. Y. S. 697; Mazetti *v.* Co., 75 Wash. 622, 135 P. 633. See Armour *v.* Wanamaker, 202 Fed. 423, 120 C. C. A. 529.

Use of automobiles.—Riley *v.* Fisher (Tex. Civ.), 146 S. W. 581.

Occurrence of accident usually prevented by ordinary care, evidence of negligence. Silverman *v.* Carr, 200 Mass. 396, 86 N. E. 898.

Statutory presumption of negligence does not overcome evidence; places upon defendant duty of showing freedom from negligence. Jennett *v.* R. Co., 162 Fed. 392 (Fla. statute).

870-46 Baltimore & O. R. Co. *v.* Wilson, 117 Md. 198, 83 A. 248; Galveston, etc. R. Co. *v.* Senn (Tex. Civ.), 125 S. W. 322; Norfolk & W. R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445.

Presumed person who caused injury saw what he should and could have seen. McDonald *v.* Yoder, 80 Kan. 25, 101 P. 468.

Criminal negligence may be indicated by circumstances under which casualty occurred. Van Schaick *v.* U. S., 159 Fed. 847, 87 C. C. A. 27.

870-47 Fowler P. Co. *v.* Enzenperger, 77 Kan. 406, 94 P. 995 (neglect of statutory duty); Kansas, etc. Co. *v.* Stark, 77 Kan. 648, 95 P. 1047 (neglect of statutory duty); Von Trebra *v.* Co. 209 Mo. 648, 108 S. W. 559; Lincoln T. Co. *v.* Shepherd, 74 Neb. 369, 374, 107 N. W. 764. See Canadian P. R. Co. *v.* Boisseau, 32 Can. Sup. 424. *Comp.* Battles *v.* R. Co. (Mo. App.), 161 S. W. 614.

It is a reasonable inference that, because a switch was open at the time of an accident, it was open some 30 or 60 seconds before. Barker *v.* R. Co., 51 Ind. App. 669, 99 N. E. 135.

Failure to keep lookout.—Colorado, etc. R. Co. *v.* Charles, 36 Colo. 221, 84 P. 67.

Violation of duty imposed by ordinance, rebuttable evidence of negligence. Shellaberger *v.* Fisher, 143 Fed. 937, 75 C. C. A. 9; Chicago, etc. R. Co. *v.* Freeman, 125 Ill. App. 318.

Act or omission resulting from influence of pressing danger, presumed involuntary. Laidlaw *v.* Sage, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216; Filippone *v.* Reisenburger, 135 App. Div. 707, 119 N. Y. S. 632.

871-48 Sweeney *v.* Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. ed. 815; Hunter *v.* R. Co., 188 Fed. 645, 110 C. C. A. 459; Wood *v.* R. Co., 5 Penne. (Del.) 369, 64 A. 246; Warfield *v.* Hepburn, 62 Fla. 409, 57 S. 618; Helmly *v.* Savannah, 13 Ga. App. 498, 79 S. E. 364; Enright *v.* R. Co., 165 Ill. App. 163; Cubbage *v.* Estate, 155 Ia. 39, 134 N. W. 1074; Dorn *v.* R. Co., 154 Ia. 140, 134 N. W. 855; Chesapeake, etc. Wks. *v.* Co., 119 Md. 303, 86 A. 345; Mirabile *v.* Co., 169 Mich. 522, 135 N. W. 299; Jones *v.* Co., 118 Minn. 217, 136 N. W. 741; Heiberger *v.* Co., 133 Mo. App. 452, 113 S. W. 730; Adams *v.* Hospital, 122 Mo. App. 675, 99 S. W. 453; Beeler *v.* Co., 41 Mont. 465, 110 P. 528; Scherzer *v.* Co., 91 Neb. 407, 136 N. W. 62; Harvey *v.* Proctor, 158 App. Div. 139, 142 N. Y. S. 139; Eaton *v.* R. Co., 125 App. Div. 54, 109 N. Y. S. 419; Muskogee, etc. Co. *v.* McIntire,

37 Okla. 684, 133 P. 213; Shawnee L. & P. Co. *v.* Sears, 21 Okla. 13, 95 P. 449 (improper insulation of electric wire); Kelley *v.* Inv. Co., 66 Or. 1, 133 P. 826; Houston, etc. R. Co. *v.* Roach, 52 Tex. Civ. 95, 114 S. W. 418.

Injuries from defective streets, maxim inapplicable. City of Corbin *v.* Benton, 151 Ky. 483, 152 S. W. 241; Singer Sew. Mach. Co. *v.* R. Co., 216 Mass. 138, 103 N. E. 283; Quinn *v.* Coke Co. (Utah), 129 P. 362, 43 L. R. A. (N. S.) 328.

Maxim applicable.—Larkin *v.* Ice Cream Co., 161 App. Div. 77, 146 N. Y. S. 230; Barnes *v.* Kirk Bros., 32 O. C. C. 233.

This inference must exclude all other inferences.—Lucid *v.* P. Co., 199 Fed. 377, 118 C. C. A. 61; Hollander *v.* Hudson, 152 App. Div. 131, 136 N. Y. S. 594.

Rule inapplicable to treatment of limb by physician. McGraw *v.* Kerr, 23 Colo. App. 163, 128 P. 870.

Applies to officer failing to make return of execution. Smith *v.* Geraty, 61 Misc. 101, 112 N. Y. S. 1100.

Pleading of negligence does not prevent plaintiff from claiming benefit of presumption (Heiberger *v.* T. Co., 133 Mo. App. 452, 113 S. W. 730), unless he alleges specific acts, in which case they must be proved. Hamilton *v.* R. Co., 114 Mo. App. 504, 89 S. W. 893.

872-49 Delaware & H. Co. *v.* Dix, 188 Fed. 901, 110 C. C. A. 535; Byers *v.* Co., 159 Fed. 347, 86 C. C. A. 347; Jaquette *v.* Co., 34 App. Cas. (D. C.) 41; Sinkovitz *v.* Co., 5 Ga. App. 788, 64 S. E. 93; Barnes *v.* Co., 235 Ill. 566, 85 N. E. 921; Paducah T. Co. *v.* Baker, 130 Ky. 360, 113 S. W. 449; Haake *v.* Davis, 166 Mo. App. 249, 148 S. W. 450; Marceau *v.* R. Co., 211 N. Y. 203, 105 N. E. 206; Eaton *v.* R. Co., 195 N. Y. 267, 88 N. E. 378; Cunningham *v.* Dady, 191 N. Y. 152, 83 N. E. 689; Nixon *v.* Co., 131 App. Div. 152, 115 N. Y. S. 130 (non-observance of statute); Bunch *v.* R. Co., 91 S. C. 139, 74 S. E. 363; St. Louis S. F. & T. R. Co. *v.* Cason (Tex. Civ.), 129 S. W. 394; De Yoe *v.* Co., 53 Wash. 588, 104 P. 647. See infra, "Railroads," 468-3; infra, "Street Railroads," 126-61.

Doctrine distinguished from presumption of negligence. Capehardt *v.* Murta, 165 Mo. App. 55, 145 S. W. 827.

Maxim merely a rule of circumstantial evidence which permits inference to be drawn from proved facts. It furnishes a working basis for reasonable hypothetical conjecture, and gives scope for legitimate reasoning by jury. Cochrell *v.* Co., 5 Ga. App. 317, 63 S. E. 244. Its application "presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence." Nebraska, etc. Co. *v.* Jeffery, 169 Fed. 609, 95 C. C. A. 137, *quot.* from Griffen *v.* Manice, 166 N. Y. 188, 59 N. E. 925, 82 Am. St. 630, 52 L. R. A. 922. In absence of maxim negligence may be inferred. Hackett *v.* R. Co., 170 Ill. App. 140; Hughes *v.* R. Co. (N. J.), 89 A. 769.

Proof of specific acts of negligence does not deprive plaintiff of benefit of presumption of negligence under general allegation of negligence. Price *v.* R. Co., 220 Mo. 435, 119 S. W. 932.

872-50 Wyatt *v.* R. Co., 156 Cal. 170, 103 P. 892; White *v.* Spreckels, 10 Cal. App. 287, 101 P. 920; Bowley *v.* Mangrum, 3 Cal. App. 229, 84 P. 996; Sauer *v.* Co., 3 Cal. App. 127, 84 P. 425; Sinkovitz *v.* Co., 5 Ga. App. 788, 64 S. E. 93; Bonham *v.* Arms Co., 179 Ill. App. 469; Coffey *v.* Sampsell, 174 Ill. App. 576; Odum *v.* Ref. Co., 173 Ill. App. 348; Smith *v.* R. Co., 165 Ill. App. 190; Denman *v.* Daniels, 146 Ill. App. 214; Independent B. Assn. *v.* Schaller, 128 Ill. App. 533; Illinois S. Co. *v.* Zolnowski, 118 Ill. App. 209; Helgeson *v.* Higley, 148 Ia. 587, 126 N. W. 769; Walter *v.* Co., 109 Md. 513, 71 A. 953; McNamara *v.* R., 202 Mass. 491, 89 N. E. 131; Rhea *v.* R. Co., 111 Minn. 271, 126 N. W. 823; Woodland G. Co. *v.* Moore (Miss.), 60 S. 574; Rice *v.* R. Co., 153 Mo. App. 35, 131 S. W. 374; Price *v.* R. Co., 220 Mo. 435, 119 S. W. 932; Fleishman *v.* Co., 148 Mo. App. 117, 127 S. W. 660; Freeman *v.* Foreman, 141 Mo. App. 359, 125 S. W. 524; Luecke *v.* Graham, 123 Mo. App. 212, 100 S. W. 505; Kokoll *v.* Co., 77 N. J. L. 169, 71 A. 120 (runaway team hitched to wagon and unattended); Francois *v.* Hanff, 77 N. J. L. 364, 71 A. 1128 (same); Levine *v.* R. Co., 134 App. Div. 606, 119 N. Y. S. 315; Keenan *v.* E. Co., 129 App. Div. 117, 113 N. Y. S. 343; Elliott *v.* R. Co., 127 App. Div. 300, 111 N. Y. S. 358; Moglia *v.* R. Co., 127 App. Div. 243, 111 N. Y. S. 70; Silverberg *v.* New York,

59 Misc. 492, 110 N. Y. S. 992; Eaton *v.* R. Co., 195 N. Y. 267, 88 N. E. 378; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300; Derry C. & C. Co. *v.* Kerbaugh, 222 Pa. 448, 71 A. 915; Lyttle *v.* Denny, 222 Pa. 395, 71 A. 841; Stevenson *v.* Co., 221 Pa. 59, 70 A. 275 (leaving horse unhitched in street); St. Clair *v.* L. Co., 38 Pa. Super. 228; Patterson, etc. Co. *v.* R. Co., 37 Pa. Super. 212; Nelson *v.* R. Co., 92 S. C. 151, 75 S. E. 408; Texas & P. C. Co. *v.* Kowsikowsiki, 103 Tex. 173, 125 S. W. 3, *rev.* s. c. 118 S. W. 829; International, etc. R. Co. *v.* Bradt, 57 Tex. Civ. 82, 122 S. W. 59; St. Louis S. R. Co. *v.* Wilcox, 57 Tex. Civ. 3, 121 S. W. 588; Texas & P. R. Co. *v.* Endsley (Tex. Civ.), 119 S. W. 1150; Galveston, etc. R. Co. *v.* Thompson (Tex. Civ.), 116 S. W. 106; Paris, etc. R. Co. *v.* Robinson, 53 Tex. Civ. 12, 114 S. W. 658; McCrorey *v.* Thomas, 109 Va. 373, 63 S. E. 1011; Peters *v.* Co., 108 Va. 333, 61 S. E. 745, 22 L. R. A. (N. S.) 1188; Bice *v.* Co., 62 W. Va. 685, 59 S. E. 626.

See Seith *v.* Co., 144 Ill. App. 612; Quincy G., etc. Co. *v.* Schmitt, 123 Ill. App. 647; Louisville Co. *v.* Owens, 32 Ky. L. R. 283, 105 S. W. 435; Todd *v.* R. Co., 126 Mo. App. 684, 105 S. W. 671; McGowan *v.* Nelson, 36 Mont. 67, 92 P. 40; McNulty *v.* Ludwig, 153 App. Div. 206, 138 N. Y. S. 84; Cahill *v.* R. T. Co., 52 Pa. Super. 561.

874-51 Barnes *v.* Co., 143 Ill. App. 259; Heiberger *v.* Co., 133 Mo. App. 452, 113 S. W. 730; Williamson *v.* R. Co., 133 Mo. App. 375, 113 S. W. 239; Levine *v.* R. Co., 134 App. Div. 606, 119 N. Y. S. 315; (front of defendant's car ran into car operated by another); McGuigan *v.* R. Co., 224 Pa. 594, 73 A. 958.

It is to be inferred wires of electric system cut on behalf of defendant rather than by trespasser. Gentzkow *v.* R. Co., 54 Or. 114, 102 P. 614.

874-52 Minneapolis E. Co. *v.* Cronon, 166 Fed. 651, 92 C. C. A. 345; Wilkerson *v.* R. Co., 140 Mo. App. 306, 124 S. W. 543; Stelter *v.* Cordes, 130 N. Y. S. 688; Keenan *v.* Co., 129 App. Div. 117, 113 N. Y. S. 343. See Chicago, etc. R. Co. *v.* Lacy, 78 Kan. 622, 97 P. 1025; Twitchell *v.* R. Co., 107 Minn. 383, 120 N. W. 531; Lone Star B. Co. *v.* Willie, 52 Tex. Civ. 550, 114 S. W. 186.

874-53 Sinkovitz *v.* Co., 5 Ga. App. 788, 64 S. E. 93; Brady *v.* R. Co., 76 N. J. L. 744, 71 A. 238; Robinson *v.* Co., 194 N. Y. 37, 86 N. E. 805; Peters *v.* Co., 108 Va. 333, 61 S. E. 745, 22 L. R. A. (N. S.) 1188. See Illinois S. Co. *v.* Zolnowski, 118 Ill. App. 209.

"**The law requires** the plaintiff, where there are two causes, to show with reasonable certainty which of the two causes produced the injury, and if the evidence shows that it resulted from either of two causes, for one of which the defendant is liable and for the other of which he is not liable, the plaintiff is then required to show to which of these causes the injury was due. The plaintiff must offer sufficient evidence to enable the jury to trace the casual connection between defendant's negligence and plaintiff's injury." Fink *v.* R. Co., 161 Mo. App. 314, 143 S. W. 568.

874-54 Western C. & M. Co. *v.* Garner, 87 Ark. 190, 112 S. W. 392; Sauer *v.* Co., 3 Cal. App. 127, 84 P. 425 (two travelers on highway); McGrath *v.* Co., 197 Mo. 97, 94 S. W. 872; Hardie *v.* Co., 205 N. Y. 336, 98 N. E. 661; Keenan *v.* E. Co., 129 App. Div. 117, 113 N. Y. S. 343; Dalzell *v.* R. Co., 136 App. Div. 329, 121 N. Y. S. 28; Crane *v.* Miller, 108 N. Y. S. 1015; Robinson *v.* Co., 53 Misc. 593, 103 N. Y. S. 717. See Laurence *v.* Co., 55 Misc. 257, 105 N. Y. S. 360.

875-55 Elliott *v.* R. Co., 127 App. Div. 300, 111 N. Y. S. 358 (collision between cars of different companies); Kurts *v.* Tran. Co. (Pa.), 90 A. 525.

875-56 Wolven *v.* Co., 143 Mo. App. 643, 128 S. W. 512; McGuigan *v.* R. Co., 224 Pa. 594, 73 A. 958; Geiser *v.* R. Co., 223 Pa. 170, 72 A. 351.

876-57 Minneapolis E. Co. *v.* Cronon, 166 Fed. 651, 92 C. C. A. 345; Stewart *v.* Harman, 108 Md. 446, 70 A. 333; Dentz *v.* R. Co., 75 N. J. L. 893, 70 A. 164 ("presumptions exist in favor of the plaintiff only in the absence, not in the presence of explanation by him").

876-58 Schier *v.* Wehner, 116 Md. 553, 82 A. 976.

877-59 Requena de Molina *v.* Co., 4 P. R. Fed. 356. See Crosby *v.* R. Co., 53 Or. 496, 100 P. 300.

877-60 Minneapolis E. Co. *v.* Cronon, 166 Fed. 651, 92 C. C. A. 345.

878-64 Central R. Co. *v.* Brown, 165 Ala. 493, 51 S. 565; Eaton *v.* R. Co., 1 Boyce (Del.) 435, 75 A. 369; Sinkovitz *v.* Co., 5 Ga. App. 788, 64 S. E. 93;

Cochrell *v.* Co., 5 Ga. App. 317, 63 S. E. 244 (automatic starting of machinery); O'Callaghan *v.* Co., 242 Ill. 336, 89 N. E. 1005; Barnes *v.* Co., 235 Ill. 566, 85 N. E. 921; Denman *v.* Daniels, 146 Ill. App. 214; Jones *v.* Pelly (Ky.), 128 S. W. 305; Tracy *v.* R. Co., 204 Mass. 13, 90 N. E. 416; McNamara *v.* R., 202 Mass. 491, 89 N. E. 131; Beattie *v.* R. Co., 201 Mass. 3, 86 N. E. 920; Gerstler *v.* Weinberg, 160 Mich. 267, 125 N. W. 1; Price *v.* R. Co., 220 Mo. 435, 119 S. W. 932; Fleishman *v.* Co., 148 Mo. App. 117, 127 S. W. 660; Freeman *v.* Foreman, 141 Mo. App. 359, 125 S. W. 524; Pratt *v.* R. Co., 139 Mo. App. 502, 122 S. W. 1125; Boucher *v.* R. Co., 76 N. H. 91, 79 A. 993; Ferrick *v.* Eidlitz, 195 N. Y. 248, 88 N. E. 33; Henson *v.* R. Co., 194 N. Y. 205, 97 N. E. 85; McNulty *v.* Ludwig, 153 App. Div. 206, 138 N. Y. S. 84; Levine *v.* R. Co., 134 App. Div. 606, 119 N. Y. S. 315; McCormack *v.* T. Co., 132 App. Div. 703, 117 N. Y. S. 532; Van Inwegan *v.* R. Co., 126 App. Div. 297, 110 N. Y. S. 959; Silverberg *v.* New York, 59 Misc. 492, 110 N. Y. S. 992; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300; St. Clair *v.* L. Co., 38 Pa. Super. 228; Patterson, etc. Co. *v.* R. Co., 37 Pa. Super. 212; Lyttle *v.* Denny, 222 Pa. 395, 71 A. 841; Petrarca *v.* Co., 27 R. I. 265, 61 A. 648 (machine starting automatically); St. Louis S. R. Co. *v.* Wilcox, 57 Tex. Civ. 3, 121 S. W. 588; Paris, etc. R. Co. *v.* Robinson, 53 Tex. Civ. 12, 114 S. W. 658; Texas & P. R. Co. *v.* Endsley (Tex. Civ.), 119 S. W. 1150; Texas & P. R. Co. *v.* Kowsikowsiki (Tex. Civ.), 118 S. W. 829; Galveston, etc. R. Co. *v.* Thompson (Tex. Civ.), 116 S. W. 106; McCrorey *v.* Thomas, 109 Va. 373, 63 S. E. 1011; Norfolk & W. R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445; De Yoe *v.* Co., 53 Wash. 588, 104 P. 647, 102 P. 446. See Carroll *v.* R. Co., 200 Mass. 527, 86 N. E. 793; Peters *v.* Co., 108 Va. 333, 61 S. E. 745.

Defendant's negligence must be shown by direct evidence to make presumption effective. Keenan *v.* Co., 129 App. Div. 117, 113 N. Y. S. 343.

879-65 Winters *v.* R. Co., 163 Fed. 106; North Jersey, etc. R. Co. *v.* Purdy, 142 Fed. 955, 74 C. C. A. 125; Western Ry. *v.* McGraw (Ala.), 62 S. 772; Louisville & N. R. Co. *v.* Godwin (Ala.), 62 S. 768; St. Louis, etc. R. Co. *v.* Chamberlain, 105 Ark. 180, 150 S. W. 157; Miles *v.* R. Co., 90 Ark. 485, 119 S. W. 837; St. Louis, etc. R. Co. *v.* Stell, 87 Ark. 308, 112 S. W. 876; Nilson *v.* Co., 10 Cal. App. 103, 101 P. 413; Georgia R. & E. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944 (statute); Steiskal *v.* Co., 238 Ill. 92, 87 N. E. 117; Field *v.* Winheim, 123 Ill. App. 227; Louisville, etc. T. Co. *v.* Worrell, 44 Ind. App. 480, 86 N. E. 78; Lake Erie & W. R. Co. *v.* Cotton, 45 Ind. App. 580, 91 N. E. 253; Paducah T. Co. *v.* Baker, 120 Ky. 360, 113 S. W. 449; Minihan *v.* R. Co., 205 Mass. 402, 91 N. E. 414; James *v.* R. Co., 204 Mass. 158, 90 N. E. 513; Beattie *v.* R. Co., 201 Mass. 3, 86 N. E. 920; Gerlach *v.* R. Co., 171 Mich. 474, 137 N. W. 256; Briscoe *v.* R. Co., 222 Mo. 104, 120 S. W. 1162; Williamson *v.* R. Co., 133 Mo. App. 375, 113 S. W. 239; Keller *v.* Realty Co., 128 App. Div. 154, 112 N. Y. S. 538; Moglia *v.* R. Co., 127 App. Div. 243, 111 N. Y. S. 70 (trolley pole); Levine *v.* R. Co., 134 App. Div. 606, 119 N. Y. S. 315; Duhme *v.* Co., 107 App. Div. 237, 94 N. Y. S. 1102; Burke *v.* S., 64 Misc. 558, 119 N. Y. S. 1089; McCormack *v.* T. Co., 61 Misc. 601, 113 N. Y. S. 1006; Nelson *v.* R. Co., 92 S. C. 151, 75 S. E. 408; Williford *v.* R. Co., 85 S. C. 301, 67 S. E. 302; Sutton *v.* R. Co., 82 S. C. 345, 64 S. E. 401; Shelton *v.* R. Co., 86 S. C. 98, 67 S. E. 899; Abilene & S. R. Co. *v.* Burleson (Tex. Civ.), 157 S. W. 1177; So. P. Co. *v.* Blake (Tex. Civ.), 128 S. W. 668; Lewis *v.* R. Co. (Tex. Civ.), 124 S. W. 1006, *cit.* the text; Houston, etc. R. Co. *v.* Roach, 52 Tex. Civ. 95, 114 S. W. 418 (explosion of drum of heating apparatus); Norfolk & W. R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445; Gay *v.* Co., 138 Wis. 348, 120 N. W. 283. See Corbin *v.* Benton, 151 Ky. 483, 152 S. W. 241, 43 L. R. A. (N. S.) 591, 599n; vol. 2, p. 912, et seq.; vol. 10, p. 566, n. 49, and supplements thereto; supra, "Carriers." 912-53, 915-63; infra, "Street Railroads." 123-47. Rule not limited to passengers. Geiser *v.* R. Co., 223 Pa. 170, 72 A. 351.

Where train derailed.—Western Md. R. Co. *v.* Shivers, 101 Md. 391, 61 A. 618. See Quebec, etc. R. Co. *v.* Julien, 37 Can. Sup. 632; Minahan *v.* R. Co., 138 Fed. 37, 70 C. C. A. 463.

Sudden stoppage of car.—Todd *v.* R. Co., 126 Mo. App. 684, 105 S. W. 671.

Elevator falling.—Field *v.* Winheim, 123 Ill. App. 227; Orcutt *v.* Co., 214

Mo. 35, 112 S. W. 532; Edwards *v.* Co., 27 R. I. 248, 61 A. 646.

881-66 Wing *v.* Co., (1909) 2 K. B. 652; Goold *v.* R. Co., 59 Misc. 36, 111 N. Y. S. 1106; St. Louis, etc. R. Co. *v.* Gosnell, 23 Okla. 588, 101 P. 1126 (jerking of freight train, injury to passenger); Cline *v.* R. Co., 226 Pa. 586, 75 A. 850 (in absence of injury to means of transportation).

Test of sufficiency of carrier's appliances is purpose for which they were designed, not incidental purpose to which put. Twitchell *v.* R. Co., 107 Minn. 383, 120 N. W. 531.

882-67 Kirkendall *v.* R. Co., 200 Fed. 197, 205, 118 C. C. A. 383; Western Ry. *v.* McGraw (Ala.), 62 S. 772; Greinke *v.* R. Co., 234 Ill. 564, 85 N. E. 327; Sewell *v.* R., 158 Mich. 407, 123 N. W. 2; Nagel *v.* R. Co., 169 Mo. App. 284, 152 S. W. 621; Price *v.* R. Co., 220 Mo. 435, 119 S. W. 932; Adams *v.* Co., 156 N. C. 174, 72 S. E. 208; Ft. Worth, etc. R. Co. *v.* Day, 50 Tex. Civ. 407, 111 S. W. 663; Harris *v.* R. Co., 52 Wash. 289, 100 P. 838. See vol. 2, p. 915, n. 60, and supplement thereto.

Rule extends to attempt to escape collision.—Lehner *v.* R. Co., 223 Pa. 208, 72 A. 525.

Collision of railroad car with street car, within maxim. McGuigan *v.* R. Co., 224 Pa. 594, 73 A. 958.

Rule applies where collision occurs with car of another carrier, but only against carrier of passenger. Stanbridge *v.* R. Co., 135 App. Div. 38, 119 N. Y. S. 668.

882-69 St. Louis S. R. Co. *v.* Wallace, 90 Ark. 138, 118 S. W. 412; Thompson *v.* R. Co., 136 Mo. App. 404, 117 S. W. 1193 (wrecking of train); Jones *v* R. Co., 148 N. C. 449, 62 S. E. 521.

882-71 Freeman *v.* Foreman, 141 Mo. App. 359, 125 S. W. 524.

883-72 Zachra *v.* Mfg. Co., 159 Mo. App. 96, 139 S. W. 518. See Jones *v.* Pelly (Ky.), 128 S. W. 305; Dittman *v.* Co., 125 App. Div. 691, 110 N. Y. S. 87.

Maxim applicable.—Schulk *v.* Traction Co., 154 Ill. App. 108; Scheurer *v.* Co., 227 Mo. 347, 126 S. W. 1037.

Maxim inapplicable.—Hartford, etc. Ins. Co. *v.* Brew. Co., 201 Fed. 617, 120 C. C. A. 455; Am. Car & Fdry. Co. *v* Barry, 195 Fed. 919, 115 C. C. A. 607; Geraghty *v.* Fire Proofing Co., 157 Ill. App. 308; Geraghty *v.* William Grace Co., 157 Ill. App. 309; Isley *v.* Co., 141 N. C. 220, 53 S. E. 841 (fall of iron from trolley by reason of breaking of chain); St. Louis S. F. & T. R. Co. *v.* Cason (Tex. Civ.), 129 S. W. 394; Lynch *v.* Packing Co., 63 Wash. 423, 115 P. 838; Findley *v.* R. Co. (W. Va.), 78 S. E. 396.

"The mere starting of a machine without the intervention of human agency, and when it should have remained at rest, is of itself evidence of its defective condition." Ryan *v.* Co., 200 Mass. 188, 86 N. E. 310.

884-73 Cincinnati, etc. R. Co. *v.* Co., 139 Fed. 528, 71 C. C. A. 316; Horton *v.* R. Co., 161 Ala. 107, 49 S. 423; St. Louis, etc. R. Co. *v.* Dawson, 77 Ark. 434, 92 S. W. 27; Talmadge *v.* R. Co., 125 Ga. 400, 54 S. E. 128; Martin *v.* McCrary, 115 Tenn. 316, 89 S. W. 324. See Friederich *v.* Klese (Neb.), 145 N. W. 353; infra, "Railroads," 532-12; vol. 10, p. 532, n. 12, et seq., and supplement thereto.

885-75 Presumption of negligence from other fire. Sampson *v.* Hughes, 147 Cal. 62, 81 P. 292.

No presumption of negligence from fire.—Pfeiffer *v.* Aue, 53 Tex. Civ. 98, 115 S. W. 300; Ulrich *v.* Stephens, 48 Wash. 199, 93 P. 206.

886-76 O'Brien *v.* R. Co., 19 Ont. L. R. (Can.) 345 (falling of coal from tender); Chamberlain *v.* R. Co., 159 Ala. 171, 48 S. 703; Gurdon, etc. R. Co. *v.* Calhoun, 86 Ark. 76, 109 S. W. 1017; Ingalls *v.* D. Co., 23 Cal. App. 652, 139 P. 97; Monahan *v.* Realty Co., 4 Ga. App. 680, 62 S. E. 127; Sinkovitz *v.* Co., 5 Ga. App. 788, 64 S. E. 93; Denman *v.* Daniels, 146 Ill. App. 214; Talge M. Co. *v.* Hockett (Ind. App.), 103 N. E. 815; Nicoll *v.* Sweet (Ia.), 144 N. W. 615; Cahill *v.* R. Co., 148 Ia. 241, 125 N. W. 331; Walter *v.* Co., 109 Md. 513, 71 A. 953; O'Neil *v.* Toomey (Mass.), 105 N. E. 974; Gerstler *v.* Weinberg, 160 Mich. 267, 125 N. W. 1; Potera *v.* Brookhaven, 95 Miss. 774, 49 S. 617 (falling of electric lamp, connected with live wires, in street); Booker *v.* R. Co., 144 Mo. 273, 128 S. W. 1012 (trolley wire); Gibbs *v.* L. & P. Co., 142 Mo. App. 19, 125 S. W. 840; Sinay *v.* Co., 140 N. Y. S. 1074; Pearson *v.* Ehrich, 133 N. Y. S. 273; Hebert *v.* E. Co., 136 App. Div. 107, 120 N. Y. S. 672 (contact with electric wire on plaintiff's premises); Hughes *v.* Assn., 131 App. Div. 185, 115 N. Y. S. 320; Morris *v.* Zimmerman, 138 App.

Div. 114, 122 N. Y. S. 900; Cunningham *v.* Daly, 119 App. Div. 89, 103 N. Y. S. 852 (caving of trench); Papazian *v.* Baumgartner, 49 Misc. 244, 97 N. Y. S. 399; McNulty *v.* Ludwig, 125 App. Div. 291, 109 N. Y. S. 703 (fall of sign overhanging sidewalk); Higgins *v.* Ruppert, 124 App. Div. 530, 108 N. Y. S. 919 (falling of merchandise upon customer in store); Lyttle *v.* Denny, 222 Pa. 395, 71 A. 841 (top of folding bed in hotel); Hauer *v.* Elec. Co., 51 Pa. Super. 613; Patterson C. & S. Co. *v.* R. Co., 37 Pa. Super. 212 (breaking and falling of electric wire); Washington *v.* Co. (R. I.), 70 A. 913 (fall of trolley pole on person in street); S. W. Tel. & T. Co. *v.* Shirley (Tex. Civ.), 155 S. W. 663; McCrorey *v.* Thomas, 109 Va. 373, 63 S. E. 1011; Anderson *v.* Co., 49 Wash. 398, 95 P. 325, 16 L. R. A. (N. S.) 931 (basket from overhead carrier system in store fell on customer); Lipsky *v.* Co., 136 Wis. 307, 117 N. W. 803. *Contra*, Frahm *v.* Co., 131 App. Div. 747, 116 N. Y. S. 90; Joyce *v.* Black, 226 Pa. 408, 75 A. 602; Commerce, etc. Co. *v.* Camp (Tex. Civ.), 117 S. W. 451. *Comp.* Bochat *v.* Knisely, 144 Ill. App. 551; Reino *v.* Co., 38 Mont. 291, 99 P. 853. See Corbin *v.* Benton, 151 Ky. 483, 153 S. W. 241, 43 L. R. A. (N. S.) 591, 595n; Brennan *v.* Butler, 107 Minn. 430, 120 N. W. 540.

Maxim inapplicable.—Lewinn *v.* Murphy, 63 Wash. 356, 115 P. 740.

886-77 Britton *v.* Transfer Co., 155 Ill. App. 317; McNamara *v.* R., 202 Mass. 491, 89 N. E. 131 (roof blown from car); Silva *v.* R., 204 Mass. 63, 90 N. E. 547; Fleishman *v.* Co., 148 Mo. App. 117, 127 S. W. 660; Texas & P. R. Co. *v.* Endsley (Tex. Civ.), 119 S. W. 1150. See supra, "Carriers," 918-71.

887-78 Rockwell *v.* McGovern, 202 Mass. 6, 88 N. E. 436 (caving of sidewalk); Teepen *v.* Taylor, 141 Mo. App 282, 124 S. W. 1062; Miller *v.* Co., 141 Mo. App. 462, 126 S. W. 187 (telephone pole); Scharff *v.* Co., 115 Mo. App. 157, 92 S. W. 126; Lubelsky *v.* Silverman, 49 Misc. 133, 96 N. Y. S. 1056. *Contra*, Ferrick *v.* Eidlitz, 195 N. Y. 248, 88 N. E. 33.

887-79 Riley *v.* Co., 82 Neb. 319, 117 N. W. 765; Crosby *v.* R. Co., 53 Or. 496, 101 P. 204.

887-80 Louisville G. Co. *v.* Guelat, 150 Ky. 583, 150 S. W. 656; Hinmon *v.* Co., 75 N. J. L. 869, 70 A. 166; Ballantine *v.* Co., 76 N. J. L. 358, 70 A. 167.

887-81 Silverberg *v.* New York, 59 Misc. 492, 110 N. Y. S. 992; Baker *v.* Schwartz, 113 N. Y. S. 727; St. Clair *v.* Co., 38 Pa. Super. 228.

Furnishing dangerous current of electricity to dwelling, prima facie negligence. Requena de Molina *v.* Co., 4 P. R. Fed. 356. See notes 22 L. R. A. (N. S.) 1183; Ann. Cas. 1913A, 1184.

Injury by escape of electricity, within rule. Southwestern T. & T. Co. *v.* Bruce, 89 Ark. 581, 117 S. W. 564.

Explosion of sufficient powder during fire in store to injure adjacent property and persons in neighborhood, raises presumption of negligence. Requena de Molina *v.* Co., 4 P. R. Fed. 356.

888-83 Reliance Wks. Co. *v.* Williams, 136 Ky. 777, 124 S. W. 850; Fitzgerald *v.* Goldstein, 56 Misc. 677, 107 N. Y. S. 614; Elliott *v.* R. Co., 127 App. Div. 300, 111 N. Y. S. 358. See Hull *v.* R. Co. (Mass.), 104 N. E. 747; Cook *v.* Newhall, 213 Mass. 392, 101 N. E. 72.

Where specific negligence alleged, rules of res ipsa loquitur inapplicable. Israel *v.* R. Co., 172 Mo. App. 656, 155 S. W. 1092; Mullery *v.* Tel. Co. (Mo. App.), 168 S. W. 213; Price *v.* R. Co., 220 Mo. 435, 119 S. W. 932; Feary *v.* R. Co., 162 Mo. 75, 62 S. W. 452; Tighe *v.* R. Co. (Mo. App.), 107 S. W. 1034; Kennedy *v.* R. Co., 128 Mo. App. 297, 107 S. W. 16; McGrath *v.* Co., 197 Mo. 97, 94 S. W. 872; Todd *v.* R. Co., 126 Mo. App. 684, 105 S. W. 671; Gulf Pipe L. Co. *v.* Brymer (Tex. Civ.), 124 S. W. 1007.

Doctrine need not be invoked if there is any specific evidence, positive or circumstantial, warranting reasonable inference of negligence. Western S. C. & F. Co. *v.* Cunningham, 158 Ala. 369, 48 S. 109.

889-84 See Gerstler *v.* Weinberg, 160 Mich. 267, 125 N. W. 1.

889-85 Exclusion of all other possible causes of injury, not required. Fleishman *v.* Co., 148 Mo. App. 117, 127 S. W. 660.

889-86 See Eaton *v.* R. Co., 195 N. Y. 267, 88 N. E. 378.

Futile attempt by either or both parties to show cause of injury does not affect application of maxim. McNamara *v.* R., 202 Mass. 491, 89 N. E. 131.

889-87 Southwestern T. & T. Co. *v.* Bruce, 89 Ark. 581, 117 S. W. 564; Sinkovitz *v.* Co., 5 Ga. App. 788, 64 S. E. 93; Denman *v.* Daniels, 146 Ill. App. 214; Jones *v.* Pelly (Ky.), 128 S. W. 305; Walter *v.* Co., 109 Md. 513, 71 A. 953; McNamara *v.* R., 202 Mass. 491, 89 N. E. 131; Rockwell *v.* McGovern, 202 Mass. 6, 88 N. E. 436; Potera *v.* Brookhaven, 95 Miss. 774, 49 S. 617; Booker *v.* R. Co., 144 Mo. App. 273, 128 S. W. 1012; Baker *v.* R. Co., 142 Mo. App. 354, 126 S. W. 764; Heiberger *v.* T. Co., 133 Mo. App. 452, 113 S. W. 730; Moglia *v.* R. Co., 127 App. Div. 243, 111 N. Y. S. 70; Hebert *v.* Co., 136 App. Div. 107, 120 N. Y. S. 672; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300, 101 P. 204; McGuigan *v.* R. Co., 224 Pa. 594, 73 A. 958; St. Clair *v.* L. Co., 38 Pa. Super. 228; Texas & P. R. Co. *v.* Endsley (Tex. Civ.), 119 S. W. 1150; St. Louis S. R. Co. *v.* Wilcox, 57 Tex. Civ. 3, 121 S. W. 588. See infra, "Street Railroads," 126-61.

Doctrine not applicable in case of trespasser or licensee. McLain *v.* R. Co., 121 Ill. App. 614.

890-88 O'Brien *v.* R. Co., 19 Ont. L. R. 345; Chamberlain *v.* R. Co., 159 Ala. 171, 48 S. 703; Stephen *v.* Duffy, 142 Ill. App. 219 (servant not connected with work in which damaging agency used); Cahill *v.* R. Co., 148 Ia. 241, 125 N. W. 331; Illinois R. Co. *v.* Vaughn, 33 Ky. L. R. 906, 111 S. W. 707 (collision); Doherty *v.* Booth, 200 Mass. 522, 86 N. E. 945; Gerstler *v.* Weinberg, 160 Mich. 267, 125 N. W. 1; Jenkins *v.* R. Co., 105 Minn. 504, 117 N. W. 928; Mobile, etc. R. Co. *v.* Hicks, 91 Miss. 273, 46 S. 360 (derailment of car as result of excessive speed on unballasted track); Scheurer *v.* Co., 227 Mo. 347, 126 S. W. 1037; Gibler *v.* R. Co., 148 Mo. App. 475, 128 S. W. 791; Miller *v.* Co., 141 Mo. App. 462, 126 S. W. 187; Pratt *v.* R. Co., 139 Mo. App. 502, 122 S. W. 1125; Riley *v.* Co., 82 Neb. 319, 117 N. W. 765; Marceau *v.* R. Co., 211 N. Y. 203, 105 N. E. 206; Lorenzo *v.* Faillace, 132 App. Div. 103, 116 N. Y. S. 326 (under labor laws, 1897); Van Suwegen *v.* R. Co., 110 N. Y. S. 959; Duvall *v.* R., 152 N. C. 524, 67 S. E. 1008 (collision); Trimmier *v.* R. Co., 81 S. C. 203, 62 S. E. 209 (misplaced switch); Missouri, etc. R. Co. *v.* Williams, 103 Tex. 228, 125 S. W. 881; Gulf, etc. R. Co. *r.* McGinnis (Tex. Civ.), 147 S. W. 1188; International, etc. R. Co. *v.* Bradt, 57 Tex. Civ. 82, 122 S. W. 59; Texas & P. C. Co. *r.* Kowsikowsiki (Tex. Civ.), 118 S. W. 829; Galveston, etc. R. Co. *v.* Thompson (Tex. Civ.), 116 S. W. 106 (derailment of engine); Le Bee *v.* Co., 51 Wash. 81, 97 P. 1104, 47 Wash. 57, 91 P. 560 (breaking of cable furnished by master for particular purpose when properly used); Cleary *v.* Co., 53 Wash. 254, 101 P. 888 (fall of scaffolding furnished by master while used properly); Lipsky *v.* Co., 136 Wis. 307, 117 N. W. 803. *Contra,* Northern P. R. Co. *v.* Dixon, 139 Fed. 737, 71 C. C. A. 555; Lone Star B. Co. *v.* Solcher (Tex. Civ.), 126 S. W. 26. *Comp.* Ashcraft *v.* Wks., 148 Ia. 420, 126 N. W. 1111; Feingold *v.* Co., 113 N. Y. S. 1018, where it is said doctrine can rarely be invoked between employer and employe. "There must appear from the surrounding circumstances attending the accident that, except for some negligence on the part of the master either of omission or commission, the accident would not have happened." See Lane *v.* Co., 125 App. Div. 808, 110 N. Y. S. 91. And see notes 6 L. R. A. (N. S.) 337; 16 L. R. A. (N. S.) 214.

The Georgia act of 1909 "creates a cause of action in all cases where an employe is killed or injured as the result of negligence on the part of the agents or servants of a railroad company, or negligent defects in its equipment or roadbed. If death results from an injury to an employe, the company is presumed to have been negligent, and carries the burden of proving diligence. 'If death does not result from the injury, the presumption of negligence shall be and remain as now provided by law in case of injury received by an employe in the service of a railroad company.' Civil Code 1910, §2782. In Wrightsville & Tennille R. Co. *v.* Tompkins, 9 Ga. App. 154, 70 S. E. 955, this court had occasion to discuss the act of 1909 at some length, and especially that part of the statute quoted above. It was held that the act 'did not affect existing presumption, so far as an employe injured, but not killed, is concerned.'" Atkinson *v.* Swords, 11 Ga. App. 167, 74 S. E. 1093.

Application of rule in favor of employes.—Rule applied in favor of employes in these cases: Byers *v.* Co., 159 Fed. 347, 86 C. C. A. 347; Sullivan

v. Rowe, 194 Mass. 500, 80 N. E. 459; Moynihan v. Co., 146 Mass. 586, 16 N. E. 574, 4 Am. St. 348; McLean v. R. Co., 137 Mich. 482, 100 N. W. 748; Schoepper v. Co., 113 Mich. 582, 71 N. W. 1081; Sackewitz v. Co., 78 Mo. App. 144; Gorman v. Milliken, 42 Misc. 336, 86 N. Y. S. 699; Samuels v. McKesson, 99 N. Y. S. 294; Fearington v. Co., 141 N. C. 80, 53 S. E. 662; Hemphill v. Co., 141 N. C. 487, 54 S. E. 420.

Distinctions. — These cases illustrate grounds upon which the rule rests and state some distinctions governing its application: Patton v. R. Co., 179 U. S. 658; Cincinnati, etc. R. Co. v. Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533; Illinois C. R. Co. v. Coughlin, 132 Fed. 801, 65 C. C. A. 101; Carnegie S. Co. v. Byers, 149 Fed. 667, 82 C. C. A. 115, 8 L. R. A. (N. S.) 677; Griffin v. R. Co., 148 Mass. 143, 19 N. E. 166, 12 Am. St. 526, 1 L. R. A. 698. See 890-89.

890-89 Cryder v. R. Co., 152 Fed. 417, 81 C. C. A. 559; Henahan v. Lyons, 201 Mass. 269, 87 N. E. 602; Lane v. Co., 125 App. Div. 808, 110 N. Y. S. 91 ("the doctrine of res ipsa loquitur as between employer and employed can rarely be invoked").

891-90 Henahan v. Lyons, 201 Mass. 269, 87 N. E. 602; Texas & P. C. Co. v. Kowsikowiski, 103 Tex. 173, 125 S. W. 3.

891-92 Byers v. Co., 159 Fed. 347, 86 C. C. A. 347; Chamberlain v. R. Co., 159 Ala. 171, 48 S. 703; Sullivan v. Tr. Co., 34 App. Cas. (D. C.) 358; Sinkovitz v. Co., 5 Ga. App. 788, 64 S. E. 93; Thompson v. R. Co., 243 Mo. 336, 148 S. W. 484; Gibler v. R. Co., 148 Mo. App. 475, 128 S. W. 791; Morris v. Zimmerman, 138 App. Div. 114, 122 N. Y. S. 900; Elliott v. R. Co., 127 App. Div. 300, 111 N. Y. S. 358; Jones v. R. Co., 148 N. C. 449, 62 S. E. 521; Martin v. Trans. Co., 237 Pa. 15, 85 A. 29.

892-94 Birmingham, etc. Co. v. Demmins, 3 Ala. App. 359, 57 S. 404. See infra, "Railroads," 514-20, et seq., and vol. 10, p. 514, n. 20, and supplement thereto.

893-95 See vol. 10, p. 515, n. 22, and supplement thereto.

893-96 See vol. 10, p. 516, n. 23, and supplement thereto.

894-97 See Mobile L. & R. Co. v. McKay, 163 Ala. 111, 50 S. 1035.

894-98 St. Louis S. W. R. Co. v. Conley (Tex. Civ.), 142 S. W. 36.

894-1 Birmingham, etc. Co. v. Demmins, 3 Ala. App. 359, 57 S. 404; Carlisle v. R. Co., 166 Ala. 591, 52 S. 341; Ga. So. & F. R. Co. v. Kell, 10 Ga. App. 675, 73 S. E. 1074; Oliveira v. Co. (R. I.), 72 A. 817.

895-4 **Gross negligence not presumed from happening of accident in absence of evidence showing degree of carelessness considerably in excess of that essential to show mere negligence.** Martin v. R. Co., 205 Mass. 16, 91 N. E. 159.

896-5 Hare v. R. Co., 101 Ark. 564, 142 S. W. 862; Cleveland, etc. Co. v. Jones, 51 Ind. App. 245, 99 N. E. 503; Williams v. Lumb. Co., 125 La. 1087, 52 S. 167; Wisniewski v. R. Co., 177 Mich. 481, 143 N. W. 613; La Pray v. Lavoris Chemical Co., 117 Minn. 152, 134 N. W. 313; Jewell v. Co., 143 Mo. App. 200, 127 S. W. 598; Chase v. R. Co., 91 Neb. 81, 135 N. W. 430; Martin v. R. Co., 81 N. J. L. 562, 80 A. 477; Ft. Worth, etc. R. Co. v. Staleup (Tex. Civ.), 167 S. W. 279; Marshall, etc. R. Co. v. Petty (Tex. Civ.), 145 S. W. 1195; Mitchell v. Coke Co., 67 W. Va. 480, 68 S. E. 366. See vol. 9, p. 895, n. 72.

On the contrary, in the absence of evidence, the law presumes that the deceased was exercising reasonable and ordinary care at the time of his injury with a view to his safety. Albrecht v. Morris, 91 Neb. 442, 136 N. W. 48; Schaefer v. Ice Co., 238 Pa. 367, 86 A. 193.

Burden of showing freedom from negligence in use of automobile on highway is on owner. McIntyre v. Coote, 19 Ont. L. R. 9, statute.

896-6 New Connellsville Coal & Coke Co. v. Kilgore, 4 Ala. App. 334, 58 S. 966; Kilby Frog & Switch Co. v. Jackson, 175 Ala. 125, 57 S. 691; Gatta v. Phila. B. & W. R. Co., 2 Boyce (Del.) 551, 83 A. 788; Louisville & N. R. Co. v. Moran, 148 Ky. 418, 146 S. W. 1131; Peyton v. City, 130 La. 986, 58 S. 852; Williams v. Union F. Co., 126 La. 502, 52 S. 678; Norris v. Anthony, 193 Mass. 225, 79 N. E. 258; Leary v. Tr. Co., 171 Mich. 365, 137 N. W. 225; Borden v. City, 161 Mo. App. 633, 144 S. W. 161; Harrington v. R. Co., 37 Mont. 169, 95 P. 8. 16 L. R. A. (N. S.) 395 (*cit.* cases pro and con); Dunn v. R. Co., 122 N. Y. S.

1066; Brudie *v.* Branch Inc., 122 N. Y. S. 963; International, etc. R. Co. *v.* Brice (Tex. Civ.), 111 S. W. 1094.

Failure to follow advice of fellow workers in protecting himself from blast does not render plaintiff guilty of contributory negligence as a matter of law. Chenoa-Hignite C. Co. *v.* Philpot's Admr., 152 Ky. 385, 153 S. W. 457.

Under the federal employers' liability act contributory negligence can only be shown in mitigation of damages. Hall *v.* Co., 169 Ill. App. 12. See supra, "Damages," 19-41; also "Master and Servant," 544-26.

Negligence.—But an employe, in a dangerous place in the discharge of his duties, is not therefore guilty of contributory negligence. Paris & G. N. R. Co. *v.* Boston (Tex. Civ.), 142 S. W. 944.

896-7 Griskell *v.* R. Co., 81 S. C. 193, 62 S. E. 205.

A boy of ten or eleven years of age, who is not shown to be deficient mentally, must be presumed to know the danger to be anticipated from crossing in front of a moving car. Byrnes *v.* R. Co., 133 N. Y. S. 243.

897-9 Phelps *v.* Board of Comrs., 118 Md. 175, 82 A. 1058.

The mere fact that one occupies a position upon the public highway for some minutes did not as a matter of law make him guilty of contributory negligence. Berler *v.* Kane, 139 App. Div. 76, 123 N. Y. S. 835.

Presence in the street of a push-cart peddler is not contributory negligence per se. Collender *v.* Reardon, 123 N. Y. S. 587.

897-10 Indianapolis *v.* Keeley, 167 Ind. 516, 79 N. E. 499; Loftus *v.* L. Co. (Mass.), 104 N. E. 575. *Comp.* Harrington *v.* R. Co., 37 Mont. 169, 95 P. 8, 16 L. R. A. (N. S.) 395.

898-11 But see Stotler *v.* R. Co., 200 Mo. 107, 98 S. W. 509, where plaintiff was left by injuries as though dead and had no knowledge of the affair, she was entitled to presumption of due care.

898-12 Rothschild *v.* Levy, 118 Ill. App. 78.

898-13 Rollins *v.* R. Co., 139 Fed. 639, 71 C. C. A. 615; C. & E., etc. R. Co. *v.* Heerey, 203 Ill. 492, 68 N. E. 74; Rosenthal *v.* R. Co., 164 Ill. App 221 (accident at railroad crossing); Chicago *v.* Thomas, 141 Ill. App. 122; Elgin, etc. R. Co. *v.* Hoadley, 122 Ill. App. 165; Breen *v.* R. Co. (Ia.), 143 N. W. 846; Ellis *v.* Co., 133 Ia. 11, 110 N. W. 20; Gilbert *v.* R. Co., 161 Mich. 73, 125 N. W. 745; Chase *v.* R. Co., 91 Neb. 81, 135 N. W. 430; Grimm *v.* Co., 79 Neb. 395, 114 N. W. 769; Stewart *v.* R. Co., 141 N. C. 253, 53 S. E. 877. See also vol. 9, p. 895, n. 72.

Presumption does not relieve plaintiff of proof of negligence on defendant's part or that injury was caused thereby. Powers *v.* R. Co., 143 Mich. 379, 106 N. W. 1117.

899-15 Cahill *v.* Stone, 153 Cal. 571, 96 P. 84; Jollimore *v.* Conn. Co., 86 Conn. 314, 85 A. 373; Wilkinson *v.* Co., 64 W. Va. 93, 61 S. E. 875 (infant over fourteen presumed sensible of danger and to have power to avoid it). But see Gregg *v.* King Co. (Wash.), 141 P. 340. *Comp.* Richardson *v.* Nelson, 221 Ill. 254, 77 N. E. 583 (child under seven incapable of contributory negligence); Chicago, etc. R. Co. *v.* Freeman, 125 Ill. App. 318 (child between five and six not guilty of contributory negligence); U. S. N. G. Co. *v.* Hicks, 134 Ky. 12, 119 S. W. 166; Cincinnati, etc. R. Co. *v.* Sowders (Ky.), 119 S. W. 203 (under fourteen presumed, prima facie, not to know what will be result of acts); Cherry *v.* R. Co., 163 Mo. App. 53, 145 S. W. 837; Gress *v.* R. Co., 228 Pa. 482, 77 A. 810; Tucker *v.* Mills, 76 S. C. 539, 57 S. E. 626 (infant between seven and fourteen is presumed incapable of contributory negligence). *Contra* as to child of ten or twelve. Potera *v.* Brookhaven, 95 Miss. 774, 49 S. 617.

No precise age at which child considered capable of exercising care for his own protection and chargeable with negligence as if he were adult. Cahill *v.* Stone, 153 Cal. 571, 96 P. 84; R. Co. *v.* Carlson, 58 Kan. 62, 48 P. 635; Biggs *v.* Co., 60 Kan. 217, 56 P. 4, 44 L. R. A. 655.

The question as to whether a child's capacity is such that it may be chargeable with contributory negligence is a question of fact for the jury, unless so young and immature as to require the court to judicially know that it could not contribute to its own injury or be responsible for its acts, or so old and mature that the court must know that, though an infant, yet it is responsible. Birmingham & A. R. Co. *v.* Mattison, 166 Ala. 602, 52 S. 49.

A child four years of age is not charge-

able with contributory negligence. Howard *v.* Scarritt Estate Co., 161 Mo. App. 552, 144 S. W. 185.

If a child is incapable of exercising care, the issue of negligence on its part must be determined by the conduct of those having charge of it. Grella *v.* Wharf Co., 211 Mass. 54, 97 N. E. 745.

900-16 See infra, "Presumptions," 885-25, et seq.

Burden of proof not affected by rule of res ipsa loquitur. Accident regarded as some evidence of negligence in jury's discretion. Sweeney *v.* Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. ed. 815; Morrisett *v.* Mills, 151 N. C. 31, 65 S. E. 514.

900-17 Easley *v.* R. Co., 96 Miss. 396, 50 S. 491; MacDonald *v.* R. Co., 219 Mo. 468, 118 S. W. 78; Kokoll *v.* Co., 77 N. J. L. 169, 71 A. 120; Levine *v.* R. Co., 134 App. Div. 606, 119 N. Y. S. 315; Mizzell *v.* Mfg. Co., 158 N. C. 265, 73 S. E. 802; Dormer *v.* Co., 16 Pa. Super. 407; San Antonio T. Co. *v.* Probandt (Tex. Civ.), 125 S. W. 931 (presumption continues until rebutted); Ft. Worth, etc. Co. *v.* Day, 50 Tex. Civ. 407, 111 S. W. 663. See supra, 900-16.

901-19 Williford *v.* R. Co., 85 S. C. 301, 67 S. E. 302. See infra, "Street Railroads," 123-48.

Burden not shifted to defendant where it has attempted to remove imputation of negligence. Ft. Worth, etc. R. Co. *v.* Day, 50 Tex. Civ. 407, 111 S. W. 663.

901-20 Southwestern T. & T. Co. *v.* Bruce, 89 Ark. 581, 117 S. W. 564; Nawrocki *v.* R. Co., 156 Ill. App. 563, *aff.* 248 Ill. 101, 93 N. E. 332; Schaller *v.* Assn., 225 Ill. 492, 80 N. E. 334; Paducah T. Co. *v.* Baker, 130 Ky. 360, 113 S. W. 419; Horn *v.* Breakstone, 133 N. Y. S. 285; Lorenzo *v.* Faillace, 132 App. Div. 103, 116 N. Y. S. 326; Nigro *v.* Willson, 50 Misc. 656, 99 N. Y. S. 344; International, etc. R. Co. *v.* Sandlin, 57 Tex. Civ. 151, 122 S. W. 60; Galveston, etc. R. Co. *v.* Thompson (Tex. Civ.), 116 S. W. 106.

902-21 Grant *v.* Bangor R. & Elec. Co., 109 Me. 133, 83 A. 121; Gates *v.* Beebe, 170 Mich. 107, 135 N. W. 934.

Boarding moving car is not conclusive evidence of contributory negligence. Palfrey *v.* United Rys. Co. of S. & L., 162 Mo. App. 470, 142 S. W. 773.

902-22 Nebraska, etc. Co. *v.* Jeffery, 169 Fed. 609, 95 C. C. A. 137; Seaboard A. L. R. Co. *v.* Thompson, 57 Fla. 155, 48 S. 750 (statutory presumption); Sewell *v.* R., 158 Mich. 407, 123 N. W. 2; Alcott *v.* Co., 77 N. J. L. 110, 71 A. 45.

Presumption does not survive sufficient proof of due care by defendant; it is for jury to infer negligence from application of it. Jenkins *v.* Co., 105 Minn. 504, 117 N. W. 925. Authority of jury to decide whether inference of negligence shall be drawn can be excluded only by "undisputed proof, not merely testimony, that such negligence did not occur." Lipsky *v.* Co., 136 Wis. 307, 117 N. W. 803.

Burden on plaintiff to show damage did not result from cause not within defendant's control. Cass *v.* Sanger, 77 N. J. L. 412, 71 A. 1126.

Evidence in rebuttal must be clear. Easley *v.* R. Co., 96 Miss. 396, 50 S. 491.

902-23 Proof accident might have happened without negligence rebuts presumption. Gay *v.* Co., 138 Wis. 348, 120 N. W. 283.

Pleading specific acts of negligence prevents application of rule of res ipsa loquitur. Gibler *v.* R. Co., 148 Mo. App. 475, 128 S. W. 791.

902-24 Alabama Great So. R. Co. *v.* Demoville, 167 Ala. 292, 52 S. 406; Louisville & N. R. Co. *v.* Fitzgerald, 161 Ala. 397, 49 S. 860; Gulf C. Co. *v.* Harrington, 90 Ark. 256, 119 S. W. 249; Jones *v.* Leonardt, 10 Cal. App. 284, 101 P. 811; Silva *v.* R., 201 Mass. 63, 90 N. E. 547; Ammer *v.* Postal, 168 Mich. 405, 134 N. W. 453; Hanke *v.* Davis, 166 Mo. App. 249, 148 S. W. 450; Werner *v.* R. Co., 138 Mo. App. 1, 119 S. W. 1076; Eder *v.* Post, 135 App. Div. 859, 120 N. Y. S. 139; Inglese *v.* R. Co., 133 App. Div. 198, 117 N. Y. S. 292; Houston, etc. R. Co. *v.* Boone, 105 Tex. 188, 146 S. W. 533; Missouri, etc. R. Co. *v.* Bush, 56 Tex. Civ. 69, 120 S. W. 224.

903-25 Dubois *v.* Luthmers, 147 Ia. 315, 126 N. W. 147.

Fact of injury is evidence of contributory negligence. Glaser *v.* Rothschild, 221 Mo. 180, 120 S. W. 1.

903-26 Stollery *v.* R. Co., 243 Ill. 290, 90 N. E. 709; Elgin, etc. R. Co. *v.* Hoadley, 220 Ill. 462, 77 N. E. 151; Pittsburgh, etc. R. Co. *v.* Ins. Co., 44 Ind. App. 268, 87 N. E. 995.

903-27 But see Prince *v.* Co., 201 Mass. 276, 87 N. E. 575.

Rule due care proved if enough circumstances are shown to support infer-

ence nothing in plaintiff's conduct contributed to injury (ibid) does not apply unless all circumstances relating to decedent's conduct at time of injury are shown. French *v.* Sabin, 202 Mass. 240, 88 N. E. 845.

Exception if positive testimony cannot be procured. Prince *v.* Co., 201 Mass. 276, 87 N. E. 558; Hamma *v.* Co., 203 Mass. 572, 89 N. E. 1043.

904-28 Baxter *v.* R. Co., 190 N. Y. 439, 83 N. E. 469, in action for death freedom from contributory negligence may be shown by circumstantial evidence. *Contra,* Coney *v.* Finn, 130 App. Div. 440, 114 N. Y. S. 864 (labor law, 1897). See Riggs *v.* Co., 134 App. Div. 672, 119 N. Y. S. 548.

904-29 Montreal, etc. P. Co. *v.* Regan, 40 Can. Sup. 580; Waters-P. O. Co. *v.* Deselms, 212 U. S. 159; Reed *v.* R. Co., 162 Fed. 750 (between master and servant); St. Louis, etc. R. Co. *v.* Hempfling, 107 Ark. 476, 156 S. W. 171; St. Louis S. R. Co. *v.* Lewis, 91 Ark. 343, 121 S. W. 268; Morse *v.* R. Co., 81 Conn. 395, 71 A. 553; Calkins *v.* Lumb. Co., 23 Ida. 128, 129 P. 435; Humason *v.* R. Co., 259 Ill. 462, 102 N. E. 793; Smith *v.* R. Co., 169 Ill. App. 132; Elgin, etc. R. Co. *v.* Hoadley, 220 Ill. 462, 77 N. E. 151; Chicago *v.* Thomas, 141 Ill. App. 122; Pittsburgh, etc. R. Co. *v.* O'Conner, 171 Ind. 686, 85 N. E. 969; Evansville M. B. Co. *v.* Loge, 42 Ind. App. 461, 85 N. E. 979; Donda *v.* R. Co., 141 Ia. 82, 119 N. W. 272; Louisville & N. R. Co. *v.* Hahn, 135 Ky. 251, 122 S. W. 142; Huddleston *v.* Co., 138 Ky. 506, 128 S. W. 589; O'Donnell *v.* R. Co., 205 Mass. 200, 90 N. E. 977; Rowe *v.* Bregenzer, 161 Mich. 684, 126 N. W. 706; Scheurer *v.* Co., 227 Mo. 347, 126 S. W. 1037; Gordon *v.* R. Co., 222 Mo. 516, 121 S. W. 80; Adams *v* R. Co., 174 Mo. App. 5, 160 S. W. 38; Collins *v.* M. Co., 143 Mo. App. 333, 127 S. W. 641; Jewell *v.* Mfg. Co., 143 Mo. App. 200, 127 S. W. 598; Potter *v.* R. Co., 142 Mo. App. 220, 126 S. W. 209; Wallace *v.* R. Co., 48 Mont. 427, 138 P. 499; Osterholm *v.* Co., 40 Mont. 508, 107 P. 499; Dail *v.* Taylor, 151 N. C. 284, 66 S. E. 135; Coalgate *v.* Hurst, 25 Okla. 588, 107 P. 657; Gynther *v.* Brown, 67 Or. 310, 134 P. 1186; Rogers *v.* Co., 54 Or. 387, 103 P. 514; Tucker *v* R. Co., 227 Pa. 66, 75 A. 991; Thornton *v.* Ry. (S. C.), 82 S. E. 433; Walton *v.* Burchel, 121 Tenn. 715, 121 S. W. 391; Gulf, etc. R. Co. *v.* Fowler, 57 Tex. Civ. 556, 122 S. W. 593; International, etc. R. Co. *v.* Bradt, 57 Tex. Civ. 82, 122 S. W. 59; Bush *v.* M. Co., 54 Wash. 212, 103 P. 45; Ohrstrom *v.* Tacoma, 57 Wash. 121, 106 P. 629.

See Burns *v.* United R. Co., 176 Mo. App. 330, 158 S. W. 394; vol. 2, p. 920, n. 79; vol. 2, p. 936, n. 19; vol. 3, p. 103, n. 38, and supplement thereto.

905-30 Delaware & H. Co. *v.* Beemer, 171 Fed. 821, 96 C. C. A. 493; Louisville & N. R. Co. *v.* Dilburn, 178 Ala. 600, 59 S. 438; Robertson *v.* Co., 238 Ill. 344, 87 N. E. 373; Wullner *v.* C. Co., 145 Ill. App. 486; Stewart *v.* R. Co., 136 Ky. 717, 125 S. W. 154; Jackson *v.* R. Co., 161 Mich. 163, 125 N. W. 763; Harrison *v.* R. Co., 195 N. Y. 86, 87 N. E. 802; Sanders *v.* R. Co., 160 N. C. 526, 76 S. E. 553; St. Louis S. R. Co. *v.* Ford, 56 Tex. Civ. 521, 121 S. W. 709; Missouri, etc. R. Co. *v.* Williams (Tex. Civ.), 117 S. W. 1043.

Written report by employe to his superior, not admissible. Central Union D. & R. Co. *v.* Mansfield, 169 Fed. 614, 95 C. C. A. 142.

905-31 Girard *v.* Co., 82 Conn. 271, 73 A. 747; Betts *v.* Hancock, 139 Ga. 198, 77 S. E. 77; Blair *v.* R. Co., 243 Ill. 224, 90 N. E. 691; Conover *v.* Coal Co., 161 Ill. App. 74; Savage *v.* Hayes, 142 Ill. App. 316; Interstate C. Co. *v.* Shelton, 152 Ky. 92, 153 S. W. 1; Kington C. Co. *v.* Aaron, 147 Ky. 480, 144 S. W. 371; Musolf *v.* Co., 108 Minn. 369, 122 N. W. 499; Johnson *v.* Co., 143 Mo. App. 441, 127 S. W. 692 (regardless of defendant's knowledge); Hollingsworth *v.* Co., 38 Mont. 143, 99 P. 142; Corcoran *v.* Co., 15 N. M. 9, 103 P. 645; Chiavaroli *v.* Co., 131 App. Div. 372, 115 N. Y. S. 327; Schaller *v.* Brick Co. (Or.), 139 P. 913; Gulf, etc. R. Co. *v.* Dickens, 54 Tex. Civ. 637, 118 S. W. 612 (to account for plaintiff's conduct); Cook *v.* Co., 51 Wash. 316, 98 P. 1130; Berger *v.* Abel, 141 Wis. 321, 124 N. W. 410. See also vol. 8, p. 543, n. 11.

Speed which elevator ordinarily capable of making admissible on question of care and duty to obtain qualified operators. Devine *v.* Boston Store, 167 Ill. App. 443; Goldblatt *v.* Brocklebank, 166 Ill. App. 315 (automobile, its greatest speed).

Statement conditions were old and much worn, a conclusion. Denver, etc. R. Co. *v.* Reiter, 47 Colo. 417, 107 P. 1100.

905-34 Noonan *v.* Coal Co., 173 Ill. App. 541; Louisville & N. R. Co. *v.* Pearcy (Ky.), 121 S. W. 1037 (for special purpose only); Dick *v.* Con. Co., 153 App. Div. 651, 138 N. Y. S. 700. See Burdette C. Co. *v.* Bunting (Ark.), 167 S. W. 77.

Evidence admissible to show slippery condition of a cabin floor on which plaintiff fell. Chicago, etc. R. Co. *v.* Lynch, 201 Fed. 70, 119 C. C. A. 408.

905-35 Alabama G. S. R. Co. *v.* Yount, 165 Ala. 537, 51 S. 737; Grasselli Chem. Co. *v.* Davis, 166 Ala. 471, 52 S. 35; Dow *v.* Co., 157 Cal. 182, 106 P. 587; Lucas *v.* R. Co., 171 Ill. App. 1; Mt. Morgan C. Co. *v.* Shumate, 157 Ky. 654, 163 S. W. 1099; Edwards *v.* Lam (Ky.), 119 S. W. 175 (test of air in mine days after accident); Whiting-M. C. Co. *v.* Preston, 121 Md. 210, 88 A. 110; L'Hote *v.* Co., 203 Mass. 294, 89 N. E. 532 (to show negligence in not directing servant to use means provided for protection); Harrison *v.* Green, 157 Mich. 690, 122 N. W. 205; Clemens *v.* P. Co., 153 Mich. 495, 117 N. W. 187; Jenkins *v.* R. Co., 105 Minn. 504, 117 N. W. 928; Phillips *v.* Shoe Co. (Mo. App.), 165 S. W. 1183; Chapman *v.* Min. Co., 177 Mo. App. 264, 162 S. W. 648; Landers *v.* R. Co., 156 Mo. App. 580, 137 S. W. 605; Titus *v.* Min. Co., 47 Mont. 583, 133 P. 677; Hollingsworth *v.* Co., 38 Mont. 143, 99 P. 142; Segelman *v.* R. Co., 132 N. Y. S. 1068; Robinson *v.* Morris, 30 R. I. 132, 73 A. 611; Odegard *v.* Co., 130 Wis. 659, 110 N. W. 809.

See Macon D. & S. R. Co. *v.* Anchors, 140 Ga. 531, 79 S. E. 153; vol. 6, p. 494, n. 51; vol. 10, p. 526, n. 75, and supplements thereto; also vol. 8, p. 543, n. 13. *Comp.* Dorrance *v.* R. Co., 175 Mich. 198, 141 N. W. 697.

907-36 Penn. R. Co. *v.* Hummel, 167 Fed. 89, 92 C. C. A. 541; Carriere *v.* Co., 203 Mass. 322, 89 N. E. 544; Musolf *v.* Co., 108 Minn. 369, 122 N. W. 499; Cotner *v.* R. Co., 220 Mo. 284, 119 S. W. 610; Corcoran *v.* Co., 15 N. M. 9, 103 P. 645.

Subsequent condition of cars shown to fix place whence obstruction came upon track. Louisville & N. R. Co. *v.* Fitzgerald, 161 Ala. 397, 49 S. 860.

907-37 Louisville & N. R. Co. *v.* Wilson, 162 Ala. 588, 50 S. 188; Guilfoil C. Co. *v.* Clark (Ind. App.), 99 N. E. 777; Tilton *v.* Haverhill, 203 Mass. 580, 89 N. E. 1040; Clack *v.* Co., 138 Mo. App. 205, 119 S. W. 1014; Joyce *v.* Black, 226 Pa. 108, 75 A. 602; McCloskey *v.* Borough, 4 Pa. Super. 181. See St. Louis O. M. & S. R. Co. *v.* Thurman (Ark.), 161 S. W. 1054.

907-38 And in Kentucky and Maryland. Warren *v.* Jellicoe (Ky.), 122 S. W. 862; Annapolis, etc. Co. *v.* Fredericks, 109 Md. 595, 72 A. 534. See also Conover *v.* Coal Co., 161 Ill. App. 74.

907-39 Funston *v.* Hoffman, 232 Ill. 360, 83 N. E. 917; Kohles *v.* Coal Co., 149 Ill. App. 434; S. *v.* Flanigan, 111 Md. 481, 74 A. 818; Neary *v.* R. Co., 37 Mont. 461, 97 P. 944. *Comp.* Christiansen *v.* McLellan, 74 Wash. 318, 133 P. 434.

Failure to show similarity of conditions affects weight, not competency, of evidence. Gulf, etc. R. Co. *v.* Fowler, 57 Tex. Civ. 556, 122 S. W. 593.

908-40 Chicago M. & L. Co. *v.* Cooper, 90 Ark. 326, 119 S. W. 672 (may warrant inference of negligence); Conover *v.* Coal Co., 161 Ill. App. 74; Stewart *v.* R. Co., 136 Ky. 717, 127 S. W. 154 (and changes in interim); Edwards *v.* Co., 158 Mich. 428, 122 N. W. 1073; Orentt *v.* Co., 214 Mo. 35, 112 S. W. 532 (conditions of elevator as far back as two years prior to injury and down to within few days thereof); Dick *v.* C. Co., 153 App. Div. 651, 138 N. Y. S. 700; Segelman *v.* R. Co., 112 N. Y. S. 1068; Blevins *v.* Co., 150 N. C. 493, 64 S. E. 428; S. *v.* Welford, 29 R. I. 450, 72 A. 396 (rate of speed); Carr *v.* L. Co., 29 R. I. 276, 70 A. 196 (cit. local cases); So. P. Co. *v.* Vaughn (Tex. Civ.), 165 S. W. 885; Niles *v.* R. Co. (Vt.), 89 A. 629.

See vol. 6, p. 493, n. 47, *et seq*; vol. 10, p. 526, n. 75, and supplements thereto.

908-41 Oregon Co. *v.* Roe, 176 Fed. 715, 100 C. C. A. 269; St. Louis S. R. Co. *v.* Lewis, 91 Ark. 342, 121 S. W. 268; Robertson *v.* Co., 143 Ill. App. 391; Pate *v.* Coal Co., 178 Ill. App. 578; Savage *v.* Hayes, 142 Ill. App. 316; Asheraft *v.* Wks., 148 Ia. 424, 126 N. W. 1111; Donovan *v.* Co., 201 Mass. 357, 87 N. E. 580; Ryan *v.* Co., 200 Mass. 188, 86 N. E. 310; Redmond *v.* R. Co., 225 Mo. 721, 126 S. W. 179; So. P. Co. *v.* Vaughn (Tex. Civ.), 165 S. W. 885; Marshal *v.* Mills, 82 Vt. 489, 74 A. 108; Kluska *v.* Yoemans, 54 Wash. 465, 103 P. 819.

908-42 Louisville & N. R. Co. *v.* Wilson, 162 Ala. 588, 50 S. 188; Foley *v.*

Everett, 142 Ill. App. 250; Finnane *v.* Perry (Ia.), 145 N. W. 494; Chandler *v.* Bowersock, 81 Kan. 606, 106 P. 54; Dulligan *v.* Co., 201 Mass. 227, 87 N. E. 567; Jenkins *v.* R. Co., 105 Minn. 504, 117 N. W. 928; Corcoran *v.* Co., 15 N. M. 9, 103 P. 645; Devine *v.* Co., 126 App. Div. 7, 110 N. Y. S. 119; Missouri, etc. R. Co. *v.* Williams (Tex. Civ.), 117 S. W. 1043, 103 Tex. 228, 125 S. W. 881.

908-43 Olsen *v.* Levy, 8 Cal. App. 487, 97 P. 76 (speed of automobile just before wrong); Willson *v.* Logan, 139 Ill. App. 204; Sticht *v.* Co., 195 N. Y. 70, 87 N. E. 801; Niles *v.* R. Co. (Vt.), 89 A. 629 (question of remoteness is for the court).

Evidence of prior condition inadmissible as between master and servant if no change since latter entered service. Simoneau *v.* Rice, 202 Mass. 82, 88 N. E. 433. And if wind and weather might influence it. Harrison *v.* R. Co., 195 N. Y. 86, 87 N. E. 802.

Effect of use upon similar things may be shown by condition of thing causing injury prior thereto. Izydorczyk *v.* Co., 225 Pa. 533, 74 A. 428.

909-48 Ballantine *v.* Co., 76 N. J. L. 358, 70 A. 167. See Waligora *v.* Co., 107 Minn. 554, 119 N. W. 395.

910-49 Rule not applied strictly to defects in railroad ties. Missouri, etc. R. Co. *v.* Williams (Tex. Civ.), 117 S. W. 1043.

910-52 Alabama, etc. R. Co. *v.* Choate (Ala.), 64 S. 78 (plaintiff allowed to show general condition of jacks used by defendant where they were similar to the one which caused the accident); Poczerwinski *v.* Co., 105 Minn. 305, 117 N. W. 486 (protection of another saw in same mill); Phelps *v.* Co., 218 Mo. 572, 117 S. W. 705; Hillerbrand *v.* M. Co., 141 Mo. App. 122, 121 S. W. 326 (not always material); Carr *v.* Co., 29 R. I. 276, 70 A. 196. But see Lawson *v.* Co. (Tex. Civ.), 162 S. W. 1023.

As to degree of similarity necessary.—See Holliday & W. Co. *v.* O'Donnell (Ind. App.), 101 N. E. 642.

Number of things similar to that in question in use on defendant's premises at time of accident may be shown as basis for showing amount and kind of care given them. Carr *v.* Co., 29 R. I. 276, 70 A. 196.

911-54 See vol. 6, p. 500, n. 75, 76 and 77, and supplement thereto.

911-55 Katzenstein *v.* Hartford, 80 Conn. 663, 70 A. 23; San Antonio, etc. R. Co. *v.* Spencer, 55 Tex. Civ. 456, 119 S. W. 716; Hackett *v.* R. Co., 141 Wis. 464, 124 N. W. 1018 (condition of track at other places relevant on issue of negligence in running at excessive speed).

912-57 Adams *v.* R. Co., 243 Ill. 191, 90 N. E. 382; Wysocki *v.* Zinc Co., 154 Ill. App. 363; Gordon *v.* R. Co., 146 Ia. 588, 123 N. W. 762; Louisville & N. R. Co. *v.* Stewart, 131 Ky. 665, 115 S. W. 775; Murr *v.* R., 204 Mass. 74, 90 N. E. 400; Gray *v.* Co., 187 N. Y. 376, 80 N. E. 201; Stoner *v.* Co., 40 Pa. Super. 599; Missouri, etc. R. Co. *v.* Williams, 103 Tex. Civ. 228, 125 S. W. 881. *Comp.* Sipes *v.* R., 54 Wash. 47, 102 P. 1057.

913-61 Roloff *v.* Ice Co., 158 Ill. App. 614; Murr *v.* R., 204 Mass. 74, 90 N. E. 400; Gray *v.* Co., 187 N. Y. 376, 80 N. E. 201; Forseth *v.* Co., 142 Wis. 87, 124 N. W. 1036.

913-62 St. Louis, etc. R. Co. *v.* Freeman, 89 Ark. 326, 116 S. W. 678; Emerling *v.* Coal Co., 149 Ill. App. 97; Savage *v.* Hayes, 142 Ill. App. 316; Reid *v.* S. S. Co. (Me.), 90 A. 609; Maryland, etc. R. Co. *v.* Brown, 109 Md. 304, 71 A. 1005 (in court's discretion); Rondeau *v.* Sayles, 30 R. I. 228, 74 A. 785. See Brunger *v.* Co., 6 Cal. App. 691, 92 P. 1043.

Cause may be shown by evidence of condition at prior time and another place. Northern A. R. Co. *v.* Counts, 166 Ala. 550, 51 S. 938.

Knowledge of witnesses who testified to condition previous to injury may be confirmed by proof of condition then. Kelland *v.* Co., 75 N. H. 168, 71 A. 947.

914-63 Chicago, etc. R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517; Johns *v.* R. Co., 226 Pa. 319, 75 A. 408.

914-65 Larrabee *v.* McGuinness, 165 Fed. 169, 91 C. C. A. 203; Johnson *v.* R. Co., 164 Mo. App. 600, 147 S. W. 529.

914-66 Landers *v.* R. Co., 134 Mo. App. 80, 114 S. W. 543. *Contra*, Fraser-J. B. Co. *v.* Baird (Tex. Civ.), 128 S. W. 460; Place *v.* R. Co., 82 Vt. 42, 71 A. 836.

914-67 Davidson *v.* U. S., 142 Fed. 315, 73 C. C. A. 425; Lake *v.* Co., 160 Fed. 887, 88 C. C. A. 69; Adams *v.* Crimm, 177 Ala. 279, 58 S. 442; Nashville, etc. R. Co. *v.* Ragan, 167 Ala. 277, 52 S. 522; Pekin, etc. Co. *v.* Ramey,

108 Ark. 483, 158 S. W. 156; St. Louis, etc. Co. *v.* Steed, 105 Ark. 205, 151 S. W. 257; Ft. Smith L. & T. Co. *v.* Soard, 79 Ark. 388, 96 S. W. 121; St. Louis, etc. R. Co. *v.* Plumlee, 78 Ark. 147, 95 S. W. 442; Parkin *v.* Co., 157 Cal. 41, 106 P. 210; Diamond R. Co. *v.* Harryman, 41 Colo. 415, 92 P. 922; Town *v.* Fairfield, 25 Colo. App. 187, 136 P. 471; Koskoff *v.* Goldman, 86 Conn. 415, 85 A. 588; Scott *v.* Dist., 27 App. Cas. (D. C.) 413; Aurora *v.* Plummer, 122 Ill. App. 143; Korab *v.* R. Co. (Ia.), 143 N. W. 876; Bell-Knox C. Co. *v.* Gregory, 152 Ky. 415, 153 S. W. 465; Interstate Coal Co. *v.* Shelton, 152 Ky. 92, 153 S. W. 1; Fluehart Collieries Co. *v.* Elam, 151 Ky. 47, 151 S. W. 34; Louisville & N. R. Co. *v.* Stewart, 131 Ky. 665, 115 S. W. 775; Louisville, etc. R. Co. *v.* Morton, 28 Ky. L. R. 355, 89 S. W. 243; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651 (to show negligent condition at time of occurrence); Stewart *v.* Harman, 108 Md. 446, 70 A. 333; Ziehm *v.* Co., 104 Md. 48, 64 A. 61; Anshen *v.* R. Co., 205 Mass. 32, 91 N. E. 157; Connolly *v.* Furbush, 201 Mass. 271, 87 N. E. 469; Beverly *v.* R. Co., 194 Mass. 450, 80 N. E. 507 (inadmissible to show defective condition, but admissible to show improvements practically possible); Minica *v.* Coop. Co., 175 Mo. App. 91, 157 S. W. 1006; Johnson *v.* R. Co., 164 Mo. App. 600, 147 S. W. 529; Landers *v.* R. Co., 134 Mo. App. 80, 114 S. W. 543; Woods *v.* Poplar Bluff, 136 Mo. App. 155, 116 S. W. 1109; Titus *v.* Min. Co., 47 Mont. 583, 133 P. 677; Pribeno *v.* R. Co., 81 Neb. 657, 116 N. W. 494; Causa *v.* Kenny, 156 App. Div. 134, 141 N. Y. S. 98; Davenport *v.* Matthews, 130 App. Div. 257, 114 N. Y. S. 715; Schultz *v.* P. Co., 127 App. Div. 305, 111 N. Y. S. 281; Blevins *v.* Co., 150 N. C. 493, 64 S. E. 428; Shawnee, etc. Co. *v.* Motesenbocker (Okla.), 138 P. 790; Sloan *v.* Warrenburg, 36 Okla. 523, 129 P. 720; Marien *v.* Walsh & Co., 64 Or. 583, 131 P. 505; Love *v.* Lumb. Co., 64 Or. 129, 129 P. 492; Ferrari *v.* Co., 54 Or. 210, 102 P. 1016; Matteson *v.* R. Co., 218 Pa. 527, 67 A. 847; Cunningham *v.* R. Co., 40 Pa. Super. 212; Fick *v.* Jackson, 3 Pa. Super. 378; Ghaner *v.* Co., 85 S. C. 90, 67 S. E. 242; Kan. etc. R. Co. *v.* Meakin (Tex. Civ.), 146 S. W. 1057; Dailey *v.* Swift & Co., 86 Vt. 189, 84 A. 603; Place *v.* R. Co., 82 Vt. 42, 71 A. 836; McKenzie *v.* Boutwell, 79 Vt. 383, 65 A. 99; Hairston *v.* Co., 66 W. Va. 324, 66 S. E. 473; Lind *v.* Co., 140 Wis. 183, 120 N. W. 839. *Comp.* Union Light H. & P. Co. *v.* Lakeman, 156 Ky. 33, 160 S. W. 723; Minea *v.* St. L. C. Co. (Mo. App.), 162 S. W. 741; Foster *v.* Lumb. Co., 65 Or. 46, 131 P. 736; Jensen *v.* Canal Co. (Utah), 137 P. 635. *Contra* as to existence of defect in highway, but not to show negligence. Tise *v.* Thomasville, 151 N. C. 281, 65 S. E. 1007. See vol. 2, p. 928, n. 93; vol. 6, p. 495, n. 53 et seq; vol. 10, p. 512, n. 10; p. 567, n. 50, and supplements thereto. See also vol. 8, p. 543, n. 14; 920-79, infra. But see Brunger *v.* Co., 6 Cal. App. 691, 92 P. 1043.

918-69 Edwards *v.* Lam, 132 Ky. 32, 116 S. W. 283.

918-71 St. Louis, etc. R. Co. *v.* Walker, 89 Ark. 556, 117 S. W. 534, quot. paragraph of the text.

919-73 Ferrari *v.* Co., 54 Or. 210, 102 P. 1016, if court instructs such evidence not to be considered on question of negligence.

919-76 Stodola *v.* R. Co., 152 Ia. 37, 131 N. W. 38; Foster *v.* Lumb. Co., 65 Or. 46, 131 P. 736; Marien *v.* Walsh & Co., 64 Or. 583, 131 P. 505; Lincoln *v.* R. Co., 82 Vt. 187, 72 A. 821.

919-77 Overby *v.* Co., 144 Mo. App. 363, 128 S. W. 813, non-occurrence of subsequent accident opens door for evidence of repairs after accident in question.

919-78 Love *v.* Lumb. Co., 64 Or. 129, 129 P. 492; Armour & Co. *v.* Morgan (Tex. Civ.), 151 S. W. 861; Lind *v.* Co., 140 Wis. 183, 120 N. W. 839.

920-79 Southern R. Co. *v.* Lewis, 165 Ala. 555, 51 S. 746. See Bell K. C. Co. *v.* Gregory, 152 Ky. 415, 153 S. W. 465.

Subsequent removal from place in question or another place of condition alleged to have caused accident may be proved, no accident having occurred at the other place. Place *v.* R. Co., 82 Vt. 42, 71 A. 836.

Subsequent repairs competent to show injury took place in manner alleged. Pearson *v.* Co., 162 N. C. 224, 78 S. E. 73.

920-80 Tipton *v.* R. Co., 89 Kan. 451, 132 P. 189; Carleton *v.* R. Co., 110 Me. 397, 86 A. 334; Boggs *v.* Cullowhee Min. Co., 162 N. C. 393, 78 S. E. 274; Marien *v.* Walsh & Co., 64 Or. 583, 131 P. 505; Ferrari *v.* Co., 54 Or. 210, 102 P. 1016; Gustafson *v.* Co., 51 Wash. 25, 97 P. 1094 (to meet contention thing alleged to have caused injury did not

exist). See vol. 10, p. 512, n. 13; vol. 10, p. 568, n. 54, and supplement thereto.

To show whose duty it was to make the repairs. Boggs *v.* Min. Co., 162 N. C. 393, 78 S. E. 274.

Evidence of subsequent repairs admissible where insulation of wires cut in uniform manner to show it was done for a definite purpose, and in connection with evidence showing necessity for baring wires at point of testing, to show negligence in not re-covering them. Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651.

921-85 Howard *v.* Osage, 89 Kan. 205, 132 P. 187; Tise *v.* Thomasville, 151 N. C. 281, 65 S. E. 1007.

921-86 See Camancho *v.* Rubert, 4 P. R. Fed. 43.

921-87 Sargent *v.* Co., 37 Utah 392, 108 P. 928.

922-88 Delaski *v.* Imp. Co., 70 Wash. 143, 126 P. 421.

922-90 Van Cleave *v.* City, 165 Ill. App. 234; Brodie *v.* City, 164 Ill. App. 335; Welfelt *v.* R. Co., 149 Ill. App. 317; Kortendick *v.* Waterford, 142 Wis. 413, 125 N. W. 945. See vol. 6, p. 492, n. 42; vol. 10, p. 529, n. 79 and supplements thereto.

922-91 See vol. 6, p. 491, n. 39, and supplement thereto.

923-92 Swen *v.* R. Co. (Ala.), 61 S. 924; Trosper Coal Co. *v.* Crawford, 152 Ky. 214, 153 S. W. 211; Schulte *v.* Paper Co., 67 Or. 334, 135 P. 527, 136 P. 5. See vol. 6, p. 492, n. 40, and supplement thereto.

923-94 Carroll *v.* R. Co., 200 Mass. 527, 86 N. E. 793; Ryan *v.* Co., 133 App. Div. 467, 118 N. Y. S. 56; Williams *v.* S. Co., 128 App. Div. 807, 113 N. Y. S. 616.

923-96 Inability to identify thing causing injury, ground for showing condition of like things furnished for use. Cincinnati, etc. R. Co. *v.* Ashcraft (Ky.), 116 S. W. 295.

923-97 Stair *v.* Kane, 156 Fed. 100, 84 C. C. A. 126; Schnare *v.* Co. (Conn.), 90 A. 933; Sargent *v.* Co., 37 Utah 392, 108 P. 928. *Comp.* Walker *v.* Williamson, 205 Mass. 514, 91 N. E. 885.

Previous neglects shown on issue of wilfulness. Robertson *v.* Co., 238 Ill. 344, 87 N. E. 373.

924-98 Adams *v.* Crimm, 177 Ala. 279, 58 S. 442.

924-2 Katzenstein *v.* Hartford, 80 Conn. 663, 70 A. 23; Van Green *v.* Oil Mill (Tex. Civ.), 152 S. W. 1108.

924-3 McIntyre *v.* Coote, 19 Ont. L. R. 9; Alabama Co. *v.* Tallant, 165 Ala. 521, 51 S. 835 (pain suffered from another injury sustained by plaintiff at about time of infliction of that sued for); Seaboard A. L. R. *v.* Parker, 65 Fla. 543, 62 S. 589; Moore *v.* R. Co., 142 Mo. App. 290, 126 S. W. 181; Wagner *v.* R. Co., 160 Mo. App. 334, 142 S. W. 463; Garcia *v.* Georgetti, 4 P. R. Fed. 495; Missouri, K. & T. R. Co. *v.* Hampton (Tex. Civ.), 142 S. W. 89; National Biscuit Co. *v.* Scott (Tex. Civ.), 142 S. W. 65.

See Crimmins *v.* Exp. Co. (Mass.), 104 N. E. 457; Beckley *v.* Alexander (N. H.), 90 A. 878; vol. 10, p. 471, n. 13, and supplement thereto.

That injured person was insured inadmissible. Curran *v.* Lorch, 243 Pa. 247, 90 A. 62.

Statements of passengers as to exits on train inadmissible for plaintiff but admissible for defendant on issue of contributory negligence. Ft. Worth & D. C. R. Co. *v.* Taylor (Tex. Civ.), 162 S. W. 967.

Inquiry should be limited to the specific acts of negligence charged in the petition. Thompson Bros. Lumb. Co. *v.* Bryant (Tex. Civ.), 144 S. W. 290.

Number of persons exposed to danger shown to determine degree of negligence. Missouri, etc. R. Co. *v.* Farris (Tex. Civ.), 126 S. W. 1174.

Consent of defendant's employe to child's playing on turntable shown. Dampf *v.* R. Co., 95 Miss. 85, 48 S. 612.

924-4 New York T. Co. *v.* Garside, 157 Fed. 521, 85 C. C. A. 285; Howard *v.* Co., 161 Mo. App. 552, 144 S. W. 185; Ciccarelli *v.* Naughton, 135 App. Div. 804, 120 N. Y. S. 127; Miller *v.* T. Co., 120 N. Y. S. 899.

925-5 Diamond *v.* Cowles, 174 Fed. 571, 98 C. C. A. 417; New York T. Co *v.* Garside, 157 Fed. 521, 85 C. C. A. 285; Travis *v.* Co., 162 Ala. 605, 50 S. 108; St. Louis, etc. Co. *v.* Green (Ark.), 161 S. W. 148; Seaboard, etc. Co. *v.* Hunt, 10 Ga. App. 273, 73 S. E. 588; Hunt *v.* R. Co. (Ia.), 141 N. W. 334; National C. Co. *v.* Powar, 137 Ky. 156, 125 S. W. 279; Yancey *v.* R. Co., 205 Mass. 162, 91 N. E. 202; Howard *v.* Holman, 203 Mass. 445, 89 N. E. 556 (that plaintiff was not trespassing); Burnside *v.* R. Co., 110 Minn. 401, 125

N. W. 895 (conductor's assurance of safety); Scholl *v.* Grayson, 147 Mo. App. 652, 127 S. W. 415; Lessenden *v.* R. Co., 238 Mo. 247, 142 S. W. 332; Owens *v.* R. Co., 152 N. C. 439, 67 S. E. 993; Lamb *v.* R. Co., 86 S. C. 106, 67 S. E. 958; Houston, etc. R. Co. *v.* Alexander (Tex. Civ.), 121 S. W. 602; Thoresen *v.* Lumb. Co., 73 Wash. 99, 131 P. 645, 132 P. 860. See Rosenberger *v.* Wells, Fargo & Co. (Mo.), 167 S. W. 433.

Violation of company's rules on part of the engineer in allowing others to ride in cab with him may be shown. So. R. Co. *v.* Gadd, 207 Fed. 277, 125 C. C. A. 21.

925-6 U. S. P. & F. Co. *v.* Driver, 162 Ala. 580, 50 S. 118 (who gave order to injured person); Georgia R. & E. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944; Madden *v.* Wilcox, 174 Ind. 657, 91 N. E. 933; Geary *v.* McCrary, 147 Ky. 254, 143 S. W. 1004; Gurney *v.* Piel, 105 Me. 501, 74 A. 1131; Bliss *v.* Wolcott, 40 Mont. 491, 107 P. 423; Eder *v.* Post, 135 App. Div. 859, 120 N. Y. S. 139; Gartland *v.* Society, 135 App. Div. 163, 120 N. Y. S. 24; St. Louis, etc. Co. *v.* Balthrop (Tex. Civ.), 167 S. W. 246; International, etc. R. Co. *v.* Brice (Tex. Civ.), 126 S. W. 613; Forseth *v.* Co., 142 Wis. 87, 124 N. W. 1036.

925-7 Racine *v.* Morris, 136 App. Div. 467, 121 N. Y. S. 146, rules of police department admissible to show officer on private premises not a trespasser.

925-8 Erie R. Co. *v.* Schomer, 171 Fed. 798, 96 C. C. A. 458; St. Louis etc. R. Co. *v.* York, 92 Ark. 554, 123 S. W. 376; Pittsburg, etc. R. Co. *v.* Hall, 46 Ind. App. 219, 90 N. E. 498; Brannock *v.* R. Co., 147 Mo. App. 301, 126 S. W. 552; St. Louis S. R. Co. *v.* Ford, 56 Tex. Civ. 521, 121 S. W. 709; Trinity, etc. Co. *v.* Elgin, 56 Tex. Civ. 573, 121 S. W. 577; Cook & S. M. Co. *v.* Thompson, 110 Va. 369, 66 S. E. 79.

925-9 Kansas City, etc. R. Co. *v.* Young, 50 Tex. Civ. 610, 111 S. W. 764, others than plaintiff affected.

Plaintiff's experience in work being done when injured, relevant as to contributory negligence. Gregory *v.* R. Co., 147 Ia. 715, 124 N. W. 797.

926-11 Result of efforts made by stranger cannot be shown on question of defendant's negligence. W. U. T. Co. *v.* Brasher, 136 Ky. 485, 124 S. W. 788.

926-12 Hales *v.* Kerr, 2 K. B. (1908), 601 (contraction of contagious disease by others in defendant's barber shop); Otis Elev. Co. *v.* Luck, 202 Fed. 452, 120 C. C. A. 558; Chicago, etc. R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517; Am. Car & F. Co. *v.* Barry, 195 Fed. 919, 115 C. C. A. 607; Fed. L. Co. *v.* Lohr, 179 Fed. 692, 103 C. C. A. 238; Chicago, etc. Co. *v.* Ross, 99 Ark. 597, 139 S. W. 632; So. R. Co. *v.* Hill, 139 Ga. 549, 77 S. E. 803; Petty *v.* Stebbins, 164 Ill. App. 439; Conover *v.* Coal Co., 161 Ill. App. 74; Lowe *v.* C. Co., 158 Ill. App. 458; Spencer *v.* Grain Co. (Ia.), 138 N. W. 820; Dagir *v.* Mfg. Co., 213 Mass. 524, 100 N. E. 620; Lamb *v.* Clam Lake, 175 Mich. 77, 140 N. W. 1009; Wiers *v.* Shaw-Walker Co., 171 Mich. 324, 137 N. W. 145; Van Doorn *v.* Heap, 160 Mich. 199, 125 N. W. 11; Gilbert *v.* Co., 93 Minn. 99, 100 N. W. 653, 106 Am. St. 430; Minica *v.* Cooperage Co., 175 Mo. App. 91, 157 S. W. 1006; Cooley *v.* Box Co., 75 N. H. 529, 77 A. 936; Herrera *v.* Sup. Co. (N. J.), 88 A. 1082; Gynther *v.* Brown, 67 Or. 310, 134 P. 1186; F. B. Allen & Co. *v.* Shook (Tex. Civ.), 160 S. W. 1091; Missouri, etc. R. Co. *v.* Dunbar, 57 Tex. Civ. 411, 122 S. W. 574; Ohrstrom *v.* Tacoma, 57 Wash. 121, 106 P. 629; Brossard *v.* Morgan Co., 150 Wis. 1, 136 N. W. 181. *Contra*, Carr *v.* Locomotive Co., 31 R. I. 234, 77 A. 104.

See Town of Meeker *v.* Fairfield, 25 Colo. App. 187; Griffith *v.* City, 55 Colo. 37, 132 P. 57. See also vol. 11, pp. 812, 818, nn. 76, 90. *Comp.* Holliday & Wyon Co. *v.* O'Donnell (Ind. App.), 101 N. E. 642; Monds *v.* Town of Dunn, 163 N. C. 108, 79 S. E. 303.

Previous accident proved to rebut contention subsequent one could not have occurred without leaving visible signs. Klein *v.* Burleson, 138 App. Div. 405, 122 N. Y. S. 752.

Warning of danger given master by other employes prior to happening of accident, proved. Galvin *v.* Brown, 53 Or. 598, 101 P. 671.

927-13 Vance *v.* Drug Co., 149 Ill. App. 499.

927-14 Prattville Cotton Mills Co. *v.* McKinney, 178 Ala. 554, 59 S. 498.

927-15 Rogers *v.* R. Co., 33 Ky. L. R. 1067, 112 S. W. 630, previous use by plaintiff.

928-16 Negligence must be shown before effect of act upon other horses

proved. Wilkie *v.* Co., 55 Wash. 324, 104 P. 616. See vol. 11, p. 815, n. 81, and supplement thereto.

928-17 Evans *v.* R. Co., 213 Fed. 129 (C. C. A.); Chesapeake & O. R. Co. *v.* Meyers, 150 Ky. 841, 151 S. W. 19; Marcotte *v.* Shoe Co., 76 N. H. 507, 85 A. 284; Fisher *v.* R., 75 N. H. 184, 72 A. 212; Alcott *v.* Co., 78 N. J. L. 482, 74 A. 499 (*dist.* Bobbink *v.* R., 75 N. J. L. 913, 69 A. 204; Friedman *v.* New York, 63 Misc. 310, 116 N. Y. S. 750). See vol. 2, p. 928, n. 95; vol. 10, p. 478, n. 31 and supplement thereto.

929-18 Evans *v.* R. Co., 213 Fed. 129 (C. C. A.); Town *v.* Fairfield, 25 Colo. App. 187, 136 P. 471; Chesapeake & O. R. Co. *v.* Warnock's Admr., 150 Ky. 74, 150 S. W. 29; Branch *v.* Klatt, 172 Mich. 31, 138 N. W. 263; Alcott *v.* Co., 78 N. J. L. 482, 74 A. 499 (also competent as corroborative of plaintiff's testimony as to condition at time in question); Friedman *v.* New York, 63 Misc. 310, 116 N. Y. S. 750; Glassman *v.* Surpless, 53 Misc. 586, 103 N. Y. S. 789; Randle *v.* Barden (Tex. Civ.), 164 S. W. 1063; St. Louis S. R. Co. *v.* Marshall (Tex. Civ.), 120 S. W. 512; Falldin *v.* Seattle, 57 Wash. 307, 106 P. 914; Armstrong *v.* Co., 75 Wash. 477, 135 P. 233.

See Monds *v.* Dunn, 163 N. C. 108, 79 S. E. 303; vol. 6, p. 499, n. 68, and supplement thereto.

929-19 Evans *v.* R. Co., 213 Fed. 129; Chesapeake & O. R. Co. *v.* Meyers, 150 Ky. 841, 151 S. W. 19; Rockwell *v.* McGovern, 202 Mass. 6, 88 N. E. 436; Flansburg *v.* Co., 136 App. Div. 551, 121 N. Y. S. 156.

930-20 Branch *v.* Klatt, 172 Mich. 31, 138 N. W. 263. *Contra*, Alcott *v.* Co., 78 N. J. L. 482, 74 A. 499, *disap.* Annapolis G., etc. Co. *v.* Fredericks, 109 Md. 595, 72 A. 534.

Evidence of prior and subsequent accidents at bridge admittedly too low, not admissible because it did not tend to show condition of telltales, nor deceased's freedom from contributory negligence. Harrison *v.* R. Co., 195 N. Y. 86, 87 N. E. 802.

930-26 Fishman *v.* Co., 78 N. J. L. 300, 73 A. 231.

Plaintiff must show similarity of conditions. Fletcher *v.* Co., 163 Ala. 240, 50 S. 996.

930-27 Diamond R. Co. *v.* Harryman, 41 Colo. 415, 92 P. 922, 15 L. R. A. (N. S.) 775; Chicago, etc. R. Co. *v.* Johnson, 128 Ill. App. 20; Grebenstein *v.* Co., 205 Mass. 431, 91 N. E. 411; Fishman *v.* Co., 78 N. J. L. 300, 73 A. 231.

931-28 Jewell *v.* Co., 143 Mo. App. 200, 127 S. W. 598 (contributory negligence); Bachman *v.* Little, 152 App. Div. 811, 137 N. Y. S. 699; Paul *v.* Co., 133 App. Div. 310, 117 N. Y. S. 698; Niles *v.* R. Co. (Vt.), 89 A. 629; Hoseth *v.* Co., 49 Wash. 682, 96 P. 423; Lillis *v.* W. Mills, 142 Wis. 128, 124 N. W. 1011.

931-29 Boin *v.* Co., 155 Cal. 612, 102 P. 937 (if means of injury, immaterial); Larned *v.* Vanderlinde, 165 Mich. 464, 131 N. W. 165; Kallher *v.* Co., 155 Mo. App. 372, 137 S. W. 76; Chase *v.* R. Co., 156 Mo. App. 696, 137 S. W. 999; Hillerbrand *v.* Co., 141 Mo. App. 122, 121 S. W. 326. See vol. 6, p. 499, n. 71, and supplement thereto.

932-30 Denver *v.* Maurer, 47 Colo. 209, 106 P. 875; Laurie Co. *v.* McCullough, 174 Ind. 477, 90 N. E. 1014; Chesapeake & O. R. Co. *v.* Christian, 110 Va. 723, 67 S. E. 345 (not conclusive). See Union T. Co. *v.* Sullivan, 38 Ind. App. 513, 76 N. E. 116; vol. 6, p. 499, n. 69, and supplement thereto.

932-32 Lloyd C. Co. *v.* Co., 145 Mo. App. 675, 123 S. W. 528; Marcotte *v.* S. Co., 76 N. H. 507, 85 A. 284; Stremme *v.* Dyer, 223 Pa. 7, 72 A. 274. See vol. 2, p. 930, n. 98; vol. 11, p. 821, n. 8, and supplements thereto

933-33 Lloyd C. Co. *v.* Co., 145 Mo. App. 675, 123 S. W. 528; Williams *v.* R. Co., 50 Pa. Super. 473, 479 (twelve years prior inadmissible). See Hayes *v.* Brandt, 80 Ark. 592, 98 S. W. 368; supra, "Carriers," 920-79; vol. 11, p. 818, n. 90, and supplement thereto.

933-34 Chenoweth *v.* Co., 53 Or. 111, 99 P. 86. See vol. 11, p. 816, n. 83, and supplement thereto.

935-37 *Contra*, Adams *v.* R. Co. (Tex. Civ.), 122 S. W. 895.

936-39 Missouri, etc. R. Co. *v.* Wilhoit, 160 Fed. 440, 87 C. C. A. 401 (not conclusive); Hinmon *v.* Co. (N. J. L.), 70 A. 166. *Contra*, Kirchoff *v.* Co., 148 Ia. 508, 123 N. W. 210; Balt. R. & H. Co. *v.* Kreiner, 109 Md. 361, 71 A. 1066.

Inference of negligence may be based on such testimony. Wyckoff *v.* R. Co., 234 Ill. 613, 85 N. E. 237.

936-40 Lake *v.* Co., 160 Fed. 887, 88 C. C. A. 69, identical conditions need not exist.

If danger patent such evidence immaterial. Forquer *v.* Co., 37 Mont. 426, 97 P. 843.

936-41 Louisville & N. R. Co. *v.* Mulverhill, 147 Ky. 360, 144 S. W. 83; Tallman *v.* Nelson, 141 Mo. App. 478, 125 S. W. 1181; Berry *v.* Greenville, 84 S. C. 122, 65 S. E. 1030 (plaintiff may testify he exercised usual care); Texas, etc. R. Co. *v.* Geiger, 55 Tex. Civ. 1, 118 S. W. 179 (use of tool in usual and customary manner).

Plaintiff may show repairs made on machine by competent person. Phillips *v.* Co., 205 Mass. 59, 90 N. E. 981.

936-42 Haines *v.* Spencer, 167 Fed. 266, 92 C. C. A. 658 (similarity of machinery to that in general use); Hamilton *v.* Coal Co., 149 Ill. App. 10; Guthrie *v.* Co., 142 Ill. App. 332; Berry *v.* R. Co., 202 Mass. 197, 88 N. E. 588 (article obtained from reputable dealer); Hoseth *v.* Co., 49 Wash. 682, 96 P. 423 (statement plaintiff could not be about camp without hearing warning, incompetent).

936-43 Cincinnati, etc. R. Co. *v.* Callahan, 148 Ky. 682, 147 S. W. 398; Barfoot *v.* White Star Line, 170 Mich. 349, 136 N. W. 437; Pribbeno *v.* R. Co., 81 Neb. 657, 116 N. W. 494; Fick *v.* Jackson, 3 Pa. Super. 378. See Buchanan *v.* Flinn, 51 Pa. Super. 145.

Change in situation may not be shown to prove admission; competent to prove that what was originally done need not have been done. Great C. Shows *v.* Petty, 7 Ga. App. 236, 66 S. E. 624.

937-44 Defendant may show what was done to prevent accidents, but not that it had employes with prescribed duties. Wyckoff *v.* R. Co., 234 Ill. 613, 85 N. E. 237.

937-46 Streeter *v.* Co., 254 Ill. 244, 98 N. E. 541; Weber *v.* R. Co., 142 Ill. App. 550; Offner *v.* R. Co., 140 Ill. App. 562; American Car & F. Co. *v.* Vance, 177 Ind. 78, 97 N. E. 327; Johnson *v.* Co., 150 Ia. 717, 130 N. W. 807; Wright *v.* Co., 137 Ky. 299, 125 S. W. 718; Plumb *v.* Hecla Co., 157 Mich. 562, 122 N. W. 208; Gerhard *v.* M. Co., 155 Mich. 618, 119 N. W. 904; Johnson *v.* Oakes, 110 Minn. 94, 124 N. W. 633; Ogan *v.* R. Co., 142 Mo. App. 248, 126 S. W. 191; Flanagan *v.* C. Co., 134 App. Div. 236, 118 N. Y. S. 953; S. *v.* Welford, 29 R. I. 450, 72 A. 396; J. Rosenbaum Grain Co. *v.* Mitchell (Tex. Civ.), 142 S. W. 121; Galveston H. & S. A. R. Co. *v.* Pingenot (Tex. Civ.), 142 S. W. 93; Smith *v.* Co., 55 Wash. 357, 104 P. 651.

Absence of known device for guarding machinery may be shown; it is not determinative of question of practicability. Shaver *v.* Co., 109 Minn. 376, 123 N. W. 1076.

937-47 Ohio C. M. Co. *v.* Hutchings, 172 Fed. 201, 96 C. C. A. 653; Chicago, etc. R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517 (testing boiler); Mertens *v.* Co., 235 Ill. 540, 85 N. E. 743; So. R. Co. *v.* Howerton (Ind.), 105 N. E. 1025; Delfs *v.* Dunshee, 143 Ia. 381, 122 N. W. 236; National C. Co. *v.* Powar, 137 Ky. 156, 125 S. W. 279 (nonuse of statutory precautions for automobiles); Doherty *v.* Booth, 200 Mass. 522, 86 N. E. 945; Morrill *v.* R. Co., 139 Mich. 478, 124 N. W. 520; Zoltovski *v.* Gzella, 159 Mich. 620, 124 N. W. 527 (failure to use lights on automobile); Speek *v.* R. Co., 108 Minn. 435, 122 N. W. 497; Musolf *v.* Co., 108 Minn. 369, 122 N. W. 499; Jewell *v.* Co., 143 Mo. App. 200, 127 S. W. 598; Spencer *v.* Bruner, 126 Mo. App. 94, 103 S. W. 578; Obermeyer *v.* Co., 120 Mo. App. 59, 96 S. W. 673 (expert testimony); Rushing *v.* R. Co., 149 N. C. 158, 62 S. E. 890; Robinson *v.* Morris, 30 R. I. 132, 73 A. 611; Sipes *v.* R., 54 Wash. 47, 102 P. 1057 (flagging system in use on other like roads). *Comp.* Ziehm *v.* Co., 104 Md. 48, 64 A. 61, action for injuries by reason of defectively insulated wire; refusal to admit evidence as to insulation used by others correct, no foundation laid. See Randall *v.* Ahearn, 34 Can. Sup. 698; Mather *v.* Rillston, 156 U. S. 391.

938-49 *Contra* by statute. Indianapolis Fdry. Co. *v.* Lackey, 51 Ind. App. 175, 97 N. E. 349.

Evidence there was another and safer way to do act causing injury, competent. Piper *v.* R., 75 N. H. 228, 72 A. 1024. Usual and customary method of doing act cannot be shown. But evidence showing method pursued was not safe may be followed by evidence showing reasonably safe method in general use. McCabe *v.* Swift, 143 Ill. App. 404.

Use of different appliances than those employed by defendant and fact their value is generally understood, shown. Currie *v.* R. Co., 81 Conn. 383, 71 A. 356.

Prognostications of weather bureau, admissible to show probable necessity

of taking precautions; not final. Cunningham *v.* R. Co., 40 Pa. Super. 212.

Discontinuance of precautions shown. Brooks *v.* Co., 202 Mass. 228, 88 N. E. 771.

Failure to remember physician's statement as to form in which medicine would be put up and directions as to administering it, shown. Scherer *v.* Schlaberg, 18 N. D. 421, 122 N. W. 1000.

938-50 Grade, reputation and name of machine which caused injury, shown. Wells *v.* Co. (Ky.), 114 S. W. 737.

938-51 Silverman *v.* Carr, 200 Mass. 396, 86 N. E. 898; Lyon *v.* Bedgood, 54 Tex. Civ. 19, 117 S. W. 897 (value of such evidence not uniform).

939-53 Paul *v.* Co., 133 App. Div. 310, 117 N. Y. S. 698; Lassiter *v.* R., 150 N. C. 483, 64 S. E. 202. See St. Louis S. R. Co. *v.* Jackson, 93 Ark. 119, 124 S. W. 241.

939-54 *Contra,* Southwestern T. & T. Co. *v.* Abeles, 94 Ark. 254, 126 S. W. 724 (use of two systems of installing telephone wire). *Contra* (in action against carrier). Price *v.* R. Co., 220 Mo. 435, 119 S. W. 932.

939-57 Canadian N. Co. *v.* Walker, 172 Fed. 346, 97 C. C. A. 44; Glockner *v.* Co., 109 Minn. 30, 122 N. W. 465 (adoption of protection in another establishment after accident, not sufficient to show practicability of lessening danger); Haines *v.* Spencer, 167 Fed. 266, 92 C. C. A. 658 (not competent to show other machines have safety appliances not furnished by defendant); Coin *v.* Co., 222 Mo. 488, 121 S. W. 1; Shinners *v.* Mullins, 136 Mo. App. 298, 117 N. W. 91 (if those in use are reasonably safe); Paul *v.* Co., 133 App. Div. 310, 117 N. Y. S. 698; Helms *v.* Co., 151 N. C. 370, 66 S. E. 312 (custom to use different appliances may be shown though testimony begins with single instance; it must be followed by evidence of others. See Marks *v.* Mills, 135 N. C. 287, 47 S. E. 432). *Comp.* Reschke *v.* R. Co., 155 App. Div. 48, 139 N. Y. S. 555.

General abandonment of use of such appliances as caused injury cannot be shown unless it is shown substituted ones were safer. Shoohoney *v.* R. Co., 223 Mo. 649, 122 S. W. 1025.

939-60 Arizona, etc. Co. *v.* Clark, 207 Fed. 817, 125 C. C. A. 305; Robinson *v.* Co., 164 Fed. 174, 90 C. C. A. 160; Bresee *v.* Co., 149 Cal. 131, 85 P. 152; Rio Grande S. R. Co. *v.* Campbell, 44 Colo. 1, 96 P. 986; Ross *v.* City (Conn.), 91 A. 201; Moffitt *v.* Co., 86 Conn. 527, 86 A. 16; City of Dalton *v.* Humphries, 139 Ga. 556, 77 S. E. 790; Pullman Co. *v.* Schaffner, 126 Ga. 609, 55 S. E. 933; Denbeigh *v.* Nav. Co., 23 Ida. 663, 132 P. 112; Hackart *v.* Co., 243 Ill. 49, 90 N. E. 257 (previous disregard of statutory duty); Tuthill *v.* R. Co., 145 Ill. App. 50; Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160; Louisville & N. R. Co. *v.* Stewart, 131 Ky. 665, 115 S. W. 775 (rate of speed at distance from place of wreck); Hodges *v.* Hill, 175 Mo. App. 441, 161 S. W. 633; Calcaterra *v.* Iovaldi, 123 Mo. App. 347, 100 S. W. 675 (inadmissible although defense was act was accident, court doubting correctness of rule); Ianne *v.* Co., 126 App. Div. 244, 110 N. Y. S. 496 (if method not shown to have been continued); St. Louis, etc. Co. *v.* Jenkins (Tex. Cr.), 163 S. W. 621. See Damren *v.* Trask, 102 Me. 39, 65 A. 513; infra, p. 537, n. 69; vol. 10, p. 477, n. 27; vol. 11, p. 786, n. 32, and supplements thereto.

941-63 Arizona, etc. R. Co. *v.* Clark, 207 Fed. 817, 125 C. C. A. 305.

Not competent to show deceased had reputation among fellow employes as a fast runner and had disregarded speed ordinances in an action for railroad employee's death. So. R. Co. *v.* Rice (Va.), 78 S. E. 592.

941-64 See Simon *v.* Logging Co., 76 Wash. 370, 136 P. 361.

941-66 Cedar C. S. Co. *v.* Steadham (Ala.), 65 S. 984; Linville *v.* Nissen, 162 N. C. 95, 77 S. E. 1096; Rober *v.* R. Co., 25 N. D. 394, 142 N. W. 22; Washington, etc. R. Co. *v.* Trimyer, 110 Va. 856, 67 S. E. 531 (failure to stop train at crossing); Allard *v.* Contract Co., 64 Wash. 14, 116 P. 457. See infra, p. 537, n. 73; vol. 11, p. 787, n. 34, and supplement thereto.

Six years previous, too remote.—Simon *v.* Logging Co., 76 Wash. 370, 136 P. 361.

Servant's identity on each occasion must be proved. Louisville & N. R. Co. *v.* Roberts, 7 Ga. App. 562, 67 S. E. 690.

"**The fact that one is skillful** and competent may prove that he will generally be more careful than the unskilled and incompetent; but it is has no tendency to prove due care on a particular occa-

sion." Tombari *v.* Connors, 85 Conn. 231, 82 A. 640, *cit.* Burgess *v.* Sims Drug Co., 114 Ia. 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359; Smith *v.* Middleton, 112 Ky. 588, 66 S. W. 388, 56 L. R. A. 484, 99 Am. St. Rep. 308; American S. B. Co. *v.* Smith, 94 Md. 19, 50 A. 414.

942-67 Reschke *v.* R. Co., 139 N. Y. S. 555.

942-68 See vol. 3, p. 103, n. 39, and supplement thereto.

942-69 French *v.* Sabin, 202 Mass. 240, 88 N. E. 845; Zucker *v.* Whitridge, 205 N. Y. 50, 98 N. E. 209. *Contra* in case of death, no eye-witness to accident. Humason *v.* R. Co., 259 Ill. 462, 102 N. E. 793; Stollery *v.* R. Co., 243 Ill. 290, 90 N. E. 709; Anderson *v.* Ry Co., 170 Ill. App. 210; Platter *v.* R. Co (Ia.), 143 N. W. 992; Tyrrell *v.* R. R. (N. H.), 91 A. 179. See Scott *v.* O'Leary (Ia.), 138 N. W. 512; vol. 10, p. 485, n. 70, and supplement thereto.

942-70 Habit of witness may be shown as bearing on probability of his doing act complained of. Adams *v.* R. Co. (Tex. Civ.), 122 S. W. 895. Habits of deceased shown on issue of due care. Devine *v.* Co., 145 Ill. App. 322, *foll.* Chicago & A. R. Co. *v.* Wilson, 225 Ill. 50, 80 N. E. 56. See vol. 10, p. 481, n. 48, and supplement thereto.

943-74 See Gibson *v.* R., 75 N. H. 342, 74 A. 589; Bourassa *v.* R. Co., 75 N. H. 359, 74 A. 590.

943-75 Travis *v.* Co., 162 Ala. 605, 50 S. 108.

943-77 And Alabama.—Cohn & G. L. Co. *v.* Robbins, 159 Ala. 289, 48 S. 853. manner in which team driven. Expert may testify as to what caused machine to blow up, in absence of other satisfactory testimony. Wells *v.* Co. (Ky.), 114 S. W. 737.

943-78 Denbeigh *v.* Nav. Co., 23 Ida. 663, 132 P. 112; Shaw *v.* Carrington, 171 Ill. App. 232 (unless in absence of direct evidence); Tuthill *v.* R. Co., 145 Ill. App. 50; Scott *v.* O'Leary (Ia.), 138 N. W. 512; Hodges *v.* Hill, 175 Mo. App. 441, 161 S. W. 633; Chabott *v.* R. Co. (N. H.), 88 A. 995; Alley *v.* Co., 159 N. C. 327, 74 S. E. 885; Missouri, etc. R. Co. *v.* Farris (Tex. Civ.), 126 S. W. 1174; Adams *v.* R. Co. (Tex. Civ.), 122 S. W. 895. See Hoffman *v.* Brew. Co., 257 Ill. 185, 100 N. E. 531; vol. 10, p. 485, n. 70, and supplement thereto.

944-80 Hoffman *v.* Brew. Co., 167 Ill. App. 291.

944-84 Standard O. Co. *v.* Brown, 31 App. Cas. (D. C.) 371.

944-86 Martin C. Co. *v.* Highbarger, 175 Fed. 340, 99 C. C. A. 128; Sloss, etc. Co. *v.* Capps (Ala.), 62 S. 66; Craney *v.* Co., 240 Ill. 602, 88 N. E. 1046; Powers *v.* R. Co., 142 Ill. App. 515; F. Bimel Co. *v.* Harter, 51 Ind. App. 267, 98 N. E. 360; Hunt *v.* R. Co. (Ia.), 141 N. W. 334; Coalgate *v.* Hurst, 25 Okla. 588, 107 P. 657; International, etc. R. Co. *v.* Lane (Tex. Civ.), 127 S. W. 1066.

Knowledge of city presumed where map kept by it discloses occasion of danger. Manuel *v.* Mayor, 111 Md. 196, 73 A. 705.

Conversation with defendant's representative proved to show notice of defect. Landers *v.* R. Co., 134 Mo. App. 80, 114 S. W. 543.

945-87 Dilburn *v.* R. Co., 156 Ala. 228, 47 S. 210; Ebbing *v.* Co., 145 Ill. App. 594; Devine *v.* S. D. Co., 145 Ill. App. 322; Trosper *v.* Co. (Ky.), 122 S. W. 205 (*comp.* Louisville & N. R. Co *v.* Hahn, 135 Ky. 251, 122 S. W. 142); Betterly *v.* R. Co., 158 Mich. 385, 122 N. W. 635; Slagel *v.* Co., 138 Mo. App. 432, 122 S. W. 321; Gillespie *v.* Ferguson, 78 N. J. L. 470, 74 A. 460; St. Louis S. R. Co. *v.* Samuels, 103 Tex. 54, 123 S. W. 121; Radley *v.* Knepfly (Tex. Civ.), 124 S. W. 447; Rice *v.* Lewis (Tex. Civ.), 125 S. W. 961; Farley *v.* R. Co., 67 W. Va. 350, 67 S. E. 1116.

945-88 Bresee *v.* Co., 149 Cal. 131, 85 P. 152; Missouri, K. & T. R. Co. *v.* Gilbert (Tex. Civ.), 130 S. W. 1037.

945-89 Wagner *v.* R. Co., 7 Penne. (Del.) 393, 75 A. 610; Guthrie *v.* Co., 142 Ill. App. 332; Louisville & N. R. Co. *v.* Lumpkin, 136 Ky. 290, 124 S. W. 318; Hines *v.* Co., 203 Mass. 288, 89 N. E. 628; Hostager *v.* Co., 110 Minn. 408, 125 N. W. 902; Gabriel *v.* R. Co., 135 Mo. App. 222, 115 S. W. 3; Schmoske *v.* R. Co., 129 App. Div. 500, 114 N. Y. S. 87; McGinnis *v.* Hyman, 63 Misc. 316, 117 N. Y. S. 202; Lumsden *v.* R. Co., 130 App. Div. 209, 114 N. Y. S. 421; Stamford O. M. Co. *v.* Barnes, 55 Tex. Civ. 420, 119 S. W. 872; Conrad *v.* Graham, 54 Wash. 641, 103 P. 1122 (notice to agent); Pederson *v.* County, 54 Wash. 637, 103 P. 1125.

945-90 Gettins *v.* Kelley, 212 Mass.

171, 98 N. E. 684; Roberts *v.* Co., 84 S. C. 283, 66 S. E. 298.

Absence of knowledge of danger may be shown. North German Lloyd S. S. Co. *v.* Roehl (Tex. Civ.), 144 S. W. 322.

Age, experience, knowledge and intelligence of child shown on issue of contributory negligence. Potefa *v.* Brookhaven, 95 Miss. 774, 49 S. 617.

945-93 Alabama Consol. Coal & Iron Co. *v.* Heald, 168 Ala. 626, 53 S. 162; Eslick *v.* Collieries Co., 149 Ill. App. 607; Belleveau *v.* S., 200 Mass. 237, 86 N. E. 301.

Evidence of decedent's knowledge of danger to be considered by jury in connection with instinct of self-preservation. Brennen *v.* Co., 147 Ill. App. 263.

Knowledge of danger may be testified to by plaintiff. Lury *v.* R. Co., 205 Mass. 540, 91 N. E. 1018.

Acts of third persons, known to plaintiff, may be shown as bearing upon his prudence in connection with place which caused injury. Cotton *v.* Co., 147 Ia. 427, 123 N. W. 381; Smith *v.* R., 155 Mich. 466, 119 N. W. 640.

946-94 Expression of third person concerning safety of doing act may be proved as part of res gestae. Miller *v.* Neale, 137 Wis. 426, 119 N. W. 94.

946-95 Burdette C. Co. *v.* Bunting (Ark.), 167 S. W. 77; Lone Star B. Co. *v.* Solcher (Tex. Civ.), 126 S. W. 26.

946-97 Anderson *v.* R. Co., 170 Ill. App. 497; Seifert *v.* Schaible, 81 Kan. 323, 105 P. 529; Crabtree *v.* R. Co., 86 Neb. 33, 124 N. W. 932.

946-98 McFarland *v.* R. Co., 136 App. Div. 194, 120 N. Y. S. 292; Hebert *v.* Co., 136 App. Div. 107, 120 N. Y. S. 672. See supra, "Infants," 268-19.

Age of trespasser or licensee, immaterial on question of defendant's negligence. Arkansas & L. R. Co. *v.* Sain, 90 Ark. 278, 119 S. W. 659.

946-2 Louisville Gas Co. *v.* Guelat, 150 Ky. 583, 150 S. W. 656; Walton *v.* Burchel, 121 Tenn. 715, 121 S. W. 391.

947-3 Little Rock R. & E. Co. *v.* Billings, 98 C. C. A. 467, 173 Fed. 903; Elgin, etc. R. Co. *v.* Brown, 129 Ill. App. 62; McIntosh *v.* Oil Co., 89 Kan. 289, 131 P. 151; Anderson *v.* Co., 78 N. J. L. 285, 73 A. 840; Conrad *v.* Graham, 54 Wash. 641, 103 P. 1122. See vol. 10, p. 487, n. 74, and supplement thereto.

Intoxication soon after admissible in court's discretion. Thayer *v.* R. Co., 214 Mass. 234, 101 N. E. 368.

947-4 El Paso, etc. R. Co. *v.* Lumbley, 56 Tex. Civ. 418, 120 S. W. 1050. See Jackson *v.* Co., 11 Cal. App. 101, 103 P. 1098.

Conduct of intoxicated person determined as though he was sober. Seaboard A. L. R. *v.* Chapman, 4 Ga. App. 706, 62 S. E. 488.

947-5 Kansas City, etc. R. Co. *v.* Young, 50 Tex. Civ. 610, 111 S. W. 764.

947-6 Madisonville *v.* Stewart (Ky.), 121 S. W. 421.

948-9 Warren *v.* Porter, 144 Mich. 699, 108 N. W. 435.

948-14 See vol. 6, p. 501, n. 80, and supplement thereto.

948-18 Character of horse shown on issue of proximate cause where he was frightened; but plaintiff's knowledge of his reputation was not material on that issue; reputation is relevant on issue of contributory negligence if plaintiff knew of it. Cain *v.* Wintersteen, 144 Mo. App. 1, 128 S. W. 274.

949-21 Canadian N. R. Co. *v.* Senske, 201 Fed. 637, 120 C. C. A. 65; Chicago, etc. R. Co. *v.* R. Co., 176 Fed. 237, 100 C. C. A. 41 (if nature of act or omission doubtful); Lake *v.* Co., 160 Fed. 887, 88 C. C. A. 69; Chicago, etc. R. Co. *v.* Egan, 159 Fed. 40, 86 C. C. A. 230; Jefferson Fertilizer Co. *v.* Houston, 3 Ala. App. 348, 57 S. 98; Lamson *v.* Andrews, 40 App. Cas. (D. C.) 540; Franey *v.* Co., 235 Ill. 522, 85 N. E. 750; Laurie Co. *v.* McCullough, 174 Ind. 477, 90 N. E. 1014; National B. Co. *v.* Wilson (Ind. App.), 78 N. E. 251 (usage of others not sole criterion); Clark *v.* Co., 146 Ia. 428, 123 N. W. 327; Warren *v.* Jeunesse (Ky.), 122 S. W. 862; Anderson *v.* Co., 108 Minn. 261, 121 N. W. 915 (custom in mines to timber drifts); Larson *v.* Ring, 43 Minn. 88, 44 N. W. 1078 (dist. on ground defendant may not excuse negligence by proving like conduct on part of others; but as bearing upon the question of reasonable care either party may prove a custom adopted and followed generally by those similarly engaged); Harris *v.* R. Co. (Mo. App.), 166 S. W. 335; Schiller *v.* Co., 156 Mo. App. 569, 137 S. W. 607; Crawford *v.* S. Co., 215 Mo. 394, 114 S. W. 1057; Leine *v.* Co., 134 Mo. App. 557, 114 S. W. 1147; Robinson *v.* R. Co., 133 Mo. App. 101, 112 S. W. 730; Westlake *v.* Min. Co., 48 Mont. 120, 136 P. 38;

Forquer *v.* B. Co., 37 Mont. 426, 97 P. 843; Hollingsworth *v.* Co., 38 Mont. 143, 99 P. 142; Egelston *v.* R. Co., 205 N. Y. 579, 98 N. E. 748; Shannahan *v.* Corp., 204 N. Y. 543, 98 N. E. 9; Gross *v.* Mfg. Co., 158 App. Div. 438, 143 N. Y. S. 582; Drummond *v.* Norton Co., 156 App. Div. 126, 141 N. Y. S. 29; Dick *v.* Con. Co., 153 App. Div. 651, 138 N. Y. S. 700; Kent *v.* Town of Patterson, 80 Misc. 560, 141 N. Y. S. 932; Murdock *v.* R. Co., 159 N. C. 131, 74 S. E. 887; Anderson *v.* Co. (Or.), 136 P. 660; Liptak *v.* Kurrie (Pa.), 90 A. 442; Thorp *v.* Boudwin, 228 Pa. 165, 77 A. 421; McGeehan *v.* Hughes, 217 Pa. 121, 66 A. 238, 72 A. 856; Nashville, etc. Co. *v.* Wade, 127 Tenn. 154, 153 S. W. 1120; Houston, etc. Co. *v.* Gray (Tex. Civ.), 137 S. W. 729; Cook & S. M. Co. *v.* Thompson, 110 Va. 369, 66 S. E. 79; Monaghan *v.* Co., 140 Wis. 457, 122 N. W. 1066; Collins *v.* R. Co., 150 Wis. 305, 136 N. W. 628; Krawiecki *v.* Box Co., 151 Wis. 176, 138 N. W. 710. *Comp.* Zartner *v.* George, 156 Wis. 131, 145 N. W. 971.

See Am. Loc. Co. *v.* White, 205 Fed. 260, 123 C. C. A. 464; vol. 10, p. 548, n. 79, and supplement thereto; also vol. 3, p. 960, n. 36.

Use of unusual machinery, not evidence of negligence. McGeehan *v.* Hughes, 223 Pa. 524, 72 A. 856.

See, however, North German Lloyd S. S. Co. *v.* Roehl (Tex. Civ.), 144 S. W. 322, where it is said; "The fact that other steamship companies and other persons engaged in a similar business had not equipped toilet rooms of the kind in question with guard rails, if such was proven to be a fact, did not justify appellant in failing to provide such a rail in the room in question, if a very cautious and prudent person, in the exercise of that high degree of care that is required by law of a carrier of passengers would have provided it. Whether such guard rail should have been provided, and whether a failure to so provide it was negligence, were questions that were, under the peculiar facts of this case, ones for the jury."

Inadmissible, unless plaintiff had a right to rely upon such custom. O'Dell *v.* R. Co., 149 Ill. App. 610.

949-22 Bandekow *v.* R. Co., 136 Wis. 341, 117 N. W. 812 (if custom not so obviously dangerous as to be recognized as such); Boyce *v.* Co., 119 Wis. 642, 97 N. W. 563; Yasdzewski *v.* Barker, 131 Wis. 494, 111 N. W. 689, 120 Am. St. 1059.

Or the manner in which the act was done is obviously negligent. Cramer *v.* Co., 239 Pa. 120, 86 A. 654.

949-23 Rudd *v.* Byrnes, 156 Cal. 636, 105 P. 957 (custom of hunters cannot be shown if plaintiff not aware of it or if he broke agreement with fellow hunters covering custom); Hamilton *v.* R. Co., 145 Ia. 431, 124 N. W. 363; Stewart *v.* Cushing, 204 Mass. 154, 90 N. E. 545; Joyce *v.* R. Co., 218 Mo. 344, 118 S. W. 21; Green *v.* R. Co., 142 Mo. App. 67, 125 S. W. 865; Jones *v.* Co., 225 Pa. 644, 74 A. 613 (to show machinery not guarded as required by statute); Clinchfield C. Co. *v.* Wheeler, 108 Va. 448, 62 S. E. 269. See Neary *v.* R. Co., 37 Mont. 461, 97 P. 944; Benson *v.* Mfg. Co., 147 Wis. 20, 132 N. W. 633; vol. 6, p. 500, n. 73, and supplement thereto.

Held irrelevant.—Jonesboro, etc. R. Co. *v.* Minson, 102 Ark. 581, 145 S. W. 215.

950-26 Chicago G. W. R. Co. *v.* Egan, 159 Fed. 40, 86 C. C. A. 230; Louisville & N. R. Co. *v.* Boque, 177 Ala. 349, 58 S. 392; Blatcher *v.* R. Co., 31 App. Cas. (D. C.) 385 (prior similar use by passenger and defendant's employes); Pickett *v.* R. Co., 138 Ga. 177, 74 S. E. 1027; Louisville R. Co. *v.* Smock, 147 Ky. 345, 144 S. W. 40; Jacob *v.* R. Co., 133 La. 735, 63 S. 306; Elliott *v.* Sawyer, 107 Me. 195, 77 A. 782; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651 (only general custom may be shown); Hines *v.* Co., 199 Mass. 522, 85 N. E. 851 (neglect to give warning if plaintiff knew of custom); Crawford *v.* Co., 215 Mo. 394, 114 S. W. 1057; Overby *v.* Co., 144 Mo. App. 363, 128 S. W. 813; Neary *v.* R. Co., 37 Mont. 461, 97 P. 944 (if act not negligent per se and connected with injury); Heilig *v.* R. Co., 152 N. C. 469, 67 S. E. 1009; Rush *v.* Co., 51 Or. 519, 95 P. 193; Stoner *v.* Co., 40 Pa. Super. 599; Missouri, etc. R. Co. *v.* Kennedy, 51 Tex. Civ. 466, 112 S. W. 339 (opinion on rehearing); Anderson *v.* Co., 57 Wash. 502, 107 P. 376 (custom to rely on signals).

See Richardson *v.* S. S. Co., 62 Or. 490, 126 P. 24; Gulf, etc. R. Co. *v.* Stewart (Tex. Civ.), 164 S. W. 1059.

Such evidence has a bearing on the question of contributory negligence. Yeager *v.* R. Co., 148 Ia. 231, 123 N. W. 974.

Also to rebut contributory negligence. New Connellsville Coal & Coke Co. *v.* Kilgore, 4 Ala. App. 334, 58 S. 966.

Competent on question of contributory negligence.—St Louis, etc. R. Co. *v.* York, 92 Ark. 554, 123 S. W. 376; Campbell *v.* R. Co., 243 Ill. 620, 90 N. E. 1106; Duffey *v.* Co., 147 Ia. 225, 124 N. W. 609; Reeves *v.* R. Co., 151 N. C. 318, 66 S. E. 133 (if known to defendant).

Usual and customary method of doing act which caused injury may be shown if act not negligent per se. Dickson *v.* Swift, 238 Ill. 62, 87 N. E. 59 (if more than one way of doing act); Hamilton *v.* R. Co., 145 Ia. 431, 124 N. W. 363.

Ground of distinction is if act or omission is not plainly negligent, but is of a doubtful character, evidence of ordinary practice, and uniform custom of others in performance, under similar circumstances, of like acts is competent. Chicago G. W. R. Co. *v.* Egan, 159 Fed. 40, 86 C. C. A. 230; *cit.* several federal cases, and *dist.* Chicago, etc. R. Co. *v.* Lindeman, 143 Fed. 946, 75 C. C. A. 18, ruling custom must be uniform, on ground motion to strike out testimony was too broad.

950-27 Such evidence irrelevant. Louisville & N. R. Co. *v.* Young, 168 Ala. 551, 53 S. 213.

950-28 Owl Creek C. Co. *v.* Goleb, 210 Fed. 209, 127 C. C. A. 27; Brown *v.* Nav. Co., 63 Or. 396, 128 P. 38; Krawiecki *v.* Box Co., 151 Wis. 176, 138 N. W. 710.

950-29 Inquiry as to custom of others must be general or limited to such as conduct their business in proper manner. Maryland, etc. R. Co. *v.* Brown, 109 Md. 304, 71 A. 1005.

951-32 Standard O. Co. *v.* Parrish, 145 Fed. 829, 76 C. C. A. 405; Jackson *v.* R. Co., 140 Ga. 277, 78 S. E. 1059; Georgia R. R. *v.* Hunter, 12 Ga. App. 294, 77 S. E. 176; Yeates *v.* R. Co., 241 Ill. 205, 89 N. E. 338, 145 Ill. App. 11 (whether custom based on rule or practice of employes); Chicago, etc. R. Co. *v.* Sugar, 117 Ill. App. 578; Carter *v.* S. Co. (Ia.), 141 N. W. 26; Chesapeake & O. R. Co. *v.* Young's Admr., 146 Ky. 317, 142 S. W. 709; Louisville & N. R. Co. *v.* Trisler, 140 Ky. 447, 131 S. W. 198; McManus *v.* Thing, 202 Mass. 11, 88 N. E. 442; Glennon *v.* Co., 130 App. Div. 491, 114 N. Y. S. 1044; Kent *v.* Patterson, 80 Misc. 560, 141 N. Y. S. 932; Missouri, etc. Co. *v.* Dereberry (Tex. Civ.), 167 S. W. 30; Nickels *v.* Dock Co., 153 Wis. 298, 141 N. W. 269; Gierczak *v.* Co., 142 Wis. 207, 125 N. W. 436.

Admissible as tending to show that instructions were given as usual. Van Geem *v.* Oil Mill (Tex. Civ.), 152 S. W. 1108.

Protection provided for others doing like work may be shown not to have been made for plaintiff. Warburton *v.* Co., 75 N. H. 592, 72 A. 826.

952-33 Maryland, etc. R. Co. *v.* Brown, 109 Md. 304, 71 A. 1005. See vol. 10, p. 472, n. 14, et seq., and supplement thereto.

Violation of law of road shown. McGourty *v.* De Marco, 200 Mass. 57, 85 N. E. 891.

952-34 Louisville & N. R. Co. *v.* Williams (Ala.), 62 S. 679; Engel *v.* Parmalee Co., 169 Ill. App. 410; Ft. Worth, etc. Co. *v.* Keith (Tex. Civ.), 163 S. W. 142. But see Hagan *v.* Steel Co., 240 Pa. 222, 87 A. 574.

952-35 Moffitt *v.* Conn. Co., 86 Conn. 527, 86 A. 16; Redin *v.* Tr. Co., 173 Ill. App. 491; Wibel *v.* R. Co., 155 Ill. App. 349; Sturm *v.* Coal Co., 155 Ill. App. 1, *aff.* 248 Ill. 20, 93 N. E. 345; Indianapolis Southern R. Co. *v.* Emmerson, 52 Ind. App. 403, 98 N. E. 895; Kean *v.* R. Co., 210 Mass. 449, 97 N. E. 64; Lury *v.* R., 205 Mass. 540, 91 N. E. 1018; Santore *v.* R. Co., 203 Mass. 437, 89 N. E. 619; Hines *v.* Co., 203 Mass. 288, 89 N. E. 628; Fitzgerald *v.* R. Co., 200 Mass. 105, 85 N. E. 911 (failure to post order); Swanson *v.* R. Co., 109 Minn. 464, 124 N. W. 219; Taylor *v.* R. Co., 166 Mo. App. 131, 148 S. W. 470; Houston, etc. R. Co. *v.* Ravanelli (Tex. Civ.), 123 S. W. 208. *Contra* if offered to show it devolved upon plaintiff to look out for himself. Berry *v.* R. Co., 202 Mass. 197, 88 N. E. 588.

953-37 Denver C. T. Co. *v.* Wright, 47 Colo. 366, 107 P. 1074; McKee *v.* Peters, 142 Mo. App. 286, 126 S. W. 255; Olson *v.* Co., 83 Neb. 735, 120 N. W. 421; Weaver *v.* Tel. Co., 82 Neb. 696, 118 N. W. 650 (violation of statute); Thompson *v.* P. Co. (N. H.), 88 A. 216; Burke *v.* Co., 133 App. Div. 113, 117 N. Y. S. 400; Fane *v.* Transit Co., 228 Pa. 471, 77 A. 806.

Neglect to comply with ordinance respecting guarding electric wires, prima facie evidence of negligence. Defendant may show non-compliance did not cause injury; but not inadequacy of

ordinance. Conrad *v.* R. Co., 240 Ill. 12, 88 N. E. 180.

Inadmissible when foreign to issue. Wabash R. Co. *v.* Keeler, 127 Ill. App. 265; Gibson *v.* Murray, 120 Ill. App. 296. Or unless shown violation was proximate cause. Friedman *v.* Co., 161 Ill. App. 480.

953-38 Yarbrough *v.* Carter (Ala.), 60 S. 833; Farrington *v.* Cheponis, 82 Conn. 258, 73 A. 139; Maier *v.* Ry., 166 Ill. App. 500; Seith *v.* Co., 144 Ill. App. 612; Thompson *v.* R. Co., 143 Ill. App. 81; Wabash R. Co. *v.* Beedle (Ind. App.) 87 N. E. 690; Beirness *v.* Missouri Val. (Ia.), 144 N. W. 628; Brown *v.* R. Co. (Mich.), 146 N. W. 278; Ebling Brew. Co. *v.* Linch, 80 Misc. 517, 141 N. Y. S. 480; Jaquith *v.* Worden, 73 Wash. 349, 132 P. 33.

Ordinance in conflict with statute.—S. *v.* Born. 85 O. St. 430, 98 N. E. 108.

Explanation may be made of circumstances leading to violation. Davis *v.* Whiting, 201 Mass. 91, 87 N. E. 199.

954-40 Birmingham R. Co. *v.* Morris, 163 Ala. 190, 50 S. 198 (*disap.* Fonda *v.* R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. 341); Moffit *v.* Conn. Co., 86 Conn. 527, 86 A. 16; Yates *v.* R. Co. (Del.), 82 A. 27; Wash. R. Co. *v.* Downey, 40 App. Cas. (D. C.) 147; Devine *v.* R. Co., 167 Ill. App. 195; Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160 (if defendant refuses to produce rules they may be proved by witness who worked under them); Southern R Co. *v.* Adkins, 133 Ky. 219, 117 S. W. 321; Crowley *v.* R. Co., 204 Mass. 241, 90 N. E. 532; Larson *v.* R. Co., 212 Mass. 262, 98 N. E. 1048; Renaud *v.* R. Co., 210 Mass. 553, 97 N. E. 98; O'Connell *v.* R. Co., 149 Mo. App. 501, 131 S. W. 117; Payne *v.* Cleveland, 4 O. C. C. (N. S.) 37; Canham *v.* R. I. Co., 35 R. I. 177, 85 A. 1050; McIsaac *v.* P. Co. (R. I.), 83 A. 754; McCormick *v.* Co., 85 S. C. 455, 67 S. E. 562; Galveston, etc. Co. *v.* Pingenot (Tex. Civ.), 142 S. W. 93; Meyers *v.* R. Co., 36 Utah 307, 104 P. 736. See supra, "Carriers," 941-29; supra, "Master and Servant," 541-98; vol. 8, p. 547, n. 44; vol. 10, p. 570, n. 67; vol. 14, p. 711, and supplements thereto.

But see Louisville & N. R. Co. *v.* Dyer, 152 Ky. 264, 153 S. W. 194.

Comp. Hoffman *v.* Cedar Rapids (Ia.), 139 N. W. 165.

Contra, Louisville & N. R. Co. *v.* Dyer, 152 Ky. 264, 153 S. W. 194.

Violation of rules with knowledge of defendant may be shown. Sloss-S., etc. Co. *v.* Capps (Ala.), 62 S. 66.

954-41 Isackson *v.* R. Co., 75 Minn. 27, 77 N. W. 433. See McKernan *v.* R. Co., 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347; Otto *v.* R. Co., 148 Wis. 54, 134 N. W. 157.

954-42 Rules violated by master admissible on issue of contributory negligence, as is time table issued by him which purports to give warnings of danger, though it does not include such structure as is complained of. George *v.* R. Co., 225 Mo. 364, 125 S. W. 196

Rule not admissible to establish substantive ground of recovery competent, in connection with other testimony, as admission extra precautions should have been taken because of conditions known by defendant. Powers *v.* R. Co., 142 Ill. App. 515.

Non-observed rules of master, competent against him in favor of servant. Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402.

954-44 Kolp *v.* R. & L. Co., 145 Ill. App. 645; Wullner *v.* C. Co., 145 Ill. App. 486; Hart *v.* Co., 146 Ill. App. 155; Hankins *v.* Reimers, 86 Neb. 307, 125 N. W. 516; Closser *v.* Washington, 11 Pa. Super. 112 (plans and photographs in evidence); McKay *v.* Elec. Co., 76 Wash. 257, 136 P. 134.

955-45 Central C. & C. Co. *v.* Williams, 173 Fed. 337, 97 C. C. A. 597; *app.* U. S. S. Co. *v.* Parry, 166 Fed. 407, 92 C. C. A. 159; Savage *v.* Hayes, 142 Ill. App. 316; Stewart *v.* R. Co., 136 Ky. 717, 125 S. W. 154; Rural Home T. Co. *v.* Arnold (Ky.), 119 S. W. 811; Ferrari *v.* Co., 54 Or. 210, 102 P. 1016 (statement thing out of repair and thing which caused injury could have been done with safety, not conclusion); Stremme *v.* Dyer, 223 Pa. 7, 72 A. 274; Garberg *v.* Samuels, 27 R. I. 359, 62 A. 211; Stone *v.* Sylliaasen, 70 Wash. 89, 126 P. 84. See Christiansen *v.* McLellan, 74 Wash. 318, 133 P. 434. See also vol. 5, p. 684, n. 54.

Expert opinion as to practicability of discovering unexploded charges of dynamite, admissible. Stephen *v.* Duffy, 142 Ill. App. 219.

Witness of experience and familiarity with conditions attending accident may testify to practicability of preventing same. Ohio C. M. Co. *v.* Hutchings, 172 Fed. 201, 96 C. C. A. 653.

Appearance of thing as indicating condition, may be testified to by one who saw it. Roberts *v.* C. Co., 84 S. C. 283, 66 S. E. 298.

955-46 U. S. S. Co. *v.* Parry, 166 Fed. 407, 92 C. C. A. 159 (scaffold); Walker *v.* Williamson, 205 Mass. 514, 91 N. E. 885; Whalen *v.* Rosnosky, 195 Mass. 545, 81 N. E. 282; Braasch *v.* Co., 153 Mich. 652, 118 N. W. 366 (if danger apparent); Shohoney *v.* R. Co., 223 Mo. 649, 122 S. W. 1025 (if based on statute); Cummings *v.* Co., 40 Mont. 599, 107 P. 904; Watson *v.* Co., 127 App. Div. 134, 111 N. Y. S. 277; Schmahl *v.* B. Co., 61 Misc. 316, 113 N. Y. S. 768; Lewis *v.* Crane, 78 Vt. 216, 62 A. 60.

955-47 Morris *v.* Williams, 143 Ill. App. 140; Korab *v.* R. Co. (Ia.), 143 N. W. 876; Spencer *v.* G. Co. (Ia.), 138 N. W. 820; McCreery *v.* Co., 143 Ia. 303, 119 N. W. 738; Hammer *v.* Janowitz, 131 Ia. 20, 108 N. W. 109; King *v.* King, 79 Kan. 584, 100 P. 503; Warren *v.* Jeunesse (Ky.), 122 S. W. 862; Doherty *v.* Booth, 200 Mass. 522, 86 N. E. 945 (weight like rope would carry); Erickson *v.* Co., 193 Mass. 119, 78 N. E. 761; Dolge *v.* R. Co., 107 Minn. 242, 119 N. W. 1066 (proper throw for split railway switch); Wofford *v.* Mills, 72 S. C. 346, 51 S. E. 918. See McGinnis *v.* Co., 122 Mo. App. 227, 99 S. W. 4.

Expert testimony is competent to show existence and common use of appliances to prevent such occurrences as that complained of. Sticht *v.* Co., 195 N. Y. 70, 87 N. E. 801. And to show proper method of setting telephone pole. Barrett *v.* Co., 201 Mass. 117, 87 N. E. 565.

955-48 Louisville & N. R. Co. *v.* Boque, 177 Ala. 349, 58 S. 392; Am. B. Co. *v.* Fennell, 158 Ala. 484, 48 S. 97; Russell *v.* R. Co. (Ky.), 124 S. W. 841; Teepen *v.* Taylor, 141 Mo. App. 282, 124 S. W. 1062; Landers *v.* R. Co., 134 Mo. App. 80, 114 S. W. 543; Shawnee, etc. Co. *v.* Motesenbocker (Okla.), 138 P. 790; International, etc. R. Co. *v.* Garcia, 54 Tex. Civ. 59, 117 S. W. 206; Johnson *v.* Caughren, 55 Wash. 125, 104 P. 170. *Comp.* Korab *v.* R. Co. (Ia.), 146 N. W. 765.

See Spencer *v.* Grain Co. (Ia.), 138 N. W. 820.

Due diligence of carrier in tracing lost goods, opinion incompetent. Burress *v.* R. Co., 79 S. C. 250, 60 S. E. 692; Moody *v.* R. Co., 79 S. C. 297, 60 S. E. 711.

955-49 Gray *v.* R. Co., 215 Mass. 143, 102 N. E. 71; Boisvert *v.* Ward, 199 Mass. 594, 85 N. E. 849; Roberts *v.* Co., 84 S. C. 283, 66 S. E. 298 (what plaintiff's conduct would have been if he knew situation); Freeman *v.* Taylor (Tex. Civ.), 125 S. W. 613; Walker *v.* R. Co., 51 Tex. Civ. 391, 112 S. W. 430; So., etc. Co. *v.* McSwain, 55 Tex. Civ. 317, 118 S. W. 874. *Contra*, Ball *v.* Co., 32 App. Cas. (D. C.) 177.

See Chesapeake, etc. Co. *v.* Mathews, 114 Va. 173, 76 S. E. 288.

955-50 Yarber *v.* R. Co., 235 Ill. 589, 85 N. E. 928. *Contra*, St. Clair *v.* Co., 38 Pa. Super. 228. *Comp.* infra, "Telegraphs and Telephones," 465-72.

Distance within which engine could have been stopped may be shown by expert testimony; but not distance within which it should have been done. Mahoning O. & S. Co. *v.* Blomfelt, 163 Fed. 827, 91 C. C. A. 390.

955-51 Ambre *v.* Co., 43 Ind. App. 47, 86 N. E. 871. *Contra* as to admission in nature of conclusion. Rudd *v.* Byrnes, 156 Cal. 636, 105 P. 957.

That tracks "seemed closer" together than they ordinarily are, may be stated by witness. Ft. Worth B. R. Co. *v.* Cabell (Tex. Civ.), 161 S. W. 1083. See also vol. 5, p. 677, n. 42.

Expert testimony as to care a drunken man could use is inadmissible. Illinois Cent. R. Co. *v.* Holland's Admr., 147 Ky. 699, 145 S. W. 389.

955-52 Parkin *v.* Co., 157 Cal. 41, 106 P. 210; Doyle *v.* Melendy, 83 Vt. 339, 75 A. 881; Hogg *v.* Co., 52 Wash. 8, 100 P. 151. *Contra* if party whose act complained of cannot present the facts so jury may draw correct conclusion therefrom, and he has detailed facts respecting manner in which act done. T. & C. Ins. Co. *v.* Fouke, 94 Ark. 358, 127 S. W. 461.

Control of engine may be testified to by engineer. International, etc. R. Co. *v.* Brice (Tex. Civ.), 126 S. W. 613.

Expert testimony admissible to show defect in appliance might have been discovered by proper inspection. Sloss-S. S. & I. Co. *v.* Green, 159 Ala. 178, 49 S. 301; St. Louis, etc. R. Co. *v.* Reed, 92 Ark. 350, 122 S. W. 645. Proper way of examining bridge to ascertain condition may be shown by an expert. Stephen *v.* Duffy, 237 Ill. 549,

86 N. E. 1082; Greenway *v.* County, 144 Ia. 332, 122 N. W. 943.

Duty of person injured to take precaution alleged to be necessary may be testified to by one familiar with act done and situation at time. Roberts *v.* Co., 84 S. C. 283, 66 S. E. 298.

955-54 Sloss-S., etc. Co. *v.* Green, 159 Ala. 178, 49 S. 301.

Possibility of doing act in particular way does not involve opinion. U. S. P. & F. Co. *v.* Driver, 162 Ala. 580, 50 S. 118.

Expert's opinion as to apparent means required to avoid danger, not harmful. Gustafson *v.* Co., 51 Wash. 25, 97 P. 1094.

Casual connection between negligence and resulting injury may be shown by experts. Resnick *v.* Joline, 113 N. Y. S. 918.

And so in Illinois, method of doing work not being matter of common knowledge. Williams *v.* Morris, 237 Ill. 254, 86 N. E. 729.

In Missouri expert may testify as to proper and safe way of loading car wheels upon flat car. Meily *v.* R. Co., 215 Mo. 567, 114 S. W. 1013.

956-55 Am. T. & L. Co. *v.* Co., 111 Md. 504, 75 A. 341.

NEW PROMISE

Sufficiency of evidence, 959-10.

957-1 Aebi *v.* Bk., 124 Wis. 73, 102 N. W. 329, signing duplicate check no waiver of laches in presenting original. See Steger *v.* Jackson, 31 Ky. L. R. 434, 102 S. W. 329.

958-2 Davis *v.* Davis, 98 Me. 135, 56 A. 588.

959-8 Goldstein *v.* Saur (Tex. Civ.), 162 S. W. 441.

959-9 Nathan *v.* Leland, 193 Mass. 576, 79 N. E. 793 (letter stating promise, sufficient); Mandell *v.* Levy, 47 Misc. 147, 93 N. Y. S. 545 (recognition of moral duty to pay evidenced by letter, insufficient; must be clear intention to pay); Meyer *v.* Bartels, 56 Misc. 621, 107 N. Y. S. 778 (part payment does not renew obligation to pay balance); German Exch. Bk. *v.* Schnitzer, 72 Misc. 362, 130 N. Y. S. 223.

959-10 New promise must be clear, unequivocal and without qualification or condition. Torrey *v.* Krauss, 149 Ala. 200, 43 S. 184; Moore *v.* Trounstine, 126 Ga. 116, 54 S. E. 810 (letter insufficient); Mordaunt *v.* Monroe, 124 Ill. App. 306; Stern *v.* Co., 227 Ill. 430, 80 N. E. 307; Needham *v.* Matthewson, 81 Kan. 340, 105 P. 456 (must be in respect to particular debt); Brooks *v.* Paine, 25 Ky. L. R. 1125, 77 S. W. 190; Sundling *v.* Willey, 19 S. D. 293, 103 N. W. 38 (promise to pay as soon as possible, not conditional).

NEW TRIAL

Newly obtained evidence, 962-75.

963-1 Unnecessary to introduce evidence on hearing of motion; presumed all evidence is within breast of court. Ewart Lumb. Co. *v.* P. Co., 9 Ala. App. 152, 62 S. 560.

964-3 Dougherty *v.* S., 59 Tex. Cr. 464, 128 S. W. 398, also oral evidence.

964-4 Misconduct relied on must be stated. Texas, etc. R. Co. *v.* Bellar, 51 Tex. Civ. 154, 112 S. W. 323.

964-6 Walsh *v.* U. S., 171 Fed. 615, 98 C. C. A. 461; Wyckoff *v.* R. Co., 234 Ill. 613, 85 N. E. 237; Schneider *v.* R. Co., 177 Ill. App. 334; Kelly *v.* R. Co., 175 Ill. App. 196; Brown *v.* Drainage Dist. No. 48 (Ia.), 113 N. W. 1077; S. *v.* Dudley, 147 Ia. 645, 126 N. W. 812; McMahon *v.* Co., 137 Ia. 368, 114 N. W. 203 (to show evidence not considered); Lexington, etc. Co. *v.* Crawford, 155 Ky. 723, 160 S. W. 267; S. *v.* Cunningham, 123 La. 867, 49 S. 601; Brinsfield *v.* Howeth, 110 Md. 520, 73 A. 289; Green *v.* Assn., 211 Mo. 18, 109 S. W. 715; Roth *v.* City (Mo. App.), 167 S. W. 1155; Finer *v.* Nichols, 175 Mo. App. 525, 157 S. W. 1023; Tulsa, etc. Co. *v.* Jacobson, 40 Okla. 118, 136 P. 410; Lee *v.* Co. (R. I.), 66 A. 835; Stroud *v.* Fish, 29 S. D. 410, 136 N. W. 1125; Gulf, etc. R. Co. *v.* Roberts (Tex. Civ.), 91 S. W. 375; Marcy *v.* Parker, 78 Vt. 73, 62 A. 19; Allen *v.* Bk., 76 Wash. 51, 133 P. 621 (misunderstanding of exhibit); Pickens *v.* Co., 58 W. Va. 11, 50 S. E. 872.

See vol. 3, p. 220, n. 44, et seq. and supplement thereto.

965-7 McDonald *v.* Pless, 206 Fed. 263, 124 C. C. A. 131; Tulsa St. R. Co *v.* Jacobson, 40 Okla. 118, 136 P. 410

Conduct of jurors after verdict with one of parties, cannot be proved unless connected with their acts. Montgomery T. Co. *v.* Knabe, 158 Ala. 458, 48 S. 501.

Declarations of juror after verdict cannot be proved. Montgomery T. Co. *v.* Knabe, supra.

In Texas otherwise.—Texas, etc. R. Co. *v.* Bellar, 51 Tex. Civ. 154, 112 S. W. 323, statute.

967-9 Porter *v.* Whitlock, 142 Ia. 66, 120 N. W. 649; Jones *v.* R. Co., 32 Ky. L. R. 1371, 108 S. W. 865; Simmons *v.* Fish, 210 Mass. 563, 97 N. E. 102; Hughes *v.* S. (Tenn.), 148 S. W. 543; Lee *v.* S., 121 Tenn. 521, 116 S. W 881; Flynt *v.* Taylor (Tex. Civ.), 91 S. W. 864. See vol. 3, p. 221, n. 46, and supplement thereto.

967-10 Continental C. Co. *v.* Ogburn (Ala.), 64 S. 619; Kimic *v.* R. Co., 156 Cal. 379, 104 P. 986; Battle Creek *v.* Haak, 139 Mich. 514, 102 N. W. 1005; Snyder *v.* Town, 48 Mont. 484, 138 P. 1090; Sutton *v.* Lowry, 39 Mont. 462, 104 P. 545; Ritchie *v.* Steger, 93 Neb. 63, 139 N. W. 838; Goldenberg *v.* Law, 17 N. M. 546, 131 P. 499; Campbell *v.* Campbell (R. I.), 83 A. 326; Ewing *v.* Lunn, 22 S. D. 95, 115 N. W. 527 (to show juror intoxicated). *Contra*, Foley *v.* Northrup, 47 Tex. Civ. 277, 105 S. W. 229, court hears evidence of jurors in support of motion for new trial for misconduct of jury.

See vol. 3, p. 220, n. 44, and supplement thereto. But see Maryland Cas. Co. *v.* Elec. Co., 75 Wash. 430, 134 P. 1097.

Admissions by former jurors not provable by others. Kimic *v.* R. Co., 156 Cal. 379, 104 P. 986.

Under Tex. Rev. St., 1895, art. 1371, as amended in 1905, jurors may testify to improper conduct of jury only in open court, and ex parte affidavits are not sufficient. San Antonio, etc. R. Co. *v.* Wells (Tex. Civ.), 146 S. W. 645.

968-11 Hull *v.* Larson, 14 Ariz. 492, 131 P. 668; S. *v.* Linn, 223 Mo. 98, 122 S. W. 679; Washington L. P. Co. *v.* Goodrich, 110 Va. 692, 66 S. E. 977, *Contra*, King *v.* Elton, 2 Cal. App. 145, 83 P. 261. See Winn *v.* R. Co., 143 Ill. App. 71.

969-12 *Contra* under statutes. Sutton *v.* Lowry, 39 Mont. 462, 104 P. 545; Ralton *v.* Co., 54 Wash. 254, 103 P. 28.

969-14 Rager *v.* R. Co., 137 Ky. 811, 127 S. W. 155; S. *v.* Williams, 124 La. 779, 50 S. 711; S. *v* Rumfelt, 228 Mo. 443, 128 S. W. 737. See Hoyt *v.* Hoyt, 137 Ia. 563, 115 N. W. 222.

970-16 See vol. 3, p. 223, n. 16, and supplement thereto.

970-17 Lintz *v.* T. Co., 54 Colo. 371, 131 P. 258; Hoyt *v.* Hoyt, 137 Ia. 563, 115 N. W. 222 (influence of another jury); Tulsa S. R. Co. *v.* Jacobson, 40 Okla. 118, 136 P. 410.

A complaint as to the grounds upon which verdict was found does not amount to an allegation of misconduct, and is a method of impeaching a verdict which should not be permitted Garza *v.* Co. (Tex. Civ.), 147 S. W. 687.

971-19 Foley *v.* Everett, 142 Ill. App. 250.

Converse of rule applied. Kimic *v.* R. Co., 156 Cal. 379, 104 P. 986.

972-20 Purdy *v.* Sherman, 74 Wash. 309, 133 P. 440; Ralton *v.* Co., 54 Wash. 254, 103 P. 28; S. *v.* Aker, 54 Wash. 342, 103 P. 420.

972-21 Tulsa S. R. Co. *v.* Jacobson, 40 Okla. 118, 136 P. 410.

973-24 S. *v.* Aker, 54 Wash. 342, 103 P. 420.

974-27 Carlson *v.* Adix, 144 Ia. 653, 123 N. W. 321.

975-29 Birmingham R. & E. Co. *v.* Mason, 144 Ala. 387, 39 S. 590; Birmingham, etc. Co. *v.* Clemons, 142 Ala 160, 37 S. 925; S. *v.* Marren, 17 Ida. 766, 107 P. 993; Kelly *v.* R. Co., 175 Ill. App. 196; Trohey *v.* R. Co., 168 Ill. App. 1; Strand *v.* Co., 136 Ia. 68, 113 N. W. 488; Goodwin *v.* Blanchard, 73 N. H. 550, 64 A. 22; Dittman *v* New York, 58 Misc. 52, 110 N. Y. S. 40; Nicholson *v.* S., 18 Wyo. 298, 106 P. 929. See vol. 3, p. 234, n. 1, and supplement thereto.

By an examination of the jurors themselves as well as by other evidence. Kirby's Digest, §§2422, 2423; Hydrick *v.* S., 103 Ark. 4, 145 S. W. 542.

"**An affidavit** was made by one of the attorneys for defendant that immediately after the jury had returned their verdict into court he went into the jury room and found on the floor a paper with figures thereon and a calculation made thereof. This was all the testimony adduced relative to this matter, and we do not think that it was sufficient to show that any member of the jury had made these figures, or that the jurors had agreed that the amount of punishment fixed in the verdict was determined by a 'quotient verdict' under any agreement to be bound thereby. Williams *v.* State, 66 Ark. 264,

50 S. W. 517." Hydrick v. S., 103 Ark. 4, 145 S. W. 542.

976-30 See vol. 3, p. 236, n. 5, and supplement thereto.

977-35 Liutz v. Tramway Co., 54 Colo. 371, 131 P. 258; Johnson v. Seel, 26 N. D. 299, 144 N. W. 237.

978-36 Callahan v. R. Co., 158 Fed. 988.

979-40 Warren v. S., 57 Tex. Cr. 518, 123 S. W. 1115 (misapplication of testimony); Dralle v. Reedsburg, 134 Wis. 293, 115 N. W. 819 (informed of foreman's communication with judge out of court).

980-41 Sufficiency of affidavits to overcome presumption that prejudice resulted from separation of jury depends upon all facts. Nicholson v. S. 18 Wyo. 298, 106 P. 929.

980-43 Counsel and client must support motion by affidavit. Western R. Co. v. Church, 137 Mo. App. 101, 119 S. W. 495.

980-44 Kimic v. R. Co., 156 Cal. 379, 104 P. 986; P. v. Feld, 149 Cal. 464, 86 P. 1100; Kelly v. R. Co., 175 Ill. App. 196 (must show source of information); U. S. v. Cook, 15 N. M. 124, 103 P. 305.

981-46 Alabama L. Co. v. Cross, 152 Ala. 562, 44 S. 563 (intoxicated juror); Scott v. S., 132 Ga. 357, 64 S. E. 272 (negative testimony insufficient); Camak v. Brooks, 130 Ga. 213, 60 S. E. 456; Western R. Co. v. Church, 137 Mo. App. 101, 119 S. W. 495; Grantz v. Deadwood, 20 S. D. 495, 107 N. W. 832.

Affiant must state source of knowledge. Indianapolis T. & T. Co. v. Miller, 43 Ind. App. 717, 88 N. E. 526.

982-47 Schneider v. R. Co., 177 Ill. App. 334; Kelly v. R. Co., 175 Ill. App. 196; Waltham Piano Co. v. Freeman (Ia.), 141 N. W. 403; Austin v. Smith (Ia.), 109 N. W. 289; Gregory v. Co., 138 App. Div. 590, 122 N. Y. S. 1085; Broadway B. Co. v. Saladino, 81 Misc. 73, 142 N. Y. S. 1076; Johnson v. Seel, 26 N. D. 299, 144 N. W. 237.

983-49 Callahan v. R. Co., 158 Fed. 988; Merritt v. Bunting, 107 Va. 174, 57 S. E. 567.

983-50 Scott v. Tubbs, 43 Colo. 221, 95 P. 540, 19 L. R. A. (N. S.) 733.

983-51 Vansant v. Kowalewski (Del.), 90 A. 421; San Antonio Tr. Co. v. Cassanova (Tex. Civ.), 154 S. W. 1190; Midgley v. Bergerman, 30 Utah 17, 83 P. 466.

984-52 Hydrick v. S., 103 Ark. 4, 145 S. W. 542.

984-53 Kates Tr. & W. Co. v. Klassen, 6 Ala. App. 301, 59 S. 355; Dill v. S., 5 Ala. App. 162, 59 S. 307; Birmingham, etc. Co. v. Turner, 154 Ala. 542, 45 S. 671; Piercy v. Piercy, 149 Cal. 163, 86 P. 597 (misconduct of plaintiff); Elliott v. S., 132 Ga. 758, 64 S. E. 1090; Hoyt v. Hoyt, 137 Ia. 563, 115 N. W. 222; Pace v. City, 138 Ia. 107, 115 N. W. 888; Ayrhart v. Wilhelmy, 135 Ia. 290, 112 N. W. 782; Phares v. Krhut, 76 Kan. 238, 91 P. 52 (misconduct of party in selecting jury); Fields v. Dewitt, 71 Kan. 676, 81 P. 467 (reading newspaper account of trial not misconduct); Shepard v. R. Co., 101 Me. 591, 65 A. 20 (bias of jurors must be shown; cannot be inferred from circumstances); Goss v. Goss, 102 Minn. 346, 113 N. W. 690; Balder v. Co., 103 Minn. 345, 114 N. W. 948; Jung v. Co., 95 Minn. 367, 104 N. W. 233; S. v. Rasco, 239 Mo. 535, 144 S. W. 449; Green v. Assn., 211 Mo. 18, 109 S. W. 715; St. Louis B. & T. Co. v. Co., 204 Mo. 565, 103 S. W. 519; Hoskovec v. R. Co., 80 Neb. 784, 115 N. W. 312 (consideration of extrinsic evidence misconduct); Douglas v. Smith, 75 Neb. 169, 106 N. W. 173; Wessel v. Bishop, 76 Neb. 74, 107 N. W. 220 (indiscretion of juror insufficient to avoid verdict); Broadway Bldg. Co. v. Saladino, 81 Misc. 73, 142 N. Y. S. 1076; (must be shown by clear and convincing evidence); Root v. Coyle, 15 Okla. 574, 82 P. 648; Lawton v. McAdams, 15 Okla. 412, 83 P. 429; Easterly v. Gater, 17 Okla. 93, 87 P. 853; S. v. Bethune, 93 S. C. 195, 75 S. E. 281; McGill v. Co., 75 S. C. 177, 55 S. E. 216 (claim agent's entertainment of juror during and after trial ground for new trial); Slack v. S. (Tex. Cr.), 149 S. W. 107; Missouri, etc. R. Co. v. Hawkins, 50 Tex. Civ. 128, 109 S. W. 221; Beaumont T. Co. v. Dilworth (Tex. Civ.), 94 S. W. 372 (misconduct of counsel in argument).

Where a motion for a new trial is not sworn to, and no affidavits attached setting out facts charged, the motion cannot be considered. Arnall v. S. (Ga. App.), 81 S. E. 366; McWhirter v. S. (Tex. Cr.), 146 S. W. 189.

985-55 Dorgan v. Stephens, 161 Ala. 660, 49 S. 871; S. v. Rasco, 239 Mo. 535, 144 S. W. 449.

986-56 Blair v. Paterson, 131 Mo. App. 122, 110 S. W. 615 (juror over

age limit accepted without objection); Rapp *v.* Becker, 4 O. C. C. (N. S.) 139; Blassingame *v.* Laurens, 80 S. C. 38, 61 S. E. 96; Heasley *v.* Nichols, 38 Wash. 485, 80 P. 769 (nothing waived by accepting juror concealing unfitness). But see Atlantic, etc. R. Co. *v.* Bunn, 2 Ga. App. 305, 58 S. E. 538.

Ignorance of misconduct of jury during trial must be shown. Clack *v.* Co., 138 Mo. App. 205, 119 S. W. 1014.

986-57 Juror may not contradict statements on voir dire. S. *v.* Labry, 124 La. 748, 50 S. 700.

986-58 Gordon *v.* C., 136 Ky. 508, 124 S. W. 806.

Cross-examination of affiants upon whose affidavits accused relied proper, though not allowable of makers of opposing affidavits. Gordon *v.* C., 136 Ky. 508, 124 S. W. 806.

986-59 Jefferson *v.* S., 137 Ga. 382, 73 S. E. 499.

986-60 Mitchell *v.* S., 138 Ga. 21, 74 S. E. 690; P. *v.* Strauch, 240 Ill. 60, 88 N. E. 155; Soper *v.* Crutcher, 29 Ky. L. R. 1080, 96 S. W. 907; Gibney *v.* Co., 204 Mo. 704, 103 S. W. 43 (juror one of defendant's striking employes); Sansouver *v.* Wks., 28 R. I. 539, 68 A. 545; Senterfeit *v.* Shealey, 71 S. C. 259, 51 S. E. 142 (relationship of juror to a party, unknown to juror at time of examination no ground for new trial). See Norcross *v.* Willard, 82 Vt. 185, 72 A. 820.

Not sufficient if evidence tend to show remark was in jest. S. *v.* Rasco, 239 Mo. 535, 144 S. W. 449.

Conflicting evidence.—Sumpter *v.* S., 62 Fla. 98, 57 S. 202.

Where, during the trial of a criminal case, the jury were, by consent, allowed to disperse, and one of the jurors heard a conversation between a witness for the state and a third person, in which the accused was denounced by the witness as having stated a falsehood, in his statement to the jury, as to a material fact, this denunciation had presumptively an effect on the mind of the juror detrimental to the accused, and this presumption was not fully rebutted by the affidavit of the juror that it did not influence his finding. Downer *v.* S., 10 Ga. App. 827, 74 S. E. 301.

Undenied affidavit of juror as to misconduct of jury, not conclusive. Clack *v.* Co., 138 Mo. App. 205, 119 S. W. 1014.

988-64 Hill *v.* McKay, 36 Mont. 440, 93 P. 345.

989-65 St. Louis, etc. R. Co. *v.* Block, 79 Ark. 179, 95 S. W. 155; Hall *v.* Jensen, 14 Ida. 165, 93 P. 962; O'Neil *v.* Lindsey, 41 Wash. 649, 84 P. 603.

990-69 So. R. Co. *v.* Dickens, 149 Ala. 651, 43 S. 121 (failure of justice to certify whole record to appellate court whereby plaintiff misled); Plumlee *v.* R. Co., 85 Ark. 488, 109 S. W. 515; Tourneux *v.* Gilliss, 1 Cal. App. 546, 82 P. 627; Mitchell *v.* Nelson, 142 Ill. App. 534; Todd *v.* Banning, 118 Ill. App. 676; Blair *v.* Blair, 125 Ill. App. 341; Oglebay *v.* Co., 41 Ind. App. 481, 82 N. E. 494; Manion *v.* R. Co., 40 Ind. App. 569, 80 N. E. 166; Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209; Patton *v.* Sanborn, 133 Ia. 650, 110 N. W. 1032; Jones *v.* R. Co., 32 Ky. L. R. 1371, 108 S. W. 865; Ray *v.* Arnett, 32 Ky. L. R. 562, 106 S. W. 828; Strand *v.* R. Co., 101 Minn. 85, 112 N. W. 987, 111 N. W. 958; Pillager *v.* Hewitt, 98 Minn. 265, 107 N. W. 815; O'Neil *v.* Printz, 115 Mo. App. 215, 91 S. W. 174; Orton *v.* Bender, 43 Mont. 263, 115 P. 406; Hill *v.* McKay, 36 Mont. 440, 93 P. 345; Pennington Co. Bk. *v.* Bauman, 81 Neb. 782, 116 N. W. 669; Quagliana *v.* R. Co., 77 N. J. L. 101, 71 A. 43; Hapgoods *v.* Lusch, 123 App. Div. 27, 107 N. Y. S. 334; Roenbeck *v.* R. Co., 123 App. Div. 606, 108 N. Y. S. 80; Dupree *v.* S., 56 Tex. Cr. 559, 120 S. W. 870; Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29; Flynt *v.* Taylor (Tex. Civ.), 91 S. W. 864; Daugherty *v.* Templeton, 50 Tex. Civ. 304, 110 S. W. 553; Massucco *v.* Tomassi, 78 Vt. 188, 62 A. 57 (sickness and death accidental causes); Clemans *v.* Western, 39 Wash. 290, 81 P. 824; Woods *v.* Co., 40 Wash. 376, 82 P. 401; Harden *v.* Card, 15 Wyo. 217, 88 P. 217.

991-70 Cain *v.* S. (Tex. Cr.), 153 S. W. 147.

991-71 Wells *v.* Gallagher, 144 Ala. 363, 39 S. 747; Rauer *v.* Bradbury, 3 Cal. App. 256, 84 P. 1007; Mitchell *v.* Nelson, 142 Ill. App. 534; Campbell *v.* Campbell, 129 Ia. 317, 105 N. W. 583; Bond *v.* R. Co., 55 Tex. Civ. 119, 118 S. W. 867.

991-72 Central, etc. Co. *v.* O'Kelly (Ga. App.), 80 S. E. 688; Mays *v.* Wilson, 141 Ga. 523, 81 S. E. 440; Soper *v.* Crutcher, 29 Ky. L. R. 1080, 96 S. W. 907; Emmett *v.* Perry, 100 Me. 139, 60

A. 872; Morrison *v.* Hammond (Tex. Civ.), 152 S. W. 494; Houston L. P. Co. *v.* Hooper, 46 Tex. Civ. 257, 102 S. W. 133.

Granting new trial is largely discretionary. (Copper River & N. W. R. Co. *v.* Reeder, 211 Fed. 280, 127 C. C. A. 648; Cahill *v.* Stone Co., 167 Cal. 126, 138 P. 712; McConnell *v.* Water Co., 20 Cal. App. 8, 127 P. 1036; Sebold *v.* Rieger (Colo. App.), 142 P. 201; Hall *v.* Tice, 86 Conn. 684, 86 A. 560; Vansant *v.* Kowalewski (Del.), 90 A. 421; Goddard *v.* Latta, 152 Ky. 538, 153 S. W. 737; S. *v.* Zagone, 135 La. —, 65 S. 737; Delancey *v.* R. Co. (Tex. Civ.), 149 S. W. 259), unless but one conclusion as to verdict can be drawn (Ex parte Worthington, 21 Cal. App. 497, 132 P. 82). But this is not an arbitrary discretion. Sharp *v.* S. (Tex. Cr.), 160 S. W. 369.

Counsel in a case cannot take the affidavits of witnesses on motion for new trial. Garza *v.* S. (Tex. Cr.), 145 S. W. 590.

992-73 Hemmenway *v.* Lincoln, 82 Vt. 465, 73 A. 1073; Taft *v.* Taft, 82 Vt. 64, 71 A. 831 (also of attorney).

Motion signed by counsel as attorney for appellant and a jurat, which does not show who made, insufficient. Funk *v.* Miller (Tex. Civ.), 142 S. W. 24.

992-74 McDonald *v.* P., 123 Ill. App. 346; Whipple *v.* McCormick (R. I.), 68 A. 428; Bond *v.* R. Co., 55 Tex. Civ. 119, 118 S. W. 867; Strunz *v.* Hood, 44 Wash. 99, 87 P. 45.

Discretion of trial court not interfered with except in case of abuse. P. *v.* Harrison, 170 Mich. 159, 135 N. W. 899.

992-75 Napoleon Hill Cotton Co. *v.* Gray, 99 Ark. 648, 137 S. W. 827; Mark *v.* Shoup, 2 Alaska 66; Chase *v.* Co., 2 Alaska 82; Colorado, etc. R. Co. *v.* Fogelsong, 42 Colo. 341, 94 P. 356; Chambless *v.* Melton, 127 Ga. 414, 56 S. E. 414; P. *v.* Williams, 242 Ill. 197, 89 N. E. 1030; Illinois S. Co. *v.* Ferguson, 129 Ill. App. 396; Burk *v.* Co., 40 Ind. App. 81, 81 N. E. 88; Robins *v.* M. W. of A., 127 Ia. 444, 103 N. W. 375; S. *v.* Stanley (Ia.), 104 N. W. 284; Ill. Cent. R. Co. *v.* C. Co., 150 Ky. 489, 150 S. W. 641; S. *v.* Zagone, 135 La. —, 65 S. 737; Emmett *v.* Perry, 100 Me. 139, 60 A. 872; Spring *v.* Perkins, 156 Mich. 327, 120 N. W. 807; Roberts *v.* Bk., 149 Mich. 507, 112 N. W. 1129; Storch *v.* Rose, 152 Mich. 521, 116 N. W. 402; Carlton *v.* Monroe, 135 Mo. App. 172, 115 S. W. 1057; Parker-W. Co. *v.* Co., 131 Mo. App. 508, 109 S. W. 1073; Vandeventer F. Co. *v.* Co., 127 Mo. App. 312, 105 S. W. 653; S. *v.* Speritus, 191 Mo. 24, 90 S. W. 459; Spencer *v.* Spencer, 31 Mont. 631, 79 P. 320; Kursheedt *v.* Co., 77 N. J. L. 99, 71 A. 39; O'Hara *v.* R. Co., 102 App. Div. 398, 92 N. Y. S. 777; Popadinec *v.* R. Co., 109 App. Div. 850, 96 N. Y. S. 913; P. *v.* Patrick, 182 N. Y. 131, 74 N. E. 813; Caseri *v.* Wogelsong, 114 N. Y. S. 882; State F. Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357; Davis *v.* Ty., 15 Okla. 462, 82 P. 507; Bleakley *v.* Adelman, 31 Pa. C. C. 159; Clemmons *v.* Johnson (Tex. Civ.), 167 S. W. 1103; Bond *v.* R. Co., 55 Tex. Civ. 119, 118 S. W. 867; El Paso, etc. R. Co. *v.* Barrett, 46 Tex. Civ. 14, 101 S. W. 1025, 121 S. W. 570; Sexton *v.* S., 48 Tex. Cr. 497, 88 S. W. 348; Missouri, etc. R. Co. *v.* Sloan (Tex. Civ.), 91 S. W. 241; Gotcher *v.* S. (Tex.), 118 S. W. 574; Houston, etc. R. Co. *v.* Davenport (Tex. Civ.), 110 S. W. 150; Wright *v.* Agelasto, 104 Va. 159, 51 S. E. 191; Brennan *v.* Seattle, 39 Wash. 640, 81 P. 1092; Dumontier *v.* Stetson, 39 Wash. 264, 81 P. 693; Coffer *v.* Erickson, 61 Wash. 559, 112 P. 643.

See Vansant *v.* Kowalewski (Del.), 90 A. 421.

Newly obtained evidence, though not newly discovered, as testimony of witness adjudged insane prior to suit and at time of trial in sanitarium, but subsequently capable of testifying, so similar to newly discovered testimony as to be governed by same rules. Cuesta *v.* Goldsmith, 1 Ga. App. 48, 57 S. E. 983.

Exception if evidence relevant since trial by amnesty proclamation. U. S. *v.* Repollo, 2 Phil. Isl. 227.

993-77 Girardino *v.* R. Co. (Ala.), 60 S. 871; General Acc. F. & L. Ins. Co. *v.* Shields, 9 Ala. App. 214, 62 S. 400; Starr Piano Co. *v.* Baker, 8 Ala. App. 449, 62 S. 549; McWhorter *v.* Co., 4 Ala. App. 296, 58 S. 790; Newton L. & B. Co. *v.* Reeves, 2 Ala. App. 411, 56 S. 255; W. F. Fitts & Son *v.* Bryan, 166 Ala. 133, 52 S. 333; West Va. Land Co. *v.* May, 166 Ala. 127, 52 S. 315; McClendon *v.* McKissack, 143 Ala. 188, 38 S. 1020; Smith *v.* Co., 147 Ala. 702, 41 S. 307; Central R. Co. *v.* Geopp, 153 Ala. 108, 45 S. 65; Louisville, etc. R. Co. *v.* Church, 155 Ala. 329, 46 S. 457; Marks *v.* Shoup, 2 Alaska 66; Long *v.*

Long, 104 Ark. 562, 149 S. W. 662; Tillar *v.* Liebke, 78 Ark. 324, 95 S. W. 769; Rockwell *v.* Colony, 10 Cal. App. 633, 103 P. 162; Lynch *v.* McGhan, 7 Cal. App. 132, 93 P. 1044; Cahill *v.* Stone Co., 167 Cal. 126, 138 P. 712; Colorado Spgs. C. Co. *v.* Soper, 38 Colo. 126, 88 P. 161; Colorado Spgs. & I R. Co. *v.* Fogelsong, 42 Colo. 341, 94 P. 356; White *v.* Avery, 81 Conn. 325, 70 A. 1065; Vansant *v.* Kowalewski (Del.), 90 A. 421; Harper *v.* S. (Ga. App.), 81 S. E. 817; Cochran *v.* S. (Ga. App.), 81 S. E. 587; Srochi *v.* Ventrees, 140 Ga. 345, 78 S. E. 1003; Campbell *v.* S., 10 Ga. App. 790, 74 S. E. 95; Harper *v.* S., 131 Ga. 771, 63 S. E. 339; Dodge *v.* Cowart, 131 Ga. 549, 62 S. E. 987; Taylor *v.* S., 132 Ga. 235, 63 S. E. 1116; Murphy *v.* Meacham, 1 Ga. App. 155, 57 S. E. 1046; Brown *v.* S., 127 Ga. 285, 56 S. E. 417; Hall *v.* Jensen, 14 Ida. 165, 93 P. 962; Hubbard-Z. S. S. Co. *v.* Crescio, 179 Ill. App. 56; Mikshonis *v.* Hotel Co., 178 Ill. App. 593; Johnson *v.* Fairbank Co., 156 Ill. App. 381; Northwestern Elev. & G. Co. *v.* Smiley, 154 Ill. App. 351; Fonner *r.* Stamatakos, 153 Ill. App. 147; McGrew *r.* R. Co., 142 Ill. App. 210; Harper *v.* Co., 142 Ill. App. 594; Karsten *r.* Winkelman, 126 Ill. App. 418; Gregory *r.* Gregory, 129 Ill. App. 96; McDonald *v.* P., 222 Ill. 325, 78 N. E. 609, 126 Ill. App. 263; Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23; Nehring *v.* Ricker, 126 Ill. App. 262; Winona, etc. Co. *r.* Williard (Ind. App.), 101 N. E. 1022; Stauffer *v.* Martin, 43 Ind. App. 675, 88 N. E 363; McCaulley *r.* Co., 151 Ia. 305, 131 N. W. 1; S. *r.* Pell, 140 Ia. 655, 119 N. W. 154; Buswell *v.* Buswell, 146 Ia. 52, 124 N. W. 770; Shirk *v.* Maquoketa, 137 Ia. 230, 114 N. W. 884; Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209; Arnd *r.* Aylesworth, 136 Ia. 297, 111 N. W. 407; Marengo S. Bk. *r.* Kent, 135 Ia. 386, 112 N. W. 767; Strong *v.* Moore, 75 Kan. 437, 89 P. 895; Cudahy P. Co. *v.* Hays, 74 Kan. 124, 85 P. 811; Woodford *r.* C., 154 Ky. 818, 159 S. W. 567; Goddard *r.* Latta, 152 Ky. 538, 153 S. W. 737; Ill. Cent. R. Co. *v.* C. Co., 150 Ky. 489, 150 S. W. 641; Warren *r.* Turman (Ky.), 120 S. W. 275; Paducah I. Co. *r.* Hall (Ky.), 113 S. W. 104; Crigler *v.* Newman, 29 Ky. L. R. 27, 91 S. W. 706; Gay *r.* Steele, 29 Ky. L. R. 248, 92 S. W. 590; Todd *r.* C., 29 Ky. L. R. 473, 93 S. W. 631; Hall *r.* Roberts, 29 Ky. L. R. 851, 96 S. W. 555; Flint *r.* R. Co., 29 Ky. L. R. 1149, 97 S. W. 736; Berger *r.* Co., 31 Ky. L. R. 613, 103 S. W. 245; S. *r.* Edwards, 135 La. —, 65 S. 634; Shallow *r.* Roux, 109 Me. 567, 84 A. 999; Savino *r.* Wheel Co., 115 Minn. 219, 132 N. W. 201; Newbury *r.* R. Co., 109 Minn. 113, 122 N. W. 1117; Strand *r.* R. Co., 101 Minn. 85, 111 N. W. 958; Kempa *r.* St. Joseph (Mo. App.), 165 S. W. 1176; Porter *r.* Co., 213 Mo. 372, 111 S. W. 1136; Ford *r.* Co., 138 Mo. App. 512, 119 S. W. 520; Carlton *r.* Monroe, 135 Mo. App. 172, 115 S. W. 1057; Vandeventer Co. *r.* Co., 127 Mo. App. 312, 105 S. W. 653; Devoy *r.* Co., 192 Mo. 197, 91 S. W. 140; S. *r.* Speritus, 191 Mo. 24, 90 S. W. 459; In re Colbert, 31 Mont. 461, 80 P. 248; Martin *r.* Corscadden, 34 Mont. 308, 86 P. 33; Rieger *r.* Schaible, 85 Neb. 221, 122 N. W 860; Butterfield *r.* Beaver City, 84 Neb. 417, 121 N. W. 592; Andrews *r.* Hastings, 85 Neb. 548, 123 N. W. 1035; Kraus *r.* Clark, 81 Neb. 575, 116 N. W. 164; Kursheedt *r.* Co., 77 N. J. L. 99, 71 A. 39; S. *r.* Padilla (N. M.), 139 P. 143; Hancock *r.* Beasley, 14 N. M. 239, 91 P. 735; Friedland & L. Bros. *r* Fish Co., 147 N. Y. S. 881; Reilly *r.* Haseltine, 127 App. Div. 64, 111 N. Y. S. 457; O'Hara *r.* R. Co., 102 App. Div. 398, 92 N. Y. S. 777; Hagen *r.* R. Co., 100 App. Div. 218, 91 N. Y. S. 914; Wheeling C. Co. *r.* Armstrong, 97 N. Y. S. 960; Froment *r.* Mugler, 51 Misc 68, 99 N. Y. S. 877; Flock *r.* Kaufman, 107 N. Y. S. 752; Romaine *r.* Village, 120 App. Div. 501, 105 N. Y. S. 256; Gay *r.* Mitchell, 146 N. C. 509, 60 S. E 426; Crenshaw *r.* R. Co., 140 N. C. 192, 52 S. E. 731; State F. Co. *r.* Beck, 15 N. D. 374, 109 N. W. 357; Wiers *r.* Treese, 27 Okla. 774, 117 P. 182; Hurst *r.* Ty., 16 Okla. 600, 86 P. 280; Simper *r.* Carroll, 31 O. C. C. 386; Cincinnati G. & E. Co. *r.* Coffelder, 31 O. C. C. 26; Bleakley *r.* Adelman, 31 Pa. C. C. 159; U. S. *r.* Palanca, 5 Phil. Isl. 269; Esleeck *r.* Capwell (R. I.), 72 A. 819; Hannan *r.* Caproni (R. I.), 71 A. 593; Hill *r.* R. Co. (R. I.), 66 A. 836; S. *r.* Anderson, 85 S. C. 229, 67 S. E. 237; Hahn *r.* Dickinson, 19 S. D. 373, 103 N. W. 642; In re McClellan, 20 S. D. 498, 107 N. W. 681; Grigsby *r.* Wolven, 20 S. D. 623, 108 N. W. 250; Deggs *r.* Loving (Tex. Civ.), 162 S. W. 9; S. W. Tel. Co. *r.* Davis (Tex. Civ.), 156 S. W. 1146; Wagner *r.* Geiselman (Tex. Civ.), 156 S. W. 524; Mims *r.* S. (Tex. Cr.),

153 S. W. 321; Pinson v. S. (Tex. Cr.), 151 S. W. 536; O'Hara v. S., 57 Tex. Cr. 577, 124 S. W. 95; Delanccy v. R. Co. (Tex. Civ.), 149 S. W. 259; La Flour v. S., 59 Tex. Cr. 645, 129 S. W. 351; Milam v. S. (Tex. Cr.), 146 S. W. 185; Evans v. S., 55 Tex. Cr. 649, 117 S. W. 820; Ringo v. S., 54 Tex. Cr. 561, 114 S. W. 119; Funk v. Miller (Tex. Civ.), 142 S. W. 24; Ikland v. Ikland (Tex. Civ.), 139 S. W. 920; Cannon v. Oil Co. (Tex. Civ.), 138 S. W. 803; Crane v. Wood (Tex. Civ.), 138 S. W. 444; Bond v. R. Co., 55 Tex. Civ. 119, 118 S. W. 867; Keck v. Woodward, 53 Tex. Civ. 267, 116 S. W. 75; De Hoyes v. R. Co., 52 Tex. Civ. 543, 115 S. W. 75; Houston O. Co. v. Kimball (Tex. Civ.), 114 S. W. 662; Kaack v. Stanton, 51 Tex. Civ. 495, 112 S. W. 702; Belton, etc. Co. v. Henry, 45 Tex. Civ. 272, 99 S. W. 1032; Upson v. Campbell (Tex. Civ.), 99 S. W. 1129; Texas, etc. R. Co. v. Searborough, 101 Tex. 436, 108 S. W. 804; Daugherty v. Templeton, 50 Tex. Civ. 304, 110 S. W. 553; Houston, etc. R. Co. v. Davenport (Tex. Civ.), 110 S. W. 150; St. Louis, etc. R. Co. v. Wiggins, 48 Tex. Civ. 449, 107 S. W. 899; Halbert v. R. Co. (Tex. Civ.), 107 S. W. 592; Neal v. Whitlock, 45 Tex. Civ. 457, 101 S. W. 284; Texas C. P. Co. v. McMillan (Tex. Civ.), 87 S. W. 846; St. Louis, etc. R. Co. v. Ross (Tex. Civ.), 89 S. W. 1105; Douglas v. Walker, 42 Tex. Civ. 213, 92 S. W. 1026; Johnson v. Scrimshire, 42 Tex. Civ. 611, 93 S. W. 712; Hemmenway v. Lincoln, 82 Vt. 465, 73 A. 1073 (before trial); Reynolds v. Hassam, 80 Vt. 501, 68 A. 645; Taylor v. St. Clair, 79 Vt. 536, 65 A. 655; Richmond v. Poore, 109 Va. 313, 63 S. E. 1014; Virginia C. Wks. v. Dalea, 109 Va. 333, 64 S. E. 41; Wright v. Agelasto, 104 Va. 159, 51 S. E. 191; Taliaferro v. Shepherd, 107 Va. 56, 57 S. E. 585; Kincaid v. Co., 57 Wash. 334, 106 P. 918; Goodrich v. Kimble, 49 Wash. 516, 95 P. 1084; Collins v. Bacon, 38 Wash. 80, 80 P. 268; Haner v. Furuya, 39 Wash. 122, 81 P. 98; Binns v. Emery, 45 Wash. 215, 88 P. 133; Findley v. R. Co. (W. Va.), 78 S. E. 396; S. v. Stowers, 66 W. Va. 198, 66 S. E. 323; Stewart v. Doak, 58 W. Va. 172, 52 S. E. 95; Bosler v. Coble, 14 Wyo. 423, 84 P. 895; Harden v. Card, 15 Wyo. 217, 88 P. 217.

See Simpson v. Blewitt (Ark.), 160 S. W. 1087; Arnall v. S. (Ga. App.), 81 S. E. 366; Johnson v. S. (Tex. Cr.), 150 S. W. 903.

Diligence "since verdict" will not do. Woodward Iron Co. v. Sheehan, 166 Ala. 429, 52 S. 24.

Not newly discovered evidence that could have been had on the trial by the use of ordinary diligence. Fowler v. S. (Tex. Cr.), 148 S. W. 576.

A nearby witness, who must have been known before the trial to have been connected with the transaction. Johnson v. Oliver, 138 Ga. 347, 75 S. E. 245.

Facts and circumstances regarded in determining diligence. Orr v. S., 5 Ga. App. 76, 62 S. E. 676.

996-78 Beach v. Schroeder, 47 Colo. 312, 107 P. 271; Wells F. Co. v. Gunn, 33 Colo. 217, 79 P. 1029; Mays v. Wilson, 141 Ga. 523, 81 S. E. 440; Cheek v. S., 171 Ind. 98, 85 N. E. 779; Taylor v. Larter (Ind. App.), 82 N. E. 96; Russell v. Ashland (Ky.), 166 S. W. 971; Boreing v. Wilson, 128 Ky. 570, 108 S. W. 914; Burgess v. Grief, 31 Ky. L. R. 215, 101 S. W. 984; Cahill v. Mullins, 31 Ky. L. R. 72, 101 S. W. 336; Farrington v. Farrington, 117 Minn. 272, 135 N. W. 815; Bunker v. U. O. of F., 97 Minn. 361, 107 N. W. 392; Nugent v. Co., 208 Mo. 480, 106 S. W. 648; S. v. Williams, 199 Mo. 137, 97 S. W. 562; In re Colbert, 31 Mont. 461, 80 P. 248; Jessen v. Wilhite, 74 Neb. 608, 104 N. W. 1064; Robinson M. Co. v. Riepe (Nev.), 138 P. 910; Straughan v. Cooper (Okla.), 139 P. 265; Slater v. U. S., 1 Okla. Cr. 275, 98 P. 110; Stern v. Volz, 52 Or. 597, 98 P. 148; Butler v. Co. (R. I.), 68 A. 426; Grigsby v. Wolven, 20 S. D. 623, 108 N. W. 250; In re McClellan, 20 S. D. 498, 111 N. W. 681; Comoli v. S., 78 Vt. 423, 63 A. 186; Jacobs v. Williams, 67 W. Va. 377, 67 S. E. 1113.

See Pickford v. Talbott, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. ed. 1240.

Inactivity excused.—Cheek v. S., 171 Ind. 98, 85 N. E. 779.

996-79 Shallow v. Roux, 109 Me. 567, 84 A. 999; Grigsby v. Wolven, 20 S. D. 623, 108 N. W. 250; Hemmenway v. Lincoln, 82 Vt. 465, 73 A. 1073. See Olaine v. McGraw, 164 Cal. 424, 129 P. 460.

Diligence must be exercised in presenting proof of newly discovered evidence. Houston O. Co. v. Kimball, 103 Tex. 94, 122 S. W. 533.

996-80 Traveler's Ins. Co. v. McIn-

erney (Ky.), 119 S. W. 171; Winn *v.* Grier, 217 Mo. 420, 117 S. W. 48.

996-81 So. R. Co. *v.* Dickson, 138 Ga. 371, 75 S. E. 462; Winn *v.* Grier, 217 Mo. 420, 117 S. W. 48; King *v.* Gilson, 206 Mo. 264, 104 S. W. 52; Slater *v.* U. S., 1 Okla. Cr. 275, 98 P. 110; S. *v.* Raice, 24 S. D. 111, 123 N. W. 708. See Green *v.* Tr. Co. (Del.), 87 A. 885.

997-82 Mays *v.* Wilson, 141 Ga. 523, 81 S. E. 440.

997-83 O'Neill *v.* Bk., 34 Mont. 521, 87 P. 970; S. *v.* Stowers, 66 W. Va. 198, 66 S. E. 323.

997-84 Ward *v.* Ward, 149 Fed. 204, 79 C. C. A. 162; Richardson *v.* Lowe, 149 Fed. 625, 79 C. C. A. 317; Girardino *v.* R. Co. (Ala.), 60 S. 871; S. *v.* Naylor (Del.), 90 A. 880; Weston *v.* Montgomery, 2 Haw. 309; Louisville, etc. R. Co. *v.* Vinyard, 39 Ind. App. 628, 79 N. E. 384; Nichols-S. Co. *v.* Ringler (Ia.), 120 N. W. 640; Arenschield *v.* R. Co., 128 Ia. 677, 105 N. W. 200; Strong *v.* Moore, 75 Kan. 437, 89 P. 895; Goddard *v.* Lotta, 152 Ky. 538, 153 S. W. 737; Ill. C. R. Co. *v.* C. Co., 150 Ky. 489, 150 S. W. 641; Todd *v.* C., 29 Ky. L. R. 473, 93 S. W. 631; Antosik *v.* Co., 166 Mich. 415, 132 N. W. 80; Bryant *v.* Lazarus, 235 Mo. 606, 139 S. W. 558; Kidder *v.* Maynard, 75 Neb. 246, 106 N. W. 172; O'Hara *v.* R. Co., 102 App. Div. 398, 92 N. Y. S. 777; Froment *v.* Mugler, 51 Misc. 68, 99 N. Y. S. 877; Rosenthal *v.* Co., 53 Misc. 265, 103 N. Y. S. 194; Whipple *v.* Dunn, 130 N. Y. S. 224; Crenshaw *v.* R. Co., 140 N. C. 192, 52 S. E. 731; Libby *v.* Barry, 15 N. D. 286, 107 N. W. 972; City of Toledo *v.* Strasel, 31 O. C. C. 432; Bleakley *v.* Adelman, 31 Pa. C. C. 159; Geer *v.* R. Co. (R. I.), 67 A. 449; Wilson *v.* Alexander, 115 Tenn. 125, 88 S. W. 935; Sylvas *v.* S. (Tex. Cr.), 150 S. W. 906; Rhea *v.* S. (Tex.), 148 S. W. 578; W. U. T. Co. *v.* Hardison (Tex. Civ.), 101 S. W. 541; Binns *v.* Emery, 45 Wash. 215, 88 P. 133; Bosler *v.* Coble, 14 Wyo. 423, 84 P. 895.

997-85 Cooper *v.* Vaughan, 107 Ark. 498, 155 S. W. 912; Cahill *v.* Stone Co., 167 Cal. 126, 138 P. 712; P. *v.* Oppenheimer, 156 Cal. 733, 106 P. 74; Spear *v.* United Railroads, 16 Cal. App. 637, 117 P. 956; Hawley *v.* Co., 16 Cal. App. 50, 116 P. 84; Specie, etc. Co. *v.* Kirk, 56 Colo. 275, 139 P. 21; C. S. I. R. Co. *v.* Fogelsong, 42 Colo. 341, 94 P. 356; Button *v.* Button, 80 Conn. 157, 67 A. 478; Vansant *v.* Kowalewski (Del.), 90 A. 421; Peacock *v.* S., 10 Ga. App. 402, 73 S. E. 404; Mitchell *v.* S., 6 Ga. App. 554, 65 S. E. 326; Denmond *v.* Hillyer, 129 Ga. 698, 59 S. E. 806; McNaughton *v.* S., 138 Ga. 412, 75 S. E. 251; Groover *v.* S., 11 Ga. App. 305, 75 S. E. 162; Walker *v.* S., 137 Ga. 398, 73 S. E. 368; Orr *v.* S., 5 Ga. App. 76, 62 S. E. 676; Laing *v.* Laing, 10 Haw. 183; S. *v.* Fleming, 17 Ida. 471, 106 P. 305; Clement *v.* Bladworth, 166 Ill. App. 68; Grossfeld, etc. Co. *v.* Gross, 165 Ill. App. 275; Cowan *v.* Day, 156 Ill. App. 105; Northwestern El. & Gr. Co. *v.* Smiley, 154 Ill. App. 351; Lerna *v.* Wood, 122 Ill. App. 542; Illinois S. Co. *v.* Ferguson, 129 Ill. App. 396; City of Hammond *v.* Jahnke, 178 Ind. 177, 99 N. E. 39; Ludwig *v.* S., 170 Ind. 648, 85 N. E. 345; Donahue *v.* S., 165 Ind. 148, 74 N. E. 996; S. *v.* Pell, 140 Ia. 655, 119 N. W. 154; Buchholtz *v.* Radcliffe, 129 Ia. 27, 105 N. W. 336; Hawk *v.* Mulhall, 133 Ia. 695, 110 N. W. 1026; Clements *v.* Stapleton, 136 Ia. 137, 113 N. W. 546; So. Covington, etc. Co. *v.* Lee, 153 Ky. 621, 156 S. W. 99; Weaks *v.* Const. Co., 153 Ky. 691, 156 S. W. 127; Sizemore *v.* Nantz, 149 Ky. 819, 149 S. W. 1126; Traynor *v.* C., 149 Ky. 462, 149 S. W. 904; Million *v.* Million (Ky.), 121 S. W. 985; Warren *v.* Turman (Ky.), 120 S. W. 275; Paducah I. Co. *v.* Hall (Ky.), 113 S. W. 104; Monarch *v.* Cowherd (Ky.), 114 S. W. 276; Illinois, etc. R. Co. *v.* Wilson, 31 Ky. L. R. 789, 103 S. W. 364; Mitchell *v.* Emmons, 104 Me. 76, 71 A. 321; Bunker *v.* U. O. of F., 97 Minn. 361, 107 N. W. 392; Hanson *v.* Bailey, 96 Minn. 274, 104 N. W. 969; McDonald *v.* Smith, 101 Minn. 476, 112 N. W. 627; S. *v.* Keener, 225 Mo. 488, 125 S. W. 747; S. *v.* Speritus, 191 Mo. 24, 90 S. W. 459; Devoy *v.* Co., 192 Mo. 197, 91 S. W. 140; Bryant *v.* Lazarus, 235 Mo. 606, 139 S. W. 558; Carlton *v.* Monroe, 135 Mo. App. 172, 115 S. W. 1057; In re Colbert, 31 Mont. 461, 80 P. 248; Martin *v.* Corscadden, 34 Mont. 308, 86 P. 33; Butterfield *v.* Beaver City, 84 Neb. 417, 121 N. W. 592; In re Winch (Neb.), 112 N. W. 293; Dickinson *v.* Aldrich, 79 Neb. 198, 112 N. W. 293; Hanson *v.* Ins. Co., 78 Neb. 421, 113 N. W. 114; St. Paul H. Co. *v.* Faulhaber, 77 Neb. 477, 109 N. W. 762; Kraus *v.* Clark, 81 Neb. 575, 116 N. W. 164; Kursheedt *v.* Co., 77 N. J. L. 99, 71 A. 39; Hancock *v.* Beasley, 14 N. M. 239, 91 P. 735; P. *v.* Gambacorta, 197

N. Y. 181, 90 N. E. 809; Brooklyn, etc. Co. *v.* Bird, 78 Misc. 683, 138 N. Y. S. 826; Romaine *v.* Village, 120 App. Div 501, 105 N. Y. S. 256; Neidlinger *v.* Co., 124 App. Div. 26, 109 N. Y. S. 717; Chaet *v.* Goldberg, 110 N. Y. S. 817; Prinzi *v.* Cataldo, 110 N. Y. S. 1054 (discovery of receipt); O'Hara *v.* R. Co., 102 App. Div. 398, 92 N. Y. S. 777; Hagen *v.* R. Co., 100 App. Div. 218, 91 N. Y. S. 914; Flock *v.* Kaufman, 107 N. Y. S. 752 (cumulative evidence of probative force ground for new trial); Raymond *v.* Ring, 60 Misc. 235, 112 N. Y. S. 1; Aden *v.* Doub, 146 N. C. 10, 59 S. E. 162; Citizens' Bk. of Drayton *v.* Schultz, 21 N. D. 551, 132 N. W. 134; McHugh *v.* Ty., 17 Okla. 1, 86 P. 433; Cincinnati Tr. Co. *v.* Fesler, 31 O. C. C. 631; Schenk *v.* Knott, 31 O. C. C. 581; Bleakley *v.* Adelman, 31 Pa. C. C. 159; U. S. *v.* Alvarez, 3 Phil. Isl. 24; U. S. *v.* Hernandez, 5 Phil Isl. 429; Aldeguer *v.* Hoskyn, 2 Phil. Isl. 500; Esleeck *v.* Capwell (R. I.), 72 A. 819; Lee *v.* Co. (R. I.), 66 A. 835; McDonald *v.* Co. (R. I.), 67 A. 451; Heath *v.* Cook (R. I.), 68 A. 427; Shepard *v.* R. Co., 27 R. I. 135, 61 A. 42; Wardlaw *v.* Mill, 74 S. C. 368, 54 S. E. 658; Smith *v.* Ins. Co., 21 S. D. 433, 113 N. W. 94; Johnson *v.* S. (Tex. Cr.), 156 S. W. 1181; Mott *v.* Ins. Co. (Tex. Civ.), 154 S. W. 658; Drake *v.* S. (Tex. Cr.), 151 S. W. 315; Hunter *v.* S., 59 Tex. Cr. 439, 129 S. W. 125; Stephens *v.* S. (Tex. Cr.), 145 S. W. 907; Garza *v.* S. (Tex. Cr.), 145 S. W. 590; Browning *v.* S. (Tex. Cr.), 142 S. W. 1; Reagan *v.* S., 57 Tex. Cr. 642, 124 S. W. 685; Reyes *v.* S., 55 Tex. Cr. 422, 117 S. W. 152; Missouri, etc. R. Co. *v.* Bailey, 53 Tex. Civ. 295, 115 S. W. 601; O'Hara *v.* S., 57 Tex. Cr. 577, 124 S. W. 95; Texas N. O. R. Co. *v.* Searborough, 101 Tex. 436, 108 S. W. 804; Rydaleh *v.* Anderson, 37 Utah 99, 107 P. 25; Foss *v.* Smith, 79 Vt. 434, 65 A. 553; Taylor *v.* St. Clair, 79 Vt. 536, 65 A. 655; Richmond *v.* Poore, 109 Va. 313, 63 S. E. 1014; Wilson *v.* Keckley, 107 Va. 592, 59 S. E. 383; Harris *v.* R. Co., 65 Wash. 27, 117 P. 601; Pierson *v.* Peirce, 42 Wash. 164, 84 P. 731; S. *v.* Stowers, 66 W. Va. 198, 66 S. E. 323; Birdsall *v.* Fraenzel, 154 Wis. 48, 142 N. W. 274; Anderson *v.* Co., 131 Wis. 34, 110 N. W. 788; Mueller *v.* Pew, 127 Wis. 288, 106 N. W. 840.

See Roundtree *v.* S. (Miss.), 65 S. 125.

Probability of different result ground for new trial. Drew *v.* Shannon, 105 Me. 562, 75 A. 122.

998-86 Daniels *v.* U. S., 196 Fed. 459, 116 C. C. A. 233; Richardson *v.* Lowe, 149 Fed. 625, 79 C. C. A. 317; Smith *v.* Co., 147 Ala. 702, 41 S. 307; Geter *v.* Co., 149 Ala. 578, 43 S. 367; Marks *v.* Shoup, 2 Alaska 66; Chase *v.* Co., 2 Alaska 82; Ary *v.* S., 104 Ark. 212, 148 S. W. 1032; Long *v.* McDaniel, 76 Ark. 292, 88 S. W. 964; Plumlee *v.* R. Co., 85 Ark. 488, 109 S. W. 515; Shaufelberger *v.* Mattix, 85 Ark. 193, 107 S. W. 380; Cahill *v.* Stone Co., 167 Cal. 126, 138 P. 712; In re Loucks' Est., 160 Cal. 551, 117 P. 673; Wood *v.* Moulton, 146 Cal. 317, 80 P. 92; Patterson *v.* R. Co., 147 Cal. 178, 81 P. 531; In re Walker, 148 Cal. 162, 82 P. 770; In re Doolittle's Est., 153 Cal. 29, 94 P. 240; In re Walker's Est., 148 Cal. 162, 82 P. 770; P. *v.* Davis, 1 Cal. App. 8, 81 P. 716; C. S. I. R. Co. *v.* Fogelsong, 42 Colo. 341, 94 P. 356; Johnson *v.* S., 138 Ga. 265, 75 S. E. 135; Brewer *v.* Ragan, 138 Ga. 346, 75 S. E. 254; Cone *v.* Cone, 138 Ga. 606, 75 S. E. 644; Walker *v.* S., 137 Ga. 398, 73 S. E. 368; Fehn *v.* S., 11 Ga. App. 328, 75 S. E. 208; Holliday *v.* Athens, 10 Ga. App. 709, 74 S. E. 67; Andrew *v.* Carithers, 124 Ga. 515, 52 S. E. 653; Georgia R. & B. Co. *v.* Adams, 127 Ga. 408, 56 S. E. 409; Grow *v.* S., 5 Ga. App. 70, 62 S. E. 669; Bunn *v.* Hargraves, 3 Ga. App. 518, 60 S. E. 223; De Vane *v.* R. Co., 4 Ga. App. 136, 60 S. E. 1079; Weston *v.* Montgomery, 2 Haw. 309; Hall *v.* Jenson, 14 Ida. 165, 93 P. 962; Kelly *v.* R. Co., 175 Ill. App. 196; Pratt *v.* Davis, 118 Ill. App. 161; Karsten *v.* Winkelman, 126 Ill. App. 418; Martinatis *v.* P., 223 Ill. 117, 79 N. E. 55; City of Hammond *v.* Jahnke, 178 Ind. 177, 99 N. E. 39; Williams *v.* S., 170 Ind. 630, 85 N. E. 113; Ludwig *v.* S., 170 Ind. 648, 85 N. E. 345; Cassidy *v.* Johnson, 41 Ind. App. 696, 84 N. E. 835; Ray *v.* Baker, 165 Ind. 74, 74 N. E. 619; Indianapolis, etc. Co. *v.* Edwards, 36 Ind. App. 202, 74 N. E. 533; Farrell *v.* R. Co., 137 Ia. 309, 114 N. W. 1063; Hemmer *v.* Burger, 127 Ia. 614, 103 N. W. 957; S. *v.* Stanley (Ia.), 104 N. W. 284; Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209; Arenschield *v.* R. Co., 128 Ia. 677, 105 N. W. 200; Hanousek *v.* Marshalltown, 130 Ia. 550, 107 N. W. 603; Bousman *v.* Stanford, 71 Kan. 648, 81 P. 184 (evidence obtained by operation); Strong

v. Moore, 75 Kan. 437, 89 P. 895; S. *v.* Lackey, 72 Kan. 95, 82 P. 527; Lawson *v.* Co., 152 Ky. 113, 153 S. W. 56; Traynor *v.* C., 149 Ky. 462, 149 S. W. 904; American Cent. Ins. Co. *v.* Hardin, 148 Ky. 246, 146 S. W. 418; Cahill *v.* Mullins, 31 Ky. L. R. 72, 101 S. W. 336; Metropolitan L. Ins. Co. *v.* Ford, 31 Ky. L. R. 513, 102 S. W. 876; Mobile & O. R. Co. *v.* Caldwell, 32 Ky. L. R. 447, 106 S. W. 236; Illinois C. R. Co. *v.* Colly, 27 Ky. L. R. 713, 86 S. W. 538; Dayton *v.* Hirth, 27 Ky. L. R. 1209; 87 S. W. 1136; Slusher *v.* Hopkins, 28 Ky. L. R. 347, 89 S. W. 244; Todd *v.* C., 29 Ky. L. R. 473, 93 S. W. 631; Torian *v.* Terrell, 29 Ky. L. R. 306, 93 S. W. 10; Hall *v.* Roberts, 29 Ky. L. R. 851, 96 S. W. 555; Phoenix Ins. Co. *v.* Wintersmith, 30 Ky. L. R. 369, 98 S. W. 987; Louisville & N. R. Co. *v.* Ueltschi, 31 Ky. L. R. 931, 104 S. W. 320; Holser *v.* Skae, 169 Mich. 484, 135 N. W. 260; Tew *v.* Webster, 103 Minn. 110, 114 N. W. 647; Adam R. G. Co. *v.* Co. (Mo. App.), 166 S. W. 1125; Gardner *v.* R. Co., 167 Mo. App. 605, 152 S. W. 98; Carlton *v.* Monroe, 135 Mo. App. 172, 115 S. W. 1057; Parker-W. Co. *v.* Co., 131 Mo. App. 508, 109 S. W. 1073; S. *v.* Speritus, 191 Mo. 24, 90 S. W. 459; In re Colbert, 31 Mont. 461, 80 P. 248; Parkins *v.* R. Co., 79 Neb. 788, 113 N. W. 265; St. Paul H. Co. *v.* Faulhaber, 77 Neb. 477, 109 N. W. 762; Kraus *v.* Clark, 81 Neb. 575, 116 N. W. 164; Blado *v.* Draper, 89 Neb. 787, 132 N. W. 410; Sachs *v.* Gasdorf, 84 Misc. 457, 146 N. Y. S. 186; Cheever *v.* Co., 86 App. Div. 331, 83 N. Y. S. 732; Myatt *v.* Myatt, 149 N. C. 137, 62 S. E. 887; Aden *v.* Doub, 146 N. C. 10, 59 S. E. 162; Gay *v.* Mitchell, 146 N. C. 509, 60 S. E. 426; Boos *v.* Ins. Co., 22 N. D. 11, 132 N. W. 222; Preston *v.* S. (Okla. Cr.), 139 P. 528; Bleakley *v.* Adelman, 31 Pa. C. C. 159; St. Pierre *v.* McMaugh (R. I.), 86 A. 896; Whipple *v.* McCormick (R. I.), 68 A. 428; Shepard *v.* R. Co., 27 R. I. 135, 61 A. 42; Hahn *v.* Dickinson, 19 S. D. 373, 103 N. W. 642; In re McClellan's Est., 21 S. D. 209, 111 N. W. 540; Hogan *v.* S. (Tex. Cr.), 147 S. W. 871; Garza *v.* S. (Tex. Cr.), 145 S. W. 590; Priddy *v.* O'Neal (Tex. Civ.), 142 S. W. 35; Harrolson *v.* S., 54 Tex. Cr. 452, 113 S. W. 544; Dowell *v.* Dergffeld, 39 Tex. Civ. 635, 87 S. W. 1051; St. Louis, etc. R. Co. *v.* Ross (Tex. Civ.), 89 S. W. 1105; Cain *v.* Corley, 44 Tex. Civ. 224, 99 S. W. 168; St. Louis, etc. R. Co. *v.* Wiggins, 48 Tex. Civ. 449, 107 S. W. 899; Houston L. P. Co. *v.* Hooper, 46 Tex. Civ. 257, 102 S. W. 133; Texas N. O. R. Co. *v.* Scarborough, 101 Tex. 436, 108 S. W. 804; Foss *v.* Smith, 79 Vt. 434, 65 A. 553; Shannon *v.* Tacoma, 41 Wash. 220, 83 P. 186; Stewart *v.* Doak, 58 W. Va. 172, 52 S. E. 95; Sparling *v.* Co., 136 Wis. 509, 117 N. W. 1055.

See vol. 3, p. 937, n. 62, et seq, and supplement thereto; supra, "Cumulative Evidence," 937-62.

Cumulative in part, new trial granted, Spencer *v.* S. (Tex. Cr.), 153 S. W. 858.

Because unlikely to change result.—Mitchell *v.* S., 138 Ga. 21, 74 S. E. 690; Park *v.* Buxton, 10 Ga. App. 356, 73 S. E. 557; Bowling *v.* C., 148 Ky. 9, 145 S. W. 1126.

"**If new trials** were granted for such reasons, judicial proceedings would be interminable; for it is nearly always practicable to find new cumulative evidence after the trial of a case." Carnes *v.* C., 146 Ky. 425, 142 S. W. 723.

Especially if party has been lax. Speer *v.* S., 10 Ga. App. 817, 74 S. E. 95; Aaron *v.* R. Co., 159 Mo. App. 307, 144 S. W. 145.

Newly discovered evidence, though cumulative, no ground for denying new trial, where verdict rests alone on unsupported and contradictory evidence of prevailing party. Schnitzler *v.* Co., 47 Misc. 356, 93 N. Y. S. 1119.

999-87 Smith *v.* S., 90 Ark. 435, 119 S. W. 655; Thompson *v.* S., 58 Fla. 106, 50 S. 507; Posey *v.* S., 58 Fla. 92, 50 S. 530; Mayo *v.* Wilson, 141 Ga. 523, 81 S. E. 440; McDonald *v.* P., 123 Ill. App. 346; Woodford *v.* C., 154 Ky. 818, 159 S. W. 567; Travelers' Ins. Co. *v.* McInerney (Ky.), 119 S. W. 171; Cummins *v.* T. Co., 177 Mich. 217, 142 N. W. 1077; Carlton *v.* Monroe, 135 Mo. App. 172, 115 S. W. 1057; Cheever *v.* Co., 86 App. Div. 331, 83 N. Y. S. 732; Idle *v.* Co., 148 Ky. 618, 147 S. W. 381; Ginners Mut., etc. *v.* Wiley (Tex. Civ.), 147 S. W. 629; Terry *v.* S. (Tex. Cr.), 117 S. W. 801; Tyler *v.* S., 48 Tex. Cr. 611, 90 S. W. 33.

1000-88 C. S. & I. R. Co. *v.* Allen, 48 Colo. 4, 108 P. 990; Freudenberg & Co. *v.* Brown, 175 Ill. App. 588; McDonald *v.* P., 123 Ill. App. 346; Dayton *v.* Hirth, 27 Ky. L. R. 1209, 87 S. W. 1136; S. *v.* Speritus, 191 Mo. 24, 90 S. W. 459; McCreery R. Co. *v.* Bk., 54

Misc. 508, 104 N. Y. S. 959 (unwilling witnesses out of jurisdiction sufficient excuse); Slater *v.* U. S., 1 Okla. Cr. 275, 98 P. 110; Texas & P. R. Co. *v.* Crump, 102 Tex 250, 115 S. W. 26; McGinsy *v.* S. (Tex. Cr.), 144 S. W. 268; Tyler *v.* S., 48 Tex. Cr. 611, 90 S. W. 33; Brennan *v.* Seattle, 39 Wash. 640, 81 P. 1092 (witnesses employes of defendant sufficient); Jacobs *v.* Williams, 67 W. Va. 377, 67 S. E. 1113.

Another person.—If this affidavit cannot be obtained the affidavit of some other person who could state what the proposed witness would say. American Cent. Ins. Co. *v.* Hardin, 148 Ky. 246, 146 S. W. 418.

Affidavit of person to whom witness made statements sufficient. Cerrato *v.* Santugge, 119 N. Y. S. 615.

Facts set out in affidavit presumed true if uncontroverted and of such nature they could be met by counter affidavits if untrue. Piper *v.* S., 57 Tex. Cr. 605, 124 S. W. 661.

1002-89 Million *v.* Million, 31 Ky. L. R 1156, 104 S. W. 768, existence of receipt discovered.

1002-90 Denial of genuineness of letters on which motion based no cause for refusing new trial; question should go to jury. Raymond *v.* Ring, 60 Misc. 235, 112 N. Y. S. 1.

1002-91 Hall *v.* Tice, 86 Conn. 684, 86 A. 560; S. *v.* Fleming, 17 Ida. 471, 106 P. 305; Midgley *v.* Bergerman, 36 Utah 17, 83 P. 466; Paul *v.* R. Co. 34 Utah 1, 95 P. 363 (priest's influence on jurors); Wilson *v.* Keckley, 107 Va. 592, 59 S. E. 383.

1003-92 Arkadelphia L. Co. *v.* Posey, 74 Ark. 377, 85 S. W. 1127; P. *v.* Von Perhaes, 20 Cal. App. 48, 127 P. 1048; P. *v.* Sing Yow, 145 Cal. 1, 78 P. 235; Specie, etc. Co. *v.* Kirk, 56 Colo. 275, 139 P. 21; Hinsman *v.* S. (Ga. App.), 81 S. E. 367; Arnall *v.* S. (Ga. App.), 81 S. E. 366; Snow *v.* S. (Ga. App.), 81 S. E. 363; Strickland *v.* S. (Ga. App.), 81 S. E. 361; Elvin *v.* Blubaugh, 89 Kan. 726, 132 P. 994; So. Covington, etc. R. Co. *v.* Lee, 153 Ky. 621, 156 S. W. 99; Stahlman *v.* R. Co. (Mo. App.), 166 S. W. 312; Dysart-C. M. Co. *v.* Reed, 114 Mo. App. 296, 89 S. W 591; Paul *v.* R. Co., 34 Utah 1, 95 P. 363.

Considerations affecting weight of affidavits in reviewing court. See P. *v* Gambacorta, 197 N. Y. 181, 90 N. E 809.

1003-93 Marks *v.* Shoup, 2 Alaska 66; Chase *v.* Co., 2 Alaska 82; P. *v.* Fitzgerald, 1 Cal. App. 507, 82 P. 555; P. *v.* Sing Yow, 145 Cal. 1, 78 P. 235; Wood *v.* Moulton, 146 Cal. 317, 80 P. 92; Harper *v.* S. (Ga. App.), 81 S. E. 817; Strickland *v.* S., 11 Ga. App. 427, 75 S. E. 446; Cone *v.* Cone, 138 Ga. 606, 75 S. E. 644; Jefferson *v.* S., 137 Ga. 382, 73 S. E. 499; Charleston, etc. Co. *v.* Finley, 10 Ga. App. 329, 73 S. E. 542; Fisher Motor C. Co. *v.* Seymour, 9 Ga. App. 465, 71 S. E. 764; Mixon *v.* S., 7 Ga. App. 865, 68 S. E. 315; Lewis *v.* S., 134 Ga. 531, 68 S. E. 101; Coker *v.* Oliver, 4 Ga. App. 728, 62 S. E. 483; Coppage *v.* S., 4 Ga. App. 696, 62 S. E. 113; Atlanta, etc. R. Co. *v.* Tilson, 131 Ga. 395, 62 S. E. 281; Miller *v.* Thigpen, 125 Ga. 113, 54 S. E. 104; Lang *v.* Yearwood, 127 Ga. 155, 56 S. E. 305; Bunn *v.* Hargraves, 3 Ga. App. 518, 60 S. E. 223; Rogers *v.* Daniels, 116 Ill. App. 515; N. W., etc. Co. *v.* Smiley, 154 Ill. App. 351; S. *v.* Lackey, 72 Kan. 95, 82 P. 527; Travelers' Ins. Co. *v.* McInerney (Ky.), 119 S. W. 171; Louisville B. & L. Co. *v.* Hart, 29 Ky. L. R. 310, 92 S. W. 951; McBurnie *v.* Stelsly, 29 Ky. L. R. 1191, 97 S. W. 42; S. *v.* Hill, 135 La. —, 65 S. 763; Northrup *v.* Hayward, 102 Minn. 307, 109 N. W. 701; Smith *v.* S., 102 Miss. 330, 59 S. 96; Overton *v.* S., 101 Miss. 607, 58 S. 219; S. *v.* Speritus, 191 Mo. 24, 90 S. W. 459; Libby *v.* Barry, 15 N. D. 286, 107 N. W. 972; Preston *v.* S. (Okla. Cr.), 139 P. 528; Bleakley *v.* Adelman, 31 Pa. C. C. 159; Cardarelli *v.* J. Co. (R. I.), 80 A. 590; Palmer *v.* Schurz, 22 S. D. 283, 117 N. W. 150; James *v.* S. (Tex. Cr.), 163 S. W. 61; Pinson *v.* S. (Tex. Cr.), 151 S. W. 556; Collins *v.* S. (Tex. Cr.), 148 S. W. 1065; Tate *v.* S. (Tex. Cr.), 146 S. W. 169; McGinsey *v.* S. (Tex. Cr.), 144 S. W. 268; Haley *v.* S., 59 Tex. Cr. 338, 128 S. W. 1133; Harrolson *v.* S., 54 Tex. Cr. 452, 113 S. W. 544; Hilscher *v.* S., 48 Tex. Cr. 357, 88 S. W. 227; Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29; Flynt *v.* Taylor (Tex. Civ.), 91 S. W. 864; Jones *v.* Neal, 44 Tex. Civ. 412, 98 S. W. 417; Houston L. P. Co. *v.* Hooper, 46 Tex. Civ. 257, 102 S. W. 133; Wilson *v.* Keckley, 107 Va. 592, 59 S. E. 383; Seattle L. Co. *v.* Sweeney, 43 Wash. 1, 85 P. 677; Birdsall *v.* Fraenzel, 154 Wis. 48, 142

N. W. 274. See supra, "Impeachment of Witnesses," 253-94; vol. 3, p. 943, n. 70, and supplement thereto.

Exception where the evidence satisfies court that material issue was wrongfully decided. Elvin *v.* Blubaugh, 89 Kan. 726, 132 P. 994.

Unless it would produce a different result by impeaching a very important witness. Whise *v.* Whise, 36 Nev. 16, 131 P. 967.

NON EST FACTUM

1-1 Strong *v.* Hasterlik, 146 Ill. App. 346; Walsh *v.* Marvel, 130 Ill. App. 305 (verified plea destroys presumption otherwise attaching to act of corporate officer executing assignment).

If plea unverified plaintiff need not prove execution of bond in suit. Lefkow *v.* Taylor, 140 Ill. App. 570.

1-2 Landt *v.* McCullough, 130 Ill. App. 515.

1-3 Gillespie *v.* Hester, 160 Ala. 444, 49 S. 580; Himes S. Co. *v.* Parker, 157 Ala. 512, 47 S. 794; Freeman *v.* Blount, 172 Ala. 655, 55 S. 293; Penton *v.* Williams, 163 Ala. 603, 51 S. 35; Martin *v.* Co., 151 Ala. 289, 44 S. 112; Walsh *v.* Pearce, 148 Ky. 760, 147 S. W. 739; Berst *v.* Moxom, 157 Mo. App. 342, 138 S. W. 74; Acme F. Co. *v.* Barber, 138 Mo. App. 9, 119 S. W. 989; Simon *v.* Lumb. Co. (Tex. Civ.), 146 S. W. 592; Feagan *v.* Co., 42 Tex. Civ. 373, 93 S. W. 1076.

Burden of proving execution of note given by defendant corporation's president, and authority therefor, on plaintiff. Elkhart H. Co. *v.* Turner, 170 Ind. 455, 84 N. E. 812.

2-4 Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37.

A letter written by defendant touching the matter in dispute is admissible to show that he did execute the contract. Shows *v.* Steiner, Lobman & Frank, 175 Ala. 363, 57 S. 700.

Proof of signature and of authority of officer to sign company's name necessary before instrument admissible (Elkhart H. Co. *v.* Turner, 170 Ind. 455, 84 N. E. 812); especially in case of verified plea non est factum. Walsh *v.* Marvel, 130 Ill. App. 305; Dreeben *v.* Bk. (Tex.), 99 S. W. 850.

2-5 McCormick *r.* Unity Co., 239 Ill. 306, 87 N. E. 924; Acme F. Co. *v.* Barber, 138 Mo. App. 9, 119 S. W. 989. See Walsh *v.* Marvel, 130 Ill. App. 305.

2-6 See Mizell *v.* Bank (Ala.), 61 S. 272.

2-7 **Payee's character** and reputation for forgery shown by maker alleging forgery by payee. McClure *v.* Co., 6 Ga. App. 303, 65 S. E. 33.

3-8 Hunter *v.* Bk., 172 Ind. 62, 87 N. E. 734.

4-14 Hahs *v.* R. Co., 147 Mo. App. 262, 126 S. W. 524.

NOVATION

6-1 Hargadine Co. *v.* Goodman, 55 Fla. 361, 45 S. 995; Jan Ban *v.* Tsen Yim, 15 Haw. 433; Farmers' Bk. *v.* Wickliffe, 131 Ky. 787, 116 S. W. 249; Bangs *v.* Farr, 209 Mass. 339, 95 N. E. 841; McAllister *v.* McDonald, 40 Mont. 375, 106 P. 882; Staples *v.* Davis, 75 N. H. 383, 74 A. 872; Miles *v.* Bowers, 49 Or. 429, 90 P. 905; Dies *v.* County Bk., 129 Tenn. 89, 165 S. W. 248. See Lemon *v.* Little, 21 S. D. 628, 114 N. W. 1001.

Novation not presumed; must be established by clear proof. Sharff Dist. Co. *v.* Transfer Co. (Mo. App.), 166 S. W. 654; Gibbs *v.* Waring, 79 Misc. 218, 139 N. Y. S. 981.

7-2 Lang *v.* Shaw, 6 Ga. App. 747, 65 S. E. 789; Swisher *v.* Market Co., 158 Ill. App. 186; Thompson *v.* Reed, 29 S. D. 85, 135 N. W. 679; Hemenway *v.* Beecher, 139 Wis. 399, 121 N. W. 150. See Young *v.* Benton, 21 Cal. App. 382, 131 P. 1051.

Evidence as to actions and statements of defendant competent. Young *v.* Benton, 21 Cal. App. 382, 131 P. 1051.

Evidence of other transactions inadmissible to show novation in particular case. Held *v.* Co., 97 App. Div. 301, 89 N. Y. S. 954.

Declarations of creditor, after contract made, that he looked to another than original debtor for pay, inadmissible. Wierman *v.* Co., 142 Mich. 422, 106 N. W. 75.

7-3 Sherer *v.* Rubedew, 11 Ida. 536, 83 P. 512; Davis *v.* Welch, 128 La. 785, 55 S. 372; Barre G. & Q. Co. *v.* Fraser, 82 Vt. 55, 71 A. 828.

7-4 Wallace *v.* Myrick, 1 Ala. App. 572, 55 S. 259; First Nat. Bk. *r.* Fish, 2 Alaska 344; Cent. T. Co. *v.* R. Co., 156 Ia. 104, 135 N. W. 721; Wyss-T.

v. Co., 216 Pa. 435, 65 A. 811; Chenoweth *v.* Assn., 59 W. Va. 653, 53 S. E. 559.

8-5 Holloway *v.* Co., 151 Fed. 216, 80 C. C. A. 568; Lane *v.* Co., 103 App. Div. 378, 92 N. Y. S. 1061; Globe Ins. Co. *v.* Wayne, 75 O. St. 451, 80 N. E. 13.

Insufficient facts to warrant implication of novation.—Am. Mtg. Co. *v.* Rawlings, 127 Ga. 82, 56 S. E. 110; Osborne Co. *v.* West (Ia.), 103 N. W. 118; Sucker S. D. Co. *v.* Loewer, 114 La. 403, 38 S. 399; Draggo *v.* Co., 144 Mich. 195, 107 N. W. 911; Fitzgerald *v.* Assn., 143 Mich. 171, 106 N. W. 853; Davis *v.* Dunn, 121 Mo. App. 490, 97 S. W. 226; Bandman *v.* Finn, 103 App. Div. 322, 92 N. Y. S. 1096; Miles *v.* Bowers, 49 Or. 429, 90 P. 905 (hotel company's debt); Midwoods Co. *v.* Assn., 28 R. I. 303, 67 A. 61; Hemrich B. Co. *v.* Co., 45 Wash. 454, 88 P. 838.

9-6 La Banque *v.* Beau Champ, 36 Can. Sup. 18; Bk. *v.* Bk., 3 Cal. App. 561, 86 P. 820; Temple *v.* Co., 46 Colo. 497, 106 P. 8; Hargadine Co. *v.* Goodman, 55 Fla. 361, 45 S. 995; Palmetto Mfg. Co. *v.* Parker, 123 Ga. 798, 51 S. E. 714; Schneider *v.* Co., 143 Ill. App. 422; Illinois L. Ins. Co. *v.* Benner, 78 Kan. 511, 97 P. 438 (either express or implied); Simmons *v.* Co., 71 N. J. Eq. 174, 63 A. 258; Ramsay *v.* Miller, 135 App. Div. 503, 120 N. Y. S. 523; Inman *v.* Co., 124 App. Div. 73, 108 N. Y. S. 210; Held *v.* Co., 97 App. Div. 301, 89 N. Y. S. 954; Clark *v.* R. Co., 138 N. C. 25, 50 S. E. 446; Miles *v.* Bowers, 49 Or. 429, 90 P. 905; U. S. *v.* Zamora, 2 Phil. Isl. 582; Gimble *v.* King, 43 Tex. Civ. 188, 95 S. W. 7; Barre G. & Q. Co. *v.* Fraser, 82 Vt. 55, 71 A. 828; Chenoweth *v.* Assn., 59 W. Va. 653, 53 S. E. 559.

9-7 Palmetto Mfg. Co. *v.* Parker, 123 Ga. 798, 51 S. E. 714; Barnett *v.* Rosenberg, 209 Mass. 421, 95 N. E. 849; Naylor *v.* Davis, 130 App. Div. 311, 114 N. Y. S. 248; Lane *v.* Co., 103 App. Div. 378, 92 N. Y. S. 1061; Globe Ins. Co. *v.* Wayne, 75 O. St. 451, 80 N. E. 13; Hemenway *v.* Beecher, 139 Wis. 399, 121 N. W. 150. See McAllister *v.* McDonald, 40 Mont. 375, 106 P. 882.

NUISANCE

Circumstantial evidence, 15-20.

12-1 Birmingham, etc. Co. *v.* Moseley, 164 Ala. 111, 51 S. 424; Vernon *v.* Wedgeworth, 148 Ala. 490, 42 S. 749; Lonoke *v.* R. Co., 92 Ark. 546, 123 S. W. 395; Joseph Schlitz B. Co. *v.* Shiel, 45 Ind. App. 623, 88 N. E. 957; Davis *v.* R. Co., 102 Md. 371, 62 A. 572; Hefferon *v.* Taxicab Co., 130 N. Y. S. 710; Kiser *v.* Kerbaugh, 40 Pa. Super. 163; C. *v.* Cassell, 1 Pa. Super. 476; Sherman G. & E. Co. *v.* Belden, 103 Tex. 59, 123 S. W. 119; Chesapeake & O. R. Co. *v.* Whitlow, 104 Va. 90, 51 S. E. 182; Jeremy Imp. Co. *v.* C., 106 Va. 482, 56 S. E. 224.

Evidence sufficient.—Stark *v.* Coe (Tex. Civ.), 134 S. W. 373.

Convincing proof required to abate nuisance where result destructive of valuable property held under specific authority of law. Jeremy Imp. Co. *v.* C., 106 Va. 482, 56 S. E. 224.

Cemetery not nuisance per se and evidence must clearly prove it so before injunction will issue. Payne *v.* Wayland, 131 Ia. 659, 109 N. W. 203.

12-2 Williams *v.* Wolfgang, 151 Ia. 548, 132 N. W. 30; Hinmon *v.* Co., 75 N. J. L. 889, 70 A. 166; Ballantino *v.* Co., 76 N. J. L. 358, 70 A. 167.

12-3 Boyd *v.* Schreiner (Tex. Civ.), 116 S. W. 100.

12-4 Wichers *v.* Fertilizer Co., 128 La. 1011, 55 S. 677; Vautier *v.* Refining Co., 231 Pa. 8, 79 A. 814.

12-5 Over *v.* Dehne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883.

Malicious purpose of one purposely causing statutory nuisance need not be shown to have solely prompted him; enough if controlling motive. Healey *v.* Spaulding, 104 Me. 122, 71 A. 472.

13-7 **Party complaining of official order** must show unauthorization. Miles *v.* Board, 39 Mont. 405, 102 P. 696. See 21-40, infra.

Burden on defendant to show legal justification. Willson *v.* R. Co., 146 N. Y. S. 208.

Authorization of nuisance never presumed. Towaliga F. P. Co. *v.* Sims, 6 Ga. App. 749, 65 S. E. 841; McArdle *v.* R. Co., 141 Ill. App. 79.

13-8 If maintainer has notice, creator immaterial. Hedrick *v.* St. Joseph, 138 Mo. App. 360, 122 S. W. 375.

13-9 See Hill *v.* Hayes, 199 Mass. 411, 85 N. E. 434.

13-11 Tedeseki *v.* Berger, 150 Ala. 649, 43 S. 960. See 12-2, supra.

13-12 Kerbaugh *v.* Caldwell, 151 Fed. 194, 80 C. C. A. 470; U. S. *v.* Luce, 141 Fed. 385; Jefferson F. Co. *v.* Rich (Ala.), 62 S. 40; Vernon *v.* Wedgeworth, 148 Ala. 490, 42 S. 749; Chicago *v.* Dunham Co., 161 Ill. App. 307; Over *v.* Dehne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883; S. *v.* Schaefer, 45 Wash. 9, 87 P. 949.

Evidence as to violation of injunction obtained by others, inadmissible. Northcutt *v.* Stone Co., 178 Mo. App. 389, 162 S. W. 747.

Smoke from engine.—Competent to show quantum of smoke emitted at other places. S. *v.* R. Co., 84 N. J. L. 140, 86 A. 48.

Ordinance forbidding injurious act admissible; not conclusive. Field *v.* Gowdy, 199 Mass. 568, 85 N. E. 884.

14-13 Northcutt *v.* Stone Co., 178 Mo. App. 389, 162 S. W. 747.

14-14 U. S. *v.* Luce, 141 Fed. 385; Towaligo F. P. Co. *v.* Sims, 6 Ga. App. 749, 65 S. E. 844; Indian R. Co. *v.* C. (Ky.), 117 S. W. 274; Woodstock, etc. Co. *v.* Co. (S. C.), 63 S. E. 548.

15-15 Sherman G. & E. Co. *v.* Belden, 103 Tex. 59, 123 S. W. 119.

15-16 Hill *v.* Hayes, 199 Mass. 411, 85 N. E. 434.

15-20 Vernon *v.* Wedgworth, 148 Ala. 490, 42 S. 749; Malmstrom *v.* Co., 32 Nev. 246, 107 P. 98 (on issue of nuisance's effect on rental value only); Rausch *v.* Glazer (N. J. Eq.), 74 A. 39.

Circumstantial evidence of malaria from mosquito breeding pond. Towaliga F. P. Co. *v.* Sims, 6 Ga. App. 749, 65 S. E. 844.

Sickness of plaintiff's employes and resulting inability to fill orders shown. Woodstock Co. *v.* Co. (S. C.), 63 S. E. 548.

16-21 Probability of future injury cannot be considered. Boyd *v.* Schreiner (Tex. Civ.), 116 S. W. 100.

May show injury to his own health. Cumberland R. Co. *v.* Bays, 153 Ky. 159, 154 S. W. 929.

16-22 Kevil *v.* Princeton (Ky.), 118 S. W. 363.

17-23 Acts of others contributing to nuisance no defense if nuisance exists without such contribution. Jeremy Imp. Co. *v.* C., 106 Va. 482, 56 S. E. 224.

Where the alleged nuisance was smoke from the defendant's engines it could not escape responsibility by showing that a modicum of smoke was thrown upon the plaintiffs from a lawful source. So. R. Co. *v.* McMenamin, 113 Va. 121, 73 S. E. 980.

Existence of other sources of possible discomfort to plaintiff no defense. Judson *v.* Co., 157 Cal. 168, 106 P. 581.

17-24 C. *v.* R. Co., 7 Pa. Super. 234; Hengy *v.* Hengy (Tex. Civ.), 151 S. W. 1127.

In Louisville & N. R. Co. *v.* Com., 149 Ky. 459, 149 S. W. 898, the defendant offered to show by a number of witnesses that the crossing in question was no worse than some other places on the highway. "This evidence was properly excluded. The statute requires a railroad company to keep its railroad crossings in good order, and it is no defense for it to show that the county authorities have failed to keep their parts of the road in good order. There is particular necessity for the road being in good order at the railroad on account of the danger from trains there."

18-25 Atty.-Gen. *v.* Co. (1904), 1 Ch. D. 673.

18-26 Hinmon *v.* Co., 75 N. J. L. 869, 70 A. 166.

Negligence shown by proof plant previously operated without injury. Ballantine *v.* Co., 76 N. J. L. 358, 70 A. 167.

18-28 Virginia R. & P. Co. *v.* Ferebee, 115 Va. 289, 78 S. E. 566.

19-30 Perrin *v.* Co., 119 La. 83, 43 S. 938.

19-31 Rushmer *v.* Polsue (1906), 1 Ch. D. 234; Gose *v.* Coryell (Tex. Civ.), 126 S. W. 1164.

19-32 C. *v.* Yost, 11 Pa. Super. 323.

19-33 Remsberg *v.* Co., 73 Kan. 66, 84 P. 548. *Contra* as to house being built. Richmond C. O. Co. *v.* Castellaw, 134 Ga. 472, 67 S. E. 1126.

20-34 Towaliga F. P. Co. *v.* Sims, 6 Ga. App. 749, 65 S. E. 844.

20-35 Feasibility of establishing grade crossing subject for experts. Gulf, etc. R. Co. *v.* Belton, 57 Tex. Civ. 460, 122 S. W. 413.

21-39 Farmer *v.* Behmer, 9 Cal. App. 773, 100 P. 901; Merchants' Mut. T. Co. *v.* Hirschman, 43 Ind. App. 283, 87 N. E. 238; King *v.* R. Co., 88 Miss. 456, 42 S. 204; Laird *v.* Co., 73 N. J. Eq. 49, 67 A. 387; City of New York *v.* Montague, 129 N. Y. S. 1084,

rev. 68 Misc. 176, 124 N. Y. S. 959; Little *v.* Lenoir, 151 N. C. 415, 66 S. E. 337; Terrell *v.* R. Co., 110 Va. 340, 66 S. E. 55 (distinction between performance of public and private duties); Chesapeake & O. R. Co. *v.* Greaver, 110 Va. 350, 66 S. E. 59.

21-40 City of Lewiston *v.* Isaman, 19 Ida. 653, 115 P. 494.

Presumption of authorization indulged against plaintiff town. Lonoke *v.* R. Co., 92 Ark. 546, 123 S. W. 395. See 13-7, supra.

21-41 Holbrook *v.* Griffis, 127 Ia. 505, 103 N. W. 479.

21-44 Farmer *v.* Behmer, 9 Cal. App. 773, 100 P. 901, evidence of reputation before lease admissible to show latter's reputation and lessor's knowledge.

22-45 Jones *v.* Co., 6 Ga. App. 506, 65 S. E. 361; Southern R. Co. *v.* McMenamin, 113 Va. 121, 73 S. E. 980.

22-46 A Cohen & Co. *v.* Rittiman (Tex. Civ.), 139 S. W. 59.

22-47 Deweese *v.* Husman, 146 Ill. App. 55; Carroll S. D. Co. *v.* Schnepfe, 111 Md. 420, 74 A. 828; Western T. C. Co. *v.* Williams (Tex. Civ.), 124 S. W. 493.

22-48 Laird *v.* Co., 73 N. J. Eq. 49, 67 A. 387.

22-51 Effect of removal upon defendant's business, immaterial. Merchants' Mut. T. Co. *v.* Hirschman, 43 Ind. App. 283, 87 N. E. 238.

22-52 Value of property affected by injunction, relevant. Gose *v.* Coryell (Tex. Civ.), 126 S. W. 1164.

Impracticability or impossibility of maintaining grade crossing or unreasonableness of requiring it shown. Gulf, etc. R. Co. *v.* Belton, 57 Tex. Civ. 460, 122 S. W. 413.

Necessity for existence of thing complained of, use and convenience shown. Chesapeake & O. R. Co. *v.* Greaver, 110 Va. 350, 66 S. E. 59.

23-53 Hartman *v.* Co., 2 Pa. Super. 123, 23 Pa. Super. 360; 11 Pa. Super. 438.

23-55 Lonoke *v.* R. Co., 92 Ark. 546, 123 S. W. 395; Crane *v.* Roselle, 236 Ill. 97, 86 N. E. 181; Payne *v.* Wayland, 131 Ia. 659, 109 N. W. 203; Davis *v.* R. Co., 102 Md. 371, 62 A. 572; Little *v.* Lenoir, 151 N. C. 415, 66 S. E. 337. See McMillan *v.* Kuehnle, 76 N. J. Eq. 256, 73 A. 1054.

Evidence held sufficient.—Longley *v.* McGeoch, 115 Md. 182, 80 A. 843.

Evidence of public inconvenience competent in action to abate thing authorized. P. *v.* Co., 131 App. Div. 174, 115 N. Y. S. 297.

Verdict finding existence of nuisance conclusive of right to injunction. Williams *v.* Co., 85 S. C. 1, 66 S. E. 117.

Injunction denied where evidence showed plaintiff's injury depended on wind's direction and not considerable. Bentley *v.* Co., 48 Misc. 457, 96 N. Y. S. 831.

24-56 Ehrlick *v.* C., 31 Ky. L. R. 401, 102 S. W. 289. *Comp.* Huber *v.* C., 31 Ky. L. R. 320, 102 S. W. 291, pool room.

Criminal intent of accused and unlawfulness of act or neglect must be shown beyond reasonable doubt. P. *v.* Eckerson, 133 App. Div. 220, 117 N. Y. S. 418.

Public corporation cannot show removal of nuisance beyond financial ability. C. *v.* Borough, 37 Pa. Super. 160.

Expert testimony of future effect of act inadmissible. P. *v.* Eckerson, 133 App. Div. 220, 117 N. Y. S. 418.

24-57 Merchants' Mut. T. Co. *v.* Hirschman, 43 Ind. App. 283, 87 N. E. 238; Paris *v.* Jenkins (Tex. Civ.), 122 S. W. 411 (if nuisance temporary). *Contra* if damage temporary. McHenry *v.* Parkersburg, 66 W. Va. 533, 66 S. E. 750.

Where the injury is discomfort and inconvenience there is no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will admit. Southern R. Co. *v.* McMenamin, 113 Va. 121, 73 S. E. 980.

24-58 Vernon *v.* Wedgeworth, 148 Ala. 490, 42 S. 749; Towaliga F. P. Co. *v.* Sims, 6 Ga. App. 749, 65 S. E. 844; Bly *v.* Co., 111 App. Div. 170, 97 N. Y. S. 592. See Meek *v.* De Latour, 2 Cal. App. 261, 83 P. 300.

Defendant may show exercise of due care in removing nuisance. Marion *v.* Tuell, 111 Me. 566, 90 A. 484.

Depreciation in usable value of homestead shown though market value increased. Jones *v.* Co., 6 Ga. App. 506, 65 S. E. 361; Hall *v.* Carter (Tex. Civ.), 137 S. W. 461. Depreciation in value of property generally, irrelevant. Sher-

man G. & E. Co. *v.* Belden, 103 Tex. 59, 123 S. W. 119.

24-59 Woodstock Co. *v.* Co., 84 S. C. 306, 66 S. E. 194, 63 S. E. 548, illness of employes.

Expenses resulting from illness, loss of time, pain and suffering shown. Towaliga F. P. Co. *v.* Sims, 6 Ga. App. 749, 65 S. E. 844.

Cost of property and amount of capital stock, immaterial. Woodstock Co. *v.* Co., 84 S. C. 306, 63 S. E. 548.

25-61 See Huntington *v.* Stemen, 37 Ind. App. 553, 77 N. E. 407; Van Veghten *v.* Co., 103 App. Div. 130, 92 N. Y. S. 956. But see Taylor *v.* R. Co., 145 N. C. 400, 59 S. E. 129.

Evidence admissible on equity side after obtaining damages on law side. Cauthen *v.* Oil Co., 96 S. C. 342, 80 S. E. 615.

25-62 Southern R. Co. *v.* Poetker, 46 Ind. App. 295, 91 N. E. 610.

26-68 Speculative testimony inadmissible, as that employes would have quit or not entered service because of unhealthful conditions. Woodstock Mfg. Co. *v.* Co., 84 S. C. 306, 66 S. E. 194.

26-70 Continuance after request for removal warrants punitive damages. Yazoo R. Co. *v.* Saunders, 87 Miss. 607, 40 S. 163.

OBJECTIONS

Effect of motion to dismiss, 134-63.

36-1 Doyle *r.* Terrace Co. (Utah), 135 P. 103.

Party offering usually need not object. In re Porter's Est., 60 Misc. 504, 113 N. Y. S. 928.

Objection by co-defendant good. Kimic *r.* R. Co., 156 Cal. 379, 104 P. 986.

36-2 Objection cannot be made by one not an attorney for the party. Ryan *r.* S. (Tex. Cr.), 142 S. W. 878.

An objection by one party cannot avail the opposite party. Tremain *r.* Dyott, 161 Mo. App. 217, 142 S. W. 760.

That answer is irresponsive, available only to propounder of question. Philpott *v.* Jones (Ja.). 146 N. W. 859.

36-4 Or sustain.—Harris *v.* S. (Ala. App.), 62 S. 477.

Converse.—Borden & Co. *v.* Co. (Ala. App.), 62 S. 245; Owen *v.* R. Co. (Ala.), 61 S. 924.

36-5 Johnson *v.* S., 4 Ala. App. 62, 58 S. 754; Davis *v.* Gaskins. 137 Ga. 450, 73 S. E. 579; Diamond B. C. Co. *r.* Cuthbertson, 166 Ind. 290, 76 N. E. 1060; Murphy *v.* R. Co., 125 Mo. App. 269, 102 S. W. 64; Berg *v.* S. (Tex. Cr.), 142 S. W. 884. See O'Brien *v.* R. Co., 55 Misc. 228, 105 N. Y. S. 238. And see vol. 12, p. 159, n. 7, and supplement thereto. But see Waddell *v.* R. Co., 113 Mo. App. 680, 88 S. W. 765, objection immediately after improper answer considered as motion to strike.

Objection that answer is not responsive to question can be made only by questioner, not by opposite party. Pope *v.* S., 174 Ala. 63, 57 S. 245.

Non-responsive answer may be objected to only by party asking question. Alabama, etc. R. Co. *v.* Bullard, 157 Ala. 618, 47 S. 578; Turck *v.* Chicago, 146 Ill. App. 472.

37-6 Stone *v.* R. Co., 161 Mo. App. 37, 142 S. W. 1092.

37-7 Johnston *v.* Beadle, 6 Cal. App. 251, 91 P. 1011.

37-8 S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235; C. *v.* Swartz, 40 Pa. Super. 370.

38-9 Hutchinson *v.* Morris, 131 Mo. App. 258, 110 S. W. 684; Anderson *v.* Co., 85 S. C. 252, 67 S. E. 232 (as by failing to strike irrelevant allegation); Burnaman *v.* S. (Tex. Cr.), 159 S. W. 244. See Indianapolis, etc. Co. *r.* Hall, 166 Ind. 557, 76 N. E. 242.

Failure to move to strike allegations waives right to object to evidence in their support. Milhous *v.* R. Co., 72 S. C. 442, 52 S. E. 41.

38-11 Hutchinson *v.* Morris, 131 Mo. App. 258, 110 S. W. 684.

38-12 Counsel's assent to admission of testimony may be withdrawn by permission and objection availed of. Washington L. P. Co. *v.* Goodrich, 110 Va. 692, 66 S. E. 977.

39-13 Canfield Lumb. Co. *v.* Lumb. Co., 148 Ia. 207, 127 N. W. 70.

39-15 St. Louis I. M. & S. R. Co. *v.* Tucka, 95 Ark. 190, 129 S. W. 541; St. Louis, etc. R. Co. *v.* Flinn, 88 Ark. 484, 115 S. W. 142; Cleveland, etc. R. Co. *v.* Gossett, 172 Ind. 525, 87 N. E. 723; Joseph *v.* R. Co., 129 Mo. App. 603, 107 S. W. 1055; Robinson *v.* Omaha, 84 Neb. 642, 121 N. W. 969; Brown *v.* R. Co., 83 S. C. 30, 64 S. E. 961.

Cross-examination as to permanence of injuries waives right to object to introduction of life tables. O'Donnell *v.* Co., 28 R. I. 245, 66 A. 578.

Incompetent testimony adduced on direct may not be objected to if also brought out on cross-examination. Barnett *v.* S., 165 Ala. 59, 51 S. 299.

40-16 Gooch *v.* Collins, 156 Ky. 282, 160 S. W. 1038; May *v.* C., 153 Ky. 141, 154 S. W. 1074; Lindeke *v.* Co-op. Co. (Minn.), 148 N. W. 459. See P. *v.* Bradley, 23 Cal. App. 44, 136 P. 955.

40-17 O'Brien *v.* Knotts, 165 Ind. 308, 75 N. E. 594; Schneider *v.* Maney, 242 Mo. 36, 145 S. W. 823; Boren *v.* Brotherhood, etc., 145 Mo. App. 136, 129 S. W. 491; Crites *v.* Woodmen, 82 Neb. 298, 117 N. W. 776; International, etc. R. Co. *v.* Brice (Tex. Civ.), 126 S. W. 613; Snead *v.* S., 55 Tex. Cr. 583, 117 S. W. 983; S. *v.* Jackson, 79 Vt. 504, 65 A. 657.

40-18 Texas & N. O. R. Co. *v.* McCoy, 54 Tex. Civ. 278, 117 S. W. 446.

40-19 Southern C. & C. Co. *v.* Swinney, 149 Ala. 405, 42 S. 808; Clinton *v.* S., 58 Fla. 23, 50 S. 580; Wren *v.* S. (Tex. Cr.), 150 S. W. 440; Platinburg *v.* S., 57 Tex. Cr. 375, 123 S. W. 421.

41-22 Seamster *v.* S., 74 Ark. 579, 86 S. W. 434; Palatine Ins. Co. *v.* Co., 13 N. M. 241, 82 P. 363. See Paterson *v.* R. Co., 95 Minn. 57, 103 N. W. 621; Abbott *v.* Co., 112 Mo. App. 550, 87 S. W. 110.

42-24 Polytinsky *v.* Patterson, 3 Ala. App. 302, 57 S. 130; Crowley *v.* S., 103 Ark. 315, 147 S. W. 47; New Amsterdam C. Co. *v.* Saloman, 165 Ill. App. 264; Providence Washington Ins. Co. *v.* Tel. Co., 153 Ill. App. 118, *aff.* 247 Ill. 84, 93 N. E. 134; McCaffery *v.* R. Co., 192 Mo. 144, 90 S. W. 816; Taylor *v.* Mere. Co., 47 Mont. 342, 132 P. 549; Olmstead *v.* Red Cloud, 86 Neb. 528, 125 N. W. 1101; Gorham *v.* R. Co., 158 N. C. 504, 74 S. E. 607; Beadle *v.* Paine, 46 Or. 424, 80 P. 903; Ghaner *v.* Co., 85 S. C. 90, 67 S. E. 242; Anderson *v.* T. Co., 85 S. C. 252, 67 S. E. 232; Brown *v.* R. Co., 83 S. C. 30, 64 S. E. 961; Lattimore *v.* Puckett & Wear (Tex. Civ.), 161 S. W. 951; Birkman *v.* Fahrenthold, 52 Tex. Civ. 335, 114 S. W. 428; Dunlap *v.* Broyles (Tex. Civ.), 146 S. W. 578. See McNeil *v.* S. S. Line, 8 Ala. App. 610, 62 S. 479.

43-27 Town of Meeker *v.* Fairfield, 25 Colo. App. 187, 136 P. 471 (quot. text); Johnson *v.* Co., 82 S. C. 87, 63 S. E. 1.

43-28 Town of Meeker *v.* Fairfield, *supra*; Chandler *v.* Prince (Mass.), 105 N. E. 1076; Larson *v.* R. Co., 89 Neb. 247, 131 N. W. 201; Blue *v.* Power Co., 60 Or. 122, 117 P. 1094; Missouri, etc. R. Co. *v.* Sullivan (Tex. Civ.), 157 S. W. 193; Gulf, etc. R. Co. *v.* Idens (Tex. Civ.), 157 S. W. 173; Love *v.* S. (Tex. Civ.), 150 S. W. 920; Gulf, etc. R. Co. *v.* Brock (Tex. Civ.), 150 S. W. 488; Pecos, etc. R. Co. *v.* Cox (Tex. Civ.), 150 S. W. 205; International & G. N. R. Co. *v.* Davison (Tex. Civ.), 138 S. W. 1162; Western Union Tel. Co. *v.* Williams (Tex. Civ.), 137 S. W. 148.

43-29 Long *v.* Seigel, 177 Ala. 338, 58 S. 380; S. *v.* Williams (Del.), 80 A. 1004; Hall *v.* Parry, 55 Tex. Civ. 40, 118 S. W. 561.

43-30 Bates *v.* Hall, 44 Colo. 360, 98 P. 3; Douville *v.* Cas. Co., 25 Ida. 390, 138 P. 506; Lott *v.* S. (Tex. Cr.), 146 S. W. 544; Hill *v.* Houser, 51 Tex. Civ. 359, 115 S. W. 112.

44-31 Hatzfeld *v.* Walsh, 55 Tex. Civ. 573, 120 S. W. 525.

44-33 Jaquith *v.* Shumway, 80 Vt. 556, 69 A. 157; Kenney Presby. Home *v.* Kenney, 45 Wash. 106, 88 P. 108; Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805.

44-34 Source of information. In re Bean's Will, 85 Vt. 472, 82 A. 734, *aff.* Ware *v.* Childs, 82 Vt. 359, 73 A. 994.

45-36 Marshall *v.* S., 54 Fla. 66, 44 S. 742; Hinkle *v.* Smith, 127 Ga. 437, 53 S. E. 464; Graham *v.* R. Co., 234 Ill. 483, 84 N. E. 1070; Delmoe *v.* Long, 35 Mont. 139, 88 P. 778; Cane Hill, etc. Co. *v.* R. Co. (Tex. Civ.), 95 S. W. 751.

45-37 Mugge *v.* Jackson, 50 Fla. 235, 39 S. 157; Meekins *v.* R. Co., 126 N. C. 1, 48 S. E. 501.

But on trial de novo cannot be made if waived on trial below. Imboden *v.* Co., 111 Mo. App. 220, 86 S. W. 283.

45-39 Robertson *v.* Sebastian, 30 Ky. L. R. 883, 99 S. W. 933. See Sparks *v.* Taylor (Tex. Civ.), 87 S. W. 740.

46-40 Refusal to hear objections and subsequently instructing as to competency of evidence not good practice. Court should direct retirement, hear evidence, and decide upon competency in whole or in part. Owen *v.* S., 58 Tex. Cr. 261, 125 S. W. 157.

46-41 McLendon *v.* Rubenstein (Ala.), 61 S. 902; Nat. Life & Acc. Ins. Co. *v.* Lokey, 166 Ala. 174, 52 S.

45; Clardy *v.* S., 96 Ark. 52, 131 S. W. 46; Davis *v.* S., 95 Ark. 555, 129 S. W. 530; Delger *v.* Jacobs, 19 Cal. App. 197, 125 P. 258; Thompson *v.* S., 55 Fla. 189, 46 S. 842; Hawkins *v.* Studdard, 132 Ga. 265, 63 S. E. 852; Ruddy *v.* McDonald, 244 Ill. 494, 91 N. E. 651; S. *v.* Kruse (Ia.), 144 N. W. 586; Hartwell *v.* Co., 78 Kan. 259, 97 P. 432; Thomas *v.* C., 146 Ky. 790, 143 S. W. 409; Moss T. Co. *v.* Myers (Ky.), 116 S. W. 255; Brinsfield *v.* Howeth, 110 Md. 520, 73 A. 289; Buck *v.* Brady, 110 Md. 568, 73 A. 277; East St. Louis Ice & Cold Storage Co. *v.* Kuhlman, 238 Mo. 685, 142 S. W. 253; Tremain *v.* Dyott, 161 Mo. App. 217, 142 S. W. 760; Boren *v.* Brotherood, etc., 145 Mo. App. 136, 129 S. W. 491; Columbus C. H. Co. *v.* Dobroczynski, 112 N. Y. S. 1049; Watkins *v.* R. Co., 97 S. C. 148, 81 S. E. 426; Stroud *v.* Fish, 29 S. D. 410, 136 N. W. 1125; Berg *v.* S. (Tex. Cr.), 142 S. W. 884; Holland *v.* Riggs, 53 Tex. Civ. 367, 116 S. W. 167; International H. Co. *v.* Campbell, 43 Tex. Civ. 421, 96 S. W. 93; Knust *v.* Bullock, 59 Wash. 141, 109 P. 329.

See Standard T. Mach. Co. *v.* Co., 6 Ala. App. 188, 60 S. 481.

Party should object immediately or, at least, within a reasonable time. Warren *v.* S., 103 Ark. 165, 146 S. W. 477.

Not after cross-examination on same line. Wilkinson *v.* Tel. Co., 163 Mo. App. 71, 145 S. W. 520, *cit.* earlier cases.

47-42 Cedar C. S. Co. *v.* Steadham (Ala.), 65 S. 984; Fowlkes *v.* Lewis (Ala. App.), 65 S. 724; Finney *v.* S. (Ala. App.), 65 S. 93; McDaniel *v.* S. (Ala. App.), 64 S. 641; Charlie's T. Co. *v.* Leedy & Co. (Ala. App.), 64 S. 205; Smith *v.* S. (Ala.), 62 S. 864; Robinson *v.* S., 8 Ala. App. 435, 62 S. 372; Key *v.* S., 8 Ala. App. 2, 62 S. 335; McLendon *v.* Rubenstein (Ala.), 61 S. 902; McCaskey R. Co. *v.* Drug Co. (Ala. App.), 61 S. 484; Watson *v.* S. (Ala.), 61 S. 334; Farlow *v.* S., 7 Ala. App. 137, 61 S. 474; Nickerson *v.* S., 6 Ala. App. 27, 60 S. 446; Powell *v.* S., 5 Ala. App. 75, 59 S. 530; Hooper *v.* Dorsey, 5 Ala. App. 463, 58 S. 951; Tice *v.* S., 3 Ala. App. 164, 57 S. 506; Carbon, etc. Co. *v.* Cooper & Son, 3 Ala. App. 460, 57 S. 81; Humphries *v.* S., 2 Ala. App. 1, 56 S. 72; Mobile Light & R. Co. *v.* Davis, 1 Ala. App. 338, 55 S. 1020; Louisville & N. R. Co. *v.* Johnson, 162 Ala. 665, 50 S. 300; Phillips *v.* S., 161 Ala. 60, 49 S. 794; Rutledge *v.* Rowland, 161 Ala. 114, 49 S. 461; Birmingham R. Co. *v.* Chastain, 158 Ala. 421, 48 S. 85; Montgomery *v.* Shirley, 159 Ala. 239, 48 S. 679; Western U. T. Co. *v.* Northcutt, 158 Ala. 539, 48 S. 553; Cohn & G. L. Co. *v.* Robbins, 159 Ala. 289, 48 S. 853; Louisville & N. R. Co. *v.* Perkins, 165 Ala. 471, 51 S. 870; Southern C. & C Co. *v.* Swinney, 149 Ala. 405, 42 S. 808; Birmingham L. & P. Co. *v.* Turner, 154 Ala. 542, 45 S. 671; Moss *v.* S., 152 Ala. 30, 44 S. 598; West Pratt C. Co. *v.* Andrews, 150 Ala. 368, 43 S. 348; Giffen *v.* Co., 5 Cal. App. 50, 89 P. 855; Williams *v.* S., 58 Fla. 138, 50 S. 749; Cotner *v.* S., 173 Ind. 168, 89 N. E. 847; S. *v.* Stutches (Ia.), 144 N. W. 597; S. *v.* Stafford, 145 Ia. 285, 123 N. W. 167; Culbertson *v.* Sallinger (Ia.), 117 N. W. 6; Rosenkovitz *v.* Co., 108 Md. 306, 70 A. 108; Hutchinson *v.* Plant (Mass.), 105 N. E. 1017; Randall *v.* Car Co., 212 Mass. 352, 99 N. E. 221; S. *v.* Wellman, 253 Mo. 302, 161 S. W. 795; Poumeroule *v.* Cable Co., 167 Mo. App. 533, 152 S. W. 114; Dehner *v.* Miller, 166 Mo. App. 504, 148 S. W. 953; Parker *v.* R. Co., 164 Mo. App. 31, 147 S. W. 489; Lowenstein *v.* R. Co., 134 Mo. App. 24, 119 S. W. 430 (exhibition of injured member); Stewart *v.* Watson, 133 Mo. App. 44, 112 S. W. 762; Utz *v.* Ins. Co., 139 Mo. App. 552, 123 S. W. 538; S. *v.* Rodgers, 40 Mont. 248, 106 P. 3; S. *v.* Barrett, 43 Mont. 502, 117 P. 895; Martin *v.* Corscadden, 34 Mont. 308, 86 P. 33; Seele *v.* S., 85 Neb. 109, 122 N. W. 686; Wightman *v.* Campbell, 161 App. Div. 49, 146 N. Y. S. 666; St. Louis, etc. Co. *v.* Davis, 37 Okla. 340, 132 P. 337; de Dios Chua Soco *v.* Veloso, 2 Phil. Isl. 658; Hebert *v.* Hebert, 20 S. D. 85, 104 N. W. 911; Texas, etc. R. Co. *v.* Walker (Tex. Civ.), 125 S. W. 99; Spates *v.* S., 62 Tex. Cr. 532, 138 S. W. 393.

See Pilcher *v.* Co., 6 Ala. App. 552, 60 S. 547. *Comp.* Craig *v.* Zint, 52 Ind. App. 19, 100 N. E. 94, question incompetent.

Motion to strike out may be overruled. Regina Co. *v.* Galloway, 50 Ind. App. 92, 98 N. E. 81.

"**Counsel are not allowed to wait** and take the chance of a witness answering favorably and when the answer turns out to be unfavorable then for

the first time raise an objection to the question and answer. That comes too late.'' Montague Compressed Air Co. *v.* City, 166 Mo. App. 11, 148 S. W. 422. And see Coates *v.* S., 5 Ala. App. 182, 59 S. 323; Ryall *v.* Pearson Bros. (Ala.), 59 S. 190; Kramer *v.* Compton, 166 Ala. 216, 52 S. 351; Hatch *v.* Bayless, 164 Mo. App. 216, 146 S. W. 839.

48-43 Southwestern Alabama R. Co. *v.* Maddox, 146 Ala. 539, 41 S. 9; Birmingham, etc. R. Co. *v.* Taylor, 152 Ala. 105, 44 S. 580; Remington M. Co. *v.* Co., 6 Penne. (Del.) 288, 66 A. 465; De Laval S. Co. *v.* Sharpless, 142 Ia. 60, 120 N. W. 657; Oxford Junction S. Bk. *v.* Cook, 134 Ia. 185, 111 N. W. 805; Medcalf *v.* Hensley, 158 Ky. 198, 164 S. W. 788; Louisville R. Co. *v.* Larberg, 158 Ky. 44, 164 S. W. 346; C. *v.* Johnson, 199 Mass. 55, 85 N. E. 188; Moynihan *v.* Brennan (N. H.), 90 A. 964; Blake *v.* Meyer, 110 App. Div. 734, 97 N. Y. S. 424; Smith *v.* League, 121 App. Div. 600, 106 N. Y. S. 251; Cullinan *v.* Horan, 116 App. Div. 711, 102 N. Y. S. 132; Houston, etc. R. Co. *v.* Roach, 52 Tex. Civ. 95, 114 S. W. 418; W. U. T. Co. *v.* Simmons (Tex. Civ.), 93 S. W. 686.

If evidence volunteered, objection after answer is in time. Allen *v.* S., 8 Ala. App. 228, 62 S. 971.

48-44 Skinner Mfg. Co. *v.* Douville, 54 Fla. 251, 44 S. 1014; Pierson *v.* R. Co., 159 Mich. 110, 123 N. W. 576; Bean *v.* Co., 40 Mont. 31, 104 P. 869. See Theodore L. Co. *v.* Lyons, 148 Ala. 668, 41 S. 682.

49-46 Birmingham L. & P. Co. *v* Turner, 154 Ala. 542, 45 S. 671; Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; S. *v.* Rhys, 40 Mont. 131, 105 P. 494.

49-47 Indefinite objections made specific upon hearing of motion to direct verdict. Finnes *v.* Selover, 108 Minn. 331, 122 N. W. 174.

Objection to evidence of confession because involuntary effectual at any stage of proceeding. U. S. *v.* Pascual, 2 Phil. Isl 457.

49-48 Terry *v.* Williams, 148 Ala. 468, 41 S. 804; Patton *v.* Bk., 124 Ga. 965, 53 S. E. 664.

49-49 Flanagan M. & E. Co. *v.* Adams, 115 Mo. App. 542, 90 S. W. 1035; Speer *v.* S., 50 Tex. Cr. 273, 97 S. W. 469; El Paso, etc. R. Co. *v.* Darr (Tex. Civ.), 93 S. W. 166; Holly St. L. Co. *v.* Beyer, 48 Wash. 422, 93 P. 1065.

49-50 Williams *v.* S., 7 Ga. App. 33, 65 S. E. 1097; Wright *v.* S., 6 Ga. App. 770, 65 S. E. 806; Metropolitan Life Ins. Co. *v.* Lyons, 50 Ind. App. 534, 98 N. E. 824; S. *v.* Roach (Mo.), 167 S. W. 1008; Floyd *v.* S. (Tex. Cr.), 161 S. W. 974; Carver *v.* S. (Tex. Cr.), 150 S. W. 914.

49-51 Delta B. Co. *v.* Leyland Co., 173 Ill. App. 38; Micklo *v.* U. S., 6 Ind. Ty. 557, 98 S. W. 349; S. *v.* Speyer 207 Mo. 540, 106 S. W. 505; Einstein *v.* Co., 118 Mo. App. 184, 94 S. W. 296, Dallas, etc. R. Co. *v.* Ely (Tex. Civ.), 91 S. W. 887.

On motion for new trial.—Crouse *v.* Barber, etc. Co., 162 Ill. App. 271.

50-52 Missouri, K. & T. R. Co. *v.* Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. ed. 690; Stone & Webster Eng. Co. *v.* Melovich, 202 Fed. 438, 120 C. C. A. 544; Quaker Oats Co. *v.* Grice, 195 Fed. 441, 115 C. C. A. 343; Shaw *v.* Cleveland, 5 Ala. App. 333, 59 S. 534; Williams *v.* S., 103 Ark. 70, 146 S. W. 471; St. Louis, etc. R. Co. *v.* Flinn, 88 Ark. 484, 115 S. W. 142; Lynch *v.* S., 95 Ark. 168, 128 S. W. 1053; P. *v.* Kizer, 22 Cal. App. 10, 133 P. 516, 521, 134 P. 346; P. *v.* Fredoni, 12 Cal. App. 685, 108 P. 663; P. *v.* Cyty, 11 Cal. App. 702, 106 P. 257; P. *v.* Garnett, 9 Cal. App. 194, 98 P. 247; P. *v.* James, 5 Cal. App. 427, 90 P. 561 (to hypothetical question); Jakway *v.* Rivers, 48 Colo. 49, 108 P. 999; Templo *v.* L. Co., 46 Colo. 497, 106 P. 8; Guldman *v.* Wilder, 45 Colo. 551, 101 P. 759; Boldberger *v.* P., 45 Colo. 327, 101 P. 407; Seaboard, etc. Co. *v.* Rentz, 63 Fla. 257, 57 S. 612; Butler *v.* Ederheimer, 55 Fla. 544, 47 S. 23; Wilson *v.* Jernigan, 57 Fla. 277, 49 S. 44; Sims *v.* S., 54 Fla. 100, 44 S. 737; Marshall *v.* S., 54 Fla. 66, 44 S. 742; Hoodless *v.* Jernigan, 51 Fla. 211, 41 S. 194; Pittman *v.* S., 51 Fla. 94, 41 S. 385; Philpot *v.* S., 141 Ga. 475, 81 S. E. 195; Holloway *v.* Hoard, 140 Ga. 380, 78 S. E. 928; Hathaway *v.* Cook, 258 Ill. 92, 101 N. E. 227; Devine *v.* Boston Store, 167 Ill. App. 443; Johnson *v.* Johnson, 166 Ill. App. 422; Coburn *v.* R. Co., 243 Ill. 448, 90 N. E. 741; Graham *v.* R. Co., 234 Ill. 483, 84 N. E. 1070; P. *v.* Nall, 242 Ill. 284, 89 N. E. 1012; Houren *v.* R. Co., 236 Ill. 620, 86 N. E 611; Tijan *v.* S. Co., 158 Ill. App. 30, *aff.* 250 Ill. 554, 95 N. E. 627; Merrill *v.* R. Co., 158 Ill. App. 38; Kunkel *v.* Tr. Co., 156 Ill. App. 393; Waiss *v.*

Cannon, 146 Ill. App. 379; Strong *v.* Hasterlik, 146 Ill. App. 346; Reavely *v.* Harris, 145 Ill. App. 545; O'Shaughnessy *v.* R. Co., 144 Ill. App. 174; Feld *v.* Loftis, 140 Ill. App. 530; Halstead *v.* Co. (Ind.), 105 N. E. 903; McCray *v.* Whitney (Ind. App.), 104 N. E. 979; Hall *v.* S., 178 Ind. 448, 99 N. E. 732; Brunaugh *v.* S., 173 Ind. 483, 90 N. E. 1019; Reddick *v.* Young, 177 Ind. 632, 98 N. E. 813; Pittsburgh, etc. R. Co. *v.* Knox, 177 Ind. 344, 98 N. E. 295; Lucas *v.* S., 173 Ind. 302, 90 N. E. 305; Strickland *v.* S., 171 Ind. 642, 87 N. E. 12; Mickle *v.* U. S., 6 Ind. Ty. 557, 98 S. W. 349; Spencer *v.* Grain Co. (Ia.), 138 N. W. 820; S. *v.* Duff, 144 Ia. 142, 122 N. W. 829; Neindorf *v.* Van de Voorde, 143 Ia. 318, 120 N. W. 84; Crowell *v.* Ins. Co., 140 Ia. 258, 118 N. W. 412; S. *v.* Finley, 147 Ia. 563, 126 N. W. 699; Andrews *v.* R. Co., 129 Ia. 162, 105 N. W. 404; Oney *v.* Lovely, 151 Ky. 651, 152 S. W. 785; Owensboro, etc. Co. *v.* Tucker, 148 Ky. 844, 147 S. W. 916; Smalling *v.* Shaw, 144 Ky. 458, 139 S. W. 779; Alexander *v.* Tebeau, 132 Ky. 487, 116 S. W. 356; Ryan *v.* Bk., 132 Ky. 625, 116 S. W. 1179; Duff *v.* Bailey, 29 Ky. L. R. 919, 96 S. W. 577; Day *v.* C., 29 Ky. L. R. 816, 96 S. W. 510; Berry *v.* Evans, 28 Ky. L. R. 22, 89 S. W. 12; Moore *v.* Kersey, 28 Ky. L. R. 1030, 90 S. W. 1073 (proof of conveyance); Anderson *v.* Stewart, 108 Md. 340, 70 A. 228; Rivers *v.* Richards, 213 Mass. 515, 100 N. E. 745; Jaquith *v.* Morrill, 204 Mass. 181, 90 N. E. 556; O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59; In re More, 153 Mich. 695, 117 N. W. 329; Baker *v.* City, 166 Mich. 597, 132 N. W. 462; Walsh *v.* Gibson, 159 Mich. 312, 123 N. W. 1115; Shelton *v.* Franklin, 224 Mo. 342, 123 S. W. 1084; Freeland *v.* Williamson, 220 Mo. 217, 119 S. W. 560; Rearden *v.* R. Co., 215 Mo. 105, 114 S. W. 961; Winfrey *v.* Matthews, 174 Mo. App. 713, 161 S. W. 583; Swails *v.* City, 158 Mo. App. 589, 138 S. W. 948; Utz *v.* Ins. Co., 139 Mo. App. 552, 123 S. W. 538; Van Cleve *v.* R. Co., 137 Mo. App. 332, 118 S. W. 116; Paris *v.* Waddell, 139 Mo. App. 288, 123 S. W. 79; Davidson *v.* Co., 226 Mo. 1, 125 S. W. 1143; S. *v.* Speyer, 207 Mo. 540, 106 S. W. 505; Spaulding *v.* City, 122 Mo. App. 65, 97 S. W. 545; Mette & K. Dist. Co. *v.* Lowrey, 39 Mont. 124, 101 P. 966; Thornton T. M. Co. *v.* Bretherton, 32 Mont. 80, 80 P. 10; Pike *v.* Hauptman, 83 Neb. 172, 119 N. W. 231; Harrington *v.* Hedlund, 89 Neb. 272, 131 N. W. 212; Karns *v.* Bk., 31 Nev. 170, 101 P. 564; S. *v.* Lawrence, 28 Nev. 440, 82 P. 614; Downs *v.* Knights, etc., 76 N. H. 165, 80 A. 227; S. *v.* Warady, 77 N. J. L. 348, 72 A. 37; Howard *v.* Moore, 79 N. J. L. 329, 75 A. 435; Ty. *v.* West, 14 N. M. 546, 99 P. 343; Arker *v.* Cohen, 136 App. Div. 871, 122 N. Y. S. 4; Fisher *v.* R. Co., 135 App. Div. 808, 120 N. Y. S. 129; Clancy *v.* R. Co., 133 App. Div. 119, 117 N. Y. S. 233; Maloney *v.* Silberman, 115 N. Y. S. 1075; Fein *v.* Weir, 129 App. Div. 299, 114 N. Y. S. 426; S. *v.* Peterson, 149 N. C. 533, 63 S. E. 87 (oath of witness); Patterson *v.* R. Co., 24 Okla. 747, 104 P. 31; Palmer *v.* Horst Co., 66 Or. 33, 133 P. 634; Galvin *v.* Brown, 53 Or. 598, 101 P. 671; Stark *v.* Epler, 59 Or. 262, 117 P. 276; C. *v.* Borough, 37 Pa. Super. 160; U. S. *v.* Mabanag, 1 Phil. Isl. 441; Hampton *v.* Hughes, 85 S. C. 343, 67 S. E. 311; S. *v.* Cokley, 83 S. C. 197, 65 S. E. 174; Merck *v.* Merck, 83 S. C. 329, 65 S. E. 347; S. *v.* Holter, 30 S. D. 353, 138 N. W. 953; Bliss *v.* Waterbury, 27 S. D. 429, 131 N. W. 731; Reeves *v.* R. Co., 24 S. D. 84, 123 N. W. 498; Hawkins *v.* Hubbell, 127 Tenn. 312, 154 S. W. 1146; Delaware Ins. Co. *v.* Hill (Tex. Civ.), 127 S. W. 283; Houston, etc. R. Co. *v.* Bath, 40 Tex. Civ. 270, 90 S. W. 55; Jones *v.* Neal, 44 Tex. Civ. 412, 98 S. W. 417; Long *v.* Riley (Tex. Civ.), 139 S. W. 79; Brown *v.* S., 58 Tex. Cr. 336, 125 S. W. 915; Texas, etc. R. Co. *v.* Walker (Tex. Civ.), 125 S. W. 99; Reno *v.* S., 56 Tex. Cr. 229, 120 S. W. 429; Lewright *v.* Walls, 55 Tex. Civ. 643, 119 S. W. 721; Cabrera *v.* S., 56 Tex. Cr. 141, 118 S. W. 1054; Moore *v.* Kirby, 52 Tex. Civ. 200, 115 S. W. 632; South Texas T. Co. *v.* Tabb, 52 Tex. Civ. 213, 114 S. W. 448; Tex., etc. R. Co. *v.* Warner, 42 Tex. Civ. 280, 93 S. W. 489; Mullen *v.* R. Co. (Tex. Civ.), 92 S. W. 1000; Sargent *v.* Co., 37 Utah 392, 108 P. 928; Griffin *v.* R. Co., 87 Vt. 278, 89 A. 220; S. *v.* Roby, 83 Vt. 121, 74 A. 638; S. *v.* Comstock, 86 Vt. 42, 83 A. 539; Fife *v.* Cate, 85 Vt. 418, 82 A. 741; Holbrook *v.* Quinlan & Co., 84 Vt. 411, 80 A. 339; Coolidge *v.* Taylor, 85 Vt. 39, 80 A. 1038; Parker *v.* R. R., 84 Vt. 329, 79 A. 865; S. *v.* Manley, 82 Vt. 556, 74 A. 231; Drown *v.* T. & T. Co., 81

Vt. 358, 70 A. 599; Falldin *v.* Seattle, 57 Wash. 307, 106 P. 914; Holly St. L. Co. *v.* Beyer, 48 Wash. 422, 93 P. 1065; Eads *v.* S., 17 Wyo. 490, 101 P. 946. *Contra*, Yeiral *v.* S., 56 Tex. Cr. 267, 119 S. W. 848.

50-53 But where purpose of preliminary questions understood objection before offer not premature. P. *v.* Smilie, 118 App. Div. 611, 103 N. Y. S. 348.

Objection before completion of question ineffective if answer not made until question completed. Redus *v.* R. Co., 148 Ala. 665, 41 S. 634; P. *v.* Grutz, 212 N. Y. 72, 105 N. E. 843.

50-54 Where extraneous testimony necessary to show defect in offered document objection thereto should be overruled until testimony introduced. Hoodless *v.* Jernigan, 51 Fla. 211, 41 S. 194; Wilson *v.* Johnson, 51 Fla. 370, 41 S. 395.

50-58 Balt., etc. R. Co. *v.* S., 107 Md. 642, 69 A. 439, 72 A. 340.

51-60 Doon *v.* Felton, 203 Mass. 267, 89 N. E. 539; Burke *v.* Co., 133 App. Div. 113, 117 N. Y. S. 400; First Nat. Bk. *v.* Miller, 48 Or. 587, 87 P. 892; Jackson *v.* Co. (Tex. Civ.), 128 S. W. 928; Kane *v.* Sholars, 41 Tex. Civ. 154, 90 S. W. 937. See International C. M. Co. *v.* R. Co., 152 Fed. 557.

Objection to copies of instruments can be made no matter how long they have been on file. Green *v.* Gregory (Tex. Civ.), 142 S. W. 999.

51-61 Absence of affidavit as basis for order must be objected to upon application. Strickland *v.* S., 171 Ind. 642, 87 N. E. 12.

51-62 Holly St. L. Co. *v.* Beyer, 48 Wash. 422, 93 P. 1065.

52-64 Capital L. Co. *v.* Barth, 33 Mont. 94, 81 P. 994; International H. Co. *v.* Campbell, 43 Tex. Civ. 421, 96 S. W. 93.

52-65 Buchanan *v.* Co., 17 N. D. 343, 116 N. W. 335; San Antonio T. Co. *v.* Higdon (Tex. Civ.), 123 S. W. 732.

52-66 See Columbus R. Co. *v.* Patterson, 143 Fed. 245, 73 C. C. A. 603; Mississippi L. Co. *v.* Smith, 152 Ala. 537, 44 S. 475; P. *v.* Gilhooley, 108 App. Div. 234, 95 N. Y. S. 636; Ivey *v.* Mills, 143 N. C. 189, 55 S. E. 613 (form of notice to take deposition); First Nat. Bk. *v.* Miller, 48 Or. 587, 87 P. 892.

52-67 Hall *v.* Hillery, 139 Ga. 13, 76 S. E. 566; Chicago T. & T. Co. *v.* Co., 242 Ill. 468, 90 N. E. 282; Adams *v.* Ins Co., 135 Ia. 599, 112 N. W. 651.

52-68 Dacy *v.* Goll, 242 Ill. 606, 90 N. E. 179; P. *v.* Smith, 144 Ill. App. 129; Gulf, etc. R. Co. *v.* Gillespie, 54 Tex. Civ. 593, 118 S. W. 623.

53-69 Cotter *v.* Sullivan, 162 Ill. App. 396.

Subsequent rulings not covered by objection made at conclusion of preliminary examination of witness called for opinion. Catlin *v.* Co., 225 Pa. 262, 74 A. 56.

53-70 Hall *v.* Hillery, 139 Ga. 13, 76 S. E. 566. See Le Moyne *v.* Meadors, 156 Ky. 832, 162 S. W. 526.

53-71 P. *v.* Driggs, 12 Cal. App. 240, 108 P. 62; Cooper *v.* Bower, 78 Kan. 156, 96 P. 59; Cincinnati, etc. R. Co. *v.* Bennette, 134 Ky. 19, 119 S. W. 181; McKee *v.* Rudd, 222 Mo. 344, 121 S. W. 312; Hydraulic P. Co. *v.* Green, 177 Mo. App. 308, 164 S. W. 250; Davis *v.* Co., 105 App. Div. 96, 93 N. Y. S. 841; Bjorkegren *v.* Kirk, 53 Misc. 560, 103 N. Y. S. 994; In re Manhattan Bridge, 108 N. Y. S. 366; Caccia *v.* Iseeke, 123 App. Div. 779, 108 N. Y. S. 542; Hintz *v.* Wagner, 25 N. D. 110, 140 N. W. 729; McIlvaine *v.* Nat. Bk., 33 S. D. 389, 146 N. W. 574. But *comp.* Malcomson *v.* Corp., 139 N. Y. S. 405; Watson *v.* Rice (Tex.), 166 S. W. 106 (another witness).

Motion to strike not necessary where testimony erroneously admitted over objection. Tracey *v.* Reid, 111 App. Div. 396, 97 N. Y. S. 1074.

Question introductory, objection should be repeated to later questions. Watson *v.* S. (Ala.), 61 S. 334.

Objection should be made to apply to subsequent similar evidence. Cuggy *v.* Zeller, 132 La. 222, 61 S. 209.

54-72 Louisville, etc. R. Co. *v.* Williamson, 29 Ky. L. R. 1165, 96 S. W. 1130; Bailey *v.* City, 189 Mo. 502, 87 S. W. 1182; Schutz *v.* R. Co., 181 N. Y. 33, 73 N. E. 491.

54-73 Giering *v.* Sauer, 120 Md. 237, 87 A. 774. *Contra*, Stark G. Co. *v.* Co., 57 Tex. Civ. 529, 122 S. W. 947.

54-74 Kettlehake *v.* C. & F. Co., 171 Mo. App. 528, 153 S. W. 552; Hegberg *v.* R. Co., 164 Mo. App. 514, 147 S. W. 192; Gold *v.* Jewelry Co., 165 Mo. App. 154, 145 S. W. 1174; Gill *v.* Ruggles, 97 S. C. 278, 81 S. E. 519; Cromeenes *v.* R. Co., 37 Utah 475, 109 P. 10. See S. *v.* Jones, 48 Mont. 505, 139 P. 441.

55-75 Clark *v.* Durland, 104 App. Div. 615, 93 N. Y. S. 249.

55-76 Greene *v.* Hereford, 12 Ariz. 85, 95 P. 105, if question answered after objection sustained motion to strike answer must be made. See Clemmons *v.* S., 92 Miss. 244, 45 S. 834.

55-77 Myers *v.* Moody (Tex. Civ.), 122 S. W. 920, another witness.

56-79 In re Small, 118 App. Div. 502, 103 N. Y. S. 705.

56-80 Cowper *v.* Slaughter, 175 Ala. 211, 57 S. 477; Remington M. Co. *v.* Co., 6 Penne. (Del.) 288, 66 A. 465; Taylor *v.* Hartsfield, 134 Ga. 478, 68 S. E. 70; Gourd *v.* Co., 118 Minn. 294, 136 N. W. 874; Galveston, etc. R. Co. *v.* Janert, 49 Tex. Civ. 17, 107 S. W. 963; Cutchin *v.* City, 113 Va. 452, 74 S. E. 403. *Contra*, Root *v.* R. Co., 195 Mo. 348, 92 S. W. 621. But see Washington, etc. Co. *v.* Cullember, 39 App. Cas. (D. C.) 316.

Failure to rule immaterial if evidence admissible. Casey *v.* Richards, 10 Cal. App. 57, 101 P. 36.

56-81 German-Am. Bk. *v.* Manning, 133 Mo. App. 294, 113 S. W. 251.

56-82 *Comp.* Van Wyk *v.* P., 45 Colo. 1, 99 P. 1009.

57-83 McConnell *v.* Slappey, 134 Ga. 95, 67 S. E. 440; Burger *v.* R. Co., 139 Ia. 645, 117 N. W. 35; S. *v.* Dahlquist, 17 N. D. 40, 115 N. W. 81; S. *v.* Mills, 79 S. C. 187, 60 S. E. 664.

59-90 See Fleming *v.* Lunsford, 163 Ala. 540, 50 S. 921.

59-91 Robinson *v.* Van Hooser, 196 Fed. 620, 116 C. C. A. 294; Pennsylvania Co. *v.* Whitney, 169 Fed. 572, 95 C. C. A. 70; Katahdin P. & P. Co. *v.* Peltomaa, 156 Fed. 342, 84 C. C. A. 238; Lake Shore, etc. R. Co. *v.* Eder, 174 Fed. 944, 98 C. C. A. 556; Erie R. Co. *v.* Schomer, 171 Fed. 798, 96 C. C. A. 458; Davidson S. S. Co. *v.* U. S., 142 Fed. 315, 73 C. C. A. 425; Barfield *v.* Evans (Ala.), 65 S. 928; Deslander *v.* Scales (Ala.), 65 S. 393; Oliver *v.* Oliver (Ala.), 65 S. 373; Ryerson G. Co. *v.* Moyer, 9 Ala. App. 254, 63 S. 13; Minto *v.* S., 8 Ala. App. 306, 62 S. 376; West *v.* S., 7 Ala. App. 145, 62 S. 290; Louisville & N. R. Co. *v.* Kay, 8 Ala. App. 562, 62 S. 1014; Rutledge *v.* Rowland, 161 Ala. 114, 49 S. 461; Ragland *v.* S., 178 Ala. 59, 59 S. 637; Birmingham R. & P. Co. *v.* Saxon (Ala.), 59 S. 584; Hall *v.* Cardwell, 5 Ala. App. 481, 59 S. 514; Conway *v.* Clark, 177 Ala. 99, 58 S. 441; So. R. Co. *v.* Smith, 177 Ala. 367, 58 S. 429; Mills *v.* Co., 175 Ala. 448, 57 S. 739; Long-Richardson Mer. Co. *v.* Herron, 3 Ala. App. 525, 57 S. 133; Jackson *v.* S., 2 Ala. App. 226, 57 S. 110; Louisville & N. R. Co. *v.* Holland, 173 Ala. 675, 55 S. 1001; Owen *v.* Moxon, 167 Ala. 615, 52 S. 527; Horton *v.* R. Co., 161 Ala. 107, 49 S. 423; Stowers F. Co. *v.* Brake, 158 Ala. 639, 48 S. 89; Koosa *v.* Warten, 158 Ala. 496, 48 S. 544; Alabama S. Co. *v.* Dewey, 156 Ala. 530, 47 S. 55; Patton *v.* S., 156 Ala. 23, 46 S. 862; Birmingham Co. *v.* Landrum, 153 Ala. 192, 45 S. 198; Machomich Merc. Co. *v.* Hickey (Ariz.), 140 P. 63; Western U. Tel. Co. *v.* Alford (Ark.), 161 S. W. 1027; Merced Bk. *v.* Price, 9 Cal. App. 177, 98 P. 383; King Solomon Co. *v.* Min. Co., 22 Colo. App. 528, 127 P. 129; Grimes *v.* Greenblatt, 47 Colo. 495, 107 P. 1111; Martin *v.* S. (Fla.), 66 S. 139; Townsend *v.* Sessoms, 139 Ga. 119, 76 S. E. 852; McCall *v.* S., 55 Fla. 108, 46 S. 321; Wilkes *v.* Groover, 138 Ga. 407, 75 S. E. 353; Foddrill *v.* Dooley, 131 Ga. 790, 63 S. E. 350; Tucker *v.* S., 133 Ga. 470, 66 S. E. 250; Fuller *v.* Fuller, 52 Ind. App. 488, 100 N. E. 869; Taylor *v.* Campbell, 50 Ind. App. 515, 98 N. E. 657; Hubbard *v.* Ranje, 52 Ind. App. 611, 98 N. E. 314; Ellis *v.* C., 146 Ky. 715, 143 S. W. 425; Jessup *v.* S., 117 Md. 119, 83 A. 140; Fremont Can. Co. *v.* R. Co. (Mich.), 146 N. W. 678; In re McNamara's Est., 154 Mich. 671, 118 N. W. 598; S. *v.* Walton, 255 Mo. 232, 164 S. W. 211; S. *v.* Wellman, 253 Mo. 302, 161 S. W. 795; S. *v.* Kanupka, 247 Mo. 706, 153 S. W. 1056; S. *v.* Ferrell, 246 Mo. 322, 152 S. W. 33; Millirons *v.* R. Co. (Mo. App.), 162 S. W. 1069; Wack *v.* R. Co., 175 Mo. App. 111, 157 S. W. 1070; S. *v.* Dipley, 242 Mo. 461, 147 S. W. 111; Tremain *v.* Dyott, 161 Mo. App. 217, 142 S. W. 760; S. *v.* Decker, 217 Mo. 315, 116 S. W. 1096; Carthage Superior Limestone Co. *v.* Methodist Church, 156 Mo. App. 671, 137 S. W. 1028; Smith *v.* Butte, 40 Mont. 445, 107 P. 409; S. *v.* Lawrence, 28 Nev. 440, 82 P. 614; Managle *v.* Parker, 75 N. H. 139, 71 A. 637; Chess *v.* Vockroth, 75 N. J. L. 665, 70 A. 73; Wightman *v.* Campbell, 161 App. Div. 49, 146 N. Y. S. 666; Baumann *v.* Tannenbaum, 125 App. Div. 770, 110 N. Y. S. 108; Carmichael *v.* Tel. Co., 162 N. C. 333, 78 S. E. 507; Mayer, etc. Co. *v.* Ferguson, 19 N. D. 496, 126 N. W. 110; S. *v.* God-

dard (Or.), 138 P. 243; Palmer *v.* Horst Co., 66 Or. 33, 133 P. 634; Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 130 P. 55; McKain *v.* Co., 89 S. C. 378, 71 S. E. 949; S. *v.* Lane, 82 S. C. 144, 63 S. E. 612; Goldberg *v.* Co., 24 S. D. 49, 123 N. W. 266; Johnson *v.* S. (Tex. Cr.), 167 S. W. 733; Harrison *v.* S. (Tex. Cr.), 153 S. W. 139; Spearman *v.* S. (Tex. Cr.), 152 S. W. 915; Draughon's P. B. College *v.* Dorsett (Tex. Civ.), 166 S. W. 495; Texas & N. O. R. Co. *v.* Francis (Tex. Civ.), 165 S. W. 40; Tompkins *v.* Pendleton (Tex. Civ.), 160 S. W. 290; Irvin *v.* Johnson, 56 Tex. Civ. 492, 120 S. W. 1085; Clayton *v.* S. (Tex.), 149 S. W. 119; Hunter *v.* S., 59 Tex. Cr. 439, 129 S. W. 125; Lanham *v.* Lanham (Tex. Civ.), 146 S. W. 635; Ross *v.* S., 61 Tex. Cr. 12, 133 S. W. 688; Walker *v.* R. Co., 51 Tex. Civ. 391, 112 S. W. 430; S. *v.* Pierce, 87 Vt. 144, 88 A. 740; S. *v.* Comstock, 86 Vt. 42, 83 A. 539; Fife *v.* Cate, 85 Vt. 418, 82 A. 741; Smith *v.* Stanley, 114 Va. 117, 75 S. E. 742; Knutson *v.* Moe Bros., 72 Wash. 290, 130 P. 347; Ruck *v.* Brewery Co., 144 Wis. 404, 129 N. W. 414.

See Reinke *v.* Sanitary Dist., 260 Ill. 380, 103 N. E. 236.

"A trial court will not be put in error for overruling a general objection to a question unless the evidence called for by such question is illegal or irrelevant on its face." Key *v.* S., 4 Ala. App. 76, 58 S. 946.

Not error to overrule a general objection to the evidence where any part of it is not subject to the objection. Huber Mfg. Co. *v.* Blessing, 51 Ind. App. 89, 99 N. E. 132.

59-92 Merrill *v.* Worthington, 155 Ala. 281, 46 S. 477; Davidson *v.* S., 108 Ark. 191, 158 S. W. 1103; Spencer *v.* Potter's Est., 85 Vt. 1, 80 A. 821.

An objection to evidence on particular grounds "and for other reasons;" held to reach its competency and relevancy. Strickland *v.* Strickland, 103 Ark. 183, 146 S. W. 501.

59-93 Sloss-Sheffield Co. *v.* Morgan (Ala.), 61 S. 283; Nickerson *v.* S., 6 Ala. App. 27, 60 S. 446; Lewis *v.* S., 178 Ala. 26, 59 S. 577; Cooper *v.* Slaughter, 175 Ala. 211, 57 S. 477; Abingdon Mills *v.* Grogan, 175 Ala. 247, 57 S. 42; Patton *v.* S., 156 Ala. 23, 46 S. 862; P. *v.* Watson, 21 Cal. App. 692, 132 P. 836; West Branch S. Bk. *v.* Haines, 135 Ia. 313, 112 N. W. 552; Jordan *v.* Co., 136 Mo. App. 192, 116 S. W. 432; Chicago, etc. R. Co. *v.* Thompson (Tex. Civ.), 124 S. W. 144; Pacific D. Co. *v.* Hamilton, 71 Wash. 469, 128 P. 1069.

Reservation of right to object, ineffectual. Cefalu *v.* Dearborn, 162 Ala. 105, 49 S. 1030.

60-94 See S. *v.* Bonvy, 124 La. 1054, 50 S. 849.

61-96 Sloss-Sheffield Co. *v.* Morgan (Ala.), 61 S. 283; Merrill *v.* Worthington, 155 Ala. 281, 46 S. 477; Hammond, etc. R. Co. *v.* Antonia, 41 Ind. App. 335, 83 N. E. 766; Carolina Timber Co. *v.* Holden, 90 S. C. 470, 73 S. E. 869. See Chapman *v.* Chapman, 74 Neb. 388, 104 N. W. 880; Austin *v.* Forbis, 99 Tex. 234, 89 S. W. 405 (objection to statement of agent sufficient).

61-97 Hays *v.* Lomoine, 156 Ala. 465, 47 S. 97; Southern R. Co. *v.* Dickens, 152 Ala. 210, 44 S. 402; Renders *v.* R. Co., 144 Mich. 387, 108 N. W. 368; Barr *v.* R. Co., 138 Mo. App. 471, 120 S. W. 111; Moseley *v.* R. Co., 132 Mo. App. 642, 112 S. W. 1010; Gurski *v.* Doscher, 112 App. Div. 345, 98 N. Y. S. 588; Houston O. Co. *v.* Kimball, 103 Tex. 94, 122 S. W. 533; Kansas City, etc. Co. *v.* Taylor (Tex. Civ.), 107 S. W. 889.

The criticism that testimony is "illegal" is a mere general objection. Johnston *v.* Johnston, 174 Ala. 220, 57 S. 450.

61-98 Davidson S. S. Co. *v.* U. S., 142 Fed. 315, 73 C. C. A. 425; Pace *v.* Co., 166 Ala. 519, 52 S. 52; King Solomon Co. *v.* Min. Co., 22 Colo. App. 528, 127 P. 129; Register *v.* S., 10 Ga. App. 623, 74 S. E. 429; McCabe *v.* Swift, 143 Ill. App. 404; Charleston *v.* Newman, 130 Ill. App. 6; S. *v.* Wilson, 223 Mo. 156, 122 S. W. 701; Price *v.* S., 1 Okla. Cr. 358, 98 P. 447 (objections must not be less specific than statute requires); S. *v.* Rucker, 86 S. C. 66, 68 S. E. 133; Texas & N. O. R. Co. *v.* Francis (Tex. Civ.), 165 S. W. 40; Wilson *v.* S. (Tex. Cr.), 158 S. W. 1114; Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156; Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807; Vagts *v.* Utman, 125 Wis. 265, 104 N. W. 88.

Interrupted by court and not completed, objection insufficient. Williams *v.* S., 123 Ga. 138, 51 S. E. 322.

62-99 Hall *v.* Cardwell, 5 Ala. App. 481, 59 S. 511; Williams *v.* Co., 164 Ala. 84, 51 S. 385; Sanders *v.* Davis,

153 Ala. 375, 44 S. 979 (*cit.* text); Nevers L. Co. *v.* Fields, 151 Ala. 367, 44 S. 81; Andrews *v.* Co., 32 App. Cas. (D. C.) 392; Chicago, etc. R. Co. *v.* Rathneau, 225 Ill. 278, 80 N. E. 119.

62-1 Chess *v.* Grant, 163 Fed. 500, 90 C. C. A. 46; Harris *v.* S., 177 Ala. 17, 59 S. 205; Shaw *v.* Cleveland, 5 Ala. App. 333, 59 S. 534; Birmingham & A. R. Co. *v.* Mattison, 166 Ala. 602, 52 S. 49; Smith *v.* Woolf, 160 Ala. 644, 49 S. 395; Montgomery *v.* S., 160 Ala. 7, 49 S. 902; St. Louis, etc. R. Co. *v.* Raines, 90 Ark. 398, 119 S. W. 665; Kansas City S. R. Co. *v.* Anderson, 88 Ark. 129, 113 S. W. 1030; P. *v.* Wieland, 10 Cal. App. 519, 102 P. 828; Grimes *v.* Greenblatt, 47 Colo. 495, 107 P. 1111; McKinnon *v.* Johnson, 57 Fla. 120, 48 S. 910; W. U. T. Co. *v.* Wells, 50 Fla. 474, 39 S. 838; Thompson *v* Carter, 6 Ga. App. 604, 65 S. E. 599; P. *v.* Weston, 236 Ill. 104, 86 N. E. 188; Iowa L. Ins. Co. *v.* Haughton, 46 Ind. App. 467, 87 N. E. 702; S. *v.* Smith, 80 Kan. 470, 102 P. 1098; Randall *v.* Co., 212 Mass. 352, 99 N. E. 221; Hubbard *v.* Allyn, 200 Mass. 166, 86 N. E. 356; Hydraulic P. Co. *v.* Green, 177 Mo. App. 308, 164 S. W. 250; Willet *v.* Morse (N. J.), 60 A. 362; Johnston C. S. Bk. *v.* Chase, 151 N. C. 108, 65 S. E. 745; Edwards *v.* White (Tex. Civ.), 120 S. W. 914.

General objection suffices to raise issue of relevancy and competency. Fakes *v.* S. (Ark.), 166 S. W. 963; Western U. Tel. Co. *v.* Alford (Ark.), 161 S. W. 1027.

62-2 Thomas *v.* S., 155 Ala. 125, 46 S. 771; Moore *v.* S., 154 Ala. 48, 45 S. 656; Braham *v.* S., 143 Ala. 28, 38 S. 919; Atlantic C. L. R. Co. *v.* Partridge, 58 Fla. 153, 50 S. 634; Lewis *v.* S., 55 Fla. 54, 45 S. 998; Mugge *v.* Jackson, 50 Fla. 235, 39 S. 157; Sims *v.* Sims, 131 Ga. 262, 62 S. E. 192; Chicago, etc. R. Co. *v.* Rathneau, 225 Ill. 278, 80 N. E. 119; Louisville & N. R. Co. *v.* Moore, 156 Ky. 708, 161 S. W. 1129; C. *v.* Johnson, 199 Mass. 55, 85 N. E. 188; Hydraulic P. Co. *v.* Green, 177 Mo. App. 308, 164 S. W. 250; Connecticut R. P. Co. *v.* Dickinson, 75 N. H. 353, 74 A. 585; Paris, etc. R. Co. *v.* Flanders (Tex. Civ.), 165 S. W. 99.

See Martin *v.* Monger (Ark.), 166 S. W. 566.

63-3 Johnson *v.* U. S., 163 Fed. 30, 89 C. C. A. 508; Thomas *v.* S. (Ala. App.), 65 S. 863; Fowlkes *v.* Lewis (Ala. App.), 65 S. 724; Stamps *v.* Thomas, 7 Ala. App. 622, 62 S. 314; West *v.* S., 7 Ala. App. 145, 62 S. 290; Hall *v.* Cardwell, 5 Ala. App. 481, 59 S. 514; Rose *v.* S., 4 Ala. App. 163, 58 S. 680; Milford *v.* S. (Ala.), 57 S. 96; Dowell *v.* S. (Ind.), 101 N. E. 815; Harris *v.* Hirsch, 121 App. Div. 767, 106 N. Y. S. 631; Oregon R. & N. Co. *v.* Eastlack, 54 Or. 196, 102 P. 1011; St. Louis B. & M. R. Co. *v.* Fielder (Tex. Civ.), 163 S. W. 606. See Ryerson G. Co. *v.* Moyer, 9 Ala. App. 254, 63 S. 13; Patterson *v.* S., 8 Ala. App. 420, 62 S. 1023.

64-4 Ryerson G. Co. *v.* Moyer, 9 Ala. App. 254, 63 S. 13; P. *v.* Morrison, 194 N. Y. 175, 86 N. E. 1120.

65-5 Wellington *v.* Pelletier, 173 Fed. 908, 97 C. C. A. 458; Mahoning O. & S. Co. *v.* Blomfelt, 163 Fed. 827, 91 C. C. A. 390; Piano *v.* S., 161 Ala. 88, 49 S. 803; Rutledge *v.* Rowland, 161 Ala. 114, 49 S. 461; Davis *v.* S., 159 Ala. 104, 48 S. 694; Schmitt *v.* Kurrus, 140 Ill. App. 132; Donk, etc. Co. *v.* Tetherington, 128 Ill. App. 256; Garrett *v.* Winterich (Ind. App.), 87 N. E. 161; Dalton *v.* Co., 114 N. Y. S. 858; Flora *v.* Mathwig, 19 N. D. 4, 121 N. W. 63; Stubbs *v.* Marshall, 54 Tex. Civ. 526, 117 S. W. 1030; Adams *v.* Lumb. Co., 54 Tex. Civ. 477, 117 S. W. 1017; Hudson *v.* Slate, 53 Tex. Civ. 453, 117 S. W. 469; Tubb *v.* S., 55 Tex. Cr. 606, 117 S. W. 858.

65-6 Johnston *v.* Johnston, 174 Ala. 220, 57 S. 450; Oates *v.* S., 156 Ala. 99, 47 S. 74; P. *v.* James, 5 Cal. App. 427, 90 P. 561; D. C. *v.* Wood, 41 App. Cas. (D. C.) 101; McCall *v.* S., 55 Fla. 108, 46 S. 321; Pittman *v.* S., 51 Fla. 94, 41 S. 385; Wyman *v.* City, 254 Ill. 202, 98 N. E. 266; Chicago T. Co. *v.* Core, 223 Ill. 58, 79 N. E. 108; Davis *v.* Cox, 178 Ind. 486, 99 N. E. 803; S. *v.* Winslow, 102 Me. 399, 66 A. 1019; Briscoe *v.* R. Co., 222 Mo. 104, 120 S. W. 1162; Chess *v.* Vockroth, 75 N. J. L. 665, 70 A. 73; S. *v.* Mizis, 48 Or. 165, 85 P. 611, 86 P. 361.

67-8 Erroneous ground of objection, immaterial if evidence excluded. Lightman *v.* Epstein, 164 Ala. 660, 51 S. 164.

New grounds of objection not heard on appeal. P. *v.* Balestieri, 23 Cal. App. 708, 139 P. 821; P. *v.* Brecker, 20 Cal. App. 205, 127 P. 666; P. *v.* Brewer, 19 Cal. App. 742, 127 P. 808; Kahn *v.* Minthorn, 178 Mich. 312, 144 N. W. 859; Evans *v.* R. Co., 37 Utah

431, 108 P. 638; S. *v.* Turley, 87 Vt. 163, 88 A. 562. *Contra*, Cooper *v.* Cooper, 65 W. Va. 712, 64 S. E. 927.

67-9 Tilton *v.* Flormann, 22 S. D. 324, 117 N. W. 377.

67-10 In absence of offer as to what testimony would be, general objection good. International Co. *v.* McKeever, 21 S. D. 91, 109 N. W. 642.

67-11 Ala. Steel & Wire Co. *v.* Thompson, 166 Ala. 460, 52 S. 75; P. *v.* Babcock, 160 Cal. 537, 117 P. 549; Christensen *v.* Holm, 33 S. D. 174, 144 N. W. 919.

68-13 C. *v.* Johnson, 199 Mass. 55, 85 N. E. 188; Ray Co. S. Bk. *v.* Hutton, 224 Mo. 42, 123 S. W. 47; Logan *v.* Field, 192 Mo. 54, 90 S. W. 127; Gulf, etc. R. Co. *v.* Tullis, 41 Tex. Civ. 219, 91 S. W. 317; Texas, etc. R. Co. *v.* Powell, 34 Tex. Civ. 575, 79 S. W. 86; St. Louis, etc. R. Co. *v.* Frazier (Tex. Civ.), 87 S. W. 400; Field *v.* Field, 39 Tex. Civ. 1, 87 S. W. 726; Pecos, etc. R. Co. *v.* Evans, 42 Tex. Civ. 60, 93 S. W. 1024; Tuttle *v.* Moody, 100 Tex. 240, 97 S. W. 1037; Wandelohr *v.* Bk. (Tex. Civ.), 106 S. W. 413; Sullivan *v.* Fant, 51 Tex. Civ. 6, 110 S. W. 507; International, etc. R. Co. *v.* Cuneo (Tex. Civ.), 108 S. W. 714; Goodloe *v.* Goodloe, 47 Tex. Civ. 493, 105 S. W. 533.

68-14 Louisville & N. R. Co. *v.* Dilburn, 178 Ala. 600, 59 S. 438; Dolvin *v.* Co., 131 Ga. 300, 62 S. E. 198; Ricks *v.* Woodard, 159 N. C. 647, 75 S. E. 735; O'Brien *v.* Von Lienen (Tex. Civ.), 149 S. W. 723; Houston, etc. R. Co. *v.* Lee (Tex. Civ.), 123 S. W. 154.

68-15 St. Louis, etc. R. Co. *v.* Pruitt (Tex. Civ.), 157 S. W. 236. But see Campbell *v.* S., 124 Ga. 432, 52 S. E. 914.

69-18 Schreiner *v.* Co., 82 N. J. L. 743, 82 A. 887.

70-19 Abingdon Mills *v.* Grogan, 167 Ala. 146, 52 S. 596.

71-22 McCleskey *v.* Howell, 147 Ala. 573, 42 S. 67.

71-23 P. *v.* Hart, 153 Cal. 261, 94 P. 1042; Ft. Collins, etc. R. Co. *v.* France, 41 Colo. 512, 92 P. 953; Gainesville, etc. R. Co. *v.* Peck, 55 Fla. 402, 46 S. 1019; Larson *v.* Anderson, 122 Minn. 39, 141 N. W. 847; Bartleson *v.* Munson, 105 Minn. 348, 117 N. W. 512 (does not raise question of admissibility under pleadings); Eisiminger *v.* Stanton, 129 Mo. App. 403, 107 S. W. 460; S. *v.* Crone, 209 Mo. 316, 108 S. W. 555; S. *v.* Reilly, 25 N. D. 339, 141 N. W. 720; Buchanan *v.* Co., 17 N. D. 343, 116 N. W. 335; S. *v.* Goddard (Or.), 138 P. 243; Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 130 P. 55; St. Louis B. & M. R. Co. *v.* Fielder (Tex. Civ.), 163 S. W. 606; Cox *v.* S., 58 Tex. Cr. 545, 126 S. W. 886.

See S. *v.* Wilson (Ia.), 141 N. W. 337; Wyatt *v.* R. Co., 173 Mo. App. 210, 158 S. W. 720; First Nat. Bk. *v.* Warner, 17 N. D. 76, 114 N. W. 1085.

72-24 Finder *v.* Segro (Okla.), 137 P. 103. See Fakes *v.* S. (Ark.), 166 S. W. 963.

72-26 Sparks *v.* Ty., 146 Fed. 371, 76 C. C. A. 594; Piretti *v.* Co., 120 N. Y. S. 782 (parol evidence varying writing); Seanlon *v.* Rock, 25 S. D. 152, 125 N. W. 638; Doyle *v.* Melendy, 83 Vt. 339, 75 A. 881.

72-27 Coorman *v.* R. Co., 127 App. Div. 315, 111 N. Y. S. 531; Dillard *v.* Co., 52 Or. 126, 94 P. 966, 96 P. 678; Missouri, etc. R. Co. *v.* Johnson (Tex. Civ.), 126 S. W. 672.

72-28 Bufford *v.* Little, 159 Ala. 300, 48 S. 697.

73-29 Broyles *v.* R. Co., 166 Ala. 616, 52 S. 81; Putnal *v.* S., 56 Fla. 86, 47 S. 864; McCleskey *v.* Howell, 147 Ala. 573, 42 S. 67; Brown *v.* Bowie, 58 Fla. 199, 50 S. 637; Platt *v.* Rowland, 54 Fla. 237, 45 S. 32; Huber Mfg. Co. *v.* Blessing, 51 Ind. App. 89, 99 N. E. 132; Johnston *v.* R. Co., 141 Ia. 114, 119 N. W. 286; Page *v.* Grant, 127 Ia. 249, 103 N. W. 124; Lamb *v.* S., 55 Tex. Cr. 323, 116 S. W. 588.

73-30 Fagan *v.* Lentz, 156 Cal. 681, 105 P. 951; Mugge *v.* Jackson, 50 Fla. 235, 39 S. 157; Dale *v.* Christian, 140 Ga. 700, 79 S. E. 1127; Holloway *v.* Hoard, 140 Ga. 380, 78 S. E. 928; Chicago, etc. R. Co. *v.* Foster, 226 Ill. 288, 80 N. E. 762; Haspar *v.* Weitcamp, 167 Ind. 371, 79 N. E. 191; Renders *v.* R. Co., 144 Mich. 387, 108 N. W. 368; S. *v.* Diemer, 255 Mo. 336, 164 S. W. 517; S. *v.* Colvin, 226 Mo. 446, 126 S. W. 448; Hutchinson *v.* Morris, 131 Mo. App. 258, 110 S. W. 684; Stoner *v.* Royar, 200 Mo. 444, 98 S. W. 601; O'Flynn *v.* Butte, 36 Mont. 493, 93 P. 643. See In re De Laveaga's Est., 165 Cal. 607, 133 P. 307; Sneed *v.* Co., 149 Cal. 704, 87 P. 376. But see Norman P. S. Co. *v.* Ford, 77 Conn. 461, 59 A. 499; In re Cheney's Est., 78 Neb. 274, 110 N. W. 731.

In Kansas rule of text favored, but because practice otherwise not applied. Cooper *v.* Bower, 78 Kan. 164, 96 P. 794.

73-31 Spaulding *v.* City, 122 Mo. App. 65, 97 S. W. 545.

73-32 Stoner *v.* Royar, 200 Mo. 444, 98 S. W. 601; Gearty *v.* Mayor, 183 N. Y. 233, 76 N. E. 12. See S. *v.* Butler, 114 La. 596, 38 S. 466.

73-33 Michigan P. Co. *v.* Co., 141 Mich. 48, 104 N. W. 387; S. *v.* Diemer, 255 Mo. 336, 164 S. W. 517; Armour & Co. *v.* Ross, 75 S. C. 201, 55 S. E. 315; McQueen *v.* Bk., 20 S. D. 378, 107 N. W. 208 (objection that evidence tended to create prejudice against defendant, and sympathy for plaintiff, and was irrelevant, insufficient).

74-34 S. *v.* Diemer, 255 Mo. 336, 164 S. W. 517; Crandall *v.* Greenes (Mo. App.), 168 S. W. 264; Kettlehake *v.* C. & F. Co., 171 Mo. App. 528, 153 S. W. 552; S. *v.* Ruck, 194 Mo. 416, 92 S. W. 706; Latimer *v.* R. Co., 126 Mo. App. 70, 103 S. W. 1102; S. *v.* McKenzie, 228 Mo. 385, 128 S. W. 948; Houston E. Co. *v.* Faroux (Tex. Civ.), 125 S. W. 922; Missouri, etc. R. Co. *v.* Mitchell, 40 Tex. Civ. 633, 90 S. W. 716.

74-35 Morgan *v.* U. S., 169 Fed. 242, 94 C. C. A. 518; Dean *v.* R. Co., 199 Mo. 386, 97 S. W. 910; Rice *v.* S., 51 Tex. Cr. 255, 103 S. W. 1156.

74-37 Curry *v.* S., 50 Tex. Cr. 158, 94 S. W. 1058.

74-38 Hoskins Mfg. Co. *v.* Elec. Co., 212 Fed. 422; Page *v.* Grant, 127 Ia. 249, 103 N. W. 124; Noyes *v.* Clifford, 37 Mont. 138, 94 P. 842; Dallas *v.* Luster, 27 N. D. 450, 147 N. W. 95; S. *v.* Devers, 32 S. D. 473, 143 N. W. 364.

75-42 Alabama, etc. R. Co. *v.* Bonner (Ala.), 39 S. 619; McMillan *v.* Reese, 61 Fla. 360, 55 S. 388; National Soc. *v.* Co., 56 Misc. 627, 107 N. Y. S. 820.

75-43 Sims *v.* S., 59 Fla. 38, 52 S. 198; Vaughan's S. Store *v.* Stringfellow, 56 Fla. 708, 48 S. 410; Williams *v.* S., 168 Ind. 87, 79 N. E. 1079; Wright *v.* S., 56 Tex. Cr. 353, 120 S. W. 458. See P. *v.* Cummins, 153 App. Div. 93, 138 N. Y. S. 517.

75-44 Phillips *v.* S., 170 Ala. 5, 54 S. 111; S. *v.* Diemer, 255 Mo. 336, 164 S. W. 517.

75-45 Alabama, etc. R. Co. *v.* Bonner (Ala.), 39 S. 619.

76-47 Chicago C. R. Co. *v.* Foster, 226 Ill. 288, 80 N. E. 762; S. *v.* Chance, 122 La. 706, 48 S. 158 (prejudicial).

No proper predicate laid, too general. S. *v.* Reilly, 25 N. D. 339, 141 N. W. 720; Pease *v.* S. (Tex. Civ.), 155 S. W. 657.

76-48 Gilley *v.* Denman (Ala.), 64 S. 97.

76-49 Selma R. Co. *v.* Campbell, 158 Ala. 438, 48 S. 378; Beyer *v.* Co., 156 Ill. App. 47; Kinnane *v.* Conroy, 52 Wash. 651, 101 P. 223.

77-51 Southern H. & S. Co. *v.* Co., 165 Ala. 582, 51 S. 789; Moore *v.* S., 154 Ala. 48, 45 S. 656; S. *v.* Stockman, 82 S. C. 388, 64 S. E. 595.

78-52 S. *v.* Bickford (N. D.), 147 N. W. 407.

78-54 Sertaut *v.* Crane, 142 Ill. App. 49; Levering *v.* Miller, 127 Ill. App. 235; S. *v.* Speyer, 207 Mo. 540, 106 S. W. 505; S. *v.* Gilson, 114 Mo. App. 652, 90 S. W. 400; Smith *v.* Stanley, 114 Va. 117, 75 S. E. 742.

79-58 Butler *v.* Ederheimer, 55 Fla. 544, 47 S. 23; S. *v.* De Hart, 38 Mont. 211, 99 P. 438. See Carter Co. *v.* Fischer, 121 N. Y. S. 614.

79-59 Archbold *v.* Joline, 114 N. Y. S. 169.

80-60 Dillard *v.* Co., 52 Or. 126, 94 P. 966, incompetent, irrelevant and immaterial.

80-62 Scott *v.* S. (Ga. App.), 82 S. E. 376; Richardson *v.* Agnew, 46 Wash. 117, 89 P. 404.

80-63 Denver *v.* Perkins, 50 Colo. 159, 114 P. 484.

81-66 Langdon *v.* R. Co., 120 Minn. 6, 138 N. W. 790; Lunham *v.* Lunham, 133 App. Div. 215, 117 N. Y. S. 396; Mulligan *v.* Sinski, 156 App. Div. 35, 140 N. Y. S. 835.

81-67 Admissibility of agent's conversation well raised by objection not binding on principal. Jungworth *v.* R. Co., 24 S. D. 342, 123 N. W. 695.

81-68 Goss *v.* S., 57 Tex. Cr. 557, 124 S. W. 107.

82-72 Louisville & N. R. Co. *v.* Britton, 163 Ala. 168, 50 S. 350; Bufford *v.* Little, 159 Ala. 300, 48 S. 697; Brooks *v.* S., 146 Ala. 153, 41 S. 156; Thomas *v.* Williamson, 51 Fla. 332, 40 S. 831; Watters *v.* R. Co., 133 Ga. 641, 66 S. E. 884; Robertson *v.* Heath, 132 Ga. 310, 64 S. E. 73; Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160; Renders *v.* R. Co., 144 Mich. 387, 108 N. W. 368; Babcock *v.* R. Co., 117 Minn. 434, 136 N. W. 275; Eisiminger *v.*

Stanton, 129 Mo. App. 403, 107 S. W. 460; Davis *v.* Co., 132 App. Div. 64, 116 N. Y. S. 508; McCreery *v.* Ollendorff, 116 N. Y. S. 30; Southern K. R. Co. *v.* McSwain, 55 Tex. Civ. 317, 118 S. W. 874; Groot *v.* R. Co., 34 Utah 152, 96 P. 1019; Norfolk & W. R. Co. *v.* Sutherland, 105 Va. 545, 54 S. E. 465. But see Interstate C. & I. Co. *v.* Clintwood, 105 Va. 574, 54 S. E. 593.

If document contains proper and improper matter, objection should be double—to improper part and to whole. Groot *v.* R. Co., 34 Utah 152, 96 P. 1019.

Use of memorandum.—Moynahan *v.* Perkins, 36 Colo. 481, 85 P. 1132.

83-73 S. *v.* Priest, 215 Mo. 1, 114 S. W. 949. See Bergquist *v.* Co., 18 Wyo. 234, 106 P. 673. *Contra,* Wright *v.* S., 3 Ala. App. 64, 58 S. 68.

83-74 Bluefield *v.* McClaugherty, 64 W. Va. 536, 63 S. E. 363.

83-75 Balt., etc. R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523; Pecos, etc. R. Co. *v.* Evans, 42 Tex. Civ. 60, 93 S. W. 1024; Kansas City M. & O. R. Co. *v.* Florence (Tex. Civ.), 138 S. W. 430.

83-76 Delmar Inv. Co. *v.* Lewis (Mo. App.), 162 S. W. 675; Landis M. Co. *v.* Konantz, 17 N. D. 310, 116 N. W. 333; C. *v.* Ensign, 40 Pa. Super. 157; Newton *v.* McGee, 31 S. D. 216, 140 N. W. 252.

Objection "no proof of certificates," not sufficient to raise question as to execution thereof. Delmar Inv. Co. *v.* Lewis (Mo. App.), 162 S. W. 675.

84-77 Supreme Lodge *v.* Baker, 163 Ala. 518, 50 S. 958.

84-78 Thomas *v.* Williamson, 51 Fla. 332, 40 S. 831; Pittman *v.* S., 51 Fla. 94, 41 S. 385.

Presumption general objection sustained because of something apparent on face of instrument. Scanlon *v.* Rock, 25 S. D. 152, 125 N. W. 638.

85-82 Thomas *v.* Williamson, 51 Fla. 332, 40 S. 831; S. *v.* Bridgham, 51 Wash. 18, 97 P. 1096.

85-83 Dallas *v.* Luster, 27 N. D. 450, 147 N. W. 95, alteration, not raised by objection.

86-85 Reynolds *v.* Morton (Wyo.), 136 P. 795.

87-89 P. *v.* Jones, 12 Cal. App. 129, 106 P. 724, objection must be specific as to part of entries if some admissible.

87-90 General objection good to "each and every memorandum shown" in several books of transactions covering number of years unless all entries admissible. Fitch *v.* Martin, 84 Neb. 745, 122 N. W. 50.

87-91 Pittsburgh, etc. R. Co. *v.* Rogers, 45 Ind. App. 230, 87 N. E. 28.

88-94 But an objection "that the same is not authenticated as required for the authentication of foreign records under the laws of this state or by act of congress in such cases made and provided," sufficient without specifying particular defect. Chapman *v.* Chapman, 74 Neb. 388, 104 N. W. 880.

88-98 P. *v.* Waite, 237 Ill. 164, 86 N. E. 572; Kennedy *v.* Borah, 226 Ill. 243, 80 N. E. 767; Hoek *v.* Allendale, 161 Mich. 571, 126 N. W. 987; Michigan P. Co. *v.* Co., 141 Mich. 48, 104 N. W. 387; Neumeyer *v.* Hooker, 131 App. Div. 592, 116 N. Y. S. 204; S. *v.* Clark, 85 S. C. 273, 67 S. E. 300.

89-1 Carpenter *v.* Dressler, 76 Ark. 400, 89 S. W. 89; Scott *v.* Herrell, 31 App. Cas. (D. C.) 45; Wyman *v.* City, 254 Ill. 202, 98 N. E. 266.

90-5 Dorais *v.* Doll, 33 Mont. 314, 83 P. 884.

90-6 Denver, etc. R. Co. *v.* Reiter, 47 Colo. 417, 107 P. 1100; Ft. Collins, etc. R. Co. *v.* France, 41 Colo. 512, 92 P. 953; Washington, etc. R. Co. *v.* Lukens, 32 App. Cas. (D. C.) 442; Texas & P. R. Co. *v.* Warner, 42 Tex. Civ. 280, 93 S. W. 489. See Chicago City R. Co. *v.* Lowitz, 218 Ill. 24, 75 N. E. 755.

91-7 Perkins *v.* Co., 155 Cal. 712, 103 P. 190; S. *v.* Kammel, 23 S. D. 465, 122 N. W. 420.

92-9 St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 113; Cahill *v.* Torrey, 121 N. Y. S. 598.

92-10 Campagnie Generale Trans. *v.* Rivers, 211 Fed. 294; Long Distance T. & T. Co. *v.* Schmidt, 157 Ala. 391, 47 S. 731; P. *v.* James, 5 Cal. App. 427, 90 P. 561; Bird *v.* Co., 2 Cal. App. 674, 84 P. 256; Peter *v.* Cohen, 176 Ill. App. 58; Ridenour *v.* Co., 164 Mo. App. 576, 147 S. W. 852; Orr *v.* Bradley, 126 Mo. App. 146, 103 S. W. 1149; Bragg *v.* R. Co., 192 Mo. 331, 91 S. W. 527; Seckerson *v.* Sinclair, 24 N. D. 326, 140 N. W. 239; Hawkins *v.* Sinclair, 24 N. D. 623, 140 N. W. 246; Burger *v.* Sinclair, 24 N. D. 624, 140 N. W. 246; Rogers *v.* R. Co., 66 Or. 244, 134 P. 9; Odegard *v.* Co., 130 Wis. 659, 110 N.

W. 809. See Frigstad *v.* R. Co., 101 Minn. 40, 111 N. W. 838.

92-11 Southern R. Co. *v.* Gullatt, 158 Ala. 502, 48 S. 472; Phoenix R. Co. *v.* Landis, 13 Ariz. 80, 108 P. 247; McCauley *v.* R. Co., 163 Ill. App. 176; Chicago U. T. Co. *v.* Roberts, 131 Ill. App. 476; Sisson *v.* Lampert, 159 Mich. 509, 124 N. W. 513 (length of question); Kinlen *v.* R. Co., 216 Mo. 145, 115 S. W. 523; Bragg *v.* R. Co., 192 Mo. 331, 91 S. W. 527.

93-12 P. *v.* Bowers, 1 Cal. App. 501, 82 P. 553; Chicago *v.* Saldman, 225 Ill. 625, 80 N. E. 349; Buck *v.* Brady, 110 Md. 568, 73 A. 277; S. *v.* Megorden, 49 Or. 259, 88 P. 306; Dralle *v.* Reedsburg, 140 Wis. 319, 122 N. W. 771.

93-13 Mississippi C. O. Co. *v.* Smith, 95 Miss. 528, 48 S. 735; Ft. Worth, etc. R. Co. *v.* Cabill (Tex. Civ.), 161 S. W. 1083.

Objection that instrument "is pleaded as a letter and is not a letter at all" is without force. Gardner *v.* S. (Ariz.), 139 P. 474.

93-14 P. *v.* Boyd, 170 Ill. App. 481; Eggman *v.* Nutter, 169 Ill. App. 116; Kerting *v.* Planz, 168 Ill. App. 571; Norfolk R. Co. *v.* Sutherland, 105 Va. 545, 54 S. E. 465. See vol. 13, p. 743, n. 42.

Objection to proof of special damage must be made with technical accuracy. Newman *v.* Seifter, 131 App. Div. 151, 115 N. Y. S. 211.

Objections as to a variance in pleading and proof must be made below, else it cannot be considered on appeal. Habitz *v.* R. Co., 170 Mich. 71, 135 N. W. 827.

94-19 Continental Cas. Co. *v.* Wynne, 36 Okla. 325, 129 P. 16; Norfolk R. Co. *v.* Sutherland, 105 Va. 545, 54 S. E. 465.

95-21 Schneider *v.* Johnson, 164 Mo. App. 639, 147 S. W. 538; Willoughby *v.* Ball, 18 Okla. 535, 90 P. 1017. St. Louis, etc. R. Co. *v.* Rollins (Tex. Civ.), 89 S. W. 1099.

An objection to the introduction of testimony is never sustained because of a lack of certainty or lack of definiteness in allegation, nor for informality in the statement of an essential fact, nor because a cause of action is defectively stated. Such objection is disallowed if by reasonable intendment, or by fair implication from facts stated, or if by most liberal construction, the essential allegation may be got at by inference. East St. Louis Ice & Cold Storage Co. *v.* Kuhlmann, 238 Mo. 685, 142 S. W. 253.

96-23 See vol. 9, p. 254, n. 76, and supplement thereto.

96-24 Louisville *v.* N. R. Co. *v.* Ratliffe, 164 Ala. 147, 51 S. 335; Ft. Collins, etc. R. Co. *v.* France, 41 Colo. 512, 92 P. 953; Keely *v.* City, 49 Ind. App. 396, 97 N. E. 568; Walston *v.* Allen, 82 Vt. 549, 74 A. 225; Vagts *v.* Utman, 125 Wis. 265, 104 N. W. 88.

96-25 Original objection to competency of witness made on appeal. Cooper *v.* Cooper, 65 W. Va. 712, 64 S. E. 927.

96-26 Holroyd *v.* Millard, 142 Ill. App. 392; Muskogee E. T. Co. *v.* McIntire, 37 Okla. 684, 133 P. 213. *Contra*, United R. & E. Co. *v.* Corbin, 109 Md. 442, 72 A. 606. See Morgan *v.* Foran, 120 App. Div. 185, 104 N. Y. S. 1084 (objection as being a "personal communication inadmissible under §829 of the code," sufficient).

Rule otherwise where witness testifies to facts by consent and objection is to his opinion. Fowlie *v.* Co., 82 Vt. 230, 72 A. 989.

96-27 Rose *v.* S., 144 Ala. 114, 42 S. 21.

96-28 Brooks *v.* S., 146 Ala. 153, 41 S. 156; Campbell *v.* S., 124 Ga. 432, 52 S. E. 914; S. *v.* Harris, 199 Mo. 716, 98 S. W. 457; S. *v.* Brown, 209 Mo. 413, 107 S. W. 1068. See S. *v.* Barrington, 198 Mo. 23, 95 S. W. 235. *Comp.* Crawford *v.* U. S., 212 U. S. 183.

On appeal assumed objections overruled because too general if record does not show otherwise. Phoenix R. Co. *v.* Landis, 13 Ariz. 80, 108 P. 247.

97-29 Johnston *v.* Johnston, 174 Ala. 220, 57 S. 450.

97-30 See Trammell *v.* Guffey, 42 Tex. Civ. 455, 94 S. W. 104.

97-31 King *v.* Hill, 172 Ala. 4, 55 S. 205; P. *v.* Mullaley, 16 Cal. App. 44, 116 P. 88; Farmers' Merc. Co. *v.* Ins. Co. (Ia.), 141 N. W. 447.

98-32 See S. *v.* Gadsden, 70 S. C. 430, 50 S. E. 16.

98-33 S. *v.* Rucker, 86 S. C. 66, 68 S. E. 133; Sauer *v.* Veltman (Tex. Civ.), 149 S. W. 706; Cromeenes *v.* R. Co., 37 Utah 475, 109 P. 10; Henderson *v.* Coleman, 19 Wyo. 183, 115 P. 439, rehear. denied, 115 P. 1136.

98-34 Birmingham R., L. & P. Co. *v.* Saxon (Ala.), 59 S. 584; Elliff *v.* Co., 53 Or. 66, 99 P. 76.

99-38 Muskogee E. T. Co. *v.* McIntire, 37 Okla. 684, 133 P. 213; Cook *v.* Lane, 86 Vt. 253, 84 A. 864; Comstock's Admr. *v.* Jacobs, 86 Vt. 182, 84 A. 568.

99-39 Wilson *v.* Godkin, 142 Mich. 631, 105 N. W. 1121; Brown *v.* Brown, 77 Neb. 125, 108 N. W. 180; Mulligan *v.* Sinski, 156 App. Div. 35, 140 N. Y. S. 835; Vagts *v.* Utman, 125 Wis. 265, 104 N. W. 88.

99-40 Miller *v.* R. Co. (Mo. App.), 167 S. W. 469; Mulligan *v.* Sinski, 156 App. Div. 35, 140 N. Y. S. 835.

99-41 Northern Tex. T. Co. *v.* Caldwell, 44 Tex. Civ. 374, 99 S. W. 869.

100-42 Reardon *v.* Land Co., 21 Cal. App. 357, 131 P. 894.

100-43 Louisville, etc. R. Co. *v.* Bogue, 177 Ala. 349, 58 S. 392; Ft. Collins, etc. R. Co. *v.* France, 41 Colo. 512, 92 P. 953; Lincoln S. Co. *v.* Graves, 73 Neb. 214, 102 N. W. 457. See Stevens *v.* S. (Tex. Cr.), 150 S. W. 944.

100-44 Pratt *v.* Seamans, 43 Colo. 517, 95 P. 929; McCune *v.* Goodwillie, 204 Mo. 306, 102 S. W. 997; Cady L. Co. *v.* Wilson, etc. Co., 80 Neb. 607, 114 N. W. 774; Ferrari *v.* Co., 54 Or. 210, 102 P. 1016, *cit.* the text; Hildebrand *v.* Artisans, 50 Or. 159, 91 P. 542 (objection to qualifications does not include objection to hypothesis for question to expert); Gulf, etc. R. Co. *v.* Cunningham, 51 Tex. Civ. 368, 113 S. W. 767; Richmond I. Co. *v.* Co., 103 Va. 465, 49 S. E. 650; S. *v.* Poole, 42 Wash. 192, 84 P. 727.

Court may sustain objection though evidence not objectionable on ground stated, but on other grounds. Eutaw *v.* Botnick, 150 Ala. 429, 43 S. 739.

101-45 Henry *v.* Brown, 143 Ala. 446, 39 S. 325; Elliott *v.* Howison, 146 Ala. 568, 40 S. 1018; Patton *v.* Bk., 124 Ga. 965, 53 S. E. 664; Elgin, etc. T. Co. *v.* Hench, 132 Ill. App. 535; Gurski *v.* Doscher, 112 App. Div. 345, 98 N. Y. S. 588.

102-46 S. *v.* Carey, 76 Conn. 342, 56 A. 632; Dickens *v.* S., 50 Fla. 17, 38 S. 909; Chicago C. R. Co. *v.* Foster, 226 Ill. 288, 80 N. E. 762; Miss., etc. R. Co. *v.* Hardy, 88 Miss. 732, 41 S. 505; McCaffery *v.* R. Co., 192 Mo. 144, 90 S. W. 816.

103-50 Hill *v.* S., 146 Ala. 51, 41 S. 621.

Where irrelevancy apparent objection as irrelevant is good. Gearty *v.* Mayor, 183 N. Y. 233, 76 N. E. 12.

103-51 Hill *v.* S., 146 Ala. 51, 41 S. 621.

103-52 Jewell B. Co. *v.* Co., 121 Ill. App. 13.

104-55 Southern R. Co. *v.* Dickens, 152 Ala. 210, 44 S. 402; Page *v.* Grant, 127 Ia. 249, 103 N. W. 124; Van Camp *v.* City, 130 Ia. 716, 107 N. W. 933 (city map); Clifford Bkg. Co. *v.* Donovan, 195 Mo. 262, 94 S. W. 527; McClintock *v.* R. Co., 83 S. C. 58, 64 S. E. 1009.

104-60 Southern R. Co. *v.* Dickens, 152 Ala. 210, 44 S. 402; Merchants, etc. Bk. *v.* Dawdy, 230 Ill. 199, 82 N. E. 606; Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547; S. *v.* Nelson, 39 Wash. 221, 81 P. 721.

105-61 See Hector *v.* Mann, 225 Mo. 228, 124 S. W. 1109.

105-64 P. *v.* Silvers, 6 Cal. App. 69, 92 P. 506.

106-68 Hildebrand *v.* United Artisans, 50 Or. 159, 91 P. 542, *cit.* the text.

106-70 Chicago U. T. Co. *v.* Roberts, 229 Ill. 481, 82 N. E. 401; S. *v.* Megorden, 49 Or. 259, 88 P. 306.

107-74 See First Nat. Bk. *v.* Warner, 17 N. D. 76, 114 N. W. 1085.

107-75 Conklin *v.* Yates, 16 Okla. 266, 83 P. 910.

107-79 Wood *v.* Wilbert's Sons, etc. Co., 226 U. S. 384, 33 Sup. Ct. 125, 57 L. ed. 264; Boland *v.* R. Co., 202 Fed. 485, 120 C. C. A. 624; Quaker Oats Co. *v.* Grice, 195 Fed. 441, 115 C. C. A. 343 (hypothetical question); Freund *v.* Greene, 139 Fed. 703 (variance); Paine *v.* Willson, 146 Fed. 488, 77 C. C. A. 44; Gravett *v.* S. (Ala. App.), 65 S. 850; City *v.* Pulley (Ala.), 65 S. 405; Kirk *v.* S. (Ala. App.), 65 S. 195; Belk *v.* S. (Ala. App.), 64 S. 515; Frazier *v.* S., 9 Ala. App. 50, 64 S. 162; Shaw *v.* Cleveland, 5 Ala. App. 333, 59 S. 534; Williams *v.* S., 5 Ala. App. 112, 59 S. 528; So. R. Co. *v.* Ins. Co., 177 Ala. 327, 58 S. 313; Birmingham R., L. & P. Co. *v.* Girod, 164 Ala. 10, 51 S. 242; Southern C. & C. Co. *v.* Swinney, 149 Ala. 405, 42 S. 808; Elliott *v.* Howison, 146 Ala. 568, 40 S. 1018; Nort *v.* S. (Ariz.), 138 P. 513; Wilkerson *v.* S., 105 Ark. 367, 151 S. W. 518; Hastaran *v.* Marchand, 23 Cal. App. 126, 137 P. 297; Johnston *v.* Porter, 21 Cal. App. 97, 131 P. 69; Eddy *v.* Amusement Co., 21 Cal. App. 487, 132 P. 83; Lucy *v.* Davis, 163 Cal. 611, 126 P. 490; Lacy Mfg. Co. *v.* Co., 12 Cal.

App. 37, 106 P. 413; P. *v.* Long, 7 Cal. App. 27, 93 P. 387; Beach *v.* Schroeder, 47 Colo. 312, 107 P. 271; Seerie *v.* Brewer, 40 Colo. 299, 90 P. 508; S. *v.* Carey, 76 Conn. 342, 56 A. 632; Sims *v.* S., 54 Fla. 100, 44 S. 737; International Kaolin Co. *v.* Vause, 62 Fla. 505, 57 S. 360; Sims *v.* S., 59 Fla. 38, 52 S. 198; Simmons *v.* De Foe, 138 Ga. 534, 75 S. E. 626; Bowers *v.* R. Co., 10 Ga. App. 367, 73 S. E. 677; Harrison *v.* S., 125 Ga. 267, 53 S. E. 958; P. *v.* Lutzow, 240 Ill. 612, 88 N. E. 1049; Reavely *v.* Harris, 239 Ill. 526, 88 N. E. 238; Cumberledge *v.* Brooks, 235 Ill. 249, 85 N. E. 197; Gilbert *v.* Lloyd, 170 Ill. App. 436; Clowry *v.* Holmes, 170 Ill. App. 125; Stout *v.* Taylor, 168 Ill. App. 410; Tilton *v.* Musgrave, 169 Ill. App. 243; New Amsterdam Cas. Co. *v.* Saloman, 165 Ill. App. 264; Book *v.* Aschenbrenner, 165 Ill. App. 23; Brodie *v.* City, 164 Ill. App. 335; Fuller *v.* Kelso, 163 Ill. App. 576; Howard *v.* Anderson, 162 Ill. App. 256; Davis *v.* Gwynn, 162 Ill. App. 72; Kearney *v.* Davin, 162 Ill. App. 37; Collins *v.* R. Co., 161 Ill. App. 95; Petersen *v.* T. Co., 142 Ill. App. 34; Hamilton *v.* Larrimer (Ind.), 105 N. E. 643; Weaver *v.* Brown, 51 Ind. App. 379, 99 N. E. 825; Graham *v.* Crisman (Ia.), 146 N. W. 756; Scott *v.* O'Leary (Ia.), 138 N. W. 512; Sutcliff *v.* Pence, 156 Ia. 643, 137 N. W. 1026; Le Moyne *v.* Meadors, 156 Ky. 832, 162 S. W. 526; Wright *v.* C., 155 Ky. 750, 160 S. W. 476; Hoskins *v.* Jackson, 155 Ky. 638, 160 S. W. 174; Lexington & E. R. Co. *v.* Fields, 152 Ky. 19, 153 S. W. 43; Andonique *v.* Carmen, 151 Ky. 249, 151 S. W. 921; Chesapeake & O. R. Co. *v* Meyers, 150 Ky. 841, 151 S. W. 19; Quinlan *v.* C., 149 Ky. 476, 149 S. W. 892; Bownan Realty Co. *v.* Moss, 147 Ky. 103, 143 S. W. 765; Gambrill *v.* S., 120 Md. 203, 87 A. 900; Larson *v.* R. Co., 212 Mass. 262, 98 N. E. 1048; Miss., etc. R. Co. *v.* Hardy, 88 Miss. 732, 41 S. 505; Shannon *v.* Abell, 169 Mo. App. 598, 155 S. W. 62; Montague, etc. Co. *v.* City, 166 Mo. App. 11, 148 S. W. 422; S. *v.* Bell, 212 Mo. 111, 111 S. W. 24; S. *v.* Hill, 46 Mont. 24, 126 P. 41; S. *v.* De Hart, 38 Mont. 211, 99 P. 438; Lams *v.* Fish (N. J.), 90 A. 1105; Statler *v.* Co., 195 N. Y. 478, 88 N. E. 1063; In re Percival's Est., 79 Misc. 567, 141 N. Y. S. 180; Geiger *v.* Rapaport, 79 Misc. 5, 139 N. Y. S. 55; Trenton I. Co. *v.* Tassi, 56 Misc. 659, 107 N. Y. S. 580; S. *v.* Dahlquist, 17 N. D. 40, 115 N. W. 81; Wallace *v.* Co., 239 Pa. 110, 86 A. 699; In re O'Bold's Est., 221 Pa. 145, 70 A. 555; Loper *v.* Co., 5 Phil. Isl. 549 (immaterial question asked by court); McLester *v.* Barlow, 95 S. C. 25, 78 S. E. 523; Hebert *v.* Hebert, 20 S. D. 85, 104 N. W. 911; Tores *v.* S. (Tex. Cr.), 166 S. W. 523; Coulter *v.* S. (Tex. Cr.), 160 S. W. 80; Ward *v.* S. (Tex. Cr.), 159 S. W. 272; Missouri, etc. R. Co. *v.* Rogers (Tex. Civ.), 156 S. W. 364; Rice *v.* Taliaferro (Tex. Civ.), 156 S. W. 242; Berg *v.* S. (Tex Cr.), 142 S. W. 884; Pryse *v.* S., 54 Tex. Cr. 523, 113 S. W. 938; Clayton *v.* S. (Tex. Cr.), 103 S. W. 848; W. U. T. Co. *v.* Simmons (Tex. Civ.), 93 S. W. 686; S. *v.* Romeo (Utah), 128 P. 530; Johnson *v.* R. Co., 35 Utah 285, 100 P. 390; Spiking *v.* R. Co., 33 Utah 313, 93 P. 838; Lyman *v.* James, 87 Vt. 486, 89 A. 932; S. *v.* Pierce, 87 Vt. 144, 88 A. 740; Moore L. Co. *v.* Walker, 110 Va. 775, 67 S. E. 374; Gold Ridge, etc. Co. *v.* Rice, 77 Wash. 384, 137 P. 1001; Keil *v.* R. Co., 71 Wash. 163, 127 P. 1113; Booth *v.* R. Co., 71 Wash. 697, 127 P. 1115; S. *v.* Gibson, 67 W. Va. 548, 68 S. E. 295; Carney C. Co. *v.* Benedict (Wyo.), 129 P. 1024; Henderson *v.* Coleman, 19 Wyo. 183, 115 P. 439, rehear. denied, 115 P. 1136.

See S. *v.* Duff, 253 Mo. 415, 161 S. W. 683; Lemons *v.* Biddy (Tex. Civ.), 149 S. W. 1065.

Contra if evidence is admissible for some purposes, but not for others. Burnham *v.* Stillings, 76 N. H. 122, 79 A. 987.

Arrangement between counsel does not relieve from making objections. S. *v.* Bridgham, 51 Wash. 18, 97 P. 1096.

109-80 Bradley R. E. Co. *v.* Robbins, 7 Ind. Ty. 94, 103 S. W. 777; Hooper *v.* Hooper, 165 N. C. 605, 81 S. E. 933.

Comp. Miller *v.* Smith, 6 Ga. App. 447, 65 S. E. 292.

109-81 So. R. Co. *v.* Rogers, 196 Fed. 286, 116 C. C. A. 106; Mayor, etc. *v.* Gordon, 167 Ala. 334, 52 S. 430; St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 113; Higdon *v.* Garrett, 163 Ala. 285, 50 S. 323; Elliott *v.* Howison, 146 Ala. 568, 40 S. 1018; Dorough *v.* Harrington, 148 Ala. 305, 42 S. 557; P. *v.* Warr, 22 Cal. App. 663, 136 P. 304; Donaldson *v.* P., 33 Colo. 333, 80 P. 906; Patton *v.* Bk., 124 Ga. 965, 53 S. E. 664; S. *v.* Horton, 247 Mo. 657, 153 S. W. 1051; Wagner *v.* R. Co.,

160 Mo. App. 334, 142 S. W. 463; Cady L. Co. *v.* Co., 80 Neb. 607, 114 N. W. 774; S. *v.* Hankelman, 32 O. C. C. 1; Davis *v.* Jones (Tex Civ.), 149 S. W. 727; Hunter *v.* S., 59 Tex. Cr. 439, 129 S. W. 125; Northern, etc. T. Co. *v.* Caldwell, 44 Tex. Civ 374, 99 S. W. 869; S. *v.* Turley, 87 Vt. 163, 88 A. 562; Cook *v.* Lane, 86 Vt. 253, 84 A. 864. See S. *v.* Duff, 253 Mo. 415, 161 S. W. 683; Gillespie *v.* Ins. Co., 168 Mo. App. 320, 153 S. W. 1079; Kiel *v.* Ott, 168 Mo. App. 40, 151 S. W. 182.

But see Eutaw *v.* Botnick, 150 Ala. 429, 43 S. 739.

109-82 Boland *v.* R. Co., 48 Misc. 523, 96 N. Y. S. 262; S. *v.* Blodgett, 50 Or. 329, 92 P. 820; Holman *v.* Edson, 81 Vt. 49, 69 A. 143. And see Hope *v.* Valente, 84 Conn. 248, 79 A. 583.

110-83 Wendell *v.* Willetts, 183 Fed. 1014.

110-84 Sweatt *v.* S., 156 Ala. 85, 47 S. 194; Southwestern, etc. R. Co. *v.* Maddox, 146 Ala. 539, 41 S. 9; Dickens *v.* S., 142 Ala. 49, 39 S. 14; Ard *v.* Crittenden (Ala.), 39 S. 675; Franklin *v.* S., 145 Ala. 669, 39 S. 979; Southern R. Co. *v.* Leard, 146 Ala. 349, 39 S. 449; De Arellanes *v.* De Arellanes, 151 Cal. 443, 90 P. 1059; MacFeat *v.* R. Co., 5 Penne. (Del.) 52, 62 A. 898; Platt *v.* Rowand, 54 Fla. 237, 45 S 32; Lewis *v.* S., 55 Fla. 54, 45 S. 998; Aughey *v.* Windrem, 137 Ia. 315, 114 N. W. 1047; Sutton *v.* Co., 33 Ky. L. R. 577, 110 S. W. 874; Biggs *v.* Langhammer, 102 Md. 94, 63 A. 198; Darrin *v.* Whittingham, 107 Md. 46, 68 A. 269; Pontier *v.* S., 107 Md. 384, 68 A. 1059; Howe *v.* R. Co., 139 Mich. 638, 103 N. W. 185 (motion to strike not good as objection to question); S. *v.* Bateman, 198 Mo. 212, 94 S. W. 843; Lutz *v.* R. Co., 123 Mo. App. 499, 100 S. W. 46; Thomas *v.* R. Co., 125 Mo. App. 131, 100 S. W. 1121; Flanagan Mills *v.* Adams, 115 Mo. App. 542, 90 S. W. 1035; Cullinan *v.* Horan, 116 App. Div. 711, 102 N. Y. S. 132; Hamlin *v.* Hamlin, 117 App. Div. 493, 102 N. Y. S. 571; Blowers *v.* R. Co., 70 S. C. 377, 50 S. E. 19; W. U. T. Co. *v.* Simmons (Tex. Civ.), 93 S. W. 686; Childress *v.* S., 51 Tex. Cr. 455, 103 S. W. 864. *Contra* if party asserting error did not elicit evidence. Alabama G. S. R. Co. *v.* Yount, 165 Ala. 537, 51 S. 737.

110-85 Tutwiler C. Co. *v.* Nichols, 145 Ala. 666, 39 S. 762.

111-86 Kimmerle *v.* Farr, 189 Fed 295, 111 C. C. A. 27; Excelsior C. Co. *v.* Gildersleeve, 160 Fed. 47, 87 C. C. A. 202; Paine *v.* Willson, 146 Fed. 488, 77 C. C. A. 44; Union S. Bk. *v.* Rinaldo, 6 Cal. App. 637, 92 P. 873 (affidavit of publication though objectionable because not certified by secretary of corporation); Yellow Pine L. Co. *v.* Jernigan, 56 Fla. 891, 47 S. 945; Littler *v.* Robinson, 38 Ind. App. 104, 77 N. E. 1145; Wells *v.* Blackman, 121 La. 394, 46 S. 437; Stockham *v.* Malcolm, 111 Md. 615, 74 A. 569; Bagley *v.* Co., 205 Mass. 238, 91 N. E. 317; Hubbard *v.* Allyn, 200 Mass. 166, 86 N. E. 356; Egbert *v.* R. Co., 106 Minn. 23, 117 N. W. 998; Gruner *v.* Gruner (Mo. App.), 165 S. W. 865; In re Percival's Est., 79 Misc. 567, 141 N. Y. S. 180; Wasiljeff *v.* Paper Co. (Or.), 137 P. 755 (quot. text); Perry *v.* Sheldon, 30 R. I. 426, 75 A. 690; Watkins *v.* R. Co., 97 S. C. 148, 81 S. E. 426; Ramsey *v.* Hill, 92 S. C. 146, 75 S. E. 366; Ehrlich *v.* Weber, 114 Tenn. 711, 88 S. W. 188; Grand Temple, etc. *v.* Johnson (Tex. Civ.), 156 S. W. 532; Taplin & Rowell, *v.* Harris (Vt.), 90 A. 956.

See Felker *v.* Rice (Ark.), 161 S. W 162; Wondra *v.* Ins. Co. (Minn.), 147 N. W. 961.

112-87 Ellis *v.* Ellis, 134 Ga. 287, 67 S. E. 819; Crozier *v.* R. Co., 106 Minn. 77, 118 N. W. 256; Wasiljeff *v.* Paper Co. (Or.), 137 P. 755 (quot. text).

112-88 Robinson *v.* Omaha, 84 Neb. 642, 121 N. W. 969; Wasiljeff *v.* Paper Co., supra (quot. text).

112-91 Andrews *v.* R. Co., 129 Ia. 162, 105 N. W. 404; Joseph *v.* R. Co., 129 Mo. App. 603, 107 S. W. 1055; Lennox *v.* R. Co., 104 App. Div. 110, 93 N. Y. S. 230; El Paso, etc. R. Co. *v.* Darr (Tex. Civ.), 93 S. W. 166.

113-92 Donk C. Co. *v.* Thil, 228 Ill. 233, 81 N. E. 857; Scholl *v.* Grayson, 147 Mo. App. 652, 127 S. W. 415; Langley *v.* Rouss, 106 App. Div. 225, 94 N. Y. S. 108; Totten *v.* Stevenson, 29 S. D. 71, 135 N. W. 715. *Contra*, Heiden *v.* R. Co., 84 S. C. 117, 65 S. E. 987.

113-94 Goehrig *v.* Stryker, 174 Fed. 897.

113-95 Messer Co. *v.* Rothstein, 129 App. Div. 215, 113 N. Y. S. 772.

On motion for judgment non obstante veredicto incompetent evidence received without objection disregarded. Goehrig *v.* Stryker, 174 Fed. 897.

114-96 Moody *v.* Rowland, 100 Tex. 363, 99 S. W. 1112.

114-97 Jones *v.* Pelly (Ky.), 128 S. W. 305, on appeal.

115-99 See Ludins *v.* Ins. Co., 117 N. Y. S. 156.

116-2 Gilbert *v.* Lloyd, 170 Ill. App. 436; Wasiljeff *v.* Paper Co. (Or.), 137 P. 755 (quot. text); Bean *v.* Bird (Tex. Civ.), 117 S. W. 177; Field *v.* Field, 39 Tex. Civ. 1, 87 S. W. 726.

116-3 Excelsior C. Co. *v.* Gildersleeve, 160 Fed. 47, 87 C. C. A. 202; Patton *v.* Bk., 124 Ga. 965, 53 S. E. 664; Frank *v.* Berry, 128 Ia. 223, 103 N. W. 358; Succession of Zebriska, 119 La. 1076, 44 S. 893; C. *v.* Johnson, 199 Mass. 55, 85 N. E. 188 (photograph with writing on back); S. *v.* Madeira, 125 Mo. App. 508, 102 S. W. 1046; Einstein *v.* Co., 118 Mo. App. 184, 94 S. W. 296 (deed); Mitchell *v.* Co., 19 N. D. 736, 124 N. W. 946; Clopton *v.* Clopton, 11 N. D. 212, 91 N. W. 46; Kane *v.* Sholars, 41 Tex. Civ. 154, 90 S. W. 937; Abee *v.* Bargas, 45 Tex. Civ. 243, 100 S. W. 191 (certificate of clerk attached to abstract of judgment). *Contra* in equity. Hector *v.* Mann, 225 Mo. 228, 124 S. W. 1109.

117-5 Bartlow *v.* R. Co., 243 Ill. 332, 90 N. E. 721.

117-6 See Am. Temperance, etc. Assn. *v.* Solomon, 209 Fed. 345, 126 C. C. A. 271.

119-10 Dorough *v.* Harrington, 148 Ala. 305, 42 S. 557; Patton *v.* Bk., 124 Ga. 965, 53 S. E. 664; Mason *v.* Truitt, 257 Ill. 18, 100 N. E. 202; Frank *v.* Berry, 128 Ia. 223, 103 N. W. 358; Dick *v.* S., 107 Md. 11, 68 A. 286, 576; S. *v.* Madeira, 125 Mo. App. 508, 102 S. W. 1046; Peck *v.* Morgan (Tex. Civ.), 156 S. W. 917; Campbell *v.* Beard, 57 W. Va. 501, 50 S. E. 747. See vol. 9, p. 308. n. 98, and supplement thereto.

119-11 Cullinan *v.* Horan, 116 App. Div. 711, 102 N. Y. S. 132; First Nat. Bk. *v.* Miller, 48 Or. 487, 87 P. 892.

120-12 Patton *v.* Bk., 124 Ga. 965, 53 S. E. 664; Mason *v.* Truitt, 257 Ill. 18, 100 N. E. 202; Doylestown Agr. Co. *v.* Brackett, 109 Me. 301, 84 A. 146; New Orleans, etc. R. Co. *v.* Maulden (Miss.), 60 S. 211.

120-13 First Nat. Bk. *v.* Miller, 48 Or. 487, 87 P. 892; Campbell *v.* Beard, 57 W. Va. 501, 50 S. E. 747.

120-16 Wade *v.* Goza, 78 Ark. 7, 96 S. W 388.

121-17 Wade *v.* Goza, 78 Ark. 7, 96 S. W. 388.

121-19 Arkansas L. & C. Co. *v.* Benson, 92 Ark. 392, 123 S. W. 367; Littler *v.* Robinson, 38 Ind. App. 104, 77 N. E. 1145 (parol evidence to prove ownership and location of real estate).

121-20 But see Pease P. Co. *v.* Fiske, 145 N. Y. S. 978. See also infra, "Parol Evidence," p. 366, n. 91.

122-21 International H. Co. *v.* Campbell, 43 Tex. Civ. 421, 96 S. W. 93. *Contra* as to land title. Iquano L. & M. Co. *v.* Jones, 65 W. Va. 59, 64 S. E. 640, question of competency seems considered in connection with sufficiency of evidence.

122-22 Evidence clearly without any issue raised disregarded by trial court though unobjected to. Sun Ins. Office *v.* Heiderer, 44 Colo. 293, 99 P. 39.

123-24 Curtis *v.* Hunt, 158 Ala. 78, 48 S. 598; Millard *v.* Millard, 221 Ill. 86, 77 N. E. 595; Gilbert *v.* Lloyd, 170 Ill. App. 436; Childress *v.* S., 51 Tex. Cr. 455, 103 S. W. 864; Cook *v.* Lane, 86 Vt. 253, 84 A. 864; Weidenhoft *v.* Primm, 16 Wyo. 340, 94 P. 453.

Competency extends to subsequent hearing. Cook *v.* Lane, supra.

In equity cases appellate court passes on witnesses' competency though no exception to court's failure to rule. McKee *v.* Downing, 224 Mo. 115, 124 S. W. 7.

123-25 *Contra* case of improper cross-examination. Yeiral *v.* S., 56 Tex. Cr. 267, 119 S. W. 848.

In Pennsylvania supreme court notices error in absence of objection. Canole *v.* Allen, 222 Pa. 156, 70 A. 1053.

124-28 Adams *v.* S., 49 Tex. Cr. 361, 91 S. W. 225.

124-29 Franklin *v.* S., 145 Ala. 669, 39 S. 979; Day *v.* C., 29 Ky. L. R. 816, 96 S. W. 510; Pontier *v.* S., 107 Md. 384, 68 A. 1059; S. *v.* Bateman, 198 Mo 212, 94 S. W. 843; S. *v.* Pyles, 206 Mo. 626, 105 S. W. 613; S. *v.* Sykes, 191 Mo. 62, 89 S. W. 851; S. *v.* Harris, 199 Mo. 716, 98 S. W. 457; Speer *v.* S., 50 Tex. Cr. 273, 97 S. W. 469; Powell *v.* S., 50 Tex. Cr. 592, 99 S. W. 1005; S. *v.* Pittam, 32 Wash. 137, 72 P. 1042.

But see Rex *v.* Brooks, 11 Ont. L. R. (Can.) 525 (failure to object to deposition, no waiver).

124-30 That witness was not on list attached to the notice of taking testimony should be objected to when the

testimony is taken, it is too late to make the objection upon appeal. Bower *v.* Gray, 40 App. Cas. (D. C.) 483.

125-31 Woodall *v.* S., 58 Tex. Cr. 513, 126 S. W. 591, hearsay statements of wife against husband.

Evidence objected to on second trial though admitted without objection on first. S. *v.* Kelleher, 224 Mo. 145, 123 S. W. 551.

126-35 By making untenable objections sustained party precludes himself from complaining on appeal. Bernstein *v.* R. Co., 147 Ill. App. 443.

126-36 Kerbaugh *v.* Caldwell, 151 Fed. 194, 80 C. C. A. 470; Gravett *v.* S. (Ala. App.), 65 S. 850; Louisville & N. R. Co. *v.* Williams (Ala.), 62 S. 679; Briel *v.* Bank (Ala.), 61 S. 277; Birmingham R. Co. *v.* Norton, 7 Ala. App. 571, 61 S. 459; Shaw & Shaw *v.* Cleveland, 5 Ala. App. 333, 59 S. 534; So. R. Co. *v.* Hardin, 1 Ala. App. 277, 55 S. 270; Sloss-S., etc. Co. *v.* Stewart, 172 Ala. 516, 55 S. 185; Ala., etc. Co. *v.* Heald, 171 Ala. 263, 55 S. 181; Theodore L. Co. *v.* Lyons, 148 Ala. 668, 41 S. 682 (objection to two questions one proper); Woodstock I. Wks. *v.* Stockdale, 143 Ala. 550, 39 S. 335; Martin *v.* Monger (Ark.), 166 S. W. 566; Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405; St. Louis, etc. R. Co. *v.* Taylor, 87 Ark. 331, 112 S. W. 745; Mallory *v.* Brademyer, 76 Ark. 538, 89 S. W. 551; P. *v.* Pembroke, 6 Cal. App. 588, 92 P. 668; Spencer's Appeal, 77 Conn. 638, 60 A. 289; Fambrough *v.* De Vane, 141 Ga. 794, 82 S. E. 249; Macon, etc. R. Co. *v.* Anchors, 140 Ga. 531, 79 S. E. 153; Reidsville, etc. R. Co. *v.* Baxter, 13 Ga. App. 357, 79 S. E. 187; Great So. Acc. & F. Co. *v.* Guthrie, 13 Ga. App. 288, 79 S. E. 162; Lewis Robinson Co. *v.* Hutchinson, 127 Ga. 789, 56 S. E. 998; Johnson *v.* S., 125 Ga. 243, 54 S. E. 184; Campbell *v.* S., 124 Ga. 432, 52 S. E. 914 (series of questions); Martin *v.* City, 126 Ga. 577, 55 S. E. 499; Park *v.* S., 126 Ga. 575, 55 S. E. 489; Jose *v.* Hunter (Ind. App.), 103 N. E. 392, 852; Abramson *v.* Horner, 115 Md. 232, 80 A. 907; Darrin *v.* Whittingham, 107 Md. 46, 68 A. 269; Smith *v.* Humphreys, 104 Md. 285, 65 A. 57; Balt., etc. R. Co. *v.* Whitehill, 104 Md. 295, 64 A. 1033; Logan *v.* Field, 192 Mo. 54, 90 S. W. 127; McMartin *v.* S., 95 Neb. 292, 145 N. W. 695; Simpson *v.* Foundation, 201 N. Y. 479, 95 N. E. 10, *rev.* 118 N. Y. S. 1142; S. *v.* English, 164 N. C. 497, 80 S. E. 72; S. *v.* Shuford, 152 N. C. 809, 67 S. E. 923; Johnson *v.* S. (Tex. Cr.), 167 S. W. 733; Paris & G. N. R. Co. *v.* Flanders (Tex. Civ.), 165 S. W. 98; Brown *v.* S. (Tex. Cr.), 162 S. W. 339; Pinkerton *v.* S. (Tex. Cr.), 160 S. W. 87; Scott *v.* Townsend (Tex. Civ.), 159 S. W. 342; Hutcheson *v.* Massie (Tex. Civ.), 159 S. W. 315; Houston C. Pub. Co. *v.* McDavid (Tex. Civ.), 157 S. W. 224; Rice *v.* Taliaferro (Tex. Civ.), 156 S. W. 242; Kell Mill. Co. *v.* Bank (Tex. Civ.), 155 S. W. 325; Williams *v.* Neill (Tex. Civ.), 152 S. W. 693; Hughes *v.* S. (Tex. Cr.), 152 S. W. 912; Overstreet *v.* S. (Tex. Cr.), 150 S. W. 899; Houston Packing Co. *v.* Griffith (Tex. Civ.), 144 S. W. 1139; Webster *v.* Frazier (Tex. Civ.), 139 S. W. 609; Gulf, etc. R. Co. *v.* Tullis, 41 Tex. Civ. 219, 91 S. W. 317; Texas, etc. R. Co. *v.* Powell, 38 Tex. Civ. 157, 86 S. W. 21; St. Louis, etc. R. Co. *v.* Frazier (Tex. Civ.), 87 S. W. 400; Field *v.* Field, 39 Tex. Civ. 1, 87 S. W. 726; Pecos, etc. R. Co. *v.* Co., 42 Tex. Civ. 60, 93 S. W. 1024; Tuttle *v.* Moody, 100 Tex. 240, 97 S. W. 1037; Wandelohr *v.* Bk. (Tex. Civ.), 106 S. W. 413; Sullivan *v.* Fant, 51 Tex. Civ. 6, 110 S. W. 507; International, etc. R. Co. *v.* Cuneo, 47 Tex. Civ. 622, 108 S. W. 714; Goodloe *v.* Goodloe, 47 Tex. Civ. 493, 105 S. W. 533; Hardy *v.* C., 110 Va. 910, 67 S. E. 522; Washington, etc. R. Co. *v.* Trimyer, 110 Va. 856, 67 S. E. 531; Thomas *v.* C., 106 Va. 855, 56 S. E. 705; Spokane *v.* Costello, 42 Wash. 182, 84 P. 652.

See Rose *v.* S., 144 Ala. 114, 42 S. 21.

That small portion is inadmissible is no ground for excluding all the testimony objected to. Branch *v.* Branch, 139 Ga. 375, 77 S. E. 386.

General objection, on oral examination, to question calling for competent and incompetent testimony sufficient. Cooper *v.* Bower, 78 Kan. 104, 96 P. 794, interesting discussion recognizing rule of text except where examination oral.

Where several articles offered and part admissible, general objection overruled. C. *v.* Karamarkovic, 218 Pa. 405, 67 A. 650.

Objection to testimony of two witnesses too broad even where one incompetent. Dorais *v.* Doll, 33 Mont. 314, 83 P. 884.

127-37 Louisville & N. R. Co. *v.* Lloyd (Ala.), 65 S. 153; Patterson *v.*

S., 8 Ala. App. 420, 62 S. 1023; Coulson *v.* Scott, 167 Ala. 606, 51 S. 436; Thornton M. Co. *v.* Bretherton, 32 Mont. 80, 80 P. 10; Winter *v.* Johnson, 27 S. D. 512, 131 N. W. 1020; Chicago, etc. R. Co. *v.* Johnson (Tex. Civ.), 156 S. W. 253; Galveston, etc. R. Co. *v.* Janert, 49 Tex. Civ. 17, 107 S. W. 963; S. *v.* Hood, 63 W. Va. 182, See also Arizona, etc. Co. *v.* Kellam, 59 S. E. 971, 15 L. R. A. (N. S.) 448. See also Arizona, etc. Co. *v.* Kellam, 13 Ariz. 291, 114 P. 561.

If entire book offered, general objection sufficient. Offer should include only admissible portion. Geneva Springs *v.* Steele, 111 App. Div. 706, 97 N. Y. S. 996.

127-38 Louisville & N. R. Co. *v.* Lloyd (Ala.), 65 S. 153; Louisville R. Co. *v.* Britton, 145 Ala. 654, 39 S. 585; Hendry *v.* Ellis, 64 Fla. 306, 60 S. 354; Fricker *v.* Co., 124 Ga. 165, 52 S. E. 65; Gamble-R. C. Co. *v.* R. Co., 262 Ill. 400, 104 N. E. 666; S. *v.* Crofford, 133 Ia. 478, 110 N. W. 921; Boylan *v.* McMillan, 137 Ia. 142, 114 N. W. 630; Potomac B. Wks. *v.* Barber, 103 Md. 509, 63 A. 1068; C. *v.* Howard, 205 Mass. 128, 91 N. E. 397; P. *v.* Gillette, 191 N. Y. 107, 83 N. E. 680; Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384.

See Kessler *v.* Ellis, 27 Ky. L. R. 1042, 87 S. W. 798.

128-39 Spaulding *v.* City, 122 Mo App. 65, 97 S. W. 545; S. *v.* Dahlquist, 17 N. D. 40, 115 N. W. 81.

128-40 See Thompson *v.* Cole, 6 Ala. App. 208, 60 S. 556.

128-41 Burkhart *v.* City, 137 Ga. 366, 73 S. E. 583.

128-43 Converse *v.* Bk., 79 Conn. 603, 65 A. 1065; Star Assn. *v.* Assn., 77 Conn. 83, 58 A. 467; Fox *v.* Erbe, 100 App. Div 343, 91 N. Y. S. 832. See Adamson *v.* U. S., 184 Fed. 714, 107 C. C. A. 633; Sullivan *v.* Fant (Tex. Civ.), 160 S. W. 612.

129-44 S. *v.* Aitken, 240 Mo. 254, 144 S. W. 499; S. *v.* Bobbitt, 228 Mo 252, 128 S. W. 953; U. S. *v.* Adamson, 15 N. M. 280, 106 P. 653; O'Reilly *v.* Adams, 163 App. Div. 60, 148 N. Y. S. 441.

129-45 Hill *v.* Bean, 150 N. C. 436, 64 S. E. 212.

129-47 Fowler *v.* Newsom, 174 Fed. 104, 90 N. E. 9.

130-49 Key *v.* Goodall, B. & Co., 7 Ala. App. 227, 60 S. 986; Scott *v.* S., 138 Ga. 29, 74 S. E. 687; People's Nat. Bk. *v.* Haralson, 1 Ga. App. 311, 57 S. E. 991; Logan *v.* Field, 192 Mo. 54, 90 S. W. 127; Reeves *v.* Lutz (Mo. App.), 162 S. W. 280; S. *v.* Squirrel Coat, 32 S. D. 569, 143 N. W. 958; Com. Bond & Cas. Co. *v.* Hendricks (Tex. Civ.), 168 S. W. 1007; Schaubuch *v.* Dillemuth, 108 Va. 86, 60 S. E. 745.

Failure to object does not waive right to have evidence properly restricted. Burnham *v.* Stillings, 76 N. H. 122, 79 A. 987.

General objection may be sustained in the discretion of the court. Kern *v.* Cox, 167 Ala. 639, 52 S. 401.

130-50 Joseph Taylor C. Co. *v.* Dawes, 220 Ill. 145, 77 N. E. 131. See Key *v.* Goodall, B. & Co., 7 Ala. App 227, 60 S. 986 Brodie *v.* City, 164 Ill App. 335.

131-52 So. R. Co. *v.* Arnold, 162 Ala. 570, 50 S. 293 (right to complain of rulings on objections lost by failure to use opportunity to obtain answers to questions objected to); Stamper *v.* C., 30 Ky. L. R. 579, 99 S. W. 304. See Martinez *v.* P., 55 Colo. 51, 132 P. 64.

131-53 Birmingham R. L. & P. Co. *v.* Girod, 164 Ala. 10, 51 S. 242; Roberts *v.* S., 96 Ark. 58, 131 S. W. 60; Ham *v.* R. Co., 136 Mo. App. 17, 117 S. W. 108 (withdrawing objection). See Bjorkegren *v.* Kirk, 53 Misc. 560, 103 N. Y. S. 994.

Asking peremptory instruction or filing demurrer to evidence does not waive objections. King *v.* Cox, 126 Tenn. 553, 151 S. W. 58.

By failure to again raise objection when court reserves decision. Waldron *v.* Waldron (W. Va.), 80 S. E. 811.

Rejected evidence must be presented on hearing motion for new trial or objection to exclusion deemed waived. Kuhn *v.* Johnson, 91 Kan. 188, 137 P. 990; Louisville & N. R. Co. *v.* Woodford, 152 Ky. 398, 153 S. W. 722; S. *v.* Eaker, 17 N. M. 479, 131 P. 489.

Objection on specific ground after having had objected on several grounds constitutes a withdrawal of other objections raised. Gilbert *v.* S., 8 Okla. Cr. 543, 128 P. 1100, 129 P. 671.

Objection to competency of witness held to be waived by making general objection to testimony. Cook *v.* Lane, 86 Vt. 253, 84 A. 864.

Where a question is not pressed after objection but is reframed and asked in another form, no error can be based

on the ruling sustaining objection to the first question. Ralph *v.* Taylor, 33 R. I. 503, 82 A. 279.

Implied waivers, not favored. Dornsife *v.* Ralston, 55 Or. 254, 106 P. 13.

131-54 *Comp.* Ward *v.* S. (Tex. Cr.), 159 S. W. 272. And see vol. 9, p. 243, n. 33; vol. 12, p. 189, n. 78, and supplements thereto. *Contra* if action on objection deferred. Menardi *v.* Wacker, 32 Nev. 169, 105 P. 287.

131-55 Pardee *v.* Johnston, 70 W. Va. 347, 74 S. E. 721.

132-56 Rodier *v.* Ins. Co., 32 App. Cas. (D. C.) 159; Proctor *v.* Harrison, 34 Okla. 181, 125 P. 479; Lowry *v.* R. Co., 92 S. C. 33, 75 S. E. 278; Tucker *v.* S. (Tex. Cr.), 150 S. W. 190; Houston, etc. R. Co. *v.* Malloy, 54 Tex. Civ. 490, 118 S. W. 721; Hudson *v.* S., 53 Tex. Civ. 453, 117 S. W. 469. But see Young *v.* S., 9 Ala. App. 55, 64 S. 171.

132-57 Gate City Terminal Co. *v.* Thrower, 136 Ga. 456, 71 S. E. 903; Casey *v.* Co., 240 Ill. 416, 88 N. E. 982; Wagner *v.* Meyer (Ind. App.), 101 N. E. 397; Wicker *v.* Jones, 159 N. C. 102, 74 S. E. 801; Williams *v.* Smith, 29 R. I. 562, 72 A. 1093; Hendrix *v.* Brazzell (Tex. Civ.), 157 S. W. 280; Jordan *v.* Johnson (Tex. Civ.), 155 S. W. 1194; St. Louis, etc. R. Co. *v.* Smith (Tex. Civ.), 153 S. W. 391; Covington *v.* Sloan (Tex. Civ.), 124 S. W. 690; Mo., etc. Co. *v.* Pettit, 54 Tex. Civ. 358, 117 S. W. 894; Lord *v.* Henderson, 65 W. Va. 321, 64 S. E. 134.

See Gambrill *v.* S., 120 Md. 203, 87 A. 900; Windle *v.* R. Co., 168 Mo. App. 596, 153 S. W. 282.

Similar evidence of adverse party by another witness admitted without objection, held objection waived. Wagner *v.* Meyer (Ind. App.), 101 N. E. 397; Malcomson *v.* Inv. Corp., 154 App. Div. 694, 139 N. Y. S. 405; Watson *v.* Rice (Tex. Civ.), 166 S. W. 106.

132-58 Kurtz *v.* Payne Inv. Co., 156 Ia. 376, 135 N. W. 1075; United R. & E. Co. *v.* Corbin, 109 Md. 442, 72 A. 606; Hydraulic P. Co. *v.* Green, 177 Mo. App. 308, 164 S. W. 250; Finkelstein *v.* R. Co., 75 N. H. 303, 73 A. 705. But see Sullivan *v.* Fant, 51 Tex. Civ. 6, 110 S. W. 507.

133-60 Cross-examination as to improper testimony received over objection bringing out same testimony waives objection. Cathey *v.* R. Co. (Tex. Civ.), 124 S. W. 217.

133-61 McKee *v.* Rudd, 222 Mo. 344, 121 S. W. 312; In re Manhattan Bridge, 108 N. Y. S. 366; Brown *v.* S. (Tex. Cr.), 150 S. W. 436. See Hoogewerff *v.* Flack, 101 Md. 371, 61 A. 184 (objections to books of account not waived by questions concerning same put to objector by own counsel); Moore *v.* S. (Tex. Cr.), 146 S. W. 183.

134-62 Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561.

Subsequent opportunity to ask question to which objection sustained waiver if not availed of. Goode *v.* S., 57 Tex. Cr. 220, 123 S. W. 597.

Waiver does not result from requesting finding of facts based on all testimony, part of which was received over objections, nor by motion for new trial not mentioning evidence objected to, but alleging reception of incompetent evidence over objection. McKee *v.* Rudd, 222 Mo. 344, 121 S. W. 312.

134-63 Frazier *v.* S., 9 Ala. App. 50, 64 S. 162; Nashville, etc. R. Co. *v.* Hinds (Ala. App.), 60 S. 409; Birmingham, etc. Co. *v.* Demmins, 3 Ala. App. 359, 57 S. 404; Republic I. & S. Co. *v.* White, 163 Ala. 187, 50 S. 141; Alabama Consol. Coal & Iron Co. *v.* Heald, 171 Ala. 263, 55 S. 181; Climax L. Co. *v.* Wks., 163 Ala. 654, 50 S. 935; Birones *v.* S., 105 Ark. 82, 150 S. W. 416; Harding *v.* S., 94 Ark. 65, 126 S. W. 90 (notwithstanding laws 1909, p. 959, require supreme court to consider errors in capital cases regardless of exceptions); S. W. T. & T. Co. *v.* Abeles, 94 Ark. 254, 126 S. W. 724; P. *v.* McKeehan, 11 Cal. App. 443, 105 P. 273 (but see act of 1909, p. 1088); Glasco *v.* S., 137 Ga. 336, 73 S. E. 578; Plaff *v.* Express Co., 251 Ill. 243, 95 N. E. 1089; Posey *v.* Ins. Co., 149 Ky. 631, 149 S. W. 984; Byrd *v.* Vanderburgh, 168 Mo. App. 112, 151 S. W. 184; S. *v.* Gray, 163 Mo. App. 696, 147 S. W. 510; Wardell *v.* R. Co., 163 Mo. App. 303, 146 S. W. 813; Werner *v.* Finley, 144 Mo. App. 554, 129 S. W. 73; Ray C. S. Bk. *v.* Hutton, 224 Mo. 42, 123 S. W. 47 (exception must be taken to failure to rule on objections); Johnson *v.* Lumb. Co. (Or.), 137 P. 765; Palmer *v.* Horst Co., 66 Or. 33, 133 P. 634; Hewitt *v.* Huffman, 55 Or. 57, 105 P. 98; Littieri *v.* Freda, 241 Pa. 21, 88 A. 82; S. *v.* Casasanta, 29 R. I. 587, 73 A. 312; Oldham *v.* S., 63 Tex. Cr. 527, 142 S. W. 13; Autrey *v.* Linn (Tex. Civ.), 138 S. W. 197; Spielberg *v.* Kuhn, 39 Utah 276, 116 P. 1027; Lanford *v.* R. Co.,

113 Va. 68, 73 S. E. 566; Bluefield *v.* McClaugherty, 64 W. Va. 536, 63 S. E. 363.

See Main *v.* Radney (Ala.), 39 S. 981; Posey *v.* Ins. Co., 149 Ky. 631, 149 S. W. 984.

Exception abortive by conditional ruling of court. Ballard *v.* Bank (Ala.), 65 S. 356.

No exception necessary to permit review of ruling materially prejudicing party. Averbuck *v.* Becher, 140 N. Y. S. 483. See P. *v.* Veld, 154 App. Div. 752, 139 N. Y. S. 788.

An exception to a ruling on the admission of evidence must be preserved, otherwise such ruling will not be reviewed. Griego *v.* S. (Tex. Cr.), 145 S. W. 613.

Failure to rule on an objection is equivalent to overruling it. Am. Agr. Co. *v.* Rhodes, 139 Ga. 495, 77 S. E. 582; Carnes *v.* C., 146 Ky. 425, 142 S. W. 723.

Effect of motion to dismiss.—Motion to dismiss, made after plaintiff's testimony received, waives all objections to competency. Battis *v.* McCord, 70 Ia. 46, 30 N. W. 11; Roscoe *v.* Co., 124 N. C. 42, 32 S. E. 389; So. R. Co. *v.* Leinart, 107 Tenn. 635, 64 S. W. 899. Introducing evidence, with permission of court, after denial of motion to dismiss terminates effect of motion as waiver of exceptions to evidence received. Citizens' St. R. Co. *v.* Stoddard, 10 Ind. App. 278, 37 N. E. 723.

Error in excluding testimony cured by timely notice to party it will be received. Zachary *v.* S., 57 Tex. Cr. 179, 122 S. W. 263.

Failure to move to set verdict aside, not a waiver. Fraser *v.* Blanchard, 83 Vt. 136, 73 A. 995.

134-64 Kramer *v.* Compton, 166 Ala. 216, 52 S. 351; Bragan *v.* Co., 163 Ala. 93. 51 S. 30; Kimic *v.* R. Co., 156 Cal. 379, 104 P. 986; P. *v.* Bartley, 12 Cal. App. 773, 108 P. 868; Spotswood *v.* Spotswood, 4 Cal. App. 711, 89 P. 362; Chany *v.* Hotchkiss, 79 Conn. 104, 63 A. 947; Balt., etc. R. Co. *v.* S., 107 Md. 642, 69 A. 439, 72 A. 340; Elec. P. A. Co. *v.* Psichos, 83 N. J. L. 262, 83 A. 766; Richardson *v.* Agnew, 46 Wash. 117, 89 P. 404 (objection insufficient but evidence excluded as hearsay).

His duty to exclude evidence outside of issues. Louisville R. Co. *v.* Frick, 158 Ky. 450, 165 S. W. 649.

135-65 Error in excluding evidence cured by subsequently admitting it in response to question objected to. International H. Co. *v.* Co., 146 Ia. 172, 122 N. W. 951.

135-67 Loew F. Co. *v.* Co., 164 Fed. 855, 90 C. C. A. 637; Temple *v.* Co., 46 Colo. 497, 106 P. 8; Jaggar *v.* Plunkett, 81 Kan. 565, 106 P. 280; Doon *v.* Felton, 203 Mass. 267, 89 N. E. 539; Jaquith *v.* Morrill, 204 Mass. 181, 90 N. E. 556; Archer *v.* R. Co., 41 Mont. 56, 108 P. 571; In re Porter's Est., 60 Misc. 504, 113 N. Y. S. 928 (and local cases cited); Karpf *v.* Borgenicht, 65 Misc. 592, 120 N. Y. S. 876. Presumed, where evidence objected to tentatively received, that court considered only that admissible. Broadie *v.* Carson, 81 Kan. 467, 106 P. 294. Otherwise where incompetent testimony received over repeated objections. Baker *v.* Baker, 43 Ind. App. 26, 86 N. E. 864.

135-68 Mogenson *v.* Zubler, 36 Colo. 235, 84 P. 981.

135-69 Comrs. *v.* Erwin, 140 N. C. 193, 52 S. E. 785.

135-70 Merchants' S. & G. Co. *v.* Bd. of Trade, 201 Fed. 20, 120 C. C. A. 582.

A general objection that the referee admitted incompetent and illegal testimony is not sufficient. Anderson *v.* Caldwell, 242 Mo. 201, 146 S. W. 444.

136-72 Kelley L. Co. *v.* R. Co., 136 App. Div. 146, 120 N. Y. S. 415; Freeman *v.* Inst. (Tex. Civ.), 128 S. W. 629 (if considered weighed by reviewing court); Pilkerton *v.* Roberson, 110 Va. 136, 65 S. E. 835.

On appeal, if no evidence on question introduced by defendant, plaintiff's challenged evidence considered in determining whether an instruction for him was properly given, on the theory that if it had been excluded other evidence might have been offered. Jones *v.* Pelly (Ky.), 128 S. W. 305. *Comp.* Henry *v.* Phillips, 105 Tex. 459, 151 S. W. 533.

A statutory affidavit, made by another than statute designates, though received without objection, not equivalent in probative force to one made by proper person. Deutsch *v.* Haab, 135 App. Div. 756, 119 N. Y. S. 911.

Error presumed where incompetent evidence received over objection in answer to questions put by one of three justices trying case. P. *v.* Morrison, 194 N. Y. 175, 86 N. E. 1120.

OBSTRUCTING JUSTICE

139-9 Appling *v.* S., 95 Ark. 185, 128 S. W. 866; S. *v.* Murphy (Del.), 66 A. 335.

142-20 Heinze *v.* U. S., 181 Fed. 322, 104 C. C. A. 510.

142-22 Acts of accused after arrest may be fully shown as bearing on wilfulness. Woodward *v.* S., 58 Tex. Cr. 412, 126 S. W. 271.

143-25 Tedford *v.* P., 219 Ill. 23, 76 N. E. 60.

143-26 S. *v.* Bringgold, 40 Wash. 12, 82 P. 132.

144-29 Use of direct, active or forcible or quasi-forcible means against officer's person need not be shown if it appear that, in his presence, defendant knowingly and wilfully used forcible means interfering with custody of property in officer's possession. Campf *v.* S., 80 O. St. 321, 88 N. E. 887.

OFFENSES AGAINST POSTAL LAWS

146-1 U. S. *v.* White, 150 Fed. 379.

146-4 Shepard *v.* U. S., 160 Fed. 584, 87 C. C. A. 486.

Letter received in regular course of mail, removed and opened by inspector with permission of addressee and without delivery to him, and afterwards replaced in mail as decoy, is mail matter and admissible to prove embezzlement. Ennis *v.* U. S., 154 Fed. 842, 83 C. C. A. 478.

147-6 Lemon *v.* U. S., 164 U. S. 953, 90 C. C. A. 617; Rumble *v.* U. S., 143 Fed. 772, 75 C. C. A. 30; Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 58; Walker *v.* U. S., 152 Fed. 111, 81 C. C. A. 329; U. S. *v.* Marrin, 159 Fed. 767; Shepard *v.* U. S., 160 Fed. 584. See Glinn *v.* U. S., 177 Fed. 679, 101 C. C. A. 305.

Intent to defraud must be proved beyond reasonable doubt. Hibbard *v.* U. S., 172 Fed. 66, 96 C. C. A. 554.

Indictment of defendant's predecessor for conducting same business, if defendant knew, relevant on question of intent. Grey *v.* U. S., 172 Fed. 101, 96 C. C. A. 415.

147-7 Rudd *v.* U. S., 173 Fed. 912, 97 C. C. A. 462.

Evidence of instances of treatment by medical institute not limited to those concerning which prosecution has offered testimony. Hibbard *v.* U. S., 172 Fed. 66, 96 C. C. A. 554.

Defendant's correspondence with patients treated by him competent in his behalf as res gestae to meet testimony of witnesses becoming patients in consequence of matter transmitted. Hibbard *v.* U. S., supra.

Intent to defraud addressee of something ingredient of crime. Miller *v.* U. S., 174 Fed. 35, 98 C. C. A. 21.

147-8 **Intent shown by letters other than those on which indictment based.** Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581. See vol. 11, p. 799, n. 55, and supplement thereto.

Accused's failure to produce letters written by witnesses against him should not be commented on by court. Hibbard *v.* U. S., 172 Fed. 66, 96 C. C. A. 554.

148-13 See People's U. S. Bk. *v.* Gilson, 140 Fed. 1.

OFFER OF EVIDENCE

152-1 In federal courts offer made without propounding question, and error assigned on its rejection. Missouri P. R. Co. *v.* Castle, 172 Fed. 841, 97 C. C. A. 124.

152-2 Sellers *v.* S., 7 Ala. App. 78, 61 S. 485; Holland *v.* Williams, 126 Ga. 617, 55 S. E. 1023; Barto *v.* Co., 155 Mich. 94, 118 N. W. 738; White *v.* R. Co., 87 Vt. 330, 89 A. 618.

If a question calls for a hearsay, self-serving declaration of defendant, court may refuse to allow a statement to the jury of what the expected answer would be. McGuire *v.* S., 3 Ala. App. 40, 58 S. 60.

Purpose of evidence need not be stated if no request. Dunman *v.* Murphey, 48 Tex. Civ. 539, 107 S. W. 70.

153-3 McGuire *v.* S., 3 Ala. App. 40, 58 S. 60; Holland *v.* Williams, 126 Ga. 617, 55 S. E. 1023; Marcum *v.* Hargis, 31 Ky. L. R. 1117, 104 S. W. 693; Moss *v.* R. Co., 46 Tex. Civ. 463, 103 S. W. 221.

153-4 Moss *v.* R. Co., supra. Jury should be withdrawn. Price *v.* S., 1 Okla. Cr. 358, 98 P. 447.

155-7 Morgan *v.* U. S., 169 Fed. 242, 94 C. C. A. 518; Birmingham R., L. & P. Co. *v.* Selhorst, 165 Ala. 475, 51 S. 568; Sellers *v.* S., 7 Ala. App. 78, 61 S. 485; P. *v.* Babcock, 160 Cal. 537, 117 P. 549; Vallejo & N. R. Co. *v.* Sav. Bk. (Cal. App.), 140 P. 974; Farnum *v.* Bk., 12 Cal. App. 426, 107 P.

568; Pickford *v.* Talbott, 28 App. Cas. (D. C.) 498; Smith *v.* Young, 179 Ill. App. 364; Tanner *v.* Clapp, 139 Ill. App. 353; Weske *v.* Co., 117 Ill. App. 298; Hinkle *v.* S., 174 Ind. 276, 91 N. E. 1090; Fowler *v.* Newsom, 174 Ind. 104, 90 N. E. 9; Work *v.* Work, 90 Kan. 683, 136 P. 236; Hindle *v.* Healy, 204 Mass. 48, 90 N. E. 511; Goyette *v.* Keenan, 196 Mass. 416, 82 N. E. 427; Kelpe *v.* Kuppertz, 235 Mo. 479, 139 S. W. 335; Ronchetto *v.* C. Co. (Mo. App.), 166 S. W. 876; Hicks *v.* Hicks, 142 N. C. 231, 55 S. E. 106; Bernhardt *v.* Dutton, 146 N. C. 206, 59 S. E. 651; Robinson *v.* S., 8 Okla. Cr. 667, 130 P. 121; Ireland *v.* Ward, 51 Or. 102, 93 P. 932; Germantown D. Co. *v.* McCallum, 223 Pa. 554, 72 A. 885; S. *v.* Cushing, 86 Vt. 416, 85 A. 770; Washington L. P. Co. *v.* Goodrich, 110 Va. 692, 66 S. E. 977.

See Turner *v.* Moore, 34 Okla. 1, 127 P. 487.

To show prejudice.—Noves *v.* Meharry, 213 Mass. 598, 100 N. E. 1090.

156-8 Big Sandy I. & S. Co. *v.* Williams (Ala.), 63 S. 1011; Harris *v.* Basden, 162 Ala. 367, 50 S. 321; Montgomery *v.* S., 160 Ala. 7, 49 S. 902; Rutledge *v.* Rowland, 161 Ala. 114, 49 S. 461; Sloss-S. & I. Co. *v.* Sharp, 156 Ala. 284, 47 S. 279; Supreme Lodge *v.* Baker, 163 Ala. 518, 50 S. 958; Boland *v.* Stanley, 88 Ark. 562, 115 S. W. 163; P. *v.* Brent, 11 Cal. App. 674, 106 P. 110; McAllister *v.* S., 7 Ga. App. 541, 67 S. E. 221; So. R. Co. *v.* Wright, 6 Ga. App. 172, 64 S. E. 703; Loeb *v.* S., 6 Ga. App. 23, 64 S. E. 338; Abrahams *v.* Woolley, 243 Ill. 365, 90 N. E. 667; Weske *v.* Co., 117 Ill. App. 298; Duncan *v.* S., 171 Ind. 444, 86 N. E. 641; Vandalia R. Co. *v.* Keys, 46 Ind. App. 353, 91 N. E. 173; Millington *v.* O'Dell, 35 Ind. App. 225, 73 N. E. 949; Neff *v.* Ins. Co., 39 Ind. App. 250, 73 N. E. 1041; S. *v.* Neubauer, 145 Ia. 337, 124 N. W. 312; Johnston *v.* R. Co., 141 Ia. 114, 119 N. W. 286; Stevenson *v.* Moore (Ky.), 118 S. W. 951; Fidelity & C. Co. *v.* Cooper, 137 Ky. 544, 126 S. W. 111; S. *v.* Campisi, 123 La. 815, 49 S. 535; Deane *v.* Co., 200 Mass. 459, 86 N. E. 890; Goyette *v.* Keenan, 196 Mass. 416, 82 N. E. 427; Bowman *v.* Min. Co., 168 Mo. App. 703, 154 S. W. 891; Salts *v.* Ins. So., 140 Mo. App. 142, 120 S. W. 714; Louis *v.* Louis, 134 Mo. App. 566, 114 S. W. 1150; S. *v.* Shapiro, 216 Mo. 359, 115 S. W. 1022; Shandy *v.* McDonald, 38 Mont. 393, 100 P. 203; Metzger *v.* Neighbors, 86 Neb. 61, 124 N. W. 913; Gillam *v.* Mann, 85 Neb. 765, 124 N. W. 143; Butterfield *v.* Beaver City, 84 Neb. 417, 121 N. W. 592; Hicks *v.* Hicks, 142 N. C. 231, 55 S. E. 106; Price *v.* S., 1 Okla. Cr. 358, 98 P. 447; Baines *v.* Co., 49 Or. 192, 89 P. 371; Ireland *v.* Ward, 51 Or. 102, 93 P. 932; Chancey *v.* S., 58 Tex. Cr. 54, 124 S. W. 426; Welch *v.* S., 57 Tex. Cr. 111, 122 S. W. 880; Irvin *v.* Johnson (Tex. Civ.), 120 S. W. 1085; Hatzfeld *v.* Walsh, 55 Tex. Civ. 573, 120 S. W. 525; Mo., etc. R. Co. *v.* Neiser, 54 Tex. Civ. 460, 118 S. W. 166; Bowmen *v.* S., 55 Tex. Cr. 416, 116 S. W. 798; Coolidge *v.* Taylor, 85 Vt. 39, 80 A. 1038; Dunbar *v.* R. Co., 79 Vt. 474, 65 A. 528; Baltimore C. & A. R. Co. *v.* Hudgins (Va.), 81 S. E. 48; Walker *v.* Strosnider, 67 W. Va. 39, 67 S. E. 1087; Nat. Val. Bk. *v.* Houston, 66 W. Va. 336, 66 S. E. 465; Lord *v.* Henderson, 65 W. Va. 321, 64 S. E. 134; S. *v.* Carr, 65 W. Va. 81, 63 S. E. 766. *Contra* on cross-examination. Powell *v.* Morrill, 83 Neb. 119, 119 N. W. 9.

156-9 Harris *v.* Brown, 187 Fed. 6, 109 C. C. A. 60; Ferry *v.* Henderson, 32 App. Cas. (D. C.) 41; Eaton *v.* Blackburn, 49 Or. 22, 88 P. 303; Hauff & Stormo *v.* R. Co. (S. D.), 147 N. W. 986. *Contra* unless error in ruling prejudicial. Sayre *v.* Woodyard, 66 W. Va. 288, 66 S. E. 320.

Refusal of court to hear question does not excuse offer. P. *v.* Casselman, 10 Cal. App. 234, 101 P. 693.

157-12 Murphey *v.* Brown, 12 Ariz. 268, 100 P. 801; Mebins & D. Co. *v.* Mills, 150 Cal. 229, 88 P. 917; Lichtenstein M. Co. *v.* Peck, 59 Misc. 193, 110 N. Y. S. 410; La Rault *v.* Palmer, 51 Wash. 664, 99 P. 1036.

Explanation need not be made if uncalled for. S. *v.* Butler, 146 Ia. 285, 125 N. W. 196.

158-13 Mebins & D. Co. *v.* Mills, 150 Cal. 229, 88 P. 917.

158-14 Rose *v.* Doe, 4 Cal. App. 680, 89 P. 135.

Proper question to which offered evidence responsive essential to raise question upon ruling excluding testimony. Indianapolis Co. *v.* Hall, 166 Ind. 557, 76 N. E. 242.

159-15 Rose *v.* Doe, 4 Cal. App. 680, 89 P. 135.

160-16 Presumed made in good faith. Court may in its discretion require production of witness. Platte Val. C. Co. *v.* Loan Co., 202 Fed. 692, 121 C. C. A. 102.

160-17 Smith *v.* Young, 179 Ill. App. 364.

160-18 First N. Bk. *v.* Shank, 53 Colo. 446, 128 P. 56; Tritch *v.* Perry, 48 Colo. 339, 108 P. 981 (offer must be renewed after foundation laid); Int. T. B. Co. *v.* Mackhorn, 158 Ill. App. 543; Hibbets *v.* Threlkeld, 137 Ia. 164, 114 N. W. 1045; Cecil's Com. *v.* Cecil, 149 Ky. 605, 149 S. W. 965; Smith *v.* Plant, 216 Mass. 91, 103 N. E. 58; Harrington *v.* Co., 33 Mont. 330, 83 P. 467; Zeller *v.* Leiter, 114 App. Div. 148, 99 N. Y. S. 624.

160-19 Hotchkiss *v.* Iron, 108 Me. 34, 78 A. 1108.

161-20 Lichtenstein M. Co. *v.* Peck, 59 Misc. 193, 110 N. Y. S. 410.

161-22 Statement made to stenographer, at court's suggestion, on closing charge timely where court refused to hear. Barto *v.* Co., 155 Mich. 94, 118 N. W. 738.

Offer before swearing of jury, too early. Suravitz *v.* Pristasz, 201 Fed. 335, 119 C. C. A. 573.

161-23 Logan *v.* McMullen, 4 Cal. App. 154, 87 P. 285; Judy *v.* Buck, 72 Kan. 106, 82 P. 1104; Marshall *v.* Marshall, 71 Kan. 313, 80 P. 629; Marcum *v.* Hargin, 31 Ky. L. R. 1117, 104 S. W. 693; Louisville, etc. R. Co. *v.* Williamson, 29 Ky. L. R. 1165, 96 S. W. 1130; Siebert *v.* Hatcher, 205 Mo. 83, 102 S. W. 962; Pier *v.* Speer, 73 N. J. L. 633, 64 A. 161; Madson *v.* Rutten, 16 N. D. 281, 113 N. W. 872; Baines *v.* Co., 49 Or. 192, 89 P. 371; McQuiggan *v.* Ladd, 79 Vt. 90, 64 A. 503; Norman *v.* Hopper, 38 Wash. 415, 80 P. 551.

Court's refusal to hear statement of counsel as to what he expects to prove by witness whose testimony is excluded on ground of incompetency error. Imboden *v.* Co., 111 Mo. App. 220, 86 S. W. 263; Ehrhardt *v.* Stevenson, 128 Mo. App. 476, 106 S. W. 1118.

162-24 Logan *v.* Smith Bros. & Co., 9 Ala. App. 459, 63 S. 766; Descrippo *v.* S., 8 Ala. App. 85, 62 S. 1004; Sellers *v.* S., 7 Ala. App. 78, 61 S. 485; Garrard *v.* S. (Ark.), 167 S. W. 485; In re Weiss' Est., 167 Cal. 410, 139 P. 1075; Snowball *v.* Snowball, 164 Cal. 476, 129 P. 784; P. *v.* Kawasaki, 23 Cal. App. 92, 137 P. 287; City *v.* Bradley, 23 Colo. App. 177, 128 P. 888; United Hdw. F. Co. *v.* Blue, 59 Fla. 419, 52 S. 364; Flemister *v.* P. Co., 141 Ga. 511, 79 S. E. 148; P. *v.* Duncan, 260 Ill. 339, 103 N. E. 1043; McGuire *v.* Smith (Ind. App.), 103 N. E. 71; Kinney *v.* Reed (Ia.), 145 N. W. 900; Gittings *v.* Duncan (Ia.), 145 N. W. 872; Hostetter *v.* Green, 150 Ky. 551, 150 S. W. 652; Noyes *v.* Meharry, 213 Mass. 598, 100 N. E. 1090; Hansen *v* Hansen (Minn.), 148 N. W. 457; Larson *v.* Anderson, 122 Minn. 39, 141 N. W. 847; Taylor *v.* Co., 47 Mont. 342, 132 P. 549; Armfield *v.* R. Co., 162 N. C. 24, 77 S. E. 963; Robinson *v.* S., 8 Okla. Cr. 667, 130 P. 121; Callan *v.* Peck (R. I.), 91 A. 34; Arneson *v.* Nerger (S. D.), 147 N. W. 982; Smithson *v.* S., 127 Tenn. 357, 155 S. W. 133; Bybee *v.* S. (Tex. Cr.), 168 S. W. 526; Prouty *v.* Nichols, 82 Vt. 181, 72 A. 988.

See May *v.* C., 153 Ky. 141, 154 S. W. 1074.

164-25 Himrod *v.* Mill Co., 202 Fed. 724, 121 C. C. A. 186; In re Weiss' Est., 167 Cal. 410, 139 P. 1075; Eaton *v.* Blackburn, 49 Or. 22, 88 P. 303; Livingston Mfg. Co. *v.* Rizzi Bros., 86 Vt. 419, 85 A. 912; Jenkins *v.* S. (Wyo.), 134 P. 260, 135 P. 749.

164-27 Nevers Co. *v.* Fields, 151 Ala. 367, 44 S. 81.

"Offered to prove" equivalent to witness would have testified. Northern Irr. Co. *v.* Dodd (Tex. Civ.), 162 S. W. 946.

165-28 Offer to prove legal conclusion properly rejected. Martin *v.* Hertz, 224 Ill. 84, 79 N. E. 558.

165-29 Welsh *v.* S., 9 Ala. App. 4, 63 S. 685; Hallwood Cash R. Co. *v.* Prouty, 196 Mass. 313, 82 N. E. 6; Pike *v.* Hauptman, 83 Neb. 172, 119 N. W. 231; Hans *v.* Tr Co., 90 Neb. 834, 134 N. W. 943.

165-31 So. C. Co. *v.* Harris, 175 Ala. 323, 57 S. 854; O'Sullivan *v.* Griffith, 153 Cal. 502, 95 P. 873, 96 P. 323; Riddle *v.* Gibson, 29 App. Cas. (D. C.) 237; Bowden *v.* Bowden, 125 Ga. 107, 53 S. E. 606; Weld *v.* Nat. Bk., 166 Ill. App. 8; Court *v.* Dinger, 123 Ill. App. 406; Flynn *v.* Coolidge, 188 Mass. 214, 74 N. E. 342; National C. Bk. *v.* Thro, 110 Minn. 169, 124 N. W. 965; City *v.* Cronin (Mo.), 168 S. W. 674; Kittanning Borough *v.* Co., 35 Pa.

Super. 167; Crahan *v.* Chittenden, 82 Vt. 410, 74 A. 86; Stevens *v.* Sayers, 82 Vt. 324, 73 A. 817; McQuiggan *v.* Ladd, 79 Vt. 90, 64 A. 503; Interstate F. Co. *v.* Schroeder (W. Va.), 81 S. E. 552; Delmar O. Co. *v.* Bartlett, 62 W. Va. 700, 59 S. E. 634; Wood *v.* Washington, 135 Wis. 299, 115 N. W. 810. See Pratt *v.* S. S. Co., 184 Fed. 303, 106 C. C. A. 445; Niles *v.* R. Co., 87 Vt. 356, 89 A. 629.

Technical objections to offer, unfavored. Washington G. M. & M. Co. *v.* O'Laughlin, 46 Colo. 503, 105 P. 1092.

A mere statement that counsel proposed "to prove her unchastity by circumstantial evidence" was no showing as to what the evidence was which he had in mind. "He should have informed the court what facts he proposed to show by the witness." S. *v.* Kozlickie, 241 Mo. 301, 145 S. W. 97, *cit.* S. *v.* Arnold, 206 Mo. 589, 105 S. W. 641; S. *v.* Shapiro, 216 Mo. 371, 115 S. W 1022.

167-32 Muntz *v.* Whitcomb, 40 Pa Super. 553.

Express statement of testimony expected need not be given. Adams *v.* Janes, 83 Vt. 334, 75 A. 799. On cross-examination general statement good. S. *v* Goodager, 56 Or. 198, 106 P. 638.

167-33 Radel *v.* Lesher, 137 Fed 719, 70 C. C. A. 411; Stanley *v.* Beckham, 153 Fed. 152, 82 C. C. A. 304 See Aughey *v.* Windrem, 137 Ia. 315, 114 N. W. 1047.

167-34 Stanley *v.* Beckham, 153 Fed. 152; Athens Mfg. Co. *v.* Malcolm, 134 Ga. 600, 68 S. E. 329.

168-35 Baker *v.* S., 4 Ala. App. 17, 58 S. 971; Vadeboncoeur *v.* Hannon, 159 Ala. 617, 49 S. 292; Millington *v.* O'Dell, 35 Ind. App. 225, 73 N. E. 949; Judy *v.* Buck, 72 Kan. 106, 82 P. 1104; Hager *v.* Donovan, 75 Kan. 43, 88 P. 637; Hart *v.* Brierley, 189 Mass. 598, 76 N. E. 286; Siebert *v.* Hatcher, 205 Mo. 83, 102 S. W. 962; Blondel *v.* Bolander, 80 Neb. 531, 114 N. W. 574; Maslin *v.* Childs, 130 N. Y. S. 902; Whitmire *v.* Heath, 155 N. C. 304, 71 S. E. 313; Bernhardt *v.* Dutton, 146 N. C. 206, 59 S. E. 651; Burns *v.* R. Co., 213 Pa. 280, 62 A. 845; Evans *v.* Scott (Tex. Civ.), 97 S. W. 116.

169-36 Shilling *v.* Varner (Ind.), 103 N. E. 404; Stout *v.* S., 174 Ind. 395, 92 N. E. 161; C. *v.* Min Sing, 202 Mass. 121, 88 N. E. 918. *Comp.* Field *v.* Schuster, 26 Pa. Super. 82.

169-37 Hager *v.* Donovan, 75 Kan. 43, 88 P. 637; Lenfest *v.* Robbins, 101 Me. 176, 63 A. 729.

169-39 Hager *v.* Donovan, supra; S. *v.* Unsworth, 85 N. J. L. 237, 88 A. 1097. See Schmidt *v.* Schweitzer, 137 N. Y. S. 807. Evidence offered for specific purpose cannot be used for more general purpose. Barasch *v.* Kramer, 62 Misc. 475, 115 N. Y. S. 176.

170-40 McMillan *v.* Reese, 61 Fla. 360, 55 S. 388. See Sanford *v.* Millikin, 144 Mich. 311, 107 N. W. 884.

171-41 Brent *v.* Baldwin, 160 Ala. 635, 49 S. 343; Oldham *v.* Ramsner, 149 Cal. 540, 87 P. 18; Bowden *v.* Bowden, 125 Ga. 107, 53 S. E. 606; Keenan *v.* Drew, 144 Ill. App. 388; Hart *v.* Brierley, 189 Mass. 598. 76 N. E. 286; Starks & Co. *v.* R. Co., 165 Mich. 642, 131 N. W. 143; Dubois *v.* Roby, 84 Vt. 465, 80 A. 150; Lewis Co. *v.* Montgomery, 59 W. Va. 75, 52 S. E. 1017.

171-42 Bain *v.* Bain, 150 Ala. 453, 43 S. 562; Logan *v.* McMullen, 4 Cal. App. 154, 87 P. 285; Oldham *v.* Ramsner, 149 Cal. 540, 87 P. 18; Am. T. Co. *v.* Siegel, 221 Ill. 145, 77 N. E. 588; Ross *v.* S., 169 Ind. 388, 82 N. E. 781; James *v.* R. Co., 201 Mass. 263, 87 N. E. 474; Borden *v.* Lynch, 34 Mont. 503, 87 P. 609; Burns *v.* R. Co., 213 Pa. 280, 62 A. 845; S. *v.* Merrill, 85 Vt. 35, 80 A. 819. But see Keats *v.* Co., 29 Pa. Super. 480; Gorham *v.* Moor, 197 Mass. 522, 84 N. E. 436.

173-43 Martin *v.* Hertz, 224 Ill. 84, 79 N. E. 558.

173-44 Canada-A., etc. Co. *v.* Flanders, 145 Fed. 875, 76 C. C. A. 1; Weeks *v.* Co., 133 Ga. 472, 66 S. E. 168; Lockwood *v.* R. Co., 200 Mass. 537, 86 N. E. 934; Hart *v.* Brierley, 189 Mass. 598, 76 N. E. 286.

Separate instrument should be offered separately, but collective offer and admission, where party had opportunity to object to each instrument separately, no error. Lee *v.* Giles, 124 Ga. 494, 52 S. E. 806.

174-46 Huntington *v.* U. S., 175 Fed. 950, 99 C. C. A. 440; P. *v.* Hogan, 11 Cal. App. 599, 105 P. 938; Davis P. S. Co. *v.* Co., 47 Colo. 68, 104 P. 389; Wallach *v.* Macfarland, 31 App. Cas. (D. C.) 130; Modern Woodmen *v.* Miles, 178 Ind. 105, 97 N. E. 1009; Indianap-

olis Co. *v.* Hall, 165 Ind. 557, 76 N. E. 242; Keeler Co. *v.* Schott, 1 Pa. Super. 458; Jacoby *v.* Ins. Co., 10 Pa. Super. 171.

Objection properly sustained. — P. *v.* Venard, 168 Ill. App. 254; Western Min. Sup. Co. *v.* Melzner, 48 Mont. 174, 136 P. 44; White *v.* R. Co., 87 Vt. 330, 89 A. 618.

Contra in criminal cases.—C. *v.* Colandro, 231 Pa. 343, 80 A. 571.

Offer including immaterial matters should not preclude proof of material matters. In re Young, 33 Utah 382, 94 P. 731.

175-47 Boyer *v.* Ins. Co., 1 Cal. App. 54, 81 P. 671; Keeler Co. *v.* Schott, 1 Pa. Super. 458; Rogers *v.* Chester (R. I.), 69 A. 848. See P. *v.* Venard, 168 Ill. App. 254; Western, etc. Co. *v.* Melzner, 48 Mont. 174, 136 P. 44; Ickes *v.* Ickes, 237 Pa. 582, 85 A. 885; White *v.* R. Co., 87 Vt. 330, 89 A. 618. *Comp.* Bausbach *v.* Reiff, 237 Pa. 482, 85 A. 762.

May be excluded as whole. Zinser *v.* Dist., 175 Ill. App. 9; Riemensnider *v.* Riemensnider, 179 Ill. App. 209; Smith *v.* Plant, 216 Mass. 91, 103 N. E. 58.

175-48 Crucible S. Co. *v.* Moen, 167 Fed. 956, 93 C. C. A. 356; Allen *v.* Assn. (Ia.), 143 N. W. 574.

176-49 Rogers *v.* Chester (R. I.), 69 A. 848.

177-50 Security T. Co. *v.* Robb, 142 Fed. 78, 73 C. C. A. 302; Coulter *v.* Assn., 144 Ill. App. 255; *cit.* the text; Board *v.* Lovejoy, 143 Mich. 555, 107 N. W. 276.

Where portion of document offered adverse party seeking to have all of it in must specify bearing of suppressed portion. Rogers *v.* Chester (R. I.), 69 A. 848.

OFFICERS

Recitals in record, 196-55; *Neglect of duty*, 199-62; *Burden of proof as to compensation*, 202-76.

182-1 Dorian *v.* Walters, 132 Ky. 54, 116 S. W. 313.

Receipt in full from sureties of officer in default at previous term not open to collateral attack on question of eligibility to second term, state paid in full by them. S. *v.* Reid, 122 La. 590, 47 S. 912.

182-3 Dorian *v.* Walters, 132 Ky. 54, 116 S. W. 313.

Existence of office for which compensation sought must be shown by plaintiff. Fact that name was on pay roll as certified by authorities does not establish. Bullis *v.* Chicago, 235 Ill. 472, 85 N. E. 614.

182-4 Wellington *v.* Corinna, 104 Me. 252, 71 A. 889; Holton *v.* Beck, 20 N. D. 5, 125 N. W. 1048; U. S. *v.* Weems, 7 Phil. Isl. 241 (admission by accused of exercise of official duties). See S. *v.* Poulin, 105 Me. 224, 74 A. 119.

183-7 Holtan *v.* Beck, 20 N. D. 5, 125 N. W. 1048, quot. the text; inchoate proceedings incompetent to show valid appointment.

184-9 Russell *v.* S., 171 Ind. 623, 87 N. E. 13.

184-11 Barry *v.* Smith, 191 Mass. 78, 77 N. E. 1099 (officer's testimony competent to prove he is officer); S. *v.* Twining, 73 N. J. L. 3, 62 A. 402; S. *v.* Clark, 64 W. Va. 625, 63 S. E. 402. See Morrison *v.* Pence, 82 Kan. 420, 108 P. 831.

185-14 See Howland *v.* Prentice, 143 Mich. 347, 106 N. W. 1105.

Burden on party alleging qualification of officer to act in place of another. Gasson *v.* Atkins, 59 Misc. 145, 112 N. Y. S. 224.

188-28 Miner *v.* Beurmann, 165 Mich. 672, 131 N. W. 388; S. *v.* Grimm, 220 Mo. 483, 119 S. W. 626.

188-29 Bullis *v.* Chicago, 235 Ill. 472, 85 N. E. 614; Dorian *v.* Walters, 132 Ky. 54, 116 S. W. 313; Wilson *v.* Tye, 31 Ky. L. R. 491, 102 S. W. 856.

189-30 P. *v.* Davidson, 2 Cal. App. 100, 83 P. 161.

189-32 Touart *v.* S., 173 Ala. 453, 56 S. 211.

190-33 Mahon *v.* S., 46 Tex. Cr. 234, 79 S. W. 28.

191-36 *Contra*, Williams *v.* Finch, 155 Ala. 399, 46 S. 645.

192-40 S. *v.* Huff, 172 Ind. 1, 87 N. E. 141, ex parte decision by administrative officer, not convincing.

192-41 Intention material element in determining whether absence results in abandonment of office; proof of neglect not decisive. School Dist. *v.* Garrison, 90 Ark. 335, 119 S. W. 275.

192-42 Written resignation delivered to officer authorized to receive or to fill vacancy presumptive, but not conclusive of intention to resign. S. *v.* Budworth, 104 Minn. 257, 116 N. W. 486.

Reasons leading to removal of officer

immaterial. Sullivan *v.* Martin, 81 Conn. 585, 71 A. 783.

193-45 **Action of governor,** after notice and hearing, conclusive. P. *v* Ahearn, 139 App. Div. 88, 123 N. Y. S. 845.

193-46 Presumed officer knows whether his claim authorized, and that he has collected fees in advance as entitled. Law *v.* Smith, 34 Utah 394, 98 P. 300.

193-48 For particular rulings, see Cutchin *v.* City, 113 Va. 452, 74 S. E. 403.

Conversation relative to cause of removal, competent. P. *v.* Tompkins, 208 N. Y. 353, 101 N. E. 865.

Civil service rules approved by state civil service commission are competent. P. *v.* Tompkins, supra.

196-55 **Judgment of acquittal** not conclusive on hearing of charges of conduct unbecoming officer. P. *v.* Bingham, 134 App. Div. 602, 119 N. Y. S. 417.

Evidence to show malfeasance by filing false claim. See Law *v.* Smith, 34 Utah 394, 98 P. 300.

Charges of neglect of duty not met by proof that city may be protected against financial loss thereby. Bolger *v.* Detroit, 153 Mich. 540, 117 N. W. 171.

Trial body may view work alleged insufficiently supervised to better understand testimony, especially in presence of counsel for arraigned officer. Bolger *v.* Detroit, supra.

Recitals in record as to motive of members of body voting to remove employe, or of body not conclusive, if consisting of matter not required spread on record. Garvey *v.* Lowell, 199 Mass. 47, 85 N. E. 182.

197-56 P. *v.* Bingham, 134 App. Div. 602, 119 N. Y. S. 417.

Evidence must be clear and satisfactory if officer vested with discretion. S. *v.* Hospers, 147 Ia. 712, 126 N. W. 818.

197-57 Costas *v.* Insular Government, 221 U. S. 623; The Ship Poll Cary, 45 Ct. Cl. 219; Appling *v.* S., 195 Ark. 185, 128 S. W. 866; McCarthy *v.* Board, 15 Cal. App. 576, 115 P. 458; P. *v.* Land Co. (Colo.), 117 P. 141; Frost *v.* Board, 43 Colo. 43, 95 P. 289; McLean *v.* Co., 44 Colo. 184, 98 P. 16; Board *v.* Robbins, 82 Conn. 623, 74 A. 938 (negligible in weight); S. *v.* R. Co., 58 Fla. 524, 50 S. 425; Rowe *v.* Spencer, 132 Ga. 426, 64 S. E. 468; Hamby *v.* Collier, 136 Ga. 309, 71 S. E. 431; Independent Highway *v.* Ada County, 24 Ida. 416, 134 P. 542; Teeple *v.* S., 171 Ind. 268, 86 N. E. 49; Pittsburgh, etc. R. Co. *v.* Comrs., 171 Ind. 189, 86 N. E. 328; Melville *v.* S., 173 Ind. 352, 89 N. E. 490; Christensen *v.* Peterson (Ia.), 144 N. W. 315; S. *v.* Clark, 141 Ia. 297, 119 N. W. 719; Dever *v.* Platt, 81 Kan. 200, 105 P. 445; Ray *v.* Miller, 78 Kan. 843, 98 P. 239; Taylor *v.* Sparks (Ky.), 118 S. W. 970; Story *v.* Little, 135 Ky. 115, 121 S. W. 1023; Higgins *v.* Carbajal, 123 La. 733, 49 S. 489; Manuel *v.* Mayor, 111 Md. 196, 73 A. 705; Whiting *v.* R. Co., 202 Mass. 298, 88 N. E. 907; Curtiss *v.* Assn., 178 Mich. 50, 144 N. W. 818; Martin *v.* Dist., 93 Minn. 409, 101 N. W. 952; Day *v.* Smith, 87 Miss. 395, 39 S. 526; Shelton *v.* Franklin, 224 Mo. 342, 123 S. W. 1084; Griffin *v.* Franklin, 224 Mo. 667, 123 S. W. 1092; Conner *v.* Nevada, 188 Mo. 148, 86 S. W. 256; Smith *v.* Vickery, 235 Mo. 413, 138 S. W. 502; S. *v.* Robertson, 142 Mo. App. 38, 125 S. W. 215; Van Natta *v.* R. E. Co., 221 Mo. 373, 120 S. W. 738; Childers *v.* Pickenpaugh, 219 Mo. 376, 118 S. W. 453; Van Pelt *v.* Parry, 218 Mo. 680, 118 S. W. 425; Kreisel *v.* Snavely, 135 Mo. App. 155, 115 S. W. 1059; Western U. T. Co. *v.* Dodge County, 80 Neb. 23, 117 N. W. 468; Brunke *v.* Gruben, 84 Neb. 806, 122 N. W. 37; S. *v.* Clark, 32 Nev. 145, 104 P. 593; S. *v.* Kelly, 76 N. J. L. 576, 70 A. 342; In re New York, 137 App. Div. 803, 122 N. Y. S. 656; Remington *v.* S., 116 App. Div. 522, 101 N. Y. S. 952; Craft *v.* Lent, 53 Misc. 481, 103 N. Y. S. 366; In re Webster, 106 App. Div. 360, 94 N. Y. S. 1050; Culp *v.* City, 130 N. Y. S. 705; P. *v.* Hayes, 135 App. Div. 19, 119 N. Y. S. 808; Brayman *v.* Grant, 130 App. Div. 272, 114 N. Y. S. 336; In re Comrs., 64 Misc. 620, 120 N. Y. S. 580; Thrash *v.* Comrs., 150 N. C. 693, 64 S. E. 772; In re Farkash, 8 O. N. P. (N. S.) 137; Christ *v.* Fent, 16 Okla. 375, 84 P. 1074; S. *v.* Olcott, 67 Or. 214, 135 P. 95, 902; Smith *v.* Cox, 83 S. C. 1, 65 S. E. 222; S. *v.* Flagstad, 25 S. D. 337, 126 N. W. 585; Gibson *v.* Smith, 24 S. D. 514, 124 N. W. 733; Fullerton L. Co. *v.* Tinker, 22 S. D. 427, 118 N. W. 700; Balden *v.* S., 122 Tenn. 704, 127 S. W. 134; Flores *v.* Hovel (Tex. Civ.), 125 S. W. 606; Gillean *v.* Witherspoon (Tex. Civ.), 124

S. W. 909; Slaughter *v.* Cooper, 56 Tex. Civ. 169, 121 S. W. 173; Webb *v.* Caldwell (Tex. Civ.), 112 S. W. 97; Tooele Bldg. Assn. *v.* High School (Utah), 134 P. 894; Carpenter *v.* Gibson, 82 Vt. 336, 73 A. 1030 (non-resident notary); S. *v.* Heuston, 56 Wash. 268, 105 P. 474; Great Northern R. Co. *v.* Snohomish County, 54 Wash. 23, 102 P. 881; S. *v.* Dist., 56 Wash. 488, 106 P. 203; Taylor *v.* Village, 147 Wis. 91, 132 N. W. 593; S. *v.* Dahl, 140 Wis. 301, 122 N. W. 748; S. *v.* Rose, 140 Wis. 360, 122 N. W. 751; Rogers-R. Co. *v.* Board, 139 Wis. 135, 120 N. W. 849; Rogers *v.* Board, 139 Wis.143, 120 N. W. 852; Strange *v.* Land Co., 136 Wis. 516, 117 N. W. 1023; State Bk. *v.* Kienberger, 140 Wis. 517, 122 N. W. 1132. See vol. 9, p. 944, n. 51, and supplement thereto. *Contra* where all facts necessary to give jurisdiction must affirmatively appear in record. Chicago, etc. R. Co. *v.* County, 87 Ark. 406, 112 S. W. 977.

Presumption conclusive on collateral attack where canvassing board certified result of election. In re McConaughy, 106 Minn. 392, 119 N. W. 408.

198-58 Belcher *v.* Harr, 94 Ark. 221, 126 S. W. 714; San Francisco S. Co. *v.* Ind. Co., 11 Cal. App. 695, 106 P. 111; S. *v.* Barr, 7 Penne. (Del.) 340, 79 A. 730; Ogle *v.* Belleville, 143 Ill. App. 514; Martindale *v.* Rochester, 171 Ind. 250, 86 N. E. 321; In re Drainage Dist., 146 Ia. 564, 123 N. W. 1059; Molyneux *v.* Grimes, 78 Kan. 830, 98 P. 278; Barron *v.* Kaufman, 131 Ky. 642, 115 S. W. 787; Canard *v.* S., 2 Okla. Cr. 505, 103 P. 737; Mejia *v.* Alimorong, 4 Phil. Isl. 572; Anderson *v.* Co. (Tex. Civ.), 120 S. W. 918; S. *v.* Montgomery, 57 Wash. 192, 106 P. 771; S. *v.* City, 64 Wash. 388, 116 P. 878; Olwell *v.* Travis, 140 Wis. 547, 123 N. W. 111.

Presumption disappears in face of opposing evidence. Huttig-M. P. B. Co. *v.* Co., 140 Mo. App. 374, 124 S. W. 1094.

198-59 Bryan *v.* Straus, 157 Mich. 49, 121 N. W. 301; S. *v.* Stock Co., 56 Or. 283, 106 P. 780; Garrison *v.* Arnett (Tex. Civ.), 126 S. W. 611. Existence of authority to act must be shown by party claiming. First Nat. Bk. *v.* Whisenhunt, 94 Ark. 583, 127 S. W. 968.

198-60 Porter *v.* S., 124 Ga. 297, 52 S. E. 283; Lauve *v.* Wilson, 114 La. 699, 38 S. 522; Abbott *v.* Rockland, 105 Me. 147, 73 A. 865.

199-61 Buchanan *v.* Barnsley, 51 Tex. Civ. 253, 112 S. W. 118.

199-62 No presumption as to use of funds by officers. Leavitt *v.* Somerville, 105 Me. 517, 75 A. 54.

Future official action presumed in harmony with duty, notwithstanding contrary declarations in advance. Taylor *v.* Sparks (Ky.), 118 S. W. 970; S. *v.* Adcock, 225 Mo. 335, 124 S. W. 1100.

No presumption that officers will exceed jurisdiction though asked. Atchison, etc. R. Co. *v.* Co., 22 Okla. 106, 98 P. 330.

Officer sued for neglect of duty concerning levy must justify failure. First I. Bk. *v.* Lee, 19 N. D. 10, 120 N. W. 1093.

199-63 Louisiana R. Com. *v.* Co., 212 U. S. 414; P. *v.* Montez, 48 Colo. 436, 110 P. 639; Stoy *v.* Co., 166 Ind. 316, 76 N. E. 1057; Barry *v.* Smith, 191 Mass. 78, 77 N. E. 1099; P. *v.* Shellenberg, 133 App. Div. 79, 117 N. Y. S. 820; Missouri, etc. R. Co. *v.* S., 24 Okla. 331, 103 P. 613; Chicago, etc. R. Co. *v.* S., 24 Okla. 370, 103 P. 617; Atchison, etc. R. Co. *v.* S., 23 Okla. 510, 101 P. 262; Slaughter *v.* Cooper, 56 Tex. Civ. 169, 121 S. W. 173; Berger *v.* DeLoach, 56 Tex. Civ. 532, 121 S. W. 591; Salt Lake Co. *v.* Clinton, 39 Utah 462, 117 P. 1075; Great Northern R. Co. *v.* County, 54 Wash. 23, 102 P. 881.

200-66 C. *v.* Wotton, 201 Mass. 81, 87 N. E. 202; Barry *v.* Smith, 191 Mass. 78, 77 N. E. 1099, 5 L. R. A. (N. S.) 1028.

200-67 Ineligibility or defect in election must be shown. C. *v.* Wotton, 201 Mass. 81, 87 N. E. 202.

201-72 Roberts *v.* St. Marys, 78 Kan. 707, 98 P. 211.

201-73 In re Bogaskie, 58 Misc. 243, 109 N. Y. S. 598.

202-75 See P. *v.* Davidson, 2 Cal. App. 100, 83 P. 161; Denver *v.* Spencer, 34 Colo. 270, 82 P. 590; P. *v.* Carr, 231 Ill. 502, 83 N. E. 269.

202-76 Duties of officer, testified to by him in absence of written evidence defining. Perry *v.* Sheldon, 30 R. I. 426, 75 A. 690.

Burden as to compensation.—If duties performed by officer not incidental to those imposed burden on defendant to show rendition without expectation of compensation. Merzbach *v.* Mayor, 163 N. Y. 16, 57 N. E. 96; Morgan *v.* New

York, 190 N. Y. 237, 82 N. E. 1089. If services rendered incidental to regular duties plaintiff must show rendition with such expectation by himself and superior. Bookman *v.* New York, 133 App. Div. 242, 117 N. Y. S. 197.

Authority of officer shown by acts if formal action by governing body not required. Roberts *v.* St. Marys, 78 Kan. 707, 98 P. 211.

203-78 Presumption of regularity of official action overcome by slight evidence of wilful neglect, thereby casting burden on officer. Frost *v.* Board, 43 Colo. 43, 95 P. 289.

203-82 Officer must show money properly applied entrusted for disbursement. Flowers *v.* County, 138 Ky. 59, 127 S. W. 512.

Finding by superior of neglect of duty by officer presumed correct. Dockins *v.* Wilbanks, 6 Ga. App. 680, 65 S. E. 689.

204-83 P. *v.* Templeman, 169 Ill. App. 287; Sharp *v.* S. (Ind. App.), 99 N. E. 1072; S. *v.* O'Neill, 114 Mo. App. 611, 90 S. W. 410; Union Inv. Co. *v.* Rosenzweig (Wash.), 139 P. 874.

Proof of falsity of notary's certificate puts burden on him to show action in good faith. Blaes *v.* C., 29 Ky. L. R. 908, 96 S. W. 802. See Phillips *v.* Eggert, 133 Wis. 318, 113 N. W. 686.

204-84 Collection of taxes presumed made after lapse of reasonable time. Dudley *v.* Barrett, 66 W. Va. 363, 66 S. E. 507.

207-98 Aultman T. M. Co. *v.* Burchett, 15 Okla. 490, 83 P. 719.

207-2 Burden shifted by slight proof of facts tending to show culpability if facts determinative of officer's liability peculiarly within knowledge. Kleinpeter *v.* Castro, 11 Cal. App. 83, 103 P. 1090.

210-9 See U. S. *v.* Pierson, 145 Fed. 814, 76 C. C. A. 390.

213-20 Cicero *v.* Grisko, 240 Ill. 220, 88 N. E. 478 (though made by clerk under officer's direction and not examined); Heritage *v.* S., 43 Ind. App. 595, 88 N. E. 114 (statute makes settlements conclusive though compromises to avoid litigation).

213-22 Trustees *v.* Cowden, 240 Ill. 39, 88 N. E. 285.

214-24 See Nagle *v.* U. S., 145 Fed. 302, 76 C. C. A. 181.

215-27 See U. S. *v.* Pierson, 145 Fed. 814, 76 C. C. A. 390.

216-29 Trustees *v.* Cowden, 240 Ill. 39, 88 N. E. 285.

216-33 U. S. *v.* Pierson, 145 Fed 814, 76 C. C. A. 390.

Sureties cannot show reports by principal misrepresented sum in his hands. Cowden *v.* Trustees, 143 Ill. App. 241.

217-34 Officer's books kept during second term inadmissible in action on bond given for first term, except on cross-examination of expert accountant to show errors in report. King County *v.* Whittlesey, 52 Wash. 206, 100 P. 320.

222-54 Nature of act by officer shown as bearing on good faith. Kirk *v.* Board, etc., 83 S. C. 372, 65 S. E. 387.

226-72 Cicero *v.* Grisko, 240 Ill. 220, 88 N. E. 478; S. *v.* Leeper, 146 N. C. 655, 61 S. E. 585.

227-78 State must show corrupt act by officer whose removal sought. Burden not cast upon him by evidence which shows only part of duties discharged by him and overpayment therefor. S. *v.* Kennedy, 82 Kan. 373, 108 P. 837.

228-81 See vol. 11, p. 801, n. 58, and supplement thereto.

229-86 Officer accused of falsely certifying to affidavit to be used in pension case may show oath administered to affiant before statement written. U. S. *v.* Medina, 15 N. M. 204, 103 P. 976.

Lack of funds shown to excuse nonperformance of duty which could not be met without them. Dunten *v.* S., 172 Ind. 59, 87 N. E. 733.

229-89 Abnormal profits by officer call for explanation. U. S. *v.* Carter, 217 U. S. 286.

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And the indictment, 232-1; *Statutory regulation,* 234-6.

232-1 Texas & P. R. Co. *v.* Rosborough, 209 Fed. 205, 126 C. C. A. 299; Boice *v.* S. (Ala. App.), 65 S. 83; Savage *v.* S., 9 Ala. App. 334, 62 S. 999; Roden Groc. Co. *v.* Gipson, 9 Ala. App. 164, 62 S. 388; Bradley *v.* S., 3 Ala. App. 212, 58 S. 95; King *v.* Electric Co., 1 Ala. App. 639, 55 S. 1030; Pressley *v.* S., 166 Ala. 17, 52 S. 337; Southern R. Co. *v.* Hatter, 165 Ala. 423, 51 S. 723; Rain *v.* S. (Ariz.), 137 P. 550; Logia Suprema *v.* Aguirre, 14 Ariz. 390, 129 P. 503; Davey *v.* S., 99 Ark. 547, 139

S. W. 629; San Pedro L. Co. *v.* Schroeter, 156 Cal. 158, 103 P. 888; P. *v.* Maughs, 8 Cal. App. 107, 96 P. 407; Land *v.* Johnston, 156 Cal. 253, 104 P. 449; Wendling L. Co. *v.* Co., 153 Cal. 411, 95 P. 1029; Moody *v.* Peirano, 4 Cal. App. 411, 88 P. 380; Bashore *v.* Mooney, 4 Cal. App. 276, 87 P. 553; In re Dolbeer, 149 Cal. 227, 86 P. 695; Burnell *v.* Morrison, 46 Colo. 533, 105 P. 876; Kingsbury *v.* P., 44 Colo. 403, 99 P. 61; Sheridan *v.* Patterson, 34 Colo. 267, 82 P. 539; Prudential Ins. Co. *v.* Hummer, 36 Colo. 208, 84 P. 61; Treasury T. Co. *v.* Gregory, 38 Colo. 212, 88 P. 445; San Miguel M. Co. *v.* Bonner, 33 Colo. 207, 79 P. 1025; S. *v.* Buonomo (Conn.), 90 A. 225; Holcomb Co. *v.* Clark, 86 Conn. 319, 85 A. 376; Sherlock *v.* Varn., 64 Fla. 447, 59 S. 953; Dannelly *v.* Russ, 54 Fla. 285, 45 S. 496; McMillan *v.* Reese, 61 Fla. 360, 55 S. 388; Minchew *v.* Lumb. Co., 5 Ga. App. 154, 62 S. E. 716; Cutter-S. Co. *v.* Clements, 5 Ga. App. 291, 63 S. E. 58; Abbott *v.* S., 11 Ga. App. 43, 74 S. E. 621; Glasco *v.* S., 137 Ga. 336, 73 S. E. 578; Southern R. Co. *v.* Clay, 130 Ga. 563, 61 S. E. 226; Standard C. M. *v.* Cheatham, 125 Ga. 649, 54 S. E. 650; Schwitters *v.* Springer, 236 Ill. 271, 86 N. E. 102; Offner *v.* R. Co., 174 Ill. App. 82; Wenger *v.* Const. Co., 170 Ill. App. 383; Hale *v.* Hale, 169 Ill. App. 272; Tinkle *v.* Wallace, 167 Ind. 382, 79 N. E. 355; American Surety Co. *v.* S., 50 Ind. App. 475, 98 N. E. 829; City of Logansport *v.* Newby, 49 Ind. App. 674, 98 N. E. 4; Cook *v.* S., 169 Ind. 430, 82 N. E. 1047; Miller *v.* Springfield, 6 Ind. Ty. 115, 89 S. W. 1011; S. *v.* Stutches (Ia.), 144 N. W. 597; Adamson *v.* Harper (Ia.), 143 N. W. 841; S. *v.* Gulliver (Ia.), 142 N. W. 948; Kossuth Bk. *v.* Richardson, 141 Ia. 738, 118 N. W. 906; Fritz *v.* Co., 136 Ia. 699, 114 N. W. 193; Van Camp *v.* City, 130 Ia. 716, 107 N. W. 933; S. *v.* Seligman, 127 Ia. 415, 103 N. W. 357; Michner *v.* Ford, 78 Kan. 837, 98 P. 273; McBride *v.* Steinweden, 72 Kan. 508, 83 P. 822; Smith *v.* C., 154 Ky. 613, 157 S. W. 1089; Duff *v.* C., 153 Ky. 655, 156 S. W. 149; Bennett *v.* C., 150 Ky. 604, 150 S. W. 806; Hathaway *v.* Williams, 105 Me. 565, 75 A. 129; C. *v.* Dorr, 216 Mass. 314, 103 N. E. 902; C. *v.* MacKenzie, 211 Mass. 578, 98 N. E. 598; Greene *v.* Corey, 210 Mass. 536, 97 N. E. 70; Carriere *v.* Co., 203 Mass. 322, 89 N. E. 544; Morena *v.* Winston, 194 Mass. 378, 80 N. E. 473; Mally *v.* W. Co. (Mich.), 148 N. W. 443; Blickley *v.* Luce, 148 Mich. 233, 111 N. W. 752; Mueller *v.* Suprs., 117 Minn. 290, 135 N. W. 996; Dales *v.* R. Co., 169 Mo. App. 183, 152 S. W. 401; Brashear *v.* American Patriots, 161 Mo. 566, 144 S. W. 163; S. *v.* Dilts, 191 Mo. 665, 90 S. W. 782; S. *v.* Taylor, 202 Mo. 1, 100 S. W. 41; S. *v.* Hill, 46 Mont. 24, 126 P. 41; Butte, etc. Co. *v.* Barker, 35 Mont. 327, 89 P. 302, 90 P. 177; Noyes *v.* Clifford, 37 Mont. 138, 94 P. 842; Hoskovec *v.* R. Co., 85 Neb. 295, 123 N. W. 305; Union P. R. Co. *v.* Edmondson, 77 Neb. 682, 110 N. W. 650; P. *v.* Ferrone, 204 N. Y. 551, 98 N. E. 8; Am. Steel & Wire Co. *v.* Copeland, 159 N. C. 556, 75 S. E. 1002; S. *v.* Bickford (N. D.), 147 N. W. 407; S. *v.* Tolley, 23 N. D. 284, 136 N. W. 784; Zilke *v.* Johnson, 22 N. D. 75, 132 N. W. 640; Petersburg S. Dist. *v.* Peterson, 14 N. D. 344, 103 N. W. 756; Cincinnati *v.* McLaughlin, 31 O. C. C. 503; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300, 101 P. 204, cit. the text; Baldi *v.* Ins. Co., 30 Pa. Super. 213; Anderton *v.* Blais, 28 R. I. 78, 65 A. 602; Tucker *v.* R. Co. (R. I.), 69 A. 850; Bolton *v.* Co., 76 S. C. 529, 57 S. E. 543; Hughes *v.* S., 126 Tenn. 40, 148 S. W. 543; Raleigh *v.* S. (Tex. Cr.), 168 S. W. 1050; Corbitt *v.* S. (Tex. Cr.), 163 S. W. 436; Howard *v.* S. (Tex. Cr.), 163 S. W. 429; White *v.* S. (Tex. Cr.), 150 S. W. 609; Illinois Cent. R. Co. *v.* Morris (Tex. Civ.), 144 S. W. 1163; Johnson *v.* S. (Tex. Cr.), 149 S. W. 190; Beeson *v.* S., 60 Tex. Cr. 39, 130 S. W. 1006 (under Code Crim. Proc. 1895, art. 698); Welch *v.* S., 57 Tex. Cr. 111, 122 S. W. 880; St. Louis, etc. R. Co. *v.* Cassidy, 48 Tex. Civ. 484, 107 S. W. 628; Holt *v.* Nielson, 37 Utah 566, 109 P. 470; S. *v.* Pierce, 87 Vt. 144, 88 A. 740; Chesapeake, etc. Co. *v.* Chapman, 115 Va. 32, 78 S. E. 631; Bettman *v.* Skinner, 113 Va. 24, 73 S. E. 436; Norfolk & W. R. Co. *v.* Thomas, 110 Va. 622, 66 S. E. 817; Pocahontas C. Co. *v.* Williams, 105 Va. 708, 54 S. E. 868; Quigley *v.* Phelps, 74 Wash. 73, 132 P. 738; Linstedt *v.* Co., 73 Wash. 624, 132 P. 403; Anderson *v.* Co., 57 Wash. 502, 107 P. 376; S. *v.* Gohl, 46 Wash. 408, 90 P. 259; Richardson *v.* Agnow, 46 Wash. 117, 89 P. 404; Rowe *v.* Co., 44 Wash. 658, 87 P. 921; Siemers *v.* Ins. Co., 143 Wis. 114, 126 N. W. 669; Olwell *v.* Skobis, 126 Wis. 308,

105 N. W. 777; Howard *v.* Beldenville L. Co., 129 Wis. 98, 108 N. W. 48.

See Holcomb Co. *v.* Clark, 86 Conn. 319, 85 A. 376; Decker *v.* S. (Tex. Cr.), 154 S. W. 566; S. *v.* MacLeod, 78 Wash. 175, 138 P. 648; vol. 12, p. 6, n. 5, and supplement thereto.

A holding that good character of defendant cannot be shown till after defendant has testified or evidence as to self defense has been adduced is error. Gilbert *v.* S., 8 Okla. Cr. 543, 128 P. 1100, 129 P. 671.

Discretion not to be exercised to aid trickery or promote unfairness. Herricks *v.* R. Co., 257 Ill. 264, 100 N. E. 897.

In Am. Steel & Wire Co. *v.* **Copeland,** 159 N. C. 556, 75 S. E. 1002, "evidence of the defendants as to the conversation with the agent of the plaintiff was not strictly competent at the time it was offered, because it was a declaration after the event, but it appears that the deposition of the agent was on file, in which he denied the contract as contended for by the defendants, but that this deposition was introduced by the plaintiff, and the declaration of the agent was competent to contradict his evidence contained in the deposition. His honor could have permitted the introduction of the evidence out of its order, in the exercise of his discretion, and, if his ruling was not on this ground, it is not reversible error, because the evidence was made competent by the introduction of the deposition."

Reopening cases.—Savage *v.* S., 8 Ala. App. 334, 62 S. 999; S. *v.* Martin, 102 Miss. 165, 59 S. 7; Fegler *v.* Gibson (Mo. App.), 166 S. W. 1096; S. *v.* Solon, 247 Mo. 672, 153 S. W. 1023; P. *v.* Soule, 142 N. Y. S. 876; Gilbert *v.* S., 8 Okla. Cr. 329, 127 P. 889; Dring *v.* Tp., 31 S. D. 197, 140 N. W. 246; Greenwood *v.* S. (Tex. Cr.), 168 S. W. 100; Cole *v.* S. (Tex. Cr.), 156 S. W. 929. See Hamman *v.* Emerson, 135 La. ——, 65 S. 765.

Reopening case for additional evidence. Grusin *v.* S. (Ga.), 75 S. E. 350.

In New York "in a criminal trial, after the case has been finally submitted to the jury, and before their retirement, the trial may be reopened for the purpose of permitting evidence to be introduced on an essential point which had been overlooked." P. *v.* Ferrone, 204 N. Y. 551, 98 N. E. 8, *citing* P. *v.* Reilly, 49 App. Div. 218, 63 N. Y. S. 18, *aff.* without opinion 164 N. Y. 600, 50 N. E. 1128.

It is an abuse of discretion for the court to deprive a litigant of the benefit of material evidence solely upon the technical ground that it was not offered at the proper time. Bass *v.* Lumb. Co. (Tex. Civ.), 146 S. W. 658.

Before testimony received in felony indictment must be read to accused if statute requires, or testimony received before must be reintroduced, which must be affirmatively shown, as must waiver of right to have it read. Essary *v.* S., 53 Tex. Cr. 596, 111 S. W. 927.

234-2 P. *v.* Emmons, 7 Cal. App. 685, 95 P. 1032; S. *v.* Washelesky, 81 Conn. 22, 70 A. 62; P. *v.* Lukoszus, 242 Ill. 101, 89 N. E. 749; Cook *v.* S., 169 Ind. 430, 82 N. E. 1047; S. *v.* Gebbia, 121 La. 1083, 47 S. 32; S. *v.* Pierce, 87 Vt. 144, 88 A. 740. See vol. 3, p. 663; n. 13, and supplement thereto. But see Brown *v.* S., 88 Miss. 166, 40 S. 737, defendant cannot be controlled in the order of introduction of testimony.

234-3 American S. Co. *v.* Works, 31 App. Cas. (D. C.) 304; Central Nat. Bk. *v.* Bk., 31 App. Cas. (D. C.) 391; Penn *v.* R. Co., 129 Ga. 856, 60 S. E. 172; Todd *v.* Crail, 167 Ind. 48, 77 N. E. 402; Tennessee R. Co. *v.* Walker, 155 Ky. 768, 160 S. W. 494; Duff *v.* C., 153 Ky. 655, 156 S. W. 149; P. *v.* Blake, 157 Mich. 533, 122 N. W. 113; Gulf, etc. R. Co. *v.* Matthews (Tex. Civ.), 89 S. W. 983; Howard *v.* Beldenville, 129 Wis. 98, 108 N. W. 48.

But such discretion cannot be exercised arbitrarily. Bass *v.* Lumb. Co. (Tex. Civ.), 146 S. W. 658.

234-4 Traup *v.* S., 160 Ala. 125, 49 S. 332; Rain *v.* S. (Ariz.), 137 P. 550; Logia Suprema *v.* Aguirre, 14 Ariz. 390, 129 P. 503; Midland V. R. Co. *v.* Co., 91 Ark. 180, 120 S. W. 380; P. *v.* Scott, 22 Cal. App. 54, 133 P. 496; In re Dolbeer, 149 Cal. 227, 86 P. 695; Casey *v.* Richards, 10 Cal. App. 57, 101 P. 36; Jaynes *v.* P., 44 Colo. 535, 99 P. 325; Prudential Ins. Co. *v.* Hummer, 36 Colo. 208, 84 P. 61; Sherlock *v.* Varn, 64 Fla. 447, 59 S. 953; Charles *v.* S., 58 Fla. 17, 50 S. 419; Richbourg *v.* Rose, 53 Fla. 173, 44 S. 69; Bridger *v.* Bk., 126 Ga. 821, 56 S. E. 97; Brooke *v.* Lowe, 122 Ga. 358, 50 S. E. 146; Wenger *v.* Const. Co., 170 Ill. App. 383; Morse *v.* Fuller, 164 Ill. App. 85; Hale

v. Hale, 169 Ill. App. 272; Tinkle *v.* Wallace, 166 Ind. 382, 79 N. E. 355; Adamson *v.* Harper (Ia.), 143 N. W. 844; S. *v.* Gulliver (Ia.), 142 N. W. 948; Carr *v.* Way, 141 Ia. 245, 119 N. W. 700; McBride *v.* Steinweden, 72 Kan. 508, 83 P. 822; Tenn. R. Co. *v.* Walker, 155 Ky. 768, 160 S. W. 494; Camden R. Co. *v.* Lester (Ky.), 118 S. W. 268; Louisville R. Co. *v.* Beard, 28 Ky. L. R. 921, 90 S. W. 944; Brockmiller *v.* Wks., 148 Mich. 642, 112 N. W. 688; Himmelberger-H. L. Co. *v.* McCabe, 220 Mo. 154, 119 S. W. 357; Gross *v.* Watts, 206 Mo. 373, 104 S. W. 30; Noyes *v.* Clifford, 37 Mont. 138, 94 P. 842; Butte, etc. Co. *v.* Barker, 35 Mont. 327, 89 P. 302, 90 P. 177; S. *v.* Barr, 90 Neb. 766, 134 N. W. 525; Madson *v.* Rutten, 16 N. D. 281, 113 N. W. 872; Gower *v.* Short, 36 Okla. 30, 127 P. 485; Gilbert *v.* S., 8 Okla. Cr. 329, 127 P. 889; Dring *v.* St. Lawrence, 31 S. D. 197, 140 N. W. 246; Wells *v.* R., 82 Vt. 108, 71 A. 1103; Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713; Richardson *v.* Agnew, 46 Wash. 117, 89 P. 404.

See Herrman *v.* Combs, 119 Md. 41, 85 A. 1044; Baltimore, etc. R. Co. *v.* Moon, 118 Md. 386, 84 A. 536; S. *v.* Pierce, 87 Vt. 144, 88 A. 740.

May be prejudicial to admit evidence after defendant's counsel has closed argument to jury. Balce *v.* C., 153 Ky. 558, 156 S. W. 147.

Promissory note is within rule. McKenney *v.* Ellsworth, 165 Cal. 326, 132 P. 75.

Refusal to permit introduction of evidence inadvertently omitted offered before instruction, prejudicial error. Parker-Washington Co. *v.* Dennison, 249 Mo. 449, 155 S. W. 797; Reynolds *v.* S. (Tex. Cr.), 160 S. W. 362. See Rankin *v.* Miller, 199 Fed. 342.

Relevant evidence should not be rejected because not offered until case submitted. Wood *v.* Kelsey, 90 Ark. 272, 119 S. W. 258.

234-5 Higdon *v.* Garrett, 163 Ala. 285, 50 S. 323; Wilson *v.* Jernigan, 57 Fla. 277, 49 S. 44; Putnal *v.* S., 56 Fla. 86, 47 S. 864; Jackson *v.* Co., 7 Ga. App. 644, 67 S. E. 898; Smith *v.* Kelley, 143 Ill. App. 640; German Am. Bk. *v.* Owens, 143 Ill. App. 211; Bartlett *v.* Co., 142 Ia. 538, 119 N. W. 729; S. *v.* Seligman, 127 Ia. 415, 103 N. W. 357; Harris *v.* Palmer, 25 Okla. 770, 108 P. 385; Seay *v.* Ellison, 25 Okla. 710, 107 P. 656; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300, 101 P. 204, cit. the text; Moore L. Co. *v.* Walker, 110 Va. 775, 67 S. E. 374; Bellingham *v.* Linck, 53 Wash. 208, 101 P. 843; Spencer *v.* T. Co., 53 Wash. 77, 101 P. 509.

See Ritchey *v.* Pakas, 136 App. Div. 879, 121 N. Y. S. 834.

Error not predicable on court's action. Higdon *v.* Garrett, 163 Ala. 285, 50 S. 323; Shires *v.* S., 2 Okla. Cr. 89, 99 P. 1100.

234-6 Loder *v.* Jayne, 142 Fed. 1010; Bashore *v.* Mooney, 4 Cal. App. 276, 87 P. 553; Moody *v.* Peirano, 4 Cal. App. 411, 88 P. 380; Treasury T. Co. *v.* Gregory, 38 Colo. 212, 88 P. 445; Richbourg *v.* Rose, 53 Fla. 173, 44 S. 69; Dannelly *v.* Russ, 54 Fla. 285, 45 S. 496; Standard C. M. *v.* Cheatham, 127 Ga. 649, 54 S. E. 650; Southern R. Co. *v.* Clay, 130 Ga. 563, 61 S. E. 226; Todd *v.* Crail, 167 Ind. 48, 77 N. E. 402; Burke *v.* Burke, 142 Ia. 206, 119 N. W. 129; McBride *v.* Steinweden, 72 Kan. 508, 83 P. 822; Kibby *v.* Gibson, 72 Kan. 375, 83 P. 968; S. *v.* Pousson, 134 La. 279, 63 S. 902; Pharr *v.* Shadel, 115 La. 92, 38 S. 914; Miller *v.* Leib, 109 Md. 414, 72 A. 466; Brockmiller *v.* Wks., 148 Mich. 642, 112 N. W. 688; S. *v.* Currier, 225 Mo. 642, 125 S. W. 461; Gross *v.* Watts, 206 Mo. 373, 104 S. W. 30; Noyes *v.* Clifford, 37 Mont. 138, 94 P. 842; Union P. R. Co. *v.* Edmondson, 77 Neb. 682, 110 N. W. 650; Petersburg S. Dist. *v.* Peterson, 14 N. D. 344, 103 N. W. 756; Stowell *v.* Hall, 56 Or. 256, 108 P. 182; Buck *v.* McKeesport, 223 Pa. 211, 72 A. 514; Baldi *v.* Ins. Co., 30 Pa. Super. 213; Anderton *v.* Blais, 28 R. I. 78, 65 A. 602; St. Louis, etc. R. Co. *v.* Cassidy, 48 Tex. Civ. 484, 107 S. W. 628; Pocahontas C. Co. *v.* Williams, 105 Va. 708, 54 S. E. 868; Richardson *v.* Agnew, 46 Wash. 117, 89 P. 404; Rowe *v.* Co., 44 Wash. 658, 87 P. 921; Howard *v.* Beldenville L. Co., 129 Wis. 98, 108 N. W. 48; Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777.

Rebuttal testimony received though properly adduced before resting. Prudential Ins. Co. *v.* Hummer, 36 Colo. 208, 84 P. 61; International R. Co. *v.* McVey, 46 Tex. Civ. 181, 102 S. W. 172.

Statutory regulation.—Deposition of plaintiff read after several witnesses have testified for her in chief, though statute provides no person shall tes-

tify for himself in chief, in ordinary action, after introducing testimony for himself in chief, nor in an equitable action after taking other testimony for himself in chief, where her deposition was taken before such witnesses testified. Cumberland T. T. Co. *v.* Overfield, 32 Ky. L. R. 421, 106 S. W. 242.

235-8 Owen *v.* Co., 126 Wis. 412, 105 N. W. 924.

236-9 Campbell *v.* R. Co., 95 Minn. 375, 104 N. W. 547; Yazoo R. Co. *v.* Grant, 86 Miss. 565, 38 S. 502; Warren *v.* S., 54 Tex. Cr. 443, 114 S. W. 380 (or for cross-examination). See P. *v.* Kawasaki, 23 Cal. App. 92, 137 P. 287; Osgood *v.* Poole, 165 Ill. App. 63.

236-10 Surawitz *v.* Pristasz, 201 Fed. 335, 119 C. C. A. 573; Osgood *v.* Poole, 165 Ill. App. 63; Owen *v.* Co., 126 Wis. 412, 105 N. W. 924. See Hall *v.* Hall, 153 Ky. 379, 155 S. W. 755.

236-11 Way *v.* S., 155 Ala. 52, 46 S. 273; Baum *v.* Palmer, 165 Ind. 513, 76 N. E. 108; Chesapeake & O. R. Co. *v.* White's Admx., 147 Ky. 15, 143 S. W. 1046; Painter *v.* Long, 69 W. Va. 765, 72 S. E. 1092.

Court may permit plaintiff on rebuttal to offer evidence to support action. Moody *v.* Peirano, 4 Cal. App. 411, 88 P. 380.

Error in excluding evidence cured by court's offer to admit it at close of evidence, witnesses not discharged. Nail *v.* Brown, 150 N. C. 533, 64 S. E. 434.

236-13 Wendling L. Co. *v.* Co., 153 Cal. 411, 95 P. 1029; P. *v.* Nall, 242 Ill. 284, 89 N. E. 1012; P. *v.* Barnes, 202 N. Y. 77, 95 N. E. 15; Beard *v.* Beard, 60 Or. 512, 133 P. 797, 134 P. 1196.

No abuse of discretion to refuse to receive evidence to disprove contributory negligence before evidence offered in support of that issue. Owen *v.* Co., 126 Wis. 412, 105 N. W. 924.

Litigant knowing from pleading and otherwise that adversary will attempt to defeat claim by denying existence may offer evidence of admissions or corroborative declarations by such adversary without previously examining him relative thereto and before he has testified. Atlas L. Co. *v.* Flint, 20 S. D. 118, 104 N. W. 1046.

237-14 Sheridan *v.* Patterson, 34 Colo. 267, 82 P. 539; Blickley *v.* Luce, 148 Mich. 233, 111 N. W. 752; Hall *v.* Wagner, 111 App. Div. 70, 97 N. Y. S. 570; Bunnell *v.* Kintner, 27 Pa. Super. 605; International R. Co. *v.* McVey, 46 Tex. Civ. 181, 102 S. W. 172.

237-15 Crawford *v.* S., 4 Ga. App. 789, 62 S. E. 501; Burk *v.* Reese, 143 Ia. 496, 121 N. W. 1016 (not within court's discretion to permit); Leistikow *v.* Zuelsdorf, 18 N. D. 511, 122 N. W. 340.

237-16 Evidence in chief improperly received on cross-examination. Durkheimer *v.* Co., 55 Or. 37, 104 P. 895.

238-18 Cefalu *v.* Dearborn, 162 Ala. 105, 49 S. 1030; Turner *v.* S., 160 Ala. 55, 49 S. 304; Stewart *v.* Mundy, 131 Ga. 586, 62 S. E. 986; S. *v.* Rohn, 140 Ia. 640, 119 N. W. 88; Hathaway *v.* Williams, 105 Me. 565, 75 A. 129; McCoy *v.* Niblick, 221 Pa. 123, 70 A. 577; Hughes *v.* S., 126 Tenn. 40, 148 S. W. 543; Gulf, etc. R. Co. *v.* Williams (Tex. Civ.), 136 S. W. 527; Wickham *v.* Leftwich, 112 Va. 225, 70 S. E. 503; First Nat. Bk. *v.* Wunderlich, 145 Wis. 193, 130 N. W. 98.

Evidence in chief should be offered in opening. Morehead *v.* Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Multnomah Co. *v.* Co., 49 Or. 204, 89 P. 389.

Reopening case for further evidence. Bynum *v.* Brady, 82 Ark. 603, 100 S. W. 66; W. U. T. Co. *v.* Hanley, 85 Ark. 263, 107 S. W. 1168; In re Dolbeer, 149 Cal. 227, 86 P. 695; Wilson *v.* Johnson, 51 Fla. 370, 41 S. 395; Standard C. M. *v.* Cheatham, 125 Ga. 649, 54 S. E. 650; Watson *v.* Barnes, 125 Ga. 733, 54 S. E. 723; Southern R. Co. *v.* Clay, 130 Ga. 563, 61 S. E. 226; Hock *v.* Magerstadt, 124 Ill. App. 140; P. *v.* Weimers, 225 Ill. 17, 80 N. E. 45; Tinkle *v.* Wallace, 167 Ind. 382, 79 N. E. 355; Todd *v.* Crail, 167 Ind. 48, 77 N. E. 402; Miller *v.* Co., 6 Ind. Ty. 115, 89 S. W. 1011; McBride *v.* Steinweden, 72 Kan. 508, 83 P. 822; Louisville R. Co. *v.* Beard, 28 Ky. L. R. 921, 90 S. W. 944; Morena *v.* Winston, 194 Mass. 378, 80 N. E. 473; Blickley *v.* Luce, 148 Mich. 233, 111 N. W. 752; Gross *v.* Watts, 206 Mo. 373, 104 S. W. 30; S. *v.* Miles, 199 Mo. 530, 98 S. W. 25; S. *v.* Dilts, 191 Mo. 665, 90 S. W. 782; Willett *v.* Morse (N. J.), 60 A. 362; Minard *v.* R. Co., 74 N. J. L. 39, 64 A. 1054; Standard Co. *v.* Merritt, 48 Misc. 498, 96 N. Y. S. 181; Potsdam Co. *v.* Potsdam, 112 App. Div. 810, 99 N. Y. S. 551; Petersburg S Dist. *v.* Peterson, 14 N. D. 344, 103 N. W. 756; Jones *v.* Wright (Tex. Civ.),

92 S. W. 1010; St. Louis, etc. R. Co. *v.* Johnson (Tex. Civ.), 94 S. W. 162; St. Louis, etc. R. Co. *v.* Cassidy, 48 Tex. Civ. 484, 107 S. W. 628; Gulf, etc. R. Co. *v.* Matthews (Tex. Civ.), 89 S. W. 983; Wilkie *v.* Co., 105 Va. 290, 54 S. E. 43; Howard *v.* Co., 129 Wis. 98, 108 N. W. 48. But see Lewis *v.* Helm, 40 Colo. 17, 90 P. 97.

After motion for nonsuit submitted court may grant or refuse plaintiff permission to introduce aditional evidence. Terry *v.* Williams, 148 Ala. 468, 41 S. 804; Brooke *v.* Lowe, 122 Ga. 358, 50 S. E. 146; Richardson *v.* Agnew, 46 Wash. 117, 89 P. 404. But see Pittsburg G. Co. *v.* Roquemore (Tex. Civ.), 88 S. W. 449.

When by reason of accident, inadvertence or mistake as to necessity for doing so to make out a prima facie case, plaintiff has omitted to introduce evidence court will reopen case to prevent nonsuit. Penn *v.* R. Co., 129 Ga. 856, 60 S. E. 172.

While motion for a directed verdict is argued court may reopen case for further evidence. Bridger *v.* Bk., 126 Ga. 821, 56 S. E. 97.

Plaintiff may recall witness for further testimony where defendant offers no proof. Dorr Co. *v.* R. Co., 128 Ia. 359, 103 N. W. 1003; Brockmiller *v.* Wks., 148 Mich. 642, 112 N. W. 688.

In Texas testimony must be received any time before argument concluded. Mahs *v.* S., 54 Tex. Cr. 390, 113 S. W. 11 (statute).

238-19 Chandler *v.* Higgins, 156 Ala. 511, 47 S. 284; California Wine Assn. *v.* Ins. Co., 159 Cal. 49, 112 P. 858.

Perhaps abuse of discretion not to permit him. Etly *v.* Co., 130 Ky. 723, 113 S. W. 896.

Documents filed in absence of parties after closing taking evidence disregarded. Wellman *v.* Blackmon, 155 Mich. 672, 119 N. W. 1102.

240-24 Security T. Co. *v.* Robb, 142 Fed. 78, 73 C. C. A. 302.

241-27 Southern R. Co. *v.* Leard, 146 Ala. 349, 39 S. 449; Quong Yu *v.* Ty., 12 Ariz. 183, 100 P. 462; Allen *v.* Shires, 47 Colo. 433, 107 P. 1070; White *v.* R. Co., 6 Penne. (Del.) 105, 63 A. 931; Thompson *v.* S., 137 Ga. 164, 73 S. E. 363; S. *v.* Cutts, 24 Ida. 329, 133 P. 115; Ross *v.* S., 169 Ind. 388, 82 N. E. 781; German Ins. Bk. *v.* Martin, 131 Ky. 57, 114 S. W. 319; Minihan *v.* R. Co., 205 Mass. 402, 91 N. E. 414; American S. Co. *v.* Cole, 174 Mich. 42, 140 N. W. 622; Brady *v.* R. Co., 76 N. J. L. 744, 71 A. 238; Cleveland *v.* Shaw (Tex. Civ.), 119 S. W. 883; Dubois *v.* Roby, 84 Vt. 465, 80 A. 150.

See Martinez *v.* P., 55 Colo. 51, 132 P. 64.

Unnecessary to further prove defendant's knowledge of reputation of bawdy house as prerequisite to evidence of character of house. C. *v.* Brink, 49 Pa. Super. 620.

241-28 Quong Yu *v.* Ty., 12 Ariz. 183, 100 P. 462; P. *v.* Carson, 155 Cal. 164, 99 P. 970; Treasury T. Co. *v.* Gregory, 38 Colo. 212, 88 P. 445; S. *v.* Buonomo, 87 Conn. 285, 87 A. 977; Taylor *v.* Co., 82 Conn. 220, 72 A. 1080; Jackson *v.* Buice, 132 Ga. 51, 63 S. E. 823; Balswie *v.* Balswie, 179 Ill. App. 118; Wojtonik *v.* Shuttler, 174 Ill. App. 431; Chicago *v.* Saldman, 129 Ill. App. 282; Felker *v.* Breece, 226 Mo. 320, 126 S. W. 424; Butte C. M. Co. *v.* Barker, 35 Mont. 327, 89 P. 302, 90 P. 177; Gibson *v.* Hjul, 32 Nev. 360, 108 P. 759; Humphries *v.* R. Co., 84 S. C. 202, 65 S. E. 1051; Wisegarver *v.* Yinger (Tex. Civ.), 122 S. W. 925; Van Horn *v.* Co., 54 Wash. 117, 103 P. 42.

See Bashore *v.* Mooney, 4 Cal. App. 276, 87 P. 553; vol. 11, p. 185, n. 25, and supplement thereto.

Declarations of defendant admitted before presumptive case of conspiracy proven if made relevant subsequently. Loder *v.* Jayne, 142 Fed. 1010; Cook *v.* S., 169 Ind. 430, 82 N. E. 1047.

242-29 German Ins. Bk. *v.* Martin, 131 Ky. 57, 114 S. W. 319. See vol. 11, p. 185, n. 28, and vol. 12, p. 162, n. 12, and supplements thereto.

242-30 Atlantic C. L. R. Co. *v.* Partridge, 58 Fla. 153, 50 S. 634; Sims *v.* Sims, 131 Ga. 262, 62 S. E. 192; St. Louis S. R. Co. *v.* Marshall (Tex. Civ.), 120 S. W. 512.

242-32 S. *v.* Gebbia, 121 La. 1083, 47 S. 32; Rowe *v.* Whatcom, etc. Co., 44 Wash. 658, 87 P. 921. But see Baum *v.* Palmer, 165 Ind. 513, 76 N. E. 108.

243-33 Flint Mfg. Co. *v.* Beckett, 167 Ind. 491, 79 N. E. 503. See Lindsay *v.* S., 138 Ga. 815, 76 S. E. 369; vol. 9, p. 131, n. 54; vol. 12, p. 189, n. 78 and supplements thereto.

243-36 Henry *v.* Frohlichstein, 149 Ala. 330, 43 S. 126; Bashore *v.* Mooney, 4 Cal. App. 276, 87 P. 553; Dannelly *v.* Russ, 54 Fla. 285, 45 S. 496 (links in chain of title); Ross *v.* Saylor, 39 Mont.

559, 104 P. 864; Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713 (ordinance).

244-38 Hurst *v.* S., 1 Ala. App. 235, 56 S. 18; Harper Mach. Co. *v.* Ryan-Unmack Co., 85 Conn. 359, 82 A. 1027; S. *v.* Washelesky, 81 Conn. 22, 70 A. 62; Fritz *v.* G. & E. Co., 136 Ia. 699, 114 N. W. 193.

See Tucker *v.* S., 9 Okla. Cr. 555, 132 P. 689; vol. 11, p. 185, n. 25, and vol. 12, p. 189, n. 78, and supplements thereto.

245-40 Southern R. Co. *v.* Leard, 146 Ala. 349, 39 S. 449; Gallagher *v.* Mach. Co., 177 Ill. App. 198.

246-44 Vincent *v.* Co., 85 Conn. 512, 84 A. 84; Anthony & C. Co. *v.* Brown, 214 Mass. 439, 101 N. E. 1056; McIntyre *v.* Smyth, 108 Va. 736, 62 S. E. 930; Henderson *v.* Coleman, 19 Wyo. 183, 115 P. 439, *rehear. denied*, id. 1136.

248-50 S. *v.* Stutches (Ia.), 144 N. W. 597. See vol. 14, p. 795, n. 89, and supplement thereto.

251-61 S. *v.* Kesner, 72 Kan. 87, 82 P. 720; S. *v.* Gohl, 46 Wash. 408, 90 P. 259. See vol. 3, p. 662, n. 10 et seq., and supplement thereto.

251-63 P. *v.* Maughs, 8 Cal. App. 107, 96 P. 407. See Cook *v.* S., 169 Ind. 430, 82 N. E. 1047.

251-64 Questions for court's discretion. P. *v.* Swaile, 12 Cal. App. 192, 107 P. 134.

252-65 P. *v.* Barnnovich, 16 Cal. App. 427, 117 P. 572. See vol. 3, p. 663, n. 12, and supplement thereto.

Admissibility of dying declaration shown after receiving. Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561.

Receiving evidence of admission by accused on rebuttal testimony of witness no serious error. Kingsbury *v.* P., 44 Colo. 403, 99 P. 61.

253-71 Anderson *v.* Anderson, 136 Wis. 328, 117 N. W. 801.

254-75 See vol. 7, p. 231, n. 14, and supplement thereto.

254-76 See supra, "Impeachment of Witnesses," 96-23, also vol. 7, p. 96, n. 23, and supplement thereto.

255-78 Cox *v.* Polk, 139 Mo. App. 260, 123 S. W. 102; Juul *v.* Co., 55 Wash. 156, 104 P. 191.

OWNERSHIP

257-1 Lightman *v.* Epstein, 164 Ala. 660, 51 S. 164; State Bk. *v.* Keeney, 134 Mo. App. 74, 114 S. W. 553; Marrett *v.* Herrington (Tex. Civ.), 145 S. W. 254; Jaquith Co. *v.* Shumway, 80 Vt. 556, 69 A. 157.

If ownership not disputed slight evidence sustains. La Porte *v.* Henry, 41 Ind. App. 197, 83 N. E. 655.

257-2 In re Diamond, 158 Fed. 370 (bankruptcy); Churchill *v.* More, 4 Cal. App. 219, 88 P. 290; Gate City F. Ins. Co. *v.* Thornton, 5 Ga. App. 585, 63 S. E. 638; La Porte *v.* Henry, 41 Ind. App. 197, 83 N. E. 655; Carter *v.* Maryland, etc. Co., 112 Md. 599, 77 A. 301; United S. M. Co. *v.* Co., 197 Mass. 206, 83 N. E. 412; Hannis Dist. Co. *v.* Court, 62 W. Va. 442, 59 S. E. 1051.

257-3 Baker *v.* Davie, 211 Mass. 429, 97 N. E. 1094.

257-4 Bibber-W. Co. *v.* R. Co., 175 Fed. 470; Osborn *v.* Hopkins, 160 Cal. 501, 117 P. 519; South *v.* Bk., 4 Ga. App. 92, 60 S. E. 1087; Mahan *v.* Schroeder, 236 Ill. 392, 86 N. E. 97; Woodward *v.* Donovan, 167 Ill. App. 503; Adams *v.* Connelly, 118 Ill. App. 441; Titcomb *v.* Powers, 108 Me. 347, 80 A. 851; Massachusetts Nat. Bk. *v.* Snow, 187 Mass. 159, 72 N. E. 959; First Nat. Bk. *v.* Sprout, 78 Neb. 187, 110 N. W. 713; Gandy *v.* Bissell, 72 Neb. 356, 100 N. W. 803; Price *v.* Bk., 14 Okla. 268, 79 P. 105; Talbert *v.* Talbert, 97 S. C. 136, 81 S. E. 644; Gray *v.* Altman (Tex. Civ.), 149 S. W. 760; Myrick *v.* Jackson, 44 Tex. Civ. 553, 99 S. W. 143; Farmers' Nat. Bk. *v.* Howard, 71 W. Va. 57, 76 S. E. 122. *Contra* if plaintiff not payee and sworn denial exists of assignment and ownership. Jones *v.* Wheeler, 23 Okla. 771, 101 P. 1112.

Though endorsed by holder possession presumptive evidence of ownership. Hughes *v.* Black (Ala.), 39 S. 984; Gumaer *v.* Jackson, 37 Colo. 39, 86 P. 885; Carolina, etc. Co. *v.* Co., 3 Ga. App. 732, 60 S. E. 375.

259-6 See Tullis *v.* McClary, 128 Ia. 493, 104 N. W. 505.

259-7 Jolly *v.* Huebler, 132 Mo. App. 675, 112 S. W. 1013.

260-9 Joint deposit of bonds raises presumption of co-ownership. Gerting *v.* Wells, 103 Md. 624, 64 A. 298, 433.

Evidence rebutting presumption.—Maxler *v.* Hawk, 233 Pa. 316, 83 A. 251.

260-10 See supra, "Bills and Notes," 525-53.

Checks payable to cash.—Cleary *v.* Co., 54 Misc. 537, 104 N. Y. S. 831.

Possession of non-negotiable instrument raises no presumption of ownership. Cuyler *v.* Wallace, 183 N. Y. 291, 76 N. E. 1.

260-11 Richards *v.* Exp. Co., 156 App. Div. 268, 141 N. Y. S. 306; In re Perry, 129 App. Div. 587, 114 N. Y. S. 246. See infra, "Presumptions," 926-89.

260-12 Greene *v.* Carmichael (Cal. App.), 140 P. 45; S. *v.* Fulman, 7 Penne. (Del.) 123, 74 A. 1; Fisher *v.* S., 55 Fla. 17, 46 S. 422; Peterson *v.* S., 6 Ga. App. 491, 65 S. E. 311; Hyde *v.* Sokol, 178 Ill. App. 601; Ware *v.* Souders, 120 Ill. App. 209; Amundson *v.* Co., 140 Ia. 464, 118 N. W. 789; Johnson *v.* Johnson, 134 Ky. 263, 120 S. W. 303; O'Malley *v.* Const. Co., 255 Mo. 386, 164 S. W. 465; S. *v.* Starr, 244 Mo. 161, 148 S. W. 862; Cuerth *v.* Arbogast, 48 Mont. 209, 136 P. 383; First Nat. Bk. *v.* Adams, 82 Neb. 801, 118 N. W. 1055; Nelson *v.* Bock, 84 N. J. L. 123, 85 A. 1009; Oakes *v.* Sloane, 135 App. Div. 354, 120 N. Y. S. 626; Dougherty *v.* Weeks, 126 App. Div. 786, 111 N. Y. S. 218; Barasch *v.* Kramer, 62 Misc. 475, 115 N. Y. S. 176; Mariner *v.* Wasser, 17 N. D. 361, 117 N. W. 343; Ragan *v.* Bank, 38 Okla. 65, 131 P. 1093; Probate Court *v.* Williams, 30 R. I. 144, 73 A. 382.

See Jackson *v.* Jetter (Ia.), 142 N. W. 431; vol. 8, p. 138, n. 46; vol. 11, p. 458, n. 3, and supplement thereto.

Homesteader' ownership of timber cut. Babcock *v.* R. Co., 117 Minn. 434, 136 N. W. 275.

Presumption depends upon contract under which possesion held . Koenigsberg *v.* Blau, 119 N. Y. S. 708.

Presumption does not obtain against established facts. Hopkins *v.* Heywood, 86 Vt. 486, 86 A. 305.

Deposition presumed to be owner of fund standing in his name. Lowman *v.* Bk., 40 Okla. 519, 139 P. 952.

Consigned goods in transitu.—Consignee presumed to have ownership necessary to bring action for conversion. Missouri R. Co. *v.* Co., 73 Kan. 295, 85 P. 408.

Consigned, with knowledge, receiving, presumed to own consignment. S. *v.* Johns, 40 Ia. 125, 118 N. W. 295.

261-13 Greene *v.* Carmichael (Cal. App.), 140 P. 45; Amundson *v.* Co., 140 Ia. 464, 118 N. W. 789; Sweeney *v.* L. S., 65 Misc. 580, 120 N. Y. S. 967.

Consignee in bill of lading presumed to own goods specified. Florence, etc. R. Co. *v.* Jensen, 48 Colo. 28, 108 P. 974. Presumption not conclusive. Fein *v.* Weir, 129 App. Div. 299, 114 N. Y. S. 426.

262-16 Hays *v.* Lemoine, 156 Ala. 465, 47 S. 97; Rengel *v.* Schoden, 178 Ill. App. 151; McAfee *v.* Montgomery, 21 Ind. App. 196, 51 N. E. 957; O'Malley *v.* Const. Co., 255 Mo. 386, 164 S. W. 565; In re Perry, 129 App. Div. 587, 114 N. Y. S. 246; In re Darrow's Est., 64 Misc. 224, 118 N. Y. S. 1082. See vol. 9, p. 910, n. 27, and supplement thereto.

263-17 Curtis *v.* Hunt, 158 Ala. 78, 48 S. 398; Nolan *v.* Nolan, 155 Cal. 476, 101 P. 520 (not opinion evidence); Taylor *v.* Co., 82 Conn. 220, 72 A. 1080; Baker *v.* Ins. Co., 133 App. Div. 496, 117 N. Y. S. 1104; Mooney *v.* S. (Tex. Cr.), 164 S. W. 828; First Nat. Bk. *v.* C. Co. (Tex. Civ.), 153 S. W. 680; Deckard *v.* S., 57 Tex. Cr. 359, 123 S. W. 417; O'Farrell *v.* O'Farrell, 56 Tex. Civ. 51, 119 S. W. 899 (except when whole issue turns upon it); United I. Wks. *v.* Co., 71 Wash. 275, 128 P. 209; Dixon, etc. Co. *v.* Grain Co., 71 W. Va. 715, 77 S. E. 362.

See Pichler *v.* Reese, 171 N. Y. 577, 64 N. E. 441.

Testimony based on another's knowledge incompetent to show ownership. Brigman *v.* S., 8 Ala. App. 400, 62 S. 980.

"**On his cross-examination** he may be required to state all of the facts within his knowledge touching such ownership for the purpose of aiding the jury in ascertaining the truth of his statements and the weight or value of his testimony on the subject. Such cross examination may elicit facts and statements from the witness showing to the satisfaction of the jury that the witness was honestly mistaken in his testimony, given on his direct examination, as to the ownership of the property involved in the testimony, or that he did not, in fact, know to whom such property belonged." Pilcher *v.* Smith, 4 Ala. App. 444, 58 S. 672.

Direct testimony no conclusion.—Rasco *v.* Jefferson, 142 Ala. 705, 38 S. 246; Lipschitz *v.* Halperin, 53 Misc. 280, 103 N. Y. S. 202; Hawley *v.* Bond, 20 S. D. 215, 105 N. W. 464. But see Cate *v.* Fife, 80 Vt. 404, 68 A. 1.

Prospective ownership testified to. Perkins *v.* Co., 155 Cal. 712, 103 P. 190.

263-18 Waters *v.* Davis, 145 Fed. 912, 76 C. C. A. 444; North Am. R. *v.* McElligott, 227 Ill. 317, 81 N. E. 388 (name on signs and bills of fare admissible); La Porte *v.* Henry 41 Ind. App. 197, 83 N. E. 655; Fleishman *v.* Co., 148 Mo. App. 117, 127 S. W. 660; Frisby *v.* T. Co., 214 Mo. 567, 113 S. W. 1059; Bailey *v.* Bailey, 139 Mo. App. 176, 122 S. W. 1099 (execution of mortgage; Cuerth *v.* Arbogast, 48 Mont. 209, 136 P. 383 (checks given therefor); P. *v.* Dairy Co., 122 N. Y. S. 294; Lawson *v.* Co., 113 N. Y. S. 647; Gershel *v.* Exp. Co., 113 N. Y. S. 919; Casey *v.* R. Co., 128 App. Div. 86, 112 N. Y. S. 522 (insignia on office windows, stationery, etc., notwithstanding existence of another corporation to which letters might apply); Dougherty *v.* Weeks, 126 App. Div. 786, 111 N. Y. S. 218 (name on articles and their location); Bunke *v.* Co., 110 App. Div. 241, 97 N. Y. S. 66 (that wires lead from defendant's terminal and defendant was only telephone company, sufficient to show ownership); Andrews *v.* Grimes, 148 N. C. 437, 62 S. E. 519; Barnett *v.* Ward (Tex. Civ.), 144 S. W. 697; Jaquith Co. *r.* Shumway, 80 Vt. 556, 69 A. 157 (bill of sale and books to corroborate testimony of witness); Anderson *v.* Co., 57 Wash. 502, 107 P. 376; Nelson *v.* N. Co., 52 Wash. 177, 100 P. 325.

See McMahon *v.* Cooper, 23 Ida. 413, 130 P. 456.

Testimony of former owner he sold property in question plaintiff's husband irrelevant, in case where purchaser denies seller's title. Brewster *v.* Miller, 31 S. D. 613, 141 N. W. 778.

Consignee in bill of lading evidence of ownership. New York, etc. R. Co. *v.* Co., 215 Mass. 36, 102 N. E. 366.

History of two suits with respect to property not relied on as source of title inadmissible. Shreve-Milligan, etc. Co. *v.* Pelham, 6 Ala. App. 262, 60 S. 516.

Assessment sheets admissible. Myers *v.* Manlove (Ind. App.), 101 N. E. 661.

Acts of stranger without plaintiff's knowledge inadmissible. Huffman *v.* Bosworth, 25 N. D. 22, 140 N. W. 672.

Evidence of reputation is inadmissible. Strother *r.* McFarland, 166 Mo. App 364, 148 S. W. 988.

Transactions between third parties, irrelevant. Temple *r.* Duran (Tex. Civ.), 121 S. W. 253.

Consideration, paid or to be paid, inquired into. Keane *v.* Co., 17 Ida. 179, 105 P. 60.

Delivery of property to another in consideration of money paid presumptive evidence of ownership. Fisher *v.* S., 55 Fla. 17, 46 S. 422.

Proof of ownership of business.—See Lord *r.* Smith, 109 Md. 42, 71 A. 430.

Register of ship merely presumptive evidence of ownership. Post *v.* Schooner, 1 Haw. 286.

Where ownership of tracks admitted presumed use exclusive, that cars running thereon owned by one owning tracks. Jennings *r.* R. Co., 121 App. Div. 587, 106 N. Y. S. 279.

Name on wagon raises presumption of ownership. United B. Co. *v.* Bass, 121 Ill. App. 299. See Hennessey *v.* Baugh, 29 Pa. Super. 310.

Statute requiring registration of automobile by owner or person in control raises presumption that at time of accident person in whose name automobile registered was owner or in control. C. *v.* Sherman, 191 Mass. 439, 78 N. E. 98.

264-19 Shaw *v.* Cleveland, 5 Ala. App. 333, 59 S. 534; Cohn & G. L. Co. *v.* Robbins, 159 Ala. 289, 48 S. 853; Parsons *r.* Co., 82 Conn. 333, 73 A. 785; Harris *r.* Crawley, 161 Mich. 383, 126 N. W. 421; Frisby *v.* Co., 214 Mo. 567, 113 S. W. 1059 (admission by counsel in opening case); Shamp *v.* Lambert, 142 Mo. App. 567, 121 S. W. 770; Moore *v.* Fingar, 138 App. Div. 929, 122 N. Y. S. 851; Flieg *v.* Levy, 133 N. Y. S. 249; Wipperman Mercantile Co. *r.* Robbins. (N. D.), 135 N. W. 785; Ragan *v.* Bk., 38 Okla. 65, 131 P. 1093.

Giving list of property to assessor as his own an admission of ownership as against him. Crump *v.* Walkup, 246 Mo. 266, 151 S. W. 709.

Offer as security.—"When a person in possession of personal property offers a mortgage on such property to a bank as security for a loan of money, such party in possession of such property thereby declares such property to be his own, and represents, in effect, that he holds the property as his own and not for another." Pilcher *v.* Smith, 4 Ala. App. 444, 58 S. 672.

Declarations by vendor in disparagement of title competent against party claiming under him. Campbell *v.* Eichorst, 122 Ill. App. 609; Remy *v.* Lilly, 22 Ind. App. 109, 53 N. E. 387.

Declarations when not in possession,

competent. McClain *v.* Assn., 17 Ida. 63, 104 P. 1015.

Mortgage given by husband to secure purchase price evidence of ownership by him rather than wife. Long *v.* Works, 132 Ga. 66, 63 S. E. 700.

265-21 Montgomery M. Mfg. Co. *v.* Leith, 162 Ala. 246, 50 S. 210; Parsons *v.* Co., 82 Conn. 333, 73 A. 785; Logre *v.* Elec. Co. (Tex. Civ.), 146 S. W. 303. *Contra* where owner intrusts property to agent solely for purpose of operating (S. *v.* Heneken, 174 Fed. 624, 98 C. C. A. 378), and if declaration offered solely to prove ownership in defendant and notice of it has not been given him. Cohn & G. L. Co. *v.* Robbins, 159 Ala. 289, 48 S. 853.

Statements of stranger, inadmissible unless owner had notice. Rankin *v.* Caldwell, 15 Ida. 625, 99 P. 108.

265-22 Receipt no final evidence of ownership. Brinser *v.* Co., 1 Boyce (Del.) 220, 75 A. 792.

Minute book of corporation, best evidence of ownership of stock. Spangenberg *v.* Nesbitt, 22 Cal. App. 274, 134 P. 343.

266-23 P. *v.* Romero, 12 Cal. App. 466, 107 P. 709. See supra, "Animals," 889-3.

266-24 See supra, "Animals," 891-12.

Rules made by owner of mining land, pursuant to statute, admissible as contract between him and persons extracting to show latter not owners of ore because of non-compliance with such rules. Meeks *v.* Co., 141 Mo. App. 648, 124 S. W. 1084.

Unprobated will, inadmissible to show ownership in beneficiaries of particular property. Bacon *v.* R. Co., 145 Ill. App. 502.

PARENT AND CHILD

272-1 See Champion *v.* McCarthy, 228 Ill. 87, 81 N. E. 808; Breidenstein *v.* Bertram, 198 Mo. 328, 95 S. W. 828; In re Tully, 54 Misc. 184, 105 N. Y. S. 858.

272-2 Robertson *v.* Heath, 132 Ga. 310, 64 S. E. 73; In re Crocheron's Est., 16 Ida. 441, 101 P. 741; Swarens *v.* Swarens, 78 Kan. 682, 97 P. 968; Brenneman *v.* Hildebrandt, 137 Mo. App. 82, 119 S. W. 452; Orey *v.* Moller, 142 Mo. App. 579, 121 S. W. 1102; Johnson *v.* Terry, 85 Neb. 267, 122 N. W. 984; Ex parte Turner, 151 N. C. 474, 66 S. E. 431; Newsome *v.* Bunch, 144 N. C. 15, 56 S. E. 509; Ex parte Barnes, 54 Or. 548, 104 P. 296; Ex parte Tillman, 84 S. C. 552, 66 S. E. 1049; Ex parte Davidge, 72 S. C. 16, 51 S. E. 269; Parker *v.* Wiggins (Tex. Civ.), 86 S. W. 788.

Burden to prove parent an improper custodian rests upon plaintiff.—Grego *v.* Schneider (Tex. Civ.), 154 S. W. 361.

The prima facie right of parents to the custody of minor children not being an absolute right to which they can under any and all circumstances assert their claims and have accorded to them the custody of a minor child, it necessarily results that each case must depend upon the facts and circumstances of that particular case. Montgomery *v.* Hughes, 4 Ala. App. 245, 58 S. 113.

272-3 Jackson *v.* Clay, 89 Ark. 501, 117 S. W. 546.

Divorce decree awarding custody prima facie evidence as to legal right to custody. Barlow *v.* Barlow, 141 Ga. 535, 81 S. E. 433.

272-4 Mother of illegitimate child entitled to custody subject to welfare. Ex parte Bryon, 83 Vt. 108, 74 A. 488.

272-5 In re Crocheron's Est., 16 Ida. 441, 101 P. 741; P. *v.* Small, 142 Ill. App. 422 (surroundings of father's home); Shoaf *v.* Livengood, 172 Ind. 707, 88 N. E. 598; Shalleross *v.* Shalleross, 135 Ky. 418, 122 S. W. 223; Ex parte Collins, 160 Mich. 531, 125 N. W. 389; Gauthier *v.* Walter, 110 Minn. 103, 124 N. W. 634; Brenneman *v.* Hildebrandt, 137 Mo. App. 82, 119 S. W. 452; Ex parte Turner, 151 N. C. 474, 66 S. E. 431; Ex parte Tillman, 84 S. C. 552, 66 S. E. 1049; Ex parte Davidge, 72 S. C. 16, 51 S. E. 269; Wingard *v.* Wingard, 56 Wash. 354, 105 P. 833 (child's welfare prime consideration); Ex parte Fields, 56 Wash. 259, 105 P. 466; Pierce *v.* Pierce, 52 Wash. 679, 101 P. 358.

Financial condition of parties desiring custody of child inquired into. Churchill *v.* Jackson, 132 Ga. 666, 64 S. E. 691.

No need of formal contest of petition as prerequisite to taking testimony. In re Bewley, 167 Cal. 8, 138 P. 689.

272-6 Jackson *v.* Clay, 89 Ark. 501, 117 S. W. 546; Shalleross *v.* Shalleross, 135 Ky. 418, 122 S. W. 223; Knepper *v.* Knepper, 139 Mo. App. 493, 122 S. W.

1117; Taylor *v.* Taylor, 103 Va. 750, 50 S. E. 273. See In re Crocheron's Est., 16 Ida. 441, 101 P. 741.

In proceeding to set aside order of adoption evidence as to fitness of parent properly excluded. Beers *v.* Merrill, 78 Wash. 576, 139 P. 629.

273-7 Knepper *v.* Knepper, 139 Mo. App. 493, 122 S. W. 1117; Moyer *v.* Moyer, 75 N. J. Eq. 439, 72 A. 965; P. *v.* Gerow, 136 App. Div. 824, 121 N. Y. S. 652; Ex parte Fields, 56 Wash. 259, 105 P. 466; Pierce *v.* Pierce, 52 Wash. 679, 101 P. 358 (her conduct at time of hearing decisive).

"**A mother** who is both capable and anxious to rear her own offspring should not be deprived of the opportunity to thus discharge the duty she owes to the child, without a clear showing of unfitness for the trust." In re Linder's Est., 13 Cal. App. 208, 109 P. 101.

273-8 P. *v.* Small, 142 Ill. App. 422, Peese *v.* Gellerman, 51 Tex. Civ. 39, 110 S. W. 196.

Opinions of qualifications of parties to rear child, inadmissible. Facts necessary. Churchill *v.* Jackson, 132 Ga. 666, 64 S. E. 691.

Gift of child to one of persons seeking custody testified to by him. Churchill *v.* Jackson, supra.

273-9 Ex parte Turner, 151 N. C. 474, 66 S. E. 431.

Scope of inquiry limited by final order awarding custody of child to father; only matters occurring since made gone into. Johnson *v.* Terry, 85 Neb. 267, 122 N. W. 984.

273-10 Harrist *v.* Harrist, 151 Ala. 656, 43 S. 962; Richards *v.* McHan, 129 Ga. 275, 58 S. E. 839; In re Tully, 54 Misc. 184, 105 N. Y. S. 858; Ex parte Davidge, 72 S. C. 16, 51 S. E. 269; Peese *v.* Gellerman, 51 Tex. Civ. 39, 110 S. W. 196.

Change of custody not granted if no material change in condition since order made. Stanfield *v.* Stanfield, 22 Okla. 574, 98 P. 334.

Guardianship letters no adjudication as to custody. Smidt *v.* Benenga, 140 Ia. 399, 118 N. W. 439; Clarke *v.* Lyon, 82 Neb. 625, 118 N. W. 472.

274-11 Swarens *v.* Swarens, 78 Kan. 682, 97 P. 968; Orey *v.* Moller, 142 Mo. App. 579, 121 S. W. 1102; Clarke *v.* Lyon, 82 Neb. 625, 118 N. W. 472 (parent's unfitness must be positive and not comparative); Warnecke *v.* Lane (N. J. Eq.), 75 A. 233; Taylor *v.* Taylor, 103 Va. 750, 50 S. E. 273.

274-12 See Knepper *v.* Knepper, 139 Mo. App. 493, 122 S. W. 1117.

274-13 P. *v.* Beaudoin, 126 App. Div. 505, 110 N. Y. S. 592 (superior financial ability of custodian will not weigh against parent's right to provide); Parker *v.* Wiggins (Tex. Civ.), 86 S. W. 788; Peese *v.* Gellerman, 51 Tex. Civ. 39, 110 S. W. 196. *Contra,* Ex parte Fields, 56 Wash. 259, 105 P. 466. *Comp.* Clarke *v.* Lyon, 82 Neb. 625, 118 N. W. 472.

Financial ability of father not controlling if child young. O'Neal *v.* O'Neal, 95 Miss. 415, 48 S. 623.

275-14 Eaves *v.* Fears, 131 Ga. 820, 64 S. E. 269; Peese *v.* Gellerman, 51 Tex. Civ. 39, 110 S. W. 196.

275-15 Eaves *v.* Fears, 131 Ga. 820, 64 S. E. 269; Ex parte Rembert, 82 S. C. 336, 64 S. E. 150 (positive assent to custody by mother given effect); Peese *v.* Gellerman, 51 Tex. Civ. 39, 110 S. W. 196. See Parker *v.* Wiggins (Tex. Civ.), 86 S. W. 788.

276-16 Ex parte Fields, 56 Wash. 259, 105 P. 466.

276-17 Richards *v.* McHan, 129 Ga. 275, 58 S. E. 839; Looney *v.* Martin, 123 Ga. 209, 51 S. E. 304; Beach *v.* Bryan, 155 Mo. App. 33, 133 S. W. 635; Terry *v.* Johnson, 73 Neb. 653, 103 N. W. 319.

276-18 Gay *v.* Thompson, 131 Ga. 694, 63 S. E. 133; Peese *v.* Gellerman, 51 Tex. Civ. 39, 110 S. W. 196.

277-19 Ex parte Field, 56 Wash. 259, 105 P. 466.

Abandonment not shown. In re Snowball, 156 Cal. 240, 104 P. 444.

277-20 Smidt *v.* Benenga, 140 Ia. 399, 118 N. W. 439; Clarke *v.* Lyon, 82 Neb. 625, 118 N. W. 472.

278-22 Jackson *v.* Clay, 89 Ark. 501, 117 S. W. 546; Shallcross *v.* Shallcross, 135 Ky. 418, 122 S. W. 223.

Right to cross-examine child and offer evidence in rebuttal of statements made privately to judge not absolute. Daniels *v.* Daniels, 145 Ia. 422, 124 N. W. 169.

278-23 Eaves *v.* Fears, 131 Ga. 820, 64 S. E. 269.

Financial condition of adoptive parents will not control if father's rights not surrendered. Orey *v.* Moller, 142 Mo. App. 579, 121 S. W. 1102.

278-25 No presumption as to adop-

tion from fact child lives with a person not his parent. Coombs *v.* Cook, 35 Okla. 326, 129 P. 698.

281-34 McClain *v.* Assn., 17 Ida. 63, 104 P. 1015; Fuller *v.* Blair, 104 Me. 469, 72 A. 182; Winebremer *v.* Eberhardt, 137 Mo. App. 659, 119 S. W. 530; Singer *v.* R. Co., 119 Mo. App. 112, 95 S. W. 944; Adams *v.* Cook, 82 Neb. 684, 118 N. W. 662 (implied from circumstances). Witness' conclusion incompetent. Adams *v.* Cook, supra.

281-35 Vanatta *v.* Carr, 229 Ill. 47, 82 N. E. 267.

281-36 Donk *v.* Rezloff, 229 Ill. 194, 82 N. E. 214; Bristor *v.* R. Co., 128 Ia. 479, 104 N. W. 487; Lewis *v.* R. Co., 82 Kan. 351, 108 P. 95; McMorrow *v.* Dowell, 116 Mo. App. 289, 90 S. W. 728; Livesley *v.* Heise, 48 Or. 147, 85 P. 509; Harper *v.* Utsey (Tex. Civ.), 97 S. W. 508; Weese *v.* Yokum, 62 W. Va. 550, 59 S. E. 514.

Emancipation inferred from permitting child to leave home and shift for himself. McMorrow *v.* Dowell, 116 Mo. App. 289, 90 S. W. 728.

282-37 Rounds *v.* McDaniel, 133 Ky. 669, 118 S. W. 956; Gulf C. Co. *v.* Abernathy, 54 Tex. Civ. 137, 116 S. W. 869.

282-38 Biggs *v.* R. Co., 91 Ark. 122, 120 S. W. 970. See Harper *v.* Utsey (Tex. Civ.), 97 S. W. 508.

282-40 *Contra*, Ingram *v.* R. Co., 152 N. C. 762, 67 S. E. 926.

Evidence to prove intent of child to support parents admissible in suit by father for death of son. Dean *v.* R. Co., 38 Wash. 565, 80 P. 842.

283-42 Merrill *v.* Hussey, 101 Me. 439, 64 A. 819.

283-44 *Contra*, Swift *v.* Johnson, 138 Fed. 867, 71 C. C. A. 619; Smith *v.* Gilbert, 80 Ark. 525, 98 S. W. 115. *Comp.* Chaloux *v.* Co., 75 N. H. 281, 73 A. 301.

284-47 McMorrow *v.* Dowell, 116 Mo. App. 29, 90 S. W. 728.

284-48 As to what must be proved in criminal cases, see Jackson *v.* S., 1 Ga. App. 723, 58 S. E. 272; Mays *v.* S., 122 Ga. 507, 51 S. E. 503; Brown *v.* S., 122 Ga. 568, 50 S. E. 378.

284-49 Burden to prove offense of failure to support rests on state. S. *v.* Langley, 248 Mo. 545, 154 S. W. 713.

288-62 Payment of previous accounts incurred by child shown; such evidence establishes no liability. Alschuler *v.* Anderson, 142 Ill. App. 323.

289-66 White *v.* Almy, 34 R. I. 29, 82 A. 397.

"To establish a claim of an implied contract for extra care and attendance, the service must be proven, and there must be testimony tending to show an agreement, assented to by both parties, binding in law and requiring compensation." De Haan's Est. *v.* De Haan's Est., 169 Mich. 146, 134 N. W. 983.

289-67 Messier *v.* Messier, 34 R. I. 233, 82 A. 996.

290-71 White *v.* Almy, 34 R. I. 29, 82 A. 397.

293-83 Pecuniary loss presumed from death of minor leaving parents. Savage *v.* Hayes, 142 Ill. App. 316.

293-85 St. Louis, Southwestern R. Co. *v.* Huey (Tex. Civ.), 130 S. W. 1017.

In action for child's death contribution to parents may be shown and personnel of household. Inquiry into financial situation of family must not go beyond this. Kerling *v.* Van Dusen, 109 Minn. 481, 124 N. W. 235.

294-87 Pecuniary circumstances of parent cannot be shown in action to recover for loss of services of injured child and expenses caused by injury. Pacific Exp. Co. *v.* Watson, 57 Tex. Civ. 111, 124 S. W. 127.

295-89 Burden on parents to show non-consent to employment of child, and that place where working dangerous. Tennessee, etc. Co. *v.* Crotwell, 156 Ala. 304, 47 S. 64.

295-92 Scott *v.* O'Leary (Ia.), 138 N. W. 512; Chesapeake, etc. Co. *v.* De Atley, 151 Ky. 109, 151 S. W. 363. Relation of master and servant must be proved. Franklin *v.* Butcher, 144 Mo. App. 660, 129 S. W. 428.

296-94 Cost of support during minority must be made subject of testimony in action to recover for child's death. Peters *v.* R. Co., 225 Pa. 307, 74 A. 61.

296-96 McLeod *v.* McLeod, 145 Ala. 269, 40 S. 414.

297-98 Nobles *v.* Hutton, 7 Cal. App. 14, 93 P. 289; Sinclair *v.* Higgins, 40 Misc. 136, 93 N. Y. S. 195.

297-1 Hessian *v.* Patton, 154 Fed. 829, 83 C. C. A. 545; Sanders *v.* Gurley, 153 Ala. 459, 44 S. 1022; Dolberry *v.* Dolberry, 153 Ala. 48, 44 S. 1018; McLeod *v.* McLeod, 145 Ala. 269, 40 S. 414; Becker *v.* Schwerdtle, 6 Cal. App. 462, 92 P. 398; Bonsal *v.* Randall, 192 Mo. 525, 91 S. W. 475; Cooper *v.* Moore, 55

Misc. 102, 104 N. Y. S. 1049; Powers *v.* Powers, 46 Or. 479, 80 P. 1058; Vaughn *v.* Vaughn, 217 Pa. 496, 66 A. 745.

See Tompkins *v.* Tompkins, 257 Ill. 557, 100 N. E. 965.

297-2 McLeod *v.* McLeod, 145 Ala. 269, 40 S. 414; Hudson *v.* Hudson, 237 Ill. 9, 86 N. E. 661.

Presumption that conveyance by trustee in resulting trust to son of beneficial owner, made subsequent to original purchase was in token of parental affection overcome by evidence showing ages of grantee and other heirs of such owner and their situations. Howe *v.* Howe, 199 Mass. 598, 85 N. E. 945.

298-3 Nobles *v.* Hutton, 7 Cal. App. 14, 93 P. 289; Sinclair *v.* Higgins, 46 Misc. 136, 93 N. Y. S. 195.

298-4 Couch *v.* Couch, 148 Ala. 332, 42 S. 624; Nobles *v.* Hutton, 7 Cal. App. 14, 93 P. 289.

301-12 Whaley *v.* Bayer, 99 Minn. 397, 109 N. W. 596.

302-13 Mullins *v.* Mullins, 27 Ky. L. R. 1048, 87 S. W. 764.

302-16 Kennedy *v.* McCann, 101 Md. 643, 61 A. 625. But see Moore *v.* Scruggs, 131 Ia. 692, 109 N. W. 205.

303-19 Spann *v.* Hellen, 114 La. 336, 38 S. 248.

305-25 Martz *v.* Fullhart, 142 Mo. App. 348, 126 S. W. 964.

306-27 Circumstances show parent's liability. Martz *v.* Fullhart, supra.

307-32 Brittingham *v.* Stadiem, 151 N. C. 299, 66 S. E. 128. See Palm *v.* Ivorson, 117 Ill. App. 535; Maher *v.* Benedict, 123 App. Div. 579, 108 N. Y. S. 228.

PAROL EVIDENCE

Reason for writing, 329-24; *Books of account,* 423-46; *Escrow agreement,* 453-92.

321-1 Contract required by special statute to be in writing is within the rule. Griggs *v.* Dist., 87 Ark. 93, 112 S. W. 215.

Existence of writing may be proved by parol. Dee *v.* Co., 141 Ia. 610, 118 N. W. 529.

321-2 Smith *v.* Baker, 137 Ga. 298, 72 S. E. 1093; Kline *v.* Hedges, 229 Mo. 126, 129 S. W. 515; Murray Co. *v.* Putman (Tex. Civ.), 130 S. W. 631.

321-3 Brown *v.* Powers, 167 Ala. 518, 52 S. 647; Goodrum *v.* Bk., 102 Ark. 326, 144 S. W. 198; Grosse *v.* Barman, 9 Cal. App. 650, 100 P. 348; Albany, etc. R. Co. *v.* Bk., 137 Ga. 391, 73 S. E. 637; Summerville *v.* Klein, 140 Ill. App. 39; Barker *v.* McClelland, 50 Ind. App. 296, 98 N. E. 300; Mills P. Co. *v.* Co., 155 App. Div. 869, 140 N. Y. S. 655; Edmonds *v.* Bk., 215 Pa. 547, 64 A. 671; Behrens *v.* Kirkgard (Tex. Civ.), 143 S. W. 698; Sandstone B. & L. Co. *v.* Lawler, 53 Wash. 10, 101 P. 360.

322-4 Coal & I. R. Co. *v.* Reherd, 204 Fed. 859, 123 C. C. A. 155; Warburton *v.* Co., 158 Fed. 969, 86 C. C. A. 173; U. S. *v.* Cantrall, 176 Fed. 949; North Am. Co. *v.* Samuels, 146 Fed. 48, 76 C. C. A. 506; Southeastern Co. *v.* Farnham, 148 Fed. 619, 78 C. C. A. 641; Shriner *v.* Meyer, 171 Ala. 112, 55 S. 156; Capitol F. Co. *v.* Mode (Ark.), 165 S. W. 637; Tillar *v.* Wilson, 79 Ark. 256, 96 S. W. 381; Smith *v.* Caldwell, 78 Ark. 333, 95 S. W. 467; Law Credit Co. *v.* Tibbitts, 160 Cal. 626, 117 P. 772; Coalinga, etc. Co. *v.* Oil Co., 16 Cal. App. 361, 116 P. 1107; Dodd *v.* Pasch, 5 Cal. App. 686, 91 P. 166; Womble *v.* Wilbur, 3 Cal. App. 535, 86 P. 916; Central L. A. Soc. *v.* Mulford, 45 Colo. 240, 100 P. 423; Fidelity & C. Co. *v.* Co., 82 Conn. 475, 74 A. 780; Hopkins *v.* Merrill, 79 Conn. 626, 66 A. 174; Ross *v.* Savage, 66 Fla. 106, 63 S. 148; Hoopes *v.* Crane, 56 Fla. 395, 47 S. 992; Porter *v.* Co., 55 Fla. 504, 46 S. 420; McNair, etc. Co. *v.* Adams, 54 Fla. 550, 45 S. 492; Blalock *v.* Ins. Co., 13 Ga. App. 486, 79 S. E. 374; Dozier *v.* Davison, 138 Ga. 190, 74 S. E. 1086; Branan *v.* Warfield, 3 Ga. App. 586, 60 S. E. 325; Bowen *v.* Waxelbaum, 2 Ga. App. 521, 58 S. E. 784; Singer S. M. Co. *v.* Johns, 135 Ga. 22, 68 S. E. 785; Smith *v.* Green, 128 Ga. 90, 57 S. E. 98; Townsend *v.* Co., 127 Ga. 342, 56 S. E. 436; Buyers, etc. Co. *v.* P. Co., 169 Ill. App. 618; P. *v* Griesbach, 127 Ill. App. 462; Sinnickson *v.* Perkins, 137 Ill. App. 10, 231 Ill. 492, 83 N. E. 194; Noble *v.* Fickes, 230 Ill. 594, 82 N. E. 950; Off *v.* Murphey, 158 Ill. App. 161; Loeb *v.* Flannery, 148 Ill. App. 471; Hay *v.* Co. (Ind. App.), 105 N. E. 919; U. S., etc. Ins. Co. *v.* Emerick (Ind. App.), 103 N. E. 435; Croan *v.* Myers, 52 Ind. App. 143, 100 N. E. 380; Gladstein *v.* Levine, 49 Ind. App. 270, 97 N. E. 184; Brown *v.* Brown, 142 Ia. 125, 120 N. W.

724; Electric S. Co. *v.* R. Co., 138 Ia. 369, 116 N. W. 144, 19 L. R. A. (N. S.) 1183; Bounanni *v.* Co., 131 Ia. 304, 108 N. W. 524; City Bk. *v.* Green, 130 Ia. 384, 106 N. W. 942; Chariton Ice Co. *v.* Co., 129 Ia. 523, 105 N. W. 1014; Hampe *v.* Sage, 87 Kan. 536, 125 P. 53; United States Fire Ins. Co. *v.* Bynum & Co., 143 Ky. 804, 137 S. W. 771; La Rue *v.* Assur. Soc., 138 Ky. 776, 129 S. W. 104 (insurance policy); Anthony *v.* Hudson, 131 Ky. 185, 114 S. W. 782; Askew *v.* Parker, 131 La. 753, 60 S. 233; Neosho Milling Co. *v.* Stock Co., 130 La. 949, 58 S. 825 (promissory note); Williams *v.* Ins. Co., 122 Md. 141, 89 A. 97; Flynn *v.* Butler, 189 Mass. 377, 75 N. E. 730; Toole *v.* Crafts, 196 Mass. 397, 82 N. E. 22; Strong *v.* Co., 197 Mass. 53, 83 N. E. 328; Budro *v.* Burgess, 197 Mass. 74, 83 N. E. 318; Bowditch *v.* Ins. Co., 193 Mass. 565, 79 N. E. 788; Crane *v.* Ross, 168 Mich. 623, 135 N. W. 83; International Text Book Co. *v.* Marvin, 166 Mich. 660, 132 N. W. 437; Rumsey *v.* Fox, 158 Mich. 248, 122 N. W. 526; Polk P. Co. *v.* Smedley, 155 Mich. 242, 118 N. W. 981; Carpenter *v.* Carpenter, 154 Mich. 100, 117 N. W. 598; Lipsett *v.* Hassard, 158 Mich. 509, 122 N. W. 1091; Goebel *v.* Look, 153 Mich. 204, 116 N. W. 1078; Phelan *v.* Edwards, 112 Minn. 345, 128 N. W. 23; Calloway *v.* McKnight (Mo. App.), 163 S. W. 932; Biddlecom *v.* Assur. Co., 167 Mo. App. 581, 152 S. W. 103; Lewis *v.* Muse, 130 Mo. App. 194, 108 S. W. 1107; Tate *v.* R. Co., 131 Mo. App. 107, 110 S. W. 622; Rowland *v.* R. Co., 124 Mo. App. 605, 102 S. W. 19; Bk. of Buffalo *v.* Reagan, 163 Mo. App. 529, 146 S. W. 1182 (promissory note as principal); Pile *v.* Bright, 156 Mo. App. 301, 137 S. W. 1017; Krbel *v.* Krbel, 84 Neb. 160, 120 N. W. 935; Lauze *v.* Ins. Co., 74 N. H. 334, 68 A. 31; Northeastern T. Co. *v.* Hepburn, 72 N. J. Eq. 7, 65 A. 747; Ramsey *v.* Co., 72 N. J. Eq. 165, 65 A. 461; Allen *v.* Oneida, 210 N. Y. 496, 104 N. E. 920; Pascal *v.* Slavin, 144 N. Y. S. 354; Johnston & Collins Co. *v.* Davis, 142 N. Y. S. 475; Lerner *v.* Roth, 136 N. Y. S. 61; White Co. *v.* Motor Co., 159 App. Div. 716, 144 N. Y. S. 960; Standard Milling Co. *v.* De Pass, 154 App. Div. 525, 139 N. Y. S. 611; Platt *v.* Flower, 66 Misc. 342, 123 N. Y. S. 536; Kreshover *v.* Berger, 62 Misc. 613, 116 N. Y. S. 20; Klein *v.* Bk., 130 N. Y. S. 136, *rev.* 125 N. Y. S. 1100; Hough *v.* S., 130 N. Y. S. 407, *rev.* 68 Misc. 26, 124 N. Y. S. 575; Wyckoff, etc. *v.* Lyford, 123 N. Y. S. 3; Butler *v.* De Villers, 107 N. Y. S. 125; Richards *v.* Hodges, 164 N. C. 183, 80 S. E. 439; Gardner *v.* Ins. Co., 163 N. C. 367, 79 S. E. 806; Woolson *v.* Beck, 151 N. C. 144, 65 S. E. 751; Bowser & Co. *v.* Tarry, 156 N. C. 35, 72 S. E. 74; Rieck *v.* Daigle, 17 N. D. 365, 117 N. W. 246; Watson *v.* Lamb, 75 O. St. 481, 79 N. E. 1075; Coyle *v.* R. Co. (Okla.), 139 P. 291; Clinton Nat. Bk. *v.* McKennon, 20 Okla. 835, 110 P. 649; Southard *v.* R. Co., 24 Okla. 108, 103 P. 750; Buxton *v.* Co., 18 Okla. 287, 90 P. 19; Deming *v.* Ins. Co., 16 Okla. 1, 83 P. 918; Sutherlin *v.* Bloomer, 50 Or. 398, 93 P. 135; Johnson *v.* Stewart, 243 Pa. 485, 90 A. 349; Share *v.* Coats, 29 S. D. 603, 137 N. W. 102; Gal. Houston Elec. R. Co. *v.* Stautz (Tex. Civ.), 166 S. W. 11; Dr. Koch, etc. Co. *v.* Malone (Tex. Civ.), 103 S. W. 662; Conn *v.* Rosamond (Tex. Civ.), 161 S. W. 73; Lewis *v.* Co. (Tex. Civ.), 121 S. W. 585; San Antonio, etc. R. Co. *v.* Timon, 45 Tex. Civ. 47, 99 S. W. 418; Williams *v.* R. Co., 43 Tex. Civ. 609, 96 S. W. 1099; Morrison *v.* Hazzard, 99 Tex. 583, 92 S. W. 33; Mut. F. Ins. Co. *v.* Turner, 115 Va. 631, 79 S. E. 1067; White *v.* Hall, 113 Va. 427, 74 S. E. 212; Potomac P. Co. *v.* Buchell, 109 Va. 676, 64 S. E. 982; Washington T. Co. *v.* Keyes (Wash.), 129 P. 638; Pickford *v.* Borland, 70 Wash. 339, 126 P. 128; Gilbert *v.* Husted, 70 Wash. 61, 96 P. 835; Pitman *v.* Erskine, 49 Wash. 166, 94 P. 921; Broadway Hospital *v.* Decker, 47 Wash. 586, 92 P. 445; Ferguson *v.* Ins. Co., 45 Wash. 209, 88 P. 128; Oliker *v.* Ins. Co. (W. Va.), 78 S. E. 746; Myers *v.* Taylor, 64 W. Va. 56, 61 S. E. 788; Duty *v.* Sprinkle, 64 W. Va. 39, 60 S. E. 882; Rief *v.* Co., 131 Wis. 208, 111 N. W. 302; Richtman *v.* Watson, 150 Wis. 385, 136 N. W. 797 (accord and satisfaction).

See vol. 7, p. 506, n. 24, and "Ambiguity," p. 826.

This rule applies even to an unsigned writing if it is shown to contain all the stipulations of the contract. Goldsmith & Co. *v.* Marcus, 7 Ga. App. 849, 68 S. E. 462.

Terms implied by law are no more subject to variation by parol evidence than its express terms. Grant *v.* King, 117 Minn. 54, 134 N. W. 291.

Rule does not apply where the instrument referred to in the testimony is not relied upon as the basis of the suit or defense, but is a mere collateral instrument of evidence. Cedar Rapids Nat. Bk. *v.* Carlson, 156 Iowa 343, 136 N. W. 659; Curtin *v.* Peoples', etc. Gas Co., 233 Pa. 397, 82 A. 503.

324-6 See Gandy *v.* Weckerly, 220 Pa. 285, 69 A. 858.

The Pennsylvania rule.—Croyle *v.* Imp. Co., 233 Pa. 310, 2 A. 360, *cit.* Gandy *v.* Weckerly, 220 Pa. 285, 69 A. 858, 123 Am. St. 691, 18 L. R. A. (N. S.) 434.

325-7 Ridgeway D. & E. Co. *v.* Co., 221 Pa. 160, 70 A. 557, stipulation in contract excluded previous negotiations. In Keller *v.* Cohen, 217 Pa. 522, 66 A. 862, it was held a contemporaneous parol agreement, entered into as inducement to written contract, might be shown as defense to latter. Morgan Smith Co. *v.* P. & S. Co., 221 Pa. 165, 70 A. 738.

325-8 U. S. *v.* Co., 152 Fed. 596, 81 C. C. A. 586; Thomas *v.* Irvine, 171 Ala. 332, 55 S. 109; Taylor *v.* Southerland, 7 Ind. Ty. 666, 104 S. W. 874; Loughridge *v.* Chenoweth, 156 Ky. 86, 160 S. W. 783; Wells *v.* Blackman, 121 La. 394, 46 S. 437; Montague, etc. Co. *v.* City, 166 Mo. App. 11, 148 S. W. 422; Simms *v.* Gilmore, 149 Mo. App. 550, 130 S. W. 1120; Grisham *v.* Ins. Co., 130 Mo. App. 57, 109 S. W. 96; Dexter *v.* Macdonald, 196 Mo. 373, 95 S. W. 359; Wightman *v.* Ins. Co., 119 App. Div. 496, 104 N. Y. S. 214; Garrison *v.* Kress, 19 Okla. 433, 91 P. 1130; Perkiomen R. Co. *v.* Bromer, 217 Pa. 263, 66 A. 359; Kansas City B. Co. *v.* Spies (Tex. Civ.), 109 S. W. 432; Home G. Co. *v.* Co., 63 W. Va. 266, 61 S. E. 329.

Sealed instrument presumed to work merger of unsealed writings. Kidd *v.* Co., 74 N. H. 160, 66 A. 127.

325-9 Hallenbeck *v.* Chapman, 72 N. J. L. 201, 63 A. 498.

326-11 Dollar *v.* International, etc. Co., 13 Cal. App. 331, 109 P. 499; Mears *v.* Smith, 199 Mass. 319, 85 N. E. 165; Lese *v.* Lamprecht, 196 N. Y. 32, 89 N. E. 365; Piretti *v.* T. & R. Co., 120 N. Y. S. 782; Stanton *v.* Granger, 125 App. Div. 174, 109 N. Y. S. 134; Lock *v.* Nat. Bk. (Tex. Civ.), 165 S. W. 536.

326-13 Brassell *v.* Fisk, 153 Ala. 558, 45 S. 70; Hutchins *v.* Langley, 27 App. Cas. (D. C.) 234; Com. F. Co. *v* Coveney, 200 Mass. 379, 86 N. E. 895; Lese *v.* Lamprecht, 196 N. Y. 32, 89 N. E. 365.

"**The rule applies** with more force in a court of law than in one of equity." Trout *v.* R. Co., 107 Va. 576, 59 S. E. 394.

326-14 Massie *v.* Chatom, 163 Cal. 772, 127 P. 56; Greve *v.* Co., 8 Cal. App. 275, 96 P. 904; Cox *v.* Co., 147 Ia. 137, 124 N. W. 202; In re Shield, 134 Ia. 559, 111 N. W. 963; Lamb *v.* Morrow, 140 Ia. 89, 117 N. W. 1118; Levine *v.* Co., 144 Ky. 380, 138 S. W. 261; Mason *v.* Highland (Ky.), 116 S. W. 320; P. *v.* Messer, 148 Mich. 168, 111 N. W. 854 (criminal action); Fitzgerald *v.* Co., 89 Neb. 393, 131 N. W. 612; Heisler P. E. Co. *v.* Baum, 86 Neb. 1, 124 N. W. 916; Glidden *v.* Town, 74 N. H. 207, 66 A. 117; Shreve *v.* Crosby, 72 N. J. L. 491, 63 A. 333; Smith *v.* Bk., 57 Or. 82, 110 P. 410; King *v.* Miller, 53 Or. 53, 97 P. 542; Charles *v.* R. Co., 78 S. C. 36, 5 S. E. 927 (writting collateral); Jarvis *v.* Matson, 52 Tex. Civ. 170, 113 S. W. 326; Roselle *v.* C., 110 Va. 235, 65 S. E. 526; Dudley *v.* Co., 65 W. Va. 461, 64 S. E. 745 (admission in contract may be explained by one who claims no rights under it); Kendall *v.* Johnson, 51 Wash. 477, 99 P. 310.

"**As against a stranger** to the contract, a party thereto may assert that the agreement was other or different—in any respect and to any extent—than that which the writing imports." Rampton *v.* Dobson, 156 Ia. 315, 136 N. W. 682, *cit.* Livingstone *v.* Stevens, 122 Iowa 62, 94 N. W. 925; Logan *v.* Miller, 106 Iowa 511, 76 N. W. 1005; Roberts *v.* Bk., 8 N. D. 504, 79 N. W. 1049.

327-15 Shattuck & D. W. Co. *v.* Gillelen, 154 Cal. 778, 99 P. 348; Dollar *v.* Int., etc. Corp., 13 Cal. App. 331, 109 P. 499; First Nat. Bk. *v.* Josefoff (Ind. App.), 105 N. E. 175; Brown *v.* Quinby, 204 Mass. 206, 90 N. E. 586; Josephson *v.* Gens, 141 N. Y. S. 522; Bumpass *v.* Mitchell (Tex. Civ.), 129 S. W. 194; Brown *v.* Wisner, 51 Wash. 509, 99 P. 581.

Creditor of partner is bound.—Haag *v.* Burns, 22 S. D. 51, 115 N. W. 104.

328-16 Good *v.* Co., 7 Ind. Ty. 268, 104 S. W. 613; Bright *v.* Ins. Co., 48 Wash. 60, 92 P. 779.

328-19 Fact a surety agreement operated for benefit of a third person (plaintiff), who did not personally assent thereto at time of its inception, but subsequently furnished materials to obligor (defendant), does not prevent rule from applying. U. S. G. Co. *v.* Gleason, 135 Wis. 539, 116 N. W. 238, 17 L. R. A. (N. S.) 906.

328-20 Current *v.* Muir, 99 Minn. 1, 108 N. W. 870.

329-24 In re William Hill & Sons, 186 Fed. 569; Baker *v.* Cotney, 150 Ala. 506, 43 S. 786; Thomas *v.* Johnston, 78 Ark. 574, 95 S. W. 468; Mendel *v.* Leader, 136 Ga. 442, 71 S. E. 753; Smith *v.* Smith, 130 Ga. 532, 61 S. E. 114; Pennington *v.* Avera, 124 Ga. 147, 52 S. E. 324; Joliet B. Co. *v.* Brew. Co., 254 Ill. 215, 98 N. E. 263; Warner *v.* Marshall, 166 Ind. 88, 75 N. E. 582; Cole *v.* Harvey, 142 Ia. 574, 120 N. W. 97; Capital City *v.* Moody, 135 Ia. 444, 110 N. W. 903; Inman Mfg. Co. *v.* Co., 133 Ia. 71, 110 N. W. 287; State Bk. *v.* Hoskins, 130 Ia. 339, 106 N. W. 764; Willis *v.* Weeks, 129 Ia. 525, 105 N. W. 1012; Diamond *v.* Shriver, 114 Md. 643, 80 A. 217; Lemmert *v.* Lemmert, 103 Md. 57, 63 A. 380; Graham *v.* Savage, 110 Minn. 510, 126 N. W. 394 (to show agreement not to be effective, and intended to be used to deceive third parties); Weissenfels *v.* Cable, 208 Mo. 515, 106 S. W. 1028; Renfro *v.* Metrop., etc. L. Ins. Co., 148 Mo. App. 258, 129 S. W. 444; Lutheran C. *v.* Gardner, 28 Pa. Super. 82; Provident Bk. *v.* Hartnett, 45 Tex. Civ. 273, 100 S. W. 1024; Herman *v.* Dunman (Tex. Civ.), 95 S. W. 80; Hackley Nat. Bk. *v.* Barry, 139 Wis. 96, 120 N. W. 275.

See Long *v.* Furnas, 130 Ia. 504, 107 N. W. 432.

Parol evidence is competent to rebut inference arising from writing concerning purpose which led to its execution. Rucker *v.* Brown, 6 Ga. App. 361, 65 S. E. 55.

330-25 Dollar *v.* Bkg. Corp., 13 Cal. App. 331, 109 P. 499; Carroll *v.* Hutchinson, 2 Ga. App. 60, 58 S. E. 309; Bowen *v.* Waxelbaum, 2 Ga. App. 521, 58 S. E. 784; Byrd *v.* Co., 127 Ga. 30, 56 S. E. 86; Crooker *v.* Hamilton, 3 Ga. App. 190, 59 S. E. 722; Andrews *v.* Co., 1 Ga. App. 560, 58 S. E. 130; Williams *v.* Gottschalk, 231 Ill. 175, 83 N. E. 141; Kelsey *v.* Ins. Co., 131 Ia. 207, 108 N. W. 221; Jackson B. Co. *v.* Wagner, 117 La. 875, 42 S. 356; Friedman *v.* Pierce, 210 Mass. 419, 97 N. E. 82; Waldo *v.* Jacobs, 152 Mich. 425, 116 N. W. 371; Superior D. Co. *v.* Carpenter, 150 Mich. 262, 114 N. W. 67 (statements of agent); Wallace *v.* Kelly, 148 Mich. 336, 111 N. W. 1049; Haas *v.* Co., 148 Mich. 358, 111 N. W. 1059; Day L. Co. *v.* Co., 141 Mich. 533, 104 N. W. 797; Weddington *v.* Ins. Co., 141 N. C. 234, 54 S. E. 271; Smith *v.* R. Co. (Tex. Civ.), 105 S. W. 528; Ferguson *v.* Ins. Co., 45 Wash. 209, 88 P. 128; Peirson *v.* Peirce, 42 Wash. 164, 84 P. 731; Buffalo P. Co. *v.* Shriner, 41 Wash. 146, 82 P. 1016; Nielson *v.* Co., 41 Wash. 194, 82 P. 292; Midland S. Co. *v.* Co., 127 Wis. 242, 106 N. W. 115.

331-26 Cressey *v.* Harvester Co., 206 Fed. 29, 124 C. C. A. 163; Hendricks *v.* Webster, 159 Fed. 927, 87 C. C. A. 107; Bachman *v.* Clyde, 152 Fed. 403, 81 C. C. A. 529; Normile *v.* U. S., 45 Ct. Cl. 203; Lower *v.* Hickman, 80 Ark. 505, 97 S. W. 681; Cox *v.* Smith, 99 Ark. 90, 138 S. W. 978; Kinney *v.* Cas. Co., 15 Cal. App. 571, 115 P. 456; Capps *v.* Edwards, 130 Ga. 146, 60 S. E. 455; Fleming *v.* Satterfield, 4 Ga. App. 351, 61 S. E. 518; Crankshaw *v.* Co., 1 Ga. App. 363, 58 S. E. 222; P. *v.* Newbold, 260 Ill. 196, 103 N. E. 69; McKinney *v.* Mfg. Co., 157 Ill. App. 339; Smith *v.* Hunt, 50 Ind. App. 592, 98 N. E. 841; Bassett *v.* Bassett, 159 Ky. 117, 166 S. W. 763; Anthony *v.* Hudson, 131 Ky. 185, 114 S. W. 782; Smith *v.* Co., 194 Mass. 193, 80 N. E. 527; Truman *v.* Mach. Co., 169 Mich. 153, 135 N. W. 89; Chute *v.* Latta, 123 Minn. 69, 142 N. W. 1048; Irwin *v.* R. Co., 99 Miss. 394, 55 S. 49; McPherson *v.* Kissee, 239 Mo. 664, 144 S. W. 410; Milan Bk. *v.* Richmond, 235 Mo. 532, 139 S. W. 352; Wilson *v.* Duffy, 158 Mo. App. 509, 138 S. W. 918; Met., etc. Co. *v.* Rope Co., 156 Mo. App. 640, 137 S. W. 633; Arnold *v.* Fraser, 43 Mont. 540, 117 P. 1064; Middleworth *v.* Ordway, 191 N. Y. 404, 84 N. E. 291; Janvey *v.* Loketz, 122 App. Div. 411, 106 N. Y. S. 690; Dowling *v.* Co., 115 N. Y. S. 154 (applying rule to map indicating depth of lot); Wilson *v.* Scarboro, 163 N. C. 380, 79 S. E. 811; Furnace, etc. Lumb. Co. *v.* Heller Bros. Co., 84 O. St. 201, 95 N. E. 771; S. *v.* Sup. Ct., 40 Okla. 120, 136 P. 424; Guthrie, etc. R. Co. *v.* Rhodes, 19 Okla. 21, 91 P. 1119; Peters & R. Co. *v.* Ins. Co., 63 Or. 382, 126 P. 1005;

Williams *v.* Power Co., 57 Or. 251, 110 P. 490; Blassingame *v.* Laurens, 80 S. C. 38, 61 S. E. 96; Prince *v.* Ins. Co., 77 S. C. 187, 57 S. E. 766; Long *v.* Riley (Tex. Civ.), 139 S. W. 79; Metropolitan Ins. Co. *v.* Hall, 104 Va. 572, 52 S. E. 345; S. *v.* R. Co., 64 Wash. 167, 116 P. 638; Austin M. Co. *v.* Coffman, 69 W. Va. 376, 71 S. E. 383; Home G. Co. *v.* Co., 63 W. Va. 266, 61 S. E. 329; Loree *v.* Co., 134 Wis. 173, 114 N. W. 449.

"**There is often difficulty** in distinguishing between mere conversations, as the term is here used, and evidence of the fact and circumstances under which a contract was made and so characterizing it. Neither is competent to vary or contradict the writing. It must speak for itself, nothing being added and nothing taken from it, changing its meaning. But in case of uncertainty, it may be read in the light of circumstances forming, really, a part of it, and giving character to it. That does not include mere conversations respecting it. We will say, in passing, that one should appreciate that discussion and agreement, or understanding at the time of making a contract as to the import of a term used in it which is susceptible of double meaning, is not within the field of mere conversations, but is within that of characterizing circumstances." Pedelty *v.* Zinc Co., 148 Wis. 245, 134 N. W. 356.

331-27 Abbott *v.* Parker, 103 Ark. 425, 147 S. W. 70; Lytle *v.* Allison, 22 Cal. App. 35, 133 P. 999; Doan *v.* R. Co. (Ind.), 98 N. E. 321; Kinney *v.* Reed (Ia.), 145 N. W. 900; Ripy & Son *v.* P. Mills (Okla.), 136 P. 1080; Western L. & C. Co. *v.* Co., 138 Wis. 404, 120 N. W. 277.

332-29 Balt. R. & H. Co. *v.* Wetzel, 152 Fed. 117, 89 C. C. A. 117; Southeastern Co. *v.* Farnham, 148 Fed. 619, 78 C. C. A. 641; Warburton *v.* Co., 158 Fed. 969, 86 C. C. A. 173; First Nat Bk. *v.* Ins. Co., 147 Fed. 519, 77 C. C. A. 215; Able *v.* Gunter, 174 Ala. 389, 57 S. 464; Bixby T. Co. *v.* Evans, 174 Ala. 571, 57 S. 39; Leftkovitz *v.* Bk., 152 Ala. 521, 44 S. 613; Brennard Mfg. Co. *v.* Co., 148 Ala. 666, 41 S. 671; Pearson *v.* Dancer, 144 Ala. 427, 39 S. 474; Main *v.* Radney (Ala.), 39 S. 981; Outcault Adv. Co. *v.* Bradley, 105 Ark. 50, 150 S. W. 148; Barry M. Co. *v.* Thompson, 83 Ark. 283, 104 S. W. 137; Johnson Co. *v.* Hughes, 83 Ark. 105, 103 S. W. 184; Steele *v.* Co., 8 Cal. App. 95, 96 P. 105; Kullman Co. *v.* Co., 153 Cal. 725, 96 P. 369; Kinsel *v.* Ballon, 151 Cal. 754, 91 P. 620; Com. Bk. *v.* Pott, 150 Cal. 358, 89 P. 431; Pierce *v.* Edwards, 150 Cal. 650, 89 P. 600; First N. Bk. *v.* Shank, 53 Colo. 446, 128 P. 56; Knight-C. M. Co. *v.* Buck, 43 Colo. 179, 95 P. 283; Doyle *v.* Nesting, 37 Colo. 522, 88 P. 862; Whitehead *v.* Emmerich, 38 Colo. 13, 87 P. 790; Dejon *v.* Street, 79 Conn. 333, 65 A. 145; Adams *v.* Bridges, 141 Ga. 418, 81 S. E. 203; Biggers *v.* Co., 124 Ga. 1045, 53 S. E. 674; Empire, etc. Co. *v.* Shillinger Bros., 167 Ill. App. 632; Schreiber *v.* Straus, 147 Ill. App. 581; Hensley *v.* Mitchell, 147 Ill. App. 161; Ross *v.* Griebel, 136 Ill. App. 399; Cochran *v.* Zachery, 137 Ia. 585, 115 N. W. 486, 16 L. R. A. (N. S.) 235; Doolittle *v.* Murray, 134 Ia. 536, 111 N. W. 999; Houts *v.* Wks., 134 Ia. 484, 110 N. W. 166; Chapman *v.* Chapman, 132 Ia. 5, 109 N. W. 300; Spurrier *v.* Bullard, 131 Ia. 123, 107 N. W. 1036; Mosnat *v.* Uchytil, 129 Ia. 274, 105 N. W. 519; Smith & Nixon Co. *v.* Morgan, 152 Ky. 430, 153 S. W. 749; Provident Sav. L. Assur. Soc. *v.* Shearer, 151 Ky. 298, 151 S. W. 938 (as applied to notes); Robinson, etc. Co. *v.* Randall, 147 Ky. 45, 143 S. W. 679; Fairbanks, etc. Co. *v.* Hooper, 147 Ky. 154, 143 S. W. 1025; Doty *v.* Dickey, 29 Ky. L. R. 900, 96 S. W. 544; Goldenberg *v.* Taglino (Mass.), 105 N. E. 883; Barrie *v.* Quinby, 206 Mass. 259, 92 N. E. 451; Mears *v.* Smith, 199 Mass. 319, 83 N. E. 165; McCusker *v.* Geger, 195 Mass. 46, 80 N. E. 648; Longe *v.* Kinney, 171 Mich. 312, 137 N. W. 119 (*cit.* this text); Hall *v.* Duplex P. Co., 168 Mich. 634, 135 N. W. 118; Int. Text-Book Co. *v.* Roberts, 168 Mich. 501, 134 N. W. 460; Foley *v.* R. Co., 168 Mich. 496, 134 N. W. 446; Grant *v.* King, 117 Minn. 54, 134 N. W. 291; Evans *v.* R. Co., 117 Minn. 4, 134 N. W. 294; Dodge *v.* Cutrer, 101 Miss. 844, 58 S. 208; Bailey *v.* S., 93 Miss. 79, 46 S. 137; Grisham *v.* Ins. Co., 130 Mo. App. 57, 109 S. W. 96; International Co. *v.* Lewis, 130 Mo. App. 158, 108 S. W. 1118; Power *v.* Turner, 37 Mont. 521, 97 P. 950; Wessell *v.* Havens, 91 Neb. 426, 136 N. W. 70; Albright *v.* Ins. Co., 80 Neb. 64, 113 N. W. 793; Gandy *v.* Wiltse, 79 Neb. 280, 112 N. W. 569; Scharff, etc. Co. *v.* Bowers,

81 N. J. Eq. 198, 86 A. 370; Alexander *v.* Ferguson, 73 N. J. L. 479, 63 A. 998; Lese *v.* Lamprecht, 196 N. Y. 32, 89 N. E. 365; Finucane Co. *v.* Board, 190 N. Y. 76, 82 N. E. 737; Borough D. Co. *v.* Harmon, 154 App. Div. 689, 139 N. Y. S. 362; Whitlock *v.* Childwood, etc. Co., 123 N. Y. S. 1084; Cooper, etc. Co. *v.* Wiegand, 123 N. Y. S. 947; Karpf *v.* Borgenicht, 120 N. Y. S. 876; Richards *v.* Hodges, 164 N. C. 183, 80 S. E. 439; Miller Bros. *v.* McCall Co., 37 Okla. 634, 133 P. 183; Garrison *v.* Kress, 19 Okla. 433, 91 P. 1130; Page *v.* Co., 17 Okla. 110, 87 P. 851; Becker *v.* Assn., 239 Pa. 590, 86 A. 1084; Haag *v.* Burns, 29 S. D. 51, 115 N. W. 104; Schriner *v.* Dickinson, 20 S. D. 433, 107 N. W. 536 (inadmissible to show one of the parties was agent for undisclosed principal); Bowen *v.* Ins. Co., 20 S. D. 103, 104 N. W. 1040; Johnson *v.* Ins. Co., 119 Tenn. 598, 107 S. W. 688; Key *v.* Hickman (Tex. Civ.), 149 S. W. 277; Whitaker *v.* Willis (Tex. Civ.), 146 S. W. 1004; Rudolph *v.* Price (Tex. Civ.), 146 S. W. 1037; Stith *v.* Graham (Tex. Civ.), 146 S. W. 661; Fish Bros *v.* Co. (Tex. Civ.), 146 S. W. 704; Murray Co. *v.* Putman (Tex. Civ.), 130 S. W. 631; Bumpass *v.* Mitchell (Tex. Civ.), 129 S. W. 194; Paris *v.* Burks, 101 Tex. 106, 105 S. W. 174; Thompson *v.* Fitzgerald (Tex. Civ.), 105 S. W. 334; International R. Co. *v.* Griffith (Tex. Civ.), 103 S. W. 225; Robertson *v.* Warren, 45 Tex. Civ. 584, 100 S. W. 805; Babcock-C. Co. *v.* Urquhart, 53 Wash. 168, 101 P. 713; Buckeye B. Co. *v.* Stables, 43 Wash. 49, 85 P. 1077; Sylvester *v.* S., 46 Wash. 585, 91 P. 15; Long *v.* Potts, 70 W. Va. 719, 75 S. E. 62; Demple *v.* Carroll (Wyo.), 123 P. 137.

See also "Bills and Notes," p. 453.

Reservation cannot be shown by parol. Cobb *v.* Johnson, 126 Ga. 618, 55 S. E. 935; Ord *v.* Waller (Tex. Civ.), 107 S. W. 1166; Suderman-D. Co. *v.* Rodgers, 47 Tex. Civ. 67, 104 S. W. 193; Carter *v.* Childress (Tex. Civ.), 99 S. W. 714; Hubenthal *v.* R. Co., 43 Wash. 677, 86 P. 955.

This rule applies to an agreement made by the agent and not assented to by the principal. Georgia Agr. Wares *v.* Price, 11 Ga. App. 80, 74 S. E. 718.

Inadmissible unless the evidence is indubitable. Wallace *v.* Steele, 228 Pa. 70, 77 A. 247.

333-30 Fox *v.* Co., 37 Colo. 203, 86 P. 344; Boylan *v.* Cameron, 126 Ill. App. 432; Lines *v.* Willey, 253 Ill. 440, 97 N. E. 843; Case M. M. Co. *v.* Vickers, 147 Ky. 296, 144 S. W. 76; Com. T. Co. *v.* Coveney, 200 Mass. 379, 86 N. E. 895; Taber *v.* City, 190 Mass. 101, 76 N. E. 727; Minor *v.* Walker (Mich.), 146 N. W. 305; Chicago, etc. R. Co. *v.* Lane, 150 Mich. 162, 113 N. W. 22; Yazoo, etc. R. Co. *v.* Martin, 94 Miss. 700, 47 S. 667; Patt *v.* Leavel, 161 Mo. App. 242, 143 S. W. 833; Creamery P. Mfg. Co. *v.* Duncan, 136 Mo. App. 659, 119 S. W. 33; New York Ins. Co. *v.* Wolfson, 124 Mo. App. 286, 101 S. W. 162; Hallenbeck *v.* Chapman, 72 N. J. L. 201, 63 A. 498; Adams *v.* Gillig, 199 N. Y. 314, 92 N. E. 670, *aff.* 115 N. Y. S. 999; Garett *v.* Cohen, 63 Misc. 450, 117 N. Y. S. 129; Gardner *v.* Welch, 21 S. D. 151, 110 N. W. 110; Luckenbach *v.* Thomas (Tex. Civ.), 166 S. W. 99; Kansas City R. Co. *v.* Spies (Tex. Civ.), 109 S. W. 432; Trout *v.* R. Co., 107 Va. 576, 59 S. E. 394; Ryan *v.* Nuce, 67 W. Va. 485, 68 S. E. 110; Holt Mfg. Co. *v.* Odenrider, 61 Wash. 555, 112 P. 670.

333-31 Goodrum *v.* Bk., 102 Ark. 326, 144 S. W. 198; Columbia Mill *v.* Co., 89 Miss. 437, 42 S. 233; Egger *v.* Egger, 225 Mo. 116, 123 S. W. 928; Joseph *v.* Platt, 130 App. Div. 478, 114 N. Y. S. 1065; Watson *v.* Gugino, 204 N. Y. 535, 98 N. E. 18.

334-32 Able *v.* Gunter, 174 Ala. 389, 57 S. 464; Atwood *v.* Quicksilver Co., 13 Cal. App. 594, 110 P. 344; Standard B. Co. *v.* Co., 10 Cal. App. 746, 103 P. 938; Torbert *v.* Montague, 38 Colo. 325, 87 P. 1145 (blank endorsement); Allen *v.* Ruland, 79 Conn. 405, 65 A. 138; Baumeister *v.* Kuntz, 53 Fla. 340, 42 S. 886 (statute fixing status of party as endorser); Murray County *v.* Wilson, 140 Ga. 689, 79 S. E. 783; McAlpine *v.* Millen, 104 Minn. 289, 116 N. W. 583; Martin *v.* Gray (Tex. Civ.), 159 S. W. 118; Parks *v.* Knox (Tex. Civ.), 130 S. W. 203.

334-34 Gray *v.* Blackwood (Ark.), 165 S. W. 958; Main *v.* Ollver, 88 Ark. 383, 114 S. W. 917; Bullard *v.* Hudson, 125 Ga. 393, 54 S. E. 132 (words describing lands not in note when executed); Heitmann *v.* Bk., 6 Ga. App. 584, 65 S. E. 590; Nichols *v.* Berning, 37 Ind. App. 109, 76 N. E. 776; Hendrix *v.* Letourneau, 139 Ia. 451, 116 N. W. 729 (memorandum never signed, Doyle *v.* Offeut, 135 Ky. 296,

122 S. W. 156; Birely *v.* Dodson, 107 Md. 229, 68 A. 488; Sheldon *v.* Assn., 73 N. J. L. 115, 62 A. 189; Burroughs, etc. Co. *v.* Van Deusen, 78 Misc. 643, 138 N. Y. S. 839; Martin *v.* Mask, 158 N. C. 436, 74 S. E. 343; Colonial J. Co. *v.* Brown, 380 Okla. 44, 131 P. 1077; Floresville, etc. Co. *v.* R. Co., 55 Tex. Civ. 78, 118 S. W. 194; Baker *v.* Co., 109 Va. 776, 65 S. E. 656.

Such evidence is admissible where the issue is whether a contract, apparently valid on its face, was in fact made in contravention of a statute of the state, and for the purpose of evading such statute in fact, though not in form. President & Trustees, etc. *v.* Co., 149 Wis. 168, 135 N. W. 499.

335-35 Green Ridge F. Co. *v.* Littlejohn, 141 Ia. 221, 119 N. W. 698.

335-36 Colonial Park Estates *v.* Massart, 112 Md. 648, 77 A. 275; Barrie *v.* Quinby, 206 Mass. 259, 92 N. E. 451; Birely *v.* Dodson, 107 Md. 229, 68 A. 488; Chesapeake, etc. Co. *v.* Swartz, 115 Va. 723, 80 S. E. 568. See Jost *v.* Wolf, 130 Wis. 37, 110 N. W. 232.

In equity.—O'Brien *v.* Co., 69 N. J. Eq. 117, 61 A. 437.

335-37 Tevis *v.* Ryan, 233 U. S. 273, 34 Sup. Ct. 481, 58 L. ed. 957; Cook *v.* Sterling, 150 Fed. 766, 80 C. C. A. 502; Delaney *v.* Jackson, 95 Ark. 131, 128 S. W. 859; McLaughlin *v.* Thomas, 86 Conn. 252, 85 A. 370; Board *v.* Robbins, 82 Conn. 623, 74 A. 938; Brown *v.* Rape, 136 Ga. 54, 71 S. E. 802; Hyer *v.* Co., 12 Ga. App. 837, 79 S. E. 58; Thomason & S. *v.* Co., 9 Ga. App. 349, 71 S. E. 596; Williams *v.* Moore, 3 Ga. App. 756, 60 S. E. 372; Am. Bldg., etc. Assn. *v.* Hughes, 46 Ind. App. 248, 92 N. E. 180; Creveling *v.* Banta, 138 Ia. 47, 115 N. W. 598; Deming I. Co. *v.* Wallace, 73 Kan. 291, 85 P. 139; Neyaus *v.* Dickinson Bros., 138 Ky. 760, 129 S. W. 100; Blanchard *v.* Ridgeway (Mich.), 146 N. W. 139; International Text-Book Co. *v.* Marvin, 166 Mich. 660, 132 N. W. 437; General Electric Co. *v.* O'Connell, 118 Minn. 53, 136 N. W. 404; Meland *v.* Youngberg, 124 Minn. 446, 145 N. W. 167; S. *v.* Lovan, 245 Mo. 516, 151 S. W. 141; Minneapolis M. Co. *v.* Otis, 78 Neb. 233, 110 N. W. 550; Sheldon *v.* Assn., 73 N. J. L. 115, 62 A. 189; Callanan *v.* Powers, 199 N. Y. 268, 92 N. E. 747, *mod.* judg., 123 N. Y. S. 1169; Electrical Co. *v.* Greenberg, 56 Misc. 514, 107 N. Y. S. 110; Case T. M. Co. *v.* McKay, 161 N. C. 584, 77 S. E. 848; Am. Tr. Co. *v.* Chitty, 36 Okla. 479, 129 P. 51; Lowry *v.* Roy, 238 Pa. 9, 85 A. 986; Safe Dep. & Tr. Co. *v.* D. C. & C. Co., 234 Pa. 100, 83 A. 54; Rectenbaugh *v.* Co., 22 S. D. 410, 118 N. W. 697; Rochford *v.* Barrett, 22 S. D. 83, 115 N. W. 522; South, etc. Co. *v.* Coe (Tex. Civ.), 166 S. W. 419; Kirby *v.* Thurmond (Tex. Civ.), 152 S. W. 1101; Syler *v.* Culp (Tex. Civ.), 138 S. W. 175; Barclay *v.* Deyerle, 53 Tex. Civ. 236, 116 S. W. 123; Farmers' Mfg. Co. *v.* Woodworth, 109 Va. 596, 64 S. E. 986. See also "Fraud," p. 16.

Rule inapplicable in action for deceit. Duffy *v.* Meyer, 122 App. Div. 838, 107 N. Y. S. 672.

Pennsylvania.—"In such cases, where the parol evidence is sufficient to warrant a chancellor in reforming the instrument, it is admissible to contradict or vary the writing. Wherever the oral evidence furnishes this degree of proof, our courts in the exercise of equitable jurisdiction have reformed the writing so as to make it conform to the intention of the parties in the execution of this instrument. We have applied this doctrine, and permitted parol testimony to be introduced for the purpose of reforming both executory and executed contracts." Safe Dep. & Tr. Co. *v.* D. C. & C. Co., 234 Pa. 100, 83 A. 54.

337-38 State L. Ins. Co. *v.* Johnson, 73 Kan. 567, 85 P. 597; Johnson C. S. Bk. *v.* Redfearn, 141 Mo. App. 386, 125 S. W. 224; Lilienthal *v.* Herren, 42 Wash. 209, 84 P. 829.

337-39 Comeau *v.* Hurley, 22 S. D. 310, 117 N. W. 371.

337-40 Lepley *v.* Anderson, 142 Wis. 668, 125 N. W. 433.

338-41 Blumer *v.* Schmidt (Ia.), 146 N. W. 751; Neyaus *v.* Dickinson Bros., 138 Ky. 760, 129 S. W. 100; Salmen *v.* Peterson, 121 La. 528, 46 S. 616. See also "Fraud," p. 16.

Failure to read, insufficient. Branan *v.* Warfield, 3 Ga. App. 586, 60 S. E. 325.

338-42 Smith & N. Co. *v.* Morgan, 152 Ky. 430, 153 S. W. 749.

A party insured may show by parol answers to questions not written by him and he did not know contents of application when he signed it. Modern Woodmen *v.* Angle, 127 Mo. App. 94, 104 S. W. 297. See Mutual Ins.

Co. *v.* Hargus (Tex. Civ.), 99 S. W. 580.

338-43 Chandler, etc. Co. *v.* Price, 10 Ga. App. 383, 73 S. E. 413; Barco *v.* Taylor, 5 Ga. App. 372, 63 S. E. 224; Hinkley *v.* Co., 132 Ia. 396, 107 N. W. 629; Bonewell *v.* Jacobson, 130 Ia. 170, 106 N. W. 614; McCusker *v.* Geiger, 195 Mass. 46, 80 N. E. 648; Sawyer *v.* Walker, 204 Mo. 133, 102 S. W. 544; Elgin J. Co. *v.* Withaup, 118 Mo. App. 126, 94 S. W. 572; Batura *v.* McBride, 77 N. J. L. 779, 73 A. 600; Scarsdale P. Co. *v.* Carter, 116 N. Y. S. 731; Greensboro L. Ins. Co. *v.* Knight, 160 N. C. 592, 76 S. E. 623; Colonial J. Co. *v.* Jones, 36 Okla. 788, 127 P. 405; Ex parte Cain, 20 Okla. 125, 93 P. 974; Faux *v.* Fitler, 223 Pa. 568, 72 A. 891; Benton *v.* Kuykendall (Tex. Civ.), 160 S. W. 438; Granger *v.* Kishi (Tex. Civ.), 153 S. W. 1161; Am. C. Co. *v.* Thompson (Tex. Civ.), 110 S. W. 777; Butler *v.* Anderson (Tex. Civ.), 107 S. W. 656; Mars *v.* Morris, 48 Tex. Civ. 216, 106 S. W. 430; Karner *v.* Ross, 43 Tex. Civ. 542, 95 S. W. 46; Winton *v.* McGraw, 60 W. Va. 98, 54 S. E. 506.

338-44 Tyson *v.* Jones, 150 N. C. 181, 63 S. E. 734.

339-45 Scarsdale P. Co. *v.* Carter, 116 N. Y. S. 731; U. S. G. Co. *v.* Shields (Tex. Civ.), 106 S. W. 724 (contract stated there were no verbal statements varying terms).

339-46 Herron-Robbins *v.* Allen (Tex. Civ.), 159 S. W. 1046. Expressions of opinion, not constituting contract, not basis upon which parol evidence admitted. Gough M. & G. Co. *v.* Looney (Tex. Civ.), 112 S. W. 782.

339-50 Muskogee L. Co. *v.* Mullins, 165 Fed. 179, 91 C. C. A. 213; Farrington *v.* Stucky, 165 Fed. 325, 91 C. C. A. 311; Smith *v.* Crockett Co., 85 Conn. 282, 82 A. 569; Roberts *v.* Arnall, 9 Ga. App. 328, 71 S. E. 590; Hines *v.* Cureton-Cole Co., 9 Ga. App. 778, 72 S. E. 191; Howard *v.* Farrar, 28 Okla. 490, 114 P. 695; M. & M. Bureau *v.* H. Co., 152 Wis. 73, 138 N. W. 624.

Contract against public policy will not be enforced and parties cannot, by reducing unobjectionable parts of it to writing, prevent reception of parol evidence to show entire agreement, although it may be inconsistent with the paper. Twentieth C. Co. *v.* Quilling, 130 Wis. 318, 110 N. W. 174. See Trout *v.* R. Co., 107 Va. 576, 59 S. E. 394.

340-58 McConnell *v.* Co., 152 Fed 321, 81 C. C. A. 429.

340-59 Clemens *v.* Crane, 234 Ill. 215, 84 N. E. 884; France *v.* Munro, 138 Ia. 1, 115 N. W. 577, 19 L. R. A. (N. S.) 391.

341-61 McNamara *v.* Cotton Co., 10 Ga. App. 669, 73 S. E. 1092.

341-62 See Smith *v.* Bowen, 45 Tex. Civ. 222, 100 S. W. 796.

341-63 Lane *v.* Co., 10 O. C. C. (N. S.) 512.

342-68 Goldsmith & Co. *v.* Marcus, 7 Ga. App. 849, 68 S. E. 462; Acme F. Co. *v.* Tousey, 148 Mich. 697, 112 N. W. 484.

342-69 Noban *v.* Shoup, 171 Mich. 191, 137 N. W. 75.

342-73 Keathley *v.* Bk. Co. (Ark.), 166 S. W. 953; Central Nat. Bk. *v.* Efird, 91 S. C. 135, 74 S. E. 136; Price *v.* Stanbra, 45 Wash. 143, 88 P. 115.

Consent to alterations shown by parol. S. *v.* Baird, 13 Ida. 126, 89 P. 298.

343-74 Meldrim *v.* Meldrim, 140 Ga. 400, 78 S. E. 1089; Germer *v.* Gambill, 140 Ky. 469, 131 S. W. 268; Stewart *v.* Co., 133 Ky. 118, 117 S. W. 401; Toole *v.* Crafts, 196 Mass. 397, 82 N. E. 22; Northwest T. Co. *v.* Hulburt, 103 Minn. 276, 115 N. W. 159; Townsend *v.* Lacock, 222 Pa. 330, 71 A. 187; Burt *v.* Burt, 221 Pa. 171, 70 A. 710; Conn *v.* Rosamond (Tex. Civ.), 161 S. W. 73; Kansas City B. Co. *v.* Spies (Tex. Civ.), 109 S. W. 432.

Writing evidentiary merely, mistake need not be pleaded to authorize parol evidence. Martin *v.* Ferguson, 31 Ky. L. R. 1095, 104 S. W. 698.

343-75 Wiltse *v.* Fifield, 143 Ia. 332, 121 N. W. 1086; Openshaw *v.* Rickmeyer, 45 Tex. Civ. 508, 102 S. W. 467; Harden *v.* Card, 17 Wyo. 210, 97 P. 1075 (date of contract).

343-77 Dillard *v.* Jones, 229 Ill. 119, 82 N. E. 206. See vol. 11, p. 74, n. 23, and supplement thereto.

344-78 Tossini *v.* Donahue, 22 S. D 277, 117 N. W. 148, quot. the text.

344-79 Burt *v.* Burt, 221 Pa. 171, 70 A. 710.

344-82 Burt *v.* Burt, supra.

345-87 Edwards *v.* R. Co., 54 Tex. Civ. 334, 118 S. W. 572.

345-88 National, etc. Box Co. *v.* Healy, 189 Fed. 49, 110 C. C. A. 613; M'Connell *v.* Co., 152 Fed. 321, 81 C. C. A. 429; Roquemore *v.* Wks., 151 Ala.

643, 44 S. 557; Polack *v.* Steinke, 100 Ark. 28, 139 S. W. 538; Montgomery *v.* Co., 93 Ark. 191, 124 S. W. 768; St. Louis, etc. R. Co. *v.* Co., 81 Ark. 373, 99 S. W. 375; Luitweiler Pump. Eng. Co. *v.* Imp. Co., 16 Cal. App. 198, 116 P. 707, rehear. *denied*, 116 P. 712; Casey *v.* Richards, 10 Cal. App. 57, 101 P. 36; Brosty *v.* Thompson, 79 Conn. 133, 64 A. 1; McCommons *v.* Williams, 131 Ga. 313, 62 S. E. 230; Martin *v.* Thrower, 3 Ga. App. 784, 60 S. E. 825; Jarrett *v.* Prosser, 23 Ida. 382, 130 P. 376; Smith *v.* Hunt, 50 Ind. App 592, 98 N. E. 841; Canfield Lumb. Co. *v.* Kint Lumb. Co., 148 Ia. 207, 127 N. W. 70; Sieberts *v.* Spangler, 140 Ia. 236, 118 N. W. 292; McCaskey R. Co. *v.* Hall (Ia.), 117 N. W. 1124 (subject to contract agreed upon collaterally); Hall *v.* Barnard, 138 Ia. 523, 116 N. W. 604; Chicago T. Co. *v.* Co., 134 Ia. 252, 111 N. W. 935; Denis *v.* Tilton, 120 La. 226, 45 S. 112; Davis *v.* Cress, 214 Mass. 379, 101 N. E. 1081; West End Mfg. Co. *v.* Co., 198 Mass. 320, 84 N. E. 488; Leavitt *v.* Fiberloid, 196 Mass. 440, 82 N. E. 682; Picard *v.* Beers, 195 Mass. 419, 81 N. E. 246; Meyer *v.* Shapton, 178 Mich. 417, 144 N. W. 887; Hautala *v.* Dover, 176 Mich. 366, 142 N. W. 579; Electrical Co. *v.* Co., 151 Mich. 662, 115 N. W. 982; Beld *v.* Darst, 146 Mich. 143, 109 N. W. 275; Harrison W. Co. *v.* Brown, 145 Mich. 621, 108 N. W. 1109; French *v.* Yale, 124 Minn. 63, 144 N. W. 451; Chute *v.* Latta, 123 Minn. 69, 142 N. W. 1048; Kessler *v.* Parelius, 107 Minn. 224, 119 N. W. 1069; St. Anthony E. Co. *v.* Co., 104 Minn. 401, 116 N. W. 935; Barnes S. M. Co. *v.* Tate, 156 Mo. App. 236, 137 S. W. 619; S. ex. rel. Polster *v.* Miles, 149 Mo. App. 638, 129 S. W. 731; Official C. Co. *v.* Weber, 130 Mo. App. 646, 109 S. W. 1071; Fairbanks, M. & Co. *v.* Burgert, 81 Neb. 465, 116 N. W. 35; De Laval Co. *v.* Jelinek, 77 Neb. 192, 109 N. W. 169; Cooper *v* Payne, 186 N. Y. 334, 78 N. E. 1076; Studwell *v.* Co., 126 App. Div. 818, 111 N. Y. S. 293; Cohen *v.* Levy, 77 Misc. 98, 136 N. Y. S. 56; Taylor *v.* Co., 54 Misc. 363, 104 N. Y. S. 557; De Jonge *v.* Printz, 49 Misc. 112, 96 N. Y. S. 750; Wilson *v.* Scarboro, 163 N. C. 380, 79 S. E. 811; Ivey *v.* Mills, 143 N. C. 189, 55 S. E. 613; Smith Premier Co. *v.* Co., 143 N. C. 97, 55 S. E. 417; Hope *v.* Peck (Okla.), 132 P. 344; Bennettsville Hdw. Co. *v.* Gray, 90 S. C. 454, 73 S. E. 872; Turner *v.* Abbott, 116 Tenn. 718, 94 S. W. 64; Am. L. & I. Co. *v.* Mercedes Co. (Tex. Civ.), 155 S. W. 286; Williams *v.* Mach. Co. (Tex. Civ.), 154 S. W. 366; Magnolia W. & S. Co. *v.* Davis (Tex. Civ.), 153 S. W. 670; Parker *v.* Naylor (Tex. Civ.), 151 S. W. 1096; San Jacinto R. Co. *v.* Co. (Tex. Civ.), 145 S. W. 1046; Allen *v.* Co., 55 Tex. Civ. 249, 118 S. W. 1157; State Mut. L. Ins. Co. *v.* Ballard (Tex. Civ.), 122 S. W. 267; Armstrong *v.* Wilson (Tex. Civ.), 109 S. W. 955; Davis *v.* Sisk, 49 Tex. Civ. 193, 108 S. W. 472; Landrum *v.* Stewart (Tex. Civ.), 111 S. W. 769; Marsteller *v.* Warden, 115 Va. 353, 79 S. E. 332; Dunnett *v.* Gibson, 78 Vt. 439, 63 A. 141; Int. Eng. Co. *v.* Archer, 64 Wash. 629, 117 P. 470; Hockersmith *v.* Ferguson, 63 Wash. 581, 116 P. 11; Patterson *v.* C. Co., 59 Wash. 556, 110 P. 379; Kipp *v.* Laun, 146 Wis. 591, 131 N W. 418; Illinois S. Co. *v.* Paczocha, 139 Wis. 23, 119 N. W. 550; Agnew *v.* Baldwin, 136 Wis. 263, 116 N. W. 641. **See** Weir *v.* Long, 145 Ala. 328, 39 S. 974.

To show a contemporaneous independent and collateral agreement.—Martin *v.* Home Bk., 92 S. C. 226, 75 S. E. 404; Eureka E. P. Co. *v.* Bennett, 85 S. C. 486, 67 S. E. 738, and cases cited.

In California terms not reduced to writing can be supplied only by an appropriate proceeding or under proper allegations. Dollar *v.* Int. Corp., 13 Cal. App. 331, 109 P. 499, *cit.* Code Civ. Proc., §1856.

But not to vary the part which is in writing. English *v.* R. Co., 100 Miss. 809, 57 S. 223.

346-89 St. Paul Ins. Co. *v.* Balfour, 168 Fed. 212, 93 C. C. A. 498; Int. T.-B. Co. *v.* Mackhorn, 158 Ill. App. 543; Wasey *v.* Whitcomb, 167 Mich. 58, 132 N. W. 572; Nichols *v.* T. Co., 126 App. Div. 184, 110 N. Y. S. 325; Crook *v.* Fidanque, 59 Misc. 178, 110 N. Y. S. 198; Becher *v.* Co., 128 App. Div. 423, 112 N. Y. S. 839; Stuart *v.* Lumb. Co., 66 Or. 546, 132 P. 1, 1164, 135 P. 165; Jung B. Co. *v.* Konrad, 137 Wis. 107, 118 N. W. 548.

Reference in instrument to matter sought to be proved, not ground for excluding testimony. Anderson *v.* Thero, 139 Ia. 632, 118 N. W. 47.

Performance.—Where defendant admits existence of obligation not evi-

denced by writing, but alleges performance, parol evidence is admissible to disprove such allegation. Williams *v.* Walden, 124 Ga. 913, 53 S. E. 564.

347-91 Texas, etc. R. Co. *v.* Coggin, 44 Tex. Civ. 423, 99 S. W. 1052, place of delivery under shipping contract. But see International, etc. R. Co. *v.* Griffith (Tex. Civ.), 103 S. W. 225.

347-93 Smith Premier Co. *v.* Co., 143 N. C. 97, 55 S. E. 417; Evans *v.* Freeman, 142 N. C. 61, 54 S. E. 847.

Date payment due.—Fresno C. Co. *v.* Hart, 152 Cal. 450, 92 P. 1010; Leffler Co. *v.* Dickerson, 1 Ga. App. 63, 57 S. E. 911; Thompson *v.* Fitzgerald (Tex. Civ.), 105 S. W. 334.

Price of lots sold and character of buildings to be erected, shown. Landvoight *v.* Paul, 27 App. Cas. (D. C.) 423.

347-94 Finnerty *v.* Stratton's Est., 53 Colo. 17, 123 P. 667; Brooks Co. *v.* Wilson (Mass.), 105 N. E. 607; Crook *v.* Fidanque, 59 Misc. 178, 110 N. Y. S. 198; Rahe *v.* Yett (Tex. Civ.), 164 S. W. 30.

Parol, admissible in denial of contemporaneous agreement. Roquemore *v.* Co., 160 Ala. 311, 49 S. 389.

347-95 St. Paul Ins. Co. *v.* Balfour, 168 Fed. 212, 93 C. C. A. 498; Peterson *v.* Chaix, 5 Cal. App. 525, 90 P. 948; Pryor *v.* Music House, 134 Ga. 288, 67 S. E. 654; Kelsey *v.* Ins. Co., 131 Ia. 207, 108 N. W. 221; Evans *v.* McElfresh, 85 Kan. 389, 116 P. 612; Studwell *v.* Co., 126 App. Div. 818, 111 N. Y. S. 293; Studwell *v.* Bush Co., 206 N. Y. 416, 100 N. E. 129; Pierce *v.* Cobb, 161 N. C. 300, 77 S. E. 350; Evans *v.* Freeman, 142 N. C. 61, 54 S. E. 847; Reid *v.* Ragland (Tex. Civ.), 156 S. W. 920.

347-96 Gemmer *v.* Hunter, 35 Ind. App. 501, 74 N. E. 586; Grant *v.* King, 117 Minn. 54, 134 N. W. 291; Official C. Co. *v.* Weber, 130 Mo. App. 646, 109 S. W. 1071; Koons *v.* Co., 203 Mo. 227, 101 S. W. 49; Hallenbeck *v.* Chapman, 72 N. J. L. 201, 63 A. 198.

348-97 Cooper *v.* Payne, 186 N. Y. 334, 78 N. E. 1076; Studwell *v.* Bush, 126 App. Div. 818, 111 N. Y. S. 293; M'Keige *v.* Carroll, 120 App. Div. 521, 105 N. Y. S. 342; Taylor *v.* Co., 54 Misc. 363, 104 N. Y. S. 557; Teague *v.* Ricks, 45 Tex. Civ. 226, 100 S. W. 794. See De Laval Co. *v.* Jelinek, 77 Neb. 192, 109 N. W. 169.

348-98 Studwell *v.* Co., 126 App. Div. 818, 111 N. Y. S. 293; Swope *v.* Bk., 52 Tex. Civ. 281, 113 S. W. 970. See Farrington *v.* Stuckey, 7 Ind. Ty. 364, 104 S. W. 647; Electrical Co. *v.* Co., 151 Mich. 662, 115 N. W. 982; Harrison W. Co. *v.* Brown, 145 Mich. 621, 108 N. W. 1109; Buxton *v.* Co., 18 Okla. 287, 90 P. 19; Victor S. Co. *v.* O'Neil, 48 Wash. 176, 93 P. 214.

348-2 Kessler *v.* Parelius, 107 Minn. 224, 119 N. W. 1069. See Mulcahy *v.* Dieudonne, 103 Minn. 352, 115 N. W. 636.

349-3 Luitweiler Pump. Eng. Co. *v.* Imp. Co., 16 Cal. App. 198, 116 P. 707, rehear. *denied*, 116 P. 712; Brosty *v.* Thompson, 79 Conn. 133, 64 A. 1 (conduct and language of parties and surrounding circumstances); Pryor *v.* Music House, 134 Ga. 288, 67 S. E. 654.

349-4 U. S. *v.* Co., 152 Fed. 596, 81 C. C. A. 586; Peterson *v.* Chaix, 5 Cal. App. 525, 90 P. 948; Pryor *v.* Music House, 134 Ga. 288, 67 S. E. 654.

349-5. Am. B. Co. *v.* Co., 107 Minn. 140, 119 N. W. 783. See Dunnett *v.* Gibson, 78 Vt. 439, 63 A. 141.

350-6 Parol evidence of material facts known when contract made, if pleaded, competent. Am. B. Co. *v.* Co., 107 Minn. 140, 119 N. W. 783.

350-7 Albion L. Co. *v.* Lowell, 20 Cal. App. 782, 130 P. 858; Baume *v.* Morse, 13 Cal. App. 456, 110 P. 350; Hawkins *v.* Studdard, 132 Ga. 265, 63 S. E. 852; Reigart *v.* Co., 217 Mo. 142, 117 S. W. 61; Broadway Hospital *v.* Decker, 47 Wash. 586, 92 P. 445; Agnew *v.* Baldwin, 136 Wis. 263, 116 N. W. 641 (where part required to be in writing is so evidenced other portions of contract not required to be in writing, shown by parol). See Maisch *v.* Cobb, 76 N. H. 62, 79 A. 489; vol. 12, p. 16, n. 49.

To clear up ambiguities and identify the subject matter, parol evidence may be received. Albion L. Co. *v.* Lowell, 20 Cal. App. 782, 130 P. 858.

Acknowledgment cannot be proved by parol. Forrester *v.* Trans. Co., 59 Wash. 86, 109 P. 312.

350-8 Wales Riggs Plantation *v.* Banks, 101 Ark. 461, 142 S. W. 828.

350-9 Brosty *v.* Thompson, 79 Conn. 133, 64 A. 1; Official C. Co. *v.* Weber, 130 Mo. App. 646, 109 S. W. 1071.

350-10 Roquemore *v.* Wks., 151 Ala. 643, 44 S. 557; Levin *v.* Co., 78 Conn. 338, 61 A. 1073; Waters *v.* Co. (Fla.), 65 S. 457; McNair, etc. Co. *v.* Adams,

54 Fla. 550, 45 S. 432; Larson *v.* Thoma, 143 Ia. 338, 121 N. W. 1059; Wells *v.* Co., 137 Ia 526, 114 N. W. 1076; Huber Mfg. Co. *v.* Piersall, 150 Ky. 307, 150 S. W. 341; Van Meter *v.* Poole, 130 Mo. App. 433, 110 S. W. 5; Codman *v.* Adamson, 130 App. Div. 317, 114 N. Y. S. 408; Davies *v.* Hotchkiss, 112 N. Y. S. 233; Land-W. Co. *v.* Hughes, 37 Pa. Super. 602; Williams *v.* Salmond, 79 S. C. 459, 61 S. E. 79; Earle *v.* Owings, 72 S. C. 362, 51 S. E. 980; Landrum *v.* Stewart (Tex. Civ.), 111 S. W. 769; Trout *v.* R. Co., 107 Va. 576, 59 S. E. 394.

Evidence as to contemporaneous executed agreement admissible. Richards *v.* Hodges, 164 N. C. 183, 80 S. E. 439.

352-11 Brown *v.* Hobbs, 147 N. C. 73, 60 S. E. 716; Bourne *v.* Sherrill, 143 N. C. 381, 55 S. E. 799; In re Barnes' Est., 221 Pa. 399, 70 A. 790; Land-W. Co. *v.* Hughes, 37 Pa. Super. 602; Rectenbaugh *v.* Co., 22 S. D. 410, 118 N. W. 697; New York Ins. Co. *v.* Thomas, 47 Tex. Civ. 149, 104 S. W. 1074. See Beld *v.* Darst, 146 Mich. 143, 109 N. W. 275, decided on another point.

Collateral agreement a condition precedent. Manhattan Co. *v.* Gluck, 52 Misc. 652, 101 N. Y. S. 528.

352-12 Schweig *v.* Co., 54 Misc. 233, 104 N. Y. S. 371; Perkiomen R. Co. *v.* Bromer, 217 Pa. 263, 66 A. 359.

352-13 Perkiomen R. Co. *v.* Bromer, 217 Pa. 263, 66 A. 359; Fidelity Co. *v.* Harder, 212 Pa. 96, 61 A. 880; Miller *v.* Wise, 33 Pa. Super. 589; Yinger *v.* Youngman, 30 Pa. Super. 139.

352-14 Gandy *v.* Weckerly, 220 Pa. 285, 69 A. 858; Phillips Co. *v.* Co., 213 Pa. 183, 62 A. 830. See Scientific Am. *v.* Creighton, 32 Pa. Super. 140.

353-15 Phillips *v.* Bradshaw, 167 Ala. 199, 52 S. 662.

353-16 Crilly *v.* Gallice, 148 Fed 835, 78 C. C. A. 525; Mills *v.* Jackson, 19 Cal. App. 695, 127 P. 655; Ober *v* Katzenstein, 160 N. C. 439, 76 S. E. 476.

353-17 Reynolds *v.* Reynolds (Ala. App.), 65 S. 194; Lundeen *v.* Ottis, 164 Cal. 183, 128 P. 335; Fisher *v.* Gossett, 36 Okla. 261, 128 P. 293. See Joseph *v.* Platt, 130 App. Div. 478, 114 N. Y. S. 1065; Colbert *v.* Bank, 38 Okla. 391, 133 P. 206.

353-18 Herlong *v.* Lumb. Co., 93 S. C. 529, 77 S. E. 219; Marsh *v.* Phillips (Tex. Civ.), 144 S. W. 1160.

353-20 Trumbull *v.* Harris, 102 Ark. 669, 145 S. W. 547 (where collateral agreement formed part of consideration); Green *v.* Booth, 91 Miss. 618, 44 S. 784; Barro *v.* Saitta, 145 N. Y. S. 849; Indelli *v.* Lesster, 130 App. Div. 548, 115 N. Y. S. 46; Blair *v.* Minzesheimer, 124 App. Div. 177, 108 N. Y. S. 799; Somerset Co. *v.* John, 219 Pa. 380, 68 A. 843 (agreement that when mortgage fell due claims of mortgagor against mortgagee should be adjusted); Barnard *v.* Williams (Tex. Civ.), 166 S. W. 910; Altgelt *v.* Gerbic (Tex. Civ.), 149 S. W. 233; Landrum *v.* Stewart (Tex. Civ.), 111 S. W. 769 (note was given as bond to secure performance of contract by third party); New York Ins. Co. *v.* Thomas, 47 Tex. Civ. 149, 104 S. W. 1074; Trout *v.* R. Co., 107 Va. 576, 59 S. E. 394; Nat. Bk. *v.* Gougar, 51 Wash. 204, 98 P. 607.

353-21 Chute *v.* Latta, 123 Minn. 69, 142 N. W. 1048; Kelly *v.* Ellis, 39 Mont. 597, 104 P. 873; Loxley *v.* Studebaker, 75 N. J. L. 599, 68 A. 98 (full discussion); Hallenbeck *v.* Chapman, 72 N. J. L. 201, 63 A. 498.

354-22 Beach *v.* Nevins, 162 Fed. 129, 89 C. C. A. 129; Pickler *v.* P. Co. (Ark.), 164 S. W. 764; Barr C. Co. *v.* Co., 82 Ark. 219, 101 S. W. 408; Drinkwater *v.* Hollar, 6 Cal. App. 117, 91 P. 664; Norman *v.* McCarthy, 56 Colo. 290, 138 P. 28; Van Norman *v.* Young, 228 Ill. 425, 81 N. E. 1060; Cedar Rapids Nat. Bk. *v.* Carlson, 156 Ia. 343, 136 N. W. 659 (contract not to be binding until specified number of signatures obtained); Cavanagh *v.* Co., 136 Ia. 236, 113 N. W. 856; McNight *v.* Parsons, 136 Ia. 390, 113 N. W. 858; Hinsdale *v.* McCune, 135 Ia. 682, 113 N. W. 478; McCormick *v.* Merritt, 131 Ia. 160, 105 N. W. 428; Bartholomew *v.* Fell (Kan.), 139 P. 1016; Stroupe *v.* Hewitt, 90 Kan. 200, 133 P. 562; Hill *v.* Hall, 191 Mass. 253, 77 N. E. 831; Chute *v.* Latta, 123 Minn. 69, 142 N. W. 1048; First Nat. Bk. *v.* Burney, 91 Neb. 269, 136 N. W. 37; Dodd *v.* Kemnitz, 74 Neb. 634, 104 N. W. 1069; Metropolitan A. Mfg. Co. *v.* Lau, 112 N. Y. S. 1059; Stiebel *v.* Grosberg, 202 N. Y. 266, 95 N. E. 692, *rev.* 121 N. Y. S. 923; Corn *v.* Bergmann, 129 N. Y. S. 1049; Garrison *v.* Mach. Co., 159 N. C. 285, 74 S. E. 821, *cit.* Pratt *v.* Chaffin, 136 N. C. 350, 48 S. E. 768; Bowser *v.* Tarry, 156 N. C. 35, 72 S. E. 74; Waters *v.* Co., 144 N.

C. 663, 57 S. E. 437; Starr P. Co. *v.* Edgar, 31 O. C. C. 295; Bruch *v.* Shafer, 45 Pa. Super. 612; Midland R. M. Co. *v.* Pickens, 96 S. C. 286, 80 S. E. 484; Rectenbaugh *v.* Co., 22 S. D. 410, 118 N. W. 697; Hawse *v.* Bk., 113 Va. 588, 75 S. E. 127; Hodge *v.* Smith, 130 Wis. 326, 110 N. W. 192.

See Gilroy *v.* Everson, 118 App. Div. 733, 103 N. Y. S. 620 (general conversations inadmissible; rule applied with great caution); vol. 4, p. 262, n. 69.

That instrument is to become payable upon certain conditions, may be shown. Musser *v.* Musser, 92 Neb. 387, 138 N. W. 599.

Enumeration of conditions precedent not presumed exhaustive; others may be shown by parol. Golden *v.* Meier, 129 Wis. 14, 107 N. W. 27.

355-24 Creveling *v.* Banta, 138 Ia. 47, 115 N. W. 598, deed given to grantee to be delivered to third person in escrow.

355-25 Hamlin *v.* Hamlin, 192 N. Y. 164, 84 N. E. 805, 117 App. Div. 493, 102 N. Y. S. 571.

355-27 Cox *v.* Smith, 99 Ark. 90, 138 S. W. 978; Butler *v.* Butler, 151 Ia. 583, 132 N. W. 63; Blackstad M. Co. *v.* Parker, 163 N. C. 275, 79 S. E. 606; Bowser & Co. *v.* Tarry, 156 N. C. 35, 72 S. E. 74; Faux *v.* Fitler, 232 Pa. 33, 81 A. 91.

357-28 Huntsville Elks' Club *v.* Bldg. Co., 176 Ala. 128, 57 S. 750; Roquemore *v.* Wks., 151 Ala. 643, 44 S. 557; Dorough *v.* Harrington, 148 Ala. 305, 42 S. 557; Brickley *v.* Gin Co. (Ark.), 166 S. W. 744; Von Berg *v.* Goodman, 85 Ark. 605, 109 S. W. 1006; Pearsall *v.* Henry, 153 Cal. 314, 95 P. 154; Hatch *v.* Fritz, 48 Colo. 530, 111 P. 74; Holmes *v.* Brooks, 84 Conn. 512, 80 A. 773; Loveless *v.* Bridges, 136 Ga. 338, 71 S. E. 166; Elyea Austell Co. *v.* Garage, 13 Ga. App. 182, 79 S. E. 38; Goldsmith & Co. *v.* M. Marcus, 7 Ga. App. 849, 68 S. E. 462; Prairie D. Co. *v.* Leiberg, 15 Ida. 379, 98 P. 616; Montgomery *v.* Kirkpatrick, 162 Ill. App. 59; American F. Co. *v.* Halstead, 165 Ind. 633, 76 N. E. 251; Kurtz *v.* Inv. Co., 156 Ia. 376, 135 N. W. 1075; Fleming *v.* Linder (Ia.), 109 N. W. 771; Balt. P. H. Co. *v.* Linthicum, 112 Md. 27, 75 A. 737; Way *v.* Greer, 196 Mass. 237, 81 N. E. 1002; Marx *v.* King, 162 Mich. 258, 127 N. W. 341; England *v.* Houser, 163 Mo. App. 1, 145 S. W. 514; Campbell *v.* Kimball, 87 Neb. 309, 127 N. W. 142; Laing *v.* Hudgens, 82 Misc. 388, 143 N. Y. S. 763; Haight *v.* Cohen, 123 App. Div. 707, 108 N. Y. S. 592; Margolys *v.* Mollenick, 98 N. Y. S. 840; Elliott *v.* Bozorth, 52 Or. 391, 97 P. 632; Germantown D. Co. *v.* McCallum, 223 Pa. 554, 72 A. 85; Phillips *v.* Co., 220 Pa. 141, 69 A. 589; Werks *v.* Stevens (Tex. Civ.), 135 S. W. 667; Dinsmore S. Co. *v.* L. Co., 70 Wash. 42, 126 P. 72; Norris *v.* Ins. Co., 52 Wash. 554, 100 P. 1025; Schoblasky *v.* Rayworth, 139 Wis. 115, 120 N. W. 822; Jost *v.* Wolf, 130 Wis. 37, 110 N. W. 932. See "Novation," p. 7. See also vol. 13, p. 1024, n. 25.

Parol agreement proved to alter written contract must be executed agreement. Pearsall *v.* Henry, 153 Cal. 314, 95 P. 154; Page *v.* Co., 17 Okla. 110, 87 P. 851. Rule does not apply where new agreement in substitution of old. Pearsall *v.* Henry, supra.

Admissible although parties contracted not to vary contract. Gilbert Co. *v.* Husted, 50 Wash. 61, 96 P. 835.

358-29 Phillips *v.* Bradshaw, 167 Ala. 199, 52 S. 662; Bradley *v.* Bush, 11 Cal. App. 287, 104 P. 845; Jones *v.* Longerbeam, 22 S. D. 625, 119 N. W. 1000 (if executed and agreement relates to doing something not stipulated for in writing); Ross *v.* Head (Tex. Civ.), 145 S. W. 1077.

358-32 Porter *v.* Co., 57 Fla. 504, 46 S. 420; Elias *v.* Coleman, 137 N. Y. S. 883; Jones *v.* Longerbeam, 22 S. D. 625, 119 N. W. 1000. *Contra*, Schoblasky *v.* Rayworth, 139 Wis. 115, 120 N. W. 882.

359-34 Schmidt *v.* Musson, 20 S. D. 389, 107 N. W. 367.

359-36 Moody *v.* Atkins, 146 Ala. 684, 40 S. 305; Hetzel *v.* Lyon, 87 Neb. 261, 126 N. W. 997 (not required to be written).

359-37 Freeman *v.* Bell, 150 N. C. 146, 63 S. E. 682.

359-38 Lee *v.* Durham (Tex. Civ.), 156 S. W. 135.

359-39 Kime *v.* Co., 240 Pa. 61, 87 A. 278.

Oral lease to take effect on expiration of written one, may be shown. Gabel *v.* Page, 6 Cal. App. 618, 92 P. 749.

359-40 Pearsall *v.* Henry, 153 Cal. 314, 95 P. 154; Guldman *v.* Willer, 45 Colo. 551, 101 P. 759; Wilson *v.* Duffy, 158 Mo. App. 509, 138 S. W. 918; Henry *v.* Phillips, 105 Tex. 459, 151 S. W. 533.

360-41 Boyd *v.* Ranch Co., 22 Cal. App. 108, 133 P. 623; Kissack *v.* Bourke, 224 Ill. 352, 79 N. E. 619; Zempel *v.* Hughes, 235 Ill. 424, 85 N. E. 641.

360-42 Jarman *v.* Westbrook, 134 Ga. 19, 67 S. E. 403; Willis *v.* Fields. 132 Ga. 242, 63 S. E. 828; Hawkins *v.* Studdard, 132 Ga. 265, 63 S. E. 852; Baker *r.* Haswell, 36 Okla. 429, 128 P 1086. See "Statute of Frauds," p. 16

Subsequent oral agreement enlarging time of performance, admissible. Scott *v.* Hubbard, 67 Or. 498, 136 P. 653.

Clear proof required to overcome presumption work begun under written contract was not continued for stipulated compensation. Phillips *v.* Co., 220 Pa. 141, 69 A. 589.

360-43 But see Fleming *v.* Linder (Ia.), 109 N. W. 771; Taylor *v.* Finnigan, 189 Mass. 568, 76 N. E. 203.

A joint instrument with but one seal is not sealed so as to prevent party whose signature is not followed by seal from proving later agreement. Baltimore P. H. Co. *v.* Linthicum, 112 Md. 27, 75 A. 737.

360-45 Gum *v.* Tibbs, 134 Ill. App. 280; Am. F. Co. *v.* Halstead, 165 Ind. 633, 76 N. E. 251.

360-48 Loval *r.* Wolf (Ala.), 60 S. 298; Smith *v.* M. Co., 6 Ala. App. 171, 60 S. 484; Steidtmann *v.* Co., 234 Ill. 84, 84 N. E. 640; Klaub *v.* Vokoun, 169 Ill. App. 434; Garfield *v.* Co., 189 Mass. 395, 75 N. E. 695; Jones & Co. *r.* Cochran, 33 Okla. 431, 126 P. 716; Ryder-G. Co. *v.* Garretson, 53 Wash. 71, 101 P. 498 (custom need not be pleaded).

361-49 Gammino *v.* Dedham, 164 Fed. 593, 90 C. C. A. 465; Noyes *v.* Marlott, 156 Fed. 753, 84 C. C. A. 409; Birmingham & A. R. Co. *v.* Maddox, 155 Ala. 292, 46 S. 780; Tribble *v.* S., 147 Ala. 699, 41 S. 183; Hale *r.* Milliken, 5 Cal. App. 344, 90 P. 365; Leonhart *v.* Assn., 5 Cal. App. 19, 89 P. 847; Albany, etc. Co. *v.* Bk., 137 Ga. 391, 73 S. E. 637; Farmers' & M. Bk. *v.* Wood, 143 Ia. 635, 118 N. W. 282; Steele *v.* Andrews, 144 Ia. 360, 121 N. W. 17; Columbia M. Co. *r.* Glenmore D. Co., 150 Ky. 229, 150 S. W. 53; Gooding *v.* Ins. Co., 110 Me. 69, 85 A. 391; Birely *v.* Dodson, 107 Md. 229, 68 A. 488; Starr P. Co. *v.* Morrison, 159 Mich. 583, 124 N. W. 562; Stearns *v.* R. Co., 148 Mich. 271, 111 N. W. 769 (express contract excluding custom); Kees *v.* Christensen, 124 Minn. 230, 144 N. W. 766; Postal T. Co. *v.* Willis, 93 Miss. 540, 47 S. 380; Ramsey *r.* Co., 72 N. J. Eq. 165, 65 A. 461; Marlatt *v.* R. Co., 154 App. Div. 388, 139 N. Y. S. 771; Hayward *v.* Wemple, 152 App. Div. 195, 136 N. Y. S. 625; Ore. T. Co. *v.* P. Co. (Or.), 138 P. 862; Savage *v.* Co., 48 Or. 1, 85 P. 69; Menz L. Co. *r.* McNeeley, 58 Wash. 223, 108 P. 621; Chandler L. Co. *v.* Radke, 136 Wis. 495, 118 N. W. 185.

"**The court itself must construe** the contract and determine what is the true interpretation to be put upon the language used therein, and to decide its legal effect." Runyan *v.* Runyan, 101 Ark. 353, 142 S. W. 519.

362-51 Southern R. Co. *v.* Cofer, 149 Ala. 565, 43 S. 102; Steidtmann *v.* Co., 234 Ill. 84, 84 N. E. 640; Peacock *v.* S. (Ga.), 73 S. E. 404; Chicago, etc. Co. *v.* Hofman, 168 Ill. App. 71; O'Neill *v.* Ogden Aerie, 32 Utah 162, 89 P. 464.

"**The term 'necessary casing'** does not purport to have a definite meaning. What casing would be necessary was not determined at the time of the execution of the contract. The contract did not purport to determine such question, but did purport to leave the question open to be determined by the circumstances attending the performance of the contract. Clearly, therefore, oral evidence was contemplated by the contract." McNames *v.* Donaker Bros., 155 Ia. 318, 136 N. W. 130.

362-53 Kentucky M. Co. *v.* Soc., 146 Fed. 695, 77 C. C. A. 121; Metz *v.* Miller, 113 N. Y. S. 527; Obernauer *v.* Solomon, 151 Mich. 570, 115 N. W. 696 (inadmissible if phrase not shown to have local or customary meaning).

362-54 Bennetts *v.* Brown, 1 K. B. (1908) 490.

362-55 So. S. & M. Co. *v.* Sav. Bank, 101 Ark. 266, 142 S. W. 178; Judson *v.* Bell (Tex. Civ.), 153 S. W. 169. See infra, "Statute of Frauds," 24-93.

363-59 To identify a contract referred to in due bill. Sellers *v.* Dickert (Ala.), 64 S. 40.

363-65 Hallenbeck *v.* Chapman, 72 N. J. L. 201, 63 A. 498. *Comp.* Rock Island Wks. *v.* Co., 147 Ala. 581, 41 S. 806.

363-71 Keller *v.* Cohen, 224 Pa. 434, 73 A. 918.

364-72 Mann *v.* Urquhart, 89 Ark.

239, 116 S. W. 219; Uecker *v.* Zuercher, 54 Tex. Civ. 289, 118 S. W. 149.

364-73 Cable Co. *v.* McFeeley, 7 Ga. App. 435, 66 S. E. 1103.

364-75 Fowler U. Co. *v.* Co., 43 Ind. App. 438, 87 N. E. 689.

364-76 Alexander *v.* Righter, 240 Pa. 22, 87 A. 427.

364-77 Guillory *v.* Elms, 126 La. 560, 52 S. 767.

365-79 Williams *v.* Butterfield, 214 Mo. 412, 114 S. W. 13.

Admissions of grantor competent to show existence of deed. Vincent *v.* Means, 207 Mo. 709, 106 S. W. 8.

365-81 Parol evidence inadmissible to sustain contract illegal on its face. Hill *v.* Hill, 74 N. H. 288, 67 A. 406.

366-90 Tilden Co. *v.* Co., 216 Mass. 323, 103 N. E. 916.

366-91 Rock Island P. Co. *v.* Rankin, 89 Ark. 24, 115 S. W. 943. *Comp.* Mears *v.* Smith, 199 Mass. 319, 85 N. E. 165. But see Pease P. Co. *v.* Fiske, 145 N. Y. S. 978. See also supra, "Objections," p. 121, n. 20.

367-92 Rock Island P. Co. *v.* Rankin, supra; Allen *v.* Co., 14 Ida. 728, 95 P. 829; Roe *v.* Ins. Assn., 137 Ia. 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144; Nichols & S. Co. *v.* Maxson, 76 Kan. 607, 92 P. 545; Cain *v.* Bauman, 118 La. 82, 42 S. 654 (admissible against privy); Hilton *v.* Hanson, 101 Me. 21, 62 A. 797 (contract sealed); Gish *v.* Ins. Co., 16 Okla. 59, 87 P. 869.

Conditions of forfeiture in insurance policy shown by parol to have been waived. Weinberger *v.* Ins. Co., 170 Mo. App. 266, 156 S. W. 79. See "Waiver," p. 1024; also vol. 7, p. 541, n. 15.

Waiver at time of contracting cannot be shown. Johnson *v.* Ins. Co., 119 Tenn. 598, 107 S. W. 688.

Inadmissible in face of express contrary provision. Black *v.* Ins. Co., 148 N. C. 169, 61 S. E. 672.

367-93 Hester *v.* Gairdner, 128 Ga. 531, 58 S. E. 165; Hall *v.* Barnard, 138 Ia. 523, 116 N. W. 604; Aultman Co. *v.* Greenlee, 134 Ia. 368, 111 N. W. 1007; Allen *v.* Rees, 136 Ia. 423, 110 N. W. 583; Yore *v.* Meshew, 146 Mich. 80, 109 N. W. 35; Bade *v.* Hibberd, 50 Or. 501, 93 P. 364; Jost *v.* Wolf, 130 Wis. 37, 110 N. W. 232. See vol. 13, p. 868, n. 36, and supplement thereto.

Statement of consideration cannot be contradicted where it is contractual. Kramer *v.* Gardner, 104 Minn. 370, 116 N. W. 925; Sturmdorf *v.* Saunders, 117 App. Div. 762, 102 N. Y. S. 1042.

367-95 Manion *v.* Brady (Ia.), 126 N. W. 801.

Must be some appropriate plea to support it. Breeding *v.* Tandy, 148 Ky. 345, 146 S. W. 742.

368-99 Louisville Tr. Co. *v.* Seminary, 148 Ky. 711, 147 S. W. 431.

An allegation of fraud or mistake will admit parol evidence to correct an erroneous date. Gunther Groc. Co. *v.* Koll, 153 Ky. 446, 155 S. W. 1145. See supra, "Parol Evidence," p. 335.

368-1 Russo-Chinese Bank *v.* Bank, 187 Fed. 80, 109 C. C. A. 398.

369-3 Bornstein *v.* Berliner, 170 Ill. App. 519.

Parol admissible to show to which obligation payment applied. Wilcox *v.* Sargeant, 4 Ga. App. 35, 60 S. E. 810.

369-4 Mougin *v.* Hergenhan, 138 App. Div. 54, 122 N. Y. S. 858.

369-7 See Lese *v.* Lamprecht, 196 N. Y. 32, 89 N. E. 365.

369-9 See vol. 2, p. 517, n. 34; vol. 9, p. 727, n. 31, and supplement thereto.

Payment by third person shown. Succession of Bagley, 120 La. 922, 45 S. 942.

Partial payment shown by parol, whether made before or after execution of instrument. Harstad *v.* Olson, 57 Wash. 264, 106 P. 741.

369-10 Albert *v.* R. Co., 107 Va. 256, 58 S. E. 575.

Contradictory parol agreement cannot be shown. — Newell *v.* Lamping, 45 Wash. 304, 88 P. 195.

Parol contemporaneous agreement not specifically enforced, where deed complete. Waters *v.* Waters, 124 Ga. 349, 52 S. E. 425.

Facts to make contract enforcible cannot be shown. Dillard *v.* Sanders (Tex. Civ.), 97 S. W. 108.

Description of property must be such it can be identified without parol evidence. Willmon *v.* Peck, 5 Cal. App. 665, 91 P. 164.

370-12 Gottfried *v.* Bray, 208 Mo. 652, 106 S. W. 639. See Chambers *v.* Roseland, 21 S. D. 298, 112 N. W. 148 (purpose of parol evidence is not to supply omissions and cure defects which render contract fatally uncertain); Crawford *v.* Workman, 64 W. Va. 10, 61 S. E. 819.

370-14 Allen *v.* Treat, 48 Wash. 552, 94 P. 102.

Contemporaneous agreement inadmissible. Bass *v.* Sanborn, 119 Mo. App. 103, 95 S. W. 955.

370-15 Jacobs *v.* Parodi, 50 Fla. 541, 39 S. 833; Dillard *v.* Jones, 229 Ill. 119, 82 N. E. 206.

370-19 De Laval *v.* Steadman, 6 Cal. App. 651, 92 P. 877.

In suit to enjoin action on note parol evidence rule not strictly applied whenever inquiry into object and purpose of writing is to be made. O'Brien *v.* Co., 69 N. J. Eq. 117, 61 A. 437.

371-20 Bowles *v.* Lowery (Ala.), 62 S. 107; Hannon *v.* Espalla, 148 Ala. 313, 42 S. 443; Novelty Mfg. Co. *v.* Wiseberg, 126 Ga. 800, 55 S. E. 923; Coldwell Co. *v.* Cowart, 138 Ga. 233, 75 S. E. 425; Foote & Davies Co. *v.* P. Co., 11 Ga. App. 164, 74 S. E. 1037; Blake *v.* Miller, 135 Ia. 1, 112 N. W. 158; Rester *v.* Powell, 120 La. 406, 45 S. 372; Paramore *v.* Campbell, 245 Mo. 287, 149 S. W. 6; Buster B. Co. *v.* Co., 140 Mo. App. 707, 126 S. W. 988; Zerr *v.* Klug, 121 Mo. App. 286, 98 S. W. 822; Rairden *v.* Hedrick, 46 Mont. 510, 129 P. 498; Coles *v.* Saitta, 119 N. Y. S. 253; Green Island Co. *v.* Co., 110 N. Y. S. 508; Penn. R. Co. *v.* R. Co., 221 Pa. 481, 70 A. 818; Sellers *v.* R. Co., 77 S. C. 361, 57 S. E. 1102; Int. Sav. & T. Co. *v.* Hornsby (Tex. Civ.), 146 S. W. 960; Smith *v.* R. Co., 101 Tex. 405, 108 S. W. 819; Brazelton *v.* Campbell, 49 Tex. Civ. 218, 108 S. W. 770. See Bent *v.* Trimboli, 61 W. Va. 509, 56 S. E. 881 (letters and plat admissible); Klueter *v.* Brew. Co., 143 Wis. 347, 128 N. W. 43; Allenberg *v.* Wainwright, 62 Wash. 234, 113 P. 585.

Documents introduced merely as admissions. Mitchell *v.* R. Co. (Tex. Civ.), 130 S. W. 735.

372-21 Hendricks *v.* Webster, 159 Fed. 927, 87 C. C. A. 107; Rose *v.* Lewis, 178 Ala. 507, 60 S. 146; Soudan P. Co. *v.* Stevenson, 83 Ark. 163, 102 S. W. 1114; Hawley *v.* Kafitz, 148 Cal. 393, 83 P. 248; Henry *v.* Shields, 19 Haw. 302; Goldstein *v.* D'Arcy, 201 Mass. 312, 87 N. E. 584; Stockbridge, etc. Co. *v.* Booth, 165 Mich. 212, 130 N. W. 619; In re Evans, 117 Mo. App. 629, 93 S. W. 922; Strother *v.* Co., 116 Mo. App. 518, 92 S. W. 758; Wheeler *v.* Moore, 78 Neb. 484, 111 N. W. 120; Wehrenberg *v.* Seiferd, 125 App. Div. 527, 109 N. Y. S. 896; Gish *v.* Ins. Co., 16 Okla. 59, 87 P. 869; Hermann *v.* McIver, 51 Tex. Civ. 270, 111 S. W. 766; Grout *v.* Moulton, 79 Vt. 122, 64 A. 453; Bartlett Co. *v.* Co., 49 Wash. 58, 94 P. 900, 15 L. R. A. (N. S.) 590; Moran Co. *v.* Co., 48 Wash. 592, 94 P. 106; Armstrong *v.* Ross, 61 W. Va. 38, 55 S. E. 895.

373-22 J. F. Hall-Martin Co. *v.* Hughes, 18 Cal. App. 513, 123 P. 617; Williams *v.* Walsh Mfg. Co., 169 Mich. 676, 135 N. W. 954; Roanoke *v.* Blair, 107 Va. 639, 60 S. E. 75.

Not competent to show contract made for a purpose different from that expressly recited in contract. Heitman *v.* Com. Bk., 7 Ga. App. 740, 68 S. E. 51.

373-23 Lowrey *v.* Hawaii, 206 U. S. 206; Standard S. & S. Co. *v.* Reiter, 199 Fed. 91 (C. C. A.); Hamilton C. Co. *v.* Co., 160 Fed. 75, 87 C. C. A. 231; Tweedie T. Co. *v.* Laguna Co., 178 Fed. 368; Feore *v.* Avent, 4 Ala. App. 551, 58 S. 727 (*cit.* Chambers *v.* Ringstaff, 69 Ala. 140, distinguishing between patent and latent ambiguity); Weil *v.* Lester, 94 Ark. 195, 126 S. W. 712; Boyd *v.* Lloyd, 86 Ark. 169, 110 S. W. 596; Massey Bros. *v.* Dixon, 81 Ark. 337, 99 S. W. 383; Wellington R. Co. *v.* Gilbert, 24 Colo. App. 118, 131 P. 803; Prowers *v.* Nowles, 42 Colo. 442, 94 P. 347; Lamb *v.* Morrow, 140 Ia. 89, 117 N. W. 1118; Julian *v.* Eagle Oil, etc. Co., 83 Kan. 127, 109 P. 996; Slusher *v.* Slusher, 31 Ky. L. R. 570, 102 S. W. 1188; Schuster *v.* Snawder, 31 Ky. L. R. 254, 101 S. W. 1194; Chesapeake B. Co. *v.* Goldberg, 107 Md. 485, 69 A. 37; Cawley *v.* Jean (Mass.), 105 N. E. 1007; McGrath *v.* Quinn (Mass.), 105 N. E. 555; McDaniel *v.* R. Co., 165 Mo. App. 678, 148 S. W. 464; Green Island, etc. Co. *v.* L. Co., 126 App. Div. 584, 110 N. Y. S. 508; Murdock *v.* Gould, 193 N. Y. 369, 86 N. E. 12; Ivey *v.* Mills, 143 N. C. 189, 55 S. E. 613; Harris *v.* Jones, 23 N. D. 488, 136 N. W. 1080; Manganese S. S. Co. *v.* Bk., 28 S. D. 426, 134 N. W. 886; Edmonds *v.* Bk., 215 Pa. 547, 64 A. 671; Spencer *v.* Potter's Est., 85 Vt. 1, 80 A. 821; Clayton *v.* Court, 58 W. Va. 253, 52 S. E. 103.

374-25 Kelsey *v.* Clausen, 257 Ill. 402, 100 N. E. 984; Hammond *v.* Ins. Co., 151 Wis. 62, 138 N. W. 92.

374-26 Crosley *v.* Reynolds, 196 Fed. 640, 116 C. C. A. 314; Nease *v.* R. Co., 195 Fed. 987; Western L. Co. *v.* Willis,

160 Fed. 27, 87 C. C. A. 183; In re Hartman, 166 Fed. 776; Crittenden *v.* Cobb, 156 Fed. 535; Chattanooga Brew. Co. *v.* Smith, 3 Ala. App. 551, 58 S. 63; Vaughan *v.* Cooper., 103 Ark. 260, 146 S. W. 503; Wood *v.* Kelsey, 90 Ark. 272, 119 S. W. 258; Pearsall *v.* Henry, 153 Cal. 314, 95 P. 154, 159; Jersey Island Co. *v.* Whitney, 149 Cal. 269, 86 P. 691; Shafer *v.* Sloan, 3 Cal. App. 335, 85 P. 162; Stalker *v.* Hayes, 81 Conn. 711, 71 A. 1099; Gay *v.* Parish, 138 Ga. 399, 75 S. E. 323; Leffler Co. *v.* Dickerson, 1 Ga. App. 63, 57 S. E. 911; Alexander *v.* Lumb. Co. (Ind.), 105 N. E. 45; Warner *v.* Marshall, 166 Ind. 88, 75 N. E. 582; Eastern Ky., etc. Co. *v.* L. Co., 148 Ky. 82, 146, S. W. 438; Rogers *v.* Hazel, 147 Ky. 333, 144 S. W. 49; McSurley *v.* Venters, 31 Ky. L. R. 963, 104 S. W. 365; Versailles *v.* Brown, 29 Ky. L. R. 1223, 96 S. W. 1108; Anse La Butte O. & M. Co. *v.* Babb, 122 La. 415, 47 S. 754; Chesapeake B. Co. *v.* Goldberg, 107 Md. 485, 69 A. 37; Willett *v.* Smith, 214 Mass. 494, 101 N. E. 1058; Fullam *v.* Co., 196 Mass. 474, 82 N. E. 711; Toole *v.* Crafts, 196 Mass. 397, 82 N. E. 22; Hodgens *v.* Sullivan, 209 Mass. 533, 95 N. E. 969; Preston *v.* Nat. Bk., 169 Mich. 571, 135 N. W. 278; Sturges *v.* R. Co., 166 Mich. 231, 131 N. W. 706; Coffman *v.* R. Co. (Mo. App.), 167 S. W. 1053; Pulitzer Pub. Co. *v.* McNichols, 170 Mo. App. 709, 153 S. W. 562; Gate City Nat. Bk. *v.* Chick, 170 Mo. App. 343, 156 S. W. 743; Kessler *v.* Clayes, 147 Mo. App. 88, 125 S. W. 799; New Amsterdam Co. *v.* Mesker, 128 Mo. App. 183, 106 S. W. 561; Great Western Co. *v.* Belcher, 127 Mo. App. 133, 104 S. W. 894; Prudential Ins. Co. *v.* Morris (N. J. Eq.), 70 A. 924 (to determine beneficiary under policy); Nichols *v.* Co., 110 N. Y. S. 325; Middleworth *v.* Ordway, 191 N. Y. 404, 84 N. E. 291; Wesley *v.* Co., 30 R. I. 403, 75 A. 626; Gravity C. Co. *v.* Sisk, 43 Tex. Civ. 194, 95 S. W. 724; Caine *v.* Hagenbarth, 37 Utah 69, 106 P. 945; Taplin *v.* Marcy, 81 Vt. 428, 71 A. 72; Ward's Admr. *v.* Ins. Co., 80 Vt. 321, 67 A. 821; Albert *v.* R. Co., 107 Va. 256, 58 S. E. 575; Whipple *v.* Lee, 58 Wash. 253, 108 P. 601; Causten *v.* Barnette, 49 Wash. 659, 96 P. 225; Bk. *v.* Catzen, 63 W. Va. 535, 60 S. E. 499; Winton *v.* McGraw, 60 W. Va. 98, 54 S. E. 506; Klueter *v.* Brew. Co., 143 Wis. 347, 128 N. W. 43; Loree *v.* Co., 134 Wis. 173, 114 N. W. 449.

Circumstances leading to enactment of statute authorizing contract. Old Colony R. Co. *v.* City, 188 Mass. 234, 74 N. E. 468.

Declarations of mortgagee.—Jones *v.* Norris, 147 N. C. 84, 60 S. E. 714.

Peculiar circumstances known to parties shown. Hale *v.* Milliken, 5 Cal. App. 344, 90 P. 365.

377-27 Middleworth *v.* Ordway, 191 N. Y. 404, 84 N. E. 291.

377-35 Brown *v.* Reeder, 108 Md. 653, 71 A. 417.

377-37 Bradley *v.* Davis, 128 La. 686, 55 S. 17.

Where the language used was: "Ten feet of said lot being reserved as a right-way," the court said: "The language used leaves us in doubt as to the real intention of the parties in that respect. But in such circumstances the trial court was at liberty to receive parol evidence showing the situation and conduct of the parties and the state and condition of the premises with a view to ascertaining the intention of the parties in using the language to be construed. . . . If it appeared from such parol evidence that the place in regard to which the language was used had a way over it already fixed by buildings or permanent inclosures, the language was rightfully construed to be a reservation of the way thus located, fixed and defined. Salisbury *v.* Andrews, 19 Pick. (Mass.) 250, 253; Washburn's Easements and Servitudes (4th Ed.), p. 277. Especially if it appeared that such way was thereafter for a long time used by the grantee of the easement and those claiming under him, the grantor acquiescing in such use. The state and condition of the premises, and the subsequent user, would show what the parties intended by the deed and would operate as an assignment of the way as effectually as if the location had been fixed by the deed." Geismann *v.* Trish, 163 Mo. App. 308, 143 S. W. 876.

377-38 Noyes *v.* Marlett, 156 Fed. 753, 84 C. C. A. 109; Lieder *v.* Ins. Co., 143 Fed. 814, 74 C. C. A. 488; Griggs *v.* Dist., 87 Ark. 93, 112 S. W. 215; Wheeler *v.* Co., 129 Ga. 237, 58 S. E. 709; Fairbanks *v.* Guilfoyle, 33 Ky. L. R. 408, 110 S. W. 233; Kostoryz *v.* Leary (Tex. Civ.), 130 S. W. 456.

377-39 Hamilton C. Co. *v.* Co., 160

Fed. 75, 87 C. C. A. 231; **U. S.** *v.* Co., 205 U. S. 105; Scruggs *v.* Riddle, 171 Ala. 350, 54 S. 641; San Miguel Co. *v.* Stubbs, 39 Colo. 359, 90 P. 842; Lambert Co. *v.* Carmody, 79 Conn. 419, 65 A. 141 (to determine whether sale or lease intended); Semon Bache Co. *v.* Co., 35 Ind. App. 351, 74 N. E. 41; Ditchey *v.* Lee, 167 Ind. 267, 78 N. E. 972; McSurley *v.* Venters, 31 Ky. L. R. 963, 104 S. W. 365; Sleeper *v.* Nicholson, 201 Mass. 110, 87 N. E. 473; Garfield *v.* Co., 199 Mass. 22, 84 N. E. 1020; Smith *v.* Co., 194 Mass. 193, 80 N. E. 527; Morison *v.* Co., 126 App Div. 575, 110 N. Y. S. 801; Rosen *v.* Bamberger, 122 N. Y. S. 240; Manganese S. S. Co. *v.* Bk., 28 S. D. 426, 134 N. W. 886; Am. C. Co. *v.* Thompson (Tex. Civ.), 110 S. W. 777; Pine Beach *v.* Co., 106 Va. 810, 56 S. E. 822; Moran Co. *v.* Co., 48 Wash. 592, 94 P. 106.

What occurred before the letters were written is competent to show the circumstances under which they were written as an aid to their interpretation. Grant *v.* Mfg. Co., 85 Conn. 421, 83 A. 212.

Terms "more or less" and "about" do not disclose ambiguity. Peterson *v.* Chaix, 5 Cal. App. 525, 90 P. 948.

378-40 Driver *v.* Galland, 59 Wash. 201, 109 P. 593.

378-41 Weil *v.* Lester, 94 Ark. 195, 126 S. W. 712; Sleeper *v.* Nicholson, 201 Mass. 110, 87 N. E. 473.

378-44 See Louisville, etc. Co. *v.* Higginbotham, 153 Ala. 334, 44 S. 872; Johnston *v.* Mulcahy, 4 Cal. App. 547, 88 P. 491.

379-45 Kessler *v.* Clayes, 147 Mo. App. 88, 125 S. W. 799; Leavitt *v.* De Vries, 127 App. Div. 721, 111 N. Y. S. 998; Beardmore *v.* Barry, 118 App. Div. 334, 103 N. Y. S. 353; West *v.* Herman, 47 Tex. Civ. 131, 104 S. W. 428.

"Company" as used in subscription paper is not ambiguous and defendant's understanding of the word inadmissible. Locke *v.* Taylor, 161 App. Div. 257, 146 N. Y. S. 256.

379-46 Lindblom *v.* Fallett, 145 Fed. 805, 76 C. C. A. 369; Cal. R. Co. *v.* Ins. Co., 23 Cal. App. 611, 138 P. 960; Brackett Co. *v.* Co., 127 Ga. 672, 56 S. E. 762 ("Texas red rust proof oats"); Kvamme *v.* Barthell, 144 Ia. 418, 118 N. W. 766; Kitzman *v.* Carl, 133 Ia. 340, 110 N. W. 587; Montgomery, etc. Co. *v.* Lumb. Co., 206 Mass. 144, 92 N. E. 71; Obenauer *v.* Solomon, 151 Mich. 570, 115 N. W. 696 ("the dock" explained by declarations of parties); Stover *v.* Springfield, 167 Mo. App. 328, 152 S. W. 122; New Amsterdam Co. *v.* Mesker, 128 Mo. App. 183, 106 S. W. 561; Lossing *v.* Cushman, 123 App. Div. 693, 108 N. Y. S. 368; Minshaw *v.* Lumb. Corp. (S. C.), 81 S. E. 1027; Houston P. Co. *v.* Griffith (Tex. Civ.), 144 S. W. 1139; Ward's Admr. *v.* Ins. Co., 80 Vt. 321, 67 A. 821.

379-49 "Reasonable time." Ould *v.* Realty Co., 94 S. C. 184, 77 S. E. 866.

380-50 Lowrey *v.* Hawaii, 206 U. S. 206; Harten *v.* Loffler, 29 App. Cas. (D. C.) 490; McLean C. Co. *v.* Bloomington, 234 Ill. 90, 84 N. E. 624; Cleveland, etc. R. Co. *v.* Gossett, 172 Ind. 525, 87 N. E. 723; Abadie *v.* Lumb. Co., 128 La. 1014, 55 S. 658; Goldenberg *v.* Taglino (Mass.), 105 N. E. 883; Ideal P. & Mfg. Co. *v.* Ins. Co., 167 Mo. App. 566, 152 S. W. 408; Ryer *v.* Turkel, 75 N. J. L. 677, 70 A. 68; Boyer *v.* Co., 128 App. Div. 458, 112 N. Y. S. 817 (entitled to great weight); C. *v.* Sanderson, 40 Pa. Super. 416; Carter *v.* Childress (Tex. Civ.), 99 S. W. 714; Shenandoah Co. *v.* Clarke, 106 Va. 100, 55 S. E. 561; Whipple *v.* Lee, 58 Wash. 253, 108 P. 601; Nelson *v.* N. Co., 52 Wash. 177, 100 P. 325; Causten *v.* Barnette, 49 Wash. 659, 96 P. 225; Winton *v.* McGraw, 60 W. Va. 98, 54 S. E. 506. See supra, "Ambiguity," 839-28.

380-54 Dalhoff Co. *v.* Maurice, 86 Ark. 162, 110 S. W. 218; O'Brien *v.* Peck, 198 Mass. 50, 84 N. E. 325; Bader *v.* Co., 134 Mo. App. 135, 113 S. W. 1154.

380-55 Goldstein *v.* D'Arcy, 201 Mass. 312, 87 N. E. 584.

381-56 Miller *v.* Ins. Co., 202 Fed. 442, 120 C. C. A. 548; Maydwell *v.* Co., 159 Fed. 930, 87 C. C. A. 110; Weir *v.* Long, 145 Ala. 328, 39 S. 974; Riley-W. Co. *v.* Co., 129 Mo. App. 325, 108 S. W. 628; C. *v.* Sanderson, 40 Pa. Super. 416; Kampmann *v.* McCormick (Tex. Civ.), 99 S. W. 1147.

381-57 Ramsey *v.* Pilcher, 130 Ga. 672, 61 S. E. 538.

381-59 Tygart *v.* Sutton, 8 Ga. App. 20, 68 S. E. 488; Martin *v.* Thrower, 3 Ga. App. 784, 60 S. E. 825; Ill. Cent. R. Co. *v.* Fleming, 148 Ky. 473, 146 S. W. 1110.

If there is no ambiguity it cannot be shown one clause of contract inserted as security for performance of the rest. Burton *v.* O'Neill, 126 Ga. 805, 55 S. E. 933.

382-61 Davis *v.* R. Co., 155 Ia. 51, 135 N. W. 356; Fidelity Co. *v.* Co., 31 Ky. L. R. 725, 103 S. W. 297; Shreve *v.* Crosby, 72 N. J. L. 491, 63 A. 333; Marshall *v.* R. Co., 73 S. C. 241, 53 S. E. 417; Earle *v.* Owings, 72 S. C. 362, 51 S. E. 980. See Doolittle *v.* Co., 134 Ia. 536, 111 N. W. 999.

382-62 Adeline S. F. Co. *v.* Co., 121 La. 961, 46 S. 935, purpose for which property sold to be used.

382-63 De Rue *v.* McIntosh, 26 S. D. 42, 127 N. W. 532; Berry *v.* Fairbanks, 51 Tex. Civ. 558, 112 S. W. 427.

383-64 Napier *v.* Elliott, 177 Ala. 113, 58 S. 435; Coalinga, etc. G. Co. *v.* Oil Co., 16 Cal. App. 361, 116 P. 1107; Whipple *v.* Geddis, 25 App. Cas. (D. C.) 333 ("certain existing incumbrances"); Jenkins *v.* Chem. Co., 169 Mo. App. 534, 154 S. W. 832; Beardmore *v.* Barry, 118 App. Div. 334, 103 N. Y. S. 353 ("more or less"); Williams *v.* Gridley, 110 App. Div. 525, 96 N. Y. S. 978 ("as soon as possible"); Kentucky Mfg. Co. *v.* Co., 77 S. C. 92, 57 S. E. 676 ("fully insured"); Old R. R. Irr. Co. *v.* Stubbs (Tex. Civ.), 137 S. W. 154; Reagan *v.* Bruff, 49 Tex. Civ. 226, 108 S. W. 185; West *v.* Herman, 47 Tex. Civ. 131, 104 S. W. 428; Roanoke *v.* Blair, 107 Va. 639, 60 S. E. 75 ("east").

Word used in statute cannot be explained by extrinsic evidence. Purdom Co. *v.* Knight, 129 Ga. 590, 59 S. E. 433, "season."

384-68 But see infra, 387-41.

385-94 "Estate." Jennings *v.* Puffer, 203 Mass. 534, 89 N. E. 1036. "Advertising drop." Lerner *v.* Roth, 136 N. Y. S. 61.

385-95 Hamilton C. Co. *v.* Co., 160 Fed. 75, 87 C. C. A. 231 (testimony should be as broad as words used); Maydwell *v.* Co., 159 Fed. 930, 88 C. C. A. 110 ("another cargo"); First Nat. Bk. *v.* Ruddock Co., 158 Cal. 334, 111 P. 86; Ellsworth *v.* Knowles, 8 Cal. App. 630, 97 P. 690 ("sight draft against papers"); Messenger *v.* Ins. Co., 47 Colo. 448, 107 P. 643; San Miguel Co. *v.* Stubbs, 39 Colo. 359, 90 P. 842 ("heart of yellow pine"); Ramsey *v.* Pilcher, 130 Ga. 672, 61 S. E. 538 ("Savannah specifications"); Driscoll *v.* Penrod, 176 Ind. 19, 95 N. E. 313; Wolverine L. Co. *v.* Ins. Co., 145 Mich. 558, 108 N. W. 1088 (application of ordinary words to peculiar facts); Davis *v.* Dodge, 126 App. Div. 469, 110 N. Y. S. 787; Sholl *v.* Prince Line, 109 App. Div. 591, 96 N. Y. S. 368 ("without time limit"); Edmonds *v.* Bk., 215 Pa. 547, 64 A. 671 (work which is "properly brickwork"); Ward's Adm. *v.* Ins. Co., 80 Vt. 321, 67 A. 821; Richmond *v.* Barry, 109 Va. 274, 63 S. E. 1074; Parks *v.* Elmore, 59 Wash. 584, 110 P. 381; Belcher *v.* Coal Co., 68 W. Va. 716, 70 S. E. 712.

To show "addition" applied to building subsequently erected. Prudential Ins. Co. *v.* Alley, 104 Va. 356, 51 S. E. 812.

"M. ranch."—Morrell *v.* San Tomas, etc. Co., 13 Cal. App. 305, 109 P. 632.

"Measured in wall."—Miller *v.* Wiggins, 227 Pa. 564, 76 A. 711.

"Bal. a/c to date."—Thayer Export Lumb. Co. *v.* Naylor, 100 Miss. 841, 57 S. 227.

That at the time when a policy was issued it was understood between insured and the agent of the company, that the only child was the person meant by "Estate." Renfro *v.* Met. Life Ins. Co., 148 Mo. App. 258, 129 S. W. 444.

"Main water supply."—Rosen *v.* Bamberger, 122 N. Y. S. 240.

"Modern asphalt roadway."—Tennant Land Co. *v.* Nordeman, 148 Ky. 361, 146 S. W. 756.

"c. o. d."—Illinois Custom Tailoring Co. *v.* Express Co., 158 Ill. App. 374.

"Ready for occupancy."—Murphy *v.* Schwaner, 84 Conn. 420, 80 A. 295.

"This rule does not permit either party to a contract to testify on direct examination what the intention of the parties was, or what his intention was, in using the words or terms of doubtful import, but only to prove facts and circumstances not inconsistent with the writing itself, tending to prove in what sense the parties used such words or terms." Smith *v.* Crockett Co., 85 Conn. 282, 82 A. 569, *cf.* Brown *v.* Slater, 16 Conn. 192, 196, 41 Am. Dec. 136; Fairfield *v.* Lawson, 50 Conn. 501, 510, 47 Am. Rep. 669.

385-96 Slavik *v.* Societies, 59 Misc. 183, 110 N. Y. S. 347, "survivors."

385-99 Routledge *v.* Elmendorf, 54 Tex. Civ. 174, 116 S. W. 156, accounts in hands of administrator.

387-33 "Regular engagement." Lewis *v.* Blackwood, 153 App. Div. 361, 137 N. Y. S. 1061.

387-41 Miller *v.* Baker Co., 208 Fed. 190; Harlow *v.* Co., 81 Conn. 572, 71 A. 734 ("when transit car"); Salt Fork, etc. Co. *v.* Coal Co., 170 Ill. App. 268 ("employed"); Layton *v.* Elba Mfg. Co., 161 N. C. 482, 77 S. E. 677 ("carload"); Berry *v.* Wadhams Oil Co., 156 Wis. 588, 146 N. W. 783 ("74 degree gasoline").

387-42 Salmon *v.* Co., 158 Fed. 300, 85 C. C. A. 551 ("10 and up" in lumber deal); Louisville & N. R. Co. *v* Grain Co., 136 Ga. 538, 71 S. E. 884; Todd *v.* Howell, 47 Ind. App. 665, 95 N. E. 279; Wilson, etc. Co. *v.* Ware, 158 Mo. App. 179, 138 S. W. 690; Vier Now *v.* Carthage, 139 Mo. App. 276, 123 S. W. 67; Davis *v.* Dodge, 126 App. Div. 469, 110 N. Y. S. 787 ("entire business services"); Lovering *v.* Miller, 218 Pa. 212, 67 A. 209 ("regular season"—in theatrical contract); Holbrook *v.* Quinlan & Co., 84 Vt. 411, 80 A. 339; Schultz *v.* Co., 46 Wash. 555, 90 P. 917 ("busy" and "dull" season).

Expert evidence admissible.—Daniel *v.* Co., 124 Ga. 1063, 53 S. E. 573, "basis" and "returns".

388-43 Grout *v.* Moulton, 79 Vt. 122, 64 A. 453, satisfactory demonstration.

388-45 See Moran B. Co. *v.* Co., 210 Mo. 715, 109 S. W. 47, parties must be shown to have been familiar with technical meaning. *Contra,* Steidtmann *v.* Co., 234 Ill. 84, 84 N. E. 640.

"Reinsurance" in an agency contract. Federal Ins. Co. *v.* Gilmour, 206 Mass. 203, 92 N. E. 36.

389-73 McKinnon B. & M. Co. *v.* Co., 156 Mich. 11, 120 N. W. 26, "retorts".

389-74 Buffington *v.* McNally, 192 Mass. 198, 78 N. E. 309.

389-86 Paepcke-Leicht L. Co. *v.* Talley, 106 Ark. 400, 153 S. W. 833 ("board measure"); Whitney *v.* Aronson, 21 Cal. App. 9, 130 Pac. 700 ("winter months").

390-92 W. U. T. Co. *v.* Merritt, 55 Fla. 462, 45 S. 1024, cit. the text (telegram); Griffin *v.* Erskine, 131 Ia. 444, 109 N. W. 13; Wilson, etc. R. Co. *v.* Capron, 145 Mo. App. 497, 122 S. W. 1085; Flegel *v.* Dowling, 54 Or. 40, 102 P. 178.

Insurance.—"The application is silent as to the kind of policy to be delivered, further than to state that the same is to be a 'G A D 20 Pay.' Now the evidence showing the representations of the agent and the character of the policy tendered was admitted by the court, and no cross-assignment complains of that ruling. But if the ruling were assigned as error, yet we would be unwilling to hold that the oral testimony was inadmissible, because it cannot be said that such testimony contradicts the written contract that the policy was to be a 'G A D 20 Pay.' That expression is not so unambiguous as to preclude oral evidence of its meaning. Very naturally some representations as to the nature of the policy to be delivered would be expected to be made, and proof of the same should be allowed, especially where such proof as we have just shown does not contravene any of the rules of evidence by contradicting the written application or contract." Stengel *v.* Assur. Co. (Tex. Civ.), 147 S. W. 1193.

391-5 See S. *v.* Nippert, 74 Kan. 371, 86 P. 478.

391-6 Burnette *v.* Young, 107 Va. 184, 57 S. E. 641.

392-11 Emerson *v.* Stratton, 107 Va. 303, 58 S. E. 577, land sold in gross and not by acre.

393-17 Alabama C. Co. *v.* Co., 131 Ga. 365, 62 S. E. 160, time of the essence.

393-25 Thrasher *v.* Royster (Ala.), 65 S. 796; McDaniel *v.* Rys. Co., 165 Mo. App. 678, 148 S. W. 464.

394-26 Tompkins *v.* Co., 160 Fed. 303, 87 C. C. A. 427; Crittenden *v.* Cobb, 156 Fed. 535; Avery & Co. *v.* Turner, 3 Ala. App. 627, 57 S. 255; Kempher *v.* Gans, 87 Ark. 221, 112 S. W. 1087; Little Rock Co. *v.* Gunnels, 82 Ark. 286, 101 S. W. 729; McLamb *v.* Lambertson, 4 Ga. App. 553, 62 S. E. 107; Emerson *v.* Knight, 130 Ga. 100, 60 S. E. 255; Martin *v.* Ferguson, 31 Ky. L. R. 590, 103 S. W. 257; Boyes *v.* Masters, 17 Okla. 460, 89 P. 198; Rouseville *v.* Cornplanter, 29 Pa. Super. 214; Staub *v.* Hampton, 117 Tenn. 706, 101 S. W. 776; Cockrell *v.* Egger (Tex. Civ.), 99 S. W. 568; Houston T. Co. *v.* Lee (Tex. Civ.), 97 S. W. 842.

Misdescription in designating bank may

be corrected by parol. Bullard v. Leach, 213 Mass. 117, 100 N. E. 57. See "Wills," p. 518.

"If the 20 shares of stock mentioned might, because of the different circumstances attending separate and different issues of its stock by the corporation mentioned, mean either one thing or another, there lurked in the contract a latent ambiguity as to what its subject-matter really was. If the description of the subject dealt with found in the terms of the contract might apply to more than one thing, this fact, and also a statement or representation so made as to identify the particular thing intended to be contracted about, may be shown by parol evidence, without any violation of the rule against admitting such evidence to vary or contradict the terms of a written instrument." Feore v. Avent, 4 Ala. App. 551, 58 S. 727.

395-28 In re Jameson, 2 Ch. Div. (1908) 111.

395-29 To identify land. Fore v. Berry, 94 S. C. 71, 78 S. E. 706.

396-30 Patent ambiguity not made certain by parol proof of intention; surrounding circumstances may be shown. Reynolds v. Lawrence, 147 Ala. 216, 40 S. 576. See Riley-W. Co. v. Co., 129 Mo. App. 325, 108 S. W. 628.

396-31 So. Bell Tel. Co. v. Covington, 139 Ga .566, 77 S. E. 382.

396-32 Maydwell v. Co., 159 Fed. 930, 87 C. C. A. 110 (contract for "another cargo" of ties, sufficiently definite and certain); Gaylord v. McCoy, 158 N. C. 325, 74 S. E. 321.

396-34 S. v. Town, 177 Ala. 204, 58 S. 905; Davis v. Horne, 54 Fla. 563, 45 S. 476; Martin v. Kitchin, 195 Mo. 477, 93 S. W. 780.

396-35 Gorham v. Settegast, 44 Tex. Civ. 254, 98 S. W. 665.

397-36 Bergan v. Co., 41 Ind. App 647, 84 N. E. 833; Strong v. Co., 197 Mass. 53, 83 N. E. 328.

398-41 North Am. etc. Co. v. Samuels, 146 Fed. 48, 76 C. C. A. 506; Colonial, etc. Co. v. Lee, 95 Ark. 253, 129 S. W. 84; Hill v. McCoy, 1 Cal. App 159, 81 P. 1015 ("Abbey Ranch"); Harten v. Loffler, 29 App. Cas. (D. C.) 490; Read P. Co. v. Co., 1 Ga. App. 420, 58 S. E. 122; Thompson v. Hill, 137 Ga. 308, 73 S. E. 640; Walden v. Walden, 128 Ga. 126, 57 S. E. 323; Bennett v. Palmer, 128 Ill. App. 626; Steele v. B. Co. (Ind.), 95 N. E. 435; Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691 (two descriptions in same deed irreconcilable); Wolf v. Wolf, 152 Ia. 121, 131 N. W. 882; Cummins v. Riordon, 84 Kan. 791, 115 P. 568; Toole v. Crafts, 196 Mass. 397, 82 N. E. 22; Smith v. Co., 194 Mass. 193, 80 N. E. 527; Miller v. Co., 150 Mich. 292, 114 N. W. 61; Shivers v. Ins. Co., 99 Miss. 744, 55 S. 965; Lauderdale v. King, 130 Mo. App. 236, 109 S. W. 852 (which of two parcels of land meant); Ranney v. Byers, 219 Pa. 332, 68 A. 971 ("Byers Place"); Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895.

399-42 Fireman's Ins. Co. v. Ins. Co., 2 Cal. App. 690, 84 P. 253; Buffington v. McNally, 192 Mass. 198, 78 N. E. 309; Kimball v. Waterman, 73 N. H. 348, 61 A. 595; Staub v. Hampton, 117 Tenn. 706, 101 S. W. 776; Bk. v. Catzen, 63 W. Va. 535, 60 S. E. 499.

399-43 New Amsterdam C. Co. v. Co., 95 Ark. 140, 128 S. W. 861; United R. Co. v. Wehr, 103 Md. 323, 63 A. 475 (property "which you have for sale").

399-44 Brannan v. Henry, 142 Ala. 698, 39 S. 92; In re Garnier, 147 Cal. 457, 82 P. 68; Hoffner v. Custer, 237 Ill. 64, 86 N. E. 737; Clayton v. Lemen, 233 Ill. 435, 84 N. E. 691; McFarland v. Stansifer, 36 Ind. App. 486, 76 N. E. 124; Richstein v. Welch, 197 Mass. 224, 83 N. E. 417; Little v. Greek, 233 Pa. 534, 82 A. 955.

399-45 Collins v. Capps, 235 Ill. 560, 85 N. E. 934.

399-47 Haskell v. Friend, 196 Mass. 198, 81 N. E. 962.

400-51 Weeks v. Brooks, 205 Mass. 458, 92 N. E. 45.

Field notes of surveyor—extrinsic evidence admissible to apply description. Selkirk v. Watkins (Tex. Civ.), 105 S. W. 1161.

400-52 St. Louis, etc. R. Co. v. Payne, 47 Tex. Civ. 194, 104 S. W. 1077.

400-53 Rix v. Smith, 145 Mich. 203, 108 N. W. 691; Warner v. Sapp (Tex. Civ.), 97 S. W. 125.

To locate point of beginning. Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340.

400-54 Delaware, etc. R. Co. v. Gleason, 159 Fed. 383, 86 C. C. A. 383.

401-60 Cumberledge v. Brooks, 235 Ill. 249, 85 N. E. 197; Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275.

402-65 Herbert *v.* Steele, 74 N. H. 409, 68 A. 411.

402-68 Van Arsdale-O. B. Co. *v.* Foster, 79 Kan. 669, 100 P. 480; Meyer *v.* Shapton, 178 Mich. 417, 144 N. W. 887; Easterwood *v.* Burnitt (Tex. Civ.), 126 S. W. 934.

403-69 So. S. B. D. *v.* Holmes (Miss.), 61 S. 698; Shepard Co. *v.* Freeman, 40 Mont. 144, 105 P. 484 (party signing contract not mentioned in it); Furculi *v.* Bittner, 60 Misc. 112, 125 N. Y. S. 36.

Parol evidence is inadmissible to contradict a recital in a record. Clark *v.* S., 100 Miss. 751, 57 S. 209.

Person cannot show he is a party to a contract, in contradiction of its terms. Vanderberg *v.* Co., 126 Mo. App. 600, 105 S. W. 17.

Where instrument purports to be made by certain persons parol evidence is inadmissible to show another person who signed it intended to be bound thereby. Brown *v.* O'Byrne, 153 Ala. 621, 45 S. 129.

403-71 Malleable I. R. Co. *v.* Pusey, 244 Ill. 184, 91 N. E. 51.

Firm name.—"A deed made to a firm by the firm name, instead of the individual members of the firm, is not for that reason void. It is a latent ambiguity, that may be explained and supplied by parol." La Fayette Land Co. *v.* Caswell, 59 Fla. 544, 52 S. 140.

404-74 Baggs *v.* Funderburke, 11 Ga. App. 173, 74 S. E. 937; Thompson *v.* Wilkinson, 9 Ga. App. 367, 71 S. E. 678; First Nat. Bk. *v.* Bickel, 143 Ky. 754, 137 S. W. 790; Walker *v.* Miller, 139 N. C. 448, 52 S. E. 125; Threlkeld *v.* Steward, 24 Okla. 403, 103 P. 630 (relations and profession); Texas Baptist University *v.* Patton (Tex. Civ.), 145 S. W. 1063.

Parties who negotiated contract may be shown. Title J. & S. Co. *v.* Nichols, 12 Ariz. 405, 100 P. 825.

405-76 Rhomberg *v.* Avenarius, 135 Ia. 176, 112 N. W. 548; Wuertz *v.* Braun, 113 App. Div. 459, 99 N. Y. S. 340.

Real party directing litigation may be shown by oral proof. Milbra *v.* Co. (Ala.), 62 S. 177.

405-77 Ottumwa M. Co. *v.* Manchester, 139 Ia. 334, 115 N. W. 911.

405-78 Mock *v.* Stoddard, 177 Fed. 611, 101 C. C. A. 237 (partnership note); Kenner *v.* Assn., 87 Kan. 293, 123 P. 739; Western G. Co. *v.* Lackman, 75 Kan. 34, 88 P. 527; Dunbar Co. *v.* Martin, 53 Misc. 312, 103 N. Y. S. 91; Birmingham *v.* Regnery, 33 Pa. Super. 54.

406-79 Russell *v.* C. Mills (Ala.), 39 S. 712; Mudge *v.* Varner, 146 N. C. 147, 59 S. E. 540.

406-80 Hay *v.* McDonald, 21 Cal. App. 204, 131 P. 74 ("cashier"); Hart *v.* Co., 130 Ga. 504, 61 S. E. 26.

408-86 Briel *v.* Bank, 172 Ala. 475, 55 S. 808; Pac. Imp. Co. *v.* Jones, 164 Cal. 260, 128 P. 404; Eddy *v.* Co., 9 Cal. App. 624, 99 P. 1115; Fitzgerald O. Co. *v.* Co., 3 Ga. App. 212, 59 S. E. 713; Klauck *v.* Ins. Co., 131 App. Div. 519, 115 N. Y. S. 1049; Kilpatrick *v.* Co., 59 Misc. 180, 110 N. Y. S. 381; Calman *v.* Kreipke (Okla.), 139 P. 698; Cohee *v.* Turner, 37 Okla. 778, 132 P. 1082; Wiers *v.* Treese (Okla.), 117 P. 182; Battey *v.* Lunt, 30 R. I. 1, 73 A. 353; Kohlberg *v.* Awbrey & Semple (Tex. Civ.), 167 S. W. 828; Crable & Son *v.* O'Connor (Wyo.), 133 P. 376. See also vol. 10, p. 36.

408-87 Pacific Guano Co. *v.* Holleman, 12 Fed. 61; Block *v.* City, 169 Fed. 516, 95 C. C. A. 4; Pleins *v.* Wachenheimer, 108 Minn. 342, 122 N. W. 166; Meyer *v.* Kilgen, 177 Mo. App. 724, 160 S. W. 569; Phelps *v.* Weber, 84 N. J. L. 630, 87 A. 469; Kilpatrick *v.* Co., 59 Misc. 180, 110 N. Y. S. 381; Schmucker *v.* Co., 28 Okla. 721, 116 P. 184; Rankin *v.* Bk., 20 Okla. 68, 93 P. 536, 18 L. R. A. (N. S.) 512; Taplin *v.* Marcy, 81 Vt. 428, 71 A. 72; Crable & Son *v.* O'Connor (Wyo.), 133 P. 376. *Contra* where writing negotiable. New York L. Ins. Co. *v.* Martindale, 75 Kan. 142, 88 P. 559.

409-88 Crelier *v.* Mackey, 243 Pa. 363, 90 A. 158.

410-90 Elec. Carriage Call & S. Co. *v.* Herman, 129 N. Y. S. 232. See Schuster *v.* Snawder, 31 Ky. L. R. 254, 101 S. W. 1194.

410-91 Outcalt A. Co. *v.* Co., 7 Ga. App. 150, 66 S. E. 480; Patten *v.* Lynett, 133 App. Div. 746, 118 N. Y. S. 185; Piretti *v.* T. & R. Co., 120 N. Y. S. 782.

410-92 Incomplete contract aided by parol. Official C. Co. *v.* Weber, 130 Mo. App. 646, 109 S. W. 1071.

Fraud may be shown. Sheldon *v.* Assn., 73 N. J. L. 115, 62 A. 189.

411-94 Blakely O. & F. Co. *v.* Proctor, 134 Ga. 139, 67 S. E. 389.

411-95 Pinkstaff *v.* Steffy, 216 Ill. 406, 75 N. E. 163.

412-1 Travelers' Ins. Co. *v.* Co., 141 Wis. 103, 123 N. W. 643.

412-2 In re Bird, 180 Fed. 229; Mulrooney *v.* Ins. Co., 157 Fed. 598, Albert *v.* Albert, 12 Cal. App. 268, 107 P. 156 (delivery on condition); Pollard *v.* Sayre, 45 Colo. 195, 98 P. 816; Hester *r.* Gairdner, 128 Ga. 531, 58 S. E. 165; Ah Hoy *v.* Raymond, 19 Haw. 568; Flynn *v.* Butler, 189 Mass. 377, 75 N. E. 730; Kasal *v.* Hlinka (Minn.), 136 N. W. 569; Janvey *v.* Loketz, 122 App. Div. 411, 106 N. Y. S. 690 (prior conversations).

413-3 Houghton Co. *v.* Kennedy, 10 Cal. App. 426, 102 P. 533; Doty *v.* Dickey, 29 Ky. L. R. 900, 96 S. W. 544; Percy *v.* Bk., 110 Va. 129, 65 S. E. 475.

413-7 Taylor *v.* Vail (Vt.), 66 A. 820, natural tendency and former plans of assignor may be shown.

414-8 Natella *v.* Prinstein, 114 N. Y. S. 342.

414-10 Kinderman *v.* Hersch, 53 Colo. 561, 129 P. 228; Stephens *v.* Midyette, 161 N. C. 323, 77 S. E. 243; Harlow *v.* Co., 53 Or. 272, 100 P. 7, interpretation of contract by parties shown. See vol. 1, p. 717.

414-11 Nolan *v.* Nolan, 155 Cal. 476, 101 P. 520; Leitch *v.* Marx, 21 Cal. App. 208, 131 P. 328; Ryan *v.* Bk., 132 Ky. 625, 116 S. W. 1179 (if purpose of assignment admitted to be for security); Josephson *v.* Gens, 141 N. Y. S. 522; Selleck *v.* Co., 117 N. Y. S. 964. See supra, "Assignments," 25-23.

415-13 New Jersey P. Co. *v.* Gluck, 79 N. J. L. 115, 74 A. 443.

415-14 Farmers' P. Co. *v.* Henderson, 46 Colo. 37, 102 P. 1063; Slade *v.* Squier, 133 App. Div. 666, 118 N. Y. S. 278.

416-17 Townsend *v.* Co., 127 Ga. 342, 56 S. E. 436; Doolittle *v.* Co., 134 Ia. 536, 111 N. W. 999; McNaughton *v.* Wahl, 99 Minn. 92, 108 N. W. 867; Farmers' N. Bk. *v.* Groc. Co., 33 Okla. 769, 127 P. 1071; Murphy *v.* Panter, 62 Or. 522, 125 P. 292; Gilbert Co. *v.* Husted, 50 Wash. 61, 96 P. 835.

Mistake to be corrected by equitable action. Anton W. Luecke & Co. *v.* Cohen, 150 Mo. App. 48, 129 S. W. 1002.

Rule applies only to parties or privies. Bright *v.* Ins. Co., 48 Wash. 60, 92 P. 779.

417-18 George *v.* Emery, 18 Wyo. 352, 107 P. 1.

417-19 Elgin J. Co. *v.* Co., 118 Mo. App. 126, 94 S. W. 572.

Conditional delivery.—See Gilroy *v.* Co., 118 App. Div. 733, 103 N. Y. S. 620.

417-20 Potlatch. etc. Co. *v.* Co., 78 Wash. 533, 139 P. 496. See Hall *v.* Barnard, 138 Ia. 523, 116 N. W. 604.

418-21 George *v.* Emery, 18 Wyo. 352, 107 P. 1.

418-22 Rairden *v.* Hedrick, 46 Mont. 510, 129 P. 498.

418-24 Donoven *v.* Travers, 122 Ia. 458, 47 S. 769; Wasey *v.* Whitcomb, 167 Mich. 58, 132 N. W. 572; Am. C. Bk. *v.* Cabrera, 3 P. R. Fed. 14; Sparks *v.* Green, 85 S. C. 109, 67 S. E. 230.

To show how the parties arrived at the amount due from plaintiff to defendant. Ward *v.* Groc. Co., 108 Ark. 430, 157 S. W. 1154.

419-27 McGuire *v.* Gerstley, 204 U. S. 489; U. S. G. Co. *v.* Gleason, 135 Wis. 539, 116 N. W. 238, 17 L. R. A. (N. S.) 1906.

420-33 Subsequent agreement. Fleming *v.* Linder (Ia.), 109 N. W. 771.

420-34 Surrounding circumstances admissible to show conditions precedent not met. Crawford *v.* Owens, 79 S. C. 59, 60 S. E. 236.

422-41 Marsh *v.* Phillips (Tex. Civ.), 144 S. W. 1160.

423-46 United S. Co. *v.* Meenan, 211 N. Y. 39, 105 N. E. 106.

Books of account, though admitted to prove delivery of goods, are private memoranda of plaintiff and he can show, by parol, credit was given third person. Pettey *v.* Benoit, 193 Mass. 233, 79 N. E. 245.

423-47 Inman *v.* R. Co., 159 Fed. 960; Sturges *v.* R. Co., 166 Mich. 231, 131 N. W. 706; Missouri K. & T. R. Co. *v.* Co. (Tex.), 131 S. W. 410, modifying judgment 120 S. W. 1146; International etc. R. Co. *v.* Griffith (Tex. Civ.), 103 S. W. 225. See supra, "Carriers," 873-43, et seq.

Custom shown to explain ambiguity. Southern R. Co. *v.* Cofer, 149 Ala. 565, 43 S. 102.

Statement goods received in apparent good order may be contradicted. Foley *v.* R. Co., 96 N. Y. S. 182.

423-48 Penn. Co. *v.* Loftis, 72 O. 288, 74 N. E. 179 (coupon ticket); Levan *v.* R. Co., 86 S. C. 514, 68 S. E. 770.

Ambiguity explained.—Sellers *v.* R. Co., 77 S. C. 361, 57 S. E. 1102.

423-49 Mace *v.* R. Co., 151 N. C. 404, 66 S. E. 342; Chicago, etc. Co. *v.* Howell (Tex. Civ.), 166 S. W. 81. See Houston, etc. R. Co. *v.* Lee (Tex. Civ.), 123 S. W. 154.

424-50 Bachman *v.* Co., 152 Fed. 403, 81 C. C. A. 529, prior conversation inadmissible.

425-51 To show loan intended. S. *v.* Bk., 136 Ia. 79, 113 N. W. 500.

427-62 First Nat. Bk. *v.* Ins. Co., 147 Fed. 519, 77 C. C. A. 215; Jersey I. Co. *v.* Whitney, 149 Cal. 269, 86 P. 509, 691; Hurr *v.* R. Co., 141 Mo. App. 217, 124 S. W. 1057 (consideration). *Comp.* Wright *v.* Anderson, 191 Mass. 148, 77 N. E. 704.

Intention of parties cannot be shown. Capital City Co. *v.* Moody, 135 Ia. 444, 110 N. W. 903.

Accord and satisfaction.—Rowland *v.* R. Co., 124 Mo. App. 605, 102 S. W. 19; Sutherlin *v.* Bloomer, 50 Or. 398, 93 P. 135.

428-66 Bowers H. D. Co. *v.* U. S., 211 U. S. 176; Gammino *v.* Dedham, 164 Fed. 593, 90 C. C. A. 465; Boston S. *v.* Schleuter, 88 Ark. 213, 114 S. W. 242; Gladding, McBean & Co. *v.* Montgomery, 20 Cal. App. 276, 128 P. 790; Hartwell *v.* Co., 8 Cal. App. 733, 97 P. 901; O'Loughlin *v.* Poli, 82 Conn. 427, 74 A. 763; Beattie *v.* McMullen, 82 Conn. 484, 74 A. 767; Boise V. Co. *v.* Kroeger, 17 Ida. 384, 105 P. 1070; Piper *v.* Murray, 43 Mont. 230, 115 P. 669; Jones *v.* Whittier, 77 N. J. L. 715, 73 A. 497; Lossing *v.* Cushman, 195 N. Y. 386, 88 N. E. 649; Murdock *v.* Gould, 193 N. Y. 369, 86 N. E. 12; Casciato *v.* Mason (Or.), 138 P. 841; Ramsdell *v.* Ramsdell, 65 Or. 428, 132 P. 1167; Am. S. S. Co. *v.* Co., 226 Pa. 461, 75 A. 669; Blassingame *v.* Laurens, 80 S. C. 38, 61 S. E. 96; Farmers' Mfg. Co. *v.* Woodworth, 109 Va. 596, 64 S. E. 986.

Payment when not otherwise expressed in the written contract, is due when the work is done, and parol evidence is inadmissible to show a different time. Delehanty *v.* Dunn, 151 App. Div. 695, 136 N. Y. S. 193. See also "Payment," p. 727, n. 37.

429-67 Hartford M. Co. *v.* Co. (Ky.), 121 S. W. 477; Aetna I. Co. *v.* Fuller, 111 Md. 321, 73 A. 738; Loomer *v.* Harlow, 214 Mass. 415, 102 N. E. 333; Van Buskirk *v.* Board, 78 N. J. L. 50, 75 A. 909; Ramsey *v.* Co., 72 N. J. Eq. 165, 65 A. 461; Gossman Bros. *v.* Phillips, 83 Misc. 453, 145 N. Y. S. 34; Rosenberg *v.* Kazemier, 138 N. Y. S. 1070; Walker *v.* Cooper, 150 N. C. 128, 63 S. E. 681; Holland *v.* Rhoades, 56 Or. 206, 106 P. 779 (agreement permitting rescission); Volk *v.* Beatty, 40 Pa. Super. 628; Ereno *v.* P., 2 P. R. Fed. 290; Thompson *v.* Fitzgerald (Tex. Civ.), 105 S. W. 334; Tobin *v.* McArthur, 56 Wash. 523, 106 P. 180.

430-70 Boise V. C. Co. *v.* Kroeger, 17 Ida. 384, 105 P. 1070; Polakoff *v.* Halphen (N. J.), 89 A. 996; McDermott *v.* Fletcher, 155 App. Div. 615, 140 N. Y. S. 871; Beattie *v.* Co., 196 N. Y. 346, 89 N. E. 831; Magnolia W. & S. Co. *v.* Davis (Tex. Civ.), 153 S. W. 670; Farmers' Mfg. Co. *v.* Woodworth, 109 Va. 596, 64 S. E. 986. See McKeige *v.* Carroll, 120 App. Div. 521, 105 N. Y. S. 342.

430-72 McLean *v.* Co., 160 Mich. 324, 125 N. W. 31.

430-73 O'Loughlin *v.* Poli, 82 Conn. 127, 14 A. 763.

And this is true even though the written contract provides against a subsequent modification thereof save by writing. Simpson *v.* Mann, 71 W. Va. 516, 76 S. E. 895.

Burden on the complainants to establish alleged change. Huntsville Elks' Club *v.* Bldg. Co., 176 Ala. 128, 57 S. 750.

431-76 Ramsey *v.* Pilcher, 130 Ga. 672, 61 S. E. 538 ("Savannah specifications"); Whidden *v.* Jordan, 215 Mass. 189, 102 N. E. 436; Derby D. Co. *v.* Co., 204 Mass. 461, 90 N. E. 543; Murdock *v.* Gould, 193 N. Y. 369, 86 N. E. 12; Lossing *v.* Cushman, 123 App. Div. 693, 108 N. Y. S. 368 (understanding of parties); C. *v.* Sanderson, 40 Pa. Super. 416.

431-78 Evans *v.* Co., 142 Ill. App. 375 (meaning agreed upon by parties shown); Aetna I. Co. *v.* Waters, 110 Md. 673, 73 A. 713 ("floor slab" and "roof slab," "columns, beams, floor and roof slabs").

432-83 Stewart *v.* Co., 108 Md. 200, 69 A. 708.

432-84 Vizard *v.* Robinson (Ala.), 61 S. 959; Foster *v.* Carlisle, 159 Ala. 621, 48 S. 665; Brassell *v.* Fisk, 153 Ala. 558, 45 S. 70; Hearin *v.* Sawmill Co., 105 Ark. 455, 151 S. W. 1007; MacLeod *v.* Moran, 11 Cal. App. 622, 105 P. 932 (applying rule to trust deed and

pointing out inapplicability of code provisions governing other deeds); Read *v.* Gould, 139 Ga. 499, 77 S. E. 642; Taylor *v.* Southerland, 7 Ind. Ty. 666, 104 S. W. 874; Miller *v.* Miller, 91 Kan. 1, 136 P. 953; Ratliff *v.* Soward's Guardian, 152 Ky. 97, 153 S. W. 25; Van Ness *v.* Boinay, 214 Mass. 340, 101 N. E. 979; Sanborn *v.* Loud, 150 Mich. 154, 113 N. W. 309; Bullard *v.* Brown, 93 Miss. 104, 46 S. 137; Northrup *v.* Burge, 255 Mo. 641, 164 S. W. 584; McPherson *v.* Kissee, 239 Mo. 664, 144 S. W. 410; Weissenfels *v.* Cable, 208 Mo. 515, 106 S. W. 1028; Kennedy's Admr. *v.* Duncan, 157 Mo. App. 212, 137 S. W. 299; Northeastern, etc. Co. *v.* Hepburn, 72 N. J. Eq. 7, 65 A. 747; Pate *v.* Lumb. Co., 165 N. C. 184, 81 S. E. 132; Foster *v.* Foster, 81 S. C. 307, 62 S. E. 320; Harriman L. Co. *v.* Hilton, 121 Tenn. 308, 120 S. W. 162; Vansickle *v.* Watson, 103 Tex. 37, 123 S. W. 112; Lindly *v.* Lindly (Tex. Civ.), 109 S. W. 467; Cook *v.* Hensler, 57 Wash. 392, 107 P. 178 (rule applies to recorded plat referred to in deed). See supra, "Carriers," S73-43.

Porto Rican laws recognizes the rule. Veve Y Diaz *v.* Sanchez, 226 U. S. 234, 33 Sup. Ct. 36, 57 L. ed. 201.

Misdescription should be corrected in an appropriate proceeding. Brown *v.* Powers, 167 Ala. 518, 52 S. 647.

In Curry *v.* **Dorr**, 210 Mass. 430, 97 N. E. 87, the court said: "The record title at that time having stood in the name of one Barlow under a conveyance in fee, absolute upon its face, with no proof that the consideration had been furnished by the defendant, parol evidence that the parties understood, that Bangs should retain the beneficial interest, and receive the rents and profits, was incompetent under our statute relating to the creation of trusts in land, and should have been excluded."

434-85 Helton *v.* Asher, 135 Ky. 751, 123 S. W. 285; Thornburg *v.* Bolt (Ky.), 116 S. W. 1177; Pryor *v.* Buffalo, 197 N. Y. 123, 90 N. E. 423; Fellbush *v.* Egen, 221 Pa. 420, 70 A. 816; Light *v.* Miller, 38 Pa. Super. 408; Scarborough *v.* Blount (Tex. Civ.), 154 S. W. 312; Johnson *v.* Johnson (Tex. Civ.), 147 S. W. 1167; Trout *v.* R. Co., 107 Va. 576, 59 S. E. 394.

434-86 Dunn *v.* Taylor, 102 Tex. 80, 113 S. W. 265.

Party seeking benefit of deed, bound by its terms. Vansickle *v.* Watson, 103 Tex. 37, 123 S. W. 112.

435-87 Unrecorded deed cannot be shown by parol to have been executed to non-resident stranger to action. McConnell *v.* Slappey, 134 Ga. 95, 67 S. E. 440.

435-88 Travis *v.* Taylor (Ky.), 118 S. W. 988; Highland Realty Co. *v.* Groves, 130 Ky. 374, 113 S. W. 420; Bliss *v.* Waterbury, 33 S. D. 214, 145 N. W. 435.

435-89 Foster *v.* Carlisle, 159 Ala. 621, 48 S. 665; Schuman *v.* George (Ark.), 161 S. W. 1039; Herrin *v.* Abbe, 55 Fla. 769, 46 S. 183; Isler *v.* Griffin, 134 Ga. 192, 67 S. E. 854 (to show deed a will); Appel *v.* Bucklinder, 82 Misc. 312, 143 N. Y. S. 710; Teague *v.* Sowder, 121 Tenn. 132, 114 S. W. 484.

435-90 Stevinson *v.* Joy, 164 Cal. 279, 128 P. 751; Bell *v.* Redd, 133 Ga. 5, 65 S. E. 90; Louisville & N. R. Co. *v.* Holland, 132 Ga. 173, 63 S. E. 898; Bullard *v.* Brown, 93 Miss. 104, 46 S. 137; Cotulla *v.* Barlow (Tex. Civ.), 115 S. W. 294; Paris G. Co. *v.* Burks, 101 Tex. 106, 105 S. W. 174; Oliver R. Co. *v.* R. Co., 109 Va. 513, 64 S. E. 56; Trout *v.* R. Co., 107 Va. 576, 59 S. E. 394; Sylvester *v.* S., 46 Wash. 585, 91 P. 15; Bradshaw *v.* Farnsworth, 65 W. Va. 28, 63 S. E. 755.

436-91 Buie *v.* Kennedy, 161 N. C. 290, 80 S. E. 445. *Comp.* Edison, etc. Co. *v.* Co., 191 Mass. 258, 80 N. E. 479.

436-92 Cerini *v.* R. Co., 71 Wash. 310, 128 P. 666.

437-94 Williams *v.* Smith, 128 Ga. 306, 57 S. E. 801; Hamlin *v.* Hamlin, 192 N. Y. 161, 84 N. E. 805, 117 App. Div. 493, 102 N. Y. S. 571; Selari *v.* Selari (Tex. Civ.), 124 S. W. 997.

437-95 Lowe *v.* Findley, 141 Ga. 380, 81 S. E. 230; Huger *v.* Church, 137 Ga. 205, 73 S. E. 385.

437-96 Morris *v.* Roberson, 137 Ky. 841, 127 S. W. 481. See Drinkwater *v.* Hollar, 6 Cal. App. 117, 91 P. 664.

437-97 Burroughs *v.* Pate, 106 Ala. 223, 51 S. 978, *dist.* Steed *v.* Hinson, 76 Ala. 298; Lanier *v.* Winchester, 7 Ga. App. 227, 66 S. E. 626; State Bk. *v.* Hoskins, 130 Ia. 339, 106 N. W. 764; Cantrell *v.* Crane, 161 Mo. App. 308, 143 S. W. 837; Coward *v.* Boyd, 79 S. C. 134, 60 S. E. 311; Sutor *v.* R. Co. (Tex. Civ.), 125 S. W. 943; Shook *v.* Shook (Tex. Civ.), 125 S. W. 638; Ord *v.* Waller (Tex. Civ.), 107 S. W. 1166; Carter

v. Childress (Tex. Civ.), 99 S. W. 714, O'Connor *v.* Enos, 56 Wash. 448, 105 P. 1039; Hubenthal *v.* R. Co., 43 Wash. 677, 86 P. 955; McCoy *v.* Ash, 64 W. Va. 655, 63 S. E. 361; Mahaffey *v.* Co., 61 W. Va. 571, 56 S. E. 893; Latton *v* McCarty, 142 Wis. 190, 125 N. W. 430. Contra as to growing crops. Cooper *v.* Kennedy, 86 Neb. 119, 124 N. W. 1131. *Comp.* Hall *v.* Solomon, 61 Conn. 476, 23 A. 876, 29 Am. St. 218.

438-99 Alabama C. & C. Co. *v.* Co., 165 Ala. 304, 51 S. 570, non-delivery.

438-1 Grantor's lack of beneficial interest and reconveyance by him, shown. Johnston *v.* Jickling, 141 Ia. 444, 119 N. W. 746.

438-2 Pavlovski *v.* Klassing, 134 Ga. 704, 68 S. E. 511; Creveling *v.* Banta, 138 Ia. 47, 115 N. W. 598; Butler *v.* Anderson (Tex. Civ.), 107 S. W. 656; Mars *v.* Morris, 48 Tex. Civ. 216, 106 S. W. 430.

439-6 Felix *v.* Caldwell, 235 Ill. 159, 85 N. E. 228, regularity of proceedings antedating execution of administrator's deed; records destroyed.

To show its existence.—Vincent *v.* Means, 207 Mo. 709, 106 S. W. 8.

439-7 Spears *v.* Weddington, 146 Ky. 434, 142 S. W. 679.

439-9 Healy *v.* Hohn (Ia.), 138 N. W. 551; Openshaw *v.* Rickmeyer, 45 Tex. Civ. 508, 102 S. W. 467.

439-10 *Contra*, King *v.* Thompson, 58 W. Va. 455, 52 S. E. 487.

440-11 Jersey F. Co. *v.* Realty Co., 164 Cal. 412, 129 P. 593; Beatty *v.* Ireland, 152 App. Div. 588, 137 N. Y. S. 456.

440-12 Hensley *v.* Co., 132 Ky. 112, 116 S. W. 316.

440-13 That a particular incumbrance not assumed by grantee even though the deed provides he shall assume all incumbrances. Palmer *v.* Welch, 171 Mo. App. 580, 154 S. W. 433. See "Deeds," p. 192; "Consideration," p. 380.

440-14 Dunn *v.* Taylor (Tex. Civ.), 107 S. W. 952.

Delivery or non-delivery shown by parol. Shute *v.* Shute, 82 S. C. 264, 64 S. E. 145.

440-15 Schmidt *v.* Musson, 20 S. D. 389, 107 N. W. 367, time and conditions of delivery.

440-16 Wallace *v.* Meeks, 99 Ark. 350, 138 S. W. 638; Morton *v.* Morton, 82 Ark. 492, 102 S. W. 213 (consideration and payment); Herrin *v.* Abbe, 55 Fla. 769, 46 S. 183, 18 L. R. A. (N. S.) 907; McLendon *v.* Finch, 2 Ga. App. 421, 58 S. E. 690; Goette *v.* Sutton, 128 Ga. 179, 57 S. E. 308; Allen *v.* Rees, 136 Ia. 423, 110 N. W. 583; Yore *v.* Meshew, 146 Mich. 80, 109 N. W. 35; Stead *v.* Rossier, 157 Mo. App. 300, 137 S. W. 901.

441-18 Harten *v.* Loffler, 212 U. S. 397; Saunders *v.* Paper Co., 208 Fed. 441; Tompkins *v.* Co., 160 Fed. 303, 87 C. C. A. 427; Brannan *v.* Henry, 142 Ala. 698, 39 S. 92 (to apply description); Taylor *v.* Sawmill Co., 105 Ark. 518, 152 S. W. 150; Watters *v.* R. Co., 133 Ga. 641, 66 S. E. 884; Fitzgerald *v.* Flannagan, 155 Ia. 217, 135 N. W. 738; White *v.* Shippee, 216 Mass. 23, 102 N. E. 948; In re Hopper's Will, 90 Neb. 622, 134 N. W. 237; Nichols *v.* Co., 126 App. Div. 184, 110 N. Y. S. 325; Morison *v.* Co., 126 App. Div. 575, 110 N. Y. S. 801 (prior conversations); Richardson *v.* Chatfield, 36 Okla. 700, 129 P. 728; Beck *v.* Schekter, 240 Pa. 596, 88 A. 21; St. Louis, etc. R. Co. *v.* Payne, 47 Tex. Civ. 194, 104 S. W. 1077; Brown *v.* Bremerton, 69 Wash. 474, 125 P. 785; Clayton *v.* Court, 58 W. Va. 253, 52 S. E. 103. See "Ambiguity." p. 847.

Understanding of parties, admissible. Kitzman *v.* Carl, 133 Ia. 340, 110 N. W. 587.

To rebut presumption land sold by acre and not in gross. Emerson *v.* Stratton, 107 Va. 303, 58 S. E. 577.

441-19 Riley *v.* Co., 152 Cal. 549, 93 P. 194; Hawley *v.* Kafitz, 148 Cal. 393, 83 P. 248; Smith *v.* Smith, 130 Ga. 532, 61 S. E. 114; Wehrenberg *v.* Seiferd, 125 App. Div. 527, 109 N. Y. S. 896; Bernardy *v.* Co., 20 S. D. 193, 105 N. W. 737; West *v.* Herman, 47 Tex. Civ. 131, 104 S. W. 428.

Patent ambiguity cannot be made certain by parol proof of intention. Reynolds *v.* Lawrence, 147 Ala. 216, 40 S. 576.

441-20 Roach *v.* McDonald (Ala.), 65 S. 823; Barry *v.* R. Co., 156 Ill. App. 9; American Nat. Bk. *v.* Madison, 144 Ky. 152, 137 S. W. 1076; McSurley *v.* Venters, 31 Ky. L. R. 963, 104 S. W. 365; Haslam *v.* Jordan, 104 Me. 49, 70 A. 1066 (character of grantee's seisin); Lancaster, etc. Co. *v.* Jones, 75 N. H. 172, 71 A. 871; Hodges *v.* Wilson, 165 N. C. 323, 81 S. E. 340; Carolina & N. W. R. Co. *v.* Carpenter, 165 N. C. 465, 81 S. E. 682; Gaddes *v.* In-

stitution, 33 R. I. 177, 80 A. 415; Smith v. Johnson, 30 S. D. 200, 138 N. W. 18; Stevens v. Haile (Tex. Civ.), 162 S. W. 1025; Fayter v. North, 30 Utah 156, 83 P. 742 (meaning of "privileges and appurtenances"); Putney S. Co. v. R. Co. (Va.), 81 S. E. 93; Johnson v. McCoy, 112 Va. 580, 72 S. E. 123; Shenandoah etc. Co. v. Clarke, 106 Va. 100, 55 S. E. 561; Maxwell v. Harper, 51 Wash. 351, 98 P. 756; Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506; Bk. v. Catzen, 63 W. Va. 535, 60 S. E. 499; Barkhausen v. R. Co., 142 Wis. 292, 124 N. W. 649. See supra, "Ambiguity," §35-19.

441-21 Harten v. Loffler, 212 U. S. 397; Whitehead v. Linn, 45 Colo. 427, 102 P. 286 (deed executed in blank prior to negotiations between principal and agent for purpose of conveyance to third person and agent's name inserted after he bought land for principal); Paris G. Co. v. Burk, 57 Tex. Civ. 223, 120 S. W. 552 (moral obligation to reconvey and good faith in so doing); Pope v. Taliaferro (Tex. Civ.), 115 S. W. 309; Ivy v. Ivy, 51 Tex. Civ. 397, 112 S. W. 110 (execution for a temporary purpose, after accomplishment of which it was to be destroyed).

Parol evidence is inadmissible to show deed intended as a will. Noble v. Fickes, 230 Ill. 594, 82 N. E. 950.

442-23 Gates v. McPeace, 106 Ark. 583, 153 S. W. 797; Berry v. Williams, 141 Ga. 642, 81 S. E. 881; Krebs v. Lanser, 133 Ia. 241, 110 N. W. 443; Grannis v. Hitchcock, 118 Minn. 462, 137 N. W. 186; In re Mechanic's Bk., 156 App. Div. 343, 141 N. Y. S. 473; Surasky v. Weintraub, 90 S. C. 522, 73 S. E. 1029.

442-24 Thornton v. Pinckard, 157 Ala. 206, 47 S. 289; Johnson v. Hattaway, 155 Ala. 516, 46 S. 760; Rogers v. Burt, 157 Ala. 91, 47 S. 226 (in equity); Prickett v. Williams (Ark.), 161 S. W. 1023; Rushton v. McIlvene, 88 Ark. 299, 114 S. W. 709; Griffin v. Welch, 88 Ark. 336, 114 S. W. 710; Todd v. Todd, 164 Cal. 255, 128 P. 413; Couts v. Winston, 153 Cal. 686, 96 P. 357 (evidence must be clear and convincing); Reitze v. Humphreys, 53 Colo. 177, 125 P. 518; Beidleman v. Koch, 42 Ind. App. 423, 85 N. E. 977; Cold v. Beh, 152 Ia. 368, 132 N. W. 73; Jones v. Gillett, 142 Ia. 506, 118 N. W. 314; Farmers' & M. Bk. v. Kackley, 88 Kan. 70, 127 P. 539; Rion v. Reeves, 122 La. 650, 48 S. 138; Mulrooney v. Bldg. Assn., 249 Mo. 629, 155 S. W. 804; Brightwell v. McAfee, 249 Mo. 562, 155 S. W. 820; Elliott v. Bozarth, 52 Or. 391, 97 P. 632; Hall v. O'Connell, 52 Or. 164, 95 P. 717 (intention controls; must be shown by clear, consistent and convincing evidence); Nagle v. Simmank, 54 Tex. Civ. 432, 116 S. W. 862; Batchelder v. Randolph, 112 Va. 296, 71 S. E. 633; Dempsey v. Dempsey, 61 Wash. 632, 112 P. 755.

See vol. 8, p. 693, n. 79, and supplement thereto.

443-25 Eames v. Woodson, 120 La. 1031, 46 S. 13, agreed price shown.

443-26 Taylor v. Morris, 163 Cal. 717, 127 P. 66; In re Fisk, 81 Conn. 433, 71 A. 559; Williams v. Smith, 128 Ga. 306, 57 S. E. 801; Payne v. Lodge (Ky.), 115 S. W. 764. See "Deeds," p. 196; "Trusts," p. 125, n. 54.

444-27 Moultrie v. Wright, 154 Cal. 520, 98 P. 257; Pittock v. Pittock, 15 Ida. 426, 98 P. 719; Amidon v. Snouffer, 139 Ia. 159, 117 N. W. 44; Piper v. Piper, 78 Kan. 82, 95 P. 1051; Turpin v. Miles, 108 Md. 678, 71 A. 440.

444-28 Krebs v. Lanser, 133 Ia. 241, 110 N. W. 443; Baker v. Baker, 75 N. J. Eq. 305, 72 A. 1000; Gaylord v. Gaylord, 150 N. C. 222, 63 S. E. 1028; Spaulding v. Collins, 51 Wash. 488, 99 P. 306.

444-29 Amidon v. Snouffer, 139 Ia. 159, 117 N. W. 44.

445-32 Colonial & United States Morg. Co. v. Lee, 95 Ark. 253, 129 S. W. 84; Thompson v. McKenna, 22 Cal. App. 129, 133 P. 512; Edmunds v. Barrow, 112 Va. 330, 71 S. E. 544.

Parol testimony is admissible to prove that growing crops may be severed from a transfer of real estate by deed. Keenan v. Sie, 91 Neb. 582, 136 N. W. 841, *cit.* Cooper v. Kennedy, 86 Neb. 119, 124 N. W. 1131, 136 Am. St. 701, 31 L. R. A. (N. S.) 701.

445-33 Pendrey v. Godwin, 175 Ala. 405, 57 S. 724; Chattahoochie & G. R. Co. v. Pilcher, 163 Ala. 401, 51 S. 11; Crozer v. White, 9 Cal. App. 612, 100 P. 130; Glover v. Newsome, 132 Ga. 797, 65 S. E. 64; Amos v. Amos, 46 Ind. App. 597, 91 N. E. 509; Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691; Sims v. Jeter, 129 La. 262, 55 S. 877; Richstein v. Welch, 197 Mass. 224, 83 N. E. 417; Wilcox v. Sonka, 137 Mo. App. 54, 119 S. W. 445; Hudson v. Morton, 162 N. C. 6, 77 S. E. 1005; State Bd. of Education v. Remick, 160

N. C. 562, 76 S. E. 627; Flegel *v.* Dowling, 54 Or. 40, 102 P. 178; Kingston *v.* Co., 241 Pa. 469, 88 A. 763; Tilton *v.* Flormann, 22 S. D. 324, 117 N. W. 377; Staub *v.* Hampton, 117 Tenn. 706, 101 S. W. 776; Wilkerson *v.* Ward (Tex. Civ.), 137 S. W. 158; Snow *v.* Gallup, 57 Tex. Civ. 572, 123 S. W. 222; Cleveland *v.* Shaw (Tex. Civ.), 119 S. W. 883; McCollum *v.* Home, 54 Tex. Civ. 348, 117 S. W. 886; Flores *v.* Hovel (Tex. Civ.), 125 S. W. 606; Tate *v.* Rose, 35 Utah 229, 99 P. 1003; South & W. R. Co. *v.* Mann, 108 Va. 557, 62 S. E. 354; Wetzler *v.* Nichols, 53 Wash. 285, 101 P. 867; Lara *v.* Peterson, 56 Wash. 70, 105 P. 160.

445-34 Herod *v.* Carter, 81 Kan. 236, 106 P. 32; Weeks *v.* Brooks, 205 Mass. 458, 92 N. E. 45.

445-35 Haskell *v.* Friend, 196 Mass. 198, 81 N. E. 962; Hubbard *v.* Whitehead, 221 Mo. 672, 121 S. W. 69; Bernero *v.* Co., 134 Mo. App. 290, 114 S. W. 531 ("an easement" may be shown to be affirmative or negative); Grimes *v.* Bryan, 149 N. C. 248, 63 S. E. 106.

445-36 Flegel *v.* Dowling, 54 Or. 40, 102 P. 178; Hardin County *v.* Co. (Tex. Civ.), 112 S. W. 822. See illustrations given in Ames *v.* Ames, 46 Ind. App. 597, 91 N. E. 509.

446-37 Thompson *v.* McKenna, 22 Cal. App. 129, 133 P. 512; Cumberledge *v.* Brooks, 235 Ill. 249, 85 N. E. 197; Babb *v.* Co., 150 N. C. 139, 63 S. E. 609; Grimes *v.* Bryan, 149 N. C. 248, 63 S. E. 106; Broadwell *v.* Morgan, 142 N. C. 475, 55 S. E. 340 (to locate point of beginning); Cleveland *v.* Shaw (Tex. Civ.), 119 S. W. 883; Tate *v.* Rose, 35 Utah 229, 99 P. 1003; Pickens *v.* Pickens (W. Va.), 77 S. E. 365.

"Resort may be had to extrinsic evidence in order to fit a description to the land conveyed, but the descriptive words in the deed must furnish the key to the identity. Dorr *v.* School District, 40 Ark. 237; Paragould *v.* Lawson, 88 Ark. 478, 115 S. W. 379; Fordyce Lumber Co. *v.* Wallace, 85 Ark. 1, 107 S. W. 160. Here the descriptive words furnish no means of identifying the land conveyed, for there is nothing to show what was meant by the words 'east part,'" Bowman *v.* S., 93 Ark. 168, 129 S. W. 80.

446-39 Armstrong *v.* Henderson, 16 Ida. 566, 102 P. 361; Allen *v.* Kitchen, 16 Ida. 133, 100 P. 1052 (city, town, county or state in which contract executed or property situated, not shown); Reed *v.* Heard, 97 Miss. 743, 53 S. 400; Cathey *v.* Co., 151 N. C. 592, 66 S. E. 580.

As for example, a description of land by sections, without mentioning the township and range, and without other marks and calls to show what sections are meant. S. *v.* Town, etc., 177 Ala. 204, 58 S. 905.

446-40 Daniels *v.* Williams, 177 Ala. 140, 58 S. 419; Bergan *v.* Co., 41 Ind. App. 647, 84 N. E. 833.

446-41 Masterson I. Co. *v.* Foote (Tex. Civ.), 163 S. W. 642; Yarbrough *v.* Clarkson (Tex. Civ.), 155 S. W. 954.

446-43 Delaware, etc. R. Co. *v.* Gleason, 159 Fed. 383, 86 C. C. A. 383; Holden *v.* Alexander, 82 S. C. 441, 62 S. E. 1108; Konnerup *v.* Milspaugh, 70 Wash. 415, 126 P. 939; Hartmyer *v.* Everly (W. Va.), 79 S. E. 1093.

If calls of deed may be located by extrinsic evidence a parol agreement concerning their location cannot be proved unless it was made contemporaneously with deed. Haddock *v.* Leary, 148 N. C. 378, 62 S. E. 426.

447-44 Hinton *v.* Moore, 139 N. C. 44, 51 S. E. 787; Beaton *v.* Fussell (Tex. Civ.), 166 S. W. 458.

447-45 See Wilcox *v.* Sonka, 137 Mo. App. 54, 119 S. W. 445.

447-46 Glover *v.* Newsome, 132 Ga. 797, 65 S. E. 64; Moody *v.* Vondereau, 131 Ga. 521, 62 S. E. 821; Thurman *v.* Leach (Ky.), 116 S. W. 300; Rix *v.* Smith, 145 Mich. 203, 108 N. W. 691; Keefe *v.* R., 75 N. H. 116, 71 A. 379; Clarke *v.* Aldridge, 162 N. C. 326, 78 S. E. 216; Warner *v.* Sapp (Tex. Civ.), 97 S. W. 125.

448-47 Cumberledge *v.* Brooks, 235 Ill. 249, 85 N. E. 197; Ball *v.* Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275.

448-48 Getchell *v.* Atherton, 104 Me. 198, 71 A. 767; Temple *v.* Benson, 213 Mass. 128, 100 N. E. 63; Allison *v.* Kenion, 163 N. C. 582, 79 S. E. 1110.

448-49 Hamilton *v.* Blackburn, 43 Tex. Civ. 153, 95 S. W. 1094, inadmissible where purpose not merely to aid field notes.

448-50 Delaware, etc. R. Co. *v.* Gleason, 159 Fed. 383, 86 C. C. A. 383; Herbert *v.* Steele, 74 N. H. 409, 68 A. 411.

448-51 Interests of tenants in com-

mon may be shown to be unequal. In re M'Connell, 197 Fed. 441.

449-55 Walker *v.* Miller, 139 N. C. 448, 52 S. E. 125; Flegel *v.* Dowling, 54 Or. 40, 102 P. 178; O'Farrell *v.* O'Farrell, 56 Tex. Civ. 51, 119 S. W. 899. *Contra* in absence of ambiguity. Townsend *v.* Dilsheimer, 50 Wash. 294, 97 P. 53.

Misdescription of relations of grantees, shown. Hubatka *v.* Meyerhofer, 79 N. J. L. 264, 75 A. 454.

To show capacity in which person signed. Lynch *v.* McDonald, 155 Cal. 704, 102 P. 918; Hart *v.* Lewis & Co., 130 Ga. 504, 61 S. E. 26 ("executor").

Misnomer corrected by parol evidence. Cobb *v.* Bryan (Tex. Civ.), 97 S. W. 513 (statute).

449-57 Meyerson *v.* Hart. 167 Fed. 965, 93 C. C. A. 365; Turtle *v.* Co., 154 Fed. 146; Diamond *v.* Fay, 23 Cal. App. 566, 138 P. 933; Clarke *v.* Co., 106 Me. 59, 75 A. 303; Simms *v.* Gilmore, 149 Mo. App. 550, 130 S. W. 1120; Studwell *v.* Bush Co., 206 N. Y. 416, 100 N. E. 129; Wightman *v.* Ins. Co., 119 App. Div. 496, 104 N. Y. S. 214 (prior conversations); Van Patten *v.* Taber, 71 Misc. 610, 130 N. Y. S. 1055.

The relation of master and servant may be shown by parol even though a written contract exist, providing the statute does not require a writing. Stanley *v.* R. Co., 166 Ill. App. 132. See also supra, "Master and Servant," p. 495, n. 10.

Prior negotiations merged.—Haas *v.* Co., 148 Mich. 358, 111 N. W. 1059.

450-59 Mears *v.* Smith, 199 Mass. 319, 85 N. E. 165; Straus *v.* Rosenthal, 121 N. Y. S. 267.

450-62 Spurrier *v.* Bullard, 131 Ia. 123, 107 N. W. 1036; Cain *v.* Moore, 54 Wash. 627, 103 P. 1130.

450-63 Wysong *v.* Sells, 44 Ind. App. 238, 88 N. E. 954.

450-64 Minnesota T. Co. *v.* Co., 108 Minn. 221, 121 N. W. 907; O'Brien *v.* Surety Co., 152 App. Div. 242, 136 N. Y. S. 758.

450-65 The Ucayali, 164 Fed. 897; Turtle *v.* Co., 154 Fed. 146.

450-67 Griggs *v.* Dist., 87 Ark. 93, 112 S. W. 215.

451-72 Spurrier *v.* Bullard, 131 Ia. 123, 107 N. W. 1036; Mears *v.* Smith, 199 Mass. 319, 85 N. E. 165; Loxley *v.* Studebaker, 75 N. J. L. 599, 68 A. 98; Nielsen *v.* Co., 40 Wash. 194, 82 P. 292.

Admissible when not inconsistent.—Wells *v.* Co., 137 Ia. 526, 114 N. W. 1076.

451-73 Prior parol agreement under which services rendered, admissible. Levin *v.* Co., 78 Conn. 538, 61 A. 1073.

451-75 Hendrix *v.* Letourneau, 139 Ia. 451, 116 N. W. 720, unsigned contract.

451-76 The Ucayali, 164 Fed. 897; Electrical Co. *v.* Greenberg, 56 Misc. 514, 107 N. Y. S. 110.

452-78 Martin *v.* Thrower, 3 Ga. App. 784, 60 S. E. 825; Brown *v.* Quinsby, 204 Mass. 206, 90 N. E. 586; Picard *v.* Beers, 195 Mass. 419, 81 N. E. 246; Morrison *v.* Hurtig, 198 N. Y. 352, 91 N. E. 842; Smith *v.* S. Co., 115 N. Y. S. 204; Audit Co. *v.* Taylor, 152 N. C. 272, 67 S. E. 582; Wintermute *v.* Co., 53 Wash. 539, 102 P. 443.

Custom or usage.—Garfield *v.* Co., 189 Mass. 395, 75 N. E. 695.

Agreement not to compete with employer.—Turner *v.* Abbott, 116 Tenn. 718, 94 S. W. 64.

452-79 Moses L. S. & R. Co. *v.* Co., 56 Wash. 529, 106 P. 207.

452-82 Laughlin *v.* Manson, 65 Misc. 492, 120 N. Y. S. 110.

452-84 Kelly P. Co. *v.* London (Tex. Civ.), 125 S. W. 974.

452-87 Schneckloth *v.* Co., 120 N. Y. S. 67.

453-90 Standard S. & S. Co. *v.* Reiter, 199 Fed. 91 (C. C. A.); Hannon *v.* Espalla, 148 Ala. 313, 42 S. 443; Walker *v.* Riley, 6 Ga. App. 519, 65 S. E. 301 (duties of "local manager" and relation to master); Blake *v.* Miller, 135 Ia. 1, 112 N. W. 158; Stahlendorf *v.* Co. (Mass.), 105 N. E. 579; Ivey *v.* Mills, 143 N. C. 189, 55 S. E. 613; Whittle *v.* Tompkins, 94 S. C. 237, 77 S. E. 929; Moses L. S. & R. Co. *v.* Co., 56 Wash. 529, 106 P. 207.

453-91 Daniel *v.* Co., 124 Ga. 1063, 53 S. E. 573; Davis *v.* Dodge, 126 App. Div. 469, 110 N. Y. S. 787 ("entire business service"); Schultz *v.* Co., 46 Wash. 555, 90 P. 917 ("busy" season).

453-92 Escrow agreement not varied by parol. Womble *v.* Wilbur, 3 Cal. App. 535, 86 P. 916.

454-93 National Bk. *v.* Rockefeller, 174 Fed. 22, 98 C. C. A. 8; Ford *v.* Fix (Ark.), 164 S. W. 726; Highsmith Bros. *v.* Hammonds, 99 Ark. 400, 138 S. W. 635; Sinnickson *v.* Perkins, 231 Ill. 492, 83 N. E. 191; Third Nat. Bk. *v.* Sav.

Bk., 244 Mo. 554, 149 S. W. 495; Great W. Co. *v.* Belcher, 127 Mo. App. 133, 104 S. W. 894; Manhattan R. M. *v.* Dellon, 113 N. Y. S. 571; Luckenbach *v.* Thomas (Tex. Civ.), 166 S. W. 99 (guaranty of water on land); U. S. G. Co. *v.* Gleason, 135 Wis. 539, 116 N. W. 238, 17 L. R. A. (N. S.) 906. See vol. 6, p. 269, n. 7.

In Sentinel Co. *v.* Smith, 150 Wis. 231, 136 N. W. 602, the defendant sought to prove that prior to the signing of the guaranty he had a conversation with plaintiff's agent in reference to its meaning, and that it was understood between them that liability would cease when Hull had purchased and paid for $500 worth of papers. This evidence was properly excluded. "If testimony such as was offered could be received in any case, it would not be receivable for the purpose of importing ambiguity into an otherwise unambiguous contract, but for the purpose of ascertaining the meaning of a contract which was ambiguous on its face or became ambiguous when applied to the subject with reference to which the parties contracted. Klueter *v.* Jos. Schlitz Brewing Co., 143 Wis. 347, 128 N. W. 43, 32 L. R. A. (N. S.) 383; Pedelty *v.* Wis. Zinc Co., 148 Wis. 245, 134 N. W. 356."

454-94 Mudge *v.* Varner, 146 N. C. 147, 59 S. E. 540.

455-95 Morris *v.* Lucker, 158 Mich. 518, 123 N. W. 21; Newcomb *v.* Kloeblen, 77 N. J. L. 791, 74 A. 511; Basnight *v.* Co., 148 N. C. 350, 62 S. E. 420.

455-96 U. S. G. Co. *v.* Gleason, 135 Wis. 539, 116 N. W. 238, 17 L. R. A. (N. S.) 906.

Contract of employe for whose conduct bond given may be shown by parol in action on bond. Germania Ins. Co. *v.* Lange, 193 Mass. 67, 78 N. E. 746.

455-97 Leftkovitz *v.* Bk., 152 Ala. 521, 44 S. 613; Lompoc Bk. *v.* Stephenson, 156 Cal. 350, 104 P. 449; Farmers' Bk. *v.* Wickliffe, 131 Ky. 787, 116 S. W. 249. *Comp.* Fidelity & C. Co. *v.* Harder, 212 Pa. 96, 61 A. 880, prior inducing agreement shown.

456-2 Henderson *v.* Coal Co., 181 Fed. 487, 104 C. C. A. 235; Finnucan *v.* Feigenspan, 81 Conn. 378, 71 A. 497; Montgomery, etc. Co. *v.* Atlantic Lumb. Co., 206 Mass. 144, 92 N. E. 71; Great W. Co. *v.* Belcher, 127 Mo. App. 133, 104 S. W. 894; Perlman *v.* Ehrlich, 119 N. Y. S. 663.

456-3 Swearingen *v.* Tyler, 132 Ky. 458, 116 S. W. 331.

That an indorsement is the indorsement of the principal and not of the agent, who signed by authority, may be shown. Civ. Code, art. 2278, does not apply. First Nat. Bk. *v.* Johnson, 130 La. 288, 57 S. 930.

Apparent joint maker may show he is surety. Windhorst *v.* Bergendahl, 21 S. D. 218, 111 N. W. 544.

456-4 Smith *v.* Caldwell, 78 Ark. 333, 95 S. W. 467; Dodd *v.* Pasch, 5 Cal. App. 686, 91 P. 166; Pollard *v.* Sayre, 45 Colo. 195, 98 P. 816; Mageon *v.* Alkire, 41 Colo. 338, 92 P. 720; Smith *v.* Green, 128 Ga. 90, 57 S. E. 98 (rent-contract); Richards *v.* Ontai, 19 Haw. 451; Slaughter *v.* Johnson, 128 Ill. App. 417; Ross *v.* Griebel, 136 Ill. App. 399; Kenyon *v.* Manley, 125 Ill. App. 615; Jackson B. Co. *v.* Wagner, 117 La. 875, 42 S. 356; Brown *v.* Dickey, 106 Me. 97, 75 A. 382; Goebel *v.* Look, 153 Mich. 204, 116 N. W. 1078; Lewis *v.* Muse, 130 Mo. App. 194, 108 S. W. 1107; Maltz *v.* Brew. Co., 146 N. Y. S. 52; Hermann *v.* McIver, 51 Tex. Civ. 270, 111 S. W. 766.

See Waldo *v.* Jacobs, 152 Mich. 425, 116 N. W. 371; Gandy *v.* Wiltse, 79 Neb. 280, 112 N. W. 569.

458-5 Remmers *v.* Remmers, 217 Mo. 541, 117 S. W. 1117; Beard *v.* Gooch & Son (Tex. Civ.), 130 S. W. 1022.

458-6 Broughton *v.* Mitchell, 147 Ill. App. 281.

458-7 Aufenkamp *v.* Storch, 138 Ky. 104, 127 S. W. 529; Campau *v.* Co., 159 Mich. 169, 123 N. W. 606; Burns *v.* Loftus, 32 Nev. 55, 104 P. 246; Hallenbeck *v.* Chapman, 72 N. J. L. 201, 63 A. 498; Hafer *v.* Corbin, 6 O. N. P. (N. S.) 468; Hardin *v.* Kirby, 25 Okla. 479, 106 P. 837; Beckham *v.* Collins, 54 Tex. Civ. 241, 117 S. W. 431.

Reservation of property cannot be shown. Suderman-D. Co. *v.* Rodgers, 47 Tex. Civ. 67, 104 S. W. 193.

Condition which would defeat lease cannot be shown. Morris *v.* Co., 46 Wash. 686, 91 P. 186.

459-8 Schweig *v.* Co., 54 Misc. 233, 104 N. Y. S. 371; Williams *v.* Salmond, 79 S. C. 459, 61 S. E. 79.

460-27 Erickson *v.* Propp, 106 Minn. 238, 119 N. W. 390; Eisert *v.* Adelson, 136 App. Div. 741, 121 N. Y. S. 446;

Tribelhorn *v.* Hanavan, 65 Misc. 22, 119 N. Y. S. 262.

Evidence not admissible to show collateral undertaking by one who signed lease next after parties, he not being mentioned in it. Doyle *v.* Dunne, 144 Ill. App. 14.

461-29 Corn *v.* Bergmann, 129 N. Y. S. 1049.

Condition precedent shown.—Cavanagh *v.* Co., 136 Ia. 236, 115 N. W. 856; Hinsdale *v.* McCune, 135 Ia. 682, 113 N. W. 478.

461-31 Muskogee L. Co. *v.* Mullins, 165 Fed. 179, 91 C. C. A. 213.

461-33 Stipulation by lessor, which led to making lease, and which he, but not lessee, knew could not be fulfilled, shown. Ramsden *v.* Co., 39 Pa. Super. 587.

462-34 Searle *v.* Bishop, 203 Mass. 493, 89 N. E. 809; Indelli *v.* Lesster, 130 App. Div. 548, 115 N. Y. S. 46; Herschman F. F. Co. *v.* Barth, 64 Misc. 77, 117 N. Y. S. 962; Harrison *v.* Focht, 18 Pa. Dist. 13. See Hallenbeck *v.* Chapman, 72 N. J. L. 201, 63 A. 498.

463-38 Taylor *v.* Finnigan, 189 Mass. 568, 76 N. E. 203; Haight *v.* Cohen, 123 App. Div. 707, 108 N. Y. S. 502; Manvell *v.* Weaver, 53 Wash. 408, 102 P. 36.

Oral lease to take effect on expiration of written one, shown. Gabel *v.* Page, 6 Cal. App. 618, 92 P. 749.

463-40 Prior negotiations. Pine Beach *v.* Co., 106 Va. 810, 56 S. E. 822.

463-41 Wabash R. & L. Co. *v.* Krabbe, 145 Ill. App. 462.

463-42 Payne *v.* Neuval, 155 Cal. 46, 99 P. 476; O'Brien *v.* Co., 31 App. Cas. (D. C.) 56; Indiana N. G. & O. Co *v.* Stewart, 45 Ind. App. 554, 90 N. E. 384 (practical construction); Rosen *v.* Bamberger, 122 N. Y. S. 240; O'Neill *v.* Aerie, 32 Utah 162, 89 P. 464 (local custom); Manvell *v.* Weaver, 53 Wash. 408, 102 P. 36.

463-44 Chesapeake B. Co. *v.* Goldberg, 107 Md. 485, 69 A. 37 ("now are"); Nash *v.* Webber, 204 Mass. 419, 90 N. E. 872.

464-45 Wheeler *v.* Moore, 78 Neb. 484, 111 N. W. 120; Hermann *v.* McIver, 51 Tex. Civ. 270, 111 S. W. 766 (intention inadmissible).

464-46 Johnson *v.* Hattaway, 155 Ala. 516, 46 S. 760.

Actual consideration shown by circumstances and conversation of parties. O'Connor *v.* Kleiman, 143 Ia. 435, 121 N. W. 1088.

Sale or lease.—Lambert Co. *v.* Carmody, 79 Conn. 419, 65 A. 141.

464-47 Beckwith *v.* Sheldon, 154 Cal. 393, 97 P. 867; Spongberg *v.* Bk., 15 Ida. 671, 99 P. 712; Lauderdale *v.* King, 130 Mo. App. 236, 109 S. W. 852 (to apply description); Cockrell *v.* Egger (Tex. Civ.), 99 S. W. 568.

464-48 Parol evidence competent to show second lease is substitute for prior one, and that agreement made concerning application of payments under later one. Erie C. O. Co. *v.* Jones, 43 Ind. App. 187, 86 N. E. 1027.

464-49 Johnson *v.* R. Co., 154 Cal. 285, 97 P. 520.

Status of parties ascertained by showing conversations and negotiations leading up to and including execution of writing. Fink *v.* Ins. Co., 109 Minn. 422, 124 N. W. 7. See Brown *v.* O'Byrne, 153 Ala. 621, 41 S. 129.

465-51 Kemp *v.* U. S., 41 App. Cas. (D. C.), 539.

465-52 Bacon *v.* Grosse, 165 Cal. 481, 132 P. 1027; Neal *v.* Hyce, 133 La. 705, 62 S. 932; Riverbark *v.* Teachey, 150 N. C. 289, 63 S. E. 1036; Cutchin *v.* City, 113 Va. 452, 74 S. E. 403; M. & M. Bureau *v.* Hosiery Co., 152 Wis. 72, 138 N. W. 624.

465-53 Washburn-Crosby M. Co. *v.* Brown (Ind. App.), 104 N. E. 967; Perry *v.* Bates, 115 App. Div. 337, 100 N. Y. S. 881.

465-54 Penn. etc. Co. *v.* Hawes, 170 Ill. App. 224.

465-55 Robertson *v.* Warren, 45 Tex. Civ. 584, 100 S. W. 805.

466-56 Fitzgerald *v.* Flannagan, 155 Ia. 217, 135 N. W. 738.

466-59 Hendricks *v.* Webster, 159 Fed. 927, 87 C. C. A. 107; Hartley *v.* Powell, 171 Ala. 597, 55 S. 97; Baker *v.* Cotney, 150 Ala. 506, 43 S. 786; Cox *v.* Smith, 99 Ark. 218, 138 S. W. 978; Briggs *v.* Steele, 91 Ark. 458, 121 S. W. 754; Fowler *v.* Pendleton, 121 Md. 297, 88 A. 124; White Co. *v.* Carroll, 147 N. C. 330, 61 S. E. 196; Sanchez *v.* Vevo, 4 P. R. Fed. 329; Blake *v.* Lowry, 43 Tex. Civ. 17, 93 S. W. 521; Bartlett Est. Co. *v.* Co., 49 Wash. 58, 94 P. 900, 15 L. R. A. (N. S.) 590. See "Mortgages," p. 701.

467-60 *Comp.* Billington *v.* Dare, 18 Pa. Dist. 61.

467-61 Iowa, etc. B. & L. Assn. *v.* Fitch, 142 Ia. 329, 120 N. W. 694;

McCusker *v.* Geiger, 195 Mass. 46, 80 N. E. 648; Hungerford *v.* Snow, 129 App. Div. 816, 114 N. Y. S. 127; Walker *v.* Venters, 148 N. C. 388, 62 S. E. 510; Billington *v.* Dare, 18 Pa. Dist. 61; McCornick *v.* Levy, 37 Utah 134, 106 P. 660.

468-62 Conditional delivery shown. Van Norman *v.* Young, 228 Ill. 425, 81 N. E. 1060.

468-64 O'Brien *v.* Co., 69 N. J. Eq. 117, 61 A. 437.

469-65 Usury in chattel mortgage. France *v.* Munro, 138 Ia. 1, 115 N. W. 577, 19 L. R. A. (N. S.) 391.

469-67 Lane *v.* Co., 10 O. C. C. (N. S.) 512.

469-68 True consideration may be shown. In re Signor, 203 Fed. 753. See vol. 3, p. 375; also vol. 8, p. 736.

469-70 Eareckson *v.* Rogers, 112 Md. 160, 75 A. 513; Castle *v.* Gleason, 31 S. D. 590, 141 N. W. 516.

469-71 Moody *v.* Atkins, 146 Ala. 684, 40 S. 305, extending time of payment.

Contemporaneous parol agreement proved. Hudson *v.* Ellsworth, 56 Wash. 243, 105 P. 463.

470-73 Phipps *v.* Willis, 53 Or. 190, 96 P. 866.

Prior conversation inadmissible if no ambiguity alleged. Smith *v.* R. Co. (Tex. Civ.), 105 S. W. 528.

470-76 Jones *v.* Norris, 147 N. C. 84, 60 S. E. 714, declarations of mortgagee.

470-77 Ladd *v.* Co., 147 Ala. 173, 40 S. 610.

Or as additional security for the payment of a chattel mortgage. Wilbur *v.* Jones, 80 N. J. Eq. 520, 86 A. 769. See also "Mortgages," p. 703.

Real object of mortgage may be shown. Campbell *v.* Co., 70 N. J. Eq. 40, 62 A. 319.

470-79 Wells *v.* Foss, 81 Vt. 15, 69 A. 155, mortgage given not only to secure note, but also to secure mortgagee for becoming bail.

470-81 Collateral parol agreement shown. Somerset-C. Co. *v.* John, 219 Pa. 380, 68 A. 843.

471-82 Gossett *v.* Morrow (Ala.), 65 S. 826; International H. Co. *v.* Davis, 13 Ga. App. 1, 78 S. E. 770.

471-83 In re Raney, 202 Fed. 1000; Read P. Co. *v.* Weichselbaum, 1 Ga. App. 420, 58 S. E. 122; S. *v.* Jackson, 128 Ia. 543, 105 N. W. 51; Weber I. Co. *v.* Dunard, 140 Mo. App. 476, 120 S. W. 608 (discrepancy in description in mortgage and note). See vol. 8, p. 666, n. 48, and supplement thereto.

471-84 Walden *v.* Walden, 128 Ga. 126, 57 S. E. 323; Sanchez *v.* Veve, 4 P. R. Fed. 329; Smith *v.* R. Co., 101 Tex. 405, 108 S. W. 819.

471-85 Davis *v.* Horne, 54 Fla. 563, 45 S. 476.

471-86 Hendricks *v.* Webster, 159 Fed. 927, 87 C. C. A. 107.

471-87 In re Farmers' S. Co., 170 Fed. 502; Emerson *v.* Knight, 130 Ga. 100, 60 S. E. 255; Hester *v.* Gairdner, 128 Ga. 531, 58 S. E. 165; Caldwell *v.* Sisson, 150 Mo. App. 547, 131 S. W. 140; Boyes *v.* Masters, 17 Okla. 460, 89 P. 198; Phipps *v.* Willis, 53 Or. 190, 96 P. 866.

471-89 Pastor *v.* Gaspar, 2 Phil. Isl. 592.

Legal inferences not rebutted by parol. McAlpine *v.* Millen, 104 Minn. 289, 116 N. W. 583.

472-94 Haag *v.* Burns, 22 S. D. 51, 115 N. W. 104.

472-96 Gross *v.* Todd, 94 Miss. 168, 47 S. 801.

473-98 Rines *v.* Ferrell, 107 Minn. 251, 119 N. W. 1055.

473-1 Causten *v.* Barnette, 49 Wash. 659, 96 P. 225.

474-7 Parol modification of articles shown. Kirkwood *v.* Smith, 132 App. Div. 758, 117 N. Y. S. 686.

474-8 Welke *v.* Wackershauser, 143 Ia. 407, 120 N. W. 77.

475-9 Babrowsky *v.* Brith Abraham, 129 App. Div. 695, 113 N. Y. S. 1080, coupled with interest.

475-12 Murphy *v.* Black, 148 Ala. 675, 41 S. 877; Steele *v.* Co., 8 Cal. App. 95, 96 P. 105; Jersey Isl. Co. *v.* Whitney, 149 Cal. 269, 86 P. 509, 691; Dejon *v.* Street, 79 Conn. 333, 65 A. 145; Twiner Bros. *v.* Manley (Ga. App.), 80 S. E. 680; Graham *v.* Peacock, 131 Ga. 785, 63 S. E. 348; Perry *v.* Co., 129 Ga. 560, 59 S. E. 216; Loeb *v.* Flannery, 148 Ill. App. 471; Barfield *v.* Saunders, 116 La. 136, 40 S. 593; Dronenburg *v.* Harris, 108 Md. 597, 71 A. 81; Hahs *v.* R. Co., 147 Mo. App. 262, 126 S. W. 524; Waters *v.* Phelps, 81 Neb. 674, 116 N. W. 783; Green *v.* Green, 76 N. J. L. 187, 63 A. 1070 ("Mem. of the disposition" of household effects of deceased acquiesced in for 20 years); Jonasson *v.* Weir, 131 App. Div. 900, 115 N. Y. S. 1126; Bowen *v.* Ins. Co.,

20 S. D. 103, 104 N. W. 1040 (binding insurance receipt).

476-13 Offutt *v.* Doyle (Ky.), 122 S. W. 156; Savage *v.* Co., 48 Or. 1, 85 P. 69 (ambiguity explained).

Otherwise where the warehouse receipt does not express the contract between the parties. Gafford *v.* Co., 71 Wash. 204, 128 P. 228. See also "Carriers," p. 877.

477-18 Willoughby *v.* Hannon, 156 Ala. 585, 47 S. 241; Batson *v.* Ins. Co., 155 Ala. 265, 46 S. 578; Channel C. Co. *v.* Hourihan, 20 Cal. App. 647, 129 P. 947; McLeod *v.* Bk., 61 Fla. 343, 56 S. 190; Hines *v.* Co., 9 Ga. App. 778, 72 S. E. 191; Gagnon *v.* Molden, 15 Ida. 727, 99 P. 965; Hartford Ins. Co. *v.* Sherman, 123 Ill. App. 202; Barthell *v.* Hermanson (Ia.), 138 N. W. 1108; Huffaker *v.* Ins. Co. (Ky.), 156 S. W. 1038; Offutt *v.* Doyle (Ky.), 122 S. W. 156; Dewees *v.* Co., 96 Miss. 253, 50 S. 865; New York Ins. Co. *v.* Wolfston, 124 Mo. App. 286, 101 S. W. 162; Strawn *v.* R. Co., 120 Mo. App. 135, 96 S. W. 488; Campbell *v.* Monks Co., 144 N. Y. S. 454; Gutierrez *v.* Garcia, 138 N. Y. S. 1079; Reedy E. Co. *v.* Berman, 107 N. Y. S. 59; Duffy *v.* Meyer, 122 App. Div. 838, 107 N. Y. S. 672; Sjoli *v.* Hogenson, 19 N. D. 82, 122 N. W. 1008; Gregory *v.* Huslander, 227 Pa. 607, 76 A. 422; Ereno *v.* P., 2 P. R. Fed. 290. See vol. 9, p. 727, n. 35; vol. 13, p. 867, n. 34, and supplement thereto.

479-19 Paddock *v.* Hatch, 169 Mich. 95, 134 N. W. 990. See vol. 9, p. 706, n. 34, and supplement thereto.

In the absence of evidence showing some mistake or fraud, a receipt is presumed to be what it purports to be O. K. Jellico Coal Co. *v.* Parks, 146 Ky. 674, 143 S. W. 22.

479-21 Boileau's Est., 18 Pa. Dist. 320; House *v.* Holland, 42 Tex. Civ. 502, 94 S. W. 153; Brixen *v.* Jorgensen, 33 Utah 97, 92 P. 1004; Lazier *v.* Cady, 44 Wash. 339, 87 P. 344. See Murphy *v.* Black, 148 Ala. 675, 41 S. 877 (foundation must be laid); Fidelity Co. *v.* Tinsley, 30 Ky. L. R. 1095, 100 S. W. 272; Holcomb-L. Co. *v.* Kaufman, 29 Ky. L. R. 1006, 96 S. W. 813; Smith *v.* Allmon, 74 S. C. 502, 54 S. E. 1014.

479-25 Wilson *v.* Fahnestock, 44 Ind. App. 35, 86 N. E. 1037.

479-27 Dee *v.* Co., 141 Ia. 610, 118 N. W. 529; Graham *v.* Good, 223 Pa. 565, 72 A. 855; Patterson & Co. *v.* R. Co. (Tex. Civ.), 126 S. W. 330.

479-30 Austin *v.* Austin, 160 N. C. 367, 76 S. E. 272.

479-33 Batson *v.* Ins. Co., 155 Ala. 265, 46 S. 578; Brinser *v.* Co., 1 Boyce (Del.) 220, 75 A. 792. See supra, "Carriers," 632-37.

Indorsement of payment on note, explained. McCaffrey *v.* Burkhardt, 97 Minn. 1, 105 N. W. 971.

Bill of lading.—Ala. Gt. S. R. Co. *v.* Norris, 167 Ala. 311, 52 S. 891.

"The consideration clause of a contract is in the nature of a receipt and is open to explanation by parol. Squier *v.* Evans, 127 Mo., loc. cit., 719, 30 S. W. 143; Liebke *v.* Knapp, 79 Mo., loc. cit. 26, 27, 49 Am. Rep. 212. Especially should this be so where, as here, the contract of guaranty does not purport to name all the consideration, but contains the clause 'and other valuable considerations to them moving.'" Third Nat. Bk. *v.* Sav. Bk., 241 Mo. 554, 149 S. W. 495.

480-35 Gardner *v.* Co., 142 Ill. App. 348.

480-36 San Pedro L. Co. *v.* Schroeter, 156 Cal. 158, 103 P. 888; Brown *v.* Co., 150 Cal. 376, 89 P. 86; California P. Co. *v.* Merritt, 6 Cal. App. 707, 92 P. 509; Thetford *v.* Co., 140 Mo. App. 254, 124 S. W. 39 (if analogous); Wegmann *v.* Rothwell, 121 Mo. App. 413, 99 S. W. 59. See Sawyer *v.* Walker, 204 Mo. 133, 102 S. W. 544.

"But the testimony of the person who signed such paper, merely to the effect that the matter of interest was not mentioned, and denying that the execution of the receipt had the effect which the law imputes to it, by no means contradicts it, or tends to show that there was any agreement on the subject, other than that expressed in the writing." Hunnicutt Land. Co. *v.* R. Co., 2 Ala. App. 476, 57 S. 73.

482-39 Dee *v.* Co., 141 Ia. 610, 118 N. W. 529.

482-40 Harvey *v.* R. Co., 44 Colo. 258, 99 P. 31; Allen *v.* Roland, 79 Conn. 405, 65 A. 138; Penn. C. Co. *v.* Thompson, 130 Ga. 766, 61 S. E. 829; Whitney *v.* Bullock, 145 Ill. App. 269; Domenburg *v.* Harris, 108 Mi. 597, 71 A. 81; Budro *v.* Burgess, 197 Mass. 74, 83 N. E. 318; Hale *v.* R. Co., 147 Mo. App. 262, 126 S. W. 724; Norfolk & W. R. Co. *v.* Mundy, 110 Va. 422, 66 S. E. 61.

See vol. 11, p. 170, n. 34, et seq., and supplement thereto.

Statement of consideration contractual. Tate *v.* R. Co., 131 Mo. App. 107, 110 S. W. 622.

Release to one of two joint wrongdoers explained. El Paso, etc. R. Co. *v.* Darr (Tex. Civ.), 93 S. W. 166.

483-41 Chaplin *v.* Gerald, 104 Me. 187, 71 A. 712.

483-42 Cache Valley L. Co. *v.* Culver, 93 Ark. 383, 125 S. W. 430.

483-43 Huntington *v.* R. Co., 175 Fed. 532, 99 C. C. A. 154; Smith *v.* Co., 131 Ga. 470, 62 S. E. 673; Rochester T. Wks. *v.* Co., 215 Mass. 194, 102 N. E. 438. See infra, "Release," 171-36.

483-44 Reason for inserting clause cannot be shown. Whitney *v.* Bullock, 145 Ill. App. 269.

483-45 Drobney *v.* Steel Co., 204 Fed. 11, 122 C. C. A. 325; Suravitz *v.* Pristasz, 201 Fed. 335, 119 C. C. A. 573; J. Rosenbaum Grain Co. *v.* Mitchell (Tex. Civ.), 142 S. W. 121; Vaillancourt *v.* R. Co., 82 Vt. 416, 74 A. 99 (though sealed). See vol. 11, pp. 168, 171.

Parol agreement for effectual delivery only on contingency, shown. Stiebel *v.* Grosberg, 137 App. Div. 275, 121 N. Y. S. 923.

484-47 Jersey Isl. Co. *v.* Whitney, 149 Cal. 269, 86 P. 509, 691.

Endorser's consent that the release shall not be operative as to him may be shown by parol. Arlington Nat. Bk. *v.* Bennett, 214 Mass. 352, 101 N. E. 982.

484-48 Dronenburg *v.* Harris, 108 Md. 597, 71 A. 81.

484-51 Pierce *v.* Edwards, 150 Cal. 650, 89 P. 600; McFadden *v.* Pyne, 46 Colo. 319, 104 P. 491; Downing I. Co. *v.* Coolidge, 46 Colo. 345, 104 P. 392; Schreiber *v.* Straus, 147 Ill. App. 581; Wolcott *v.* Moore, 46 Ind. App. 427, 92 N. E. 880; Moots *v.* Cope, 147 Mo. App. 76, 126 S. W. 184; Parsons *v.* Kelso, 141 Mo. App. 369, 125 S. W. 227; Kelly *v.* Ellis, 39 Mont. 597, 104 P. 873; Tull *v.* Lynn, 18 Pa. Dist. 699; Speer *v.* Phillips, 24 S. D. 257, 123 N. W. 722; Toepperwein *v.* San Antonio (Tex. Civ.), 124 S. W. 699. See supra, 432-84, 85.

485-52 Hirsch *v.* Co., 169 Fed. 578, 95 C. C. A. 76 (custom or usage not provable); Roll *v.* Co., 162 Ala. 416, 50 S. 354; Leonhart *v.* Assn., 5 Cal. App. 19, 89 P. 847 (custom); Davis P. S. Co. *v.* Mfg. Co., 47 Colo. 68, 104 P. 389; Brown *v.* Est., 47 Colo. 461, 108 P. 25; Knight-C. M. Co. *v.* Buck, 43 Colo. 179, 95 P. 283; Griffin *v.* Co., 1 Boyce (Del.) 169, 74 A. 1072; Cortelyou *v.* U. S., 32 App. Cas. (D. C.) 20; Thomason *v.* Moore, 139 Ga. 341, 77 S. E. 155; Fuchs & L. Co. *v.* Kittredge, 242 Ill. 88, 89 N. E. 723; Rockwell *v.* Co., 145 Ill. App. 403; Goldenberg *v.* Taglino (Mass.), 105 N. E. 883; Wellman *v.* Co. (Mich.), 146 N. W. 289; Simpson *v.* Green, 160 N. C. 301, 76 S. E. 237; Dr. Shoop M. Co. *v.* Mizell, 148 N. C. 384, 62 S. E. 511; Greenville County *v.* Greenville, 84 S. C. 410, 66 S. E. 417; Houston P. Co. *v.* Griffith (Tex. Civ.), 164 S. W. 431; McCullough *v.* Bk. (Tex. Civ.), 123 S. W. 439; Patrick *v.* Watson, 55 Wash. 76, 104 P. 144. See vol. 11, p. 511.

Horsepower of car sold, when stated in the written contract, cannot be varied by parol testimony of its present power. Colt *v.* Demarest & Co., 159 App. Div. 394, 144 N. Y. S. 557. See vol. 11, p. 526, n. 63.

Assumption of indebtedness by buyer cannot be shown by parol where it would contradict the terms of offer and acceptance. Mooney *v.* Co., 71 Wash. 258, 128 P. 225. See also "Sales," p. 511.

Sale cannot be shown to have been mortgage, where language definite and certain and proof involves prior agreements. Doolittle *v.* Murray, 134 Ia. 536, 111 N. W. 999.

486-53 Com. Bk. *v.* Pott, 150 Cal. 358, 89 P. 431; Fuchs & L. Co. *v.* Kittredge, 146 Ill. App. 350; Daylight A. G. Co. *v.* Hardesty (Ky.), 112 S. W. 847; Red Snapper S. Co. *v.* Balling, 95 Miss. 752, 50 S. 401; Kellerman C. Co. *v.* H. W. Co., 137 Mo. App. 392, 118 S. W. 99; Wheless *v.* Co., 140 Mo. App. 572, 120 S. W. 708; Kelly *v.* Ellis, 39 Mont. 597, 104 P. 873; Hoopes *v.* R. Co., 79 N. J. L. 597, 75 A. 944; Lesster *v.* Warehouses, 130 App. Div. 551, 115 N. Y. S. 61; Passow *v.* Co., 54 Wash. 196, 103 P. 34; Schoblasky *v.* Rayworth, 139 Wis. 115, 120 N. W. 822.

487-54 Standard B. Co. *v.* Co., 10 Cal. App. 746, 103 P. 938; Minnix Co. *v.* Co., 33 App. Cas. (D. C.) 357; Porter *v.* Co., 55 Fla. 504, 46 S. 420; Loyless *v.* Co., 10 Ga. App. 660, 74 S. E. 90; International Filter Co. *v.* Co., 157 Ill. App. 96; Varney E. S. Co. *v.* Carter,

133 Ky. 90, 115 S. W. 763, 116 S. W. 1176; Providence J. Co. *v.* Bailey, 159 Mich. 285, 123 N. W. 1117; Creek-N. C. Co. *v.* Co., 96 Miss. 835, 51 S. 1; Zeller *v.* Ranson, 140 Mo. App. 220, 123 S. W. 1016; American Co. *v.* Muleski, 138 Mo. App. 419, 122 S. W. 384; United B. Co. *v.* Wright, 134 Mo. App. 717, 115 S. W. 470; Hughes *v.* Constantin, 139 N. Y. S. 865; Stonehill W. Co. *v.* Lupo, 110 N. Y. S. 408; Passow *v.* D. Co., 54 Wash. 196, 103 P. 34; Menz L. Co. *v.* McNeeley, 58 Wash. 223, 108 P. 621.

Warranty of quality may be shown where the written order does not evidence the whole contract. Lovell *v.* Alton, 82 Misc. 431, 143 N. Y. S. 995. See infra, p. 489, n. 69; also "Sales," p. 526, n. 63.

Time may be shown to be of essence of contract though it stipulates shipment to be made within given period. Alabama C. Co. *v.* Co., 131 Ga. 365, 62 S. E. 160.

Bill of parcels does not embody contract and parol evidence may explain it. North P. Co. *v.* Lynch, 196 Mass. 204, 81 N. E. 891.

487-55 Rule applies only to parties and privies. Good *v.* Co., 7 Ind. Ty. 268, 104 S. W. 613.

487-56 Standard M. Co. *v.* De Pass, 154 App. Div. 525, 139 N. Y. S. 611; Stonehill W. Co. *v.* Lupo, 110 N. Y. S. 408; Berry *v.* Oil Co., 156 Wis. 588, 146 N. W. 783.

Though goods delivered corresponded to sample parol evidence is admissible to show non-compliance with specifications. West End Mfg. Co. *v.* Co., 198 Mass. 320, 84 N. E. 488.

487-57 Buffalo O. L. Q. Co. *v.* Davis 45 Ind. App. 116, 90 N. E. 327; Millet *v.* Andrews, 175 Mich. 350, 141 N. W. 578; Ives *v.* Kimlin, 140 Mo. App. 293, 124 S. W. 23 (subsequent agreement within rule).

488-58 Brennard Mfg. Co. *v.* Co., 148 Ala. 666, 41 S. 671; Bradley G. Co. *v.* Co., 94 Ark. 130, 126 S. W. 81; Knight-C. Co. *v.* Buck, 43 Colo. 179, 95 P. 283; Biggers *v.* Co., 124 Ga. 1045, 53 S. E. 674; Ziehme *v.* McInerney, 167 Ill. App. 577; Ford M. Co. *v.* Osburn, 140 Ill. App. 633; Doolittle *v.* Murray, 134 Ia. 536, 111 N. W. 999; Eckles, etc. Co. *v.* Co., 119 Md. 107, 86 A. 38; Columbia Mill *v.* Russell, 89 Miss. 437, 42 S. 233; Kruger *v.* Brown, 79 N. J. L. 418, 75 A. 171; Norton *v.* Abbott, 113 N. Y. S. 669; Hershey *v.* Johns, 39 Pa. Super. 645; Western Mfg. Co. *v.* Freeman (Tex. Civ.), 126 S. W. 924; Fontress *v.* Steele, 110 Va. 578, 66 S. E. 870 (to add term to contract); Carlin *v.* Fraser, 105 Va. 216, 53 S. E. 145; Buckeye B. Co. *v.* Stables, 43 Wash. 49, 85 P. 1077; Ady *v.* Barnett, 142 Wis. 18, 124 N. W. 1061.

488-59 McCaskey R. Co. *v.* Curfman, 45 Ind. App. 297, 90 N. E. 323.

488-60 Standard B. Co. *v.* Co., 10 Cal. App. 746, 103 P. 948; Zeller *v.* Ranson, 140 Mo. App. 220, 123 S. W. 1016.

488-62 Fowler U. Co. *v.* Co., 43 Ind. App. 438, 87 N. E. 689.

488-64 Fairbanks *v.* Burgert, 81 Neb. 465, 116 N. W. 35; Blair *v.* Minzesheimer, 108 N. Y. S. 799; Brown *v.* Hobbs, 147 N. C. 73, 60 S. E. 716; Bourne *v.* Sherrill, 143 N. C. 381, 55 S. E. 799; Watson *v.* Rice (Tex. Civ.), 166 S. W. 106. *Contra* if collateral agreement inducing cause of contract. Kelly *v.* Ellis, 39 Mont. 597, 104 P. 873.

488-65 Stipulated value of property to be received as part payment cannot be varied by parol. Vulcan I. W. Co. *v.* Roquemore, 175 Fed. 11, 99 C. C. A. 77.

488-66 Ordelheide *v.* Traube (Mo App.), 166 S. W. 1108. Agreement not to sell goods to others, inadmissible. Main *v.* Radney (Ala.), 39 S. 981.

489-67 Seattle, etc. Co. *v.* Kinney, 74 Wash. 179, 132 P. 1012.

489-68 Middletown M. Co. *v.* Chaffin, 108 Ark. 254, 157 S. W. 208; Robinson *v.* Ligon, 146 Mo. App. 634, 124 S. W. 590; Am. M. S. Co. *v.* Jones, 119 N. Y. S. 1087; Houghton Imp. Co. *v.* Doughty, 14 N. D. 331, 104 N. W. 516. See also "Sales," p. 526, n. 63.

General warranty of soundness will admit parol evidence of patent defects. Turner Bros. *v.* Manley (Ga. App.), 80 S. E. 680. See vol. 11, p. 720, n. 63.

489-69 Florence W. Wks. *v.* Co., 145 Ala. 677, 40 S. 49; Fisher *v.* Whitehurst (Ga. App.), 80 S. E. 526; Chicago T. Co. *v.* Co., 134 Ia. 252, 111 N. W. 935 (contract incomplete on face); Leavitt *v.* Co., 196 Mass. 440, 82 N. E. 682; Burns *v.* Limerick (Mo. App.), 165 S. W. 1166; Fairbanks *v.* Burgert, 81 Neb. 465, 116 N. W. 35; Pease O. Co. *v.* Oil Co., 78 Misc. 285, 138 N. Y. S. 177; Lovell *v.* Alton, 82 Misc. 431, 143 N. Y. S. 995; De Jonge *v.* Printz, 49 Misc.

112, 96 N. Y. S. 750; Eiler's M. House *v.* Oriental Co., 69 Wash. 618, 125 P. 1023. See supra 487-54. See also vol. 11, p. 526, n. 63, p. 528.

489-70 Bluegrass C. Co. *v.* Steward, 175 Fed. 537, 99 C. C. A. 159; Barry *v.* Thompson, 83 Ark. 283, 104 S. W. 137; Johnson *v.* Hughes, 83 Ark. 105, 103 S. W. 184; Arden L. Co. *v.* Co., 83 Ark. 240, 103 S. W. 185; Lower *v.* Hickman, 80 Ark. 505, 97 S. W. 681; Kullman *v.* Co., 153 Cal. 725, 96 P. 369; Cochran *v.* Jones, 11 Ga. App. 302, 75 S. E. 143 (of a mule purchase price served by note and mortgage); Chicago, etc. Co. *v.* Hofman, 168 Ill. App. 71; Fuchs & L. Co. *v.* Kittredge, 146 Ill. App. 350; King *v.* Thompson Co. (Ind. App.), 104 N. E. 106; Electric S. Co. *v.* R. Co., 138 Ia. 369, 116 N. W. 144, 19 L. R. A. (N. S.) 1183; Scholl *v.* Killorin, 190 Mass. 493, 77 N. E. 382; Day L. Co. *v.* Co., 141 Mich. 533, 104 N. W. 797; Meland *v.* Youngberg, 124 Minn. 446, 145 N. W. 167; McNaughton *v.* Wohl, 99 Minn. 92, 108 N. W. 467; Green *v.* Watts (N. J.), 90 A. 667. See vol. 1, p. 314; vol. 11, pp. 511, 526, n. 63.

Warranty inadvertently omitted from written instrument may be shown by parol. White Auto Co. *v.* Dorsey, 119 Ind. 251, 86 A. 617. See vol. 11, p. 526, n. 63.

491-71 Dr. Shoop F. M. Co. *v.* Davenport, 163 N. C. 294, 79 S. E. 602; Vance *v.* Heath (Utah), 129 P. 365.

491-72 Brooks M. Co. *v.* Jeffries, 94 Ark. 575, 127 S. W. 960; Case T. M. Co. *v.* Barnes, 133 Ky. 321, 117 S. W. 418.

Non-delivery shown though evidence discloses parol contract varying from written one. Koester *v.* Co., 24 S. D. 546, 124 N. W. 740.

491-73 Nichols *v.* Berning, 37 Ind. App. 109, 76 N. E. 776; Lilienthal *v.* Herren, 42 Wash. 209, 84 P. 829.

Mistake.—Northwest T. Co. *v.* Hulburt, 103 Minn. 276, 115 N. W. 159.

Alteration.—Price *v.* Stanbra, 45 Wash. 143, 88 P. 115.

491-74 Ah Hoy *v.* Raymond, 19 Haw. 568; Providence J. Co. *v.* Fessler, 145 Ia. 74, 123 N. W. 957; United B. Co. *v.* Wright, 134 Mo. App. 717, 115 S. W. 470; Robinson *v.* Ligon, 146 Mo. App. 634, 124 S. W. 599; S. *v.* Emblen, 66 W. Va. 360, 66 S. E. 499.

492-75 Troy Laundry Mach. Co. *v.* Laundry Co., 14 Cal. App. 152, 111 P. 121; Chicago, etc. Co. *v.* Butler, 139 Ga. 876, 78 S. E. 244; State H. Assn. *v.* Silverman, 6 Ga. App. 560, 65 S. E. 293; Bank *v.* Buck (Ia.), 142 N. W. 1004; Bonewell *v.* Jacobson, 130 Ia. 170, 106 N. W. 614; Tiffany *v.* Auto Co., 168 Mo. App. 729, 154 S. W. 865; Am. P. F. Co. *v.* Elliott, 151 N. C. 393, 66 S. E. 451; U. S. G. Co. *v.* Shields (Tex. Civ.), 106 S. W. 724.

"**They do not alter the contract;** but they may afford a reason why the contract itself may be avoided or rescinded, or, if that be not done, why the injured party may recover damages, or recoup damages, if sued on the contract. Representations of the physical characteristics of a thing sold, and not open at the time to inspection, when made by a vendor as an inducement to purchase, are in the nature of warranties, for breach of which the purchaser may rescind the contract and restore the articles purchased, or may recoup in damages, when sued for the purchase price." Doylestown Agr. Co. *v.* Co., 109 Me. 301, 84 A. 146 (cultivators).

492-77 Weir *v.* Long, 145 Ala. 328, 39 S. 974; Shannon C. Co. *v.* Potter, 13 Ariz. 245, 108 P. 486; St. Louis, etc. R. Co. *v.* Wynn, 81 Ark. 373, 99 S. W. 375; Worsley *v.* Ayres, 144 Ia. 676, 123 N. W. 353; Eastern Granite Roofing Co. *v.* Co., 140 Ky. 441, 131 S. W. 194; West End Mfg. Co. *v.* Co., 198 Mass. 320, 84 N. E. 488; Leavitt *v.* Co., 196 Mass. 440, 82 N. E. 682; Electrical A. Co. *v.* S. Co., 151 Mich. 662, 115 N. W. 982; St. Anthony E. Co. *v.* Co., 104 Minn. 401, 116 N. W. 935; Nat. E. Co. *v.* Laundry, 92 Neb. 402, 138 N. W. 575; Cooper *v.* Payne, 186 N. Y. 334, 78 N. E. 1076; Crook *v.* Fidanque, 59 Misc. 178, 110 N. Y. S. 198; Gelb *v.* Waller, 115 N. Y. S. 201; Willis *v.* Co., 152 N. C. 100, 67 S. E. 265; Eureka E. P. Co. *v.* Co., 85 S. C. 486, 67 S. E. 738; Hunter *v.* Wallace, 57 Tex. Civ. 1, 121 S. W. 180 (contract to furnish abstract of title).

An agreement to instruct buyer of automobile in its use, may be shown by parol, though not mentioned in the order for the machine signed by the buyer. Holmboe *v.* Morgan (Or.), 138 P. 1084.

493-78 Reed *v.* McDonald, 22 Cal. App. 701, 136 P. 506; Mendel *v.* L. F. Hiller & Sons, 134 Ga. 610, 68 S. E. 430 (contract for delivery of corn, evi-

dence to show a waiver of time); McCommons *v.* Williams, 131 Ga. 313, 62 S. E. 230; Fuchs & L. Co. *v.* Kittredge, 242 Ill. 88, 89 N. E. 723; Heskett *v.* Co., 81 Kan. 356, 105 P. 432; Painter *v.* Fletcher, 81 Kan. 195, 105 P. 500 (securities to be given); Roebling *v.* Bk., 56 Wash. 102, 105 P. 174. See Victor S. & L. Co. *v.* O'Neil, 48 Wash. 176, 93 P. 214.

493-80 Stephens-Adamson Mfg. Co. *v.* Bigelow, 84 N. J. L. 585, 87 A. 74.

493-81 Adams *v.* Janes, 83 Vt. 334, 75 A. 799.

494-85 See Ronginsky *v.* Freudenthal, 134 App. Div. 422, 119 N. Y. S. 409.

Kentucky.—"The most that this court has done in any of its opinions dealing with this subject has been to hold two propositions: First, that the consideration need not be expressed (and this is so held because the statute expressly authorizes it); and, second, that where the description of the land in the memorandum is not full and explicit, yet is capable of being ascertained with accuracy and absolute certainty, such description has been held to be sufficient, and parol testimony allowed to identify the property." McKnight *v.* Co., 147 Ky. 535, 145 S. W. 377.

Parol guarantee of number of acres of land in tract, shown. Stern *v.* Benbow, 151 N. C. 460, 66 S. E. 445.

494-87 Duplicate copies differing, parol admissible to show which contains agreement. Bowman *v.* Poppenberg, 53 Misc. 373, 103 N. Y. S. 245.

494-90 McCaskey Co. *v.* Green, 57 Misc. 549, 109 N. Y. S. 970; Manvell *v.* Weaver, 53 Wash. 408, 102 P. 36, quot. the text.

495-92 Belding H. Mfg. Co. *v.* Co., 175 Fed. 335, 99 C. C. A. 123; Porter *v.* Co., 55 Fla. 504, 46 S. 420.

495-93 Burgie *v.* Bailey, 91 Ark. 383, 121 S. W. 266; Gandy *v.* Co. (Ind. App.), 90 N. E. 915.

495-95 *Comp.* Jost *v.* Wolf, 130 Wis. 37, 110 N. W. 232.

495-96 Parol agreement modifying contract within statute may be proved if modification does not amount to contract forbidden by statute to rest in parol. Stamey *v.* Hemple, 173 Fed. 61, 97 C. C. A. 379.

495-97 The Venezuela, 173 Fed. 834; Scudders-G. G. Co. *v.* Co., 9 Cal. App. 553, 99 P. 978; Smith *v.* Co., 82 Conn. 116, 72 A. 577; Gandy *v.* Co. (Ind. App.), 90 N. E. 915; Passow *v.* Co., 54 Wash. 196, 103 P. 34 (course of dealing between parties under contract and under like previous one, relevant on issue of mistake in former); Hughes Mfg. & L. Co. *v.* Co., 53 Wash. 516, 102 P. 433.

General custom shown to establish time for doing stipulated act, contract being silent. Rose *v.* Lewis, 157 Ala. 521, 48 S. 105.

496-98 Smith *v.* Co. (Conn.), 72 A. 577; Pittsburgh C. Co. *v.* Northy, 153 Mich. 530, 123 N. W. 47.

496-99 Mass *v.* Dixon, 81 Ark. 337, 99 S. W. 388; Bass *v.* O'Berry, 59 Fla. 159, 51 S. 507; Nichols *v.* Maxson, 76 Kan. 607, 92 P. 547; Foster *v.* Powell, 120 La. 106, 45 S. 372; Pittsburgh S. Co. *v.* Cottingham (Mo. App.), 105 S. W. 391; Roberts *v.* Tuttle, 36 Utah 614, 105 P. 916 (practical construction concerning payment); Burton *v.* Douglass, 141 Wis. 110, 123 N. W. 631.

Contract to furnish "lumber enough to build one dwelling house" may be made clear by parol. Coleman *v.* Kea, 12 Ga. App. 708, 78 S. E. 474.

Practical construction by parties. McLean C. Co. *v.* Bloomington, 254 Ill. 90, 84 N. E. 624.

Intention.—Powers *v.* Nowles, 42 Colo. 442, 94 P. 347.

496-1 Krebs H. Co. *v.* Livesley, 57 Or. 227, 101 P. 3, place of delivery.

496-2 Shafer *v.* Shaw, 3 Cal. App. 335, 85 P. 162; Lambert Co. *v.* Carmody, 79 Conn. 419, 65 A. 141 (to explain whether sale or lease intended); Garfield & P. Co. *v.* Co., 199 Mass. 22, 84 N. E. 1027; Pullan *v.* Co., 196 Mass. 474, 82 N. E. 711; Whipple *v.* Lee, 48 Wash. 253, 103 P. 901 (contemporaneous agreements and parties' construction of contract).

Broad field open to ascertain intent of parties as to time for delivery. Lemola *v.* Co., 81 Conn. 333, 71 A. 358.

496-4 McKinney *v.* Dismuke, 166 Fed. 370; Cassatt Mfg. *v.* Co., 126 Ala. 274, 51 S. 603; Brockett *v.* Co., 127 Ga. 672, 56 S. E. 762; Parks & L. Co. *v.* Kittredge, 146 Ill. App. 450; Jennings *v.* Fuller, 203 Mass. 554, 89 N. E. 1036; Keel *v.* Smith, 66 Misc. 527, 51 S. 3; Willis *v.* Co., 152 N. C. 109, 67 S. E. 253; Hocking M. & E. Co. *v.* Gossett (Tex. Civ.), 125 S. W. 927.

496-5 Baer *v.* Co., 159 Ala. 491, 49 S. 92; Scudders-G. G. Co. *v.* Co., 9 Cal.

App. 553, 99 P. 978; Ford *v.* Lawson, 133 Ga. 237, 65 S. E. 444; Howes *v.* Co. (Ky.), 113 S. W. 512; Grout *v.* Moulton, 79 Vt. 122, 64 A. 453; Phoenix P. Co. *v.* Co., 58 Wash. 396, 108 P. 952.

497-6 Barnett *v.* Hagan, 18 Ida. 104, 108 P. 743; Pittsburgh S. Co. *v.* Cottengin (Mo. App.), 165 S. W. 391.

497-8 Case T. M. Co. *v.* Fee (Can.), 10 West. L. Rep. 70; Little Rock *v.* Gunnels, 82 Ark. 286, 101 S. W. 729; Alabama C. Co. *v.* Co., 131 Ga. 365, 62 S. E. 160; United R. Co. *v.* Wehr, 103 Md. 323, 63 A. 475; Miller *v.* Co., 150 Mich. 292, 114 N. W. 61 (reference to another contract allowed).

497-9 Muldowan *v.* Co. (Can.), 10 West. L. Rep. 561; Hill *v.* McCoy, 1 Cal. App. 159, 81 P. 1015; State H. Assn. *v.* Silverman, 6 Ga. App. 560, 65 S. E. 293; McFarland *v.* Stansifer, 36 Ind. App. 486, 76 N. E. 124; Kimball *v.* Waterman, 73 N. H. 348, 61 A. 595; Morrison *v.* Brenmohl, 137 App. Div. 4, 122 N. Y. S. 81; Pitts *v.* Curtis, 152 N. C. 615, 68 S. E. 189.

498-10 Burns *v.* Witter, 56 Or. 368, 108 P. 129.

498-11 North Am., etc. Co. *v.* Samuels, 146 Fed. 48, 76 C. C. A. 506; In re Garnier, 147 Cal. 457, 82 P. 68.

499-17 Chicago T. & T. Co. *v.* Co., 242 Ill. 468, 90 N. E. 282.

Parol, admissible to show basis of ownership and good faith of vendor. Taylor *v.* Co., 82 Conn. 220, 72 A. 1080. Estoppel established by proof of subsequent parol agreement. Lilienthal *v.* Cartwright, 173 Fed. 580, 97 C. C. A. 530.

500-21 Shattuck *v.* Gillelen, 154 Cal. 778, 99 P. 348.

500-22 Dotson *v.* Co., 140 Ga. 161, 78 S. E. 801.

500-23 Russell *v.* Mills (Ala.), 39 S. 712, admissible to prove corporation to be bound by agreement not purporting to be signed by it.

501-24 Snodgrass *v.* Zander, 106 Ark. 462, 154 S. W. 212; Lyell Ave. L. Co. *v.* Lighthouse, 137 App. Div. 422, 121 N. Y. S. 802; Cattleman's Tr. Co. *v.* Beck (Tex. Civ.), 167 S. W. 753. See also "Corporations," p. 622, n. 72.

501-25 Collins *v.* Co., 92 Ark. 504, 123 S. W. 652; Capps *v.* Edwards, 130 Ga. 146, 60 S. E. 455.

501-26 Hinkley *v.* Co., 132 Ia. 396, 107 N. W. 629; Metropolitan Co. *v.* Webster, 193 Mo. 351, 92 S. W. 79.

502-29 Mulford *v.* Co., 45 Colo. 81, 100 P. 596; Bobzin *v.* Co., 140 Ia. 744, 118 N. W. 40.

PARTIES AND PERSONS INTERESTED AS WITNESSES

506-1 A party may testify against interest. Duffy *v.* Duffy, 243 Ill. 476, 90 N. E. 697.

506-3 Citizens' Nat. Life Ins. Co. *v.* Ragan, 13 Ga. App. 29, 78 S. E. 683; Stephens *v.* Hoffman, 263 Ill. 197, 104 N. E. 1090.

Interest must be legal, certain, vested, present. Stephens *v.* Hoffman, 263 Ill. 197, 104 N. E. 1090.

506-4 Cobb *v.* Cobb, 4 Pa. Super. 273; In re Stewart, 15 Pa. C. C. 380. Release for this purpose does not render party competent. Party who quitclaimed property for attorney's fees competent. Stephens *v.* Hoffman, 263 Ill. 197, 104 N. E. 1090.

506-5 White *v.* Bower, 56 Colo. 575, 136 P. 1053; Ackman *v.* Potter, 239 Ill. 578, 88 N. E. 231; Miller *v.* Miller (Ind. App.), 104 N. E. 588. See Stewart *v.* Blalock, 139 Ga. 44, 76 S. E. 573; supra, "Competency," 211-6.

507-6 Turner *v.* Woodward, 136 Ga. 275, 71 S. E. 418; Stephens *v.* Hoffman, 263 Ill. 197, 104 N. E. 1090; Patterson *v.* Patterson, 251 Ill. 153, 95 N. E. 1051; Pierce *v.* Jacobs, 157 Ill. App. 441; Allen *v.* Allen, 157 Ill. App. 362; Robinson *v.* Kraft, 154 Ill. App. 213; Mounger *v.* Daugherty (Tex. Civ.), 138 S. W. 1070.

507-7 Sutherland *v.* S., 121 Ga. 190, 48 S. E. 915; Frazier *v.* City (Ga. App.), 80 S. E. 209.

507-10 Wong Din *v.* U. S., 135 Fed. 702, 68 C. C. A. 340; Larsen *v.* Co., 131 Ill. App. 286; Mansfield *v.* R. Co., 132 Ill. App. 552; Platner *v.* Ryan, 76 N. J. L. 239, 69 A. 1007 (statute); Fisher *v.* Fallon, 142 N. Y. S. 72; Gordon *v.* Farrell, 157 App. Div. 409, 142 N. Y. S. 491.

507-11 Shelton *v.* S., 144 Ala. 106, 42 S. 30; S. *v.* Bursaw, 74 Kan. 473, 87 P. 183; Donner *v.* S., 72 Neb. 263, 100 N. W. 305.

508-12 S. *v.* Smith, 135 La. —, 65 S. 598; Becker *v.* Hart, 129 App. Div. 511, 113 N. Y. S. 1053 (on cross-examination).

508-14 Donner *v.* S., 72 Neb. 263, 100 N. W. 305. See Vails *v.* S., 94 Miss. 365, 48 S. 725.

509-16 Miller *v.* Ty., 149 Fed. 330, 79 C. C. A. 268 (contribution of money to aid prosecution and purpose of so doing); Ripperdan *v.* Weldy, 149 Cal. 667, 87 P. 276; Atlantic, etc. R. Co. *v.* Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769; Taylor *v.* S., 121 Ga. 348, 40 S. E. 303; S. *v.* Cook, 13 Ida. 45, 88 P. 240 (attempt by one witness to induce another not to testify); S. *v.* Koller, 129 Ia. 111, 105 N. W. 391; Louisville R. Co. *v.* Williams, 33 Ky. L. R. 168, 109 S. W. 874; Buxton *v.* Ainsworth, 153 Mich. 315, 116 N. W. 1094; Schon *v.* Harlan, 56 Misc. 518, 107 N. Y. S. 113; P. *v.* Wenzel, 189 N. Y. 275, 285, 82 N. E. 130; Miller *v.* Ty., 15 Okla. 422, 85 P. 239; Lowry *v.* S., 53 Tex. Cr. 562, 110 S. W. 911; Owens *v.* S. (Tex. Cr.), 96 S. W. 31 (inquiry by witness of prosecutor as to what latter testified to before grand jury).

509-17 Isaac *v.* U. S., 7 Ind. Ty. 196, 104 S. W. 588.

509-18 Frank *v.* Symons, 35 Mont. 56, 88 P. 561; Platner *v.* Ryan, 76 N. J. L. 239, 69 A. 1007; Hirsh *v.* Co., 92 N. Y. S. 794.

509-20 Buxton *v.* Ainsworth, 153 Mich. 315, 116 N. W. 1094.

509-21 Steve *v.* Co., 13 Ida. 384, 92 P. 363.

509-22 Teston *v.* S., 50 Fla. 137, 39 S. 787.

509-23 Miller *v.* Ty., 149 Fed. 330, 79 C. C. A. 268, and capacity in which he was retained.

510-24 Murray *v.* Co., 4 Cal. App. 41, 87 P. 202; Chicago City R. Co. *v.* Smith, 226 Ill. 178, 80 N. E. 716; Gulf, etc. R. Co. *v.* Hays, 40 Tex. Civ. 162, 89 S. W. 29; Norfolk & W. R. Co. *v.* Birchfield, 105 Va. 809, 54 S. E. 879. See Chicago, etc. R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050.

510-25 Pecos, etc. R. Co. *v.* Harrington (Tex. Civ.), 99 S. W. 1050.

510-27 P. *v.* Harper, 145 Mich. 402, 108 N. W. 689.

511-28 Capital C. Co. *v.* Holtzman, 27 App. Cas. (D. C.) 125. So held. Vindicator G. M. Co. *v.* Firstbrook, 36 Colo. 498, 86 P. 313; Bates *v.* S., 4 Ga. App. 486, 61 S. E. 888; Jaquinto *v.* Bauer, 104 App. Div. 56, 93 N. Y. S. 388.

511-36 Henrietta Co. *v.* Martin, 221 Ill. 460, 77 N. E. 902, 122 Ill. App. 354; Ellis *v.* R. Co., 131 Mo. App. 395, 111 S. W. 839; S. *v.* Constantine, 18 Wash. 218, 93 P. 317.

512-37 Smith *v.* S., 79 Ark. 25, 94 S. W. 918; Hayes *v.* S., 126 Ga. 95, 54 S. E. 809; S. *v.* Rosa, 71 N. J. L. 316, 58 A. 1010.

512-39 Harrell *v.* S., 121 Ga. 607, 49 S. E. 703.

512-40 Briscoe *v.* R. Co., 118 Mo. App. 668, 95 S. W. 276.

513-44 McCowan *v.* Co., 41 Wash. 675, 84 P. 614.

514-46 Christiansen *v.* Wks., 223 Ill. 142, 79 N. E. 97; Henrietta Co. *v.* Martin, 221 Ill. 460, 77 N. E. 902, 122 Ill. App. 354; S. *v.* Smith, 135 La. —, 65 S. 598.

515-47 Giltman *v.* R. Co., 129 App. Div. 919, 113 N. Y. S. 1048.

518-57 Ripperdan *v.* Weldy, 149 Cal. 667, 87 P. 276.

519-62 Louisville, etc. R. Co. *v.* Sherrill, 152 Ala. 213, 44 S. 631; Hayes *v.* S., 126 Ga. 95, 54 S. E. 809; Georgia, etc. R. Co. *v.* Stanley, 1 Ga. App. 487, 57 S. E. 1042; Miller *v.* Ty., 15 Okla. 422, 85 P. 239; Norfolk & W. R. Co. *v.* Birchfield, 105 Va. 809, 54 S. E. 879.

519-64 Goss *v.* Goss, 102 Minn. 346, 113 N. W. 690.

519-65 National, etc. Co. *v.* Fagan, 115 Ill. App. 590; Creeping Bear *v.* S., 113 Tenn. 322, 87 S. W. 653.

519-66 Domestic, etc. Co. *v.* Holden (Ind. App.), 103 N. E. 73.

520-67 Graez *v.* Anderson, 104 Minn. 476, 116 N. W. 1116; Goss *v.* Goss, 102 Minn. 346, 113 N. W. 690.

520-68 *Contra*, Taylor *v.* S., 121 Ga. 348, 49 S. E. 303.

520-69 Birmingham, etc. Co. *v.* Rutledge, 142 Ala. 195, 39 S. 338.

The issues do not limit questions which may be put to determine interest of witness. Vindicator Co. *v.* Firstbrook, 36 Colo. 498, 86 P. 313. But comp. Lowsit *v.* Co., 38 Wash. 290, 80 P. 431. See Graez *v.* Anderson, 104 Minn. 476, 116 N. W. 1116.

521-73 S. *v.* Spaugh, 200 Mo. 571, 98 S. W. 55; C. *v.* Miller, 31 Pa. Super. 317.

PARTITION

523-1 Elliott *v.* Delaney, 217 Mo. 14, 116 S. W. 494, must be clearly proven.

523-2 Helton *v.* Campbell, 155 Ky. 257, 159 S. W. 785.

524-3 Joyce *v.* Dyer, 189 Mass. 64, 75 N. E. 81.

524-6 Ming *v.* Olster, 195 Mo. 460, 92 S. W. 898, certified copy of deed of partition.

524-7 Oliver *v.* Williams, 163 Ala. 376, 50 S. 937; Seawell *v.* Young, 77 Ark. 309, 91 S. W. 544; Duffy *v.* Duffy, 243 Ill. 476, 90 N. E. 697; Folk *v.* Brooks, 91 S. C. 7, 74 S. E. 46.

525-9 See Smith *v.* Smith, 133 Ga. 170, 65 S. E. 414.

525-10 Blanton *v.* Howard, 148 Ky. 547, 146 S. W. 1089; Ming *v.* Olster, 195 Mo. 460, 92 S. W. 898.

526-11 Seawell *v.* Young, 77 Ark. 309, 91 S. W. 544.

526-13 Bad faith of party to agreement may be shown by parol, as may facts constituting estoppel. Breaux *v.* Co., 125 La. 421, 51 S. 444.

526-14 Carroll *v.* Fulton, 148 Ala. 671, 41 S. 741; Williams *v.* St. Petersburg, 57 Fla. 544, 48 S. 754; Dallam *v.* Sanchez, 56 Fla. 779, 47 S. 871; Fischer *v.* Langlotz, 114 App. Div. 903, 100 N. Y. S. 578; Francis *v.* Co., 243 Pa. 380, 90 A. 205; Ivy *v.* Ivy (Tex. Civ.), 128 S. W. 682; Hyde *v.* Britton, 41 Wash. 277, 83 P. 307.

Defendant setting up title in derogation of plaintiff's title, has burden of proving same. McKeel *v.* Holloman, 163 N. C. 132, 79 S. E. 445.

Affirmative matter set up in avoidance of plaintiff's legal title must be proved by defendant. Garretson *v.* Garretson, 43 Ind. App. 688, 88 N. E. 624.

Will of former owner and plat of land, material. Whitelaw *v.* Rodney, 212 Mo. 540, 111 S. W. 560.

527-15 Kidd *v.* Bell (Ky.), 122 S. W. 232; Heard *v.* Cherry, 29 Ky. L. R. 106, 92 S. W. 551 (title from state need not be proved); Pickens *v.* Stout, 67 W. Va. 422, 68 S. E. 354.

528-17 Fies *v.* Rosser, 162 Ala. 504, 50 S. 287 (or immediate use of proceeds); Varni *v.* Devoto, 10 Cal. App. 304, 101 P. 934; Shetterly *v.* Axt, 37 Ind. App. 687, 76 N. E. 901; Breidenstein *v.* Bertram, 198 Mo. 328, 95 S. W. 828 (heir not mentioned in will). *Contra*, Country Homes L. Co. *v.* De Gray (N. J. Eq.), 71 A. 340. See Mansfield *v.* Hill, 56 Or. 400, 108 P. 1007.

528-19 Undisputed possession by plaintiff under lease, not a defense. Buhrmeister *v.* Buhrmeister, 10 Cal. App. 392, 102 P. 221.

529-23 Cannon *v.* Stevens, 88 Ark. 610, 115 S. W. 388.

530-27 See Cooper *v.* Trout, 31 Ky. L. R. 444, 102 S. W. 798.

It will be presumed that 183 acres of land can be divided without materially impairing its value. Hellier *v.* Syck, 147 Ky. 762, 145 S. W. 1110.

531-29 Opinions admissible as to effect of partition on value of land. Palmer *v.* Husbands, 134 Ky. 152, 119 S. W. 762.

531-33 Evidence as to rents admissible. Mitler *v.* Odom (Tex. Civ.), 152 S. W. 1185.

532-36 Mead *v.* Mead, 31 Ky. L. R. 70, 101 S. W. 330 (affidavit of party and three witnesses, insufficient); Bowles *v.* Wood, 90 Miss. 742, 44 S. 169 (evidence, sufficient); Bowen *v.* True, 79 S. C. 394, 60 S. E. 943; Parrott *v.* Barrett, 81 S. C. 255, 62 S. E. 241; Aldrich *v.* Aldrich, 75 S. C. 369, 55 S. E. 887, 117 Am. St. 909; Field *v.* Leiter, 16 Wyo. 1, 90 P. 378, 92 P. 622.

Evidence limited to showing whether court's directions obeyed, unless report attacked for unfairness. Richardson *v.* Ruddy, 15 Ida. 488, 98 P. 842.

532-37 Mead *v.* Mead, 31 Ky. L. R. 70, 101 S. W. 330.

533-40 Mansfield *v.* Wallace, 217 Ill. 610, 75 N. E. 682.

PARTNERSHIP

Presumption as to profits and division of capital, 573-35; *Damages to individual partners*, 573-37.

538-1 Watson *v.* Hamilton (Ala.), 60 S. 63; Russell *v.* Bellinger, 146 Ala. 679, 40 S. 132; Butts *v.* Cooper, 152 Ala. 375, 44 S. 616; Letson *v.* Hall, 1 Ala. App. 619, 55 S. 944; Kent *v.* Cobb, 24 Colo. App. 264, 133 P. 424; American Cotton College *v.* Union, 138 Ga. 147, 74 S. E. 1084; Cowart *v.* Fender, 137 Ga. 586, 73 S. E. 822; Clark *v.* Hoffman, 128 Ill. App. 422; Briggs *v.* Kohl, 132 Ill. App. 484; Wiggins *v.* Markham, 131 Ia. 102, 108 N. W. 113; Willoughby *v.* Hildreth (Mo. App.), 167 S. W. 639; Day *v.* Sup. Forest, 174 Mo. App. 260, 156 S. W. 721; Watts *v.* Pierson, 170 Mo. App. 532, 156 S. W. 724; Norton *v.* Brink, 75 Neb. 566, 106 N. W. 668; Bristol Co. *v.* Skapple, 17 N. D. 271, 115 N. W. 841; Clifton *v.* C. Co., 39 Tex. Civ. 188, 87 S. W. 182.

See Russell *v.* Billinger, 146 Ala. 679, 40 S. 132; Mitchell *v.* Whaley, 29 Ky. L. R. 125, 92 S. W. 556; Chase *v.* Angell, 148 Mich. 1, 108 N. W. 1105; Tuite *v.* Tuite, 72 N. J. Eq. 740, 66 A. 1090; Oram *v.* Peirce (N. J. L.), 67 A. 1053; Thompson *v.* Pist, 52 Pa. Super. 305; Davidson *v.* Copeland, 77 S. C. 108, 57 S. E. 620; Lellman *v.* Mills, 15 Wyo. 149, 87 P. 985.

Insufficient evidence.—Hillert *v.* Harned, 143 Ky. 3, 135 S. W. 764.

Claim of estoppel to deny relation must be established by person who asserts it. In re Stoddard Bros. L. Co., 169 Fed. 190.

538-2 Dorough *v.* Harrington, 148 Ala. 305, 42 S. 557; Buford *v.* Lewis, 87 Ark. 412, 112 S. W. 963 (as between third parties and firm test is cogent and conclusive unless circumstances alter nature of contract); Rector *v.* Robins, 74 Ark. 437, 86 S. W. 667; Ramsay *v.* Meade, 37 Colo. 465, 86 P. 1018; Jones *v.* Purnell, 5 Penne. (Del.) 444, 62 A. 149; Leeds *v.* Townsend, 228 Ill. 451, 81 N. E. 1069; Boreing *v.* Wilson, 33 Ky. L. R. 14, 108 S. W. 914; Bluefields S. S. Co. *v.* S. S. Co., 133 La. 424, 63 S. 96; Morgart *v.* Smouse, 103 Md. 463, 63 A. 1070; Berry *v.* Pelneault, 188 Mass. 413, 74 N. E. 917; McDonald *v.* Campbell, 96 Minn. 87, 104 N. W. 760; Aehle *v.* Brand, 176 Mo. App. 395, 158 S. W. 709; Swofford *v.* Diment, 132 Mo. App. 616, 111 S. W. 1196; Sawyer *v.* Burris, 141 Mo. App. 108, 121 S. W. 321; Lefevre *v.* Silo, 112 App. Div. 464, 98 N. Y. S. 321; Providence M. Co. *v.* Browning, 72 S. C. 424, 52 S. E. 117; Bentley *v.* Bossard, 33 Utah 396, 94 P. 736.

See Roberts *v.* Co., 33 Ky. L. R. 207, 110 S. W. 314; Miller *v.* Simpson, 107 Va. 476, 59 S. E. 378. *Contra*, Brotherton *v.* Gilchrist, 144 Mich. 274, 107 N. W. 890; Agnew *v.* Montgomery, 72 Neb. 9, 99 N. W. 820.

On proof of contract showing no partnership, presumption vanishes. Ellis *v.* Brand, 176 Mo. App. 383, 158 S. W. 705.

Absence of profit sharing, conclusive. Meinhart *v.* Draper, 133 Mo. App. 50, 112 S. W. 709.

539-4 Weiss *v.* Hamilton, 40 Mont. 99, 105 P. 74.

In fraternities, presumption is against partnership. Willoughby *v.* Hildreth (Mo. App.), 167 S. W. 639.

Purpose to share profits is to be deduced from purchase of property in common, in absence of explanation. Fernandez *v.* de la Rosa, 1 Phil. Isl. 671.

539-5 Garbarino *v.* Howard, 43 Colo. 530, 95 P. 933, use of name implying corporation. *Contra* where parties associated together knowingly incur liabilities under given name. Harrill *v.* Davis, 168 Fed. 187, 94 C. C. A. 47.

Furnishing capital for business use by one who is not receiving interest as creditor raises presumption he is partner. Manson *v.* Williams, 213 U. S. 453.

539-6 Flock *v.* Williams, 175 Ill. App. 319 (contract for joint enterprise admissible); Mingus *v.* Bk., 136 Mo. App. 407, 117 S. W. 683; Swofford *v.* Diment, 132 Mo. App. 616, 111 S. W. 1196; Bowen *v.* Epperson, 136 Mo. App. 571, 118 S. W. 528; Townley *v.* Crickenberger, 64 W. Va. 379, 63 S. E. 320.

Agreement may control intention of parties. Cudahy P. Co. *v.* Hibou, 92 Miss. 234, 46 S. 73.

541 Parol proof of failure to comply with contract admissible. Rush *v.* First Nat. Bk. (Tex. Civ.), 160 S. W. 609.

541-8 Chase *v.* Angell, 148 Mich. 1, 108 N. W. 1105. See Norris *v.* Anthony, 193 Mass. 225, 79 N. E. 258; Michigan S. Co. *v.* Paul, 149 Mich. 695, 113 N. W. 310.

541-9 In re Lamon, 171 Fed. 516; Stitt *v.* Co., 98 Minn. 52, 107 N. W. 824. See Butts *v.* Cooper, 152 Ala. 375, 44 S. 616; Norton *v.* Brink, 75 Neb. 566, 106 N. W. 668.

The existence of the partnership and the extent of the interest of the partners may be shown by parol. Burguyn *v.* Jones, 113 Va. 511, 75 S. E. 188, *cit.* Miller *v.* Ferguson, 107 Va. 249, 250-252, 57 S. E. 649.

541-10 *Comp.* Walls *v.* A. N. Union, 141 Ga. 594, 81 S. E. 866.

541-11 Kent *v.* Cobb, 24 Colo. App. 264, 133 P. 424; Metzger *v.* Manlove, 241 Ill. 113, 89 N. E. 249.

542-14 Bartholomew *v.* Shepperd, 41 Tex. Civ. 579, 93 S. W. 218. See Ramsay *v.* Meade, 37 Colo. 465, 86 P. 1018.

542-15 Manson *v.* Williams, 213 U. S. 453; In re Lamon, 171 Fed. 516; Ruggles *v.* Buckley, 158 Fed. 950, 86 C. C. A. 154; Bartleson *v.* Feidler, 149 Fed. 299; Nevers L. Co. *v.* Fields, 151 Ala. 367, 44 S. 81; Letson *v.* Hall, 1 Ala.

App. 619, 55 S. 944; Niroad *v.* Farnell, 11 Cal. App. 767, 106 P. 252; Shaw *v.* Jones, 133 Ga. 446, 66 S. E. 240; P. *v.* Sholem, 244 Ill. 502, 91 N. E. 704; Union Nat. Bk. *v.* Griswold, 141 Ill. App. 464; Briggs *v.* Kohl, 132 Ill. App. 484; Bagley *v.* Co., 205 Mass. 238, 91 N. E. 317; Gay *v.* Ray, 189 Mass. 112, 75 N. E. 138; Beckwith *v.* Mace, 140 Mich. 157, 103 N. W. 559; Diamond R. Co. *v.* Hans, 105 Minn. 249, 117 N. W. 504; Lenahan *v.* Casey, 46 Mont. 367, 128 P. 601; Weiss *v.* Hamilton, 40 Mont. 99, 105 P. 74; Reisman *v.* Silver, 48 Misc. 399, 95 N. Y. S. 483; In re Dusenbery, 106 App. Div. 235, 94 N. Y. S. 107; Gertner *v.* Merker, 104 N. Y. S. 873; Barth *v.* Paul, 50 Misc. 600, 99 N. Y. S. 425; Hoskins *v.* Bk., 48 Tex. Civ. 246, 107 S. W. 598; Mitchell *v.* Jensen, 29 Utah 346, 81 P. 165; Coons *v.* Coons, 106 Va. 572, 56 S. E. 576.

See Am. B. Co. *v.* Ensey, 105 Md. 211, 65 A. 921; Houfek *v.* Co., 75 Neb. 210, 106 N. W. 171; Bartelt *v.* Smith, 145 Wis. 31, 129 N. W. 782.

Acts, conduct and declarations of alleged partners, admissible. Jones *v.* Purnell, 5 Penne. (Del.) 444, 62 A. 149. Ex parte declarations of partner, competent if there is other evidence. Morris *v.* Moon (Tex. Civ.), 120 S. W. 1063.

Circumstantial evidence available to prove partnership. Miller *v.* Laughlin (Tex. Civ.), 147 S. W. 711.

Constant and uniform recognition.—Demain *v.* Huston, 70 W. Va. 306, 73 S. E. 923.

Cases of circumstantial evidence.—Fechteler *v.* Palm, 133 Fed. 462, 66 C. C. A. 336; In re Neasmith, 147 Fed. 160, 77 C. C. A. 402.

In Watson *v.* Farley, 85 Conn. 705, 82 A. 189, "there was evidence tending to show that the funds of that partnership were deposited in the name of L.'s brother, and in part used in connection with the arsenal and armory job with the defendant L's knowledge. The evidence also tended to show that the business of Alfred Farley & Co. had its headquarters in L.'s store; that L. wrote letters connected with its business under letter heads bearing the firm name. It was in evidence, also, that he had visited the work in question in this action, and had given orders and directions with reference to it, and had shown himself familiar with it."

543-17 Paris M. Co. *v.* Hunter, 74 Ark. 615, 86 S. W. 808; Phillips *v.* Mires, 2 Cal. App. 274, 83 P. 300; Blaisdell *v.* Burns, 13 Haw. 507; Clark *v.* Hoffman, 128 Ill. App. 422; Duncan C. Co. *v.* Co., 29 Ky. L. R. 1249, 97 S. W. 43; Howard *v.* Yates, 32 Ky. L. R. 1081, 107 S. W. 738; Michigan S. Co. *v.* Paul, 149 Mich. 695, 113 N. W. 310; Daugherty *v.* Burgess, 118 Mo. App. 557, 94 S. W. 594; Reilly *v.* Gallagher, 108 N. Y. S. 655; Ludowieg *v.* Talcott, 47 Misc. 77, 93 N. Y. S. 621; Bartholomew *v.* Shepperd, 41 Tex. Civ. 579, 93 S. W. 218; Jackson *v.* Haynie, 106 Va. 365, 56 S. E. 148.

See Headley *v.* Rice, 29 Ky. L. R. 1102, 96 S. W. 903; Chlopeck *v.* Chlopeck, 47 Wash. 256, 91 P. 966.

Contract with third person inadmissible.—Phipps *v.* Little, 213 Mass. 414, 100 N. E. 615.

544-18 Jenkins *v.* Jenkins, 81 Ark. 68, 98 S. W. 685; Briggs *v.* Kohl, 132 Ill. App. 484; Boreing *v.* Wilson, 128 Ky. 570, 108 S. W. 914; Bagley *v.* Co., 205 Mass. 238, 91 N. E. 317; Sawyer *v.* Burris, 141 Mo. App. 108, 121 S. W. 321; Morback *v.* Young, 51 Or. 128, 94 P. 35; Bentley *v.* Brossard, 33 Utah 396, 94 P. 736. See Breinig *v.* Sparrow, 39 Ind. App. 702, 80 N. E. 40.

Intent is controlling factor. It is to be ascertained from entire transaction as affected by surrounding circumstances. Beller *v.* Murphy, 139 Mo. App. 663, 123 S. W. 1029.

544-19 Frankel *v.* Hillier, 16 N. D. 387, 113 N. W. 1067.

544-20 McCaskey *v.* Gantt Bros. (Ala.), 64 S. 316; Hamrick *v.* Gilbreath, 164 Ala. 292, 51 S. 336; Rector *v.* Robins, 74 Ark. 437, 86 S. W. 667; Hubbard *v.* Mulligan, 34 Colo. 236, 82 P. 783; Coe *v.* Kutinsky, 82 Conn. 685, 74 A. 1065; Shaw *v.* Jones, 133 Ga. 446, 66 S. E. 240; Davidson *v.* Waxelbaum, 2 Ga. App. 432, 58 S. E. 687; Hohnadel *v.* Ellsworth, 154 Ill. App. 484; Bertenshaw *v.* Laney, 77 Kan. 497, 94 P. 805; Mathis *v.* Bk., 136 Ky. 634, 124 S. W. 876; Graham *v.* Swann, 148 Ky. 608, 147 S. W. 11; Mersick *v.* Bilafsky, 205 Mass. 488, 91 N. E. 889; Willoughby *v.* Hildreth (Mo. App.), 167 S. W. 639; Oil W. S. Co. *v.* Metcalf, 174 Mo. App. 555, 160 S. W. 897; Menzie *v.* Wolff, 120 N. Y. S. 53; Franklin *v.* Hoadley, 115 App. Div. 538, 101 N. Y. S. 374; s. c. 126 App. Div. 687, 111 N. Y. S. 300 (notwithstanding prima facie evi-

dence of existence of partnership); Franklin *v.* Hoadley, 130 N. Y. S. 47; Smith *v.* R., 89 S. C. 415, 71 S. E. 989; Young *v.* Bank (Tex. Civ.), 161 S. W. 436; Miller *v.* Laughlin (Tex. Civ.), 147 S. W. 711; Ex parte Wilson, 84 S. C. 444, 66 S. E. 675; Holt *v.* S., 57 Tex. Cr. 432, 125 S. W. 43. *Comp.* Diamond R. Co. *v.* Hans, 105 Minn. 249, 117 N. W. 504.

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545-21 See Bass *v.* Tolbert, 51 Tex. Civ. 437, 112 S. W. 1077.

545-22 H. Kahn Co. *v.* Co., 80 Ark. 23, 96 S. W. 126. See Flock *v.* Williams, 175 Ill. App. 319; Thomas *v.* Mosher, 128 Ill. App. 479; Daniel *v.* Lance, 29 Pa. Super. 454; Providence M. Co. *v.* Browning, 70 S. C. 148, 49 S. E. 325.

545-23 Swygert Bros. *v.* Bk., 13 Ga. App. 640, 79 S. E. 759.

545-24 Swygert Bros. *v.* Bk., 13 Ga. App. 640, 79 S. E. 759; Davidson *v.* Waxelbaum, 2 Ga. App. 432, 58 S. E. 688; Mersick *v.* Bilafsky, 205 Mass. 488, 91 N. E. 889; Payne *v.* Dexter, 211 Mass. 1, 97 N. E. 77; Van Doorn *v.* Heap, 160 Mich. 199, 125 N. W. 11 (failure to deny allegation in pleading). Revised list of delinquent personalty taxes and sheriff's return of citations issued therefor, evidence of partnership. Hanson *v.* Franklin, 19 N. D. 259, 123 N. W. 386; Nilsson *v.* McDole, 73 Wash. 312, 131 P. 1141.

546-27 Swift & Co. *v.* Co. (Mo. App.), 163 S. W. 538.

547-29 Method of keeping books when person in partnership with stranger may not be shown in disproof of partnership claimed to exist. Cincinnati T. Co. *v.* Garvey (Ky.), 128 S. W. 86.

547-30 Graham *v.* Swann, 148 Ky. 608, 147 S. W. 11; Bell *v.* Daugherty, 30 Ky. L. R. 853, 99 S. W. 922. *Contra*, Grey *v.* Callan, 133 Ia. 500, 110 N. W. 909.

548-32 Culligan *v.* Alpern, 160 Mich. 241, 125 N. W. 20; Bridgman *v.* Winsness, 34 Utah 383, 98 P. 186 (if alleged partner knew of publication).

548-33 Gay *v.* Ray, 189 Mass. 112, 75 N. E. 138; Drewry-H. Co. *v.* McDougall, 145 N. C. 285, 59 S. E. 73; Bridgman *v.* Winsness, 34 Utah 182, 98 P. 186; cit. the text.

549-34 Penn Nat. Bk. *v.* Cromwell, 141 Ill. App. 404.

549-35 Debt owned by individual in whose name business conducted, is only prima facie proof it is his obligation. Kempton *v.* P., 129 Ill. App. 563.

549-37 Plaintiff's knowledge, obtained from one of the alleged partners, may be ascertained on cross-examination. Morris *v.* Moore (Tex. Civ.), 120 S. W. 1063.

550-38 See Mitchell *v.* Jensen, 29 Utah 346, 81 P. 165.

Conduct and admissions of alleged partner, competent to show holding out was by him or with his consent. Ex parte Wilson, 84 S. C. 444, 66 S. E. 675.

550-42 American Cotton Cellar *v.* Union, 138 Ga. 147, 74 S. E. 1081; Folks *v.* Burleson, 177 Mich. 242, 143 N. W. 1120 (advertisement admissible); Bing *v.* Schmidt, 250 Pa. 502, 75 A. 871; Nat. Grocery Co. *v.* Simmons, 63 Wash. 204, 115 P. 260.

550-43 Garlarino *v.* Howard, 48 Colo. 530, 95 P. 923.

551-44 Ex parte Wilson, 84 S. C. 444, 66 S. E. 675.

551-46 Roach *v.* Rector, 93 Ark. 521, 125 S. W. 290 (but a circumstance); Jones *v.* Purnell, 5 Penne. (Del.) 444, 62 A. 149; Phillips *v.* Reynolds, 236 Ill. 119, 86 N. E. 150; McDonald *v.* Cassie Bell, 96 Miss. 87, 104 N. W. 760; Citizens' Nat. Bk. *v.* Mitchell, 24 Okla. 488, 103 P. 720; In re Rosenthal's Est., 227 Pa. 205, 75 A. 1072 (as between partners); Townley *v.* Cockerberger, 64 W. Va. 570, 63 S. E. 320. *Contra*, In re Latham, 171 Fed. 910; Tyson *v.* Bryan, 81 Neb. 303, 120 N. W. 940 (if there is a sharing of gross returns with or without common interest). See Russell *v.* Merrick, 127 App. Div. 703, 111 N. Y. S. 974.

Not conclusive as between parties. Reed *v.* Bunn, 237 Ill. 625, 86 N. E. 1110; Weiss *v.* Hamilton, 40 Mont. 89, 105 P. 74.

551-47 Roach *v.* Rector, 93 Ark. 521, 125 S. W. 290; McDonald *v.* Campbell, 96 Minn. 87, 104 N. W. 760; Spurlock *v.* Wilson, 160 Mo. App. 34, 142 S. W. 364; Morgan *v.* Bk., 150 Mo. App. 407, 117 S. W. 682. See Brotherton *v.* Gilchrist, 144 Mich. 674, 107 N. W. 890.

551-48 Swygert Bros. *v.* Bk., 13 Ga.

App. 640, 79 S. E. 759; Chapin *v.* Cherry (Mo.), 147 S. W. 1084; Townley *v.* Crickenberger, 64 W. Va. 379, 63 S. E. 320.

552-49 See Hurd *v.* Fleck, 34 Colo. 262, 82 P. 485.

553-51 Letson *v.* Hall, 1 Ala. App. 619, 55 S. 944.

Evidence held insufficient. — American Seeding Mach. Co. *v.* Co., 64 Misc. 652, 120 N. Y. S. 592; Blodgett *v.* Inglis, 63 Wash. 513, 115 P. 1043.

Evidence held sufficient.—Vittitow *v.* McKinney, 99 Ark. 602, 139 S. W. 544; Elliot *v.* Swannell, 154 Ill. App. 570; Floore *v.* Co. (Tex. Civ.), 128 S. W. 1152.

554-52 Kent *v.* Cobb, 24 Colo. App. 264, 133 P. 424.

554-55 Vinegar Bend Lumb. Co. *v.* Howard Hooks & Henson (Ala.), 65 S. 172; Caldwell B. & T. Co. *v.* Porter, 52 Or. 318, 95 P. 1.

Affirmative showing of assent to contract without scope of partnership essential. Brown *v.* First Nat. Bk., 35 Okla. 726, 130 P. 140.

Evidence held sufficient.—Blake *v.* Bd., 33 R. I. 464, 82 A. 225.

555-57 Lichenstein *v.* Murphree, 9 Ala. App. 108, 62 So. 444.

556-58 Lichenstein *v.* Murphree, 9 Ala. App. 108, 62 S. 444.

556-59 Presumption against new partners assuming liability for debts already incurred. Freeman *v.* Huttig S. & D. Co. (Tex.), 153 S. W. 122.

Burden on firm to show money borrowed by member not applied for its benefit. Bishop *v.* Bk., 7 Ga. App. 432, 67 S. E. 119.

556-60 Griffing *v.* Dunn, 23 S. D. 141, 120 N. W. 890, sale of good-will and contract not to re-enter business.

556-61 Griffin *v.* Bk., 7 Ga. App. 126, 66 S. E. 382; Ex parte Wilson, 84 S. C. 444, 66 S. E. 675 (immaterial note in hands of payee). See Adams *v.* Long, 114 Ill. App. 277; Bentley *v.* Brossard, 33 Utah 396, 94 P. 736 (distinction between "mining and trading partnerships").

Authority thus to bind partnership noticed judicially. Lichenstein *v.* Murphree, 9 Ala. App. 108, 62 S. 444.

557-62 See Powell H. Co. *v.* Mayer, 110 Mo. App. 14, 83 S. W. 1008; Third Nat. Bk. *v.* Co., 115 Mo. App. 42, 90 S. W. 755 (firm carrying mail, non-trading partnership).

557-63 U. S. Exch. Bk. *v.* Zimmerman, 113 N. Y. S. 33.

558 Must show assent of all partners. Clement Nat. Bk. *v.* Connelly (Vt.), 90 A. 794.

558-64 It is presumed where **it is** usage of firm for one partner, in his name, to borrow money for firm, as between it and lender, members of firm intended he should do so. Progressive L. Co. *v.* Rogers (Tex. Civ.), 120 S. W. 260.

558-65 Presumed an indorsement of guaranty was made in due course of business. Garden C. N. Bk. *v.* Schulman, 89 Kan. 182, 131 P. 559.

558-66 Mock *v.* Stoddard, 177 Fed. 611, 101 C. C. A. 237 (note signed by two individuals); In re Stoddard Bros. L. Co., 169 Fed. 190 (notes signed by individual partners); Owens *v.* First Nat. Bk. (Tex. Civ.), 167 S. W. 798.

Common usage admissible to show scope of business. Shackleford *v.* Williams (Ala.), 62 S. 54.

559-67 Rector *v.* Robins, 74 Ark. 437, 86 S. W. 667, 82 Ark. 424, 102 S. W. 209; Citizens' Bk. *v.* Lowder, 141 Mo. App. 603, 125 S. W. 1180. See Morback *v.* Young, 51 Or. 128, 94 P. 35.

559-68 Fay *v.* Walsh, 190 Mass. 374, 77 N. E. 44; Morback *v.* Young, 51 Or. 128, 94 P. 35; Morbach *v.* Young, 58 Or. 135, 113 P. 22; Brown *v.* Brown (Tex. Civ.), 155 S. W. 551.

Agreement among partners refusing to ratify contract of partner admissible. Chicago, etc. Co. *v.* Butler (Ga.), 78 S. E. 244.

Presumption of correctness of account books, not conclusive. Donaldson *v.* Donaldson, 142 Ill. App. 21.

559-70 Direction to partner not to borrow more money inadmissible in absence of showing of notice to plaintiff. Phipps *v.* Little, 213 Mass. 414, 100 N. E. 615.

560-74 Jenkins *v.* Jenkins, 81 Ark. 68, 98 S. W. 685; Johnson *v.* Hogan, 158 Mich. 635, 123 N. W. 891.

560-77 Allen *v.* Fleck, 54 Tex. Civ. 507, 118 S. W. 176.

560-78 Jenkins *v.* Jenkins, 81 Ark. 68, 98 S. W. 685.

If partnership existed fact title to property acquired by it was in name of one of its members, not conclusive it was his. In re Culver, 176 Fed. 450.

561-81 Marcum's Admr. *v.* Marcum, 154 Ky. 401, 157 S. W. 1101.

561-82 Johnson *v.* Hogan, 158 Mich. 635, 123 N. W. 891, evidence need not be so convincing as express agreement. Intent of parties may be gathered from evidence of their general purpose, nature of business and manner of dealing with land; not essential to show it was bought with money of firm.

562-83 Within the statute.—Burgwyn *v.* Jones, 113 Va. 511, 75 S. E. 188.

562-85 Sawyer *v.* Burris, 141 Mo. App. 108, 121 S. W. 321. See Brotherton *v.* Gilchrist, 144 Mich. 274, 107 N. W. 890.

563-89 American Cotton College *v.* Union, 138 Ga. 147, 74 S. E. 1084.

563-90 See Henderson *v.* Emerson Co., 105 Ark. 697, 151 S. W. 251.

564-91 Union N. Bk. *v.* Dean, 154 App. Div. 869, 139 N. Y. S. 835.

Dissolution must be shown by party alleging it. Osius *v.* Davis, 156 Fed. 569, 84 C. C. A. 335; Watkins *v.* Delahunty, 133 App. Div. 422, 117 N. Y. S. 885.

564-92 See Lee *v.* Kirby, 80 Ark. 366, 97 S. W. 298.

564-94 Straus *v.* Sparrow, 148 N. C. 309, 62 S. E. 308. See Brinson *v.* Brinson, 3 Ga. App. 223, 59 S. E. 711.

Evidence held insufficient.—Hevk *v.* Collins, 231 Pa. 357, 80 A. 535.

Actual notice to selling and collecting agent may be shown. Straus *v.* Sparrow, 148 N. C. 309, 62 S. E. 308, *dist.* Cowan *v.* Roberts, 133 N. C. 629, 45 S. E. 954.

565-97 City directory, competent on extent of notice given of dissolution of partnership admitted to have existed. Culligan *v.* Alpern, 160 Mich. 241, 125 N. W. 20.

565-1 Watkins *v.* Delahunty, 133 App. Div. 422, 117 N. Y. S. 885.

566-3 Construction of agreement containing ambiguous terms, shown. Causten *v.* Barnette, 49 Wash. 659, 96 P. 225.

Presumption of equal interest. — Demain *v.* Huston, 70 W. Va. 306, 73 S. E. 923.

566-4 See supra, "Parol Evidence," 474-7.

568-11 But this rule does not apply where the partners are not on an equal footing. Hirshberg *v.* Ciconett, 146 Ky. 642, 143 S. W. 10.

568-12 Hirshberg *v.* Ciconett, 146 Ky. 642, 143 S. W. 10.

569-16 See Sandford *v.* Embry, 151 Fed. 977, 81 C. C. A. 167.

571-26 Previous profits, not provable in action for accounting. Hatzfeld *v.* Walsh, 55 Tex. Civ. 573, 120 S. W. 525.

572-29 Reid *v.* Freed, 100 Miss. 48, 56 S. 278.

Accuracy of accounts must be shown by managing partner who kept them. Lewelling *v.* Lewelling, 110 Va. 761, 67 S. E. 362.

Parol evidence.—In action by one partner to recover net share of profits parol testimony of general manager as to items entered in firm books is admissible if his knowledge of them was independent of the books, though they were in court. But knowledge is essential. Hatzfeld *v.* Walsh, 55 Tex. Civ. 573, 120 S. W. 525.

Burden on executor where partner did not keep accurate accounts to show application of firm funds to firm debts. Marcum's Admr. *v.* Marcum, 154 Ky. 401, 157 S. W. 1101.

572-30 Keller *v.* Keller, 154 App. Div. 919, 139 N. Y. S. 87; Cronk *v.* Crandall, 137 App. Div. 440, 121 N. Y. S. 805; McIntyre *v.* Johnston, 63 Wash. 323, 115 P. 509.

572-31 Holden *v.* Thurber (R. I.), 72 A. 720, unaided memory of party who claims to have paid may not be sufficient proof.

572-33 Adams *v.* Atkison, 158 Ala. 225, 48 S. 346. *Contra* if party charged active manager of business and received money belonging to firm after dissolution. Hubbard *v.* Ferry, 141 Wis. 17, 123 N. W. 142.

573-35 See Burrows *v.* Williams, 52 Wash. 278, 100 P. 340.

Value of property disposed of by surviving partner should be established by what he received for it rather than its market value at time of death of decedent. Kirkwood *v.* Smith, 132 App. Div. 758, 117 N. Y. S. 686.

Presumption as to profits and division of capital.—Regardless of inequality of contribution, skill or fidelity, it is presumed profits are to be equally divided; otherwise as to division of capital. Johnson *v.* Jackson, 130 Ky. 751, 114 S. W. 260.

573-37 Damages to individual partners.—If partnership merely nominal and formed for special non-commercial

purpose, in action by it to recover for breach of contract for service damages sustained by its individual members may be proved under proper pleading. Cumberland T. & T. Co. *v.* Co. (Ky.), 119 S. W. 793.

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582-4 See Ex parte Samstag, 133 O. G. 1188; Ex parte Green, 130 O. G. 299.

583-5 See In re Booth, 128 O. G. 1291; In re Setter, 126 O. G. 3421; Siebert *v.* Bloomberg, 124 O. G. 628.

583-6 See Ex parte Dilg, 132 O. G. 1837; Ex parte Midgley, 127 O. G. 1577; Ex parte Myers, 123 O. G. 1663; Ex parte Wentzel, 131 O. G. 941; Ex parte Westinghouse, 131 O. G. 1420; Ex parte McKee, 130 O. G. 980; Cutler *v.* Leonard, 136 O. G. 438; Ex parte Tribon, 127 O. G. 2815; Ex parte Hess, 126 O. G. 3041.

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584-11 See In re U. S. Stand. *v.* Co., 130 O. G. 1486; Ex parte Newman, 135 O. G. 1122.

585-14 Distinction between public use and interference proceedings, as to using testimony taken in former on hearing in latter. Ex parte Wenzelman, 132 O. G. 232.

585-15 Richards *v.* Meissner, 162 Fed. 485, after patent granted in interence proceedings it cannot be shown in such suit it is void for anticipation.

587-21 Brenizer *v.* Robinson, 41 App. Cas. (D. C.) 560.

Must establish case beyond a reasonable doubt.—Brenizer *v.* Robinson, 41 App. Cas. (D. C.) 560.

588-25 Field *v.* Coleman, 131 O. G. 1686; Dukesmith *v.* Carrington, 125 O. G. 348.

589-27 Daggett *v.* Kaufmann, 33 App. Cas. (D. C.) 450 (the burden heavier if rulings of patent office uniformly adverse); Mark *v.* Greenawalt, 32 App. Cas. (D. C.) 253; Braunstein *v.* Holmes, 30 App. Cas. (D. C.) 328; Sobey *v.* Holselaw, 28 App. Cas (D. C.) 65; Orcutt *v.* McDonald, 27 App. Cas. (D. C.) 228; Lowrie *v.* Taylor, 27 App. Cas. (D. C.) 522; Smith *v.* Foley, 136 O. G. 850; Duff *v.* Latshaw, 31 App. Cas. (D. C.) 255, 136 O. G. 658; Durker *v.* Mirquist, 136 O. G. 229; Gibbons *v.* Peller, 28 App. Cas. (D. C.) 530. *Comp.* Larkin *v.* Richardson, 28 App. Cas. (D. C.) 471.

589-28 Western E. Co. *v.* Fowler, 177 Fed. 224, 101 C. C. A. 394; Henderson *v.* Gilpin, 39 App. Cas. (D. C.) 428; Woodbridge *v.* Winship, 33 App. Cas. (D. C.) 490; Horton *v.* Zimmer, 32 App. Cas. (D. C.) 217 (burden heavy); Schmidt *v.* Clark, 32 App. Cas. (D. C.) 290; Marder *v.* Dey, 32 App. Cas. (D. C.) 593; McKillip *v.* Fetzer, 31 App. Cas. (D. C.) 586; Weeks *v.* Dale, 30 App. Cas. (D. C.) 498; Lewis *v.* Cronemeyer, 29 App. Cas. (D. C.) 174; Richards *v.* Burkholder, 29 App. Cas. (D. C.) 485; Shuman *v.* Beall, 27 App. Cas. (D. C.) 324; French *v.* Halcomb, 26 App. Cas. (D. C.) 307; McKnight *v.* Pohle, 30 App. Cas. (D. C.) 92; Rolfe *v.* Hoffman, 26 App. Cas. (D. C.) 336; Kreag *v.* Geen, 124 O. G. 1208.

590-29 Jansson *v.* Larson, 30 App. Cas. (D. C.) 203.

590-31 Bolin *v.* Slingluff, 39 App. Cas. (D. C.) 134; Cutler *v.* Leonard, 31 App. Cas. (D. C.) 297, 136 O. G. 438; De Ferranti *v.* Lyndmark, 30 App. Cas. (D. C.) 417, (*foll.* Paul *v.* Hess, 24 App. Cas. (D. C.) 462); Fenner *v.* Blake, 30 App. Cas. (D. C.) 507; Bliss *v.* McElroy, 29 App. Cas. (D. C.) 120; Andrews *v.* Nilson, 27 App. Cas. (D. C.) 451; Laas *v.* Scott, 26 App. Cas. (D C.) 354.

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591-33 *Comp.* In re LaCroix, 30 App. Cas. (D. C.) 299.

591-34 Howell *v.* Hess, 30 App. Cas. (D. C.) 194; Duryea *v.* Rice, 28 App. Cas. (D. C.) 423; Lotz *v.* Kenney, 31 App. Cas. (D. C.) 205, 135 O. G. 1801.

591-35 Lotz *v.* Kenney, 31 App. Cas. (D. C.) 205, 135 O. G. 1801.

592-37 McArthur *v.* Mygatt, 31 App. Cas. (D. C.) 514, 136 O. G. 661, s. c. 132 O. G. 1585; Parkes *v.* Lewis,

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Proof of work on machines not embodying invention in issue and not necessary for development of it, not sufficient. Kilbourn *v.* Hirner, 124 O. G. 1841.

Proof of property, competent but insufficient.—Woods *v.* Poor, 29 App. Cas. (D. C.) 397.

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592-38 Goolman *v.* Hobart, 31 App. Cas. (D. C.) 286; Wickers *v.* McKee, 29 App. Cas. (D. C.) 4; Wickers *v.* Upham, 29 App. Cas. (D. C.) 30; Munster *v.* Ashworth, 29 App. Cas. (D. C.) 84; Robinson *v.* McCormick, 29 App. Cas. (D. C.) 98; Gibbons *v.* Peller, 28 App. Cas. (D. C.) 530; Fowler *v.* Boyce, 27 App. Cas. (D. C.) 48; Fowler *v.* Dyson, 27 App. Cas. (D. C.) 52; Bourn *v.* Hill, 27 App. Cas. (D. C.) 291; Sherwood *v.* Drewson, 29 App. Cas. (D. C.) 161 (*foll.* Blackford *v.* Wilder, 21 App. Cas. (D. C.) 1, 104 O. G. 578); Burson *v.* Vogel, 29 App. Cas. (D. C.) 388 (*appr.* Mergenthaler *v.* Scudder, 11 App. Cas. (D. C.) 264); Howell *v.* Hess, 30 App. Cas. (D. C.) 194. *Comp.* O'Connell *v.* Schmidt, 27 App. Cas. (D. C.) 77. See Peirce *v.* Hiss, 33 App. Cas. (D. C.) 1; Martin *v.* Rowley, 33 App. Cas. (D. C.) 487.

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593-39 Henry *v.* Doble, 27 App. Cas. (D. C.) 33, *aff.* 122 O. G. 1308.

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593-40 Every presumption in favor of inventor who delays filing application until invention perfected; but it cannot withstand delay of ten years. Kinsman *v.* Kintner, 31 App. Cas. (D. C.) 293.

Originality must be shown by junior party if model made under direction of senior. Duff *v.* Latshaw, 31 App. Cas. (D. C.) 235.

593-41 See Richards *v.* Burkholder, 128 O. G. 2529; Horsole *v.* Darwin, 132 O. G. 842.

593-42 Sydeman *v.* Thoma, 32 App. Cas. (D. C.) 362; Gordon *v.* Wentworth, 130 O. G. 2065. See Rolfe *v.* Kaisling, 32 App. Cas. (D. C.) 582.

Practicability.—See Marconi *v.* Shoemaker, 131 O. G. 1939.

594-43 Sydeman *v.* Thoma, 32 App. Cas. (D. C.) 362; Bliss *v.* McElroy, 29 App. Cas. (D. C.) 124, *aff.* 122 O. G. 2687; Robinson *v.* Thresher, 28 App. Cas. (D. C.) 22. *Comp.* Seckerger *v.* Russel, 26 App. Cas. (D. C.) 344.

Apparent lack of diligence, explainable. Rolfe *v.* Kaisling, 32 App. Cas. (D. C.) 582; MacArthur *v.* Mygatt, 31 App. Cas. (D. C.) 514.

594-45 Peters *v.* Pike, 29 App. Cas. (D. C.) 59. See Osterbank *v.* Parkin, 31 App. Cas. (D. C.) 214; Steinmetz *v.* Thomas, 31 App. Cas. (D. C.) 574; Kinsman *v.* Strohm, 31 App. Cas. (D. C.) 581; Alexander *v.* Blackman, 29 App. Cas. (D. C.) 541.

Disclosure must be proved beyond reasonable doubt. Anderson *v.* Wells, 27 App. Cas. (D. C.) 115.

595-46 See Robinson *v.* McCormick, 29 App. Cas. (D. C.) 98, 128 O. G. 3289; Gregg *v.* Gray, 28 App. Cas. (D. C.) 437, 127 O. G. 1781.

595-47 Rolfe *v.* Kaisling, 32 App. Cas. (D. C.) 582.

595-48 Schmidt *v.* Clark, 32 App. Cas. (D. C.) 290. See Marconi *v.* Shoemaker, 131 O. G. 1939; Whitman *v.* King, 35 App. Cas. (D. C.) 449.

596-49 Hopkins *v.* Peters *v.* Dement, 134 O. G. 1050; Martin *v.* Goodman, 134 O. G. 1297.

Taking testimony as to inoperativeness not proper prior to determination of motion to dissolve. Barber *v.* Wood, 127 O. G. 1991. *Comp.* Clement *v.* Brown, 126 O. G. 2189.

596-52 See Wickers *v.* Wenniwinn, 129 O. G. 2501.

599-57 Latshaw *v.* Duff *v.* Kaplan, 130 O. G. 980; Newell *v.* Clifford *v.* Rose, 125 O. G. 665. See Cutler *v.* Hall, 135 O. G. 449.

Reopening to print testimony, refused. Parker *v.* Corkhill, 130 O. G. 2067.

601-61 Dunbar *v.* Schellenger, 29 App. Cas. (D. C.) 129, 128 O. G. 2837, *aff.* 121 O. G. 2663. See Dunbar *v.* Schellenger, 125 O. G. 348.

601-62 Rule amended. — 129 O. G. 2078.

Discretion of examiner of interferences, not reviewable except for clear abuse. Keith *v.* Lundquist, 128 O. G. 2835; Lowry *v.* Ruping, 135 O. G. 652.

604-70 Rhodes *v.* Rhodes, 132 O. G. 680.

605-71 Subsequent duces tecum not authorized. In re Outcault, 149 Fed. 228.

Patent office no power to compel attendance of witnesses nor enforce production of evidence. Bay State B. Co. *v.* Co., 127 O. G. 1580.

605-72 Alberts B. Mill Co. *v.* Forrest, 131 O. G. 1419; Peak *v.* Bush, 129 O. G. 1268.

605-73 See Lacroix *v.* Tyberg, 149 Fed. 782.

606-74 *Comp.* Am. S. Co. *v.* Wks., 31 App. Cas. (D. C.) 304. See Munster *v.* Ashworth, 29 App. Cas. (D. C.) 84.

606-76 Dyson *v.* Land, 133 O. G. 1679, 130 id. 1690 (*foll.* Andrews *v.* Nilson, 111 O. G. 1038, and citing cases); Jansson *v.* Larsson, 30 App. Cas. (D. C.) 203.

607-78 Smith *v.* Emerson, 133 O. G. 1433; Johnston *v.* Ereckson, 131 O. G. 2419; Floyd *v.* Rolfing, 133 O. G. 992.

Amendment after testimony taken. Green *v.* Farley, 132 O. G. 235; Smith *v.* Ingram, 131 O. G. 2420.

608-80 See Marconi *v.* Shoemaker, 131 O. G. 1939.

608-81 Beall *v.* Lyon, 127 O. G. 3215. *Comp.* Corey *v.* Eiseman, 126 O. G. 3421.

Rule amended to read "upon motion duly made and granted." 129 O. G. 2077.

Such testimony competent only to discredit witness. Hewitt *v.* Weintraub, 134 O. G. 1561.

Former testimony cannot be used in equitable suit to obtain patent unless foundation laid. Dover *v.* Greenwood, 177 Fed. 946.

610-85 Kinsman *v.* Strohm, 125 O. G. 1699. See Gould *v.* Barnard, 132 O. G. 1071.

Evidence in chief not received in rebuttal. Woodbridge *v.* Winship, 33 App. Cas. (D. C.) 490.

610-86 Sandage *v.* Dean, 130 O. G. 981. See Gold *v.* Gold, 133 O. G. 993; Dyson *v.* Land, 130 O. G. 1690.

611-87 Wide range allowable on cross-examination of party to proceedings. Jansson *v.* Larsson, 132 O. G. 447, *aff.* 30 App. Cas. (D. C.) 203.

Where cross-examination suspended, because of illness of witness, counsel refusing consent to postponement, direct examination should be excluded. Munster *v.* Ashworth, 29 App. Cas. (D. C.) 84, 128 O. G. 2089, *aff.* 128 O. G. 2085.

611-89 Gueniffet *v.* Wictorsohn, 30 App. Cas. (D. C.) 432; Fowler *v.* McBerty, 27 App. Cas. (D. C.) 41; Fowler *v.* Boyce, 27 App. Cas. (D. C.) 48; Fowler *v.* Boyce, 27 App. Cas. (D. C.) 55; Neth *v.* Ohmer, 27 App. Cas. (D. C.) 319; Lowrie *v.* Taylor, 27 App. Cas. (D. C.) 522; Phillips *v.* Sensenich, 132 O. G. 677; Johnson *v.* Mueser, 29 App. Cas. (D. C.) 61; Dixon *v.* Graves, 127 O. G. 1993. And see Dunbar *v.* Schellenberger, 125 O. G. 348; Weintraub *v.* Hewitt, 126 O. G. 2589; Clement *v.* Brownie, 126 O. G. 2589, 126 O. G. 2189.

612-91 Hamm *v.* Black, 132 O. G. 841.

Claim of joint invention, contestible. Lemp *v.* Randall, 33 App. Cas. (D. C.) 430.

612-93 Sufficiency of testimony to establish disclosure. Weeks *v.* Dale, 30 App. Cas. (D. C.) 498, 135 O. G. 218.

Testimony based solely on memory not sufficient.—Smith *v.* Foley, 136 O. G. 847, 850.

612-94 Parkes *v.* Lewis, 28 App. Cas. (D. C.) 1; Phillips *v.* Seuseuich, 132 O. G. 677; Burson *v.* Vogel, 29 App. Cas. (D. C.) 388, *dist.* Hammond *v.* Basch, 24 App. Cas. (D. C.) 469.

613-99 Goolman *v.* Hobart, 31 App. Cas. (D. C.) 286, 135 O. G. 1123.

Circumstantial evidence given controlling effect. Duff *v.* Latshaw, 31 App. Cas. (D. C.) 235.

614-1 *Comp.* Ebersole *v.* Durkin, 132 O. G. 842; Bay State B. Co. *v.* Co., 127 O. G. 1580.

Drawings made after all testimony taken, inadmissible to show conception by person who made them. Thompson *v.* Smith, 33 App. Cas. (D. C.) 284.

614-3 See Bossart *v.* Pohl, 31 App. Cas. (D. C.) 218, 135 O. G. 453.

615-5 Failure to produce original mold in which article cast not fatal to application for process patent. Saunders *v.* Miller, 33 App. Cas. (D. C.) 456.

615-6 Ex parte tests. Marconi *v.* Shoemaker, 131 O. G. 1939. Result of secret tests made by expert of device of other party may be proved. If devices used to make them were dismantled without giving such party opportunity to make tests burden of showing those made were fair is on party claiming benefit of them. Mark *v.* Greenawalt, 32 App. Cas. (D. C.) 253.

615-8 See In re Garrett, 27 App. Cas. (D. C.) 19. *Comp.* Robinson *v.* Thresher, 123 O. G. 2627; Gordon *v.* Wentworth, 130 O. G. 2065.

615-9 Pym *v.* Hadaway, 129 O. G. 480.

615-10 Dunbar *v.* Schellenger, 125 O. G. 348; Goolman *v.* Hobart, 31 App. Cas. (D. C.) 286, 135 O. G. 1123.

616-11 Peters *v.* Pike, 33 App. Cas. (D. C.) 59; Thompson *v.* Smith, 33 App. Cas. (D. C.) 284; Durkee *v.* Minquist, 136 O. G. 229; Dunbar *v.* Schellenger, 125 O. G. 348; Burson *v.* Vogel, 125 O. G. 2361; French *v.* Halcomb, 26 App. Cas. (D. C.) 307. *Comp.* Turnbull *v.* Curtis, 27 App. Cas. (D. C.) 567; Gibbons *v.* Peller, 28 App. Cas. (D. C.) 530.

Rule does not apply where one inventor testifies deceased person was joint inventor. Lemp *v.* Randall, 33 App. Cas. (D. C.) 430.

616-12 Sherwood *v.* Drewsen, 124 O. G. 1205.

618-13 Wickers *v.* McKee, 29 App. Cas. (D. C.) 4; Taylor *v.* Lowrie, 27 App. Cas. (D. C.) 527.

618-16 **Circumstantial evidence** may be potent in determining time invention reduced to practice; long delay in using it or in applying for patent are relevant to show alleged reduction to practice was merely an abandoned experiment. Daggett *v.* Kaufman, 33 App. Cas. (D. C.) 450; Nelson *v.* Faucette, 33 App. Cas. (D. C.) 217.

Rule as to former adjudication applies in proceedings before commissioner, and every question that might have been determined is foreclosed. Blumenthal *v.* Bigbie, 33 App. Cas. (D. C.) 209.

618-17 Kilbourn *v.* Hirner, 29 App. Cas. (D. C.) 54; Johnson *v.* Muesser, 29 App. Cas. (D. C.) 61; Bauer *v.* Crone, 26 App. Cas. (D. C.) 352; Ries *v.* Kirkegaard, 30 App. Cas. (D. C.) 199; Parkes *v.* Lewis, 28 App. Cas. (D. C.) 1; Bourn *v.* Hill, 27 App. Cas. (D. C.) 291; Turnbull *v.* Curtis, 27 App. Cas. (D. C.) 567.

619-18 In re Clunies, 28 App. Cas. (D. C.) 18. See also Wickers *v.* McKee, 29 App. Cas. (D. C.) 4. *Comp.* In re Schraubstadter, 26 App. Cas. (D. C.) 331.

619-19 See In re Wickers, 29 App. Cas. (D. C.) 71.

Suits under §4915.—Richards *v.* Meissner, 162 Fed. 485 (striking out such evidence taken under decision in same cause in 155 Fed. 135).

Novelty must be matter of doubt in order that fact device may have displaced others by reason of manifest superiority may be material. Millett *v.* Allen, 27 App. Cas. (D. C.) 70.

Extension of English patent.—See In re Johnson's Patent (1904), 1 Ch. Div. 114, for statement of questions involved.

620-20 Heinz Co. *v.* Cohn, 207 Fed. 547, 125 C. C. A. 197; Hess B. Co. *v.* Co., 177 Fed. 135; Campbell *v.* Co., 175 Fed. 115; Perfection C. Co. *v.* Mfg. Co., id. 120 (the presumption goes only to the question of priority); Corrington *v.* Co., 173 Fed. 69; Stafford *v.* Morris, 161 Fed. 113. *Comp.* Consolidated R. & E. Co. *v.* Co., 161 Fed. 343, 88 C. C. A. 355; Quincey M. Co. *v.* Krause, 151 Fed. 1012, 81 C. C. A. 200. See United S. & G. Co. *v.* Beattie, 149 Fed. 736, 79 C. C. A. 442.

620-22 Concurrence of examiners in error of patentee in stating prior

condition of art weakens presumption. Pope Mfg. Co. *v.* Arnold, 177 Fed. 419.

620-23 Heinz Co. *v.* Cohn, 207 Fed. 547, 125 C. C. A. 197; Corrington *v.* Co., 173 Fed. 69; Keasbey & M. Co. *v.* Co., 143 Fed. 490, 74 C. C. A. 510; Consolidated R. & E. Co. *v.* Co., 161 Fed. 343, 88 C. C. A. 355; Stafford *v.* Morris, 161 Fed. 113.

621-24 Gillette *v.* Sendelbach, 146 Fed. 758, 77 C. C. A. 55. *Comp.* Laas *v.* Scott, 161 Fed. 122.

622-29 **Testimony that another was real inventor** if not such as to satisfy court beyond reasonable doubt as to its accuracy should be rejected. Protector Last R. E. Co. *v.* Pell, 204 Fed. 453.

623-35 Failure to declare interference, material where applications for patents in question pending at same time and before same examiner. Beckwith *v.* Co., 174 Fed. 1001.

623-36 Baker *v.* Co., 146 Fed. 744, 77 C. C. A. 234; Stafford *v.* Morris, 161 Fed. 113, *cit.* Am. S. P. Co. *v.* Co., 157 Fed. 660, 87 C. C. A. 260; New York B. Co. *v.* Co., 137 U. S. 445.

624-38 *Comp.* National C. Co. *v.* Stolts, 174 Fed. 413, 98 C. C. A. 617.

624-39 See Am. S. P. Co. *v.* Co., 157 Fed. 660, 86 C. C. A. 260.

624-40 International M. Co. *v.* Sievert, 213 Fed. 225 (C. C. A.); Bonsall *v.* Co., 161 Fed. 564; Thomas *v.* R. Co., 149 Fed. 753, 79 C. C. A. 89. See National C. Co. *v.* Stoltz, 174 Fed. 413, 98 C. C. A. 617.

625-43 Interchange of publications, close commercial relations and personal intercourse between individuals in the United States and in England, noticed. Pope Mfg. Co. *v.* Arnold, 177 Fed. 419.

625-44 Overend *v.* Co., 19 Ont. L. R. 642; In re Fayetteville, etc. Co., 197 Fed. 180; Superior D. Co. *v.* Co., 160 Fed. 504; Leona G. Co. *v.* Jenks, 160 Fed. 693; Robinson *v.* Co., 150 Fed. 331, 80 C. C. A. 127; Los Angeles-A. O. Co. *v.* Co., 143 Fed. 880, 75 C. C. A. 88; Owen *v.* Co., 147 Ia. 393, 121 N. W. 1076; Virtue *v.* Mfg. Co., 123 Minn. 17, 142 N. W. 930.

626-45 Westinghouse E. & Mfg. Co. *v.* R. Co., 172 Fed. 371, 97 C. C. A. 69.

626-50 Stafford *v.* Morris, 161 Fed. 113; N. Y. B. & P. Co. *v.* Sierer, 149 Fed. 756; West D. Co. *v.* Frank, 149 Fed. 423, 79 C. C. A. 359.

627-51 Gilbert Mfg. Co. *v.* Co., 197 Fed. 56; Connors *v.* Ormsby, 148 Fed. 13, 78 C. C. A. 181.

627-52 Am. S. P. Co. *v.* Co., 157 Fed. 660, 87 C. C. A. 260; Byron Jackson Iron Wks. *v.* Wks., 197 Fed. 44.

627-54 Hancock *v.* Boyd, 170 Fed. 600.

627-56 Clark *v.* Co., 160 Fed. 512.

627-57 Overend *v.* Co., 19 Ont. L. R. 642; Beckwith *v.* Co., 174 Fed. 1001; Am. S., etc. Co. *v.* Co., 160 Fed. 125.

Must prove the priority strictly.—Phoenix Knitting Wks. *v.* Rich, 194 Fed. 721.

628-60 Moline P. Co. *v.* Plow Co., 212 Fed. 727 (C. C. A.); Gamewell, etc. Co. *v.* Commission, 199 Fed. 182; San Francisco Cornice Co. *v.* Beyrle, 195 Fed. 516, 115 C. C. A. 426; Victor T. M. Co. *v.* Co., 177 Fed. 248 (doubt resolved in favor of complainant). See Western T. Co. *v.* Rainear, 156 Fed. 49.

629-62 Moline Plow Co. *v.* Plow Co., 212 Fed. 727 (C. C. A.); Elec., etc. Co. *v.* Battery Co., 211 Fed. 154; Kryptok Co. *v.* Lens Co., 207 Fed. 85; Phoenix Knitting Wks. *v.* Rich, 194 Fed. 708; Corrington *v.* Air Brake Co., 178 Fed. 711, 103 C. C. A. 479; Beckwith *v.* Co., supra; Buser *v.* Co., 151 Fed. 478, 81 C. C. A. 16; United S. & C. Co. *v.* Beattie, 149 Fed. 736, 79 C. C. A. 442.

Evidence held insufficient.—Moyer *v.* Co., 178 Fed. 830, 102 C. C. A. 504.

Evidence must be clear and satisfactory. Green F. S. Co. *v.* S. Co., 205 Fed. 745; Sipp E. & M. Co. *v.* Co., 142 Fed. 149, 73 C. C. A. 367.

630-66 Stuart *v.* Co., 149 Fed. 748, 79 C. C. A. 60.

630-67 New England M. Co. *v.* Co., 150 Fed. 131, 80 C. C. A. 85; Columbus C. Co. *v.* Co., 148 Fed. 622, 78 C. C. A. 394.

630-69 Where prior use is shown, burden rests upon patentee to establish validity. Virtue *v.* Mfg. Co., 123 Minn. 17, 142 N. W. 930.

631-70 Am. C. Co. *v.* Mills, 149 Fed. 743, 79 C. C. A. 449.

631-71 Certain and convincing evidence, required. Single Tube, etc. Co. *v.* Wks., 174 Fed. 50.

631-72 Interurban R. & Terminal Co. *v.* Mfg. Co., 186 Fed. 166, 108 C. C. A. 298.

632-75 W. W. Sly Mfg. Co. *v.* Russell & Co., 189 Fed. 61, 110 C. C. A. 625; Victor T. M. Co. *v.* Co., 177 Fed.

248; International T. Mfg. Co. *v.* Co., 171 Fed. 651, 96 C. C. A. 395; Saunders *v.* Miller, 33 App. Cas. (D. C.) 456 (proof must be clear and convincing).

632-76 Internat. T. Mfg. Co. *v.* Co., supra; Saunders *v.* Miller, 33 App. Cas. (D. C.) 456.

Withdrawal of first application, with consent of patent office and filing second one, not a bar to proof of actual date of invention; second application regarded as continuance of first. Corrington *v.* Co., 173 Fed. 69.

632-78 Washburne *v.* Co., 197 Fed. 552; B. F. Avery *v.* Wks., 148 Fed. 214, 78 C. C. A. 110.

632-79 Victor T. M. Co. *v.* Co., 177 Fed. 248; Saunders *v.* Miller, 33 App. Cas. (D. C.) 456.

633-80 Louden M. Co. *v.* Co., 148 Fed. 686, 78 C. C. A. 548. See Am. S., etc. Co. *v.* Co., 160 Fed. 125; Hotel, etc. Co. *v.* Co., 160 Fed. 467, 87 C. C. A. 451; Am., etc. Mfg. Co. *v.* Co., 161 Fed. 556; Am. G. T. Co. *v.* Choate, 159 Fed. 140, 86 C. C. A. 330; Houghton *v.* Wks., 153 Fed. 740, 83 C. C. A. 84.

Book in plaintiff's possession admissible to show knowledge of prior art. Bassett *v.* Const. Co., 213 Fed. 810 (C. C. A.).

633-82 Stafford *v.* Morris, 161 Fed. 113; O'Rourke, etc. C. Co. *v.* McMullen, 160 Fed. 933, 88 C. C. A. 115.

634-84 Ehrlich *v.* Ihlee, 5 Rep. Pat. Cas. (Eng.) 198; Lucas *v.* Miller, 2 Rep. Pat. Cas. (Eng.) 155 (better evidence of utility of invention cannot be had than defendant's attempt to infringe it); Overend *v.* Co., 19 Ont. L. R. (Can.) 642 (evidence of large demand, cogent); Am. L. M. Mfg. Co. *v.* Co., 174 Fed. 415, 98 C. C. A. 612; St. Louis, etc. M. Co. *v.* Co., 156 Fed. 574, 84 C. C. A. 340.

Converse of rule has force in determining scope of patent. National M. C. Co. *v.* Co., 171 Fed. 847, 96 C. C. A. 515.

634-85 See Consol. R. T. Co. *v.* Co., 151 Fed. 237, 80 C. C. A. 589; Comptograph Co. *v.* Co., 145 Fed. 331, 76 C. C. A. 205.

635-86 Beckwith *v.* Co., 174 Fed. 1001; Bullock E. Mfg. Co. *v.* Co., 149 Fed. 409, 79 C. C. A. 229; Voigtmann *v.* Co., 148 Fed. 848, 78 C. C. A. 538; Kuhn *v.* Co., 157 Fed. 235; Wills *v.* Co., 147 Fed. 525. See Bonsall *v.* Co., 161 Fed. 564; Fielding *v.* Co., 154 Fed. 377, 83 C. C. A. 331.

Successful results.—See Am. G. Co. *v.* Co., 151 Fed. 505, 81 C. C. A. 139.

636-89 Overend *v.* Co., 19 Ont. L. R. (Can.) 642; Hancock *v.* Boyd, 170 Fed. 600.

637-90 See In re Garrett, 27 App. Cas. (D. C.) 19; In re Thurston, 26 App. Cas. (D. C.) 315.

638-93 Cook Co. *v.* Co., 145 Fed. 348, 76 C. C. A. 222.

638-95 Clark *v.* Co., 160 Fed. 512.

639-97 Overend *v.* Co., 19 Ont. L. R. (Can.) 642.

Cross-examination of complainant's expert by whom prima facie case made, cannot cover defensive matter concerning question of novelty. Aeolian Co. *v.* Co., 157 Fed. 320.

Expert testimony very desirable to explain patents introduced to show prior state of art. General E. Co. *v.* Co., 174 Fed. 1013.

639-99 Proof of utility, purposes for which admissible. Republic Rubber Co. *v.* Tire Co., 212 Fed. 170 (C. C. A.).

639-2 Stillwell *v.* McPherson, 207 Fed. 837; Electric C. & S. Co. *v.* Co., 171 Fed. 83, 96 C. C. A. 187 (persuasive where defects in prior inventions overcome).

640-4 See Am. Caramel Co. *v.* Co., 201 Fed. 363.

640-7 Am. W. M. Co. *v.* Co., 151 Fed. 576, 81 C. C. A. 120.

641-8 Clark *v.* Co., 149 Fed. 1001, 79 C. C. A. 511.

641-11 Kryptok Co. *v.* Lens Co., 207 Fed. 85; Columbus C. Co. *v.* Co., 118 Fed. 622, 78 C. C. A. 394, *foll.* Barbed Wire Patent, 143 U. S. 275; Bauer *v.* Co., 151 Fed. 478, 81 C. C. A. 16.

642-12 Hopewell *v.* Sup. Co., 205 Fed. 757; Green *v.* Shoe Co. *v.* Shoe Co., 205 Fed. 745; De Laski, etc. Tire Co. *v.* Rubber Co., 203 Fed. 980, 122 C. C. A. 286; United S. & C. Co. *v.* Beattie, 149 Fed. 736, 79 C. C. A. 442. See Hopewell *v.* Supply Co., 205 Fed. 757. Must be supported by visible, concrete contemporaneous proof.—Hopewell *v.* Sup. Co., 205 Fed. 757; De Laski, etc. Tire Co. *v.* Rubber Co., 203 Fed. 980, 122 C. C. A. 286. See Emerson & Norris Co. *v.* Simpson Bros., 202 Fed. 747, 121 C. C. A. 113.

642-15 See Williams *v.* R. Co., 161 Fed. 571.

642-16 Hillard *v.* Co., 159 Fed. 419, 86 C. C. A. 469; Westinghouse, etc. Mfg. Co. *v.* Co., 156 Fed. 582, 84 C.

C. A. 348. See Pope Mfg. Co. *v.* Arnold, 177 Fed. 419.

644-20 Bell *v.* MacKinnon, 149 Fed. 205, 79 C. C. A. 163.

644-21 See Beckwith *v.* Co., 74 Fed. 1001.

644-23 See Westinghouse, etc. Co. *v.* Co., 153 Fed. 890, 82 C. C. A. 636.

645-24 Abandonment of device. United S., etc. Co. *v.* Greenman, 153 Fed. 283, 82 C. C. A. 581. See Buser *v.* Co., 151 Fed. 478, 81 C. C. A. 16.

645-25 Device not practically operative. Van Epps *v.* Co., 143 Fed. 869, 75 C. C. A. 77.

645-27 Malignani *v.* Co., 177 Fed. 430.

647-35 Bradley *v.* Eccles, 144 Fed. 90, 75 C. C. A. 248.

Proof of constant use not necessary. Los Angeles A. O. Co. *v.* Co., 143 Fed. 880, 75 C. C. A. 88.

Experimental use.—Am. C. Co. *v.* Mills, 149 Fed. 743, 79 C. C. A. 449.

648-36 Tompkins Co. *v.* Co., 159 Fed. 133, 86 C. C. A. 323.

648-37 Eight years of inaction as proof of abandonment.—Universal, etc. Co. *v.* Co., 146 Fed. 981, 77 C. C. A. 227.

Describing but not claiming invention. Kinnear Mfg. Co. *v.* Wilson, 142 Fed. 970, 74 C. C. A. 232.

648-38 See Davis & R. etc. Co. *v.* Co., 164 Fed. 191.

649-39 Intention of party in allowing former application to be forfeited may be gone into on issue of abandonment; such inquiry must be limited to abandonment of invention particularly described in such application. Saunders *v.* Miller, 33 App. Cas. (D. C.) 456.

652-50 "To allow the patentee by parol testimony, to make a wholly different contract, and obtain an entirely different grant, is utterly inadmissible. Even as against the government, the other party to the grant, this would be unauthorized by settled principle, and how much less should it be allowed against the public, in no way bound or concluded by such grant." Wolff Tr. Frame Co. *v.* Am. Steel Foundries, 195 Fed. 940, 115 C. C. A. 628.

652-51 See Kampfe *v.* Co., 149 Fed. 778.

652-53 Victor T. M. Co. *v.* Co., 151 Fed. 601, 81 C. C. A. 145.

Opinion of purchaser of patent, immaterial as to its construction in so far as it may tend to narrow rights patentee might have claimed. Armstrong *v.* Belding, 174 Fed. 410, 98 C. C. A. 361.

Omission of element.—Edison G. Elec. Co. *v.* Co., 152 Fed. 437, 81 C. C. A. 579.

652-54 See Am. S., etc. Co. *v.* Co., 160 Fed. 108.

653-56 National, etc. S. Co. *v.* Co., 151 Fed. 19, 80 C. C. A. 485; Robins C. B. Co. *v.* Co., 145 Fed. 923, 76 C. C. A. 461.

655-64 U. S. *v.* Patterson, 205 Fed. 292.

655-66 Ensign *v.* Coffelt, 102 Ark. 568, 145 S. W. 231, cit. this text.

655-68 See Shelby S. & T. Co. *v.* Co., 151 Fed. 64, 160 Fed. 928, 88 C. C. A. 110.

Original assignment or proved copy but not abstract of record thereof in patent office may be used to prove assignment. Johnston *v.* Well Wks. Co., 208 Fed. 145, 125 C. C. A. 361.

656-69 Valvona-M. Co. *v.* Perella, 207 Fed. 377; U. S. *v.* Patterson, 205 Fed. 292; Wright Co. *v.* Herring-Curtiss Co., 180 Fed. 110, *rev.* order 177 Fed. 257, 103 C. C. A. 31; Societe Fabriques *v.* Lueders, 142 Fed. 753, 74 C. C. A. 15; Gray *v.* Grinberg, 147 Fed. 732. See Miller *v.* Wks., 160 Fed. 501; O'Rourke Eng. Con. Co. *v.* McMullen, 150 Fed. 338.

Evidence sufficient.—Nat. Binding Mach. Co. *v.* Eisler, 197 Fed. 175; Decker *v.* Smith, 196 Fed. 784; Tilden-Thurber Co. *v.* Theodore W. Foster & Bro. Co., 195 Fed. 538.

Proof of threatened infringement.—Gray *v.* Grimberg, 147 Fed. 732.

In suit under §4918, actual conflict must be shown. Donner *v.* Co., 160 Fed. 971.

Complainant must establish facts excusing delay in applying for reissue of patent. Sirocco E. Co. *v.* Co., 171 Fed. 440.

656-70 Identity of product is some evidence of identity of process. Green F. Shoe Co. *v.* Shoe Co., 205 Fed. 745.

Process and product.—See Downes *v.* Co., 150 Fed. 122, 80 C. C. A. 76.

657-73 Murray *v.* Co., 206 Fed. 465, 124 C. C. A. 371; Crowe *v.* Co., 206 Fed. 164; Gillette Safety Razor Co. *v.* Razor Co., 197 Fed. 574; Gen. Elec. Co. *v.* Allis-Chalmers Co., 197 Fed. 558; Parker *v.* Stebler, 177 Fed. 210, 101 C. C. A. 380; Union M. Co. *v.* Co., 162 Fed. 148, 89 C. C. A. 172; Superior D. Co. *v.* Co., 160 Fed. 504; Hardison *v.* Brink-

man, 156 Fed. 962; Western T. Co. *v.* Rainear, 156 Fed. 49.

657-75 See Rumford C. Wks. *v.* Co., 159 Fed. 436, 86 C. C. A. 416.

657-76 Morton T. Co. *v.* Co., 177 Fed. 931, 101 C. C. A. 211; Am. S. S. Co. *v.* Co., 176 Fed. 357, 100 C. C. A. 193.

Possession of infringing device does not show infringement, it not being shown who made it or that it was ever used or sold. Sheffield C. Co. *v.* Co., 177 Fed. 713.

"Anticipation of patents must be proven by evidence so cogent as to leave no reasonable doubt." Underwood T. Co. *v.* Co., 165 Fed. 927.

657-77 Oral evidence based on memory and an old invention, not produced, must remove reasonable doubt as to priority of infringed invention. Parker *v.* Stebler, 177 Fed. 210, 101 C. C. A. 380.

658-78 Macbeth E. G. Co. *v.* Co., 199 Fed. 154; U. S. F. Co. *v.* Caesar, 160 Fed. 943, 88 C. C. A. 162. See Ironclad Mfg. Co. *v.* Co., 143 Fed. 512, 74 C. C. A. 372; Lidgerwood Mfg. Co. *v.* Co., 150 Fed. 364; Blamire *v.* Wks., 149 Fed. 780; Friedberger A. Mfg. Co. *v.* Chapin, 151 Fed. 264.

Distinction between combination and aggregation.—Am. C. M. Co. *v.* Helmstetter, 142 Fed. 978, 74 C. C. A. 240.

Interchangeability of part not conclusive test of infringement. Columbia W. Co. *v.* Co., 143 Fed. 116, 74 C. C. A. 310. *Comp.* Ball B. Co. *v.* R. Co., 147 Fed. 721.

658-79 Scott *v.* Lazell, 160 Fed. 472, 87 C. C. A. 456; Cameron S. T. Co. *v.* Spgs., 159 Fed. 453, 86 C. C. A. 483; Indiana Mfg. Co. *v.* Co., 154 Fed. 365, 83 C. C. A. 343.

All evidence tending to show state of art at time of invention in issue, admissible. Holt Mfg. Co. *v.* Co., 172 Fed. 409, 97 C. C. A. 107.

658-81 Reis *v.* Rosenfeld, 204 Fed. 282, 122 C. C. A. 480.

Testimony of prior patentee admissible in rebuttal. Blackledge *v.* Absorber Co., 213 Fed. 478.

659-84 Weight of prior adjudication.—On application for injunction judgments in other jurisdictions are almost conclusive; they must be overcome by convincing proof. If new testimony offered to show anticipation it must establish it beyond reasonable doubt. Warren Bros. Co. *v.* Montgomery, 172 Fed. 414. Interference proceedings, only evidentiary. Nesbitt G. Mfg. Co. *v.* Brookfield, 170 Fed. 443, 95 C. C. A. 516.

Testimony of deceased witness in former suit to which parties herein were privies, admissible. Rumford C. Wks. *v.* Co., 159 Fed. 436, 86 C. C. A. 416.

659-85 See Cimiotti U. Co. *v.* Rowsky, 143 Fed. 508, 74 C. C. A. 617.

659-87 See Consuming *v.* Baker, 144 Fed. 395, 75 C. C. A. 373; Lane F. Co. *v.* Co., 164 Fed. 855, 90 C. C. A. 617.

660-90 Lichtenstein *v.* Phipps, 161 Fed. 578; Am. C. Co. *v.* Mills, 162 Fed. 147, 89 C. C. A. 171; Westinghouse, etc. Mfg. Co. *v.* Co., 159 Fed. 154. *Comp.* Morton T. Co. *v.* Co., 161 Fed. 546.

Marking or notice to defendant may be proved any time prior to final decree. Underwood T. Co. *v.* Co., 171 Fed. 110.

660-94 Wright Co. *v.* Co., 177 Fed. 257; St. Louis, etc. M. Co. *v.* Co., 171 Fed. 725, 88 C. C. A. 587; Ewell C. R. Co., 157 Fed. 241; Kaebel *v.* Ruhmer, 151 Fed. 777. See Hall S. Co. *v.* Co., 153 Fed. 907, 82 C. C. A. 675; Scott *v.* Laas, 150 Fed. 704, 80 C. C. A. 500.

661-96 Hartford *v.* Co., 172 Fed. 676, indicating proof required.

661-97 Abandoned application not given weight on hearing of application for preliminary injunction in absence of satisfactory testimony of priority of invention. Wright Co. *v.* Co., 177 Fed. 257; Wright Co. *v.* Paulhan, 177 Fed. 261.

662-2 Westinghouse E. Co. *v.* Mfg. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. ed. 1222; McSherry Mfg. Co. *v.* Co., 160 Fed. 948, 89 C. C. A. 26; Force *v.* Co., 143 Fed. 894, 75 C. C. A. 102. See Mast *v.* Co., 154 Fed. 45, 83 C. C. A. 157.

663-4 Canda *v.* Co., 172 Fed. 178, 81 C. C. A. 420. See McSherry Mfg. Co. *v.* Co., 160 Fed. 948, 89 C. C. A. 26.

663-6 Force *v.* Co., 143 Fed. 894, 75 C. C. A. 102. *Comp.* Brennan *v.* Co., 162 Fed. 472, 89 C. C. A. 302 (dist. Garretson *v.* Clark, 111 U. S. 120). See Dowagiac Mfg. Co. *v.* Co., 172 Fed. 479, 89 C. C. A. 709.

664-8 Profits not proper in action at law for damages. Portland G. M. Co. *v.* Hermann, 160 Fed. 61, 87 C. C. A. 247; Brown *v.* Lauyon, 148 Fed. 838, 78 C. C. A. 528.

664-10 See Mackie L. M. Co. *v.* Cazier, 157 Fed. 88, 84 C. C. A. 591, 138 Fed. 654, 71 C. C. A. 104.

664-11 Fox *v.* Co., 158 Fed. 422, if license fees varied damages measured by those prevailing at time of separate infringement. See Mast *v.* Co., 154 Fed. 45, 83 C. C. A. 157.

Prerequisite to inquiry into details of defendant's business is an interlocutory decree sustaining claims and finding infringement. Slocomb & Co. *v.* Mach. Co., 201 Fed. 101.

665-12 Collusion. Mast *v.* Co., supra.

666-15 McCune *v.* R. Co., 154 Fed. 63, 83 C. C. A. 175.

666-19 Mast *v.* Co., 154 Fed. 45, 83 C. C. A. 157.

Patentee must show profits resulting from use of infringing parts where defendant made improvements on patent, regardless of failure of latter to keep books, no change in so doing being made after charge of infringement known. Westinghouse E. & M. Co. *v.* Co., 173 Fed. 361, 97 C. C. A. 621.

Measure of profits for use of machine is what was saved to defendant by its use over other available machines; but if it appears products of machine could not have been produced without loss independently of it all profits made on them may measure defendant's liability. Novelty G. Mfg. Co. *v.* Brookfield, 170 Fed. 946, 95 C. C. A. 516.

Uncertainty as to amount of profits must be removed by deliberate infringer. Novelty G. Mfg. Co. *v.* Brookfield, supra.

667-23 *Comp.* Canda *v.* Co., 152 Fed. 178, 81 C. C. A. 420.

668-27 Failure of defendant to produce books justifies estimates by his employes of number of infringing articles made. Yesbera *v.* Co., 166 Fed. 120, 92 C. C. A. 46.

668-28 Laches as defense. Safety C. etc. Co. *v.* Co., 160 Fed. 476; Germer S. Co. *v.* Co., 157 Fed. 842; Hillard *v.* Co., 151 Fed. 34.

Ineligibility of assignment for record not matter of defense. Delaware, etc. T. Co. *v.* Co., 160 Fed. 928, 88 C. C. A. 110, *aff.* 151 Fed. 64.

Discontinuance of infringement prior to suit. See Deere & W. Co. *v.* Co., 153 Fed. 177, 82 C. C. A. 351.

Non-user as defense.—See Continental P. B. Co. *v.* Co., 150 Fed. 741, 80 C. C. A. 407; U. S. F. Co. *v.* Bradley, 149 Fed. 222, 79 C. C. A. 180.

669-29 Wold *v.* Thayer, 148 Fed. 227, 78 C. C. A. 350. *Comp.* St. Louis, etc. M. Co. *v.* Co., 161 Fed. 725, 88 C. C. A. 585.

669-32 See Lincoln I. Wks. *v.* Co., 142 Fed. 967, 74 C. C. A. 229.

PAUPERS

673-6 Ripton *v.* Brandon, 80 Vt. 234, 67 A. 541.

Value of relief extended, presumed to be reasonable value of maintaining pauper at poor farm, though he may have performed such work as he was able. Hamilton County *v.* Hollis, 141 Ia. 477, 119 N. W. 978.

674-7 Wellington *v.* Corinna, 104 Me. 252, 71 A. 889, proof of notice by de facto officer.

674-9 Washington Co. *v.*County, 137 Ia. 333, 113 N. W. 883; Hewitt *v.* County, 103 Minn. 41, 114 N. W. 261.

675-11 Washington Co. *v.* County, 137 Ia. 333, 113 N. W. 833.

677-20 Whately *v.* Hatfield, 196 Mass. 393, 82 N. E. 48.

681-32 Bernard *v.* Bedminster, 74 N. J. L. 92, 64 A. 960.

Assessment of tax by assessor against person, not admissible on question of residence. Rockland *v.* Union, 100 Me. 67, 60 A. 705.

686-48 Jericho *v.* Huntington, 79 Vt. 329, 65 A. 87.

688-56 See vol. 9, p. 700, n. 1, and supplement thereto.

688-58 See vol. 9, p. 704, n. 20, and supplement thereto.

689-59 Wellington *v.* Corinna, 104 Me. 252, 71 A. 889.

690-60 Wellington *v.* Corinna, supra.

695-74 Testimony as to expense of keeping all inmates, competent to show expense per capita. Dallas County *v.* Thornley, 140 Ia. 355, 118 N. W. 530.

PAYMENT

700-1 Denver E. W. Wks. Co. *v.* Elkin, 196 Fed. 40, 116 C. C. A. 55; Kirkland *v.* Arnold, 178 Ala. 227, 59 S. 162; Foster *v.* Luck (Ark.), 165 S. W. 267; Continental Gin Co. *v.* Benton, 104 Ark. 367, 149 S. W. 528; Black *v.* Roberson, 87 Ark. 641, 112 S. W. 402, Hamby *v.* Brooks, 86 Ark. 448, 111 S. W. 277; Smith *v.* Weatherford, 92 Ark. 6, 121 S. W. 943; Sanguinetti *v.* Pelligrini, 2 Cal. App. 294, 83 P. 293; Harvey *v.* R. Co., 44 Colo. 258, 99 P. 31;

Mercer, etc. Co. *v.* Mfg. Co., 87 Conn. 691, 89 A. 909; O'Loughlin *v.* Poli, 82 Conn. 427, 74 A. 763; Int. H. Co. *v.* Smith, 51 Fla. 220, 40 S. 840; Justice *v.* Mill Co., 13 Ga. App. 389, 79 S. E. 223; Chapman *v.* Meiling, 147 Ill. App. 411; Evans *v.* C. Co., 142 Ill. App. 375; Stephens *v.* Neilson, 142 Ill. App. 263; Supreme Lodge *v.* Hinsey, 241 Ill. 384, 89 N. E. 728; Lasswell *v.* Gahan, 122 Ill. App. 513; Haspar *v.* Weitcamp, 167 Ind. 371, 79 N. E. 191; Gas Belt T. Co. *v.* Ward, 43 Ind. App. 537, 87 N. E. 1110; Jamison *v.* Auxier, 145 Ia. 654, 124 N. W. 606; Delana *v.* Voss (Ia.), 114 N. W. 1076; Toms Creek C. Co. *v.* Skeene, 28 Ky. L. R. 962, 90 S. W. 993; Loyd M. Co. *v.* Long, 123 La. 777, 49 S. 521; Essex F. Co. *v.* Danforth, 111 Me. 212, 88 A. 651; Hawkins *v.* Bouie, 121 Md. 147, 88 A. 126; Baldwin *v.* Porter (Mass.), 104 N. E. 492; Swift *v.* Boyd, 202 Mass. 26, 88 N. E. 439; Van Seeiver *v.* King, 176 Mich. 605, 142 N. W. 1069; Christians *v.* Christians, 108 Minn. 157, 121 N. W. 633; Greenburg *v.* Saul, 91 Miss. 410, 45 S. 569; Stewart *v.* Graham, 93 Miss. 251, 46 S. 245; Winfrey *v.* Matthews, 174 Mo. App. 713, 161 S. W. 583; Donijanovic *v.* Hartman, 169 Mo. App. 204, 152 S. W. 424; Union B. Co. *v.* Co., 143 Mo. App. 300, 126 S. W. 996; Steltemeier *v.* Barrett, 145 Mo. App. 534, 122 S. W. 1095; Harrison *v.* Doyle, 163 Mo. App. 602, 147 S. W. 504; West. Pub. Co. *v.* Corbett, 165 Mo. App. 7, 145 S. W. 868; Barrett *v.* Kern, 141 Mo. App. 5, 121 S. W. 774; Wessel *v.* Bishop, 76 Neb. 74, 107 N. W. 220; Gravert *v.* Goothard, 81 Neb. 99, 115 N. W. 559; Tonn *v.* Pier (N. J.), 89 A. 510; Squire *v.* Ordemann, 194 N. Y. 394, 87 N. E. 435; Skelly *v.* Mortimer, 151 App. Div. 921, 138 N. Y. S. 1100; Salomon *v.* Fiske, 78 Misc. 406, 138 N. Y. S. 422; Simon *v.* Krimko, 123 N. Y. S. 697; Steele *v.* Leopold, 135 App. Div. 247, 120 N. Y. S. 569; C. M. Co. *v.* Carruth, 135 App. Div. 36, 119 N. Y. S. 784; Little *v.* McClain, 134 App. Div. 197, 118 N. Y. S. 916; Plaut *v.* Straub, 131 App. Div. 154, 115 N. Y. S. 148; Dowdall *v.* Borgfeldt, 113 N. Y. S. 1069; Murphy *v.* Panter, 62 Or. 522, 125 P. 292; Behn *v.* Rosatzin, 5 Phil. Isl. 660; Williams *v.* Smith, 29 R. I. 526, 72 A. 1093; Talbert *v.* Talbert, 97 S. C. 136, 81 S. E. 644; Richards *v.* Osborne (Tex. Civ.), 164 S. W. 392; Hutton *v.* Pederson (Tex. Civ.), 153 S. W. 176; Tilt-K. S. Co. *v.* Haggarty (Tex. Civ.), 111 S. W. 386; Helmer *v.* Co., 55 Wash. 104 P. 783; Drake *v.* Drake, 142 Wis. 602, 126 N. W. 19; Baehr *v.* Buell, 135 Wis. 119, 113 N. W. 433; Chapman *v.* Carrothers (Wyo.), 129 P. 434.

See vol. 2, p. 501, n. 92; vol. 6, p. 312, n. 40; vol. 7, p. 523, n. 67; vol. 8, p. 508, n. 24; p. 668, n. 56; p. 764, n. 62; vol. 9, p. 572, n. 31; vol. 13, p. 727, n. 25; and supplement thereto.

Where recovery based on nonpayment, burden of proof on plaintiff. Altman *v.* Bungay Co., 146 N. Y. S. 949.

Administrator suing for value of services of attorney has burden. Winter *v.* Pollack (Ala.), 66 S. 11.

Different rule applies in cash sale in which no credit is given and title does not pass until payment of consideration. Daughdrill *v.* Lockhart (Ala.), 61 S. 802.

Plaintiff must first prove amount due. D. H. Baldwin & Co. *v.* Moser, 135 Ia. 410, 136 N. W. 495.

"Where the proof of payment is in the exclusive knowledge and control of the plaintiff, the burden is on him to produce it." Schneider *v.* Maney, 242 Mo. 36, 145 S. W. 823.

Evidence insufficient.—Smith *v.* Pitts, 167 Ala. 461, 52 S. 402; Ware *v.* Bennett, 143 Ky. 743, 137 S. W. 532; Seidenfried *v.* Ullman, 123 N. Y. S. 2.

701-2 Harrison *v.* Russell, 17 Ida. 196, 105 P. 48; Zang *v.* Co. (Tex. Civ.), 125 S. W. 85.

701-3 Janvier *v.* Culbreth, 5 Penne. (Del.) 505, 63 A. 309; People's Bk. *v.* Stewart, 136 Mo. App. 24, 117 S. W. 99; Dose *v.* Hirsch, 65 Misc. 515, 120 N. Y. S. 91, *disap.* Cochran *v.* Reich, 91 Hun 440, 36 N. Y. S. 233; Argo Mfg. Co. *v.* Parker, 52 Wash. 100, 100 P. 188. *Contra*, Pollak *v.* Winter, 173 Ala. 550, 55 S. 828.

701-4 Smith *v.* Bk., 61 Misc. 647, 114 N. Y. S. 56; Olson *v.* Day, 23 S. D. 150, 120 N. W. 883.

701-5 Ariston Realty Co. *v.* Bernstein, 111 N. Y. S. 748.

701-6 Good *v.* Askin, 147 Ill. App. 390; Am. C. & P. Co. *v.* Co., 221 Pa. 529, 70 A. 867.

702-7 King *v.* McConnell, 57 Fla. 77, 49 S. 539; West Pub. Co. *v.* Corbett, 165 Mo. App. 7, 145 S. W. 868; McCormack H. Mach. Co. *v.* Blair, 146 Mo. App. 374, 124 S. W. 49; Groomer *v.* McMillan, 143 Mo. App. 612, 128 S.

W. 285 (check); Am. C. & F. Co. *v.* Co., 221 Pa. 529, 70 A. 867.

702-8 Lomax *v.* Bk., 46 Colo. 229, 104 P. 85; Hill *v.* Waight, 140 Ia. 584, 118 N. W. 877.

703-11 Berger *v.* Berger, 44 Pa. Super. 305.

703-13 Stone *v.* Rich, 160 N. C. 161, 75 S. E. 1077.

703-15 Van Sceiver *v.* King, 176 Mich. 605, 142 N. W. 1069 (complain-

703-16 Roberts, Johnson & Rand Shoe Co. *v.* McKim, 34 Nev. 191, 117 P. 13.

703-17 Checks presumptively representative of payments or given in exchange for money. Leask *v.* Hoagland, 64 Misc. 156, 118 N. Y. S. 1035.

Payment from month to month presumed payment in full of all liability. Morrow *v.* Frankish (Del.), 89 A. 740.

Order of court confirming composition of creditors raises presumption. Hem *v.* Allen, 179 Ill. App. 223.

Payment of note when due presumed as between maker and holder of collateral in action for accounting. Des Moines Nat. Bk. *v.* Sisson, 143 Ia. 191, 121 N. W. 533.

No presumption of payment into state treasury unless money placed in hands of designated officer. Daily *v.* S., 171 Ind. 646, 87 N. E. 4.

704-19 As between husband and wife it is presumed property bought by him in her name was gift to her, and not he intended to pay debt due her. Hamby *v.* Brooks, 86 Ark. 448, 111 S. W. 277.

704-20 Brady *v.* Brady, 110 Md. 656, 73 A. 567; Hall *v.* O'Brien, 160 App. Div. 851, 146 N. Y. S. 551; Raski *v.* Wise, 56 Or. 72, 107 P. 984; Gray *v.* Tribue (Tex. Civ.), 118 S. W. 808. *Contra,* see supra, "Bills and Notes," 502-93, 516-29; vol. 2, p. 502, n. 93; vol. 8, p. 689, n. 58, p. 761, n. 40, and supplements thereto.

704-21 Hudson *v.* Williams, 6 Penne. (Del.) 550, 72 A. 985; Stephenson *v.* Ins. Co., 139 Ga. 82, 76 S. E. 592; Chamberlain *v.* O'Leary, 161 Mich. 670, 126 N. W. 831. See supra, "Mortgages," 763-44; vol. 8, p. 763, n. 44; vol. 2, p. 504, n. 94, and supplement thereto.

704-22 Brady *v.* Brady, 110 Md. 656, 73 A. 567.

705-25 Rule not applicable to possession by joint promisor in action by him to recover from the other. Heald *v.* Davis, 11 Cush. (Mass.) 319, 59 Am. Dec. 147; Craig *v.* Craig, 3 Rawle (Pa.) 472, 24 Am. Dec. 390; Bates *v.* Cain, 70 Vt. 144, 40 A. 36. *Contra,* Ingram *v.* Croft, 7 La. 82; Chandler *v.* Davis, 47 N. H. 462; Dillenbeck *v.* Dygert, 97 N. Y. 303, 49 Am. Rep. 525.

705-26 Stevenson *v.* Stunkard, 44 Ind. App. 716, 90 N. E. 106 (negotiable note); Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 130 P. 55.

705-28 See supra, "Master and Servant," 508-24; vol. 8, p. 763, n. 46, and supplement thereto.

705-29 Fluegelman *v.* Armstrong, 59 Misc. 506, 110 N. Y. S. 967 (filing satisfaction of judgment).

705-31 Indiana Ty. Co. *v.* Assn., 36 Ind. App. 685, 74 N. E. 633. See Tulley *v.* Bk., 18 Ind. App. 240, 47 N. E. 850. *Comp.* In re Miller, 33 Pa. Super 20.

706-33 See vol. 8, p. 761, n. 39, and supplement thereto.

Failure to produce bonds an admission of payment. Huntington, etc. Co. *v.* Coke Co. (W. Va.), 80 S. E. 871.

706-34 Bray *v.* Arnold (Ga. App.), 80 S. E. 668; Stephens *v.* Neilson, 142 Ill. App. 263; Fitzgerald *v.* Coleman, 114 Ill. App. 25 (burden on party contradicting recitals); Partridge *v.* R. Co., 111 Me. 589, 90 A. 618 (burden on party contradicting recitals); Richards *v.* Osborne (Tex. Civ.), 164 S. W. 392. See McGahren *v.* Ins. Co., 28 Pa. Super. 47. And see vol. 7, p. 524, n. 68; vol. 8, p. 766, n. 67; vol. 9, p. 479, n. 19; vol. 13, p. 867, n. 34, and supplements thereto.

If in possession of plaintiff.—Sexton *v.* Ins. Co., 160 N. C. 597, 76 S. E. 535.

707-35 See supra, "Mortgages," 767-69; vol. 2, p. 505, n. 97, and supplement thereto.

707-37 Dodwell *v.* Co., 90 Ark. 287, 119 S. W. 262.

Judgment creditor who buys at execution sale, presumed not to have paid cash. Lightfoot *v.* Horst (Tex. Civ.), 122 S. W. 606.

707-38 *Contra,* if claim assigned. Dial *v.* Co., 52 Wash. 81, 100 P. 157. Execution of obligation by creditor to debtor. See supra, "Mortgages," 763-51.

707-39 Leschen & S. R. Co. *v.* Co., 173 Fed. 855, 97 C. C. A. 465; ("a clear agreement by the creditor that he will take the risk of the payment

of the note, or the indubitable intention of both parties to that effect, is requisite to extinguish a debt by the taking of the debtor's note"); Western R. *v.* Foshee (Ala.), 62 S. 590; Manser *v.* Sims, 157 Ala. 167, 47 S. 270 (subsequent conduct of creditor may show payment by receipt of notes); Am. Ins. Co. *v.* Co., 98 Ark. 62, 124 S. W. 252; Burritt *v.* Negry, 81 Conn. 502, 71 A. 570; Baughman *v.* Lowe, 41 Ind. App. 1, 83 N. E. 255; Chorn *v.* Zollinger, 143 Mo. App. 191, 128 S. W. 213; Atterbury *v.* Edwa, 61 Misc. 234, 113 N. Y. S. 614; Virginia-C. Co. *v.* McNair, 130 N. C. 326, 51 S. E. 949; Sjoli *v.* Hogenson, 19 N. D. 82, 122 N. W. 1008; Rushing *v.* Citizens' Bk. (Tex. Civ.), 162 S. W. 460; Otto *v.* Griffin, 54 Wash. 506, 103 P. 789.

See Bk. *v.* Ringo, 72 Kan. 116, 83 P. 119; Citizens' Bk. *v.* Kretschmar, 91 Miss. 608, 44 S. 930; Weller *v.* Co., 7 O. C. C. (N. S.) 303; Matlock *v.* Scheuerman, 51 Or. 49, 93 P. 823, 17 L. R. A. (N. S.) 747; Cochran *v.* Slomkowski, 29 Pa. Super. 385. And see vol. 2, p. 511, n. 4; vol. 8, p. 763, n. 51, and supplement thereto. But failure to use diligence in collection operates as payment where it causes loss to debtor. Herron *v.* Mawby, 5 Cal. App. 39, 89 P. 872.

707-40 Beach *v.* Huntsman, 42 Ind. App. 205, 85 N. E. 523 (note to third person); Spitz *v.* Morse, 104 Me. 447, 72 A. 178; Am. M. Co. *v.* Co., 194 Mass. 89, 80 N. E. 526. *Comp.* Hoar *v.* Ins. Co., 118 App. Div. 416, 103 N. Y. S. 1059. See vol. 2, p. 507, n. 98, and supplement thereto.

Checks.—Meyer *v.* Doherty, 133 Wis. 398, 113 N. W. 671, 13 L. R. A. (N. S.) 247.

Acceptance of bill of exchange.—Keck *v.* S., 12 Ind. App. 119, 39 N. E. 899.

708-41 Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. 537; Craswell *v.* Co., 148 Ia. 9, 126 N. W. 908 (note of managing partner for firm debt); Union B. Co. *v.* Co., 143 Mo. App. 300, 126 S. W. 996; Lee *v.* Larkin, 125 App. Div. 302, 109 N. Y. S. 480; Sullivan *v.* Saunders, 66 W. Va. 350, 66 S. E. 497 (acceptance by judgment creditor). See vol. 2, p. 510, n. 3, and supplement thereto.

Checks.—See Cox *v.* Hayes, 18 Ind. App. 220, 47 N. E. 844.

An individual note given by a managing partner for a debt due from the firm is not a payment of the firm debt in the absence of an express acceptance of it as such. Craswell *v.* Coal Co., 148 Ia. 9, 126 N. W. 908.

708-42 Am. M. Co. *v.* Co., 194 Mass. 89, 80 N. E. 526; McLean *v.* Grist, 118 App. Div. 100, 103 N. Y. S. 129; In re Van Haagen, 8 Pa. C. C. 84.

708-44 Loschen & S. R. Co. *v.* Co., 173 Fed. 855, 97 C. C. A. 465; Beach *v.* Huntsman (Ind. App.), 85 N. E. 1033; Spitz *v.* Morse, 104 Me. 447, 72 A. 178; McLean *v.* Grist, 118 App. Div. 100, 103 N. Y. S. 129; Dudley *v.* Barrett, 66 W. Va. 205, 66 S. E. 207.

708-45 Keys *v.* Keys, 247 Mo. 48, 116 S. W. 537, secured note.

708-46 Comstock *v.* Taggart, 156 Mich. 47, 120 N. W. 29; Shubley *v.* Harvitt, 121 N. Y. S. 392. See Bache S. Co. *v.* Austin, 92 Ark. 248, 122 S. W. 482.

Fact decedent had income raises presumption he made personal payments for board and nursing, in absence of proof of express contract to pay therefor. Haines' Est., 17 Pa. Dist. 420.

709-47 Lease *v.* Hoagland, 61 Misc. 156, 118 N. Y. S. 1035; Taplin *v.* Marcy, 81 Vt. 428, 71 A. 72.

Payee's loss of collateral security or other substantial benefit, relevant. Beach *v.* Huntsman, 42 Ind. App. 205, 85 N. E. 523.

709-48 Gay *v.* Fleming (Ala.), 62 S. 523; Shockley *v.* Christopher (Ala.), 60 S. 317; Roach *v.* Cox, 161 Ala. 426, 49 S. 378; Fagan *v.* Bank, 253 Ill. 288, 97 N. E. 1087; Doty *v.* Jamison, 26 Ky. L. R. 507, 93 S. W. 628; Jenkins *v.* Seminary, 295 Mass. 176, 91 N. E. 352; Longe *v.* Kinney, 171 Mich. 312, 137 N. W. 119; Perego *v.* Waldmann, 46 Misc. 1, 93 N. Y. S. 362; Richards *v.* Walp, 221 Pa. 412, 70 A. 815; Buckley *v.* Runge, 57 Tex. Civ. 323, 122 S. W. 596; Milwee *v.* Phelps, 53 Tex. Civ. 195, 115 S. W. 891; Graves *v.* Stone, 76 Wash. 88, 135 P. 810; Rush *v.* Griffith, 65 W. Va. 752, 65 S. E. 168; Holway *v.* Sanborn, 145 Wis. 151, 130 N. W. 95.

See vol. 2, p. 504, n. 93; vol. 15, p. 867, n. 31, and supplement thereto.

Lapse of time alone insufficient.—Van Ness *v.* Ransom, 81 Misc. 178, 144 N. Y. S. 420; Graves *v.* Stone, 72 Wash. 382, 130 P. 509.

Death of debtor strengthens presumption. Jackson's Est., 18 Pa. Dist. 163.

710-50 Love *v.* Love, 72 Kan. 675, 83 P. 201; Rosenstock *v.* Desar, 109

App. Div. 10, 95 N. Y. S. 1064 (certificate of deposit).

Presumption of payment from lapse of time does not apply in ejectment by vendor's grantee. Rankin *v.* Dean, 157 Ala. 490, 47 S. 1015.

711-51 Parsons *v.* Cannon(Del.), 88 A. 470; Janvier *v.* Culbreth, 5 Penne. (Del.) 505, 63 A. 309 (lapse of eighteen years raises no presumption); Haynes *v.* Blanchard, 194 Mass. 244, 80 N. E. 504; Cobb *v.* Houston, 117 Mo. App. 645, 94 S. W. 299 (statute); Partridge *v.* Moynihan, 59 Misc. 234, 110 N. Y. S. 539 (after five years); In re Miller's Est., 243 Pa. 328, 90 A. 77; Roberts *v.* Powell, 210 Pa. 594, 60 A. 258.

Non-payment for ten years, no execution issued, affords conclusive presumption of payment. Bowman *v.* Holman, 53 Or. 456, 99 P. 424, statute.

"In a proceeding to revive a dormant judgment, where the judgment debtor pleads payment, a presumption of payment arises, and the burden is upon the judgment creditor to rebut that inference." Hill *v.* Feeny, 90 Neb. 791, 134 N. W. 921, quoted Platte County Bk. *v.* Clark, 81 Neb. 255, 115 N. W. 787.

712-53 Jenkins *v.* Seminary (Mass.), 91 N. E. 552; Williamsburgh T. Co. *v.* Gottsch, 121 N. Y. S. 890; Berger *v.* Waldbaum, 46 Misc. 4, 93 N. Y. S. 352; Fidelity T. & T. Co. *v.* Chapman, 226 Pa. 312, 75 A. 428. *Comp.* Pool *v.* Anderson, 150 N. C. 624, 64 S. E. 593. See vol. 8, p. 755, n. 17, and supplement thereto.

713-59 Hagins *v.* Blitch, 6 Ga. App. 839, 65 S. E. 1082, during dormancy of judgment presumption of payment exists only in favor of third persons.

713-60 Leask *v.* Hoagland, 64 Misc. 156, 118 N. Y. S. 1035. *Contra,* it seems. Roush *v.* Griffith, 65 W. Va. 752, 65 S. E. 168. As to payment for domestic service, see supra, "Master and Servant," 508-25; and as to payment for nursing and boarding, see supra "Executors and Administrators," 426-81.

714-61 P. *v.* Freeman, 110 App. Div. 605, 97 N. Y. S. 343; Buckley *v.* Runge, 57 Tex. Civ. 322, 122 S. W. 596. *Contra,* Roach *v.* Cox, 160 Ala. 425, 49 S. 578, indicating McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529, and Harrison *v.* Heflin, 54 Ala. 552, are overruled.

715-62 Jenkins *v.* Seminary, 205 Mass. 376, 91 N. E. 552; Puls *v.* R. Co., 54 Misc. 303, 104 N. Y. S. 374 (admission in papers on motion to vacate); Richards *v.* Walp, 221 Pa. 412, 70 A. 815 (direct proof of payment or proof of facts and circumstances from which it may be clearly inferred). See vol. 8, p. 758, n. 28 et seq., and supplement thereto.

715-63 In re Kohler, 18 Pa. C. C. 184. See Hutton *v.* Pederson (Tex. Civ.), 153 S. W. 176; vol. 8, p. 757, n. 19, and supplement thereto.

716-64 Partridge *v.* Moynihan, 59 Misc. 234, 110 N. Y. S. 539.

Satisfactory and convincing evidence required if suit deferred until after death of debtor. Fidelity T. & T. Co. *v.* Chapman, 226 Pa. 312, 75 A. 428.

716-65 Fidelity T. & T. Co. *v.* Chapman, supra.

From time last installment due.—Smith *v.* Timmons, 50 Pa. Super. 486, 489.

716-69 Allison *v.* Wood, 104 Va. 765, 52 S. E. 559. See In re Miller's Est., 243 Pa. 328, 90 A. 77, burden not shifted.

717-71 Not where sole purpose of revival is for purpose of repelling presumption. In re Miller's Est., 243 Pa. 328, 90 A. 77.

718-79 Plaintiff may not testify his intestate received property from other maker of note to be applied in part payment of it. Hudson *v.* Williams, 6 Penne. (Del.) 550, 72 A. 985.

718-82 Hudson *v.* Williams, supra (acknowledgment must be express); Budd *v.* Conard, 2 Phila. (Pa.) 175.

719-86 In re DeHaven, 215 Pa. 549, 64 A. 779.

719-89 Cobb *v.* Houston, 117 Mo. App. 645, 94 S. W. 299.

720-91 *Contra,* Hunter *v.* Thurlow, 18 Pa. Dist. 661.

Rebuttal evidence must be satisfactory and convincing when action brought after debtor's death. Hunter *v.* Thurlow, supra.

720-92 W. B. Johnson & Co. *v.* R. Co., 84 Vt. 486, 79 A. 1095.

720-93 Light *v.* Stevens, 159 Cal. 288, 113 P. 659. *Comp.* Brown *v.* Larry (Ala.), 44 S. 841.

Homestead.—Shaffer *v.* Chernyk, 130 Ia. 686, 107 N. W. 801.

720-94 See Epply *v.* Von Phul, 7 O. C. C. (N. S.) 449.

As between secured and unsecured claims. Fremont County *v.* Bk., 138 Ia. 167, 115 N. W. 925; Bk. *v.* Co., 27

Ky. L. R. 645, 85 S. W. 1103. But see Campbell G. Co. *v.* Co., 130 Mo. App. 474, 110 S. W. 24.

721-95 Winston *v.* Farrow (Ala.), 40 S. 53; Briggs *v.* Steele, 91 Ark. 458, 121 S. W. 754; Fremont County *v.* Bk., 138 Ia. 167, 115 N. W. 925; In re Houeye, 115 La. 1066, 40 S. 460; Campbell G. Co. *v.* Co., 130 Mo. App. 474; 110 S. W. 24; Stanwix *v.* Leonard, 125 App. Div. 299, 109 N. Y. S. 804; Fisher *v.* Co., 47 Tex. Civ. 58, 103 S. W. 655.

721-97 Russell *v.* Amlot, 132 App. Div. 584, 116 N. Y. S. 1080; Epply *v.* Von Phul, 7 O. C. C. (N. S.) 449; Gavieres *v.* Tavera, 1 Phil. Isl. 71 (after long period).

No presumption of other business transactions between parties than those shown. Lynch *v.* Lyons, 131 App. Div. 120, 115 N. Y. S. 227.

721-98 *Contra* if no other debt due. Briggs *v.* Steele, 91 Ark. 458, 121 S. W. 754.

721-99 Lawler *v.* Vette, 166 Mo. App. 342, 149 S. W. 43, cit. this text.

721-1 Optional obligation, presumed availed of. Fidelity T. & T. Co. *v.* Chapman, 226 Pa. 312, 75 A. 428.

722-3 Lynch *v.* Lyons, 131 App. Div. 120, 115 N. Y. S. 227.

722-4 And shifts the burden of proof. Graves *v.* Stone, 76 Wash. 88, 135 P. 810.

722-5 Norton *v.* Aiken, 134 Ga. 21, 67 S. E. 425 (failure to enforce collection of note and include it in tax returns); Hays *v.* Hays, 49 Ind. App. 298, 97 N. E. 198; Eames *v.* Ins. Co., 134 Mo. App. 331, 114 S. W. 85. See Reynolds *v.* Reynolds (Ala. App.), 65 S. 194; Hutton *v.* Pederson (Tex. Civ.), 153 S. W. 176.

Conduct of parties.—See vol. 13, p. 868, n. 35 and supplement thereto.

Under plea of payment, evidence as to payment in any form is admissible. Newcomb *v.* La Roe, 116 N. Y. S. 133.

722-6 S. *v.* Co., 81 Conn. 56, 70 A. 55 (agreement and conveyance); Iowa-M. L. Co. *v.* Connor, 136 Ia. 674, 112 N. W. 820 (deed to be given after payment); Watrous *v.* Kenyon, 156 Mich. 404, 120 N. W. 980; Cobb *v.* Holloway, 129 Mo. App. 212, 108 S. W. 109; Boothe *v.* Scriber, 48 Or. 561, 87 P. 887, 90 P. 1002; Barber *v.* S. (Tex. Cr.), 142 S. W. 577; Davidson *v.* Ryle, 103 Tex. 209, 124 S. W. 616 (certified copy of indorsement on paper in land office). See Smith *v.* Robinson (N. J.), 90 A. 1063; vol. 2, p. 515, n. 25 *et seq.*, and supplement thereto.

722-7 Ladd *v.* Craig, 94 Miss. 670, 47 S. 777; Herstal *v.* Olson, 57 Wash. 284, 106 P. 741.

723-8 Justis *v.* R. Co., 12 Cal. App. 639, 108 P. 328 (railroad ticket); Sampson *v.* Ins. Co., 87 Neb. 319, 127 N. W. 302; Am. L. Co. *v.* Rickert, 111 N. Y. S. 25. See vol. 2, p. 515, n. 24, and supplement thereto.

723-9 Magill L. Co. *v.* Co., 90 Ark. 426, 119 S. W. 822; Brown *v.* Keffler, 133 Mo. App. 494, 113 S. W. 711.

723-10 Security M. L. Ins. Co. *v.* Kleutsch, 169 Fed. 104, 95 C. C. A. 472; Fidelity Mut. Ins. Co. *v.* Clark, 93 Ark. 162, 124 S. W. 764; Kelly *v.* Mott, 85 Ark. 363, 114 S. W. 911 (conclusive if not attacked); Gregory *v.* Huslander, 227 Pa. 607, 76 A. 422.

724-14 Wisconsin S. Co. *v.* Steel Co., 203 Fed. 403, 121 C. C. A. 507.

Exception exists where contract designates a person to whom payment should be made. Wisconsin S. Co. *v.* Steel Co., 203 Fed. 403, 121 C. C. A. 507.

Recital in deed of decedent, inadmissible against grantees in prior deed. Ryle *v.* Davidson 102 Tex. 227, 115 S. W. 28, *foll.* Doe *v.* Webber, 3 Nev. & Man. (Eng.) 586.

724-15 Gray *v.* Walker, 157 Cal. 281, 108 P. 278; S. *v.* Reid, 122 Ia. 700, 47 S. 912; Am. L. Co. *v.* Rickert, 111 N. Y. S. 25.

725-18 Sexton *v.* Ins. Co., 160 N. C. 597, 76 S. E. 535.

725-19 Southwestern T. & T. Co. *v.* Luckett (Tex. Civ.), 127 S. W. 856.

725-21 Union S. Wks. *v.* Robinson, 113 N. Y. S. 608.

725-22 Hudson *v.* Williams, 6 Penne. (Del.) 550, 72 A. 985.

725-23 St. Louis & S. F. R. Co. *v.* Bertig Stone Co. (Ark.), 142 S. W. 830; P. *v.* Seifert, 14 Cal. App. 108, 111 P. 270; Light *v.* Stevens, 8 Cal. App. 74, 103 P. 361, cit. the text; Harding *v.* Harding, 132 Ky. 150, 116 S. W. 305; Davidson *v.* Browning (W. Va.), 80 S. E. 362.

726-24 *Comp.* Shirts *v.* Booker, 21 Ind. App. 420, 52 N. E. 690.

Retaining, without cashing, a check tendered in full payment of sum in excess of that payable on it, not payment. Washington R. S. Co. *v.* Wachenheimer (R. I.), 71 A. 305.

726-25 Note of creditor to third

person. Boothe *v.* Scriber, 48 Or. 561, 87 P. 887, 90 P. 1002.

726-26 Bailey *v.* Robison, 123 Ill. App. 611.

726-27 Wilmer *v.* Placide, 119 Md. 49, 86 A. 43; Stabler *v.* Clark, 155 Mich. 26, 118 N. W. 605 (diary by wife, entry based on information received from husband). See vol. 2, p. 514, n. 19, p. 646, n. 72. But see vol. 8, p. 508, n. 25 (book of master), and supplement thereto.

726-29 Ladd *v.* Craig, 94 Miss. 659, 47 S. 777 (charge by administrators against themselves); Van Name *v.* Barber, 115 App. Div. 593, 100 N. Y. S. 987.

727-31 Shepherd *v.* Sartin (Ala.), 64 S. 57; Knight *v.* Kerfoot (Ind. App.), 102 N. E. 983; Brady *v.* Brady, 110 Md. 656, 73 A. 567; Candee *v.* Co., 126 App. Div. 15, 110 N. Y. S. 355; Union S. Wks. *v.* Robinson, 113 N. Y. S. 608; Ivy *v.* Ivy (Tex. Civ.), 128 S. W. 682. See vol. 9, p. 369, n. 9, and supplement thereto.

Creditor's custom to receive checks shown to estop from claiming such payment not in compliance with contract. Continental Ins. Co. *v.* Hargrove, 131 Ky. 837, 116 S. W. 256.

Mailing funds to creditor proved. Continental Ins. Co. *v.* Hargrove, supra.

Payment of license fee may be shown by parol. Eastman & Co. *v.* Watson, 72 Wash. 522, 130 P. 1144. See vol. 7, p. 731.

727-32 See vol. 10, p. 971, n. 41, and supplement thereto.

727-34 Brown *v.* Koffler, 133 Mo. App. 494, 113 S. W. 711. See vol. 8, p. 765, n. 55, and supplement thereto.

Proof money order sent to wrong address no evidence of payment. Jenkins *v.* Clopton, 141 Mo. App. 74, 121 S. W. 759.

Payment for special purpose or of particular debt not shown by proof debtor borrowed. Ryle *v.* Davidson (Tex. Civ.), 116 S. W. 823.

727-35 Boileau's Est., 18 Pa. Dist. 320. See vol. 9, p. 477, n. 18; vol. 13, p. 867, n. 34, and supplement thereto.

727-37 Ambiguous receipt explained by parol. Thetford *v.* Co., 140 Mo. App. 254, 124 S. W. 39.

Time of payment for work, though not expressly provided for in the written contract, cannot be shown by parol, since in legal contemplation payment is due when the work is finished. Delehanty *v.* Dunn, 151 App. Div. 695, 136 N. Y. S. 193. See also "Parol Evidence," p. 428, n. 66.

728-38 Averbuck *v.* Becher, 140 N. Y. S. 483; Hawkins *v.* Western Nat. Bk. (Tex. Civ.), 145 S. W. 722.

728-39 First Nat. Bk. *v.* Alexander, 161 Ala. 580, 50 S. 45; Russell *v.* Amlot, 132 App. Div. 584, 116 N. Y. S. 1080. See vol. 2, p. 515, n. 23; vol. 8, p. 765, n. 58 et seq., and supplement thereto.

729-41 Norton *v.* Aiken, 134 Ga. 21, 67 S. E. 425; Pool *v.* Anderson, 150 N. C. 624, 64 S. E. 593; Hawkins *v.* Western Nat. Bk. (Tex. Civ.), 145 S. W. 722.

729-43 Eames *v.* Ins. Co., 134 Mo. App. 331, 114 S. W. 85; Russell *v.* Amlot, 132 App. Div. 584, 116 N. Y. S. 1080. See Pierce & Son *v.* Davis, 155 Ky. 270, 159 S. W. 781. And see vol. 2, p. 516, n. 29, and supplement thereto.

Evidence of other payments than those admitted received to impeach plaintiff and support defendant's proposition. Axel *v.* Kraemer, 75 N. J. L. 688, 70 A. 367.

730-44 Acceptance of services must be shown. Parker *v.* Carter, 91 Ark. 162, 120 S. W. 836.

730-45 See Janvier *v.* Culbreth, 5 Penne. (Del.) 505, 63 A. 309; Mann *v.* Schneider, 110 N. Y. S. 383.

730-46 Huff *v.* Simmers, 114 Md. 548, 79 A. 1003.

In suit to recover wages plaintiff may be asked as to payment for board and drawing money from bank during time in question. Huff *v.* Simmers, supra.

730-47 Janvier *v.* Culbreth, 5 Penne. (Del.) 505, 63 A. 309; Supreme Tribe *v.* Hall, 24 Ind. App. 316, 56 N. E. 780. *Contra,* Fidelity Ins. Co. *v.* Satterfield, 162 Ala. 291, 50 S. 132; Brady *v.* Brady, 110 Md. 656, 73 A. 567; McAllister *v.* Chambers, 71 Wash. 521, 129 P. 85. *Comp.* Coulter *v.* Barker, 98 Minn. 68, 107 N. W. 823; Dick *v.* Marvin, 188 N. Y. 426, 81 N. E. 162.

Mortgage on debtor's farm, relevant. Haspar *v.* Weitcamp, 167 Ind. 371, 79 N. E. 191.

731-48 Haspar *v.* Weitcamp, supra; Rhodes *v.* Walker (Ky.), 115 S. W. 257.

731-50 Janvier *v.* Culbreth, 5 Penne. (Del.) 505, 63 A. 309.

731-51 See Janvier *v.* Culbreth, supra.

Creditor's carelessness in collecting

may not be shown. Norton *v.* Aiken, 134 Ga. 21, 67 S. E. 425. But see Dowling *v.* Hastings (N. Y.), 105 N. E. 194.

Method of payment.—If shown debtor habitually paid by checks in rebuttal shown he usually carried considerable sums and had often paid in cash. Security, etc. Ins. Co. *v.* Kleutsch, 169 Fed. 104, 95 C. C. A. 432.

731-53 *Comp.* Janvier *v.* Culbreth, 5 Penne. (Del.) 505, 63 A. 309.

731-54 See Konz *v.* Henson (Tex. Civ.), 156 S. W. 593.

732-55 Rhodes *v.* Walker (Ky.), 115 S. W. 257; Barry *v.* Curley, 202 Mass. 42, 88 N. E. 437.

Absence of money from effects of decedent, shown. Williams *v.* Smith, 29 R. I. 562, 72 A. 1093.

732-56 Spitz *v.* Morse, 104 Me. 447, 72 A. 178.

732-57 Steinfeld & Co. *v.* Wing Wong, 14 Ariz. 336, 128 P. 354 (by statement of account); Am. W. Co. *v.* Maaget, 86 Conn. 234, 85 A. 583; Koehler *v.* Bierbaum (Ky.), 122 S. W. 524; Compton *v.* Mfg. Co. (Tex. Civ.), 151 S. W. 884.

Parol evidence competent to show under which of two instruments payment made. Erie C. O. Co. *v.* Jones, 43 Ind. App. 187, 86 N. E. 1027.

733-58 Clear and convincing evidence required under some circumstances. Commonwealth M. Co. *v.* Carruth, 135 App. Div. 36, 119 N. Y. S. 784.

733-61 McLeod *v.* Bk., 61 Fla. 343, 56 S. 190; Wherley *v.* Rowe, 106 Minn. 494, 119 N. W. 222. See Steltemeier *v.* Barrett, 145 Mo. App. 534, 122 S. W. 1095; Galvin *v.* Gaussen, 31 O. C. C. 565; In re Williamson, 12 Phila. (Pa.) 144.

734-62 Connelly *v.* Sullivan, 119 Ill. App. 469.

735-63 Dovel *v.* Fansler, 132 Mo. App. 669, 112 S. W. 1009; Scranton *v.* Campbell, 45 Tex. Civ. 388, 101 S. W. 285.

735-64 Eddy *v.* Loyd, 90 Ark. 340, 119 S. W. 264; Lang *v.* Shaw, 6 Ga. App. 747, 65 S. E. 789; Rogers *v.* Tiedeman, 9 Ga. App. 811, 72 S. E. 285.

736-66 Light *v.* Stevens, 8 Cal. App. 74, 103 P. 361.

736-68 Testimony of disinterested witness overcomes that of party claiming payment. Loyd M. Co. *v.* Long, 123 La. 777, 49 S. 521.

Intention of obligor important.—Fisher *v.* Seattle, 55 Wash. 396, 104 P. 655.

PEDIGREE

738-1 Ewell *v.* Ewell, 163 N. C. 233, 79 S. E. 509. See Hughes *v.* S. (Tex. Cr.), 152 S. W. 912.

738-2 P. *v.* Balmain, 16 Cal. App. 28, 116 P. 303; Scott *v.* Herrell, 27 App. Cas. (D. C.) 395; Savage *v.* Luther, 165 Ill. App. 1; Met. L. Ins. Co. *v.* Lyons, 50 Ind. App. 534, 98 N. E. 824; Hubatka *v.* Meyerhofer, 79 N. J. L. 264, 75 A. 454; In re Kennedy, 82 Misc. 214, 143 N. Y. S. 404; Ewell *v.* Ewell, 163 N. C. 233, 79 S. E. 509; George *v.* U. S., 1 Okla. Cr. 307, 97 P. 1052; Kirby *v.* Boaz (Tex. Civ.), 121 S. W. 223; Wolf *v.* Wilhelm (Tex. Civ.), 146 S. W. 216; Wall *v.* Lubbock (Tex. Civ.), 118 S. W. 886 (the rule extends to matters intimately connected with pedigree); Sullivan *v.* Solis, 52 Tex. Civ. 464, 114 S. W. 456; Smith *v.* Smith, 140 Wis. 599, 123 N. W. 146.

But see Tout *v.* Woodin (Ia.), 137 N. W. 1001.

In some jurisdictions only in cases where some matter of pedigree is the direct subject of the suit; but in Indiana, and in many other states, also in cases where the question of pedigree is not directly involved. Met. Life Ins. Co. *v.* Lyons, 50 Ind. App. 534, 98 N. E. 824.

739-4 Mutual, etc. Ins. Co. *v.* Jay (Tex. Civ.), 101 S. W. 545.

739-6 Taylor *v.* McCowen, 154 Cal. 798, 99 P. 351.

739-7 In re Gird's Est., 157 Cal. 534, 108 P. 499; Jarchow *v.* Grosse, 257 Ill. 36, 100 N. E. 290 (cit. text); Champion *v.* McCarthy, 228 Ill. 87, 81 N. E. 808; Robertson *v.* Campbell (Ia.), 147 N. W. 301; Taylor *v.* Lodge, 101 Minn. 72, 111 N. W. 919; Aaholm *v.* P., 211 N. Y. 406, 105 N. E. 647; In re Fail, 56 Misc. 217, 107 N. Y. S. 224; S. *v.* McDonald, 55 Or. 419, 106 P. 444; In re McClellan, 20 S. D. 498, 107 N. W. 681; Wolf *v.* Wilhelm (Tex. Civ.), 146 S. W. 216; Kirby *v.* Hayden, 44 Tex. Civ. 207, 99 S. W. 746; Overby *v.* Johnston, 42 Tex. Civ. 348, 94 S. W. 131; Lemons *v.* Harris, 115 Va. 809, 80 S. E. 740. *Comp.* George *v.* U. S., 1 Okla. Cr. 307, 97 P. 1052.

740-8 Cox *v.* Brice, 159 Fed. 378, 86 C. C. A. 378; Scheidegger *v.* Terrell, 149 Ala. 338, 43 S. 26; In re Walden's Est., 166 Cal. 446, 137 P. 35; In re Hartman's Est., 157 Cal. 206, 107 P. 105; Scott *v.* Herrell, 27 App. Cas. (D. C.) 395; Drawdy *v.* Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190; Jarchow *v.* Grosse, 257 Ill. 36, 100 N. E. 290 (cit. text); Champion *v.* McCarthy, 228 Ill. 87, 81 N. E. 808; Taylor *v.* Lodge, 101 Minn. 72, 111 N. W. 819; Aaholm *v.* P., 211 N. Y. 406, 105 N. E. 647; In re Fail, 56 Misc. 217, 107 N. Y. S. 224; Layton *v.* Kraft, 111 App. Div. 842, 98 N. Y. S. 72; Perkins *v.* Baker (Okla.), 137 P. 661; In re McClellan, 20 S. D. 498, 107 N. W. 681; Wolf *v.* Wilhelm (Tex. Civ.), 146 S. W. 216; Kirby *v.* Boaz (Tex. Civ.), 121 S. W. 223 (competent if made before declarant had knowledge of the controversy); Flores *v.* Hovel (Tex. Civ.), 125 S. W. 606; Kirby *v.* Hayden, 44 Tex. Civ. 207, 99 S. W. 746; Lemons *v.* Harris, 115 Va. 809, 80 S. E. 740.

See Tout *v.* Woodin (Ia.), 137 N. W. 1001.

740-9 Fuller *v.* Cole, 33 Pa. Super. 563; Kirby *v.* Hayden, 44 Tex. Civ. 207, 99 S. W. 746. See Robertson *v.* Campbell (Ia.), 147 N. W. 301.

741-11 S. *v.* McDonald, 55 Or. 419, 104 P. 967.

741-12 Adler *v.* Royal Neighbors, 90 Neb. 56, 132 N. W. 716; Kirby *v.* Boaz (Tex. Civ.), 121 S. W. 223.

741-13 Scheidegger *v.* Terrell, 149 Ala. 338, 43 S. 26; Mist *v.* Kapiolani, 13 Haw. 523; Bernard *v.* Bedminster, 74 N. J. L. 92, 64 A. 960; Aaholm *v.* P., 157 App. Div. 618, 142 N. Y. S. 926; Lowenfeld *v.* Ditchett, 114 App. Div. 56, 99 N. Y. S. 724; Layton *v.* Kraft, 111 App. Div. 842, 98 N. Y. S. 72; S. *v.* McDonald, 55 Or. 419, 104 P. 967 (relationship de facto sufficient); Overby *v.* Johnston, 42 Tex. Civ. 348, 94 S. W. 131. *Contra*, In re Hartman's Est., 157 Cal. 206, 107 P. 105.

741-14 In re Hartman's Est., 157 Cal. 206, 107 P. 105; Aaholm *v.* P., 211 N. Y. 406, 105 N. E. 647; Layton *v.* Kraft, 111 App. Div. 842, 98 N. Y. S. 72.

741-15 Jarchow *v.* Grosse, 257 Ill. 36, 100 N. E. 290. See In re Gird's Est., 157 Cal. 534, 108 P. 499.

742-16 Scheidegger *v.* Terrell, 149 Ala. 338, 43 S. 26; Overby *v.* Johnston, 42 Tex. Civ. 348, 94 S. W. 131.

743-17 Hoyt *v.* Lightbody, 98 Minn. 189, 108 N. W. 843; McLain *v.* Allen (S. C.), 79 S. E. 1 (quoting text); Gorham *v.* Settegast, 44 Tex. Civ. 254, 98 S. W. 665.

743-18 Champion *v.* McCarthy, 228 Ill. 87, 81 N. E. 808.

743-19 Poulett Peerage, (1903) App. Cas. (Eng.) 395; Champion *v.* McCarthy, 228 Ill. 87, 81 N. E. 808 (relationship of parent and child).

744-21 Cox *v.* Brice, 159 Fed. 378, 86 C. C. A. 378; Harvick *v.* Modern, etc., 158 Ill. App. 570; Taylor *v.* Lodge, 101 Minn. 72, 111 N. W. 919; Mutual Ins. Co. *v.* Jay, 50 Tex. Civ. 165, 109 S. W. 1116; Overby *v.* Johnston, 42 Tex. Civ. 348, 94 S. W. 131; Kirby *v.* Boaz, 41 Tex. Civ. 282, 91 S. W. 642.

745-22 In re McClellan, 20 S. D. 498, 107 N. W. 681; Kirby *v.* Hayden, 44 Tex. Civ. 207, 99 S. W. 746; Kirby *v.* Boaz, 41 Tex. Civ. 282, 91 S. W. 642. *Contra*, Rule self-serving declarations of decedents inadmissible does not apply in cases of pedigree. Topper *v.* Perry, 197 Mo. 531, 544, 95 S. W. 203.

Declarations of alleged relative against interest competent on general principles and as member of family under statute. S. *v.* McDonald, 55 Or. 419, 104 P. 967.

Not fatal if declarations otherwise proved. Kirby *v.* Boaz (Tex. Civ.), 121 S. W. 223.

745-23 Ewell *v.* Ewell, 163 N. C. 233, 79 S. E. 509; In re McClellan, 20 S. D. 498, 107 N. W. 681; Wolf *v.* Wilhelm (Tex. Civ.), 146 S. W. 216; Butcher *v.* Sommerville, 67 W. Va. 261, 67 S. E. 726 (tacit recognition of relationship). See vol. 11, p. 206, n. 12, and supplement thereto.

Family Bible.—In re Peterson's Est., 22 N. D. 480, 134 N. W. 751.

The affidavit of a deceased heir, as to family history, properly accredited and identified as a member of the deceased family, may be used, to prove the declaration. Wolf *v.* Wilhelm (Tex. Civ.), 146 S. W. 216.

Affidavit of stranger on information and belief inadmissible. Bernard *v.* Bedminster, 74 N. J. L. 92, 64 A. 960.

745-24 Ewell *v.* Ewell, 163 N. C. 233, 79 S. E. 509.

745-25 P. *v.* Balmain, 16 Cal. App. 28, 116 P. 303; Mist *v.* Kapiolani, 13 Haw. 523; Rollins *v.* R. Co., 73 N. J. L. 64, 62 A. 929; Layton *v.* Kraft, 111

App. Div. 842, 98 N. Y. S. 72; Ewell *v.* Ewell, 163 N. C. 233, 79 S. E. 509; Kirby *v.* Boaz (Tex. Civ.), 121 S. W. 223; Wren *v.* Howland, 33 Tex. Civ. 87, 75 S. W. 894.

Ancient deeds.—Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484.

Copies.—Bryant *v.* McKinney, 29 Ky. L. R. 951, 96 S. W. 809.

746-26 Wigley *v.* Solicitor, (1902) Prob. (Eng.) 233; Hays *v.* Claypool (Ia.), 145 N. W. 874 (repute alone insufficient); In re Fail, 56 Misc. 217, 107 N. Y. S. 224; Layton *v.* Kraft, 111 App. Div. 842, 98 N. Y. S. 72; Ewell *v.* Ewell, 163 N. C. 233, 79 S. E. 509; S. *v.* McDonald, 55 Or. 419, 104 P. 967; Arnold *v.* Co., 20 Pa. Super. 61.

"Such testimony generally comes down in family talk, discussing such matters among themselves, handing down the family history. Such is the experience of every family and made generally without regard to any selfish interest regarding property rights, where bias and prejudice might creep in to control." Wolf *v.* Wilhelm (Tex. Civ.), 146 S. W. 216.

747-27 Kirby *v.* Boaz, 41 Tex. Civ. 282, 91 S. W. 642.

Witness knowing deceased from childhood reared in same house may testify to pedigree and to acknowledged relationship between deceased and mother. S. *v.* McDonald, 55 Or. 419, 104 P. 967.

747-28 S. *v.* McDonald, 55 Or. 419, 104 P. 967. *Comp.* Hays *v.* Claypool (Ia.), 145 N. W. 874.

747-29 *Contra* under statute. S. *v.* McDonald, 55 Or. 419, 106 P. 444. But see Lay *v.* Fuller, 178 Ala. 375, 59 S. 609.

747-30 See Lee *v.* R. Co., 125 La. 236, 51 S. 182, stated under supra, "Carriers." 941-31.

Ancestor voting at election where negroes not permitted, evidence of general reputation he was white. Gilliland *v.* Board, 141 N. C. 482, 54 S. E. 413.

748-31 Private catalogue inadmissible. L. & N. R .Co. *v.* Frazee, 24 Ky. L. R. 1273, 71 S. W. 437.

PENALTIES

750-2 New York C., etc. R. Co. *v.* U. S., 165 Fed. 833, 91 C. C. A. 519 Criminal features of action prevent removal to federal court. S. *v.* R. Co., 173 Fed. 572.

Evidence of rule of defendant prohibiting the acts complained of is inadmissible. P. *v.* Hartford Life Ins. Co., 252 Ill. 398, 96 N. E. 1049.

750-6 St. Louis, etc. R. Co. *v.* McClerkin, 88 Ark. 277, 114 S. W. 241; Miley *v.* R. Co., 41 Mont. 51, 108 P. 5; Greece *v.* Vick, 126 App. Div. 171, 110 N. Y. S. 338; McCarthy *v.* R. Co., 126 App. Div. 182, 110 N. Y. S. 936; Enton *v.* R. Co., 126 App. Div. 800, 121 N. Y. S. 793; Fullerton *v.* R. Co., 82 S. C. 333, 64 S. E. 142; Chicago, etc. R. Co. *v.* Risley, 35 Tex. Civ. 66, 119 S. W. 897; Mo., etc. R. Co. *v.* Thompson, 55 Tex. Civ. 12, 118 S. W. 618. See Board *v.* Schlechter, 83 N. J. L. 88, 83 A. 783.

Exculpatory facts must be established by defendant under safety appliance law. U. S. *v.* R. Co., 170 Fed. 542, 95 C. C. A. 628.

That violation of ordinance occurred within corporate limits of city. City *v.* Gustin, 163 Ill. App. 459.

751-8 Conclusively presumed that carrier sued for failure to receive and transport has made, published and filed rates. Burlington L. Co. *v.* R. Co., 152 N. C. 70, 67 S. E. 167.

751-9 St. Louis, etc. R. Co. *v.* Waldrop, 93 Ark. 42, 123 S. W. 778, mistake goes only in mitigation of penalty. *Contra*, McCarthy *v.* R. Co., 126 App. Div. 182, 110 N. Y. S. 936. In proceeding to recover penalty under safety appliance act, condition of cars where last inspected shown by verified slips of workmen making repairs. U. S. *v.* R. Co., 174 Fed. 290, 98 C. C. A. 293.

751-10 U. S. *v.* Regan, 229 U. S. 612, 33 Sup. Ct. 772, 57 L. ed. 1351; U. S. *v.* R. Co., 170 Fed. 542, 95 C. C. A. 628, 170 Fed. 456 (under safety appliance act); U. S. *v.* R. Co., 157 Fed. 459 (act concerning unloading live stock by railroads); U. S. *v.* R. Co., 157 Fed. 893; Robinson *v.* Schiltz, 135 Mo. App. 55, 115 S. W. 472; Waters P. O. Co. *v.* S., 48 Tex. Civ. 162, 106 S. W. 958.

751-11 Atchison R. Co. *v.* P., 237 Ill. 270, 81 N. E. 242; Greece *v.* Vick, 126 App. Div. 171, 110 N. Y. S. 338; Morrison *v.* Hall, 55 Or. 243, 104 P. 963. See City *v.* Clawson, 170 Ill. App. 310.

752-12 U. S. *v.* R. Co., 156 Fed. 182 (federal safety appliance law). Engel

v. R. Co., 55 Misc. 203, 105 N. Y. S. 80.

752-13 U. S. v. R. Co., 157 Fed. 893; New Orleans v. Villere, 126 La. 514, 52 S. 682; Partridge v. Doty, 121 N. Y. S. 586; Merchants, etc. Bk. v. Horton (Okla.), 117 P. 201; Central H. Co. v. S. (Tex. Civ.), 117 S. W. 880.

PERJURY

754-1 Cox v. S., 13 Ga. App. 687, 79 S. E. 909; C. v. Schweiters, 29 Ky. L. R. 417, 93 S. W. 592; P. v. Ellenbogen, 114 App. Div. 182, 99 N. Y. S 897 (letter-press copy of officer's authority).

Under federal statute affidavit need not be subscribed before officer if he administered oath. Nurnberger v. U. S., 156 Fed. 721, 84 C. C. A. 377.

Presumption of certificate not overcome by testimony of officer that he had no independent recollection of fact certified to. S. v. Day, 108 Minn. 121, 121 N. W. 611; Komp v. S., 129 Wis. 20, 108 N. W. 46.

754-2 Boren v. U. S., 144 Fed. 801, 75 C. C. A. 531; S. v. Loos, 145 Ia. 170, 123 N. W. 962; Biard v. S., 54 Tex. Cr. 440, 113 S. W. 275; Clay v. S., 52 Tex. Cr. 555, 107 S. W. 1129.

754-3 Goslin v. C., 28 Ky. L. R. 683, 90 S. W. 223; Komp v. S., 129 Wis. 20, 108 N. W. 46.

754-4 P. v. Collins, 6 Cal. App. 492, 92 P. 513; S. v. Mercer, 101 Md. 535, 61 A. 220; Trevinio v. S., 48 Tex. Cr. 350, 88 S. W. 356 (oath translated by interpreter); Lamar v. S., 49 Tex. Cr. 563, 95 S. W. 509; S. v. Miller (Wash.), 141 P. 293 (testimony of clerk); Komp v. S., 129 Wis. 20, 108 N. W. 46.

Administration of oath by deputy clerk cannot be shown if alleged administered by clerk or judge unless shown done in clerk's presence. Jackson v. S., 156 Ala. 161, 47 S. 77.

Acts and declarations of person on whose behalf perjury committed, tending to show guilt of crime with which charged, and other circumstances condemnatory of him irrelevant. Saucier v. S., 95 Miss. 226, 48 S. 840.

755-5 Rex v. Drummond, 10 Ont. L. R. 546; C. v. Focht, 38 Pa. Super. 211; Curtis v. S., 46 Tex. Cr. 480, 81 S. W. 29.

Existence of statute giving immunity to one giving incriminating testimony justifies proof of such testimony against him in perjury prosecution. P. v. Cahill, 126 App. Div. 391, 110 N. Y. S. 728.

755-7 See Smith v. S. (Tex. Cr.), 156 S. W. 645.

755-9 Cain v. S., 10 Ga. App. 473, 73 S. E. 623; McLaren v. S., 4 Ga. App. 643, 62 S. E. 138.

755-10 Brooks v. S., 91 Ark. 505, 121 S. W. 740; Foreman v. S., 47 Tex. Cr. 179, 85 S. W. 809; Adams v. S., 49 Tex. Cr. 361, 91 S. W. 225; Hambright v. S., 49 Tex. Cr. 162, 91 S. W. 232.

755-11 McLaren v. S., 4 Ga. App. 643, 62 S. E. 138.

756-12 Askew v. S., 3 Ga. App. 79, 59 S. E. 311; S. v. Loos, 145 Ia. 170, 123 N. W. 962; S. v. Gordon, 196 Mo. 185, 95 S. W. 420; S. v. Smith, 119 Minn. 107, 137 N. W. 295; Shevalier v. S., 85 Neb. 366, 123 N. W. 424; P. v. Teal, 196 N. Y. 372, 89 N. E. 1086; P. v. Davis, 122 App. Div. 569, 107 N. Y. S. 426; McVicker v. S., 52 Tex. Cr. 508, 107 S. W. 834.

If perjured testimony goes to gist of case evidence of materiality non-essential. Grissom v. S., 88 Ark. 115, 113 S. W. 1011.

756-13 Smith v. S., 91 Ark. 200, 120 S. W. 985; P. v. Collins, 6 Cal. App. 492, 92 P. 513; S. v. Hoel, 77 Kan. 334, 94 P. 267; S. v. Moran, 216 Mo. 550, 115 S. W. 1126; S. v. Ackerman, 214 Mo. 325, 113 S. W. 1087; S. v. Cline, 150 N. C. 854, 64 S. E. 591; S. v. Miller, 26 R. I. 282, 58 A. 882; Busby v. S., 48 Tex. Cr. 83, 86 S. W. 1032.

756-14 P. v. Chadwick, 4 Cal. App. 63, 87 P. 384 (time and place of forging immaterial); P. v. Collins, 6 Cal. App. 492, 92 P. 513; Wilkinson v. P., 226 Ill. 135, 80 N. E. 699; S. v. Mercer, 101 Md. 535, 61 A. 220; Christy v. Rice, 152 Mich. 563, 116 N. W. 200; McNeice v. S., 101 Miss. 366, 58 S. 3; P. v. Teal, 196 N. Y. 372, 89 N. E. 1086; S. v. Harris, 145 N. C. 456, 59 S. E. 115; S. v. Cline, 146 N. C. 640, 61 S. E. 522; Field v. S., 9 O. C. C. (N. S.) 245.

756-15 Grissom v. S., 88 Ark. 115, 113 S. W. 1011 (not necessarily error to allow jury to pass on question, though no conflict in evidence); P. v. Bradbury, 155 Cal. 808, 103 P. 215; P. v. Chadwick, 4 Cal. App. 63, 87 P. 384; Saucier v. S., 95 Miss. 226, 48 S. 840; S. v. Moran, 216 Mo. 550, 115 S.

W. 1126; P. v. Corrigan, 195 N. Y. 1, 87 N. E. 792; S. v. Harris, 145 N. C. 456, 59 S. E. 115; Busby v. S., 48 Tex. Cr. 83, 86 S. W. 1032.

757-16 Wilkinson v. P., 226 Ill. 135, 80 N. E. 699.

757-17 S. v. Carothers (Or.), 138 P. 1077; Poulter v. S. (Tex. Cr.), 161 S. W. 475.

757-21 Pilgrim v. S., 3 Okla. Cr. 49, 104 P. 383 (grand juror by statute); S. v. Miller (Wash.), 141 P. 293 (presiding judge).

Grand juror's testimony as to manner of defendant's testifying, admissible to show deliberation. Poulter v. S. (Tex. Cr.), 161 S. W. 475. See Scott v. S. (Tex. Cr.), 160 S. W. 960.

May testify that defendant was warned his statements would be used against him. See Robertson v. S. (Tex. Cr.), 150 S. W. 893.

758-22 P. v. Bradbury, 155 Cal. 808, 103 P. 215 (also that testimony given and materiality); S. v. Pratt, 20 S. D. 440, 107 N. W. 538; Waddle v. S. (Tex. Cr.), 165 S. W. 591; Miles v. S. (Tex. Cr.), 165 S. W. 567; Poulter v. S. (Tex. Cr.), 161 S. W. 475; Johnson v. S. (Tex. Cr.), 160 S. W. 964 (note); Mares v. S. (Tex. Cr.), 158 S. W. 1130; Manning v. S., 46 Tex. Cr. 326, 81 S. W. 957; S. v. Justesen, 35 Utah 165, 99 P. 456 (also materiality of testimony).

See Powell v. S., 5 Ala. App. 150, 59 S. 328; Edwards v. S. (Tex. Cr.), 160 S. W. 709; Spearman v. S. (Tex. Cr.), 152 S. W. 915.

Fact of criminal proceedings and coroner's inquisition may be shown by state but not papers upon which such proceeding is founded. P. v. Van Zile, 159 App. Div. 61, 144 N. Y. S. 287.

Indictment not shown to be recorded admissible, second trial in same court. Hannegan v. S., 5 Ala. App. 142, 59 S. 376.

Portions of transcript showing withdrawal of counsel from case inadmissible. Key v. S. (Tex. Cr.), 161 S. W. 130.

Inadmissible on question of materiality. Poulter v. S. (Tex. Cr.), 161 S. W. 475.

If error to admit the original file in the civil suit in which the defendant was charged with having sworn falsely, because the record was the best evidence, it is rendered harmless by following up the admission of these papers immediately by the introduction of the original record showing identically the same things. Powell v. S., 5 Ala. App. 150, 59 S. 328.

758-23 S. v. Justesen, 35 Utah 165, 99 P. 456.

Report and affidavit by officer, bills and vouchers showing purchases made, admissible. Hotel v. S., 112 Md. 115, 75 A. 1056.

Record showing accused's conviction of offense of which he swore he was not guilty need not be introduced, complaint is admissible. Warren v. S., 57 Tex. Cr. 518, 123 S. W. 1115.

In absence of formal accusation or record of proceedings before magistrate he and clerk may, with aid of notes, testify to proceedings. Rex v. Yaldon, 17 Ont. L. R. 179. See Rex v. Legros, 17 Ont. L. R. 425.

759-24 Or refresh memory therefrom. S. v. Miller (Wash.), 141 P. 293.

759-25 Holmgren v. U. S., 156 Fed. 439, 84 C. C. A. 301 (unnecessary to show malicious intent); Baker v. S., 87 Ark. 564, 113 S. W. [illegible]; Blevins v. S., 85 Ark. 195, 107 S. W. 200; Andrew v. S., 3 Ga. App. 70, 59 S. E. 311 (must prove action not barred; Ind. Tr. & T. Co. v. Henby, 178 Ind. 230, 97 N. E. 313; S. v. Roche, 137 Ia. 737, 114 N. W. 1034; P. v. Corrigan, 129 App. Div. 62, 113 N. Y. S. 504; P. v. Peck, 130 N. Y. S. 967; P. v. Gillette, 120 App. Div. 665, 111 N. Y. S. 141; S. v. Cline, 150 N. C. 854, 64 S. E. 891; S. v. Smith, 47 Or. 485, 83 P. 867.

759-26 Wechsler v. U. S., 158 Fed. 579, 86 C. C. A. 37.

Failure of accused to produce paper testified given him no evidence of falsity of testimony. Baker v. S., 87 Ark. 564, 113 S. W. 295.

759-27 See vol. 3, p. 696, n. 45, and supplement thereto.

760-29 P. v. Smith, 3 Cal. App. 68, 84 P. 452; Nance v. S., 129 Ga. 97, 58 S. E. 832; McLaren v. S., 4 Ga. App. 643, 62 S. E. 138; Parham v. S., 3 Ga. App. 468, 60 S. E. 128; Stamper v. Co., 30 Ky. L. R. 892, 100 S. W. 286; Howell v. C., 21 Ky. L. R. 983, 104 S. W. 685; Smart v. C., 29 Ky. L. R. 1067, 96 S. W. 845; P. v. Smyth, 110 App. Div. 1, 96 N. Y. S. 1046; Ex parte Metcalf, 8 Okla. Cr. 605, 129 P. 675; S. v. Smith, 47 Or. 485, 83 P. 865; S. v. Pratt, 20 S. D. 440, 107 N. W. 538; Kelley v. S., 51 Tex. Cr. 597,

103 S. W. 189; Conant *v.* S., 51 Tex. Cr. 610, 103 S. W. 897 (accomplice not credible witness); Holt *v.* S., 48 Tex Cr. 559, 89 S. W. 838; Grady *v.* S., 49 Tex. Cr. 3, 90 S. W. 38; S. *v.* Rutledge, 37 Wash. 523, 79 P. 1123.

See Holmgren *v.* U. S., 156 Fed. 439, 84 C. C. A. 301. And see vol. 3, p. 697, n. 48, and supplement thereto. But see Kelley *v.* S., 51 Tex. Cr. 507, 103 S. W. 189.

760-30 Lee *v.* S. (Miss.), 62 S. 360. See vol. 3, p. 696, n. 44, and supplement thereto.

"In trials for treason and perjury almost alone are now to be found any survival of the practice of arbitrarily measuring the probative value of the evidence by the number of witnesses." Allen *v.* U. S., 194 Fed. 664, 114 C. C. A. 357; Powell *v.* S., 5 Ala. App. 150, 59 S. 328; Brooks *v.* S., 91 Ark. 505, 121 S. W. 740; Cook *v.* U. S., 26 App. Cas. (D. C.) 427; Saucier *v.* S., 95 Miss. 226, 48 S. 840; U. S. *v.* Lozano, 7 Phil. Isl. 142; Billingsley *v.* S., 49 Tex. Cr. 620, 95 S. W. 520; S. *v.* Sargood, 80 Vt. 415, 68 A. 49.

761-31 See vol. 3, p. 698, n. 50, and supplement thereto.

761-32 Daniels *v.* U. S., 196 Fed. 459, 116 C. C. A. 233. See vol. 3, p. 674, n. 20, 21, and supplement thereto.

Not presumed testimony of accused set out in indictment true. Anderson *v.* S., 56 Tex. Cr. 360, 120 S. W. 462.

762-33 Allen *v.* U. S., 194 Fed. 664, 114 C. C. A. 357; *cit.* U. S. *v.* Wood, 14 Pet. (U. S.) 430; P. *v.* Doody, 172 N. Y. 165, 64 N. E. 807.

Instrument executed by defendant containing recital contradictory of testimony establishes not falsity of latter. Baker *v.* S., 87 Ark. 564, 113 S. W. 205

762-34 Nance *v.* S., 126 Ga. 95, 54 S. E. 932; Stamper *v.* C., 30 Ky. L. R. 992, 100 S. W. 286. See S. *v.* Pratt, 20 S. D. 440, 112 N. W. 152 (presumptive evidence must be overcome). See vol. 3, p. 698, n. 49, and supplement thereto.

763-35 Brooks *v.* S., 91 Ark. 505, 121 S. W. 740; Bell *v.* S., 5 Ga. App. 701, 63 S. E. 860. See vol. 3, p. 676, n. 31; p. 700, n. 59, and supplement thereto.

763-37 Baker *v.* S., 87 Ark. 564, 113 S. W. 205; Nance *v.* S., 126 Ga. 95, 54 S. E. 932.

763-38 Anderson *v.* S., 56 Tex. Cr. 360, 120 S. W. 462. See vol. 3, p. 679, n. 44, p. 701, n. 60, and supplement thereto.

764-39 Parham *v.* S., 3 Ga. App. 468, 60 S. E. 123; S. *v.* Gordon, 196 Mo. 185, 95 S. W. 420. See vol. 3, p. 699, n. 58, and supplement thereto.

764-41 See supra, "Citizens and Aliens," 156-20.

764-42 Miles *v.* S. (Tex. Cr.), 165 S. W. 567; Stanley *v.* S. (Tex. Cr.), 95 S. W. 1076. See vol. 3, p. 704, n. 72 et seq., and supplement thereto.

765-43 Powell *v.* S., 5 Ala. App. 150, 59 S. 328; Davis *v.* S., 7 Ga. App. 680, 67 S. E. 839, *cit.* the text.

Confessions or admissions of defendant not to be considered on question of corroboration. S. *v.* Thornton, 245 Mo. 436, 150 S. W. 1048.

765-44 Hannegan *v.* S., 5 Ala. App. 142, 59 S. 376; Johnson *v.* S., 3 Ala. App. 98, 57 S. 389; P. *v.* Chadwick, 4 Cal. App. 63, 87 P. 384, 389; Leaptrot *v.* S., 51 Fla. 57, 40 S. 616; Martinatis *v.* P., 223 Ill. 117, 79 N. E. 55; Ex parte Metcalf, 8 Okla. Cr. 605, 129 P. 675; S. *v.* Smith, 47 Or. 485, 83 P. 865; Hart *v.* S. (Tex. Cr.), 166 S. W. 152; Spearman *v.* S. (Tex. Cr.), 152 S. W. 915; Barber *v.* S. (Tex. Cr.), 142 S. W. 577; Foreman *v.* S., 47 Tex. Cr. 179, 85 S. W. 809; Stanley *v.* S. (Tex. Cr.), 95 S. W. 1076; Komp *v.* S., 129 Wis. 20, 108 N. W. 46. See supra, "Citizens and Aliens," 156-20.

False testimony as to whereabouts of any members of conspiracy admissible. Smith *v.* C., 154 Ky. 613, 157 S. W. 1089.

Delay of first inventors in reducing idea to practice immaterial. Patterson *v.* U. S., 202 Fed. 208, 120 C. C. A. 650.

Defendant to prove truth of statement that he had not delivered liquor to infant, cannot show a sale by the infant unless he shows he had been indicted therefor. Robertson *v.* S. (Tex. Cr.), 150 S. W. 893.

Defendant's witnesses may be cross-examined as to their whereabouts at the time of the trial of the civil suit and why they did not testify in same. Barber *v.* S. (Tex. Cr.), 142 S. W. 577.

766-45 Barnard *v.* U. S., 162 Fed. 618, 89 C. C. A. 376; Hannegan *v.* S., 5 Ala. App. 142, 59 S. 378; S. *v.* Gordon, 196 Mo. 185, 95 S. W. 420; Hardin *v.* S., 59 Tex. Cr. 631, 117 S. W. 974.

766-46 Facts contradictory of ac-

cused's former testimony admissible in his behalf, to show another committed crime accused testified he committed. Hardin *v.* S., 59 Tex. Cr. 631, 117 S. W. 974.

767-47 S. *v.* Gordon, 196 Mo. 185, 95 S. W. 420.

767-49 Nurnberger *v.* U. S., 156 Fed. 721, 84 C. C. A. 377; Hannegan *v.* S., 4 Ala. App. 142, 59 S. 376; S. *v.* Hoel, 77 Kan. 334, 94 P. 267; P. *v.* Cahill, 193 N. Y. 232, 86 N. E. 39; S. *v.* Smith, 47 Or. 485, 83 P. 865 (circumstances impute fraudulent intent); S. *v.* Sargood, 80 Vt. 415, 68 A. 49 (ignorance of materiality of statements no excuse). See Lamar *v.* S., 49 Tex. Cr. 563, 95 S. W. 509; Hirsch *v.* S., 50 Tex. Cr. 1, 95 S. W. 513; vol. 3, p. 126, n. 19, and supplement thereto.

That accused on a trial for perjury knew that the alleged perjured testimony was false when he gave it may be proved by circumstantial evidence. Trinkle *v.* S. (Tex. Cr.), 158 S. W. 544.

Burden to prove on state.—Trinkle *v.* S. (Tex. Cr.), 158 S. W. 544.

767-50 Barnard *v.* U. S., 162 Fed. 618, 89 C. C. A. 376; Davis *v.* S., 7 Ga. App. 680, 67 S. E. 839.

Criminal intent established by showing accused wilfully testified to what he knew false. P. *v.* Corrigan, 195 N. Y. 1, 87 N. E. 792.

In a prosecution for perjury where accused was alleged to have falsely testified that the plaintiff in an action on a note had given him a receipt for the payment of same, the receipt is material and admissible, as showing whether it had been executed by the plaintiff. Barber *v.* S. (Tex. Cr.), 142 S. W. 577.

Previous reports by accused concerning condition of bank admissible to show knowledge of falsity of report. Anderson *v.* C. (Ky.), 117 S. W. 364.

Impairment of memory shown by accused charged with testifying falsely as to belief. S. *v.* Coyne, 214 Mo 344, 114 S. W. 8.

Corroboration not required concerning knowledge or intent. O'Leary *v.* U S., 158 Fed. 796, 86 C. C. A. 56.

768-51 Presumption writing entered into between parties contained all agreed upon inconclusive upon accused: hence he may testify on intent to understanding that no part of agreement omitted. May also ask person drawing paper why entire agreement was not included therein if he says it is incomplete. S. *v.* Loos, 145 Ia. 170, 123 N W. 962.

Defendant competent witness in favor of co-defendant if not shown they agreed to commit perjury. Anderson *v.* S., 56 Tex. Cr. 560, 120 S. W. 462.

768-52 P. *v.* Elenbogen, 114 App. Div. 182, 99 N. Y. S. 897.

769-54 Boren *v.* U. S., 144 Fed. 801, 75 C. C. A. 531; S. *v.* Richardson, 248 Mo. 563, 154 S. W. 735. See vol. 3, p. 699, n. 55, and supplement thereto.

769-55 P. *v.* Nichols, 108 App. Div. 362, 95 N. Y. S. 736. *Contra*, Bell *v.* S., 5 Ga. App. 701, 63 S. E. 860; Stone *v.* S., 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145.

Record of conviction of perjurer inadmissible against suborner. S. *v.* Justesen, 35 Utah 105, 99 P. 456.

Attempt to suborn perjury established without showing issues made. P. *v.* Teal, 133 App. Div. 35, 117 N. Y. S. 743.

PHOTOGRAPHS

To show value, 771-4; *Evidentiary weight*, 771-4; *Use of magnifying glass*, 771-4.

770-1 Porter *v.* Buckley, 147 Fed. 140; Houston, etc. R. Co. *v.* Shapard 54 Tex. Civ. 596, 118 S. W. 596 (accuracy of X-ray photograph of bones of living body).

Photograph is a "paper" and may be taken to jury room. P. *v.* Balestieri, 23 Cal. App. 708, 139 P. 821.

Such evidence does not necessarily discredit conflicting testimony. Stotelmeyer *v.* R. Co., 148 Ia. 278, 127 N W. 205.

771-2 Kansas City R. Co. *v.* Morris, 80 Ark. 528, 98 S. W. 363; P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077; Ligon *v.* Allen, 157 Ky. 101, 162 S. W. 536; Cincinnati, etc. Co. *v.* De Onzo, 87 O. St. 109, 100 N. E. 320; Buck *v.* McKeesport, 223 Pa. 211, 72 A. 514.

See Ligon *v.* Allen, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842, 844, n.

771-3 Porter *v.* Buckley, 147 Fed. 140; Sellers *v.* S., 91 Ark. 175, 120 S. W. 840, *cit.* text; Strasser *v.* Stabeck, 112 Minn. 90, 127 N. W. 384; Cincinnati, etc. Co. *v.* De Onzo, 87 O. St. 109, 100 N. E. 320; Parker *v.* Mfg. Co. (Or.), 138 P. 1061; Buck *v.* McKeesport, 223

Pa. 211, 72 A. 514; Hupfer *v.* Co., 127 Wis. 306, 106 N. W. 831. See vol. 6, p. 503, n. 87, and supplement thereto.

771-4 To show value. — Conrad *v.* Richter, 13 Pa. C. C. 478; Willis *v.* S., 49 Tex. Cr. 139, 90 S. W. 1100; Foss *v.* Smith, 79 Vt. 434, 65 A. 553. See vol. 6, p. 508, n. 86, and supplement thereto.

Evidentiary weight.—Higgs *v.* R. Co., 16 N. D. 446, 114 N. W. 722.

Use of magnifying glass.—S. *v.* Wallace, 78 Conn. 677, 63 A. 448.

Photographs of tool offered in evidence and of piece of steel no part of tool admissible to explain expert testimony concerning chemical and microscopical tests of former. Potvin *v.* Co., 156 Mich. 201, 120 N. W. 613.

772-5 Temple *v.* Gilbert, 86 Conn. 335, 85 A. 380; Henke *v.* Deere & M. Co., 175 Ill. App. 240; Krauss *v.* Ballinger, 171 Ill. App. 534 (evidence sufficient); Nolte *v.* R. Co. (Ia.), 147 N. W. 192; Stone *v.* R. Co., 99 Me. 243, 59 A. 56; Babb *v.* Co., 99 Me. 298, 59 A. 290; Western M. R. Co. *v.* Martin, 110 Md. 554, 73 A. 267; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651; Eldredge *v.* Mitchell, 214 Mass. 480, 102 N. E. 69; Halloran *v.* R. Co., 211 Mass. 132, 97 N. E. 631; C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127; McKarren *v.* R. Co., 194 Mass. 179, 80 N. E. 477; Le Barron *v.* S. (Miss.), 65 S. 648; Gibbs *v.* City, 163 Mo. App. 105, 145 S. W. 841; Parker *v.* Mfg. Co. (Or.), 138 P. 1061; Whaley *v.* Vidal, 27 S. D. 642, 132 N. W. 248. See Beach Front H. Co. *v.* Sooy, 210 Fed. 265, 127 C. C. A. 83; Ligon *v.* Allen, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842, 848 n. And see vol. 6, p. 503, n. 87.

Admissibility a question of judicial discretion. Rodick *v.* R. Co., 109 Me. 530, 85 A. 41; Gillet *v.* Shaw (Mass.), 104 N. E. 719; Eldredge *v.* Mitchell, 214 Mass. 480, 102 N. E. 69; S. *v.* Fateh-Mohamed, 76 Wash. 462, 136 P. 676.

Admission of photograph tending to prejudice, error. Fearon *v.* Ins. Co., 147 N. Y. S. 644.

Better to conduct preliminary examination in absence of jury. Gillet *v.* Shaw (Mass.), 104 N. E. 719.

That copy looked like person whose identity is questioned is sufficient preliminary. S. *v.* Ling, 91 Kan. 647, 138 P. 582.

Whether photograph correctly represents scene for jury. Mitton *v.* Elev. Co., 124 Minn. 65, 144 N. W. 434.

Locality.—"It is not possible to lay down a general rule as to what changes shall require an exclusion of photographic representations of the locality, but the trial court with the photographs before it, and the witness who took them, ought to be conceded some discretion in admitting or rejecting them." Maryland Electric R. Co. *v.* Beasley, 117 Md. 270, 83 A. 157.

To show age.—"Dress alone makes a great deal of difference in the appearent age of a person. The combination of dress and a photograph would be doubly deceptive. When employed, the plaintiff was six months below the age fixed by the statute. A photograph taken a year before, dressed as she was, with veil and flowers on her head, short white dress, white slippers and stockings, was no evidence of her appearance as to age when employed. The prejudicial character of the photograph is manifest." Dresch *v.* Elliott, 137 App. Div. 252, 122 N. Y. S. 14.

773-6 S. *v.* Rogers, 129 Ia. 229, 105 N. W. 455; C. *v.* Johnson, 199 Mass 55, 85 N. E. 188. See Ligon *v.* Allen, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842, 851 n.; In re Lyle's Est., 93 Neb. 768, 141 N. W. 1127; vol. 7, p. 931, n. 95, and supplement thereto; supra, "Libel and Slander," 200-48.

Photographs excluded if taken long before time in question. S. *v.* Ready, 77 N. J. L. 329, 72 A. 445.

Photograph of person before accident admissible. Hoyt *v.* R. Co., 166 Ill. App. 361.

774-11 Willis *v.* S., 49 Tex. Cr. 139, 90 S. W. 1100. *Contra* as to photograph of injured person before injury. Galveston, etc. R. Co. *v.* Harper, 53 Tex. Civ. 614, 114 S. W. 1168. But see Hoyt *v.* R. Co., 166 Ill. App. 361.

774-12 *Contra,* Spiers *v.* Hendershott, 142 Ia. 446, 120 N. W. 1053.

Photograph of girl, taken year before question at issue arose in different dress, inadmissible to show knowledge of age by third person. Dresch *v.* Elliott, 137 App. Div. 252, 122 N. Y. S. 14.

774-13 Fuller *v.* Kelso, 163 Ill. App. 576; McKarren *v.* R. Co., 194 Mass. 179, 80 N. E. 477; Davis *v.* City, 147

Mich. 300, 110 N. W. 1084 (of sore). See vol. 7, p. 405, n. 96, and supplement thereto.

Photograph tracings showing cardiac pulsations competent. Mo., K. & T. R. Co. *v.* Heacker (Tex. Civ.), 168 S. W. 26.

"If a man has a photograph taken of himself, and this photograph shows certain marks not usually found upon a man's body, and he knows what those marks are, we can see no reason why, if the photograph is admitted in evidence on the trial of a case, he cannot tell what produced those marks." Carter *v.* S., 4 Ala. App. 72, 59 S. 222.

775-16 Prescott, etc. Co. *v.* Franks (Ark.), 163 S. W. 180; Chicago R. Co. *v.* Smith, 226 Ill. 178, 80 N. E. 716; Haywood *v.* Co., 145 Ill. App. 506; Elzig *v.* Bales, 135 Ia. 208, 112 N. W. 540; S. *v.* Matheson, 142 Ia. 414, 120 N. W. 1036 (admissible though person making photograph not witness, shown by physician directing taking present when taken, it was correct. Competent for physician to testify spot on photograph represented bullet); Dean *v.* Wabash R. Co., 229 Mo. 425, 129 S. W. 953; Lake Shore E. Ry. *v.* Hobart, 32 O. C. C. 154; Houston, etc. R. Co. *v.* Shapard, 54 Tex. Civ. 596, 118 S. W. 596. See Ligon *v.* Allen, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842, 858 n; infra, "Physicians and Surgeons," 845-69.

To show normal condition.—McIlwain *v.* Gaebe, 128 Ill. App. 209.

Opinion of experts best evidence as to what X-ray photograph shows. Marion *v.* Const. Co., 157 App. Div. 95, 141 N. Y. S. 647.

776-17 Conditions shown by X-ray photograph, explained. See supra, vol. 5, p. 776, n. 17.

Opinion of experts best evidence.—Marion *v.* Const. Co., 157 App. Div. 95, 141 N. Y. S. 647.

777-18 Kansas C. S. R. Co. *v.* Morris, 80 Ark. 528, 98 S. W. 363; P. *v.* Balestieri, 23 Cal. App. 708, 139 P. 821; Rawles *v.* Corp., 23 Cal. App. 455, 138 P. 369; MacFeat *v.* R. Co., 5 Penne (Del.) 52, 62 A. 898; McClain *v.* Assn., 17 Ida. 63, 104 P. 1015; Illinois S. R. Co. *v.* Hayner, 225 Ill. 613, 80 N. E. 316; Sample *v.* R. Co., 233 Ill. 564, 84 N. E. 643; Henke *v.* M. Co., 175 Ill. App. 240; Chicago *v.* Hutchinson, 129 Ill. App. 239; New York, etc. R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804; Huntington L. Co. *v.* Beaver, 37 Ind. App. 4, 73 N. E. 1092; Louisville, etc. R. Co. *v.* Brown, 32 Ky. L. R. 572, 106 S. W. 795 (of railroad work admitted); Consolidated, etc. Co. *v.* S., 100 Md. 186, 72 A. 651; Pruner *v.* R. Co., 173 Mich. 146, 139 N. W. 48; Harriman *v.* Green, 157 Mich. 690, 122 N. W. 205; Riggs *v.* R. Co., 216 Mo. 304, 115 S. W. 969; Kirkpatrick *v.* R. Co., 211 Mo. 68, 109 S. W. 682; Zaccanella *v.* R. Co., 93 Neb. 774, 142 N. W. 190; McGirr S. Co. *v.* Babbitt, 61 Misc. 291, 113 N. Y. S. 753; Sherlock *v.* R. Co., 24 N. D. 40, 138 N. W. 976; Higgs *v.* R. Co., 16 N. D. 446, 114 N. W. 722; St. Louis, etc. Co. *v.* Nichols, 39 Okla. 722, 136 P. 159; St. Louis, etc. Co. *v.* Dale, 36 Okla. 114, 128 P. 137; Curtis *v.* R. Co., 32 R. I. 542, 80 A. 127; Wade *v.* R. Co., 80 S. C. 280, 71 S. E. 859; Johnson *v.* R. Co., 35 Utah 284, 100 P. 390; Smith *v.* R. Co., 80 Vt. 208, 67 A. 535; Taylor *v.* R. Co., 72 Wash. 378, 130 P. 500; Pfeiffer *v.* Radke, 142 Wis. 512, 125 N. W. 944; Forseth *v.* L. Co., 142 Wis. 87, 124 N. W. 1036.

See Ligon *v.* Allen, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842, 858 n; vol. 6, p. 502, n. 84, and supplement thereto.

Photographs showing only part of scene. Ill. S. R. Co. *v.* Hayer, 128 Ill. App. 315.

Of similar thing, admissible. Smith *v.* Eichelberger, 175 Ill. App. 561.

Of river, inadmissible unless shown how long floods existed before and after taking of photographs. Zinser *v.* Sanitary Dist., 175 Ill. App. 9.

Although place capable of oral description, photograph admissible. Zaccanella *v.* R. Co., 93 Neb. 774, 142 N. W. 190.

777-19 P. *v.* Ah Lee, 164 Cal. 350, 128 P. 1035; Temple *v.* Gilbert, 86 Conn. 335, 85 A. 380; Consolidated, etc. Co. *v.* S., 100 Md. 186, 72 A. 651; McKarren *v.* R. Co., 104 Mass. 179, 80 S. E. 477; Harriman *v.* Green, 157 Mich. 690, 122 N. W. 205; McGirr S. Co. *v.* Babbitt, 113 N. Y. S. 753; Parker *v.* Mfg. Co. (Or.), 138 P. 1061; C. *v.* Swartz, 40 Pa. Super. 370; Thompson *v.* R. Co., 48 Tex. Civ. 284, 106 S. W. 910; Acrousi *v.* Co. (Tex. Civ.), 87 S. W. 861 (sufficiently identified when sworn to be correct by injured); Smith *v.* R. Co., 80 Vt. 208, 67 A. 535;

Hebbe *v.* Maple Creek, 121 Wis. 668, 99 N. W. 442.

See Ligon *v.* Allen, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842, 846 n; vol. 6, p. 503, n. 88, and supplement thereto.

Photographs taken more than a year after accident are admissible in evidence if "plaintiff testifies that he had been out to the crossing a few days before the trial, and that there was relatively no change in the surroundings." Davidson *v.* R. Co., 164 Mo. App. 701, 148 S. W. 406.

778-20 Beach Front H. Co. *v.* Sooy, 210 Fed. 265, 127 C. C. A. 83; Miller *v.* City, 104 App. Div. 33, 93 N. Y. S. 227; Higgs *v.* R. Co., 15 N. D. 446, 114 N. W. 722; St. Louis R. Co. *v.* Dale, 36 Okla. 114, 128 P. 137; Hughes *v.* S., 126 Tenn. 40, 148 S. W. 543. See Griffin *v.* B. Co., 90 Kan. 375, 133 P. 574; Ligon *v.* Allen, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842, 844 n; Columbia, etc. Co. *v.* S., 105 Md. 34, 65 A. 625; Mahar *v.* Granite Co., 146 Wis. 46, 130 N. W. 949.

778-21 Porter *v.* Buckley, 147 Fed. 140; Donovan *v.* Conn. Co., 84 Conn. 531, 80 A. 779; C. & E. I. R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865; S. *v.* Rogers, 129 Ia. 229, 105 N. W. 455; Riggs *v.* R. Co., 216 Mo. 304, 115 S. W. 969; Carr *v.* Co., 29 R. I. 276, 70 A. 196; Johnson *v.* R. Co., 35 Utah 285, 100 P. 390 (change must be material). *Comp.* Sherlock *v.* R. Co., 24 N. D. 40, 138 N. W. 976. See Ligon *v.* Allen, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842, 846 n; vol. 6, p. 502, n. 85, and supplement thereto.

Presence of others than parties to transaction in photograph immaterial if persons represented occupy positions parties occupied at time of occurrence. Harrison *v.* Green, 157 Mich. 690, 122 N. W. 205.

Party offering photographs of experiments must show accuracy of latter. Riggs *v.* R. Co., 216 Mo. 304, 115 S. W. 969.

Change in condition shown.—Sample *v.* R. Co., 233 Ill. 564, 84 N. E. 643.

779-22 Babb *v.* Co., 99 Me. 298, 59 A. 290. See Brett *v.* S., 94 Miss. 669, 47 S. 781. See Grant *v.* R. Co., 176 Ill. App. 292.

Photograph of experiment received, in court's discretion, if of value. Field *v.* Gowdy, 199 Mass. 568, 85 N. E. 884.

779-23 Corbet *v.* Savings Inst., 122 N. Y. S. 269. See Ligon *v.* Allen, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842, 857n; vol. 5, p. 855, n. 14, and supplement thereto.

779-24 S. *v.* Skillman, 76 N. J. L. 464, 70 A. 83; Willis *v.* S., 49 Tex. Cr. 139, 90 S. W. 1100. See Parker *v.* Mfg. Co. (Or.), 138 P. 1061.

779-25 Stitzel *v.* Miller, 250 Ill. 72, 95 N. E. 53. *Contra* if not received as substantive proof. S. *v.* Skillman, 76 N. J. L. 464, 70 A. 83.

Where a party showed he could not produce an original hotel register because beyond the jurisdiction of the court and not within the control of either of the parties, photographs of the register showing proved signatures thereon were properly received in evidence. Fuller *v.* Robinson, 230 Mo 22, 130 S. W. 343.

Inaccessible documents.—In re McClellan, 20 S. D. 498, 107 N. W. 681.

Photograph of lost writing, admissible to prove contents and peculiarities of handwriting. McCullough *v.* Munn (1908), 2 Irish 194.

780-26 S. *v.* Ready, 77 N. J. L. 329, 72 A. 445 (signature exhibited on background of ruled squares and taken from two genuine signatures); S. *v.* Skillman, 76 N. J. L. 464, 70 A. 83. See vol. 6, p. 436, n. 23, and supplement thereto.

780-28 P. *v.* Ong Git, 23 Cal. App. 148, 137 P. 283; S. *v.* Jones, 48 Mont. 505, 139 P. 441; C. *v.* Swartz, 40 Pa. Super. 370; Willis *v.* S., 49 Tex. Cr. 139, 90 S. W. 1100. See vol. 6, p. 768, n. 71, and supplement thereto.

Not inadmissible because taken while deceased was inmate of prison. S. *v.* Jones, 48 Mont. 505, 139 P. 441.

781-29 S. *v.* Roberts, 28 Nev. 350, 82 P. 100; S. *v.* Finch, 54 Or. 482, 103 P. 505.

781-30 Carter *v.* S., 4 Ala. App. 72, 59 S. 222; P. *v.* Elmore, 167 Cal. 205, 128 P. 989; P. *v.* Lee Nam Chin, 166 Cal. 570, 137 P. 917; P. *v.* Rogers, 163 Cal. 476, 126 P. 143; S. *v.* Bailey, 79 Conn. 589, 65 A. 951; S. *v.* Powell, 5 Penne. (Del.) 24, 61 A. 966; S. *v.* Roberts, 28 Nev. 350, 32 P. 100; Morris *v.* S., 6 Okla. Cr. 29, 115 P. 1030; Young *v.* S., 49 Tex. Cr. 207, 92 S. W. 841; S. *v.* Fateh-Mohamed, 76 Wash. 462, 136 P. 676. See Ligon *v.* Allen, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842, 852, n. And see vol. 6, p. 608, and supplement thereto.

Photographs of wearing apparel, etc. C. v. Tucker, 189 Mass. 457, 76 N. E. 127.

781-31 See P. v. Loper, 159 Cal. 6, 112 P. 720; S. v. Roberts, 28 Nev. 350, 82 P. 100.

781-32 Sellers v. S., 91 Ark. 175, 120 S. W. 840; Sellers v. S., 93 Ark. 313, 124 S. W. 770; P. v. Ah Lee, 164 Cal. 350, 128 P. 1035; P. v. Grill, 151 Cal. 592, 91 P. 515; P. v. Veld, 154 App. Div. 752, 139 N. Y. S. 788; Morris v. Ty., 1 Okla. Cr. 617, 99 P. 760 (in court's discretion if shown correct); Gibson v. S., 53 Tex. Cr. 349, 110 S. W. 41; Newcomb v. S., 49 Tex. Cr. 550, 95 S. W. 1048. See Ligon v. Allen, 157 Ky. 101, 162 S. W. 536, 51 L. R. A. (N. S.) 842, 856 n. And see vol. 6, p. 608, n. 36, and supplement thereto.

Wherever the introduction of photographs and diagrams serves to illustrate a question in the case or to throw light upon the transaction, it is permissible to introduce same in evidence. Sanchez v. S. (Tex. Cr.), 149 S. W. 124.

Not conclusive of true location, "and, if appellant believed that views taken from or directed to the point where he locates the culmination of the affray would show a material variance from those presented by the state, it was an easy expedient to procure them and place them in evidence by the side of those relied upon by the prosecution." S. v. Baker (Ia.), 135 N. W. 1097.

Sufficient testimony as to accuracy of photograph of scene of homicide. In brief, Works testified that he knew the position of the various objects referred to, and that the photograph reported them correctly. This was sufficient for the admission of the photograph in evidence. The fact that the photograph was not taken until some time had elapsed after the homicide was not a circumstance of sufficient weight to exclude it. Hughes v. S., 126 Tenn. 40, 148 S. W. 543.

782-33 Photographs of assumed situations. P. v. Mahatch, 148 Cal. 200, 82 P. 779.

PHYSICAL EXAMINATION

785-1 Am., etc. Co. v. Jankus, 121 Ill. App. 267; Felsch v. Babb, 72 Neb. 736, 101 N. W. 1011; Humphries v. R. Co., 84 S. C. 2[illegible]2, 65 S. E. 1031; Dunkin v. Hoquiam, 56 Wash. 47, 105 P. 149.

786-4 Am., etc. Co. v. Jankus, 121 Ill. App. 267; Felsch v. Babb, 72 Neb. 736, 101 N. W. 1011; Missouri, etc. R. Co. v. Lynch, 40 Tex. Civ. 542, 90 S. W. 511; Sheldon v. Wright, 80 Vt. 295, 67 A. 807.

786-5 St. Louis, etc. R. Co. v. Smith, 38 Tex. Civ. 507, 86 S. W. 943.

786-6 Houston, etc. R. Co. v. Anglin, 99 Tex. 349, 89 S. W. 966.

790-24 Injured part exhibited if so connected with res gestae as to be necessary to determine rights of parties. Dunkin v. Hoquiam, 56 Wash. 47, 105 P. 149.

791-27 Failure of plaintiff to observe agreement to submit to examination excused by proof of inability. Murphy & Co. v. Dunman, 55 Tex. Civ. 587, 120 S. W. 240.

791-30 Gore v. Gore, 103 App. Div. 168, 93 N. Y. S. 396. See Christman v. Christman, 7 Pa. C. C. 595.

792-32 See Christman v. Christman, 7 Pa. C. C. 595.

792-35 Gore v. Gore, 103 App. Div. 168, 93 N. Y. S. 396.

793-40 Johnston v. S. P. Co., 150 Cal. 535, 89 P. 348; Denver City T. Co. v. Roberts, 43 Colo. 522, 96 P. 186; S. v. Call, 64 Fla. 144, 59 S. 789, 41 L. R. A. (N. S.) 1071; Atlantic C. L. R. Co. v. Dees, 56 Fla. 127, 48 S. 28 (statute); Cedartown v. Brooks, 2 Ga. App. 583, 59 S. E. 836; Dickinson v. R. Co., 74 Kan. 863, 86 P. 150; Clark v. Borough, 23 Pa. C. C. 555; Hess v. R. Co., 7 Pa. C. C. 565.

794-41 Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583, 123 Ill. App. 550; Kellyville C. Co. v. Moreland, 121 Ill. App. 410; Chicago v. McNally, 128 Ill. App. 375; Diamond G. Co. v. Wietzychowski, 125 Ill. App. 277 (examination after trial); Yazoo, etc. Co. v. Robinson (Miss.), 65 S. 241; Strom v. Steam Co., 145 N. Y. S. 720 (except where exception is shown); Moore v. Reinhardt, 136 App. Div. 617, 121 N. Y. S. 205; Best v. Co., 85 S. C. 422, 67 S. E. 1; Missouri, etc. R. Co. v. Rogers, 55 Tex. Civ. 93, 117 S. W. 939; Larson v. Salt Lake City, 34 Utah 318, 97 P. 483.

797-48 Best v. Co., 85 S. C. 422, 67 S. E. 1.

798-50 See Johnston v. R. Co., 150 Cal. 535, 89 P. 348.

798-51 Order enforced, not by con-

tempt proceedings, but by staying or dismissing action. Western G. Mfg. Co. *v.* Schoeninger, 42 Colo. 357, 94 P. 342.

799-52 Booth *v.* Andrus, 91 Neb. 810, 137 N. W. 884; Galveston, etc. R. Co. *v.* Chojnacky (Tex. Civ.), 163 S. W. 1011.

Operation on different portions of body, exhibition of one portion, waives right as to other. Booth *v.* Andrus, 91 Neb. 810, 137 N. W. 884.

799-53 Houston, etc. R. Co. *v.* Anglin, 99 Tex. 349, 89 S. W. 966; *foll.* Chicago R., etc. Co. *v.* Langston, 92 Tex. 709, 50 S. W. 574, and *dist.* Austin, etc. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403.

800-56 No abuse of discretion to refuse to order examination before jury where one had before physicians, two of them chosen by defendant and testified. St. Louis, etc. R. Co. *v.* Carter, 93 Ark. 589, 126 S. W. 99.

800-58 But see Johnston *v.* R. Co., 150 Cal. 535, 89 P. 348.

800-59 Melone *v.* R. Co., 151 Cal. 113, 91 P. 522; Western G. Mfg. Co. *v.* Schoeninger, 42 Colo. 357, 94 P. 342, 15 L. R. A. (N. S.) 663; S. *v.* Call, 64 Fla. 144, 59 S. 789, 41 L. R. A. (N. S.) 1071; Atlantic C. L. R. Co. *v.* Dees, 56 Fla. 127, 48 S. 28 (under statute providing for examination); Fillingham *v.* R. Co., 154 Mich. 233, 117 N. W. 635; Logan *v.* Soc., 156 Mich. 537, 121 N. W. 485; Graham *v.* Sly, 177 Mo. App. 348, 164 S. W. 136; Shamp *v.* Lambert, 142 Mo. App. 567, 121 S. W 770; Murphy *v.* R. Co., 31 Nev. 120, 101 P. 322; Brown *v.* R. Co., 12 N. D. 61, 95 N. W. 153.

Defendant entitled as matter of right to a physical examination of plaintiff, where it is alleged his injuries are permanent. Triangle Lumb. Co. *v.* Acree (Ark.), 166 S. W. 958.

Misled by plaintiff, entitled to second examination. Rief *v.* R. Co. (Minn.), 148 N. W. 309.

801-60 Macon & B. R. Co. *v.* Ross, 133 Ga. 83, 65 S. E. 146.

802-61 No error to refuse on that ground unless injury shown. Shamp *v.* Lambert, 142 Mo. App. 567, 121 S. W. 770.

802-62 Brown *v.* R. Co., 12 N. D. 61, 95 N. W. 153; Taylor *v.* White (Tex. Civ.), 113 S. W. 554. See Houston, etc. R. Co. *v.* Anglin, 99 Tex. 349, 89 S. W. 966.

803-63 Lexington R. Co. *v.* Cropper, 142 Ky. 39, 133 S. W. 968.

803-64 Melone *v.* R. Co., 151 Cal. 113, 91 P. 522; International, etc. R. Co. *v.* Lane (Tex. Civ.), 127 S. W. 1066; St. Louis S. R. Co. *v.* Browning, 54 Tex. Civ. 521, 118 S. W. 245.

803-66 Western G. Mfg. Co. *v.* Schoeninger, 42 Colo. 357, 94 P. 342, 15 L. R. A. (N. S.) 663; Logan *v.* Soc., 156 Mich. 537, 121 N. W. 485; Clark *v.* Borough, 23 Pa. C. C. 555 (electric tests permitted); Hess *v.* R. Co., 7 Pa. C. C. 565.

804-67 Atchison T., etc. R. Co. *v.* Palmore, 68 Kan. 545, 75 P. 509.

807-73 Logan *v.* Soc., 156 Mich. 537, 121 N. W. 485; Fillingham *v.* R. Co., 154 Mich. 233, 117 N. W. 635; Donovan *v.* R. Co., 157 Mo. App. 649, 138 S. W. 679; Murphy *v.* R. Co., 31 Nev. 120, 101 P. 322; Dunkin *v.* Hoquiam, 56 Wash. 47, 105 P. 149. See Houston, etc. R. Co. *v.* Anglin, 99 Tex. 349, 89 S. W. 966.

807-75 Fuller *v.* Co., 16 Haw. 1; St. Louis, etc. R. Co. *v.* Smith, 38 Tex. Civ. 507, 86 S. W. 943.

808-82 Atlantic C. L. R. Co. *v.* Dees, 56 Fla. 127, 48 S. 28.

809-83 See Orlando *v.* R. Co., 109 App. Div. 356, 95 N. Y. S. 898, counter affidavits.

809-86 Orlando *v.* R. Co., 109 App. Div. 356, 95 N. Y. S. 898.

809-91 Johnston *v.* R. Co., 150 Cal. 535, 89 P. 348; Keller *v.* Berry (Ky.), 121 S. W. 1009; Clark *v.* Borough, 23 Pa. C. C. 555.

810-93 Western G. Mfg. Co. *v.* Schoeninger, 42 Colo. 357, 94 P. 342, 15 L. R. A. (N. S.) 663.

810-94 Western G. Mfg. Co. *v.* Schoeninger, 42 Colo. 357, 94 P. 342, 15 L. R. A. (N. S.) 663; Hess *v.* R. Co., 7 Pa. C. C. 565.

810-97 Goldenberg *v.* Zirinsky, 114 App. Div. 827, 100 N. Y. S. 251.

811-98 Triangle L. Co. *v.* Acree (Ark.), 166 S. W. 958; Landau *v.* Citron, 47 Misc. 354, 93 N. Y. S. 1111; Clark *v.* Borough, 23 Pa. C. C. 555.

811-99 Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807 (judges' room). See Fordyce *v.* Key, 74 Ark. 19, 84 S. W. 797.

811-1 Fordyce *v.* Key, 74 Ark. 19, 84 S. W. 797.

811-3 Cedartown *v.* Brooks, 2 Ga. App. 583, 59 S. E. 836; Simpson *v.* R. Co., 179 Ill. App. 307; Junget *v.* R.

Co., 177 Ill. App. 435; Schlechte *v.* Co., 157 Ill. App. 181; Atchison, etc. Co. *v.* Melson, 40 Okla. 1, 134 P. 388; Chicago, etc. R. Co. *v.* Hill, 36 Okla. 540, 129 P. 13, 43 L. R. A. 622. *Comp.* Chicago, etc. Co. *v.* Shreve, 128 Ill. App. 462.

See Chicago, etc. R. Co. *v.* Hill, 36 Okla. 540, 129 P. 13, 43 L. R. A. (N. S.) 622 n.

811-4 Illinois, etc. R. Co. *v.* Downs, 122 Ill. App. 545. See Chicago *v.* McNally, 128 Ill. App. 375.

Held not error to sustain objection to question put to plaintiff. Cole *v.* City, 158 Ill. App. 494.

Plaintiff's willingness to submit to examination inquired into. Sertaut *v.* Crane, 142 Ill. App. 49.

813-9 Missouri, etc. R. Co. *v.* Lynch, 40 Tex. Civ. 543, 90 S. W. 511.

813-10 Authority to direct taking X-ray photograph not included in power conferred by statute to direct physical examination. Lasher *v.* Bolton's Sons, 161 App. Div. 381, 146 N. Y. S. 321. See S. *v.* Call, 64 Fla. 144, 59 S. 789, 41 L. R. A. (N. S.) 1071.

813-12 Tirpak *v.* Hoe, 53 Misc. 532, 103 N. Y. S. 795. See Wood *v.* Hoffman, 56 Misc. 66, 106 N. Y. S. 940.

813-13 Smyth *v.* Lichtenstein, 137 App. Div. 335, 122 N. Y. S. 74 (ground for denying application in action for indignities and assault that defendant wanted to inquire into plaintiff's past and physical state); Goldenberg *v.* Zirinsky, 114 App. Div. 827, 100 N. Y. S. 251; Potter *v.* Village, 112 App. Div. 91, 98 N. Y. S. 186; Pitt *v.* Dunlap, 54 Misc. 115, 105 N. Y. S. 846.

813-14 Lasher *v.* Bolton's Sons, 161 App. Div. 381, 146 N. Y. S. 321; Potter *v.* Village, 112 App. Div. 91, 98 N. Y. S. 186 (not merely in presence of such physician).

814-15 Orlando *v.* R. Co., 109 App. Div. 356, 95 N. Y. S. 898.

814-17 Orlando *v.* R. Co., supra; Tirpak *v.* Hoe, 53 Misc. 532, 103 N. Y. S. 795. See Wood *v.* Hoffman Co., 121 App. Div. 636, 106 N. Y. S. 308.

815-18 Goldenberg *v.* Zirinsky, 114 App. Div. 827, 100 N. Y. S. 251.

816-29 See Pitt *v.* Dunlap, 54 Misc. 115, 105 N. Y. S. 846.

816-30 See S. *v.* Horton, 247 Mo. 657, 153 S. W. 1051.

Constitutional right of alleged insane criminal not infringed by appointing physicians to examine into physical condition as bearing upon mental state. S. *v.* Petty, 32 Nev. 384, 108 P. 641. See P. *v.* Furlong, 187 N. Y. 198, 79 N. E. 978.

Results of compulsory examination of one accused of rape may not be given jury; nor statements by examining physician to accused. S. *v.* Newcomb, 220 Mo. 54, 119 S. W. 405.

816-31 Examination of accused by X-ray process should be ordered on his motion if result may corroborate testimony. Browder *v.* C., 136 Ky. 45, 123 S. W. 328.

818-36 **Inherent power** rests in court to direct examination of prosecutrix in rape case. P. *v.* Preston, 19 Cal. App. 675, 127 P. 660.

PHYSICIANS AND SURGEONS

On mandamus against state board, 822-6; *Personating another,* 826-11; *Similar results in treatment of others,* 836-48; *Usage and custom of hospitals,* 850-81.

821-1 See Allen *v.* S. (Okla. Cr.), 138 P. 178. Reputability of institution graduating applicant for license from state board must be shown by him. S. *v.* Adcock, 225 Mo. 335, 124 S. W. 1100; S. *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

821-3 S. *v.* Blumenthal, 141 Mo. App. 502, 125 S. W. 1188 (though holding out constitutes distinct offense); S. *v.* Hanover (Wash.), 107 P. 388.

821-4 S. *v.* Yates, 145 Ia. 332, 124 N. W. 174 (evidence of acts prior to previous indictment, incompetent); Germany *v.* S., 62 Tex. Cr. 276, 137 S. W. 130; S. *v.* Blumenthal, 141 Mo. App. 502, 125 S. W. 1188; S. *v.* Snearly, 18 Wyo. 341, 107 P. 389 (fact patient diseased relevant; otherwise as to effect of treatment, and conditions requiring treatment if question not limited to patient's case). See S. *v.* Bresee, 137 Ia. 673, 114 N. W. 45.

Newspaper article, signed by defendant referring to previous arrest for similar offense, in which his purpose to continue as he had was stated, inadmissible in absence of evidence to show previous acts. S. *v.* Yates, 145 Ia. 332, 124 N. W. 174.

Where the main issue is whether or not defendant was treating and offering to treat diseases for pay, any statement made by him bearing on that point would be admissible. Singh *v.*

S. (Tex. Cr.), 146 S. W. 891, *cit.* Germany *v.* S., 62 Tex. Cr. 476, 137 S. W. 130.

822-5 S. *v.* Heffernan, 28 R. I. 20, 65 A. 284. See C. *v.* Porn, 196 Mass. 326, 82 N. E. 31.

822-6 Kettles *v.* P., 221 Ill. 221, 77 N. E. 472; S. *v.* Doerring, 194 Mo. 398, 92 S. W. 489; P. *v.* Somme, 120 App. Div. 20, 104 N. Y. S. 946; C. *v.* Clymer, 30 Pa. Super. 61. See Ty. *v.* Lotspeich, 14 N. M. 412, 94 P. 1025; Collins *v.* S. (Tex. Cr.), 152 S. W. 1047; S. *v.* Lawson, 40 Wash. 455, 82 P. 750.

Unnecessary to prove defendant practiced by some particular system. Collins *v.* S. (Tex. Cr.), 152 S. W. 1047.

Practicing dentistry without license. S. *v.* Doerring, 194 Mo. 398, 92 S. W. 489; S. *v.* Hicks, 143 N. C. 689, 57 S. E. 441.

On mandamus against state board. Arwine *v.* Board, 151 Cal. 499, 91 P. 319.

824-8 Leggat *v.* Gerrick, 35 Mont. 91, 88 P. 788. See Brunswick *v.* Hurley, 131 Ill. App. 235.

825-9 Abhau *v.* Grassie, 262 Ill. 636, 104 N. E. 1020.

825-10 McAllister *v.* S., 156 Ala. 122, 47 S. 161; Brooks *v.* S., 146 Ala. 153, 41 S. 156; Melville *v.* S., 173 Ind. 352, 89 N. E. 490; Wilson *v.* S., 8 Okla. Cr. 493, 129 P. 82.

Result of practice upon others immaterial. Swarts *v.* Sweny, 35 R. I. 1, 85 A. 33.

Books relating to defendant's school admissible. Swarts *v.* Sweny, 35 R. I. 1, 85 A. 33.

The exclusion of the license and certificate is immaterial if testimony admitted without objection, that he was a regularly licensed and practicing physician. Feingold *v.* Lefkovitz (Tex. Civ.), 147 S. W. 346.

Failure to file license makes presumptive case under statute declaring records of office such evidence of existence or non-existence of license. S. *v.* Dodson, 54 Wash. 31, 102 P. 872.

826-11 Melville *v.* S., 173 Ind. 352, 89 N. E. 490, it seems.

Pamphlet may not be received to show method of treatment defendant pursued, though offered as testimony he would have given if sworn as witness. P. *v.* Trenner, 144 Ill. App. 275.

Parol evidence admissible to show defendant met requirements of law and secured license stolen from him. P. *v.* Koehler, 146 Ill. App. 541.

Personating another.—Under statute making it felony for practitioner to falsely personate another incompetent to show accused had, at other times and places than those alleged and under same false name, advised or treated others than prosecuting witness. P. *v.* Dudenhausen, 130 App. Div. 760, 115 N. Y. S. 374.

826-12 Insolvency of patients.—Laurel County *v.* Pennington, 26 Ky. L. R. 124, 80 S. W. 820.

Claim for unusual compensation must be well supported. Burke *v.* Mulgrew, 127 App. Div. 733, 111 N. Y. S. 899.

826-13 Voorhees *v.* R. Co., 129 App. Div. 780, 114 N. Y. S. 242; MacGuire *v.* Hughes, 126 App. Div. 637, 111 N. Y. S. 153. See Cotnam *v.* Wisdom, 83 Ark. 601, 104 S. W. 164; Pryor *v.* Milburn, 51 Misc. 596, 101 N. Y. S. 34.

827-14 Hall *v.* R. Co., 27 R. I. 525, 65 A. 278; May *v.* Roberts, 28 Okla. 619, 115 P. 771; Laurel County *v.* Pennington, 26 Ky. L. R. 124, 80 S. W. 820.

828-15 Hall *v.* R. Co., 27 R. I. 525, 65 A. 278.

Admission by rendering bill against third party explained. Lewis *v.* Du Bois, 126 App. Div. 514, 110 N. Y. S. 337.

828-16 Weldon *v.* Co., 27 Pa. Super. 257.

828-18 Extent to which patient was in plaintiff's charge, shown. Nims *v.* Cunningham, 8 Cal. App. 250, 96 P. 785.

Inducements to make and prolong unnecessary visits, shown. Burke *v.* Mulgrew, 127 App. Div. 733, 111 N. Y. S. 899.

828-19 Weinlander *v.* Volkman, 153 Ill. App. 137.

If no issue raised by pleadings as to terms of contract either party may give evidence as to value of services. Henderson *v.* Hall, 87 Ark. 1, 112 S. W. 171.

829-20 Cotnam *v.* Wisdom, 83 Ark. 601, 104 S. W. 164.

Any advantage resulting to patient from service, immaterial. Henderson *v.* Hall, 87 Ark. 1, 112 S. W. 171.

829-21 Improper to ask physician if it is his custom to proportion his fees to the amount of recovery. Gulf, etc. R. Co. *v.* Stewart (Tex. Civ.), 164 S. W. 1059.

Evidence as to number of members of lodge and as to readiness to perform admissible. Page *v.* Cohen, 80 Misc. 237, 140 N. Y. S. 935.

829-22 Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006.

Previous charge for attending same patient may govern recovery. Haas *v.* Read, 63 Misc. 342, 117 N. Y. S. 106.

829-23 Cotnam *v.* Wisdom, 83 Ark. 601, 104 S. W. 164; Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571.

829-24 Annual income shown to prove value of physician's time while absent in care of patient. Burke *v.* Mulgrew, 127 App. Div. 733, 111 N. Y. S. 899.

Lessened receipts cannot be shown because of absence in care of patient. Burke *v.* Mulgrew, supra.

830-25 Sills *v.* Cochems, 36 Colo. 524, 85 P. 1007; Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006; Morrell *v.* Lawrence, 203 Mo. 363, 101 S. W. 571.

830-27 MacGuire *v.* Hughes, 126 App. Div. 637, 111 N. Y. S. 153; Best *v.* McAuslan, 27 R. I. 107, 60 A. 774.

830-29 Duggar *v.* Pitts, 145 Ala. 358, 39 S. 905.

Hypothetical questions must not be based on decedent's declarations as to satisfactory nature of services rendered. May assume treatment given proper. Burke *v.* Mulgrew, 127 App. Div. 733, 111 N. Y. S. 899.

831-31 Best *v.* Auslan, 27 R. I. 107, 60 A. 774. But see Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006, value of services is question for jury.

831-32 Coyne *v.* Baker, 2 Cal. App. 640, 84 P. 269; Vandenberg *v.* Slagh, 150 Mich. 225, 114 N. W. 72.

831-33 Personal relations of patient with family of plaintiff, immaterial. Nims *v.* Cunningham, 8 Cal. App. 250, 96 P. 785.

831-35 Purse *v.* Purcell, 43 Colo. 50, 95 P. 291; Thomas *v.* Dabblemont, 31 Ind. App. 146, 67 N. E. 463.

832-36 Vandenberg *v.* Slagh, 150 Mich. 225, 114 N. W. 72.

833-39 *Contra*, Burnham *v.* Stillings, 76 N. H. 122, 79 A. 987.

Physician in employ of defendant. Jones *v.* Telegraph Co., 118 Minn. 217, 136 N. W. 741.

Employment by defendant.—Ballard *v.* R. Co., 144 Ky. 476, 139 S. W. 771; Youngstown, etc. R. Co. *v.* Kessler, 84 O. St. 74, 95 N. E. 509.

833-40 Shelton *v.* Hacelip, 167 Ala. 217, 51 S. 937; McGraw *v.* Kerr, 23 Colo. App. 163, 128 P. 870; Miller *v.* Leib, 109 Md. 414, 72 A. 466; Farrell *v.* Haze, 157 Mich. 374, 122 N. W. 197; Booth *v.* Andrus, 91 Neb. 810, 137 N. W. 884; Wood *v.* Wyeth, 106 App. Div. 21, 94 N. Y. S. 360; Warner *v.* Packer, 123 N. Y. S. 725; McCarthy *v.* Harvard D. P., 121 N. Y. S. 343; Wilkins *v.* Brock, 81 Vt. 332, 70 A. 572; Dye *v.* Corbin, 59 W. Va. 266, 53 S. E. 147; Marchand *v.* Bellin (Wis.), 147 N. W. 1033. See Grainger *v.* Still, 187 Mo. 197, 85 S. W. 1114; Longan *v.* Weltmer, 180 Mo. 322, 79 S. W. 655.

A preponderance required.—McGraw *v.* Kerr, 23 Colo. App. 163, 128 P. 870.

When the plaintiff has proved facts making a prima facie case, the burden is on the defendant to show they did not result from his negligence. Davis *v.* Kerr (Pa.), 86 A. 1007; Evans *v.* Munro (R. I.), 83 A. 82.

Evidence held sufficient.—James *v.* Robertson, 39 Utah 414, 117 P. 1068.

Evidence insufficient.—Luka *v.* Lowrie, 171 Mich. 122, 136 N. W. 1106; Bennan *v.* Parsonnet, 83 N. J. L. 20, 83 A. 948.

834-43 Champion *v.* Kieth, 17 Okla. 204, 87 P. 845.

"**Without the assistance** of expert evidence, it is entirely logical and correct to say that the result furnishes no evidence of negligent treatment: but there doubtless are cases where evidence of a poor result alone would convince an expert that the treatment must have been improper, and in such cases we can see no reason for excluding the opinion based on such evidence, or in refusing to give weight to such opinion. The court does not draw the inference of negligence from the result, but from the evidence of the experts." Sawyer *v.* Berthold, 116 Minn. 441, 134 N. W. 120.

Death immediately following operation. Staloch *v.* Holm, 100 Minn. 276, 111 N. W. 264.

835-44 Preponderance of evidence enough. Helland *v.* Bridenstine, 55 Wash. 470, 104 P. 626.

836-46 Pratt *v.* Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609.

836-48 Bonnet *v.* Foote, 47 Colo. 282, 107 P. 252; Ball *v.* Skinner, 134 Ia. 298, 111 N. W. 1022; Shockley *v.* Tucker, 127 Ia. 456, 103 N. W. 360; Grainger *v.* Still, 187 Mo. 197, 85 S. W. 1114;

Willard *v.* Norcross, 81 Vt. 293, 69 A. 942; Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807.

Form of question. — Question as to whether treatment given in accordance with usual and customary practice should be this: whether an ordinarily skillful and prudent physician would have adopted it under circumstances. Gore *v.* Brockman, 138 Mo. App. 231, 119 S. W. 1082.

Omission not charged inadmissible. — Cozine *v.* Moore (Ia.), 141 N. W. 424; Spain *v.* Burch, 169 Mo. App. 94, 154 S. W. 172.

Similar results in treatment of others. Shockley *v.* Tucker, 127 Ia. 456, 103 N. W. 360.

840-54 McGraw *v.* Kerr, 23 Colo. App. 163, 128 P. 870; Longfellow *v.* Vernon (Ind. App.), 105 N. E. 178, (*cit.* 9 ENCYC. OF EV. 840, 846); Samuels *v.* Willis, 133 Ky. 459, 118 S. W. 339; Willard *v.* Norcross, 81 Vt. 293, 69 A. 942; Froman *v.* Ayars, 42 Wash. 385, 85 P. 14.

Opinion of nurse as to defendant's relative standard of "technique" is inadmissible. Mosslander *v.* Armstrong, 90 Neb. 774, 134 N. W. 922.

Opinion as to results following customary treatment admissible. Baker *v* Langan (Ia.), 145 N. W. 513.

841-55 Making of indecent proposal inadmissible. Booth *v.* Andrus, 91 Neb. 810, 131 N. W. 884.

841-57 Longfellow *v.* Vernon (Ind. App.), 105 N. E. 178 (*cit.* 9 ENCYC. OF EV., p. 841 et seq.); Frisk *v.* Cannon, 110 Minn. 438, 126 N. W. 67; Rann *v.* Twitchell, 82 Vt. 79, 71 A. 1045; Helland *v.* Bridenstine, 55 Wash. 470, 104 P. 626.

See Baker *v.* Langan (Ia.), 145 N. W. 513.

Error of judgment excuses not unqualified practitioner. Farrell *v.* Haze, 157 Mich. 374, 122 N. W. 197.

Practicability of discovering cause of plaintiff's condition shown. Burton *v.* Neill, 140 Ia. 141, 118 N. W. 302.

Custom in care and treatment admissible. Hunner *v.* Stevenson, 122 Md. 40, 89 A. 418.

Result of treatment admissible although not specially pleaded. Duffy *v.* Charters (Mich.), 147 N. W. 541.

843-58 Longfellow *v.* Vernon (Ind. App.), 105 N. E. 178, *cit.* text.

843-59 Discharge of physician by another patient and change of treatment by substituted physician cannot be shown. Farrell *v.* Haze, 157 Mich. 374, 122 N. W. 197.

843-64 Assent of defendant, employed for special purpose, to treatment administered not inferable from silence, he being under no duty to speak. Lason *v.* Crane, 83 Vt. 115, 74 A. 641.

844-65 Hodgins *v.* Banting, 12 Ont. L. R. (Can.) 117; Bonnet *v.* Foote, 47 Colo. 282, 107 P. 252. See Peterson *v.* Wells, 41 Wash. 693, 84 P. 608.

845-69 See Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807; vol. 9, p. 786, n. 2, et seq.

Photograph of injured part not inadmissible because taken five years after defendant's treatment began. Bonnet *v.* Foote, 47 Colo. 282, 107 P. 252.

846-71 Longfellow *v.* Vernon (Ind. App.), 105 N. E. 178, *cit.* 9 ENCYC. OF EV. 840-846.

846-72 Baker *v.* Langan (Ia.), 145 N. W. 513; Hunner *v.* Stevenson, 122 Md. 40, 89 A. 418; Longan *v.* Weltner, 180 Mo. 322, 79 S. W. 655; Coleman *v.* Wilson, 85 N. J. L. 203, 88 A. 1059; S. *v.* Pierce, 87 Vt. 144, 88 A. 740; Willard *v.* Norcross, 86 Vt. 426, 85 A. 904; Wilkins *v.* Brock, 82 Vt. 332, 70 A. 572; Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807; Taylor *v.* Kidd, 72 Wash. 18, 129 P. 406; Klodek *v.* Logging Co., 71 Wash. 573, 129 P. 99; Helland *v.* Bridenstein, 55 Wash. 470, 104 P. 626. See Peterson *v.* Wells, 41 Wash. 693, 84 P. 608.

Anaesthetic—opinion of dentist as to proper use of, admissible. Spain *v.* Burch, 169 Mo. App. 94, 154 S. W. 172.

"**The law** seems well settled that malpractice must be substantiated by the testimony of expert witnesses in order to prevail; it being proper for other witnesses to testify as to the treatment and acts of defendant and the province of experts, physicians and surgeons, to say whether or not the same was proper and the proper results. Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597." Rogers *v.* Kee, 171 Mich. 551, 137 N. W. 260.

Result of examination of fractured limb made five years after defendant began treating shown in corroboration of plaintiff's testimony of former condition. Bonnet *v.* Foote, 47 Colo. 282, 107 P. 252.

848-75 S. *v.* Smith, 25 Ida. 541, 138

P. 1107; Wilkins *v.* Brock, 82 Vt. 332, 70 A. 572.

849-76 Grainger *v.* Still, 187 Mo. 197, 85 S. W. 1114; Logan *v.* Weltner, 180 Mo. 322, 79 S. W. 655.

849-77 Grainger *v.* Still, 187 Mo. 197, 85 S. W. 1114.

850-78 See Logan *v.* Field, 192 Mo. 54, 90 S. W. 127.

850-79 Wilkins *v.* Brock, 82 Vt. 332, 70 A. 572.

850-81 Not binding on jury. Helland *v.* Bridenstine, 55 Wash. 470, 104 P. 626.

Usage and custom of hospitals generally concerning after-care of surgical patients presumably known to patient going to hospital for operation to relieve independent operating surgeon from responsibility for neglect of attendants; local custom cannot be proved. Harris *v.* Fall, 177 Fed. 79, 100 C. C. A. 497.

Holding himself out as physician and administration of remedies cannot be shown against defendant if plaintiff knew not facts. Raisler *v.* Benjamin, 133 App. Div. 721, 118 N. Y. S. 223.

851-85 Total amount of defendant's bill inadmissible, calculated to prejudice. See Cozino *v.* Moore (Ia.), 141 N. W. 424.

Amount paid competent. Reeves *v.* Lutz (Mo. App.), 162 S. W. 280.

851-87 Zilke *v.* Johnson, 22 N. D. 75, 132 N. W. 640; Helland *v.* Bridenstine, 55 Wash. 470, 104 P. 626.

Patient's condition relevant.—Bonnet *v.* Foote, 47 Colo. 282, 107 P. 252.

Cost of resetting fracture.—Albertson *v.* Lewis, 132 Ia. 243, 109 N. W. 705.

Impairment of ability to attend business admissible, not however as basis of damages. Stanley *v.* Taylor (Ia.), 142 N. W. 81.

852 Petition of another to recover for medical expenses incompetent. Ghio *v.* Shaper Bros. (Mo. App.), 163 S. W. 551.

852-88 Blakeslee *v.* Van Der Slice, 94 Neb. 153, 142 N. W. 799; Beadle *v.* Paine, 46 Or. 424, 80 P. 903; Sauers *v.* Smits, 49 Wash. 557, 95 P. 1097, 17 L. R. A. (N. S.) 1242.

852-89 Conveyance may not be inquired about on cross-examination unless question refers to it in connection with pending case. Gore *v.* Brockman, 138 Mo. App. 231, 119 S. W. 1082.

Existence of insurance. — Defendant may not be cross-examined as to obtaining protective insurance about time plaintiff's condition became serious. Gore *v.* Brockman, supra.

PLEDGES

854-1 Wehner *v.* Bauer, 169 Fed. 240 (evidence showed contract of pledge); Cantwell *v.* Johnson, 236 Mo. 575, 139 S. W. 365; Patton *v.* Washington, 54 Or. 479, 103 P. 68. See Thomas *v.* Co. (N. J. Eq.), 73 A. 833.

Maker proved good defense.—Pledgee must prove non-payment, amount due, and other security held, if any. Wharton *v.* State Bk. (Tex. Civ.), 153 S. W. 699.

Evidence held insufficient. — Reading Finance & Securities Co. *v.* Hasley, 186 Fed. 673, 108 C. C. A. 529; Casgrain *v.* Hammond, 165 Mich. 615, 141 N. W. 122.

854-2 Spires *v.* Co., 4 Ga. App. 323, 61 S. E. 300. *Comp.* King *v.* Sullivan (Tex. Civ.), 92 S. W. 51.

857-10 Existing liability presumed if no time fixed for payment of debt. Stokes *v.* Dimmick, 157 Ala. 277, 48 S. 66.

857-11 Fourth St. Nat. Bk. *v.* Trustee, 172 Fed. 177, 96 C. C. A. 629; Am. C. Co. *v.* Co., 171 Fed. 340; Sequeira *v.* Collins, 153 Cal. 426, 95 P. 876 (conclusions as to possession valueless unless supported by facts); Little *v.* Berry (Ky.), 113 S. W. 902; Grand Ave. Bk. *v.* Co., 135 Mo. App. 366, 115 S. W. 1071. See Philadelphia W. Co. *v.* Winchester, 156 Fed. 600, "field storage" and notice by placards.

858-12 Am. C. Co. *v.* Co., 171 Fed. 340.

860-14 Grand Ave. Bk. *v.* Co., 135 Mo. App. 366, 115 S. W. 1071.

861-17 Shattuck & D. W. Co. *v.* Gillelen, 154 Cal. 778, 99 P. 348; Josephson *v.* Gens, 141 N. Y. S. 522. See Hill *v.* Kerstetter, 43 Ind. App. 431, 86 N. E. 997.

862-20 Previous dealings of parties in accordance with custom sought to be proved must be shown before evidence of custom admissible. Weir *v.* Dwyer, 114 N. Y. S. 528.

863-21 That plaintiff's husband authorized sale inadmissible. Bk. of Tupelo *v.* Thompson (Ala.), 65 S. 147.

POSITIVE AND NEGATIVE EVIDENCE

864-1 Heywood *v.* S., 12 Ga. App. 643, 77 S. E. 1130; Lyons *v.* R. Co., 258 Ill. 75, 101 N. E. 211; Lamb *v.* R. Co., 86 S. C. 106, 67 S. E. 958. See Taylor *v.* R. Co. (Tex. Civ.), 153 S. W. 355.

Negative testimony competent. McCreery *v.* R. Co., 221 Mo. 18, 120 S. W. 24. May establish issue. Schon *v.* Woodmen, 51 Wash. 482, 99 P. 25. **As to relevancy,** see vol. 11, p. 196, n. 58, et seq., and supplement thereto.

865-2 Norfolk & W. R. Co. *v.* U. S., 177 Fed. 623, 101 C. C. A. 249; U. S. *v.* R. Co., 170 Fed. 456; Phila., etc. Co. *v.* Gatta (Del.), 85 A. 721; E. B. Martin & Sons *v.* Bk., 137 Ga. 285, 73 S. E. 387; Fleenor *v.* R. Co., 16 Ida. 781, 102 P. 897; Eblin *v.* Co., 238 Ill. 176, 87 N. E. 385; Vandalia R. Co. *v.* Baker, 50 Ind. App. 184, 97 N. E. 16; Wiar *v.* R. Co. (Ia.), 144 N. W. 703; Mudd *v.* R. Co., 146 Mo. App. 388, 124 S. W. 59; Cox *v.* T. Co., 214 Pa. 223, 63 A. 599; Chesapeake, etc. Co. *v.* Chapman, 115 Va. 32, 78 S. E. 631; Carnefix *v.* R. Co. (W. Va.), 82 S. E. 219; Anderson *v.* M. Co., 137 Wis. 569, 119 N. W. 342.

See Indianapolis, etc. R. Co. *v.* Taylor, 39 Ind. App. 592, 80 N. E. 436.

865-3 Hunter *v.* S., 4 Ga. App. 761, 62 S. E. 466; Daniel *v.* S., 4 Ga. App. 843, 62 S. E. 539; Wood *v.* S., 1 Ga. App. 684, 58 S. E. 271; Grabill *v.* Ren, 110 Ill. App. 587; Chicago, etc. R. Co. *v.* Louderback, 125 Ill. App. 323; Catlin *v.* Sheldon, 56 Wash. 423, 105 P. 828. See Riley *v.* R. Co., 36 Mont. 545, 93 P. 948.

865-4 Gray *v.* R. Co., 143 Ia. 268, 121 N. W. 1097.

866-5 Bryson *v.* Biggs, 32 Ky. L. R. 159, 104 S. W. 982; Hobbs *v.* Blanchard, 75 N. H. 73, 70 A. 1082; S. *v.* Simmons, 52 Wash. 132, 100 P. 269; Anderson *v.* M. Co., 137 Wis. 569, 119 N. W. 342.

866-6 Van Norden T. Co. *v.* Spar, 111 N. Y. S. 674; Zollner *v.* Moffitt, 222 Pa. 644, 72 A. 285.

866-7 Fletcher *v.* Hickman, 165 Fed. 403, 91 C. C. A. 353; Cotton *v.* R. Co., 99 Minn. 366, 109 N. W. 835; Strickland *v.* R. Co., 150 N. C. 4, 63 S. E. 161.

867-10 Union Bk. *v.* Trust, 40 Can. Sup. 510; Watt *v.* Watt (Can.), 10 West. L. Rep. 697; The Dorchester, 163 Fed. 779; Riccio *v.* R. Co. (Del), 82 A. 604; Richards *v.* Burkholder, 29 App. Cas. (D. C.) 485; Leonard *v.* S., 5 Ga. App. 494, 63 S. E. 530; Jacobs *v.* S., 1 Ga. App. 519, 57 S. E. 1063; Idaho, etc. Co. *v.* Kalanquin, 8 Ida. 101, 66 P. 933; Grabill *v.* Ren, 110 Ill. App. 587; Illinois S. R. Co. *v.* Hamill, 128 Ill. App. 152; Missouri, etc. R. Co. *v.* McCoy, 7 Ind. Ty. 288, 104 S. W. 620; Eckert *v.* Ins. Co., 147 Ia. 507, 124 N. W. 170; In re Wharton, 132 Ia. 714, 109 N. W. 492; Lurker *v.* Ross (Ky.), 121 S. W. 647; Lower Terrebonne, etc. Co. *v.* Barrow, 126 La. 263, 52 S. 487; Von Eye *v.* Byrnes, 124 La. 769, 50 S. 708; McGee *v.* Co., 123 La. 696, 49 S. 475; S. *v.* Green, 115 La. 1041, 40 S. 451; Rausch *v.* Glazer (N. J. Eq.), 74 A. 39; Becker *v.* Fargo, 158 App. Div. 810, 144 N. Y. S. 297; Wallowa L. A. Co. *v.* Hamilton (Or.), 142 P. 321; St. Louis, etc. R. Co. *v.* Berry, 42 Tex. Civ. 470, 93 S. W. 1107; Chesapeake, etc. Co. *v.* Chapman, 115 Va. 32, 78 S. E. 631; Miller *v.* Smith, 109 Va. 651, 64 S. E. 956; Long *v.* McCabe, 52 Wash. 422, 100 P. 1016. **Error to so instruct jury.**—Vandalia R. Co. *v.* Baker, 50 Ind. App. 184, 97 N. E. 16.

Error to instruct in accordance with text where jury sole judges of value and effect of evidence. Russell *v.* Co., 54 Or. 128, 102 P. 619.

867-11 Rich *v.* R. Co., 149 Fed. 79, 78 C. C. A. 663; White *v.* R. Co., 6 Penne. (Del.) 105, 63 A. 631; Queen Anne's R. Co. *v.* Reed, 5 Penne. (Del.) 226, 59 A. 860; Chicago, etc. R. Co. *v.* Eganolf, 112 Ill. App. 323; Hoffard *v.* R. Co., 138 Ia. 543, 110 N. W. 446, 16 L. R. A. (N. S.) 797; R. Co. *v.* Brock, 69 Kan. 448, 77 P. 86; Cartwright *v.* R. Co., 131 La. 210, 59 S. 124; Williamson *v.* R. Co., 139 Mo. App. 481, 122 S. W. 1113; Horandt *v.* R. Co., 78 N. J. L. 190, 73 A. 9 (weight due positive testimony, enhanced by action of witnesses in conformity therewith); Stetson *v.* R. Co., 77 N. J. L. 121, 71 A. 113; Anspach *v.* R. Co., 225 Pa. 528, 74 A. 373; Holland *v.* R. Co., 55 Wash. 266, 104 P. 252; Anderson *v.* Co., 137 Wis. 569, 119 N. W. 342; Ives *v.* R. Co., 128 Wis. 357, 107 N. W. 452. See Louisville, etc. R. Co. *v.* Molloy, 32 Ky. L. R. 745, 107 S. W. 217.

868-13 Van Salvellergh *v.* Co., 132

Wis. 166, 111 N. W. 1120; Wickham *v.* R. Co., 95 Wis. 23, 69 N. W. 982.

When rule not applicable.—Wood *v.* S., 1 Ga. App. 684, 58 S. E. 271. See Phillips *v.* S., 1 Ga. App. 687, 57 S. E. 1079.

868-14 Van Salvellergh *v.* Co., 135 Wis. 166, 111 N. W. 1120.

868-15 Chicago, etc. R. Co. *v.* Stepp, 164 Fed. 785, 90 C. C. A. 431; City & S. R. Co. *v.* Cooper, 32 App. Cas. (D. C.) 550; Pendergrast *v.* Greeson, 6 Ga. App. 47, 64 S. E. 282; Hunter *v.* S., 4 Ga. App. 761, 62 S. E. 466; Peak *v.* S., 5 Ga. App. 56, 62 S. E. 665; Fleenor *v.* R. Co., 16 Ida. 781, 102 P. 897; Grand Trunk W. R. Co. *v.* Reynolds (Ind. App.), 90 N. E. 94; Chesapeake & O. R. Co. *v.* Hawkins (Ky.), 124 S. W. 836; Chesapeake & O. R. Co. *v.* Brashear (Ky.), 124 S. W. 277; Louisville & N. R. Co. *v.* O'Nan (Ky.), 119 S. W. 1192; Louisville, etc. R. Co. *v.* Molloy, 32 Ky. L. R. 745, 107 S. W. 217; S. *v.* Green, 115 La. 1041, 40 S. 451; Slattery *v.* R. Co., 203 Mass. 453, 89 N. E. 622 (value of negative testimony depends upon situation of witness and attendant circumstances); Hines *v.* Co., 203 Mass. 288, 89 N. E. 628 (same); Cotton *v.* R. Co., 99 Minn. 366, 109 N. W. 835; Stotler *v.* R. Co., 200 Mo. 107, 98 S. W. 509; King *v.* R. Co., 143 Mo. App. 279, 127 S. W. 400; Bodenheimer *v.* R. Co., 140 Wis. 623, 123 N. W. 148; Van Salverllergh *v.* Co., 132 Wis. 166, 111 N. W. 1120.

See Hornstein *v.* R. Co., 195 Mo. 440, 92 S. W. 884; Butler *v.* R. Co., 117 Mo. App. 354, 93 S. W. 877; Winterbottom *v.* R. Co., 217 Pa. 574, 66 A. 861; Barney *v.* Quaker Oats Co., 85 Vt. 372, 82 A. 113.

869-16 E. B. Martin & Sons *v.* Bk., 137 Ga. 285, 73 S. E. 387; Russell *v.* R. Co., 54 Or. 128, 102 P. 619.

869-17 Anderson *v.* M. Co., 137 Wis. 569, 119 N. W. 342. See Montijo *v.* Sherer, 5 Cal. App. 736, 91 P. 261; Lanning *v.* R., 196 Mo. 647, 94 S. W. 491.

869-18 Chicago, etc. R. Co. *v.* Stepp, 164 Fed. 785, 90 C. C. A. 431; U. S. *v.* R. Co., 170 Fed. 456; Louisville & N. R. Co. *v.* Brown (Ky.), 113 S. W. 465; McKinnon B. & M. Co. *v.* Co., 156 Mich. 11, 120 N. W. 26; Riley *v.* R. Co., 36 Mont. 545, 93 P. 948.

870-21 Sargent *v.* Modern Brotherhood, 148 Ia. 600, 127 N. W. 52.

PRESUMPTIONS

Business status, 895 67; *Revocation of will*, 907-15; *Presumption of continuance of an action at law*, 909-21.

877-2 *Contra*, S. *v.* McIntyre, 58 Wash. 178, 101 P. 710.

878-4 See Turner *v.* Williams, 202 Mass. 500, 89 N. E. 110.

878-5 First S. Bk. *v.* Haswell, 174 Fed. 209, 98 C. C. A. 217; Horan *v.* Co., 159 Ala. 139, 48 S. 1029; First Nat. Bk. *v.* Bk., 171 Ind. 323, 86 N. E. 417; Am. F. L. M. Co. *v.* Smith, 84 Neb. 237, 120 N. W. 1113 (sufficiency of pleading in action to revive dormant judgment); Stark *v.* Epler, 59 Or. 262, 117 P. 276. *Contra*, Smith *v.* Olivarri (Tex. Civ.), 127 S. W. 235. See U. S. *v.* Rose, 166 Fed. 999; Peckham *v.* Lane, 81 Kan. 489, 106 P. 464; McKillop *v.* Burton's Admr., 82 Vt. 403, 74 A. 78.

Amendment presumed if defect not injurious. Cornelius *v.* Laundry, 52 Wash. 272, 100 P. 727.

No presumption in favor of substituted indictment unless substitution by judicial order. Brooks *v.* S., 55 Tex. Cr. 122, 113 S. W. 920.

879-6 Marquis *v.* Ins. Co., 128 Tenn. 213, 159 S. W. 733. See First Nat. Bk. *v.* Adams, 82 Neb. 801, 118 N. W. 1055; Anderson *v.* Co., 137 Wis. 569, 119 N. W. 342.

No retrospective operation given presumptions arising from proof. W. U. T. Co. *v.* Hughey, 55 Tex. Civ. 403, 118 S. W. 1130.

Legislature may declare doing certain acts shall have effect as presumptive evidence. Sprintz *v.* Saxton, 126 App. Div. 421, 110 N. Y. S. 585.

879-7 Ensel *v.* Ins. Co. (Ohio), 102 N. E. 955; Missouri, etc. R. Co. *v.* Jones, 103 Tex. 187, 125 S. W. 909; Caledonia County G. School *v.* Howard, 84 Vt. 1, 77 A. 877. See Hubert *v.* Dale (1909), 2 Ch. Div. 570.

No presumption in hostility to common custom. Bright *v.* Bacon, 131 Ky. 845, 116 S. W. 268.

880-8 Modern Woodmen *v.* Craiger, 175 Ind. 30, 92 N. E. 113; Indianapolis *v.* Keeley, 167 Ind. 516, 79 N. E. 4[illegible] (public policy and social convenience); Plattsmouth *v.* Murphy, 74 Neb. 74[illegible] 105 N. W. 293 (knowledge of law); Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807 ("temporary convenience").

Presumptions will not be indulged

where direct proof is obtainable. Skov *v.* Coffin (Tex. Civ.), 137 S. W. 450.

880-9 The Ship Poll Cary, 45 Ct. Cl. 219; Rodan *v.* Co., 207 Mo. 392, 105 S. W. 1061.

Presumption must rest upon some proved or admitted fact or facts. Gude *v.* R. Co., 77 N. J. L. 391, 71 A. 1128.

Constitutionality of laws creating presumptions.—It is competent for the legislature to create by law prima facie presumptions of evidence without denying due process of law, where such presumptions may be a natural or reasonable inference from the facts or circumstances from which the presumptions are raised by the statute, and the opposite party is not deprived of the right to rebut the presumptions in some fair manner duly provided or accorded by the rules of law or procedure. Goldstein *v.* Maloney, 62 Fla. 198, 57 S. 342.

880-10 Missouri, etc. R. Co. *v.* Foreman, 174 Fed. 377, 98 C. C. A. 281; Smith *v.* R. Co., 169 Ill. App. 132; Cleveland, etc. R. Co. *v.* Lynn, 177 Ind. 311, 98 N. E. 67; U. S. Cem. Co. *v.* Whitted, 46 Ind. App. 105, 90 N. E. 481; Carter *v.* S., 172 Ind. 227, 87 N. E. 1081; Duncan *v.* R. Co., 82 Kan. 230, 108 P. 101; Heniz *v.* Co., 81 Kan. 261, 105 P. 527; Collins *v.* Co., 143 Mo. App. 333, 127 S. W. 641; Fink *v.* R. Co., 161 Mo. App. 314, 143 S. W. 568; Huttig-M. P. B. Co. *v.* Co., 140 Mo. App. 374, 124 S. W. 1094; Haynie *v.* Co., 126 Mo. App. 88, 103 S. W. 581; Hobbs *v.* Blanchard, 75 N. H. 73, 70 A. 1082; Lamb *v.* R. Co., 195 N. Y. 260, 88 N. E. 371; In re Duffy, 127 App. Div. 74, 111 N. Y. S. 77; S. *v.* Hembree, 54 Or. 463, 103 P. 1008; St. Louis S. R. Co. *v.* McIntosh (Tex. Civ.), 126 S. W. 692; Tull *v.* R. Co. (Tex. Civ.), 87 S. W. 910; Jones *v.* R. Co., 47 Tex. Civ. 596, 105 S. W. 1007; Moore *v.* Hanscom (Tex. Civ.), 103 S. W. 665, 106 S. W. 876; Vernon Cotton Oil Co. *v.* Jones (Tex. Civ.), 137 S. W. 424; Missouri, etc. R. Co. *v.* Byrd (Tex. Civ.), 124 S. W. 738; Phillips *v.* Palmer, 56 Tex. Civ. 91, 120 S. W. 911; Ryle *v.* Davidson (Tex. Civ.), 116 S. W. 823; Fadden *v.* McKinney, 87 Vt. 316, 89 A. 351.

Exception made.—Hinshaw *v.* S., 147 Ind. 334, 47 N. E. 157.

Presumption not indulged to make prima facie case. W. U. T. Co. *v.* Sullivan, 82 O. St. 14, 91 N. E. 867.

881-11 P. *v.* Wong Sang Lung, 3 Cal. App. 221, 84 P. 843; Sears *v.* Vaughan, 230 Ill. 572, 82 N. E. 881; Rodan *v.* Co., 207 Mo. 392, 105 S. W. 1061; Leask *v.* Hoagland, 205 N. Y. 171, 98 N. E. 395.

882-16 "True" and "dry" presumptions. Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807.

882-17 Cleveland, etc. R. Co. *v.* Lynn, 177 Ind. 311, 98 N. E. 67; Indianapolis *v.* Keeley, 167 Ind. 516, 79 N. E. 499.

883-18 Cleveland, etc. R. Co. *v.* Lynn, supra; Indianapolis *v.* Keeley, supra; Linderman *v.* Carmin, 142 Mo. App. 519, 127 S. W. 124; Sowders *v.* R. Co., 127 Mo. App. 119, 104 S. W. 1122; White *v.* McCullough, 56 Tex. Civ. 383, 120 S. W. 1093; Fadden *v.* McKinney, 87 Vt. 316, 89 A. 351.

884-22 See Lipsky *v.* Co., 136 Wis. 307, 117 N. W. 803.

884-23 Ensel *v.* Ins. Co. (Ohio), 102 N. E. 955.

884-24 S. *v.* Pilling, 53 Wash. 464, 102 P. 230. See Inglin *v.* Hoppin, 156 Cal. 483, 105 P. 582; Leggett *v.* R. Co., 152 N. C. 110, 67 S. E. 249; Doyle *v.* S., 59 Tex. Cr. 60, 127 S. W. 815; supra, "Penalties," 751-8.

885-25 Ruth *v.* Krone, 10 Cal. App. 770, 103 P. 960; Board *v.* Robbins, 82 Conn. 623, 74 A. 938; Warner *v.* Warner, 235 Ill. 448, 85 N. E. 630; McLaughlin *v.* Hanecy, 132 Ill. App. 38; Prudential Ins. Co. *v.* Dolan, 46 Ind. App. 40, 91 N. E. 970; Harris *v.* Lewis, 156 Ia. 413, 136 N. W. 674; Jenkins *v.* R. Co., 105 Minn. 504, 117 N. W. 928; Huttig-M. P. B. Co. *v.* S. Co., 140 Mo. App. 374, 124 S. W. 1094; Schaub *v.* R. Co., 133 Mo. App. 444, 113 S. W. 1163; Brannock *v.* R. Co., 147 Mo. App. 301, 126 S. W. 552; First Nat. Bk. *v.* Adams, 82 Neb. 801, 118 N. W. 1055; Atchison, etc. R. Co. *v.* S., 23 Okla. 210, 100 P. 11; Peters *v.* Lohr, 24 S. D. 605, 124 N. W. 853.

See Rodan *v.* Co., 207 Mo. 392, 105 S. W. 1061; Western A. Co. *v.* Co., 146 Mo. App. 90, 123 S. W. 969; Miller *v.* Canton, 112 Mo. App. 322, 87 S. W. 96; Purdy *v.* S., 86 Neb. 638, 126 N. W. 90; P. *v.* Weinstock, 193 N. Y. 481, 86 N. E. 547; Pares *v.* Reynes, 2 P. R. Fed. 402; Savage *v.* Co., 28 R. I. 391, 67 A. 633; City Council *v.* Earle, 80 S. C. 321, 60 S. E. 1117 ("presumptions fade in the presence of facts").

886-26 McDuffee *v.* S., 55 Fla. 125,

46 S. 721; S. *v.* Kennedy, 154 Mo. 268, 55 S. W. 293; Peters *v.* Lohr, 24 S. D. 605, 124 N. W. 853; White *v.* McCullough, 56 Tex. Civ. 383, 120 S. W. 1093; Houston O. Co. *v.* Kimball (Tex. Civ.), 114 S. W. 662. See Board *v.* Robbins, 82 Conn. 623, 74 A. 938.

887-27 See Duncan *v.* R. Co., 82 Kan. 230, 108 P. 101.

887-28 Coppock *v.* R. Co., 174 Fed. 264; Ruth *v.* Krone, 10 Cal. App. 770, 103 P. 960; P. *v.* Siemsen, 153 Cal. 387, 95 P. 863; Tackman *v.* Brotherhood, 132 Ia. 64, 106 N. W. 350; Ritter *v.* R. Co., 83 S. C. 213, 65 S. E. 175; San Antonio T. Co. *v.* Probandt (Tex. Civ.), 125 S. W. 931; S. *v.* Marston, 82 Vt. 250, 72 A. 1075; Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807; In re Cowdry, 77 Vt. 359, 60 A. 141. See The Wildcroft, 130 Fed. 521, 65 C. C. A. 145; Valente *v.* R. Co., 151 Cal. 534, 91 P. 481.

887-29 P. *v.* Siemsen, 153 Cal. 387, 95 P. 863; Williford *v.* R. Co., 85 S. C. 301, 67 S. E. 302. See supra, "Adverse Possession," 667-51.

887-30 U. S. *v.* Richards, 149 Fed. 443; Holmes *v.* S., 82 Neb. 406, 118 N. W. 99 (presumption of innocence, evidence, rather than of nature of evidence); S. *v.* Clark, 83 Vt. 305, 75 A. 534; S. *v.* Marston, 82 Vt. 250, 72 A. 1075. *Contra*, C. *v.* Sinclair, 195 Mass. 100, 80 N. E. 799. See Agnew *v.* U. S., 165 U. S. 36, probably *mod.* Coffin *v.* U. S., 156 U. S. 432 (cited in original work); P. *v.* Linares, 142 Cal. 17, 75 P. 308.

888-31 Rathbun *v.* White, 157 Cal. 248, 107 P. 309; Reclamation Dist. *v.* Sherman, 11 Cal. App. 399, 105 P. 277 (under code presumption may outweigh positive testimony); Wilkinson *v.* Ins. Co., 144 Ill. App. 38; Stephens *v.* Neilson, 142 Ill. App. 263; Clifford *v.* Taylor, 204 Mass. 358, 90 N. E. 862. See Lipsky *v.* Co., 136 Wis. 307, 117 N. W. 803. But see Board *v.* Robbins, 82 Conn. 623, 74 A. 938.

889-33 Jones *v.* Co., 56 Fla. 452, 47 S. 1; S. *v.* Adams, 22 Ida. 485, 126 P. 401. See vol. 2, p. 811, n. 12, and supplement thereto.

889-34 See Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807.

889-35 W. F. Corbin & Co. *v.* U. S., 181 Fed. 296, 104 C. C. A. 278; Helbig *v.* Ins. Co., 234 Ill. 251, 84 N. E. 897; North *v.* Jones (Ind. App.), 100 N. E. 84; Sewell *v.* R., 158 Mich. 407, 123 N. W. 2; Bower *v.* Bower, 78 N. J. L. 387, 74 A. 522; Model M. Co. *v.* Webb, 164 N. C. 87, 80 S. E. 232; Cox *v.* R. Co., 149 N. C. 117, 62 S. E. 884. See vol. 2, p. 810, n. 11; vol. 2, p. 811, n. 12; vol. 9, p. 897, n. 77; p. 885, n. 25; vol. 14, p. 744, n. 15; vol. 14, p. 754, n. 35, and supplement thereto.

890-37 Golden *v.* R. Co., 39 Mont. 435, 104 P. 549.

891-39 Casper *v.* R. Co., 149 Ill. App. 588; Moglia *v.* R. Co., 127 App. Div. 243, 111 N. Y. S. 70. See Buchanan *v.* Rollings (Tex. Civ.), 112 S. W. 785.

Language is used in statutes. See Vance *v.* S., 128 Ga. 661, 57 S. E. 880.

891-40 Cooper *v.* Water Co., 16 Cal. App. 17, 116 P. 298. *Comp.* Bingaman *v.* Bingaman, 85 Neb. 248, 122 N. W. 981. And see Erie R. Co. *v.* Schomer, 171 Fed. 798, 96 C. C. A. 458.

891-41 Mulligan *v.* R. Co., 84 S. C. 171, 65 S. E. 1040.

892-42 Lindsey *v.* Couch, 22 Okla. 4, 98 P. 973.

892-43 See P. *v.* LeDoux, 155 Cal. 535, 102 P. 517.

"One presumption cannot overthrow another." S. *v.* James, 133 Mo. App. 300, 113 S. W. 222.

Where one presumption will impute a felony and the other will impute a crime of lesser degree, the law will presume for the lesser offense. In re Eichler, 146 N. Y. S. 846.

892-44 Dalton *v.* U. S., 154 Fed. 461, 83 C. C. A. 317; P. *v.* Scott, 22 Cal. App. 54, 133 P. 496; Rathbun *v.* White, 157 Cal. 248, 107 P. 309 (continuance); Coffman *v.* Christenson, 102 Minn. 469, 113 N. W. 1061; Richter *v.* S., 16 Wyo. 437, 95 P. 51 (regularity of official action). See vol. 4, p. 250, n. 23.

Presumption of innocence does not extend to any reason therefor. C. *v.* Co., 201 Mass. 564, 88 N. E. 420.

892-45 Bowman *v.* Little, 101 Md. 273, 61 A. 1084. *Contra*, Turner *v.* Williams, 202 Mass. 500, 89 N. E. 110.

892-46 *Comp.* Kerr *v.* U. S., 7 Ind. Ty. 486, 104 S. W. 870. *Contra*, Turner *v.* Williams, 202 Mass. 500, 89 N. E. 110.

892-47 In re Eichler, 146 N. Y. S. 846.

893-52 P. *v.* LeDoux, 155 Cal. 535, 102 P. 517.

894-55 Smith *v.* Fuller (Ida.), 108 N. W. 765.

894-56 Muir *v.* Chandler, 16 N. D. 551, 113 N. W. 1038.

Presumption in favor of marriage, one of the strongest. Maier *v.* Brock, 222 Mo. 74, 120 S. W. 1167.

894-57 Chicago, etc. R. Co. *v.* R. Co., 176 Fed. 237, 100 C. C. A. 41; Johnston *v.* Johnston, 174 Ala. 220, 57 S. 450; Fenn *v.* Clark, 11 Cal. App. 79, 103 P. 944; Kramm *v.* R. Co., 10 Cal. App. 271, 101 P. 914; Pre *v.* C. Co., 9 Cal. App. 591, 100 P. 122; Louft *v.* Pyle, 1 Boyce (Del.) 192, 75 A. 619; Holcombe *v.* S., 5 Ga. App. 47, 62 S. E. 647; Chicago & E. R. Co. *v.* Ginther, 48 Ind. App. 12, 90 N. E. 911; Cleveland, etc. R. Co. *v.* Moore, 45 Ind. App. 58, 90 N. E. 93; Wherry *v.* Latimer (Miss.), 60 S. 642; Burnett *v.* Smith, 93 Miss. 566, 47 S. 117; McDermeitt *v.* Keesler, 240 Mo. 278, 144 S. W. 414; Fortune *v.* Hall, 122 App. Div. 250, 106 N. Y. S. 787; Mowry *v.* Saunders, 33 R. I. 45, 80 A. 421; S. *v.* Faulk, 22 S. D. 183, 116 N. W. 72; W. U. T. Co. *v.* Hughey, 55 Tex. Civ. 403, 118 S. W. 1130 (consciousness presumed during serious illness); Fosnes *v.* R. Co., 140 Wis. 455, 122 N. W. 1054.

When illiteracy presumed.—Interstate Co. *v.* Clintwood, 105 Va. 574, 54 S. E. 593.

894-58 Impotency not presumed incurable. Hobbs *v.* Hobbs, 10 Cal. App. 97, 101 P. 22.

894-59 As to whether infants are capable of contributory negligence, see vol. 8, p. 899.

894-62 Rand *v.* Smith, 153 Ky. 516, 155 S. W. 1134; Beall *v.* Wilson, 146 Ky. 646, 143 S. W. 55; In re Ricards, 97 Md. 608, 55 A. 384.

895-65 Gunter *v.* Hinson, 161 Ala. 536, 50 S. 86, *cit.* the text.

895-67 Legal divorce.—Hammond *v.* Hammond, 43 Tex. Civ. 284, 94 S. W. 1067.

Business status.—Grossman *v.* Lieb, 126 App. Div. 348, 110 N. Y. S. 386.

895-70 Platter *v.* R. Co. (Ia.), 143 N. W. 992.

895-71 Devine *v.* Co., 145 Ill. App. 322; Modern Woodman *v.* Craiger, 175 Ind. 30, 92 N. E. 113; Newland *v.* Woodmen, 168 Mo. App. 311, 153 S. W. 1097; Norman *v.* Order, 163 Mo. App. 175, 145 S. W. 853; Johnston *v.* St. L. etc. R. Co., 150 Mo. App. 304, 130 S. W. 413; Monson *v.* Co., 39 Mont. 50, 101 P. 243; Krogh *v.* Brotherhood, 153 Wis. 397, 141 N. W. 276. See supra, "Insurance," 552-41.

"**The presumption** against suicide is very strong—strong as the universal instinct for life—but it may be overcome by proof, just as the instinct for life, in individual instances, may be overmastered by a desire for death; and we perceive no reason in law or logic for saying that the fact of suicide cannot be established in law. The true rule thus is tersely stated by the Supreme Court of Wisconsin, in Agen *v.* Insurance Co., 105 Wis. 217, 80 N. W. 1020, 76 Am. St. Rep. 905: 'Where the reasonable probabilities from the evidence all point to suicide as the cause of death, so as to establish it, in the light of reason and common sense, with such certainty as to leave no room for reasonable controversy on the subject, a jury should not be permitted to find to the contrary, and have such finding stand as a verity in the case; but the question should be decided by the trial court as one of law.'" Richey *v.* Woodmen of the World, 163 Mo. App. 235, 146 S. W. 461.

895-72 Worthington *v.* Elmer, 207 Fed. 306, 125 C. C. A. 50; Wabash R. Co. *v.* De Tar, 141 Fed. 932, 73 C. C. A. 166; Parkin *v.* R. Co., 149 Ill. App. 421; Indianapolis *v.* Keeley, 167 Ind. 516, 79 N. E. 499; Breen *v.* R. Co. (Ia.), 143 N. W. 846; Wisniewski *v.* R. Co., 177 Mich. 481, 143 N. W. 613; Nelson *v.* R. Co., 119 Minn. 347, 138 N. W. 419; Capp *v.* St. Louis, 251 Mo. 345, 158 S. W. 616; Dutcher *v.* R. Co., 241 Mo. 137, 145 S. W. 63; Heine *v.* R. Co., 144 Mo. App. 443, 129 S. W. 421; Rodan *v.* Co., 207 Mo. 392, 105 S. W. 1061; Cahill *v.* R. Co., 205 Mo. 393, 103 S. W. 532; Savage *v.* Co., 28 R. I. 391, 67 A. 633; Ft. Worth, etc. R. Co. *v.* Stalcup (Tex. Civ.), 167 S. W. 279; San Antonio T. Co. *v.* Levyson, 52 Tex. Civ. 122, 113 S. W. 569. See also vol. 8, p. 896, n. 5; vol. 8, p 898, n. 13.

No presumption child of two years will leave situation of danger in time to avoid injury. Galveston, etc. R. Co. *v.* Olds (Tex. Civ.), 112 S. W. 787.

895-73 Jerrue *v.* Court, 7 Cal. App. 717, 95 P. 906 (bid open and continuous); Stambaugh *v.* Lung, 232 Ill. 373, 83 N. E. 922; Lowden *v.* Co., 41 Ind. App. 614, 82 N. E. 941; Am. Syrup, etc. Co. *v.* Roberts, 112 Md. 18, 76 A. 589; Richards *v.* Co., 221 Mo. 149, 119 S. W. 953 (corporation has officers and

stockholders); Morrow v. R. Co., 140 Mo. App. 200, 123 S. W. 1034 (keeping account books); Brookfield v. College, 139 Mo. App. 339, 123 S. W. 86; Wieters v. Hart, 67 N. J. Eq. 507, 63 A. 241; Enton v. R. Co., 136 App. Div. 800, 121 N. Y. S. 793 (consent to operation of railroad); Cyr v. Walker, 29 Okla. 281, 116 P. 931; So. R. Co. v. Gossett, 79 S. C. 372, 60 S. E. 956.

Ordinary course of forwarding goods will be presumed to have been followed by carrier. Lacey v. R. Co., 63 Or. 596, 128 P. 999. See "Carriers," p. 879.

Intention to perform contract. Williams v. Co., 169 Mich. 676, 135 N. W. 954.

Consistency of declarations and conduct, presumed. Selden v. Williams, 108 Va. 542, 62 S. E. 380.

As between claimants for commission on sale of land, it is presumed holder of legal title purchased in good faith. Shapiro v. Shapiro, 125 App. Div. 608, 110 N. Y. S. 11.

Investigation of title and knowledge of restrictions, presumed against purchaser of land. Maurer v. Friedman, 125 App. Div. 754, 110 N. Y. S. 320.

Natural and probable consequences.—S. v. Truitt, 5 Penne. (Del.) 466, 62 A. 790.

896-74 **Work done on property was,** presumably, done by owner. Masal v. Tarrnowski, 128 App. Div. 159, 112 N. Y. S. 556; Keilly v. Severson, 149 Wis. 251, 135 N. W. 875.

If one buys real estate of another while the subject of the transactions is in possession of a third person, he is presumed to act with notice of all facts which such situation would suggest, or which could be obtained by diligent inquiry. Keilly v. Severson, 149 Wis. 251, 135 N. W. 875.

Sale on market presumed to be for cash. Hetland v. Bilstad, 140 Ia. 411, 118 N. W. 422.

Value of note.—As against negligent person or one who has done affirmative wrong, promissory note presumed to be worth its face. Hoff v. Co., 140 Ill. App. 458.

896-75 Newell v. White (Conn.), 73 A. 798; P. v. Campbell, 160 Mich. 108, 125 N. W. 42 (date on paper date of execution); S. v. Court, 38 Mont. 119, 99 P. 139; Tilden v. Smith, 24 S. D. 576, 124 N. W. 841.

897-76 Brookfield v. College, 139 Mo. App. 339, 123 S. W. 86.

897-77 Blothenthal v. Atkinson, 93 Ark. 252, 124 S. W. 510; Merchants Exch. v. Sanders, 74 Ark. 16, 84 S. W. 786; Baker v. Temple, 160 Mich. 318, 125 N. W. 63; Long Bell L. Co. v. Norman, 145 Mich. 177, 108 N. W. 1019; Ruder v. Nat. Council, 124 Minn. 61, 145 N. W. 118; Sills v. Burge, 141 Mo. App. 148, 124 S. W. 605; Covell v. Co., 164 Mo. App. 620, 147 S. W. 557; Mishkind F. Co. v. Silovsky, 189 N. Y. 402, 82 N. E. 448; Model M. Co. v. Webb, 164 N. C. 87, 80 S. E. 232; Model M. Co. v. Webb, 164 N. C. 87, 80 S. E. 232; Beard v. R. Co., 142 N. C. 126, 57 S. E. 505; Reeves v. Martin, 29 Okla. 705, 94 P. 1058; C. v. Fisher, 221 Pa. 538, 70 A. 865; Lawyer v. Co., 25 S. D. 540, 127 N. W. 615; Opet v. Denton (Tex. Civ.), 93 S. W. 527; Pink F. S. v. Minrot, 40 Tex. Civ. 375, 90 S. W. 77.

See Hendy Iron Wks. v. Brenneman, 185 Fed. 183; vol. 2, p. 810, n. 11; vol. 9, p. 885, n. 25; p. 889, n. 35; vol. 14, p. 744, n. 15; p. 754, n. 47, and supplement thereto.

Sending a check in a letter.—Findlay v. Bank, 166 Ill. App. 57.

Reply letter.—W. U. T. Co. v. Troth, 43 Ind. App. 7, 84 N. E. 727 (rebuttable); Am. B. Co. v. Essex, 107 Md. 211, 68 A. 921. Mere receipt of letter, not a reply, not evidence it was signed by person whose signature purports to be upon it. Beard v. R. Co., 143 N. C. 136, 55 S. E. 507.

898-80 Campbell v. Gowans, 37 Utah 268, 100 P. 297.

No presumption of law or fact, letter received. Continental Ins. Co. v. Hargrove, 131 Ky. 837, 116 S. W. 256.

899-82 Empire S. S. Co. v. Lamb Co., 200 Fed. 224, 227, 118 C. C. A. 410; Davidson Co. v. U. S., 142 Fed. 315, 73 C. C. A. 427; McAuley v. Co., 39 Mont. 185, 102 P. 680; Kuyper v. Brown, 79 N. J. L. 618, 77 A. 171; Sherrod v. Ins. Co., 139 N. C. 167, 51 S. E. 910 (rebuttable); Judge v. Assn., 10 O. C. C. (N. S.) 473.

Presumption limited to party to whom letter addressed. Cole v. Co., 200 Mass. 594, 86 N. E. 902.

900-87 Chicago, etc. R. Co. v. Elk, 174 Fed. 923, 98 C. C. A. 335.

900-88 Sills v. Burge, 141 Mo. App. 148, 124 S. W. 605; Graham v. Patterson, 198 N. Y. 173, 91 N. E. 371.

"Mailed" implies the payment of the

necessary postage. City of Omaha *v.* Yancey, 91 Neb. 261, 135 N. W. 1044.

900-89 Banker's C. Co. *v.* Bk., 127 Ga. 326, 56 S. E. 429; Fountain City Co. *v.* Lindquist, 22 S. D. 7, 114 N. W. 1098; Trezevant & Cochran *v.* Co. (Tex. Civ.), 130 S. W. 234.

900-90 Ward *v.* Co., 119 Mo. App. 83, 95 S. W. 964; Reynolds *v.* Co., 30 Pa. Super. 456.

901-92 McCaskey, etc. Co. *v.* Redd (Mo.), 130 S. W. 109.

901-93 Long Bell L. Co. *v.* Nyman, 145 Mich. 477, 108 S. W. 1019; City of Omaha *v.* Yancey, 91 Neb. 261, 135 N. W. 1044; Reeves *v.* Martin, 20 Okla. 558, 94 P. 1058; Beeman *v.* Lodge, 215 Pa. 627, 64 A. 792.

901-95 Beeman *v.* Lodge, supra.

901-96 Cassel *v.* Randall, 10 Ga. App. 587, 73 S. E. 858; Benge's Admr. *v.* Eversole, 156 Ky. 131, 160 S. W. 911; City of Omaha *v.* Yancey, 91 Neb. 261, 135 N. W. 1044; Cagliostro *v.* Indelli, 53 Misc. 44, 102 N. Y. S. 918. See vol. 4, p. 260, n. 56; also vol. 2, pp. 14, 380.

902-99 Judge *v.* Assn., 10 O. C. C. (N. S.) 473.

902-1 Allen *v.* Wilbur, 199 Mass. 366, 85 N. E. 429. See Gardam *v.* Batterson, 198 N. Y. 175, 91 N. E. 371.

903-4 Gilliland *v.* R. Co., 85 S. C. 26, 67 S. E. 20.

Compliance with a request to central to connect with certain number, will be presumed. Union C. Co. *v.* Tel. Co., 163 Cal. 298, 125 P. 242.

904-6 Delay in asserting a right when unreasonably extended, though unattended by other inequitable features, may create a conclusive presumption against the validity of a claim, if the delay is continued under circumstances affording opportunity for diligence. Russel *v.* Fish, 149 Wis. 122, 135 N. W. 531.

904-9 Easement. Cahill *v.* Mangold, 151 Ky. 156, 151 S. W. 373.

904-10 Harris *v.* Bow, 156 Mich. 28, 120 N. W. 17, settlement of estate.

906-13 Garten *v.* Trobridge, 80 Kan. 720, 104 P. 1067; Louisville *v.* Tompkins (Ky.), 122 S. W. 174 (acceptance of land for highway). See supra, "Deeds," 178-47.

Substituted contract found among private papers of decedent in safety deposit box, presumed to have been accepted by him though placed there by another. Wood *v.* Brotherhood, 140 Ia. 98, 117 N. W. 1123.

906-14 Hoagland *v.* Canfield, 160 Fed. 146 (continued intoxication); Buck *v.* R. Co., 159 Ala. 305, 48 S. 699; Fair *v.* Elec. Co., 15 Cal. App. 705, 115 P. 754; Pettus *v.* Gault, 81 Conn. 415, 71 A. 509 (relation of mortgagor and mortgagee); Murray *v.* Co., 79 Kan. 326, 99 P. 589; Dehner *v.* Miller, 166 Mo. App. 504, 148 S. W. 953; S. *v.* Wiethaupt, 165 Mo. App. 634, 148 S. W. 429; Feller *v.* Lee, 225 Mo. 319, 124 S. W. 1129; Viertel *v.* Viertel, 212 Mo. 562, 111 S. W. 579; In re Van Ness' Will, 78 Misc. 592, 139 N. Y. S. 485; Jones *v.* Co., 52 Or. 311, 97 P. 625; S. *v.* Gibson, 67 W. Va. 548, 68 S. E. 295; Hilliard *v.* Ins. Co., 137 Wis. 208, 117 N. W. 999.

See Alabama Bk. *v.* Parker, 146 Ala. 513, 40 S. 987; Fire Assn. *v.* LaGrange, 50 Tex. Civ. 172, 109 S. W. 1134. Recognized by statute. Thornton-T. M. Co. *v.* Bretherton, 32 Mont. 80, 80 P. 10, and applied to book accounts.

907-15 Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581; Trumbull *v.* Board, 140 Mich. 529, 103 N. W. 993; In re Murphy's Est., 43 Mont. 353, 116 P. 1004. *Contra,* Corcoran *v.* Co., 15 N. M. 9, 103 P. 645.

Indebtedness presumed to continue. Gt. West. L. Co. *v.* Shumway, 25 N. D. 268, 141 N. W. 479.

Revocation of will.—Will last seen in custody of testator few months prior to death and which cannot be found, is presumed revoked. Buchanan *v.* Rollings (Tex. Civ.), 112 S. W. 785.

Cessation of trust presumed from lapse of time. Pooler *v.* Sammet, 58 Misc. 469, 111 N. W. 658.

908-17 Pressure of gas in well. Moore *v.* Co., 63 W. Va. 455, 60 S. E. 401.

Does not apply to a perishable crop after the lapse of several years. Bludworth *v.* Bray, 59 Fla. 437, 52 S. 957.

908-18 Evidence not required until facts shown to be contrary to presumption or different presumption rises from nature of subject. Hilliard *v.* Ins. Co., 137 Wis. 208, 117 N. W. 999.

909-20 Erford *v.* City, 229 Ill. 546, 82 N. E. 374; Zarate *v.* Villareal (Tex. Civ.), 155 S. W. 328. See also "Foreign Law," p. 816, n. 23.

Change of territory into state and entire change of judiciary, overcomes presumption of continuance of rule of

law declared by territorial court. W. U. T. Co. *v.* Parsley, 57 Tex. Civ. S, 121 S. W. 226.

909-21 P. *v.* Zimmerman, 11 Cal. App. 115, 104 P. 590; Earlville *v.* Radley, 141 Ill. App. 359; Burke *v.* Co., 133 App. Div. 113, 117 N. Y. S. 400; Gay *v.* Eugene, 53 Or. 289, 100 P. 306. **Presumption of continuance** of action at law. Williams *v.* Ellis, 101 Me. 247, 63 A. 818.

909-22 Alabama State Land Co. *v.* Matthews, 168 Ala. 200, 54 S. 174; Metteer *v.* Smith, 156 Cal. 572, 105 P. 735 (of realty); Burgener *v.* Lippold, 128 Ill. App. 590; Boagni *v.* Co., 111 La. 1063, 36 S. 129; Sanford *v.* Millikin, 144 Mich. 311, 107 N. W. 884; Wails *v.* Farrington, 27 Okla. 754, 116 P. 428; Krebs H. Co. *v.* Taylor, 52 Or. 627, 97 P. 44. *Contra* as to personalty. Lettelier *v.* Mann, 79 Fed. 81.

No presumption as to time possession began. Tonopah & G. R. Co. *v.* Fellenbaum, 32 Nev. 278, 107 P. 882.

910-24 Presumption of grant or its confirmation not indulged from ancient possession. Sena *v.* Co., 14 N. M. 511, 98 P. 170.

910-27 New York C. R. Co. *v.* Moore, 137 App. Div. 461, 121 N. Y. S. 884; In re Perry, 129 App. Div. 587, 114 N. Y. S. 246; In re Darrow's Est., 64 Misc. 224, 118 N. Y. S. 1082; Marsters *v.* Co., 49 Or. 374, 90 P. 151. See vol. 9, p. 262, n. 16, and supplement thereto.

911-30 Soler *v.* Parkhurst, 4 P. R. Fed. 335.

911-32 See S. *v.* Jackson, 128 Ia. 543, 105 N. W. 51; Wickern *v.* U. S., Exp. Co., 83 N. J. L. 241, 83 A. 776.

912-33 Grand Lodge *v.* Whitehead, 87 Ark. 115, 112 S. W. 199 (membership in benefit society); Anglo-C. Bk. *v.* Field, 146 Cal. 644, 80 P. 1080; Clark *v.* Barney, 24 Okla. 455, 103 P. 598 (continuance of bigamous relations after removal of barrier to marriage); Crosby *v.* Ardoin (Tex. Civ.), 145 S. W. 709; S. *v.* Chittenden, 127 Wis. 468, 107 N. W. 500; Weidenhoft *v.* Primm, 16 Wyo. 340, 94 P. 453.

Citizenship.—S. *v.* Jackson, 79 Vt. 504, 65 A. 657.

Status as president of a corporation presumed to continue, in absence of proof to the contrary. Westinghouse Elec. & Mfg. Co. *v.* Hodge (Mo. App.), 167 S. W. 1186.

912-34 Stoutenborough *v.* Rammel, 123 Ill. App. 487; Kentucky S. Co. *v.* Page (Ky.), 125 S. W. 170. See vol. 8, p. 457, n. 51, and supplement thereto.

912-35 See Turner *v.* Williams, 202 Mass. 500, 89 N. E. 110.

912-36 Gibson *v.* Brown, 214 Ill. 330, 73 N. E. 579; Wells *v.* Margraves (Tex. Civ.), 164 S. W. 881. But see Shown *v.* McMackin, 9 Lea (Tenn.) 601, 42 Am. Rep. 680.

Merely because a girl was of tender years when she died, raises no presumption she had never been married, if she was over the age at which she might marry (twelve years). Dudley *v.* R. Co., 167 Mo. App. 647, 150 S. W. 737.

Boy is presumed to have continued unmarried until 18 years of age. Tex. & P. R. Co. *v.* Lacey, 185 Fed. 225, *aff.* Gaunt *v.* S., 50 N. J. L. 490, 14 A. 600.

Married people presumed to have sustained relations incident to condition from time of marriage to institution of suit for annulment. Killackey *v.* Killackey, 156 Mich. 127, 120 N. W. 680.

913-38 Celibacy presumed to continue. Rucker *v.* Jackson (Ala.), 60 S. 139.

913-41 Stitzel *v.* Farley, 148 Ill. App. 635; Severns *v.* Broffey, 155 Ill. App. 70; In re Osborn, 130 N. Y. S. 406.

913-42 Mullen *v.* Johnson, 157 Ala. 262, 47 S. 594; In re Murphy's Est., 43 Mont. 353, 116 P. 1064.

914-43 Webb *v.* Eutaw, 9 Ala. App. 474, 63 S. 687.

914-44 Aycock *v.* Co. (Ala.), 62 S. 94; Wachsmuth *v.* Ins. Co., 147 Ill. App. 510, *aff.* in 241 Ill. 409, 89 N. E. 787.

914-45 See Cate *v.* Fife, 80 Vt. 494, 68 A. 1.

Position of trust, once shown to exist, is presumed to continue until contrary proved. Trask *v.* Karrick, 87 Vt. 451, 89 A. 472.

914-47 Stafford, etc. R. Co. *v.* Co., 80 Conn. 37, 66 A. 775.

915-51 Cover *v.* Hatten, 136 Ia. 63, 113 N. W. 470; In re Colton, 129 Ia. 542, 105 N. W. 1008; S. *v.* Jackson, 79 Vt. 504, 65 A. 657.

915-54 Brooks *v.* U. S., 146 Fed. 223, 76 C. C. A. 581.

916-63 W. P. Corbin & Co. *v.* United States, 181 Fed. 296, 104 C. C. A. 278; Excelsior S. L. Co. *v.* Lomax, 166

Ala. 612, 52 S. 347; In re Dolbeer, 149 Cal. 227, 86 P. 695 (insanity); In re Brigham's Est., 144 Ia. 71, 120 N. W. 1054; Spiers *v.* Hendershott, 142 Ia. 446, 120 N. W. 1058; German Bk. *v.* Co., 27 Ky. L. R. 581, 85 S. W. 761 (insolvency); S. *v.* Morrison, 244 Mo. 193, 148 S. W. 907; MacRae *v.* Mills, 130 N. Y. S. 339; Beck *v.* Club, 228 Pa. 173, 77 A. 448; Pierce *v.* Stolhand, 141 Wis. 286, 124 N. W. 259.

Use of intoxicants as a habit will be presumed to continue but no retroactive force can be given to the presumption. Brotherhood, etc. *v.* Cole, 108 Ark. 527, 158 S. W. 153. See also vol. 9, p. 915.

Shore line presumed to have always existed in its present condition. Somerville *v.* New York, 78 Misc. 203, 137 N. Y. S. 919.

917-64 Washington, etc. R. Co. *v.* Vaughan, 111 Va. 785, 69 S. E. 1035.

Though no presumption arises that houses located in certain portion of town were thus situated some years prior thereto, the circumstances is nevertheless entitled to some consideration. Ralls *v.* Parish (Tex. Civ.), 151 S. W. 1089.

917-65 Cleage *v.* Laidley, 149 Fed. 346, 79 C. C. A. 284; Ames *v.* Kruzner, 1 Alaska 598; Henshall *v.* Marsh, 151 Cal. 289, 90 P. 693; Washington Terminal Co. *v.* D. C., 36 App. Cas. (D. C.) 186; Feinberg *v.* Stearns, 56 Fla. 279, 47 S. 797 (subsequent purchaser's good faith); Schlauder *v.* Co., 253 Ill. 154, 97 N. E. 233; P. *v.* Moore, 240 Ill. 408, 88 N. E. 979; Choctaw R. Co. *v.* McAlester, 7 Ind. Ty. 520, 104 S. W. 821; Joseph Schlitz B. Co. *v.* Shiel, 45 Ind. App. 623, 88 N. E. 957; Smith *v.* Corbin, 135 Ky. 727, 123 S. W. 277; Palatine Ins. Co. *v.* O'Brien, 109 Md. 100, 71 A. 775 (performance of contract); Silver *v.* Graves, 210 Mass. 26, 95 N. E. 948; Chelmsford Fdry. Co. *v.* Shepard, 206 Mass. 102, 92 N. E. 75; Creeden *v.* Mahoney, 193 Mass. 402, 79 N. E. 776; S. *v.* Morrison, 244 Mo. 193, 148 S. W. 907; City of Maysville *v.* Truex, 235 Mo. 619, 139 S. W. 390; Heine *v.* R. Co., 144 Mo. App. 443, 129 S. W. 421 (use of proper engine in proper manner); Hendricks *v.* Calloway, 211 Mo. 536, 111 S. W. 60; In re Darrow's Est., 64 Misc. 224, 118 N. Y. S. 1082; Steele *v.* Lippman, 115 N. Y. S. 1099 (ability and willingness to perform contract); Bell *v.* Co., 85 S. C. 182, 67 S. E. 151; Jones *v.* Hopkins, 29 S. D. 615, 137 N. W. 280; Harkrider *v.* Gaut (Tex. Civ.), 167 S. W. 164; Grand Fraternity *v.* Green (Tex. Civ.), 131 S. W. 442; Shorett *v.* Signor, 58 Wash. 89, 107 P. 1033; Ripon H. Co. *v.* Haas, 141 Wis. 65, 123 N. W. 659; Forest County *v.* Shaw, 150 Wis. 294, 136 N. W. 642.

Bad faith, like fraud, is never presumed. Jose *v.* Hunter (Ind. App.), 103 N. E. 392.

Jury presumed to have followed court's instructions. Whittaker *v.* Sanford, 110 Me. 77, 85 A. 399.

At a populous crossing in a city where people were likely to be crossing, it must be presumed the motorman was conscious of the surroundings and conditions. Birmingham R. L. & P. Co. *v.* Leach, 5 Ala. App. 546, 59 S. 358.

Presumed, in the absence of evidence to the contrary, that surveys were made in accordance with the statute. Elwood, Arnett & Arnett *v.* Copeland (Tex. Civ.), 129 S. W. 146.

It is the legal duty of the plaintiff to cause this mortgage to be recorded before undertaking to sell the property, and we cannot assume that she will violate this legal duty. Aaron *v.* Bayon, 131 La. 228, 59 S. 130.

The presumption is that the issuance appraisers and umpire proceeded properly, did everything rightly, and only appraised the proper loss. Kent & Purdy Paint Co. *v.* Co., 165 Mo. App. 30, 146 S. W. 78.

"**The presumption of law** is that the state will keep its faith inviolate and honestly fulfill all its obligations." East Shore Land Co. *v.* Peckham, 33 R. I. 541, 82 A. 487.

A physician is presumed to be regularly licensed. Des Mond *v.* Kelly, 163 Mo. App. 205, 146 S. W. 99.

In considering a motion for a non-suit plaintiff's evidence is presumed to be true. Nicholson *v.* Villepeque, 91 S. C. 231, 74 S. E. 506.

No presumption of negligence.—Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807.

No presumption unimpeached witness testified truly. Hauser *v.* P., 210 Ill. 253, 71 N. E. 416.

919-66 U. S. *v.* Canal Co., 206 Fed. 964; Ruth *v.* Krone, 10 Cal. App. 770, 103 P. 960 (contract fair and honest); Barger *v.* Brown (Ia.), 143 N. W. 496; So. R. Co. *v.* Alford, 150 Ky. 808, 150

S. W. 985; Aetna Ind. Co. *v.* Fuller, 111 Md. 321, 73 A. 738 (applying presumption); S. *v.* Reed, 250 Mo. 379, 157 S. W. 316; Hendricks *v.* Calloway, 211 Mo. 536, 111 S. W. 60; Walkeen L. M. Co. *v.* Johnston, 131 Mo. App. 693, 111 S. W. 639; Snow *v.* Wathen, 127 App. Div. 948, 112 N. Y. S. 41; Coffey *v.* Scott, 66 Or. 465, 135 P. 88; Ball *v.* Danton, 64 Or. 184, 129 P. 1032; S. *v.* Palacios (Tex. Civ.), 150 S. W. 229. *Comp.* Central C. & C. Co. *v.* Penny, 173 Fed. 340, 97 C. C. A. 600.

Entries in corporation books presumed to have been rightly made by proper officer in conformity to law. Smith *v.* Moore, 199 Fed. 689, 118 C. C. A. 127.

Commission of crime will not be presumed, hence the presumption that person found dead was not assassinated. Capp *v.* St. Louis (Mo.), 158 S. W. 616.

Statutory requirement that foreign corporation maintain an office in the state presumed to have been complied with. In re Tennessee Const. Co., 207 Fed. 203. See also vol. 3, p. 596.

920-67 Grant of easement presumed from long uninterrupted and unexplained use. Goldberg *v.* Cleveland, 33 Ky. L. R. 953, 111 S. W. 682.

920-68 In re Smith, 170 Fed. 900, 96 C. C. A. 76; White *v.* Bates, 234 Ill. 276, 84 N. E. 906; S. *v.* Gilbert, 163 Mo. App. 679, 147 S. W. 505; Offenstein *v.* Gehner, 223 Mo. 318, 122 S. W. 715; Smith *v.* Fuller, 86 O. St. 57, 99 N. E. 214 (that trustee will live up to his trust); Meisenheimer *v.* Meisenheimer, 55 Wash. 32, 104 P. 159 (attorney).

920-69 Appeal of Gardner, 81 Conn. 171, 70 A. 653; Ancell *v.* Co., 223 Mo. 209, 122 S. W. 709 (guardian).

Co-tenants and remaindermen within rule, their purchase of outstanding title presumed to be for benefit of all parties in interest. Morrison *v.* Rochl, 215 Mo. 545, 114 S. W. 981.

920-70 Brakeman's authority to eject trespasser, presumed. Golden *v.* R. Co., 39 Mont. 435, 104 P. 549.

Contra, between principal and third party. American Nat. Bk. *v.* Ritz, 70 W. Va. 409, 74 S. E. 679.

920-71 Alston *v.* Dunn, 176 Ala. 421, 58 S. 300; McCarthy *v.* Board, 15 Cal. App. 576, 115 P. 158.

While each party has the right to presume that the other part will do his duty—exercise due care—such presumption in no wise relieves either party from the duty of exercising ordinary and reasonable care on his own part. Culbert *v.* Co. (Del.), 82 A. 781.

That city will act within its rights, and not beyond them. Bond *v.* City, 116 Md. 683, 82 A. 978. [illegible]mination.

Compliance with precedent conditions presumed in favor of legislature. Cravens *v.* S., 57 Tex. Cr. 135, 122 S. W. 29.

Ability to perform contract, presumed. Palmer *v.* Clark, 52 Wash. 345, 100 P. 749.

921-72 U. S. *v.* Wilson, 176 Fed. 806; U. S. *v.* Guthrie, 171 Fed. 528; U. S. *v.* Richards, 149 Fed. 443; U. S. *v.* Cole, 153 Fed. 801; Roberson *v.* S. (Ala.), 62 S. 837; Williams *v.* S., 3 Ala. App. 118, 57 S. 1030; Harrison *v.* S., 144 Ala. 20, 40 S. 568; S. *v.* Naylor (Del.), 90 A. 880; S. *v.* De Paola (Del.), 84 A. 213; S. *v.* Brown (Del.), 83 A. 1083; S. *v.* Watson (Del.), 82 A. 1086; S. *v.* Stockley (Del.), 82 A. 1078; S. *v.* Jackson (Del.), 82 A. 824; S. *v.* Short, 2 Boyce (Del.) 101, 82 A. 239; S. *v.* Massey (Del.), 82 A. 243; S. *v.* Sigerella, 7 Penne. (Del.) 311, 82 A. 31; S. *v.* Lyons (Del.), 491, 82 A. 239; S. *v.* Massey (Del.), 435, 67 A. 786; S. *v.* Wolf, 6 Penne. (Del.) 323, 66 A. 739; Thurman *v.* S. (Ga. App.), 81 S. E. 796; Davis *v.* S., 13 Ga. App. 112, 78 S. E. 866; S. *v.* Snyder, 137 Ia. 660, 115 N. W. 225; S. *v.* Reilly, 85 Kan. 175, 116 P. 481; Keeton *v.* C., 32 Ky. L. R. 1164, 108 S. W. 315; Slaydon *v.* S., 102 Miss. 101, 58 S. 977; S. *v.* Starr, 244 Mo. 161, 148 S. W. 862; S. *v.* Wilson, 170 Mo. App. 151, 108 S. W. 1086; S. *v.* Miles, 174 Mo. App. 181, 156 S. W. 758; S. *v.* R. Co., 41 Mont. 557, 111 P. 141; P. *v.* Razeziez, 206 N. Y. 240, 99 N. E. 557; P. *v.* Waldo, 146 N. Y. S. 781; In re Jacob's Will, 76 Misc. 294, 137 N. Y. S. 151; S. *v.* West, 152 N. C. 832, 68 S. E. 14; Fried *v.* Olsen, 22 N. D. 381, 133 N. W. 1041 (recognized by Code Civ. Proc., §§ 7315, 7317, R. C.); Ray *v.* S., 3 Okla. Cr. 269, 105 P. 781; U. S. *v.* Abreo, 4 Phil. Isl. 181; U. S. *v.* Laguna, 4 Phil. Isl. 224; Thompson *v.* S. (Tex. Cr.), 150 S. W. 181; Flannery *v.* S., 57 Tex. Cr. 88, 122 S. W. 26; S. *v.* Clark, 58 Wash. 128, 107 P. 1047.

See also "Reasonable Doubt," p. 627, n. 13.

921-73 S. *v.* McCallister, 7 Penne. (Del.) 301, 76 A. 226; S. *v.* Pepe, 1

Boyce (Del.) 232, 76 A. 367; S. *v.* Dudley, 245 Mo. 177, 149 S. W. 449; Weber *v.* S., 2 Okla. Cr. 329, 101 P. 355.

922-76 U. S. *v.* R. Co., 156 Fed. 182.

923-80 Flowers *v.* S., 2 Ala. App. 65, 56 S. 98; S. *v.* Williams (Del.), 80 A. 1004; S. *v.* Brown, 2 Boyce (Del.) 405, 80 A. 146; S. *v.* Samuels, 6 Penne. (Del.) 36, 67 A. 164; McNair *v.* S., 61 Fla. 35, 55 S. 401; Mundy *v.* S., 9 Ga. App. 835, 72 S. E. 300; Parish *v.* C., 136 Ky. 77, 123 S. W. 339 (does not survive verdict); Frazier *v.* C. (Ky.), 114 S. W. 268; S. *v.* Burke, 81 N. J. L 93, 79 A. 882; Hedden *v.* S., 2 Okla. Cr. 588, 103 P. 737; Hightower *v.* S., 56 Tex. Cr. 248, 119 S. W. 691; Spick *v.* S., 140 Wis. 104, 121 N. W. 664. *Contra* in homicide case if no proof of mitigation or justification. Elliott *v.* S., 132 Ga. 758, 64 S. E. 1090.

923-81 Strickland *v.* S., 151 Ala. 31, 44 S. 90; P. *v.* Linares, 142 Cal. 17, 75 P. 308; P. *v.* Patino, 9 Cal. App. 192, 98 P. 199; Flynn *v.* P., 222 Ill. 303, 78 N. E. 617; Gow *v.* Bingham, 57 Misc. 66, 107 N. Y. S. 1011.

Conviction terminates presumption. P. *v.* Fritch, 161 Mich. 111, 125 N. W. 785.

925-88 Freeman *v.* Blount, 172 Ala. 655, 55 S. 293; Smith *v.* Lawley, 149 Ill. App. 480; In re Mara, 137 N. Y. S. 151. *Contra*, Kurz *v.* Doerr, 180 N. Y. 88, 72 N. E. 926, action for assault.

926-89 Henderson *v.* Gilliland (Ala.), 65 S. 793; Larch *v.* Holz (Ind. App.), 101 N. E. 127; Zehnder *v.* Stark, 248 Mo. 39, 154 S. W. 92; Coffey *v.* Scott, 66 Or. 465, 135 P. 88.

Where confidential relations exist a different rule is applicable. Early *v* R. Co., 167 Mo. App. 252, 149 S. W. 1170. See generally vol. 2, p. 829; vol. 6, p. 6. And see vol. 13, p. 300.

A bankrupt broker who, prior to bankruptcy, converted a customer's stock is presumed to have held other like stock for customer as against broker's trustee in bankruptcy. In re Brown, 171 Fed. 254.

926-90 Woodard *v.* S., 5 Ga. App. 447, 63 S. E. 573; Kerr *v.* U. S., 7 Ind. Ty. 486, 104 S. W. 809; S. *v.* Kelley, 191 Mo. 680, 90 S. W. 834. See vol. 11, p. 692, n. 93, and supplement thereto, also supra, "Chastity," 54-2.

926-91 See vol. 11, p. 692, n. 94, and supplement thereto.

927-94 In re Townley's Will, 144 N. Y. S. 750.

928-96 Griffin *v.* Allen, 207 Fed. 61, 124 C. C. A. 621; Rexford *v.* Co., 181 Fed. 462, 104 C. C. A. 210; Forbes *v.* Davis (Ala.), 65 S. 516; Mower *v.* Shannon, 178 Ala. 469, 59 S. 568; Cook *v.* S., 5 Ala. App. 11, 59 S. 519; Powell *v.* S., 5 Ala. App. 150, 59 S. 328; Bickley *v.* Sherrod, 3 Ala. App. 1013, 57 S. 1013; Jackson *v.* S., 5 Ala. App. 306, 57 S. 594; Leath *v.* Cobia, 175 Ala. 435, 57 S. 972; Ala. Steel & Wire Co. *v.* Thompson, 166 Ala. 460, 52 S. 75; U S. *v.* Manthei, 2 Alaska 459; Sylvester *v.* Willson, 2 Alaska 325; Dixon *v.* S., 103 Ark. 629, 145 S. W. 901; Taylor *v.* Shell, 102 Ark. 649, 145 S. W. 539; P. *v.* Casselman, 10 Cal. App. 234, 101 P. 693 (change of judges during trial); Dunnellon Phosphate Co. *v.* Co., 63 Fla. 131, 58 S. 786; Millinor *v.* Thornhill, 63 Fla. 531, 58 S. 34; Hogans *v.* Demps, 66 Fla. 177, 58 S. 33; International Kaolin Co. *v.* Vanse, 62 Fla. 505, 57 S. 360; Watt *v.* Decker, 16 Ida. 184, 101 P. 253; Chicago *v.* Condell, 124 Ill. App. 64; March *v.* March, 50 Ind App. 293, 98 N. E. 324; Webster *v.* Bligh, 50 Ind. App. 56, 98 N. E. 73; Keely *v.* City, 49 Ind. App. 396, 97 N. E. 568; Habich *v.* Bldg. Co., 177 Ind. 193, 97 N. E. 539; Elijah *v.* Dowling, 49 Ind. App. 515, 97 N. E. 551; Romona Oolitic Stone Co *v.* Weaver, 49 Ind. App. 368, 97 N. E 441; Bamberger *v.* Green, 146 Ky. 258, 142 S. W. 384; S. *v.* Judge, 128 La. 914, 55 S. 574; S. *v.* Boasberg, 124 La. 289, 50 S. 162; Martel *v.* Syndicate, 118 La. 391, 42 S. 975; Maryland Elec. R. Co. *v.* Beasley, 117 Md. 270, 83 A. 157; Madill *v.* Currie, 168 Mich. 546, 134 N. W. 1004; Comans *v.* Tapley, 101 Miss. 203, 57 S. 567; Kelley *v.* Ross, 165 Mo. App. 475, 148 S. W. 1000; Howell *v.* Sherwood, 242 Mo. 513, 147 S. W. 810; Winter *v.* Spradling, 163 Mo. App. 77, 145 S. W. 834; Peper *v.* Peper, 241 Mo. 260, 145 S. W. 408; S. *v.* Lawson, 239 Mo. 591, 145 S. W. 92; Ray Co. S. Bk. *v.* Hutton, 224 Mo. 42, 123 S. W. 47; Stull *v.* Masilonka, 74 Neb. 309, 104 N. W. 188; Burke *v.* Kaltenbach, 125 App. Div. 261, 109 N. Y. S. 225; Broadway T. Co. *v.* Manheim, 47 Misc 415, 95 N. Y. S. 93; Black *v.* R. & P. Co., 158 N. C. 468, 74 S. E. 468; Tise *v.* Thomasville, 151 N. C. 281, 65 S. E. 1007 (evidence properly limited by instruction); Sutton *v.* Jenkins, 147 N. C. 11, 60 S. E. 643; Settle *v.* Settle, 141 N. C. 553, 54 S. E. 445; Johnson *v.* S., 1 Okla. Cr. 321, 97 P. 1059; Ex

parte Jones, 4 Okla. Cr. 74, 109 P. 570; Wilson *v.* S., 3 Okla. Cr. 714, 109 P. 289; Swift *v.* Refractories Co., 228 Pa. 584, 77 A. 916; Randal *v.* Gould, 18 Pa. Dist. 6; S. *v.* Hunter, 82 S. C. 153, 63 S. E. 685; Ex parte Pearson, 79 S. C. 302, 60 S. E. 706; Williams *v.* Highlands, 27 S. D. 471, 134 N. W. 58; Spencer *v.* Lyman, 28 S. D. 497, 131 N. W. 802; Hobbs *v.* S., 121 Tenn. 413, 118 S. W. 262 (jury sworn); Sharp *v.* S. (Tex. Cr.), 150 S. W. 943; Arnett *v.* Copeland (Tex. Civ.), 129 S. W. 146; Nelson *v.* Lamm (Tex. Civ.), 147 S. W. 664; Early & Clement G. Co. *v.* Fite (Tex. Civ.), 147 S. W. 673; Blunt *v.* Oil Co. (Tex. Civ.), 146 S. W. 218; Moray *v.* S. (Tex. Cr.), 145 S. W. 592; Dilley *v.* Co. (Tex. Civ.), 114 S. W. 878; Carter *v.* Skillman, 108 Va. 204, 60 S. E. 775; Morrison *v.* Berlin, 37 Wash. 600, 79 P. 1114; Colle *v.* Kewaunee, etc. R. Co., 149 Wis. 96, 135 N. W. 536; Rowlands *v.* R. Co., 149 Wis. 51, 135 N. W. 156.

See also vol. 10, p. 770, n. 42.

Plea to indictment presumed to have been made by defendant. Martinez *v.* S. (Tex. Cr.), 153 S. W. 886.

"It is the well-settled law of the state, even in felony cases, but especially in misdemeanors, that when there are several counts in an indictment, some good and others bad, or only two, one good and the other bad, and there has been no election or dismissal as to the bad counts, and the verdict is a general one, it will be applied to the counts which are good, or to the good count; and the presumption on appeal is that the conviction was upon the good count." Warner *v.* S. (Tex. Cr.), 147 S. W. 265.

That action of lower court sustained by evidence. Treadway *v.* S. (Tex. Cr.), 144 S. W. 655.

Where the testimony is not reported the findings of the jury are presumed to have been reached in accordance with correct instructions upon adequate testimony. Thompson *v.* Luciano, 211 Mass. 169, 97 N. E. 892.

Error shown is presumed to be prejudicial. Hatch *v.* Bayless, 164 Mo. App. 216, 146 S. W. 839.

Rule does not apply where trial on agreed case. Templeton *v.* Board, 44 Ind. App. 381, 89 N. E. 410.

Judgment by confession.—Bowman *v.* Powell, 127 Ill. App. 114.

Presence of lunatic at hearing of inquest. Porter *v.* Asylum, 28 Ky. L. R. 796, 90 S. W. 265.

928-97 Brumbaugh *v.* Wilson, 82 Kan. 53, 107 P. 795; Farmer's Bank *v.* Farmers' Bank, 147 Ky. 766, 145 S. W. 746; Howell *v.* Stonewall, 122 Mo. 516, 147 S. W. 800; Wagner *v.* King, 31 O. C. C. 199, *aff.* 80 O. St. 717, 89 N. E. 1127.

928-98 McKillop *v.* Burton, 82 Vt. 403, 74 A. 78.

929-99 Bleicher *v.* S., 177 Ind. 376, 98 N. E. 118; Brown *v.* Hutchison, 155 N. C. 205, 71 S. E. 302.

Indictment presumed found upon competent and sufficient evidence. P. *v.* Glaser, 112 N. Y. S. 328.

929-1 Bk. of Andrews *v.* Gudger, 212 Fed. 496 (C. C. A.); Marshall Bk. *v.* Turney, 105 Ark. 116, 150 S. W. 99; Imp., etc. *v.* Winkler (Ark.), 145 S. W. 209; Jerrue *v.* Superior Court, 7 Cal. App. 717, 95 P. 906; Dane *v.* Layne, 10 Cal. App. 306, 101 P. 1067; Welsh *v.* Koch, 4 Cal. App. 571, 88 P. 604; Godwin *v.* S., 1 Boyce (Del.) 172, 74 A. 1101; Curtis *v.* Mansfield, 132 Ga. 441, 64 S. E. 327; Peavy *v.* Dore, 141 Ga. 104, 62 S. E. 47; Medlin *v.* Co., 138 Ga. 115, 57 S. E. 232; O'Neill *v.* Perrin, 13 Ida. 721, 93 P. 29, 557; Light *v.* Reed, 234 Ill. 626, 85 N. E. 282; Horn *v.* Horn, 234 Ill. 268, 84 N. E. 904; Peters *v.* Dieus, 234 Ill. 379, 98 N. E. 560; Cigler *v.* Kelseth, 167 Ill. App. 65; Klaproth *v.* Greenberg, 147 Ill. App. 380; Summers *v.* Summers (Ind.), 98 N. E. 365; U. S. Ins. Co. *v.* Clark, 41 Ind. App. 545, 83 N. E. 709; Chicago, etc. R. Co. *v.* Grantham, 167 Ind. 279, 75 N. E. 267; S. *v.* Walker, 78 Kan. 680, 97 P. 882; Landers *v.* Landers, 151 Ky. 206, 151 S. W. 286; Feltner *v.* Huff (Ky.), 118 S. W. 936; Roney *v.* Organ (Mo. App.), 161 S. W. 868; Crotty *v.* Brown, 167 Mo. App. 1, 150 S. W. 1120; Perry *v.* R. Co., 214 Mo. 593, 114 S. W. 27; S. *v.* St. Clair, 137 Mo. App. 188, 117 S. W. 645; Kelterman *v.* Cullvers, 82 Neb. 216, 117 N. W. 405; McDevitt *v.* Caswell, 71 N. J. Eq. 119, 63 A. 504; Hunt *v.* Seaman, 119 N. Y. S. 711; Seattle *v.* Seattle, 141 N. C. 553, 54 S. E. 445; Smith *v.* Whiting, 55 Or. 393, 106 P. 791; Marquez *v.* Kenley (Tex. Civ.), 145 S. W. 216; Carter *v.* Skillman, 108 Va. 204, 60 S. E. 775.

Special judge presumed legally chosen. White *v.* Sohn, 65 W. Va. 409, 64 S.

E. 442. And duly qualified. S. *v.* St. Clair, 137 Mo. App. 188, 117 S. W. 648.

Supreme court of another state presumed to be court of record and to have seal. Houston O. Co. *v.* Kimball, 103 Tex. 94, 122 S. W. 533.

931-3 Gillespie *v.* Co., 162 Fed. 742 (all questions determined); Cohen *v.* Lodge, 144 Fed. 266; Horn *v.* Metzger, 234 Ill. 240, 84 N. E. 893; Sinclair *v.* Gunzenhauser, 179 Ind. 78, 98 N. E. 37, 100 N. E. 376; Myer *v.* Minch, 45 Ind. App. 495, 91 N. E. 32; Spangle *v.* Spangle, 41 Ind. App. 297, 83 N. E. 720; Burke *v.* Kaltenbach, 125 App. Div. 261, 109 N. Y. S. 225; Wright *v.* Johnson, 108 Va. 855, 62 S. E. 948.

Recitals in findings of fact, not required in equity, do not raise same presumption in favor of jurisdiction as does a judgment containing recitals. Holly *v.* Munro, 55 Wash. 311, 104 P. 508.

931-4 Knapp *v.* Wallace, 50 Or. 348, 92 P. 1054. *Contra,* if absence temporary. Still *v.* Wood, 85 S. C. 562, 67 S. E. 910.

Judicial jurisdiction, presumed co-extensive with territorial limits of political jurisdiction. S. *v.* Bowman, 89 Ark. 428, 116 S. W. 896.

931-5 Old Wayne L. Assn. *v.* McDonough, 204 U. S. 8, *rev.* 164 Ind. 321, 73 N. E. 703; Johnson *v.* Hunter, 147 Fed. 133, 77 C. C. A. 359; Crawford *v.* Simonton, 163 Ala. 609, 50 S. 1024; Alaska Co. *v.* Debney, 2 Alaska 303; North S. Ins. Co. *v.* Dillard, 88 Ark. 473, 115 S. W. 154; Ayers *v.* Co., 89 Ark. 160, 116 S. W. 199; Wetherbee *v.* Johnston, 10 Cal. App. 264, 101 P. 802; Wilson *v.* Collin, 45 Colo. 412, 102 P. 21; Franklin *v.* Crow, 128 Ga. 458, 57 S. E. 784; Emens *v.* Emens, 46 Ind. App. 22, 91 N. E. 747; O'Bryen *v.* Co., 80 Kan. 427, 102 P. 501 (not presumed judgment to which but one objection made, and which is not shown to be subject to any other, was rejected as evidence for undisclosed reason); Minnesota F. Mfg. Co. *v.* L'Heureux, 82 Neb. 692, 118 N. W. 565; Smith *v.* Whiting, 55 Or. 393, 106 P. 791; Bilby *v.* Rodgers (Tex. Civ.), 125 S. W. 616; Moore *v.* Hanscom (Tex. Civ.), 103 S. W. 665, judgment *mod.,* 106 S. W. 876; Jones *v.* Crim, 66 W. Va. 301, 66 S. E. 367.

That lost indictment was supplied will not be presumed where the record shows the contrary. S. *v.* Doerries, 168 Mo. App. 324, 153 S. W. 1062.

Presumption conclusive in favor of record recitals in absence of fraud. Gunter *v.* Hinson, 161 Ala. 536, 50 S. 86.

And recitals of jurisdiction or of service of process contained in the judgment must be construed in connection with the whole record, and may be overthrown by other recitals in the record of equal dignity and importing equal verity, showing that the former recitals are untrue. Kunzi *v.* Hickman, 243 Mo. 103, 147 S. W. 1002.

932-6 Cohen *v.* Lodge, 152 Fed. 357, 81 C. C. A. 483; Godwin *v.* S., 1 Boyce (Del.) 173, 74 A. 1101; Drummer Creek D. Dist. *v.* Roth, 244 Ill. 68, 91 N. E. 63; P. *v.* Karr, 244 Ill. 374, 91 N. E. 485; Illinois, etc. R. Co. *v.* Hasenwinkle, 232 Ill. 224, 83 N. E. 815; Lake *v.* Perry, 95 Miss. 550, 49 S. 569; Doddridge *v.* Patterson, 222 Mo. 146, 121 S. W. 72; Cooper *v.* Gunter, 215 Mo. 558, 114 S. W. 943; Smith *v.* Whiting, 55 Or. 393, 106 P. 791; S. *v.* Cary, 132 Wis. 501, 112 N. W. 428.

Appellate jurisdiction, not presumed Goodwin *v.* Walker (Tex. Civ.), 124 S. W. 462.

932-7 Smith *v.* S., 7 Ga. App. 252, 66 S. E. 556 (bill of exceptions signed within prescribed time); S. *v.* Wilson, 216 Mo. 215, 115 S. W. 549, 568 (where court required to find existence of certain facts in pais in order to acquire jurisdiction); Timmerman *v.* McCullagh, 55 Wash. 204, 104 P. 212. See P. *v.* Siemsen, 153 Cal. 387, 95 P. 863; Appeal of Woodward, 81 Conn. 152, 70 A. 453; Atchison, etc. R. Co. *v.* S., 23 Okla. 210, 100 P. 11.

933-8 Cobe *v.* Guyer, 237 Ill. 516, 86 N. E. 1071; Robinson *v.* Levy, 217 Mo. 498, 117 S. W. 577.

933-10 Broadus *v.* Russell, 160 Ala. 353, 49 S. 327 (presence of officers and performance of duties); North Alabama T. Co. *v.* Daniel, 158 Ala. 414, 48 S. 50 (court held by supernumerary judge); Curtis *v.* Board, 154 Mich. 646, 118 N. W. 618; S. *v.* Bush, 136 Mo. App. 608, 118 S. W. 670; Winder *v.* Winder, 86 Neb. 495, 125 N. W. 1095.

If record shows qualified judge presided any time during course of litigation, it will be presumed he did so whenever necessary. Hector *v.* Mann, 225 Mo. 228, 124 S. W. 1109.

No presumption trial court in session two days after term opened. Harding

v. Bedoll, 202 Mo. 625, 100 S. W. 638; Breimeyer *v.* Co., 136 Mo. App. 84, 117 S. W. 119.

933-11 Roman *v.* Morgan, 162 Ala. 133, 50 S. 273; Flowers *v.* Reece, 92 Ark. 611, 123 S. W. 773; Western L. & M. Co. *v.* Co., 13 Cal. App. 4, 108 P. 891; Hawk *v.* Day, 148 Ia. 47, 126 N. W. 955; Fitch *v.* Gentry, 29 Ky. L. R. 210, 92 S. W. 586; Roberts *v.* Asylum, 31 Ky. L. R. 477, 102 S. W. 818; S. *v.* McCrocklin, 130 La. 106, 57 S. 645; Robinson *v.* Levy, 217 Mo. 498, 117 S. W. 577; S. *v.* Court, 38 Mont. 166, 99 P. 291; Jones *v.* Fowler, 161 N. C. 354, 77 S. E. 415; Kaylor *v.* Hiller, 77 S. C. 393, 58 S. E. 2; Ex parte Drake, 55 Tex. Cr. 233, 116 S. W. 49; Moore *v.* Hanscom (Tex. Civ.), 103 S. W. 655, judgment *mod.*, 166 S. W. 876.

934-12 North State Ins. Co. *v.* Dillard, 88 Ark. 473, 115 S. W. 151; Del Campo *v.* Camarillo, 154 Cal. 647, 98 P. 1049; P. *v.* Garnett, 9 Cal. App. 194, 98 P. 247 (presence of accused); In re Vogt's Est., 154 Cal. 508, 98 P. 265 (election by widow); Wehmeier *v.* Bk. Co., 49 Ind. App. 454, 97 N. E. 558; S. *v.* Daniels, 122 La. 261, 47 S. 599 (presence of accused continued throughout trial); Markinson *v.* S., 2 Okla. Cr. 323, 101 P. 353; Ex parte Thompson, 57 Tex. Cr. 437, 123 S. W. 612; Kruegel *v.* Rawlins (Tex. Civ.), 121 S. W. 216; Timmerman *v.* McCullagh, 55 Wash. 204, 104 P. 212; Chandler *v.* Munkivitz Realty, etc. Co., 148 Wis. 5, 134 N. W. 148.

Presence of attorney at hearing presumed; the record showing nothing to the contrary. McConnell *v.* Schultz, 23 Colo. App. 194, 128 P. 876.

934-13 Baker *v.* R. Co., 165 Ala. 466, 51 S. 796; Spring Creek D. D. *v.* Commissioners, 238 Ill. 521, 87 N. E. 394; Watkins *v.* Co., 132 Ky. 700, 116 S. W. 1192; Doddridge *v.* Patterson, 222 Mo. 146, 121 S. W. 72; S. *v.* Randolph, 139 Mo. App. 314, 123 S. W. 61; Leggat *v.* Palmer, 39 Mont. 302, 102 P. 327 (allowance of amendment to pleading). See Lindley *v.* S., 57 Tex. Cr. 305, 122 S. W. 873.

No presumption against record recitals.—Fagan *v.* Fagan, 56 Tex. Civ. 175, 120 S. W. 550.

934-16 Briggs *v.* Manning, 80 Ark. 304, 97 S. W. 289; Welsh *v.* Koch, 4 Cal. App. 571, 88 P. 604; Farmer's Co. *v.* Co., 37 Colo. 512, 86 P. 1042; In re East., 143 Ia. 370, 122 N. W. 153; Dennis *v.* Alves, 132 Ky. 345, 116 S. W. 483; Grill *v.* O'Neil, 111 Md. 60, 73 A. 576; Case *v.* Perkins, 49 Mont. 334, 107 P. 901; Jamison *v.* Gross (Tex. Civ.), 94 S. W. 1091; Berryman *v.* Riddle, 48 Tex. Civ. 634, 107 S. W. 922.

935-17 Wallace *v.* Adams, 143 Fed. 716, 74 C. C. A. 540; Baldwin *v.* Foster, 157 Cal. 643, 108 P. 714; Cornell Bk. *v.* Jack, 148 Cal. 427, 83 P. 795; Harrow *v.* Groman, 219 Ill. 288, 76 N. E. 350; Roberts *v.* Asylum, 31 Ky. L. R. 477, 102 S. W. 818 (not recorded); Curtis *v.* Board, 154 Mich. 646, 118 N. W. 618; S. *v.* Broaddus, 216 Mo. 330, 115 S. W. 1018; Hounsels *v.* Coe (Tex. Civ.), 159 S. W. 865; Ferguson *v.* Ferguson (Tex. Civ.), 128 S. W. 692; Douglas *v.* S., 58 Tex. Cr. 122, 124 S. W. 963; Johnson *v.* Grace (Tex. Civ.), 94 S. W. 1064; Humphrey *v.* Co., 41 Tex. Civ. 308, 93 S. W. 180; Rye *v.* Co., 42 Tex. Civ. 185, 95 S. W. 622; Minneapolis T. M. Co. *v.* Ashauer, 142 Wis. 640, 126 N. W. 113. *Contra* on appeal See infra, "Service," 739-57.

Presumption may always be rebutted by oral testimony even when the judgment recites jurisdictional facts. Hendrick *v.* Biggar, 66 Misc. 576, 122 N. Y. S. 162.

936-18 Colon *v.* Lodge, 152 Fed. 357, 81 C. C. A. 483; Deputy *v.* Dellarhide, 42 Ind. App. 554, 86 N. E. 344 (insufficient proof of service in record).

936-19 Harpold *v.* Doyle, 16 Ida. 671, 102 P. 158; Core *v.* Smith, 21 Okla. 909, 102 P. 114.

937-21 Harbert *v.* Darden, 116 Mo. App. 512, 92 S. W. 746; Smith *v.* Whiting, 55 Or. 293, 106 P. 791; Mo., etc. R. Co. *v.* Wood (Tex. Civ.), 124 S. W. 487; Giggs *v.* Seales, 54 Tex. Civ. 90, 118 S. W. 188.

Not conclusive on direct attack.—Silverstone *v.* Totten, 50 Wash. 447, 97 P. 491.

937-22 Cater *v.* Hare (Tex. Civ.), 122 S. W. 97.

937-23 Santos *v.* Church, 212 U. S. 463; May *v.* U. S., 199 Fed. 23, 117 C. C. A. 431; The Falcon, 177 Fed. 916, 101 C. C. A. 196; Lee *v.* Abeel, 172 Fed. 90, 96 C. C. A. 578 (verity of recital); Roll *v.* Howell, 9 Ala. App. 171, 62 S. 962; Moody *v.* Atkinson, 165 Ala. 299, 51 S. 751 (abandonment of demurrer); Swift *v.* Doe, 161 Ala. 147, 50 S. 123; Young *v.* Vincent, 94 Ark. 115, 125 S. W. 658; Bloomer *v.* Cone,

92 Ark. 622, 124 S. W. 254; Board *v.* Powell, 89 Ark. 570, 117 S. W. 753; Tharpe *v.* Co., 94 Ark. 530, 127 S. W. 730; Hearn *v.* Ayres, 77 Ark. 497, 92 S. W. 768; P. *v.* Russell, 156 Cal. 450, 105 P. 416; McConnell *v.* Slappey, 134 Ga. 95, 67 S. E. 440; Continental B. & L. Assn. *v.* Woolf, 12 Cal. App. 725, 108 P. 729; P. *v.* Disperati, 11 Cal. App. 469, 105 P. 617; Kern Valley Bk. *v.* Koehn, 10 Cal. App. 679, 103 P. 173; P. *v.* Sykes, 10 Cal. App. 67, 101 P. 20 (that verdict was read to jury); Empire Co. *v.* Chapin, 22 Colo. App. 538, 126 P. 1107; Mackenzie *v.* Mines, 132 Ga. 323, 63 S. E. 900; Bedingfield *v.* Bk., 4 Ga. App. 197, 61 S. E. 30; Smith *v.* Clyne, 16 Ida. 466, 101 P. 819; Stoddard *v.* Fox, 15 Ida. 704, 99 P. 122; Culver *v.* Co., 17 Ida. 669, 107 P. 65; McKennan *v.* Mickelberry, 242 Ill. 117, 89 N. E. 717; Kennard *v.* Curran, 239 Ill. 122, 87 N. E. 913; Chicago, etc. R. Co. *v.* Glos, 239 Ill. 24, 87 N. E. 881; McMahon *v.* Rowley, 238 Ill. 31, 87 N. E. 66; Walker *v.* Newman, 146 Ill. App. 450; Zippe *v.* Zippe, 143 Ill. App. 638; Adams *v.* S., 179 Ind. 44, 99 N. E. 483; Purcell *v.* Hosey, 44 Ind. App. 448, 89 N. E. 520; Indianapolis N. T. Co. *v.* Brennan, 174 Ind. 1, 90 N. E. 65; O'Neil *v.* Adams, 144 Ia. 385, 122 N. W. 976; In re East, 143 Ia. 370, 122 N. W. 153; Gray *v.* Carroll, 144 Ia. 68 , 120 N. W. 1035; Johnson *v.* Waterloo, 140 Ia. 670, 119 N. W. 70 (competent and impartial jury); Kan. C. S. R. Co. *v.* Co., 79 Kan. 59, 99 P. 819; May *v.* Walter's Exrs., 149 Ky. 749, 149 S. W. 1014; Dersch *v.* Miller, 137 Ky. 89, 122 S. W. 177; Dickerson *v.* L. Co., 133 Ky. 820, 121 S. W. 662; Steele *v.* Bryant, 132 Ky. 569, 116 S. W. 755; Tharp *v.* Tharp (Ky.), 119 S. W. 814; Howcott *v.* Smart, 125 La. 50, 51 S. 64; Biles *v.* Wolf (Miss.), 49 S. 267 (best evidence produced); Warner *v.* Michel, 167 Mo. App. 713, 151 S. W. 159; Marshall *v.* Moore, 146 Mo. App. 618, 124 S. W. 585; Stroup *v.* Thomas, 140 Mo. App. 430, 124 S. W. 1069; Wicecarver *v.* Ins. Co., 137 Mo. App. 247, 117 S. W. 698; Lower *v.* Co., 142 Mo. App. 351, 126 S. W. 987; S. *v.* Berberick, 38 Mont. 423, 100 P. 209; S. *v.* Dist. Ct., 38 Mont. 119, 99 P. 138; S. *v.* Williams, 31 Nev. 360, 102 P. 974; Street *v.* Smith, 15 N. M. 95, 103 P. 644; P. *v.* Britton, 134 App. Div. 275, 118 N. Y. S. 989; Howard *v.* S., 2 Okla. Cr. 200, 101 P. 131; S. *v.* Avant, 85 S. C. 570, 67 S. E. 908; Lee *v.* R. Co., 84 S. C. 125, 65 S. E. 1031; McCoy *v.* R. Co., 84 S. C. 62, 65 S. E. 939 (that the best evidence was in existence); S. *v.* Hunter, 82 S. C. 153, 63 S. E. 685 (filing of remittitur); Albien *v.* Smith, 24 S. D. 203, 123 N. W. 675; Danforth *v.* Egan, 23 S. D. 43, 119 N. W. 1021; S. *v.* Johnson, 24 S. D. 590, 124 N. W. 847; Tex. & P. R. Co. *v.* Dickson Bros. (Tex. Civ.), 167 S. W. 33; Johnson *v.* Sullivan (Tex. Civ.), 163 S. W. 1015; Bradley L. Co. *v.* Hamilton (Tex. Civ.), 159 S. W. 35; Ex parte Ellerd (Tex. Cr.), 158 S. W. 1145; Fowler *v.* S. (Tex. Cr.), 158 S. W. 1117; Maxwell *v.* S. (Tex. Cr.), 153 S. W. 324; Garza *v.* Cotton (Tex. Civ.), 120 S. W. 212; Bradshaw *v.* Lyles, 55 Tex. Civ. 384, 119 S. W. 918; Schneider *v.* Schneider (Tex. Civ.), 118 S. W. 789; Hahl & Co. *v.* Assn. (Tex. Civ.), 116 S. W. 831; Arnwine *v.* S., 54 Tex. Cr. 213, 114 S. W. 796 (that witness was error); Mundt *v.* Bk., 35 Utah 90, 99 P. 454; Perkins *v.* Perley, 82 Vt. 524, 74 A. 231; Bristol Mfg. Co. *v.* Palmer, 82 Vt. 438, 74 A. 76; Davis *v.* R. Co., 82 Vt. 24, 71 A. 724; Gould *v.* Austin, 52 Wash. 457, 100 P. 1029; Sheard *v.* Co., 58 Wash. 29, 107 P. 1024 (findings within issues); Wolf *v.* R. Co., 140 Wis. 337, 122 N. W. 743. *Contra* as against accused. Hartsell *v.* S., 55 Tex. Cr. 389, 116 S. W. 1159. Otherwise on appeal if abstract purports to contain all evidence. Henry Ins. Co. *v.* Semonian, 45 Colo. 260, 100 P. 425.

Existence of "special occasion" authorizing the recall of grand jury, presumed. P. *v.* McCauley, 256 Ill. 504, 100 N. E. 182.

Findings presumed to be warranted by the evidence. McKinnon *v.* Fuller, 33 S. D. 582, 146 N. W. 910.

Instructions to jury, presumed followed. International, etc. R. Co. *v.* Aleman, 52 Tex. Civ. 565, 115 S. W. 73.

Dismissal of action as to parties not served and who did not appear, presumed if record silent as to them. Porter *v.* R. Co., 56 Tex. Civ. 479, 121 S. W. 897.

Observance of court rules by attorneys, presumed. District *v.* Blackman, 31 App. Cas. (D. C.) 229.

Future judicial action presumed to be in accordance with rights of parties and conformably to correct procedure. S. *v.* Court, 40 Mont. 17, 104 P. 872.

938-24 Crown R. E. Co. *v.* Rogers, 132 Ky. 790, 117 S. W. 275; Stoneman *v.* Bilby, 43 Tex. Civ. 293, 96 S. W. 50.

938-25 Pine Tree L. Co. *v.* Exchange, 238 Ill. 449, 87 N. E. 539; Bloch *v.* Crumpacker, 44 Ind. App. 171, 88 N. E. 875 (trial court took notice person who attested affidavit clerk thereof); Halsey *v.* Sauer, 79 N. J. L. 159, 74 A. 508.

Performance by affiants of duty imposed by statute presumed in favor of affidavits upon which jurisdiction rests. Crown R. E. Co. *v.* Rogers, 132 Ky. 790, 117 S. W. 275.

Affidavit for continuance.—Stone *v.* R. Co., 75 Kan. 600, 90 P. 251.

938-26 Robinson *v.* Mill, 75 N. H. 589, 71 A. 864.

939-28 Copley *v.* Ball, 176 Fed. 682, 100 C. C. A. 234; Reeves *v.* Conger, 103 Ark. 446, 147 S. W. 438; Kennedy *v.* Borah, 226 Ill. 243, 80 N. E. 767; Crown R. E. Co. *v.* Rogers, 132 Ky. 790, 117 S. W. 275; Ex parte Alexander, 163 Mo. App. 615, 147 S. W. 521; Sawyer *v.* Burris, 141 Mo. App. 108, 121 S. W. 321; Ruckert *v.* Richter, 127 Mo. App. 664, 106 S. W. 1081; Katz *v.* Schreckinger, 52 Misc. 160, 101 N. Y. S. 743; Carpenter *v.* Pirner, 107 N. Y. S. 875 (municipal court); Texas & P. R. Co. *v.* Hood (Tex. Civ.), 125 S. W. 982 (against record). *Contra*, Appeal of Head, 141 Ia. 651, 118 N. W. 884 (statute); Carter *v.* Skillman, 108 Va. 204, 60 S. E. 775.

If jurisdiction appears same presumptions indulged as if court had general jurisdiction. Jones *v.* Leeds, 41 Ind. App. 164, 83 N. E. 526.

939-29 Larimer *v.* Krau (Ind. App.), 105 N. E. 936; Stegeman *v.* Fraser, 161 Mich. 35, 125 N. W. 769; Holmes *v.* Igo, 110 Minn. 133, 124 N. W. 974 (consent court be held without territorial jurisdiction assumed given); S. *v.* Wiethaupt, 165 Mo. App. 634, 148 S. W. 429; S. *v.* Carlisle, 22 S. D. 529, 118 N. W. 1033; Bumgarner *v.* Nat. Bk., 70 W. Va. 787, 74 S. E. 996.

940-30 S. *v.* Court, 137 Mo. App. 698, 119 S. W. 1010.

940-31 Gilman *v.* Weiser, 140 Ia. 554, 118 N. W. 774.

Error in excluding evidence in jury trial, presumptively injurious. Crawford *v.* U. S., 212 U. S. 183.

940-32 U. S. *v.* Sommers, 171 Fed. 57, 96 C. C. A. 299.

941-33 New York Inst. *v.* Crockett, 117 App. Div. 269, 102 N. Y. S. 412.

941-34 Chase *v.* Wetzlar, 225 U. S. 79, 32 Sup. Ct. 659, 56 L. ed. 991. See vol. 2, p. 779, n. 14, and supplement thereto.

941-35 Gamble *v.* Andrews (Ala.), 65 S. 525; Milbra *v.* Iron Co. (Ala.), 62 S. 176; Briggs *v.* Manning, 80 Ark. 304, 97 S. W. 289; Am. B. Co. *v.* P., 46 Colo. 394, 104 P. 81; Steadham *v.* Rogers, 141 Ga. 146, 80 S. E. 624; Smith *v.* Clyne, 16 Ida. 466, 101 P. 819; Balsewicz *v.* R. Co., 240 Ill. 238, 88 N. E. 734; Rabbett's Est. *v.* Connolly, 153 Ia. 607, 133 N. W. 1060; Young *v.* R. Co., 136 Ky. 784, 125 S. W. 241; Norton *v.* Reed, 253 Mo. 236, 161 S. W. 842; S. *v.* McQuillin, 246 Mo. 586, 151 S. W. 441; Wagoner U. Co. *v.* Jones, 134 Mo. App. 101, 111 S. W. 1049; Strobel *v.* Clark, 128 Mo. App. 48, 106 S. W. 587; Drake *v.* Cunningham, 127 App. Div. 79, 111 N. Y. S. 199; Smith *v.* Whiting, 55 Or. 393, 106 P. 791; Golden *v.* Walker (Tex. Civ.), 153 S. W. 683; Magee *v.* Co., 51 Wash. 406, 99 P. 16. See also vol. 10, p. 770, n. 39; vol. 5, p. 452, n. 22.

941-36 Ford *v.* Ford, 117 Ill. App. 502; Goss *v.* R. Co., 137 Ky. 208, 125 S. W. 1061; In re Watts' Est., 108 Md. 696, 71 A. 316.

941-38 Sylvester *v.* Willson, 2 Alaska 325.

942-40 Schooler *v.* Yancey, 132 Ky. 695, 118 S. W. 940; Ex parte Brown, 3 Okla. Cr. 329, 105 P. 577; Ex parte Cox, 53 Tex. Cr. 240, 109 S. W. 369.

942-43 Geduld *v.* R. Co., 55 Misc. 239, 105 N. Y. S. 110. *Contra*, White *v.* Brown, 54 Or. 7, 101 P. 909.

942-44 P. *v.* Pugliese, 80 Misc. 75, 140 N. Y. S. 849.

942-45 American B. Co. *v.* Hoyt (Conn.), 90 A. 932; Ashley *v.* Pick, 53 Or. 410, 100 P. 1103 (statute).

Issuance of long summons by justice raises presumption of defendant's residence. Henika *v.* Brown, 155 Mich. 559, 119 N. W. 1083.

942-46 Old Wayne, etc. Assn. *v.* McDonough, 204 U. S. 8; Alaska C. Co. *v.* Debney, 2 Alaska 203; In re Hancock's Est., 156 Cal. 804, 106 P. 73; Rhodes *v.* Rhodes, 36 App. Cas. (D. C.) 261; Stull *v.* Veatch, 226 Ill. 207, 80 N. E. 827; Roberts *v.* Lentzke, 39 Ind. App. 577, 78 N. E. 637; S. *v.* Weber, 96 Minn. 422, 105 N. W. 400; Hanks *v.* Hanks, 218 Mo. 670, 117 S. W. 1101

(evidence to support); Anthony *v.* Wilson, 74 N. J. L. 630, 65 A. 988; Johnston *v.* Ins. Co., 104 App. Div. 550, 93 N. Y. S. 1052; Hodge *v.* Co., 54 Misc. 442, 105 N. Y. S. 1067; Christiansen *v.* Kriesel, 133 Wis. 508, 113 N. W. 980.

943-47 Geduld *v.* R. Co., 55 Misc. 239, 105 N. Y. S. 110.

944-51 Jover Y. Costas *v.* Insular Government, 221 U. S. 623; U. S. *v.* Erickson, 188 Fed. 747; Eagle White Lead Co. *v.* Co., 188 Fed. 256; Hooker *v.* Com., 188 Fed. 242; Erhardt *v.* Ballen, 150 Fed. 529, 80 C. C. A. 271; The Ship Poll Cary, 45 Ct. Cl. 219; Barry *v.* Stephens, 176 Ala. 93, 57 S. 467; Crawford Bk. *v.* Baker, 95 Ark. 438, 130 S. W. 556; P. *v.* Siemsen, 153 Cal. 387, 95 P. 863; Pardee *v.* Schanzlin, 3 Cal. App. 597, 86 P. 812; Shepard *v.* Mace, 148 Cal. 270, 82 P. 1046; P. *v.* Land Co., 51 Colo. 260, 117 P. 141; P. *v.* Montez, 48 Colo. 436, 110 P. 639; Wyatt *v.* Burdette, 43 Colo. 208, 95 P. 336; Woods *v.* Sargent, 43 Colo. 268, 95 P. 932; Frost *v.* Board, 43 Colo. 43, 95 P. 289; Stevens *v.* C. Co., 86 Conn. 36, 84 A. 361; City of N. L. *v.* R. Co., 85 Conn. 595, 84 A. 115; Dixon Lumb. Co. *v.* Jennings, 63 Fla. 405, 57 S. 615; Railroad Comrs. *v.* R. Co., 64 Fla. 112, 59 S. 385; Sullivan *v.* Orange County, 59 Fla. 630, 52 S. 517; Montgomery *v.* S., 53 Fla. 115, 42 S. 894; Williams *v.* Smith, 128 Ga. 306, 57 S. E. 801; Hamby *v.* Collier, 136 Ga. 309, 71 S. E. 431; Warner *v.* Warner, 235 Ill. 448, 85 N. E. 630; P. *v.* Lyons, 168 Ill. App. 396; Roemheld *v.* Chicago, 131 Ill. App. 76; Peoria *v.* Bk., 224 Ill. 43, 79 N. E. 296; Town of Cicero *v.* R. Co. (Ind.), 97 N. E. 389; S. *v.* Pitkin, 137 Ia. 22, 114 N. W. 550; Brown *v.* Brown, 157 Ky. 804, 164 S. W. 70; Smith *v.* Chapman, 153 Ky. 70, 154 S. W. 915; Hegan *v.* City, 32 Ky. L. R. 1082, 107 S. W. 809; Eversole *v.* Asylum, 30 Ky. L. R. 989, 100 S. W. 300; Wood *v.* Frickie, 120 La. 180, 45 S. 96; Mass., etc. Co. *v.* Herman, 106 Me. 524, 76 A. 943; Schultz *v.* S., 112 Md. 211, 76 A. 592; Buman *v.* R. Co., 168 Mich. 651, 134 N. W. 972; Minn. Brew. Co. *v.* City, 118 Minn. 467, 136 N. W. 1103; Day *v.* Smith, 87 Miss. 395, 39 S. 526; Gass *v.* Evans, 244 Mo. 329, 149 S. W. 628; S. *v.* Morrison, 244 Mo. 193, 148 S. W. 907; Smith *v.* Vickery, 235 Mo. 413, 138 S. W. 502; S. *v.* Ferry, 208 Mo. 622, 106 S. W. 1005; S. *v.* Comrs., 42 Mont. 62, 111 P. 144; In re Gopsill's Est., 77 N. J. Eq. 215, 77 A. 793; In re Sheriff (N. J.), 69 A. 305; P. *v.* Hubbell, 82 Misc. 624, 144 N. Y. S. 219; Culp *v.* City, 130 N. Y. S. 705; Town of Ridgeway *v.* Treman, 129 N. Y. S. 1081; Syracuse *v.* Roscoe, 66 Misc. 317, 123 N. Y. S. 403; Craft *v.* Lent, 53 Misc. 481, 103 N. Y. S. 366; Remington *v.* S., 116 App. Div. 522, 101 N. Y. S. 952; Empire R. Co. *v.* Sayre, 107 App. Div. 415, 95 N. Y. S. 371; In re Webster, 106 App. Div. 360, 94 N. Y. S. 1050; Missouri, etc. R. Co. *v.* Witcher, 25 Okla. 586, 106 P. 852; Board *v.* Gregory, 15 Okla. 208, 81 P. 422; Christ *v.* Fent, 16 Okla. 375, 84 P. 1074; Baker C. M. Co. *v.* Co., 67 Or. 372, 136 P. 23; Goodnough M. Co. *v.* Galloway, 48 Or. 239, 84 P. 1049 (trustee in bankruptcy); C. *v.* Hughes, 33 Pa. Super. 90; Houseman *v.* Co., 214 Pa. 552, 64 A. 379; Charleston, etc. Co. *v.* City, etc., 92 S. C. 127, 75 S. E. 390; City of Union *v.* Board, etc., 91 S. C. 248, 74 S. E. 496; Frink *v.* Ins. Co., 90 S. C. 544, 74 S. E. 33; Whitcomb *v.* Mandeville, 90 S. C. 384, 73 S. E. 775; S. *v.* Matejousky, 22 S. D. 30, 115 N. W. 96; State Board *v.* Taylor (Tex.), 129 S. W. 600; Earley *v.* Compton (Tex. Civ.), 149 S. W. 694; Waterhouse *v.* Corbett, 43 Tex. Civ. 512, 96 S. W. 651; Thatcher *v.* Matthews, 101 Tex. 122, 105 S. W. 317; Houston *v.* Stewart, 40 Tex. Civ. 499, 90 S. W. 49; San Antonio *v.* Tobin (Tex. Civ.), 101 S. W. 269; Salt Lake County *v.* Clinton, 39 Utah 462, 117 P. 1075; S. *v.* Angus, 70 W. Va. 772, 74 S. E. 998. See supra, "Officers," 197-57; vol. 9, p. 197, n. 57, and supplement thereto.

Judgment presumed entered on day it was filed. Landry *v.* Co., 124 La. 599, 50 S. 593.

Ordinary's signing of minutes of court presumed. Floyd *v.* Ricketson, 129 Ga. 668, 59 S. E. 909.

Authority of secretary of corporation. Bliss *v.* Harris, 38 Colo. 72, 87 P. 1076.

Compliance with statute.—S. *v.* Switzer, 79 Neb. 78, 112 N. W. 297.

Clerk of court.—S. *v.* Harter, 131 Ia. 199, 108 N. W. 232.

946-52 Rogers-R. Co. *v.* Board, 139 Wis. 135, 120 N. W. 849; Rogers *v.* Board, 139 Wis. 143, 120 N. W. 852.

946-54 Montgomery *v.* S., 55 Fla. 97, 45 S. 879; Brown *v.* Brown, 157 Ky.

804, 164 S. W. 70; Louisville, etc. R Co. *v.* Schwab, 31 Ky. L. R. 1313, 106 S. W. 110; Gehlert *v.* Quinn, 35 Mont. 451, 90 P. 168.

May support finding against positive evidence. P. *v.* Siemsen, 153 Cal. 387, 95 P. 863.

947-58 St. Louis, etc. R. Co. *v.* Newell, 25 Okla. 502, 106 P. 818. See Fisher *v.* City, 87 Vt. 524, 90 A. 582.

947-59 Smith *v.* Log Co., 115 Minn. 432, 137 N. W. 6; Ex parte McCartney, 85 Neb. 655, 124 N. W. 104; Cardenas *v.* S., 58 Tex. Cr. 109, 124 S. W. 953. See Drennen *v.* P., 222 Ill. 592, 78 N. E. 937.

948-62 Melville *v.* S., 173 Ind. 352, 89 N. E. 490. See Chilton *v.* Metcalf, 234 Mo. 27, 136 S. W. 701; Muir *v.* Chandler, 16 N. D. 551, 113 N. W. 1038.

948-63 Norddeutscher Lloyd *v.* United States, 213 Fed. 10 (C. C. A.); S. *v.* Barr, 7 Penne. (Del.) 340, 79 A. 730; S. *v.* Pitkin, 137 Ia. 22, 114 N. W. 550; Hibernia Bk., etc. *v.* Whitney, 130 La. 817, 58 S. 583; Brown *v.* Hannah, 152 Mich. 33, 115 N. W. 980; Davison *v.* L. Assn., 166 Mo. App. 625, 150 S. W. 713; Houseman *v.* Co., 214 Pa. 552, 64 A. 379; U. S. *v.* Enriquez, 1 Phil. Isl. 241; Taylor *v.* Village, 147 Wis. 91, 132 N. W. 593. See supra, "Officers," 198-58.

"When there is nothing in the form of the probate on the deed indicating that it was improperly taken, a presumption arises from the act of the register of deeds in admitting the deed to registration that the probate was by the proper officer, and regular, and that proof of that fact was before him." Moore *v.* Quickle, 159 N. C. 129, 74 S. E. 927.

949-64 Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175; Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1061; Maffi *v.* Stephens (Tex. Civ.), 93 S. W. 158; S. *v.* City, 64 Wash. 388, 116 P. 878.

949-65 Barry *v.* Stephens, 176 Ala. 93, 57 S. 467; Howell *v.* Sherwood, 242 Mo. 513, 147 S. W. 810; Shelton *v.* Franklin, 224 Mo. 342, 123 S. W. 1081; Person *v.* Roberts, 159 N. C. 168, 74 S. E. 322; Nicholson *v.* Villepeque, 91 S. C. 231, 74 S. E. 506.

950-66 See Tompkins *v.* Co., 160 Fed. 303, 87 C. C. A. 427, Texas law.

Authority of governor to execute grant of land, presumed. Flores *v.* Hovel (Tex. Civ.), 125 S. W. 606.

950-69 S. *v.* Hines, 148 Mo. App. 289, 128 S. W. 248; Calahan *v.* R. Co., 22 N. D. 615, 135 N. W. 189.

951-72 P. *v.* R. Co., 256 Ill. 280, 100 N. E. 208; Indp., etc. R. Co. *v.* Gro. Twp. (Ind.), 94 N. E. 529; Hogan *v.* City, 32 Ky. L. R. 1062, 107 S. W. 809 (retroactive assessment); Southland Lumb. Co. *v.* Alpha, 126 La. 906, 53 S. 45; Cheltenham Fly. Co. *v.* Shepard, 206 Mass. 102, 92 N. E. 75; W. U. T. Co. *v.* County, 80 Neb. 23, 117 N. W. 468; Bardon *v.* Walters, 20 S. D. 445, 107 N. W. 204; Strouse *v.* Co., 136 Wis. 516, 117 N. W. 1021.

953-79 Woods *v.* Sargent, 43 Colo. 268, 95 P. 932.

953-82 Illegal voting. Sullivan *v.* Coutts., 59 Fla. 430, 52 S. 517.

954-86 Sullivan *v.* Coutts., supra.

954-87 Not presumed seal attached to public record of sister state, is proper one. Milwaukee G. F. Co. *v.* Gordon, 37 Mont. 250, 95 P. 665.

955-89 S. *v.* Mattheasy, 22 S. D. 30, 115 N. W. 96, state's attorney.

955-91 Woods *v.* Sargent, 43 Colo. 268, 95 P. 932 (also to referee in taking testimony); Flanagan, etc. Co. *v.* Foster Co., 170 Fed. App. 537; Day *v.* Smith, 87 Miss. 395, 39 S. 526 (clerk of probate court); S. *v.* Clark, 32 Nev. 145, 104 P. 593; Morris & C. D. Co. *v.* Williams, 79 N. J. L. 157, 74 A. 271; In re Farkash, 8 O. N. P. (N. S.) 147; Gillean *v.* Witherspoon (Tex. Civ.), 121 S. W. 909.

Clerk of grand jury.—S. *v.* Pitkin, 137 Ia. 22, 114 N. W. 550.

955-95 Erhardt *v.* Ballin, 150 Fed. 529, 80 C. C. A. 271.

956-96 Gregg *v.* Cicero, 162 N. C. 479, 78 S. E. 301.

956-97 S. *v.* McGrath, 228 Mo. 413, 128 S. W. 966; Harris *v.* Palmer, 25 Okla. 770, 108 P. 687.

956-98 S. *v.* Co., 208 Mo. 622, 106 S. W. 1005.

956-1 Missouri, etc. R. Co. *v.* Witcher, 25 Okla. 580, 106 P. 852, corporation commission.

956-2 Frost *v.* Board, 43 Colo. 43, 95 P. 289; Floyd *v.* Berkstone, 129 Ga. 668, 59 S. E. 909; In re New York, 137 App. Div. 802, 122 N. Y. S. 676.

956-3 Louisville, etc. R. Co. *v.* Schwab, 31 Ky. L. R. 1313, 106 S. W. 110; Baldon *v.* S., 122 Tenn. 704, 127 S. W. 134.

956-4 Molia *v.* Almonte, 4 Phil. Isl. 572.

956-5 Officers of state land office,—

Houseman *v.* Co., 214 Pa. 552, 64 A. 379.

Land commissioner.—Smithers *v.* Lowrance (Tex. Civ.), 91 S. W. 606.

956-6 Pardee *v.* Schanzlin, 3 Cal. App. 597, 86 P. 812; Melville *v.* S., 173 Ind. 352, 89 N. E. 490.

Notarial act, presumed to have been done within notary's jurisdiction. Gibson *v.* Austin, 23 Colo. App. 220, 128 P. 859.

957-9 S. *v.* Montgomery, 57 Wash. 192, 106 P. 771, secretary of state.

957-10 State Bk *v.* Kienberger, 140 Wis. 517, 122 N. W. 1132.

957-12 San Francisco S. Co. *v.* Co., 11 Cal. App. 695, 106 P. 111; S. *v.* Hines, 148 Mo. App. 289, 128 S. W. 248.

957-14 P. *v.* Lyons, 168 Ill. App. 396; Metsker *v.* Whitesell (Ind.), 103 N. E. 1078; In re D. Dist., 146 Ia. 564, 123 N. W. 1059; S. *v.* Switzer, 79 Neb. 78, 112 N. W. 297.

957-15 Christ *v.* Fent, 16 Okla. 375, 84 P. 1074; Thatcher *v.* Matthews, 101 Tex. 122, 105 S. W. 317; Waterhouse *v.* Corbett, 43 Tex. Civ. 512, 96 S. W. 651.

958-16 Dever *v.* Platt, 81 Kan. 200, 105 P. 445 (mayor); In re Sheriff (N. J.), 69 A. 305 (county clerk).

958-17 Belcher *r.* Harr, 94 Ark. 221, 126 S. W. 714 (commissioner of state lands); Manitou *v.* Bk., 37 Colo. 344, 86 P. 75; Pfarr *v.* Oil Co. (Ia.), 146 N. W. 851 (state inspectors); Gratz *v.* City of Kirkwood (Mo.), 166 S. W. 319; S. *r.* Flagstad, 25 S. D. 337, 126 N. W. 585.

958-18 The Luckenbach, 174 Fed. 265, 144 Fed. 980; Choctaw, etc. R. Co. *v.* Newton, 140 Fed. 225, 71 C. C. A. 655; Robinson *v.* Ins. Co., 144 Fed. 1005; Murray *v.* Joseph, 146 Fed. 260; Del Campo *v.* Camarillo, 154 Cal. 647, 98 P. 1049; Bone *v.* Hayes, 154 Cal. 759, 99 P. 172; Tetreault *v.* Co., 81 Conn. 556, 71 A. 786; Huff *r.* Gulick, 38 App. Cas. (D. C.) 334; Renken *v.* R. Co., 156 Ill. App. 65; Lake Forest Water Co. *r.* City, 154 Ill. App. 184, *aff.* 249 Ill. 382, 94 N. E. 517; Hartford Ins. Co. *r.* Sherman, 123 Ill. App. 202; Ableman *v.* Haehnel (Ind. App.), 103 N. E. 869; Judy *v.* Jester (Ind. App.), 100 N. E. 15; W. U. T. Co. *v.* McClelland, 38 Ind. App. 578, 78 N. E. 672; Missouri P. R. Co. *r.* Kennett, 79 Kan. 232, 99 P. 269; Fowler P. Co. *v.* Enzenperger, 77 Kan. 406, 94 P. 995, 15 L. R. A. (N. S.) 784; Grace *v.* Shakers, 203 Mass. 355, 89 N. E. 552; Howe *v.* Howe, 199 Mass. 598, 85 N. E. 945; Hodgins *v.* Bay City, 156 Mich. 687, 121 N. W. 274; King *v.* Co., 226 Mo. 351, 126 S. W. 415; Johnston *v.* R. Co., 150 Mo. App. 304, 130 S. W. 413; Stuckes *r.* Candy Co., 158 Mo. App. 342, 138 S. W. 352; Hubbard *r.* Slavens, 218 Mo. 598, 117 S. W. 1104; Fairchild *r.* Realty Co., 82 N. J. L. 423, 82 A. 924; Bendue *r.* Bidwell, 82 Misc. 33, 143 N. Y. S. 97; Reiter *r.* Ziegler, 121 N. Y. S. 324; Moore *r.* Adams, 26 Okla. 48, 108 P. 392; A. T., etc. R. Co. *v.* Davis, 26 Okla. 359, 109 P. 551; Green *v.* Brooks, 215 Pa. 492, 64 A. 672; Cason *v.* Rickards, 5 Phil. Isl. 611; Pares *v.* Reynes, 2 P. R. Fed. 402; Le Brun *v.* Romero, 3 P. R. Fed. 225; Warren *r.* Warren, 33 R. I. 71, 80 A. 593; Standard O. Co. *r.* S., 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015; San Antonio, etc. Co. *r.* Williams (Tex. Civ.), 158 S. W. 1171; Bost *r.* S. (Tex. Cr.), 144 S. W. 589; Pull-Man Co. *v.* Cox, 56 Tex. Civ. 327, 120 S. W. 1058; Galveston, etc. R. Co. *v.* Young, 45 Tex. Civ. 430, 100 S. W. 993 (defective coupling); Minneapolis T. M. Co. *v.* Ashauer, 142 Wis. 646, 126 N. W. 113. See Aetna I. Co. *v.* Fuller, 111 Md. 321, 74 A. 369.

Evidence to rebut this presumption is admissible. Fleishman *r.* Ice Co., 163 Mo. App. 416, 143 S. W. 881.

959-21 Abhau *v.* Grassie, 262 Ill. 636, 104 N. E. 1020; C. *v.* Johnson, 199 Mass. 55, 85 N. E. 188 (failure of accused to call witnesses to prove occupation and residence commented on by court); Reehil *v.* Fraas, 129 App. Div. 563, 114 N. Y. S. 17 (unless evidence which might have been produced would have been conclusive); Reiter *r.* Zeigler, 121 N. Y. S. 324. See New York C. & R. H. Co. *v.* U. S., 212 U. S. 481; vol. 2, p. 800, n. 81; p. 803, n. 87, and supplement thereto.

Presumptive conclusive better evidence does not exist. Despard *r.* Pearcy, 65 W. Va. 140, 63 S. E. 871.

Circumstances under which papers destroyed, shown. Mastin *v.* Noble, 157 Fed. 506, 85 C. C. A. 98.

959-22 Chesapeake B. R. Co. *v.* Brez, 39 App. Cas. (D. C.) 58; Hausler *r.* Co., 144 Ill. App. 643; Oliver *r.* Synhorst, 58 Or. 582, 115 P. 594, 109 P. 762.

No presumption arises from defend-

ant's failure to produce billy, where its production was not demanded. Stockwell *v.* Brinton, 26 N. D. 1, 142 N. W. 242.

960-24 Isabella M. Co. *v.* Glenn, 37 Colo. 165, 86 P. 349 (office map); Varnado *v.* Banner, etc. Co., 126 La. 590, 52 S. 777; Morrow *v.* R. Co., 140 Mo. App. 200, 123 S. W. 1034; Williams *v.* Bk., 49 Or. 492, 90 P. 1012.

961-25 Notice must be given. Rochester G. Ins. Co. *v.* Assn., 107 Va. 701, 60 S. E. 93.

961-26 Yesbera *v.* Co., 166 Fed. 120 92 C. C. A. 46; Wilson *v.* Griswold, 79 Conn. 18, 63 A. 659; Brown *v.* Shubert Co., 166 Ill. App. 322; Chandler *v.* Prince (Mass.), 105 N. E. 1076.

963-30 See vol. 11, p. 969, n. 35, and supplement thereto.

963-33 See vol. 11, p. 970, n. 37, and supplement thereto.

963-34 See vol. 11, p. 970, n. 38, and supplement thereto.

964-35 Laurie Co. *v.* McCullough, 174 Ind. 477, 90 N. E. 1014; P. *v.* Daily, 178 Mich. 354, 144 N. W. 890.

964-36 Penn. R. Co. *v.* Durkee, 147 Fed. 99, 78 C. C. A. 107.

964-37 Williamson *v.* S., 9 Ga. App. 442, 71 S. E. 509.

964-38 U. S. *v.* Carter, 217 U. S. 286; Davis *v.* S., 4 Ga. App. 441, 61 S. E. 843; Saffold *v.* S., 11 Ga. App. 329, 75 S. E. 338.

965 Morgan County *v.* Glass, 139 Ga. 415, 77 S. E. 583; Neale *v.* R. Co., 146 N. Y. S. 263; Duffy *v.* Power Co., 242 Pa. 146, 88 A. 935.

965-39 Failure to call person jointly indicted with accused may be commented on by counsel. Davis *v.* C. (Ky.), 121 S. W. 429.

965-40 Evidence offered by accused should not, as matter of law, be distrusted because it did not directly deny or explain that received on behalf of state. P. *v.* Charles, 9 Cal. App. 338, 99 P. 383.

965-42 Young *v.* Corrigan, 208 Fed. 431; Alexander *v.* Blackman, 26 App. Cas. (D. C.) 541; Zimmerman *v.* Zimmerman, 149 Ill. App. 231, decree modified, 242 Ill. 552, 90 N. E. 192; Second Nat. Bk. *v.* Gibboney, 43 Ind. App. 492, 87 N. E. 1064; Closson *v.* Bligh, 41 Ind. App. 14, 83 N. E. 263; Star Mills *v.* Bailey, 140 Ky. 194, 130 S. W. 1077; Iberia Co. *v.* Thorgeson, 116 La. 218, 40 S. 682; D'Addio *v.* R. Co., 213 Mass. 465, 100 N. E. 647; C. *v.* Co., 201 Mass. 564, 88 N. E. 420; McClanahan *v.* R. Co., 147 Mo. App. 386, 126 S. W. 535; Burns' Exp. *v.* Ice Co., 144 N. Y. S. 683; Wade *v.* Mt. Vernon, 133 App. Div. 389, 117 N. Y. S. 356; Hollon *v.* R. Co., 133 N. Y. S. 206; Curcio *v.* Marx, 120 N. Y. S. 721; Green *v.* Brooks, 215 Pa. 492, 64 A. 672; Texas, etc. R. Co. *v.* Harrington, 44 Tex. Civ. 386, 98 S. W. 673; Berry *v.* Colborn, 65 W. Va. 493, 64 S. E. 636; Nichols *v.* R. Co., 62 W. Va. 409, 59 S. E. 968. See Morgan *v.* S., 124 Ga. 442, 52 S. E. 748.

Contra, as to privileged communications. Lauer *v.* Banning, 152 Ia. 99, 131 N. W. 783.

Weight of inference, question for jury. Booher *v.* Trainer, 172 Mo. App. 376, 157 S. W. 848.

No presumption.—Richter *v.* Solomon, 104 N. Y. S. 405; Ferrari *v.* R. Co., 118 App. Div. 155, 103 N. Y. S. 134.

Rule stated.—S. *v.* Callahan, 76 N. J. L. 426, 69 A. 957.

967-43 Norgnet *v.* Mills, 177 Fed. 970; Dumas *v.* Clayton, 32 App. Cas. (D. C.) 566; Mullen *v.* Quinlan, 195 N. Y. 109, 87 N. E. 1078.

967-44 Presumption does not arise unless prima facie case made against party who might have called witness. Cooper *v.* Upton, 65 W. Va. 401, 64 S. E. 527.

967-45 Thomas *v.* S., 156 Ala. 166, 47 S. 257; Macon R. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569; Chicago U. T. Co. *v.* Arnold, 131 Ill. App. 599; Rechil *v.* Fraas, 129 App. Div. 563, 114 N. Y. S. 17; Brewster *v.* S., 40 Tex. Civ. 1, 88 S. W. 858.

Absence of the plaintiff's physician explained by showing that he had promised to attend the trial unless summoned to an impending operation. Morgan Co. *v.* Glass, 139 Ga. 415, 77 S. E. 583.

On second trial of case testimony explaining failure to call witness at first trial, admissible. McDonald *v.* R. Co., 144 Mich. 379, 108 N. W. 85.

967-46 Consolidated C. Co. *v.* Towage Co., 200 Fed. 840; Southern R. Co. *v.* Osborn, 39 Ind. App. 333, 78 N. E. 248, 79 N. E. 1067; Kane *v.* R. Co., 254 Mo. 175, 162 S. W. 240; Santiago *v.* Co., 152 App. Div. 697, 137 N. Y. S. 611; Kimball *v.* Odell & E. Co., 122 N. Y. S. 755; W. U. T. Co. *v.* Sullivan, 82 O. St. 14, 91 N. E. 867. See Houston, etc. R. Co. *v.* Alexander (Tex.

Civ.), 121 S. W. 602. But see Ia. Cent R. Co. *v.* Elec. Co., 204 Fed. 961, 123 C. C. A. 283.

968-48 Mutual Ind. Co. *v.* Perkins, 81 Ark. 87, 98 S. W. 709; Tuthill *v.* R. Co., 145 Ill. App. 50; Naughton Co. *v.* Exchange, 49 Misc. 227, 97 N. Y. S. 387.

969-52 Schlechte *v.* Transit Co., 157 Ill. App. 181; S. *v.* Jahrans, 117 La. 286, 41 S. 575; Schooler *v.* Schooler (Mo.), 167 S. W. 444; Childers *v.* Pickenpaugh, 219 Mo. 376, 118 S. W. 453; Johnston *v.* McKenna, 76 N. J. Eq. 217, 74 A. 284; Jenner *v.* Shope, 205 N. Y. 66, 98 N. E. 325; Lane *v.* Fenn, 65 Misc. 336, 120 N. Y. S. 237; In re Leonard, 127 App. Div. 493, 111 N. Y. S. 905; Fisher *v.* Ins. Co., 124 Tenn. 450, 138 S. W. 316; Rushing *v.* Spreen (Tex. Civ.), 142 S. W. 49; Walker *v.* Dickey, 44 Tex. Civ. 110, 98 S. W. 658; Copperthite *v.* Loudan, etc. Bk., 111 Va. 70, 68 S. E. 392; Aragon C. Co. *v.* Rogers, 105 Va. 51, 52 S. E. 843; Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609.

A party's motives having been impugned, his failure to testify, where he has the opportunity to do so, raises a reasonable presumption against him. Berenson *v.* Conant, 214 Mass. 127, 101 N. E. 60.

Depositions.—Belknap H. Co. *v.* Sleeth, 77 Kan. 164, 93 P. 580.

Failure to answer interrogatories.—Locust *v.* Randle, 46 Tex. Civ. 544, 102 S. W. 946.

970-53 Meyer *v.* Minsky, 128 App. Div. 589, 112 N. Y. S. 860. *Comp.* Brooks *v.* Garner, 20 Okla. 236, 97 P. 995.

Burden affected sometimes.—Johnston *v.* McKenna, 76 N. J. Eq. 217, 74 A. 284.

971-55 Tuggle *v.* S., 127 Ga. 290, 56 S. E. 406; Blackman *v.* Andrews, 150 Mich. 322, 114 N. W. 218.

971-56 Chicago M. & L. Co. *v.* Cooper, 90 Ark. 326, 119 S. W. 672.

971-57 Southern Exp. Co. *v.* Co., 126 Ga. 472, 55 S. E. 254.

972-60 P. *v.* Bills, 129 App. Div. 798, 114 N. Y. S. 587; Sturgis *v.* S., 2 Okla. Cr. 362, 102 P. 57; O'Hara *v.* S., 57 Tex. Cr. 577, 124 S. W. 95; Singleton *v.* S., 57 Tex. Cr. 560, 124 S. W. 92; Matthews *v.* S., 57 Tex. Cr. 328, 122 S. W. 544.

Proper to instruct that, if accused can disprove evidence conclusive of his guilt, his silence justifies strong inference against him. S. *v.* Callahan, 77 N. J. L. 685, 73 A. 235. No inference may be drawn. P. *v.* Smith, 114 App. Div. 513, 100 N. Y. S. 259.

Cautionary instruction may be given. Brandes *v.* S. (Ala. App.), 65 S. 307.

972-61 Hibbard *v.* U. S., 172 Fed. 66, 96 C. C. A. 554 (non-production of letters); P. *v.* Smith, 144 Ill. App. 129; Wells *v.* C., 96 Miss. 500, 51 S. 209 (error, though not necessarily serious, to ask accused if he testified at commitment trial); Harris *v.* S., 96 Miss. 379, 50 S. 626; S. *v.* Skillman, 76 N. J. L. 464, 70 A. 83; Brown *v.* S., 3 Okla. Cr. 442, 106 P. 808; U. S. *v.* Navarro, 3 Phil. Isl. 143; Shaw *v.* S., 57 Tex. Cr. 474, 123 S. W. 691; Brown *v.* S., 57 Tex. Cr. 269, 122 S. W. 565 (error to ask defendant if he testified on former trial).

972-63 Reehil *v.* Fraas, 129 App. Div. 563, 114 N. Y. S. 17; Fulsom, etc. Co. *v.* Mitchell, 37 Okla. 575, 132 P. 1103; Modesto *v.* Leyva, 6 Phil. Isl. 186.

973-64 American, etc. Co. *v.* Kaveney, 39 App. Cas. (D. C.) 223; Tauger *v.* R. Co., 104 N. Y. S. 681.

973-65 P. *v.* McGovern, 105 App. Div. 296, 94 N. Y. S. 662.

973-67 Jordan *v.* Austin, 161 Ala. 585, 50 S. 70; Wood *v.* Co., 1 Cal. App. 474, 82 P. 547; United R. & E. Co. *v.* Cloman, 107 Md. 681, 69 A. 379; Reehil *v.* Fraas, 129 App. Div. 563, 114 N. Y. S. 17.

973-68 Eldridge *v.* Terry & Tench Co., 129 N. Y. S. 865.

973-70 Failure to call witness, immaterial if party for whom he testifies makes him his own witness on being called by adverse party. Fleck *v.* Cohn, 131 App. Div. 248, 115 N. Y. S. 652.

974-71 Barnett *v.* S., 165 Ala. 59, 51 S. 299; Jordan *v.* Austin, 161 Ala. 585, 50 S. 70; Rump *v.* Woods, 50 Ind. App. 347, 98 N. E. 369; Fox *v.* Valeille, 61 Misc. 619, 114 N. Y. S. 5; In re Darrow's Est., 64 Misc. 224, 118 N. Y. S. 1082; Fulsom, etc. Co. *v.* Mitchell, 37 Okla. 575, 132 P. 1103; U. S. *v.* Sweet, 2 Phil. Isl. 130.

974-72 Bryant *v.* Lazarus, 235 Mo. 606, 139 S. W. 558.

975-74 Corn *v.* The B. & M., 121 N. Y. S. 434.

975-75 Warth *v.* Loewenstein, 219 Ill. 222, 76 N. E. 379.

975-76 Mills *v.* S., 133 Ga. 155, 65

S. E. 368; S. *v.* Callahan, 76 N. J. L. 426, 69 A. 957; Kimball *v.* O'Dell, 188 App. Div. 409, 122 N. Y. S. 755; Eldridge *v.* T. & T. Co., 129 N. Y. S. 865; St. Louis, etc. R. Co. *v.* Finley, 122 Tenn. 127, 118 S. W. 692; Portsmouth *v.* Houseman, 109 Va. 554, 65 S. E. 11; Cooper *v.* Upton, 65 W. Va. 401, 64 S. E. 527.

975-77 Childers *v.* Pickenpaugh, 219 Mo. 376, 118 S. W. 453; Scherl *v.* Flam, 133 App. Div. 274, 117 N. Y. S. 654; Ferrari *v.* R. Co., 118 App. Div. 155, 103 N. Y. S. 134; Christy *v.* Am. Temp., etc. Ins. Co., 123 N. Y. S. 740. **Knowledge of witness** who testifies positively, presumed. Plumb *v.* Halleuer, 130 App. Div. 284, 114 N. Y. S. 474.

976-78 See S. *v.* Constantine, 48 Wash. 218, 93 P. 317.

976-80 Kyle *v.* Slaughter, 158 Ala. 109, 48 S. 343; Grace Co. *v.* Larson, 129 Ill. App. 290; Lauer *v.* Banning, 152 Ia. 99, 131 N. W. 783; Poppleton *v.* Poppleton (Mich.), 122 N. W. 272 (omission from and alteration of entries in diary). See S. *v.* Constantine, 48 Wash. 218, 93 P. 317; also vol. 11, p. 952, n. 6, and supplement thereto.

977-82 Federal L. Co. *v.* Reece (Ky.), 116 S. W. 783 (removal of lumber to be estimated authorized resolving of doubt against party responsible therefor); Tracy *v.* Buchanan, 167 Mo. App. 432, 151 S. W. 747.

978-83 Mastin *v.* Noble, 157 Fed. 506, 85 C. C. A. 98.

978-84 See Dove *v.* Fansler, 132 Mo. App. 669, 112 S. W. 1009.

PRINCIPAL AND AGENT

6-1 Heathcoat *v.* Co., 156 Ala. 339, 47 S. 139; Ebersole *v.* Assn., 147 Ala. 177, 41 S. W. 150; Bell *v.* S., 93 Ark. 600, 125 S. W. 1020; Pease *v.* Fink, 3 Cal. App. 371, 85 P. 657; Whalen *v.* Gleeson, 81 Conn. 638, 71 A. 908; United P. & D. Co. *v.* Dunn, 137 Ga. 307, 73 S. E. 492; Ridgeway *v.* Downing, 109 Ga. 591, 34 S. E. 1028; White S. M. Co. *v.* Horkan, 7 Ga. App. 283, 66 S. E. 811; Chesley *v.* Vehicle Co., 147 Ill. App. 588; Hunt *v.* Johnson, 7 Ind. Ty. 575, 104 S. W. 841; Fenton *v.* Miller, 153 Ia. 747, 134 N. W. 95; Wade *v.* Boone (Mo. App.), 168 S. W. 360; Mathes *v.* Lumb. Co., 173 Mo. App. 239, 158 S. W. 729; Hutchinson *v.* Mach. Co., 161 Mo. App. 87, 142 S. W. 457; Warner *v.* Sohn, 86 Neb. 519, 125 N. W. 1072; Lippincott *v.* Lumb. Co., 79 Misc. 559, 141 N. Y. S. 229; Lane *v.* Penn, 65 Misc. 336, 120 N. Y. S. 237; Wood B. *v.* Van Cliff, 107 N. Y. S. 88; Ramsdell *v.* Harris, 165 N. C. 358, 81 S. E. 346; Rumble *v.* Cummings, 52 Or. 202, 95 P. 1111; Kroll *v.* City, 240 Pa. 131, 87 A. 532; Bray-Robinson, etc. Co. *v.* Walker (Tex. Civ.), 165 S. W. 107; Conner *v.* Nat. Bk. (Tex. Civ.), 156 S. W. 1092; Stember *v.* Keene (Tex. Civ.), 152 S. W. 661; Simon *v.* Lumb. Co. (Tex. Civ.), 146 S. W. 592; Camp *v.* Barber, 87 Vt. 235, 88 A. 812; Day *v.* Fay, 59 W. Va. 65, 52 S. E. 1013. As between husband and wife, see that title, supra, S07-4.

No presumption of agency from identity of officers of two corporations. Union Trust Co. *v.* Op. Co., 28 S. D. 549, 134 N. W. 65.

Evidence insufficient. — McCormick *v.* Williams, 152 N. C. 638, 68 S. E. 148; Simmons *v.* Okeetee Club, 86 S. C. 73, 68 S. E. 131.

Burden on party affirming change of relation. Bergner *v.* Bergner, 219 Pa. 113, 67 A. 999.

6-2 Beitman *v.* Glass Co. (Ala.), 64 S. 600; Ebersole *v.* Assn., 147 Ala. 177, 41 S. 150; Johnson *v.* Lennox, 53 Colo. 125, 133 P. 744; Saull *v.* Lapsley, 46 Colo. 538, 105 P. 863; Jerman *v.* B. Co., 46 Colo. 33, 102 P. 743; Beattie *v.* McMullen, 82 Conn. 484, 74 A. 767; Bergan *v.* R. Co., 82 Conn. 574, 74 A. 937; Rogers *v.* Tiedeman, 9 Ga. App. 811, 72 S. E. 285; Dispatch P. Co. *v.* Bk., 109 Minn. 440, 124 N. W. 236; Howze *v.* Whitehead, 93 Miss. 578, 46 S. 401; Raas *v.* Sharp, 46 Mont. 474, 128 P. 594; Travers *v.* Barrett, 36 Nev. 402, 97 P. 126; Hall *v.* Co., 89 N. J. L. 771, 85 A. 349; Studebaker *v.* Rose, 65 Misc. 322, 119 N. Y. S. 970; Cable Piano Co. *v.* Strickland, 164 N. C. 252, 79 S. E. 506; Spangler *v.* Sonnenberg (Ohio), 102 N. E. 737; Garrett C. *v.* Hudspeth, 19 Okla. 429, 91 P. 843; Baker *v.* Seaward, 63 Or. 350, 127 P. 961; Rumble *v.* Cummings, 52 Or. 202, 95 P. 1111; Am. C. & F. Co. *v.* Co., 221 Pa. 529, 70 A. 867; Conner *v.* Bank (Tex. Civ.), 156 S. W. 1092; St. Louis, etc. Co. *v.* Rhoker (Tex. Civ.), 148 S. W. 156; Wills *v.* R. Co., 41 Tex. Civ.

58, 92 S. W. 273; O'Daniel *v.* Streeby, 77 Wash. 414, 137 P. 1025.

Principal has burden of proving that agent acted beyond his authority. Lowry *v.* R. Co., 92 S. C. 33, 75 S. E. 278; Sweeny *v.* Underwriters Co., 29 S. D. 576, 137 N. W. 379.

Authority to waive, sometimes presumed. See supra, "Insurance," 539-10.

Answering telephone call from place of business of corporation which caller is in business relations with and communicating with latter concerning business ordinarily conducted there raises presumption person so doing speaks for corporation. Gilliland *v.* R. Co., 85 S C. 26, 67 S. E. 20.

Evidence insufficient.—Tyler I. Co. *v.* Coupland, 44 Tex. Civ. 383, 99 S. W. 133.

6-3 Spengler *v.* Sonnenberg (Ohio), 102 N. E. 737. See Pease *v.* Fink, 3 Cal. App. 371, 85 P. 657.

Written authority to buy land for agent is not necessary. Mills *v.* Hudmon & Co., 175 Ala. 448, 57 S. 739.

7-7 Noble *v.* Burney, 124 Ga. 960, 53 S. E. 463; Johnson *v.* Hulett, 56 Tex. Civ. 11, 120 S. W. 257.

7-8 Dowdall *v.* Borgfeldt, 113 N. Y. S. 1069; Farmers' & M.'s Bk. *v.* Ins. Co., 150 N. C. 770, 64 S. E. 902.

7-10 Crone *v.* Long, 159 Ala. 487, 49 S. 227.

8-11 Carroll *v.* Co., 111 Md. 252, 73 A. 665.

8-12 *Contra* as to secretary of corporation. Carroll *v.* Co., supra.

8-14 Ricker Nat. Bk. *v.* Stone, 21 Okla. 833, 97 P. 577; Dunham *v.* Salmon, 130 Wis. 164, 109 N. W. 959.

May be implied from general authority Dietrich *v.* Badders (Del.), 90 A. 47.

8-16 Good *v.* Arkin, 147 Ill. App. 390; Goodyear *v.* Williams, 73 Kan. 192, 85 P. 300; Jolly *v.* Huebler, 132 Mo. App. 675, 112 S. W. 1013; Campbell *v.* Gowans, 35 Utah 268, 100 P. 397. See Merchant *v.* Rogan (Tex. Civ.), 150 S. W. 956.

9-18 See Belcher *v.* Assn., 74 N. J. L. 833, 67 A. 399; Bautz *v.* Adams, 131 Wis. 152, 111 N. W. 69.

9-19 Hume *v.* Peterson, 91 Neb. 347, 135 N. W. 1013.

9-21 Dr. Shoop M. Co. *v.* Mizell, 148 N. C. 384, 62 S. E. 511.

Revocation of authority prior to exercise of authority conferred must be proved by party so claiming. Foddrill *v.* Dooley, 131 Ga. 790, 63 S. E. 350.

9-22 Strayhorn *v.* McCall, 78 Ark. 209, 95 S. W. 455; Bass *v.* Masters, 5 Ga. App. 288, 63 S. E. 24; Deane *v.* Co., 200 Mass. 459, 86 N. E. 890. See Jordan *v.* Coal Co., 52 Ind. App. 542, 100 N. E. 880.

9-23 Westerfield *v.* Cohen, 130 La. 533, 58 S. 175; Union Bank & Trust Co. *v.* Lumb. Co., 70 W. Va. 558, 74 S. E. 674. See Lane *v.* Fenn, 65 Misc. 336, 120 N. Y. S. 237.

Failure of principal to claim land conveyed, though he had conveyed other lands in same county, and subsequent revocation of power, raise presumption after long lapse of time power was granted. Loughridge *v.* Ball (Ky.), 118 S. W. 321.

10-25 Chalmers & Son *v.* Bowen (Ark.), 164 S. W. 1131.

10-26 Oak Leaf Mill Co. *v.* Cooper, 103 Ark. 79, 146 S. W. 130; Kilborn *v.* Ins. Co., 99 Minn. 176, 108 N. W. 861; Birge-F. Co. *v.* R. Co., 53 Tex. Civ. 55, 115 S. W. 333; First Nat. Bk. *v.* Co., 66 W. Va. 505, 66 S. E. 713.

A party may presume that an agent was authorized to make statements and representations as are usually incident to such transactions. King *v.* Thompson Co. (Ind. App.), 104 N. E. 106.

Agent authorized to make lease, presumed authorized to give notice to quit. Benton *v.* Stokes, 109 Md. 117, 71 A. 532.

10-27 Loughridge *v.* Ball (Ky.), 118 S. W. 321.

11-30 No presumption of authority to convey arises from lapse of time if agency revoked by principal's death. Wall *v.* Lubbock, 52 Tex. Civ. 405, 118 S. W. 886.

11-32 See Thompson *v.* Mfg. Co., 60 W. Va. 42, 53 S. E. 908.

11-33 Contract made by agent in his name presumed his contract. Young *v.* Inman, 146 Ia. 492, 125 N. W. 177; Pastells *v.* Hollman, 2 Phil. Isl. 235.

11-35 Strader's Admr. *v.* Mfg. Co., 146 Ky. 580, 142 S. W. 1073.

11-37 Joint authority presumed where several persons named as attorneys in fact. Kind *v.* Barry, 66 Misc. 188, 121 N. Y. S. 324.

Notice of agent's lack of authority to use principal's deposits for own benefit imputed to bank in which they are. Farmers' & M.'s Bk. *v.* Ins. Co., 150 N. C. 770, 64 S. E. 902.

11-39 Childress *v.* Co., 102 Ala. 371, 50 S. 322. *See* Fritz *v.* Co., 136 Ia. 699, 114 N. W. 193, order of proof in court's discretion.

12-40 Jones *v.* Waterman, 1 Cal. App. xiii, 87 P. 469; Hall *v.* Bates, 216 Mass. 140, 103 N. E. 285; Sills *v.* Burge, 141 Mo. App. 148, 124 S. W. 605; Thompson *v.* Mills, 45 Tex. Civ. 642, 101 S. W. 560.

12-41 Davis *v.* Anderson, 163 Ala. 385, 50 S. 1002; Robinson & Co. *v.* Greene, 148 Ala. 434, 43 S. 797; Ariz. L. Ins. Co. *v.* Lindell (Ariz.), 140 P. 60; Jones *v.* Waterman, 4 Cal. App. xiii, 87 P. 469; DeLaval S. Co. *v.* Sharpless, 142 Ia. 60, 120 N. W. 657 (agency to be exclusive no conclusion); Cuggy *v.* Zeller, 132 La. 222, 61 S. 209; Sheridan Coal Co. *v.* C. W. Hull Co., 87 Neb. 117, 127 N. W. 218; Conklin *v.* Kruger, 79 N. J. L. 326, 75 A. 436; Kelly A. B. Co. *v.* Co., 136 App. Div. 22, 120 N. Y. S. 163; Flegel *v.* Dowling, 54 Or. 40, 102 P. 178; Woodward *v.* Cave, 79 S. C. 578, 61 S. E. 82; Blowers *v.* R. Co., 74 S. C. 221, 54 S. E. 368; Webb *v.* Burroughs, 25 S. D. 629, 127 N. W. 623; Child *v.* Const. Co. (Utah), 129 P. 356; Belnap *v.* Condon, 34 Utah 213, 97 P. 111.

Parol evidence competent to show contract made in another's name for defendant. Moyers *v.* Fogarty, 140 Ia. 701, 119 N. W. 159. To show agency. Belnap *v.* Condon, 34 Utah 213, 97 P. 111.

Extent of agent's authority shown by testimony of officers of corporation for which he acted. Dolvin *v.* Co., 131 Ga. 300, 62 S. E. 198.

13-44 Welke *v.* Wackershauser, 143 Ia. 107, 120 N. W. 77; Starr P. Co. *v.* Morrison, 159 Mich. 583, 124 N. W. 562; Goller *v.* Sup. Co. (Mo. App.), 161 S. W. 581; Hodkinson *v.* Mach. Co., 161 Mo. App. 87, 142 S. W. 457. *See* Waco M. & E. Co. *v.* Co., 49 Tex. Civ. 426, 109 S. W. 224.

14-46 Goodhue *v.* Cameron, 142 App. Div. 470, 127 N. Y. S. 120; Shumway *v.* Kitzman, 28 S. D. 577, 134 N. W. 325.

14-47 Authority to execute sealed writing cannot be shown by parol if principal not present when executed, though writing did not require seal. Dalton B. Co. *v.* Wood, 7 Ga. App. 477, 67 S. E. 121.

14-48 Joslyn *v.* Co., 177 Fed. 863, 101 C. C. A. 77; Rogers *v.* Smith (Ala.), 63 S. 539; Beckman L. Co. *v.* Kittrell, 80 Ark. 228, 96 S. W. 988; Ayer & L. T. Co. *v.* Young, 90 Ark. 104, 117 S. W. 1089; Kust *v.* Miller & Lux, 159 Cal. 723, 115 P. 932; McDougall *v.* Eaton (Cal. App.), 128 P. 415; Wales *v.* Mower, 44 Colo. 146, 96 P. 971; Flournoy *v.* Iler Co., 61 Fla. 216, 55 S. 843; Great, etc. Fidelity Co. *v.* Guthrie, 13 Ga. App. 288, 79 S. E. 102; Leonard *v.* Heavner, 171 Ill. App. 188; Buttz *v.* Mach. Co. (Ind. App.), 103 N. E. 812; First Nat. Bk. *v.* Co., 105 Minn. 82, 114 N. W. 267; Samsell *v.* Kitselman Bros., 101 Miss. 789, 58 S. 591; Menx *v.* Haller (Mo. App.), 162 S. W. 688; Oil W. Sup. Co. *v.* Metcalf, 174 Mo. App. 525, 160 S. W. 897; McCloud *v.* Tel. Co., 170 Mo. App. 624, 157 S. W. 101; Griswold *v.* Haas, 145 Mo. App. 578, 122 S. W. 787; Clough *v.* Co., 75 N. H. 84, 71 A. 253; Colloty *v.* Schuman, 73 N. J. L. 92, 62 A. 186, 75 N. J. L. 97, 66 A. 933; Tiernan *v.* Havens, 147 N. Y. S. 786; Lefkowitz *v.* Iba, 114 N. Y. S. 29; Steuerwald *v.* Jackson, 123 App. Div. 569, 108 N. Y. S. 41; Sutton *v.* Lyons, 156 N. C. 3, 72 S. E. 4; Hill *v.* Bean, 150 N. C. 436, 64 S. E. 212; Iowa S. Co. *v.* Sanders, 40 Okla. 676, 140 P. 406; Whitcomb *v.* Oller (Okla.), 137 P. 709; Cannel C. Co. *v.* Lamb (Tex. Civ.), 144 S. W. 721; Autrey *v.* Linn (Tex. Civ.), 138 S. W. 197; Union Bk. & T. Co. *v.* Lumb. Co., 70 W. Va. 578, 74 S. E. 671; Somers *v.* Nat. Bk., 152 Wis. 210, 138 N. W. 713.

See Sylvester *v.* R. Co. (Mass.), 104 N. E. 437. *Contra*, it seems, Hensley *v.* McDonald, 32 Ky. L. R. 1208, 108 S. W. 862; S. *v.* Yellowday, 152 N. C. 793, 67 S. E. 480.

Conclusion of agent inadmissible.— Arnold *v.* Johnson (Tex. Civ.), 128 S. W. 1186.

15-49 Connor *v.* Hodges, 7 Ga. App. 153, 66 S. E. 546; Irvin *v.* Cohen, 109 N. Y. S. 169; Fee *v.* Co., 18 Pa. Super. 83; Fretwell *v.* Carter, 89 S. C. 553, 65 S. E. 829; Rainey *v.* Kemp, 54 Tex. Civ. 486, 118 S. W. 630; Beeler *v.* Ragan, 53 Wash. 621, 102 P. 427.

15-50 Emerson *v.* Co., 159 Ala. 350, 49 S. 69 (agent may testify to capacity in which he did particular act); Cottondale, etc. Bk. *v.* Adding Mach. Co., 61 Fla. 143, 54 S. 896; Chickasha, etc. Co. *v.* Lamb, 28 Okla. 279, 114 P. 333.

15-52 Grant Bros. *v.* U. S., 232 U. S. 647, 34 Sup. Ct. 432, 58 L. ed. 776;

In re Thomas, 199 Fed. 214; Goll *v.* U. S., 166 Fed. 419, 92 C. C. A. 171; Alabama, etc. Co. *v.* Rice (Ala.), 65 S. 402; Rogers *v.* Smith (Ala.), 63 S. 530; Alexander *v.* R. Co. (Ala.), 60 S. 295; Henderson-M. M. Co. *v.* Chapman & Co., 3 Ala. App. 296, 57 S. 82; Eubanks *v.* Mercantile Co., 171 Ala. 488, 55 S. 98; Cohn & G. L. Co. *v.* Robbins, 159 Ala. 289, 48 S. 853; Union N. S. Co. *v.* Pugh, 156 Ala. 369, 47 S. 48; Crone *v.* Long, 159 Ala. 487, 49 S. 227; Smiley *v.* Hooper, 147 Ala. 646, 41 S. 660; Gambill *v.* Fuqua, 148 Ala. 448, 42 S. 735; Eagle I. Co. *v.* Baugh, 147 Ala. 613, 41 S. 663; Bell *v.* S., 93 Ark. 600, 125 S. W. 1020; Beekman L. Co. *v.* Kittrell, 80 Ark. 228, 96 S. W. 983; Union Const. Co. *v.* Tel. Co., 163 Cal. 298, 125 P. 242; Pease *v.* Fink, 3 Cal. App. 371, 85 P. 657; Western I. Co. *v.* Bank, 23 Colo. App. 143, 128 P. 476; Coe *v.* Kutinsky, 82 Conn. 685, 74 A. 1065; Florida E. C. R. Co. *v.* Lassiter, 58 Fla. 234, 50 S. 428; Weiner Bros. *v.* Tucker, 139 Ga. 596, 77 S. E. 811; Fowler *v.* Parks, 138 Ga. 786, 76 S. E. 85; Becker *v.* Donalson, 133 Ga. 864, 67 S. E. 92; Ga. Stell Co. *v.* White, 136 Ga. 492, 71 S. E. 890; So. R. Co. *v.* Grant, 136 Ga. 303, 71 S. E. 422; Franklin Co. L. Co. *v.* County, 133 Ga. 557, 66 S. E. 264; Johnson Co. Sav. Bk. *v.* Richardson & Son, 9 Ga. App. 466, 71 S. E. 757; Ham *v.* Brown, 2 Ga. App. 71, 58 S. E. 316; Leonard *v.* Heavner, 171 Ill. App. 188; McManus *v.* R. Co., 156 Ia. 359, 136 N. W. 769; Goodyear *v.* Williams, 73 Kan. 192, 85 P. 300; Conley *v.* Mayo, 157 Ky. 445, 163 S. W. 243; Louisville & N. R. Co. *v.* White, 152 Ky. 463, 153 S. W. 1199; Louisville & N. R. Co. *v.* Byrley, 152 Ky. 35, 153 S. W. 36; Smith *v.* Ohler, 31 Ky. L. R. 1275, 104 S. W. 995; Payton *v.* Mills Co., 28 Ky. L. R. 1303, 91 S. W. 719; Edmiston *v.* Hurley, 30 Ky. L. R. 557, 99 S. W. 259; Gragg *v.* Ins. Co., 32 Ky. L. R. 988, 107 S. W. 321; Crenshaw *v.* Ware's Exr., 148 Ky. 196, 146 S. W. 426; Sylvester *v.* R. Co. (Mass.), 104 N. E. 437; Deane *v.* Co., 200 Mass. 459, 86 N. E. 890; Folks *v.* Burletson, 177 Mich. 6, 142 N. W. 1120; Superior D. Co. *v.* Carpenter, 150 Mich. 262, 114 N. W. 67; Heffernan *v.* Whittlsey (Minn.), 148 N. W. 63; Meux *v.* Haller (Mo. App.), 162 S. W. 688; Mather *v* Lumb. Co., 173 Mo. App. 239, 158 S. W. 729; McCloud *v.* Tel. Co., 170 Mo. App. 624, 157 S. W. 101; Griswold *v.* Haas, 145 Mo. App. 578, 122 S. W. 781; Handlan *v.* Miller, 143 Mo. App. 101, 122 S. W. 751; Warner *v.* Sohn, 86 Neb. 519, 125 N. W. 1072; Fitzgerald *v.* Kimball, 76 Neb. 236, 107 N. W. 227; Clough *v.* L. & P. Co., 75 N. H. 84, 71 A. 223; Nicholas *v.* Oram, 77 N. J. L. 220, 71 A. 54; Yoshimi *v.* Co., 78 N. J. L. 281, 73 A. 45; Ryle *v.* Assn., 74 N. J. L. 840, 67 A. 87; Standard O. Co. *v.* Linol Co., 75 N. J. L. 294, 68 A. 174; Tiernan *v.* Havens, 147 N. Y. S. 786; Joseph *v.* Platt, 130 App. Div. 478, 114 N. Y. S. 1065; Gieger *v.* Levin, 110 N. Y. S. 203; Traver *v.* Murphy, 134 App. Div. 987, 119 N. Y. S. 1147; Steuerwald *v.* Jackson, 123 App. Div. 569, 108 N. Y. S. 41; Weltman *v.* Kotlar, 124 App. Div. 494, 108 N. Y. S. 952; Sanford *v.* Fountain, 49 Misc. 301, 99 N. Y. S. 234; Rounseville *v.* Paulson, 19 N. D. 466, 126 N. W. 221; Whitcomb *v.* Oller (Okla.), 137 P. 709; Markham *v.* Loveland (Or.), 138 P. 483; Kroll *v.* City, 240 Pa. 131, 87 A. 592; Monast *v.* Ins. Co., 35 R. I. 294, 86 A. 728; Seneca Co. *v.* Crenshaw, 89 S. C. 470, 71 S. E. 1081; Woodward *v.* Cave, 79 S. C. 578, 61 S. E. 82; Case Threshing Mach. Co. *v.* Gidley, 28 S. D. 101, 132 N. W. 711; Kohlberg *v.* Awbrey & Semple (Tex. Civ.), 167 S. W. 828; Lange *v.* Sales Co. (Tex. Civ.), 166 S. W. 900; Pray-Robinson, etc. Mills *v.* Walker (Tex. Civ.), 165 S. W 107; Sargent *v.* Barnes (Tex. Civ.), 159 S. W. 366; Sullivan & Co. *v.* Ramsey (Tex. Civ.), 155 S. W. 580; Missouri, etc. R. Co. *v.* Brown (Tex. Civ.), 155 S. W. 979; Sackville *v.* Storey (Tex. Civ.), 149 S. W. 239; Cannel Coal Co. *v.* Luna (Tex. Civ.), 144 S. W. 721; Stringfellow *v.* Brazelton (Tex. Civ.), 142 S. W. 937; Gulf, etc. R. Co. *v.* Cunningham, 51 Tex. Civ. 368, 113 S. W. 767; Sullivan *v.* Fant, 51 Tex. Civ. 6, 110 S. W. 507; Surbaugh *v.* Butterfield (Utah), 140 P. 757; Cronquist *v.* Smith (Utah), 133 P. 130; Witherow *v.* Mystic Toilers (Utah), 130 P. 58; Taplin *v.* Harris (Vt.), 90 A. 956; First Nat. Bk. *v.* Bertoli, 87 Vt. 297, 89 A. 359, Livingstone Mfg. Co. *v.* Rizzi Bros., 86 Vt. 419, 85 A. 912; Prouty *v.* Nichols, 82 Vt. 181, 72 A. 988; Lemcke *v.* Co., 78 Wash. 460, 139 P. 234; Merrill *v.* O'Bryan, 48 Wash. 415, 93 P. 917; S. *v.* Brew. Co. (W. Va.), 81 S. E. 974; Somers *v.* Nat. Bk., 152 Wis. 210, 138

N. W. 713; Kellogg L. & M. Co. *v.* Co., 140 Wis. 341, 122 N. W. 737.

See Gervais *v.* McCarthy, 35 Can. Sup. 14; Smith *v.* Raines (Okla.), 130 P. 133.

Competent as a circumstance with other evidence. Watkins *v.* R. Co., 97 S. C. 148, 81 S. E. 426.

If part of res gestae, admissible.—Lowden *v.* Wilson, 233 Ill. 340, 84 N. E. 245.

Rule relaxed in application to corporations. Smith *v.* Pullman Co., 138 Mo. App. 238, 119 S. W. 1072, *cit.* Pullman Co. *v.* Nelson, 22 Tex. Civ. 223, 54 S. W. 624.

Principal bound by written declaration of agent introduced by himself. Lillian R. Co. *v.* Erdurm, 120 N. Y. S. 749.

18-53 Grant Bros. *v.* U. S., 232 U. S. 647, 34 Sup. Ct. 452, 58 L. ed. 776; Chicago, etc. R. Co. *v.* Bk., 174 Fed. 923, 98 C. C. A. 535; Latham *v.* Bk., 92 Ark. 315, 122 S. W. 992; Western I. Co. *v.* Bank, 23 Colo. App. 143, 128 P. 476; Martin *v.* Johnson, 54 Fla. 487, 44 S. 949; Sonnenschein *v.* Malter, 144 Ill. App. 183; Elev. S. D. Co. *v.* Iron Wks., 153 Ill. App. 313; Louisville & N. R. Co. *v.* Byrley, 152 Ky. 35, 153 S. W. 36; Wilson *v.* Kelso, 115 Md. 162, 80 A. 895; Ennis *v.* Wright (Mass.), 104 N. E. 430; Fitzgerald *v.* Kimball, 76 Neb. 236, 107 N. W. 227; Ryle *v.* Assn., 74 N. J. L. 840, 67 A. 87; Sutton *v.* Lyons, 156 N. C. 3, 72 S. E. 4; Spande *v.* Indemnity Co., 61 Or. 220, 117 P. 973; Smith *v.* R. Co., 89 S. C. 415, 71 S. E. 989.

See Taplin *v.* Harris (Vt.), 90 A. 956.

Declarations of agent not competent in behalf of principal to show agent acted outside the scope of his authority. Whimster *v.* Holmes, 177 Mo. App. 130, 164 S. W. 236.

18-54 Payton *v.* Mills Co., 28 Ky. L. R. 1303, 91 S. W. 719.

Declarations as to past transactions inadmissible. Wade *v.* Co., 65 Or. 488, 132 P. 710.

19-55 Olson *v.* Bk., 78 Kan. 592, 96 P. 853. *Contra* unless authority first shown by other than own testimony. Fee *v.* Exp. Co., supra.

19-56 Kamm *v.* Rees, 177 Fed. 14, 100 C. C. A. 432; Miller-B. L. Co. *v.* Stewart, 166 Ala. 657, 51 S. 943; Childress *v.* H. Co., 162 Ala. 371, 50 S. 322; Eagle I. Co. *v.* Baugh, 147 Ala. 613, 41 S. 663; Brown *v.* Spencer, 163 Cal. 589, 126 P. 493; Kelley *v.* Assn., 2 Cal. App. 460, 84 P. 321; Burnell *v.* Morrison, 46 Colo. 533, 105 P. 876; Mulford *v.* Rowland, 45 Colo. 172, 100 P. 603; White S. M. Co. *v.* Horkan, 7 Ga. App. 283, 66 S. E. 811; Ham *v.* Brown, 2 Ga. App. 71, 58 S. E. 316, Olson *v.* Bk., 78 Kan. 592, 96 P. 853; Webster *v.* Moore, 108 Md. 572, 71 A. 466; Folks *v.* Burletson, 177 Mich. 6, 142 N. W. 1120; Sills *v.* Burge, 141 Mo. App. 148, 124 S. W. 665; Clough *v.* Co., 75 N. H. 84, 71 A. 223; Mullen *v.* Quinlan, 195 N. Y. 109, 87 N. E. 1078; Faris *v.* Co., 84 S. C. 102, 65 S. E. 1017; Missouri, etc. R. Co. *v.* Brown (Tex. Civ.), 155 S. W. 979; Autrey *v.* Linn (Tex. Civ.), 138 S. W. 197; Gilliland *v.* Ellison (Tex. Civ.), 137 S. W. 168; Chicago, etc. R. Co. *v.* Clements, 53 Tex. Civ. 143, 115 S. W. 664; Gulf, etc. R. Co. *v.* Cunningham, 51 Tex. Civ. 308, 113 S. W. 767; Missouri V. B. & L. Co. *v.* Ballard (Tex. Civ.), 116 S. W. 93; Sullivan *v.* Fant (Tex. Civ.), 110 S. W. 507; Lemcke *v.* Co., 78 Wash. 160, 139 P. 234; Henderson *v.* Coleman, 19 Wyo. 183, 115 P. 439, rehear. *denied*, 115 P. 1136.

See Gambill *v.* Fuqua, 148 Ala. 448, 42 S. 735; Carey *v.* Wolff, 72 N. J. L. 510, 63 A. 270; Witherow *v.* Mystic Toilers (Utah), 130 P. 58.

19-57 Cohn & G. L. Co. *v.* Robbins, 159 Ala. 289, 48 S. 853; Reddick *v.* Young, 177 Ind. 632, 98 N. E. 813; Levi *v.* R. Co., 157 Mo. App. 536, 138 S. W. 699.

Declarations to past transactions of principal competent to show what caused other party to pursue course and upon what he relied. Kamm *v.* Rees, 177 Fed. 14, 100 C. C. A. 432.

19-58 Western I. Co. *v.* Bank, 23 Colo. App. 143, 128 P. 476; Smith *v.* Johnson, 13 Ga. App. 837, 80 S. E. 1051.

Advertisement of alleged agent as dealer on own account, proved. Winslow *v.* Staton, 150 N. C. 264, 63 S. E. 950.

20-60 Jackson *v.* S., 2 Ala. App. 226, 57 S. 110.

20-61 Hill *v.* Pullman Co., 188 Fed. 497; Golden Cycle Min. Co. *v.* Min. Co., 188 Fed. 179; Chicago *v.* Cox, 145 Fed. 157, 76 C. C. A. 127; Schiffer *v.* Anderson, 146 Fed. 457, 76 C. C. A. 667; Nat. Bk. *v.* Schirm, 3 Cal. App. 696, 86 P. 981; Cable Co. *v.* Walker,

127 Ga. 65, 56 S. E. 108; So. Exp. Co. *v.* Cohen, 13 Ga. App. 174, 78 S. E. 1111; Hilbert *v.* R. Co., 20 Ida. 54, 116 P. 1116; Osgood *v.* Poole, 165 Ill. App. 63; Snyder *v.* Frank (Ind. App.), 101 N. E. 684; Cudahy P. Co. *v.* Hays, 74 Kan. 124, 85 P. 811; Nicola *v.* Hurst, 30 Ky. L. R. 851, 99 S. W. 917; Cecil P. Co. *v.* Nesbitt, 117 Md. 59, 83 A. 254; Westheimer *v.* Co., 195 Mass. 510, 81 N. E. 289; Stenson *v.* Lancaster (Mo. App.), 165 S. W. 1158; Parr *v.* Ins. Co. (Mo. App.), 165 S. W. 1152; Huse *v.* Co., 121 Mo. App. 89, 97 S. W. 990; Callahan *v.* R. Co., 47 Mont. 401, 133 P. 687; Beatty *v.* Ireland, 152 App. Div. 588, 137 N. Y. S. 456, Renard *v.* Grenthal, 145 N. Y. S. 947; Styles *v.* Mfg. Co., 164 N. C. 376, 80 S. E. 417; Robertson *v.* Lumb. Co., 165 N. C. 4, 80 S. E. 894; Gazzam *v.* Ins. Co., 155 N. C. 330, 71 S. E. 434; Younce *v.* Lumb. Co., 155 N. C. 239, 71 S. E. 329; Canham *v.* R. I. Co., 35 R. I. 177, 85 A. 1050; Louisville, etc. R. Co. *v.* Bohan, 116 Tenn. 271, 94 S. W. 84; Three States L. Co. *v.* Blanks, 118 Tenn. 627, 102 S. W. 79; Lange *v.* Sales Co. (Tex. Civ.), 166 S. W. 900; Am. L. Co. *v.* Belcher (Tex. Civ.), 152 S. W. 853; Western Union Tel. Co. *v.* Erwin (Tex. Civ.), 147 S. W. 607; Int. Sav. & Tr. Co. *v.* Hornsby (Tex. Civ.), 146 S. W. 960; Guitar *v.* McGee (Tex. Civ.), 139 S. W. 622; Austin *v.* Nuchols (Tex. Civ.), 94 S. W. 336 (also admissible as part of res gestae); Myers *v.* R. Co., 39 Utah 198, 116 P. 1119; Comeau *v.* Manuel & Sons Co., 84 Vt. 501, 80 A. 51; Blodgett *v.* Inglis, 63 Wash. 513, 115 P. 1043.

See Aetna I. Co. *v.* Co., 147 Fed. 95, 78 C. C. A. 262; Monogram H. Co. *v.* Thrower (Ala. App.), 65 S. 89; Beitman *v.* Glass Co. (Ala.), 64 S. 600; Arnold *v.* Adams, 4 Ga. App. 56, 60 S. E. 815; Hunt *v.* R. Co. (Ia.), 141 N. W. 334; Louisville & N. R. Co. *v.* Lee, 154 Ky. 226, 157 S. W. 60; Payton *v.* Mills Co., 28 Ky. L. R. 1303, 91 S. W. 719; Smith *v.* Ohler, 31 Ky. L R. 1275, 104 S. W. 995; Congregation *v.* Hathaway, 216 Mass. 539, 104 N. E. 379; P. *v.* Terwilliger, 59 Misc. 617, 110 N. Y. S. 1034; Brickell *v.* Co., 147 N. C. 118, 60 S. E. 905; Stroud *v.* Co., 79 S. C. 447, 60 S. E. 963; Sullivan *v.* Fant, 51 Tex. Civ. 6, 110 S. W. 507; Utah, etc. G. C. *v.* Gas Co. (Utah), 131 P. 1173; Horlick's M. & M. Co *v.* Spiegel Co., 155 Wis. 201, 144 N. W. 272; supra, "Admissions," 538-48, et seq.; supra, "Corporations," 631-4. But see International & G. N. R. Co. *v.* Carr (Tex. Civ.), 91 S. W. 858. *Comp.* Miller *v.* McKenzie, 126 Ga. 746, 55 S. E. 952; Ga. R. & E. Co. *v.* Harris, 1 Ga. App. 714, 57 S. E. 1076; Rice *v.* James, 193 Mass. 458, 79 N. E. 807; Gardner *v.* R. Co., 113 App. Div. 133, 98 N. Y. S. 1034; McKeige *v.* Carroll, 120 App Div. 521, 105 N. Y. S. 342; Ohly *v.* Mendham, 104 N. Y. S. 413.

Where principal denies authority of agent the burden of proof is on him to disprove the agency. O'Daniel *v* Streeby, 77 Wash. 414, 137 P. 1025.

A letter written by agent of railroad to general manager, stating the cause of a fire, is not admissible, though the letter was written in performance of his duty, unless the company adopted the statements and admissions as its own. Warner *v.* R. Co., 111 Me. 149, 88 A. 403.

The burden of proof is on party seeking to show admissions that they were made when the principal was bound by them. Noel Const. Co. *v.* Const. Co., 120 Md. 237, 87 A. 1049.

Declarations as to past transactions are inadmissible. Wade *v.* Co., 65 Or. 488, 132 P. 710.

Not admissible after his authority has ceased. Miller *v.* Ins. Co., 164 Ill. App. 237. See Barnes *v.* R. Co., 161 N. C. 581, 77 S. E. 855.

Preliminary proof of agency prerequisite to admission of declarations of agents. See vol. 9, p. 246, n. 43, and supplement thereto.

But there must be evidence of the authority of the agent to bind principal. Riviera R. Co. *v.* Henry, 144 N. Y. S. 790.

Admissions beyond the scope of agent's authority. Corn *v.* Bergman, 129 N. Y. S. 1049.

If one party refers another, on a disputed fact, to a third person, as authorized to answer for him, he is bound by what his referee answers upon the occasion as much as if the answer had been given by himself. Aldridge *v.* Ins. Co., 204 N. Y. 83, 97 N. E. 399.

Receipts given by agent admissible. Robinson *v.* Sresovich, 5 Haw. 618.

Fact of agency must be first established. Hill *v.* Barner, 8 Cal. App. 58, 96 P. 111; McDonough *v.* R. Co., 191 Mass. 509, 78 N. E. 141; Stengel *v.* Sergeant, 74 N. J. Eq. 20, 68 A. 1106;

Standard O. Co. v. Linol Co., 75 N. J. L. 294, 68 A. 174; Shesler v. Patton, 114 App. Div. 846, 100 N. Y. S. 286; Putnam v. Co., 191 N. Y. 166, 83 N. E. 789; Gulf, etc. R. Co. v. Batte (Tex. Civ.), 107 S. W. 632; Munson v. McGregor, 49 Wash. 276, 94 P. 1085.

Admission of fellow servant.—Cooper v. Co., 29 Ky. L. R. 1172, 96 S. W. 1100.

Foreman's statements.—See Stecher v. Steadman, 78 Ark. 381, 94 S. W. 41; Gray Tie Co. v. Clark, 30 Ky. L. R. 409, 98 S. W. 1000. See also Bundy v. Co., 149 Cal. 772, 87 P. 622; Gray L. Co. v. Harris, 127 Ga. 693, 56 S. E. 252.

Brakeman's statement.—St. Louis, etc. Co. v. Frazar, 43 Tex. Civ. 585, 97 S. W. 325.

Declarations outside issue, inadmissible. W. U. T. Co. v. Woodard, 84 Ark. 323, 105 S. W. 579.

Statements outside scope of duties, inadmissible. Trainor v. Schutz, 98 Minn. 213, 107 N. W. 812; Thompson v. Mfg. Co., 60 W. Va. 42, 53 S. E. 908. See Gould v. Gates, 147 Ala. 629, 41 S. 675.

Self-serving declarations. — Shelbyville W. Co. v. McDade, 29 Ky. L. R. 119, 92 S. W. 568.

20-62 John G. B. Co. v. Peterson, 130 Ia. 301, 106 N. W. 741; Payton v. W. M., 28 Ky. L. R. 1303, 91 S. W. 719; Griffin v. Co., 93 Miss. 477, 46 S. 946 (making or offering to make similar contracts). See Ga. R. & E. Co. v. Harris, 1 Ga. App. 714, 57 S. E. 1076; Fleishman v. Ballou, 131 Ill. App. 564.

Offer to sell goods to third party irrelevant to show unauthorization to buy. Savings Bk. v. Sprunt, 86 S. C. 8, 67 S. E. 955.

Principal may testify as to whether person claimed to be agent was such. Vaughan's S. Store v. Stringfellow, 56 Fla. 708, 48 S. 410. May testify to scope of agent's authority. Rosnaglo v. Armstrong, 17 Ida. 246, 105 P. 216.

20-63 Merrill v. Worthington, 155 Ala. 281, 46 S. 477; Silver Mt. M. Co. v. Anderson, 51 Colo. 298, 117 P. 173; Wales v. Mower, 44 Colo. 146, 96 P. 971; Colonial S. C. v. Larson, 47 Colo. 25, 105 P. 861; Arnold v. Adams, 4 Ga. App. 56, 60 S. E. 815; Ham v. Brown, 2 Ga. App. 71, 58 S. E. 316 (admissions as to husband's agency); Worsley v. Ayres, 144 Ia. 676, 123 N. W. 353 (writing held by agent though not exhibited to plaintiff); Horner v. Beasley, 105 Md. 193, 65 A. 824; Randall v. Fay, 158 Mich. 630, 123 N. W. 574; Burnes v. R. Co., 144 Mo. App. 71, 128 S. W. 236; Lowman v. Bk., 31 Nev. 306, 102 P. 967; Perry v. Co., 75 N. H. 199, 72 A. 369; Carroll v. Farley, 113 N. Y. S. 478; Beck v. Freund, 117 N. Y. S. 193; Mitchell v. Co., 19 N. D. 736, 124 N. W. 946; Armstrong v. Crump, 25 Okla. 452, 106 P. 855; Vaillancourt v. R. Co., 82 Vt. 416, 74 A. 99; Taplin v. Marcy, 81 Vt. 428, 71 A. 72.

Defendant may show, in answer to proof of particular acts of alleged agent, whom plaintiff failed to call as witness, nature of employment, by whom employed and scope of possible authority. Harris v. Co. (R. I.), 72 A. 392.

Person to whom agent is sent to principal may testify as to general scope of agent's authority. Brown v. R. Co., 83 S. C. 30, 64 S. E. 961.

Offering testimony to show revocation of authority presupposes existence. Bennett P. Co. v. Space, 130 App. Div. 281, 114 N. Y. S. 324.

Letters.—Gragg v. Ins. Co., 32 Ky. L. R. 988, 107 S. W. 321; Peycke v. Shinn, 76 Neb. 364, 107 N. W. 386; Ontario Bk. v. Loomis, 189 N. Y. 578, 82 N. E. 436.

21-64 Kellogg L. & M. Co. v. Co., 140 Wis. 341, 122 N. W. 737.

Private instructions given agent, not provable. Forrester D. L. Co. v. Evatt, 90 Ark. 301, 119 S. W. 282.

21-67 St. Louis, etc. R. Co. v. Sanders, 91 Ark. 153, 121 S. W. 337. Testimony of another agent who has charge of work by agent whose authority in issue and knows extent thereof, competent. Fee v. Co., 38 Pa. Super. 83.

21-68 Republic I. & S. Co. v. Passafume (Ala.), 61 S. 327; Bell v. S., 93 Ark. 600, 125 S. 1020; McCreery v. Morrison (Colo.), 105 P. 876; Broadstreet v. McKamey, 41 Ind. App. 272, 83 N. E. 773; Leonard v. Olmstead, 141 Ia. 485, 119 N. W. 973; Darrin v. Whittingham, 107 Md. 46, 68 A. 269; Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958; Greenbrier D. Co. v. Van Frank, 147 Mo. App. 204, 126 S. W. 222; Phillips v. Co., 129 Mo. App. 296, 107 S. W. 471; Young v. Anthony, 119 App. Div. 612, 104 N. Y. S. 87; Co-Op.

Cop. Co. *v.* Law, 65 Or. 250, 132 P. 521; Sargent *v.* Barnes (Tex. Civ.), 159 S. W. 366; Equitable L. Assur. Soc. *v.* Ellis (Tex. Civ.), 137 S. W. 184; Black L. Co. *v.* Co., 63 W. Va. 477, 60 S. E. 409; Bautz *v.* Adams, 131 Wis. 152, 111 N. W. 69.

Evidence of principal's acts after institution of suit to replevin hay is admissible to show son's acquiescence in contract by father claiming to act as son's agent. Cronk *v.* Mulvaney, 168 Mich. 346, 134 N. W. 9.

Fact of agency.—Cable Co. *v.* Walker, 127 Ga. 65, 56 S. E. 108. See Tate *v.* Aitken, 5 Cal. App. 505, 90 P. 836.

21-69 Union N. S. Co. *v.* Pugh, 156 Ala. 369, 47 S. 48 (payment of taxes for principal); Alabama S. Co. *v.* Dewey, 156 Ala. 530, 47 S. 55; Agee *v.* Ins. Co., 165 Ala. 291, 51 S. 829; Robinson *v.* Greene, 148 Ala. 434, 43 S. 797; Markley *v.* Co., 144 Ia. 105, 122 N. W. 136; Moyers *v.* Fogarty, 140 Ia. 701, 119 N. W. 159; Welch *v.* Corey, 201 Mass. 165, 87 N. E. 477; Rintamaki *v.* Co., 205 Mass. 115, 91 N. E. 220; Mullen *v.* Quinlan, 195 N. Y. 109, 87 N. E. 1078; Sariol *v.* McDonald, 127 App. Div. 648, 111 N. Y. S. 796; Hewitt *v.* Huffman, 55 Or. 57, 105 P. 98; Sullivan & Co. *v.* Ramsey (Tex. Civ.), 155 S. W. 580; Holbrook *v.* Quinlan & Co., 84 Vt. 411, 80 A. 339; McIntyre *v.* Smyth, 108 Va. 736, 62 S. E. 930; Northwest T. Co. *v.* Dahlgren, 50 Wash. 325, 97 P. 228. See Lord *v.* Smith, 109 Md. 42, 71 A. 430.

Railroad pass to foreman of bonder gang, good for him and "five men, bonders," is evidence of his authority to employ. Harris *v.* R. Co., 52 Wash. 298, 100 P. 841.

22-70 Heathcoat *v.* Co., 156 Ala. 339, 47 S. 139; Pease *v.* Fink, 3 Cal. App. 371, 85 P. 657; Rolfe *v.* Tufts, 216 Mass. 563, 104 N. E. 341; Cannel Coal Co. *v.* Luna (Tex. Civ.), 144 S. W. 721. See Rice *v.* James, 193 Mass. 458, 79 N. E. 807; Mathes *v.* Lumb. Co., 173 Mo. App. 239, 158 S. W. 729. Use of article by agent in principal's business not evidence that former bought it for latter. Seely Office A. Co. *v.* Co., 119 N. Y. S. 213.

23-71 Garden *v.* Holley, 157 Ala. 652, 47 S. 716; Henderson L. Co. *v.* Hinson, 157 Ala. 640, 47 S. 717; Alcorn *v.* Gieseke, 158 Cal. 396, 111 P. 98; Murphy *v.* W. H. & F. W. Cane, 82 N. J. L. 557, 82 A. 854; Fretwell *v.* Carter, 83 S. C. 553, 65 S. E. 829. See Board *v.* Co., 198 U. S. 424; McIntyre *v.* Smyth, 108 Va. 736, 62 S. E. 930.

An affidavit made by agent in verification of an answer by insurer is evidence of his authority. Thompson *v.* Ins. Co. (Ind. App.), 105 N. E. 780.

What a witness saw an agent do is evidence of the scope of his authority. Beaucage *v.* Mercer, 206 Mass. 492, 92 N. E. 774.

24-72 Nat. Life & Acc. Ins. Co. *v.* Lokey, 166 Ala. 174, 52 S. 45; Murphy *v.* Co., 150 Ala. 143, 43 S. 212; Noble *v.* Burney, 124 Ga. 960, 53 S. E. 463; Germain Co. *v.* Bank (Ga. App.), 80 S. E. 302; P. *v.* Zito, 237 Ill. 434, 86 N. E. 1041; Broadstreet *v.* McKamey, 41 Ind. App. 272, 83 N. E. 773; McCloud *v.* Tel. Co., 170 Mo. App. 624, 157 S. W. 101; Norden *v.* Duke, 113 App. Div. 99, 99 N. Y. S. 30; Nat. Bk. *v.* Co., 223 Pa. 328, 72 A. 794; Brennan *v.* Dansby, 43 Tex. Civ. 7, 95 S. W. 700. See vol. 11, p. 784, n. 25, and supplement thereto.

24-73 In re Perry & W. Co., 172 Fed. 745; Haas Lumb. Co. *v.* Harty Bros., 169 Ill. App. 323; Moyers *v* Fogarty, 140 Ia. 701, 119 N. W. 159; Hawkins *v.* Windhorse, 77 Kan. 674, 96 P. 48; Rintamaki *v.* Co., 205 Mass. 115, 91 N. E. 220; Smith *v.* Co., 138 Mo. App. 238, 119 S. W. 1072; Brian *v.* R. Co., 40 Mont. 109, 105 P. 489; Lilley *v.* Co., 127 App. Div. 310, 111 N. Y. S. 559; Gieger *v.* Levin, 113 N. Y. S. 1016; U. S. F. & G. Co. *v.* Shirk, 20 Okla. 576, 95 P. 218; St. Louis, etc. R. Co. *v.* Boshear, 102 Tex. 76, 113 S. W. 6; Bowman *v.* Bank, 115 Va. 463, 80 S. E. 95. *Comp.* Wierman *v.* Co., 142 Mich. 422, 106 N. W. 75.

Fact orders for goods sent by alleged agent filled not evidence he was authorized to bind person claimed to be principal by acceptance of order unusual as to terms. Harris *v.* Co. (R. I.), 72 A. 392.

25-74 Seely Office A. Co. *v.* Co., 119 N. Y. S. 213.

25-75 Elliott *v.* Bankston (Ala.), 45 S. 173; Pease *v.* Fink, 3 Cal. App. 371, 85 P. 657; Jordan *v.* Co., 1 Boyce (Del.) 107, 75 A. 1014; Ham *v.* Brown, 2 Ga. App. 71, 58 S. E. 316; Collins *v.* Crews, 3 Ga. App. 238, 59 S. E. 727.

26-76 See vol. 11, p. 785, n. 26, and supplement thereto.

26-77 Pastetts *v.* Hollman, 2 Phil. Isl. 235; Smith *v.* R. Co., 84 S. C. 167, 65 S. E. 1029; Blowers *v.* R. Co., 74 S. C. 221, 54 S. E. 368; Staats *v.* Assn., 55 Wash. 51, 104 P. 185; Fielder *v.* Co., 63 W. Va. 459, 60 S. E. 402.

26-79 Alabama S. Co. *v.* Dewy, 156 Ala. 530, 47 S. 55; Wales *v.* Mower, 44 Colo. 146, 96 P. 971; Chicago, etc. R. Co. *v.* Clements, 53 Tex. Civ. 143, 115 S. W. 664; Iona W. Co. *v.* Van Buren, 50 Wash. 375, 97 P. 291.

26-80 See Anderson *v.* Patten (Ia.), 137 N. W. 1050.

27-81 Evidence of general custom of other agents of principals engaged in same business incompetent as against defendant's rules. Taylor *v.* R. Co., 108 Va. 817, 62 S. E. 798.

27-82 Thompson *v.* Mfg. Co., 60 W. Va. 42, 53 S. E. 908.

28-83 McGraw *v.* O'Neil, 123 Mo. App. 691, 101 S. W. 132. *Contra*, Moyers *v.* Fogarty, 140 Ia. 701, 119 N. W. 159, witness may testify for whom alleged agent working at given time. See supra, "Expert and Opinion Evidence," 699-7.

Conclusion, such as usually involved in general knowledge of public as to identity of corporate agents, admissible and presumptive proof of agency. Markley *v.* Co., 144 Ia. 105, 122 N. W. 136.

Conclusion may not be erroneous if stated as introductory to testimony, and error in receiving cured by later testimony. Vaughan's S. Store *v.* Stringfellow, 56 Fla. 708, 48 S. 110.

28-84 W. U. T. Co. *v.* Heathcoat, 149 Ala. 623, 43 S. 117; Kimball B. Co. *v.* Fitzgerald, 82 Neb. 805, 118 N. W. 1076; Powers *v.* Knights, etc., 146 N. Y. S. 193; Sackett P. B. Co. *v.* Co., 66 Misc. 158, 121 N. Y. S. 238. See Weaver-Dowdy Co. *v.* Fritz (Ark.), 160 S. W. 1085. *Comp.* Fritz *v.* Co., 136 Ia. 699, 114 N. W. 193; Rice *v.* James, 193 Mass. 458, 79 N. E. 807; Waco M. & E. Co. *v.* Co., 49 Tex. Civ. 426, 109 S. W. 224. See supra, 12-41.

28-85 Augusta N. S. Co. *v.* Forlaw, 133 Ga. 138, 65 S. E. 370· Keane *v.* Co., 17 Ida. 179, 105 P. 60; Rumble *v.* Cummings, 52 Or. 203, 95 P. 1111. *Comp.* Gould *v.* Co., 147 Ala. 629, 41 S. 675. See Mullen *v.* Thaxton, 24 Okla. 643, 104 P. 359, witness may testify alleged agent cancelled contract for him.

Vice-president of corporation, familiar with business in question, and acts of manager, may testify to capacity in which latter acted and authority Sariol *v.* McDonald, 127 App. Div. 648, 111 N. Y. S. 796.

29-86 Pesso *v.* Pink, 3 Cal. App. 371, 85 P. 657; Winslow *v.* Staton, 1 N. C. 264, 63 S. E. 950. See Loy *v.* McClure, 124 Mo. App. 689, 101 S. W. 1148.

Witness may testify he invariably received orders from alleged agent. Alabama S. Co. *v.* Dewy, 156 Ala. 530, 47 S. 55.

29-87 Mulford *v.* Bowland, 45 Colo. 172, 100 P. 663.

29-89 Bush Grocery Co. *v.* Conely, 61 Fla. 131, 55 S. 867; Levis *v.* Car Co., 202 N. Y. 402, 95 N. E. 815, rev. 115 N. Y. S. 1128; Minneapolis Thresh. Mach. Co. *v.* Humphrey (Okla.), 117 P. 203; Campbell *v.* Prieto (Tex. Civ.), 143 S. W. 668; Garlick *v.* Marley, 147 Wis. 397, 132 N. W. 601. See Lillian R. Co. *v.* Erdurm, 129 N. Y. S. 749; Southwestern T. & T. Co. *v.* Owens (Tex. Civ.), 116 S. W. 89.

A person to whom goods are consigned to be sold, and who is at liberty to sell them at any price and on any terms he pleases, he paying a fixed price to the owner, is not an agent, but a vendee. Jackson *v.* S., 2 Ala. App. 226, 57 S. 110.

Evidence sufficient.—Coles *v.* Bk., 131 N. Y. S. 1000. See Spencer Lumb. Co. *v.* Marsh, 99 Ark. 358, 138 S. W. 479; Ladenberg *v.* Co., 83 Ark. 440, 104 S. W. 145; Brockman, etc. Co. *v.* Pound, 77 Ark. 364, 91 S. W. 184; Brady *v.* Co., 7 Cal. App. 182, 94 P. 85; Curry *v.* King, 6 Cal. App. 368, 92 P. 602. McDonald *v.* Kingsbury, 16 Cal. App. 234, 116 P. 380; Silver Mt. M. Co. *v.* Anderson, 51 Colo. 238, 117 P. 173; Cripple Creek *v.* Marshall, 41 Colo. 126, 91 P. 1103; Bailey *v.* Co., 1 Ga. App. 398, 58 S. E. 121; Pa. Elev. & S. Co. *v.* Fosnotte, 48 Ind. App. 106, 95 N. E. 586; Peru Heating Co. *v.* Lenhart, 43 Ind. App. 319, 95 N. E. 680; Sanford *v.* Co., 7 Ind. Ty. 580, 104 S. W. 846; Allison *v.* Cash, 142 Ky. 679, 137 S. W. 245; S. *v.* Dickson, 213 Mo. 66, 111 S. W. 817; Montgomery *v.* Hamilton, 205 Mo. 138, 103 S. W. 527; Ry. *v.* Co., 127 Mo. App. 480, 105 S. W. 1100; Fitzgerald *v.* Kimball, 76 [illegible] 236, 107 N. W. 227; Howard *v.* Co., 77 Neb. 116, 108 N. W. 178; Dunn *v.* Currie (Tex. Civ.), 121 S. W. [illegible] Vt. M. Co. *v.* Mead, 85 Vt. 29, 80 A. 872; Grout *v.* Moulton, 79 Vt. [illegible]

A. 453; Adams C. Merc. Co. *v.* Live S. Co., 64 Wash. 285, 116 P. 669; Hein *v.* Mildebrandt, 134 Wis. 582, 115 N. W. 121; Bleser *v.* Stedl, 135 Wis. 124, 115 N. W. 337; Abrohams *v.* Freres, 129 Wis. 235, 107 N. W. 656.

Evidence insufficient.—Naughton *v.* Exchange, 49 Misc. 227, 97 N. Y. S. 387; Bender *v.* Co., 101 N. Y. S. 75; Miller *v.* Harris, 117 App. Div. 395, 102 N. Y. S. 604. See Hackney *v.* Perry, 152 Ala. 626, 44 S. 1029; Hunt *v.* Johnson, 7 Ind. Ty. 575, 104 S. W. 841; Hensley *v.* McDonald, 32 Ky. L. R. 1333, 108 S. W. 362; Plummer *v.* Knight, 156 Mo. App. 321, 137 S. W. 1019; Loy *v.* McClure, 124 Mo. App. 689, 101 S. W. 1148; Stengel *v.* Sergeant, 74 N. J. Eq. 20, 68 A. 1106; Gieger *v.* Levin, 110 N. Y. S. 203; Miller *v.* Harris, 125 App. Div. 922, 110 N. Y. S. 1138, 117 App. Div. 395, 102 N. Y. S. 604; Watkins, etc. Co. *v.* Campbell, 100 Tex. 542, 101 S. W. 1078; Vallentine *v.* Carter, 49 Wash. 141, 94 P. 932; Steele *v.* Lawyer, 47 Wash. 266, 91 P. 958.

Relationship of parties sufficient. Gieger *v.* Levin, 110 N. Y. S. 203.

30-90 Sariol *v.* McDonald, 127 App. Div. 648, 111 N. Y. S. 796.

31-91 *Contra*, Abrams *v.* Turkel, 114 N. Y. S. 174. See Dennis *v.* S., 85 Ark. 252, 107 S. W. 994.

31-92 Strader's Admr. *v.* Mfg. Co., 146 Ky. 580, 142 S. W. 1073.

31-93 Hewitt *v.* Huffman, 55 Or. 57, 105 P. 98, taking note in favor of third party, not conclusive.

Assent of principal must be shown. Wales-Riggs Plantation *v.* Dye, 105 Ark. 446, 151 S. W. 998.

"**From the natural improbability** that one should voluntarily, without authority, assume to act for another, settling his obligations for a considerable length of time, and from the fact that such conduct would naturally come to be known by the assumed principal, the fact of agency may be presumed." Russell *v.* Ins. Co. (Miss.), 63 S. 644.

Presumptive case established by such evidence as against corporation in charge of whose office alleged agent is. Markley *v.* Co., 144 Ia. 105, 122 N. W. 136.

31-94 Alabama, etc. Co. *v.* Rice (Ala.), 65 S. 402; Long-L. H. Co. *v.* Ewing (Ala. App.), 62 S. 341; Brown *v.* Spencer, 163 Cal. 589, 126 P. 493; Markley *v.* Co., 144 Ia. 105, 122 N. W. 136; Strader's Admr. *v.* Mfg. Co., 146 Ky. 580, 142 S. W. 1073; Pritchard *v.* R. Co., 216 Mass. 221, 103 N. E. 692. See Robinson *v.* Geyer, 107 Ark. 322, 155 S. W. 118; Everdell *v.* Carrington, 154 App. Div. 500, 139 N. Y. S. 119; Seattle S. Co. *v.* Packard, 43 Wash. 527, 86 P. 845.

But not in the absence of such knowledge or consent. Phila., etc. R. Co. *v.* Crawford, 112 Md. 508, 77 A. 278.

32-98 Mich. Mut., etc. Ins. Co. *v.* Parker, 10 Ga. App. 697, 73 S. E. 1096.

Evidence held to show that an agent had no authority to enter into an agreement of arbitration. Heard *v.* Clegg (Tex. Civ.), 144 S. W. 1145.

32-99 Jones *v.* Richards, 50 Misc. 645, 98 N. Y. S. 698.

32-1 See Galbraith *v.* Weber, 58 Wash. 132, 107 P. 1050.

33-3 Jackson *v.* S., 2 Ala. App. 226, 57 S. 110; Ellison *v.* Flint, 43 Ind. App. 276, 87 N. E. 38; Pine *v.* Mangus, 76 Neb. 83, 107 N. W. 222; Northwest T. Co. *v.* Dahlgren, 50 Wash. 325, 97 P. 228.

Non-possession of securities by agent when payment made not decisive agency and authority but evidential. Campbell *v.* Gowans, 35 Utah 268, 100 P. 397, discussing cases pro and con.

33-4 Herman *v.* Leland, 80 Misc. 598, 142 N. Y. S. 664; Sanford *v.* Fountain, 49 Misc. 301, 99 N. Y. S. 234; Purkey *v.* Harding, 23 S. D. 632, 123 N. W. 69; Lightfoot *v.* Horst (Tex. Civ.), 122 S. W. 606; Harvester Co. *v.* Campbell (Tex. Civ.), 96 S. W. 93; Skirvin *v.* O'Brien, 43 Tex. Civ. 1, 95 S. W. 696; (evidence insufficient). See infra, "Ratification," 612-4.

Evidence sufficient.—Spencer Lumb. Co. *v.* Marsh, 99 Ark. 358, 138 S. W. 479; Union Trust & R. Co. *v.* Best, 160 Cal. 263, 116 P. 737; Tate *v.* Aitken, 5 Cal. App. 505, 90 P. 836; Johnson *v.* Ogren, 102 Minn. 8, 112 N. W. 894.

Evidence insufficient.—Finkelstein *v.* Fabyik, 107 N. Y. S. 67; Rumble *v.* Cummings, 52 Or. 203, 95 P. 1111; Teagarden *v.* Patten, 48 Tex. Civ. 571, 107 S. W. 909; Vallentine *v.* Carter, 49 Wash. 141, 94 P. 932.

33-5 Hartwell *v.* Co., 78 Kan. 259, 97 P. 432; Keyes *v.* Co., 81 Vt. 420, 71 A. 201; Thompson *v.* Mfg. Co., 60 W. Va. 42, 53 S. E. 908. See Ilfeld *v.* Ziegler, 40 Colo. 401, 91 P. 825; Finch *v.* Gillespie, 122 App. Div. 858, 107 N.

Y. S. 418; Russell *v.* Co., 17 N. D. 248, 116 N. W. 611.

Repudiation must be prompt.—Fischer *v.* Co., 61 Misc. 66, 113 N. Y. S. 56; Standard L. Co. *v.* Ins. Co., 224 Pa. 186, 73 A. 192.

33-6 Black Lick L. Co. *v.* Co., 63 W. Va. 477, 60 S. E. 409.

33-7 Pease *v* Fink, 3 Cal. App. 371, 85 P. 657; Sill *v.* Pate, 230 Ill. 39, 82 N. E. 356; Welke *v.* Wackershauser, 143 Ia. 107, 120 N. W. 77; Steinman *v.* Co., 109 Md. 62, 71 A. 517; Groscup *v.* Downey, 105 Md. 273, 65 A. 930; Superior Drill Co. *v.* Carpenter, 150 Mich. 262, 114 N. W. 67; Dispatch P. Co. *v.* Bk., 115 Minn. 157, 132 N. W. 2; John Gund B. Co. *v.* Tourtelotte, 108 Minn. 71, 121 N. W. 417; Craver *v.* House, 138 Mo. App. 251, 120 S. W. 686; Carlson *v.* Co., 40 Mont. 434, 107 P. 419; Watt *v.* Davidson, 82 Neb. 712, 118 N. W. 562; Belcher *v.* Assn., 74 N. J. L. 833, 67 A. 399; Rumble *v.* Cummings, 52 Or. 203, 95 P. 1111; Lightfoot *v.* Horst (Tex. Civ.), 122 S. W. 606; Sterling *v.* Da Laune, 47 Tex. Civ. 470, 105 S. W. 1169; Suderman *v.* Rodgers, 47 Tex. Civ. 67, 104 S. W. 193; Wills *v.* R. Co., 41 Tex. Civ. 58, 92 S. W. 273; Thompson *v.* Mfg. Co., 60 W. Va. 42, 53 S. E. 908.

See Mims *v.* Brook, 3 Ga. App. 247, 59 S. E. 711; Goodyear *v.* Williams, 73 Kan. 192, 85 P. 300.

Knowledge of all details of transaction need not be shown to have come to principal. Moyers *v.* Fogarty, 140 Ia. 701, 119 N. W. 159.

33-8 See Russell *v.* Co., 17 N. D. 248, 116 N. W. 611.

33-9 Porter *v.* Bk., 143 Ia. 629, 120 N. W. 633; Kimball Co. *v.* G. & E. Co., 141 Ia. 632, 118 N. W. 891 (execution of agent's contract); De Laval S. Co. *v.* Sharpless, 142 Ia. 60, 120 N. W. 657; Owensboro W. Co. *v.* Wilson, 79 Kan. 633, 101 P. 4; Benton *v.* Stokes, 109 Md. 117, 71 A. 532; Athol S. Bk. *v.* Bennett, 203 Mass. 480, 89 N. E. 632 (by pleading); Rice *v.* R. Co., 195 Mass. 507, 81 N. E. 285; Hansen *v.* Rolison, 156 Mich. 83, 120 N. W. 574; Fischer *v.* Co., 61 Misc. 66, 113 N. Y. S. 56; Minn. T. Mach. Co. *v.* Humphrey (Okla.), 117 P. 203; U. S. F. & G. Co. *v.* Shirk, 20 Okla. 576, 95 P. 218; Schultheis *v.* Sellars, 223 Pa. 513, 72 A. 887; Laughlin *v.* Co., 83 S. C. 62, 64 S. E. 1010; St. Louis, etc. R. Co. *v.* Boshear, 102 Tex. 76, 113 S. W. 6 (action upon previous similar transactions of agent); Staats *v.* Assn., 55 Wash. 51, 104 P. 185. See Infra, "Ratification," 619-39.

Principal's conduct must be consistent only with hypothesis of approval. Ayer & L. T. Co. *v.* Young, 90 Ark. 104, 117 S. W. 1089.

Evidence insufficient.—Norden *v.* Duke, 113 App. Div. 99, 99 N. Y. S. 30; Suderman *v.* Rodgers, 47 Tex. Civ. 67, 104 S. W. 193.

34-10 Henderson L. Co. *v.* Hinson, 157 Ala. 640, 47 S. 717; Mutual A. A. Co. *v.* Beard, 59 Misc. 174, 110 N. Y. S. 416.

34-11 Haswell *v.* Standring, 152 Ia. 291, 132 N. W. 417; Fehrenbach, etc. Co. *v.* R. Co. (Mo. App.), 167 S. W. 631.

Trifling benefit received from agent's act may not constitute ratification. Saul *v.* Lapidus, 46 Colo. 538, 105 P. 863.

35-13 Lightfoot *v.* Horst (Tex. Civ.), 122 S. W. 606; Lemcke *v.* Co., 78 Wash. 460, 139 P. 234.

Parol evidence inadmissible to show ratification of execution of sealed writing though seal not required. Dalton B. Co. *v.* Wood, 7 Ga. App. 477, 67 S. E. 121.

35-16 Clark *v.* Talbott (W. Va.), 77 S. E. 523.

37-20 Rosenthal *v.* Co., 157 Fed. 83, 84 C. C. A. 587.

Evidence of conduct and statements of employer's auditor are admissible against principal in an action where defendant agent sets up counterclaim. Watkins Co. *v.* Moss (Ia.), 141 N. W. 497.

Evidence insufficient.—Hubbard *v.* Cook, 153 Fed. 774, 82 C. C. A. 538.

37-22 Hildreth *v.* Co., 32 Ky. L. R. 1212, 108 S. W. 275; Wilson *v.* Perlmat, 235 Pa. 412, 84 A. 404.

If agent claims a lien on moneys collected he has burden of showing it. Weber *v.* Werner, 122 N. Y. S. 945.

If debtor gives agent a note or something other than money in settlement of an obligation, the burden of proof is on debtor to show agent's authority or a ratification by the principal. West Pub. Co. *v.* Corbett, 165 Mo. App. 7, 145 S. W. 868.

Presumed non-existent notes collected by agent. Harding *v.* Harding, 132 Ky. 133, 116 S. W. 305.

37-23 Smith *v.* Courant Co., 22 N. D. 297, 136 N. W. 781.

37-24 Commissions presumed payable on delivery to principal of property. Welker *v.* Appleman, 44 Ind. App. 699, 90 N. E. 35.

37-25 See Harding *v.* Harding, 132 Ky. 133, 116 S. W. 305.

38-28 Bone *v.* Hayes, 154 Cal. 759, 99 P. 172; Oberfelder *v.* Mattingly (Ky.), 120 S. W. 352; Smith *v.* Hutton, 123 N. Y. S. 656.

Agent collecting principal sum due principal presumed collected interest. Olivieri *v.* Tomei, 1 P. R. Fed. 125.

38-29 Douglass *v.* Lougee, 147 Ia. 406, 123 N. W. 967; Wells *v.* Cochran, 84 Neb. 278, 120 N. W. 1123; Atkinson *v.* Heine, 134 App. Div. 406, 119 N. Y. S. 122 (excuse of cause for employer's rescission of contract).

39-31 Mahon *v.* Rankin, 54 Or. 328, 102 P. 608, important case.

Transactions between other parties proved to show bonus probably received by agent on sale of bonds. Bone *v.* Hayes, 154 Cal. 759, 99 P. 172.

In Nat. Produce Dist. Co. *v.* Growers' Assn., 10 Ga. App. 338, 73 S. E. 606, "the general theory of the plaintiff's case was that the defendants contracted to act as their sales agents and to aid them in the distribution of their melon crops, by directing them how and where to ship and sell most advantageously, and that they breached this contract by negligently advising them, so that they shipped the melons to places where, on account of market conditions, a fair price could not be obtained. Evidence that the melons could have been disposed of at the initial point for sums largely in excess of the price at which these sales agents sold them at the places to which they directed the melons to be shipped had some relevancy toward establishing the negligence thus charged by the plaintiffs against the defendants; and the court did not err in admitting the testimony."

39-33 Doggett *v.* Greene, 254 Ill. 134, 98 N. E. 219.

40-35 Reeder *v.* Epps (Ark.), 166 S. W. 747; Lowell *v.* Hessey, 46 Colo. 517, 105 P. 870; Geier *v.* Howells, 47 Colo. 345, 107 P. 255; Fox *v.* Ryan, 240 Ill. 391, 88 N. E. 974; Waiss *v.* Cannon, 146 Ill. App. 379; Hill *v.* Dakin (Ia.), 143 N. W. 821; Kramer *v.* Vaughan, 148 Ia. 721, 126 N. W. 817; Wenks *v.* Hazard, 149 Ia. 16, 127 N. W. 1099, *rev.* 121 N. W. 1058; Woods *v.* Lowe, 207 Mass. 1, 92 N. E. 772; O'Connell *v.* Casey, 206 Mass. 520, 92 N. E. 804; Russell *v.* Poor (Mo. App.), 119 S. W. 433; Sills *v.* Burge, 141 Mo. App. 148, 124 S. W. 605; Atkinson *v.* Heine, 134 App. Div. 406, 119 N. Y. S. 122; Swee *v.* Neumann, 123 N. Y. S. 776; Chenkin *v.* Lipman, 122 N. Y. S. 1083; Backer *v.* Ratkowsky, 122 N. Y. S. 225; Davis *v.* Jacobson, 115 N. Y. S. 133; Willard *v.* Ferguson, 125 App. Div. 868, 110 N. Y. S. 909; Cooper *v.* Lawrence, 110 N. Y. S. 238; Stark *v.* Cotton (R. I.), 82 A. 386; Meyer *v.* Burmeister, 29 S. D. 458, 136 N. W. 1126; English *v.* R. Co., 55 Tex. Civ. 137, 117 S. W. 996; Cooper *v.* Upton, 65 W. Va. 401, 64 S. E. 527.

Agency must be established by a preponderance of evidence. Martin *v.* S. (Ida.), 134 P. 532.

Employment is basis.—Miller *v.* Realty Co., 123 N. Y. S. 837.

Fair preponderance required.—Moloney *v.* Brennan, 123 N. Y. S. 375.

40-36 In re Breon Lumb. Co., 181 Fed. 909; Fox *v.* Cohen, 34 App. Cas. (D. C.) 389; Windsor *v.* Coal Co., 147 Ill. App. 451.

Defendant may prove that another agent, to whom a commission was paid, was the actual procuring cause of the sale. Cameron *v.* Powers, 63 Fla. 108, 57 S. 888; Gerhardt R. E. Co. *v.* E. Co., 144 Mo. App. 620, 129 S. W. 419.

If defendant claims abandonment of the agency he has the burden. McFarland *v.* Boucher, 153 Ia. 716, 134 N. W. 91.

40-37 Maxwell *v.* Ins. Co., 206 Mass. 197, 92 N. E. 42.

In an action for commissions for selling real estate, to show that plaintiff was not the procuring cause of the sale, defendant may show that some other agent was the procuring cause. Gerhardt R. E. Co. *v.* R. E. Co., 144 Mo. App. 620, 129 S. W. 419. But the fact that he has paid a commission to such other party is inadmissible. Stephenson *v.* Jackson (Tex. Civ.), 128 S. W. 1196.

In an action for commissions, a commission certificate issued by the principal to its agents is admissible to show the defendant's construction of the contract and its recognition of plaintiff's procurement. Woods & Woods *v.* Mach. Co., 155 Ia. 177, 135 N. W. 399.

Carrying out contract made by agent,

convincing proof entitled to compensation. Cooper *v.* Upton, 65 W. Va. 401, 64 S. E. 527.

As to abandonment of employment of broker to sell land competent to show terms of offer received after alleged abandonment. Bailey *v.* Smith, 103 Ala. 641, 15 S. 900; Young *v.* Hubbard, 154 Mich. 218, 117 N. W. 632.

40-38 Prouty *v.* Perry, 142 Ia. 294, 120 N. W. 722.

In action of indebitatus assumpsit canceled contract admissible. Breen *v.* Roy, 8 Cal. App. 475, 97 P. 170.

If contract void because not in writing, proof of value of services inadmissible. Nelson *v.* Webster, 83 Neb. 169, 119 N. W. 256.

40-40 Fleming *v.* Wells, 45 Colo 255, 101 P. 66 (not conclusive); Geiger *v.* Kiser, 47 Colo. 297, 107 P. 267; Knight *v.* Knight, 142 Ill. App. 62; Hess *v.* Hayes, 146 Ia. 620, 125 N. W. 671; Maxwell *v.* Ins. Co., 206 Mass. 197, 92 N. E. 42; Cronk *v.* Mulvaney, 168 Mich. 346, 134 N. W. 9; Toland *v.* Williams & Wiley (Tex. Civ.), 129 S. W. 392.

And an instruction making such payment dependent on expectation to pay is objectionable. Toland *v.* Williams & Wiley (Tex. Civ.), 129 S. W. 392.

Deeds inadmissible to show price at which land sold and quantity of it, as between principal and agent. Hall *v.* Assn., 53 Tex. Civ. 592, 116 S. W. 831.

41-43 A broker's conversations with a prospective purchaser are competent in his behalf to show what was done by him. Saunders *v.* Thut (Tex. Civ.), 165 S. W. 553.

41-45 Orders taken for goods, admissible in agent's favor. Schaefer *v.* Whitman, 146 Ia. 64, 124 N. W. 763.

Continuance of agent's efforts to sell property after receipt of letters purporting to revoke authority shown, and facts efforts were successful. Benton *v.* Brown, 145 Ia. 604, 124 N. W. 815.

41-47 Sherman *v.* Dwight, 123 N. Y. S. 89.

42-49 Macke *v.* Camps, 7 Phil. Isl. 553.

The president may act through the heads of the different departments and it will be presumed that the acts of a head of a department were those of president. Northern P. R. Co. *v.* Mitchell, 208 Fed. 469.

42-50 Gerloff *v.* Carleton, 121 N. Y. S. 338.

42-51 *Comp.* Macke *v.* Camps, 7 Phil. Isl. 553.

42-54 Clark *v.* Talbott (W. Va.), 77 S. E. 523.

43-57 Acts and conduct of alleged agent may show agency as against heirs though no formal appointment. Hudson *v.* Herman, 81 Kan. 927, 107 P. 35.

43-58 Clear and explicit evidence of intention to substitute or add personal liability of known agent for or to that of principal required. Gerloff *v.* Carleton, 121 N. Y. S. 338. And if one is agent of a foreign corporation which has not complied with the laws of the state it will be presumed that contracts made by him are made in his individual capacity. Boynton *v.* Brannan (Ark.), 136 S. W. 979.

43-61 Representations by agent that he was agent shown by others than him from whom money embezzled. Morse *v.* C., 129 Ky. 294, 111 S. W. 714.

PRINCIPAL AND SURETY

Parol proof to show consent to alterations, 53-25; *Parol proof to show wrongful delivery*, 53-32; *Term of obligation*, 75-45.

48-1 Fidelity & D. Co. *v.* S. Co., 153 Ky. 74, 117 S. W. 308; Betts *v.* Surety Co., 117 Minn. 70, 134 N. W. 506; McCloud *v.* Surety Co., 87 N. J. L. 572, 83 A. 908.

Evidence sufficient.—Williams *v.* Morris, 99 Ark. 319, 138 S. W. 464.

Evidence insufficient.—Hubbard *v.* Reilly, 51 Ind. App. 19, 98 N. E. 886; Grayson County Nat. Bk. *v.* Wan Delohr (Tex.), 146 S. W. 1182.

48-2 Barrett-H. Co. *v.* Glas, 9 Cal. App. 491, 99 P. 536. *Contra*, State Bk. *v.* Tel. Co., 123 Minn. 314, 143 N. W. 912.

49-6 Sinclair *v.* Co., 132 Ia. 549, 107 N. W. 184; Berge's Admr. *v.* Iverside, 156 Ky. 131, 160 S. W. 934; Dine *v.* Donnelly, 134 Ky. 778, 121 S. W. 685 (non-official acts of officer); Mdse. Bk. *v.* Richmond, 237 Mo. 702, 142 S. W. 352; Fancher *v.* Kazens, 18 O. Dec. 804. See Title G. & S. Co. *v.* Schmidt, 215 Fed. 199 (C. C. A.); Riehl *v.* Austin, 155 App. Div. 207, 140 N. Y. S. 217.

Burden of proof is on plaintiff to prove execution and delivery of bond. Am.

Surety Co. *v.* Pangburn (Ind.), 105 N. E. 769.

A presumption of a misappropriation by administrator arises from his failure to account after order. Upon proof of the removed administrator's failure to account, plaintiff established, prima facie, such misappropriation; and it was upon the defendant surety to plead and prove that its principal duly applied and administered the money of the estate received by him. Fassbender *v.* Surety Co., 66 Misc. 6, 122 N. Y. S. 442.

49-7 Wilkinson *v.* McKimmie, 36 App. Cas. (D. C.) 336; Farmers' Bk. *v.* Wickliffe, 134 Ky. 627, 121 S. W. 498; State Bk. *v.* Tel. Co., 123 Minn. 314, 143 N. W. 912; Bandler *v.* Bradley, 110 Minn. 66, 124 N. W. 644; Patrode *v.* Deschenes, 15 N. D. 100, 106 N. W. 573; Reakirt *v.* Besuden, 3 O. N. P. (N. S.) 646.

49-8 General B. & C. Ins. Co. *v.* School Dist. (Tex. Civ.), 156 S. W. 1161; McKenzie *v.* Barrett, 43 Tex. Civ. 451, 98 S. W. 229.

50-11 Crosby *v.* Woodbury, 37 Colo. 1, 89 P. 34; Ferguson *v.* Henderson, 89 S. C. 146, 71 S. E. 831.

50-12 Crosby *v.* Woodbury, supra.

51-13 Ultra vires.—Corporation must sustain contention of ultra vires. Baglin *v.* Co., 166 Fed. 356.

Payment.—Surety must show payment or discharge of principal before recovery from him can be had. Vermeule *v.* Co., 105 Me. 350, 74 A. 800.

51-14 Alexander *v.* Blackburn, 178 Ind. 66, 98 N. E. 711.

51-15 Brady *v.* Brady, 110 Md. 656, 73 A. 567, referring to text.

Where petition avers that defendant's relation to the instrument in question was that of surety, "in order to overcome the presumption arising on the face of the instrument that appellee signed it as surety, it was incumbent on him not only to allege and prove that he signed the contract as an attesting witness, but also that his failure to indicate on the instrument that such is his relation thereto was caused by the fraud of appellant or his own mistake." Green *v.* May, 148 Ky. 783, 147 S. W. 428.

51-18 S. *v.* O'Neill, 114 Mo. App. 611, 90 S. W. 410.

52-19 Payment by surety for principal, presumed requested by latter. Blanchard *v.* Blanchard, 61 Misc. 497, 113 N. Y. S. 882.

52-20 Daviess Co. Bk. *v.* Wright, 33 Ky. L. R. 457, 110 S. W. 361.

Presumed sureties of public administrator know property accountable for. Newman *v.* Flowers, 134 Ky. 557, 121 S. W. 652.

53-25 Doyle *v.* Nesting, 37 Colo. 522, 88 P. 862; McGuire *v.* Gerstley, 26 App. Cas. (D. C.) 193, 204 U. S. 489; Kerr *v.* Holder, 13 Ga. App. 9, 78 S. E. 682; Farmers' Bk. *v.* Wickliffe, 131 Ky. 787, 116 S. W. 249; Jones *v.* Short, 53 Or. 525, 101 P. 209; Fambro *v.* Keith, 57 Tex. Civ. 302, 122 S. W. 40.

Parol proof to show consent to alterations. S. *v.* Baird, 13 Ida. 126, 89 P. 298.

53-32 Parol proof to show wrongful delivery. School Dist. *v.* Lapping, 100 Minn. 139, 110 N. W. 849.

54-34 Gibson *v.* Wallace, 147 Ala. 322, 41 S. 960 (wife may show by parol she signed as surety); Kinderman *v.* Hersch, 53 Colo. 561, 129 P. 228; Bishop *v.* Bank, 13 Ga. App. 38, 78 S. E. 947; Maril *v.* Boswell, 12 Ga. App. 41, 76 S. E. 773; Hart *v.* Bk., 32 Ky. L. R. 338, 105 S. W. 934; S. *v.* Causey, 93 S. C. 300, 76 S. E. 707; Shepherd *v.* Mott (Tex. Civ.), 166 S. W. 128; Fidelity & D. Co. *v.* Trust Co. (Tex. Civ.), 161 S. W. 45; Erwin *v.* P. Co. (Tex. Civ.), 156 S. W. 1097. See Cent. B. & T. Co. *v.* Hill (Tex. Civ.), 160 S. W. 1099.

Surety may be shown to be principal. Daugherty *v.* Wiles (Tex. Civ.), 156 S. W. 1089.

Apparent joint maker.—First Nat. Bk. *v.* Dutcher, 128 Ia. 413, 104 N. W. 497; Jennings *v.* Moore, 189 Mass. 197, 75 N. E. 214.

55-35 Rogers *v.* Hagel, 147 Ky. 333, 144 S. W. 49.

Suretyship relations may be established by circumstantial evidence. Bishop *v.* Bank, 13 Ga. App. 38, 78 S. E. 947.

55-36 Fullerton L. Co. *v.* Snouffer, 139 Ia. 176, 117 N. W. 50; Shea *v.* Vahey, 215 Mass. 80, 102 N. E. 119; Kaufman *v.* Barbour, 98 Minn. 158, 107 N. W. 1128; Noble *v.* Beeman Co., 65 Or. 93, 131 P. 1006.

55-37 See Gate C. N. Bk. *v.* Chick, 170 Mo. App. 343, 156 S. W. 743.

55-38 Dale *v.* Christian, 140 Ga. 790, 79 S. E. 1127; Western Bk. *v.* Gibbs (Tex. Civ.), 96 S. W. 947.

55-39 Collins *v.* Gray, 3 Cal. App.

723, 86 P. 983; Windhorst *v.* Bergendahl, 21 S. D. 218, 111 N. W. 544.

57-41 See Union Pac. T. Co. *v.* Dick, 87 Conn. 711, 89 A. 204.

No presumption that a bond was delivered conditionally that all obligors named should sign as sureties. Husak *v.* Clifford, 179 Ind. 173, 102 N. E. 466.

57-42 Federal Union Surety Co. *v.* Mfg. Co., 176 Ind. 328, 95 N. E. 1104; Gt. W. L. Assur. Co. *v.* Shumway (N. D.), 141 N. W. 479; Star Grocery Co *v.* Bradford, 70 W. Va. 496, 74 S. E 509. See Cohen *v.* Hurwitz, 142 N. Y. S. 305.

Return by administrator.—Bailey *v.* McAlpin, 122 Ga. 616, 50 S. E. 388.

58-43 Dixie F. Ins. Co. *v.* B. Co., 162 N. C. 384, 78 S. E. 430.

58-44 Chappell *v.* John, 45 Colo. 45, 99 P. 44; Atlas S. Co. *v.* Bloom, 209 Mass. 563, 95 N. E. 952; Dixie F. Ins. Co. *v.* B. Co., 162 N. C. 384, 78 S. E. 430; Ball C. Co. *v.* Humphrey (Tex. Civ.), 154 S. W. 595; Opet *v.* Denzer (Tex. Civ.), 93 S. W. 527.

59-45 Bailey *v.* McAlpin, 122 Ga. 616, 50 S. E. 388.

59-46 Star Grocery Co. *v.* Bradford, 70 W. Va. 496, 74 S. E. 509.

59-49 Kuhl *v.* Chamberlain, 140 Ia. 546, 118 N. W. 776; Am. S. Co. *v.* Gaskill's Admr., 85 Vt. 358, 82 A. 218; Brillion L. Co. *v.* Barnard, 131 Wis. 284, 111 N. W. 483.

County treasurer's books admissible against sureties of depositary of county funds, regardless of whether they would be so as between private persons. Sawyer *v.* Stilson, 146 Ia. 707, 125 N. W. 822.

60-51 P. *v.* Surety Co., 156 Ill. App. 488.

61-54 Statement in sheriff's return. Phillips *v.* Eggert, 133 Wis. 318, 113 N. W. 686.

61-57 Cicero *v.* Grisko, 144 Ill. App. 564.

Conclusive on sureties filing bill for relief from false report of principal. Cowden *v.* Trustees, 235 Ill. 604, 85 N. E. 924.

63-62 United, etc. F. Co. *v.* Adams Co. (Miss.), 63 S. 192.

63-68 Chapman *v.* Pendleton, 26 R. I. 573, 59 A. 928.

64-72 Plea of guilty. Paducah *v.* Jones, 31 Ky. L. R. 1203, 104 S. W. 971.

Bond to dissolve foreign attachment. "The bond in the case at bar is not an official bond, or a bond of indemnity, or a bond to insure the faithful performance of duty, or to secure a proper accounting by persons acting in fiduciary relations, and therefore the rule in this class of cases, that a judgment against the principal is conclusive against his sureties as to his misconduct, and failure to properly account, has no controlling force here. In the class of cases referred to the surety submits himself to the acts of his principal as a legal consequence of his suretyship because, as the courts have said, it was the intention of the parties to the undertaking to assume this liability. This rule applies to bonds of administrators and guardians, bonds of assignees for benefit of creditors, official bonds, bonds of indemnity, and other bonds of like character." Com. *v.* Baxter & Co., 235 Pa. 179, 84 A. 136, cit. many earlier cases.

64-75 Henry *v.* Heldmaier, 226 Ill. 152, 80 N. E. 705; Beh *v.* Bay, 127 Ia 246, 103 N. W. 119.

65-76 Ingle *v.* Co., 89 Ark. 378, 117 S. W. 241.

67-89 Weaver *v.* Tuten, 138 Ga. 101, 74 S. E. 835; Sioli *v.* Hogesson, 19 N. D. 82, 122 N. W. 1008. See Johnson *v.* Huggins, 7 Ga. App. 553, 67 S. E. 247.

68-92 See Briggs *v.* Manning, 80 Ark. 304, 97 S. W. 289; Northrop Nat. Bk. *v.* Varner, 82 Kan. 691, 109 P. 704; S. *v.* Goggin, 191 Mo. 482, 90 S. W. 370.

69-1 Ruggles *v.* Bernstein, 188 Mass. 232, 74 N. E. 366.

70-11 See Ward *v.* Schlosser, 111 Md. 528, 75 A. 116.

70-12 Paducah *v.* Jones, 31 Ky. L. R. 1203, 104 S. W. 971.

71-16 Stevens *v.* Carroll, 131 Ia 170, 105 N. W. 673 (official bond); Thompson *v.* Chaffee, 39 Tex. Civ. 587, 89 S. W. 285.

71-18 See Comstock *v.* Keating, 115 Mo. App. 372, 91 S. W. 416.

74-36 Surety company may offer books kept by bookkeeper whose fidelity it has guaranteed to show character of examination thereof by officers of bank in connection with statements made to secure renewals of bond. Nat. Bk. *v.* Co., 223 Pa. 328, 72 A. 704.

74-37 Statute of frauds not applicable; extension shown by circumstantial evidence. Bandler *v.* Bradley, 110 Minn. 66, 124 N. W. 644.

75-40 Fullerton L. Co. *v.* Snouffer, 139 Ia. 176, 117 N. W. 50. See Cooper W. & B. Co. *v.* Torbert, 86 Neb. 143, 124 N. W. 1134.

75-45 Kirkwood *v.* Byrne (Mo. App.), 125 S. W. 810.

Damages resulting from cancellation of contract shown by substituted contract of like tenor and effect. U. S. *v.* Co., 177 Fed. 321, 100 C. C. A. 651.

Ratification of acts of principal obligor in loaning funds of obligee to himself shown by demanding of and receiving from him securities executed. Catholic University *v.* Morse, 32 App. Cas. (D. C.) 195.

Term of obligation.—If bond silent as to time covered, custom of obligee, as shown by by-laws and records, in fixing period of service of employe shown. Fancher *v.* Kaneen, 18 O. Dec. 834.

75-46 George *v.* Crim, 66 W. Va. 421, 66 S. E. 526.

76-49 George *v.* Crim, supra.

PRIVILEGED COMMUNICATIONS

Contractual relation unnecessary, 109-40; *testimony before grand jury,* 324-94.

97-2 Arizona R. Co. *v.* Clark, 207 Fed. 817, 125 C. C. A. 305; Maloney *v.* Cas. Co. (Ark.), 167 S. W. 845; Jones *v.* Caldwell, 23 Ida. 467, 130 P. 995; Cash *v.* Dennis (Ia.), 139 N. W. 920; Unterharnscheidt *v.* Ins. Co. (Ia.), 138 N. W. 459; Mass. etc. Ins. Co. *v.* Trustees (Mich.), 144 N. W. 538; Steketee *v.* Newkirk, 173 Mich. 222, 138 N. W. 1034; Krapp *v.* Ins. Co., 143 Mich. 369, 106 N. W. 1107; Kloppenburg *v.* R. Co., 123 Minn. 173, 143 N. W. 322; Freeburg *v.* S., 92 Neb. 346, 138 N. W. 143; Matter of Myer, 184 N. Y. 54, 76 N. E. 920, *rev.* 100 App. Div. 512, 91 N. Y. S. 1104; Cohodes *v.* Co., 149 Wis. 308, 135 N. W. 879.

97-3 All cases cited herein so far as 159-21 recognize rule except as otherwise stated.

98-4 Hays *v.* Hays, 49 Ind. App. 298, 97 N. E. 198; S. *v.* Long (Mo.), 165 S. W. 748; Thrasher *v.* S., 92 Neb. 110, 138 N. W. 120.

Common law rule in force.—Banigan *v.* Banigan, 26 R. I. 454, 59 A. 313.

98-5 Privilege extended to professional and registered nurses. Homnyack *v.* Ins. Co., 194 N. Y. 456, 87 N. E. 769.

99-10 Smith *v.* Co., 147 N. C. 62, 60 S. E. 717.

Financial condition of patient.—Smart *v.* Kansas City, 208 Mo. 162, 105 S. W. 709.

99-11 Olson *v.* Court, 100 Minn. 117, 110 N. W. 374.

100-13 Woods *v.* Town, 150 Ia. 433, 130 N. W. 372.

102-14 Davie *v.* Roland, 3 Ala. App. 567, 57 S. 1034; Indiana U. T. Co. *v.* Thomas, 44 Ind. App. 468, 88 N. E. 356; Dambmann *v.* R. Co., 55 Misc. 60, 106 N. Y. S. 221.

102-16 In re More, 153 Mich. 695, 117 N. W. 329.

105-23 S. *v.* Bennett, 137 Ia. 427, 110 N. W. 150.

106-24 Laurie Co. *v.* McCullough, 174 Ind. 477, 90 N. E. 1014.

106-26 Colorado, etc. R. Co. *v.* Fogelsong, 42 Colo. 341, 94 P. 356.

107-33 Indiana U. T. Co. *v.* Thomas, supra; Woods *v.* Lisbon, 138 Ia. 402, 116 N. W. 143, 16 L. R. A. (N. S.) 886.

Presence of patient's wife.—Murphy *v.* Board, 2 Cal. App. 468, 83 P. 577.

109-39 Triangle Lumb. Co. *v.* Acree (Ark.), 166 S. W. 958; Woods *v.* Lisbon, 138 Ia. 402, 116 N. W. 143, 16 L. R. A. (N. S.) 886; S. *v.* Winnett, 48 Wash. 93, 92 P. 904.

Physician calling upon patient to collect bill may testify to what he observed of latter's movements. Chlanda *v.* Co., 213 Mo. 244, 112 S. W. 249.

109-40 S. *v.* Winnett, 48 Wash. 93, 92 P. 904.

But express or implied contractual relation unnecessary—as where persons injured in wreck and taken to hospital are treated by physicians of the town, a professional capacity, for humane reasons alone. Epstein *v.* R. Co., 250 Mo. 1, 156 S. W. 699.

111-45 Assistants in hospital.—Smart *v.* Kansas City, 208 Mo. 162, 105 S. W. 709.

Physician in charge of hospital records. Smart *v.* Kansas City, supra. See 121-85, infra.

Physician accompanying another also disqualified under privilege. Mut., etc. Ins. Co. *v.* Owen (Ark.), 164 S. W. 720.

Treatment of patient non-essential. Beave *v.* Co., 212 Mo. 331, 111 S. W. 52.

111-46 Gray *v.* New York, 137 App. Div. 316, 122 N. Y. S. 118, response to call from hospital.

112-48 Lynch *v.* Ins. Co., 132 App. Div. 571, 116 N. Y. S. 998.

112-49 Union P. R. Co. *v.* Thomas, 152 Fed. 365, 81 C. C. A. 491; Colorado M. R. Co. *v.* McGarry, 41 Colo. 398, 92 P. 915.

113-52 S. *v.* Winnett, 48 Wash. 93, 92 P. 904.

114-58 Union P. R. Co. *v.* Thomas, 152 Fed. 365, 81 C. C. A. 491.

115-60 Physician in charge of defendant's hospital. McRae *v.* Erickson, 1 Cal. App. 326, 82 P. 209.

117-67 Blossi *v.* R. Co., 144 Ia. 697, 123 N. W. 360.

118-72 Blossi *v.* R. Co., supra; Green *v.* Assn., 211 Mo. 18, 109 S. W. 715; Obermeyer *v.* Co., 120 Mo. App. 59, 96 S. W. 673.

118-73 Hammel *v.* R. Co. (Ark.), 168 S. W. 144; Booren *v.* McWilliams, 26 N. D. 558, 145 N. W. 410.

118-74 Denaro *v.* Ins. Co., 154 App. Div. 840, 139 N. Y. S. 758; Booren *v.* McWilliams, 26 N. D. 558, 145 N. W. 410.

119-75 Knowledge gained after operation is privileged. Jones *v.* City, 23 Ida. 467, 130 P. 995.

119-77 Booren *v.* McWilliams, 26 N. D. 558, 145 N. W. 410.

119-78 Green *v.* Assn., supra.

120-79 Union P. R. Co. *v.* Thomas, 152 Fed. 365, 81 C. C. A. 491.

Statute liberally construed.—McRae *v.* Erickson, 1 Cal. App. 326, 82 P. 209.

120-80 Hays *v.* Hays, 49 Ind. App. 298, 97 N. E. 198.

Information acquired before or after relationship of physician is not privileged. Triangle Lumb. Co. *v.* Acree (Ark.), 166 S. W. 958.

121-83 Scott *v.* Smith, 171 Ind. 453, 85 N. E. 774.

121-84 Grand Lodge, etc. *v.* Daly, 31 O. C. C. 391.

121-85 In re Budan's Est., 156 Cal. 230, 104 P. 442; Prudential Ins. Co. *v.* Lear, 31 App. Cas. (D. C.) 184; S. *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634.

Admissibility of death certificates. Krapp *v.* Ins. Co., 143 Mich. 369, 106 N. W. 1107. See 111-45, supra.

122-88 Prudential Ins. Co. *v.* Lear, 31 App. Cas. (D. C.) 184.

123-90 In re Budan's Est., 156 Cal. 230, 104 P. 442; Long *v.* Co., 135 Ia. 398, 112 N. W. 550; In re Myer, 184 N. Y. 54, 76 N. E. 920.

123-93 Smith *v.* Co., 147 N. C. 62, 60 S. E. 717; Madsen *v.* L. Co., 36 Utah 528, 105 P. 709.

126-97 Bryant *v.* Woodmen, 86 Neb. 372, 125 N. W. 621.

Instructions privileged.—Marfia *v.* Co., 124 Minn. 466, 145 N. W. 385.

126-1 Thomas *v.* Byron Tp., 163 Mich. 593, 134 N. W. 1021.

128-12 See Beard *v.* R. Co., 143 N. C. 136, 55 S. E. 505.

129-15 Ossenkop *v.* S., 86 Neb. 539, 126 N. W. 72, though employed by accused.

130-18 Missouri P. R. Co. *v.* Castle, 172 Fed. 841, 97 C. C. A. 124.

130-19 Gray *v.* New York, 137 App. Div. 316, 122 N. Y. S. 118; Benjamin *v.* Lake, 110 App. Div. 426, 97 N. Y. S. 512; Travis *v.* Haan, 119 App. Div. 138, 103 N. Y. S. 973; Smith *v.* Co., 147 N. C. 62, 60 S. E. 717; Madsen *v.* L. Co., 36 Utah 528, 105 P. 709.

131-22 Mental competency. Boyle *v.* Robinson, 129 Wis. 567, 109 N. W. 623.

132-24 Anderson *v.* R. Co., 103 Minn. 184, 114 N. W. 744, *dist.* LeMere *v.* McHale, 30 Minn. 410, 15 N. W. 682.

133-27 Thrasher *v.* S., 92 Neb. 110, 138 N. W. 120; P. *v.* Brecht, 120 App. Div. 769, 105 N. Y. S. 430; S. *v.* Law, 150 Wis. 313, 136 N. W. 803.

135-30 In re Gray's Est., 88 Neb. 835, 130 N. W. 746.

136-31 Pence *v.* Myers (Ind.), 101 N. E. 716.

137-33 Hartley *v.* Calbreath, 127 Mo. App. 559, 106 S. W. 570.

138-34 Hartley *v.* Calbreath, supra.

138-38 In re Myer, 184 N. Y. 54, 76 N. E. 920.

138-40 Where waiver procured by fraud privilege may still be claimed Kloppenburg *v.* R. Co., 123 Minn. 173, 143 N. W. 322.

139-41 Metropolitan L. Ins. Co. *v.* Brubaker, 78 Kan. 146, 76 P. 62, 18 L. R. A. (N. S.) 362.

139-42 Nat. Annuity Assn. *v.* McCall, 103 Ark. 201, 146 S. W. 125; Studabaker *v.* Faylor, 52 Ind. App. 171, 98 N. E. 318; Laurie Co. *v.* McCullough, 174 Ind. 477, 90 N. E. 1014; S. *v.* Bennett, 137 Ia. 427, 110 N. W. 150; Wallace *v.* Wallace, 137 N. Y. S. 43; Terler *v.* Dare, 131 N. Y. S. 51.

139-44 Studabaker *v.* Faylor, 52 Ind. App. 171, 98 N. E. 318; Long *v.* Co., 135 Ia. 398, 112 N. W. 550; Olson *v.* Court, 100 Minn. 117, 110 N. W. 374;

Sovereign Camp *v.* Grandon, 64 Neb. 39, 89 N. W. 448; Parker *v.* Parker, 78 Neb. 535, 111 N. W. 119; Wallace *v.* Wallace, 137 N. Y. S. 43.

Administrator cannot waive.—Scott *v.* Smith (Ind. App.), 82 N. E. 556. Except in interest of estate. Scott *v.* Smith, 171 Ind. 453, 85 N. E. 774.

Forbidden to waive in certain cases.—Mulligan *v.* Sinski, 156 App. Div. 35, 140 N. Y. S. 835.

139-45 Wallace *v.* Wallace, 137 N. Y. S. 43.

140-46 Studabaker *v.* Faylor, 52 Ind. App. 171, 98 N. E. 318; Winters *v.* Winters, 102 Ia. 53, 71 N. W. 184, 63 Am. St. 428; Fish *v.* Poorman, 85 Kan. 237, 116 P. 898.

141-56 Thomas *v.* Byron Tp., 168 Mich. 593, 134 N. W. 1021.

142-59 Metropolitan L. Ins. Co. *v.* Brubaker, 78 Kan. 146, 76 P. 62, 18 L. R. A. (N. S.) 362; Modern Woodmen *v.* Angle, 127 Mo. App. 94, 104 S. W. 297

143-60 Wallace *v.* Wallace, 137 N. Y. S. 43. Stipulation waiving privilege should be signed by both party and attorney. Geis *v.* Geis, 116 App. Div. 362, 101 N. Y. S. 845, statute.

Statute requiring waiver at the trial. Clifford *v.* R. Co., 188 N. Y. 349, 80 N. E. 1094.

143-61 Pittsburgh, etc. R. Co. *v.* O'Connor, 171 Ind. 686, 85 N. E. 969; Elliott *v.* City, 198 Mo. 593, 96 S. W. 1023; Williams *v.* R. Co., 42 Wash. 597, 84 P. 1129.

144-63 Long *v.* Co., 135 Ia. 398, 110 N. W. 26; Elliott *v.* City, 198 Mo. 593, 96 S. W. 1023; O'Brien *v.* Co., 141 Mo. App. 331, 125 S. W. 804; Patnode *v.* Foote, 153 App. Div. 494, 138 N. Y. S. 221; Marquardt *v.* R. Co., 126 App. Div. 272, 110 N. Y. S. 657; Seaman *v.* Mott, 127 App. Div. 18, 110 N. Y. S. 1040. See Fidelity C. Co. *v.* Meyer, 106 Ark. 91, 152 S. W. 995, no waiver.

By calling one of two attending physicians.—Morris *v.* R. Co., 148 N. Y. 88, 42 N. E. 410.

144-64 Patnode *v.* Foote, 153 App. Div. 494, 138 N. Y. S. 221; Seaman *v.* Mott, 127 App. Div. 18, 110 N. Y. S. 1040 (treatment of disease).

145-67 S. *v.* Long (Mo.), 165 S. W. 748; Epstein *v.* R. Co., 250 Mo. 1, 156 S. W. 699; Oliver *v.* Aylor, 173 Mo. App. 323, 158 S. W. 733; O'Brien *v.* Co., 141 Mo. App. 331, 125 S. W. 804; Speck *v.* R. Co., 133 App. Div. 802, 118 N. Y. S. 71.

146-68 B. & O. R. Co. *v.* Morgan, 35 App. Cas. (D. C.) 195; Milligan *v.* Co., 137 App. Div. 383, 121 N. Y. S. 763.

146-69 Jones *v.* City, 20 Ida. 5, 116 P. 110; Slater *v.* Sorge, 166 Mich. 173, 131 N. W. 565.

Waiver as to principal physician does not include assistants. Epstein *v.* R. Co., 143 Mo. App. 135, 122 S. W. 366.

147-70 Nolan *v.* Glynn (Ia.), 142 N. W. 1029; Reed *v.* Fuel Co. (Ia.), 141 N. W. 1056; S. *v.* Bennett, 137 Ia. 427, 110 N. W. 150; Oliver *v.* Aylor, 173 Mo. App. 323, 158 S. W. 733; City of Tulsa *v.* Wicker (Okla.), 141 P. 963; Fulsom, etc. Co. *v.* Mitchell, 37 Okla. 575, 132 P. 1103; Roeser *v.* Pease, 37 Okla. 222, 131 P. 534; Forrest *v.* L. & P. Co., 64 Or. 240, 129 P. 1048.

149-71 Hilary *v.* R. Co., 104 Minn. 432, 116 N. W. 933.

149-72 McAllister *v.* R. Co., 105 Minn. 1, 116 N. W. 917; Noelle *v.* Co., 47 Wash. 519, 92 P. 372 (two judges dissenting); Cohodes *v.* Co., 149 Wis. 308, 135 N. W. 879.

Detailed statement by plaintiff in action for malpractice or by others for him of condition and method of treatment waiver. Capron *v.* Douglass, 193 N. Y. 11, 85 N. E. 827.

149-73 McAllister *v.* R. Co., 105 Minn. 1, 116 N. W. 917.

150-75 Union P. R. Co. *v.* Thomas, 152 Fed. 365, 81 C. C. A. 491; Lauer *v.* Banning, 152 Ia. 99, 131 N. W. 783.

151-76 Mays *v.* Casualty Co., 40 App. Cas. (D. C.) 249, 46 L. R. A. (N. S.) 1108.

Where the defendant without objection answered questions of the prosecuting attorney upon cross-examination relating to treatment of defendant by his physician and the physician's opinion of his condition, he did not waive his privilege to object that the physician could not as a witness for the state testify to confidential communications between them. Larson *v.* S., 92 Neb. 24, 137 N. W. 894.

151-80 Nat. Annuity Assn. *v.* McCall, 103 Ark. 201, 146 S. W. 125.

152-86 Bringing action on account of physical ailment. Union P. R. Co. *v.* Thomas, 152 Fed. 365; Smart *v.* City, 208 Mo. 162, 105 S. W. 709.

153-87 Bryant *v.* Woodmen, 86 Neb. 372, 125 N. W. 621.

154-91 Studabaker *v.* Faylor, 52 Ind. App. 171, 98 N. E. 318; S. *v.* Long (Mo.), 165 S. W. 748; Patnode *v.* Foote,

153 App. Div. 494, 138 N. Y. S. 221.
Waiver irrevocable.—Lissak *v.* Crocker, 119 Cal. 442, 51 P. 688; Pittsburgh, etc. R. Co. *v.* O'Conner, 171 Ind. 656, 85 N. E. 969; Elliott *v.* City, 198 Mo. 593, 96 S. W. 1023; P. *v.* Bloom, 124 App. Div. 767, 109 N. Y. S. 344; Marquardt *v.* R. Co., 126 App. Div. 272, 110 N. Y. S. 657.
Consent withdrawn.—Ross *v.* R. Co., 101 Minn. 122, 111 N. W. 951.
Waiver by failing to object in civil action binding on party in criminal action involving different issue. P. *v.* Bloom, 193 N. Y. 1, 85 N. E. 824.

155-94 Struble *v.* Village, 89 Neb. 726, 132 N. W. 124; Marquardt *v.* R. Co., 126 App. Div 272, 110 N. Y. S. 657; Powers *v.* R. Co., 105 App. Div. 358 94 N. Y. S. 184.

156-98 General objection insufficient. Hammel *v.* R. Co. (Ark.), 168 S. W. 144.

156-99 Lindahl *v.* Court, 100 Minn. 87, 110 N. W. 358.

157-8 Mulligan *v.* Sinski, 156 App. Div. 35, 140 N. Y. S. 835; Booren *v.* McWilliams, 26 N. D. 558, 145 N. W. 410.

158-13 See Denaro *v.* Ins. Co., 154 App. Div. 840, 139 N. Y. S. 758.

159-20 Dambmann *v.* R. Co., 55 Misc. 60, 106 N. Y. S. 221; Jones *v.* R. Co., 3 N. Y. S. 253, 21 N. Y. St. 169, *aff.* without opinion, 121 N. Y. 683, 24 N. E. 1098.

159-21 Dambmann *v.* R. Co., supra.

160-22 Dambmann *v.* R. Co., 55 Misc. 60, 106 N. Y. S. 221.

160-24 See Madsen *v.* Co., 36 Utah 528, 105 P. 799.

161-28 Madsen *v.* Co., supra.

163-34 Rump *v.* Woods, 50 Ind. App. 347, 98 N. E. 369 (calling attention to fact that City of Warsaw *v.* Fisher, 24 Ind. App. 46, 55 N. E. 42, has been disapproved by William Laurie Co. *v.* McCullough, 174 Ind. 477, 90 N. E. 1014, 92 N. E. 337); Mortimer *v.* Daub, 52 Ind. App. 30, 98 N. E. 845.

164-38 "It is argued that legislation requiring physicians to file death certificates in a public office and to make report of certain accident cases to local registers of vital statistics is a legislative declaration that the secrecy, as formally enjoined by the provisions of section 4075, Stats., has been relaxed, and that the privilege thereof, in cases like the present one, should be more restricted than formerly. We perceive no basis for this claim." Columbus *v.* Co., 149 Wis. 308, 135 N. W. 879.

165-41 State Bk. of Clinton *v.* Barnett, 250 Ill. 312, 95 N. E. 178, rev. 151 Ill. App. 70; Patterson *v.* Bank (Ind. App.), 102 N. E. 880; Goff *v.* Murphy, 153 Ky. 634, 156 S. W. 95; Whitehead *v.* Kirk (Miss.), 61 S. 737; Wilke's Admr. *v.* Wilkes, 115 Va. 886, 80 S. E. 745.
Rule stated in text recognized by all cases cited herein to 200-59.

168-13 Ex parte Beville, 58 Fla. 170, 50 S. 685, *cit.* the text.

169-49 Harper *v.* Harper, 83 Kan. 761, 113 P. 300.

169-51 P. *v.* Bowen, 165 Mich. 231, 130 N. W. 706; Whitehead *v.* Kirk (Miss.), 61 S. 737; Hanor *v.* Housel 128 App. Div. 801, 113 N. Y. S. 163; Lurty *v.* Lurty, 107 Va. 466, 59 S. E. 405.

170-52 Privilege is personal to husband or wife. Luick *v.* Arends, 21 N. D. 614, 132 N. W. 353.

171-57 Oborn *v.* S., 143 Wis. 249, 126 N. W. 737.

171-58 Not applicable where living apart under articles of separation. Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40.

175-64 Short *v.* Thomas, 178 Mo. App. 400, 163 S. W. 252.
When husband and wife are alone everything said and done is presumed confidential and privileged. Whitehead *v.* Kirk (Miss.), 61 S. 737.

176-71 Jacobs *v.* U. S., 161 Fed. 694, 88 C. C. A. 554; Rudd *v.* Dewey, 139 Ia. 528, 116 N. W. 1062; Ellis *v.* Ellis (Ky.), 128 S. W. 1057; Cole *v.* S., 51 Tex. Cr. 89, 101 S. W. 218.

177-77 Stephens *v.* Collision, 256 Ill. 238, 99 N. E. 914; Donnan *v.* Donnan, 256 Ill. 244, 99 N. E. 921; Vernon *v.* Men's Assn. (Ia.), 138 N. W. 606; Pierson *v.* R. Co., 159 Mich. 110, 123 N. W. 576, of physical condition.

179-80 S. *v.* Bell, 212 Mo. 111, 111 S. W. 24.

180-85 Gant *v.* S., 55 Tex. Cr. 284, 116 S. W. 801.

180-86 S. *v.* Bell, 212 Mo. 111, 111 S. W. 24; C. *v.* Fisher, 221 Pa. 538, 70 A. 865 (letter dictated by husband); Lanham *v.* Lanham (Tex. Civ.), 146 S. W. 635; Hearne *v.* S., 50 Tex. Cr. 431, 97 S. W. 1070.
Letter written by third party to one spouse and handed by addressee to

other privileged. Wall *v.* Dimmet, 132 Ky. 747, 117 S. W. 299.

183-94 O'Toole *v.* Ins. Co., 150 Mich. 187, 123 N. W. 795; S. *v.* Wallace, 162 N. C. 622, 78 S. E. 1; S. *v.* Sysinger, 25 S. D. 110, 125 N. W. 879.

184-97 Connela *v.* Ty., 16 Okla. 365, 86 P. 72.

185-99 C. *v.* Fisher, 221 Pa. 538, 70 A. 865.

187-3 Lindahl *v.* Court, 100 Minn. 87, 110 N. W. 358.

188-10 S. *v.* Harness, 10 Ida. 18, 76 P. 788; Illinois L. Ins. Co. *v.* DeLang, 30 Ky. L. R. 753, 99 S. W. 616; Erickson *v.* Maccabees, 25 S. D. 183, 126 N. W. 259 (miscarriage).

189-11 Jacobs *v.* U. S., 161 Fed. 694, 88 C. C. A. 554; P. *v.* Loper, 159 Cal. 6, 112 P. 720.

189-13 S. *v.* Luper (Or.), 95 P. 811. **Acts by accused's wife.**—Gosselin *v.* King, 33 Can. Sup. 255.

190-15 Nortis *v.* Lee, 136 App. Div. 685, 121 N. Y. S. 512; Lurty *v.* Lurty, 107 Va. 466, 59 S. E. 405.

Written directions by husband to wife referring to business matters and not intended for her until after his death are not privileged and are admissible to prove suicide. Whitford *v.* Ins. Co., 163 N. C. 223, 79 S. E. 501.

191-19 Stevens *v.* Stevens (Mich.), 148 N. W. 229; First Nat. Bk. *v.* Hill (Tex. Civ.), 151 S. W. 652.

193-29 Whitehead *v.* Kirk (Miss.), 61 S. 737; First Nat. Bk. *v.* Hill (Tex. Civ.), 151 S. W. 652; Richards *v.* S., 55 Tex. Cr. 278, 116 S. W. 587.

194-32 Hostetter *v.* Green, 159 Ky. 611, 167 S. W. 919.

195-34 S. *v.* Laudisi (N. J.), 90 A. 1098.

196-37 Lynn *v.* State, 140 Ga. 387, 79 S. E. 29; Williams *v.* S., 139 Ga. 591, 77 S. E. 818; C. *v.* Everson, 29 Ky. L. R. 760, 96 S. W. 460.

196-43 Wetzel *v.* Firebaugh, 251 Ill. 190, 95 N. E. 1085; Wickes *v.* Walden, 228 Ill. 56, 81 N. E. 798; Pierson *v.* R. Co., 159 Mich. 110, 123 N. W. 576; Metzger *v.* Neighbors, 86 Neb. 61, 124 N. W. 913; Adkins *v.* Wright, 37 Okla. 771, 131 P. 686; Herron *v.* Rumley Co., 29 Okla. 317, 116 P. 952.

In action by son against his father's estate his mother may testify, deceased's interests having passed to others. In re Schaffner's Est. (Kan.), 141 P. 251.

198-44 McCord *v.* McCord, 140 Ga. 170, 78 S. E. 833.

199-51 See S. *v.* Perkins, 143 Ia. 55, 120 N. W. 62.

200-55 See Whittier *v.* Wenner (Neb.), 147 N. W. 460.

200-59 Jacobs *v.* U. S., 161 Fed. 694.

201-62 Abusive epithets held not communications. Meyer *v.* Meyer, 158 Mo. App. 299, 138 S. W. 70.

202-69 Hostetter *v.* Green, 159 Ky. 611, 167 S. W. 919.

203-72 Declarations of vendor's widow inadmissible to show fraudulent conveyance. Will *v.* Tornabells, 217 U. S. 47.

205-78 P. *v.* Swaile, 12 Cal. App. 192, 107 P. 134. See Cowser *v.* S. (Tex. Cr.), 157 S. W. 758. But see Pace *v.* S., 61 Tex. Cr. 436, 135 S. W. 379.

205-80 Ganus *v.* Tew, 163 Ala. 358, 50 S. 1000; Holmes *v.* Horn, 120 Ill. App. 359; S. *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634; Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40; Lowe *v.* Lowe, 111 Md. 113, 73 A. 878; P. *v.* Dahrooge, 173 Mich. 375, 139 N. W. 22; Gick *v.* Stumpf, 126 App. Div. 548, 110 N. Y. S. 712; Leistikow *v.* Zuelsdorf, 18 N. D. 511, 122 N. W. 340, *cit.* text; Pearson *v.* Yoder, 39 Okla. 105, 134 P. 421 (*quot.* 10 Encyc. of Ev. 205); Wortman *v.* S., 9 Okla. Cr. 440, 132 P. 358; Menefee *v.* S. (Tex. Cr.), 149 S. W. 138; Dyer *v.* McWhirter, 51 Tex. Civ. 200, 111 S. W. 1053, cases herein cited, to 330-31. See Hyman *v.* Grant (Tex. Civ.), 114 S. W. 853.

Inadmissible to contradict client's testimony. Hardin *v.* S., 51 Tex. Cr. 559, 103 S. W. 401.

208-86 In re Ruos, 159 Fed. 252; Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40; Lenahan *v.* Casey, 46 Mont. 367, 128 P. 601.

209-87 Ehrhardt *v.* Stevenson, 128 Mo. App. 476, 106 S. W. 1118; Evans *v.* S., 5 Okla. Cr. 643, 115 P. 809; S. *v.* Hoben, 36 Utah 186, 102 P. 1000; In re Young, 33 Utah 382, 94 P. 731.

Privilege continues after decease of client. Fox *v.* Spears, 78 Ark. 71, 93 S. W. 560.

211-3 S. *v.* Bell, 212 Mo. 111, 111 S. W. 24, wife of accused.

212-7 Leistikow *v.* Zuelsdorf, 18 N. D. 511, 122 N. W. 340, *cit.* the text.

213-8 Flood *v.* Bollmeier (Ia.), 138 N. W. 1102; Stoddard *v.* Kendall, 140 Ia. 688, 119 N. W. 138; Cerny *v.* Galla-

gher Co., 83 Neb. 88, 119 N. W. 14; In re Padelford, 21 Pa. C. C. 130.

214-10 In re Watson, 83 Neb. 211, 119 N. W. 451; S. *v.* Hoben, 36 Utah 186, 102 P. 1000.

214-14 Temple *v.* Phelps, 193 Mass. 297, 79 N. E. 482.

219-36 Allen *v.* Bollenbacher, 49 Ind. App. 589, 97 N. E. 817; S. *v.* Miller, 78 Wash. 268, 138 P. 896.

220-37 Coker *v.* Oliver, 4 Ga. App. 728, 62 S. E. 483.

221-40 Moyers *v.* Fogarty, 140 Ia. 701, 119 N. W. 159.

221-42 Lifschitz *v.* O'Brien, 143 App. Div. 180, 127 N. Y. S. 1091.

221-43 Mueller *v.* Batcheler, 131 Ia. 650, 109 N. W. 186.

222-44 S. *v.* Schumacher, 21 N. D. 591, 132 N. W. 143.

222-45 P. *v.* Enright, 256 Ill. 221, 99 N. E. 936; Moyers *v.* Fogarty, 140 Ia. 701, 119 N. W. 159; Lanasa *v.* S., 109 Md. 602, 71 A. 1058; Cogan *v.* Cogan, 202 Mass. 58, 88 N. E. 662; In re Huffman, 132 Mo. App. 44, 111 S. W. 848; Mackel *v.* Bartlett, 33 Mont. 123, 82 P. 795; O'Connor *v.* Padget, 82 Neb. 95, 116 N. W. 1131; Graham *v.* S. Wks., 129 N. Y. S. 323; In re Robinson, 140 App. Div. 329, 125 N. Y. S. 193; P. *v.* Freeman, 133 App. Div. 630, 118 N. Y. S. 199; Smart *v.* Lodge, 6 O. C. C. (N. S.) 15; Swayne *v.* Swayne, 19 Pa. Super. 160; S. *v.* Miller (Wash.), 141 P. 293.

223-47 McCoy *v.* McCoy (Ky.), 125 S. W. 177.

224-49 Jolls *v.* Keegan, 4 Penne. (Del.) 21, 55 A. 340; Cox *v.* Cline, 147 Ia. 353, 126 N. W. 330.

224-50 In re Huffman, 132 Mo. App. 44, 111 S. W. 848.

224-53 And so of attorney employed by prosecutor to assist. Pinson *v.* Campbell, 124 Mo. App. 260, 101 S. W. 621.

226-55 Prosecuting attorney. S. *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634.

227-59 S. *v.* Bell, 212 Mo. 111, 111 S. W. 24, attorney of accused husband considered wife's attorney.

228-67 Attorney's testimony. Mackel *v.* Bartlett, 33 Mont. 123, 82 P. 795.

228-68 Hanson *v.* Kline, 136 Ia. 101, 113 N. W. 504; Gulf, etc. R. Co. *v.* Gibson, 42 Tex. Civ. 306, 93 S. W. 469.

230-73 Seaboard A. L. R. *v.* Parker, 65 Fla. 543, 62 S. 589; Surface *v.* Bentz, 228 Pa. 610, 77 A. 922.

Termination of relation.—Hardy *v.* Martin, 149 Cal. 341, 89 P. 111.

231-74 Rinaldo *v.* Schaefer, 158 App. Div. 477, 143 N. Y. S. 611.

231-75 Hanson *v.* Kline, 136 Ia. 101, 113 N. W. 504; In re Young's Est., 59 Or. 348, 116 P. 95, rehear. *denied*, 116 P. 1060.

232-78 Hanson *v.* Kline, *supra*; In re Young's Est., *supra*; International, etc. R. Co. *v.* Duncan, 55 Tex. Civ. 440, 121 S. W. 362.

233-81 S. *v.* Stafford, 145 Ia. 285, 123 N. W. 167.

234-83 Stoddard *v.* Kendall, 140 Ia. 688, 119 N. W. 148; Smart *v.* Lodge, 6 O. C. C. (N. S.) 15; Sarro *v.* Bell (Tex. Civ.), 126 S. W. 24; Taplin *v.* Marcy, 81 Vt. 428, 71 A. 72.

235-89 Vittitow *v.* Barnett (Ark.), 165 S. W. 623; Model C. House *v.* Hirsch, 42 Ind. App. 270, 85 N. E. 719.

236-90 Provin *v.* Provin, 161 Mich. 28, 125 N. W. 743, affidavit.

237-94 Trenton St. R. Co. *v.* Lawlor, 71 N. J. Eq. 828, 71 A. 234.

237-95 Aaron *v.* U. S., 155 Fed. 833.

238-99 Yardley *v.* S., 50 Tex. Cr. 644, 100 S. W. 399.

239-8 Alpha R. Co. *v.* Randolph, 23 Colo. App. 69, 127 P. 247; Champion *v.* McCarthy, 228 Ill. 87, 81 N. E. 808; Kissack *v.* Bourke, 122 Ill. App. 340; Koogle *v.* Cline, 110 Md. 587, 73 A. 672; In re Fekler's Est., 126 App. Div. 199, 110 N. Y. S. 670; In re Simmons, 48 Misc. 484, 96 N. Y. S. 1104; S. *v.* Falsetta, 43 Wash. 159, 86 P. 168.

240-10 Gerety *v.* O'Sullivan, 9 Cal. App. 447, 99 P. 545; Furnace *v.* Archer, 130 Ia. 49, 106 N. W. 372; Reeter *v.* Powell, 120 La. 406, 45 S. 372; P. *v.* Andre, 153 Mich. 531, 117 N. W. 55; P. *v.* Farmer, 194 N. Y. 251, 87 N. E. 457; In re Fekler's Est., 126 App. Div. 199, 110 N. Y. S. 670; Smith *v.* Guerre (Tex. Civ.), 129 S. W. 417.

241-11 Under Minnesota statute. Hilary *v.* R. Co., 104 Minn. 432, 116 N. W. 933.

241-13 In re Cunnion's Will, 61 Misc. 546, 115 N. Y. S. 969, under recent amendment to statute.

242-15 Myers *v.* Brink, 130 N. Y. S. 910; Atlantic, etc. R. Co. *v.* R. Co., 147 N. C. 368, 61 S. E. 185.

242-16 In re Ross, 159 Fed. 252.

242-18 Communications by client to third person, not agent, not privileged though in attorney's possession. Ex parte Niday, 15 Ida. 559, 98 P. 845.

244-21 Maxwell *v.* Harper, 51 Wash. 351, 98 P. 756, intention of grantor as to delivery of deed.

Communications concerning personal matters.—Herrin *v.* Abbe, 55 Fla. 769, 46 S. 183, 18 L. R. A. (N. S.) 907.

245-25 In re Huffman, 132 Mo. App. 44, 111 S. W. 848.

247-31 Delger *v.* Jacobs, 19 Cal. App. 197, 125 P. 258; Potter *v.* Barringer, 236 Ill. 224, 86 N. E. 233; Champion *v.* McCarthy, 228 Ill. 87, 81 N. E. 808; Conklin *v.* Dougherty, 44 Ind. App. 570, 89 N. E. 893; Conway *v.* Rock, 139 Ia. 162, 117 N. W. 273; Mueller *v.* Batcheler, 131 Ia. 650, 109 N. W. 186; Carpenter *v.* Carpenter, 154 Mich. 100, 177 N. W. 598; O'Connor *v.* Padget, 82 Neb. 95, 116 N. W. 1131.

248-32 Gick *v.* Stumpf, 126 App. Div. 548, 110 N. Y. S. 712.

Statement of grantor to attorney drawing deed. Fox *v.* Spears, 78 Ark. 71, 93 S. W. 560.

249-33 P. *v.* Farmer, 194 N. Y. 251, 87 N. E. 457.

256-53 Lupton *v.* Underwood (Del.), 85 A. 965; Devich *v.* Dick, 177 Mich. 173, 143 N. W. 56.

257-61 Evans *v.* S., 5 Okla. Cr. 643, 115 P. 809.

261-76 In re Higgins' Est., 156 Cal. 257, 104 P. 6.

264-78 S. *v.* Loponio, 85 N. J. L. 357, 88 A. 1045.

265-81 Rylee *v.* Bk., 7 Ga. App. 489, 67 S. E. 383.

267-86 Missouri, etc. R. Co. *v.* Williams, 43 Tex. Civ. 549, 96 S. W. 1087.

268-94 McCune *v.* Scott, 18 Pa. Super. 263.

269-5 Jordan *v.* S. (Tex. Cr.), 143 S. W. 623.

271-12 Myers *v.* Kenyon, 7 Cal. App. 112, 93 P. 888; Bridgeport *v.* Co., 81 Conn. 84, 70 A. 650; Bankers, etc. Assn. *v.* Nachod, 120 App. Div. 732, 105 N. Y. S. 773; Pearson *v.* Yoder, 39 Okla. 105, 134 P. 421.

272-13 Grant *v.* U. S., 227 U. S. 74, 33 Sup. Ct. 190, 57 L. ed. 423; Pearson *v.* Yoder, 39 Okla. 105, 134 P. 421.

279-59 May be required to identify document witnessed. In re Ruos, 159 Fed. 252.

284-69 Warren *v.* Warren, 33 R. I. 71, 80 A. 593.

285-70 Kaufman *v.* U. S., 212 Fed. 613 (C. C. A.); So. Bitulithic Co. *v.* Hughston, 177 Ala. 559, 58 S. 450; Nixon *v.* Goodwin, 3 Cal. App. 358, 85 P. 169.

285-74 Rylee *v.* Bk., 7 Ga. App. 489, 67 S. E. 383.

285-75 Rylee *v.* Bank, supra.

285-76 That advice given shown by attorney. Nixon *v.* Goodwin, 3 Cal. App. 358, 85 P. 169.

286-77 Bischoff *v.* C., 29 Ky. L. R. 770, 96 S. W. 538.

287-79 Bell *v.* Staack, 159 Cal. 193, 115 P. 221; In re Jones, 6 Penne. (Del.) 463, 70 A. 15 (service on client). See Lenahan *v.* Casey, 46 Mont. 518, 128 P. 601.

287-80 Collins *v.* Hoffman, 62 Wash. 278, 113 P. 625.

287-81 Collins *v.* Hoffman, supra; Schwarz *v.* Robinson, 129 App. Div. 404, 113 N. Y. S. 995.

287-83 Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40; Markevich *v.* Ins. Co., 147 N. Y. S. 1004; Bohling *v.* Bronson, 130 App. Div. 895, 115 N. Y. S. 29; Schwarz *v.* Robinson, 129 App. Div. 404, 113 N. Y. S. 995; Richards *v.* Richards, 64 Misc. 285, 119 N. Y. S. 81 (notwithstanding promise to conceal the fact); O'Connor *v.* O'Connor, 62 Misc. 53, 115 N. Y. S. 965; In re Malcolm, 60 Misc. 324, 113 N. Y. S. 255, 129 App. Div. 226, 113 N. Y. S. 666.

288-87 Dukes *v.* Davis, 30 Ky. L. R. 1348, 101 S. W. 390.

288-89 Bronston *v.* Bronston, 141 Ky. 639, 133 S. W. 584; Temple *v.* Phelps, 193 Mass. 297, 79 N. E. 482; Steketee *v.* Newkirk, 173 Mich. 222, 138 N. W. 1034.

291-1 Where attorney's fidelity is attacked he may testify to defend his character. Smith *v.* Guerre (Tex. Civ.), 159 S. W. 417.

291-2 In re Ruos, 159 Fed. 252 (identification of paper); Hardy *v.* Martin, 150 Cal. 341, 89 P. 111; Boyle *v.* Robinson, 129 Wis. 567, 109 N. W. 623.

292-3 Strickland *v.* Mills, 74 S. C. 16, 54 S. E. 220.

293-4 Herrin *v.* Abbe, 55 Fla. 769, 46 S. 183.

294-11 Mitchell *v.* Bromberger, 2 Nev. 345, 100 Am. Dec. 550; Stern *v.* Daniel, 47 Wash. 96, 91 P. 552.

294-12 Allen *v.* Bollenbacher, 49 Ind. App. 589, 97 N. E. 817; Mueller *v.* Batcheler, 131 Ia. 650, 109 N. W. 186; Lenahan *v.* Casey, 46 Mont. 518, 128 P. 601; Leitch *v.* Nat. Bk., 234 Pa. 557,

83 A. 416; McCune *v.* Scott, 18 Pa. Super. 263; Swayne *v.* Swayne, 19 Pa. Super. 160; Kirchner *v.* Smith, 61 W. Va. 434, 58 S. E. 614.

In an action by an executor to recover bonds of deceased claimed by defendant, her husband, as a gift, it appeared that at the time the attorney went with defendant to the bank, "and when the bonds were transferred in his presence to box 158, the relation of attorney and client did not subsist between them. Afterwards he was employed as counsel for both deceased and defendant, and the transactions about which he testified were their joint business and the conversations took place in the presence of both. Under these circumstances he was a competent witness. Goodwin Gas Stove & Meter Company's Appeal, 117 Pa. 514, 12 Atl. 736, 2 Am. St. Rep. 696; Seip's Estate, 163 Pa. 423, 30 Atl. 226, 43 Am. St. Rep. 803; Hummel *v.* Kistner, 182 Pa. 216, 37 Atl. 815." Leitch *v.* Nat. Bk., 234 Pa. 557, 83 A. 416.

297-20 McCune *v.* Scott, 18 Pa. Super. 263; Swayne *v.* Swayne, 19 Pa. Super. 160; In re Young, 33 Utah 382, 94 P. 731; Kirchner *v.* Smith, 61 W. Va. 434, 58 S. E. 614.

298-23 Mahoney *v.* Healy (Del.), 91 A. 208; Ross *v.* Ross, 140 Ia. 51, 117 N. W. 1105; Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40; In re Loree's Est., 158 Mich. 372, 122 N. W. 623; Pierce *v.* Farrar (Tex. Civ.), 126 S. W. 932 (heirs also). See In re Veazey's Will, 80 N. J. Eq. 466, 85 A. 176.

Communications of relatives to attorney drawing will not privileged. In re Beck's Est. (Wash.), 140 P. 340.

Statement by client as to intention in matter independent of will prepared not privileged. Stoddard *v.* Kendall, 140 Ia. 688, 119 N. W. 138.

Rule extends to attorney's powers in nature of testamentary disposition of property. Bannon *v.* Co., 135 Ky. 556, 119 S. W. 1170

Contents of former will.—In re Young, 33 Utah 382, 94 P. 731.

299-24 In re Dominici, 151 Cal. 181, 90 P. 448 (construction of will); Doherty *v.* O'Callaghan, 157 Mass. 90, 31 N. E. 726, 34 Am. St. 258, 17 L. R. A. 188; Rintelen *v.* Schaefer, 152 App Div. 727, 137 N. Y. S. 527 (holding attorney cannot testify as to whether another gave him data).

300-25 In re Cunnion's Will, 201 N. Y. 123, 94 N. E. 648, held that the common law rules have been changed in New York by Code Civ. Proc. §§835, 836, and that a will having been lost, the attorney who drew it cannot be called to prove its contents, unless he was a subscribing witness thereto. The court cited Loder *v.* Whelpley, 111 N. Y. 239, 18 N. E. 874; Matter of Coleman, 111 N. Y. 220, 19 N. E. 71, and said the rule could only be changed by statute. See In re Carpenter's Will, 145 N. Y. S. 365; In re Seymour's Will, 76 Misc. 371, 136 N. Y. S. 942; In re Campbell's Will, 136 N. Y. S. 1086.

301-27 See Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40.

301-28 Delger *v.* Jacobs, 19 Cal. App. 197, 125 P. 258. *Contra*, In re Cunnion's Will, 135 App. Div. 864, 120 N. Y. S. 266, 61 Misc. 546, 115 N. Y. S. 969.

302-29 Draft of will, by attorney copied by stenographer, inadmissible. In re Cunnion's Will, supra.

302-30 In re Carpenter's Will, 145 N. Y. S. 365.

302-31 Such waiver is annulled by revoking will.—Mead *v.* Herdman, 61 App. Div. 177, 146 N. Y. Supp. 353.

303-33 Kaufman *v.* U. S., 212 Fed. 613 (C. C. A.); Lockhart *v.* Min. Co., 16 N. M. 223, 117 P. 833; Morris *v.* S., 6 Okla. Cr. 29, 115 P. 1030. See P. *v.* Farmer, 194 N. Y. 251, 87 N. E. 457.

Qualified threat in conversation between attorney and client, not privileged. Pearson *v.* S., 56 Tex. Cr. 607, 120 S. W. 1004.

306-42 Will *v.* Tornabells, 3 P. R. Fed. 125.

306-43 In re Watson, 83 Neb. 211, 119 N. W. 451; Stone *v.* Stitt, 56 Tex. Civ. 465, 121 S. W. 187.

307-47 Fraud found or testimony excluded. Will *v.* Tornabells, 217 U. S. 47.

308-50 Supplee *v.* Hall, 75 Conn. 17, 52 A. 407.

310-54 Kerr *v.* Kerr, 85 Kan. 460, 116 P. 880.

Client's mental condition.—Oliver *v.* Warren, 16 Cal. App. 164, 116 P. 312; Norton *v.* Clark, 253 Ill. 557, 97 N. E. 1079.

314-55 See Horlick's M. M. Co. *v.* Spiegel Co., 155 Wis. 201, 144 N. W. 272.

314-56 Seaboard Ry. Co. *v.* Parker, 65 Fla. 543, 62 S. 589.

Heir may assert privilege.—Smith *v.* Guerre (Tex. Civ.), 159 S. W. 417.

314-58 **Privilege does not apply** in suit after death of client where all parties claim under client. Mahoney *v.* Healy (Del.), 91 A. 208.

315-60 In re Trainer, 130 N. Y. S. 682.

316-63 Fearnley *v.* Fearnley, 44 Colo. 116, 98 P. 819; In re Burnette, 73 Kan. 609, 85 P. 575; In re Elliott, 73 Kan. 151, 84 P. 750; In re Whiting, 110 Me. 232, 85 A. 791.

316-64 S. *v.* Loponi, 85 N. J. L. 357, 88 A. 1045.

317-65 Holyoke *v.* Holyoke's Est., 110 Me. 469, 87 A. 40.

317-66 In re Greene, 102 Me. 455, 67 A. 317; Oldenberg *v.* Lieberg, 177 Mich. 150, 142 N. W. 1076.

317-69 *Contra*, Bannon *v.* P. Co., 135 Ky. 556, 119 S. W. 1170.

319-73 Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755.

319-75 Gick *v.* Stumpf, 126 App. Div. 548, 110 N. Y. S. 712. *Contra* if instrument not required witnessed. Gick *v.* Stumpf, supra.

320-78 In re Burnette, 73 Kan. 609, 85 P. 575; In re Elliott, 73 Kan. 151, 84 P. 750; Pinson *v.* Campbell, 124 Mo. App. 260, 101 S. W. 621; S. *v.* Hoben, 36 Utah 186, 102 P. 1000.

321-86 Ehrhardt *v.* Stevenson, 128 Mo. App. 476, 106 S. W. 1118.

322-87 P. *v.* Enright, 256 Ill. 221, 99 N. E. 936.

322-91 Fearnley *v.* Fearnley, 44 Colo. 116, 98 P. 819; Kelly *v.* Cummens, 143 Ia. 148, 121 N. W. 540; Cerny *v.* Co., 83 Neb. 88, 119 N. W. 14; Wortman *v.* S., 9 Okla. Cr. 440, 132 P. 358; In re Young's Est., 59 Or. 348, 116 P. 95, rehear. *denied*, 116 P. 1060; Sanpere *v.* Sanpair, 57 Wash. 524, 107 P. 369. *Contra*, see Seaboard A. L. R. *v.* Parker, 65 Fla. 543, 62 S. 589.

324-93 Pierce *v.* Norton, 82 Conn. 441, 74 A. 686.

324-94 If client as compulsory witness before grand jury refuses waivering privilege, fact he answers questions no waiver of privilege, nor is counsel compellable to testify. P. *v.* Cravath, 58 Misc. 154, 110 N. Y. S. 454.

325-96 Seaboard, A. L. R. Co. *v.* Parker, 65 Fla. 543, 62 S. 589; Lauer *v.* Banning, 152 Ia. 99, 131 N. W. 783.

327-12 Waiver withdrawn. Herpolsheimer *v.* Ins. Co., 79 Neb. 685 113 N. W. 152.

328-15 S. *v.* Hoben, 36 Utah 186, 102 P. 1000.

328-16 In re Whiting, 110 Me. 232, 85 A. 791.

328-21 Where right to estate by succession involved and both parties claim under decedent, no privilege. Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755.

329-22 Natlee, etc. Co. *v.* Marion Cripe & Co., 142 Ky. 810, 135 S. W. 292; Leistikow *v.* Zuelsdorf, 18 N. D. 511, 122 N. W. 340, cit. the text.

Failure to object is waiver.—Am. Trust Co. *v.* Chitty, 36 Okla. 479, 129 P. 51.

330-31 In re Ruos, 159 Fed. 252; S. *v.* Louanis, 79 Vt. 463, 65 A. 532.

331-32 Stewart *v.* Douglass, 9 Cal. App. 712, 100 P. 711.

332-40 People's Bk. *v.* Brown, 112 Fed. 652, 50 C. C. A. 411; In re Ruos, 159 Fed. 252.

Attorney, acting as scrivener, asked who paid. Baker *v.* Baker, 9 Cal. App. 737, 100 P. 892.

332-41 Ex parte Niday, 15 Ida. 559, 98 P. 845; Shuttlefield *v.* Neil (Ia.), 145 N. W. 1; Stoddard *v.* Kendall, 140 Ia. 688, 119 N. W. 138; Moyers *v.* Fogarty, 140 Ia. 701, 119 N. W. 159.

337-59 Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755.

340-72 See Gankyo *v.* P., 54 Colo. 102, 129 P. 241.

340-74 Milburn *v.* Haworth , 47 Colo. 593, 108 P. 155; Blossi *v.* R. Co., 144 Ia. 697, 123 N. W. 360; Partridge *v.* Partridge, 220 Mo. 321, 119 S. W. 415.

If the communications are made to one who happens to be a clergyman, but who does not sustain to the communicant that professional character or relation, then they are not privileged. Alford *v.* Johnson, 103 Ark. 236, 146 S. W. 516.

341-76 **Not member of any church.** Alford *v.* Johnson, 103 Ark. 236, 146 S. W. 516.

342-80 Milburn *v.* Haworth, 47 Colo. 593, 108 P. 155.

342-81 Milburn *v.* Haworth, supra.

343-86 Schall *v.* Co., 123 Minn. 214, 143 N. W. 357.

347-10 Michael *v.* Matson, 81 Kan. 360, 105 P. 537. See S. *v.* Wilcox, 90 Kan. 80, 132 P. 982.

347-11 S. *v.* Hoben, 36 Utah 186, 102 P. 1000, statute applies only to public matters; state opening door

against accused cannot exclude matters in his favor. And see S. v. Leek, 152 Ia. 12, 130 N. W. 1062.

347-14 S. v. Hector (Ia.), 138 N. W. 930.

349-31 In re Reid, 155 Fed. 933.

Where the supervisor made personal tax statement from questions asked taxpayer, the former may testify as to latter's statements concerning his property. Pease v. Jennings (Mich.), 146 N. W. 260.

355-66 See 356-72.

In Canada.—Elmsley v. Miller, 10 Ont. L. R. 343.

In England.—Southwark & V. W. Co. v. Quick, 3 Q. B. D. 315; Learoyd v. Co. (1893), 1 Ch. Div. 686.

356-72 Virginia, etc. Co. v. Knight, 106 Va. 674, 56 S. E. 725.

Reports by employes.—Ex parte Schoepf, 74 O. St. 1, 77 N. E. 276; Cully v. R. Co., 35 Wash. 241, 77 P. 202; Davenport Co v. R. Co., 166 Pa. 480, 31 A. 245. See supra, "Depositions," 420-95, 421-99.

In England.—Collins v. Co., 68 L. T. (Eng.) 831.

In Canada.—Reports of accidents by operators of car, pursuant to company's rules, privileged if used by its attorney as basis of his advice. Snell v. R. Co., 11 West. L. Rep. 198.

357-77 Ex parte Parker, 74 S. C. 466, 55 S. E. 122.

358-82 Interstate Com. v. Harriman, 157 Fed. 432; Plunkett v. Hamilton, 136 Ga. 72, 70 S. E. 781; In re Edris, 25 Pa. C. C. 377.

PUBLIC LANDS

368-1 Nurnberg v. U. S., 156 Fed. 721, 84 C. C. A. 377; Van Gesner v. U. S., 153 Fed. 46, 82 C. C. A. 180; Tonopah & G. R. Co. v. Fellanbaum, 32 Nev. 278, 107 P. 882.

368-5 Stanford v. Bailey, 122 Ga. 404, 50 S. E. 161.

368-6 Black v. R. Co., 237 Ill. 500, 86 N. E. 1065, and that certain parts granted state.

368-8 McQueen v. Lumb. Co., 135 La. ——, 65 S. 900; Houseman v. Co., 214 Pa. 552, 64 A. 379; Sanford v. Terrell (Tex.), 87 S. W. 655; S. v. Lumb. Co. (Tex. Civ.), 159 S. W. 391; Hood v. Pursley, 39 Tex. Civ. 475, 87 S. W. 870. See 411-93.

368-10 S. v. Lumb. Co. (Tex. Civ.), 159 S. W. 391.

369-14 U. S. v. Laam, 149 Fed. 781; Rogers v. Co., 104 Minn. 198, 116 N. W. 739; Warner, etc. Co. v. Morrow, 48 Or. 258, 86 P. 369; Hamilton v. S. (Tex. Cr.), 152 S. W. 1117.

370-17 Manitou & P. R. Co. v. Harris, 45 Colo. 185, 101 P. 61; Bradshaw v. Edelen, 194 Mo. 640, 92 S. W. 691; Warner Co. v. Morrow, 48 Or. 258, 86 P. 369.

371-20 Warner Co. v. Morrow, 48 Or. 258, 86 P. 369.

371-25 Haggerty v. Annison, 133 La. 338, 62 S. 946. Fair evidence of title. Covington v. Berry, 76 Ark. 460, 88 S. W. 1005.

371-26 Board, etc. County v. Timb. Co. (Ark.), 166 S. W. 589; Westfelt v. Adams, 159 N. C. 409, 74 S. E. 1041; Ross v. Stewart, 25 Okla. 611, 106 P. 870; Demars v. Hickey, 13 Wyo. 371, 80 P. 521.

372-27 Burke v. R. Co., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. ed. 1527; Board, etc. County v. Timb. Co. (Ark.), 166 S. W. 589; People's W. Co. v. Lewis, 19 Cal. App. 622, 127 P. 506; Smyth v. Saigling (Tex. Civ.), 119 S. W. 550; Demars v. Hickey, 13 Wyo. 371, 80 P. 521.

372-29 Burke v. R. Co., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. ed. 1527; Rogers v. Co., 104 Minn. 198, 116 N. W. 739.

373-30 *Contra*, Tonopah & G. R. Co. v. Fellanbaum, 32 Nev. 278, 107 P. 882, person in possession not having been a party and not having notice.

373-32 Kerns v. Lee, 142 Fed. 985; Jameson v. James, 155 Cal. 275, 100 P. 700.

374-35 Oregon, etc. R. Co. v. Stalker, 14 Ida. 362, 94 P. 70; McClanden v. Tompkins, 150 Ky. 301, 150 S. W. 337; Tonopah & G. R. Co. v. Fellanbaum, 32 Nev. 278, 107 P. 882.

375-38 P. Water Co. v. Lewis, 19 Cal. App. 622, 127 P. 506.

376-39 Jameson v. James, 155 Cal. 275, 100 P. 700.

376-41 See Ross v. Stewart, 25 Okla. 611, 106 P. 870.

376-43 See Board, etc. County v. Timb. Co. (Ark.), 166 S. W. 589.

376-44 Conflicting presumptions. Ayres v. U. S., 42 Ct. Cl. 385.

376-45 Diamond C. Co. v. U. S., 233 U. S. 236, 34 Sup. Ct. 507, 58 L. ed.

936; U. S. *v.* Collett, 159 Fed. 932, 87 C. C. A. 460.

377-46 See Board, etc. County *v.* Timb. Co. (Ark.), 166 S. W. 589.

378-48 Recital in patent. Broadwell *v.* Morgan, 142 N. C. 475, 55 S. E. 340.

378-51 Register's certificate. Ayres *v.* U. S., 42 Ct. Cl. 385; Fall Creek Sheep Co. *v.* Walton, 24 Ida. 760, 136 P. 438.

A prima facie title is made by proof of plaintiff's application, the award to him, payment of the required amounts, and the certificate of proof of occupancy. Patrick *v.* Barnes (Tex. Civ.), 163 S. W. 408.

378-52 Black *v.* R. Co., 237 Ill. 500, 86 N. E. 1065, selection of land by state.

378-53 Kerr *v.* Snowden (Cal. App.), 140 P. 704; Davis *v.* Chamberlain, 51 Or. 304, 98 P. 154 (date of settlement).

381-62 Consolidated Gold & S. Min. Co. *v.* Struthers, 41 Mont. 565, 111 P. 152.

381-68 Patrick *v.* Barnes (Tex. Civ.), 163 S. W. 408.

381-69 Ayres *v.* U. S., 44 Ct. Cl. 48; Kerr *v.* Snowden (Cal. App.), 140 P. 704; Fall C. S. Co. *v.* Walton, 24 Ida. 760, 136 P. 438.

Receiver's receipt.—Thompson *v.* Basler, 148 Cal. 646, 84 P. 161.

382-73 Record of evidence in ex parte proceeding, inadmissible to show when land settled on. Driskill *v.* Rebbe, 22 S. D. 242, 117 N. W. 135.

384-75 Logan *v.* Davis, 233 U. S. 613, 34 Sup. Ct. 685, 58 L. ed. 1121; Whitcomb *v.* White, 214 U. S. 15; Gertgens *v.* O'Connor, 191 U. S. 237; Emmons *v.* U. S., 175 Fed. 514; Harvey *v.* Hollis, 160 Fed. 531; McKenna *v.* Atherton, 160 Fed. 547; Ayres *v.* U. S., 42 Ct. Cl. 385; Old Dominion C. Co. *v.* Haverly, 11 Ariz. 241, 90 P. 333; Little *v.* Williams, 88 Ark. 37, 113 S. W. 340; Baldwin S. C. Co. *v.* Quinn, 46 Colo. 590, 105 P. 1101; White *v.* Whitcomb, 13 Ida. 490, 90 P. 1080; Barringer *v.* Davis (Ia.), 112 N. W. 208; Rogers *v.* Co., 104 Minn. 198, 116 N. W. 739; Lamson *v.* Coffin, 102 Minn. 493, 114 N. W. 248; Kennedy *v.* Dickie, 34 Mont. 205, 85 P. 982; Whitehill *v.* C. Co. (N. M.), 139 P. 184; Forman *v.* Healey, 19 N. D. 116, 121 N. W. 1122; Ross *v.* Stewart, 25 Okla. 611, 106 P. 870; Greenameyer *v.* Coate, 18 Okla. 160, 88 P. 1054; Parryman *v.* Cunningham, 16 Okla. 94, 82 P. 822; Smith *v.* McClain, 39 Tex. Civ. 152, 87 S. W. 212.

Recitals in decisions.—Parryman *v.* Cunningham, 16 Okla. 94, 82 P. 822.

Decision not conclusive (Osborn *v.* Froyseth, 105 Minn. 16, 116 N. W. 1113); nor as to matters of law generally. McKenna *v.* Atherton, 160 Fed. 547; Ayres *v.* U. S., 42 Ct. Cl. 385.

385-76 Pacific L. S. Co. *v.* Isaacs, 52 Or. 54, 96 P. 460; Knapp *v.* Patterson (Tex. Civ.), 87 S. W. 391. See Old Dominion C. Co. *v.* Haverly, 11 Ariz. 241, 90 P. 333.

Jurisdiction must be shown. Pacific L. S. Co. *v.* Isaacs, supra.

385-77 Fast *v.* Walcott, 38 Okla. 715, 134 P. 848.

385-79 See James *v.* Germania I. Co., 107 Fed. 597, 46 C. C. A. 476; LeMarchel *v.* Teagarden, 152 Fed. 662; Smith *v.* McClain, 39 Tex. Civ. 152, 87 S. W. 212.

385-81 See Osborn *v.* Froyseth, 105 Minn. 16, 116 N. W. 1113; Kennedy *v.* Dickie, 34 Mont. 205, 85 P. 982; Cagle *v.* Dunham, 14 Okla. 610, 78 P. 561; Greenameyer *v.* Coate, 18 Okla. 160, 88 P. 1054.

Ex parte hearing.—Miller *v.* Margerie, 149 Fed. 694, 79 C. C. A. 382.

386-82 Kennedy *v.* Dickie, 34 Mont. 205, 85 P. 982.

386-83 Wash., etc. Co. *v.* U. S., 234 U. S. 76, 34 Sup. Ct. 725, 58 L. ed. 1220.

386-84 Small *v.* Rakestraw, 196 U. S. 403.

Must be pleaded.—Pacific L. S. Co. *v.* Isaacs, 52 Or. 54, 96 P. 460.

387-85 Harvey *v.* Holles, 160 Fed. 531.

387-86 Townsite trustee in Alaska within principle. Miller *v.* Margerie, 149 Fed. 694, 79 C. C. A. 382.

388-87 Register's tract book.—Nurnberger *v.* U. S., 156 Fed. 721, 84 C. C. A. 377.

Abbreviations in tract book explained. Nurnberger *v.* U. S., supra.

388-88 Not overturned after lapse of fifty years. LeMarchel *v.* Teagarden, 152 Fed. 662.

Possession of wild and vacant lands presumed to be in the record owner. Brannock *v.* McHenry, 252 Mo. 1, 158 S. W. 385.

In Texas.—Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064; Wilkins *v.*

Clawson, 50 Tex. Civ. 82, 110 S. W. 103.

388-90 Howard *v.* Perrin, 200 U. S. 71; Boynton *v.* Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20 (under statute copies as effective as originals); Pardee *v.* Schanzlin, 3 Cal. App. 597, 86 P. 812; Black *v.* R. Co., 237 Ill. 500, 86 N. E. 1065; Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064; Keith *v.* Guedry (Tex. Civ.), 114 S. W. 392; Sylvester *v.* S., 46 Wash. 585, 91 P. 15.

389-91 Howdashell *v.* Krenning, 103 Va. 30, 48 S. E. 491; Virginia, etc. Co. *v.* Co., 101 Va. 723, 45 S. E. 291. See 408-82.

Loss of original patent or inability to produce must be shown. Covington *v.* Berry, 76 Ark. 460, 88 S. W. 1005; Boynton *v.* Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20.

390-94 Certificate of commissioner. Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064.

391-95 Trimble *v.* Burroughs, 41 Tex. Civ. 554, 95 S. W. 614.

391-98 Robertson *v.* Brothers (Tex. Civ.), 139 S. W. 657; Flynt *v.* Taylor (Tex. Civ.), 91 S. W. 864.

392-1 Black *v.* R. Co., 237 Ill. 500, 86 N. E. 1065.

392-2 Stewart *v.* Co., 200 Mo. 281, 98 S. W. 767.

392-3 Pacific L. S. Co. *v.* Isaacs, 52 Or. 54, 96 P. 460.

393-5 Talley *v.* Lamar County, 104 Tex. 295, 137 S. W. 1125, *aff.* 127 S. W. 272. See Kerr *v.* Snowden (Cal. App.), 140 P. 704.

394-7 Little *v.* Williams, 88 Ark. 37, 113 S. W. 340, character of land.

Official survey not open to collateral attack. Kneeland *v.* Korter, 40 Wash. 359, 82 P. 608.

Map and field notes.—Goodson *v.* Fitzgerald, 40 Tex. Civ. 619, 90 S. W. 898.

Correct acreage presumed shown by government survey. Curtis L. & L. Co. *v.* Co., 137 Wis. 341, 118 N. W. 853.

394-8 Bradshaw *v.* Edelen, 194 Mo. 640, 92 S. W. 691.

394-9 U. S. *v.* Co., 196 U. S. 573.

395-13 Notice card. Slaughter *v.* Cooper (Tex. Civ.), 107 S. W. 897.

396-19 Parol proof. P. *v.* Christian, 144 Mich. 247, 107 N. W. 919.

397-22 Little *v.* Williams, 88 Ark. 37, 113 S. W. 340, in collateral proceedings though survey erroneous.

397-27 Indefinite description. Braswell *v.* Morgan, 142 N. C. 475, 55 S. E. 340.

400-39 Evidence of cancellation. Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064.

Right to cancel patent because of fraud must be affirmatively shown by clear convincing evidence. U. S. *v.* Co., 172 Fed. 948.

400-44 Eastern, etc. Co. *v.* Brosnan, 147 Fed. 807; Johnson *v.* Co., 2 Alaska 224; North Hempstead *v.* Eldridge, 104 App. Div. 789, 93 N. Y. S. 157; Black House Fork L. Co. *v.* Gray (W. Va.), 80 S. E. 821.

401-48 See McCorkell *v.* Herron, 128 Ia. 324, 103 N. W. 988.

Absence enforced by law does not show abandonment. Huffman *v.* Smyth, 47 Or. 573, 84 P. 80.

401-49 Barringer *v.* Davis (Ia.), 112 N. W. 208.

402-53 Iowa R. L. Co. *v.* Fehring, 126 Ia. 1, 101 N. W. 120.

403-56 State of Illinois, 30 L. D. 128; S. *v.* R. Co., 30 L. D. 132.

State patent to swamp land.—Mouillerre *v.* Coco, 116 La. 845, 41 S. 113.

Character of land conclusively determined by ruling of federal land department, in absence of fraud or mistake. Morrow *v.* Co. (Or.), 101 P. 171.

403-57 White *v.* Co., 100 Minn. 16, 110 N. W. 371.

404-60 See Boyles *v.* S., 33 L. D. 56.

Federal patent.—Kerns *v.* Lee, 142 Fed. 985.

405-62 Robert L. Sheppard, 32 L. D. 474.

405-63 Gray Eagle O. Co. *v.* Clarke, 31 L. D. 303.

405-67 Little *v.* Williams, 88 Ark. 37, 113 S. W. 340.

405-69 Chauvin *v.* Com., 121 La. 10, 46 S. 38.

405-70 Boyles *v.* S., 33 L. D. 56.

406-73 Boyles *v.* S., 33 L. D. 56; Mary *v.* Coffin, 32 L. D. 154; State of Minnesota, 32 L. D. 65; State of Illinois, 30 L. D. 128; Cook *v.* S., 29 L. D. 47.

407-75 State of Illinois, 30 L. D. 128.

407-76 Moyers *v.* Fogarty, 140 Ia. 701, 119 N. W. 169.

407-78 School Land, 31 L. D. 212.

408-82 Belcher *v.* Harr, 94 Ark. 221, 126 S. W. 714; Lally *v.* R. Co., 61 Misc. 199, 113 N. Y. S. 177; House-

man *v.* Co., 214 Pa. 552, 64 A. 379; Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064; Flores *v.* Hovel (Tex. Civ.), 125 S. W. 606; Holt *v.* Cave, 38 Tex. Civ. 62, 85 S. W. 309.

Absence of seal immaterial.—San Augustine County *v.* Madden, 39 Tex. Civ. 257, 87 S. W. 1056.

Fraud in obtaining patent not presumed. Henshall *v.* Marsh, 151 Cal. 289, 90 P. 693; Waring *v.* Loomis, 48 Wash. 541, 93 P. 1088.

409-83 Bealmear *v.* Hutchins, 148 Fed. 545, 78 C. C. A. 231; Belcher *v.* Harr, 94 Ark. 221, 126 S. W. 714; Worcester *v.* Kitts, 8 Cal. App. 181, 96 P. 335; Houston *v.* S., 124 Ga. 417, 52 S. E. 757; Coulthard *v.* McIntosh, 143 Ia. 389, 122 N. W. 233 (not conclusive of jurisdiction); C. *v.* James, 138 Ky. 472, 128 S. W. 338; Witt *v.* Middleton, 27 Ky. L. R. 831, 86 S. W. 968; Chauvin *v.* Com., 121 La. 10, 46 S. 38; Frellsen *v.* Crandell, 120 La. 712, 45 S. 558; Holland *v.* Netterberg, 107 Minn. 380, 120 N. W. 527; Price *v.* Loe, 56 Wash. 253, 105 P. 469.

No presumption on direct attack if want of authority not shown. S. *v.* Co., 56 Or. 283, 106 P. 780.

Patent must be void on face to be impeached collaterally. Lally *v.* R. Co., 61 Misc. 199, 113 N. Y. S. 177.

Presumed township full congressional one, and if right to sell school lands dependent on their being situated in fractional township fact must be proved. Doddridge *v.* Patterson, 222 Mo. 146, 121 S. W. 72.

Recitals in patents presumed true.—Boynton *v.* Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20; Warner V. S. Co. *v.* Morrow, 48 Or. 258, 86 P. 369.

410-86 Donovan *v.* R. Co., 137 N. Y. S. 113; McCauley *v.* Grim, 115 Va. 610, 79 S. E. 1041.

410-87 See Haynes *v.* S., 100 Tex. 426, 100 S. W. 912.

411-92 Bealmear *v.* Hutchins, 134 Fed. 257; Fuller *v.* Keesee, 31 Ky. L. R. 1099, 104 S. W. 700; Morgan *v.* Armstrong (Tex. Civ.), 102 S. W. 1164.

North Carolina.—Walker *v.* Carpenter, 144 N. C. 674, 57 S. E. 461; Bowser *v.* Wescott, 145 N. C. 56, 58 S. E. 748. See Lumber Co. *v.* Coffey, 144 N. C. 560, 57 S. E. 344; Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064; Morgan *v.* Armstrong (Tex. Civ.), 102 S. W. 1164; S. *v.* Jadwin (Tex. Civ.), 85 S. W. 490.

411-93 Party asserting land granted without jurisdiction must maintain contention. Coulthard *v.* McIntosh, 143 Ia. 389, 122 N. W. 233.

411-94 Certificate of occupancy, conclusive as to holder's right to other school land. Zettlemeyer *v.* Shuler, 52 Tex. Civ. 648, 115 S. W. 78.

411-95 Barnes *v.* Williams, 102 Tex. 444, 119 S. W. 89; Gilmore *v.* Lockwood, 57 Tex. Civ. 616, 124 S. W. 111, noting that Williams *v.* Barnes (Tex. Civ.), 111 S. W. 432, was reversed in Barnes *v.* Williams, supra. See Bieber *v.* Lambert, 152 Cal. 557, 93 P. 94.

411-96 Duplicate deed, duly authenticated by seal of commissioner, evidance of title. Thornton *v.* Smith, 88 Ark. 543, 115 S. W. 677.

411-97 Corrigan *v.* Fitzsimmons, 97 Tex. 595, 80 S. W. 989; Stolley *v.* Lilwall, 38 Tex. Civ. 48, 84 S. W. 689. But see Knippa *v.* Brown (Tex. Civ.), 82 S. W. 658.

Certificate presumptive evidence of title. Dean *v.* Dunn, 9 Cal. App. 352, 99 P. 380.

Recognition, in statutory manner, of rights of purchaser of school lands by proper state officers, presumptive evidence of title against one claiming under subsequently rejected application. Barnes *v.* Williams, 102 Tex. 444, 119 S. W. 89.

412-2 Magee *v.* Paul (Tex. Civ.), 159 S. W. 325.

412-3 Magee *v.* Paul, supra.

413-7 Possession under sale. Jones *v.* Wright, 98 Tex. 457, 84 S. W. 1053.

413-8 Abandoned survey. Fuller *v.* Keesee, 31 Ky. L. R. 1099, 104 S. W. 700.

413-10 S. *v.* Lumb. Co. (Tex. Civ.), 159 S. W. 391.

414-13 Wilkins *v.* Clawson, 50 Tex. Civ. 82, 110 S. W. 103.

415-15 Frasier *v.* Gibson, 140 N. C. 272, 52 S. E. 1035.

Corrections in original field notes.—Ward *v.* Forrester (Tex. Civ.), 87 S. W. 751.

415-16 Entries in surveyor's book. Asher *v.* Brashear, 28 Ky. L. R. 1012, 90 S. W. 1060.

415-19 Waiver of rule concerning surveys not shown. General Prop. *v.* Force, 72 N. J. Eq. 56, 68 A. 914.

416-24 Series of entries made at same time shown to prove entry special

and that one communicated with another and began at established point. Breckenridge C. Co. *v.* Scott, 121 Tenn. 88, 114 S. W. 930.

417-30 *Comp.* Breckenridge C. Co. *v.* Scott, 121 Tenn. 88, 114 S. W. 930.

417-33 Stanford *v.* Bailey, 122 Ga. 404, 50 S. E. 161.

419-41 See Patrick *v.* Barnes (Tex. Civ.), 163 S. W. 408.

419-44 Jones *v.* Wright (Tex. Civ.), 92 S. W. 1010.

419-45 Phares *v.* Gleason, 73 Kan. 604, 85 P. 572; Spencer *v.* Smith, 74 Kan. 142, 85 P. 573; True *v.* Brandt, 72 Kan. 502, 83 P. 826; Perry *v.* Rutherford, 39 Tex. Civ. 477, 87 S. W. 1054.

Temporary absence no evidence of abandonment if intent to return. Bustin *v.* Robison, 102 Tex. 526, 119 S. W. 1140.

420-46 **Date of deed from state.**—Patton *v.* Terrell, 101 Tex. 221, 105 S. W. 1115.

Lease of school land.—Trimble *v.* Borroughs, 41 Tex. Civ. 554, 95 S. W. 614.

Cancellation of lease.—Bradford *v.* Brown, 37 Tex. Civ. 323, 84 S. W. 392; Trimble *v.* Borroughs, 41 Tex. Civ. 554, 95 S. W. 614.

Copy of award of land to third party, made after sale by and to parties, admissible to show original sale by state forfeited before grantee conveyed. Slaughter *v.* Cooper, 56 Tex. Civ. 169, 121 S. W. 173, *dist.* Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064.

Declaration of forfeiture of school land not conclusive on purchaser. Zettlemeyer *v.* Shuler, 52 Tex. Civ. 648, 115 S. W. 78.

Payment of taxes shown to prove state has parted with title. Bardin *v.* Ins. Co., 82 S. C. 358, 64 S. E. 165.

Location of public lots in tract of granted land shown by secondary evidence. In re Ring, 104 Me. 544, 72 A. 548.

420-47 Settlement shown. Smith *v.* Florence, 43 Tex. Civ. 557, 96 S. W. 1096.

420-50 Babb *v.* Co., 150 N. C. 139, 63 S. E. 609 (burden of showing land vacant and unappropriated on plaintiff, if proceedings contested); Barnes *v.* Williams, 102 Tex. 441, 119 S. W. 89; Smith *v.* Hughes, 39 Tex. Civ. 113, 86 S. W. 936.

Facts constituting cause for forfeiture must be shown by party claiming. Keith *v.* Guedry, 103 Tex. 160, 122 S. W. 17.

Subsequent applicant must show invalidity of prior applicant's title. Bieber *v.* Lambert, 152 Cal. 557, 93 P. 94; Risdon *v.* Stevner, 9 Cal. App. 344, 99 P. 377 (especially if latter in possession); Dean *v.* Dunn, 9 Cal. App. 352, 99 P. 380.

420-51 **Invalidity of prior entry.**—Frasier *v.* Gibson, 140 N. C. 272, 52 S. E. 1035. Land agent alleging certain reserved lots in tract not located in severalty must prove fact; but if grant shows, presumptively, agent's authority to institute proceeding, landowner must produce evidence to contrary. In re Ring, 104 Me. 544, 72 A. 548.

Priority of settlement.—Christison *v.* Bartlett, 78 Kan. 118, 95 P. 1130.

Claimant under later award must show prior sale void. Zettlemeyer *v.* Shuler, 52 Tex. Civ. 648, 115 S. W. 78.

Forfeiture must be established. Keith *v.* Guedry (Tex. Civ.), 111 S. W. 192.

423-59 Surghenor *v.* Taliaferro (Tex. Civ.), 98 S. W. 648.

423-60 **Recitals in ancient deeds.**—S. *v.* Bruni, 37 Tex. Civ. 2, 83 S. W. 209.

Ancient possession not presumptive evidence of grant or of confirmation. Sena *v.* Co., 14 N. M. 511, 98 P. 170.

424-62 Grant by King of Spain shown. S. *v.* Ortiz, 99 Tex. 475, 90 S. W. 1084.

425-71 **Virginia grants.**—Certified copies of a Virginia grant is admissible as evidence of title. William James Sons Co. *v.* Crouch (W. Va.), 79 S. E. 815.

427-80 Herrick *v.* Boquillas, 200 U. S. 96.

432-3 Hamilton *v.* S. (Tex. Cr.), 152 S. W. 1117.

434-12 Davidson *v.* Ryle (Tex.), 124 S. W. 616 (of indorsement of payment). See Sullivan *v.* Solis, 32 Tex. Civ. 464, 114 S. W. 456.

434-14 Hamilton *v.* S. (Tex. Cr.), 152 S. W. 1117; Sullivan *v.* Solis, supra.

436-24 **Character of adjacent land.** U. S. *v.* Co., 121 Fed. 704, 57 C. C. A. 624; U. S. *v.* Rossi, 133 Fed. 389, 66 C. C. A. 442; Lynch *v.* U. S., 138 Fed. 535, 71 C. C. A. 59.

Expert miner may give opinion of value of land for placer mining. Anderson *v.* U. S., 152 Fed. 87, 81 C. C. A. 311; Lynch *v.* U. S., supra.

436-25 Lynch *v.* U. S., 138 Fed. 535, 71 C. C. A. 59; Anderson *v.* U. S., supra.
Certificate of sale conclusive as to land's character in collateral action. S. *v.* Co., 109 Minn. 185, 123 N. W. 412.
436-29 U. S. *v.* Co., 117 Fed. 481, 54 C. C. A. 303; S. *v.* Co., 102 Minn. 470, 114 N. W. 738.
Defendant's good faith.—Anderson *v.* U. S., 152 Fed. 87, 81 C. C. A. 311.
437-32 Carroll *v.* U. S., 154 Fed. 425, 83 C. C. A. 245; Krause *v.* U. S., 147 Fed. 442, 78 C. C. A. 642.
437-33 Altenberg *v.* Fogarty, 31 L. D. 112.
439-44 Evans *v.* Dawes, 35 L. D. 332.
442-53 Harkrader *v.* Goldstein, 31 L. D. 87; Purtle *v.* Steffee, 31 L. D. 400; Morris *v.* Svor, 114 Minn. 303, 131 N. W. 324.
The petitioner has the burden of proving himself entitled to registration of the premises as described in the application. Temple *v.* Benson, 213 Mass. 128, 100 N. E. 63.
443-54 Fred Lidgett, 35 L. D. 371.
443-61 Long period of abandonment. Chesser *v.* O'Neil, 30 L. D. 294.
444-62 McKee *v.* West, 55 Tex. Civ 460, 118 S. W. 1135.
444-65 Proof of service of notice by mail. Schmiedt *v.* Enderson, 35 L. D. 307.
444-67 Judgment in divorce suit. Jacoby *v.* Kubal, 31 L. D. 382.
444-68 Unauthorized record without probative force. Slaughter *v.* Cooper 56 Tex. Civ. 169, 121 S. W. 173.
445-69 McKeand *v.* Waring, 35 L. D. 147.
Judicial notice.—Hallquist *v.* Cotton, 35 L. D. 625.
448-89 State of Illinois, 30 L. D. 128.

PUBLIC POLICY

Burden of proof. 452-6; *Violation of anti monopoly act,* 452-6.

450-1 Action of postal authorities in excluding from mails literature relating to such scheme under investigation immaterial. Baldwin *v.* Moser (Ia.), 123 N. W. 989.
Party asserting particular contract against public policy must prove it. James Quirk M. Co. *v.* R. Co., 98 Minn. 22, 107 N. W. 742.
451-2 Hall *v.* Co., 56 Fla. 324, 47 S. 609 (information obtained from other reliable sources); Mutual Life Ins. Co. *v.* Durden, 9 Ga. App. 797, 72 S. E. 295; Zeigler *v.* Bk., 245 Ill. 180, 91 N. E. 1041 (and constant practice of government officials); Chicago *v.* R. Co., 146 Ill. App. 403.
452-6 See Butler *v.* Agnew, 9 Cal. App. 327, 99 P. 395.
Violation of anti-monopoly act.—All circumstances connected with sale of business of individuals to corporation and scope of restrictive covenants accompanying are to be regarded in ascertaining purpose of purchaser. Number of purchases material. Declarations of purchasers, officers and agents in discharge of duties and its acts in the conduct of business are relevant. These last shown to aid in arriving at intent. Effect of contracts made between third parties prior to defendant's incorporation shown where it became successor to rights of one of parties and made use of them. And so of contracts made thereafter and acquired by it. P. *v.* Co., 120 N. Y. S. 443.
Presumption in favor of validity of contract not void on face. Barteldes *v.* Co., 23 Okla. 675, 101 P. 1130.
Burden on party loaning corporation money on illegal contract to show it ought to recover same on equitable grounds by proving borrower benefited thereby. Standard S. & L. Assn. *v.* Aldrich, 163 Fed. 216, 89 C. C. A. 646.
452-7 Shown that other like devices were on market to meet contention that one in question would not have the advantages of monopoly. Twentieth C. Co. *v.* Quilling, 136 Wis. 481, 117 N. W. 1007.
452-9 Dunbar *v.* Co., 238 Ill. 456, 87 N. E. 521, intent of seller of stock to completing corporation.
452-10 Ft. Smith L. & T. Co. *v.* Kelley, 94 Ark. 461, 127 S. W. 975; Leeds *v.* Townsend, 228 Ill. 451, 81 N. E. 1069, 13 L. R. A. (N. S.) 191; Superior C. Co. *r.* Co., 236 Ill. 83, 86 N. E. 180; Harbison *r.* Shirley, 139 Ia. 605, 117 N. W. 963; Baldwin *v.* Moser (Ia.), 123 N. W. 989; Horn *v.* Gibson, 24 Okla. 481, 103 P. 563.
Contracts in restraint of trade, not presumed contrary to Sherman anti-trust act. Harbison-W. R. Co. *v.* Stanton, 227 Pa. 55, 75 A. 988.
Constitution of alleged monopolistic organization admissible, but not con-

clusive unless clear in terms. Howell *v.* S., 83 Neb. 448, 120 N. W. 139.

Rule of presumptive innocance and reasonable doubt applies in defendant's favor where prosecuted for violation of anti-monopoly statute. P. *v.* Co., supra. But proof beyond reasonable doubt not necessary if allegations of plaintiff can be established without showing violation of penal statute. Dunbar *v.* Co., 238 Ill. 456, 87 N. E. 521.

Presumption contracting parties contemplated only reasonable restraint. Artistic P. Co. *v.* Boch, 76 N. J. Eq. 533, 74 A. 680.

Local conditions connected with business companies proposing consolidation before and about time contract provided shown. Telephone Co. *v.* Co., 7 O. N. P. (N. S.) 425.

QUO WARRANTO

454 In proceedings against a corporation for franchise, evidence that property claimed to have been paid for capital stock had never been paid, is admissible. Floyd *v.* S., 177 Ala. 169, 59 S. 280.

454-1 S. *v.* Waldrop, 158 Ala. 86, 48 S. 394; P. *v.* Stratton, 33 Colo. 464, 81 P. 245; S. *v.* Clark (Conn.), 89 A. 172; S. *v.* Hatch, 82 Conn. 122, 72 A. 575; S. *v.* Kuhns (Del.), 89 A. 1; P. *v.* O'Connor, 239 Ill. 272, 87 N. E. 1016; S. *v.* Johnson, 173 Ind. 14, 89 N. E. 393; P. *v.* Rafferty, 154 App. Div. 767, 139 N. Y. S. 572; C. *v.* Heller, 31 Pa C. C. 267.

456-3 S. *v.* Board (S. D.), 145 N. W. 548.

458-9 S. *v.* R. Co., 80 Neb. 333, 114 N. W. 422, 14 L. R. A. (N. S.) 336.

Admission by default, conclusive. P. *v.* O'Connor, 239 Ill. 272, 87 N. E 1016.

458-10 Merits of controversy not determinable on affidavits and counter-affidavits. P. *v.* Blake, 144 Ill. App. 246.

All facts connected with agreement alleged violating laws concerning monopolies weighed regardless of individual importance. Ownership of stock of corporations involved material circumstance and existence of rebate system S. *v.* Co., 218 Mo. 1, 116 S. W. 902.

RAILROADS

Interference with extinguishment of fire, 532-11; *Inadequate train service*, 574-81; *Diversion of underground water*, 575-89; *Violation of law relating to care of animals*, 576-94; *Violation of safety appliance law*, 576-94; *Location of accommodation*, 576-94; *Running train on Sunday*, 576-94; *Indictment for running trains at unsafe rate of speed*, 576-94.

467-1 Illinois C. R. Co. *v.* O'Neill, 177 Fed. 328, 100 C. C. A. 658; St. Louis, etc. R. Co. *v.* Summers, 171 Fed. 358, 97 C. C. A. 328; St. Louis, etc. R. Co. *v.* Chapman, 140 Fed. 120, 71 C. C. A. 528; St. Louis, etc. Co. *v.* Zerr (Ark.), 102 S. W. 375; Seaboard, etc. R. Co. *v.* Smith, 53 Fla. 173, 43 S. 235; Stuart's Admr. *v.* R. Co., 146 Ky. 127, 142 S. W. 232; Hobler *v.* R Co., 160 N. C. 3, 75 S. E. 1094; *Contra.* Billingsley *v.* Nashville, etc. R. Co., 177 Ala. 342, 58 S. 433 (by statute); St. Louis, etc. R. Co. *v.* Standifer, 81 Ark. 275, 99 S. W. 81; Same *v.* Graham, 83 Ark. 61, 102 S. W. 700; Johnson *v.* L. & N. R. Co., 59 Fla. 305, 52 S. 195; Jones *v.* Co., 56 Fla. 452, 47 S. 1 (statute); Smith *v.* R. Co., 5 Ga. App. 219, 62 S. E. 1020 (in certain cases, by statute); Ellenberg *v.* R. Co., 5 Ga App. 389, 63 S. E. 240 (statutory presumption extends to all allegations of petition); Gainsville, etc. R. Co. *v.* Austin, 127 Ga. 120, 56 S. E. 254; Combs *v.* R Co., 92 Miss. 532, 46 S. 108, statute.

See Central, etc. R. Co. *v.* McKey, 13 Ga. App. 177, 79 S. E. 378; Ala. & V. R. Co. *v.* Thornhill (Miss.), 68 S. 674. *Contra.*—"It is first urged by appellant that the court erred in giving instruction No. 1, at the request of the appellee. The instruction is as follows: 'You are instructed that if you find from a preponderance of the evidence that the plaintiff was struck and injured by an engine on defendant's road that this is prima facie evidence of negligence on the part of the defendant.' The appellee was injured by the operation of defendant's train, and there was no error in giving the instruction. In the case of St. L., I. M. & So. Ry. Co. *v.* Evans, 89 Ark. 19, 96 S. W. 616, the court held: 'Where it is established that the plaintiff was injured by the operation of a train, a prima facie presumption arises that the railroad was negligent.'" Kansas

City S. R. Co. *v.* Drew, 103 Ark. 374, 147 S. W. 50.

467-2 Virginia, etc. R. Co. *v.* Hawk, 160 Fed. 348, 87 C. C. A. 300; Montgomery, etc. Co. (Ala.), 62 S. 311; Southern Co. *v.* Smith, 163 Ala. 174, 50 S. 390; Southern R. Co. *v.* Stewart, 153 Ala. 133, 45 S. 51; St. Louis, I. M. & S. R. Co. *v.* Wirbel, 104 Ark. 236, 149 S. W. 92; Buchanan *v.* R. Co., 1 Boyce (Del.) 83, 75 A. 872; Fla., etc. Co. *v.* Jackson, 65 Fla. 393, 62 S. 210; Smith *v.* R. Co., 5 Ga. App. 219, 62 S. E. 1020; Gibbons *v.* R. Co., 263 Ill. 266, 104 N. E. 1063; Humason *v.* R. Co., 259 Ill. 462, 102 N. E. 793, *aff.* 176 Ill. App. 329; Kujawa *v.* R. Co., 175 Ill. App. 325; Stuart's Admr. *v.* R. Co., 146 Ky. 127, 142 S. W. 232; Manning *v.* R. Co. (La.), 64 S. 925; Jones *v.* R. Co., 121 La. 39, 46 S. 61; Johnson *v.* Co., 197 Mass. 302, 83 N. E. 874; Helback *v.* R. Co., 125 Minn. 155, 145 N. W. 799; Dahmer *v.* R. Co., 48 Mont. 152, 136 P. 1059, 142 P. 209; Wise *v.* R. Co., 81 N. J. L. 397, 80 A. 459; Holder *v.* R. Co., 160 N. C. 3, 75 S. E. 1094; Duffy *v.* R. Co., 144 N. C. 26, 56 S. E. 557; Harbert *v.* R. Co., 78 S. C. 537, 59 S. E. 644; Houston E. & W. T. R. Co. *v.* Foster (Tex. Civ.), 142 S. W. 846; Houston, etc. R. Co. *v.* Sallee, 56 Tex. Civ. 23, 120 S. W. 216; Whitney *v.* R. Co., 50 Tex. Civ. 1, 110 S. W. 70; Caldwell *v.* R. Co., 54 Tex. Civ. 399, 117 S. W. 488; Holland *v.* R. Co., 55 Wash. 266, 104 P. 252; Carnefix *v.* R. Co. (W. Va.), 82 S. 219. See supra, "Negligence," 852-51, vol. 8, p. 852, n. 5, and supplement thereto.

Trainmen have right to expect person approaching to exercise due care. Cook *v.* R. Co., 130 La. 917, 58 S. 767.

Presumption from injury to person rightfully upon the track. Purifoy *v.* Mill Co., 99 Ark. 490, 138 S. W. 995; Illinois C. R. Co. *v.* Dupree, 138 Ky. 459, 128 S. W. 334; McGee *v.* R. Co., 214 Mo. 530, 114 S. W. 33; Simkoff *v.* R. Co., 190 N. Y. 256, 83 N. E. 15, 118 App. Div. 918, 103 N. Y. S. 1142; Kearns *v.* R. Co., 139 N. C. 470, 52 S. E. 131; Kunz *v.* Co., 51 Or. 191, 93 P. 141, 94 P. 504; Weaver *v.* R. Co., 76 S. C. 49, 56 S. E. 657; Rogers *v.* R. Co., 32 Utah 367, 90 P. 1075.

Evidence sufficient.—Cleveland C. C. & St. L. R. Co. *v.* Lynn, 177 Ind. 311, 95 N. E. 577; Toledo, St. L. & W. R. Co. *v.* Lander, 48 Ind. App. 56, 95 N. E. 319; Vandalia R. Co. *v.* Baker, 50 Ind. App. 184, 97 N. E. 16; Illinois Cent. R. Co. *v.* Ethridge, 144 Ky. 589, 139 S. W. 832; Chesapeake & O. Ry. Co. *v.* Banks' Admr., 144 Ky. 137, 137 S. W. 1066; Conrad *v.* R. Co., 121 N. Y. S. 774, *aff.* 201 N. Y. 514, 94 N. E. 1093, Whaley *v.* Vidal, 27 S. D. 627, 132 N. W. 242; St. Louis S. W. R. Co. *v.* Driver (Tex. Civ.), 137 S. W. 409; Cromeenes *v.* R. Co., 37 Utah 475, 109 P. 10.

Evidence insufficient. — Goudreau *v.* Connecticut Co., 84 Conn. 406, 80 A 281; Southern R. Co. *v.* Campbell, 9 Ga. App. 530, 71 S. E. 934; Hammers *v.* R. Co., 128 La. 648, 55 S. 4; Bonert *v.* R. Co., 130 N. Y. S. 271.

Burden on defendant to show injury inflicted by licensee. Sanders *v.* R. Co., 225 Pa. 105, 73 A. 1010. Also where injury occurred to person walking along the track, at a place habitually used by pedestrians, while he was at a safe distance from train, in consequence of a projection therefrom. St. Louis S. R. Co. *v.* Wilcox, 57 Tex. Civ. 3, 121 S. W. 588. Failure to give statutory signals casts burden on defendant to show plaintiff's knowledge of approach of train and practicability of avoiding danger. Nashville, etc. Co. *v.* Wallace, 164 Ala. 209, 51 S. 371; Lee *v.* R. Co., 84 S. C. 125, 65 S. E. 1031. It is on defendant if circumstances justify inference of negligence, as where cars ran, with no one in charge of them, over public crossing at high rate of speed. Rowe *v.* R. Co., 224 Pa. 405, 73 A. 456.

468-3 Montgomery, etc. Co. *v.* Co. (Ala. App.), 62 S. 311; Louisville & N. R. Co. *v.* Phillips' Admr., 151 Ky. 445, 152 S. W. 246; (insufficient); Gage *v.* R. Co. (N. H.), 90 A. 855; Chicago, etc. R. Co. *v.* O'Dell (Tex. Civ.), 160 S. W. 1098.

See vol. 8, p. 851, n. 1, and supplement thereto.

468-4 Burden controlled by the rule of the forum. Jenkins *v.* R. Co., 124 Minn. 368, 145 N. W. 40.

Circumstantial evidence may establish lack of contributory negligence. Chicago, etc. R. Co. *v.* Daun (Ind. App.), 101 N. E. 731.

Conclusive presumption of negligence arises against one who steps in front of train he could have seen and heard only where no inference, except that

of negligence, possible. Sefcik *v.* R. Co., 223 Pa. 348, 72 A. 787.

468-5 Starett *v.* R. Co., 33 Ky. L. R. 309, 110 S. W. 282. See Nelson *v.* R. Co., 119 Minn. 347, 138 N. W. 419.

468-6 Wabash R. Co. *v.* De Tar, 141 Fed. 932, 73 C. C. A. 166; Wilson *v.* R. Co. (Ia.), 142 N. W. 54; Gray *v.* R. Co., 143 Ia. 268, 121 N. W. 1097 (in absence of direct evidence); Atchison, etc. R. Co. *v.* Hayes, 79 Kan. 542, 99 P. 1131; Atchison, etc. R. Co. *v.* Baumgartner, 74 Kan. 148, 85 P. 822; Kunkel *v.* R. Co., 18 N. D. 367, 121 N. W. 830; Missouri, etc. R. Co. *v.* Wall (Tex. Civ.), 110 S. W. 453; Rogers *v.* R. Co., 32 Utah 367, 90 P. 1075. See Sherlock *v.* R. Co., 24 N. D. 40, 138 N. W. 976.

Weight of presumption.—Wabash R. Co. *v.* De Tar, 141 Fed. 932, 73 C. C. A. 166.

468-7 Pittsburgh R. Co. *v.* Scherrer, 205 Fed. 356, 123 C. C. A. 484; Coppock *v.* R. Co., 174 Fed. 264; Choctaw, etc. R. Co. *v.* Baskins, 78 Ark. 355, 93 S. W. 757; Fleenor *v.* R. Co., 16 Ida. 781, 102 P. 897; Underwood *v.* R Co. (Mo. App.), 168 S. W. 803; Maginnis *v.* R. Co. (Mo. App.), 165 S. W 849; Weigman *v.* R. Co., 223 Mo. 699, 123 S. W. 38; Wade *v.* R. Co., 220 Pa. 578, 69 A. 1112; Schwarz *v.* R. Co. 218 Pa. 187, 67 A. 213; Hanna *v.* R Co., 213 Pa. 157, 62 A. 613; Bracken *v.* R. Co., 32 Pa. Super. 22; Ft. Worth, etc. R. Co. *v.* Longino, 54 Tex. Civ. 87, 118 S. W. 198. *Contra*, Zaun *v.* R. Co., 124 N. Y. S. 511, *aff.* 201 N. Y. 599, 95 N. E. 1142.

See Gibbons *v.* R. Co., 263 Ill. 266, 104 N. E. 1063; Chicago, etc. R. Co. *v.* Daun (Ind. App.), 101 N. E. 731. But see Young *v.* Erie R. Co., 158 App. Div. 14, 143 N. Y. S. 176.

468-8 Rollins *v.* R. Co., 139 Fed. 639, 71 C. C. A. 615; Bressler *v.* R. Co., 74 Kan. 256, 86 P. 472; Hamilton *v.* R., 227 Pa. 137, 75 A. 1058; Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58; Clemons *v.* R. Co., 137 Wis. 387, 119 N. W. 102. See Loftus *v.* R. Co. (Cal.), 137 P. 34.

469-9 Wabash R. Co. *v.* De Tar, 141 Fed. 932, 73 C. C. A. 166; St. Louis, etc. R. Co. *v.* Chapman, 140 Fed. 129, 71 C. C. A. 523; Evans *v.* R. Co., 7 Penne. (Del.) 458, 80 A. 634, *aff.* 77 A. 831; Folkmire *v.* R. Co., 157 Mich. 159, 121 N. W. 811; Moekowik *v.* R. Co., 196 Mo. 550, 94 S. W. 256; Schmidt *v.* R. Co., 191 Mo. 215, 90 S. W. 136; Chabott *v.* R. Co. (N. H.), 88 A. 995; Wade *v.* R. Co., 220 Pa. 578, 69 A. 1112; Southern R. Co. *v.* Hansbrough, 107 Va. 733, 60 S. E. 58.

Dependent upon whether one is walking or riding. See Jackson *v.* R. Co., 171 Mo. App. 130, 156 S. W. 1065.

Whether plaintiff should have seen a train is a question for the jury, even though he is required as a matter of law to look and listen, since he is not required to look in any particular direction at any particular time. Cleveland, etc. R. Co. *v.* Lynn, 177 Ind. 311, 98 N. E. 67.

Presumption of negligence arises when it is conclusively shown colliding train was plainly visible to injured person and he had opportunity to avoid it. Carlson *v.* R. Co., 96 Minn. 504, 105 N. W. 555.

469-10 Grand Trunk R. Co. *v.* Hainer, 36 Can. Sup. 180; Illinois C. R. Co. *v.* O'Neill, 177 Fed. 328, 100 C. C. A. 658; Louisville, etc. Co. *v.* Turney (Ala.), 62 S. 885; St. Louis, etc. Co. *v.* Gibson, 107 Ark. 431, 155 S. W. 510; Chicago, etc. R. Co. *v.* Hamilton, 92 Ark. 400, 123 S. W. 379; St. Louis R. Co. *v.* Sparks, 81 Ark. 187, 99 S. W. 73; Hutson *v.* R. Co., 150 Cal. 701, 89 P. 1093 (words "to your satisfaction" should not be used in instructions); Buchanan *v.* R. Co. (Del.), 75 A. 872; Florida, etc. Co. *v.* Jackson, 65 Fla. 393, 62 S. 210; Dozier *v.* R. Co., 12 Ga. App. 753, 78 S. E. 469; Central R. Co. *v.* North, 129 Ga. 106, 58 S. E. 647; Pittsburgh, etc. Co. *v.* Broderick (Ind. App.), 102 N. E. 887; Chicago & E. R. Co. *v.* Fretz, 173 Ind. 519, 90 N. E. 76; Chicago & E. R. Co. *v.* Ginther, 48 Ind. App. 12, 90 N. E. 911 (by statute where death occurs); Grand Trunk W. R. Co. *v.* Reynolds (Ind. App.), 90 N. E. 94; Cleveland, etc. R. Co. *v.* Starks (Ind. App.), 89 N. E. 602; Lowden *v.* Co., 41 Ind. App. 614, 82 N. E. 941 (under laws of 1899, ch. 41); Wamsley *v.* R. Co., 41 Ind. App. 147, 82 N. E. 490; Johnson *v.* R. Co., 80 Kan. 456, 103 P. 90; Hollins *v.* R. Co., 119 La. 418, 44 S. 159; Kelsall *v.* R. Co., 196 Mass. 554, 82 N. E. 674; Simonson *v.* R. Co., 117 Minn. 243, 135 N. W. 745; Miss. Cent. R. Co. *v.* Robinson (Miss.), 61 S. 838; Jefferson *v.* R. Co. (Miss.), 62 S. 643; Nixon *v.* R. Co. (Miss.), 60 S. 566; Yazoo, etc. R Co. *v.* Landrum, 89 Miss. 399, 42 S.

675; Dudley *v.* R. Co., 167 Mo. App. 647, 150 S. W. 737; Compton *v.* R. Co., 165 Mo. App. 287, 147 S. W. 842; Stotler *v* R. Co., 200 Mo. 107, 98 S. W. 509; Turner *v.* R. Co., 134 Mo. App. 397, 114 S. W. 1026; Nilson *v.* R. Co., 84 Neb. 595, 121 N. W. 1128; Farris *v.* R. Co., 151 N. C. 483, 66 S. E. 457; Galveston, etc. R. Co. *v.* Pennington (Tex. Civ.), 166 S. W. 464; Galveston, etc. Co. *v.* Linney (Tex. Civ.), 163 S. W. 1035; Missouri, etc. R. Co. *v.* King (Tex. Civ.), 123 S. W. 151; Missouri, etc. R. Co. *v.* Sharp (Tex. Civ.), 120 S. W. 263; Chicago, etc. R. Co. *v.* Clay, 55 Tex. Civ. 526, 119 S. W. 730; Boyd *v.* R. Co., 101 Tex. 411, 108 S. W. 813; Ft. Worth, etc. R. Co. *v.* Morris, 45 Tex. Civ. 596, 101 S. W. 1038; Evans *v.* R. Co., 37 Utah 431, 108 P. 638; Carnefix *v.* R. Co. (W. Va.), 82 S. E. 219; Clemons *v.* R. Co., 137 Wis. 387, 119 N. W. 102.

See vol. 8, p. 854, n. 7, and supplement thereto.

Evidence sufficient.—Gillespie *v.* R. Co., 157 Ill. App. 347; Gray *v.* R. Co., 155 Ill. App. 428; Brooks *v.* Traction Co., 176 Ind. 298, 95 N. E. 1006; Zaun *v.* R. Co., 124 N. Y. S. 511, *aff.* in 201 N. Y. 599, 95 N. E. 1142; Wright *v.* R. Co., 155 N. C. 325, 71 S. E. 306; Swalm *v* R. Co., 143 Wis. 442, 128 N. W. 62.

Evidence insufficient.—Grand Trunk W. R. Co. *v.* Reynolds, 175 Ind. 161, 92 N. E. 733; Jenkins *v.* R. Co., 155 N. C. 203, 71 S. E. 213.

Where contributory negligence is shown the burden shifts and plaintiff must show negligence. S. *v.* R. Co., 120 Md. 65, 87 A. 492.

Must show negligence was proximate cause of injury. Cleveland, etc. R. Co. *v.* Henson (Ind. App.), 102 N. E. 399.

470-11 Rich *v.* R. Co., 149 Fed. 79, 78 C. C. A. 663; Arkansas Cent. R. Co. *v.* Williams, 99 Ark. 167, 137 S. W. 829; Evansville, etc. R. Co. *v.* Berndt, 172 Ind. 697, 88 N. E. 612 (former rule changed by statute where injuries occur at crossings; unless injury be to chattel); Cleveland, etc. R. Co. *v.* Moore, 45 Ind. App. 58, 90 N. E. 93; Cook *v.* R. Co., 130 La. 917, 58 S. 767; Chicago, etc. R. Co. *v.* Clay, 55 Tex. Civ. 526, 119 S. W. 730; Huber *v.* R. Co. (Tex. Civ.), 113 S. W. 984.

470-12 Elliott *v.* R. Co., 84 Conn. 444, 80 A. 283; Popke *v.* R. Co., 81 Conn. 724, 71 A. 1098; Cottle *v.* R. Co., 82 Conn. 142, 72 A. 727; Florida, etc. Co. *v.* Jackson, 65 Fla. 393, 62 S. 210; Winn *v.* R. Co., 239 Ill. 132, 87 N. E. 954; Collison *v.* R. Co., 239 Ill. 532, 88 N. E. 251; Chicago, etc. R. Co. *v.* Gill, 132 Ill. App. 310; Dusold *v.* R. Co. (Ia.), 142 N. W. 213; Rietveld *v.* R. Co., 129 Ia. 249, 105 N. W. 515; White *v.* R. Co., 200 Mass. 441, 86 N. E. 923; Lundergan *v.* R., 203 Mass. 460, 89 N. E. 625; Hamblin *v.* R. Co., 195 Mass. 555, 81 N. E. 258; Wright *v.* R. Co., 74 N. H. 128, 65 A. 687; Parsons *v.* R. Co., 133 App. Div. 461, 117 N. Y. S. 1058; Paulding *v.* R. Co., 132 App. Div. 68, 116 N. Y. S. 518; O'Brien *v.* R. Co., 129 App. Div. 288, 113 N. Y. S. 329; Shumm *v.* R. Co., 81 Vt. 186, 69 A. 945 (deaf person).

See vol. 8, p. 859, n. 16, and supplement thereto.

Gross negligence of decedent must be shown by defendant. Slattery *v.* R. Co., 203 Mass. 453, 89 N. E. 622.

471-13 St. Louis & S. F. R. Co. *v.* Rutland, 207 Fed. 287, 125 C. C. A. 31; Baltimore & O. R. Co. *v.* O'Neill, 186 Fed. 13, 108 C. C. A. 115; Smith *v.* R. Co., 5 Ga. App. 219, 62 S. E. 1020; Farris *v.* R. Co., 151 N. C. 483, 66 S. E. 457; Douglas *v.* R. Co., 149 Ill. App. 612; Dutcher *v.* Wabash R. Co., 241 Mo. 137, 145 S. W. 63; Atlantic Coast Line R. Co. *v.* Grubbs, 113 Va. 214, 74 S. E. 144. See vol. 8, p. 924, n. 3, and supplement thereto.

Condition of track and roadbed. Finding of broken angle bars short distance ahead. Powell *v.* R. Co., 255 Mo. 420, 164 S. W. 628.

472-14 St. Louis S. R. Co. *v.* Boyd, 56 Tex. Civ. 282, 119 S. W. 1154, *cit.* the text (on previous occasions when plaintiff crossed). See vol. 8, p. 952, n. 33, and supplement thereto.

473-15 Elgin, etc. R. Co. *v.* Hoadley, 220 Ill. 462, 77 N. E. 151; Davis *v.* R. Co., 30 Ky. L. R. 172, 946, 97 S. W. 1122, 99 S. W. 930; Louisville, etc. R. Co. *v.* Taylor, 31 Ky. L. R. 1142, 104 S. W. 776; St. Louis S. R. Co. *v.* Boyd, 56 Tex. Civ. 282, 119 S. W. 1154; Ft. Worth, etc. R. Co. *v.* Longino, 54 Tex. Civ. 87, 118 S. W. 198.

473-16 West *v.* R., 159 Mich. 269, 123 N. W. 1101.

Agreement between railroad company and street car company as to former's duty to latter's employes at crossing where one of latter injured, admissible

to show precautions taken by railroad company. Cox *v.* Co., 112 N. Y. S. 443.

474-19 McLellan *v.* R. Co., 155 N. C. 1, 70 S. E. 1066.

474-20 St. Louis, etc. R. Co. *v.* Hitt, 76 Ark. 227, 88 S. W. 908, 990; Minot *v.* R. Co., 74 N. H. 230, 66 A. 825.

475-21 Bandekow *v.* R. Co., 136 Wis. 341, 117 N. W. 812; Banderob *v.* R. Co., 133 Wis. 249, 113 N. W. 738.

476-23 Louisville, etc. R. Co. *v.* Taylor, 31 Ky. L. R. 1142, 104 S. W. 776; Southern R. Co. *v.* Winchester, 32 Ky. L. R. 19, 105 S. W. 167; Gulf, etc. R. Co. *v.* Garrett (Tex. Civ.), 99 S. W. 162.

476-25 Cox *v.* Co., 112 N. Y. S. 443 Such evidence probably admissible. McDermott *v.* Severe, 25 App. Cas. (D. C.) 276.

477-27 See vol. 8, p. 939, n. 60; vol 11, p. 786, n. 32, and supplement thereto.

478-31 See vol. 8, p. 928, n. 17, et seq., and supplement thereto.

478-32 Number of persons killed at crossing in given time cannot be shown Tiffin *v.* R. Co., 78 Ark. 55, 93 S. W. 564.

478-33 Missouri, etc. R. Co. *v.* Nesbit, 43 Tex. Civ. 630, 97 S. W. 825.

478-34 Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844; Matteson *v.* Co., 6 Cal. App. 318, 92 P. 101; Popke *v.* R. Co., 81 Conn. 724, 71 A. 1098; Murray *v.* R. Co., 140 Ky. 453, 131 S. W. 183; White *v.* R. Co., 200 Mass. 441 86 N. E. 923; Hamblin *v.* R. Co., 195 Mass. 555, 81 N. E. 258; Raiolo *v.* R. Co., 108 Minn. 431, 122 N. W. 489; Stotler *v.* R. Co., 204 Mo. 619, 103 S. W. 1; Gibson *v.* R., 75 N. H. 342, 74 A. 589; Weiss *v.* R. Co., 76 N. J. L. 348, 69 A. 1087; O'Brien *v.* R. Co., 129 App. Div. 288, 113 N. Y. S. 329; Missouri, etc. R. Co. *v.* Sharp (Tex. Civ.), 120 S. W. 263; Rogers *v.* R. Co., 32 Utah 367, 90 P. 1075; Teakle *v.* R. Co., 32 Utah 276, 90 P. 402; Clemons *v.* R. Co., 137 Wis. 387, 119 N. W. 102.

478-35 Southern R. Co. *v.* Stutts, 144 Fed. 948, 75 C. C. A. 588; Southern R. Co. *v.* Gullatt, 158 Ala. 502, 48 S. 472; Ala., etc. Co. *v.* McWhorter, 156 Ala. 269, 47 S. 84; Central R. Co. *v.* Hyatt, 151 Ala. 355, 43 S. 867; St. Louis, etc R. Co. *v.* Raines, 90 Ark. 398, 119 S. W. 665; Kansas, etc. R. Co. *v.* Wayt, 80 Ark. 382, 97 S. W. 656; Cleveland, etc. R. Co. *v.* Henson (Ind. App.), 102 N. E. 399; Christiansen *v.* R. Co., 146 Ia. 345, 118 N. W. 387; Tenn., etc. Co *v.* Cook, 146 Ky. 372, 142 S. W. 684; Davidson *v.* R. Co., 124 La. 165, 49 S. 1015; Harrison *v.* R. Co., 93 Miss. 46, 46 S. 408; Combs *v.* R. Co., 92 Miss. 532, 46 S. 168; Mann *v.* R. Co., 121 Mo. App. 486, 100 S. W. 566; Duggan *v.* R. Co., 74 N. H. 259, 66 A. 829; Neuberger *v.* R. Co., 131 App. Div. 885, 116 N. Y. S. 311; Parris *v.* R. Co., 151 N. C. 483, 66 S. E. 457; Mo., etc. R. Co. *v.* Mitcham, 57 Tex. Civ. 154, 121 S. W. 871; International, etc. R. Co. *v.* Tinon (Tex. Civ.), 117 S. W. 926; Houston, etc. R. Co. *v.* Finn (Tex. Civ.), 107 S. W. 94, 101 Tex. 511, 109 S. W. 918; Teakle *v.* R. Co., 36 Utah 29, 102 P. 635.

479-36 Central R. Co. *v.* Hyatt, 151 Ala. 355, 43 S. 867; Annapolis, etc. R Co. *v.* S., 104 Md. 670, 65 A. 434; Porter *v.* R. Co., 190 Mo. 82, 97 S. W. 880; International, etc. R. Co. *v.* Edwards, 100 Tex. 22, 93 S. W. 106.

479-38 International, etc. R. Co. *v.* Munn, 46 Tex. Civ. 276, 102 S. W. 442; Teakle *v.* R. Co. (Utah), 102 P. 635.

479-39 St Louis, I. M. & S. R. Co. *v.* Humbert, 101 Ark. 532, 142 S. W. 1122; Illinois C. R. Co. *v.* Frame, 100 Ky. 26, 112 S. W. 929; Balt. & O. R. Co. *v.* S., 111 Md. 536, 80 A. 170; Combs *v.* R. Co., 92 Miss. 532, 46 S. 168; Galveston, etc. R. Co. *v.* Ohls (Tex. Civ.), 112 S. W. 787; Missouri, etc. R. Co. *v.* Nesbit, 43 Tex. Civ. 630, 97 S. W. 825; Houston, etc. R. Co. *v.* Ramsey, 43 Tex. Civ. 603, 97 S. W. 1067.

Plaintiff must show, not that those in charge of the train were in a position to see, but either that they did see, or were in a position where they could not help but see, the perilous position of the trespasser. Tennessee Cent. R. Co. *v.* Cook, 146 Ky. 372, 142 S. W. 683.

Proved by circumstances.—Higginbotham *v.* R. Co. (Tex. Civ.), 135 S. W. 1025.

479-40 Houston, etc. R. Co. *v.* O'Donnell, 99 Tex. 636, 92 S. W. 409.

479-41 See Teakle *v.* R. Co., 32 Utah 276, 90 P. 402.

480-42 Experiment. Harrison *v.* R. Co., 93 Miss. 46, 46 S. 408; Wheeling, etc. R. Co. *v.* Parker, 9 O. C. C. (N. S.) 28, 29 O. C. C. 1. See Schweinfurth *v.* R. Co., 60 O. St. 215, 54 N. E. 89.

480-43 Southern R. Co. *v.* Gullatt,

158 Ala. 502, 48 S. 472; Lynch *v.* R. Co., 208 Mo. 1, 106 S. W. 68.

Expert may testify from knowledge of sound made by train whether effort made to stop it. St. Louis, etc. R. Co. *v.* Dysart, 89 Ark. 261, 116 S. W. 224.

480-45 Southern R. Co. *v.* Forrister, 158 Ala. 477, 48 S. 69; Combs *v.* R. Co., 92 Miss. 532, 46 S. 168.

All the material elements and conditions of the case at bar must be embodied in a hypothetical question to an expert. Burge *v.* R. Co., 244 Mo. 76, 148 S. W. 825, holding improper this question: "How long in your judgment, based upon your experience as a railroad man and your appliances—railroad appliances—would it take a train composed of an engine and three cars—passenger coaches—to make a stop in an emergency, at 60 miles an hour, in what distance?" Burge *v.* R. Co., 244 Mo. 76, 148 S. W. 925.

480-46 Hale *v.* R. Co., 190 Mass. 84, 76 N. E. 656; Mann *v.* R. Co., 123 Mo. App. 486, 100 S. W. 566; International, etc. R. Co. *v.* Munn, 46 Tex. Civ. 276, 102 S. W. 442.

The fact that the Interstate Commerce Commission did not require handholds is immaterial. Kan. City. S. R. Co. *v.* Leslie (Ark.), 167 S. W. 83.

Appliances in use.—Aurora, etc. R. Co. *v.* Gary, 123 Ill. App. 163.

Condition of appliances used in connection with brake, after accident, may be shown to establish no effort made to stop train. St. Louis, etc. R. Co. *v.* Dysart, 89 Ark. 261, 116 S. W. 224.

481-47 Physical incapacity of defendant's employes shown. Missouri, etc. R. Co. *v.* Nesbit, 43 Tex. Civ. 630, 97 S. W. 825.

481-48 See Gibson *v.* R., 75 N. H. 342, 74 A. 589; vol. 8, p. 942, n. 70, and supplement thereto.

481-50 Vance *v.* R. Co., 9 Cal. App. 20, 98 P. 41; Henry *v.* R. Co., 236 Ill. 219, 86 N. E. 231; Louisville & N. R. Co. *v.* Trisler, 140 Ky. 447, 131 S. W. 198; Rademacher *v.* R. Co., 158 Mich. 552, 123 N. W. 45; Campbell *v.* R. Co., 108 Minn. 104, 121 N. W. 429 (attempt to rescue property of another); Paulding *v.* R. Co., 132 App. Div. 68, 116 N. Y. S. 518; Farris *v.* R. Co., 151 N. C. 483, 66 S. E. 457; Struble *v.* Co., 226 Pa. 118, 75 A. 17 (occasion for crossing track, relevant); Keifner *v.* R. Co., 223 Pa. 50, 72 A. 253 (it may be shown that deceased was a passenger and was crossing the track to take his train); Jones *v.* R. Co. (Tex. Civ.), 146 S. W. 618; Horton *v.* R. Co., 46 Tex. Civ. 639, 103 S. W. 467; Grant *v.* R. Co., 54 Wash. 678, 103 P. 1126.

See Illinois C. R. Co. *v.* Daniels, 96 Miss. 314, 50 S. 721.

Evidence held to show negligence.—Evans *v.* R. Co., 7 Penne. (Del.) 458, 80 A. 634, *aff.* 77 A. 831.

Statement as to difference in degrees of care required of passengers and others, made in Chicago, etc. R. Co. *v.* Stepp, 164 Fed. 785, 90 C. C. A. 431.

Plaintiff may meet testimony of defendant's employe to the effect warning not to cross given by showing he was informed by employe it was safe to cross. Macon & B. R. Co. *v.* Ross, 133 Ga. 83, 65 S. E. 146.

482-51 Matteson *v.* S. P. Co., 6 Cal. App. 318, 92 P. 101; Chicago & E. R. Co. *v.* Fretz, 173 Ind. 519, 90 N. E. 76; Jones *v.* R. Co., 121 La. 39, 46 S. 61; Stotler *v.* R. Co., 204 Mo. 619, 103 S. W. 1; Kunz *v.* R. & N. Co., 51 Or. 191, 93 P. 141, 94 P. 504; Horton *v.* R. Co., 46 Tex. Civ. 639, 103 S. W. 467; Wilkinson *v.* R. Co., 35 Utah 110, 99 P. 466. See 485-70.

Irregular time of train.—Wrightsville, etc. R. Co. *v.* Gornto, 129 Ga. 204, 58 S. E. 769.

482-52 Chesapeake, etc. R. Co. *v.* Vaughn, 30 Ky. L. R. 215, 97 S. W. 774; Lang *v.* R. Co., 115 Mo. App. 489, 91 S. W. 1012.

482-53 Louisville, etc. R. Co. *v.* Davis, 29 Ky. L. R. 846, 96 S. W. 533; Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713. See Hutson *v.* R. Co., 150 Cal. 701, 89 P. 1093; Stotler *v.* R. Co., 204 Mo. 619, 103 S. W. 1.

Custom to violate a statutory provision as to stopping at track crossings cannot repeal statute. Clark *v.* R. Co., 242 Mo. 570, 148 S. W. 472.

482-56 Belt R. Co. *v.* Manhei, 116 Ill. App. 330; Louisville & N. R. Co. *v.* Onan, 33 Ky. L. R. 462, 110 S. W 380; Haley *v.* R. Co., 197 Mo. 15, 93 S. W. 1120; Hope *v.* R. Co., 19 N. D. 438, 122 N. W. 997; Jensen *v.* R. Co. (Utah), 138 P. 1185.

It is shown that a child 13 years old is very intelligent, and that he fully realized his responsibility in crossing a railroad track, his conduct in looking out for himself must be judged by the same standards as applied to adult.

Cherry *v.* R. Co., 163 Mo. App. 53, 145 S. W. 837.

Engineer had no right to presume the injured party would get out of the way. St. Louis, etc. R. Co. *v.* Newman, 105 Ark. 284, 151 S. W. 255.

483-57 Stotler *v.* R. Co., 204 Mo. 619, 103 S. W. 1.

483-58 Southern R. Co. *v.* Forrister, 158 Ala. 477, 48 S. 69; Garrison *v.* R. Co., 92 Ark. 437, 123 S. W. 657; Conger *v.* R. Co., 31 App. Cas. (D. C.) 139; Anderson *v.* R. Co., 15 Ida. 513, 99 P. 91; McNamara *v.* R. Co., 126 Mo. App. 152, 103 S. W. 1093; Crabtree *v.* R. Co., 86 Neb. 33, 124 N. W. 932; Foley *v.* R. Co., 132 App. Div. 506, 117 N. Y. S. 956; Galveston, etc. R. Co. *v.* Olds (Tex. Civ.), 112 S. W. 787; Schwind *v.* R. Co., 140 Wis. 1, 121 N. W. 639.

483-60 Chicago, etc. R. Co. *v.* Bunch, 82 Ark. 522, 102 S. W. 369.

483-61 See Smith *v.* R. Co., 137 Wis. 97, 118 N. W. 638.

Reliance of passenger on driver, shown. See Howe *v.* R. Co., 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. 616; Liabraaten *v.* R. Co., 105 Minn. 207, 117 N. W. 423.

Engineer may assume the person will leave the track. Texas & P. R. Co. *v.* Hope (Tex. Civ.), 149 S. W. 1077.

483-63 Vance *v.* R. Co., 9 Cal. App. 20, 98 P. 41; Chicago City R. Co. *v.* Rohe, 118 Ill. App. 322; Rowe *v.* R. Co., 144 Ia. 378, 122 N. W. 929; Rutherford *v.* Co., 142 Ia. 714, 121 N. W. 703; Rietveld *v.* R. Co., 129 Ia. 249, 105 N. W. 515; Chesapeake & O. R. Co. *v.* Brashear (Ky.), 124 S. W. 277; Slattery *v.* R. Co., 203 Mass. 453, 89 N. E. 622; Lundergan *v.* R. Co., 203 Mass. 460, 89 N. E. 625; Perego *v.* R. Co., 158 Mich. 225, 122 N. W. 535; Strong *v.* R. Co., 156 Mich. 66, 120 N. W. 683; Mockowik *v.* R. Co., 196 Mo. 550, 94 S. W. 256; Neary *v.* R. Co., 37 Mont. 461, 97 P. 944; Leithead *v.* R. Co., 78 N. J. L. 148, 72 A. 453; Willoughby *v.* R. Co., 77 N. J. L. 149, 71 A. 41; Dangelo *v.* R. Co., 127 App. Div. 835, 111 N. Y. S. 800; Strickland *v.* R. Co., 150 N. C. 4, 63 S. E. 161; Chesapeake & O. R. Co. *v.* Hall, 109 Va. 296, 63 S. E. 1007.

It is a presumption of law that one sees and hears what he is in a position to see and hear, and which in the absence of evidence which overrides it will prevail. Cleveland, etc. R. Co. *v.* Lynn, 177 Ind. 311, 98 N. E. 67.

484-64 Chicago, etc. R. Co. *v.* Mann, 88 Ark. 231, 114 S. W. 228; Smith's Admr. *v.* R. Co., 146 Ky. 508, 142 S. W. 1047; Louisville & N. R. Co. *v.* Taylor, 31 Ky. L. R. 1142, 104 S. W. 776; Stotler *v.* R. Co., 204 Mo. 619, 103 S. W. 1; Smith *v.* R. Co., 137 Wis. 97, 118 N. W. 638.

484-66 Warning to adult relieves defendant from consequence of using excessive speed. Cincinnati, etc. R. Co. *v.* Chavasse (Ky.), 122 S. W. 171.

484-67 See Jackson *v.* R. Co., 32 Can. Sup. 245.

485-69 Bourassa *v.* R. Co., 75 N. H. 359, 74 A. 590; Graves *v.* R. Co., 76 N. J. L. 362, 69 A. 971.

Negative testimony.—Stotler *v.* R. Co., 204 Mo. 619, 103 S. W. 1.

485-70 St. Louis, etc. R. Co. *v.* Sparks, 81 Ark. 187, 99 S. W. 73; Gray *v.* R. Co., 143 Ia. 268, 121 N. W. 1097 (specific instances in reference to crossing in question and to others); Louisville & N. R. Co. *v.* Taylor, 31 Ky. L. R. 1142, 104 S. W. 776; Maysville, etc. R. Co. *v.* Willis, 31 Ky. L. R. 1249, 104 S. W. 1016; Chalott *v.* R. Co. (N. H.), 88 A. 995; Parsons *v.* R. Co., 133 App. Div. 461, 117 N. Y. S. 1058. See vol. 8, p. 942, n. 69, and supplement thereto.

Plaintiff's habitual negligence in approaching crossing where injury occurred, incompetent except to show familiarity with it. Wheeling, etc. R. Co. *v.* Parker, 9 O. C. C. (N. S.) 28, 29 O. C. C. 1; Balt. & O. R. Co. *v.* Van Horn, 21 O. C. C. 337.

Experience of others in using crossing when deceased not present, incompetent. Gray *v.* R. Co., 143 Ia. 268, 121 N. W. 1097.

486-71 Bourassa *v.* R. Co., 75 N. H. 359, 74 A. 590, plaintiff testified he had no expectation train would pass.

486-72 Frederickson *v.* R. Co., 156 Ia. 26, 135 N. W. 12.

"A question of evidence, to some extent, is a question of sound policy in the administration of the law. Sometimes it is necessary to weigh the probative force of evidence offered, compare it with the practical inconvenience of enforcing a rule to admit it, and decide whether, as matter of good policy, it should be admitted. Uniform conduct under the same circumstances on many prior occasions may be relevant as tending somewhat to show like conduct under like circumstances on

the occasion in question. All relevant evidence, however, is not competent.'' Zucker *v.* Whitridge, 205 N. Y. 50, 98 N. E. 209, where there were four witnesses.

Instinct of self-preservation may be considered by jury where no eyewitnesses to accident. Rosenthal *v.* R. Co., 164 Ill. App. 221.

487-74 Pittsburgh, etc. R. Co. *v.* O'Conner, 171 Ind. 686, 85 N. E. 969; Wilson *v.* R. Co., 165 N. C. 499, 81 S. E. 684. See Texas M. R. Co. *v.* Nelson (Tex. Civ.), 161 S. W. 1088; Texarkana, etc. R. Co. *v.* Frugia, 43 Tex. Civ. 48, 95 S. W. 563; vol. 8, p. 947, n. 3, and supplement thereto.

Evidence of plaintiff's drunkenness on other occasions immaterial. Starett *v.* R. Co., 33 Ky. L. R. 309, 110 S. W. 282.

Measure of duty owing to injured person affected by knowledge of his condition by defendant's employes. St. Louis, etc. R. Co. *v.* Raines, 90 Ark. 398, 119 S. W. 665.

487-75 Chicago & A. R. Co. *v.* Johnson (Tex. Civ.), 111 S. W. 758.

488-77 *Comp.* Gray *v.* R. Co., 143 Ia. 268, 121 N. W. 1097.

488-78 See Chesapeake & O. R. Co. *v.* Vaughn, 30 Ky. L. R. 215, 97 S. W. 774; Metzler *v.* R. Co., 28 Pa. Super. 180.

488-79 Ordinance admissible to show how long crossing might be obstructed. Kurt *v.* R. Co., 127 App. Div. 838, 111 N. Y. S. 859; Texas, etc. R. Co. *v.* Bean, 55 Tex. Civ. 341, 119 S. W. 328.

488-80 Louisville & N. R. Co. *v.* Hubbard, 148 Ala. 45, 41 S. 814, erection of signposts. See Metzler *v.* R. Co., 28 Pa. Super. 180.

Plaintiff's knowledge of nature of crossing and inaccessibility of other convenient places to cross, immaterial. Reinhardt *v.* R. Co., 235 Ill. 576, 85 N. E. 605.

488-81 Atchison, etc. R. Co. *v.* Pitts, 123 Ill. App. 607.

488-82 St. Louis, I. M. & S. R. Co. *v.* Wells, 102 Ark. 257, 143 S. W. 1069; Thomasson *v.* R. Co., 72 S. C. 1, 51 S. E. 443; Weaver *v.* R. Co., 76 S. C. 49, 56 S. E. 657.

489-85 Galveston, H. & S. A. R. Co. *v.* Pingenot (Tex. Civ.), 142 S. W. 93.

Time crossing obstructed material as to whether person who went around cars and beyond street was trespasser. Kurt *v.* R. Co., 127 App. Div. 838, 111 N. Y. S. 859.

489-86 Delaware & H. Co. *v.* Larnard, 161 Fed. 520, 88 C. C. A. 462; Southern R. Co. *v.* Douglass, 144 Ala. 351, 39 S. 268; Charleston, etc. R. Co. *v.* Camp, 3 Ga. App. 232, 59 S. E. 710 (crossing blocked; evidence part of res gestae); Aurora, etc. R. Co. *v.* Gary, 123 Ill. App. 163; Chicago, etc. R. Co. *v.* Hirsch, 132 Ill. App. 656; Guilfoil C. Co. *v.* Clark (Ind. App.), 99 N. E. 777; Cleveland, etc. R. Co. *v.* Clark, 51 Ind. App. 392, 97 N. E. 822; Rutherford *v.* R. Co., 142 Ia. 744, 121 N. W. 703; Gray *v.* R. Co., 143 Ia. 268, 121 N. W. 1097; Rietveld *v.* R. Co., 129 Ia. 249, 105 N. W. 515; Louisville & N. R. Co. *v.* Parks, 154 Ky. 269, 157 S. W. 27; Chesapeake, etc. Co. *v.* Warnock, 150 Ky. 74, 150 S. W. 29; Cincinnati, etc. R. Co. *v.* Champ, 31 Ky. L. R. 1054, 104 S. W. 988; Balt. & O. R. Co. *v.* Harris, 121 Md. 254, 88 A. 282; Schaub *v.* R. Co., 133 Mo. App. 444, 113 S. W. 1163; Russell *v.* Co., 54 Or. 128, 102 P. 619; Harbert *v.* R. Co., 78 S. C. 537, 59 S. E. 644; Ft. Worth, etc. R. Co. *v.* Longino, 54 Tex. Civ. 87, 118 S. W. 198; Schwind *v.* R. Co., 140 Wis. 1, 121 N. W. 639 (absence of fence); Clemons *v.* R. Co., 137 Wis. 387, 119 N. W. 102.

See Kelle *v.* R. Co. (Mo.), 167 S. W. 433.

Use made of such crossing is admissible. Cunningham *v.* R. Co., 179 Ill. App. 505.

May show other vehicles had broken down on crossing. R. Co. *v.* Dooley, 32 O. C. C. 655.

Other accidents at same crossing may be shown. Chesapeake, etc. R. Co. *v.* Meyers, 150 Ky. 841, 151 S. W. 19.

Effect of ballasting track upon teams and vehicles of others not relevant. Johnson *v.* R. Co., 80 Kan. 456, 103 P. 90.

Defendant may show it is not responsible for any alleged dangerous feature of crossing to meet contention it was bound to use extra precautions. Horandt *v.* R. Co., 78 N. J. L. 190, 73 A. 93.

Abandonment of street by defendant prior to injury may be shown. Gulf, etc. R. Co. *v.* Garrett (Tex. Civ.), 99 S. W. 162.

Non-prosecution of defendant for obstructing street cannot be shown. Gulf, etc. R. Co. *v.* Garrett (Tex. Civ.), 99 S. W. 162.

Time required to pass over crossing.—

Stokes *v.* R. Co., 104 Va. 817, 52 S. E. 855.

490-87 Rich *v.* R. Co., 149 Fed. 79, 78 C. C. A. 663 (absence of light on tender); Matteson *v.* Co., 6 Cal. App 318, 92 P. 101; Southern R. Co. *v.* Goddard, 28 Ky. L. R. 523, 89 S. W. 675; Clancy *v.* R. Co., 128 App. Div. 141, 112 N. Y. S. 541; Banderob *v.* R. Co., 133 Wis. 249, 113 N. W. 738. See Amanta *v.* R. Co., 177 Mich. 280, 143 N. W. 76.

490-89 St. Louis, etc. R. Co. *v.* Graham, 83 Ark. 61, 102 S. W. 700.

Evidence as to how far a man could be seen with a headlight is admissible. Draper *v.* R. Co., 161 N. C. 307, 77 S. E. 231.

490-90 See Louisville & N. R. Co. *v.* Co., 149 Ky. 459, 149 S. W. 898.

Previous grade cannot be shown. Steil Brew. Co. *v.* R. Co., 120 Md. 419, 87 A. 838.

490-91 St. Louis, etc. R. Co. *v.* Garner, 90 Ark. 19, 117 S. W. 763; Chicago, etc. Co. *v.* Moon, 88 Ark. 231, 114 S. W. 228; Nichols *v.* R. Co., 44 Colo. 501, 98 P. 808; Winn *v.* R. Co., 143 Ill. App. 71; Childress *v.* R. Co. (Ind. App.), 101 N. E. 332; Johnson *v.* R. Co., 80 Kan. 456, 103 P. 90; Louisville, etc. Co. *v.* Park, 154 Ky. 269, 157 S. W. 27; Chesapeake & O. R. Co. *v.* Wilson, 31 Ky. L. R. 500, 102 S. W. 810; Campbell *v.* R. Co., 108 Minn. 104, 121 N. W. 429; Weigman *v.* R. Co., 223 Mo. 699, 123 S. W. 38; Day *v.* R. Co., 132 Mo. App. 707, 112 S. W. 1019; Lang *v.* R. Co., 115 Mo. App. 489, 91 S. W. 1012; Russell *v.* Co., 54 Or. 128, 102 P. 619; Barthelmas *v.* R. Co., 225 Pa. 597, 74 A. 556; Missouri, etc. R. Co. *v.* King (Tex. Civ.), 123 S. W. 151; Stokes *v.* R. Co., 104 Va. 817, 52 S. E. 855.

See Waite *v.* R. Co., 168 Mo. App. 160, 153 S. W. 66; Houston, etc. R. Co. *v.* O'Donnell, 99 Tex. 636, 92 S. W. 409

491-92 Louisville & N. R. Co. *v.* Hubbard, 148 Ala. 45, 41 S. 811; Cherry *v.* R. Co., 121 La. 471, 46 S. 596, 17 L. R. A. (N. S.) 50; Slattery *v.* R. Co., 203 Mass. 453, 89 N. E. 622; Wheeling, etc. R. Co. *v.* Parker, 9 O. C. C. (N S.) 28, 29 O. C. C. 1 (records of company competent for plaintiff).

491-95 Weatherly *v.* R. Co., 166 Ala. 575, 51 S. 959; Southern R. Co. *v.* Weatherlow, 153 Ala. 171, 44 S. 1019; Tiffin *v.* R. Co., 78 Ark. 55, 93 S. W 564; Southern R. Co. *v.* Brock, 132 Ga. 858, 64 S. E. 1083 (statement crossing used great deal, not conclusion); Atlantic, etc. Co. *v.* Adams, 7 Ga. App. 146, 66 S. E. 494; Wamsley *v.* R. Co., 41 Ind. App. 147, 82 N. E. 490; Louisville & N. R. Co. *v.* Allnutt, 150 Ky 831, 151 S. W. 14; Louisville & N. R Co. *v.* Miller, 134 Ky. 716, 121 S. W. 648; Louisville & N. R. Co. *v.* Berry, 33 Ky. L. R. 850, 111 S. W. 370; Farris *v.* R. Co., 151 N. C. 483, 66 S. E. 457; Vaden *v.* R Co., 150 N. C. 760, 64 S. E. 762; Davis *v* R. Co., 34 Pa. Super. 388; Metzler *v.* R. Co., 28 Pa. Super. 180; Grant *v.* R. Co., 54 Wash. 678, 103 P. 1126.

There was no error in permitting the evidence as to whether the locus in quo was "a thickly populated neighborhood," where there were "numbers of people on both sides of the track," etc. "Such evidence is permissible, in connection with other evidence, in order to determine whether the conditions at such place were such as to impute simple negligence or willful or wanton wrong to the engineer in running at a high rate of speed at the locality." Birmingham, etc. Co. *v.* Saxon (Ala.), 59 S. 590.

492-96 Tiffin *v.* R. Co., 78 Ark. 55, 93 S. W. 564. *Contra*, if reasons given. Douglass *v.* R. Co., 82 S. C. 71, 62 S. E. 15. See Weatherly *v.* R. Co., 166 Ala. 575, 51 S. 959.

Parol evidence admissible to show tracks laid in street. International, etc. R. Co. *v.* Morin, 53 Tex. Civ. 531, 116 S. W. 656.

492-1 Chicago, etc. R. Co. *v.* Johnson (Tex. Civ.), 111 S. W. 758.

492-2 Louisville & N. R. Co. *v.* Berry, 33 Ky. L. R. 850, 111 S. W. 370. See vol. 11, p. 820, n. 6, and supplement thereto.

492-3 Coppock *v.* R. Co., 174 Fed. 264 (timeliness of signals); St. Louis, etc. Co. *v.* Kimbrell (Ark.), 163 S. W. 516; Atkinson *v.* Fountain, 10 Ga. App. 307, 73 S. E. 534; Fleenor *v.* R. Co., 16 Ida. 781, 102 P. 897; Chesapeake, etc. Co. *v.* Hall's Admr., 147 Ky. 12, 142 S. W. 749; Louisville & N. R. Co. *v.* Miller, 134 Ky. 716, 121 S. W. 648; Chesapeake & O. R. Co. *v.* Brashear (Ky.), 143 S. W. 277; Cincinnati, etc. R. Co. *v.* Champ, 31 Ky. L. R. 1054, 104 S. W. 988; Louisville & N. R. Co. *v.* Taylor, 31 Ky. L. R. 1142, 104 S. W. 776; Cherry *v.* R. Co., 121 La. 471, 46 S. 596; Line *v.* R. Co., 143 Mich. 163, 106 N. W. 719; Liabraaten *v.* R. Co.,

105 Minn. 207, 117 N. W. 423; Haley *v.* R. Co., 197 Mo. 15, 93 S. W. 1120 (unsafe rate of speed not excused because of grade beyond); Mann *v.* R Co., 123 Mo. App. 486, 100 S. W. 566; Neary *v.* R. Co., 37 Mont. 461, 97 P. 944 (violation of rule); Stearns *v.* R., 75 N. H. 40, 71 A. 21; Paulding *v.* R. Co., 132 App. Div. 68, 116 N. Y. S. 518; Kurt *v.* R. Co., 127 App. Div. 838, 111 N. Y. S. 859; Farris *v.* R. Co., 151 N. C. 483, 66 S. E. 457; Russell *v.* R. Co., 54 Or. 128, 102 P. 619; St. Louis, etc. R. Co. *v.* Summers, 51 Tex. Civ. 133, 111 S. W. 211.

See Liverett *v.* R. Co. (Ala.), 65 S. 54; Hartman *v.* R. Co., 132 Ia. 582, 110 N. W. 10; Schwarz *v.* R. Co., 218 Pa. 187, 67 A. 213; Merrill *v.* R. Co., 25 S. D. 527, 129 N. W. 846.

Speed sufficient to constitute negligence. Jackson *v.* R. Co., 171 Mo. App. 430, 156 S. W. 1005.

Speed may be considered as evidence of negligence. Evans *v.* R. Co., 213 Fed. 129 (C. C. A.).

While the violation of an ordinance is admissible as evidence tending to show negligence, it is not, standing alone, negligence which would justify recovery, or upon which an action could be based. Mollica *v.* R. Co., 170 Mich. 96, 135 N. W. 927.

Effect of repeal of statute.—See infra, "Street Railroads," 137-3.

Rate of speed not evidence of negligence in open country if plaintiff saw train. Atchison, etc. R. Co. *v.* Schriver, 80 Kan. 540, 103 P. 994. Immaterial to person injured on track. Rutherford *v.* R. Co., 142 Ia. 744, 121 N. W. 703. *Comp.* Folkmire *v.* R. Co., 157 Mich. 159, 121 N. W. 811.

Rate of speed over private crossing, immaterial. Louisville & N. R. Co. *v.* Engleman, 135 Ky. 515, 122 S. W. 833.

Presumption train will not be run at unlawful rate of speed may not be relied upon where means of observation open. Schaub *v.* R. Co., 133 Mo. App. 444, 113 S. W. 1163.

493-4 Louisville R. Co. *v.* Sheehan's Admx., 146 Ky. 168, 142 S. W. 221; Illinois C. R. Co. *v.* France, 130 Ky. 26, 112 S. W. 929 (train schedule).

Failure to reduce speed.—Zancanella *v.* R. Co., 93 Neb. 774, 142 N. W. 190.

Defendant's time table.—Schwarz *v.* R. Co., 218 Pa. 187, 67 A. 213.

Nature of injuries sustained.—Wheeling, etc. R. Co. *v.* Parker, 9 O. C. C. (N. S.) 28, 29 O. C. C. 1.

493-5 Porter *v.* Buckley, 147 Fed. 140, 78 C. C. A. 138; Little Rock, etc. Co. *v.* Hicks, 79 Ark. 248, 96 S. W. 385; Nichols *v.* R. Co., 44 Colo. 501, 98 P. 808; Seaboard, etc. R. Co. *v.* Smith, 53 Fla. 375, 43 S. 235; Chicago City R. Co. *v.* Hyndshaw, 116 Ill. App. 367; Chicago City R. Co. *v.* Rohe, 118 Ill. App. 322; Illinois C. R. Co. *v.* France, 130 Ky. 26, 112 S. W. 929; Line *v.* R. Co., 143 Mich. 163, 106 N. W. 719; Lynch *v.* R. Co., 208 Mo. 1, 106 S. W. 68; Stotler *v.* R. Co., 200 Mo. 107, 98 S. W. 509; King *v.* R. Co., 211 Mo. 1, 109 S. W. 671; Potter *v.* R. Co., 136 Mo. App. 125, 117 S. W. 593; Parsons *v.* R. Co., 133 App. Div. 461, 117 N. Y. S. 1058 (observers may state train going fast or slow, but not how fast). See supra, "Expert and Opinion Evidence," 600-77, 708-31. But see Southern R. Co. *v.* Weatherlow, 153 Ala. 171, 44 S. 1019.

Opinion not weighty.—Northern P. Co. *v.* Hayes, 87 Fed. 129, 30 C. C. A. 576; Keiser *v.* R. Co., 212 Pa. 409, 61 A. 903; Cook *v.* Co., 41 Wash. 314, 83 P. 419.

493-6 Lynch *v.* R. Co., 208 Mo. 1, 106 S. W. 68.

494-10 Louisville & N. R. Co. *v.* Taylor, 31 Ky. L. R. 1142, 104 S. W. 776; Nashville, etc. R. Co. *v.* Peavler, 134 Ga. 618, 68 S. E. 432.

494-12 Louisville & N. R. Co. *v.* Goulding, 52 Fla. 327, 42 S. 854.

495-14 Chesapeake & O. R. Co. *v.* Dandridge, 171 Fed. 74, 96 C. C. A. 178; Garrison *v.* R. Co., 92 Ark. 437, 123 S. W. 657; Conger *v.* R. Co., 31 App. Cas. (D. C.) 139; Charleston, etc. R. Co. *v.* Camp, 3 Ga. App. 232, 59 S. E. 710; Wells *v.* R. Co., 153 Ill. App. 23; Farley *v.* R. Co., 153 Ill. App. 493; Henry *v.* R. Co., 236 Ill. 219, 86 N. E. 231; Hartman *v.* R. Co., 132 Ia. 582, 110 N. W. 10; Illinois C. R. Co. *v.* Coley, 28 Ky. L. R. 336, 89 S. W. 234; Davis *v.* R. Co., 30 Ky. L. R. 172, 946, 97 S. W. 1122; Slattery *v.* R. Co., 203 Mass. 453, 89 N. E. 622; Liabraaten *v.* R. Co., 105 Minn. 207, 117 N. W. 423; Carleo *v.* R. Co., 77 N. J. L. 607, 72 A. 89; Foley *v.* R Co., 132 App. Div. 506, 117 N. Y. S. 956; Paulding *v.* R. Co., 132 App. Div. 68, 116 N. Y. S. 518; Kurt *v.* R. Co., 111 N. Y. S. 859; Farris *v.* R. Co., 151 N. C. 483, 66 S. E. 457; Kunkel *v.* R. Co., 18 N.

D. 367, 121 N. W. 830; Wheeling, etc. R. Co. *v.* Parker, 9 O. C. C. (N. S.) 28, 29 O. C. C. 1; Barthelmas *v.* R. Co., 225 Pa. 597, 74 A. 556; Schwarz *v.* R. Co., 218 Pa. 187, 67 A. 213; Davis *v.* R. Co., 34 Pa. Super. 388; Osteen *v.* R. Co., 76 S. C. 368, 57 S. E. 196; Grant *v.* R. Co., 54 Wash. 678, 103 P. 1126. *Contra,* at private crossings if signals not customarily given. Louisville & N. R. Co. *v.* Engleman, 135 Ky. 515, 122 S. W. 833.

See Alexander *v.* R. Co. (Mo. App.), 165 S. W. 1156; Jackson *v.* R. Co., 171 Mo. App. 430, 156 S. W. 1005.

Evidence that at same crossing and within an hour of alleged act an engineer had failed to ring bell and give signals is admissible. Rober *v.* R. Co., 25 N. D. 394, 142 N. W. 22.

Evidence that whistle was unusually loud and its effect is admissible. Balt. & O. R. Co. *v.* Harris, 121 Md. 254, 88 A. 282.

This is not negative but positive testimony which, notwithstanding direct and positive contradictory testimony of witnesses on the part of the defendant, requires the question to be submitted to the jury. Union Sav. & Bldg. Assn. *v.* Vahle, 235 Pa. 435, 84 A. 407.

Plaintiff must show crossing such as required signal. Wilkinson *v.* R. Co., 35 Utah 110, 99 P. 466.

Unusual signals required under some circumstances. Louisville & N. R. Co. *v.* Smith, 135 Ky. 462, 122 S. W. 806.

Absence of lookout proved regardless of ordinance. Norfolk & W. R. Co. *v.* Holmes, 109 Va. 407, 64 S. E. 46.

Inefficiency of signal.—Metcalf *v.* R. Co., 78 Conn. 614, 63 A. 633; Cincinnati, etc. R. Co. *v.* Champ, 31 Ky. L. R. 1054, 104 S. W. 988.

Kind of signal given, shown. Southern R. Co. *v.* Hobbs, 151 Ala. 335, 43 S. 844.

Testimony of trainmen as to giving signals must be positive. Chesapeake & O. R. Co. *v.* Wilson, 31 Ky. L. R. 500, 102 S. W. 810.

Engineer's testimony as to ringing bell may rest upon his habit of doing so. Texas & P. R. Co. *v.* Crump, 102 Tex. 250, 115 S. W. 26.

495-15 *Contra* if rate of speed high and gates not properly operated. Bracken *v.* R. Co., 32 Pa. Super. 22.

Exigencies of defendant's business cannot excuse non-compliance with statute prescribing lights to be carried. Chicago, etc. R. Co. *v.* Moon, 88 Ark. 231, 114 S. W. 228.

496-16 Cincinnati, etc. R. Co. *v* Champ, 31 Ky. L. R. 1054, 104 S. W. 988. See Holland *v.* R. Co., 55 Wash. 266, 104 P. 252.

Failure to sound bell or whistle is conclusive evidence of negligence. Lawson *v.* Ry. Co., 91 S. C. 201, 74 S. E. 473.

Presumption of negligence arises if statutory signals not given. Turbyfill *v.* R. Co., 83 S. C. 325, 65 S. E. 278.

Evidence of signal given by stranger, immaterial unless plaintiff heard and understood it. Dunwoody *v.* R. Co., 136 Mo. App. 509, 118 S. W. 503.

Plaintiff's ignorance of crossing renders exclusion of testimony as to failure to ring crossing bell immaterial. Horandt *v.* R. Co., 78 N. J. L. 190, 73 A. 93.

In Alabama statute imposes on defendant burden of showing signals given at specified places; if injury occurred at another place compliance with statute need not be shown. Southern R. Co. *v.* Smith, 163 Ala. 174, 50 S. 390.

496-17 Bracken *v.* R. Co., 32 Pa. Super. 22.

496-18 Henry *v.* R. Co., 236 Ill. 219 86 N. E. 231; Taylor *v.* R. Co., 154 Ill App. 222; Rogers *v.* R. Co., 75 N. J. L. 568, 68 A. 148.

496-19 Chesapeake & O. R. Co. *v.* Dandridge, 171 Fed. 74, 96 C. C. A. 178; Fleenor *v.* R. Co., 16 Ida. 781, 102 P. 897; Chicago & A. R. Co. *v.* Wright, 120 Ill. App. 218; Aurora, etc. R. Co. *v.* Gary, 123 Ill. App. 163; Illinois C. R. Co. *v.* Coley, 28 Ky. L. R. 336, 89 S. W. 234; Russell *v.* R. Co., 54 Or. 128, 102 P. 619; Davis *v.* R. Co., 34 Pa. Super. 388; St. Louis S. R. Co. *v.* Moore (Tex. Civ.), 107 S. W. 658. But see Giacomo *v.* R. Co., 196 Mass. 192, 81 N. E. 899; Hodgin *v.* R. Co., 143 N. C. 93, 55 S. E. 413.

Presumption that one relied on assurance of safety by absence of flagman where one was required. Summer *v.* R. Co., 122 Minn. 44, 141 N. W. 854.

497-21 Chicago & A. R. Co. *v.* Wright, 120 Ill. App. 218; McNamara *v.* R. Co., 126 Mo. App. 152, 103 S. W. 1093; Carleo *v.* R. Co., 77 N. J. L. 607, 72 A. 89; Roland *v.* R. Co., 224 Pa. 630, 73 A. 958 (failure to lower gates not decisive).

497-23 Roland *v.* R. Co., 224 Pa. 630, 73 A. 958.

497-27 *Comp.* Giacomo *v.* R. Co., 196 Mass. 192, 81 N. E. 899.

498-28 Delaware & H. Co. *v.* Larnard, 161 Fed. 520, 88 C. C. A. 462; Chicago, etc. R. Co. *v.* Hamilton, 92 Ark. 400, 123 S. W. 379; Evansville, etc. R. Co. *v.* Berndt, 172 Ind. 697, 88 N. E. 612; Louisville & N. R. Co. *v.* Eckman, 137 Ky. 331, 125 S. W. 729; Louisville & N. R. Co. *v.* Roth, 130 Ky. 759, 114 S. W. 264; Slattery *v.* R. Co., 203 Mass. 453, 89 N. E. 622; Lundergan *v.* R. Co., 203 Mass. 460, 89 N. E. 625; Rademacher *v.* R. Co., 158 Mich. 552, 123 N. W. 45; Riley *v.* R. Co., 36 Mont. 545, 93 P. 948; Shafer *v.* R. Co., 75 N. J. L. 75, 66 A. 1072; Barthelmas *v.* R. Co., 225 Pa. 597, 74 A. 556; Bracken *v.* R. Co., 32 Pa. Super. 22.

Presence of open and unattended gates, it being unusual to have an attendant at night, may be shown, not to prove negligence in failure to operate, but to illustrate condition under which accident occurred and throw light upon plaintiff's contributory negligence. Rogers *v.* R. Co., 75 N. J. L. 568, 68 A. 148.

498-29 Gray *v.* Co., 143 Ia. 268, 121 N. W. 1097, absence of whistling post.

498-31 Illinois C. R. Co. *v.* O'Neill, 177 Fed. 328, 100 C. C. A. 658; Erie R. Co. *v.* Farrell, 147 Fed. 220, 77 C. C. A. 446; Seaboard, etc. R. Co. *v.* Smith, 53 Fla. 375, 43 S. 235; Atlantic C. L. R. Co. *v.* Adams, 7 Ga. App. 146, 66 S. E. 494; Charleston, etc. R. Co. *v.* Camp, 3 Ga. App. 232, 59 S. E. 710; Henry *v.* R. Co., 236 Ill. 219, 86 N. E. 231; Balsewicz *v.* R. Co., 144 Ill. App. 219 (on the issue of wilfullness); Winn *v.* R. Co., 143 Ill. App. 71; Wamsley *v.* R. Co., 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640; Beck *v.* R. Co., 156 Mich. 252, 120 N. W. 983; Kunz *v.* R. Co., 51 Or. 191, 93 P. 141, 94 P. 504; Missouri, etc. Co. *v.* Taylor (Tex. Civ.), 156 S. W. 544; Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713.

498-32 Illinois C. R. Co. *v.* O'Neill, 177 Fed. 328, 100 C. C. A. 658; Louisville & N. R. Co. *v.* Loyd (Ala.), 65 S. 153 (ordinance admissible); St. Louis, etc. R. Co. *v.* Tomlinson, 78 Ark. 251, 94 S. W. 613; Buchanan *v.* R. Co., 1 Boyce (Del.) 83, 75 A. 872; Chicago & E. R. Co. *v.* Ginther, 48 Ind. App. 12, 90 N. E. 911 (contributory negligence); Chesapeake & O. R. Co. *v.* Vaughan, 30 Ky. L. R. 215, 97 S. W. 774; Southern R. Co. *v.* Winchester, 32 Ky. L. R. 19, 105 S. W. 167; Eppstein *v.* R. Co., 197 Mo. 720, 94 S. W. 967; Texas, etc. R. Co. *v.* Bean, 55 Tex. Civ. 341, 119 S. W. 328 (crossing blocked); Ft. Worth, etc. Co. *v.* Poteet, 53 Tex. Civ. 44, 115 S. W. 883; Texarkana, etc. R. Co. *v.* Frugia, 43 Tex. Civ. 48, 95 S. W. 563; Galveston, etc. R. Co. *v.* Vollrath, 40 Tex. Civ. 46, 89 S. W. 279.

Distance of whistling post from crossing, shown. Defendant's rules immaterial unless they tend to show post placed where law required. Walker *v.* R. Co., 193 Mo. 453, 92 S. W. 83.

498-34 Missouri, etc. R. Co., *v.* Bratcher, 54 Tex. Civ. 10, 118 S. W. 1091.

498-36 Objection must be specific and reasonable. Stotler *v.* R. Co., 200 Mo. 107, 98 S. W. 509.

City limits.—Exercise of municipal authority over territory under color of law may not be collaterally attacked. Missouri, etc. R. Co. *v.* Bratcher, 54 Tex. Civ. 10, 118 S. W. 1091. See supra, "Boundaries," 722-75.

Not material if injury sustained at private crossing. Freitag *v.* R. Co., 46 Ind. App. 491, 89 N. E. 501.

498-37 See Texarkana, etc. R. Co. *v.* Frugia, 43 Tex. Civ. 48, 95 S. W. 563.

499-38 Gulf, etc. R. Co. *v.* Garrett (Tex. Civ.), 99 S. W. 162.

Presumed ordinances regulating speed are reasonable. Kunz *v.* R. Co., 51 Or. 191, 93 P. 141, 94 P. 504.

Repealing ordinance enacted after accident, inadmissible.—Nilson *v.* R. Co., 84 Neb. 595, 121 N. W. 1128.

499-39 Atlantic C. L. R. Co. *v.* Adams, 7 Ga. App. 146, 66 S. E. 494. See Grand T. R. Co. *v.* Hainer, 36 Can. Sup. 180.

499-40 Dukeman *v.* R. Co., 237 Ill. 104, 86 N. E. 712. See Grand T. R. Co. *v.* Hainer, 36 Can. Sup. 180.

499-41 Southern R. Co. *v.* Weatherlow, 153 Ala. 171, 44 S. 1019; Nichols *v.* R. Co., 44 Colo. 501, 98 P. 808; Southern R. Co. *v.* Mouchet, 3 Ga. App. 266, 59 S. E. 927; Collison *v.* R. Co., 239 Ill. 532, 88 N. E. 251 (absence of date from certificate, immaterial); Winn *v.* R. Co., 143 Ill. App. 71; Pittsburgh, etc. R. Co. *v.* Rogers, 45 Ind. App. 230, 87 N. E. 28; Stotler *v.* R. Co., 200 Mo. 107, 98 S. W. 509; Bracken *v.* R. Co., 32 Pa. Super. 22; Texarkana, etc. R. Co. *v.* Frugia, 43 Tex. Civ. 48, 95 S. W. 563.

Ordinance admissible if defendant knew

of it. Southern R. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713.

Hack driver presumed to know village speed ordinance. Gibbons *v.* R. Co., 177 Ill. App. 572.

Immaterial that ordinance was subsequently repealed. Gibbons *v.* R. Co., 177 Ill. App. 572.

499-43 Ordinance admissible though not pleaded. Louisville & N. R. Co. *v.* Co., 150 Ala. 390, 43 S. 723.

499-44 Erie R. Co. *v.* Weber, 207 Fed. 293, 125 C. C. A. 37; Cook *v.* R. Co., 153 Ill. App. 596; Collison *v.* R. Co., 239 Ill. 532, 88 N. E. 251; Kelsall *v.* R. Co., 196 Mass. 554, 82 N. E. 674; Ellington *v.* R. Co., 96 Minn. 176, 104 N. W. 827; Rowe *v.* R. Co., 85 S. C. 23, 66 S. E. 1056. *Contra* if death did not result. Mochowik *v.* R. Co., 196 Mo. 550, 94 S. W. 256; Palmer *v.* R. Co., 142 Mo. App. 440, 127 S. W. 96. See Lueders *v.* R. Co., 253 Mo. 97, 161 S. W. 1159.

It is negligence in some cases.—Kelsall *v.* R. Co., 196 Mass. 554, 82 N. E. 674; Stotler *v.* R. Co., 200 Mo. 107, 98 S. W. 509; Harbert *v.* R. Co., 78 S. C. 537, 59 S. E. 644; Drawdy *v.* R. Co., 78 S. C. 374, 58 S. E. 980. See Kunz *v.* R. Co., 51 Or. 191, 93 P. 141, 94 P. 504.

499-45 Cook *v.* R. Co., 153 Ill. App. 596; Cleveland, etc. R. Co. *v.* Dukeman, 130 Ill. App. 105; Day *v.* R. Co., 132 Mo. App. 707, 112 S. W. 1019.

Violation of statute is negligence per se as to persons using a crossing, but as to others it is evidentiary only. Missouri, etc. R. Co. *v.* Saunders, 101 Tex 255, 106 S. W. 321.

500-46 Garber *v.* R. Co. (Tex. Civ.), 118 S. W. 857. See Texarkana, etc. R. Co. *v.* Frugia, 43 Tex. Civ. 48, 95 S. W. 563. *Comp.* 489-86, supra.

500-47 Louisville & N. R. Co. *v.* Loyd (Ala.), 65 S. 153; St. Louis S. R. Co. *v.* Graham, 83 Ark. 61, 102 S. W. 700; Giacomo *v.* R. Co., 196 Mass. 192, 81 N. E. 899; Sprague *v.* R. Co., 40 Mont. 481, 107 P. 412; Wallenburg *v.* R. Co., 86 Neb. 642, 126 N. W. 289; Quinn *v.* R. Co., 78 N. J. L. 539, 74 A. 456.

500-49 Southern R. Co. *v.* Douglass, 144 Ala. 351, 39 S. 268; Stuart's Admr. *v.* R. Co., 146 Ky. 127, 142 S. W. 232; Rogers *v.* R. Co., 75 N. J. L. 568, 68 A. 148; Schwarz *v.* R. Co., 218 Pa. 187, 67 A. 213.

Testimony witness exclaimed, "Why don't they blow that whistle?" is admissible. Terwilliger *v.* R. Co., 152 App. Div. 168, 136 N. Y. S. 733.

500-50 Louisville R. Co. *v.* Sheehan's Admr., 146 Ky. 168, 142 S. W. 221.

501-51 Stotler *v.* R. Co., 200 Mo. 107, 98 S. W. 509.

501-52 Rich *v.* R. Co., 149 Fed. 79, 78 C. C. A. 663; Keiser *v.* R. Co., 212 Pa. 409, 61 A. 903.

In some courts rule stated in text does not prevail. Cleveland, etc. R. Co. *v.* Wuest, 41 Ind. App. 210, 83 N. E. 620. See Rogers *v.* R. Co., 75 N. J. L. 568, 68 A. 148.

Not negative.—Schwarz *v.* R. Co., 218 Pa. 187, 67 A. 213.

Negative evidence given more weight than positive testimony of defendant's employes. Stotler *v.* R. Co., 200 Mo. 107, 98 S. W. 509.

501-53 St. Louis, etc. R. Co. *v.* Gibson (Ark.), 168 S. W. 1129; Stuart's Admr. *v.* R. Co., 146 Ky. 127, 142 S. W. 232; McGee *v.* R. Co., 214 Mo. 530, 114 S. W. 33 (presumption may be overcome by plaintiff's testimony); King *v.* R. Co., 211 Mo. 1, 109 S. W. 671.

501-54 Illinois C. R. Co. *v.* Dupree, 138 Ky. 459, 128 S. W. 334, where child knew train coming, though too young to be capable of contributory negligence. See Stearns *v.* R., 75 N. H. 40, 71 A. 21.

Infliction of injury at crossing by object projecting from car, prima facie evidence of negligence. St. Louis, etc. R. Co. *v.* Carr, 94 Ark. 246, 126 S. W. 850, statute.

502-55 Thompson *v.* R., 81 S. C. 333, 62 S. E. 396; St. Louis, etc. Co. *v.* Dumright (Tex. Civ.), 166 S. W. 938; Texas M. R. *v.* Byrd (Tex. Civ.), 110 S. W. 199.

Number of crossings between stations, shown, and their nature. Missouri, etc. R. Co. *v.* Malone (Tex. Civ.), 110 S. W. 958.

Parol testimony as to location of street with reference to alleged accident, competent. Northern Alabama R. Co. *v.* Counts, 166 Ala. 550, 51 S. 938.

Condition of articles on car in same train, on day in question, at another station, shown to establish cause of injury inflicted by article projecting from car. Northern Alabama R. Co. *v.* Counts, supra.

502-58 Louisville & N. R. Co. *v.* Williams (Ala.), 62 S. 679; Birmingham Southern R. Co. *v.* Fox, 167 Ala. 281, 52 S. 889; Alabama G. S. R. Co. *v.* McWhorter, 156 Ala. 269, 47 S. 84; Reidel *v.* R. Co., 144 Ill. App. 424; Norris *v.* R. Co., 152 N. C. 505, 67 S. E. 1017; Thompson *v.* R. Co., 149 N. C. 155, 62 S. E. 883; Thompson *v.* R., 81 S. C. 333, 62 S. E. 396; Goodwin *v.* R. Co., 82 S. C. 321, 64 S. E. 242; Missouri, etc. R. Co. *v.* Malone (Tex. Civ.), 110 S. W. 958.

When immaterial.—Pope *v.* R. Co., 242 Mo. 232, 146 S. W. 790.

Absence of headlight may be testified to by witnesses who first noticed fact immediately after accident; such testimony throws burden of showing light previously burning on defendant. Cotner *v.* R. Co., 220 Mo. 284, 119 S. W. 610.

503-59 Northern Alabama R. Co. *v.* Counts, 166 Ala. 550, 51 S. 938 (defendant's knowledge of extent of travel shown to establish wantonness in using excessive speed and not giving signals or maintaining lookout); Thompson *v.* R. Co., 155 N. C. 155, 62 S. E. 883; Marks *v.* R. Co., 88 Va. 1, 13 S. E. 299.

503-60 *Contra,* Missouri, etc. R. Co. *v.* Malone (Tex. Civ.), 110 S. W. 958.

Persons injured while using track as a walkway at a place where people accustomed to walk may show signals not given, not to establish negligence per se, but to show prudence required warning to be given, engine being without headlight. Morrow *v.* R. Co., 147 N. C. 623, 61 S. E. 621, 16 L. R. A. (N. S.) 642.

Defective appliances and incompetent management may be shown in action by trespassers where situation required defendant to maintain lookout. Louisville & N. R. Co. *v.* Berry, 33 Ky. L. R. 850, 111 S. W. 370, *dist.* Brown *v.* R. Co., 97 Ky. 228, 30 S. W. 639.

Extent to which road used as a way shown if defendant knew facts. Thompson *v.* R. Co., 81 S. C. 333, 62 S. E. 396.

If defendant's wrongful act caused plaintiff to leave crossing and enter upon its track at a distance therefrom in the effort to save imperiled property, he may show no signal given. Thompson *v.* R. Co., supra.

503-62 See Galveston, etc. R. Co. *v.* Olds (Tex. Civ.), 112 S. W. 787.

Such evidence immaterial in favor of employe who knew when train due and whose duty it was to keep track clear. Wickham *v.* R. Co., 135 Ky. 288, 122 S. W. 154.

503-63 St. Louis, I. M. & S. R. Co. *v.* Wells, 102 Ark. 257, 143 S. W. 1069; Nashville & C. R. Co. *v.* Peavler, 134 Ga. 618, 68 S. E. 432; Texas & P. R. Co. *v.* Adkins (Tex. Civ.), 126 S. W. 954; St. Louis, etc. R. Co. *v.* Summers, 51 Tex. Civ. 133, 111 S. W. 211. *Contra,* as to absolute ordinance. Baltimore I. O. R. Co. *v.* S., 114 Md. 536, 80 A. 170.

504-64 Macon & B. R. Co. *v.* Parker, 127 Ga. 471, 56 S. E. 616; Goodwin *v.* R. Co., 82 S. C. 321, 64 S. E. 242 (to show wantonness). See Charleston R. Co. *v.* Camp, 3 Ga. App. 232, 59 S. E. 710. *Comp.* Southern R. Co. *v.* Flynt, 2 Ga. App. 162, 58 S. E. 374.

Injuries at private crossing.—Chesapeake & O. R. Co. *v.* Wilson, 31 Ky. L. R. 500, 102 S. W. 810. *Comp.* Hartman *v.* R. Co., 132 Ia. 582, 110 N. W. 10; Annapolis, etc. R. Co. *v.* S., 104 Md. 659, 65 A. 434.

505-67 Southern R. Co. *v.* Chatman, 124 Ga. 1026, 53 S. E. 692; St. Louis, S. W. R. Co. *v.* Driver (Tex. Civ.), 137 S. W. 409; So. R. Co. *v.* Wiley, 112 Va. 183, 70 S. E. 510.

Evidence that plaintiff on other occasions had jumped on moving trains is inadmissible. Ala. & V. R. Co. *v.* Thornhill (Miss.), 63 S. 674.

Consent to use of track not presumed. Bailey *v.* R. Co., 220 Pa. 516, 69 A. 998.

505-68 Anderson *v.* R. Co., 15 Ida. 513, 99 P. 91; Cincinnati, etc. Co. *v.* Harrigan, 149 Ky. 53, 147 S. W. 942; Davis *v.* R. Co., 30 Ky. L. R. 172, 97 S. W. 1122; Cotner *v.* R. Co., 220 Mo. 284, 119 S. W. 610; Hair *v.* R. Co., 84 Neb. 398, 121 N. W. 439; Meitzner *v.* R. Co., 224 Pa. 352, 73 A. 434; Goodwin *v.* R. Co., 82 S. C. 321, 64 S. E. 242; Kyne *v.* R. Co. (Utah), 126 P. 311.

Crossing at other points.—Louisville & N. R. Co. *v.* Williams (Ala.), 62 S. 679.

505-69 Blackmon *v.* R. Co. (Ala.), 64 S. 592; So. R. Co. *v.* Stewart (Ala.), 60 S. 927; Southern R. Co. *v.* Smith, 173 Ala. 697, 55 S. 913; Southern R. Co. *v.* Forrister, 158 Ala. 477, 48 S. 69; Alabama, etc. R. Co. *v.* Guest, 144

Ala. 373, 39 S. 654; Moody *v.* R. Co., 89 Ark. 103, 115 S. W. 400 (act of defendant making use of track necessary shown); St. Louis, etc. R. Co. *v.* Sparks, 81 Ark. 187, 99 S. W. 73; Florida R. Co. *v.* Sturkey, 56 Fla. 196, 48 S. 34; Macon & B. R. Co. *v.* Parker, 127 Ga. 471, 56 S. E. 616; Sublett *v.* R. Co., 146 Ky. 530, 142 S. W. 1060; Thompson *v.* R. Co., 243 Mo. 336, 148 S. W. 484; Kunkel *v.* R. Co., 18 N. D. 367, 121 N. W. 830; Sanders *v.* C. Div., 90 S. C. 331, 73 S. E. 356; Chicago, etc. R. Co. *v.* Loftis (Tex. Civ.), 168 S. W. 403 (negative testimony); Mo., etc. R. Co. *v.* Sharp (Tex. Civ.), 120 S. W. 263 (warning signboards are immaterial); St. Louis S. R. Co. *v.* Wilcox, 57 Tex. Civ. 3, 121 S. W. 588; Teakle *v.* R. Co., 32 Utah 276, 90 P. 402; Chesapeake & O. R. Co. *v.* Corbin, 110 Va. 700, 67 S. E. 179.

Knowledge of defendant may not be inferred from fact of use. Southern R. Co. *v.* Stewart, 164 Ala. 171, 51 S. 324. See Eppstein *v.* R. Co., 197 Mo. 720, 94 S. W. 967. Knowledge of use of track by others during the day, not notice of such use at night. Moore *v.* R. Co. (Tex. Civ.), 123 S. W. 1142.

Burden of proof is on person injured. Ervin *v.* Ry. Co., 158 Mo. App. 1, 139 S. W. 498.

506-71 Missouri, etc. R. Co. *v.* Bratton, 85 Ark 326, 108 S. W. 518; Ellenberg *v.* R. Co., 5 Ga. App. 389, 63 S. E. 240; Pittsburg, etc. R. Co. *v.* Simons, 168 Ind. 333, 79 N. E. 911; Bryant *v.* R. Co. (Mo. App.), 168 S. W. 228; Farris *v.* R. Co., 151 N. C. 483, 66 S. E. 457 (custom of employes); Sanders *v.* Carolina Div., 90 S. C. 331, 73 S. E. 356; Texas & P. R. Co. *v.* Adkins (Tex. Civ.), 126 S. W. 954 (express consent need not be shown). Posting bulletin directing employes to take train at place in question, shown. Louisville & N. R. Co. *v.* Johnson, 162 Ala. 665, 50 S. 300; International, etc. R. Co. *v.* Ploeger (Tex. Civ.), 93 S. W. 226 (Tex.) 93 S. W. 722.

506-72 Acquiescence in use of bridge, not inferred from use if notice forbidding it given. Lamb *v.* R. Co., 86 S. C. 106, 67 S. E. 958. Witness in position to know may testify he never heard of objection. Lamb *v.* R. Co., supra.

Facts amounting to implied license, shown. Lowenstein *v.* R. Co. (Mo. App.), 119 S. W. 430.

506-73 Brown *v.* R. Co. (Ala.), 64 S. 581; Adams *v.* R. Co., 83 Ark. 300, 103 S. W. 725; Cunningham *v.* R. Co., 260 Ill. 589, 103 N. E. 594; McGuire *v.* R. Co., 120 Ill. App. 111; Miller *v.* R. Co. (Ky.), 118 S. W. 348 (rule does not apply to persons walking along tracks in or near villages or sparsely settled hamlets); Louisville, etc. R. Co. *v.* Woolfork, 30 Ky. L. R. 569, 99 S. W. 294 (bridge without footway plank); Prince *v.* R. Co., 30 Ky. L. R. 469, 99 S. W. 293 (switchyard); Balt., etc. Co. *v.* S., 114 Md. 536, 80 A. 170. But *comp.* last case with Louisville & N. R. Co. *v.* Goulding, 52 Fla. 327, 42 S. 854.

507-74 Bailey *v.* R. Co., 220 Pa. 516, 69 A. 998, custom of employe to use track. See So. R. Co. *v.* Stewart (Ala.), 60 S. 927.

507-75 Louisville & N. R. Co. *v* Hurst, 132 Ky. 121, 116 S. W. 291.

507-76 Immaterial where recovery sought on ground plaintiff's peril known to defendant. Missouri, etc. R Co. *v.* Mitcham, 57 Tex. Civ. 134, 121 S. W. 871.

Burden on trespasser.—Adams *v.* R. Co., 83 Ark. 300, 103 S. W. 725; Burdo *v.* R. Co., 123 Mo. App. 629, 100 S. W 509.

Blocking crossing by defendant may be shown to account for plaintiff's presence on track. Balsewicz *v.* R. Co., 144 Ill. App. 219.

508-78 Chicago, etc. R. Co. *v.* Bunch, 82 Ark. 522, 102 S. W. 369; Butler *v.* R. Co., 63 Fla. 95, 58 S. 225; Georgia R. Co. *v.* Fuller, 6 Ga. App. 454, 65 S. E. 313; Sublett *v.* R. Co., 146 Ky. 530, 142 S. W. 1060; Tennessee Cent. R. Co. *v.* Cook, 146 Ky. 372, 142 S. W. 683; Creager *v.* R. Co., 134 Ky. 543, 121 S. W. 458 (if reasonable diligence employed to ascertain facts submitted); Jones *v.* R. Co., 122 La. 354, 47 S. 679; Hufft *v.* R. Co., 222 Mo. 286, 121 S. W. 120.

508-79 Johnson *v.* R. Co., 59 Fla. 302, 51 S. 851 (unreasonable obstruction of street by cars); Lamb *v.* R. Co., 86 S. C. 106, 67 S. E. 958.

It is presumed, from allegation injury sustained while plaintiff attempting to cross track, there being no averment he was doing so rightfully, he was intentional trespasser. Sutton *v.* R. Co., 78 N. J. L. 17, 73 A. 256.

Defendant's consent for one to enter upon its track for the purpose of at-

tempting to save property imperiled by its negligence, presumed. Thompson *v.* R., 81 S. C. 333, 62 S. E. 396.

Parol testimony and photographs, admissible.—Missouri, etc. R. Co. *v.* Williams, 50 Tex. Civ. 134, 109 S. W. 1126.

509-83 See Pittsburgh, etc. R. Co. *v.* Warrum, 42 Ind. App. 179, 82 N. E. 934.

509-85 Choctaw & O. R. Co. *v.* Coker, 89 Ark. 270, 116 S. W. 216; Conway *v.* R. Co., 135 Ky. 229, 119 S. W. 206; Christie *v.* R. Co. (Ky.), 124 S. W. 796; Gendreau *v.* R. Co., 99 Minn. 38, 108 N. W. 814; Mobile, etc. R. Co. *v.* Kea, 96 Miss. 195, 50 S. 628; Turner *v.* R. Co., 134 Mo. App. 397, 114 S. W. 1026; Lyons *v.* R. Co., 28 S. D. 31, 132 N. W. 679, *rev.* 26 S. D. 333, 128 N. W. 134.

Similarity of crossing obstructed with other crossings, immaterial. Texas C. R. Co. *v.* Randall, 51 Tex. Civ. 249, 113 S. W. 180.

Time car removed may be shown if testimony conflicting as to where it stood and time witnesses saw it varied. Texas C. R. Co. *v.* Randall, supra.

509-86 Vandalia R. Co. *v.* McMains, 42 Ind. App. 532, 85 N. E. 1038; Feeney *v.* R. Co., 123 Mo. App. 420, 99 S. W. 477. See Fay *v.* R. Co., 131 Wis. 639, 111 N. W. 683. But see Illinois C. R. Co. *v.* Martin, 33 Ky. L. R. 666, 110 S. W. 815 (acts or omissions of deceased engineer cannot be shown); Davidson *v.* R. Co., 164 Mo. App. 701, 148 S. W. 406.

Violation of ordinance by allowing engines to remain on crossing, negligence per se. Lindler *v.* R. Co., 84 S. C. 536, 66 S. E. 995.

509-87 So. R. Co. *v.* Crawford, 164 Ala. 178, 51 S. 340; Charleston, etc. R. Co. *v.* Camp, 3 Ga. App. 232, 59 S. E. 710; Warn *v.* R. Co., 149 Ia. 450, 126 N. W. 1104; Conway *v.* R. Co., 135 Ky. 229, 119 S. W. 206; Turner *v.* R. Co., 134 Mo. App. 397, 114 S. W. 1026.

Where animals on adjacent highways and not at crossings are frightened, statute governing signals and slackening speed at crossings, no application So. R. Co. *v.* Flynt, 2 Ga. App. 162, 58 S. E. 374.

510-88 Louisville & N. R. Co. *v.* Blackaby, 33 Ky. L. R. 885, 111 S. W. 317; Baker *v.* R. Co., 144 N. C. 36, 56 S. E. 553.

510-92 So. R. Co. *v.* Hutcheson, 136 Ga. 591, 71 S. E. 802; Feeney *v.* R. Co., 123 Mo. App. 420, 99 S. W. 477; Baker *v.* R. Co., 144 N. C. 36, 56 S. E. 553.

Unreliability of horse may be shown. Johnson *v.* R. Co., 45 Tex. Civ. 146, 100 S. W. 206.

510-93 Plaintiff's knowledge of danger of attempting to cross, not determinative of contributory negligence. Texas C. R. Co. *v.* Randall, 51 Tex. Civ. 249, 113 S. W. 180.

Burden on defendant who has admitted its train caused horse to become frightened to show some other cause therefor than omission of statutory duty. Turner *v.* R. Co., 134 Mo. App. 397, 114 S. W. 1026.

510-94 See Settlemeyer *v.* R. Co., 97 S. C. 85, 81 S. E. 465.

Reputation of defendant's engineer may not be shown, nor may he testify he could not recall he had frightened any other horse; he may testify to his habit in shutting off steam before he reached place in question. Adams *v.* R. Co. (Tex. Civ.), 122 S. W. 895.

512-10 See vol. 8, p. 914, n. 67, et seq., and supplement thereto.

512-13 See vol. 8, p. 920, n. 80, and supplement thereto.

513-15 Dunham *v.* R. Co., 126 Mo. App. 643, 105 S. W. 21; Golden *v.* R. Co., 84 Mo. App. 59.

513-18 St. Louis S. R. Co. *v.* Heintz, 82 Ark. 459, 102 S. W. 221 (as against licensee operating railroad); Atchison, etc. Co. *v.* Gumaer, 22 Colo. App. 495, 125 P. 589; So. R. Co. *v.* Patton, 10 Ga. App. 678, 73 S. E. 1075; Cox *v.* R. Co., 87 Neb. 136, 126 N. W. 999 (on station grounds not required to be fenced); Starke *v.* R. Co., 82 Neb. 800, 118 N. W. 1066; Kennedy *v.* R. Co., 80 Neb. 267, 114 N. W. 165; St. Louis, etc. R. Co. *v.* Smith (Okla.), 137 P. 357; Fowles *v.* R. Co., 73 S. C. 306, 53 S. E. 534; Missouri, etc. R. Co. *v.* Byrd (Tex. Civ.), 124 S. W. 738; Gulf, etc. R. Co. *v.* Simpson, 41 Tex. Civ. 125, 91 S. W. 874; Martin *v.* R. Co., 15 Wyo. 493, 89 P. 1025.

See Chicago, etc. R. Co. *v.* Porter (Tex. Civ.), 166 S. W. 37.

Fact of injury must be proved first. Illinois S. R. Co. *v.* Bottoms, 1 Ala. App. 302, 55 S. 260.

514-19 Fenton *v.* R. Co., 102 Ark. 386, 144 S. W. 192; Kansas C. R. Co. *v.* Lewis, 80 Ark. 396, 97 S. W. 56 (ruled under laws of Indian Territory); Atchison, etc. Co. *v.* Gumaer, 22

Colo. App. 495, 125 P. 589; Denver, etc. R. Co. *v.* Dunn, 46 Colo. 150, 103 P. 387; Rio Grande W. R. Co. *v.* Boyd, 44 Colo. 119, 96 P. 781 (aside from the act of 1902); Denver, etc. R. Co. *v.* Coulter, 41 Colo. 445, 92 P. 906; Atlantic Co. *v.* Hillhouse, 64 Fla. 173, 60 S. 339; Gibson *v.* R. Co., 136 Ia. 415, 113 N. W. 927; Pickett *v.* R. Co., 153 Ky. 460, 155 S. W. 1139; Miller *v.* R. Co. (Mo. App.), 167 S. W. 1160; Pontius *v.* R. Co., 174 Mo. App. 576, 161 S. W. 292; Nelson *v.* R. Co., 136 Mo. App. 160, 116 S. W. 1118 (circumstantial evidence sufficient); White *v.* R. Co., 93 Neb. 736, 141 N. W. 1038; Reagan *v.* R. Co., 15 N. M. 270, 106 P. 376 (burden shifted by giving statutory notice of claim); Pecos, etc. R. Co. *v.* Cazier, 13 N. M. 131, 79 P. 714; Midland Val. R. Co. *v.* Bryant, 37 Okla. 206, 131 P. 678; St. Louis, etc. R. Co. *v.* Tabb (Tex. Civ.), 168 S. W. 866; International, etc. R. Co. *v.* Leuschner (Tex. Civ.), 166 S. W. 416; Irving *v.* R. Co. (Tex. Civ.), 164 S. W. 910; International, etc. R. Co. *v.* Matthews Bros. (Tex. Civ.), 158 S. W. 1058; Marshall, etc. R. Co. *v.* Boaz (Tex. Civ.), 157 S. W. 216; Gulf, etc. R. Co. *v.* Blumberg (Tex. Civ.), 155 S. W. 1184; Texas & P. R. Co. *v.* Bailey (Tex. Civ.), 150 S. W. 962 (proof insufficient); Texas C. R. Co. *v.* Mill (Tex. Civ.), 126 S. W. 627.

See Canadian P. R. Co. *v.* Eggleston, 36 Can. Sup. 641.

Evidence sufficient.—Seaboard A. L. R. Co. *v.* Jennings, 9 Ga. App. 744, 72 S. E. 188.

Evidence insufficient.—Blid *v.* R. Co., 89 Neb. 689, 131 N. W. 1027; Harvey Coal & Coke Co. *v.* R. Co., 69 W. Va. 228, 71 S. E. 178.

Circumstantial evidence may be sufficient, however. Hanger *v.* R. Co., 70 W. Va. 212, 73 S. E. 713.

Where evidence is circumstantial. Gibson *v.* R. Co., 136 Ia. 415, 113 N. W. 927. Such evidence sufficient if it establishes the more probable hypothesis. Meier *v.* R. Co., 51 Or. 69, 93 P. 691.

514-20 Ex parte S. R. Co. (Ala.), 61 S. 881; So. R. Co. *v.* Cobb (Ala. App.), 60 S. 426; O'Rear *v.* Lumb. Co., 6 Ala. App. 461, 60 S. 462; Midland Valley R. Co. *v.* Skinner, 99 Ark. 370, 138 S. W. 969; St. Louis S. R. Co. *v.* Oliphant, 93 Ark. 631, 125 S. W. 121; El Dorado & B. R. Co. *v.* Knox, 90 Ark. 1, 117 S. W. 779; Kansas City R. Co. *v.* Wyat, 80 Ark. 382, 97 S. W. 656; Ocilla S. R. Co. *v.* Dorminy (Ga. App.), 80 S. E. 723; So. R. Co. *v.* Carter, 139 Ga. 236, 77 S. E. 21; Western, etc. Co. *v.* Poston, 12 Ga. App. 124, 76 S. E. 1042; Central R. Co. *v.* Hughes, 127 Ga. 593, 56 S. E. 770; Augusta S. R. Co. *v.* Carroll, 7 Ga. App. 138, 66 S. E. 403; Western, etc. R. Co. *v.* Clark, 2 Ga. App. 346, 58 S. E. 510; Ritter *v.* R. Co., 83 S. C. 213, 65 S. E. 175; Griffith *v.* R. Co., 82 S. C. 252, 64 S. E. 222; Miller *v.* R. Co., 21 S. D. 242, 111 N. W. 553.

See Nashville, etc. R. Co. *v.* Garth (Ala.), 59 S. 640; vol. 8, p. 892, n. 94, and supplement thereto.

Not applicable where animals merely frightened. Garth *v.* R. Co. (Ala.), 65 S. 166.

Presumption in all cases is against the railroad company. Alderman *v.* Alderman, 141 Ga. 600, 81 S. E. 899.

515-21 Johnson *v.* R. Co., 11 Cal. App. 278, 104 P. 713, if defendant knew of defect in time to repair it.

515-22 Bacon *v.* R. Co., 12 Ont. L. R. (Can.) 196; So. R. Co. *v.* Parks (Ala. App.), 65 S. 202; So. R. Co. *v.* Penney, 164 Ala. 188, 51 S. 392; Central R. Co. *v.* Williams, 163 Ala. 119, 50 S. 328; Louisville & N. R. Co. *v.* B. Co., 150 Ala. 390, 43 S. 723; Central R. Co. *v.* Lindley, 105 Ark. 294, 151 S. W. 246; Geren *v.* R. Co., 99 Ark. 226, 137 S. W. 1100; St. Louis, etc. R. Co. *v.* Rhoden, 93 Ark. 29, 123 S. W. 798; Lane *v.* R. Co., 78 Ark. 234, 95 S. W. 460; Rio Grande W. R. Co. *v.* Boyd, 44 Colo. 119, 96 P. 781; Atlantic C. L. Co. *v.* Peebles, 56 Fla. 145, 47 S. 392; Georgia, etc. R. Co. *v.* Norman (Ga. App.), 79 S. E. 86; Macon, etc. R. Co. *v.* Fuller, 6 Ga. App. 499, 65 S. E. 299 (rule not applicable to private tram road); Dean *v.* Co., 6 Ga. App. 480, 65 S. E. 300; Remley *v.* R. Co., 151 Ky. 796, 152 S. W. 973; Feagan *v.* Metcalfe, 150 Ky. 745, 150 S. W. 988; Byrd *v.* Co., 136 Ky. 766, 125 S. W. 174; Chesapeake & O. R. Co. *v.* Grigsby, 131 Ky. 363, 115 S. W. 237; Cincinnati, etc. R. Co. *v.* Lowry (Ky.), 122 S. W. 128; Mobile & O. R. Co. *v.* Morrow, 30 Ky. L. R. 83, 97 S. W. 389; Troutwine *v.* R. Co., 32 Ky. L. R. 5, 105 S. W. 142; O'Kelly *v.* R. Co., 94 Miss. 635, 47 S. 660; So. R. Co. *v.* Murray, 91 Miss. 546, 44 S. 785; Reinke *v.* R. Co. (N. D.), 135 N. W. 779; Corbett *v.* R. Co., 19 N. D. 450, 125 N. W. 1054;

Anderson *v.* R. Co., 18 N. D. 462, 123 N. W. 281; Texas & P. R. Co. *v.* Webb, 102 Tex. 210, 114 S. W. 1171.

See Kan., etc. R. Co. *v.* Dickerson (Ark.), 165 S. W. 272; Seaboard, etc. R. Co. *v.* Lott, 11 Ga. App. 839, 76 S. E. 596; Pickett *v.* R. Co., 153 Ky. 460, 155 S. W. 1139; vol. 8, p. 893, n. 95, and supplement thereto.

Extends only to acts alleged.—South. Ga. R. Co. *v.* Atkins (Ga. App.), 79 S. E. 226.

516-23 So. R. Co. *v.* Murray, 91 Miss. 546, 44 S. 785.

It has been said that it requires evidence of less weight to rebut such presumption than would be necessary if plaintiff made proof of actual negligence. Reinke *v.* R. Co. (N. D.), 135 N. W. 779. See vol. 8, p. 893, n. 96, and supplement thereto.

517-25 See Cincinnati, etc. R. Co. *v.* Lowry (Ky.), 122 S. W. 128.

517-26 Atl., etc. R. Co. *v.* Cox, 11 Ga. App. 384, 75 S. E. 268; Augusta S. R. Co. *v.* Carroll, 7 Ga. App. 138, 66 S. E. 403; Western & A. R. Co. *v.* Clark, 2 Ga. App. 346, 58 S. E. 510; Byrd *v.* Co., 136 Ky. 766, 125 S. W. 174; Chesapeake & O. R. Co. *v.* Grigsby, 131 Ky. 363, 115 S. W. 237; Corbett *v.* R. Co., 19 N. D. 450, 125 N. W. 1054; Griffith *v.* R. Co., 82 S. C. 252, 64 S. E. 222; Miller *v.* R. Co., 21 S. D. 242, 111 N. W. 553.

517-27 Louisville & N. R. Co. *v.* B. Co., 150 Ala. 390, 43 S. 723; Little Rock, etc. Co. *v.* Hicks, 79 Ark. 248, 96 S. W. 385; Colorado & S. R. Co. *v.* Webb, 36 Colo. 224, 85 P. 683; Houston, etc. R. Co. *v.* Kincheloe, 56 Tex. Civ. 123, 119 S. W. 905.

It may be shown train behind time. So. R. Co. *v.* Puryear, 127 Ga. 88, 56 S. E. 73.

518-28 Louisville & N. R. Co. *v.* B. Co., 150 Ala. 390, 43 S. 723.

518-29 Colorado, etc. R. Co. *v.* Webb, 36 Colo. 244, 85 P. 683; Miller *v.* R. Co., 21 S. D. 242, 111 N. W. 553; Tex. & P. R. Co. *v.* Bailey (Tex. Civ.), 150 S. W. 962; Texas, etc. R. Co. *v.* Langham (Tex. Civ.), 95 S. W. 686.

518-30 Barbee *v.* Co., 9 Cal. App. 457, 99 P. 541; Skipworth *v.* R. Co., 95 Miss. 50, 48 S. 964; Nicholson *v.* R., Co., 155 Mo. App. 359, 137 S. W. 69; Texas & P. R. Co. *v.* Corn, 102 Tex. 194, 114 S. W. 103. Such evidence, immaterial. Gulf, etc. R. Co. *v.* Bennett (Tex. Civ.), 126 S. W. 607.

518-31 *Contra,* Miller *v.* R. Co., 21 S. D. 242, 111 N. W. 553.

519-33 Meier *v.* R. So., 51 Or. 69, 93 P. 691; Texas C. R. Co. *v.* Pruitt, 49 Tex. Civ. 370, 110 S. W. 966; International & G. N. R. Co. *v.* Merideth (Tex. Civ.), 137 S. W. 922.

Any evidence tending to prove violation of duty is admissible. Lake E. & W. R. Co. *v.* Voliva (Ind. App.), 101 N. E. 338.

519-36 Hires *v.* R. Co., 157 Mo. App 46, 137 S. W. 60.

Burden of proof is on defendant to show that defect was without its knowledge. Harper *v.* R. Co. (Ia.), 143 N. W. 529.

"**The liability of the defendant** in this class of cases is statutory; and plaintiff can only recover upon proof of the defendant's failure to lawfully fence at the place where the animals killed came upon the right of way, as provided in section 3145, R. S. 1909. The burden of making this proof is undoubtedly upon the plaintiff, and his action fails, unless he makes out a prima facie case. He is required to prove, either directly or from physical facts and circumstances, that the animals entered the right of way at a place where the statute requires the fences or cattle guards to be erected and maintained, and that the statute had not been complied with. As stated, this need not be by direct testimony. Proper circumstantial evidence of sufficient probative force will support the burden of proof; but the same must show that the animals entered at a place on the right of way where the defendant was required to erect and maintain a lawful fence or cattle guards, and had failed to do so." Lynn *v.* R. Co., 164 Mo. App. 445, 146 S. W. 451.

519-37 Texas C. R. Co. *v.* Pruitt, 49 Tex. Civ. 370, 110 S. W. 966; International, etc. R. Co. *v.* Seiders, 50 Tex. Civ. 568, 110 S. W. 997.

520-38 Gibson *v.* R. Co., 136 Ia. 415, 113 N. W. 927; Gulf, etc. R. Co. *v.* Bennett (Tex. Civ.), 126 S. W. 607.

520-40 Chicago, etc. Co. *v.* Ness (Ind. App.), 105 N. E. 250; Cleveland, etc. R. Co. *v.* Miller, 40 Ind. App. 165, 81 N. E. 517; Texas C. R. Co. *v.* Mill (Tex. Civ.), 126 S. W. 627.

520-41 Central Ind. R. Co. *v.* Smith, 42 Ind. App. 365, 85 N. E. 26; Todd *v.* R. Co., 59 Or. 249, 117 P. 300; Inter-

national & G. N. R. Co. *v.* Schram (Tex. Civ.), 138 S. W. 195; Texas C. R. Co. *v.* Wills (Tex. Civ.), 116 S. W. 145.

521-43 Edie *v.* R. Co., 133 Mo. App. 9, 112 S. W. 993; Burnham *v.* R. Co., 83 Neb. 183, 119 N. W. 235.

521-44 Expert testimony not proper to show necessary limits for switching purposes and excuse absence of fences. Green *v.* R. Co., 142 Mo. App. 67, 125 S. W. 865.

Usual and customary extent of switch limits cannot be proved. Green *v.* R. Co., supra.

522-47 Toledo, etc. R. Co. *v.* Delliplane, 119 Ill. App. 122; Wabash R. Co. *v.* Pickrell, 72 Ill. App. 601; Lynn *v.* R. Co., 164 Mo. App. 445, 146 S. W 451; Meier *v.* R. Co., 51 Or. 69, 93 P. 691.

522-48 Dorsey *v.* R. Co., 175 Mo. App. 150, 157 S. W. 1065; Green *v.* R. Co., 142 Mo. App. 67, 125 S. W. 865; Corcoran *v.* R. Co., 138 Mo. App. 408, 122 S. W. 743; Sowders *v.* R. Co., 127 Mo. App. 119, 104 S. W. 1122; Int., etc. R. Co. *v.* Bandy (Tex. Civ.), 163 S. W. 341.

"This presumption or inference or fact in this class of cases was first authoritatively declared by our supreme court in the case of Jantzen *v.* Railway Co., 83 Mo. 171." Lynn *v.* R. Co., 164 Mo. App. 445, 146 S. W. 451.

523-51 Midland Valley R. Co. *v.* Skinner, 99 Ark. 370, 138 S. W. 969; St. Louis, etc. R. Co. *v.* Heintz, 82 Ark. 459, 102 S. W. 221; Int., etc. R. Co. *v.* Holley (Tex. Civ.), 160 S. W. 990. *Contra*, Central R. Co. *v.* Turner, 145 Ala. 441, 40 S. 355; Young *v.* R. Co., 88 Miss. 446, 40 S. 870. See St. Louis, etc. R. Co. *v.* Ewing, 85 Ark. 53, 107 S. W. 191; Ft. Smith & W. R. Co. *v.* Collins, 26 Okla. 82, 108 P. 550; Stewart *v.* R. Co. (Tex. Civ.), 165 S. W. 559; Int. & G. N. R. Co. *v.* Matthews (Tex. Civ.), 158 S. W. 1048.

Such facts not evidence of negligence. Denver, etc. R. Co. *v.* Coulter, 41 Colo. 445, 92 P. 906; Atchison, etc. R. Co. *v.* Adcock, 38 Colo. 369, 88 P. 180; Martin *v.* R. Co., 15 Wyo. 493, 89 P. 1025.

523-52 Hires *v.* R. Co., 157 Mo. App. 46, 137 S. W. 60; St. Louis, S. W. R. Co. of Texas *v.* Conley (Tex. Civ.), 142 S. W. 36; International, etc. R. Co. *v.* Carr (Tex. Civ.), 91 S. W. 858. See Barbee *v.* Co., 9 Cal. App. 457, 99 P. 541.

523-53 Louisville & N. R. Co. *v.* Co., 150 Ala. 390, 43 S. 723.

523-54 Failure to post notice shown. St. Louis, etc. R. Co. *v.* Ewing, 85 Ark. 53, 107 S. W. 191.

523-55 Young *v.* R. Co., 88 Miss. 446, 40 S. 870; Alexander *v.* R. Co. (Mo. App.), 165 S. W. 1156 (inadmissible); Texas C. R. Co. *v.* Mallard (Tex. Civ.), 127 S. W. 1117; Houston, etc. R. Co. *v.* Kinchelse (Tex. Civ.), 119 S. W. 905; Texarkana, etc. R. Co. *v.* Bell, 56 Tex. Civ. 123, 101 S. W. 1167.

Extent of use made of farm crossing, if assented to by defendant and it has knowledge thereof, shown as bearing upon duty to give signals before crossing. Potter *v.* R. Co., 134 App. Div. 827, 119 N. Y. S. 150.

523-56 Heise *v.* R. Co. (Ia.), 114 N. W. 180.

Failure to give signals immaterial as to a hunting dog trailing around a public crossing. Fowles *v.* R.Co., 73 S. C. 306, 53 S. E. 534.

Affidavit may establish non-existence of municipal by-law relieving defendant from giving signals; fact they were given is some evidence giving them not forbidden. Pedlar *v.* R. Co. (Can.), 10 West. L. Rep. 593.

524-58 Heise *v.* R. Co., 141 Ia. 88, 119 N. W. 371.

Failure to signal at other crossing immaterial if signal given at crossing in question so far as liability is concerned; it is otherwise as to exercise of due care by person in charge of animals at latter crossing if he might have heard it in time to have affected conduct. Heise *v.* R. Co., 141 Ia. 88, 119 N. W. 371.

524-60 Hogue *v.* R. Co., 146 Ala. 384, 41 S. 425; Western R. Co. *v.* Stone, 145 Ala. 663, 39 S. 723; Wilkinson *v.* R. Co., 146 Mo. App. 711, 125 S. W. 544; Anson *v.* R. Co., 42 Tex. Civ. 437, 94 S. W. 94 (it may be shown train behind time); Smith *v.* R. Co., 35 Utah 390, 100 P. 673.

524-61 Balsewicz *v.* R. Co., 240 Ill. 238, 88 N. E. 734 (whether violation establishes wilfulness or wantonness depends upon circumstances); Missouri, etc. R. Co. *v.* Byrd (Tex. Civ.), 124 S. W. 993.

525-65 Jonesboro, etc. R. Co. *v.* Guest, 81 Ark. 267, 99 S. W. 71; Cen-

tral R. Co. *v.* Hughes, 127 Ga. 593, 56 S. E. 770; St. Louis, etc. R. Co. *v.* Johnson, 25 Okla. 833, 108 P. 378; Hanger *v.* Chesapeake & O. R. Co., 70 W. Va. 212, 73 S. E. 713.

525-68 O'Mara *v.* R. Co., 140 Ia. 190, 118 N. W. 377 (proof of injury on right of way does not make prima facie case); Adams *v.* R. Co., 136 Mo. App. 157, 116 S. W. 1119 (though killing occurred elsewhere than place where guard should have been).

525-70 Corcoran *v.* R. Co., 138 Mo. App. 408, 122 S. W. 743; Gilpin *v.* R. Co., 197 Mo. 319, 94 S. W. 869.

Burden of proof.—Gilpin *v.* R. Co., 197 Mo. 319, 94 S. W. 869.

526-71 Gilpin *v.* R. Co., supra.

526-72 Johnson *v.* Co., 11 Cal. App. 278, 104 P. 713 (and that defendant had notice of fact); Guilfoil C. Co. *v.* Clark (Ind. App.), 99 N. E. 777; Brown *v.* R Co., 127 Mo. App. 614, 106 S. W. 551; Texas & P. R. Co. *v.* Webb, 102 Tex. 210, 114 S. W. 1171; Texas P. R. Co. *v.* Corn, 102 Tex. 194, 114 S. W. 103.

Contributory negligence.—Chicago & A. R Co. *v.* Nevitt, 122 Ill. App. 505.

Permissible to give evidence also that gate at crossing was left open and had been open prior to killing. Walker *v.* R. Co., 162 Ill. App. 151.

526-73 Missouri, etc. R. Co. *v.* Tolbert, 100 Tex. 483, 101 S. W. 206. See So. R. Co. *v.* Parks (Ala. App.), 65 S. 202.

526-74 But see Nashville, etc. R. Co. *v.* Russell, 33 Ky. L. R. 447, 110 S. W. 317, general use on other roads.

526-75 See vol. 8, p. 905, n. 35; p. 908, n. 40, and supplement thereto.

527-77 Kosher Dairy Co. *v.* R. Co., 83 N. J. L. 270, 83 A. 498.

527-79 See vol. 8, p. 922, n. 90, and supplement thereto.

527-80 Absence of brakes from **locomotives** and cars, shown. Dean *v.* Co., 6 Ga. App. 480, 65 S. E. 300.

528-85 Hogue *v.* R. Co., 146 Ala. 384, 41 S. 425; International, etc. Co. *v.* Bandy (Tex. Civ.), 163 S. W. 341.

Proof of killing another animal shortly before competent to show condition of engineer's mind. Central R. Co. *v.* Cox, 124 Ga. 143, 52 S. E. 161.

Evidence that defendant had paid for other animals killed by train near there is immaterial. Int., etc. R. Co. *v.* Bandy (Tex. Civ.), 163 S. W. 341.

528-87 Frequent use of highway for purposes similar to use made of **it on** occasion in question may be shown **on** issue of negligence. Smith *v.* R. **Co.,** 35 Utah 390, 100 P. 673.

528-88 Evidence that another horse had caught his foot between rail and plank at crossing admissible. See Guilfoil C. Co. *v.* Clark (Ind. App.), 99 N. E. 777.

528-89 O'Mara *v.* R. Co., 140 Ia. 190, 118 N. W. 377. See Midland Val. R. Co. *v.* Bryant, 37 Okla. 206, 131 P. 678.

Manner in which animal approached and crossed guard in question, though not in itself evidence of its insufficiency, may be considered. O'Mara *v.* R. Co., supra.

528-90 O'Mara *v.* R. Co., 140 Ia. 190, 118 N. W. 377.

529-97 Nashville, etc. Co. *v.* Bingham (Ala.), 62 S. 111.

529-98 But engineer cannot testify as to his intentions. Boan *v.* Lumb. Co. (Ala.), 63 S. 564.

529-1 Atlanta, etc. R. Co. *v.* Hudson, 2 Ga. App. 352, 58 S. E. 500; O'Kelly *v.* R. Co., 94 Miss. 635, 47 S. 660. *Contra,* Porter *v.* R. Co. (Tex. Civ.), 124 S. W. 708 (N. M. statute). See International & G. N. R. Co. *v.* Diaz (Tex. Civ.), 156 S. W. 907.

530-2 Colorado & S. R. Co. *v.* Webb, 36 Colo. 224, 85 P. 683; Atlanta, etc. R. Co. *v.* Hudson, 2 Ga. App. 352, 58 S. E. 500; Missouri, etc. R. Co. *v.* Byrd (Tex. Civ.), 124 S. W. 738; Ft. Worth, etc. R. Co. *v.* Hudgens, 43 Tex. Civ. 201, 94 S. W. 378. *Contra* where animal allowed to run on owner's land, though he knew of defect in fence. Balt., etc. R. Co., Seitzinger, 116 Ill. App. 55.

That plaintiff's horses had been seen frequently on highway is admissible when he has testified he did not allow his horses to run at large. Evans *v.* R. Co., 156 Wis. 36, 145 N. W. 229.

530-3 Ft. Worth, etc. R. Co. *v.* Hudgens, 43 Tex. Civ. 201, 94 S. W. 378; Houston, etc. R. Co. *v.* Nussbaum, 43 Tex. Civ. 410, 94 S. W. 1101. See Corbett *v.* R. Co., 19 N. D. 450, 125 N. W. 1054.

Plaintiff's antecedent negligence, immaterial if defendant's negligence caused damage. Rio Grande W. R. Co. *v.* Boyd, 44 Colo. 119, 96 P. 781.

530-4 Defendant must show contributory negligence.—Atlantic C. L.

R. Co. *v.* Peebles, 56 Fla. 145, 47 S. 392.

Not contributory negligence.—Little Rock, etc. R. Co. *v.* Hicks, 79 Ark. 248, 96 S. W. 385.

530-5 Hogue *v.* R. Co., 146 Ala. 384, 41 S. 425; Central R. Co. *v.* Turner, 145 Ala. 441, 40 S. 355; Kansas City R. Co. *v.* Lewis, 80 Ark. 396, 97 S. W. 56; Rio Grande W. R. Co. *v.* Boyd, 44 Colo. 119, 96 P. 781; So. R. Co. *v.* Keel, 7 Ga. App. 244, 66 S. E. 627; Union P. R. Co. *v.* Thisler, 80 Kan. 583, 103 P. 999; Wilkinson *v.* R. Co., 146 Mo. App. 711, 125 S. W. 544; Ft. Smith & W. R. Co. *v.* Collins, 26 Okla. 82, 108 P. 550; Texas C. R. Co. *v.* Estes (Tex. Civ.), 113 S. W. 547. *Comp.* S. *v.* Campbell, 82 Conn. 671, 74 A. 927.

Result of experiments.—Atlanta, etc. R. Co. *v.* Hudson, 2 Ga. App. 352, 58 S. E. 500.

530-6 Nashville C. & St. R. *v.* Garth (Ala.), 59 S. 640; Lane *v.* R. Co., 78 Ark. 234, 95 S. W. 460; Mobile & O. R. Co. *v.* Morrow, 30 Ky. L. R. 83, 97 S. W. 389. But see Western R. Co. *v* Stone, 145 Ala. 663, 39 S. 723.

531-7 Service of notice on person who answered as defendant's agent at its depot, good. Rio Grande W. R. Co. *v.* Boyd, 44 Colo. 119, 96 P. 781.

531-9 Atlantic L. L. R. Co. *v.* Peebles, 56 Fla. 145, 47 S. 392; Moore *v.* R. Co. (Tex. Civ.), 146 S. W. 1070; Texarkana, etc. R. Co. *v.* Bell (Tex. Civ.), 101 S. W. 1167. See Hogue *v.* R. Co., 146 Ala. 384, 41 S. 425. Cost of entering injured horses for "futurity stakes" and amount of stakes cannot be shown. Nashville, etc. R. Co. *v.* Garth, 155 Ala. 311, 46 S. 583.

Evidence of value placed on cattle in attempted compromise is inadmissible. Busch *v.* R. Co., 29 S. D. 44, 135 N. W. 757.

531-10 Louisville & N. R. Co. *v.* Bell, 206 Fed. 395, 124 C. C. A. 277; Sullivan T. Co. *v.* R. Co., 163 Ala. 125, 50 S. 941; Viera *v.* R. Co., 10 Cal. App. 267, 101 P. 690; Louisville & N. R. Co. *v.* Vinyard, 39 Ind. App. 628, 79 N. E. 384; Toledo, etc. R. Co. *v.* Sullivan, 41 Ind. App. 390, 83 N. E. 1024; Helverson *v.* R. Co., 139 Ia. 423, 116 N. W. 699; Louisville & N. R. Co. *v.* Ins. Co., 152 Ky. 510, 153 S. W. 745; Sims *v.* Co., 109 Md. 68, 71 A. 522; Waddell *v.* R. Co., 146 Mo. App. 604, 124 S. W. 588; Snow L. Co. *v.* R. Co., 151 N. C. 217, 65 S. E. 920; Hawley *v.* R. Co., 49 Or. 509, 90 P. 1106; Am. I. Co. *v.* R. Co., 224 Pa. 439, 73 A. 873; Byers *v.* R. Co., 222 Pa. 547, 72 A. 245; Morgan *v.* R. Co., 50 Tex. Civ. 420, 110 S. W. 978.

Evidence sufficient.—Renken *v.* R. Co., 156 Ill. App. 65.

532-11 Canadian N. R. Co. *v.* Olson, 201 Fed. 859, 120 C. C. A. 197.

Interference with extinguishment of fire.—Moving burning car near to combustible property threatened by existing fire and destroying owner's chance to save property casts upon railroad company burden of showing "by clear, undisputed and conclusive evidence" existence of every fact necessary to sustain its contention. Valentine *v.* R. Co., 155 Mich. 151, 118 N. W. 970.

Defendant must show plaintiff's negligence in caring for burned property. St. Louis, etc. R. Co. *v.* Clements, 82 Ark. 3, 99 S. W. 1106.

532-12 Deason *v.* R. Co. (Ala.), 65 S. 172; Tombigbee, etc. R. Co. *v.* Howard (Ala.), 64 S. 338; Miller-Brent Lumb. Co. *v.* Douglas, 167 Ala. 286, 52 S. 414; Louisville & N. R. Co. *v.* Smith, 163 Ala. 141, 50 S. 241; Southern R. Co. *v.* Dickens, 161 Ala. 144, 49 S. 766; Horton *v.* R. Co., 161 Ala. 107, 49 S. 423 (emission of sparks in dangerous and unusual size and quantity); Sullivan T. Co. *v.* R. Co., 163 Ala. 125, 50 S. 941; St. Louis S. R. Co. *v.* Trotter, 89 Ark. 273, 116 S. W. 227; Same *v.* Dawson, 77 Ark. 434, 92 S. W. 27; Atlantic, etc. Co. *v.* McElmurray, 12 Ga. App. 233, 77 S. E. 2; Southern R. Co. *v.* Elliott, 129 Ga. 705, 59 S. E. 786; Osburn *v.* Co., 15 Ida. 478, 98 P. 627; Adkins *v.* R. Co., 165 Ill. App. 300; Thomason *v.* R. Co., 122 La. 995, 48 S. 432; Murphy *v.* R. Co., 248 Mo. 28, 154 S. W. 106; Westing *v.* R. Co., 87 Neb. 655, 127 N. W. 1076; Shipman *v.* R. Co., 78 Neb. 43, 110 N. W. 535; Deppe *v.* R. Co., 152 N. C. 79, 67 S. E. 262; Cox *v.* R. Co., 149 N. C. 117, 62 S. E. 884; St. Louis, etc. Co. *v.* Weldon, 39 Okla. 369, 135 P. 8; St. Louis, etc. Co. *v.* Marlin, 33 Okla. 510, 128 P. 108; Chenoweth *v.* Co., 53 Or. 111, 99 P. 86; Cividanes *v.* R. Co., 1 P. R. Fed. 106; Hutto *v.* R., 81 S. C. 567, 62 S. E. 835; St. Louis Southwestern R. Co. *v.* Waco Cotton Pickery (Tex. Civ.), 146 S. W. 201; Crawford *v.* R. Co. (Tex. Civ.), 127 S. W. 869; Houston, etc. R. Co. *v.* Washington (Tex. Civ.), 127 S. W.

1126; St. Louis S. R. Co. *v.* Ross, 55 Tex. Civ. 622, 119 S. W. 725; St. Louis S. R. Co. *v.* Eccles, 53 Tex. Civ. 125, 115 S. W. 648; Gulf, etc. R. Co. *v.* Meentzen, 52 Tex. Civ. 416, 113 S. W. 1000; Ross *v.* R. Co., 47 Tex. Civ. 24, 103 S. W. 708; Gulf, etc. R. Co. *v.* Co., 48 Tex. Civ. 443, 106 S. W. 1140; Morgan *v.* R. Co., 50 Tex. Civ. 420, 110 S. W. 978; Norfolk & W. R. Co. *v.* Thomas, 110 Va. 622, 66 S. E. 817; Phillips *v.* R. Co., 109 Va. 436, 63 S. E. 998; Mills *v.* R. Co. (W. Va.), 79 S. E. 1090; Bonnell *v.* R. Co. (Wis.), 147 N. W. 1046. *Contra* if parties stipulate it is not known how fire originated. St. Louis S. R. Co. *v.* Henderson, 55 Tex. Civ. 425, 119 S. W. 891.

See Birmingham R. Co. *v.* Hinton, 158 Ala. 470, 48 S. 546; vol. 8, p. 884, n. 73, et seq.. and supplement thereto.

A weak and inconclusive presumption. McCary *v.* Co. (Ala.), 62 S. 18.

Burden on defendant to show fire caused by operation of engine on a track, exemption from liability for fire caused on which it had secured by contract with plaintiff. Thomason *v.* R. Co., 122 La. 995, 48 S. 432.

"**The reason for the rule,** which places the burden upon a railroad company to rebut the presumption of negligence by proof of the condition of the engine and its proper operation, is that it has the means of producing the necessary evidence on the subject, and to require a plaintiff to prove the condition of the engine and the appliances used to prevent the escape of sparks would be practicaly a denial of justice." Missouri, etc. R. Co. *v.* Morgan & Bros. (Tex. Civ.), 146 S. W. 336.

"**But this is a mere presumption of fact,** and, when proof is offered of the condition and operation of the engine, the burden of proof is not shifted from the plaintiff to the defendant, but remains throughout the trial with the plaintiff. It is not required that plaintiff's prima facie case established in the manner referred to shall be rebutted by a preponderance of the evidence. Evidence of equal weight with that which grows out of the presumption of negligence, which the law implies from proof that the fire originated from sparks thrown by the railway company's engine, and other evidence offered by the plaintiff, will suffice." Trinity, etc. R. Co. *v.* Gregory (Tex. Civ.), 142 S. W. 656.

534-13 Cincinnati, etc. R. Co. *v.* Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533; Dudley *v.* R. Co., 133 La. 80, 62 S. 413; Babbitt *v.* R. Co., 108 App. Div. 74, 95 N. Y. S. 429; Hawley *v.* R. Co., 49 Or. 509, 90 P. 1106. **Presumption of negligence** may arise from collision of trains, fire resulting therefrom. Cincinnati, etc. R. Co. *v.* Co., supra.

535-16 Beal *v.* R. Co., 19 Ont. L. R. (Can.) 502; Deason *v.* R. Co. (Ala.), 65 S. 172; So. R. Co. *v.* Ins. Co., 177 Ala. 327, 58 S. 313; Miller Brent. Lumb. Co. *v.* Douglas, 167 Ala. 286, 50 S. 414; Southern R. Co. *v.* Dickens, 161 Ala. 144, 49 S. 766; Stewart *v.* R. Co., 136 Ia. 182, 113 N. W. 764; Smart *v.* R. Co., 80 Kan. 438, 102 P. 253; Carter *v.* R. Co., 112 Md. 599, 77 A. 301; Waddell *v.* R. Co., 146 Mo. App. 604, 124 S. W. 588 (and that fire emitted as alleged); Shipman *v.* R. Co., 78 Neb. 43, 110 N. W. 535; Union P. R. Co. *v.* Fickenscher, 77 Neb. 608, 110 N. W. 567; St. Louis S. R. Co. *v.* McIntosh (Tex. Civ.), 126 S. W. 692; Gulf, etc. R. Co. *v.* Meentzen, 52 Tex. Civ. 416, 113 S. W. 1000.

That the fire might have been set by a locomotive is insufficient. Hewett *v.* R. Co., 171 Mich. 211, 137 N. W. 66.

Evidence sufficient.—Overacker *v.* R. Co., 64 Wash. 491, 117 P. 403.

Circumstantial evidence. — Generally where it is shown that there was no fire on the premises before, and no probable cause for the fire except the locomotive, that the wind was blowing from the road to the grass, and that the fire broke out soon after the engine passed, these things are circumstances sufficient to justify the conclusion that the fire was communicated by the train. Baltimore, etc. R. Co. *v.* Lodge, 50 Ind. App. 220, 98 N. E. 141, *cit.* Pittsburgh, etc., R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766, and cases collected on page 333.

536-17 Erickson *v.* R. Co., 170 Fed. 572, 95 C. C. A. 652 (New Jersey); Woodward *v.* R. Co., 145 Fed. 577, 75 C. C. A. 591; Toledo, etc. R. Co. *v.* Co., 146 Fed. 953, 77 C. C. A. 203; Florida East Coast R. Co. *v.* Smith, 61 Fla. 218, 55 S. 871; Florida, etc. R. Co. *v.* Welch, 53 Fla. 145, 44 S. 250; Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044; Adkins *v.* R. Co., 165 Ill. App. 300; Chicago, etc. R. Co. *v.* Hill, 130 Ill. App. 218; Stewart *v.* R.

Co., 136 Ia. 182, 113 N. W. 764; Lillard *v.* R. Co., 79 Kan. 25, 98 P. 213; Cincinnati, etc. R. Co. *v.* Falconer, 30 Ky. L. R. 152, 97 S. W. 727; New England Box Co. *v.* R. Co., 210 Mass. 465, 97 N. E. 140; Goodman *v.* R. Co., 78 N. J. L. 317, 74 A. 519; People's Co. *v.* Co., 83 S. C. 530, 65 S. E. 733; Hutto *v.* R. Co., 81 S. C. 567, 62 S. E. 835; St. Louis S. R. Co. *v.* Starks (Tex. Civ.), 109 S. W. 1003; Huntley *v.* R. Co., 83 Vt. 180, 74 A. 1000 (statute imposes burden on defendant); Ide *v.* R. Co., 83 Vt. 66, 74 A. 401.

Statutory presumption applies whether origin of fire admitted or not. Illinois C. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833.

537-18 Southern R. Co. *v.* Dickens, 161 Ala. 144, 49 S. 766; Viera *v.* R. Co., 10 Cal. App. 267, 101 P. 690; Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044; St. Louis, etc. R. Co. *v.* Noland, 75 Kan. 691, 90 P. 273; Continental Ins. Co. *v.* Co., 97 Minn. 467, 107 N. W. 548 (valuable opinion); Union P. R. Co. *v.* Murphy, 76 Neb. 545, 107 N. W. 757; Rollins *v.* R. Co., 73 N. J. L. 64, 62 A. 929; Lumber Co. *v.* R. Co., 143 N. C. 324, 55 S. E. 781; Taffe *v.* Co., 60 Or. 177, 117 P. 989; Gulf, etc. R. Co. *v.* Lourie (Tex. Civ.), 144 S. W. 367; Smith *v.* R. Co., 33 Utah 129, 93 P. 185; Phillips *v.* R. Co., 109 Va. 436, 63 S. E. 998; Fireman's F. Ins. Co. *v.* Co., 46 Wash. 635, 91 P. 13.

537-21 McCary *v.* R. Co. (Ala.), 62 S. 18; St. Louis S. R. Co. *v.* Trotter, 89 Ark. 273, 116 S. W. 227; Osburn *v.* Co., 15 Ida. 478, 98 P. 627; Chicago, etc. R. Co. *v.* Hill, 130 Ill. App. 218; White *v.* R. Co., 91 Kan. 526, 138 P. 589; Clark *v.* R. Co., 149 Mich. 400, 112 N. W. 1121; Rollins *v.* R. Co., 73 N. J. L. 64, 62 A. 929; Goodman *v.* R. Co., 75 N. J. L. 277, 68 A. 63; Deppe *v.* R. Co., 152 N. C. 79, 67 S. E. 262; Lumber Co. *v.* R. Co., 143 N. C. 324, 55 S. E. 781; Chenoweth *v.* Co., 53 Or. 111, 99 P. 86; Tex. & N. O. R. Co. *v.* Cook (Tex. Civ.), 167 S. W. 158; Gulf, etc. R. Co. *v.* Meentzen, 52 Tex. Civ. 416, 113 S. W. 1000; Ross *v.* R. Co., 47 Tex. Civ. 24, 103 S. W. 708; Gulf, etc. R. Co. *v.* Blakeney, 48 Tex. Civ. 443, 106 S. W. 1140; Phillips *v.* R. Co., 109 Va. 436, 63 S. E. 998.

But see Albany & N. R. Co. *v.* Wheeler, 3 Ga. App. 414, 59 S. E. 1116.

Inspection of spark arrester three days after fire is competent, it not having been inspected in the meantime. Sadieville M. Co. *v.* R. Co., 153 Ky. 55, 154 S. W. 396.

539-22 Woodward *v.* R. Co., 145 Fed. 577, 75 C. C. A. 591; Toledo, etc. R. Co. *v.* Co., 146 Fed. 953, 77 C. C. A. 203; Tombigbee, etc. R. Co. *v.* Howard (Ala.), 64 S. 338; Illinois C. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833; Cincinnati, etc. R. Co. *v.* Falconer, 30 Ky. L. R. 152, 97 S. W. 727; Continental Ins. Co. *v.* R. Co., 97 Minn. 467, 107 N. W. 548; St. Louis, etc. R. Co. *v.* Starks (Tex. Civ.), 109 S. W. 1003; Bryan Press Co. *v.* R. Co. (Tex. Civ.), 110 S. W. 99. See Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044.

539-23 Woodward *v.* R. Co., 145 Fed. 577, 75 C. C. A. 591; Toledo, etc. R. Co. *v.* Co., 146 Fed. 953, 77 C. C. A. 203; McCary *v.* R. Co. (Ala.), 62 S. 18; Ashley *v.* R. Co., 7 Ga. App. 711, 68 S. E. 56; Osburn *v.* R. Co., 15 Ida. 478, 98 P. 627; Chenoweth *v.* Co., 53 Or. 111, 99 P. 86; St. Louis S. R. Co. *v.* McLeod (Tex. Civ.), 115 S. W. 85; Gulf, etc. R. Co. *v.* Meentzen, 52 Tex. Civ. 416, 113 S. W. 1000.

Proof to overcome statutory presumption of negligence need not constitute a preponderance; it is sufficient if the weight equal to implied presumption of negligence and evidence offered by plaintiff. St. Louis, etc. R. Co. *v.* Starks (Tex. Civ.), 109 S. W. 1003. *Contra,* Stewart *v.* R. Co., 136 Ia. 182, 113 N. W. 764.

539-24 Viera *v.* R. Co., 10 Cal. App. 267, 101 P. 690; Southern R. Co. *v.* Elliott, 129 Ga. 705, 59 S. E. 786; Chicago, etc. R. Co. *v.* Wright, 120 Ill. App. 218; Illinois C. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833; Lillard *v.* R. Co., 79 Kan. 25, 98 P. 213; Continental Ins. Co. *v.* R. Co., 97 Minn. 467, 107 N. W. 548.

540-25 Goodman *v.* R. Co., 78 N. J. L. 317, 74 A. 519.

540-26 Louisville & N. R. Co. *v.* Sherrill, 152 Ala. 213, 44 S. 631; Stewart *v.* R. Co., 136 Ia. 182, 113 N. W. 764; Cox *v.* R. Co., 149 N. C. 117, 62 S. E. 884; St. Louis, etc. R. Co. *v.* Starks (Tex. Civ.), 109 S. W. 1003; Gulf, etc. R. Co. *v.* Blakeney, 48 Tex. Civ. 443, 106 S. W. 1140; Mo., etc. R. Co. *v.* Morgan & Bros. (Tex. Civ.), 146 S. W. 336; Thorgrimson *v.* R. Co., 64 Wash. 500, 117 P. 406.

But see Woodward *v.* R. Co., 145 Fed. 577, 75 C. C. A. 591.

540-27 Burden on defendant.—Furst-Edwards & Co. *v.* R. Co. (Tex. Civ.), 146 S. W. 1024; Smith *v.* R. Co., 33 Utah 129, 93 P. 185.

541-28 Southern R. Co. *v.* Thompson, 129 Ga. 367, 58 S. E. 1044; Diggs *v.* R. Co., 131 Mo. App. 457, 110 S. W. 9. See Blunck *v.* R. Co. (Ia.), 115 N. W. 1013.

541-29 Southern R. Co. *v.* Dickens, 152 Ala. 210, 44 S. 402; Woodward *v.* R. Co., 16 N. D. 38, 111 N. W. 627.

541-31 Canadian N. R. Co. *v.* Olson, 201 Fed. 859, 120 C. C. A. 197; Toledo, etc. R. Co. *v.* Ins. Co. (Ind. App.), 101 N. E. 1035; Carter *v.* R. Co., 112 Md. 599, 77 A. 301; Sembum *v.* R. Co., 121 Minn. 439, 141 N. W. 523; Manning *v.* R. Co., 137 Mo. App. 631, 119 S. W. 464; J. Hancock I. Co. *v.* R. Co., 231 Pa. 117, 80 A. 63; Tex., etc. R. Co. *v.* Ray (Tex. Civ.), 168 S. W. 1013; Phillips *v.* R. Co., 109 Va. 436, 63 S. E. 998; Theresa V. Mut. Fire Ins. Co. *v.* R. Co., 144 Wis. 321, 128 N. W. 103. See Knott *v.* R. Co., 142 N. C. 238, 55 S. E. 150.

541-32 Gulf C. Co. *v.* Harrington, 90 Ark. 256, 119 S. W. 249; Chicago, etc. R. Co. *v.* Dyal, 93 Ark. 631, 124 S. W. 771; Georgia, etc. R. Co. *v.* Summer, 133 Ga. 134, 65 S. E. 381; Blaine *v.* R. Co., 158 Ill. App. 115; Toledo, etc. R. Co. *v.* Sullivan, 41 Ind. App. 390, 83 N. E. 1024; Helverson *v.* R. Co., 139 Ia. 423, 116 N. W. 699; St. Louis, etc. R. Co. *v.* Noland, 75 Kan. 691, 90 P. 273; Hudspeth *v.* R. Co., 172 Mo. App. 579, 155 S. W. 868; Conn., etc. Co. *v.* R. Co., 171 Mo. App. 70, 153 S. W. 544; Vanderburgh *v.* R. Co., 146 Mo. App. 609, 124 S. W. 563; Markt *v.* R. Co., 139 Mo. App. 456, 122 S. W. 1142; Foster *v.* R. Co., 143 Mo. App. 547, 128 S. W. 36; Big River L. Co. *v.* R. Co., 123 Mo. App. 394, 101 S. W. 636; Staples *v.* R. Co., 74 N. H. 499, 69 A. 890; Goodman *v.* R. Co., 78 N. J. L. 317, 74 A. 519; Babbitt *v.* R. Co., 108 App. Div. 74, 95 N. Y. S. 429; Nichols *v.* R. Co., 61 Misc. 195, 114 N. Y. S. 942; Deppe *v.* R. Co., 152 N. C. 79, 67 S. E. 262; St. Louis R. Co. *v.* Marlin, 33 Okla. 510, 128 P. 108; St. Louis, etc. R. Co. *v.* Shannon, 25 Okla. 754, 108 P. 401; John Hancock I. Co. *v.* R. Co., 224 Pa. 74, 73 A. 194; Hutto *v.* Ry., 81 S. C. 567, 62 S. E. 835; St. Louis S. R. Co. *v.* Ross, 55 Tex. Civ. 622, 119 S. W. 725; Houston, etc. R. Co. *v.* Washington (Tex. Civ.), 127 S. W. 1126; Bryan Press Co. *v.* R. Co. (Tex. Civ.), 110 S. W. 99; Smith *v.* R. Co., 80 Vt. 208, 67 A. 535; Phillips *v.* R. Co., 109 Va. 436, 63 S. E. 998; Fireman's F. Ins. Co. *v.* Co., 58 Wash. 332, 108 P. 770; Thompson *v.* R. Co. (W. Va.), 78 S. E. 624.

Evidence sufficient.—Lemann Co. *v.* R. Co., 128 La. 1089, 55 S. 684.

542-33 St. Louis, etc. R. Co. *v.* Dawson, 77 Ark. 434, 92 S. W. 27; Continental Ins. Co. *v.* R. Co., 97 Minn. 467, 107 N. W. 548; Tapley *v.* R. Co., 129 Mo. App. 88, 107 S. W. 470; Gibbs *v.* R. Co., 104 Mo. App. 276, 78 S. W. 835; Union P. R. Co. *v.* Murphy, 76 Neb. 545, 107 N. W. 757; Byers *v.* R. Co., 222 Pa. 547, 72 A. 245.

Speed, weather, inflammable character of property near track, and unusual amount of sparks emitted may be considered. Western & A. R. Co. *v.* Maynard, 139 Ga. 407, 77 S. E. 399.

542-34 Central, etc. R. Co. *v.* Goelzer, 92 Ark. 569, 123 S. W. 781; Cincinnati, etc. R. Co. *v.* Falconer, 30 Ky. L. R. 152, 97 S. W. 727; Byers *v.* R. Co., 222 Pa. 547, 72 A. 245.

542-35 Monte Ne R. Co. *v.* Phillips, 80 Ark. 292, 96 S. W. 1060; Illinois C. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833; Hudspeth *v.* R. Co., 172 Mo. App. 579, 155 S. W. 868; Manning *v.* R. Co., 137 Mo. App. 631, 119 S. W. 464; Am. I. Co. *v.* R. Co., 224 Pa. 439, 73 A. 873. See Big River L. Co. *v.* R. Co., 123 Mo. App. 394, 101 S. W. 636; Finkelston *v.* R. Co., 94 Wis. 270, 68 N. W. 1005, *appr.* in Clark *v.* R. Co., 149 Mich. 400, 112 N. W. 1121.

Evidence insufficient.—Thorgrimson *v.* R. Co., 64 Wash. 500, 117 P. 406.

542-36 Cleveland, etc. R. Co. *v.* Hayes, 167 Ind. 454, 79 N. E. 448; Big River L. Co. *v.* R. Co., 123 Mo. App. 394, 101 S. W. 636; John Hancock I. Co. *v.* R. Co., 224 Pa. 74, 73 A. 194; Byers *v.* R. Co., 222 Pa. 547, 72 A. 245. See Central, etc. Co. *v.* R. Co., 156 Ky. 759, 162 S. W. 81.

542-37 Smith *v.* R. Co., 80 Vt. 208, 67 A. 535.

542-38 Big River L. Co. *v.* R. Co., 123 Mo. App. 394, 101 S. W. 636; John Hancock I. Co. *v.* R. Co., 224 Pa. 74, 73 A. 194 (absence of other fire in vicinity and in burned building, shown); Smith *v.* R. Co., 80 Vt. 208, 67 A. 535. See Florida, etc. R. Co. *v.* Welch, 53 Fla. 145, 44 S. 250, *disap.* Read *v.* Nichols, 118 N. Y. 224,

23 N. E. 468, 7 L. R. A. 130; Virginian R. Co. *v.* Hurt, 112 Va. 622, 72 S. E. 110.

542-39 In absence of evidence of fresh cinders near burned premises it is not competent to show that on several occasions fire boxes of engines had been cleaned there and cinders rolled down near where the fire occurred. Cincinnati, etc. R. Co. *v.* Co., 137 Ky. 568, 126 S. W. 118.

543-40 Hitchner W. P. Co. *v.* R. Co., 158 Fed. 1011.

543-43 Fleming *v.* Pullen (Tex. Civ.), 97 S. W. 109, unless facts on which conclusion based, stated.

Negative opinion-testimony, inadmissible. Snow L. Co. *v.* R. Co., 151 N. C. 217, 65 S. E. 920.

543-44 Competent. Ide *v.* R. Co., 83 Vt. 66, 74 A. 401.

543-46 Signs of fresh repair on spark arrester of engine may be shown to have been discovered two or three days after fire. Byers *v.* R. Co., 222 Pa. 547, 72 A. 245.

In an action by an administratrix for damages alleged to have been caused by fire negligently set out upon the premises of the decedent by the engine of a corporation operating a tramroad, no error is committed by the trial judge in refusing to permit a letter written by the decedent to be introduced in evidence in which he stated that the fire was set out by train No. 58, when it is not alleged in the declaration that the fire was set out by a train so numbered, and especially when the purpose of the letter was to confine the evidence on the part of the plaintiff to the condition of an engine numbered 58, its spark arrester and ash pan. Dowling Lumb. Co. *v.* King, 62 Fla. 151, 57 S. 337.

543-47 Southern R. Co. *v.* Darwin, 156 Ala. 311, 47 S. 314; Louisville & N. R. Co. *v.* Sherrill, 152 Ala. 213, 44 S. 631; Southern R. Co. *v.* Elliott, 129 Ga. 705, 59 S. E. 786; Osburn *v.* R. Co., 15 Ida. 478, 98 P. 627; Cleveland, etc. R. Co. *v.* Hayes, 167 Ind. 454, 79 N. E. 448; Toledo, etc. R. Co. *v.* Sullivan, 41 Ind. App. 390, 83 N. E. 1024; Chesapeake & O. R. Co. *v.* Richardson, 30 Ky. L. R. 786, 99 S. W. 642; Sims *v.* Co., 109 Md. 68, 71 A. 522; Continental Ins. Co. *v.* R. Co., 97 Minn. 467, 107 N. W. 548; Goodman *v.* R. Co., 78 N. J. L. 317, 74 A. 519; Chenoweth *v.* Co., 53 Or. 111, 99 P. 86. But *comp.* Smith *v.* R. Co., 3 N. D. 17, 53 N. W. 173, and see criticism of it in 2 Thompson, Neg. 796, and disapproval in Continental Ins. Co. *v.* R. Co., supra.

Action of authorities prohibiting defendant from loading and unloading wood because of emission of sparks from its engine cannot be shown. McMillan *v.* Co., 161 Ala. 169, 49 S. 685.

544-48 Louisville & N. R. Co. *v* Sherrill, 152 Ala. 213, 44 S. 631; Toledo, etc. R. Co. *v.* Sullivan, 41 Ind. App. 390, 83 N. E. 1024; Continental Ins. Co. *v.* R. Co., 97 Minn. 467, 107 N. W. 548; Chenoweth *v.* Co., 53 Or. 111, 99 P. 86; Jeffress *v.* R. Co., 158 N. C. 215, 73 S. E. 1013; Smith *v.* R. Co., 80 Vt. 208, 67 A. 535.

More sparks than usual.—Witness may testify that quantity of sparks thrown by engine was unsually large. Missouri, etc. R. Co. *v.* Browning (Tex. Civ.), 166 S. W. 34.

544-49 Hitchner W. P. Co. *v.* R. Co., 158 Fed. 1011; Horton *v.* R. Co., 161 Ala. 107, 49 S. 423; Osburn *v.* R. Co., 15 Ida. 478, 98 P. 627; Toledo, etc. R. Co. *v.* Sullivan, 41 Ind. App. 390, 83 N. E. 1024; John Hancock I. Co. *v.* R. Co., 123 Mo. App. 394, 101 S. W. 636; Goodman *v.* R. Co., 75 N. J. L. 277, 68 A. 63; Bryan Press Co. *v.* R. Co. (Tex. Civ.), 110 S. W. 99. See Cleveland, etc. R. Co. *v.* Hayes, 167 Ind. 454, 79 N. E. 448.

544-51 Woodward *v.* R. Co., 145 Fed. 577, 75 C. C. A. 591 (inspection at various times within month, shown); Goodman *v.* R. Co., 75 N. J. L. 277, 68 A. 63.

Use made of engine.—Alabama, etc. R. Co. *v.* Clark, 145 Ala. 459, 39 S. 816.

545-54 Woodward *v.* R. Co., 145 Fed. 577, 75 C. C. A. 591; Chenoweth *v.* Co., 53 Or. 111, 99 P. 86; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401 (subsequent inspections proved to fix period of inquiry as to other fires). See Sims *v.* Co., 109 Md. 68, 71 A. 522.

545-57 Cincinnati, etc. R. Co. *v.* Falconer, 30 Ky. L. R. 152, 97 S. W. 727; P. *v.* R. Co., 155 App. Div. 699, 140 N. Y. S. 902, re-argument *denied*, 156 App. Div. 925, 141 N. Y. S. 1139; Higgins *v.* R. Co., 129 App. Div. 415, 114 N. Y. S. 262; Smith *v.* R. Co., 80 Vt. 208, 67 A. 535; Norfolk & W. R. Co. *v.* Thomas, 110 Va. 622, 66 S. E. 817, *cit.* the text; Allen *v.* R. Co., 145 Wis. 263, 129 N. W. 1094.

545-58 Inspection of engine not

shown to have been at least probably connected with fire, immaterial. Missouri, etc. R. Co. *v.* Neiser, 54 Tex. Civ. 460, 118 S. W. 166.

546-59 St. Louis, etc. R. Co. *v.* Dawson, 77 Ark. 434, 92 S. W. 27. See St. Louis, etc. R. Co. *v.* Dawson, 77 Ark. 434, 92 S. W. 27.

Conclusion not admissible. — Bryan Press Co. *v.* R. Co. (Tex. Civ.), 110 S. W. 99 (no reference made to case cited to contrary in corresponding note of the Encyclopaedia). See Birmingham, etc. Co. *v.* Martin, 148 Ala. 8, 42 S. 618.

Expert evidence not needed on issue of ordinary care in operating engine. Bryan Press Co. *v.* R. Co. (Tex. Civ.), 110 S. W. 99.

546-61 St. Louis, etc. R. Co. *v.* Nowland, 75 Kan. 691, 90 P. 273; Watkins *v.* R. Co., 163 N. C. 131, 79 S. E. 273; Tex. & N. O. R. Co. *v.* Cook (Tex. Civ.), 167 S. W. 158; Morgan *v.* R. Co., 50 Tex. Civ. 420, 110 S. W. 978.

546-62 Toledo, etc. R. Co. *v.* M. Co., 146 Fed. 953, 77 C. C. A. 203; Potter *v.* R. Co., 157 Mich. 216, 121 N. W. 808; Babbitt *v.* R. Co., 108 App. Div. 74, 95 N. Y. S. 429; Jacobs *v.* R. Co., 107 App. Div. 134, 94 N. Y. S. 954, 186 N. Y. 586, 79 N. E. 1108 (no opinion).

Weight of expert testimony.—Jackson *v.* R. Co., 32 Can. Sup. 245. See Continental Ins. Co. *v.* R. Co., 97 Minn. 467, 107 N. W. 548.

546-63 Testimony as to how far spark would carry on windy day and be capable of causing fire, improper unless shown to be within witness' knowledge. Hitchner *v.* Co., 168 Fed. 602, 93 C. C. A. 598.

546-67 Monte Ne R. Co. *v.* Phillips, 80 Ark. 292, 96 S. W. 1060; Morgan *v.* R. Co., 50 Tex. Civ. 420, 110 S. W. 978; Nacodoches Compress Co. *v.* R. Co. (Tex. Civ.), 143 S. W. 302.

The evidence must show, in order to exonerate appellant, that ordinary care was used by it "in the selection of a fuel which was in use generally by railway companies for such purposes," which is an additional burden that would rest upon appellant to those placed upon railway companies. Missouri, etc. R. Co. *v.* W. A. Morgan & Bros. (Tex. Civ.), 146 S. W. 336.

547-70 See Horton *v.* R. Co., 161 Ala. 107, 49 S. 423. *Comp.* supra, "Expert and Opinion Evidence," 527-38. See Birmingham, etc. Co. *v.* Martin, 148 Ala. 8, 42 S. 618; supra, 546-59.

547-71 Alabama, etc. R. Co. *v.* Clark, 145 Ala. 459, 39 S. 816; Continental Ins. Co. *v.* R. Co., 97 Minn. 467, 107 N. W. 548; Mo., etc. R. Co. *v.* McCall (Tex. Civ.), 143 S. W. 188. See Western & A. R. Co. *v.* Maynard. 139 Ga. 407, 77 S. E. 399. But see Woodward *v.* R. Co., 145 Fed. 577, 75 C. C. A. 591.

547-72 Southern R. Co. *v.* Ins. Co., 177 Ala. 327, 58 S. 313.

547-73 Defendant's time table, issued five years after fire, competent to show what it then regarded as a reasonable rate of speed, and as tending to show what might have been so theretofore, general conditions not being changed. Norfolk & W. R. Co. *v.* Thomas, 110 Va. 622, 66 S. E. 817.

547-77 Hitchner W. P. Co. *v.* R. Co., 158 Fed. 1011.

548-80 McMahon *v.* R. Co., 2 Cal. App. 400, 84 P. 350; Higgins *v.* R. Co., 129 App. Div. 415, 114 N. Y. S. 262; Knott *v.* R. Co., 142 N. C. 238, 55 S. E. 150; Hawley *v.* R. Co., 49 Or. 509, 90 P. 1106; Smith *v.* R. Co., 80 Vt. 208, 67 A. 535.

548-83 Jacobs *v.* R. Co., 107 App. Div. 134, 94 N. Y. S. 954, 186 N. Y. 586, 79 N. E. 1108; Babbitt *v.* R. Co., 108 App. Div. 74, 95 N. Y. S. 429; Armfield *v.* R. Co., 162 N. C. 24, 77 S. E. 963; Missouri, etc. R. Co. *v.* Miller (Tex. Civ.), 110 S. W. 549. But see Louisville & N. R. Co. *v.* Vinyard, 39 Ind. App. 628, 79 N. E. 384; vol. 11, p. 816, n. 83, and supplement thereto.

549-84 Toledo, etc. R. Co. *v.* Co., 146 Fed. 953, 77 C. C. A. 203; Chenoweth *v.* Co., 53 Or. 111, 99 P. 86.

549-86 Central, etc. R. Co. *v.* Goelzer, 92 Ark. 569, 123 S. W. 781 (within two or three weeks); Knott *v.* R. Co., 142 N. C. 238, 55 S. E. 150; St. Louis S. R. Co. *v.* Eccles, 53 Tex. Civ. 125, 115 S. W. 648 (in rebuttal); Fleming *v.* Pullen (Tex. Civ.). 97 S. W. 109. See vol. 11, p. 816, n. 84, and supplement thereto.

550-87 Canadian N. R. Co. *v.* Olson, 201 Fed. 859, 120 C. C. A. 197; Whitehurst *v.* R. Co., 146 N. C. 588, 60 S. E. 648.

550-88 Birmingham, etc. Co. *v.* Martin, 148 Ala. 8, 42 S. 618; Georgia, etc. R. Co. *v.* Summer, 133 Ga. 134, 65

S. E. 381. See Farley *v.* R. Co., 149 Ala. 557, 42 S. 747; Whitehurst *v.* R. Co., 146 N. C. 588, 60 S. E. 648.

Cinders received to rebut testimony one of their size could escape. Cincinnati, etc. R. Co. *v.* Cecil, 28 Ky. L. R. 830, 90 S. W. 585.

550-89 Whitehurst *v.* R. Co., 146 N. C. 588, 60 S. E. 648.

550-90 Barker *v.* Collins, 6 Penne. (Del.) 49, 63 A. 686.

550-91 In absence of showing of emission of sparks at time in question evidence of emission before and after, not admissible. Am. I. Co. *v.* R. Co., 224 Pa. 439, 73 A. 873.

550-92 Stowe *v.* R. Co., 140 Ky. 291, 131 S. W. 4; John Hancock I. Co. *v.* R. Co., 224 Pa. 74, 73 A. 194.

551-93 Question of remoteness for trial court if method of inspecting engines not changed. Ide *v.* R. Co., 83 Vt. 66, 74 A. 401. See vol. 11, p. 817, n. 87, and supplement thereto.

551-94 Northern P. R. Co. *v.* Mentzer, 214 Fed. 10 (C. C. A.); Canadian N. R. Co. *v.* Olson, 201 Fed. 859, 120 C. C. A. 197; McMahon *v.* R. Co., 2 Cal. App. 400, 84 P. 350; Illinois C. R. Co. *v.* Hicklin, 131 Ky. 624, 115 S. W. 752; McGill Bros. *v.* R., 87 S. C. 178, 69 S. E. 156; St. Louis, etc. Co. *v.* Benjamin (Tex. Civ.), 161 S. W. 379; Tex. & P. R. Co. *v.* Wooldridge (Tex. Civ.), 126 S. W. 603 (to rebut testimony that defendant's engines were all equipped with best arrester); Texas C. R. Co. *v.* Qualls (Tex. Civ.), 124 S. W. 140; Texas & P. R. Co. *v.* Owen (Tex. Civ.), 128 S. W. 1139 (subsequent emission of sparks to meet evidence all engines well equipped); Huntley *v.* R. Co., 83 Vt. 180, 74 A. 1000.

Testimony as to other fires caused by other engines is competent to show at what distance from right-of-way sparks emitted had fallen and to contradict testimony of experts. Whitehurst *v.* R. Co., 146 N. C. 588, 60 S. E. 648.

552-95 Goodman *v.* R. Co., 78 N. J. L. 317, 74 A. 519; Smith *v.* R. Co., 80 Vt. 208, 67 A. 535.

553-96 Canadian N. R. Co. *v.* Olson, 201 Fed. 859, 120 C. C. A. 197; Canadian R. Co. *v.* Akre, 200 Fed. 955, 119 C. C. A. 250; Birmingham, etc. Co. *v.* Martin, 148 Ala. 8, 42 S. 618; Fla. E. C. R. Co. *v.* Smith, 61 Fla. 218, 55 S. 871; Florida, etc. R. Co. *v.* Welch, 53 Fla. 145, 44 S. 250; So. R. Co. *v.* Fleming, 141 Ga. 69, 80 S. E. 325; Barker *v.* R. Co., 89 Kan. 573, 132 P. 156; Chesapeake & O. R. Co. *v.* Richardson, 30 Ky. L. R. 786, 99 S. W. 642; Big River L. Co. *v.* R. Co., 123 Mo. App. 394, 101 S. W. 636; Taffe *v.* Nav. Co., 60 Or. 177, 117 P. 989; Henderson *v.* R. Co., 144 Pa. 461, 22 A. 851, 27 Am. St. 652, 16 L. R. A. 299; Tex. & N. O. R. Co. *v.* Assur. Co. (Tex. Civ.), 137 S. W. 401; Morgan *v.* R. Co., 50 Tex. Civ. 420, 110 S. W. 978; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401; Hoskinson *v.* R. Co., 66 Vt. 618, 30 A. 24; Smith *v.* R. Co., 80 Vt. 208, 67 A. 535. See Chesapeake & O. R. Co. *v.* Bagby, 155 Ky. 420, 159 S. W. 964.

554-97 Not error to exclude such testimony. McClintock *v.* R. Co., 83 S. C. 58, 64 S. E. 1009.

Evidence of other local fires earlier in year and in previous years, inadmissible to show land in vicinity subject to fires and to establish defendant's negligence in not complying with statutory duty in respect to such lands (character of lands being admitted), in absence of evidence to show fires might not have been otherwise caused. Higgins *v.* R. Co., 129 App. Div. 415, 114 N. Y. S. 262.

555-99 Farley *v.* R. Co., 149 Ala. 557, 42 S. 747; Illinois C. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833; Nussbaum *v.* R. Co. (Tex. Civ.), 149 S. W. 1083; Fleming *v.* Pullen (Tex. Civ.), 97 S. W. 109; Morgan *v.* R. Co., 50 Tex. Civ. 420, 110 S. W. 978.

Such evidence is competent in Washington. Asplund *v.* Gt. Northern R. Co., 63 Wash. 164, 114 P. 1043, pointing out that Noland *v.* Gt. Northern R. Co., 31 Wash. 430, 71 P. 1098, is not contra.

555-1 Osburn *v.* R. Co., 15 Ida. 478, 98 P. 627.

Train dispatcher's sheet, competent. Hitchner W. P. Co. *v.* R. Co., 158 Fed. 1011; Big River L. Co. *v.* R. Co., 123 Mo. App. 394, 101 S. W. 636.

556-3 Florida, etc. R. Co. *v.* Welch, 53 Fla. 145, 44 S. 250.

556-4 Identification of engine by whistle, proper. Whitehurst *v.* R. Co., 146 N. C. 588, 60 S. E. 648.

557-9 Southern R. Co. *v.* Stonewall Ins. Co., 177 Ala. 327, 58 S. 313; Louisville & N. R. Co. *v.* Guttman, 148 Ky. 235, 146 S. W. 731; Smith *v.* R. Co., 80 Vt. 208, 67 A. 535.

558-10 Osburn *v.* R. Co., 15 Ida. 478, 98 P. 627; Louisville, etc. R. Co.

v. Home Ins. Co., 146 Ky. 281, 142 S. W. 398.

558-13 Tapley *v.* R. Co., 129 Mo. App. 88, 107 S. W. 470; St. Louis, etc. R. Co. *v.* Shannon, 25 Okla. 754, 108 P. 401 (court admits weight of authority is *contra*); Huntley *v.* R. Co., 83 Vt. 180, 74 A. 1000. See Big River L. Co. *v.* R. Co., 123 Mo. App. 394, 101 S. W. 636.

559-14 Tapley *v.* R. Co., 129 Mo. App. 88, 107 S. W. 470.

559-15 Cincinnati, etc. R. Co. *v.* Co., 137 Ky. 568, 126 S. W. 118; Close *v.* Ann Arbor R. Co., 169 Mich. 392, 135 N. W. 346.

560-16 See Louisville & N. R. Co. *v.* Stanley (Ala.), 65 S. 39; Connecticut F. Ins. Co. *v.* R. Co., 171 Mo. App. 70, 153 S. W. 544.

Jury may not know, without evidence, engines emit sparks which may be blown a given distance. St. Louis S. R. Co. *v.* McIntosh (Tex. Civ.), 126 S. W. 692.

"**Testimony not limited** to the particular engine which, according to the appellant's theory, was the only one which could have caused the fire in question. This testimony was unquestionably competent upon one issue. The railway company was taking the position that the barn was so far distant from the railroad track as that it would be impossible for sparks or cinders to be cast or carried so far from a locomotive. The testimony of the witnesses generally upon their observation in this respect was certainly competent and admissible to throw light upon this issue. The same remarks apply to the size of the cinders and sparks. This precise question was before this court in Kentucky Central Railroad Co. *v.* Barrow, 89 Ky. 638, 20 S. W. 165, where it was held competent to show that the engines running past the location of the fire were so managed as to be likely to set on fire objects not more remote than the property burned." Cincinnati, R. C. *v.* Winkle, 148 Ky. 726, 147 S. W. 746.

560-17 Cunningham *v.* R. Co., 172 Mo. App. 590, 155 S. W. 871; Jacobs *v.* R. Co., 107 App. Div. 134, 94 N. Y. S. 954, 186 N. Y. 586, 79 N. E. 1108.

560-18 Hitchner W. P. Co. *v.* R. Co., 158 Fed. 1011; Hudspeth *v.* R. Co., 172 Mo. App. 579, 155 S. W. 868.

560-19 Smith *v.* R. Co., 80 Vt. 208, 67 A. 535.

Evidence of other fires, inadmissible unless it connects defendant with them. Hawley *v.* R. Co., 49 Or. 509, 90 P. 1106.

561-21 Existence of combustible material on land adjoining right of way, immaterial. Atlantic C. L. R. Co. *v.* Davis, 5 Ga. App. 214, 62 S. E. 1022; Walker *v.* R. Co., 76 Kan. 32, 90 P. 772, 12 L. R. A. (N. S.) 624.

Practice for many years to pile ties and wood for shipping at same place, may be shown in action for damages for fire of railroad ties piled on defendant's right of way. Martin T. Co. *v.* R. Co., 123 Minn. 423, 144 N. W. 145.

561-22 Sims *v.* Co., 109 Md. 68, 71 A. 522.

561-25 Smith *v.* R. Co., 80 Vt. 208, 67 A. 535.

Cinders inadmissible in evidence when it does not appear they were emitted from engine setting fire. Atlantic, etc. R. Co. *v.* McElmurray (Ga. App.), 80 S. E. 680.

Defendant's failure to exercise diligence in fighting fire, shown by proof of number of men available and number furnished in connection with knowledge of situation. Ide *v.* R. Co., 83 Vt. 66, 74 A. 401.

562-26 Chicago & N. W. R. Co. *v.* Kendall, 186 Fed. 139, 108 C. C. A. 251.

562-29 Morgan *v.* R. Co., 50 Tex. Civ. 420, 110 S. W. 978.

562-31 Freeman *v.* Nathan (Tex.), 149 S. W. 248. But see Hitchner W. P. Co. *v.* R. Co., 158 Fed. 1011; Smith *v.* R. Co., 33 Utah 129, 93 P. 185.

563-33 Lost profits.—Johnson *v.* R. Co., 140 N. C. 574, 53 S. E. 362.

Length of time it took corn-cribs to burn is inadmissible. Marshall, etc. R. Co. *v.* Killingsworth (Tex. Civ.), 162 S. W. 1181.

Effect of destruction of manure spread upon land on its value, shown. Champlin *v.* R. Co., 140 Ill. App. 94 (value of fertilizer); Missouri, etc. R. Co. *v.* McDowell, 78 Kan. 686, 98 P. 201.

563-34 Illinois C. R. Co. *v.* Hicklin, 131 Ky. 624, 115 S. W. 752.

563-35 Wabash, etc. R. Co. *v.* Oetting, 147 Ill. App. 179 (if insurer's right of subrogation not enforced); Farmers, etc. Ins. Co. *v.* Hanks, 83 Kan.

96, 110 P. 99; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401.

563-36 Diggs *v.* R. Co., 131 Mo. App. 457, 110 S. W. 9.

563-37 Dowling Lumb. Co. *v.* King, 62 Fla. 151, 57 S. 337.

Cost of orchard is relevant as tending to show the damages. Ozark O. Co. *v.* R. Co., 173 Mo. App. 450, 158 S. W. 884.

563-39 Collins *v.* R. Co., 161 Ill. App. 95; St. Louis, etc. R. Co. *v.* Noland, 75 Kan. 691, 90 P. 273; Wiggins *v.* R. Co., 129 Mo. App. 369, 108 S. W. 574; Marron *v.* R. Co., 46 Mont. 593, 129 P. 1055; Thompson *v.* R. Co., 84 Neb. 482, 121 N. W. 447; Union P. R. Co. *v.* Murphy, 76 Neb. 545, 107 N. W. 757.

Tenant's damages.—Blunck *v.* R. Co. (Ia.), 115 N. W. 1013.

564-40 See Marron *v.* R. Co., 46 Mont. 593, 129 P. 1055.

564-44 See vol. 7, p. 941, n. 57, and supplement thereto. But see Texas, etc. R. Co. *v.* Langham (Tex. Civ.), 95 S. W. 686; Pierce *v.* R. Co. (Tex. Civ.), 108 S. W. 979.

566-49 See vol. 8, p. 879, n. 65, and supplement thereto.

567-50 See vol. 8, p. 914, n. 67, and supplement thereto.

568-54 See vol. 8, p. 920, n. 80, and supplement thereto.

568-59 Sample *v.* R. Co., 233 Ill. 564, 84 N. E. 643; Metzler *v.* R. Co., 28 Pa. Super. 180.

569-64 Owen *v.* R. Co. (Ala.), 61 S. 924; Kane *v.* R. Co., 251 Mo. 13, 157 S. W. 644; Forrester *v.* Pac. Co., 36 Nev. 247, 134 P. 753, 136 P. 705; International, etc. R. Co. *v.* Munn, 46 Tex. Civ. 276, 102 S. W. 442.

570-65 Gardner *v.* R. Co., 223 Mo. 389, 122 S. W. 1068; Finkelstein *v.* R. Co., 75 N. H. 303, 73 A. 705 (though fact report made brought out on cross-examination). See infra, "Street Railroads," 147-51. Defendant may not show it had received no report of the accident from its employes. Smith *v.* R. Co., 169 Ill. App. 570.

570-66 Train sheets not conclusive evidence of movement of trains. Staples *v.* R. Co., 74 N. H. 499, 69 A. 890.

570-67 Poole *v.* R. Co., 216 Mass. 12, 102 N. E. 918 (rules inadmissible); T. & P. R. Co. *v.* Hilgartner (Tex. Civ.), 149 S. W. 1091.

See vol. 8, p. 954, n. 40, and supplement thereto.

In an action by employe against railroad, an order is admissible in evidence to show violation by employe. Washington R. Co. *v.* Downey, 40 App. Cas. (D. C.) 147.

Rules which do not tend to fix standard of duty owing by defendant's employes to others, not admissible. Continental Ins. Co. *v.* R. Co., 97 Minn. 467, 107 N. W. 548.

571-69 Tex. & P. R. Co. *v.* Hilgartner (Tex. Civ.), 149 S. W. 1091.

571-71 Rules inadmissible. Chabott *v.* R. Co. (N. H.), 88 A. 995; Baird *v.* R. Co., 78 Wash. 67, 138 P. 325.

572-74 But see Louisville & N. R. Co. *v.* Taylor, 31 Ky. L. R. 1142, 104 S. W. 776.

573-76 Illinois C. R. Co. *v.* Bethea, 88 Miss. 119, 40 S. 813.

573-78 Atlanta, etc. R. Co. *v.* Brown, 158 Ala. 607, 48 S. 73 (reputation and assessment for taxation); Plumb *v.* Co., 157 Mich. 562, 122 N. W. 208; Waaler *v.* R. Co., 22 S. D. 256, 117 N. W. 140.

573-79 Moore *v.* R. Co., 133 App. Div. 396, 117 N. Y. S. 604; Waaler *v.* R. Co., supra.

574-81 Johnson *v.* R. Co., 154 Cal. 285, 97 P. 520; Pittsburgh, etc. R. Co *v.* Rogers, 45 Ind. App. 230, 87 N. E. 28; Hollins *v.* R. Co., 119 La. 418, 44 S. 159 (liability joint).

574-82 Authority to operate, presumed. Enton *v.* R. Co., 136 App. Div. 800, 121 N. Y. S. 793.

574-84 Western R. Co. *v.* Cleghorn, 143 Ala. 392, 39 S. 133.

Folder inadmissible.—Chicago, etc. R. R. Co. *v.* Weber, 219 Ill. 372, 76 N. E. 489; Brandom *v.* R. Co., 134 Mo. App. 89, 114 S. W. 540.

Certified copy of lease.—Chicago, etc. R. Co. *v.* Weber, supra; Brandom *v.* R. Co., supra.

Ownership of stock.—Penn. Co. *v.* Rossett, 116 Ill. App. 342.

Conductor's receipt for fare does not raise presumption company named owned road. Brandom *v.* R. Co., 134 Mo. App. 89, 114 S. W. 540.

Time-tables and atlases, not evidence of ownership unless authenticity shown. Brandom *v.* R. Co., supra.

Train service.—In mandamus proceedings to compel adequate train service plaintiff may not show injury on basis of conjecture only; nor can he show facts which indicate cause for forfeiture of defendant's franchise. He may show facts indicating defendant's

failure to properly serve local public. P. *v.* R. Co., 143 Ill. App. 337.

575-85 *Contra* if authorized construction permanent in nature, cause of damage. Hart *v.* R. Co., 143 Ill. App. 503. And where water diverted. St. Louis, etc. R. Co. *v.* Magness, 93 Ark. 46, 123 S. W. 786. *Comp.* Matteson *v.* R. Co., 40 Pa. Super. 234.

Presumed due care exercised in construction of bridge. Matteson *v.* R. Co., 40 Pa. Super. 234.

575-89 Plaintiff's statements to defendant's character as to probable consequence of excavation being made, competent to show it caused injury and knowledge thereof by defendant. Southern R. Co. *v.* Lewis, 165 Ala. 555, 51 S. 746.

Cause of overflowing lands may be shown by effect produced by diversion of water. St. Louis, etc. R. Co. *v.* Magness, 93 Ark. 46, 123 S. W. 786.

Regularity of proceedings locating track, presumed after lapse of more than twenty-five years. U. S. Peg Wood, etc. Co. *v.* R. Co., 104 Me. 472, 72 A. 190.

To recover for diversion of underground water plaintiff must show it ordinarily flowed in a definite channel or uniform direction; otherwise it will be presumed it had its source in percolation and its diversion did not give cause of action. Western M. R. Co. *v.* Martin, 110 Md. 554, 73 A. 267.

Construction of another road in vicinity shown to fix responsibility. Missouri, etc. R. Co. *v.* Hagler (Tex. Civ.), 112 S. W. 783.

575-91 Gorham *v.* R. Co., 158 N. C. 504, 74 S. E. 607.

Value farm would have if crossing constructed and maintained as stipulated and its value without same, shown in action for breach of covenant for its construction. Pittsburgh, etc. R. Co. *v.* Wilson, 46 Ind. App. 444, 91 N. E. 725.

Representations made to defendant as to the sufficiency of proposed culvert, shown to prove its wilfulness and malice in thereafter completing, without enlarging it. Houghtaling *v.* R. Co., 117 Ia. 540, 91 N. W. 811.

576-94 Violation of law relating to care of animals.—A suit for violation of the twenty-eight hour law is civil in all respects. It is not a defense for its knowing and wilful violation that defendant's rules were disobeyed by employe. U. S. *v.* R. Co., 173 Fed. 764, 98 C. C. A. 110.

Violation of safety appliance law.—Evidence need not show defendant's liability beyond reasonable doubt. Immaterial defendant indicated coupler on car it moved was in bad order. U. S. *v.* R. Co., 173 Fed. 684.

Running trains on Sunday.—Under statute prohibiting company from running trains on Sunday state must show permission as an essential ingredient of the offense. Fact train drawn by one of defendant's locomotives may be evidence of permission; but does not cast upon it burden of showing permission not given. S. *v.* R. Co., 149 N. C. 470, 62 S. E. 755.

Location of accommodation.—In prosecution for failure to comply with statute requiring maintenance of convenient closet defendant may show whole situation surrounding station. Louisville & N. R. Co. *v.* C., 131 Ky. 268, 114 S. W. 1192.

Indictment for running trains at unsafe rate of speed must be sustained by proof defendant so ran them habitually and failed to give necessary warnings. It may be shown watchman was placed at crossings in question in pursuance of extra-official demand of authorities. Cincinnati, etc. R. Co. *v.* C., 31 Ky. L. R. 1113, 104 S. W. 771.

RAPE

579 Prosecutrix may testify to her own age. Boyd *v.* S. (Tex. Cr.), 163 S. W. 67.

Prosecutrix may testify she did not understand enormity of the offense. Hamilton *v.* S. (Tex. Cr.), 168 S. W. 536.

579-1 Age of male sixteen. Schramm *v.* P., 220 Ill. 16, 77 N. E. 117.

579-2 Payne *v.* C., 33 Ky. L. R. 229, 110 S. W. 311; Beason *v.* S., 96 Miss. 105, 50 S. 488; S. *v.* Fisk, 15 N. D. 589, 108 N. W. 485.

579-3 No presumption of consent. King *v.* Erickson, 5 Haw. 159.

579-4 P. *v.* Morris, 3 Cal. App. 1, 84 P. 463; S. *v.* Brown (Del.), 83 A. 1083; S. *v.* Fowler, 13 Ida. 317, 89 P. 757; P. *v.* Murphy, 145 Mich. 524, 108 N. W. 1009; S. *v.* Zempel, 103 Minn. 428, 115 N. W. 275; Vickers *v.* U. S., 1 Okla. Cr. 452, 98 P. 467 (it must be shown that defendant was not an In-

dian before the death penalty can be imposed under a statute); Marshall *v.* Ty., 2 Okla. Cr. 136, 101 P. 139; S. *v.* Johnson , 85 S. C. 265, 67 S. E. 453; Railsback *v.* S., 53 Tex. Cr. 542, 110 S. W. 916; Scott *v.* S., 51 Tex. Cr. 5, 100 S. W. 159.

Must prove the chaste character of prosecutrix. S. *v.* Kelly, 245 Mo. 489, 150 S. W. 1057.

Sufficient evidence.—Poe *v.* S., 95 Ark. 172, 129 S. W. 292; P. *v.* Bardin, 255 Ill. 9, 99 N. E. 59; Bowman *v.* Com., 146 Ky. 486, 143 S. W. 47; S. *v.* Stackhouse, 242 Mo. 444, 146 S. W. 1151; S. *v.* Swain, 239 Mo. 723, 144 S. W. 427; Wragg *v.* S. (Tex. Cr.), 145 S. W. 342; Showalter *v.* S., 148 Wis. 450, 134 N. W. 830.

580-5 P. *v.* Babcock, 160 Cal. 537, 117 P. 549; S. *v.* Johnson, 114 Minn. 493, 131 N. W. 629; S. *v.* Huggins, 83 N. J. L. 43, 83 A. 495; P. *v.* Marks, 130 N. Y. S. 524; Marshall *v.* Ty., 2 Okla. Cr. 136, 101 P. 139 (previous chaste character of female must be proved if statute makes it element of offense); Whitehead *v.* S., 61 Tex. Cr. 558, 137 S. W. 356.

580-7 Fact prosecutrix unmarried, shown by circumstantial evidence. S. *v.* Pipkin, 221 Mo. 453, 120 S. W. 17.

580-8 Harris *v.* S., 2 Ala. App. 116, 56 S. 55; Green *v.* S., 91 Ark. 562, 121 S. W. 949; P. *v.* Howard, 143 Cal. 316, 76 P. 1116; S. *v.* Sigerella, 7 Penne. (Del.) 311, 82 A. 31; S. *v.* Colombo, 1 Boyce (Del.) 96, 75 A. 616; Taliaferro *v.* C., 151 Ky. 10, 150 S. W. 977; P. *v.* Rivers, 147 Mich. 643, 111 N. W. 201; S. *v.* Headley, 224 Mo. 177, 123 S. W. 577; Cook *v.* S., 85 Neb. 57, 122 N. W. 706; U. S. *v.* Mulero, 4 P. R. Fed. 130; Taylor *v.* S., 50 Tex. Cr. 362, 97 S. W. 94.

Not essential time of offense be proved as of day alleged; substantial harmony between pleading and proof, enough. S. *v.* Ferris, 81 Conn. 97, 70 A. 587.

Use of words "carnal knowledge" and "abuse" does not require other evidence of abuse than such knowledge. S. *v.* Ferris, supra; S. *v.* Sebastian, 81 Conn. 1, 69 A. 1054.

581-9 P. *v.* Schultz, 260 Ill. 35, 102 N. E. 1045 (circumstantial evidence); S. *v.* Devorss, 221 Mo. 469, 120 S. W. 75; Cook *v.* S., 85 Neb. 57, 122 N. W. 706; Young *v.* S., 49 Tex. Cr. 434, 93 S. W. 743; S. *v.* Biggs, 57 Wash. 514, 107 P. 374.

581-10 Posey *v.* S., 143 Ala. 54, 38 S. 1019; S. *v.* Colombo, 1 Boyce (Del.) 96, 75 A. 616; S. *v.* Williams (Del.), 80 A. 1004; S. *v.* Sigerella, 7 Penne. (Del.) 311, 82 A. 31.

581-11 McQueary *v.* P., 48 Colo. 214, 110 P. 210; S. *v.* Williams (Del.), 80 A. 1004; Vanderford *v.* S., 126 Ga. 753, 55 S. E. 1025; Rucker *v.* P., 224 Ill. 131, 79 N. E. 606; Payne *v.* C., 33 Ky. L. R. 229, 110 S. W. 311; P. *v.* Murphy, 145 Mich. 524, 108 N. W. 1009; S. *v.* Zempel, 103 Minn. 428, 115 N. W. 275; S. *v.* Cowing, 99 Minn. 123, 108 N. W. 851; Adams *v.* S. (Miss.), 47 S. 787; S. *v.* Needy, 43 Mont. 442, 117 P. 102; U. S. *v.* Mulero, 4 P. R. Fed. 130; Eiley *v.* S., 55 Tex. Cr. 1, 114 S. W. 793; Salazar *v.* S., 55 Tex. Cr. 307, 116 S. W. 819; Perez *v.* S., 50 Tex. Cr. 34, 94 S. W. 1036; Brown *v.* S., 127 Wis. 193, 106 N. W. 536.

Attempt to commit rape must be accompanied by such force as will overcome resistance, considering relative strength of parties. Holloway *v.* S., 54 Tex. Cr. 465, 113 S. W. 928.

Acts of parties immediately after offense, shown on question of use of force. Griffin *v.* S., 155 Ala. 88, 46 S. 481.

582-12 Herndon *v.* S., 2 Ala. App. 118, 56 S. 85; S. *v.* Sigerella, 7 Penne. (Del.) 311, 82 A. 31; Vanderford *v.* S., 126 Ga. 753, 55 S. E. 1025; Rahke *v.* S., 168 Ind. 615, 81 N. E. 584; Bowman *v.* Co., 146 Ky. 486, 143 S. W. 47; S. *v.* Cowing, 99 Minn. 123, 108 N. W. 851; Perez *v.* S., 50 Tex. Cr. 34, 94 S. W. 1036; Cole *v.* S., 57 Tex. Cr. 51, 123 S. W. 409; Loescher *v.* S., 142 Wis. 260, 125 N. W. 459 (insensibility through fright, ceasing resistance under fear).

582-13 Posey *v.* S., 143 Ala. 54, 38 S. 1019; Rahke *v.* S., 168 Ind. 615, 81 N. E. 584; S. *v.* Crouch, 130 Ia. 478, 107 N. W. 173; S. *v.* Smith, 203 Mo. 695, 102 S. W. 526; S. *v.* Welch, 191 Mo. 179, 89 S. W. 945.

Intoxication of female may be proved. Hirdes *v.* Circuit Judge (Mich.), 146 N. W. 646.

584-17 McQueary *v.* P., 48 Colo. 214, 110 P. 210; S. *v.* Stevens, 133 Ia. 684, 110 N. W. 1037; Payne *v.* C., 33 Ky. L. R. 229, 110 S. W. 311; S. *v.* Mehojovich, 118 La. 1013, 43 S. 660; S. *v.* Devorss, 221 Mo. 469, 120 S. W. 75; Hubert *v.* S., 74 Neb. 220, 104 N. W.

276, 106 N. W. 774; Robertson *v.* S., 51 Tex. Cr. 493, 102 S. W. 1130; Ross *v.* S., 16 Wyo. 285, 93 P. 299, 94 P. 217.

584-18 S. *v.* Brown (Del.), 83 A. 1083; S. *v.* Whimpey, 140 Ia. 199, 118 N. W. 281; Patton *v.* C., 140 Ky. 513, 131 S. W. 275; P. *v.* Murphy, 145 Mich. 524, 108 N. W. 1009; S. *v.* Zempel, 103 Minn. 428, 115 N. W. 275; S. *v.* Cowing, 99 Minn. 123, 108 N. W. 851; S. *v.* Barbour, 234 Mo. 526, 137 S. W. 874; S. *v.* Schenk, 238 Mo. 429, 142 S. W. 263; Vaughn *v.* S., 78 Neb. 317, 110 N. W. 992; S. *v.* Rhoades, 17 N. D. 579, 118 N. W. 233; Perez *v.* S., 50 Tex. Cr. 34, 94 S. W. 1036.

In statutory rape willingness of prosecutrix is immaterial, for she cannot consent. P. *v.* MacDonald, 167 Cal. 545, 140 P. 256.

585-19 Rahke *v.* S., 168 Ind. 615, 81 N. E. 584; Payne *v.* C., 33 Ky. L. R. 229, 110 S. W. 311; Sandefur *v.* C., 143 Ky. 655, 137 S. W. 504; S. *v.* Smith, 203 Mo. 695, 102 S. W. 526; Hubbard *v.* S. (Tex. Cr.), 147 S. W. 260; Robertson *v.* S., 51 Tex. Cr. 493, 102 S. W. 1130.

Burden on state to show mental derangement and knowledge thereof by defendant. S. *v.* Warren, 232 Mo. 185, 134 S. W. 522.

Intoxication may be proved.—Hirdes *v.* Cir. Judge (Mich.), 146 N. W. 646.

586-20 Morris *v.* S., 103 Ark. 352, 147 S. W. 74; S. *v.* Cunningham, 5 Penne. (Del.) 294, 63 A. 30; Rahke *v.* S., 168 Ind. 615, 81 N. E. 584; S. *v.* Bricker, 135 Ia. 343, 112 N. W. 645; S. *v.* Johnson, 133 Ia. 38, 110 N. W. 170; S. *v.* Blackburn (Ia.), 110 N. W. 275; S. *v.* Stevens, 133 Ia. 684, 110 N. W. 1037; Payne *v.* C., 33 Ky. L. R. 229, 110 S. W. 311; S. *v.* Mehojovich, 118 La. 1013, 43 S. 660; S. *v.* Smith, 203 Mo. 695, 102 S. W. 526; P. *v.* Marks, 180 N. Y. S. 524; Lopez *v.* S. (Tex. Cr.), 156 S. W. 217; Whitehead *v.* S., 61 Tex. Cr. 558, 137 S. W. 356; Robertson *v.* S., 51 Tex. Cr. 493, 102 S. W. 1130; Ross *v.* S., 16 Wyo. 285, 93 P. 299, 94 P. 217.

Defendant is bound by an admission as to age of child. Kearse *v.* S. (Tex. Cr.), 151 S. W. 827.

Representations as to age by person incapable of consenting, immaterial. Zachary *v.* S., 57 Tex. Cr. 179, 122 S. W. 263.

586-21 Story *v.* S., 178 Ala. 98, 59 S. 480; Griffin *v.* S., 155 Ala. 88, 46 S. 481; Bowman *v.* C., 146 Ky. 486, 143 S. W. 47; S. *v.* Lovitt, 243 Mo. 510, 147 S. W. 484; Leedom *v.* S., 81 Neb. 585, 116 N. W. 496; Diffey *v.* S. (Okla. Cr.), 135 P. 942; Brown *v.* S., 52 Tex. Cr. 267, 106 S. W. 368; Jacobs *v.* S. (Tex. Cr.), 146 S. W. 558. See P. *v.* Preston, 19 Cal. App. 675, 127 P. 660; S. *v.* Kelly, 245 Mo. 489, 150 S. W. 1057. But see C. *v.* Howe, 35 Pa. Super. 554. *Contra,* Lake *v.* C., 31 Ky. L. R. 1232, 104 S. W. 1003.

Acts subsequent to offense not admissible. S. *v.* Perrigin (Mo.), 167 S. W. 573.

Prosecutrix may testify she had intercourse only with accused where medical testimony as to her condition received. S. *v.* Colombo, 1 Boyce (Del.) 96, 75 A. 616.

Possession by prosecutrix year before rape of unsigned and unaddressed note suggesting meeting for improper purpose, not admissible to show she was not virtuous. S. *v.* Dudley, 147 Ia. 645, 126 N. W. 812.

587-22 Brooks *v.* S., 8 Ala. App. 277, 62 S. 569; Sanders *v.* S., 148 Ala. 603, 41 S. 466; Trimble *v.* Ty., 8 Ariz. 273, 71 P. 932; Hamer *v.* S., 104 Ark. 606, 150 S. W. 142; Sexton *v.* S., 91 Ark. 589, 121 S. W. 1075; Skaggs *v.* S., 88 Ark. 62, 113 S. W. 346 (*cit.* the text); Huey *v.* S., 7 Ga. App. 398, 66 S. E. 1023, *cit.* the text; Fields *v.* S., 2 Ga. App. 41, 58 S. E. 327; S. *v.* Neil, 13 Ida. 539, 90 P. 860, 91 P. 318; S. *v.* Fowler, 13 Ida. 317, 89 P. 757; P. *v.* Weston, 236 Ill. 104, 86 N. E. 188; Totten *v.* Totten, 172 Mich. 565, 138 N. W. 257 (in civil actions); Frost *v.* S., 94 Miss. 104, 47 S. 898; Jeffries *v.* S., 89 Miss. 643, 42 S. 801; S. *v.* Burgess (Mo.), 168 S. W. 740; S. *v.* Lawhorn, 250 Mo. 293, 157 S. W. 344; S. *v.* Bateman, 198 Mo. 212, 94 S. W. 843; S. *v.* Wertz, 191 Mo. 569, 90 S. W. 838; Henderson *v.* S., 85 Neb. 444, 123 N. W. 459; S. *v.* Rodesky (N. J.), 90 A. 1099; P. *v.* Shaw, 158 App. Div. 146, 142 N. Y. S. 782; P. *v.* Seaman, 152 App. Div. 495, 137 N. Y. S. 294; S. *v.* Oden (Or.), 138 P. 1083; Ulmer *v.* S. (Tex. Cr.), 160 S. W. 1188; Ortiz *v.* S. (Tex. Cr.), 151 S. W. 1059; Duckett *v.* S. (Tex. Cr.), 150 S. W. 1177; Love *v.* S. (Tex. Cr.), 150 S. W. 920; Jacobs *v.* S. (Tex. Cr.), 146 S. W. 558; Lemons *v.* S., 59 Tex. Cr. 299, 128 S. W. 416 (also statement made in reply); Adams *v.* S., 52 Tex. Cr. 13, 105 S. W. 197; S. *v.* Hol-

comb, 73 Wash. 652, 132 P. 416; S. *v.* Myrberg, 56 Wash. 384, 105 P. 622; S. *v.* Griffin, 43 Wash. 591, 86 P. 951.

See Turner *v.* S., 66 Fla. 404, 63 S. 708; S. *v.* Dudley, 147 Ia. 645, 126 N. W. 812; Rogers *v.* S., 9 Okla. Cr. 277, 131 P. 941; Love *v.* S. (Tex. Cr.), 150 S. W. 920; Smits *v.* S., 145 Wis. 601, 130 N. W. 525.

In an "extremely close case on the facts, the court permitted some half dozen witnesses to testify to what the prosecutrix told them about all the details of the alleged offense, and all about the locality where the offense was alleged to have been committed—the condition of the ground and other things. What these witnesses testified to was nothing that they had any personal knowledge of; but the prosecutrix took them down to the place where she said the alleged offense occurred, and pointed out to them various objects, footprints in the sand, depression in the earth, cane trampled down, and grass, and told them, moreover, the details of the alleged offense. This was manifest and fatal error." **Frost** *v.* S., 100 Miss. 796, 57 S. 221.

Prosecutrix not wife of accused.—See Gent *v.* S., 57 Tex. Cr. 414, 123 S. W. 594.

Complaints must be voluntary.—S. *v.* Hoskinson, 78 Kan. 183, 96 P. 138. But see supra, "Corroboration," 731-12.

588-23 Griffin *v.* S., 155 Ala. 88, 46 S. 481; Sexton *v.* S., 91 Ark. 589, 121 S. W. 1075 (may be brought out on cross-examination and to corroborate prosecutrix's testimony if impeached); S. *v.* Sebastian, 81 Conn. 1, 69 A. 1054; Ty. *v.* Schilling, 17 Haw. 249, 265; S. *v.* Andrews, 130 Ia. 609, 105 N. W. 215; S. *v.* Barkley, 129 Ia. 484, 105 N. W. 506; S. *v.* Stackhouse, 242 Mo. 444, 146 S. W. 1151; S. *v.* Apley, 25 N. D. 298, 141 N. W. 740; Bader *v.* S., 57 Tex. Cr. 293, 122 S. W. 555. See Brooks *v.* S., 8 Ala. App. 277, 62 S. 569. But see Younger *v.* S., 80 Neb. 201, 114 N. W. 170.

589-24 P. *v.* Duncan, 261 Ill. 339, 103 N. E. 1043; S. *v.* Novak, 151 Ia. 536, 132 N. W. 26; S. *v.* Hoskinson, 78 Kan. 183, 96 P. 138 (it seems); S. *v.* Ingraham, 118 Minn. 13, 136 N. W. 258; S. *v.* Alton, 105 Minn. 410, 117 N. W. 617; Henderson *v.* S., 85 Neb. 444, 123 N. W. 459; In re Kelly, 28 Nev. 491, 83 P. 223; Bouie *v.* S., 9 Okla. Cr. 345, 131 P. 953; Rogers *v.* S., 9 Okla. Cr. 277, 131 P. 941; Burge *v.* S. (Tex. Cr.), 167 S. W. 63; Boyd *v.* S. (Tex. Cr.), 163 S. W. 67; Sharp *v.* S. (Tex. Cr.), 160 S. W. 369; Valdez *v.* S. (Tex. Cr.), 160 S. W. 341; Fuller *v.* S. (Tex. Cr.), 154 S. W. 1021; Duckett *v.* S. (Tex. Cr.), 150 S. W. 1177; Callihan *v.* S. (Tex. Cr.), 150 S. W. 617; Adams *v.* S., 52 Tex. Cr. 13, 105 S. W. 197; Chambless *v.* S., 49 Tex. Cr. 354, 94 S. W. 220; Wade *v.* S. (Tex. Cr.), 144 S. W. 246; S. *v.* Holcomb, 73 Wash. 652, 132 P. 416. See vol. 11, pp. 364, 365, notes 39, 43.

Books and papers of accused, found on ground where offense committed shortly after, admissible as res gestae. Fletcher *v.* C., 123 Ky. 571, 96 S. W. 855; Lyon *v.* C., 29 Ky. L. R. 1020, 96 S. W. 857.

Evidence disclosed to first person met after crime not necessarily res gestae. Douglass *v.* S. (Tex. Cr.), 165 S. W. 933.

589-25 Hamer *v.* S., 104 Ark. 606, 150 S. W. 142; Huey *v.* S., 7 Ga. App. 398, 66 S. E. 1023; Simmons *v.* S. (Miss.), 61 S. 826 (*cit.* ENCYC. OF EV.).

Rule not applicable if child is too young to testify. P. *v.* Bianchino, 5 Cal. App. 633, 91 P. 112.

Weight to be given evidence of complaint, for jury, which should not be instructed it is a corroborating circumstance. Henderson *v.* S., 85 Neb. 444, 123 N. W. 459.

590-26 Beiser *v.* S. (Ala. App.), 65 S. 312; Brooks *v.* S. (Ala. App.), 62 S. 569; Levy *v.* Ty., 13 Ariz. 425, 115 P. 415; P. *v.* Corey, 8 Cal. App. 720, 97 P. 907 (if testimony as to delayed complaint, brought out on cross-examination no error committed by repeating it on redirect examination); P. *v.* Bianchino, 5 Cal. App. 633, 91 P. 112; P. *v.* Gonzalez, 6 Cal. App. 255, 91 P. 1013; Totten *v.* Totten, 172 Mich. 565, 138 N. W. 257 (in civil actions); S. *v.* Miller, 191 Mo. 587, 90 S. W. 767; S. *v.* Werner, 16 N. D. 83, 112 N. W. 60; Ortiz *v.* S. (Tex. Cr.), 151 S. W. 1059; Pettus *v.* S., 58 Tex. Cr. 546, 126 S. W. 868 (delay explained); Salazar *v.* S., 55 Tex. Cr. 307, 116 S. W. 819; Smith *v.* S., 52 Tex. Cr. 344, 106 S. W. 1161.

Youth of prosecutrix may excuse prompt complaint. P. *v.* Lutzow, 240 Ill. 612, 88 N. E. 1049.

591-27 S. *v.* Sigerella, 7 Penne. (Del.) 311, 82 A. 31; Webb *v.* S., 7 Ga.

App. 35, 66 S. E. 27; S. *v.* Dudley, 147 Ia. 645, 126 N. W. 812; S. *v.* Oswalt, 72 Kan. 84, 82 P. 586; C. *v.* Rollo, 203 Mass. 354, 89 N. E. 556 (delay explained by showing conduct of third person toward prosecutrix); S. *v.* Goodale, 210 Mo. 275, 109 S. W. 9; S. *v.* Miller, 191 Mo. 587, 90 S. W. 767; Vaughn *v.* S., 78 Neb. 317, 110 N. W. 992; S. *v.* Werner, 16 N. D. 83, 112 N. W. 60; Duckett *v.* S. (Tex. Cr.), 150 S. W. 1177; S. *v.* Williams, 36 Utah 273, 103 P. 250. *Contra,* Cowles *v.* S., 51 Tex. Cr. 498, 102 S. W. 1128; S. *v.* Griffin, 43 Wash. 591, 86 P. 951. See P. *v.* Bolik, 241 Ill. 394, 89 N. E. 700.

Delay explained.—Buchanan *v.* S., 137 Ga. 774, 74 S. E. 536.

592-28 Brooks *v.* S., 8 Ala. App. 277, 62 S. 569; Skaggs *v.* S., 88 Ark. 62, 113 S. W. 346; Fields *v.* S., 2 Ga. App. 41, 58 S. E. 327; S. *v.* Fowler, 13 Ida. 317, 89 P. 757; P. *v.* Weston, 236 Ill. 104, 86 N. E. 188; S. *v.* Alton, 105 Minn. 410, 117 N. W. 617; S. *v.* Zempel, 103 Minn. 428, 115 N. W. 275; S. *v.* Wertz, 191 Mo. 569, 90 S. W. 838; In re Kelly, 28 Nev. 491, 83 P. 223; S. *v.* Apley, 25 N. D. 298, 141 N. W. 740; Burge *v.* S. (Tex. Cr.), 167 S. W. 63; Sharp *v.* S. (Tex. Cr.), 160 S. W. 369; Jaureque *v.* S., 55 Tex. Cr. 221, 116 S. W. 809; Turman *v.* S., 50 Tex. Cr. 7, 95 S. W. 533; Young *v.* S., 49 Tex. Cr. 434, 93 S. W. 743.

See P. *v.* Jansma (Mich.), 147 N. W. 600.

Where the alleged act occurred at 11 p. m. evidence of the girl's physical condition the following morning was admissible. Jacobs *v.* S. (Tex. Cr.), 146 S. W. 558.

Diseased condition of prosecutrix shown if accused affected with venereal disease. Cook *v.* S., 85 Neb. 57, 122 N. W. 706.

Attempts made by prosecutrix to secure help from others, shown. Vogel *v.* S., 138 Wis. 315, 119 N. W. 190.

592-29 P. *v.* Maruyama, 19 Cal. App. 290, 125 P. 924; Fields *v.* S., 2 Ga. App. 41, 58 S. E. 327; S. *v.* Hodgeson, 130 La. 382, 58 S. 14; S. *v.* Zempel, 103 Minn. 428, 115 N. W. 275; S. *v.* Brannan, 206 Mo. 636, 105 S. W. 602; Ulmer *v.* S. (Tex. Cr.), 160 S. W. 1188; Sharp *v.* S. (Tex. Cr.), 160 S. W. 369; Thompson *v.* S. (Tex. Cr.), 157 S. W. 494.

Garment admissible.—Salazar *v.* S., 55 Tex. Cr. 307, 116 S. W. 819.

Conduct of prosecutrix on leaving home to go with accused, material on question of motive. Warren *v.* S., 54 Tex. Cr. 443, 114 S. W. 380.

593-30 P. *v.* Corey, 8 Cal. App. 720, 97 P. 907; S. *v.* Colombo, 1 Boyce (Del.) 96, 75 A. 616 (two months after not too remote; otherwise as to six months); Sigerella *v.* S., 1 Boyce (Del.) 157, 74 A. 1081; Messel *v.* S., 176 Ind. 214, 95 N. E. 565; S. *v.* Dudley, 147 Ia. 645, 126 N. W. 812; S. *v.* Cowing, 99 Minn. 123, 108 N. W. 851; In re Kelley, 28 Nev. 491, 83 P. 223; S. *v.* Apley, 25 N. D. 298, 141 N. W. 740; Boyd *v.* S. (Tex. Cr.), 163 S. W. 67; Young *v.* S., 49 Tex. Cr. 434, 93 S. W. 743; Caton *v.* S. (Tex. Cr.), 147 S. W. 590.

A physician's testimony that a rape was impossible under circumstance testified to is properly excluded. Burge *v.* S. (Tex. Cr.), 167 S. W. 63.

Subsequent conduct of prosecutrix shown to prove her condition may have resulted therefrom—may be explained on re-direct examination. P. *v.* Corey, 8 Cal. App. 720, 97 P. 907.

594-31 P. *v.* Schultz, 260 Ill. 35, 102 N. E. 1045; S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531 (medical works not admissible).

595-34 Lenor *v.* S. (Ariz.), 137 P. 412; Renfroe *v.* S., 84 Ark. 16, 104 S. W. 542; P. *v.* Ah Lean, 7 Cal. App. 626, 95 P. 380; Schuette *v.* P., 33 Colo. 325, 80 P. 890; S. *v.* Sebastian, 81 Conn. 1, 69 A. 1054; Kidwell *v.* U. S., 38 App. Cas. (D. C.) 566; S. *v.* Hogan, 145 Ia. 352, 124 N. W. 178; P. *v.* Nichols, 159 Mich. 355, 124 N. W. 25; S. *v.* Schueller, 120 Minn. 26, 138 N. W. 937; S. *v.* Sechrist (Mo.), 126 S. W. 400; S. *v.* Campbell, 210 Mo. 202, 109 S. W. 706; Flowers *v.* S. (Okla. Cr.), 138 P. 1041; Allen *v.* S. (Okla. Cr.), 134 P. 91; Morris *v.* S., 9 Okla. Cr. 241, 131 P. 731; S. *v.* Sysinger, 25 S. D. 110, 125 N. W. 879; Williamson *v.* S. (Tex. Cr.), 163 S. W. 435; Cain *v.* S. (Tex. Cr.), 153 S. W. 147; Washington *v.* S., 58 Tex. Cr. 345, 125 S. W. 917; Schults *v.* S., 49 Tex. Cr. 351, 91 S. W. 786; S. *v.* Conlin, 45 Wash. 478, 88 P. 932; Grabowski *v.* S., 126 Wis. 447, 105 N. W. 805. *Contra,* Skidmore *v.* S., 57 Tex. Cr. 497, 123 S. W. 1129, arguendo. *Comp.* S. *v.* Dlugozima, 7 Penne. (Del.) 151, 74 A. 1086.

Previous conduct of defendant admissible to show intent. Pope *v.* S. (Ala. App.), 64 S. 526.

Conduct of others with prosecutrix previous to offense committed by accused, provable if they and he acted in concert. S. *v.* Hogan, 145 Ia. 352, 124 N. W. 178.

595-35 P. *v.* Soto, 11 Cal. App. 431, 105 P. 420; P. *v.* Duncan, 261 Ill. 339, 103 N. E. 1043; S. *v.* Crouch, 130 Ia. 478, 107 N. W. 173; McCreary *v.* C., 158 Ky. 612, 165 S. W. 981; S. *v.* Kaufman, 125 Minn. 315, 146 N. W. 1115; S. *v.* Palmberg, 199 Mo. 233, 97 S. W. 566; Evers *v.* S., 84 Neb. 708, 121 N. W. 1005; Boyd *v.* S., 81 O. St. 239, 90 N. E. 355; S. *v.* Hardin, 63 Or. 305, 127 P. 789; Jamison *v.* S., 117 Tenn. 58, 94 S. W. 675; Cooper *v.* S. (Tex. Cr.), 162 S. W. 364; Ulmer *v.* S. (Tex. Cr.), 160 S. W. 1188; Battles *v.* S., 53 Tex. Cr. 202, 109 S. W. 195; S. *v.* Willett, 78 Vt. 157, 62 A. 48; S. *v.* Mobley, 44 Wash. 549, 87 P. 815; Grabowski *v.* S., 126 Wis. 447, 105 N. W. 805.

See vol. 7, p. 630, n. 18; p. 631, n. 20, and supplement thereto.

Error in admitting such evidence, immaterial if it was brought out on cross-examination by state. Price *v.* S., 56 Tex. Cr. 82, 119 S. W. 99.

596-36 P. *v.* Scott (Cal. App.), 141 P. 945 (admissible as corroboration); S. *v.* Dlugozima, 7 Penne. (Del.) 151, 74 A. 1086; S. *v.* Oswalt, 72 Kan. 84, 82 P. 586; P. *v.* Nichols, 159 Mich. 355, 124 N. W. 25; Collier *v.* S. (Miss.), 64 S. 373; P. *v.* Doyle, 158 App. Div. 37, 142 N. Y. S. 884; P. *v.* Farina, 134 App. Div. 110, 118 N. Y. S. 817; P. *v.* Bills, 129 App. Div. 798, 114 N. Y. S. 587; Flowers *v.* S. (Okla. Cr.), 138 P. 1041 (admissible); Allen *v.* S. (Okla. Cr.), 134 P. 91 (admissible). See Lenord *v.* S. (Ariz.), 137 P. 412; Morris *v.* S., 9 Okla. Cr. 241, 131 P. 731. But see S. *v.* Stone, 74 Kan. 189, 85 P. 808; P. *v.* Brown, 142 Mich. 622, 106 N. W. 149; S. *v.* Lawrence, 74 O. St. 38, 77 N. E. 266; Cecil *v.* Ty., 16 Okla. 197, 82 P. 654; Jamison *v.* S., 117 Tenn. 58, 94 S. W. 675. *Contra*, P. *v.* Soto, 11 Cal. App. 431, 105 P. 420; S. *v.* Palmberg, 199 Mo. 233, 97 S. W. 566; Leedom *v.* S., 81 Neb. 585, 116 N. W. 496.

Conversations between parties at other times than that alleged, proved. S. *v.* Simmons, 52 Wash. 132, 100 P. 269.

Acts after prosecutrix reached age of consent are inadmissible. Kidwell *v.* U. S., 38 App. Cas. (D. C.) 566.

597-37 Webb *v.* S., 7 Ga. App. 35, 66 S. E. 27; P. *v.* Gibson, 255 Ill. 302, 99 N. E. 599; S. *v.* Smith, 250 Mo. 274, 157 S. W. 307; P. *v.* Bills, 129 App. Div. 798, 114 N. Y. S. 587; S. *v.* La Mont, 23 S. D. 174, 120 N. W. 1104; S. *v.* Williams, 36 Utah 273, 103 P. 250, *quot.* the text.

Accused's relations with another female may be gone into by proving his statement to prosecutrix soon after offense; he may be cross-examined concerning it. Rex *v.* Chitson (1909), 2 K. B. 945.

597-38 Williams *v.* S., 103 Ark. 70, 146 S. W. 471; P. *v.* Scott (Cal. App.), 141 P. 945; S. *v.* Norris, 127 Ia. 683, 104 N. W. 282; Thompson *v.* C., 155 Ky. 333, 159 S. W. 829; S. *v.* Kaufman, 125 Minn. 315, 146 N. W. 1115; S. *v.* Campbell, 210 Mo. 202, 109 S. W. 706; S. *v.* Coss, 53 Or. 462, 101 P. 193; Jacobs *v.* S. (Tex. Cr.), 146 S. W. 558; Rowan *v.* S., 57 Tex. Cr. 625, 124 S. W. 668 (though prosecutrix under age of consent); S. *v.* Biggs, 57 Wash. 514, 107 P. 374; Grabowski *v.* S., 126 Wis. 447, 105 N. W. 805.

See S. *v.* Hardin, 63 Or. 305, 127 P. 789; Mora *v.* S. (Tex. Cr.), 167 S. W. 344.

597-39 P. *v.* Pia, 14 Cal. App. 131, 111 P. 105; P. *v.* Davis, 6 Cal. App. 229, 91 P. 810; S. *v.* Callahan, 100 Minn. 63, 110 N. W. 342; Loar *v.* S., 76 Neb. 148, 107 N. W. 229; Sharp *v.* S. (Tex. Cr.), 160 S. W. 369; Bawcom *v.* S., 49 Tex. Cr. 417, 94 S. W. 462.

Declarations, long before crime, of intent to marry prosecutrix, competent. Warren *v.* S., 54 Tex. Cr. 443, 114 S. W. 380.

598-40 Lenord *v.* S. (Ariz.), 137 P. 412; P. *v.* Darr, 3 Cal. App. 50, 84 P. 457; P. *v.* Ah Lung, 2 Cal. App. 278, 83 P. 296; S. *v.* Sebastian, 81 Conn. 1, 69 A. 1054; Wistrand *v.* P., 218 Ill. 323, 75 N. E. 891; S. *v.* Sells, 145 Ia. 675, 124 N. W. 776; S. *v.* McPursley, 144 Ia. 414, 121 N. W. 1031; S. *v.* Ralston, 139 Ia. 44, 116 N. W. 1058; Totten *v.* Totten, 172 Mich. 565, 138 N. W. 257; S. *v.* Zempel, 103 Minn. 428, 115 N. W. 275; Dunmore *v.* S., 86 Miss. 788, 39 S. 69; S. *v.* Campbell, 210 Mo. 202, 109 S. W. 706; S. *v.* Mathews, 202 Mo. 143, 100 S. W. 420; S. *v.* Bateman, 198 Mo. 212, 94 S. W.

843; S. *v.* Wertz, 191 Mo. 569, 90 S. W. 838; S. *v.* Miller, 191 Mo. 587, 90 S. W. 767; Leedom *v.* S., 81 Neb. 585, 116 N. W. 496; Cecil *v.* Ty., 16 Okla. 197, 82 P. 654; Bawcom *v.* S., 49 Tex. Cr. 417, 94 S. W. 462; Smith *v.* S., 52 Tex. Cr. 344, 106 S. W. 1161; Curry *v.* S., 50 Tex. Cr. 158, 94 S. W. 1058; Bradshaw *v.* S., 49 Tex. Cr. 165, 94 S. W. 223.

And see S. *v.* Haugh, 156 Ia. 639, 137 N. W. 918.

Accused is not bound by admissions of an attorney in conversation with father of prosecutrix. Bradley *v.* S. (Tex. Cr.), 162 S. W. 515.

598-41 S. *v.* Ralston, 139 Ia. 44, 116 N. W. 1058; Dickey *v.* S., 86 Miss. 525, 38 S. 776; S. *v.* Kelley, 191 Mo. 680, 90 S. W. 834; Miller *v.* S. (Tex. Cr.), 150 S. W. 635.

Reasons for flight may be given in evidence by defendant. S. *v.* Hogg, 64 Or. 57, 129 P. 115.

598-42 P. *v.* Davenport, 13 Cal. App. 632, 110 P. 318; Powers *v.* S., 138 Ga. 624, 75 S. E. 651; Dickey *v.* S., 86 Miss. 525, 38 S. 776; S. *v.* Mathews, 202 Mo. 143, 100 S. W. 420; Cecil *v.* Ty., 16 Okla. 197, 82 P. 654.

Signed statement, by prosecutrix before trial, not competent to corroborate testimony. P. *v.* Nichols, 159 Mich. 355, 124 N. W. 25.

Defendant's acts in connection with procuring abortion to be performed on complainant, shown. S. *v.* Hansford, 81 Kan. 300, 106 P. 738.

Declarations of stranger, in absence of accused, not admissible. S. *v.* Newcomb, 220 Mo. 54, 119 S. W. 405.

599-43 P. *v.* Gibson, 255 Ill. 302, 99 N. E. 599; S. *v.* Waters, 132 Ia. 481, 109 N. W. 1013; Whitehead *v.* S., 61 Tex. Cr. 558, 137 S. W. 356.

Details of the condition of place where crime was committed is admissible. Sharp *v.* S. (Tex. Cr.), 160 S. W. 369.

Failure of prosecutrix to identify others brought in her presence has a tendency to show her recollection of accused and good faith in identifying him. S. *v.* Johnson, 85 S. C. 265, 67 S. E. 453.

Circumstantial evidence may establish identity. S. *v.* Hogan, 144 Ia. 130, 122 N. W. 818.

Evidence as to identity may be allowed wide range. Vickers *v.* U. S., 1 Okla. Cr. 452, 98 P. 467.

599-44 P. *v.* Currie, 16 Cal. App. 731, 117 P. 941; P. *v.* Duncan, 261 Ill. 339, 103 N. E. 1043; Druin *v.* C. (Ky.), 124 S. W. 856; S. *v.* Johnson, 114 Minn. 493, 131 N. W. 629; S. *v.* Palmberg, 199 Mo. 233, 97 S. W. 566; Cooper *v.* S. (Tex. Cr.), 162 S. W. 364; Bradshaw *v.* S., 49 Tex. Cr. 165, 94 S. W. 223. See P. *v.* Farina, 134 App. Div. 110, 118 N. Y. S. 817.

Pregnancy may be proved.—S. *v.* Dlugozima, 7 Penne. (Del.) 151, 74 A. 1086; S. *v.* Kelly, 245 Mo. 489, 150 S. W. 1057; Thrasher *v.* S., 92 Neb. 110, 138 N. W. 120; Smith *v.* S. (Tex. Cr.), 165 S. W. 574. Prosecutrix may testify thereof. S. *v.* Sysinger, 25 S. D. 110, 125 N. W. 879. If she is under age of consent pregnancy may be shown only as it tends to prove the corpus delicti. P. *v.* Soto, 11 Cal. App. 431, 105 P. 420.

599-45 S. *v.* Palmberg, 199 Mo. 233, 97 S. W. 566; S. *v.* Danforth, 73 N. H. 215, 60 A. 839.

600-46 Watson *v.* Taylor, 35 Okla. 768, 131 P. 922. See P. *v.* Soto, 11 Cal. App. 431, 105 P. 420.

Subsequent conduct of prosecutrix toward accused, shown. Warren *v.* S., 54 Tex. Cr. 443, 114 S. W. 380.

600-47 Herndon *v.* S., 2 Ala. App. 118, 56 S. 85; P. *v.* Bonzani (Cal. App.), 141 P. 1062; P. *v.* Scott (Cal. App.), 141 P. 945; P. *v.* Crawford (Cal. App.), 141 P. 824; P. *v.* Preston, 19 Cal. App. 675, 127 P. 660; P. *v.* Currie, 16 Cal. App. 731, 117 P. 941; P. *v.* Corey, 8 Cal. App. 720, 97 P. 907; Kidwell *v.* U. S., 38 App. Cas. (D. C.) 566; Parker *v.* S., 3 Ga. App. 336, 59 S. E. 823; Fields *v.* S., 2 Ga. App. 41, 58 S. E. 327; P. *v.* Freeman, 244 Ill. 590, 91 N. E. 708 (must be most clear and convincing); S. *v.* Brown, 85 Kan. 418, 116 P. 508; Druin *v.* C. (Ky.), 124 S. W. 856; Mosely *v.* S., 92 Miss. 250, 45 S. 833; S. *v.* Hughes (Mo.), 167 S. W. 529; S. *v.* Donnington, 246 Mo. 243, 151 S. W. 975; S. *v.* Goodale, 210 Mo. 275, 109 S. W. 9; S. *v.* Welch, 191 Mo. 179, 89 S. W. 945; Morris *v.* S., 9 Okla. Cr. 241, 131 P. 731; Reeve *v.* Ty., 2 Okla. Cr. 351, 101 P. 1039; S. *v.* McPherson (Or.), 138 P. 1076; Duckett *v.* S. (Tex. Cr.), 150 S. W. 1177; Logan *v.* S. (Tex. Cr.), 148 S. W. 713; Price *v.* S., 56 Tex. Cr. 82, 119 S. W. 99; S. *v.* Conlin, 45 Wash. 478, 88 P. 932; Vogel *v.* S., 138 Wis. 315, 119 N. W. 190.

See S. *v.* Adams, 247 Mo. 652, 153 S. W. 1046.

Assault with intent to rape.—Duckett *v.* S. (Tex. Cr.), 150 S. W. 1177.

Prosecutrix's testimony as to penetration must be free from contradiction to support death penalty. Vickers *v.* U. S., 1 Okla. Cr. 452, 98 P. 467.

Statement rape committed, covers all elements of crime. U. S. *v.* Ramos, 1 Phil. Isl. 81.

601-48 P. *v.* Ah Lung, 2 Cal. App. 278, 83 P. 296; S. *v.* Whimpey, 140 Ia. 199, 118 N. W. 281; S. *v.* Ralston, 139 Ia. 44, 116 N. W. 1058; S. *v.* Bricker, 135 Ia. 343, 112 N. W. 645; S. *v.* Johnson, 133 Ia. 38, 110 N. W. 170; S. *v.* Stevens, 133 Ia. 684, 110 N. W. 1037; S. *v.* Waters, 132 Ia. 481, 109 N. W. 1013; S. *v.* Crouch, 130 Ia. 478, 107 N. W. 173; S. *v.* Cardwell, 90 Kan. 606, 135 P. 597; Boling *v.* S., 91 Neb. 599, 136 N. W. 1078; Henderson *v.* S., 85 Neb. 444, 123 N. W. 459 (if defendant denies guilt); Harris *v.* S., 80 Neb. 195, 114 N. W. 168; Burk *v.* S., 79 Neb. 241, 112 N. W. 573; Fitzgerald *v.* S., 78 Neb. 1, 110 N. W. 676; Klawitter *v.* S., 76 Neb. 49, 107 N. W. 121; P. *v.* Harrison, 63 Misc. 18, 117 N. Y. S. 477 (corroboration must cover age of prosecutrix if under age of consent); U. S. *v.* Flores, 6 Phil. Isl. 420 (corroboration must be on disputed points); Austin *v.* S., 51 Tex. Cr. 327, 101 S. W. 1162; S. *v.* Simmons, 52 Wash. 132, 100 P. 269; S. *v.* Jonas, 48 Wash. 133, 92 P. 899; Lam Yee *v.* S., 132 Wis. 527, 112 N. W. 425. *Comp.* S. *v.* Sells, 145 Ia. 675, 124 N. W. 776; P. *v.* Farina, 134 App. Div. 110, 118 N. Y. S. 817.

See P. *v.* Duncan, 261 Ill. 339, 103 N. E. 1043; S. *v.* Adams, 247 Mo. 652, 153 S. W. 1046; Mott *v.* S., 83 Neb. 226, 119 N. W. 461.

Corroborative evidence may be circumstantial. P. *v.* De Nigris, 157 App. Div. 798, 142 N. Y. S. 620.

Corroboration held insufficient.—S. *v.* Gibson, 64 Wash. 131, 116 P. 872.

Pregnancy of prosecutrix and opportunities of accused to commit crime, not sufficient corroborative evidence. P. *v.* Cole, 134 App. Div. 759, 119 N. Y. S. 259.

Immediate complaints, not sufficient corroboration. S. *v.* Stewart, 52 Wash. 61, 100 P. 153.

Declarations of purpose by accused four months prior to offense, competent Sexton *v.* S., 91 Ark. 589, 121 S. W. 1075.

Proof of previous opportunity and suspicious circumstances, prosecutrix testifying no improper relations existed, not sufficient corroboration, and so of evidence of pregnancy subsequent to offense where association with other men about time of offense, shown. S. *v.* McCool, 53 Wash. 487, 102 P. 422.

602-49 Story *v.* S., 178 Ala. 98, 59 S. 480; Herndon *v.* S., 2 Ala. App. 118, 56 S. 85; Jackson *v.* S., 92 Ark. 71, 122 S. W. 101; S. *v.* Williams (Del.), 80 A. 1004; S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531; S. *v.* Hodgesen, 130 La. 382, 58 S. 14; P. *v.* Ryno, 148 Mich. 137, 111 N. W. 740; Wilkerson *v.* S. (Miss.), 64 S. 420; S. *v.* Kozlickie, 241 Mo. 301, 145 S. W. 97; S. *v.* Apley, 25 N. D. 298, 141 N. W. 740; U. S. *v.* Mulero, 4 P. R. Fed. 130; Bigleben *v.* S. (Tex. Cr.), 151 S. W. 1044; S. *v.* Verto, 65 W. Va. 628, 64 S. E. 1025, *cit.* the text; S. *v.* Barrick, 60 W. Va. 576, 55 S. E. 652; S. *v.* Detwiler, 60 W. Va. 583, 55 S. E. 654.

Wide latitude permitted defendant in cross-examination. Kidwell *v.* U. S., 38 App. Cas. (D. C.) 566.

General reputation of prosecutrix may be sustained by state. Warren *v.* S., 54 Tex. Cr. 443, 114 S. W. 380.

603-50 S. *v.* Rivers, 82 Conn. 454, 74 A. 757; Sacks *v.* U. S., 41 App. Cas. (D. C.) 34; Harris *v.* S., 80 Neb. 195, 114 N. W. 168; Kearse *v.* S. (Tex. Cr.), 151 S. W. 827; Shoemaker *v.* S., 58 Tex. Cr. 518, 126 S. W. 887. But see Burk *v.* S., 79 Neb. 241, 112 N. W. 573; Marshall *v.* Ty., 2 Okla. Cr. 136, 101 P. 139.

604-51 Jackson *v.* S., 92 Ark. 71, 122 S. W. 101 (general reputation for truth or immorality); S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531; S. *v.* Evans, 90 Kan. 795, 136 P. 270; McCreary *v.* C., 158 Ky. 612, 165 S. W. 981; P. *v.* Wilson, 170 Mich. 669, 137 N. W. 92.

604-52 P. *v.* Jacobs, 16 Cal. App. 478, 117 P. 615; P. *v.* Boero, 13 Cal. App. 686, 110 P. 525; Smith *v.* S., 64 Tex. Cr. 454, 142 S. W. 1173. *Contra,* P. *v.* Ah Lean, 7 Cal. App. 626, 95 P. 380.

Also acts of intimacy not amounting to intercourse. Clardy *v.* S. (Tex. Cr.), 147 S. W. 568.

604-53 S. *v.* Brown, 85 Kan. 418, 116 P. 508; S. *v.* Henderson, 243 Mo. 503, 147 S. W. 480.

Written and illustrated communications between parties, competent on question of force. Smith *v.* S., 56 Tex. Cr. 316, 120 S. W. 188.

604-54 Story *v.* S., 178 Ala. 98, 59 S. 480; Griffin *v.* S., 155 Ala. 88, 46 S. 481; Garrard *v.* S. (Ark.), 167 S. W. 485; King *v.* S., 106 Ark. 160, 152 S. W. 990; S. *v.* Gereke, 74 Kan. 196, 86 P. 160, 87 P. 759; Walker *v.* S., 8 Okla. Cr. 125, 126 P. 829; Jamison *v.* S., 117 Tenn. 58, 67, 94 S. W. 675. See Kidwell *v.* U. S., 38 App. Cas. (D. C.) 566; Chaney *v.* C., 149 Ky. 464, 149 S. W. 923. But see S. *v.* Blackburn, 136 Ia. 743, 114 N. W. 531.

Specific immoral libidinous acts toward others, shown in rebuttal of accused's evidence of good character. Robinson *v.* S., 143 Wis. 205, 126 N. W. 750.

Prosecution may produce third person to testify that he never had had intercourse with the prosecutrix when defendant sets up claim that it was another. Cain *v.* S. (Tex. Cr.), 153 S. W. 147.

Evidence tending to show others than accused might have had intercourse with prosecutrix, admissible to rebut her testimony to the contrary and account for her physical condition as disclosed by medical examination. Bader *v.* S., 57 Tex. Cr. 293, 122 S. W. 555.

Evidence that prosecuting witness had sexual intercourse with one other than defendant is admissible to affect credibility of prosecuting witness. Wade *v.* S. (Tex. Cr.), 144 S. W. 246.

605-55 P. *v.* Ah Lean, 7 Cal. App. 626, 95 P. 380; McCreary *v.* C., 158 Ky. 612, 165 S. W. 981; S. *v.* Hodgeson, 130 La. 382, 58 S. 14; S. *v.* Kozlickie, 241 Mo. 301, 145 S. W. 97.

Cannot be given to affect credibility. S. *v.* Holcomb, 73 Wash. 652, 132 P. 416.

Conclusions of prosecutrix respecting effect of her conduct on other men may not be shown. Lemons *v.* S., 59 Tex. Cr. 299, 128 S. W. 416.

605-56 Peters *v.* S., 103 Ark. 119, 146 S. W. 491; Renfroe *v.* S., 84 Ark. 16, 104 S. W. 542; P. *v.* Currie, 14 Cal. App. 67, 111 P. 108; Heath *v.* S., 173 Ind. 296, 90 N. E. 310; S. *v.* Devorss, 221 Mo. 469, 120 S. W. 75 (rape by another); S. *v.* Smith, 18 S. D. 341, 100 N. W. 740.

But may show she had been inmate of a house of ill-fame prior to time of offense to affect her credibility. Bigliben *v.* S. (Tex. Cr.), 151 S. W. 1044. See vol. 3, p. 26, n. 68; also p. 40, n. 20, and supplement thereto.

606-57 P. *v.* Ah Lean, 7 Cal. App. 626, 95 P. 380; P. *v.* Fong Chung, 5 Cal. App. 587, 91 P. 105; S. *v.* Rivers, 82 Conn. 454, 74 A. 757 (cross-examination as to particular acts of immorality either before or after offense to test veracity).

Defendant's belief as to age of prosetrix, if she was incapable of consent, immaterial. Heath *v.* S., 173 Ind. 296, 90 N. E. 310; Pilgrim *v.* S., 59 Tex. Cr. 231, 128 S. W. 128.

606-58 Jackson *v.* S., 92 Ark. 71, 122 S. W. 101; Adams *v.* S. (Miss.), 47 S. 787; Vickers *v.* U. S., 1 Okla. Cr. 452, 98 P. 467; Warren *v.* S., 54 Tex. Cr. 443, 114 S. W. 380 (explanation proper); Elliott *v.* S., 49 Tex. Cr. 435, 93 S. W. 742.

606-59 Subsequent friendly relations with accused shown. Jackson *v.* S., 92 Ark. 71, 122 S. W. 101.

606-60 See Lenord *v.* S. (Ariz.), 137 P. 412.

606-61 Shoemaker *v.* S., 58 Tex. Cr. 518, 126 S. W. 887 (for revenge); S. *v.* Gibson, 64 Wash. 131, 116 P. 872.

Accused's good character not a defense; it may be shown as bearing on question of reasonable doubt as to guilt. S. *v.* Jones, 145 Ia. 176, 123 N. W. 960.

606-62 Sims *v.* S., 146 Ala. 109, 41 S. 413; Tuttle *v.* S., 83 Ark. 379, 104 S. W. 135; Anderson *v.* S., 77 Ark. 37, 90 S. W. 846; P. *v.* Ah Lung, 2 Cal. App. 278, 83 P. 296; S. *v.* Honey, 1 Boyce (Del.) 324, 80 A. 240; S. *v.* Truitt, 5 Penne. (Del.) 466, 62 A. 790; Webb *v.* S., 7 Ga. App. 35, 66 S. E. 27 (clearest and most convincing evidence required); Scott *v.* S., 3 Ga. App. 479, 60 S. E. 112; Fields *v.* S., 2 Ga. App. 41, 58 S. E. 327; S. *v.* Neil, 13 Ida. 539, 90 P. 860, 91 P. 318; Newman *v.* P., 223 Ill. 324, 79 N. E. 80; Rahke *v.* S., 168 Ind. 615, 81 N. E. 584; Payne *v.* C., 33 Ky. L. R. 229, 110 S. W. 311; S. *v.* Pierce, 243 Mo. 524, 147 S. W. 970; S. *v.* Platner, 196 Mo. 128, 93 S. W. 403; Cotton *v.* S., 52 Tex. Cr. 55, 105 S. W. 185; Bourland *v.* S., 49 Tex. Cr. 197, 93 S. W. 115; Castle *v.* S., 49 Tex. Cr. 1, 90 S. W. 32.

Evidence may cast burden of proof on defendant to prove actions were innocent. Miller *v.* S. (Tex. Cr.), 150 S. W. 635.

May be proved by circumstantial evidence. Love *v.* S. (Tex. Cr.), 150 S. W. 920.

Evidence insufficient. — Paul *v.* S., 99 Ark. 558, 139 S. W. 287.

Evidence sufficient.—Kelly *v.* S., 1 Ala. App. 133, 56 S. 15; Owens *v.* S., 9 Ga. App. 441, 71 S. E. 680; Williams *v.* S. (Okla. Cr.), 136 P. 599; S. *v.* Badnelley, 32 R. I. 378, 79 A. 834; Rogers *v.* S. (Tex. Cr.), 143 S. W. 631; McWhirter *v.* S. (Tex. Cr.), 146 S. W. 189; Fowler *v.* S. (Tex. Cr.), 148 S. W. 576; Hightower *v.* S. (Tex. Cr.), 143 S. W. 1168; Quinn *v.* S., 153 Wis. 573, 142 N. W. 510, 46 L. R. A. (N. S.) 422.

607-63 Tuttle *v.* S., 83 Ark. 379, 104 S. W. 135; P. *v.* Bowman, 6 Cal. App. 749, 93 P. 198; Clark *v.* S., 56 Fla. 46, 47 S. 481; Scott *v.* S., 3 Ga. App. 479, 60 S. E. 112; Fields *v.* S., 2 Ga. App. 41, 58 S. E. 327; McCullough *v.* S., 10 Ga. App. 403, 73 S. E. 546; Horseford *v.* S., 124 Ga. 784, 53 S. E. 322; S. *v.* Neil, 13 Ida. 539, 90 P. 860, 91 P. 318; Payne *v.* C., 33 Ky. L. R. 229, 110 S. W. 311; Bowman *v.* C., 31 Ky. L. R. 828, 104 S. W. 263; Gibson *v.* C., 31 Ky. L. R. 945, 104 S. W. 351; Austin *v.* S. (Miss.), 48 S. 817; U. S. *v.* Solar, 1 Phil. Isl. 358; S. *v.* Saunders, 92 S. C. 427, 75 S. E. 702; Cotton *v.* S., 52 Tex. Cr. 55, 105 S. W. 185; Washington *v.* S., 51 Tex. Cr. 542, 103 S. W. 879; Warren *v.* S., 51 Tex. Cr. 598, 103 S. W. 888; Baweom *v.* S., 49 Tex. Cr. 417, 94 S. W. 462; Bourland *v.* S., 49 Tex. Cr. 197, 93 S. W. 115; Hudson *v.* S., 49 Tex. Cr. 24, 90 S. W. 177; Castle *v.* S., 49 Tex. Cr. 1, 90 S. W. 32; Woodson *v.* C., 107 Va. 895, 59 S. E. 1097.

See Rushton *v.* S., 58 Fla. 94, 50 S. 486; S. *v.* Johnson, 84 S. C. 45, 65 S. E. 1023.

Evidence of want of physical development is competent only to illustrate mental capacity. Morrow *v.* S., 13 Ga. App. 189, 79 S. E. 63.

Intent to use force inferred from circumstances, including fact prosecutrix is white and defendant black. Pumphrey *v.* S., 156 Ala. 103, 47 S. 156.

608-64 Roberts *v.* S., 9 Ga. App. 807, 72 S. E. 287; U. S. *v.* Banzon, 1 Phil. Isl. 435.

Other assaults by accused upon prosecutrix may not be proved. S. *v.* Riggio, 124 La. 614, 50 S. 600.

Evidence of previous similar assault on daughter of prosecuting witness by co-defendant not on trial, fatally irrelevant. S. *v.* Osborne, 54 Or. 289, 103 P. 62.

608-65 Sims *v.* S., 146 Ala. 109, 41 S. 413; P. *v.* Ah Lean, 7 Cal. App. 626, 95 P. 380; S. *v.* Fishel, 140 Ia. 460, 118 N. W. 763 (employing first opportunity to escape from accused also shown); Rogers *v.* S. (Tex. Cr.), 143 S. W. 631.

609-66 S. *v.* Johnson, 133 Ia. 38, 110 N. W. 170; Childress *v.* S., 51 Tex. Cr. 455, 103 S. W. 864. See Gamble *v.* C., 151 Ky. 372, 151 S. W. 924.

Previous solicitation by defendant, proved. S. *v.* Allison, 24 S. D. 622, 124 N. W. 747.

609-67 Flight and qualified denials sufficient corroboration, evidence as to which need not extend to all elements of offense. S. *v.* Hetland, 141 Ia. 524, 119 N. W. 961.

609-68 Pitnam *v.* S., 148 Ala. 612, 42 S. 993; S. *v.* Waters, 132 Ia. 481, 109 N. W. 1013; Boyd *v.* S., 50 Tex. Cr. 138, 94 S. W. 1053.

610-70 Ross *v.* S., 16 Wyo. 285, 93 P. 299, 94 P. 217.

Consent of prosecutrix, if under age of consent, immaterial. S. *v.* Allison, 24 S. D. 622, 124 N. W. 747.

Desisting from attempt, proved; not convincing as to defendant's intent. S. *v.* Allison, supra.

RATIFICATION

611-1 International Text Book Co. *v.* Connelly, 206 N. Y. 188, 99 N. E. 722; Heely *v.* Kellogg, 145 N. Y. S. 943.

Must prove written ratification.—Carroll *v.* Nat. Bk., 38 Okla. 267, 133 P. 179.

612-4 Rennie *v.* Ins. Co., 176 Fed. 202, 99 C. C. A. 556; Chicago, etc. R. Co. *v.* Bk., 174 Fed. 923, 98 C. C. A. 535; Jerman *v.* Co., 46 Colo. 33, 102 P. 743; Findlay *v.* Hildenbrand, 17 Ida. 403, 105 P. 790; Welke *v.* Wackershauser, 143 Ia. 107, 120 N. W. 77; Cowan *v.* Co., 141 Mich. 87, 104 N. W. 377; Shevlin *v.* Shevlin, 96 Minn. 398, 105 N. W. 257; Doll *v.* Co., 33 Mont. 80, 81 P. 625; Belcher *v.* Assn., 74 N. J. L. 833, 67 A. 399; Ramsay *v.* Miller, 135 App. Div. 503, 120 N. Y. S. 523; Sanford *v.* Fountain, 49 Misc. 301, 99 N. Y. S. 234; Sword *v.* Reformed Con., 29 Pa. Super. 626; Griffing *v.* Dunn, 23

S. D. 141, 120 N. W. 890; Quale *v.* Hazel, 19 S. D. 483, 104 N. W. 215; Holt & Smith *v.* Plow Co. (Tex. Civ.), 150 S. W. 215; Lightfoot *v.* Horst (Tex. Civ.), 122 S. W. 606; Skirvin *v.* O'Brien, 43 Tex. Civ. 1, 95 S. W. 696; Sterling *v.* DeLaune, 47 Tex. Civ. 470, 105 S. W. 1169; First Nat. Bk. *v.* Bean, 66 W. Va. 505, 66 S. E. 713; Same *v.* Assn., 141 Wis. 476, 124 N. W. 656.

612-5 Servant *v.* McCampbell, 46 Colo. 292, 104 P. 394; Beattie *v.* McMullen, 82 Conn. 484, 74 A. 767; Mathes *v.* Lumb. Co., 173 Mo. App. 239, 158 S. W. 729; Lightfoot *v.* Horst (Tex. Civ.), 122 S. W. 606. See supra, "Principal and Agent," 33-4.

"Ratification may be made by formal action, or by passive acquiescence; but in either event such facts must be established as will warrant the proper finding. In the present case the ratification relied on by appellee depends upon certain facts, and, as we view the record, these facts are for the jury. The burden will be on the plaintiff to show such acquiescence in, knowledge of, and adoption of, his services by the corporation as will warrant the jury, under instructions as to the law, in finding a ratification." De Forest *v.* N. W. T. Co., 236 Pa. 125, 84 A. 674.

Slight evidence only needed where agent derives no benefit and principal will. Winston *v.* Gordon, 115 Va. 899, 80 S. E. 756.

An exception.—Farjeon *v.* Co., 120 N. Y. S. 298.

Presumption may rest on slight circumstances when act of agent beneficial to principal. Knowles *v.* Co. (Tex. Civ.), 121 S. W. 232.

Non-ratification must be shown by person denying existence of contract defendant's board of directors had power to authorize or ratify. Lyon *v.* Co., 132 App. Div. 777, 117 N. Y. S. 648.

613-6 Feigenspan *v.* McDonnell, 201 Mass. 341, 87 N. E. 624.

Ratification of fraudulent act of trustee must be clearly shown. Branch *v.* Buckley, 109 Va. 784, 65 S. E. 652.

613-7 Koppe *v.* Koppe, 57 Tex. Civ. 204, 122 S. W. 68.

613-9 Smith *v.* Bk., 120 Mo. App. 527, 97 S. W. 247; Hall *v.* R. Co., 27 R. I. 525, 65 A. 278.

614-13 Lamkin *v.* LeDoux, 101 Me. 581, 64 A. 1048. See Louden Mfg. Co. *v.* Milmine, 14 Ont. L. R. (Can.) 532.

615-16 See Fidelity T. Co. *v.* Butler, 28 Ky. L. R. 1268, 91 S. W. 676.

616-21 Davis *v.* Gaskins, 137 Ga. 450, 73 S. E. 579.

616-23 Wickham *v.* Torley, 136 Ga. 594, 71 S. E. 881.

616-25 Putnal *v.* Walker, 61 Fla. 720, 55 S. 844.

617-30 Central, etc. Co. *v.* Co., 45 Tex. Civ. 199, 99 S. W. 1144.

619-38 Mulford *v.* Rowland, 45 Colo. 172, 100 P. 603.

619-39 Underfeed S. Co. *v.* Co., 165 Fed. 65; Brown *v.* Holloway, 47 Colo. 461, 108 P. 25; Mahoney *v.* Co., 82 Conn. 280, 73 A. 766; Catholic University *v.* Morse, 32 App. Cas. (D. C.) 195; Davis *v.* Gaskins, 137 Ga. 450, 73 S. E. 579; Kirby *v.* R. Co., 242 Ill. 418, 90 N. E. 252; McCormick *v.* Unity Co., 142 Ill. App. 159; Welker *v.* Appleman, 44 Ind. App. 699, 90 N. E. 35; Chamberlain *v.* Brown, 141 Ia. 540, 120 N. W. 334; Bobzin *v.* Co. (Ia.), 118 N. W. 40; Watt *v.* R. Co., 82 Kan. 458, 108 P. 811; Feigenspan *v.* McDonald, 201 Mass. 341, 87 N. E. 624; Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23; Steffens *v.* Nelson, 94 Minn. 365, 102 N. W. 871; Business Men's Assn. *v.* Williams, 137 Mo. App. 575, 119 S. W. 439 (payment of subscription to stock after corporation formed, ratification of irregular subscriptions); Carlson *v.* Co., 40 Mont. 434, 101 P. 419; Hammond *v.* Patterson, 85 Neb. 362, 123 N. W. 304; Ramsom *v.* Ramsom, 147 App. Div. 835, 133 N. Y. S. 173; Siff *v.* Forbes, 63 Misc. 319, 117 N. Y. S. 143; Laughlin *v.* Corp., 83 S. C. 62, 64 S. E. 1010; Smith *v.* Olivarri (Tex. Civ.), 127 S. W. 235; Corey *v.* Boynton, 82 Vt. 257, 72 A. 987 (Sunday contract); Ankeny *v.* Young, 52 Wash. 235, 100 P. 736; Shertzer *v.* Co., 52 Wash. 492, 100 P. 982; Smith *v.* Co., 66 W. Va. 599, 66 S. E. 746; Thompson *v.* Co., 60 W. Va. 42, 53 S. E. 908; Topolewski *v.* Co., 143 Wis. 52, 126 N. W. 554; Pfister *v.* Co., 139 Wis. 627, 121 N. W. 938; Bergquist *v.* Co., 18 Wyo. 234, 106 P. 673.

Act of incompetent person ratified by retention of benefit received, after competency restored, with knowledge of precedent fact. Fahy *v.* R., 160 Mich. 629, 125 N. W. 704.

To meet issue of ratification of investment of money plaintiff may show it

was invested in an over-issue of stock and part of it in another corporation. Miller *v.* Denman, 49 Wash. 217, 95 P. 67.

620-41 St. Louis, etc. R. Co. *v.* Sanders, 91 Ark. 153, 121 S. W. 337; Stiebel *v.* Haigney, 134 App. Div. 516, 119 N. Y. S. 455.

620-42 Heath *v.* Co., 18 Ida. 42, 108 P. 343; Fort *v.* Legion, 146 Ia. 183, 123 N. W. 224 (action of benefit association).

620-45 Chamberlain *v.* Brown, 141 Ia. 540, 120 N. W. 334.

621-50 Zelenka *v.* Co., 144 Ia. 592, 123 N. W. 332; Hansen *v.* Rolison, 156 Mich. 83, 120 N. W. 574; Morse *v.* Whitcomb, 54 Or. 412, 102 P. 788; Carter-K. L. Co. *v.* County (Tex. Civ.), 126 S. W. 293; Mayfield W. M. Co. *v.* Long (Tex. Civ.), 119 S. W. 908; Staats *v.* Assn., 55 Wash. 51, 104 P. 185.

622-51 Underfeed S. Co. *v.* Co., 165 Fed. 65; Ilfeld *v.* Ziegler, 40 Colo. 401, 91 P. 825; Garten *v.* Trobridge, 80 Kan. 720, 104 P. 1067; Tulboys *v.* Byrne, 109 Minn. 412, 124 N. W. 15; Russell *v.* Co., 17 N. D. 248, 116 N. W. 611; Knowles *v.* Co. (Tex. Civ.), 121 S. W. 232; Ankeny *v.* Young, 52 Wash. 235, 100 P. 736.

623-52 See Kane *v.* Ins. Co., 200 Mass. 265, 86 N. E. 302.

623-55 St. Louis, etc. R. Co. *v.* Sanders, 91 Ark. 153, 121 S. W. 337; Bobzin *v.* Co., 140 Ia. 744, 118 N. W. 40; Knowles *v.* Co. (Tex. Civ.), 121 S. W. 232; Tex. & G. R. Co. *v.* Whiteside, 55 Tex. Civ. 593, 119 S. W. 126; Topolewski *v.* Co., 143 Wis. 52, 126 N. W. 554.

Presumption of ratification may rest on slight evidence when act clearly for benefit of corporation. Davis *v.* Co., 103 Tex. 243, 126 S. W. 4.

624-56 Gage County *v.* Wright, 86 Neb. 436, 125 N. W. 625; Carter-K. L. Co. *v.* County (Tex. Civ.), 126 S. W. 293 (order of commissioners' court approving act on behalf of county need not be in writing); Gallup *v.* Liberty County, 57 Tex. Civ. 175, 122 S. W. 291.

Allowance of claims by council for services rendered at instance of mayor, ratification of his act. Moore *v.* Hupp, 17 Ida. 232, 105 P. 209.

624-57 Lochwitz *v.* Co., 37 Utah 349, 108 P. 1128.

REASONABLE DOUBT

625-1 Butts *v.* S., 13 Ga. App. 274, 79 S. E. 87. Limiting ground for reasonable doubt to the evidence, not error. P. *v.* Del Cerro, 9 Cal. App. 764, 100 P. 887, *disap.* Brown *v.* S., 105 Ind. 385, 5 N. E. 900. See infra, 626-5.

626-2 Bailey *v.* S. (Ark.), 150 S. W. 1030 (to prove clearly); Buchanan *v.* S., 11 Ga. App. 756, 76 S. E. 73; Norman *v.* S., 10 Ga. App. 802, 74 S. E. 428; Governor *v.* S., 5 Ga. App. 357, 63 S. E. 241; Middleton *v.* S., 7 Ga. App. 1, 66 S. E. 22; P. *v.* Barkas, 255 Ill. 516, 99 N. E. 698; Douglas *v.* Ty., 1 Okla. Cr. 583, 98 P. 1023; Price *v.* S., 1 Okla. Cr. 358, 98 P. 447; Cannon *v.* Ty., 1 Okla. Cr. 600, 99 P. 622; King *v.* S., 57 Tex. Cr. 363, 123 S. W. 135; S. *v.* Marston, 82 Vt. 250, 72 A. 1075. See Claussen *v.* S. (Wyo.), 133 P. 1055, *aff.* 135 P. 802.

Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further definition or refining. P. *v.* Lalonde, 171 Mich. 286, 137 N. W. 74, *cit.* P. *v.* Steubenvoll, 62 Mich. 329, 28 N. W. 883.

626-3 Hill *v.* S., 161 Ala. 67, 50 S. 41; Greer *v.* S., 156 Ala. 15, 47 S. 300; Parham *v.* S., 147 Ala. 57, 42 S. 1; Gregory *v.* S., 148 Ala. 566, 42 S. 829; Davis *v.* S., 152 Ala. 25, 44 S. 561; P. *v.* Botkin, 9 Cal. App. 244, 98 P. 861; S. *v.* Naylor (Del.), 90 A. 880; S. *v.* McKinney (Del.), 90 A. 1067; S. *v.* McCann (Del.), 90 A. 81; S. *v.* Wyatt (Del.), 89 A. 217; S. *v.* Creste (Del.), 85 A. 214; S. *v.* Brown (Del.), 85 A. 797; S. *v.* Brelawski (Del.), 84 A. 950; S. *v.* Jackson (Del.), 82 A. 824; S. *v.* Luff, 1 Boyce (Del.) 152, 74 A. 1079; S. *v.* Tyre, 6 Del. 343, 67 A. 199; Saunders *v.* S., 7 Ga. App. 803, 68 S. E. 307; P. *v.* Lucas, 244 Ill. 603, 91 N. E. 659; S. *v.* Nerzinger, 220 Mo. 36, 119 S. W. 379; S. *v.* Temple, 194 Mo. 228, 92 S. W. 494, 869; S. *v.* Glover, 91 S. C. 562, 75 S. E. 218; S. *v.* King, 49 Wash. 31, 94 P. 663.

See U. S. *v.* Reid, 210 Fed. 486.

Actual subsisting doubt.—Goemann *v.* S., 94 Neb. 582, 143 N. W. 800.

626-4 Dority *v.* S., 5 Ala. App. 208, 59 S. 317; Smith *v.* S., 142 Ala. 14, 39 S. 329; Bennett *v.* S., 95 Ark. 100, 128 S. W. 851; P. *v.* Del Cerro, 9 Cal. App. 764, 100 P. 887; Blue *v.* S., 86 Neb. 189, 125 N. W. 136; Price *v.* S., 1 Okla. Cr.

358, 98 P. 447. *Contra,* U. S. *v.* Wilson, 176 Fed. 806; S. *v.* Grant, 20 S. D. 164, 105 N. W. 97. *Comp.* U. S. *v.* Guthrie, 171 Fed. 528; Leonard *v.* S., 150 Ala. 89, 43 S. 214; Howard *v.* S., 151 Ala. 22, 44 S. 95 (such instructions argumentative); P. *v.* Hoffman, 142 Mich. 531, 105 N. W. 838. See S. *v.* Raice, 24 S. D. 111, 123 N. W. 708.

626-5 Kulp *v.* U. S., 210 Fed. 249, 127 C. C. A. 67; U. S. *v.* Guthrie, 171 Fed. 528; Roden *v.* S., 5 Ala. App. 247, 59 S. 751; S. *v.* Dryden (Del.), 84 A. 1037; S. *v.* Johnson (Del.), 84 A. 1040; S. *v.* De Paolo (Del.), 84 A. 213; S. *v.* Brooks (Del.), 84 A. 225; S. *v.* Brown, 2 Boyce (Del.) 405, 83 A. 1083; S. *v.* Short, 2 Boyce (Del.) 491, 82 A. 239; S. *v.* Massey, 2 Boyce (Del.) 501, 82 A. 243; S. *v.* Fitzsimmons (Del.), 82 A. 598; S. *v.* Brown (Del.), 80 A. 146; S. *v.* Honey, 2 Boyce (Del.) 324, 80 A. 240; S. *v.* Williams (Del.), 80 A. 1004; S. *v.* Lockwood, 1 Boyce (Del.) 152, 74 A. 2; S. *v.* Lee, 1 Boyce (Del.) 18, 74 A. 4; S. *v.* Stewart, 6 Penne. (Del.) 435, 67 A. 786; S. *v.* Mills, 6 Penne. (Del.) 497, 69 A. 841; Lewis *v.* S., 11 Ga. App. 102, 74 S. E. 708; S. *v.* Christian, 253 Mo. 382, 161 S. W. 736; Chandler *v.* S., 3 Okla. Cr. 254, 105 P. 375; U. S. *v.* Douglass, 2 Phil. Isl. 461; U. S. *v.* Reyes, 4 P. R. Fed. 69.

See U. S. *v.* Mulero, 4 P. R. Fed. 130.

Reasonable doubt is substantial doubt. S. *v.* Concelia, 250 Mo. 411, 157 S. W. 778; S. *v.* Sillbaugh, 250 Mo. 308, 157 S. W. 352.

Must be fully satisfied.—S. *v.* Charles, 161 N. C. 286, 76 S. E. 715.

Not a painful anxiety.—S. *v.* Ferguson, 91 S. C. 235, 74 S. E. 502.

Requiring "substantial and well-founded" doubt, erroneous. Frazier *v.* S., 117 Tenn. 430, 100 S. W. 94. *Comp.* Hampton *v.* S., 50 Fla. 55, 39 S. 421.

Basis for reasonable doubt not limited to testimony; the want of it, statement of accused, credibility of witnesses and other circumstances may give rise to it. Governor *v.* S., 5 Ga. App. 357, 63 S. E. 241; S. *v.* Andrews, 77 N. J. L. 108, 71 A. 109. See 625-1, supra.

626-6 Hale *v.* S. (Ala. App.), 64 S. 530; Simmons *v.* S., 158 Ala. 8, 48 S. 606; Little *v.* S., 145 Ala. 662, 39 S. 674; Brown *v.* S., 148 Ala. 657, 43 S. 101; Stewart *v.* S., 88 Ark. 602, 115 S. W. 374; Snyder *v.* S., 86 Ark. 456, 111 S. W. 465; Hendrix *v.* U. S., 2 Okla. Cr. 240, 101 P. 125; Schwantes *v.* S., 127 Wis. 160, 106 N. W. 237. *Comp.* Gordon *v.* S., 147 Ala. 42, 41 S. 847.

626-7 S. *v.* Short, 2 Boyce (Del.) 491, 82 A. 239; S. *v.* Blackburn, 7 Penne. (Del.) 479, 75 A. 536.

626-8 Shirley *v.* S., 144 Ala. 35, 40 S. 269. See Toliver *v.* S., 142 Ala. 3, 38 S. 801; Williams *v.* S., 161 Ala. 52, 50 S. 59; Chandler *v.* S., 3 Okla. Cr. 254, 105 P. 375.

626-9 Pettine *v.* Ty., 201 Fed. 489, 119 C. C. A. 581; Dickens *v.* S., 137 Ga. 523, 73 S. E. 826; S. *v.* Raice, 24 S. D. 111, 123 N. W. 708; Miller *v.* S., 139 Wis. 57, 119 N. W. 850; Roszczynilia *v.* S., 125 Wis. 414, 104 N. W. 113. *Contra,* Phillips *v.* S., 162 Ala. 14, 50 S. 194. See S. *v.* Pitt (N. C.), 80 S. E. 1060.

Held argumentative, but not reversible error. Perry *v.* S., 177 Ala. 1, 59 S. 150.

626-10 S. *v.* McCallister, 7 Penne. (Del.) 301, 76 A. 226.

626-11 Brown *v.* S., 142 Ala. 287, 38 S. 268; S. *v.* Flanagan, 83 N. J. L. 379, 84 A. 1046; S. *v.* Jacobs, 26 S. D. 183, 128 N. W. 162.

All testimony, including that of defendant, regarded. Williams *v.* S., 161 Ala. 52, 50 S. 59.

Possibility of innocence. — Proper to charge if jury believes beyond reasonable doubt defendant is guilty they must convict though it is possible he is innocent. Parham *v.* S., 147 Ala. 57, 42 S. 1. See S. *v.* Spaugh, 200 Mo. 571, 98 S. W. 55; Ty. *v.* Price, 14 N. M. 262, 91 P. 733.

Reasonable doubt is not same as probability of innocence. Harris *v.* S., 8 Ala. App. 33, 62 S. 477.

Additional definitions.—U. S. *v.* Richards, 149 Fed. 443; U. S. *v.* Greene, 146 Fed. 803; Neilson *v.* S., 146 Ala. 683, 40 S. 221; Patterson *v.* S., 146 Ala. 39, 41 S. 157; Creagh *v.* S., 149 Ala. 8, 43 S. 112; Dempsey *v.* S., 83 Ark. 81, 102 S. W. 704; Tetterton *v.* C., 28 Ky. L. R. 146, 89 S. W. 8; Wylie *v.* S., 53 Tex. Cr. 182, 109 S. W. 186.

626-12 U. S. *v.* Richards, 149 Fed. 443; U. S. *v.* Dexter, 154 Fed. 890; Perovich *v.* U. S., 205 U. S. 86 (circumstantial evidence); Yorty *v.* S. (Ala. App.), 65 S. 914; Roberson *v.* S. (Ala.), 62 S. 837; Hooten *v.* S., 9 Ala. App. 9, 64 S. 200; Parker *v.* S., 5 Ala. App. 64, 59 S. 518; Little *v.* S., 145 Ala. 662, 39 S. 674; Brown *v.* S.,

148 Ala. 657, 43 S. 101; Larimore *v.* S., 84 Ark. 606, 107 S. W. 165; Fitch *v.* P., 45 Colo. 298, 100 P. 1132; S. *v.* Naylor (Del.), 90 A. 880; S. *v.* McCann (Del.), 90 A. 81; S. *v.* Burton (Del.), 86 A. 739; S. *v.* Lyons (Del.), 80 A. 976; S. *v.* Johns, 6 Penne. (Del.) 173, 65 A. 763; McNair *v.* S., 61 Fla. 35, 55 S. 401; Williams *v.* S., 13 Ga. App. 179, 78 S. E. 1012; Davis *v.* S., 13 Ga. App. 142, 78 S. E. 866; Childs *v.* S. (Ga.), 74 S. E. 89; McBeth *v.* S., 122 Ga. 737, 50 S. E. 931; P. *v.* Whittington, 143 Ill. App. 438; Fritz *v.* S., 178 Ind. 463, 99 N. E. 727; S. *v.* Snyder, 137 Ia. 600, 115 N. W. 225; Saylor *v.* C., 158 Ky. 768, 166 S. W. 254; Watkins *v.* C., 29 Ky. L. R. 1273, 97 S. W. 740; Ball *v.* C., 30 Ky. L. R. 600, 99 S. W. 326; Mann *v.* Co., 33 Ky. L. R. 269, 110 S. W. 243; P. *v.* Rogulski (Mich.), 148 N. W. 189; S. *v.* Douglas (Mo.), 167 S. W. 552; S. *v.* R. Co., 41 Mont. 557, 111 P. 141; Keeler *v.* S., 73 Neb. 441, 103 N. W. 64; S. *v.* Rogers (N. C.), 81 S. E. 999; Nash *v.* S., 8 Okla. Cr. 1, 126 P. 260; C. *v.* Duffy, 49 Pa. Super. 344; C. *v.* Lynch, 49 Pa. Super. 370; C. *v.* Shobert, 49 Pa. Super. 371; C. *v.* McCloskey, 37 Pa. Super. 621; U. S. *v.* Lopena, 4 Phil. Isl. 224; U. S. *v.* Balboa, 2 Phil. Isl. 165; U. S. *v.* Jose, 1 Phil. Isl. 402; U. S. *v.* Asiao, 1 Phil. Isl. 304; Hill *v.* S. (Tex. Cr.), 168 S. W. 864; Sain *v.* S. (Tex. Cr.), 148 S. W. 566; S. *v.* Karas (Utah), 136 P. 788. See Lovett *v.* S. (Ala. App.), 64 S. 643; vol. 2, p. 790, n. 48; vol. 6, p. 593, n. 66; vol. 9, p. 921, n. 72 and supplement thereto.

Proof beyond all doubt, not necessary. Shirley *v.* S., 144 Ala. 35, 40 S. 269; Gordon *v.* S., 147 Ala. 42, 41 S. 847; Mills *v.* S., 148 Ala. 633, 42 S. 816.

627-13 White *v.* Anniston, 161 Ala. 662, 49 S. 1030; Barron *v.* Anniston, 157 Ala. 399, 48 S. 58; Henderson *v.* S., 91 Ark. 224, 120 S. W. 966; S. *v.* Naylor (Del.), 90 A. 880; Hayes *v.* P., 146 Ill. App. 596; Fritz *v.* S., 178 Ind. 463, 99 N. E. 727; Small *v.* C., 134 Ky. 272, 120 S. W. 361; Reed *v.* S., 3 Okla. Cr. 16, 103 P. 1070; High *v.* S., 2 Okla. Cr. 161, 101 P. 115; Price *v.* S., 1 Okla. Cr. 358, 98 P. 447; Humphries *v.* S., 58 Tex. Cr. 30, 124 S. W. 635. See also "Presumptions," p. 921.

Fair balance of evidence sufficient in proceeding for condemnation of liquors kept for unlawful sale. S. *v.* Liquor, 82 Vt. 287, 73 A. 586.

627-14 S. *v.* Mills, 6 Penne. (Del.) 497, 69 A. 841; P. *v.* Sanducci, 195 N. Y. 361, 88 N. E. 385.

628-15 Rule applicable to trials de novo on appeal from conviction for violation of ordinance. Barron *v.* Anniston, 157 Ala. 399, 48 S. 58.

628-16 Doty *v.* S., 9 Ala. App. 21, 64 S. 170; Phillips *v.* S., 162 Ala. 53, 50 S. 326 (reasonable doubt of one juror does not require acquittal); Phillips *v.* S., 156 Ala. 140, 47 S. 245; Boyd *v.* S., 150 Ala. 101, 43 S. 204; Leonard *v.* S., 150 Ala. 89, 43 S. 214; Nicholson *v.* S., 18 Wyo. 298, 106 P. 929. *Contra,* Howard *v.* S., 165 Ala. 18, 50 S. 954. See Phillips *v.* S. (Ala. App.), 65 S. 444; Tronp *v.* S., 160 Ala. 125, 49 S. 332; P. *v.* Lee, 237 Ill. 272, 86 N. E. 573.

628-17 Howard *v.* S., 151 Ala. 22, 44 S. 95. *Comp.* Boyd *v.* S., 150 Ala. 101, 43 S. 204; Leonard *v.* S., 150 Ala. 89, 43 S. 214. See Smith *v.* S., 165 Ala. 50, 51 S. 610; P. *v.* Singh, 20 Cal. App. 146, 128 P. 420.

628-18 Hubbard *v.* S. (Ala. App.), 64 S. 633; McCutchen *v.* S., 5 Ala. App. 96, 59 S. 714; Simmons *v.* S., 158 Ala. 8, 48 S. 606; Leonard *v.* S., 150 Ala. 89, 43 S. 214; P. *v.* Carson, 155 Cal. 164, 99 P. 970; S. *v.* Cusack (Del.), 89 A. 216; S. *v.* Blackburn, 7 Penne. (Del.) 479, 75 A. 536; S. *v.* Ottley, 147 Ia. 329, 126 N. W. 334; Ty. *v.* Livingston, 13 N. M. 318, 84 P. 1021; S. *v.* Starnes, 151 N. C. 724, 66 S. E. 347; S. *v.* Cline, 150 N. C. 854, 64 S. E. 891; U. S. *v.* Paddit, 1 Phil. Isl. 426; Frazier *v.* S., 117 Tenn. 430, 100 S. W. 94; Hollis *v.* S. (Tex. Cr.), 153 S. W. 853; Jones *v.* (Tex. Cr.), 156 S. W. 1191.

Proof of each element.—Lucas *v.* S., 75 Neb. 11, 105 N. W. 976.

Every material allegation.—S. *v.* Fleetwood, 6 Penne. (Del.) 153, 65 A. 772; S. *v.* Cephus, 6 Penne. (Del.) 160, 67 A. 150; Steinkuhler *v.* S., 77 Neb. 331, 109 N. W. 395.

628-19 See "Corpus Delicti," 663-16.

628-20 Hibbard *v.* U. S., 172 Fed. 66, 96 C. C. A. 554; S. *v.* Luff, 1 Boyce (Del.) 152, 74 A. 1079; S. *v.* Hartnett, 7 Penne. (Del.) 204, 74 A. 82 (and knowledge); Magan *v.* C. (Ky.), 119 S. W. 734; S. *v.* Rodriguez, 31 Nev. 342, 102 P. 863; U. S. *v.* Trini-

dad, 4 Phil. Isl. 152; S. *v.* Brown, 36 Utah 46, 102 P. 641; S. *v.* Pilling, 53 Wash. 464, 102 P. 230.

628-21 S. *v.* Vanella, 40 Mont. 326, 106 P. 364. See P. *v.* Olivas, 10 Cal. App. 173, 101 P. 434.

629-22 Sanity.—S. *v.* Pressler, 16 Wyo. 214, 92 P. 806, rules in various jurisdictions discussed. *Contra*, Rusk *v.* S., 53 Tex. Cr. 338, 110 S. W. 58.

629-23 U. S. *v.* Bergantino, 3 Phil. Isl. 118.

629-24 Harrold *v.* Ty., 169 Fed. 47, 94 C. C. A. 415 (voluntary character of confession); McGhee *v.* S., 178 Ala. 4, 59 S. 573; Piano *v.* S., 161 Ala. 88, 49 S. 803 (knowledge goods received stolen); S. *v.* Pepe, 1 Boyce (Del.) 232, 76 A. 367; Bells *v.* S., 93 Ark. 600, 125 S. W. 1020; Lowry *v.* S., 6 Ga. App. 541, 65 S. E. 353; P. *v.* Israel, 240 Ill. 375, 88 N. E. 802; S. *v.* Kimes, 145 Ia. 346, 124 N. W. 164; S. *v.* Hood, 143 Mo. App. 313, 126 S. W. 992; Marshall *v.* Ty., 2 Okla. Cr. 136, 101 P. 139 (chastity of prosecutrix in rape). *Comp.* P. *v.* Probst, 237 Ill. 390, 86 N. E. 588.

Venue of crime need not be proved beyond reasonable doubt. Melton *v.* S. *v.* S. (Tex. Ci;3U;inglyB?3-7ffli RDL (Tex. Cr.), 158 S. W. 550; Reynolds *v.* S. (Tex. Cr.), 160 S. W. 362.

Venue.—Green *v.* S., 4 Ga. App. 260, 61 S. E. 234; Cooper *v.* S., 2 Ga. App. 730, 59 S. E. 20; Keeler *v.* S., 73 Neb. 441, 103 N. W. 64; S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969.

Statute of limitations.—Battles *v.* S., 53 Tex. Cr. 202, 109 S. W. 195, rape.

629-25 Plea of confession and avoidance removes requirement guilt must be shown beyond reasonable doubt. U. S. *v.* Heike, 175 Fed. 852.

629-26 U. S. *v.* Greene, 146 Fed. 803; Phillips *v.* S. (Ala. App.), 65 S. 444; Griffin *v.* S., 150 Ala. 49, 43 S. 197; Way *v.* S., 155 Ala. 52, 46 S. 273; Williams *v.* S., 123 Ga. 138, 51 S. E. 322; S. *v.* Clinkenbeard, 142 Mo. App. 146, 125 S. W. 827; S. *v.* R. Co., 41 Mont. 557, 111 P. 141; Fagnani *v.* S. (Tex. Cr.), 146 S. W. 542; S. *v.* Hutchings, 30 Utah 319, 84 P. 893; Colbert *v.* S., 125 Wis. 423, 104 N. W. 61; Schwantes *v.* S., 127 Wis. 160, 106 N W. 237. See S. *v.* Block, 87 Conn. 573, 89 A. 167; Nash. *v.* S., 8 Okla. Cr. 1, 126 P. 260; supra, "Circumstantial Evidence." 92-91, 97-10.

Hypothesis of guilt should flow naturally from facts proved. Neilson *v.* S., 146 Ala. 683, 40 S. 221.

630-27 S. *v.* Watson (Del.), 82 A. 1086; S. *v.* Harris, 153 Ia. 592, 133 N. W. 1078; S. *v.* Tedder, 83 S. C. 437, 65 S. E. 449.

A single fact may raise reasonable doubt. Walker *v.* S., 153 Ala. 31, 45 S. 640.

630-28 McGhee *v.* S. (Tex. Cr.), 155 S. W. 246; Colbert *v.* S., 125 Wis. 423, 104 N. W. 61.

631-30 Richards *v.* U. S., 175 Fed. 911, 99 C. C. A. 401; Wolf *v.* P., 45 Colo. 532, 102 P. 20.

Evidentiary facts need not be proved beyond reasonable doubt. Butt *v.* S., 81 Ark. 173, 98 S. W. 723.

Does not require mathematical certainty of proof. Besheres *v.* S., 12 Ga. App. 805, 78 S. E. 483.

Corroborating evidence.—Lasater *v.* S., 77 Ark. 468, 94 S. W. 59.

631-31 S. *v.* Fisk, 170 Ind. 166, 83 N. E. 995.

632-33 U. S. *v.* Heike, 175 Fed. 852.

632-34 Allen *v.* S., 148 Ala. 588, 42 S. 1006; S. *v.* Reeder, 72 S. C. 223, 51 S. E. 702.

632-35 Blandon *v.* S., 6 Ga. App. 782, 65 S. E. 842; S. *v.* Skinner, 32 Nev. 70, 104 P. 223. *Contra*, Lawson *v.* S., 155 Ala. 44, 46 S. 259.

632-36 Browne *v.* U. S., 145 Fed. 1, 76 C. C. A. 31 (refusal to charge good character alone raises reasonable doubt not error); Taylor *v.* S., 148 Ala. 565, 42 S. 997; McCall *v.* S., 55 Fla. 108, 46 S. 321; Nelms *v.* S., 123 Ga. 575, 51 S. E. 588; Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039; Sweet *v.* S., 75 Neb. 263, 106 N. W. 31; S. *v.* Thomas, 83 N. J. L. 799, 85 A. 452; P. *v.* Jackson, 182 N. Y. 66, 74 N. E. 565; Niezorawski *v.* S., 131 Wis. 166, 111 N. W. 250. See Teague *v.* S., 144 Ala. 42, 40 S. 312; Witt *v.* S., 5 Ala. App. 137, 59 S. 715; Gerke *v.* S., 151 Wis. 495, 139 N. W. 404; supra, "Character," 8-19.

632-37 Ransom *v.* S., 2 Ga. App. 826, 59 S. E. 101; Smith *v.* S., 3 Ga. App. 803, 61 S. E. 737; O'Hara *v.* S., 57 Tex. Cr. 577, 124 S. W. 95.

633-38 Jones *v.* S. (Ala.), 61 S. 434.

633-39 Bailey *v.* S., 105 Ark. 228, 150 S. W. 1030; Raysor *v.* S., 132 Ga. 237, 63 S. E. 786; Duthey *v.* S., 131 Wis. 178, 111 N. W. 222.

633-40 Jones *v.* S. (Ala.), 61 S.

434; P. *v.* Casey, 231 Ill. 261, 83 N. E. 278.

634-41 Grant City *v.* Simmons, 167 Mo. App. 183, 151 S. W. 187; City of Stanberry *v.* O'Neal, 166 Mo. App. 709, 150 S. W. 1104.

In contempt proceedings charge need not be proved beyond reasonable doubt. Flannery *v.* P., 225 Ill. 62, 80 N. E. 60; In re McCormick, 132 App. Div. 921, 117 N. Y. S. 70.

634-42 P. *v.* Sullivan, 218 Ill. 419, 75 N. E. 1005, disbarment.

634-48 *Contra,* Suell *v.* Derricott, 161 Ala. 259, 49 S. 895.

REBUTTAL

635-1 Miller *v.* Co., 6 Ind. Ty. 115, 89 S. W. 1011.

636-2 Rose *v.* Lewis, 157 Ala. 521, 48 S. 105; S. *v.* Pousson, 134 La. 279, 63 S. 902; Bunnell *v.* Kintner, 27 Pa. Super. 605.

637-3 Stephens *v.* Elliott, 36 Mont. 92, 92 P. 45; Auten *v.* Bennett, 183 N. Y. 496, 76 N. E. 609.

If defendant announces he will introduce no testimony, plaintiff may introduce in chief evidence of rebuttal character. Brockmiller *v.* Wks., 148 Mich. 642, 112 N. W. 688.

637-4 Wendling L. Co. *v.* Co., 153 Cal. 411, 95 P. 1029.

637-5 Rose *v.* Lewis, 157 Ala. 521, 48 S. 105; Hanks *v.* S., 55 Tex. Cr. 451, 117 S. W. 150.

Evidence overcoming legal effect of evidence of opponent is rebuttal, and is not confined to disproving facts testified to by adverse party. Reserve, etc. Ins. Co. *v.* Boreing, 157 Ky. 730, 163 S. W. 1085.

639-8 See Meyer D. Co. *v.* Madden, 45 Tex. Civ. 74, 99 S. W. 723.

640-14 Kansas City S. R. Co. *v.* Henrie, 87 Ark. 443, 112 S. W. 967; Gray *v.* Good, 44 Ind. App. 476, 89 N. E. 498; Miller *v.* Co., 6 Ind. Ty. 115, 89 S. W. 1011; Truax *v.* C., 149 Ky. 699, 149 S. W. 1033; Louisville, etc. R. Co. *v.* Beard, 28 Ky. L. R. 921, 90 S. W. 944; Poole *v.* R. Co., 216 Mass. 12, 102 N. E. 918; Mitchell *v.* City, 215 Mass. 150, 102 N. E. 127; City of Aurora *v.* Ins. Co. (Mo. App.), 165 S. W. 357; Meyers *v.* Kilgen, 177 Mo. App. 724, 160 S. W. 569; Mutz *v.* Anderson, 94 Neb. 293, 143 N. W. 302; Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182; Hughes *v.* S., 126 Tenn. 40, 148 S. W. 543; Barnett *v.* Elliott (Tex. Civ.), 160 S. W. 671; Meyer D. Co. *v.* Madden, 45 Tex. Civ. 74, 99 S. W. 723; Barlow *v.* Foster, 148 Wis. 613, 136 N. W. 822.

Evidence not strictly rebuttal or surrebuttal excluded where admission would open up entire case. Hallwood, etc. Co. *v.* Rollins, 73 N. H. 390, 62 A. 380.

641-15 Jaynes *v.* P., 44 Colo. 535, 99 P. 325; Hoggson *v.* Sears, 77 Conn. 587, 60 A. 133; Leake *v.* Co., 5 Ga. App. 102, 62 S. E. 729; Adamson *v.* Harper (Ia.), 143 N. W. 844; Allen *v.* Assn. (Ia.), 143 N. W. 574; S. *v.* Gulliver (Ia.), 142 N. W. 948; Louisville, etc. R. Co. *v.* Beard, 28 Ky. L. R. 921, 90 S. W. 944; Minnesota & D. C. Co. *v.* R. Co., 108 Minn. 470, 122 N. W. 493, *cit.* the text; Callahan *v.* R. Co., 47 Mont. 401, 133 P. 687; S. *v.* Skillman, 76 N. J. L. 464, 70 A. 83; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300, 101 P. 204. See Turner *v.* R. Co., 134 Mo. App. 397, 114 S. W. 1026.

Error not assignable thereon. Kelly *v.* R. Co., 177 Ill. App. 149.

642-18 Minnesota & D. C. Co. *v.* R. Co., 108 Minn. 470, 122 N. W. 493, *cit.* the text.

643-19 Holmes *v.* Rivers, 145 Ia. 702, 124 N. W. 801; Morse *v.* C., 129 Ky. 294, 111 S. W. 714; Burk *v.* Pence, 206 Mo. 315, 104 S. W. 23; McCook *v.* McAdams, 76 Neb. 1, 106 N. W. 988; Wilkins *v.* Brock, 81 Vt. 332, 70 A. 572. See Am. C. Co. *v.* Co., 218 Pa. 542, 67 A. 861.

643-20 Phillips *v.* S., 161 Ala. 60, 49 S. 794; Alabama, etc. R. Co. *v.* Bonner (Ala.), 39 S. 619; Best *v.* Wohlford, 153 Cal. 17, 94 P. 98; Dalton *v.* P., 224 Ill. 333, 79 N. E. 669; P. *v.* Mulvaney, 171 Mich. 272, 137 N. W. 155; S. *v.* Speritus, 191 Mo. 24, 90 S. W. 459. See Kirby L. Co. *v.* Chambers (Tex. Civ.), 95 S. W. 607.

643-21 Lesueur *v.* S., 176 Ind. 448, 95 N. E. 239; Roberts *v.* Co., 37 Ind. App. 664, 76 N. E. 895; Adams *v.* C., 129 Ky. 255, 111 S. W. 348; S. *v.* Barrett, 43 Mont. 502, 117 P. 895; Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295; Klein *v.* Burleson, 138 App. Div. 405, 122 N. Y. S. 752; Kemper *v.* S., 63 Tex. Cr. 1, 138 S. W. 1025; Spencer *v.* Potter's Est., 85 Vt. 1, 80 A. 821; Berg *v.* R. Co., 146 Wis. 419, 131 N. W.

902. See Auten *v.* Bennett, 183 N. Y. 496, 76 N. E. 609.

644-22 Lang *v.* S., 1 Ala. App. 128, 55 S. 1024; Cooper *v.* S. (Tenn.), 138 S. W. 826; Thomas *v.* S., 121 Tenn. 83, 113 S. W. 1041; St. Louis, etc. R. Co. *v.* Sizemore, 53 Tex. Civ. 491, 116 S. W. 403; Parker *v.* R. R., 84 Vt. 329, 79 A. 865.

645-23 Bennett *v.* Susser, 191 Mass. 329, 77 N. E. 884.

Admission of evidence on purely collateral question does not necessitate admission of evidence to rebut. Pichon *v.* Martin, 35 Ind. App. 167, 73 N. E. 1009.

645-24 Boyett *v.* S. (Ala. App.), 62 S. 984; Louisville & N. R. Co. *v.* Stiles, 133 Ky. 786, 119 S. W. 786. See State Bk. *v.* Tel. Co. (N. M.), 142 P. 156.

645-26 Esque *v.* R. Co., 174 Mo. App. 317, 157 S. W. 1061.

Cannot rebut immaterial evidence. S. *v.* Grigg (Ida.), 137 P. 371; S. *v.* Long (Mo.), 165 S. W. 748.

646-30 Security, etc. Ins. Co. *v.* Kleutsch, 169 Fed. 104, 95 C. C. A. 432; Stanley *v.* Beckham, 153 Fed. 152, 82 C. C. A. 304; Cooke *v.* Loper, 151 Ala. 546, 44 S. 78; Wyatt *v.* R. Co., 156 Cal. 170, 103 P. 892; Burrell *v.* Collins, 9 Cal. App. 288, 99 P. 211; Moody *v.* Peirano, 4 Cal. App. 411, 88 P. 380; Denver C. T. Co. *v.* Hills, 50 Colo. 328, 116 P. 125; Ball *v.* Co., 32 App. Cas. (D. C.) 177; Davis *v.* S., 11 Ga. App. 804, 76 S. E. 391; Watters *v.* R. Co., 133 Ga. 641, 66 S. E. 884; P. *v.* Scott, 261 Ill. 165, 103 N. E. 617; Inlet D. Dist. *v.* Anderson, 257 Ill. 214, 100 N. E. 909; Grace *v.* Larson, 227 Ill. 101, 81 N. E. 44 (rebuttal to contradict expert testimony); Presley *v.* Tel. Co., 158 Ill. App. 220; Krab *v.* R. Co. (Ia.), 146 N. W. 765; S. *v.* Kilduff (Ia.), 141 N. W. 962; S. *v.* Duff, 144 Ia. 142, 122 N. W. 829; S. *v.* Latham, 131 La. 533, 59 S. 981; Marine Bk. *v.* Stirling, 115 Md. 90, 80 A. 736; Huggins *v.* S. (Miss.), 60 S. 209; Jamison *v.* Jamison, 92 Miss. 468, 46 S. 945; Wellman *v.* R. Co. (Mo. App.), 167 S. W. 655; Joplin Supply Co. *v.* Smith (Mo. App.), 167 S. W. 649; Burk *v.* Pence, 206 Mo. 315, 104 S. W. 23; Holland *v.* R. Co., 157 Mo. App. 476, 137 S. W. 995; Kinney *v.* Co., 76 N. J. L. 735, 71 A. 269; Goodman *v.* R. Co., 78 N. J. L. 317, 74 A. 519; P. *v.* Garfalo, 207 N. Y. 141, 100 N. E. 698; Crowley *v.* See, 63 Misc. 346, 117 N. Y. S. 101; Bunnell *v.* Kintner, 27 Pa. Super. 605; Dutton *v.* R. Co., 32 Pa. Super. 630; Am. C., etc. Co. *v.* Co., 218 Pa. 542, 67 A. 861; Campbell *v.* Campbell, 30 R. I. 63, 73 A. 354; Reeves *v.* R. Co., 24 S. D. 84, 123 N. W. 498; Reynolds *v.* S. (Tex. Cr.), 160 S. W. 362; Holmes *v.* S. (Tex. Cr.), 156 S. W. 1172; Johnson *v.* S. (Tex. Cr.), 153 S. W. 875; Meyer D. Co. *v.* Madden, 45 Tex. Civ. 74, 99 S. W. 723; St. Louis, etc. R. Co. *v.* Parks, 40 Tex. Civ. 480, 90 S. W. 343; St. Louis, etc. Co. *v.* Smith, 38 Tex. Civ. 507, 86 S. W. 943; Smith *v.* S., 46 Tex. Cr. 267, 81 S. W. 936 (showing animus of defendant); Usher *v.* Severance, 86 Vt. 523, 86 A. 741; Berry *v.* Doolittle, 82 Vt. 471, 74 A. 97; Willard *v.* Noreross, 81 Vt. 293, 69 A. 942; Green *v.* Dodge, 79 Vt. 73, 64 A. 499; S. *v.* Hazzard, 75 Wash. 5, 134 P. 514; S. *v.* Fish Co., 72 Wash. 420, 130 P. 499; Rowe *v.* R. Co., 44 Wash. 658, 87 P. 921; Bazelon *v.* Lyon, 128 Wis. 337, 107 N. W. 337. See Reeves & Co. *v.* Younglove (Ia.), 145 N. W. 502.

A defendant may make supplemental statement strictly in rebuttal to confession. Timmons *v.* S., 13 Ga. App. 376, 79 S. E. 216.

Defendant may also introduce rebuttal. Ward *v.* S. (Tex. Cr.), 158 S. W. 1126.

Repetition of denial of evidence of opponent admissible if additional facts have been testified to since witness gave direct testimony. Rowell *v.* Adams, 83 S. C. 124, 65 S. E. 207.

Cumulative rebuttal testimony on matter fully covered, excluded. Muntz *v.* Co., 222 Pa. 621, 72 A. 247.

646-31 Liberty B. G. M. Co. *v.* M Co., 203 Fed. 795, 122 C. C. A. 113; Finley *v.* S. (Ala. App.), 62 S. 265; Penton *v.* Williams, 163 Ala. 603, 51 S. 35; Weaver *v.* S., 83 Ark. 119, 102 S. W. 713; Sampson *v.* Hughes, 147 Cal. 62, 81 P. 292; James *v.* Co., 10 Cal. App. 785, 103 P. 1082; Macon & B. R. Co. *v.* Ross, 133 Ga. 83, 65 S. E. 146; Chisholm *v.* Bk., 176 Ill. App. 382; Mussellam *v.* R. Co., 31 Ky. L. R. 908, 104 S. W. 337; S. *v.* Blount, 124 La. 202, 50 S. 12; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651; Phillips *v.* Co., 205 Mass. 59, 90 N. E. 981; Crowley *v.* See, 63 Misc. 346, 117 N. Y. S. 101; Katz *v.* R. Co., 63 Misc.

315, 116 N. Y. S. 562; Whipple *v.* Farrelly, 136 App. Div. 587, 121 N. Y. S. 117; Armfield *v.* R. Co., 162 N. C. 24, 77 S. E. 963; S. *v.* Stockman, 82 S. C. 388, 64 S. E. 595; First Nat. Bk. *v.* Pearce (Tex. Civ.), 126 S. W. 285; Robinson *v.* S., 143 Wis. 205, 126 N. W. 750.

Must be more than mere contradiction. Light *v.* R. Co., 208 Fed. 158.

646-32 Hardin *v.* S. (Ala. App.), 63 S. 18; Boyett *v.* S. (Ala. App.), 62 S. 984; Stamps *v.* Thomas (Ala. App.), 62 S. 314; Pritchard *v.* Fowler, 171 Ala. 662, 55 S. 147; Noel *v.* S., 161 Ala. 25, 49 S. 824; Jordan *v.* Austin, 161 Ala. 585, 50 S. 70; S. *v.* Bellard, 132 La. 491, 61 S. 537; Pratt *v.* McCoy, 125 La. 1040, 52 S. 151; Koch *v.* Wimbrow, 111 Md. 21, 73 A. 896; Auten *v.* Bennett, 183 N. Y. 496, 76 N. E. 609; S. *v.* Draughon, 151 N. C. 667, 65 S. E. 913; Bade *v.* Hibberd, 50 Or. 501, 93 P. 364; Cunningham *v.* R. Co., 40 Pa. Super. 212; Qualls *v.* S. (Tex. Cr.), 165 S. W. 202; Valigura *v.* S. (Tex. Cr.), 153 S. W. 856; Cain *v.* S. (Tex. Cr.), 153 S. W. 147; Mo., etc. R. Co. *v.* Dalton, 56 Tex. Civ. 82, 120 S. W. 240; Gulf, etc. R. Co. *v.* Adams (Tex. Civ.), 121 S. W. 876; Decker *v.* S., 58 Tex. Cr. 159, 124 S. W. 912; Citizens S. Bk. *v.* Ins. Co., 87 Vt. 23, 86 A. 1056; Willard *v.* Norcross, 81 Vt. 293, 69 A. 942; Green *v.* Dodge, 79 Vt. 73, 64 A. 499; Anderson *v.* Co., 131 Wis. 34, 110 N. W. 788; Monture *v.* Regling, 140 Wis. 407, 122 N. W. 1129.

Where defense shows delay in filing complaint state may show reason. Creale *v.* S. (Tex. Cr.), 158 S. W. 268.

647-34 James *v.* Co., 10 Cal. App. 785, 103 P. 1082. See Patterson *v.* R. Co., 147 Cal. 178, 81 P. 531; S. *v.* Blount, 124 La. 202, 50 S. 12; Russell *v.* S., 19 Wyo. 272, 116 P. 451.

648-36 Bennett *v.* S., 160 Ala. 25, 49 S. 296; Scheerer *v.* Deming, 154 Cal. 138, 97 P. 155; Jenkins *v.* S., 58 Fla. 62, 50 S. 582; Falvai *v.* R. Co., 177 Ill. App. 125; Longine *v.* Co., 120 La. 803, 45 S. 732; Poole *v.* R. Co., 216 Mass. 12, 102 N. E. 918; S. *v.* Minnick, 54 Or. 86, 102 P. 605 (rule should be strictly applied in criminal case); Ft. Worth *v.* Williams (Tex. Civ.), 119 S. W. 137; Day *v.* S., 62 Tex. Cr. 527, 138 S. W. 123.

Where prima facie case impeached. Wade *v.* R. Co. (Tex. Civ.), 110 S. W. 84.

648-37 S. *v.* Buonomo (Conn.), 90 A. 225; Woodbridge *v.* Winship, 33 App. Cas. (D. C.) 490; Sanger *v.* Bacon (Ind.), 101 N. E. 1001; Morehead *v.* Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Babington *v.* Barber, 124 La. 1042, 50 S. 844; Berkshire Lumb. Co. *v.* Inv. Co., 168 Mo. App. 342, 153 S. W. 1078.

Court may permit plaintiff to testify in rebuttal to matter not covered in original examination but covered by some of his witnesses. Falvai *v.* R. Co., 177 Ill. App. 125.

648-38 Omaha *v.* Co., 171 Fed. 647, 96 C. C. A. 419; Brantley *v.* S. (Ala. App.), 65 S. 678; Dodson *v.* S. (Ala. App.), 65 S. 206; Clayton *v.* S. (Ala.), 64 S. 76; Davis *v.* S. (Ala. App.), 62 S. 382; Horton *v.* R. Co., 161 Ala. 107, 49 S. 423; Gosdin *v.* Williams, 151 Ala. 592, 44 S. 611; Cross *v.* S., 147 Ala. 125, 41 S. 875; Wolfort *v.* Hochbaum, 89 Ark. 612, 117 S. W. 525; P. *v.* Williams (Cal. App.), 142 P. 124; Higgins *v.* R. Co., 5 Cal. App. 748, 91 P. 344; In re Dolbeer, 149 Cal. 227, 86 P. 695; P. *v.* Mar Gin Suie, 11 Cal. App. 42, 103 P. 951; Beach *v.* Schroeder, 47 Colo. 312, 107 P. 271; Greenlaw L. & T. Co. *v.* Chambers, 46 Colo. 587, 105 P. 1091; Prudential Ins. Co. *v.* Hummer, 36 Colo. 208, 84 P. 61; Mahoney *v.* Co., 82 Conn. 280, 73 A. 766; Jenkins *v.* S., 58 Fla. 62, 50 S. 582;; Flemister *v.* Co., 140 Ga. 511, 79 S. E. 148; Atlanta *v.* Hampton, 139 Ga. 389, 77 S. E. 293; Southern R. Co. *v.* Clay, 130 Ga. 563, 61 S. E. 226; Standard C. Mills *v.* Cheatham, 125 Ga. 649, 54 S. E. 650; Holland *v.* S., 9 Ga. App. 831, 72 S. E. 290; Lo Toon *v.* Ty., 16 Haw. 351; Beyer *v.* Traction Co., 156 Ill. App. 47; Cleveland S. Co. *v.* Moore, 142 Ill. App. 615; Gottmanshausen *v.* Wolfing, 127 Ill. App. 485; Floto *v.* Floto, 233 Ill. 605, 84 N. E. 712; Tinkle *v.* Wallace, 167 Ind. 382, 79 N. E. 355; Allen *v.* Assn. (Ia.), 143 N. W. 574; Witt *v.* Latimer, 139 Ia. 273, 117 N. W. 680; Duff *v.* C., 153 Ky. 655, 156 S. W. 149; Collett *v.* C. (Ky.), 121 S. W. 426; Chapman *v.* C., 33 Ky. L. R. 965, 112 S. W. 567; S. *v.* Bellard, 132 La. 491, 61 S. 537; Pharr *v.* Shadel, 115 La. 92, 38 S. 914; Harris *v.* Hipsley, 122 Md. 418, 89 A. 852; Kozlowski *v.* R. Co., 174 Mich. 412, 140 N. W. 459;

S. *v.* Crane, 202 Mo. 54, 100 S. W. 422; S. *v.* Brooks, 202 Mo. 106, 100 S. W. 416; S. *v.* De Hart, 38 Mont. 211, 99 P. 438; Minard *v.* R. Co., 74 N. J. L. 39, 64 A. 1054; Hall *v.* Wagner, 111 App. Div. 70, 97 N. Y. S. 570; Jaffe *v.* Nagel, 114 N. Y. S. 905; Petersburg S. Dist. *v.* Peterson, 14 N. D. 344, 103 N. W. 756; Pease *v.* Magill, 17 N. D. 166, 115 N. W. 260; Marien *v.* Walsh, 64 Or. 583, 131 P. 505; Crosby *v.* R. Co., 53 Or. 496, 100 P. 300, 101 P. 204; Williams *v.* Smith, 29 R. I. 562, 72 A. 1093; Harrell *v.* P., 89 S. C. 97, 71 S. E. 359; Bolton *v.* Co., 76 S. C. 529, 57 S. E. 543; Kime *v.* Bk., 22 S. D. 630, 119 N. W. 1003; Schott *v.* Swan, 21 S. D. 639, 114 N. W. 1005; Raleigh *v.* S. (Tex. Cr.), 168 S. W. 1050; International, etc. R. Co. *v.* McVey, 46 Tex. Civ. 181, 102 S. W. 172; St. Louis, etc. R. Co. *v.* Cassidy, 48 Tex. Civ. 484, 107 S. W. 628; In re Miller's Est., 36 Utah 228, 102 P. 996; Jacobs *v.* Warthen, 115 Va. 571, 80 S. E. 113; Nethery *v.* Nelson, 51 Wash. 624, 99 P. 879; Howard *v.* Co., 129 Wis. 98, 108 N. W. 48; Olwell *v.* Skobis, 126 Wis. 308, 105 N. W. 777; Jenkins *v.* S. (Wyo.), 134 P. 260, rehear. *denied*, 135 P. 749.

See Aetna Life Ins. Co. *v.* Rustin, 151 Ky. 103, 151 S. W. 366.

650-39 See P. *v.* Harris, 209 N. Y. 70, 102 N. E. 546.

650-40 Such evidence should be disregarded. Patterson *v.* Patterson, 251 Ill. 153, 95 N. E. 1051.

651-42 Marseilles *v.* Heister, 142 Ill. App. 299; S. *v.* Holter, 30 S. D. 353, 138 N. W. 953. See Postal T. C. Co. *v.* R. Co., 211 Fed. 824 (C. C. A.); Dixon *v.* Russell, 156 Wis. 161, 145 N. W. 761.

652-46 In Texas material testimony admitted before argument closed. Graham *v.* S., 57 Tex. Cr. 104, 123 S. W. 691, statute.

652-47 See Light *v.* R. Co., 208 Fed. 158; Griffiths *v.* Sanitary Dist., 174 Ill. App. 100.

653-50 Floto *v.* Floto, 233 Ill. 605, 84 N. E. 712.

653-51 Ashford *v.* McKee (Ala.), 62 S. 879; Abshire *v.* Lege, 133 La. 254, 62 S. 667; Herman *v.* Combs, 119 Md. 41, 85 A. 1044; Rafferty *v.* R. Co., 78 N. J. L. 203, 73 A. 41.

Where witnesses were not used in chief by plaintiff because it was assumed defendant would use them. Light *v.* R. Co., 208 Fed. 158.

653-52 Rebuttal evidence from hostile witness cannot be brought out on cross-examination unless confined to subject-matter of examination in chief. C. *v.* Hyde, 39 Pa. Super. 261.

654-54 In re Winslow's Will (Ia.), 122 N. W. 971; Herrman *v.* Combs, 119 Md. 41, 85 A. 1044; Klein *v.* Sarnoff 83 Miss. 447, 145 N. Y. S. 88; Keller *v.* Co., 128 App. Div. 154, 112 N. Y. S. 538.

655-56 P. *v.* Hutchings, 8 Cal. App. 550, 97 P. 325.

655-57 P. *v.* Hutchings, supra; P. *v.* Mar Gin Suie, 11 Cal. App. 42, 103 P. 951; Illinois S. Co. *v.* Ferguson, 129 Ill. App. 396; Gabbard *v.* C., 159 Ky. 624, 167 S. W. 942; Campbell *v.* Campbell, 30 R. I. 63, 73 A. 354.

656-58 Kerr Co. *v.* Corry, 211 Fed. 647.

656-59 In re Winslow's Will (Ia.), 122 N. W. 971; Wysong *v.* R. Co., 74 S. C. 1, 54 S. E. 214. See Shoemaker *v.* Exp. Co., 51 Pa. Super. 284.

RECEIVERS

659-2 Federman *v.* Co., 128 App. Div. 493, 112 N. Y. S. 834.

659-3 Black *v.* R. & P. Co., 158 N. C. 468, 74 S. E. 468.

659-4 Dilley *v.* Co. (Tex. Civ.), 114 S. W. 878.

659-5 Spinney *v.* Hall, 49 Ind. App. 502, 97 N. E. 571.

Certified copy of federal court's order appointing receiver, admissible. Cain *v.* R., 7 Ga. App. 461, 67 S. E. 127.

661-13 Action on lease, burden to show adoption thereof on plaintiff. Fisher *v.* Nat. Bk. (Ind. App.), 103 N. E. 119.

661-15 Plaintiff must show cause for appointment of receiver. Rappaport *v.* Otten, 135 App. Div. 386, 120 N. Y. S. 461. Necessity must be clearly established. Lehman *v.* Co., 57 Fla. 473, 49 S. 502. Bankruptcy court may not appoint receiver unless case clearly shows necessity. In re Oakland L. Co., 98 C. C. A. 388, 174 Fed. 634.

Must prove no assessment work done to obtain receiver. Anderson *v.* Robinson, 63 Or. 228, 126 P. 988, 127 P. 546.

A petition for an interlocutory order appointing a receiver, stating a cause

of action, and sworn to, is sufficient proof to justify the order. Smith *v.* Lamon (Tex. Civ.), 143 S. W. 304.

661-17 Unsupported statement of plaintiff on information and belief, when denied explicitly by defendant's affidavit, does not warrant appointment of receiver. Henderson *v.* Reynolds, 168 Ind. 522, 81 N. E. 494; Weber *v.* Wallerstein, 111 App. Div. 700, 97 N. Y. S. 852.

662-22 Lapse of time raises presumption trust had ceased. Pooler *v.* Sammet, 58 Misc. 469, 111 N. Y. S. 658.

663-25 Authority to sell land under judicial order not provable by parol. Hutchinson *v.* Patterson, 226 Mo. 174, 126 S. W. 403.

663-26 Compensation allowed by court, not presumed excessive. Lohman *v.* Claussen, 55 Wash. 408, 104 P. 624.

RECEIVING STOLEN GOODS

Subsequent receipt or purchase of goods from same person, 673-36; *Ordinance admissible,* 674-40.

666-1 Sanders *v.* S., 167 Ala. 85, 52 S. 417; Boyd *v.* S., 150 Ala. 101, 43 S. 204; S. *v.* Pray, 30 Nev. 206, 94 P. 218; P. *v.* Walker, 198 N. Y. 329, 91 N. E. 806; S. *v.* Denny, 17 N. D. 519, 117 N. W. 869. See Moss *v.* S., 143 Ala. 86, 39 S. 198 (value must be shown); Booker *v.* S., 151 Ala. 97, 44 S. 56 (control over property); C. *v.* Kronick, 196 Mass. 286, 82 N. E. 39 (purchase for himself or third person); S. *v.* Woodson (Mo. App.), 162 S. W. 327; P. *v.* Jaffe, 185 N. Y. 497, 78 N. E. 169; Pickering *v.* U. S., 2 Okla. Cr. 197, 101 P. 123.

Evidence sufficient.—S. *v.* Marable, 156 N. C. 616, 72 S. E. 72.

Evidence held insufficient to convict. Fisher *v.* S., 102 Ark. 321, 143 S. W. 1064.

Knowledge property stolen. Minor *v.* S., 55 Fla. 90, 45 S. 818; S. *v.* Pray, supra.

Ownership of goods must be shown as alleged. Aldrich *v.* P., 225 Ill. 610, 80 N. E. 320.

In Minnesota only three elements last mentioned in text involved. S. *v.* Gordon, 105 Minn. 217, 117 N. W. 483.

Identification of thief non-essential. S. *v.* Denny, 17 N. D. 519, 117 N. W. 869; S. *v.* Pirkley, 22 S. D. 550, 118 N. W. 1042.

666-2 Arrington *v.* S., 62 Tex. Cr. 357, 137 S. W. 669.

666-4 See S. *v.* Feiss, 74 N. J. L. 633, 66 A. 418, owner may testify as to value of goods.

667-5 S. *v.* Rom, 77 N. J. L. 248, 72 A. 431. See Miller *v.* S., 165 Ind. 566, 76 N. E. 245; S. *v.* Ozias, 136 Ia. 175, 113 N. W. 761.

667-6 Receiver and thief not accomplices. S. *v.* Scott, 136 Ia. 152, 113 N. W. 758; S. *v.* Gordon, 105 Minn. 217, 117 N. W. 483.

667-7 But see Lipsey *v.* P., 227 Ill. 364, 81 N. E. 348.

Competent on issue of larceny and to prove receipt of goods. Atchison *v.* S., 90 Ark. 457, 119 S. W. 651.

Confession proved to show goods stolen. Hanks *v.* S., 55 Tex. Cr. 451, 117 S. W. 150.

667-11 S. *v.* Nelson, 27 R. I. 31, 60 A. 589.

668-12 Piano *v.* S., 161 Ala. 88, 49 S. 803.

668-14 James *v.* S., 8 Ala. App. 255, 62 S. 897, warehouse receipt.

669-15 S. *v.* Ozias, 136 Ia. 175, 113 N. W. 761.

669-17 S. *v.* Brown, 72 N. J. L. 354, 60 A. 1117.

669-18 Corroboration unnecessary. Ty. *v.* West, 14 N. M. 546, 99 P. 343.

669-19 Sexton *v.* S., 49 Tex. Cr. 253, 92 S. W. 37. See Atchison *v.* S., 90 Ark. 457, 119 S. W. 651.

670-20 Between defendant and his son. S. *v.* Weinberg, 245 Mo. 564, 150 S. W. 1069.

670-21 S. *v.* Weiner, 84 Conn. 411, 80 A. 198; P. *v.* Cosmides, 133 App. Div. 103, 117 N. Y. S. 718.

670-22 S. *v.* Kosky, 191 Mo. 1, 90 S. W. 454. See Thrash *v.* S., 79 Ark. 347, 96 S. W. 360; S. *v.* Gordon, 105 Minn. 217, 117 N. W. 483 (*app.* Huggins *v.* P., quoted from in note to text); Becker *v.* S., 91 Neb. 352, 136 N. W. 17; S. *v.* D'Adame, 82 N. J. L. 315, 82 A. 520; Ty. *v.* West, 14 N. M. 546, 99 P. 343.

Test personal one, not that of man of ordinary intelligence and caution. Text rule condemned as invasion jury's province where given as instruction. S. *v.* Denny, 17 N. D. 519, 117 N. W. 869.

670-23 Fulton *v.* S. (Ala. App.), 62 S. 959; Boyd *v.* S., 150 Ala. 101, 43 S. 204.

No presumption from possession of stamps they were stolen from the government rather than from purchasers thereof from the government. Naftzger *v.* U. S., 200 Fed. 494, 118 C. C. A. 598

671-24 Piano *v.* S., 161 Ala. 88, 49 S. 803; S. *v.* Speritus, 191 Mo. 24, 90 S. W. 459.

671-26 Piano *v.* S., 161 Ala. 88, 49 S. 803; Gallaher *v.* S., 78 Ark. 299, 95 S. W. 463; C. *v.* Phelps, 192 Mass. 591, 78 N. E. 741. See P. *v.* Jaffe, 112 App. Div. 516, 98 N. Y. S. 486.

671-27 See Pickering *v.* U. S., 2 Okla. Cr. 197, 101 P. 123.

671-28 C. *v.* Phelps, 192 Mass. 591, 78 N. E. 741. See Golden *v.* S., 2 Ga. App. 440, 58 S. E. 557.

671-29 Minor *v.* S., 55 Fla. 90, 45 S. 818; S. *v.* Levich, 128 Ia. 372, 104 N. W. 334; S. *v.* Kosky, 191 Mo. 1, 90 S. W. 454; S. *v.* Pirkey, 22 S. D. 550, 118 N. W. 1042, *cit.* the text, and holding it competent to show property exchanged for that in question known by accused to have been stolen.

672-33 S. *v.* Gordon, 105 Minn. 217, 117 N. W. 483.

672-34 P. *v.* Zimmerman, 11 Cal. App. 115, 104 P. 590 (non-compliance with ordinance); S. *v.* Winter, 83 S. C. 251, 65 S. E. 243 (unsatisfactory account of manner in which possession obtained; prior conviction for buying other stolen goods, and condition of goods); Stanfield *v.* S. (Tex. Cr.), 165 S. W. 216 (changing appearance).

673-35 Lipsey *v.* P., 227 Ill. 364, 81 N. E. 348; Beuchert *v.* S., 165 Ind. 523, 76 N. E. 111; S. *v.* Levich, 128 Ia. 372, 104 N. W. 334; S. *v.* Cohen, 254 Mo. 437, 162 S. W. 216; S. *v.* Smith, 250 Mo. 350, 157 S. W. 319; S. *v.* Winter, 83 S. C. 251, 65 S. E. 243. See Gassenheimer *v.* U. S., 26 App. Cas. (D. C.) 432; vol. 11, p. 804, n. 63; p. 806, n. 67, and supplement thereto.

Unnecessary to prove knowledge that other property received was stolen. S. *v.* Cohen, 254 Mo. 437, 162 S. W. 216.

To show system.—Kaufman *v.* S. (Tex. Cr.), 159 S. W. 58.

673-36 Sapir *v.* U. S., 174 Fed. 219, 98 C. C. A. 227; Piano *v.* S., 161 Ala. 88, 49 S. 803; P. *v.* Zimmerman, 11 Cal. App. 115, 104 P. 590; Ty. *v.* West, 14 N. M. 546, 99 P. 343; Becker *v.* S., 91 Neb. 352, 136 N. W. 17; P. *v.* Jacobs, 158 App. Div. 293, 143 N. Y. S. 21.

Subsequent receipt or purchase from same person proved if connected with former dealings between parties, though goods last bought not stolen. P. *v.* Zimmerman, 11 Cal. App. 115, 104 P. 590.

674-37 Com. *v.* McGarvey, 158 Ky. 570, 165 S. W. 973.

See Lipsey *v.* P., 227 Ill. 364, 81 N. E. 348.

Testimony as to finding some of stolen property buried admissible. Meek *v.* S. (Tex. Cr.), 160 S. W. 698.

674-38 Piano *v.* S., 161 Ala. 88, 49 S. 803 (testimony that other stolen goods had brand of certain company on them not hearsay. Testimony concerning goods not shown stolen inadmissible); Beuchert *v.* S., supra; S. *v.* Levich, 128 Ia. 372, 104 N. W. 334; Hanks *v.* S., 55 Tex. Cr. 451, 117 S. W. 150 (goods received from all parties being in defendant's possession).

674-40 Ordinance requiring pawnbrokers to keep registry of goods bought and make report, competent as against one failing to comply. Admissible as against clerk whose duty it is to keep registry. S. *v.* Hersvitz, 108 Minn. 174, 121 N. W. 905.

674-41 Beuchert *v.* S., 165 Ind. 523, 76 N. E. 111.

675-50 Dalton *v.* S. (Tex. Cr.), 103 S. W. 935.

675-51 Bryan *v.* S., 54 Tex. Cr. 59, 111 S. W. 1035.

That other dealers sold such goods admissible. P. *v.* Goldfarb, 152 App. Div. 473, 137 N. Y. S. 284.

676-52 S. *v.* Jacobs, 133 Mo. App. 182, 113 S. W. 244.

676-53 Defendant must prove value of property if relying on it for diminution of punishment. S. *v.* Dixon, 149 N. C. 460, 62 S. E. 615.

RECOGNIZANCES

678-1 Gen.-B., etc. Co. *v.* S. (Tex. Cr.), 165 S. W. 615; Heiman *v.* S. Tex. Cr.), 158 S. W. 276.

678-2 C. *v.* Lamar, 32 Pa. Super. 200 (insufficient defense).

678-3 Ty. *v.* Sellers, 15 Okla. 419, 82 P. 575.

680-9 Hollister *v.* U. S., 145 Fed. 773, 76 C. C. A. 337.

680-12 Hollister *v.* U. S., supra.

681-13 Mason *v.* Terrell, 3 Ga. App. 348, 60 S. E. 4; Baker *v.* S., 54 Tex. Cr. 52, 111 S. W. 735.

681-14 Heiman *v.* S. (Tex. Cr.), 158 S. W. 276.
682-20 Hollister *v.* U. S., supra.
682-22 Davis *v.* S. (Tex. Cr.), 106 S. W. 1169.
684-33 C. *v.* Gray, 26 Pa. Super. 110.
684-37 Recognizance must be proved by record. S. *v.* Delaney, 76 N. J. L. 547, 70 A. 311.
686-42 See Moore *v.* S., 52 Tex. Cr. 364, 106 S. W. 355.
686-43 *Comp.* Wellmaker *v.* Terrell, 3 Ga. App. 791, 60 S. E. 464.
687-48 See Moore *v.* S. (Tex. Cr.), 106 S. W. 358. But see S. *v.* Holt, 145 N. C. 450, 59 S. E. 64.
688-51 Perkins *v.* Terrell, 1 Ga. App. 250, 58 S. E. 133. See Bird *v.* Terrell, 128 Ga. 386, 57 S. E. 777; Woodring *v.* S., 53 Tex. Cr. 17, 108 S. W. 371.
Cannot be shown by parol.—Edwards *v.* S., 39 Okla. 605, 136 P. 577.

RECORDS

School register, 716-1; *Abstract and index of deeds,* 730-67; *Certificate of* **increase of capital stock of foreign corporation,** 808-90; *Sworn copy of certified copy,* 862-51; *Photographic copy,* 864-58; *Genuineness of seal,* 897-22; *Schedules of rates filed with interstate commerce commission,* 1008-29.

716-1 Hogarth S. Co. *v.* Co., 174 Fed. 278; Parrish *v.* C., 136 Ky. 77, 123 S. W. 339; S. *v.* Salmon, 216 Mo. 466, 115 S. W. 1106.
School register required to be kept, showing names and ages of pupils, open to the public, is competent as an official register to prove facts properly recorded. Levels *v.* R. Co., 196 Mo. 606, 94 S. W. 275. See Priddy *v.* Boice, 201 Mo. 309, 99 S. W. 1055.
Land office tract book.—Nurnberger *v.* U. S., 156 Fed. 721, 84 C. C. A. 377. See Allen *v.* Kidd, 197 Mass. 256, 84 N. E. 122.
716-2 King *v.* Ins. Co., 133 Mo. App. 612, 114 S. W. 63; S. *v.* Pabst, 139 Wis. 561, 121 N. W. 351. *Comp.* McInerney *v.* U. S., 143 Fed. 729, 74 C. C. A. 655.
716-4 Grenada C. C. A. Co. *v.* Atkinson, 94 Miss. 93, 47 S. 644. See McInerney *v.* U. S., 143 Fed. 729, 74 C. C. A. 655; Priddy *v.* Boice, 201 Mo. 309, 99 S. W. 1055. But see Big Thompson, etc. Co. *v.* Mayne (Colo.), 91 P. 44; Gorham *v.* Settegast, 44 Tex. Civ. 254, 98 S. W. 665; infra, 740-8.
716-5 McInerney *v.* U. S., 143 Fed. 729, 74 C. C. A. 655; Hudson *v.* Herman, 81 Kan. 627, 107 P. 35; C. *v.* Snyder, 40 Pa. Super. 485. See Priddy *v.* Boice, 201 Mo. 309, 99 S. W. 1055. *Comp.* Big Thompson, etc. Co. *v.* Mayne (Colo.), 91 P. 44. But see infra, 720-19.
717-6 *Comp.* Slaughter *v.* Cooper, 56 Tex. Civ. 169, 121 S. W. 173.
717-8 Grenada C. C. Co. *v.* Atkinson (Miss.), 47 P. 644; S. *v.* McDonald, 55 Or. 419, 104 P. 967.
718-11 Curry *v.* Lehman, 57 Fla. 385, 49 S. 673.
719-14 Swan *v.* Indianola, 142 Ia. 731, 121 N. W. 547.
719-15 P. *v.* Ezell, 155 Ill. App. 293.
720-18 *Contra,* Buffalo L., T. & S. Co. *v.* Co., 121 N. Y. S. 900, *foll.* Martin *v.* Barbour, 34 Fed. 701, and *disap.* Supervisors *v.* Betts, 53 Hun 638, 6 N. Y. S. 934.
A deed is admissible though not recorded until after commencement of suit. Smith *v.* Worley, 10 Ga. App. 469, 73 S. E. 428.
720-19 Big Thompson, etc. Co. *v.* Mayne (Colo.), 91 P. 44; In re Jones, 130 Ia. 177, 106 N. W. 610; Allen *v.* Kidd, 197 Mass. 256, 84 N. E. 122; Havholm *v.* Iron Wks., 144 N. Y. S. 836; In re Thorp's Will, 150 N. C. 487, 64 S. E. 379; U. S. *v.* Doria, 1 P. R. Fed. 417; S. *v.* Flagstad, 25 S. D. 337, 126 N. W. 585; Davis *v.* Davis, 24 S. D. 474, 124 N. W. 715; Ritchie L. Co. *v.* Nutter, 66 W. Va. 444, 66 S. E. 646. *Comp.* P. *v.* Lindley, 37 Colo. 476, 86 P. 352.
See Monarch M. Co. *v.* R. Co., 127 Ia. 511, 103 N. W. 493. But see supra, 716-5.
Police record of city lights not burning on particular nights, made up from reports telephoned in either by policemen or others observing fact, incompetent to prove facts shown thereby. Taylor *v.* Jackson, 151 Mich. 639, 115 N. W. 977.
721-21 Molyneux *v.* Grimes, 78 Kan. 830, 98 P. 278.
721-22 Wilson *v.* Johnson, 152 Ala. 614, 44 S. 539; Dutton *v.* Stoughton, 79 Vt. 361, 65 A. 91.
722-25 Flint Riv., etc. Co. *v.* Smith, 134 Ga. 627, 68 S. E. 436; S. *v.* Cole, 156 N. C. 618, 72 S. E. 221; Goss *v.* Herman, 20 N. D. 295, 127 N. W. 78;

Allen *v.* Clearman (Tex. Civ.), 128 S. W. 1140; White *v.* McCullough, 56 Tex. Civ. 383, 120 S. W. 1093. See Globe M. L. Ins. Co. *v.* Meyer, 118 Ill. App. 155; Washington F. Sem. *v.* Borough, 18 Pa. Super. 555. *Comp.* Scott *v.* Williams, 74 Kan. 448, 87 P. 550.

Records in public office transcribed and transmitted to another such office pursuant to law public records though it does not appear who made them nor how they came to be in former office. Board *v.* Patrick, 18 Wyo. 130, 107 P. 748.

723-28 See Maher *v.* Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496.

723-29 Big Thompson, etc. Co. *v.* Mayne (Colo.), 91 P. 44; Sullivan *v.* R. Co., 167 Ill. App. 152; Tourtelot *v.* Booker (Tex. Civ.), 160 S. W. 293. See Ex parte Von Vetsera, 7 Cal. App. 136, 93 P. 1036.

724-35 S. *v.* Flagstad, 23 S. D. 337, 126 N. W. 417. *Comp.* Reeder *v.* Jones, 6 Penne. (Del.) 66, 65 A. 571.

725-38 See Jonesboro & R. Co. *v.* Board, 80 Ark. 316, 97 S. W. 281, board of directors of levy district.

725-39 Norris *v.* McFadden, 159 Mich. 424, 124 N. W. 54. *Comp.* Allen *v.* Kidd, 197 Mass. 256, 84 N. E. 122; Dickinson *v.* Smith, 134 Wis. 6, 114 N. W. 133.

725-40 Ida Grove *v.* Co. (Ia.), 125 N. W. 866, plans for city hall.

725-41 Grafton *v.* R. Co., 16 N. D. 313, 113 N. W. 598; Whaley *v.* Vidal, 27 S. D. 627, 132 N. W. 242.

Original ordinance book competent to prove ordinances therein. Plummer *v.* R. Co. (Ind. App.), 104 N. E. 601. See also vol. 8, p. 818-45.

725-42 Leavitt *v.* Somerville, 105 Me. 517, 75 A. 54.

726-44 Pilkins *v.* Hans, 87 Neb. 7, 126 N. W. 864.

726-45 Bertram *v.* Witherspoon, 138 Ky. 116, 127 S. W. 533 (census); Tucker *v.* McKay, 131 Mo. App. 728, 111 S. W. 867.

727-47 Clinchfield C. Corp. *v.* Steinman, 213 Fed. 557 [(C. C. A.) index to a deed record is part of the record]; Nelson *v.* S., 151 Ala. 2, 43 S. 966 (record of marriage licenses); Walrond *v.* Noyes, 82 Kan. 118, 107 P. 795. See Reeder *v.* Jones, 6 Penne. (Del.) 66, 65 A. 571 (record of licenses); Keller *v.* Harrison, 139 Ia. 383, 116 N. W. 327; Camp *v.* League (Tex. Civ.), 92 S. W. 1062 (surveyor's field notes).

Eminent domain proceedings.—Mendocino County *v.* Peters, 2 Cal. App. 24, 82 P. 1122.

727-48 P. *v.* Davis, 171 Mich. 241, 137 N. W. 61. See Sawyer *v.* Stilson, 146 Ia. 707, 125 N. W. 822.

727-49 Presumed, after lapse of time, ancient surveys recorded by authority, notwithstanding informality in certificate. Lexington *v.* Hoskins, 96 Miss. 163, 50 S. 561.

727-50 In re Drainage Dist., 146 Ia. 564, 123 N. W. 1059.

728-52 Baker *v.* Gaskins, 10 Ga. App. 679, 73 S. E. 1075; Churchill *v.* Jackson, 132 Ga. 666, 64 S. E. 691; P. *v.* R. Co., 243 Ill. 217, 90 N. E. 730; Ashenfelter *v.* Seiling, 141 Ia. 512, 119 N. W. 984; Hudson *v.* Herman, 81 Kan. 627, 107 P. 35.

Entries required unchangeable by officer because of error in finding; must remain until judicially found wrong, and are evidence in favor of taxpayer. Burchardt *v.* Scofield, 141 Ia. 336, 117 N. W. 1061.

728-53 Matthewson *v.* Hevel, 82 Kan. 134, 107 P. 768 (to show ownership in tax proceedings); Houston *v.* Stewart, 40 Tex. Civ. 499, 90 S. W. 49; Wilkinson *v.* Linkous, 64 W. Va. 205, 61 S. E. 152. See Gayle *v.* Comrs., 155 Ala. 204, 46 S. 261.

729-56 Nashville, etc. R. Co. *v.* Garth, 155 Ala. 311, 46 S. 583 (unless owner gave assessment); C. *v.* Tryon, 31 Pa. Super. 146.

729-61 Ripton *v.* Brandon, 80 Vt. 234, 67 A. 541, *dist.* Hubbard *v.* Moore, 67 Vt. 532, 32 A. 465.

729-62 Ripton *v.* Brandon, supra.

730-66 S. *v.* Day, 108 Minn. 121, 121 N. W. 611, seal of court need not be affixed to jurat.

730-67 Blaha *v.* Borgman, 142 Wis. 43, 124 N. W. 1047.

Abstract and index of deeds competent secondary evidence. Einstein *v.* Co., 132 Mo. App. 82, 111 S. W. 859.

732-73 Arnold *v.* Hussen, 111 Me. 224, 88 A. 724; Scott *v.* R. Co., 43 Or. 26, 72 P. 594; Kolodrianski *v.* Co., 29 R. I. 127, 69 A. 505 (of city).

Weather records voluntarily kept, inadmissible. Monarch Mfg. Co. *v.* R. Co., 127 Ia. 511, 103 N. W. 493.

732-75 Garrett *v.* Winterich (Ind. App.), 87 N. E. 161; Priddy *v.* Boice, 201 Me. 309, 99 S. W. 1005; C. *v.* Dorr, 216 Mass. 314, 103 N. E. 902; Nolt *v.* Crow, 22 Pa. Super. 113.

732-76 Ball *v.* Flora, 26 App. Cas. (D. C.) 394.

733-77 In re Goodrich (1904), Prob. D. (Eng.) 138 (to prove date as well as fact of birth; *disap.* In re Wintle, L. R. 9 Eq. 373); Murray *v.* Supreme Hive, 112 Tenn. 664, 80 S. W. 827. See vol. 8, p. 469, n. 78, and supplement thereto.

Competent as to all facts recited if law requires them reported. S. *v.* McDonald, 55 Or. 419, 104 P. 967.

Undertaker's report, inadmissible. Globe M. L. Ins. Co. *v.* Meyer, 118 Ill. App. 155.

Foreign record.—See Pirrung *v.* Assn., 104 App. Div. 571, 93 N. Y. S. 575.

733-79 Bilkovie *v.* Loeb, 156 App. Div. 719, 141 N. Y. S. 279. See In re Kennedy, 82 Misc. 214, 143 N. Y. S. 404. See Maher *v.* Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496.

734-80 Finer *v.* Nichols, 122 Mo. App. 497, 99 S. W. 808 (by statute); S. *v.* Pabst, 139 Wis. 561, 121 N. W. 351. *Comp.* Rohloff *v.* Assn., 130 Wis. 61, 109 N. W. 989.

By statute.—Vanderbilt *v.* Mitchell, 72 N. J. Eq. 910, 67 A. 97, 14 L. R. A. (N. S.) 304.

734-83 S. *v.* Payne, 223 Mo. 112, 122 S. W. 1062.

735-87 Huckabee *v.* S., 7 Ga. App. 677, 67 S. E. 837; S. *v.* Dowdy, 145 N. C. 432, 58 S. E. 1002. See S. *v.* Schaeffer, 74 Kan. 390, 86 P. 477; S. *v.* Nippert, 74 Kan. 371, 86 P. 478.

As privileged communications.—See Meyer *v.* Ins. Co., 127 Wis. 293, 106 N. W. 1087.

735-88 S. *v.* Hall, 16 S. W. 6, 91 N. W. 325, record of money orders.

735-89 In re McClellan, 20 S. D. 498, 107 N. W. 681, enlistment records of British army.

736-90 Lattig *v.* Scott, 17 Ida. 506, 107 P. 47; Dent *v.* Simpson, 81 Kan. 217, 105 P. 542; Scott *v.* Williams, 74 Kan. 448, 87 P. 550; Hackbarth *v.* Gordon (Tex. Civ.), 120 S. W. 591; Sullivan *v.* Solis, 52 Tex. Civ. 464, 114 S. W. 456 (of resurvey). See Austin *v.* Whitcher, 135 Ia. 733, 110 N. W. 910; Camp *v.* League (Tex. Civ.), 92 S. W. 1062 (surveyor's field notes). *Comp.* Keller *v.* Harrison, 139 Ia. 383, 116 N. W. 327.

Must show survey made legally.—Clark *v.* McAtee, 227 Mo. 152, 127 S. W. 37.

736-92 Strickland *v.* S., 171 Ind. 642, 87 N. E. 12.

736-93 See McInerney *v.* U. S., 143 Fed. 729, 74 C. C. A. 655.

737-94 Hogarth S. Co. *v.* Co., 174 Fed. 278.

738-96 Post *v.* Lady Jane, 1 Haw. 286.

738-98 Layton *v.* Kraft, 111 App. Div. 842, 98 N. Y. S. 72. See Casley *v.* Mitchell, 121 Ia. 96, 96 N. W. 725.

738-99 See vol. 5, p. 272, n. 63, and supplement thereto.

739-2 See Gorham *v.* Settegast, 44 Tex. Civ. 254, 98 S. W. 665.

740-5 Delaney *v.* Co., 202 Mass. 359, 88 N. E. 773. See Franklin *v.* R. Co., 74 S. C. 332, 54 S. E. 578.

740-6 Record must be made by person doing the examining. Meyer *v.* R. Co., 152 App. Div. 709, 137 N. Y. S. 529. See also vol. 5, p. 273, n. 66; vol. 14, p. 710.

740-7 Census.—Gregory *v.* Woodbery, 53 Fla. 566, 43 S. 504.

740-8 Census report. — Competent only to prove facts of public nature. Campbell *v.* Everhart, 139 N. C. 503, 52 S. E. 201.

Census roll as distinguished from report incompetent to prove facts of private nature. Campbell *v.* Everhart, supra; Gorham *v.* Settegast, 44 Tex. Civ. 254, 98 S. W. 665 (original roll incompetent to prove existence of persons named therein, their family relationship, ages, or other matters of pedigree). But see Levels *v.* R. Co., 196 Mo. 606, 94 S. W. 275; and *contra*, Priddy *v.* Boice, 201 Mo. 309, 99 S. W. 1055 (copies of original lists certified by secretary of interior competent to show ages of members of family), *dist.* Hegler *v.* Faulkner, 153 U. S. 109; Murray *v.* Supreme Hive, 112 Tenn. 664, 80 S. W. 827. *Comp.* Maher *v.* Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496, holding certified copy of census of Ireland incompetent to prove age because it was contradictory on its face and was hearsay under the principle discussed in "Records," p. 733, n. 79.

741-12 S. *v.* R. Co., 141 N. C. 846, 54 S. E. 294.

Presumed reports to railroad commission required. Chicago, etc. R. Co. *v.* Risley, 55 Tex. Civ. 66, 119 S. W. 897.

741-15 Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979. See Washington F. Sem. *v.* Borough, 18 Pa. Super. 555.

742-16 Ship's manifest delivered to immigration office (pursuant to act of Congress requiring ship's commander and agent to report to inspection officers name, nationality, last residence and destination of alien immigrants) and kept as a record of such office is competent evidence of facts shown thereby relating to name, sex, age, nationality, last residence, destination and occupation of persons landed from ship. McInerney *v.* U. S., 143 Fed. 729, 74 C. C. A. 655.

Approval of report made to legislature presumed from reception and publication, no formal action required. Greenough *v.* Narragansett, 29 R. I. 380, 71 A. 594.

742-17 See U. S. *v.* Hempstead, 153 Fed. 483; Big Thompson, etc. Co. *v.* Mayne (Colo.), 91 P. 44; McClure *v.* County, 19 Colo. 122, 34 P. 763. *Comp.* Rio Grande Co. *v.* Catlin, 40 Colo. 450, 94 P. 323.

Government inspector's report.—Illinois C. R. Co. *v.* Holt, 29 Ky. L. R. 135, 92 S. W. 540.

742-18 Certified copy of report of state mine inspector competent, by statute. Andricus *v.* Co., 28 Ky. L. R. 704, 90 S. W. 233.

743-19 *Comp.* cases under 740-7, supra.

744-22 Davidson *v.* Ryle, 103 Tex. 209, 124 S. W. 616.

745-27 Certificates of election. See Fleener *v.* Johnson, 38 Ind. App. 334, 77 N. E. 366.

745-28 *Comp.* Trimble *v.* Borroughs, 41 Tex. Civ. 554, 95 S. W. 614.

745-30 See 1013-45, infra.

746-32 See Flynt *v.* Taylor (Tex. Civ.), 91 S. W. 864; Trimble *v.* Borroughs, 41 Tex. Civ. 554, 95 S. W. 614.

746-34 Dees *v.* Smith, 55 Fla. 652, 46 S. 173 (endorsement of date complaint filed); Walrond *v.* Noyes, 82 Kan. 118, 107 P. 795 (notation in record).

Date of making record.—Mansfield *v.* Johnson, 51 Fla. 239, 40 S. 196.

750-53 See S. *v.* Costa, 78 Vt. 198, 62 A. 38.

751-60 *Comp.* Nurnberger *v.* U. S., 156 Fed. 721, 84 C. C. A. 377.

751-61 Millner *v.* S. (Tex. Cr.), 162 S. W. 348. See O'Connor *v.* Board, 17 Ida. 346, 105 P. 560.

752-64 Tate *v.* Rose, 35 Utah 229, 99 P. 1003.

753-67 Vadeboncoeur *v.* Hannon, 159 Ala. 617, 49 S. 292.

753-69 Whitman *v.* Giesing, 224 Mo. 600, 123 S. W. 1052.

Admissible to identify grantee in the recorded deed. Pillsbury *v.* Beresford, 58 Wash. 656, 109 P. 193.

In Texas, "there seems to be no statute making deed records admissible in evidence. If by any rule of common law they are admissible under certain circumstances (Styles *v.* Gray, 10 Tex. 503; Hardin *v.* Blackshear, 60 Tex. 135), nevertheless they are secondary evidence only, and, as no proper predicate was established for the introduction of the deed in question, plaintiffs' objection thereto for that reason was properly sustained." Producers' Oil Co. *v.* Bean & Markowitz (Tex. Civ.), 147 S. W. 1166.

754-70 McBride *v.* Lowe, 175 Ala. 408, 57 S. 832; Akins *v.* Adams, 256 Mo. 2, 164 S. W. 603; Harlan *v.* Harlan (Tex. Civ.), 125 S. W. 950.

754-71 Hall *v.* Crowley, 12 Cal. App. 30, 106 P. 426.

754-73 Embree *v.* Emerson, 37 Ind. App. 16, 74 N. E. 44, 1110; Bennett *v.* C., 133 Ky. 452, 118 S. W. 332.

754-74 Tucker *v.* Duncan, 224 Ill. 453, 79 N. E. 613.

755-77 To show recordation. Brucke *v.* Hubbard, 74 S. C. 144, 54 S. E. 249. *Comp.* infra, 919-35.

755-78 McBride *v.* Lowe, 175 Ala. 408, 57 S. 832; Richards *v.* Bussell, 70 Wash. 554, 127 P. 198, 129 P. 90.

756-80 Bledsoe *v.* Haney, 57 Tex. Civ. 285, 122 S. W. 455; Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384.

757-81 Bledsoe *v.* Haney, 57 Tex. Civ. 285, 122 S. W. 455.

757-85 Veatch *v.* Gray, 41 Tex. Civ. 145, 91 S. W. 324; Jones *v.* Neal, 44 Tex. Civ. 412, 98 S. W. 417; Townsend *v.* Downer, 32 Vt. 183.

757-86 Ammons *v.* Dwyer, 78 Tex. 639, 15 S. W. 1049.

758-87 Standard M. Ins. Co. *v.* Co., 167 Fed. 119, 92 C. C. A. 571; Oliver *v.* S., 7 Ga. App. 695, 67 S. E. 886; Comans *v.* Tapley, 101 Miss. 203, 57 S. 567; S. *v.* Payne, 223 Mo. 112, 122 S. W. 1062; S. *v.* Hall, 158 Mo. App. 123, 138 S. W. 45; Kimmons *v.* Abraham (Tex. Civ.), 158 S. W. 256; Huff *v.* McMichael (Tex. Civ.), 127 S. W. 574.

758-92 Williamson *v.* Coal Co. (W. Va.), 78 S. E. 94.

759-94 *Comp.* McInerney *v.* U. S., 143 Fed. 729, 74 C. C. A. 655.
Indictment proper part of judgment roll of former conviction introduced for impeachment. Ball *v.* U. S., 147 Fed. 32, 78 C. C. A. 126.

760-95 Final docket, no record. Wynn *v.* McCraney, 156 Ala. 630, 46 S. 854.

761-97 In re McNeil's Est., 155 Cal. 333, 100 P. 1086, affidavit for publication and order granted thereon.

761-98 *Contra,* Millie I. M. Co. *v.* McKinney, 172 Fed. 42, 96 C. C. A. 156.
Opinion of appellate court by judge thereof, which expresses order in accordance with it will be signed by court, no part of record. S. *v.* Butler, 151 N. C. 672, 65 S. E. 993.
Statement of facts in cause on file in supreme court admissible. Rushing *v.* Lanier, 51 Tex. Civ. 278, 111 S. W. 1089.

761-99 *Contra,* it seems. Alexander *v.* Alexander, 94 Ark. 438, 127 S. W. 740. *Comp.* Dowd *v.* S., 52 Tex. Cr. 563, 108 S. W. 389.

761-2 See Mansfield *v.* Johnson, 51 Fla. 239, 40 S. 196.

763-9 P. *v.* Oppenheimer, 156 Cal. 733, 106 P. 74.
All record should be offered if sought to impeach judgment for lack of jurisdiction. Del Campo *v.* Camarillo, 154 Cal. 647, 98 P. 1049.
Record in suit between other parties admissible to show scope of decision as precedent. Kahn *v.* Co., 161 Fed. 495, 88 C. C. A. 437.

764-14 Toombs *v.* Spratlin, 127 Ga. 766, 57 S. E. 59.

764-15 *Comp.* S. *v.* Call, 100 Me. 403, 61 A. 833.

764-16 Ayres *v.* Patton, 51 Tex. Civ. 186, 111 S. W. 1079, contradictory recitals in execution.

765-18 See Ex parte Drake, 55 Tex. Cr. 233, 116 S. W. 49.
Signature of judge to order in record, made by clerk and not required signed, disregarded and entry effectuated as evidence. Plains L. & I. Co. *v.* Lynch, 38 Mont. 271, 99 P. 847.

765-19 Fabien *v.* Grabow, 134 Mo. App. 193, 114 S. W. 80.

765-21 Lalor *v.* Tooker, 130 App. Div. 11, 114 N. Y. S. 403; Muckenfuss *v.* S., 55 Tex. Cr. 216, 117 S. W. 853. *Comp.* 880-23, infra.

766-23 Georgia Eng. & Constr. Co. *v.* Horton & Smith, 135 Ga. 58, 68 S. E. 794. See Sellers *v.* Page, 127 Ga. 633, 56 S. E. 1011, original record of court trying case, competent.

768-27 See Gent *v.* S., 57 Tex. Cr. 414, 123 S. W. 594.
Judgment roll in another action between same parties, admissible to show existence of lost exhibit. Monahan *v.* Co., 114 N. Y. S. 862.

768-32 Blocker *v.* Owensboro, 33 Ky. L. R. 478, 110 S. W. 369.

769-35 S. *v.* Neubauer, 145 Ia. 337, 124 N. W. 312 (no presumption "Jesse" and "Joseph" same person); Despard *v.* Pearcy, 65 W. Va. 140, 63 S. E. 871.

769-37 Columbia B. Co. *v.* Forgey, 140 Mo. App. 605, 120 S. W. 625.

769-38 Pattison *v.* Smith, 94 Ark. 588, 127 S. W. 983; Colehour *v.* Bass, 143 Ill. App. 530.

770-39 Norton *v.* Reed, 253 Mo. 236, 161 S. W. 842. See also vol. 9, p. 941, n. 35; vol. 5, p. 542, n. 22.

770-40 Martin *v.* Martin, 173 Ala. 106, 55 S. 632; Bowman *v.* Seaman, 152 App. Div. 690, 137 N. Y. S. 568. See also vol. 9, p. 939, n. 28.

770-42 Forbes *v.* Davis (Ala.), 65 S. 516. See also vol. 9, p. 928, n. 96.

771-44 Carter *v.* Frahm, 31 S. D. 379, 141 N. W. 370; Hembree *v.* McFarland, 55 Wash. 605, 104 P. 837; Wick *v.* Rea, 54 Wash. 424, 103 P. 462.
Not conclusive of adjudication.—Kammann *v.* Barton, 23 S. D. 442, 122 N. W. 416.

771-47 Recitals in sheriff's deed and clerk's order for publication cannot supply omission of default judgment to state jurisdictional facts in statutory proceeding. Cooper *v.* Gunter, 215 Mo. 558, 114 S. W. 943.

772-48 Coombs *v.* Cook, 35 Okla. 326, 129 P. 698; Smalley *v.* Paine (Tex. Civ.), 130 S. W. 739.

772-49 Bailie *v.* Co., 55 Tex. Civ. 473, 119 S. W. 325 (to show identity of person whose estate administered). Record conclusive to show nothing done except what it shows and manner in which that was done. Graden *v.* Mais, 77 Kan. 702, 95 P. 412.

773-53 S. *v.* Overton, 85 N. J. L. 287, 88 A. 689; Lowellville C. M. Co. *v.* Zappio, 80 O. St. 458, 89 N. E. 97.

775-65 *Comp.* Palmer *v.* Parker, 52 Fla. 389, 42 S. 398.

776-71 *Contra.* M., K. & T. R. Co. *v.* Hindman (Kan.), 110 P. 102.

778-75 Hermanson *v.* Goodyear, 139 Ill. App. 374; Horton *v.* Haralson, 130 La. 1003, 58 S. 858.

Control minutes by judge in docket. Spain *v.* S., 59 Tex. Cr. 538, 128 S. W. 904. Clerk's personal memorandum book incompetent. Ex parte Von Vetsera, 7 Cal. App. 136, 93 P. 1036.

778-76 See Mansfield *v.* Johnson, 51 Fla. 239, 40 S. 196.

778-77 McKnight *v.* Ballif, 45 Colo. 138, 100 P. 433; Hector *v.* Mann, 225 Mo. 228, 124 S. W. 1109; Cockrell *v.* Schmitt, 20 Okla. 207, 94 P. 521; Gibson *v.* Holmes, 78 Vt. 110, 62 A. 11; Gould *v.* Austin, 52 Wash. 457, 100 P. 1029. *Comp.* Ex parte Von Vetsera, 7 Cal. App. 136, 93 P. 1036.

779-78 Cockrell *v.* Schmitt, 20 Okla. 207, 94 P. 521. *Comp.* Teague *v.* Swasey, 46 Tex. Civ. 151, 102 S. W. 458.

Where record not made up, minutes admissible. S. *v.* Warady, 77 N. J. L. 348, 72 A. 37.

780-81 O'Neil *v.* Adams, 144 Ia. 385, 122 N. W. 976 (though some recitals admitted incorrect); S. *v.* Knowles, 98 Me. 429, 57 A. 588; S. *v.* Warady, 78 N. J. L. 687, 75 A. 977; S. *v.* Warady, 77 N. J. L. 348, 72 A. 37. See McInerney *v.* U. S., 143 Fed. 729, 735, 74 C. C. A. 655. But see S. *v.* Powell, 5 Penne. (Del.) 24, 61 A. 966. *Comp.* Warburton *v.* Gourse, 193 Mass. 203, 79 N. E. 270.

782-86 Shelton *v.* Franklin, 224 Mo. 342, 123 S. W. 1084; Gillean *v.* Witherspoon (Tex. Civ.), 121 S. W. 909.

784-96 Devine *v.* Kilcommons, 122 N. Y. S. 260.

Inadmissible to contradict recital of journal. McNeal *v.* Ritterbusch, 29 Okla. 223, 116 P. 778.

785-98 See East Coast L. Co. *v.* Co., 55 Fla. 256, 45 S. 826.

786-1 Town of Ormond *v.* Shaw, 50 Fla. 445, 39 S. 108, assessment records.

787-8 Whitwell *v.* Wright, 136 App. Div. 246, 120 N. Y. S. 1065. See In re Pearson, 19 Phila. (Pa.), 128.

788-9 Watkins *v.* Co. (Ky.), 119 S. W. 225; Letcher *v.* Bk., 134 Ky. 24, 119 S. W. 236. *Contra*, Whitwell *v.* Wright, 115 N. Y. S. 48.

788-10 Johnston *v.* Sexton, 159 Fed. 70, 86 C. C. A. 260; Weaver *v.* Tuten, 138 Ga. 101, 74 S. E. 835; Citizens' Bk. *v.* Warfield, 85 Neb. 328, 123 N. W. 315; Taylor *v.* Taylor, 54 Or. 560, 103 P. 524, cit. text; Beall *v.* Chatham (Tex. Civ.), 94 S. W. 1086 (bankruptcy). See Sims *v.* S., 54 Fla. 100, 44 S. 737; In re Pearson, 19 Phila. (Pa.) 59.

Complete record essential to overcome presumption in favor of jurisdiction. Wood *v.* Browning, 176 Fed. 273, 100 C. C. A. 161.

789-12 See In re Pearson, 19 Phila. (Pa.) 59; Farrell *v.* Phillips, 140 Wis. 611, 123 N. W. 117.

789-15 *Comp.* Chicago, etc. R. Co. *v.* Grantham, 165 Ind. 279, 75 N. E. 265, and infra, 894-2.

790-16 See Palmer *v.* Parker, 52 Fla. 389, 42 S. 398.

790-18 Monk *v.* R. Co., 166 Mo. App. 692, 150 S. W. 1087.

Jurisdiction admitted, judgment admissible without judgment roll. Hibernia S. & L. Soc. *v.* Boyd, 155 Cal. 193, 100 P. 239.

792-19 Mich. & A. L. Co. *v.* Bullington, 106 Ark. 25, 152 S. W. 999; Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175. See Sims *v.* S., 54 Fla. 100, 44 P. 737; Pontier *v.* S., 107 Md. 384, 68 A. 1059.

793-20 Palmer *v.* Parker, 52 Fla. 389, 42 S. 398; Oliver *v.* Gimbel, 38 Okla. 50 132 P. 144. *Comp.* Wood *v.* Browning, 176 Fed. 273, 100 C. C. A. 161.

Statute dispensing with necessity for producing remainder of record in case of judgments "rendered and entered in the circuit courts" does not apply to abstract of justice's judgment filed with clerk of circuit court although it thus becomes a judgment of latter. Palmer *v.* Parker, 52 Fla. 389, 42 S. 398.

794-25 See Palmer *v.* Parker, supra.

794-27 Wallace *v.* Wallace, 141 Ia. 306, 119 N. W. 752.

795-32 See Ayres *v.* Patton, 51 Tex. Civ. 186, 111 S. W. 1079; vol. 4, p. 836.

796-34 Despard *v.* Pearcy, 65 W. Va. 140, 63 S. E. 871.

797-36 Parks *v.* Roth, 25 Colo. App. 296, 137 P. 76; Empire, etc. Co. *v.* Gibson, 23 Colo. App. 344, 129 P. 520.

798-40 In re Peterson's Est., 22 N. D. 480, 134 N. W. 751. See Flynt *v.* Taylor (Tex. Civ.), 91 S. W. 864.

798-41 **Certified copy** of foreign record. In re Peterson's Est., 22 N. D. 480, 134 N. W. 751.

799-42 Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064 (statement of custodian to witness who makes copy

not hearsay and sufficient to identify record), *over.* 91 S. W. 606. *Comp.* 803-66, infra.

799-43 S. *v.* Co., 135 Mo. App. 143, 116 S. W. 14, omission of filing mark immaterial. See Nelson *v.* S., 149 Ala. 26, 43 S. 18; Board *v.* Patrick, 13 Wyo. 130, 107 P. 748.

799-44 Tully *v.* Lewitz, 50 Misc. 350, 98 N. Y. S. 829. See Layton *v.* Kraft, 111 App. Div. 842, 98 N. Y. S. 72.

799-45 Harbison, etc. Co. *v.* White (Ky.), 114 S. W. 250.

800-46 S. *v.* Bringgold, 40 Wash. 12, 82 P. 132.

800-47 Voight *v.* Woll, 110 Minn. 6, 124 N. W. 446.

800-51 Grimes *v.* Greenblatt, 47 Colo. 495, 107 P. 1111.

800-52 In re Peterson's Est., 22 N. D. 480, 134 N. W. 751. *Contra* as to foreign record. In re Peterson's Est., supra.

800-53 In re Drainage Dist., 146 Ia. 564, 123 N. W. 1059 (though amendment made during course of litigation wherein record offered); In re Farkash, 8 O. N. P. (N. S.) 137.

801-54 Parrish *v.* C., 136 Ky. 77, 123 S. W. 339; Hill *v.* Lane, 149 N. C. 267, 62 S. E. 1074. *Contra* as to unsigned pleading. Michel *v.* Michel (Tex. Civ.), 115 S. W. 358. See Flynt *v.* Taylor (Tex. Civ.), 91 S. W. 864. *Comp.* Lorenz *v.* U. S., 24 App. Cas. (D. C.) 337; Murphy *v.* Cady, 145 Mich. 33, 108 N. W. 493 (copy of ancient document admissible without proof of authenticity of original).

801-55 Waterbury Nat. Bk. *v.* Reed, 231 Ill. 246, 83 N. E. 188; S. *v.* Kesner, 72 Kan. 87, 82 P. 720. See supra, "Judicial Notice," 1007-76.

801-57 Michel *v.* Michel (Tex. Civ.), 115 S. W. 358.

802-59 See Ryan *v.* Young, 147 Ala. 660, 41 S. 954.

802-60 Junior *v.* S., 76 Ark. 483, 89 S. W. 467.

802-62 See Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78.

Clerk's certificate not being available, the fact of filing may be shown by testimony. Gove *v.* Gove's Admr., 87 Vt. 468, 89 A. 868.

802-63 See Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755; S. *v.* Bringgold, 40 Wash. 12, 82 P. 132.

803-66 Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78, witness must have personal knowledge; attorney in case competent to identify pleadings, judgment and verdict. See S. *v.* Bringgold, 40 Wash. 12, 82 P. 132, (certification by custodian necessary only where record attempted to be proved as record). *Comp.* 799-42, supra.

Affidavits from files in another case sufficiently identified by witness not custodian. Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755.

803-67 Junior *v.* S., 76 Ark. 483, 89 S. W. 467.

804-69 Grimes *v.* Greenblatt, 47 Colo. 495, 107 P. 1111; P. *v.* R. Co., 243 Ill. 217, 90 N. E. 730; Powers *v.* R. Co. (Ia.), 136 N. W. 1049; Kolterman *v.* Chilvers, 82 Neb. 216, 117 N. W. 405.

806-76 Hobbs *v.* S., 86 Ark. 360, 111 S. W. 264.

806-78 Hudson *v.* Webber, 104 Me. 429, 72 A. 184.

807-82 Sampson *v.* Ins. Co., 85 Neb. 319, 123 N. W. 302; Hagan *v.* Holderby, 62 W. Va. 106, 57 S. E. 289.

807-83 Pontier *v.* S., 107 Md. 384, 68 A. 1059; Meyer *v.* Creighton, 83 N. J. L. 749, 85 A. 344.

Certificate inconsistent with record inadmissible to correct. In re O'Sullivan, 137 Mo. App. 214, 117 S. W. 651.

807-85 Santana *v.* Marquez, 4 P. R. Fed. 87. See Frugia *v.* Trueheart, 48 Tex. Civ. 513, 106 S. W. 736 (recorder's certified abstract of deeds competent secondary evidence); Houston *v.* Stewart, 40 Tex. Civ. 499, 90 S. W. 49.

808-86 Wilkins *v.* Clawson, 50 Tex. Civ. 82, 110 S. W. 103.

808-88 See Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064.

808-90 Certificate of increase of capital stock of foreign corporation when made by secretary of foreign state under his seal as required by law of such state admissible though not under great seal and not authenticated as provided by act of Congress. Person & R. Co. *v.* Lipps, 219 Pa. 99, 67 A. 1081.

"The records and judicial proceedings of the courts of any state or territory, or of any country subject to the jurisdiction of the United States, are required to be admitted in evidence in any court within the United States, when such records and judicial proceedings are attested by the clerk, and the seal of the court annexed, if there be any seal, together with a certificate

of the judge, chief justice, or presiding magistrate, that the attestation is in due form. Federal Statutes Annotated, vol. 3, p. 37, §905 (U. S. Comp. St. 1901, p. 677). 'A copy of a judgment of a state court certified by the clerk alone, without the certificate of a judge, chief justice, or presiding magistrate, that the attestation was in due form of law, cannot be admitted in evidence.' Northwestern Mut. Life Ins. Co. *v.* Stevens, 71 Fed. 258, 18 C. C. A. 107.'' Ex parte Felker, 3 Ala. App. 231, 58 S. 94.

S09-91 P. *v.* R. Co., 231 Ill. 514, 83 N. E. 193; Bennett *v.* C., 133 Ky. 452, 118 S. W. 332.

Claims against county filed with auditor. McGuire *v.* County, 133 Ia. 636, 111 N. W. 34.

Copy of rates filed with interstate commission best evidence in defendant's power to produce. Sloop *v.* Wabash R. Co. (Mo.), 84 S. W. 111.

S09-92 Lewright *v.* Walls, 55 Tex. Civ. 643, 119 S. W. 721.

S09-93 See S. *v.* Junkin, 79 Neb. 532, 113 N. W. 256.

Parol evidence of matters not included in record not excluded by this rule. Phillips *v.* Welts, 40 Wash. 501, 82 P. 737, minutes of county commissioners.

S10-1 P. *v.* Worges, 176 Mich. 685, 142 N. W. 1100.

S10-2 Highway by user provable by parol. Harriman *v.* Moore, 74 N. H. 277, 67 A. 225.

S11-10 Action of grand jury. Elliott *v.* S., 1 Ga. App. 113, 57 S. E. 972.

S12-20 Russell *v.* S., 97 Ark. 92, 133 S. W. 188.

S12-21 Whitaker *v.* Browning (Tex. Civ.), 155 S. W. 1197; Clawson *v.* Wilkins (Tex. Civ.), 93 S. W. 1086. See Butt *v.* Mastin, 143 Ala. 321, 39 S. 217.

S14-31 Wells Fargo & Co. *v.* Johnson, 205 Fed. 60. But see Cullinan *v* Horan, 116 App. Div. 711, 102 N. Y. S. 132.

S14-33 So. R. Co. *v.* Leard, 146 Ala. 349, 39 S. 449. See Ripton *v.* Brandon, 80 Vt. 234, 67 A. 541.

S15-35 Robbins *v.* Hubbard (Tex. Civ.), 108 S. W. 773.

S15-39 Empire, etc. Co. *v.* Lanning, 49 Colo. 458, 113 P. 491.

S15-40 **Copy of official county paper** containing notice of conveyance of unredeemed lands sold for taxes, may be received to establish prima facie the contents of such notice where better evidence is unobtainable. Morrow *v.* Ingle, 89 Kan. 481, 131 P. 1184.

S15-41 Ganow *v.* Ashton, 32 S. D. 458, 143 N. W. 383; Landauer *v.* Kasik, 155 Wis. 376, 144 N. W. 974. See also vol. 2, p. 211, n. 11.

S16-45 Northern Alabama R. Co. *v.* Feldman, 1 Ala. App. 334, 56 S. 16; Partin *v.* C., 154 Ky. 701, 159 S. W. 542; Hagan *v.* Holderby, 62 W. Va. 106, 57 S. E. 289 (qualification of receiver). But see S. *v.* Call, 100 Me. 403, 61 A. 833.

Original record not admissible.—Georgia Eng. & Constr. Co. *v.* Horton & Smith, 135 Ga. 58, 68 S. E. 794.

Rules of court must be proved by records. Chicago C. R. Co. *v.* Gregory, 123 Ill. App. 259.

Motion orally made at trial to amend pleadings provable by parol. Diekman *v.* MacDonald, 50 Misc. 531, 99 N. Y. S. 429.

S19-50 Mullenary *v.* Burton, 3 Cal. App. 263, 84 P. 159, date of commencement.

S19-51 Goslin *v.* C., 28 Ky. L. R. 683, 90 S. W. 223.

Original pleadings not properly certified not admissible to prove a bankruptcy proceeding. Horton *v.* Haralson, 130 La. 100, 57 S. 643.

S19-52 See Clark *v.* Scovill, 198 N. Y. 279, 91 N. E. 800.

Where pleadings oral.—See Ruemer *v.* Clark, 121 App. Div. 231, 105 N. Y. S. 659.

S19-55 **Certified copy** best evidence. Whitaker *v.* S., 138 Ga. 139, 75 S. E. 254.

S20-56 Sherman *v.* S., 2 Ga. App. 148, 58 S. E. 393 (warrant of arrest); S. *v.* Shirley, 233 Mo. 335, 135 S. W. 1.

S20-61 See Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175.

S22-67 S. *v.* Faith (Mo. App.), 166 S. W. 649.

S22-68 Georgia S. & F. R. Co. *v.* Goodman, 4 Ga. App. 631, 62 S. E. 97; Livesey *v.* Besson, 82 N. J. L. 333, 82 A. 509.

S23-70 Hoover *v.* Jones, 84 Neb. 662, 121 N. W. 975.

S23-74 If nul tiel record pleaded record must stand or fall by itself. Santa Clara Valley M. & L. Co. *v.* Prescott, 238 Ill. 625, 87 N. E. 851.

S24-75 See Clark *v.* Scovill, 198 N. Y. 279, 91 N. E. 800.

S24-76 S. *v.* Clark (Ia.), 144 N. W.

596; Matthews *v.* S. (Tex. Cr.), 163 S. W. 723.

825-86 Christensen *v.* Peterson (Ia.), 144 N. W. 315; Feder *v.* Hager, 64 W. Va. 452, 63 S. E. 285. See also vol. 12, p. 543.

825-87 Filing and docketing of claim best shown by docket entries Gillespie *v.* Campbell, 149 Ala. 193, 43 S. 28.

827-96 Davis *v.* S., 90 Miss. 56, 43 S. 81.

827-97 Cooke *v.* Loper, 151 Ala. 546, 44 S. 78; S. *v.* Ireland, 89 Miss. 763, 42 S. 797. But see Ruemer *v.* Clark, 121 App. Div. 231, 105 N. Y. S. 659.

829-2 See Kelly *v.* Moore, 22 App. Cas. (D. C.) 9.

Sufficiency of authentication.—Nadel *v.* Campbell, 18 Ida. 335, 110 P. 262.

829-4 Wall *v.* S., 2 Ala. App. 157, 56 S. 57; Am. S. Co. *v.* Wood, 2 Ga. App. 641, 58 S. E. 1116 (that returns of administrator had been filed and withdrawn); Breeden *v.* Martens, 21 S. D. 357, 112 N. W. 960. But see Brusseau *v.* Co, 133 Ia. 245, 110 N. W. 577; Shannon *v.* Summers, 86 Miss. 619, 38 S. 345; Griffin *v.* R. Co., 115 Mo. App. 549, 91 S. W. 1015.

Issuance of execution.—Barnes *v.* Imhoff, 254 Mo. 217, 162 S. W. 152.

830-5 Welsh *v.* Shumway, 232 Ill. 54, 83 N. E. 549.

830-6 Woodall *v.* S., 145 Ala. 662, 39 S. 718; Williams *v.* S., 149 Ala. 4, 43 S. 720 (divorce); Joyce *v.* Joyce, 80 Conn. 88, 67 A. 374; S. *v.* Durham, 89 S. C. 134, 71 S. E. 847.

Appointment to office.—S. *v.* Twining, 73 N. J. L. 3, 62 A. 402.

831-8 See In re Colton, 129 Ia. 542, 105 N. W. 1008.

832-11 See Massucco *v.* Tomasi, 80 Vt. 186, 67 A. 551.

Swearing of witness.—Goslin *v.* C., 28 Ky. L. R. 683, 90 S. W. 223.

834-12 See Joyce *v.* Joyce, 80 Conn. 88, 67 A. 374; S. *v.* Matlack, 5 Penne. (Del.) 401, 64 A. 259; C. *v.* Dill, 156 Mass. 226, 30 N. E. 1016; Cullinan *v.* Horan, 116 App. Div. 711, 102 N. Y. S. 132; Massucco *v.* Tomasi, 80 Vt. 186, 67 A. 551.

834-13 Dickman *v.* MacDonald, 50 Misc. 531, 99 N. Y. S. 429. See Leaptrot *v.* S., 51 Fla. 57, 40 S. 616, testimony of juror on voir dire.

834-14 Mere abstract of testimony given before coroner, made by latter pursuant to law, not best evidence—any witness who heard testimony may relate it. Green *v.* S., 124 Ga. 343, 52 S. E. 431.

835-18 See Joyce *v.* Joyce, 80 Conn. 88, 67 A. 374; Massucco *v.* Tomasi, 80 Vt. 186, 67 A. 551.

But preliminary proof must show that witness had personally examined the records. Goronto *v.* Wilson, 141 Ga. 597, 81 S. E. 860.

Plea of guilty orally made.—S. *v.* Call, 100 Me. 403, 61 A. 833.

Fact of voting.—S. *v.* Matlack, 5 Penne. (Del.) 401, 64 A. 259.

835-20 Gornto *v.* Wilson (Ga.), 81 S. E. 860; Whitaker *v.* S., 138 Ga. 139, 75 S. E. 254; Wilson *v.* Wood, 127 Ga. 316, 56 S. E. 457 (witness must have examined all record or so much as pertinent to inquiry); Flint, etc. R. Co. *v.* Maples, 10 Ga. App. 573, 73 S. E. 957 (lack of administration); Welsh *v* Shumway, 232 Ill. 54, 83 N. E. 549; In re Colton, 129 Ia. 542, 105 N. W. 1008 (testimony of custodian unnecessary—any witness having sufficient capacity and experience to make search may testify). See Reeder *v.* Jones, 6 Penne. (Del.) 66, 65 A. 571. But see Buxton *v.* M. Co., 18 Okla. 287, 90 P. 19.

Testimony of custodian or someone equally familiar with contents of records is necessary to establish negative fact of absence of record. Nelson *v.* Jones, 245 Mo. 579, 151 S. W. 80.

Lack of administration.—Wilson *v.* Wood, 127 Ga. 316, 56 S. E. 457.

Official custodian.—Stamper *v.* C., 30 Ky. L. R. 992, 100 S. W. 286.

836-23 Cobb *v.* Bryan, 37 Tex. Civ. 339, 83 S. W. 887.

836-24 In re Colton, 129 Ia. 542, 105 N. W. 1008; P. *v.* Bromwich, 135 App. Div. 67, 119 N. Y. S. 833.

836-27 Cullinan *v.* Horan, 116 App. Div. 711, 102 N. Y. S. 132.

837-32 Brasch *v.* Co., 80 Ark. 425, 97 S. W. 445; Bowland *v.* Co., 82 Kan. 84, 107 P. 797; Brumbaugh *v.* Wilson, 82 Kan. 53, 107 P. 792; Davis *v.* Montgomery, 205 Mo. 271, 103 S. W. 979.

839-37 See Brasch *v.* Co., 80 Ark. 425, 97 S. W. 445.

839-39 So. R. Co. *v.* Dickens, 163 Ala. 114, 50 S. 109; Felix *v.* Caldwell, 235 Ill. 159, 85 N. E. 228; Kennedy *v.* Borah, 226 Ill. 243, 80 N. E. 767 (adoption proceedings); Morrison *v.* Price, 130 Ky. 139, 112 S. W. 1090; Moulierre *v.* Coco, 116 La. 845, 41 S. 113 (process verbal); Eminence L. & M. Co. *v.* Co.,

187 Mo. 420, 86 S. W. 145; Martin *v.* Reid (Tex. Civ.), 160 S. W. 1094; Day *v.* S., 51 Tex. Cr. 324, 101 S. W. 806 (bail bond).

840-43 Williams *v.* Richardson, 66 Fla. 234, 63 S. 446; Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175 (execution); Barnes *v.* Imhoff, 254 Mo. 217, 162 S. W. 152 (execution). See vol. 2, p. 318, n. 39.

Writ of attachment.—Rule *v.* Richards (Tex. Civ.), 159 S. W. 386.

840-45 So. R. Co. *v.* Dickens, 163 Ala. 114, 50 S. 109.

841-47 Lewis *v.* S. (Ala. App.), 64 S. 537.

841-48 Davis *v.* Montgomery, 205 Mo. 271, 103 S. W. 979.

Order for sale of property may be shown by parol where the records have been lost. Brown *v.* Madden, 141 Ga. 419, 81 S. E. 196.

841-50 Kinney *v.* Howard, 133 Ia. 94, 110 N. W. 282.

Action of park commissioners. Denver *v.* Spencer, 34 Colo. 270, 82 P. 590.

842-52 See Ex parte Von Vetsera, 7 Cal. App. 136, 93 P. 1036; Cockrell *v.* Schmitt, 20 Okla. 207, 94 P. 521.

842-53 See S. *v.* True, 116 Tenn. 294, 95 S. W. 1028.

843-54 Secondary evidence of lost record, inadmissible after proceeding instituted to supply it. Morrison *v.* Price, 130 Ky. 139, 112 S. W. 1090.

843-56 Person *v.* Roberts, 159 N. C. 168, 74 S. E. 322.

843-57 See Ex parte Von Vetsera, 7 Cal. App. 136, 93 P. 1036; S. *v.* True, 116 Tenn. 294, 95 S. W. 1028.

844-60 Hays *v.* Claypool (Ia.), 145 N. W. 874.

845-65 Wells *v.* Toogood, 165 Mich. 677, 131 N. W. 124.

Previous existence, but not contents, of alleged judicial record provable by testimony of witness that clerk of court had read to him record of such proceeding. Kennedy *v.* Borah, 226 Ill. 243, 80 N. E. 767.

845-67 Black, etc. Dist. *v.* Marple, 19 Ida. 176, 112 P. 766.

846-70 Kinard *v.* S., 1 Ga. App. 146, 58 S. E. 263; Mahan *v.* S., 1 Ga. App. 534, 58 S. E. 265.

847-76 King *v.* Cox, 126 Tenn. 553, 151 S. W. 58. See Sims *v.* S., 155 Ala. 96, 46 S. 493; Grabill *v.* S. (Tex. Cr.), 97 S. W. 1046; McGill *v.* Co., 45 Wash. 615, 88 P. 1038.

848-83 Williamson *v.* Work, 33 Tex. Civ. 369, 77 S. W. 266. See Cox *v.* McDonald, 118 Ga. 414, 45 S. E. 401.

Variance in copy and affidavit, immaterial. Williams *v.* Cessna, 43 Tex. Civ. 315, 95 S. W. 1106.

Affidavit is conclusive and cross-examination of affiant not permissible. Glos *v.* Garrett, 219 Ill. 208, 76 N. E. 373.

849-88 Custodian's failure to find complaint in former case after search, warrants introductions of secondary evidence. Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102.

851-97 *Comp.* Patterson *v.* Drake, 126 Ga. 498, 55 S. E. 175.

852-5 Lost execution proved by entries in the execution docket of the court. Williams *v.* Lyon (Ala.), 61 S. 299.

852-7 S. *v.* Peeples, 71 Wash. 451, 129 P. 108.

853-11 See Meyer *v.* Ins. Co., 127 Wis. 293, 106 N. W. 1087.

Where no issue as to existence or contents of record showing of search need not be so strong. Porch *v.* S., 50 Tex. Cr. 335, 99 S. W. 102.

855-16 See Kennedy *v.* Borah, 226 Ill. 243, 80 N. E. 767.

Lost pleadings.—Robbins *v.* Hubbard (Tex. Civ.), 108 S. W. 773.

856-24 See Glos *v.* Wheeler, 229 Ill. 272, 82 N. E. 234; Clawson *v.* Wilkins (Tex. Civ.), 93 S. W. 1086 (only as secondary evidence).

857-30 Judgment conclusive that all preliminary steps to restore record regular. Morrison *v.* Price, 130 Ky. 139, 112 S. W. 1090.

859-34 Pineland Club *v.* Robert, 171 Fed. 341, 96 C. C. A. 233.

860-38 See Schradin *v.* R. Co., 103 N. Y. S. 73, newspaper copies of legislative acts.

860-40 Campbell *v.* Hughes, 155 Ala. 591, 47 S. 45; Succession of Derigny, 128 La. 853, 55 S. 552; S. *v.* Nilson, 56 Wash. 289, 105 P. 829.

861-45 By statute.—Chicago, etc. R. Co. *v.* Weber, 219 Ill. 372, 76 N. E. 489. See also Mandel *v.* Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. 124, 27 L. R. A. 313; Grand Lodge *v.* Young, 123 Ill. App. 628.

861-48 See Foster *v.* P., 121 Ill. App. 165; S. *v.* Schaeffer, 74 Kan. 390, 86 P. 477; S. *v.* Nippert, 74 Kan. 371, 86 P. 78; First Nat. Bk. *v.* Miller, 48 Or. 587, 87 P. 892.

861-50 *Comp.* Kennedy *v.* Borah, 226

Ill. 243, 80 N. E. 767; Davis *v.* Montgomery, 205 Mo. 271, 103 S. W. 979.

862-51 See Ruddock Co. *v.* Peyret, 113 La. 867, 37 S. 858.

Sworn copy of certified copy, competent secondary evidence. Davis *v.* Montgomery, 205 Mo. 271, 103 S. W. 979.

862-52 See Williams *v.* Cessna, 43 Tex. Civ. 315, 95 S. W. 1106. But see Preston *v.* Hirsch, 5 Cal. App. 485, 90 P. 965.

862-53 Mansfield *v.* Johnson, 51 Fla. 239, 40 S. 196; Trimble *v.* Borroughs, 41 Tex. Civ. 554, 95 S. W. 614. But see Ruddock Co. *v.* Peyret, 113 La. 867, 37 P. 858. Copy of record of copy. Preston *v.* Hirsch, 5 Cal. App. 485, 90 P. 965.

863-56 Certified copy of transcription appeal secondary evidence of lost original record below. Louisville, etc. R. Co. *v.* Fowler, 29 Ky. L. R. 905, 96 S. W. 568.

864-58 P. *v.* Joyce, 154 Ill. App. 13; P. *v.* Stone, 154 Ill. App. 7; Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064; Wolf *v.* King, 49 Tex. Civ. 41, 107 S. W. 617. See S. *v.* Schaeffer, 74 Kan. 390, 86 P. 477; S. *v.* Nippert, 74 Kan. 371, 86 P. 478.

Photographic copy of foreign record, correctness of which shown, secondary evidence, at least for purpose of verifying correctness of sworn copy. In re McClellan, 20 S. D. 498, 107 N. W. 681, foreign enlistment records.

864-60 Kelly *v.* Moore, 22 App. Cas. (D. C.) 9, will on file.

864-61 S. *v.* Nippert, 74 Kan. 371, 86 P. 478. *Comp.* supra, 861-48. See Wolf *v.* King, 49 Tex. Civ. 41, 107 S. W. 617.

865-64 Impeaching correctness of copy by oral testimony not permissible where original in court. Glos *v.* Holmes, 228 Ill. 436, 81 N. E. 1064.

866-73 Kelly *v.* Moore, 22 App. Cas. (D. C.) 9; In re McClellan, 20 S. D. 498, 107 N. W. 681 (of custodian).

866-74 Glos *v.* Holmes, 228 Ill. 436, 81 N. E. 1064.

867-77 U. S. *v.* Brelin, 166 Fed. 104, 92 C. C. A. 88 ("it is not conclusive; but when no especial incentive for falsification appears, and the records are shown to have been carelessly kept, it should prevail over the bare fact that seven years later an original record could not be found"); Silby *v.* England, 90 Ark. 420, 119 S. W. 820; McMillan *v.* Co., 133 Ga. 760, 66 S. E. 943; Morris *v.* Moon (Tex. Civ.), 120 S. W. 1063.

867-79 Stephens *v.* Middlebrooks, 160 Ala. 283, 49 S. 321; Campbell *v.* Hughes, 155 Ala. 591, 47 S. 45; Mansfield *v.* Johnson, 51 Fla. 239, 40 S. 196; Huckabee *v.* S., 7 Ga. App. 677, 67 S. E. 837; Cain *v.* R., 7 Ga. App. 461, 67 S. E. 127; Collison *v.* R. Co., 239 Ill. 532, 88 N. E. 251 (freedom from contributory negligence); Austin *v.* Whitcher, 135 Ia. 733, 110 N. W. 910; Dent *v.* Simpson, 81 Kan. 217, 105 P. 542; Healy *v.* Hoy, 115 Minn. 321, 132 N. W. 208; Kellogg *v.* Finn, 22 S. D. 578, 119 N. W. 545; Rudolph *v.* Tinsley (Tex. Civ.), 143 S. W. 209; Hackbarth *v.* Gordon (Tex. Civ.), 120 S. W. 591; Davidson *v.* Ryle, 103 Tex. 209, 124 S. W. 616; Davenport *v.* Davenport, 80 Vt. 400, 68 A. 49; Wellman *v.* Hoge, 66 W. Va. 234, 66 S. E. 357.

See Pearce *v.* Co., 48 Wash. 38, 92 P. 773. But see Carpenter *v.* Dressler, 76 Ark. 400, 89 S. W. 89; Ruddock Co. *v.* Peyret, 113 La. 867, 37 S. 858; Rohloff *v.* Assn., 130 Wis. 61, 109 N. W. 989. Record of marks and brands. Seaborn *v.* S. (Tex. Cr.), 90 S. W. 649.

Copy of the records of the Land Office, duly certified under the seal of the office. Wyman *v.* City, 254 Ill. 202, 98 N. E. 266.

869-80 Witt *v.* S., 5 Ala. App. 137, 59 S. 715; Ex parte Law, 2 Ala. App. 257, 56 S. 79; Des Moines S. Bk. *v.* Kennedy, 142 Ia. 272, 120 N. W. 742; Keller *v.* Harrison, 139 Ia. 383, 116 N. W. 327; Henderson M. & M. Co. *v.* Nicholson (Ky.), 126 S. W. 139; Hoffman *v.* Ins. Co., 135 App. Div. 739, 119 N. Y. S. 978; Brown *v.* Moss, 53 Or. 518, 101 P. 207; Randolph *v.* Lewis (Tex. Civ.), 163 S. W. 647; McKee *v.* West, 55 Tex. Civ. 460, 118 S. W. 1135. See Campbell *v.* Mfg. Co., 53 Fla. 632, 43 S. 874; Thomas *v.* Williamson, 51 Fla. 332, 40 S. 831; S. *v.* Dowdy, 145 N. C. 432, 58 S. E. 1002; First Nat. Bk. *v.* Miller, 48 Or. 587, 87 P. 892; Montgomery *v.* R. Co., 73 S. C. 503, 53 S. E. 987.

Admission of transcript of a record required by law to be kept in the office of a sworn public officer, is proper by the terms of the Alabama statute (section 3983), when properly certified, and is not in violation of defendant's con-

stitutional right to be confronted with witnesses. Woodward *v.* S., 5 Ala. App. 202, 59 S. 688.

Copies of official bonds.—Richland County *v.* Owens, 92 S. C. 329, 75 S. E. 549.

870-83 Such statutes provide exclusive way for proving copies. Letcher *v.* Bk., 134 Ky. 24, 119 S. W. 236.

870-84 McKee *v.* West, 55 Tex. Civ 460, 118 S. W. 1135.

Texas statute making certified copies recorded for ten years evidence, whether original properly proved or not, applies to party acquiring right prior to enactment. Sims *v.* Sealy, 53 Tex. Civ. 518, 116 S. W. 630.

870-86 S. *v.* Montgomery, 57 Wash. 192, 106 P. 771.

871-87 Allter *v.* St. Johnsville, 130 App. Div. 297, 114 N. Y. S. 355. Preliminary filing and notice. Burton *v* S., 51 Tex. Cr. 196, 101 S. W. 226; Lamar *v.* S., 49 Tex. Cr. 563, 95 S. W. 509.

872-88 McKinnon *v.* Fuller, 33 S. D. 582, 146 N. W. 910.

873-91 Howard *v.* S. (Tex. Cr.), 163 S. W. 429; Zettlemeyer *v.* Shuler, 52 Tex. Civ. 648, 115 S. W. 78.

873-92 Ayers *v.* Co., 76 Kan. 149, 90 P. 794; Milwaukee, etc. Co. *v.* Gordon, 37 Mont. 209, 95 P. 995. See Wilcox *v.* Bergman, 96 Minn. 219, 104 N. W. 955; William M. Rice Institute *v.* Freeman (Tex. Civ.), 145 S. W. 688.

873-95 Flynt *v.* Taylor (Tex. Civ.), 91 S. W. 864. *Comp.* Murphy *v.* Cady, 145 Mich. 33, 108 N. W. 493.

Ancient instruments.—Murphy *v.* Cady, supra.

Admission obviates proof of execution of original. Morris *v.* Moon (Tex. Civ.), 120 S. W. 1063.

873-96 Andrieus *v.* Co., 28 Ky. L. R. 704, 90 S. W. 233; Vanderbilt *v.* Mitchell, 72 N. J. Eq. 910, 67 A. 97, 14 L. R. A. (N. S.) 304 (certificates of birth); Burton *v.* S., 51 Tex. Cr. 196, 101 S. W. 226 (county clerk), Lamar *v.* S., 49 Tex. Cr. 563, 95 S. W. 509 (same).

Vital statistics.—Certified copy of a certificate of birth made receivable in evidence. S. *v.* Miller, 90 Kan. 230, 133 P. 878. See also vol. 4, p. 827.

874-97 See S. *v.* Dowdy, 145 N. C. 432, 58 S. E. 1002.

874-99 See Sylvester *v.* S., 46 Wash. 585, 91 P. 15.

874-1 Mansfield *v.* Johnson, 51 Fla. 239, 40 S. 196, certified copy of record of judgment in one county recorded in another provable by certified copy of latter record.

874-2 Bailie *v.* Co., 55 Tex. Civ. 473, 119 S. W. 325.

875-6 Royal Ins. Co. *v.* R. Co., 53 Tex. Civ. 154, 115 S. W. 117, 123.

Letter received by state treasurer.—Trimble *v.* Burroughs, 41 Tex. Civ. 554, 95 S. W. 614.

875-7 Flint Riv. Lumb. Co. *v.* Smith, 134 Ga. 627, 68 S. E. 436; Whitman *v.* Giesing, 224 Mo. 600, 123 S. W. 1052; Montgomery *v.* R. Co., 73 S. C. 503, 53 S. E. 987; Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384. See infra, 930-90.

875-8 Globe, etc. Ins. Co. *v.* Meyer, 118 Ill. App. 155.

Erratum.—"Authorized" should read "unauthorized."

876-9 S. W. Surety Ins. Co. *v.* Anderson (Tex.), 155 S. W. 1176.

877-17 Butt *v.* Mastin, 143 Ala. 321, 39 S. 217 (statute); Chaput *v.* Pickel, 250 Mo. 578, 157 S. W. 613; Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064. See Sylvester *v.* S., 46 Wash. 585, 91 P. 15. *Comp.* Preston *v.* Hirsch, 5 Cal. App. 485, 90 P. 965.

As secondary evidence only.—Covington *v.* Berry, 76 Ark. 460, 88 S. W. 1005 (to prove lost patent); Carpenter *v.* Smith, 76 Ark. 447, 88 S. W. 976 (same); Carpenter *v.* Dressler, 76 Ark. 400, 89 S. W. 89 (same).

878-18 Allen *v.* Clearman (Tex. Civ.), 128 S. W. 1140 (memoranda on file wrapper); Trimble *v.* Borroughs, 41 Tex. Civ. 554, 95 S. W. 614. See Slaughter *v.* Cooper (Tex. Civ.), 107 S. W. 897. *Comp.* 807-85 and 808-86, supra.

878-19 Trimble *v.* Borroughs, supra (letter—also copy of letter sent by commissioner to treasurer); Kirby *v.* Hayden, 44 Tex. Civ. 207, 99 S. W. 746; Robertson *v.* Brothers (Tex. Civ.), 139 S. W. 657. See Flynt *v.* Taylor (Tex. Civ.), 91 S. W. 864, letters to commissioner.

878-21 Finberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979; Myers *v.* Moody (Tex. Civ.), 122 S. W. 920.

879-24 Allen *v.* Clearman (Tex. Civ.), 128 S. W. 1140, letter to commissioner.

879-25 Davis *v.* Seybold, 195 Fed. 402; P. *v.* Wiemers, 225 Ill. 17, 89 N. E. 45 (only as secondary evidence after accounting for original plat from

which record made); Brecker *v.* Fillingham, 209 Mo. 578, 108 S. W. 41. See Austin *v.* Whitcher, 135 Ia. 733, 110 N. W. 910. *Comp.* Stewart *v.* Co., 200 Mo. 281, 98 S. W. 767.

879-27 Montgomery *v.* R. Co., 73 S. C. 503, 53 S. E. 987.

879-28 See Montgomery *v.* R. Co., supra.

880-32 Kinard *v.* S., 1 Ga. App. 146, 58 S. E. 263; Seaborn *v.* S. (Tex. Cr.), 90 S. W. 649.

880-33 Blocker *v.* Owensboro, 33 Ky. L. R. 478, 110 S. W. 369. *Comp.* supra, 765-21, et seq.

881-34 Bruce *v.* Wanzer, 20 S. D. 277, 105 N. W. 282, discretionary.

881-35 See Lorenz *v.* U. S., 24 App Cas. (D. C.) 337.

881-37 North Birmingham L. Co. *v.* Sims, 157 Ala. 595, 48 S. 84; Carp *v.* Ins. Co., 203 Mo. 295, 101 S. W. 78.

883-46 P. *v.* Foreman, 165 Ill. App. 13. See Gage *v.* Chicago, 225 Ill. 218, 80 N. E. 127, pen changes in printed blank.

884-49 Sibley *v.* England, 90 Ark. 420, 119 S. W. 820.

884-52 East Coast L. Co. *v.* Co., 55 Fla. 256, 45 S. 826.

884-53 Hudson *v.* Webber, 104 Me. 429, 72 A. 184.

884-56 Davis *v.* Seybold, 195 Fed. 402; Hubbard *v.* Co., 209 Mo. 495, 108 S. W. 15. See Rule *v.* Richards (Tex. Civ.), 149 S. W. 1073.

885-59 Ibid (omission of ("L. S.") in certified copy presumed mistake of recorder).

885-61 Cross *v.* Co., 55 Fla. 374, 46 S. 6; Pardee *v.* Johnston, 70 W. Va. 347, 74 S. E. 721.

886-68 *Contra,* Globe, etc. Ins. Co. *v.* Meyer, 118 Ill. App. 155.

888-77 Phillips *v.* Co., 5 Ga. App. 634, 63 S. E. 808.

889-81 See Jordan *v.* McDonnell, 151 Ala. 279, 44 S. 101 (certificate in name of clerk "per" deputy, good).

890-85 Phillips *v.* Co., 5 Ga. App. 634, 63 S. E. 808 (ex officio officer).

891-88 Smallwood *v.* Kimball, 129 Ga. 49, 58 S. E. 640.

Must affirmatively appear from certificate, where judge of court of ordinary certifies copy, there is no other clerk. Smallwood *v.* Kimball, supra.

891-90 McMillan *v.* Co., 133 Ga. 760, 66 S. E. 943. See Williams *v.* Cessna, 43 Tex. Civ. 315, 95 S. W. 1106; supra, "Age," 733-11.

892-91 S. *v.* Montgomery, 57 Wash. 192, 106 P. 771.

892-93 McMillan *v.* Co., 133 Ga. 760, 66 S. E. 943.

894-2 Chicago, etc. R. Co. *v.* Grantham, 165 Ind. 279, 75 N. E. 265 (certificate that copy contains "full and complete copy of the complaint, answer, reply and judgment," sufficient).

895-5 Brecker *v.* Fillingham, 209 Mo. 578, 108 S. W. 41 (copy of map certified to be true copy "so far as it goes into detail," inadmissible). *Comp.* Town of Ormond *v.* Shaw, 50 Fla. 445, 39 S. 108; Shelton *v.* R. Co., 131 Mo. App. 560, 110 S. W. 627.

Where matter certified appears to be copy of record and not a mere statement of officer, fact it is called an "abstract" or "extract" in certificate does not render it inadmissible. Scheidegger *v.* Terrell, 149 Ala. 338, 43 S. 26.

897-21 See Jordan *v.* McDonnell, 151 Ala. 279, 44 S. 101.

897-22 Genuineness of seal provable or disproved by comparison with genuine impressions. Loring *v.* Jackson, 43 Tex. Civ. 306, 95 S. W. 19.

898-30 Gundry *v.* Hancock, 147 Ill. App. 49. See S. *v.* Kniffen, 44 Wash. 485, 87 P. 837.

901-42 Certificate aided by statement of venue at top of paper certified to. S. *v.* Walker, 78 Kan. 680, 97 P. 862.

902-45 Certificate may state particular record from which copy taken, and is presumptive evidence of this fact. Mansfield *v.* Johnson, 51 Fla. 239, 40 S. 196.

902-47 See East Coast L. Co. *v.* Co., 55 Fla. 256, 45 S. 826. *Comp.* Town of Ormond *v.* Shaw, 50 Fla. 445, 39 S. 108; Brecker *v.* Fillingham, 209 Mo. 578, 108 S. W. 41.

903-50 Williams *v.* Finch, 155 Ala. 399, 46 S. 645.

904-52 See Feld *v.* Loftis, 140 Ill. App. 530.

904-54 First Nat. Bk. *v.* Miller, 48 Or. 587, 87 P. 892; George *v.* Crim, 66 W. Va. 421, 66 S. E. 526.

904-55 Foster *v.* P., infra.

904-56 See Foster *v.* P., 121 Ill. App. 165.

905-58 Ketchum *v.* Co., 155 Ala. 256, 46 S. 476; Churchill *v.* Jackson, 132 Ga. 666, 64 S. E. 691; Hagan *v.* Holderby, 62 W. Va. 106, 57 S. E. 289.

Certified copy of a judgment not inadmissible because not filed with the papers of this case at least three days before the trial thereof and notice given to plaintiff or his attorney. Such papers are "admissible in evidence without the aid of the statute making duly recorded instruments admissible, and consequently are not affected by the proviso requiring such instrument to be filed among the papers three days before the commencement of trial." James *v.* Midland Grocery & Dry Goods Co. (Tex. Civ.), 146 S. W. 1073, *quoting* McDaniel *v.* Weiss, 53 Tex. 257.

906-62 Pontier *v.* S., 107 Md. 384, 68 A. 1059 (of decree of court to prove recovery); King *v.* Cox, 126 Tenn. 553, 151 S. W. 58.

907-71 S. *v.* Walker, 78 Kan. 680, 97 P. 862.

An amendment to a certified copy allowed upon the recollection of the certifying justice, where the copy clearly purported upon its face to show the error. S. *v.* Grace, 862 Vt. 470, 86 A. 162.

908-74 Weaver *v.* Tuten, 138 Ga. 101, 74 S. E. 835; Magee *v.* Paul (Tex. Civ.), 159 S. W. 325.

910-85 Pineland Club *v.* Robert, 171 Fed. 341, 96 C. C. A. 233.

912-89 Feld *v.* Loftis, 140 Ill. App. 530; Peeples *v.* Woolen Mills (Tex. Civ.), 90 S. W. 61.

912-91 Certified transcript of justice's docket. Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175.

912-92 Original documents sent up with transcript provable by certified or sworn copy. First Nat. Bk. *v.* Miller, 48 Or. 587, 87 P. 892.

913-96 Louisville, etc. R. Co. *v.* Fowler, 29 Ky. L. R. 905, 96 S. W. 568.

913-98 Mansfield *v.* Johnson, 51 Fla. 239, 40 S. 196; Peeples *v.* Woolen Mills (Tex. Civ.), 90 S. W. 61 (execution and return).

914-3 S. *v.* Bartholomew (Ind.), 95 N. E. 417.

914-5 See supra, 891-88, and infra, 1029-23.

914-9 Jordan *v.* McDonnell, 151 Ala. 279, 44 S. 101.

915-13 Halfhill *v.* Malick, 145 Wis. 200, 129 N. W. 1086.

915-14 Style of case need not be given at head of certificate if it appears in body. Varn *v.* Co. (Tex. Civ.), 124 S. W. 693.

915-16 See Weeks *v.* Co., 133 Ga. 472, 66 S. E. 168.

917-30 *Contra,* Feld *v.* Loftis, 140 Ill. App. 530.

918-32 Houston O. Co. *v.* Kimball, 103 Tex. 94, 122 S. W. 533, 124 S. W. 85.

919-34 Kinard *v.* S., 1 Ga. App. 146, 58 S. E. 263 (original in possession of adverse party); Mahan *v.* S., 1 Ga. App. 534, 58 S. E. 265 (same).

919-35 *Comp.* supra, 755-77.

920-37 Execution and delivery of original deed need not be proved. Cunningham *v.* Cunningham, 75 Conn. 64, 53 A. 318.

921-51 Hong Quon *v.* Sam, 14 Haw. 276; Goff *v.* Murphy, 153 Ky. 634, 156 S. W. 95; Bruce *v.* Wanzer, 20 S. D. 277, 105 N. W. 282.

923-52 Crawford *v.* McDonald, 84 Ark. 415, 106 S. W. 206; Eagan *v.* Mahoney, 24 Colo. App. 285, 134 P. 156; Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175; Ming *v.* Olster, 195 Mo. 460, 92 S. W. 898.

923-54 Peeples *v.* Wilson, 140 Ga. 610, 79 S. E. 466; Sims *v.* Scheussler, 2 Ga. App. 466, 58 S. E. 693.

Original in possession of adverse party. Kinard *v.* S., 1 Ga. App. 146, 58 S. E. 263; Mahan *v.* S., 1 Ga. App. 534, 58 S. E. 265.

924-61 Allen *v.* Clearman (Tex. Civ.), 128 S. W. 1140.

Bond for conveyance admissible if recorded ten years, though not witnessed or acknowledged as required when recorded. Milwee *v.* Phelps, 53 Tex. Civ. 195, 115 S. W. 891.

925-64 Ming *v.* Olster, 195 Mo. 460, 92 S. W. 898.

Affidavit of forgery.—Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645.

926-67 See Hong Quon *v.* Sam, 14 Haw. 276.

926-72 Ballard *v.* Bk. (Ala.), 65 S. 356.

Copy of record of sister state.—See infra, 1034-42.

Existence or genuineness of original need not be proved. Sims *v.* Scheussler, supra. *Comp.* Dyson *v.* Knight, 130 Ga. 573, 61 S. E. 468.

926-73 Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645; Robbins *v.* Hubbard (Tex. Civ.), 108 S. W. 773.

927-75 *Comp.* Dyson *v.* Knight, 130 Ga. 573, 61 S. E. 468.

927-76 Ming *v.* Olster, 195 Mo. 460, 92 S. W. 898; Young *v.* Engdahl, 18

N. D. 166, 119 N. W. 169; Chrast *v.* O'Connor, 41 Wash. 360, 83 P. 238. See Bruce *v.* Wanzer, 20 S. D. 277, 105 N. W. 282.

928-82 Tate *v.* Rose, 35 Utah 229, 99 P. 1003.

930-89 Mansfield *v.* Johnson, 51 Fla. 239, 40 S. 196.

930-90 Turner *v.* Neisler, 141 Ga. 27, 80 S. E. 461; Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918; Ball *v.* Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Belcher *v.* Polly, 32 Ky. L. R. 623, 106 S. W. 818; Bledsoe *v.* Haney, 57 Tex. Civ. 285, 122 S. W. 455; Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384. See supra, 875-7, et seq.

931-92 Alaska Exp. Co. *v.* Co., 152 Fed. 145, 81 C. C. A. 363; Brown *v.* Moss, 53 Or. 518, 101 P. 207 (memorandum of document).

Recording of translation of private instrument being unauthorized copy of such record inadmissible. West *v.* Co., 46 Tex. Civ. 102, 102 S. W. 927.

932-93 Bledsoe *v.* Haney, 57 Tex. Civ. 285, 122 S. W. 455.

932-98 Williamson *v.* Work, 33 Tex. Civ. 369, 77 S. W. 266 (certified copy of record of certified copy).

933-4 Bledsoe *v.* Haney, 57 Tex. Civ. 285, 122 S. W. 455.

933-7 Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918; Belcher *v.* Polly, 32 Ky. L. R. 623, 106 S. W. 818.

934-10 Payment of purchase price. Mills *v.* McLanahan, 70 W. Va. 288, 73 S. E. 927.

934-11 Cole *v.* Ward, 79 S. C. 573, 61 S. E. 108.

935-19 Existence of original deed must be proved before copy competent. Dyson *v.* Knight, 130 Ga. 573, 61 S. E. 468.

936-21 See supra, 878-19.

936-26 *Comp.* West *v.* Co., 46 Tex. Civ. 102, 102 S. W. 927.

937-28 Leath *v.* Cobia, 175 Ala. 435, 57 S. 972; Bishop *v.* Welch, 149 Ill. App. 491; Williams *v.* Steele, 101 Tex. 382, 108 S. W. 155; Yellow Poplar L. Co. *v.* Thompson, 108 Va. 612, 62 S. E. 358 (as against officer who certified record); Merz *v.* Mehner, 57 Wash. 324, 106 P. 1118.

Bankruptcy proceedings, rule applies. Edelstein *v.* U. S., 149 Fed. 636, 79 C. C. A. 328.

939-29 Johannessen *v.* U. S., 225 U. S. 227, 32 Sup. Ct. 613, 56 L. ed. 1066; In re Ellsworth Co., 173 Fed. 699; Parsons *v.* S. (Ala.), 60 S. 864; Hare *v.* Shaw, 84 Ark. 32, 104 S. W. 931; Warthen *v.* Melton, 132 Ga. 113, 62 S. E. 832; Central of Ga. R. Co. *v.* Wright, 5 Ga. App. 514, 63 S. E. 639; P. *v.* Crowe, 130 Ill. App. 349; Morgantown Mfg. Co. *v.* Hicks, 43 Ind. App. 32, 86 N. E. 856; Morgan *v.* Champion, 150 Ky. 396, 150 S. W. 517; Bamberger *v.* Green, 146 Ky. 258, 142 S. W. 384; Kozee *v.* C., 139 Ky. 66, 129 S. W. 527; Warburton *v.* Gourse, 193 Mass. 203, 79 N. E. 270; Bk. *v.* Hardy, 94 Miss. 587, 48 S. 731; Hutchinson *v.* Patterson, 226 Mo. 174, 126 S. W. 403; Davidson *v.* Co., 226 Mo. 1, 125 S. W. 1143; Becker *v.* Linton, 80 Neb. 655, 114 N. W. 928; Chambers *v.* Kirk (Okla.), 139 P. 986; Smith *v.* Whiting, 55 Or. 393, 106 P. 791; Gay *v.* Eugene, 53 Or. 289, 100 P. 306; Harris *v.* Mason, 120 Tenn. 68, 115 S. W. 1146; Salas *v.* Mundy (Tex. Civ.), 125 S. W. 633; Davis *v.* Ragland, 42 Tex. Civ. 400, 93 S. W. 1099; McGuire *v.* Co., 53 Wash. 425, 102 P. 237; Nichols *v.* Doak, 48 Wash. 457, 93 P. 919; Chappell *v.* Chappell, 45 Wash. 652, 89 P. 166; Plant *v.* Humphries, 66 W. Va. 88, 66 S. E. 94. See Owens *v.* Cage, 101 Tex. 286, 106 S. W. 880.

942-34 Appearance of party must be shown by record. Smith *v.* Whiting, 55 Or. 383, 106 P. 791.

942-35 Deweese *v.* Yost, 161 Mo. App. 10, 143 S. W. 72.

942-41 See vol. 8, p. 486, n. 73, and supplement thereto.

943-42 Recital matter disposed of at chambers conclusive. Morehead *v.* Allen, 131 Ga. 807, 63 S. E. 507.

943-44 Gilman *v.* Heitman, 137 Ia. 336, 113 N. W. 932.

944-52 Collection of fines and cause of imposition shown by testimony of clerk of court who made their collection and records of judgments imposing them. Ford *v.* Oliver (Ia.), 124 N. W. 1067.

945-55 See Hollenbeck *v.* Glover, 128 Ga. 52, 57 S. E. 108.

945-56 *Contra* in absence of bill of exceptions. Everett *v.* Everett, 215 U. S. 203. See Clark *v.* Scovill, 198 N. Y. 279, 91 N. E. 800.

945-59 In re Ellsworth Co., 173 Fed. 699; Carpenter *v.* Auditor, 144 Mich. 251, 107 N. W. 878.

946-67 Doyle-K. Co. *v.* T. Co., 206 Fed. 813; McGuire *v.* Co., 53 Wash. 425, 102 P. 237.

947-69 Pettitti *v.* S., 2 Okla. Cr. 131, 100 P. 1122.

949-78 Smith *v.* Whiting, 55 Or. 393, 106 P. 791; Lutcher *v.* Allen, 43 Tex. Civ. 102, 95 S. W. 572.

950-80 Aldrich *v.* Barton, 153 Cal. 488, 95 P. 900; In re Davis, 151 Cal. 318, 86 P. 183; Medlin *v.* Co., 128 Ga. 115, 57 S. E. 232; Spring Creek D. D. *v.* Com., 238 Ill. 521, 87 N. E. 394; Balt., etc. R. Co. *v.* Freeze, 169 Ind. 370, 82 N. E. 761; Ames *v.* Young, 105 Me. 543, 75 A. 66; Patchin *v.* Co., 226 Pa. 159, 75 A. 250; Salas *v.* Mundy (Tex. Civ.), 125 S. W. 633; Moore *v.* Hanscom (Tex. Civ.), 103 S. W. 665, judgment *mod.*, 106 S. W. 876.

950-81 Parol evidence admissible to show matter apparently governed by judgment not passed on. Dix *v.* Dix, 132 Ga. 630, 64 S. E. 790 (statute).

950-82 Bliss *v.* Caille, 149 Mich. 601, 113 N. W. 317; S. *v.* Com., 79 S. C. 316, 60 S. E. 928.

951-83 Hendrick *v.* Biggar, 66 Misc 576, 122 N. Y. S. 162; Southern P. L. Co. *v.* Ward, 16 Okla. 131, 85 P. 459.

951-86 Waterman *v.* Bash, 46 Wash. 212, 89 P. 556.

Record silent as to service of process. Weaver *v.* Webb, 3 Ga. App. 726, 60 S. E. 367.

952-92 Callahan *v.* Gerbereux, 137 N. Y. S. 996; Merz *v.* Mehner, 57 Wash. 324, 106 P. 1118 (otherwise as to regularity of service).

952-93 Francis *v.* Lilly, 30 Ky. L. R. 391, 98 S. W. 996 (in direct proceeding recital of service rebuttable).

953-96 Briggs *v.* Manning, 80 Ark. 304, 97 S. W. 289.

953-98 Hendrick *v.* Biggar, 122 N. Y. S. 162.

953-99 Manion *v.* Brady (Ia.), 138 N. W. 558. *Contra,* Hendrick *v.* Biggar, supra.

953-1 Johnson *v.* Hunter, 147 Fed. 133, 77 C. C. A. 359, *rev.* 127 Fed. 219 (no presumption additional evidence presented where recited facts insufficient).

954-4 Davis *v.* Ragland, 42 Tex. Civ. 400, 93 S. W. 1099.

954-6 Filing of motion cannot be shown by parol, where it would contradict the record. Cote *v.* Nav. Co., 213 Mass. 177, 99 N. E. 972.

954-8 Parol evidence competent to apply declaration to subject-matter by showing circumstances in connection with which made. Godley *v.* Barnes, 132 Ga. 513, 64 S. E. 546.

955-10 Rude *v.* P., 44 Colo. 384, 99 P. 317; Hutchinson *v.* Patterson, 226 Mo. 174, 126 S. W. 403; Gamble *v.* Martin (Tex. Civ.), 129 S. W. 386.

955-11 Warburton *v.* Gourse, 193 Mass. 203, 79 N. E. 270.

956-20 Horn *v.* Metzger, 234 Ill. 240, 84 N. E. 893.

956-21 *Contra,* Manion *v.* Brady (Ia.), 126 N. W. 801.

957-32 Van Gundy *v.* Hill, 262 Ill. 162, 104 N. E. 147.

959-47 Walrond *v.* Noyes, 82 Kan. 118, 107 P. 795.

961-71 Denial of existence of record. Rainey *v.* Ridgeway, 151 Ala. 532, 43 S. 843.

961-72 White *v.* Martin, 2 Alaska 495; In re McVay, 14 Ida. 56, 93 P. 28; In re Mudgett, 103 Me. 367, 69 A. 575; Desloge *v.* Tucker, 196 Mo. 587, 94 S. W. 283; Jenkins *v.* Morrow, 131 Mo. App. 288, 109 S. W. 1051; Murphy *v.* Sisters, 43 Tex. Civ. 638, 97 S. W. 135.

962-73 Milbra *v.* Co. (Ala.), 62 S 176.

963-82 Smith *v.* Whiting, 55 Or. 393, 106 P. 791.

963-83 Dudley *v.* Stansberry (Ala. App.), 59 S. 379; Ruoff *v.* Fitzgerald, 128 Mo. App. 639, 106 S. W. 1110; Ex parte Walton, 2 Okla. Cr. 437, 101 P. 1034; Curran *v.* S., 53 Or. 154, 99 P. 420; S. *v.* Court, 36 Utah 502, 105 P. 105; Griffiths *v.* Court, 35 Utah 443, 100 P. 1064.

Intention of justice of peace to enter a certain judgment cannot be shown where it would contradict the record. Wilkerson *v.* State, 105 Ark. 367, 151 S. W. 518.

964-88 Albie *v.* Jones, 82 Ark. 414, 102 S. W. 222.

Jurisdiction cannot be shown by extrinsic evidence in opposition to record. Texas & P. R. Co. *v.* Hood (Tex. Civ.), 125 S. W. 982.

965-90 Ruoff *v.* Fitzgerald (appearance and confession of judgment); Curran *v.* S., 53 Or. 154, 99 P. 420.

965-91 Rule not applicable in certeriorari proceedings if extrinsic facts set up not required shown and return is made by tribunal not composed of same person before whom proceedings were had, or otherwise were not presumably within personal knowledge.

Griffiths *v.* Court, 35 Utah 443, 100 P. 1064.

965-93 Reach *v.* Quinn, 159 Ala. 340, 48 S. 540; Sigler *v.* Shaffer, 9 O. C. C. (N. S.) 267 (to show entry of judgment made within time prescribed).

966-97 Fabien *v.* Grabow, 134 Mo. App. 193, 114 S. W. 80.

966-3 Brand *v.* Swindler, 68 W. Va. 571, 70 S. E. 362.

967-13 Choate *v.* R. Co., 143 Ala. 316, 39 S. 218; Hartzfeld *v.* Taylor, 207 Mo. 236, 105 S. W. 599. *Comp.* Getzendaner *v.* R. Co., 43 Tex. Civ. 66, 102 S. W. 161.

968-15 Warthen *v.* Melton, 132 Ga. 113, 63 S. E. 832. See Collier *v.* Parish, 147 Ala. 526, 41 S. 772; Stephens *v.* Council, 132 Ia. 490, 107 N. W. 614.

969-30 Manion *v.* Brady (Ia.), 126 N. W. 801.

970-35 To explain an uncertain date in recorded indictment. Valigura *v.* S. (Tex. Cr.), 153 S. W. 856.

971-41 See vol. 9, p. 727, n. 33, and supplement thereto.

972-51 Jordan *v.* McDonnell, 151 Ala. 279, 44 S. 101.

973-52 Taylor *v.* McCowen, 154 Cal. 798, 99 P. 351; Easterwood *v.* Burnitt (Tex. Civ.), 126 S. W. 934.

973-53 Purpose and consideration under which judgment rendered shown by parol. Bente *v.* Sullivan, 52 Tex. Civ. 454, 115 S. W. 350.

973-54 Selph *v.* Selph, 133 Ga. 409, 65 S. E. 881; Tomlinson *v.* Bennett, 145 N. C. 279, 59 S. E. 37 (what complaint never filed would have been).

Ground of order.—"If the decree appointing the guardian had expressly found the deceased unsound of mind, doubtless parol testimony would have been inadmissible because in contradiction of the record, but as a guardian may in this state be appointed for one who is an habitual drunkard, or a spendthrift, as well as for one who is unsound of mind, we think the rule should be that, where the record does not expressly state the ground for the appointment, parol testimony is admissible to show the reasons therefor. Of course, parol testimony should not be allowed to contradict a record; but, if the record is silent, parol testimony may be adduced to explain it." Cahill *v.* Cahill, 155 Ia. 340, 136 N. W. 214.

975-62 Irvin *v.* Spratlin, 127 Ga. 240, 55 S. E. 1037; Hubbard *v.* Gould, 74 N. H. 25, 64 A. 668; Pennebaker *v.* Parker, 33 Pa. Super. 458; Harris *v.* Mason, 120 Tenn. 668, 115 S. W. 1146; Manchester, etc. Assn. *v.* Porter, 106 Va. 528, 56 S. E. 337.

976-64 Martin *v.* Stranger, 29 R. I. 464, 72 A. 534.

976-66 Harris *v.* Mason, 120 Tenn. 668, 115 S. W. 1146.

977-67 Parol evidence showing nature of suit received if inquiry collateral and incidental. Garden *v.* Houston, 163 Ala. 300, 50 S. 1030.

978-73 Old Wayne, etc. Assn. *v.* McDonough, 204 U. S. 8.

979-74 Sullivan *v.* Kenney, 148 Ia. 361, 126 N. W. 349. See Grider *v.* Corbin, 116 App. Div. 818, 102 N. Y. S. 181.

979-75 Roberts *v.* Leutzke, 39 Ind. App. 577, 78 N. E. 635.

979-76 **Recital of jurisdiction acquired by publication of summons conclusive.** Leman *v.* MacLennan, 7 O. C. C. (N. S.) 205.

Jurisdictional recitals, prima facie true. Reis *v.* Epperson, 143 Mo. App. 90, 122 S. W. 353.

979-77 P. *v.* Rose, 254 Ill. 332, 98 N. E. 533; Trustees of Schools *v.* Crawford, 155 Ill. App. 170.

Recorded proceedings of corporation to condemn land, cannot be varied by parol. Post *v.* R. Co., 80 Vt. 551, 69 A. 156.

980-79 S. *v.* Fagan, 1 Boyce (Del.) 45, 74 A. 692 (ambiguous date).

981-88 Inhab. of Rockport *v.* Rockland, 109 Me. 512, 84 A. 1077. See vol. 8, p. 472, n. 83, and supplement thereto.

982-91 Parol evidence admissible to show paper executed in county in which attesting officer qualified. Rowe *v.* Spencer, 132 Ga. 426, 64 S. E. 468.

983-94 Belleville *v.* Miller, 257 Ill. 244, 100 N. E. 946; Seass *v.* Monroe, 146 Ill. App. 56; Dunn *v.* City, 140 Ky. 217, 130 S. W. 1089; Geiser Mfg. Co. *v.* Frankford, 40 Pa. Super. 97; S. *v.* City, 64 Wash. 388, 116 P. 878.

Mistake in date of filing plans and specifications shown by parol. Meyers *v.* Wood, 173 Mo. App. 564, 158 S. W. 909. See vol. 8, p. 834.

984-96 Bailey *v.* Des Moines (Ia.), 138 N. W. 853. See also vol. 8, p. 837.

But see Barber P. Co. *v.* O'Brien, 128 Mo. App. 267, 107 S. W. 25.

Omitted facts may be shown by parol. Wheat *v.* Van Tine, 149 Mich. 314, 112 N. W. 933.

984-98 Fogg *v.* Co., 72 N. J. Eq. 736, 66 A. 609.

985-4 Chase *v.* R. Co., 165 Mich. 493, 131 N. W. 118.

986-7 Entries explainable by parol. Westerman *v.* Cleland, 12 Cal. App. 63, 106 P. 606.

987-12 See supra, "Beneficial Associations," 276-16.

987-14 Newmann *v.* Sexton, 156 Ill. App. 517.

Purpose of assessments as recited in resolutions of directors. Hewel *v.* Hogin, 3 Cal. App. 248, 84 P. 1002.

988-15 See Rose *v.* Kadisho, 215 Pa. 69, 64 A. 401.

988-19 Declaring dividend.—Poutch *v.* Co., 147 Ky. 242, 143 S. W. 1003.

989-26 Rose *v.* Kadisho, 215 Pa. 69, 64 A. 401.

990-27 Jenkins *v.* Co., 120 La. 549, 45 S. 435.

990-31 Absence of record of instrument shown by parol. Hendricks *v.* Brooks, 80 Kan. 1, 101 P. 622.

992-42 Wade *v.* Co., 51 Fla. 628, 638, 41 S. 72; Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675.

994-56 Millikin *v.* Gillum, 135 Ky. 280, 122 S. W. 151 (orders of fiscal court); Grayson County *v.* Rogers (Ky.), 122 S. W. 866; Derosia *v.* Loree, 158 Mich. 64, 122 N. W. 357 (signature not attached within prescribed time).

Presence of supervisors who did not vote cannot be shown. Howland *v.* Prentice, 143 Mich. 347, 106 N. W. 1105.

Judgment of board.—Panola County *v.* Carrier, 92 Miss. 148, 45 S. 426.

994-57 Cator *v.* Hays (Tex. Civ.), 122 S. W. 953.

994-60 Minutes of school meeting not conclusive. Tucker *v.* McKay, 131 Mo. App. 728, 111 S. W. 867.

996-71 Rust *v.* S. (Tex. Cr.), 158 S. W. 519.

997-75 Record of clerk of drainage commission. P. *ex. rel.* Arnold *v.* Carr, 231 Ill. 502, 83 N. E. 269.

997-76 Dunn *v.* Youmans, 224 Ill. 34, 79 N. E. 321.

Drainage district.—Where statute requires a complete record to be kept of proceedings to establish a drainage district, parol evidence is inadmissible to impeach the same even in a collateral proceeding. Cobb *v.* Albert, 38 Okla. 296, 132 P. 1075.

997-77 See Foster *v.* Meyers, 117 La. 216, 41 S. 551.

999-84 Tate *v.* Rose, 35 Utah 229, 99 P. 1003.

1000-86 Parol evidence competent to show how papers customarily folded and sealed. Keck *v.* Woodward, 53 Tex. Civ. 267, 116 S. W. 75.

1000-91 Evansville, etc. R. Co. *v.* Broermann, 40 Ind. App. 47, 80 N. E. 972. But see Covington *v.* Regenthal, 33 Ky. L. R. 127, 109 S. W. 341 (recorded plat may be explained, although no allegation of mistake pleaded, if it forms no part of pleadings).

1001-92 Board *v.* Taylor, 133 Ia. 453, 108 N. W. 927.

1002-4 Wells-Fargo & Co. *v.* Johnson, 205 Fed. 60. Ambiguity as to which of two lots was sold for taxes and on which taxes were paid, explained by parol. McCash *v.* Penrod, 131 Ia. 631, 109 N. W. 180.

1003-9 Chapman *v.* Zoberlein, 152 Cal. 216, 92 P. 188.

1004-15 Grimes *v.* Ellyson, 136 Ia. 286, 105 N. W. 418 (record of service of notice cannot be aided by extrinsic evidence).

1005-17 Jordan *v.* McDonnell, 151 Ala. 279, 44 S. 101.

1006-19 See Jordan *v.* McDonnell, 151 Ala. 279, 44 S. 101.

1006-20 Jordan *v.* McDonnell, supra (certificate and name of clerk, "per" deputy clerk, sufficient).

1006-21 Jordan *v.* McDonnell, supra.

1006-22 *Comp.* Seymour *v.* DuBois, 145 Fed. 1003.

1007-25 Internal revenue records privileged.—Meyer *v.* Ins. Co., 127 Wis. 293, 106 N. W. 1087. *Contra,* S. *v.* Schaeffer, 74 Kan. 390, 86 P. 477 (sworn copy inadmissible); S. *v.* Nippert, 74 Kan. 371, 86 P. 478 (same). Certified copy competent. S. *v.* Pigg, 78 Kan. 618, 97 P. 859.

1007-26 Hamon *v.* Foust, 127 Tenn. 32, 150 S. W. 418. See Brecker *v.* Fillingham, 209 Mo. 578, 108 S. W. 41; S. *v.* Dowdy, 145 N. C. 432, 58 S. E. 1002. *Comp.* Ayres *v.* Co., 76 Kan. 149, 90 P. 794.

Land office records. — Although a method of proving land office and other federal records is prescribed by both state statute and act of Congress. This

does not preclude a higher quality of proof than that mentioned in those laws. Harmening *v.* Howland, 25 N. D. 38, 141 N. W. 131. See also supra, 1032-30.

1007-28 Knox *v.* Gibson, 23 Colo. App. 402, 128 P. 470; C. *v.* Ensign, 40 Pa. Super. 157.

1008-29 See Lorenz *v.* U. S., 24 App. Cas. (D. C.) 337 (effect on competency of letters on file in such offices).

Schedules of rates filed with interstate commission.—Shelton *v.* R. Co., 131 Mo. App. 560, 110 S. W. 627. See Griffin *v.* R. Co., 115 Mo. App. 549, 91 S. W. 1015.

Pension vouchers.—Certified copy admissible. Murphy *v.* Cady, 145 Mich. 33, 108 N. W. 493.

1009-30 Kellogg *v.* Finn, 22 S. D. 578, 119 N. W. 545. *Comp.* Nurnberger *v.* U. S., 156 Fed. 721, 84 C. C. A. 377.

Original documents, properly authenticated, admissible. Harmening *v.* Howland, 25 N. D. 38, 141 N. W. 131.

1009-32 Nat. C. R. Co. *v.* Gratigny, 213 Fed. 463 (C. C. A.).

1010-34 Johnston *v.* Well Wks. Co., 208 Fed. 145, 125 C. C. A. 361.

1011-37 U. S. *v.* Pierson, 145 Fed. 814, 76 C. C. A. 390.

1012-41 U. S. *v.* Pierson, supra.

1013-45 Certified copy of letter of secretary of state on political question, admissible. Am. B. Co. *v.* Co., 160 Fed. 184.

1015-54 *Comp.* Milwaukee, etc. Co. *v.* Gordon, 37 Mont. 209, 95 P. 995.

1015-57 See Van Deventer *v.* Mortimer, 56 Misc. 650, 107 N. Y. S. 564.

1016-59 Whited *v.* Johnson (Tex. Civ.), 167 S. W. 812. Board of supervisors not a court. In re Felker, 3 Ala. App. 231, 58 S. 94.

1017-63 Beauchamp *v.* Bertig, 90 Ark. 351, 119 S. W. 75; Light *v.* Reed, 234 Ill. 626, 85 N. E. 282; Skrillow *v.* Rubonovitz, 113 N. Y. S. 835.

1017-65 Light *v.* Reed, 234 Ill. 626, 85 N. E. 282 (certificate unimpeachable because of inference unnecessary part absent).

1019-72 Brack *v.* Morris, 90 Kan. 64, 132 P. 1185.

1019-74 Hazel *v.* Jacobs, 78 N. J. L. 459, 75 A. 903.

1019-76 Strecker *v.* Railson, 16 N. D. 68, 111 N. W. 612, 8 L. R. A. (N. S.) 1099.

1020-78 Van Deventer *v.* Mortimer, 56 Misc. 650, 107 N. Y. S. 564.

1021-81 Strecker *v.* Railson, 16 N. D. 68, 111 N. W. 612, 8 L. R. A. (N. S.) 1099.

1021-82 See Van Deventer *v.* Mortimer, 56 Misc. 650, 107 N. Y. S. 564.

1022-84 Holyoke *v.* Est., 110 Me. 469, 87 A. 40.

1023-92 *Comp.* Seymour *v.* DuBois, 145 Fed. 1003.

1024-99 In re Felker, 3 Ala. App. 231, 58 S. 94; Henry I. Co. *v.* Semonian, 45 Colo. 260, 100 P. 425; Chapman *v.* Chapman, 74 Neb. 388, 104 N. W. 880; Hagan *v.* Snider, 44 Tex. Civ. 139, 98 S. W. 213; Wolf *v.* King, 49 Tex. Civ. 41, 107 S. W. 617.

1025-5 But see Britton *v.* Chamberlain, 234 Ill. 246, 84 N. E. 895.

1026-9 Rich *v.* Cohen, 61 Misc. 148, 114 N. Y. S. 672.

1028-15 See Britton *v.* Chamberlain, 234 Ill. 246, 84 N. E. 895 (certified by justice of supreme court of New York).

1028-19 See Britton *v.* Chamberlain, 234 Ill. 246, 84 N. E. 895.

1028-20 Davis *v.* Davis, 24 S. D. 474, 124 N. W. 715 (recital that clerk's certificate is "entitled to full faith and credit" equivalent to "that the attestation is in due form").

1029-23 Brown *v.* Baxter, 77 Kan. 97, 94 P. 155, 574.

1031-27 See Bohlander *v.* Heikes, 168 Fed. 886, 94 C. C. A. 298.

1032-30 Sullivan *v.* Kenney, 148 Ia. 361, 126 N. W. 349; Wolf *v.* King, 49 Tex. Civ. 41, 107 S. W. 617.

1032-31 Barringer *v.* Dauernheim, 127 La. 679, 53 S. 923; Straub *v.* Becker, 127 N. Y. S. 310.

1032-33 Ex parte Law, 2 Ala. App. 257, 56 S. 79; Milwaukee, etc. Co. *v.* Gordon, 37 Mont. 209, 95 P. 995; Pirrung *v.* Council, 104 App. Div. 571, 93 N. Y. S. 575; Hamon *v.* Foust, 127 Tenn. 32, 150 S. W. 418. See El Paso, etc. R. Co. *v.* Harris (Tex. Civ.), 110 S. W. 145.

Statute relating to foreign countries not applicable to sister states. Van Deventer *v.* Mortimer, 56 Misc. 650, 107 N. Y. S. 564.

Statute not applicable to courts of limited jurisdiction, whose records must be proved by common law methods. Strecker *v.* Railson, 16 N. D. 68, 111 N. W. 612, 8 L. R. A. (N. S.) 1099.

Statute in terms applying only to for-

eign records construed to apply to records of sister state. Ayres *v.* Co., 76 Kan. 149, 90 P. 794.

Where clerk of court is also county clerk, under statute providing for admission of copies of court records certified by clerk, his certificate must be made as clerk of court with seal thereof and show record to be one of court and not of county, otherwise copy must be certified as prescribed by act of congress. S. *v.* Kniffen, 44 Wash. 485, 86 P. 837.

General statute governing use of certified copies of records does not apply to sister or foreign states, at least where there is a special statute governing latter. S. *v.* Kniffen, 44 Wash. 485, 86 P. 837.

1033-34 Scott *v.* Herrell, 27 App. Cas. (D. C.) 395; Sullivan *v.* Kenney, 148 Ia. 361, 126 N. W. 349; Douglas *v.* Teller, 53 Wash. 695, 102 P. 761.

1033-35 Sullivan *v.* Kenney (Ia.), 126 N. W. 349.

1033-36 But see S. *v.* Kniffen, 44 Wash. 485, 86 P. 837.

1033-37 Strecker *v.* Railson, 16 N. D. 68, 111 N. W. 612, 8 L. R. A. (N. S.) 1099.

1033-38 Gordon *v.* Wageman, 77 Neb. 185, 108 N. W. 1067. See Van Deventer *v.* Mortimer, 56 Misc. 650, 107 N. Y. S. 564.

1034-40 Miller *v.* R. Co., 18 N. D. 19, 118 N. W. 344 (in absence of local statute to contrary).

1034-41 Wilcox *v.* Bergman, 96 Minn. 219, 104 N. W. 955.

1034-42 Force and effect of such record and copy in sister state must be shown. Wilcox *v.* Bergman, supra.

1035-43 *Comp.* Miller *v.* R. Co., 18 N. D. 19, 118 N. W. 344.

1035-45 P. *v.* LeDoux, 155 Cal. 535, 102 P. 517.

1035-47 Sherwood *v.* Wallin, 154 Cal. 735, 99 P. 191. *Comp.* Pepper *v.* James, 7 Ga. App. 518, 67 S. E. 218.

1036-48 Wilcox *v.* Bergman, 96 Minn. 219, 104 N. W. 955.

1036-50 In re Felker, 3 Ala. App. 231; 58 S. 94; Milwaukee, etc. Co. *v.* Gordon, 37 Mont. 209, 95 P. 995.

1036-51 Milwaukee, etc. Co. *v.* Gordon, supra.

1036-57 See Milwaukee, etc. Co. *v* Gordon, supra.

1037-58 Freeman *v.* Inst. (Tex. Civ.), 128 S. W. 629 (only examined copy admissible).

1037-61 Pirrung *v.* Assn., 104 App. Div. 571, 93 N. Y. S. 575 (vital statistics). See S. *v.* McDonald, 55 Or. 419, 104 P. 967.

1038-63 Krekel *v.* Guenzler (Ky.), 124 S. W. 848; S. *v.* McDonald, supra.

1038-64 Royal Neighbors *v.* Hayes, 150 Ky. 626, 150 S. W. 845; In re Pearson, 5 Pa. C. C. 330.

1038-65 See S. *v.* McDonald, 55 Or. 419, 104 P. 967.

1039-68 In re McClellan, 20 S. D. 498, 107 N. W. 681; Wolf *v.* King, 49 Tex. Civ. 41, 107 S. W. 617.

1039-70 See Gautier Steel Co., Ltd., 2 Pa. C. C. 399.

1040-81 Genuineness of certifying officers' signature must be authenticated. Guerra *v.* Co. (Tex. Civ.), 163 S. W. 669.

1041-83 See Gautier Steel Co., Ltd., supra.

1043-89 Scott *v.* Herrell, 27 App. Cas. (D. C.) 395. *Comp.* Ayres *v.* Co., 76 Kan. 149, 90 P. 794.

1043-91 See Van Deventer *v.* Mortimer, 56 Misc. 650, 107 N. Y. S. 564.

REFERENCES

3-1 New York practice.—Johnson *v.* Co., 58 Misc. 353, 110 N. Y. S. 1098; Russell *v.* McDonald, 125 App. Div. 844, 110 N. Y. S. 950; Northrop *v.* Butler, 126 App. Div. 906, 110 N. Y. S. 815; Sullivan *v.* McCann, 124 App. Div. 126, 108 N. Y. S. 909; Neal *v.* Gilleran, 123 App. Div. 639, 108 N. Y. S. 118; Lustgarten *v.* Harlam, 56 Misc. 606, 107 N. Y. S. 612; Kindberg *v.* Chapman, 115 App. Div. 154, 100 N. Y. S. 686. Applicable to suits in equity as well as at law. Roomeo *v.* Smith, 123 App. Div. 416, 107 N. Y. S. 1088.

Proceedings to review tax assessments, proper to order reference. P. *v.* Feitner, 53 Misc. 334, 104 N. Y. S. 794, 105 N. Y. S. 1136.

3-4 Speakman *v.* Vest, 154 Ala. 412, 45 S. 667; Smith *v.* Kunert, 17 N. D. 120, 115 N. W. 76. *Comp.* Russell *v.* Alt, 12 Ida. 789, 88 P. 416.

4-5 Allen *v.* Wilbur, 199 Mass. 366, 85 N. E. 429; Boston, etc. R. Co. *v.* S., 76 N. H. 86, 79 A. 701.

9-21 Jones *v.* Gilbert, 117 App. Div. 775, 102 N. Y. S. 983. See Baldwin *v.* Patrick, 39 Colo. 347, 91 P. 828.

Uncontradicted and unimpeached testimony, not intrinsically improbable,

cannot be disregarded. Larson *v.* Glos, 235 Ill. 584, 85 N. E. 926.

10-23 See Atlantic T. Co. *v.* Osgood, 155 Fed. 700.

11-29 Jones *v.* Gilbert, 117 App. Div. 775, 102 N. Y. S. 983.

13-33 Chadeloid C. Co. *v.* Co., 173 Fed. 797, equity suit.

19-50 McGuire *v.* Appling, 157 Ala. 309, 47 S. 700 (must conform to court rules); Boldman *v.* Co., 145 Ill. App. 551; Marshall E. Co. *v.* Co., 203 Mass. 410, 89 N. E. 548; Hunneman *v.* Phelps, 199 Mass. 15, 85 N. E. 169; Lehman *v.* Powe, 95 Miss. 446, 49 S. 622; Phalen *v.* Co., 136 Wis. 571, 118 N. W. 219. See Winkles *v.* Co., 132 Ga. 32, 63 S. E. 627.

That referee made material findings on incompetent evidence to be raised by motion to recommit report for amendment before trial. Jean *v.* Cawley (Mass.), 105 N. E. 1009.

20-51 Waiver of objection. In re Hirsch, 116 App. Div. 367, 101 N. Y. S. 893.

23-60 See Cook *v.* Scheffreen, 215 Mass. 444, 102 N. E. 715.

23-62 Greenville *v.* Earle, 80 S. C. 321, 60 S. E. 1117.

25-68 But parol evidence is admissible to prove delivery. Farmers Sav. Bk. *v.* Newton, 154 Ia. 49, 134 N. W. 436.

26-73 Return of all evidence taken, presumed. Guarantee, etc. Co. *v.* Edwards, 164 Fed. 809, 90 C. C. A. 585.

Master's findings only prima facie correct, aside from statute. Larson *v.* Glos, 235 Ill. 584, 85 N. E. 926.

27-74 It is presumed findings are correct; but consent to reference to a master which will render his findings conclusive under rule in Kimberly *v.* Arms, 129 U. S. 512, not inferred from failure to object thereto. Guarantee, etc. Co. *v.* Edwards, 164 Fed. 809, 90 C. C. A. 585; White *v.* Hale, 208 Mass. 94, 94 N. E. 259.

27-75 Findings contained in report admissible. Welch *v.* McNeil, 214 Mass. 402, 101 N. E. 985.

27-76 Wakefield *v.* Surety Co., 209 Mass. 173, 95 N. E. 350.

28-77 Du Bose *v.* Thomas, 136 Ga. 673, 71 S. E. 1106.

29-78 Brock *v.* Wildey, 132 Ga. 19, 63 S. E. 794.

30-81 Silence of report as to material fact raises presumption fact not proved and does not exist. Brooks *v.* Garner, 20 Okla. 236, 97 P. 995.

31-82 Guarantee, etc. Co. *v.* Edwards, 164 Fed. 809, 90 C. C. A. 585; Blakesmore *v.* Johnson, 24 Okla. 544, 103 P. 554.

34-91 Morris *v.* Lemp, 13 Ida. 116, 88 P. 761. *Comp.* Guarantee Co. *v.* Edwards, 7 Ind. Ty. 297, 104 S. W. 624.

REFORMATION OF INSTRUMENTS

38-1 Fidelity, etc. Co. *v.* Hilliard, 65 Fla. 443, 62 S. 585; Hesson *v.* Hesson, 121 Md. 626, 89 A. 107; Aetna L. Ins. Co. *v.* Smelt. Co., 169 Mo. App. 550, 154 S. W. 827; Sayre *v.* Moir (Or.), 137 P. 215; Bibb *v.* Co., 109 W. Va. 261, 64 S. E. 32.

38-2 Indian R. Mfg. Co. *v.* Wooten, 55 Fla. 745, 46 S. 185; Griffin *v.* Societe, 53 Fla. 801, 44 S. 342; Robinson *v.* Korns, 250 Mo. 663, 157 S. W. 790; Delaware Ins. Co. *v.* Hill (Tex. Civ.), 127 S. W. 283.

Evidence sufficient.—White *v.* Adams, 138 Ga. 306, 75 S. E. 321.

38-3 Ezell *v.* Humphrey, 90 Ark. 24, 117 S. W. 758.

40-8 Wright *v.* Bott (Tex. Civ.), 163 S. W. 360.

40-10 Bierman *v.* College, 20 Pa. Super. 133.

40-13 Simpson P. & H. Co. *v.* Geschke, 75 N. J. Eq. 394, 72 A. 90.

41-15 Williams *v.* McManus, 90 S. C. 490, 73 S. E. 1038.

41-16 Newell *v.* Brew. Co., 9 Del. Ch. 240, 80 A. 672; Knuckles *v.* Co. (Ky.), 116 S. W. 1193; Moran Mfg. Co. *v.* Co., 210 Mo. 715, 109 S. W. 47, Am. M. Co. *v.* Co., 39 Mont. 476, 104 P. 525; Goerke Co. *v.* Diskon (N. J. Eq.), 75 A. 780; Boak *v.* Ins. Co., 226 Pa. 493, 75 A. 713; Grant M. Co. *v.* Abbot, 142 Wis. 279, 124 N. W. 264.

Violation of a contemporaneous oral promise is not enough. White *v.* Hall, 113 Va. 427, 74 S. E. 212.

Evidence held insufficient.—Security Trust, etc. Co. *v.* Farraday, 9 Del. Ch. 306, 82 A. 24.

Evidence sufficient.—Drum *v.* Drum, 251 Ill. 232, 95 N. E. 1071; Pfiester *v.* Ins. Co., 85 Kan. 97, 116 P. 245; Godwin *v.* Da Conturbia, 115 Md. 488, 80 A. 1016; Brown *v.* Tuschoff, 235 Mo. 449, 138 S. W. 497; Strauss *v.* Specialty Co., 89 Neb. 176, 131 N. W. 193; Rohlinger *v.* Orchard Co., 64 Wash. 348, 116

P. 1095; Rosenbaum *v.* Evans, 63 Wash. 506, 115 P. 1054.

43-24 Mills *v.* Kampfe, 135 App. Div. 748, 119 N. Y. S. 903.

43-25 Delaware Ins. Co. *v.* Hill (Tex. Civ.), 127 S. W. 283.

44-39 Rundle *v.* Bohrer, 222 Ill. 475, 78 N. E. 831.

44-40 Harmon *v.* Pohle (Ind. App.), 103 N. E. 1087.

45-44 Bap. Book Concern *v.* Deitzman, 140 Ky. 364, 131 S. W. 8.

45-46 Miller *v.* Stuart, 107 Md. 23, 68 A. 273.

45-47 Eustis Mfg. Co. *v.* Co., 201 Mass. 391, 87 N. E. 596.

45-48 Kinyon *v.* Cunningham, 146 Mich. 430, 109 N. W. 675.

45-50 Dougherty *v.* Dougherty, 204 Mo. 228, 102 S. W. 1099; Redding *v.* Co., 127 Mo. App. 625, 106 S. W. 557.

45-53 Mills *v.* Kampfe, 135 App. Div. 748, 119 N. Y. S. 903.

46-59 Bower *v.* Bowser, 49 Or. 182, 88 P. 1104.

46-63 Scheuer *v.* Chloupek, 130 Wis. 72, 109 N. W. 1035.

46-64 Bierman *v.* College, 20 Pa. Super. 133.

46-65 It must be found from the testimony that the instrument as written does not express the contract of either of the parties thereto. Goodrum *v.* Bk., 102 Ark. 326, 144 S. W. 198.

46-66 Cox *v.* Beard, 75 Kan. 369, 89 P. 671.

46-69 When scrivener acts solely for grantee his mistake is mistake of grantee and is not mutual. Dougherty *v.* Dougherty, 204 Mo. 228, 102 S. W. 1099.

47-73 Roycroft *v.* Jordan (Ala.), 62 S. 701.

47-75 Crane *v.* Blackburn (Ala.), 65 S. 812.

47-76 Turner *v.* Todd, 85 Ark. 62, 107 S. W. 181.

47-77 Indian R. Mfg. Co. *v.* Wooten, 55 Fla. 745, 46 S. 185, "proof must be full and satisfactory."

47-79 Bushert *v.* Stevenson (Ia.), 113 N. W. 916.

48-88 Gray *v.* Jenkins, 151 N. C. 80, 65 S. E. 644.

48-90 Mistake must be shown beyond reasonable doubt. Fuller *v.* Knapp, 82 Vt. 166, 72 A. 688; Fairbanks *v.* Harvey, 83 Vt. 283, 75 A. 268. Evidence must be conclusive. Bibb *v.* Co., 109 Va. 261, 64 S. E. 32. Must be clear and convincing. Norton *v.* Gross, 52 Wash. 341, 100 P. 734.

48-94 *Comp.* Kinyon *v.* Cunningham, 146 Mich. 430, 109 N. W. 675.

49-96 Indian R. Mfg. Co. *v.* Wooten, 55 Fla. 745, 46 S. 185.

50-7 See Griffith *v.* York, 152 Ky. 14, 153 S. W. 31.

51-8 Home & F. Co. *v.* Freitas, 153 Cal. 680, 96 P. 308.

51-9 **If evidence comes up to rule** laid down, question for jury. Archer *v.* McClure (N. C.), 81 S. E. 1081.

51-11 **Small amount** of clear and credible evidence necessary where contract highly improbable. Biser *v.* Bauer, 205 Fed. 229, 123 C. C. A. 417. **Fair preponderance.**—Harmon *v.* Pohle (Ind. App.), 103 N. E. 1087. **Slight evidence insufficient.**—Driskill *v.* Ashley (Mo.), 167 S. W. 1026.

52-12 Greil *v.* Tillis, 170 Ala. 391, 54 S. 524; Weltner *v.* Thurmond, 17 Wyo. 268, 98 P. 590.

52-13 Sayre *v.* Moir (Or.), 137 P. 215.

52-16 Mitchell Mfg. Co. *v.* Kempner, 84 Ark. 349, 105 S. W. 880; Strout *v.* Lewis, 104 Me. 65, 71 A. 137; Knowles *v.* Knowles, 33 R. I. 491, 82 A. 257; Williams *v.* McManus, 90 S. C. 490, 73 S. E. 1038; Snipes *v.* Morton (Tex. Civ.), 144 S. W. 286.

54-18 Biser *v.* Bauer, 205 Fed. 229, 123 C. C. A. 417; Hand *v.* Cox, 164 Ala. 348, 51 S. 519; St. Louis, etc. R. Co. *v.* McConnell (Ark.), 161 S. W. 496; Ford *v.* Munnelley (Ark.), 165 S. W. 291 (clear, convincing and satisfactory); Home & F. Co. *v.* Freitas, 153 Cal. 680, 96 P. 308; Loukowski *v.* Pryor, 46 Colo. 584, 106 P. 7; Miller *v.* Mandel, 259 Ill. 314, 102 N. E. 760; McCarl *v.* Ins. Co., 151 Ia. 669, 132 N. W. 12; Salzman *v.* Assn., 142 Ia. 99, 120 N. W. 697; Griffith *v.* York, 152 Ky. 14, 153 S. W. 31 (convincing); Wilson *v.* Reynolds, 154 Ky. 159, 156 S. W. 1036; Mahoning C. Co. *v.* Dowling (Ky.), 124 S. W. 370; Mills *v.* Shreve (Mich.), 146 N. W. 374; Robinson *v.* Korns, 250 Mo. 663, 157 S. W. 790; Aetna L. Ins. Co. *v.* Smelt. Co., 169 Mo. App. 550, 154 S. W. 827; Redding *v.* Co., 127 Mo. App. 625, 106 S. W. 557; Moran Mfg. Co. *v.* Co., 210 Mo. 715, 109 S. W. 47; Brown *v.* Gwin, 197 Mo. 499, 95 S. W. 208; Am. M. Co. *v.* Co., 39 Mont. 476, 104 P. 525; Hallgren *v.* Becker, 94 Neb. 415, 143 N. W. 467; Disbrow *v.* Disbrow, 146 N.

Y. S. 63; City *v.* Matthews, 156 App. Div. 490, 141 N. Y. S. 432; Beatty *v.* Ireland, 152 App. Div. 588, 137 N. Y. S. 456; Baird *v.* R. Co., 129 N. Y. S. 329; Lamm *v.* Lamm, 163 N. C. 71, 79 S. E. 290; Schafer *v.* Hotel Co. (Okla.), 137 P. 664; West Assur. Co. *v.* Hillyer, etc. Co. (Tex. Civ.), 167 S. W. 816; Delaware Ins. Co. *v.* Hill (Tex. Civ.), 127 S. W. 283; Carlson *v.* Druse (Wash.), 140 P. 570.

Clear preponderance.—Codd *v.* Langley, 75 Wash. 45, 134 P. 467.

55-21 Lucas *v.* Boyd, 158 Ala. 338, 47 S. 1017; Ezell *v.* Humphrey, 90 Ark. 24, 117 S. W. 758; Griffin *v.* Societe, 53 Fla. 801, 44 S. 342; Seery *v.* Catholic Order, 176 Ill. App. 307; Fosler *v.* Miller, 132 Ill. App. 464; Tucker *v.* Glew (Ia.), 139 N. W. 565; Rockport C. Co. *v.* Carter, 157 Ky. 555, 163 S. W. 734; Knuckles *v.* Co. (Ky.), 116 S. W. 1193; Kinyon *v.* Cunningham, 146 Mich. 430, 109 N. W. 675; Lenheim *v.* Smith, 54 Pa. Super. 147.

"Full and satisfactory." — Robinson, etc. Co. *v.* Johnson, 63 Fla. 562, 58 S. 841.

56-22 Page *v.* Whatley, 162 Ala. 473, 50 S. 116; Fidelity, etc. Co. *v.* Hilliard, 65 Fla. 443, 62 S. 585; Buck *v.* Garber, 261 Ill. 378, 103 N. E. 1059 (clear, convincing and satisfactory); Perkins *v.* Herring, 110 Va. 822, 67 S. E. 515 (clear, convincing and satisfactory).

56-26 Prior *v.* Davis, 58 Fla. 510, 50 S. 535; Highsmith *v.* Page, 158 N. C. 226, 73 S. E. 998.

57-27 Lines *v.* Willey, 253 Ill. 440, 97 N. E. 843; Bonneville *v.* Dum (Tex. Civ.), 128 S. W. 1179 (clear and specific).

57-28 Bennett Jellico Coal Co. *v.* Coal Co., 152 Ky. 838, 154 S. W. 922 (clear, positive and unequivocal).

57-29 Leslie *v.* O'Neil, 108 Ark. 607, 156 S. W. 1017 (clear, unequivocal and decisive); Strout *v.* Lewis, 104 Me. 65, 71 A. 137.

57-30 Robinson *v.* Korns, 250 Mo. 663, 157 S. W. 790, clear and unequivocal.

57-31 White *v.* Co., 165 Ala. 218, 51 S. 764; McKnight *v.* Witherington, 94 Ark. 621, 127 S. W. 727 ("decisive, unequivocal and beyond reasonable controversy"); Wilson-W. Co. *v.* G. Co., 94 Ark. 200, 126 S. W. 847; Cherry *v.* Brizzolara, 89 Ark. 309, 116 S. W. 668; Tyler *v.* Bk., 89 Ark. 612, 116 S. W. 213; Clark *v.* Clark, 141 Ga. 437, 81 S. E. 129 (clear, unequivocal and decisive); Doeksstader *v.* Gibbs, 34 Okla. 497, 126 P. 229 (clear, unequivocal and decisive).

58-34 Parker *v.* Carter, 91 Ark. 162, 120 S. W. 836.

"So clearly as to leave no substantial doubt." Adolph *v.* Adolph, 148 Wis. 210, 134 N. W. 353, *cit.* Burnham *v.* Burnham, 119 Wis. 509, 97 N. W. 176, 100 Am. St. 895, and cases cited.

58-36 Additional cases as to sufficiency.—Western L. & S. Co. *v.* Thibodeau, 159 Fed. 370, 86 C. C. A. 370; Turner *v.* Todd, 85 Ark. 62, 107 S. W. 181; Bushert *v.* Stevenson (Ia.), 113 N. W. 916; Coggins *v.* Carey, 106 Md. 204, 66 A. 673; Baker *v.* Montgomery, 79 Neb. 98, 110 N. W. 695; Nat. Bk. *v.* Shaw, 218 Pa. 612, 67 A. 875; Gailey *v.* Co., 34 Pa. Super. 533; Bierman *v.* College, 20 Pa. Super. 133; Isner *v.* Nydegger, 63 W. Va. 677, 60 S. E. 793.

58-37 Leslie *v.* O'Neil, 108 Ark. 607, 156 S. W. 1017; Fidelity, etc. Co. *v.* Hilliard, 65 Fla. 443, 62 S. 585; Horne *v.* Co., 55 Fla. 690, 45 S. 1016; Miller *v.* Stuart, 107 Md. 23, 68 A. 273; Crouch *v.* Thompson, 254 Mo. 477, 162 S. W. 149; First Nat. Bk. *v.* Ins. Co., 17 N. M. 334, 127 P. 1115; Stevens *v.* Johnson (W. Va.), 78 S. E. 377. See Birch *v.* Baker, 81 N. J. Eq. 264, 86 A. 932.

"Strong, unequivocal, and beyond reasonable controversy." Doniphan K. & S. R. Co. *v.* Mo. & N. A. R. Co., 104 Ark. 475, 149 S. W. 60; Robinson, etc. Co. *v.* Johnson, 63 Fla. 562, 58 S. 841.

59-38 Fife *v.* Cate, 85 Vt. 418, 82 A. 741.

59-39 Brown & Hill *v.* McCabe (W. Va.), 77 S. E. 538 (clear, convincing and free from reasonable doubt); Smith *v.* Owens, 63 W. Va. 60, 59 S. E. 762; Isner *v.* Nydegger, 63 W. Va. 677, 60 S. E. 793.

59-40 Newell *v.* Brew. Co., 9 Del. Ch. 240, 80 A. 672; Lines *v.* Willey, 253 Ill. 440, 97 N. E. 843.

59-42 Waslee *v.* Rossman, 231 Pa. 219, 80 A. 643; National Bk. *v.* Shaw, 218 Pa. 612, 67 A. 875.

"That there was a mistake, and that it was mutual, must be shown by a very high degree of proof, as may be seen from the following expressions gathered from our own reports: The proof must be 'full, clear, and decisive,' 'strong, satisfactory, and convincing,' 'free from all doubt and uncertainty,' 'beyond fair and reason-

able controversy,' 'beyond reasonable doubt,' such as 'entirely to satisfy the conscience of the court.' Farley *v.* Bryant, 32 Me. 474; Young *v.* McGown, 62 Me. 56; Fessenden *v.* Ockington, 74 Me. 123; Andrews *v.* Andrews, 81 Me. 337, 17 Atl. 166; Cross *v.* Bean, 81 Me. 525, 17 Atl. 710; Linscott *v.* Linscott, 83 Me. 384, 22 Atl. 253. But this does not mean, of course, that the testimony on the whole must be free from contradiction. A burden as severe as that required by law in this case is well sustained in numberless cases, where life or liberty are at stake, though the testimony is in sharp conflict.'' Brunswick *v.* Topsham Water Dist. *r.* Inhab. of Topsham, 109 Me. 334, 84 A. 644.

60-49 Lesser *v.* Demarest (N. J Eq.), 72 A. 14.

60-53 Panhandle Lumb. Co. *v.* Rancour, 24 Ida. 603, 135 P. 558.

61-54 Owsley *v.* Matson, 156 Cal. 401, 104 P. 983; Home & F. Co. *v.* Freitas, 153 Cal. 680, 96 P. 308.

Insufficient evidence.—Tanner *v.* Newton, 254 Ill. 432, 98 N. E. 929.

64-65 Merchants' Mut. Fire Ins. Co. *v.* Harris, 51 Colo. 95, 116 P. 143; Lines *v.* Willey, 253 Ill. 440, 97 N. E. 843.

65-70 Home & F. Co. *v.* Freitas, 153 Cal. 680, 96 P. 308; Laufer *v.* Moppins, 44 Tex. Civ. 472, 99 S. W. 109.

67-71 Bushert *v.* Stevenson (Ia.), 113 N. W. 916; Moran Mfg. Co. *v.* Co., 210 Mo. 715, 109 S. W. 47; Gailey *v.* Co., 34 Pa. Super. 533; National Bk. *v.* Shaw, 218 Pa. 612, 67 A. 875; Isner *v.* Nydegger, 63 W. Va. 677, 60 S. E. 793.

72-99 Evidence dehors instrument inadmissible to show mistake in expressing agreement. Torrey *v.* McFadyen, 165 N. C. 237, 81 S. E. 296.

72-1 Gray *v.* Jenkins, 151 N. C. 80, 65 S. E. 644; Bell *v.* McJones, 151 N. C. 85, 65 S. E. 646.

74-23 Biser *v.* Bauer, 205 Fed. 229, 123 C. C. A. 417; Fresno C. Co. *v.* Hart, 152 Cal. 450, 92 P. 1010; House *v.* McMullen, 9 Cal. App. 664, 100 P. 344; First Nat. Bk. *v.* Ins. Co., 17 N. M. 334, 127 P. 1115; Beatty *v.* Ireland, 152 App. Div. 588, 137 N. Y. S. 456; Archer *v.* McClure (N. C.) 81 S. E. 1081; Tossini *v.* Donahue, 22 S. D. 277, 117 N. W. 148; Hughes *v.* Payne, 22 S. D. 293, 117 N. W. 363; Harry *v.* Hamilton (Tex. Civ.), 154 S. W. 637. See vol. 9, p. 343, nn. 74, 77, and supplement thereto.

74-24 Sloss-S. S. & I. Co. *v.* Ins. Co., 74 N. J. Eq. 635, 70 A. 380; Delaware Ins. Co. *v.* Hill (Tex. Civ.), 127 S. W. 283.

75-29 McCluskey *v.* Scott (Ia.), 124 N. W. 796.

75-30 Parol evidence not received to reform contract void under statute of frauds. Mead *v.* White, 53 Wash. 638, 102 P. 753.

76-34 Sims *v.* Jeter, 129 La. 262, 55 S. 877; Efta *v.* Swanson, 109 Minn. 94, 123 N. W. 56; Syler *v.* Culp (Tex. Civ.), 138 S. W. 175.

79-37 Hughes *v.* Payne, 22 S. D. 293, 117 N. W. 363.

81-51 Delaware Ins. Co. *v.* Hill (Tex. Civ.), 127 S. W. 283.

81-54 See U. S. H. & A. Ins. Co. *v.* Emerick (Ind. App.), 103 N. E. 435.

81-56 Austin *v.* Hunter, 85 S. C. 472, 67 S. E. 734.

81-57 Owsley *v.* Matson, 156 Cal. 401, 104 P. 983 (personal knowledge of how mistake occurred, not essential); King *v.* Edw. Thompson Co. (Ind. App.), 104 N. E. 106.

82-60 Collection of premiums after apparent date of expiration may be shown so as to make policy run for longer term. Flickinger *v.* Ins. Co., 136 Ia. 258, 113 N. W. 824.

84-68 Kunz *v.* Mason, 75 N. J. Eq. 616, 73 A. 869.

84-73 Moore *v.* Moore, 151 N. C. 555, 66 S. E. 598.

85-75 Tossini *v.* Donahoe, 22 S. D. 277, 117 N. W. 148.

85-78 See McCluskey *v.* Scott (Ia.), 124 N. W. 796.

85-79 Long *v.* Gilbert, 133 Ga. 691, 66 S. E. 894; Aetna L. Ins. Co. *v.* Smelt. Co., 154 Mo. App. 550, 154 S. W. 827.

Note signed by agent, admissible, it being contended he was authorized to sign principal's name, and failed to do so by fraud, accident or mistake, through mortgage securing it void because of misdescription of property. Foddrill *v.* Dooley, 131 Ga. 790, 63 S. E. 350.

86-80 Verified denial, given weight. Lesser *v.* Demarest (N. J. Eq.), 72 A. 14.

86-82 Value of improvements admissible. Allen *v.* Purcell, 141 Ga. 226, 80 S. E. 713.

86-83 Baker *v.* Montgomery, 78 Neb. 98, 110 N. W. 695; Gailey *v.* Co., 34 Pa. Super. 533.

86-85 Fife *v.* Cate, 85 Vt. 418, 82 A. 741.

87-87 Loring *v.* Grummon, 176 Ala. 240, 57 S. 819.

87-92 Hesson *v.* Hesson, 121 Md. 626, 89 A. 107.

88-98 Allen *v.* Spensley, 202 Fed. 62, 120 C. C. A. 378.

90-8 Home & F. Co. *v.* Freitas, 153 Cal. 680, 96 P. 308.

REFRESHING MEMORY

Stenographic report read to one's own witness, 152-89; *Going over scene of crime,* 158-4; *Of jury,* 158-4.

94-1 S. *v.* Kiviatkowski, 83 N. J. L. 650, 85 A. 209. Privilege largely discretionary with court. Winn *v.* Modern Woodmen, 157 Mo. App. 1, 137 S. W. 292.

95-2 Moore *v.* Co., 82 Ark. 485, 102 S. W. 385; Sizer Co. *v.* Melton, 129 Ga. 143, 58 S. E. 1055; Hawaii *v.* Toyotaro, 11 Haw. 195; Hawaii *v.* Hang, 10 Haw. 94; Richardson F. Co. *v.* Seymour, 235 Ill. 319, 85 N. E. 496; Diamond G. Co. *v.* Wietzychowski, 227 Ill. 338, 81 N. E. 392; Lindenbaum *v.* R. Co., 197 Mass. 314, 84 N. E. 129; Meriwether *v.* R. Co., 128 Mo. App. 647, 107 S. W. 434; Gibbons *v.* Co., 125 App. Div. 741, 110 N. Y. S. 96; Proctor *v.* S., 54 Tex. Cr. 254, 112 S. W. 770 (former testimony); Virginian R. Co. *v.* Jeffries, 110 Va. 471, 66 S. E. 731.

97-3 Eberson *v.* Co., 130 Mo. App. 296, 109 S. W. 62; DePalma *v.* Weinman, 15 N. M. 68, 103 P. 782; Josias *v.* Nivois, 56 Misc. 557, 107 N. Y. S. 15.

99-4 Diamond G. Co. *v.* Wietzychowski, 227 Ill. 338, 81 N. E. 392; Callman *v.* Bruckenfeld, 108 N. Y. S. 1070.

99-5 Curtis *v.* S., 89 Ark. 394, 117 S. W. 521; Hawaii *v.* Hang, 10 Haw. 94; Hawaii *v.* Toyotaro, 11 Haw. 195; Diamond G. Co. *v.* Wietzychowski, supra; Einstein *v.* Co., 132 Mo. App. 82, 111 S. W. 859.

99-7 Blalock *v.* Ins. Co., 13 Ga. App. 486, 79 S. E. 374; Diamond G. Co. *v.* Wietzychowski, 227 Ill. 338, 81 N. E. 392; McCabe *v.* Swift, 143 Ill. App. 404; Graham *v.* Dillon, 144 Ia. 82, 121 N. W. 47; Title G. & S. Co. *v.* Co., 146 Ky. 702, 143 S. W. 401; Lindenbaum *v.* R. Co., 197 Mass. 314, 84 N. E. 129; Howard *v.* Moore, 79 N. J. L. 329, 75 A. 435; Cohen *v.* Ins. Office, 198 N. Y. 140, 91 N. E. 265; Morris *v.* R. Co., 36 Utah 14, 102 P. 629. See Smith *v.* Ins. Co., 21 S. D. 433, 113 N. W. 94; Brown *v.* S. (Tex. Cr.), 162 S. W. 339.

"With the memoranda recollection was so refreshed that they were able to testify from recollection to the matters detailed. . . . His testimony concerning it is, in substance, that he set down in it what he found at the time it was made, and knew at that time that it was correct." Close *v.* R. Co., 169 Mich. 392, 135 N. W. 346.

101-8 C. *v.* Edgerton, 200 Mass. 318, 86 N. E. 768; Eberson *v.* Co., 130 Mo. App. 296, 109 S. W. 62. See Madunkeunk D. & I. Co. *v.* Co., 102 Me. 257, 66 A. 537; Catlett *v.* Stokes, 33 S. D. 278, 145 N. W. 554.

102-9 Roe *v.* Doe (Ala.), 63 S. 949; Richardson F. Co. *v.* Seymour, 235 Ill. 319, 85 N. E. 496; Athens C. & C. Co *v.* Elsbree, 19 Pa. Super. 618. See Cohen *v.* Ins. Office, 198 N. Y. 140, 91 N. E. 265.

104-11 Federal Union Surety Co. *v.* Mfg. Co., 176 Ind. 328, 95 N. E. 1104; Smith *v.* S. (Tex. Cr.), 156 S. W. 214 (*quot.* text); Misher *v.* S. (Tex. Cr.), 152 S. W. 1049 (*quot.* text); Galveston, etc. R. Co. *v.* Quilhot (Tex. Civ.), 123 S. W. 200. See Keipp *v.* S., 51 Tex. Cr. 417, 103 S. W. 392.

105-13 Misher *v.* S. (Tex. Cr.), 152 S. W. 1049, (*quot.* text).

105-14 Patterson *v.* S., 8 Ala. App. 420, 62 S. 1023; Curtis *v.* S., 89 Ark. 394, 117 S. W. 521; Proctor *v.* Co., 128 Ga. 606, 57 S. E. 879; Sizer Co. *v.* Melton, 129 Ga. 143, 58 S. E. 1055; Sullivan *v.* Miller, 169 Ill. App. 607; Gurley *v.* R. Co., 206 Mass. 534, 92 N. E. 714; Craig *v.* Brown, 171 Mich. 256, 137 N. W. 126; Samuel *v.* R. Co., 45 Pa. Super. 395; Sorell *v.* S. (Tex. Cr.), 167 S. W. 356; Misher *v.* S. (Tex. Cr.), 152 S. W. 1049 (*quot.* text); Proctor *v.* S., 54 Tex. Cr. 254, 112 S. W. 770; Coolidge *v.* Taylor, 85 Vt. 39, 80 A. 1038; Toepfer *v.* Sterr, 156 Wis. 226, 145 N. W. 970. See P. *v.* Maddox, 176 Ill. App. 480; Brown *v.* S. (Tex. Cr.), 162 S. W. 339; Davis *v.* S. (Tex. Cr.), 152 S. W. 1094.

Must say writing was true.—Diamond G. Co. *v.* Wietzychowski, 227 Ill. 338, 81 N. E. 392.

106-16 Ashford *v.* Evening Star Co., 41 App. Cas. (D. C.) 395; Rudd *v.* Buxton, 41 App. Cas. (D. C.) 353; Greiner *v.* Ins. Co., 40 Pa. Super. 379; S. *v.* Collins, 27 R. I. 419, 62 A. 1010; S. *v.* Burns, 25 S. D. 364, 126 N. W. 572.

107-18 Southern R. Co. *v.* Co., 8 Ala. App. 583, 62 S. 975; Thompson's Exr. *v.* Thompson's Exr., 155 Ky. 323, 159 S. W. 831; Ammon *v.* R. Co., 120 Minn. 438, 139 N. W. 819; O'Rourke *v.* Opera House Co., 47 Mont. 459, 133 P. 965; Welch *v.* Adams, 87 Neb. 681, 127 N. W. 1064; Misher *v.* S. (Tex. Cr.), 152 S. W. 1049 (quot. text). See Marron *v.* R. Co., 46 Mont. 593, 129 P. 1055; vol. 7, p. 138, n. 3, and supplement thereto. *Contra,* Laub *v.* De Vault, 139 Ill. App. 398.

108-19 Roe *v.* Doe (Ala.), 63 S. 949; Atlantic C. L. R. Co. *v.* Hill, 12 Ga. App. 392, 77 S. E. 316; P. *v.* Maddox, 162 Ill. App. 95. See Int. Harvester Co. *v.* C., 147 Ky. 557, 144 S. W. 1070; Lintner *v.* Wiles (Or.), 141 P. 871; vol. 7, p. 139, n. 4, and supplement thereto.

109-21 Proctor *v.* Co., 128 Ga. 606, 57 S. E. 879; Meriwether *v.* R. Co., 128 Mo. App. 647, 107 S. W. 434; Eberson *v.* Co., 130 Mo. App. 296, 109 S. W. 62. See Callman *v.* Bruckenfeld, 108 N. Y. S. 1070.

109-22 S. *v.* Bradley, 161 N. C. 290, 76 S. E. 720. See vol. 3, p. 495, n. 37; vol. 14, p. 574, n. 65, and supplement thereto.

110-23 Production of writing compelled on taking deposition in order witness' memory may be refreshed. Gibbons *v.* Co., 125 App. Div. 741, 110 N. Y. S. 96.

111-26 See Powell *v.* Ins. Co., 2 Pa. Super. 151.

111-28 S. *v.* Burns, 25 S. D. 364, 126 N. W. 572.

111-29 See Bass *v.* S., 1 Ga. App. 728, 790, 57 S. E. 1054.

112-30 P. *v.* Duncan, 8 Cal. App. 186, 96 P. 414; Pool *v.* S., 51 Tex. Cr. 596, 103 S. W. 892.

115-33 Stewart *v.* Harris, 6 Ala. App. 518, 60 S. 445; Proctor *v.* Co., 128 Ga. 606, 57 S. E. 879; Diamond G. Co. *v.* Wietzychowski, 227 Ill. 338, 81 N. E. 392; Dorrance *v.* Co., 233 Ill. 354, 84 N. E. 269; Eberson *v.* Co., 130 Mo. App. 296, 109 S. W. 62; Hill *v.* Co., 74 N. J. L. 338, 68 A. 94; Vichos *v.* Cuttler, 133 App. Div. 230, 117 N. Y. S. 366; Josias *v.* Nivois, 56 Misc. 557, 107 N. Y. S. 15; Owen *v.* Rothermel, 21 Pa. Super. 561. See Galveston, etc. R. Co. *v.* Solcher (Tex. Civ.), 110 S. W. 545. **Belief of witness** sufficient if party who made entries within jurisdiction. St. Louis S. R. Co. *v.* Mitchell (Tex. Civ.), 127 S. W. 876.

117-35 Asinof *v.* Kuropotkin, 144 N. Y. S. 758; Brower *v.* Byrne, 151 App. Div. 543, 136 N. Y. S. 77; Owen *v.* Rothermel, 21 Pa. Super. 561. "**As to items on the book** in reference to sales of which he had no personal knowledge, neither his testimony nor the entries on the book in reference to such items were admissible, in the absence of other competent evidence tending to show that such entries spoke the truth." Davie *v.* Roland, 3 Ala. App. 567, 57 S. 1034.

118-37 Eberson *v.* Co., 130 Mo. App. 296, 109 S. W. 62.

119-39 Winn *v.* Modern Woodmen, 157 Mo. App. 1, 137 S. W. 292. **Discretion of court** not reviewed unless abused. Brown *v.* Smith, 24 S. D. 231, 123 N. W. 689.

120-42 Magill *v.* S., 51 Tex. Cr. 357, 103 S. W. 397.

121-43 Mahoney *v.* R. Co., 81 Vt. 210, 69 A. 652.

122-44 Glenn *v.* S., 157 Ala. 12, 47 S. 1034.

124-50 Stevens *v.* Worcester, 196 Mass. 45, 81 N. E. 907. **Testimony that witness refreshed memory** properly retained and objection overruled. Burns *v.* Lee (Ga. App.), 80 S. E. 676.

125-51 Burson *v.* Vogel, 29 App. Cas. (D. C.) 388; De Palma *v.* Weinman, 15 N. M. 68, 103 P. 782; Spencer *v.* S., 132 Wis. 509, 112 N. W. 462. **Paper may be received** as witness' testimony if he refuses to say more than that it is correct, though it would not be otherwise admissible. Atherton *v.* Emerson, 199 Mass. 199, 85 N. E. 530.

125-52 C. *v.* Edgerton, 200 Mass. 318, 86 N. E. 768. **Production of book** containing irrelevant matter may not be ordered if cross-examiner declines to limit cross-examination to relevant matter therein. Morrow *v.* S., 56 Tex. Cr. 519, 120 S. W. 491.

126-53 Memorandum containing irrelevant matter, not admissible. Little *v.* Rich, 55 Tex. Civ. 326, 118 S. W. 1077.

126-54 Pool *v.* S., 51 Tex. Cr. 596, 103 S. W. 892.

126-55 S. *v.* Kwiatkowski, 83 N. J. L. 650, 85 A. 209; Powell *v.* Ins. Co., 2 Pa. Super. 151.

126-56 Patterson *v.* S., 8 Ala. App. 420, 62 S. 1023; Roe *v.* Doe (Ala.), 63 S. 949; Bishop *v.* New Haven, 82 Conn.

51, 72 A. 646 (fragmentary notes of arguments of counsel made by judge); Burson *v.* Vogel, 29 App. Cas. (D. C.) 388; New England Syndicate *v.* Cutler (Ia.), 143 N. W. 1095; C. *v.* McGarvey, 158 Ky. 570, 165 S. W. 973; Philadelphia, etc. R. Co. *v.* Diffendal, 109 Md. 494, 72 A. 193, 458; Lindenbaum *v.* R. Co., 197 Mass. 314, 84 N. E. 129; Union I. Co. *v.* R. Co., 178 Mich. 346, 144 N. W. 1033; Weinberger *v.* Ins. Co. (Mo. App.) 156 S. W. 79; Gardner *v.* R. Co., 223 Mo. 389, 122 S. W. 1068; S. *v.* Carpenter, 216 Mo. 442, 115 S. W. 1008; Einstein *v.* L. & L. Co., 132 Mo. App. 82, 111 S. W. 859; O'Rourke *v.* Grand Opera House Co., 47 Mont. 459, 133 P. 965; Marron *v.* R. Co., 46 Mont. 593, 129 P. 1055; S. *v.* Kwiatkowski, 83 N. J. L. 650, 85 A. 209; More-J. G. Co. *v.* R. Co., 76 N. J. L. 708, 72 A. 65; N. Y. Motor C. Co. *v.* Greenfield, 145 N. Y. S. 33; Elwell *v.* Purcell (Okla.), 140 P. 412; Sorell *v.* S. (Tex. Cr.), 167 S. W. 356; Edwards *v.* Assn. (Tex. Civ.), 166 S. W. 423 (non-executed lease); American, etc. Co. *v.* Mercedes Co. (Tex. Civ.), 155 S. W. 286; Spencer *v.* S., 132 Wis. 509, 112 N. W. 462. See Harkness *v.* Borough, 238 Pa. 544, 86 A. 478; vol. 5, p. 321, n. 65; p. 954, n. 79, p. 958, n. 92 (memorandum of former testimony); vol. 7, p. 137, n. 99; vol. 9, p. 614, n. 1, and supplement thereto.

Inventory of loss by fire.—See vol. 7, p. 564, n. 74, and supplement thereto.

127-58 Beitman *v.* Birmingham Co. (Ala.), 64 S. 600; Kansas City S. R. Co. *v.* Morrison, 103 Ark. 522, 146 S. W. 853; Philadelphia, etc. R. Co. *v.* Diffendal, 109 Md. 494, 72 A. 193, 458; Marron *v.* R. Co., 46 Mont. 593, 129 P. 1055.

128-59 Riley *v.* Fletcher (Ala.), 64 S. 85; Patterson *v.* S., 8 Ala. App. 420, 62 S. 1023; Alexander *v.* Wellington, 44 Colo. 388, 98 P. 631; Atlantic R. Co. *v.* Hill, 12 Ga. App. 392, 77 S. E. 316; Ga. Excelsior Co. *v.* Co., 12 Ga. App. 797, 78 S. E. 611; Albany P. Co. *v.* Hugger, 4 Ga. App. 771, 62 S. E. 533; S. *v.* Klute (Ia.), 140 N. W. 864; In re Dist., 146 Ia. 564, 123 N. W. 1059 (public record of body of which witness a member); Cockrill *v.* R. Co., 90 Kan. 650, 136 P. 322; Madunkeunk D. & I. Co. *v.* Co., 102 Me. 257, 66 A. 537; Hanrahan *v.* City, 114 Md. 517, 80 A. 312; S. *v.* Patton (Mo.), 164 S. W. 223 (testimony before grand jury); Emberson *v.* Co., 130 Mo. App. 296, 109 S. W. 62; Meriwether *v.* R. Co., 128 Mo. App. 647, 107 S. W. 434; Gibbons *v.* Co., 125 App. Div. 741, 110 N. Y. S. 96; Brown *v.* Smith, 24 S. D. 231, 123 N. W. 689; American, etc. Co. *v.* Mercedes Co. (Tex. Civ.), 153 S. W. 286; Hammond *v.* Decker, 46 Tex. Civ. 232, 102 S. W. 453; St. Louis, etc. R. Co. *v.* Wills (Tex. Civ.), 102 S. W. 733; Magill *v.* S., 51 Tex. Cr. 357, 103 S. W. 397; Keipp *v.* S., 51 Tex. Cr. 417, 103 S. W. 392; Jenkins *v.* S. (Wyo.), 134 P. 260.

See C. *v.* McGarvey, 158 Ky. 570, 165 S. W. 973; Ammon *v.* R. Co., 120 Minn. 438, 139 N. W. 819.

Statement to prosecuting attorney may be used by attorney to refresh memory of witness. See Cooper *v.* S. (Tex. Cr.), 161 S. W. 1094.

Market reports in trade journal.—See vol. 13, p. 564, n. 71, and supplement thereto.

131-62 Ga. Excelsior Co. *v.* Co., 12 Ga. App. 797, 78 S. E. 611 (copy of account attached to petition); P. *v.* Maddox, 176 Ill. App. 480; New England Syndicate *v.* Cutler (Ia.), 143 N. W. 1095; Bowen *v.* Indemnity Co., 151 Ia. 663, 131 N. W. 1086; Philadelphia, etc. R. Co. *v.* Diffendal, 109 Md. 494, 72 A. 193, 458; Smith *v.* Pickands, 148 Mich. 558, 112 N. W. 122; Gibson *v.* Campbell, 242 Pa. 551, 89 A. 662; Wagonseller *v.* Brown, 7 Pa. C. C. 663; Daly *v.* S. (Tex. Cr.), 162 S. W. 1152; Hammond *v.* Decker, 46 Tex. Civ. 232, 102 S. W. 453. See Tabor *v.* S., 52 Tex. Cr. 387, 107 S. W. 1116; Washington *v.* S. (Tex. Cr.), 147 S. W. 276 (*cit.* this text).

Bill of particulars filed by order of court and compiled by witness and others from invoices and inventories, used. De Palma *v.* Weinman, 15 N. M. 68, 103 P. 782.

133-63 Tabor *v.* S., 52 Tex. Cr. 387, 107 S. W. 1116. See Owen *v.* Rothermel, 21 Pa. Super. 561.

133-64 Greiner *v.* Ins. Co., 40 Pa. Super. 387; Owen *v.* Rothermel, supra.

135-67 Error in reading from exhibit harmless if books in evidence and correctness of exhibit not challenged. Alexander *v.* Wellington, 44 Colo. 388, 98 P. 631.

Ledger may be used if other books destroyed. Kansas City S. R. Co. *v.* Co. (Tex. Civ.), 114 S. W. 436.

135-68 See Wagonseller *v.* Brown, 7 Pa. C. C. 663.

Summary of inventory preserved in compliance with terms of policy may be referred to in action on policy by witness testifying to contents of inventory, it having been lost. Arkansas, etc. Ins. Co. *v.* Woolverton, 82 Ark. 476, 102 S. W. 226.

135-69 S. *v.* Brooks (Del.), 84 A. 225; Hawaii *v.* Hang, 10 Haw. 94; Hawaii *v.* Toyotaro, 11 Haw. 195; Wilmer *v.* Placide, 119 Md. 49, 86 A. 43; Phila., etc. R. Co. *v.* Diffendal, 109 Md. 494, 72 A. 193; Edwards *v.* Assn. (Tex. Civ.), 166 S. W. 423; Virginian R. Co. *v.* Jeffries, 110 Va. 471, 66 S. E. 731. See Meriwether *v.* R. Co., 128 Mo. App 647, 107 S. W. 434.

Action to recover money overpaid. Memoranda not admissible as independent evidence, because they did not show a continuous dealing with persons generally or several items of charge at different times in the same book or set of books. Porter *v.* Bk., 155 Ia. 617, 136 N. W. 666.

136-70 Riley *v.* Fletcher (Ala.), 64 S. 85; Ernst *v.* Ganahl, 166 Cal. 493, 137 P. 256; In re De Laveaga's Est., 165 Cal. 607, 133 P. 307; In re Packer's Est., 164 Cal. 525, 129 P. 778; Presley *v.* S., 63 Fla. 37, 57 S. 605; C. *v.* McGarney, 158 Ky. 570, 165 S. W. 973; Hawley *v.* R. Co., 108 Minn. 136, 121 N. W. 627 (if error, not prejudicial). See Gray *v.* R. Co., 215 Mass. 143, 102 N. E. 71; S. *v.* Patton, 255 Mo. 245, 164 S. W. 223.

Adverse party may introduce writing in evidence. Ammon *v.* R. Co., 120 Minn. 438, 139 N. W. 819.

Memory refreshed from copy of invoices, originals properly admitted. Mo. K. & T. R. Co. *v.* Patterson (Tex. Civ.), 164 S. W. 442.

137-71 Southern R. Co. *v.* Co., 8 Ala. App. 583, 62 S. 975; Calahan *v.* Conran, 172 Ill. App. 261. See Furlong & M. *v.* Ins. Co., 136 Ia. 468, 113 N. W. 1084; Griffin *v.* R. Co., 87 Vt. 278, 89 A. 220.

140-73 Marron *v.* R. Co., 46 Mont. 593, 129 P. 1055; S. *v.* Kwiatkowski, 83 N. J. L. 650, 85 A. 209. *Comp.* Torpedo T. Co. *v.* Ins. Co., 162 Ill. App. 338.

140-74 S. *v.* Smith, 129 La. 61, 55 S. 710; Collier *v.* Co., 147 Mo. App. 700, 127 S. W. 435 (for discretion of court); Smith *v.* Ins. Co., 21 S. D. 433, 113 N. W. 94; St. Louis, etc. R. Co. *v.* Wills (Tex. Civ.), 102 S. W. 733; Mahoney *v.* R. Co., 81 Vt. 210, 69 A. 652. *Comp.* Atlanta, etc. R. Co. *v.* Brown, 158 Ala. 607, 48 S. 73.

141-75 Marron *v.* R. Co., 46 Mont. 593, 129 P. 1055. See Riley *v.* Fletcher (Ala.), 64 S. 85.

142-76 McCoy *v.* Tr. Co., 117 Minn. 38, 134 N. W. 293.

143-77 Sizer Co. *v.* Melton, 129 Ga. 143, 58 S. E. 1055; Meriwether *v.* R. Co., 128 Mo. App. 647, 107 S. W. 434; Hill *v.* Co., 74 N. J. L. 338, 68 A. 94.

143-79 Price lists of merchandise.—More-J. G. Co. *v.* R. Co., 76 N. J. L. 708, 72 A. 65; Keipp *v.* S., 51 Tex. Cr. 417, 103 S. W. 392.

Memorandum made by direction of witness.—Stone *v.* S. F. Brick Co., 13 Cal. App. 203, 109 P. 103.

Receipt book of railroad agent.—Sinsabaugh *v.* R. Co., 149 Ill. App. 642.

Market quotations in trade journal. Lay *v.* R. Co., 157 Mo. App. 467, 138 S. W. 884.

Account books.—Sullivan *v.* Miller, 169 Ill. App. 607; Lyons *v.* Corder, 253 Mo. 539, 162 S. W. 606; Carson *v.* Blount, 156 N. C. 103, 72 S. E. 90. Memorandum from. Kinney *v.* Casualty Co., 15 Cal. App. 571, 115 P. 456.

Newspaper report.—Erdman *v.* S., 90 Neb. 642, 134 N. W. 258.

List of forged warrants made by an accountant. Title Guaranty & Surety Co. *v.* C., 146 Ky. 702, 143 S. W. 401.

Inventory.—Close *v.* Ann Arbor R. Co., 169 Mich. 392, 135 N. W. 346.

Complaint in action. Brown *v.* Smith, 24 S. D. 231, 123 N. W. 689.

Testimony before grand jury.—Magill *v.* S., 51 Tex. Cr. 357, 103 S. W. 397.

List of property.—Smith *v.* Ins. Co., 21 S. D. 433, 113 N. W. 94.

Clinical record.—Lindenbaum *v.* R. Co., 197 Mass. 314, 84 N. E. 129.

Diary phonographic.—Burson *v.* Vogel, 29 App. Cas. (D. C.) 388.

Documents set forth in pleading—petition.—Hammond *v.* Decker, 46 Tex. Civ. 232, 102 S. W. 453.

Bank bills.—S. *v.* Burns (Ia.), 139 N W. 1094.

Bill of particulars.—Frair *v.* Caswell (Wash.), 140 P. 564.

Memorandum as to ages of school children by school teacher. Sorell *v.* S (Tex. Cr.), 167 S. W. 356.

Entry on hotel register.—P. *v.* McKeown, 171 Ill. App. 146.

Sales tickets.—Union Cold Storage & W. Co. *v.* Lapidus, 172 Ill. App. 283.
Entries as to contents of destroyed policies. Aetna L. Ins. Co. *v.* Flour City, 120 Minn. 463, 139 N. W. 955.
Report of commission company.—Cockrill *v.* R. Co., 90 Kan. 650, 136 P. 322
Deposition. — Thompson's Exr. *v.* Thompson's Exr., 155 Ky. 323, 159 S. W. 831.

147-80 Alabama, etc. R. Co. *v* Brown, 158 Ala. 607, 48 S. 73; Hoye *v* Mfg. Co., 99 Miss. 229, 54 S. 839.

151-86 O'Rourke *v.* Co., 47 Mont 459, 133 P. 965; Barber *v.* S., 64 Tex Cr. 96, 142 S. W. 577.

151-87 Lueders *v.* **U. S.,** 210 Fed 419, 127 C. C. A. 151.

152-88 P. *v.* Durrant, 116 Cal. 179, 48 P. 75; P. *v.* McFarlane, 138 Cal. 481, 71 P. 568, 61 L. R. A. 245; Carpenter *v.* Ashley, 16 Cal. App. 302, 116 P. 983; S. *v.* Marren, 17 Ida. 766, 107 P. 993; S. *v.* Patton (Mo.), 164 S. W. 223; Mahoney *v.* R. Co., 81 Vt. 210, 69 A. 652; Jenkins *v.* S. (Wyo.), 134 P. 260. See vol. 6, p. 264, n. 73, and supplement thereto.

152-89 Stenographic report read to one's own witness. Mahoney *v.* R. Co., supra. See Bass *v.* S., 1 Ga. App. 728, 790, 57 S. E. 1054.

152-90 Prosecuting attorney may use testimony taken before grand jury to refresh memory of a witness who is hostile, evasive, or who has a hazy memory. S. *v.* Patton (Mo.), 164 S. W. 223.

152-92 Souza *v.* Joseph, 22 Cal. App. 179, 133 P. 981; Marron *v.* R. Co., 46 Mont. 593, 129 P. 1055. *Comp.* Bruder *v.* S. (Ark.), 161 S. W. 1067. See vol. 3, p. 910, n. 85, and supplement thereto.
Written calculations are not memoranda within rule. Hull *v.* Mfg. Co., 208 Fed. 260, 125 C. C. A. 460.

154-93 Part of letter privileged, remainder may be inspected. Lee *v.* Follensby, 86 Vt. 401, 85 A. 915.

155-97 Roe *v.* Doe (Ala.), 63 S. 949; Souza *v.* Joseph, 22 Cal. App. 179, 133 P. 981; Harman *v.* Co., 237 Ill. 36 86 N. E. 625; S. *v.* Miller, 234 Mo. 588, 137 S. W. 887; Marron *v.* R. Co., 46 Mont. 593, 129 P. 1055. See vol. 3, p. 910, n. 84, and supplement thereto

155-99 So. R. Co. *v.* Co., 8 Ala. App. 583, 62 S. 975.

156-1 Warren *v.* S., 103 Ark. 165, 146 S. W. 477.

157-2 Tabor *v.* S., 52 Tex. Cr. 387, 107 S. W. 1116.

158-1 See Bruder *v.* S. (Ark.), 161 S. W. 1067.
Going over scene of crime.—Prosecuting witness may refresh memory by going over scene of crime in company with officer under direction of court. S. *v.* De Hart, 38 Mont. 211, 99 P. 438.
Of jury.—Such parts of the testimony of witnesses in a criminal action as may be called for by jury on returning into court may be read by reporter from notes. S. *v.* Perkins, 143 Ia. 55, 120 N. W. 62.

RELEASE

160-1 Dalton *v.* R. Co., 7 Cal. App. 510, 94 P. 868; Louisville & N. R. Co. *v.* Beeler (Ky.), 123 S. W. 254; Keller *v.* Berry (Ky.), 121 S. W. 1009 (the clearest proof is required under some circumstances); Johnson *v.* Von Scholley (Mass.), 106 N. E. 17; Borchardt *v.* Co., 106 Minn. 134, 118 N. W. 359 (stipulation to dismiss action); Griffith *v.* B. Co., 157 App. Div. 264, 142 N. Y. S. 199; Price *v.* Logue (Tex. Civ.), 164 S. W. 1048; Holderman *v.* Reynolds (Tex. Civ.), 159 S. W. 67. See vol. 8, p. 767, n. 72, and supplement thereto.
"While disposed to believe that some conversation between the parties may have occurred, we feel that the testimony of a single witness, subject to suspicion, at least, of unfriendliness to defendant, after the decease of the declarant and the lapse of so many years, is not evidence of that clear and convincing character from which a release may be presumed. Liberty *v.* Haines, 103 Me. 182, 192, 68 Atl. 738; Wilbur *v.* Toothaker, 105 Me. 490, 75 Atl. 42 18 Ann. Cas. 1190; Lord's Appeal, 106 Me. 51, 56, 75 Atl. 286." Adams *v.* Hodgkins, 109 Me. 361, 84 A. 530.
Delivery.—Stiebel *v.* Grosberg, 202 N. Y. 266, 95 N. E. 692, *rev.* 121 N. Y. S. 923.
Evidence insufficient.—Bentley *v.* Ross, 250 Ill. 182, 95 N. E. 182, *mod.* decree, 154 Ill. App. 583.
Burden on plaintiff to sustain claim against defendant, where he alleges fraud in release. Pierce *v.* Elec. Co., 78 Wash. 167, 138 P. 666.
Correspondence between attorneys of parties admissible on question of proving a covenant a release. Johnson *v.* Von Scholley (Mass.), 106 N. E. 17.

161-2 St. Louis R. Co. *v.* Morgan, 107 Ark. 202, 154 S. W. 518; Miller *v.* R. Co., 176 Ill. App. 439; Dickson *v.* R. Co., 147 Ia. 601, 125 N. W. 167; Remy *v.* Pack. Co., 90 Kan. 224, 133 P. 707; Louisville & N. R. Co. *v.* Crutcher, 135 Ky. 381, 122 S. W. 191; Stewart *v.* Leonard, 103 Me. 128, 68 A. 638; Griffith *v.* Bridge Co., 157 App. Div. 264, 142 N. Y. S. 199; Aderholt *v.* R., 152 N. C. 411, 67 S. E. 978; Perry *v.* O'Neil, 78 O. St. 200, 85 N. E. 41; Spritzer *v.* R. Co., 226 Pa. 166, 75 A. 256; Chicago, etc. R. Co. *v.* Williams, 44 Tex. Civ. 168, 99 S. W. 141; Vaillancourt *v.* R. Co., 82 Vt. 416, 74 A. 99; Wallace *v.* Skinner, 15 Wyo. 233, 88 P. 221. See Ross *v.* R. Co., 17 Phila. (Pa.) 361; Probate Court *v.* Enright, 79 Vt. 416, 65 A. 530.

161-3 Meginn *v.* Ramsdell, 163 App. Div. 232, 148 N. Y. S. 415 (release presumed void); Watson *v.* Vansickle (Tex. Civ.), 114 S. W. 1160 (presumption of knowledge of contents).

Release presumed valid.—Griffith *v.* Bridge Co., 157 App. Div. 264, 142 N. Y. S. 199.

161-5 See Wallace *v.* Skinner, 15 Wyo. 233, 88 P. 221.

161-8 See vol. 8, p. 767, n. 71, and supplement thereto.

Inadequacy of consideration paid raises presumption of fraud. Interstate Coal Co. *v.* Trivett, 155 Ky. 795, 160 S. W. 731.

161-9 Lapse of time may raise presumption of release. Given *v.* Wright, 117 U. S. 648. If authority to execute it shown. Mayor *v.* R. Co., 78 N. J. L. 72, 73 A. 609.

162-10 Illinois C. R. Co. *v.* Vaughn, 33 Ky. L. R. 906, 111 S. W. 707; Erickson *v.* R. Co., 57 Wash. 520, 107 P. 365.

Release by former administrator of decedent's estate, admissible as against objection it was a collateral attack on plaintiff's later appointment as administrator by another court. Balsewicz *v.* R. Co., 240 Ill. 238, 88 N. E. 734.

Sealed release but prima facie evidence of consideration. Olston *v.* Co., 52 Or. 343, 96 P. 1095.

163-12 Cleveland, etc. R. Co. *v.* Hilligoss, 171 Ind. 417, 86 N. E. 485; Breeden *v.* Ins. Co., 220 Mo. 327, 119 S. W. 576 (rule extends to all who might have been sued jointly or severally).

164-13 Wallner *v.* Co., 245 Ill. 148, 91 N. E. 1053; Borchardt *v.* Co., 106 Minn. 134, 118 N. W. 359. See Ryan *v.* Becker, 136 Ia. 273, 111 N. W. 426, 14 L. R. A. (N. S.) 329.

166-18 St. Louis, etc. R. Co. *v.* Hambright, 87 Ark. 614, 113 S. W. 803; Balsewicz *v.* R. Co. 144 Ill. App. 219 (authority of administrator); Vellekoup *v.* Fullerton, 79 N. J. L. 16, 74 A. 793.

Financial condition of party considered a factor in ascertaining whether he was coerced or unfairly influenced. Atchison, etc. R. Co. *v.* Peck, 79 Kan. 413, 100 P. 54. See 169-32.

166-19 See Olston *v.* Co., 52 Or. 343, 96 P. 1095.

166-20 Hulbert *v.* Co., 201 Mass. 239, 87 N. E. 577; Vaillancourt *v.* R. Co., 82 Vt. 416, 74 A. 99. *Contra* as to admission by agent before contract made. Wells *v.* Co. (Ky.), 114 S. W. 737.

166-21 Douda *v.* R. Co., 141 Ia. 82, 119 N. W. 272 (inability to read); Lax-Fos Co. *v.* Rowlett, 144 Ky. 690, 139 S. W. 836; Illinois C. R. Co. *v.* Vaughn, 33 Ky. L. R. 906, 111 S. W. 707; Larsson *v.* Exch., 200 Mass. 367, 86 N. E. 940; Kansas City, etc. R. Co. *v.* Chiles, 86 Miss. 361, 38 S. 498; Griffith *v.* Bridge Co., 157 App. Div. 264, 142 N. Y. S. 199; Barnes *v.* Co., 131 App. Div. 40, 115 N. Y. S. 703; Wade *v.* R. Co., 89 S. C. 280, 71 S. E 859; Mensforth *v.* Co., 142 Wis. 546, 126 N. W. 41.

Subsequent concealment and misrepresentation of facts connected with release shown. Piper *v.* R., 75 N. H. 228, 72 A. 1024.

167-22 Bona fides of appointment of administrator, who executed release, may be gone into on cross-examination of witness who testified to its execution. Balsewicz *v.* R. Co., 240 Ill. 238, 88 N. E. 734.

167-23 Barrett *v.* R. Co., 104 Me. 479, 72 A. 308; Mattson *v.* Lumb. Co. (Wash.), 140 P. 377; Demark *v.* R. Co., 142 Wis. 624, 126 N. W. 13 (must go beyond reasonable controversy). *Contra* as to mistake by releasor. O'Brien *v.* R. Co., 19 Ont. L. R. 345. *Comp.* Larsson *v.* Exch., 200 Mass. 367, 86 N. E. 940. See Atchison, etc. R. Co. *v.* Coltrane, 80 Kan. 317, 102 P. 835; Ross *v.* R. Co., 17 Phila. (Pa.), 361.

167-24 Leach *v.* R. Co., 137 Ky. 292, 125 S. W. 708; Spritzer *v.* R. Co., 226 Pa. 166, 75 A. 256; Vaillancourt *v.* R. Co., 82 Vt. 416, 74 A. 99 (injured per-

son may show extent of injury and that he was advised by counsel he had cause of action against defendant).

Gross inadequacy will require but little additional evidence to overcome release for fraud. Illinois C. R. Co. *v.* Vaughn, 33 Ky. L. R. 906, 111 S. W. 707.

167-25 Nason *v.* R. Co., 140 Ia. 533, 118 N. W. 751; Douda *v.* R. Co., 141 Ia. 82, 119 N. W. 272; Nelson *v.* R. Co., 111 Minn. 193, 126 N. W. 902; San Antonio, etc. R. Co. *v.* Polka, 57 Tex. Civ. 626, 124 S. W. 226. See St. Louis, etc. R. Co. *v.* Hambright, 87 Ark. 614, 113 S. W. 803; Texas & P. R. Co. *v.* Jowers (Tex. Civ.), 110 S. W. 946; Pattison *v.* R. Co., 55 Wash. 625, 104 P. 825.

168-26 Roberts *v.* R. Co., 45 Colo. 188, 101 P. 59; Cohen *v.* Schreiber, 60 Misc. 114, 111 N. Y. S. 702; Vaillancourt *v.* R. Co., 82 Vt. 416, 74 A. 99. See Creshkoff *v.* Schwartz, 53 Misc. 576, 103 N. Y. S. 782.

168-27 Pacific, etc. Co. *v.* Webb, 157 Fed. 155, 84 C. C. A. 603; Loveman *v.* R. Co., 149 Ala. 515, 43 S. 411; Hulbert *v.* Co., 201 Mass. 239, 87 N. E. 577 (statement plaintiff's counsel said it was right to sign); Marple *v.* R. Co., 115 Minn. 262, 132 N. W. 333; Winter *v.* R. Co., 118 Minn. 487, 136 N. W. 1089; Jones *v.* Assn., 114 N. Y. S. 589; St. Louis, etc. R. Co. *v.* Richards, 23 Okla. 256, 102 P. 92; Gulf, etc. R. Co. *v.* Huyett, 49 Tex. Civ. 395, 108 S. W. 502; Pattison *v.* R. Co., 55 Wash. 625, 104 P. 825.

Releases of prior injuries incompetent to show party knew what he was signing. Illinois S. Co. *v.* Ferguson, 129 Ill. App. 396.

168-28 Simeoli *v.* Co., 81 Conn. 423, 71 A. 546, infancy and inability to read. See Larsson *v.* Exch., 200 Mass. 367, 86 N. E. 940.

168-29 Vellekoup *v.* Fullerton, 79 N. J. L. 16, 74 A. 793, *disap.* Burik *v.* Co., 66 N. J. L. 420, 49 A. 442.

169-30 See Mensforth *v.* Co., 142 Wis. 546, 126 N. W. 41.

169-31 Savage *v.* R. Co., 142 Ill. App. 342; Cohen *v.* Schreiber, 60 Misc. 114, 111 N. Y. S. 702.

169-32 *Contra* if releasor did not know of agency. Piper *v.* R., 75 N. H. 228, 72 A. 1024. See St. Louis, etc. R. Co. *v.* Hambright, 87 Ark. 614, 113 S. W. 803.

Mental incompetency of releasor, immaterial, in absence of adjudication, unless other party had actual or constructive knowledge of it and derived inequitable benefit from release. West *v.* R. Co., 151 N. C. 231, 65 S. E. 979.

Poverty of deceased releasor and family at time of execution of release, shown. Treadway *v.* Co., 84 S. C. 41, 65 S. E. 934. See 166-18.

170-34 Harvey *v.* R. Co., 44 Colo. 258, 99 P. 31; Smith *v.* R. Co., 131 Ga. 470, 62 S. E. 673; Dronenburg *v.* Harris, 108 Md. 597, 71 A. 81. See vol. 9, p. 482, n. 40 et seq and supplement thereto.

171-36 Huntington *v.* R. Co., 175 Fed. 532, 99 C. C. A. 154; Chaplin *v.* Gerald, 104 Me. 187, 71 A. 712.

Parol evidence admissible to show release does not represent entire agreement. Maloney *v.* Co., 133 App. Div. 499, 117 N. Y. S. 601.

171-38 Vaillancourt *v.* R. Co., 82 Vt. 416, 74 A. 99, though sealed.

Subject-matter may be shown by parol. Dronenburg *v.* Harris, 108 Md. 597, 71 A. 81.

RELEVANCY

Fraud—rules relaxed, 203-84; *Right to prove whole conversation*, 213-48.

173-1 S. *v.* Sebastian, 81 Conn. 1, 69 A. 1054 ("one fact is relevant to another fact whenever, according to the common course of events, the existence of the one, taken alone or in connection with other facts, renders the existence of the other certain or more probable"); Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295; Fishman *v* Co., 78 N. J. L. 300, 73 A. 231 (quoting from Steph. Dig. language given in corresponding note to original volume of this work); P. *v.* Furlong, 140 App. Div. 179, 125 N. Y. S. 164, 201 N. Y. 511, 95 N. E. 1096; Wells F. & Co. *v.* Gentry (Tex. Civ.), 154 S. W. 363; San Antonio T. Co. *v.* Higdon (Tex. Civ.), 123 S. W. 732.

174-2 Objection on ground of irrelevancy, weakest of all objections. S. *v* Labry, 124 La. 748, 50 S. 700.

Evidence which is relevant to the charge under investigation is not rendered inadmissible because it may also tend to prove the defendant guilty of another criminal offense. Kirkwood *v.* S., 3 Ala. App. 15, 57 S. 504.

174-3 Moody *v.* Peirano, 4 Cal. App. 411, 88 P. 380.

174-4 Graham *v.* S. (Ala. App.), 65 S. 717; Boswell *v.* S. (Ala. App.), 64 S. 188; Birmingham R. L. & P. Co. *v.* Canfield, 177 Ala. 422, 59 S. 217; Wynehouse *v.* Mandelson, 84 Conn. 613, 80 A. 706; Girard *v.* Grosvenordale Co., 82 Conn. 271, 73 A. 747; Dunham *v.* Cox, 81 Conn. 268, 70 A. 1033; Floral C. Co. *v.* Dillon, 83 Conn. 65, 74 A. 82; S. *v.* Sebastian, 80 Conn. 1, 69 A. 1054; Alexander *v.* S., 7 Ga. App. 88, 66 S. E. 274; Tifton, etc. R. Co. *v.* Butler, 4 Ga. App. 191, 60 S. E. 1087; Hubbard *v.* Ranje, 52 Ind. App. 611, 98 N. E. 314; S. *v.* Gebbia, 121 La. 1083, 47 S. 32; Cox *v.* Polk, 139 Mo. App. 260, 123 S. W. 102; Barrie *v.* R. Co., 138 Mo. App. 557, 119 S. W. 1020; Connecticut R. P. Co. *v.* Dickinson, 75 N. H. 353, 74 A. 585 (regardless of probability jury may apply it to issue to which it is irrelevant); Am. P. Co. *v.* Co., 78 N. J. L. 658, 75 A. 976; Crosby *v.* Wells, 73 N. J. L. 790, 67 A. 295; P. *v.* Furlong, 140 App. Div. 179, 125 N. Y. S. 164; Irvin *v.* R. Co., 164 N. C. 5, 80 S. E. 78; National Bk. *v.* Thomas, 30 R. I. 294, 74 A. 1092; Bennett *v.* R. Co. (S. C.), 79 S. E. 710; Spearman *v.* S. (Tex. Cr.), 152 S. W. 915; Foster *v.* S. (Tex. Cr.), 150 S. W. 936; S. *v.* Ryder, 80 Vt. 422, 68 A. 652; Lyons *v.* R. E. Co., 71 W. Va. 754, 77 S. E. 525; Kirchner *v.* Smith, 61 W. Va. 434, 58 S. E. 614.

See P. *v.* Moeller, 260 Ill. 375, 103 N. E. 216.

That police shadowed witness irrelevant. S. *v.* Gulliver (Ia.), 142 N. W. 948.

176-5 P. *v.* Pezutto, 255 Ill. 583, 99 N. E. 677. See Pelatowski *v.* Black, 213 Mass. 428, 100 N. E. 831.

Relevant evidence is not rendered irrelevant merely because it tends to prejudice adverse party. Bonner *v.* S. (Fla.), 65 S. 663.

Amendments to pleadings after reception of evidence will not make it irrelevant. Birmingham R. Co. *v.* Morris, 163 Ala. 190, 50 S. 198.

176-6 Hampton *v.* S., 1 Ala. App. 15, 55 S. 1018; Howard *v.* S., 172 Ala. 402, 55 S. 255; Gilbert *v.* S., 172 Ala. 386, 56 S. 136; Solomon *v.* S., 10 Ga. App. 469, 73 S. E. 623; Gate City Terminal Co. *v.* Thrower, 136 Ga. 456, 71 S. E. 903; P. *v.* Jennings, 252 Ill. 534, 96 N. E. 1077; Halstead *v.* R. Co., 48 Ind. App. 497, 95 N. E. 439; Mulligan *v.* C., 144 Ky. 246, 137 S. W. 1062; Maryland Elec. R. Co. *v.* Beasley, 117 Md. 270, 83 A. 157; Powers *v.* R. Co., 201 Mass. 66, 87 N. E. 192; Houts *v.* Dunham, 162 Mo. App. 477, 142 S. W. 806; Carson *v.* Blount, 156 N. C. 103, 72 S. E. 90; Dakin *v.* Ins. Co., 59 Or. 269, 117 P. 419; Moore *v.* Lachmund, 59 Or. 565, 117 P. 1123; Vautier *v.* Refining Co., 231 Pa. 8, 79 A. 814; Smithson *v.* S., 124 Tenn. 218, 137 S. W. 487; January *v.* S. (Tex. Cr.), 146 S. W. 555; Dewitt *v.* Bowers (Tex. Civ.), 138 S. W. 1147; S. *v.* Hatch, 63 Wash. 617, 116 P. 286; Henderson *v.* Coleman, 19 Wyo. 183, 115 P. 439, rehear. *denied*, 115 P. 1136.

Natural and rational inference from evidence sought to be adduced necessary to relevancy. Cent., etc. Co. *v.* Teasley (Ala.), 65 S. 981.

"The test of the relevancy of evidence in criminal cases is whether it conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being that which, if sustained, would logically influence the issue." Bailey *v.* S., 4 Ala. App. 7, 58 S. 675, *cit.* Whitaker *v.* S., 106 Ala. 30, 17 S. 456; Curtis *v.* S., 118 Ala. 125, 24 S. 111; Mayfield's Dig., p. 317, §91.

"Testimony is not necessarily incompetent because counsel deduce unwarranted conclusions therefrom." S. *v.* Baker (Ia.), 135 N. W. 1097.

176-7 Rogers *v.* Co., 18 Ont. L. R. 8 (Can.); Moody *v.* Peirano, 4 Cal. App. 411, 88 P. 380; Girard *v.* Co., 83 Conn. 20, 74 A. 1126; Dougherty *v.* White, 2 Boyce (Del.) 316, 80 A. 237; Vaughan's S. S. *v.* Stringfellow, 56 Fla. 708, 48 S. 410; Carswell *v.* S., 7 Ga. App. 198, 66 S. E. 488; Todd *v.* Ins. Co., 2 Ga. App. 789, 59 S. E. 94; P. *v.* Viskniskki, 155 Ill. App. 292; Rullman *v.* Rullman, 81 Kan. 521, 106 P. 52; Metropolitan Ins. Co. *v.* Maddox (Ky.), 127 S. W. 503; National C. Co. *v.* Powar, 137 Ky. 156, 125 S. W. 279; Allen *v.* C., 134 Ky. 110, 119 S. W. 795; Louisville R. Co. *v.* Ellerhorst, 33 Ky. L. R. 605, 110 S. W. 823; Hindle *v.* Healy, 204 Mass. 48, 90 N. E. 511 (relevant to show one of the parties to whom credit given insolvent); Dayton F. B. Co. *v.* Danciger, 161 Mo. App. 640, 143 S. W. 855; Lloyd C. Co. *v.* Co., 145 Mo. App. 675, 123 S. W. 528; Shepherd *v.* Co., 79 Neb. 834, 113 N. W. 627; Mahoney *v.* Smith, 132 App. Div. 291, 116 N. Y. S. 1091; Mulligan *v.* R. Co., 84 S. C. 171, 65 S. E. 1040; Sweeney *v.* S. (Tex. Cr.), 146 S. W. 883; Fentress *v.* Steele, 110 Va. 578, 66

S. E. 870; Norfolk & W. R. Co. *v.* Thomas, 110 Va. 622, 66 S. E. 817; S. *v.* Cool, 66 W. Va. 86, 66 S. E. 740; Spick *v.* S., 140 Wis. 104, 121 N. W. 664; Hardy *v.* S., 150 Wis. 176, 136 N. W. 638.

176-8 In re Higgins' Est., 156 Cal. 257, 104 P. 6; Bordner *v.* Depler, 142 Ill. App. 526; Hurst *v.* Mechlin (Ky.), 119 S. W. 807; P. *v.* Neely, 171 Mich 249, 137 N. W. 150; Leggett *v.* Exp. Co., 157 Mo. App. 108, 137 S. W. 893; Fitch *v.* Martin, 84 Neb. 745, 122 N. W. 50; Brooks *v.* Gleason, 113 N. Y. S. 122.

176-9 Turner *v.* S. (Ala. App.), 65 S. 719; Strickland *v.* S., 151 Ala. 31, 44 S. 90; Parker *v.* S., 153 Ala. 25, 45 S. 248; Melrose Mfg. Co. *v.* Kennedy, 59 Fla. 312, 51 S. 595; Knight *v.* Co., 55 Fla. 301, 45 S. 1025; Jackson *v.* Gallagher, 128 Ga. 321, 57 S. E. 750; Neindorf *v.* Van De Voorde, 143 Ia. 318, 120 N. W. 84; Cromwell *v.* Norton, 193 Mass. 291, 79 N. E. 433; Wilhite *v.* P. Co., 39 Mont. 1, 101 P. 168; P. *v.* McAdoo, 117 App. Div. 438, 102 N. Y. S. 656; Bowick *v.* Co., 69 S. C. 360, 48 S. E. 276 (evidence not responsive to allegations of complaint); Mullinax *v.* Pyron (Tex. Civ.), 123 S. W. 1139; Temple *v.* Duran (Tex. Civ.), 121 S. W. 253; Guthrie *v.* Lyon (Tex. Civ.), 98 S. W. 432; Yellow Pine O. Co. *v.* Noble (Tex. Civ.), 97 S. W. 332; Church *v.* Co., 58 Wash. 262, 108 P. 596; Franck *v.* Stout, 139 Wis. 223, 120 N. W. 867.

177-10 Quinalty *v.* Temple, 176 Fed. 67, 99 C. C. A. 375; Gunter *v.* Gunter, 174 Fed. 933, 98 C. C. A. 545; Salmon *v.* Box Co., 158 Fed. 300, 85 C. C. A. 551; Delaware, etc. R. Co. *v.* Gleason, 159 Fed. 383, 86 C. C. A. 383, *rev.* 151 Fed. 321; Earle *v.* S., 1 Ala. App. 183, 56 S. 32; Poellnitz *v.* S., 1 Ala. App. 121, 55 S. 1028; Wheat *v.* S., 2 Ala. App. 242, 57 S. 68; McGehee *v.* S., 171 Ala. 19, 55 S. 159; Green *v.* S., 168 Ala. 90, 53 S. 286; So. R. Co. *v.* Harrington, 166 Ala. 630, 52 S. 57; Ala. Steel & W. Co. *v.* Thompson, 166 Ala. 460, 52 S. 75; Hardaway W. Co. *v.* Bradley, 163 Ala. 596, 51 S. 21; Louisville & N. R. Co. *v.* Smith, 163 Ala. 141, 50 S. 241; Dilburn *v.* R. Co., 156 Ala. 228, 47 S. 210; Barnett *v.* S., 165 Ala. 59, 51 S. 299; Martin *v.* Co., 151 Ala. 289, 44 S. 112; P. *v.* Martin, 13 Cal. App. 96, 108 P. 1034; Goldman *v.* R. Co., 83 Conn. 59, 75 A. 148; Smith *v.* Lumb. Co., 82 Conn. 116, 72 A. 577; Darnall *v.* Georgia R., etc. Co, 134 Ga. 656, 68 S. E. 584; S. *v.* Moon, 20 Ida. 202, 117 P. 757; Mapes *v.* R. Co., 238 Ill. 142, 87 N. E. 393; Snell *v.* Weldon, 239 Ill. 279, 87 N. E. 1022; Robinson *v.* Kraft, 154 Ill. App. 213; Haywood *v.* C. Co., 145 Ill. App. 506; Perido *v.* R. Co., 144 Ill. App. 446; Fitzgerald *v.* Chicago, 144 Ill. App. 462; Ellison *v.* Flint, 43 Ind. App. 276, 87 N. E. 38; Winthrop L. Co. *v.* Utley, 146 Ia. 310, 125 N. W. 164; Estzkorn *v.* Oelwein, 142 Ia. 107, 120 N. W. 636 (previous birth of children in natural position does not prove that child born in unnatural position was so born because of injury sustained by mother); S. *v.* Laird, 79 Kan. 681, 100 P. 637; Kingston Coal Co. *v.* Aaron, 147 Ky. 480, 144 S. W. 371; Wendling *v.* C., 143 Ky. 587, 137 S. W. 205; Allen *v.* C., 134 Ky. 110, 119 S. W. 795; Louisville & N. R. Co. *v.* Summers, 133 Ky. 684, 118 S. W. 926; Louisville & N. R. Co. *v.* Payne, 133 Ky. 539, 118 S. W. 352; S. *v.* Lazarone, 130 La. 1, 57 S. 532; Rumsey *v.* Livers, 112 Md. 546, 77 A. 295; Aetna I. Co. *v.* Fuller, 111 Md. 321, 74 A. 369; Consolidated, etc. Co. *v.* S., 109 Md. 186, 72 A. 651; Clemons, etc. Mfg. Co. *v.* Walton, 206 Mass. 215, 92 N. E. 459; In re Norton's Est., 169 Mich. 531, 135 N. W. 253; Finklea *v* S., 94 Miss. 777, 48 S. 1; Saucier *v.* S., 95 Miss. 226, 48 S. 840; Strother *v* McFarland, 166 Mo. App. 364, 148 S. W. 988; Milan Bk. *v.* Richmond, 235 Mo. 532, 139 S. W. 352; S. *v.* Kimmel, 156 Mo. App. 461, 137 S. W. 329; Wilson *v.* Yegen, 38 Mont. 504, 100 P. 613; Sutton *v.* Lowry, 39 Mont. 462, 104 P. 545; Suiter *v.* R. Co., 84 Neb. 256, 121 N. W. 113; Sears *v.* Bailey, 58 Misc. 145, 110 N. Y. S. 467; Lawton *v.* Roseno, 125 App. Div. 628, 110 N. Y. S. 14; Martin *v.* Knight, 147 N. C. 564, 61 S. E. 447; Indian Land, etc. Co. *v.* Clement, 22 Okla. 40, 109 P. 1089; Vuilleumier *v.* W. P. & R. Co., 55 Or. 129, 105 P. 706; Shallenberger *v.* Co., 223 Pa. 220, 72 A. 500; S. *v.* Casasanta, 29 R. I. 587, 73 A. 312; Kime *v.* Bk., 22 S. D. 630, 119 N. W. 1003; Norbeck & N. Co. *v.* Mallock, 26 S. D. 54, 127 N. W. 471; Reid A. Co. *v.* Gorseczya (Tex. Civ.), 144 S. W. 688; Gulf, etc. Co. *v.* Coulter (Tex. Civ.), 139 S. W. 16; St. Louis, etc. Co. *v.* Blocker (Tex. Civ.), 138 S. W. 156; Pitman *v.* Self (Tex. Civ.), 127 S. W. 907; Phillips *v.* Henry (Tex. Civ.), 124 S. W. 184; Smith *v.* Gunn, 57 Tex. Civ. 330, 122 S. W. 919;

Pennington *v.* Co. (Tex. Civ.), 122 S. W. 923; Tipton *v.* Tipton (Tex. Civ.), 118 S. W. 842; Maibaum *v.* S., 59 Tex. Cr. 386, 128 S. W. 378; McCullough *v.* Rucker, 53 Tex. Civ. 89, 115 S. W. 323; Taylor *v.* S., 54 Tex. Cr. 90, 111 S. W. 932; McDonald *v.* S., 55 Tex. Cr. 508, 117 S. W. 131; Meyers *v.* R. Co., 36 Utah 307, 104 P. 736; Ankerson *v.* Larson, 58 Wash. 113, 107 P. 879; Abrahamson *v.* Cummings, 65 Wash. 35, 117 P. 709.

Irrelevant matter not connected with plaintiff inadmissible in justification or mitigation. Weinman *v.* Wks., 156 App. Div. 168, 140 N. Y. 1085.

178-11 St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 113; S. *v.* Bouvy, 124 La. 1054, 50 S. 849; Healey *v.* Bartlett, 73 N. H. 110, 59 A. 617; Lawshe *v.* S., 57 Tex. Cr. 32, 121 S. W. 865.

178-12 Johnson *v.* U. S., 170 Fed. 581, 95 C. C. A. 661; Atwood *v.* Co., 82 Conn. 539, 74 A. 899; S. *v.* Sebastian, 81 Conn. 1, 69 A. 1054; Delaney *v.* Co., 202 Mass. 359, 88 N. E. 773; S. *v.* Hjerpe, 109 Minn. 270, 123 N. W. 474; Fitch *v.* Martin, 84 Neb. 745, 122 N. W. 50; Worcester L. Co. *v.* Heald, 78 N. J. L. 172, 72 A. 421; McGhee *v.* Montgomery, 85 S. C. 207, 65 S. E. 721; McClintock *v.* R. Co., 83 S. C. 58, 64 S. E. 1009; S. *v.* Barr, 84 Vt. 38, 77 A. 914.

Discretion of judge in ruling on relevancy not disturbed unless abused. McCrary *v.* R. Co., 83 S. C. 103, 65 S. E. 3. Not ordinarily reviewable (S. *v.* Doherty, 72 Vt. 381, 48 A. 658, 82 Am. St. 951; Smith *v.* R. Co., 80 Vt. 208, 67 A. 535), unless ruling expressly made as matter of law. Belka *v.* Allen, 82 Vt. 456, 74 A. 91.

179-13 Lunsford *v.* S., 2 Ala. App. 38, 56 S. 89; In re Higgins' Est., 156 Cal. 257, 104 P. 6; S. *v.* Sebastian, 80 Conn. 1, 69 A. 1054 (term has regard to other factors besides lapse of time); Bannon *v.* Co. (Ky.), 119 S. W. 1170; Ducharme *v.* R. Co., 203 Mass. 384, 89 N. E. 561 (condition of weather); S. *v.* Newcomb, 220 Mo. 54, 119 S. W. 405; S. *v.* Pemberton, 39 Mont. 530, 104 P. 556; Raapke *v.* Co., 82 Neb. (Unof.) 716, 118 N. W. 652; Fishman *v.* B. Co., 78 N. J. L. 300, 73 A. 231; P. *v.* Carlin, 194 N. Y. 448, 87 N. E. 805; Williams *v.* Smith, 29 R. I. 562, 72 A. 1093; Kime *v.* Bk., 22 S. D. 630, 119 N. W. 1003; O'Brien *v.* Von Lienen (Tex. Civ.), 149 S. W. 723; Williams *v.* S., 55 Tex. Cr. 65, 115 S. W. 35; Dunkin *v.* Hoquiam, 56 Wash. 47, 105 P. 149. See Butler *v.* Sams, 138 Ga. 748, 75 S. E. 1127.

180-14 Ducharme *v.* R. Co., 203 Mass. 384, 89 N. E. 561.

180-15 Adler *v.* Martin (Ala.), 59 S. 597; Redman *v.* S. (Tex. Cr.), 149 S. W. 670.

180-16 Johnsonburg V. B. Co. *v.* Yates, 177 Fed. 389, 101 C. C. A. 553; Hadnot *v.* S., 3 Ala. App. 102, 57 S. 383; Holden *v.* Thurber (R. I.), 72 A. 720; Gardner *v.* S., 121 Tenn. 684, 120 S. W. 816; Barnett *v.* Ward (Tex. Civ.), 144 S. W. 697.

181-17 Suggs *v.* S., 9 Ga. App. 830, 72 S. E. 287; Darby *v.* S., 9 Ga. App. 700, 72 S. E. 182; Maryland, etc. R. Co. *v.* Brown, 109 Md. 304, 71 A. 1005; S. *v.* Welford, 29 R. I. 450, 72 A. 396 (speed prior to collision); Belka *v.* Allen, 82 Vt. 456, 74 A. 91. See Hoxie *v.* Walker, 75 N. H. 308, 74 A. 183; supra, "Expert and Opinion Evidence," 666-6.

"No error in allowing witnesses to testify to their finding of sorghum seed and peas in defendant's back yard several weeks after the burglary and murder. Such articles had been taken from McClurkin's ginhouse on the night of the murder, and the fact that some weeks had elapsed was but a circumstance for the jury to consider in estimating the probative value of the discovery. The fact was none the less relevant." Pope *v.* S., 174 Ala. 63, 57 S. 245.

181-20 Richards *v.* U. S., 175 Fed. 911, 99 C. C. A. 401; Linforth *v.* Co., 156 Cal. 58, 103 P. 320; Moody *v.* Peirano, 4 Cal. App. 411, 88 P. 380; Nugent *v.* Watkins, 129 Ga. 382, 58 S. E. 888 ("evidence which tends to establish issue admissible even if not of itself sufficient for that purpose"); Summit W. Co. *v.* Lowery, 6 Ga. App. 147, 64 S. E. 489; Youngerman *v.* Pugh (Ia.), 125 N. W. 321; Tallman *v.* Nelson, 141 Mo. App. 478, 125 S. W. 1181; Citizens' Bk. *v.* Warfield, 85 Neb. 328, 123 N. W. 315; Mahon *v.* Rankin, 54 Or. 328, 102 P. 608; Foehr *v.* R. Co., 40 Pa. Super. 7.

Need not tend to sustain all of allegations of declarant. Ellis *v.* Durkee, 79 Vt. 341, 65 A. 94.

Carrying concealed weapons.—"Section 4 of the act, which created the offense for which this defendant was tried, ex-

pressly provides that the defendant may give evidence that at the time of carrying the pistol he had good reason to apprehend an attack, which evidence the jury may consider in mitigation of the fine or justification of the offense. It is true that the defendant in his testimony denied that he had carried a pistol as charged in the indictment; but the jury may have disbelieved that part of his testimony, and the fact that the jury convicted the defendant clearly indicates that they did not believe that part of his testimony. This fact, however, does not in any way destroy the relevancy of the above-stated testimony." Ward *v.* S., 4 Ala. App 112, 58 S. 788.

182-21 Sims *v.* S., 59 Fla. 38, 52 S 198; Koeper *v.* Louisville, 109 Minn 519, 124 N. W. 218; Baker *v.* S., 86 Neb. 775, 120 N. W. 300; Hoxie *v.* Walker, 75 N. H. 308, 74 A. 183; S. *v.* Boyleston, 84 S. C. 574, 66 S. E. 1047; Smith *v.* Clark, 37 Utah 116, 106 P. 653; S. *v.* Kent, 83 Vt. 28, 74 A. 389. See Allen *v.* Ruland, 79 Conn. 405, 65 A. 138.

183-22 Context may be looked at. Lambie *v.* S., 151 Ala. 86, 44 S. 51.

184-23 Harper Mach. Co. *v.* Ryan-Unmack Co., 85 Conn. 359, 82 A. 1027; Holcombe *v.* S., 5 Ga. App. 47, 62 S. E 647; S. *v.* Co., 79 Kan. 371, 99 P. 603, Crowley *v.* R. Co., 204 Mass. 241, 90 N. E. 532; San Antonio T. Co. *v.* Higdon (Tex. Civ.), 123 S. W. 732; Spiek *v.* S., 140 Wis. 104, 121 N. W. 664.

185-24 W. U. T. Co. *v.* Saunders, 164 Ala. 234, 51 S. 176; Noel *v.* S., 161 Ala. 25, 49 S. 824; Roguemore *v.* Co., 160 Ala. 311, 49 S. 389; Bufford *v.* Little, 159 Ala. 300, 48 S. 697; Thompson *v.* S., 58 Fla. 106, 50 S. 507; Shaw *v.* Jones, 133 Ga. 446, 66 S. E. 240; Neumeyer *v.* Hooker, 131 App. Div. 592, 116 N. Y. S. 204; Schock *v.* Co., 222 Pa. 271, 71 A. 94; Shelton *v.* S., 56 Tex. Cr. 265, 119 S. W. 862; S. *v.* Cool, 66 W. Va. 86, 66 S. E. 740.

185-25 See vol. 9, p. 241, n. 25; p. 245, n. 39, and supplement thereto.

185-26 Wilson *v.* Jernigan, 57 Fla. 277, 49 S. 44; C. *v.* Tucker, 189 Mass. 457, 76 N. E. 127; Campbell *v.* Co., 95 Minn. 375, 104 N. W. 547; Uvalde County *v.* Oppenheimer, 53 Tex. Civ. 137, 115 S. W. 904.

185-27 Fletcher *v.* Co., 163 Ala. 240, 50 S. 996; Battel *v.* R. Co., 153 Ill. App. 210; Herrman *v.* Combs, 119 Md. 41, 85 A. 1044; Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1; Gebus *v.* R. Co., 22 N. D. 29, 132 N. W. 227; C *v.* Brown, 23 Pa. Super. 470; S. *v.* Madison, 23 S. D. 584, 122 N. W. 647; Baltimore, etc. Co. *v.* Hudgins (Va.), 81 S. E. 48; Mullins *v.* Co., 113 Va. 787, 75 S. E. 193; Hurley *v.* Charles (Va.), 65 S. E. 468.

185-28 St. Louis, etc. R. Co. *v.* Savage, 163 Ala. 55, 50 S. 113; Wilson *v.* Jernigan, 57 Fla. 277, 49 S. 44 (if irrelevancy not apparent objector should move to exclude); C. *v.* Johnson, 199 Mass. 55, 85 N. E. 188; Hutchins *v.* Berry, 75 N. H. 416, 75 A. 650; Statler *v.* Co., 195 N. Y. 478, 88 N. E. 1063; Manufacturers' C. Co. *v.* R. Co., 117 N. Y. S. 989; S. *v.* Hembree, 54 Or. 463, 103 P. 1008; Ballou *v.* Ballou, 30 R. I. 286, 74 A. 1089; Uvalde County *v.* Oppenheimer, 53 Tex. Civ. 137, 115 S. W. 904. See vol. 9, p. 242, n. 29; vol. 12, p. 162, n. 12, and supplement thereto.

It is not "necessary that the party on whose behalf testimony is received, upon the promise of counsel to show its materiality subsequently, should afterward connect such testimony with the issues involved, by undoubted evidence. If sufficient evidence is offered to make it a fair question of fact for the jury to determine, such evidence should not be excluded; but if the subsequent evidence does not tend to connect such testimony with the issues involved, it should be excluded when the court is asked to do so at the close of all the evidence of the party offering such testimony." P. *v.* Smith, 254 Ill. 167, 98 N. E. 281.

187-30 Bass *v.* O'Berry, 59 Fla. 159, 51 S. 597; Metropolitan Ins. Co. *v.* McAuley, 134 Ga. 165, 67 S. E. 393; Capital C. B. Co. *v.* I. & C. Co., 5 Ga. App. 436, 63 S. E. 562; Barrish *v.* Orben, 78 N. J. L. 128, 73 A. 529; Gaylord *v.* Gaylord, 150 N. C. 222, 63 S. E. 1028.

Evidence not irrelevant because tending to prove fact irrelevant if it also tends to prove relevant fact. O'Brien *v.* White, 105 Me. 308, 74 A. 721.

Unless improper use made of evidence relevant for particular purpose, that it may have resulted in verdict complained of no cause for interfering with judgment. Kelland *v.* Co., 75 N. H. 168, 71 A. 947.

187-31 Vaughan's S. S. *v.* Stringfellow, 56 Fla. 708, 48 S. 410; Indian-

apolis T. & T. Co. *v.* Rowe, 43 Ind. App. 407, 87 N. E. 653; Leathers *v.* Geitz, 135 Ia. 145, 112 N. W. 191, Aetna Ins. Co. *v.* R. Co., 123 Mo. App. 513, 100 S. W. 569.

188-32 St. Louis, etc. R. Co. *v.* Walker, 89 Ark. 556, 117 S. W. 534; Logan *v.* S., 58 Fla. 72, 50 S. 536; Brusseau *v.* Co., 133 Ia. 245, 110 N. W. 577.

188-33 Louisville R. Co. *v.* Ellerhorst, 33 Ky. L. R. 605, 110 S. W. 823; Bishop *v.* S., 96 Miss. 846, 52 S. 21; Kansas City, etc. R. Co. *v.* Young, 50 Tex. Civ. 610, 111 S. W. 764.

The relevancy of testimony is for the court. Ward *v.* S. (Ala.), 58 S. 788; McMurphy *v.* S., 4 Ala. App. 20, 58 S. 748; Bailey *v.* S., 4 Ala. App. 7, 58 S. 675; Ex parte Alexander, 163 Mo. App. 615, 147 S. W. 521.

189-35 J. B. Anderson & Co. *v.* Brammer, 4 Ala. App. 596, 58 S. 941; Harper Machinery Co. *v.* Ryan-Unmack Co., 85 Conn. 359, 82 A. 1027; Atlantic C. L. R. Co. *v.* Partridge, 58 Fla. 153, 50 S. 634; Furlong *v.* Ins. Co., 136 Ia. 468, 113 N. W. 1084 (inventory admissible as foundation for testimony of witness who made it); Tachini *v.* S., 59 Tex. Cr. 55, 126 S. W. 1139.

191-40 Presumed on appeal, if record is not to contrary, necessary preliminary facts appeared or that there was evidence sufficient to make related testimony admissible. Bristol Mfg. Co. *v.* Palmer, 82 Vt. 438, 74 A. 76.

191-41 Smiley *v.* Hooper, 147 Ala. 646, 41 S. 660; Kimic *v.* R. Co., 156 Cal. 379, 104 P. 986; Vollmer C. Co. *v.* Rogers, 13 Ida. 564, 92 P. 579 (books of accounts admissible to explain notes and receipts); P. *v.* Pezutto, 255 Ill. 583, 99 N. E. 677; Churchill *v.* Mace, 148 Mich. 456, 111 N. W. 1034; Pearson *v.* Millard, 150 N. C. 303, 63 S. E. 1053; Wilson *v.* Moss, 79 S. C. 120, 60 S. E. 313 (to show circumstances under which partnership created); San Antonio T. Co. *v.* Haines, 45 Tex. Civ. 289, 100 S. W. 788; Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807 (to render expert evidence intelligible). But see Oates *v.* S., 51 Tex. Cr. 449, 103 S. W. 859.

192-42 Crawford *v.* U. S., 212 U. S. 183; Pollak *v.* Gunter, 162 Ala. 317, 50 S. 155; Hoxie *v.* Walker, 75 N. H. 308, 74 A. 183; Page *v.* Hazelton, 74 N. H. 252, 66 A. 1049; Hall *v.* R. Co., 27 R. I. 525, 65 A. 278 (explanation of why bill rendered was made out to third person instead of defendant); Holt & Smith *v.* Plow Co. (Tex. Civ.), 150 S. W. 215. See S. *v.* Harrison, 145 N. C. 408, 59 S. E. 867; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401.

Reason for depreciated market value may be shown. Robertson *v.* Warren, 45 Tex. Civ. 584, 100 S. W. 805.

193-43 Chitwood *v.* U. S., 153 Fed. 551, 82 C. C. A. 505; Andrews *v.* S., 159 Ala. 14, 48 S. 858; Tifton, etc. R. Co. *v.* Butler, 4 Ga. App. 191, 60 S. E. 1087; Mealey *v.* Lumb. Co., 118 Minn. 427, 136 N. W. 1090.

To show mental condition of grantor when his deed is attacked on the ground of insanity. Lang *v.* Lang (Ia.), 135 N. W. 604.

193-44 Gehlert *v.* Quinn, 35 Mont. 451, 90 P. 168.

193-45 Gardner *v.* S., 56 Tex. Cr. 594, 120 S. W. 895.

194-46 McGuire *v.* County, 133 Ia. 636, 111 N. W. 34.

195-49 Christy *v.* Ins. Assn., 123 N. Y. S. 740; Day *v.* S., 62 Tex. Cr. 448, 138 S. W. 130.

195-51 Weaver *v.* S., 1 Ala. App. 48, 55 S. 956; Montgomery *v.* S., 2 Ala. App. 25, 56 S. 92; P. *v.* Fisher, 16 Cal. App. 271, 116 P. 688; Grant *v.* S., 122 Ga. 740, 50 S. 946; S. *v.* Meyers, 59 Or. 537, 117 P. 818; S. *v.* Papa, 32 R. I. 453, 80 A. 12.

195-52 Hillman Land & Iron Co. *v.* C., 148 Ky. 331, 146 S. W. 776.

195-53 Shepherd *v.* Co., 79 Neb. 834, 113 N. W. 627.

196-54 Humphrey *v.* Stage Co., 115 Minn. 18, 131 N. W. 498.

196-55 Rule has special force in equity. Barrie *v.* R. Co., 138 Mo. App. 557, 119 S. W. 1020.

196-56 Rutledge *v.* Rowland, 161 Ala. 114, 49 S. 461.

"**No error in permitting** the state's witnesses to show that the deceased did not own a pistol, did not have one on the night of the killing, and that none was found on his person after he was killed. This may have been negative evidence, but it was relevant and tended to contradict the defendant in the statement that the deceased had a pistol and tried to shoot him with it when the shooting occurred at the crib." McGhee *v.* S., 178 Ala. 4, 59 S. 573.

197-61 See vol. 2, p. 661, n. 30, and supplement thereto.

198-64 See vol. 2, p. 660, n. 28, and supplement thereto.

199-66 Roquemore *v.* Co., 160 Ala. 311, 49 S. 389; Gillespie *v.* Campbell, 149 Ala. 193, 43 S. 28; World's Fair M. Co. *v.* Powers, 12 Ariz. 285, 100 P. 957; Linforth *v.* Co., 156 Cal. 58, 103 P. 320; Beach *v.* Schroeder, 47 Colo. 312, 107 P. 271; White *v.* S., 63 Fla. 49, 59 S. 17; Chicago, etc. R. Co. *v.* Johnson, 128 Ill. App. 20; McFarland *v.* Boucher, 153 Ia. 716, 134 N. W. 91; Moore *v.* R. Co. (Ia.), 123 N. W. 324; S. *v.* Moore, 77 Kan. 736, 95 P. 409 (criminal action); Powers *v.* R. Co., 201 Mass. 66, 87 N. E. 192; Minnesota & D. C. Co. *v.* R. Co., 108 Minn. 470, 122 N. W. 493; Dayton F. Box Co. *v.* Danciger, 161 Mo. App. 640, 143 S. W. 855; Hanson *v.* Neal, 215 Mo. 256, 114 S. W. 1073; Stevens *v.* S., 84 Neb. 759, 122 N. W. 58; Wimpfheimer *v.* Harris, 114 N. Y. S. 441; Townsend *v.* Rosenblum, 113 N. Y. S. 1029; S. *v.* Dunn, 53 Or. 304, 100 P. 258; Tieman *v.* Sachs, 52 Or. 560, 98 P. 163; Heblich *v.* Slater, 217 Pa. 404, 66 A. 655 (amount paid another attorney in same case inadmissible in action for services rendered); Eastman *v.* Dunn, 34 R. I 416, 83 A. 1057; Ralph *v.* Taylor, 33 R. I. 503, 82 A. 279; Bailey *v.* Walton, 24 S. D. 118, 123 N. W. 701; Stevens *v.* S. (Tex. Cr.), 150 S. W. 944; Moray *v.* S. (Tex. Cr.), 145 S. W. 592; Gulf, etc. R. Co. *v.* Peacock (Tex. Civ.), 128 S. W. 463 (former suit against another party for same injury); Hollen *v.* Crim, 62 W. Va. 451, 59 S. E. 172.

See Mo., etc. R. Co. *v.* Mulkey (Tex. Civ.), 159 S. W. 111.

Collateral matters admissible under statute. Beard *v.* Beard, 66 Or. 526, 133 P. 795.

A question asked the assaulted party by the defendant, while testifying as a witness for the state, about a third party's having shot at him some time before the assault in question by the defendant, was properly disallowed by the court. That some other person, in no way shown to be connected with the commission of the offense for which the defendant was being tried, at some other place and time, had shot, or shot at, the party assaulted, was entirely irrelevant and immaterial. Walker *v.* State, 139 Ala. 56, 35 South. 1011." Collins *v.* S., 3 Ala. App. 64, 58 S. 80.

Where it was fully admitted by the defendant that the deceased was caught in the gearing, and that he died as a result of the injuries received thereby, and the only questions were whether the uncovered gearing constituted negligence, and whether, if so, the deceased was guilty of contributory negligence; it was improper to show the shocking condition of the body. "The evidence could only tend to excite the sympathies and, perhaps, the passions of the jury." West *v.* Bayfield Mill Co., 149 Wis. 145, 135 N. W. 478.

A witness, "after testifying to facts material to the case, stated that he had known the plaintiff for 30 years, and that his general character was good. The defendant then asked him the following question: 'Do you think a man that will go to a distillery and try to run another man away with gun and sticks and other weapons, and attend a lynching bee, and help lynch a man, is a man of good character?' This question was plainly incompetent, as it sought to inject into the case questions of fact utterly foreign to the issues in the case." Woodie *v.* Town of No. Wilkesboro, 159 N. C. 353, 74 S. E. 924. As said by Mr. Justice Allen in State *v.* Holly, 155 N. C. 485, 71 S. E. 450: "If one collateral question of this character can be raised and tried, the same rule would permit a hundred others. The authorities in this state are numerous and uniform that it is an error to allow such questions on the cross-examination of a witness as to character."

For the court to determine.—Fellows *v.* Int. Co., 76 N. H. 457, 83 A. 1091.

199-67 Watts *v.* S., 177 Ala. 24, 59 S. 270; Porter *v.* R. Co., 3 Ala. App. 302, 59 S. 255; Polytinsky *v.* Patterson, 177 Ala. 406, 57 S. 130; Sheppard *v.* S., 172 Ala. 363, 55 S. 514; Crone *v.* Long, 159 Ala. 487, 49 S. 227; Rutledge *v.* Rowland, 161 Ala. 114, 49 S. 463; Thomas *v.* Young, 81 Conn. 702, 71 A. 1100; U. S. *v.* Hoover, 31 App. Cas. (D. C.) 311; De Nieff *v.* Howell, 138 Ga. 248, 75 S. E. 202; Hutcheson *v.* R. Co., 134 Ga. 602, 68 S. E. 323; McMahon *v.* R. Co., 239 Ill. 334, 88 N. E. 223; Bordner *v.* Depler, 142 Ill. App. 526; Foley *v.* Everett, 142 Ill. App. 250; S. *v.* Rozeboom, 145 Ia. 620, 124 N. W. 783; Aetna I. Co. *v.* Fuller, 111 Md. 321, 73 A. 738; French *v.* Sabin, 202 Mass. 240, 88 N. E. 845; Barnard *v.* Bates, 201 Mass. 234, 87 N. E. 472; S.

v. Kight, 106 Minn. 371, 119 N. W. 56; Waldrop *v.* S., 95 Miss. 287, 48 S. 609; Finkelstein *v.* R. Co., 75 N. H. 303, 73 A. 705; Mims *v.* Co., 82 S. C. 247, 64 S. E. 236; S. *v.* Jacobs, 26 S. D. 183, 128 N. W. 162; Irvin *v.* S. (Tex. Cr.), 148 S. W. 589; Phinney *v.* S., 59 Tex. Cr. 480, 129 S. W. 628; Neumann *v.* S., 58 Tex. Cr. 248, 125 S. W. 28; Green *v.* S., 56 Tex. Cr. 599, 120 S. W. 1002; Hardin *v.* S., 55 Tex. Cr. 631, 117 S. W. 974; Gibbens *v.* Hart (Tex. Civ.), 117 S. W. 168.

In Betts *v.* **S.** (Tex. Cr.), 144 S. W. 677, it was said that witness should have only been permitted to testify as to what she saw and heard, and not "that she covered up her head with a pillow to keep from hearing Betts whip the child any longer."

That the officer at some other time may have mistreated some other prisoner in an attempt to get a confession out of him, was inadmissible for any purpose. Moray *v.* S. (Tex. Civ.), 145 S. W. 927.

In a suit by a guest against an innkeeper for the loss of jewelry and valuable articles alleged to have been taken from the room occupied by the guest, the issue being whether the innkeeper had made a rule requiring valuable articles to be deposited in a safe provided by him, and had duly posted such rule in accordance with Civ. Code, 1895, §2937, it was not admissible to ask the plaintiff, on cross-examination, if the wife of the innkeeper did not warn her, on a certain occasion, to leave her jewelry in a safe of the hotel provided for the safe-keeping of the valuables of guests. McBride *v.* Goodhue, 134 Ga. 608, 68 S. E. 321.

200-68 Hall *v.* Cardwell, 5 Ala. App. 481, 59 S. 514; Kramer *v.* Compton, 166 Ala. 216, 52 S. 351; Blair *v.* Williams, 159 Ala. 655, 49 S. 71; Marsh *v.* Fricke, 1 Ala. App. 649, 56 S. 110; Maurice *v.* Hunt, 80 Ark. 476, 97 S. W. 664; Marshall *v.* Bahnsen, 1 Ga. App. 485, 57 S. E. 1006; Ratliff *v.* Daniel, 137 Ky. 55, 121 S. W. 1034; Bailey *v.* C., 130 Ky. 301, 113 S. W. 140; Welch *v.* Corey, 201 Mass. 165, 87 N. E. 477; C. *v.* King, 202 Mass. 379, 88 N. E. 454; Irons *v.* School Dist., 119 Minn. 119, 137 N. W. 303; See *v.* Wormser, 129 App. Div. 596, 113 N. Y. S. 1093; Floyd *v.* Co., 222 Pa. 257, 71 A. 13; Gardner *v.* S., 121 Tenn. 684, 120 S. W. 816; Lawson *v.* S. (Tex.), 148 S. W. 587; Gardner *v.* S., 55 Tex. Cr. 400, 117 S. W. 148; Freeman *v.* Puckett, 56 Tex. Civ. 126, 120 S. W. 514.

"**Ordinarily, evidence** of other criminal transactions is not admissible. Some of the exceptions are when it shows 'a system of mutually dependent crimes,' or is 'evidence of guilty knowledge,' or bears upon the question of identity of the accused, 'or articles connected with the offense,' or where the evidence of other transactions tends to 'prove malice, intent, motive, or the like.' Cawthon *v.* State, 119 Ga. 395, 409, 46 S. E. 897, 901. If the evidence of other transactions tends 'to illustrate the transaction in issue, or to establish some necessary ingredient of the particular offense under investigation,' it is admissible. Ray *v.* State, 4 Ga. App. 67, 70, 60 S. E. 816. See, also, Robinson *v.* State, 6 Ga. App. 696, 711, 65 S. E. 792; Hall *v.* State, 7 Ga. App. 115, 120, 66 S. E. 390; Lee *v.* State, 8 Ga. App. 413, 69 S. E. 310; Farmer *v.* State, 100 Ga. 41, 28 S. E. 26." Martin *v.* S., 10 Ga. App. 795, 74 S. E. 304.

200-69 Loughead *v.* Co., 16 Ont. L. R. 64; Kerbaugh *v.* Gray, 212 Fed. 716 (C. C. A.); Walker R. & H. Co. *v.* Co., 173 Fed. 771, 97 C. C. A. 495; Puget Sound R. Co. *v.* Van Pelt, 168 Fed. 206, 93 C. C. A. 492; Monarch T. Wks. *v.* C., 165 Fed. 774; Cogbill *v.* S., 8 Ala. App. 223, 62 S. 406; Smith *v.* S., 8 Ala. App. 187, 62 S. 575; Key *v.* Goodall, 7 Ala. App. 227, 60 S. 986; Sheridan *v.* S., 5 Ala. App. 297, 59 S. 735; Napier *v.* Elliott, 177 Ala. 113, 58 S. 435; Reaves *v.* Co., 166 Ala. 645, 52 S. 142; Cleaney *v.* Parker, 167 Ala. 134, 51 S. 951; Agee *v.* Ins. & R. E. Co., 165 Ala. 291, 51 S. 829; Penton *v.* Williams, 163 Ala. 603, 51 S. 35; Tennessee C., I. & R. Co. *v.* Kelly, 163 Ala. 348, 50 S. 1008; Roach *v.* Whitfield, 94 Ark. 448, 127 S. W. 722; Morris *v.* Eagle, 94 Ark. 180, 126 S. W. 382; McCown *v.* Wilson, 92 Ark. 153, 122 S. W. 478; Breuner Co. *v.* King, 9 Cal. App. 271, 98 P. 1077; Ausmus *v.* P. Co., 47 Colo. 167, 107 P. 204; Smith *v.* Ford, 82 Conn. 653, 74 A. 910; Augusta N. S. Co. *v.* Forlaw, 133 Ga. 138, 65 S. E. 370; Lewman *v.* Owens, 132 Ga. 484, 64 S. E. 544; Hobart *v.* Van Aernam, 146 Ill. App. 1; Pell *v.* R. Co., 142 Ill. App. 362; Gray *v.* R. Co., 143 Ia. 268, 121 N. W. 1097; Chesapeake & O. R.

Co. *v.* Austin, 137 Ky. 611, 126 S. W. 144; Probst *v.* Hinesley, 133 Ky. 61, 117 S. W. 389; Roettger *v.* Reifkin, 130 Ky. 197, 113 S. W. 88; S. *v.* Brady, 121 La. 951, 50 S. 806; Beck *v.* Hanline, 122 Md. 68, 89 A. 377; Webster *v.* Moore, 108 Md. 572, 71 A. 466; Di Giorgio Co. *v.* R. Co., 104 Md. 693, 65 A. 425 (requisition for cars presented at time subsequent to transaction, irrelevant upon issue of negligence); Holt *v.* Holt, 204 Mass. 25, 90 N. E. 392; Moffat *v.* Davitt, 200 Mass. 452, 86 N. E. 929; Hamsy *v.* Mudarri, 195 Mass. 418, 81 N. E. 266 (habits of intoxication inadmissible to prove intoxication at particular time); Goyette *v.* Keenan, 196 Mass. 416, 82 N. E. 427; Schock *v.* Cooling, 175 Mich. 313, 141 N. W. 675; Ruttle *v.* Foss, 161 Mich. 132, 125 N. W. 790; Dennis *v.* Ins. Co., 159 Mich. 594, 124 N. W. 575; S. *v.* Colvin, 226 Mo. 446, 126 N. W. 448; Crawford *v.* S. Co., 215 Mo. 394, 114 S. W. 1057; Tonopah & G. R. Co. *v.* Fellanbaum, 32 Nev. 278, 107 P. 882; Smith *v.* Appleton, 155 App. Div. 520, 140 N. Y. S. 565; P. *v.* Carlin, 194 N. Y. 448, 87 N. E. 805; P. *v.* Kathan, 136 App. Div. 303, 120 N. Y. S. 1096; Frahm *v.* Co., 131 App. Div. 747, 116 N. Y. S. 90; Meyer *v.* Gans, 130 App. Div. 236, 114 N. Y. S. 584; Lessler *v.* Bernstein, 123 N. Y. S. 224; Zippert *v.* Acme Co., 113 N. Y. S. 998; Niles *v.* P. Co., 115 N. Y. S. 602; Koch *v.* Bjorkegren, 119 N. Y. S. 193; Pfaelzer *v.* Gassner, 116 N. Y. S. 15; Boney *v.* Boney, 161 N. C. 614, 77 S. E. 784; Hamilton *v.* R. Co., 150 N. C. 193, 63 S. E. 730; Byers *v.* T., 1 Okla. Cr. 677, 100 P. 261, 103 P. 532; S. *v.* Osborne, 54 Or. 289, 103 P. 62; Chenoweth *v.* S. P. Co., 53 Or. 111, 99 P. 86; Trainer *v.* McGarrity, 40 Pa. Super. 57; Rookard *v.* R. Co., 84 S. C. 190, 65 S. E. 1047; Poulter *v.* S. (Tex. Cr.), 161 S. W. 475; Holmes *v.* S. (Tex. Cr.), 150 S. W. 926; Key *v.* Hickman (Tex. Civ.), 149 S. W. 275; Penton *v.* S. (Tex.), 149 S. W. 190; Houston, etc. R. Co. *v.* Johnson, 103 Tex. 320, 127 S. W. 539; Lemons *v.* S., 59 Tex. Cr. 299, 128 S. W. 416; Mayors *v.* S., 58 Tex. Cr. 39, 124 S. W. 663; Groszehmigem *v.* S., 57 Tex. Cr. 241, 121 S. W. 1113; Williams *v.* S., 55 Tex. Cr. 65, 115 S. W. 35; Smith *v.* S., 57 Tex. Cr. 455, 123 S. W. 698; Stephenson *v.* Jackson (Tex. Civ.), 128 S. W. 1196; International, etc. R. Co. *v.* Duncan, 55 Tex. Civ. 440, 121 S. W. 362; Johnson *v.* Hulett, 56 Tex. Civ. 11, 120 S. W. 257; Houston, etc. R. Co. *v.* Johnson (Tex. Civ.), 118 S. W. 1150; Merritt *v.* S., 42 Tex. Civ. 495, 94 S. W. 372; Cerriglio *v.* Pettit, 113 Va. 533, 75 S. E. 303; Dunkin *v.* Hoquiam, 56 Wash. 47, 105 P. 149; Fisher *v.* R. Co., 141 Wis. 515, 124 N. W. 1005. *Comp.* Postal T. C. Co. *v.* Harriss, 55 Tex. Civ. 105, 121 S. W. 358; Kurowski *v.* S., 143 Wis. 210, 126 N. W. 546.

See Coast Cent. Mill Co. *v.* Co. (Conn.), 89 A. 898; Walker *v.* S. (Tex. Cr.), 151 S. W. 822; see vol. 11, p. 777, n. 9, and supplement thereto.

202-70 Bauer C. Co. *v.* Smith (Ky.), 115 S. W. 828; Richardson *v.* Baker, 83 Vt. 204, 75 A. 151; Garberson *v.* Co., 51 Wash. 213, 98 P. 612.

Exception sometimes in establishing boundaries. Bristol Mfg. Co. *v.* Palmer, 82 Vt. 438, 74 A. 76.

Discretionary with judge to admit evidence as to collateral matters. Goodlett *v.* Co., 84 Neb. 485, 121 N. W. 444.

202-71 Hall *v.* S., 7 Ga. App. 115, 66 S. E. 390. See infra, "Similar Transactions," 800-56, et seq.

Scope of relevancy extended as to collateral matters, if evidence of material fact is conflicting. Landis *v.* Watts, 82 Neb. 359, 117 N. W. 705.

202-72 Moody *v.* Peirano, 4 Cal. App. 411, 88 P. 380.

202-73 Grey *v.* U. S., 172 Fed. 101, 96 C. C. A. 415 (after commission of crime); Sloss-S. S. & I. Co. *v.* Mitchell, 161 Ala. 278, 49 S. 851; Phillips *v.* S., 161 Ala. 60, 49 S. 794; Alexander *v.* S., 7 Ga. App. 88, 66 S. E. 274; Kinnaird *v.* C., 134 Ky. 575, 121 S. W. 489; Ryan *v.* Chown, 161 Mich. 204, 125 N. W. 46; P. *v.* Schlessel, 196 N. Y. 476, 90 N. E. 44; Meyer *v.* Gans, 130 App. Div. 236, 114 N. Y. S. 584; Johnson *v.* Hulett, 56 Tex. Civ. 11, 120 S. W. 257; Simons *v.* Cissna, 52 Wash. 115, 100 P. 200. *Comp.* Richardson *v.* Baker, 83 Vt. 204, 75 A. 151.

Exception to rule.—See Barrie *v.* R. Co., 138 Mo. App. 557, 119 S. W. 1020; Belka *v.* Allen, 82 Vt. 456, 74 A. 91.

Matters occurring after commission of crime may be irrelevant. Noel *v.* S., 161 Ala. 25, 49 S. 824.

202-74 Taylor *v.* S., 5 Ga. App. 237, 62 S. E. 1048; Ratliff *v.* Daniel, 137 Ky. 55, 121 S. W. 1034. *Comp.* Kelly P. Co. *v.* London (Tex. Civ.), 125 S. W. 974.

203-84 Where fraud alleged rules

relaxed, evidence admissible which in other actions might be regarded as too remote. Dantzler *v.* Cox, 75 S. C. 334, 55 S. E. 774.

If evidence circumstantial scope of relevant matters much enlarged. Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755.

204-99 C. *v.* Johnson, 199 Mass. 55, 85 N. E. 188.

206-12 See vol. 9, p. 745, n. 23, et seq. and supplement thereto.

209-33 When reversible error. — Phillips *v.* S., 3 Ala. App. 218, 57 S. 1033.

209-34 Barry *v.* Anderson, 89 Neb 332, 131 N. W. 591.

Evidence having remote bearing on issues, admissible in court's discretion. Bradley *v.* Co. (N. J.), 90 A. 1015.

209-36 Birmingham, etc. Co. *v.* Demmis, 3 Ala. App. 359, 57 S. 404; McDonald *v.* S., 55 Tex. Cr. 508, 117 S. W. 131; Schon *v.* Woodmen, 51 Wash. 482, 99 P. 25.

210-37 Jefferson *v.* S., 137 Ga. 382, 73 S. E. 499; O'Rourke *v.* Sproul, 241 Ill. 576, 89 N. E. 663; Garland *v.* R. Co., 210 Mass. 458, 97 N. E. 97; Southwestern T. & T. Co. *v.* Owens (Tex. Civ.), 116 S. W. 89; In re Seattle (Wash.), 100 P. 330.

See vol. 3, p. 929, n. 38, and supplement thereto.

Where relevant evidence is ruled out, but witness is afterwards allowed to testify as to the same matters the error is not prejudicial. Bradley *v.* S., 3 Ala. App. 212, 58 S. 95.

210-38 S. *v.* Bancroft, 23 N. D. 442, 137 N. W. 37.

Exclusion of testimony which would not, in connection with that received, establish case no cause for reversal. Spongberg *v.* Nat. Bk., 15 Ida. 671, 99 P. 712; Taylor *v.* Taylor, 79 Kan. 161, 99 P. 814; P. *v.* Farmer, 194 N. Y. 251, 87 N. E. 457.

Prejudice presumed from excluding relevant testimony in a trial before jury. Crawford *v.* U. S., 212 U. S. 183. In close case. Clover *v.* Woodmen, 142 Ill. App. 276.

Right to object to exclusion of evidence as irrelevant waived by causing exclusion of like evidence. Louisville & N. R. Co. *v.* O'Nan (Ky.), 119 S. W. 1192.

210-39 Phillips *v.* S., 161 Ala. 60, 49 S. 794; Woodbridge I. Co. *v.* Co., 81 Conn. 479, 71 A. 577; Griser *v.* Schoenborn, 109 Minn. 297, 123 N. W. 823; Harrison *v.* R. Co., 195 N. Y. 86, 87 N. E. 802; Chesapeake & O. R. Co. *v.* Ghee, 110 Va. 527, 66 S. E. 826.

210-40 McNaron *v.* S., 7 Ala. App. 170, 62 S. 302; Tennessee C., I. & R. Co. *v.* Kelly, 163 Ala. 348, 50 S. 1008; Rollings *v.* S., 160 Ala. 82, 49 S. 329; Ware *v.* S., 91 Ark. 555, 121 S. W. 927; P. *v.* Martin, 13 Cal. App. 96, 108 P. 1034; Robinson *v.* S., 6 Ga. App. 696, 65 S. E. 792; P. *v.* McMahon, 244 Ill. 45, 91 N. E. 104; Porter *v.* S., 173 Ind. 694, 91 N. E. 340; Wallingford *v.* R. Co., 32 Ky. L. R. 1049, 107 S. W. 781; Hilliker *v.* Farr, 149 Mich. 444, 112 N. W. 1116; Saucier *v.* S., 95 Miss. 226, 48 S. 840; P. *v.* Schlessel, 196 N. Y. 476, 90 N. E. 44; P. *v.* Kathan, 136 App. Div. 303, 120 N. Y. S. 1096; Higgins *v.* R. Co., 129 App. Div. 415, 114 N. Y. S. 262; P. *v.* Santagata, 130 App. Div. 225, 114 N. Y. S. 321; Rothschild *v.* Weingreen, 121 N. Y. S. 234; Vickers *v.* U. S., 1 Okla. Cr. 452, 98 P. 467; Maibaum *v.* S., 59 Tex. Cr. 386, 128 S. W. 378; Neumann *v.* S., 58 Tex. Cr. 248, 125 S. W. 28; Damron *v.* S., 58 Tex. Cr. 255, 125 S. W. 396; Hankins *v.* S., 57 Tex. Cr. 152, 122 S. W. 21; Haney *v.* S., 57 Tex. Cr. 158, 122 S. W. 34; Lewis *v.* S., 56 Tex. Cr. 130, 119 S. W. 100; Church *v.* Co., 58 Wash. 262, 108 P. 596.

210-41 Gilbert *v.* S., 58 Fla. 50, 50 S. 535. See *v.* Wormser, 129 App. Div. 596, 113 N. Y. S. 1093; Pilgrim *v.* S., 3 Okla. Cr. 49, 104 P. 383.

211-42 Guin *v.* Co., 6 Ga. App. 484, 65 S. E. 330.

211-43 Loughead *v.* Co., 16 Ont. L. R. 64; Consolidated G. Co. *v.* Hammond, 175 Fed. 641, 99 C. C. A. 195; Minot *v.* Snavely, 172 Fed. 212, 97 C. C. A. 30; Lord *v.* Calhoun, 162 Ala. 444, 50 S. 402; Fidelity Ins. Co. *v.* Satterfield, 162 Ala. 291, 50 S. 132; Murphy *v.* R. Co., 92 Ark. 159, 122 S. W. 636; McCown *v.* Wilson, 92 Ark. 153, 122 S. W. 478; Powers *v.* Perry, 12 Cal. App. 77, 106 P. 595 (though trial be to court); Bartell *v.* Griffin, 47 Colo. 569, 108 P. 171; Silka *v.* Quinn, 46 Colo. 596, 105 P. 1104; Ga. R. & E. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944; Gossett *v.* S., 6 Ga. App. 439, 65 S. E. 162; Haywood *v.* Co., 145 Ill. App. 506; Cincinnati P. & S. Co. *v.* Thompson, 80 Kan. 467, 102 P. 848; S. *v.* Blassengame, 132 La. 250, 61 S. 219; Ryan *v.* Chown, 160 Mich. 204, 125 N. W. 46; Heiden *v.* R. Co., 84 S.

C. 117, 65 S. E. 987; Kinnan *v.* S., 86 Neb. 234, 125 N. W. 594; Curry *v.* Co. (N. J. L.), 73 A. 124; Gunn *v.* Mumford, 74 N. J. L. 601, 65 A. 989; Potter *v.* Browne, 197 N. Y. 288, 90 N. E. 812; Ryan *v.* G. Co., 133 App. Div. 467, 118 N. Y. S. 56; Frahm *v.* Siegel-C. Co., 131 App. Div. 747, 116 N. Y. S. 90; Wasserman *v.* Rubin, 67 Misc. 398, 123 N. Y. S. 60; Koch *v.* Bjorkegren, 119 N. Y. S. 193; Ebling B. Co. *v.* Feldman, 114 N. Y. S. 910; New Bern *v.* Wadsworth, 151 N. C. 309, 66 S. E. 141; S. *v.* Osborne, 54 Or. 289, 103 P. 62; McIntosh *v.* McNair, 53 Or. 87, 99 P. 74; Heiden *v.* R. Co., 84 S. C. 117, 65 S. E. 987; Hookman *v.* S., 59 Tex. Cr. 183, 127 S. W. 825; Gaines *v.* S., 58 Tex. Cr. 631, 127 S. W. 181; Patterson *v.* R. Co. (Tex. Civ.), 126 S. W. 336; Arthur C. Co. *v.* Willis (Tex. Civ.), 125 S. W. 584; Pennington *v.* L. Co. (Tex. Civ.), 122 S. W. 923; Garber *v.* R. Co. (Tex. Civ.), 118 S. W. 857; Meyers *v.* R. Co., 36 Utah 307, 104 P. 736.

Burden of proving prejudice is on party alleging error. Givens *v.* Co., 91 S. C. 417, 74 S. E. 1067.

211-44 Martin *v.* S., 3 Ala. App. 90, 58 S. 83; Roden *v.* S., 3 Ala. App. 204, 58 S. 73; Anglo-C. Bk. *v.* Field, 154 Cal. 513, 98 P. 267; Aggeler *v.* Dauphiny, 11 Cal. App. 245, 104 P. 702; Skinner *v.* Knickrehm, 10 Cal. App. 596, 102 P. 947; Grosse *v.* Barman, 9 Cal. App. 650, 100 P. 348; Shealy *v.* S., 138 Ga. 510, 74 S. E. 689; Walters *v.* Josey, 137 Ga. 475, 73 S. E. 653; Cook *v.* S., 134 Ga. 347, 67 S. E. 812; Norton *v.* Aiken, 134 Ga. 21, 67 S. E. 425; Elliott *v.* S., 132 Ga. 758, 64 S. E. 1090; Johnson *v.* S., 128 Ga. 71, 57 S. E. 84; Hutchinson *v.* S., 5 Ga. App. 598, 63 S. E. 597; McCain *v.* Assn., 17 Ida. 63, 104 P. 1015; P. *v.* Nall, 242 Ill. 284, 89 N. E. 1012; Zetsche *v.* R. Co.,' 238 Ill. 240, 87 N. E. 412; Savage *v.* Hayes, 142 Ill. App. 316; Leach *v.* S., 177 Ind. 234, 97 N. E. 792; Stokes *v.* Sac. City, 155 Ia. 334, 136 N. W. 207; S. *v.* Rozeboom, 145 Ia. 620, 124 N. W. 783; Flint *v.* Co., 142 Ia. 431, 120 N. W. 1031; Madisonville *v.* Stewart (Ky.), 121 S. W. 421; S. *v.* Chance, 122 La. 706, 48 S. 158; Moneyweight S. Co. *v.* McCormick, 109 Md. 170, 72 A. 537; Mountford *v.* Co., 202 Mass. 345, 88 N. E. 782; Casavan *v.* Sage, 201 Mass. 547, 87 N. E. 893; Gate City Nat. Bk. *v.* Bover, 161 Mo. App. 143, 142 S. W. 487; George *v.* R. Co., 225 Mo. 364, 125 S. W. 196; Hinckley *v.* Jewett, 86 Neb. 464, 125 N. W. 1086; Tobler *v.* S. Co., 85 Neb. 413, 123 N. W. 461; Hoskover *v.* R. Co., 85 Neb. 295, 123 N. W. 305; Modlin *v.* Jones, 84 Neb. 551, 121 N. W. 984; Proctor *v.* Blanchard, 75 N. H. 186, 72 A. 210; Bunker *v.* Mfg. Co., 75 N. H. 131, 71 A. 866; Hoxie *v.* Walker, 75 N. H. 308, 74 A. 183; Page *v.* Hazelton, 74 N. H. 252, 66 A. 1049 (evidence which might have been excluded as too remote); Mulholland *v.* Jones, 83 N. J. L. 604, 83 A. 875; P. *v.* Hill, 198 N. Y. 64, 91 N. E. 272; Maldonado *v.* Espen, 195 N. Y. 541, 88 N. E. 14; Post *v.* R. Co., 195 N. Y. 62, 87 N. E. 771; In re Water Supply, 129 App. Div. 711, 114 N. Y. S. 68; Freeman *v.* Brown, 151 N. C. 111, 65 S. E. 743; Hilliboe *v.* Warner, 17 N. D. 594, 118 N. W. 1047; Rhea *v.* Ty., 3 Okla. Cr. 230, 105 P. 314; Mullen *v.* Thaxton, 24 Okla. 643, 104 P. 359; Byers *v.* T., 1 Okla. Cr. 677, 100 P. 261, 103 P. 532; Mahon *v.* Rankin, 54 Or. 328, 102 P. 608; Floyd *v.* Co., 222 Pa. 257, 71 A. 13; Humphries *v.* R. Co., 84 S. C. 202, 65 S. E. 1051; Tinsley *v.* Co., 72 S. C. 350, 51 S. E. 913; S. *v.* Guy, 25 S. D. 144, 125 N. W. 570; Neeley *v.* Roberts, 23 S. D. 604, 122 N. W. 655; Crowell *v.* S., 56 Tex. Cr. 480, 120 S. W. 897; Churchill *v.* S., 56 Tex. Cr. 213, 120 S. W. 195; Field *v.* S., 55 Tex. Cr. 524, 117 S. W. 806; Tomlinson *v.* Drought (Tex. Civ.), 127 S. W. 262; Hartford F. Ins. Co. *v.* Beeton (Tex. Civ.), 124 S. W. 474; Knowles *v.* T. Co. (Tex. Civ.), 121 S. W. 232; Edwards *v.* White (Tex. Civ.), 120 S. W. 914; Savage *v.* Umphries (Tex. Civ.), 118 S. W. 893; Rainey *v.* Kemp, 54 Tex. Civ. 486, 118 S. W. 630; Adams *v.* Lumb. Co., 54 Tex. Civ. 477, 117 S. W. 1017; O'Neal *v.* Weisman, 39 Tex. Civ. 592, 88 S. W. 290; S. *v.* Justesen, 35 Utah 105, 99 P. 456; S. *v.* Roby, 83 Vt. 121, 74 A. 638; In re Seattle (Wash.), 100 P. 330; McCormick *v.* Tappendorf, 51 Wash. 312, 99 P. 2; Anderson *v.* Sparks, 142 Wis. 398, 125 N. W. 925.

See Dunnigan *v.* Ellis, 162 Ill. App. 185.

Should not be admitted. — Cent., etc. Co. *v.* Teasley (Ala.), 65 S. 981.

May be cured by instruction withdrawing it from the jury. Thomas *v.* Shea, 90 Neb. 823, 134 N. W. 933.

So when an issue has been found in

favor of a party. Tyrrel *v.* S., 177 Ind. 14, 97 N. E. 14.

211-45 Union Cent. L. Ins. Co. *v.* Washburn, 158 Ala. 169, 48 S. 475; Shannon C. Co. *v.* Potter, 13 Ariz. 245, 108 P. 486; Hughes *v.* Co., 13 Ariz. 52, 108 P. 231; Stewart *v.* Douglass, 9 Cal. App. 712, 100 P. 711; Guldman *v.* Wilder, 45 Colo. 551, 101 P. 759; Alexander *v.* Wellington, 44 Colo. 388, 98 P. 631; Venable *v.* Atlanta, 7 Ga. App. 190, 66 S. E. 489; Benedict *v.* Dakin, 243 Ill. 384, 90 N. E. 712; Kennard *v.* Curran, 239 Ill. 122, 87 N. E. 913; Bowen *v.* Eaton, 46 Ind. App. 65, 89 N. E. 961; Ditlinger *v.* Miller (Kan.), 105 P. 20; Am. B. Co. *v.* Co., 107 Minn. 140, 119 N. W. 783; Powers & B. C. & R. Co. *v.* Muir (Mo. App.), 123 S. W. 490; S. *v.* Wahl, 137 Mo. App. 651, 119 S. W. 453; Am. P. Co. *v.* Co., 78 N. J. L. 658, 75 A. 976; Missouri, etc. R. Co. *v.* S., 24 Okla. 331, 103 P. 613 (before corporation commission); Martin *v.* Frank (Tex. Civ.), 125 S. W. 958; Merriman *v.* Blalack, 57 Tex. Civ. 270, 122 S. W. 403; Merriman *v.* Blalack, 56 Tex. Civ. 594, 121 S. W. 552; Morris *v.* Moon (Tex. Civ.), 120 S. W. 1063; Edwards *v.* White (Tex. Civ.), 120 S. W. 914; Mundt *v.* Bk., 35 Utah 90, 99 P. 454; Hastie *v.* Jenkins, 53 Wash. 21, 101 P. 495; Springfield S. Co. *v.* Co., 52 Wash. 620, 101 P. 233; Yount *v.* Strickland, 17 Wyo. 526, 101 P. 942.

212-46 See Harmon *v.* Ins. Co. (Mo. App.), 156 S. W. 89.

Rule applies in condemnation proceedings before commissioners and has special force where view had. In re Croton Falls, etc., 129 App. Div. 707, 114 N. Y. S. 75.

212-47 Bartlett *v.* S., 7 Ala. App. 85, 60 S. 958; Kuhn *v.* Eppstein, 239 Ill. 555, 88 N. E. 174; Bowen *v.* Eaton, 46 Ind. App. 65, 89 N. E. 961; Crawford *v.* Co., 215 Mo. 394, 114 S. W. 1057; New York C. A. Co. *v.* Co., 114 N. Y. S. 788; Van Zandt-M. I. Wks. *v.* Axtell (Tex. Civ.), 126 S. W. 930; Missouri, etc. R. Co. *v.* Pettit, 54 Tex. Civ. 358, 117 S. W. 894.

If issue is joined upon an immaterial allegation, defendant cannot complain of testimony proving it. Bowman Realty Co. *v.* Moss, 147 Ky. 103, 143 S. W. 765.

213-48 Cahill *v.* Cahill, 155 Ia. 340, 136 N. W. 214; Canfield Lumb. Co. *v.* Kint Lumb. Co., 148 Ia. 207, 127 N. W. 70; McCown *v.* Muldrow, 91 S. C. 523, 74 S. E. 386; Met. Life Ins. Co. *v.* Hayslett, 111 Va. 107, 68 S. E. 256.

Negative testimony does not open door for irrelevant testimony. P. *v.* Schlessel, 196 N. Y. 476, 90 N. E. 44.

Right to prove whole conversation.— Rule of relevancy is not suspended by right to prove whole of a conversation part of which has been testified to, insofar as unproved part is irrelevant, it may be proved only to aid in understanding the utterance. P. *v.* Schlessel, 196 N. Y. 476, 90 N. E. 44.

Part of transaction used, whole admissible. Bagnell *v.* R. Co., 250 Mo. 514, 157 S. W. 497.

If accused, as witness in his own behalf, testifies to facts erroneously proved by state, error in admitting them is rendered harmless, notwithstanding his objection to so testifying. P. *v.* Geyer, 132 App. Div. 790, 117 N. Y. S. 662.

213-49 P. *v.* Newman, 261 Ill. 11, 103 N. E. 589; Rourke *v.* R. Co., 221 Mo. 46, 119 S. W. 1094; Sanzenbacher *v.* Santhuff, 220 Mo. 274, 119 S. W. 395. See Maxwell *v.* S. (Ala. App.), 65 S. 732; P. *v.* McKeehan, 11 Cal. App. 443, 105 P. 273.

REMOVAL OF CAUSES

215-1 Fishblatt *v.* Atlantic City, 174 Fed. 196.

216-3 Fact defendant described himself as resident of a state in deed executed by him is strong evidence tending to show him a citizen of state. Jones *v.* Subera, 150 Fed. 462.

216-4 Harton *v.* Howley, 155 Fed. 491.

216-5 International Bk. & T. Co. *v.* Scott, 159 Fed. 58, 86 C. C. A. 248; Balt. & O. R. Co. *v.* Davis, 149 Fed. 191, 79 C. C. A. 139 (plaintiff testified he was at home and lived in a certain town; sufficient proof of citizenship to give federal court jurisdiction).

217-9 Harton *v.* Howley, 155 Fed. 491; Nadal *v.* Ramos, 1 P. R. Fed. 363; Garrosi *v.* Garrosi, 1 P. R. Fed. 228.

217-10 Harton *v.* Howley, 155 Fed. 491. *Contra,* Jones *v.* Subera, 150 Fed. 462.

Fraudulent joinder of parties defendant for purpose of avoiding federal jurisdiction must be proved by petitioner.

So. R. Co. *v.* Arnold, 162 Ala. 570, 50 S. 293.

Filing petition not presumed too late in absence of anything in record to so show. Bilby *v.* Hancock (Tex. Civ.), 125 S. W. 370.

REPLEVIN

Execution as evidence of possessory right, 238-47.

222-1 Strickland *v.* Lesesne, 160 Ala. 213, 49 S. 233; Montgomery *v.* Patterson, 162 Ala. 125, 49 S. 1027; Snellgrove *v.* Evans, 165 Ala. 322, 51 S. 560; Ward *v.* McPherson, 87 Ark. 521, 113 S. W. 42; Black *v.* Roberson, 87 Ark. 641, 112 S. W. 402; Austin *v.* Terry, 38 Colo. 407, 88 P. 189 (where parties claim under same vendor); Staunton *v.* Smith, 6 Penne. (Del.) 193, 65 A. 593; Hitch *v.* Riggin (Del.), 80 A. 975; Hawkins *v.* Davie, 136 Ga. 550, 71 S. E. 873; Perfect Knitting Mills *v.* Obstfeld, 154 Ill. App. 637; Jackson *v.* Craw, 149 Ill. App. 559; Wiemer *v.* Temple, 145 Ill. App. 498; Nat. Bk. *v.* Thuet, 124 Ill. App. 501; Welker *v.* Appleman, 44 Ind. App. 699, 90 N. E. 35 (denial of plaintiff's right to possession, not admission of his ownership); Adamson *v.* Harper (Ia.), 143 N. W. 844; Daniels *v.* Taubenblatt, 120 La. 349, 45 S. 273; Wylie *v.* Marinofsky, 201 Mass. 583, 88 N. E. 448; Lohrenz *v.* Nelson, 124 Minn. 183, 143 N. W. 268, 1135; Namakan Lumb. Co. *v.* Boom Corp., 115 Minn. 296, 132 N. W. 259; Shevlin Mathieu L. Co. *v.* L. Co., 115 Minn. 533, 132 N. W. 263; Brunson *v.* Co., 93 Miss. 793, 47 S. 377; Steffin *v.* Lang, 165 Mo. App. 254, 147 S. W. 191; Moriund & Johnson, 140 Mo. App. 345, 124 S. W. 80; Meeks *v.* Co., 141 Mo. App. 648, 124 S. W. 1084; Frank *v.* Symons, 35 Mont. 56, 88 P. 561; Krebs H. Co. *v.* Taylor, 52 Or. 627, 97 P. 44. See Steckman *v.* Bk., 126 Mo. App. 664, 105 S. W. 674.

Claim of lien set up by defendant must be proved where plaintiff has shown ownership and right to possession. Kebabian *v.* Co., 27 R. I. 564, 65 A. 271. See Pease *v.* Magill, 17 N. D. 166, 115 N. W. 260.

Property must be identified as that owned by plaintiff. Daniels *v.* Taubenblatt, 120 La. 345, 45 S. 273; Lohrenz *v.* Nelson, 123 Minn. 525, 143 N. W. 268; Dennis *v.* Robinson (Miss.), 61 S. 597; Ellis *v.* Whitney (Tex. Civ.), 111 S. W. 158.

223-2 Blair *v.* Williams, 159 Ala. 655, 49 S. 71; Friedrich *v.* Donahue, 20 Ida. 92, 116 P. 1029; Baldwin *v.* Smith, 143 Ill. App. 56; Clark *v.* Anderson, 103 Me. 134, 68 A. 633; Standard V. Wks. *v.* Cushing, 202 Mass. 576, 89 N. E. 163; Fagan I. Wks. *v.* Co., 109 N. Y. S. 740; North Shore B. & D. Co. *v.* Co., 52 Wash. 564, 101 P. 48.

223-4 Rightful possession is presumed to continue to time goods taken by defendant. Sanford *v.* Millikin, 144 Mich. 311, 107 N. W. 884.

223-5 Strickland *v.* Lesesne, 160 Ala. 213, 49 S. 233; Anderson *v.* Stewart, 108 Md. 340, 70 A. 228.

224-6 Richbourg *v.* Rose, 53 Fla. 176, 44 S. 69; Sanitary C. Co. *v.* Hines, 149 Ill. App. 244; Segars *v.* Segars, 82 S. C. 196, 63 S. E. 891; Weber I. Co. *v.* Dunard (Tex. Civ.), 120 S. W. 608; Swenson *v.* Wells, 140 Wis. 316, 122 N. W. 724. *Comp.* Adamson *v.* Harper (Ia.), 143 N. W. 844. See Malone *v.* Collins (Ark.), 165 S. W. 641.

Prima facie case made, as against one claiming under lien, by showing right to possession. McCarty *v.* Key, 87 Miss. 248, 39 S. 780.

225-7 Shinn *v.* Plott, 82 Ark. 260, 101 S. W. 742.

Original possession of defendant lawful, burden on plaintiff to prove cessation of right of possession. Malone *v.* Collins (Ark.), 165 S. W. 641.

225-8 Lundee *v.* Talbot, 83 Ark. 315, 103 S. W. 731 (burden on mortgagee to bring property within mortgage); State Bk. *v.* Bk., 18 Okla. 10, 89 P. 206; Murdouch *v.* Tuten, 76 S. C. 502, 57 S. E. 547.

Defendant has burden of proving plea in the nature of confession and avoidance. Colean Mfg. Co. *v.* Johnson, 82 Kan. 655, 109 P. 405.

225-9 Martin *v.* Lesan, 129 Ia. 573, 105 N. W. 996.

Failure of consideration as between other parties, immaterial in action by second mortgagee. Weber I. Co. *v.* Dunard (Tex. Civ.), 120 S. W. 608.

226-11 Actual possession sufficient where property taken wrongfully. Taylor *v.* Brown, 49 Or. 423, 90 P. 673. *Comp.* Murray *v.* Lyons (Tex. Civ.), 95 S. W. 621.

226-12 Maxler *v.* Hawk, 233 Pa. 816, 82 A. 251.

227-16 Holbrook *v.* Neely, 93 Ark. 272, 124 S. W. 1025; Richbourg *v.* Rose, 53 Fla. 176, 44 S. 69; Martin *v.* Lesan, 129 Ia. 573, 105 N. W. 996 (mortgagee).

227-17 Brooke *v.* Kettler, 166 Ala. 76, 51 S. 940. See Churchill *v.* More, 4 Cal. App. 219, 88 P. 290; Judy *v.* Buck, 72 Kan. 106, 82 P. 1104; First Nat. Bk. *v.* Yoeman, 17 Okla. 613, 90 P. 412.

Conversation between plaintiff and his tenant, admissible though defendant not present. Turner *v.* Morris, 142 Mo. App. 60, 125 S. W. 238.

Affidavit and return on process, though not filed in due time, admissible to show who had possession. Kimmitt *v.* Deitrich, 22 S. D. 590, 119 N. W. 986.

229-20 Griswold *v.* Nichols, 126 Wis. 401, 105 N. W. 815.

Inventory of administratrix.—Austin *v.* Terry, 38 Colo. 407, 88 P. 189.

Owner's declarations at time of sale of property by receiver, competent to show he did not acquiesce therein. Brooke *v.* Kettler, 166 Ala. 76, 51 S. 940.

229-21 Agreement between owner and receiver, under whose sale defendant claims property, respecting capacity in which receiver held it, proved. Brooke *v.* Kettler, supra.

Officer's return conclusive as to who was in possession of property when writ served. Baldwin *v.* Smith, 143 Ill. App. 56.

229-22 Richbourg *v.* Rose, 53 Fla. 173, 44 S. 69; Idaho M. Co. *v.* Green, 14 Ida. 249, 93 P. 954; Wylie *v.* Marinofsky, 201 Mass. 583, 88 N. E. 448.

229-24 Williams *v.* Hampton, 57 Fla. 272, 49 S. 506.

230-25 Standard V. Wks. *v.* Cushing, 202 Mass. 576, 89 N. E. 163; Barnes *v.* Plessner, 137 Mo. App. 571, 119 S. W. 457; McHay *v.* Peterson, 52 Tex. Civ. 195, 113 S. W. 981.

230-28 Martin *v.* Barnett, 158 Mo. App. 375, 138 S. W. 538; Sullivan *v* Girson, 39 Mont. 274, 102 P. 320 (admission of possession day before suit brought and on that day, prior to institution of suit, raises prima facie presumption of actual possession when suit brought); Hyde *v.* Elmer, 14 N. M. 39, 88 P. 1132; Fries *v.* Lockwood, 64 Wash. 221, 116 P. 640. *Comp.* Segars *v.* Segars, 82 S. C. 196, 63 S. E. 891.

231-29 Bona fides of defendants' title as innocent purchasers may be shown by proof they were partners of third party chargeable with notice of facts imputing fraud. Parlin *v.* Glover, 55 Tex. Civ. 112, 118 S. W. 731.

232-30 Am. F. Co. *v.* Co., 136 Ia. 312, 111 N. W. 534.

233-32 Indiana T. Co. *v.* Bick, 40 Ind. App. 451, 81 N. E. 617.

234-36 Churchill *v.* More, 4 Cal. App. 219, 88 P. 290; Williams *v.* Hampton, 57 Fla. 272, 49 S. 506.

235-37 Brown *v.* Lewis, 50 Or. 358, 92 P. 1058.

237-42 Pruett *v.* Gunn, 158 Ala. 123, 48 S. 492, execution admissible against third person, ownership being in dispute.

Burden on officer who holds property under tax warrant to show his authority, regularity of antecedent proceedings and ownership in tax debtor. O'Sullivan *v.* Blakely, 54 Or. 551, 104 P. 297.

To sustain plea of estoppel, proper to prove city officials had no knowledge of claim superior to plaintiff's. Hooven, etc. Co. *v.* Atlantic (Ia.), 144 N. W. 635.

Plaintiff's knowledge of defendant's financial condition admissible. McKay *v.* Wishert (Tex. Civ.), 152 S. W. 508.

Officer need not show debt of attaching creditor if property taken from stranger. Curtis-B. Co. *v.* Lang, 83 Neb. 728, 120 N. W. 178. Otherwise if taken from plaintiff. Curtis-B. Co. *v.* Lang, supra.

238-46 See Strauss *v.* Reen, 17 Phila. (Pa.) 89. But see Sanford *v.* Millikin, 144 Mich. 311, 107 N. W. 884.

Burden on party who claims under execution, though plaintiff required to allege property not so taken. Valid execution and judgment must be shown. Moriund *v.* Johnson, 140 Mo. App. 345, 124 S. W. 80.

Fraud may be proved though not pleaded. Wendling L. Co. *v.* Co., 153 Cal. 411, 95 P. 1029.

238-47 Birmingham P. & R. Co. *v.* Gillespie, 163 Ala. 408, 50 S. 1032; Idaho M. Co. *v.* Green, 14 Ida. 249, 93 P. 954; Beinert *v.* Tivoli, 62 Misc. 616, 116 N. Y. S. 4 (burden on fraudulent vendee to show he purchased innocently and for value). See Denier *v.* Bonewur, 134 App. Div. 577, 119 N. Y. S. 313; Hydraulic, etc. Co. *v.* Christensen, 38 Utah 525, 114 P. 524.

The burden of proof is on the one claiming to be the donee of property

to establish all the facts essential to the validity of such gift. Maxler *v.* Hawk, 233 Pa. 316, 82 A. 251.

Valid mortgage must be shown by purchaser at mortgage sale. Blair *v.* Williams, 159 Ala. 655, 49 S. 71.

Officer's possessory rights cannot be established by proof merely of execution under which he took property; judgment upon which it issued must be produced. Hoover *v.* Jones, 84 Neb. 662, 121 N. W. 975.

Joint defendants.—Swope *v.* Crawford, 16 Pa. Super. 474.

238-48 Wright *v.* Bush, 165 Ala. 320, 51 S. 635 (if plaintiff relies solely on title); Idaho M. Co. *v.* Green, 14 Ida. 249, 93 P. 954; Moriund *v.* Johnson, 140 Mo. App. 345, 124 S. W. 80. *Contra* if defendant claims title. Jakway *v.* Rivers, 48 Colo. 49, 108 P. 999. But see Anderson C. Co. *v.* Bartley, 102 Me. 492, 67 A. 567. *Comp.* Staunton *v.* Smith, 6 Penne. (Del.) 193, 65 A. 593.

Lack of possession by defendant may be shown under general issue. Wright *v.* Bush, 165 Ala. 320, 51 S. 635.

Defendant must connect himself with title of third person set up as defense. Kebabian *v.* Co., 27 R. I. 564, 65 A. 271.

239-50 Defendant must show right to possession as predicate for damages. McMillan H. Co. *v.* Ross, 24 Okla. 696, 104 P. 343.

239-52 Staunton *v.* Smith, 6 Penne. (Del.) 193, 65 A. 593; Hyde *v.* Elmer, 14 N. M. 39, 88 P. 1132.

240-54 Bowen *v.* King, 146 N. C. 385, 59 S. E. 1044.

240-56 Reasonable cost of manufacturing goods taken, admissible. Itasca Co. *v.* McKinley, 124 Minn. 183, 144 N. W. 768, 1135.

240-57 Eitzen *v.* Hilbert, 165 Mich. 650, 131 N. W. 449; Hyde *v.* Elmer, 14 N. M. 39, 88 P. 1132; Bowen *v.* King, 146 N. C. 385, 58 S. E. 1044; Arnold *v.* Wurlitzer Co., 31 O. C. C. 491.

241-59 See Murdouch *v.* Tuten, 76 S. C. 502, 57 S. E. 547.

241-60 Smith *v.* Miller, 145 Ill. App. 606.

Rents received by defendant shown. Cummings *v.* Co., 130 Mo. App. 557, 109 S. W. 68.

242-64 Staunton *v.* Smith, 6 Penne. (Del.) 193, 65 A. 593; Schnitzer *v.* Russell, 81 N. J. L. 146, 80 A. 938.

Either hire or interests may be recovered as plaintiff elects. Smith *v.* Duke, 6 Ga. App. 75, 64 S. E. 292.

243-65 Hitch *v.* Riggin (Del.), 80 A. 975.

243-66 Rice *v.* Cassells, 48 Colo. 73, 108 P. 1001; Smith *v.* Miller, 145 Ill. App. 606; McDonough *v.* Reilly, 131 Ill. App. 553; Cummings *v.* Co., 130 Mo. App. 557, 109 S. W. 68 (depreciation due to injury).

243-68 Gregory *v.* Woodbery, 53 Fla. 566, 43 S. 504, statute.

244-71 Staunton *v.* Smith, 6 Penne. (Del.) 193, 65 A. 593; Payne *v.* King, 141 Mo. App. 246, 124 S. W. 1066 (not presumed plaintiff's interest equal to unpaid portion of purchase price).

246-74 See Gilroy *v.* Co., 118 App. Div. 733, 103 N. Y. S. 620.

246-75 Good faith affects rule of damages. Nashville L. Co. *v.* Barefield, 93 Ark. 353, 124 S. W. 758.

246-76 Blaul *v.* Wandel, 137 Ia. 301, 114 N. W. 899.

246-77 Payne *v.* King, 141 Mo. App. 246, 124 S. W. 1066.

247-82 See Aultman *v.* Richardson, 10 Ind. App. 413, 38 N. E. 532.

248-83 Burden on principal or surety on replevin bond to show why identical property not redelivered. Kaminsky *v.* Harrigan, 2 Ga. App. 332, 58 S. E. 497.

248-84 Williams *v.* Finch, 155 Ala. 399, 46 S. 645.

248-85 **Parol evidence** competent to show but one suit instituted by plaintiff against defendant. Williams *v.* Finch, 155 Ala. 399, 46 S. 645.

Justice's docket need not be proved to show appeal taken where appeal bond in evidence. Williams *v.* Finch, supra.

Appeal bond competent to show appeal taken though not signed by parties to suit on bond. Williams *v.* Finch, supra.

248-87 Lindsey *v.* Hewitt, 42 Ind. App. 573, 86 N. E. 446, presumed all matters at issue litigated. See Mounts *v.* Murphy, 31 Ky. L. R. 1192, 104 S. W. 978 (damages for withholding); Larson *v.* Hanson, 21 N. D. 411, 131 N. W. 229.

251-89 Lindsey *v.* Hewitt, 42 Ind. App. 573, 86 N. E. 446.

251-90 Hoek *v.* Magerstadt, 124 Ill. App. 140, dismissal for failure to prosecute.

253-97 Mounts *v.* Murphy, 31 Ky. L. R. 1192, 104 S. W. 978.

254-1 Klaproth *v.* Greenberg, 147 Ill. App. 380.

Where action dismissed for want of jurisdiction ownership may be shown in mitigation. Robinson *v.* Teeter, 10 Ind. App. 698, 38 N. E. 222.

254-3 In re Purcell's Est., 165 Cal. 607, 128 P. 932.

256-6 Lindsey *v.* Hewitt, 42 Ind. App. 573, 86 N. E. 446.

256-8 Martin *v.* Hertz, 224 Ill. 84, 79 N. E. 558.

256-10 Maguire *v.* Co., 205 Mass. 64, 91 N. E. 135, noting earlier cases to the contrary not recognized.

257-12 Requisite to introduction of other writs on ground of conspiracy is showing of unlawful combination between plaintiffs and others, and that defendant was unusually oppressed. Lubin Mfg. Co. *v.* Swaab, 240 Pa. 182, 87 A. 597.

RESCISSION

258-1 That a contract has been rescinded is not warrant for its exclusion. Smith *v.* Cline (Ga. App.), 80 S. E. 700.

259-3 Benet *v.* Ford, 113 Va. 442, 74 S. E. 394.

259-4 Reiger *v.* Turley, 151 Ia. 491, 131 N. W. 866.

259-10 Mt. Vernon Ref. Co. *v.* Wolf Co., 188 Fed. 164, 110 C. C. A. 200; Millsapp *v.* Woolf, 1 Ala. App. 599, 56 S. 22; Clauss S. Co. *v.* S. Co., 1 Ala. App. 664, 56 S. 49; Luitweiler P. E. Co. *v.* Imp. Co., 16 Cal. App. 198, 116 P. 707, rehear. *denied*, 116 P. 712; Ptacek *v.* Pisa, 231 Ill. 522, 83 N. E. 221; Seventh St. Planing M. Co. *v.* Schaefer, 30 Ky. L. R. 623, 99 S. W. 341; Enterprise M. Co. *v.* Oppenheim O. & Co., 114 Md. 368, 79 A. 1007; Clark *v.* Gulesian, 197 Mass. 492, 84 N. E. 94; White *v.* Remick, 198 Mass. 41, 84 N. E. 113 (breach of agreement not to sublet); Peet *v.* City, 101 Minn. 518, 112 N. W. 1003; Mateos *v.* Lopez, 6 Phil. Isl. 206; Dillingham *v.* Kerr (Tex. Civ.), 139 S. W. 911; Ellison S. & Co. *v.* Groc. Co., 69 W. Va. 380, 71 S. E. 391.

259-12 Minto *v.* Moore, 1 Ala. App. 556, 55 S. 542; Atkinson *v.* Heine, 134 App. Div. 406, 119 N. Y. S. 122; South Texas T. Co. *v.* Huntington (Tex. Civ.), 121 S. W. 242.

259-13 Stoneking *v.* Long, 142 Ill. App. 203; Krebs H. Co. *v.* Livesley, 51 Or. 527, 92 P. 1084.

260-14 Abbott *v.* Dow, 133 Wis. 533, 113 N. W. 960.

260-15 King *v.* Lamborn, 186 Fed. 21, 108 C. C. A. 123; Maxwell *v.* Sherman, 172 Ala. 626, 55 S. 520; Geiser Mfg. Co. *v.* Lunsford (Tex. Civ.), 139 S. W. 64.

260-16 Murray *v.* Davies, 77 Kan. 767, 94 P. 283; Flatow *v.* Bk., 135 App. Div. 24, 119 N. Y. S. 860; Moore *v.* Assn., 121 App. Div. 335, 106 N. Y. S. 255; Gross *v.* Hochstim, 72 Misc. 343, 130 N. Y. S. 315; Commerce Trust Co. *v.* Mailloux, 27 S. D. 543, 132 N. W. 176; Union Nat. Bk. *v.* Mailloux, 27 S. D. 588, 132 N. W. 168.

260-19 John *v.* McNeal, 167 Mich. 148, 132 N. W. 508; Charles J. Webb & Co. *v.* Hosiery Co., 231 Pa. 297, 80 A. 173.

Notice not required.—Northern Assur. Co. *v.* Stout, 16 Cal. App. 548, 117 P. 617; Cold *v.* Beh, 152 Ia. 368, 132 N. W. 73.

260-20 Maxwell *v.* Sherman, 172 Ala. 626, 55 S. 520; Kelley *v.* R. Co., 154 Ala. 573, 54 S. 906; Miller *v.* Roberts, 9 Ga. App. 511, 71 S. E. 927; Hakes *v.* Thayer, 165 Mich. 476, 131 N. W. 174; Carroll *v.* Rys. Co., 157 Mo. App. 247, 137 S. W. 303; Conrad *v.* Brick Co., 31 O. C. C. 700, *aff.* 79 O. St. 461, 87 N. E. 1134; Swanke *v.* Herdeman, 138 Wis. 654, 120 N. W. 414.

Actual tender necessary.—Sturges & Burn Mfg. Co. *v.* Ref. Co., 156 Ill. App. 474, *aff.* 248 Ill. 285, 93 N. E. 740.

260-22 Robert M. Green & Sons *v.* Drug Co., 167 Ala. 372, 52 S. 433; Hathaway *v.* Edwards, 42 Ind. App. 22, 85 N. E. 28; Nickerson *v.* Weld, 204 Mass. 346, 90 N. E. 589; Roots Co. *v.* Co., 51 Misc. 627, 101 N. Y. S. 104.

Evidence sufficient.—Tygart *v.* Sutton, 8 Ga. App. 20, 68 S. E. 488.

Evidence insufficient. — Bertram *v.* Bergquist, 153 Ill. App. 43; John Hetherington & Sons *v.* William Firth Co., 210 Mass. 8, 95 N. E. 961.

Scienter need not be proved in an action to rescind for false representation. McFadden *v.* Alexander, 154 Ia. 716, 135 N. W. 396.

Before a court will rescind a contract upon the ground that it was procured by fraud, the proof must be strong and convincing, and the case a clear one. Northern Coal & Coke Co. *v.* Bates, 146 Ky. 624, 143 S. W. 13.

Facts excusing ground for rescission must be shown by party setting them

up. Atkinson *v.* Heine, 134 App. Div. 406, 119 N. Y. S. 122.

260-23 Com. Realty Co. *v.* Dorsey, 114 Md. 172, 78 A. 1099; Ward *v.* Cook, 158 Mich. 283, 122 N. W. 785.

Offer to arbitrate proved as part of res gestae. McNitt *v.* Henderson, 155 Mich. 214, 118 N. W. 974.

Consideration paid may be shown in action to rescind and recover it. Oliver *v.* Kneedler, 141 Ia. 158, 119 N. W. 525.

Defendant may show what he has done and readiness to perform. Alphons C. Co. *v.* Broaker, 110 N. Y. S. 926.

260-24 Am. Ed. Co. *v.* Taggert, 124 Ill. App. 567.

261-25 Seddon *v.* Co. (1905), 1 Ch. D. (Eng.) 326; Graham *v.* U. S., 188 Fed. 651, 110 C. C. A. 465; Blank *v.* Aronson, 187 Fed. 241, 109 C. C. A. 327; Brown *v.* Co., 44 Colo. 311, 97 P. 1042; Am. Ed. Co. *v.* Taggert, 124 Ill. App. 567; Modern Woodmen *v.* Vincent, 40 Ind. App. 711, 80 N. E. 427; McPherson *v.* Kissee, 239 Mo. 664, 144 S. W. 410; Long *v.* Mach. Co., 158 Mo. App. 662, 139 S. W. 819; Remmers *v.* Berbling, 66 Misc. 291, 123 N. Y. S. 41; Moore *v.* Assn., 121 App. Div. 335, 106 N. Y. S. 255; Central Bureau *v.* Pratt, 111 N. Y. S. 561; Burchfield *v.* P. Co., 45 Pa. Super. 254; Monast *v.* Ins. Co., 32 R. I. 557, 79 A. 932; City Nat. Bk. *v.* Bk. (Tex. Civ.), 105 S. W. 338; Noble *v.* Brew. Co., 64 Wash. 461, 117 P. 241; Dickinson Fire, etc. Co. *v.* Crowe & Co., 63 Wash. 550, 115 P. 1087.

Whether made in a reasonable time, ordinarily a question for jury. When facts admitted, and lapse of time such that fair-minded men would say it is unreasonable without hesitation, then a question for court. Emery *v.* Shoe Co., 167 Mo. App. 703, 151 S. W. 174.

261-26 Kilgore Lumb. Co. *v.* Thomas, 98 Ark. 219, 135 S. W. 858.

Mere negotiation with view to rectifying fraud, not waiver of right to rescind. Murray *v.* Davies, 77 Kan. 767, 94 P. 283.

261-31 J. R. Barnes Coal Co. *v.* Knitting Mills, 10 Ga. App. 485, 73 S. E. 701; Fritz *v.* Fritz, 141 Ia. 721, 118 N. W. 769.

262-33 International H. Co. *v.* Hibler (Ky.), 119 S. W. 790; Hanson *v* Wittenberg, 205 Mass. 319, 91 N. E 383 (acts, declarations, motives of parties and change in market price of article contracted for); Rogers *v.* Simpson, 31 O. C. C. 103.

Proof of right to rescind does not show rescission. Holland *v.* Rhoades, 56 Or. 206, 106 P. 779.

Proof of indefinite understanding or testimony which raises inference, not sufficient. Fritz *v.* Fritz, 141 Ia. 721, 118 N. W. 769.

Rescission shown by circumstances or course of conduct clearly disclosing intention of parties. Davenport *v.* Crowell, 79 Vt. 419, 65 A. 557.

262-35 Holland *v.* Rhoades, 56 Or. 206, 106 P. 779.

263-36 Vezey *v.* Rashleigh (1904), 1 Ch. D. (Eng.) 634; Keeney *v.* Waters, 135 Ky. 525, 122 S. W. 837.

263-37 Pelouze *v.* Gibbons, 157 Ill. App. 186.

264-41 Pelouze *v.* Gibbons, 157 Ill. App. 186.

265-43 Long *v.* Athol, 196 Mass. 497, 82 N. E. 665.

265-45 Basye *v.* Co., 79 Kan. 755, 101 P. 658; Long *v.* Athol, 196 Mass. 497, 82 N. E. 665; Atty. Gen. *v.* Council, 206 Mass. 158, 92 N. E. 136; Allen *v.* Pulfer, 159 Mich. 616, 124 N. W. 525; Phelps *v.* Jones, 141 Mo. App. 223, 124 S. W. 1067.

265-46 Eichelberger *v.* Co., 9 Cal. App. 628, 100 P. 117.

265-49 Staiger *v.* Klitz, 129 App. Div. 703, 114 N. Y. S. 486. See O'Shea *v.* Vaughn, 201 Mass. 412, 87 N. E. 616.

266-50 Wright *v.* Boltz, 87 Ark. 567, 113 S. W. 201; Hagan *v.* Taylor, 110 Va. 9, 65 S. E. 487 (burden on defendant asserting affirmative issues). Where defendant asks for rescission. Isner *v.* Nydegger, 63 W. Va. 677, 60 S. E. 793.

266-52 See Crocheron *v.* Savage, 74 N. J. Eq. 629, 70 A. 353.

267-53 Am. Ed. Co. *v.* Taggert, 124 Ill. App. 567; Goggins *v.* Risley, 13 Pa. Super. 316; Hagan *v.* Taylor, 110 Va. 9, 65 S. E. 487.

Defendant must show plaintiff's knowledge and time it was acquired. Liland *v.* Tweto, 19 N. D. 551, 125 N. W. 1032.

267-54 Am. Ed. Co. *v.* Taggert, 124 Ill. App. 567.

If property cannot be returned in specie, value of part consumed may be shown. Basye *v.* Co., 79 Kan. 755, 101 P. 658.

268-57 Van Gundy *v.* Steele, 261 Ill. 206, 103 N. E. 754 (clear proof);

Ashmore *v.* Harmon, 157 Ky. 437, 163 S. W. 222; Hickman *v.* Washington, 122 La. 945, 48 S. 333; Succession of Witting, 121 La. 501, 46 S. 606 (evidence must be peculiarly strong and convincing, and of such nature as to exclude speculation and conjecture); Goggins *v.* Risley, 13 Pa. Super. 316. Clearest and most satisfactory evidence required. Kincaid *v.* Price, 82 Ark. 20, 100 S. W. 76; Isner *v.* Nydegger, 63 W. Va. 677, 60 S. E. 793.

268-58 Isner *v.* Nydegger, 63 W. Va. 677, 60 S. E. 793.

269-60 Goggins *v.* Risley, 13 Pa. Super. 316.

269-62 Goggins *v.* Risley, supra.

269-63 In re Am. K. G. Mfg. Co., 173 Fed. 480, 97 C. C. A. 486; Mitchell M. Co. *v.* Hammons, 12 Ariz. 300, 100 P. 795; Dooley *v.* Co., 12 Ariz. 332, 100 P. 797; Keyes *v.* Quinn, 154 Mich. 668, 118 N. W. 615; Hoeldtke *v.* Horstman (Tex. Civ.), 128 S. W. 642; Golle *v.* Bk., 52 Wash. 437, 100 P. 984 (must be clear, unequivocal and convincing).

270-64 Isner *v.* Nydegger, 63 W. Va. 677, 60 S. E. 793.

270-65 Fuchs & L. Co. *v.* Kittredge, 242 Ill. 88, 89 N. E. 723.

270-66 Evidence plaintiff acted on mistake and as to what was in his mind, admissible. Long *v.* Athol, 196 Mass. 497, 82 N. E. 665.

RESCUE

274-5 S. *v.* Sutton, 170 Ind. 473, 84 N. E. 824 (affidavit of officer sufficient to show accused's knowledge of lawful custody). And see Harvey *v.* S., 8 Ga. App. 660, 70 S. E. 141.

277-12 Fluty *v.* C., 32 Ky. L. R. 89, 105 S. W. 138.

278-66 Scott *v.* Townsend (Tex. Civ.), 159 S. W. 342.

RES GESTAE

288-2 **Use of res gestae testimony** is not to be limited by instructions; it cannot be used for illegal purposes. Roma *v.* S., 55 Tex. Cr. 344, 116 S. W. 598.

289-4 Martinez *v.* S., 55 Colo. 51, 132 P. 64; Illinois, etc. R. Co. *v.* Houchins, 31 Ky. L. R. 93, 101 S. W. 924; S. *v.* Kane, 77 N. J. L. 244, 72 A. 39. See McMahon *v.* R. Co., 239 Ill. 334, 88 N. E. 223; S. *v.* McKenzie, 228 Mo. 385, 128 S. W. 948; Fredenthal *v.* Brown, 52 Or. 33, 95 P. 1114.

It may be properly defined as a collection of primary facts constituting the necessary and immediate field of a judicial inquiry, and within such field of immediate inquiry all the facts are competent evidence. Royle Mining Co. *v.* Co., 161 Mo. App. 185, 142 S. W. 438.

290-7 Schlater *v.* Le Blanc, 121 La. 919, 46 S. 921, "the shibboleth, res gestae, is put to such indiscriminate service that it is to be approached with a feeling of despair." See S. *v.* Hogan, 145 Ia. 352, 124 N. W. 178.

292-24 Davis *v.* Clausen, 2 Ala. App. 378, 57 S. 79.

293-25 Soto *v.* Ty., 12 Ariz. 36, 94 P. 1104; Swanson *v.* R. Co., 148 Ill. App. 135; Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402; Sheibley *v.* Nelson, 84 Neb. 393, 121 N. W. 458.

293-27 Klauder-W. D. M. Co. *v.* Gagnon, 166 Fed. 286, 92 C. C. A. 204; McMahon *v.* R. Co., 239 Ill. 334, 88 N. E. 223; S. *v.* Bartley, 105 Me. 505, 74 A. 1129; Receivers *v.* Lloyd (Tex. Civ.), 126 S. W. 319; Riggs *v.* N. P. R. Co., 60 Wash. 292, 111 P. 162.

294-30 Soto *v.* Ty., 12 Ariz. 36, 94 P. 1104. See Malone *v.* R. Co., 49 Tex. Civ. 398, 109 S. W. 430.

294-32 McMahon *v.* R. Co., 239 Ill. 334, 88 N. E. 223; Johnson *v.* Co., 79 Kan. 423, 100 P. 52; S. *v.* Jacobs, 133 Mo. App. 182, 113 S. W. 244; Robinson *v.* Stahl, 74 N. H. 310, 67 A. 577; Rainer *v.* S. (Tex.), 148 S. W. 735. See Johnston *v.* Spoonheim, 19 N. D. 191, 123 N. W. 830.

296-34 Gardner *v.* S., 56 Tex. Cr. 594, 120 S. W. 895.

296-38 *Comp.* S. *v.* Alton, 105 Minn. 410, 117 N. W. 617.

296-40 See Price *v.* S., 1 Okla. Cr. 358, 98 P. 447.

296-41 Dying declarations treated as res gestae. Graham *v.* S., 57 Tex. Cr. 104, 123 S. W. 691.

297-44 Soto *v.* Ty., 12 Ariz. 36, 94 P. 1104; S. *v.* Alton, 105 Minn. 410, 117 N. W. 617.

299-48 Pittsburgh, etc. R. Co. *v.* Haislup, 39 Ind. App. 394, 79 N. E. 1035; Malone *v.* R. Co., 49 Tex. Civ. 398, 109 S. W. 430.

299-50 Johnston *v.* Spoonheim, 19 N. D. 191, 123 N. W. 830; S. *v.* Gardner, 83 S. C. 476, 65 S. E. 630.

299-52 Dudley *v.* S. (Ala.), 64 S. 309; Pace *v.* S., 162 Ala. 56, 50 S. 353; Hamburg Bk. *v.* George, 92 Ark. 472, 123 S. W. 654; Baker *v.* S., 85 Ark. 300, 107 S. W. 983 (must be emanation); Chappell *v.* John, 45 Colo. 45, 99 P. 44; Baker *v.* Baker, 43 Ind. App. 26, 86 N. E. 864; Pittsburgh, etc. R. Co. *v.* Haislup, 39 Ind. App. 394, 79 N. E. 1035; Campbell *v.* Brown, 81 Kan. 480, 106 P. 37; Johnson *v.* Co., 79 Kan. 423, 100 P. 52; United R. Co. *v.* Cloman, 107 Md. 681, 69 A. 379; Robinson *v.* Stahl, 74 N. H. 310, 67 A. 577; Hanor *v.* Housel, 128 App. Div. 801, 113 N. Y. S. 163; Fredenthal *v.* Brown, 52 Or. 33, 95 P. 1114; Richards *v.* C., 107 Va. 881, 59 S. E. 1104.

300-53 Huntington *v.* U. S., 175 Fed. 950, 99 C. C. A. 440; Ausmus *v.* P., 47 Colo. 167, 107 P. 204; Neice *v.* R. Co., 165 Ill. App. 627; McMahon *v.* R. Co., 239 Ill. 334, 88 N. E. 223; Louisville R. Co. *v.* Johnson, 131 Ky. 277, 115 S. W. 207; Foley *v.* Sav. Bk., 157 App. Div. 868, 142 N. Y. S. 822; Johnston *v.* Spoonheim, 19 N. D. 191, 123 N. W. 830 (in case of fraudulent conveyance main transaction is consideration, not execution of deed); Coalgate Co. *v.* Hurst, 25 Okla. 588, 107 P. 657; S. *v.* Gardner, 83 S. C. 476, 65 S. E. 630; Henry *v.* Co., 55 Wash. 444, 104 P. 776.

301-54 Huntington *v.* U. S., 175 Fed. 950, 99 C. C. A. 440; P. *v.* Hayes, 9 Cal. App. 301, 99 P. 386; Johnson *v.* S., 63 Fla. 16, 58 S. 540; Lyles *v.* S., 130 Ga. 294, 60 S. E. 578; Pittsburgh, etc. R. Co. *v.* Chicago, 144 Ill. App. 293; S. *v.* Alton, 105 Minn. 410, 117 N. W. 617; S. *v.* McKenzie, 228 Mo. 385, 128 S. W. 948; S. *v.* Jacobs, 133 Mo. App. 182, 113 S. W. 244; Gebus *v.* R. Co., 22 N. D. 29, 132 N. W. 227; Johnston *v.* Spoonheim, 19 N. D. 191, 123 N. W. 830; Cincinnati, etc. Co. *v.* Haines, 8 O. C. C. (N. S.) 77 ("expressions to be part of the res gestae must be automatic, involuntary and must not involve intellectual processes and matters of inference and deduction"); S. *v.* Way, 76 S. C. 91, 56 S. E. 653; Deneaner *v.* S., 58 Tex. Cr. 624, 127 S. W. 201; Douglass *v.* S., 54 Tex. Cr. 639, 114 S. W. 808; Lockhart *v.* S., 53 Tex. Cr. 589, 111 S. W. 1024; Malone *v.* R. Co., 49 Tex. Civ. 398, 109 S. W. 430.

302-56 Jones *v.* S., 88 Ark. 579, 115 S. W. 166; Leeklieder *v.* R. Co., 142 Ill. App. 139; Hill *v.* Ins. Co., 150 N. C. 1, 63 S. E. 124; Life Ins. Co. *v.* Hairston, 108 Va. 832, 62 S. E. 1057.

302-57 P. *v.* Hayes, 9 Cal. App. 301, 99 P. 386; Atlanta, etc. R. Co. *v.* Haralson, 133 Ga. 231, 65 S. E. 437; Louisville R. Co. *v.* Johnson, 131 Ky. 277, 115 S. W. 207; Hobbs *v.* S., 55 Tex. Cr. 299, 117 S. W. 811; Douglass *v.* S., 54 Tex. Cr. 639, 114 S. W. 808.

302-58 S. *v.* Alton, 105 Minn. 410, 117 N. W. 617; Price *v.* S., 1 Okla. Cr. 358, 98 P. 447; Order of U. C. T. *v.* Roth (Tex. Civ.), 159 S. W. 176.

Larger latitude as to time should be allowed where declarant was party to the affair than if he were bystander. S. *v.* Spivey, 151 N. C. 676, 65 S. E. 995.

Statute has extended rule as to time; but where matter offered as explanatory of part of conversation proved is not relevant thereto it may be excluded. Potts *v.* S., 56 Tex. Cr. 39, 118 S. W. 535.

302-59 McMahon *v.* R. Co., 239 Ill. 334, 88 N. E. 223; Sullivan *v.* Co., 148 Ill. App. 538; S. *v.* Kelleher, 201 Mo. 614, 100 S. W. 470; S. *v.* Jacobs, 133 Mo. App. 182, 113 S. W. 244; Brauer *v.* R. Co., 131 App. Div. 682, 116 N. Y. S. 59 ("contemporaneous" given literal meaning); S. *v.* Way, 76 S. C. 91, 56 S. E. 653; Gardner *v.* S., 56 Tex. Cr. 594, 120 S. W. 895.

See Louisville & N. R. Co. *v.* Moore, 150 Ky. 692, 150 S. W. 849.

303-60 S. *v.* Martin, 94 S. C. 92, 77 S. E. 721; Britton *v.* Co., 59 Wash. 440, 110 P. 20. But see Fredenthal *v.* Brown, 52 Or. 33, 95 P. 1114.

303-61 Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1; Woodward *v.* S., 58 Tex. Cr. 412, 126 S. W. 271 (resisting officer).

305-62 Haywood *v.* Co., 145 Ill. App. 506. *Contra*, Lamb *v.* Co., 140 Ill. App. 195. See Walters *v.* R. Co., 58 Wash. 293, 108 P. 593.

305-63 Pope *v.* S., 174 Ala. 63, 57 S. 245; Cobb *v.* S., 11 Ga. App. 52, 74 S. E. 702; Lyles *v.* S., 130 Ga. 294, 60 S. E. 578; Illinois C. R. Co. *v.* Houchins, 31 Ky. L. R. 93, 101 S. W. 924; Price *v.* S., 1 Okla. Cr. 358, 98 P. 447; Walters *v.* R. Co., 58 Wash. 293, 108 P. 593; Carver *v.* S. (Tex.), 148 S. W. 746.

306-65 Soto *v.* Ty., 12 Ariz. 36, 94 P. 1104; Beal-D. Co. *v.* Carr, 85 Ark. 479, 108 S. W. 1053; Zipperlen *v.* R. Co., 7 Cal. App. 206, 93 P. 1049; Den-

ver City Tramway Co. *v.* Brumley, 51 Colo. 251, 116 P. 1051; Darby *v.* S., 9 Ga. App. 700, 72 S. E. 182; Mason *v.* S., 171 Ind. 78, 85 N. E. 776; Spevack *v.* Co., 152 Ia. 90, 131 N. W. 653; Illinois C. R. Co. *v.* Houchins, 31 Ky. L. R. 93, 101 S. W. 924; Knittel *v.* Co., 147 Mo. App. 677, 128 S. W. 5; Fraley *v.* Fraley, 150 N. C. 501, 64 S. E. 381; Clark *v.* S., 56 Tex. Cr. 293, 120 S. W. 179 (within five minutes); Walling *v.* S., 55 Tex. Civ. 254, 116 S. W. 813; Malone *v.* R. Co., 49 Tex. Civ. 398, 109 S. W. 430; Walters *v.* R. Co., 58 Wash. 293, 108 P. 593. See Shelton *v.* R. Co., 86 S. C. 98, 67 S. E. 899.

308-67 Klauder-W. D. M. Co. *v.* Gaynon, 166 Fed. 286, 92 C. C. A. 204. **Declaration made** after several days' unconsciousness. Britton *v.* Washington, etc. Co., 59 Wash. 440, 110 P. 20.

308-68 Rogers *v.* S., 88 Ark. 451, 115 S. W. 156; Mitchell *v.* S., 82 Ark. 324, 101 S. W. 763 (self-serving statement); Lamb *v.* Co., 140 Ill. App. 195; Figaroa *v.* S., 58 Tex. Cr. 611, 127 S. W. 193.

308-69 *Comp.* Illinois C. R. Co. *v.* Cotter, 31 Ky. L. R. 679, 103 S. W. 279; Robinson *v.* Stahl, 74 N. H. 310, 67 A. 577.

309-70 Douglass *v.* R. Co., 82 S. C. 71, 62 S. E. 15 (on recovery of consciousness by injured person); Graham *v.* S., 57 Tex. Cr. 104, 123 S. W. 691.

309-71 Goehrig *v.* Stryker, 174 Fed. 897; Jefferson Fertilizer Co. *v.* Houston, 3 Ala. App. 348, 57 S. 98; Lundsford *v.* S., 2 Ala. App. 38, 56 S. 89; White *v.* Co., 165 Ala. 218, 51 S. 764; Arlington H. Co. *v.* Tanner (Ark.), 164 S. W. 286; P. *v.* Sidelinger, 9 Cal. App. 298, 99 P. 390; Baker *v.* Baker, 43 Ind. App. 26, 86 N. E. 864; Clark *v.* Van Vleck, 135 Ia. 194, 112 N. W. 648; Campbell *v.* Brown, 81 Kan. 480, 106 P. 37; Johnson *v.* Co., 79 Kan. 423, 100 P. 52; Louisville & N. R. Co. *v.* Scalf, 155 Ky. 273, 159 S. W. 804; Interstate C. Co. *v.* Love, 153 Ky. 323, 155 S. W. 746; S. *v.* Robertson, 133 La. 806, 63 S. 363; Bernard *v.* Co., 170 Mich. 238, 136 N. W. 374; S. *v.* McKenzie, 228 Mo. 385, 128 S. W. 948; S. *v.* Kelleher, 201 Mo. 614, 100 S. W. 470; Dunlap *v.* Chicago, etc. R. Co., 145 Mo. App. 215, 129 S. W. 262; S. *v.* Murphy, 17 N. D. 48, 115 N. W. 84; Coalgate Co. *v.* Hurst, 25 Okla. 588, 107 P. 657; S. *v.* Gardner, 83 S. C. 476, 65 S. E. 630; S. *v.* Way, 76 S. C. 91, 56 S. E. 653; Kelly *v.* S. (Tex. Cr.), 149 S. W. 110; Deneaner *v.* S., 58 Tex. Cr. 624, 127 S. W. 201; Pryse *v.* S., 54 Tex. Cr. 523, 113 S. W. 938; Houston El. Co. *v.* Jones (Tex. Civ.), 129 S. W. 863; Travelers Assn. *v.* Roth (Tex. Civ.), 108 S. W. 1039; Meyers *v.* R. Co., 36 Utah 307, 104 P. 736; Henry *v.* Co., 55 Wash. 444, 104 P. 776. See vol. 7, p. 378, n. 13.

310-72 Interstate A. Co. *v.* Martin (Ala. App.), 62 S. 404; Gilbert *v.* R. Co., 161 Mich. 73, 125 N. W. 745; S. *v.* Alton, 105 Minn. 410, 117 N. W. 617; S. *v.* Spivey, 151 N. C. 676, 65 S. E. 995; File *v.* Lancaster, 17 Pa. Dist. 144; Havard *v.* S., 55 Tex. Cr. 213, 115 S. W. 1185.

313-74 Moorhead *v.* Eckert, 61 Misc. 612, 114 N. Y. S. 31.

314-78 Price *v.* S., 1 Okla. Cr. 358, 98 P. 447; Terrell *v.* S., 55 Tex. Cr. 282, 116 S. W. 569; Shepard *v.* Co., 50 Wash. 242, 97 P. 57 (made at request of employer). See Beal-D. Co. *v.* Carr, 85 Ark. 479, 108 S. W. 1053.

314-79 Benedict *v.* Dakin, 148 Ill. App. 301; Welker *v.* Appleman, 44 Ind. App. 699, 90 N. E. 35; United P. Co. *v.* Matheny, 81 O. St. 204, 90 N. E. 154.

315-80 S. *v.* Alton, 105 Minn. 410, 117 N. W. 617. See Herrington *v.* S., 130 Ga. 307, 60 S. E. 572.

315-81 Charleston & W. C. R. Co. *v.* Burckhalter, 141 Ga. 127, 80 S. E. 278; Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402; Lewis *v.* G. Co. (Ky.), 117 S. W. 278; Svensden *v.* McWilliams, 157 App. Div. 474, 142 N. Y. S. 606; Shepard *v.* Co., 50 Wash. 242, 97 P. 57.

When inadmissible.—Riley *v.* Roach, 168 Mich. 294, 134 N. W. 14.

315-82 Ft. Wayne, etc. R. Co. *v.* Roudebush, 173 Ind. 57, 88 N. E. 676.

315-83 S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461; S. *v.* Kane, 77 N. J. L. 244, 72 A. 39; Price *v.* S., 1 Okla. Cr. 358, 98 P. 447; U. S. *v.* David, 3 Phil. Isl. 128; Humphrey *v.* S., 55 Tex. Cr. 329, 116 S. W. 570.

316-84 Hunter *v.* S., 54 Tex. Cr. 224, 114 S. W. 124.

318-87 Parker *v.* S., 7 Ala. App. 9, 60 S. 995.

Declarations of person incompetent as witness because of youth, admissible. Beal-D. Co. *v.* Carr, 85 Ark. 479, 108 S. W. 1053; Soto *v.* Ty., 12 Ariz. 36, 94 P. 1104.

319-91 Clark *v.* S., 56 Tex. Cr. 293,

120 S. W. 179, *over.* Bateson *v.* S., 46 Tex. Cr. 34, 80 S. W. 88, and other cases.

319-92 Wheeler *v.* R. Co., 16 Ida. 375, 102 P. 347; Figaroa *v.* S., 58 Tex. Cr. 611, 127 S. W. 193; Sullivan *v.* Co., 51 Wash. 71, 97 P. 1109.

321-98 Knittel *v.* R. Co., 147 Mo. App. 677, 128 S. W. 5 (may illustrate state of speaker's mind); Svendsen *v.* McWilliams, 157 App. Div. 474, 142 N. Y. S. 606.

321-99 Schlater *v.* LeBlanc, 121 La. 919, 46 S. 921.

321-1 Powell *v.* S., 7 Ala. App. 17, 60 S. 967; Wash., etc. Co. *v.* Wright, 38 App. Cas. (D. C.) 268.

321-2 Clark *v.* Van Vleck, 135 Ia. 194, 112 N. W. 648; Dorr *v.* R., 76 N. H. 160, 80 A. 336; Shelton *v.* R. Co., 86 S. C. 98, 67 S. E. 899; S. *v.* Way, 76 S. C. 91, 56 S. E. 653; Hobbs *v.* S., 55 Tex. Cr. 299, 117 S. W. 811; Matsuda *v.* Hammond, 77 Wash. 120, 137 P. 328; Walters *v.* R. Co., 58 Wash. 293, 108 P. 593.

325-10 Figaroa *v.* S., 58 Tex. Cr. 611, 127 S. W. 193.

326-13 Chicago U. T. Co. *v.* Daly, 129 Ill. App. 519; S. *v.* Kelleher, 201 Mo. 614, 100 S. W. 470; S. *v.* Hunter, 82 S. C. 153, 63 S. E. 685; Miller *v.* McConnell, 23 S. D. 137, 120 N. W. 888; Pryse *v.* S., 54 Tex. Cr. 523, 113 S. W. 938.

327-14 Graham *v.* S., 57 Tex. Cr. 104, 123 S. W. 691.

327-15 Gilbert *v.* R. Co., 161 Mich. 73, 125 N. W. 745.

328-16 See Fredenthal *v.* Brown, 52 Or. 33, 95 P. 1114.

328-17 Ft. Wayne, etc. R. Co. *v.* Roudebush, 173 Ind. 57, 88 N. E. 676; S. *v.* Wilson (Ia.), 141 N. W. 337; Schattler *v.* Co., 162 Mich. 115, 127 N. W. 42; Hickman *v.* S. (Tex. Cr.), 145 S. W. 914; Hobbs *v.* S., 55 Tex. Cr. 299, 117 S. W. 811; International, etc. R. Co. *v.* Hugen, 45 Tex. Civ. 326, 100 S. W. 1000.

329-19 White Sewing Mach. Co. *v.* Wingo (Tex. Civ.), 152 S. W. 187.

330-20 *Comp.* Bionto *v.* R. Co., 125 La. 147, 51 S. 98; Missouri, etc. R. Co. *v.* Williams, 50 Tex. Civ. 134, 109 S. W. 1126.

332-23 *Contra,* Rogers *v.* S., 88 Ark. 451, 115 S. W. 156.

333-24 Paris, etc. R. Co. *v.* Calvin (Tex. Civ.), 103 S. W. 428, 101 Tex. 291, 106 S. W. 879.

333-27 Fidelity & C. Co. *v.* Cooper, 137 Ky. 544, 126 S. W. 111.

334-29 Bionto *v.* R. Co., 125 La. 147, 51 S. 98.

334-34 Soto *v.* Ty., 12 Ariz. 36, 94 P. 1104.

335-37 Lyles *v.* S., 130 Ga. 294, 60 S. E. 578; Clark *v.* Van Vleck, 135 Ia. 194, 112 N. W. 648; S. *v.* Lewis, 139 Ia. 405, 116 N. W. 606; S. *v.* Howard, 120 La. 311, 45 S. 260; Malone *v.* R. Co., 49 Tex. Civ. 398, 109 S. W. 430.

337-38 Louisville & N. R. Co. *v.* Mason (Ala. App.), 64 S. 154; Dubois *v.* Luthmers, 147 Ia. 315, 126 N. W. 147, *cit.* the text; Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1; United P. Co. *v.* Matheny, 81 O. St. 204, 90 N. E. 154; Redman *v.* S. (Tex. Cr.), 149 S. W. 670; Lemons *v.* S., 59 Tex. Cr. 299, 128 S. W. 416; Havard *v.* S., 55 Tex. Cr. 213, 115 S. W. 1185; Britton *v.* Co., 59 Wash. 440, 110 P. 20; Bugge *v.* Co., 54 Wash. 483, 103 P. 824 (communication by one passenger to another of statement by conductor).

337-39 S. *v.* Little, 228 Mo. 273, 128 S. W. 971; Kumke *v.* Co., 244 Pa. 126, 90 A. 538.

338-40 Kennedy *v.* C., 30 Ky. L. R. 1063, 100 S. W. 242; Belleveau *v.* Co., 200 Mass. 237, 86 N. E. 301; Hodges *v.* Hill, 175 Mo. App. 441, 161 S. W. 633; Bedsole *v.* R. Co., 151 N. C. 152, 65 S. E. 925; Fraley *v.* Fraley, 150 N. C. 501, 64 S. E. 381; Miller *v.* Neale, 137 Wis. 426, 119 N. W. 94.

339-41 Douda *v.* R. Co., 141 Ia. 82, 119 N. W. 272; Coalgate Co. *v.* Hurst, 25 Okla. 588, 107 P. 657; Mo., etc. R. Co. *v.* Boring (Tex. Civ.), 166 S. W. 76.

Statement of foreman who did not see accident, inadmissible although made immediately thereafter on reaching place. St. Louis, etc. R. Co. *v.* Brisco (Tex. Civ.), 100 S. W. 989.

341-45 Pope *v.* S., 174 Ala. 63, 57 S. 245; Louisville R. Co. *v.* Johnson, 131 Ky. 277, 115 S. W. 207; Peacock *v.* S., 52 Tex. Cr. 432, 107 S. W. 346.

342-46 Havard *v.* S., 55 Tex. Cr. 213, 115 S. W. 1185; St. Louis, etc. R. Co. *v.* Schuler, 46 Tex. Civ. 356, 102 S. W. 783; Britton *v.* Co., 59 Wash. 440, 110 P. 20. See Kehan *v.* R. Co., 28 App. Cas. (D. C.) 108.

342-47 Weller & Co. *v.* Camp, 169

Ala. 275, 52 S. 929; P. *v.* Bartley, 263 Ill. 69, 104 N. E. 1057; Shadowski *v.* R. Co., 226 Pa. 537, 75 A. 730.

343-48 Kehan *v.* R. Co., 28 App. Cas. (D. C.) 108; Kinner *v.* Boyd, 139 Ia. 14, 116 N. W. 1044; S. *v.* Howard, 120 La. 311, 45 S. 260; Clement *r.* Beers, 126 App. Div. 1, 110 N. Y. S. 99.

343-49 P. *r.* Long, 7 Cal. App. 27, 93 P. 387; Dubois *r.* Luthmers, 147 Ia. 315, 126 N. W. 147 (ten minutes after not too late); Cincinnati, etc. R. Co. *r.* Martin, 146 Ky. 260, 142 S. W. 410; S. *v.* Howard, 120 La. 311, 45 S. 260; P. *v.* Sartori, 168 Mich. 308, 134 N. W. 200.

343-50 Rapp *v.* Co. (N. J. L.), 72 A. 38; Wells *r.* R., 82 Vt. 108, 71 A. 1103. *Comp.* Fraley *v.* Fraley, 150 N. C. 501, 64 S. E. 381.

344-51 A conversation between one of the defendant company's employes, a conductor, and a person who was said to have used the plaintiff's commutation ticket on an occasion prior to the date when it was taken from him, was no part of the res gestae; as it did not take place in the presence of the plaintiff, and was not connected with the transaction which was the subject-matter of the present litigation. Harris *v.* R. Co., 82 N. J. L. 456, 82 A. 881.

344-54 Baldwin *r.* R. Co., 7 Penne. (Del.) 81, 76 A. 1088; Bugge *v.* Co., 54 Wash. 483, 103 P. 824. *Comp.* Shadowski *v.* R. Co., 226 Pa. 537, 75 A. 730.

344-55 Harnage *r.* S., 7 Ga. App. 573, 67 S. E. 694; Louisville R. Co. *r.* Johnson, 131 Ky. 277, 115 S. W. 207; Texas, etc. R. Co. *v.* Marshall, 57 Tex. Civ. 538, 122 S. W. 946. See Lockhart *r.* S., 53 Tex. Cr. 589, 111 S. W. 1024, *cit.* the text.

345-57 S. *v.* Kennedy, 207 Mo. 528, 106 S. W. 57.

347-61 Exclamations of motorman immediately after the accident, admissible. Bessierre *r.* R. Co. (Ala.), 60 S. 82. See also vol. 12, p. 147, n. 50, and vol. 7, p. 380, n. 17.

347-63 Motorman. — Birmingham, etc. R. *r.* Glenn (Ala.), 60 S. 111. See also "Res Gestae," p. 391, n. 52, and "Street Railroads," p. 134, n. 86.

347-64 Birmingham R. Co. *v.* O'Brien (Ala.), 64 S. 343; Louisville & N. R. Co. *r.* Moore, 150 Ky. 692, 150 S. W. 849.

The motorman on a street railway. Baldwin *r.* People's R. Co., 7 Penne. (Del.) 81, 76 A. 1088; Cohodes *r.* Co., 149 Wis. 308, 135 N. W. 879.

348-66 Kinner *r.* Boyd, 139 Ia. 14, 116 N. W. 1044.

348-67 Sovereign Camp, etc. *v.* Bailey (Tex. Civ.), 163 S. W. 683; Britton *v.* Co., 59 Wash. 440, 110 P. 20; Andrews *r.* C. Co., 154 Wis. 82, 142 N. W. 487. See also vol. 11, p. 405, and vol. 6, p. 621.

349-69 Williams *v.* S. (Tex. Cr.), 166 S. W. 1170.

349-70 Chicago C. R. Co. *v.* McDonough, 221 Ill. 69, 77 N. E. 577. See Cincinnati, etc. Co. *v.* Haines, 8 O. C. C. (N. S.) 77.

352-79 Empire C. Co. *v.* Gravlee (Ala. App.), 64 S. 207; Washington R. & E. Co. *v.* Wright, 38 App. Cas. (D. C.) 268; Ft. Wayne, etc. R. Co. *r.* Roudebush, 173 Ind. 57, 88 N. E. 676, 89 N. E. 369; Vernon *v.* Assn. (Ia.), 138 N. W. 696; Fidelity & C. Co. *v.* Cooper, 137 Ky. 544, 126 S. W. 111; Svendsen *r.* McWilliams, 157 App. Div. 474, 142 N. Y. S. 606; Sutton *v.* R. Co., 82 S. C. 345, 64 S. E. 401; Galveston, etc. R. Co. *r.* Mitchell, 48 Tex. Civ. 381, 107 S. W. 374; Dixon *r.* Russell, 156 Wis. 161, 145 N. W. 761; Zoesch *r.* Co., 134 Wis. 270, 114 N. W. 485 (how explosion occurred). See also vol. 7, p. 376, and vol. 12, p. 147, n. 50.

Party making the exclamation may himself testify to it. Svensden *r.* McWilliams, 157 App. Div. 474, 142 N. Y. S. 606.

Statements by third person present at time of injury, admissible. St. Louis, etc. R. Co. *r.* Schuler, 46 Tex. Civ. 356, 102 S. W. 783.

352-80 St. Louis, etc. R. Co. *v.* Cundieff, 171 Fed. 319, 96 C. C. A. 211.

352-81 Vaughan *v.* R. Co. (Mo. App.), 164 S. W. 144.

352-82 Charleston & W. C. R. Co. *v.* Burckhalter, 141 Ga. 127, 80 S. E. 278; Louisville & N. R. Co. *r.* Strange's Admx., 156 Ky. 439, 161 S. W. 239; Illinois C. R. Co. *r.* Cotter, 31 Ky. L. R. 679, 103 S. W. 279; Jewell *r.* Mfg. Co., 166 Mo. App. 555, 149 S. W. 1045; Greener *v.* Co., 153 App. Div. 439, 138 N. Y. S. 273; Zoesch *v.* Co., 134 Wis. 270, 114 N. W. 485. See vol. 8, p. 524, n. 24; also vol. 7, p. 377, n. 11.

353-83 Koke's Admr. *r.* Steel Co., 149 Ky. 627, 149 S. W. 968; Poumeroule *r.* Cable Co., 167 Mo. App. 533, 152 S. W. 114; Klass *r.* R. Co., 169 Mo. App.

617, 155 S. W. 57; Greener *v.* Elec. Co., 209 N. Y. 135, 102 N. E. 527.

Three-quarters of an hour intervening between accident and statements of injured party render those statements inadmissible. Greed *v.* Co., 238 Pa. 248, 86 A. 95.

354-84 Clement *v.* Beers, 126 App. Div. 1, 110 N. Y. S. 99.

355-86 Matthews *v.* R. Co., 130 Ky. 551, 113 S. W. 459; Hulse *v.* R. Co., 47 Mont. 59, 130 P. 415.

355-87 Hitchman *v.* Kerbaugh, 242 Pa. 582, 89 A. 669.

356-88 Ft. Wayne, etc. R. Co. *v.* Roudebush, 173 Ind. 57, 88 N. E. 676, 89 N. E. 369; Sutton *v.* R. Co., 82 S. C. 345, 64 S. E. 401.

356-89 Magill *v.* R. Co., 95 S. C. 306, 78 S. E. 1033.

356-90 Louisville & N. R. Co. *v.* Miller, 154 Ky. 236, 157 S. W. 8.

356-91 Kimie *v.* R. Co., 156 Cal. 379, 104 P. 986; Dudley *v.* R. Co., 171 Mo. App. 652, 154 S. W. 462.

356-92 St. Louis, etc. R. Co. *v.* Coats (Tex. Civ.), 103 S. W. 662; International, etc. R. Co. *v.* Hugen, 45 Tex. Civ. 326, 100 S. W. 1000.

357-93 Malone *v.* R. Co., 49 Tex. Civ. 398, 109 S. W. 430.

357-96 Missouri, etc. R. Co. *v.* Williams, 50 Tex. Civ. 134, 109 S. W. 1126, ten minutes.

357-97 Smith *v.* Stoner, 243 Pa. 57, 89 A. 795.

358-3 Alsup *v.* S. (Tex. Cr.), 153 S. W. 624.

An expression of unwillingness on the part of deceased to do the work which resulted in his fatal injury, made sometime prior to the accident, in a different part of the premises and because that was not his work, inadmissible as part of the res gestae. Ferance *v.* Co. (R. I.), 89 A. 339. See "Injuries to Person," p. 376.

358-4 S. *v.* Bartley, 105 Me. 505, 74 A. 1129; Russell *v.* S. (Tex. Cr.), 158 S. W. 546; Humphrey *v.* S., 55 Tex. Cr. 329, 116 S. W. 570.

Letter written by defendant over a year prior to his indictment for using the mails to defraud admissible as of the res gestae of the fraudulent transaction. A wide latitude is allowed in such cases in the admission of evidence for the prosecution. Gould *v.* U. S., 209 Fed. 730, 126 C. C. A. 454. See vol. 9, p. 146.

358-5 Finley *v.* S., 7 Ala. App. 161, 62 S. 265; P. *v.* Davis, 6 Cal. App. 229, 91 P. 810 (statement of accused to prosecutrix of his relations with other girls); S. *v.* Kane, 77 N. J. L. 244, 72 A. 39; Meador *v.* S. (Tex. Cr.), 162 S. W. 1155; Alsup *v.* S. (Tex. Cr.), 153 S. W. 624; Bronson *v.* S., 59 Tex. Cr. 17, 127 S. W. 175; Bradley *v.* S., 54 Tex. Cr. 53, 111 S. W. 733.

Declarations during writing of letter for accused, competent when it is used against him. S. *v.* Bartley, 105 Me. 505, 74 A. 1129.

358-6 S. *v.* Porter, 213 Mo. 43, 111 S. W. 529.

358-7 Holland *v.* S., 162 Ala. 5, 50 S. 215.

359-8 Bronson *v.* S., 59 Tex. Cr. 17, 127 S. W. 175.

359-9 Receivers *v.* Lloyd (Tex. Civ.), 126 S. W. 319.

359-11 Maddox *v.* S., 159 Ala. 53, 48 S. 689; Holland *v.* S., 162 Ala. 5, 50 S. 215; Helms *v.* S., 138 Ga. 826, 76 S. E. 353; S. *v.* Rogers, 253 Mo. 399, 161 S. W. 770; S. *v.* Lance, 149 N. C. 551, 63 S. E. 198; Puryear *v.* S., 56 Tex. Cr. 231, 118 S. W. 1042. See vol. 6, p. 613.

360-12 Flores *v.* S. (Tex. Cr.), 162 S. W. 883.

360-13 Johnson *v.* S. (Ala.), 63 S. 163; Bone *v.* S., 8 Ala. App. 59, 62 S. 455; S. *v.* McKellar, 85 S. C. 236, 67 S. E. 314; Burns *v.* S. (Tex. Cr.), 150 S. W. 794. See vol. 6, p. 620, n. 81.

360-17 Powell *v.* S., 7 Ala. App. 17, 60 S. 967.

361-18 Holland *v.* S., supra; Brown *v.* S., 56 Tex. Cr. 389, 120 S. W. 444 (six or seven minutes).

361-25 Livingston *v.* S., 7 Ala. App. 43, 61 S. 54. See vol. 6, p. 614, n. 59.

362-27 S. *v.* McKellar, 85 S. C. 236, 67 S. E. 314; Gentry *v.* S. (Tex. Cr.), 152 S. W. 635; Roma *v.* S., 55 Tex. Cr. 344, 116 S. W. 598.

363-34 Maddox *v.* S., 159 Ala. 53, 48 S. 689; Brown *v.* S., 56 Tex. Cr. 389, 120 S. W. 444.

363-35 Grant *v.* U. S., 28 App. Cas. (D. C.) 169; Herrington *v.* S., 130 Ga. 307, 60 S. E. 572; S. *v.* Lewis, 139 Ia. 405, 116 N. W. 606.

363-36 St. Louis, etc. Co. *v.* Fielder (Tex. Civ.), 163 S. W. 606.

364-37 Wilson *v.* S. (Tex. Cr.), 158 S. W. 512. See vol. 11, p. 467, n. 22, and supplement thereto.

364-39 Rogers *v.* S., 9 Okla. Cr. 277, 131 P. 941.

364-40 See Smith *v.* P., 39 Colo. 202, 88 P. 1072.

365-42 P. *v.* Scattura, 238 Ill. 313, 87 N. E. 332; Price *v.* Grzyll, 133 Wis. 623, 114 N. W. 100.

365-43 Simmons *v.* S. (Miss.), 61 S. 826; S. *v.* Badnelley, 32 R. I. 378, 79 A. 834; Sharp *v.* S. (Tex. Cr.), 160 S. W. 369; Boyd *v.* S. (Tex. Cr.), 163 S. W. 67; Valdez *v.* S. (Tex. Cr.), 160 S. W. 341. See also vol. 10, p. 589, n. 24; vol. 11, p. 364, n. 39.

366-48 Hobbs *v.* S., 55 Tex. Cr. 299, 117 S. W. 811.

367-50 S. *v.* Vance, 38 Utah 1, 110 P. 434.

367-51 Easley *v.* S. (Ark.), 159 S. W. 36; S. *r.* Hazzard, 75 Wash. 5, 134 P. 514.

Note purported to have been written by the deceased prior to their taking morphine with suicidal intent, admissible as part of the res gestae. Farrell *v.* S. (Ark.), 163 S. W. 768.

Conversation of deceased had with neighbor over the telephone shortly prior to her death admitted. State *v.* Hessenius (Ia.), 146 N. W. 58. See vol. 6, p. 615.

368-53 S. *v.* Alexander, 89 Kan. 422, 131 P. 139; Lopez *v.* S. (Tex. Cr.), 166 S. W. 154; Corbitt *v.* S. (Tex. Cr.), 163 S. W. 436; Ryan *v.* S., 64 Tex. Cr. 628, 142 S. W. 878; Puryear *v.* S., 56 Tex. Cr. 231, 118 S. W. 1042.

370-58 S. *v.* Findling, 123 Minn. 413, 144 N. W. 142. See also vol. 6, p. 617, n. 70. Witness ran a half mile after hearing the shot to where deceased lay. Christian *v.* S. (Tex. Cr.), 161 S. W. 101. See vol. 6, p. 616.

370-59 S. *v.* Kelleher, 201 Mo. 614, 100 S. W. 470.

370-60 Matthews *v.* S. (Tex. Cr.), 163 S. W. 723; Tinsley *v.* S., 52 Tex. Cr. 91, 106 S. W. 347. See vol. 6, p. 617, n. 70.

370-61 Baker *v.* S., 85 Ark. 300, 107 S. W. 983.

370-62 Admissible. Williams *v.* S., 58 Fla. 138, 50 S. 749.

370-63 Hobbs *v.* S., 55 Tex. Cr. 299, 117 S. W. 811, five to ten minutes.

371-73 Hobbs *v.* S., supra.

372-75 Price *v.* S., 1 Okla. Cr. 353, 98 P. 447.

372-76 Prayer for forgiveness of assailant. Herrington *v.* S., 130 Ga. 307, 60 S. E. 572.

372-77 Williams *v.* S., 58 Fla. 138, 50 S. 749.

372-79 Barnard *v.* U. S., 162 Fed. 618, 89 C. C. A. 376; Martin *v.* S., 2 Ala. App. 175, 56 S. 64; Allison *v.* S., 1 Ala. App. 206, 55 S. 453; McCullough *v.* Sawtell, 134 Ga. 512, 68 S. E. 89; Com. *v.* Bottom, 140 Ky. 212, 130 S. W. 1091; Pioway *v.* Sheldon, 167 Mich. 218, 132 N. W. 517; Royle Mining Co. *r.* Co., 161 Mo. App. 185, 142 S. W. 438; Caldwell *v.* Glazier, 123 N. Y. S. 622; Wernekoff *r.* Co., 123 N. Y. S. 222; Goldschmidt *v.* Co., 134 App. Div. 475, 119 N. Y. S. 233; Hutchinson *v.* S., 58 Tex. Cr. 228, 125 S. W. 19; United American Fire Ins. Co. *r.* Bonding Co., 146 Wis. 573, 131 N. W. 994.

Thus the question: "At the time the elderly lady handed you the pass, how, if in any way, did she indicate for whom she was tendering the pass?" was held to call "for evidence as to a part of the actual transaction whereby defendant was allowed to ride upon said train. It was a part of the res gestae." Broyles *v.* R. Co., 166 Ala. 616, 52 S. 81.

373-80 Ala. City, etc. R. Co. *v.* Sampley, 169 Ala. 372, 53 S. 142; Lamm *v.* Lamm, 163 N. C. 71, 79 S. E. 290.

373-81 P. *v.* Darr, 262 Ill. 202, 104 N. E. 389.

373-82 Girtman *v.* S. (Tex. Cr.), 164 S. W. 1008; Boyd *v.* S., 57 Tex. Cr. 250, 122 S. W. 393.

373-83 Barnard *v.* U. S., 162 Fed. 618, 89 C. C. A. 376.

373-85 Harmon *v.* S., 166 Ala. 28, 52 S. 348.

A receipted bill admissible to show payment and to fix date of transaction. Banks *v.* Warner, 85 Conn. 613, 74 A. 325, *cit.* Bradley *v.* Gorham, 77 Conn. 211, 58 A. 698, 66 L. R. A. 934.

373-86 Cobb *v.* S., 11 Ga. App. 52, 74 S. E. 702; Johnston *v.* Spoonheim, 19 N. D. 191, 123 N. W. 830.

374-87 Ala. City G. & A. R. Co. *v.* Heald, 168 Ala. 626, 53 S. 162; Farrington *v.* Cheponis, 82 Conn. 258, 73 A. 139; S. *v.* Major, 134 La. 774, 64 S. 710; S. *v.* Kimmel, 156 Mo. App. 461, 137 S. W. 329; Netterfield *v.* R. Co., 129 App. Div. 56, 113 N. Y. S. 434.

Evidence inadmissible.—MacKenzie *v.* Barrett, 148 Ill. App. 414; S. *v.* Little, 228 Mo. 273, 128 S. W. 971; Luttrell *r.* Parry (Tex. Civ.), 129 S. W. 865.

377-94 Boyd *v.* S., 57 Tex. Cr. 250, 122 S. W. 393 (statement just prior to interrupting religious meeting);

Huff *v.* S., 51 Tex. Cr. 550, 103 S. W. 629.

378-96 Miller *v.* Bank, 52 Ind. App. 5, 100 N. E. 119; Mulligan *v.* C., 144 Ky. 246, 137 S. W. 1062; McCrimmon *v.* Murray, 43 Mont. 457, 117 P. 73; Liftieri *v.* Freda, 241 Pa. 21, 88 A. 82; Naylor *v.* Parker (Tex. Civ.), 139 S. W. 93; Hudson *v.* Slate, 53 Tex. Civ. 453, 117 S. W. 469, *cit.* the text; S. *v.* Ryder, 80 Vt. 422, 68 A. 652.

379-1 Louisville & N. R. Co. *v.* Grimes (Ala.), 63 S. 554; Harris *v.* S., 177 Ala. 17, 59 S. 205; Story *v.* S., 178 Ala. 98, 59 S. 480 (rape); King *v.* Thompson Co. (Ind. App.), 104 N. E. 106; Duke *v.* Graham (Ia.), 143 N. W. 817; Puryear *v.* Ould, 81 S. C. 456, 62 S. E. 863.

Car repairer's statements concerning the condition of a car made while he was inspecting it. Owensboro City R. Co. *v.* Rowland, 152 Ky. 175, 153 S. W. 206.

Accompanying the signing of a written statement. Swearingen *v.* Bray (Tex. Civ.), 157 S. W. 953.

381-5 S. *v.* Ryder, 80 Vt. 422, 68 A. 652; Fife *v.* Cate, 85 Vt. 418, 82 A. 741.

381-6 May *v.* U. S., 157 Fed. 1, 86 C. C. A. 575; In re Gleason's Est., 164 Cal. 756, 130 P. 872; P. *v.* Petruzo, 13 Cal. App. 569, 110 P. 324; O'Connor Co. *v.* Gillaspy, 170 Ind. 428, 83 N. E. 738; Sumwalt Ice Co. *v.* Ice Co., 114 Md. 403, 80 A. 48; Barker *v.* Ins. Co., 163 N. C. 175, 79 S. E. 424.

382-8 Ehrhardt *v.* P., 51 Colo. 205, 117 P. 164; Winn *v.* Coal Co., 156 Ill. App. 179. See Legris *v.* Marcotte, 129 Ill. App. 67.

383-10 Craddock *v.* Walden (Ala.), 63 S. 534; Lockhart *v.* S., 53 Tex. Cr. 589, 111 S. W. 1024, *quot.* the text.

383-11 Johnston *v.* S., 101 Miss. 397, 58 S. 97; Young *v.* Beveridge, 81 Neb. 180, 115 N. W. 766; Brauer *v.* R. Co., 131 App. Div. 682, 116 N. Y. S. 59; S. *v.* Ryder, 80 Vt. 422, 68 A. 652.

385-16 S. *v.* Briggs, 122 Minn. 493, 142 N. W. 823; Jaffe *v.* Nagel, 114 N. Y. S. 905; Gowans *v.* S., 64 Tex. Cr. 401, 145 S. W. 614.

Accompanying execution of probate and in explanation of the same. Cannon *v.* Baker, 97 S. C. 116, 81 S. E. 478.

On a prosecution for larceny of a steer conversation of defendant with witness touching the steer whilst being driven into the market. "These declarations were made at a time when there was no reason to suppose that they were being manufactured for the purpose of exculpation. They were not self-serving declarations, within the true meaning of that principle of the law. They were explanatory of the custody or possession then had by the appellant whilst driving the steers into market." Johnston *v.* S., 101 Miss. 397, 58 S. 97.

385-17 Horton *v.* Stone, 32 R. I. 499, 80 A. 1; Glover *v.* Co., 78 S. C. 502, 59 S. E. 526; National State Bk. *v.* Ricketts (Tex. Civ.), 152 S. W. 646; Dunlap *v.* Broyles (Tex. Civ.), 146 S. W. 578; Missouri, etc. R. Co. *v.* Gober (Tex. Civ.), 125 S. W. 383; Northern M. Co. *v.* Schultz, 56 Wash. 393, 105 P. 850 (may constitute delivery).

386-21 Napier *v.* Elliott, 152 Ala. 248, 44 S. 552, also statement of scrivener.

386-23 Robertson *v.* Kennedy, 152 Mich. 553, 116 N. W. 413.

387-32 McIntosh *v.* Fisher, 125 Ill. App. 511, declarations of deceased grantor before and after delivery, admissible.

388-37 Poole *v.* Comrs., 9 Del. Ch. 192, 80 A. 683.

388-40 Beaufort Land, etc. Co. *v.* New River Lumb. Co., 86 S. C. 358, 68 S. E. 637.

In Ben Bow *v.* **Harvin**, 92 S. C. 180, 75 S. E. 414, it was held that "declarations of the trustees and their instructions to the surveyor at the time of the first division were admissible as part of the res gestae. They were explanatory of their acts. But neither the acts nor the declarations of the trustees who made the second division, over 20 years afterwards, were competent as evidence to affect the rights which had vested under the first division."

389-41 Holden *v.* Cantrell, 88 S. C. 281, 70 S. E. 815; Steves *v.* Smith, 49 Tex. Civ. 126, 107 S. W. 141.

Attempts to sell by one in possession. Owen *v.* Moxon, 167 Ala. 615, 52 S. 527.

Declarations which relate to the matter of the possession may be admitted as part of the res gestae, yet they must be confined to that subject; and those which relate to the origin of the title, or to the contract under which possession is held, or to the mode or man-

ner of payment, or other independent facts, should be excluded. In re Klehr's Will, 147 Wis. 653, 133 N. W. 1105.

389-42 Owen *v.* Moxon, 167 Ala. 615, 52 S. 527; N. W. R. Co. *v.* Dicken, 13 Cal. App. 689, 110 P. 591; Minor *v.* Burton, 228 Mo. 558, 128 S. W. 964. **The rule in Missouri** is thus put in Dunlap *v.* Griffith, 146 Mo. 294, 47 S. W. 920: "As to the admission and exclusion of evidence, the court correctly ruled that Henry Griffith's declarations were inadmissible because he was not in possession of the land when the proposed declarations were made, and the statements of Daniel Griffith asserting title while in possession were admissible as verbal acts tending to characterize his possession. Burgert *v.* Borchert, 59 Mo. 80; Railroad *v.* Clark, 68 Mo. 371; Lemmon *v.* Hartsook, 80 Mo. 13; Miss. Co. *v.* Vowels, 101 Mo. 255 (14 S. W. 282)," followed in Allen *v.* Morris, 244 Mo. 357, 148 S. W. 905.

389-43 Barfield *v.* Evans (Ala.), 65 S. 928; Kimball *v.* Edwards, 91 Kan. 298, 137 P. 948; Wipperman Mercantile Co. *v.* Robbins, 23 N. D. 208, 135 N. W. 785, *cit.* this text; Ragan *v.* Bank, 38 Okla. 65, 131 P. 1093. See also Boozer *v.* Jones, 169 Ala. 481, 53 S. 1018.

390-49 See Mason *v.* S., 171 Ind. 78, 85 N. E. 776.

391-52 Baltimore & O. R. Co. *v.* Thornton, 188 Fed. 868, 110 C. C. A. 502; Maddox *v.* Newton, 4 Ala. App. 454, 58 S. 934; St. Louis & S. F. R. Co. *v.* Sutton, 169 Ala. 389, 55 S. 989; Wilhite *v.* Fricke, 169 Ala. 76, 53 S. 157; Lewy Art Co. *v.* Agricola, 169 Ala. 60, 53 S. 145; Birmingham So. R. Co. *v.* Fox, 167 Ala. 281, 52 S. 889; Alabama S. & W. Co. *v.* Tallant, 165 Ala. 521, 51 S. 835; Long *v.* Cummings, 156 Ala 577, 47 S. 109; Morris *v.* McClellan, 154 Ala. 639, 45 S. 641; Neidy *v.* Littlejohn, 146 Ia. 355, 125 N. W. 198; C. *v.* McGarvey, 158 Ky. 570, 165 S. W. 973; P. *v.* Emmons, 178 Mich. 126, 144 N. W. 479; Smith *v.* Ry., 155 Mich. 466, 119 N. W. 640, *cit.* the text; Tucker *v.* S. (Miss.), 60 S. 65; S. *v.* Anderson, 252 Mo. 83, 158 S. W. 817; Carmichael *v.* Co., 162 N. C. 333, 78 S. E. 507; Sigmon *v.* Shell, 165 N. C. 582, 81 S. E. 739; Ty. *v.* Leslie, 15 N. M. 240, 106 P. 378; C. *v.* Henderson, 242 Pa. 372, 89 A. 567; Robinson *v.* Morris, 30 R. I. 132, 73 A. 611; Smithson *v.* S., 124 Tenn. 218, 137 S. W. 487; Stevens *v.* S. (Tex. Cr.), 150 S. W. 944; Barber *v.* S., 64 Tex. Cr. 96, 142 S. W. 577; Boardman *v.* Woodward (Tex. Civ.), 118 S. W. 550; Missouri, etc. R. Co. *v.* Johnson (Tex. Civ.), 126 S. W. 672; S. *v.* Hazzard, 75 Wash. 5, 134 P. 514; Zwietusch *v.* Luehring, 156 Wis. 96, 144 N. W. 257. See Goldschmidt *v.* Ins. Co., 134 App. Div. 475, 119 N. Y. S. 233.

All acts of co-conspirator in procuring an abortion done in furtherance of the offense admissible as part of the res gestae. S. *v.* Moeller, 24 N. D. 165, 138 N. W. 981. See vol. 1, p. 63, n. 65.

Where jerking of car was alleged cause of accident to plaintiff, it may be shown that plaintiff's husband, who was at the time on the car steps, was jerked off. Birmingham, etc. Co. *v.* Glenn (Ala.), 60 S. 111. See also vol. 12, p. 134, n. 86, and "Res Gestae," p. 347.

Want of consent to acts of intercourse, admissible as part of the res gestae of the rape. Boyd *v.* S. (Tex. Cr.), 163 S. W. 67. See vol. 10, p. 589.

Where the charge is for keeping as well as for setting up gambling devices described, and necessarily implies a period and lapse of time in the commission of the crime so as to make it a continuing offense, any facts and circumstances connected with the place where the gambling device is kept during such time, tending to prove the charge, or concerning the conduct of the defendant in the management of such device, or any other gambling device in the same room or place and conducted as a part of the same plan or scheme, should be admitted in evidence. S. *v.* Jackson, 242 Mo. 410, 146 S. W. 1166.

Prosecution for sale of liquor.—Dulin *v.* S., 52 Tex. Cr. 442, 108 S. W. 696.

All circumstances showing nature and force of explosion.—Knight *v.* Donnelly, 131 Mo. App. 152, 110 S. W. 687.

392-53 Personal injuries sustained at time in question may be proved as tending to show circumstances connected with act, though they may not be cause for damage under pleadings. Posener *v.* Harvey (Tex. Civ.), 125 S. W. 356.

392-56 Ridgell *v.* S., 1 Ala. App. 94, 55 S. 327; P. *v.* Jones, 12 Cal. App. 129, 106 P. 724; Chicago T. Co. *v.* Mahoney, 230 Ill. 562, 82 N. E. 868; Kennedy *v.* Borah, 157 Ill. App. 90;

Powell *v.* R. Co., 229 Mo. 246, 129 S. W. 963; Leggett *v.* Exp. Co., 157 Mo. App. 108, 137 S. W. 893; S. *v.* Morris, 58 Or. 397, 114 P. 476; S. *v.* Hatch, 63 Wash. 617, 116 P. 286.

Upon an inquiry as to the state of mind, or disposition of a person at any particular period, his acts and declarations are admissible. Home Bank. & Co. *v.* Baum, 85 Conn. 383, 82 A. 970.

The admission in evidence by the trial court of a conversation between the conductor who lifted the plaintiff's commutation ticket and a man named Smith, and which took place in the presence of the plaintiff at the time when his ticket was taken up, was a part of the res gestae and was properly admitted. Harris *v.* R. Co., 82 N. J. L. 456, 82 A. 881.

393-57 Lewis *v.* S., 178 Ala. 26, 59 S. 577; Hightower *v.* S., 9 Ga. App. 236, 70 S. E. 1022; O'Connor *v.* Gillaspy, 170 Ind. 428, 83 N. E. 738; Andrews *v.* C. Co., 154 Wis. 82, 142 N. W. 487.

393-58 American Mfg. Co. *v.*, Bigelow, 188 Fed. 34, 110 C. C. A. 77; Ala. G. S. R. Co. *v.* Arrington, 1 Ala. App. 385, 56 S. 78; Huckabee *v.* S., 168 Ala. 27, 53 S. 251; Plefka *v.* Ry., 155 Mich. 53, 118 N. W. 731; Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561; Robinson *v.* Morris, 30 R. I. 132, 73 A. 611; S. *v.* Harris (R. I.), 69 A. 506; Lemons *v.* S., 59 Tex. Cr. 299, 128 S. W. 416; Gardner *v.* S., 56 Tex. Cr. 594, 120 S. W. 895; Jaureque *v.* S., 55 Tex. Cr. 221, 116 S. W. 809; Roma *v.* S., 55 Tex. Cr. 344, 116 S. W. 598; South Tacoma F. & T. Co. *v.* Co., 50 Wash. 686, 97 P. 970; Segerstrom *v.* Lawrence, 64 Wash. 245, 116 P. 876.

Arrest of motorman at time of accident, shown, and cause and reason therefor. Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160.

394-59 McMahon *v.* R. Co., 143 Ill. App. 608.

Declarations by other participants, admissible. S. *v.* Jones, 77 S. C. 385, 58 S. E. 8, riot.

395-61 Young *v.* S., 149 Ala. 16, 43 S. 100; P. *v.* Jones, 160 Cal. 358, 117 P. 176; Farley *v.* R. Co., 53 Ill. App. 493; Allen *v.* R. Co., 143 Ky. 723, 137 S. W. 230; S. *v.* Terry, 128 La. 680, 55 S. 15; Seaboard A. L. R. Co. *v.* Phillips, 108 Md. 285, 70 A. 232; Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1; Cooper *v.* S., 123 Tenn. 37, 128 S. W. 826; Roma *v.* S., 55 Tex. Cr. 344, 116 S. W. 598; Eggleston *v.* S., 59 Tex. Cr. 542, 128 S. W. 1105; Cromeenes *v.* R. Co., 37 Utah 475, 109 P. 15; Palmer *v.* Smith, 147 Wis. 70, 132 N. W. 614.

396-62 S. *v.* Kennedy, 207 Mo. 528, 106 S. W. 57.

397-63 Woodward *v.* S., 58 Tex. Cr. 412, 126 S. W. 271. See Majors *v.* S., 58 Tex. Cr. 39, 124 S. W. 663.

398-68 Atlantic, etc. R. Co. *v.* Crosby, 53 Fla. 400, 43 S. 318 (declaration of mother of plaintiff assuming blame for accident); Smith *v.* Ry., 155 Mich. 466, 119 N. W. 640.

399-71 Montgomery T. Co. *v.* Fitzpatrick, 149 Ala. 511, 43 S. 136, 9 L. R. A. (N. S.) 851. See vol. 11, p. 805, n. 65, and supplement thereto.

399-73 Rathbun *v.* White, 157 Cal. 248, 107 P. 309; Hertz *v.* R. Co., 154 Ill. App. 80; Sterns C. Co. *v.* Evans, 33 Ky. L. R. 755, 111 S. W. 308; Heiberger *v.* Co., 133 Mo. App. 452, 113 S. W. 730; Kansas City, etc. R. Co. *v.* Young, 50 Tex. Civ. 610, 111 S. W. 764.

399-74 Hall *v.* S., 7 Ga. App. 115, 66 S. E. 390; Bennett *v.* C., 133 Ky. 452, 118 S. W. 332; S. *v.* Blount, 124 La. 202, 50 S. 12; S. *v.* Sylvester, 40 Mont. 76, 105 P. 86; Trimble *v.* S., 57 Tex. Cr. 439, 125 S. W. 40; Hines *v.* S., 57 Tex. Cr. 216, 123 S. W. 411.

400-75 P. *v.* Courtright, 10 Cal. App. 522, 102 P. 542; S. *v.* Hogan, 145 Ia. 352, 124 N. W. 178; Parrish *v.* C., 136 Ky. 77, 123 S. W. 339.

400-76 S. *v.* Werner, 128 La. 1, 54 S. 402; Compton *v.* S. (Tex. Cr.), 148 S. W. 580.

Distinct crime committed by defendant's companion elsewhere, inadmissible. P. *v.* Edwards, 13 Cal. App. 551, 110 P. 342.

400-78 Kennedy *v.* S. (Ala.), 62 S. 49; Granberry *v.* S. (Ala.), 62 S. 52; May *v.* Com., 153 Ky. 141, 154 S. W. 1074; P. *v.* Rogers, 192 N. Y. 331, 85 N. E. 135; Nelson *v.* S., 51 Tex. Cr. 349, 101 S. W. 1012. See also vol. 6, p. 613, n. 53.

401-79 S. *v.* Baker, 209 Mo. 444, 108 S. W. 6; P. *v.* Morse, 196 N. Y. 306, 89 N. E. 816; Jenkins *v.* S., 59 Tex. Cr. 475, 128 S. W. 1113; Fay *v.* S., 52 Tex. Cr. 185, 107 S. W. 55; Knight *v.* S., 55 Tex. Cr. 243, 116 S. W. 56.

402-83 P. *v.* Kafoury, 16 Cal. App. 718, 117 P. 938; Vanhooser *v.* S., 55 Tex. Cr. 114, 113 S. W. 285.

402-86 Renfroe *v.* S., 84 Ark. 16, 104 S. W. 542 (second assault on same person); P. *v.* Rardin, 255 Ill. 9, 99 N. E. 59.

402-87 P. *v.* Cahill, 11 Cal. App. 685, 106 P. 115; S. *v.* Willette, 46 Mont. 326, 127 P. 1013; P. *v.* Colmey, 117 App. Div. 462, 102 N. Y. S. 714, 188 N. Y. 573, 80 N. E. 1115. See vol. 8, p. 132.

403-88 S. *v.* Flynn (Mo.), 167 S. W. 516; Tabor *v.* S., 52 Tex. Cr. 387, 107 S. W. 1116 (fact other articles taken from person robbed and had not been recovered, shown). See vol. 11, p. 466.

403-90 P. *v.* Piner, 11 Cal. App. 542, 105 P. 780; Doyle *v.* S., 59 Tex. Cr. 39, 126 S. W. 1131.

403-91 Nunn *v.* S., 60 Tex. Cr. 86, 131 S. W. 320.

403-92 Vanhooser *v.* S., 55 Tex. Cr. 114, 113 S. W. 285.

403-93 Bishop *v.* S. (Ala.), 61 S. 820; Redden *v.* S., 7 Ala. App. 33, 60 S. 992; Chestnut *v.* S., 7 Ala. App. 72, 61 S. 609; P. *v.* Cipolla, 155 Cal. 224, 100 P. 252; P. *v.* Brewer, 19 Cal. App. 742, 127 P. 808; S. *v.* Perry, 124 La. 931, 50 S. 799; S. *v.* Baker, 209 Mo. 444, 108 S. W. 6; Hart *v.* S. (Tex. Cr.), 154 S. W. 553. See also "Homicide," p. 610.

That defendant "was using" the premises at time of the killing admissible as part of the res gestae. Parsons *v.* S. (Ala.), 60 S. 864. See vol. 6, p. 610.

That deceased was at time possessed of premises where killing occured, competent in explanation of his presence there. Kennedy *v.* S. (Ala.), 62 S. 49. See vol. 6, p. 610.

That defendant and family were in their own home just prior to the killing when deceased used the alleged insulting language, may be shown. Bailey *v.* S. (Ala. App.), 65 S. 422.

That the homicide took place in a "booze joint" may be shown. Fowler *v.* S., 8 Okla. Cr. 130, 126 P. 831. See vol. 6, p. 610.

404-94 Lahue *v.* S., 51 Tex. Cr. 159, 101 S. W. 1008.

404-96 Fleming *v.* S., 150 Ala. 19, 43 S. 219.

404-97 McCombs *v.* S., 151 Ala. 7, 43 S. 965; McCoy *v.* S., 91 Miss. 257, 44 S. 814 (no conspiracy need be shown).

405-98 See Morello *v.* P., 226 Ill. 388, 80 N. E. 903.

405-99 Newman *v.* S., 160 Ala. 102, 49 S. 786; Hall *v.* S. (Ala. App.), 65 S. 427; S. *v.* Bernard, 132 La. 463, 61 S. 528; Wynne *v.* S., 59 Tex. Cr. 126, 127 S. W. 213.

Request of bystander that defendant "give it to him over the head" admissible. Parker *v.* S. (Ala. App.), 65 S. 90. See vol. 6, p. 621.

405-1 S. *v.* Buck, 88 Kan. 114, 127 P. 631; S. *v.* Perry, 124 La. 931, 50 S. 799. See vol. 6, p. 610.

Statements of third person to deceased just prior to homicide. Hull *v.* S., 50 Tex. Cr. 607, 100 S. W. 403.

406-2 Kirklin *v.* S., 168 Ala. 83, 53 S. 253.

406-3 Deal *v.* S., 82 Ark. 58, 100 S. W. 75 (remote threats, not shown to refer to deceased, inadmissible); S. *v.* Perry, 124 La. 931, 50 S. 799; S. *v.* Kelleher, 224 Mo. 145, 123 S. W. 551.

406-4 Pate *v.* S., 150 Ala. 10, 43 S. 343 (actions of accused immediately after homicide); Harris *v.* S., 8 Ala. App. 33, 62 S. 477; P. *v.* Cipolla, 155 Cal. 224, 100 P. 252; S. *v.* Rutledge, 135 Ia. 581, 113 N. W. 461 (declarations of defendant admisible though favorable to himself); S. *v.* Simon, 131 La. 520, 59 S. 975; S. *v.* Rasco, 239 Mo. 535, 144 S. W. 449; S. *v.* Spivey, 151 N. C. 676, 65 S. E. 995; Hawkins *v.* U. S., 3 Okla. Cr. 651, 108 P. 561; U. S. *v.* David, 3 Phil. Isl. 128; S. *v.* Harris (R. I.), 69 A. 506 (assault with deadly weapon); Luttrell *v.* S. (Tex. Cr.), 157 S. W. 157; Irving *v.* S. (Tex. Cr.), 156 S. W. 641; Keeton *v.* S., 59 Tex. Cr. 316, 128 S. W. 404 (by third person just after leaving room where killing occurred); Bice *v.* S., 51 Tex. Cr. 133, 100 S. W. 949; Graves *v.* S., 58 Tex. Cr. 42, 124 S. W. 676 (fifteen minutes after); Wynne *v.* S., 59 Tex. Cr. 126, 127 S. W. 213.

407-5 Phillips *v.* S. (Ala. App.), 65 S. 444; Monarch L. Co. *v.* Luck (Ala.), 63 S. 656; Martinez *v.* P., 55 Colo. 51, 132 P. 64; Gibbons *v.* S., 137 Ga. 786, 74 S. E. 549; Magan *v.* C. (Ky.), 119 S. W. 734; P. *v.* Sartori, 168 Mich. 308, 134 N. W. 200; Mayhew *v.* S. (Tex. Cr.), 155 S. W. 191. *Comp.* Derden *v.* S., 56 Tex. Cr. 396, 120 S. W. 485. See vol. 6, p. 622, n. 82.

Intoxicated condition of deceased some months subsequent to the shooting and two weeks prior to his death not admissible. Hooten *v.* S. (Ala. App.), 64 S. 200. See vol. 6, p. 610.

408-9 Hamburg Bk. *v.* George, 92 Ark. 472, 123 S. W. 654; Schwartz *v.* Neighbors, 12 Cal. App. 595, 108 P. 51.

408-11 Hamburg Bk. *v.* George, supra; Batcheller *v.* Whittier, 12 Cal. App. 262, 107 P. 141; S. *v.* Murphy, 17 N. D. 48, 115 N. W. 84.

408-12 Moore *v.* Moore, 151 N. C. 555, 66 S. E. 598; Chilcott *v.* Co., 45 Wash. 148, 88 P. 113.

409-15 In action for commissions. Fritz *v.* Co., 136 Ia. 699, 114 N. W 193.

410-18 In re Dowell's Est., 152 Mich. 194, 115 N. W. 972.

410-22 Reeve *v.* Ness (Ia.), 135 N. W. 575; Gulf, etc. R. Co. *v.* Batte (Tex. Civ.), 107 S. W. 632 (statement of buyer to third person, immediately after sale, he had bought cattle for specified price, res gestae).

Statement by broker to third party may be proved in actions by former against his principal. Jaffe *v.* Nagel, 114 N. Y. S. 905.

411-28 Goetz *v.* Bk., 23 N. D. 643, 138 N. W. 10.

412-31 Statements immediately preceding collision of boats. The Theodore Roosevelt, 154 Fed. 155; Multnomah County *v.* Co., 49 Or. 204, 89 P. 389.

412-34 Hibbard *v.* U. S., 172 Fed. 66, 96 C. C. A. 554; Magruder *v.* Montgomery, 33 App. Cas. (D. C.) 133.

413-36 Davidson *v.* Lee (Tex. Civ.), 139 S. W. 904.

413-37 Lacks *v.* Bk., 204 Mo. 455, 102 S. W. 1007.

414-45 Keel *v.* Ins. Co., 20 Okla. 195, 94 P. 177; Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384. See Helbig *v.* Ins. Co., 234 Ill. 251, 84 N. E. 897; Moritz *v.* Herskovitz, 46 Wash. 192, 89 P. 560.

416-51 Ernst *v.* Ganahl, 166 Cal. 493, 137 P. 256.

416-52 Book entries made in presence of parties, admissible. Wiggins *v.* Wilson, 123 Ill. App. 663.

Field notes, made by same surveyor in connection with a series of surveys, admissible as part of res gestae. State *v.* Lumb. Co. (Tex. Civ.), 159 S. W. 391.

417-54 See St. Louis, etc. R. Co. *v.* Watkins, 45 Tex. Civ. 321, 100 S. W. 162.

418-58 Southern R. Co. *v.* Hardin, 1 Ala. App. 277, 55 S. 270; New Connellsville C. & C. Co. *v.* Kilgore, 162 Ala. 642, 50 S. 205; Cedartown *v.* Brooks, 2 Ga. App. 583, 59 S. E. 836; Chicago C. R. Co. *v.* Mauger, 128 Ill. App. 512; Vernon *v.* Assn. (Ia.), 138 N. W. 696; Patton *v.* Town, 133 Ia. 650, 110 N. W. 1032; St. Louis, etc. R. Co. *v.* Chaney, 77 Kan. 276, 94 P. 126 (verbal acts); Federal B. Co. *v.* Reeves, 77 Kan. 111, 93 P. 627; Geiselman *v.* Schmidt, 106 Md. 580, 68 A. 202; Nixon *v.* R. Co., 79 Neb. 550, 113 N. W. 117; Dublin G. & E. Co. *v.* Frazier, 46 Tex. Civ. 288, 103 S. W. 197; El Paso, etc. R. Co. *v.* Polk, 49 Tex. Civ. 269, 108 S. W. 761; Travelers' Assn. *v.* Roth (Tex. Civ.), 108 S. W. 1039; Runnells *v.* R. Co., 49 Tex. Civ. 150, 107 S. W. 647; Sheldon *v.* Wright, 80 Vt. 298, 67 A. 807.

418-59 Schock *v.* Cooling, 175 Mich. 313, 141 N. W. 675; St. Louis, etc. R. Co. *v.* Garber (Tex. Civ.), 108 S. W. 742.

418-60 Watson *v.* Kentucky, etc. Co., 137 Ky. 619, 129 S. W. 341.

419-61 Harrison *v.* U. S., 200 Fed. 662, 119 C. C. A. 78.

420-62 Souleyret *v.* Coal Co., 161 Ill. App. 60; Carter *v.* S., 172 Ind. 227, 87 N. E. 1081; Lewis *v.* Co., 135 Ky. 611, 117 S. W. 278; Hutchinson *v.* S., 58 Tex. Cr. 228, 25 S. W. 19.

420-63 Dubois *v.* Luthmers, 147 Ia. 315, 126 N. W. 147.

422-70 Foster *v.* Shepherd, 258 Ill. 164, 101 N. E. 411.

423-74 Cent. of Ga. *v.* Bell (Ala.), 65 S. 835.

425-81 Hyvonen *v.* Co., 103 Minn. 331, 115 N. W. 161; St. Louis, etc. R. Co. *v.* Watkins, 45 Tex. Civ. 321, 100 S. W. 162.

425-82 Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23. See Chicago T. Co. *v.* Brethauer, 223 Ill. 521, 79 N. E. 287.

425-83 Markham *v.* Loveland (Or.), 138 P. 483. See Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23.

425-85 Cyborowski *v.* Transit Co., 179 Fed. 440, 102 C. C. A. 586; W. U. T. Co. *v.* West, 165 Ala. 399, 51 S. 740; Turner *v.* Min. Co., 156 Ill. App. 60; Ft. Wayne, etc. Co. *v.* Crosbie, 169 Ind. 281, 81 N. E. 474, 13 L. R. A. (N. S.) 1214; Meier *v.* Johnson, 136 Ia. 302, 111 N. W. 420; Moseley *v.* Co., 33 Ky. L. R. 110, 109 S. W. 306; United R. Co. *v.* Cloman, 107 Md. 681, 69 A. 379; Zart *v.* Singer, etc. Co., 162 Mich. 387, 127 N. W. 272; Royle Min. Co. *v.* F. & C. Co., 161 Mo. App. 185,

142 S. W. 438; Johnson *v.* Co., 143 Mo. App. 441, 127 S. W. 692; Wagner *v.* Brew. Co., 130 N. Y. S. 584; Jungworth *v.* R. Co., 24 S. D. 342, 123 N. W. 695.

427-86 Southern R. Co. *v.* Reeder, 152 Ala. 227, 44 S. 699.

427-87 See Jungworth *v.* R. Co., 24 S. D. 342, 123 N. W. 695.

427-88 Alabama Consol. Coal & I. Co. *v.* Heald, 168 Ala. 626, 53 S. 162; Southern R. Co. *v.* Lewis, 165 Ala. 555, 51 S. 746; Stowers F. Co. *v.* Brake, 158 Ala. 639, 48 S. 89; Kington Coal Co. *v.* Aaron, 147 Ky. 480, 144 S. W. 371; W. U. T. Co. *v.* West, 165 Ala. 399, 51 S. 740; Kentucky S. Co. *v.* Page (Ky.), 125 S. W. 170; Cecil P. Co. *v.* Nesbitt, 117 Md. 59, 83 A. 254; Reese *v.* R., 159 Mich. 600, 124 N. W. 539; Fein *v.* Weir, 129 App. Div. 299, 114 N. Y. S. 426; Maller *v.* R. Co., 122 App. Div. 463, 106 N. Y. S. 784; Steele *v.* Lippman, 115 N. Y. S. 1099; Elliff *v.* R. Co., 53 Or. 66, 99 P. 76; Missouri, etc. R. Co. *v.* Ross (Tex. Civ.), 123 S. W. 231; So. T. & T. Co. *v.* Evans, 54 Tex. Civ. 63, 116 S. W. 418; Vaillancourt *v.* R. Co., 82 Vt. 416, 74 A. 99.

428-89 Southern T. & T. Co. *v.* Evans, 54 Tex. Civ. 63, 116 S. W. 418; Walters *v.* R. Co., 58 Wash. 293, 108 P. 593 (two hours after).

428-90 Missouri, etc. R. Co. *v.* Ross (Tex. Civ.), 123 S. W. 231.

429-92 Glover *v.* Co., 78 S. C. 502, 59 S. E. 526, statements of messenger admissible as res gestae of delivery of telegram; otherwise as to contents.

429-93 Goehrig *v.* Stryker, 174 Fed. 897; Sloss-S. S. & I. Co. *v.* Bibb, 164 Ala. 62, 51 S. 345; Lecklieder *v.* R. Co., 142 Ill. App. 139; Johnson *v.* Co., 79 Kan. 423, 100 P. 52; Carson *v.* Stockyards Co., 167 Mo. App. 443, 151 S. W. 752; Kenney *v.* Co., 134 App. Div. 859, 119 N. Y. S. 363; Brauer *v.* R. Co., 131 App. Div. 682, 116 N. Y. S. 59; McConnell *v.* Operating Co., 133 N. Y. S. 255; Rounseville *v.* Paulson, 19 N. D. 466, 126 N. W. 221; Gillespie *v.* Bk., 20 Okla. 768, 95 P. 220; Fredenthal *v.* Brown, 52 Or. 33, 95 P. 1114; Galveston E. Co. *v.* Dickey (Tex. Civ.), 126 S. W. 332; Grant *v.* R. Co., 54 Wash. 678, 103 P 1126.

430-94 Reese *v.* R., 159 Mich. 606, 124 N. W. 539; Champlin *v.* R. Co., 33 R. I. 572, 82 A. 481.

430-95 Miller B. L. Co. *v.* Stewart, 166 Ala. 657, 51 S. 943; Kentucky S. Co. *v.* Page (Ky.), 125 S. W. 170; Kenney *v.* Co., 134 App. Div. 859, 119 N. Y. S. 363 (statement of purpose); Henderson *v.* Coleman, 19 Wyo. 183, 115 P. 459, rehear. *denied*, 115 P. 1136.

430-96 Rouston *v.* R. Co., 151 Mich. 237, 115 N. W. 62, eighteen hours previous and five miles away. See Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23.

431-99 Rouston *v.* R. Co., 151 Mich. 237, 115 N. W. 62.

432-1 Zipperlen *v.* R. Co., 7 Cal. App. 206, 93 P. 1049; Anderson *v.* R. Co., 15 Ida. 513, 99 P. 91; Illinois C. R. Co. *v.* Houchins, 31 Ky. L. R. 93, 101 S. W. 924; Cincinnati, etc. R. Co. *v.* Evans, 33 Ky. L. R. 596, 110 S. W. 844; Stone *v.* R. Co., 66 W. Va. 417, 66 S. E. 521 (three or four minutes after). **Engineer in charge** of hoisting machinery at mine. Hyvonen *v.* Co., 103 Minn. 331, 115 N. W. 167.

432-2 Chesapeake & O. R. Co. *v.* Walker's Admr., 159 Ky. 237, 167 S. W. 128.

432-3 Colorado, etc. R. Co. *v.* McGarry, 41 Colo. 398, 92 P. 915; Louisville, etc. R. Co. *v.* Davis, 32 Ky. L. R. 580, 106 S. W. 304; International, etc. R. Co. *v.* Munn, 46 Tex. Civ. 276, 102 S. W. 442 (half hour).

433-5 Birmingham, etc. R. Co. *v.* O'Brien (Ala.), 64 S. 343. See vol. 11, p. 347.

433-6 Canhan *v.* R. I. Co., 35 R. I. 177, 85 A. 1050. See vol. 12, p. 147, n. 50.

Six or seven minutes after the accident, when the car was at a standstill by reason of the accident, and the plaintiff was just being picked up or had just been picked up. Champlin *v.* R. Co., 33 R. I. 572, 82 A. 481.

433-9 Chicago, etc. Co. *v.* Daly, 129 Ill. App. 519.

433-10 Mobile L. & R. Co. *v.* Baker, 158 Ala. 491, 48 S. 119.

434-11 Baldwin *v.* R. Co., 7 Penne. (Del.) 81, 76 A. 1088; Swanson *v.* R. Co., 242 Ill. 388, 90 N. E. 210 (four or five minutes before competent to show knowledge of presence of person injured); Chicago C. R. Co. *v.* McDonough, 221 Ill. 69, 77 N. E. 577.

434-13 Missouri, etc. R. Co. *v.* Ross (Tex. Civ.), 123 S. W. 231.

434-14 Walters *v.* R. Co., 58 Wash. 293, 108 P. 593, two hours after.

435-21 Denver City Tramway Co. *v.* Brumley, 51 Colo. 251, 116 P. 1051; United R. Co. *v.* Cloman, 107 Md. 681, 69 A. 379.

436-26 John H. Radel Co. *v.* Borches, 147 Ky. 506, 145 S. W. 155.
437-31 Conklin *v.* R. Co., 196 Mass. 302, 82 N. E. 23.
439-1 Moorman *v.* Parkerson, 127 La. 835, 54 S. 47; Sivley *v.* Cramer (Miss.), 61 S. 653.
440-3 *Contra*, Standard Oil Co. *v.* U. S., 221 U. S. 1, *aff.* 173 Fed. 177.

RESTRAINT OF TRADE

442-11 See McConnell *v.* Co., 152 Fed. 321, 81 C. C. A. 429.
443-14 My Laundry Co. *v.* Schmeling, 129 Wis. 597, 109 N. W. 540.
443-16 That character of evidence that in ordinary penal actions would be sufficient to establish the existence of any material fact will be sufficient in a prosecution under the anti-trust statute. International Harvester Co. *v.* C., 147 Ky. 795, 146 S. W. 12.

REWARDS

445-3 Sheldon *v.* George, 132 App. Div. 470, 116 N. Y. S. 969; Rubenstein *v.* Frost, 116 N. Y. S. 681; Couch *v.* S., 14 N. D. 361, 103 N. W. 942; Broadnax *v.* Ledbetter, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057.
445-4 Oldfield *v.* Reading, 18 Pa. Dist. 833.
446-8 Evidence of what occurred after person wanted arrested, irrelevant under offer for information leading to arrest and conviction. Rogers *v.* McCoach, 120 N. Y. S. 686.
447-11 Invalidity of proclamation may be shown—as by proving blank signed by governor filled out by another. Hager *v.* Sidebottom, 130 Ky. 687, 113 S. W. 870.

RIOT AND UNLAWFUL ASSEMBLY

452-4 Proctor *v.* S., 5 Okla. Cr. 553, 115 P. 630.
452-5 Croy *v.* S., 4 Ga. App. 457, 61 S. E. 847; Stanfield *v.* S., 1 Ga. App. 532, 57 S. E. 953.
453-7 Stanfield *v.* S., supra.
454-8 S. *v.* Seeley, 51 Or. 131, 94 P. 37.
Public opinion concerning red flag carried in procession may be shown by testimony of citizens. P. *v.* Burman, 154 Mich. 150, 117 N. W. 589.
454-9 See vol. 11, p. 805, n. 65, and supplement thereto.
455-13 See Cherryvale *v.* Hawman, 80 Kan. 170, 101 P. 994.

ROBBERY

Evidence incriminating others, 470-27.
457-1 U. S. *v.* Decusin, 2 Phil. Isl. 536; Lipscomb *v.* S., 130 Wis. 238, 109 N. W. 986. See McDuffee *v.* S., 55 Fla. 125, 46 S. 721.
Evidence held sufficient to support a conviction. Benson *v.* S., 103 Ark. 87, 145 S. W. 883; P. *v.* Boyd, 16 Cal. App. 130, 116 P. 323; Holland *v.* S., 8 Ga. App. 202, 68 S. E. 861; Pirkle *v.* S., 11 Ga. App. 98, 74 S. E. 709; S. *v.* Dingman, 155 Ia. 332, 135 N. W. 1082; Jones *v.* S., 64 Tex. Cr. 510, 143 S. W. 621; Robinson *v.* S., 62 Tex. Cr. 645, 138 S. W. 704; S. *v.* Brache, 63 Wash. 396, 115 P. 853.
457-2 P. *v.* Delucc, 237 Ill. 541, 86 N. E. 1080, prima facie evidence.
Proof of identity of foreign coin admittedly in accused's possession may be made without specifying value or showing other particulars. P. *v.* Delucc, supra.
458-3 See vol. 9, p. 260, n. 12, and supplement thereto.
458-5 S. *v.* Luhano, 31 Nev. 278, 102 P. 260.
Force and intimidation presumed from circumstances. U. S. *v.* Santiago, 1 Phil. Isl. 716.
Gun employed in assault with intent to rob presumed to have been loaded and to have been dangerous. S. *v.* Parr, 54 Or. 316, 103 P. 434.
458-6 Henderson *v.* S., 172 Ala. 415, 55 S. 816.
Manner in which money carried admissible. Chafino *v.* S. (Tex. Cr.), 154 S. W. 546.
Separate similar offense, previously committed on prosecuting witness, shown to prove state of mind. Harris *v.* S., 55 Tex. Cr. 469, 117 S. W. 839.
459-8 Intoxication of victim several hours afterwards inadmissible. Robinson *v.* S., 8 Okla. Cr. 667, 130 P. 121.
Non-consent testified to by owner. Davis *v.* S., 159 Ala. 104, 48 S. 694.
460-9 U. S. *v.* Ramirez, 4 Phil. Isl. 549; U. S. *v.* Sosa, 4 Phil. Isl. 172; U. S. *v.* Birueda, id. 229.
460-10 P. *v.* Ryan, 239 Ill. 410, 88

N. E. 170. *Contra,* Brown *v.* C., 135 Ky. 635, 117 S. W. 281.

Physician who attended person robbed may describe his injuries by way of corroborating testimony as to force used. P. *v.* Whitelaw, 7 Cal. App. 622, 95 P. 379.

461-12 Force exercised for purpose distinct from robbery, though operative when property removed, immaterial. U. S. *v.* Birueda, 4 Phil. Isl. 229.

462-14 S. *v.* Luhano, 31 Nev. 278, 102 P. 260; Lipscomb *v.* S., 130 Wis. 238, 109 N. W. 986.

464-16 Williams *v.* C., 33 Ky. L. R. 330, 110 S. W. 339; Carr *v.* S., 55 Tex. Cr. 352, 116 S. W. 591.

465-17 Proof must be made of at least one of items taken of description alleged. Spanish *v.* S. (Fla.), 65 S. 457.

It is not necessary to prove that all the property alleged was taken. Proof of any part is sufficient. Jones *v.* S., 64 Tex. Cr. 510, 143 S. W. 621. And see Davis *v.* S., 3 Ala. App. 71, 57 S. 493.

465-18 Article stolen may be sufficient evidence of value. P. *v.* Dumas, 161 Mich. 45, 125 N. W. 766.

466-21 Boyd *v.* S., 153 Ala. 41, 45 S. 591; P. *v.* Courtright, 10 Cal. App. 522, 102 P. 542; S. *v.* Flynn (Mo.), 167 S. W. 516; S. *v.* Finn, 199 Mo. 597, 98 S. W. 9; Tabor *v.* S., 52 Tex. Cr. 387, 107 S. W. 1116. See vol. 11, p. 403, n. 88.

Acts and conduct of defendants prior to crime shown to establish it was result of previously concocted plan. P. *v.* Whitelaw, 7 Cal. App. 622, 95 P. 379.

That another person was robbed, at the same time and place as prosecuting witness, admissible. Serop *v.* S. (Tex. Cr.), 154 S. W. 557.

Other crimes as part of res gestae. See vol. 11, p. 403, n. 88, and supplement thereto.

467-22 Robinson *v.* S., 8 Okla. Cr. 667, 130 P. 121; Walling *v.* S., 55 Tex. Cr. 254, 116 S. W. 813. See vol. 11, p. 364, n. 37, and supplement thereto.

470-27 U. S. *v.* Merin, 2 Phil. Isl. 88, finding stolen goods at place indicated by accused. See vol. 3, p. 322, n. 74, p. 324, n. 81, and supplement thereto.

Evidence incriminating others placed in such relation to prosecutor they might have been guilty, admissible. Chancey *v.* S., 50 Tex. Cr. 85, 96 S. W. 12.

471-28 Solicitation of witness to commit robbery six days prior to offense too remote. S. *v.* Hanson (Mont.), 141 P. 669.

472-29 See vol. 11, p. 799, n. 55, and supplement thereto.

Previous attempted robberies may be proved solely to aid in identifying accused and to prove intent if it is clearly shown they were made by the guilty person. Wyatt *v.* S., 55 Tex. Cr. 73, 114 S. W. 812.

472-30 P. *v.* Sullivan, 144 Cal. 471, 77 P. 1000; Perry *v.* S. (Tex. Cr.), 155 S. W. 263. See Walker *v.* S., 50 Tex. Cr. 221, 96 S. W. 35.

473-31 P. *v.* Castile, 3 Cal. App. 485, 86 P. 745; U. S. *v.* Gregorio, 4 Phil. Isl. 443. See vol. 3, p. 137, n. 64, and supplement thereto.

475-36 See vol. 3, p. 134, n. 531; vol. 6, p. 929, n. 83, and supplement thereto.

475-37 P. *v.* Powers, 23 Cal. App. 447, 138 P. 373. See vol. 3, p. 6, n. 11 et seq., and supplement thereto.

475-40 Washington *v.* S. (Ala.), 66 S. 34; P. *v.* Sullivan, 144 Cal. 471, 77 P. 1000; P. *v.* Salas, 2 Cal. App. 537, 84 P. 295; S. *v.* Newman, 245 Mo. 495, 150 S. W. 1050; Fouse *v.* S., 83 Neb. 258, 119 N. W. 478; C. *v.* McManiman, 27 Pa. Super. 304; Wingate *v.* S. (Tex. Cr.), 152 S. W. 1078; Tabor *v.* S., 52 Tex. Cr. 387, 107 S. W. 1116; Chancey *v.* S., 50 Tex. Cr. 85, 96 S. W. 12.

Circumstances of arrest, as with whom and where, are admissible. People *v.* Scott, 261 Ill. 165, 103 N. E. 617.

That defendant had internal revenue license, admissible. Phillips *v.* S. (Tex. Cr.), 164 S. W. 1004.

Presence of defendant in city admissible. S. *v.* Newman, 245 Mo. 495, 150 S. W. 1050.

476-41 McDuffee *v.* S., 55 Fla. 125, 46 S. 721; Brown *v.* C., 135 Ky. 635, 117 S. W. 281.

476-42 Steward *v.* P., 224 Ill. 434, 79 N. E. 636; S. *v.* Parkhurst, 74 Kan. 672, 87 P. 703.

Intent to do harm found without proof revolver held against person robbed was loaded. P. *v.* Deluce, 237 Ill. 541, 86 N. E. 1080.

477-43 O'Donnell *v.* P., 224 Ill. 218, 79 N. E. 639.

478-44 Opinions and indirect evi-

dence, competent. Craig *v.* S., 171 Ind. 317, 86 N. E. 397.

478-46 See vol. 3, p. 6, n. 11, and supplement thereto.

478-48 Defendant's access to considerable sum of money in his own house cannot be shown. Craig *v.* S., 171 Ind. 317, 86 N. E. 397.

479-49 Evidence in rebuttal of alibi, competent. Smith *v.* P., 39 Colo. 202, 88 P. 1072; S. *v.* Finn, 199 Mo. 597, 98 S. W. 9.

Evidence held insufficient.—Robinson *v.* S., 62 Tex. Cr. 645, 138 S. W. 704.

SALES

Seller's reliance upon alleged fraudulent promise—burden of proof, 568-22; *Action for price—burden of proving gift,* 577-51; *Delivery of bills of lading as evidence of passing title,* 584-75; *Proof of authority to ship under limited liability contract,* 586-82; *Proof of value,* 594-12; *Breach of contract of sale—burden of proving defense,* 602-51; *Burden of showing rescission of continuing contract,* 617-13; *Rescission by buyer—burden of proof,* 622-35.

487-1 **Sale presumed to be a cash sale** and delivery and payment presumed concurrent acts. Hamilton *v.* Rankin, 108 Ark. 552, 158 S. W. 496.

487-2 Separate contracts, entered into contemporaneously, admissible. Gilbert Co. *v.* Husted, 50 Wash. 61, 96 P. 835.

487-3 Smith *v.* Weatherford, 92 Ark. 6, 121 S. W. 943; L. McManus Co. *v.* Drexel Furniture Co., 8 Ga. App. 158, 68 S. E. 859; Abbott Voting Mach. Co. *v.* City, 165 Mich. 625, 131 N. W. 71.

Every transfer of personal property without immediate delivery if vendor has possession is conclusively presumed fraudulent. Taylor *v.* Co., 47 Mont. 342, 132 P. 549.

Weight.—A preponderance of evidence is required. Perry *v.* Stayton, 2 Boyce (Del.) 529, 82 A. 87.

Evidence sufficient.—Mattar *v.* Wathen, 99 Ark. 329, 138 S. W. 455; Reeves *v.* Kinney, 16 Cal. App. 156, 116 P. 309; Thompson *v.* Iron Co., 9 Ga. App. 593, 71 S. E. 1024.

Evidence insufficient.—Southern Tent & Awning Co. *v.* Smith, 144 Ky. 527, 139 S. W. 794; Sokol *v.* Trading Co., 130 N. Y. S. 131.

Terms of sale, presumed to be for cash. Berlaiwsky *v.* Rosenthal, 104 Me. 62, 71 A. 69.

488-5 Grenawalt *v.* Roe, 136 Wis. 501, 117 N. W. 1017. See Whitsett *v.* Carney (Tex. Civ.), 124 S. W. 443.

488-6 Retention of possession by vendor is presumptive proof transaction is executory agreement to sell. Barber *v.* Andrews, 29 R. I. 51, 69 A. 1.

488-8 First Nat. Bk. *v.* Snell, 144 Wis. 433, 129 N. W. 668.

492-14 Harris *v.* Beebe, 144 Ia. 735, 123 N. W. 938.

492-15 Clark *v.* Co., 137 Ga. 324, 73 S. E. 580.

492-19 Hunkins-W. L. C. Co. *v.* Co., 155 Cal. 41, 99 P. 369; Metzler *v.* Kaufman, 32 App. Cas. (D. C.) 434.

493-20 Schon-K. M. & G. Co. *v.* Snow, 43 Colo. 538, 96 P. 182.

494-23 Swan *v.* Talbot, 152 Cal. 142, 94 P. 238, drunkenness.

498-45 Moline J. Co. *v.* Dinnan, 81 Conn. 111, 70 A. 634.

499-50 Moline J. Co. *v.* Dinnan, supra.

499-51 Correspondence between parties competent to show whether vendor so stamped goods as to render them unsalable in state in which buyer resided. Moline J. Co. *v.* Dinnan, supra.

502-73 Butler *v.* Ederheimer, 55 Fla. 544, 47 S. 23, though unsigned if shown to be original.

504-79 Principal may show broker's failure to report contract in accordance with rules of organization of which they were members though execution of contract not denied under oath. Floresville O. & M. Co. *v.* R. Co., 55 Tex. Civ. 78, 118 S. W. 194.

505-83 Priest *v.* Hodges, 90 Ark. 131, 118 S. W. 253; Muller Mfg. Co. *v.* Benton, 137 Ga. 411, 73 S. E. 669; Patterson *v.* R. Co., 10 Ga. App. 306, 73 S. E. 431; Harris *v.* Co. (R. I.), 72 A. 392; Cooper W. & B. Co. *v.* Co., 24 S. D. 381, 123 N. W. 846.

506-84 Scudders-G. G. Co. *v.* Co., 9 Cal. App. 553, 99 P. 978; Postal T. C. Co. *v.* Co., 136 Ky. 843, 122 S. W. 852.

507-86 Caldwell *v.* Co., 58 Wash. 461, 108 P. 1075.

508-95 Retention of money accompanying order for goods, without notifying buyer order rejected, sufficient. Enterprise Mfg. Co. *v.* Campbell (Ky.), 121 S. W. 1040.

508-96 Rockland-Rockport Lime Co. *v.* Leary, 203 N. Y. 469, 97 N. E. 43.

509-99 Cobb, etc. Co. *v.* Hills, 208 Mass. 270, 94 N. E. 265.

509-5 See Comeau *v.* Hurley, 24 S. D. 275, 123 N. W. 715.

510-12 De Laval, etc. Co. *v.* Steadman, 6 Cal. App. 651, 92 P. 877; Northwest T. Co. *v.* Hulburt, 103 Minn. 276, 115 N. W. 159.

Warranty not expressed in bill of sale cannot be established by parol. Barry, etc. Co. *v.* Thompson, 83 Ark. 283, 104 S. W. 137; Agnew *v.* Richardson, 7 Haw. 9; McNaughton *v.* Wahl, 99 Minn. 92, 108 N. W. 467. See Lombard Co. *v.* Co., 101 Me. 114, 63 A. 555.

Burden of proving special meaning of terms on party asserting it. Roylance Co. *v.* Descalzi, 243 Pa. 180, 90 A. 55

Parol evidence is not admissible to vary.—Houston P. Co. *v.* Griffith (Tex. Civ.), 164 S. W. 431. See vol. 9, p. 485, n. 52.

513-18 M'Connell *v.* Camors, 152 Fed. 321, 81 C. C. A. 429; Roquemore *v.* Wks., 151 Ala. 643, 44 S. 557; Polack *v.* Steinke, 100 Ark. 28, 139 S. W. 538; Luitweiler Pumping Eng. Co. *v.* Improvement Co., 16 Cal. App. 198, 116 P. 707, rehear. *denied*, 116 P. 712; International Text-Book Co. *v.* Mackhorn, 158 Ill. App. 543; Wasey *v.* Whitcomb, 167 Mich. 58, 132 N. W. 572; Barnes-Smith Mercantile Co. *r.* Tate, 156 Mo. App. 236, 137 S. W. 619; Interstate Engineering Co. *v.* Archer, 64 Wash. 629, 117 P. 470.

514-19 Broussard *v.* Lawson (Tex. Civ.), 124 S. W. 712.

514-22 Shriner *v.* Meyer, 171 Ala. 112, 55 S. 156; Minnix Co. *v.* Co., 33 App. Cas. (D. C.) 357 (order for goods though not approved in writing as required. acceptance in fact shown); Butler *r.* Ederheimer, 55 Fla. 544, 47 S. 23 (bill of lading); Gettys *v.* Marsh, 145 Ill. App. 291; Worsley *v.* Ayres, 144 Ia. 676, 123 N. W. 353; Robinson *v.* Ligon, 146 Mo. App. 634, 124 S. W. 590 (catalogue); Kan. City M. & O. R. Co. *r.* Worsham (Tex. Civ.), 149 S. W. 755. See Sturtevant Co. *v.* Dugan, 106 Md. 587, 68 A. 351.

Where there is a variance between two copies of an order, both are admissible as tending to prove the real agreement. King *r.* Thompson Co., (Ind. App.), 104 N. E. 106.

514-23 Letter calling for bids inadmissible where plaintiff did not bid on all items therein as per letter. Hyman & Co. *v.* Snyder H., 159 Ky. 354, 167 S. W. 146.

514-24 Childs *v.* Paraphernalia H., 80 Neb. 673, 114 N. W. 941; Greenwood G. Co. *v.* Co., 77 S. C. 219, 57 S. E. 867.

515-27 Insurance by defendant of subject-matter incompetent where he denies sale and sets up bailment. Webster Bros. *v.* Bingham, 14 Ariz. 50, 125 P. 709.

Assignment of money demand to arise upon performance of contract by assignor does not necessarily show sale of property covered by assignment. Grant *v.* Co., 155 Mich. 600, 119 N. W. 1092.

516-28 Dysart Sav. Bk. *v.* Weinstein, 152 Ia. 260, 132 N. W. 18.

Bill of sale of cattle complying with statute is evidence of sale and admissible. Wells *v.* S. (Ariz.), 131 P. 970.

As a bill of sale of staves, which states the number sold, where located, the length, and number of staves of each length, and that 44 per cent. were made of red oak, and that all were to be shipped from the place where located to designated consignees. Esteve Bros. & Co. *v.* Rosengrant, 10 Ga. App. 286, 73 S. E. 534.

But if the description in the bill of sale is defective, parol evidence is admissible in aid of the description. Balchin *v.* Jones, 10 Ga. App. 434, 73 S. E. 613. And see Miller *v.* Co., 150 Mich. 292, 114 N. W. 61.

516-30 Hall *v.* Barnard, 138 Ia. 523, 116 N. W. 604.

516-31 Hall *v.* Barnard, supra.

518-32 Conditions under which memorandum of prices of goods delivered may be shown to rebut contention sale was thereby evidenced. Gunzburger *v.* Rosenthal, 226 Pa. 300, 75 A. 418.

519-33 Memorandum made at auction sale by clerk, acting for both parties, admissible. Kendall *v.* Boyer, 144 Ia. 303, 122 N. W. 941.

An unrecorded bill of sale is admissible in evidence. Balchin *v.* Jones, 10 Ga. App. 434, 73 S. E. 613.

519-34 Proof of handwriting of nonresident subscribing witnesses, prima facie evidence of execution of bill of sale. Worman *v.* Seybert, 78 N. J. L. 176, 73 A. 529.

Proof of execution waived.—Balchin *v.* Jones, 10 Ga. App. 434, 73 S. E. 613.

519-36 Muller Mfg. Co. *r.* Benton, 137 Ga. 411, 73 S. E. 669; Bailey Co.

v. Co., 1 Ga. App. 398, 58 S. E. 120; Springer *v.* Co., 126 Ga. 321, 55 S. E. 53. See Kohl *v.* Bradley, 130 Wis. 301, 110 N. W. 265.

Evidence insufficient.—Hanchett Paper Co. *v.* Moore, 157 Ill. App. 209.

520-37 Cottondale, etc. Bk. *v.* Adding Mach. Co., 61 Fla. 143, 54 S. 896; Cameron S. P. Wks. *v.* Co. (Tex. Civ.), 167 S. W. 256.

521-45 Presumption of law. Long B. L. Co. *v.* Nyman, 145 Mich. 477, 108 N. W. 1019.

522-47 Owensboro W. Co. *v.* Riggan, 151 N. C. 303, 66 S. E. 126.

522-48 Guion M. Co. *v.* Campbell, 91 Ark. 240, 121 S. W. 164, *contra* if made subsequent to sale and in absence of other party.

Telephone communications.—Star B. Co. *v.* Co., 128 Mo. App. 517, 109 S. W. 802.

523-54 See Fentress *v.* Steele, 110 Va. 578, 66 S. E. 870.

524-55 Disease of sheep sold was "obvious and was discovered by the buyer himself, but it is clear that he did not know that the disease was dangerous and contagious, but was assured by respondent's agent that the sheep were all right; that their condition was the result of sand burrs in the hay or change of food, and that they were all right. Was this a concealment of a latent defect? The agent of respondent by his representations concealed from the appellant the latent deadly and contagious nature of the disease of which the jury might infer he had knowledge. Under such circumstances the agent committed a fraud upon appellant." Dale *v.* Co., 160 Mo. App. 314, 142 S. W. 745.

Question for jury whether the defendant had the right to accept positive statement and guaranty as to age of horse made by the plaintiff and rely upon it, rather than rely upon the statement made to him by his friend, especially in view of the fact that the owner of the horse, as the evidence shows, was an experienced dealer in horses. Mizell Live Stock Co. *v.* Banks, 10 Ga. App. 362, 73 S. E. 410.

No evidence of express warranty justifying submission to jury. Swift & Co. *v.* McMullen, 169 Mich. 1, 134 N. W. 1109.

524-57 Telephone conversations.—Conkling *v.* Co., 138 Ia. 596, 116 N. W. 822.

Burden of showing performance of condition precedent. International H. Co. *v.* Dillon, 126 Ga. 672, 55 S. E. 1034.

526-61 See infra, 615-10; Schlichting *v.* Rowell, 140 Ia. 731, 119 N. W. 151; Alvin F. & T. Assn. *v.* Hartman, 146 Mo. App. 155, 123 S. W. 957; Strauss *v.* Co., 134 Mo. App. 110, 114 S. W. 73; John Thurl's Sons *v.* Co., 136 App. Div. 710, 121 N. Y. S. 478; Smith *v.* Reed, 141 Wis. 483, 124 N. W. 489 (and reliance thereon if warranty not express).

Breach of warranty must be proved by purchaser. Burt *v.* Co., 237 Ill. 473, 86 N. E. 1055, 141 Ill. App. 603.

526-62 Chas. H. P. Co. *v.* Kennedy, 152 N. C. 196, 67 S. E. 488.

It cannot be shown warranty in former executed contract has been made part of contract in suit by parol agreement. Balt. R. & H. Co. *v.* Wetzel, 162 Fed. 117, 89 C. C. A. 117.

526-63 General F. Co. *v.* Wallace, 175 Fed. 650, 99 C. C. A. 204; Middleton M. Co. *v.* Chaffin, 108 Ark. 254, 157 S. W. 398; Kullman *v.* Co., 153 Cal. 725, 96 P. 369; Germain F. Co. *v.* Co., 153 Cal. 585, 96 P. 319; Case Threshing Mach. Co. *v.* Broach, 137 Ga. 602, 73 S. E. 1063; Nave *v.* Gross, 146 Ill. App. 104; Eilers M. House *v.* Oriental Co. (Wash.), 125 P. 1023. *Contra*, Loxtercamp *v.* Co., 147 Ia. 29, 125 N. W. 830.

See Four Tr. A. Co. *v.* Hurni, 156 Ia. 725, 137 N. W. 1014; "Parol Evidence," p. 489, notes 68, 69.

Written instrument silent as to warranty.—King *v.* Thompson Co. (Ind. App.), 104 N. E. 106. See vol. 9, p. 489, n. 70.

Under general warranty parol evidence is admissible of patent defects. Turner Bros. *v.* Manley (Ga. App.), 80 S. E. 680. See vol. 9, p. 489, n. 68.

Warranty shown by parol where order for goods did not contain the complete contract. Lovell *v.* Alton, 82 Misc. 431, 143 N. Y. S. 995. See vol. 9, p. 489, n. 69; vol. 9, p. 526, n. 63.

Warranty mentioned in but omitted from written instrument may be shown by parol. White Auto. Co. *v.* Dorsey, 119 Md. 251, 86 A. 617. See vol. 9, p. 492.

527-64 See Brown *v.* Korns, 134 Ia. 699, 112 N. W. 195.

527-65 Advertisement containing representations admissible. Kitchin *v.*

Nursery Co., 65 Or. 20, 130 P. 408, 1133; 132 P. 956.

527-66 Burns *v.* Limerick, 178 Mo. App. 145, 165 S. W. 1166.

527-67 Texas Star F. M. Co. *v.* Moore, 177 Fed. 744; Cornish *v.* Friedman, 94 Ark. 282, 126 S. W. 1079.

528-72 Cornish *v.* Friedman, supra; Schlichting *v.* Rowell, 140 Ia. 731, 119 N. W. 151; Alvin F. & T. Assn. *v.* Hartman, 146 Mo. App. 155, 123 S. W. 957; Joy *v.* Cale, 124 Mo. App. 569, 102 S. W. 30; Carter Co. *v.* Fischer, 121 N. Y. S. 614.

Knowledge of parties concerning article contracted for, relevant respecting warranty. Eichbaum *v.* Co., 58 Wash. 163, 108 P. 434.

Evidence of custom to warrant, inadmissible where express oral warranty relied on. Jesse French P. & O. Co. *v.* Garza, 53 Tex. Civ. 346, 116 S. W. 150.

528-73 Adams M. Co. *v.* Castleberry, 92 Ark. 310, 122 S. W. 998; Wertheimer-S. S. Co. *v.* McDonald, 138 Mo. App. 328, 122 S. W. 5; Harroll *v.* McDuffie (Tex. Civ.), 128 S. W. 1149.

528-74 Larrowe M. Co. *v.* R. Co., 137 App. Div. 732, 122 N. Y. S. 567; King *v.* Graef, 136 Wis. 548, 117 N. W. 1058.

528-75 Schiller *v.* Blyth, 15 Wyo. 304, 88 P. 648.

530-81 Gray *v.* Haynes, 164 Ala. 294, 51 S. 416; Hartley *v.* Rotman, 200 Mass. 372, 86 N. E. 903; St. Anthony & D. E. Co. *v.* Dawson, 20 N. D. 18, 126 N. W. 1013 (though seller has only constructive possession); Clevenger *v.* Lewis, 20 Okla. 837, 95 P. 230, 16 L. R. A. (N. S.) 410.

530-84 Ford M. Co. *v.* Osburn, 140 Ill. App. 633; Remy *v.* Healy, 161 Mich. 266, 126 N. W. 202 (in case of sale by sample warranty extends no further than that goods shall correspond with it if seller is dealer); Manning *v.* Co., 126 App. Div. 325, 110 N. Y. S. 685 (fitness for buyer's purpose); La Crosse P. Co. *v.* Brooks, 142 Wis. 640, 126 N. W. 3 (though purpose for which article desired stated).

531-86 Cochran *v.* Co., 88 Ark. 343, 114 S. W. 711; Brooks *v.* Camak, 130 Ga. 213, 60 S. E. 456; Eureka E. P. Co. *v.* Co., 85 S. C. 486, 67 S. E. 738.

531-87 Swift *v.* Redhead, 147 Ia. 94, 122 N. W. 140; Heath, etc. Co. *v.* Hurd, 193 N. Y. 255, 86 N. E. 18.

531-88 General F. Co. *v.* Wallace, 175 Fed. 650, 99 C. C. A. 204. *Contra,* if buyer informed seller has no personal knowledge of quality. Gilcrest L. Co. *v.* Wilson, 84 Neb. 583, 121 N. W. 989.

Evidence of previous transactions between parties, competent to show meaning of their language and establish description of goods intended to be warranted. Putnam-H. Co. *v.* Hewins, 204 Mass. 426, 90 N. E. 983.

531-90 Cook *v.* Darling, 160 Mich. 475, 125 N. W. 411.

531-91 Baer *v.* Co., 159 Ala. 491, 49 S. 92; S. P. Co. *v.* Oteri, 94 Ark. 318, 126 S. W. 1065; Brooks *v.* Camak, 130 Ga. 213, 60 S. E. 456; White *v.* Co., 6 Ga. App. 860, 65 S. E. 1075.

533-97 Loxtercamp *v.* Co., 147 Ia. 29, 125 N. W. 830; Kenyon P. & Mfg. Co. *v.* Co., 143 Mo. App. 518, 127 S. W. 666.

534-1 Barnett *v.* Hagan, 18 Ida. 104, 108 P. 743; John Turl's Sons *v.* Co., 136 App. Div. 710, 121 N. Y. S. 478. *Contra,* Blue Grass C. Co. *v.* Steward, 175 Fed. 537, 99 C. C. A. 159, *foll.* Seitz *v.* Co., 141 U. S. 510. *Comp.* Fuchs & L. Co. *v.* Kittredge, 146 Ill. App. 350.

538-10 *Contra,* if goods bought by sample and conform thereto. Remy *v.* Healy, 161 Mich. 266, 126 N. W. 202.

Custom is immaterial where an express warranty is relied on. Swift & Co. *v.* McMullen, 169 Mich. 1, 134 N. W. 1109.

Evidence of trade usage at point where goods delivered received to show time at which inspection and report thereof are made. Shinn *v.* McLean (Can.), 11 West. L. Rep. 527.

539-11 Burden rests on those objecting to confirmation of sale to show inadequacy of price. Knickerbocker Tr. Co. *v.* Co., 81 N. J. Eq. 130, 86 A. 55.

540-14 Texas Star F. M. Co. *v.* Moore, 177 Fed. 744; Salmon *v.* Lynch, 122 N. Y. S. 236.

541-16 Quality of goods delivered may be shown though brand varies from that specified in order if pleadings disclose quality was of essence of contract. Plotner *v.* Co. (Tex. Civ.), 122 S. W. 443.

543-17 Hutchinson L. Co. *v.* Dickerson, 127 Ga. 328, 56 S. E. 491.

543-19 *Comp.* Baer *v.* Co., 159 Ala. 491, 49 S. 92.

544-20 Where the theory of the defendant was that the plaintiff pur-

chased on the inspection of its agents, it was material for the defendant to show that the plaintiff's agents had full opportunity to inspect the goods. Swift & Co. *v.* McMullen, 169 Mich. 1, 134 N. W. 1109.

545-25 Moline J. Co. *v.* Dinnan, 81 Conn. 111, 70 A. 634. See Depew *v.* Co., 121 App. Div. 28, 105 N. Y. S. 390.

552-68 See Letts-S. G. Co. *v.* R. Co., 138 Mo. App. 352, 122 S. W. 10.

555-99 See vol. 11, p. 817, n. 88, and supplement thereto.

562-3 Seigfried *v.* R. Co., 147 Mo. App. 545, 126 S. W. 798.

562-4 Protest of note not conclusive of insolvency. Rex B. Co. *v.* Ross, 80 Ark. 388, 97 S. W. 291. Refusal to honor seller's drafts does not show insolvency. Smith *v.* R. Co., 145 Mo. App. 394, 122 S. W. 342.

565-15 Proof of tender of purchase price is admissible to defeat seller's right to recover property. Forrester & Bro. *v.* Co., 3 Ala. App. 281, 57 S. 64.

568-21 Mere failure to perform executory agreement, part of consideration of sale, not in itself proof of fraud. Blaul *v.* Wandel, 137 Ia. 301, 114 N. W. 899.

568-22 Where goods were sold, buyer promising to do acts which he failed to do, burden was on seller to prove that but for such promise sale would not have been made. Blaul *v.* Wandel, supra.

569-23 Ayres *v.* Farwell, 196 Mass. 349, 82 N. E. 35. See Blaul *v.* Wandel 137 Ia. 301, 114 N. W. 899.

Burden of establishing intent on seller. Scandinavian, etc. Co. *v.* Skinner (Ind.), 105 N. E. 784.

570-25 Katzenberger *v.* Leedom Co., 103 Tenn. 144, 52 S. W. 35.

And the fraudulent intent not to pay for the property purchased may be deduced from the facts and circumstances, where no actual false representations of solvency are made, when the purchaser has full knowledge of his insolvent condition and inability to make payment. Richardson *v.* Vick, 125 Tenn. 532, 145 S. W. 174.

573-36 Berlaiwsky *v.* Rosenthal, 104 Me. 62, 71 A. 69.

573-37 Texas, etc. L. Co. *v.* Rose (Tex. Civ.), 103 S. W. 444.

Letter from broker, and seller's draft on buyer, admissible on issue of good faith. Tyng & Co. *v.* Woodward, 121 Md. 422, 88 A. 243.

573-38 Brinn *v.* Cohen, 107 N. Y. S. 37 (delivery must be shown). See Main *v.* Simmons, 2 Ga. App. 821, 59 S. E. 85; Brown *v.* Grossman, 108 N. Y. S. 653; Harris *v.* Gill, 102 N. Y. S. 665.

574-39 Burden of proof on buyer. Smith *v.* Hickands, 148 Mich. 558, 112 N. W. 122.

575-42 Am. J. Assn. *v.* Wesson, 92 Ark. 287, 122 S. W. 664.

575-44 Gourd *v.* Healy, 137 App. Div. 323, 122 N. Y. S. 7.

Reason for refusal to deal with third party admissible on issue of the reason he dealt direct with defendant and fact of sale to defendant instead of the third person. Munroe *v.* Mundy & Scott (Ia.), 146 N. W. 819.

575-45 Fairbanks *v.* Heltsley, 135 Ky. 397, 122 S. W. 198; Jaehnig *v.* Fried, 83 N. J. L. 361, 85 A. 321; Back *v.* Smith, 66 W. Va. 47, 66 S. E. 1.

Retention of invoice and account. Hamilton-B. S. Co. *v.* Co., 80 Ark. 438, 97 S. W. 284.

576-47 Am. S. J. Co. *v.* Hill, 90 Ark. 78, 117 S. W. 781; Gauger *v.* Co., 88 Ark. 422, 115 S. W. 157; Lattner *v.* Co., 136 Ia. 687, 112 N. W. 653; Helm *v.* Loveland, 136 Ia. 504, 113 N. W. 1082; Whitcomb *v.* Co. (Mass.), 105 N. E. 554; Mette & K. Dist. Co. *v.* Lowrey, 39 Mont. 124, 101 P. 966; Keystone C. & C. Co. *v.* Co., 39 Pa. Super. 500.

Receipt for goods signed by defendant's wife imposes burden of proving non-delivery on defendant. Suckle *v.* Frankel & Co. (Ark.), 153 S. W. 87.

Burden on purchaser to show amount of reduction to which he is entitled where seller did not deliver kind of goods ordered. Muller *v.* Wire Co., 141 Ga. 376, 81 S. E. 127.

576-48 Acceptance must be shown. Inman Mfg. Co. *v.* Co., 133 Ia. 71, 110 N. W. 287.

576-49 Am. S. J. Co. *v.* Hill, 90 Ark. 78, 117 S. W. 781; Gandy *v.* Co. (Ind. App.), 90 N. E. 915; Putnam-H. Co. *v.* Hewins, 204 Mass. 426, 90 N. E. 983.

576-50 Duluth L. Co. *v.* Co., 110 Minn. 124, 124 N. W. 967 (must negative rescission by defendant); Bodenmann Mfg. Co. *v.* Lesser, 121 N. Y. S. 335 (equality with sample).

Burden of proof on plaintiff to prove price and damages. Stephenson *v.* Co. (Ala. App.), 65 S. 314.

Terms and conditions of sale.—Drake C. Co. *v.* Croze, 149 Mich. 60, 112 N. W. 715.

Evidence must show debt due.—Inman Mfg. Co. *v.* Co., 133 Ia. 71, 110 N. W. 287.

After prima facie case made burden shifts to defendant to establish plea of recoupment. Gem K. M. *v.* Co., 3 Ga. App. 709, 60 S. E. 365; Am. T. Co. *v.* Siegel, 221 Ill. 145, 77 N. E. 588.

577-51 Gem K. M. *v.* Co., supra.

In action to recover for goods sold and delivered defendant must show they were given him. Merritt *v.* Bush, 122 Ill. App. 189.

577-53 Beatty *v.* Miller, 47 Ind. App. 494, 94 N. E. 897; Chase *v.* R. Co., 208 Mass. 137, 94 N. E. 377.

578-55 Goodrich *v.* Wheeler, 145 Ia. 289, 123 N. W. 950; Automatic, etc. Co. *v.* Time Table Co., 208 Mass. 252, 94 N. E. 462.

578-56 Hartman F. & C. Co. *v.* Krieger, 137 Wis. 650, 119 N. W. 347.

579-59 Gourd *v.* Healy, 137 App. Div. 323, 122 N. Y. S. 7.

579-61 Main *v.* Jarrett, 83 Ark. 426, 104 S. W. 163; Lewis *v.* Imhof, 138 Mo. App. 370, 122 S. W. 329; Mette & K. Dist. Co. *v.* Lowrey, 39 Mont. 124, 101 P. 966; Reed *v.* Co. (Tex. Civ.), 127 S. W. 901.

580-63 See Stephens *v.* Burch (Can.), 10 West. L. Rep. 400; Urch *v.* Strathcona H. R. (Can.), 10 West. L. Rep. 475; Mears *v.* Daniels, 84 Vt. 91, 78 A. 737.

580-65 Am. J. Assn. *v.* Wesson, 92 Ark. 287, 122 S. W. 664; Kessler *v.* Lally, 109 Minn. 238, 123 N. W. 921; Back *v.* Smith, 66 W. Va. 47, 66 S. E. 1. See Kitchin *v.* Clark, 120 Ill. App. 105.

581-66 Norfolk, etc. R. Co. *v.* Duke, 107 Va. 764, 60 S. E. 96.

581-67 Loomis *v.* Co., 81 Conn. 343, 71 A. 358. See Norfolk, etc. R. Co. *v.* Duke, supra.

581-68 Loomis *v.* Co., supra; Norfolk etc. R. Co. *v.* Duke, supra.

581-69 Brownfield *v.* Jones Co., 98 Ark. 495, 136 S. W. 664; Childs & Co. *v.* Paraphernalia H., 80 Neb. 673, 114 N. W. 941.

Necessity for immediate shipment may be shown. Gorham *v.* R. Co. (Tex. Civ.), 106 S. W. 930.

582-71 Botsford *v.* Heney, 12 Cal. App. 380, 107 P. 593, to bank for delivery on performance of conditions.

584-75 Delivery of bills of lading is strong presumptive evidence of passing of title; not conclusive. Smith *v.* R. Co., 145 Mo. App. 394, 122 S. W. 342.

585-76 See North P. L. Co. *v.* Carroll, 48 Wash. 163, 93 P. 212.

585-77 Cook & Laurie Contract. Co. *v.* Bell, 177 Ala. 618, 59 S. 273. See Houghton I. Co. *v.* Vavrowski, 19 N. D. 594, 125 N. W. 1024.

585-78 McKerchey *v.* McIlvenna, 161 Mich. 57, 125 N. W. 765 (complaint to deceased agent of seller); Stuart *v.* Co., 161 Mich. 123, 125 N. W. 720.

586-82 See Moreland *v.* Co., 94 Miss. 572, 48 S. 187.

Authority to ship under limited liability contract must be shown by seller; not implied from direction of new customer to ship by express. Lewis *v.* Imhof, 138 Mo. App. 370, 122 S. W. 329.

586-83 Godkin *v.* Weber, 158 Mich. 515, 122 N. W. 1083; Northern M. Co. *v.* Schultz, 56 Wash. 393, 105 P. 850. See Eureka E. P. Co. *v.* Bennett-H. Co., 85 S. C. 486, 67 S. E. 738.

Acceptance must be shown.—Jaehnig *v.* Fried, 83 N. J. L. 361, 85 A. 321.

586-84 Shinn *v.* McLean (Can.), 11 West. L. Rep. 527.

587-88 Buyer must show non-delivery if he sets it up. Marquette N. Bk. *v.* Stearns, 111 Minn. 218, 126 N. W. 726.

587-89 Wolf *v.* Co., 252 Ill. 491, 96 N. E. 1063; Wirth *v.* Fawkes, 109 Minn. 254, 123 N. W. 661; Harrison *v.* Scott, 135 App. Div. 546, 120 N. Y. S. 377. See Roach *v.* Whitfield, 94 Ark. 448, 127 S. W. 722.

587-90 Case T. M. Co. *v.* Fee (Can.), 10 West. L. Rep. 70; Childress *v.* Co., 162 Ala. 371, 50 S. 322 (failure to object to accounts mailed); Wolf *v.* Co., 55 Wash. 665, 104 P. 1123. See Plotner *v.* Co. (Tex. Civ.), 122 S. W. 443.

Claim of seller against third party, irrelevant. Roach *v.* Whitfield, 94 Ark. 448, 127 S. W. 722.

Letter admissible to show rejection. Larrowe M. Co. *v.* R. Co., 137 App. Div. 732, 122 N. Y. S. 567.

587-91 Fountain City D. Co. *v.* Lindquist, 22 S. D. 7, 114 N. W. 1098; Wheeling Mold, etc. Co. *v.* Co., 62 W. Va. 288, 57 S. E. 826. See Garvin *v.* Co., 31 Ky. L. R. 1182, 104 S. W. 964.

588-93 Harrison *v.* Scott, 135 App. Div. 546, 120 N. Y. S. 377, if accept-

ance sought to be shown from buyer's acts.

If buyer informed seller of reasons for not accepting goods he cannot, on the trial, show other reasons. Providence J. Co. *v.* Bailey, 159 Mich. 285, 123 N. W. 1117.

589-96 Hillman *v.* Hulett, 149 Mich. 289, 112 N. W. 918. See Central T. G. Co. *v.* Co., 45 Tex. Civ. 199, 99 S. W. 1144, reasons for special price.

That article delivered was as good as one contracted for admissible. Barry *v.* Danielson, 78 Wash. 453, 139 P. 223.

Financial condition of plaintiff corporation as tending to show value of stock sold and probability of price agreed to be paid, admissible. McIntosh *v.* McNair, 63 Or. 57, 126 P. 9.

That goods sold were part of larger bill may be proved, tending to show that plaintiff was willing to give reduced price on whole. Coleman *v.* Forrester, 178 Mo. App. 57, 163 S. W. 263.

Another contract for rental of property showing value, admissible. Myers *v.* Adams (Ga. App.), 81 S. E. 595.

590-1 Tuttle-C. C. Co. *v.* Co., 136 Ia. 382, 113 N. W. 827.

590-3 Tuttle-C. C. Co. *v.* Co., supra.

591-4 Cleveland *v.* Rowe, 99 Minn. 444, 109 N. W. 817.

Market value at end of month admissible as showing it during month. Hull *v.* Mfg. Co., 208 Fed. 260, 125 C. C. A. 460.

592-5 Condition of property received in exchange as affected by occurrence postdating contract, immaterial. Manganese S. S. Co. *v.* Bk., 25 S. D. 119, 125 N. W. 572.

Buyer may show goods were received in apparently same condition as when shipped and were not subsequently interfered with. Mette & K. Dist. Co. *v.* Lowrey, 39 Mont. 124, 101 P. 966.

592-6 Seller must show performance of conditions under executory contract. Grenawalt *v.* Roe, 136 Wis. 501, 117 N. W. 1017.

592-7 See Kirchman *v.* Co., 92 Ark. 111, 122 S. W. 239.

593-8 Trafton *v.* Davis, 110 Me. 318, 86 A. 179; Gardiner *v.* Davis, 110 Me. 310, 86 A. 176.

593-9 But contract may contemplate buying and delivering merchandise at a specified price. In such a case the loss as to such merchandise not in seller's "possession or control is the difference between what it would have cost him to deliver the merchandise and the contract price." Dimmick *v.* Hendley, 117 Md. 458, 84 A. 171.

593-10 Repudiation of contract by buyer shown by proof of default in payments and unsatisfactory state of his business. Moffat *v.* Davitt, 200 Mass. 452, 86 N. E. 929.

594-11 In re Bellevue Pipe & F. Co., 189 Fed. 169; Moffat *v.* Davitt, supra; Brown *v.* Co., 210 Mo. 260, 109 S. W. 22; Charles J. Webb & Co. *v.* Hosiery Co., 231 Pa. 297, 80 A. 173.

594-12 Hull Co. *v.* Mfg. Co., 208 Fed. 260, 125 C. C. A. 460; Fisher Hydraulic S. & Mach. Co. *v.* Warner, 188 Fed. 465.

Bills of lading "subject to correction," admissible in absence of showing of correction or need therefor. Mariele *v.* Co., 55 Tex. Civ. 178, 121 S. W. 221.

Value of goods delivered shown by evidence seller put up but one quality, and that standard; how work done and supervised, and that samples from all goods put up were approved by a competent and disinterested man. Character of goods sold to others, though sold defendant, but not delivered, cannot be shown, nor acceptance thereof by buyers. Webster *v.* Moore, 108 Md. 572, 71 A. 466.

596-18 See Wright *v.* Schultz (Ky.), 122 S. W. 138.

597-23 Mizell *v.* Watson, 57 Fla. 111, 49 S. 149; Avil Pub. Co. *v.* Bradford, 121 Mo. App. 577, 97 S. W. 238.

No breach where goods had to be manufactured and could not be manufactured and delivered after the receipt of the order and before the expiration of the contract, and so evidence of this fact should be received. Haven Malleable Casting Co. *v.* Co., 146 Ky. 135, 142 S. W. 227.

601-48 Reed *v.* McDonald, 22 Cal. App. 701, 136 P. 506.

601-49 Schon-K., etc. Co. *v.* Snow, 43 Colo. 538, 96 P. 182.

602-51 Very slight evidence is sufficient to show readiness and ability to pay for goods. Baker *v.* Co. (Ala.), 65 S. 321.

Burden of proving defense to action for breach of contract. Star B. Co. *v.* Co., 128 Mo. App. 517, 109 S. W. 802.

602-52 Delivery by mistake may be shown under general denial. Peoples

v. Brockman (Tex. Civ.), 153 S. W. 907.

If parties' acts concurrent buyer may show his ability to pay if delivery made. Catlin *v.* Jones, 52 Or. 337, 97 P. 546.

603-57 Tender of goods shown though not pleaded. Ford *v.* Lawson, 133 Ga. 237, 65 S. E. 444.

603-58 Crowley *v.* Co., 100 Minn. 178, 110 N. W. 969; Raymore Realty Co. *v.* Pfotenhauer Nesbit Co., 129 N. Y. S. 1002; Interstate Engineering Co. *v.* Archer, 64 Wash. 629, 117 P. 470. See Alwart Bros. Co. *v.* Colliery Co., 211 Fed. 313, 127 C. C. A. 599.

That plaintiff was compelled to go into open market to buy goods, admissible. Albion L. Co. *v.* Lowell, 20 Cal. App. 782, 130 P. 858.

603-59 Schon-K. M. & G. Co. *v.* Snow, 43 Colo. 538, 96 P. 182; Central Ga. Brick Co. *v.* Co., 136 Ga. 693, 71 S. E. 1048; Milledgeville Cotton Co. *v.* Cary, 9 Ga. App. 391, 71 S. E. 503; Twigg Candy Co. *v.* Co., 9 Ga. App 358, 71 S. E. 679; Ford *v.* Lawson, 133 Ga. 237, 65 S. E. 444; Smith *v.* Co., 156 Ill. App. 508; Eaves *v.* Harris, 95 Miss. 607, 49 S. 258; Thedford *v.* Herbert, 135 App. Div. 174, 119 N. Y. S. 1025; Brody *v.* Birnbaum, 108 N. Y. S 581; Gadsden *v.* Chem. Co., 89 S. C. 483, 72 S. E. 15; Cocke & Co. *v.* C. & I. Co. (Tex. Civ.), 155 S. W. 1019; Cal. Pine B. & L. Co. *v.* Co., 39 Utah 325, 117 P. 35.

See Albion L. Co. *v.* Lowell, 20 Cal. App. 782, 130 P. 858.

"**This rule is based** upon the presumption that the vendor has the property in his possession or under his control. In such case, if the vendee refuses to accept, the vendor may sell the property in the open market, and his damage would be the difference between what it sold for and the contract price. This rule also obtains in a contract to manufacture, as to such articles as have been already manufactured and ready for delivery where the contract is broken by the defendant. The rule rests upon the principle of the indemnification of the injured party for the injury he has sustained, and, ordinarily, the value in the market at the time and place of delivery under the contract furnishes the readiest, most direct, and fairest method of ascertaining the measure of this indemnity." Dimmick *v.* Hendley (Md.), 84 A. 171.

Parol evidence competent to show damages though contract in writing. Hanson *v.* Wittenberg, 205 Mass. 319, 91 N. E. 383. See Globe R. Co. *v.* Co., 190 U. S. 540.

Remote damages.—Interest on value of plant, fixed charges for operating it while shut down pending arrival of purchased parts, and cost of keeping up steam to avoid breach of insurance policy, too remote for proof. Oxford K. M. *v.* Co., 6 Ga. App. 642, 65 S. E. 791.

Value in nearby markets, shown. U. S. C. Co. *v.* Joachimstahl (N. J. L.), 72 A. 46.

Resales by plaintiff months after goods should have been delivered cannot be proved to show market value at time of default. McManus *v.* Co., 126 App. Div. 68, 110 N. Y. S. 680.

Price current lists.—See Orr *v.* Kenny, 150 Mich. 159, 114 N. W. 228; Moseley *v.* Johnson, 144 N. C. 257, 274, 56 S. E. 922.

Efforts made in open market by buyer to procure goods, shown. Talcott *v.* Freedman, 149 Mich. 577, 113 N. W. 13.

Evidence of loss sustained by buying goods to take place of those contracted for, inadmissible. Pierce *v.* Waller (Tex. Civ.), 102 S. W. 1173.

Market price—burden of proof.—Orr *v.* Kenny, 150 Mich. 159, 114 N. W. 228.

604-61 Evidence as to cost of repairing.—Marbury L. Co. *v.* Co., 32 Ky. L. R. 739, 107 S. W. 200.

Buyer may indicate to jury such articles as are covered by different items of order, it and goods being before jury. Moline J. Co. *v.* Dinnan, 81 Conn. 111, 70 A. 634.

Evidence as to difference in value between article contracted for and that delivered, not competent. Isbell-P. Co. *v.* Heineman, 126 App. Div. 713, 111 N. Y. S. 332.

605-63 *Contra,* Taussig *v.* Co., 124 Mo. App. 209, 101 S. W. 602.

606-66 Walnut R. M. Co. *v.* Cohn, 79 Ark. 338, 96 S. W. 413; Gruen *v.* Co., 81 N. J. L. 626, 80 A. 547. *Contra,* Thedford *v.* Herbert, 135 App. Div. 174, 119 N. Y. S. 1025.

Facts showing necessity for buying goods must be pleaded or price paid cannot be shown. Eaves *v.* Harris, 95 Miss. 607, 49 S. 258.

607-72 National Candy Co. *v.* Candy Co., 155 Ill. App. 44; Enterprise Mfg. Co. *v.* Campbell (Ky.), 121 S. W. 1040;

Nat. Coal Co. *v.* Min. Co., 168 Mich. 198, 132 N. W. 88; McManus *v.* Co., 126 App. Div. 68, 110 N. Y. S. 680; Czarnikow, MacDougall & Co. *v.* Baxter, 130 N. Y. S. 617.

607-73 Trego *v.* Arave, 20 Ida. 38, 116 P. 119; Pittman *v.* Co., 48 Tex. Civ. 320, 106 S. W. 724, 108 S. W. 1165.

608-74 Enterprise Mfg. Co. *v.* Campbell (Ky.), 121 S. W. 1040.

608-76 Kirby L. Co. *v.* Cummings, 57 Tex. Civ. 291, 122 S. W. 273.

608-78 Pitman *v.* Co., 48 Tex. Civ. 320, 106 S. W. 724, 108 S. W. 1165; Hammond *v.* Mfg. Co., 146 Wis. 485, 131 N. W. 1097.

Expenses incurred during life of contract in going to place of delivery to ascertain why goods not sent, proved. Enterprise Mfg. Co. *v.* Campbell (Ky.), 121 S. W. 1040.

609-84 Cary *v.* Niblo, 155 Ill. App. 338.

Expert evidence as to market value of firsts admissible to prove quality of goods contracted for. Wells Co. *v.* Rayworth, 153 Wis. 453, 141 N. W. 286.

610-85 John Turl's Sons *v.* Co., 121 N. Y. S. 478.

611-89 Letter admissible to show notice only. Cameron S. P. Wks. *v.* L. & I. Co. (Tex. Civ.), 167 S. W. 256.

611-91 Time of delivery governs if warranty so stipulates. Tibbals O. Co. *v.* Meigs, 11 Cal. App. 298, 104 P. 844.

611-94 See Eaton *v.* Hope, 177 Mich. 411, 143 N. W. 241.

612-97 That cheese was returned because of condition inadmissible to show contract. Chivers *v.* Sigmund, 164 Ill. App. 555.

Incompetent to show defects in a piece of machinery under investigation by showing that another machine made by the same people was defective. Fetzer *v.* Haralson (Tex. Civ.), 147 S. W. 290.

612-98 Harrison *v.* Russell, 17 Ida. 196, 105 P. 48; Nat. Bk. of Anadarko *v.* Oldham, 26 Okla. 139, 109 P. 75. See Ford *v.* Lawson, 133 Ga. 237, 65 S. E. 444; Moore *v.* Shannon, 137 Ky. 604, 126 S. W. 136.

Evidence as to condition of auto at destination admissible to show condition when loaded. Kelly *v.* Automobile Co. (Mo. App.), 156 S. W. 62.

613-99 Good behavior admissible in rebuttal. Ellis *v.* Barkley (Ia.), 142 N. W. 203.

613-1 Comparison of article in question with like articles made by others, not relevant; otherwise as to proof of effects of use of like articles similarly made by defendant. Barnett *v.* Hagan, 18 Ida. 104, 108 P. 743.

Failure to give notice of defects in goods raises strong presumption they correspond with warranty and calls for strict proof of its breach. Shinn *v.* McLean (Can.), 11 West. L. Rep. 527.

613-2 S. P. Co. *v.* Oteri, 94 Ark. 318, 126 S. W. 1065 (loss of profits not provable); Tibbals O. Co. *v.* Meigs, 11 Cal. App. 298, 104 P. 844; Miller L. Co. *v.* Co., 37 Pa. Super. 585; Abrahamson *v.* Cummings, 165 Wash. 35, 117 P. 709; Hammond *v.* Mfg. Co., 146 Wis. 485, 131 N. W. 1097.

Expert evidence that actual value of machinery in good condition was less than contract price is admissible. Cameron S. P. Wks. *v.* L. & I. Co. (Tex. Civ.), 167 S. W. 256.

Where subject matter is in separate units, one of which is defective, defendant may prove value of perfect writ separately, *e. g.*, piano and player attachment. Smith & Nixon Co. *v.* Morgan, 152 Ky. 430, 153 S. W. 749.

614-3 As showing value of goods sold under warranty, breach of which is alleged, evidence is admissible showing price received by buyer on resale. Petrified Bone M. Co. *v.* Rogers, 150 Fed. 445.

Admissibility of offer to accept other goods.—See Ford *v.* Lawson, 133 Ga. 237, 65 S. E. 444.

Quality of goods.—Buyer may show goods were, to seller's knowledge, bought to resell, and were of such quality as he could not sell without material injury. White *v.* Co., 6 Ga. App. 860, 65 S. E. 1075.

614-4 In affirmative. Sapp *v.* Bradfield, 137 Ky. 308, 125 S. W. 721; Adams M. Co. *v.* Castleberry, 92 Ark. 310, 122 S. W. 998.

615-9 See Elmore *v.* Booth, 83 Ark. 47, 102 S. W. 393.

615-10 Excelsior C. Co. *v.* Gildersleeve, 160 Fed. 47, 87 C. C. A. 202; Brooks *v.* Camak, 130 Ga. 213, 60 S. E. 456; Fairbanks, etc. Co. *v.* Burgert, 88 Neb. 376, 129 N. W. 557.

616-11 Canadian P. H. Co. *v.* Peck (Can.), 11 West. L. Rep. 605; Excelsior C. Co. *v.* Gildersleeve, 160 Fed. 47, 87 C. C. A. 202; Highsmith Bros. *v.* Hammonds, 99 Ark. 400, 138 S. W. 635;

Am. S. J. Co. *v.* Hill, 90 Ark. 78, 117 S. W. 781; Elmore *v.* Booth, 83 Ark. 47, 102 S. W. 393; South Side Coal Co. *v.* Gross, 157 Ill. App. 218; Wyandotte, etc. Co. *v.* Bruner, 147 Mich. 400, 110 N. W. 949; Prizer, etc. Co. *v.* Peaslee, 99 Minn. 275, 109 N. W. 232; Shannon *v.* Abell, 169 Mo. App. 598, 155 S. W. 62; Clevenger *v.* Lewis, 20 Okla. 837, 95 P. 230, 16 L. R. A. (N. S.) 410; Miller *v.* Co., 220 Pa. 181, 69 A. 598; Dunham *v.* Salmon, 130 Wis. 164, 109 N. W. 959.

Burden to show that breach was within exception of warranty is upon defense. Brown *v.* Nevins, 84 N. J. L. 215, 86 A. 938.

Evidence sufficient.—Crouch & Son *v.* Spooner, 9 Ga. App. 695, 72 S. E. 61.

Evidence insufficient.—Lawson *v.* Barber & Co., 189 Fed. 165.

Burden of defense that material was defective and not fit for use is on defendant. A. Wyckoff & Sons Co. *v.* Town, 130 La. 563, 58 S. 338.

Reliance on representations must be proved. Moore *v.* R. Co., 137 Mo. App. 679, 119 S. W. 454.

Return of goods must be shown by plaintiff. Hartley *v.* Rotman, 200 Mass. 372, 86 N. E. 903.

Negligent or wrongful delivery must be shown by buyer. Smith *v.* Weatherford, 92 Ark. 6, 121 S. W. 943.

617-13 Continuing contract, once shown to exist, is presumed to continue; burden of showing discontinuance upon party alleging same. Fruit D. Co. *v.* Le Seno, 147 Mich. 149, 110 N. W. 526.

617-14 Burden of establishing grounds of rescission by a preponderance of evidence on plaintiff. In re Spokane-C. R. Co., 70 Wash. 142, 126 P. 418.

619-21 Fuller *v.* Chenault, 157 Ala. 46, 47 S. 197.

619-26 Cochran *v.* Co., 88 Ark. 343, 114 S. W. 711; Burns Bro. *v.* Bigelow, 122 N. Y. S. 255.

621-31 Vollum *v.* Beall, 117 Md. 617, 83 A. 1095.

621-32 "When it is alleged that a person has been deceived and misled by what some other person has done or said, no one can know as well as the person alleged to have been deceived whether or not such was the case; and when such person is put upon the stand as a witness, and the party who alleged that he was deceived fails to call upon him to answer in the affirmative or negative in that regard, the conclusion that he was deceived and defrauded ought not to be indulged, although it may appear that he has made an unwise trade." Rushing *v.* Spreen (Tex. Civ.), 142 S. W. 49.

621-33 Joslyn *v.* Co., 177 Fed. 863, 101 C. C. A. 77; U. S. G. Co. *v.* Shields, 101 Tex. 473, 108 S. W. 1165; Compagnie, etc. Co. *v.* Co. (Tex. Civ.), 107 S. W. 651.

622-35 Burden of showing fraud of seller.—Lyon *v.* Lindblad, 145 Mich. 588, 108 N. W. 969.

Buyer must show rescission by him. Muncie W., etc. Co. *v.* Finch, 150 Mich. 274, 113 N. W. 1107.

624-43 Noel *v.* Hughes, 152 Mo. App. 192, 133 S. W. 585.

626-49 Clauss Shear Co. *v.* Supply Co., 1 Ala. App. 664, 56 S. 49.

628-53 Worth Huskey Coal Co. *v.* Parker-Washington Co., 157 Ill. App. 199; Enterprise Mfg. Co. *v.* Oppenheim, Oberndorf & Co., 114 Md. 368, 79 A. 1007; Geiser Mfg. Co. *v.* Lunsford (Tex. Civ.), 139 S. W. 64; Klock *v.* Newbury, 63 Wash. 153, 114 P. 1032.

628-54 Ellison Son & Co. *v.* Grocery Co., 69 W. Va. 380, 71 S. E. 391.

629-55 Finch & Co. *v.* Coal Co., 156 Ill. App. 589; Larrowe Milling Co. *v.* R. Co., 122 N. Y. S. 567.

630-59 Hakes *v.* Thayer, 165 Mich. 476, 131 N. W. 174.

Defendant must prove acquiescence and waiver by purchaser. Joslyn *v.* Co., 177 Fed. 863, 101 C. C. A. 77.

630-60 Mizell *v.* Watson, 57 Fla. 111, 48 S. 149; Stimpson Specialty Co. *v.* Parker, 10 Ga. App. 295, 73 S. E. 412; Billmeyer *v.* Mfg. Co., 150 Ia. 318, 130 N. W. 115.

631-61 Thomas C. Co. *v.* Co., 135 Fed. 25, 67 C. C. A. 629; Joslyn *v.* Co., 177 Fed. 863, 101 C. C. A. 77; Jordan *v.* Austin, 161 Ala. 585, 50 S. 70; J. I. Case T. M. Co. *v.* Johnson, 140 Wis. 534, 122 N. W. 1037. See The Willis A. Holden, 174 Fed. 5, 98 C. C. A. 43.

As where the contract itself provided that, in case of rejection, the plant should be removed, and no reason appears why it is not capable of removal. Wolf *v.* Ref. Co., 252 Ill. 491, 96 N. E. 1063.

Notwithstanding an express rescission may show an election to take benefit

of contract. Wolf *v.* Ref. Co., 252 Ill. 491, 96 N. E. 1063.

A purchaser of shirts, "before acceptance, discovered the inferior quality of the shirts as compared to the samples, and immediately notified the seller of the fact, and that the shirts were held subject to the seller's order and directions as to disposition or shipment. While he placed the shirts in his store, he did not treat them as a part of his stock by selling any of them to customers. But when the seller absolutely refused to take the shirts back, or to give any directions as to disposition, and when the shirts were deteriorating in value by dust, the depredation of rats, etc., the purchaser sold them for the purpose of lessening the eventual damages. This conduct did not amount to an acceptance of the shirts, for when the purchaser at once notified the seller of their inferior condition and offered to reship them, and that they were held subject to the seller's order, he did all he could do; and when, after the refusal to rescind, the shirts were deteriorating in value, it was his duty to sell in order to diminish the damages." Salant & Salant *v.* Dannenberg Co., 10 Ga. App. 263, 73 S. E. 426.

SALVAGE

635-10 Promptness and efficient service to be considered. The Navis, 196 Fed. 843.

636-13 See Pacific Mail S. S. Co. *v.* Co., 173 Fed. 28, 97 C. C. A. 346.

636-14 Merritt Co. *v.* Tice, 118 App. Div. 123, 103 N. Y. S. 333.

637-22 No fixed rule based on value of property and character of services. The Indian, 159 Fed. 20, 86 C. C. A. 210.

639-24 The S. C. Schenk, 158 Fed. 54, 85 C. C. A. 384; The Western Star, 157 Fed. 489.

640-27 Dunsmuir *v.* The Otter (Can.), 10 West. L. Rep. 380.

640-28 Dunsmuir *v.* The Otter, supra; The Devonian, 150 Fed. 831; The Western Star, 157 Fed. 489.

641-32 The Willis A. Holden, 174 Fed. 5, 98 C. C. A. 43.

641-33 Damage sustained by rescuing vessel considered only for purpose of fixing award. The Rockland, 175 Fed. 524.

641-34 The Pelican, 158 Fed. 183.

641-36 Dunsmuir *v.* The Otter (Can.), 10 West. L. Rep. 380; The Western Star, 157 Fed. 489.

644-53 *Comp.* The S. C. Schenk, 158 Fed. 54, 85 C. C. A. 384.

SCIRE FACIAS

646-1 See Goodfellow *v.* S., 53 Tex. Cr. 471, 110 S. W. 755.

647-5 But see Day *v.* S., 51 Tex. Cr. 324, 101 S. W. 806.

649-13 Burden on defendant of proving mala fides in obtaining scire facias on production of record, apparently regular. In re Miller's Est., 243 Pa. 328, 90 A. 77.

649-15 Rayburn *v.* Handlan, 165 Mo. App. 412, 147 S. W. 846. See Weaver *v.* Webb, 3 Ga. App. 726, 60 S. E. 367; Waterbury Nat. Bk. *v.* Reed, 231 Ill. 246, 83 N. E. 188; Henry *v.* Co., 46 Tex. Civ. 179, 102 S. W. 749.

651-21 Weaver *v.* Webb, 3 Ga. App. 726, 60 S. E. 367. See Leonard *v.* Weymouth, 193 Mass. 479, 79 N. E. 787.

SEALS

655-1 Pardee *v.* Schanzlin, 3 Cal. App. 597, 86 P. 812; Brown Mfg. Co. *v.* Gilpin, 120 Mo. App. 130, 96 S. W. 669.

655-4 Christensen *v.* Peterson (Ia.), 144 N. W. 315. See Rule *v.* Richards (Tex. Civ.), 149 S. W. 1073.

656-7 But see Milwaukee, etc. Co. *v.* Gordon, 37 Mont. 209, 95 P. 995, no presumption seal used by secretary of a territory is its great seal fact must affirmatively appear.

658-20 Sealed contract, but presumptive evidence of agreement. Israelson *v.* Wollenberg, 63 Misc. 293, 116 N. Y. S. 626.

659-22 See Langley *v.* Owens, 52 Fla. 302, 42 S. 457.

659-23 See Bancroft *v.* Haines, 13 Pa. C. C. 116.

Presumption instrument sealed does not arise from appearance of seal thereon; there must be recognition of seal in body of paper. In re Pirie, 198 N. Y. 209, 91 N. E. 587.

660-26 Griffing Co. *v.* Winfield, 53 Fla. 589, 43 S. 687.

661-28 Griffing Co. *v.* Winfield, supra; New York L. Ins. Co. *v.* Rhodes, 4 Ga. App. 25, 60 S. E. 828.

662-29 Malsby *v.* Gamble, 61 Fla. 327, 54 S. 766. See supra, "Corporations," 627-93.

662-30 Gause *v.* Co., 196 N. Y. 134, 89 N. E. 476.

664-34 Unincorporated association, not presumed to have seal. Brower *v.* Crimmins, 121 N. Y. S. 648.

Burden on city to show it is not usual for its officers to execute under seal such contracts as the one in suit. Peterson *v.* New York, 194 N. Y. 437, 87 N. E. 772.

Use of proper seal, presumed. Kessler *v.* Polkosky, 81 Kan. 69, 105 P. 7.

SEDUCTION

668-1 Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. 421; Clemons *v.* Seba, 131 Mo App. 378, 111 S. W. 522.

670-7 Breiner *v.* Nugent, 136 Ia. 322, 111 N. W. 446; Lauer *v.* Banning, 152 Ia. 99, 131 N. W. 783.

674-21 Elder *v.* Warner, 129 N. Y. S. 816.

676-33 But see Taylor *v.* Daniel, 30 Ky. L. R. 377, 98 S. W. 986, illegitimate child.

Evidence sufficient to sustain verdict. Wilson *v.* Mangold, 154 Ia. 352, 134 N. W. 1072.

677-37 Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. 421.

679-43 See Pough *v.* S., 7 Ga. App. 610, 67 S. E. 695.

Previous acts of intercourse may be proved to show influence of defendant over plaintiff. Fisher *v.* Bolton, 148 Ia. 651, 127 N. W. 979.

681-54 Corroboration not required in civil action. Olson *v.* Rice, 140 Ia. 630, 119 N. W. 84.

681-56 Anderson *v.* Aupperle, 51 Or. 556, 95 P. 330.

Child may be exhibited to jury though less than three months old. Anderson *v.* Aupperle, supra.

682-58 Breiner *v.* Nugent, 136 Ia. 322, 111 N. W. 446; Anderson *v.* Aupperle, 51 Or. 556, 95 P. 330.

682-59 General rules. See vol. 4, p. 940, n. 53, and supplement thereto.

683-62 Leroux *v.* Schnupp, 15 Ont. L. R. 91.

684-63 Breiner *v.* Nugent, 136 Ia. 322, 111 N. W. 446.

687-73 Cook *v.* S., 102 Ark. 363, 144 S. W. 221; Carson *v.* Slattery, 123 La. 825, 49 S. 586; Clemons *v.* Seba, 131 Mo. App. 378, 111 S. W. 522.

Previous unchastity does not defeat action. Olson *v.* Rice, 140 Ia. 630, 119 N. W. 84.

687-74 See Clemons *v.* Seba, supra.

Profanity, not evidence of lewdness.— Anderson *v.* Aupperle, 51 Or. 556, 95 P. 330.

688-75 Opinion woman drank beer on one occasion, inadmissible. Anderson *v.* Aupperle, supra.

Opinions as to character, based on observations, inadmissible. Anderson *v.* Aupperle, supra.

688-77 *Contra,* Bishop *v.* S. (Tex. Cr.), 160 S. W. 705. See vol. 3, p. 21, n. 53, and supplement thereto.

Continuing to live with defendant without complaint inconsistent with claim of seduction. Carson *v.* Slattery, 123 La. 825, 49 S. 586.

Nor is proof of an independent crime competent to impeach defendant or establish his bad reputation. S. *v.* Teeter, 239 Mo. 475, 144 S. W. 445.

688-78 Exemplary damages recovered without proving malice. Anderson *v.* Aupperle, 51 Or. 556, 95 P. 330.

689-80 Sramek *v.* Sklenar, 73 Kan. 450, 85 P. 566.

690-86 Olson *v.* Rice, 140 Ia. 630, 119 N. W. 84.

691-88 That prosecutrix is unmarried. P. *v.* Weinstock, 140 N. Y. S. 453.

Evidence held insufficient to support a conviction. Murphy *v.* S. (Tex. Cr.), 143 S. W. 616.

In Georgia, the fact that defendant is single may be shown, since under an indictment for seduction by promise of marriage, the accused may be convicted of fornication, if it appear from the evidence that he and the female were both unmarried. Boggs *v.* S., 11 Ga. App. 92, 74 S. E. 716.

691-89 P. *v.* Whittington, 143 Ill. App. 438; S. *v.* Turner, 82 S. C. 278, 64 S. E. 424.

692-93 Wilhite *v.* S., 84 Ark. 67, 104 S. W. 531; Woodard *v.* S., 5 Ga. App. 477, 63 S. E. 573; Kerr *v.* U. S., 7 Ind. Ty. 486, 104 S. W. 809; S. *v.* Drake, 128 Ia. 539, 105 N. W. 54; S. *v.* Turner, 82 S. C. 278, 64 S. E. 424; Blackburn *v.* S. (Tex. Cr.), 160 S. W. 687; Curry *v.* S. (Tex. Cr.), 162 S. W. 851; S. *v.* Jones (Wash.), 142 P. 35. See vol. 3, p. 54, notes 1, 2; vol. 9, p. 926, n. 90, and supplement thereto.

692-94 P. *v.* Weinstock, 140 N. Y. S. 453. See vol. 3, p. 55, n. 3; vol. 9, p. 926, n. 91, and supplement thereto.

692-95 S. *v.* Walker, 232 Mo. 252, 134 S. W. 516; S. *v.* Holter, 30 S. D 353, 142 N. W. 657. See vol. 3, p. 55, n. 3, and supplement thereto.

692-96 S. *v.* Dolan, 132 Ia. 196, 109 N. W. 609; Russell *v.* S., 77 Neb. 519, 110 N. W. 380.

692-97 Kerr *v.* U. S., 7 Ind. Ty. 486, 104 S. W. 809, unchastity presumed to continue.

692-98 Adams *v.* S., 93 Ark. 260, 124 S. W. 766.

692-99 S. *v.* Bennett, 137 Ia. 427, 110 N. W. 150.

693-1 Evidence sufficient where evidence of defendant, as a whole, corroborated testimony of prosecuting witness. Hay *v.* S., 178 Ind. 478, 98 N. E. 712.

693-7 P. *v.* Whittington, 143 Ill. App. 438.

693-8 S. *v.* Raynor, 145 N. C. 472, 59 S. E. 344; S. *v.* Turner, 82 S. C. 278, 64 S. E. 424; Browning *v.* S., 64 Tex. Cr. 148, 142 S. W. 1; Barclay *v.* S., 62 Tex. Cr. 323, 137 S. W. 118.

694-9 Rex *v.* Daun, 12 Ont. L. R. (Can.) 227; S. *v.* Ring, 142 N. C. 596, 55 S. E. 194.

694-10 De Rossett *v.* S. (Tex. Cr.), 168 S. W. 531.

694-12 Whatley *v.* S., 144 Ala. 68, 39 S. 1014; S. *v.* Bennett, 137 Ia. 427, 110 N. W. 150; S. *v.* Raynor, 145 N. C 472, 59 S. E. 344.

Chastity may be proved by circumstantial evidence. Curry *v.* S. (Tex. Cr.), 162 S. W. 851.

694-13 Wilhite *v.* S., 84 Ark. 67, 104 S. W. 531.

Subsequent acts of intercourse between prosecutrix and defendant may be testified to by her. Bishop *v.* S. (Tex. Cr.), 144 S. W. 278.

694-16 Weaver *v.* S., 142 Ala. 33, 39 S. 341; Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215 (writer may explain language and abbreviations); Jeter *v.* S., 52 Tex. Cr. 212, 106 S. W. 371.

694-17 Weaver *v.* S., 142 Ala. 33, 39 S. 341; Watts *v.* S., 8 Ala. App. 264, 63 S. 18.

Testimony before grand jury objected to because not in writing and signed. 'A voluntary statement made by a defendant, when not under arrest, in regard to the case on trial, is always admissible when offered by the state, and that this statement was made under the sanction of an oath could not affect its admissibility, if voluntarily made.'' Browning *v.* S., 64 Tex. Cr. 148, 142 S. W. 1.

694-18 Hinman *v.* S., 59 Tex. Cr. 29, 127 S. W. 221.

695-19 De Rossett *v.* S. (Tex. Cr.), 168 S. W. 531.

Conversation with and threats of mother and daughter and discovery of defendant with another woman, incompetent. Bray *v.* U. S., 39 App. Cas. (D. C.) 600.

695-20 S. *v.* Jones (Wash.), 142 P. 35.

695-21 Bray *v.* U. S., 39 App. Cas. (D. C.) 600.

695-22 P. *v.* Tibbs, 143 Cal. 100, 76 P. 904; S. *v.* Holter, 30 S. D. 353, 138 N. W. 953. See vol. 3, p. 716, n. 26, and supplement thereto.

Prosecutrix may testify to this fact.— Bishop *v.* S. (Tex. Cr.), 144 S. W. 278.

695-24 S. *v.* Dolan, 132 Ia. 196, 109 N. W. 609; S. *v.* Nugent, 134 Ia. 237, 111 N. W. 927.

695-25 Watts *v.* S., 8 Ala. App. 264, 63 S. 18; Adams *v.* S., 93 Ark. 260, 124 S. W. 766.

695-27 Parker *v.* S., 11 Ga. App. 251, 75 S. E. 437.

695-28 Acts subsequent to original seduction, shown in explanation of inconsisteney in prosecutrix's testimony. Hinman *v.* S., 59 Tex. Cr. 29, 127 S. W. 221.

695-29 S. *v.* Bennett, 137 Ia. 427, 110 N. W. 150; S. *v.* Holter, 30 S. D. 353, 138 N. W. 953.

Not leading to ask ''would have yielded but for his promise to marry you.'' Black *v.* S. (Tex. Cr.), 160 S. W. 720.

See vol. 4, p. 669, n. 56; vol. 8, p. 155, n. 21, and supplement thereto.

696 Cumberland G. Mfg. Co. *v.* Do Witt, 120 Md. 381, 87 A. 927.

696-30 Washington *v.* S., 124 Ga. 423, 53 S. E. 910; S. *v.* Whitley, 141 N. C. 823, 53 S. E. 820.

696-31 Woodard *v.* S., 5 Ga. App. 447, 63 S. E. 573, evidence of persuasion.

696-33 Weaver *v.* S., 142 Ala. 33, 39 S. 341; Whatley *v.* S., 144 Ala. 68, 39 S. 1014; Holland *v.* S. (Ala. App.), 66 S. 126; Wilhite *v.* S., 84 Ark. 67, 104 S. W. 531; Faulkner *v.* S., 53 Tex. Cr. 258, 109 S. W. 199; Jeter *v.* S., 52 Tex. Cr. 212, 106 S. W. 371.

696-34 S. *v.* Waterman, 75 Kan. 253, 88 P. 1074.

As where evidence showed that defendant and prosecuting witness had been acquainted but a short time prior to the time she says they became engaged to be married, and he had been with her but a few times prior to the time she says the first act of intercourse took place. Wooldridge *v.* S. (Tex. Cr.), 146 S. W. 550.

696-35 Whatley *v.* S., 144 Ala. 68, 39 S. 1014; Watts *v.* S., 8 Ala. App. 264, 63 S. 18; Bray *v.* U. S., 39 App. Cas. (D. C.) 600; S. *v.* Kincaid, 142 N. C. 657, 55 S. E. 647; Hinman *v.* S., 59 Tex. Cr. 29, 127 S. W. 221.

696-37 Russell *v.* S., 77 Neb. 519, 110 N. W. 380; Muhlhause *v.* S., 56 Tex. Cr. 288, 119 S. W. 866. But see S. *v.* Sortviet, 100 Minn. 12, 110 N. W. 100.

696-38 Seduced as accomplice.—See supra, "Accomplices," 112-53. See vol. 3, p. 711, n. 2, and supplement thereto.

696-39 Rex *v.* Daun, 12 Ont. L. R. (Can.), 227; Holland *v.* S. (Ala. App.), 66 S. 126; Pannell *v.* S., 162 Ala. 81, 50 S. 281; Nichols *v.* S., 92 Ark. 421, 122 S. W. 1003 (if accusation is of seduction under promise of marriage corroborative evidence must cover both facts); Cooper *v.* S., 86 Ark. 30, 109 S. W. 1023; P. *v.* Whittington, 143 Ill. App. 438; S. *v.* Bruton, 253 Mo. 361, 161 S. W. 751; Cluck *v.* S., 9 Okla. 580, 132 P. 930; S. *v.* Turner, 82 S. C. 278, 64 S. E. 424; James *v.* S. (Tex. Cr.), 161 S. W. 472; Lemmons *v.* S., 58 Tex. Cr. 269, 125 S. W. 400; Campbell *v.* S., 57 Tex. Cr. 301, 123 S. W. 583; Murphy *v.* S. (Tex. Cr.), 143 S. W. 616. See vol. 3, p. 711, n. 4, and supplement thereto.

"**Other testimony** tending to connect the defendant with the offense charged." Murphy *v.* S. (Tex. Cr.), 143 S. W. 616.

Where the evidence of the prosecutrix as to the promise of marriage is of such a nature as to cast doubt upon her veracity, the corroboration of her evidence as to the promise of marriage should be clear and convincing. S. *v.* Teeter, 239 Mo. 475, 144 S. W. 445.

Corroboration prerequisite to valid indictment.—Allen *v.* S., 162 Ala. 74, 50 S. 279.

697-40 See vol. 3, p. 712, n. 6, and supplement thereto.

"**This corroboration** need not be by a witness or witnesses who heard the promise of marriage, but may be by such conduct of the parties as usually accompanies a contract of marriage, or by statements of the defendant to third parties." S. *v.* Teeter, 239 Mo. 475, 144 S. W. 445.

697-41 Cook *v.* S., 102 Ark. 363, 144 S. W. 221; Long *v.* S., 100 Miss. 7, 56 S. 185; Russell *v.* S., 77 Neb. 519, 110 N. W. 380; S. *v.* Raynor, 145 N. C. 472, 59 S. E. 344; Cluck *v.* S., 9 Okla. 580, 132 P. 930; Williams *v.* S., 59 Tex. Cr. 347, 128 S. W. 1120 (need not extend to prosecutrix's age); Holmes *v.* S. (Tex. Cr.), 102 S. W. 408. *Comp.* De Rossett *v.* S. (Tex. Cr.), 168 S. W. 531. See vol. 3, p. 713, n. 15, and supplement thereto.

697-42 Cluck *v.* S., 9 Okla. Cr. 580, 132 P. 930.

697-43 Cluck *v.* S., 9 Okla. Cr. 580, 132 P. 930.

697-44 See Carter *v.* S., 99 Miss. 206, 54 S. 805; Taylor *v.* S. (Tex. Cr.), 106 S. W. 366.

697-45 But see S. *v.* Holter, 30 S. D. 353, 138 N. W. 953.

698-47 Curry *v.* S. (Tex. Cr.), 151 S. W. 319.

698-48 Nichols *v.* S., 92 Ark. 421, 122 S. W. 1003; Bost *v.* S., 64 Tex. Cr. 464, 144 S. W. 589. See vol. 3, pp. 107, 714, notes 17, 53, and supplement thereto.

Death of mother of witness as reason for complaint to another perhaps admissible. See Gillespie *v.* S. (Tex. Cr.), 166 S. W. 135.

698-52 S. *v.* Jones (Wash.), 142 P. 35.

698-53 *Comp.* Bishop *v.* S. (Tex. Cr.), 151 S. W. 821. See vol. 3, p. 715, n. 24, and supplement thereto.

Letters of prosecutrix's sister to third person inadmissible. Black *v.* S. (Tex. Cr.), 160 S. W. 720.

Letter telling defendant to return inadmissible unless shown defendant received it and that he was notified of her reasons for writing it. Gillespie *v.* S. (Tex. Cr.), 166 S. W. 135.

Letters of prosecutrix written long afterwards inadmissible. Moran *v.* S. (Tex. Cr.), 166 S. W. 161.

699-58 Davis *v.* S., 95 Ark. 555, 129 S. W. 530; S. *v.* Pace, 159 N. C. 462, 74 S. E. 1018.

699-60 In S. *v.* Teeter, 239 Mo. 475, 144 S. W. 445, the corroboration rested entirely upon statements alleged to

have been made by defendant in the presence of the aunt of prosecutrix at whose home the entire courtship between defendant and prosecutrix was carried on. "The prosecutrix testified that the promise of marriage and seduction took place the second time defendant called upon her. This evidence itself is improbable and unsatisfactory. While it is possible for courtships to proceed at such a breakneck speed, it is certainly very unusual, and the fact that the prosecutrix yielded to defendant on such limited acquaintance tends more strongly to support the contention of defendant as to her previous unchastity than to corroborate her evidence that a promise of marriage was the means of bringing about the alleged seduction."

699-61 P. *v.* Tibbs, 143 Cal. 100, 76 P. 904. See vol. 3, p. 716, n. 30, and supplement thereto.

Not admissible unless shown that defendant had knowledge thereof. Hay *v.* S., 178 Ind. 478, 98 N. E. 712, *cit.* this text. *Contra*, Parker *v.* S., 11 Ga. App. 251, 75 S. E. 437.

699-62 But see Watts *v.* S., 8 Ala. App. 264, 63 S. 18.

Fact of loss of engagement ring admissible. Watts *v.* S., 8 Ala. App. 264, 63 S. 18.

700-67 Muhlhause *v.* S., 56 Tex. Cr. 288, 119 S. W. 866.

701-74 Berry *v.* C., 149 Ky. 398, 149 S. W. 824; Gillespie *v.* S. (Tex. Cr.), 166 S. W. 135.

They cannot be shown by evidence of statements made by such person to that effect. This is mere hearsay. Murphy *v.* S. (Tex. Cr.), 143 S. W. 616.

701-75 Berry *v.* C., 149 Ky. 398, 149 S. W. 824. But see P. *v.* Tibbs, 143 Cal. 100, 76 P. 904.

701-76 But see S. *v.* Whitley, 141 N. C. 823, 53 S. E. 820. *Contra*, Ex parte Vandiveer, 4 Cal. App. 650, 88 P. 993.

701-80 Knight *v.* S., 147 Ala. 93, 41 S. 850; Jeter *v.* S., 52 Tex. Cr. 212, 106 S. W. 371.

701-81 Nolan *v.* S., 48 Tex. Cr. 436, 88 S. W. 242.

701-82 But see Anderson *v.* Aupperle, 51 Or. 556, 95 P. 330.

702-86 Muhlhause *v.* S., 56 Tex. Cr. 288, 119 S. W. 866.

702-87 Inference or conclusion of accused, based on what others said to him respecting chastity of prosecutrix, inadmissible. Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215.

Belief of third person, based on facts not known to accused, concerning character of prosecutrix may not be shown. Carter *v.* S., supra.

702-88 Hatton *v.* S., 92 Miss. 651, 46 S. 708; Simmons *v.* S., 54 Tex. Cr. 619, 114 S. W. 841.

702-90 Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215.

703-94 Oldham *v.* S., 99 Ark. 175, 137 S. W. 825; S. *v.* Kyle (Mo.), 168 S. W. 681; S. *v.* Long (Mo.), 165 S. W. 748; S. *v.* Slattery, 74 N. J. L. 241, 65 A. 866 (immaterial on account of statute); Gillespie *v.* S. (Tex. Cr.), 166 S. W. 135. See S. *v.* Jones (Wash.), 142 P. 35.

Prior acts between parties admissible. S. *v.* Tilden (Wash.), 140 P. 680.

Where first act was without witness' consent, the subsequent act with consent may be shown, she being still chaste. Watts *v.* S., 8 Ala. App. 264, 63 S. 18.

703-95 Walls *v.* S. (Tex. Cr.), 153 S. W. 130; Nolan *v.* S., 48 Tex. Cr. 436, 88 S. W. 242.

To prove subsequent acts, proof must be made they followed closely upon commission of offense and of unchastity of prosecutrix. Bray *v.* U. S., 39 App. Cas. (D. C.) 600.

703-98 See S. *v.* Jones (Wash.), 142 P. 35.

703-99 Admission of previous intercourse with others may be proved. Muhlhause *v.* S., 56 Tex. Cr. 288, 119 S. W. 866.

703-3 That money paid prosecutrix was not paid in presence of defendant, where he is shown to have consented to payment, immaterial. Cole *v.* S. (Tex. Cr.), 156 S. W. 929.

704-4 *Contra*, Williams *v.* S., 90 Miss. 319, 43 S. 467.

704-14 Under Kentucky statute, accused who has married and abandoned seduced person may offer any evidence showing justification for abandonment. State makes prima facie case by showing proper conduct on part of wife. C. *v.* McNutt, 133 Ky. 702, 118 S. W. 978.

SEQUESTRATION

Action on replevin bond, 712-24.

711-20 Hurlbut *v.* Gainor, 45 Tex. Civ. 588, 103 S. W. 409.

That affidavit did not state facts to be true according to affiant's knowledge immaterial. Power *v.* First St. Bk. (Tex. Civ.), 162 S. W. 416.

711-23 Value of land as a whole may be stated. Caruthers *v.* Hadley (Tex. Civ.), 115 S. W. 80.

712-24 In action on replevin bond amount of rent collected by principal may be shown. Wandelohr *v.* Bk. (Tex. Civ.), 106 S. W. 413.

712-28 Dissolution not granted when. Suttle *v.* Biles, 130 La. 448, 58 S. 144.

713-30 Sweeney *v.* Storage Co. (Tex. Civ.), 137 S. W. 1147.

714-32 See Werner S. Co. *v.* Pickering, 55 Tex. Civ. 632, 119 S. W. 333.

714-34 Webb *v.* Wiginton, 55 Tex. Civ. 413, 118 S. W. 856. See Rea *v.* Schow, 42 Tex. Civ. 600, 93 S. W. 706.

SERVICE

716-3 Place of service, manner and time, must be shown where service by individual, since presumption existing in favor of officer does not attach. Lynch *v.* West, 63 W. Va. 571, 60 S. E. 606.

717-5 Duckworth *v.* McSorley, 134 App. Div. 290, 118 N. Y. S. 881.

717-6 Unangst *v.* Southwick, 80 Neb. 112, 113 N. W. 989; Finucane *v.* Warner, 194 N. Y. 160, 86 N. E. 1118 (privileged witness); Yarborough *v.* Moore, 151 N. C. 116, 65 S. E. 763 (on infants after lapse of time). See Hooper *r.* McDade, 1 Cal. App. 733, 82 P. 1116; Hotovitsky *v.* Church, 78 N. J. Eq. 576, 79 A. 340.

Where sheriff was given two notices concerning two actions for the partition of a piece of land, there is no presumption he served the first received first. Boone *v.* Boone (Ia.), 141 N. W. 938.

718-9 Orosco *v.* Gonzales (N. M.), 141 P. 617; Mahan *v.* McManus (Tex. Civ.), 102 S. W. 789.

Burden upon person alleging illegality to show service outside jurisdiction of officer. McDonald *v.* Cawhorn, 152 Ala. 357, 44 S. 395.

719-10 Phillips *v.* Bond, 132 Ga. 413, 64 S. E. 456; Densel *v.* Co., 17 Ida. 432, 106 P. 2; Gogebic L. Co. *v.* Moore, 157 Mich. 499, 122 N. W. 128; Taylor *v.* Assn., 84 Neb. 799, 122 N. W. 41.

No presumption if return does not give name of person served. St. Louis J. Co. *v.* Imbraguglio, 123 La. 389, 48 S. 1007.

719-11 Defective return cannot be aided by presumption. Jones *v.* Crim, 66 W. Va. 301, 66 S. E. 367.

719-12 Not presumed in favor of default judgment that process not showing date of service was served on date of indorsement of appointment of officer who made service. Lawrence *v.* Stone, 160 Ala. 382, 49 S. 376.

720-13 Holmes *v.* King, 158 Mich 445, 123 N. W. 1 (no presumption of error in date of return).

No presumption return not made before return day when fact so expressed, though clerk of court made no endorsement showing when return filed. Himmelberger-H. L. Co. *v.* McCabe, 220 Mo. 154, 119 S. W. 357.

721-17 National M. Co. *v.* Co., 9 Ariz. 192, 80 P. 397, 11 Ariz. 108, 89 P. 535; Slocum *v.* McLaren, 106 Minn. 386, 119 N. W. 406; Westman *r.* Carlson, 86 Neb. 847, 126 N. W. 515; Marler-D.-G. Co. *v.* Wadesboro, etc. Co., 150 N. C. 519, 64 S. E. 366; S. *v.* Court, 42 Wash. 521, 85 P. 256. See Buck *v.* Hawley, 129 Ia. 406, 105 N. W. 688.

Evidentiary effect of return limited to service of such papers as officer bound to serve. S. *v.* Emblen, 66 W. Va. 360, 66 S. E. 499.

Return inadmissible unless made as statute provides. Markley *v.* Co., 144 Ia. 105, 122 N. W. 136.

California.—Berentz *v.* Co., 148 Cal. 577, 84 P. 47 (constable—certificate insufficient).

Verification.—Return, to be effective, must be verified. Berentz *v.* Co. (Cal. App.), 84 P. 45.

Age of server must appear as of time of service. French *v.* Co., 44 Wash. 697, 87 P. 360.

721-18 Kimsey & Dopson *v.* Lumb. Co., 136 Ga. 369, 71 S. E. 675; Gogebic L. Co. *v.* Moore, 157 Mich. 499, 122 N. W. 128.

722-19 McGowan *v.* Simons (Ala.), 64 S. 569; Harrell *v.* Williams (Ga. App.), 80 S. E. 534; Miedreich *r.* Lauenstein, 172 Ind. 140, 86 N. E. 963; Mound City E. Co. *v.* R. Co., 146 Mo.

App. 463, 124 S. W. 27; Strobel *v.* Clark, 128 Mo. App. 48, 106 S. W. 585; Cornwall *v.* Co., 128 Mo. App. 163, 106 S. W. 591; Regent R. Co. *v.* Co., 112 Mo. App. 271, 86 S. W. 880; Ewald *v.* Ortynsky, 77 N. J. Eq. 76, 75 A. 577; Coal Co. *v.* Co., 25 Pa. Super. 628; Philadelphia S. F. Soc. *v.* Purcell, 24 Pa. Super. 205; Talbott *v.* Co., 60 W. Va. 423, 55 S. E. 1009. See supra, "Conclusive Evidence," 288-81.

723-20 Matchett *v.* Liebig, 20 S. D. 169, 105 N. W. 170.

723-21 Mechanical A. Co. *v.* Castleman, 215 U. S. 437 (after removal to federal court); Hawkins *v.* Johnson, 131 Ga. 347, 62 S. E. 285; Cooke *v.* Haungs, 113 Ill. App. 501; Unangst *v.* Southwick, 80 Neb. 112, 113 N. W. 989; Patterson *v.* Taylor, 78 N. J. L. 10, 73 A. 225, applying Nebraska rule.

Ex parte affidavits used to impeach returns. Johnson *v.* Carpenter, 77 Neb. 49, 108 N. W. 161 (in revivor proceedings).

Conclusive unless traversed.—Mayerson *v.* Cohen, 123 App. Div. 646, 108 N. Y. S. 59; Mann *v.* Meryash, 107 N. Y. S. 599.

725-22 Driggers *v.* U. S., 21 Okla. 60, 95 P. 612.

727-24 Morrissey *v.* Gray, 160 Cal. 390, 117 P. 438; Walrond *v.* Noyes, 82 Kan. 118, 107 P. 795; Broadie *v.* Carson, 81 Kan. 467, 106 P. 294; Petersilie *v.* McLachlin, 80 Kan. 176, 101 P. 1014.

727-26 See Meyer *v.* Wilson, 166 Ind. 651, 76 N. E. 748; Reich *v.* Cochran, 102 N. Y. S. 827. *Comp.* Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481.

728-27 Wells-Fargo & Co. *v.* Baker Lumb. Co., 107 Ark. 415, 155 S. W. 122; Spring Creek D. D. *v.* Commissioners, 238 Ill. 521, 87 N. E. 394; Duffy *v.* Frankenberg, 144 Ill. App. 103; Tyler *v.* Davis, 37 Ind. App. 557, 75 N. E. 3 (in absence of fraud); Reese Lumb. Co. *v.* Coal & Lumb. Co., 156 Ky. 723, 161 S. W. 1124; Claryville, etc. Co. *v.* C., 32 Ky. L. R. 1157, 107 S. W. 327 (official character of server cannot be contradicted); Hanson *v.* Franklin, 19 N. D. 259, 123 N. W. 386; Flaccus Oak Leather Co. *v.* Heasley, 50 Pa. Super. 127; Delaware Ins. Co. *v.* Hutto (Tex. Civ.), 159 S. W. 73; Timmerman *v.* McCullagh, 55 Wash. 204, 104 P. 212; Leachman *v.* Young, 64 W. Va. 652, 63 S. E. 362. See supra, "Replevin," 229-21.

Not even record or statement of sheriff can be used to impeach return. Pinnacle Gold Min. Co. *v.* Popst, 54 Colo. 451, 131 P. 413.

The return of sheriff controls the recitals in the judgment. Pinnacle Gold Min. Co. *v.* Popst, 54 Colo. 451, 131 P. 413.

728-28 *Contra*, Hawkins *v.* Johnson, 131 Ga. 347, 62 S. E. 285.

729-29 Kavanagh *v.* Hamilton, 53 Colo. 157, 125 P. 512 (clear and convincing); Barnes *v.* Willis, 65 Fla. 363, 61 S. 828 (clear and convincing); Mann *v.* Meryash, 107 N. Y. S. 599; Sills *v.* Machson, 104 N. Y. S. 770; Marin *v.* Potter, 15 N. D. 284, 107 N. W. 970 (general denial by defendant in affidavit, insufficient); Unangst *v.* Southwick, 80 Neb. 112, 113 N. W. 989; Matchett *v.* Liebig, 20 S. D. 169, 105 N. W. 170. See Bradley *v.* Ryan, 110 N. Y. S. 977.

Reasonably clear proof enough.—Raulf *v.* Co., 138 Wis. 126, 119 N. W. 646. See Hogan *v.* Gault, 104 N. Y. S. 410; Pfotenhauer *v.* Brooker, 52 Misc. 649, 101 N. Y. S. 762.

730-30 **Rule not so strongly stated.** Westman *v.* Carlson, 86 Neb. 847, 126 N. W. 515.

Recitals in return, not substantive evidence. Haywood *v.* Co., 145 Ill. App. 506.

730-31 Stuart *v.* Cole, 42 Tex. Civ. 478, 92 S. W. 1040 ("publisher" comes within "editor, proprietor, or manager").

730-32 By chief clerk insufficient. Osburn *v.* Maata, 66 Or. 558, 135 P. 165.

731-39 Fleming *v.* Tatum, 232 Mo. 678, 135 S. W. 61.

732-41 Felsinger *v.* Quinn, 62 Wash. 183, 113 P. 275.

732-43 Whitford *v.* Whitford, 100 Ark. 63, 139 S. W. 653; Cannon *v.* Lunsford, 89 Ark. 64, 115 S. W. 940; Harbert *v.* Durden, 116 Mo. App. 512, 92 S. W. 746.

732-44 Sternberger *v.* Moffat, 44 Colo. 520, 99 P. 560 (tax proceedings).

Conclusiveness of treasurer's affidavit of posting tax list not impeached by showing no personal recollection of facts stated therein, affidavit being based on records, believed true. Sternberger *v.* Moffat, supra.

732-46 *Comp.* Stuart *v.* Cole, 42 Tex. Civ. 478, 92 S. W. 1040.

732-47 Zahorka *v.* Geith, 129 Wis. 498, 109 N. W. 552.

In mail chute will not do. Korn *v.* Lipman, 201 N. Y. 404, 94 N. E. 861, where order required deposit in general postoffice, and statute allowed mailing in a branch.

Recital in sheriff's deed, competent. Cutting *v.* Harrington, 104 Me. 96, 71 A. 374.

Recital in justice's docket, presumptive evidence only; questioned by parol testimony. Squires *v.* Detwiler, 45 Colo. 366, 101 P. 342.

733-48 Cannon *v.* Lunsford, 89 Ark. 64, 115 S. W. 940; Lybass *v.* Ft. Myers, 56 Fla. 817, 47 S. 346; Weaver *v.* Webb, 3 Ga. App. 726, 60 S. E. 367; Ladd *v.* Craig, 94 Miss. 659, 47 S. 777 (proof to overcome recital "must be clear, overwhelming and convincing"); Harbert *v.* Durden, 116 Mo. App. 512, 92 S. W. 746; Johnson *v.* Co., 60 Misc. 468, 112 N. Y. S. 346. *Contra,* Glasscock *v.* Barnard (Tex. Civ.), 125 S. W. 615. See Bilby *v.* Rodgers (Tex. Civ.), 125 S. W. 616 (no presumption against record, notwithstanding recital in judgment).

Recital ineffectual unless relating to legal entity. Perry *v.* Whiting, 56 Tex. Civ. 550, 121 S. W. 903.

In absence of recital service presumed in court of general jurisdiction. Clark *v.* Neves, 76 S. C. 484, 57 S. E. 614.

734-49 Humphrey *v.* Hays, 85 Neb. 239, 122 N. W. 987; Jones *v.* Crim, 66 W. Va. 301, 66 S. E. 367. See French *v.* Co., 44 Wash. 697, 87 P. 360.

Record showing publication of void summons makes presumptive case for defendant. Gould *v.* White, 54 Wash. 394, 103 P. 460.

734-51 Morse *v.* U. S., 29 App. Cas. (D. C.) 433 (order of publication); Wick *v.* Rea, 54 Wash. 424, 103 P. 462. See Point Pleasant *v.* Greenlee, 63 W. Va. 207, 60 S. E. 601.

736-52 In re McNeil's Est., 155 Cal. 333, 100 P. 1086; Waterbury Bk. *v.* Reed, 231 Ill. 246, 83 N. E. 188; Knapp *v.* Wallace, 50 Or. 348, 92 P. 1054; Carr *v.* Miller (Tex. Civ.), 123 S. W. 1158; Douglas *v.* S., 58 Tex. Cr. 122, 124 S. W. 933; Steves *v.* Smith, 49 Tex. Civ. 126, 107 S. W. 141; Point Pleasant *v.* Greenlee, 63 W. Va. 207, 60 S. E. 601. *Comp.* Davis *v.* Montgomery, 205 Mo. 271, 103 S. W. 979. See S. *v.* Doyle, 107 Minn. 498, 120 N. W. 902.

738-54 Stuart *v.* Cole, 42 Tex. Civ. 478, 92 S. W. 1040.

739-57 Baldridge *v.* Baldridge (Ky.), 117 S. W. 253 (no presumption of service on appeal if record silent); Duff *v.* Combs, 132 Ky. 710, 117 S. W. 259 (same); Priest *v.* Capitain, 236 Mo. 446, 139 S. W. 204; Smith *v.* Whiting, 55 Or. 393, 106 P. 791 (so of appearance).

739-58 Parol evidence admissible to prove actual service, not appearing of record. Jones *v.* Gunn, 149 Cal. 687, 87 P. 577; S. *v.* Liquor, 82 Vt. 287, 73 A. 586 (if return not varied or contradicted).

SET-OFF AND COUNTERCLAIM

740-1 In re Harper, 175 Fed. 412; Poull *v.* Co., 159 Ala. 453, 48 S. 785; Muir *v.* Co., 155 Mich. 441, 119 N. W. 589; Sucrerie Centrale Coloso *v.* Esteves, 4 P. R. Fed. 25.

Though set-off not pleaded evidence received without objection must be considered. Richardson *v.* Anderson, 109 Md. 641, 72 A. 485.

740-2 Herndon *v.* Bk. Co. (Ky. L. R.), 124 S. W. 835; Dreeland *v.* Pascoe, 39 Mont. 290, 102 P. 331; Murphy *v.* Cooper, 41 Mont. 72, 108 P. 576; Marshall *v.* Trerise, 33 Mont. 28, 81 P. 400; Simonoff *v.* Horwitz, 95 N. Y. S. 522; Liberty, etc. Co. *v.* Stoner, etc. Co., 178 N. Y. 219, 70 N. E. 501.

Party resisting counterclaim for money paid under mistake must show it inequitable to require repayment. Payne *v.* Witherbee, 132 App. Div. 579, 117 N. Y. S. 15.

741-3 Carolina P. C. Co. *v.* Co., 162 Ala. 380, 50 S. 332 (otherwise as to common-law recoupment); Farrar L. Co. *v.* Johnstone, 6 Ga. App. 409, 65 S. E. 60; McKeige *v.* Carroll, 120 App. Div. 521, 105 N. Y. S. 342.

743-7 Verified answer admissible against defendant. Talbot *v.* Laubheim, 188 N. Y. 421, 81 N. E. 163.

SHIPS AND SHIPPING

Refusal to carry passenger, 746-1.

746-1 Liability for refusal to carry passenger cannot be imposed unless he shows giving of required notice of intention to embark. Rabinowitz *v.* Co., 119 N. Y. S. 625.

746-2 Evidence to show who had

control of ship. Nelson *v.* Co., 52 Wash. 177, 100 P. 325.

Nationality of vessel well shown by certified copy of enrollment under §§882, 4155, R. S. of U. S. Wynne *v.* U. S., 217 U. S. 234.

747-9 If title condition precedent to registry presumption of title arises from registry. Martinez *v.* Martinez, 1 Phil. Isl. 647.

748-14 Loss of vessel by charterer, burden on him to negative negligence. Swenson *v.* Co., 160 Fed. 459, 87 C. C. A. 443.

748-18 See Peck *v.* U. S., 152 Fed. 524.

749-19 Customary dispatch in unloading not conclusively shown as against strangers to a maritime association by its rules. Crowley *v.* Hurd, 172 Fed. 498.

749-21 Waiver presumed when party acts inconsistent with asserted right. Percy *v.* Co., 173 Fed. 534. See Mowinckel *v.* Dewar, 173 Fed. 544.

749-22 Warranty of seaworthiness in charter—from accident presumed vessel was unseaworthy. Bartley *v.* Dev. Co., 214 Fed. 296.

751-28 Ambiguity in contract removed by proof of practical construction given it. Nelson *v.* Co., 52 Wash. 177, 100 P. 325.

752-32 See Nelson *v.* Co., supra.

753-18 Boston *v.* Co., 197 Mass. 561, 83 N. E. 1116.

753-50 Identity of vessel. The Ramleh, 157 Fed. 769.

753-52 The President Lincoln, 197 Fed. 155, 116 C. C. A. 592; Board, etc. *v.* Paxson Co., 196 Fed. 158; Nicholas Transit Co. *v.* Pittsburgh S. S. Co., 196 Fed. 69.

Estoppel to charge fault.—West Kentucky Coal Co. *v.* Lumb. Co., 188 Fed. 26, 110 C. C. A. 176.

Evidence sufficient.—Egan *v.* T. Co., 189 Fed. 543; The Leader, 187 Fed. 807, 109 C. C. A. 567; The Harry M. Wall, 187 Fed. 278.

Evidence insufficient.—The R. B. Little, 188 Fed. 205, 110 C. C. A. 246; The Raymond, 178 Fed. 848; The Dorothy, 189 Fed. 40.

In So. Transp. Co. *v.* **R. Co.,** 196 Fed. 548, the only evidence that there was improper steering was the fact that the sheer took place. "What caused it is not shown. Such sheers are often caused by other things than the mistakes of the helmsman. As in this case, it not infrequently happens that their real cause is a mystery. The barge was proceeding very slowly. It seems unlikely, under such conditions, that any probable negligence on the part of the man at the helm could have caused so rank a sheer."

753-53 The Prudence, 197 Fed. 479.

754-56 The Charles R. Spencer, 178 Fed. 862.

754-59 In re Perth Amboy D. C. Co., 172 Fed. 984.

754-60 The Henry O. Barrett, 161 Fed. 481, 88 C. C. A. 423.

755-64 Presumption not conclusive. In re Eastern D. Co., 159 Fed. 541.

756-78 As between sailing vessels probability that one will fall off from her course is greater than that the other will swing many points therefrom. The Metamora, 144 Fed. 936, 75 C. C. A. 576. Rule has less force where collision occurred between steamer and sailing vessel. The Edda, 173 Fed. 436, 97 C. C. A. 638.

757-81 Must be shown goods ordered by authority and delivered to vessel or put within her control. The Curtin, 165 Fed. 271.

757-84 Campbell *v.* Co., 165 Fed. 270.

Burden to show time and place of death on claimant. Thompson T. & W. Assn. *v.* McGregor, 207 Fed. 209, 124 C. C. A. 479.

Evidence as to use of gang plank under similar conditions with knowledge, admissible. Rizzo *v.* W. Co. (Mass.), 104 N. E. 363.

758-86 Quantity of goods delivered must be shown by shipper if bill of lading expresses it is unknown. The Seneca, 172 Fed. 370, 97 C. C. A. 68.

Burden on plaintiff to show delay caused by defendant's failure to deliver lumber within reach of defendant's tackle. Evidence as to equipment with tackle in general use, and quantity of lumber which could be loaded on proper delivery admissible. Tweedie T. Co. *v.* Craig, 159 App. Div. 192, 144 N. Y. S. 64.

Burden of proving unreasonable delay to recover demurrage on owner. Tweedie T. Co. *v.* Barry, 205 Fed. 721, 124 C. C. A. 15.

758-87 See Bolton Steam S. Co. *v.* Crossman, 206 Fed. 183.

758-89 Presumption not overcome. Dowgate S. Co. *v.* Arbuckle, 158 Fed. 179.

758-90 Bolton Steam S. Co. *v.* Crossman, 206 Fed. 183; Pacific C. Co. *v.* Co., 155 Fed. 29, 83 C. C. A. 625; The Fri. 154 Fed. 333, 83 C. C. A. 205. See Northern C. Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230

758-91 Bill of lading as best evidence of contract The Eva D. Rose, 151 Fed. 704, *mod.* 153 Fed. 912.

759-92 Concealment by shipper of dangerous character of article shipped must be shown by carrier. International M. M. Co. *v.* Fels, 170 Fed. 275, 95 C. C. A. 471.

759-93 Mallory S. S. Co. *v.* Optical Co. (Tex. Civ.), 154 S. W. 282.

759-94 The Folmina, 212 U. S. 354; The Konigin Luise, 173 Fed. 811; The Rappahannock, 173 Fed. 829; Village S. S. Co. *v.* Co., 171 Fed. 243 (short delivery); The Ghazee, 172 Fed. 368, 97 C. C. A. 66 (same); Northern C. Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 236; Mallory S. S. Co. *v.* Optical Co. (Tex. Civ.), 154 S. W. 282. *Comp.* The St. Quentin, 162 Fed. 883, 89 C. C. A. 573; The Baralong, 172 Fed. 220, 97 C. C. A. 24.

Measure of proof must go beyond conjecture. The Folmina, 212 U. S. 354.

Under allegation of loss by negligence plaintiff has burden, and may show vessel operated with insufficient crew. Northern Co. *v.* Lindblom, supra.

Damage to cargo.—Burden on ship as to sea perils. The Folmina, 153 Fed. 364, 82 C. C. A. 440.

761-97 The River Meander, 209 Fed. 931; The Babin Chevaye, 208 Fed. 966, 126 C. C. A. 54; The Ninfa, 156 Fed. 512.

763-2 Implied warranty of seaworthiness does not exist in favor of hirer of vessel who has fully inspected her, so far as defects might have been discovered. Sanford & B. Co. *v.* Co., 177 Fed. 878, 101 C. C. A. 92.

763-6 In absence of proof of adequate cause for sinking of boat, unseaworthiness presumed. Sanborn *v.* Co., 171 Fed. 449.

764-7 The Koranna, 214 Fed. 172; The Baralong, 172 Fed. 220, 97 C. C. A. 24; The Oceana, 171 Fed. 172.

765-10 Sinking of vessel at dock. Boyle *v.* R. Co., 151 App. Div. 551, 136 N. Y. S. 355.

Breaking of rope does not establish negligence, but must be explained by ship owner. Reid *v.* Fargo, 213 Fed. 771 (C. C. A.).

765-11 *Comp.* Haase F. Co. *v.* Co., 143 Mo. App. 42, 122 S. W. 362.

765-12 Negligence not inferred from amount of leakage if packages apparently intact. The Neidenfels, 174 Fed. 293.

765-13 Certificate executed in foreign country showing proper stowage admissible. The Koranna, 214 Fed. 172.

766-14 Bill of lading exempting from liability except by improper stowage, burden rests on shipper. Wright *v.* Grace, 203 Fed. 360.

Entire load owned by one shipper, burden rests on him. The Rokeby, 202 Fed. 322.

767-20 Minneapolis, etc. Co. *v.* Co., 156 Fed. 424.

Very strong evidence necessary to overcome presumption attaching to opinion of master. Willcox *v.* Co., 210 Fed. 89.

767-22 The River Meander, 209 Fed. 931; I. C. Levy *v.* Gibson, 130 Ga. 581, 61 S. E. 484. See Deslions *v.* La Compagnie, 210 U. S. 95.

Allegations of fault by claimant must be sustained by affirmative testimony supplementing presumption of negligence occasioned by accident. **In re** Starin, 173 Fed. 721.

SIMILAR TRANSACTIONS

Limitation as to use of evidence of, 807-70.

770-2 Southern R. Co. *v.* Gullatt, 158 Ala. 502, 48 S. 472; Effler *v.* S. (Del.), 85 A. 731; Denham *v.* S., 5 Ga. App. 303, 63 S. E. 62; Haigh *v.* Lenfesty, 239 Ill. 227, 87 N. E. 962; Balt. R. & H. Co. *v.* Kreiner, 109 Md. 361, 71 A. 1066; Barnard *v.* Bates, 201 Mass. 234, 87 N. E. 472; Bookman *v.* New York, 133 App. Div. 242, 117 N. Y. S. 197; Marshall & E. T. R. Co. *v.* Killingsworth (Tex. Civ.), 162 S. W. 1181 (*cit.* ENCYC. OF EV.); Wiggs *v.* Co. (Tex. Civ.), 110 S. W. 179.

An instruction limiting effect of admitted evidence is the most defendant can claim. Breese *v.* U. S., 203 Fed. 824, 122 C. C. A. 142.

Defenses to other notes for other horses inadmissible. Vaughan *v.* Exum, 161 N. C. 492, 77 S. E. 679.

771-3 Cox *v.* Steed (Tex. Civ.), 131 S. W. 246; Rosenberg *v.* Surety Co., 140 App. Div. 436, 125 N. Y. S. 257.

772-5 Ware *v.* S., 91 Ark. 555, 121 S. W. 927 (other reasons given); Griffith *v.* Denver, 55 Colo. 37, 132 P. 57; Marshall & E. T. R. Co. *v.* Killingsworth (Tex. Civ.), 162 S. W. 1181 (*cit.* the text).

773-6 Moffitt *v.* Co., 86 Conn. 527, 86 A. 16; Partridge *v.* U. S., 39 App. Cas. (D. C.) 571; Barnard *v.* Bates, 201 Mass. 234, 87 N. E. 472; Texas, etc. R. Co. *v.* Berlin (Tex. Civ.), 165 S. W. 62.

775-8 Ford & Co. *v.* Holmes (Ga. App.), 80 S. E. 696; Scott *v.* Lowe, 136 App. Div. 442, 120 N. Y. S. 959; P. *v.* Governale, 193 N. Y. 581, 86 N. E. 554; Sucker St. D. Co. *v.* Wirtz, 17 N. D. 313, 115 N. W. 844; Ft. Worth B. R. Co. *v.* Cabell (Tex. Civ.), 161 S. W. 1083; Texas, etc. R. Co. *v.* Berlin (Tex. Civ.), 165 S. W. 62.

Similar settlements, or damages granted by defendant to persons under similar circumstances inadmissible. Brink *v.* Dann, 33 S. D. 81, 144 N. W. 734. See vol. 4, p. 17, n. 35; vol. 5, p. 242, n. 51, and supplement thereto.

777-9 West. U. Tel. Co. *v.* Sledge (Ala. App.), 62 S. 390; August *v.* S., 11 Ga. App. 798, 76 S. E. 164; Zeman *v.* Union, 263 Ill. 304, 105 N. E. 22; White Auto Co. *v.* Dorsey, 119 Md. 251, 86 A. 617; P. *v.* Huff, 173 Mich. 620, 139 N. W. 1033; Hartzell *v.* Min. Co., 239 Pa. 602, 86 A. 1093; Texas, etc. R. Co. *v.* Berlin (Tex. Civ.), 165 S. W. 62; Lara *v.* S. (Tex. Cr.), 161 S. W. 99; Haynes *v.* S. (Tex. Cr.), 159 S. W. 1059; Forrester *v.* S. (Tex. Cr.), 152 S. W. 1041. See vol. 2, p. 764, n. 30; vol. 6, p. 175, n. 27; vol. 11, p. 200, n. 69, and supplement thereto. *Contra,* where good faith of party involved. Plumb *v.* Bridge, 128 App. Div. 651, 113 N. Y. S. 92.

Proof a tenant ordered improvements admissible, tending to show landlord did not. Walter *v.* Sperry, 86 Conn. 474, 85 A. 739.

May cross-examine witness about dealings with third persons as bearing upon his credibility. Marx & Son *v.* King, 177 Mich. 662, 144 N. W. 553.

778-12 *Comp.* Compagnie Des Metaux (Tex. Civ.), 107 S. W. 651. See vol. 1, p. 775, n. 7, and supplement thereto.

779-13 Ryan *v.* R. Co., 127 App. Div. 11, 111 N. Y. S. 21; Beard *v.* Ins. Co., 65 W. Va. 283, 64 S. E. 119. See supra, "Intoxication," 778-6.

779-15 See vol. 2, p. 922, n. 82, and supplement thereto.

780-16 See vol. 7, p. 421, n. 37, and supplement thereto.

780-17 See vol. 2, p. 845, n. 31, and supplement thereto.

780-18 Martin *v.* Logan, 30 Ky. L. R. 799, 99 S. W. 648; Wyatt *v.* Cely, 86 S. C. 539, 68 S. E. 657.

Contra, as to contract between partners. Swanson *v.* Wilsen, 13 Cal. App. 389, 110 P. 336.

782-20 Beasore *v.* Stevens, 155 Mich. 403, 119 N. W. 431, custom of parties to sell jointly to plaintiff.

Payment of like claim after suit brought cannot be shown in action by officer to recover fees. Bookman *v.* New York, 133 App. Div. 242, 117 N. Y. S. 197.

783-21 Smith *v.* M. Co., 6 Ala. App. 171, 60 S. 484; Ware *v.* House, 141 Ga. 410, 81 S. E. 118; Stoner *v.* Nall, 150 Ky. 511, 150 S. W. 648; Provencher *v.* Moore, 105 Me. 87, 72 A. 880. *Comp.* Coleman *v.* Forrester, 178 Mo. App. 57, 163 S. W. 263. See vol. 8, p. 659, n. 12; p. 713, n. 30, and supplement thereto. *Contra,* under some circumstances. Moody *v.* Peirano, 4 Cal. App. 411, 88 P. 380; Bone *v.* Hayes, 154 Cal. 759, 99 P. 172.

783-22 Detroit R. T. Co. *v.* Aldrich, 176 Mich. 357, 142 N. W. 373. See vol. 3, p. 524, n. 45; vol. 8, p. 713, n. 31, and supplement thereto.

Like agreement, previously made between same parties and relating to a collateral subject, provable to show it might reasonably be subject of parol agreement under similar circumstances. Lilienthal *v.* Cartwright, 173 Fed. 580, 97 C. C. A. 530.

784-23 See vol. 3, p. 525, n. 47, and supplement thereto.

Non-compliance with substituted contract shown in action on original because it tends to show non-compliance with understood terms of latter. Baer *v.* Co., 159 Ala. 491, 49 S. 92.

784-25 Gieger *v.* Levin, 113 N. Y. S. 1016. See vol. 10, p. 24, n. 72, et seq., and supplement thereto.

Other like wrongful acts not provable to show scope of servant's authority. Philadelphia, etc. R. Co. *v.* Green, 110 Md. 32, 71 A. 986.

785-26 Jordan *v.* Co., 1 Boyce (Del.) 107, 75 A. 1014. See vol. 10, p. 26,

n. 76, and supplement thereto. *Contra,* Rintamaki *v.* Co., 205 Mass. 115, 91 N. E. 220.

786-32 McCown *v.* Wilson, 92 Ark. 153, 122 S. W. 478; Denver C. T. Co. *v.* Cowan, 51 Colo. 64, 116 P. 136; Ross *v.* City (Conn.), 91 A. 201; Moffitt *v.* Co., 86 Conn. 527, 86 A. 16; Hackart *v.* Co., 243 Ill. 49, 90 N. E. 257; Tuthill *v.* R. Co., 145 Ill. App. 50; Grebenstein *v.* Co., 205 Mass. 431, 91 N. E. 411; Larned *v.* Vanderline, 165 Mich. 464, 131 N. W. 165; Sabine T. Co. *v.* Oliver, 46 Tex. Civ. 428, 102 S. W. 925. See Missouri, etc. R. Co. *v.* Parrott, 43 Tex. Civ. 325, 94 S. W. 1135, 96 S. W. 950; supra, "Books of Account," 632-16; vol. 2, p. 198, n. 27; vol. 8, p. 939, n. 60; vol. 10, p. 477, n. 27; p. 487, n. 75; p. 528, n. 85, and supplement thereto.

Other errors in account book. See vol. 2, p. 686, n. 30, and supplement thereto.

787-33 French *v.* Sabin, 202 Mass. 240, 88 N. E. 845; Parsons *v.* R. Co., 133 App. Div. 461, 117 N. Y. S. 1058; Adams *v.* R. Co. (Tex. Civ.), 122 S. W. 895. *Comp.* Devine *v.* Co., 145 Ill. App. 322.

787-34 Hales *v.* Kerr, 2 K. B. (1908) 601; Thompson Co. *v.* Co. (N. H.), 88 A. 216; Rober *v.* R. Co., 25 N. D. 394, 142 N. W. 22; Washington, etc. R. Co. *v.* Trimyer, 110 Va. 856, 67 S. E. 531; Allard *v.* Contract Co., 64 Wash. 14, 116 P. 457. See vol. 8, p. 941, n. 66, and supplement thereto.

Conversation as to prior robberies to show negligence of guests and suitability of locks. Weadock *v.* Swart, 178 Mich. 80, 144 N. W. 557.

Carriers, other accidents to show negligence. See vol. 2, p. 928, n. 95, and supplement thereto.

Identity of servant on each occasion must be shown in action against master. Louisville & N. R. Co. *v.* Roberts, 7 Ga. App. 562, 67 S. E. 690.

Wilfulness shown by such testimony. Robertson *v.* Co., 238 Ill. 344, 87 N. E. 373.

Evidence of other fires, originating from one in controversy, admissible to shown possibility and probability of later fire caused by one which started others. Lloyd C. Co. *v.* Co., 145 Mo. App. 675, 123 S. W. 528.

Similar occurrences admissible to bring home knowledge. Taylor C. Co. *v.* Dawes, 220 Ill. 145, 77 N. E. 131; Pfudl *v.* Romer, 107 Minn. 353, 120 N. W. 302.

788-35 Fisher *v.* R., 75 N. H. 184, 72 A. 212.

788-36 Pittsburgh R. Co. *v.* Thomas, 174 Fed. 591, 98 C. C. A. 437. See vol. 8, p. 537, n. 69, and supplement thereto.

788-37 Grebenstein *v.* Co., 205 Mass. 431, 91 N. E. 411; Iwanowski *v.* Co., 205 Mass. 316, 91 N. E. 296.

788-38 Smolowitz *v.* Orbach, 141 N. Y. S. 527; Osteen *v.* R. Co., 93 S. C. 61, 76 S. E. 25. See vol. 2, p. 895, n. 96, and supplement thereto.

Question of intent, evidence as to other acts properly excluded. See Worthington *v.* Long (Ala. App.), 64 S. 174.

Practice and custom of druggist in selling liquor as beverage, act being per se unlawful, shown to meet contention sales for medicinal uses. Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1, *dist.* Hilliker *v.* Farr, 149 Mich. 444, 112 N. W. 1116.

789-39 Mahler *v.* Beishline, 46 Colo. 603, 105 P. 874; Epstein C. Co. *v.* Solvinsky, 110 N. Y. S. 351; Johnson S. Bk. *v.* Koch, 38 Pa. Super. 553; Houston, etc. R. Co. *v.* Johnson, 103 Tex. 320, 127 S. W. 539; Ogden Val., etc. Co. *v.* Lewis (Utah), 125 P. 687. See vol. 13, p. 841, n. 55, and supplement thereto. But see vol. 2, p. 489, n. 78, and supplement thereto.

791-40 See vol. 6, p. 148, n. 2, and supplement thereto.

791-41 Breese *v.* U. S., 203 Fed. 824, 122 C. C. A. 142; Gibson *v.* Seney, 138 Ia. 383, 116 N. W. 325; Millet *v.* Andrews, 175 Mich. 350, 141 N. W. 578, Ward *v.* Cook, 158 Mich. 283, 122 N. W. 785; Harris *v.* R. Co., 77 N. J. L. 278, 72 A. 50; Greensboro L. Ins. Co. *v.* Knight, 160 N. C. 592, 76 S. E. 623; Crosland *v.* Graham, 83 S. C. 228, 65 S. E. 233 (wilfulness and malice in trover); Compagnie Des Metaux U. *v.* Co. (Tex. Civ.), 107 S. W. 651. *Contra* in criminal case. Denham *v.* S., 5 Ga. App. 303, 63 S. E. 62; Ogden Val., etc. Co. *v.* Lewis (Utah), 125 P. 687. See Stotts *v.* Fairfield (Ia.), 145 N. W. 61; Hyman *v.* Kirt, 153 Mich. 113, 116 N. W. 536; vol. 5, p. 842, n. 18; vol. 6, p. 35, n. 13; p. 146, n. 95; vol. 7, p. 533, n. 83; p. 627, n. 6; p. 632, n. 22; vol. 8, p. 23, n. 57, and supplement thereto.

793-42 Homewood P. Bk. *v.* Marshall, 223 Pa. 289, 72 A. 627.

794-45 See vol. 6, p. 37, n. 23; p. 148, n. 97, and supplement thereto.

794-46 See vol. 6, p. 38, n. 27; p. 148, n. 1, and supplement thereto.

794-47 Schwitters *v.* Springer, 236 Ill. 271, 86 N. E. 102; Stotts *v.* Fairfield, supra; P. *v.* Martin, 205 N. Y. 275, 98 N. E. 474; Ogden Val., etc. Co. *v.* Lewis (Utah), 125 P. 687. See vol. 6, p. 35, n. 16, and supplement thereto.

795-49 In re Friedman, 164 Fed. 131 (transactions several years prior); Stewart *v.* Wright, 147 Fed. 321, 77 C. C. A. 499; McGuire *v.* Co., 133 Ia. 636, 111 N. W. 34; Newton, etc. Trust Co. *v.* Stuart, 208 Mass. 221, 94 N. E. 454; Holbrook *v.* Quinlan & Co., 84 Vt. 411, 80 A. 339. See vol. 7, p. 634, n. 31, and supplement thereto.

795-50 Randle *v.* Barden (Tex. Civ.), 164 S. W. 1063. See Smith *v.* Bk., 147 Mo. App. 461, 126 S. W. 810; Commonwealth F. Ins. Co. *v.* Obenchain (Tex. Civ.), 151 S. W. 611.

796-51 Rathbun *v.* White, 157 Cal. 248, 107 P. 309 (death of others to show violence of explosion); Harshbarger *v.* Murphy, 22 Ida. 261, 125 P. 180; Hertz *v.* R. Co., 154 Ill. App. 80; Bird *v.* S. (Tex. Cr.), 148 S. W. 738; Carnahan *v.* Moore, 70 Wash. 623, 127 P. 195.

797-52 *Comp.* Florida, etc. Co. *v.* Jackson, 65 Fla. 393, 62 S. 610. *Contra,* Adams *v.* R. Co. (Tex. Civ.), 122 S. W. 895. See Gibson *v.* R., 75 N. H. 342, 74 A. 589.

797-53 Atlanta I. & C. Co. *v.* Mixon, 126 Ga. 457, 55 S. E. 237.

798-54 Evidence of other gaming transactions within knowledge of payee of note admissible against indorsee thereof to show it was based on such transaction. Birmingham T. & S. Co. *v.* Curry, 160 Ala. 370, 49 S. 319.

As showing doing of act at time in question, habit admissible. Jaquith *v.* Worden, 73 Wash. 349, 132 P. 33.

Habit of witness in performance of duty makes him competent to testify he did certain thing on given occasion, though not recollecting it. Texas & P. R. Co. *v.* Crump, 102 Tex. 250, 115 S. W. 26, *foll.* Davie *v.* Terrill, 63 Tex. 105.

799-55 Taliaferro *v.* U. S., 213 Fed. 25 (C. C. A.); Lueders *v.* U. S., 210 Fed. 419, 127 C. C. A. 151; Toothman *v.* U. S., 203 Fed. 218, 121 C. C. A. 424; Dyar *v.* S., 186 Fed. 614, 108 C. C. A. 478; Register *v.* S., 186 Fed. 624, 108 C. C. A. 488; Barr *v.* S. (Ala. App.), 65 S. 197; Willingham *v.* S. (Ala. App.) 64 S. 544; Howell *v.* S. (Ala. App.), 64 S. 522; Moore *v.* S. (Ala. App.), 64 S. 520; Lightning *v.* S., 9 Ala. App. 672, 62 S. 322; Bartlett *v.* S., 7 Ala. App. 85, 60 S. 958; Askew *v.* S., 6 Ala. App. 22, 60 S. 455; Robinson *v.* S., 5 Ala. App. 45, 59 S. 321; Gray *v.* S., 160 Ala. 107, 49 S. 678; Cox *v.* S., 162 Ala. 66, 50 S. 398; Butler *v.* S., 162 Ala. 71, 50 S. 400; Crowell *v.* S. (Ariz.), 136 P. 279; Setzer *v.* S. (Ark.), 161 S. W. 190; Ware *v.* S., 91 Ark. 555, 121 S. W. 927; Jones *v.* S., 88 Ark. 579, 115 S. W. 166; P. *v.* Casselman, 10 Cal. App. 234, 101 P. 693; P. *v.* Smith, 9 Cal. App. 644, 99 P. 1111; P. *v.* Martin, 13 Cal. App. 96, 108 P. 1034; Rice *v.* P., 55 Colo. 506, 136 P. 74; Jaynes *v.* P., 44 Colo. 535, 99 P. 325; S. *v.* Sebastian, 81 Conn. 1, 69 A. 1054; S. *v.* Brown (Del.), 85 A. 797; Elder *v.* S. (Del.), 85 A. 731; Ryan *v.* U. S., 26 App. Cas. (D. C.) 74; Denton *v.* S., 66 Fla. 87, 62 S. 914; Frank *v.* S., 141 Ga. 243, 80 S. E. 1016; Hightower *v.* S. (Ga. App.), 80 S. E. 684; Cooper *v.* S., 13 Ga. App. 697, 79 S. E. 908; Holmes *v.* S., 12 Ga. App. 359, 77 S. E. 187; Webb *v.* S., 7 Ga. App. 35, 66 S. E. 27; Robinson *v.* S., 6 Ga. App. 696, 65 S. E. 792; P. *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804; P. *v.* Schultz, 260 Ill. 35, 102 N. E. 1045; P. *v.* Burger, 259 Ill. 284, 102 N. E. 751; P. *v.* Gibson, 255 Ill. 302, 99 N. E. 599; Kahn *v.* S. (Ind.), 105 N. E. 385; Miller *v.* S., 174 Ind. 255, 91 N. E. 930; S. *v.* Clark (Ia.), 140 N. W. 821; S. *v.* Yates, 145 Ia. 332, 124 N. W. 174; S. *v.* Wheeler, 89 Kan. 160, 130 P. 656; Watson *v.* C., 132 Ky. 46, 116 S. W. 287; Johnson *v.* C., 144 Ky. 287, 137 S. W. 1079; Raymond *v.* C., 29 Ky. L. R. 785, 96 S. W. 515; S. *v.* Riggio, 124 La. 614, 50 S. 600; Avery *v.* S., 121 Md. 229, 88 A. 148; C. *v.* Parsons, 195 Mass. 560, 81 N. E. 291; P. *v.* Bullock, 173 Mich. 397, 139 N. W. 43; P. *v.* Loomis, 161 Mich. 651, 126 N. W. 985; P. *v.* Klise, 156 Mich. 373, 120 N. W. 989; S. *v.* Kaufman, 125 Minn. 315, 146 N. W. 1115; S. *v.* Fournier, 108 Minn. 402, 122 N. W. 329; Webster *v.* S. (Miss.), 60 S. 214; Benoit *v.* City (Miss.), 60 S. 137; S. *v.* Banks (Mo.), 167 S. W. 505; S. *v.* Duff, 253 Mo. 415, 161 S. W. 683; S. *v.* Gordon, 253 Mo. 510, 161 S. W. 721; S.

r. Smith, 250 Mo. 274, 157 S. W. 307; S. *v.* Foley, 247 Mo. 607, 153 S. W. 1010; S. *v.* Horton, 247 Mo. 657, 153 S. W. 1051; S. *v.* R. Co., 219 Mo. 156, 117 S. W. 1173; S. *v.* McNamara, 212 Mo. 150, 110 S. W. 1067; S. *r.* Radmilovich, 40 Mont 93, 105 P. 91; Wilson *v.* S., 87 Neb. 638, 128 N. W. 38; P. *r.* Grutz, 212 N. Y. 72, 105 N. E. 843; P. *r.* Duffy, 212 N. Y. 57, 105 N. E. 839; P. *r.* Katz, 209 N. Y. 311, 103 N. E. 305; P. *v.* Pettanza, 207 N. Y. 560, 101 N. E. 428; P. *r.* Geyer, 196 N. Y. 364, 90 N. E. 48; P. *v.* Duffy, 160 App. Div. 385, 145 N. Y. S. 699; P. *r.* Jacobs, 158 App. Div. 293, 143 N. Y. S. 21; P. *r.* Colburn, 147 N. Y. S. 689; P. *v.* Faulhaber, 152 App. Div. 101, 136 N. Y. S. 546; P. *r.* Santagata, 130 App. Div. 225, 114 N. Y. S. 321; P. *r.* Dudenhausen, 130 App. Div. 760, 115 N. Y. S. 374; P. *r.* Bills, 129 App. Div. 798, 114 N. Y. S. 587; P. *r.* Nelson, 130 N. Y. S. 488; S. *v.* Hazlet, 16 N. D. 426, 113 N. W. 374, *dist.* S. *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518; Flowers *v.* S. (Okla. Cr.), 138 P. 1041; Dupree *v.* S. (Okla. Cr.), 134 P. 86; Tempy *v.* S., 9 Okla. Cr. 446, 132 P. 383; Morris *v.* S., 9 Okla. Cr. 241, 131 P. 731; Green *v.* S., 8 Okla. Cr. 595, 129 P. 683; Rea *v.* S., 3 Okla. Cr. 269, 105 P. 381; Vickers *r.* U. S., 1 Okla. Cr. 452, 98 P. 467; S. *r.* Jensen (Or.), 140 P. 740; S. *r.* McAllister, 67 Or. 480, 136 P. 354; C. *v.* House, 223 Pa. 487, 72 A. 804; C. *r.* Shields, 50 Pa. Super. 1; U. S. *v.* Tanjuanco, 1 Phil. Isl. 116; Parrish *v.* S., 129 Tenn. 273, 164 S. W. 1174; Ransom *r.* S. (Tex. Cr.), 165 S. W. 932; Ross *r.* S. (Tex. Cr.), 163 S. W. 433; Currington *v.* S. (Tex. Cr.), 161 S. W. 478; Poulter *v.* S. (Tex. Cr.), 161 S. W. 475; Scott *v.* S. (Tex. Cr.), 160 S. W. 960; Dugat *v.* S. (Tex. Cr.), 160 S. W. 376; Bowman *r.* S. (Tex. Cr.), 155 S. W. 939; Horn *v.* S. (Tex. Cr.), 150 S. W. 943; Gaines *r.* S., 63 Tex. Cr. 73, 138 S. W. 387; Comegys *r.* S., 62 Tex. Cr. 231, 137 S. W. 349; Whitehead *r.* S., 61 Tex. Cr. 558, 137 S. W. 356; Nunn *v.* S., 60 Tex. Cr. 86, 131 S. W. 320; Windham *r.* S., 59 Tex. Cr. 366, 128 S. W. 1130; Clark *r.* S., 59 Tex. Cr. 246, 128 S. W. 131; Railey *r.* S., 58 Tex. Cr. 1, 121 S. W. 1120; Owen *r.* S., 58 Tex. Cr. 261, 125 S. W. 405; Pace *r.* S., 58 Tex. Cr. 90, 124 S. W. 949; Johnson *r.* S., 57 Tex. Cr. 488, 123 S. W. 1105; Harvey *r.* S., 57 Tex. Cr. 5, 121 S. W. 501; Zinn *r.* S., 56 Tex. Cr. 512, 120 S. W. 893; Gelber *r.* S., 56 Tex. Cr. 460, 120 S. W. 863; Monroe *r.* S., 56 Tex. Cr. 444, 120 S. W. 479; Harris *r.* S., 55 Tex. Cr. 469, 117 S. W. 839; Gardner *r.* S., 55 Tex. Cr. 394, 117 S. W. 140; Campbell *r.* S., 55 Tex. Cr. 277, 116 S. W. 581; Saldiver *r.* S., 55 Tex. Cr. 177, 115 S. W. 584; Windham *v.* S., 59 Tex. Cr. 366, 128 S. W. 1130; Roberts *r.* S., 51 Tex. Cr. 27, 100 S. W. 150; Lightfoot *v.* S. (Tex. Cr.), 106 S. W. 345; Smith *v.* S., 51 Tex. Cr. 427, 102 S. W. 406; Hinson *r.* S., 51 Tex. Cr. 102, 100 S. W. 939; S. *v.* Bowen (Utah), 134 P. 623; In re Evans (Utah), 130 P. 217; S. *r.* Williams, 36 Utah 273, 103 P. 250; S. *v.* Sanderson, 83 Vt. 351, 75 A. 961; S. *r.* McLeod, 78 Wash. 175, 138 P. 648; S. *v.* Hazzard (Wash.), 134 P. 514; Davis *r.* S., 134 Wis. 632, 115 N. W. 150. *Contra* under statute relating to sale of intoxicants. Thomas *v.* Yazoo, 95 Miss. 395, 48 S. 821.

See P. *r.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 194, and note; vol. 1, p. 49, n. 92; p. 57, n. 27; p. 990, n. 53; vol. 2, p. 763, n. 25; vol. 3, p. 413, n. 22; p. 451, n. 58; vol. 4, p. 730, n. 9; vol. 6, p. 675, n. 71; vol. 7, p. 753, n. 33; vol. 8, p. 121, n. 93; vol. 9, p. 147, n. 8; vol. 11, p. 472, n. 29; vol. 13, p. 5, n. 16, and supplement thereto.

Theft of a different animal at another time. Slaydon *v.* S., 102 Miss. 101, 58 S. 977.

In Meno *v.* **S.,** 117 Md. 435, 83 A. 759, it was held improper to attempt to prove by witness that the accused had told him that he had performed operations on or treated other girls as showing a familiarity on the part of the traverser with what could be done to rid a woman of a child. Said the court: "There is a class of cases in which evidence may be given of other similar acts done by an accused, but this class of cases is restricted to where the several acts are connected together and form part of one entire scheme or transaction, so that one of the acts forms a basis for a reasonable and proper inference as to the purpose and intent with which the particular act was performed for which the accused was then on trial."

Second offense.—Evidence of another offense is admissible where punishment

is greater for second offense. Gould *v.* S. (Tex. Cr.), 147 S. W. 247.

Unperformed agreement to commit crime like that of which accused cannot be shown. P. *v.* Minney, 155 Mich. 534, 119 N. W. 918.

Evidence admissible to identify defendant. Dillard *v.* S., 152 Ala. 86, 44 S. 537; Abrams *v.* S., 155 Ala. 105, 46 S. 464; Crowell *v.* S. (Ariz.), 136 P. 279; Effler *v.* S. (Del.), 85 A. 731; Morse *v.* C., 33 Ky. L. R. 831, 111 S. W. 714; S. *v.* Hill, 46 Mont. 24, 126 P. 41; P. *v.* Grutz, 212 N. Y. 72, 105 N. E. 843; C. *v.* Shields, 50 Pa. Super. 1; Dugat *v.* S. (Tex. Cr.), 160 S. W. 376; Bowman *v.* S. (Tex. Cr.), 155 S. W. 939; Overstreet *v.* S. (Tex. Cr.), 150 S. W. 630. See vol. 3, p. 132, n. 49; vol. 8, p. 677, n. 81, and supplement thereto. Defendant connected with crime by proof of guilt of another offense different in nature. P. *v.* Hill, 198 N. Y. 64, 91 N. E. 272; Hewitt *v.* S. (Tex. Cr.), 167 S. W. 40; Ross *v.* S. (Tex. Cr.), 163 S. W. 433; Forrester *v.* S. (Tex. Cr.), 152 S. W. 1041. Subsequent act proved if so related to its antecedent in character and locality as to show he who committed one must have committed other. Sorenson *v.* U. S., 168 Fed. 785, 94 C. C. A. 181. Some connection between crime necessary. That similar offenses be committed by same person insufficient. Effler *v.* S. (Del.), 85 A. 731.

As corroborating proof, admissible. Smothers *v.* S., 81 Neb. 426, 116 N. W. 152; S. *v.* Routzahn, 81 Neb. 133, 115 N. W. 759. *Contra* in case of incest. Skidmore *v.* S. (Tex. Cr.), 123 S. W. 1129.

Possession of other stolen goods admissible. See vol. 2, p. 823, n. 26, and supplement thereto.

Acts constituting crime must be first clearly established. Kahn *v.* S. (Ind.), 105 N. E. 385.

If it tends to establish particular crime charged, evidence of other crimes is always admissible. P. *v.* Grutz, 212 N. Y. 72, 105 N. E. 843.

Evidence conflicting, evidence admissible. Nobles *v.* S. (Tex. Cr.), 158 S. W. 1133.

Details of former offense inadmissible, but if accused seeks to arouse sympathy thereby state may rebut it by showing facts. Kelly *v.* S. (Tex. Cr.), 151 S. W. 304.

To make out chain of circumstantial evidence, evidence as to other offenses admissible. Howell *v.* (Ala. App.), 64 S. 522.

Other acts of sexual intercourse admissible to prove act in controversy. See note 62 L. R. A. 329; vol. 1, p. 629, n. 28, et seq.; vol. 2, p. 248, n. 29; p. 255, n. 40; vol. 3, p. 127, n. 23; vol. 4, p. 759, n. 67; vol. 5, p. 970, n. 11; vol. 7, p. 256, n. 12; vol. 10, p. 535, n. 34; vol. 11, p. 687, n. 74; p. 701, n. 74, and supplement thereto.

Precise date of offense must be stated in indictment before evidence as to other offenses can be admitted. Lawson *v.* Gulfport (Miss.), 62 S. 357.

Proximity of time no test. Must be a causal relation, or logical and natural connection between two offenses. P. *v.* Gibson, 255 Ill. 302, 99 N. E. 599.

Direction to jury to disregard testimony does not cure error of admitting such evidence. S. *v.* Lovan, 245 Mo. 516, 151 S. W. 141.

Statement of police he had other reasons for suspecting defendant inadmissible. Conners *v.* C., 152 Ky. 57, 153 S. W. 16.

Keeping intoxicating liquors.—But see vol. 7, p. 761, n. 73, and supplement thereto.

Relevant evidence not rendered irrelevant because it tends to prove the commission of another offense. Lueders *v.* U. S., 210 Fed. 419, 127 C. C. A. 151.

800-56 Thomas *v.* U. S., 156 Fed. 897, 84 C. C. A. 477; Howell *v.* S. (Ala. App.), 64 S. 522; Moore *v.* S. (Ala. App.), 64 S. 520; Smith *v.* S., 8 Ala. App. 187, 62 S. 575; Crowell *v.* S. (Ariz.), 136 P. 279; P. *v.* Kizer, 22 Cal. App. 10, 133 P. 516, 521, 134 P. 346; P. *v.* Kirk (Cal. App.), 134 P. 346; P. *v.* McCarthy, 14 Cal. App. 148, 111 P. 274; P. *v.* Smith, 9 Cal. App. 644, 99 P. 1111; P. *v.* Cahill, 11 Cal. App. 685, 106 P. 115; P. *v.* Argentos, 156 Cal. 720, 106 P. 65; Jaynes *v.* P., 44 Colo. 535, 99 P. 325; Partridge *v.* P. S., 39 App. Cas. (D. C.) 571; Hightower *v.* S. (Ga. App.), 80 S. E. 684; Kahn *v.* S. (Ind.), 105 N. E. 385; Sanderson *v.* S., 169 Ind. 301, 82 N. E. 525; S. *v.* O'Connell, 144 Ia. 559, 123 N. W. 201; Wellington *v.* C., 158 Ky. 161, 164 S. W. 333; May *v.* C., 153 Ky. 141, 154 S. W. 1074; Greenwell *v.* C., 30 Ky. L. R. 1282, 100 S. W. 852; S. *v.* McKowen, 126 La. 1075, 53 S. 353; C. *v.* Howard, 205 Mass. 128, 91 N. E. 397; P. *v.* MacGregor, 178 Mich. 436, 144 N.

W. 869; S. *v.* Spaugh, 200 Mo. 571, 98 S. W. 55; S. *v.* Blumenthal, 141 Mo. App. 502, 125 S. W. 1188; S. *v.* Jankowski, 83 N. J. L. 796, 85 A. 1135; P. *v.* Barobuto, 196 N. Y. 293, 89 N. E. 837; P. *v.* Grutz, 212 N. Y. 72, 105 N. E. 843; S. *v.* Dickerson, 77 O. St. 34, 82 N. E. 969; Smith *v.* S., 3 Okla. Cr. 629, 108 P. 418; S. *v.* La Rose, 54 Or. 555, 104 P. 299; S. *v.* Finch, 54 Or. 482, 103 P. 505; S. *v.* Hembree, 54 Or. 463, 103 P. 1008; C. *v.* Shields, 50 Pa. Super. 1; C. *v.* Levinson, 34 Pa. Super. 286; Parrish *v.* S., 129 Tenn. 273, 164 S. W. 1174; Robbins *v.* S. (Tex. Cr.), 166 S. W. 528; Duget *v.* S. (Tex. Cr.), 160 S. W. 376; Gradington *v.* S. (Tex. Cr.), 155 S. W. 210; Bailey *v.* S. (Tex. Cr.), 155 S. W. 536; Adams *v.* S., 62 Tex. Cr. 426, 138 S. W. 117; Jenkins *v.* S., 59 Tex. Cr. 475, 128 S. W. 1113; S. *v.* Bowen (Utah), 134 P. 623; S. *v.* Sargood, 80 Vt. 415, 68 A. 49.

See Schultz *v.* U. S., 200 Fed. 234, 118 C. C. A. 420; P. *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 199 note; vol. 1, p. 1012, n. 18; vol. 3, p. 125, n. 15; vol. 6, p. 676, n. 75.

Other acts must be committed at or near the time of offense in question, the determination of which question lies in discretion of court. Kettenbach *v.* U. S., 202 Fed. 377, 120 C. C. A. 505; Schultz *v.* U. S., 200 Fed. 234, 118 C. C. A. 420.

Mobbing of brother-in-law of deceased inadmissible in absence of showing accused was actual participant, or conspirator. S. *v.* Jones, 249 Mo. 80, 155 S. W. 33.

801-57 Williamson *v.* U. S., 207 U. S. 425; S. *v.* Brown (Del.), 85 A. 797; Ray *v.* S., 4 Ga. App. 67, 60 S. E. 816; S. *v.* Holland, 120 La. 429, 45 S. 380 (kidnaping); P. *v.* Burke, 157 Mich. 108, 121 N. W. 282 (if intent necessary conclusion from act charged); Proctor *v.* S., 8 Okla. Cr. 537, 129 P. 77; S. *v.* Smith, 55 Or. 408, 106 P. 797; S. *v.* La Mont, 23 S. D. 174, 120 N. W. 1104.

Exceptions limited.—Such testimony "is allowed, where a guilty intent must be shown, to meet the presumption of accident or mistake. Such is the case of passing counterfeit money, or of filing undervaluing invoices 'with intent to evade' the customs law, or of making false representations 'with intent' to obtain property thereby. When the government has proved that the defendant has passed a counterfeit coin, or has filed an undervaluing invoice, or has made false representations, the case is not fully made out. Every one of these things might be done innocently in one instance, but hardly in many instances. The exception ought not to be extended. Such testimony certainly prejudices the defendant even if the court charges the jury that it is admitted only to show intent. It is not needed in the case of a scheme to defraud. It would be impossible to find the existence of a scheme to defraud without finding also the fraudulent intent of the person who devised it. The moment the fraudulent scheme is established, there is no necessity for resorting to other transactions as in the excepted cases mentioned. No one can have an innocent intent in devising a fraudulent scheme." Marshall *v.* U. S., 197 Fed. 511, 117 C. C. A. 65.

Defendant's connection with one company admissible to prove scheme to defraud the other where they are closely interwoven. Parker *v.* U. S., 203 Fed. 950, 122 C. C. A. 252.

801-58 Coggey *v.* Bird, 209 Fed. 803, 126 C. C. A. 527; Breese *v.* U. S., 203 Fed. 824, 122 C. C. A. 142; Warden *v.* U. S., 204 Fed. 1, 122 C. C. A. 315; Kettenback *v.* U. S., 202 Fed. 377, 126 C. C. A. 505; Schultz *v.* U. S., 200 Fed. 234, 118 C. C. A. 420; Thomas *v.* U. S., 156 Fed. 897, 84 C. C. A. 477; U. S. *v.* Dexter, 154 Fed. 890; Moore *v.* S. (Ala. App.), 64 S. 520; Howell *v.* S. (Ala. App.), 64 S. 522; Roden *v.* S., 5 Ala. App. 247, 59 S. 751; Pugh *v.* S., 4 Ala. App. 144, 58 S. 936 (knowledge that stock was running at large); Cox *v.* S., 162 Ala. 66, 50 S. 398; Crowell *v.* S. (Ariz.), 136 P. 279; Storms *v.* S., 81 Ark. 25, 98 S. W. 678; Setzer *v.* S. (Ark.), 161 S. W. 190; Davis *v.* S. (Ark.), 159 S. W. 1129; P. *v.* Bercovitz, 163 Cal. 636, 126 P. 479; P. *v.* Grubb (Cal. App.), 141 P. 1051; P. *v.* Rial, 23 Cal. App. 713, 139 P. 661; P. *v.* King (Cal. App.), 137 P. 1076; P. *v.* Kizer, 22 Cal. App. 10, 133 P. 516, 521, 134 P. 346; P. *v.* Kirk (Cal. App.), 134 P. 346; P. *v.* Brecker, 20 Cal. App. 205, 127 P. 666; P. *v.* Grow, 16 Cal. App. 147, 116 P. 369; P. *v.* Piner, 11 Cal. App. 542, 105 P. 780 (larceny and burglary); Elliott *v.* P., 56 Colo. 236, 138 P. 39; Rice *v.* P., 55 Colo. 506, 136 P. 74; S. *v.* Brown (Del.), 85 A. 797; Effler *v.* S. (Del.),

85 A. 731; Partridge *v.* U. S., 39 App. Cas. (D. C.) 571; Alsobrook *v.* S., 126 Ga. 100, 54 S. E. 805; Wyatt *v.* S. (Ga. App.), 81 S. E. 802; S. *v.* O'Neil, 24 Ida. 582, 135 P. 60; P. *v.* Viskniskki, 255 Ill. 384, 99 N. E. 621; P. *v.* Baskin, 254 Ill. 509, 98 N. E. 957; P. *v.* Pouchof, 174 Ill. App. 1; Kahn *v.* S. (Ind.), 105 N. E. 385; Eacock *v.* S., 169 Ind. 488, 82 N. E. 1039; S. *v.* Foxton (Ia.), 147 N. W. 347; S. *v.* Johnson, 133 Ia. 38, 110 N. W. 170; S. *v.* Boggs (Ia.), 147 N. W. 934; S. *v.* Brown, 85 Kan. 418, 116 P. 508; Mulligan *v.* C., 144 Ky. 246, 137 S. W. 1062; S. *v.* Morgan, 129 La. 154, 55 S. 747; Avery *v.* S., 121 Md. 229, 88 A. 148; C. *v.* Dow (Mass.), 105 N. E. 995; P. *v.* MacGregor, 178 Mich. 436, 144 N. W. 869; P. *v.* Bullock, 173 Mich. 397, 139 N. W. 43; P. *v.* Neely, 171 Mich. 249, 137 N. W. 150; P. *v.* Hancock, 166 Mich. 654, 132 N. W. 443; S. *v.* Foley, 247 Mo. 607, 153 S. W. 1010; S. *v.* Robinson, 236 Mo. 712, 139 S. W. 140; S. *v.* Lee, 228 Mo. 480, 128 S. W. 987 (keeping gaming devices); S. *v.* Hill, 46 Mont. 24, 126 P. 41; Clark *v.* S., 79 Neb. 482, 113 N. W. 804; S. *v.* Flanagan, 83 N. J. L. 379, 84 A. 1046; S. *v.* Jankowski, 82 N. J. L. 235, 82 A. 311; P. *v.* Grutz, 212 N. Y. 72, 105 N. E. 843; P. *v.* Katz, 209 N. Y. 311, 103 N. E. 305; P. *v.* Freeman, 160 App. Div. 640, 145 N. Y. S. 1061; P. *v.* Furlong, 140 App. Div. 179, 125 N. Y. S. 164; P. *v.* Weber, 130 App. Div. 593, 115 N. Y. S. 453; P. *v.* Weinseimer, 117 App. Div. 603, 102 N. Y. S. 579, *aff.* 190 N. Y. 537, 83 N. E. 1129; Greensboro L. Ins. Co. *v.* Knight, 160 N. C. 592, 76 S. E. 623; Vickers *v.* U. S., 1 Okla. Cr. 452, 98 P. 467 (to show identity and local proximity); S. *v.* Weiss (Or.), 128 P. 448; S. *v.* La Rose, 54 Or. 555, 104 P. 299; C. *v.* Shields, 50 Pa. Super. 1; S. *v.* Allison, 24 S. D. 622, 124 N. W. 747; S. *v.* Jackson, 21 S. D. 494, 113 N. W. 880; Parrish *v.* S., 129 Tenn. 273, 164 S. W. 1174; Hewitt *v.* S. (Tex. Cr.), 167 S. W. 40; Ross *v.* S. (Tex. Cr.), 163 S. W. 433; Currington *v.* S. (Tex. Cr.), 161 S. W. 478; Golden *v.* S. (Tex. Cr.), 160 S. W. 957; Cowart *v.* S. (Tex. Cr.), 158 S. W. 809; Bailey *v.* S. (Tex. Cr.), 155 S. W. 536; Forrester *v.* S. (Tex. Cr.), 152 S. W. 1041; Overstreet *v.* S. (Tex. Cr.), 150 S. W. 630, 899; Jackson *v.* S., 62 Tex. Cr. 541, 138 S. W. 411; Carden *v.* S., 62 Tex. Cr. 545, 138 S. W. 598; Schuh *v.* S., 58 Tex. Cr. 165, 124 S. W. 908; Harvey *v.* S., 57 Tex. Cr. 5, 121 S. W. 501; Harris *v.* S., 55 Tex. Cr. 469, 117 S. W. 839; Tuller *v.* S., 58 Tex. Cr. 571, 126 S. W. 1158; Gorman *v.* S., 52 Tex. Cr. 327, 106 S. W. 384; Lynne *v.* S., 53 Tex. Cr. 375, 111 S. W. 729; S. *v.* Bowen (Utah), 134 P. 623; S. *v.* Pierce, 87 Vt. 144, 88 A. 740; S. *v.* Roby, 83 Vt. 121, 74 A. 638; S. *v.* Louanis, 79 Vt. 463, 65 A. 532; S. *v.* Mobley, 44 Wash. 549, 87 P. 815. *Contra* if no evidence accused acted on system. Rex *v.* Pollard, 19 Ont. L. R. 96.

See Schultz *v.* U. S., 200 Fed. 234, 118 C. C. A. 420; P. *v.* McPherson, 6 Cal. App. 266, 91 P. 1098; P. *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 214n. See also supra, "Intent," 627-6, 630-19; vol. 1, p. 54, n. 2; p. 1012, n. 18; vol. 2, p. 820, n. 20; vol. 3, p. 126, n. 21; p. 129, n. 36; vol. 5, p. 747, n. 14, p. 868, n. 71; vol. 6, p. 676, n. 77, p. 629, n. 23, p. 199, n. 44; vol. 7, p. 683, n. 57, p. 627, n. 6, et seq., p. 560, n. 59, p. 754, n. 36; vol. 8, p. 23, n. 56; vol. 9, p. 228, n. 81; vol. 10, p. 595, n. 34; and supplement thereto.

Evidence objected to, even if the bills could be considered. Dugat *v.* S. (Tex. Cr.), 160 S. W. 376.

802-59 Walsh *v.* U. S., 174 Fed. 615, 98 C. C. A. 461; Wall *v.* S., 2 Ala. App. 157, 56 S. 57; Crowell *v.* S. (Ariz.), 136 P. 279; Ross *v.* S., 92 Ark. 481, 123 S. W. 756; P. *v.* Hatch, 163 Cal. 368, 125 P. 907; P. *v.* Robertson, 6 Cal. App. 514, 92 P. 498; Gassenheimer *v.* U. S., 26 App. Cas. (D. C.) 432; Chamberlain *v.* S., 80 Neb. 812, 115 N. W. 535; S. *v.* Hight, 150 N. C. 817, 63 S. E. 1043; Lawshe *v.* S., 57 Tex. Cr. 32, 121 S. W. 865; In re Evans (Utah), 130 P. 217; S. *v.* Nilson, 56 Wash. 289, 105 P. 829.

See P. *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 264n; vol. 5, p. 145, n. 33; vol. 7, p. 630, n. 12; and supplement thereto.

803-60 Clarke *v.* P., 53 Colo. 214, 125 P. 113; Partridge *v.* U. S., 39 App. Cas. (D. C.) 571; Saffold *v.* S., 11 Ga. App. 329, 75 S. E. 338; P. *v.* Weil, 243 Ill. 208, 90 N. E. 731, 244 Ill. 176, 91 N. E. 112; S. *v.* Wilson, 223 Mo. 156, 122 S. W. 701; P. *v.* Levin, 119 App. Div. 233, 104 N. Y. S. 647; S. *v.* Roberts, 201 Mo. 702, 100 S. W. 484; S. *v.* Sparks, 79 Neb. 504, 113 N. W. 154; Coblentz *v.* S., 84 O. St. 235, 95 N. E.

768; S. *v.* Germain, 54 Or. 395, 103 P. 521.

See P. *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 240n; vol. 3, p. 127, n. 22; vol. 5, p. 747, n. 14; vol. 7, p. 630, n. 14; and supplement thereto.

803-61 Ex parte Schorer, 197 Fed. 67; Ex parte Glaser, 176 Fed. 702, 100 C. C. A. 254; S. *v.* O'Connell, 144 Ia. 559, 123 N. W. 201; S. *v.* Cooper, 83 Kan. 385, 111 P. 428; S. *v.* Chance, 82 Kan. 388, 108 P. 789; S. *v.* Ray (S. C.), 75 S. E. 174; S. *v.* Bowen (Utah), 134 P. 623.

See P. *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 249n; vol. 3, p. 127, n. 24; vol. 5, p. 868, n. 71; vol. 7, p. 630, n. 15, and supplement thereto.

"It may have been months before or months after the forgery on trial. If they serve to illustrate or to show system or make apparent the intent with which this act was committed, then they are germane to this transaction, and are admissible in evidence." Warren *v.* S. (Tex. Cr.), 149 S. W. 130.

804-62 S. *v.* Bowen (Utah), 134 P. 623. See P. *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 257n; vol. 3, p. 746, n. 4, p. 804, n. 62; vol. 7, p. 630, n. 11; and supplement thereto.

804-63 Sapir *v.* U. S., 174 Fed. 219, 98 C. C. A. 227; Piano *v.* S., 161 Ala. 88, 49 S. 803; Woodward *v.* S., 84 Ark. 119, 104 S. W. 1109; P. *v.* Zimmerman, 11 Cal. App. 115, 104 P. 590; Lipsey *v.* P., 227 Ill. 364, 81 N. E. 348; Jeffries *v.* U. S., 7 Ind. Ty. 47, 103 S. W. 761; C. *v.* McGarvey, 158 Ky. 570, 165 S. W. 973; C. *v.* Cohen (Mo.), 162 S. W. 216; S. *v.* Smith, 250 Mo. 350, 157 S. W. 319; Dugat *v.* S. (Tex. Cr.), 160 S. W. 376; Hanks *v.* S., 55 Tex. Cr. 451, 117 S. W. 150; S. *v.* Bowen (Utah), 134 P. 623. See P. *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 269n; vol. 10, p. 673, n. 35, and supplement thereto.

Fact of knowledge as to character of goods received at other times unnecessary to be proved to render evidence admissible. S. *v.* Cohen (Mo.), 162 S. W. 216.

804-64 Rex *v.* Chitson, (1909) 2 K. B. 945 (rape); Smith *v.* S., 8 Ala. App. 187, 62 S. 575; Radford *v.* S., 7 Ga. App. 600, 67 S. E. 707 (adultery); S. *v.* Sysinger, 25 S. D. 110, 125 N. W. 879 (prior acts of intercourse in rape case); Boyd *v.* S., 81 O. St. 239, 90 N. E. 355 (sexual offense); S. *v.* Anderson, 53 Or. 479, 101 P. 198; Jenkins *v.* S., 59 Tex. Cr. 475, 128 S. W. 1113.

See P. *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 227n; supra, "Robbery," 458-6; vol. 7, p. 630, n. 16, and supplement thereto.

805-65 U. S. *v.* Rhodes, 212 Fed. 513; Wells *v.* S. (Ala.), 65 S. 950; Howell *v.* S. (Ala. App.), 64 S. 522; Conwill *v.* S., 8 Ala. App. 82, 62 S. 1006; Granberry *v.* S. (Ala.), 62 S. 52; Kennedy *v.* S. (Ala.), 62 S. 49; Askew *v.* S., 6 Ala. App. 22, 60 S. 455; Autrey *v.* S. (Ark.), 168 S. W. 556; Renfroe *v.* S., 84 Ark. 16, 104 S. W. 542; P. *v.* Smith, 9 Cal. App. 644, 99 P. 1111; Effler *v.* S. (Del.), 85 A. 731; Partridge *v.* U. S., 39 App. Cas. (D. C.), 571; Hightower *v.* S. (Ga. App.), 80 S. E. 684; P. *v.* Gibson, 255 Ill. 302, 99 N. E. 599; S. *v.* Wilcox, 90 Kan. 80, 132 P. 982; May *v.* C., 153 Ky. 141, 154 S. W. 1074; Gross *v.* C., 151 Ky. 87, 151 S. W. 36; Bennett *v.* C., 133 Ky. 452, 118 S. W. 332; S. *v.* Blount, 124 La. 202, 50 S. 12; Avery *v.* S., 121 Md. 229, 88 A. 148; S. *v.* Schrum, 255 Mo. 273, 164 S. W. 202; S. *v.* Anderson, 252 Mo. 83, 158 S. W. 817; P. *v.* Furlong, 140 App. Div. 179, 125 N. Y. S. 164, *aff.* 201 N. Y. 511, 94 N. E. 1096; Tempy *v.* S., 9 Okla. Cr. 446, 132 P. 383; Morris *v.* S., 9 Okla. Cr. 241, 131 P. 731; Green *v.* S., 8 Okla. Cr. 595, 129 P. 683; Hewitt *v.* S. (Tex. Cr.), 167 S. W. 40; Ross *v.* S. (Tex. Cr.), 163 S. W. 433; Lee *v.* S. (Tex. Cr.), 162 S. W. 843; Currington *v.* S. (Tex. Cr.), 161 S. W. 478; Dugat *v.* S. (Tex. Cr.), 160 S. W. 376; Kaufman *v.* S. (Tex. Cr.), 159 S. W. 58; Cowart *v.* S. (Tex. Cr.), 158 S. W. 809; Bowman *v.* S. (Tex. Cr.), 155 S. W. 939; Forrester *v.* S. (Tex. Cr.), 152 S. W. 1041; Overstreet *v.* S. (Tex. Cr.), 150 S. W. 630, 899; Dool *v.* S. (Tex. Cr.), 150 S. W. 626; Doyle *v.* S., 59 Tex. Cr. 39, 126 S. W. 1131; Trimble *v.* S., 57 Tex. Cr. 439, 125 S. W. 40; S. *v.* Bowen (Utah), 134 P. 623; S. *v.* Thuna, 59 Wash. 689, 109 P. 331, 111 P. 768.

See Heike *v.* U. S., 227 U. S. 131, 33 Sup. Ct. 226, 57 L. ed. 450; Brown *v.* S. (Ga. App.), 81 S. E. 590; P. *v.* Moeller, 260 Ill. 375, 103 N. E. 216; Stephens *v.* S. (Tex. Cr.), 154 S. W. 1001; vol. 1, p. 991, n. 55; vol. 6, p. 613, n. 53; p. 678, n. 85; vol. 7, p. 754,

n. 35; vol. 8, p. 264, n. 8; vol. 11, p. 399, notes 71, 74; p. 454, n. 9; and supplement thereto.

Other acts forming one offense admissible as treating other patients where charged with illegally practicing medicine. Mueller *v.* S. (Tex. Cr.), 153 S. W. 1142.

805-66 P. *v.* Courtright, 10 Cal. App. 522, 102 P. 542; Hall *v.* S., 7 Ga. App. 115, 66 S. E. 390; Parrish *v.* C., 136 Ky. 77, 123 S. W. 339; S. *v.* Anderson, 120 La. 331, 45 S. 267; S. *v.* Sylvester, 40 Mont. 79, 105 P. 86; P. *v.* Morse, 196 N. Y. 306, 89 N. E. 816; Hines *v.* S., 57 Tex. Cr. 216, 123 S. W. 411; Nelson *v.* S., 51 Tex. Cr. 349, 101 S. W. 1012; Schoette *v.* Drake, 139 Wis. 18, 120 N. W. 393 (false imprisonment; other violations of ordinance than that for which arrest without warrant made, competent). See P. *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 308n. *Contra* if positive evidence to support state in cause on trial. Gardner *v.* S., 55 Tex. Cr. 400, 117 S. W. 148.

806-67 Heike *v.* U. S., 227 U. S. 131, 33 Sup. Ct. 226, 57 L. ed. 450; Schultz *v.* U. S., 200 Fed. 234, 118 C. C. A. 420; Griggs *v.* U. S., 158 Fed. 272, 85 C. C. A. 596; Coates *v.* S., 5 Ala. App. 182, 59 S. 323; Martin *v.* S., 2 Ala. App. 175, 56 S. 64; Howle *v.* S., 1 Ala. App. 228, 56 S. 37; Allison *v.* S., 1 Ala. App. 206, 55 S. 453; Crowell *v.* S. (Ariz.), 136 P. 279; Levy *v.* Ty., 13 Ariz. 425, 115 P. 415; Boyle *v.* S. (Ark.), 161 S. W. 1049; P. *v.* Kafoury, 16 Cal. App. 718, 117 P. 938; P. *v.* Harben, 5 Cal. App. 29, 91 P. 398; Charles *v.* S., 58 Fla. 17, 50 S. 419; Frank *v.* S., 141 Ga. 243, 80 S. E. 1016; Cooper *v.* S., 12 Ga. App. 561, 77 S. E. 878; P. *v.* Covitz, 262 Ill. 514, 104 N. E. 887; Dotterer *v.* S., 172 Ind. 357, 88 N. E. 689; S. *v.* O'Connell, 144 Ia. 559, 123 N. W. 201; Avery *v.* S., 121 Md. 229, 88 A. 148; C. *v.* Dow (Mass.), 105 N. E. 995; P. *v.* MacGregor, 178 Mich. 436, 144 N. W. 869; S. *v.* Briggs, 122 Minn. 493, 142 N. W. 823; S. *v.* Hill, 46 Mont. 24, 126 P. 41; S. *v.* Hall, 45 Mont. 498, 125 P. 639; S. *v.* Newman, 34 Mont. 434, 87 P. 462; S. *v.* Routzahn, 81 Neb. 133, 115 N. W. 759; S. *v.* Deliso, 75 N. J. L. 808, 69 A. 218; Ty. *v.* West, 14 N. M. 546, 99 P. 343 (intent not involved); P. *v.* Grutz, 212 N. Y. 72, 105 N. E. 843; P. *v.* Duffy, 212 N. Y. 57, 105 N. E. 839; P. *v.* Neff, 191 N. Y. 210, 83 N. E. 970; S. *v.* Boynton, 155 N. C. 456, 71 S. E. 341; Tucker *v.* S., 7 Okla. Cr. 634, 124 P. 1134, 125 P. 1089; C. *v.* Shields, 50 Pa. Super. 1; Cole *v.* S. (Tex. Cr.), 162 S. W. 880; Dugat *v.* S. (Tex. Cr.), 160 S. W. 376; Kaufman *v.* S. (Tex. Cr.), 159 S. W. 58; Creech *v.* S. (Tex. Cr.), 158 S. W. 277; Bowman *v.* S. (Tex. Cr.), 155 S. W. 939; Wilson *v.* S. (Tex. Cr.), 154 S. W. 571; Misher *v.* S. (Tex. Cr.), 152 S. W. 1049; Forrester *v.* S. (Tex. Cr.), 152 S. W. 1041; Byrd *v.* S. (Tex. Cr.), 151 S. W. 1068; Germany *v.* S., 62 Tex. Cr. 276, 137 S. W. 130; Parshall *v.* S., 62 Tex. Cr. 177, 138 S. W. 759; Wright *v.* S., 56 Tex. Cr. 353, 120 S. W. 458; Holland *v.* S., 51 Tex. Cr. 142, 101 S. W. 1005; S. *v.* Bowen (Utah), 134 P. 623; S. *v.* Shea, 78 Wash. 342, 139 P. 203; S. *v.* Hazzard (Wash.), 134 P. 514.

See P. *v.* Grutz, 212 N. Y. 72, 105 N. E. 843; P. *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 218n; vol. 1, p. 990, n. 54; vol. 3, p. 451, n. 59; vol. 5, p. 749, n. 16; vol. 6, p. 677, notes 79, 82; vol. 10, p. 673, n. 35; and supplement thereto.

Comp. Curtis *v.* S., 52 Tex. Cr. 606, 108 S. W. 380.

Subsequent offenses may be shown. P. *v.* Duffy, 212 N. Y. 57, 105 N. E. 839.

Collection of bribes by accused's predecessor admissible as showing a scheme. P. *v.* Duffy, 212 N. Y. 57, 105 N. E. 839.

If committed before scheme entered upon inadmissible. P. *v.* Grutz, 212 N. Y. 72, 105 N. E. 843.

Commission of other crimes of same nature by others shown if accused connected with them and they form part of surrounding circumstances. S. *v.* Hogan, 145 Ia. 352, 124 N. W. 178.

807-69 S. *v.* Kaufman, 125 Minn. 315, 146 N. W. 1115.

Lascivious and lewd disposition of accused shown by evidence of prior acts of like nature. S. *v.* Neubauer, 145 Ia. 337, 124 N. W. 312.

807-70 Crowell *v.* S. (Ariz.), 136 P. 279; Effler *v.* S. (Del.), 85 A. 731; P. *v.* Giddings, 159 Mich. 523, 124 N. W. 546; P. *v.* Hoffman, 142 Mich. 531, 105 N. W. 838; S. *v.* Sparks, 79 Neb. 511, 114 N. W. 598, 79 Neb. 504, 113 N. W. 154; S. *v.* Mor, 85 N. J. L. 558, 89 A. 755; P. *v.* Grutz, 212 N. Y. 72, 105 N. E. 843; C. *v.* Valverdi, 218 Pa. 7,

66 A. 877; Penrice *v.* S. (Tex. Cr.), 105 S. W. 797. See P. *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, 300n.

Explanation.—Transactions proved by state explained; but explanations must be limited thereto. S. *v.* Germain, 54 Or. 395, 103 P. 521.

Limitation to use of such evidence. Court should instruct as to purpose for which such evidence received on request; and prosecution should state purpose for which offered. Jaynes *v.* P., 44 Colo. 535, 99 P. 325.

808-72 Epstein C. Co. *v.* Solvinsky, 110 N. Y. S. 351. See Hodges *v.* Hill, 175 Mo. App. 441, 161 S. W. 633.

810-73 Sacchi *v.* Co., 13 Cal. App. 72, 108 P. 885; Evansville, etc. Co. *v.* Montgomery, 50 Ind. App. 528, 98 N. E. 731; Cincinnati, etc. R. Co. *v.* Ashcraft (Ky.), 116 S. W. 295; Penn. R. Co. *v.* Co., 111 Md. 356, 73 A. 571; Kinston, etc. Mills *v.* Hosiery Co., 154 N. C. 462, 70 S. E. 910.

Animals.—Former acts of viciousness. See vol. 1, p. 894, n. 19, and supplement thereto.

Absence of complaint about other canned goods prepared by same company inadmissible as showing good quality of goods in question. Reed G. Co. *v.* Miller, 36 Okla. 134, 128 P. 271.

811-75 Corbin & Co. *v.* U. S., 181 Fed. 296, 104 C. C. A. 278; Home I. F. *v.* Co., 157 Ala. 603, 48 S. 117; Erie City I. Wks. *v.* Noble (Tex. Civ.), 124 S. W. 172; Dixon *v.* Watson, 52 Tex. Civ. 412, 115 S. W. 100.

812-76 Oregon Co. *v.* Roe, 176 Fed. 715, 100 C. C. A. 269; Rondeau *v* Sayles, 30 R. I. 228, 74 A. 785; Odegard *v.* Co., 130 Wis. 659, 110 N. W. 809. See vol. 8, p. 926, n. 12, and supplement thereto.

812-77 Beach *v.* Huntsman, 42 Ind. App. 205, 85 N. E. 523, *cit.* text; Berky *v.* S. Co., 178 Mich. 586, 146 N. W. 247. *Comp.* Hammerschlag Mfg. Co. *v.* Co., 154 Fed. 326, 83 C. C. A. 198.

815-81 Winona *v.* Botzet, 169 Fed. 321, 94 C. C. A. 563. See vol. 8, p. 928, n. 16, and supplement thereto.

That other horses were not frightened admissible in rebuttal. Kent *v.* Patterson, 80 Misc. 560, 141 N. Y. S. 932. See vol. 6, p. 500, n. 72, and supplement thereto.

816-83 Florida E. C. R. Co. *v.* Smith, 61 Fla. 218, 55 S. 871; P. *v.* R. Co., 140 N. Y. S. 902; Armfield *v.* R. Co., 162 N. C. 24, 77 S. E. 963; Aman *v.* Lumb. Co., 160 N. C. 369, 75 S. E. 931; Chenoweth *v.* Co., 53 Or. 111, 99 P. 86. See vol. 8, p. 933, n. 34; vol. 10, p. 548, n. 83, and supplement thereto.

Emission of sparks at other times. St. Louis, etc. R. Co. *v.* McGrath (Tex. Civ.), 160 S. W. 444.

Question whether witness had heard of another fire near track set by a locomotive is competent. Louisville & N. R. Co. *v.* Stanley (Ala.), 65 S. 39.

816-84 See vol. 10, p. 549, n. 86, and supplement thereto.

817-87 Northern P. R. Co. *v.* Mentzer, 214 Fed. 10 (C. C. A.); Canadian N. R. Co. *v.* Olson, 201 Fed. 859, 120 C. C. A. 197; Canadian N. R. Co. *v.* Akre, 200 Fed. 955, 119 C. C. A. 250; So. R. Co. *v.* Black, 141 Ga. 35, 80 S. E. 323; Osburn *v.* R. Co., 15 Ida. 478, 98 P. 627 (where shown different engines of similar construction); Barker *v.* R. Co., 89 Kan. 573, 132 P. 156; St. Louis, etc. R. Co. *v.* Shannon, 25 Okla. 754, 108 P. 401 (if practical similarity in construction shown); Taffe *v.* Co., 60 Or. 177, 117 P. 989; Oakdale B. Co. *v.* R. Co., 244 Pa. 463, 91 A. 358; St. Louis, etc. R. Co. *v.* Benjamin (Tex. Civ.), 161 S. W. 379; Texas, etc. R. Co. *v.* Co. (Tex. Civ.), 137 S. W. 401. See Texas M. R. Co. *v.* Ray (Tex. Civ.), 168 S. W. 1013; vol. 10, p. 551, n. 94, and supplement thereto. *Contra,* Chenoweth *v.* Co., 53 Or. 111, 99 P. 86.

817-88 Nussbaum *v.* R. Co. (Tex. Civ.), 149 S. W. 1083. *Comp.* Texas & P. R. Co. *v.* Rosborough, 209 Fed. 205, 126 C. C. A. 299. See vol. 10, p. 555, n. 99.

818-90 Town *v.* Fairfield, 25 Colo. App. 187, 136 P. 471 (to show knowledge); Petty *v.* Stebbins, 164 Ill. App. 439 (to show knowledge); O'Mara *v.* R. Co., 140 Ia. 190, 118 N. W. 377; Chesapeake & O. R. Co. *v.* Meyers, 150 Ky. 841, 151 S. W. 19; Minica *v.* Cooperage Co., 175 Mo. App. 91, 157 S. W. 1006; Pittsburgh *v.* Dooley, 32 O. C. C. 655. See vol. 8, p. 933, n. 33.

To show possibility of plaintiff's injury in manner claimed. See vol. 7, p. 376, n. 6, and supplement thereto.

818-91 Aurora *v.* Plummer, 122 Ill. App. 143.

818-92 See Brucker *v.* Co., 30 Ky. L. R. 1162, 100 S. W. 240.

819-93 Chicago Mill & L. Co. *v.* Ross, 99 Ark. 597, 139 S. W. 632; Lowe

v. Catering Co., 158 Ill. App. 458; Yore *v.* Newton, 194 Mass. 250, 80 N. E. 472; Klein *v.* Burleson, 122 N. Y. S. 752. See Leonhart *v.* Assn., 5 Cal. App. 19, 89 P. 847; vol. 2, p. 955, n. 39, and supplement thereto.

819-97 *Comp.* Funston *v.* Hoffman, 232 Ill. 360, 83 N. E. 917.

819-98 Klein *v.* Burleson, 138 App. Div. 405, 122 N. Y. S. 752, previous collision to show possibility for occurrence without leaving marks on one vehicle.

820-99 Vautier *v.* Refining Co., 231 Pa. 8, 79 A. 814.

820-2 City of Dalton *v.* Humphries, 139 Ga. 556, 77 S. E. 790; Guilfoil Con. Co. *v.* Clark (Ind. App.), 99 N. E. 777; Dorrance *v.* R. Co., 175 Mich. 198, 141 N. W. 697, *quot.* text; S. *v.* Fish Co. (Wash.), 130 P. 499.

Scales, condition long afterwards inadmissible. Davis Bros. *v.* R. Co., 168 Ill. App. 621.

Condition of spark arrester, three days afterwards, too remote. Sadieville M. Co. *v.* R. Co., 153 Ky. 55, 154 S. W. 396.

820-3 Dorrance *v.* R. Co., 175 Mich. 198, 141 N. W. 697, quot. text.

820-4 Dorrance *v.* R. Co., supra, quot. text.

820-5 Dorrance *v.* R. Co., 175 Mich. 198, 141 N. W. 697, *quot.* text. See Walker *v.* Williamson, 205 Mass. 514, 91 N. E. 885.

820-6 Daniels *v.* Stock, 23 Colo. App. 529, 130 P. 1031; Howard *v.* Osage City, 89 Kan. 205, 132 P. 187; Burton *v.* Kansas City (Mo. App.), 168 S. W. 889; Lamb *v.* R. Co., 217 Pa. 564, 66 A. 762 (condition of roof); Dowler *v.* Oil Co., 71 W. Va. 417, 76 S. E. 845. See vol. 6, p. 491, n. 39; vol. 10, p. 492, n. 2, and supplement thereto.

To show notice only.—Brodie *v.* City, 164 Ill. App. 335; Van Cleave *v.* City, 165 Ill. App. 234.

821-8 Vaughan's S. S. *v.* Stringfellow, 56 Fla. 708, 48 S. 410; Aurora *v.* Plummer, 122 Ill. App. 143; Williams *v.* Holbrook, 216 Mass. 239, 103 N. E. 633; Hinton *v.* R. Co., 83 Neb. 835, 120 N. W. 431; Samuels & Co. *v.* R. Co. (Tex. Civ.), 150 S. W. 291; Puget Sound E. R. Co. *v.* Co., 76 Wash. 364, 136 P. 117. See Griffith *v.* Denver, 55 Colo. 37, 132 P. 57; Newton *v.* Fruit Co., 155 Ky. 440, 159 S. W. 968; vol. 4, p. 27, n. 62; vol. 8, p. 932, n. 32; and supplement thereto.

SODOMY

826-3 S. *v.* Gage, 139 Ia. 401, 116 N. W. 596; C. *v.* Poindexter, 133 Ky. 720, 118 S. W. 943; Moody *v.* S., 57 Tex. Cr. 76, 121 S. W. 1117.

827-4 S. *v.* Gage, supra.

Testimony as to appearance of clothing and substance thereon admissible. S. *v.* Morasco (Utah), 128 P. 571.

827-5 S. *v.* Beaudin, 76 Wash. 306, 136 P. 137.

828-8 C. *v.* Poindexter, 133 Ky. 720, 118 S. W. 943; S. *v.* Wilkens, 221 Mo. 444, 120 S. W. 22.

829-11 Jury may convict on uncorroborated testimony of accomplice. Republic *v.* Edwards, 11 Haw. 571.

830-14 S. *v.* Beaudin, 76 Wash. 306, 136 P. 137.

831-22 Similar prior offenses proved to show lascivious and lewd disposition. S. *v.* Neubauer, 145 Ia. 337, 124 N. W. 312.

Other acts between same parties admissible, but if with a different person inadmissible. S. *v.* Stark, 65 Or. 178, 132 P. 512.

832-23 Profert of animal refused. Richardson *v.* S., 49 Tex. Cr. 391, 94 S. W. 1016.

May produce physician to explain other causes productive of same condition of child's body. S. *v.* Beaudin, 76 Wash. 306, 136 P. 137.

832-24 See vol. 3, p. 7, n. 13, and supplement thereto.

SPACE AND DISTANCE

Expert opinion as to distances at which gases will ignite, 840-26.

833-1 Naylor *v.* Adams, 15 Cal. App. 353, 114 P. 997; Chrystal *v.* Level, 144 Ill. App. 533 (within city).

834-4 Speers *v.* S., 55 Tex. Cr. 368, 116 S. W. 568.

836-9 St. Louis, etc. R. Co. *v.* Flinn, 88 Ark. 484, 115 S. W. 142; Gray *v.* R. Co., 143 Ia. 268, 121 N. W. 1097 (ability of witness to see person injured).

836-10 Hines *v.* Co., 203 Mass. 288, 89 N. E. 628, dissimilarity of conditions bear rather on weight of testimony than admissibility.

837-15 P. *v.* Helm, 152 Cal. 532, 93 P. 99 (opinion of width of bicycle tracks admissible); Augusta R. E. Co *v.* Arthur, 3 Ga. App. 513, 60 S. E.

213; Parker *v.* R. Co., 84 Vt. 329, 79 A. 865. See Gardner *v.* R. Co., 223 Mo. 389, 122 S. W. 1068.

837-16 Buxton *v.* Ainsworth, 153 Mich. 315, 116 N. W. 1094.

That platform space would be crowded by given number. Beverly *v.* R. Co., 194 Mass. 450, 80 N. E. 507; Standley *v.* R. Co., 121 Mo. App. 537, 97 S. W. 244 (opinion as to whether space left by bridge large enough to carry off water, competent). *Comp.* S. *v.* Hunskor, 16 N. D. 420, 114 N. W. 996.

838-18 Cross-examiner may not ask witness testifying to distance between two objects distance between two other objects. O'Shaughnnessy *v.* R. Co., 144 Ill. App. 174.

838-19 New York, etc. R. Co. *v.* Wilson, 109 Va. 754, 64 S. E. 1060.

838-20 Louisville & N. R. Co. *v.* Johnson, 162 Ala. 665, 50 S. 300; Louisville & N. R. Co. *v.* Fitzgerald, 161 Ala. 397, 49 S. 860; Arkansas R. Co. *v* Sanders, 81 Ark. 604, 99 S. W. 1109.

Testimony must be predicated on similarity of conditions. Currie *v.* R. Co., 81 Conn. 383, 71 A. 356.

839-21 See Chicago C. R. Co. *v.* Hagenback, 228 Ill. 290, 81 N. E. 1014; Farese *v.* R. Co., 78 N. J. L. 499, 74 A. 458.

839-23 Chesapeake & O. R. Co. *v.* Lang, 135 Ky. 76, 121 S. W. 993. See Hoagland *v.* Canfield, 160 Fed. 146. *Contra,* Lynch *v.* R. Co., 208 Mo. 1, 106 S. W. 68.

840-25 Lynch *v.* R. Co., supra; Scholl *v.* Grayson, 147 Mo. App. 652, 127 S. W. 415 (automobile); Yergy *v.* R. Co., 39 Mont. 213, 102 P. 310. See vol. 5, p. 600, n. 79 and supplement thereto.

840-26 Expert opinion as to distances at which gases will ignite. Waters-P. O. Co. *v.* Snell, 47 Tex. Civ. 413, 106 S. W. 170.

841-27 Canerdy *v.* R. Co., 156 Mich. 211, 120 N. W. 582.

SPECIAL ASSESSMENT

Assessment resisted on ground of prior improvement, 882-10.

846-1 Essen *v.* Cape May, 77 N. J. L. 361, 72 A. 49.

847-3 City *v.* Henningsen, 109 Minn. 132, 123 N. W. 289.

847-4 Eagle *v.* Board, 91 Ark. 378, 121 S. W. 340; Hildreth *v.* Longmont, 47 Colo. 79, 105 P. 107; Cosgrove *v.* Chicago, 235 Ill. 358, 85 N. E. 599; P. *v.* Hulin, 237 Ill. 122, 86 N. E. 666; Martindale *v.* Rochester, 171 Ind. 250, 86 N. E. 321; Andre *v.* Burlington, 141 Ia. 65, 117 N. W. 1082; O'Connell *v.* Malden, 204 Mass. 118, 90 N. E. 530; In re Avenue D., 122 App. Div. 416, 106 N. Y. S. 889, 192 N. Y. 575, 84 N. E. 956.

848-5 New York, etc. R. Co. *v.* Hammond, 170 Ind. 493, 83 N. E. 244, on appeal. *Comp.* In re East 136th St., 127 App. Div. 672, 111 N. Y. S. 916.

848-6 Kirtland *v.* Parker, 76 N. J. L. 217, 68 A. 913; Seattle *v.* Felt, 50 Wash. 323, 97 P. 226.

849-7 P. *v.* Gunzenhauser, 237 Ill. 262, 86 N. E. 669; Hughes *v.* Portland, 53 Or. 370, 100 P. 942. See P. *v.* Board, 127 App. Div. 851, 111 N. Y. S. 924. Assessment presumed on basis of benefits. See New York, etc. R. Co. *v.* Hammond, 170 Ind. 493, 83 N. E. 244.

852-12 City must show compliance with law. Applegate *v.* Portland, 53 Or. 552, 99 P. 890.

Certificate made conclusive evidence. P. *v.* Board, 127 App. Div. 851, 111 N. Y. S. 924.

852-13 Bellwood *v.* Co., 238 Ill. 52, 87 N. E. 66.

853-16 See Chicago, etc. T. Co. *v.* Oak Park, 225 Ill. 9, 80 N. E. 42.

854-17 Record must show objections to proposed reassessment heard and determined. Hughes *v.* Portland, 53 Or. 370, 100 P. 942.

858-37 City *v.* Henningsen, 109 Minn. 132, 123 N. W. 289.

859-39 But see New York, etc. R. Co. *v.* Hammond, 170 Ind. 493, 83 N. E. 244.

862-47 East St. Louis *v.* R. Co., 238 Ill. 296, 87 N. E. 407 (depth of property on one side street as compared with other side); City of Louisville *v.* Benedict, 147 Ky. 391, 144 S. W. 43.

864-50 East St. Louis *v.* R. Co., supra.

866-54 Form of inquiry is what proportion assessment on given tract bears to assessment imposed on all other tracts, and not how it compares with assessment on any specified lot. East St. Louis *v.* R. Co., supra.

869-63 See Snydacker *v.* Hammond, 225 Ill. 154, 80 N. E. 93.

876-95 East St. Louis *v.* R. Co., supra.

877-97 If some notice is given and authorities find it sufficient, matter not

questionable in suit to foreclose assessment lien. Daly *v.* Higman, 43 Ind. App. 357, 87 N. E. 669. See Hartford *v.* Poindexter, 84 Conn. 121, 79 A. 79.

879-5 Improvement Dist. No. 1 *v.* R. Co., 99 Ark. 508, 139 S. W. 308; McCaleb *v.* Dreyfus, 156 Cal. 204, 103 P. 924; Reclamation Dist. *v.* Sherman, 11 Cal. App. 399, 105 P. 277 (regularity of meetings); City *v.* Marsh, 250 Ill. 512, 95 N. E. 473; Chicago *v.* Wilshire, 238 Ill. 317, 87 N. E. 383; Clark *v.* Chicago, 229 Ill. 363, 82 N. E. 370; Wiemers *v.* P., 225 Ill. 82, 80 N. E. 68; Logansport *v.* Webster (Ind. App.), 91 N. E. 36; In re Johnson D. Dist., 141 Ia. 380, 118 N. W. 380; Salem *v.* Young (Mo. App.), 125 S. W. 857; City *v.* Ettenson, 120 Mo. App. 215, 96 S. W. 701.

880-6 Chicago *v.* Wildman, 240 Ill. 215, 88 N. E. 559 (lack of title in city); City *v.* Ettenson, 120 Mo. App. 215, 96 S. W. 701.

Reasonableness of ordinance, presumed. Marengo *v.* Eichler, 245 Ill. 47, 91 N. E. 758. See supra, "Municipal Corporations," 809-21, 22.

880-9 Osborne *v.* Board, 94 Ark. 563, 128 S. W. 357; Board *v.* Offenhauser, 84 Ark. 257, 105 S. W. 265; Beckett *v.* Morse, 4 Cal. App. 228, 87 P. 408; Flinn *v.* Strauss, 4 Cal. App. 245, 87 P. 414; City *v.* Ettenson, 120 Mo. App. 215, 96 S. W. 701.

882-10 Where owner resists payment on ground of prior paving he must show improvement permanent and by authority. Chester *v.* Evans, 32 Pa. Super. 641.

882-12 Reclamation Dist. *v.* Sherman, 11 Cal. App. 399, 105 P. 277.

883-16 See Beckett *v.* Portland, 53 Or. 169, 99 P. 659.

883-17 Probert *v.* Inv. Co., 155 Mo. App. 344, 137 S. W. 41.

885-28 Bambriek Bros. Const. Co. *v.* McCormick, 157 Mo. App. 198, 137 S. W. 43.

886-36 Chicago *v.* MacChesney, 240 Ill. 174, 88 N. E. 560.

888-49 Findings of authorities of sufficiency of petition, presumptive evidence. Hedge *v.* Des Moines, 141 Ia. 4, 119 N. W. 276.

889-55 Enactment of ordinance, need not be shown if no issue concerning it, or if it is part of petition pursuant to statute. Marengo *v.* Eichler, 245 Ill. 47, 91 N. E. 758.

890-60 Assessment roll admissible, and supportable by testimony in rebuttal. Carbondale *v.* Walker, 240 Ill. 18, 88 N. E. 296.

A tax bill makes a prima facie case for the plaintiff. Michel *v.* Taylor, 143 Mo. App. 683, 127 S. W. 949.

Tax bills presumptive evidence of nonpayment of taxes against persons named. Jaicks *v.* Merrill, 201 Mo. 91, 98 S. W. 753. Not against others. Parker W. Co. *v.* Cole, 137 Mo. App. 530, 120 S. W. 118. They are presumptive evidence land on which work done a street. Parker W. Co. *v.* Cole, supra.

892-70 See Berkeley D. Co. *v.* Marx, 10 Cal. App. 410, 102 P. 278.

892-75 Inquiry into business experience of officer making assessment, improper. Marengo *v.* Eichler, 245 Ill. 47, 91 N. E. 758.

895-80 Defense indicated must be made before assessment confirmed. Woodlawn *v.* Durham, 162 Ala. 565, 50 S. 356.

896-83 Existence of lease of premises, immaterial. Pittsburg *v.* Newell, 223 Pa. 420, 72 A. 793.

897-92 Exemption of property from assessment shown by parol to have been consideration for the conveyance of land to city. Scovel *v.* Detroit, 159 Mich. 95, 123 N. W. 569.

898-95 Flinn *v.* Strauss, 4 Cal. App. 245, 87 P. 414; P. *v.* Martin, 243 Ill. 284, 90 N. E. 699; Weimers *v.* P., 225 Ill. 82, 80 N. E. 68; Halsey *v.* Richardson, 139 Mo. App. 157, 122 S. W. 326.

904-8 Osborne *v.* Board, 94 Ark. 563, 128 S. W. 357; Oregon S. L. R. Co. *v.* Dist., 16 Ida. 578, 102 P. 904; Knowles *v.* Dist., 16 Ida. 217, 101 P. 81 (water assessment); Glen Falls *v.* McMillen, 62 Misc. 134, 116 N. Y. S. 49; Houck *v.* Roseburg, 56 Or. 238, 108 P. 186.

905-9 Conclusive presumption of benefit to land of individuals arises from inclusion in irrigation district by statute. Reclamation Dist. *v.* Sherman, 11 Cal. App. 399, 105 P. 277.

908-27 East St. Louis *v.* Davis, 233 Ill. 553, 84 N. E. 674; Brigham *v.* Hickman, 136 Mo. App. 216, 116 S. W. 449.

908-28 Hughes *v.* Portland, 53 Or. 370, 100 P. 942.

909-30 Hughes *v.* Portland, 53 Or. 370, 100 P. 942. *Comp.* Oskaloosa *v.* Co., 141 Ia. 236, 119 N. W. 736.

910-32 East St. Louis *v.* Davis, 233 Ill. 553, 84 N. E. 674; Hedge *v.* Des Moines, 141 Ia. 4, 119 N. W. 276.

911-37 Board *v.* Offenhauser, 84 Ark. 257, 105 S. W. 265, burden upon at-

tacking party of showing ordinance not duly passed.

913-48 Jones *v.* Plummer, 137 Mo. App. 337, 118 S. W. 109.

918-79 Conclusive under statute in absence of fraud or bad faith. Roberts *v.* Sandusky, 158 Mich. 521, 123 N. W. 39. See Granite, etc. Co. *v.* Town, 76 N. H. 1, 79 A. 25.

918-80 Reclamation Dist. No. 730 *v.* Hershey, 160 Cal. 692, 117 P. 904.

919-85 Roberts *v.* Sandusky, 158 Mich. 521, 123 N. W. 39.

920-94 East St. Louis *v.* Davis, 233 Ill. 553, 84 N. E. 674.

SPECIFIC PERFORMANCE

925-5 No presumption contract void because made by person of over eighty years without advice. Ellis *v.* Keeler, 126 App. Div. 343, 110 N. Y. S. 542.

926-6 Jones *v.* Patrick, 145 Fed. 440; German S. & L. Soc. *v.* McLellan, 154 Cal. 710, 99 P. 194; Charbonier *v.* Arbona, 63 Fla. 384, 57 S. 887; McKnight *v.* Co., 147 Ky. 535, 145 S. W. 377; Ross *v.* Ross, 148 Ia. 729, 127 N. W. 1034; Hespin *v.* Wendeln, 85 Neb. 172, 122 N. W. 852; Krah *v.* Wassmer, 75 N J. Eq. 109, 71 A. 404; McNichol *v.* Townsend, 73 N. J. Eq. 276, 67 A. 938; James *v.* Co., 221 Pa. 634, 70 A. 885; Phelan *v.* Neary, 22 S. D. 265, 117 N. W. 142; Roberts *v.* Braffett, 33 Utah 51, 92 P. 789; Creecy *v.* Grief, 108 Va. 320, 61 S. E. 769; Colonna, etc. Co. *v.* Colonna, 108 Va. 230, 61 S. E. 770; Smith *v.* Peterson, 71 W. Va. 364, 76 S. E. 804; Cooper *v.* Cooper, 65 W. Va. 712, 64 S. E. 927; Kipp *v.* Laun, 146 Wis. 591, 131 N. W. 418.

See Bradley Co. *v.* Robbins, 7 Ind. Ty. 94, 103 S. W. 777; Bradley *v.* Haven, 208 Mass. 300, 94 N. E. 268; Boam *v.* Greenman, 147 Mich. 106, 110 N. W. 508; Koch *v.* Fischer, 122 Minn. 123, 142 N. W. 18; Ross *v.* Blunt (Tex. Civ.), 166 S. W. 913. And see 943-91.

To show plaintiff understood contract. Smith *v.* Johnson, 30 S. D. 200, 138 N. W. 18.

Evidence insufficient.—Grant *v.* Derrick, 134 Ga. 644, 68 S. E. 422.

927-8 Turn Verein Eiche *v.* Kionka, 255 Ill. 392, 99 N. E. 684; Joffrion *v.* Gumbel, 123 La. 391, 48 S. 1007; Hall *v.* Hyle, 76 Misc. 71, 136 N. Y. S. 887; Roberts *v.* Braffett, 33 Utah 51, 92 P. 789; Colonna Co. *v.* Colonna, 108 Va. 230, 61 S. E. 770.

927-10 Turn Verein Eiche *v.* Kionka, 255 Ill. 392, 99 N. E. 684; Powell *v* Huey, 241 Ill. 132, 89 N. E. 299; Germer *v.* Gambill, 140 Ky. 469, 131 S. W. 268; Stafford *v.* Richard, 121 La. 76, 46 S. 107. See Horn *v.* Graffagnino, 121 La. 263, 46 S. 305; In re Grogan's Est., 38 Mont. 540, 100 P. 1044; Pennington *v.* Pennington, 89 S. C. 277, 71 S. E. 825; Spencer *v.* Lyman, 27 S. D. 471, 131 N W. 802; Percy *v.* Bk., 110 Va. 129, 65 S. E. 475; Hagan *v.* Taylor, 110 Va. 9, 65 S. E. 487 (right to relief); Learned *v.* Iman, 50 Wash. 701, 97 P. 449 (applying rule to most of preceding propositions).

927-11 Davidson *v.* Slack, 143 Ia. 104, 120 N. W. 109.

927-12 Sulk *v.* Tumulty, 77 N. J. Eq. 97, 75 A. 757; Triplett *v.* Williams, 149 N. C. 394, 63 S. E. 79. But see Witte *v.* Koerner, 123 App. Div. 824, 108 N. Y. S. 560.

Burden shifts.—Van Gundy *v.* Shewey, 90 Kan. 253, 133 P. 720, 47 L. R. A. (N. S.) 645.

928-13 Indianapolis N. T. Co. *v.* Essington (Ind. App.), 99 N. E. 757, 100 N. E. 765; Abrahams *v.* King, 111 Md. 104, 73 A. 694.

928-15 Ames *v.* Ames, 46 Ind. App. 597, 91 N. E. 509; Shoop *v.* Burnside, 78 Kan. 871, 98 P. 202.

929-17 Vaughan *v.* Callaway, 94 Ark. 621, 126 S. W. 1067; Branch *v.* Klatt, 173 Mich. 31, 138 N. W. 263.

929-18 Branch *v.* Klatt, 173 Mich. 31, 138 N. W. 263.

929-22 **Circumstantial evidence** admissible to prove contract. Willis *v.* Zorger, 258 Ill. 574, 101 N. E. 963.

929-26 Abstract of title and ex parte affidavits admissible to prove compliance with contract and show who decedent's heirs. Harrell *v.* Neef, 80 Kan. 348, 102 P. 838.

930-32 Carr *v.* Howell, 154 Cal. 372, 97 P. 885; Allen *v.* Kitchen, 16 Ida. 133, 100 P. 1052; Spongberg *v.* Bk., 15 Ida. 671, 99 P. 712; Zelleken *v.* Lynch, 80 Kan. 746, 104 P. 563; Bateman *v.* Riley (N. J. Eq.), 73 A. 1006; Morrison *v.* Brenmohl, 137 App. Div. 4, 122 N. Y. S. 81.

931-35 Rudisill *v.* Whitener, 149 N. C. 439, 63 S. E. 101.

931-37 Carr *v.* Vance, 102 Ark. 679, 144 S. W. 528; Allen *v.* Kitchen, 16 Ida. 133, 100 P. 1052.

932-40 Parol agreement between defendant and former owner of land,

though not made in plaintiff's presence, proved if shown latter informed thereof and he and such owner subsequently acted thereon. Bashinski *v.* Swint, 133 Ga. 38, 65 S. E. 152.

932-43 *Contra* if within the statute of frauds. Safe Deposit & Trust Co. *v.* Co., 234 Pa. 100, 83 A. 54.

933-44 Newell *v.* Lamping, 45 Wash. 304, 88 P. 195.

933-46 Dalby *v.* Maxfield, 244 Ill. 214, 91 N. E. 420.

934-48 Worth *v.* Watts, 74 N. J. Eq. 609, 70 A. 357.

Greatest strictness between allegata and probata required in cases relating to realty. Jones *v.* Mahone, 157 Ala. 105, 47 S. 195.

934-49 Downing *v.* Ernst, 40 Colo. 137, 92 P. 230.

934-51 Competent to prove the oral agreement and everything done thereunder. Gilfillan *v.* Schaller, 32 S. D. 638, 144 N. W. 133.

Original contract admissible.—See Tolar *v.* Dev. Co. (Tex. Civ.), 153 S. W. 911.

935-53 Price at which defendant offered land to others shown on issue as to estate conveyed, and his declarations subsequent to sale, and prior authorization of agent to sell. Wooddell *v.* Allbrecht, 80 Kan. 736, 104 P. 559.

935-54 Kirk *v.* Middlebrook, 201 Mo. 245, 100 S. W. 450. See Cummings *v.* Roeth, 10 Cal. App. 144, 101 P. 434.

Consideration for option is immaterial if that for land was fair. Smith *v.* Bangham, 156 Cal. 359, 104 P. 689.

935-55 Carr *v.* Howell, 154 Cal. 372, 97 P. 885; Williams *v.* Co., 144 Cal. 619, 78 P. 28; Albert *v.* R. Co., 107 Va. 256, 58 S. E. 575; Kight *v.* Kight, 64 W. Va. 519, 63 S. E. 335. See Sylliaasen *v* Hanson, 48 Wash. 608, 94 P. 187.

Receipt competent to show terms of oral contract. Krah *v.* Wassmer, 75 N. J. Eq. 109, 71 A. 404.

935-57 Naylor *v.* Parker (Tex. Civ.), 139 S. W. 93; Balkwill *v.* Spencer, 45 Wash. 600, 88 P. 1029. See Lindsey *v.* Humbrecht, 162 Fed. 548.

936-58 See Kessler *v.* Pruitt, 14 Ida. 175, 93 P. 965.

936-59 See Worth *v.* Watts, 74 N. J. Eq. 609, 70 A. 357.

937-63 Carr *v.* Howell, 154 Cal. 372, 97 P. 885.

938-66 Creecy *v.* Grief, 108 Va. 320, 61 S. E. 769.

938-67 School Dist. *v.* Holt, 226 Mo. 406, 126 S. W. 462.

Testimony of stranger to contract that he went to person representing vendor and informed him of readiness to pay proper if not shown he did not state vendee had sent him to make payment. Van Dyke *v.* Cole, 81 Vt. 379, 70 A. 593.

Proof as to exclusive possession under parol contract need only show it was in accordance with contract. Taylor *v.* Taylor, 79 Kan. 161, 99 P. 814.

939-68 Ranson *v.* Ranson, 233 Ill. 369, 84 N. E. 210.

Issue as to abandonment of contract met by evidence of plaintiff's possession and improvements on property. Durham *v.* Breathwit, 57 Tex. Civ. 38, 121 S. W. 890.

939-69 See Dalby *v.* Maxfield, 244 Ill. 214, 91 N. E. 420.

940-76 Shoop *v.* Burnside, 78 Kan. 871, 98 P. 202; Worth *v.* Watts, 76 N. J. Eq. 299, 74 A. 431; Martinson *v.* McCutcheon, 84 S. C. 256, 66 S. E. 120.

Under statutes inadequacy of consideration bars decree. Phelan *v.* Neary, 22 S. D. 265, 117 N. W. 142.

941-81 Tombigbee V. R. Co. *v.* Co., 155 Ala. 575, 47 S. 88. See Schrieber *v.* Elkin, 118 App. Div. 244, 103 N. Y. S. 330.

Impossibility of performance must result from act of God or plaintiff. Durham *v.* Breathwit, 57 Tex. Civ. 38, 121 S. W. 890.

941-82 See Riggins *v.* Trickey, 46 Tex. Civ. 569, 102 S. W. 918.

Evidence insufficient.—Green River Coal Min. Co. *v.* Brown, 140 Ky. 332, 131 S. W. 13.

942-85 Jones *v.* Hawk, 61 Wash. 171, 116 P. 642.

942-86 Evidence insufficient.—Prince *v.* Prince, 64 Wash. 552, 117 P. 255.

943-88 Hays *v.* Hot Springs Co. (Ark.), 160 S. W. 854 (reasonable certainty); Eagle *v.* Pettus (Ark.), 159 S. W. 1116 (clear, unambiguous and proved with reasonable degree of certainty); Blanc *v.* Connor (Cal.), 141 P. 217 (definite and distinct); Stubblefield *v.* Stubblefield, 32 App. Cas. (D. C.) 535; Coffey *v.* Cobb, 140 Ga. 661, 79 S. E. 568 (reasonable certainty); Prairie D. Co. *v.* Leiberg, 15 Ida. 379, 98 P. 616; Wallis *v.* Zorger, 258 Ill. 574, 101 N. E. 963 (clear and satisfactory); Turn Verein Eiche *v.* Kionka, 255 Ill. 392, 99 N. E. 684 (clear and satisfac-

tory); McKennan *v.* Minkelberry, 242 Ill. 117, 89 N. E. 717; Powell *v.* Huey, 145 Ill. App. 477; Kinman *v.* Botts, 147 Ia. 474, 124 N. W. 773; Pratt *v.* McCoy, 128 La. 570, 54 S. 1012; Lanahan *v.* Cockey, 108 Md. 620, 71 A. 314; Robertson *v.* Corcoran, 125 Minn. 118, 145 N. W. 812 (satisfactory); Hersman *v.* Hersman, 253 Mo. 175, 161 S. W. 800 (clear and convincing, leaving no reasonable doubt); McQuitty *v.* Wilhite, 247 Mo. 163, 152 S. W. 598 (clear, definite and unequivocal); Campbell *v.* Hayden (Mo. App.), 168 S. W. 363 (clear and convincing, leaving no reasonable doubt); In re Panko's Est., 83 Neb. 145, 119 N. W. 224; Fisher *v.* Fallon, 142 N. Y. S. 72 (clear and convincing); Racich Asbestos Mfg. Co. *v.* Brooks, 130 N. Y. S. 382; Portland I. Wks. *v.* Willett, 49 Or. 245, 89 P. 421, 90 P. 1000; Kroeger *v.* Warren, 31 S. D. 480, 141 N. W. 395 (clear and convincing).

Evidence sufficient.—Bates *v.* Harris, 144 Ky. 399, 138 S. W. 276; Maret *v.* Sanders, 144 Ky. 89, 137 S. W. 844; Anderson *v.* Clayton, 39 Utah 343, 117 P. 41; Collier *v.* Robinson (Tex. Civ.), 129 S. W. 389.

943-89 Rosemoald *v.* Middlebrook, 188 Mo. 58, 86 S. W. 200.

943-90 Bounds *v.* City, 47 Tex. Civ. 233, 105 S. W. 56.

943-91 McCullough *v.* Sutherland, 153 Fed. 418; Jones *v.* Patrick, 145 Fed. 440; Thompson *v.* Burns, 15 Ida. 572, 99 P. 111; Standard *v.* Standard, 223 Ill. 255, 79 N. E. 92; White *v.* White, 231 Ill. 298, 83 N. E. 234; Ranson *v.* Ranson, 233 Ill. 369, 84 N. E. 210; Bichel *v.* Oliver, 77 Kan. 696, 95 P. 396; Baldwin *v.* Baldwin, 73 Kan. 39, 84 P. 568; Ricketts *v.* Capwell, 228 Pa. 268, 77 A. 464; Bell *v.* Whitesell, 64 W. Va. 1, 60 S. E. 879. See Pickett *v.* Michaels, 120 App. Div. 357, 105 N. Y. S. 411 (stock).

If defendant denies sale, burden on plaintiff to establish written agreement. Bradley Co. *v.* Robbins, 7 Ind. Ty. 94, 103 S. W. 777. See Cobb *v.* Johnson, 101 Tex. 440, 108 S. W. 811.

943-92 Jones *v.* Jones, 155 Ala. 644, 47 S. 80; Phillips *v.* Jones, 103 Ark. 550, 146 S. W. 513; Tatum *v.* Bolding, 96 Ark. 98, 131 S. W. 207; Anderson *v.* Manners, 243 Ill. 405, 90 N. E. 728; Wooddell *v.* Allbrecht, 80 Kan. 736, 104 P. 559; Bichel *v.* Oliver, 77 Kan. 696, 95 P. 396; Wilbur *v.* Toothaker, 105 Me. 490, 75 A. 42; Boam *v.* Greenman, 147 Mich. 106, 110 N. W. 508; Detroit, etc. R. Co. *v.* Hartz, 147 Mich. 354, 110 N. W. 1089; Collins *v.* Harrell, 219 Mo. 279, 118 S. W. 432; Peterson *v.* Bauer, 83 Neb. 405, 119 N. W. 764; West *v.* R. Co., 49 Or. 436, 90 P. 666.

See Morgan *v.* Morgan, 54 Wash. 406, 103 P. 478.

Clear and convincing.—Kofsky *v.* Kofsky, 254 Ill. 88, 98 N. E. 287.

"Clear, satisfactory and convincing." Ross *v.* Ross, 148 Ia. 729, 127 N. W. 1034.

Evidence must be clear, full and free from suspicion. Pickens *v.* Stout, 67 W. Va. 422, 68 S. E. 354.

944-93 Young *v.* Crawford, 82 Ark. 33, 100 S. W. 87; White *v.* White, 241 Ill. 551, 89 N. E. 682; Wills *v.* Westendorf, 140 Ia. 293, 118 N. W. 376; Cooper *v.* Cooper, 65 W. Va. 712, 64 S. E. 927 (proof must be clear, cogent and convincing). See Logue *v.* Langan, 151 Fed. 455, 81 C. C. A. 271; Atchley *v.* Perry, 55 Tex. Civ. 538, 120 S. W. 1105.

945-94 Redman *v.* Mays, 129 Ga. 435, 59 S. E. 212; Kirk *v.* Middlebrook, 201 Mo. 245, 100 S. W. 450; Rosenwald *v.* Same, 188 Mo. 58, 86 S. W. 200.

In Illinois rule same.—Proof must show terms of contract with same certainty as required to establish fact contract made. Streator, etc. Co. *v.* Co., 142 Ill. App. 183.

945-95 Bichel *v.* Oliver, 77 Kan. 696, 95 P. 396; Rau *v.* Rau, 79 Neb. 694, 113 N. W. 174; Tousey *v.* Hastings, 194 N. Y. 442, 86 N. E. 831, 127 App. Div. 94, 111 N. Y. S. 344; Holt *v.* Tuite, 188 N. Y. 17, 80 N. E. 364; Townsend *v.* Perry, 130 N. Y. S. 951, *rev.* 124 N. Y. S. 143. See Hespin *v.* Wendeln, 85 Neb. 172, 122 N. W. 852; Haren *v.* Block, 9 O. C. C. (N. S.) 328.

Evidence sufficient.—Peterson *v.* Bauer, 83 Neb. 405, 119 N. W. 764.

946-96 Portland I. Wks. *v.* Willett, 49 Or. 245, 89 P. 421, 90 P. 1000. See Wright *v.* Co., 148 Fed. 209, 79 C. C. A. 183.

946-1 Evidence held insufficient to justify plaintiff in abandoning land. Combest *v.* Glenn (Tex. Civ.), 142 S. W. 112.

946-97 Performance shown. Peterson *v.* Bauer, 83 Neb. 405, 119 N. W. 764.

946-99 See Sanders *v.* Idol (Ky.), 122 S. W. 512.

SPOLIATION

948-1 McClure *v.* McClintock, 150 Ky. 332, 150 S. W. 332.

949-2 Hennessey *v.* Walsh, 142 Ill. App. 237.

950-5 Grace Co. *v.* Larson, 129 Ill. App. 590; Tracy *v.* Buchanan, 167 Mo. App. 432, 151 S. W. 747; Wipperman Mercantile Co. *v.* Robbins, 23 N. D. 208, 135 N. W. 785, *cit.* Patch Mfg. Co. *v.* Protection Lodge, 77 Vt. 294, 60 A. 74, 107 Am. St. 765.

May raise presumption of guilt, overthrowing presumption of innocence. McClure *v.* McClintock, 150 Ky. 265, 150 S. W. 332.

952-6 Hennessey *v.* Walsh, 142 Ill. App. 237; Ireland *v.* Shore, 91 Kan. 326, 137 P. 926; San Antonio, etc. R. Co. *v.* Williams (Tex. Civ.), 158 S. W. 1171. See vol. 9, p. 976, n. 80, and supplement thereto.

Presumed to be as claimed by adversary. Tracy *v.* Buchanan, 167 Mo. App. 432, 151 S. W. 747.

953-8 Cornog *v.* Wilson, 231 Pa. 281, 80 A. 174.

Right to explain.—See Crawford *v.* U. S., 212 U. S. 183.

955-10 Mastin *v.* Noble, 157 Fed. 506, 85 C. C. A. 98.

963-22 See Tuggle *v.* S., 127 Ga. 290, 56 S. E. 406; Shields *v.* Co., 1 Ga. App. 172, 57 S. E. 980.

966-29 See Davis *v.* S., 4 Ga. App. 441, 61 S. E. 843. But see Rice *v.* Eatonton (Ga. App.), 81 S. E. 797.

967-32 Stuckes *v.* Candy Co., 158 Mo. App. 342, 138 S. W. 352. See S. *v.* Constantine, 48 Wash. 218, 93 P. 317.

967-33 Choctaw, etc. R. Co. *v.* Newton, 140 Fed. 225, 71 C. C. A. 655; Robinson *v.* Ins. Co., 144 Fed. 1005; The Luckenbach, 144 Fed. 980; Rice *v.* Eatonton (Ga. App.), 81 S. E. 797; Hartford Ins. Co. *v.* Sherman, 123 Ill. App. 202; W. U. T. Co. *v.* McClellan, 38 Ind. App. 578, 78 N. E. 672; Fowler P. Co. *v.* Enzenperger, 77 Kan. 406, 94 P. 995, 15 L. R. A. (N. S.) 784; Green *v.* Brooks, 215 Pa. 492, 64 A. 672; Standard O. Co. *v.* S., 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015; Eggleston *v.* S., 59 Tex. Cr. 542, 128 S. W. 1105. See Tuggle *v.* S., 127 Ga. 290, 56 S. E. 406; Shields *v.* Co., 1 Ga. App. 172, 57 S. E. 980.

968-34 Wilson *v.* Griswold, 79 Conn. 18, 63 A. 659. See Isabella M. Co. *v.* Glenn, 37 Colo. 165, 86 P. 349; Williams *v.* Bk., 49 Or. 492, 90 P. 1012, 91 P. 443; Rochester Ins. Co. *v.* Assn., 107 Va 701, 60 S. E. 93.

969-35 In re Evert's Est., 163 Cal. 449, 125 P. 1058. See vol. 9, p. 963, n. 30, and supplement thereto.

970-37 See vol. 9, p. 963, n. 33, and supplement thereto.

970-38 See vol. 9, p. 963, n. 34, and supplement thereto.

971-41 Eckart *v.* Kiel, 123 Minn. 114, 143 N. W. 122; Galveston, etc. R. Co. *v.* Young, 45 Tex. Civ. 430, 110 S. W. 993 (failure to produce alleged defective coupling). See Grace Co. *v.* Larson, 129 Ill. App. 590; Powell *v.* R. Co., 255 Mo. 420, 164 S. W. 628.

Failure to produce does not warrant presumption it was suppressed. Stockwell *v.* Brinton, 26 N. D. 1, 142 N. W. 242.

979-10 Repeal of statute removes disability from instruments executed while in effect. Ohio River J. R. Co. *v.* Co., 222 Pa. 573, 72 A. 271.

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985-19 See Sandford *v.* Embry, 151 Fed. 977, 81 C. C. A. 167.

985-21 Wade *v.* Foss, 96 Me. 230, 52 A. 640; Wade *v.* Curtis, 96 Me. 309, 52 A. 762; Davis *v.* Evans, 133 N. C. 320, 45 S. E. 643.

992-36 Ohio River **J. R. Co. *v.* Co.,** 222 Pa. 573, 72 A. 271.

STATUTE OF FRAUDS

Instruments may be connected by parol, 24-93.

2-1 Arkansas L. & C. Co. *v.* Benson, 92 Ark. 392, 123 S. W. 367 (evidence must be objected to); In re Fisk, 81 Conn. 433, 71 A. 559. See Campbell *v.* Preece, 133 Ky. 572, 118 S. W. 373; Lese *v.* Lamprecht, 196 N. Y. 32, 89 N. E. 365.

Objection to statute of frauds cannot be taken by objection to evidence. Stephens *v.* Midyette, 161 N. C. 323, 77 S. E. 243.

Rule of evidence.—Yracheta *v.* Stanford, 120 N. Y. S. 117.

Rule of substantive law.—Mears *v.* Smith, 199 Mass. 319, 85 N. E. 165.

Not a mere rule of evidence but a limitation of judicial authority to afford a remedy. Safe Deposit & Trust Co. *v.* C. Co., 234 Pa. 100, 83 A. 54, *cit.*

Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418, 423.

Not a rule of pleading.—"Hence, when the plea of non assumpsit requires the plaintiff to prove a contract enforceable at law, the defendant has the benefit of the statute without having specially pleaded it. A collection of authorities illustrative of the application of this doctrine in practice is presented in Walker *v.* Hill's Ex'rs, 21 N. J. Eq. 191, affirmed in 22 N. J. Eq. 519; Wakeman *v.* Dodd, 27 N. J. Eq. 265." Owen *v.* Riddle, 81 N. J. L. 546, 79 A. 886.

Rescission by parol.—See supra, "Rescission," 263-36.

Defense of statute, personal to the parties. Pasquay *v.* Pasquay, 235 Ill. 48, 85 N. E. 316.

3-2 Freeman *v.* Matthews, 6 Ga. App. 164, 64 S. E. 716; Fresno H. P. Co. *v.* Turle, 60 Misc. 79, 111 N. Y. S. 839; Hanson *v.* Svarverud, 18 N. D. 550, 120 N. W. 550; Rhodes *v.* Maret (Tex. Civ.), 112 S. W. 433 (after lapse of forty years presumption is writing signed).

5-4 Lord *v.* Calhoun, 162 Ala. 444, 50 S. 402; Beach *v.* Bryan, 155 Mo. App. 33, 133 S. W. 635; Stouffer *v.* Jackson, 42 Pa. Super. 450; Houston O. Co. *v.* Gore (Tex. Civ.), 159 S. W. 924.

6-5 See vol. 9, p. 232, n. 1; p. 249, n. 55, and supplement thereto.

6-6 Gard *v.* Ramos, 23 Cal. App. 303, 138 P. 108; Wilson *v.* Hotchkiss, 21 Cal. App. 392, 132 P. 88.

7-7 Where date for commencement of performance is shown by same evidence which establishes the contract such date must be deemed to appear from terms of contract. O'Donnell *v.* Daily News, 119 Minn. 378, 138 N. W. 677.

Facts not gathered from reasonable interpetration of terms of contract cannot be considered. Taylor *v.* Scott, 178 Ill. App. 487.

7-8 Distinct writings admissible if sufficiently connected. Gulfport Mfg. Co. *v.* Reneau, 94 Miss. 904, 48 S. 292.

7-9 Seymour *v.* Oelrichs, 156 Cal. 782, 106 P. 88; Brookfield *v.* College, 139 Mo. App. 339, 123 S. W. 86; Wagniere *v.* Dunnell, 29 R. I. 580, 73 A. 309.

7-10 Gulfport Mfg. Co. *v.* Reneau, 94 Miss. 904, 48 S. 292.

7-11 Oral contract party within statute may be proved in collateral action. Appeal of Beardsley, 83 Conn. 34, 75 A. 141.

Party may not testify what he contemplated as to time required for performance of contract. Valley P. Co. *v.* Wise, 93 Ark. 1, 123 S. W. 768.

Restatement of void oral contract within year, immaterial. Goldberg *v.* Cohen, 110 N. Y. S. 185.

7-12 See Downs *v.* Racine Co., 175 Mo. App. 382, 162 S. W. 331; Epstein *v.* Hiller, 146 N. Y. S. 305; Catlett *v.* Burke, 96 S. C. 363, 80 S. E. 610.

Question for jury.—Sheingold *v.* Baer, 129 N. Y. S. 924.

8-13 Williams *v.* **Perlstein,** 174 Ill. App. 441.

8-15 Johnson *v.* **Tindall** (Tex. Civ.), 161 S. W. 401.

Agent presumed to intend to bind principal only. Roach *v.* **Rutter,** 40 Mont. 167, 105 P. 555.

9-16 Miller *v.* Adams, 142 Ia. 515, 119 N. W. 593. See Canfield *v.* Stewart, 151 App. Div. 740, 136 N. Y. S. 229.

9-17 Rubey Trust Co. *v.* Weidner, 174 Mo. App. 692, 161 S. W. 333; McGowan C. Co. *v.* Co., 41 Mont. 211, 108 P. 655 (it may be shown why entries so made); Shay *v.* Cruxton, 116 N. Y. S. 1123. See Mackey *v.* Smith, 21 Or. 598, 28 P. 974; Wood *v.* Dodge, 23 S. D. 95, 120 N. W. 774 (not conclusive).

Mistake in entries in books.—See Wittenberg *v.* Fisher (Mo. App.), 166 S. W. 1106.

Making claim against another, not conclusive upon creditor. Miller *v.* Adams, 142 Ia. 515, 119 N. W. 593.

11-18 Spande *v.* Indemnity Co., 61 Or. 220, 117 P. 973.

11-19 Wachal *v.* Davis (Ia.), 145 N. W. 865; McGowan C. Co. *v.* Co., 41 Mont. 211, 108 P. 655; Richardson *v.* Parker, 33 Okla. 339, 125 P. 442; Corcoran *v.* Huey, 231 Pa. 441, 80 A. 881. See Rubey Trust Co. *v.* Weidner, 174 Mo. App. 692, 161 S. W. 333.

11-20 Willis *v.* Fields, 132 Ga. 242, 63 S. E. 828; Elliott *v.* Brady, 192 N. Y. 221, 85 N. E. 69.

11-22 McGowan C. Co. *v.* Co., 41 Mont. 211, 108 P. 655.

Reliance on promise by promisee, immaterial. Regan *v.* Kirk, 140 Ia. 302, 118 N. W. 317.

Writings explainable by parol.—Saginaw M. Co. *v.* Mower, 154 Mich. 620, 118 N. W. 622.

13-29 Campbell *v.* Preece, 133 Ky 572, 118 S. W. 373 (consideration); Anderson *v.* Stewart, 108 Md. 340, 70 A. 228.

14-35 Farmers' Savings Bk. *v.* Newton (Ia.), 131 N. W. 774.

15-42 Schaefer *v.* Strieder, 203 Mass. 467, 89 N. E. 618, and that contract was in nature of guaranty.

15-45 Blueprints of plan of machine admissible in action for purchase price and for extra work. Clement Co. *v.* Mach. Co., 214 Fed. 78 (C. C. A.).

16-49 First Nat. Bk. *v.* Co., 141 Mo. App. 524, 125 S. W. 1194; Moses L. S & R. Co. *v.* Co., 56 Wash. 529, 106 P. 207.

16-50 Porter *v.* Patterson, 42 Ind App. 404, 85 N. E. 797.

17-53 Houser *v.* Hobart, 22 Ida. 735, 127 P. 997; Leach *v.* Weil, 129 App. Div. 688, 114 N. Y. S. 234.

18-56 Joppa Mattress Co. *v.* Oil Co., 101 Ark. 548, 142 S. W. 831; Jennings *v.* Shertz, 45 Ind. App. 120, 88 N. E. 729; Weymouth *v.* Goodwin, 105 Me. 510, 75 A. 61; Waxelbaum *v.* Schloss, 131 App. Div. 826, 116 N. Y. S. 42.

Memorandum made after breach of contract, competent. Bird *v.* Munroe, 66 Me. 337, 22 Am. Rep. 571.

Letters written third party may aid memorandum. Hickey *v.* Dole, 66 N. H. 336, 29 A. 792, 49 Am. St. 614.

18-58 See Porter *v.* Patterson, 42 Ind. App. 404, 85 N. E. 797.

19-60 Buyer must clearly show seller accepted check as absolute payment pro tanto. Groomer *v.* McMillan, 143 Mo. App. 612, 128 S. W. 285.

19-65 McMillan *v.* Heaps, 85 Neb. 535, 123 N. W. 1041.

20-70 See Timmons *v.* Bostwick, 141 Ga. 713, 82 S. E. 29.

20-71 Evidence sufficient. Adams County M. Co. *v.* Live Stock Co., 64 Wash. 285, 116 P. 669.

20-75 Beedy *v.* Wooden Ware Co., 108 Me. 200, 79 A. 721.

21-78 Burden of proof on plaintiff to show acceptance. Brager *v.* Levy, 122 Md. 554, 90 A. 102.

21-85 Colleton R. Co. *v.* Folk, 85 S. C. 84, 67 S. E. 156, repudiating contract.

22-86 Letters need not have been written to, or intended for, other party or known of by him. Jacobson *v.* Hendricks, 83 Conn. 120, 75 A. 85.

Letters to third party.—Beckwith *v.* Clark, 188 Fed. 171, 110 C. C. A. 207.

22-87 Wilkins *v.* Hardaway, 173 Ala. 57, 55 S. 817; Kennedy *v.* Merickel, 8 Cal. App. 378, 97 P. 81; Hartwell *v.* Co., 8 Cal. App. 733, 97 P. 901; Capital City B. Co. *v.* Co., 5 Ga. App. 436, 63 S. E. 562; Nickerson *v.* Weld, 204 Mass. 346, 90 N. E. 589; Heenan *v.* Parmele (Neb.), 118 N. W. 324 (correspondence and abstract of title); Van Name *v.* Co., 130 App. Div. 857, 115 N. Y. S. 905; Flegel *v.* Dowling, 54 Or. 40, 102 P. 178; Wharton *v.* Tolbert, 84 S. C. 197, 65 S. E. 1056; Jordan *v.* Mahoney, 109 Va. 133, 63 S. E. 467; Hummer *v.* McGee, 141 Wis. 216, 124 N. W. 302.

Writing admissible though executed subsequent to contract. Campbell *v.* Preece, 133 Ky. 572, 118 S. W. 373; Black *v.* Hanz (Tex. Civ.), 146 S. W. 309.

23-88 Walker *v.* Cross, 160 Fed. 372, 87 C. C. A. 324; Moore *v.* Collier, 133 Ga. 762, 66 S. E. 1080; Elwell *v.* Hicks, 238 Ill. 170, 87 N. E. 316; McKnight *v.* Inv. Co., 147 Ky. 535, 145 S. W. 377; Scherck *v.* Moyse, 94 Miss. 259, 48 S. 513; Ruggerio *v.* Leuchtenburg, 61 Misc. 298, 113 N. Y. S. 615; Bonicamp *v.* Starbuck, 25 Okla. 483, 106 P. 839; Colleton R. Co. *v.* Folk, 85 S. C. 84, 67 S. E. 156; Alexander *v.* Herndon, 84 S. C. 181, 65 S. E. 1048; Shumway *v.* Kitzman, 28 S. D. 577, 134 N. W. 325, (*cit.* among other cases Webster *v.* Brown, 67 Mich. 328, 34 N. W. 676; Swallow *v.* Strong, 83 Minn. 87, 85 N. W. 942; Ringer *v.* Holtzclaw, 112 Mo. 519, 20 S. W. 800; Bruckman *v.* Dry Goods Co., 91 Mo. App. 454; Foote *v.* Robbins, 50 Wash. 277, 97 P. 103).

See Young *v.* Bancroft (Tex. Civ.), 168 S. W. 392.

Burden of proof on plaintiff to prove agent had authority to execute contract in sale of land. Johnson *v.* Lennox, 55 Colo. 125, 133 Pac. 744.

Neither parties, consideration, or subject matter can be proved by parol. Baker *v.* Kilburn, 77 Misc. 624, 137 N. Y. S. 512.

And to connect separate writing with memorandum for purchase of land. Jordan *v.* Mahoney, 109 Va. 133, 63 S. E. 467.

As between grantee and third party parol evidence is admissible to show modification or cancellation of written contract and waiver of benefit reserved by deed. Lamb *v.* Morrow, 140 Ia. 89, 117 N. W. 1118.

Defects in writing cannot be supplied by oral testimony. Phelan *v.* Neary, 22 S. D. 265, 117 N. W. 142.

23-89 Jacobson *v.* Hendricks, 83 Conn. 120, 75 A. 85; Nickerson *v.* Weld,

204 Mass. 346, 90 N. E. 589; Bowen *v.* Chandler, 172 Mich. 678, 138 N. W. 247. See Rauch *v.* Donovan, 126 App. Div. 52, 110 N. Y. S. 690.

Explanatory parol testimony cannot be received in absence of written evidence of contract. Phelan *v.* Neary, 22 S. D. 265, 117 N. W. 142.

Equitable title to easement, shown by parol. Rubio Canon L. & W. Assn. *v.* Everett, 154 Cal. 29, 96 P. 811.

23-90 Harrigan *v.* Dodge, 200 Mass. 357, 86 N. E. 780; Wilcox *v.* Sonka, 137 Mo. App. 54, 119 S. W. 445; Bateman *v.* Riley (N. J. Eq.), 73 A. 1006; Flegel *v.* Dowling, 54 Or. 40, 102 P. 178; Rozelle *v.* Lewis, 37 Pa. Super. 563.

Parol evidence inadmissible unless writing refers to external standards capable of being identified. McCarn *v.* London, 83 Neb. 201, 119 N. W. 251, *dist.* Ruzicka *v.* Hotovy, 72 Neb. 589, 101 N. W. 328. Inadmissible to add to and supply insufficient description. Allen *v.* Kitchen, 16 Ida. 133, 100 P. 1052.

Where memorandum refers to a deed, parol evidence to identify deed is admissible. Shelinsky *v.* Foster, 87 Conn. 90, 87 A. 35.

Parol evidence to identify.—Shelinsky *v.* Foster, 87 Conn. 90, 86 A. 35.

24-91 Resulting trust, shown by parol. Walker *v.* Bruce, 44 Colo. 109, 97 P. 250; Schrager *v.* Cool, 221 Pa. 622, 70 A. 889.

24-92 Nicholson *v.* Dover, 145 N. C. 18, 58 S. E. 444, 13 L. R. A. (N. S.) 167; Combes *v.* Adams, 150 N. C. 64, 63 S. E. 186; Wharton *v.* Tolbert, 84 S. C. 197, 65 S. E. 1056. *Contra* if statute says promise of party to be charged shall be in writing and signed by him. McCrea *v.* Ogden, 54 Wash. 521, 103 P. 788. *Comp.* Thompson *v.* Burns, 15 Ida. 572, 99 P. 111, 119; Mertz *v.* Hubbard, 75 Kan. 1, 88 P. 529, 8 L. R. A. (N. S.) 733. Identity of purchaser may be shown. Flegel *v.* Dowling, 54 Or. 40, 102 P. 178.

24-93 Instruments passing between parties may be connected by parol, at least so far as it is the result thereof to establish that all the different papers which are to be considered together were brought to their attention, and were linked together in their minds, so that they may be found to have adopted all of them as the expression of their purpose. Nickerson *v.* Weld. 204 Mass. 346, 90 N. E. 589, noting that Morton *v.* Dean, 13 Met. (Mass.) 385, and Boardman *v.* Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196, are no longer followed. Flegel *v.* Dowling, 54 Or. 40, 102 P. 178, is to same effect.

24-95 In re Fisk, 81 Conn. 433, 71 A. 559.

Reservation of matured crop on land conveyed may be shown by parol to have been part of the consideration. Grabow *v.* McCracken, 23 Okla. 612, 102 P. 84.

25-96 A contract to cancel an agreement to give security on land to be acquired may be proved by parol. Elliott *v.* Robbins, 110 Minn. 481, 126 N. W. 65.

Parol contract may not be proved by vendee in possession as basis of estoppel in defense of action of ejectment. Zeuske *v.* Zeuske, 55 Or. 65, 103 P. 648.

Parol guaranty of number of acres sold may be proved. Stern *v.* Benbow, 151 N. C. 460, 66 S. E. 445.

Parol evidence admissible to show power of agent to make written contract for sale of land. Lawson *v.* Williams (Ky.), 115 S. W. 730.

Parol agreement settling dispute as to dividing line between adjoining owners may be proved. Warden *v.* Addington, 131 Ky. 296, 115 S. W. 241.

Condition on which deed delivered in escrow may be proved by parol. Manning *v.* Foster, 49 Wash. 541, 96 P. 233.

25-97 Bentley *v.* Barnes, 162 Ala. 524, 50 S. 361 (it seems, regardless of improvements); Reicardt *v.* Howe, 91 Ark. 280, 121 S. W. 347; Lee *v.* Foushee, 91 Ark. 468, 120 S. W. 160; Pearsall *v.* Henry, 153 Cal. 314, 95 P. 154; Brown *v.* Sebastopol, 153 Cal. 704, 96 P. 363; Park *v.* Park, 45 Colo. 347, 101 P. 403; Demps *v.* Hogan, 57 Fla. 60, 48 S. 998; Havlick *v.* Davidson, 15 Ida. 787, 100 P. 91; Williams *v.* Carty, 205 Mass. 396, 91 N. E. 392; School Dist. *v.* Holt, 226 Mo. 406, 126 S. W. 462; Collins *v.* Leary (N. J. Eq.), 74 A. 42; Friedman *v.* Ender, 116 N. Y. S. 461 (improvement is essential); McKinley *v.* Hessen, 135 App. Div. 832, 120 N. Y. S. 257; Mitchell *v.* Co., 19 N. D. 736, 124 N. W. 946; Jerman *v.* Misner, 56 Or. 390, 108 P. 179 (part payment and possession only); Eisenberger *v.* Eisenberger, 38 Pa. Super. 569.

Facts raising presumption of vendor's knowledge and acquiescence must be

proved. Openshaw *v.* Dean (Tex. Civ.), 125 S. W. 989.

Payment alone not sufficient. Colleton R. Co. *v.* Folk, 85 S. C. 84, 67 S. E. 156.

Performance of personal services to owner of land in reliance upon his parol agreement, shown. Reed *v.* Reed, 108 Va. 790, 62 S. E. 792.

25-98 Starrett *v.* Boynton, 73 N. J. Eq. 669, 70 A. 183.

25-99 McKinley *v.* Hessen, 135 App. Div. 832, 120 N. Y. S. 257.

25-1 Slight improvements will not affect operation of statute. Elam *v.* Carter, 55 Tex. Civ. 649, 119 S. W. 914.

26-2 McNeil *v.* Corbett, 39 Can. Sup. 608; Horton *v.* Stegmyer, 175 Fed. 756, 99 C. C. A. 332; Pearsall *v.* Henry, 153 Cal. 314, 95 P. 154, 159 (rule as stated on rehearing is broader than in first opinion); Kinderland *v.* Kirk, 131 Ga. 454, 62 S. E. 582; Collins *v.* Harrell, 219 Mo. 279, 118 S. W. 432. See McKinley *v.* Hessen, 135 App. Div. 832, 120 N. Y. S. 257.

Insufficient evidence.—Davis *v.* Judson, 159 Cal. 121, 113 P. 147.

Affirmative acts must be proved.—Hawkins *v.* Studdard, 132 Ga. 265, 63 S. 852.

26-3 McNeil *v.* Corbett, 39 Can. Sup. 608; Ruthven *v.* Co., 140 Ia. 570, 118 N. W. 915.

26-4 Pasquay *v.* Pasquay, 235 Ill. 48, 85 N. E. 316; Sizemore *v.* Bowling (Ky.), 115 S. W. 737.

27-6 Baldridge *v.* Centgraf, 82 Kan. 240, 108 P. 83 (payment and possession not enough); McKinley *v.* Hessen, 135 App. Div. 832, 120 N. Y. S. 257. See Pasquay *v.* Pasquay, 235 Ill. 48, 85 N. E. 316.

28-10 Conduct showing consent, proved. Starrett *v.* Boynton, 73 N. J. Eq. 669, 70 A. 183.

Vendor's express or implied consent to actual, definite and exclusive possession must be shown. Kinderland *v.* Kirk, 131 Ga. 454, 62 S. E. 582.

Possession of land must be shown. Garrick *v.* Garrick, 43 Ind. App. 585, 88 N. E. 104.

Vendor's parol authority to agent to deliver possession may be shown or ratification by parol of agent's act. Jones *v.* Gainer, 157 Ala. 218, 47 S. 142

28-14 Wills *v.* Westendorf, 140 Ia. 293, 118 N. W. 376; Cook *v.* Cook, 24 S. D. 223, 123 N. W. 693 (clearest and most convincing evidence required). See White *v.* White, 241 Ill. 551, 89 N. E. 682; Bichel *v.* Oliver, 77 Kan. 696, 95 P. 396.

Verbal agreement for easement in land must be conclusively proved before equity will enforce it as an estoppel in favor of party who has acted on it. Title G. & T. Co. *v.* Asylum, 133 App. Div. 529, 118 N. Y. S. 302.

STATUTES

Silence of legislative journals, 43-37; *History of statute as aid in construction,* 44-38; *Intent of revisers,* 44-38; *Time of taking effect,* 50-58.

31-1 Darby *v.* City, 173 Ala. 709, 55 S. 889; Clark *v.* City, 160 Cal. 30, 116 P. 722; Jacques *v.* Yuba County (Cal. App.), 141 P. 404; Ex parte Avdalas, 16 Cal. App. 507, 102 P. 674; Klein *v.* Reinhardt, 163 Ill. App. 257; Saum *v.* Dewey, 84 Kan. 811, 115 P. 570; Burke *v.* R. Co., 133 La. 369, 63 S. 51; S. *v.* Drabelle (Mo.), 167 S. W. 1016; S. *v.* Roach (Mo.), 167 S. W. 1008; Barnes *v.* Commission, 85 N. J. L. 70, 88 A. 837; Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 130 P. 55; S. *v.* Angel, 93 S. C. 149, 76 S. E. 190; Ganow *v.* Ashton, 32 S. D. 458, 143 N. W. 383. See supra, "Judicial Notice," 947-90.

State courts will judicially notice municipal charters. Land Co. *v.* City (Mo.), 165 S. W. 741; Mosher *v.* Elmira, 83 Misc. 328, 145 N. Y. S. 964.

31-2 Sullivan *v.* Algrem, 157 Ill. App. 123; Wabash R. Co. *v.* Priddy, 179 Ind. 483, 101 N. E. 724; Louisville, etc. R. Co. *v.* Woodford, 153 Ky. 185, 154 S. W. 1083, *denying rehear.* 152 Ky. 398, 153 S. W. 722; Louisville & N. R. Co. *v.* Scott, 133 Ky. 724, 118 S. W. 990; In re Little River Drainage Dist., 236 Mo. 94, 139 S. W. 330; Davis *v.* McColl (Mo. App.), 166 S. W. 1113; Wentz *v.* R. Co. (Mo.), 168 S. W. 1166; Carlin *v.* R. Co., 71 Misc. 521, 130 N. Y. S. 828; Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 130 P. 55; Ganow *v.* Ashton, 32 S. D. 458, 143 N. W. 383; Western U. T. Co. *v.* White (Tex. Civ.), 162 S. W. 905; Edwards *v.* Smith (Tex. Civ.), 137 S. W. 1161; Bouchard *v.* R. Co., 87 Vt. 399, 89 A. 475; Northern P. R. Co. *v.* Wadekamper, 70 Wash. 392, 126 P. 909. See Anheuser, etc. Brew. Assn. *v.* Doss, 36 Okla. 318, 129 P. 19.

Bankruptcy forms judicially noticed.

Powell *v.* Pangborn, 145 N. Y. S. 1073. **State courts of Missouri** will judicially notice territorial laws of Missouri. Davis *v.* McColl (Mo. App.), 166 S. W. 1113.

32-4 Irvine *v.* Elliott, 203 Fed. 82; Ritterbusch *v.* R. Co., 198 Fed. 46, 117 C. C. A. 154; Edwards *v.* Smith (Tex. Civ.), 137 S. W. 1161. See supra, "Judicial Notice," 958-35.

32-5 And so of court of appeals. Denver, etc. R. Co. *v.* Wagner, 167 Fed. 75, 92 C. C. A. 527.

34-10 Ellis *v.* Terrell (Ark.), 158 S. W. 957; Gleason *v.* Thayer, 87 Conn. 248, 87 A. 790; Appeal of Woodward, 81 Conn. 152, 70 A. 453.

35-11 Teat *v.* Chapman & Co., 1 Ala. App. 491, 56 S. 267; In re Campbell's Est., 12 Cal. App. 707, 108 P. 669; New York, etc. R. Co. *v.* Lind (Ind.), 102 N. E. 449; Merrick *v.* Betts, 214 Mass. 223, 101 N. E. 131; Twin City B. F. *v.* Ins. Co., 114 Minn. 475, 131 N. W. 497; Davis *v.* McColl (Mo. App.), 166 S. W. 1113; Rashall *v.* R. Co., 248 Mo. 509, 155 S. W. 426; Mathieson *v.* R. Co., 219 Mo. 542, 118 S. W. 9; Gibson *v.* R. Co., 225 Mo. 473, 125 S. W. 453; Fish *v.* R. Co., 158 App. Div. 92, 143 N. Y. S. 365, *aff.* 79 Misc. 636, 141 N. Y. S. 245; Van Tassell *v.* Sup. Co., 83 Misc. 126, 144 N. Y. S. 393; Strodl *v.* F. S. Co., 130 N. Y. S. 35, *rev.* 122 N. Y. S. 609; Brown C. Co. *v.* Dowd, 155 N. C. 307, 71 S. E. 721; Schlotterbeck *v.* Schwinn, 23 Okla. 681, 103 P. 854; Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 130 P. 55; Cape M. R. Est. *v.* Henderson, 231 Pa. 82, 79 A. 982; Bethea *v.* Allen, 95 S. C. 479, 79 S. E. 639; Ogg *v.* Ogg (Tex. Civ.), 165 S. W. 912; Western U. T. Co. *v.* White (Tex. Civ.), 162 S. W. 905; Stamp *v.* R. Co. (Tex. Civ.), 161 S. W. 450; Tourtelot *v.* Booker (Tex. Civ.), 160 S. W. 293; Grow *v.* R. Co. (Utah), 138 P. 398; Mountain Lake L. Co. *v.* Blair, 109 Va. 147, 63 S. E. 751 (if at variance with common law).

38-15 Barrielle *v.* Bettman, 199 Fed. 838; U. S. Bkg. Co. *v.* Veale, 84 Kan. 385, 114 P. 229; Oehler *v.* Hamburg, etc., 145 N. Y. S. 1090.

38-16 Sandoval *v.* Priest, 210 Fed. 814, 127 C. C. A. 364. See Zarate *v.* Villoreal (Tex. Civ.), 155 S. W. 328.

38-17 See vol. 7, p. 960, and supplement thereto.

39-18 Reid *v.* R. Co., 162 N. C. 355, 78 S. E. 306; Galveston, etc. R. Co. *v.* Stautz (Tex. Civ.), 166 S. W. 11. See Vickery *v.* R. Co., 87 Conn. 634, 89 A. 277.

42-28 Special statute noticed if it amends general law. Denver, etc. R. Co. *v.* Wagner, 167 Fed. 75, 92 C. C. A. 527.

When published.—Lester *v.* Riley (Tex. Civ.), 157 S. W. 458.

43-35 S. *v.* Gordon, 236 Mo. 142, 139 S. W. 403.

43-36 S. *v.* Bowman, 90 Ark. 174, 118 S. W. 711 (cit. the text); S. *v.* Wheeler, 172 Ind. 578, 89 N. E. 1; S. *v.* Goff (La.), 65 S. 481; Webb *v.* Carter, 129 Tenn. 182, 165 S. W. 426. See Burlingham *v.* New Bern, 213 Fed. 1014; P. *v.* Brady, 262 Ill. 578, 105 N. E. 1.

Judicial notice of legislative journals will not be taken but must be proved. Worthy *v.* Bush, 262 Ill. 560, 104 N. E. 904.

Original prevails over printed journal. Revenue & R. Comrs. *v.* S., 163 Ala. 441, 50 S. 972.

Enrolled bill, conclusive as to terms of statute. Bass *v.* Doughty, 5 Ga. App. 458, 63 S. E. 516.

43-37 Mechanics, etc. Assn. *v.* Coffman (Ark.), 162 S. W. 1090; Hodges *v.* Keel (Ark.), 159 S. W. 21; S. *v.* Bowman, 90 Ark. 174, 118 S. W. 711; City of Denver *v.* Rubidge, 51 Colo. 224, 116 P. 1130; Worthy *v.* Bush, 262 Ill. 560, 104 N. E. 904; Jessup *v.* Baltimore, 121 Md. 562, 89 A. 103; Ridgely *v.* Baltimore, 119 Md. 567, 87 A. 909; Balt. Fidelity Warehouse Co. *v.* Lumb. Co., 118 Md. 135, 84 A. 188; S. *v.* Dean, 84 Neb. 344, 121 N. W. 719. See Devine *v.* Co., 258 Ill. 389, 101 N. E. 539. **Silence of legislative journals** as to matters concerning which constitution does not require them to speak, not evidence proper action not taken. Ibid.

Rebuttal by production of manuscript journal may be permitted. Colorado M. R. Co. *v.* Davis, 23 Colo. App. 41, 127 P. 249.

44-38 Parkinson *v.* Johnson, 160 Cal. 756, 117 P. 1057; Vogt *v.* Beauchamp, 153 Ky. 64, 154 S. W. 393; Krakowski *v.* Waskey, 33 S. D. 335, 145 N. W. 566; Parshall *v.* S., 62 Tex. Cr. 177, 138 S. W. 759; Knox *v.* S., 62 Tex. Cr. 512, 138 S. W. 787. See supra, "Conclusive Evidence," 285-72.

Legislative history of statute, inadmissible. Tennant *v.* Kuhlemeier, 142 Ia. 241, 120 N. W. 689.

Revisers' intent, though it may be

proved, will not govern language used. Tennant *v.* Kuhlemeier, supra.

44-39 Bonner *v.* S., 8 Ala. App. 236, 62 S. 337; Justis *v.* R. Co., 12 Cal. App. 639, 108 P. 328; Ridpath *v.* Heller, 46 Mont. 586, 129 P. 1054. See vol. 5, p. 821, n. 47.

Book publishing laws sometimes admissible. P. *v.* Portman, 159 App. Div. 702, 145 N. Y. S. 189.

Printed statute books certified by secretary of state admissible. New York, etc. R. Co. *v.* Lind (Ind.), 102 N. E. 449.

Copies of laws inadmissible. Rudolph Hdw. Co. *v.* Price (Ia.), 145 N. W. 910.

Statute of another state adopting common law is inadmissible when the cause of action is statutory. Powell *v.* R. Co., 255 Mo. 420, 164 S. W. 628.

Existence of statute cannot be proved by decisions of court of state in which it is alleged to be in effect. Atchison, etc. R. Co. *v.* Smythe, 55 Tex. Civ. 557, 119 S. W. 892.

44-40 Trimble *v.* Stamper (Mo. App.), 166 S. W. 820.

Cannot be impeached by parol. Ridgely *v.* Baltimore, 119 Md. 567, 87 A. 909.

45-41 See Western U. T. Co. *v.* White (Tex. Civ.), 162 S. W. 905.

Admission of correctness of plea setting out statute, brings it before court. Mathieson *v.* R. Co., 219 Mo. 542, 118 S. W. 9.

45-42 **Certificate of proper officer** is at least prima facie evidence of existence of statute. S. *v.* Wheeler, 172 Ind. 578, 89 N. E. 1.

Expert testimony, not admissible to prove federal patent laws. Owens *v.* Co. (Ia.), 121 N. W. 1076.

45-43 General Conference Assn., etc. *v.* Benevolent Assn., 166 Mich. 504, 132 N. W. 94.

47-45 State Bk. *v.* Pease, 153 Wis. 9, 139 N. W. 767.

48-50 S. *v.* Joseph, 175 Ala. 579, 57 S. 942; Mayor *v.* Simmons, 165 Ala. 359, 51 S. 638; Mechanics' etc. L. Assn. *v.* Coffman (Ark.), 162 S. W. 1090; S. *v.* Bowman, 90 Ark. 174, 118 S. W. 711; Miller *v.* Oelwein, 155 Ia. 706, 136 N. W. 1045; S. *v.* Akers (Kan.), 140 P. 637; Ridgely *v.* Baltimore, 119 Md. 567, 87 A. 909; Balt. Fidelity Warehouse Co. *v.* Lumb Co., 118 Md. 135, 84 A. 188; S. *v.* Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496; Adams *v.* Noble (Miss.), 60 S. 561; McNeal *v.* Ritterbusch, 29 Okla. 223, 116 P. 778; Krakowski *v.* Waskey, 33 S. D. 335, 145 N. W. 566; Jackson *v.* Mfg. Co., 124 Tenn. 421, 137 S. W. 757; Richardson *v.* Young, 122 Tenn. 471, 125 S. W. 664. See S. *v.* Baseball Club, 127 Tenn. 292, 154 S. W. 1151.

Burden of proof is on party asserting invalidity. S. *v.* Smart (Wyo.), 136 P. 452.

No presumption against silence of legislative journals where they are not required to speak. Pope *v.* S., 165 Ala. 68, 51 S. 521.

Time of approval of statutes enacted on same day, presumed to have been contemporaneous. No presumption arises as to order in which they were enacted from numbers given them by executive officer. Stuart *v.* Chapman, 104 Me. 17, 70 A. 1069. Date of approval of inconsistent statutes, presumed to conform to their numerical numbers. Musgrove *v.* R. Co., 111 Md. 629, 75 A. 245.

48-51 New York C., etc. R. Co. *v.* U. S., 212 U. S. 481; Red C. O. Mfg. Co. *v.* Board, 172 Fed. 695; S. *v.* Skeggs, 154 Ala. 249, 46 S. 268; Ex parte Byles, 93 Ark. 612, 126 S. W. 94; Ex parte King, 157 Cal. 161, 106 P. 578; Reclamation Dist. *v.* Sherman, 11 Cal. App. 399, 105 P. 277; Ex parte O'Shea, 11 Cal. App. 568, 105 P. 776; P. *v.* Nye, 9 Cal. App. 148, 98 P. 241; In re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. 137; 98 P. 180; Rash *v.* Allen, 1 Boyce (Del.) 444, 76 A. 370; S. *v.* Barrett, 172 Ind. 169, 87 N. E. 7; Gardner *v.* Ray, 154 Ky. 509, 157 S. W. 1147; C. *v.* Hodges, 137 Ky. 233, 125 S. W. 689; C. *v.* H. Co., 131 Ky. 551, 115 S. W. 703; S. *v.* Rose, 125 La. 462, 51 S. 496; S. *v.* Poulin, 105 Me. 224, 74 A. 119; Cochran *v.* Preston, 108 Md. 220, 70 A. 113; Michigan C. R. Co. *v.* Commission, 160 Mich. 355, 125 N. W. 549; S. *v.* City, 117 Minn. 458, 136 N. W. 264; Miners' Bk. *v.* Clark, 252 Mo. 20, 158 S. W. 597; Quong Wing *v.* Kirkendall, 39 Mont. 64, 101 P. 250; S. *v.* Co., 85 Neb. 25, 122 N. W. 691; Wilkinson *v.* Lord, 85 Neb. 136, 122 N. W. 699; Riter *v.* Douglass, 32 Nev. 400, 109 P. 444; S. *v.* R., 75 N. H. 327, 74 A. 542; Dixon *v.* Russell, 78 N. J. L. 296, 73 A. 51; P. *v.* Co., 196 N. Y. 421, 90 N. E. 441; Hathorn *v.* G. Co., 194 N. Y. 326, 87 N. E. 504; In re Board, 128 App. Div. 103, 112 N. Y. S. 619; New York Cent., etc. R. Co. *v.* Williams,

64 Misc. 15, 118 N. Y. S. 785; Bush *v.* Ins. Co., 63 Misc. 89, 116 N. Y. S. 1056; Hathorn *v.* G. Co., 60 Misc. 341, 113 N. Y. S. 458; Economic P. & C. Co. *v.* Buffalo, 59 Misc. 571, 111 N. Y. S. 443; Polo *v.* Stevens, 120 N. Y. S. 227; P. *v.* Baker, 110 N. Y. S. 848; Ex parte Watson, 157 N. C. 340, 72 S. E. 1049; S. *v.* R. Co., 19 N. D. 45, 120 N. W. 869; Pond Creek *v.* Haskell, 21 Okla. 711, 97 P. 338; McCord *v.* S., 2 Okla. Cr. 214, 101 P. 280; Rakowski *v.* Wagoner, 24 Okla. 282, 103 P. 632; S. *v.* Cochran, 55 Or. 157, 105 P. 884; In re Likins, 223 Pa. 456, 72 A. 858; Kirk *v.* Wyman, 83 S. C. 372, 65 S. E. 387; Kimbrell *v.* Berry, 85 S. C. 243, 67 S. E. 225; Board *v.* Buckley, 82 S. C. 352, 64 S. E. 163; Wickhem *v.* Alexandria, 23 S. D. 556, 122 S. W. 597; In re McKennan's Est., 25 S. D. 369, 126 N. W. 611; Kirk *v.* S., 126 Tenn. 7, 150 S. W. 83; Lemons *v.* S., 59 Tex. Cr. 299, 128 S. W. 416; Long *v.* S., 58 Tex. Cr. 209, 127 S. W. 208; Blackrock, etc. Co. *v.* Tingey, 34 Utah 369, 98 P. 180; Scottish U., etc. Ins. Co. *v.* Winchester, 110 Va. 451, 66 S. E. 84; Willis *v.* Kalmbach, 109 Va. 475, 64 S. E. 342; C. *v.* S. B., 109 Va. 346, 63 S. E. 1081; Adams Exp. Co. *v.* Mills, 109 Va. 1, 63 S. E. 8; C. *v.* Henry, 110 Va. 879, 65 S. E. 570; Coal & C. R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613; Kiley *v.* R. Co., 142 Wis. 154, 125 N. W. 464; In re Appointment of Revisor, 141 Wis. 592, 124 N. W. 670; S. *v.* Sherman, 18 Wyo. 169, 105 P. 299.

Where no exceptions are made there is a legal presumption that none were intended. U. S. *v.* Lumb. Co., 202 Fed. 700, 121 C. C. A. 162.

Unconstitutionality must be proved beyond a reasonable doubt. East Shore Land Co. *v.* Peckham, 33 R. I. 541, 82 A. 487; S. *v.* Kofines, 33 R. I. 211, 80 A. 432, and cases cited.

"Every presumption is in favor of the validity of the legislative enactment; and, unless the court can clearly see that the act is contrary to the fundamental law, it ought not to declare it unconstitutional. If the court entertains a doubt, that is enough to determine the question in favor of the legislative act; for the rule is that the court must be clearly and strongly convinced of its unconstitutionality before it will be justified in declaring an act void." Herold *v.* McQueen, 71 W. Va. 43, 75 S. E. 313.

"Laws enacted by the legislature are presumed to be valid, and, even if defective because violative of some provision of the state constitution, are not void, although they may in a proper case be voidable; that is, upon complaint by a party whose *rights* are impaired by such statute." S. *v.* Blake, 241 Mo. 100, 144 S. W. 1094.

Construction of language used.—Statutes are presumed to have been enacted with a knowledge of the construction placed by the courts upon the language used, unless the contrary expressly appears. Pouch *v.* Ins. Co., 204 N. Y. 281, 97 N. E. 731.

Conclusively presumed where legislature acted upon matter involving determination of fact it took evidence thereon, and its action will not be judicially reviewed. P. *v.* Dist., 155 Cal. 373, 103 P. 207.

Motives of legisature or governor, in acting upon legislation, cannot be inquired into. Lukens *v.* Nye, 156 Cal. 498, 105 P. 593.

Construction.—Re-enactment of statute construed before its repeal, presumed approval of construction. Wender, etc. Co. *v.* Co., 137 Ky. 339, 125 S. W. 732.

Repeal.—Statutes are presumed to be passed with deliberation, and with full knowledge by the legislature of the existing law upon the same subject. Re Gopsill's Est., 77 N. J. Eq. 215, 77 A. 793, *cit.* Landis *v.* Landis, 39 N. J. L. 274.

18-52 Chesser *v.* Motes (Ala.), 61 S. 267; In re Warner's Estate, 167 Cal. 686, 140 P. 583; Cellulose, etc. Mfg. Co. *v.* Calhoun, 166 Cal. 513, 137 P. 238; Wills *v.* Wills, 166 Cal. 529, 137 P. 249; Van Buskirk *v.* Kuhns, 164 Cal. 472, 129 P. 587; Hobbs *v.* M. Co., 164 Cal. 497, 129 P. 781, 43 L. R. A. (N. S.) 1112; Wilson *v.* Durkee, 20 Cal. App. 492, 129 P. 617; Justis *v.* R. Co., 12 Cal. App. 639, 108 P. 328; Schwartz *v.* R. Co., 155 Cal. 742, 103 P. 196; Daggett *v.* P. Co., 155 Cal. 762, 103 P. 204; Lilly-B. Co. *v.* Sonnemann, 157 Cal. 192, 106 P. 715 (regardless of whether substantive defense involved); Board *v.* Bureau, 175 Ill. App. 464; Secor *v.* Siver (Ia.), 146 N. W. 845; Putbrees *v.* James (Ia.), 144 N. W. 607; Scott *v.* Scott (Ia.), 143 N. W. 1103; Knight *v.* R. Co. (Ia.), 140 N. W. 839; Smith *v.* Bloom (Ia.), 141 N. W. 32; Condit *v.* Johnson (Ia.), 139 N. W. 477; Lefebure *v.* Exp. Co. (Ia.), 139 N. W. 1117;

Crans *v.* Durdall, 154 Ia. 468, 134 N. W. 1086; Elswick *v.* Ramey, 157 Ky. 639, 163 S. W. 751; Twin C. B. F. *v.* Ins. Co., 114 Minn. 475, 131 N. W. 497; Lyons *v.* R. Co., 253 Mo. 143, 161 S. W. 726; Armor *v.* Frey, 253 Mo. 447, 161 S. W. 829; Bethel *v.* Pawnee County, 95 Neb. 203. 145 N. W. 363; Fish *v.* R. Co., 158 App. Div. 92, 143 N. Y. S. 365, *aff.* 79 Misc. 636, 141 N. Y. S. 245; Mo., etc. Co. *v.* McLaughlin, 29 Okla. 345, 116 P. 811; W. U. T. Co. *v.* Crawford, 29 Okla. 143, 116 P. 925; Ellis *v.* Abbott (Or.), 138 P. 488; Stoddart *v.* Meyers, 52 Pa. Super. 179; Cape M. R. Co. *v.* Henderson, 231 Pa. 82, 79 A. 982; Mo., etc. Co. *v.* Harriman (Tex. Civ.), 128 S. W. 932; Western U. T. Co. *v.* White (Tex. Civ.), 162 S. W. 905; Southwestern S. Ins. Co. *v.* Anderson (Tex. Civ.), 152 S. W. 816, *rev.* 155 S. W. 1176; Grow *v.* R. Co. (Utah), 138 P. 398; Stanford *v.* Gray (Utah), 129 P. 423; State Bk. *v.* Pease, 153 Wis. 9, 139 N. W. 767; Wenzel *v.* R. Co., 152 Wis. 418, 140 N. W. 81. See Wentz *v.* R. Co. (Mo.), 168 S. W. 1166. *Comp.* Morril *v.* Bentley (Ia.), 126 N. W. 155; Richardson *v.* Mackay, 4 Okla. 328, 46 P. 546; Schlotterbeck *v.* Schwinn, 23 Okla. 681, 103 P. 854; Tex., etc. R. Co. *v.* Miller (Tex. Civ.), 128 S. W. 1165 (after averment of existence).

Common law presumed same. Levy *v.* Downing, 213 Mass. 334, 100 N. E. 638. But see Merrick *v.* Betts, 214 Mass. 223, 101 N. E. 131.

Laws of China presumed same as lex fori in bankruptcy. Fletcher *v.* Comm. Co., 72 Wash. 525, 130 P. 1140.

Porto Rico.—See Brooks *v.* Central Sainte Jeanne, 228 U. S. 668, 33 Sup. Ct. 700, 57 L. ed. 1025.

In Indiana courts will presume an Illinois statute authorizing execution if a note with warrant of attorney to confess judgment invalid as in their own state in absence of proof. Irose *v.* Balla (Ind.), 104 N. E. 851.

Where state was never under common law jurisdiction the laws of that state will be presumed the same as those of lex fori. Fehrenbach, etc. Co. *v.* R. Co. (Mo. App.), 167 S. W. 631.

49-53 Corinth Bk. *v.* King (Ala.), 62 S. 704; Bonfils *v.* Gillespie, 25 Colo. App. 496, 139 P. 1054; Seaboard A. L. R. Co. *v.* Andrews, 140 Ga. 254, 78 S. E. 925; Cormo *v.* Wks., 205 Mass. 366, 91 N. E. 313; Rashall *v.* R. Co., 248 Mo. 509, 155 S. W. 426; Kimball *v.* Kimball, 75 N. H. 291, 73 A. 408; Venner *v.* R. Co., 160 App. Div. 127, 145 N. Y. S. 725; Howlan *v.* Co., 131 App. Div. 443, 115 N. Y. S. 316. See Goodwin *v.* Goodwin, 80 Misc. 303, 141 N. Y. S. 175; In re Kutter's Est., 79 Misc. 74, 139 N. Y. S. 693.

Common law presumed same. Woodward *v.* Woodward, 216 Mass. 1, 102 N. E. 921; Holden *v.* McGillicuddy, 215 Mass. 563, 102 N. E. 923.

Must be proved.—In re Weekes, 146 N. Y. S. 1006.

50-56 Wade *v.* Boone (Mo. App.), 168 S. W. 360.

50-57 Construction given statute by court of state from which it was taken, presumed adopted therewith. Abraham *v.* Roseburg, 55 Or. 359, 105 P. 401; Ollre *v.* S., 57 Tex. Cr. 520, 123 S. W. 1116.

Presumed common law in force.—Davis *v.* McCall (Mo. App.), 166 S. W. 1113; Cherry *v.* Cherry (Mo.), 167 S. W. 539; O'Donnell *v.* Johnson (R. I.), 90 A. 165.

50-58 Time of taking effect.—It is presumed statute took effect on beginning of day of enactment; but if a right depends upon time it was enacted evidence is admissible on that question. Lloyd *v.* R. Co., 151 N. C. 536, 66 S. E. 604.

Practical construction given statute by officers governed by it, presumed known and adopted when it was re-enacted. Van Veen *v.* County, 13 Ariz. 167, 108 P. 252.

STIPULATIONS

54-5 Rex *v.* Degan, 17 Ont. L. R. 366; Curtin *v.* Dunne, 10 Cal. App. 586, 102 P. 825.

60-16 Holmes *v.* S., 82 Neb. 406, 118 N. W. 99.

60-18 McWhirter *v.* Donaldson, 36 Utah 293, 104 P. 731.

62-19 Pringle *v.* Dean, 128 N. Y. S. 1051; S. *v.* Quillen (Tex. Civ.), 115 S. W. 660.

63-23 Sheppard *v.* Sheppard, 15 Cal. App. 614, 115 P. 751.

65-37 St. Louis I. M. & S. R. Co. *v.* Webster, 99 Ark. 265, 137 S. W. 1103.

Not to be regarded if made out of court. Bramlett *v.* Adams, 96 Miss. 61, 50 S. 489.

67-43 Continental B. & L. Assn. *v.* Woolf, 12 Cal. App. 725, 108 P. 729.

70-49 P. *v.* Whitridge, 129 N. Y. S. 300.

71-51 Luce *v.* Ash, 28 S. D. 109, 132 N. W. 708.

78-74 Lloyd *v.* Fendick, 231 Pa. 367, 80 A. 529.

86-99 See Capital T. Co. *v.* Brown, 34 Okla. 568, 126 P. 722.

93-16 McClatchey *v.* Anderson, 84 Neb. 783, 122 N. W. 67.

93-21 Dooley *v.* Co., 12 Ariz. 332, 100 P. 797; Chicago T. & T. Co. *v.* Co., 242 Ill. 468, 90 N. E. 282; Priolo *v.* Co., 198 N. Y. 528, 91 N. E. 275.

93-22 Hiller *v.* Pfeffer, 79 N. J. L. 362, 75 A. 471.

93-26 Hinkle *v.* Smith, 133 Ga. 255, 65 S. E. 427; Mutual L. & B. Assn. *v.* Garlick, 139 Ill. App. 448; St. Louis, etc. R. Co. *v.* Sparks, 52 Tex. Civ. 321, 114 S. W. 673 (limited in effect according to terms).

Deposition may be used in lieu of record testimony. Lewright *v.* Walls, 55 Tex. Civ. 643, 119 S. W. 721.

93-27 Presumption may be overcome by stipulation. St. Louis S. R. Co. *v.* Henderson, 55 Tex. Civ. 425, 119 S. W. 891.

Stipulation describing map may take place of original or certified copy. Victoria *v.* County (Tex. Civ.), 115 S. W. 67.

Stipulations concerning proof of foreign laws, binding. Union Cent. L. Ins. Co. *v.* Dukes, 132 Ky. 370, 113 S. W. 454.

94-31 Brooklyn M. & M. Co. *v.* Miller, 13 Ariz. 217, 108 P. 471; Conway *v.* Chicago, 237 Ill. 128, 86 N. E. 619. See Clason *v.* Matko, 12 Ariz. 213, 100 P. 773.

95-33 Dooley *v.* Co., 12 Ariz. 332, 100 P. 797.

95-38 Kaighn *v.* Friday, 77 N. J. L. 709, 73 A. 540.

95-43 Bottoms *v.* Neukirchner, 29 Okla. 104, 116 P. 434.

96-45 Rule of court governing printing of testimony cannot be waived. Callender *v.* Reardon, 121 N. Y. S. 531.

96-51 Rights of all parties may be considered on appeal though some of them have not appealed if stipulation so provides. Lanham *v.* Bowlby, 86 Neb. 148, 125 N. W. 149.

96-56 Court may, of its own motion, disregard stipulation fairly made. Friedman *v.* O'Neill, 136 App. Div. 750, 121 N. Y. S. 426.

99-64 North *v.* Graham, 235 Ill. 178, 85 N. E. 267.

100-66 First Nat. Bk. *v.* Fowler, 54 Wash. 65, 102 P. 1038.

Regularity and legality of prior judicial proceedings, covered by stipulation expressing rendition of judgment and proceedings thereunder. Gough *v.* Center, 57 Wash. 276, 106 P. 774.

100-68 Brooks *v.* Ostrander, 158 Ill. App. 78; Mahoning C. Co. *v.* Dowling (Ky.), 124 S. W. 370; In re McNamara's Est., 154 Mich. 671, 118 N. W. 598; In re Holloway's Est., 89 Neb. 403, 131 N. W. 606; McCall *v.* Cohn, 113 N. Y. S. 540; Vucci *v.* Pellettieri, 111 N. Y. S. 784.

101-69 Underwood *v.* Woodman, 141 Ia. 240, 119 N. W. 610.

Effect of stipulation depends upon whether facts intended to be only evidentiary for purpose of pending trial or whether it was intended to be statement of ultimate facts and applicable to all trials. In former case, it is not conclusive; in latter, it is. Volker-S. L. Co. *v.* Vance, 36 Utah 348, 103 P. 970.

101-72 Giving one party the right to produce additional testimony, without securing to the other the right to rebut it, error. Adams *v.* Hartzell, 18 N. D. 221, 119 N. W. 635.

102-78 Sac & Fox Indians of Ia. *v.* U. S., 45 Ct. Cl. 287, *aff.* 220 U. S. 481.

102-80 Mecca F. Ins. Co. *v.* Wilderspin (Tex. Civ.), 118 S. W. 1131.

103-82 P. *v.* Anderson, 239 Ill. 168, 87 N. E. 917.

103-84 Jury presumed to have regarded stipulation. Winona F. Inst. *v.* Stolte, 173 Ind. 39, 89 N. E. 393.

104-85 Combest *v.* Wall (Tex. Civ.), 115 S. W. 354. *Contra* if either party objects. Rigdon *v.* More, 242 Ill. 256, 89 N. E. 992, 147 Ill. App. 346.

105-88 Stipulation to try prosecution for bastardy before same jury and on same evidence as given in civil action for seduction, enforced. P. *v.* Whittington, 143 Ill. App. 445.

110-3 Clear case must be made. Northern P. R. Co. *v.* Barlow, 20 N. D. 197, 126 N. W. 233.

STREET RAILROADS

Neglect to furnish separate compartments, 120-37; *Repeal of act limiting rate of speed,* 137-3; *Methods elsewhere,* 144-38; *Action for failure to issue transfer,* 151-70.

115-4 Murphy *v.* R. Co. (Mass.), 85 N. E. 507.

115-7 Ownership of connecting lines, not judicially noticed. Mannion *v.* R. Co., 121 N. Y. S. 263.

Operation only by corporations, not known. Beaumont T. Co. *v.* S., 57 Tex. Civ. 605, 122 S. W. 615.

Existence of another company with name like defendant's, not noticed. Mobile L. & R. Co. *v.* Mackay, 158 Ala. 51, 48 S. 509.

115-8 Lease presumed valid.—Graefe *v.* Co., 224 Mo. 232, 123 S. W. 835; Chlanda *v.* Co., 213 Mo. 244, 112 S. W. 249 (public assent).

Mortgage of franchise, presumed been made with assent of city. Kavanaugh *v.* St. Louis, 220 Mo. 496, 119 S. W. 552.

Right to use bridge as part of street, presumed. Riggs *v.* R. Co., 216 Mo. 304, 115 S. W. 969.

Statutory presumption in favor of occupancy of highway.—Hollis *v.* R. Co., 128 App. Div. 821, 113 N. Y. S. 4.

118-23 Int. Lumb. Co. *v.* Am. Suburbs Co., 119 Minn. 77, 137 N. W. 395.

119-33 Unlawful acts done at night, convincing evidence company knew it had no right to tear up street and believed it was laying tension rather than switch. Waverly *v.* Co., 132 App. Div. 561, 116 N. Y. S. 1074.

120-37 Operation of cars on tracks, presumed authorized. Baker *v.* R. Co., 142 Mo. App. 354, 126 S. W. 764.

Neglect to furnish separate compartments.—It is presumed failure to comply with statute requiring separate compartments be provided for whites and blacks was intentional if it was voluntarily done. Immaterial defendant was without authority to operate road, or that lease of it void. Louisville R. Co. *v.* C., 130 Ky. 738, 114 S. W. 343.

120-38 Love *v.* R. Co., 170 Mich. 1, 135 N. W. 963; Kirkpatrick *v.* R. Co., 161 Mo. App. 515, 143 S. W. 865.

121-40 Petersen *v.* Co., 142 Ill. App. 34 (if payment of fare not demanded and refused); Lockwood *v.* R. Co., 200 Mass. 537, 86 N. E. 934; Kohn *v.* R. C., 117 N. Y. S. 231 (validity of transfer need not be shown). See Beaumont T. Co. *v.* Happ, 57 Tex. Civ. 427, 122 S. W. 610.

Burden on third party who has right of action on existence of relation of passenger and carrier to establish same Garrett *v.* Co., 218 Mo. 65, 118 S. W. 68.

121-41 As between third parties fact car stopped in front of home of person on it and he alighted therefrom is evidence he had been a passenger. McAuley *v.* Co., 39 Mont. 185, 102 P. 586.

121-42 Rosenkovitz *v.* Co., 108 Md. 306, 70 A. 108; Garrett *v.* Co., 218 Mo. 65, 118 S. W. 68.

121-43 Montgomery Co. *v.* Riverside Co., 8 Ala. App. 509, 62 S. 311; Birmingham Co. *v.* Elmit, 6 Ala. App. 653, 60 S. 981; Thompson *v.* R. Co., 165 Cal. 748, 134 P. 709; Wyatt *v.* R. Co., 156 Cal. 170, 103 P. 892; Swayne *v.* R. Co., 86 Conn. 439, 85 A. 634, 737; Kruck *v.* C. Co., 84 Conn. 401, 80 A. 162; File *v.* R. Co., 7 Penne. (Del.) 463, 80 A. 623; Elliott *v.* R. Co., 6 Penne. (Del.) 570, 73 A. 1040; Benson *v.* R. Co., 1 Boyce (Del.) 202, 75 A. 793; Foster *v.* R. Co., 158 Ill. App. 478; Randall *v.* R. Co., 158 Ill. App. 56; Lexington R. Co. *v.* Johnson, 139 Ky. 323, 122 S. W. 830; Weiss *v.* R. Co., 133 La. 14, 62 S. 216; Sewell *v.* R., 158 Mich. 407, 123 N. W. 2; Sterrett *v.* R. Co., 225 Mo. 99, 123 S. W. 877; Graefe *v.* T. Co., 224 Mo. 232, 123 S. W. 835; Gardner *v.* R. Co., 223 Mo. 389, 122 S. W. 1068; Widener *v.* Co., 224 Pa. 171, 73 A. 209; Paul *v.* R. Co., 34 Utah 1, 95 P. 363.

Presumption that motorman will exercise due care.—Schaedel *v.* R. Co., 182 Ill. App. 70.

Cause of injury must be shown by plaintiff; defendant must show it had done all that was reasonable and required by prudence and foresight. Casper *v.* Co., 121 La. 603, 46 S. 666.

If joint negligence is alleged it must be proved. Chlanda *v.* Co., 213 Mo. 244, 112 S. W. 249.

Evidence sufficient.—Doll *v.* Traction Co., 153 Ill. App. 442; Cincinnati Tr. Co. *v.* Cramer, 31 O. C. C. 576; Cincinnati Tr. Co. *v.* Hulvershorn, 31 O. C. C. 444; Miller *v.* Transit Co., 231 Pa. 627, 80 A. 1108; Kline *v.* R. & L. Co., 146 Wis. 134, 131 N. W. 427.

121-44 Wyatt *v.* R. Co., 156 Cal.

170, 103 P. 892; Girardo *v.* T. Co. (Del.), 90 A. 476; Coyle *v.* R. Co., 7 Penne. (Del.) 454, 80 A. 638; Eaton *v.* R. Co., 1 Boyce (Del.) 435, 75 A. 369 (though injured while jumping to avoid collision); Bigwood *v.* R. Co., 209 Mass. 345, 95 N. E. 751; Rhea *r.* R. Co., 111 Minn. 271, 126 N. W. 823; Battles *v.* R. Co., 178 Mo. App. 596, 161 S. W. 614; Cline *v.* R. Co., 226 Pa. 586, 75 A. 850; Sama *v.* Co., 4 P. R. Fed. 13; De Yoe *v.* Co., 53 Wash. 588, 104 P. 647. See Zercher *v.* Co., 50 Pa. Super. 324.

Presumption of due care.—Ebert *v.* R. Co., 174 Mo. App. 45, 160 S. W. 34.

No presumption of negligence from mere fall of trolley wire. Douds *v.* Traction Co., 54 Pa. Super. 477.

Proof that tracks projected above street and caused obstruction is prima facie negligence. San Antonio Traction Co. *v.* Cassanova (Tex. Civ.), 154 S. W. 1190.

Presumption of negligence where trolley pole broke while car was in motion. Hull *v.* R. Co., 217 Mass. 361, 104 N. E. 747.

122-45 Williamson *v.* R. Co., 133 Mo. App. 375, 113 S. W. 239.

122-46 Louisville, etc. T. Co. *v.* Warrell, 44 Ind. App. 480, 86 N. E. 78; Steverman *r.* R. Co., 205 Mass. 508, 91 N. E. 919; Gay *r.* Co., 138 Wis. 348, 120 N. W. 283.

123-47 Cincinnati T. Co. *v.* Leach, 169 Fed. 549, 95 C. C. A. 47; Briscoe *v.* R. Co., 222 Mo. 104, 120 S. W. 1162.

123-48 Wyatt *v.* R. Co., 156 Cal. 170, 103 P. 892; Georgia R. & E. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944 (presumption can only be rebutted by proof of exercise of "all extraordinary and reasonable care and diligence in connection with those things that are charged to be negligence"); Tracey *v.* R. Co., 204 Mass. 13, 90 N. E. 416. See Lockwood *v.* R. Co., 200 Mass. 537, 86 N. E. 934.

Res ipsa loquitur.—Denver City Tramway Co. *r.* Hills, 50 Colo. 328, 116 P. 125; Kunkel *v.* Tr. Co., 156 Ill. App. 393.

124-49 *Comp.* Nilson *v.* Co., 10 Cal. App. 103, 101 P. 413.

Starting car before passenger is seated is not negligence per se. Benjamin *v.* R. Co., 245 Mo. 598, 151 S. W. 91.

124-50 Beattie *r.* R. Co., 201 Mass. 3, 86 N. E. 920.

Presumption of negligence extends to injuries caused by effort of passenger to escape collision if made on well-founded belief it would occur. Lehner *r.* R. Co., 223 Pa. 208, 72 A. 525.

The court will take judicial notice of the fact that it is the custom of electric railway companies operating their cars in the public streets to equip them with fenders or some similar device, and that their object is the protection of the public engaged in ordinary business or travel upon the streets, whence arises a duty on the part of defendant. Love *r.* R. Co., 170 Mich. 1, 135 N. W. 963.

Evidence as to purpose of handhold properly refused.—"No testimony offered upon that question could have added to the knowledge already in the possession of each of the jurors. The use of the appliance is absolutely obvious. It is intended primarily as an aid to passengers in boarding and alighting from cars, but, when cars are crowded, it is frequently used by passengers to enable them to maintain themselves in a position upon the car which without its use would be impossible. It is intended for use by all who are invited to become passengers upon the cars of defendant. As, in its invitation to the public, no discrimination is or can be made by defendant in favor of those light in weight or against those who are heavy, it follows that defendants' equipment must be such as to reasonably meet the demands of all." Gerlach *v.* R., 171 Mich. 474, 137 N. W. 256.

124-51 Paducah T. Co. *v.* Baker, 130 Ky. 360, 113 S. W. 449; Fields *v.* R. Co., 169 Mo. App. 624, 155 S. W. 845; Brady *r.* Co., 140 Mo. App. 421, 124 S W. 1070. See Louisville R. Co. *v.* Osborne, 157 Ky. 341, 163 S. W. 189. *Contra*, McGann *v.* R. Co., 199 Mass. 446, 85 N. E. 570, unless defect in track or negligence in managing car is shown (but *comp.* Consolidated T. Co. *v.* Thalheimer, 59 N. J. L. 474, 37 A. 132, and see Lacour *v.* R. Co., 200 Mass. 34, 85 N. E. 868); Cline *r.* R. Co., 226 Pa. 586, 75 A. 850 (if means of transportation not injured); Tilton *r.* Tr. Co., 231 Pa. 63, 79 A. 877; Harrell *r.* P. Co., 89 S. C. 97, 71 S. E. 359; De Yoe *v.* Co., 53 Wash. 588, 102 P. 446, 104 P. 647

Statute makes fact of injury caused by running car, prima facie evidence of

negligence. Pensacola E. Co. *v.* Alexander, 58 Fla. 337, 50 S. 673.

125-52 James *v.* R. Co., 201 Mass. 263, 87 N. E. 474; Minihan *v.* R. Co., 205 Mass. 402, 91 N. E. 414; MacDonald *v.* R. Co., 218 Mo. 468, 118 S. W. 78; San Antonio T. Co. *v.* Probandt (Tex. Civ.), 125 S. W. 931. *Contra,* Niedzinski *v.* Co., 160 Mich. 517, 125 N. W. 409.

125-55 *Contra* if negligent acts causing injury specifically pleaded. Gardner *v.* R. Co., 223 Mo. 389, 122 S. W. 1068.

Rule applied where derailed car collided with object not under defendant's control. Wolven *v.* Co., 143 Mo. App. 643, 128 S. W. 512.

125-56 Eaton *v.* R. Co., 1 Boyce (Del.) 435, 75 A. 369; Schmidt *v.* R. Co., 239 Ill. 494, 88 N. E. 275; Wojczynska *v.* Tr. Co., 156 Ill. App. 587; Fuhry *v.* R. Co., 144 Ill. App. 521; Wilson *v.* R. Co., id. 604; Barnes *v.* R. & L. Co., 143 Ill. App. 259; Ind. U. T. Co. *v.* Maher, 176 Ind. 289, 95 N. E. 1012; Sewell *v.* R., 158 Mich. 407, 123 N. W. 2; Price *v.* R. Co., 220 Mo. 435, 119 S. W. 932; Chlanda *v.* T. Co., 213 Mo. 244, 112 S. W. 249; Potter *v.* R. Co., 142 Mo. App. 220, 126 S. W. 209.

126-57 Kimie *v.* R. Co., 156 Cal. 379, 104 P. 986; Ellis *v.* R. Co., 127 App Div. 328, 111 N. Y. S. 544; Elliott *v.* R. Co., 127 App. Div. 300, 111 N. Y. S. 358. *Contra,* Vogel *v.* Bahr, 130 App. Div. 732, 115 N. Y. S. 284, *foll.* Hill *v.* R. Co., 109 N. Y. 239, 16 N. E. 61; Stanbridge *v.* R. Co., 135 App. Div. 38, 119 N. Y. S. 668 (but not against company of which plaintiff not passenger); Cleveland P. & E. R. *v.* Sites, 31 O. C. C. 167.

Evidence as to expectation of what motorman would do is irrelevant. Gadbois *v.* R. Co., 216 Mass. 188, 103 N. E. 294.

126-58 Elliott *v.* R. Co., 6 Penne. (Del.) 570, 73 A. 1040; Seale *v.* R. Co., 214 Mass. 59, 100 N. E. 1020; Whilt *v.* Co., 76 N. J. L. 729, 72 A. 420 (tripping on rear fender while transferring from one car to another, though fenders usually fastened up); Masterson *v.* R. Co., 201 N. Y. 499, 94 N. E. 1086, *rev.* 120 N. Y. S. 1134; Paul *v.* R. Co., 34 Utah 1, 95 P. 363.

Observations as to conduct of plaintiff referring to her acts at other times and places is inadmissible. Mitchell *v.* R. Co. (Ia.), 141 N. W. 43.

126-59 Cooke *v.* Tr. Co., 144 Mo. App. 451, 129 S. W. 265; Paul *v.* R. Co., supra. See Ward *v.* R. Co., 237 Ill. 633, 86 N. E. 1111; Stevens *v.* R. Co., 199 Mass. 471, 85 N. E. 571.

Burden of proof is on plaintiff to show unusual and extraordinary sudden jerking of car. Sanson *v.* Co., 239 Pa. 505, 86 A. 1069.

Knowledge of conductor passenger about to alight inferred from fact car stopped on his signal. Groshong *v.* R. Co., 142 Mo. App. 718, 121 S. W. 1084.

Violation of ordinance by permitting plaintiff to alight while car in motion, evidence of negligence. Johnson *v.* R., etc. Co., 143 Mo. App. 376, 128 S. W. 243.

126-60 Thompson *v.* R. Co., 165 Cal. 748, 134 P. 709; Fuyise *v.* R. Co., 12 Cal. App. 207, 107 P. 317; O'Connor *v.* R. Co., 82 Conn. 170, 72 A. 934; Fay *v.* R. Co., 81 Conn. 330, 71 A. 364; Morse *v.* R. Co., 81 Conn. 395, 71 A. 553; Fitzgerald *v.* R. & L. Co., 131 La. 92, 59 S. 26; Reynolds *v.* R. Co., 136 Mo. App. 282, 116 S. W. 1135; Trigg *v.* Co., 215 Mo. 521, 114 S. W. 972; Hayden *v.* Joline, 137 App. Div. 755, 122 N. Y. S. 629. See vol. 8, p. 852, n. 5, and supplement thereto.

126-61 Culbert *v.* Tr. Co. (Del.), 82 A. 1081; Tobias *v.* R. Co. (Del.), 80 A. 358; Lenkewicz *v.* R. Co., 7 Penne. (Del.) 64, 74 A. 11; Kinlen *v.* R. Co., 216 Mo. 145, 115 S. W. 523. See vol. 8, p. 869, n. 45, and supplement thereto.

Presumption of negligence arises when injury caused pedestrian on sidewalk by derailment of car. Baker *v.* R. Co., 142 Mo. App. 354, 126 S. W. 764; Najarian *v.* R. Co., 77 N. J. L. 704, 73 A. 527 (because of splitting of switch). Negligence presumed from injury caused by sagging wire. Crosby *v.* R. Co., 53 Or. 496, 100 P. 300, 101 P. 204. It may arise from proof of circumstances showing accident could have been avoided. Mobile L. & R. Co. *v.* McKay, 163 Ala. 111, 50 S. 1035. As where a car is run into the rear of a wagon bearing a light, if no account given of motorman's conduct. Swift *v.* R. Co., 136 App. Div. 34, 120 N. Y. S. 203. Unusual circumstances connected with injury may raise presumption. Geiser *v.* R. Co., 223 Pa. 170, 72 A. 351.

Burden of proving freedom from negligence is on company where prevent-

able collision occurs with vehicle on track. Oliveira *v.* Co. (R. I.), 72 A. 817.

Plaintiff must show defendant operated car as alleged. Mobile L. & R. Co. *v.* Mackay, 158 Ala. 51, 48 S. 509.

Time and opportunity to stop car may be shown. Dalton *v.* Rys. Co., 134 Mo. App. 392, 114 S. W. 561.

127-62 Defendant may show switch causing injury to traveler was of standard make, commonly used, properly installed and inspected. Alcott *v.* Corp., 77 N. J. L. 110, 71 A. 45.

127-63 City & S. R. Co. *v.* Cooper, 32 App. Cas. (D. C.) 550; Murphy *v.* R. Co., 235 Ill. 275, 85 N. E. 334 (rate of speed material); Doherty *v.* R. Co., 144 Ia. 26, 121 N. W. 690; Kern *v.* R. Co., 141 Ia. 620, 118 N. W. 451; McKenzie *v.* Rys. Co., 216 Mo. 1, 115 S. W. 13; Stewart *v.* R. Co., 83 Neb. 97, 118 N. W. 1106; Donohoe *v.* R. Co., 56 Or. 58, 107 P. 964; Palmer *v.* R. Co., 56 Or. 262, 108 P. 211; Martin *v.* R. Co., 84 S. C. 568, 66 S. E. 993 (negligence per se); Northern Texas T. Co. *v.* Hunt, 54 Tex. Civ. 415, 118 S. W. 827 (ordinance admissible); Norfolk & P. T. Co. *v.* Forrest, 109 Va. 658, 64 S. E. 1034 (though ordinance imposes penalty); Wilson *v.* R. Co., 52 Wash. 522, 101 P. 50.

Speed ordinance admissible. Wagner *v.* R. Co., 19 Cal. App. 396, 126 P. 186.

Absence of lights and high rate of speed shown. Donelson *v.* R. Co., 235 Ill. 625, 85 N. E. 914.

Failure to sound gong as required by rules shown. Murphy *v.* R. Co., 204 Mass. 229, 90 N. E. 398; Stewart *v.* R. Co., 83 Neb. 97, 118 N. W. 1106; Normand *v.* R. Co., 133 App. Div. 474, 117 N. Y. S. 1076; El Paso E. R. Co. *v.* Adkins, 56 Tex. Civ. 202, 120 S. W. 218 (regardless of ordinance).

Ordinances concerning signals, admissible. Denver C. T. Co. *v.* Martin, 44 Colo. 324, 98 P. 836.

Rate of speed, independently of ordinance, not significant if track elevated and but little travel. Trigg *v.* Co., 215 Mo. 521, 114 S. W. 972.

Violation of speed ordinance by plaintiff by driving horse faster than allowed shown; that being done, ordinance admissible. Thompson *v.* R. Co., 143 Ill. App. 81.

No presumption indulged as to speed of car by one about to cross track. Netterfield *v.* R. Co., 129 App. Div. 56, 113 N. Y. S. 434.

127-64 Childress *v.* R. Co., 141 Mo. App. 667, 126 S. W. 169.

128-65 See Pascagoula R. Co. *v.* Brondum, 96 Miss. 28, 50 S. 97.

128-66 Quinlan *v.* R. Co., 133 App Div. 402, 117 N. Y. S. 641.

Incapacity of child to be guilty of contributory negligence does not relieve plaintiff from proving child's conduct and situation when injured. Morse *v.* R. Co., 81 Conn. 395, 71 A. 553.

128-67 Danna *v.* City, 129 La. 138, 55 S. 741; Dorr *v.* R. Co., 76 N. H. 160, 80 A. 336.

129-69 Cairns *v.* Sampsell, 158 Ill. App. 415; Rastetter *v.* R. Co., 142 Ill. App. 417; Pascagoula R. Co. *v.* Brondum, 96 Miss. 28, 50 S. 97; Tjaden *v.* R. Co., 130 N. Y. S. 280; Glynn *v.* R. Co., 110 N. Y. S. 836; Stephens *v.* Tr. Co., 31 O. C. C. 439; Davis *v.* R. Co., 222 Pa. 356, 71 A. 538. See Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160.

In Breen *v.* **R. Co.,** 211 Mass. 519, 98 N. E. 511, there were contradictions in the evidence, but in almost any view, the child tried to use care. The court said that "Whether the care and judgment that were exercised were such as naturally might be expected of such a child, and, as bearing upon that, to what extent, if any, she might rely upon the motorman's seeing her and slackening his speed and so enabling her to cross in safety, were matters which we think rendered the question of due care, one for the jury."

Violation of ordinance requiring vigilant watch kept for persons on foot, especially children, negligence per se. Spencer *v.* T. Co., 222 Mo. 310, 121 S. W. 108.

129-70 Braly *v.* R. Co., 9 Cal. App 417, 99 P. 400; Fujise *v.* R. Co., 12 Cal. App. 207, 107 P. 317; Freeman *v.* Tr. Co. (Del.), 80 A. 1001; File *v.* R. Co., 7 Penne. (Del.) 463, 80 A. 623; Elliott *v.* R. Co., 6 Penne. (Del.) 570, 73 A. 1040; Lenkewicz *v.* R. Co., 7 Penne. (Del.) 64, 74 A. 11; Indiana U. Tract. Co. *v.* Love (Ind.), 99 N. E. 1005; Louisville, etc. T. Co. *v.* Warrell, 44 Ind. App. 480, 86 N. E. 78; Ind. T. & T. Co. *v.* Miller, 43 Ind. App. 717, 88 N. E. 526; Weiss *v.* R. Co., 133 La. 14, 62 S. 216; Day *v.* R. Co., 121 Minn. 445, 141 N. W. 795; Swanson *v.* R. Co., 109 Minn. 464, 124 N. W. 219; Bremer

v. Co., 107 Minn. 326, 120 N. W. 382; Byerly *v.* R. Co., 172 Mo. App. 470, 158 S. W. 413; Troll *v.* R. Co., 169 Mo. App. 260, 153 S. W. 504; Palmer *v.* R. Co., 56 Or. 262, 108 P. 211; Pawtucket B. Co. *v.* R. I. Co., 32 R. I. 517, 80 A. 665; Beaumont T. Co. *v.* Happ, 57 Tex. Civ. 427, 122 S. W. 610; Barnes *v.* R. Co. (Tex.), 128 S. W. 367; Grimm *v* R. Co., 138 Wis. 44, 119 N. W. 833.

Where plaintiff saw car coming nearly half block away and made no attempt to warn driver there is a presumption of negligence. Traction Co. *v.* Sanders, 32 O. C. C. 413.

What witness would have done under certain circumstances is irrelevant. Texas Tract. Co. *v.* Wiley (Tex. Civ.), 164 S. W. 1028.

Evidence sufficient.—Drane *v.* R. Co., 154 Ill. App. 70.

130-71 McKenzie *v.* Rys. Co., 216 Mo. 1, 115 S. W. 13; Sontum *v.* R. Co., 226 Pa. 230, 75 A. 189.

130-72 Kruck *v.* Conn. Co., 84 Conn. 401, 80 A. 162; O'Connor *v.* R. & L. Co., 82 Conn. 170, 72 A. 934; Fay *v.* R. Co., 81 Conn. 330, 71 A. 364; Mesite *v.* Co., 82 Conn. 403, 74 A. 684; Haynes *v.* R. Co., 204 Mass. 249, 90 N. E. 419; Maercker *v.* R. Co., 137 App. Div. 49, 122 N. Y. S. 87; Wood *v.* R. Co., 133 App. Div. 270, 117 N. Y. S. 703; Enders *v.* R. Co., 131 App. Div. 170, 115 N. Y. S. 155; Vandenbout *v.* R. Co., 129 App. Div. 844, 114 N. Y. S. 760; Paladino *v.* R. Co., 127 App. Div. 183, 111 N. Y. S. 715; Bachmann *v.* R. Co., 111 N. Y. S. 586; St. John *v.* Rhode Island Co., 32 R. I. 447, 79 A. 1101.

131-73 Little Rock R. & Elec. Co. *v.* Billings, 187 Fed. 960, 110 C. C. A. 80; Coyle *v.* R. Co., 7 Penne. (Del.) 454, 80 A. 638; Pusateri *v.* R. Co., 156 Ill. App. 578; Ellis *v.* R. Co., 234 Mo. 657, 138 S. W. 23; McNamara *v.* R. Co., 133 Mo. App. 645, 114 S. W. 50; Anderson *v.* Corporation, 81 N. J. L. 700, 80 A. 480; Stephens *v.* Tr. Co., 31 O. C. C. 439; Underwood *v.* R. Co., 33 R. I. 319, 80 A. 390; Roanoke Ry. & Elec. Co. *v.* Carroll, 112 Va. 598, 72 S. E. 125; Riedel *v.* Tr. Co., 69 W. Va. 18, 71 S. E. 174.

See Galveston E. Co. *v.* Antonini (Tex. Civ.), 152 S. W. 841.

131-74 Little Rock R. Co. *v.* Billings, 173 Fed. 903, 98 C. C. A. 467; Spear *v.* United Rys., 16 Cal. App. 637, 117 P. 956; Fay *v.* R. Co., 82 Conn. 471, 74 A. 779; Riccio *v.* R. Co. (Del.), 82 A. 604; Dubose *v.* R. Co., 123 La. 1029, 49 S. 696; Kinsley *v.* R. Co., 209 Mass. 467, 95 N. E. 856; Willis *v.* R. Co., 208 Mass. 589, 94 N. E. 1041; Wood *v.* R. Co., 84 Neb. 282, 120 N. W. 1121; Wecker *v.* R. Co., 136 App. Div. 340, 120 N. Y. S. 1020; Glynn *v.* R. Co., 110 N. Y. S. 836; Vandenbout *v.* R Co., 202 N. Y. 61, 95 N. E. 5, *rev.* 120 N. Y. S. 1149; Peck *v.* Co., 32 R. I. 449, 79 A. 1106.

Greater care required if view is obstructed. Roanoke Ry. & Elec. Co. *v.* Carroll, 112 Va. 598, 72 S. E. 125.

131-75 Swanson *v.* R. Co., 242 Ill. 388, 90 N. E. 210; Dow *v.* R. Co., 148 Ia. 429, 126 N. W. 918 (failure to stop, look and listen); Mullen *v.* R. Co., 209 Mass. 79, 95 N. E. 391; Swanson *v.* R. Co., 109 Minn. 464, 124 N. W. 219; Jackson E. R., etc. Co. *v.* Carnahan, 95 Miss. 66, 48 S. 617; Parrish *v.* R. Co., 140 Mo. App. 700, 126 S. W. 767. See Ledoux *v.* R. Co., 75 N. H. 598, 74 A. 874.

Condition of street beside track shown as bearing upon plaintiff's care in driving on track. Murphy *v.* R. Co., 235 Ill. 275, 85 N. E. 334.

132-76 Fay *v.* R. Co., 81 Conn. 330, 71 A. 364, 82 Conn. 471, 74 A. 779; Brown *v.* R. Co., 155 Ill. App. 434; Burke *v.* R. Co., 153 Ill. App. 388; Hamilton *v.* R. Co., 167 Mich. 5, 132 N. W. 453; Measel *v.* R. Co., 166 Mich. 688, 132 N. W. 453; Carlson *v.* R. Co., 111 Minn. 244, 126 N. W. 825; Harlan *v.* R. Co., 157 Mo. App. 623, 138 S. W. 677; Sontum *v.* R. Co., 226 Pa. 230, 75 A. 189; Smathers *v.* R. Co., 226 Pa. 212, 75 A. 190; Helliesen *v.* E. Co., 56 Wash. 278, 105 P. 458.

See Stewart *v.* R. Co., 83 Neb. 97, 118 N. W. 1106, *disap.* Buzby *v.* T. C., 126 Pa. 559, 17 A. 895, 12 Am. St. 919, as to distinction between degree of care required in crossing street car and steam railroad tracks.

If blinded by headlight, same rule applies. Mecker *v.* Traction Co., 31 O. C. C. 346.

133-82 Relation of carrier and passenger established by slight proof; payment of fare, not essential. Barnes *v.* R. Co., 143 Ill. App. 259.

Defendant's non-observance of custom known to plaintiff excuses failure to look and listen. Swanson *v.* R. Co., 109 Minn. 464, 124 N. W. 219.

Duty to stop before driving across tracks depends upon circumstances.

Smathers *v.* R. Co., 226 Pa. 212, 75 A. 190.

133-83 Prior negligent acts of same motorman admissible. Bessierre *v.* R. Co. (Ala.), 60 S. 82.

Statute placing burden on railroad of acquitting itself of negligence when property has been injured on its tracks does not apply to street railroads. Montgomery, etc. Co. *v.* Co. (Ala. App.), 62 S. 311.

133-84 **Previous failure to stop car** at same crossing shown. Washington, etc. R. Co. *v.* Trimyer, 110 Va. 856, 67 S. E. 531.

Failure to observe mandatory statute for protection of public evidence of negligence though statute silent as to consequence of non-observance. Fortin *v.* E. Co., 154 Mich. 316, 117 N. W. 741.

Violation of rule forbidding passengers to ride on front platform. See Jones *v.* R. Co., 205 Mass. 108, 90 N. E. 1152.

134-86 Birmingham, etc. R. Co. *v.* Saxon (Ala.), 59 S. 584; Birmingham, etc. Co. *v.* Glenn (Ala.), 60 S. 111; Kramm *v.* R. Co., 22 Cal. App. 737, 136 P. 523; Great Falls & O. D. R. Co. *v.* Hill, 34 App. Cas. (D. C.) 304; Plefka *v.* R. Co., 155 Mich. 53, 118 N. W. 731; Brady *v.* Co., 140 Mo. App. 421, 124 S. W. 1070; Ritscher *v.* R. Co., 79 N. J. L. 462, 75 A. 209; Vandenbout *v.* R. Co., 129 App. Div. 844, 114 N. Y. S. 760; White *v.* Joline, 121 N. Y. S. 852; Champlin *v.* R. Co., 33 R. I. 572, 82 A. 481.

See Owens *v.* R. Co., 171 Ill. App. 647.

Evidence of distance headlights of other cars cast their light is inadmissible. Canham *v.* R. I. Co., 35 R. I. 177, 85 A. 1050.

Quality, strength, and effect of headlights may be shown. Simoneau *v.* Co., 166 Cal. 264, 136 P. 544.

Witness of accident may testify as to what he saw after reaching scene. Kramm *v.* R. R. Co., 22 Cal. App. 737, 136 P. 523.

Weight of water wagon is admissible to show noise made and deceased could not hear approach of car. Kramm *v.* R. Co., 22 Cal. App. 737, 136 P. 523.

Populousness of place near scene of injury is admissible. Sheffield Co. *v.* Harris (Ala.), 61 S. 88. But see Jordan *v.* R. Co. (Ala.), 60 S. 309.

Second collision, occurring five or ten minutes after first and before animal struck removable, shown under allegation injury by cars. South Tacoma F & T. Co. *v.* R. Co., 50 Wash. 686, 97 P. 970.

134-87 Cutts *v.* R. Co., 202 Mass. 450, 89 N. E. 21; Potter *v.* R. Co., 142 Mo. App. 220, 126 S. W. 209.

Intoxication of passenger and conduct shown, but not condition of street where restrained from alighting. Sullivan *v.* Co., 51 Wash. 71, 97 P. 1109.

134-88 **Contract between defendant and railroad whose tracks it crossed** admissible to show cause of injury sustained at crossing. Washington, etc. R. Co. *v.* Trimyer, 110 Va. 856, 67 S. E. 531.

Inquiry of motorman's appreciation of responsibility for lives of passengers, irrelevant. Georgia R. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944.

135-92 Franklin *v.* R. Co., 21 Cal. App. 270, 131 P. 776; Reese *v.* R., 159 Mich. 600, 124 N. W. 539; Dwyer *v.* R. Co., 115 N. Y. S. 364.

In an action for falling from a car on a curve, testimony of plaintiff that she had never alighted at the given place is admissible. Dallas, etc. St. R. Co. *v.* Stone (Tex. Civ.), 166 S. W. 708.

Assumed passenger sane **and sober** until notice to contrary shown. Sullivan *v.* Co., 51 Wash. 71, 97 P. 1109.

Time signal to stop car shown. Needham *v.* R. Co. (Tex. Civ.), 127 S. W. 904.

136-96 Orders given laborer by foreman are admissible in evidence. Riordan *v.* R. Co., 178 Ill. App. 323.

136-98 Welsh *v.* R. Co., 148 Ia. 200, 126 N. W. 1118.

137-2 See Swayne *v.* Co., 86 Conn. 439, 85 A. 634, 737.

Bulletin posted in barn of one company whose car collided with car of another inadmissible to show which company had right of way at crossing unless shown it was in force at time of collision. Rule of company relating to right of way, admissible. Schmidt *v.* R. Co., 239 Ill. 494, 88 N. E. 275.

Motorman's knowledge that power had been intermittent, relevant to show negligence in not shutting it off when leaving car. Barnes *v.* R. Co., 235 Ill. 566, 85 N. E. 921.

137-3 Repeal of act limiting rate of speed intermediate injury and trial does not affect right of plaintiff to rely on excessive speed as evidence of

negligence. James *v.* Co., 10 Cal. App. 785, 103 P. 1082.

137-5 Ruppel *v.* R., 10 Cal. App. 319, 101 P. 803; City & S. R. Co. *v.* Cooper, 32 App. Cas. (D. C.) 550; Dieckman *v.* T. Co., 46 Ind. App. 11, 89 N. E. 909; Union T. Co. *v.* Howard (Ind. App.), 87 N. E. 1103; Dow *v.* R. Co., 148 Ia. 429, 126 N. W. 918; Leach *v.* R. Co., 137 Ky. 292, 125 S. W. 708; Netter *v.* R. Co., 134 Ky. 678, 121 S. W. 636; Horsman *v.* R. Co., 205 Mass. 519, 91 N. E. 897; Robbins *v.* R. Co., 203 Mass. 546, 89 N. E. 1039; Moore *v.* R. Co., 142 Mo. App. 290. 126 S. W. 181 (that car on another track has stopped to permit passengers to alight relevant on question of propriety of speed of car causing injury); Sauter *v.* R. Co., 128 App. Div. 400, 112 N. Y. S. 863 (sudden increase of speed and unnecessary noise); White *v.* Joline, 121 N. Y. S. 852; Vandenbout *v.* R. Co., 129 App. Div. 844, 114 N. Y. S. 760; Palmer *v.* R. Co., 56 Or. 262, 108 P. 211; Cabrera *v.* Co., 4 P. R. Fed. 60.

A traveler may assume car is not operated at an unlawful rate of speed. Bruce *v.* R. Co., 175 Mo. App. 568, 158 S. W. 102; Troll *v.* R. Co., 169 Mo. App. 260, 153 S. W. 504.

Speed in violation of ordinance does not raise presumption that injury was caused by speed. Battles *v.* R. Co., 178 Mo. App. 596, 161 S. W. 614.

Proof of excessive speed or failure to give warning is evidence of negligence. Pierce *v.* Traction Co., 92 Neb. 797, 139 N. W. 656.

Car could have been stopped may be proved. Canham *v.* R. I. Co., 35 R. I. 177, 85 A. 1050.

Speed does not warrant presumption of negligence. Hollihan *v.* R. Co., 54 Pa. Super. 204; Stevenson *v.* R. Co., 54 Pa. Super. 211.

Defendant's rules, though unknown to plaintiff, admissible, regardless of purpose in adopting. McCormick *v.* R. Co., 85 S. C. 455, 67 S. E. 562.

Connection between speed of car and injury shown by collateral facts. Schmidt *v.* Co., 140 Mo. App. 182, 120 S. W. 96.

Conditions of travel shown as affecting reasonableness of speed. Dubose *v.* R. Co., 123 La. 1029, 49 S. 696.

138-7 Birmingham R. Co. *v.* Morris, 163 Ala. 190, 50 S. 198; City & S. R. Co. *v.* Cooper, 32 App. Cas. (D. C.) 550; Kern *v.* R. Co., 141 Ia. 620, 118 N. W. 451; Dalton *v.* Rys. Co., 134 Mo. App. 392, 114 S. W. 561 (though estimate made afterward); Fleddermann *v.* Co., 134 Mo. App. 199, 113 S. W. 1143. See Grudzinski *v.* R. Co., 165 Ill. App. 152; supra. "Expert and Opinion Evidence," 708-31, 709-32.

139-9 Kinlen *v.* R. Co., 216 Mo. 145, 115 S. W. 523.

Value of such evidence.—See Atwood *v.* Co., 82 Conn. 539, 74 A. 899.

Possibility of stopping car so as to avoid collision with automibile, not a matter for opinion evidence. El Paso Elec. R. Co. *v.* Davidson (Tex. Civ.), 162 S. W. 937. But see vol. 8, p. 955, n. 54; vol. 10, pp. 478, 530.

Opportunity of witness to judge of speed affects only weight of testimony. Fuhry *v.* R. Co., 239 Ill. 548, 88 N. E. 221.

Opinion of expert competent to show distance at which car could be stopped. Randle *v.* R. Co., 158 Ala. 532, 48 S. 114; Bladecka *v.* Co., 155 Mich. 253, 118 N. W. 963 (when running at various rates of speed).

139-10 Knittel *v.* R. Co., 147 Mo. App. 677, 128 S. W. 5. *Contra.* Peterson *v.* St. R. Co., 211 Mo. 498, 111 S. W. 37.

Excessive speed of other motormen at other times may not be shown. Rome R. & L. Co. *v.* Lansdell, 13 Ga. App. 795, 79 S. E. 1131.

Consequences of collision of car with vehicle may show its speed and that it was not under control. White *v.* Joline, 121 N. Y. S. 852.

139-11 Eldredge *v.* R. Co., 203 Mass. 582, 89 N. E. 1041; Paff *v.* R. Co., 125 App. Div. 773, 110 N. Y. S. 145; Cabrera *v.* Co., 4 P. R. Fed. 60; Blake *v.* R. I. Co., 32 R. I. 213, 78 A. 834.

Failure of conductor to observe rule requiring him to stand on lower step of car not evidence of negligence in favor of person who tried to board while in motion, all elements of danger being visible. Gagnon *v.* R. Co., 205 Mass. 483, 91 N. E. 875.

140-13 Carroll *v.* Co., 82 Conn. 513, 74 A. 897; Lenkewicz *v.* R. Co., 7 Penne. (Del.) 64, 74 A. 11; Perryman *v.* R Co., 242 Ill. 269, 89 N. E. 980; Dieckman *v.* T. Co., 46 Ind. App. 11, 89 N. E. 909; Leach *v.* R. Co., 137 Ky. 292, 125 S. W. 708; Hunt *v.* R. Co., 206 Mass. 11, 91 N. E. 883; Horsman *v.* R Co., 205 Mass 519, 91 N. E. 897; Williams *v.* R. Co., 141 Mo. App. 625, 125

S. W. 522; Murphy *v.* R. Co., 138 Mo. App. 436, 122 S. W. 334; Ledoux *v.* R. Co., 75 N. H. 598, 74 A. 874; Ritscher *v.* R. Co., 79 N. J. L. 462, 75 A. 209.

Failure to give warning of approach to crossing shown. Savage *v.* R. Co., 142 Ill. App. 342 (regardless of ordinance); Union T. Co. *v.* Howard (Ind. App.), 87 N. E. 1103.

Effort made to stop car shown; such testimony not objectionable as conclusion. Birmingham R. Co. *v.* McLain, 162 Ala. 656, 50 S. 149.

140-15 Reynolds *v.* R. Co., 136 Mo. App. 282, 116 S. W. 1135.

141-17 Custom of motormen eating meals on defendant's line is admissible. Kirkland *v.* Corp., 97 S. C. 61, 81 S. E. 306.

Mode of operation of street cars on other occasions is inadmissible. Mahoney *v.* R. Co., 213 Mass. 196, 99 N. E. 960.

Rules as to customary stopping places, are admissible. Moffitt *v.* Co., 86 Conn. 527, 86 A. 16.

Custom at another point is irrelevant. Merrill *v.* Sheffield Co., 169 Ala. 242, 53 S. 219.

141-18 Donnelly *v.* R. Co., 163 Ill. App. 7; Central Ky. T. Co. *v.* Chapman (Ky.), 124 S. W. 830 (place where passengers alighted).

141-21 See Hirschberg *v.* R. Co., 134 App. Div. 629, 119 N. Y. S. 492.

142-23 Violation of company's rules, relevant. Chadbourne *v.* R. Co., 199 Mass. 574, 85 N. E. 737.

142-26 Alcott *v.* Corp., 78 N. J. L. 482, 74 A. 499.

Amount of travel and condition of track may be shown. Capital Tract. Co. *v.* Contner, 120 Md. 78, 87 A. 904.

143-27 Alcott *v.* Corp., 78 N. J. L. 482, 74 A. 499.

Condition of tracks and machinery when injury inflicted by jerking of car shown. Setzler *v.* R. Co., 227 Mo. 454, 127 S. W. 1.

143-28 A contract between the city and contractor requiring latter to repair pavement, is admissible in evidence in an action where plaintiff was jolted from his wagon by reason of defective pavement. Maloney *v.* City, 154 App. Div. 608, 139 N. Y. S. 794.

143-29 Pascagoula R. Co. *v.* Brondum, 96 Miss. 28, 50 S. 97; Gardner *v.* R. Co., 223 Mo. 389, 122 S. W. 1068 (unevenness of rails); Huff *v.* Light, etc. Co., 213 Mo. 495, 111 S. W. 1145; Alcott *v.* Corp., 78 N. J. L. 482, 74 A. 499; Kincaid *v.* T. Co., 57 Wash. 334, 106 P. 918.

144-36 Lexington R. Co. *v.* Johnson, 139 Ky. 323, 122 S. W. 830.

144-37 Absence of bars and failure to give passenger warning of approach of car on parallel track shown. Columbus R. Co. *v.* Asbell, 133 Ga. 573, 66 S. E. 902.

144-38 Existence and satisfactory use of better headlight than defendant used shown. Currie *v.* R. Co., 81 Conn. 383, 71 A. 356.

Evidence of manner in which railings for protection of passengers are constructed in other cities, inadmissible to show negligence. Joyce *v.* R. Co., 218 Mo. 344, 118 S. W. 21.

Greasy condition of track shown in favor of pedestrian. Slater *v.* R. Co., 78 N. J. L. 559, 74 A. 511.

Defect in gong shown in favor of pedestrian. Dow *v.* R. Co., 148 Ia. 429, 126 N. W. 918.

145-39 Expert may testify use of fenders required by most approved plan of construction. Fisher *v.* Co., 141 Wis. 515, 124 N. W. 1005.

145-40 Defendant's rules admissible for passenger. Crowley *v.* R. Co., 204 Mass. 241, 90 N. E. 532.

145-41 Alcott *v.* Corp., 78 N. J. L. 482, 74 A. 499.

145-43 Evidence that other cars had been stopped on other occasions because of obstructions on track is inadmissible. Good Roads, etc. Co. *v.* R. Co., 173 Mich. 1, 138 N. W. 320.

145-44 Grady *v.* T. Co., 169 Fed. 400, 94 C. C. A. 622.

Rules of company regulating stoppage of cars, admissible to show care. Grady *v.* T. Co., supra; Frizzell *v.* R. Co., 124 Fed. 176, 59 C. C. A. 382.

146-45 Fujise *v.* R. Co., 12 Cal. App. 207, 107 P. 317; Carroll *v.* Co., 82 Conn. 513, 74 A. 897; City & S. R. Co. *v.* Cooper, 32 App. Cas. (D. C.) 550; Savannah E. Co. *v.* Elarbee, 6 Ga. App. 137, 64 S. E. 570; Swanson *v.* R. Co., 242 Ill. 388, 90 N. E. 210; Horsman *v.* R. Co., 205 Mass. 519, 91 N. E. 897; Swift *v.* R. Co., 136 App. Div. 34, 120 N. Y. S. 203; Vandenbout *v.* R. Co., 129 App. Div. 844, 114 N. Y. S. 760; Cabrera *v.* Co., 4 P. R. Fed. 60; Helliesen *v.* Co., 56 Wash. 278, 105 P. 458. *Contra,* between blocks. Jaffa *v.* R. Co., 131 App. Div. 852, 116 N. Y. S. 324. *Comp.*

Normand *v.* R. Co., 133 App. Div. 474, 117 N. Y. S. 1076. See Callahan *v.* R. Co., 205 Mass. 422, 91 N. E. 388.

Relative rights at crossings and on streets which come to, but do not cross that on which cars are. See Moore *v.* R. Co., 134 App. Div. 853, 119 N. Y. S. 97.

146-46 Doherty *v.* R. Co., 144 Ia. 26, 121 N. W. 690, it being alleged ordinance violated.

146-47 Traveler may assume speed limit and regulations concerning signals will be observed. City & S. R. Co. *v.* Cooper, 32 App. Cas. (D. C.) 550.

146-48 Martin *v.* R. Co., 84 S. C. 568, 66 S. E. 993.

147-49 **Rules of company** inadmissible on question of negligence of employes. Louisville R. Co. *v.* Gaugh, 133 Ky. 467, 118 S. W. 276.

Unauthorized laying of track, immaterial in action by injured pedestrian. Huff *v.* Light, etc. Co., 213 Mo. 495, 111 S. W. 1145.

147-50 Baldwin *v.* R. Co., 7 Penne. (Del.) 81, 76 A. 1088, judgment *aff.* People's R. Co. *v.* Baldwin, 7 Penne. (Del.) 383, 72 A. 979; Washington R. & E. Co. *v.* Wright, 38 App. Cas. (D. C.) 268; McMahon *v.* R. Co., 143 Ill. App. 608 (language used just before scuffle between the conductor and a passenger); Swanson *v.* R. Co., 242 Ill. 388, 90 N. E. 210; Kern *v.* R. Co., 141 Ia. 620, 118 N. W. 451; Reese *v.* R., 159 Mich. 600, 124 N. W. 539; Champlin *v.* R. Co., 33 R. I. 572, 82 A. 481; Bugge *v.* E. Co., 54 Wash. 483, 103 P. 824 (statement of one passenger to another prior to accident of communication by conductor); Cohodes *v.* Co., 149 Wis. 308, 135 N. W. 879. See vol. 7, p. 376; vol. 11, p. 352, n. 79.

Motorman's statements immediately after the accident, while he was running up the track in an agitated condition, admissible. Canham *v.* R. I. Co., 35 R. I. 177, 85 A. 1050. See vol. 11, p. 433, n. 6.

Third parties.—Declarations of motorman immediately after accident, admissible. Bessierre *v.* R. Co. (Ala.), 60 S. 82. See also vol. 11, p. 347, n. 61, and vol. 7, p. 380, n. 17.

147-51 See Netterfield *v.* R. Co., 129 App. Div. 56, 113 N. Y. S. 434.

Report by conductor to company not admissible, though inquired about by defendant, contents not being called for. Setzler *v.* R. Co., 227 Mo. 454, 127 S. W. 1.

148-52 Georgia R. & E. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944; Stack *v.* R. Co., 152 Ill. App. 613.

148-53 Wilmington R. Co. *v.* Truman, 7 Penne. (Del.) 197, 72 A. 983; Zyla *v.* R. Co., 158 Ill. App. 401; Hauk *v.* R. Co., 154 Ill. App. 473; Cokinos *v.* R. Co., 209 Mass. 225, 95 N. E. 89; Ferguson *v.* R. Co., 204 Mass. 340, 90 N. E. 535 (rule applied, though recognized not absolute); Willis *v.* R. Co., 202 Mass. 463, 89 N. E. 31; Callaghan *v.* R. Co., 200 Mass. 450, 86 N. E. 767; Tognazzi *v.* R. Co., 201 Mass. 7, 86 N. E. 799; Schanno *v.* R. Co., 109 Minn. 43, 122 N. W. 783 (under facts); Daly *v.* R. Co., 132 App. Div. 359, 116 N. Y. S. 698; Netterfield *v.* R. Co., 129 App. Div. 56, 113 N. Y. S. 434; Pettine *v.* Co., 32 R. I. 488, 79 A. 1118; Austin E. R. *v.* Lane, 55 Tex. Civ. 577, 120 S. W. 1011; Oswald *v.* R. Co., 39 Utah 245, 117 P. 46. *Contra,* Horsman *v.* R. Co., 205 Mass. 519, 91 N. E. 897. *Comp.* Williams *v.* R. Co., 141 Mo. App. 625, 125 S. W. 522. See Byerly *v.* R. Co., 172 Mo. App. 470, 158 S. W. 413; Kinlen *v.* R. Co., 216 Mo. 145, 115 S. W. 523.

Presumption that a traveler looked. Troll *v.* R. Co., 169 Mo. App. 260, 153 S. W. 504.

Stop, look and listen not ordinarily required. Little Rock R. & E. Co. *v.* Sledge, 108 Ark. 95, 158 S. W. 1096.

Ordinary care not the same as in commercial railway cases. Henry *v.* Epstein, 50 Ind. App. 660, 95 N. E. 275; Berry *v.* R. Co., 209 Mass. 100, 95 N. E. 95; Tozer *v.* R. Co., 45 Pa. Super. 417.

Failure to look not contributory negligence. Underwood *v.* R. Co., 33 R. I. 319, 80 A. 390.

Failure to stop not negligence. Walker *v.* R. Co. (N. J.), 80 A. 486.

Such neglect but circumstance to be weighed with all evidence. Carroll *v.* Co., 82 Conn. 513, 74 A. 897.

Rule not absolute.—Rastetter *v.* R. Co., 142 Ill. App. 417; Knoll *v.* R. Co., 79 N. J. L. 369, 75 A. 450; City S. & R. Co. *v.* Cooper, 32 App. Cas. (D. C.) 550. See Powers *v.* R. Co., 143 Ia. 427, 121 N. W. 1095; McQuisten *v.* R. Co., 147 Mich. 67, 110 N. W. 118; Omaha St. R. Co. *v.* Mathiesen, 73 Neb. 820, 103 N. W. 666.

Opportunity of motorman to observe

plaintiff while crossing, relevant. Robkin *v.* Joline, 114 N. Y. S. 98.

148-54 Dubose *v.* R. Co., 123 La. 1029, 49 S. 696; Winter *v.* United Rys., 115 Md. 69, 80 A. 651; Grimm *v.* Co., 138 Wis. 44, 119 N. W. 833. *Contra*, Kern *v.* R. Co., 141 Ia. 620, 118 N. W. 451 (if pedestrian thrown off guard by company's negligence); Bremer *v.* R. Co., 107 Minn. 326, 120 N. W. 382.

Where person testified he heard no signal he may afterward testify there was no reason to have prevented him hearing. Lawyer *v.* Pac. Co., 23 Cal. App. 543, 138 P. 920.

Rule not applied with same strictness as in case of steam roads. Ductz *v.* T. Co., 46 Ind. App. 692, 91 N. E. 622.

It is not absolute. Northern Texas T. Co. *v.* Hunt, 54 Tex. Civ. 415, 118 S. W. 827.

Driver of vehicle may rely on observance of law requiring signal. Denver C. T. *v.* Martin, 44 Colo. 324, 98 P. 836.

Plaintiff's knowledge of defendant's method of operating cars as to speed and signals relevant if usual course deviated from. Horsman *v.* R. Co., 205 Mass. 519, 91 N. E. 897.

148-55 Fosnes *v.* R. Co., 140 Wis. 455, 122 N. W. 1054.

149-57 Circumstances which caused plaintiff to leave car shown. Louisville, etc. T. Co. *v.* Worrell, 44 Ind. App. 480, 86 N. E. 78.

149-58 Relationship of passenger to another passenger injured by conductor in a scuffle may be shown, as may language used by latter. McMahon *v.* R. Co., 143 Ill. App. 608.

149-59 Municipal ordinances as to right of way admissible. Ebling Brew. Co. *v.* Linch, 80 Misc. 517, 141 N. Y. S. 480.

Ordinance prohibiting horses running at large inadmissible. Windle *v.* R. Co., 168 Mo. App. 596, 153 S. W. 282.

Ordinance admissible regarding carrying of lights on vehicles. Ovens *v.* R. Co., 171 Ill. App. 647.

Ordinance admissible to show negligence though not pleaded and notwithstanding it imposes penalty. Norfolk & P. T. Co. *v.* Forrest, 109 Va. 658, 64 S. E. 1034.

149-60 Admissibility of rules and evidence of custom depends upon issues. Birmingham R. Co. *v.* Morris, 163 Ala. 190, 50 S. 198; Carter *v.* Service Co. (Ia.), 141 N. W. 26.

Rules of railway company inadmissible. Municipal ordinances regarding speed admissible. Brown *v.* R. Co. (Mich.), 146 N. W. 278.

150-62 See Braly *v.* R. Co., 9 Cal. App. 417, 99 P. 400.

Evidence sufficient.—Hermann *v.* Co., 144 Mo. App. 147, 129 S. W. 414.

Validity of transfer must be shown by passenger. Brown *v.* R. Co., 136 App. Div. 690, 121 N. Y. S. 445.

151-70 Action for failure to issue transfer.—Plaintiff may show where car would have carried her had she not alighted. A custom to issue transfers at the point in question is admissible. Birmingham, etc. Co. *v.* Hatton (Ala.), 65 S. 934.

Rules of company proved to show justification for expulsion of passenger who tenders sum in payment of fare in excess of that which conductor required to make change for. Burge *v.* R. Co., 133 Ga. 423, 65 S. E. 879.

151-71 White *v.* S. R. Co., 132 Mo. App. 339, 112 S. W. 278.

152-73 White *v.* S. R. Co., supra (after plaintiff had returned to car and paid fare, under allegation that conductor thereafter continued to charge fraud); Telzer *v.* R. Co., 61 Misc. 59, 113 N. Y. S. 18.

Tender of second fare after rejection and attempt to re-enter car shown as bearing on recovery of punitive damages. Georgia R. Co. *v.* Davis, 6 Ga. App. 645, 65 S. E. 785.

152-75 Louisville & N. R. Co. *v.* Mason (Ala. App.), 64 S. 154, statements of stranger admitted as part of res gestae.

Complaints to conductor by passengers because of plaintiff's conduct competent to show conductor's motives in removing plaintiff. United P. Co. *v.* Matheny, 81 O. St. 204, 90 N. E. 154.

154-83 Opinions and other expressions of passengers concerning action of parties, inadmissible. Kirk *v.* E. Co., 58 Wash. 283, 108 P. 604.

Punitive damages for refusal to carry based on evidence of defendant's waiver of rule concerning articles that may be carried. Vlasservitch *v.* R. Co., 85 S. C. 291, 67 S. E. 306.

Plaintiff's business success immaterial on question as to motive in causing ejection from car. Savannah E. Co. *v.* Badenhoop, 6 Ga. App. 371, 65 S. E. 50.

STRIKING OUT AND WITHDRAWAL OF EVIDENCE

156-1 Pinto *v.* Seely, 22 Cal. App. 318, 135 P. 43; Reutz *v.* Bk., 61 Fla. 403, 55 S. 856; Bowen *v.* Chandler, 172 Mich. 678, 138 N. W. 247; House *v.* R. Co., 32 S. D. 209, 142 N. W. 736, rev. 30 S. D. 321, 138 N. W. 809; Johnson *v.* Tindall (Tex. Civ.), 161 S. W. 401.

158-2 Thomas *v.* S., 58 Fla. 122, 51 S. 410; Bean *v.* L. Co., 40 Mont. 31, 104 P. 869.

158-3 Foster *v.* Shepherd, 258 Ill. 164, 101 N. E. 411.

159-4 Crawford *v.* U. S., 212 U. S. 183; Cent., etc. Co. *v.* Teasley (Ala.), 65 S. 981; Marinoni *v.* S. (Ariz.), 136 P. 626; P. *v.* Corey, 8 Cal. App. 720, 97 P. 907; Denver & C. I. Co. *v.* Rudolph, 47 Colo. 380, 107 P. 816; Beach *v.* Schroeder, 47 Colo. 312, 107 P. 271; Woodbridge I. Co. *v.* Co., 81 Conn. 479, 71 A. 577; Sims *v.* S., 59 Fla. 38, 52 S. 198; Rankin *v.* Caldwell, 15 Ida. 625, 99 P. 108; O'Shaugnessy *v.* R. Co., 144 Ill. App. 174; Cleveland S. Co. *v.* Moore, 142 Ill. App. 615; Brinsfield *v.* Howeth, 110 Md. 520, 73 A. 289; Barnard *v.* Bates, 201 Mass. 234, 87 N. E. 472; Crozier *v.* R. Co., 106 Minn. 77, 118 N. W. 256; Donijanovic *v.* Hartman, 169 Mo. App. 204, 152 S. W. 424; P. *v.* Clemente, 130 N. Y. S. 612; Kan. C. S. R. Co. *v.* Carter (Tex. Civ.), 166 S. W. 115; S. *v.* Carr, 65 W. Va. 81, 63 S. E. 766; Van Matre *v.* Swank, 147 Wis. 93, 131 N. W. 982, *rehear. denied*, 132 N. W. 904; Chase *v.* Woodruff, 138 Wis. 641, 120 N. W. 499; Ellis *v.* S., 138 Wis. 513, 119 N. W. 1110.

159-6 Van Valkenburgh *v.* Oldham, 12 Cal. App. 572, 108 P. 42; P. *v.* Seattura, 238 Ill. 313, 87 N. E. 332; Holmes *v.* Rivers, 145 Ia. 702, 124 N. W. 801; Pratt *v.* Hamilton, 161 Mich. 258, 126 N. W. 196; S. *v.* Osborne, 54 Or. 289, 103 P. 62; Pauza *v.* Co., 231 Pa. 577, 80 A. 1126; Cosgrove *v.* Franklin, 35 R. I. 527, 87 A. 544; Trego *v.* Co., 136 Wis. 315, 117 N. W. 855.

Where not entirely hearsay it will not be stricken out. S. *v.* Turley, 87 Vt. 163, 88 A. 562.

159-7 Billingsley *v.* R. Co., 177 Ala. 342, 58 S. 433; Birmingham, etc. Co. *v.* Demmins, 3 Ala. App. 359, 57 S. 404; Wall *v.* S., 2 Ala. App. 157, 56 S. 57; Fleming *v.* Lunsford, 163 Ala. 540, 50 S. 921; Supreme Lodge *v.* Baker, 163 Ala. 518, 50 S. 958; Montgomery M. Mfg. Co. *v.* Leith, 162 Ala. 246, 50 S. 210; Jones *v.* S., 156 Ala. 175, 47 S. 100; Marinoni *v.* S. (Ariz.), 136 P. 626; Sterne *v.* Co., 153 Cal. 516, 97 P. 66; Evans D. Co. *v.* Co., 13 Cal. App. 119, 108 P. 1027; Johnson *v.* S., 136 Ga. 864, 72 S. E. 233; Math *v.* R. Co., 243 Ill. 114, 90 N. E. 235; Miller *v.* S., 174 Ind. 255, 91 N. E. 930; S. *v.* Rohn, 140 Ia. 640, 119 N. W. 88; Ross *v.* Ross, 140 Ia. 51, 117 N. W. 1105; Binsfield *v.* Howeth, 110 Md. 520, 73 A. 289; United R. & E. Co. *v.* Corbin, 109 Md. 442, 72 A. 606; Jacobs *v.* Cromwell, 216 Mass. 182, 103 N. E. 383; Barnard *v.* Bates, 201 Mass. 234, 87 N. E. 472; Putnam *v.* Ins. Co., 155 Mich. 134, 118 N. W. 922; P. *v.* Meert, 157 Mich. 93, 121 N. W. 318; S. *v.* Jones, 48 Mont. 505, 139 P. 441; S. *v.* D'Adame, 84 N. J. L. 386, 86 A. 414; S. *v.* Skillman, 76 N. J. L. 464, 70 A. 83; S. *v.* Green, 152 N. C. 835, 68 S. E. 16; Cosgrove *v.* Franklin, 35 R. I. 527, 87 A. 544; Roth *v.* Assn., 102 Tex. 241, 115 S. W. 31; Merriman *v.* Blalack, 57 Tex. Civ. 270, 122 S. W. 403; Sherman G. & E. Co. *v.* Belden (Tex. Civ.), 115 S. W. 897; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401; Vaillancourt *v.* R. Co., 82 Vt. 416, 74 A. 99; Rangenier *v.* E. Co., 52 Wash. 401, 100 P. 842; Chase *v.* Woodruff, 138 Wis. 641, 120 N. W. 499; Koenig *v.* Koenig, 140 Wis. 618, 123 N. W. 130; Henderson *v.* Coleman, 19 Wyo. 183, 115 P. 439, *rehear. denied*, 115 P. 1136.

See Leibrandt Plumb. Co. *v.* Glos, 176 Ill. App. 169; vol. 9, p. 36, n. 5, and supplement thereto.

161-8 Sloss-S. S. & I. Co. *v.* Sharp, 156 Ala. 284, 47 S. 279; P. *v.* Botkin, 9 Cal. App. 244, 98 P. 861.

161-9 Further testimony may remove objection of non-responsiveness. Kimic *v.* R. Co., 156 Cal. 273, 104 P. 312; S. *v.* Kritchman, 84 Conn. 152, 79 A. 75, supports the text.

162-10 S. *v.* Hill, 46 Mont. 24, 126 P. 41. See Hertzog *v.* L. Co., 73 Wash. 197, 131 P. 806.

Relevant testimony, though irresponsive, will not be stricken out of a deposition. Carwille *v.* Franklin, 163 Ala. 543, 51 S. 396, *appr.* Saltmarsh *v.* Bower, 22 Ala. 221, and Sullivan T. Co. *v.* R. Co., 163 Ala. 125, 50 S. 941, which *over.* First Nat. Bk. *v.* Leland, 122 Ala. 289, 25 S. 195, and Garrison *v.* Glass, 139 Ala. 512, 36 S. 725. See

Zenor *v.* Smith, 150 Ia. 424, 130 N. W. 382.

162-11 Missouri, etc. R. Co. *v.* Boring (Tex. Civ.), 166 S. W. 76.

Reception of evidence admissible when received but afterward rendered not pertinent is not error when no motion is made to strike it out. Washington, etc. R. Co. *v.* Downey, 40 App. Cas. (D. C.) 147.

Testimony irrelevant when received should be stricken; becoming relevant offering party should move to reinstate it. O'Mara *v.* Jensma, 143 Ia. 297, 121 N. W. 518.

162-12 Cent., etc. Co. *v.* Teasley (Ala.), 65 S. 981; Schmitt *v.* Kurrus, 140 Ill. App. 132; P. *v.* Auerbach, 176 Mich. 23, 141 N. W. 869; Ianne *v.* G. Co., 126 App. Div. 244, 110 N. Y. S. 496. See vol. 9, p. 242, n. 29, and vol. 11, p. 185, n. 28, and supplement thereto.

Evidence to lay foundation and not used for that purpose must be excluded on motion. P. *v.* Warfield, 261 Ill. 293, 103 N. E. 979, *rev.* 172 Ill. App. 1.

163-13 Gieger *v.* Levin, 110 N. Y. S. 203.

163-14 Lindsay *v.* S., 138 Ga. 818, 76 S. E. 369.

163-15 In absence of motion to strike evidence received conditionally, party complaining without remedy. Dorn *v.* Cooper, 139 Ia. 742, 117 N. W. 1.

165-23 Hitchner W. P. Co. *v.* R. Co., 168 Fed. 602, 93 C. C. A. 598; Allen *v.* S., 8 Cal. App. 228, 62 S. 971; P. *v.* Melnick, 263 Ill. 24, 104 N. E. 1111; First Nat. Bk. *v.* Miller, 235 Ill. 135, 85 N. E. 312.

Unobjectionable volunteer evidence if permissible will not be stricken out. Davis *v.* Parsons, 165 Cal. 70, 130 P. 1055.

Motion to strike whole of answer well denied if part competent. Atlanta & B. R. Co. *v.* Wheeler, 154 Ala. 530, 46 S. 262.

165-25 P. *v.* Ho Kim You (Cal. App.), 141 P. 950; P. *v.* Yee Yum (Cal. App.), 141 P. 958; Sorenson *v.* Smith, 65 Or. 78, 129 P. 757, *aff.*, 131 P. 1022.

166-26 Brigham *v.* S., 8 Ala. App 400, 62 S. 980; Beans *v.* Denny, 141 Ia. 52, 117 N. W. 1091; Lubin Mfg. Co. *v.* Swaab, 240 Pa. 182, 87 A. 597; Ballou *v.* Ballou, 30 R. I. 286, 74 A. 1089; S. *v.* Turley, 87 Vt. 163, 88 A. 562; Trego *v.* Co., 136 Wis. 315, 117 N. W. 855. See S. *v.* Moeller, 20 N. D. 114 126 N. W. 568, failure to move to strike does not cure error.

168-31 Stewart *v.* Harris Co., 6 Ala. App. 518, 60 S. 445.

168-34 Wise *v.* Curl (Ala.), 58 S. 286; Stowers F. Co. *v.* Brake, 158 Ala. 639, 48 S. 89; P. *v.* Overacker, 15 Cal. App. 620, 115 P. 756; S. *v.* Allen, 23 Ida. 772, 131 P. 1112; Fearon *v.* Mullins, 38 Mont. 45, 98 P. 650; Gugler *v.* R. Co., 86 Neb. 586, 125 N. W. 1098 (incomplete answer); Fouse *v.* S., 83 Neb. 258, 119 N. W. 478; S. *v.* D'Adame, 84 N. J. L. 386, 86 A. 414; S. *v.* Howard, 83 N. J. L. 636, 87 A. 436; S. *v.* Skillman, 76 N. J. L. 464, 70 A. 83 (though subsequent testimony may show witness' incompetency); Gay *v.* S., 58 Tex. Cr. 472, 125 S. W. 896.

Error to strike out merely because part of answer states a conclusion. P. *v.* Terrell, 262 Ill. 138, 104 N. E. 264.

Where there is opportunity for cross-examination court will refuse to strike out testimony. Sanger *v.* Bacon (Ind.), 101 N. E. 1001.

Where expert's testimony was such as is within common knowledge and might be given by non-expert it is proper to refuse to strike out. Rugenstein *v.* Ottenheimer (Or.), 140 P. 747.

Lack of opportunity for exhaustive cross-examination is no ground for striking out. S. *v.* Duvall, 135 La. —, 65 S. 904.

170-35 If issues will be changed by striking out evidence unobjected to motion should be denied. Knapp *v.* Brotherhood, 139 Ia. 136, 117 N. W. 298.

170-36 Bailey *v.* S. (Ala. App.), 65 S. 422; Granberry *v.* S. (Ala.), 63 S. 975; Bailey *v.* S. (Ala.), 63 S. 73; Allen *v.* S., 8 Ala. App. 228, 62 S. 971; Coates *v.* S., 5 Ala. App. 182, 59 S. 323; Powell *v.* S., 5 Ala. App. 75, 59 S. 530; Sanders *v.* S. (Ala.), 61 S. 336; McLaughlin *v.* Beyer (Ala.), 61 S. 62; Pilcher *v.* Dothan Co., 6 Ala. App. 552, 60 S. 547; Vallejo, etc. R. Co. *v.* Bank (Cal. App.), 140 P. 974; P. *v.* Anthony, 20 Cal. App. 586, 129 P. 968; P. *v.* Brewer, 19 Cal. App. 742, 127 P. 808; In re Louck's Est., 160 Cal. 551, 117 P. 673; Wilson *v.* Jernigan, 57 Fla. 277, 49 S. 44; Sanger *v.* Bacon (Ind.), 101 N. E. 1001; S. *v.* Stutches (Ia.), 144 N. W. 597; De Laval S. Co. *v.* Sharpless, 142 Ia. 60, 120 N. W. 657; Ewing *v.* Light Co., 91 Kan. 388, 137 P. 940; Drew *v.* Carroll, 120 Minn. 478,

139 N. W. 953; Downs *v.* Cassidy, 47 Mont. 471, 133 P. 106; Murphy *v.* Netl, 47 Mont. 38, 130 P. 451; S. *v.* D'Adame, 82 N. J. L. 315, 82 A. 520; St. Louis, etc. R. Co. *v.* Davis, 37 Okla. 340, 132 P. 337; Smith *v.* Co., 239 Pa. 496, 86 A. 1067; Watkins *v.* R. Co., 97 S. C. 148, 81 S. E. 426; S. *v.* Pirkey, 22 S. D. 550, 118 N. W. 1042; Ward *v.* S. (Tex. Cr.), 159 S. W. 272; Bagnall *v.* City of Milwaukee, 156 Wis. 642, 146 N. W. 791.

Objection too late.—P. *v.* Ho Kim Yow (Cal. App.), 141 P. 950; P. *v.* Yee Yum (Cal. App.), 141 P. 958.

Objection to answers and not to questions. Objecting party cannot speculate on what testimony will be and then move to exclude it. Robinson *v.* S. (Ala. App.), 62 S. 372.

"When a witness is being examined, and a question is put to the witness which calls for irrelevant or immaterial testimony, it is the duty of the party against whom such testimony is being offered to object to the question. If he fails to do so, and the answer of the witness to such question is responsive to it, although irrelevant and immaterial, then a motion of the party against whom such testimony is introduced to exclude such answer from the jury is addressed to the sound discretion of the trial court, and the action of the trial court on such motion will not be reviewed." Yolande Coal & Coke Co. *v.* Norwood, 4 Ala. App. 390, 58 S. 118.

171-37 Iron Wks. *v.* U. S., 47 Ct Cl. 124; Page *v.* Haas Co., 9 Ala. App. 445, 63 S. 691; Chaney *v.* S., 9 Ala App. 45, 63 S. 693; Hageman *v.* Vanderdoes (Ariz.), 138 P. 1053; Vick *v.* S. (Ark.), 165 S. W. 287; P. *v.* Bradley, 23 Cal. App. 44, 136 P. 955; Pinto *v.* Seely, 22 Cal. App. 318, 135 P. 43; Gainesville, etc. R. Co. *v.* Peck, 55 Fla. 402, 46 S. 1019; Chicago T. & T. Co. *v.* Co., 242 Ill. 468, 90 N. E. 282; Culbertson *v.* Sallinger (Ia.), 117 N. W. 6; Brown *v.* Oil Co., 134 La. 672, 64 S. 674; Hunner *v.* Stevenson, 122 Md. 40, 89 A. 418; Maryland, etc. R. Co. *v.* Brown, 109 Md. 304, 71 A. 1005; In re Percival's Est., 79 Misc. 567, 141 N. Y. S. 180; Cooper *v.* S. (Tex. Cr.), 162 S. W. 364; Zarate *v.* Villareal (Tex. Civ.), 155 S. W. 328.

Answer must be objected to as well as question. Tiller *v.* S. (Ala. App.), 64 S. 653.

174-38 W. U. T. Co. *v.* Merritt, 55 Fla. 462, 46 S. 1024; Bank of Bushnell *v.* Buck (Ia.), 142 N. W. 1004; Watkins *v.* R. Co., 97 S. C. 148, 81 S. E. 426.

175-39 Cent., etc. Co. *v.* Teasley (Ala.), 65 S. 981.

176-41 Bank of Bushnell *v.* Buck (Ia.), 142 N. W. 1004; S. *v.* D'Adame, 84 N. J. L. 386, 86 A. 414.

179-46 S. *v.* D'Adame, 84 N. J. L. 386, 86 A. 414.

179-47 Neumeyer *v.* Hooker, 131 App. Div. 592, 116 N. Y. S. 204.

179-49 Klopp *v.* R. Co., 142 Ia. 483, 119 N. W. 377; Henderson *v.* Coleman, 19 Wyo. 183, 115 P. 439, *rehear.* denied, id. 1136.

180-50 Central of Ga. R. Co. *v.* Teasley (Ala.), 65 S. 981; In re De Laveaga's Est., 165 Cal. 607, 133 P. 367; Penn. R. Co. *v.* Co., 111 Md. 356, 73 A. 571 (discretion absolute); S. *v.* Lane (N. C.), 81 S. E. 620; Sockwell *v.* Sockwell (Tex. Civ.), 166 S. W. 1188; Postal T. C. Co. *v.* Harriss, 56 Tex. Civ. 105, 121 S. W. 358; Hatzfeld *v.* Walsh, 55 Tex. Civ. 573, 120 S. W. 525.

When questions and answers were not heard by defendant's counsel it is discretionary with the court whether the testimony will be stricken out. Sprague *v.* Electric Co., 213 Mass. 375, 100 N. E. 628.

181-51 S. *v.* Kruse (Ia.), 144 N. W. 586.

181-52 Sims *v.* S., 59 Fla. 38, 52 S. 198; Clinton *v.* S., 58 Fla. 23, 50 S. 580; Henderson *v.* Co. (Tex. Civ.), 128 S. W. 671 (partial answer).

184-61 P. *v.* Auerbach, 176 Mich. 23, 141 N. W. 869.

184-62 Explanatory answers making meaning clear. P. *v.* Brewer, 19 Cal. App. 742, 127 P. 808.

186-66 Bohanan *v.* Darden, 7 Ala. App. 220, 60 S. 955; Wilson *v.* Jernigan, 57 Fla. 277, 49 S. 44; Dales *v.* R. Co., 169 Mo. App. 183, 152 S. W. 401; S. *v.* McIntosh, 94 S. C. 439, 78 S. E. 327. See Charleston & W. C. R. Co. *v.* Cobb, 140 Ga. 155, 78 S. E. 763.

186-67 *Contra.* Wall *v.* S., 2 Ala. App. 157, 56 S. 57.

187-71 Gainesville, etc. R. Co. *v.* Peck, 55 Fla. 402, 46 S. 1019.

187-72 Kimie *v.* R. Co., 156 Cal. 275, 104 P. 312; Posey *v.* Nat. Bk., 243 Pa. 568, 90 A. 363; Miller *v.* Neale, 137 Wis. 426, 119 N. W. 94.

Indefiniteness cured by subsequent defi-

nite testimony. Johnson *v.* S. & R. Co., 50 Wash. 567, 97 P. 746.

187-74 Smith *v.* S. (Ala.), 62 S. 864; White *v.* Anniston, 161 Ala. 662, 49 S. 1030; Putnal *v.* S., 56 Fla. 86, 47 S. 864; Fordtran *v.* Stowers, 52 Tex. Civ. 226, 113 S. W. 631.

187-76 Lewis *v.* Coupe, 200 Mass. 182, 85 N. E. 1053; Gaffney *v.* Mentele, 23 S. D. 38, 119 N. W. 1030.

Party eliciting damaging testimony cannot have it stricken. Hill *v.* S., 54 Tex. Civ. 646, 114 S. W. 117.

187-77 Lenor *v.* S. (Ariz.), 137 P. 412; W. U. T. Co. *v.* Rowell, 166 Ala. 651, 51 S. 880; Kan. C. S. Co. *v.* Leslie (Ark.), 167 S. W. 83; Vick *v.* S. (Ark.), 165 S. W. 287; P. *v.* Watson, 165 Cal. 645, 133 P. 298; S. *v.* Saxon, 87 Conn. 5, 86 A. 590; Brooks *v.* Brierton, 142 Ill. App. 369; Shuttlefield *v.* Neil (Ia.), 145 N. W. 1; Balt. & R. Co. *v.* Comrs., 111 Md. 176, 73 A. 656; Healy *v.* Mach. Co., 216 Mass. 75, 102 N. E. 944; Rivers *v.* Richards, 213 Mass. 515, 100 N. E. 745; Doon *v.* Felton, 203 Mass. 267, 89 N. E. 539; Minea *v.* Cooperage Co. (Mo. App.), 162 S. W. 741; Dudley *v.* R. Co., 167 Mo. App. 647, 150 S. W. 737 (see Gipperd *v.* Gipperd's Est. [Mo. App.], 163 S. W. 934); Paris *v.* Waddell, 139 Mo. App. 288, 123 S. W. 79; Hollenback *v.* Corporation, 46 Mont. 559, 129 P. 1058; Wightman *v.* Campbell, 161 App. Div. 49, 146 N. Y. S. 666; Miller *v.* Barnett, 158 App. Div. 862, 144 N. Y. S. 40; P. *v.* Russo, 126 App. Div. 717, 111 N. Y. S. 190; Midgette *v.* Co., 150 N. C. 333, 64 S. E. 5; St. Louis, etc. R. Co. *v.* Davis, 37 Okla. 340, 132 P. 337; Muskogee Elec. T. Co. *v.* Reed, 35 Okla. 334, 130 P. 157; Anderson *v.* Co. (Or.), 136 P. 660; Perry *v.* Hunt, 62 Or. 256, 125 P. 295; Littieri *v.* Freda, 241 Pa. 21, 88 A. 82; Marshall *v.* R. Co., 240 Pa. 272, 87 A. 575; Merck *v.* Merck, 83 S. C. 329, 65 S. E. 347; Coulter *v.* S. (Tex. Cr.), 160 S. W. 80; Ward *v.* S. (Tex. Cr.), 159 S. W. 272; Sargent *v.* F. Co., 37 Utah 392, 108 P. 928; Fadden *v.* McKinney, 87 Vt. 316, 89 A. 351; Jenkins *v.* S. (Wyo.), 134 P. 260, *rehear.* denied, 135 P. 749.

189-78 Birmingham, etc. Power Co. *v.* Saxon (Ala.), 59 S. 584; Ricker *v.* Davis (Ia.), 139 N. W. 1110; Morrison *v.* Holder, 214 Mass. 366, 101 N. E. 1067; Ducharme *v.* R. Co., 203 Mass. 384, 89 N. E. 561; McCormack *v.* O'Connor, 62 Misc. 297, 114 N. Y. S. 1030; Sav. Bk. *v.* Sprunt, 86 S. C. 8, 67 S. E. 955. See vol. 9, p. 131, n. 54; vol. 9, p. 243, n. 33; vol. 11, p. 185, n. 25; and supplement thereto.

190-79 Malcomson *v.* Inv. Corp., 154 App. Div. 694, 139 N. Y. S. 405.

190-80 Tarpey *v.* Veith, 22 Cal. App. 289, 134 P. 367; Lindsay *v.* S., 138 Ga. 818, 76 S. E. 369; Moneyweight S. Co. *v.* McCormick, 109 Md. 170, 72 A. 537.

190-81 P. *v.* Balmain, 16 Cal. App. 28, 116 P. 303; Thurman *v.* S. (Ga. App.), 81 S. E. 796; Soucier *v.* Mfg. Co., 77 N. H. 118, 88 A. 708; C. *v.* Donnelly, 40 Pa. Super. 116.

Exception to refusal to strike evidence offered by plaintiff waived by introducing testimony for defendant. Fuller *v.* Co., 64 W. Va. 437, 63 S. E. 206.

191-82 Troy, etc. Co. *v.* Co. (Ala.), 65 S. 141; Cromeenes *v.* R. Co., 37 Utah 475, 109 P. 10.

192-85 Katahdin P. & P. Co. *v.* Peltomaa, 156 Fed. 342, 84 C. C. A. 238; R. Co. *v.* Dilburn, 178 Ala. 600, 59 S. 438; Humphreys *v.* Smith, 133 Ga. 456, 66 S. E. 158; S. *v.* Wakely, 43 Mont. 427, 117 P. 95; Ardmore Oil & M. Co. *v.* Robinson, 29 Okla. 79, 116 P. 191.

192-86 In re Snowball's Est., 157 Cal. 301, 107 P. 598; Maxton *v.* C. Co. (Mo. App.), 114 S. W. 577; Galveston, etc. R. Co. *v.* Sanchez, 57 Tex. Civ. 87, 122 S. W. 44.

192-88 Only propounder of question may ask to have answer stricken upon the ground merely that it is unresponsive. Philpott *v.* Jones (Ia.), 146 N. W. 859.

196-97 Court may indicate testimony to be stricken or may act on motion. Chicago, etc. R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517.

196-99 Firth S. Co. *v.* S. Co., 199 Fed. 353.

197-3 Hedger *v.* S., 144 Wis. 279 128 N. W. 80.

197-4 Starkweather *v.* Dawson, 14 Cal. App. 666, 112 P. 736; Holland *v.* Riggs, 53 Tex. Civ. 367, 116 S. W. 167

Motion need not be made immediately. Barnard *v.* Bates, 201 Mass. 234, 87 N. E. 472.

197-5 Pittsburg Steel Co. *v.* Streety, 61 Fla. 393, 55 S. 67; McMillan *v.* Reese, 61 Fla. 360, 55 S. 388; Voorhees Rubber Co. *v.* Co., 31 O. C. C. 557.

199-10 Com. *v.* Phelps, 209 Mass. 396, 95 N. E. 868.

199-15 Am. Auto Co. *v.* Porter, 205 Fed. 105.

200-16 Hunner *v.* Stevenson, 122 Md. 40, 89 A. 418; Peters *v.* S. (Miss.), 63 S. 666; McCullough *v.* Assn., 225 Pa. 118, 73 A. 1007 (in absence of objection).

200-17 Holland *v.* Riggs, 53 Tex. Civ. 367, 116 S. W. 167.

200-21 Lunham *v.* Lunham, 133 App. Div. 215, 117 N. Y. S. 396.

200-23 Too late after judgment. Reed *v.* Robertson (Tex.), 156 S. W. 196, *rev.* (Tex. Civ.), 150 S. W. 306.

200-25 Eggman *v.* Nutter, 155 Ill. App. 390.

201-31 Cable P. Co. *v.* R. Co., 94 S. C. 143, 77 S. E. 868.

Delay of court in striking out testimony objected to prejudicial. Sulkowski *v.* Zynda, 160 Mich. 7, 124 N. W. 536.

201-32 Lucy *v.* Davis, 162 Cal. 611, 126 P. 490; P. *v.* Knapp, 16 Cal. App. 682, 117 P. 792; Southern R. Co. *v.* Brock, 132 Ga. 858, 64 S. E. 1083; Talge M. Co. *v.* Hockett (Ind. App.), 103 N. E. 815; Bk. of Bushnell *v.* Buck (Ia.), 142 N. W. 1004; McBride *v.* McBride, 142 Ia. 169, 120 N. W. 709; S. *v.* Skibiski, 245 Mo. 459, 150 S. W. 1038; Voorhees Rubber Co. *v.* Co., 31 O. C. C. 557; Copenhaver *v.* R. Co., 42 Mont. 453, 113 P. 467.

If whole answer objectionable designation unnecessary. Sterne *v.* Co., 153 Cal. 516, 97 P. 66.

203-33 Chicago, etc. R. Co. *v.* Egan, 159 Fed. 40, 86 C. C. A. 230; Louisville & N. R. Co. *v.* Williams (Ala.), 62 S. 628, 679; Louisville & N. R. Co. *v.* Dilburn, 178 Ala. 600, 59 S. 438; Clardy *v.* S., 96 Ark. 52, 131 S. W. 46; Southern H. & S. Co. *v.* Co., 165 Ala. 582, 51 S. 789; P. *v.* Ho Kim You (Cal. App.), 141 P. 950; P. *v.* Yee Yum (Cal. App.), 141 P. 958; Lowe *v.* Co., 157 Cal. 503, 108 P. 297; Pittsburg Steel Co. *v.* Streety, 61 Fla. 393, 55 S. 67; Clark *v.* S., 59 Fla. 915, 52 S. 518; Sims *v.* S., 59 Fla. 38, 52 S. 198; Walker *v.* Riley, 6 Ga. App. 519, 65 S. E. 301; McClain *v.* Assn., 17 Ida. 63, 104 P. 1015; Stout *v.* Taylor, 168 Ill. App. 410; Zetsche *v.* R. Co., 238 Ill. 240, 87 N. E. 412; Cincinnati, etc. R. Co. *v.* Cook, 45 Ind. App. 401, 90 N. E. 1052; Bank of Bushnell *v.* Buck (Ia.), 142 N. W. 1004; Miller *v.* Baker (Ia.), 140 N. W. 407; McDermott *v.* Com. Assn. (Ia.), 139 N. W. 472; Lee *v.* Hederman (Ia.), 138 N. W. 893; Mayor, etc. *v.* Yost, 121 Md. 366, 88 A. 342; Murphy *v.* S., 120 Md. 229, 87 A. 811; Cumberland G. Mfg. Co. *v.* De Witt, 120 Md. 381, 87 A. 927; S. *v.* Hilton, 248 Mo. 522, 154 S. W. 729; Dudley *v.* Wabash R. Co., 167 Mo. App. 647, 150 S. W. 737; Ray C. S. Bk. *v.* Hutton, 224 Mo. 42, 123 S. W. 47; Hilburn *v.* Co., 140 Mo. App. 355, 124 S. W. 63; Westlake *v.* Mining Co., 48 Mont. 120, 136 P. 38; Fein *v.* Weir, 129 App. Div. 269, 114 N. Y. S. 426; Bowen *v.* Lumber Co., 162 N. C. 516, 77 S. E. 227; Dalin *v.* Ins. Co., 59 Or. 269, 117 P. 419; Smith *v.* Cunningham, 239 Pa. 496, 86 A. 1067; Telluride P. Co. *v.* Bonneau (Utah), 125 P. 399; White *v.* R. Co., 87 Vt. 330, 89 A. 618; Potomac F. & P. R. Co. *v.* Chichester, 111 Va. 152, 68 S. E. 404; S. *v.* Calhoun, 67 W. Va. 666, 69 S. E. 1098.

See Westlake *v.* Min. Co., 48 Mont. 120, 136 P. 38.

Court need not separate good from bad. Lewis *v.* S., 178 Ala. 26, 59 S. 577.

204-34 Nichols *v.* S., 92 Ark. 421, 122 S. W. 1003; Turner *v.* S., 66 Fla. 404, 63 S. 708.

205-37 Bone *v.* S., 8 Ala. App. 59, 62 S. 455; Lucy *v.* Davis, 162 Cal. 611, 126 P. 490; Gaffney *v.* Mentele, 23 S. D. 38, 119 N. W. 1030; St. Louis, etc. R. Co. *v.* Fielder (Tex. Civ.), 163 S. W. 606.

207-39 Ewing *v.* Light Co., 91 Kan. 388, 137 P. 940; Hertzog *v.* L. Co., 73 Wash. 197, 131 P. 806.

Motion in conjunctive need not be denied though only part of grounds valid. U. S. O. & L. Co. *v.* Bell, 153 Cal. 781, 96 P. 901.

208-43 Flanagan *v.* Wells, 237 Ill. 82, 86 N. E. 609.

209-47 Alaska F. Pack. Co. *v.* Chin Quong, 202 Fed. 707, 121 C. C. A. 169; Louisville & N. R. Co. *v.* Cornelius (Ala.), 62 S. 710; W. U. T. Co. *v.* Rowell, 166 Ala. 651, 51 S. 880; P. *v.* Cvty, 11 Cal. App. 702, 106 P. 257; Goldberger *v.* P., 45 Colo. 327, 101 P. 407; Park *v.* Reid, 141 Ga. 681, 81 S. E. 1105; Lyons *v.* R. Co., 258 Ill. 75, 101 N. E. 211, *rev.* 171 Ill. App. 374; Burford *v.* Dautrich (Ind. App.), 103 N. E. 953; Cincinnati, etc. R. Co. *v.* Armuth (Ind.), 103 N. E. 738 (restricting evidence); Hunt *v.* R. Co. (Ia.), 141 N. W. 334; Cooper *v.* Washington, 154 Ky. 248, 157 S. W. 1; Mutual L. Ins. Co. *v.* Murray, 111 Md. 600, 75 A. 348; Burch *v.* Bernard, 107 Minn. 210, 120

N. W. 33; Reinhoff *v.* Gas Co., 177 Mo. App. 417, 162 S. W. 761; S. *v.* Hurley, 242 Mo. 452, 146 S. W. 1154; McMurray *v.* R. Co., 225 Mo. 272, 125 S. W. 571; S. *v.* Lockman, 83 N. J. L. 168, 83 A. 689; Brown *v.* R. Co., 76 N. J. L. 795, 71 A. 271; Mitchell *v.* Edeburn, 37 Pa. Super. 223; Cable P. Co. *v.* R. Co., 94 S. C. 143, 77 S. E. 868; Cukierski *v.* S. (Tex. Cr.), 153 S. W. 313; Sweeney *v.* S. (Tex. Cr.), 146 S. W. 883; Stubbs *v.* Marshall, 54 Tex. Civ. 526, 117 S. W. 1030; Walston *v.* Allen, 82 Vt. 549, 74 A. 225 (trial before court); Winston *v.* Terrace, 78 Wash. 146, 138 P. 673; Grays Harbor B. Co. *v.* Lownsdale, 54 Wash. 83, 102 P. 1041.

211-50 Foster *v.* Shepherd, 258 Ill. 164, 101 N. E. 411, *rev.* 164 Ill. App. 199; Shay *v.* Horr, 78 Wash. 667, 139 P. 604.

211-51 Order, etc. *v.* Young, 212 Fed. 132; Chicago, etc. R. Co. *v.* Newsome, 174 Fed. 394, 98 C. C. A. 1; Foster *v.* Shepherd, 258 Ill. 164, 101 N. E. 411; P. *v.* McMahon, 244 Ill. 45, 91 N. E. 104; Hoxsey *v.* R. Co., 171 Ill. App. 76; Shaw *v.* Corrington, 171 Ill. App. 232; Wicks *v.* Wheeler, 139 Ill. App. 412 (especially if commented on in argument); Chernick *v.* Co., 66 Misc. 177, 121 N. Y. S. 352; Phillips *v.* Thomas, 70 Wash. 533, 127 P. 97. See Alaska F. Pack. Co. *v.* Chin Quong, 202 Fed. 707, 121 C. C. A. 169; Media S. Bk. *v.* Garrett, 165 Ill. App. 69; Fellows *v.* R. Co., 166 Ill. App. 71.

212-52 Turner *v.* Co., 213 U. S. 257; Ware *v.* Pearsons, 173 Fed. 878, 98 C. C. A. 364; Mahler *v.* Beishline, 46 Colo. 603, 105 P. 874; Samuels *v.* Willis, 133 Ky. 459, 118 S. W. 339; Moffat *v.* Davitt, 200 Mass. 452, 86 N. E. 929; P. *v.* Droste, 160 Mich. 66, 125 N. W. 87; Walsh *v.* Gibson, 159 Mich. 312, 123 N. W. 1115; S. *v.* Berman, 108 Minn. 534, 122 N. W. 161; S. *v.* Towers, 106 Minn. 105, 118 N. W. 361; S. *v.* Sassaman, 214 Mo. 695, 114 S. W. 590 (though facts subsequently stated confirming withdrawn testimony); Canaday *v.* R. Co., 134 Mo. App. 282, 114 S. W. 88; Connecticut R. P. Co. *v.* Dickinson, 75 N. H. 353, 74 A. 585; Huffines *v.* Co., 152 N. C. 522, 67 S. E. 1008; Kirby L. Co. *v.* Stewart (Tex. Civ.), 161 S. W. 372; Kirby *v.* S. (Tex. Cr.), 150 S. W. 455; Gent *v.* S., 57 Tex. Cr. 414, 123 S. W. 594; Hart *v.* S., 57 Tex. Cr. 21, 121 S. W. 508; Goode *v.* S., 57 Tex. Cr. 220, 123 S. W. 597; Galveston, etc. R. Co. *v.* Harper, 53 Tex. Civ. 614, 114 S. W. 1168; Lindsay, etc. Co. *v.* Livestock Co. (Utah), 137 P. 837; Billings *v.* Snohomish, 51 Wash. 135, 98 P. 107.

See Higby *v.* Kirksey (Tex. Civ.), 163 S. W. 315.

213-53 Hawman *v.* McLean, 139 Mo. App. 429, 122 S. W. 1094; P. *v.* Springer, 137 App. Div. 304, 122 N. Y. S. 194; Haney *v.* S., 57 Tex. Cr. 158, 122 S. W. 34. See Corbett *v.* R. Co., 19 N. D. 450, 125 N. W. 1054.

214-54 P. *v.* Springer, 137 App. Div. 304, 122 N. Y. S. 194.

214-55 Holt *v.* S., 91 Ark. 576, 121 S. W. 1072; Musial *v.* Kudlik, 87 Conn. 164, 87 A. 551; Hendry *v.* Ellis, 64 Fla. 306, 60 S. 354; Inlet S. Drainage Dist. *v.* Anderson, 257 Ill. 214, 100 N. E. 909; Manhattan Co. *v.* Eversz, 180 Ill. App. 470, *aff.* 262 Ill. 612, 104 N. E. 1048; Knudson *v.* Brewing Co., 182 Ill. App. 296; Brown *v.* Ry. Co., 177 Ill. App. 599; Moylan *v.* R. Co., 172 Ill. App. 645; Wenger *v.* Const. Co., 170 Ill. App. 383; Baker *v.* Power Co., 164 Ill. App. 232; Ohio V. Trust Co. *v.* Wernke, 179 Ind. 49, 99 N. E. 734; Barger *v.* Brown (Ia.), 143 N. W. 496; Mills *v.* Flynn (Ia.), 137 N. W. 1082; Stewart *v.* C. Co., 147 Ia. 548, 126 N. W. 449; Bell-K. Coal Co. *v.* Gregory, 152 Ky. 415, 153 S. W. 465; Carroll S. D. Co. *v.* Schnepfe, 111 Md. 420, 74 A. 828; Lundin *v.* Pub. Co., 217 Mass. 213, 104 N. E. 480; Millspaugh *v.* Schultz (Mich.), 146 N. W. 634; Nutter *v.* Colyer (Mich.), 146 N. W. 643; P. *v.* Thompson, 161 Mich. 391, 126 N. W. 466; Wells *v.* Sullivan (Minn.), 147 N. W. 244; Skoog *v.* Mayer Co., 122 Minn. 209, 142 N. W. 193; Finer *v.* Nichols, 175 Mo. App. 525, 157 S. W. 1023; Northrop *v.* Diggs, 146 Mo. App. 145, 123 S. W. 954 (in civil cases); Trogdon *v.* Sheep Co. (Mont.), 139 P. 792; Baker *v.* R. Co., 86 Neb. 227, 125 N. W. 587; Ellison *v.* W. U. Tel. Co., 163 N. C. 5, 79 S. E. 277; Harrison *v.* Tel. Co., 163 N. C. 18, 79 S. E. 281; Bedsole *v.* R. Co., 151 N. C. 152, 65 S. E. 925; Seckerson *v.* Sinclair, 24 N. D. 326, 140 N. W. 239; Hawkins *v.* Sinclair, 24 N. D. 623, 140 N. W. 246; Burger *v.* Sinclair, 24 N. D. 624, 140 N. W. 246; First Nat. Bank *v.* Thompson (Okla.), 137 P. 668; Prement *v.* Wells, 65 Or. 336, 133 P. 647; Ainsley *v.* Ry. Co., 243 Pa. 437, 90 A. 129; Ralph *v.* Taylor (R. I.), 85 A. 941; Klaveness *v.* Freese, 33 S. D. 263, 145

N. W. 561; Tex. M. R. Co. *v.* Simmons (Tex. Civ.), 152 S. W. 1106; Trinity, etc. Ry. Co. *v.* McCune (Tex. Civ.), 154 S. W. 237; Producers O. Co. *v.* Barnes (Tex. Civ.), 120 S. W. 1023; Mo. V. B. & I. Co. *v.* Ballard, 53 Tex. Civ. 110, 116 S. W. 93; Jacot *v.* Seed Co., 115 Va. 90, 78 S. E. 646; Baird *v.* Ry. Co., 78 Wash. 67, 138 P. 325; Johnson *v.* Lumber Co., 75 Wash. 539, 135 P. 217; Hoseth *v.* Co., 55 Wash. 416, 104 P. 612; Westra *v.* Roberts, 156 Wis. 230, 145 N. W. 773; Hanson *v.* Johnson, 141 Wis. 550, 124 N. W. 506 (except where all evidence before reviewing court satisfied objector was prejudiced notwithstanding instruction); Pullman Co. *v.* Finley, 20 Wyo. 456, 125 P. 380, See Steel Co. *v.* Acton, 8 Ala. App. 502, 62 S. 402; St. Louis, etc. Ry. Co. *v.* Loyd (Ark.), 160 S. W. 851; Mertens *v.* Mueller, 122 Md. 313, 89 A. 613.

Restricting evidence does not cure testimony erroneously received. Left F. Coal Co. *v.* Owen's Admx., 155 Ky. 212, 159 S. W. 703.

Submitting on independent issue is in effect striking out. Kahn *v.* Minthorn, 178 Mich. 312, 144 N. W. 859.

Restricting effect of evidence.—Marshall *v.* R. Co., 240 Pa. 272, 87 A. 575.

Instruction to disregard incompetent testimony of one witness considered effective as to similar testimony of another. Potvin *v.* Co., 156 Mich. 201, 120 N. W. 613.

217-56 Kalinski *v.* Coal Co., 263 Ill. 257, 104 N. E. 1097, *rev.* 183 Ill. App. 541.

217-57 Salo *v.* R. R. Co., 121 Minn. 78, 140 N. W. 188; Chenoweth *v.* Sutherland, 141 Mo. App. 272, 124 S. W. 1055; S. *v.* Rees, 40 Mont. 571, 107 P. 893; Hamory *v.* R. Co., 222 Pa. 631, 72 A. 227; Swank *v.* Elwert, 55 Or. 487, 105 P. 901 (instruction must be specific as to evidence to be disregarded); Gulf, etc. R. Co. *v.* Bagby (Tex. Civ.), 127 S. W. 254; Darnell *v.* S., 58 Tex. Cr. 585, 126 S. W. 1122; Birch *v.* Abercrombie, 74 Wash. 486, 133 P. 1020, modified, 135 P. 821.

219-58 Not cured by charge where it is doubtful whether jury understood remarks were directed to them. Hiller *v.* Bank, 96 S. C. 74, 79 S. E. 899.

219-59 Dornsife *v.* Ralston, 55 Or. 254, 106 P. 13.

Instruction neutralized by subsequent admission of like testimony. Snyder *v.* Maxwell, 138 App. Div. 621, 122 N. Y. S. 876.

221-62 Howard *v.* Power Co., 75 Wash. 255, 134 P. 927.

222-65 Loval *v.* Wolf (Ala.), 60 S. 298; St. Louis, etc. Ry. Co. *v.* McConnell, 107 Ark. 545, 156 S. W. 1024; Lyman *v.* S., 90 Ark. 596, 119 S. W. 1116; Hope *v.* Valente, 86 Conn. 301, 85 A. 541; Wash. etc. Ry. Co. *v.* Cullember, 39 App. Cas. (D. C.) 316; Louisville & N. R. Co. *v.* Stiles, 133 Ky. 786, 119 S. W. 786; Slack *v.* Curry, 177 Mich. 437, 143 N. W. 602; Ward *v.* Cook, 158 Mich. 283, 122 N. W. 785; Sivertson *v.* Moorhead, 119 Minn. 467, 138 N. W. 674; Wolfgram *v.* Woodmen, 167 Mo. App. 220, 149 S. W. 1167; Waldrons *v.* Wells, 84 N. J. L. 245, 86 A. 362; Shoemaker *v.* Express Co., 51 Pa. Super. 284; Zarate *v.* Villareal (Tex. Civ.), 155 S. W. 328; Cooper *v.* Robischung (Tex. Civ.), 155 S. W. 1050; Jaquith *v.* Worden, 73 Wash. 349, 132 P. 33; Morehouse *v.* Voight, 151 Wis. 580, 139 N. W. 423. See Story *v.* Green, 164 Cal. 768, 130 P. 870.

223-66 Error in striking out **not** fatal if other direct and undisputed evidence to same fact. Metzger *v.* Manlove, 241 Ill. 113, 89 N. E. 249; Jackson *v.* R. Co., 161 Mich. 163, 125 N. W. 763.

224-67 Prager *v.* Glanzer. 110 N. Y. S. 981.

224-68 Lowe *v.* R. Co., 154 Cal. 573, 98 P. 678; Selfridge *v.* P., 45 Colo. 275, 100 P. 591; Osborn *v.* R. Co., 144 Mo. App. 119, 129 S. W. 226; Fallon *v.* Fallon, 110 Minn. 213, 124 N. W. 994; Clague *v.* Co., 84 Neb. 499, 121 N. W. 570. See Thompson *v.* Nat. Bk., 152 Ky. 133, 153 S. W. 205.

225-69 Maryland, etc. R. Co. *v.* Brown, 109 Md. 304, 71 A. 1005 (similar testimony unobjected to); International, etc. R. Co. *v.* Flory (Tex. Civ.), 118 S. W. 1116.

226-70 Vincent *v.* Co., 85 Conn. 512, 84 A. 84; Collins *v.* Co., 54 Wash. 524, 103 P. 798.

226-71 Toole F. Co. *v.* Ellis, 5 Ga. App. 271, 63 S. E. 55; Peebles *v.* Co., 143 Ill. App. 370; S. *v.* Rohn, 140 Ia. 640, 119 N. W. 88; Manchester *v.* Duggan, 75 N. H. 33, 70 A. 1075; Cable P. Co. *v.* R. Co., 94 S. C. 143, 77 S. E. 868.

227-72 P. *v.* Wieland, 10 Cal. App. 519, 102 P. 828; O'Shaughnessy *v.* R.

Co., 144 Ill. App. 174; S. *v.* Vanella, 40 Mont. 326, 106 P. 364; Boesen *v.* R. Co., 83 Neb. 378, 119 N. W. 771.

On appeal incompetent evidence disregarded by court will not be considered though not stricken. Tuthill *v.* R. Co., 145 Ill. App. 50.

227-73 S. *v.* Sparks, 79 Kan. 548, 99 P. 1130; Smith *v.* R., 155 Mich. 466, 119 N. W. 640; Gaebler *v.* R. Co., 130 App. Div. 881, 114 N. Y. S. 585. *Contra.* Yazoo, etc. R. Co. *v.* Rivers, 93 Miss. 557, 46 S. 705; Rubenstein *v.* Radt, 133 App. Div. 57, 117 N. Y. S. 893 (if evidence supported by charge and effect is sought to be cured thereafter).

Error in striking out cured by subsequent reception of testimony on point without objection. Fearon *v.* Mullins, 38 Mont. 45, 98 P. 650.

Directing verdict equivalent to striking out evidence of defeated party. Bean *v.* Co., 40 Mont. 31, 104 P. 869.

Instruction to disregard cures error in refusing to strike. Layne *v.* R. Co., 66 W. Va. 607, 67 S. E. 1103.

SUPPLEMENTARY PROCEEDINGS

232-11 Examination of contents of safe deposit box standing in names of debtor and another not compellable in absence of evidence as to what they are. Ehrich *v.* Root, 134 App. Div. 432, 119 N. Y. S. 395.

233-12 Examination of third persons by judgment creditor not proper after receiver named. Sorrentino *v.* Langlois, 128 N. Y. S. 1003.

234-22 Where community personal deficiency judgment obtained in foreclosure proceedings husband may be examined as to non-confidential communications notwithstanding wife's objections. Belknap *v.* Platter, 54 Wash. 1, 103 P. 432.

237-25 See P. *v.* Hanbury, 145 N. Y. S. 483, *aff.* 162 App. Div. 337, 147 N. Y. S. 851; Smith *v.* Weed, 75 Wash. 452, 134 P. 1070.

Evidence as to use made of loan obtained is admissible to verify the truth of the schedule. McCray *v.* Whitney (Ind. App.), 104 N. E. 979.

238-30 Hubbard *v.* Lewis, 128 App. Div. 416, 112 N. Y. S. 1050.

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258-5 Assessors bound by evidence before them. P. *v.* Hall, 130 App. Div. 360, 114 N. Y. S. 511.

258-7 Hillman Land & Iron Co. *v.* C., 148 Ky. 331, 146 S. W. 776.

259-10 See Riddle *v.* P. Co., 78 N. J. L. 520, 74 A. 507; Boque *v.* Laughlin, 149 Wis. 271, 136 N. W. 606.

261-13 Nemaha Val. D. Dist. *v.* Skeen, 90 Neb. 510, 134 N. W. 184.

Burden of proving exemption is upon the party claiming it. First Congregational Church *v.* Board, 254 Ill. 220, 98 N. E. 275.

262-15 S. *v.* Co., 162 Ala. 234, 50 S. 366 (commissioner's court must act on evidence before it regardless of return).

263-16 Holton E. Co. *v.* Board, 81 Kan. 6, 105 P. 453; Star M. Co. *v.* Board (Ky.), 125 S. W. 1051.

266-19 In re assessment, 225 Pa. 272, 74 A. 65 (procedure indicated). See W. U. T. Co. *v.* County, 80 Neb. 23, 117 N. W. 468.

Affidavit as to value does not overcome presumptive case made by assessor's valuation. Elmore P. Co. *v.* County, 55 Or. 218, 105 P. 898.

"**A mere opinion** of the owner with reference to the value of personal property, unsupported by facts or circumstances, and coupled with evasive answers as to the quantity and market value of the personal property in question, while worthy of consideration by the board of review, cannot be held to so nullify the assessor's valuation that the board is without jurisdiction to confirm the latter." S. *v.* McPhee, 149 Wis. 76, 135 N. W. 470, *citing* State ex rel. Giroux *v.* Lien, 108 Wis. 316, 84 N. W. 422; State ex rel. Vilas *v.* Wharton, 117 Wis. 558, 94 N. W. 359; State ex rel. Stearns Lumber Co. *v.* Fisher, 124 Wis. 271, 102 N. W. 566; State ex rel. Hines Lumber Co. *v.* Fisher, 129 Wis. 57, 108 N. W. 206; State ex rel. Foster Lumber Co. *v.* Williams, 123 Wis. 61, 100 N. W. 1048.

Market value must be taken. Porter *v.* Langley (Tex. Civ.), 155 S. W. 1042.

269-22 California D. W. Co. *v.* County, 10 Cal. App. 185, 101 P. 547.

270-23 State must show return of taxpayer does not include all his property. C. *v.* Co., 135 Ky. 324, 122 S. W. 164.

271-27 P. *v.* Purdy, 231 U. S. 373,

34 Sup. Ct. 114, 58 L. ed. 274; United G. Mines *v.* County, 12 Ariz. 217, 100 P. 774; P. *v.* R. Co., 256 Ill. 626, 100 N. E. 187; Collins *v.* Bd. (Ia.), 138 N. W. 1095; Holton E. Co. *v.* Board, 81 Kan. 6, 105 P. 453; Dixon *r.* Melton, 137 Ky. 689, 126 S. W. 358; S. *v.* Nelson, 116 Minn. 424, 133 N. W. 1010; W. U. T. Co. *v.* County (Neb.), 117 N. W. 468; Bellows F. C. Co. *v.* Walpole, 76 N. H. 384, 83 A. 95; P. *v.* Comrs., 196 N. Y. 39, 89 N. E. 581; P. *r.* Board, 202 N. Y. 426, 95 N. E. 754, *aff.* 124 N. Y. S. 1125, aff. 119 N. Y. S. 925; People *v.* State Board, 157 App. Div. 165, 142 N. Y. Supp. 180; Ventriniglia *v.* Eichner, 155 App. Div. 236, 140 N Y. S. 395; Underwood *v.* Town, 152 N. C. 641, 68 S. E. 147; Washington County *v.* Marquis, 233 Pa. 552, 82 A. 756; In re Assessment, 225 Pa. 272, 74 A. 65; McKennon *r.* McFall, 127 Tenn. 393, 155 S. W. 158.

An internal revenue assessment is prima facie evidence of amount of tax due. U. S. Fidelity & G. Co. *r.* U. S., 201 Fed. 91, 119 C. C. A. 429.

Evidence sufficient to cause the abatement of a tax. Metropolitan Bldg. Co. *v.* King County, 64 Wash. 615, 117 P. 495.

273-28 Acts of officers conclusive on state in absence of statute. S. *v.* Little, 94 Ark. 217, 126 S. W. 713.

274-29 In re assessment, 225 Pa. 272, 74 A. 65.

274-30 Northern P. R. Co. *v.* County, 55 Wash. 108, 104 P. 178.

Evidence on which board of equalization acted will not be considered by court on question of value of property. Elmore P. Co. *v.* County, 55 Or. 218, 105 P. 898.

275-34 Boston, etc. Co. *v.* S., 76 N. H. 515, 85 A. 616.

Record made by board of equalization conclusive as to its action; parol evidence to show how it reached result arrived at inadmissible. Nashville L. Co. *v.* County, 89 Ark. 53, 115 S. W. 936.

Sale price of property persuasive as to value. Royal Mfg. Co. *r.* Board, 76 N. J. L. 402, 70 A. 978.

Undervaluation of other properties no cause for decreasing valuation of that in question. Ibid.

277-35 In prosecution for non-payment of poll tax proof of levy on tax must be made. Bluitt *v.* S., 56 Tex. Cr. 525, 121 S. W. 168.

Notice taken of city's power to levy, assess and collect taxes and that lien results from non-payment of taxes. Miami *r.* Co., 57 Fla. 366, 49 S. 55.

277-36 See Kiser *r.* McLean, 67 W. Va. 294, 67 S. E. 725.

278-39 Grand assessment list inadmissible unless statutory notices duly posted. Smith *v.* Stannard, 81 Vt. 319, 70 A. 568.

279-40 Parol evidence competent to show manner in which officers obtained information as to items and value of estate of recusant property owner. Ibid.

280-43 Atchison, etc. R. Co. *r.* Sullivan, 173 Fed. 456, 97 C. C. A. 1.

Report by railroad to interstate commission inadmissible against it, if made for period of time differing from that fixed by statute governing assessment property. Ibid.

282-47 California D. W. Co. *r.* County, 10 Cal. App. 185, 101 P. 547; P. *r.* Tunnel Co., 263 Ill. 253, 104 N. E. 1016; S. *r.* Clausen, 63 Wash. 535, 116 P. 7; S. *r.* Thompson, 151 Wis. 184, 138 N. W. 628.

Invalidity of assessment not presumed. Old Republic Min. Co. *r.* Ferry County, 69 Wash. 600, 125 P. 1018; Blaine, etc. Min. Co. *r.* Ferry County, 69 Wash. 702, 125 P. 1021.

283-48 P. *r.* Bourne, 242 Ill. 61, 89 N. E. 690.

284-50 See S. *r.* Co., 111 Minn. 21, 124 N. W. 380; P. *r.* Woodbury, 67 Misc. 481, 123 N. Y. S. 592.

Burden of proof on relator.—P. *r.* Woodbury, 67 Misc. 481, 123 N. Y. S. 592 (franchise). And see P. *r.* State Brd., 67 Misc. 474, 123 N. Y. S. 609.

285-52 Pleadings affect applicability of presumption. Atchison, etc. R. Co. *r.* Sullivan, 173 Fed. 456, 97 C. C. A. 1.

State must show appurtenance to property has value independent of use in connection with property so as to be separately taxable. Hale *r.* County, 39 Mont. 137, 101 P. 973.

286-53 Presumption of payment after lapse of 10 years. Graves *r.* Stone, 72 Wash. 382, 130 P. 369.

286-55 P. *r.* Bourne, 242 Ill. 61, 89 N. E. 690.

289-59 W. U. T. Co. *r.* Trapp, 186 Fed. 114; P. *r.* Bourne, supra; P. *r.* Co., 238 Ill. 279, 87 N. E. 410.

289-61 Where a surviving partner brought an action to be exempt from taxes on property located in another

county the commonwealth could introduce proof of omitted assessable property. C. *v.* Schmelz, 114 Va. 364, 76 S. E. 905.

The authority of the town clerk calling the meeting levying the tax may be inquired into. Cole *v.* Co., 35 R. I. 511, 87 A. 307.

291-63 Agreement by former members of tribunal to sustain assessments regardless of evidence irrelevant though some of its members yet in office. Lufkin L. & L. Co. *v.* Noble (Tex. Civ.), 127 S. W. 1093.

291-66 De jure character of officer need not be shown. Greenville *v.* Blair, 104 Me. 444, 72 A. 177.

292-68 Singer Mfg. Co. *v.* Denver, 46 Colo. 50, 103 P. 294; Atwater *v.* O'Reilly, 81 Conn. 367, 71 A. 505; Gouaux *v.* Beaullieu, 123 La. 684, 49 S. 285; Greenville *v.* Blair, 104 Me. 444, 72 A. 177.

Not applicable as to jurisdictional defects. Foster *v.* Cattle Co., 123 Minn. 273, 143 N. W. 786.

294-69 Columbus *v.* Bk. (Ky.), 122 S. W. 835; Rogers *v.* Gookin, 198 Mass. 434, 85 N. E. 405; McMahan *v.* Morgan (Tex. Civ.), 151 S. W. 1123.

Not necessary to prove the order of the Commissioners Court making the levy. American Lumber Co. *v.* S. (Tex. Civ.), 165 S. W. 467.

Presumption of sufficiency of notice overcome by producing it if not meeting requirements of statute; thereafter burden is on officers to show other sufficient notice given. Ward *v.* Wentz, 130 Ky. 705, 113 S. W. 892.

295-70 Newton T. Co. *v.* Atwood, 77 N. J. L. 141, 71 A. 110 (acted on proper proof).

295-73 Value of land presumed at least equal to amount invested in it. Smith *v.* Stephens, 173 Ind. 564, 91 N. E. 167.

Boundaries of taxing district not presumed changed pursuant to authority. Saranac L. & T. Co. *v.* Roberts, 195 N. Y. 303, 88 N. E. 753.

296-77 Peters *v.* Lohr, 24 S. D. 605, 124 N. W. 853.

297-83 P. *v.* R. Co., 249 Ill. 97, 94 N. E. 11; Barber A. P. Co. *v.* Brick Co., 170 Mo. App. 503, 156 S. W. 749 (tax bills); Hanson *v.* Franklin, 19 N. D. 259, 123 N. W. 386.

300-85 Bowland *v.* Co., 18 O. Dec. 126.

302-91 Authority of the town clerk calling the meeting levying the tax may be inquired into. Cole *v.* Co., 35 R. I. 511, 87 A. 307.

302-92 Insufficient description. Sears *v.* Murdock, 59 Or. 211, 117 P. 305.

308-4 Johnson *v.* Jones, 86 Vt. 167, 83 A. 1085.

Omission of other non-exempt property, immaterial as defense to action to collect tax. Greenville *v.* Blair, 104 Me. 444, 72 A. 177.

308-5 Morrill *v.* Bentley (Ia.), 126 N. W. 155; Trenton *v.* Humel, 134 Mo. App. 595, 114 S. W. 1131.

310-6 Trustees *v.* Board, 242 Ill. 477, 90 N. E. 178; P. *v.* Hospital, 238 Ill. 137, 87 N. E. 305; S. *v.* Holcomb, 81 Kan. 879, 106 P. 1030; Boston Lodge *v.* Boston (Mass.), 104 N. E. 453; Hale *v.* County, 39 Mont. 137, 101 P. 973; St. Paul's Church *v.* Concord, 75 N. H. 420, 75 A. 531; Kenyon College *v.* Schnably, 8 O. N. P. (N. S.) 160. *Comp.* P. *v.* Raymond, 194 N. Y. 189, 87 N. E. 90.

In action to collect penalty as personal liability burden on plaintiff to show defendant's ownership of property at time in issue. Central H. Co. *v.* S. (Tex. Civ.), 117 S. W. 880.

311-9 Hathaway *v.* Edwards, 42 Ind. App. 22, 85 N. E. 28.

313-14 Prima facie case sustaining judgment for sale of land made by introduction of verified report of list of delinquent lands, proof of its publication and notice of application. P. *v.* R. Co., 243 Ill. 221, 90 N. E. 381.

Ownership of land shown prima facie by county tax rolls. Matthewson *v.* Hevel, 82 Kan. 134, 107 P. 768.

314-15 In re Scott, 231 Pa. 311, 80 A. 255; Lehigh & Wilkes-Barre Coal Co. *v.* Luzerne Co., 231 Pa. 481, 80 A. 1093.

317-21 Approval of assessment roll cannot be collaterally attacked in action to confirm title. Yazoo, etc. Lumber Co. *v.* Eastland (Miss.), 61 S. 597.

320-29 Essery *v.* Bell, 18 Ont. L. R. 76; Doe *v.* Styles (Ala.), 64 S. 345. Knauff *v.* Woodenware Co., 99 Ark. 137, 137 S. W. 823; Bursey *v.* Lyon, 32 App. Cas. (D. C.) 231; Borthwick *v.* Johnson (Or.), 137 P. 784.

321-30 Defendant relying on tax certificate issued to county must show compliance with all jurisdictional requirements; not done by proving deed by county to himself. Dufur *v.* Healy, 56 Or. 49, 107 P. 692.

321-33 Burks *v.* Cox, 149 Ky. 106, 147 S. W. 737.
Evidence showing jurisdictional defects is admissible. Russell *v.* Di Furia, 83 Misc. 169, 145 N. Y. S. 640.
324-40 Marr *v.* Kane, 133 La. 627, 63 S. 246.
Where owner was prevented from paying taxes through misinformation of town treasurer a preponderance of evidence is necessary to establish such claim. Gould *v.* Killen, 152 Wis. 197, 139 N. W. 758.
324-41 Roman *v.* Lentz (Ala.), 58 S. 438; Boyer *v.* Gehaus, 19 Cal. App. 320, 125 P. 916.
326-43 Stough *v.* Reeves, 42 Colo. 432, 95 P. 958.
327-44 Am. B. & I. Co. *v.* Hopkins, 46 Colo. 460, 104 P. 1040 (absence of proof prima facie evidence notice not given).
327-46 See Compton *v.* Feldmark, 82 N. J. Eq. 112, 88 A. 174.
327-48 Rexford *v.* Phillips, 159 N. C. 213, 74 S. E. 337.
328-50 Gardner *v.* Cherry, 51 Colo. 150, 116 P. 1127.
329-55 Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609.
330-56 Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609.
Grantee of purchaser buying at fraudulent sale must show he is good-faith purchaser for valuable consideration. Lohr *v.* George, supra.
332-66 Empire R. etc. *v.* Langley, 23 Colo. App. 49, 127 P. 451; Brock *v.* Satchell, 130 La. 853, 58 S. 686; Weld *v.* Clarke, 209 Mass. 9, 95 N. E. 651; Dunbar *v.* Lumb. Co., 102 Miss. 623, 59 S. 852; Rafferty *v.* Davis, 54 Or. 77, 102 P. 305 (assignee of certificate); Timmerman *v.* McCullagh, 55 Wash. 204, 104 P. 212.
334-69 Gamble *v.* Andrews (Ala.), 65 S. 525; McNair *v.* Boy, 163 N. C. 478, 79 S. E. 966; Clough *v.* Welsh, 229 Pa. 386, 78 A. 1000.
334-71 Bender *v.* Bailey, 130 La. 341, 57 S. 998.
335-72 Defect in notice. Lanning *v.* Musser, 88 Neb. 418, 129 N. W. 1022.
336-75 Boswell *v.* Jordan (Ark.), 165 S. W. 295; Wilson *v.* Jarron, 23 Ida. 563, 131 P. 12.
337-77 Boswell *v.* Jordan (Ark.), 165 S. W. 295.
337-78 Papers filed out of regular order, inadmissible. Buffalo, etc. Co. *v.* Co., 121 N. Y. S. 900.
338-80 Timmerman *v.* McCullagh, supra (recital in selling officer's return).
338-81 See Upham *v.* Weisshaar, 23 Colo. App. 277, 128 P. 1129.
340-85 Material omission from record overcomes its effect as evidence. Ashenfelter *v.* Seiling, 141 Ia. 512, 119 N. W. 984.
340-86 Deed to plaintiff and testimony as to possession of premises described sufficient to show occupation by grantee. Brimson *v.* Arnold, 236 Ill. 495, 86 N. E. 254.
340-87 Harton *v.* Euslen (Ala.), 62 S. 696; Parks *v.* Roth, 25 Colo. App. 296, 137 P. 76; Sheesley *v.* Voorhees, 24 Colo. App. 428, 134 P. 1008; Weld *v.* Clarke, 209 Mass. 9, 95 N. E. 651; Borthwick *v.* Johnson (Or.), 137 P. 784; Zarate *v.* Villareal (Tex. Civ.), 155 S. W. 328; Caretta R. Co. *v.* Fisher (W. Va.), 81 S. E. 710.
Deed received without objection, prima facie evidence. St. Paul, etc. R. Co. *v.* Howard, 23 S. D. 34, 119 N. W. 1032.
342-88 Bursey *v.* Lyons, 32 App. Cas. (D. C.) 231.
Presumptions not indulged in favor of defective tax deed not recorded at least five years. Grinstead *v.* Cooper, 77 Kan. 778, 95 P. 401; Jackson *v.* McCarron, 77 Kan. 776, 95 P. 402.
343-89 Vandermuelen *v.* Burwell, 22 Colo. App. 486, 125 P. 131.
344-94 Moss T. Co. *v.* Myers (Ky.), 116 S. W. 255.
345-95 State Board of Education *v.* Remick (N. C.), 76 S. E. 627.
Where tax deed had been recorded five years every presumption will be indulged to sustain it. Gibson *v.* Rea, 89 Kan. 714, 132 P. 1006.
346-96 Peterson *v.* Inv. Co., 115 Minn. 333, 132 N. W. 273; Miller *v.* Keaton, 236 Mo. 694, 139 S. W. 158; State B. Education *v.* Remick (N. C.), 76 S. E. 627; Person *v.* Roberts (N. C.), 74 S. E. 322; S. *v.* King, 64 W. Va. 546, 63 S. E. 468.
346-97 Louisiana Land Co. *v.* Blakewood, 131 La. 539, 59 S. 984.
346-98 Maney *v.* Dennison (Ark.), 163 S. W. 783; Jacks *v.* Co., 90 Ark. 548, 120 S. W. 142; Allen *v.* Phillips, 87 Ark. 185, 112 S. W. 403; Bolton *v.* Bennett, 56 Colo. 507, 138 P. 761; Lambert *v.* Scott, 53 Colo. 357, 127 P. 142; Gibson *v.* Foster, 24 Colo. App. 434, 135 P. 121; Pelton *v.* Muntzing, 24 Colo. App. 1, 131 P. 281; Shomaker *v.* Betts

Co., 64 Fla. 466, 60 S. 117; Armstrong *v.* Jarron, 21 Ida. 747, 125 P. 170; Vournazos *v.* Glos, 263 Ill. 314, 104 N. E. 1053; Henderson *v.* Bivens, 56 Ind. App. 384, 98 N. E. 421; Bivens *v.* Henderson, 42 Ind. App. 562, 86 N. E. 426; Saum *v.* Dewey, 84 Kan. 811, 115 P. 570; Norgress *v.* Schwing, 128 La. 1040, 55 S. 667; McMahon *v.* Crean, 109 Md. 652, 71 A. 995; Mitchell *v.* Tubb (Miss.), 65 S. 216; Bingham *v.* Kollman, 256 Mo. 573, 165 S. W. 1097; Williams *v.* Sands, 251 Mo. 147, 158 S. W. 47; Cromwell *v.* Nichols, 155 App. Div. 905, 139 N. Y. S. 1051; Clinton *v.* Krull, 125 App. Div. 157, 111 N. Y. S. 105; Bandow *v.* Wolven, 23 S. D. 124, 120 N. W. 881; Tacoma G. & E. L. Co. *v.* Pauley, 49 Wash. 562, 95 P. 1103. See Williams *v.* Hall, 87 Kan. 63, 123 P. 739.

Presumed tax deeds in prescribed form. Strange *v.* Co., 136 Wis. 516, 117 N. W. 1023.

349-99 Allen *v.* Phillips, 87 Ark. 185, 112 S. W. 403; Smith *v.* Furlong, 160 Cal. 522, 117 P. 527; Sullenger *v.* Baecher (Ind. App.), 101 N. E. 517; Hatler *v.* Hatler, 153 Ky. 93, 154 S. W. 390; Gallatin *v.* Land Co., 89 Neb. 235, 131 N. W. 224; Dawson *v.* Anderson, 38 Okla. 167, 132 P. 666; Rexford *v.* Phillips, 159 N. C. 213, 74 S. E. 337; Harter *v.* Cone, 59 Or. 43, 115 P. 1070; Puget Sound Nat. Bk. *v.* Biswanger, 59 Wash. 134, 109 P. 327.

Where tax deed is attacked for noncompliance with condition precedent to notice. McNair *v.* Boyd, 163 N. C. 478, 79 S. E. 966.

A paper reciting receipt of taxes and signed by the clerk is not sufficient to show that the land had been sold for taxes. McClanahan *v.* Brown, 157 Ky. 450, 163 S. W. 467.

350-1 St. Bd. of Education *v.* Remick (N. C.), 76 N. E. 627.

351-3 It was not intended by the Kentucky statute "that in an action of ejectment or of trespass to try title or to quiet title beween him and a third party, not the taxpayer or claiming through the taxpayer, that the sheriff's deed should be prima facie evidence of title, either of record or by adverse possession, in the person in whose name the property was sold, and thus render it unnecessary in such an action to prove title in him. On the contrary, in such an action, it is still necessary to prove in the taxpayer either a title of record or by adverse possession. Having proven such title in the taxpayer, all that then remains is to introduce the tax deed. This will be prima facie evidence of title in the purchaser by virtue of the tax proceedings." Burks *v.* Cox, 149 Ky. 106, 147 S. W. 737.

352-5 Parks *v.* Roth, 25 Colo. App. 296, 127 P. 76; Eaches *v.* Johnston, 46 Colo. 457, 104 P. 940; Empire Ranch & Cattle Co. *v.* Coldren, 51 Colo. 115, 117 P. 1005.

Admissible to show common source of title.—Skov *v.* Coffin (Tex. Civ.), 137 S. W. 450.

354-9 "The manifest purpose of this section [Ky. St., §4030] was to change the burden of proof, which was formerly upon the purchaser at the tax sale, and impose upon the taxpayer the burden of proving some fatal irregularity in the tax proceedings. Therefore all that is necessary on the part of the purchaser in a contest between him and the taxpayer, or any one holding under the taxpayer, is to introduce the tax deed. This makes out a prima facie case of title in him by virtue of the tax proceedings, and it then devolves upon the taxpayer, or one claiming through him, to show such irregularities in the tax proceedings as will avoid the sale. By such proceedings the purchaser acquires the title of the taxpayer, whatever it may be. Husbands *v.* Polivick, 128 Ky. 652, 96 S. W. 825, 29 Ky. Law. Rep. 890." Burks *v.* Cox, 149 Ky. 106, 147 S. W. 737.

355-14 Conclusive against state as to title of grantee in tax deed. S. *v.* Co., 64 W. Va. 673, 63 S. E. 372; S. *v.* Snyder, 64 W. Va. 659, 63 S. E. 385.

356-15 Henderson *v.* De Turk, 164 Cal. 296, 128 P. 747; Cullen *v.* T. Co., 47 Mont. 513, 134 P. 302; Cornelius *v.* Ferguson, 23 S. D. 187, 121 N. W. 91.

359-18 Warden *v.* Broome, 9 Cal. App. 172, 98 P. 252.

360-20 Cone *v.* Lauer, 115 N. Y. S. 644.

360-22 Presumption of payment from lapse of time and destruction of records. Surghenor *v.* Ayers (Tex. Civ.), 139 S. W. 28.

Evidence sufficient.—Knauff *v.* Woodenware Co., 99 Ark. 137, 137 S. W. 823.

360-23 Leary *v.* Jersey City, 189 Fed. 419.

Payment of taxes when due, presumed.

Kirchner *v.* Board, 141 Ia. 43, 118 N. W. 51.

362-27 Parol proof of payment on lands not returned for taxation, not convincing. Lofton *v.* Miller, 55 Tex. Civ. 253, 118 S. W. 911.

Bona fide attempt to pay, frustrated by mistake or fault of officer, equivalent to payment. Seroggin *v.* Ridling, 92 Ark. 630, 121 S. W. 1053.

363-29 Certificate by county clerk prima facie evidence of non-payment of taxes. Broekway *v.* McClun, 243 Ill. 196, 90 N. E. 374.

Proof of payment of city taxes no evidence of payment of other taxes. S. *v.* Quillen (Tex. Civ.), 115 S. W. 660.

364-30 Despard *v.* Pearey, 65 W. Va. 140, 63 S. E. 871; Bumgarner *v.* First Nat. Bk., 70 W. Va. 787, 74 S. E. 996.

368-39 Louisiana Land Co. *v.* Blakewood, 131 La. 539, 59 S. 984.

368-40 Cumberland T. & T. Co. *v.* Calhoun, 151 Ky. 241, 151 S. W. 659; Lancaster Sea B. Imp. Co. *v.* City of New York, 161 App. Div. 469, 146 N. Y. S. 734; St. Paul, etc. R. Co. *v.* Howard, 23 S. D. 34, 119 N. W. 1032 (to show property taxable under special law).

In Kentucky owner must, in order to defeat tax title, show defect in proceedings; rule formerly prevailing having been changed by statute. Hamilton *v.* Steele (Ky.), 117 S. W. 378.

369-41 If power to tax rests upon precedent condition burden on public to show performance. Masonic E. & C. Tr. *v.* Boston, 201 Mass. 320, 87 N. E. 602.

If presumption of regularity overcome by taxpayer burden on party relying on such presumption to sustain it. Starks *v.* Sawyer, 56 Fla. 596, 47 S. 513.

369-42 Great Northern R. Co. *v.* County, 54 Wash. 23, 102 P. 881.

Action of state board conclusive as to valuation, but not as to property assessable. Board *v.* Johnson, 173 Ind. 76, 89 N. E. 590. See Cleveland, etc. R. Co. *v.* Ensley, 44 Ind. App. 538, 89 N. E. 607.

Double taxation not presumed intended by legislature. Newport *v.* Fitzer, 131 Ky. 544, 115 S. W. 742. No presumption in favor of it. S. *v.* R. Co., 215 Mo. 479, 114 S. W. 956.

370-44 California D. W. Co. *v.* County, 10 Cal. App. 185, 101 P. 547; Glenn *v.* Stewart, 78 Kan. 608, 97 P. 863; Masonic E. & C. Trust *v.* Boston, supra; Gibson *v.* Pekarek, 25 S. D. 281, 126 N. W. 597.

No presumption in favor of territorial jurisdiction of assessor because lands are described on his roll. Martin *v.* White, 53 Or. 319, 100 P. 290.

371-47 Fifth Ave. Coach Co. *v.* S., 131 N. Y. S. 62.

373-53 Whitford, Bartlett & Co. *v.* Clarke, 33 R. I. 331, 80 A. 257.

Involuntary payment.—Brenner *v.* City, 160 Cal. 72, 116 P. 397; Ottawa University *v.* Stratton, 85 Kan. 246, 116 P. 892.

377-66 Assessors may give testimony explanatory of schedules. Warner *v.* Campbell, 238 Ill. 630, 87 N. E. 853.

TELEGRAPHS AND TELEPHONES

Injury to credit, 441-4.

402-2 Salinger *v.* Co., 147 Ia. 484, 126 N. W. 362; Wells *v.* T. Co., 144 Ia. 605, 123 N. W. 371 (sending forged message); Postal T.-C. Co. *v.* Co., 102 Tex. 148, 114 S. W. 98.

402-3 W. U. T. Co. *v.* Crowley, 158 Ala. 583, 48 S. 381; W. U. T. Co. *v.* Long, 90 Ark. 203, 118 S. W. 405; So. Bell Tel. & T. Co. *v.* Glawson, 140 Ga. 507, 79 S. E. 136; 13 Ga. App. 520, 79 S. E. 488; Hauser *v.* Co., 150 N. C. 557, 64 S. E. 503; Thompson *v.* Reed, 29 S. D. 85, 135 N. W. 679; W. U. T. Co. *v.* Hudson, 56 Tex. Civ. 238, 120 S. W. 1112.

Consciousness of person very ill, presumed, hence plaintiff need not show that person whom he might have seen but for defendant's negligence would have been conscious at time he could have reached her. W. U. T. Co. *v.* Hughey, 55 Tex. Civ. 403, 118 S. W. 1130.

402-4 Defendant must prove special contract. Postal T.-C. Co. *v.* Harriss, 56 Tex. Civ. 105, 121 S. W. 358.

403-6 McInturf *v.* Co., 81 Kan. 476, 106 P. 282; Oxner *v.* Co., 82 S. C. 510, 63 S. E. 545.

Presumption of wilful negligence arising from long delay in delivering message (Young *v.* Co., 65 S. C. 93, 43 S. E. 448) explained by evidence showing efforts to deliver. Lewis *v.* Co., 84 S. C. 54, 65 S. E. 941; Glenn *v.* Co., 84 S. C. 155, 65 S. E. 1024.

Limitation of liability.—Unless plaintiff admits existence of stipulation limiting defendant's liability latter must establish it. Postal T.-C. Co. *v.* Harriss, 56 Tex. Civ. 105, 122 S. W. 891.

404-7 Lewis *v.* Co., 84 S. C. 54, 65 S. E. 941; S. W. Tel. Co. *v.* Thompson (Tex. Civ.), 157 S. W. 1185.

405-8 A messenger sent to receive a message is prima facie an agent of the company. Alexander *v.* Tel. Co., 158 N. C. 473, 74 S. E. 449.

406-11 Payment provable by direct testimony in connection with evidence showing message marked "paid." W. U. T. Co. *v.* Saunders, 164 Ala. 234, 51 S. 176.

407-13 W. U. T. Co. *v.* Louisell, 161 Ala. 231, 50 S. 87; Cobb *v.* Co., 85 S. C. 430, 67 S. E. 549.

Evidence held insufficient to show unreasonable delay. Marquette *v.* Tel. Co., 153 N. C. 156, 69 S. E. 73.

407-14 W. U. T. Co. *v.* Webb, 98 Ark. 87, 135 S. W. 366; Brown *v.* Co., 85 S. C. 495, 67 S. E. 146.

See Western Union Tel. Co. *v.* Glenn (Tex. Civ.), 156 S. W. 1116.

Proof that a telegram was not delivered is prima facie proof it was not sent out. Hewitt *v.* W. U. Tel. Co., 172 Mo. App. 272, 157 S. W. 827.

408-16 Proof message duly mailed to addressee raises presumption he received it; denial of its receipt raises presumption not mailed. Glenn *v.* Co., supra.

408-17 W. U. T. Co. *v.* Bennett, 3 Ala. App. 275, 57 S. 87; Jackson *v.* W. U. Tel. Co., 174 Mo. App. 70, 156 S. W. 801; Levy Bros. *v.* W. U. T. Co., 39 Okla. 416, 135 P. 423.

411-23 W. U. T. Co. *v.* Ivy, 177 Fed. 63, 100 C. C. A. 481; Seddon *v.* Co., 146 Ia. 743, 126 N. W. 969; W. U. T. Co. *v.* Elliott, 131 Ky. 340, 115 S. W. 228; Cameron *v.* Tel. Co., 90 S. C. 503, 74 S. E. 929; Glenn *v.* T. Co., 84 S. C. 155, 65 S. E. 1024; Baker *v.* Co., 84 S. C. 477, 66 S. E. 182, 87 S. C. 174, 69 S. E. 151; Lothian *v.* Co., 25 S. D. 319, 126 N. W. 621; West. U. T. Co. *v.* Glenn (Tex. Civ.), 156 S. W. 1116; Postal T.-C. Co. *v.* Smith (Tex. Civ.), 124 S. W. 733. See W. U. T. Co. *v.* Bodkin, 79 Kan. 792, 101 P. 652.

Presumption does not arise unless plaintiff shows some one was at place designated for delivery to receive message. W. U. T. Co. *v.* Sullivan, 82 O. St. 14, 91 N. E. 867.

Burden of excusing delay is on defendant. Western U. Tel. Co. *v.* Hearn (Ark.), 161 S. W. 1025.

Telegraph company must exercise due diligence to deliver a message promptly. Western U. Tel. Co. *v.* Johnson (Tex. Civ.), 164 S. W. 903.

A delay of 4 hours is some evidence of negligence. Poe *v.* W. U. Tel. Co., 160 N. C. 315, 76 S. E. 81.

412-25 Robertson *v.* Co., 95 S. C. 356, 78 S. E. 977.

412-26 W. U. T. Co. *v.* Benson, 159 Ala. 254, 48 S. 712.

412-27 See Stewart *v.* Tel. Co. (Tex. Civ.), 158 S. W. 1034. *Contra.* W. U. T. Co. *v.* Price, 137 Ky. 578, 126 S. W. 1100.

The fact that brother of plaintiff had told defendant's agent how he could be reached by telephone is admissible when reply came after office hours. Western Tel. Co. *v.* Johnson (Tex. Civ.), 164 S. W. 903.

413-28 W. U. T. Co. *v.* Elliott, 131 Ky. 340, 115 S. W. 228.

414-33 Strauss *v.* Co., 83 S. C. 22, 64 S. E. 913 (omission of street and number insufficient).

A long unexplained delay is some evidence of a reckless or wanton disregard of duty. Ogilvie *v.* T. Co., 83 S. C. 8, 64 S. E. 860.

Evidence of long delay in delivery, without affirmative showing of effort to deliver, tends to show wilfulness. Baker *v.* Co., 84 S. C. 477, 66 S. E. 182.

415-34 W. U. T. Co. *v.* Crowley, 158 Ala. 583, 48 S. 381; Bailey *v.* Co., 150 N. C. 316, 63 S. E. 1044; Martin *v.* Co., 81 S. C. 432, 62 S. E. 833 (shown addressee's name in directory usually relied on by defendant's agent, addressee's residence known to mail carrier). Such evidence met by testimony showing use of other means to find plaintiff's address. W. U. T. Co. *v.* Sockwell, 91 Ark. 475, 121 S. W. 1046.

416-36 Condition of wires over which necessary for message to go shown if not result of defendant's negligence. Baker *v.* Co., 84 S. C. 477, 66 S. E. 182.

Existence of telephone connection between plaintiff's residence and defendant's office and fact defendant had frequently sent messages to plaintiff by telephone shown where claimed operator did not know plaintiff's residence. W. U. T. Co. *v.* Hill, 163 Ala. 18, 50 S. 248.

417-37 W. U. T. Co. *v.* West, 165 Ala. 399, 51 S. 740; W. U. T. Co. *v.* Brasher, 136 Ky. 485, 124 S. W. 788.
Declarations of agent competent to excuse person desiring to send message from employing other means to communicate with plaintiff. Southwestern T. & T. Co. *v.* Owens (Tex. Civ.), 116 S. W. 89.
Notation on message of time sent, competent. W. U. T. Co. *v.* Merritt, 55 Fla. 462, 46 S. 1024.

418-38 **Where addressee** of telegrams while seeking information as to nondelivery of the telegrams has a conversation with a messenger who had the telegrams, such conversation is admissible. West. U. Tel. Co. *v.* Walters (Miss.), 63 S. 194.
Efforts made by third party before message sent to find addressee cannot be shown by defendant. W. U. T. Co. *v.* Brashear, 136 Ky. 485, 124 S. W. 788.

418-39 W. U. T. Co. *v.* West, 165 Ala. 399, 51 S. 740; W. U. T. Co. *v.* Erwin (Tex. Civ.), 147 S. W. 607; S. W. T. Co. *v.* Gehring (Tex. Civ.), 137 S. W. 754. See W. U. T. Co. *v.* Griffin, 92 Ark. 219, 122 S. W. 489.
Failure of transmitting agent to inform sender office to which message addressed not night office, decisive. W. U. T. Co. *v.* Harris, 91 Ark. 602, 121 S. W. 1051.

418-40 See Hollingsworth *v.* Co., 82 Kan. 472, 108 P. 807; W. U. T. Co. *v.* Hiller, 93 Miss. 658, 47 S. 377.

418-45 W. U. T. Co. *v.* Crowley, 158 Ala. 583, 48 S. 381; Cordell *v.* Co., 149 N. C. 402, 63 S. E. 71.

419-47 If message for one addressed care of another, competent to show seasonably received by former if promptly delivered to latter. W. U. T. Co. *v.* Shofner, 87 Ark. 303, 112 S. W. 751.

419-48 Tully *v.* Co., 141 Ill. App. 312; Cobb *v.* Co., 85 S. C. 430, 67 S. E. 549.
Knowledge of sender of facts connected with message shown to prove what action would probably have been if message delivered. W. U. T. Co. *v.* Powell, 54 Tex. Civ. 466, 118 S. W. 226.
Communications from addressee to sender, admissible. Postal T.-C. Co. *v.* Harriss, 56 Tex. Civ. 105, 121 S. W. 358.

420-49 W. U. T. Co. *v.* McMorris, 158 Ala. 563, 48 S. 349; *dist.* in Same *v.* Crowley, 158 Ala. 583, 48 S. 381; Seddon *v.* Co., 146 Ia. 743, 126 N. W. 869 (closeness of relationship with decedent to cause suffering); Slaughter *v.* Co. (Tex. Civ.), 112 S. W. 688.
Prima facie case made to show plaintiff would have reached destination in time by proof of train schedules, without negativing contingencies. W. U. T. Co. *v.* Shofner, 87 Ark. 303, 112 S. W. 751.
Evidence sufficient.—W. U. T. Co. *v.* Bickerstaff, 100 Ark. 1, 138 S. W. 997.

420-50 Holler *v.* Co., 149 N. C. 336, 63 S. E. 92.
Plaintiff must show defendant's knowledge of facts or circumstances imposing special liability. Hildreth *v.* Co., 56 Fla. 387, 47 S. 820.
Mitigation of damages.—W. U. T. Co. *v.* Ivy, 102 Ark. 246, 143 S. W. 1078.

422-52 See McInturf *v.* Co., 81 Kan. 476, 106 P. 282.

423-54 W. U. T. Co. *v.* Sullivan, 82 O. St. 14, 91 N. E. 867; El Paso, etc. R. Co. *v.* Sawyer, 54 Tex. Civ. 387, 119 S. W. 110.

424-56 Marriott *v* Co., 84 Neb. 443, 121 N. W. 241; Cordell *v.* Co., 149 N. C. 402, 63 S. E. 71.

425-57 W. U. T. Co. *v.* Russell, 4 Ala. App. 485, 58 S. 938.

427-59 Veitch *v.* Tel. Co., 6 Ala. App. 328, 59 S. 352; W. U. T. Co. *v.* Merritt, 55 Fla. 462, 46 S. 1024.

428-60 Guilford *v.* T. Co., 163 Ala. 1, 50 S. 112; W. U. T. Co. *v.* Peagler, 163 Ala. 38, 50 S. 913; W. U. T. Co. *v.* Oastler, 90 Ark. 268, 119 S. W. 285; Same *v.* Merritt, 55 Fla. 462, 46 S. 1024; Illinois S. & R. Co. *v.* Co., 146 Ill. App. 163; W. U. T. Co. *v.* Glover, 138 Ky. 500, 128 S. W. 587; Clark M. Co. *v.* Co., 152 N. C. 157, 67 S. E. 329; Holler *v.* T. Co., 149 N. C. 336, 63 S. E. 92; W. U. T. Co. *v.* Sullivan, 82 O. St. 14, 91 N. E. 867; Clio G. Co. *v.* Co., 82 S. C. 405, 64 S. E. 426; W. U. T. Co. *v.* Kibble, 53 Tex. Civ. 222, 115 S. W. 643; Postal T.-C. Co. *v.* Const. Co. (Tex.), 114 S. W. 98.

428-61 Postal T.-C. Co. *v.* Co., 136 Ky. 843, 122 S. W. 852; Same *v.* Smith (Tex. Civ.), 124 S. W. 733.

429-62 Veitch *v.* Tel. Co., 6 Ala. App. 328, 59 S. 352; W. U. T. Co. *v.* Northcutt, 158 Ala. 539, 48 S. 553; Same *v.* Co., 24 Okla. 535, 103 P. 717 (operator familiar with code used).

429-64 Postal T.-C. Co. *v.* Co., 136 Ky. 843, 122 S. W. 852; Marriott *v.* Co., 84 Neb. 443, 121 N. W. 241; Baker *v.* Co., 84 S. C. 477, 66 S. E. 182.

Giving notice of special circumstances outside message must be pleaded. Fass *v.* Co., 82 S. C. 461, 64 S. E. 235.

Relations existing between sender and sendee, understanding concerning sending of message and conduct of sendee on learning message incorrectly transmitted, shown. Williamson *v.* Co., 151 N. C. 223, 65 S. E. 974.

430-66 W. U. T. Co. *v.* West, 165 Ala. 399, 51 S. 740; Postal T. Co. *v.* Beal, 159 Ala. 249, 48 S. 676; W. U. T. Co. *v.* Griffin, 92 Ark. 219, 122 S. W. 489; W. U. T. Co. *v.* Askew, 92 Ark. 133, 122 S. W. 107; Wells *v.* Co., 144 Ia. 605, 123 N. W. 371; W. U. T. Co. *v.* Bodkin, 79 Kan. 792, 101 P. 652; Duncan *v.* Co., 93 Miss. 500, 47 S. 552; Williamson *v.* T. Co., 151 N. C. 223, 65 S. E. 974; Battle *v.* Co., 151 N. C. 629, 66 S. E. 661; Pierson *v.* T. Co., 150 N. C. 559, 64 S. E. 577; Shaw *v.* Co., 151 N. C. 638, 66 S. E. 668; Baker *v.* T. Co., 84 S. C. 477, 66 S. E. 182; Fass *v.* Co., 82 S. C. 461, 64 S. E. 235; W. U. T. Co. *v.* Robertson (Tex. Civ.), 126 S. W. 629; Postal T.-C. Co. *v.* Smith (Tex. Civ.), 124 S. W. 733; W. U. T. Co. *v.* Williams, 57 Tex. Civ. 267, 122 S. W. 280.

Relationship of addressee and decedent need not appear on face of message. Seddon *v.* Co., 146 Ia. 743, 126 N. W. 969.

In Western Union Tel. Co. *v.* **Russell,** 4 Ala. App. 485, 58 S. 938, it was pointed out that "the words of the message showed plainly enough that the subject of it was a matter of serious concern to both parties to the communication."

431-68 Cordell *v.* T. Co., 149 N. C. 402, 63 S. E. 71 (the unusual efforts made to send a message); Williamson *v.* Co., 151 N. C. 223, 65 S. E. 974; Herring *v.* Co. (Tex. Civ.), 127 S. W. 882.

431-69 Williamson *v.* Co., 151 N. C. 223, 65 S. E. 974.

431-70 W. U. T. Co. *v.* Merritt, 55 Fla. 462, 46 S. 1024; Postal T.-C. Co. *v.* Co., 136 Ky. 843, 122 S. W. 852.

431-71 Postal T.-C. Co. *v.* Co., 102 Tex. 148, 114 S. W. 98; Stumm *v.* Co., 140 Wis. 528, 122 N. W. 1032.

Where plaintiff was offered employment at will. See Fulkerson *v.* W. U. Tel. Co. (Ark.), 161 S. W. 168.

432-74 Robinson *v.* Tel. Co., 169 Mich. 503, 135 N. W. 292.

434-82 W. U. T. Co. *v.* Hoyt, 89 Ark. 118, 115 S. W. 941; Cain *v.* Tel. Co., 89 Kan. 797, 133 P. 874; W. U. T. Co. *v.* Co., 24 Okla. 535, 103 P. 717.

Sendee may testify that if he had received the message he would have bought. W. U. Tel. Co. *v.* Sights, 34 Okla. 461, 126 P. 234.

435-83 Manager of proposed buyer of goods may testify if message received terms offered would have been accepted. Ibid.

435-84 Loss sustained by non-performance of theatrical troupe, arrived at by proof of number of tickets sold and spoken for, and plaintiff's experience as to attendance upon like performances. W. U. T. Co. *v.* Auslet, 53 Tex. Civ. 264, 115 S. W. 624.

436-86 W. U. T. Co. *v.* Askew, 92 Ark. 133, 122 S. W. 107.

437-94 Sultan *v.* Co., 92 Miss. 785, 46 S. 827.

Value of stock ordered to be purchased need only be proved at place where it was to have been obtained. Postal T.-C. Co. *v.* Harriss, 56 Tex. Civ. 105, 121 S. W. 358.

437-96 W. U. T. Co. *v.* Robertson (Tex. Civ.), 126 S. W. 629.

439-98 W. U. T. Co. *v.* Fischer, 133 Ky. 768, 119 S. W. 189.

Market value on day in question is admissible. Jackson *v.* W. U. Tel. Co., 174 Mo. App. 70, 156 S. W. 801.

439-99 W. U. T. Co. *v.* Lyon, 93 Miss. 590, 47 S. 344; Henry *v.* Tel. Co. (Wash.), 131 P. 812 (market value).

Where plaintiff was deprived of chance to buy cattle at offered price evidence that person offering to sell had refused to sell at that price is admissible to reduce damages. Hanson *v.* W. U. Tel. Co. (Ia.), 146 N. W. 460.

439-1 Marriott *v.* Co., 84 Neb. 443, 121 N. W. 241.

441-4 Expenses incurred in traveling recoverable. Lothian *v.* Co., 25 S. D. 319, 126 N. W. 621.

Injury to credit.—In action by merchant for non-delivery of message directing payment of note by addressee plaintiff may show protest of other notes did not affect his credit, and may testify refusal of credit by payee of such note prevented him from buying goods on credit. Baker *v.* Co., 84 S. C. 477, 66 S. E. 182.

Illness resulting from exposure to inclement weather because of failure of sendee to meet invalid with conveyance

shown. W. U. T. Co. *v.* Powell, 54 Tex. Civ. 466, 118 S. W. 226.

441-5 Duncan *v.* Co., 93 Miss. 500, 47 S. 552.

444-11 Postal T.-C. Co. *v.* Beal, 159 Ala. 249, 48 S. 676; W. U. T. Co. *v.* Benson, 159 Ala. 254, 48 S. 712; Same *v.* Teague, 134 Ky. 601, 121 S. W. 484; Cates *v.* Co., 151 N. C. 497, 66 S. E. 592; Alexander *v.* Co., 158 N. C. 473, 74 S. E. 449; Bailey *v.* Co., 150 N. C. 316, 63 S. E. 1044; Cordell *v.* Co., 149 N. C. 402, 63 S. E. 71; Suttle *v.* Co., 148 N. C. 480, 62 S. E. 593; W. U. T. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789.

445-12 Beal *v.* Co., 153 N. C. 331, 69 S. E. 247.

Burden on plaintiff to show failure to receive telegram deprived her of privilege stated as cause of action. Howard *v.* W. U. Tel. Co., 106 Ark. 559, 153 S. W. 803.

448-28 W. U. T. Co. *v.* Arant, 88 Ark. 499, 115 S. W. 136.

Not comprehended within statute as being too remote and intangible. Howard *v.* W. U. T. Co., 106 Ark. 559, 153 S. W. 803.

449-29 W. U. T. Co. *v.* Northcutt, 158 Ala. 539, 48 S. 553.

450-31 Goodhue *v.* Co., 57 Tex. Civ. 297, 122 S. W. 41 (prolongation of anxiety no cause for recovery); Hart *v.* Co., 53 Tex. Civ. 275, 115 S. W. 638. See W. U. T. Co. *v.* Taylor (Ky.), 122 S. W. 131.

Addressee may testify what he would have done if message delivered. W. U. T. Co. *v.* Benson, 159 Ala. 254, 48 S. 712.

450-32 W. U. T. Co. *v.* Archie, 92 Ark. 59, 121 S. W. 1045; W. U. T. Co. *v.* Oastler, 90 Ark. 268, 119 S. W. 285.

451-34 W. U. T. Co. *v.* West, 165 Ala. 399, 51 S. 740.

451-35 W. U. T. Co. *v.* Toms, 99 Ark. 117, 137 S. W. 559.

Suffering need not have been contemporaneous with result of negligence. Lyles *v.* Co., 84 S. C. 1, 65 S. E. 832.

451-36 W. U. T. Co. *v.* Williams, 129 Ky. 515, 112 S. W. 651.

452-37 Lewis *v.* Co., 84 S. C. 54, 65 S. E. 941; Johnson *v.* Tel. Co., 81 S. C. 235, 62 S. E. 244.

453-38 Lee *v.* Co., 130 Ky. 202, 113 S. W. 55; W. U. T. Co. *v.* Williams, 129 Ky. 515, 112 S. W. 651.

454-40 W. U. T. Co. *v.* Benson, 159 Ala. 254, 48 S. 712 (identity of surnames of sender, addressee and decedent).

456-41 W. U. T. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789. See Herring *v.* Co. (Tex. Civ.), 127 S. W. 882.

If relationship is by affinity notice of facts must be given company. Lewis *v.* Co., 84 S. C. 54, 65 S. E. 941.

456-42 W. U. T. Co. *v.* Northcutt, 158 Ala. 539, 48 S. 553; Same *v.* Potts, 120 Tenn. 37, 113 S. W. 789.

457-44 Lyles *v.* Co., 84 S. C. 1, 65 S. E. 832; West. U. T. Co. *v.* Daniels (Tex. Civ.), 152 S. W. 1116.

459-49 Suttle *v.* Co., 148 N. C. 480, 62 S. E. 593.

459-50 Leland *v.* Co., 159 Ala. 245, 49 S. 252; W. U. T. Co. *v.* Barrett, 55 Tex. Civ. 323, 118 S. W. 1089 (if message would not have relieved anxiety).

460-54 Affection existing between deceased and plaintiff shown by proof of gift from latter to former, who may excuse failure to visit deceased by showing financial circumstances. W. U. T. Co. *v.* Sockwell, 91 Ark. 475, 121 S. W. 1046.

Effect of neglect.—Sender of message inquiring as to market may state effect upon mind of failure to receive reply. Marriott *v.* Co., 84 Neb. 443, 121 N. W. 241.

Where defendant claimed plaintiff should have taken earlier train evidence as to reasons for delay is admissible. Western Union Tel. Co. *v.* Daniels (Tex. Civ.), 152 S. W. 1116.

461-55 Christmon *v.* Co., 159 N. C. 195, 74 S. E. 325.

Plaintiff's inability to see body of husband because of its condition when it reached her, shown. Martin *v.* Co., 81 S. C. 432, 62 S. E. 833.

Presumption of mental suffering arises from long delay. Talbert *v.* Co., 83 S. C. 68, 64 S. E. 862; W. U. T. Co. *v.* Blair, 51 Tex. Civ. 427, 113 S. W. 164 (failure to attend funeral explainable).

462-56 Inability of wife to prepare husband's body for burial and fact it was prepared by others shown where message shows addressee's assistance needed. W. U. T. Co. *v.* West, 165 Ala. 399, 51 S. 740.

Age of child and ability to recognize father shown in suit by father. Battle *v.* Co., 151 N. C. 629, 66 S. E. 661.

462-57 W. U. T. Co. *v.* Cleveland, 169 Ala. 131, 53 S. 80; Shaw *v.* Co., 151 N. C. 638, 66 S. E. 668; Pierson *v.* Co., 150 N. C. 559, 64 S. E. 577;

Hamilton *v.* Tel. Co., 96 S. C. 398, 80 S. E. 706; Ogilvie *v.* Co., 83 S. C. 8, 64 S. E. 860 (testimony showing peculiar or abnormal fears and apprehensions, inadmissible); West. U. Tel. Co. *v.* Mooney (Tex. Civ.), 160 S. W. 318. *Contra.* W. U. T. Co. *v.* Northcutt, 158 Ala. 539, 48 S. 553.

Added anguish cannot be shown by plaintiff, prevented from reaching mother until after death, by proof in previous illnesses she had readily responded to his treatment, or by showing she became depressed when informed of inability to reach her. W. U. T. Co. *v.* Williams, 129 Ky. 515, 112 S. W. 651.

463-58 Martin *v.* Co., 81 S. C. 432, 62 S. E. 833 (testimony as to cause of death of plaintiff's husband rebuttable by her).

Testimony of state of feeling and relations between mother and son is competent even though it shows relation a year past. Markley *v.* Co. (Ia.), 141 N. W. 443.

463-59 Nitka *v.* Co., 149 Wis. 106, 135 N. W. 492.

463-60 Battle *v.* Co., 151 N. C. 629, 66 S. E. 661.

Arrangements between sender and sendee may be shown tending to show what sendee would have done. Ellison *v.* Tel. Co., 163 N. C. 5, 79 S. E. 277.

Conversation between deceased and person, shortly before death, provable to show state of feeling. Luckey *v.* Co., 151 N. C. 551, 66 S. E. 596.

463-61 Plaintiff's conclusion as to cause of mental suffering, inadmissible. W. U. T. Co. *v.* Peagler, 163 Ala. 38, 50 S. 913.

463-62 W. U. T. Co. *v.* Rowell, 166 Ala. 651, 51 S. 880 (physician).

464-63 Oglivie *v.* Co., 83 S. C. 8, 64 S. E. 860.

Relationship and feeling existing between plaintiff and decedent shown. W. U. T. Co. *v.* Douglass (Tex. Civ.), 124 S. W. 488. See 463-60.

Testimony must be limited to period covered by defendant's default. W. U. T. Co. *v.* Northcutt, 158 Ala. 539, 48 S. 553.

464-64 W. U. T. Co. *v.* Henderson, 89 Ala. 510, 7 S. 419, 18 Am. St. 148.

Positive evidence not required; jury may find as to suffering from their own knowledge and experience and circumstances. W. U. T. Co. *v.* Benson, 159 Ala. 254, 48 S. 712.

Direct testimony as to mental suffering is not essential; it may be inferred from the circumstances. W. U. T. Co. *v.* McMorris, 158 Ala. 563, 48 S. 349.

464-67 *Contra.* Ogilvie *v.* Co., 83 S. C. 8, 64 S. E. 860 (testimony as to entire income of office not irrelevant on issue of agent's failure to receive and deliver message because of other demands on his time in associated duties).

465-69 Existence of strike shown to rebut inference of negligence. W. U. T. Co. *v.* Ivy, 100 C. C. A. 481, 177 Fed. 63. *Contra* if message accepted without giving notice of strike. Same *v.* McMorris, 158 Ala. 563, 48 S. 349.

Establishment of free delivery limits and extent must be shown by defendant; plaintiff must show sendee's residence within them. W. U. T. Co. *v.* Burns, 164 Ala. 252, 51 S. 373.

Informal character of message no excuse for refusing to send. Cordell *v.* Co., 149 N. C. 402, 63 S. E. 71.

465-72 Expert testimony admissible to show skillful operator may easily make mistake in sending or receiving certain words. Postal T.-C. Co. *v.* Co. (Tex. Civ.), 126 S. W. 1172.

Delivery sheet admissible to show time messenger delivered, genuineness of signature proved. W. U. T. Co. *v* Northcutt, 158 Ala. 539, 48 S. 553.

Message in question admissible, abbreviations being explainable. Ibid.

466-74 Clause requiring message to be repeated void, though contract made in another state. Williamson *v.* Co., 151 N. C. 223, 65 S. E. 974.

467-76 No presumption that public who employ telegraph company know conditions on blanks because there. Mims *v.* Co., 82 S. C. 247, 64 S. E. 236.

469-87 Mims *v.* Co., 82 S. C. 247, 64 S. E. 236.

470-88 Custom of receiving messages by telephone shown to establish conditions in blanks inapplicable. Gore *v.* Co. (Tex. Civ.), 124 S. W. 977.

471-90 West. U. T. Co. *v.* Taylor (Ind. App.), 104 N. E. 771; Covell *v.* Co., 164 Mo. App. 630, 147 S. W. 555.

473-99 Violation of statute requiring delivery shown. W. U. T. Co. *v.* Biggerstaff, 177 Ind. 168, 97 N. E. 531.

477-7 In mitigation shown plaintiff might have used other means to have been present at funeral of relative than those rendered unavailable by de-

fendant's negligence. Bailey *v.* Co., 150 N. C. 316, 63 S. E. 1044.

Special contract for delivery beyond statutory limits must be proved by plaintiff. W. U. T. Co. *v.* Klitzke, 45 Ind. App. 550, 89 N. E. 405.

477-10 Defendant may show failure to transmit not owing to partiality, bad faith or discrimination. S. *v.* Co., 76 Ark. 124, 88 S. W. 834; W. U. T. Co. *v.* Swain, 109 Ind. 405, 9 N. E. 927; Petze *v.* Co., 128 App. Div. 192, 112 N. Y. S. 516.

478-11 Richmond, etc. Co. *v.* Blau, 210 Fed. 887, 127 C. C. A. 497; St. L., etc. Co. *v.* Amer., etc. Co., 167 Ala. 442, 52 S. 904; Tonkin-Clark R. Co. *v.* Hedges, 24 Ida. 304, 133 P. 669; Pieper *v.* Krutzfeldt, 155 Ia. 716, 136 N. W. 904; Gilpin *v.* Savage, 60 Misc. 605, 112 N. Y. S. 802; Streight *v.* S., 62 Tex. Cr. 453, 138 S. W. 742.

Sounds accompanying homicide heard over telephone, perhaps of little weight, but competent. S. *v.* Rasco, 239 Mo. 535, 144 S. W. 449.

478-12 Monarch L. Co. *v.* Luck (Ala.), 63 S. 656; Delaware I. Co. *v.* Wallace (Tex. Civ.), 160 S. W. 1130; "In view of the commercial use of the telephone and its general trustworthiness as tested by average experience, the rule to be adopted is that where, in the course of a business transaction, one party calls up another by his telephone number, recognizes and identifies his voice, and discusses with him some phase of the business they have together, it is for the jury to determine, if the conversation is denied." Murphy-Hardy Lumb. Co. *v.* Roder, 83 N. J. L. 34, 83 A. 769.

478-13 Brooks *v.* S., 8 Ala. App. 277, 62 S. 569; Kent *v.* Cobb, 24 Colo. App. 264, 133 P. 424; Hancock *v.* Hartford Ins. Co., 81 Misc. 159, 142 N. Y. S. 352; Rees *v.* Gair, 129 N. Y. S. 213; Jacobs *v.* S. (Tex. Cr.), 146 S. W. 558; Rimes *v.* Carpenter, 61 Misc. 614, 114 N. Y. S. 96 (overheard by witness at telephone connected with that over which parties conducted conversation). **Words used by third person** in telephoning at plaintiff's request to defendant's sending office proved if message as sent corresponds to such words, though not shown conversation occurred therewith. W. U. T. Co. *v.* Saunders, 164 Ala. 234, 51 S. 176.

Witness should not be allowed to detail what was said by the person who was being communicated with, as that would be a mere guess or inference. Miller *v.* Miller, 154 Ia. 344, 134 N. W. 1058.

478-14 Rueckheim *v.* Co., 146 Ill. App. 607; National Bk. *v.* Cooper, 86 Neb. 792, 126 N. W. 656; Hancock *v.* Ins. Co., 81 Misc. 159, 142 N. Y. S. 352; Harris *v.* Raskin, 142 N. Y. S. 342; Funk & Wagnalls Co. *v.* Bruenn, 142 N. Y. S. 291; Abrahams *v.* Komarow, 137 N. Y. S. 862. *Contra* if communication made from place of business of party and relates to business ordinarily transacted there. Gilliland *v.* R. Co., 85 S. C. 26, 67 S. E. 20. *Comp.* Evans *v.* S., 94 Ark. 400, 127 S. W. 743.

Identification not necessary.—Knickerbocker I. Co. *v.* Co., 107 Md. 536, 69 A. 405, 16 L. R. A. (N. S.) 746; Miller *v.* Leib, 109 Md. 414, 72 A. 466; Wolfe *v.* R. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. 331, 3 L. R. A. 539. See supra, "Hearsay," 449-42.

479-15 Union C. Co. *v.* Tel. Co., 163 Cal. 298, 125 P. 242; Cox *v.* Cline, 147 Ia. 353, 126 N. W. 330; National Bk. *v.* Cooper, 86 Neb. 792, 126 N. W. 656.

479-16 Wicks *v.* Wheeler, 157 Ill. App. 578; Barrett *v.* Magner, 105 Minn. 118, 117 N. W. 245; Northern A. Co. *v.* Morrison (Tex. Civ.), 162 S. W. 411. See Collins *v.* Co., 140 Ia. 304, 118 N. W. 401.

479-17 Tonkin-Clark R. Co. *v.* Hedges, 24 Ida. 304, 133 P. 669.

TENDER

482-1 Hanson *v.* Implement Co., 173 Ill. App. 293; Little *v.* Herzinger, 34 Utah 337, 97 P. 639.

Rules of tender more liberal in equity than in law. Rohn *v.* Heidrich, 174 Ill. App. 423.

482-3 Evidence sufficient. Davis *v.* Barada-Ghio R. E. Co., 163 Mo. App. 528, 143 S. W. 1108.

484-7 Kleeb *v.* McInturff, 71 Wash. 419, 128 P. 1076.

Where tender is made to cashier who stated he had no authority but said he would speak to a member of firm the tenderer must wait reasonable time for acceptance. Sisson *v.* Barnum, 157 App. Div. 149, 141 N. Y. S. 846.

485-9 Worn coin. Cincinnati N. Traction Co. *v.* Rosnagle, 84 O. St. 310, 95 N. E. 884.

486-10 Kitchell *v.* Schneider (Ind.),

103 N. E. 647; Neal *v.* Finley, 136 Ky. 346, 124 S. W. 348 (if drawer has funds in bank to meet it); Schaeffer *v.* Coldren, 237 Pa. 77, 85 A. 98.

487-13 Nolan *v.* Foley, 141 Ia. 671, 120 N. W. 310; Thompson *v.* County, 227 Mo. 220, 126 S. W. 1044.

489-16 Smith *v.* School Dist., 89 Kan. 225, 131 P. 557; Jenkins *v.* Clopton, 141 Mo. App. 74, 121 S. W. 759; Abrahams *v.* Komarow, 137 N. Y. S. 862; Bell *v.* Riggs, 34 Okla. 834, 127 P. 427, 41 L. R. A. (N. S.) 1111; Goss *v.* Sorrell, 33 Okla. 586, 127 P. 435; Oakes *v.* Buckman, 87 Vt. 187, 88 A. 736. *Contra* if sum received tendered and demand for amount of other sums expended not complied with on promise to pay. Treadway *v.* Co., 84 S. C. 41, 65 S. E. 934.

490-17 O'Meara *v.* Coal Co., 154 Ill. App. 321; Bambrick Bros. Const. Co. *v.* McCormick, 157 Mo. App. 198, 137 S. W. 43.

490-19 Little *v.* Herzinger, 34 Utah 337, 97 P. 639.

491-21 Chicago, etc. R. Co. *v.* Bk., 98 C. C. A. 535, 174 Fed. 923; Dunbar *v.* Springer, 256 Ill. 53, 99 N. E. 889, *aff.* 168 Ill. App. 9; Masson *v.* L. Co. (Ind. App.), 101 N. E. 753, *over.* rehear. 100 N. E. 875; Leischner *v.* Kaiser, 156 Ill. App. 123; Pope *v.* Whitridge, 110 Md. 468, 73 A. 281; Southwick *v.* Himmelman, 109 Minn. 76, 122 N. W. 1016; Union E. M. Co. *v.* Min. Co. (N. M.), 135 P. 78; Campbell *v.* Abbott, 60 Misc. 93, 111 N. Y. S. 782; Purdin *v.* Hancock, 67 Or. 164, 135 P. 515; Murdock *v.* Groves, 51 Pa. Super. 539; Barnes *v.* Lumb. Co. (S. D.), 147 N. W. 775; Pittsburg P. G. Co. *v.* Leary, 25 S. D. 256, 126 N. W. 271; Foxley *v.* Rich, 35 Utah 162, 99 P. 666.

Nature of tender provable by showing whether other demands held by creditor partially paid or not. Sparks *v.* Green, 85 S. C. 109, 67 S. E. 230.

492-22 Rule not so strict where tender made in pursuance of executory contract containing mutual and dependent conditions to be performed simultaneously. Beiseker *v.* Moore, 174 Fed. 368, 98 C. C. A. 272.

493-24 Howard P. Co. *v.* Glover (Ga. App.), 67 S. E. 277.

493-25 At common law tender could only be made before bringing action. Browning K. & Co. *v.* Chamberlain, 210 N. Y. 270, 104 N. E. 627, *rev.* 150 App. Div. 391, 134 N. Y. S. 1104.

494-26 Tender of corporate dues made at place where books kept, payment having theretofore been made there. Pope *v.* Whitridge, 110 Md. 468, 73 A. 281.

495-27 The D. J. Foley, 12 Fed. 925; Cassell *v.* R. Co., 142 Ill. App. 593.

Tender of amount due on contract, conclusive as to ability and willingness to perform. Alpern *v.* Farrell, 133 App Div. 278, 117 N. Y. S. 706.

496-28 Jaffe Jewelry Co. *v.* Ellsworth, 1 Ala. App. 466, 55 S. 457; Security S. Bk. *v.* Lodge, 85 Neb. 255 122 N. W. 992; Ward *v.* Thorndyke, 65 Wash. 11, 117 P. 593.

497-29 Wilson *v.* Kirkland, 172 Ala. 72, 55 S. 174; Abbott *v.* Herron, 90 Ark. 206, 118 S. W. 708; Gerbig *v.* Moore, 146 Ill. App. 434; Lewis *v.* Helton, 144 Ky. 595, 139 S. W. 772; Jenkins *v.* Clopton, 141 Mo. App. 74, 121 S. W. 759; De Bruhl *v.* Hood, 156 N. C. 52, 72 S. E. 83, rehear, denied, id. 622.

498-31 De Bruhl *v.* Hood, 156 N. C. 52, 72 S. E. 83, rehear. denied, id. 622. See Rowell *v.* Ross, 87 Conn. 157, 87 A. 355.

At common law money must have been paid into court. Browning King & Co. *v.* Chamberlain, 210 N. Y. 270, 104 N. E. 627, *rev.* 150 App. Div. 391, 134 N. Y. S. 1104.

499-32 Security S. Bk. *v.* Lodge, 85 Neb. 255, 122 N. W. 992 (offer to confess judgment); Strattan *v.* Graham, 140 N. Y. S. 869; Murray *v.* O'Brien, 56 Wash. 361, 105 P. 840; Thomas *v.* B. & M. Co., 48 Wash. 560, 94 P. 116, 15 L. R. A. (N. S.) 1164, 125 Am. St. 945.

499-34 Porter *v.* Bk., 143 Ia. 629, 120 N. W. 633; Douglas *v.* County, 82 Neb. 577, 118 N. W. 114; Weinberg *v.* Naher, 51 Wash. 591, 99 P. 736: Baker *v.* Robbins, 51 Wash. 467, 99 P. 1.

501-35 Moyses *v.* Schendorf, 238 Ill. 232, 87 N. E. 401; Smethers *v.* Lindsay, 89 Kan. 338, 131 P. 563; Piazzek *v.* Harman, 79 Kan. 855, 98 P. 771; Neal *v.* Finley, 136 Ky. 346, 124 S. W. 348; Harper *v.* Runner, 85 Neb. 343, 123 N. W. 313; Trenton St. R. Co. *v.* Lawlor, 74 N. J. Eq. 828, 71 A. 234; Barrett *v.* A. O. U. W., 63 Misc. 429, 117 N. Y. S. 125; Ford *v.* Stroud, 150 N. C. 362, 64 S. E. 1; Creek L. & I. Co. *v.* Davis, 28 Okla. 579, 115 P. 468; St. Louis, etc. R. Co. *v.* Richards, 23 Okla. 256, 102

P. 92; Sanborn *v.* D. Co. (Tex. Civ.), 137 S. W. 182; Van Dyke *v.* Cole, 81 Vt. 379, 70 A. 593; Livieratos *v.* Co., 57 Wash. 376, 106 P. 1125; Sutthoff *v.* Maruca, 57 Wash. 102, 106 P. 632; Gould *v.* White, 54 Wash. 394, 103 P. 460; Palmer *v.* Clark, 52 Wash. 345, 100 P. 749.

Not required if sum due not ascertainable. Lance *v.* Rumbough, 150 N. C. 19, 63 S. E. 357.

TIMBER

Rate of growth of trees, 513-66; *Defacing brands*, 513-66.

503-1 Smith Lmbr. Co. *v.* Jernigan (Ala.), 64 S. 300.

503-2 Smith Lumb. Co. *v.* Jernigan, supra.

506-15 Burt & B. L. Co. *v.* Bailey, 175 Fed. 131; Griffith *v.* Tie Co. (Ark.), 159 S. W. 218; High *v.* Co., 57 Fla. 437, 49 S. 156; Sears *v.* Ohler, 144 Ky. 473, 139 S. W. 759; Morgan *v.* O'Bannon, 125 La. 367, 51 S. 293 (by statute); Hurley *v.* Hurley, 110 Va. 31, 65 S. E. 472 (unless timber branded in accordanee with statute); Somers Co. *v.* Pix, 75 Wash. 233, 134 P. 932.

506-16 Smythe L. Co. *v.* Austin, 162 Ala. 110, 49 S. 875 (wilfully cutting trees).

507-21 See Whitfield *v.* Co., 152 N. C. 211, 67 S. E. 512.

507-24 Goodnough M. & S. Co. *v.* Galloway, 71 Fed. 940; Baker *v.* Kenney, 145 Ia. 638, 124 N. W. 901; Baustie *v.* Phillips, 134 Ky. 711, 121 S. W. 629; St. John *v.* Sinclair, 108 Minn. 274, 122 N. W. 164; Newkirk *v.* Stevens, 152 N. C. 498, 67 S. E. 1013; Fairbanks *v.* Stowe, 83 Vt. 155, 74 A. 1006; Hurricane L. Co. *v.* Lowe, 110 Vt. 380, 66 S. E. 66 (immediate severance of trees). See Hitch Lumb. Co. *v.* Brown, 160 N. C. 281, 75 S. E. 714.

508-26 High *v.* Co., 57 Fla. 437, 49 S. 156.

After execution contract not subject to attack. Bay View L. Co. *v.* Ferguson, 53 Wash. 323, 101 P. 1093.

508-29 Dunlevie *v.* Spangenberg, 121 N. Y. S. 299 (method at place of sale).

509-39 Amount of lumber cut shown by testimony as to measurements of stumps and tops of trees, intervening logs gone for several years. Bryant L. Co. *v.* Crist, 87 Ark. 434, 112 S. W. 965.

510-45 By refusing to consent to stipulated test scale other evidence than scale made admissible. Thiel *v.* Co., 137 Wis. 272, 118 N. W. 802.

511-59 Expert scaler's estimate of amount of timber taken, competent. Callen *v.* Collins (Tex. Civ.), 154 S. W. 673.

513-66 Rate of growth of trees on other land shown by expert testimony. Whitfield *v.* Co., 152 N. C. 211, 67 S. E. 512.

Record containing writing and accompanying certificates adopting brand, admissible in prosecution for defacing it. Bennett *v.* C., 133 Ky. 452, 118 S. W. 332.

514-73 Permits granted by authorities, reciting compliance with law as to sale of timber, prima facie evidence of title in defendant. S. *v.* Co., 107 Minn. 54, 119 N. W. 387.

517-82 Morgan *v.* U. S., 169 Fed. 242, 94 C. C. A. 518.

517-85 Morgan *v.* U. S., 169 Fed. 242, 94 C. C. A. 518.

519-86 Joppa Mattress Co. *v.* Oil Co., 101 Ark. 518, 142 S. W. 831.

522-10 Recognition of plaintiff's title does not bar defendant from showing superior title. Sample *v.* Co., 150 N. C. 161, 63 S. E. 731.

522-13 Bailey *v.* Hayden, 65 Wash. 57, 117 P. 720.

523-14 Northern P. R. Co. *v.* Co., 54 Wash. 447, 103 P. 453.

Verdict presumed to be for treble damages, nothing to contrary appearing. Henning *v.* Keiper, 37 Pa. Super. 488.

524-18 Skamania Boom Co. *v.* Youmans, 64 Wash. 94, 116 P. 645.

524-20 It may be shown accused was in business which indications showed timber had been cut for. McMillan *v.* S., 160 Ala. 115, 49 S. 680.

531-34 Erie City I. Wks. *v.* Noblo (Tex. Civ.), 124 S. W. 172.

TITLE

In proceedings for registration, 542-18; *Assignment for creditors*, 563-78.

539-1 Carino *v.* Government, 212 U. S. 449; Carter *v.* Walker (Ala.), 65 S. 170; Dodge *v.* Co., 158 Ala. 91, 48 S. 383; Barrett *v.* Durbin, 106 Ark. 332, 153 S. W. 265; Bates *v.* Hall, 44 Colo. 360, 98 P. 3; Downey *v.* Moriarty, 81

Conn. 442, 71 A. 581; Rexford *v.* Bleckley, 131 Ga. 678, 63 S. E. 337; Stevens *v.* Sandnes, 108 Minn. 271, 121 N. W. 902; Sewell *v.* Ins. Co., 131 App. Div. 131, 115 N. Y. S. 345; Gabriel *v.* Bartolome, 7 Phil. Isl. 699 (good faith of possessor, presumed); Soler *v.* Parkhurst, 4 P. R. Fed. 335; Thacker *v.* Wilson (Tex. Civ.), 122 S. W. 938. *Contra* if title in another. Bahnsen *v.* Qualley, 142 Ia. 282, 120 N. W. 625.

No presumption against occupant of land that the title remains in the government and burden is on him who so affirms to prove it. Carter *v.* Walker (Ala.), 65 S. 170.

Occupation of land does not raise presumption it is under any particular deed. McCleery *v.* Lewis, 104 Me. 33, 70 A. 540.

540-2 Black *v.* Roberson, 87 Ark. 641, 112 S. W. 402; Leak *v.* Bk., 149 N. C. 17, 62 S. E. 733.

541-3 Bass *v.* Ramos, 58 Fla. 161, 50 S. 945; American P. Co. *v.* B. Co., 56 Fla. 116, 47 S. 942.

541-4 *Comp.* Carino *v.* Government, 212 U. S. 449.

541-5 Equality of interests presumed to result from conveyance of land to two or more persons in absence of contrary specification. Keuper *v.* Heirs, 239 Ill. 586, 88 N. E. 218.

541-6 Wertheimer *v.* Wells, 112 N. Y. S. 1062.

542-7 No presumption arises from mere attempt to convey. Villalva *v.* Brown (Tex. Civ.), 148 S. W. 1124.

542-14 Gillette *v.* Plimpton, 253 Ill. 147, 97 N. E. 260; Williams *v.* Keef, 241 Mo. 366, 145 S. W. 425; Lake *v.* Weaver (N. J. Eq.), 70 A. 81; Shinnecock Hills, etc. R. Co. *v.* Aldrich, 132 App. Div. 118, 116 N. Y. S. 532.

542-15 Servitude by implication must be shown by claimant. Lipsky *v.* Heller, 199 Mass. 310, 85 N. E. 453.

542-18 Applicant for registration of title, who produces evidence showing title, not required to show invalidity of tax deeds held by opposing party. McMahon *v.* Rowley, 238 Ill. 31, 87 N. E. 66. Statements in application must be sustained by affirmative evidence, and title shown to be good against world. Jackson *v.* Glos, 243 Ill. 280, 90 N. E. 717; Brooke *v.* Glos, 243 Ill. 392, 90 N. E. 751. See supra, "Abstracts of Title," 68-9. Rules of evidence applicable in equity govern in proceeding for registration of title. Voorhies *v.* Voorhies, 120 N. Y. S. 677.

Presumption is in favor of bona fides of subsequent purchaser where registry act not complied with. Feinberg *v.* Stearns, 56 Fla. 279, 47 S. 797.

Ownership of equitable title, not presumed to follow legal title. Nowsky *v.* Siedlecki, 83 Conn. 109, 75 A. 135.

543-19 Harbison W. Co. *v.* Scott (Ala.), 64 S. 547; Morgan *v.* Dunwoody, 66 Fla. 522, 63 S. 905; Foley *v.* Everett, 142 Ill. App. 250; Barringer *v.* Davis, 141 Ia. 419, 120 N. W. 65; Betty *v.* Petrie, 138 Ky. 426, 128 S. W. 320; Drake *v.* Cunningham, 127 App. Div. 79, 111 N. Y. S. 199; Cosgrove *v.* Franklin, 35 R. I. 527, 87 A. 544; National Bk. *v.* Thomas, 30 R. I. 294, 74 A. 1092.

Unforeclosed mortgage, not evidence of title. Moorhead *v.* Ellison, 56 Tex. Civ. 444, 120 S. W. 1049.

Mortgages judicially canceled, inadmissible. Union N. S. Co. *v.* Pugh, 156 Ala. 369, 47 S. 48.

Unprobated will, inadmissible. Bartlow *v.* R. Co., 243 Ill. 332, 90 N. E. 721; Dean *v.* Furrh (Tex. Civ.), 124 S. W. 431. Unless execution proved. Smith *v.* Allen, 121 N. Y. S. 939.

Power of attorney, giving authority to execute deed, admissible. Downs *v.* Stevenson, 56 Tex. Civ. 211, 119 S. W. 315.

544-20 Lecroix *v.* Malone, 157 Ala. 434, 47 S. 725; Union N. S. Co. *v.* Pugh, supra; McGuire *v.* Lovelace (Ky.), 128 S. W. 309; O'Quin *v.* Russell, 121 La. 57, 46 S. 100; Mayfield *v.* R. Co., 85 S. C. 165, 67 S. E. 132; Foster *v.* Foster, 81 S. C. 307, 62 S. E. 320; Hackbarth *v.* Gordon (Tex. Civ.), 120 S. W. 591. See Abernathy *v.* R. Co., 150 N. C. 97, 63 S. E. 180.

Title to water rights acquired by appropriation, provable by parol if there is no record evidence or chain of title. Bates *v.* Hall, 44 Colo. 360, 98 P. 3.

Proof of fact of partnership prerequisite. See vol. 9, p. 249, n. 56, and supplement thereto.

Evidence must be certain where statute provides for parol testimony. Babington *v.* Barber, 124 La. 1042, 50 S. 844.

544-22 Title by parol agreement must rest upon proof of occupancy and acquiescence thereunder. Hooper *v.* Herald, 154 Mich. 529, 118 N. W. 3.

544-23 St. Louis, etc. R. Co. *v.* Caldwell, 93 Ark. 286, 124 S. W. 1034;

Carter *v.* R. Co., 240 Ill. 152, 88 N. E. 493; Erhart *v.* R. Co., 136 Mo. App 617, 118 S. W. 657; National Bk. *v.* Thomas, 30 R. I. 294, 74 A. 1092; Larrabee *v.* Porter (Tex. Civ.), 166 S. W. 395; Anderson *v.* S. (Tex. Cr.), 159 S. W. 847; Wetzel *v.* Satterwhite (Tex. Civ.), 125 S. W. 93.

545-25 Booze *v.* Neal, 6 Ga. App. 279, 64 S. E. 1104; Higson *v.* Ins. Co., 152 N. C. 206, 67 S. E. 509.

Judgment in replevin, conclusive of ownership in subsequent action between parties thereto. Smith *v.* Clark, 37 Utah 116, 106 P. 653.

546-34 Title not shown by disclosure of foreclosure sale by advertisement if it is not shown sale authorized by mortgage. Bryan *v.* Straus, 157 Mich. 49, 121 N. W. 301.

Inadmissible.—Vanderbilt *v.* All Persons, 163 Cal. 507, 126 P. 158; Christensen *v.* Peterson (Ia.), 144 N. W. 315 *cit.* ENCYC. OF EV.

546-35 Norman *v.* Beekman, 58 Fla. 325, 50 S. 876; New York C. R. Co *v.* Moore, 137 App. Div. 461, 121 N. Y. S. 884 (deed from possessor presumptively shows title); In re Riddell, 116 N. Y. S. 261; Sison *v.* Silva, 5 Phil. Isl. 587; Tambunting *v.* Manila, 5 Phil. Isl. 590; Rider *v.* Radford (Tex. Civ.), 151 S. W. 1181; Anderson *r.* Co. (Tex. Civ.), 120 S. W. 918; McMahon *r.* McDonald, 51 Tex. Civ. 613, 113 S. W. 322.

Not conclusive.—In re Strang, 166 Fed. 779.

Deed not excluded because of variance in pleading and proof if that explainable by parol. Prince *v.* Prince, 162 Ala. 114, 49 S. 873.

A deed offered as color of title may incorporate another paper, and when identified, may be read in evidence. Goad *r.* Walker (W. Va.), 80 S. E. 873.

546-36 Leggat *r.* Blomberg, 15 Ida. 496, 98 P. 723; Bond *r.* Garrison (Tex. Civ.), 127 S. W. 839 (ambiguity not cause for excluding); Colville *r.* Colville (Tex. Civ.), 118 S. W. 870 (defective acknowledgment by wife); McCollum *r.* Home, 54 Tex. Civ. 348, 117 S. W. 886 (indefiniteness of description not an objection). See Brown *r.* Myers, 150 N. C. 441, 64 S. E. 374.

Deed inadmissible if plaintiff's abstract does not correctly refer to volume in which it was recorded, at least as against party who demanded abstract; otherwise as to interveners who have not demanded it. Coler *r.* Alexander (Tex. Civ.), 128 S. W. 664.

Deed issued on execution sale must be accompanied by judgment and writ on which sale made or secondary evidence thereof. Kruegel *v.* Cobb (Tex. Civ.), 124 S. W. 723.

Unacknowledged official deed, execution of which in other respects proved, admissible as a paper upon which purchaser may base beneficial ownership or equitable title. Hardin County *r.* Co. (Tex. Civ.), 112 S. W. 822.

547-41 Office copy admissible where lapse of time and recognition of deed give rise to presumption of due acknowledgment. Hudson *r.* Webber, 104 Me. 429, 72 A. 184. Not admissible as against third party if original not acknowledged; extrinsic evidence not competent to show acknowledgment. Ibid.

548-43 Iguano L. & M. Co. *v.* Jones, 65 W. Va. 59, 64 S. E. 640.

550-49 Empire C. Co. *r.* Gibson, 23 Colo. App. 399, 128 P. 472; Lewright *r.* Walls, 55 Tex. Civ. 643, 119 S. W. 721 (no greater presumption of regularity of proceedings where state purchaser than in other cases). See "Taxation," p. 340, et seq.

554-54 Material variance between official deed, tax fi. fa. and levy renders former inadmissible. Thompson *r.* Tasker, 134 Ga. 80, 67 S. E. 446.

554-57 McMahon *r.* Crean, 109 Md. 652, 71 A. 995.

555-60 Hahn *r.* Co., 79 Kan. 693 100 P. 484. See Norman *v.* Beekman, 58 Fla. 325, 50 S. 870.

555-64 Stanton *r.* Hotchkiss, 157 Cal. 652, 108 P. 864; Halbouer *r.* Cuenin, 45 Colo. 507, 101 P. 763; Saunders *r.* Collins, 56 Fla. 534, 47 S. 958; Young *r.* Gibson, 80 Kan. 264, 105 P. 3; Taylor *r.* Adams, 79 Kan. 360, 99 P. 597; Moss T. Co. *r.* Myers (Ky.), 116 S. W. 255; Moseley *r.* Hamilton, 136 Ky. 680, 124 S. W. 894 (statutes have changed rule, and recitals may be impeached only for fraud or mistake); McMahon *r.* Crean, 109 Md. 652, 71 A. 995; Griffin *r.* Franklin, 224 Mo. 667, 123 S. W. 1092; Peters *r.* Lohr, 24 S. D. 605, 124 N. W. 853; Gibson *r.* Smith, 24 S. D. 514, 124 N. W. 733 (after expiration of the three periods of limitation); Wright *r.* Carson, 110 Va. 498, 66 S. E. 37.

See Billings *r.* Hendry, 66 Fla. 168, 63 S. 701.

All reasonable presumptions indulged in favor of recorded tax deed under which possession held. Schroeder *v.* Griggs, 80 Kan. 357, 102 P. 469.

Assignment of certificate on which deed by state based need not be proved if deed shows certificate surrendered by grantee. Saunders *v.* Collins, 56 Fla. 534, 47 S. 958.

557-65 Warren *v.* R. Co., 176 Fed. 336, 99 C. C. A. 473 (Washington); Maney *v.* Burke, 92 Ark. 84, 122 S. W. 111; Meyer *v.* Snell, 89 Ark. 298, 116 S. W. 208; Morris *v.* Breedlove, 89 Ark. 296, 116 S. W. 223; Honghton *v.* Bk., 157 Cal. 289, 107 P. 113; Metteer *v.* Smith, 156 Cal. 572, 105 P. 735; Ludwick *v.* Dean, 81 Kan. 292, 105 P. 525; Einstein *v.* Co., 132 Mo. App. 82, 111 S. W. 859; Peters *v.* Lohr, 24 S. D. 605, 124 N. W. 853; Kellogg L. & M. Co. *v.* Co., 140 Wis. 341, 122 N. W. 737.

558-66 McMahon *v.* Crean, 109 Md. 652, 71 A. 995.

Parol evidence admissible to show plaintiff not party to judgment on which tax deed relied upon by defendant issued. Wren *v.* Scales, 55 Tex. Civ. 62, 119 S. W. 879.

558-67 Gibson *v.* Pekarek, 25 S. D. 281, 126 N. W. 597.

559-68 Stanton *v.* Hotchkiss, 157 Cal. 652, 108 P. 864; Wright *v.* Carson, 110 Va. 498, 66 S. E. 37. See P. *v.* Inman, 197 N. Y. 200, 90 N. E. 438.

559-69 Wright *v.* Carson, 110 Va. 498, 66 S. E. 37.

560-71 Howell *v.* Bent, 48 Mont. 268, 137 P. 49; Kramer *v.* Smith, 23 Okla. 581, 100 P. 532.

Tax deed invalid on its face is admissible as color of title. Jackson *v.* Larson, 24 Colo. App. 548, 136 P. 81.

560-73 Robert *v.* Gibson, 79 Kan. 344, 99 P. 595.

560-74 **Second deed**, issued in lieu of improper one, admissible though it does not disclose it was such, facts and circumstances under which it issued appearing. Young *v.* Gibson, 80 Kan. 264, 105 P. 3.

Tax bill does not prove ownership. S. *v.* Bartlett, 147 Mo. App. 133, 125 S. W. 839.

Recitals in deed may overcome presumption in its favor. Stitt *v.* Stringham, 55 Or. 89, 105 P. 252.

Informal deed aided by presumptions. Gibson *v.* Garst, 81 Kan. 741, 107 P. 40.

Void deed, not prima facie evidence of title. Johnson *v.* Scott, 205 Mass. 294, 91 N. E. 302.

562-77 Mathews *v.* Hanson, 19 N. D. 692, 124 N. W. 1116; Jones *v.* Burkitt (Tex. Civ.), 150 S. W. 275; Ingalls *v.* Co., 56 Tex. Civ. 543, 122 S. W. 53 (consent judgment).

563-78 McDoel *v.* Jordan (Tex. Civ.), 151 S. W. 1178.

See Anderson *v.* Co. (Tex. Civ.), 120 S W. 918.

Surrogate's court judgment, not presumptive evidence of title to land. Auchon *v.* R. Co., 137 App. Div. 834, 122 N. Y. S. 581.

Schedule of property attached to an assignment, admissible as evidence of title in favor of claimants under assignee. McMahon *v.* McDonald, 51 Tex. Civ. 613, 113 S. W. 322.

563-81 Title to land cannot be divested by parol admissions or declarations. Garrett *v.* Co., 66 W. Va. 587, 66 S. E. 741.

564-83 S. conveyed a strip of land to the city and later sold the property, excepting such strip, to C. Years later he made a deed confirming former conveyance. This latter deed is admissible in evidence to recover strip from C. Close *v.* City of Chicago, 257 Ill. 47, 100 N. E. 215.

565-88 Fullbright *v.* Neely, 131 Ga. 342, 62 S. E. 188; Duren *v.* Bottoms (Tex. Civ.), 129 S. W. 376.

566-89 Smith *v.* Donalson, 137 Ga. 465, 73 S E. 577; Patterson *v.* Patterson, 251 Ill. 153, 95 N. E. 1051; Cryer *v.* McGuire, 148 Ky. 100, 146 S. W. 402; Bowman & Cockrell *v.* Baker, 147 Ky 437, 144 S. W. 383; Ware *v.* Bennett, 143 Ky. 743, 137 S. W. 532.

566-93 Gilmartin *v.* Buchanan, 134 App. Div. 587, 119 N. Y. S. 489.

566-94 Rucker *v.* Rucker, 136 Ga. 830, 72 S. E. 241.

567-95 Owen *v.* Moxon, 167 Ala. 615, 52 S. 527; Pruett *v.* Cowsart, 136 Ga. 756, 72 S. E. 30; Hampe *v.* Sage, 87 Kan. 536, 125 P. 53; Heynbrock *v.* Hormann, 256 Mo. 21, 164 S. W. 547; Peattie *v.* Gabel, 155 App. Div. 786, 140 N. Y. S. 993; Faulkner *v.* Rocket, 33 R. I. 152, 80 A. 380; Benbow *v.* Harvin, 92 S. C. 180, 75 S. E. 414.

568-2 Admission of such title in plaintiff as his patent calls for, not inconsistent with evidence patent conveyed no title. Hackbarth *v.* Gordon (Tex. Civ.), 120 S. W. 591.

569-11 Whelan *v.* R. Co., 91 Neb. 238, 136 N. W. 20.

569-13 Yndo *v.* Rivas (Tex. Civ.), 142 S. W. 920.

"The declarations of a party in possession are only admissible in evidence against himself or his privies in blood or estate, and are not admissible to attack or destroy the title; for that is of record and of a higher and stronger nature than to be attacked by parol evidence. Such declarations, made by a person in possession, are competent simply to explain the character and extent of the possession in a given case." Strickland *v.* Strickland, 103 Ark. 183, 146 S. W. 501.

570-17 Not entitled to weight in ejectment though in writing. P. *v.* R. Co., 239 Ill. 42, 87 N. E. 946.

572-19 Pritchard *v.* Fowler, 171 Ala. 662, 55 S. 147; Close *v.* Chicago, 257 Ill. 47, 100 N. E. 215; Bowman & Cockrell *v.* Baker, 147 Ky. 437, 144 S. W. 383; Soriano *v.* Arrese, 1 P. R. Fed. 194.

574-21 Dixon *v.* Dixon (Md.), 90 A. 846.

576-35 Baldwin *v.* McCullough (Tex. Civ.), 146 S. W. 203.

577-43 Poole *v.* Com., 9 Del. Ch. 192, 80 A. 683.

579-53 Butts *v.* Purdy, 63 Ore. 150, 125 P. 313, 127 P. 25.

579-54 Inadmissible when it does not appear admissions were made when he was in possession. Smith *v.* Smith, 141 Ga. 629, 81 S. E. 895.

580-56 McGuire *v.* Lovelace (Ky.), 128 S. W. 309.

580-59 Marsh *v.* Fricke, 1 Ala. App. 649, 56 S. 110.

581-62 Rohrer *v.* Lockery, 136 Wis. 532, 117 N. W. 1060.

583-71 Schmidt *v.* Schweitzer, 137 N. Y. S. 867.

588-88 See Reber *v.* Schroeder, 221 Pa. 152, 70 A. 556.

"Whether a setting apart of the goods for the buyer is a sufficient delivery to effect a passing of the title depends entirely upon the intention of the parties, and their intention in this respect is ordinarily to be drawn as an inference or conclusion from their words, statements and conduct." F. P. Gluck Co. *v.* Therme, 154 Ia. 201, 134 N. W. 438.

588-93 See Hopkins *v.* Heywood, 86 Vt. 486, 86 A. 305.

600-41 Owen *v.* Moxon, 167 Ala. 615, 52 S. 527; Manitou & P. P. R. Co. *v.* Harris, 45 Colo. 185, 101 P. 61; Pittsburg, etc. R. Co. *v.* Wilson, 46 Ind. App. 444, 91 N. E. 725; Folk *v.* Brooks, 91 S. C. 7, 74 S. E. 46.

602-47 Owen *v.* Moxon, 167 Ala. 615, 55 S. 527; Tachini *v.* S., 59 Tex. Cr. 55, 126 S. W. 1139.

Title.—Violation of Sunday laws.— Theater tickets and programs are admissible as showing ownership of a theater, of which accused was an agent. Gould *v.* S. (Tex. Cr.), 146 S. W. 172.

602-48 McDonald *v.* R. Co., 164 Fed. 1007.

603-52 Tachini *v.* S., 59 Tex. Cr. 55, 126 S. W. 1139; Wilson Lumb. Co. *v.* Hutton, 152 N. C. 537, 68 S. E. 2.

603-54 Schweitzer *v.* Williams, 43 Pa. Super. 202; Cosgrove *v.* Franklin, 35 R. I. 527, 87 A. 544.

604-60 Reed *v.* Sefton, 11 Cal. App. 88, 103 P. 1095; Locklear *v.* Paul, 163 N. C. 338, 79 S. E. 617; Waukop *v.* Sauvage (Tex. Civ.), 159 S. W. 185; Scott *v.* Hughes, 66 W. Va. 573, 66 S. E. 737.

605-63 Dixon *v.* Dixon (Md.), 90 A. 846.

606-67 See supra, "Hearsay," 447-23.

606-68 Van Deventer *v.* Lott, 172 Fed. 574; Vaughan *v.* Palmore, 176 Ala. 72, 57 S. 488 (source unnecessarily averred); Gilbert *v.* Pinkston, 167 Ala. 490, 52 S. 442; Hornor *v.* Jarrett, 99 Ark. 154, 137 S. W. 820; Johnson *v.* Elder, 92 Ark. 30, 121 S. W. 1066; Sibly *v.* England, 90 Ark. 420, 119 S. W. 820; McMilan *v.* Morgan, 90 Ark. 190, 118 S. W. 407; McDaniel *v.* Berger, 89 Ark. 139, 116 S. W. 194; Meyer *v.* Snell, 89 Ark. 298, 116 S. W. 208; Morris *v.* Breedlove, 89 Ark. 296, 116 S. W. 223; Little *v.* Williams, 88 Ark. 37, 113 S. W. 340; Hill *v.* Barner, 8 Cal. App. 58, 96 P. 111; Brown *v.* Whetstone, 25 Colo. App. 371, 138 P. 61; Hill *v.* De Costa, 65 Fla. 371, 61 S. 750; Baltzell *v.* McKinnon, 57 Fla. 355, 49 S. 546; Kelle *v.* Egan, 256 Ill. 45, 99 N. E. 859; Ruppe *v.* Glos, 243 Ill. 414, 90 N. E. 744; Heaton *v.* Grand Lodge (Ind. App.), 103 N. E. 488; Hafner *v.* Chase, 146 Ia. 231, 124 N. W. 1087; Hughes *v.* Williams (Mass.), 105 N. E. 1056; Hammond *v.* Cowart (Miss.), 52 S. 451; Buck *v.* Walker, 115 Minn. 239, 132 N. W. 205; Whitman *v.* Giesing, 224 Mo. 600, 123 S. W. 1052; Young *v.* Engdahl, 18 N. D. 166, 119 N. W. 169; Sears *v.* Murdock, 59

Or. 211, 117 P. 305; Iguano L. & M. Co. *v.* Jones, 65 W. Va. 59, 64 S. E. 640. See Brown *v.* Whetstone, 25 Colo. App. 371, 138 P. 61; Dooley *v.* P. & G. Co., 158 App. Div. 429, 143 N. Y. S. 650, *rev.* 77 Misc. 398, 137 N. Y. S. 737.

Evidence sufficient.—Maynor *v.* Timber Co., 236 Mo. 722, 139 S. W. 393.

In proceedings to remove a cloud upon title plaintiff must show clearly, accurately, and certainly the validity of his own title, and the invalidity of the title of the opposing party. Gasque *v.* Ball, 65 Fla. 383, 62 S. 215; Jarrell *v.* McRainey, 65 Fla. 141, 61 S. 240.

Where plaintiff seeks to enjoin defendant from interfering with placing obstruction in the street because of his superior title the burden is on him to show such title. Johnston *v.* Palmetto, 139 Ga. 556, 77 S. E. 807.

Tenants in common.—Where one tenant in common unites with another he assumes the burden of proving co-tenant's title. Heaton *v.* Grand Lodge (Ind. App.), 103 N. E. 488.

607-69 Rucker *v.* Jackson (Ala.), 60 S. 139.

607-70 Nashville, etc. R. Co. *v.* Proctor, 160 Ala. 450, 49 S. 377; Whittaker *v.* Van Hoose, 157 Ala. 286, 47 S. 741.

607-71 Hill *v.* Da Costa, 65 Fla. 371, 61 S. 750; Heaton *v.* Grand Lodge (Ind. App.), 103 N. E. 488.

Invalid Tax Deed.—Burden of setting aside is on plaintiff. Christensen *v.* Peterson (Ia.), 144 N. W. 315.

608-73 Harris Woodbury Lumb. Co. *v.* Coffin, 179 Fed. 257, *aff.* 187 Fed. 1005; Gamble *v.* Andrews (Ala.), 65 S. 525; Birmingham Securities Co. *v.* Southern University, 173 Ala. 116, 55 S. 240; Mitchell *v.* Trowbridge, 47 Colo. 6, 105 P. 878; House *v.* Grable, 25 Colo. App. 405, 138 P. 1012; Burchel *v.* Withers (Ky.), 121 S. W. 469; Graves *v.* Fancher, 81 N. J. Eq. 517, 88 A. 172; Ocean View Land Co. *v.* Loudenslager, 78 N. J. Eq. 571, 80 A. 471; Chandley *v.* Robinson (N. J. Eq.), 75 A. 180; Durkin *v.* Ward, 66 Or. 335, 133 P. 345; Butts *v.* Purdy, 63 Or. 150, 125 P. 313, 127 P. 25. See Kiser *v.* McLean, 67 W. Va. 294, 67 S. E. 725.

Evidence sufficient.—Kaufman *v.* All Persons, 16 Cal. App. 388, 117 P. 586.

Where defendant claimed under deed from plaintiff in 1908 he need not prove title prior to them. Strange *v.* Strange, 23 Cal. App. 281, 137 P. 1104.

Burden of proving an adverse claim is on defendant. Magnetite M. Co. *v.* R. Co., 142 N. Y. S. 1094.

609-74 Under the act of 1911 a patent to land is prima facie evidence of title. Brue *v.* McMillan, 175 Ala. 416, 57 S. 486.

Either party may attack title of the other; if both titles void, advantage is defendant's. Meyer *v.* Snell, 89 Ark. 298, 116 S. W. 208.

Introduction of patent and deed from patentee, shifts burden to defendant. Temple *v.* Osburn, 55 Or. 506, 106 P. 16.

609-75 Metteer *v.* Smith, 156 Cal. 572, 105 P. 735.

Possession found by decree to exist in 1895, not presumed continuous until 1907. Lister *v.* Glos, 236 Ill. 95, 86 N. E. 180.

609-77 Boyer *v.* Gelhaus, 19 Cal. App. 320, 125 P. 916; Nicholson *v.* Villepegue, 91 S. C. 231, 74 S. E. 506.

Possession of subsoil presumably follows possession of surface, especially where latter follows attempted grant of whole estate. Vandegrift *v.* Co., 166 Ala. 312, 51 S. 983.

Grant conclusively presumed though adverse holding not continued for full time. East Jellico C. Co. *v.* Tays, 133 Ky. 4, 117 S. W. 307.

Conveyance of expectant state, never presumed from execution of quitclaim deed. Layton *v.* Herr, 45 Ind. App. 203, 90 N. E. 645.

610-79 Johnston *v.* Kramer Bros., 203 Fed. 733; Buchanan Co. *v.* Adkins, 99 C. C. A. 246, 175 Fed. 692; Randolph *v.* Vails (Ala.), 60 S. 159; Buchner *v.* Malloy, 155 Cal. 253, 100 P. 687; Lougee *v.* Wilson, 24 Colo. App. 70, 131 P. 777; Dodge *v.* Millett, 23 Colo. App. 64, 127 P. 247; Buckland *v.* Fielder, 48 Colo. 153, 109 P. 262; Stephens *v.* Johnson, 255 Ill. 610, 99 N. E. 642; Bowling *v.* Co., 134 Ky. 249, 120 S. W. 317; Cockrell *v.* Colson (Ky.), 116 S. W. 775; Stewart *v.* May, 111 Md. 162, 73 A. 460.

Owner of estate for years may maintain action. German-Am. S. Bk. *v.* Gollmer, 155 Cal. 683, 102 P. 932.

611-80 Vandegrift *v.* Co., 166 Ala. 312, 51 S. 983 (actual or constructive); Am. B. & I. Co. *v.* Hopkins, 46 Colo. 460, 104 P. 1040 (proof may come from defendant); Mulford *v.* Rowland, 45 Colo. 172, 100 P. 603; Lister *v.* Glos, 236 Ill. 95, 86 N. E. 180; Louis-

ville & N. R. Co. *v.* Taylor, 138 Ky. 437, 128 S. W. 325; Dupoyster *v.* Dunn (Ky.), 113 S. W. 880; Horn *v.* Bates (Ky.), 114 S. W. 763; Vanderveer *v.* Rapalje, 133 App. Div. 203, 117 N. Y. S. 485 (right to easement will not support action; claim or color of title to fee, essential); O'Donohue *v.* Smith, 130 App. Div. 214, 114 N. Y. S. 536 (the rule is the same in equity as at law).

Possession of vacant land is constructive and title must be proved. Knox *v.* Gibson, 23 Colo. App. 402, 128 P. 470.

Dispossession by fraud, immaterial to plaintiff. Am. B. & I. Co. *v.* Hopkins, 46 Colo. 460, 104 P. 1040.

Possession subsequent to suit cannot be shown unless pleaded. Sayre *v.* Sage, 47 Colo. 559, 108 P. 160.

611-81 Graves *v.* Ashburn, 215 U. S. 331; Lougee *v.* Wilson, 24 Colo. 70, 131 P. 777; Stephens *v.* Johnson, 255 Ill. 610, 99 N. E. 642; Beiber *v.* Porter, 242 Ill. 616, 90 N. E. 183.

612-83 Holland *v.* Coleman, 162 Ala. 462, 50 S. 128 (though deed under which defendant claims void); Sayre *v.* Sage, 47 Colo. 559, 108 P. 160 (immaterial possession obtained by trespass solely for purpose of bringing action); Wood L. Co. *v.* Williams, 157 Ala. 73, 47 S. 202 (facts not inconsistent with "peaceable possession" at time bill filed).

Exception made if plaintiff shows special equity, as some obstacle or impediment preventing or embarrassing assertion of his legal rights. Fies *v.* Rosser, 162 Ala. 504, 50 S. 287.

612-84 Devine *v.* Los Angeles, 202 U. S. 313; Baltzell *v.* McKinnon, 57 Fla. 355, 49 S. 546; Brodsky *v.* Nelson, 57 Wash. 671, 107 P. 840.

And so in Missouri and North Dakota. Stevens *v.* Fitzpatrick, 218 Mo. 708, 118 S. W. 51; Burke *v.* Scharf, 19 N. D. 227, 124 N. W. 79.

In North Carolina owner of land may bring action to remove cloud from title, although not in possession. Johnston *v.* Kramer, 203 Fed. 733.

In Oregon, statute so provides. Under former statute plaintiff who went into equity had burden of showing land unoccupied. Comegys *v.* Hendricks, 55 Or. 533, 106 P. 1016.

In Utah, proof of legal title raises presumption of constructive possession by plaintiff. Gibson *v.* McGurrin, 37 Utah 158, 106 P. 669.

Actual possession for any period under claim of title, sufficient against one without title. Morris *v.* Clarkin, 156 Cal. 16, 103 P. 180; Mitchell *v.* Trowbridge, 47 Colo. 6, 105 P. 878 (and under color of title).

Possession need not be shown where main purpose of action is to obtain other relief and prayer to quiet title but an incident. Ward *v.* Clendenning, 245 Ill. 206, 91 N. E. 1028.

Exception to general rule requiring possession made where defendant files cross-bill to quiet his own title. Relender *v.* Riggs, 20 Colo. App. 423, 79 P. 328.

613-85 Peninsular N. S. Co. *v.* Cox, 57 Fla. 505, 49 S. 191; Bale *v.* Bale, 242 Ill. 519, 90 N. E. 233; Kollock *v.* Bennett, 53 Or. 395, 100 P. 940; Custer *v.* Hall, 71 W. Va. 119, 76 S. E. 182.

In order to establish an adverse equitable title, it is essential that the evidence of such title should be clear and unequivocal, and lead to but one conclusion. Gillette *v.* Plimpton, 253 Ill. 147, 97 N. E. 260.

Surrounding facts may be considered in determining ownership. Chisholm *v.* Thompson, 233 Pa. 181, 82 A. 67.

614-87 Poole *v.* Lake Forest, 238 Ill. 305, 87 N. E. 320; Thurston *v.* McMillan, 108 Me. 67, 78 A. 1122.

Quitclaim deed executed after action **begun,** admissible, grantor therein having previously executed deed containing defective description. Brodsky *v.* Nelson, 57 Wash. 671, 107 P. 840.

Claim of fraudulent title met by all defendant's muniments of title. Livingston *v.* Taylor, 132 Ga. 1, 63 S. E. 694.

A deed to plaintiff by heirs is admissible, the intestacy of ancestors' heirs being admitted. Muntzing *v.* Harwood, 25 Colo. App. 292, 137 P. 71.

One claiming under unrecorded mortgage must prove any matters which avoid the effect of a recorded mortgage. Kelsey *v.* Norris, 53 Colo. 306, 125 P. 111.

614-88 Unrecorded deed, not pleaded in answer, inadmissible. Garvey *v.* Garvey, 52 Wash. 516, 101 P. 45 (statute).

614-89 Certified copy of last recorded deed, but prima facie evidence of title. Young *v.* Engdahl, 18 N. D. 166, 119 N. W. 169.

614-91 Brue *v.* McMillan, 175 Ala. 416, 57 S. 486.

615-92 **Letters written by purchaser** of land to defendant's predecessor in interest and by latter to former, admissible in connection with other testimony against plaintiff as trustee. Uihlein *v.* Co., 39 Mont. 327, 102 P. 564.

Non-compliance of judgment with statute, shown in collateral action. Cooper *v.* Gunter, 215 Mo. 558, 114 S. W. 943.

615-93 Tate *v.* Rose, 35 Utah 229, 99 P. 1003.

616-95 Bale *v.* Bale, 242 Ill. 519, 90 N. E. 233.

617-96 Nall *v.* Conover, 223 Mo. 477, 122 S. W. 1039. See Layton *v.* Herr, 45 Ind. App. 203, 90 N. E. 645.

Ownership of vacant land, not proved by master's deed in absence of proof of possession or title in grantor. Bauer *v.* Glos, 236 Ill. 450, 86 N. E. 116; Metropolitan E. R. Co. *v.* Eschner, 232 Ill. 210, 83 N. E. 809.

617-97 Hawkins *v.* McAdoo, 94 Ark 59, 126 S. W. 81; Felker *v.* Breece, 226 Mo. 320, 126 S. W. 424 (superiority of title between parties is the issue).

618-98 Phillips *v.* Menotti, 167 Cal. 328, 139 P. 796; Himmelberger-H. L. Co. *v.* Jones, 220 Mo. 190, 119 S. W. 366.

619-99 Hardy *v.* Samuels, 92 Ark. 289, 122 S. W. 654; Montgomery, etc. Co. *v.* Quimby, 164 Cal. 250, 128 P. 402; Earle *v.* Bryant, 12 Cal. App. 553, 107 P. 1018; Craven *v.* Lesh, 22 Ida. 463, 126 P. 774; Silverton *v.* Brown, 63 Or. 418, 128 P. 45.

Burden of proof on defendant to establish adverse possession. Kerr *v.* Yager (Ia.), 138 N. W. 905. Cannot be established by inference or implication. Fleming *v.* Howell, 22 Colo. App. 382, 125 Pac. 551.

620-3 See Rucker *v.* Jackson (Ala.), 60 S. 139.

The evidentiary value of the circumstances essential to authorize the presumption that the missing conveyance had been made is derived chiefly from their tendency to show an acquiescence in the title asserted by the adverse claimant. But asquiescence presupposes knowledge on the part of the owner that opposing rights are set up by another; for how can it be said that one acquiesces in something of which he is ignorant: But knowledge may also be inferred from circumstances, such, for instance, as possession, coupled with open and notorious claim of ownership. It has been held, however, that actual possession of another is not necessary to an inference of knowledge and acquiescence sufficient to support the presumption of a conveyance." Baldwin *v.* McCullough (Tex. Civ.), 146 S. W. 203.

TOWAGE

624-4 The Kunkle Bros., 211 Fed 540.

625-14 The Mame, 189 Fed. 419.

626-17 Sicula *v.* Dalzell, 204 Fed. 697; The El Rio, 162 Fed. 567.

Evidence that machinery was defective held immaterial. Am. Towing & Lightering Co. *v.* Co., 117 Md. 660, 84 A. 182.

626-19 The Ashbourne, 206 Fed. 860; Sicula, etc. *v.* Dalzell, 204 Fed. 697; The Murrell, 200 Fed. 826. See The Kunkle Bros., 211 Fed. 540.

627-25 **Ignorance of recently changed conditions in a harbor,** where means of knowledge exists, is negligence on part of master. The Murrell, 200 Fed. 826.

628-29 Value of lost scow provable by owner, as witness for defendant. Am. T. & L. Co. *v.* Co., 111 Md. 504, 75 A. 341.

628-30 Opinion of non-expert as to sufficiency of hawser, inadmissible; otherwise as to expert. Am. T. & L. Co. *v.* Co., 111 Md. 504, 75 A. 341.

TRADE-MARKS AND TRADE NAMES

Abandonment, 636-24; *Exhibits,* 668-16; *Custom as to use of name,* 668-16.

635-18 Commissioner's decision, conclusive. In re Herbst, 32 App. Cas. (D. C.) 269.

636-22 Spiegel *v.* Zuckerman, 175 Fed. 978.

Questions of doubt resolved in favor of prior registrant. Wayne County P. Co. *v.* Co., 32 App. Cas. (D. C.) 279; Udell-P. Mfg. Co. *v.* Works, 32 App. Cas. (D. C.) 282; Phoenix P. & V. Co. *v.* Lewis, 32 App. Cas. (D. C.) 285.

636-24 **Intent to register more than one mark** under same application, ascertained from contents of application. S. *v.* Montgomery, 57 Wash. 192, 106 P. 771.

Compliance with antecedent requirements of law, prima facie shown by act of officer in receiving and filing application for registration of label. Ibid.
Burden on party objecting to registration of trade-mark because its resemblance is likely to deceive, if fact not apparent from inspection of marks. McLean Co. *v.* Co., 31 App. Cas. (D. C.) 509.
Temporary disuse of trade-mark during period covered by license to another, not abandonment. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180.

636-32 Metcalf *v.* Mill Co., 204 Fed. 211, 122 C. C. A. 483; Walter Baker & Co. *v.* Harrison, 32 App. Cas. (D. C.) 272; Phoenix P. & V. Co. *v.* Lewis, 32 App. Cas. (D. C.) 285; New Orleans C. Co. *v.* Co., 124 La. 19, 49 S. 730.

638-35 Accounting of profits realized by defendant ordered if he acted with intent to defraud. Reading S. Wks. *v.* Howes, 201 Mass. 437, 87 N. E. 751.

638-36 Motion P. Co. *v.* Film Co., 208 Fed. 416; Stephano *v.* Satmatopoulous, 199 Fed. 451.
Actual competition must be shown. The intent that makes the defendant liable is the intent of his proven acts. Hanover S. M. Co. *v.* Allen, 208 Fed. 513, 125 C. C. A. 515.

640-37. Sometimes against sworn protestations of defendants. Wolf Bros. *v.* Shoe Co., 206 Fed. 611, 124 C. C. A. 409, reversing 192 Fed. 930.

640-39 McDonald, etc. Co. *v.* Mfg. Co., 106 C. C. A. 312, 183 Fed. 972.

640-40 Abandonment of attempt to sell goods in manner pursued before bill filed may be admission of infringement. See Lynn S. Co. *v.* Co., 100 Me. 461, 62 A. 499, 4 L. R. A. (N. S.) 460; Reading S. Wks. *v.* Howes, 201 Mass. 437, 87 N. E. 751.

641-43 Forster Mfg. Co. *v.* Co., 211 Mass. 219, 97 N. E. 749.
Plaintiff has burden of proving unfair competition. Pippen *v.* Harris (Ala.), 61 S. 890.

643-47 Perkins *v.* Apollo Bros., Inc., 197 Fed. 476.

644-49 Barnes Co. *v.* Vandyck Co., 207 Fed. 855; Wolf Bros. Co. *v.* Shoe Co., 206 Fed. 611, 124 C. C. A. 409; *rev.* 192 Fed. 930; Yale Mfg. Co. *v.* Worcester Mfg. Co., 205 Fed. 952; Notaseme Hosiery Co. *v.* Straus, 201 Fed. 99, 119 C. C. A. 134; Coco Cola Co. *v.* Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164; Estes *v.* Frost, 176 Fed. 338, 100 C. C. A. 258; Rubber, etc. Co. *v.* Co., 81 N. J. Eq. 519, 88 A. 210.

644-50 Ben Levy Co. *v.* Tetlow, 209 Fed. 139; Hill Bread Co. *v.* Goodrich Baking Co. (N. J.), 89 A. 863.

645-51 See Samson C. Works *v.* Puritan Mills, 211 Fed. 603, *rev.* 197 Fed. 205 and affirming 194 Fed. 573.
"Reputation and good will in connection with, and as a part of a business, generally is recognized as a property right, and will be protected against the unfair competition of rival manufacturers or dealers in similar products. Geo. C. Fox Co. *v.* Glynn, 191 Mass. 344, 349, 78 N. E. 89, 9 L. R. A. (N. S.) 1096, 114 Am. St. Rep. 916; Reading Stove Works *v.* S. M. Howes Co., 201 Mass. 437, 438, 87 N. E. 751, 21 L. R. A. (N. S.) 979; Draper *v.* Skerrett 116 Fed. 206. It is wholly immaterial where this right has been invaded, that the retail or wholesale dealer who may be the immediate purchaser of goods put out in imitation, is not misled as to their identity. The wrong of unfair competition is present where goods are so dressed in form, or marked by decorative symbols, that the ultimate consumer, when the goods are distributed for use in the ordinary course of trade, either is, or possibly may be deceived. The liability to deception being the test, it also is not necessary to show that specific buyers have been actually deceived, or that the infringer did intend to deceive the public." Forster Mfg. Co. *v.* Co., 211 Mass. 219, 97 N. E. 749.

646-52 Dyment *v.* Lewis, 144 Ia. 509, 123 N. W. 244; Scanlan *v.* Williams, 53 Tex. Civ. 28, 114 S. W. 862. See Margarete Steiff *v.* Bing, 206 Fed. 900, 124 C. C. A. 560.

647-53 Florence Mfg. Co. *v.* Dowd, 171 Fed. 122; Newcomer *v.* Co., 168 Fed. 621, 94 C. C. A. 77.

651-58 Humph H. Co. *v.* Co., 39 App. Cas. (D. C.) 484.

654-70 Reading S. Wks. *v.* Howes, 201 Mass. 437, 87 N. E. 751 (wrong consists of attempt to sell goods by misrepresentation); Dutton *v.* Cupples, 117 App. Div. 172, 102 N. Y. S. 309; Collier *v.* Jones, 66 Misc. 97, 120 N. Y. S. 991; Martell *v.* Co., 51 Wash. 375, 98 P. 1116.

655-72 Newport S. Bank Co. *v.* Min. Co., 144 Ky. 7, 137 S. W. 784; George

G. Fox Co. *v.* Baking Co., 209 Mass. 251, 95 N. E. 747.

655-73 Gaines & Co. *v.* Turner Co., 204 Fed. 553, 122 C. C. A. 79; Forster Mfg. Co. *v.* Cutter-Tower Co., 211 Mass. 219, 97 N. E. 749; Reading S. Wks. *v.* Howes, 201 Mass. 437, 87 N. E. 751; Martell *v.* Co., 51 Wash. 375, 98 P 1116.

Intent proved by proof of sales to plaintiff's emissaries. Kessler *v.* Goldstrom, 101 C. C. A. 476, 177 Fed. 392.

It may be shown by circumstances independently of label on goods. Nelle *v.* Baer, 5 Phil. Isl. 608. Continued use after notice and warning by plaintiff shows intent. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180.

Intent of corporation shown by acts of partners who organized it as successor to partnership, notwithstanding such acts not a cause of action because of statute of limitations. Racine P. G. Co. *v.* Dittgen, 171 Fed. 631, 96 C. C. A. 433.

656-74 Apollo Bros. *v.* Perkins, 207 Fed. 530, 125 C. C. A. 192, *rev.* 197 Fed. 476.

656-75 See Moore *v.* Auwell, 172 Fed. 508.

656-76 Hill B. Co. *v.* B. Co. (N. J.), 89 A. 863. See Martin *v.* Martin, 75 N. J. Eq. 39, 71 A. 409.

Sufficient evidence of bad faith afforded by defendant's failure to establish legal right claimed. Racine P. G. Co. *v.* Dittgen, 171 Fed. 631, 96 C. C. A. 433.

657-77 Cost sheet adopted and acted on by defendant, evidence of cost of goods made by him. Failure to keep accounts after notice by plaintiff, a circumstance against defendant. Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180.

Sum agreed upon by parties for use of trade-mark and business name, strong, if not controlling, evidence of damages caused by subsequent wrongful use. Ibid.

658-81 Samson Cordage Works *v.* Cordage Mills, 197 Fed. 205.

658-84 Leach *v.* Scarff, 188 Fed. 446.

661-90 Use not amounting to fraud. Jacobs *v.* Beecham, 221 U. S. 263.

663-97 Burke *v.* Bishop, 175 Fed. 167.

663-98 Burke *v.* Bishop, 175 Fed. 167.

Defendant's good faith may be shown in action for accounting. Vulcan D. Co. *v.* Co., 75 N. J. Eq. 542, 73 A. 603.

665-9 James Van Dyk Co. *v.* Reilly Co., 130 N. Y. S. 755.

667-13 Star Brew. Co. *v.* Brew. Co., 36 App. Cas. (D. C.) 534; Munn Co. *v.* Co., 82 N. J. Eq. 63, 88 A. 330.

668-16 Exhibits of articles of same name, manufactured by different persons, not relevant without evidence showing origin and use. Am. T. Co. *v.* Polacsek, 170 Fed. 117.

Custom to allow trade name to be used on goods prepared for use in different form, irrelevant unless it is shown to have been open, notorious and with acquiescence. Ibid.

675-39 P. *v.* Luhrs, 127 App. Div. 634, 111 N. Y. S. 749.

TRANSACTIONS WITH DECEASED PERSONS

703-6 See Abrahams *v.* Woolley, 243 Ill. 365, 90 N. E. 667.

718-9 Temple *v.* Bradley, 119 Md. 602, 87 A. 394.

720-18 There is no presumption of the incompetency of a witness to testify as to transactions with a deceased. Abbott *v.* Doughan, 204 N. Y. 223, 97 N. E. 599.

721-20 Orndorf *v.* Jeffries, 46 Ind. App. 254, 91 N. E. 608.

723-25 See Clifton *v.* Meuser, 79 Kan. 655, 100 P. 645.

731-63 Chapman *v.* Dougherty, 87 Mo. 617, 56 Am. Rep. 469; Leavea *v.* R. Co., 171 Mo. App. 24, 153 S. W. 500.

734-86 Boyd *v.* Gore, 143 Wis. 531, 128 N. W. 68.

736-94 Roberts *v.* Tift, 136 Ga. 901, 72 S. E. 234; Kington *v.* Ewart, 85 Kan. 292, 116 P. 495.

A party to a suit is competent to testify in his own behalf against a board of education in relation to a personal transaction between himself and a deceased member of such board. Board of Education *v.* Harvey, 70 W. Va. 480, 74 S. E. 507.

738-2 Actions to recover money judgments, as for example an action on a note given to plaintiff by deceased by gift inter vivos, do not come within the terms of such statutes. Snyder *v.* Frank (Ind. App.), 101 N. E. 684.

739-10 Green *v.* Co. (Del.), 87 A. 885; Duncan *v.* Jouett (Tex. Civ.), 111 S. W. 981.

As to scope of Vermont statute, see Wilkins *v.* Brock, 81 Vt. 332, 70 A. 572.

742-21 Gernon *v.* Sisson, 21 Cal. App. 123, 131 P. 85.

743-24 Validity of claim against estate may be testified to by claimant in proceeding to remove the administrator, though claimant could not testify thereto against estate. Scott *v.* Smith, 171 Ind. 453, 85 N. E. 774.

745-39 Condor *v.* Secrest, 149 N. C. 201, 61 S. E. 921.

746-45 Allen *v.* Allen, 157 Ill. App. 362; Boeck *v.* Milke, 141 Ia. 713, 118 N. W. 874; Spencer *v.* Schell (Tex. Civ.), 142 S. W. 111; Nelson *v.* Carlson, 48 Wash. 651, 94 P. 477; Cartright *v.* Cartright, 70 W. Va. 507, 74 S. E. 655; Weidenhoft *v.* Primm, 16 Wyo. 340, 94 P. 453.

747-54 Kirby *v.* Kirby, 236 Ill. 255, 86 N. E. 259; Scully *v.* Scully, 154 App. Div. 359, 139 N. Y. S. 622.

747-55 Shotwell *v.* Stickle (N. J.), 90 A. 246.

747-57 Harmon *v.* Harmon (S. C.), 71 S. E. 815.

750-67 Gledhill *v.* McCoombs, 110 Me. 341, 86 A. 247; Kohlberg *v.* Awbrey & Semple (Tex. Civ.), 167 S. W. 828; Tennison *v.* Palmer (Tex. Civ.), 142 S. W. 948.

An executor named in will may testify as to conversations with the testator concerning the will. In re Bretzman's Will, 117 Minn. 247, 135 N. W. 980 construing statute.

752-78 Ross *v.* Ross, 140 Ia. 51, 117 N. W. 1105.

753-83 Wall *v.* Dimmet, 132 Ky. 747, 117 S. W. 299.

754-89 In re Cauldwell, 156 App. Div. 66, 141 N. Y. S. 734.

755-96 Barnett *v.* Kemp (Mo.), 167 S. W. 546.

756-98 In re Whitlow's Est. (Mo. App.), 167 S. W. 463.

759-16 Watkins *v.* Carter, 164 Ala. 456, 51 S. 318.

760-22 Wife as beneficiary in insurance policy competent to testify in an action on the policy. She is claiming not as heir of the deceased but by virtue of a contract with the company. Grand Lodge *v.* Dillard (Tex. Cr.), 162 S. W. 1173.

761-23 Napier *v.* Elliott, 177 Ala. 113, 58 S. 435; Thornton *v.* Ferguson, 133 Ga. 825, 67 S. E. 97; Orendorf *v.* Jeffries, 46 Ind. App. 254, 91 N. E. 608; In re Murray's Est., 145 Ia. 368, 124 N. W. 193; Mollison *v.* Rittgers, 140 Ia. 365, 118 N. W. 512; Swearingen *v.* Tyler, 132 Ky. 458, 116 S. W. 331; Paducah C. Co. *v.* Co., 135 Ky. 53, 121 S. W. 986; Brown *v.* Patterson, 224 Mo. 639, 124 S. W. 1; Jackson *v.* Smith, 139 Mo. App. 691, 123 S. W. 1026; Bailey *v.* Bailey, 139 Mo. App. 176, 122 S. W. 1099; Borchers *v.* Barckers, 158 Mo. App. 267, 138 S. W. 555; Poppenhusen *v.* id., 68 Misc. 548, 125 N. Y. S. 269; In re McCahan's Est., 221 Pa. 186, 70 A. 711; Armstrong *v.* Burt (Tex. Civ.), 138 S. W. 172.

762-25 McBride *v.* Kirkpatrick, 207 Fed. 893; Watkins *v.* Carter, 164 Ala. 456, 51 S. 318; Rooker *v.* Samuels, 10 Cal. App. 227, 101 P. 689; Elwell *v.* Hicks, 238 Ill. 170, 87 N. E. 316; Kirby *v.* Kirby, 236 Ill. 255, 86 N. E. 259; Keenan *v.* Blue, 146 Ill. App. 7; Miller *v.* Mathias, 145 Ill. App. 465; Merchants' L. & T. Co. *v.* Egan, 143 Ill. App. 572; Kempton *v.* P., 139 Ill. App. 563; Quandt *v.* Ernst, 143 Ill. App. 299; In re Wittick's Est. (Ia.), 145 N. W. 913; Dashner *v.* Dashner, 142 Ia. 348, 120 N. W. 975; Frye *v.* Gullion, 143 Ia. 719, 121 N. W. 563; Heery *v.* Reed, 80 Kan. 380, 102 P. 846; Smith *v.* Berry, 155 Ky. 686, 160 S. W. 247; Skinner *v.* Creasy (Ky.), 116 S. W. 753; Koogle *v.* Cline, 110 Md. 587, 73 A. 672; Lanahan *v.* Conkey, 108 Md. 620, 71 A. 314; In re Rohrig, 176 Mich. 467, 142 N. W. 561; Lieber *v.* Lieber, 239 Mo. 1, 143 S. W. 458; Brown *v.* Patterson, 224 Mo. 639, 124 S. W. 1; Deal *v.* Hainley, 135 Mo. App. 507, 116 S. W. 1; Moore *v.* Fingar, 131 App. Div. 399, 115 N. Y. S. 1035; Harrell *v.* Hagan, 150 N. C. 242, 63 S. E. 952; Larson *v.* Newman, 19 N. D. 153, 121 N. W. 202; Dunshee *v.* Dunshee, 243 Pa. 599, 90 A. 362; McCandless *v.* Mobley, 81 S. C. 303, 62 S. E. 260; Lester *v.* Hutson (Tex. Civ.), 167 S. W. 321; Ross *v.* Kell (Tex. Civ.), 159 S. W. 119; Boiders *v.* Dooley (Tex. Civ.), 154 S. W. 614; McDonald's Est. *v.* McDonald (Tex. Civ.), 150 S. W. 593; Mounger *v.* Daugherty (Tex. Civ.), 138 S. W. 1070; Wilkins *v.* Brock, 81 Vt. 332, 70 A. 572; Shaw *v.* Lobe, 58 Wash. 219, 108 P. 450; Smith *v.* Scott, 51 Wash. 330, 98 P. 763; George *v.* Crim, 66 W. Va. 421, 66 S. E. 526.

762-26 Watson *v.* Appleton (Ala.), 62 S. 765; Green *v.* Co. (Del.), 87 A. 885; Hathaway *v.* Cook, 258 Ill. 92, 101

N. E. 227; Keys *v.* McDowell (Ind. App.), 100 N. E. 385; Van Wagenen *v.* Bonnot, 74 N. J. Eq. 843, 70 A. 143; Lester *v.* Hutson (Tex. Civ.), 167 S. W. 321.

763-29 Executrix not disqualified as against heir of decedent because she might be benefited as result of suit in consequence of the will. Wilder *v.* Wilder, 82 Vt. 123, 72 A. 203.

764-33 Frye *v.* Gullion, 143 Ia. 719, 121 N. W. 563; Sullivan *v.* R. Co., 245 Ill. 1, 91 N. E. 643, 147 Ill. App. 227 (though made party to disqualify him from testifying on behalf of co-defendants).

765-40 Anthony *v.* Sturdivant, 163 Ala. 530, 50 S. 1028.

Disclaimer by some heirs, parties to partition proceeding, does not render them competent witnesses for the others as to transactions and communications with deceased. Frye *v.* Gullion, 143 Ia. 719, 121 N. W. 563.

766-44 Hess *v.* Harting, 89 Kan. 599, 132 P. 148; Eareckson *v.* Rogers, 112 Md. 160, 75 A. 513.

767-47 Wells *v.* Hobbs, 57 Tex. Civ. 375, 122 S. W. 451; Zwietusch *v.* Luehring, 156 Wis. 96, 144 N. W. 257.

767-49 Blass *v.* Linsley, 78 Misc. 422, 139 N. Y. S. 540.

769-58 *Contra* where dismissal because of "adjudication of bankruptcy," that not being equivalent to discharge in bankruptcy. Anthony *v.* Sturdivant, 163 Ala. 530, 50 S. 1028.

769-59 Denny *v.* Schwabacher, 54 Wash. 689, 104 P. 137. *Comp.* Sullivan *v.* R. Co., 245 Ill. 1, 91 N. E. 643.

Sworn disclaimer prevails over allegation on a cross complaint. Sackman *v.* Thomas, 24 Wash. 660, 64 P. 819.

769-60 Sullivan *v.* R. Co., 245 Ill. 1, 91 N. E. 643 (offer by a defendant to restrict testimony to advantage of co-defendant).

769-63 Disclaimer in ejectment.— Under a statute conferring competency on any defendant in ejectment if he disclaims title to the premises and also pays the accrued costs or gives security therefor, a party is not rendered competent who though disclaiming title fails to pay or secure the costs. Burke *v.* Burke, 240 Pa. 379, 87 A. 960.

770-67 Patterson *v.* Patterson, 251 Ill. 153, 95 N. E. 1051; Elwell *v.* Hicks, 238 Ill. 170, 87 N. E. 316; In re Van Houten's Will, 147 Ia. 725, 124 N. W. 886; In re Winslow's Will, 146 Ia. 67, 124 N. W. 895; McClure *v.* Clement, 161 Mo. App. 23, 143 S. W. 82; In re Klinzner's Will, 71 Misc. 620, 130 N. Y. S. 1059; Harrell *v.* Hagan, 150 N. C. 242, 63 S. E. 952; George *v.* Crim, 66 W. Va. 421, 66 S. E. 526.

In an action to recover possession of a diamond ring which plaintiff alleged that the defendant unlawfully withheld from her, a witness for the plaintiff testified, in substance, that the plaintiff purchased the ring of him and paid for it, and that at the time it was delivered, by parol agreement between the plaintiff and defendant's intestate, Doughan, the ring was loaned to the latter; the title and ownership being retained by the plaintiff. He was not "a person interested in the event" of this action. "He had sold the ring and received his pay therefor, and it made not the slightest difference to him, directly or indirectly, whether subsequently the ownership of the ring remained in plaintiff or passed to defendant's intestate." Abbott *v.* Doughan, 204 N. Y. 223, 97 N. E. 599.

771-69 Powell *v.* Powell, 78 O. St. 331, 85 N. E. 541.

771-71 Sayre *v.* Woodyard, 66 W. Va. 288, 66 S. E. 320.

772-72 Woodbury *v.* Henning, 148 Ia. 23, 126 N. W. 912; Farmers' Bk. *v.* Wickliffe, 134 Ky. 627, 121 S. W. 498 (stockholder); Scheu *v.* Blum, 136 App. Div. 592, 121 N. Y. S. 122; In re Rossell, 126 App. Div. 607, 110 N. Y. S. 706; Boltz *v.* Muehlhof, 37 Pa. Super. 375.

An agent is "in no legal sense one of the 'original parties' to the contract. The witness is not a party to this suit, and, if he ever had any pecuniary interest in the purchase, it is clear that he had no such interest in it or in this controversy when he testified. He was clearly a competent witness." Jefferson *v.* Gregory, 113 Va. 61, 73 S. E. 452.

772-73 Oliver *v.* Williams, 163 Ala. 376, 50 S. 937; First Nat. Bk. *v.* Alexander, 161 Ala. 580, 50 S. 45 (witness a party to another suit brought by the same plaintiff); Wetzel *v.* Firebaugh, 251 Ill. 190, 95 N. E. 1085; Ackman *v.* Potter, 239 Ill. 578, 88 N. E. 231; So. C. Inst. *v.* Avery's Est., 157 Ill. App. 568; Mollison *v.* Rittgers, 140 Ia. 365, 118 N. W. 512; Cooper *v.* Cooper, 65 W. Va. 712, 64 S. E. 927. See British & A. Mort. Co. *v.* Worrill, 168 Fed. 120.

773-74 Jones *v.* Abbott, 235 Ill. 220, 85 N. E. 279; Orndorf *v.* Jeffries, 46 Ind. App. 254, 91 N. E. 608; Burnett *v.* Smith, 93 Miss. 566, 47 S. 117; Patterson *v.* Hughes, 236 Pa. 315, 84 A. 829.

774-75 Jones *v.* Abbott, supra; Mollison *v.* Rittgers, supra; Boltz *v.* Muehlhof, supra; Sayre *v.* Woodyard, 66 W. Va. 288, 66 S. E. 320.

775-76 First Nat. Bk. *v.* Gerli, 225 Pa. 256, 74 A. 52.

775-77 Hungerford *v.* Snow, 129 App. Div. 816, 114 N. Y. S. 127.

776-78 Ratliff *v.* Daniel, 137 Ky. 55, 121 S. W. 1034; Powell *v.* Powell, 78 O. St. 331, 85 N. E. 541.

776-79 First Nat. Bk. *v.* Alexander, 161 Ala. 580, 50 S. 45.

777-81 Glennan *v.* Dep. Co., 152 App. Div. 316, 136 N. Y. S. 247.

777-82 Allen *v.* Shires, 47 Colo. 433, 107 P. 1070.

778-86 McCall *v.* Hall (Ala.), 62 S. 68.

778-90 Husband not disqualified on ground of interest to testify in his wife's suit against estate for services rendered deceased. Hall *v.* Hilley, 139 Ga. 13, 76 S. E. 566.

779-91 Scheu *v.* Blum, 136 App. Div. 592, 121 N. Y. S. 122.

779-94 In re Russell, 126 App. Div. 607, 110 N. Y. S. 706.

779-95 Cooper *v.* Cooper, 65 W. Va. 712, 64 S. E. 927.

Possible liability for costs does not disqualify witness who testifies against interest. Ackman *v.* Potter, 239 Ill. 578, 88 N. E. 231.

780-97 In re Martin's Will (Ia.), 142 N. W. 74.

780-98 Augusta N. S. Co. *v.* Forlaw, 133 Ga. 138, 65 S. E. 370; In re McNaughton's Will, 138 Wis. 179, 118 N. W. 997.

780-1 In Kentucky the assignment of a claim by a person who is incompetent to testify for himself does not make him competent to testify for another. Davis *v.* Strange, 156 Ky. 420, 161 S. W. 217. See also infra, p. 798, n. 81.

781-3 *Contra*, Augusta N. S. Co. *v.* Forlaw, 133 Ga. 138, 65 S. E. 370.

784-22 Elwell *v.* Hicks, 238 Ill. 170, 87 N. E. 316; Greensburg B. & L. Assn. *v.* Bates, 36 Pa. C. C. 257.

784-23 Burke *v.* Burke, 240 Pa. 379, 87 A. 960.

785-25 Ratliff *v.* Daniel, 137 Ky. 55, 121 S. W. 1034.

785-26 See Abrahams *v.* Woolley, 243 Ill. 365, 90 N. E. 667.

787-35 Massey *v.* Co. (Ky.), 116 S. W. 276; Peteron *v.* Co., 111 Minn. 105, 126 N. W. 534 (though acting as manager); Greensburg B. & L. Assn. *v.* Bates, 36 Pa. C. C. 257.

788-38 Johnson *v.* Assn., 136 Wis. 528, 117 N. W. 1019 (before amendment of 1907).

789-41 See Spithover *v.* Assn., 225 Mo. 660, 125 S. W. 766.

789-44 Disqualifying status must exist when witness testifies. In re McNaughton's Will, 138 Wis. 179, 118 N. W. 997.

790-49 British & A. Mort. Co. *v.* Worrill, 168 Fed. 120; So. Collegiate Institute *v.* Avery's Est., 157 Ill. App. 568; Massey *v.* Co., (Ky.), 116 S. W. 276; Taylor *v.* George, 176 Mo. App. 215, 161 S. W. 1187; Jackson *v.* Smith, 139 Mo. App. 691, 123 S. W. 1026.

791-50 Collins *v.* Co., 143 Mo. App. 333, 127 S. W. 641; Jackson *v.* Smith (Mo. App.), 118 S. W. 659.

792-55 Currier *v.* Clark, 145 Ia. 613, 124 N. W. 622; Dewein *v.* Hooss, 237 Mo. 23, 139 S. W. 195; Smith *v.* Olivarri (Tex. Civ.), 127 S. W. 235.

793-56 Elwell *v.* Hicks, 238 Ill. 170, 87 N. E. 316.

794-60 Augusta N. S. Co. *v.* Forlaw, 133 Ga. 138, 65 S. E. 370.

794-64 Farmers' M. Co. *v.* Woodworth, 109 Va. 596, 64 S. E. 986.

795-69 Gray *v.* Wright, 142 Ia. 225, 119 N. W. 612; Boney *v.* Boney, 161 N. C. 614, 77 S. E. 784.

796-73 Zwietusch *v.* Luehring, 156 Wis. 96, 144 N. W. 257.

798-81 Davis *v.* Strange, 156 Ky. 420, 161 S. W. 217.

800-97 Mortgagor not disqualified as witness in favor of mortgagee's grantee. Shook *v.* Fox, 126 App. Div. 565, 110 N. Y. S. 951.

801-99 Jones *v.* Gatliff (Ky.), 113 S. W. 436; Chase *v.* Woodruff, 138 Wis. 641, 120 N. W. 499. *Contra*, Ivy *v.* Ivy (Tex. Civ.), 128 S. W. 682. See Wiegand *v.* Rutschke, 253 Ill. 260, 97 N. E. 641.

801-2 Shook *v.* Fox, 126 App. Div. 565, 110 N. Y. S. 951; Preston *v.* Co., 50 Wash. 377, 97 P. 293.

801-3 Ables *v.* Ackley, 133 Mo. App. 594, 113 S. W. 698.

Assignee may testify against interest.

Goldschmidt *v.* Ins. Co., 134 App. Div. 475, 119 N. Y. S. 233.

802-8 Buckman *v.* R. Co., 227 Pa. 277, 75 A. 1069.

803-9 Bailey *v.* Robison, 244 Ill. 16, 91 N. E. 98; Condor *v.* Secrest, 149 N. C. 201, 62 S. E. 921.

803-13 McKee *v.* Downing, 224 Mo. 115, 124 S. W. 7.

803-14 In re Whitlow's Est. (Mo. App.), 167 S. W. 463.

810-46 Executor's right to commissions disqualifies him in suit to set will aside. Jones *v.* Abbott, 235 Ill. 220, 85 N. E. 279 (wife incompetent where he is).

812-61 In re Mulligan, 82 Misc. 336, 143 N. Y. S. 686.

813-65 Snellgrove *v.* Evans, 165 Ala. 322, 51 S. 560; De Nieff *v.* Howell, 138 Ga. 248, 75 S. E. 202; Grindle *v.* Grindle, 240 Ill. 143, 88 N. E. 473.

813-68 Stone *v.* St. Bk., 64 Fla. 456, 59 S. 945; Grindle *v.* Grindle, 240 Ill. 143, 88 N. E. 473.

813-69 Royal F. Union *v.* Stahl (Tex. Civ.), 126 S. W. 920.

813-72 Gloss's Est., 36 Pa. C. C. 457.

814-75 Crevelíng *v.* Brown, 147 Ia. 45, 125 N. W. 807.

814-77 Worrell *v.* Torrance, 242 Ill. 64, 89 N. E. 693.

Statute using words where judgment may be obtained for or against executor, etc., does not apply to controversies between devisees over a will or between devisees or legatees and heirs as to distribution of estate by will or otherwise. Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405.

814-80 Bannon *v.* Co., 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843 (analogous transaction).

814-81 In re Jeffrey's Will, 129 App. Div. 791, 114 N. Y. S. 667.

814-82 Kirby *v.* Kirby, 236 Ill. 255, 86 N. E. 259; Burch *v.* Nicholson (Ia.), 137 N. W. 1066.

815-86 Hoffner *v.* Custer, 237 Ill. 64, 86 N. E. 737.

815-89 Legatee not disqualified where the opposite party to the suit likewise claims as legatee and not as heir or legal representative. Schnable *v.* Henderson (Tex. Civ.), 152 S. W. 231.

815-90 Nelson *v.* Olson, 108 Minn. 109, 121 N. W. 609.

815-91 Orndorf *v.* Jeffries, 46 Ind. App. 254, 91 N. E. 608.

816-98 In re Bresler's Est., 155 Mich. 567, 119 N. W. 1104.

817-1 Grand Lodge *v.* Brown, 160 Mich. 437, 125 N. W. 400; Whitehead *v.* Kirk (Miss.), 61 S. 737; Collard *v.* Burch, 138 Mo. App. 94, 119 S. W. 1009.

Surviving husband is incompetent to testify on his own behalf as to transactions with deceased wife. Eberhart *v.* Rath, 89 Kan. 329, 131 P. 604.

817-4 Orndorf *v.* Jeffries, supra; Umbenhouer *v.* Umbenhouer, 31 O. C. C. 317.

818-17 Widow may testify to any fact she might have testified to if husband alive. Swearingen *v.* Tyler, 132 Ky. 458, 116 S. W. 331.

819-20 Execution of mortgage on community property to decedent may be testified to by his widow in action by her to foreclose as to her interest. Blair *v.* Breeding, 57 Tex. Civ. 147, 121 S. W. 869.

820-29 Moylan *v.* Moylan, 49 Wash. 341, 95 P. 271.

In action against surety on partnership notes, in which surviving partner filed cross-petition seeking to cancel notes executed by him to surety, such partner not disqualified to testify to partnership relation and manner in which business conducted. Culbertson *v.* Sallinger (Ia.), 117 N. W. 6.

821-32 Shaw *v.* Lobe, 58 Wash. 219, 108 P. 450.

Surviving partner not legal representative of deceased partner in suit by him for benefit of firm. Shivel *v.* Greer (Tex. Civ.), 123 S. W. 207.

822-39 See infra, 820-29.

826-66 Creditor whose claim has thus been paid, is competent to testify in behalf of the representative, as he is not a party to the proceedings or interested in the event nor does the representative derive title through or under such creditor. In re Mulligan, 82 Misc. 336, 143 N. Y. S. 686.

826-71 Keenan *v.* Blue, 240 Ill. 177, 88 N. E. 553 (in absence of evidence showing deceased knew of facts surrounding execution of note when he bought it).

828-83 Dillivan *v.* Bk. (Ia.), 124 N. W. 350; Burke *v.* Burke, 240 Pa. 379, 87 A. 960.

828-84 White *v.* Christopherson, 46 Colo. 46, 102 P. 747; Spivey *v.* Walton (Miss.), 64 S. 937; Hungerford *v.* Snow, 129 App. Div. 816, 114 N. Y. S. 127.

829-86 Collins *v.* Lawson's Committee, 140 Ky. 510, 131 S. W. 262.

830-90 Hamilton *v.* Chaffee, 158 Ill. App. 54.

835-18 Willis *v.* Bonner, 136 Ga. 720, 71 S. E. 1048; Pierce *v.* Jacobs, 157 Ill. App. 441; Robinson *v.* Kraft, 154 Ill. App. 213; Swan *v.* Price (Tex. Civ.), 162 S. W. 994.

836-20 Stewart Est. *v.* Falkenberg, 82 Kan. 576, 109 P. 170.

836-22 Bartley *v.* Knott, 140 Ky. 288, 130 S. W. 1096.

836-23 See Bannon *v.* Co., 136 Ky. 556, 119 S. W. 170.

838-34 Lockard *v.* Vare, 230 Pa. 591, 79 A. 802.

838-39 Taylor *v.* Hodges, 65 Fla. 502, 62 S. 588; In re Rohrig, 176 Mich. 407, 142 N. W. 561.

838-40 Sheldon *v.* Thornburg, 153 Ia. 622, 133 N. W. 1076.

841-52 Lieber *v.* Bk., 137 Mo. App. 158, 117 S. W. 672 (payee of check forged by decedent).

842-56 Turner *v.* Woodward, 136 Ga. 275, 71 S. E. 418.

842-58 Ritz *v.* Rea, 155 Ia. 181, 135 N. W. 645.

845-74 Crowell *v.* Ins. Co., 140 Ia. 258, 118 N. W. 412.

846-84 Burke *v.* Burke, 240 Pa. 379, 87 A. 960.

849-99 Gurley *v.* Hanrick's Heirs (Tex. Civ.), 139 S. W. 721.

850-6 *Contra*, Foley *v.* Sav. Bk., 79 Misc. 220, 139 N. Y. S. 915, holding a bank's interest in a deposit of deceased, to be an interest derived from, through or under the deceased.

Donee, in gift causa mortis, of bank book, suing the bank and the administrator to recover the deposit is incompetent to testify to the transaction in which the decedent made the gift. Elliott *v.* Bank, 79 Misc. 258, 139 N. Y. S. 939.

851-7 *Contra* in suit against co-heir claiming as grantee of decedent. Hudson *v.* Hudson, 237 Ill. 9, 86 N. E. 661.

854-29 Farmer's U. W. Co. *v.* Wells, 65 Fla. 350, 61 S. 745; Cobb *v.* Hall, 136 Ga. 254, 71 S. E. 145.

855-42 Joint maker of note, not incompetent in action against himself and administrator of his deceased co-maker. Hill-D. Bk. Co. *v.* Loomis, 140 Mo. App. 62, 119 S. W. 967.

858-63 Dolvin *v.* Co., 131 Ga. 300, 62 S. E. 198; Doggett *v.* Greene, 254 Ill. 134, 98 N. E. 219.

859-66 Not protected. Birdsall *v.* Coon, 157 Mo. App. 439, 136 S. W. 243.

859-67 Swearingen *v.* Tyler, 132 Ky. 458, 116 S. W. 331.

860-69 Carroll *v.* United Rys., 157 Mo. App. 247, 137 S. W. 303; Berry *v.* Ins. Co., 83 S. C. 13, 64 S. E. 859.

860-70 Anderson *v.* R. Co., 134 Ky. 343, 120 S. W. 298.

Opposite party to transaction with deceased agent of corporation and another who survives, not disqualified. Augusta N. S. Co. *v.* Forlaw, 133 Ga. 138, 65 S. E. 370.

864-85 Party to transaction relied upon to establish resulting trust may testify against heir of decedent though disqualified as to his co-party, the personal representative. Eagan *v.* Kenney, 75 N. H. 410, 75 A. 98.

865-92 In re Hennessey's Will, 157 App. Div. 136, 141 N. Y. S. 736.

Delivery of a deed being proved aliunde grantee may testify to its loss. Cartright *v.* Cartright, 70 W. Va. 507, 74 S. E. 655.

865-95 Watkins *v.* Carter, 161 Ala. 456, 51 S. 318.

Mo. R. S. 1909, §6354, disqualifies any person from testifying as a witness in a cause, regarding any matter involved therein when the other party thereto is dead or insane. "The wisdom and justice of this statute at once suggests itself to all fair-minded persons, namely, that, when death or insanity has closed the lips of one of the parties to the contract or cause of action in issue and on trial, then the law should hold mute the tongue of the other." Lieber *v.* Lieber, 239 Mo. 1, 143 S. W. 458.

"Transaction" defined. — Sheldon *v.* Thornburg, 153 Ia. 622, 133 N. W. 1076; McIntyre *v.* Wright, 113 Va. 299, 74 S. E. 172.

866-99 Norsworthy *v.* Willoughby, 176 Ala. 145, 57 S. 717; Loomis *v.* Loomis, 178 Mich. 221, 144 N. W. 552.

866-2 Smith *v.* Berry, 155 Ky. 686, 160 S. W. 247.

866-3 Blue *v.* Blue, 155 Ala. 206, 46 S. 751 (admission by administrators as to use of money raised by decedent); Di Nardi *v.* S. Co. (Del.), 84 A. 124; Friebe *v.* Elder (Ind. App.), 103 N. E. 429; Swearingen *v.* Tyler, 132 Ky. 458, 116 S. W. 331; Keck *v.* Woodward, 53

Tex. Civ. 267, 116 S. W. 75; Davidson *v.* Browning (W. Va.), 80 S. E. 363.

"I think it must be regarded as the rule that a witness who might be disqualified may, by his own testimony, show the existence of conditions permitting him to testify concerning the acts of a deceased person. This question has been involved commonly in the case of an interested witness offered for the purpose of proving declarations of a deceased person in a conversation with a third party in which the proposed witness took no part; and, while it has been questioned whether the witness might, by his own testimony, establish his aloofness from the conversation, for the purpose of permitting him to testify concerning what was said by the deceased (Petrie *v.* Petrie, 6 N. Y. S. 831), this has repeatedly been allowed and sometimes apparently where the question was fairly raised. Lobdell *v.* Lobdell, 36 N. Y. 327, 332, 333; Stern *v.* Eisner, 51 Hun 224, 4 N. Y. S. 406; Nicholls *v.* Van Valkenburgh, 15 Hun 230, 234; Holcomb *v.* Holcomb, 95 N. Y. 316, 326." Abbott *v.* Doughan, 204 N. Y. 223, 97 N. E. 599.

Kind and amount of work required to care for decedent and his household may be testified to if witness does not state what service he rendered. Wise *v.* Outtrim, 139 Ia. 192, 117 N. W. 264.

Conversations between decedent and third person overheard by witness not within statute using "personal transaction or communication." Ibid; Culbertson *v.* Sallinger (Ia.), 117 N. W. 6.

867-4 Blount *v.* Blount, 158 Ala. 242, 48 S. 581.

867-5 Ibid; McCoy *v.* McCoy (Ky.), 125 S. W. 177.

867-6 Blount *v.* Blount, 158 Ala. 242, 48 S. 581; In re Winslow's Will (Ia.), 122 N. W. 971 ("We have consistently held that the statute does not exclude proof of facts inferentially showing transactions with decedent"); Harper *v.* Harper, 148 N. C. 453, 62 S. E. 553.

The test applied in New Jersey is that a transaction occurred with deceased so as to exclude the other party where deceased, if living, could contradict the testimony of such party of his own knowledge, that testimony being false. Van Wagenen *v.* Bonnot, 74 N. J. Eq. 843, 70 A. 143.

868-7 Quandt *v.* Ernst, 143 Ill. App. 299.

Under statute excluding testimony by any party as to any transaction by any testator or intestate represented in the action, party claiming a donatio causa mortis is incompetent to testify closed parcel delivered by donor remained unopened until after his death. Van Wagenen *v.* Bonnot, 74 N. J. Eq. 843, 70 A. 143.

868-8 Napier *v.* Elliott, 177 Ala. 113, 58 S. 435; Blount *v.* Blount, 158 Ala. 242, 48 S. 581.

870-17 In re Brown's Will, 143 Ia. 649, 120 N. W. 667; Creveling *v.* Brown, 147 Ia. 45, 125 N. W. 807; Royal F. Union *v.* Stahl (Tex. Civ.), 126 S. W. 920.

870-18 Boeck *v.* Milke, 141 Ia. 713, 118 N. W. 874.

871-27 Wetmore *v.* Thurman, 121 Minn. 352, 141 N. W. 481.

871-30 Eubanks *v.* Mercantile Co., 171 Ala. 488, 55 S. 98; Conner *v.* Conner, 145 Ill. App. 608; Abrahams *v.* Woolley, 243 Ill. 365, 90 N. E. 667; Brown *v.* Patterson, 224 Mo. 639, 124

871-31 Brown *v.* Patterson, 224 Mo. 639, 124 S. W. 1.

872-35 Statements in decedent's will, if relied upon by proponents, may be met by contestants. In re Winslow's Will (Ia.), 122 N. W. 971.

873-37 Wooden *v.* Wooden (Tex. Civ.), 116 S. W. 627. See Gaffney *v.* Mentele, 23 S. D. 38, 119 N. W. 1030.

873-38 Griffin *v.* Nicholas, 224 Mo. 275, 123 S. W. 1063.

Statement of deceased, as mere incident, proved as basis for showing admission by party. Peters *v.* Schultz, 107 Minn. 29, 119 N. W. 385.

873-41 Date on which indorsement was made on a lease is a matter involving a transaction with deceased and witness is prohibited from testifying as to it. Wald *v.* Weilhamer, 82 Misc. 455, 144 N. Y. S. 929.

875-48 Graham *v.* McKinney, 147 Ia. 164, 125 N. W. 840 (amount of care received from decedent).

876-51 See Miller *v.* Mathias, 145 Ill. App. 465.

876-52 Graham *v.* McKinney, 147 Ia. 164, 125 N. W. 840; Lawyer *v.* White, 198 N. Y. 318, 91 N. E. 840.

877-55 Plowman *v.* Nicholson, 81 Kan. 210, 105 P. 692; U. S. H. & A. Ins. Co. *v.* Jolly (Ky.), 118 S. W. 281.

878-57 In re Winslow's Will (Ia.), 122 N. W. 971; Kerr *v.* Kerr, 85 Kan.

460, 116 P. 880; Fish *v.* Poorman, 85 Kan. 237, 116 P. 898.

880-63 Dennis *v.* Perkins, 88 Kan. 428, 129 P. 165.

880-65 Blount *v.* Blount, 158 Ala. 242, 48 S. 581.

882-71 See Wilson *v.* Wilson, 83 Neb. 562, 120 N. W. 147.

882-72 Chapman *v.* Greene, 27 S. D. 178, 130 N. W. 30.

882-73 "The test laid down in our decisions in ascertaining what is a transaction with the deceased about which the other party to it cannot testify is to inquire whether in case the witness testify falsely the deceased if living could contradict it of his own knowledge." Campbell *v.* Akarman, 83 N. J. L. 567, 83 A. 881, *cit.* Van Wagenen *v.* Bonnot, 74 N. J. Eq. 843, 70 A. 143, 18 L. R. A. (N. S.) 400.

882-74 N. Y. Code Civ. Proc. §829, "excludes the testimony of an interested witness to any knowledge which he has gained by the use of his senses from the personal presence of the deceased." Griswold *v.* Hart, 205 N. Y. 384, 98 N. E. 918.

882-75 Larson *v.* Lund, 109 Minn. 372, 123 N. W. 1070.

884-78 Seeing deed in decedent's possession in connection with transaction with him, matter respecting which survivor may not testify. Chase *v.* Woodruff, 138 Wis. 641, 120 N. W. 499.

884-79 Willis *v.* Zorger, 258 Ill. 574, 101 N. E. 963; Quandt *v.* Ernst, 143 Ill. App. 299; Keenan *v.* Blue, 146 Ill. App. 7; Eberhart *v.* Rath, 89 Kan. 329, 131 P. 604; Howell *v.* Co. (Ky.), 121 S. W. 645; Richardson *v.* Isaacs (Ky.), 118 S. W. 1003; Hunter *v.* Briggs, 254 Mo. 28, 162 S. W. 204; Blood *v.* W. O. W., 140 Mo. App. 526, 120 S. W. 700; Knight *v.* Everett, 152 N. C. 118, 67 S. E. 328; Patterson *v.* Hughes, 236 Pa. 315, 84 A. 829.

If validity of contract not essential to establishment of rights of devisee he may testify to contract between himself and testator. In re Mason's Will, 82 Vt. 160, 72 A. 329.

An employe of plaintiff who witnessed the contract with decedent is incompetent to testify as to it. Sherman *v.* La e, 139 Ga. 781, 78 S. E. 123.

884-82 Richardson *v.* Isaacs (Ky.), 118 S. W. 1003; Koogle *v.* Cline, 110 Md. 587, 73 A. 672.

885-84 Stokes *v.* Stokes, 240 Ill. 330, 88 N. E. 829.

885-86 Lester *v.* Hutson (Tex. Civ.), 167 S. W. 321.

886-89 Sheldon *v.* Thornburg, 153 Ia. 622, 133 N. W. 1076.

888-94 Di Nardi *v.* Co. (Del.), 84 A. 124; Clifton *v.* Meuser, 79 Kan. 655, 100 P. 645; Heery *v.* Reed, 80 Kan. 380, 102 P. 846; Lowe *v.* Lowe, 111 Md. 113, 73 A. 878.

888-95 Giering *v.* Sauer, 120 Md. 295, 87 A. 774; Wells *v.* Hobbs, 57 Tex. Civ. 375, 122 S. W. 451 (going with deceased, taking him from place to place, waiting on him, and his use of supplies purchased by witness, transactions otherwise, as to what witness did).

889-96 See preceding note.

890-97 Fitch *v.* Martin, 83 Neb. 124, 119 N. W. 25 (entries in plaintiff's diary relating to transactions with decedent, inadmissible); Brady *v.* Donohue, 139 N. Y. S. 851; Knight *v.* Everett, 152 N. C. 118, 67 S. E. 328.

890-5 Fitch *v.* Martin, 74 Neb. 538, 104 N. W. 1072.

892-10 Wilkins *v.* Brock, 81 Vt. 332, 70 A. 572.

893-14 If delivery of a deed to the grantee be fully proven by other competent witnesses, the grantee is then competent to prove its subsequent loss. Cartright *v.* Cartright, 70 W. Va. 507, 74 S. E. 655.

893-15 *Contra* if facts do not exclude means of delivery otherwise than by decedent. Timlin *v.* Soc., 141 Wis. 276, 124 N. W. 253.

893-16 *Contra.* Conner *v.* Conner, 145 Ill. App. 608 (benefit certificate).

893-19 Wilber *v.* Gillespie, 127 App. Div. 604, 112 N. Y. S. 20.

893-20 Terry *v.* Glover, 235 Mo. 544, 139 S. W. 337; Wilson *v.* Wilson, 83 Neb. 562, 120 N. W. 147; Davis *v.* Davis, 24 S. D. 474, 124 N. W. 715; Cartright *v.* Cartright, 70 W. Va. 507, 74 S. E. 655.

895-25 Conner *v.* Conner, 145 Ill. App. 608; Draper *v.* Brown, 153 Mich. 120, 117 N. W. 213.

895-27 Wilber *v.* Gillespie, 127 App. Div. 604, 112 N. Y. S. 20; Jones *v.* Subera, 25 S. D. 223, 126 N. W. 253.

895-28 Bardsley *v.* Truax, 64 Wash. 400, 116 P. 1075.

896-29 In re Holloway's Est., 89 Neb. 403, 131 N. W. 606.

897-35 Defendant may testify his father owned no other land than de-

scribed in note sued upon. Edwards *v.* White (Tex. Civ.), 120 S. W. 914.

897-37 Merchants' L. & T. Co. *v.* Egan, 143 Ill. App. 572; Kern *v.* Cooper (Miss.), 64 S. 838; Groff *v.* Stitzer, 75 N. J. Eq. 452, 72 A. 970; Moore *v.* Fingar, 131 App. Div. 399, 115 N. Y. S. 1035.

898-46 Million *v.* Million (Ky.), 121 S. W. 985; Jackman *v.* Inman, 137 Wis. 30, 118 N. W. 189.

899-47 *Contra* in behalf of heirs; but otherwise in behalf of widow claiming property as belonging to community. Edwards *v.* White (Tex. Civ.), 120 S. W. 914.

899-50 Worrell *v.* Torrance, 242 Ill. 64, 89 N. E. 693 (payment by decedent's widow).

901-59 Whitehead *v.* Kirk (Miss.), 61 S. 737. *Contra,* Bannon *v.* Co., 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843.

902-62 Bannon *v.* Co., 135 Ky. 556, 119 S. W. 1170, 124 S. W. 843, *foll.* Swinebroad *v.* Bright, 116 Ky. 514, 76 S. W. 365, 25 Ky. L. R. 742, and *over.* view expressed in 119 S. W. 1170.

902-66 Freeman *v.* Freeman, 71 W. Va. 303, 76 S. E. 657.

904-73 Collard *v.* Burch, 138 Mo. App. 94, 119 S. W. 1009.

904-74 Weatherall *v.* Weatherall, 56 Wash. 344, 105 P. 822; Weidenhoft *v.* Primm, 16 Wyo. 340, 94 P. 453.

904-75 Nelson *v.* Carlson, 48 Wash. 651, 94 P. 477.

906-82 Going with decedent to place named, leaving him there and relative positions of witness, decedent and others at a certain time, not matters within statute. In re Bowling's Will, 150 N. C. 507, 64 S. E. 368.

906-86 Mackenzie *v.* Barrett, 148 Ill. App. 414; Garten *v.* Trobridge, 80 Kan. 720, 104 P. 1067.

906-87 Foster *v.* Allshouse, 222 Pa. 446, 71 A. 915.

907-90 Proctor *v.* Blanchard, 75 N. H. 186, 72 A. 210.

907-91 Wilber *v.* Gillespie, 127 App. Div. 604, 112 N. Y. S. 20.

909-95 Ibid.

909-97 Blount *v.* Blount, 158 Ala. 242, 48 S. 581 (grantor may testify he did not execute deed to decedent unless it is clearly shown he was party to deed or transaction).

911-4 Subscribing witness a party. Merck *v.* Merck, 89 S. C. 347, 71 S. E. 969. *Contra.* Freeman *v.* Blount, 172 Ala. 655, 55 S. 293.

914-11 Cartright *v.* Cartright, 70 W. Va. 507, 74 S. E. 655.

915-18 Quandt *v.* Ernst, 143 Ill. App. 299.

916-22 *Contra* if it is proposed to show by a party whose book it was, by whom kept, for what purpose and what it purported to show. Stauffer *v.* Martin, 43 Ind. App. 675, 88 N. E. 363.

Testimony as to book entries by deceased, inadmissible in favor of disqualified party. Smith *v.* Scott, 51 Wash. 330, 98 P. 763.

916-26 Loudermilch's Est., 35 Pa. C. C. 318, 18 Pa. Dist. 787 (joint maker).

918-36 Dolvin *v.* Co., 131 Ga. 300, 62 S. E. 198.

918-38 See Fagan *v.* Troutman, 25 Colo. App. 251, 138 P. 442.

918-39 Abrahams *v.* Woolley, 243 Ill. 365, 90 N. E. 667.

918-41 Smith *v.* Olivarri (Tex. Civ.), 127 S. W. 235.

Testimony not within statute.—Tutwiler *v.* Burns, 160 Ala. 386, 49 S. 455.

920-45 Beatty *v.* Snouffer (Ia.), 146 N. W. 844; Bennett *v.* Miller, 158 Ky. 105, 166 S. W. 805; Mariner *v.* Wiens, 137 Wis. 637, 119 N. W. 340 (execution of contract by deceased for another, in presence of both parties).

920-49 Doggett *v.* Greene, 254 Ill. 134, 98 N. E. 219; McBride *v.* McBride, 142 Ia. 169, 120 N. W. 709; Russell *v.* Carman, 114 Md. 25, 78 A. 903; Yearsley *v.* Blake, 85 Neb. 736, 124 N. W. 161.

921-51 Holway *v.* Sanborn, 145 Wis. 151, 130 N. W. 95.

928-69 Bryan *v.* Palmer, 83 Kan. 298, 111 P. 443.

929-71 Scott *v.* Micek, 86 Neb. 421, 125 N. W. 615; Lawyer *v.* White, 198 N. Y. 318, 91 N. E. 840.

929-72 Wright *v.* Hawes (Ky.), 121 S. W. 611.

930-76 Montague *v.* Priester, 82 S. C. 492, 64 S. E. 393.

930-77 Jamison *v.* Auxier, 145 Ia. 654, 124 N. W. 606; McCarthy *v.* Stanley, 151 App. Div. 358, 136 N. Y. S. 386.

931-80 Hall *v.* Hilley, 139 Ga. 13, 76 S. E. 566.

933-89 Van Seeiver *v.* King, 176 Mich. 605, 142 N. W. 1069. In re Rohrig, 176 Mich. 407, 142 N. W. 561; Cald-

well *v.* Goodenough, 170 Mich. 114, 135 N. W. 1057; Bigelow *v.* Sheehan, 166 Mich. 89, 131 N. W. 78.

934-93 Beadle *v.* Anderson, 158 Mich. 483, 123 N. W. 8.

935-5 McMurray *v.* Bodwell, 16 Cal. App. 574, 117 P. 627; Sheldon *v.* Thornburg, 153 Ia. 622, 133 N. W. 1076; Jordan *v.* Jordan, 76 N. H. 20, 78 A. 1077.

937-21 Larson *v.* Lund, 109 Minn. 372, 123 N. W. 1070.

938-23 Yoder *v.* Engelbert, 155 Ia. 515, 136 N. W. 522.

939-24 Smith *v.* Huff (Tex. Civ.), 164 S. W. 429.

939-27 Rozelle *v.* Lewis, 37 Pa. Super. 563.

942-43 Anthony *v.* Sturdivant, 163 Ala. 530, 50 S. 1028.

948-72 Jackson *v.* Cook, 71 W. Va. 210, 76 S. E. 443.

950-81 Carwille *v.* Franklin, 164 Ala. 543, 51 S. 396.

950-84 Corless *v.* Carlisle, 122 N. Y. S. 407.

950-85 In re Runious, 71 Misc. 641, 130 N. Y. S. 1039.

Inadmissible books cannot be used to refresh disqualified witness' recollection and qualify him to testify. Dohmen *v.* Blum's Est., 137 Wis. 560, 119 N. W. 349.

960-31 Abbott *v.* Doughan, 123 N. Y. S. 123.

965-63 Leavea *v.* R. Co., 171 Mo. App. 24, 153 S. W. 500.

969-79 Snyder *v.* Patrick, 175 Mo. App. 320, 162 S. W. 312.

970-84 Barnett *v.* Nat. Bk., 148 Ia. 667, 127 N. W. 1012; Partridge *v.* Meeker, 169 Mich. 303, 135 N. W. 248.

974-8 *Contra.* Holtman Co. *v.* Sweeney (Ky.), 125 S. W. 180 (Code).

979-28 Spencer *v.* Potter's Est., 85 Vt. 1, 80 A. 821.

983-49 Donee, not assignee; allegation such is fact does not disqualify witness. McAleer *v.* McNamara, 140 Ia. 112, 117 N. W. 1122.

984-52 Short *v.* Thomas, 178 Mo. App. 400, 163 S. W. 252.

989-78 Anthony *v.* Sturdivant, 163 Ala. 530, 50 S. 1028.

999-62 Newberry's Admx. *v.* Rhinehart, 159 Ky. 513, 167 S. W. 674.

1000-75 Newberry's Admx. *v.* Rhinehart, supra; Corless *v.* Carlisle, 122 N. Y. S. 407.

1002-88 Myers *v.* Maulove (Ind. App.), 101 N. E. 661.

1003-89 Gleeson *v.* Costello (Ariz.), 138 P. 544.

1005-3 Allen *v.* Shires, 47 Colo. 433, 107 P. 1070; Cowles *v.* Cowles, 81 Vt. 498, 71 A. 191.

1009-10 Allen *v.* Shires, 47 Colo. 433, 107 P. 1070, (is rendered competent for all purposes, regardless of purpose for which witness called); Plowman *v.* Nicholson, 81 Kan. 210, 105 P. 692; Harper *v.* Corcoran, 166 Mich. 474, 132 N. W. 106; Brown's Est., 36 Pa. C. C. 13; Edwards *v.* White (Tex. Civ.), 120 S. W. 914; Lester *v.* Hutson (Tex. Civ.), 167 S. W. 321; Anderson *v.* Anderson, 136 Wis. 328, 117 N. W. 801.

1010-12 Merchants' L. & T. Co. *v.* Egan, 143 Ill. App. 572.

1010-14 Edwards *v.* White (Tex. Civ.), 120 S. W. 914.

1010-16 Saylor *v.* Saylor, 151 Ky. 694, 152 S. W. 763; Fuller *v.* R. Co., 160 App. Div. 345, 146 N. Y. S. 345.

1010-17 Mollison *v.* Rittgers, 140 Ia. 365, 118 N. W. 512. *Contra.* Lohnes *v.* Baker, 156 Mo. App. 397, 137 S. W. 282.

1011-19 Clark *v.* Clark, 76 N. H. 430, 83 A. 516; Lester *v.* Hutson (Tex. Civ.), 167 S. W. 321.

1014-34 Cowles *v.* Cowles, 81 Vt. 498, 71 A. 191.

1015-38 Plowman *v.* Nicholson, 81 Kan. 210, 105 P. 692 (negative testimony of consideration).

1015-42 Plowman *v.* Nicholson, supra; Watson *v.* Dodson, 57 Tex. Civ. 32, 121 S. W. 209 (entire conversation received if witness examined as to part of it).

1016-43 Richardson *v.* Isaacs (Ky.), 118 S. W. 1003.

1017-50 Anderson *v.* Anderson, 136 Wis. 328, 117 N. W. 801, (on surrebuttal).

1018-53 Galvin *v.* Knights, 169 Mo. App. 496, 155 S. W. 45; Beard *v.* Beard, 66 Or. 526, 133 P. 795.

1023-72 Judy *v.* Judy, 261 Ill. 470, 104 N. E. 256.

1023-74 Patterson *v.* Hughes, 236 Pa. 315, 84 A. 829.

1026-87 Lockwood *v.* Rucker, 34 App. Cas. (D. C.) 376.

1037-29 Adenaw *v.* Piffard, 137 App. Div. 470, 121 N. Y. S. 825.

1039-39 A letter of deceased having been offered in evidence by the protected party this removes the disqualification of the other party as to the matters therein treated. Galvin *v.*

Knights, 169 Mo. App. 496, 155 S. W. 45.

1040-45 Adenaw *v.* Piffard, 137 App. Div. 470, 121 N. Y. S. 825.

1041-46 Adenaw *v.* Piffard, 202 N. Y. 122, 95 N. E. 555, *rev.* 137 App. Div. 470, 121 N. Y. S. 825.

1041-48 Doggett *v.* Greene, 254 Ill. 134, 98 N. E. 219; In re Whitlow's Est. (Mo. App.), 167 S. W. 463.

1042-50 See Chicago T. & T. Co. *v.* Co., 242 Ill. 468, 90 N. E. 282.

1042-51 See Adenaw *v.* Piffard, 202 N. Y. 122, 95 N. E. 555, *rev.* 137 App. Div. 470, 121 N. Y. S. 825.

1042-53 Amidon *v.* Snouffer, 139 Ia. 159, 117 N. W. 44; In re Porter's Est., 60 Misc. 504, 113 N. Y. S. 928.

1042-54 Chicago T. & T. Co. *v.* Co., 242 Ill. 468, 90 N. E. 282.

1043-61 Bland *v.* Beasley, 138 Ga. 712, 76 S. E. 50.

1044-66 Hanrahan *v.* O'Toole, 139 Ia. 229, 117 N. W. 675; Lewis *v.* Jacobs, 153 Mich. 664, 117 N. W. 325.

1044-67 Cooper *v.* Cooper, 65 W. Va. 712, 64 S. E. 927.

1045-73 Campbell *v.* Hughes, 155 Ala. 591, 47 S. 45.

1045-76 Wells *v.* Hobbs, 57 Tex. Civ. 375, 122 S. W. 451.

1046-80 Williams *v.* Joins, 34 Okla. 733, 126 P. 1013.

1046-85 Campbell *v.* Hughes, 155 Ala. 591, 47 S. 45.

1046-86 Administrator may testify in support of his claim if no objection made. In re Porter's Est., 60 Misc. 504, 113 N. Y. S. 928.

1047-91 Dashner *v.* Dashner, 142 Ia. 348, 120 N. W. 975. See Quandt *v.* Ernst, 143 Ill. App. 299.

1048-93 Greensburg B. & L. Assn. *v.* Bates, 36 Pa. C. C. 257.

1052-19 Ross *v.* Ross, 140 Ia. 51, 117 N. W. 1105.

Refusal to strike immaterial when case tried to court. Freeman *v.* Peterson, 45 Colo. 102, 100 P. 600. If testimony not material refusal to strike disregarded. Smith *v.* Moore, 149 N. C. 185, 62 S. E. 892.

1052-20 Incompetent testimony need not be stricken if facts established by testimony of competent witness. Chamberlain *v.* Eddy, 154 Mich. 593, 118 N. W. 499.

TREASON

2-4 U. S. *v.* de los Reyes, 3 Phil. Isl. 349, holding military commissions.

3-7 Capacity of minor to take part in armed rebellion must be proved. U. S. *v.* Racines, 4 Phil. Isl. 427.

4-10 Unexplained possession of ammunition, not convincing. U. S. *v.* Racines, supra.

4-12 Existence of commission does not support conviction in absence of proof showing knowledge thereof. U. S. *v.* Villarino, 5 Phil. Isl. 697. And so of possession of it. U. S. *v.* Manalo, 6 Phil. Isl. 364. Acceptance of commission proved. U. S. *v.* Bautista, 6 Phil. Isl. 581.

4-13 U. S. *v.* de los Reyes, 3 Phil. Isl. 349.

Act of congress of 1902 does not include admissions of fact, from which defendant's guilt may be inferred, made in giving testimony after pleading not guilty. U. S. *v.* Magtibay, 2 Phil. Isl. 703.

Confession must be proved by two witnesses. U. S. *v.* Magtibay, supra.

5-19 U. S. *v.* de la Cruz, 4 Phil. Isl. 120.

9-42 See U. S. *v.* Racines, 4 Phil. Isl. 427

TRESPASS

14-1 Alacusly Lumb. Co. *v.* Gudger, 134 Ga. 603, 68 S. E. 427; Williams *v.* Coal Co., 149 Ky. 409, 148 S. W. 372; Scroggins *v.* Nave, 133 Ky. 793, 119 S. W. 158; Tensas D. L. Co. *v.* Fleischer, 132 La. 1021, 62 S. 129; Hobart-Lee T. Co. *v.* Stone, 135 Mo. App. 438, 117 S. W. 604; Waters *v.* Dennis S. Lumb. Co., 154 N. C. 232, 70 S. E. 284; Lyons *v.* R. E. Co., 71 W. Va. 754, 77 S. E. 525.

16-4 Ashcraft *v.* Courtney (Ky.), 121 S. W. 625.

Failure of evidence.—Lee *v.* Raiford, 171 Ala. 124, 54 S. 543.

16-5 Lavin *v.* Dodge, 30 R. I. 8, 73 A. 376.

16-7 Faulkner *v.* Rocket, 33 R. I. 152, 80 A. 380.

16-8 Muse *v.* Payne, 144 Ky. 30, 137 S. W. 788.

16-9 Steltz *v.* Morgan, 16 Ida. 368, 101 P. 1057; Lehigh, etc. R. Co. *v.* Antalics, 81 N. J. L. 685, 80 A. 469; Deaderick *v.* S., 122 Tenn. 222, 122 S. W. 975; Lyons *v.* R. E. Co., 71 W. Va. 754, 77 S. E. 525.

Assignee of a lease may be cross-examined as to his title. Streit *v.* Wilkerson (Ala.), 65 S. 164.

Actual possession not necessary.—Bowling *v.* Co., 134 Ky. 249, 120 S. W. 317.

18-11 Diamond *v.* Lawyer, 117 N. Y. S. 94 (witness may state who had possession of realty since given date); Thornton *v.* R. Co., 150 N. C. 691, 64 S. E. 776.

18-12 Virginian R. Co. *v.* Jeffries, 110 Va. 471, 66 S. E. 731.

Deed not admissible if possession involved. Diamond *v.* Lawyer, 117 N. Y. S. 94. Admissible if absolute in form without showing compliance by grantee with conditions. Palmer *v.* Peterson, 56 Wash. 74, 105 P. 179.

19-13 McConnell *v.* Slappey, 134 Ga. 95, 67 S. E. 440.

19-17 Receiver's certificate issued to one in possession of land as homestead, sufficient evidence of title. Hiawannee L. Co. *v.* McPhearson, 95 Miss. 589, 49 S. 741, statute.

19-18 Blunck *v.* R. Co., 142 Ia. 146, 120 N. W. 737.

22-29 Tolbert *v.* Rome, 134 Ga. 136, 67 S. E. 540; Virginian R. Co. *v.* Jeffries, 110 Va. 471, 66 S. E. 731.

24-34 Steltz *v.* Morgan, 16 Ida. 368, 101 P. 1057.

26-38 Steltz *v.* Morgan, 16 Ida. 368, 101 P. 1057; Stone *v.* Perkins, 217 Mo. 586, 117 S. W. 717.

26-39 *Contra*, Van Ness *v.* Co., 78 N. J. L. 511, 74 A. 456.

Burden on plaintiff, not in actual possession, to show title. Gaskins *v.* Co., 6 Ga. App. 167, 64 S. E. 714.

Claim of title by both parties from common grantor usually makes prima facie case for plaintiff. Garbult L. Co. *v.* Wall, 126 Ga. 172, 54 S. E. 944. Otherwise where there is a grant of timber separate from land. Gaskins *v.* Co., 6 Ga. App. 167, 64 S. E. 714.

26-43 Wilmer L. Co. *v.* Eisely, 163 Ala. 290, 50 S. 225; Stoneman-Z. L. Co. *v.* McComb, 92 Ark. 297, 122 S. W. 648; Gallegos *v.* Sandoval, 15 N. M. 216, 106 P. 373. *Contra* as to officer acting under process. Gallegos *v.* Sandoval, 15 N. M. 216, 106 P. 373.

Trespass presumed willful and burden of showing contrary rests on defendant. Liberty B. G. Min. Co. *v.* M. Co., 203 Fed. 795, 122 C. C. A. 113.

That trespass was caused by joint act of all must be proved by preponderance of evidence. Clark *v.* Torchiana, 19 Cal. App. 786, 127 P. 831.

27-44 **Condition after trespass** may be shown. Ty. *v.* Gallegos, 17 N. M. 409, 130 P. 245.

Conversation with defendant at time of trespass protesting it, admissible. Southern R. Co. *v.* Hayes (Ala.), 62 S. 874.

City records relating to condemnation admissible. Ewen *v.* Hart (Mo. App.), 166 S. W. 315.

28-47 **Prima facie case.**—Wright *v.* Co. (Ala.), 65 S. 353.

29-51 Moore *v.* Duke, 84 Vt. 401, 80 A. 194.

30-58 Burden on defendant to overcome prima facie case. Dyer *v.* Tyrrell, 142 Mo. App. 467, 127 S. W. 114. And to show justification. Danielson *v.* Kyllonen, 111 Minn. 47, 126 N. W. 404.

31-60 Dyer *v.* Tyrell, 142 Mo. App. 467, 127 S. W. 114; Bolton *v.* Hendrix, 84 S. C. 35, 65 S. E. 947.

31-61 Timanus *v.* Leonard, 121 Md. 583, 89 A. 99.

Good faith is a fact which must be proved. Kahle *v.* Oil Co. (Ind.), 100 N. E. 681.

33-76 Moore *v.* Duke, 84 Vt. 401, 80 A. 194.

34-83 Wilmer L. Co. *v.* Eisely, 163 Ala. 290, 50 S. 225; Walker F. Co. *v.* Dyson, 32 App. Cas. (D. C.) 90.

Burden of proof.—When a conditional license is relied upon in defense to an action of trespass, the burden of proving the license and the performance of its conditions is upon the party alleging the same. Chapman *v.* Pendleton, 34 R. I. 160, 82 A. 1063.

36-91 Wilmer L. Co. *v.* Eisely, 163 Ala. 290, 50 S. 225, error in excluding deed conveying timber and other rights not cured by admission defendant owned timber.

Adverse possession in good faith. Lyons *v.* Stickney, 170 Ala. 134, 54 S. 496.

37-95 If plaintiff relies solely upon his title and makes prima facie case by showing he and defendant claim under common grantor, defendant may show paramount outstanding title in third person or that such grantor conveyed title superior to plaintiff's to another. Defendant need not show third person has true title or that he has it. Leverett *v.* Tift, 6 Ga. App. 90, 64 S. E. 317.

38-97 Mugge *v.* Erkman, 161 Ill.

App. 180; Marron *v.* R. Co., 46 Mont. 593, 129 P. 1055.

Damages suffered by tenant incompetent in action by landlord. Staudt *v.* Power Co., 169 Ill. App. 276.

38-98 So. R. Co. *v.* McEntire, 169 Ala. 42, 53 S. 158; Perkins *v.* Blauth, 163 Cal. 782, 127 P. 50; Northcutt *v.* Co., 178 Mo. App. 389, 162 S. W. 747.

39-3 Nelson *v.* R. Co. (Ia.), 138 N. W. 831; Kentucky S. Co. *v.* Page (Ky.), 125 S. W. 170 (though damage to land may also be recovered); Jensen *v.* Canal Co. (Utah), 137 P. 635.

Difference between value of growing crop if it had matured and value of what was obtained from it, after deducting expense, not shown by proof of what it would have realized. Texas Co. *v.* Lacour (Tex. Civ.), 122 S. W. 424.

40-5 *Contra,* Whitfield *v.* Co., 152 N. C. 211, 67 S. E. 512.

40-7 Reynolds *v.* R. Co., 119 Minn. 251, 138 N. W. 30.

40-8 Injury from flowage of land used for dairy purposes may be shown by evidence of its productive capacity preceding years; number of cows plaintiff grazed thereon; cost incurred in consequence of flooding in caring for them; their relative productivity before and after; effect of debris left on land, and cost of restoring it to former condition, and other like facts. Sacchi *v.* Co., 13 Cal. App. 72, 108 P. 885.

41-12 Ferriday *v.* Grosvenor, 86 Conn. 698, 86 A. 569.

42-18 Russell *v.* Fernandez, 131 La. 76, 59 S. 20.

43-22 Bailey *v.* Hayden, 65 Wash. 57, 117 P. 720.

44-27 Interstate L. Co. *v.* Duke (Ala.), 62 S. 845 (*cit.* 13 ENCYC. OF EV. 44-46); Coleman *v.* Pepper, 159 Ala. 310, 49 S. 310; Kentucky S. Co. *v.* Page (Ky.), 125 S. W. 170; Faris *v.* Co., 84 S. C. 102, 65 S. E. 1017.

45-34 Interstate L. Co. *v.* Duke (Ala.), 62 S. 845, *cit.* 13 ENCYC. OF EV. 44-46.

46-36 Interstate L. Co. *v.* Duke (Ala.), 62 S. 845.

46-39 Callen *v.* Collins, 56 Tex. Civ. 620, 120 S. W. 546.

48-61 Green *v.* Turner, 85 Kan. 877, 116 P. 234; Fox *v.* Turner, 85 Kan. 146, 116 P. 233; Bockes *v.* McAfee, etc. Co., 165 Mich. 7, 130 N. W. 313.

49-62 Skamania Boom Co. *v.* Youmans, 64 Wash. 94, 116 P. 645.

50-66 Bailey *v.* Hayden, 65 Wash. 57, 117 P. 720.

50-68 Hayes *v.* S., 13 Ga. App. 647, 79 S. E. 76.

Presence without bona fide claim, or color of title and without consent of owner must be shown by state. Hayes *v.* S., 13 Ga. App. 647, 79 S. E. 761.

52-73 S. *v.* Davenport, 156 N. C. 596, 72 S. E. 7.

53-74 Hendley *v.* S., 3 Ala. App. 107, 57 S. 1017.

TRESPASS TO TRY TITLE

55-3 Warren *v.* Wilson, 89 S. C. 420, 71 S. E. 818 (*rehear. denied,* 71 S. E. 992); Long *v.* Shelton (Tex. Civ.), 155 S. W. 945; Ruedas *v.* O'Shea (Tex. Civ.), 127 S. W. 891; West *v.* Co., 56 Tex. Civ. 341, 120 S. W. 228 (defendant's affidavit of forgery of deed relied upon by plaintiff casts burden on latter); Crosby *v.* Ardoin (Tex. Civ.), 145 S. W. 709; Roe *v.* Davis (Tex. Civ.), 142 S. W. 950; Mitchell *v.* R. Co. (Tex. Civ.), 130 S. W. 735; Dean *v.* Furrh (Tex. Civ.), 124 S. W. 431; Merriman *v.* Blalack, 56 Tex. Civ. 594, 121 S. W. 552; Hoffman *v.* Buchanan, 57 Tex. Civ. 368, 123 S. W. 168. See Harkrider *v.* Gaut (Tex. Civ.), 167 S. W. 164.

Evidence sufficient.—Guilmartin *v.* Padgett (Tex. Civ.), 138 S. W. 1143; Burns *v.* Parker (Tex. Civ.), 137 S. W. 705; Cochran *v.* Casey (Tex. Civ.), 128 S. W. 1145.

Evidence insufficient.—Surghenor *v.* Ayers (Tex. Civ.), 139 S. W. 28; Surghenor *v.* Ducey (Tex. Civ.), 139 S. W. 22.

56-5 Plummer *v.* Marshall (Tex. Civ.), 126 S. W. 1162. *Contra* as between landlord and tenant. Makey *v.* Dryden (Tex. Civ.), 128 S. W. 633; Skov *v.* Coffin (Tex. Civ.), 137 S. W. 450; White *v.* McCullough, 56 Tex. Civ. 383, 120 S. W. 1093; Murphy *v.* Luttrell, 56 Tex. Civ. 149, 120 S. W. 905; Bailie *v.* L. & S. Co., 55 Tex. Civ. 473, 119 S. W. 325.

56-6 Gaffney *v.* Clark (Tex. Civ.), 118 S. W. 606.

Grantee must prove grantor's fraudulent intent if he seeks to prevent recovery of property by latter. Smith *v.* Olivarri (Tex. Civ.), 127 S. W. 235.

56-7 Long *v.* Shelton (Tex. Civ.), 126 S. W. 40; Murphy *v.* Luttrell, 56 Tex. Civ. 149, 120 S. W. 905.

If defendant proves the invalidity of the deed under which the common source is claimed and supplements it by proof that the title in fact never passed to the common source, but is held by the defendant, or is outstanding in some third party, the plaintiff cannot recover upon the title held by him under the common source. Word *v.* Houston Oil Co. (Tex. Civ.), 144 S. W. 334.

56-8 Defendant claiming title as adopted heir of a former owner has burden of proving his title in this manner. Powell *v.* Ott (Tex. Civ.), 146 S. W. 1019.

56-9 Under Sayles' Civ. St., §5266, "if a plaintiff in an action of trespass to try title shows that the defendant has a deed or chain of title from the person under whom the plaintiff deraigns title, he prima facie establishes a common source, and is not required to show title back of such common source; and if the proof stops here the plaintiff is entitled to recover, if his title under the common source is superior to that shown in the defendant." Word *v.* Houston Oil Co. (Tex. Civ.), 144 S. W. 334.

56-10 Stephenville O. Mill *v.* McNeill, 57 Tex. Civ. 252, 122 S. W. 911.

Plaintiff must, as against defendant in possession, identify land claimed. Long *v.* Shelton (Tex. Civ.), 126 S. W. 40. See 58-22.

56-11 Allen *v.* Clearman (Tex. Civ.), 128 S. W. 1140.

An order of sale under execution and sheriff's return make out a prima facie case for plaintiff. Levy *v.* Persons (Tex. Civ.), 145 S. W. 286.

Indefiniteness in deed, not cause for excluding it. McCollum *v.* Home, 54 Tex. Civ. 348, 117 S. W. 886.

57-12 Lester *v.* Hutson (Tex. Civ.), 167 S. W. 321.

Evidence as to payment of taxes, immaterial if neither adverse possession nor good faith involved. Beall *v.* Chatham (Tex. Civ.), 117 S. W. 492.

Proceedings in administration of estate, admissible on question of identity of person whose estate administered. Bailie *v.* Co., 55 Tex. Civ. 473, 119 S. W. 325.

57-13 Walker *v.* Cornett (Ky.), 122 S. W. 841; Edwards *v.* Smith (Tex.), 137 S. W. 1161.

Where plaintiff claimed by liquidation, a deed which was a link in his title, though void because executed by only two of three executors, is admissible to show extent and boundaries of the land in question. Dean *v.* Furrh (Tex. Civ.), 143 S. W. 343.

To establish a conveyance which is a link in the chain of title, deeds showing an assertion of title for more than fifty years are admissible in support of a presumption of such conveyance. Blunt *v.* Houston Oil Co. (Tex. Civ.), 146 S. W. 248.

57-14 Adels *v.* Joseph (Tex. Civ.), 148 S. W. 1154.

58-15 Kirby *v.* Boaz (Tex. Civ.), 121 S. W. 223.

Possession as mortgagee sufficient.—Frazer *v.* Seureau (Tex. Civ.), 128 S. W. 649.

58-17 Hoeneke *v.* Lomax, 55 Tex. Civ. 189, 118 S. W. 817; Sabine Valley Co. *v.* Cagle (Tex. Civ.), 149 S. W. 697; Merriman *v.* Blalack, 57 Tex. Civ. 270, 122 S. W. 403.

58-18 Lowry *v.* McDaniel (Tex. Civ.), 124 S. W. 710; Blair *v.* Hennessy (Tex. Civ.), 138 S. W. 1076; Bell County *v.* Felts (Tex. Civ.), 120 S. W. 1065; Emporia L. Co. *v.* Tucker (Tex. Civ.), 120 S. W. 1082.

58-19 Equitable title must be specially pleaded. Smith *v.* Olivarri (Tex. Civ.), 127 S. W. 235.

58-22 Title of third party whose surveys not involved cannot be attacked. McGill *v.* Sites, 54 Tex. Civ. 262, 118 S. W. 220.

Admission of title dispenses with proof. Gaffney *v.* Clark (Tex. Civ.), 118 S. W. 606.

Identity of land claimed with that described in plaintiff's patent must be shown by him though defendant makes affirmative allegations in addition to general denial. Firberg *v.* Gilbert (Tex. Civ.), 124 S. W. 979. See 56-10.

General reputation of ownership in plaintiff's predecessor in title, proved to show notoriety of his claim. Carlisle *v.* Gibbs, 57 Tex. Civ. 592, 123 S. W. 216.

Opinions in community in respect to validity of claimant's title, inadmissible. Carlisle *v.* Gibbs, supra.

59-23 Houston O. Co. *v.* Kimball, 103 Tex. 94, 122 S. W. 533 (evidence of reputation of grantor as forger of title, inadmissible); Wilkerson *v.* Ward (Tex. Civ.), 137 S. W. 158.

Defendant's claim of title inadmissible by virtue of an agreement. Adams *v.*

Cameron & Co. (Tex. Civ.), 161 S. W. 417.

Under plea of not guilty and general denial, that defendant's were bona fide purchasers may be shown. Keenon *v.* Burkhardt (Tex. Civ.), 162 S. W. 483.

Statements by unauthorized agent inadmissible to affect title. Rice *v.* Taliaferro (Tex. Civ.), 156 S. W. 242.

Deed not referring to land irrelevant. Albro *v.* Hoxsie (R. I.), 89 A. 705.

Evidence that purpose in borrowing money was to prevent suit, admissible. Lester *v.* Hutson (Tex. Civ.), 167 S. W. 321.

Evidence as to uncontroverted plea of payment immaterial. Lester *v.* Hutson (Tex. Civ.), 167 S. W. 321.

Alienage of claimant heir may be set up to defeat his rights to land. Douthit *v.* Southern (Tex. Civ.), 155 S. W. 315.

Burden on defendant to impeach plaintiff's deed. Irvin *v.* Johnson, 56 Tex. Civ. 492, 120 S. W. 1085.

Title acquired after suit brought, used defensively. Murphy *v.* Luttrell, 56 Tex. Civ. 149, 120 S. W. 905.

County surveyor's field notes, original evidence to show plaintiff's patent covered no land not taken under prior patent. Hackbarth *v.* Gordon (Tex. Civ.), 120 S. W. 591.

Solicitation by plaintiff's grantor of third person to execute deed to him, immaterial. Robertson *v.* Hefley, 55 Tex. Civ. 368, 118 S. W. 1159.

Plea of limitations must be sustained by defendant. Lofton *v.* Miller, 55 Tex. Civ. 253, 118 S. W. 911.

59-24 Long *v.* Shelton (Tex. Civ.), 155 S. W. 945; Plummer *v.* Marshall (Tex. Civ.), 126 S. W. 1162.

Plat inadmissible, there having been no showing title remained in defendant's ancestor until his death. Albro *v.* Hoxsie (R. I.), 89 A. 705.

Cannot impeach validity of title of common source on whom the parties have agreed. Long *v.* Shelton (Tex. Civ.), 155 S. W. 945.

59-25 Fraud practiced by defendant's grantor on state, immaterial unless right in defendant shown independently of grantor. Elliott *v.* Morris (Tex. Civ.), 121 S. W. 209.

59-26 Word *v.* Houston Oil Co. (Tex. Civ.), 144 S. W. 334; Rudolph *v.* Tinsley (Tex. Civ.), 143 S. W. 209.

Before showing superior title from independent source defendant must show absence of title in common source. Roberts *v.* Blount (Tex. Civ.), 120 S. W. 933.

Title in defendant though transfer of a headright certificate may be proven by circumstances. Baldwin *v.* McCullough (Tex. Civ.), 146 S. W. 203.

60-29 A naked judgment is not proof of title unless title emanating from creditor is connected with government, and is not admissible unless it is shown defendant's grantor recovered because of the state of judgment defendant's title. Hamman *v.* Presswood (Tex. Civ.), 120 S. W. 1052.

60-30 Prior possession sufficient against naked trespasser. Knox *v.* McElroy (Tex. Civ.), 118 S. W. 1142.

Presumption is in favor of regularity of award of public land to defendant. McKee *v.* West, 55 Tex. Civ. 460, 118 S. W. 1135.

TROVER AND CONVERSION

65-1 M'Kinnon *v.* Co., 196 Fed. 487, 116 C. C. A. 462; Wadsworth *v.* Co., 1 Ala. App. 415, 56 S. 112; Zimmerman Mfg. Co. *v.* Dunn, 163 Ala. 272, 50 S. 906; Birmingham F. Co. *v.* Dozier, 13 Ga. App. 759, 79 S. E. 927; Prater *v.* Painter, 6 Ga. App. 292, 64 S. E. 1003; Banker *v.* Miller, 153 Ill. App. 115; Martin *v.* Johnson, 105 Me. 156, 73 A. 963; Jones *v.* Co., 114 Minn. 415, 131 N. W. 494; Fairbank Co. *v.* R. Co., 167 Mo. App. 286, 149 S. W. 1154; Johnson *v.* Blaney, 198 N. Y. 312, 91 N. E. 721; Thompson *v.* Tweto, 22 N. D. 528, 134 N. W. 743; Carey *v.* Davidson (R. I.), 83 A. 753.

66-5 *Contra,* Walker *v.* Lewis, 140 Mo. App. 26, 124 S. W. 567.

66-6 Defendant's knowledge of defect in his title must be shown by plaintiff. Dickey *v.* Adler, 143 Mo. App. 326, 127 S. W. 593.

67-8 Painter *v.* McGaha, 6 Ga. App. 54, 64 S. E. 129; Preston *v.* Co., 114 Minn. 398, 131 N. W. 474; Gunzburger *v.* Rosenthal, 226 Pa. 300, 75 A. 418.

68-14 Zimmerman Mfg. Co. *v.* Dunn, 163 Ala. 272, 50 S. 906, void tax deed admissible as color of title in connection with evidence of actual possession.

69-15 See Tallassee Mfg. Co. *v.* Bk., 159 Ala. 315, 49 S. 246.

69-16 National Citizens' Bk. *v.* McKinley, 115 Minn. 378, 132 N. W. 290.

Mortgagee must prove, as against one claiming under prior mortgage given

by another, ownership of his mortgagor and that property is covered by mortgage. Boatmen's Bk. *v.* Trower, 171 Fed. 964.

71-26 Gulf R. C. Co. *v.* Crenshaw (Ala.), 65 S. 1010.

71-30 Melrose Mfg. Co. *v.* Kennedy, 59 Fla. 312, 51 S. 595.

Instrument not identifying property, inadmissible. Clarke *v.* Stowe, 132 Ga. 621, 64 S. E. 786.

72-38 In re McIntyre, 174 Fed. 627, 98 C. C. A. 381.

Conversion by plaintiff.—Where defendant sets up conversion by plaintiff as a counterclaim he has the burden of proving conversion. Utah F. Co. *v.* Gas Co. (Utah), 131 P. 1173.

74-46 Siegel-C. L. S. Co. *v.* Holly, 44 Colo. 580, 101 P. 68; Wilson *v.* Moore, 57 Tex. Civ. 418, 122 S. W. 577.

75-47 Rosenberg *v.* Dielc, 61 Misc. 610, 114 N. Y. S. 24.

75-48 Devlin *v.* Houghton, 202 Mass. 75, 88 N. E. 580; Ripy *v.* Less, 55 Tex. Civ. 492, 118 S. W. 1084.

77-54 Knapp *v.* Guyer, 75 N. H. 397, 74 A. 873; Kilmer *v.* Hutton, 131 App. Div. 625, 116 N. Y. S. 127; Swank *v.* Elwert, 55 Or. 487, 105 P. 901; Smith *v.* Hurley, 29 R. I. 489, 72 A. 705. See S. *v.* Ross, 55 Or. 450, 104 P. 596; Bowe *v.* Palmer, 36 Utah 214, 102 P. 1007.

79-56 S. *v.* Ross, 55 Or. 450, 104 P. 596.

79-58 Hamburg Bk. *v.* George, 92 Ark. 472, 123 S. W. 654; Padgett *v.* Bk., 141 Mo. App. 374, 125 S. W. 219; Ellery *v.* Bk., 114 N. Y. S. 108; Bowe *v.* Palmer, 36 Utah 214, 102 P. 1007.

Conversion of grain, upon which plaintiff alleged a seed lien. Fried *v.* Olsen, 22 N. D. 381, 133 N. W. 1041.

80-60 Kilmer *v.* Hutton, 131 App. Div. 625, 116 N. Y. S. 127.

81-61 Walker *v.* Lewis, 140 Mo. App. 26, 124 S. W. 567.

81-64 Passow *v.* Co., 54 Wash. 196, 103 P. 34.

82-66 McCord *v.* Hill, 10 Ga. App. 254, 73 S. E. 559; Baruch *v.* Platt, 114 N. Y. S. 26; Fried *v.* Olsen, 22 N. D. 381, 133 N. W. 1041.

83-67 Cumberland T. & T. Co. *v.* Taylor, 44 Ind. App. 27, 88 N. E. 631; U. S. *v.* Zamora, 2 Phil. Isl. 582.

83-70 Shriner *v.* Meyer, 171 Ala. 112, 55 S. 156; Ah Hoy *v.* Raymond, 19 Haw. 568; Knapp *v.* Guyer, 75 N. H. 397, 74 A. 873.

83-71 Humbert *v.* Mason, 46 Colo. 430, 104 P. 1037; Abramson *v.* Brimberg, 120 N. Y. S. 746.

84-72 McConnell *v.* Hamp, 147 Ill. App. 56.

84-73 Kavanaugh *v.* McIntyre, 128 App. Div. 722, 112 N. Y. S. 987.

84-74 Cumberland T. & T. Co. *v.* Taylor, 44 Ind. App. 27, 88 N. E. 631.

85-78 DeYoung *v.* Andrews Co., 211 Mass. 47, 100 N. E. 1080.

87-85 Defendant's statements as to use of property held admissible to show intent in refusing permission to remove it. Brown *v.* Mfg. Co. (Ia.), 144 N. W. 613.

Defendant's admissions that he held property under an unauthorized sale and sold it knowing of plaintiff's claim held sufficient. Wilson *v.* Lewis (Ala. App.), 65 S. 919.

88-86 Indebtedness of defendant to plaintiff, shown as reason for non execution by former of security for payment of property converted. Boardman *v.* Woodward (Tex. Civ.), 118 S. W. 550.

88-87 Sigel-C. L. S. C. Co. *v.* Holly, 44 Colo. 580, 101 P. 68; Hill *v.* Wiley, 202 Mass. 243, 88 N. E. 838 (inconsistent attitude of plaintiff as compared with position in former suit).

89-92 *Contra.* Gandy *v.* Cowart, 163 Ala. 295, 50 S. 355.

89-93 Douglass *v.* Scott, 130 App. Div. 322, 114 N. Y. S. 470.

Verbal license to sell property held under sealed lease, admissible; but it cannot be shown by declarations of licensee. Prouty *v.* Nichols, 82 Vt. 181, 72 A. 988.

89-95 Knapp *v.* Guyer, 75 N. H. 397, 74 A. 873.

89-96 Receipt from third party is inadmissible. Jones *v.* Co., 137 Ga. 638, 74 S. E. 59.

90-99 Mortgagor who claims authority to sell mortgaged property may show what he did with money, that he informed plaintiff thereof and his action was not disapproved. Stevenson *v.* Whatley, 161 Ala. 250, 50 S. 41.

93-11 Crawford *v.* Thomason, 53 Tex. Civ. 561, 117 S. W. 181.

93-13 Cohen *v.* Longarini, 207 Mass. 556, 93 N. E. 702.

94-14 Morton *v.* Frick, 87 Ga. 230, 13 S. E. 463.

94-16 Sigel-C. L. S. C. Co. *v.* Holly, 44 Colo. 580, 101 P. 68.

Defendant must show value of converted property if his act has put it

out of plaintiff's power to show quality. Gordon *v.* R. Co., 7 Ga. App. 354, 66 S. E. 988.

94-17 Merchants' Nat. Bk. *v.* Williams, 110 Md. 334, 72 A. 1114; Swank *v.* Elwert, 55 Or. 487, 105 P. 901; Hassam *v.* Safford L. Co., 82 Vt. 444, 74 A. 197.

97-23 Smith *v.* Goff, 29 R. I. 439, 72 A. 289.

98-25 Swank *v.* Elwert, 55 Or. 487, 105 P. 901.

98-28 In an action of conversion by a mortgagee against a buyer of mortgaged property the payment made by the buyer is a part of the res gestae of the conversion. Phillips *v.* Pippin, 4 Ala. App. 426, 58 S. 111.

99-31 Hassam *v.* Safford L. Co., 82 Vt. 444, 74 A. 197 (time and place logs loaded on cars).

99-33 Massey *v.* Fain, 1 Ala. App. 424, 55 S. 936; McIntyre *v.* Whitney, 139 App. Div. 557, 124 N. Y. S. 234, *aff.* 201 N. Y. 526, 94 N. E. 1096; Lee Tung *v.* Burkhart, 59 Or. 194, 116 P. 1066; Harrison *v.* McGehee (Tex. Civ.), 139 S. W. 613.

100-38 Hamburg Bk. *v.* George, 92 Ark. 472, 123 S. W. 654; Fried *v.* Olsen, 22 N. D. 381, 133 N. W. 1041.

102-39 Elder *v.* Mfg. Co., 9 Ga. App. 484, 71 S. E. 806; Thompson *v.* Carter, 6 Ga. App. 604, 65 S. E. 599; Williams *v.* Monks, 108 Minn. 256, 122 N. W. 5 (if there is proof of wilfulness).

102-41 Funk *v.* Hendricks, 24 Okla. 837, 105 P. 352, plaintiff may elect during trial.

102-42 Barber *v.* Ellingwood, 137 App. Div. 704, 122 N. Y. S. 369; Rosenbaum *v.* Stiebel, 137 App. Div. 912, 122 N. Y. S. 131; Keller *v.* Halsey, 130 App. Div. 598, 115 N. Y. S. 564.

103-43 Citizens' Bk. *v.* Shaw, 132 Ga. 771, 65 S. E. 81; Birmingham Fertilizer Co. *v.* Cox & Son, 10 Ga. App. 699, 73 S. E. 1090.

104-45 Werner S. Co. *v.* Pickering, 55 Tex. Civ. 632, 119 S. W. 333, if conversion by mistake. *Contra*, though defendant innocent purchaser from wrongdoer. Godwin *v.* Taenzer, 122 Tenn. 101, 119 S. W. 1133.

Election as to time.—Where taking intentional and wrongful owner may fix time of conversion. If he seeks to fix time of conversion of timber into lumber as of date of manufacture he must show it was manufactured. Ripy *v.* Less, 55 Tex. Civ. 492, 118 S. W. 1084.

Presumption taking ore intentional arises in absence of evidence to contrary; in such case owner may recover full value of property at time of conversion, regardless of any deduction because of labor or expenditure of defendant. Central C. & C. Co. *v.* Penny, 173 Fed. 340, 97 C. C. A. 600.

104-47 Value of property to owner not recoverable unless he shows it had no market value. Swank *v.* Elwert, 55 Or. 487, 105 P. 901.

104-49 Ward *v.* Odem (Tex. Civ.), 153 S. W. 634.

105-53 Crawford *v.* Thomason, 53 Tex. Civ. 561, 117 S. W. 181.

Proof of other trespasses by defendant, competent to show wilfulness and malice. Crosland *v.* Graham, 83 S. C. 228, 65 S. E. 233.

105-55 Johnson *v.* Marks, 66 Misc. 153, 121 N. Y. S. 294.

107-61 Johnson *v.* Marks, 66 Misc. 153, 121 N. Y. S. 294, property kept for hire.

107-62 Defendant must show checks not worth face value. Deri *v.* Bk., 65 Misc. 531, 120 N. Y. S. 813.

107-63 Birmingham Fertilizer Co. *v.* Cox, 10 Ga. App. 699, 73 S. E. 1090.

107-64 Citizens' Bk. *v.* Shaw, 132 Ga. 771, 65 S. E. 81.

108-65 Defendant must establish good faith as innocent converter. Hassam *v.* Safford L. Co., 82 Vt. 444, 74 A. 197.

TRUSTS AND TRUSTEES

Revocation—absence of clause in voluntary deed, 164-76.

114-5 *Contra*, O'Briant *v.* O'Briant, 160 Ala. 457, 49 S. 317.

114-6 Lehrling *v.* Lehrling, 84 Kan. 766, 115 P. 556.

114-7 Fox *v.* Fox, 250 Ill. 384, 95 N. E. 498; Smith *v.* Smith (Ky.), 121 S. W. 1002.

114-8 Elliott *v.* Mach. Co., 236 Mo. 546, 139 S. W. 356; Jones *v.* Lynch (Tex. Civ.), 137 S. W. 395.

115-10 Met. Tr. & S. Bk. *v.* Perry, 259 Ill. 183, 102 N. E. 218; State Bk. of Clinton *v.* Barnett, 250 Ill. 312, 95 N. E. 178; Worthington *v.* Redkey, 86 O. St. 128, 99 N. E. 211.

115-12 Mahan *v.* Schroeder, 142 Ill. App. 538; Lurie *v.* Sabath, 208 Ill. 401,

70 N. E. 323 (and terms and conditions).

115-16 Preponderance sufficient.—Buckner *v.* Carter (Tex. Civ.), 137 S. W. 442.

116-17 Acts of trustee are competent evident on issue of acceptance of trust. Goodsell *v.* Co., 86 Conn. 402, 85 A. 509

116-21 Jackson *v.* Farmer, 151 N. C. 279, 65 S. E. 1008 (inadequacy of consideration); Gray *v.* Beard, 66 Or. 59, 133 P. 791.

117-25 *Contra,* Tourtillotte *v.* Tourtillotte, 205 Mass. 547, 91 N. E. 909; Rothschild *v.* Dickinson, 169 Mich. 200, 134 N. W. 1035.

117-26 Harbour *v.* Harbour, 103 Ark. 273, 146 S. W. 867; Spradling *v.* Spradling, 101 Ark. 451, 142 S. W. 848; Carpenter *v.* Gibson, 104 Ark. 32, 148 S. W. 508; Appeal of Wilson, 84 Conn. 560, 80 A. 718; Louisville & N. R. Co. *v.* Ramsay, 134 Ga. 107, 67 S. E. 652; Ryder *v.* Ryder, 244 Ill. 297, 91 N. E. 451; Burch *v.* Nicholson (Ia.), 137 N. W. 1066; Flanders *v.* Booge, 146 Ia. 675, 125 N. W. 661; Mugan *v.* Wheeler, 241 Mo. 376, 145 S. W. 462; Stevenson *v.* Haynes, 220 Mo. 199, 119 S. W. 346; Ewing *v.* Parrish, 148 Mo. App. 492, 128 S. W. 538; Pilcher *v.* Lotzgesell, 57 Wash. 471, 107 P. 340; Arnold *v.* Hall, 72 Wash. 50, 129 P. 914; Kinney *v.* McCall, 57 Wash. 545, 107 P. 385.

It will be presumed that a trust was evidenced by a written instrument. Mantle *v.* White, 47 Mont. 234, 132 P. 22.

119-28 Jones *v.* Jones, 164 N. C. 320, 80 S. E. 430; Jackson *v.* Farmer, 151 N. C. 279, 65 S. E. 1008; Lester *v.* Hutson (Tex. Civ.), 167 S. W. 321; Sachs *v.* Goldberg (Tex. Civ.), 159 S. W. 92.

120-30 In re MacDougall, 175 Fed. 400; O'Briant *v.* O'Briant, 160 Ala. 457, 49 S. 317; Jones *v.* Nicholas, 151 Iowa 362, 130 N. W. 125; Ewing *v.* Parrish, 148 Mo. App. 492, 128 S. W. 538; Watson *v.* Payne, 143 Mo. App. 721, 128 S. W. 238; Mantle *v.* White, 47 Mont. 234, 132 P. 22; Nelson *v.* Kress, 145 Wis. 38, 129 N. W. 790.

121-32 Shook *v.* Shook (Tex. Civ.), 125 S. W. 638.

121-35 Longe *v.* Kinney, 171 Mich. 312, 137 N. W. 119; Illinois Steel Co. *v.* Konkel, 146 Wis. 572, 131 N. W. 842; Illinois Steel Co. *v.* Witsotski, 146 Wis. 572, 131 N. W. 848.

123-44 Denny *v.* Holden, 55 Wash. 22, 103 P. 1109, clear, cogent and convincing.

Evidence sufficient.—Stone *v.* Middleton, 144 Ky. 284, 137 S. W. 1047; Ware *v.* Bennett, 143 Ky. 743, 137 S. W. 532; Macklanburg *v.* Griffith, 115 Minn. 131, 131 N. W. 1063.

Insufficient.—Stubbings *v.* Stubbings, 248 Ill. 406, 94 N. E. 54.

124-45 See Stevenson *v.* Haynes, 220 Mo. 199, 119 S. W. 346.

125-50 Tatum *v.* Bolding, 96 Ark. 98, 131 S. W. 207.

Evidence insufficient.—Adams *v.* Craig, 148 Ia. 705, 127 N. W. 1021.

125-53 Sullivan *v.* Applebaum, 164 Mich. 432, 129 N. W. 866; Buckner *v.* Carter (Tex. Civ.), 137 S. W. 442.

125-54 Taylor *v.* Morris, 163 Cal. 717, 127 P. 66; Yndo *v.* Rivas (Tex. Civ.), 142 S. W. 920. See vol. 9, p. 443, n. 26.

126-57 Mortimer *v.* Jackson (Tex. Civ.), 155 S. W. 341; Yndo *v.* Rivas (Tex. Civ.), 142 S. W. 920; Schmittou *v.* Dunham (Tex.), 142 S. W. 941.

126-58 Talbot *v.* Talbot, 32 R. I. 72, 78 A. 535.

127-59 Taber *v.* Bailey, 22 Cal. App. 617, 135 P. 975; Trubey *v.* Pease, 240 Ill. 513, 88 N. E. 1005; St. Catherine's Cem. *v.* Trust Co., 152 Ky. 797, 154 S. W. 29; Watson *v.* Payne, 143 Mo. App. 721, 128 S. W. 238; Hemmerich *v.* Sav. Inst., 205 N. Y. 366, 98 N. E. 499. See Citizens' N. Bk. *v.* McKenna, 168 Mo. App. 254, 153 S. W. 521.

A trust in an absolute legacy may be shown by parol only in case of actual or constructive fraud. General Convention *v.* Smith, 52 Ind. App. 136, 100 N. E. 384.

128-61 Declarations by deceased person, after deposit of funds, inadmissible. Tierney *v.* Fitzpatrick, 195 N. Y. 433, 88 N. E. 750.

128-63 Keith *v.* Wheeler, 105 Ark. 318, 151 S. W. 284; Spradling *v.* Spradling, 101 Ark. 451, 142 S. W. 848; Breitenbucher *v.* Oppenheim, 160 Cal. 98, 116 P. 55; Noble *v.* Noble, 255 Ill. 629, 99 N. E. 631; Wright *v.* Wright, 242 Ill. 71, 89 N. E. 789; In re Malin's Est. (Ia.), 143 N. W. 420; Staples *v.* Bowden, 105 Me. 177, 73 A. 999; Dixon *v.* Dixon (Md.), 90 A. 846; Stevens *v.* Fitzpatrick, 218 Mo. 708, 118 S. W. 51; Adams *v.* Gossom, 228 Mo. 566, 129 S. W. 16; Wrightsman *v.* Rogers, 239 Mo. 417, 144 S. W. 479; Cowles *v.* Cowles, 89

Neb. 327, 131 N. W. 738; Phillips *v.* Phillips, 81 N. J. Eq. 459, 86 A. 949; Gray *v.* Beard, 66 Or. 59, 133 P. 791; Gilmore *v.* Brown (Tex. Civ.), 150 S. W. 964; Bell County *v.* Felts (Tex. Civ.), 120 S. W. 1065.

130-66 Dixon *v.* Dixon (Md.), 90 A. 846; Lutz *v.* Matthews, 37 Pa. Super. 354.

130-67 In re Mahin's Est. (Ia.), 143 N. W. 420; Dixon *v.* Dixon (Md.), 90 A. 846.

130-68 Graves *v.* Garard, 44 Ind. App. 712, 90 N. E. 22; Adley *v.* Pletcher, 55 Wash. 82, 104 P. 167. See Cotton *v.* Citizens Bk., 97 Ark. 568, 135 S. W. 340.

Evidence of conversation between daughter and father is admissible, even though made before the conveyance, in an action to establish a trust by parol. Dieckmann *v.* Merkh, 20 Cal. App. 655, 130 P. 27.

131-69 Carpenter *v.* Gibson, 104 Ark. 32, 148 S. W. 508; Vickers *v.* Vickers, 133 Ga. 383, 65 S. E. 885; De France *v.* Reeves, 148 Ia. 348, 125 N. W. 655; Beck *v.* Beck, 78 N. J. Eq. 544, 80 A. 550; Effler *v.* Burns, 70 W. Va. 415, 74 S. E. 233; Ludwick *v.* Johnson, 67 W. Va. 499, 68 S. E. 117.

The same presumption arises from a purchase in the name of the husband with funds of the wife. Whitten *v.* Whitten, 70 W. Va. 422, 74 S. E. 237.

Presumption rebutted by fraud.—Batty *v.* Greene, 206 Mass. 561, 92 N. E. 715.

132-70 Southern Bk. of Fulton *v.* Nichols, 235 Mo. 401, 138 S. W. 881; Williams *v.* Keef, 241 Mo. 366, 145 S. W. 425.

132-71 Hatfield *v.* Cline, 143 Ky 565, 137 S. W. 212; Denny *v.* Schwabacher, 54 Wash. 689, 104 P. 137.

Presumption of trust unless the evidence shows clearly that a gift was intended. Spradling *v.* Spradling, 101 Ark. 451, 142 S. W. 848.

133-72 Noble *v.* Noble, 255 Ill. 629, 99 N. E. 631.

Nominal grantee presumed to accept beneficial conveyance of which he is ignorant. Garten *v.* Trobridge, 80 Kan. 720, 104 P. 1067.

133-73 Keith *v.* Wheeler, 105 Ark 318, 151 S. W. 284; Easter *v.* Easter, 246 Mo. 409, 151 S. W. 413; McDonald *v.* McAndrew, 40 Pa. Super. 146.

134-76 Keuper *v.* Heirs, 239 Ill. 586, 88 N. E. 218.

134-77 Keith *v.* Wheeler, 105 Ark. 318, 151 S. W. 284.

135-82 Evidence of subsequent transactions, immaterial. Stevenson *v.* Haynes, 220 Mo. 199, 119 S. W. 346.

135-83 Cooney *v.* Glynn, 157 Cal. 583, 108 P. 506 (destruction of will in favor of plaintiff on defendant's oral promise to hold land for her); Lord *v.* Reed, 254 Ill. 350, 98 N. E. 553; In re Kaupper, 141 App. Div. 54, 125 N. Y. S. 878, *aff.* 201 N. Y. 534, 94 N. E. 1095. See Coolidge *v.* Smith, 18 O. Dec. 151.

Continued acts of dominion with notice to trustee and without protest establishes a trust. Gray *v.* Beard, 66 Or. 59, 133 P. 791, and cases cited.

136-85 Stevens *v.* Hicks, 84 Kan. 351, 113 P. 1049; Flaum *v.* Kaiser Bros. Co., 66 Misc. 586, 122 N. Y. S. 100, *aff.* 129 N. Y. S. 1122.

"**The allegations of plaintiff's petition** showing that the title to the property in controversy was placed in Mrs. Shook by a deed reciting, in effect, that it was to be her separate property and to be held by her for her own use and benefit, etc., and that the same was done to place it beyond the reach of his creditors, plaintiff was not entitled to show by parol evidence in a court of equity, in order to defeat the legal import and effect of such deed, that it was the intention of himself and wife at the time of the execution thereof that the land therein described should be held by Mrs. Shook in trust for the benefit of the community estate of herself and her husband." Shook *v.* Shook (Tex. Civ.), 145 S. W. 699.

137-90 Lehrling *v.* Lehrling, 84 Kan. 766, 115 P. 556.

137-92 Cole *v.* Thompson, 169 Fed. 729 (advancement); Appeal of Wilson, 84 Conn. 560, 80 A. 718; Florida, etc. R. Co. *v.* Jones, 66 Fla. 51, 62 S. 898; In re Mahin's Est. (Ia.), 143 N. W. 420; Smith *v.* Smith (Ky.), 121 S. W. 1002; Stevens *v.* Fitzpatrick, 218 Mo. 708, 118 S. W. 51 (notwithstanding death of trustee); Baker *v.* Baker, 75 N. J. Eq. 305, 72 A. 1000; Myers *v.* Grey, 122 N. Y. S. 1079; Modlin *v.* Ins. Co., 151 N. C. 35, 65 S. E. 605; Coolidge *v.* Smith, 18 O. Dec. 151; Case, etc. Co. *v.* Co., 39 Okla. 748, 136 P. 769 (*cit.* 9 ENCYC. OF Ev. 309); Shutz *v.* Harris (Tex. Civ.), 149 S. W. 244; Leland *v.* Chamberlin, 56 Tex. Civ. 256, 120 S. W. 1040; Herriford *v.* Herriford, 78 Wash. 429, 139 P. 212.

But, when the proposed testimony shows an agreement beyond what the law would imply, it involves an express agreement, inconsistent with a resulting trust. Surasky *v.* Weintraub, 90 S. C. 522, 73 S. E. 1029.

140-95 See Welch *v.* Brown, 46 Colo. 129, 103 P. 296; Stone *v.* Middleton, 144 Ky. 284, 137 S. W. 1047.

140-97 Gray *v.* Walker, 157 Cal. 381, 108 P 278 (with exceptions); Baker *v.* Baker, 75 N. J. Eq. 305, 72 A. 1000; Down *v.* Down, 80 N. J. Eq. 68, 82 A. 322; Yndo *v.* Rivas (Tex. Civ.), 142 S. W. 920.

141-99 Cooney *v.* Glynn, 157 Cal. 583, 108 P. 506 (admissions competent to show what took place when conveyance made); Traylor *v.* Hallis, 45 Ind. App. 680, 91 N. E. 567, cit. the text; McDonald *v.* McAndrew, 40 Pa. Super. 146.

Substance of conversation between parties at time of transaction may be shown, as may impression of witness as to their intention; otherwise as to his opinion as to what was in their minds. Leland *v.* Chamberlin, 56 Tex. Civ. 256, 120 S. W. 1040.

141-1 Traylor *v.* Hallis, 45 Ind. App. 680, 91 N. E. 567.

141-2 Garten *v.* Trobridge, 80 Kan. 720, 104 P. 1067.

142-4 Yndo *v.* Rivas (Tex. Civ.), 142 S. W. 920.

142-5 Dixon *v.* Dixon (Md.), 90 A. 846; Angermiller *v.* Ewald, 133 App. Div. 691, 118 N. Y. S. 195.

Declarations of testator, admissible to show trust in property given legatee. Miller *v.* Hill, 64 Misc. 199, 118 N. Y. S. 63.

142-6 Cooney *v.* Glynn, 157 Cal. 583, 108 P. 506; Carlisle *v.* Gibbs, 57 Tex. Civ. 592, 123 S. W. 216 (of decedent).

142-7 Inconsistent acts of cestui que trust not entitled to much weight. Freeland *v.* Williamson, 220 Mo. 217, 119 S. W. 560.

143-8 Woodward *v.* Woodward, 89 Neb. 142, 131 N. W. 188.

144-10 Cole *v.* Thompson, 169 Fed. 729; Carlson *v.* Erickson, 164 Ala. 380, 51 S. 175; Nevils *v.* Co. (Ark.), 163 S. W. 162; Keith *v.* Wheeler, 105 Ark. 318, 151 S. W. 284; Hall *v.* Cox, 104 Ark. 303, 149 S. W. 80; Florida, etc. R. Co. *v.* Jones, 66 Fla. 51, 62 S. 898; Lord *v.* Reed, 254 Ill. 350, 98 N. E. 553; Burch *v.* Nicholson (Ia.), 137 N. W. 1066; De France *v.* Reeves, 148 Ia. 348, 125 N. W. 655; Lillie *v.* Owen, 147 Ia. 290, 126 N. W. 188; Mitchell *v.* Bilderback, 159 Mich. 483, 124 N. W. 557; Easter *v.* Easter, 246 Mo. 409, 151 S. W. 413; Stevens *v.* Fitzpatrick, 218 Mo. 708, 118 S. W. 51; Down *v.* Down, 80 N. J. Eq. 68, 82 A. 322; Miller *v.* Hill, 64 Misc. 199, 118 N. Y. S. 63; McDonald *v.* McAndrew, 40 Pa. Super. 146; Lutz *v.* Matthews, 37 Pa. Super. 354; Robson *v.* Moore (Tex. Civ.), 166 S. W. 908; Lee *v.* Elliott & Co., 113 Va. 618, 75 S. E. 146; Herriford *v.* Herriford, 78 Wash. 429, 139 P. 212; Cushing *v.* Heuston, 53 Wash. 379, 102 P. 29; Cassady *v.* Cassady (W. Va.), 81 S. E. 829.

Evidence sufficient.—Wrightsman *v.* Rogers, 239 Mo. 417, 144 S. W. 479.

Evidence insufficient.—Hall *v.* Bertram's Admr., 151 Ky. 66, 151 S. W. 40; Du Bose *v.* Kell, 90 S. C. 196, 71 S. E. 371.

Exception between insurer and insured. Modlin *v.* Ins. Co., 151 N. C. 35, 65 S. E. 605.

146-11 Holt *v.* Johnson, 166 Ala. 358, 52 S. 323; Hall *v.* Cox, 104 Ark. 303, 149 S. W. 80; Keuper *v.* Heirs, 239 Ill. 586, 88 N. E. 218; Ryder *v.* Ryder, 244 Ill. 297, 91 N. E. 451; Stevenson *v.* Haynes, 220 Mo. 199, 119 S. W. 346; Stillwagon *v.* Coe, 18 O. Dec. 811.

146-12 In re Teter, 173 Fed. 798; Butt *v.* McAlpine, 167 Ala. 521, 52 S. 420; Geter *v.* Simmons, 57 Fla. 423, 49 S. 131; Henninger *v.* McGuire (Ia.), 125 N. W. 180; McKee *v.* Downing, 224 Mo. 115, 124 S. W. 7; Eisenberg *v.* Goldsmith, 42 Mont. 563, 113 P. 1127; Berla *v.* Strauss, 76 N. J. Eq. 275, 74 A. 518.

147-13 Johnson *v.* Johnson, 134 Ky 263, 120 S. W. 303; Kinney *v.* McCall, 57 Wash. 545, 107 P. 385.

After death of trustee great care used in weighing parol evidence. Stevens *v.* Fitzpatrick, 218 Mo. 708, 118 S. W. 51.

148-15 Leroy *v.* Norton, 49 Colo. 490, 113 P. 529; Dixon *v.* Dixon (Md.), 90 A. 846; Cottonwood C. Bk. *v.* Case, 25 S. D. 77, 125 N. W. 298.

150-17 Breitenbucher *v.* Oppenheim, 160 Cal. 98, 116 P. 55.

150-19 See Dixon *v.* Dixon (Md.), 90 A. 846.

151-24 Woodward *v.* Woodward, 89 Neb. 142, 131 N. W. 188; Ludwick *v.* Johnson, 67 W. Va. 499, 68 S. E. 117

152-26 Where a deed from a husband to his wife, through a third party, expresses a consideration of money,

parol evidence of a promise of the wife to reconvey to her husband is not admissible to declare a trust in his favor. Down *v.* Down, 80 N. J. Eq. 68, 82 A. 322.

153-29 Ryder *v.* Ryder, 244 Ill. 297, 91 N. E. 451.

154-31 Grantor's declarations not competent if made after conveyance and in absence of grantee. Ryder *v.* Ryder, supra.

154-32 Witte *v.* Storm, 236 Mo. 470, 139 S. W. 384; French *v.* Armstrong, 79 N. J. Eq. 283, 82 A. 101; Waterbury *v.* Barry, 130 N. Y. S. 517; Harmon *v.* Harmon (S. C.), 71 S. E. 815; Henyan *v.* Trevino (Tex. Civ.), 137 S. W. 458.

154-33 McSorley *v.* Bullock, 62 Wash. 140, 113 P. 279.

154-34 Brookfield *v.* Brookfield (Ark.), 145 S. W. 245; Schmidt *v.* Schmidt, 152 Iowa 168, 130 N. W. 365.

154-35 Shearer *v.* Barnes, 118 Minn. 179, 136 N. W. 861; Clough *v.* Dawson (Or.), 138 P. 233.

154-36 U. S. *v.* Carter, 172 Fed. 1, 96 C. C. A. 587.

154-37 Davis *v.* Spicer (Ky.), 128 S. W. 294; Congregation, etc. *v.* Co., 134 App. Div. 368, 119 N. Y. S. 72. *Comp.* Perreau *v.* Perreau, 12 Cal. App. 122, 106 P. 728.

Admissions by trustee.—See Taylor *v.* Morris, 163 Cal. 717, 127 P. 66.

Declarations of grantee are strong evidence of the trust. Taylor *v.* Morris, 163 Cal. 717, 127 P. 66.

155-39 Ruhe *v.* Ruhe, 113 Md. 595, 77 A. 797; Miller *v.* Himelbaugh (Tex. Civ.), 153 S. W. 338.

Evidence insufficient. — Townsend *v.* Crowner, 125 N. Y. S. 329.

Evidence insufficient.—Reid *v.* Savage, 59 Or. 301, 117 P. 306.

156-40 Aetna Indemnity Co. *v.* Malone, 89 Neb. 260, 131 N. W. 200. See Stephens *v.* Tr. Co., 260 Ill. 364, 103 N. E. 190.

156-41 Aumack *v.* Jackson, 79 N. J. Eq. 599, 82 A. 896.

157-42 Holley *v.* Still, 91 S. C. 487, 74 S. E. 1065.

158-49 Fox *v.* Fox, 250 Ill. 384, 95 N. E. 498.

160-61 Where one has without right money of another, the law presumed that it was received for the latter and held for his use. Jackson *v.* White, 194 Fed. 677, 115 C. C. A. 71.

163-72 In re McIntyre & Co., 185 Fed. 96, 108 C. C. A. 543; Russell *v.* Fish, 149 Wis. 122, 135 N. W. 531.

163-73 The fact that an express trust was created by deeds absolute on their face may be shown by a separate writing. Mugan *v.* Wheeler, 241 Mo. 376, 145 S. W. 462.

164-75 Snodgrass *v.* Snodgrass, 176 Ala. 276, 58 S. 201.

164-76 Where primary underlying purpose of trust is inconsistent with power of revocation, neither intended nor desired by grantor, absence of clause of revocation in voluntary deed, not prima facie evidence of mistake, nor circumstances to be regarded. Wallace *v.* Co., 29 R. I. 550, 73 A. 25.

164-77 Blick *v.* Cockins, 234 Pa. 261, 83 A. 196.

165-81 Empire State Surety Co. *v.* Carroll County, 194 Fed. 593, 114 C. C. A. 435; Wells *v.* Wells' Exrs., 147 Ky. 467, 144 S. W. 382; Reeder *v.* Lanahan, 111 Md. 372, 74 A. 575; Offenstein *v.* Gehner, 223 Mo. 318, 122 S. W. 715; Wiener *v.* Zweib (Tex. Civ.), 128 S. W. 699 (compliance with law); Waddell *v.* Waddell, 36 Utah 435, 104 P. 743 Contra where trustee profits by his transactions. Smith *v.* Elderton, 16 Cal. App. 424, 117 P. 563.

166-82 Dillivan *v.* Bk. (Ia.), 124 N. W. 350.

166-83 Swift *v.* Craighead, 75 N. J. Eq. 102, 75 A. 974, direct transaction.

Authority to mortgage trust estate, not presumed. Snyder *v.* Collier, 85 Neb. 552, 123 N. W. 1023.

166-86 Trustee must show his separate interest in property partly acquired by trust funds. Waddell *v.* Waddell, 36 Utah 435, 104 P. 743. And that any loss of trust fund without his fault. Bogard *v.* Bk. (Ky.), 112 S. W. 872.

166-89 See Galford *v.* Eastman, 242 Ill. 41, 89 N. E. 783.

Good faith must be shown by cogent and convincing proof where trustee ignored orders of court and disregarded law. Gibney *v.* Allen, 156 Mich. 301, 120 N. W. 811.

167-93 In proceeding to terminate trust acts of alleged trustee tending to defeat its purpose may be shown. Torres *v.* Fernandez y Perez, 2 P. R. Fed. 367.

167-95 Ashley *v.* Winkley, 209 Mass. 509, 95 N. E. 932.

168-4 Express contract to pay for special services need not be proved. Knight *v.* Knight, 142 Ill. App. 69.

UNDUE INFLUENCE

Confidential relations and presumption, 349-68.

191-12 Holt *v.* Guerguin (Tex. Civ.), 156 S. W. 581.

191-13 Councill *v.* Mayhew, 172 Ala. 295, 55 S. 314; Alford *v.* Johnson, 103 Ark. 236, 146 S. W. 516; In re Carither's Est., 156 Cal. 422, 105 P. 127; In re Higgins' Est., 156 Cal. 257, 104 P. 6; In re Snowball's Est., 157 Cal. 301, 107 P. 598; Larabee *v.* Larabee, 240 Ill. 576, 88 N. E. 1037; Ginter *v.* Ginter, 79Kan. 721, 101 P. 634; Watson *v.* Watson, 137 Ky. 25, 121 S. W. 626; Bannon *v.* Co. (Ky.), 119 S. W. 1170; Phillips *v.* Chase, 203 Mass. 556, 89 N. E. 1049; Shepard's Appeal, 161 Mich. 441, 126 N. W. 640; Buck *v.* Buck, 122 Minn. 463, 142 N. W. 729; Howard *v.* Farr, 115 Minn. 86, 131 N. W. 1071; Winn *v.* Grier, 217 Mo. 420, 117 S. W. 48; Henderson *v.* Ressor, 141 Mo. App. 540, 126 S. W. 203; Hacker *v.* Hoover, 89 Neb. 317, 131 N. W. 734; In re Buckman's Will, 80 N. J. Eq. 293, 85 A. 246; In re Brooks' Will, 120 N. Y. S. 596; In re Ellwanger's Will, 114 N. Y. S. 727; Warren *v.* Ellis (Tex. Civ.), 137 S. W. 1182; In re Miller's Est., 36 Utah 228, 102 P. 996; Howard *v.* Howard, 112 Va. 566, 72 S. E. 133.

195-14 Phillips *v.* Chase, 203 Mass. 556, 89 N. E. 1049.

195-15 Phillips *v.* Chase, 203 Mass. 556, 89 N. E. 1049.

196-20 Reck *v.* Reck, 110 Md. 497, 73 A. 144.

199-34 Gillispie's Exr. *v.* Gillispie (Ky.), 128 S. W. 1078; Whitcomb *v.* Whitcomb, 205 Mass. 310, 91 N. E. 210 (moral coercion).

200-38 Alford *v.* Johnson, 103 Ark. 236, 146 S. W. 516; Miller *v.* Carr, 94 Ark. 176, 126 S. W. 1068; Smith *v.* Boswell, 93 Ark. 66, 124 S. W. 264.

202-42 Beemer *v.* Beemer, 256 Ill. 312, 100 N. E. 135; Watson *v.* Watson, 137 Ky. 25, 121 S. W. 626; Taphorn *v.* Taphorn, 18 O. Dec. 748.

203-44 Convey *v.* Murphy, 146 Ia. 154, 124 N. W. 1073; Ginter *v.* Ginter, 79 Kan. 721, 101 P. 634; Bannon *v.* Co. (Ky.), 119 S. W. 1170.

203-45 Berst *v.* Moxom, 157 Mo. App. 342, 138 S. W. 74.

203-46 Fitzgerald *v.* Allen, 240 Ill. 80, 88 N. E. 240; Bannon *v.* Co. (Ky.) 119 S. W. 1170; Ginter *v.* Ginter, 79 Kan. 721, 101 P. 634; Watson *v.* Watson, 137 Ky. 25, 121 S. W. 626; Hayes *v.* Hayes, 242 Mo. 155, 145 S. W. 1155; Weber *v.* Strobel, 236 Mo. 649, 139 S. W. 188; Turner *v.* Anderson, 236 Mo. 523, 139 S. W. 180; Luebbert *v.* Brockmeyer, 158 Mo. App. 196, 138 S. W. 92; Converse *v.* Mix, 63 Wash. 318, 115 P. 305.

205-53 Brackey *v.* Brackey, 151 Ia. 99, 130 N. W. 370.

208-71 Foster *v.* Long, 8 O. N. P. (N. S.) 75.

209-74 Birmingham, etc. Co. *v.* Demmins, 3 Ala. App. 359, 57 S. 404.

210-83 Whitlock *v.* Dixon, 150 N. C. 616, 64 S. E. 504.

211-84 Abrahams *v.* Woolley, 243 Ill. 365, 90 N. E. 667; Winn *v.* Grier, 217 Mo. 420, 117 S. W. 48.

211-90 Ginter *v.* Ginter, 79 Kan. 721, 101 P. 634; Crump *v.* Chenault, 151 Ky. 187, 156 S. W. 1053; Childers *v.* Cartwright, 136 Ky. 498, 124 S. W. 802; In re Richardson's Will, 137 App. Div. 103, 122 N. Y. S. 83; In re Tyson's Est., 223 Pa. 596, 72 A. 1065.

212-92 Hawthorne *v.* Jenkins (Ala.), 62 S. 505.

212-93 Miller *v.* Carr, 94 Ark. 176, 126 S. W. 1068.

212-94 Larabee *v.* Larabee, 240 Ill. 576, 88 N. E. 1037.

213-95 Councill *v.* Mayhew, 172 Ala. 295, 55 S. 314; In re Carither's Est., 156 Cal. 422, 105 P. 127.

213-2 In re Weber's Est., 15 Cal. App. 224, 114 P. 597.

214-3 In re Rick's Est., 160 Cal. 450, 117 P. 532; In re Higgins' Est., 156 Cal. 257, 104 P. 6; Ditton *v.* Hart, 175 Ind. 181, 93 N. E. 961; Holt *v.* Guerguin (Tex. Civ.), 156 S. W. 581.

219-23 Bowen *v.* Kutner, 167 Fed. 281, 93 C. C. A. 33; Ginter *v.* Ginter, 79 Kan. 721, 101 P. 634; Kerr *v.* Kerr, 80 Kan. 83, 101 P. 647; Wood *v.* Rigg, 152 Ky. 242, 153 S. W. 214; Andrews *v.* Lavery, 159 Mich. 26, 123 N. W. 543; Jamison *v.* Jamison, 96 Miss. 288, 51 S. 130; In re Richardson's Will, 137 App. Div. 103, 122 N. Y. S. 83; Watson *v.* Holmes, 80 Misc. 48, 140 N. Y. S. 727; In re Ellwanger's Will, 111 N. Y. S.

727; Gallagher *v.* Neilon (Tex. Civ.), 121 S. W. 564; In re Tresidder's Est., 70 Wash. 15, 125 P. 1034.

"**From the very nature of the case** evidence of undue influence, like that of fraud, must necessarily be mainly circumstantial. Undue influence is not exercised ordinarily openly in the presence of others, so that it can be proved by direct testimony. In the very nature of things influence springs from relations; and undue influence may be inferred as a matter of fact from the character of those relations." Alford *v.* Johnson, 103 Ark. 236, 146 S. W. 516. And see Bowles *v.* Bryan, 254 Ill. 148, 98 N. E. 230.

220-24 Donnan *v.* Donnan, 256 Ill. 244, 99 N. E. 931; Rhea *v.* Madison, 151 Ky. 262, 151 S. W. 667; Eckert *v.* Page, 161 App. Div. 154, 146 N. Y. S. 513.

221-32 Fulton *v.* Freeland, 219 Mo. 494, 118 S. W. 12. *Contra* if alleged domination of testator continuous. In re Loree's Est., 158 Mich. 372, 122 N. W. 623.

222-33 Bannon *v.* Co. (Ky.), 119 S. W. 1170; Maxey *v.* Ins. Co. (Tex. Civ.), 164 S. W. 438.

223-38 Kerr *v.* Kerr, 80 Kan. 83, 101 P. 647; In re Ellwanger's Will, 114 N. Y. S. 727; Bellamy *v.* Andrews, 151 N. C. 256, 65 S. E. 963; Gallagher *v.* Neilon (Tex. Civ.), 121 S. W. 564.

223-39 Peterson *v.* Budge, 35 Utah 596, 102 P. 211.

224-42 Wolf *v.* Harris, 57 Or. 276, 106 P. 1016.

224-44 Shirley *v.* Ezell (Ala.), 60 S. 905.

224-45 Hawthorne *v.* Jenkins (Ala.), 62 S. 505; McDonnell *v.* McDonnell, 10 Cal. App. 63, 101 P. 40; Pye *v.* Pye, 133 Ga. 246, 65 S. E. 424; Raison *v.* Raison, 148 Ky. 116, 146 S. W. 400; Dinguid *v.* Roberts (Ky.), 121 S. W. 464; Bannon *v.* Co. (Ky.), 119 S. W. 1170; Shepard's Appeal, 161 Mich. 441, 126 N. W. 640 (important); Naeseth *v.* Hommedal, 109 Minn. 153, 123 N. W. 287; Nelson *v.* Wickham, 86 Neb. 46, 124 N. W. 908; In re Ellwanger's Will, 114 N. Y. S. 727; Koppe *v.* Koppe, 57 Tex. Civ. 204, 122 S. W. 68; Gallagher *v.* Neilon (Tex. Civ.), 121 S. W. 564.

224-46 Newman *v.* Thompson, 134 Ga. 137, 67 S. E. 662; Peterson *v.* Budge, 35 Utah 596, 102 P. 211.

225-48 Diuguid *v.* Roberts (Ky.), 121 S. W. 464.

225-50 Conklin *v.* Conklin, 165 Mich. 571, 131 N. W. 154; Hattie *v.* Potter, 54 Wash. 170, 102 P. 1023.

226-51 Borchers *v.* Barckers, 143 Mo. App. 72, 122 S. W. 357.

226-52 Fish *v.* Poorman, 85 Kan. 237, 116 P. 898.

226-58 Aldrich *v.* Aldrich, 215 Mass. 164, 102 N. E. 487; In re Hernandez's Will, 158 App. Div. 815, 144 N. Y. S. 150.

226-59 Hayes *v.* Hayes, 242 Mo. 155, 145 S. W. 1155.

227-60 Kerr *v.* Kerr, 80 Kan. 83, 101 P. 647.

227-61 Stephenson *v.* Meeks, 141 Ga. 561, 81 S. E. 851.

228-70 Former will admissible though it varies in two respects from one in question. In re Loree's Est., 158 Mich. 372, 122 N. W. 623.

228-72 In re Ellwanger's Will, 114 N. Y. S. 727.

229-75 Bellamy *v.* Andrews, 151 N. C. 256, 65 S. E. 963.

229-76 Bowen *v.* Kutzner, 167 Fed. 281, 93 C. C. A. 33.

231-88 Abrahams *v.* Woolley, 243 Ill. 365, 90 N. E. 667.

231-91 In re Schmidt's Will, 139 N. Y. S. 464.

233-2 Converse of rule applied. Wolf *v.* Harris, 57 Or. 276, 106 P. 1016.

234-6 Madill *v.* McConnell, 16 Ont. L. R. 314.

234-7 In re Miller's Est., 36 Utah 228, 102 P. 996, persistence in conduct over remonstrance of contestant.

234-11 See In re Morley's Will, 119 N. Y. S. 58.

235-12 Trainer *v.* McGarrity, 40 Pa. Super. 57.

235-13 In re Overpeck's Will, 144 Ia. 400, 120 N. W. 1044; Buck *v.* Buck, 122 Minn. 463, 142 N. W. 729.

235-19 In re Snowball's Est., 157 Cal. 301, 107 P. 598; Murphy's Exr. *v.* Murphy, 146 Ky. 396, 142 S. W. 1018; Reck *v.* Reck, 110 Md. 497, 73 A. 144; In re Morley's Will, 119 N. Y. S. 58; Bellamy *v.* Andrews, 151 N. C. 256, 65 S. E. 963.

236-20 Welch *v.* Barnett, 34 Okla. 166, 125 P. 472.

236-21 Betcher *v.* Brady, 52 Wash. 644, 101 P. 220.

Threats to have actor confined in asylum admissible. Davis *v.* Parsons, 165 Cal. 70, 130 P. 1055.

236-22 In re Loree's Est., 158 Mich. 372, 122 N. W. 623.

236-23 Gallagher *v.* Neilon (Tex.

Civ.), 121 S. W. 564; Betcher *v.* Brady, 52 Wash. 644, 101 P. 220.

236-24 In re Snowball's Est., 157 Cal. 301, 107 P. 598.

236-25 Lisle *v.* Couchman, 146 Ky. 345, 142 S. W. 1023; Dudderar *v.* Dudderar, 116 Md. 605, 82 A. 453; In re Brooks' Will, 120 N. Y. S. 596.

236-27 Shirley *v.* Ezell (Ala.), 60 S. 905; In re Brooks' Will, 120 N. Y. S. 596; Gallagher *v.* Neilon (Tex. Civ.), 121 S. W. 564.

237-28 Kerr *v.* Kerr, 80 Kan. 83, 101 P. 647; Devlin *v.* Devlin, 89 S. C. 268, 71 S. E. 966.

240-48 Advice given grantor by persons called in by him and grantees to pass upon value of property as compared with consideration to be paid, relevant, he being informed of conclusion reached. Fraley *v.* Fraley, 150 N. C. 501, 64 S. E. 381.

241-49 In re Esterbrook's Will, 83 Vt. 229, 75 A. 1.

242-57 In re Snowball's Est., 157 Cal. 301, 107 P. 598; Gordon *v.* Gilmer, 141 Ga. 347, 80 S. E. 1007; McConnell's Exr. *v.* McConnell, 138 Ky. 783, 129 S. W. 106; Winn *v.* Grier, 217 Mo. 420, 117 S. W. 48.

243-58 Bannon *v.* Co. (Ky.), 119 S. W. 1170, transactions many years previous, too remote.

245-67 In re Snowball's Est., 157 Cal. 301, 107 P. 598.

246-69 Goodman *v.* Griffith, 238 Mo. 706, 142 S. W. 259.

246-74 Bellamy *v.* Andrews, 151 N. C. 256, 65 S. E. 963.

246-75 Alford *v.* Johnson, 103 Ark. 236, 146 S. W. 516; Lord *v.* Reed, 254 Ill. 350, 98 N. E. 553; Norton *v.* Clark, 253 Ill. 557, 97 N. E. 1079; Fulton *v.* Freeland, 219 Mo. 494, 118 S. W. 12 (if time not remote); In re Chidester's Est., 227 Pa. 560, 76 A. 418; Duncan *v.* Metcalf, 154 Wis. 39, 141 N. W. 1002.

247-76 Rhea *v.* Madison, 151 Ky. 262, 151 S. W. 667; In re Van Ness' Will, 78 Misc. 592, 139 N. Y. S. 485.

248-81 Shepard's Appeal, 161 Mich. 441, 126 N. W. 640, attempted disposition of another's property.

249-82 In re Snowball's Est., 157 Cal. 301, 107 P. 598; Kerr *v.* Kerr, 80 Kan. 83, 101 P. 647; Ginter *v.* Ginter, 79 Kan. 721, 101 P. 634; Andrews *v.* Lavery, 159 Mich. 26, 123 N. W. 543 (assignment); Jamison *v.* Jamison, 96 Miss. 288, 51 S. 130; Byrne *v.* Byrne, 250 Mo. 632, 157 S. W. 609; Mowry *v.* Norman, 223 Mo. 463, 122 S. W. 724; In re Ellwanger's Will, 114 N. Y. S. 727; Gallagher *v.* Neilon (Tex. Civ.), 121 S. W. 564.

250-83 In re Snowball's Est., 157 Cal. 301, 107 P. 598 (does not raise presumption); McLaughlin *v.* McLaughlin, 242 Ill. 366, 89 N. E. 645; Friedersdorf *v.* Lacy, 173 Ind. 429, 90 N. E. 766; Blodgett *v.* Yocum, 80 Kan. 644, 103 P. 128; Ginter *v.* Ginter, 79 Kan. 721, 101 P. 634; Clark *v.* Young's Exr., 146 Ky. 377, 142 S. W. 1032; Poppleton's Appeal, 158 Mich. 21, 122 N. W. 272 (though person charged received less than his share); Fulton *v.* Freeland, 219 Mo. 494, 118 S. W. 12.

251-86 Poppleton's Appeal, 158 Mich. 21, 122 N. W. 272.

251-90 Poppleton's Appeal, supra; In re Tyson's Est., 223 Pa. 596, 72 A. 1065.

253-99 Hattie *v.* Potter, 54 Wash. 170, 102 P. 1023.

254-3 In re Higgins' Est., 156 Cal. 257, 104 P. 6.

Antecedent circumstances, shown. In re Esterbrook's Will, 83 Vt. 229, 75 A. 1.

254-5 Action without advice, significant. In re Ellwanger's Will, 114 N. Y. S. 727.

254-6 Madill *v.* McConnell, 16 Ont. L. R. 314.

254-7 In re Tyson's Est., 223 Pa. 596, 72 A. 1065.

255-13 Payne *v.* Payne, 12 Cal. App. 251, 107 P. 148; Naeseth *v.* Hommedal, 109 Minn. 153, 123 N. W. 287.

255-14 Payne *v.* Payne, supra; Naeseth *v.* Hommedal, supra.

255-16 Koppe *v.* Koppe, 57 Tex. Civ. 204, 122 S. W. 68.

256-20 Peterson *v.* Budge, 35 Utah 596, 102 P. 211; Black *v.* Post, 67 W. Va. 253, 67 S. E. 1072.

256-21 In re Morley's Will, 119 N. Y. S. 58.

257-24 Mowry *v.* Norman, 223 Mo. 463, 122 S. W. 724; In re Esterbrook's Will, 83 Vt. 229, 75 A. 1.

259-28 Shepard's Appeal, 161 Mich. 441, 126 N. W. 640.

260-31 Miller *v.* Worth, 89 Neb. 75, 130 N. W. 846.

260-32 Hall *v.* Orme, 146 Ky. 467, 142 S. W. 1077. See In re Morley's Will, 119 N. Y. S. 58.

264-33 In re Higgins' Est., 156 Cal. 257, 104 P. 6; Arnold *v.* Livingstone, 155 Ia. 601, 134 N. W. 101; Casad *v.*

Ripley, 145 Ia. 544, 124 N. W. 196 (opportunity and inclination); Goodman *v.* Griffith, 238 Mo. 706, 142 S. W. 259.

272-35 In re Snowball's Est., 157 Cal. 301, 107 P. 598; Bannon *v.* Co. (Ky.), 119 S. W. 1170; In re Loree's Est., 158 Mich. 372, 122 N. W. 623; In re Van Ness' Will, 78 Misc. 592, 139 N. Y. S. 485; In re Miller's Est., 36 Utah 228, 102 P. 996.

272-37 Payne *v.* Payne, 12 Cal. App. 251, 107 P. 148; In re Snowball's Est., 157 Cal. 301, 107 P. 598; Pierce *v.* Farrar (Tex. Civ.), 126 S. W. 932.

273-38 Abrahams *v.* Woolley, 243 Ill. 365, 90 N. E. 667; Stubbs *v.* Marshall, 54 Tex. Civ. 526, 117 S. W. 1030.

273-39 Stubbs *v.* Marshall, 54 Tex. Civ. 526, 117 S. W. 1030.

273-40 In re Snowball's Est., 157 Cal. 301, 107 P. 598.

Value at preceding assessment irrelevant. Washington County *v.* Marquis, 233 Pa. 552, 82 A. 756.

275-48 In re Snowball's Est., 157 Cal. 301, 107 P. 598; Smith *v.* Keller, 205 N. Y. 39, 98 N. E. 214; Pierce *v.* Farrar (Tex. Civ.), 127 S. W. 932.

281-82 Jones *v.* Thomas, 218 Mo. 508, 117 S. W. 1177; Mansfield *v.* Hill, 56 Or. 400, 108 P. 1007.

281-83 Stubbs *v.* Marshall, 54 Tex. Civ. 526, 117 S. W. 1030.

282-85 In re Snowball's Est., 157 Cal. 301, 107 P. 598; Provin *v.* Provin, 161 Mich. 28, 125 N. W. 743; In re Davis' Will (N. J. Eq.), 75 A. 827; Smith *v.* Keller, 205 N. Y. 39, 98 N. E. 214.

284-86 In re Fowler's Will, 159 N. C. 203, 74 S. E. 117.

Testator's declarations prior to execution of will, made to heir in presence of person charged, competent to prove the then exercise of undue influence. In re Snowball's Est., 157 Cal. 301, 107 P. 598.

285-88 Jones *v.* Thomas, 218 Mo. 508, 117 S. W. 1177.

287-96 Nemaha Val. D. Dist. *v.* Marconnit, 90 Neb. 514, 134 N. W. 177.

287-97 Hayes *v.* Hayes, 242 Mo. 155, 145 S. W. 1155.

287-1 In re Loree's Est., 158 Mich 372, 122 N. W. 623; Gibson *v.* Boston, 75 N. H. 405, 75 A. 103.

When inadmissible.—Collins *v.* Dowlan, 118 Minn. 214, 136 N. W. 854.

288-4 Dudderar *v.* Dudderar, 116 Md. 605, 82 A. 453.

288-8 McConnell's Exr. *v.* McConnell, 138 Ky. 783, 129 S. W. 106.

289-16 In re Hewitt's Will, 161 Mich. 536, 126 N. W. 848.

293-32 Declaration of executor who is proponent admissible. In re Shanahan's Est., 176 Mich. 137, 142 N. W. 573.

294-36 See Stratton *v.* Riley (Tex. Civ.), 154 S. W. 606.

295-42 Trainer *v.* McGarrity, 40 Pa. Super. 57.

296-47 Will of testator's husband, inadmissible. Trainer *v.* McGarrity, supra.

298-67 In re Miller's Est., 36 Utah 228, 102 P. 996.

298-68 Larabee *v.* Larabee, 240 Ill. 576, 88 N. E. 1037; In re Bean's Will, 85 Vt. 452, 82 A. 734.

Where the circumstances are insufficient to show undue influence, an opinion based thereon is likewise insufficient. Clark *v.* Young's Est., 146 Ky. 377, 142 S. W. 1032.

299-70 Existence of confidential relation between third parties cannot be shown by opinion. Boye *v.* Andrews, 10 Cal. App. 494, 102 P. 551.

299-71 *Comp.* In re Snowball's Est., 157 Cal. 301, 107 P. 598.

Facts must be stated or opinions not competent. Smith *v.* Boswell, 93 Ark. 66, 124 S. W. 264.

299-74 Borchers *v.* Barckers, 143 Mo. App. 72, 122 S. W. 357.

299-75 In re Shaul's Will, 158 App. Div. 348, 143 N. Y. S. 433.

302-77 Welch *v.* Barnett, 34 Okla. 166, 125 P. 472.

303-84 Du Bose *v.* Kell, 90 S. C. 196, 71 S. E. 371.

More than relation necessary. Crosby *v.* Dorward, 248 Ill. 471, 94 N. E. 78.

304-86 Nelson *v.* Brown, 164 Ala. 397, 51 S. 360; Groff *v.* Stitzer, 75 N. J. Eq. 452, 72 A. 970.

305-87 Kline *v.* Hedges, 229 Mo. 126, 129 S. W. 515.

305-91 Egger *v.* Egger, 225 Mo. 116, 123 S. W. 928; Holley *v.* Still, 91 S. C. 487, 74 S. E. 1065.

305-92 *Contra.* Egger *v.* Egger, 225 Mo. 116, 123 S. W. 928.

306-95 McDermeitt *v.* Keesler, 240 Mo. 278, 144 S. W. 414.

308-2 Smith *v.* Kopitzke, 254 Ill. 498, 98 N. E. 953; Nelson *v.* Wickham, 86 Neb. 46. 124 N. W. 908; Taphorn *v.* Taphorn, 18 O. Dec. 748.

309-4 Stanfill *v.* Johnson, 159 Ala. 546, 49 S. 223; Forbes *v.* Stream, 117 Minn. 484, 136 N. W. 304.

310-5 Nelson *v.* Wickham, 86 Neb. 46, 124 N. W. 908. *Comp.* Huffman *v.* Huffman, 217 Mo. 182, 117 S. W. 1.

311-15 Cooley *v.* Miller, 156 Cal. 510, 105 P. 981, unless attorney openly assumed hostile attitude toward client, or contract created relation of attorney and client.

313-23 See Madill *v.* McConnell, 16 Ont. L. R. 314.

314-35 Carmen *v.* Kight, 85 Kan. 18, 116 P. 231. *Contra* where one fully informed as to facts and other not. Bowen *v.* Kutzner, 167 Fed. 281, 93 C. C. A. 33.

314-37 Whitlock *v.* Dixon, 150 N. C. 616, 64 S. E. 504.

314-38 Thompson *v.* Peterson, 152 App. Div. 667, 137 N. Y. S. 635.

315-40 Generally the fact that a beneficiary has had close business relations with testatrix does not raise a presumption of undue influence. In re Chidester's Est., 227 Pa. 560, 76 A. 418.

315-41 In connection with other circumstances. Conklin *v.* Conklin, 165 Mich. 571, 131 N. W. 154.

315-45 See Grundmann *v.* Wilde, 255 Mo. 109, 164 S. W. 200.

316-52 Alford *v.* Johnson, 103 Ark. 236, 146 S. W. 516; In re Chidester's Est., 227 Pa. 560, 76 A. 418.

318-60 Sellards *v.* Kirby, 82 Kan. 291, 108 P. 73, if estate equally divided between draughtsman and other kin.

320-73 Donnan *v.* Donnan, 256 Ill. 244, 99 N. E. 931; Lisle *v.* Couchman, 146 Ky. 345, 142 S. W. 1023; Clark *v.* Young's Exr., 146 Ky. 377, 142 S. W. 1032.

322-81 Prosise *v.* Phillips, 41 App. Cas. (D. C.) 226; Madre *v.* Gaskins, 39 App. Cas. (D. C.) 19.

323-84 Fulton *v.* Freeland, 219 Mo 494, 118 S. W. 12.

324-87 In re Packer's Est., 164 Cal 525, 129 P. 778; Fulton *v.* Freeland, 219 Mo. 494, 118 S. W. 12.

325-94 Absence of consideration for deed, relevant, but not final. McDonnell *v.* McDonnell, 10 Cal. App. 63, 101 P. 40.

325-96 Hildreth *v.* Hildreth, 153 Ky. 597, 156 S. W. 144.

326-1 Fulton *v.* Freeland, 219 Mo. 494, 118 S. W. 12.

327-10 Craddock *v.* Weekley, 85 S. C. 329, 67 S. E. 308.

329-17 West *v.* West, 84 Neb. 169, 120 N. W. 925.

332-25 Stanfill *v.* Johnson, 159 Ala. 546, 49 S. 223; Miller *v.* Carr, 94 Ark. 176, 126 S. W. 1008; Smith *v.* Boswell, 93 Ark. 66, 124 S. W. 264; Purdy *v.* Watts (Conn.), 99 A. 936; Simons *v.* Laraia (Conn.), 90 A. 28; Lord *v.* Reed, 254 Ill. 350, 98 N. E. 553; Convey *v.* Murphy, 146 Ia. 154, 124 N. W. 1073; Ginter *v.* Ginter, 79 Kan. 721, 101 P. 634; Crump *v.* Chenault, 154 Ky. 187, 156 S. W. 1053; Hildreth *v.* Hildreth, 153 Ky. 597, 156 S. W. 144; Childers *v.* Cartwright, 136 Ky. 498, 124 S. W. 802; Sherrod's Appeal, 161 Mich. 441, 126 N. W. 640; In re Lorec's Est., 158 Mich. 372, 122 N. W. 623; Howard *v.* Farr, 115 Minn. 86, 131 N. W. 1071; Borchers *v.* Borchers, 143 Mo. App. 72, 122 S. W. 257; Fulton *v.* Freeland, 219 Mo. 494, 118 S. W. 12; West *v.* West, 84 Neb. 169, 120 N. W. 925; In re Johnson's Will, 80 N. J. Eq. 525, 85 A. 254; In re Davis' Will (N. J. Eq.), 75 A. 827; In re Kindberg's Will, 207 N. Y. 220, 100 N. E. 789; Thompson *v.* Peterson, 152 App. Div. 667, 137 N. Y. S. 635; In re Richardson's Will, 137 App. Div. 103, 122 N. Y. S. 83; Whitlock *v.* Dixon, 150 N. C. 616, 64 S. E. 504; Foster *v.* Long, 8 O. N. P. (N. S.) 75; Barber *v.* Toomey, 67 Or. 462, 136 P. 343; In re Mason's Will, 82 Vt. 160, 72 A. 329; Woody *v.* Taylor, 114 Va. 737, 77 S. E. 498; Howard *v.* Howard, 112 Va. 566, 72 S. E. 133; Orum *v.* Rose (W. Va.), 81 S. E. 719; Black *v.* Post, 67 W. Va. 253, 67 S. E. 1072.

Evidence sufficient.—McConnell's Exr. *v.* McConnell, 138 Ky. 783, 129 S. W. 106; Gillispie's Exr. *v.* Gillispie (Ky.), 128 S. W. 1078; Bosley *v.* Laverick, 89 Neb. 415, 131 N. W. 617.

Evidence insufficient.—Wampler *v.* Harrell, 112 Va. 655, 72 S. E. 135.

334-26 Robinson *v.* Griffin, 173 Ala. 372, 56 S. 124; Harrison *v.* Rodgers, 162 Ala. 515, 50 S. 364; Payne *v.* Payne, 12 Cal. App. 251, 107 P. 148; Stouffer *v.* Wolfkill, 114 Md. 603, 80 A. 300; Naeseth *v.* Hommedal, 109 Minn. 153, 123 N. W. 287; Jones *v.* Thomas, 218 Mo. 508, 117 S. W. 1177; In re Davis' Will (N. J. Eq.), 75 A. 827; Peterson *v.* Budge, 35 Utah 596, 102 P. 211.

Evidence insufficient.—Lyon *v.* Bailey, 130 N. Y. S. 815.

335-27 Payne *v.* Payne, 12 Cal. App. 251, 107 P. 148; In re Eatley's Will, 82 N. J. Eq. 591, 89 A. 776.

339-32 Fitzgerald *v.* Allen, 240 Ill. 80, 88 N. E. 240.

339-33 In re Banward's Est. (N. J.), 89 A. 1024; In re Gordon's Est. (N. J.), 89 A. 33; In re Phillip's Est., 244 Pa. 35, 90 A. 457.

340-39 McDermeitt *v.* Keesler, 240 Mo. 278, 144 S. W. 414.

341-41 Hawthorne *v.* Jenkins (Ala.), 62 S. 505; Rader *v.* Rader, 108 Minn. 139, 121 N. W. 393; Jones *v.* Thomas, 218 Mo. 508, 117 S. W. 1177; Ward *v.* Ward, 86 Neb. 744, 126 N. W. 305.

341-42 Sullivan *v.* Kenney, 148 Ia. 361, 126 N. W. 349; Reck *v.* Reck, 110 Md. 497, 73 A. 144; Naeseth *v.* Hommedal, 109 Minn. 153, 123 N. W. 287; Wendling *v.* Bowden, 252 Mo. 647, 161 S. W. 774; Kineer *v.* Kineer, 246 Mo. 419, 151 S. W. 424; In re Brooks' Will, 120 N. Y. S. 596; Hattie *v.* Potter, 54 Wash. 170, 102 P. 1023.

342-43 Egger *v.* Egger, 225 Mo. 116, 123 S. W. 928; Schultz *v.* Schultz, 75 N. J. Eq. 615, 74 A. 1135. See In re Cooper's Will (N. C.), 81 S. E. 161.

343-46 Bolles *v.* O'Brien, 63 Fla. 342, 59 S. 133; Aaron *v.* Bayon, 131 La. 228, 59 S. 130.

347-62 See Madill *v.* McConnell, 16 Ont. L. R. 314.

348-66 Harrison *v.* Rodgers, 162 Ala. 515, 50 S. 364; Byrne *v.* Byrne, 250 Mo. 632, 157 S. W. 609.

349-68 The rule concerning the presumption where undue influence is alleged to have been used by parties in confidential relations with testator is limited to cases in which person charged has been immediately connected with preparation or execution of will. Ginter *v.* Ginter, 79 Kan. 721, 101 P. 634.

349-70 Relation of physician and patient, confidential. Zeigler *v.* Bk., 245 Ill. 180, 91 N. E. 1041; Peterson *v.* Budge, 35 Utah 596, 102 P. 211.

351-71 In re Tresidder's Est., 70 Wash. 15, 125 P. 1034.

356-72 Yahr *v.* Hynes, 159 Ky. 518, 167 S. W. 680; In re Chidester's Est., 227 Pa. 560, 76 A. 418.

357-73 Keys *v.* McDowell (Ind. App.), 100 N. E. 385.

358-74 Scarbrough *v.* Scarbrough (Ala.), 64 S. 105; In re Gedney's Will, 142 N. Y. S. 157.

358-75 Peterson *v.* Budge, 35 Utah 596, 102 P. 211.

358-78 Jones *v.* Brooks (Ala.), 63 S. 978; Zeigler *v.* Bk., 245 Ill. 180, 91 N. E. 1041; In re Fallabella's Will, 139 N. Y. S. 1003.

368-12 Cullum *v.* Colwell, 85 Conn. 459, 83 A. 695; Berry *v.* Brown (Tex. Civ.), 148 S. W. 1117.

372-25 McConnell's Exr. *v.* McConnell, 138 Ky. 783, 129 S. W. 106; Bannon *v.* Co. (Ky.), 119 S. W. 1170.

372-28 Bannon *v.* Tr. Co., 150 Ky. 401, 150 S. W. 510.

372-29 Noban *v.* Shoup, 171 Mich. 191, 137 N. W. 75; Paulter *v.* Manuel, 25 Okla. 59, 108 P. 749.

372-30 Beemer *v.* Beemer, 256 Ill. 312, 100 N. E. 135.

373-32 See Jamison *v.* Jamison, 96 Miss. 288, 51 S. 130.

373-36 Thompson *v.* Peterson, 152 App. Div. 667, 137 N. Y. S. 635; In re Van Ness' Will, 78 Misc. 592, 139 N. Y. S. 485; In re Phillips' Est., 244 Pa. 35, 90 A. 457. See Trainer *v.* McGarrity, 40 Pa. Super. 57.

374-37 Opportunity, interest and mental weakness do not warrant inference of undue influence. In re Overpeck's Will, 144 Ia. 400, 120 N. W 1044.

374-38 Murphy's Exr. *v.* Murphy, 146 Ky. 396, 142 S. W. 1018.

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391-1 See Doster *v.* English, 152 N. C. 339, 67 S. E. 754.

391-3 Briggs *v.* Steele, 91 Ark. 458, 121 S. W. 754.

392-4 Forsythe *v.* Co. (Ky.), 121 S. W. 962.

392-5 Nelson *v.* Satre, 111 Minn. 60, 126 N. W. 399.

392-8 Foreign corporation which attempts to evade usury law of forum, not entitled to any presumptions. Washington Nat. B. & L. Assn. *v.* Pifer, 31 App. Cas. (D. C.) 434.

Foreign statute admissible. Casner *v.* Hoskins, 64 Or. 254, 128 P. 841.

394-17 Am. M. Co. *v.* Woodward, 83 S. C. 521, 65 S. E. 739.

394-19 Silverman *v.* Katz, 120 N. Y. S. 790.

395-22 Klein *v.* Co., 166 Fed. 365; Pusser *v.* Thompson, 132 Ga. 280, 64 S. E. 75; Fulwood *v.* Leitch, 7 Ga. App. 359, 66 S. E. 987; Walker *v.* Lovitt. 250 Ill. 543, 95 N. E. 631; Temple *v.* Davis, 115 Minn. 328, 132 N. W. 257; Marsh *v.* Vanness, 75 N. J. Eq. 607, 74 A. 47; Silverman *v.* Katz, 120 N. Y. S. 790; Merchants' & Planters' Nat. Bank *v.* Horton, 27 Okla. 689, 117 P. 201.

Evidence sufficient.—Lee *v.* Reynolds, 170 Ala. 328, 54 S. 166; Ussiker *v.* Mahoney, 67 Misc. 450, 123 N. Y. S. 112.

396-23 Terminal Bk. *v.* Dubroff, 120 N. Y. S. 609.

399-35 In re Straschnow, 181 Fed. 337, 104 C. C. A. 167; Interstate Savings & Trust Co. *v.* Hornsby (Tex. Civ.), 146 S. W. 960.

400-36 Nocona Nat. Bank *v.* Bolton (Tex. Civ.), 143 S. W. 242.

400-41 Evidence sufficient. Athens Mutual Ins. Co. *v.* Evans, 136 Ga. 584, 71 S. E. 892.

402-51 Fulwood *v.* Leitch, 7 Ga. App. 359, 66 S. E. 987.

More required if its works forfeiture. Temple *v.* Davis, 115 Minn. 328, 132 N. W. 257.

Evidence held sufficient to prove usury. Johnson *v.* Grayson, 230 Mo. 380, 130 S. W. 673.

402-53 Smithwick *v.* Whitley, 152 N C. 366, 67 S. E. 914; Doster *v.* English 152 N. C. 339, 67 S. E. 754.

403-59 Klein *v.* Co., 166 Fed. 365.

405-68 Stewart *v.* Lattner (Tex Civ.), 142 S. W. 631.

VALUE

Proof of value as affording basis of rates for services, 509-35; *of substituted article,* 532-43; *Toll bridge,* 534-58; *Railroad property,* 534-58.

425-2 S. *v.* Pigg, 80 Kan. 481, 103 P. 121, and national bank notes.

425-6 *Contra,* Czerney *v.* Haas, 129 N. Y. S. 537.

425-8 Bagley E. Co. *v.* Butler, 24 S. D. 429, 123 N. W. 866.

425-11 Recent increase in value of local lands. Mays *v.* Pelly (Ky.), 125 S. W. 713.

Relative value of land in certain county at given time, noticed. Anderson *v.* Nelson, 86 Neb. 752, 126 N. W. 314.

Facts of general knowledge as to value, noticed. W. U. T. Co. *v.* Brower (Kan.), 105 P. 497.

Constant depreciation in value of many industrial plants over value of ordinary repairs, noticed. P. *v.* Comrs., 196 N. Y. 39, 89 N. E. 581.

Matters entering into comparative value of machines, noticed. Cavanagh *v.* Stevens, 24 S. D. 349, 123 N. W. 681.

Value must be proved when an issuable fact. Carr *v.* Fair, 92 Ark. 359, 122 S. W. 659.

426-13 Citizens' Bk. *v.* Shaw, 132 Ga. 771, 65 S. E. 81; Duncan *v.* Holder. 15 N. M. 323, 107 P. 685; Deri *v.* Bk., 65 Misc. 531, 120 N. Y. S. 813 (checks).

426-16 *Contra,* Tevis *v.* Ryan, 13 Ariz. 120, 108 P. 461. See Whitewater, etc. Mfg. Co. *v.* Baker, 142 Wis. 420, 125 N. W. 984.

427-22 Naked fee in street, disconnected from abutting lot, presumed to be of nominal value. In re Decatur St., 133 App. Div. 321, 117 N. Y. S. 855.

427-24 A rate of compensation in force for considerable time, presumed reasonable and remunerative. Northern P. R. Co. *v.* Com., 57 Wash. 134, 106 P. 611.

428-37 Appraisers presumed to have properly performed duty. Arnold *v.* Watson, 91 Ark. 328, 121 S. W. 354.

428-39 See infra, "Vendor and Purchaser," 885-85.

429-43 Swank *v.* Elwert, 55 Or. 487, 105 P. 901.

If plaintiff's damages measured by market value of property involved, he must show that value. Edwards *v.* Lee, 147 Mo. App. 38, 126 S. W. 104.

431-55 See supra, "Eminent Domain," 197-19.

432-59 Hoover-B. *v.* Palisade, 48 Colo. 64, 108 P. 983.

432-60 Taxation.—Blackstone Mfg. Co. *v.* Town, 211 Mass. 14. 97 N. E. 58.

432-61 Gate City Terminal Co. *v.* Thrower, 136 Ga. 456, 71 S. E. 903.

432-62 Atlanta, etc. R. Co. *v.* Wood, 160 Ala. 657, 49 S. 426; West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377.

433-64 Atlanta, etc. R. Co. *v.* Wood, 160 Ala. 657, 49 S. 426; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401.

433-65 Hoover-B. *v.* Palisade, 48 Colo. 64, 108 P. 983; West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377; In re Bensel, 158 App. Div. 41, 142 N. Y. S. 982; Harrisburg, etc. R. Co. *v.* County, 225 Pa. 467, 74 A. 340 (tolls received or that would be received under better management, and market value of stock of turnpike company); In re Water Co., 223 Pa. 323, 72 A. 625; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401.

434-68 Kentucky S. Co. *v.* Page (Ky.), 125 S. W. 170; Tri-State T. & T. Co. *v.* Cosgriff, 19 N. D. 771, 124 N. W. 75 (damage to trees outside strip taken regarded only in connection with entire tract not taken); Lufkin L. & L. Co. *v.* Noble (Tex. Civ.), 127 S. W.

1093; Belka *v.* Allen, 82 Vt. 456, 74 A. 91 (wood and timber).

Opinion of witness as to value of each tree inadmissible. Ozark O. Co. *v.* R. Co., 173 Mo. App. 450, 158 S. W. 884.

434-69 Hoover-B. *v.* Palisade, 48 Colo. 64, 108 P. 983.

434-70 Value of timber shown by evidence of relative value of lumber and cost of manufacturing it at different times. Marthinson *v.* McCutchen, 84 S. C. 256, 66 S. E. 120.

434-71 Ide *v.* R. Co., 83 Vt. 66, 74 A. 401 (availibility of water power). Irrigation facilities, relevant. Hoover-B. *v.* Palisade, 48 Colo. 64, 108 P. 983.

434-72 Atlanta T. C. Co. *v.* Co., 132 Ga. 537, 64 S. E. 563.

435-76 Central R. Co. *v.* Kelley, 7 Ga. App. 464, 67 S. E. 118; In re Manhattan T., 120 N. Y. S. 465 (though lease for long term and rental value is because of location of property near bridge, it is not cause for ignoring such value city not bound to maintain bridge); Citizens' S., etc. Bk. *v.* Ins. Co., 87 Vt. 23, 86 A. 1056.

That rent is what it ought to be competent. Citizens S., etc. Bk. *v.* Ins. Co., 87 Vt. 23, 86 A. 1056.

436-83 Atlanta, etc. R. Co. *v.* Wood, 160 Ala. 657, 49 S. 426; In re Blackwell's Isl., 198 N. Y. 84, 91 N. E. 278, *rev.* In re City of New York, 118 App. Div. 272, 103 N. Y. S. 441 (structural value); In re Block, etc., 66 Misc. 488, 122 N. Y. S. 321 (if the building is suitable to the land).

Value of parts of structure may not be shown; evidence must deal with it as entirety. Ide *v.* R. Co., 83 Vt. 66, 74 A. 401.

437-84 In re Simmons, 130 App. Div. 350, 114 N. Y. S. 571.

438-86 Value separate from land admissible. Missouri, etc. R. Co. *v.* Murray (Tex. Civ.), 150 S. W. 217.

438-87 In re Water Co., 223 Pa. 323, 72 A. 625; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401.

438-93 City of Los Angeles *v.* Lumb. Co., 15 Cal. App. 676, 115 P. 654; Halstead *v.* R. Co., 48 Ind. App. 96, 95 N. E. 439.

439-96 Myers *v.* Bender, 46 Mont. 497, 129 P. 330.

439-97 In re Simmons, 130 App. Div. 356, 114 N. Y. S. 575; Harrisburg, etc. R. Co. *v.* County, 225 Pa. 467, 74 A. 340. *Comp.* Gray's Harbor B. Co. *v.* Lownsdale, 54 Wash. 83, 102 P. 1041.

441-99 Louisiana R. Co. *v.* Sarpy, 125 La. 388, 51 S. 433; In re Simmons, 130 App. Div. 356, 114 N. Y. S. 575; Harrisburg, etc. R. Co. *v.* County, 225 Pa. 467, 74 A. 340 (reasonable prospect of another use); Vancouver W. Co. *v.* County, 55 Wash. 112, 104 P. 180.

441-1 Crystal City & U. R. Co. *v.* Isbell (Tex. Civ.), 126 S. W. 47.

441-3 See supra, "Eminent Domain," 196-15.

441-4 St. Louis, etc. R. Co. *v.* Maxfield, 94 Ark. 135, 126 S. W. 83; Catlin *v.* Co., 225 Pa. 262, 74 A. 56.

443-6 Gray's Harbor B. Co. *v.* Lownsdale, 54 Wash. 83, 102 P. 1041, 104 P. 267; Seattle *v.* Byers, 54 Wash. 518, 103 P. 791.

444-9 In re Simmons, 130 App. Div. 356, 114 N. Y. S. 575.

445-23 Value of each portion may be shown after showing value of whole. Reinke *v.* Sanitary Dist., 260 Ill. 380, 103 N. E. 236.

446-34 Co-owner's admission, not competent. Indianapolis & C. T. Co. *v.* Wiles, 174 Ind. 236, 91 N. E. 161.

446-35 Holmes *v.* Rivers, 145 Ia. 702, 124 N. W. 801; Fairchild *v.* R. Co., 82 N. J. L. 423, 82 A. 924.

447-37 Deed prima facie evidence of value of land conveyed as between officers of two corporations, land of one of which leased to the other. C. *v.* Donnelly, 40 Pa. Super. 116.

447-39 Gate City Terminal Co. *v.* Thrower, 136 Ga. 456, 71 S. E. 903; Halstead *v.* R. Co., 48 Ind. App. 96, 95 N. E. 439; Cherry Bros. *v.* Christian Co., 146 Ky. 330, 142 S. W. 726; In re Block, etc., 66 Misc. 488, 122 N. Y. S. 321 (and local cases cited); In re Hamilton Place, 122 N. Y. S. 660; Belka *v.* Allen, 82 Vt. 456, 74 A. 91; S. *v.* Court, 55 Wash. 64, 104 P. 148.

A single sale of property is not a good criterion of its value. Harmon *v.* Ins. Co., 170 Mo. App. 309, 156 S. W. 87.

448-41 Gray's Harbor B. Co. *v.* Lownsdale, 54 Wash. 83, 102 P. 1041.

449-44 Wichita Falls, etc. R. Co. *v.* Wyrick (Tex. Civ.), 147 S. W. 730.

449-45 Price received by attorney on resale or exchange of undivided interest in land bought by him from client may be proved, explanation being made of changes in prices in interim of six months, though such interest without market value when bought. Hamilton *v.* Allen, 86 Neb. 401, 125 N. W. 610.

450-53 Bankrupt sale not set aside if sum realized exceeds appraised value of property sold. Schuler *v.* Hassinger, 177 Fed. 119, 100 C. C. A. 539.

451-61 *Contra*, Sveiven *v.* Thompson, 110 Minn. 484, 126 N. W. 131.

451-62 Oregon R. & N. Co. *v.* Eastlack, 54 Or. 196, 102 P. 1011, remote time. If value fixed for purpose of ascertaining difference in worth of exchanged properties, it is not conclusive. Robbins *v.* Selby (Ia.), 121 N. W. 674. Otherwise it is. Fagin *v.* Hook, 134 Ia. 381, 105 N. W. 155.

451-64 Cent. Ga. P. Co. *v.* Stone, 139 Ga. 416, 77 S. E. 565; City of Louisville *v.* Benedict, 147 Ky. 391, 144 S. W. 43; Williams *v.* Hewitt, 57 Wash. 62, 106 P. 496.

452-66 Indianapolis & C. T. Co. *v.* Wiles, 174 Ind. 236, 91 N. E. 161.

452-67 *Comp.* Houston, etc. R. Co. *v.* Dooley (Tex. Civ.), 160 S. W. 594.

453-75 Mays *v.* Pelly (Ky.), 125 S. W. 713.

453-76 Mays *v.* Pelly, supra, all circumstances connected with bidding and operating on bidder, relevant.

453-81 In re Hamilton Place, 67 Misc. 191, 122 N. Y. S. 660; Belka *v.* Allen, 82 Vt. 456, 74 A. 91.

Owner's valuation not conclusive upon him in case of fraud. Knight *v.* Leighton, 110 Minn. 254, 124 N. W. 1090.

453-82 *Comp.* Indianapolis & C. T. Co. *v.* Wiles, 174 Ind. 236, 91 N. E. 161.

453-84 Offers to sell, not convincing. McKee *v.* Downing, 224 Mo. 115, 124 S. W. 7.

454-91 Lonisville & N. R. Co. *v.* Club, 155 Ky. 452, 159 S. W. 983; Det. & M. R. Co. *v.* R. Coon (Mich.), 137 N. W. 331.

455-94 St. Louis, etc. R. Co. *v.* Magness, 93 Ark. 46, 123 S. W. 786; Hildreth *v.* Longmont, 47 Colo. 79, 105 P. 107; Denver, etc. R. Co. *v.* Heckman, 45 Colo. 470, 101 P. 976; Calahan *v.* Dunker, 51 Ind. App. 436, 99 N. E. 1021; Crystal City & U. R. Co. *v.* Isbell (Tex. Civ.), 126 S. W. 47. Statute prohibits use of tax statements for extraneous purposes. Williams *v.* Brown, 137 Mich. 569, 100 N. W. 786.

456-95 Porter *v.* Bridge Co., 137 N. Y. S. 214.

Assessment some evidence of value. In re Simmons, 132 App. Div. 574, 116 N. Y. S. 952.

Conclusive for purpose of ascertaining what is real estate and its value as basis for limits of municipal indebtedness. Levy *v.* McClellan, 196 N. Y. 178, 89 N. E. 569.

Not conclusive for purpose of fixing value of land in controversy for jurisdictional purposes. Spreckles *v.* Brown, 212 U. S. 208.

456-96 Crystal City & N. R. Co. *v.* Isbell (Tex. Civ.), 126 S. W. 47.

457-10 If too remote, properly excluded. Martin *v.* Daniel (Tex. Civ.), 164 S. W. 17.

457-11 Holmes *v.* Rivers, 145 Ia. 702, 124 N. W. 801; Cornell-Andrews S. Co. *v.* Corp., 215 Mass. 381, 102 N. E. 625.

458-14 St. Louis, etc. R. Co. *v.* Maxfield, 94 Ark. 135, 126 S. W. 83; Flemister *v.* Co., 140 Ga. 511, 79 S. E. 148; West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377; Smith *v.* Sanitary Dist., 260 Ill. 453, 102 N. E. 254; Louisville, etc. R. Co. *v.* Baskett (Ky.), 121 S. W. 957; In re Manhattan T., 120 N. Y. S. 465; Oregon R. & N. Co. *v.* Eastlack, 54 Or. 196, 102 P. 1011 (even on cross-examination to test knowledge); East Shore L. Co. *v.* Com. (R. I.), 86 A. 894; S. *v.* Court, 55 Wash. 64, 104 P. 148.

458-16 Cleveland, etc. R. Co. *v.* Smith, 177 Ind. 524, 97 N. E. 164.

459-17 Admission of such evidence discretionary. Am. States S. Co. *v.* R. Co., 139 Wis. 199, 120 N. W. 844.

460-21 St. Louis, etc. R. Co. *v.* MacAdams (Mo.), 166 S. W. 307; In re Block, etc., 66 Misc. 488, 122 N. Y. S. 321; Koppe *v.* Koppe, 57 Tex. Civ. 204, 122 S. W. 68. See Houston, etc. R. Co. *v.* Dooley (Tex. Civ.), 160 S. W. 594.

"No two pieces of property are exactly alike, so that no positive rule can be laid down as to the degree of similarity to justify proof of such sales. The limits of the evidence necessarily rest largely in the discretion of the trial judge. St. Louis & Illinois Belt Railway Co. *v.* Guswelle, 236 Ill. 214, 86 N. E. 230." Chicago, etc. R. Co. *v.* Heidenreich, 254 Ill. 231, 98 N. E. 367.

461-28 Fourth Nat. Bk. *v.* C., 212 Mass. 66, 98 N. E. 686.

462-30 West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377.

462-31 Koppe *v.* Koppe, 57 Tex. Civ. 204, 122 S. W. 68.

462-33 West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377.

"Where a railroad company has located its road across property, it is not proper for one owner to show what the

company has paid as compensation for other property, because it must have the particular property, even if it costs more than its real value. There is also the element of damage to remaining property, differing in almost every case, and the amount paid furnishes no fair criterion of value. The company cannot prove what it has paid, because the sale is compulsory; and it could have forced a sale at a price to be fixed by a jury.'' Chicago, etc. R. Co. *v.* Heidenreich, 254 Ill. 231, 98 N. E. 567.

462-35 Roberts *v.* City, 239 Pa. 339, 86 A. 926; Brown *v.* City, 231 Pa. 593, 80 A. 1113.

465-48 General increase in land values cannot be shown; otherwise it seems, if testimony limited to vicinity of res. S. *v.* Court, 55 Wash. 64, 104 P. 148.

466-49 Rule does not apply where land injured in excess of value. The part must be valued independently of the whole. Hord *v.* R. Co., 122 Tenn. 399, 123 S. W. 637.

468-60 Ozark O. Co. *v.* R. Co., 173 Mo. App. 450, 158 S. W. 884.

469-68 Broadway C. M. Co. *v.* Smith, 136 Ky. 725, 125 S. W. 157.

471-80 Sandersville *v.* Stanley, 10 Ga. App. 360, 73 S. E. 535.

476-18 Birmingham, etc. Co. *v.* Long, 5 Ala. App. 510, 59 S. 382; Tenn. C., etc. Co. *v.* McMillion, 161 Ala. 130, 49 S. 880; Consolidated Co. *v.* Alaux, 24 Colo. App. 377, 133 P. 1046; Central Ga. P. Co. *v.* Cornwell, 139 Ga. 1, 76 S. E. 387; Cornell-Andrews S. Co. *v.* Corp., 215 Mass. 381, 102 N. E. 625; Morrell *v.* Preiskel (N. J. L.), 74 A. 994; St. Louis, etc. Co. *v.* Weldon, 39 Okla. 369, 135 P. 8; Wichita, etc. Co. *v.* Munsell, 38 Okla. 253, 132 P. 906; City of Portland *v.* Tigard, 64 Or. 404, 129 P. 755, 130 P. 982 (real estate dealer); Drexler *v.* Borough, 238 Pa. 376, 86 A. 272; Hagelstein *v.* Blaschke (Tex. Civ.), 149 S. W. 721; Day *v.* Hunnicutt (Tex. Civ.), 160 S. W. 134; Porter *v.* Langley (Tex. Civ.), 155 S. W. 1042; Callen *v.* Collins (Tex. Civ.), 154 S. W. 673; Ft. Worth R. Co. *v.* Ayers (Tex. Civ.), 149 S. W. 1068; City of Tacoma *v.* Bonnell, 58 Wash. 593, 109 P. 60; Bogart *v.* L. Co., 72 Wash. 417, 130 P. 490; Newell *v.* Loeb, 77 Wash. 182, 137 P. 811; North Coast R. Co. *v.* Gentry, 58 Wash. 82, 107 P. 1060; Jeffery *v.* Osborne, 145 Wis. 351, 129 N. W. 931.

''The question of market value is to be determined upon the testimony of those who have knowledge upon that subject or whose business or experience entitles their opinions to weight, and is usually established by the opinions of witnesses who are familiar with the property taken; this being one of the recognized exceptions to the general rule that witnesses are required to state facts and not express opinions.'' Ft. Smith, etc. Bridge Dist. *v.* Scott, 103 Ark. 405, 147 S. W. 440.

Testimony of a real estate broker who qualified as an expert as to the value of the option in 1908, as to the value of the property in April or May of that year, and as to the rate at which it had increased in value during the ten years preceding the trial, and the reasons for such increase ''was properly admitted both as showing the familiarity of the witness with the property in question and with other surrounding property, as a part of his qualification as an expert, and was also admissible as showing the value of the option of which the plaintiff allowed the defendants to avail themselves as a part of the consideration for the agreement between the parties.'' Eastman *v.* Dunn, 34 R. I. 416, 83 A. 1057.

Lack of knowledge of value after part of property taken does not disqualify witness in proceeding to ascertain difference in value. First P. Church *v.* Pittsburg, 223 Pa. 165, 72 A. 347.

477-20 City of Woburn *v.* Adams, 187 Fed. 781, 109 C. C. A. 629; Central Ga. P. Co. *v.* Cornwell, 139 Ga. 1, 76 S. E. 387; In re Western Ave., 57 Wash. 290, 106 P. 901.

478-23 Cent. Ga. P. Co. *v.* Stone, 139 Ga. 416, 77 S. E. 565.

478-24 No special experience or training necessary. Hodges *v.* Kyle, 9 Ala. App. 449, 63 S. 761.

478-27 Rotan Groc. Co. *v.* Jackson (Tex. Civ.), 153 S. W. 687.

478-28 Flemister *v.* Co., 140 Ga. 511, 79 S. E. 148; Burkhard *v.* Co., 243 Pa. 369, 90 A. 157.

479-38 Familiarity with similar conditions as those existing in instant case must be shown. Morrell *v.* Preiskel (N. J. L.), 74 A. 994.

480-41 Flemister *v.* Co., 140 Ga. 511, 79 S. E. 148.

480-42 Harris *v.* Co. (Ark.), 162 S. W. 49. See Citizens' S., etc. Bk. *v.* Ins. Co., 86 Vt. 267, 84 A. 970.

480-43 Meighan *v.* Co., 165 Ala. 591, 51 S. 775.

480-46 Must rest on evidence. Harten *v.* Loeffler, 212 U. S. 397.

480-47 Morrell *v.* Preiskel (N. J. L.), 74 A. 994; Mo., etc. R. Co. *v.* Murray (Tex. Civ.), 150 S. W. 217.

May state he saw the property the previous fall. Moon *v.* Wright, 12 Ga. App 659, 78 S. E. 141.

481-48 Receiving testimony of expert based on hearsay not error. Citizens' S., etc. Bk. *v.* Ins. Co., 86 Vt. 267, 84 A. 970.

481-54 In re Kassel, 195 Fed. 492, 115 C. C. A. 402; Bonds *v.* Brown, 133 Ga. 451, 66 S. E. 156; In re Manhattan, 120 N. Y. S. 465.

481-56 Tennessee, C., etc. Co. *v.* McMillion, 161 Ala. 130, 49 S. 880; Enterprise L. Co. *v.* Porter, 165 Ala. 579, 51 S. 723; St. Louis, etc. R. Co. *v.* Shore, 89 Ark. 418, 117 S. W. 515; Konda *v.* Fay, 22 Cal. App. 722, 136 P. 514; Cent. Ga. P. Co. *v.* Stone, 139 Ga. 416, 77 S. E. 565; Miller *v.* Luckey, 132 Ga. 581, 64 S. E. 658; Kelley *v.* R. Co., 123 La. 1088, 49 S. 717; Baldinger *v.* Ins. Assn., 121 Minn. 160, 141 N. W. 104; Jenkins *v.* Womach, 164 Mo. App. 38, 147 S. W. 223; Mengell *v.* W. Co., 224 Pa. 120, 73 A. 201; Catlin *v.* Co., 225 Pa. 262, 74 A. 56; Matteson *v.* R. Co., 40 Pa. Super. 234; Mo., etc. R. Co. *v.* Chilton (Tex Civ.), 118 S. W. 779; Mo., etc. R. Co. *v.* Neiser, 54 Tex. Civ. 460, 118 S. W. 166; International, etc. R. Co. *v.* Fickey (Tex. Civ.), 125 S. W. 327; Ide *v.* R. Co., 83 Vt. 66, 74 A. 401; City of Sedro-Woolley *v.* Willard, 71 Wash. 646, 129 P. 372.

"Expert witnesses" in the sense in which the term is usually employed, are not required to prove the value in cases of this kind. Combs *v.* Lake, 91 Ark. 132, 120 S. W. 977. If this were not so, in cases like this, involving an inquiry into the market value of property not commonly bought and sold for the purpose for which the land was taken, and the owner was confined upon such inquiry to witnesses who showed themselves qualified to testify to its value by their knowledge of sales of similar property for like purposes, it would, in effect, deny him the right to prove the true market value of his property." Ft. Smith, etc. Bridge Dist. *v.* Scott, 103 Ark. 405, 147 S. W. 440.

486-65 Schmidt *v.* Beiseker, 19 N. D. 35, 120 N. W. 1096; Catlin *v.* Co., 225 Pa. 262, 74 A. 56.

486-67 Witness who does not know value of property may not testify to its estimated value. Thornburg *v.* Doolittle, 148 Ia. 530, 125 N. W. 1003.

487-68 Cent. R. Co. *v.* Stone, 139 Ga. 416, 77 S. E. 565; W. J. Funk & Co. *v.* Stevens, 56 Or. 490, 109 P. 133; Matteson *v.* R. Co., 40 Pa. Super. 234; Houston, etc. Co. *v.* Vogel (Tex. Civ.), 156 S. W. 261.

487-69 Savings, etc. Co. *v.* R. Co., 229 Pa. 484, 78 A. 1039.

488-77 Combs *v.* Lake, 91 Ark. 128, 120 S. W. 977.

488-78 Martin *v.* Ince (Tex. Civ.), 148 S. W. 1178.

488-79 *Contra* as to information concerning prices paid by condemnor. Oregon R. & N. Co. *v.* Eastlack, 54 Or. 196, 102 P. 1011.

489-80 "All persons who are acquainted with property and have opinions of its value may give their opinions to the jury together with their knowledge of the property and the facts upon which the opinions are based." Chicago, etc. R. Co. *v.* Heidenreich, 254 Ill. 231, 98 N. E. 367.

489-83 Anderson *v.* R. Co., 84 Neb. 311, 120 N. W. 1114; McCaffery *v.* R. Co., 22 N. D. 544, 134 N. W. 749; Needham *v.* Halverson Co., 22 N. D. 594, 135 N. W. 203.

Defendant who has testified may be called as witness by plaintiff and asked as to extent to which he owned lands in vicinity. Connecticut R. P. Co. *v.* Dickinson, 75 N. H. 353, 74 A. 585.

490-84 Washington County *v.* Marquis, 233 Pa. 552, 82 A. 756.

490-87 Martin *v.* Schwertley, 155 Ia. 347, 136 N. W. 218.

490-91 Ide *v.* R. Co., 83 Vt. 66, 74 A. 401.

491-94 Bonds *v.* Brown, 133 Ga. 451, 66 S. E. 156; Krebs *v.* Bambrick Bros., etc. Co., 144 Mo. App. 649, 129 S. W. 425.

491-95 Liskey *v.* Snyder, 66 W. Va. 149, 66 S. E. 702.

491-96 Costinett *v.* Hotel Co., 41 App. Cas. (D. C.) 80; Carter *v.* R. Co., 240 Ill. 152, 88 N. E. 493; Hurxthal *v.* Co., 65 W. Va. 346, 64 S. E. 355.

492-98 Liskey *v.* Snyder, 66 W. Va. 149, 66 S. E. 702.

492-2 Louisville, etc. R. Co. *v.* Baskett (Ky.), 121 S. W. 957.

492-7 Value of separate parts of farm available for specific uses, shown. Sveiven *v.* Thompson, 110 Minn. 484, 126 N. W. 131.

494-17 Miller *v.* Luckey, 132 Ga. 581, 64 S. E. 658; Stewart *v.* Co., 147 Ia. 548, 126 N. W. 449.

494-24 Meighan *v.* Co., 165 Ala. 591, 51 S. 775.

495-31 Tennessee C., etc. Co. *v.* McMillion, 161 Ala. 130, 49 S. 880.

495-32 Miller *v.* Luckey, 132 Ga. 581, 64 S. E. 658; Wasioto, etc. R Co. *v.* Hensley, 148 Ky. 366, 146 S. W 751.

497-41 Indianapolis & C. T. Co. *v.* Wiles, 174 Ind. 236, 91 N. E. 161; Holmes *v.* Rivers, 145 Ia. 702, 124 N. W. 801; Matteson *v.* R. Co., 40 Pa. Super. 234.

497-42 Trinity, etc. R. Co. *v.* Jobe (Tex. Civ.), 126 S. W. 32, owner may be asked what he would take for property.

497-43 Opportunity of witness to be informed as to value, a factor in determining weight of testimony. Meighan *v.* Co., 165 Ala. 591, 51 S. 775.

497-44 Not conclusive on commissioners. In re Water Supply, 114 N. Y. S. 68; In re Croton River Dam, 129 App. Div. 707, 114 N. Y. S. 75.

Theory or basis upon which witnesses act in making estimates, opportunity for obtaining information and ability or capacity to express opinion, regarded in connection with credibility. Kelley *v.* R. Co., 123 La. 1088, 49 S. 717.

498-47 Lambeth *v.* Co., 152 N. C. 371, 67 S. E. 921.

498-49 Value when purchased incompetent. St. Louis, etc. R. Co. *v.* Miller, 107 Ark. 276, 154 S. W. 956.

498-50 In re Collis, 129 N. Y. S. 214.

498-51 See Cosgrove *v.* Franklin, 35 R. I. 527, 87 A. 544; supra, "Eminent Domain," 194-8.

499-52 Missouri, etc. R. Co. *v.* Chilton (Tex. Civ.), 118 S. W. 779, one year after damage inflicted too late unless clear proof of no change of value.

If damages recoverable are entire, value of land at time of trial may be shown. Suehr *v.* Dist., 242 Ill. 496, 90 N. E. 197.

499-54 Less scope allowable where issue is as to depreciation in value because of loss of improvements. Kuhn *v.* Epstein, 239 Ill. 555, 88 N. E. 174.

505-5 See Jackson B. Co. *v.* Wagner, 123 La. 798, 49 S. 529.

506-8 Liskey *v.* Snyder, 66 W. Va. 149, 66 S. E. 702.

506-9 Rogers *v.* Co., 18 Ont. L. R. 8 (income and expenditures to determine value of buildings); Jackson B. Co. *v.* Wagner, 123 La. 798, 49 S. 529; Dorb *v.* Waybright, 121 N. Y. S. 584.

506-12 Pitman *v.* Ball, 140 Mo. App. 389, 124 S. W. 1082, sale of later lease on same property four years after time in question.

507-15 Baldwin *v.* Bohl, 23 S. D. 395, 122 N. W. 247.

507-17 Offers by irresponsible parties irrelevant. Jackson B. Co. *v.* Wagner, 123 La. 798, 49 S. 529.

507-19 Boston E. R. Co. *v.* Boyton Co., 211 Fed. 812 (C. C. A.).

507-21 *Comp.* Boston E. R. Co. *v.* Boyton Co., 211 Fed. 812 (C. C. A.). *Contra*, Probst *v.* Hinesley, 133 Ky. 64, 117 S. W. 389.

507-22 Carter *v.* R. Co., 145 Ill. App. 653, to show lease has value.

509-35 Proof of value as basis of in absence of better evidence of actual profits or rents received by tenant in common. Griffin *v.* Griffin, 82 S. C. 256, 64 S. E. 160.

Proof of value as basis of rates for services. — Proof of value as basis for establishing rates for public service must not be confined to mere addition of value of several parts of plant, nor to its cost alone, nor to what it might have been sold for if price influenced by excessive rates for service, nor to the cost of replacing it. "The original cost of construction, the amount expended in permanent improvements, the amount and market value of the bonds and stock, the present, as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses are all matters for consideration." Smyth *v.* Ames, 169 U. S. 466 (applying rule to carriers); Cedar Rapids W. Co. *v.* Cedar Rapids, 118 Ia. 234, 260, 91 N. W. 1081 (water rates); Cedar Rapids G. Co. *v.* Cedar Rapids, 144 Ia. 426, 120 N. W. 966 (gas rates). In such a proceeding value of goodwill of corporation which has a monopoly is not to be considered. Willcox *v.* Co., 212 U. S. 19, and Iowa cases cited supra. The

value of property possessed without title may be shown, but not that held for future use if it will not be required for immediate extension of the plant. Cedar Rapids G. Co. *v.* Cedar Rapids, supra. Value is to be fixed as of day ordinance establishing rates enacted. Ibid. Value of pipe in ground is not to be fixed by evidence of cost of material on day in question. Its cost, the prices at which it ordinarily sold, in connection with existing price, is to be considered, allowance being made for deterioration. No added value results to pipes from being covered with pavement. Ibid. Value of services in promoting and organizing similar company, immaterial. Ibid. Cost of reproducing a plant is not a correct measure of its value for the purpose of determining justice of rates established for services; allowance should be made for depreciation in value. Bonds and stocks issued under unusual conditions, not a guide to its value. Knoxville *v.* Co., 212 U. S. 1. In such a case evidence of discounts given by company under contracts with patrons is irrelevant because the ordinance fixing rates does not contemplate giving them; and so of evidence of the effect of the ordinance without the limits of the city. Evidence of the earnings of the plant after ordinance took effect, admissible. Knoxville *v.* Co., supra.

Money expended from earnings in keeping up plant is not to be added to its original cost in fixing value. Knoxville *v.* Co., 212 U. S. 1.

Rates fixed by ordinance after investigation of data furnished by corporation, prima facie valid. Burden of showing excess of earnings over depreciation in any year has not been carried to capital is on corporation, contrary appearing from its books. Louisiana R. Com. *v.* Co., 212 U. S. 414.

In valuing property of public corporations as a basis on which to adjust charges for service each case must depend largely on its own special facts, and every element or circumstance which affects its value is to be regarded. "Neither the fair value of stocks and bonds, the cost of construction, nor the cost of reproducing the plant is absolutely controlling, but each should be regarded as a fact tending to show fair value." So. P. R. Co. *v.* Bartine, 170 Fed. 725. "If there is no other testimony in respect to the value of railroad property than the amount of stocks and bonds outstanding, or the construction account, it may be assumed that one or the other of these represents it." So. P. R. Co. *v.* Bartine, supra; Ames *v.* R. Co., 64 Fed. 165. See S. *v.* Co., 85 Neb. 25, 122 N. W. 591, as to evidence required to show unreasonableness of rates fixed by law.

510-36 In re Stokes' Est., 240 Pa. 288, 87 A. 975. Not conclusive. Lloyd *v.* Co., 223 Pa. 148, 72 A. 516.

Evidence sufficient to establish market value. Jackson *v.* Tel. Co., 174 Mo. App. 70, 156 S. W. 801.

510-37 Muck *v.* Hayden, 173 Mo. App. 27, 155 S. W. 889; Wells *v.* Margraves (Tex. Civ.), 164 S. W. 881; Missouri, etc. R. Co. *v.* Crews, 51 Tex. Civ. 548, 120 S. W. 1110.

510-40 McCarthy *v.* Blackwell (Tex. Civ.), 162 S. W. 1163; State Mut. F. I. Co. *v.* Cathey (Tex. Civ.), 153 S. W. 935. But see Galveston, etc. Co. *v.* Wallraven (Tex. Civ.), 160 S. W. 116; Pecos & N. T. R. Co. *v.* Porter (Tex. Civ.), 156 S. W. 267.

Liberal investigation permitted where there is no market value. Milwaukee T. Co. *v.* Milwaukee, 151 Wis. 224, 138 N. W. 707.

510-42 Existence of combination in restraint of trade may be shown by judgment entered on plea of nolo contendre by plaintiff. Consolidated I. Mfg. Co. *v.* Medford, 18 Pa. Dist. 293

511-46 Nat. W., etc. Co. *v.* Toomey 144 Mo. App. 516, 129 S. W. 423.

511-49 Testimony as to existence of market value is not to be excluded because witness bases opinion on value of use for particular purpose. Texas & P. R. Co. *v.* Owen (Tex. Civ.), 128 S. W. 1139.

Letters of commission firm inadmissible. Houston P. Co. *v.* Griffith (Tex. Civ.), 164 S. W. 431.

511-50 Expert evidence competent. Aldrich *v.* R. Co., 95 S. C. 427, 79 S. E. 316.

511-51 To show market value it is necessary to show cattle of like quality had been bought and sold during the season in sufficient quantity to show a market value. Houston, etc. R. Co. *v.* Crowder (Tex. Civ.), 152 S. W. 183.

511-52 P. *v.* Melnick, 263 Ill. 24, 104 N. E. 1111.

Hearsay is primary evidence on issue

of value. Brown *v.* S. (Tex. Cr.), 162 S. W. 339.

512-57 Massey *v.* Fain, 1 Ala. App. 424, 55 S. 936; Kirchman *v.* Co., 92 Ark. 111, 122 S. W. 239; Westphalen *v.* R. Co., 152 Ia. 232, 132 S. W. 57; Carson *v.* Blount, 156 N. C. 103, 72 S. E. 90; F. W. Brockman Com. Co. *v.* Aaron, 145 Mo. App. 307, 130 S. W. 116; Monture *v.* Regling, 140 Wis. 407, 122 N. W. 1129.

512-58 St. Louis & S. F. R. Co. *v.* Blocker (Tex. Civ.), 138 S. W. 156; Municipal Paving Co. *v.* Donovan Co. (Tex. Civ.), 142 S. W. 644; Monture *v.* Regling, 140 Wis. 407, 122 N. W. 1129.

512-59 Evidence insufficient. White *v.* Jouett, 147 Ky. 197, 144 S. W. 55.

513-66 Monarch Metal Weather-Strip Co. *v.* Hanick, 172 Mo. App. 680, 155 S. W. 858.

513-69 Greenwald *v.* Weir, 130 App. Div. 696, 115 N. Y. S. 311. See supra, "Carriers," 866-10, 11, 12.

513-70 Florman *v.* Co., 79 N. J. L. 63, 74 A. 446; Perrin *v.* Co., 78 N. J. L. 515, 74 A. 462.

513-72 Hohl *v.* Norddeutscher Lloyd, 175 Fed. 544, 99 C. C. A. 166, *foll.* Hart *v.* R. Co., 112 U. S. 331; Bernard *v.* Co., 205 Mass. 254, 91 N. E. 325 (notwithstanding acts of congress of Feb 4, 1887, June 29, 1906); Chicago, etc R. Co. *v.* Wehrman, 25 Okla. 147, 105 P. 328. *Contra,* Berry *v.* R. Co., 24 S. D. 611, 124 N. W. 859 (if carrier has means of knowing value of property and there is wide divergence between agreed and actual value). As between vendor and vendee agreed value, conclusive. Vulcan I. W. Co. *v.* Roquemore, 175 Fed. 11, 99 C. C. A. 77.

514-75 In action for goods sold under a contract, the contract price is itself prima facie evidence of value. Cullen-Friestedt Co. *v.* Turley, 50 Ind. App. 468, 97 N. E. 946.

514-80 Defendant's admissions may be proved. Johnson *v.* Co., 143 Mo. App. 441, 127 S. W. 692.

Action of committee of local exchange in fixing price of commodity on basis of sales, evidence of market value. Liverpool, etc. Ins. Co. *v.* McFadden, 170 Fed. 179, 95 C. C. A. 429.

515-83 Minor's Est. *v.* Crusel, 124 La. 590, 50 S. 590. See Duroth Mfg. Co. *v.* Couffiel, 243 Pa. 24, 89 A. 798.

515-89 Pittsburg, etc. R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022.

515-92 Ott *v.* Boring, 139 Wis. 403, 121 N. W. 126.

516-96 Invoice made by importer conclusive upon him as to value for customs purposes. Daloz *v.* U. S., 171 Fed. 275.

516-97 Ott *v.* Boring, 139 Wis. 403, 121 N. W. 126, firm assets.

517-3 See Texarkana, etc. R. Co. *v.* Works, 57 Tex. Civ. 249, 122 S. W. 64.

517-4 Peters *v.* McPhadden, 75 Wash. 525, 135 P. 26; Tenry *v.* Tel. Co., 73 Wash. 260, 131 P. 812.

Actual quotations.—F. W. Brockman, etc. Co. *v.* Aaron, 145 Mo. App. 307, 130 S. W. 116; Kan., etc. R. Co. *v.* Worsham (Tex. Civ.), 149 S. W. 756.

Newspaper quotations.—Houston Packing Co. *v.* Griffith (Tex. Civ.), 144 S. W. 1139.

517-5 Definite information concerning market prices must be given to make trade publications admissible. Galveston, etc. R. Co. *v.* Word (Tex. Civ.), 124 S. W. 478.

517-6 Houston P. Co. *v.* Griffith (Tex. Civ.), 164 S. W. 431; Peters *v.* McFadden, 75 Wash. 525, 135 P. 26.

Reliance of plaintiff upon newspaper quotation admissible upon issue of credit to be given to paper. Houston P. Co. *v.* Griffith (Tex. Civ.), 164 S. W. 431.

A report over name of individual being his opinion inadmissible. Houston P. Co. *v.* Griffith (Tex. Civ.), 164 S. W. 431.

517-9 Merchants' G. Co. *v.* Co., 89 Ark. 591, 117 S. W. 767, if acted upon by trade.

518-14 Jones *v.* Short, 53 Or. 525, 101 P. 209.

518-18 Maguire *v.* Co., 205 Mass. 64, 91 N. E. 135.

518-22 Galveston, etc. R. Co. *v.* Naelke (Tex. Civ.), 125 S. W. 669.

520-33 Windmiller *v.* R. Co., 52 Wash. 613, 101 P. 225.

520-36 Epperson *v.* Jackson, 83 S. C. 157, 65 S. E. 217.

521-50 Atchison, etc. R. Co. *v.* Sullivan, 173 Fed. 456, 97 C. C. A. 1 (*contra* as to report by corporate officers to public authorities, time covered not corresponding to that fixed for assessment purposes); Calahan *v.* Dunker, 51 Ind. App. 436, 99 N. E. 1021.

521-51 Tax digest admissible to prove value of property to any resident of county covered by it. Churchill *v.* Jackson, 132 Ga. 666, 64 S. E. 691.

522-54 Price paid for property, not evidence of market value. Texarkana, etc. R. Co. *v.* Works, 57 Tex. Civ. 249, 122 S. W. 64.

If the repairs are of different grade, evidence inadmissible. Citizens' S., etc. Bk. *v.* Ins. Co., 87 Vt. 23, 86 A. 1056.

522-55 Galveston, etc. R. Co. *v.* Wallraven (Tex. Civ.), 160 S. W. 116; Galveston, etc. R. Co. *v.* Powers, 54 Tex. Civ. 168, 117 S. W. 459 (intrinsic value may be shown if there is doubt as to proof of market value).

Condition two years prior to time in issue may be shown if condition subsequently made to appear. Bailey *v.* Walton, 24 S. D. 118, 123 N. W. 701.

522-56 Wea Tp. *v.* Cloyd, 46 Ind. App. 49, 91 N. E. 959, also for breeding purposes.

522-57 Pannell *v.* Allen, 160 Mo. App. 714, 142 S. W. 482; Galveston, etc. R. Co. *v.* Crippen (Tex. Civ.), 147 S. W. 361.

523-63 Non-assessment of dog, not evidence it was valueless. El Dorado & B. R. Co. *v.* Knox, 90 Ark. 1, 117 S. W. 779.

523-64 Wea Tp. *v.* Cloyd, 46 Ind. App. 49, 91 N. E. 959.

524-70 Baker *v.* Temple, 160 Mich. 318, 125 N. W. 63.

524-74 Citizens' S. Bk. *v.* Ins. Co., 87 Vt. 23, 86 A. 1056.

525-77 Kates Transfer & W. Co. *v.* Klassen, 6 Ala. App. 301, 59 S. 355; Illinois C. R. Co. *v.* Frost (Ky.), 124 S. W. 821.

525-78 Missouri, etc. R. Co. *v.* Neiser, 54 Tex. Civ. 460, 118 S. W. 166.

Evidence of the price paid for personal property is admissible on the question of intrinsic value. McCullough Hardware Co. *v.* Burdett (Tex. Civ.), 142 S. W. 612.

525-79 Lloyd *v.* Co., 223 Pa. 148, 72 A. 516.

Plaintiff's testimony as to value to him must be accompanied by facts. Galveston, etc. R. Co. *v.* Giles (Tex. Civ.), 126 S. W. 282.

Value to owner only shown if property without market or intrinsic value or cannot be reproduced or replaced. Missouri, etc. R. Co. *v.* Crews, 54 Tex. Civ. 548, 120 S. W. 1110.

526-94 Citizens' Bk. *v.* Shaw, 132 Ga. 771, 65 S. E. 81.

526-98 Bills and notes are, prima facie, worth their face as against one who has been negligent in respect to them. First Nat. Bk. *v.* Henry, 159 Ala. 367, 49 S. 97. As between parties to note converted by solvent maker, partial failure of consideration may be shown. Capps *v.* Vasey, 23 Okla. 554, 101 P. 1043.

527-2 Wegerer *v.* Jordan, 10 Cal. App. 362, 101 P. 1066.

527-3 Greene-Grieb-Sherman Co. *v.* Quinlen Co., 148 Ill. App. 1; Bordner *v.* Depler, 142 Ill. App. 526 (opportunity in any event); Aken *v.* Clark, 146 Ia. 436, 123 N. W. 379; Maas *v.* Co., 156 Wis. 44, 145 N. W. 176.

527-4 Tevis *v.* Ryan, 13 Ariz. 120, 108 P. 461; White *v.* Jouett, 147 Ky. 197, 144 S. W. 55; Harlow *v.* Haines, 63 Misc. 98, 116 N. Y. S. 449; Duroth Mfg. Co. *v.* Caufliel, 243 Pa. 24, 89 A. 798; S. *v.* Pabst, 139 Wis. 561, 121 N. W. 351.

History of corporations admissible. Klaveness *v.* Freese, 33 S. D. 263, 145 N. W. 561.

527-6 Market value regarded as actual value.—Cain *v.* Moore, 54 Wash. 627, 103 P. 1130.

Declarations of owner in deed of gift, relevant. S. *v.* Pabst, 139 Wis. 561, 121 N. W. 351.

528-7 S. *v.* Pabst, 139 Wis. 561, 121 N. W. 351.

528-10 Brown *v.* S. (Tex. Cr.), 162 S. W. 339.

528-11 Jury may consider for what it is worth price obtained for stock at private sale. Chestnut Hill, etc. Road Co. *v.* Montgomery County, 228 Pa. 1, 76 A. 726.

529-16 Price offered, admissible, but not controlling. Morril *v.* Bentley (Ia.), 126 N. W. 155.

Book value of stocks shown if have been dealt in on that basis between parties. S. *v.* Pabst, 139 Wis. 561, 121 N. W. 351.

530-30 Agreement between partners for purchase of good will, sufficient evidence of its value for purpose of levying transfer tax. In re Vivanti's Est., 138 App. Div. 281, 122 N. Y. S. 954.

531-31 Blunck *v.* R. Co., 142 Ia. 146, 120 N. W. 737 (rental value means value of use of land for purpose of maturing and harvesting crop); Missouri, etc. R. Co. *v.* Couch (Tex. Civ.), 122 S. W. 67 (for pasturage purpose if grass destroyed). *Contra*, Tippett *v.* Corder (Tex. Civ.), 117 S. W. 186, especially if lease two years old.

531-32 Missouri, etc. R. Co. *v.* Farm, 53 Tex. Civ. 643, 117 S. W. 1049.

531-33 Jefferis *v.* R. Co., 147 Ia. 124, 124 N. W. 367.

531-34 Chicago, etc. R. Co. *v.* Johnson, 25 Okla. 760, 107 P. 662.

531-37 Lessened value of land, not competent. Tretter *v.* R. Co., 147 Ia. 375, 126 N. W. 339.

532-38 Smith *v.* Co. (Can.), 11 West. L. R. 488; Blunck *v.* R. Co., 142 Ia. 146, 120 N. W. 737; Chicago, etc. R. Co. *v.* Johnson, 25 Okla. 760, 107 P. 662; Missouri, etc. R. Co. *v.* Farm, 53 Tex. Civ. 643, 117 S. W. 1049.

532-39 Tretter *v.* R. Co., 147 Ia. 375, 126 N. W. 339.

532-41 Blunck *v.* R. Co., 142 Ia. 146, 120 N. W. 737 (assumed crop matured when damaged would have been harvested without loss); Chicago, etc. R. Co. *v.* Johnson, 25 Okla. 760, 107 P. 662; Missouri, etc. R. Co. *v.* Farm, 53 Tex. Civ. 643, 117 S. W. 1049.

532-43 Opinions must be given in answer to questions indicating crop like that in question. Tretter *v.* R. Co., 147 Ia. 375, 126 N. W. 339.

Expert opinion as to value of crop on date given must not be based on assumption of continued favorable conditions. Clague *v.* Co., 84 Neb. 499, 121 N. W. 570.

Value of growing grass may not be proved by value of hay used in lieu of it. Missouri, etc. R. Co. *v.* Couch (Tex. Civ.), 122 S. W. 67.

533-45 In re Water Co., 223 Pa. 323, 72 A. 625.

533-48 In re Water Co., 223 Pa. 323, 72 A. 625. All property of corporation to be regarded in fixing value of franchise. C. *v.* Co., 135 Ky. 324, 122 S. W. 164.

533-50 Value of waterworks plant includes value of contract with city which seeks its condemnation. In re Water Co., 223 Pa. 323, 72 A. 625.

533-52 Failure of certain persons to make sales is insufficient to show invention worthless. Rushing *v.* Spreen (Tex. Civ.), 142 S. W. 49.

534-58 Probable future income of toll bridge as affected by prospective increase of local population and opening of free bridges in close proximity to it, regarded as are cost of replacing it in case of destruction, net income received, par value of stock of owner and dividends paid thereon. S. *v.* Co., 82 Conn. 460, 74 A. 775.

Rules for ascertaining value of railroad plant for taxation purposes, given in Atchison, etc. R. Co. *v.* Sullivan, 173 Fed. 456, 97 C. C. A. 1.

534-59 The Lucille, 169 Fed. 719; Vulcan I. W. Co. *v.* Roquemore, 175 Fed. 11, 99 C. C. A. 77; Carnego *v.* Co. (Ia.), 146 N. W. 38; Hanley *v.* R. Co., 154 Ia. 60, 134 N. W. 417; Jelalian *v.* R. Co., 134 App. Div. 381, 119 N. Y. S. 136; Lloyd *v.* Co., 223 Pa. 148, 72 A. 516; McCullough Hardware Co. *v.* Burdett (Tex. Civ.), 142 S. W. 612; Henry *v.* Tel. Co., 73 Wash. 260, 131 P. 812; Schacht *v.* Oriental S. & T. Co., 155 Wis. 121, 143 N. W. 1058. See Galveston, etc. Co. *v.* Wallraven (Tex. Civ.), 160 S. W. 116.

If not too remote.—City of Portland *v.* Tigard, 64 Or. 404, 129 P. 755, 130 P. 982.

535-60 Utz *v.* Ins. Co., 139 Mo. App. 552, 123 S. W. 538, *quot.* the text.

536-74 Galveston, etc. R. Co. *v.* Giles (Tex. Civ.), 126 S. W. 282.

536-77 Greenburg *v.* Childs, 242 Ill. 110, 89 N. E. 679.

537-86 Bill of goods inadmissible to show cash or market value when property lost. Orr, etc. Co. *v.* Co., 77 N. J. L. 749, 73 A. 541.

537-87 Johnson *v.* Co., 143 Mo. App. 441, 127 S. W. 692; Melini *v.* Freige, 15 N. M. 455, 110 P. 563; Dakin *v.* Ins. Co., 59 Or. 269, 117 P. 419; Galveston, etc. Co. *v.* Wallraven (Tex. Civ.), 160 S. W. 116.

537-88 Phillips *v.* Pippen, 4 Ala. App. 426, 58 S. 111; Atlanta, etc. R. Co. *v.* Minchew, 7 Ga. App. 566, 67 S. E. 678 (in connection with proof of condition); Weinberg *v.* R. Co., 83 S. C. 468, 65 S. E. 634.

Actual value of converted property may be shown to be in excess of price agreed upon by parties, but not to be less unless contract so provides. Smith *v.* Goff, 29 R. I. 439, 72 A. 289.

538-92 Beardsley *v.* Ashdown (W. Va.), 80 S. E. 128.

538-97 Ommen *v.* Talcott, 175 Fed. 261; Sanitary Dist. *v.* Corneau, 257 Ill. 93, 100 N. E. 517; Vaupel *v.* Lamply (Ind.), 103 N. E. 796; Epp *v.* Hinton, 91 Kan. 513, 138 P. 576; Schall *v.* Co., 123 Minn. 214, 143 N. W. 357; Allen *v.* Gray, 63 Misc. 219, 115 N. Y. S. 928; Chestnut H. & S., etc. Co. *v.* M. Co., 228 Pa. 1, 76 A. 726; Olson *v.* Rydl, 25 S. D. 268, 126 N. W. 587; St. Louis, etc. R. Co. *v.* Lane (Tex.

Civ.), 118 S. W. 847 (accounts of sale by commission men competent if verified). See supra, "Partnership," 573-35.

539-3 Ommen *v.* Talcott, 175 Fed. 261; Old Dominion C. M. & S. Co. *v.* Bigelow, 203 Mass. 159, 89 N. E. 193; Berry *v.* R. Co., 24 S. D. 611, 124 N. W. 859.

540-13 Sigel-C. L. S. Co. *v.* Holly, 44 Colo. 580, 101 P. 68, trover.

541-21 Corey *v.* Penney, 165 Ala. 234, 51 S. 624; Sanitary Dist. *v.* Corneau, 257 Ill. 93, 100 N. E. 517; Moore *v.* Lachmund, 59 Or. 565, 117 P. 1123.

542-23 Sale six months after representations concerning value of property, not convincing as to their fraudulent character. In re Am. K. G. Mfg. Co., 173 Fed. 480, 97 C. C. A. 486.

542-25 Not binding on parties. Corey *v.* Penney, 165 Ala. 234, 51 S. 624. Except where redelivery bond given. Jones *v.* Short, 53 Or. 525, 101 P. 209.

543-26 "The highest bid made at an open judicial sale, fairly conducted, after full notice, in the face of such competition as can be attracted, is a fair and just criterion of the value of the property at that time. After-stated opinions, affidavits of undervalue, and the like, are regarded with little favor, and are entitled to little weight in comparison with the fact established by the auction and its results." Nitro-Phos. Syn. *v.* Johnson, 100 Va. 774, 42 S. E. 995, *cit.* Todd *v.* Gallego Mills, 84 Va. 586, 5 S. E. 676, and *quoted* in Benet *v.* Ford, 113 Va. 442, 74 S. E. 394.

543-28 George *v.* Lane, 80 Kan. 94, 102 P. 55.

543-32 George *v.* Lane, 80 Kan. 94, 102 P. 55.

544-35 Epp *v.* Hinton, 91 Kan. 513, 138 P. 576.

544-38 Stanley *v.* Sumrell (Tex. Civ.), 163 S. W. 697.

544-45 Stanley *v.* Sumrell, supra.

An offer is not evidence of value unless accepted, and the court is not bound to let such testimony go in unchallenged, because counsel for the plaintiff made no objection thereto. Elec. Park Amusement Co. *v.* Psichos, 83 N. J. L. 262, 83 A. 766.

545-47 Ill. Cent. R. Co. *v.* Roskemmer, 264 Ill. 103, 105 N. E. 695; Swank *v.* Elwert, 55 Or. 487, 105 P. 901 (offer must be absolute).

Bona fide offers for such property are admissible; if for no other reason than to show the competency of the witness. Rottlesberger *v.* Hanley, 155 Ia. 638, 136 N. W. 776, *cit.* Faust *v.* Hosford, 119 Ia. 97, 93 N. W. 58; Clausen *v.* Tjernagel, 91 Ia. 285, 59 N. W. 277; Joy *v.* Insurance Co., 83 Ia. 12, 48 N. W. 1049.

545-48 Moore *v.* Shannon, 137 Ky. 604, 126 S. W. 136, to show property not worthless and as bearing on value.

Newspaper report of offers of sale of stock probably inadmissible. Peters *v.* McPhadden, 75 Wash. 525, 135 P. 26.

545-52 Whitaker *v.* S., 11 Ga. App. 208, 75 S. E. 258.

546-56 Bailey *v.* Walton, 24 S. D. 118, 123 N. W. 701.

546-58 Unindorsed check. See supra, "Larceny," 141-58.

547-61 S. *v.* Lewis, 144 Ia. 483, 123 N. W. 168.

547-65 Peterson *v.* S., 6 Ga. App. 491, 65 S. E. 311; S. *v.* Lewis, 144 Ia. 483, 123 N. W. 168; Lambert *v.* S., 91 Neb. 520, 136 N. W. 720; McCoy *v.* S., 56 Tex. Cr. 551, 120 S. W. 858.

547-66 See supra, "Larceny," 142-60.

548-68 Article stolen may be sufficient evidence. P. *v.* Dumas, 161 Mich. 45, 125 N. W. 766.

548-70 S. *v.* Feinberg, 145 Ia. 329, 124 N. W. 208, in prosecution for receiving stolen goods value must be fixed at place they were received. If owner testifies in another county than that in which theft committed it will be assumed his testimony related to value in one or other of these counties and it was same in both.

548-76 Gossett *v.* Morrow (Ala.), 65 S. 826; St. Louis, etc. R. Co. *v.* Dale, 36 Okla. 114, 128 P. 137; St. Louis, etc. R. Co. *v.* Crowell, 33 Okla. 773, 127 P. 1063; Chicago, etc. R. Co. *v.* Johnson, 25 Okla. 760, 107 P. 662 (growing crops); Stocker *v.* Schneider, 228 Pa. 149, 77 A. 437; Brown *v.* S. (Tex. Cr.), 162 S. W. 339; McGee *v.* S. (Tex. Cr.), 155 S. W. 246.

549-78 Halper *v.* Wolff, 82 Conn. 552, 74 A. 890; Euston & Co. *v.* R. Co., 147 Ill. App. 594; Wendnagel *v.* Houston, 155 Ill. App. 664; Westphalen *v.* R. Co., 152 Ia. 232, 132 N. W. 57.

549-81 St. Louis, etc. Co. *v.* Armstrong (Tex. Civ.), 166 S. W. 366; Gulf, etc. R. Co. *v.* Peacock (Tex. Civ.), 128

S. W. 463; Galveston, etc. R. Co. *v.* Jones (Tex. Civ.), 123 S. W. 737.

550-85 Louisville & N. R. Co. *v.* Tobacco Society, 147 Ky. 22, 143 S. W. 1040; Ft. Worth, etc. R. Co. *v.* Arthur (Tex. Civ.), 124 S. W. 213.

550-88 Ibid; Wood *v.* R. Co., 118 Minn. 362, 136 N. W. 1095.

550-91 See Leder *v.* Co., 175 Mich. 470, 141 N. W. 646.

550-92 Gulf, etc. R. Co. *v.* Peacock (Tex. Civ.), 128 S. W. 463.

551-95 Lightman *v.* Epstein, 164 Ala. 660, 51 S. 164; Converse *v.* Ferguson, 166 Cal. 1, 134 P. 977; Halper *v.* Wolff, 82 Conn. 552, 74 A. 890; Muncie & P. Co. *v.* Min. Co., 179 Ind. 322, 100 N. E. 65; Waud *v.* Crawford (Ia.), 141 N. W. 1041; Rumsey *v.* Livers, 112 Md. 546, 77 A. 295; Van Ness *v.* Co., 78 N. J. L. 511, 74 A. 456; Houston P. Co. *v.* Griffith (Tex. Civ.), 164 S. W. 431; Brown *v.* S. (Tex. Cr.), 162 S. W. 339; Galveston, etc. R. Co. *v.* Jones (Tex. Civ.), 123 S. W. 737; Bogart *v.* L. Co., 72 Wash. 417, 130 P. 490.

551-96 Johnson *v.* Co., 143 Mo. App. 441, 127 S. W. 692; Racine S. Co. *v.* Hansen, 84 Neb. 525, 121 N. W. 573; Hall *v.* Biddle, 26 S. D. 178, 128 N. W. 121; Berry *v.* R. Co., 24 S. D. 611, 124 N. W. 859; Barteldes S. Co. *v.* Elev. Co. (Tex. Civ.), 161 S. W. 399; St. Louis, etc. R. Co. *v.* Ewing (Tex. Civ.), 126 S. W. 625; Galveston, etc. R. Co. *v.* Cobb (Tex. Civ.), 126 S. W. 63; Missouri, etc. R. Co. *v.* Pettit, 54 Tex. Civ. 358, 117 S. W. 894; Bogart *v.* L. Co., 72 Wash. 417, 130 P. 490.

552-99 Chicago, etc. R. Co. *v.* Johnson, 25 Okla. 760, 107 P. 662.

552-4 Schall *v.* Co., 123 Minn. 214, 143 N. W. 357; Ward *v.* Ins. Co. (Or.), 138 P. 1067; Bogart *v.* L. Co., 72 Wash. 417, 130 P. 490. See Houston P. Co. *v.* Griffith (Tex. Civ.), 164 S. W. 431.

552-6 Description of property in issue, equivalent to hypothetical question. Sullivan *v.* Girson, 39 Mont. 274, 102 P. 320.

552-7 Ft. Worth, etc. R. Co. *v.* Arthur (Tex. Civ.), 124 S. W. 213; Chicago, etc. R. Co. *v.* Jones (Tex. Civ.), 118 S. W. 759.

555-8 Corey *v.* Penney, 165 Ala. 234, 51 S. 624; Montgomery M. Mfg. Co. *v.* Leith, 162 Ala. 246, 50 S. 210; Wulschner S. Music Co. *v.* Faulkner (Ind. App.), 103 N. E. 665; Midland Val. R. Co. *v.* Larson (Okla.), 138 P. 173; Missouri, etc. R. Co. *v.* Neiser, 54 Tex. Civ 460, 118 S. W. 166; Tippett *v.* Corder (Tex. Civ.), 117 S. W. 186; Maynard *r.* Westfield, 87 Vt. 532, 90 A. 504.

One who has knowledge of the value of the kind of dogs about which he was questioned, gained from actual sales made of which he was cognizant, may be asked as to value of "a grown well-trained fox hound." Hooper *v.* Dorsey, 5 Ala. App. 463, 58 S. 951.

555-14 Jefferis *v.* R. Co., 147 Ia. 124, 124 N. W. 367; Bailey *v.* Walton, 24 S. D. 118, 123 N. W. 701 (question not objectionable because it permits witness to assume article kept in good condition); St. Louis, etc. R. Co. *v.* Woods Bros. (Tex. Civ.), 147 S. W. 283; Chicago, etc. R. Co. *v.* Jones (Tex. Civ.), 118 S. W. 759; Tippett *v.* Corder (Tex. Civ.), 117 S. W. 186.

556-20 Rottlesberger *v.* Hanley, 155 Ia. 638, 136 N. W. 776; St. Louis, etc. Co. *v.* Benjamin (Tex. Civ.), 161 S. W. 379.

557-25 Louisville & N. R. Co. *v.* Zeigler, 167 Ala. 237, 52 S. 599; Walker E. Co. *v.* Co., 146 Ill. App. 176; Deal *v.* R. Co., 144 Mo. App. 691, 129 S. W. 52 (a practical farmer, as to corn); W. U. T. Co. *v.* Coyle, 24 Okla. 740, 104 P. 367; Dakin *v.* Ins. Co., 59 Or. 269, 117 P. 419; Pecos & N. T. R. Co. *v.* Porter (Tex. Civ.), 156 S. W. 267; Gulf, etc. R. Co. *v.* Gillespie, 54 Tex. Civ. 593, 118 S. W. 628; Freeman *v.* Taylor (Tex. Civ.), 130 S. W. 733; Chicago, etc. R. Co. *v.* Kapp (Tex. Civ.), 117 S. W. 904.

558-26 Bailey *v.* Walton, 24 S. D. 118, 123 N. W. 701; Chicago R. I. & G. R. Co. *v.* Clark (Tex. Civ.), 129 S. W. 186.

558-29 Upton *v.* Hospital, 157 Ill. App. 126; Federal Union Surety Co. *v.* Mfg. Co., 176 Ind. 328, 95 N. E. 1104; Model Clothing Co. *v.* Co., 158 Mo. App. 481, 139 S. W. 242; Lay *v.* R. Co., 157 Mo. App. 467, 138 S. W. 884; Missouri, etc. R. Co. *v.* Neiser, 54 Tex. Civ. 460, 118 S. W. 166.

Persons knowing habits, and character of dog may testify. Ellis *v.* Oliphant (Ia.), 141 N. W. 415.

559-30 Taylor *v.* Co., 82 Conn. 220, 72 A. 1080; Euston *v.* R. Co., 147 Ill. App. 594; Culver *v.* Ins. Co., 141 Mo. App. 205, 124 S. W. 540; Sykes *v.* Thornton, 223 Pa. 589, 72 A. 1063; Chicago, etc. R. Co. *v.* Jones (Tex. Civ.), 118 S. W. 759.

If witnesses qualify themselves to testify as to the market value of horses; that they, in effect, testified that they had not sold or knew of any horse of this exact description being sold does not disqualify them to testify as to the market value. Moore *v.* R. Co. (Tex. Civ.), 146 S. W. 1070.

559-34 Clapper *v.* Race, 121 N. Y. S. 317.

560-35 Sandberg *v.* Borstadt, 48 Colo. 96, 109 P. 419; Needham *v.* Halverson, 22 N. D. 594, 135 N. W. 203 (*cit.* this text); Hertzog *v.* Star Co., 73 Wash. 197, 131 P. 806 (market value); Schacht *v.* Oriental S. & T. Co., 155 Wis. 121, 143 N. W. 1058. See Midland V. R. Co. *v.* Larson (Okla.), 138 P. 173.

560-37 Maiss *v.* Assn., 146 Ill. App. 196.

561-38 Lewis *v.* S., 165 Ala. 83, 51 S. 308.

561-39 Hardaway-W. Co. *v.* Bradley, 163 Ala. 596, 51 S. 21 (value of use); Hawkins *v.* Collins, 89 Neb. 140, 131 N. W. 187; Anderson *v.* R. Co., 84 Neb. 311, 120 N. W. 1114 (crops and live stock); Texas C. R. Co. *v.* Qualls (Tex. Civ.), 124 S. W. 140. See Ellis *v.* Oliphant (Ia.), 141 N. W. 415.

Insurance carried, some evidence of owner's opinion as to value of property. Dunsmuir *v.* The Otter (Can.), 10 West. L. R. 380.

561-40 Bolte *v.* Assn., 23 S. D. 240, 121 N. W. 773.

561-43 Millsapp *v.* Woolf, 1 Ala. App. 599, 56 S. 22.

561-45 Sandberg *v.* Borstadt, 48 Colo. 96, 109 P. 419; Sullivan *v.* Girson, 39 Mont. 274, 102 P. 320.

562-53 Description of property, basis for opinion. Gulf, etc. R. Co. *v.* Gillespie, 54 Tex. Civ. 593, 118 S. W. 628.

562-56 P. *v.* White, 19 Cal. App. 555, 126 P. 505; St. Louis, etc. R. Co. *v.* Lieurance, 80 Kan. 424, 102 P. 842.

562-57 Knowledge of value in either of two near-by markets, sufficient. Corey *v.* Penney, 165 Ala. 234, 51 S. 624.

563-63 But the newspaper is admissible. Houston Pkg. Co. *v.* Griffith (Tex. Civ.), 144 S. W. 1139.

563-64 Ellis *v.* Co., 4 Ala. App. 518, 58 S. 724; Estes *v.* R. Co., 49 Colo. 378, 113 P. 1005; Houston P. Co. *v.* Griffith (Tex. Civ.), 164 S. W. 431; Texas & P. R. Co. *v.* Isenhower (Tex. Civ.), 131 S. W. 297.

563-65 Brown *v.* Truax, 58 Or. 572, 115 P. 597; Burris F., etc. Co. *v.* Allen (Tex. Civ.), 164 S. W. 878.

563-67 Flynn *v.* B., 53 Tex. Civ. 481, 118 S. W. 848; Galveston, etc. R. Co. *v.* Hillman (Tex. Civ.), 118 S. W. 158.

563-68 Making inquiries does not disqualify witness if testimony not entirely rested on information obtained in consequence. Ft. Worth, etc. R. Co. *v.* Arthur (Tex. Civ.), 124 S. W. 213.

564-77 C. R. I. & G. R. Co. *v.* Clark (Tex. Civ.), 129 S. W. 186.

565-81 Texas C. R. Co. *v.* Qualls (Tex. Civ.), 124 S. W. 140.

565-83 Gulf, C. & S. F. Co. *v.* Coulter (Tex. Civ.), 139 S. W. 16.

566-91 Palestine H. Wine Co. *v.* Co., 67 Misc. 456, 123 N. Y. S. 346.

Value at the time is the limits of admissibility. Brown *v.* S. (Tex. Cr.), 162 S. W. 339.

566-92 Midland Val. R. Co. *v.* Adkins, 36 Okla. 15, 127 P. 867.

566-93 Deal *v.* R. Co., 144 Mo. App. 691, 129 S. W. 52.

566-96 Mealey *v.* Co., 118 Minn. 427, 136 N. W. 1090; Mitchell *v.* Rowley, 63 Misc. 643, 118 N. Y. S. 751; Houston Pkg. Co. *v.* Griffith (Tex. Civ.), 144 S. W. 1139; Austin *v.* Langlois, 83 Vt. 104, 74 A. 489 (value as basis for damages).

566-99 Houston, etc. R. Co. *v.* Roberts (Tex. Civ.), 126 S. W. 890.

Nor earlier than it could have reached there. Galveston, etc. R. Co. *v.* Word (Tex. Civ.), 124 S. W. 478.

State of market one day prior to time in question, irrelevant. Galveston, etc. R. Co. *v.* Noelke (Tex. Civ.), 125 S. W. 969.

567-6 Delaware Ins. Co. *v.* Hill (Tex. Civ.), 127 S. W. 283.

For jurisdictional purposes value must be fixed as of time suit begun. People's S. Bk. *v.* Sanderson, 24 S. D. 443, 123 N. W. 873.

567-7 Grays H. Co. *v.* Lumb. Co., 163 Ill. App. 231; Cope *v.* Thurston, 147 Mo. App. 684, 127 S. W. 397.

Cross-examination.—In an action for damages to a shipment of horses where plaintiff had testified as to the value at a particular place he may be cross-examined as to price paid at another place—this being a circumstance to be considered by the jury. Hanley *v.* Chicago, etc. R. Co., 154 Ia. 60, 134 N. W. 417.

567-8 No presumption material difference in value of ordinary article of commerce, sold in large quantities, existed in one city as against its value in another city not remote. Jaquith *v.* Morrill, 204 Mass. 181, 90 N. E. 556.

Value at other market, where value is the same, competent. Ft. Worth, etc. R. Co. *v.* Poindexter (Tex. Civ.), 154 S. W. 581.

568-12 Value of stocks at place where they were directed to be bought may be shown in action for negligence in transmitting message. Postal T. C. Co. *v.* Harriss, 56 Tex. Civ. 105, 121 S. W. 358.

568-15 Kirchman *v.* Co., 92 Ark. 111, 122 S. W. 239; Ford *v.* Lawson, 133 Ga. 237, 65 S. E. 444. *Contra,* Missouri, etc. R. Co. *v.* Wasson (Tex. Civ.), 126 S. W. 664.

Value in other markets generally inadmissible. Justice *v.* Brock (Wyo.), 131 P. 38.

Rule not absolute so as to exclude proof of actual value. Galveston, etc. R. Co. *v.* Powers, 54 Tex. Civ. 168, 117 S. W. 459.

569-18 Ford *v.* Lawson, 133 Ga. 237, 65 S. E. 444.

569-24 Nat. W. & S. Co. *v.* Toomey, 144 Mo. App. 516, 129 S. W. 423.

570-27 Nat. W. & S. Co. *v.* Toomey, 144 Mo. App. 516, 129 S. W. 423; Ford *v.* Lawson, 133 Ga. 237, 65 S. E. 444; Olson *v.* Rydl, 25 S. D. 268, 126 N. W. 587; Houston, etc. R. Co. *v.* Roberts (Tex. Civ.), 126 S. W. 890; St. Louis, etc. R. Co. *v.* Adams, 55 Tex. Civ. 245, 118 S. W. 1155.

571-36 Kirchman *v.* Co., 92 Ark. 111, 122 S. W. 239.

572-39 Meadows *v.* Shelbourne (Ky.), 127 S. W. 477. See supra, "Attorney and Client," 162-88.

573-43 Meadows *v.* Shelbourne (Ky.), 127 S. W. 477. See supra, "Attorney and Client," 163-90.

575-51 *Comp.* Meadows *v.* Shelbourne (Ky.), 127 S. W. 477. See supra, "Attorney and Client," 168-3.

575-54 What another would consider a reasonable fee inadmissible. Latourette *v.* Miller, 67 Or. 141, 135 P. 327.

578-74 Gilbert *v.* Lloyd, 170 Ill. App. 436.

578-78 Stoddard *v.* Sagal, 86 Conn. 346, 85 A. 519.

579-79 S. *v.* Flarsheim, 137 Mo. App. 1, 119 S. W. 17, Missouri attorney not competent to testify to value of services rendered in California in absence of special information.

579-81 Shaw *v.* Probacco, 139 Ga. 481, 77 S. E. 577; Chicago, etc. R. Co. *v.* Whitney, 143 Ia. 506, 121 N. W. 1043; Steele *v.* Hammond, 136 App. Div. 667, 121 N. Y. S. 589. See supra, "Attorney and Client," 172-17.

580-82 Central, etc. R. Co. *v.* Goelzer, 92 Ark. 569, 123 S. W. 781.

581-91 Financial condition of patient and value of estate of deceased competent. Schoenberg *v.* Rose, 145 N. Y. S. 831.

582-7 Fowle *v.* Parsons (Ia.), 141 N. W. 1049.

583-22 Price paid admissible to show value of services. Carnego *v.* Crescent C. Co. (Ia.), 146 N. W. 38.

584-23 Value of wife's services to husband, inferred from nature of her injuries and knowledge of jurors. Texas T. & T. Co. *v.* Scott (Tex. Civ.), 127 S. W. 587.

Jurors may fix value of services rendered by members of family to one of their number as unskilled nurses without evidence. Scurlock *v.* Boone, 142 Ia. 684, 121 N. W. 369; Scullane *v.* Kellogg, 169 Mass. 544, 48 N. E. 622; Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622; Murray *v.* R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. 601; 4 Sutherland on Damages (3d ed.), §1250.

584-24 Value of services of dentist's assistant, not matter of common knowledge. Woodward *v.* Donnell, 146 Mo. App. 119, 123 S. W. 1004.

It is presumed ordinances fixing value of services to be rendered municipality or its inhabitants are reasonable and valid. Knoxvill *v.* Co., 212 U. S. 1; McCook W. Co. *v.* McCook, 85 Neb. 677, 124 N. W. 100. Same presumption in favor of statute. S. *v.* Co., 85 Neb. 25, 122 N. W. 691.

584-25 Woodward *v.* Donnell, 146 Mo. App. 119, 123 S. W. 1004; O'Meara *v.* McDermott, 40 Mont. 38, 104 P. 1049.

Sufficient evidence. — Pearson *v.* Hendrick, 13 Cal. App. 732, 110 P. 586.

584-32 See supra, "Master and Servant," 503-83.

586-47 Atlantic Coast, etc. Co. *v.* Blalock, 8 Ga. App. 44, 68 S. E. 743; Stevens *v.* Co., 124 Minn. 421, 145 N W. 173; Anthony *v.* Nourse, 34 Okla. 795, 127 P. 491.

586-49 Geiger *v.* Kiser, 47 Colo. 297,

107 P. 267; Floore *v.* J. T. Burgher & Co. (Tex. Civ.), 128 S. W. 1152.

Reasonableness and extent of customary charge must be shown. Eckstein *v.* Schleimer, 62 Misc. 635, 116 N. Y. S. 7.

587-60 Stevens *v.* Co., 124 Minn. 421, 145 N. W. 173.

Value of real estate broker's services is dependent upon results; hence it is competent to show amount of money received by defendant. Mayhew *v.* Brislin, 13 Ariz. 102, 108 P. 253.

588-61 Ingham L. Co. *v.* Ingersoll, 93 Ark. 447, 125 S. W. 139; Anthony *v.* Nourse, 34 Okla. 795, 127 P. 491.

588-63 Ralph *v.* Taylor, 33 R. I. 503, 82 A. 279. *Contra,* Whipple *v.* Farrelly, 136 App. Div. 587, 121 N. Y. S. 117.

589-70 Stevens *v.* Co., 124 Minn. 421, 145 N. W. 173.

589-72 Stevens *v.* Co., 124 Minn. 421, 145 N. W. 173.

590-86 Compensation paid for other services rendered during time those in question rendered, may be shown on issue of reasonable value. Ferry *v.* Henderson, 32 App. Cas. (D. C.) 41.

591-87 Mayhew *v.* Brislin, 13 Ariz. 102, 108 P. 253; Ferry *v.* Henderson, 32 App. Cas. (D. C.) 41; Public Service Com. *v.* Co., 122 Md. 355, 90 A. 105; Doyle *v.* Gibson, 119 Md. 36, 85 A. 961; Hialey *v.* Hialey, 157 Mich. 45, 121 N. W. 465 (employer who paid by piece may testify to value of services by day); Ward *v.* Kropf, 120 N. Y. S. 476; Floore *v.* Burgher (Tex. Civ.), 128 S. W. 1152 (though witness had no experience in city where services performed, it not appearing their value varied because of place). Value of services to be rendered may be so shown. Carter *v.* R. Co., 145 Ill. App. 653.

591-90 Elements of opinion must be stated. Barnes *v.* Co., 131 App. Div. 40, 115 N. Y. S. 703.

592-96 Rosenow *v.* Wiener, 11 Cal. App. 294, 104 P. 839; Escher *v.* County, 146 Ia. 738, 125 N. W. 810; Nesbit *v.* Shisler, 175 Mo. App. 565, 158 S. W. 419; O'Meara *v.* McDermott, 40 Mont. 38, 104 P. 1049; International, etc. R. Co. *v.* Lane (Tex. Civ.), 127 S. W. 1066.

592-98 Thompson *v.* Co. (Ia.), 141 N. W. 912; McCoy *v.* McCoy (Ky.), 125 S. W. 177.

593-2 Gibson *v.* Wheldon, 82 Vt. 175, 72 A. 909.

595-13 Ferry *v.* Henderson, 32 App. Cas. (D. C.) 41; Davis *v.* Dist., 84 Neb. 858, 122 N. W. 38.

595-21 Hypothetical questions must be based on testimony tending to support assumed facts. Mayhew *v.* Brislin, 13 Ariz. 102, 108 P. 253.

596-28 Leasure *v.* Boie, 142 Ia. 284, 120 N. W. 643; Cox *v.* Polk, 139 Mo. App. 260, 123 S. W. 102; Peyser *v.* Co., 53 Wash. 633, 102 P. 750.

Value of property supplied under contract may be proved as against contractor charged with conspiracy to defraud. C. *v.* Snyder, 40 Pa. Super. 485.

Ambiguity in contract aided by evidence of value of articles contracted for. C. *v.* Sanderson, 40 Pa. Super. 416, *foll.* Hume *v.* U. S., 132 U. S. 406.

Competent to show motive for desiring postponement of delivery of goods. Koch *v.* Wimbrow, 111 Md. 21, 73 A. 896.

597-29 Baker *v.* Temple, 160 Mich. 318, 125 N. W. 63, price paid several years before, too remote.

598-37 McCarthy *v.* Fell, 24 S. D. 74, 123 N. W. 497.

602-47 Masterson *v.* Harrington (Tex. Civ.), 145 S. W. 626.

604-81 Uncontradicted opinions, not conclusive. Salinger *v.* Co., 147 Ia. 484, 126 N. W. 362.

VARIANCE

620-1 Stegmaier *v.* Co., 225 Pa. 221, 74 A. 58.

621-2 Bouyer *v.* City, 4 Ala. App. 292, 59 S. 188; Zacuchny *v.* Lighterage Co., 157 Ill. App. 136.

"**Practically conceding the action** will not lie as one for slander of title, plaintiffs insist it may be treated as an action in the nature of trespass on the case; the essential fact being that the defendant maliciously asserted title to the ground by driving stakes, when he knew he had no title, for the purpose of preventing plaintiffs from selling, and succeeded in accomplishing the purpose. That is to say, his act alarmed Casey and prevented him from completing the sale, which had been negotiated with him. Without holding such an action will not lie, we hold it was not brought in this instance, which is plainly one for slander of title. The petition does not say setting the stakes out in itself prevented Casey from buying, but alleges, as will be observed by

reading the conclusion, that said conduct, in connection with the verbal slander, broke up the sale. The allegation is 'that by reason of said false, defamatory, and malicious acts, representations, and statements so done and made by the defendant,' Casey was dissuaded from the purchase of the property, etc. The verbal slander is counted on throughout the petition as an essential part of the cause of action, and there was a futile attempt to make it good by evidence." Rhoades *v.* Bugg 148 Mo. 707, 129 S. W. 38.

622-3 W. U. T. Co. *v.* Webb, 94 Ark. 350, 126 S. W. 1072; Schwarting *v.* Carpenter, 157 Cal. 432, 108 P. 318; Fields *v.* Florence (Tex. Civ.), 123 S. W. 187.

623-5 Pence *v.* City of Danville, 147 Ky. 683, 145 S. W. 385.

624-8 Casner *v.* Hoskins, 64 Or. 254, 128 P. 841, 140 P. 55; Reed *v.* Robertson (Tex. Civ.), 150 S. W. 306.

630-16 Handley *v.* Shaffer, 177 Ala. 636, 59 S. 286; Darling *v.* Wood, 168 Ill. App. 272; Chesapeake & O. R. Co. *v.* Collinsworth, 152 Ky. 197, 153 S. W. 241; Borkstrom *v.* Ryan, 138 App. Div. 183, 122 N. Y. S. 878.

"A plaintiff cannot file a statement which avers one cause of action, and be permitted, on the trial, to prove a different cause of action. He must state the claim on which he will rely to recover so clearly and concisely that the defendant may be fully advised as to what he is called upon to meet." Nat. Bk. *v.* B. Co., 233 Pa. 421, 82 A. 773.

631-19 Aldrich *v.* R. Co., 147 Ill. App. 198; Wilson *v.* Kelso, 115 Md. A. 895; French *v.* Mfg. Co., 173 Mo. App. 220, 158 S. W. 723.

632-20 Coe *v.* Kutinsky, 82 Conn. 685, 74 A. 1065.

636-28 International, etc. R. Co. *v.* Garcia, 54 Tex. Civ. 59, 117 S. W. 206. See South, etc. R. Co. *v.* Com., 171 Fed. 225.

637-30 See Mound City Co. *v.* Castleman, 171 Fed. 520.

638-31 Mayor *v.* R. Co., 76 N. J. Eq. 317, 74 A. 505.

638-33 Cooper *v.* Cooper, 65 W. Va. 712, 64 S. E. 927.

638-34 Brandom *v.* McCausland, 171 Fed. 402, 96 C. C. A. 358.

639-35 Tedescki *v.* Burger, 162 Ala. 534, 50 S. 150.

641-40 S. *v.* Starnes, 151 N. C. 724, 66 S. E. 347; Early *v.* S., 56 Tex. Cr. 61, 118 S. W. 1036.

642-43 Brantley *v.* S. (Ala. App.), 65 S. 678; Holloway *v.* S., 90 Ark. 123, 118 S. W. 256; P. *v.* Russell, 156 Cal. 450, 105 P. 416; Wyatt *v.* S., 58 Tex. Cr. 115, 124 S. W. 929.

642-44 Evans *v.* S., 94 Ark. 400, 127 S. W. 743; S. *v.* Lund, 80 Kan. 240, 101 P. 1000.

643-46 Appeal of Beardsley, 83 Conn. 34, 75 A. 141. See Martin *v.* Co., 198 N. Y. 324, 91 N. E. 798, notice of servant's injury.

643-47 In admiralty pleading the technical precision necessary at common law is not required. There is no rigid rule that a libelant alleging one fault cannot recover on proof of a different fault. The Prudence, 204 Fed. 66, 122 C. C. A. 380; The Cambridge, 4 Fed. Cas. No. 2,334.

645-52 S. *v.* Edminster, 105 Me. 485, 75 A. 57; Fowlie *v.* Co., 82 Vt. 230, 72 A. 989.

Failure of plaintiff to prove all damages alleged is not a variance. Loy *v.* Reed (Ala. App.), 65 S. 855.

646-53 Fitzgerald *v.* Chicago, 144 Ill. App. 462; Williams *v.* Smith, 29 R. I. 562, 72 A. 1093.

647-55 Colorado Springs & I. R. Co. *v.* Allen, 48 Colo. 4, 108 P. 990; Fuller *v.* Mullins, 143 Ky. 639, 137 S. W. 243; Hall G. Co. *v.* R. Co., 148 Mo. App. 308, 128 S. W. 42; Parker *v.* Co., 85 Neb. 515, 123 N. W. 1026; Dellinger *v.* R. Co., 160 N. C. 532, 76 S. E. 494; International, etc. R. Co. *v.* Lane (Tex. Civ.), 127 S. W. 1066; Speight *v.* Co., 36 Utah 483, 107 P. 742; Bartelt *v.* R. Co., 57 Wash. 16, 105 P. 487; Butterworth *v.* Teale, 54 Wash. 14, 102 P. 768; Zohrlaut *v.* Mengelberg, 144 Wis. 564, 124 N. W. 247.

647-56 Geiger *v.* Kiser, 47 Colo. 297, 107 P. 267; Findley *v.* R. Co., 7 Ga. App. 180, 66 S. E. 485; Mingus *v.* Bk., 136 Mo. App. 407, 117 S. W. 683; Birdsall *v.* Coon, 157 Mo. App. 439, 139 S. W. 243; Texas C. T. Co. *v.* Owens (Tex. Civ.), 128 S. W. 926; Varn *v.* H. Co. (Tex. Civ.), 124 S. W. 693.

649-59 So. R. Co. *v.* Lee, 167 Ala. 268, 52 S. 648; Hinton *v.* Tyler, 163 Ill. App. 454; Mosier *v.* Board, etc., 91 Kan. 825, 139 P. 414; Main Jellico M. C. Co. *v.* Parker (Ky.), 124 S. W. 871; Oborn *v.* Nelson, 141 Mo. App. 428, 126 S. W. 178; Loeffler *v.* Bleier, 63 Misc. 352, 117 N. Y. S. 163; Coore *v.* R. Co.,

152 N. C. 702, 68 S. E. 210; Zeno v. Bazzell (Okla.), 139 P. 281; Brown C. Co. v. Johnson (Tex. Civ.), 154 S. W. 684; Ft. Worth, etc. Co. v. Limberg (Tex. Civ.), 152 S. W. 1180; National M. & M. Co. v. Piccalo, 54 Wash. 617, 104 P. 128; Luther L. Co. v. Bk. (Wyo.), 139 P. 433.

650-61 Vandalia R. Co. v. Keys, 46 Ind. App. 353, 91 N. E. 173.

650-64 Hauer v. Sampsell, 153 Ill. App. 66; Marr v. Zeidler, 145 Mo. App. 199, 129 S. W. 469.

651-65 Cockins v. Bk., 84 Neb. 624, 122 N. W. 16; Walleston v. Fahnestock, 116 N. Y. S. 743; Huie v. De Vore, 138 App. Div. 677, 123 N. Y. S. 12; Kansas City, etc. R. Co. v. Pope (Tex. Civ.), 153 S. W. 163; Western U. Tel. Co. v. Stracner (Tex. Civ.), 152 S. W. 845.

652-68 Denver v. Walker, 45 Colo. 387, 101 P. 348.

654-75 Walker v. Bohannan, 243 Mo. 119, 147 S. W. 1024.

654-76 Powell v. Huey, 241 Ill. 132, 89 N. E. 299.

655-77 S. v. Gainey, 135 La. 65 S. 609.

Admission of a trust deed when mortgage was specified is immaterial. Osborne v. S. (Ark.), 160 S. W. 215.

655-78 Harrison v. U. S., 200 Fed. 662, 119 C. C. A. 78; Kemp v. U. S., 41 App. Cas. (D. C.) 539; Ty. v. Leslie, 15 N. M. 240, 106 P. 378.

656-81 Met. Life Ins. Co. v. Hayslett, 111 Va. 107, 68 S. E. 256.

657-90 S. v. Lund, 80 Kan. 240, 101 P. 1000.

659-99 Karczenska v. Chicago, 144 Ill. App. 516 (if allegation ambiguous); Hewitt v. R. Co., 171 Mich. 211, 137 N. W. 66.

661-2 Cent. of Ga. R. Co. v. Teasley (Ala.), 65 S. 981; S. v. Heft, 155 Ia. 21, 134 N. W. 950; Saxton v. Corbett (Tex. Civ.), 122 S. W. 75 (date of eviction in trespass to try title).

662-3 S. v. Riggio, 124 La. 614, 50 S. 600

663-5 Sovereign Bk. v. Stanley, 176 Fed. 743; Stevenson v. Whatley, 161 Ala. 250, 50 S. 41; Coen v. Bettman, 166 Mo. App. 671, 150 S. W. 1137.

664-7 Stevenson v. Cauble, 55 Tex. Civ. 75, 118 S. W. 811, principal and agent.

666-12 Number of article need not be proved as alleged if it is the only one in controversy. Smith v. Duke, 6 Ga. App. 75, 64 S. E. 292.

667-14 Ty. v. Co., 13 Ariz. 198, 108 P. 960.

667-15 But see Corona, etc. Co. v. Ferrier (Ala.), 65 S. 780.

669-18 Higgins v. Co., 78 Wash. 551, 139 P. 500.

671-29 Dempster v. Cochran, 174 Fed. 587, 98 C. C. A. 433; U. S. H. & A. Co. v. Veitch, 161 Ala. 630, 50 S. 95; Austin v. Beall, 167 Ala. 426, 52 S. 657; Jenkins v. Clopton, 141 Mo. App. 74, 121 S. W. 759; Green v. Crutcher, 143 Mo. App. 595, 128 S. W. 768; Silvert v. Kommel, 138 App. Div. 229, 122 N. Y. S. 846; De Luccia v. Cellilo, 123 N. Y. S. 229; Warner L. Co. v. Sweet, 65 Misc. 57, 119 N. Y. S. 166 (place of delivery); Overland A. Co. v. Buntyn (Tex. Civ.), 154 S. W. 654.

Proof that a different contract than the one alleged had been made, is tantamount to proof that the contract, as set up in plaintiff's cause of action, had never been entered into by the parties. Goodwin v. Biddy (Tex. Civ.), 149 S. W. 739.

672-31 Harris v. Sanders (Ala.), 65 S. 136.

672-32 Harris v. Sanders (Ala.), 65 S. 136; Atlas C. Co. v. O'Rear, 161 Ala. 591, 50 S. 63; Rentz v. Bk., 61 Fla. 403, 55 S. 856; Pluard v. Gerrity, 146 Ill. App. 224; Heidelmeier v. Hecht, 145 Ill. App. 116; Metzger v. Manlove, 241 Ill. 113, 89 N. E. 249. *Contra*, Logan v. R. Co., 40 Mont. 467, 107 P. 415.

672-33 See Laumeier v. Dolph, 171 Mo. App. 81, 153 S. W. 510.

673-34 Burgher v. R. Co., 139 Mo. App. 62, 120 S. W. 673; Johnson v. Hulett, 56 Tex. Civ. 11, 120 S. W. 257.

673-38 U. S. P. Co. v. Linn Co., 170 Ill. App. 250; O'Neill v. Co., 55 Or. 122, 104 P. 725.

675-40 Johnson v. Bldg. Co., 171 Mo. App. 543, 153 S. W. 511; Modern Order v. Taylor (Tex. Civ.), 127 S. W. 260.

Especially where the pleadings allege that a copy of the contract was attached as an exhibit to the pleading. State v. Palacios (Tex. Civ.), 150 S. W. 229.

676-41 *Comp.* Harris v. Basden, 162 Ala. 367, 50 S. 321.

677-42 Glausier v. Co., 132 Ga. 549, 64 S. E. 547; Brown v. Williams, 24 Okla. 308, 103 P. 588.

677-44 Reynolds v. Curry, 81 Kan. 443, 105 P. 437; Reifschneider v. Beck, 148 Mo. App. 725, 129 S. W. 232; Texas

& P. R. Co. *v.* Rackusin (Tex. Civ.), 145 S. W. 734.

677-45 Dempster *v.* Cochran, 174 Fed. 587, 98 C. C. A. 433; Scholz *v.* Schneck, 174 Ind. 186, 91 N. E. 730; Jones *v.* Buck, 147 Ia. 494, 126 N. W. 452; Michael *v.* Kennedy, 166 Mo. App. 462, 148 S. W. 983; Mullinax *v.* Pyron (Tex. Civ.), 123 S. W. 1139.

678-49 Reifschneider *v.* Beck, 148 Mo. App. 725, 129 S. W. 232; Hughes *v.* McFarland (Tex. Civ.), 128 S. W. 172.

Complaint held to aver an express contract. Tharp *v.* Blew (N. D.), 135 N. W. 659.

678-51 Funk *v.* Funk (Ky.), 122 S. W. 511.

679-52 Humphrey *v.* Totman, 204 Mass. 8, 90 N. E. 356.

An allegation of a promise to compensate is sufficient without specifying the manner of compensation. Hursey *v.* Surles, 91 S. C. 284, 74 S. E. 618.

679-53 Pollak *v.* Gunter, 162 Ala. 317, 50 S. 155; Smith *v.* Weatherford, 92 Ark. 6, 121 S. W. 943.

681-56 Birmingham T. & S. Co. *v* Curry, 160 Ala. 370, 49 S. 319; Goldstein *v.* Co., 164 Ala. 505, 51 S. 150; Saylor *v.* Obendorf, 45 Ind. App. 436, 89 N. E. 600; Mullinax *v.* Lowry, 140 Mo. App. 42, 124 S. W. 572; Griswold *v.* Haas, 145 Mo. App. 578, 122 S. W. 781; Almy *v.* Hammer, 121 N. Y. S. 339.

681-57 Carey *v.* Thyson, 39 App. Cas. (D. C.) 233.

681-58 Dolinski *v.* Bk. (Tex. Civ.), 122 S. W. 276.

682-59 Green *v.* Co., 163 Ala. 511, 50 S. 917; Parsons *v.* D. C., 38 App. Cas. (D. C.) 388.

682-61 McCornick *v.* Swem, 36 Utah 6, 102 P. 626.

685-74 Crystal River Lumb. Co. *v* Stores Co., 63 Fla. 119, 58 S. 129.

690-83 See Dyer *v.* Adams, 56 Tex. Civ. 400, 120 S. W. 946.

691-89 Kirkbridge *v.* Bartz, 82 Conn. 615, 74 A. 888.

692-92 Kelsay *v.* Taylor, 56 Or. 13, 107 P. 609.

692-96 Bronston *v.* Lakes, 135 Ky. 173, 121 S. W. 1021; Simers *v.* Halpern, 114 N. Y. S. 163.

692-97 *Contra*, Samples *v.* Wever, 56 Tex. Civ. 562, 121 S. W. 1129.

693-3 For example of immaterial variance, see Hawkins *v.* Bk. (Tex Civ.), 145 S. W. 722.

694-4 A note indorsed in blank. See Howell *v.* Bank, 40 App. Cas. (D. C.) 370.

697-18 Alexander *v.* Woodmen, 161 Ala. 561, 49 S. 883; Barclay *v.* Co., 46 Colo. 558, 105 P. 865.

Evidence credit given for premium, not inconsistent with allegation policy issued in consideration of stipulations and $24 premium. Raulet *v.* Ins. Co., 157 Cal. 213, 107 P. 292.

697-20 Hilburn *v.* Ins. Co., 140 Mo. App. 355, 124 S. W. 63.

697-21 Allegation of full performance of conditions covers any and all forms of waiver. Wicecarver *v.* Ins. Co., 137 Mo. App. 247, 117 S. W. 698, stating rule limited to insurance cases.

700-35 Lynch's Admr. *v.* Murray, 86 Vt. 1, 83 A. 746.

701-42 No variance.—Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778.

702-46 Central of Georgia R. Co. *v.* Thomas, 1 Ala. App. 267, 55 S. 443. See Comer *v.* Meyer, 78 N. J. L. 464, 74 A. 497.

702-47 Gray Eagle Co. *v.* Lewis, 161 Ala. 415, 49 S. 859; Probst *v.* Hinesley, 133 Ky. 64, 117 S. W. 389 (surprise cannot be claimed where matter fully gone into in taking deposition).

702-48 Penn. Co. *v.* Whitney, 169 Fed. 572, 95 C. C. A. 70; Collins C. Co. *v.* De Pugh, 43 Ind. App. 648, 88 N. E. 317; Samuels *v.* Willis, 133 Ky. 459, 118 S. W. 339; Reynolds *v.* Fitzpatrick, 40 Mont. 593, 107 P. 902; McConnell *v.* R. Co., 223 Pa. 442, 72 A. 849; Producers' O. Co. *v.* Barnes (Tex. Civ.), 120 S. W. 1023.

704-50 Metropolitan L. Ins. Co. *v.* Hartman, 174 Fed. 801, 98 C. C. A. 509; Tennessee, etc. Co. *v.* George, 161 Ala. 421, 49 S. 681 (variance in name of person charged with negligence, fatal); Link *v.* Jackson, 164 Mo. App. 197, 147 S. W. 1114; Gordon *v.* R. Co., 195 N. Y. 137, 88 N. E. 14; Menzie *v.* Wolff, 120 N. Y. S. 53; St. John *v.* Co., 32 R. I. 447, 79 A. 1101; Stacy *v.* Delery, 57 Tex. Civ. 242, 122 S. W. 300.

704-52 Hoyt *v.* Co., 52 Wash. 672, 101 P. 367.

Common law marriage shown under allegation of marriage. Harlan *v.* Harlan (Tex. Civ.), 125 S. W. 950.

705-54 Guianios *v.* Co., 242 Ill. 278, 89 N. E. 1003, 147 Ill. App. 243.

705-55 Fleenor *v.* R. Co., 16 Ida. 781, 102 P. 897.

706-56 Vaillancourt *v.* R. Co., 82 Vt. 416, 74 A. 99.

706-57 W. U. T. Co. *v.* Harris, 6 Ga. App. 260, 64 S. E. 1123.

706-59 Tobler *v.* Mfg. Co., 166 Ala. 482, 52 S. 86.

707-60 Sanitary C. Co. *v.* Lindley (Ind. App.), 105 N. E. 585.

707-61 McLean *v.* Schoenhut, 225 Pa. 100, 73 A. 1058.

Allegation of specific acts preceded by general allegations of negligence does not confine plaintiff to proof of such specific acts unless complaint clearly indicates intention to so limit proof. U. S. Exp. Co. *v.* Wahl, 168 Fed. 848, 94 C. C. A. 260, *foll.* Traver *v.* R. Co., 25 Wash. 225, 65 P. 284.

All incidental facts and circumstances constituting alleged negligence and fairly tending to establish it may be proved. Puget Sound E. R. *v.* Van Pelt, 168 Fed. 206, 93 C. C. A. 492.

If general allegation is followed by special averments latter are grounds of recovery relied upon unless pleading discloses intention to set up different acts in respective allegations. Lantry-S. C. Co. *v.* McCracken, 53 Tex. Civ. 627, 117 S. W. 453.

707-64 Missouri, etc. R. Co. *v.* Willis (Tex. Civ.), 117 S. W. 171.

708-65 P. *v.* Crowe, 145 Ill. App. 450; Cleveland, etc. R. Co. *v.* Case, 174 Ind. 369, 91 N. E. 238; Lexington & E. R. Co. *v.* Fields, 152 Ky. 19, 153 S. W. 43; Louisville R. Co. *v.* Gaugh, 133 Ky. 467, 118 S. W. 276 (injury to hearing not provable under allegation of injury to head); Eaver *v.* Harris, 95 Miss. 607, 49 S. 258; Parsons-A. Co. *v.* R. Co., 136 Mo. App. 494, 118 S. W. 101; Gordon *v.* R. Co., 39 Mont. 571, 104 P. 679; Keefe *v.* Lee, 197 N. Y. 68, 90 N. E. 344 (personal injuries). See Sheftall *v.* Zipperer, 133 Ga. 488, 66 S. E. 253.

Proof of mental injury received under allegations of great or permanent bodily harm. Rapid T. R. Co. *v.* Allen, 54 Tex. Civ. 245, 117 S. W. 486.

Cause of damage must be proved as pleaded. Missouri, etc. R. Co. *v.* McLean, 55 Tex. Civ. 130, 118 S. W. 161.

Specific allegation of usual and necessary damages, not required. Trousil *v.* Bayer, 85 Neb. 431, 123 N. W. 445.

In personal injury action evidence other organs than those specified were affected may be received to show extent of injury to latter. Houston, etc. R. Co. *v.* Hanks (Tex. Civ.), 124 S. W. 136.

708-66 Karczenska *v.* Chicago, 250 Ill. 483, 88 N. E. 188; Cleveland, etc. R. Co. *v.* Foland (Ind. App.), 88 N. E. 787.

709-69 Hauser *v.* Stoigers, 137 Mo. App. 560, 119 S. W. 52.

Substance of words alleged or so many of them as constitute charge must be proved. Fleet *v.* Tichenor, 156 Cal. 343, 104 P. 458.

709-70 Warren *v.* Harlan & Hollingsworth Corp. (Del.), 84 A. 219; D. C. *v.* Donaldson, 38 App. Cas. (D. C.) 270; Jaquette *v.* Traction Co., 34 App. Cas. (D. C.) 41; Kavanaugh *v.* Morgan, 145 Ill. App. 25; Christenson *v.* Daniels Co., 142 Ill. App. 129; Keenan *v.* Wells, 142 Ill. App. 1; Peterson *v.* Sears, 242 Ill. 38, 89 N. E. 696; Terre Haute E. Co. *v.* Roberts, 174 Ind. 351, 91 N. E. 941; Louisville & N. R. Co. *v.* Payne, 133 Ky. 539, 118 S. W. 352; S. *v.* Finnigan, 111 Md. 481, 74 A. 818; Edwards *v.* L. Co., 158 Mich. 428, 122 N. W. 1073; Pierson *v.* R. Co., 159 Mich. 110, 123 N. W. 576; Gardner *v.* R. Co., 223 Mo. 389, 122 S. W. 1068; Bobbitt *v.* R. Co., 160 Mo. App. 424, 153 S. W. 70; Bowles *v.* R. Co., 167 Mo. App. 268, 149 S. W. 1041; Detrich *v.* R. Co., 143 Mo. App. 176, 127 S. W. 603; Haake *v.* Davis, 166 Mo. App. 249, 148 S. W. 450; Capehardt *v.* Murta, 165 Mo. App. 55, 145 S. W. 827; Ransom *v.* D. Co., 142 Mo. App. 361, 126 S. W. 785; Wilson *v.* St. Joseph, 139 Mo. App. 557, 123 S. W. 504; Flaherty *v.* R. Co., 40 Mont. 454, 107 P. 416 (specific act alleged); Lewis *v.* Co., 84 S. C. 54, 65 S. E. 941; Sutton *v.* R. Co., 82 S. C. 345, 64 S. E. 401; Ft. Worth, etc. R. Co. *v.* Morrison (Tex. Civ.), 123 S. W. 621.

Where a plaintiff pleads and relies upon one or more specific acts or omissions as negligence, which are denied by the defendant, and the petition contains no general allegation of negligence, evidence of other acts of negligence may properly be excluded, and it is not error to so instruct the jury. Bowers *v.* R. Co., 91 Neb. 229, 135 N. W. 1017.

Other negligence may be shown cooperating with that alleged. Settlemeyer *v.* R. Co., 91 S. C. 147, 74 S. E. 137.

709-71 Dallas, etc. R. Co. *v.* Barron (Tex. Civ.), 119 S. W. 122.

709-72 Bank *v.* Johnson, 169 Fed. 151; East Tenn. Tel. Co. *v.* Jeffries, 153

Ky. 133, 154 S. W. 1112; Pittsburg, etc. R. Co. *v.* Schaub, 136 Ky. 652, 124 S. W. 885; Klass *v.* R. Co., 169 Mo. App. 617, 155 S. W. 57; Galveston, etc. R. Co. *v.* Grant (Tex. Civ.), 124 S. W. 145; Galveston, etc. R. Co. *v.* Callahan (Tex. Civ.), 124 S. W. 129; Kluska *v.* Yeomans, 54 Wash. 465, 103 P. 819; Stone *v.* R. Co., 66 W. Va. 417, 66 S. E. 521. Variance as to number of car in which livestock shipped held immaterial. McCampbell *v.* R. Co., 150 Ky. 723, 150 S. W. 987.

Specific acts of negligence may be proved under general allegation. Wolven *v.* Co., 143 Mo. App. 643, 128 S. W. 512.

Presumption of negligence overcome by proving non-negligence as to particular acts alleged. Volquardsen *v.* Co., 148 Ia. 77, 126 N. W. 928.

709-73 *Contra* if notice of injury specifies time of occurrence. Taylor *v.* Peck, 29 R. I. 481, 72 A. 645.

710-77 Daniels *v.* U. S., 196 Fed. 459, 116 C. C. A. 233; Hope *v.* S., 5 Ala. App. 123, 59 S. 326; Lewis *v.* S., 3 Ala. App. 133, 57 S. 1035; Southern R. Co. *v.* Arnold, 162 Ala. 570, 50 S. 293; Brd. of Tenement House Super. *v.* Schlechter, 83 N. J. L. 88, 83 A. 783; S. *v.* Brache, 63 Wash. 396, 115 P. 853.

710-78 S. *v.* Young, 163 Mo. App. 88, 146 S. W. 70; S. *v.* Judd, 221 Mo. 554, 120 S. W. 780; S. *v.* Coss, 53 Or. 462, 101 P. 193; U. S. *v.* Constantino, 2 Phil. Isl. 693; Robinson *v.* S. (Tex. Cr.), 163 S. W. 434; Novy *v.* S., 62 Tex. Cr. 492, 138 S. W. 139; Arredondo *v.* S., 58 Tex. Cr. 145, 124 S. W. 930; Woods *v.* S., 58 Tex. Cr. 103, 124 S. W. 918; Dobbs *v.* S., 55 Tex. Cr. 483, 117 S. W. 799.

"When the state charges a violation in a particular way, it must be bound by the position it takes, and is not entitled to a verdict in its favor, unless it makes proof of the particular charge which it has made." S. *v.* Young, 163 Mo. App. 88, 146 S. W. 70.

711-81 See Enson *v.* S., 58 Fla. 37, 50 S. 948.

711-83 Melton *v.* S., 58 Tex. Cr. 86, 124 S. W. 910.

"Even allegations originally immaterial may be made material by their averment, and be required to be proved as alleged, in order to protect the defendant from again being placed in jeopardy for the same transaction." Bone *v.* S., 11 Ga. App. 128, 74 S. E. 852, *cit.* Caswell *v.* S., 5 Ga. App. 483, 63 S. E. 566.

712-84 S. *v.* Hansford, 81 Kan. 300, 106 P. 738.

712-85 If abandonment of wife and children alleged, proof must correspond. Carnley *v.* S., 162 Ala. 94, 50 S. 362.

712-86 "White slavery" cases.—The indictment charged the transporting of two persons for the purpose stated, the proof wholly failed as to one of them. "The violation of the statute is complete if one person is transported, and the fact that two persons are named in the same count, instead of basing a separate count upon the travel of each person, should not be fatal to a conviction. It is true that where two persons are named as the subject of the offense, and it is proved as to one of them only, there is a seeming variance, but it is really a failure of proof as to a thing which it was not necessary to allege." Bennett *v.* U. S., 194 Fed. 630, 114 C. C. A. 402.

714-94 P. *v.* Sykes, 10 Cal. App. 67, 101 P. 20; S. *v.* Colombo, 1 Boyce (Del.) 96, 75 A. 616; May *v.* Com., 153 Ky. 141, 154 S. W. 1074; S. *v.* Kapiesky, 105 Me. 127, 73 A. 830 (maintenance of nuisance for any length of time between alleged dates may be shown); P. *v.* Nichols, 159 Mich. 355, 124 N. W. 25; S. *v.* Gerber, 111 Minn. 132, 126 N. W. 482; S. *v.* Lee, 228 Mo. 480, 128 S. W. 987; S. *v.* R. Co., 219 Mo. 156, 117 S. W. 1173; S. *v.* Fellers, 140 Mo. App. 723, 127 S. W. 95; S. *v.* Vanella, 40 Mont. 326, 106 P. 364; P. *v.* Lewis, 132 App. Div. 256, 116 N. Y. S. 893; Fletcher *v.* S., 2 Okla. Cr. 300, 101 P. 599; S. *v.* Coss, 53 Or. 462, 101 P. 193; U. S. *v.* Smith, 3 Phil. Isl. 20; U. S. *v.* Cardona, 1 Phil. Isl. 381; S. *v.* Sysinger, 25 S. D. 110, 125 N. W. 879; S. *v.* Heffernan, 24 S. D. 1, 123 N. W. 87; S. *v.* Hoben, 36 Utah 186, 102 P. 1000; S. *v.* Myrberg, 56 Wash. 384, 105 P. 622.

"When time is not of the essence, the date laid in the bill is ordinarily not considered as restrictive or controlling on the question of proof. State *v.* Williams, 117 N. C. 753, 23 S. E. 250." S. *v.* Mostella, 159 N. C. 459, 74 S. E. 578.

714-95 Townsend *v.* S., 7 Ga. App. 811, 68 S. E. 333; Green *v.* S., 6 Ga. App. 324, 64 S. E. 1121 (time of making contract in violation of law, material); P. *v.* Loomis, 161 Mich. 651, 126 N. W. 985; S. *v.* Sowell, 85 S. C. 278,

67 S. E. 316; S. v. Kelly, 89 S. C. 303, 71 S. E. 987; Cowan v. S. (Tex. Cr.), 155 S. W. 214; Graso v. S. (Tex. Cr.), 155 S. W. 209; S. v. Hoben, 36 Utah 186, 102 P. 1002.

714-96 White v. S., 9 Ga. App. 558, 71 S. E. 879.

Exception to bar of statute must be alleged. If it is not it will be presumed day on which offense alleged to have been committed is immaterial and prosecution not barred. Hollingsworth v. S., 7 Ga. App. 16, 65 S. E. 1077.

In Oliver v. S., 101 Miss. 382, 58 S. 6, a prosecution for unlawful sale of intoxicating liquors, etc. The day on which turned into court by the grand jury on the 15th day of March, 1911, and charged that the defendant, on the 15th day of February, 1911, in said county, did unlawfully sell vinous, spirituous, malt, alcoholic and intoxicating liquors, etc. The day on which the sale was actually made was not shown by the evidence; the witnesses simply stating that it occurred some time in February, 1911. The court: "Appellant claims that he was entitled to a peremptory instruction, for the reason that it was not shown that the sale occurred prior to the 15th day of February, 1911, the day laid in the indictment. 'The day on which the offense is charged to have been committed is immaterial, except in those cases where time is of the essence of the offense, or a necessary ingredient of its description; and hence, in a case not within the above exception, proof that the offense was committed either before or after the day laid in the indictment, but before the indictment was found and within the period prescribed by the statute of limitations, is sufficient.' McCarty v. State, 37 Miss. 411; Miazza v. State, 36 Miss. 613; Code 1906, §1428."

715-97 *Comp.* Roberts v. S., 6 Ga. App. 574, 65 S. E. 359.

715-98 Chaney v. S., 59 Tex. Cr. 283, 128 S. W. 614. See S. v. Exnicious, 223 Mo. 61, 122 S. W. 730; Johnson v. S., 58 Tex. Cr. 442, 126 S. W. 597; Hankins v. S., 57 Tex. Cr. 152, 122 S. W. 21.

Rule of idem sonans applies.—"Munnison" and "munnicon," not variant. U. S. v. Medina, 15 N. M. 204, 103 P. 976.

Name by which person generally known sufficient though it may vary from baptismal name. S. v. Myrberg, 56 Wash. 384, 105 P. 622.

715-99 Wells v. S. (Ala.), 65 S. 950; S. v. Tillotson, 85 Kan. 577, 117 P. 1030; Forey v. S., 55 Tex. Cr. 545, 117 S. W. 834. See Betts v. S., 57 Tex. Cr. 389, 124 S. W. 424.

Illustration.—Ellis Carter was named in indictment. He testified his name was Richard Ellis Carter but his friends called him Ellis Carter. This was held to be no variance. Shores v. S. (Tex. Cr.), 150 S. W. 776.

Illustration.—Where proof showed the name forged as Mrs. J. N. Grigg, but her name was Mrs. J. N. Griggs, this is not a fatal variance. Shores v. S. (Tex. Cr.), 150 S. W. 776.

715-1 P. v. Spencer, 16 Cal. App. 756, 117 P. 1039; S. v. O'Neal, 19 N. D. 426, 124 N. W. 68.

715-3 P. v. Lapique, 10 Cal. App. 669, 103 P. 164; Pilgrim v. S. (Tex. Cr.), 150 S. W. 1170.

715-4 Hatfield v. S. (Tex. Cr.), 147 S. W. 236. *Comp.* Kelley v. S., 56 Tex. Cr. 516, 120 S. W. 877.

716-7 Brunaugh v. S., 173 Ind. 483, 90 N. E. 1019.

717-14 Marriage of accused need not be proved though alleged. U. S. v. Cook, 15 N. M. 124, 103 P. 305, federal statute.

717-18 See S. v. Arthur, 151 N. C. 653, 65 S. E. 758.

717-19 Peinhardt v. S., 161 Ala. 70, 49 S. 831.

Ownership in prosecution for arson is alleged to identify the property; not fatal to show alleged owner was lessee. S. v. Sprouse, 150 N. C. 860, 64 S. E. 900.

718-21 Maloney v. S., 57 Tex. Cr. 435, 125 S. W. 36.

718-22 Use of two weapons may be shown, though only one alleged. P. v. Oppenheimer, 156 Cal. 733, 106 P. 74.

718-26 Rodgers v. S., 59 Tex. Cr. 146, 127 S. W. 834; Sedgwick v. S., 57 Tex. Cr. 420, 123 S. W. 702. See P. v. Everett, 242 Ill. 628, 90 N. E. 226.

Taking articles not described may not be proved unless it is shown they were in the house at time burglary committed, were then taken therefrom or their disappearance connected with offense charged. Hawkins v. S., 6 Ga. App. 109, 64 S. E. 289.

719-28 *Contra.* S. v. Simpson, 32 Nev. 138, 104 P. 244, allegation of own-

ership unnecessary. But see S. *v.* Riddle, 245 Mo. 451, 150 S. W. 1044.

Proof of ownership in wife, not variance if goods in husband's possession. Kidd *v.* S., 101 Ga. 528, 28 S. E. 990.

Proof of exclusive care, control and management of property taken is equivalent to ownership. Clark *v.* S., 58 Tex. Cr. 181, 125 S. W. 12. *Comp.* Bonner *v.* S., 58 Tex. Cr. 195, 125 S. W. 22.

722-45 Hanna *v.* Ins. Co., 241 Mo. 383, 145 S. W. 412; S. *v.* Gebhart, 219 Mo. 708, 119 S. W. 350.

723-47 Cook *v.* S., 162 Ala. 90, 50 S. 319 (description of land); P. *v.* Lapique, 10 Cal. App. 669, 103 P. 164; S. *v.* Daniel, 83 S. C. 309, 65 S. E. 236.

Means by which money procured may be shown; and proof it was money of one of the persons named is sufficient. P. *v.* Leavens, 12 Cal. App. 178, 106 P. 1103.

723-48 Hale *v.* C., 151 Ky. 639, 152 S. W. 773.

725-52 Bartlett *v.* S., 8 Ala. App. 248, 62 S. 320; S. *v.* Carlson, 145 Ia. 154, 123 N. W. 765; Feeney *v.* S., 58 Tex. Cr. 152, 124 S. W. 944.

726-53 Bartlett *v.* S., 8 Ala. App. 248, 62 S. 320; Davis *v.* S., 165 Ala. 93, 51 S. 239.

727-56 S. *v.* Pilling, 53 Wash. 464, 102 P. 230.

729-62 S. *v.* Powers, 39 Mont. 259, 102 P. 583.

730-77 Reed *v.* S., 3 Okla. Cr. 16, 103 P. 1070.

731-80 Loeb *v.* S., 6 Ga. App. 23, 64 S. E. 338.

731-82 Fitch *v.* S., 6 Ga. App. 338, 64 S. E. 1007, unless person to whom sale made acted for person named in indictment and defendant knew fact. But see Clay *v.* S. (Tex. Cr.), 150 S. W. 430.

731-87 S. *v.* Randolph, 139 Mo. App. 311, 123 S. W. 60.

732-93 Edwards *v.* Gulfport, 95 Miss. 148, 49 S. 620.

"Vinous and spirituous liquors" do not include malt liquors. Smith *v.* S., 94 Miss. 255, 49 S. 113. Sale of malt liquor cannot be proved under allegation of sale of spirituous liquors. Donithan *v.* C., 109 Va. 845, 64 S. E. 1050.

733-97 Mobley *v.* S., 57 Fla. 22, 49 S. 941; S. *v.* Daniel, 83 S. C. 309, 65 S. E. 236; Poston *v.* S., 58 Tex. Cr. 583, 126 S. W. 1148; Johnson *v.* S., 58 Tex. Cr. 442, 126 S. W. 597; Rogers *v.* S., 58 Tex. Cr. 146, 124 S. W. 921; Maxey *v.* S., 58 Tex. Cr. 118, 124 S. W. 927; Snelling *v.* S., 57 Tex. Cr. 416, 123 S. W. 610.

Theft of draft on which money obtained may be proved under allegation money stolen. P. *v.* Geyer, 132 App. Div. 790, 117 N. Y. S. 662.

734-2 Hardeman *v.* S., 58 Tex. Cr. 51, 124 S. W. 632.

734-3 S. *v.* Tillett, 173 Ind. 133, 89 N. E. 589; S. *v.* Pigg, 80 Kan. 481, 103 P. 121. See Betts *v.* S., 6 Ga. App. 773, 65 S. E. 841; Bonner *v.* S., 58 Tex. Cr. 195, 125 S. W. 22.

735-5 Owner's consent may be proved if obtained by fraud though nonconsent alleged. Hawkins *v.* S., 58 Tex. Cr. 407, 126 S. W. 268.

736-6 S. *v.* Thothos, 147 Mo. App. 596, 126 S. W. 797, officer before whom affidavit made.

737-7 S. *v.* Anderson, 35 Utah 496, 101 P. 385.

In Hogg *v.* **S.** (Tex. Cr.), 146 S. W. 195, it was contended "that there was a fatal variance in the proof and the allegations in the information, in that the evidence shows that the cement stolen was the property of the City Lumber Company; and, further, that it shows the property was in the control and custody of Frank Machen, and therefore the information should have alleged ownership in the City Lumber Company, or in Frank Machen. We do not think these contentions are well taken. It is not questioned that C. H. Machen, in whom ownership was alleged, was the real owner of the property, and, though he might have been doing business under a given name, it was proper in the information to give the name of the real owner. Frank Machen was working for his brother, and had his peculiar duties assigned to him, but, inasmuch as C. H. Machen was in actual control and management of all the property, the fact that he, as yardman, had control of the property in the yard, was not that exclusive control and management of the property which rendered it essential to allege ownership in him."

739-22 Gambling.—Evidence must be confined to game designated. S. *v.* Duncan, 40 Mont. 531, 107 P. 510.

Riot.—Proof battery committed does not constitute a variance under charge of riot. Carter *v.* S., 7 Ga. App. 44, 65 S. E. 1072.

Robbery.—Character of money taken must be proved as alleged. Early v. S., 56 Tex. Cr. 61, 118 S. W. 1036.

Slander.—Words alleged to have been used must be substantially proved. Hasley v. S., 57 Tex. Cr. 400, 123 S. W. 596.

740-26 Fenton v. Mansfield, 82 Conn. 343, 73 A. 770.

740-28 Williams v. Hampton, 57 Fla. 272, 49 S. 506; Duncan v. Holder, 15 N. M. 323, 107 P. 685; Carey P. Co. v. Co., 135 App. Div. 441, 120 N. Y. S. 436; Marthinson v. McCutchen, 84 S. C. 256, 66 S. E. 120. And see Gascoigne v. R. Co., 143 Ill. App. 547.

741-29 Western R. E. Trustees v. Hughes, 172 Fed. 206, 96 C. C. A. 658; Sandberg v. Borstadt, 48 Colo. 96, 109 P. 419; Gilette v. Young, 45 Colo. 562, 101 P. 766; Fenton v. Mansfield, 82 Conn. 343, 73 A. 770; P. v. Smith, 144 Ill. App. 129; Main Jellico M. C. Co. v. Parker (Ky.), 124 S. W. 871; Daley v. Redburn, 143 Mo. App. 653, 127 S. W. 924; Johnson County S. Bk. v. Mills, 143 Mo. App. 265, 127 S. W. 425; Littio v. R. Co., 139 Mo. App. 50, 120 S. W. 695; Archer v. R. Co., 41 Mont. 56, 108 P. 571; Sharpe v. Sowers, 152 N. C. 379, 67 S. E. 1003; Kaufman v. Boismier, 25 Okla. 252, 105 P. 326; Patterson v. R Co., 24 Okla. 747, 104 P. 31; St. Paul, etc. Ins. Co. v. Mittendorf, 24 Okla. 651, 104 P. 354; U. S. v. Gimeno, 3 Phil. Isl. 233; Carter v. Henderson, 224 Pa. 319, 73 A. 554; Frankel v. Clarke, 5 Phil. Isl. 349; Johnson v. Caughren, 55 Wash. 125, 104 P. 170; Staats v. Assn., 55 Wash. 51, 104 P. 185; Kluska v. Yeomans, 54 Wash. 465, 103 P. 819; Coughlin v. Holmes, 53 Wash. 692, 102 P. 772 (amendment presumed to have been made); Jacobs v. Williams, 67 W. Va. 377, 67 S. E. 1113.

741-31 Brennan v. Shanks, 24 Okla. 563, 103 P. 705; Campbell v. Order, 53 Wash. 398, 102 P. 410 (receiving evidence by consent).

742-36 Cleveland, etc. P. Co. v. Foland (Ind. App.), 88 N. E. 787; Kentucky S. Mfg. Co. v. Carraway, 136 Ky. 581, 124 S. W. 852; Habitz v. R. Co., 170 Mich. 71, 135 N. W. 827; O'Brien v. Co., 40 Mont. 212, 105 P. 721; W. U. T. Co. v. Robertson (Tex. Civ.), 126 S. W. 629; Galveston, etc. R. Co. v. Grant (Tex. Civ.), 124 S. W. 145; Brown v. Haley, 56 Wash. 218, 105 P. 478.

Objection must be made that the party is not ready to meet the evidence. A mere objection on the ground of variance is not sufficient. But see Louisville, etc. Co. v. Lloyd (Ind. App.), 105 N. E. 519.

742-37 Louisville, etc. Co. v. Lloyd (Ind. App.), 105 N. E. 519.

742-40 Holland v. R. Co., 137 Mo. 476, 137 S. W. 995; Avery v. Tucker, 137 Mo. App. 428, 118 S. W. 672.

743-42 Fenton v. Mansfield, 82 Conn. 343, 73 A. 770; P. v. Boyd, 170 Ill. App. 481; Eggmann v. Nutter, 169 Ill. App. 116; Keiting v. Planz, 168 Ill. App. 571; Scott v. Parlin, 146 Ill. App. 92. See Texas & N. O. R. Co. v. McCoy, 54 Tex. Civ. 278, 117 S. W. 446; "Objections," p. 93, n. 14.

746-49 Carey Co. v. Thyson, 39 App. Cas. (D. C.) 233.

746-55 Eiseman v. Griffith (Mo. App.), 167 S. W. 1142; S. v. Padilla (N. M.), 139 P. 143.

747-56 S. v. Padilla (N. M.), 139 P. 143; Ft. Worth, etc. R. Co. v. Stalcup (Tex. Civ.), 167 S. W. 279.

Request by defendant for general charge raises question. Tennessee C., etc. Co. v. George, 161 Ala. 421, 49 S. 681.

747-57 Fenton v. Mansfield, 82 Conn. 343, 73 A. 770.

Amendment should precede reception of testimony. McConnell v. Slappey, 134 Ga. 95, 67 S. E. 440.

747-59 Penn. Co. v. Whitney, 169 Fed. 572, 95 C. C. A. 70; Phoenix v. Chapman, 143 Ill. App. 286; Zelenka v. Co., 141 Ia. 592, 123 N. W. 332; Chesapeake & O. R. Co. v. Conley, 136 Ky. 601, 124 S. W. 861; P. v. Bromwich, 135 App. Div. 67, 119 N. Y. S. 833; Leslie v. Grover, 132 App. Div. 448, 116 N. Y. S. 868; Coughlin v. Holmes, 53 Wash. 692, 102 P. 772. See the title "Amendments and Jeofails," 1 STANDARD PROC.

In O'Brien v. Co., 119 Minn. 4, 137 N. W. 399, the court said: "Considering that this is primarily a question of pleading, the result, under the evidence adduced on the trial, would be a mere variance, which, even if the defendant's point be well taken, would not be available to it, but would simply result in an amendment of the complaint on the trial or even after judgment."

Court will consider complaint amended so as to conform to the proof. Louis-

ville, etc. Tr. Co. *v.* Lloyd (Ind. App.), 105 N. E. 519.

748-60 McCrory *v.* Guyton, 164 Ala. 365, 51 S. 312; Harrison *v.* Russell, 17 Ida. 196, 105 P. 48; Devine *v.* R. Co., 156 Ill. App. 369; Lyle *v.* Detroit, 157 Mich. 438, 122 N. W. 108; Fournier *v.* R., 157 Mich. 589, 122 N. W. 299; Finnegan *v.* Ulmer, 31 Nev. 523, 104 P. 17.

748-61 Heiden *v.* R. Co., 84 S. C. 117, 65 S. E. 987; Cooper W. & B. Co. *v.* Co., 24 S. D. 381, 123 N. W. 846.

Amendment must be made; not enough leave to make it granted. Christensen *v.* Co., 142 Ill. App. 129.

Limitation of rule recognized where issues not fairly and openly presented and mutually contested, as where there was no opportunity to object to evidence because received for different purpose from that for which used. Limerick *v.* Holdsworth, 136 App. Div. 323, 120 N. Y. S. 1011.

748-62 Discretionary with chancellor to permit amendments to conform to proof. Reynolds *v.* Phillips, 142 Ill. App. 482.

749-63 Amendments not allowable to conform pleading to evidence received against objection. Leggat *v.* Palmer, 39 Mont. 302, 102 P. 327.

Not presumed on appeal amendment offered allowed if record silent. Leggat *v.* Palmer, supra.

750-69 Wooley *v.* Corley, 57 Tex. Civ. 229, 121 S. W. 1139.

750-73 Casey *v.* R. Co., 146 Mo. App. 614, 124 S. W. 562.

751-77 Leggat *v.* Palmer, 39 Mont. 302, 102 P. 327.

May be made in appellate court.—De la Rosa *v.* Arenas, 7 Phil. Isl. 556.

751-78 Rule not absolute if effect of amendment is to extend right to full hearing, though testimony admitted over objection. Sutter *v.* Co., 81 Kan. 452, 106 P. 29.

751-79 Snowy Peak M. Co. *v.* Co., 17 Ida. 630, 107 P. 60; Quigley *v.* Beam, 137 Ky. 325, 125 S. W. 727; S. *v.* Duncan, 40 Mont. 531, 107 P. 510.

May be made in county court after appeal. Wooley *v.* Corley, 57 Tex. Civ. 229, 121 S. W. 1139.

751-80 Burk *v.* S., 57 Tex. Cr. 635, 124 S. W. 658. *Contra* if distinct offenses involved. S. *v.* Sowell, 85 S. C. 278, 67 S. E. 316. See P. *v.* Geyer, 196 N. Y. 364, 90 N. E. 48, indicating limit to rule under penal law.

752-83 Downs *v.* Jackson (Ky.), 128 S. W. 339.

752-84 Floyd *v.* Wilson, 163 Ala. 283, 50 S. 122.

753-86 Shantz *v.* Shriner, 167 Mo. App. 635, 150 S. W. 727.

754-92 Page *v.* Gillett, 47 Colo. 289, 107 P. 290; Grannemann *v.* Meyer, 169 Ill. App. 291.

755-99 See supra, "Admissions," 401-9 et seq.

756-1 Casey *v.* Richards, 10 Cal. App. 57, 101 P. 36; Whittington *v.* Stanton, 63 Fla. 311, 58 S. 489; Dunham *v.* Co., 146 Ill. App. 140; Fass *v.* Co., 82 S. C. 461, 64 S. E. 235; St. Louis, etc. Co. *v.* White (Tex. Civ.), 160 S. W. 1128; Freeman *v.* Wilson (Tex. Civ.), 149 S. W. 413; O'Brien *v.* Von Lienen (Tex. Civ.), 149 S. W. 723; Sauer *v.* Veltmann (Tex. Civ.), 149 S. W. 706.

756-2 Britt *v.* Caldwell, etc. Lumb. Co., 126 La. 155, 52 S. 251; Smith Co. *v.* Smick, 119 Md. 279, 86 A. 500; Evans *v.* R. Co., 222 Mo. 435, 121 S. W. 36; Cannon *v.* Fargo, 138 App. Div. 20, 122 N. Y. S. 576; Dye *v.* R. Co. (Tex. Civ.), 127 S. W. 893.

756-3 International, etc. R. Co. *v.* Bradt, 57 Tex. Civ. 82, 122 S. W. 59. *Comp.* Glass *v.* Co., 144 Ill. App. 116, under allegation car started with sudden jerk it cannot be shown it "began to run away quick."

757-4 Prince *v.* Prince, 162 Ala. 114, 49 S. 873; Standard O. Co. *v.* Brown, 31 App. Cas. (D. C.) 371.

757-5 Plumb *v.* Co., 157 Mich. 562, 122 N. W. 208.

757-6 Texas Star F. M. Co. *v.* Moore, 177 Fed. 744; Lyons *v.* Ryerson, 242 Ill. 409, 90 N. E. 288; Cincinnati, etc. R. Co. *v.* Bennette, 134 Ky. 19, 119 S. W. 181; Long *v.* Co., 133 App. Div. 842, 117 N. Y. S. 1118; Missouri, etc. R. Co. *v.* Doyal (Tex. Civ.), 142 S. W. 610.

757-7 Norfolk & P. T. Co. *v.* Miller, 174 Fed. 607, 98 C. C. A. 453 (exemplary damages and ratification of servant's act); Farrington *v.* Cheponis, 82 Conn. 258, 73 A. 139; McMillan H. Co. *v.* Ross, 24 Okla. 696, 104 P. 343 (capacity in which plaintiff entitled to possession of chattels); Henning *v.* Keiper, 37 Pa. Super. 488 (treble damages under statute); Hopkins *v.* Richmond, 29 R. I. 527, 73 A. 308; Erie City I. Wks. *v.* Noble (Tex. Civ.), 124 S. W. 172; Singletary *v.* Goeman (Tex. Civ.), 123 S. W. 436.

758-8 Birmingham R., etc. Co. *v.* Stanfield, 161 Ala. 488, 50 S. 51; Bechtel *v.* Chase, 156 Cal. 707, 106 P. 81; Galveston, etc. R. Co. *v.* Wirtz, 55 Tex. Civ. 555, 119 S. W. 324.

758-9 Miller *v.* Natwick, 110 Minn. 448, 125 N. W. 1022.

758-11 Chenoweth *v.* Burr, 146 Ill. App. 443 (issuance of order by master shown under general allegation of negligence); Clement *v.* Crosby, 157 Mich. 643, 122 N. W. 263; Buttron *v.* Bridell, 228 Mo. 622, 129 S. W. 12; Shelton *v.* R. Co., 86 S. C. 98, 67 S. E. 899; Ft. Worth *v.* Williams (Tex. Civ.), 119 S. W. 137; Interstate R. Co. *v.* Tyree, 110 Va. 38, 65 S. E. 500.

758-13 Ableman *v.* Haehnel (Ind.), 103 N. E. 869; Hurricane L. Co. *v.* Lowe, 110 Va. 380, 66 S. E. 66.

759-14 Sanders *v.* Williams, 163 Ala. 451, 50 S. 893 (avoidance of contract by infant in favor of the party affected must be specially pleaded); Goldstein *v.* Co., 164 Ala. 505, 51 S. 150; Williams *v.* Hampton, 57 Fla. 272, 49 S. 506; Timson *v.* Co., 220 Mo. 580, 119 S. W. 565; List *v.* Chase, 80 O. St. 42, 88 N. E. 120.

Any evidence offered in support of the complaint may be met. Kahn *v.* Guggenheimer, 114 N. Y. S. 767.

All evidence offered by plaintiff may be controverted. Harder *v.* Co., 64 Misc. 89, 117 N. Y. S. 1001.

761-25 Birmingham W. Co. *v.* Vinter, 164 Ala. 490, 51 S. 356; Wall *v.* Wall, 139 Ga. 270, 77 S. E. 19.

761-26 Cox *v.* First Nat. Bk., 126 La. 88, 52 S. 227.

762-27 Howlan *v.* Co., 131 App. Div. 443, 115 N. Y. S. 316; Texas, etc. R. Co. *v.* Miller (Tex. Civ.), 128 S. W. 1165. See supra, "Foreign Laws," 808-4.

762-28 Robinson *v.* Co., 164 Fed. 174, 90 C. C. A. 160; Metteer *v.* Smith, 156 Cal. 572, 105 P. 735; Helling *v.* Boss, 121 N. Y. S. 1013. *Contra*, Griffith *v.* Co., 14 Colo. App. 504, 61 P. 46; Denver T. Co. *v.* Martin, 44 Colo. 324, 98 P. 836; Norfolk & P. T. Co. *v.* Forrest, 109 Va. 658, 64 S. E. 1034 (if ordinance used in connection with other evidence to show negligence). See Dale *v.* Co., 173 Fed. 787, 97 C. C. A. 511.

762-29 Zeno *v.* Bazzell (Okla.), 139 P. 281.

765-45 *Contra* in action on sealed instrument. National Valley Bk. *v.* Houston, 66 W. Va. 336, 66 S. E. 465.

765-50 Coulter *v.* Assn., 144 Ill. App. 255.

765-51 Coulter *v.* Assn., 144 Ill. App. 255.

766-61 *Contra*, Derby D. Co. *v.* Co., 204 Mass. 461, 90 N. E. 843.

766-64 Columbia H. Co. *v.* O'Halloran, 144 Ill. App. 74.

767-67 Failure of consideration for note specially declared upon and offered solely under special count cannot be shown under general issue. Columbia H. Co. *v.* O'Halloran, supra.

767-71 Prematurity of action shown. Freeman *v.* Hedrington, 204 Mass. 238, 90 N. E. 519.

767-72 See Buckeye B. Co. *v.* Eymer, 157 Mich. 518, 122 N. W. 124.

Account annexed to complaint may be shown to be covered by special contract of different nature. Fisher *v.* Doe, 204 Mass. 34, 90 N. E. 592.

Recoupment need not be formally pleaded. Franklin *v.* Co., 66 W. Va. 164, 66 S. E. 225.

768-73 Kelly *v.* Union, 146 Ill. App. 611 (performance of conditions subsequent); Warren *v.* Union, 145 Ill. App. 375.

770-83 Pinckard *v.* Bramlett, 165 Ala. 327, 51 S. 557.

771-93 *Contra*, Wright *v.* Bush, 165 Ala. 320, 51 S. 635, also that defendant not in possession.

772-99 Fairbanks *v.* Stowe, 83 Vt. 155, 74 A. 1006.

774-13 Everett *v.* De Long, 144 Ill. App. 496; Birdsall *v.* Smith, 158 Mich. 390, 122 N. W. 626.

775-21 Gandy *v.* Cowart, 163 Ala. 295, 50 S. 355 (application of property for plaintiff's benefit); Cole *v.* Waters, 164 Mo. App. 567, 147 S. W. 562.

776-26 Liebhardt P. Co. *v.* Gibbs, 46 Colo. 613, 106 P. 6; Jacobson *v.* Hendricks, 83 Conn. 120, 75 A. 85 (approval of contract must be shown by party alleged); Goldman *v.* R. Co., 83 Conn. 79, 75 A. 148; Citizens' S. Bk. *v.* Read, 45 Ind. App. 158, 90 N. E. 492; O'Neil *v.* Adams, 144 Ia. 385, 122 N. W. 976; Newlin *v.* R. Co., 222 Mo. 375, 121 S. W. 125; Thurman *v.* Co., 41 Mont. 141, 108 P. 588; Gordon *v.* R. Co., 39 Mont. 571, 104 P. 679; Hoffman *v.* Ins. Co., 135 App. Div. 739, 119 N. Y. S. 978; Corbett *v.* R. Co., 19 N. D. 450, 125 N. W. 1054; Am. J. Assn. *v.* James, 24 Okla. 460, 103 P. 670; Purkey *v.* Harding, 23 S. D. 632, 123 N. W. 69 (ratification of contract must be pleaded);

Lewis *v.* R. Co., 57 Tex. Civ. 585, 122 S. W. 605; Spokane G. Co. *v.* Co., 55 Wash. 545, 104 P. 794.

Every effect or result of injury sustained need not be pleaded. Oolitic S. Co. *v.* Ridge, 174 Ind. 558, 91 N. E. 944.

Complaint includes, for purpose of testing question of variance, notice of injury given pursuant to statute and set out therein, and claim for damages filed with authorities. Dralle *v.* Reedsburg, 140 Wis. 319, 122 N. W. 771.

Affirmative matters of defense, deemed denied where replication to answer not permitted. Sarnighausen *v.* Scannell, 11 Cal. App. 652, 106 P. 117.

Ratification need not be pleaded. De Zavala *v.* Daughters (Tex. Civ.), 124 S. W. 160.

777-28 General usage or custom need not be pleaded in order to admit proof thereof in aid of obscure contract. Ryder-G. Co. *v.* Garretson, 53 Wash. 71, 101 P. 498.

777-29 Montgomery *v.* Glasscock (Ky.), 121 S. W. 668.

Under allegation of ownership in decedent and transfer by him to plaintiff it may be shown decedent held property in trust for plaintiff. Cahlan *v.* Bk., 11 Cal. App. 533, 105 P. 765.

778-30 W. U. T. Co. *v.* Webb, 94 Ark. 350, 126 S. W. 1072 (place where negligence occurred); Little Nell G. M. Co. *v.* Hemby, 45 Colo. 582, 101 P. 981 (unconditional agreement alleged, proof of conditional one, inadmissible); Thompson *v.* County, 227 Mo. 220, 126 S. W. 1044 (waiver); Hendricks *v.* Butcher, 144 Mo. App. 671, 129 S. W. 431. See Moore *v.* Co., 226 Mo. 689, 126 S. W. 1013, loss of sexual desire.

Claim for damages need not mention all items thereof. Carstens P. Co. *v.* Co., 58 Wash. 239, 108 P. 613.

779-34 Mott *v.* Minor, 11 Cal. App. 774, 106 P. 244; Goff *v.* Craig, 51 Ind. App. 461, 99 N. E. 1013; Brown *v.* Club, 50 Ind. App. 670, 97 N. E. 958; Barr *v.* Lake, 147 Mo. App. 252, 126 S. W. 755; Heiden *v.* R. Co., 84 S. C. 117, 65 S. E. 987; Dennis *v.* Gary, 56 Wash. 112, 105 P. 172. See the title "Denials" in 7 STANDARD PROC.

780-36 *Contra* if it is essential ownership of property in suit should be shown to be in plaintiff. Van Praag *v.* Weinberger, 114 N. Y. S. 871.

781-41 Proof of execution of lost paper proper under general denial. Blair *v.* Breeding, 57 Tex. Civ. 147, 121 S. W. 869.

782-42 Ziegler *v.* Smith, 115 N. Y. S. 99; Anderson, etc. Co. *v.* Anderson, 22 N. D. 441, 134 N. W. 36. See Brent *v.* Lilly, 174 Fed. 877.

Limitation of carrier's common law liability must be alleged. Cleveland, etc. R. Co. *v.* Schaefer (Ind. App.), 90 N. E. 502.

782-43 Ruckman *v.* Co., 139 Mo. App. 256, 123 S. W. 69; Anderson, etc. Co. *v.* Anderson, 22 N. D. 441, 134 N. W. 36; Cooper W. & B. Co. *v.* Co., 24 S. D. 381, 123 N. W. 846.

782-44 McKee *v.* Rudd, 222 Mo. 344, 121 S. W. 312.

Matters of avoidance must be pleaded. Alamo D. B. Co. *v.* Yeargan (Tex. Civ.), 123 S. W. 721; Blixt *v.* R. Co., 138 App. Div. 499, 122 N. Y. S. 861 (new matter).

Defense of illegality must be specially pleaded if it is not shown by complaint or plaintiff's evidence. Rabinowitz *v.* Co., 119 N. Y. S. 625.

Matters mitigating defendant's liability must be specially pleaded. Phillips L. Co. *v.* Smith, 7 Ga. App. 222, 66 S. E. 623.

783-47 Wray *v.* Miller, 120 N. Y. S. 787.

783-49 South Texas T. Co. *v.* Huntington (Tex. Civ.), 121 S. W. 242.

784-53 Quality of goods may be shown. Mette & K. Dist. Co. *v.* Lowrey, 39 Mont. 124, 101 P. 966.

784-54 Release admitted. Goff *v.* Craig, 51 Ind. App. 461, 99 N. E. 1013.

785-61 Neilsen *v.* Hovander, 56 Wash. 93, 105 P. 172.

785-62 Hickey *v.* Breen, 40 Mont. 368, 106 P. 881.

786-67 Baker *v.* Tedford (Can.), 11 West. L. R. 614.

787-70 Contributory negligence may be shown in Minnesota. Hardy *v.* R. Co., 172 Fed. 454.

787-73 Cincinnati, etc. R. Co. *v.* Silvers (Ky.), 126 S. W. 120; Ashcroft *v.* Hammond, 132 App. Div. 3, 116 N. Y. S. 362; Heiden *v.* R. Co., 84 S. C. 117, 65 S. E. 987.

788-74 Gaskell *v.* Nolte, 138 App. Div. 875, 123 N. Y. S. 442.

790-80 Temple *v.* Co., 46 Colo. 497, 106 P. 8 (novation); Hinton *v.* Roane, 124 La. 927, 50 S. 798; Union B. Co. *v.* Co., 143 Mo. App. 300, 126 S. W. 996; Mitchell *v.* Co., 19 N. D. 736, 124 N. W. 946; Smith *v.* Cleaver, 25 S. D.

351, 126 N. W. 589; Neuberger *v.* Robbins, 37 Utah 197, 106 P. 933; Brown *v.* Haley, 56 Wash. 218, 105 P. 478. See Babcock C. Co. *v.* Urquhart, 53 Wash. 168, 101 P. 713.

791-81 *Comp.* Harder *v.* Co., 64 Misc. 89, 117 N. Y. S. 1001.

Any method of payment agreed upon may be proved. Uvalde A. P. Co. *v.* Co., 135 App. Div. 391, 120 N. Y. S. 11.

791-82 Other payments than those admitted in complaint may be shown under general denial. Parker *v.* Mayes, 85 S. C. 419, 67 S. E. 559.

791-83 Swamp L. Dist. *v.* Blumenberg, 156 Cal. 532, 106 P. 389.

Exception.—See Keely *v.* Co., 169 Fed. 601, 95 C. C. A. 99.

Rule not applicable where fraud relates to matter not connected with contract. O'Neill *v.* Co., 55 Or. 122, 104 P. 725.

792-85 De Lucia *v.* Valente, 83 Conn. 107, 75 A. 150; McRaith *v.* A. O. U. W., 149 Ia. 148, 126 N. W. 321; Barr *v.* Lake, 147 Mo. App. 252, 126 S. W. 755; Wray *v.* Miller, 120 N. Y. S. 787; Eppley *v.* Kennedy, 131 App. Div. 1, 115 N. Y. S. 360; Awalt *v.* Schooler (Tex. Civ.), 128 S. W. 453; Delaware Ins. Co. *v.* Hill (Tex. Civ.), 127 S. W. 283; Western Mfg. Co. *v.* Freeman (Tex. Civ.), 126 S. W. 924.

792-86 Meholin *v.* Carlson, 17 Ida. 742, 107 P. 755; Am. C. Co. *v.* Muleski, 138 Mo. App. 419, 122 S. W. 384; Wilcox *v.* R. Co., 152 N. C. 316, 67 S. E. 758.

793-87 Defense of ultra vires must be pleaded. Stanton *v.* R. Co., 131 App. Div. 879, 116 N. Y. S. 375.

793-88 Sibeck *v.* McTiernan, 94 Ark. 1, 125 S. W. 136; Lilly-B. Co. *v.* Sonneman, 157 Cal. 192, 106 P. 715 (foreign statute); Arnold *v.* North Tarrytown, 137 App. Div. 68, 122 N. Y. S. 92.

793-89 *Contra* under statute expressing only plea in trespass shall be not guilty. Martin *v.* R. Co., 227 Pa. 18, 75 A. 837.

794-92 Ackley *v.* Skinner, 65 Misc. 142, 120 N. Y. S. 1105.

794-93 Admissible. Roberts *v.* Co., 84 S. C. 283, 66 S. E. 298, negligence of fellow servant.

795-96 Georgia R. & B. Co. *v.* Wheeler, 6 Ga. App. 746, 65 S. E. 719; George *v.* R. Co., 225 Mo. 364, 125 S. W. 196; Cain *v.* Wintersteen, 144 Mo. App. 1, 128 S. W. 274; Stewart *v.* R. Co., 142 Mo. App. 322, 126 S. W. 1003.

795-99 Cain *v.* Wintersteen, 144 Mo. App. 1, 128 S. W. 274.

796-2 Scott *v.* R. Co. (Tex. Civ.), 127 S. W. 849.

796-4 Leczycki *v.* Kuczynski, 138 N. Y. S. 316.

798-11 *Contra*, McCabe *v.* R. Co., 136 Ky. 674, 124 S. W. 892.

798-13 Cooley *v.* Miller, 156 Cal. 510, 105 P. 981.

799-14 Doyle *v.* Emerson, 145 Ia. 358, 124 N. W. 176; Barr *v.* Lake, 147 Mo. App. 252, 126 S. W. 755; Bee B. Co. *v.* Co., 86 Neb. 326, 125 N. W. 518.

Evidence must be confined to mistake pleaded. W. U. T. Co. *v.* Bennett (Tex. Civ.), 124 S. W. 151.

800-23 Sheldon *v.* R. Co., 161 Mich. 503, 126 N. W. 1056; Kirby *v.* Hayden (Tex. Civ.), 125 S. W. 993; Hoffman *v.* Buchanan, 57 Tex. Civ. 368, 123 S. W. 168.

803-35 Hughes *v.* Rose, 163 Ala. 368, 50 S. 899.

803-36 Cape Girardeau, etc. R. Co. *v.* R. Co., 222 Mo. 461, 121 S. W. 300.

803-37 Butte *v.* Mikosowitz, 39 Mont. 350, 102 P. 593; Sarro *v.* Bell (Tex. Civ.), 126 S. W. 24.

Recovery of value of improvements, within rule. Rucker *v.* Martin, 94 Ark. 365, 126 S. W. 1062.

803-38 U. S. *v.* Co., 172 Fed. 948; Powell *v.* Huey, 241 Ill. 132, 89 N. E. 299; Ginn *v.* Alwy, 212 Mass. 486, 99 N. E. 276.

Fiduciary relationship may be shown under general allegation of fraud. Bleyer *v.* Bleyer, 219 Mo. 99, 117 S. W. 709.

Interest allowed in case of fraud, though not claimed. Robbins *v.* Selby, 144 Ia. 407, 122 N. W. 954.

804-39 U. S. *v.* Co., 172 Fed. 948; Kosturka *v.* Bartkiewicz, 241 Ill. 604, 89 N. E. 657; Smith *v.* Olivarri (Tex. Civ.), 127 S. W. 235.

806-47 Ogden *v.* Stevens, 241 Ill. 556, 89 N. E. 741.

806-48 Mettler *v.* Warner, 243 Ill. 600, 90 N. E. 1099; Moore *v.* Crandall, 146 Ia. 25, 124 N. W. 812.

806-49 Marsh *v.* Vanness, 75 N. J. Eq. 607, 74 A. 47, usury.

806-50 Nelson *v.* Winchell, 203 Mass. 75, 89 N. E. 180.

806-52 Porter *v.* Armour, 241 Ill. 145, 89 N. E. 356.

806-53 Laches or abandonment in patent infringement suit. See Curtain S. Co. *v.* Co., 174 Fed. 45.

807-55 See Am. M. Co. *v.* Co., 39 Mont. 476, 104 P. 525.

807-57 Mangrall *v.* S., 1 Ala. App. 189, 55 S. 446; White *v.* S., 9 Ga. App. 558, 71 S. E. 879; Carson *v.* S., 57 Tex. Cr. 30, 121 S. W. 860.

813-91 Galvin *v.* O'Gorman, 40 Mont. 391, 106 P. 887.

814-92 Neuberger *v.* R. Co., 131 App. Div. 885, 116 N. Y. S. 311; Squires *v.* Penfield, 121 N. Y. S. 348.

815-96 Griffin *v.* Co., 91 Ark. 292, 121 S. W. 297; Reavely *v.* Harris, 239 Ill. 526, 88 N. E. 238; Cape Girardeau, etc. R. Co. *v.* R. Co., 222 Mo. 461, 121 S. W. 300; Alkire *v.* Co., 57 Wash. 300, 106 P. 915.

815-97 Kentucky S. Mfg. Co. *v.* Carraway, 136 Ky. 581, 124 S. W. 852; Yorty *v.* Mach. Co., 91 Neb. 449, 136 N. W. 67.

815-98 Wabash R. Co. *v.* Beedle (Ind. App.), 88 N. E. 535.

816-2 Cape Girardeau, etc. R. Co. *v.* R. Co., 222 Mo. 461, 121 S. W. 300.

VENDOR AND PURCHASER

Presumption as to kind of title and terms of payment, 852-79.

826-3 Davis *v.* R. E. Co., 163 Mo. App. 328, 143 S. W. 1108.

Vendor's consent to substitution of vendee must be shown by his vendee. Stout *v.* Williams, 57 Tex. Civ. 548, 123 S. W. 192.

826-4 Beach *v.* Co., 202 Mass. 177, 88 N. E. 924.

826-5 Federal L. & S. Co. *v.* Hatch, 147 Ia. 18, 125 N. W. 837; Sennett *v.* Melville, 85 Neb. 209, 122 N. W. 851; Bridge *v.* Calhoun, 57 Wash. 272, 106 P. 762.

828-11 Presumption in favor of mental capacity. Lamb & Co. *v.* Adams, 18 Pa. Dist. 110.

829-17 Skiba *v.* Gustin, 161 Mich. 358, 126 N. W. 464, receipt.

Lack of acknowledgment of instrument tends strongly to show it was not completed conveyance. Lipscomb *v.* Fuqua, 55 Tex. Civ. 535, 121 S. W. 193.

830-18 If contract not in writing evidence of subsequent acts of parties, irrelevant. Hill *v.* Jones, 7 Ga. App. 394, 66 S. E. 1099.

837-41 Tyng *v.* Co., 37 Utah 304, 108 P. 1109.

837-42 Curtis *v.* Sexton, 142 Mo. App. 179, 125 S. W. 806.

838-44 See Smith *v.* Bangham, 156 Cal. 359, 104 P. 689.

838-46 Fitzgerald *v.* Frankel, 109 Va. 603, 64 S. E. 941.

Insufficient evidence.—Tipton *v.* Ellsworth, 18 Ida. 207, 109 P. 134.

838-48 Fitzgerald *v.* Frankel, 109 Va. 603, 64 S. E. 941.

839-49 Fitzgerald *v.* Frankel, 109 Va. 603, 64 S. E. 941.

841-55 See vol. 11, p. 789, n. 39, and supplement thereto.

842-61 Evidence insufficient. Currie *v.* Colline, 136 Ga. 473, 71 S. E. 798.

Evidence sufficient.—Vanderbilt *v.* Bishop, 188 Fed. 971; Winter *v.* Johnson, 27 S. D. 512, 131 N. W. 1020.

843-64 King *v.* Realty Co., 210 N. Y. 467, 104 N. E. 926; Hannon *v.* Kelly, 156 Wis. 509, 146 N. W. 512.

845-66 Butler *v.* Colson, 99 Ark. 340, 138 S. W. 467.

846-70 Clayton *v.* Phillipp (Tex. Civ.), 159 S. W. 117.

846-71 Hannon *v.* Kelly, 156 Wis. 509, 146 N. W. 512; Kipp *v.* Laun, 146 Wis. 591, 131 N. W. 418.

847-72 Pack *v.* Whitaker, 110 Va. 122, 65 S. E. 496; McComb *v.* Gilkeson, 110 Va. 406, 66 S. E. 77.

849-75 Webber *v.* Harter, 154 Ia. 317, 134 N. W. 947. See Boggs *v.* Bush, 137 Ky. 95, 122 S. W. 220.

849-76 Boggs *v.* Bush, 137 Ky. 95, 122 S. W. 220.

850-78 Milner *v.* Tyler, 9 Ga. App. 659, 71 S. E. 1123; Anderson *v.* Dawson, 133 Ky. 708, 118 S. W. 953. See Landrum *v.* Wells (Ky.), 122 S. W. 213.

852-79 In absence of stipulation to contrary marketable title is presumed to be bargained for. Mutchnick *v.* Davis, 130 App. Div. 417, 114 N. Y. S. 997.

Payment presumed to be due immediately. Jones *v.* Co., 25 Okla. 856, 108 P. 403.

854-88 Cash *v.* Meisenheimer, 53 Wash. 576, 102 P. 429.

855-92 Rogers *v.* Simpson, 31 O. C. C. 103.

859-5 John *v.* McNeal, 167 Mich. 148, 132 N. W. 508; Dillingham *v.* Kerr (Tex. Civ.), 139 S. W. 911. *Contra,* Northern Assur. Co. *v.* Stout, 16 Cal. App. 548, 117 P. 617.

Where it was claimed that the failure

of defendant to pay $7.50 each month was a forfeiture of her rights under her contract, the court said: "In O'Fallon *v.* Kennerly, 45 Mo. 124, it was held that, where the other party received a payment after the forfeiture, the forfeiture was waived. Here, by the long-continued conduct of both parties, the provision for the payment of $7.50 each month was disregarded, and payments were repeatedly made at irregular intervals and of different amounts. The forfeiture was waived, and cannot be insisted on here." Randolph *v.* Ellis, 240 Mo. 216, 144 S. W. 483.

860-10 Minter *v.* Hawkins, 54 Tex. Civ. 228, 117 S. W. 172.

862-20 Bourke *v.* Kissack, 242 Ill. 233, 89 N. E. 990.

864-26 Krekel *v.* Guenzler (Ky.) 124 S. W. 848.

866-30 Atterbery *v.* Blair, 244 Ill. 363, 91 N. E. 475.

867-31 See vol. 9, p. 709, n. 48, and supplement thereto.

867-34 See vol. 9, p. 727, n. 35; vol. 9, p. 706, n. 34, and supplement thereto.

Execution and delivery of deed, pursuant to conditions of bond, prima facie evidence of payment of note. Dodwell *v.* Co., 90 Ark. 287, 119 S. W. 262.

868-36 See vol. 9, p. 367, n. 93 and supplement thereto.

869-39 Finnell *v.* Finnell, 156 Cal. 589, 105 P. 740.

871-44 Cook *v.* Atkins, 173 Ala. 363, 56 S. 224.

874-49 Finnell *v.* Finnell, 156 Cal. 589, 105 P. 740; Stickle *v.* Steel Co., 78 N. J. Eq. 549, 578, 80 A. 500, 80 A. 503.

Evidence insufficient.—Waschow *v.* Waschow, 155 Ill. App. 167.

Evidence sufficient.—Kaufman *v.* All Persons, 16 Cal. App. 388, 117 P. 586.

874-50 Evidence held to show waiver.—Knickerbocker Trust Co. *v.* Co., 79 N. J. Eq. 501, 82 A. 146.

Failure to contemplate assertion of lien originally, not inconsistent with its existence. Knickerbocker T. Co. *v.* Co., supra.

Absence of knowledge of existence of the lien and vendor's secret intention, not material. Knickerbocker T. Co. *v.* Co., supra.

875-52 Jensen *v.* Wilslef, 36 Nev. 37, 132 P. 16.

877-61 Coleman *v.* Kiernan, 159 Ala. 543, 49 S. 230, clear and convincing proof required.

878-68 Montgomery *v.* Wise, 138 Mo. App. 176, 120 S. W. 100.

879-71 McKee *v.* R. E. Co., 114 Va. 639, 77 S. E. 515.

884-83 Blewitt *v.* Greene, 57 Tex. Civ. 588, 122 S. W. 914.

885-85 Burden on plaintiff to show value of land as he contracted for it. Finnes *v.* Selover, 108 Minn. 331, 122 N. W. 174.

885-86 Beauchamp *v.* Couch, 54 Tex. Civ. 471, 117 S. W. 924.

886-87 Parol evidence admissible to correct or supply apparent defects in title if vendee not entitled to demand abstract. McMillan *v.* Bk., 56 Tex. Civ. 45, 119 S. W. 709.

Existence of custom not to execute release of notes reserving vendor's lien may be shown by vendor. McMillan *v.* Bk., supra.

887-92 McMillan *v.* Bk., 56 Tex. Civ. 45, 119 S. W. 709.

888-98 Westchester, etc. Co. *v.* Whitlock, 80 Misc. 489, 141 N. Y. S. 592.

889-99 Montgomery *v.* Wise, 138 Mo. App. 176, 120 S. W. 100.

889-1 Rittenhouse *v.* Swango (Ky.), 128 S. W. 299; Reynolds *v.* White, 134 App. Div. 248, 118 N. Y. S. 979.

891-3 Berkeley D. Co. *v.* Marx, 10 Cal. App. 410, 102 P. 278, papers issued under street improvement statutes.

891-5 McKee *v.* R. E. Co., 114 Va. 639, 77 S. E. 515.

892-10 Knight *v.* Everett, 152 N. C. 118, 67 S. E. 328; Mitchem *v.* Wallace, 150 N. C. 640, 64 S. E. 901.

893-12 Mitchem *v.* Wallace, 150 N. C. 640, 64 S. E. 901.

893-13 Mesa M. Co. *v.* Crosby, 174 Fed. 96, 98 C. C. A. 70.

894-14 Naylor *v.* Parker (Tex. Civ.), 139 S. W. 93; Mullen *v.* Cook, 69 W. Va. 456, 71 S. E. 566.

In case of deceit damages are measurable by difference between actual value of property and its value if it had conformed to representations. Evidence to show latter, not necessarily speculative. Kendrick *v.* Ryns, 225 Mo. 150, 123 S. W. 937.

Vendor's bad faith may affect damages, and it is competent to show it by proving assertion title was good. Ross *v.* Saylor, 39 Mont. 559, 104 P. 864.

896-17 Maitlen *v.* Maitlen, 41 Ind.

App. 559, 89 N. E. 966; Van Gundy *v.* Shewey, 90 Kan. 253, 133 P. 720.

896-20 Union Bk. *v.* Trust, 40 Can. Sup. 510; Abbott *v.* Parker, 103 Ark. 425, 147 S. W. 70; Brown *v.* Tuschoff, 235 Mo. 449, 138 S. W. 497; Davidson *v.* Ryle, 103 Tex. 209, 124 S. W. 616, 125 S. W. 881; Long *v.* Shelton (Tex. Civ.), 155 S. W. 945; Bledsoe *v.* Haney (Tex. Civ.), 139 S. W. 612; Downs *v.* Stevenson, 56 Tex. Civ. 211, 119 S. W. 315; Ross *v.* Martin (Tex. Civ.), 128 S. W. 718; Cash *v.* Meisenheimer, 53 Wash. 576, 102 P. 429; Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609. *Contra* under repealed statute. Houston O. Co. *v.* Kimball, 103 Tex. 94, 122 S. W. 533.

Evidence insufficient.—Wilkerson *v.* Ward (Tex. Civ.), 137 S. W. 158.

Burden rests upon purchaser from fraudulent grantee to prove that he is purchaser for valuable consideration and without notice of the fraud. Koebel *v.* Doyle, 256 Ill. 610, 100 N. E. 154.

Burden on party claiming under unrecorded instrument to show notice to a creditor before latter acquired a lien upon the property. Rule *v.* Richards (Tex. Civ.), 159 S. W. 386.

Purchaser must show his vendor was purchaser in good faith. La Brie *v.* Cartwright, 55 Tex. Civ. 144, 118 S. W. 785.

899-21 Richards *v.* Potter (Ky.), 124 S. W. 850.

Vendor must show fraud or mistake, and that vendee had no notice thereof. Beavers *v.* Baker (Tex. Civ.), 124 S. W. 450.

899-22 Black E. V. Co. *v.* Belcher, 22 Cal. App. 258, 133 P. 1153; Smith *v.* Newberry Co., 21 Cal. App. 432, 131 P. 1055; Errett *v.* Wheeler, 109 Minn. 157, 123 N. W. 414; Kreusler *v.* Glukoff Co., 223 Pa. 174, 72 A. 352; Atl. etc. Co. *v.* Co., 93 S. C. 397, 76 S. E. 1091; Rule *v.* Richards (Tex. Civ.), 159 S. W. 386; Houston, etc. Co. *v.* Hayden, 104 Tex. 175, 135 S. W. 1149.

Evidence sufficient.—Dawson *v.* Co., 130 La. 645, 58 S. 496.

900-23 Hopkins *v.* O'Brien, 57 Fla 444, 49 S. 936; West Coast L. Co. *v.* Griffin, 56 Fla. 878, 48 S. 36; Shelton *v.* Franklin, 224 Mo. 342, 123 S. W. 1084; Phillips *v.* Campbell (Tex. Civ.), 146 S. W. 319; Buckley *v.* Runge, 57 Tex. Civ. 322, 122 S. W. 596; Wootton *v.* Thomson, 55 Tex. Civ. 583, 119 S. W. 117; Scott *v.* Farnam, 55 Wash. 336, 104 P. 639; Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609. *Contra,* Errett *v.* Wheeler, 109 Minn. 157, 123 N. W. 414.

901-24 White *v.* Moffett, 108 Ark. 490, 158 S. W. 505; Powers *v.* Perry, 12 Cal. App. 77, 106 P. 595; Kruse *v.* Conklin, 82 Kan. 358, 108 P. 856; McCollum *v.* Home, 54 Tex. Civ. 348, 117 S. W. 886.

901-25 Kruse *v.* Conklin, 82 Kan. 358, 108 P. 856; Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609. See Jackson *v.* Berliner (Tex. Civ.), 127 S. W. 1160.

Giving non-negotiable notes, not payment. Beavers *v.* Baker (Tex. Civ.), 124 S. W. 450. See vol. 9, p. 700, n. 1, and supplement thereto.

902-26 Carlisle *v.* King (Tex. Civ.), 122 S. W. 581.

902-27 Davidson *v.* Ryle (Tex.), 124 S. W. 616, recital in deed may be potent circumstance in connection with other circumstances.

Appraisement, deed, report of administrator's sale and his final account may show full consideration paid. McCollum *v.* Home, 54 Tex. Civ. 348, 117 S. W. 886.

903-30 McCarthy *v.* Moir, 12 Cal. App. 441, 107 P. 628. See Zenda M. & M. Co. *v.* Tiffin, 11 Cal. App. 62, 104 P. 10; Sinclair *v.* Gunzenhauser, 179 Ind. 78, 98 N. E. 37, 100 N. E. 376; Harlan *v.* Harlan (Tex. Civ.), 125 S. W. 950.

Inability to read does not affect notice given by record. Seilert *v.* McAnally, 223 Mo. 505, 122 S. W. 1064.

906-39 Immaterial against non-resident. Hopkins *v.* O'Brien, 57 Fla. 444, 49 S. 936.

906-40 Moody *v.* Martin (Tex. Civ.), 117 S. W. 1015.

907-44 McCarthy *v.* Moir, 12 Cal. App. 441, 107 P. 628 (building and other improvements with reference to street); Randal *v.* Gould, 18 Pa. Dist. 6 (payment of extra premium for indemnifying title); Ross *v.* Martin (Tex. Civ.), 128 S. W. 718; Downs *v.* Stevenson, 56 Tex. Civ. 211, 119 S. W. 315 (purchase of defective title).

"**The burden of proving** the fact of actual notice was on the plaintiff. Unquestionably that fact, like any other fact to be proved, may be established by direct evidence, or it may be inferred as a legitimate conclusion from indirect evidence—by circumstantial evidence. But in considering whether or not the evidence of such fact, relied upon in any given case, is sufficient, it

must be borne in mind that actual notice is the requirement of the statute, and it is that fact that must be proved, whether the evidence be direct or circumstantial." Hooper *v.* Leavitt, 109 Me. 70, 82 A. 547.

908-45 Bergstrom *v.* Johnson, 111 Minn. 247, 126 N. W. 899; Moody *v.* Martin (Tex. Civ.), 117 S. W. 1015.

Character of warranty in deed, relevant, not conclusive. Davidson *v.* Rylo (Tex.), 124 S. W. 616.

Grantor's statements as to title may be shown by purchaser. Downs *v.* Stevenson, 56 Tex. Civ. 211, 119 S. W. 315.

Participation in legal proceedings affecting title prior to obtaining it may be shown. Randal *v.* Gould, 225 Pa. 42, 73 A. 986.

908-47 Richards *v.* Sutter, 94 Ark. 621, 125 S. W. 1018; Griffin *v.* Franklin, 224 Mo. 667, 123 S. W. 1092.

Notice to corporation.—See Finnell *v.* Finnell, 156 Cal. 589, 105 P. 740.

Contract of indemnity, admissible Buckhorn P. Co. *v.* Co., 47 Colo. 516 108 P. 27.

909-48 Luke *v.* Smith, 13 Ariz. 155, 108 P. 494; In re Jones' Est. (Kan.), 103 P. 772; Fleming *v.* Fouts, 108 Minn. 415, 122 N. W. 490; Howard *v.* Scott, 225 Mo. 685, 125 S. W. 1158; Griffin *v.* Franklin, 224 Mo. 667, 123 S. W. 1092; Zweigart *v.* Reed, 221 Mo. 33, 119 S. W. 960; Snyder *v.* Collier, 85 Neb. 552, 123 N. W. 1023; Schwoebel *v.* Storrie, 76 N. J. Eq. 466, 74 A. 969; Russell *v.* Gerlach, 24 Okla. 556, 103 P. 604; In re Mulholland's Est., 224 Pa. 536, 73 A. 932; Hunker *v.* Estes (Tex. Civ.), 159 S. W. 470; Tomlinson *v.* Drought (Tex. Civ.), 127 S. W. 262; Hardy O. Co. *v.* Burnham (Tex. Civ.), 124 S. W. 221 (a purchaser may not presume that his predecessor in title made the necessary inquiry); Carlisle *v.* King (Tex. Civ.), 122 S. W. 581; Merrill *v.* Bradley (Tex. Civ.), 121 S. W. 561; La Brie *v.* Cartwright, 55 Tex. Civ. 144, 118 S. W. 785 (opinion of attorney based upon abstract notwithstanding).

Existence of policy insuring title, shown. Randal *v.* Gould, 225 Pa. 42, 73 A. 986.

Actual notice, implied. Cooper *v.* Flesner, 24 Okla. 47, 103 P. 1016.

910-49 McCullars *v.* Reaves, 162 Ala. 158, 50 S. 313; Hughes *v.* Redus, 90 Ark. 149, 118 S. W. 414; Zeuda M. & M. Co. *v.* Tiffin, 11 Cal. App. 62, 104 P. 10; Park *v.* Park, 45 Colo. 347, 101 P. 403; Mathias *v.* Fulton, 241 Ill. 590, 89 N. E. 697; Weeks *v.* Hathaway, 45 Ind. App. 196, 90 N. E. 647; Brown *v.* Columbus (N. J. Eq.), 75 A. 917; Schwoebel *v.* Storrie, 76 N. J. Eq. 466, 74 A. 969; Smith *v.* Fuller, 152 N. C. 7, 67 S. E. 48; Llanos *v.* Nairn, 4 P. R. Fed. 75. *Contra,* Foster *v.* Bailey, 82 S. C. 378, 64 S. E. 423, statute.

Only facts naturally and reasonably connected with known fact, and of which it can be said to furnish a clue, imputed. Hawkes *v.* Hoffman, 56 Wash. 120, 105 P. 156.

912-50 Hall *v.* Hilley, 134 Ga. 77, 67 S. E. 428; Schwoebel *v.* Storrie, 76 N. J. Eq. 466, 74 A. 969.

"**The possession of land** essential to give rise to that duty of inquiry on the part of a purchaser need not be such an adverse possession as, if maintained for the necessary period, would ripen into title. Smith *v.* Jackson, 76 Ill. 254. It is generally sufficient if it is such a visible possession as would naturally suggest inquiry upon the part of an ordinarily prudent person intending to purchase, though it must be open, notorious and exclusive as regards the purchaser's vendor, and, in consequence, unambiguous and unequivocal." Sloss-Sheffield Steel & Iron Co. *v.* Taff, 178 Ala. 382, 59 S. 658.

913-52 Enclosure of few acres by plaintiff's agent, not notice. Hopkins *v.* O'Brien, 57 Fla. 444, 49 S. 936.

913-53 Ely *v.* Cavanaugh, 82 Conn. 681, 74 A. 1122, possession of chattels on land by licensee.

914-54 Possession alone is insufficient. Norfolk *v.* P. Traction Co. *v.* C. B. White & Bros., 113 Va. 102, 73 S. E. 467.

915-57 Langley *v.* Pulliam, 162 Ala. 142, 50 S. 365.

915-59 Possession by devisee, presumably under will and excuses inquiring. Jackson *v.* Berliner (Tex. Civ.), 127 S. W. 1160.

Declarations of possessor and circumstances learned by grantee, competent. Hall *v.* Hilley, 134 Ga. 77, 67 S. E. 428.

916-61 Doty *v.* Knox (Kan.), 105 P. 437; Zweigart *v.* Reed, 221 Mo. 33, 119 S. W. 960; Proctor *v.* Nance, 220 Mo. 104, 119 S. W. 409; Starr *v.* Bartz, 219 Mo. 47, 117 S. W. 1125 (if the registry act does not protect the purchaser);

Rule *v.* Richards (Tex. Civ.), 149 S. W. 1073; Hudman *v.* Henderson (Tex. Civ.), 124 S. W. 186; McMurray *v.* L. Co., 56 Tex. Civ. 199, 120 S. W. 246.

Rule not applicable where grantor gives warranty deed though he held under quit claim. Downs *v.* Rich (Kan.), 105 P. 9.

917-63 Marshall *v.* Pierce, 136 Ga. 543, 71 S. E. 893.

918-64 So. R. Co. *v.* Carroll, 86 S. C. 56, 67 S. E. 4; Eyanson *v.* Waidlich, 57 Wash. 234, 106 P. 746; McDougall *v.* Murray, 57 Wash. 76, 106 P. 490.

922-68 Good faith and lack of notice may be shown though prior conveyance recorded. Isler *v.* Griffin, 134 Ga. 192, 67 S. E. 854.

Vendor's good faith relevant; may support presumption of good faith in vendee. Davidson *v.* Ryle, 103 Tex. 209, 124 S. W. 616.

Purchaser's acts after purchase, irrelevant. Davidson *v.* Ryle, supra.

Notice of claim accruing prior to deed which is common source of title, not decisive as to the claim. Downs *v.* Stevenson, 56 Tex. Civ. 211, 119 S. W. 315.

922-69 Western G. Co. *v.* Alleman, 81 Kan. 543, 106 P. 460 (antecedent indebtedness); Morris *v.* Wicks, 81 Kan. 790, 106 P. 1048; Temple *v.* Osburn, 55 Or. 506, 106 P. 16 (conveyance in payment of pre-existing claim not within rule); Davidson *v.* Ryle, 103 Tex. 209, 124 S. W. 616; Lightfoot *v.* Horst (Tex. Civ.), 122 S. W. 606; Kinney *v.* McCall, 57 Wash. 545, 107 P. 385; Wisconsin R. L. Co. *v.* Selover, 135 Wis. 594, 116 N. W. 265, 16 L. R. A. (N. S.) 1073.

Consideration for mortgage cannot be shown as against stranger by foreclosure proceedings, recitals in mortgage or assignments of it. Langley *v.* Pulliam, 162 Ala. 142, 50 S. 365.

Full value represented by notes as effectual as cash in absence of proof they were not negotiated before maturity, so far as good faith of vendor is concerned in disposing of community property. Davis *v.* Carter, 55 Tex. Civ. 423, 119 S. W. 724.

923-70 Bell County *v.* Felts (Tex. Civ.), 120 S. W. 1065.

Payment of valuable consideration by prior grantees need not be shown. Downs *v.* Stevenson, 56 Tex. Civ. 211, 119 S. W. 315.

923-71 *Contra,* Davis *v.* Bell (Tex. Civ.), 128 S. W. 658.

Amount of consideration may be material in determining whether transaction sale or redemption. Duson *v.* Roos, 123 La. 835, 49 S. 590.

924-72 Kruse *v.* Conklin, 82 Kan. 358, 108 P. 856; Morrison *v.* Cotton (Tex. Civ.), 152 S. W. 866; McAdoo *v.* Williams, 54 Tex. Civ. 562, 118 S. W. 625(not sufficient evidence).

Recital not evidence in purchaser's favor if sale fraudulent. Doniphan L. Co. *v.* Wenzel, 94 Ark. 149, 126 S. W. 710.

925-74 La Brie *v.* Cartwright, 55 Tex. Civ. 144, 118 S. W. 785.

925-75 Downs *v.* Stevenson, 56 Tex. Civ. 211, 119 S. W. 315, unless consideration so inadequate as to shock conscience of court.

VENUE

927-1 Ringer *v.* Milner, 6 Ga. App. 790, 65 S. E. 814; S. *v.* Alford, 142 Mo. App. 412, 127 S. W. 109. *Contra* S. *v.* Willard, 228 Mo. 328, 128 S. W. 749.

928-2 Prejudice presumed from denial of change of venue on account of prejudice of judge. Ex parte Ellis, 3 Okla. Cr. 220, 105 P. 184. *Comp.* S. *v.* Tawney, 81 Kan. 162, 105 P. 218.

928-5 Presumed cause transferred to nearest justice as law required. White *v.* Brown, 54 Or. 7, 101 P. 900.

929-7 S. *v.* Bush, 136 Mo. App. 608, 118 S. W. 670; Stevens *v.* S. (Tex. Cr.), 150 S. W. 944.

Evidence sufficient.—Nichols *v.* S., 102 Ark. 266, 143 S. W. 1071.

929-8 Williams *v.* S., 5 Ala. App. 112, 59 S. 528; Minor *v.* Atlanta, 7 Ga. App. 471, 67 S. E. 108; Andrews *v.* Atlanta, 7 Ga. App. 472, 67 S. E. 109; Isabel *v.* S., 101 Miss. 371, 58 S. 1; S. *v.* Sexton, 141 Mo. App. 694, 125 S. W. 519.

Evidence sufficient.—McGhee *v.* S., 178 Ala. 4, 59 S. 573; Palmer *v.* S., 168 Ala. 124, 53 S. 283; Wolfe *v.* S., 104 Ark. 140, 148 S. W. 641; P. *v.* Smith, 13 Cal. App. 627, 110 P. 333; Rickerson *v.* S., 10 Ga. App. 464, 73 S. E. 681.

929-9 Silence in answer, admission of allegation of complaint. Williams *v.* Hampton, 57 Fla. 272, 49 S. 506.

Evidence insufficient.—Severn *v.* R. Co., 149 Mo. App. 631, 129 S. W. 477.

930-14 Ex parte Lair, 177 Fed. 789.

930-18 S. *v.* Skibiski, 245 Mo. 459, 150 S. W. 1038.

931-19 Bell *v.* S., 93 Ark. 600, 125 S. W. 1020; S. *v.* Molz, 91 Kan. 901, 139 P. 376; Litchfield *v.* S., 8 Okla. Cr. 164, 126 P. 707; Gossett *v.* S., 57 Tex. Civ. 43, 123 S. W. 428. *Contra* as to unincorporated town. S. *v.* Bush, 136 Mo. App. 608, 118 S. W. 670.

931-21 **Statement as to residence of party in action on indemnifying bond,** made in petition in attachment suit, not noticed. Constantine *v.* Rowland, 147 Ia. 142, 124 N. W. 189.

Existence of race prejudice against accused, noticed. Browder *v.* C., 136 Ky. 45, 123 S. W. 328.

931-22 Wade *v.* S., 11 Ga. App. 411, 75 S. E. 494; P. *v.* McIntosh, 242 Ill. 602, 90 N. E. 180; S. *v.* Keeland, 39 Mont. 506, 104 P. 513; Litchfield *v.* S., 8 Okla. Cr. 164, 126 P. 707; Norris *v.* S., 127 Tenn. 437, 155 S. W. 165 (*cit.* ENCYC. OF EV.); Reynolds *v.* S. (Tex. Cr.), 160 S. W. 362; Melton *v.* S. (Tex. Cr.), 158 S. W. 550.

932-23 Minter *v.* S., 7 Ga. App. 16, 65 S. E. 1079.

932-24 Booton *v.* S., 86 Neb. 114, 125 N. W. 144, proof beyond rational doubt.

There need be no direct evidence.—It is sufficient if it may fairly and reasonably be inferred. Lee *v.* P., 53 Colo. 507, 127 P. 1023.

Venue may be inferred in case of conspiracy by proof of residence if there is no proof of conspirators' absence therefrom. Marrash *v.* U. S., 168 Fed. 225, 93 C. C. A. 511.

932-25 If prosecuting witness testified place in which crime committed was pointed out by him to another, latter may testify to that fact and to county in which place was. Smith *v.* S., 90 Ark. 435, 119 S. W. 655.

932-26 Powell *v.* S., 5 Ala. App. 75, 59 S. 530; Pearson *v.* S., 5 Ala. App. 68, 59 S. 526; Douglass *v.* S., 91 Ark. 492, 121 S. W. 923; Dyer *v.* S., 6 Ga. App. 390, 65 S. E. 42; Wilson *v.* S., 6 Ga. App. 16, 64 S. E. 112; S. *v.* Lee, 228 Mo. 480, 128 S. W. 987; Booton *v.* S., 86 Neb. 114, 125 N. W. 144; P. *v.* Cosmides, 133 App. Div. 103, 117 N. Y. S. 718; Reynolds *v.* S. (Tex. Cr.), 160 S. W. 362.

Facts when action begun control if residence determinative of venue. Ogburn-D. L. Co. *v.* Taylor (Tex. Civ.), 126 S. W. 48.

Parol evidence inadmissible if venue depends upon terms of written contract. Ogburn-D. L. Co. *v.* Taylor (Tex. Civ.), 126 S. W. 48.

933-27 P. *v.* McIntosh, 242 Ill. 602, 90 N. E. 180; S. *v.* Forbes, 75 N. H. 306, 73 A. 929.

933-28 Rex *v.* Graf, 19 Ont. L. R. 238.

Admission corporation is doing business in A. county means it keeps office there. Collins *v.* Co., 54 Wash. 524, 103 P. 798.

933-29 Smith *v.* S., 90 Ark. 435, 119 S. W. 655; Eno *v.* S., 91 Ark. 441, 121 S. W. 732.

"Where there is no proof of venue, it becomes, when properly presented, a question for this court to pass upon; but when it is a question of the *sufficiency* of the evidence tending to prove the venue it becomes a question for the jury, and this court will not interfere, unless the ruling of the trial court was invoked on the sufficiency of the evidence, and this ruling made the ground of attack." Pearson *v.* S., 5 Ala. App. 68, 59 S. 526.

934-30 St. Louis, etc. R. Co. *v.* Weatherly, 93 Ark. 269, 124 S. W. 1031.

934-31 Wilson *v.* S., 6 Ga. App. 16, 64 S. E. 112.

937-47 Godau *v.* S. (Ala.), 60 S. 908; Bloom *v.* Co., 11 Cal. App. 122, 104 P. 324; Constantine *v.* Rowland, 147 Ia. 142, 124 N. W. 189; S. *v.* Bassnett, 80 Kan. 392, 102 P. 461; Hargis *v.* C., 135 Ky. 578, 123 S. W. 239; Seacif *v.* Crofford (Tex. Civ.), 146 S. W. 1003; Hillsman *v.* Cline (Tex. Civ.), 145 S. W. 726; Willard *v.* Norcross, 83 Vt. 268, 75 A. 269 (facts must be "clearly" shown). See generally the title "Change of Venue" in STANDARD PROC.

Evidence sufficient.—Mullin *v.* Curtis, 129 N. Y. S. 916.

Evidence insufficient.—Gibbert *v.* Power Co., 19 Ida. 637, 115 P. 924; Burroughs *v.* Foster, 130 N. Y. S. 530.

937-48 Pittsburgh, etc. R. Co. *v.* Chicago, 144 Ill. App. 293; Tubb *v.* S., 55 Tex. Cr. 606, 117 S. W. 858.

938-49 Downs *v.* S., 111 Md. 241, 73 A. 893; Clarence *v.* S., 89 Neb. 762, 132 N. W. 395; Smith *v.* Coon, 89 Neb. 776, 132 N. W. 535; S. *v.* Winchester, 18 N. D. 534, 122 N. W. 1111; Horton *v.* Haines, 23 Okla. 878, 102 P. 121; Wolf *v.* Sahm, 55 Tex. Civ. 564, 120 S. W. 1114; Willard *v.* Norcross, 83 Vt. 268, 75 A. 269.

940-69 General manager's affidavit as to corporation's place of business is not evidence it had acquired such a place, nor sufficient to show it demanded removal of cause thereto. Waechter *v.* R. Co., 10 Cal. App. 70, 101 P. 41.
942-81 O'Brien *v.* O'Brien, 16 Cal. App. 103, 116 P. 692.
943-87 Good faith of applicant must be determined from the record, pleadings and proceedings, and not upon oral testimony. St. Louis, etc. R. Co. *v.* Co., 139 Mo. App. 272, 123 S. W. 70.
944-94 Evidence sufficient. Streight *v.* S., 62 Tex. Cr. 453, 138 S. W. 742.
944-97 S. *v.* Casey, 34 Nev. 154, 117 P. 5; Carpenter *v.* R. Co., 84 Vt. 538, 80 A. 657.
947-19 See Mathis *v.* Bk., 136 Ky. 634, 124 S. W. 876.
948-26 Carpenter *v.* R. Co., 84 Vt. 538, 80 A. 657.
949-32 Latourette *v.* S., 91 Ark. 65, 120 S. W. 411.
950-36 Corroborating testimony adduced by affiants need not be heard, their testimony being received on issue of credibility. Latourette *v.* S., 91 Ark. 65, 120 S. W. 411.
950-37 Opinions not binding on court. Browder *v.* C., 136 Ky. 45, 123 S. W. 328.
951-49 Downs *v.* S., 111 Md. 241, 73 A. 893.
951-50 Godau *v.* S. (Ala.), 60 S. 908.
951-54 Newspaper clippings, not convincing. Downs *v.* S., 111 Md. 241, 73 A. 893. See S. *v.* Smarr, 121 N. C. 669, 28 S. E. 549.
No proof of prejudice is necessary where counter affidavit is not filed. S. *v.* Yager, 250 Mo. 388, 157 S. W. 557.
952-57 Recent election of movant to town office, shown. Willard *v.* Norcross, 83 Vt. 268, 75 A. 269. *Contra*, Williams *v.* S., 103 Ark. 70, 146 S. W. 471.

VIEW BY JURY

958-15 Discretion of court final. Colorado Springs & I. R. Co. *v.* Allen, 48 Colo. 4, 108 P. 990.
958-16 Equitable Powder Mfg. Co. *v.* R. Co., 155 Ill. App. 265; Lee *v.* R. Co., 84 S. C. 125, 65 S. E. 1031 (negligence).
962-31 O'Brien *v.* Co., 237 Pa. 44, 85 A. 130.
964-38 Atl., etc. Co. *v.* Whitney, 65 Fla. 72, 61 S. 179; City of Lexington *v.* Finn, 149 Ky. 146, 147 S. W. 960; Wade *v.* Co., 65 Or. 488, 132 P. 710; S. *v.* Suber (S. C.), 71 S. E. 466; Rodgers *v.* Hodge, 83 S. C. 569, 65 S. E. 819.
964-39 Louisville & N. R. Co. *v.* Wilson, 162 Ala. 588, 50 S. 188; Sulser *v.* Sayre, 4 Ala. App. 452, 58 S. 758; United States C. I. Pipe & F. Co. *v.* Granger, 172 Ala. 546, 55 S. 244; Becker & Co. *v.* Baker, 146 Ky. 233, 142 S. W. 222; Piper *v.* Murray, 43 Mont. 230, 115 P. 669.
A judicial discretion.—Cutchin *v.* City, 113 Va. 452, 74 S. E. 405.
965-40 Not reviewable.—Smith *v.* S., 11 Ga. App. 89, 74 S. E. 711.
966-43 Where an object can be readily described by witnesses it is not error to refuse a view. **S. *v.* Hawthorn,** 134 La. 979, 64 S. 873.
966-45 Illinois C. R. Co. *v.* Frost (Ky.), 124 S. W. 821.
966-49 *Contra* in case of animal Mitchell *v.* Rowley, 63 Misc. 643, 118 N. Y. S. 751.
967-51 P. *v.* Crawley, 23 Cal. App. 340, 138 P. 123.
967-54 Illinois C. R. Co. *v.* Frost (Ky.), 124 S. W. 821.
971-76 P. *v.* Auerbach, 176 Mich. 23, 141 N. W. 869.
972-78 P. *v.* Auerbach, 176 Mich. 23, 141 N. W. 869.
975-92 S. *v.* Suber, 89 S. C. 100, 71 S. E. 466.
975-95 Lee *v.* R. Co., 84 S. C. 125, 65 S. E. 1031.
978-9 Louisville R. Co. *v.* Hallahan (Ky.), 119 S. W. 200, misconduct ground for new trial.
980-16 Kimic *v.* R. Co., 156 Cal. 379, 104 P. 986.
981-21 Payson *v.* Milan, 144 Ill. App. 204.
986-36 Hancock *v.* R. Co., 145 Ill. App. 491.
988-39 West Skokie D. Dist. *v.* Dawson, 243 Ill. 175, 90 N. E. 377. See Herrin & S. R. Co. *v.* Nolte, 243 Ill. 594, 90 N. E. 1097.
992-56 Change in situation cannot be availed of after view unless party knowing thereof sought continuance in order to restore pre-existing condition. Brown *v.* Co., 47 Colo. 294, 107 P. 258.
992-57 View by judge after cause taken under advisement and application of what he learned thereby to tes-

timony, prejudicial. Denver O. & C. Co. *v.* Co., 47 Colo. 446, 107 P. 1073.
Certificate by justice as to result of his view, not evidence on appeal. Cruz *v.* Joaquin, 2 Phil. Isl. 503.

VOIR DIRE

997-5 Witness who states belief in sanctity of oath may not be asked concerning variant statements, except as affecting credibility. S. *v.* Dlugozima, 7 Penne. (Del.) 151, 74 A. 1086.
1007-52 P. *v.* Wright, 170 Mich 154, 135 N. W. 912.
Second examination refused.—P. *v.* Ruef, 14 Cal. App. 576, 114 P. 54.
1007-53 Oath omitted. Hilton, etc. Lumb. Co. *v.* Ingram, 135 Ga. 696, 70 S. E. 234.
1007-57 Exhibition of newspaper articles from paper juror read may be refused. Palmer *v.* S., 121 Tenn. 465, 118 S. W. 1022.
1008-62 Apkins *v.* C., 148 Ky. 662, 147 S. W. 376; Streight *v.* S., 62 Tex. Cr. 453, 138 S. W. 742.
1008-63 Walsingham *v.* S., 61 Fla. 67, 56 S. 195; P. *v.* Collins, 166 Mich. 4, 131 N. W. 78.
Evidence held not to disqualify. S. *v.* Rasco, 239 Mo. 535, 144 S. W. 449.
1011-71 Goff *v.* Wks., 43 Ind. App. 642, 88 N. E. 312.
1011-72 National Bk. *v.* Romine, 154 Mo. App. 624, 136 S. W. 21.
1012-79 Duncan *v.* S., 141 Ga. 4, 80 S. E. 317; Goff *v.* Wks., 43 Ind. App. 642, 88 N. E. 312; S. *v.* Banik, 21 N. D. 417, 131 N. W. 262; Fowlie *v.* Co., 85 Vt. 438, 82 A. 677.
1013-80 Instance of abuse. Goff *v.* Wks., supra; S. *v.* Banik, supra; Fowlie *v.* Co., supra.
Abuse of discretion.—Ventriss *v.* Coal Co., 155 Ill. App. 152.

WAIVER

Of statutory rule of evidence, 1020-9.
1013-81 It is not competent to ask him if he did form an opinion of the credibility of the complaining witness, in another case where he was a juror and same person was a witness. P. *v.* Wright, 170 Mich. 154, 135 N. W. 912.
1014-85 Lindsay *v.* S., 138 Ga. 818, 76 S. E. 369.
1014-86 Lindsay *v.* S., 138 Ga. 818, 76 S. E. 369.
1014-87 Lindsay *v.* S., 138 Ga. 818, 76 S. E. 369.
1014-88 Lindsay *v.* S., 138 Ga. 818, 76 S. E. 369.
1014-90 C. *v.* Phelps, 209 Mass. 396, 95 N. E. 868.
1015-93 Held permissible.—Goodwin *v.* U. S., 200 Fed. 121, 118 C. C. A. 295.
Permissible.—But it devolves on defendant before he can claim prejudice to show that he had availed himself of the opportunity to ascertain whether he had formed or expressed an opinion. Bealmear *v.* S., 104 Ark. 616, 150 S. W. 129.
1018-1 Burnham *v.* Austin, 105 Me. 196, 73 A. 1089; Kelly *v.* Ins. Co., 84 S. C. 95, 65 S. E. 949; Barber *v.* Vinton, 82 Vt. 327, 73 A. 881; Percy *v.* Bk., 110 Va. 129, 65 S. E. 475; Atlantic C. L. R. Co. *v.* Bryan, 109 Va. 523, 65 S. E. 30; McNaughton *v.* Ins. Co., 140 Wis. 214, 122 N. W. 764; Castello *v.* Bk., 140 Wis. 275, 122 N. W. 769.
1019-2 Ubarri *v.* Laborde, 214 U. S. 168; Hasey *v.* McMullen, 109 Minn. 332, 123 N. W. 1078.
1019-3 Demurrers filed, but not acted on, presumed waived. Higdon *v.* Garrett, 163 Ala. 285, 50 S. 323.
1019-4 Circumstances may rebut inference of waiver. Burns Bros. *v.* Biglow, 122 N. Y. S. 255.
1020-9 Officers in navy bound by agreement to allow proceedings of court of inquiry to be evidence on hearing of charges against him by court-martial. Mullan *v.* U. S., 212 U. S. 516.
Acts inconsistent with assertion and exercise of right, presumed to waive it. Percy *v.* Co., 173 Fed. 534.
1020-10 United Order *v.* Hooser, 160 Ala. 334, 49 S. 354; Ramsey *v.* Hill, 92 S. C. 146, 75 S. E. 366; Morgan *v.* Oliver (Tex. Civ.), 129 S. W. 156. See supra, "Insurance," 539-10.
1020-11 Reilly R. & S. Co. *v.* Smith, 177 Fed. 168, 100 C. C. A. 630; Fitzgerald *v.* Frankel, 109 Va. 603, 64 S. E. 941. See supra, "Insurance," 569-84.
Rule not stringent when waiver of forfeiture involved. McDaniel *v.* Co., 6 Ga. App. 848, 66 S. E. 146.
1021-13 United Order *v.* Hooser, 160 Ala. 334, 49 S. 354; German-Am. S. Bk. *v.* Gollmer, 155 Cal. 683, 102 P. 932; Boppart *v.* Co., 140 Mo. App. 675, 126 S. W. 768; Hartford Ins. Co. *v.* Wright (Tex. Civ.), 125 S. W. 363.
1022-15 Keys *v.* Nat. Council, 174

Mo. App. 671, 161 S. W. 345. See supra, "Insurance," 539-10.

1022-18 Mound M. Co. *v.* Hawthorne, 173 Fed. 882, 97 C. C. A. 394; Metropolitan L. Ins. Co. *v.* Williamson, 174 Fed. 116, 98 C. C. A. 90; Mahoney *v.* Co., 82 Conn. 280, 73 A. 766; Johnson *v.* Brotherhood, 109 Minn. 288, 123 N. W. 819; Marshall *v.* Co., 148 Mo. App. 669, 129 S. W. 40; Whitsett *v.* Bk., 138 Mo. App. 81, 119 S. W. 999; Palmer *v.* Reeves, 139 Mo. App. 473, 122 S. W. 1119; Burke *v.* Grand Lodge, 136 Mo. App. 450, 118 S. W. 493; P. *v.* Atchinson, 123 N. Y. S. 577; Missouri, etc. R. Co. *v.* Hood, 55 Tex. Civ. 636, 120 S. W. 236; St. Louis & S. F. R. Co. *r.* Dysart (Tex. Civ.), 130 S. W. 1047.

1023-19 Ryan *v.* Co., 36 Utah 382, 104 P. 218.

1023-20 Boppart *v.* Co., 140 Mo. App. 675, 126 S. W. 768.

1023-21 McInturff *v.* Ins. Co., 155 Ill. App. 225, *aff.* P. *v.* R. Co., 247 Ill. 445, 93 N. E. 369; Funk *v.* Fire Assn., 157 Ill. App. 602; Burnham *v.* Austin, 105 Me. 196, 73 A. 1089; Morgenstern *v.* Ins. Co., 89 Neb. 459, 131 N. W. 969; Downs *v.* Knights, 76 N. H. 165, 80 A. 227; Perry *v.* Co., 75 N. H. 199, 72 A. 369; Kelly *v.* R., 84 S. C. 249, 66 S. E. 198.

1023-22 Burnham *r.* Austin, 105 Me. 196, 73 A. 1089; Phenix Ins. Co. *v.* Hunter, 95 Miss. 754, 49 S. 740; Castello *v.* Bk., 140 Wis. 275, 122 N. W. 769. See General F. Co. *v.* Wallace, 175 Fed. 650, 99 C. C. A. 204; List *v.* Chase, 80 O. St. 42, 88 N. E. 120.

1023-23 Dorff *v.* Co., 157 Mich. 516, 122 N. W. 82.

1024-25 Elyea-A. Co. *v.* Garage, 13 Ga. App. 182, 79 S. E. 38; Weinberger *v.* Ins. Co., 170 Mo. App. 266, 156 S W. 79; Perry *v.* Co., 75 N. H. 199, 72 A. 369; Gilliland *r.* R. Co., 85 S. C. 26, 67 S. E. 20. See vol. 7, p. 541, n. 15; vol. 9, p. 357, n. 28; p. 367, n. 92.

1026-30 Seguin Milling & P. Co. *v.* Guinn (Tex. Civ.), 137 S. W. 456.

1028-41 Wales-Riggs Plantation *v.* Banks, 101 Ark. 461, 142 S. W. 828; California Raisin Grower's Assn. *v.* Abbott, 160 Cal. 601, 117 P. 767; Brown *v.* Maccabees, 167 Mich. 123, 132 N. W. 562; Detwiler *v.* Downes, 119 Minn. 44, 137 N. W. 422; Johnson *v.* Modern Brotherhood, 114 Minn. 411, 131 N. W. 471; Smith *r.* Ins. Co., 129 N. Y. S. 775; Smith *r.* Russell, 129 N. Y. S. 46; Fisher *v.* Ins. Co., 124 Tenn. 450, 138 S. W. 316; Bastrop & Austin Bayou Rice Growers' Assn. *v.* Cochran (Tex. Civ.), 138 S. W. 1188.

1028-42 Pratt *v.* McCoy, 128 La. 570, 54 S. 1012; Rhodus *v.* Ins. Co., 156 Mo. App. 281, 137 S. W. 907; Macey Co. *r.* City, 144 App. Div. 408, 129 N. Y. S. 241; Weir *v.* Dwyer, 114 N. Y. S. 528; Workingman's Loan & Bldg. Assn. *v.* Heaton, 233 Pa. 173, 82 A. 78; Barber *r.* Vinton, 82 Vt. 327, 73 A. 881; Security L. & T. Co. *r.* Fields, 110 Va. 827, 67 S. E. 342 (clear and unmistakable proof necessary); McNaughton *v.* Ins. Co., 140 Wis. 214, 122 N. W. 764.

1029-46 Cable Co. *r.* Griffitts, 160 Ala. 315, 49 S. 577 (though preceded by knowledge of intent of other party); Richardson *r.* Anderson, 109 Md. 641, 72 A. 485; Modlin *v.* Ins. Co., 151 N. C. 35, 65 S. E. 605; Equitable Life Assur. Society *r.* Ellis (Tex. Civ.) 137 S. W. 184; Seattle Merchants' Assn *r.* Ins. Co., 64 Wash. 115, 116 P. 585.

1030-47 H. J. Decker, Jr. & Co. *v.* R. Co., 189 Fed. 224; Title Guaranty & Surety Co. *r.* United States, 187 Fed. 98, 109 C. C. A. 106; *aff.* United States *r.* Schofield, 182 Fed. 240; Lord *v.* Ins. Co., 99 Ark. 476, 138 S. W. 1008; Wayne *r.* Alspach, 20 Ida. 144, 116 P 1033; Fitzsimmons-Kreider Milling Co *r.* Ins. Co., 158 Ill. App. 174; Daniels *r.* Bruce, 176 Ind. 151, 95 N. E. 569; City of St. Louis *r.* Smith, 235 Mo. 64, 138 S. W. 11; Rogers *r.* Ins. Co., 157 Mo. App. 671, 139 S. W. 265; Brown *v* Hillman, 29 Okla. 205, 116 P. 775; Welch *v.* Ladd, 29 Okla. 93, 116 P. 573; St. Louis & S. F. R. Co. *r.* Blocker (Tex. Civ.), 138 S. W. 156; King *v.* Oliphant (Tex. Civ.), 137 S. W. 1167; Olson Land Co. *v.* Park Co., 63 Wash. 521, 115 P. 1083.

1030-48 Houlette *v.* Arntz, 148 Ia. 407, 126 N. W. 796.

1030-49 See S. *v.* Warden, 110 Md. 579, 73 A 294.

1030-50 Villmont *v.* U. A. O. D., 111 Minn. 201, 126 N. W. 730.

1031-54 Montant *v.* Moore, 135 App. Div. 334, 120 N. Y. S. 556.

WATERS AND WATERCOURSES

Custom and usage as to navigation, 30-47; *Establishment of ferry,* 49-13.

2-2 Rutherford *v.* Wilson, 95 Ark. 246, 129 S. W. 534.

10-1 Smith *v.* Smith, 67 Or. 606, 135 P. 876.

15-7 Parish of Bossier *v.* Parish, 130 La. 429, 58 S. 137.

18-14 Blackman *v.* Mauldin, 164 Ala 337, 51 S. 23 (if not meandered); Bissel *v.* Olson, 26 N. D. 60, 143 N. W. 340.

21-22 Blackman *v.* Mauldin, 164 Ala. 337, 51 S. 23.

21-25 See Blackman *v.* Mauldin, 164 Ala. 337, 51 S. 23.

22-26 Blackman *v.* Mauldin, 164 Ala. 337, 51 S. 23.

26-33 Sumner L. & S. Co. *v.* P. Co., 72 Wash. 631, 131 P. 220.

28-38 In re Madsen, 117 Minn. 369, 135 N. W. 1003; In re Rutland Drainago Dist., 148 Wis. 421, 134 N. W. 838.

30-47 In absence of proof of publication of rules governing navigation of rivers, as prescribed by act of congress, evidence of custom existing since they were declared is admissible in action to recover for injuries inflicted on boat by drawbridge. Fugina *v.* R. Co., 142 Wis. 144, 125 N. W. 981.

30-48 Presumption is, after lapse of very long period since construction of artificial channel for a stream upon land of adjoining proprietors, it was originally made for their joint benefit, and upper owner had right to use water for all reasonable purposes so long as material injury not done lower owner. Whitmores *v.* Stanford (1909), 1 Ch. Div. 427.

Burden upon one who petitions to have point of diversion changed to prove that the rights of others will not be injured by the change. Monta Vista C. Co. *v.* Co., 24 Colo. 496, 135 P. 981; Farmers H. L. Co. *v.* Wolf, 23 Colo. App. 570, 131 P. 291.

32-56 Chicago, etc. R. Co. *v.* Hoover, 147 Ky. 33, 143 S. W. 770; Johnson *v.* Co., 118 Minn. 24, 136 N. W. 262.

33-60 Killian *v.* Killian, 175 Ala. 224, 57 S. 825.

33-61 S. *v.* Toney, 162 N. C. 635, 78 S. E. 156.

34-64 Hershey *v.* Kerbaugh, 242 Pa. 227, 88 A. 1009.

35-69 Arminius Chemical Co. *v.* Landrum, 113 Va. 7, 73 S. E. 459.

36-73 Lawrie *v.* Silsby, 82 Vt. 505, 74 A. 94, size, character and use made of stream.

36-74 So., etc. Co. *v.* Acton, 8 Ala. App. 502, 62 S. 402.

37-78 King Land Co. *v.* Bowen, 7 Ala. App. 462, 61 S. 22; Malmstrom *v.* Co., 32 Nev. 246, 107 P. 98.

39-84 Torgerson *v.* Lumb. Co., 123 Minn. 476, 144 N. W. 154.

40-86 Whether railroad bridge increased flowage. Missouri R. Co. *v.* Johnson, 34 Okla. 582, 126 P. 567.

43-97 Sloss-S., etc. Co. *v.* Mitchell (Ala.), 61 S. 934; Brown *v.* R. Co., 165 N. C. 392, 81 S. E. 450.

49-13 Establishment of ferry, prima facie shown by issue of annual licenses to maintain it. Finley *v.* Shemwell, 94 Ark. 190, 126 S. W. 717.

50-17 Anderson Land & Stock Co. *v.* McConnell, 188 Fed. 818.

50-18 Sowards *v.* Meagher, 37 Utah 212, 108 P. 1112.

Ownership presumptively follows possession. Evans D. Co. *v.* Co., 13 Cal. App. 119, 108 P. 1027.

51-21 Patterson *v.* Ryan, 37 Utah 410, 108 P. 1118.

53-30 Farmers' H. L. Co. *v.* Wolf, 23 Colo. App. 510, 131 P. 291.

54-32 Miller *v.* Co., 157 Cal. 256, 107 P. 115, as to show appropriated waters wasted or lost.

60-59 Wilder *v.* Irr. Dist., 55 Colo. 363, 135 P. 461.

62-63 Hudson *v.* Dailey, 156 Cal. 617, 105 P. 748.

Defendant must show reasonableness of his use of subterranean waters where facts, prima facie, bring him within terms of statute governing their use. P. *v.* Co., 196 N. Y. 421, 90 N. E. 441.

Admissibility of evidence for defendant.—P. *v.* Co., supra.

63-66 Manner of creation of river, shown by expert testimony. Los Angeles *v.* Hunter, 156 Cal. 603, 105 P. 755.

66-81 Hanson *v.* Village (Minn.), 148 N. W. 276.

75-2 Brock *v.* Ins. Co., 156 N. C. 112, 72 S. E. 213; Meadors *v.* Johnson, 27 Okla. 544, 112 P. 1121.

76-8 Levi *v.* R. Co., 157 Mo. App. 536, 138 S. W. 699; Hess *v.* Methodist Book Concern, 146 N. Y. S. 143; Adams *v.* Bucyrus Co., 155 Wis. 70, 143 N. W. 1027.

76-9 Lyons *v.* R. Co., 258 Ill. 75, 101 N. E. 211, quoting 14 Encyc. of Ev. 76.

78-10 U. S. *v.* Regan, 232. U. S. 37, 34 Sup. Ct. 213, 58 L. ed. 494; People's Nat. Bk. *v.* Rhoades (Del.), 90 A. 409; Donovan *v.* Maloney (Del.), 84 A. 1032; Stafford *v.* Williams, 1 Boyce

(Del.) 288, 76 A. 626; Escambia County E. L. & P. Co. *v.* Sutherland, 61 Fla. 167, 55 S. 83; Kelley *v.* Martin, 169 Ill. App. 92; Indianapolis L. & H. Co. *v.* Dolby, 47 Ind. App. 406, 92 N. E. 739; Carpenter *v.* Lennane, 166 Mich. 610, 132 N. W. 477; Flaherty *v.* R. Co., 42 Mont. 89, 111 P. 348; Xippas *v.* Co., 123 N. Y. S. 238.

The burden is on the plaintiff to make out his case by the preponderance and the greater weight of the evidence. S. Board of Education *v.* Co. (N. C.), 73 S. E. 994.

78-11 Brewer *v.* Doose (Tex. Civ.), 146 S. W. 323.

WEIGHT AND EFFECT OF EVIDENCE

78-12 Chicago *v.* Classen, 170 Ill. App. 310.

79-19 Northern P. R. Co. *v.* Com., 57 Wash. 134, 106 P. 611.

84-35 People's Nat. Bk. *v.* Rhoades (Del.), 90 A. 409; Donovan *v.* Maloney (Del.), 84 A. 1032; Perry *v.* Stayton, 1 Boyce (Del.), 529, 82 A. 87; Gray *v.* Chicago, etc. Co., 148 Ill. App. 354; S. *v.* Harris, 74 Wash. 60, 132 P. 735, *cit.* 14 ENCYC. OF EV., p. 84.

Preponderance of evidence means evidence most consistent with the truth as measured by your experience and judgment. U. S. *v.* McCaskill, 200 Fed. 332.

Uncontradicted inference, a preponderance. Hawkinson *v.* Oatway, 143 Wis. 136, 126 N. W. 683.

86-38 Phillips *v.* Morris, 169 Ala. 460, 53 S. 1001.

86-39 See Gage *v.* Billing, 12 Cal. App. 688, 108 P. 664.

86-40 Blaikie *v.* Post, 122 N. Y. S. 292.

88-44 Grigsby *v.* R. Co. (Tex. Civ.), 137 S. W. 709.

89-52 Central of Ga. R. Co. *v.* McGuire, 10 Ga. App. 483, 73 S. E. 702.

89-54 Cleveland, etc. Co. *v.* Jones (Ind. App.), 99 N. E. 503.

"**Determining the preponderance** of the evidence by the greater number of witnesses testifying for or against any matter in controversy has been held to be an erroneous test, even in a case where the witnesses are of equal intelligence and credibility, with equal opportunities of knowledge of the matters about which they testify, and testifying with equal candor, intelligence, and fairness, and all other things being equal in all respects." Thurman *v.* Miller, 50 Ind. App. 372, 98 N. E. 379.

89-55 Hall *v.* Clayton, 4 Ala. App. 461, 59 S. 235; Winter-Loeb Grocery Co. *v.* Co., 4 Ala. App. 431, 58 S. 807; Newton Loan & Banking Co. *v.* Reeves, 2 Ala. App. 411, 56 S. 255; Fountain *v.* Ins. Co. (Cal.), 117 P. 630; James *v.* Co., 10 Cal. App. 785, 103 P. 1082; Colorado Springs & I. R. Co. *v.* Allen, 48 Colo. 4, 108 P. 990; Layton *v.* Hudson, 2 Boyce (Del.) 573, 83 A. 134; Culbert *v.* Co. (Del.), 82 A. 1081; Freeman *v.* Co. (Del.), 80 A. 1001; Benson *v.* R. Co., 1 Boyce (Del.) 202, 75 A. 793; Martin *v.* Dumbar, 10 Ga. App. 287, 73 S. E. 596; Chenoweth *v.* Burr, 242 Ill. 312, 89 N. E. 1008; Warren C. Co. *v.* Powell, 173 Ind. 207, 89 N. E. 857; Eby *v.* Norris (Ky.), 128 S. W. 878; S. *v.* Pullen, 130 La. 249, 57 S. 906; Longley *v.* McGeoch, 115 Md. 182, 80 A. 843; Merrill *v.* Thompson (Mo.), 161 S. W. 674; S. *v.* Clifford, 228 Mo. 194, 128 S. W. 755; Hoskovec *v.* R. Co., 85 Neb. 295, 123 N. W. 305; In re Schmidt's Will, 139 N. Y. S. 464; Neal *v.* R. Co., 92 S. C. 197, 75 S. E. 405; International, etc. R. Co. *v.* Poloma (Tex. Civ.), 123 S. W. 1149; Money *v.* R. Co., 59 Wash. 120, 109 P. 307; Wojahn *v.* Bank, 144 Wis. 646, 129 N. W. 1068.

90-56 Steinhaus *v.* Radtke, 145 Ill. App. 232; Colegrove *v.* Berry, 146 Ill. App. 107; Redden *v.* R. Co., 79 N. J. L. 3, 75 A. 179.

91-57 Cummins *v.* C. C. C. & St. L. R. Co., 147 Ill. App. 291.

91-58 St. Louis, I. M. & S. R. Co. *v.* Evans, 99 Ark. 69, 137 S. W. 568.

91-59 Langan *v.* R. Co., 145 Ill. App. 249, error to charge number of witnesses not to be considered.

92-60 Stein *v.* Schwartz, 163 Ill. App. 121.

92-61 Nau *v.* Oil Co., 154 Ill. App. 421; McFadden *v.* R. Co., 149 Ill. App 298; Com. *v.* Harris, 147 Ky. 702, 145 S. W. 387.

93-62 See Yung *v.* Hubert, 119 N Y. S. 180.

94-66 Carter Grocer Co. *v.* Day (Tex. Civ.), 144 S. W. 365; McGuire *v.* R. Co., 70 W. Va. 538, 74 S. E. 859.

95-69 San Antonio T. Co. *v.* Higdon (Tex. Civ.), 123 S. W. 732.

95-70 If equally credible a recovery is not warranted. Adams *v.* Germain Lumb. Co., 130 La. 920, 58 S. 815.

95-72 Youmans *v.* Clarke Co., 19 Cal App. 784, 127 P. 799; Richards *v.* Potter (Ky.), 124 S. W. 850.

97-75 But there must be proof.—Facts merely raising a suspicion are insufficient. Byrd *v.* City of Hazelhurst, 101 Miss. 57, 57 S. 360.

Witnesses may disagree on a point, and there still be sufficient evidence to convict on one theory or the other. P. *v.* Petruzo, 13 Cal. App. 569, 110 P. 324.

97-76 S. *v.* Skibiski, 245 Mo. 459, 150 S. W. 1038.

97-77 Reasonable probability, sufficient. Marriott *v.* R. Co., 142 Mo. App. 204, 126 S. W. 233.

98-80 Norfolk & W. R. Co. *v.* Hauser, 211 Fed. 567 (C. C. A.); Ala. Great So. R. Co. *v.* Demoville, 167 Ala. 292, 52 S. 406; Graysonia-Nashville Lumb. Co. *v.* Carroll, 102 Ark. 460, 144 S. W. 519; Donovan *v.* Co., 86 Conn. 82, 84 A. 288; Browder Manget Co. *v.* Edmondson, 7 Ga. App. 843, 68 S. E. 453; Grand Trunk W. R. Co. *v.* Reynolds, 175 Ind. 161, 92 N. E. 733, *aff.* 90 N. E. 94; Gillespie *v.* R. Co., 144 Mo. App. 508, 129 S. W. 277; Gillean *v.* Witherspoon (Tex. Civ.), 121 S. W. 909.

On motion by defendant for a directed verdict "the plaintiff is entitled to the benefit of every presumption that can legally be drawn from the evidence in his favor, disregarding any contradictory evidence." Hately *v.* Kiser, 253 Ill. 288, 97 N. E. 651.

99-82 Norfolk & W. R. Co. *v.* Hauser, 211 Fed. 567 (C. C. A.); Western Union T. Co. *v.* Brazier (Ala. App.), 65 S. 95; Lyons *v.* R. Co., 258 Ill. 75, 101 N. E. 211, quoting 14 ENCYC. OF EV., p. 99.

100-84 Greenbrier D. Co. *v.* Van Frank, 147 Mo. App. 204, 126 S. W. 222.

101-85 Sexton *v.* R. Co., 245 Mo. 254, 149 S. W. 21; Creson *v.* R. Co., 152 Mo. App. 197, 133 S. W. 57.

102-93 Substance or effect of conversation may be given. Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37.

102-94 Crump *v.* Chenault, 154 Ky. 187, 156 S. W. 1053; American Dist. Telegraph Co. *v.* Oldham, 148 Ky. 320, 146 S. W. 764.

Where all evidence is insufficient to support a verdict, the judge may direct verdict. Fla., etc. Co. *v.* Carter (Fla.), 65 S. 254.

Court should not exclude evidence because in his opinion it is insufficient to support a verdict. Louisville & N. R. Co. *v.* Greenwell, 155 Ky. 799, 160 S. W. 479.

103-95 Alexander *v.* Vaughan, 106 Ark. 438, 153 S. W. 594; Chance *v.* R. Co., 10 Ga. App. 702, 73 S. E. 1076; Chenoa-Hignite C. Co. *v.* Philpot's Admr., 152 Ky. 385, 153 S. W. 457; Bell-Knox C. Co. *v.* Gregory, 152 Ky. 415, 153 S. W. 465; O'Dowd *v.* Wabash R. Co., 166 Mo. App. 660, 150 S. W. 729; Bennett *v.* R. Assn., 242 Mo. 125, 145 S. W. 433; McNulty *v.* R. Co., 166 Mo. App. 439, 148 S. W. 973; Galveston, etc. R. Co. *v.* Blockner (Tex. Civ.), 155 S. W. 955; U. S. Exp. Co. *v.* Taylor (Tex. Civ.), 156 S. W. 617; Wall *v.* Wilson (Tex. Civ.), 145 S. W. 655.

Scintilla doctrine not recognized. S. *v.* Hallen, 165 Mo. App. 422, 146 S. W. 1171.

104-96 Cincinnati T. W. Co. *v.* Garvey (Ky.), 128 S. W. 86 (though contradicted by three witnesses); Weil *v.* R. Co. (Mass.), 105 N. E. 983.

106-5 Fla. E. C. R. Co. *v.* Jones, 66 Fla. 51, 62 S. 898.

107-9 Siekmann *v.* Vergez, 127 La. 944, 54 S. 295.

107-10 Conception and reduction to practice of an invention cannot be established by testimony of party alone. Kitchen *v.* Smith, 39 App. Cas. (D. C.) 500.

Remoteness may be considered in weighing evidence. S. *v.* Cerciello (N. J.), 90 A. 1112.

110-17 P. *v.* Martin, 243 Ill. 284, 90 N. E. 699; Brooke *v.* Glos, 243 Ill. 392, 90 N. E. 751; Broadie *v.* Carson, 81 Kan. 467, 106 P. 294; Chicago, etc. R. Co. *v.* Com., 85 Neb. 818, 124 N. W. 477. See supra, "Conclusive Evidence," 291 96.

111-19 Powell *v.* R. Co., 255 Mo. 420, 164 S. W. 628; Davenport *v.* Co., 242 Mo. 111, 145 S. W. 454.

111-20 Hyde *v.* U. S., 225 U. S. 347, 32 Sup. Ct. 793, 56 L. ed. 1114.

113-26 Smith *v.* Goethe, 159 Cal. 628, 115 P. 223; Scott *v.* Wuynn, 151 Ky. 688, 151 S. W. 932.

113-27 Randal *v.* Gould, 18 Pa. Dist. 6.

114-29 Stead *v.* Curtis, 205 Fed. 439, 123 C. C. A. 507; Carolina A. Co. *v.* Garlington, 85 S. C. 114, 67 S. E. 225.

114-30 S. *v.* Marren, 17 Ida. 766, 107 P. 993. See P. *v.* Gambacorta, 197 N. Y. 181, 90 N. E. 809.

117-41 A "showing" of what ab-

sent witness would testify to if present has same effect as if he testified to facts set out. Williams *v.* Co., 164 Ala. 84, 51 S. 385.

117-42 Court required to charge depositions entitled to same weight as oral testimony. Coburn *v.* R. Co., 243 Ill. 448, 90 N. E. 741.

119-49 Merchantable evidence entitled to little weight. Flood *v.* Bollmeier (Ia.), 144 N. W. 579.

121-53 Kiech Mfg. Co. *v.* Hopkins, 108 Ark. 578, 158 S. W. 981; Skeen *v.* Ellis, 105 Ark. 513, 152 S. W. 153; P. *v.* York, 262 Ill. 620, 105 N. E. 35; P. *v.* Barkas, 255 Ill. 516, 99 N. E. 698; Murphy *v.* Co., 206 Mass. 243, 92 N. E. 333; Cummings *v.* W. O. W., 170 Mo. App. 194, 155 S. W. 488; Yates *v.* Yates, 211 N. Y. 163, 105 N. E. 195; Chicago R. Co. *v.* Brazzell, 40 Okla. 460, 138 P. 794; Graham *v.* Co. (Or.), 139 P. 337; Carver *v.* S. (Tex. Cr.), 148 S. W. 746; Jones *v.* Jones (Tex. Civ.), 146 S. W. 265.

121-54 Parker *v.* S., 11 Ga. App. 251, 75 S. E. 437; Union Bk. of Brooklyn *v.* Mandel, 124 N. Y. S. 459; S. *v.* Vance, 38 Utah 1, 110 P. 434.

121-55 St. Louis, I. M. & S. R. Co. *v.* Humbert, 101 Ark. 532, 142 S. W. 1122; Edwards *v.* Const. Co., 64 Or. 308, 130 P. 49; Brooks *v.* Davis (Tex. Civ.), 148 S. W. 1107.

122-58 Peters *v.* Perras, 42 Can. Sup. 244 (trial to court on testimony of witness examined under commission); Norguet *v.* Mills, 177 Fed. 970; McAusland *v.* Rieser (N. J.), 90 A. 261. See Illinois C. R. Co. *v.* Long (Ky.), 128 S. W. 890.

124-60 Wagner *v.* Co., 121 N. Y. S. 607.

124-61 Value of party's testimony enhanced by absence of evidence controverting it. O'Brien *v.* R. Co., 19 Ont. L. R. (Can.) 345.

126-64 Vansant *v.* Kowalewski (Del.), 90 A. 421.

126-66 Touart *v.* Rickert, 163 Ala. 362, 50 S. 896; Ingraham *v.* R. Co., 207 Mass. 451, 93 N. E. 692.

126-67 Paragould & M. R. Co. *v.* Smith, 93 Ark. 224, 124 S. W. 776; Huddleston *v.* Co., 138 Ky. 506, 128 S. W. 589; Farris *v.* R. Co., 210 Mass. 585, 96 N. E. 1098; Zart *v.* Co., 162 Mich. 387, 127 N. W. 272; Perry *v.* Sedalia, 168 Mo. App. 235, 153 S. W. 536; Adams *v.* Woodmen, 145 Mo. App. 207, 130 S. W. 113; Blid *v.* R. Co., 89 Neb. 689, 131 N. W. 1027; P. *v.* Razeziez, 206 N. Y. 249, 99 N. E. 557; Union Bk. *v.* Mandel, 124 N. Y. S. 459; Hobart Nat. Bk. *v.* Fordtran (Tex. Civ.), 122 S. W. 413; Leavitt *v.* Thurston, 38 Utah 351, 113 P. 77; Norfolk & W. R. Co. *v.* Crowe, 110 Va. 798, 67 S. E. 518.

127-68 Norton *v.* U. S., 205 Fed. 593; Fidelity Mut. Ins. Co. *v.* Click, 93 Ark. 162, 124 S. W. 764; Sterling *v.* Cole, 12 Cal. App. 93, 106 P. 602; Mutual Mfg. Co. *v.* Moore, 137 Ky. 130, 125 S. W. 267; Goode *v.* Co., 167 Mo. App. 109, 151 S. W. 508; Dickey *v.* Adler, 143 Mo. App. 326, 127 S. W. 593; Sovereign Camp *v.* Jackson (Tex. Civ.), 138 S. W. 1137. See Le Brun *v.* Romero, 3 P. R. Fed. 225.

128-69 Norton *v.* U. S., 205 Fed. 593.

129-70 O'Reilly *v.* Davis, 136 App. Div. 386, 120 N. Y. S. 883; Falkenstern *v.* Town, 145 Wis. 232, 130 N. W. 61.

131-77 *Contra.* Young *v.* R. Co., 227 Mo. 307, 127 S. W. 19; S. *v.* Vance, 38 Utah 1, 110 P. 434.

132-82 Zibbell *v.* Co., 160 Cal. 237, 116 P. 513.

132-83 Pedlar *v.* R. Co. (Can.), 10 West. L. Rep. 593; Dover *v.* Greenwood, 177 Fed. 946; Drueke *v.* Boylon, 160 Mich. 522, 125 N. W. 416; Patterson *v.* Mikkelson, 86 Neb. 512, 125 N. W. 1104; Gainesville W. Co. *v.* Gainesville, 103 Tex. 394, 128 S. W. 370 (contrary to experience).

135-93 Zart *v.* Singer Sewing Mach. Co., 162 Mich. 387, 127 N. W. 272, 17 Detroit Leg. N. 633.

135-94 Norguet *v.* Mills, 177 Fed. 970; S. *v.* Clifford, 228 Mo. 194, 128 S. W. 755; Blue *v.* S., 86 Neb. 189, 125 N. W. 136.

135-95 Gage *v.* Billing, 12 Cal. App. 688, 108 P. 664.

136-96 Moennich *v.* Chicago, 147 Ill. App. 553; Cook *v.* Down (Ky.), 124 S. W. 838; Quinley *v.* Tr. Co. (Mo. App.), 165 S. W. 346. See supra, "Ships and Shipping," 756-78.

136-97 Cook *v.* Down (Ky.), 124 S. W. 838; Lee *v.* Lee, 77 N. J. Eq. 91, 75 A. 562. See S. *v.* Sells, 145 Ia. 675, 124 N. W. 776.

137-98 Baltimore & O. R. Co. *v.* O'Neill, 186 Fed. 13, 108 C. C. A. 115; Brown *v.* R. Co., 155 Ill. App. 434; Stokes *v.* Ry. Co., 173 Mo. App. 676, 160 S. W. 46; Giles *v.* R. Co., 169 Mo. App. 24, 154 S. W. 852; Davidson *v.* R. Co., 164 Mo. App. 701, 148 S. W.

406; McClanahan *v.* R. Co., 147 Mo. App. 386, 126 S. W. 535.

138-1 Winkler *v.* Co., 141 Wis. 244, 124 N. W. 273.

138-2 St. Louis, etc. R. Co. *v.* Cundieff, 171 Fed. 319, 96 C. C. A. 211. See Osborne *v.* R. Co., 160 N. C. 309, 76 S. E. 16.

140-5 Henry *v.* Co. (R. I.), 90 A. 168.

141-7 In re Grant's Will, 149 Wis. 330, 135 N. W. 833.

143-15 Wright *v.* R. Co., 139 Ga. 343, 77 S. E. 161; Heywood *v.* State, 12 Ga. App. 643, 77 S. E. 1130.

144-19 Sanguinetti *v.* Rossen, 12 Cal. App. 623, 107 P. 560; Huber *v.* McGlynn, 161 Ill. App. 69; In re Shuman's Est., 45 Pa. Super. 587.

144-20 See C. *v.* Howard, 205 Mass. 128, 91 N. E. 397.

145-22 Flynn *v.* Flynn, 17 Ida. 147, 104 P. 1030.

147-29 Succession of Drysdale, 124 La. 256, 50 S. 30; Stillwell *v.* Bateman, 83 Misc. 589, 145 N. Y. S. 321; Wallace *v.* Wallace, 137 N. Y. S. 43.

147-30 Succession of Daste, 125 La. 657, 51 S. 677; Miller *v.* Hill, 64 Misc. 199, 118 N. Y. S. 63.

152-48 **Silence.**—"That a person remains silent when accused of guilt is competent evidence as a circumstance tending to show guilt (Jackson *v.* S., 167 Ala. 44, 52 S. 835); and when a witness remains silent upon being asked about matters or a transaction supposed to be within his knowledge, and which he subsequently details upon the witness stand, it is competent to show this on his cross-examination, for the purpose of allowing the jury to consider it as a circumstance in determining the weight they will give to his testimony; and if there was any explanation for the witness' silence, as suggested by appellant, this could be made to appear upon redirect examination." Penney *v.* McCauley, 3 Ala. App. 497, 57 S. 510.

153-53 Brenstein *v.* R. Co., 119 N. Y. S. 1.

155-62 Illiterate is competent to identify a written instrument. C. *v.* Borasky, 214 Mass. 313, 101 N. E. 377.

159-75 Inspectors of railroad appliances under act of congress, whether for government or company, given such credence as jury may determine. Norfolk & W. R. Co. *v.* U. S., 177 Fed. 623, 101 C. C. A. 249.

159-80 See supra, "Credibility," 756-19.

159-81 See U. S. *v.* Jhu Why, 175 Fed. 630.

160-86 Ex parte Joyce, 212 Fed. 282.

160-87 The same rule applies to cocaine fiends. Anderson *v.* S. (Tex. Cr.), 144 S. W. 281.

162-91 McElvain *v.* S., 101 Ark. 443, 142 S. W. 840; Cyrulik *v.* Bosworth (R. I.), 83 A. 81.

165-8 Bliss *v.* Bliss, 161 Mo. App. 70, 142 S. W. 1081.

167-21 Riccio *v.* R. Co. (Del.), 82 A. 604; Stafford *v.* Williams, 1 Boyce (Del.) 288, 76 A. 626; Cecchi *v.* Lindsay, 1 Boyce (Del.) 185, 75 A. 376.

169-25 **Maxim** is a permissible inference. S. *v.* Dugan (N. J.), 89 A. 691.

170-29 Deming *v.* Ins. Co., 169 Ill. App. 96.

170-32 Smith *v.* Cunningham, 239 Pa. 496, 86 A. 1067.

171-34 Gilbert *v.* S., 8 Okla. Cr. 329, 127 P. 889.

Entitled to little consideration.—Emerson *v.* Riley, 41 App. Cas. (D. C.) 480.

175-49 Laidlaw *v.* R. Co. (Can.), 10 West. L. R. 17; Ins. Co. *v.* Leyland, 171 Fed. 524 (memoranda made in course of official duty); Riccio *v.* R. Co. (Del.), 82 A. 604; Benson *v.* R. Co., 1 Boyce (Del.) 202, 75 A. 793; Murphy *v.* Murphy, 146 Ia. 255, 125 N. W. 191.

175-50 Stafford *v.* Williams, 1 Boyce (Del.) 288, 76 A. 626; Faudington *v.* R. Co., 136 App. Div. 737, 121 N. Y. S. 428.

178-55 Riccio *v.* R. Co. (Del.), 82 A. 604.

178-58 Culbert *v.* Co. (Del.), 82 A. 1081.

180-67 Russell *v.* Carman, 114 Md. 25, 78 A. 903; Wood *v.* Dean (Tex. Civ.), 155 S. W. 363.

182-73 In re Grant's Will, 149 Wis. 330, 135 N. W. 833.

183-77 Walrond *v.* Noyes, 82 Kan. 118, 107 P. 795; Wilbur *v.* Toothaker, 105 Me. 490, 75 A. 42; Overstreet *v.* S. (Tex. Cr.), 150 S. W. 899.

183-78 Ins. Co. *v.* Leyland, 171 Fed. 524.

184-79 Wilbur *v.* Toothaker, 105 Me. 490, 75 A. 42.

187-94 Succession of King, 124 La. 805, 50 S. 735.

188-95 Ins. Co. *v.* Leyland, 171 Fed. 524; Scully *v.* R., 76 N. H. 578, 83 A. 512.

190-4 Chesapeake & O. R. Co. *v.* White's Admx., 147 Ky. 15, 143 S. W. 1046.

191-11 Redmond *v.* R. Co., 225 Mo. 721, 126 S. W. 159.

192-13 P. *v.* Sartori, 168 Mich. 308, 134 N. W. 200.

193-15 Galveston, H. & S. A. R. Co. *v.* Pingenot (Tex. Civ.), 142 S. W. 93 (question of negligence is for the jury in spite of statement of deceased while in agony of death, blaming himself).

194-24 In re Lott, 65 Misc. 422, 121 N. Y. S. 1102.

195-32 Murphy *v.* Murphy, 146 Ia. 255, 125 N. W. 191.

197-37 Kinney *v.* McCall, 57 Wash. 545, 107 P. 385.

200-48 Sargent *v.* Modern Brotherhood, 148 Ia. 600, 127 N. W. 52; Lower, etc. Mfg. Co. *v.* Barrow, 126 La. 263, 52 S. 487.

201-52 Ellis *v.* Ellis (Ky.), 128 S. W. 1057; Texas Tr. Co. *v.* Morrow (Tex. Civ.), 145 S. W. 1069.

209-78 Louisville & A. R. Co. *v.* Phillips' Admr., 151 Ky. 445, 152 S. W. 246; Bennett *v.* R. Assn., 242 Mo. 125, 145 S. W. 433.

212-86 Direct testimony not necessarily to be disregarded because of contradictions on cross-examination. Stewart *v.* R. Co., 149 Mo. App. 456, 130 S. W. 441.

212-87 Burns Lumb. Co. *v.* Reynolds Co., 148 Ill. App. 356.

213-93 A witness may make a statement and afterwards contradict the same, and satisfactorily explain such contradiction by showing that his statement was made through inadvertenance or upon a misapprehension of the facts; and in such case the jury may be justified in accepting the revised testimony of the witness as the basis of the verdict. Teutonia Ins. Co *v.* Tobias (Tex. Civ.), 145 S. W. 251.

213-94 In re Bremer's Est., 151 Ia. 449, 131 N. W. 667.

214-96 Fetzer *v.* Lumb. Co., 202 Fed. 878, 121 C. C. A. 236; Philadelphia & G. S. Co. *v.* M'Cauldin, 202 Fed. 735, 121 C. C. A. 197; New York, etc. R. Co. *v.* Bransteeter, 200 Fed. 255, 118 C. C. A. 441; Glass *v.* State (Ark.), 158 S. W. 1071; Tribue *v.* Broaddus, 106 Ark. 418, 153 S. W. 611; Moulton *v.* State, 105 Ark. 502, 152 S. W. 132; Rhea *v* S., 104 Ark. 162, 147 S. W. 463; Young *v.* S., 63 Fla. 55, 58 S. 188; Middleton *v.* S., 63 Fla. 24, 58 S. 225; Millinor *v.* Thornhill, 63 Fla. 531, 58 S. 34; W. U. T. Co. *v.* Ford, 10 Ga. App. 606, 74 S. E. 70; J. S. Wood & Bro. *v.* M. E. Jones & Son, 10 Ga. App. 735, 73 S. E. 1099; Garland *v.* Rumble, 10 Ga. App. 347, 73 S. E. 588; Robinson & Johnson *v.* Rothschilds & Co., 10 Ga. App. 237, 73 S. E. 554; Hooks *v.* Willis, 10 Ga. App. 366, 73 S. E. 550; Beasley, Couch & Co. *v.* Rogers, 10 Ga. App 383, 73 S. E. 423; Wolf *v.* Ref. Co., 252 Ill. 491, 96 N. E. 1063; P. *v.* York, 262 Ill. 620, 105 N. E. 35; Vandalia C. Co. *v.* Haverkamp, 52 Ind. App. 397, 98 N. E. 643; William *v.* C., 153 Ky. 710, 156 S. W. 372; United Iron Wks. Co. *v.* Bowling, 153 Ky. 683, 156 S. W. 124; Sacrey *v.* R. Co., 152 Ky. 473, 153 S. W. 760; Louisville & N. R. Co. *v.* Woodford, 152 Ky. 398, 153 S. W. 722; Burrow *v.* Hall, 152 Ky. 252, 153 S. W. 246; Southern R. Co. *v.* Alford's Admr., 150 Ky. 808, 150 S. W. 985; Illinois Cent. R. Co. *v.* Dallas' Admx., 150 Ky. 442, 150 S. W. 536; Austin *v.* First Nat. Bank, 150 Ky. 113, 150 S. W. 8; Stratton *v.* Stratton's Admr., 149 Ky. 473, 149 S. W. 900; Green *v.* May, 148 Ky. 783, 147 S. W. 428; Louisville, etc. R. Co. *v.* Guttman, 148 Ky. 235, 146 S. W. 731; Emerald Chief Stock Farm *v.* Patrick, 147 Ky. 740, 145 S. W. 747; National Council, etc. of Security *v.* Wilson, 147 Ky. 393, 143 S. W. 1000; Abram *v.* Mallicoat, 147 Ky. 817, 145 S. W. 764; Boudreaux *v.* Nat. Bk., 130 La. 345, 57 S. 999; Daman *v.* Remme, 246 Mo. 233, 151 S. D. 429; Dales *v.* R. Co., 169 Mo. App. 183, 152 S. W. 401; Donijonovic *v.* Hartman, 169 Mo. App. 204, 152 S. W. 424; Bettman *v.* Mobile & O. R. Co., 167 Mo. App. 729, 151 S. W. 169; Gillfillan *v.* Schmidt, 167 Mo. App. 709, 151 S. W. 161; Dimmitt *v.* Dimmitt, 167 Mo. App. 94, 150 S. W. 1107; S. *v.* Swain, 239 Mo. 723, 144 S. W. 427; Gate City Nat. Bk. *v.* Boyer, 161 Mo. App. 143, 142 S. W. 487; Johnson *v.* Noble Mach. Co., 144 Mo. App. 436, 129 S. W. 271; Smith *v.* McKay, 90 Neb. 703, 134 N. W. 272; McGee *v.* Hungerford, 90 Neb. 663, 134 N. W. 274; Graham *v.* S., 90 Neb. 658, 134 N. W. 249; Floersch *v.* Donnell, 82 N. J. L. 357, 82 A. 733; Gilbert *v.* Real Est. Co., 155 App. Div. 411, 140 N. Y. S. 354; McNamee *v.* Burke, 29 S. D. 493, 136 N. W. 1127; Texas Traction Co. *v.* Sherron (Tex. Civ.), 166 S. W. 897; Haley *v.* S. (Tex. Cr.), 156 S. W. 637; Valigura *v.* S. (Tex. Cr.), 153 S. W. 856; Cain *v.* S. (Tex. Cr.), 153 S. W. 147; Gray *v.* S. (Tex. Cr.), 144 S. W. 283; McGuire *v.* R. Co., 70 W. Va. 538, 74 S. E. 859;

Cook *v.* R. Co., 70 W. Va. 586, 74 S. E. 730.

See Gibson *v.* Samples, 202 Fed. 743, 121 C. C. A. 620.

Mere scintilla of evidence is insufficient to sustain verdict. Gage *v.* R. Co. (N. H.), 90 A. 855.

Whether evidence sufficient as a matter of law determined by appellate court. Hogue *v.* S. (Tex. Cr.), 151 S. W. 805.

Whether appellate court would have rendered such a verdict had they been sitting as jurors is not criterion. Newhouse Mill & Lumb. Co. *v.* Keller (Ark.), 146 S. W. 855. See So. Covington, etc. Co. *v.* Burns, 150 Ky. 348, 150 S. W. 343.

Judgment of lower court entitled to some weight. Applegate *v.* Moore, 146 Ky. 267, 142 S. W. 381.

In determining whether a judgment for plaintiff is supported by the evidence, the court will regard the testimony in a light most favorable to plaintiff. Griffin *v.* McDonald, 163 Mo. App. 84, 145 S. W. 505.

Substantial testimony, however small as compared to the great body of the proof. Dutcher *v.* R. Co., 241 Mo. 137, 145 S. W. 63.

Appellate court does not examine evidence to determine preponderance of probabilities. In re Radford, 168 Mich. 474, 134 N. W. 472.

"Unless it appears so radically wrong as to have no reasonable probabilities in its favor after giving legitimate effect to the presumption in its favor and the make weights reasonably presumed to have been rightly afforded below which do not appear, and could not be made to appear, of record." Barlow *v.* Foster, 148 Wis. 613, 136 N. W. 822.

214-97 Yee Yet *v.* U. S., 175 Fed. 565, 99 C. C. A. 187; Washburn-Crosby Co. *v.* Brown (Ind. App.), 104 N. E. 997; Center Creek Min. Co. *v.* Coyne, 164 Mo. App. 492, 147 S. W. 148.

214-98 Knights of the Modern Maccabees *v.* Gillis (Tex. Civ.), 144 S. W. 713.

Whether there was substantial testimony upholding the verdict for appellate court. S. *v.* Bostwick, 245 Mo. 483, 150 S. W. 1063. See Tyler *v.* First Nat. Bk., 150 Ky. 515, 150 S. W. 665.

214-99 Supreme court, on appeal from intermediate court which affirms judgment of trial court, will not disregard testimony unless it is contrary to natural law. Kennedy *v.* Ins. Co., 242 Ill. 396, 90 N. E. 292.

If the verdict was not founded upon a calm and dispassionate consideration of the evidence, the judgment should be reversed. P. *v.* McMahon, 254 Ill. 62, 98 N. E. 239.

215-3 Stokes *v.* S., 5 Ala. App. 159, 59 S. 310; Louisville & N. R. Co. *v.* Burch, 155 Ky. 731, 160 S. W. 252.

216-5 Ala. Steel & Wire Co. *v.* Thompson, 166 Ala. 460, 52 S. 75; Hawthorne *v.* Murray (Del.), 84 A. 5; S. *v.* Brown (Del.), 83 A. 1083; Gatta *v.* R. Co. (Del.), 83 A. 788; S. *v.* McCallister, 7 Penne. (Del.) 301, 76 A. 226; Stafford *v.* Williams, 1 Boyce (Del.) 288, 76 A. 626; P. *v.* Giusto, 206 N. Y. 67, 99 N. E. 190.

216-6 Lim Sam *v.* U. S., 189 Fed. 534; Midland Valley R. Co. *v.* LeMoyne, 104 Ark. 327, 148 S. W. 654; S. *v.* Naylor (Del.), 90 A. 880; Vansant *v.* Kowalewski (Del.), 90 A. 421; Dietrich *v.* Badders (Del.), 90 A. 47; Riccio *v.* Ry. Co. (Del.), 82 A. 604; Shockley *v.* McCullough, 2 Boyce (Del.), 504, 82 A. 144; Johnson *v.* Hibbert, 2 Boyce (Del.) 526, 82 A. 86; Emory *v.* Glens Falls Ins. Co., 7 Penne. (Del.) 101, 76 A. 230; Freeman *v.* Tr. Co. (Del.), 80 A. 1001; Hitch *v.* Riggin (Del.), 80 A. 975; Callaway *v.* Milligan, 2 Boyce (Del.), 383, 80 A. 630; Linthicum *v.* Truitt, 2 Boyce (Del.) 338, 80 A. 245; Gray *v.* Gray, 2 Boyce (Del.) 308, 80 A. 233.

218-12 McCown *v.* Muldrow, 91 S. C. 523, 74 S. E. 386.

218-14 Freeman *v.* Blount, 172 Ala. 655, 55 S. 293; Johnson *v.* Ry. Co., 9 Ga. App. 661, 72 S. E. 66; Caldwell *v.* Turner, 129 La. 19, 55 S. 695.

An employe of a party is an interested witness. Mobile Light & R. Co. *v.* Davis, 1 Ala. App. 338, 55 S. 1020.

220-20 White *v.* S., 105 Ark. 698, 152 S. W. 163; Brown *v.* Madden, 141 Ga. 419, 81 S. E. 196; S. *v.* Bridge, 49 Ind. App. 544, 97 N. E. 803; Kirby L. Co. *v.* Williams (Tex. Civ.), 159 S. W. 309; Minehan *v.* Murphy, 149 Wis. 14, 134 N. W. 1130.

WILLS

245-10 In re Land's Est., 166 Cal. 538, 137 P. 246.

246-15 Wright *v.* Clark, 81 Misc. 527, 142 N. Y. S. 812.

246-16 Jacobs *v.* Fowler, 135 App. Div. 713, 119 N. Y. S. 647.

246-18 In re Martin's Will, 82 Misc. 574, 144 N. Y. S. 174.

246-19 Clark *v.* Young's Exr., 146 Ky. 377, 142 S. W. 1032.

Under a statute providing that a holographic will is effective if found among decedent's valuable papers and effects, proof is not necessary that it was placed there by him or with his knowledge or consent. In re Jenkins' Will, 157 N. C. 429, 72 S. E. 1072.

249-27 In re Noyes' Est., 40 Mont. 231, 106 P. 355.

Only papers referred to in will are part of it. Sibley *v.* Maxwell, 203 Mass. 94, 89 N. E. 232.

Parol evidence received, good faith not being involved, to show marginal writing, not referred to in will, was part of it. In re Swire's Est., 225 Pa. 188, 73 A. 1110.

250-28 Succession of Drysdale, 124 La. 256, 50 S. 30.

253-43 Brown *v.* Avery, 63 Fla. 355, 58 S. 34; Pence *v.* Myers (Ind.), 101 N. E. 716; In re Van Ness' Will, 78 Misc. 592, 139 N. Y. S. 485; In re Patrick's Will, 162 N. C. 519, 77 S. E. 413.

256-53 Sockwell *v.* Sockwell (Tex. Civ.), 166 S. W. 1188.

Declaration will would not be made, incompetent. Miller *v.* Miller, 96 Miss. 526, 51 S. 210.

256-54 In re Campbell's Will, 136 N. Y. S. 1086.

256-55 In re Abel's Will, 136 App. Div. 788, 121 N. Y. S. 452.

257-57 Smith *v.* Smith, 112 Va. 205, 70 S. E. 491.

257-58 St. Mary's O. Asylum *v.* Masterson, 57 Tex. Civ. 646, 122 S. W. 587.

258-64 Bailey *v.* Bee (W. Va.), 80 S. E. 454.

259-65 *Contra* if will written by testator. In re De Hart's Will, 67 Misc. 13, 122 N. Y. S. 220.

259-66 Evidence sufficient. In re Klinzner's Will, 71 Misc. 620, 130 N. Y. S. 1059; Warren *v.* Ellis (Tex. Civ.), 137 S. W. 1182.

266-91 Strong *v.* Gambier, 155 App. Div. 294, 140 N. Y. S. 410, 141 N. Y. S. 421.

266-95 Turner *v.* Butler, 253 Mo. 202, 161 S. W. 745.

267-96 Beemer *v.* Beemer, 252 Ill. 452, 96 N. E. 1058; In re Van Ness' Will, 78 Misc. 592, 139 N. Y. S. 485; Wooddy *v.* Taylor, 114 Va. 737, 77 S. E. 498.

267-2 Johnston *v.* Johnston, 174 Ala. 220, 57 S. 450; Rodney *v.* Burton (Del.), 86 A. 826; Philpott *v.* Jones (Ia.), 146 N. W. 859; In re Gedney's Will, 142 N. Y. S. 157.

267-3 Smith *v.* Boswell, 93 Ark. 66, 124 S. W. 264; Beemer *v.* Beemer, 252 Ill. 452, 96 N. E. 1058; Sevening *v.* Smith, 153 Ia. 639, 133 N. W. 1081; Convey *v.* Murphy, 146 Ia. 154, 124 N. W. 1073; Mileham *v.* Montague, 148 Ia. 476, 125 N. W. 664; Watson *v.* Watson (Ky.), 121 S. W. 626; In re Johnson's Will, 80 N. J. Eq. 525, 85 A. 254; Converse *v.* Mix, 63 Wash. 318, 115 P. 305.

269-4 Council *v.* Mayhew, 172 Ala. 295, 55 S. 314; In re Weedman's Est., 254 Ill. 504, 98 N. E. 956; Clifford *v.* Taylor, 204 Mass. 358, 90 N. E. 862.

"The law presumes every person to be of sound mind, and, when a will has been executed with the formalities required by law, it has always been held that the evidence of incapacity must clearly preponderate to authorize the setting aside of the will." Norton *v.* Clark, 253 Ill. 557, 97 N. E. 1079.

Evidence insufficient.—In re Klinzner's Will, 71 Misc. 620, 130 N. Y. S. 1059.

271-18 Bensberg *v.* Washington University, 251 Mo. 641, 158 S. W. 330.

272-21 Clifford *v.* Taylor, 204 Mass. 358, 90 N. E. 862.

272-35 Scott *v.* Townsend (Tex. Civ.), 159 S. W. 342.

274-36 Bensberg *v.* Washington University, 251 Mo. 641, 158 S. W. 330; In re Sweeney's Est., 94 Neb. 834, 144 N. W. 902.

275-37 Mowry *v.* Norman, 223 Mo. 463, 122 S. W. 724.

276-38 Byrne *v.* Byrne, 250 Mo. 632, 157 S. W. 609.

277-39 Burden on proponent to establish competency. In re Gedney's Will, 142 N. Y. S. 157.

279-55 Johnston *v.* Johnston, 174 Ala. 220, 57 S. 450; Mileham *v.* Montague, 148 Ia. 476, 125 N. W. 664; Buford *v.* Gruber, 223 Mo. 231, 122 S. W. 717. *Contra,* In re Murphy's Est., 43 Mont. 353, 116 P. 1004.

280-61 In re Schmidt's Will, 139 N. Y. S. 464.

281-68 Lisle *v.* Couchman, 146 Ky. 345, 142 S. W. 1023; McConnell's Exr. *v.* McConnell, 138 Ky. 783, 129 S. W. 106; Barber *v.* Newman, 138 Ky. 710, 128 S. W. 1092; In re Esterbrook's Est., 83 Vt. 229, 75 A. 1.

Crying from intense pain not indicative of a man's mental unsoundness. Beemer *v.* Beemer, 252 Ill. 452, 96 N. E. 1058.

282-71 Smith *v.* Keller (N. Y.), 98 N. E. 214.

283-72 Smith *v.* Keller, 205 N. Y. 39, 98 N. E. 214.

283-73 Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664; Barber's Exrs. *v.* Baldwin, 138 Ky. 710, 128 S. W. 1092.

Facts remote in point of time, competent if they had permanent influence on testator. Mileham *v.* Montagne, supra; Barber's Exrs. *v.* Baldwin, supra.

284-75 Lisle *v.* Couchman, 146 Ky 345, 142 S. W. 1023; Barber's Exrs. *v.* Baldwin, 138 Ky. 710, 128 S. W. 1092.

286-89 In re Esterbrook's Est., 83 Vt. 229, 75 A. 1, or at time of execution.

287-94 Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176.

288-4 Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176, due to physical infirmity.

290-11 Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176.

293-34 Luebbert *v.* Brockmeyer, 158 Mo. App. 196, 138 S. W. 92.

296-56 McCoy *v.* Sheehy, 252 Ill. 509, 96 N. E. 1069; Cahill *v.* Cahill, 155 Ia. 340, 136 N. W. 214; Naylor *v.* McRuer, 248 Mo. 423, 154 S. W. 772.

297-57 Watson *v.* Watson (Ky.), 121 S. W. 626.

Presumption arising from capacity to do business, not conclusive. Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664.

298-59 Rowcliffe *v.* Belson, 261 Ill. 566, 104 N. E. 268.

300-68 In re Martin's Will (Ia.), 142 N. W. 74.

300-75 Wilson *v.* Wilson, 7 O. N. P. (N. S.) 435.

301-77 Large variety of papers, some of which testator did not prepare, received. See Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664.

304-95 Whisner *v.* Whisner, 122 Md. 195, 89 A. 393.

305-11 In re Buckman's Will, 80 N. J. Eq. 556, 85 A. 246.

307-27 In re Shepard's Est., 161 Mich. 441, 126 N. W. 640.

307-31 A devise of real property which the testator had previously contracted to convey in future upon payment of the purchase price does not show mental unsoundness, since the title remains in him or his devisee until the price is paid. Beemer *v.* Beemer, 252 Ill. 452, 96 N. E. 1058.

308-38 Councill *v.* Mayhew, 172 Ala. 295, 55 S. 314; Beemer *v.* Beemer, 252 Ill. 452, 96 N. E. 1058; Healea *v.* Keenan, 244 Ill. 484, 91 N. E. 646; Crawfordsville Tr. Co. *v.* Ramsey, 178 Ind. 258, 98 N. E. 177; Arnold *v.* Livingstone, 155 Ia. 601, 134 N. W. 101; Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664; Murphy *v.* Nett, 47 Mont. 38, 130 P. 451; Lanham *v.* Lanham (Tex. Civ.), 146 S. W. 635.

311-49 Convey *v.* Murphy, 146 Ia. 154, 124 N. W. 1073; Casad *v.* Ripley, 145 Ia. 544, 124 N. W. 196.

313-52 Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664; Wolfe *v.* Whitworth, 170 Mo. App. 372, 156 S. W. 715.

317-70 Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664; McDonald's Est. *v.* McDonald (Tex. Civ.), 150 S. W. 593.

317-72 Oxford *v.* Oxford, 136 Ga. 589, 71 S. E. 883; Healea *v.* Keenan, 244 Ill. 484, 91 N. E. 646; Philpott *v.* Jones (Ia.), 146 N. W. 859; Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664; Mowry *v.* Norman, 223 Mo. 463, 122 S. W. 724; McDonald's Est. *v.* McDonald (Tex. Civ.), 150 S. W. 593.

318-73 In re Esterbrook's Est., 83 Vt. 229, 75 A. 1.

318-75 Ellis *v.* Ellis (Ky.), 128 S. W. 1057.

318-76 Ellis *v.* Ellis (Ky.), 128 S. W. 1057.

319-80 The hardships endured by the testator's wife are admissible as bearing on the reasonableness of his disposition of his estate. Lanham *v.* Lanham (Tex. Civ.), 146 S. W. 635.

321-1 Sanger *v.* Bacon (Ind.), 101 N. E. 1001.

322-15 Hurley *v.* Caldwell, 244 Ill. 448, 91 N. E. 654; Ellis *v.* Ellis (Ky.), 128 S. W. 1057; Dudderar *v.* Dudderar, 116 Md. 605, 82 A. 453; McDonald's Est. *v.* McDonald (Tex. Civ.), 150 S. W. 593.

323-16 Holt *v.* Guerguin (Tex. Civ.), 156 S. W. 581.

324-21 Hurley *v.* Caldwell, 244 Ill. 448, 91 N. E. 654.

324-24 Greater length of time between declaration of purpose and execution of will stronger is proof of fixedness of purpose. Ellis *v.* Ellis (Ky.), 128 S. W. 1057.

324-25 Hurley *v.* Caldwell, 244 Ill. 448, 91 N. E. 654.
325-30 Norton *v.* Clark, 253 Ill. 557, 97 N. E. 1079; Healea *v.* Keenan, 244 Ill. 484, 91 N. E. 646; Provin *v.* Provin, 161 Mich. 28, 125 N. W. 743.
326-35 In re Campbell's Will, 136 N. Y. S. 1086.
326-40 Kellan *v.* Kellan, 258 Ill. 256, 101 N. E. 614; Scott *v.* Townsend (Tex.), 166 S. W. 1138.
328-48 Brainard *v.* Brainard, 259 Ill. 613, 103 N. E. 45; Norton *v.* Clark, 253 Ill. 557; 97 N. E. 1079; Dudderar *v.* Dudderar, 116 Md. 605, 82 A. 453; Gick *v.* Stumpf, 204 N. Y. 413, 97 N. E. 865; McDonald *v.* McDonald's Est (Tex. Civ.), 150 S. W. 593.
330-53 In re Esterbrook's Est., 83 Vt. 229, 75 A. 1.
330-60 Scott *v.* Townsend (Tex.), 166 S. W. 1138.
330-62 Letters and papers written by a testatrix, who has transferred personal property, which are inconsistent with the transfer, should not in any case be received until other evidence is produced tending to prove want of mental capacity in the testatrix. Gick *v.* Stumpf, 204 N. Y. 413, 97 N. E. 865.
331-67 In re Carither's Est., 156 Cal. 422, 105 P. 127; Weatherall *v.* Weatherall, 63 Wash. 526, 115 P. 1078.
334-89 Buford *v.* Gruber, 223 Mo. 231, 122 S. W. 717.
335-92 Rowcliffe *v.* Belson, 261 Ill. 566, 104 N. E. 268; Snell *v.* Weldon, 243 Ill. 496, 90 N. E. 1061; Buford *v.* Gruber, 223 Mo. 231, 122 S. W. 717; Lanham *v.* Lanham (Tex. Civ.), 146 S. W. 635, *cit.* this text.
335-96 Buford *v.* Gruber, 223 Mo. 231, 122 S. W. 717.
336-2 Remoteness cause for excluding such testimony. Turner *v.* Co., 213 U. S. 257, thirty years prior to will.
337-7 Acts of testator in conjunction with person against whom he is alleged to have been deluded, competent to explain declarations showing delusion; otherwise as to reasons which actuated other party. Turner *v.* Co., supra.
339-23 Snell *v.* Weldon, 243 Ill. 496, 90 N. E. 1061.
340-24 Snell *v.* Weldon, 243 Ill. 496, 90 N. E. 1061.
340-26 Friedersdorf *v.* Lacy, 173 Ind. 429, 90 N. E. 766.
340-28 Snell *v.* Weldon, 243 Ill. 496, 90 N. E. 1061; Buford *v.* Gruber, 223 Mo. 231, 122 S. W. 717.
341-34 Buford *v.* Gruber, 223 Mo. 231, 122 S. W. 717.
341-36 Snell *v.* Weldon, 243 Ill. 496, 90 N. E. 1061; Buford *v.* Gruber, 223 Mo. 231, 122 S. W. 717.
342-42 Raison *v.* Raison, 148 Ky. 116, 146 S. W. 400.
345-56 Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176.
347-68 Rodney *v.* Burton (Del.), 86 A. 826; Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176; Casad *v.* Ripley, 145 Ia. 544, 124 N. W. 196; Succession of Schmidt, 125 La. 1065, 52 S. 160; In re Buckman's Will, 80 N. J. Eq. 556, 85 A. 246.
348-71 Buford *v.* Gruber, 223 Mo. 231, 122 S. W. 717.
Evidence of weakness caused by physical ailment before and after execution of will, not convincing. Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176.
349-72 Union & N. H. Trust Co. *v.* Taintor, 85 Conn. 452, 83 A. 697.
349-74 Healea *v.* Keenan, 244 Ill. 484, 91 N. E. 646.
350-80 In re Carither's Est., 156 Cal. 422, 105 P. 127; In re Olson's Est., 19 Cal. App. 379, 126 P. 171; In re Esterbrook's Est., 83 Vt. 229, 75 A. 1.
353-92 Lanham *v.* Lanham (Tex. Civ.), 146 S. W. 635.
Held inadmissible. — Wetzel *v.* Firebaugh, 251 Ill. 190, 95 N. E. 1085.
Apparent condition of testator day after execution of will, immaterial if due to physical ailment. Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176.
354-94 Lanham *v.* Lanham (Tex. Civ.), 146 S. W. 635, *cit.* this text.
354-95 Collins *v.* Dowlan, 118 Minn. 214, 136 N. W. 854.
356-5 Gibson *v.* Boston, 75 N. H. 405, 75 A. 103, inadmissible as bearing on interest of executor, he not having testified.
356-7 Liles *v.* May (Miss.), 63 S. 217.
356-8 Gordon *v.* Gilmer, 141 Ga. 347, 80 S. E. 1007.
356-9 Murphy *v.* Nett, 47 Mont. 38, 130 P. 451.
356-11 In re De Laveaga's Est., 165 Cal. 607, 133 P. 307; In re Purcell's Est., 165 Cal. 607, 128 P. 932; Carpenter's Appeal, 74 Conn. 431, 51 A. 126; Lawless *v.* Lawless, 156 Ia. 184, 135 N. W. 560; Casad *v.* Ripley, 145 Ia. 544, 124 N. W. 196; Lundy *v.* Lundy, 118 Ia. 445, 92 N. W. 39; In re Bullard's Est., 124 Minn. 27, 144 N. W.

412; In re Benjamin's Will, 136 N. Y. S. 1070; Helsley *v.* Moss, 52 Tex. Civ. 37, 113 S. W. 599.

357-13 Wall *v.* Dimmitt, 24 Ky. L. R. 1749, 72 S. W. 300; In re Van Ness' Will, 78 Misc. 592, 139 N. Y. S. 485.

359-29 Habits of husband of party immaterial if testator's reason for bequest made given. Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664.

360-41 In re Whiting, 110 Me. 232; 85 A. 791; In re Hoyle's Est., 162 Mich. 275, 127 N. W. 284; Murphy *v.* Nett, 47 Mont. 38, 130 P. 451; In re Schmidt's Will, 139 N. Y. S. 464; McDonald's Est. *v.* McDonald (Tex. Civ.), 150 S. W. 593.

It is the duty of an attending or family physician to make himself acquainted with the peculiarities, bodily and mental, of his patient, and he has the experience resulting from the performance of such duty. He therefore is permitted to testify from his own observation of the patient's mental capacity. C. *v.* Spencer, 212 Mass. 438, 99 N. E. 266.

366-88 Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664.

369-12 In re Graham's Est., 225 Pa. 314, 74 A. 169.

371-22 In re Graham's Est., 225 Pa. 314, 74 A. 169.

372-27 Turner *v.* Co., 213 U. S. 257; Johnston *v.* Johnston, 174 Ala. 220, 57 S. 450; Macafee *v.* Higgins, 31 App. Cas. (D. C.) 355; Austin *v.* Austin, 260 Ill. 299, 103 N. E. 268; Graham *v.* Deuterman, 244 Ill. 124, 91 N. E. 61; Murphy's Exr. *v.* Murphy, 146 Ky. 396, 142 S. W. 1018; Harris *v.* Hipsley, 122 Md. 418, 89 A. 852; Whisner *v.* Whisner, 122 Md. 195, 89 A. 393; Clifford *v.* Taylor, 204 Mass. 358, 90 N. E. 862; Paul *v.* Clements, 176 Mich. 251, 142 N. W. 384; Wilson *v.* Wilson, 7 O. N. P. (N. S.) 435; In re Esterbrook's Est., 83 Vt. 229, 75 A. 1; Freeman *v.* Freeman, 71 W. Va. 303, 76 S. E. 657. See vol. 7, p. 469, n. 75; vol. 8, p. 584, n. 89.

Soundness of testator's mind.—Witnesses, after having been examined as to their knowledge of testator's competency and allowed to express an opinion favorable to his ability to make a will, cannot further testify as to his soundness of mind. Crosthwaite *v.* Crosthwaite, 151 Ky. 364, 151 S. W. 945.

374-29 Crawfordsville Trust Co. *v.* Ramsey, 178 Ind. 258, 98 N. E. 177.

374-33 Moffitt *v.* Smith, 153 N. C. 292, 69 S. E. 224.

374-35 Mosley *v.* Fears, 135 Ga. 71, 68 S. E. 804; In re Hackett's Est., 33 S. D. 208, 145 N. W. 437.

376-39 In re De Laveaga's Est., 165 Cal. 607, 133 P. 307; Coleman *v.* Marshall, 263 Ill. 330, 104 N. E. 1042; Brainard *v.* Brainard, 259 Ill. 613, 103 N. E. 45; In re Martin's Will (Ia.), 142 N. W. 74.

378-53 Macafee *v.* Higgins, 31 App. Cas. (D. C.) 355; Crosthwaite *v.* Crosthwaite, 151 Ky. 364, 151 S. W. 945.

379-60 Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176, either at time of, or prior to, execution.

379-65 Turner *v.* Co., 213 U. S. 257; Collins *v.* Dowlan, 118 Minn. 244, 136 N. W. 854; In re Kuhman's Est., 94 Neb. 783, 144 N. W. 778.

380-66 Turner *v.* Co., 213 U. S. 257.

380-73 Lanham *v.* Lanham (Tex. Civ.), 146 S. W. 635.

381-85 Healea *v.* Keenan, 244 Ill. 484, 91 N. E. 646; In re Gedney's Will, 142 N. Y. S. 157.

384-95 Witness' notice in transacting business with decedent, immaterial; and whether transaction ordinary business may not be shown by his opinion. Healea *v.* Keenan, 244 Ill. 484, 91 N. E. 646.

385-3 Turner *v.* Co., 213 U. S. 257; Johnston *v.* Johnston, 174 Ala. 220, 57 S. 450.

387-11 Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664; In re Esterbrook's Est., 83 Vt. 229, 75 A. 1 (applying rule to lawyer).

Inference as to testator's capacity to understand witness, not admissible. Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176.

387-15 Capacity of testator to do any kind of business may be inquired into. Hurley *v.* Caldwell, 244 Ill. 448, 91 N. E. 654.

388-20 Macafee *v.* Higgins, 31 App. Cas. (D. C.) 357, regardless of limitations in text.

388-21 Shirley *v.* Ezell (Ala.), 60 S. 905; Rodney *v.* Burton (Del.), 86 A. 826; In re Miller's Will (Del.), 85 A. 803; Wilkinson *v.* Service, 249 Ill. 146, 94 N. E. 50; Carlson *v.* Lafgran, 250 Mo. 527, 157 S. W. 555; In re Johnson's Will, 80 N. J. Eq. 525, 85

A. 254, 260; In re Schmidt's Will, 139 N. Y. S. 464; Thornton *v.* McReynolds (Tex. Civ.), 156 S. W. 1144; In re Esterbrook's Est., 83 Vt. 229, 75 A. 1.

Competency determined as of time of attestation.—In re Delavergne's Will, 259 Ill. 589, 102 N. E. 1081.

390-30 In re Miller's Will (Del.), 85 A. 803.

390-35 Ellis *v.* Ellis (Ky.), 128 S. W. 1057.

395-66 Mobley *v.* Lyon, 134 Ga. 125, 67 S. E. 668.

396-68 Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176.

398-89 Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664.

Appointment of conservator, relevant. Clifford *v.* Taylor, 204 Mass. 358, 90 N. E. 862.

399-91 Commitment to institution not inadmissible if testator discharged therefrom as sane prior to execution of will. Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664.

Judgment of competency rendered two years after will executed, admissible where alleged mental condition result of senile dementia. In re Van Houten's Will, 147 Ia. 725, 124 N. W. 886.

400-96 Not conclusive, but persuasive, if subsequent change not shown. Deleglise *v.* Morrissey, 142 Wis. 234, 125 N. W. 452.

Presumption of incapacity does not arise from appointment of conservator. Clifford *v.* Taylor, 204 Mass. 358, 90 N. E. 862, *cit.* statute.

400-2 Judgment of incompetency to manage estate, rendered after execution of will, inadmissible. Watson *v.* Watson (Ky.), 121 S. W. 626.

401-8 Mileham *v.* Montagne, 148 Ia. 476, 125 N. W. 664.

401-10 Evidence sufficient to show capacity to execute a will. Berst *v.* Moxom, 163 Mo. App. 123, 145 S. W. 857.

Evidence held insufficient to establish mental capacity. Arnold *v.* Livingstone, 155 Ia. 601, 134 N. W. 101. And see Hannaher's Will, 155 Ia. 73, 135 N. W. 34.

401-15 McCoy *v.* Sheehy, 252 Ill. 509, 96 N. E. 1069.

Evidence insufficient.—Beemer *v.* Beemer, 252 Ill. 452, 96 N. E. 1058. And see Sevening *v.* Smith, 153 Ia. 639, 133 N. W. 1081.

403-26 Wells *v.* Thompson, 140 Ga. 119, 78 S. E. 823; Head *v.* Nixon, 22 Ida. 765, 128 P. 557; Voodry *v.* Trustees, 251 Ill. 48, 95 N. E. 1034; Succession of White, 132 La. 890, 61 S. 860; In re Jacob's Will, 76 Misc. 394, 137 N. Y. S. 155; In re Gedney's Will, 142 N. Y. S. 157; Wendl *v.* Fuerst (Or.), 136 P. 1; In re Rhoad's Est., 241 Pa. 38, 88 A. 71.

Evidence sufficient.—Collins *v.* Dowlan, 118 Minn. 214, 136 N. W. 854.

Proceedings in vacation.—"The proof of the execution of the will which the statute authorizes to be taken in vacation, whether by the judge or the clerk, is not conclusive until it has been confirmed by the court, and is not so binding on the court that it may not be rejected if the court should so adjudge." Farris *v.* Burchard, 242 Mo. 1, 145 S. W. 825.

404-28 Venable *v.* Venable, 165 Ala. 621, 51 S. 833.

405-37 Convey *v.* Murphy, 146 Ia. 154, 124 N. W. 1073.

406-40 Nixon *v.* Snellbaker, 155 Ia. 390, 136 N. W. 223.

407-46 *Contra,* In re Abel's Will, 136 App. Div. 788, 121 N. Y. S. 452.

407-48 Wells *v.* Thompson, 140 Ga. 119, 78 S. E. 823; In re Abel's Will, supra; Hawkinson *v.* Oatway, 143 Wis. 136, 126 N. W. 683.

410-58 See In re Abel's Will, 63 Misc. 169, 118 N. Y. S. 429.

411-64 Nixon *v.* Snellbaker, 155 Ia. 390, 136 N. W. 223.

411-65 Nixon *v.* Snellbaker, supra; Buchanan *v.* Rollings (Tex. Civ.), 122 S. W. 962 (will not produced). See supra, "Forgery," 863-49.

Contradictory declarations proved.—Venable *v.* Venable, 165 Ala. 621, 51 S. 833.

412-67 See Giles *v.* Giles, 204 Mass. 383, 90 N. E. 595.

414-78 Avaro *v.* Avaro, 235 Mo. 424, 138 S. W. 500.

416-82 St. Mary's Home *v.* Dodge, 257 Ill. 518, 101 N. E. 46.

416-83 Crowell *v.* Tuttle (Mass.), 105 N. E. 980 (legatee incompetent as witness); Bailey *v.* Bee (W. Va.), 80 S. E. 454 (son of testatrix omitted from will competent).

416-84 In re Hopper's Est., 90 Neb. 622, 134 N. W. 237.

417-90 In re Abel's Will, 136 App. Div. 788, 121 N. Y. S. 452.

419-99 In re Abel's Will, supra.

419-2 Hawkinson *v.* Oatway, 143 Wis. 136, 126 N. W. 683.

420-4 Normand's Est., 88 Neb. 767, 130 N. W. 571.

423-21 In re Dougherty's Est., 168 Mich. 281, 134 N. W. 24.

424-25 Hawkinson *v.* Oatway, 143 Wis. 136, 126 N. W. 683.

424-28 Secondary evidence testator's signature was in his handwriting, not required. Proof of signatures of witnesses to attestation clause expressing compliance with requirements of law makes prima facie case. Elston *v.* Montgomery, 242 Ill. 348, 90 N. E. 3, statute.

426-35 Bruce *v.* Sierra, 175 Ala. 517, 57 S. 709; Jaboneta *v.* Gustilo, 5 Phil. Isl. 541.

426-40 In re De Hart's Will, 67 Misc. 13, 122 N. Y. S. 220.

427-41 Rules as to proof of publication relaxed in favor of holographic wills. In re De Hart's Will, 122 N. Y. S. 220.

427-46 Turner *v.* Butler, 253 Mo. 202, 161 S. W. 745.

430-67 In re Rick's Est., 160 Cal. 450, 117 P. 532.

430-73 In re Van Ness' Will, 78 Misc. 592, 139 N. Y. S. 485.

430-74 Byrne *v.* Byrne, 250 Mo. 632, 157 S. W. 609.

Circumstantial evidence competent to establish. Hagerty *v.* Olmstead, 39 App. Cas. (D. C.) 170.

431-81 Mobley *v.* Lyon, 134 Ga. 125, 67 S. E. 668.

432-82 Mobley *v.* Lyon, supra.

Evidence insufficient.—In re Young's Est., 59 Or. 348, 116 P. 95, *rehear.* denied, 116 P. 1060.

432-86 Declarations of deceased attesting witness, shown to impeach implication arising from signature. Mobley *v.* Lyon, 134 Ga. 125, 67 S. E. 668.

435-19 See In re Noyes' Est., 40 Mont. 231, 106 P. 355.

436-21 See Buchanan *v.* Rollings (Tex. Civ.), 122 S. W. 962.

Unimpeachable evidence of three disinterested witnesses to testator's handwriting and signature is supplied when there is no evidence reflecting on their character or testimony. Smith *v.* Boswell, 93 Ark. 66, 124 S. W. 264.

438-43 In re Meyer's Will, 72 Misc. 566, 131 N. Y. S. 27.

Sickness of testator may be proved as bearing upon intent. In re O'Connor's Will, 121 N. Y. S. 903.

439-45 **Evidence sufficient.**—Warren *v.* Ellis (Tex. Civ.), 137 S. W. 1182.

439-47 Weber *v.* Strobel, 236 Mo. 649, 139 S. W. 188.

440-48 In re Lord's Will, 106 Me. 51, 75 A. 286; In re Cunnion's Will, 135 App. Div. 864, 120 N. Y. S. 266.

Destruction by insane testator does not revoke. Towne's Admr. *v.* Robertson, 138 Ky. 652, 128 S. W. 1069.

440-51 Burton *v.* Wylde, 261 Ill. 397, 103 N. E. 976; In re Cunnion's Will, 201 N. Y. 123, 94 N. E. 648; In re Pattison's Will, 78 Misc. 609, 140 N. Y. S. 478; Buchanan *v.* Rollings (Tex. Civ.), 122 S. W. 962.

But this presumption may be overcome by evidence; the burden being upon the proponent. In re Ziegenhagen's Will, 148 Wis. 382, 134 N. W. 905, *cit.* In re Valentine's Will, 93 Wis. 45, 67 N. W. 12; Gavitt *v.* Moulton, 119 Wis. 35, 96 N. W. 395.

442-56 In re Ziegenhagen's Will, 148 Wis. 382, 134 N. W. 905.

443-60 In re Sheaffer's Est., 240 Pa. 83, 87 A. 577; Buchanan *v.* Rollings, supra.

444-63 Buchanan *v.* Rollings (Tex. Civ.), 122 S. W. 962.

446-72 In re Wellborn's Will, 165 N. C. 636, 81 S. E. 1023. *Contra* if signature restored and will preserved by testator or delivered by him to executor. Sellards *v.* Kirby, 82 Kan. 291, 108 P. 73; In re Wood's Will, 2 Conn. Sur. 144, 11 N. Y. S. 157.

446-76 While, where the intention is clear, slight acts of cancellation or obliteration may be sufficient to constitute a revocation, an intention to revoke cannot be *presumed* from acts that are in themselves incomplete and inconclusive, and that are as readily accounted for on the opposite theory. Safe Deposit & Trust Co. *v.* Thom, 117 Md. 154, 83 A. 45.

447-79 See In re Lord's Will, 106 Me. 51, 75 A. 286.

448-82 Authority must exist when act done. Gill *v.* Gill (1909), Prob. Div. 157.

448-85 In re Lord's Will, 106 Me. 51, 75 A. 286; Schnable *v.* Henderson (Tex. Civ.), 152 S. W. 231; Jackson *v.* Hewlett, 114 Va. 573, 77 S. E. 518.

449-87 Giles *v.* Giles, 204 Mass. 383, 90 N. E. 595; Stevens *v.* Stevens, 72 N. H. 360, 56 A. 916.

450-89 Pickens *v.* Davis, 134 Mass. 252, 45 Am. Rep. 322.

450-91 Burton *v.* Wylde, 261 Ill. 397, 103 N. E. 976.

454-7 Bruce *v.* Sierra, 175 Ala. 517, 57 S. 709.

454-8 Aldrich *v.* Aldrich, 215 Mass. 164, 102 N. E. 487.

Evidence tending to show improbability of making will in question, not competent to show revocation. Giles *v.* Giles, 204 Mass. 383, 90 N. E. 595.

455-15 Israell *v.* Rodon, 2 Moore P. C. 51, 12 Eng. Reprint 922; In re Battis' Will, 143 Wis. 234, 126 N. W. 9; Glascott *v.* Bragg, 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258.

458-27 In re Teed's Est., 225 Pa. 633, 74 A. 646.

463-52 Keeler *v.* Co., 253 Ill. 528, 97 N. E. 1061.

464-57 In re Lord's Will, 106 Me. 51, 75 A. 286 (by evidence clear, strong, satisfactory and convincing); In re Ziegenhagen's Will, 148 Wis. 382, 134 N. W. 905.

464-59 Arauj *v.* Celis, 6 Phil. Isl. 223.

464-60 St. Mary's Home *v.* Dodge, 257 Ill. 518, 101 N. E. 46.

466-74 Timbol *v.* Manalo, 6 Phil. Isl. 254.

467-77 In re Cunnion's Will, 135 App. Div. 864, 120 N. Y. S. 266.

468-80 Cassem *v.* Prindle, 258 Ill. 11, 101 N. E. 241.

468-82 Harris *v.* Camp, 138 Ga. 752, 76 S. E. 40.

469-87 Jackson *v.* Hewlett, 114 Va. 573, 77 S. E. 518.

470-88 Griffith *v.* Higinbotom, 262 Ill. 126, 104 N. E. 233.

473-5 In re Land's Est., 166 Cal. 538, 137 P. 246.

474-10 Wood *v.* Wood, 263 Ill. 285, 104 N. E. 1108.

475-14 *Contra,* In re Cunnion's Will, supra.

475-16 Identity of papers constituting will, if unattached, may be shown by connection of contents. Sellards *v.* Kirby, 82 Kan. 291, 108 P. 73.

479-30 Straw *v.* Barnes, 250 Ill. 481, 95 N. E. 471; Heilman *v.* Reitz, 89 Neb. 422, 131 N. W. 909; Zarate *v.* Villareal (Tex. Civ.), 155 S. W. 328.

Claimant has burden of proving relationship. Mooney *v.* Mooney, 244 Mo. 372, 148 S. W. 896.

Presumption of intention to omit heir arising from fact he is not named in will may be rebutted by extrinsic evidence. Schultz *v.* Schultz, 19 N. D. 688, 125 N. W. 555.

479-31 Gray *v.* Noholoa, 214 U. S. 108; In re Blake's Est., 157 Cal. 448, 108 P. 287; Galloway *v.* Galloway, 32 App. Cas. (D. C.) 76; Miller *v.* Jones, 136 Ga. 428, 71 S. E. 910; Eyer *v.* Williamson, 256 Ill. 540, 100 N. E. 188; Welsh *r.* Shade, 163 Ill. App. 523; Reed *v.* Welborn, 253 Ill. 338, 97 N. E. 669; Cusick *v.* Langan, 157 Ill. App. 472; Walters *v.* Neafus, 136 Ky. 756, 125 S. W. 167; Givens *v.* Ott, 222 Mo. 395, 121 S. W. 23; In re Percival's Est., 79 Misc. 567, 141 N. Y. S. 180.

Such intent is always to be presumed where there is a general residuary clause, unless it appears from the will that he did not so intend. Hartford Trust Co. *v.* Wolcott, 85 Conn. 134, 81 A. 1057.

479-33 In re Blake's Est., 157 Cal. 448, 108 P. 287.

485-67 Kramer *v.* Lyle, 197 Fed. 618 (notes on back of will); Johnson *v.* McDowell, 154 Ia. 38, 134 N. W. 419; In re Nisbet's Will, 123 N. Y. S. 414.

489-88 Betty *v.* Petrie, 138 Ky. 426, 128 S. W. 320.

489-95 Where not recorded, presumed that the clerk did his duty in withholding it from record because it was not probated. Farris *v.* Burchard, 242 Mo. 1, 145 S. W. 825.

491-3 Sayre *v.* Sage, 47 Colo. 559, 108 P. 160.

492-8 Parol evidence cannot establish probate of will. Betty *v.* Petrie, 138 Ky. 426, 128 S. W. 320.

493-9 Sullivan *v.* Kenney, 148 Ia. 361, 126 N. W. 349; Succession of Drysdale, 124 La. 256, 50 S. 30; In re Rumford's Will, 66 W. Va. 39, 66 S. E. 10 (admissible on appeal though not probated in probate court).

496-24 Sullivan *v.* Kenney, supra.

496-26 Sullivan *v.* Kenney, 148 Ia. 361, 126 N. W. 349.

497-30 Burden on one who claims because of testator's omission to mention one of his children in will to show his right. King *v.* Byrne, 92 Ark. 88, 122 S. W. 96.

498-34 Pease *v.* Cornell, 84 Conn. 391, 80 A. 86.

"**It will be presumed** ordinarily from the fact that the testator has attempted to make a particular legacy that it was not his primary intention that the property so attempted to be disposed of would become a part of his residuary estate. But this fact does not show that in case the legacy should lapse or

be void or fail for any reason the testator did not intend that the property thus attempted to be disposed of should then go to the residuary legatee. It would be easy, if he intended otherwise, to provide for the contingency of the lapsing or other failure of the legacy." Hartford Trust Co. *v.* Wolcott, 85 Conn. 134, 81 A. 1057.

498-35 Pease *v.* Cornell, 84 Conn. 391, 80 A. 86.

When either of two constructions is possible, one of which would be valid and the other invalid, the former will be preferred, because it is presumed to accord with the actual intention. Henry *v.* Henderson, 101 Miss. 751, 58 S. 354; Seitz *v.* Faversham, 205 N. Y. 197, 98 N. E. 385.

498-36 Clore *v.* Smith, 45 Ind. App. 340, 90 N. E. 917, legal meaning of words.

Conversion of realty into money, not presumed to have been effected by will in absence of positive direction. Scott's Est., 37 Pa. Super. 198.

499-39 La Tourette *v.* La Tourette (Ariz.), 137 P. 426; In re Hodgdon's Est., 23 Cal. App. 415, 138 P. 111; Brown *v.* Avery, 63 Fla. 355, 58 S. 34; Hanvy *v.* Moore, 140 Ga. 691, 79 S. E. 772; Hopper *v.* Sellers (Kan.), 139 P. 365; Van Gallow *v.* Brandt, 168 Mich. 642, 134 N. W. 1018; Reagan *v.* Curran, 226 Pa. 265, 75 A. 362; Morton *v.* Calvin (Tex. Civ.), 164 S. W. 420; Packard *v.* De Miranda (Tex. Civ.), 146 S. W. 211.

There being no suggestion of a change of testamentary intent, or of fraud, mistake, imposition, incompetency, illegality, or other infirmity in the instrument or in the making and execution of it. Brown *v.* Avery, 63 Fla. 355, 58 S. 34.

499-41 Waterman *v.* Trust Co., 186 Fed. 71, 108 C. C. A. 183; Jacobs *v.* Trust Co., 9 Del. Ch. 400, 80 A. 346; Wallace *v.* Foxwell, 250 Ill. 616, 95 N. E. 985; Hornbeck *v.* Hornbeck, 156 Ill. App. 232; Perrine *v.* Reed, 155 Ill. App. 213; Dunn *v.* Morse, 109 Me. 254, 83 A. 795; Brengle *v.* Tucker, 114 Md. 597, 80 A. 224; Ex parte Humbird, 114 Md. 627, 80 A. 209; Sanger *v.* Bourke, 209 Mass. 481, 95 N. E. 894; Hall *v.* Hall, 209 Mass. 350, 95 N. E. 788; Dameron *v.* Lanyon, 234 Mo. 627, 138 S. W. 1; In re Perceval's Est., 79 Misc. 567, 141 N. Y. S. 180; Kahn *v.* Tierney, 120 N. Y. S. 663, *aff.* 201 N. Y. 516, 94 N. E. 1095; Smith *v.* Lumb. Co., 155 N. C. 389, 71 S. E. 445; Matteson *v.* Brown, 33 R. I. 339, 80 A. 153; Winfree *v.* Winfree (Tex. Civ.), 139 S. W. 36.

499-42 In re Donnellan's Est., 164 Cal. 14, 127 P. 166; Harness *v.* Harness, 50 Ind. App. 364, 98 N. E. 357; Candle *v.* Candle (N. C.), 74 S. E. 631.

Intentional omission of heir, shown by parol. In re Motz's Est. (Minn.), 145 N. W. 623.

500-43 Foster *v.* Clifford, 87 O. St. 294, 101 N. E. 269.

500-45 Lydon *v.* Campbell, 204 Mass. 580, 91 N. E. 151.

500-46 Ligon *v.* Osborn, 155 Ky. 328, 159 S. W. 801; Conrades *v.* Heller, 119 Md. 448, 87 A. 28; Walton *v.* Draper, 206 Mass. 20, 91 N. E. 884; Kemp *v.* Dandison, 169 Mich. 578, 135 N. W. 270; Brown *v.* Tuschoff, 235 Mo. 449, 138 S. W. 497; McAllister *v.* Hayes, 76 N. H. 108, 79 A. 726; Vrooman *v.* Virgil, 81 N. J. Eq. 301, 88 A. 372; In re Lyden's Est., 61 Misc. 597, 119 N. Y. S. 973; In re Campbell's Will, 136 N. Y. S. 1086; Dale *v.* Dale, 241 Pa. 234, 88 A. 445; Hunter *v.* Hunter, 37 Pa. Super. 311; Maris *v.* Adams (Tex. Civ.), 166 S. W. 475.

"The religion of Christian Science as taught by me," held not patently ambiguous. Glover *v.* Baker, 76 N. H. 393, 83 A. 916.

501-47 Abbott *v.* Lewis (N. H.), 88 A. 98; White *v.* Old, 113 Va. 709, 75 S. E. 182 ("niece" and "nephew"); Cornwell *v.* M. E. Church (W. Va.), 80 S. E. 148.

502-50 And thus better comprehend the meaning and application of the language used by him; but statements made by the testator touching his meaning and purpose cannot be entertained. Hammell *v.* Barrett, 79 N. J. Eq. 217, 81 A. 1106.

502-51 Wallace *v.* Foxwell, 250 Ill. 616, 95 N. E. 985.

502-52 Bacon *v.* Nichols, 47 Colo. 31, 105 P. 1082; Albury *v.* Albury, 63 Fla. 329, 58 S. 190; Jacobs *v.* Ditz, 260 Ill. 98, 102 N. E. 1077; Chapman *v.* Newell, 146 Ia. 415, 125 N. W. 324; Lydon *v.* Campbell, supra; Van Gallow *v.* Brandt, 168 Mich. 642, 134 N. W. 1018; In re Rau's Est., 139 N. Y. S. 525.

Will of another, used in writing will in question, admissible. Taylor *v.* Taylor, 7 O. N. P. (N. S.) 297.

Blood relationship existing between devisees, shown. Taylor *v.* Taylor, supra.

504-54 "The intention of the testator must be obtained from the language of the will and from that alone, but the law admits proof of the facts and peculiar circumstances relating to and surrounding the testator, his attitude towards his family and the state of his affairs, in order to discover the intent and reasonably interpret the words in the will as used by the testator, so as to make application of the facts of the case." Packard *v.* De Miranda (Tex. Civ.), 146 S. W. 211.

504-55 Peck *v.* Peck, 76 Wash. 548, 137 P. 137.

"**Such proof** cannot be admitted to alter the will, or to make it speak a purpose different from that written in the will. The testator's intentions must be gathered from what he says in the will; and, in so far as his intentions are not expressed there, they cannot be carried into effect." Louisville Trust Co. *v.* Seminary, 148 Ky. 711, 147 S. W. 431.

505-57 Crabtree *v.* Dwyer, 257 Ill. 101, 100 N. E. 510.

506-67 Hopper *v.* Sellers (Kan.), 139 P. 365.

507-68 Sibley *v.* Maxwell, 203 Mass. 94, 89 N. E. 232; Hammell *v.* Barrett, 79 N. J. Eq. 217, 81 A. 1106; Hunter *v.* Hunter, 37 Pa. Super. 311; Hunter *v.* Hunter, 229 Pa. 349, 78 A. 849; Packard *v.* De Miranda (Tex. Civ.), 123 S. W. 710.

508-71 In re Arnold's Est., 240 Pa. 261, 87 A. 590.

509-76 Pease *v.* Cornell, 84 Conn. 391, 80 A. 86; Lich *v.* Lich, 158 Mo. App. 400, 138 S. W. 558; Bishop *v.* Rider, 31 O. C. C. 332.

Technical words are presumed to have been used in their technical sense. Houghton *v.* Hughes, 108 Me. 233, 79 A. 909; Zook *v.* Welty, 156 Mo. App. 703, 137 S. W. 989.

509-79 Lich *v.* Lich, 158 Mo. App. 400, 138 S. W. 558; Dwight *v.* Gibb, 129 N. Y. S. 961, 965, 966.

510-83 Snyder *v.* Toler (Mo. App.), 166 S. W. 1059; Maris *v.* Adams (Tex. Civ.), 166 S. W. 475.

511-89 Terry *v.* Hood, 172 Ala. 40, 55 S. 423; Weeks *v.* Mansfield, 84 Conn. 544, 80 A. 784; Winter *v.* Dibble, 251 Ill. 200, 95 N. E. 1093; Wallace *v.* Diehl, 202 N. Y. 156, 95 N. E. 646, *mod.* judgment, 118 N. Y. S. 1149; Rembert *v.* Vetoe, 89 S. C. 198, 71 S. E. 959; Winfree *v.* Winfree (Tex. Civ.), 139 S. W. 36.

512-90 Northrop *v.* Co., 186 Fed. 770, 108 C. C. A. 640; Coon *v.* McNelly, 254 Ill. 39, 98 N. E. 218; Straw *v.* Barnes, 250 Ill. 481, 95 N. E. 471; Osenton *v.* Elliott (W. Va.), 81 S. E. 837.

512-91 "Surrounding circumstances as well as the declarations of the testator are relevant to the inquiry and especially where, as in this case, they were made at the time the will was executed." McLeod *v.* Jones (N. C.), 74 S. E. 733, citing many cases.

515-4 Instructions for writing will, being in handwriting of testator, competent, not to evidence intention, but to ascertain who was meant by erroneous description. In re Ofner (1909), 1 Ch. Div. 60.

515-5 Pope *v.* Hinckley, 209 Mass. 323, 95 N. E. 798.

Habit of testator in designating individual, proved, it seems. Pope *v.* Hinckley, supra.

Deed executed by testator and referred to in will, admissible. Bacon *v.* Nichols, 47 Colo. 31, 105 P. 1082.

Parol evidence not admissible to show testator claimed to own property not his, no ambiguity appearing. McDonald *v.* Shaw, 92 Ark. 15, 121 S. W. 935.

516-6 If a testator has manifested a general intention to give to charity, the charity is regarded as the matter of substance, and the gift will be sustained, though it may not be possible to carry it out in the particular manner indicated. Franklin *v.* Hastings, 253 Ill. 46, 97 N. E. 265.

518-14 Deeds executed simultaneously with will and as part of transaction, admissible. Packard *v.* De Miranda (Tex. Civ.), 123 S. W. 710.

519-21 Temple *v.* Bradley, 119 Md. 602, 87 A. 394; Myher *v.* Myher, 224 Mo. 631, 123 S. W. 806.

520-26 Citizens L. & T. Co. *v.* Herron (Ind. App.), 103 N. E. 1092.

The presumption "that one in making a will intends to dispose of his whole estate vanishes when it is shown that any part of the estate is not disposed of. Augustus *v.* Seabolt, 3 Metc. 155; Walters *v.* Neafus, 136 Ky. 756, 125 S. W. 167. If, when the will is read as a whole, there is a question as to whether or not the entire estate is disposed of, that interpretation will be given to the language used which will

dispose of the entire estate." Gray *v.* Garnett, 148 Ky. 34, 146 S. W. 18.

523-42 Kelly *v.* Kelly (Ia.), 130 N. W. 380; Van Horn *v.* Demarest, 77 N. J. Eq. 264, 77 A. 354.

523-43 Hull *v.* Thoms, 82 Conn. 647, 74 A. 925.

Self-serving declarations, made after performance by other party, inadmissible. Gunter *v.* Gunter, 174 Fed. 933, 98 C. C. A. 545; Dalby *v.* Maxfield, 244 Ill. 214, 91 N. E. 420.

524-44 Stiles *v.* Breed, 151 Ia. 86, 130 N. W. 376; Oliver *v.* Johnson, 238 Mo. 359, 142 S. W. 274; In re Burke's Est., 66 Or. 252, 134 P. 11.

Making will, not basis to support inference of contract to make it. Miller *v.* Hill, 64 Misc. 199, 118 N. Y. S. 63.

WITNESSES

Disclosure of knowledge obtained as revenue officer, 641-36.

540-22 Yazoo, etc. R. Co. *v.* Richardson (Miss.), 61 S. 649.

541-23 Duncan *v.* Holder, 15 N. M. 323, 107 P. 685, fees for non-resident limited to distance traveled within jurisdiction.

541-25 Bar Assn. of City of Boston *v.* Scott, 209 Mass. 200, 95 N. E. 402; Hobbs *v.* R. Co., 151 N. C. 134, 65 S. E. 755.

541-26 See Hobbs *v.* R. Co., supra.

541-27 *Contra.* Hobbs *v.* R. Co., 151 N. C. 134, 65 S. E. 755.

541-28 Presumed witness not sworn, unnecessarily subpoenaed. Garcia *v.* Ins. Co., 1 P. R. Fed. 233.

542-35 Independent Pack. Co. *v.* Burns, 168 Ill. App. 482.

543-36 But see Peay *v.* Searey Co. (Ark.), 163 S. W. 1147.

544-42 Altgelt *v.* Callaghan (Tex. Civ.), 144 S. W. 1166.

Voter, testifying to sustain his vote, is an interested party. Every voter, either for pure and patriotic motives, or for base and corrupt designs, is interested in sustaining his vote whenever it is attacked, and to that extent he is an interested party, and should not be allowed to profit by his attendance on court in order to testify and sustain his vote. This should be the rule in every contested election case where the contestants have absolutely no pecuniary interest in the case, and are acting as the representatives of a large body of the voters of a community, and who have assumed pecuniary obligations in connection with the case in other respects, which the statutes compel them to pay. Altgelt *v.* Callaghan (Tex. Civ.), 144 S. W. 1166.

545-16 Noon *v.* Mironski, 58 Wash. 453, 108 P. 1069.

547-55 But see Anderson *v.* Board of Comrs., 91 Kan. 362, 137 P. 799.

Police officer is a "city officer" within statute. S. *v.* Kimmel, 256 Mo. 611, 165 S. W. 1067.

552-78 P. *v.* Sharp, 78 Misc. 528, 139 N. Y. S. 995.

552-80 Kirke *v.* Strafford County 76 N. H. 181, 80 A. 1046.

554-85 Suthon *v.* Laws, 132 La. 207, 61 S. 204; Egan *v.* Hotel Co., 129 La. 163, 55 S. 750.

556-91 Dixon *v.* S., 12 Ga. App. 17, 76 S. E. 794.

557-93 Independent Pack. Co. *v.* Burns, 168 Ill. App. 482. See Marks *v.* Merrill Co., 203 Fed. 16, *mod.* 188 Fed. 850.

558-96 Ahrens *v.* Coleman, 121 N. Y. S. 1121.

558-97 Wohlforth *v.* Kuppler, 77 Wash. 339, 137 P. 477.

From state line.—Wohlforth *v.* Kuppler, 77 Wash. 339, 137 P. 477.

561-11 Marks *v.* Merrill, 203 Fed. 16, 123 C. C. A. 380.

563-21 Banks *v.* Mobley, 4 Ala. App. 510, 58 S. 745.

564-25 Lansing W. Co. *v.* Montgomery, 91 Ark. 600, 121 S. W. 1052.

567-40 See Blankenship *v.* S. (Ala. App.), 65 S. 860.

574-65 See vol. 11, p. 109, n. 22, and supplement thereto.

581-92 S. *v.* Vanella, 40 Mont. 326, 106 P. 364.

Accused must show he was absent or had no opportunity to be present at taking of deposition by state. S. *v.* Vanella, 40 Mont. 326, 106 P. 364.

581-93 Oborn *v.* S., 143 Wis. 249, 126 N. W. 737, authenticators of documents as to competency of witness.

582-97 Naftzger *v.* U. S., 200 Fed. 494, 118 C. C. A. 598. And see vol. 2, p. 982.

582-1 Certificate of clerk of court of foreign state, in which accused claimed he was naturalized, to effect no record of naturalization could be found, inadmissible in action for illegal registra-

tion. P. *v.* Bromwich, 135 App. Div. 67, 119 N. Y. S. 833.

590-23 P. *v.* Rogers, 163 Cal. 476, 126 P. 143; P. *v.* Ong Git, 23 Cal. App. 148, 137 P. 283.

Held to be the duty of the court to grant the order where an affidavit is filed stating sufficient grounds therefor. Hughes *v.* S., 126 Tenn. 40, 148 S. W. 543.

591-24 Southern A. C. Co. *v.* Bowen, 93 Ark. 140, 124 S. W. 1048; S. *v.* Cristy, 154 Ia. 514, 133 N. W. 1074; Druin *v.* C. (Ky.), 124 S. W. 856.

592-26 Smith *v.* S. (Tex. Cr.), 156 S. W. 645.

593-27 Heywood *v.* S., 12 Ga. App. 643, 77 S. E. 1130.

593-31 Hughes *v.* S., 126 Tenn. 40, 148 S. W. 543.

595-37 Cole *v.* S. (Tex. Cr.), 165 S. W. 929.

596-40 Hughes *v.* S., 126 Tenn. 40, 148 S. W. 543.

596-44 Belk *v.* S. (Ala. App.), 64 S. 515; Johnson *v.* S., 8 Ala. App. 14, 62 S. 450; Thomas *v.* S. (Miss.), 60 S. 781; Ryan *v.* S., 64 Tex. Cr. 628, 142 S. W. 878. See also vol. 3, p. 239, n. 15, and supplement thereto.

601-55 Welch *v.* S. (Tex. Cr.), 147 S. W. 572.

604-68 Professional statement of attorney to court, equivalent to statement under oath. In re Winslow's Will (Ia.), 122 N. W. 971.

604-69 Gehl *v.* Brew. Co., 156 App. Div. 51, 141 N. Y. S. 133, appeal *denied*, 156 App. Div. 915, 141 N. Y. S. 1120.

604-70 See generally vol. 7, p. 271, et seq., and supplement thereto.

608-85 Any member of board constituting a municipal court. Broadwater *v.* S., 10 Ga. App. 458, 73 S. E. 691.

611-13 Bradley *v.* S., 3 Ala. App. 212, 58 S. 95; Maddox *v.* City, 8 Ga. App. 817, 70 S. E. 214; Fairbank *v.* Fairbank, 92 Kan. 45, 139 P. 1011; Wagner *v.* S., 119 Md. 559, 87 A. 407; S. *v.* Fiore, 85 N. J. L. 311, 88 A. 1039; S. *v.* Fogleman, 164 N. C. 458, 79 S. E. 879; S. *v.* Cobb, 164 N. C. 418, 79 S. E. 419; Jacobs *v.* Warthen, 115 Va. 571, 80 S. E. 113.

In Wisconsin.—A defendant has the right to re-examine an adverse witness called by the other side immediately after the close of the plaintiff's examination as to all matters tending to explain or qualify testimony already given, but not as to defensive matters not brought out by plaintiff's counsel. Adams *v.* Bucyrus Co., 155 Wis. 70, 143 N. W. 1027; Guse *v.* Mach. Co., 151 Wis. 400, 139 N. W. 195.

612-14 Paul *v.* Clements, 176 Mich. 251, 142 N. W. 384; Jacobs *v.* Warthen, 115 Va. 571, 80 S. E. 113; Smith *v.* Stanley, 114 Va. 117, 75 S. E. 742.

612-17 S. *v.* Solon, 247 Mo. 672, 153 S. W. 1023.

612-18 Welch *v.* S. (Tex. Cr.), 147 S. W. 572.

612-19 Abduction.—"Important evidence on the essential fact of the complainant's age was given by her mother, who was evidently ignorant and confused. After the jury had been charged and had retired, they returned, and on the request of the one of their number the mother was recalled to the stand for further examination on this subject. This examination was largely conducted by members of the jury, although the court and the prosecuting attorney did ask some questions. The counsel for the appellant was not denied the right of subsequent cross-examination, he expressly disclaiming any desire therefor, nor did he request the privilege of commenting on the additional evidence before the jury retired again. . . . If it rested in the discretion of the trial judge no complaint, can be effectively made in this court because the discretion was exercised in favor of allowing it." P. *v.* Ferrone, 204 N. Y. 551, 98 N. E. 8.

613-22 Dowler *v.* Gas Co., 71 W. Va. 417, 76 S. E. 845.

613-23 Mims *v.* S. (Tex. Cr.), 153 S. W. 321; Hinman *v.* S., 59 Tex. Cr. 29, 127 S. W. 221.

614-28 Bruggeman *v.* Illinois Cent. R. Co., 154 Ia. 596, 134 N. W. 1079.

615-33 Pressley *v.* S., 166 Ala. 17, 52 S. 337.

615-34 Madisonville, H. & E. R. Co. *v.* C., 140 Ky. 255, 130 S. W. 1084; S. *v.* Martin, 102 Miss. 165, 59 S. 7.

616-39 S. *v.* Owens, 130 La. 746, 58 S. 557; Hughes *v.* S., 126 Tenn. 40, 148 S. W. 543.

617-42 P. *v.* Cord, 157 Cal. 562, 108 P. 511; Lury *v.* R., 205 Mass. 540, 91 N. E. 1018; Seebach *v.* R. Co., 177 Mich. 1, 142 N. W. 1086; Crutchfield *v.* S. (Tex. Cr.), 152 S. W. 1053.

618-43 Improper question.—On cross-examination the witness had been asked with respect to whether N. had not sold

certain rams, which in no way were related to or had any connection with the rams in controversy. On redirect counsel for appellant asked the witness this question: "How much did Nielson get a head for this whole lot he sold to Adams?" By this lot counsel meant a certain lot of sheep. Holt *v.* Nielson, 37 Utah 566, 109 P. 470.

619-44 See P. *v.* Cord, 157 Cal. 562, 108 P. 511; Lemons *v.* S., 59 Tex. Cr. 299, 128 S. W. 416.

619-46 Crosswhite *v.* Co. (Ala. App.), 65 S. 298.

619-47 P. *v.* Brecker, 20 Cal. App. 205, 127 P. 666; Missouri, etc. R. Co. *v.* Goodrich (Tex. Civ.), 149 S. W. 1176.

622-50 P. *v.* Dumas, 161 Mich. 45, 125 N. W. 766; S. *v.* Roberts (N. M.), 138 P. 208; In re Esterbrook's Est., 83 Vt. 229, 75 A. 1.

623-52 Town of Wells *v.* Sullivan, 119 Minn. 389, 138 N. W. 305.

623-53 Spencer *v.* S., 59 Tex. Cr. 217, 128 S. W. 118.

625-58 Clemons *v.* S., 167 Ala. 20, 52 S. 467; Maxey *v.* S. (Tex. Cr.), 145 S. W. 952.

626-61 Yates *v.* S. (Tex. Cr.), 152 S. W. 1064.

627-66 S. *v.* Wilson (Ia.), 141 N. W. 337. See Doggett *v.* Greine, 163 Ill. App. 369.

627-67 Penton *v.* Williams, 163 Ala. 603, 51 S. 35.

627-68 Stephens *v.* S. (Tex. Cr.), 145 S. W. 907.

627-69 Loudermilk *v.* S., 4 Ala. App. 167, 58 S. 180 (where the court refused to allow the defendant to prolong the cross-examination of this witness after she had been examined on direct, cross, and redirect examination by re-examining her on the same matters she had already testified to on direct, cross, and rebuttal examination); Donijanovic *v.* Hartman, 169 Mo. App. 204, 152 S. W. 424.

629-74 Inquiry as to paper not introduced, improper. S. *v.* Fagan, 1 Boyce (Del.) 45, 74 A. 692.

630-80 Humphries *v.* S., 2 Ala. App. 1, 56 S. 72.

632-91 In re Coburn, 165 Cal. 202, 131 P. 352.

634-3 In re Coburn, 165 Cal. 202, 131 P. 352; Russie C. Co. *v.* Woolworth & Co., 68 Misc. 454, 125 N. Y. S. 82.

635-6 S. *v.* Angel, 93 S. C. 149, 76 S. E. 190.

636-8 In re Klinzner's Will, 71 Misc. 620, 130 N. Y. S. 1059.

636-9 Castleberry *v.* S. (Okla. Cr.), 139 P. 132. See vol. 3, p. 14, n. 30, and supplement thereto.

636-12 S. *v.* Reese (Utah), 135 P. 270.

638-18 Troxell *v.* R. Co., 205 Fed. 830; Buckeye P. Co. *v.* Powder Co., 205 Fed. 827.

639-28 Patterson *v.* P. (Colo. App.), 130 P. 618.

640-33 Patterson *v.* P. (Colo. App.), 130 P. 618.

641-36 Internal revenue officers have no right to divulge information obtained solely in their official capacities. Regulations of department so directing have effect of law and apply where such officer is witness in state court. Stegall *v.* Thurman, 175 Fed. 813.

641-41 Wilburn *v.* S., 141 Ga. 510, 81 S. E. 444; Sovereign Camp *v.* Bailey (Tex. Cr.), 163 S. W. 683; Karel *v.* Conlan, 155 Wis. 221, 144 N. W. 266, 49 L. R. A. (N. S.) 826.

641-42 Ensign *v.* Pennsylvania, 227 U. S. 592, 33 Sup. Ct. 321, 57 L. ed. 658, *aff.* 228 Pa. 400, 77 A. 657; Wilburn *v.* S., 141 Ga. 510, 81 S. E. 444; C. *v.* Cameron, 18 Pa. Dist. 753, 36 Pa. C. C. 161, and so of fourteenth amendment.

642-43 *Contra*, Twining *v.* New Jersey, 211 U. S. 78; C. *v.* Cameron, 18 Pa. Dist. 753.

642-45 May *v.* U. S., 199 Fed. 53, 117 C. C. A. 431.

642-46 Held not to apply to corporations. Baltimore & O. R. Co. *v.* Co., 221 U. S. 612.

642-48 Underwood *v.* S., 13 Ga. App. 206, 78 S. E. 1103.

A statutory requirement that operators of motor vehicles stop and give their name to the injured person or to the police is not in conflict with the constitutional provision relative to compulsory self incrimination. P. *v.* Rosenheimer, 209 N. Y. 115, 102 N. E. 530, 46 L. R. A. (N. S.) 977.

643-50 C. *v.* Cameron, 229 Pa. 592, 79 A. 169.

643-55 Lollar *v.* S., 167 Ala. 112, 52 S. 745.

644-59 P. *v.* Cummins, 153 App. Div. 93, 138 N. Y. S. 517.

Proceeding before a justice of the peace. Faucett *v.* S. (Okla. Cr.), 134 P. 839.

644-60 P. *v.* Barnnovich, 16 Cal. App. 427, 117 P. 572; C. *v.* Co., 157 Ky. 180, 162 S. W. 823; Wyres *v.* S. (Tex. Cr.), 166 S. W. 1150; Pinckard *v.* S., 62 Tex. Cr. 602, 138 S. W. 601; S. *v.* Thorne, 39 Utah 208, 117 P. 58; Karel *v.* Conlan, 155 Wis. 221, 144 N. W. 266, 49 L. R. A. (N. S.) 826.

644-62 But cannot apply to contempt proceedings where the contempt does not constitute a crime. Merchants, etc. Co. *v.* Board, 201 Fed. 20, 120 C. C. A. 582.

644-63 Ex parte Gauss, 223 Mo. 277, 122 S. W. 741; Ex parte Eichel, 223 Mo. 258, 122 S. W. 743; Ex parte Hughes, 57 Tex. Cr. 82, 121 S. W. 1118; Edmonston *v.* C., 110 Va. 897, 66 S. E. 224.

644-69 S. *v.* Drew, 110 Minn. 247, 124 N. W. 1091.

Under bawdy house act, privilege cannot be claimed. S. *v.* Gilbert (Minn.), 147 N. W. 953.

647-77 Beifeld *v.* Pub. Co., 198 Fed. 658; C. *v.* Co., 157 Ky. 180, 162 S. W. 823.

649-88 Although membership in underwriter's association will render insurer liable for 25% of loss, witness cannot refuse to answer a question regarding membership. Ex parte Pepper (Ala.), 64 S. 112.

650-89 U. S. *v.* Heike, 175 Fed. 852; S. *v.* Drew, 110 Minn. 247, 124 N. W. 1091; S. *v.* Gardner, 88 Minn. 130, 92 N. W. 529; Ex parte Gauss, 223 Mo. 277, 122 S. W. 741; Ex parte Hughes, 57 Tex. Cr. 82, 121 S. W. 1118.

651-92 *Contra,* Ex parte Hughes, supra.

652-94 S. *v.* Lee, 228 Mo. 480, 128 S. W. 987.

652-97 Ex parte Nesson, 25 S. D. 49, 125 N. W. 124.

652-98 Seduction where previous unchastity of prosecutrix is shown. Cook *v.* S., 102 Ark. 363, 144 S. W. 221.

653-4 C. *v.* Hotel Co., 157 Ky. 180, 162 S. W. 823 (exposing quail for sale); S. *v.* Knox (S. C.), 82 S. E. 278 (previous assaults).

657-33 Johnson *v.* U. S., 228 U. S. 457, 33 Sup Ct. 572, 57 L. ed. 919; U. S. *v.* Rhodes, 212 Fed. 518; S. *v.* Pence, 173 Ind. 99, 89 N. E. 488; Meredith *v.* S. (Tex. Cr.), 164 S. W. 1019.

659-34 Birmingham, etc. Co. *v.* R. Co., L. R. 3 K. B. (1913), 850, 109 L. T. 64, 57 S. J. 752.

Production to receiver is production to court which will protect corporate officers from illegal use of books. Manning *v.* Co., 242 Ill. 584, 90 N. E. 238.

659-38 As to former officers of a dissolved corporation.—See Wheeler *v.* U. S., 226 U. S. 478, 33 Sup. Ct. 158, 57 L. ed. 309.

659-39 Officer of insolvent bank must produce books. Burnett *v.* S., 8 Okla. Cr. 639, 129 P. 1110.

659-40 Wilson *v.* U. S., 221 U. S. 361; Dreier *v.* U. S., 221 U. S. 394; American Lithographic Co. *v.* Werckmeister, 221 U. S. 603.

A stockholder in defunct corporation must produce books. Grant *v.* U. S., 227 U. S. 74, 33 Sup. Ct. 190, 57 L. ed. 423, *aff.* 198 Fed. 708.

659-41 U. S. *v.* Halstead, 38 App. Cas. (D. C.) 69.

659-43 Johnson *v.* U. S., 228 U. S. 457, 33 Sup. Ct. 572, 57 L. ed. 919.

Scope of privilege under bankruptcy act. See Edelstein *v.* U. S., 149 Fed. 636, 79 C. C. A. 328; U. S. *v.* Brod, 176 Fed. 165.

660-45 P. *v.* O'Bryan, 165 Cal. 55, 130 P. 1042; S. *v.* Oden, 130 La. 598, 58 S. 351; Ex parte Muncy (Tex. Cr.), 163 S. W. 29; S. *v.* Thorne, 39 Utah 208, 117 P. 58. See C. *v.* Cameron, 36 Pa. C. C. 161, for ruling on effect of clause in state constitution.

Privilege does not apply if no accusation is made against witness. P. *v.* O'Bryan, 165 Cal. 55, 130 P. 1042.

Evidence of mental examination submitted to by accused is not obnoxious. Lane *v.* S., 59 Tex. Cr. 595, 129 S. W. 353.

660-46 Gillespie *v.* S., 5 Okla. Cr. 546, 115 P. 620.

661-53 Admissible. S. *v.* Thompson, 161 N. C. 238, 76 S. E. 249.

661-55 Hahn *v.* S. (Tex. Cr.), 165 S. W. 218. See supra, "Physical Examination," 816-30.

663-65 Daniels *v.* U. S., 196 Fed. 459, 116 C. C. A. 233; S. *v.* Barwick, 89 S. C. 153, 71 S. E. 838.

663-66 S. *v.* Lloyd, 152 Wis. 24, 139 N. W. 514.

663-67 Davis *v.* Parsons, 165 Cal. 70, 130 P. 1055.

664-70 Hanson *v.* Village (Minn.), 148 N. W. 276.

665-75 See Sovereign Camp *v.* Bailey (Tex. Civ.), 163 S. W. 683.

666-78 In re Bornn Hat Co., 184 Fed. 506.

666-80 S. *v.* Andrews, 82 Vt. 314, 73 A. 586.

666-81 P. *v.* Barnnovich, 16 Cal. App. 427, 117 P. 572; Castleberry *v.* S. (Okla. Cr.), 139 P. 132.

The person against whom the witness is called has no rights in relation to the matter. C. *v.* De Masi, 234 Pa. 570, 83 A. 430.

666-91 S. *v.* McKowen, 126 La. 1075, 53 S. 353; Ex parte Barnes (Tex. Cr.), 166 S. W. 728.

669-98 Sovereign Camp *v.* Bailey (Tex. Civ.), 163 S. W. 683.

670-3 See Grant *v.* U. S., 227 U. S. 74, 33 Sup. Ct. 190, 57 L. ed. 423, *aff.* 198 Fed. 708; U. S. *v.* Heike, 175 Fed. 852; Sparks *v.* Reeves, 165 Ala. 352, 51 S. 574; Empire Life Ins. Co. *v.* Einstein, 12 Ga. App. 380, 77 S. E. 209; Anderson *v.* S., 8 Okla. Cr. 90, 126 P. 840.

671-4 McGorray *v.* Sutter, 80 O. St. 400, 89 N. E. 10; Karel *v.* Conlan, 155 Wis. 221, 144 N. W. 266, 49 L. R. A. (N. S.) 826.

671-5 Manning *v.* Co., 242 Ill. 584, 90 N. E. 238.

671-6 Empire Life Ins. Co. *v.* Einstein, 12 Ga. App. 380, 77 S. E. 209; Anderson *v.* S., 8 Okla. Cr. 90, 126 P. 840.

672-8 McGorray *v.* Sutter, 80 O. St. 400, 89 N. E. 10.

674-14 S. *v.* Lloyd, 152 Wis. 24, 139 N. W. 514.

674-19 In re Tracy, 177 Fed. 532 (surrender of possession of books); Patterson *v.* P. (Colo. App.), 130 P. 618; Daly *v.* S. (Fla.), 64 S. 358; McCray *v.* S., 134 Ga. 416, 68 S. E. 62; P. *v.* Dist. Co., 76 Misc. 577, 137 N. Y. S. 235.

675-25 P. *v.* O'Bryan, 165 Cal. 55, 130 P. 1042; Finn *v.* Court, 145 Ia. 157, 123 N. W. 1066; S. *v.* Uric, 35 Nev. 268, 129 P. 305.

675-26 See U. S. *v.* Heike, 175 Fed. 852.

676-33 C. *v.* Co., 157 Ky. 180, 162 S. W. 823; P. *v.* Anhut, 162 App. Div. 517, 148 N. Y. S. 7.

Evidence may be used in subsequent proceeding. S. *v.* Stout, 176 Mo. App. 12, 162 S. W. 1064.

Comp. In re Tracy, 177 Fed. 532 (surrender of books by bankrupt to receiver permitted their use by authorities of state in proceedings against bankrupt), *dist.* Blum *v.* S., 94 Md. 375, 51 A. 26, 56 L. R. A. 322.

677-35 Waer *v.* Waer (N. J.), 90 A. 1039. See also vol. 9, p. 972, n. 60.

679-46 But prosecution may prove the facts to which accused was compelled to testify by other evidence. P. *v.* Cummins, 153 App. Div. 93, 138 N. Y. S. 517.

680-51 If statute repealed after testifying witness still entitled to immunity. Cameron *v.* U. S., 231 U. S. 710, 34 Sup. Ct. 244, 58 L. ed. 448.

680-53 U. S. *v.* Burdick, 211 Fed. 492, whether or not he accepts the pardon.

Refusal to accept pardon will not justify party in still maintaining the privilege. U. S. *v.* Burdick, 211 Fed. 492.

681-58 Flanary *v.* C., 113 Va. 775, 75 S. E. 289.

683-67 Ex parte Muncy (Tex. Cr.), 163 S. W. 29.

686-74 P. *v.* Bowman, 78 Misc. 425, 138 N. Y. S. 410.

688-87 City of Anderson *v.* Fant, 96 S. C. 5, 79 S. E. 641.

WRITTEN INSTRUMENTS

695-2 Johnson *v.* Hayes, 139 Ga. 218, 77 S. E. 73.

695-5 Releases though they did contain recitations of fact which would not of themselves constitute evidence. Adams *v.* Hill (Tex.), 149 S. W. 349.

An erroneous characterization of the written instrument in the pleadings is immaterial. Gamage *v.* Llewellyn, 139 N. Y. S. 936.

696-8 See supra, "Admissions," 392-79, et seq.

696-10 Hardy *v.* Randall, 173 Ala. 516, 55 S. 997; Creditors' Union *v.* Lundy, 16 Cal. App. 567, 117 P. 624; Burton *v.* Meinert & Miller, 136 Ga. 420, 71 S. E. 870; Winter *v.* Dibble, 251 Ill. 200, 95 N. E. 1093; International Text Book Co. *v.* Mackhorn, 158 Ill. App. 543; Charles H. Conner & Co. *v.* Mason, 143 Ky. 635, 137 S. W. 235; Harper *v.* Davis, 115 Md. 349, 80 A. 1012; Jones *v.* Harris (Tex. Civ.), 139 S. W. 69. *Comp.* Beach *v.* Schroeder, 47 Colo. 312, 107 P. 271.

697-12 See supra, "Adverse Possession," 678-71.

697-15 Peculiarity of form of signature may require explanation. Mencfee *v.* S., 59 Fla. 316, 51 S. 555.

698-18 Fidelity & C. Co. *v.* Co., 94 Ark. 90, 125 S. W. 653; Welling *v.* Strickland, 161 Mich. 235, 126 N. W. 471. See Beattie *v.* McMullen, 82 Conn. 484, 74 A. 767.

701-33 Graves *v.* J. M. Harris & Bro., 63 Fla. 169, 58 S. 236.

704-49 Brodie *v.* Co., 166 Ala. 170, 51 S. 861; Tillman *v.* Bomar, 134 Ga. 660, 68 S. E. 504; Carlson *v.* Co., 40 Mont. 434, 107 P. 419; Lindsay *v.* Dutton, 227 Pa. 208, 75 A. 1096.

705-51 Gem K. Mills *v.* Thurman, 140 Ga. 15, 78 S. E. 408; Dockery *v.* Maple (Tex. Civ.), 125 S. W. 631.

705-53 Investment Co. *v.* Trueman, 63 Fla. 184, 57 S. 663.

706-55 E. E. Forbes Piano Co. *v.* Oliver, 11 Ga. App. 65, 74 S. E. 713.

707-66 As to the necessity of recording power of attorney see Hobday *v.* Kane, 114 Va. 398, 76 S. E. 902.

709-78 Berry *v.* S., 103 Ark. 153, 146 S. W. 139.

709-83 Texas & P. R. Co. *v.* Isenhower (Tex. Civ.), 131 S. W. 297.

710-85 Whitman *v.* Giesing, 224 Mo. 600, 123 S. W. 1052.

Private memoranda in reference to dealings with other parties, with which the defendant was in no way connected. Ellis *v.* W. L. Casey & Co., 4 Ala. App. 518, 58 S. 724.

Log books, see supra, "Admiralty," 287-74.

711-91 Morrow *v.* Frankish (Del.), 89 A. 740.

711-92 Held, admission of indebtedness from drawer to payee. Brandon *v.* Distilling Co., 167 Ala. 365, 52 S. 640.

711-93 *Contra,* Louisville & N. R. Co. *v.* Dyer, 152 Ky. 264, 153 S. W. 194.

Railroad guide.—W. U. T. Co. *v.* Gilliland (Tex. Civ.), 130 S. W. 212.

712-95 Bernstein *v.* R. Co., 147 Ill. App. 443.

Receipt is hearsay when given by one not a party to the issue. Hornsby *v.* Jensen, 12 Ga. App. 696, 78 S. E. 267.

712-99 U. S. *v.* Hillegass, 176 Fed. 444; Central R. Co. *v.* Malone, 165 Ala. 432, 51 S. 730; Colonial S. Co. *v* Larson, 47 Colo. 25, 105 P. 861; McMilan *v.* Co., 133 Ga. 760, 66 S. E. 943; Hardenburg *v.* Roberts, 146 Ia. 696, 125 N. W. 818; Weymouth *v.* Goodwin, 105 Me. 510, 75 A. 61; Stevens *v.* Gilbert, 120 N. Y. S. 114; Eastern *v.* Dunn, 34 R. I. 416, 83 A. 1057; Tilden *v.* Smith, 24 S. D. 576, 124 N. W. 841; Curtsinger *v.* McGown (Tex. Civ.), 149 S. W. 303.

Expressions and abbreviations in letter, explained by writer. Carter *v.* S., 59 Tex. Cr. 73, 127 S. W. 215.

Admission of whole letter where part only is competent. Page, etc. Co. *v.* R. Co., 162 Ill. App. 492.

713-1 Mobile, etc. R. Co. *v.* Hawkins, 163 Ala. 565, 51 S. 37; Bowman *v.* Callahan, 137 Ky. 773, 127 S. W. 142; S. *v.* Johnson, 125 La. 347, 51 S. 289; P. *v.* Kennedy, 176 Mich. 384, 142 N. W. 771; Martindale *v.* Cummins Co., 143 N. Y. S. 1100.

Telegram received long distance from point whence it was sent and bearing letters "D. H.," not competent to show it was sent on a frank. Gaines *v.* S., 58 Tex. Cr. 631, 127 S. W. 181.

713-2 Griscom-Spencer Co. *v.* Bernier, 204 Fed. 74, 122 C. C. A. 388; Cassell's Mills *v.* Co., 166 Ala. 274, 51 S. 969; Barham *v.* Bk., 94 Ark. 158, 126 S. W. 394; Putnam I. Co. *v.* King, 82 Kan. 216, 107 P. 559; C. *v.* Howard, 205 Mass. 128, 91 N. E. 397; Sills *v.* Burge, 141 Mo. App. 148, 124 S. W. 605; C. *v.* Snyder, 40 Pa. Super. 485. See vol. 8, p. 495, n. 11.

714-3 Salisbury *v.* Henion, 138 App. Div. 389, 122 N. Y. S. 748.

714-4 S. *v.* Bartley, 105 Me. 505, 74 A. 1129; Baltimore C. & A. R. Co. *v.* William Sperber & Co., 117 Md. 595, 84 A. 72; Galvin *v.* O'Gorman, 40 Mont. 391, 106 P. 887. See supra, "Admissions," 392-81.

715-5 S. *v.* Brown, 146 Ia. 113, 124 N. W. 899.

715-6 Magruder *v.* Montgomery, 33 App. Cas. (D. C.) 133. See supra, "Impeachment of Witnesses," 60-84.

715-8 *Comp.* C. *v.* Howard, 205 Mass. 128, 91 N. E. 397.

715-9 Dillivan *v.* Bk. (Ia.), 124 N. W. 350; Haydel *v.* Gould, 136 App. Div. 594, 121 N. Y. S. 194; Williams *v.* Hamlin, 121 N. Y. S. 228.

716-10 Huntington *v.* U. S., 175 Fed. 950, 99 C. C. A. 440; Kemper *v.* Whiteside, 122 N. Y. S. 265 (letter written apparently to make evidence); Moore L. Co. *v.* Walker, 110 Va. 775, 67 S. E. 374.

716-12 Berry *v.* R. Co., 24 S. D. 611, 124 N. W. 859.

716-14 Foss *v.* Dullam, 111 Minn. 220, 126 N. W. 820.

717-17 Sills *v.* Burge, 141 Mo. App. 148, 124 S. W. 605; Larrowe M. Co. *v.*

R. Co., 137 App. Div. 732, 122 N. Y. S. 567.

717-18 Unanswered letter, not called for by any previous letter and not required to complete correspondence, admissible only when it is of res gestae. Kemper *v.* Whiteside, 122 N. Y. S. 265.

717-19 Emanuel *v.* U. S., 196 Fed. 317, 116 C. C. A. 137.

717-20 Howard *v.* Anderson, 162 Ill. App. 256.

717-21 See supra, "Statute of Frauds," 18-56.

Not admissible against third parties. U. S. Exp. Co. *v.* Long, 105 Ark. 130, 150 S. W. 576.

717-22 Cabaniss *v.* S., 8 Ga. App. 129, 68 S. E. 849; S. *v.* Morgan, 146 Ia. 298, 125 N. W. 166.

718-25 S. *v.* Blake, 36 Utah 605, 105 P. 910.

718-26 In re Van Ness' Will, 78 Misc. 592, 139 N. Y. S. 485.

718-27 U. S. Exp. Co. *v.* Long, 105 Ark. 130, 150 S. W. 576 (*cit.* ENCYC. OF EV.); P. *v.* Frey, 165 Cal. 140, 131 P. 127.

718-28 S. *v.* Blake, 36 Utah 605, 105 P. 910.

718-29 Stevens *v.* Gilbert, 120 N. Y. S. 114.

719-30 Singer *v.* Nat. F. Ins. Co., 154 App. Div. 783, 139 N. Y. S. 375; Hirsch *v.* Lichtenstein, 79 Misc. 31, 139 N. Y. S. 4.

719-32 Central R. Co. *v.* Malone, 165 Ala. 432, 51 S. 730.

720-37 **Undelivered letter.**—A letter with a post-marked envelope is competent which has not been received by the addressee and which is authenticated only by the statements made in another letter written by the sender which enclosed the undelivered letter and envelope. P. *v.* Dietmeyer, 164 Ill. App. 405.

721-40 S. *v.* Sysinger, 25 S. D. 110, 125 N. W. 879.

723-48 Rylee *v.* Bk., 7 Ga. App. 489, 67 S. E. 383.

724-49 Brandon *v.* Distilling Co., 167 Ala. 365, 52 S. 640; Martin & Sons *v.* Bank of Leesburg, 137 Ga. 285, 73 S. E. 387; Gasser *v.* Wall, 111 Minn. 6, 126 N. W. 284; Goldfarb *v.* Goldman, 141 N. Y. S. 479; Kan. City M. & O. R. Co. *v.* West (Tex. Civ.), 149 S. W. 206 (ex parte expense bills); Harris *v.* Camp (Tex. Civ.), 148 S. W. 597 (a diary); Luttrell *v.* Parry (Tex. Civ.), 129 S. W. 865.

724-50 **Mental state of writer shown,** by private memoranda. Lascelles *v.* Clark, 204 Mass. 362, 90 N. E. 875.

Entries in diaries and memoranda made by architect during performance of contract, admissible to show his views and conclusions respecting conformity to contract, he being arbiter, and unable to testify. Beattie *v.* McMullen, 82 Conn. 484, 14 A. 767.

725-55 Stone *v.* Brick Co., 13 Cal. App. 203, 109 P. 103; Davis Bros. *v.* Vandalia R. Co., 168 Ill. App. 621; Fortier *v.* Timber Co., 111 Minn. 518, 127 N. W. 414.

727-57 Johnson *v.* Union Carbide Co., 169 Mich. 651, 135 N. W. 1069.

728-59 Man. Nat. Bk. *v.* Hollingsworth, 106 Me. 326, 76 A. 880.

728-61 Hirschman *v.* Ins. Co., 123 N. Y. S. 781.

730-73 Piowaty *v.* Sheldon, 167 Mich. 218, 132 N. W. 517.

731-79 Otherwise if made in presence of opponent. Athens Mfg. Co. *v.* Malcolm, 134 Ga. 600, 68 S. E. 329.

731-83 Poreba *v.* Coal Co., 156 Ill. App. 140.

733-89 Winter *v.* Dibble, 251 Ill. 200, 95 N. E. 1093; Ex parte Atkinson, 101 Miss. 744, 58 S. 215. See vol. 10, p. 829, et seq., and supplement thereto.

The burden of establishing the genuineness of a disputed paper is on the party offering it. Boyd *v.* Kirch, 234 Pa. 432, 83 A. 366.

735-93 Echerd *v.* Viele, 164 N. C. 122, 80 S. E. 408.

736-95 Indorsements on negotiable instruments. Becker *v.* S., 91 Neb. 352, 136 N. W. 17.

736-96 Indorsements may be explained. Beach *v.* Schroeder, 47 Colo. 312, 107 P. 271.

737-2 Cole & Co. *v.* Lea, etc. Co., 35 App. Cas. (D. C.) 355.

741-10 United S. Co. *v.* Meenan, 211 N. Y. 39, 105 N. E. 106.

742-11 De facto relation of writer of letter to corporation on whose behalf it appears to have been written, shown. Am. P. Co. *v.* Co., 78 N. J. L. 658, 75 A. 976.

742-12 Butterworth *v.* Catheart, 168 Ala. 262, 52 S. 896; Markley *v.* Tel. Co., 151 Ia. 612, 132 N. W. 37; Quanah, etc. R. Co. *v.* Drummond (Tex. Civ.), 147 S. W. 728; Newman *v.* Norris Implement Co. (Tex. Civ.), 147 S. W. 725; Smith *v.* S., 58 Tex. Civ. 106, 124 S. W. 919, testimony of accom-

plice not competent to admit letter as corroborative evidence. See supra, "Documentary Evidence," 829-65.

743-13 Thayer *v.* Schley, 137 App. Div. 166, 121 N. Y. S. 1064; S. *v.* Blake, 36 Utah 605, 105 P. 910. See Monk *v.* S., 105 Ark. 12, 150 S. W. 133.

Authority of clerk to sign name of purported writer, inferred though testimony shows it was not his signature. Central R. Co. *v.* Malone, 165 Ala. 432, 51 S. 730.

744-14 Boston Elev. R. Co. *v.* Boyton Co., 211 Fed. 812 (C. C. A.).

744-15 Boston Elev. R. Co. *v.* Boyton Co., 211 Fed. 812 (C. C. A.); Model M. Co. *v.* Webb, 164 N. C. 87, 80 S. E. 232; Tilden *v.* Smith, 24 S. D. 576, 124 N. W. 841. See vol. 2, p. 810, n. 11; vol. 9, p. 885, n. 25; p. 889, n. 35; p. 897, n. 77; vol. 14, p. 754, n. 47; and supplement thereto.

744-18 Barham *v.* Bk., 94 Ark. 158, 126 S. W. 394.

Statement on letter offered it is in answer to one received, does not prove fact. Consolidated G. Co. *v.* Hammond, 175 Fed. 641, 99 C. C. A. 195.

745-19 Salisbury *v.* Henion, 138 App. Div. 389, 122 N. Y. S. 748.

748-31 A. S. Cameron Steam Pump Works *v.* Lubbock Light & Ice Co. (Tex. Civ.), 147 S. W. 717.

750-35 Walden *v.* Assn., 89 Neb. 546, 131 N. W. 962; Model M. Co. *v.* Webb, 164 N. C. 87, 80 S. E. 232. See vol. 2, p. 810, n. 11; vol. 9, p. 885, n. 25; p. 889, n. 35; p. 897, n. 77; vol. 14, p. 744, n. 15; and supplement thereto.

Memorandum held admissible though unsigned. Barnett *v.* Bank, 148 Ia. 667, 127 N. W. 1012.

750-36 M. K. & T. R. Co. *v.* Walker, 27 Okla. 849, 113 P. 907.

751-40 Hardenburg *v.* Roberts, 146 Ia. 696, 125 N. W. 818, by silence.

755-50 Receipt of letter may be testified to by addressee. Baldridge *v.* Stribling, 101 Miss. 666, 57 S. 658.

756-54 Letter-head. Georgia Steel Co. *v.* White, 136 Ga. 492, 71 S. E. 890.

758-64 Thompson *v.* Wilkinson, 9 Ga. App. 367, 71 S. E. 678; Nelson *v.* Bock, 84 N. J. L. 123, 85 A. 1009; Boyle *v.* Knauss, 81 N. J. L. 330, 79 A. 1025.

760-74 Judy *v.* Judy, 261 Ill. 470, 104 N. E. 256.

764-83 Prescott *v.* Fletcher, 133 Ga. 404, 65 S. E. 877; Sanger *v.* Bacon (Ind.), 101 N. E. 1001.

766-88 As between the parties to a deed the fact that a subscribing witness had an indirect interest, such as commissions due a real estate agent or a claim on part of the money to be received would not make him incompetent as he has no interest in the land itself. Carolina Timber Co. *v.* Holden, 90 S. C. 470, 73 S. E. 869.

767-91 Brock *v.* Brock, 140 Ga. 590, 79 S. E. 473.

774-12 Winding Gulf C. Co. *v.* Campbell (W. Va.), 78 S. E. 384.

775-18 Pugh *v.* Jackson, 154 Ky. 772, 159 S. W. 600.

781-38 Merck *v.* Merck, 89 S. C. 347, 71 S. E. 969.

789-67 Berst *v.* Moxom, 157 Mo. App. 342, 138 S. W. 74.

794-82 Decedent's denial of knowledge of letter offered by defendant may be proved, and author of letter may testify to fact of authorship and decedent's lack of knowledge respecting it. Griffin *v.* S., 165 Ala. 29, 50 S. 962.

795-89 See vol. 9, p. 248, n. 50, and supplement thereto.

795-91 Supreme Lodge *v.* Baker, 163 Ala. 518, 50 S. 958.

795-92 Martin *v.* S., 2 Ala. App. 90, 58 S. 83; National Produce Dist. Co. *v.* Growers' Assn., 10 Ga. App. 338, 73 S. E. 606.

Evidence sufficient.—Holtzclaw *v.* Miley, 172 Ala. 15, 55 S. 150.

796-96 Louisville & N. R. Co. *v.* Holland, 173 Ala. 675, 55 S. 1001; Brittin *v.* McClelland, 156 Ill. App. 158.

Effect of instruments is for court. Empire T. & L. Co. *v.* Mooney (Tex. Civ.), 128 S. W. 907.

798-4 The location of land described in a deed is a question of fact for the jury. Marks *v.* Ligonier Borough, 233 Pa. 372, 82 A. 477.